No. 04-1468

In the Supreme Court of the United States

MICHAEL BOULWARE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in concluding that a state jury verdict did not resolve whether certain funds belonged to petitioner.

2. Whether the district court violated the Confrontation Clause when it sustained an objection during petitioner's cross-examination of a government witness.

3. Whether the forfeiture of the entire proceeds of petitioner's conspiracy to make false statements to a federally insured financial institution violated the Eighth Amendment's Excessive Fines Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 384 F.3d 794 (9th Cir. 2004).

JURISDICTION

The judgment of the court of appeals was filed on September 14, 2004. A petition for rehearing was denied on February 1, 2005 (Pet. App. B1). The petition for a writ of certiorari was filed on May 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On November 29, 2001, a jury found petitioner guilty on five counts of filing false tax returns, in violation of 26 U.S.C. 7206(1), four counts of tax evasion, in violation of 26 U.S.C. 7201, and one count of conspiring to make a false statement to a federally insured financial institution, in violation of 18 U.S.C. 371. The court of appeals affirmed in part, reversed in part, vacated the sentence, and remanded the case for further proceedings consistent with its opinion.

1. a. Petitioner was the founder, chief executive officer, and part-owner of Hawaiian Isles Enterprises, Inc. (HIE), a Hawaiian corporation dealing in tobacco distribution, coffee processing and sales, arcade games, vending machines, and bottled water. Between 1989 and 1993, petitioner diverted millions of dollars from HIE and failed to report or to pay taxes on this income. Pet. App. A3-A4, A30-A31.

b. In addition, in 1992 petitioner engaged in a scheme, with Lorin Kushiyama, to obtain a loan for HIE from General Electric Credit Company (GECC), an organization insured by the Federal Deposit Insurance Corporation, by submitting fraudulent invoices. Specifically, Kushiyama prepared invoices listing equipment that he purportedly leased to HIE, and GECC would pay the invoices for HIE; the equipment on the invoices, however, was already owned by HIE. Pet. 4. Under this arrangement, GECC paid Kushiyama $495,814.80, and Kushiyama gave these proceeds to petitioner. Pet. App. A4.

c. Petitioner, who was seeking to divorce his wife, purportedly intended to use the money diverted from HIE and acquired from GECC to buy out his wife's interest in HIE. Upon learning about this plan, petitioner's girlfriend, Jin Sook Lee, requested that she hold the funds until petitioner accumulated enough money to acquire his wife's interest. By 1994, petitioner had collected $5 million, enough money to purchase his wife's interest. Lee, however, refused to return the money to petitioner. Pet. 4-5.

In 1994, after petitioner had become aware of the IRS investigation, petitioner and HIE filed claims in Hawaii state court against Lee, seeking the return of the money on the ground that it belonged to HIE. In 1997, after a trial, a jury found by a special verdict that the money transferred to Lee did not constitute a gift to her and that the money belonged to HIE. Pet. App. A9.

2. In 2000, petitioner was charged with, *inter alia*, five counts of filing false tax returns, in violation of 26 U.S.C. 7206(1), and four counts of attempted tax evasion, in violation of 26 U.S.C. 7201. He also was charged with four counts of making false statements to a federally insured financial institution, in violation of 18 U.S.C. 1014 (2000 & Supp. II 2002), and one count of conspiring to make such statements, in violation of 18 U.S.C. 371, for his scheme to obtain a loan from GECC. The indictment also sought forfeiture of the proceeds of the loan under 18 U.S.C. 982(a)(2)(A).

Before trial, petitioner moved to adopt as controlling the Hawaii state court's determination that the money that had been transferred to Lee belonged to HIE and therefore was not taxable income to him. The court denied petitioner's motion. The court explained that the state judgment did not establish that petitioner did not own the money, because the state case dealt only with ownership of the funds as between Lee and HIE and did not determine ownership as between HIE and petitioner. Pet. App. A10. Furthermore, on the government's motion, the court excluded all evidence of the state court's verdict, concluding that it was not relevant to "the ultimate issues of the case." *Id.* at A11.

On November 29, 2001, the jury found petitioner guilty on all nine tax counts. It also found him guilty of conspiring to make false statements to a federally insured financial institution, but acquitted him of the substantive false statements counts. The court sentenced petitioner to 36 months of imprisonment on each of the false tax return counts, 51 months of imprisonment on each of the tax evasion counts, and 51 months of imprisonment on the conspiracy count, with all sentences running concurrently. Pet. App. A3. The court also ordered petitioner, who had waived a jury trial on the forfeiture count, to forfeit the entire $495,814.80 loan from GECC, rejecting petitioner's argument that he should receive a credit for the amount of the loan that had already been repaid to GECC.

3. The court of appeals affirmed in part, reversed in part, vacated the sentence, and remanded. Pet. App. A1-A35.

a. The court reversed petitioner's conviction for filing false tax returns and for attempted tax evasion. The court rejected petitioner's argument that the Hawaii state judgment precluded the government from relitigating that the money that had been transferred to Lee belonged to HIE, from which it would follow that the funds were not taxable income to petitioner. The court held that, even if state court determinations about ownership are binding for federal tax purposes, the Hawaii court's decision did not resolve whether the money constituted income to petitioner, because the state court decision determined ownership of the funds as between Lee and HIE, and not as between petitioner and HIE. Pet. App. A15-A16. The court held, however, that the district court had committed reversible error by excluding the state court judgment as irrelevant, because the judgment corroborated petitioner's testimony that the funds were owned by HIE. *Id.* at A22-A25.

