No. 23-95

In the Supreme Court of the United States

PHILIP ESFORMES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion when it suppressed evidence, but denied petitioner's motions to dismiss the indictment and disqualify the prosecution team, based on an intrusion into petitioner's attorney-client privilege, where the court found the intrusion to be nonintentional and petitioner failed to demonstrate any remaining prejudice.

2. Whether the Sixth Amendment entitles a defendant to have the jury find the facts essential to criminal forfeiture beyond a reasonable doubt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-34a) is reported at 60 F.4th 621. The order of the district court denying petitioner's motions to dismiss the indictment and disqualify the prosecution team (Pet. App. 78a-160a) is not published in the Federal Supplement but is available at 2018 WL 5919517. The report and recommendation of the magistrate judge regarding the same motions (Pet. App. 161a-313a) is not published in the Federal Supplement but is available at 2018 WL 6626233. The district court's forfeiture order (Pet. App. 52a-54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2023. A petition for rehearing was denied on March 3, 2023 (Pet. App. 1a). On June 16, 2023, Justice Thomas extended the time within which to file a petition

for a writ of certiorari to and including July 31, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of conspiring to receive and pay health care kickbacks, in violation of 18 U.S.C. 371; two counts of receiving kickbacks in connection with a federal health care program, in violation of 42 U.S.C. 1320a-7b(b)(1)(A); four counts of paying kickbacks in connection with a federal health care program, in violation of 42 U.S.C. 1320a-7b(b)(2)(A); one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); nine counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); two counts of conspiring to commit federal program bribery, in violation of 18 U.S.C. 371; and one count of obstructing justice, in violation of 18 U.S.C. 1503. Am. Judgment 1-2. He was sentenced to 240 months of imprisonment, to be followed by three years of supervised release. *Id.* at 3-4. The court also ordered $5,530,207 in restitution, *id.* at 6, and forfeiture in the amount of $38,700,795. Pet. App. 54a. While petitioner's appeal was pending, President Trump commuted petitioner's term of imprisonment to time served but left intact and in effect the remainder of his sentence. *Id.* at 11a. The court of appeals affirmed the convictions, restitution award, and forfeiture judgment. *Id.* at 2a-34a.

1. Petitioner, the owner and operator of several skilled nursing facilities and assisted living facilities in South Florida collectively referred to as the Esformes Network, orchestrated a massive health care fraud scheme. The scheme centered around the payment of

bribes and kickbacks to physicians and administrators at a local hospital "to refer patients to his skilled nursing facilities who did not need that care." Pet. App. 4a. The Esformes Network then provided "unnecessary and expensive medical services to those patients and fraudulently inflated bills with services that the facilities did not provide." *Ibid.* When petitioner was done billing the patients at his skilled nursing facilities, the patients were often sent to one of his assisted living facilities. See Gov't C.A. Br. 8. From there, petitioner often sold access to his patients to other corrupt health care providers in exchange for kickbacks. See *ibid.* Those providers included laboratories, pharmacies, and partial hospitalization programs that often did not provide services to the patients. See *id.* at 7-8.

Petitioner's complex health care fraud scheme operated for years, aided in large part by bribes that petitioner paid a state regulator—who was employed by the agency responsible for ensuring that the Esformes Network provided proper care and complied with Medicare and Medicaid requirements—to get advance notice of unannounced inspections at his facilities. Pet. App. 4a; see Gov't C.A. Br. 8-9. Armed with that confidential information, petitioner instructed his employees to fix patient charts and hide potential violations before the inspections. See *id.* at 9.

Petitioner and his confederates also implemented money-laundering schemes designed to disguise the kickback payments and other unlawful proceeds and thereby avoid detection, which they successfully accomplished for over a decade. Pet. App. 4a; see Gov't C.A. Br. 9. For example, petitioner demanded kickbacks for access to his patients in the form of cash and perks, such as limousine rides and hotel stays in the Ritz-Carlton

with female companions. Pet. App. 4a; see Gov't C.A. Br. 9. Petitioner also used the money to buy things (such as a $1.6 million Ferrari Aperta) in accounts bearing other people's names, and to bribe the head basketball coach at the University of Pennsylvania over $200,000 to falsely represent that petitioner's child was a recruited athlete. Pet. App. 4a-5a; see Gov't C.A. Br. 9-10.

