

INVOKING THE CRIME FRAUD EXCEPTION: WHY COURTS SHOULD HEIGHTEN THE STANDARD IN CRIMINAL CASES

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INTRODUCTION

In a 2014 opinion, the Third Circuit invoked one of the most prominent exceptions to the attorney-client privilege in the context of a Foreign Corrupt Practices Act (“FCPA”) investigation: the crime-fraud exception.¹ Although the attorney-client privilege generally protects confidential communications between clients and their attorneys, the crime-fraud exception effectively prohibits a client from consulting with an attorney in order to obtain information that would help the client commit a crime or fraud.² The exception therefore allows an opposing party seeking disclosure of documents or testimony to defeat the attorney-client privilege by demonstrating first, that the client committed or intended to commit a crime or fraud,³ and second, that the otherwise-privileged communication was made “in furtherance of” that illicit purpose.⁴

The case arose after a grand jury issued a subpoena to the former attorney of a company and its executive, both of whom were targets of an ongoing investigation into alleged FCPA violations.⁵ Allegations that the targets made corrupt payments to a foreign government official in order to obtain business stemmed from the company’s dealings with the official’s employer, a bank owned by foreign countries.⁶ During the time the bank employed the company and its executive, the company allegedly paid the official’s sister over \$3.5 million even though the sister apparently never worked on any projects connected to the company.⁷ Seeking

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1. *In re Grand Jury Subpoena*, 745 F.3d 681, 684 (3d Cir. 2014), *cert. denied sub nom. Corp. & Client v. United States*, 135 S. Ct. 510 (2014).

2. *United States v. Zolin*, 491 U.S. 554, 562–63 (1989) (quoting *O’Rourke v. Darbishire*, [1920] A.C. 581, 604 (P.C.)). The attorney-client privilege’s primary goals are to encourage honest communication and assure the proper administration of justice through effective legal representation, PAUL F. ROTHSTEIN, *FEDERAL TESTIMONIAL PRIVILEGES* 19 (2d ed. 2014), and the crime-fraud exception’s underlying premise is that obtaining legal advice to further a crime or fraud undermines those goals. *Zolin*, 491 U.S. at 562–63.

3. JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS* 1022 (5th ed. 2012).

4. ROTHSTEIN, *supra* note 2, at 261.

5. *In re Grand Jury Subpoena*, 745 F.3d at 684.

6. *Id.* at 685.

7. *Id.*

more information about the nature of these payments, the grand jury subpoenaed the company and executive's former attorney.⁸

Despite the company and executive's argument that the attorney-client privilege prevented the attorney from testifying, the district court found the government's *ex parte* submission met the low threshold required for the judge to question the attorney *in camera* to determine whether the crime-fraud exception applied to the communications and vitiated the privilege.⁹ During the *in camera* examination, the attorney informed the judge that he had counseled the executive with regard to paying the official.¹⁰ Although the attorney's research did not conclusively show the payments were illegal, the attorney had advised the executive against making any payments.¹¹ After receiving the advice, the executive nevertheless made the allegedly illegal payments.¹²

Based on both the *ex parte* government submission¹³ and the attorney's *in camera* testimony, the district court held the crime-fraud exception applicable and ordered the attorney to testify before the grand jury.¹⁴ The court noted that the showing needed to establish the exception is "relatively low" and is "particularly appropriate in the grand jury context, given 'the need for speed, simplicity, and secrecy.'"¹⁵ Disclosing limited facts to support its conclusion,¹⁶ the court explained that the government's *ex parte* submission and the court's subsequent *in camera* questioning of the attorney provided sufficient evidence "to establish a reasonable basis for the Court to conclude [the clients] intended to commit a crime when Attorney was consulted for legal advice regarding the Transaction and could have easily used it to shape the contours of conduct intended to escape the reaches of the law."¹⁷

8. *Id.* at 686.

9. *Id.* at 689–90. The district court did not allow the government or the company and executive to attend the *in camera* proceeding and also denied access to a transcript of that proceeding, which the company and executive had requested in order to refute allegations that the communications were subject to the crime-fraud exception. *Id.* at 686.

10. *Id.* at 685. According to the attorney, the executive felt he had to make the payments to dissuade the official from intentionally slowing the approval process for a pending project. *Id.*

11. *Id.*

12. *Id.*

13. The company and executive were not allowed access to this submission at any stage of the proceedings. *Id.* at 685.

14. *Id.* at 684.

15. *In re Grand Jury Subpoena*, No. 10-127-02, 2013 WL 228115, at *4 (E.D. Pa. Jan. 18, 2013) (quoting *In re Grand Jury*, 705 F.3d 133, 154 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 63 (2013)), *aff'd*, 745 F.3d 681 (3d Cir. 2014), *cert. denied sub nom.* Corp. & Client v. United States, 135 S. Ct. 510 (2014).

16. *Id.* at *1.

17. *Id.* at *5. The only hints provided by the district court regarding exactly what *type* and *amount* of evidence it found sufficient came when the court analogized the case to a Third Circuit opinion finding whether or not the attorney knew the client's illegal motive was irrelevant and holding the crime-fraud exception applicable "when an attorney instructed his client as to what types of documents were responsive to a Government subpoena because the client used that information to target and destroy responsive documents, thereby committing the crime of obstruction of justice." *Id.* at *4.

Though characterizing the scenario as a “close case,”¹⁸ the Court of Appeals reviewed the district court’s decision for abuse of discretion¹⁹ and upheld the order applying the crime-fraud exception and compelling the attorney to testify before the grand jury.²⁰ The court acknowledged that the crime-fraud exception cannot apply “to a situation where a client consults an attorney about a possible course of action and *later* forms the intent to undertake that action.”²¹ However, the panel upheld the district court’s conclusion that the executive intended to commit the crime *before* seeking the attorney’s advice, thus satisfying the crime-fraud exception’s first prong.²² The court also held the second prong satisfied: despite explaining that the advice must not only “relate to the crime,” but also that the client intend for it to *advance* the crime,²³ the panel upheld the district court’s conclusion that the executive used the attorney’s advice to “fashion conduct in furtherance of [his] crime.”²⁴ The court also affirmed the district court’s exclusion of those asserting the privilege from attending the *in camera* examination or reviewing a transcript of that examination on grand jury secrecy grounds.²⁵

Use of the crime-fraud exception is widespread, and many advocates and commentators argue it has expanded over the past several decades.²⁶ Of immediate concern in this Article is the Supreme Court’s refusal to define the measure of

18. *In re Grand Jury Subpoena*, 745 F.3d at 691.

19. *See id.* at 687, 691 (“We exercise *de novo* review over the legal issues underlying the application of the crime-fraud exception to the attorney-client privilege. Once the court determines there is sufficient evidence of a crime or fraud to waive the attorney-client privilege, we review its judgment for abuse of discretion.” (quoting *In re Impounded*, 241 F.3d 308, 312 (3d Cir. 2001) (quotation marks omitted))).

20. *Id.* at 693.

21. *Id.* at 691 (emphasis added).

22. *Id.* at 692. The court noted the facts that the executive informed the attorney of his intent to proceed with the payment at the end of the consultation and that he made the payment in the same month as that the bank financed the executive’s project both allowed the district court to infer the executive had already decided to break the law by the time he sought legal advice. *Id.*

23. *Id.* at 692–93.

24. *Id.* at 693. The court upheld this finding while recognizing that “[i]f the attorney merely informs the client of the criminality of a proposed action, the crime-fraud exception does not apply.” *Id.* That the attorney explained the types of behavior that might violate the FCPA was enough to convince the court that the executive routed the payment through the official’s sister because he realized paying the official directly would violate the law. *Id.*

25. *Id.* at 690–91. The court also analyzed the showing necessary for *in camera* questioning of an attorney and upheld the propriety of conducting such *in camera* examinations despite concern about “the pliability of a witness’s memory,” which “could be influenced by the mere fact that the crime-fraud exception is implicated.” *Id.* at 689.

26. *See, e.g.,* David J. Fried, *Too High A Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 446 (1986) (“Taking the crime-fraud exception as a clear-cut rule of law and applying it mechanically, without understanding its underlying principles or historical development, the courts have been led to expand the exception insensibly.”); Rachel A. Hutzler, *Evidence: The Crime Fraud Exception to Attorney-Client Privilege—United States v. Zolin*, 109 S. Ct. 2619 (Interim Ed. 1989), 15 U. DAYTON L. REV. 365, 382 (1990) (“The scope of the crime-fraud exception is being gradually expanded by

proof required to vitiate the attorney-client privilege through the crime-fraud exception.²⁷ Although the Supreme Court has indicated that those seeking to invoke the exception must establish a “prima facie case”²⁸ that it applies, the Court has acknowledged, “in a wonderful example of studied understatement,”²⁹ the “confusion” caused by that articulation.³⁰ Lower courts have adopted at least three³¹ different recitations of the prima facie standard, ranging from “probable cause”³² to a “reasonable basis to suspect”³³ to “evidence that if believed by the trier of fact” would establish the exception.³⁴ The real question seems to be not whether there is an inconsistency in articulation of the exception’s standard of proof—to that the answer is undoubtedly yes—but instead whether those differing formulations bring about practical disparities in application.

This Article argues that regardless of whether differences in the circuits’ articulated standards actually produce disparate results, none of those standards sufficiently safeguard the attorney-client privilege for criminal defendants. The Supreme Court should instead adopt a more stringent, preponderance of the evidence standard to invoke the exception in the criminal context.³⁵

Part I will provide an overview of the crime-fraud exception and define the various conceptions of the showing needed to defeat the attorney-client privilege, specifically addressing the confusion regarding whether the standard needed to invoke the exception is consistent among the circuits. It will also explain the particular concerns unique to the criminal context. Part II will argue, based partly on the risk of differing applications throughout the circuits, that many courts

the increased use of *in camera* review, lowered thresholds of evidence and the rejection of the independent evidence requirement.”).

27. See *United States v. Zolin*, 491 U.S. 554, 563 (1989) (“[W]e need not decide the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception.”).

28. *Clark v. United States*, 289 U.S. 1, 14 (1933).

29. *Laser Indus., Ltd. v. Reliant Techs., Inc.*, 167 F.R.D. 417, 432 (N.D. Cal. 1996), *dismissed*, 232 F.3d 910 (Fed. Cir. 2000).

