No. 05-415

In the Supreme Court of the United States

IN RE GRAND JURY PROCEEDINGS

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

REDACTED
BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the crime-fraud exception to the attorney-client privilege applies when there is a reasonable basis to believe that the attorney's services were used by the client to foster a crime or fraud.

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OPINIONS BELOW

The opinion of the court of appeals (Sealed Pet. App. 1a-23a) is sealed and not reported, but a redacted version of the opinion (Public Pet. App. 1a-21a) is reported at 417 F.3d 18. The memorandum opinion of the district court (Sealed Pet. App. 24a-34a) is sealed and not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2005. The petition for a writ of certiorari was filed on July 21, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In **[REDACTED]**, a lawyer (Lawyer I) represented a client (Client A) who was subpoenaed to testify before a federal grand jury. Lawyer I advised Client A

to tell the truth. Lawyer I has also represented petitioner.[1] **[REDACTED.]** Lawyer I then advised Client A to commit perjury during his testimony before the grand jury, and Client A did so. Sealed Pet. App. 6a, 14a; Public Pet. App. 3a, 12a.

In **[REDACTED]**, Lawyer I told Client A to recant his perjured testimony. Lawyer I did so after consulting with another lawyer (Lawyer II), who represented **[REDACTED]** other clients (the Group C Clients) connected with petitioner and events pertinent to this case. Lawyer I claimed to have a joint-defense agreement with Lawyer II. Sealed Pet. App. 6a-7a; Public Pet. App. 3a-4a.

Lawyer I was subpoenaed to testify before a grand jury, and was questioned about Client A's perjury. When asked about his conversations with petitioner, Lawyer I invoked the attorney-client privilege and refused to answer. Lawyer I also asserted the joint-defense privilege and refused to answer questions about his conversations with Lawyer II. Sealed Pet. App. 6a-7a; Public Pet. App. 3a-4a.

2. The government filed a motion to compel Lawyer I's testimony, arguing that the asserted privileges were not available because of the crime-fraud exception. The district court then issued a notice of proceedings that informed petitioner's current counsel and the Group C Clients' current counsel of the filing of the motion to compel. The notice prohibited Lawyer I and his attorney from disclosing the motion to third parties or discussing its substance with them. Sealed Pet. App. 7a; Public Pet. App. 4a.

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[1] In its opinion, the court of appeals referred to petitioner as Client B. See Sealed Pet. App. 3a; Public Pet. App. 3a.

Petitioner objected to the non-disclosure order, on the ground that it contravened Rule 6(e)(2)(A) of the Federal Rules of Criminal Procedure by imposing an obligation of secrecy on a grand jury witness (Lawyer I).[2] Petitioner also opposed the government's motion to compel, on the ground that the government had not established the applicability of the crime-fraud exception. The government made two *ex parte* filings that addressed the non-disclosure order and the crime-fraud exception. (A redacted version of one of the filings was served on petitioner and the Group C Clients.) Sealed Pet. App. 7a-8a; Public Pet. App. 4a-5a.

The district court considered a request from the government that it conduct an *in camera* inquiry of the kind authorized by this Court in *United States* v. *Zolin*, 491 U.S. 554 (1989).[3] It expressed reservations about doing so, however, because the complexity of the background events would involve the court in questioning Lawyer I, not just in reviewing documents. The government ultimately abandoned its request, and chose to rest on the evidence already adduced. Sealed Pet. App. 8a; Public Pet. App. 5a.

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[2] Rule 6(e)(2)(A) provides that "[n]o obligation of secrecy" with respect to grand jury proceedings "may be imposed on any person except in accordance with Rule 6(e)(2)(B)." Rule 6(e)(2)(B), in turn, imposes non-disclosure obligations on certain categories of people, including grand jurors, interpreters, court reporters, and government attorneys.