After the scheme was uncovered, a federal grand jury indicted petitioner on one count of conspiring to commit health care and wire fraud, in violation of 18 U.S.C. 1349; two counts of health care fraud, in violation of 18 U.S.C. 1347; one count of conspiring to receive and pay health care kickbacks, in violation of 18 U.S.C. 371; two counts of receiving kickbacks in connection with a federal health care program, in violation of 42 U.S.C. 1320a-7b(b)(1)(A); six counts of paying kickbacks in connection with a federal health care program, in violation of 42 U.S.C. 1320a-7b(b)(2)(A); one count of conspiring to commit money laundering, in violation of 18 U.S.C. 1956(h); 14 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i); two counts of conspiring to commit federal program bribery, in violation of 18 U.S.C. 371; one count of federal program bribery, in violation of 18 U.S.C. 666(a)(2); one count of obstructing justice, in violation of 18 U.S.C. 1503; and one count of conspiring to make a false statement relating to a health care matter, in violation of 18 U.S.C 371. D. Ct. Doc. 869, at 1-40 (July 19, 2018). The indictment included forfeiture allegations under 18 U.S.C. 981(a)(1)(C) and 18 U.S.C 982(a)(1) and (a)(7). D. Ct. Doc. 869, at 41-49.

2. The day after petitioner was indicted, federal agents executed a search warrant at Eden Gardens, an Esformes Network assisted living facility. Pet. App. 5a.

Given the possibility that some documents there might be privileged, the government established a "taint," or filter, protocol for executing the search. *Id.* at 124a-125a. The search team was intended to consist of "agents who were not otherwise involved in the investigation," *id.* at 5a, who were, among other things, "to place any materials they believed could be potentially privileged into a 'taint' box, which were to be subsequently reviewed by a filter attorney," *id.* at 124a-125a.

As eventually became clear, the design and implementation of the taint protocol suffered from several flaws. Pet. App. 5a. Most notably, the agents conducting the search "did not receive sufficient instructions on how to treat" or identify potentially privileged materials. *Id.* at 125a. The search team ultimately seized over 179,000 documents from Eden Gardens, which the agents placed in 70 boxes, only one of which was labeled "taint." *Id.* at 127a, 188a n.11. The agents also passed on "at least a hundred" privileged documents that were not properly placed in the "taint" box. *Id.* at 5a.

Before the prosecution team realized the failures of the filter protocols, it reviewed 12 pages of QuickBooks and Excel spreadsheets and three pages of handwritten notes—collectively referred to as the "Descalzo documents." Pet. App. 136a. Although "there are no writings or markings on the 'Descalzo documents' which would alert anyone that the documents were privileged," *id.* at 133a, the documents were in fact privileged, *id.* at 150a. Unaware of their privileged nature, the prosecution team presented the documents to Norman Ginsparg—"an Illinois-licensed attorney who worked with [petitioner]" and one of petitioner's alleged co-conspirators—"in an unsuccessful attempt to convince him to cooperate with the government." *Id.* at 5a-

6a. In addition, "prosecutors interviewed one of Ginsparg's assistants about the same privileged documents at length to determine whether they incriminated [petitioner]." *Id.* at 6a.

3. Before trial, petitioner moved to dismiss the indictment and disqualify members of the prosecution team based on violations of petitioner's attorney-client and attorney work-product privileges. Pet. App. 6a; see D. Ct. Docs. 275, 278 (Apr. 14, 2017).

a. After an evidentiary hearing, the magistrate judge issued a report and recommendation in which she recommended that the motions be denied, "subject to the suppression of certain items of evidence." Pet. App. 162a. The magistrate judge found, among other things, that the taint protocol used during the Eden Gardens search was "inadequate and ineffective"; that the prosecution team "improperly reviewed materials from the Eden Gardens search prior to further scrutiny by 'taint' attorneys"; that the prosecution team impermissibly used the Descalzo documents during meetings with Ginsparg and his assistant; and that the prosecution team "attempt[ed] to obfuscate the record" with respect to the Descalzo documents during the evidentiary hearing. *Id.* at 299a, 301a, 303a-305a, 310a.

As a remedy, the magistrate judge recommended suppression of privileged documents seized during the Eden Gardens search, Pet. App. 311a, but denial of "the extreme remedies of dismissal and disqualification," *id.* at 310a. The magistrate judge "reasoned that after the privileged materials were suppressed, [petitioner] would not be further prejudiced." *Id.* at 6a-7a; see *id.* at 310a.

b. After holding a hearing on the report and recommendation, the district court denied petitioner's

motions. Pet. App. 78a-160a. The court found that "although the Government attempted to implement a taint protocol prior to conducting its search of Eden Gardens, its preparation for and the methods used during and after the search were sloppy and ineffective." *Id.* at 131a. The court also found that the government had violated the work-product privilege by reviewing and using the Descalzo documents. *Id.* at 150a.

