No. 23-95

In the Supreme Court of the United States

PHILIP ESFORMES,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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This case squarely presents two critically important questions of criminal law, each of which independently merits this Court's review. First, the Court should resolve whether a defendant must prove actual prejudice to demonstrate a Sixth Amendment violation warranting dismissal or disqualification when the government wrongfully invades attorney-client privilege. The government does not deny that this important, recurring question has split the circuits and state supreme courts into three camps: one applies an irrebuttable presumption of prejudice, one applies a rebuttable presumption of prejudice, and one requires defendants to show actual prejudice.

The government instead argues that the facts of this case do not implicate that split because courts purportedly

limit any presumption of prejudice to intentional privilege violations that reveal trial strategy. That reading of the caselaw is incorrect; many courts broadly presume prejudice in cases of wrongful privilege violations, *i.e.*, when the government invades the defendant's attorney-client privilege without justification. That indisputably occurred here when the government recklessly seized hundreds of privileged documents and repeatedly used them in its investigation. In other circuits, the government would have faced a presumption of prejudice, and Mr. Esformes would have had a strong case for dismissal or disqualification given the government's admitted misconduct. Only this Court can correct that arbitrary disparity.

Second, this Court should grant certiorari to resolve whether district courts can impose forfeiture money judgments based on their own fact-finding—a question the government recognizes that only this Court can resolve. This Court should decide that immensely consequential issue, which affects thousands of criminal defendants to the tune of over $1 billion a year.

The government argues on the merits that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not apply to criminal forfeiture because there is no ceiling on forfeiture—defendants forfeit "any property" tainted by the offense. 18 U.S.C. § 982(a)(1). But the fact that a potentially infinite amount of property can be tainted and thus subject to forfeiture does not diminish a defendant's Sixth Amendment rights. Absent a factual finding that property is tainted, the statutory maximum for forfeiture is *zero*. That fact therefore must be found by a jury. In any event, the government's merits arguments are just that: arguments to be addressed on the merits. This case is an ideal vehicle to resolve both important, recurrent questions once and for all.

I. The Privilege Question Warrants Review

The government does not dispute that the circuits and state supreme courts have split three ways on the prejudice showing required for wrongful privilege violations. Pet. 14-22. Nor does the government deny that taint teams (like the one here) have committed recurrent privilege violations, making the question critically important and frequently arising. Pet. 23-25. The government (at 12-13) instead argues that, "[t]o the extent there is disagreement in the lower courts," none "would have reached a different outcome on the facts of this case." In the government's view, courts presume prejudice only when "the prosecutors deliberately violate[] a defendant's privilege and obtain[] information about a defendant's trial strategy." BIO 13-14 (quoting Pet.App.15a). That argument does not withstand scrutiny. Most courts broadly presume prejudice where, as here, the government *wrongfully* invades attorney-client privilege.

A. The Decision Below Implicates the Split

1. Contrary to the government's suggestion, courts do not invariably limit presumptions of prejudice to privilege invasions that are "deliberate"—or, as the government (at I, 17) elsewhere suggests, "intentional." To be sure, courts that apply *irrebuttable* presumptions require the privilege intrusion to have been "purposeful," *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995), "intentional[]," *United States v. Costanzo*, 740 F.2d 251, 254 (3d Cir. 1984), or "deliberate," *State v. Quattlebaum*, 527 S.E.2d 105, 109 (S.C. 2000). But courts that apply *rebuttable* presumptions do not so narrowly confine their holdings. For example, the Ninth Circuit asks whether the government acted "wrongful[ly]," "improperly," or "affirmatively." *United States v. Danielson*, 325 F.3d 1054,

1070-71 (9th Cir. 2003). And the First Circuit—like several state supreme courts—ignores intent altogether: Once a defendant shows that "confidential communications were conveyed as a result of the government intrusion into the attorney-client relationship," "the burden … shifts to the government to show that the defendant was not prejudiced." *United States v. DeCologero*, 530 F.3d 36, 64 (1st Cir. 2008) (cleaned up).[1]