[3] In *Zolin*, this Court held that a district court may conduct an *in camera* review of presumptively privileged materials to determine whether the crime-fraud exception applies, if the party opposing the privilege makes a threshold factual showing that would support a good-faith belief by a reasonable person that review of the materials may reveal evidence that establishes the applicability of the exception. 491 U.S. at 572.

In March 2004, the district court granted the government's motion to compel. It subsequently denied petitioner's request for permission to interview Lawyer I about the underlying events. Sealed Pet. App. 8a; Public Pet. App. 5a.

3. In October 2004, the district court filed a memorandum opinion (Sealed Pet. App. 24a-34a) that set forth the reasons for its ruling that the non-disclosure order was proper (*id.* at 25a-29a) and its ruling that the crime-fraud exception overcame the attorney-client privilege (*id.* at 29a-34a). In finding that the privilege had been overcome, the court explained that it was **[REDACTED]** that enabled the government to make the requisite "*prima facie* showing," not only of "Lawyer I's corruption," but also of "a shared intent" by petitioner and the Group C Clients to use "otherwise privileged attorney-client communications to facilitate corruption and frustration of the grand jury inquiry." *Id.* at 9a; Public Pet. App. 6a. In so ruling, the district court made clear that it had not found that petitioner or any of the Group C Clients had in fact corruptly communicated with Lawyer I, but had found only enough of a likelihood of such communication to justify compelling Lawyer I to provide answers to the government's limited lines of inquiry. Sealed Pet. App. 9a; Public Pet. App. 6a.

4. Petitioner and the Group C Clients appealed. All of them argued that the district court applied an incorrect legal standard in granting the motion to compel, and that the government did not satisfy even the standard applied by the district court. Petitioner also argued that the district court should have employed the *Zolin in camera* procedures. And petitioner and the Group C Clients argued that the non-disclosure order was barred by Federal Rule of Criminal Procedure

6(e)(2), or at least was overbroad. In an opinion by Chief Judge Boudin, the court of appeals affirmed the order granting the motion to compel as to petitioner's privilege; vacated the order as to the Group C Clients' privilege; and modified, and then affirmed as modified, the order prohibiting disclosure. Sealed Pet. App. 1a-23a; Public Pet. App. 1a-21a.

a. Addressing first the motion to compel, the court of appeals explained that the crime-fraud exception to the attorney-client privilege applies when the opponent of the privilege establishes that (1) the client was engaged in (or planning) criminal or fraudulent activity when the attorney-client communications took place and (2) the communications were intended to facilitate or conceal the criminal or fraudulent activity. Sealed Pet. App. 10a-11a; Public Pet. App. 8a. The court observed that "[i]t is often hard to determine whether the attorney-client relationship has been misused by the client for crime or fraud without seeing the document, or hearing the testimony, as to which the privilege is claimed." Sealed Pet. App. 11a; Public Pet. App. 8a. To overcome this problem, the court said, judges sometimes employ the procedure approved by this Court in *Zolin*—namely, "review[ing] privileged materials by themselves *in camera* and then decid[ing] whether the other side is entitled to it." Sealed Pet. App. 11a; Public Pet. App. 8a. Under *Zolin*, the court added, "a 'lesser evidentiary showing' is needed for *in camera* review than is needed finally to pierce the privilege." Sealed Pet. App. 11a (quoting 491 U.S. at 572); Public Pet. App. 9a (same).

The court of appeals observed that *Zolin* "did not answer the question of what level of proof is needed to pierce the privilege itself," although *Zolin* acknowl-

edged that "some confusion" had been caused by the statement in *Clark* v. *United States*, 289 U.S. 1, 14 (1933), that the requisite showing was a "*prima facie* case." Sealed Pet. App. 12a (quoting 491 U.S. at 563 n.7); Public Pet. App. 9a (same). The court of appeals went on to explain what "*prima facie* case" means in this context. "As we read the consensus of precedent in the circuits," the court said, "it is enough to overcome the privilege that there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud." Sealed Pet. App. 12a-13a; Public Pet. App. 10a. The court noted that the federal courts of appeals are "divided on articulation" of the standard, but "all effectively allow" piercing of the privilege "on something less than a mathematical (more likely than not) probability that the client intended to use the attorney in furtherance of a crime or fraud." Sealed Pet. App. 13a; Public Pet. App. 10a.