30. See *Zolin*, 491 U.S. at 563 n.7 (declining to address the question of what “showing [is] needed to defeat the privilege” despite referencing various authorities’ confusion with lower courts’ applications of *Clark*’s “prima facie case”).

31. Some argue the circuit split includes as many as six different articulations of the requisite showing required to overcome the privilege. See *Petition for Writ of Certiorari at 17 n.13, Doe 1 v. United States*, 134 S. Ct. 63 (2013) (No. 12-1239) [hereinafter *Doe 1 Certiorari Petition*] (“The Third Circuit claimed that there is a tripartite circuit split . . . [but] the split is even more pronounced.”).

32. *E.g., In re Grand Jury Proceedings, G.S., F.S.*, 609 F.3d 909, 913 (8th Cir. 2010); *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997).

33. *E.g., In re Grand Jury*, 705 F.3d 133, 153 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 63 (2013).

34. *E.g., In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007).

35. The scope of this Article is limited to assessing the crime-fraud exception in the context of federal, criminal cases. It concentrates on federal case law because many arguments deal with the Federal Rules of Evidence and Federal Rules of Criminal Procedure, neither of which has been uniformly adopted to govern state proceedings. It focuses on criminal cases because concerns surrounding grand jury secrecy are uniquely present in criminal cases alone, meaning that applying the exception in the criminal context is sufficiently different from applying it in civil suits. Therefore, this Article will only address civil cases to illustrate larger concerns at issue in criminal cases. See Parts I.B.4 & II.B.2.

currently employ a standard that insufficiently protects the underlying purpose of the attorney-client privilege. It will advocate that the government should be required to meet a stricter, preponderance of the evidence burden to invoke the exception in the criminal context. This standard would both (1) comport with established Supreme Court precedent and the Federal Rules of Evidence, and (2) better protect the rights of criminal defendants when other aspects of the exception and the criminal justice system weigh against the accused. Part III will revisit the Third Circuit case described in this Introduction to illustrate how the arguments made could have led to a different outcome in this recent case. This Article will conclude by recommending that the Supreme Court adopt a preponderance standard to govern application of the crime-fraud exception in criminal cases.³⁶

I. THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY CLIENT PRIVILEGE: DEVELOPMENT AND APPLICATION

A. *History and Purpose of the Attorney-Client Privilege and the Crime-Fraud Exception*

The attorney-client privilege is the oldest recognized confidential communications privilege at common law.³⁷ Its purpose is to protect confidential disclosures within the attorney-client relationship in order to encourage “full and frank communication between attorneys and their clients.”³⁸ The privilege allows for these honest communications by alleviating a client’s fears that his communications will be publicly revealed.³⁹ Honest, complete disclosures in turn better equip

36. The Supreme Court denied *certiorari* to petitioners in the case described in this Article’s Introduction, *In re Grand Jury Subpoena*, 745 F.3d 681, 684 (3d Cir. 2014), *cert. denied sub nom.* Corp. & Client v. United States, 135 S. Ct. 510 (2014), as well as in another Third Circuit opinion in 2012 on, *inter alia*, the issue of whether the Third Circuit’s “reasonable basis to suspect” standard is appropriate to invoke the crime-fraud exception, *In re Grand Jury*, 705 F.3d 133, 153 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 63 (2013); *Doe I Certiorari Petition*, *supra* note 31.

37. *United States v. Zolin*, 491 U.S. 554, 562 (1989); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege attaches when the following elements are satisfied: “(1) where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.” ROTHSTEIN, *supra* note 2, at 19 (quoting 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)).

38. *Upjohn*, 449 U.S. at 389; *see also* *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009); *Trammel v. United States*, 445 U.S. 40, 51 (1980) (“The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”).

39. ROTHSTEIN, *supra* note 2, at 19; *see also* *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (“The [privilege] is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”).

attorneys to provide effective legal services to their clients.⁴⁰ In a broader sense, the privilege serves the interest of the public in “the observance of law and administration of justice”⁴¹ because effective advocacy “serves public ends”⁴² by ensuring the proper functioning of the adversarial judicial process. The attorney-client privilege is absolute in nature,⁴³ meaning it will not yield just because an opposing party claims a need for the protected information.⁴⁴ Rather, the Supreme Court has consistently held that fact-specific balancing tests are inappropriate.⁴⁵ Moreover, the privilege applies in both criminal and civil proceedings and may be invoked at any stage of litigation, including discovery and, specifically in the criminal context, during grand jury proceedings.⁴⁶ Despite the strength of the attorney-client privilege, however, courts have recognized its limits. Because the privilege “has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose.”⁴⁷ The determination of whether an applied exception furthers or undermines the privilege is made on a “case-by-case basis.”⁴⁸ Still, because testimonial privileges are construed narrowly,⁴⁹ there are several clear exceptions to the privilege’s protection that warrant

40. *Mohawk*, 558 U.S. at 108 (“By assuring confidentiality, the privilege encourages clients to make ‘full and frank’ disclosures to their attorneys, who are then better able to provide candid advice and effective representation.” (citing *Upjohn*, 449 U.S. at 389)).

41. *Id.*

42. *Upjohn*, 449 U.S. at 389.

43. See Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853, 856 n.6 (1998) (“Under federal law and the law of most states, once the attorney-client privilege has attached to confidential communications between the attorney and client, the privilege is absolute.”).

44. ROTHSTEIN, *supra* note 2, at 23. The privilege’s absolute nature is one of its differences when compared to the work product doctrine, although the two protections are often asserted together. See Alec Koch, Note, *Internal Corporate Investigations: The Waiver of Attorney-Client Privilege and Work-Product Protection Through Voluntary Disclosures to the Government*, 34 AM. CRIM. L. REV. 347, 352 (1997) (“While the attorney-client privilege is absolute, work-product may be obtained upon a showing of substantial or extraordinary need for the material” (citations omitted)). This Article will not address the crime-fraud exception in the work product context because that doctrine presents different concerns.

45. *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998) (“Balancing *ex post* the importance of the information against client interests . . . introduces substantial uncertainty into the privilege’s application. For just that reason, we have rejected use of a balancing test in defining the contours of the privilege.”); *Upjohn*, 449 U.S. at 393 (“But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”).

46. ROTHSTEIN, *supra* note 2, at 26–27; see also FED. R. EVID. 1101(c) (“The rules on privilege apply to all stages of a case or proceeding.”).

47. *Fisher v. United States*, 425 U.S. 391, 403–04 (1976) (“[The privilege] protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.”) (holding pre-existing documents in an attorney’s possession privileged only if privileged in the client’s hands before transfer to the attorney).

48. *Upjohn*, 449 U.S. at 396 (quoting S. REP. NO. 93-1277, at 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059).

49. See *Trammel v. United States*, 445 U.S. 40, 50 (1980) (“[Testimonial privileges] must be strictly construed and accepted ‘only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has

application in many instances.⁵⁰ Among the most prominent is the crime-fraud exception.

Crafted to prevent abuse of the attorney-client relationship, the exception allows for disclosure of otherwise-privileged material when the client seeks advice to aid him in committing a crime or fraud.⁵¹ Protection of communications involving past crimes is necessary to ensure that clients will openly share all relevant facts to gain “the aid of persons having knowledge of the law and skilled in its practice.”⁵² Therefore, the privilege remains when clients consult their attorneys about *prior* wrongdoing and only yields to the exception when the purpose of the advice pertains to *future* wrongdoing.⁵³ The exception’s underlying rationale recognizes that clients have “no legitimate interest in seeking legal advice to further a crime or conceal criminal activity.”⁵⁴ To invoke the crime-fraud exception, the party seeking disclosure (the government, in the criminal context) must make a prima facie showing that “(1) the client was committing or intending to commit a fraud or crime,”⁵⁵ and (2) “the communications in question were made with respect to, in furtherance of, or to induce the illegal acts involved.”⁵⁶

B. Supreme Court Interpretation of the Crime-Fraud Exception to the Attorney-Client Privilege

1. Original Articulation of the Crime-Fraud Exception

Justice Cardozo articulated the Supreme Court’s understanding of the crime-fraud exception and announced the prevailing burden of proof necessary to invoke it in *Clark v. United States*.⁵⁷ In *Clark*, the Court explained that although the attorney-client privilege generally protects communications between the client and his attorney, “[a] client who consults an attorney for advice that will serve him in the commission of fraud will have no help from the law” and “must let the truth be

a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.” (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

50. EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 6.13.2 (describing exceptions based on fairness, interpretation, desire to stop antisocial conduct, protection for child abuse, and commission of a crime or fraud); *see also* ROTHSTEIN, *supra* note 2, at 246–83 (describing exceptions including the crime-fraud exception, the charge against the attorney exception, and the fiduciary-beneficiary exception).

51. *United States v. Zolin*, 491 U.S. 554, 563 (1989) (citing *O’Rourke v. Darbishire*, [1920] A.C. 581, 604 (P.C.)).

52. *Id.* at 562 (citing *Hunt v. Blackburn*, 128 U.S. 464, 470 (1988)).

53. *Id.* at 562–63.

54. Thomas M. DiBiagio, *Federal Criminal Law and the Crime-Fraud Exception: Disclosure of Privileged Conversations and Documents Should Not Be Compelled Without the Government’s Factual Foundation Being Tested by the Crucible of Meaningful Adversarial Testing*, 62 MD. L. REV. 1, 8 (2003). Mr. DiBiagio is a former United States Attorney for the District of Maryland.