The district court explained, however, that petitioner "ha[d] not sufficiently demonstrated that he was prejudiced by the use of the Descalzo documents." Pet. App. 150a-151a. The court observed that "the documents did not ultimately produce any charges against" petitioner. Pet. App. 151a. And the court emphasized that, based on its evaluation of the record, it was "unconvinced that a review of these documents resulted in any real advantage to the Government." *Ibid.*; see *id.* at 153a (explaining that "the 'Descalzo documents' were in no way inculpatory").

With respect to adverse credibility determinations that the magistrate judge had made regarding certain members of the prosecution team and the Descalzo documents, the district court found it "unnecessary to adopt" those determinations, because "there was no demonstrable prejudice" to petitioner from the underlying violations. Pet. App. 151a. In the alternative, however, the court found "an articulable basis in the record for rejecting those credibility findings." *Ibid.* Based on "a complete and careful reading of the record," the court found that any issues during the evidentiary hearing were "due to differences in memories and from misunderstandings, and not due to any intentional attempt to lie or subvert justice." *Id.* at 152a; see *id.* at 153a. The court also "found it implausible that a prosecution

team that tried, however incompetently, to maintain privilege protections would take the risk of fabricating a justification for its actions after the fact." *Id.* at 8a; see *id.* at 153a-154a.

4. After a two-month trial, a jury found petitioner guilty on 20 counts and deadlocked on six other charges. Pet. App. 10a. Because the jury returned a verdict that included convictions for ten money-laundering offenses, the district court conducted a bifurcated forfeiture proceeding pursuant to Federal Rule of Criminal Procedure 32.2. Rule 32.2(b)(1)(A) provides that, if the government seeks forfeiture of specific property, the court must determine "what property is subject to forfeiture under the applicable statute" and "whether the government has established the requisite nexus between the property and the offense." Fed. R. Crim. P. 32.2(b)(1)(A).

When imposing sentence on a person convicted of money laundering, district courts are required by statute to "order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." 18 U.S.C. 982(a)(1). Forfeitures under Section 982(a)(1) are governed by the procedures in 21 U.S.C. 853. See 18 U.S.C. 982(b)(1). Section 853(p), in turn, provides for the forfeiture of "any other property of the defendant" if, "as a result of any act or omission of the defendant," the directly forfeitable property "cannot be located upon the exercise of due diligence," "has been commingled with other property which cannot be divided without difficulty," or meets other statutory criteria of unavailability. 21 U.S.C. 853(p)(1) and (2).

The indictment in petitioner's case sought both the forfeiture of specific property and "a forfeiture money judgment" constituting "[a]ll property, real or personal,

involved in" petitioner's money-laundering offenses and "any property traceable to such property." D. Ct. Doc. 869, at 42; see *id.* at 42-48. The indictment also provided that if the property constituting or derived from the proceeds of petitioner's offenses could not be located, the government would seek forfeiture of substitute property under 21 U.S.C. 853(p). D. Ct. Doc. 869, at 48. Rule 32.2(b)(5) permits a party to request that the jury "determine the forfeitability of specific property." Fed. R. Crim. P. 32.2(b)(5). Petitioner made such a request with respect to the forfeiture of specific property in his case, and the jury returned a forfeiture verdict, in which it found that seven of petitioner's business entities and their assets were involved in a money-laundering offense on which it had convicted petitioner; the jury did not reach a forfeiture verdict as to other assets. Pet. App. 29a-30a; see *id.* at 60a-77a.

Rule 32.2 specifies that for money judgments, as opposed to specific property, "the court must determine the amount of money that the defendant will be ordered to pay." Fed. R. Crim. P. 32.2(b)(1)(A). Here, the government accordingly requested a forfeiture money judgment in the amount of $38,700,795, which was the amount petitioner personally obtained from his skilled nursing facilities and assisted living facilities between 2010 and 2016. D. Ct. Doc. 1372 (Sept. 6, 2019). The district court granted that request, finding that petitioner's facilities were property "involved in" his money-laundering offenses, because the facilities and their management companies "facilitated [petitioner's] money laundering activity in that * * * the Esformes Network[] made [petitioner's] money laundering activity less difficult or more or less free from obstruction and hindrance." Pet. App. 53a-54a. The court further

found, based on the testimony of a certified public accountant, that petitioner personally obtained $38,700,795 from his facilities between 2010 and 2016. *Id.* at 53a.