In explaining why that standard is correct, the court said that "the requirements for access cannot be set too high," because "the initial barrier of the privilege" makes it "very hard for an adversary unaided to show that the privileged communications were themselves corrupt." Sealed Pet. App. 13a; Public Pet. App. 10a. The court nevertheless described the standard as "reasonably demanding," in that "neither speculation nor evidence that shows only a distant likelihood of corruption is enough." Sealed Pet. App. 13a; Public Pet. App. 11a. The court added that the crime-fraud exception requires that the client had a corrupt intent to engage in criminal or fraudulent activity and to use the attorney-client communications for that purpose; it is not sufficient that the lawyer was corrupt. Sealed Pet. App. 13a-14a; Public Pet. App. 11a-12a.

The court of appeals held that the standard was satisfied as to petitioner. Sealed Pet. App. 14a-15a; Public Pet. App. 12a. **[REDACTED.]** Sealed Pet. App. 14a; Public Pet. App. 12a. In holding that the government had made a sufficient showing to overcome the privilege, the court observed that the district court's initial proposal to examine Lawyer I *in camera* "was not a finding that the government had met only the lower threshold under *Zolin*," such that the district court could only grant the motion to compel after acquiring additional evidence. Sealed Pet. App. 15a; Public Pet. App. 12a. The district court "made quite clear," the court of appeals said, that the government "had fully met its *prima facie* burden," and it is that conclusion that the court of appeals affirmed. Sealed Pet. App. 15a; Public Pet. App. 12a.

The court of appeals reached a different conclusion with respect to the Group C Clients. It held that the district court erred in finding that the government had met its burden as to them (Sealed Pet. App. 15a-17a; Public Pet. App. 12a-14a), because there was "scant evidence" that they used Lawyer II's services to further a crime or fraud (Sealed Pet. App. 15a; Public Pet. App. 13a). In vacating the district court's decision on that point, the court of appeals noted that the district court was not foreclosed from conducting an *in camera* inquiry under *Zolin* with respect to the Group C Clients. Sealed Pet. App. 17a; Public Pet. App. 14a.

b. Turning to the non-disclosure order, the court of appeals first held that the order did not violate Federal Rule of Criminal Procedure 6(e)(2). Sealed Pet. App. 18a-21a; Public Pet. App. 14a-19a. The court agreed with decisions of other courts that "take Rule 6(e)(2)(A) to set a default rule of permitting disclosure by wit-

nesses absent a contrary order by the court in that proceeding" and "leave open the possibility of restrictions where they can be justified by particular and compelling circumstances." Sealed Pet. App. 19a; Public Pet. App. 16a-17a. The court found the requisite "extraordinary circumstances" present in this case, because Lawyer I "confessedly suborned perjury of a witness in a related grand jury proceeding[]," Lawyer I "is connected to certain underlying events that may have comprised an effort to frustrate a grand jury investigation," and disclosure could help petitioner and the Group C Clients "coordinate their own testimony." Sealed Pet. App. 20a; Public Pet. App. 18a.

The court of appeals agreed with petitioner and the Group C Clients, however, that the non-disclosure order was overbroad. Sealed Pet. App. 21a-22a; Public Pet. App. 19a-20a. While approving the prohibition on Lawyer I's disclosure of matters occurring before the grand jury, the court rejected the prohibition on disclosure of his "independent recollection of previous events outside the grand jury." Sealed Pet. App. 21a; Public Pet. App. 19a. The court therefore modified the non-disclosure order to cover only matters occurring before the grand jury. Sealed Pet. App. 22a; Public Pet. App. 20a. The court also made clear that Lawyer I, petitioner, and the Group C clients "remain free at any time to seek relief from the district court," on a showing of good cause, to permit Lawyer I to disclose some or all of his grand jury testimony to petitioner, the Group C clients, or both. Sealed Pet. App. 22a-23a; Public Pet. App. 21a.