55. O’SULLIVAN, *supra* note 3, at 1022.

56. ROTHSTEIN, *supra* note 2, at 261.

57. 289 U.S. 1 (1933).

told.”⁵⁸ The Court went on to reject the idea that any “mere charge of illegality” would be sufficient to warrant disclosure under the exception, explaining that a party seeking to overcome the privilege must provide “prima facie evidence that [the charge] has some foundation in fact.”⁵⁹ The Court further stated that attorneys need not be complicit in their clients’ schemes for the privilege to fall.⁶⁰

It is somewhat curious that *Clark*’s conception of the crime-fraud exception is the foundation of case law on the exception’s application. This is because *Clark* did not deal with the attorney-client privilege, but instead centered on whether a juror’s conviction⁶¹ could stand even though it was partially based on evidence subject to the juror’s own claim of privilege over her deliberations and vote.⁶² In fact, the Court’s entire discussion stemmed from a “turn to the precedents in the search for an *analogy*” to the juror’s privilege in deciding when that privilege should fall.⁶³ The Court found a suitable analogy in the attorney-client privilege, and thus went on to describe the crime-fraud exception.⁶⁴

2. Further Development of the Crime-Fraud Exception

The Supreme Court most recently analyzed the crime-fraud exception in *United States v. Zolin*.⁶⁵ The case arose when the IRS, during a tax dispute with the Church of Scientology’s founder, obtained materials documenting Church activities from an unrelated lawsuit involving the Church.⁶⁶ The Church believed the materials were protected by the attorney-client privilege, while the government

58. *Id.* at 15.

59. *Id.* (citing *O’Rourke v. Darbishire*, [1920] A.C. 581, 604 (P.C.)) The Court described the prima facie showing required “[t]o drive the privilege away” as “something to give colour to the charge.” *Id.* (citing *O’Rourke v. Darbishire*, [1920] A.C. 581, 604 (P.C.)).

60. *Id.*

61. The juror was convicted of criminal contempt with intent to obstruct justice. *Id.* at 9.

62. *Id.* at 18–19.

63. *Id.* at 15 (emphasis added).

64. *Id.* It is possible that *Clark*’s discussion of the crime-fraud exception may have been dismissed had the Court not breathed life into it in several cases during the 1980s. See *Nix v. Whiteside*, 475 U.S. 157, 174 (1986) (“An attorney’s duty of confidentiality, which totally covers the client’s admission of guilt, does not extend to a client’s announced plans to engage in future criminal conduct.”) (assessing a habeas petition on ineffective assistance of counsel grounds where the attorney advised he would withdraw from representation if the defendant committed perjury); *Maine v. Moulton*, 474 U.S. 159, 188–89 (1985) (Burger, C.J., dissenting) (quoting *Clark* while explaining the Court’s error in allowing the defendant to prevail by invoking his right to counsel while “under investigation because of his plans to obstruct justice by killing an essential witness”); *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 354 (1985) (holding a bankruptcy trustee had power to waive the corporation’s attorney-client privilege and citing *Clark* for the proposition that the trustee needed that power in order to investigate whether a fraud was ongoing). In fact, at least one court has explicitly identified the passages creating the foundation of the crime-fraud exception as dicta. *Laser Indus., Ltd. v. Reliant Techs., Inc.*, 167 F.R.D. 417, 431 (N.D. Cal. 1996), *dismissed*, 232 F.3d 910 (Fed. Cir. 2000) (“[T]he portions of the *Clark* opinion that are relevant to the attorney-client privilege suffer from one obvious limitation: they are all dicta.”).

65. 491 U.S. 554 (1989).

66. *Id.* at 557. The Church argued that its former member had obtained those materials illegally. *Id.*

argued the crime-fraud exception applied.⁶⁷ At issue in *Zolin* was whether a district court could review otherwise-privileged materials⁶⁸ *in camera* to determine whether the crime-fraud exception applied (thus warranting their disclosure), and if so, what evidentiary showing the party attempting to pierce the attorney-client privilege needed to make for the court to undertake that *in camera* review.⁶⁹

The Supreme Court held, *inter alia*, that courts may review documents *in camera* to determine whether they fall under the crime-fraud exception.⁷⁰ Such review depends upon a threshold evidentiary showing sufficient to support a “good faith belief by a reasonable person”⁷¹ that the review “may yield evidence that establishes the exception’s applicability.”⁷² The Court remanded the case for consideration of whether *in camera* review was justified.⁷³

Of particular relevance to this Article’s inquiry is not only what the Supreme Court decided in *Zolin*, but also what it declined to address. Namely, the Court left open the question of what “quantum of proof [is] necessary ultimately to establish the applicability of the crime-fraud exception.”⁷⁴ The Court did cite *Clark*, but only to acknowledge that the “prima facie case” articulation in that case “has caused some confusion.”⁷⁵

In essence, *Zolin* created a two-tiered process for lower courts to follow when considering application of the crime-fraud exception. First, courts apply the analysis squarely presented in *Zolin* by determining whether reviewing the relevant documents and/or testimony *in camera* would aid their decision. The Court made clear that the amount of proof required to conduct an *in camera* review of the otherwise-privileged information is that which allows for a reasonable belief that

67. *Id.* at 558.

68. These materials were at issue as opposed to “independent evidence,” which consists of any evidence that does not reference “the content of the contested communications themselves.” *Id.* at 556.

69. *Id.* at 564–65 (“[T]he initial question in this case is whether a district court, at the request of the party opposing the privilege, may review the allegedly privileged communications *in camera* to determine whether the crime-fraud exception applies. If such *in camera* review is permitted, the second question we must consider is whether some threshold evidentiary showing is needed before the district court may undertake the requested review. Finally, if a threshold showing is required, we must consider the type of evidence the opposing party may use to meet it . . .”).

70. *See id.* at 565 (“We conclude that no express provision of the Federal Rules of Evidence bars such use of *in camera* review, and that it would be unwise to prohibit it in all instances as a matter of federal common law.”).

71. *Id.* at 572 (quotations omitted).

72. *Id.* at 574–75. The Court rejected arguments that the showing required for *in camera* review must be established through “independent evidence,” finding instead that the party seeking the exception may use any evidence not previously deemed privileged to support its request for *in camera* review. *Id.* at 573–74. The Court further held that such evidence may also “provide the evidentiary basis for the ultimate showing that the crime-fraud exception applies” in addition to being used in support of a request for *in camera* review. *Id.* at 574 n.12.

73. *Id.* at 575.

74. *Id.* at 563. This inquiry is distinct from the Court’s primary holdings, which focused on the evidentiary threshold necessary to trigger *in camera* review, not the amount of evidence required to merit outright disclosure. *Id.* at 570.

75. *Id.* at 563 n.7.

in camera review may provide evidence counseling in favor of applying the exception.⁷⁶ Importantly, the Court emphasized that the showing necessary for *in camera* inspection is less stringent than that required to overcome the privilege entirely.⁷⁷ Courts must undertake this initial analysis *before* deciding to conduct an *in camera* review.⁷⁸

The second inquiry, which the Court expressly reserved in *Zolin*, pertains to what level of proof is required *not* for *in camera* review of privileged communications, but to *defeat the privilege altogether*. This analysis must be undertaken whether or not courts choose to inspect the information *in camera* first. The relevant inquiry for this second level of analysis is whether (1) “the client was committing or intending to commit a fraud or crime,”⁷⁹ and whether (2) “the communications in question were made with respect to, in furtherance of, or to induce the illegal acts involved.”⁸⁰ For courts to invoke the crime-fraud exception to the attorney-client privilege, the party seeking disclosure must present “prima facie” evidence that the two prongs of the crime-fraud exception exist.⁸¹ As noted above, the Supreme Court explicitly declined to provide any guidance as to the amount of proof required to make this second showing and definitively invoke the exception.

3. Lower Courts’ Understandings of the Crime-Fraud Exception After *Zolin*, and the Potential for Disparities in Application Among the Circuits

Both before and in the wake of *Zolin*, lower courts have offered different views of exactly how much evidence is needed to establish the prima facie case.⁸² Although some have argued there are as many as six different variations of the appropriate quantum of proof necessary to establish the crime-fraud exception,⁸³ courts and commentators more commonly characterize the split as encompassing

76. *Id.* at 572, 574–75.

77. *Id.* at 572 (“We therefore conclude that a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege. The threshold we set, in other words, need not be a stringent one.” (citation omitted)).

78. However, courts are not *required* to review the information *in camera* to find the crime-fraud exception ultimately applicable. *Id.* at 572. As the Court explained in *Zolin*, after the party seeking *in camera* review has made the requisite showing, “the decision whether to engage in *in camera* review rests in the sound discretion of the district court.” *Id.*; see also *In re Grand Jury*, 705 F.3d 133, 152 (3d Cir. 2012) (describing the Supreme Court’s opinion in *Zolin* as “affirming the *permissibility*,” rather than the *requirement*, of *in camera* review after the sufficient showing is made (emphasis added)), *cert. denied*, 134 S. Ct. 63 (2013).

79. O’SULLIVAN, *supra* note 3, at 1022.

80. ROTHSTEIN, *supra* note 2, at 261.

81. *Clark v. United States*, 289 U.S. 1, 14 (1933); see also *In re Grand Jury Proceedings*, G.S., F.S., 609 F.3d 909, 913 n.2 (8th Cir. 2010) (“We have distinguished between the lower standard of proof necessary to justify a district court’s initial *in camera* review and the higher burden necessary to compel production of the evidence.”).

82. See, e.g., *In re Grand Jury*, 705 F.3d at 152 (“Courts of appeals have articulated the proper measure of proof in different ways.”) (referencing three different articulations).

83. See *Doe I Certiorari Petition*, *supra* note 31, at 17 n.13 (“The Third Circuit claimed that there is a tripartite circuit split . . . [but] the split is even more pronounced.”).

three different variations.⁸⁴ The Third and Sixth Circuits describe their standard as “a reasonable basis to suspect” the elements of the crime-fraud exception are met.⁸⁵ The Second and Eighth Circuits hold a showing of “probable cause” is required to invoke the exception.⁸⁶ In the First and Ninth Circuits, the requirement is defined as “reasonable cause.”⁸⁷ Articulations from the Fourth, Fifth, and Seventh Circuits suggest that the burden shifts from one party to another, but do not clearly establish the amount of proof required for that shift to occur.⁸⁸ Those articulations also explain that despite a privilege holder’s potential opportunity to rebut the government’s prima facie case, the interest in maintaining grand jury secrecy in criminal cases means that generally “the party [asserting the privilege] cannot have access to the allegations in the government’s *in camera* submission to do so.”⁸⁹ The D.C. Circuit’s formulation of the prima facie case is “evidence that if believed by the trier of fact would establish the elements” of the crime-fraud

84. *See, e.g., In re Grand Jury*, 705 F.3d at 153 (“Courts of appeals have articulated the proper measure of proof in different ways. Some require there to be probable cause or a reasonable basis to suspect or believe that the client was committing or intending to commit a crime or fraud and that the attorney-client communications were used in furtherance of the alleged crime or fraud. Other courts call for evidence sufficient to compel the party asserting the privilege to come forward with an explanation for the evidence offered against the privilege. Still other courts demand a showing of evidence that, if believed by a trier of fact, would establish that some violation was ongoing or about to be committed and that the attorney-client communications were used in furtherance of that scheme.” (citations omitted)). The dispute over whether there are three or six different standards seems to stem from disagreement about whether “reasonable basis to suspect,” “probable cause,” and “reasonable basis to believe” are essentially the same standard. *See, e.g., United States v. Clem*, No. 97-5507, 2000 WL 353508, at *3 (6th Cir. Mar. 31, 2000) (“The evidentiary burden for making this prima facie showing is the same as that for demonstrating probable cause—such that ‘a prudent person [would] have a reasonable basis to suspect the perpetration of a crime or fraud’”).