In imposing sentence, the district court described "the length and scope and breadth of [petitioner's] criminal conduct" as "seemingly unmatched in our community, if not our country." Sent. Tr. 133. The court ultimately sentenced petitioner to 240 months of imprisonment, to be followed by three years of supervised release, and ordered restitution in the amount of $5,530,207. Am. Judgment 1-4, 6. And, in accordance with the outcome of the forfeiture proceedings, it ordered forfeiture in the amount of $38,700,795. Pet. App. 54a.

5. The court of appeals affirmed petitioner's convictions, as well as the restitution and forfeiture orders. Pet. App. 2a-34a.[1]

The court of appeals first rejected petitioner's argument that the district court should have dismissed the indictment or disqualified the prosecution team based on the identified privilege violations. Pet. App. 14a-18a. Relying on circuit precedent—and noting that petitioner's opening brief "did not explain *why* [it] should adopt" a presumption of prejudice under these circumstances—the court of appeals explained that "'absent demonstrable prejudice, dismissal [is] plainly inappropriate as a remedy' for the violation of attorney-client privilege." *Id.* at 14a-15a (quoting *United States* v. *Ofshe*, 817 F.2d 1508, 1515 (11th Cir.), cert. denied, 484 U.S. 963 (1987)) (second set of brackets in original).

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[1] The court of appeals determined that petitioner's challenge to his prison sentence was moot in light of the presidential commutation. Pet. App. 13a.

"Instead," the court observed, "the remedy should ordinarily be limited to preventing the prosecution team from using illegally obtained evidence against the defendant." *Id.* at 15a (citing *United States* v. *Morrison*, 449 U.S. 361, 364-365 (1981)). And the court found that petitioner "ha[d] not even attempted to satisfy his burden of proving prejudice." *Ibid.* It agreed with the district court's finding—which petitioner had "not sought to establish" was "clearly erroneous"—"that the privilege violations did not prejudice [petitioner] because the privileged materials did not serve as either the basis for the charges against him or the evidence admitted at trial" and did not otherwise "provide the government with any strategic advantage." *Id.* at 16a.

As to the forfeiture order, the court of appeals found that "[t]he district court followed Rule 32.2 to the letter" in entering the money judgment, and explained that the court had not violated the Sixth Amendment in doing so. Pet. App. 29a. The court of appeals observed that this Court "explained in *Libretti* v. *United States* [516 U.S. 29 (1995)] that 'the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection,'" Pet. App. 29a (quoting 516 U.S. at 49), and it held that circuit precedent foreclosed petitioner's argument that *Libretti* be denied controlling weight, *ibid.*

ARGUMENT

Petitioner renews his contentions that the district court improperly denied his motions for dismissal and disqualification (Pet. 14-27), and that the Sixth Amendment guarantees a right to jury factfinding on criminal forfeiture (Pet. 27-36). The court of appeals correctly rejected both contentions, and its resolution of petitioner's claims does not conflict with any decision of this

Court or another court of appeals. No further review is warranted.

1. Petitioner contends (Pet. 14-27) that the court of appeals erred in affirming the denial of his motions to dismiss the indictment and disqualify the prosecution team. That assertion lacks merit, and no court of appeals would have reached a different outcome on the facts of this case.

a. The court of appeals correctly determined (Pet. App. 14a-16a) that petitioner was not entitled to the "drastic" sanctions, *United States* v. *Morrison*, 449 U.S. 361, 367 (1981), of dismissal or disqualification because he suffered no prejudice from the government's mistaken intrusion. As this Court explained in *Morrison*, "[c]ases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Id.* at 364; see *id.* at 364-365 (citing cases). "More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate." *Id.* at 365; see *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988) ("[A] district court exceeds its powers in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant.").

Adhering to those well-established principles, the court of appeals recognized that "the remedy" for an intrusion into the attorney-client relationship "should ordinarily be limited to preventing the prosecution team from using illegally obtained evidence against the defendant." Pet. App. 15a (citing *Morrison*, *supra*); see *Morrison*, 449 U.S. at 366 (explaining that the preferred "remedy in the criminal proceeding is limited to

denying the prosecution the fruits of its transgression"). That suppression remedy was appropriately applied here. See Pet. App. 150a-151a, 156a-159a, 311a. And the court of appeals—like the district court and the magistrate judge before it—correctly determined that the more extreme sanction of dismissal or disqualification was unwarranted because petitioner suffered no prejudice from the government's infringements. *Id.* at 14a-16a.