ARGUMENT

Petitioner contends (Sealed Pet. 5-20; Public Pet. 5-22) that the court of appeals applied an incorrect legal

standard in holding that the government met its burden of establishing the applicability of the crime-fraud exception to the attorney-client privilege. In particular, petitioner contends that the court of appeals erred in holding that the privilege is overcome if "there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud." Sealed Pet. App. 12a-13a; Public Pet. App. 10a. The decision of the court of appeals is correct, and it does not conflict with any decision of any other court. Further review is therefore unwarranted.

1. a. The attorney-client privilege protects, at the behest of the client, confidential communications between attorney and client to facilitate legal services for the client. See, *e.g.*, *United States* v. *BDO Seidman*, 337 F.3d 802, 810 (7th Cir. 2003), cert. denied, 540 U.S. 1178 (2004); *United States* v. *Rakes*, 136 F.3d 1, 3 (1st Cir. 1998). It is intended to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). The privilege is interpreted narrowly, because "[t]he investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of the[] privilege[]." *Cavallaro* v. *United States*, 284 F.3d 236, 245 (1st Cir. 2002) (quoting 8 John Henry Wigmore, *Evidence* § 2192, at 73 (McNaughton rev. 1961)). See also *Fisher* v. *United States*, 425 U.S. 391, 403 (1976).

The joint-defense privilege is an extension of the attorney-client privilege. See, *e.g.*, *United States* v. *Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989); *Waller* v. *Financial Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987). Also known as the

"common-interest" privilege, it applies to communications by a client or a client's lawyer to a lawyer representing another in a matter of common interest, as well as to communications between two or more clients and their attorney on matters of common interest. See, *e.g.*, *Cavallaro*, 284 F.3d at 249-250; *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986). A joint-defense relationship may be formed, however, only with respect to the subject of actual or potential litigation. See, *e.g.*, *In re Grand Jury Subpoena*, 274 F.3d 563, 575 (1st Cir. 2001); *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d at 126.

When a client communicates with his lawyer for the purpose of advancing a criminal or fraudulent enterprise, "the rationale that underpins the [attorney-client] privilege vanishes." *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71, 76 (1st Cir. 1999). Accord *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995). There is thus a "crime-fraud" exception to the privilege, to ensure that it will not extend to "communications made for the purpose of getting advice for the commission of a fraud or crime." *United States* v. *Zolin*, 491 U.S. 554, 563 (1989) (internal quotation marks omitted). To establish the crime-fraud exception, the party invoking it must show "(1) that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place" and "(2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity." *Violette*, 183 F.3d at 75. Accord *United States* v. *Jacobs*, 117 F.3d 82, 87-89 (2d Cir. 1997).

b. In *Clark* v. *United States*, 289 U.S. 1 (1933), this Court stated that, for the crime-fraud exception to apply, "there must be something to give colour to the

charge; there must be *prima facie* evidence that it has some foundation in fact." *Id.* at 15 (internal quotation marks and citation omitted). In *Zolin*, the Court held that a district court may review allegedly privileged material *in camera* to determine whether the *prima facie* showing has been made. 491 U.S. at 562-575. In so holding, the Court made clear that "a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege." *Id.* at 572. The Court described this lesser showing as "a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Ibid.* (internal quotation marks and citation omitted).

Zolin makes clear that the decision whether to conduct an *in camera* review is left to the discretion of the district court. 491 U.S. at 572. A court may "defer its *in camera* review" if it concludes that "additional evidence in support of the crime-fraud exception may be available" and that "production of the additional evidence will not unduly disrupt or delay the proceedings." *Ibid.* If the government can make the requisite *prima facie* showing without relying on the privileged material, therefore, it is free to do so.