85. *E.g., In re Grand Jury*, 705 F.3d at 153 (“Where there is a reasonable basis to suspect that the privilege holder was committing or intending to commit a crime or fraud and that the attorney-client communications . . . were used in furtherance of the alleged crime or fraud, this is enough to break the privilege.”); *United States v. Collis*, 128 F.3d 313, 321 (6th Cir. 1997) (quoting *In re Antitrust Grand Jury*, 805 F.2d 155, 166 (6th Cir. 1986)).

86. *E.g., In re Grand Jury Proceedings*, G.S., F.S., 609 F.3d 909, 913 (8th Cir. 2010); *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997) (“A party wishing to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime.”), *abrogated on other grounds by Loughrin v. United States*, 134 S. Ct. 2384 (2014).

87. *E.g., In re Grand Jury Proceedings*, 417 F.3d 18, 23 (1st Cir. 2005); *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002) (“The exception applies only when there is ‘reasonable cause to believe that the attorney’s services were utilized in furtherance of the ongoing unlawful scheme.’” (quoting *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir.1996))).

88. *E.g., United States v. Boender*, 649 F.3d 650, 655 (7th Cir. 2011) (quoting *United States v. BDO Seidman, LLP*, 492 F.3d 806, 818 (7th Cir. 2007)); *In re Grand Jury Proceedings #5*, 401 F.3d 247, 251 (4th Cir. 2005) (“[T]he proof ‘must be such as to subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left rebutted.’” (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1220 (4th Cir. 1976))); *In re Grand Jury Subpoena*, 419 F.3d 329, 336 (5th Cir. 2005) (“To make the necessary prima facie showing for the application of the crime-fraud exception here, the government must produce evidence ‘such as will suffice until contradicted and overcome by other evidence . . . a case which has proceeded upon sufficient proof to that stage where it will support a finding if evidence to the contrary is disregarded.’” (quoting *In re Int’l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982)).

89. *E.g., In re Grand Jury Proceedings #5*, 401 F.3d at 251 n.2.

exception.⁹⁰ Neither the Tenth nor the Eleventh Circuit has adopted a particular standard, but instead both recite language from *Clark* that such a showing requires “some foundation in fact.”⁹¹

The “confusion”⁹² noted by the Supreme Court in *Zolin* surrounding what showing is needed to establish the crime-fraud exception and defeat the attorney-client privilege stems from the following critique recognized by the Court itself:

The prima facie standard is commonly used by courts in civil litigation to *shift* the burden of proof from one party to the other. In the context of the fraud exception, however, the standard is used to dispel the privilege altogether *without* affording the client an opportunity to rebut the prima facie showing.⁹³

Courts have remarked on the strange decision to adopt a familiar phrase from civil litigation to govern criminal (specifically grand jury) situations.⁹⁴ As the D.C. Circuit has questioned, “[i]n terms of the level of proof, is a ‘prima facie showing’ a preponderance of the evidence, clear and convincing evidence, or something else?”⁹⁵ Regardless of their specific articulations of the showing required, application in the grand jury context is especially confusing because most circuits largely forbid the type of rebuttal generally expected when using the phrase “prima facie” in civil suits.⁹⁶

With this confusion as their starting point, it is not surprising that the circuits came to describe the applicable quantum of proof in varied terms. The question is whether the confusion extends beyond semantics to practical application. Unfortunately, courts themselves seem to have difficulty determining whether their

90. *E.g.*, *In re Grand Jury*, 475 F.3d 1299, 1305 (D.C. Cir. 2007); *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997) (quoting *In re Sealed Case*, 754 F.2d 395, 399 (D.C. Cir. 1985)).

91. *E.g.*, *In re Grand Jury Subpoenas*, 144 F.3d 653, 660 (10th Cir. 1998) (“[T]he party opposing the privilege must present prima facie evidence that the allegation of attorney participation in the crime or fraud has some foundation in fact.”); *In re Grand Jury Investigation* (Schroeder), 842 F.2d 1223, 1226 (11th Cir. 1987). The Eleventh Circuit’s standard may be close to the D.C. Circuit’s, as it has also stated, “‘The first prong [of the exception] is satisfied by a showing of evidence that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed.’” *United States v. Cleckler*, 265 F. App’x 850, 853 (11th Cir. 2008) (quoting *In re Grand Jury Investigation* (Schroeder), 842 F.2d at 1226).

92. *United States v. Zolin*, 491 U.S. 554, 563 n.7 (1989).

93. *Id.* (quoting Note, 51 BROOKLYN L. REV. 913, 918–19 (1985)).

94. *E.g.*, *In re Sealed Case*, 107 F.3d at 49–50; *In re Grand Jury Proceedings*, 417 F.3d 18, 22–23 (1st Cir. 2005) (“Prima facie is among the most rubbery of all legal phrases; it usually means little more than a showing of whatever is required to permit some inferential leap sufficient to reach a particular outcome.” (citation omitted)).

95. *In re Sealed Case*, 107 F.3d at 50; *see also In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1093 (9th Cir. 2007) (“Both before and after *Zolin*, the lower courts have struggled with the meaning of ‘prima facie case’ in cases in which outright disclosure of attorney-client communications has been sought.”), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009).

96. *See, e.g., In re Grand Jury Subpoena*, 745 F.3d 681, 690–91 (3d Cir. 2014) (affirming a district court decision barring the company and executive from attending *in camera* proceedings and denying them access to a transcript of that proceeding, which would have allowed them to refute allegations that the communications were subject to the crime-fraud exception), *cert. denied sub nom. Corp. & Client v. United States*, 135 S. Ct. 510 (2014).

diverging articulations of the level of proof required to demonstrate a prima facie case of the crime-fraud exception constitute a practical split or if they are instead a distinction without a difference.⁹⁷ For instance, the D.C. Circuit has noted that “there is little practical difference” between the Second Circuit’s test and its own,⁹⁸ yet in a later case “confess[ed] some difficulty in understanding why the differences between the two formulations were considered slight.”⁹⁹ The Seventh Circuit has stated its belief in the practical difference among the courts’ constructions: “The language ‘prima facie evidence’ has suggested to some courts enough to support a verdict in favor of the person making the claim. We are not among them, nor are most of the other courts of appeals.”¹⁰⁰ Commentators appear to agree that the various articulations make a practical difference in application of the exception.¹⁰¹

Perhaps the best support for assuming the difference among circuits’ articulations is more than semantic comes from a reading of the plain language: a “reasonable basis to suspect” standard is arguably akin to “the reasonable suspicion standard applied in stop and frisk cases,” and the Supreme Court has expressly held that the “reasonable suspicion” standard is met with “‘information that is less reliable than that required to show probable cause.’”¹⁰² Since the Third and Sixth Circuits apply a “reasonable basis to suspect” standard, and the Second and Eighth Circuits apply a “probable cause” standard, it is not a stretch to assume that courts in different circuits could resolve cases differently, even if defendants find themselves in similar factual scenarios.

97. Compare O’SULLIVAN, *supra* note 3, at 2014 (“The D.C. Circuit applied its prima facie standard in much more rigorous fashion than have other courts, most particularly the Seventh Circuit.”), and *In re Sealed Case*, 107 F.3d at 50 (“We confess some difficulty in understanding why the differences between the two formulations were considered slight . . .”), with *In re Sealed Case*, 754 F.2d 395, 399 n.3 (D.C. Cir. 1985) (explaining the court’s agreement with the Second Circuit that “there is little practical difference between the two tests” (citation omitted)).

98. *In re Sealed Case*, 754 at 399 n.3.

99. *In re Sealed Case*, 107 F.3d at 50.

100. *In re Feldberg*, 862 F.2d 622, 625 (7th Cir. 1988) (Easterbrook, J.) (citations omitted); see also O’SULLIVAN, *supra* note 3, at 1024 (highlighting that the Seventh Circuit “rejects such an approach [as the D.C. Circuit adopts], as (in its view) do the Second and Sixth Circuits”).

101. See, e.g., IMWINKELRIED, *supra* note 50, at § 6.13.2 (“[T]he expression ‘prima facie case’ can be slippery” and the “phrasing of the standard varies from jurisdiction to jurisdiction”); Auburn K. Daily & S. Britta Thornquist, *Has the Exception Outgrown the Privilege?: Exploring the Application of the Crime-Fraud Exception to the Attorney-Client Privilege*, 16 GEO. J. LEGAL ETHICS 583, 595 (2003) (“As long as courts continue to adopt such widely differing formulations of the evidentiary requirement, the uncertainty will persist, and with it, the continuing threat to the attorney-client privilege.”); Kathleen N. Allen, Note, *Turning Lawyers into Witnesses: Does Forced Client Disclosure Breach the Attorney-Client Privilege?*, 30 SUFFOLK U. L. REV. 795, 814, 814 (1997) (“Because courts attach varying interpretations to the term ‘prima facie,’ a prima facie showing is perhaps an uncertain standard for those who carry the burden of establishing the crime-fraud exception.”). *But see* Brief for the United States in Opposition to Petition for a Writ of Certiorari at 14, *Doe 1 v. United States*, 134 S. Ct. 63 (2013) (No. 12-1239) (“Petitioner has failed to identify any conflict among the courts of appeals warranting this Court’s review.”).