The court of appeals affirmed petitioner's conviction for conspiring to make a false statement to a federally insured institution. It rejected petitioner's argument that the district court had violated the Confrontation Clause by sustaining the government's objection during petitioner's cross-examination of Kushiyama to the following question: "As far as these invoices, you are not the—intending to submit fake invoices to anyone, were you?" The court of appeals explained that this question had come after a series of irrelevant questions about whether Kushiyama had prepared invoices for other parties, and that the district court had clearly understood this question also to refer, not to invoices prepared for petitioner, but to invoices prepared for third parties. Observing that defense counsel could have rephrased the question or explained to the district court that he was inquiring about the invoices in this case, the court of appeals concluded that petitioner's right to confront Kushiyama had not been violated. Pet. App. A31-A32.

The court vacated petitioner's sentence on the conspiracy count, however, directing that petitioner be sentenced in accordance with *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). Pet. App. A33.

Finally, the court of appeals affirmed the forfeiture order. The court rejected petitioner's argument that the forfeiture order should be reduced by the amount GECC had been repaid, explaining that nothing in 18 U.S.C. 982(a)(2) entitled petitioner to a credit for the repayment. Pet. App. A33-A34.

b. Judge Silverman dissented in part. Pet. App. A35-A36. In his view, the Hawaii judgment was irrelevant to whether petitioner owned the money diverted to Lee. He therefore would have affirmed all of petitioner's convictions.

ARGUMENT

Petitioner raises three challenges to the court of appeals' decision in this case. First, he argues (Pet. 6-15) that the court erred in rejecting his claim that the state court judgment precluded the government from relitigating the ownership of the money transferred to Lee. Second, he claims (Pet. 15-28) that the district court erred by improperly limiting his cross-examination of Kushiyama. Finally, he maintains (Pet. 28-29) that the forfeiture order violates the Eighth Amendment's prohibition against excessive fines. These claims do not warrant review.

1. Petitioner contends that this Court should grant a writ of certiorari to resolve whether *Commissioner* v. *Estate of Bosch*, 387 U.S. 456 (1967), which holds that federal courts, in assessing federal estate tax liability, are not bound by state probate court determinations about property interest, applies outside the estate-tax context. That question, however, is not presented in this case.

In this case, the court of appeals held that, even assuming that a state court's determination of ownership was binding in subsequent tax cases, the Hawaii judgment did not resolve whether the money belonged to HIE or petitioner. Pet. App. A15-A16. Thus, the significance of *Bosch* outside the estate-tax context is not at issue in this case. Although petitioner disputes what the state court resolved, that fact-bound contention does not warrant this Court's review.

In any event, the court of appeals' conclusion was correct. The dispute in the Hawaii case was whether Lee had received the money as a gift or whether she had been given the money to hold in trust for HIE. In resolving that dispute, the jury determined only that HIE had a better claim to the money than Lee did. Pet. App. A16. The jury did not determine whether the money belonged to HIE or petitioner, because that was not an issue in the lawsuit.

2. Petitioner next argues (Pet. 15-28) that the district court violated the Confrontation Clause when, during his cross-examination of Kushiyama, it sustained the government's objection to his question "[a]s far as these invoices, you are not the—intending to submit fake invoices to anyone, were you?" According to petitioner (Pet. 27), this purported error, when combined with the court's purported error in refusing to give preclusive effect to the state jury verdict, requires that his conviction be reversed.

Petitioner's fact-bound contention that the district court violated his right to confront Kushiyama does not warrant this Court's review. Contrary to petitioner's contention (Pet. 21), the court of appeals correctly concluded that the district court did not impermissibly prevent petitioner from asking Kushiyama whether he "intended to submit false invoices to GECC." This Court has recognized that "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about * * * interrogation that is repetitive or only marginally relevant." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679

(1986). In this case, as the court of appeals explained, the district court concluded that petitioner's question was irrelevant, because it understood petitioner's question, like the questions preceding it, to refer to invoices prepared for third parties. Petitioner's counsel could have rephrased the question or explained to the district court that he was inquiring about the invoices at issue in this case. The district court therefore did not unduly restrict petitioner's right to cross-examine Kushiyama on that point. See *ibid.* Although petitioner contends (Pet. 24-25) that the question was relevant even if it did refer to invoices prepared for others, petitioner did not present that argument to the district court or to the court of appeals, and this Court should not pass on that fact-bound claim in the first instance. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998).

3. Finally, petitioner contends (Pet. 28-29) that the forfeiture of the entire $495,814.80 loan from GECC violates the Eighth Amendment's Excessive Fines Clause as interpreted in *United States* v. *Bajakajian*, 524 U.S. 321 (1998). In *Bajakajian*, this Court held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* at 334. In applying that test, the Court considered (1) whether the offense leading to forfeiture was related to other illegal activities; (2) whether the defendant fit into the class of persons for whom the statute was designed; (3) the other possible penalties for the offense; and (4) the harm caused by the offense. *Id.* at 336-340.

As petitioner notes, the Eighth Circuit has concluded that under *Bajakajian* a forfeiture order may be excessive under the Eighth Amendment if it is not reduced when a defendant has returned a portion of the illegally obtained assets. See *United States* v. *Hawkey*, 148 F.3d 920, 928 (1998). In this case, however, the court of appeals did not address whether the forfeiture order violated the Eighth Amendment; the only argument that petitioner made and that the court considered about forfeiture was whether 18 U.S.C. 982(a)(2) entitled petitioner to a credit. Pet. App. A34.* The court of appeals' decision therefore does not present a conflict warranting this Court's review. Moreover, this Court should not consider petitioner's Eighth Amendment claim in the first instance. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* Petitioner does not argue in this Court that he is entitled to a credit under 18 U.S.C. 982(a)(2).