As the court of appeals explained, "*prima facie* evidence" generally means "a showing of whatever is required to permit some inferential leap sufficient to reach a particular outcome"—in this context, "piercing the privilege based on a certain level of proof." Sealed Pet. App. 12a; Public Pet. App. 9a-10a. This Court has not decided what that "quantum of proof" is, *Zolin*, 491 U.S. at 564 n.7, and the courts of appeals have used different linguistic formulations, see Sealed Pet. App. 13a n.4;

Public Pet. App. 10a n.4. While the courts of appeals employ different terminology, however, they "all effectively allow piercing of the privilege on something less than a mathematical (more likely than not) probability that the client intended to use the attorney in furtherance of a crime or fraud." Sealed Pet. App. 13a; Public Pet. App. 10a. More specifically, "the consensus of precedent in the circuits" is that the attorney-client privilege is overcome if "there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud." Sealed Pet. App. 12a-13a; Public Pet. App. 10a. As the court below explained, "the requirements for access cannot be set too high," because "the initial barrier of the privilege" makes it "very hard for an adversary unaided to show that the privileged communications were themselves corrupt." Sealed Pet. App. 13a; Public Pet. App. 10a.

c. The evidence in this case was more than sufficient for a *prima facie* showing that the elements of the crime-fraud exception were satisfied with respect to petitioner's communications with Lawyer I in **[REDACTED]**. As the court of appeals explained, **[REDACTED]**. Sealed Pet. App. 14a; Public Pet. App. 12a. That evidence, together with the other evidence described in the government's *ex parte* filings in the court of appeals (see Sealed Gov't *Ex Parte* C.A. Br. 27-31), provides, at the very least, "a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud" (Sealed Pet. App. 12a-13a; Public Pet. App. 10a).

The lower courts were also correct in holding that the government made the requisite *prima facie* showing without the need for prior *in camera* review of the allegedly privileged communications themselves. As the

court of appeals explained, the district court's initial proposal to examine Lawyer I *in camera* "was not a finding that the government had met only the lower threshold under *Zolin*." Sealed Pet. App. 15a; Public Pet. App. 12a. The district court "made quite clear" in its October 2004 memorandum opinion that the government "had fully met its *prima facie* burden." Sealed Pet. App. 15a; Public Pet. App. 12a.

2. a. Petitioner contends that "the circuits are in conflict as to the quantum of proof required to establish the crime-fraud exception." Sealed Pet. 6; Public Pet. 7. According to petitioner, while some courts of appeals, including the court below, "use a 'probable cause' or 'reasonable basis/cause' standard," others "require evidence, if believed by a fact-finder and left uncontradicted, establishing (1) that a crime or fraud was ongoing or planned and (2) that the attorney-client communication was in furtherance thereof." Sealed Pet. 6-7; Public Pet. 7. There is no such circuit conflict.

As an initial matter, petitioner is mistaken in his contention that the latter formulation (evidence that, if believed by a fact-finder and left uncontradicted, establishes the elements of the crime-fraud exception) reflects a "higher standard" (Sealed Pet. 4; Public Pet. 4) than the former formulation ("probable cause" or "reasonable basis"). The latter formulation merely requires what this Court's decision in *Clark* requires—namely, a *prima facie* showing that the elements of the crime-fraud exception have been satisfied, see 289 U.S. at 15, or, as the court below put it, a showing that "permit[s] some inferential leap sufficient to * * * pierc[e] the privilege based on a certain level of proof," Sealed Pet. App. 12a; Public Pet. App. 9a-10a. The former formulation provides the requisite "quantum of proof," *Zolin*,

491 U.S. at 564 n.7—namely, probable cause, or, in the court of appeals' language, a "reasonable basis" to believe that the elements of the crime-fraud exception have been satisfied, Sealed Pet. App. 12a; Public Pet. App. 10a.