As the courts below found, "the privileged materials did not serve as either the basis for the charges against [petitioner] or the evidence admitted at trial. Nor did the privilege violations provide the government with any strategic advantage." Pet. App. 16a; see *id.* at 151a (district court finding that the "review of these [privileged] documents" did not result "in any real advantage to the Government"); *id.* at 310a. Rather, the privileged documents at issue "were in no way inculpatory and were a drop of water in the sea of evidence against [petitioner]." *Id.* at 153a. As the court of appeals noted, petitioner did not even attempt to challenge those factual findings or otherwise seek to demonstrate prejudice. *Id.* at 15a-16a. Instead, petitioner's opening brief on appeal merely asserted that the court "should presume prejudice," but without "explain[ing] *why* [it] should adopt th[e] novel approach" he preferred. *Id.* at 15a.

b. Petitioner is mistaken in suggesting (Pet. 14-25) that other circuits would have granted him relief in these circumstances. To the extent there is disagreement in the lower courts, it concerns circumstances materially distinct from the facts at issue here. As the court of appeals recognized below, petitioner's preferred approach has been applied where "the

prosecutors deliberately violated a defendant's privilege and obtained information about the defendant's trial strategy." Pet. App. 15a (citing *United States* v. *Danielson*, 325 F.3d 1054, 1072 (9th Cir. 2003)). Neither of those circumstances is present here, and petitioner would not be entitled to the relief he seeks in any jurisdiction.

For example, in the Ninth Circuit decision that petitioner cited in the court of appeals (see Pet. App. 15a), the prosecution team "deliberately and affirmatively took steps, while [the defendant] was represented by counsel, that resulted in the prosecution team's obtaining privileged information about [the defendant]'s trial strategy." *Danielson*, 325 F.3d at 1059. After the defendant was indicted, the government deliberately obtained recordings where the defendant "discussed at length his trial strategy," including his plans to testify at trial and what he would say while on the stand. *Id.* at 1061-1062. This intrusion was revealed by the government during its cross-examination of the defendant at trial. See *id.* at 1059, 1064-1065. In deeming mistrial warranted when that conduct was uncovered, the Ninth Circuit emphasized that "[t]he problem in this case * * * is not that the government obtained incriminating statements or other specific evidence, but rather that it obtained information about [the defendant]'s trial strategy." *Id.* at 1067; see *id.* at 1070.

The Ninth Circuit accordingly limited its adoption of a rebuttable presumption of prejudice for violations of attorney-client privilege to circumstances where "the government informant * * * acted affirmatively to intrude into the attorney-client relationship and thereby to obtain the privileged information." *Danielson*, 325 F.3d at 1071; see *id.* at 1070 (again stating that "[i]n

cases where wrongful intrusion results in the prosecution obtaining the defendant's trial strategy, the question of prejudice is more subtle"). And the court made clear that the government can rebut that presumption of prejudice if it shows "that 'all of the evidence it proposes to use,' and all of its trial strategy, were 'derived from legitimate independent sources.'" *Id.* at 1072 (citation omitted); see *id.* at 1071-1072. In this case, however, the government did not initiate any recordings of petitioner after he was indicted or otherwise purposefully seek to intrude attorney-client confidences; it disclosed all the material relevant to its breach well before trial; it was precluded from introducing evidence derived from the Descalzo documents; and it did not obtain any privileged information about petitioner's trial strategy. See Pet. App. 5a-8a, 16a, 125a, 131a, 151a, 154a.

Petitioner's reliance on decisions from the First Circuit (Pet. 16-17) is similarly misplaced. In *United States* v. *Mastroianni*, 749 F.2d 900 (1984), the First Circuit considered a defendant's claim that "a government informant" "attend[ed] a joint defense meeting," resulting in the acquisition of "their potential defense strategy" for trial. *Id.* at 904, 908. The First Circuit accordingly limited its adoption of a rebuttable presumption of prejudice to cases where a defendant "prove[s] that confidential communications were conveyed as a result of the presence of a government informant at a defense meeting." *Id.* at 907-908. Upon such proof, the government was required "to show that there has been and there will be no prejudice to the defendants as a result of these communications." *Id.* at 908. And in *Mastroianni* itself, the First Circuit found that the government had "successfully rebutted

defendants' prima facie case of prejudice," such that "there was no Sixth Amendment violation." *Ibid.*