102. Petition for Writ of Certiorari at 23, *Corp. & Client v. United States*, 135 S. Ct. 510 (2014) (No. 14-389) [hereinafter *Corp. & Client Certiorari Petition*] (quoting *Alabama v. White*, 496 U.S. 325, 330 (1990)).

4. *The Importance of Grand Jury Secrecy in the Criminal Context and Lack of Relevance in Civil Suits*

The grand jury proceeding is a uniquely important stage for the crime-fraud exception's application in the criminal context. The attorney-client privilege is most commonly invoked during grand jury proceedings pursuant to subpoenas, either to testify (subpoenas *ad testificandum*) or to produce documents (subpoena *duces tecum*).¹⁰³ It is also often at this stage that the government seeks to override the privilege by making its prima facie showing that the crime-fraud exception applies to the subpoenaed communications.¹⁰⁴ Thus, the grand jury stage of criminal proceedings is the quintessential front line of battle between the target's vital interest in preserving the attorney-client privilege and the government's fundamental interest in maintaining the integrity of grand jury proceedings. To better contextualize that conflict, it is necessary to further explain the government's interests at stake.

Like the attorney-client privilege, “[t]he institution of the grand jury is deeply rooted in Anglo-American history.”¹⁰⁵ Its function is two-fold: it must screen cases, or “stand between the accuser and the accused . . . to determine whether a charge” is supported by probable cause,¹⁰⁶ and investigate, or “compel the provision of evidence that may be considered” to decide whether a crime has been committed.”¹⁰⁷ Grand juries have “wide latitude in their investigative role.”¹⁰⁸ As the Third Circuit explained, “[a] grand jury proceeding is not an adversary hearing where guilt or innocence is adjudicated but an *ex parte* investigation to determine

103. See Cary Bricker, *Revisiting the Crime-Fraud Exception to the Attorney-Client Privilege: A Proposal to Remedy the Disparity in Protections for Civil and Criminal Privilege Holders*, 82 TEMP. L. REV. 149, 156 (2009) (describing the differences between criminal and civil procedures surrounding the application of the crime-fraud exception).

104. Commentators have recognized the Department of Justice's widespread use of subpoenas to attorneys during grand jury investigations. See, e.g., *Corp. & Client Certiorari Petition*, *supra* note 102, at 24 n.10 (citing IMWINKELRIED, *supra* note 50, at § 6.13.2d) (“[T]he crime-fraud ‘exception has grown in importance because the federal prosecutors appear to be invoking the exception more and more often.’”) (other internal quotations and citations omitted); Brief for the Nat'l Ass'n. of Criminal Def. Lawyers as Amicus Curiae Supporting Petitioners at 17–18, *Corp. & Client v. United States of America*, 135 S. Ct. 510 (2014) (No. 14-389) [hereinafter Nat'l Ass'n. of Criminal Def. Lawyers Amicus Brief] (collecting sources); Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469, 557 (2003); see also *id.* at 557 n.400 (collecting sources, including one “surveying reported federal cases in which attorneys were subpoenaed to testify before grand jury and finding increase in percentage in which government invoked crime-fraud exception from 8.33% in 1995 to 38.01% in 1998” (citing Stuart M. Gerson & Jennifer E. Gladioux, *Advice of Counsel: Eroding Confidentiality in Federal Health Care Law*, 51 ALA. L. REV. 163, 198 (1999)).

105. *United States v. Calandra*, 414 U.S. 338, 342–43 (1974).

106. O'SULLIVAN, *supra* note 3, at 797 (citing *United States v. Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring)) (other citations omitted).

107. *Id.* at 799.

108. *Id.*

if there is probable cause to believe a crime has been committed.”¹⁰⁹ The government therefore has an interest in the efficacy of the process, as “saddl[ing] a grand jury with mini-trials and preliminary showings” over disputed facts “would assuredly impede its investigation and frustrate the public’s interest in the fair and expeditious administration of the criminal laws.”¹¹⁰ The grand jury process is governed by Federal Rule of Criminal Procedure 6, which mandates, *inter alia*, that proceedings remain secret.¹¹¹ This is the government’s other, perhaps stronger, interest in maintaining the integrity of grand jury proceedings. The Supreme Court has justified upholding grand jury secrecy for reasons ranging from guarding against witness tampering to ensuring the accused is not publicly criticized before indictment.¹¹² Essentially, the Court has held that the criminal justice system may be undermined without the proper functioning of the grand jury process, which includes the guarantee that its proceedings remain secret.¹¹³

The government’s concerns about maintaining the grand jury process’s integrity can squarely conflict with a criminal defendant’s assertion of the attorney-client privilege. Indeed, some courts have concluded that the need for grand jury secrecy and efficacy, coupled with the grand jury’s investigative purpose, simply make “the rules of the game different” when applying the crime-fraud exception in criminal, as opposed to civil, cases.¹¹⁴ Because no similar concerns exist in the civil context, courts are more apt to allow adversarial testing when one civil party claims the crime-fraud exception to pierce another’s attorney-client privilege than for criminal cases. One circuit has even adopted a higher, preponderance of the evidence standard for invoking the exception in the civil context.¹¹⁵ Some circuits have also held that denying those asserting the privilege an opportunity to rebut allegations that the exception applies violates due process.¹¹⁶ By contrast, courts

109. *In re Grand Jury Subpoena*, 223 F.3d 213, 216 (3d Cir. 2000).

110. *United States v. Dionisio*, 410 U.S. 1, 17 (1973).

111. See FED. R. CRIM. P. 6(e)(2)(b) (describing people prohibited from “disclos[ing] a matter occurring before the grand jury”).

112. *United States v. John Doe, Inc. I*, 481 U.S. 102, 109 n.5 (1987) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958)); see also *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218–19 (1979) (providing similar reasons for the courts’ reluctance “to lift unnecessarily the veil of secrecy from the grand jury”).

113. *Douglas Oil Co.*, 441 U.S. at 218.

114. *In re Grand Jury Subpoena*, 223 F.3d 213, 218 (3d Cir. 2000) (distinguishing its holding in a civil case that the privilege holder is entitled to rebut the party seeking to establish the crime-fraud exception’s evidence and explaining the fundamental differences inherent in criminal proceedings involving the grand jury).

115. See *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1094–95 (9th Cir. 2007) (“[W]e conclude that in a civil case the burden of proof that must be carried by a party seeking outright disclosure of attorney-client communications under the crime-fraud exception should be preponderance of the evidence.”), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009).

116. See Bricker, *supra* note 103, at 159 (“In the context of civil litigation, all circuits that have addressed the issue have held that privilege holders must have notice of the alleged conduct constituting crime-fraud and must be afforded an opportunity to rebut the claims through an evidentiary hearing *before* the court rules on the issue.”); see also *Napster*, 479 F.3d at 1093 (“[W]e are convinced . . . that in a civil case the party resisting an order to disclose materials allegedly protected by the attorney-client privilege must be given the opportunity to present

often justify denying a meaningful opportunity to rebut assertions of the exception in criminal cases by citing the need to protect grand jury secrecy, even from a target or defendant seeking to assert his attorney-client privilege.¹¹⁷

The tension between civil and criminal application of the exception is apparent in *In re Grand Jury Subpoena*.¹¹⁸ In that case, the Third Circuit recognized the difference between its analyses of the crime-fraud exception in civil and criminal contexts. The government had subpoenaed documents and testimony from the attorney of a grand jury investigation's target, and the district court, relying solely on the government's *ex parte* affidavit, concluded that the crime-fraud exception applied.¹¹⁹ The subpoenaed attorney and his client argued that prohibiting them from reviewing the *ex parte* affidavit deprived the client of due process because "without recourse to the *ex parte* affidavit, they could not effectively rebut the government's assertion of the crime-fraud exception."¹²⁰

The court first acknowledged its previous holding: "that the appropriate procedure for determining the applicability of the crime-fraud exception in the context of civil litigation requires that, after the party seeking the documents makes a prima facie showing that the exception applies, the party invoking the attorney-client privilege be given an opportunity to rebut."¹²¹ It then unequivocally rejected that procedure in the grand jury context.¹²² The court underlined the fundamental differences between the adversarial nature of civil cases and the investigative purpose of grand jury proceedings, focusing on the overwhelming importance of maintaining secrecy.¹²³ Finally, the court concluded the district court did not abuse its discretion or violate due process in applying the crime-fraud exception and denying the subpoenaed attorney and his client access to the government's *ex parte* submission.¹²⁴ The court also collected cases with similar holdings from the Second, Fourth, Seventh, Eighth, Ninth, and Tenth Circuits.¹²⁵

evidence and argument in support of its claim of privilege."); *Haines v. Liggett Grp. Inc.*, 975 F.2d 81, 97 (3d Cir. 1992) ("The importance of the privilege, as we have discussed, as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege.").

117. *E.g. In re Grand Jury Subpoena*, 745 F.3d 681, 690–91 (3d Cir. 2014), *cert. denied sub nom. Corp. & Client v. United States*, 135 S. Ct. 510 (2014).

118. 223 F.3d at 219.

119. *Id.* at 214–15.

120. *Id.* at 215.

121. *Id.* at 218 (citing *Haines*, 975 F.2d at 97). The court went on to explain that "when a district court weighs the evidence to determine the applicability of the crime-fraud exception to privilege, the party invoking the privilege has the 'absolute right to be heard by testimony and argument.'" *Id.* (quotation omitted).

122. *Id.* at 219.