Because there is no inconsistency between the two formulations, any division among the circuits, as Chief Judge Boudin correctly recognized, is merely over the "articulation" of the standard. Sealed Pet. App. 13a; Public Pet. App. 10a. As he explained, despite the different terminology, there is a "consensus of precedent in the circuits," which "all effectively allow" piercing of the privilege "on something less than a mathematical (more likely than not) probability that the client intended to use the attorney in furtherance of a crime or fraud." Sealed Pet. App. 12a-13a; Public Pet. App. 10a. Other courts, on both sides of the purported "conflict," also recognize that there is no substantive difference between the standards. See *Haines* v. *Liggett Group, Inc.*, 975 F.2d 81, 95 (3d Cir. 1992) ("all of these proposed standards amount to the same basic proposition") (internal quotation marks and citation omitted); *In re Sealed Case*, 754 F.2d 395, 399 n.3 (D.C. Cir. 1985) ("there is little practical difference between the two tests"); *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1039 (2d Cir. 1984) ("As a practical matter, there is little difference here between the two tests."); *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 n.11 (5th Cir. 1982) ("while the [Second Circuit's] phraseology is different, its approach was the same"). See also *In re Grand Jury Proceedings*, 401 F.3d 247, 251, 254-255 (4th Cir. 2005) (stating that *prima facie* evidence means "evidence that, if believed by a trier of fact, would establish the elements" of the

crime-fraud exception, but also stating that, "[i]n satisfying this prima facie standard, proof * * * by a preponderance * * * is not required").

Petitioner places heavy reliance (Sealed Pet. 9-11; Public Pet. 9-12) on the District of Columbia Circuit's 1997 decision in *In re Sealed Case*, 107 F.3d 46. In that case, the court noted that, while it had found "little practical difference" between the two formulations of the applicable standard in its 1985 *In re Sealed Case* decision, *supra*, it had "some difficulty in understanding why the differences between the two formulations were considered slight." 107 F.3d at 50 (quoting 754 F.2d at 399 n.3). The court found "no reason to dwell on the matter," however, because it concluded that the government could not satisfy even the "probable cause" standard (*ibid.*), which, as petitioner acknowledges (Sealed Pet. 6; Public Pet. 7), is equivalent to the "reasonable basis" standard applied by the court below. With respect to the applicable legal standard, therefore, there is no conflict between the decision below and the District of Columbia Circuit's 1997 *In re Sealed Case* decision.

Petitioner suggests that the court of appeals misapplied the standard. He argues that "[t]he facts in this case are analytically the same" as the facts in *In re Sealed Case* (Sealed Pet. 10; Public Pet. 11), and that, "if the facts of this case had arisen in the District of Columbia, the crime-fraud exception would not have applied" (Sealed Pet. 11; Public Pet. 11-12). But since petitioner acknowledges that the court of appeals had before it "evidence the [p]etitioner has not seen" (Sealed Pet. 9; Public Pet. 10), which may well have influenced the inferences the court of appeals drew from the sequence of events, any effort to suggest that the facts before the

District of Columbia Circuit were "analytically the same" as the facts here is entirely without foundation.

Petitioner also argues (Sealed Pet. 14-17; Public Pet. 14-19) that the evidence before the court of appeals was insufficient to establish the applicability of the crime-fraud exception because it does not rise "beyond the level of suspicion" (Sealed Pet. 14; Public Pet. 15). But the court of appeals correctly held otherwise, and, in any event, the question of evidentiary sufficiency raised by petitioner does not warrant the exercise of this Court's certiorari jurisdiction. See Sup. Ct. R. 10.

b. Petitioner also contends that the crime-fraud standard applied by the court of appeals conflicts with the standard applied by other courts of appeals in two additional respects. He contends that "the circuits do not agree as to whether the standard for the crime-fraud exception has two prongs or one" (Sealed Pet. 5; Public Pet. 6) and that "the circuits disagree about the degree of closeness of the relationship required between the confidential communications and the alleged crime or fraud" (Sealed Pet. 7; Public Pet. 8). There is no circuit conflict on either issue.