Thus, as Justice Sotomayor has observed, "many federal and state courts have struggled to define what burden, if any, a defendant must meet to demonstrate prejudice from a prosecutor's *wrongful or negligent* acquisition of privileged information." *Kaur v. Maryland*, 141 S. Ct. 5, 6 (2020) (Sotomayor, J., respecting denial of certiorari) (emphasis added). These courts, when confronted with a privilege invasion, broadly evaluate the propriety of the government's conduct. For example, even when a search "was not conducted for a purpose of intruding on [a defendant's] privilege," courts have applied a presumption of prejudice where the prosecutor failed to "insulate herself from the privileged materials," *State v. Robins*, 431 P.3d 260, 269 (Idaho 2018), or "did not notify the defendant and trial court immediately" of the intrusion, *Lenarz*, 22 A.3d at 550 n.14.

That broader understanding tracks the reason for the presumption. Whether intentional, reckless, or negligent, governmental invasions of privilege can seriously threaten

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[1] *E.g.*, *State v. Lenarz*, 22 A.3d 536, 549 (Conn. 2011) (presuming prejudice "regardless of whether the invasion into the attorney-client privilege was intentional"); *State v. Soto*, 933 P.2d 66, 79-80 (Haw. 1997) (adopting First Circuit's standard); *State v. Bain*, 872 N.W.2d 777, 791 (Neb. 2016) (presuming prejudice even "when the State did not deliberately intrude into the attorney-client relationship").

the fairness of proceedings. Thus, when the government engages in such wrongful conduct, it should bear the burden of demonstrating a lack of prejudice, especially given that the effects of its misconduct may be difficult for the defendant to pinpoint. *See United States v. Mastroianni*, 749 F.2d 900, 907-08 (1st Cir. 1984). And to the extent courts have highlighted different degrees of wrongfulness, that disparity only reinforces the need for this Court's guidance.

Here, the government's conduct was plainly wrongful. A "taint team" seized "[h]undreds of documents, clearly prepared by law firms," and sent them directly to prosecutors—sometimes with "no review at all." Pet.App.127a, 301a. Prosecutors used the documents "extensively" in their investigation, despite multiple red flags. Pet.App.302a. When the lead prosecutor finally stopped her review after encountering yet more privileged documents, she never informed Mr. Esformes or the court about the violation. Pet.App.134a.

The magistrate judge thus found that Mr. Esformes had "show[n] misconduct," given the government's "improper" actions and blatant "disregard for the attorney client and work product privileges." Pet.App.309a. While the district court concluded that the government had not acted in "bad faith," it nonetheless decried the government's "sloppy, careless, clumsy, [and] ineffective" behavior, "clouded by [the prosecutors'] stubborn refusal to be sufficiently sensitive to issues impacting the attorney client privilege." Pet.App.158a. And even the government conceded that its actions were "reckless." C.A. Oral Arg. Recording 13:10-13:16.

For its part, the Eleventh Circuit did not weigh in on whether the government's conduct was wrongful or intentional because it concluded that even a finding of "bad

faith" would not affect the appeal, absent a showing of actual prejudice. Pet.App.16a. In other circuits, however, the government's wrongful conduct would have triggered a presumption of prejudice.

2. The government (at 14, 19) also is mistaken that courts limit presumptions of prejudice to cases involving revelations of "the defendant's trial strategy." The First Circuit, for instance, has held that a rebuttable presumption of prejudice applies even when privileged information "did not in any way tend even to suggest [the defendants'] defense strategy to the government." *Mastroianni*, 749 F.2d at 908. The Washington State Supreme Court likewise has held that government "eavesdropping" on privileged conversations triggers a presumption, without any mention of "strategy." *State v. Fuentes*, 318 P.3d 257, 262 (Wash. 2014).

While the facts of certain cases concern trial strategy, their holdings are not so limited. Take *Shillinger*. There, the intrusion involved "pretrial preparatory sessions." 70 F.3d at 1134. But "trial strategy" played no part in the Tenth Circuit's legal rule: an irrebuttable presumption of prejudice applies whenever the government "becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so." *Id.* at 1142.

Other cases discussing "strategy" reach matters far beyond trial planning and equate "confidential trial strategy" with "confidential attorney-client information." *Bain*, 872 N.W.2d at 790. In *Robins*, for example, the court deemed a defendant's handwritten notes to contain "strategy," since they "deal[t] with [the defendant's] thoughts and commentary regarding some very specific facts of the case." 431 P.3d at 265.