123. *Id.*

124. *Id.*

125. *Id.* (citing *In re Grand Jury Subpoenas*, 144 F.3d 653 (10th Cir. 1998); *In re John Doe, Inc.*, 13 F.3d 633 (2d Cir. 1994); *In re Grand Jury Subpoena as to C97-216*, 187 F.3d 996 (8th Cir. 1999); *In re Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term, 1991*, 33 F.3d 342, 353 (4th Cir. 1994); *In re Grand Jury Proceedings*, 867 F.2d 539, 540–41 (9th Cir. 1989); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 57 (7th

II. CHANGING THE STANDARD GOVERNING THE CRIME-FRAUD EXCEPTION'S APPLICATION IN THE CRIMINAL CONTEXT

Even if the circuits' varying articulations of the crime-fraud exception in the criminal context make no practical difference,¹²⁶ the showing required to invoke the exception is quite low.¹²⁷ Some even argue it is at times difficult to see how the standards are higher than the *in camera* review standard established in *Zolin*,¹²⁸ which the Court explicitly described as lower than that "required ultimately to overcome the privilege."¹²⁹

Federal Rule of Evidence 501 counsels that privileges should be applied "in the light of reason and experience," meaning that courts may develop their substance and procedure over time and "leave the door open to change."¹³⁰ By extension, the same must be true of exceptions to those privileges.¹³¹ Given this understanding of privilege analysis, there are many reasons counseling in favor of adopting a more stringent, preponderance of the evidence standard for invoking the crime-fraud exception in the criminal context. Among the strongest reasons¹³² are that a

Cir. 1980)). It is worth noting, however, that several of these cases held due process not violated when the district court relied solely on an *ex parte* affidavit to determine *whether it would conduct an in camera review*. As explained above, the Supreme Court established a separate analysis and set the bar for *in camera* review lower than the showing necessary to establish application of the crime-fraud exception. *United States v. Zolin*, 491 U.S. 554, 572 (1989).

126. Brief for the United States in Opposition to Petition for a Writ of Certiorari, *Doe 1 v. United States*, *supra* note 101, at 13.

127. *See In re Grand Jury Proceedings*, 417 F.3d 18, 23 (1st Cir. 2005) ("The circuits—although divided on articulation and on some important practical details—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.").

128. *See Doe 1 Certiorari Petition*, *supra* note 31, at 26 (equating the Third Circuit's "reasonable basis to suspect" standard with that established in *Terry v. Ohio*, 392 U.S. 1 (1968), and arguing that it is even lower than the standard applied to trigger *in camera* review under *Zolin*).

129. *Zolin*, 491 U.S. at 572.

130. *See Trammel v. United States*, 445 U.S. 40, 47 (1980) ("In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis . . .'" (internal citations omitted)).

131. *See In re Grand Jury Proceedings*, 417 F.3d at 22 ("Like the privilege itself, the exception, where employed in a federal criminal case, is effectively a creature of federal common law. This means that federal judges start with a core of common precedent reflecting the privilege but also have power to refine and adjust both the substance and procedure in light of reason and experience. The process of development is far from over." (citations omitted)).

132. This Article will not address other potential reasons for raising the standard of proof required to apply the crime-fraud exception, which include substantive and procedural expansions making it more difficult to protect privilege holders' rights. *See, e.g.*, Norman W. Spaulding, *Compliance, Creative Deviance, and Resistance to Law: A Theory of the Attorney-Client Privilege*, 2013 J. PROF. LAW. 135, 139 (2013) ("Traditionally, the exception applied only to crimes *mala in se*, and it was available only upon making out a *prima facie* case that advice of counsel had been sought in furtherance of such crimes. In its modern formulation, however, wrongdoing well short of crime and common law fraud triggers the exception. Criminal sanctions for regulatory violations have been expanded, putting the exception in play at the discretion of prosecutors in a broad class of cases."); *see also Holt-Orsted v. City of Dickson*, 641 F.3d 230, 238 (6th Cir. 2011) (recognizing that a recent Supreme Court

preponderance of the evidence standard (1) better comports with Supreme Court precedent and the Federal Rules of Evidence, and (2) better protects criminal defendants' rights.

There are certainly many who believe the standard for breaching the privilege when the client is suspected of committing a crime is necessarily low. Among those important concerns are the necessity of maintaining grand jury secrecy for the reasons discussed in Part I.B.4, and the simple fact that the attorney-client privilege's underlying purpose is undermined when clients use the privilege as a vehicle for concealing their wrongdoings.¹³³ This is especially true because courts must narrowly construe the privilege and uphold it where necessary to achieve its purpose of "obtain[ing] informed legal advice—which might not have been made absent the privilege."¹³⁴ Given the importance of these concerns, it is worth reiterating that this Article's proposal is modest: it merely points out that (1) requiring the government to meet a higher burden for invoking the crime-fraud exception is not inapposite to Supreme Court precedent, and (2) doing so may in fact provide balance to the criminal justice system by safeguarding criminal defendants' attorney-client privilege rights when other aspects of the exception and criminal procedure may leave those rights less protected.

A. Applying a Preponderance of the Evidence Standard Better Comports with the Federal Rules of Evidence and Supreme Court Precedent

Courts dismissing the preponderance standard in the criminal context have done so with little additional explanation other than citing grand jury secrecy and efficacy concerns.¹³⁵ These decisions are troubling because crime-fraud exception issues sometimes occur after the grand jury stage is complete, meaning that the rationale for maintaining a lower standard out of concern for grand jury secrecy does not exist in some cases.¹³⁶ More importantly, decisions dismissing a prepon-

opinion which held that the party asserting the attorney-client privilege could not appeal an adverse district court order of disclosure under the collateral order doctrine, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009), "altered the legal landscape" by "narrow[ing] the category of cases that qualify for interlocutory review"); Fried, *supra* note 26, at 480 (explaining how courts have "loosely applied the requirement that the confidential communications whose production is sought have been made in 'furtherance' of crime"); Gerson & Gladieux, *supra* note 104, at 186 ("The scope of the crime-fraud exception has broadened significantly . . . in the wake of expressions of judicial aversion to privilege, the procedural lowering of the evidentiary threshold for establishing the exception, and Congress' creation of additional criminal statutes.").

133. See *Zolin*, 491 U.S. at 562–63 (explaining the underlying rationale for the privilege and the important justifications for allowing its defeat when a client attempts to abuse it by using confidential communications to further a crime or fraud).

134. *Fisher v. United States*, 425 U.S. 391, 403 (1976).

135. *E.g.*, *In re Grand Jury*, 705 F.3d 133, 154 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 63 (2013).

136. See, *e.g.*, *United States v. Boender*, 649 F.3d 650, 653 (7th Cir. 2011) (applying the same prima facie standard despite the case's procedural posture wherein it arose during motions *in limine* (pre-trial proceedings) rather than during grand jury proceedings).

derance standard are not clearly supported by either the Supreme Court's precedent or the Court's interpretations of the Federal Rules of Evidence.

The preponderance standard is at least in less tension with Supreme Court case law and the Federal Rules of Evidence, and in fact appears to more plainly adhere to both, than a lower standard. First, adopting a preponderance of the evidence standard is an easy inference from the text of Federal Rule of Evidence 104(a) and Supreme Court precedent interpreting that Rule. Second, the standard comports with the Supreme Court's interpretation of the crime-fraud exception in *Zolin*, because the Court likely did not intend lower courts to interpret the standards required for *in camera* review and to invoke the exception to be substantially similar. Third, the procedures adopted in *Zolin* militate against any concerns that a preponderance standard will provide criminals free reign to abuse the privilege.

1. Federal Rule of Evidence 104(a) Governs Preliminary Questions Regarding a Privilege's Applicability

First, a plain reading of Federal Rule of Evidence 104(a) and the Supreme Court's interpretation of it counsel in favor of adopting a preponderance of the evidence standard for invoking the crime-fraud exception. Rule 104(a) requires courts to "decide any preliminary question about whether . . . a privilege exists."¹³⁷ Interpreting Rule 104(a),¹³⁸ the Supreme Court has held that these preliminary factual predicates must be decided under a "preponderance of the evidence" standard.¹³⁹ Although *Clark* (the Supreme Court's case initially establishing the "prima facie case" standard for invocation of the crime-fraud exception) was decided long before the Federal Rules of Evidence were promulgated, the Court there referred to whether or not a privilege existed as a "preliminary question[.]"¹⁴⁰ Rule 104(a)'s use of the "preliminary question" terminology thus fits comfortably with the Supreme Court's understanding of privilege both when *Clark* was decided and today. Moreover, courts have recognized that the crime-fraud exception does not function to remove privilege protections but rather has the effect of establishing that the privilege never existed at all.¹⁴¹ Thus, where the inquiry goes directly to the heart of whether the privilege exists in the first instance, it should be

137. FED. R. EVID. 104(a).

138. Rule 104(a) was amended in 2011 through the Restyled Federal Rules of Evidence. The substance of the Rule is unchanged, however, and the applicable portion of the Rule when the Court decided *Bourjaily* provided that "[p]reliminary questions concerning . . . the existence of a privilege . . . shall be determined by the court." FED. R. EVID. 104(a) (2010) (amended 2011).

139. *Bourjaily v. United States*, 483 U.S. 171, 176 (1987). Although the Court's analysis specifically pertained to Rule 801(d)(2)(E) (governing admission of co-conspirators' hearsay statements), the Court in *Zolin* contemplated, without deciding, Rule 104's application to the crime-fraud exception. *United States v. Zolin*, 491 U.S. 554, 566–68 (1989).

140. *Clark v. United States*, 289 U.S.1, 14 n.1 (1933).

141. *E.g.*, *Laser Indus., Ltd. v. Reliant Techs., Inc.*, 167 F.R.D. 417, 437 (N.D. Cal. 1996), *dismissed*, 232 F.3d 910 (Fed. Cir. 2000).

assessed as a preliminary question under a preponderance of the evidence standard.

The Supreme Court even contemplated Rule 104(a)'s relevance to the attorney-client privilege in *Zolin* itself.¹⁴² There, the Court rejected a broad reading of the Rule that would leave no room to debate the privilege's existence.¹⁴³ However, the Court only held the Rule could not be applied to bar *in camera* review, and did not address the Rule's application to the ultimate inquiry.¹⁴⁴ The important takeaway from the Court's Rule 104(a) analysis in *Zolin* is not what the Court concluded with respect to *in camera* review, but simply that the Court understood and acknowledged that Rule 104(a) (and precedent interpreting it) applies to the crime-fraud exception analysis.¹⁴⁵ In sum, because Rule 104(a) governs preliminary questions regarding the application of privilege, it should also govern application of the crime-fraud exception, as that exception is intrinsic to the privilege. As the Supreme Court mandated in *Bourjaily* when dealing with other preliminary evidentiary issues, the preponderance standard should also govern the crime-fraud exception's application.¹⁴⁶

2. A Higher Standard for Outright Disclosure Would Create Less Confusion When Compared to the Standard for *in Camera* Review

Second, adopting a preponderance of the evidence standard better coincides with the Supreme Court's analysis outlining the requirements for *in camera* review in *Zolin*. In addition to noting Rule 104(a)'s applicability to the crime-fraud exception, the Court explained, "a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege."¹⁴⁷ Unfortunately, the Court did not explain exactly *how much lower* that *in camera* showing is than the prima facie showing required to vitiate the privilege altogether. However, it is safe to assume that the Court intended to establish a clear and workable standard for lower courts to apply. The Court defined the standard required for *in camera* review as 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."¹⁴⁸ It is likely, therefore, that the Court would not employ similar language in describing the higher standard needed to defeat the

142. *Zolin*, 491 U.S. at 566–68.