The First Circuit's rejection of the defendant's claim in *Mastroianni* does not show that it would have granted relief in petitioner's case. Unlike *Mastroianni*, the mistaken access of attorney-client materials here was not because of the "presence of a government informant at a defense meeting." 749 F.2d at 908; see *ibid.* (explaining that the "advantage that the government gains" from "insinuating itself into the midst of the defense meeting must not be abused"). Moreover, even if the First Circuit's burden-shifting standard were extended to the present circumstances, petitioner—like the defendant in *Mastroianni*—would still not be entitled to relief because the government would be able to successfully rebut any presumption, given the lower courts' unanimous finding that petitioner suffered no prejudice here once the documents were suppressed. See pp. 6-7, 11, 13, *supra.* And for much the same reasons, the First Circuit's decision in *United States* v. *DeCologero*, 530 F.3d 36, cert. denied, 555 U.S. 1005, and 555 U.S. 1039 (2008), does not support petitioner's claim of a conflict, either. *DeCologero* involved an extreme set of allegations—that government informants had hired a lawyer on the defendant's behalf for the purpose of obtaining confidential defense information—and the First Circuit affirmed the district court's rejection of the Sixth Amendment claim based on the absence of evidence that the prosecution had obtained any information from the individuals in question. *Id.* at 63-64.

Although petitioner does not appear to advocate for a prejudice *per se* standard, see Pet. 26, he nonetheless claims that the Third and Tenth Circuits "irrebuttably

presume prejudice when prosecutors wrongfully invade attorney-client privilege," Pet. 15-16. But those decisions, like the ones adopting limited rebuttable presumptions, involve markedly different situations than the one at issue here. For example, in *United States* v. *Levy*, 577 F.2d 200 (1978)—a case that predates this Court's decision in *Morrison*, and whose vitality the Third Circuit has questioned following *Morrison*, see Pet. 15—the Third Circuit reversed a conviction and dismissed an indictment where "defense strategy was actually disclosed" and "government enforcement officials sought such confidential information." 577 F.2d at 210; see *ibid.* (noting that "in this case an actual disclosure of defense strategy occurred"). Unlike *Levy*, the intrusion here was not an intentional invasion of attorney-client privilege and it did not disclose any defense trial strategy.

The Tenth Circuit's decision in *Shillinger* v. *Haworth*, 70 F.3d 1132 (1996), similarly applied an irrebuttable presumption only in response to "a prosecutor's intentional intrusion" into "the defendant's trial preparation sessions." *Id.* at 1134, 1142. There, a deputy sheriff who was present during the defense team's trial preparation meetings relayed the substance of those sessions to the prosecutor, who then used that information to impeach the defendant on cross-examination during trial. *Id.* at 1134-1141. Concluding that "[t]his sort of purposeful intrusion on the attorney-client relationship strikes at the center of the protections afforded by the Sixth Amendment," the Tenth Circuit affirmed the district court's grant of habeas relief. *Id.* at 1141-1143. Again, the facts of this case show neither a purposeful intrusion nor the acquisition of information about strategic matters. See p. 15, *supra*. And the

Tenth Circuit has declined to apply *Shillinger* outside the extreme facts in that case. See *United States* v. *Kennedy*, 225 F.3d 1187, 1195 n.5 (2000) (noting that *Shillinger* "seemingly limited the remedy of a new trial or dismissal of an indictment only where 'the evidence has been wrongfully admitted'") (citation omitted), cert. denied, 532 U.S. 943 (2001); *United States* v. *Orduno-Ramirez*, 61 F.4th 1263, 1274-1275 (2023) (noting that *Shillinger* applied its "*per se* prejudice rule" where "a law enforcement official disclosed confidential attorney-client trial-preparation communications to the prosecution" and declining to apply that rule to the distinct facts of that case), petition for cert. pending, No. 23-5034 (filed June 30, 2023); *United States* v. *Spaeth*, 69 F.4th 1190, 1210-1211 (2023) (similar).

Petitioner's invocation (Pet. 17-18) of six state-court decisions likewise shows no conflict with the decision below. In all of those cases, a government informant or law enforcement agent was alleged to have acquired defense strategy as a result of the intrusion in question. See *State* v. *Lenarz*, 22 A.3d 536, 539-540, 542 (Conn. 2011) (applying rebuttable presumption where "detailed discussions of the defendant's trial strategy" were sent to the prosecution), cert. denied, 565 U.S. 1156 (2012); *State* v. *Soto*, 933 P.2d 66, 70, 72, 75-76, 79-80 (Haw. 1997) (adopting rebuttable presumption in case where informant listened to a conversation between the defendant and his counsel regarding "the defense's legal strategy" after a hearing); *State* v. *Robins*, 431 P.3d 260, 263-268 (Idaho 2018) (applying rebuttable presumption where prosecution obtained defendant's notes prepared for a counsel meeting that discussed, *inter alia*, "a potential alibi"); *State* v. *Taylor*, 49 N.E.3d 1019, 1023-1025, 1028 (Ind. 2016) (applying rebuttable