Even were an intrusion on strategic information required, the sheer depth and breadth of its privilege violation here undoubtedly reached such information. The government seized "[h]undreds of privileged documents, clearly prepared by law firms and/or marked 'privileged or confidential' or 'attorney/client privilege' or 'work product privileged' or 'legal.'" Pet.App.127a. One was even titled "Outline of potential defenses"—"Memo protected by attorney/client privilege." Pet.App.172a. While the government (at 13) now dismisses those documents as a drop in the ocean, the government did not think so at the time. The government used the privileged documents "extensively" in its investigation, Pet.App.302a, including in its attempt to persuade Mr. Esformes' civil attorney to turn against him, Pet.App.138a-139a, and in its "exhaustive questioning" of a legal assistant, Pet.App.194a, 305a. In short, the privileged information helped the government chart the course of its investigation. This is, therefore, precisely the type of case in which courts would apply a presumption of prejudice.

3. The government (at 14-15, 18) also notes that some cases applying presumptions of prejudice involve government informants. The government, however, does not appear to argue that any presumption is limited to that fact pattern and rightly so. While many cases involve informants, others extend "beyond the informant context." *Robins*, 431 P.3d at 268 (seizure of handwritten notes prepared for attorney meeting); *accord Lenarz*, 22 A.3d at 539 (seizure of privileged computer files).

4. Contrary to the government's contention, this case would come out differently in different courts. For example, in the First Circuit, Ninth Circuit, and six States, the government's indisputably wrongful conduct would have forced the government to bear the burden of rebutting a

presumption of prejudice, and Mr. Esformes would have had a strong argument for dismissal or disqualification. But in the Eleventh Circuit, dismissal and disqualification categorically were unavailable because Mr. Esformes could not peer inside prosecutors' minds and determine how their ill-gotten information affected the investigation. Because criminal convictions should not depend on geographic happenstance, this Court's review is imperative.

B. The Decision Below Is Wrong

The government barely defends the Eleventh Circuit's actual-prejudice standard. The government (at 12-13, 19-20) instead insists that no actual prejudice or a substantial threat thereof occurred here. But the question presented is who bears the burden of proving that: the defendant (who cannot know how the government used his wrongfully obtained privileged materials) or the government (which knows what it did and why).

Only placing the burden on the government accords with this Court's decision in *United States v. Morrison*, 449 U.S. 361, 365 (1981). When the government wrongfully invades attorney-client privilege, that creates a "substantial threat" of prejudice, which opens the door to dismissal. *See id.* Dismissal is especially appropriate in a case, like this one, when the government engages in "a pattern of recurring violations" that "might warrant the imposition of a more extreme remedy" like dismissal. *Id.* at 366 n.2.

As many lower courts and one Justice of this Court have recognized, defendants rarely will know all the ways in which prosecutors used privileged information against them. *See Kaur*, 141 S. Ct. at 7 (Sotomayor, J., respecting denial of certiorari); *Danielson*, 325 F.3d at 1071; *Mastro-*

ianni, 749 F.2d at 907. That is because "prosecutors' possession of [a defendant's] privileged information" can "subtly but indelibly affect[] the course of her trial" in ways that are difficult for the defendant to prove. *Kaur*, 141 S. Ct. at 7 (Sotomayor, J., respecting denial of certiorari). "[P]lacing the entire burden on the defendant" is therefore "unreasonable." *Mastroianni*, 749 F.2d at 907. It follows that a presumption of prejudice should apply when prosecutors wrongfully invade attorney-client privilege.

The government (at 16) also briefly asserts that "the lower courts[] unanimous[ly] f[ound] that [Mr. Esformes] suffered no prejudice," seemingly suggesting that it could defeat a rebuttable presumption of prejudice here. That mischaracterizes the decisions below. The district court merely found that Mr. Esformes had "not sufficiently demonstrated that he was prejudiced." Pet.App.150a. And the Eleventh Circuit simply held that Mr. Esformes had not "satisf[ied] his burden of proving prejudice." Pet.App.15a. Had a rebuttable presumption applied, the burden would have been on *the government* to disprove prejudice. No court has found that the government could carry that burden here.