143. *Id.* at 566. The Court essentially explained that the Rule could not be read to treat "contested communications as 'privileged' for purposes of the Rule," *id.* at 568, because such a determination would make the crime-fraud exception, and others, "dead letters, since the preliminary facts that give rise to these exceptions can never be proved." *Id.* at 566 (quotation omitted).

144. *Id.* at 566–68.

145. *Id.*

146. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

147. *Zolin*, 491 U.S. at 572.

148. *Id.* (citations omitted).

privilege altogether.¹⁴⁹ Yet according to some advocates, that is precisely the way at least one circuit interprets the prima facie showing required to invoke the exception.¹⁵⁰

Although the Third Circuit has expressly rejected a preponderance standard and justified its decision by stating that “[n]either our own nor Supreme Court precedent suggests that a preponderance-of-the-evidence standard is necessary to protect the policy concerns underlying the crime-fraud exception,”¹⁵¹ the court also omitted a discussion of any evidence specifically counseling *against* adoption of that standard. In noting the Supreme Court has never adopted a preponderance standard, the Third Circuit summarized *Zolin*’s open question but did not provide further reasoning as to why the standard is inappropriate.¹⁵²

It is not a stretch to assume the Supreme Court, attempting to clarify application of the crime-fraud exception in *Zolin*, intended the difference between the threshold showing required to review evidence *in camera* and that needed to overcome the privilege to be substantial.¹⁵³ Specifically stating that “a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege,” the Court reasoned that the attorney-client privilege’s rationale is only slightly undercut when a judge reviews potentially privileged evidence *in camera*,¹⁵⁴ and “does not have the legal effect of terminating the privilege.”¹⁵⁵ The contrast is stark when compared to a court finding the privilege altogether inapplicable and permitting disclosure of that evidence, which permanently destroys the confidentiality of communications between client and attorney.¹⁵⁶

The Supreme Court likely would not have intended lower courts to create greater confusion by adopting substantially similar standards to complete two separate tasks: first, considering review of privileged evidence *in camera*, and

149. Of course, the Supreme Court has not yet weighed in on this standard.

150. See *Doe I* Certiorari Petition, *supra* note 31, at 24–28 (equating the Third Circuit’s “reasonable basis to suspect” standard with that established in *Terry v. Ohio*, 392 U.S. 1 (1968), and arguing that it is even lower than the standard applied to trigger *in camera* review under *Zolin*).

151. *In re Grand Jury*, 705 F.3d 133, 154 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 63 (2013).

152. *Id.* at 152.

153. *In re Omnicom Grp., Inc. Sec. Litig.*, No. 02 Civ. 4483, 2007 WL 2376170, at *11 (S.D.N.Y. Aug. 10, 2007) (“[I]t seems clear that the burden of proof for actual invasion of the privilege should be at least somewhat more rigorous [than required for *in camera* review].”).

154. *United States v. Zolin*, 491 U.S. 554, 572 (1989).

155. *Id.* at 568.

156. *Laser Indus., Ltd. v. Reliant Techs., Inc.*, 167 F.R.D. 417, 439 (N.D. Cal. 1996), *dismissed*, 232 F.3d 910 (Fed. Cir. 2000). This is true even if the communications are ultimately not admitted into evidence, as the opposing party has still seen them and the purpose underlying the attorney-client privilege is still undermined. Whether evidence is introduced at trial of course matters when it comes to winning or losing a case but whether the privilege remains viable or whether it will be swallowed by the exception means that concerns regarding disclosure remain despite any final decision on admissibility.

second, deciding to ultimately disclose that evidence.¹⁵⁷ Indeed, while courts have paid lip service to the idea that the “threshold for conducting *in camera* review” is “considerably lower” than that “for fully disclosing documents,”¹⁵⁸ the risk of confusion is great when both standards amount to more than mere guesswork yet less than a preponderance of the evidence.¹⁵⁹ Furthermore, any mistake with regard to the latter decision using such a low standard cannot be undone, especially when the result is a published opinion.¹⁶⁰

3. *Zolin* Adequately Protects Against Abuse of the Privilege

Third, as a practical matter, *Zolin* guards against the possibility that district courts will improperly deny application of the exception where it should apply. The Supreme Court implemented safeguards against abuse of the privilege in *Zolin* by holding both that courts may review evidence *in camera* upon a very low showing,¹⁶¹ and that purely independent evidence is not required to make such a showing.¹⁶² These measures mitigate any concern that criminal defendants would otherwise be able to subvert meaningful application of the crime-fraud exception by hiding behind a higher standard of proof.

In fact, the Ninth Circuit has held, albeit in the civil context, that “judicious use of *in camera* review, combined with a preponderance burden for terminating

157. See, e.g., *In re Omnicom Grp.*, 2007 WL 2376170, at *9 (“Although the Supreme Court has stated that a lesser evidentiary showing is needed to trigger *in camera* review . . . like most courts, the Second Circuit has not articulated how the standards governing the two stages of the analysis may differ.” (citing *In re John Doe, Inc.*, 13 F.3d 633, 637 (2d Cir. 1994) (declining to reach whether *Zolin* required a higher standard of proof at the second stage)); see also *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997) (articulating only the probable cause standard in discussing the two steps of the analysis).

158. *In re Grand Jury Investigation*, 974 F.2d 1068, 1073 (9th Cir. 1992).

159. Compare *Zolin*, 491 U.S. at 574–75 (“[B]efore a district court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception’s applicability.”), with *In re Grand Jury*, 705 F.3d 133, 153–54 (3d Cir. 2012) (“[N]either speculation nor evidence that shows only a distant likelihood of corruption is enough. At the same time, the party opposing the privilege is not required to introduce evidence sufficient to . . . show that it is more likely than not that the crime or fraud occurred.” (citations omitted)), *cert. denied*, 134 S. Ct. 63 (2013).

160. Cf. *In re Grand Jury Subpoena*, 745 F.3d 681, 685 n.1 (3d Cir. 2014), *cert. denied sub nom.* Corp. & Client v. United States, 135 S. Ct. 510 (2014) (“We recognize that even this vague recitation of the communications between Attorney and Client would ordinarily be covered by the attorney-client privilege. We reveal this account of the communications only because we have found that the crime-fraud exception applies.”). For example, had the Supreme Court reviewed this case and reversed the Third Circuit, even though the evidence would not be admissible at trial, the damage of disclosing confidential attorney-client communications was already done through the Third Circuit’s published opinion admitting as much. See *Owens v. Office of Dist. Attorney for Eighteenth Judicial Dist.*, 896 F. Supp. 2d 1003, 1014 (D. Colo. 2012) (“[T]he general injury or harm caused by the improper disclosure of material subject to the attorney-client privilege is irreparable.”). But see *In re Grand Jury Proceedings*, 417 F.3d 18, 24 (1st Cir. 2005) (“We think that there may well be room for protective remedies if the privilege is initially pierced but this turns out to have been in error.”) (identifying and explaining none of those “protective remedies”).

161. *Zolin*, 491 U.S. at 574–75.

162. *Id.* at 573–74.

privilege, strikes a better balance between the importance of the attorney-client privilege and deterrence of its abuse than a low threshold for outright disclosure.”¹⁶³ These procedures remove obstacles to establishing a prima facie case of the crime-fraud exception. Thus, their existence would also allow courts to safely raise the burden of proof required to vitiate the privilege without concern that criminal defendants will be able to conceal their wrongdoings with claims of privilege.¹⁶⁴

B. A Preponderance of the Evidence Standard Would Better Safeguard Criminal Defendants’ Rights

In addition to adhering to Supreme Court precedent and the Federal Rules of Evidence, a preponderance standard could help to provide balance when the scales of justice are otherwise weighted considerably against criminal defendants and grand jury targets. The low standards currently used to invoke the crime-fraud exception are particularly concerning because their effects are compounded by the facts that (1) criminal defendants typically have no practical opportunity to rebut the government’s prima facie showing given the protections afforded the grand jury process; (2) some circuits (paradoxically) provide stronger protections against the crime-fraud exception’s application in civil, rather than criminal, cases; and (3) circuit courts employ deferential standards of review to crime-fraud exception determinations on appeal.

1. Current Standards Provide Limited or No Rebuttal Opportunity in the Criminal Context

At a fundamental level, criminal defendants have a right to be informed of the evidence against them¹⁶⁵ and a right to challenge that evidence.¹⁶⁶ Unfortunately, these basic guarantees do not always protect criminal defendants during the investigative, or grand jury, phase of proceedings.¹⁶⁷ Courts have traditionally

163. *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1096 (9th Cir. 2007), *abrogated on other grounds by* *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009).

164. *Cf. Laser Indus., Ltd. v. Reliant Techs., Inc.*, 167 F.R.D. 417, 439 (N.D. Cal. 1996) (explaining in a civil patent case that since *Zolin* provides for *in camera* inspection using a low standard and that inspection effectively allows courts to “uncover[] abuses of the privilege . . . there is no great risk that the courts will create too much room for corrupt use of lawyers by adopting a somewhat more demanding standard for actually disclosing the communications”), *dismissed*, 232 F.3d 910 (Fed. Cir. 2000).

165. *See* U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation [and] to be confronted with the witnesses against him . . .”); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (describing “what might loosely be called the area of constitutionally guaranteed access to evidence”).

166. *See Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) (“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.”); DiBiagio, *supra* note 54, at 9 (citing *Montana v. Egelhoff*, 518 U.S. 37, 63 (1996) (O’Connor, J., dissenting)).