presumption where law enforcement officers eavesdropped on a post-arrest conversation between the defendant and his attorney and thereby obtained the defendant's "strategic 'playbook'"); *State* v. *Bain*, 872 N.W.2d 777, 780-781, 790-791 (Neb. 2016) (applying rebuttable presumption where prosecutors obtained documents containing "confidential trial strategy" from defendant's prior counsel); *State* v. *Fuentes*, 318 P.3d 257, 261-263 (Wash. 2014) (applying rebuttable presumption where police officer eavesdropped on defendant's posttrial phone calls with counsel that discussed posttrial motions). None of those courts suggested that it would apply the same presumption of prejudice in circumstances akin to those here.

Finally, petitioner's reliance (Pet. 14) on Justice White's dissent from the denial of certiorari in *Cutillo* v. *Cinelli*, 485 U.S. 1037 (1988), is mistaken for the same reason. The dissent observed that *Cutillo* "present[ed] the issue of who bears the burden of persuasion for establishing prejudice or lack thereof when the Sixth Amendment violation involves the transmission of *confidential defense strategy information*." *Id.* at 1037-1038 (emphasis added). But Petitioner advocates a more encompassing approach than any of the decisions on which he relies.

c. Petitioner briefly suggests that the decision below is inconsistent with this Court's decision in *Morrison*, which "held that dismissal is not an appropriate remedy for a Sixth Amendment violation 'absent demonstrable prejudice, *or substantial threat thereof*.'" Pet. 25 (quoting *Morrison*, 449 U.S. at 365). But this Court did not suggest that a substantial threat of prejudice should be *presumed* under any particular circumstances. And as detailed above, there is no basis in the

record to conclude that petitioner suffered even a "substantial threat" of prejudice. See, *e.g.*, Pet. App. 16a (sustaining the district court's finding that the privilege violations did not "provide the government with any strategic advantage").

2. Petitioner next contends (Pet. 27-36) that the court of appeals erred in concluding that defendants do not have a Sixth Amendment right to have a jury determine the facts on which criminal forfeiture relies and that this Court should overrule its contrary holding in *Libretti* v. *United States*, 516 U.S. 29 (1995). That argument lacks merit. This Court has repeatedly denied petitions for writs of certiorari raising similar contentions,[2] and it should follow the same course here.

a. The court of appeals correctly concluded that the Sixth Amendment right to a jury does not extend to factfinding underlying a criminal forfeiture order. In *Libretti*, this Court considered a defendant's argument that the right to a jury determination on criminal forfeiture "has both a constitutional and statutory foundation." 516 U.S. at 48. Rejecting that proposition, the Court instead held that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." *Id.* at 49.

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[2] See, *e.g.*, *Elbeblawy* v. *United States*, 141 S. Ct. 2740 (2021) (No. 20-7940); *Bradley* v. *United States*, 141 S. Ct. 2763 (2021) (No. 20-7198); *Afriyie* v. *United States*, 140 S. Ct. 1228 (2020) (No. 19-7259); *Stevenson* v. *United States*, 580 U.S. 1161 (2017) (No. 16-900); *Crews* v. *United States*, 580 U.S. 974 (2016) (No. 16-6183); *Miller* v. *United States*, 580 U.S. 928 (2016) (No. 16-5841); *Sigillito* v. *United States*, 574 U.S. 1104 (2015) (No. 14-7586); *Wilkes* v. *United States*, 574 U.S. 1049 (2014) (No. 14-5591); *Phillips* v. *United States*, 569 U.S. 1031 (2013) (No. 12-8549); *Dantone, Inc.* v. *United States*, 549 U.S. 1071 (2006) (No. 06-71); *Braun* v. *United States*, 546 U.S. 1076 (2005) (No. 05-599).

Petitioner contends (Pet. 30-32) that this Court should overrule *Libretti* in light of subsequent cases construing the Sixth Amendment, but no sound basis exists for doing so. In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held, as a matter of federal constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. In *Southern Union Co.* v. *United States*, 567 U.S. 343 (2012), the Court held "that the rule of *Apprendi* applies to the imposition of criminal fines." *Id.* at 360. *Libretti*'s determination that the Sixth Amendment does not require a jury to engage in fact-finding in the forfeiture context, however, does not conflict with *Apprendi* or *Southern Union*.