The circuits agree, consistent with this Court's decision in *Clark*, see 289 U.S. at 15, that the relevant question is whether there is "*prima facie* evidence" that the elements of the crime-fraud exception have been satisfied, and they also agree that there are two such elements. Indeed, the First Circuit, which is alleged by petitioner to have "used a one-prong test" (Sealed Pet. 5; Public Pet. 6), recognized in this very case that the opponent of the privilege must establish "(1) that the client was engag[ed] in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; *and* (2) [that] the communications were

intended by the client to facilitate or conceal the criminal or fraudulent activity." Sealed Pet. App. 10a-11a (quoting *Violette*, 183 F.3d at 75); Public Pet. App. 8a (same). When, later in its opinion, the court of appeals said that the standard for overcoming the privilege is whether "there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud" (Sealed Pet. App. 12a-13a; Public Pet. App. 10a), it was simply combining the two elements. Any doubt on that question is dispelled by the court's later statement that "it is not enough to find reasonable cause to believe that the client is guilty of crime or fraud[;] [f]orfeiture of the privilege requires the client's *use or aim to use* the lawyer to foster the crime or the fraud." Sealed Pet. App. 14a; Public Pet. App. 11a.

Petitioner's contention that "the First Circuit did not require that the communication further an alleged crime or fraud" (Sealed Pet. 7; Public Pet. 8) is also refuted by the decision below. In it, the court stated that piercing of the privilege is allowed on less than a probability that the client intended to use the attorney "in furtherance of a crime or fraud" (Sealed Pet. App. 13a; Public Pet. App. 10a), and then held that piercing of the privilege would not be allowed with respect to the Group C Clients because there was insufficient evidence that their purpose in retaining Lawyer II was to use his services "in furtherance of a crime or fraud" (Sealed Pet. App. 15a; Public Pet. App. 13a). Again relying on the District of Columbia's 1997 decision in *In re Sealed Case*, *supra*, petitioner suggests (Sealed Pet. 7-8; Public Pet. 8) that the decision below conflicts with that decision's holding that "[s]howing temporal proximity between the communication and a crime is not enough." 107 F.3d at 50. But the decision below explicitly recognized that the privi-

lege is not overcome merely because the communications at issue "occur in the same time frame as criminal [conduct]." Sealed Pet. App. 14a (quoting *Rakes*, 136 F.3d at 4); Public Pet. App. 11a (same).

3. In the section of the petition titled "Questions Presented," petitioner posits two questions in addition to the primary one (whether the crime-fraud exception applies when there is a reasonable basis to believe that the lawyer's services were used by the client to foster a crime or fraud). Sealed Pet. i; Public Pet. i. Like the first question, neither of the two additional questions warrants review by this Court.

a. The second question is

> [w]hether the purpose of a *Zolin* hearing is merely to confirm that the government has reason to suspect communications between a lawyer and client could have furthered a crime or is to permit development of facts * * * so that the suspicion solidifies into probable cause or some other articulatable quantum of proof sufficient to justify the irreversible effect of abrogating the attorney-client privilege.

Sealed Pet. i; Public Pet. i. That question does not appear to be distinct from the first question; it appears, instead, to be an argument in support of petitioner's position on the first question. That view of the second question is consistent with the fact that, in support of his contention that this Court should resolve the purported circuit conflict on the meaning of "*prima facie* evidence" in the context of the crime-fraud exception (Sealed Pet. 12-13; Public Pet. 13-14), petitioner argues that, "[w]hatever words one chooses to describe the quantum of evidence, the standard to trigger a *Zolin* type hearing

must be less than the standard necessary to breach the attorney-client privilege," because "otherwise such a hearing would be redundant" (Sealed Pet. 14; Public Pet. 14; accord Sealed Pet. 4; Public Pet. 4-5).