II. The Forfeiture Question Warrants Review

This Court should also grant certiorari to resolve whether a court may order a criminal-forfeiture money judgment based on judicial fact-finding. The government does not dispute that this question is squarely presented, recurring, and important. Pet. 34-36. Nor does the government dispute that this Court's pre-*Apprendi* remark in *Libretti v. United States*, 516 U.S. 29 (1995), that the Sixth Amendment does not apply to criminal forfeiture has stymied percolation in the lower courts. Pet. 34. Indeed, the government's circuit cases (at 22-23) underscore that the

lower courts consider themselves "bound" by *Libretti*, notwithstanding "some tension" between that decision and *Apprendi*. *See United States v. Leahy*, 438 F.3d 328, 332-33 (3d Cir. 2006) (en banc).

On the merits, the government does not deny that criminal forfeiture is "punishment" subject to the Sixth Amendment, that the forfeiture statute requires forfeited property to be related to the offense, or that property's relationship to the offense is a question of fact. Pet. 28-29. Nor does the government dispute that *Libretti* rests on bad law, or that this Court has routinely overruled old decisions incompatible with *Apprendi*. Pet. 30-31. The government also notably ignores its previous concession that extending *Apprendi* to criminal fines (as this Court did in *Southern Union Co. v. United States*, 567 U.S. 343, 360 (2012)) would foreordain the same result for criminal forfeiture. Pet. 31-32.

Instead, the government (at 21-22) principally contends that *Apprendi* does not apply to criminal forfeiture because forfeiture supposedly does not have a "statutory maximum." But as Justice Gorsuch has explained in the restitution context, absent the requisite factual finding, "the statutory maximum for restitution is usually *zero*." *Hester v. United States*, 139 S. Ct. 509, 510 (2019) (Gorsuch, J., dissenting from denial of certiorari). The same is true of forfeiture, which is capped at the amount of property tainted by the offense. 18 U.S.C. § 982(a)(1). Absent a factual finding that property is tainted, *no* forfeiture is authorized. Pet. 29-30. The government offers no response to this point.

Further, in *Southern Union* itself, the fine had no upper limit. The statute there imposed a fine up to $50,000 times the number of days the violation lasted. 567 U.S. at 347. The longer the violation lasted, the larger the fine—

up to infinity. Yet because the fine turned on a factual question—the number of days of the violation—that fact had to be found by a jury. *Id.* at 358-59. Here too, the size of the forfeiture is capped by a factual determination—what property was tainted in the offense—so that fact must be found by a jury.

Taken to its logical conclusion, the government's theory would eviscerate *Apprendi*. Suppose a statute tied maximum jail time to a factual question—say 1 day in prison for every $1 involved in the offense. Under the government's reasoning, because that prison term has no upper bound, the court could calculate the amount of money involved in the offense and sentence a defendant to hundreds of years in prison based on its own factual finding. That cannot be right.

The government (at 22) also suggests that *United States v. Booker*, 543 U.S. 220, 258 (2005), resolved the question presented by including a different criminal-forfeiture provision in a list of statutes unaffected by the invalidation of mandatory Sentencing Guidelines. But *Booker* predates this Court's extension of *Apprendi* to monetary penalties in *Southern Union*, 567 U.S. at 360, so its assumption that *Apprendi* might not apply to forfeiture is hardly surprising. Regardless, *Booker*'s passing citation to a forfeiture provision hardly settles the *Apprendi* question.

This Court's review is especially warranted because lower courts have misread forfeiture statutes to authorize money judgments untethered to specific property tainted by the offense. Pet. 32. Such money judgments exacerbate the *Apprendi* problem by permitting the government to seek massive monetary penalties without any jury check, as this case illustrates. Pet. 32-33. The government does not defend this atextual practice but claims (at 23 n.3)

that Mr. Esformes forfeited this objection in the Eleventh Circuit. That is incorrect. Mr. Esformes argued that cases authorizing "[f]orfeiture money judgments" are "mistaken" because "the government does, in fact, have a property tracing burden in forfeiture cases." C.A. Br. 55-56. The government's routine failure to tie specific property to the offense underscores the need for certiorari. And this case is an ideal vehicle to resolve the question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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