By its terms, the rule in *Apprendi and Southern Union* applies only to determinate sentencing schemes in which a factual determination "increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. But, unlike criminal sentences or the fine at issue in *Southern Union*, the amount of money or property that a defendant may be required to forfeit is not subject to any such statutory maximum. See 21 U.S.C. 853(a)(1) (requiring mandatory forfeiture of "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of [the] violation"); 18 U.S.C. 982(a)(1) (requiring mandatory forfeiture of "any property, real or personal, involved in [the] offense, or any property traceable to such property"). And a "judge cannot exceed his constitutional authority by imposing a punishment beyond the statutory maximum if there is no statutory maximum." *United States* v. *Fruchter*, 411

F.3d 377, 383 (2d Cir.), cert. denied, 546 U.S. 1076 (2005); see *United States* v. *Bradley*, 969 F.3d 585, 591 (6th Cir. 2020) ("Unlike a statutory minimum or maximum based on a certain fact—say a fine for every day of a violation—criminal forfeiture requires a defendant to forfeit the property he used in or received from his crime."), cert. denied, 141 S. Ct. 2763 (2021).

This Court has also recognized the compatibility of its *Apprendi* line of cases with the conclusion that the facts underlying a criminal forfeiture need not be proved to a jury beyond a reasonable doubt. After the Court in *United States* v. *Booker*, 543 U.S. 220 (2005), reached its constitutional holding on the federal sentencing guidelines, it considered which portions of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987 (18 U.S.C. 3551 *et seq.*), it had to "sever and excise as inconsistent with the Court's constitutional requirement." 543 U.S. at 258. At the outset of that analysis, the Court explained that "[m]ost of the statute is perfectly valid." *Ibid.* It then listed examples of those "perfectly valid" provisions, including 18 U.S.C. 3554, governing criminal "forfeiture." *Booker*, 543 U.S. at 258; see *Fruchter*, 411 F.3d at 382 ("*Booker* itself suggests that a district court's forfeiture determination * * * does not offend the Sixth Amendment.").

b. Every court of appeals that has considered the question has recognized that *Apprendi* and its progeny do not alter *Libretti*'s holding that the Sixth Amendment does not require jury findings on criminal forfeiture. See, *e.g.*, *United States* v. *Saccoccia*, 564 F.3d 502, 507 (1st Cir.), cert. denied, 558 U.S. 891 (2009); *Fruchter*, 411 F.3d at 382-383 (2d Cir.); *United States* v. *Leahy*, 438 F.3d 328, 331-333 (3d Cir.) (en banc), cert. denied, 549 U.S. 1071 (2006); *United States* v. *Day*, 700

F.3d 713, 732-733 (4th Cir. 2012), cert. denied, 569 U.S. 959 (2013); *United States* v. *Simpson*, 741 F.3d 539, 560 (5th Cir.), cert. denied, 572 U.S. 1127 (2014); *Bradley*, 969 F.3d at 591 (6th Cir.); *United States* v. *Tedder*, 403 F.3d 836, 841 (7th Cir.), cert. denied, 546 U.S. 1075 (2005); *United States* v. *Sigillito*, 759 F.3d 913, 935 (8th Cir. 2014), cert. denied, 574 U.S. 1104 (2015); *United States* v. *Phillips*, 704 F.3d 754, 769-771 (9th Cir. 2012), cert. denied, 569 U.S. 1031 (2013); *United States* v. *Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001) (per curiam). And, as with past petitions raising this issue, no review of that consensus is warranted here.[3]

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[3] In the course of arguing that his Sixth Amendment rights were violated, petitioner asserts that "money judgment forfeitures are not currently authorized by statute." Pet. 33 (citation omitted). Petitioner does not identify that contention as a separate question presented, however. And in any event, he did not raise that claim in the court of appeals, and this Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992). This case provides no reason to depart from that practice. This Court has repeatedly denied review of petitions for writs of certiorari presenting similar questions. See, *e.g.*, *Channon* v. *United States*, 142 S. Ct. 578 (2021) (No. 21-5064); *Hatum* v. *United States*, 142 S. Ct. 72 (2021) (No. 20-1370); *Bradley*, *supra* (No. 20-7198); *Holden* v. *United States*, 139 S. Ct. 1645 (2019) (No. 18-8672); *Lo* v. *United States*, 583 U.S. 931 (2017) (No. 16-8327); *Crews* v. *United States*, 580 U.S. 974 (2016) (No. 16-6183); *Hampton* v. *United States*, 571 U.S. 1145 (2014) (No. 13-7406); *Newman* v. *United States*, 566 U.S. 915 (2012) (No. 11-9001); *Smith* v. *United States*, 565 U.S. 1218 (2012) (No. 11-8046); *Olguin* v. *United States*, 565 U.S. 958 (2011) (No. 11-6294). It should do the same here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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