As explained above, there is no basis for this Court's review of the first question presented in the petition. And the argument reflected in the second question does nothing to alter that conclusion, because petitioner is mistaken in his suggestion that the court of appeals applied the same standard for piercing the privilege and for triggering *in camera* review. The court of appeals explicitly recognized that "a 'lesser evidentiary showing' is needed for *in camera* review than is needed finally to pierce the privilege." Sealed Pet. App. 11a (quoting *Zolin*, 491 U.S. at 572); Public Pet. App. 9a (same). It also recognized that, while "all that [i]s needed" for *in camera* review is "a factual basis 'to support a good-faith belief by a reasonable person'" that such review "may reveal evidence to establish the claim that the crime-fraud exception applies," Sealed Pet. App. 12a (quoting *Zolin*, 491 U.S. at 572); Public Pet. App. 9a (same), "neither speculation nor evidence that shows only a distant likelihood of corruption is enough" to establish the ultimate claim that the exception applies, Sealed Pet. App. 13a; Public Pet. App. 11a.

Petitioner also argues that the standard applied by the court of appeals allows "the crime-fraud exception [to] swallow[] the attorney-client privilege." Sealed Pet. 19; Public Pet. 21. That assertion is belied by the fact that, in this very case, the court of appeals concluded that the government had *not* established the elements of the exception with respect to the Group C Clients, and that the privilege as to them was therefore not over-

come. Sealed Pet. App. 15a-17a; Public Pet. App. 12a-14a.

b. The third question presented is

> [w]hether, as a matter of due process under the Fifth Amendment, the district court should have allowed the privilege-holder to (a) speak with his former attorney prior to the privilege-holder's attempt in the *Zolin* hearing to defend the privilege from attack and/or (b) see the government's evidence in support of its argument that the crime-fraud exception applied.

Sealed Pet. i; Public Pet. i. Notwithstanding the petition's inclusion of that question, petitioner acknowledges that he "does not directly seek further appellate review of the district court's orders" prohibiting Lawyer I "from speaking with the Petitioner about the motion to compel and the underlying facts." Sealed Pet. 3; Public Pet. 3-4. Even if he did, however, review by this Court would be unwarranted.

As an initial matter, petitioner's due process claim is without merit. The court of appeals (Sealed Pet. App. 8a; Public Pet. App. 5a) cited its prior decision in *Violette*, *supra*, which recognized the "well-settled" principle that, in the context of grand jury proceedings, "the government may proffer *ex parte* the evidence on which it bases its claim that a particular privilege does not apply," and that "the court may weigh that evidence, gauge its adequacy, and rule on the claim without affording the putative privilege-holder a right to see the evidence proffered or an opportunity to rebut it." 183 F.3d at 79. *Violette*, in turn, relied on decisions of the Fourth, Sixth, and Tenth Circuits. *Ibid.* (citing *In re Grand Jury Subpoenas*, 144 F.3d 653, 662-663 (10th

Cir.), cert. denied, 525 U.S. 966 (1998)), *In re Grand Jury Proceedings*, 33 F.3d 342, 352-353 (4th Cir. 1994), and *In re Antitrust Grand Jury*, 805 F.2d 155, 167-168 (6th Cir. 1986)).

Petitioner has failed to identify any conflict in the circuits "as to what process is due to the privilege-holder in determining if the crime-fraud exception applies." Sealed Pet. 8; Public Pet. 8. He asserts that the Seventh Circuit's decision in *In re Feldberg*, 862 F.2d 622 (1988), conflicts with decisions of circuits that "allow the opponent of the privilege to submit *ex parte* evidence and otherwise deny the proponent a meaningful opportunity to rebut." Sealed Pet. 8; Public Pet. 8-9. But *Feldberg* does not address any question of due process—or, for that matter, any question concerning the use of *ex parte* evidence or the ability of the proponent of the privilege to have an opportunity to rebut it.

Finally, certiorari should also be denied because the court of appeals did not specifically address a due process claim and this Court generally does not address claims that were not addressed by the court below. See, *e.g.*, *Cutter* v. *Wilkinson*, 125 S. Ct. 2113, 2120 n.7 (2005); *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 175 (2004).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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