167. *See* DiBiagio, *supra* note 54, at 10; *see also In re John Doe, Inc.*, 13 F.3d 633, 636 (2d Cir. 1994) (explaining that “where an *in camera* submission is the only way to resolve an issue without compromising a

given grand juries (and prosecutors) “wide latitude to inquire into violations of criminal law.”¹⁶⁸ That backdrop of prosecutorial discretion, coupled with the importance of maintaining grand jury secrecy discussed in Part I.B.4, create a dilemma when the government seeks to invoke the crime-fraud exception to defeat the grand jury target or defendant’s attorney-client privilege.

The law *should* afford criminal defendants the right to be informed of and to challenge the government’s evidence in all aspects of their cases. In contrast, the common use of the crime-fraud exception in grand jury proceedings provides almost the opposite: it allows the government to pierce a criminal defendant’s attorney-client privilege without affording the privilege holder an opportunity to review, let alone meaningfully contest, the government’s evidence in support of the exception.¹⁶⁹

Granted, maintaining grand jury secrecy is an incredibly important objective. Among other reasons, failure to safeguard the secrecy of grand jury proceedings could provide disincentives for witnesses to disclose knowledge of criminal activity and undermine efforts to protect the innocent from the stigma of “arbitrary and oppressive governmental action.”¹⁷⁰ Maintaining grand jury efficacy is also a worthy objective, as “saddl[ing] a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public’s interest in the fair and expeditious administration of the criminal laws.”¹⁷¹ However, when the amount of evidence the government must show to defeat a claim of privilege in these *ex parte* investigations is relatively low, the lack of adversarial hearing or other opportunity to refute the government’s position is troubling.

In many cases, specifically those in circuits that articulate the prima facie standard with burden-shifting language, courts have held that privilege holders charged with rebutting the government’s showing are barred from accessing the very evidence to which a response is required.¹⁷² One might wonder how the

legitimate need to preserve the secrecy of the grand jury, it is an appropriate procedure” and “any resultant limit on [those asserting the privilege’s] ability to rebut the government’s submission was . . . not violative of due process”).

168. *United States v. Calandra*, 414 U.S. 338, 343 (1974).

169. *See DiBiagio, supra* note 54, at 13 (“The circuit courts of appeals . . . have universally held that in order to preserve the secrecy of ongoing grand jury proceedings, the government is not required to disclose grand jury evidence relied on in support of the government’s application of the crime-fraud exception.”).

170. *See In re Grand Jury Subpoena*, 223 F.3d 213, 216 (3d Cir. 2000) (citations omitted) (discussing purposes for grand jury secrecy).

171. *United States v. Dionisio*, 410 U.S. 1, 17 (1973).

172. *E.g., In re Grand Jury Proceedings #5*, 401 F.3d 247, 251 n.2 (4th Cir. 2005) (“[W]e have explicitly held that the necessary secrecy of the grand jury process prevents the party asserting the privilege from viewing the government’s *in camera* evidence. This does not mean that the party asserting the privilege may not seek to rebut the government’s assertion that the crime-fraud exception should apply and thereby demonstrate that the government has not proven its prima facie case, rather it means that the party cannot have access to the allegations in the government’s *in camera* submission to do so.” (citations omitted)).

privilege holder will know what theory of crime or fraud to rebut without access to that information. Similarly, the Third Circuit has held that it will not allow those seeking to assert the privilege an opportunity to review the government's *ex parte* showings or even transcripts of completed *in camera* examinations when attempting to rebut the government's prima facie case of the crime-fraud exception.¹⁷³ The Third Circuit even upheld such denials in cases whose nature was public knowledge due to parallel proceedings or other reasons.¹⁷⁴

As with their conception of the showing required to establish the crime-fraud exception, the circuits are not uniform in the types of *in camera* proceedings conducted during criminal proceedings. District courts have wide discretion to determine the appropriate type of proceedings. Those proceedings range from *ex parte* government submissions with no rebuttal opportunity for the defendant,¹⁷⁵ to opportunities for rebuttal without review of *ex parte* submissions,¹⁷⁶ to *in camera* review of evidence or examination of testimony without either party present,¹⁷⁷ to full adversarial hearings.¹⁷⁸ "Although the court[s] ha[ve] the discretion to provide opposing counsel the opportunity to rebut claims, or to make the proceeding an adversarial one, [they] rarely do[] so."¹⁷⁹ The type of proceedings utilized also seem to vary based on the stage of criminal proceedings, with the least adversarial

173. See *In re Grand Jury Subpoena*, 223 F.3d at 219 (upholding denial of client's request for access to government's *ex parte* affidavit supporting the exception's application).

174. *In re Grand Jury Subpoena*, 745 F.3d 681, 690–91 (3d Cir. 2014), *cert. denied sub nom.* Corp. & Client v. United States, 135 S. Ct. 510 (2014); *In re Grand Jury Subpoena*, 223 F.3d at 219.

175. See *Grand Jury*, 41 GEO. L.J. ANN. REV. CRIM. PROC. 252, 267 n.816 (2012) (collecting cases for the proposition that "[s]ome circuits have held that a subject of a grand jury investigation is not entitled to review the government's *ex parte*, in-chambers submissions in support of an application of the crime-fraud exception, even when the subject is not permitted to present rebuttal evidence").

176. *E.g.*, *In re Grand Jury*, 705 F.3d 133, 156 n.23 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 63 (2013).

177. *E.g.*, *In re Grand Jury Subpoena* as to C97-216, 187 F.3d 996, 997 (8th Cir. 1999) (upholding crime-fraud exception application where district court's *in camera* examination of an attorney excluded both the government and the privilege holder); *In re Grand Jury Subpoena*, No. 10-127-02, 2012 WL 5587438, at *5 (E.D. Pa. Nov. 13, 2012) ("[B]oth Intervenors and the Government should be given an opportunity to propose questions to be asked of Attorney by the Court, but . . . neither side should be present for the examination itself, just as neither side would peer over the Court's shoulder as the Court reviewed documents *in camera*. This procedure avoids giving Intervenors an unfair preview of potential grand jury testimony, while at the same time protecting privileged information from disclosure to the Government."), *aff'd*, 745 F.3d 681 (2014).

178. *E.g.*, *United States v. Boender*, 649 F.3d 650, 656–58 (7th Cir. 2011) (affirming decision permitting adversarial *in camera* hearing at trial stage). While in the grand jury context, most criminal defendants would welcome an adversarial *in camera* hearing because it would give them access to information and provide some insight into the government's theory of the case, in this case's proceeding just before trial the court's decision to allow an adversarial hearing only benefited the government, as the government gained access to the attorney's otherwise-confidential communications. See *id.* (rejecting Boender's argument that the court should have excluded the government from his attorney's *in camera* examination).

179. Bricker, *supra* note 103, at 158; see also *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1092 (9th Cir. 2007) ("It has been assumed by a number of courts of appeal, including our own, that while nothing forbids the district court from asking for or receiving such countervailing evidence, there is also nothing requiring the district court to do so."), *abrogated on other grounds by* *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009).

protections generally in effect during grand jury proceedings and the most adversarial protections afforded closer to and during trial.¹⁸⁰

In light of this setting, the practical chances of successfully challenging the government's evidence and maintaining the privilege through adversarial proceedings are slim indeed.¹⁸¹ That no truly adversarial proceedings are available in the grand jury setting counsels in favor of adopting a higher burden to establish the crime-fraud exception in the criminal context. In the grand jury setting, where a prima facie showing in essence constitutes the *entire* showing, the preponderance standard would allow for a more critical assessment of the government's evidence. This standard would in turn help balance against the effects of procedures that lack meaningful adversarial testing.

2. Adopting a Higher Standard Would Bring Criminal Application of the Crime-Fraud Exception in Line With Its Application in Civil Cases

Related to the unique challenges posed by the grand jury context wherein limited-to-no rebuttal opportunity may be available, many circuits do little more than allude to the importance of maintaining grand jury secrecy to justify their current low standards for application of the crime-fraud exception throughout criminal proceedings.¹⁸² Many have also categorically rejected due process claims relating to the privilege holder's inability to examine *ex parte* government

180. Compare *In re Grand Jury*, 705 F.3d 133, 156 n.23 (3d Cir. 2012) (upholding, in the grand jury context, a district court's decision denying the privilege asserter access to the government's *ex parte* submission and refusing to hold a hearing, though accepting the privilege asserter's independent evidentiary submission for consideration), *cert. denied*, 134 S. Ct. 63 (2013), with *Boender*, 649 F.3d at 658 (recognizing a "presumption against using *ex parte* proceedings" as one factor district courts should consider when deciding whether to allow parties to attend *in camera* proceedings, and upholding a district court's decision to use an adversarial hearing when determining the crime-fraud exception's applicability at the trial stage).

181. DiBiagio, *supra* note 54, at 24 (comparing the grand jury process to the Court of Star Chamber in seventeenth-century England, explaining that the government's burden is "unfairly lighten[ed]" by district courts' reluctance to allow the privilege holder to inspect the government's evidence in support of the crime-fraud exception).

182. See, e.g., *In re Grand Jury Subpoena*, 745 F.3d 681, 690–91 (3d Cir. 2014), *cert. denied sub nom. Corp. & Client v. United States*, 135 S. Ct. 510 (2014) (upholding the district court's crime-fraud exception determination and finding it appropriate to exclude the privilege asserters from the *in camera* review and deny them access to transcript or summary of those proceedings based on grand jury secrecy concerns); *In re Grand Jury Proceedings*, 867 F.2d 539, 540 (9th Cir. 1989) ("Both the government and the grand jury have a substantial interest in maintaining the secrecy of the materials submitted for the district court's *in camera* inspection. Under these circumstances, the balance is weighted in favor of maintaining secrecy of the grand jury proceedings."); *In re Grand Jury Investigation*, 842 F.2d 1223, 1226 (11th Cir. 1987) ("If courts always had to hear testimony and conflicting evidence . . . the rationale behind the prima facie standard—the promotion of speed and simplicity at the grand jury stage—would be lost."); *In re Antitrust Grand Jury*, 805 F.2d 155, 167–68 (6th Cir. 1986) ("If the district court were required to weigh all conflicting evidence, it would be tantamount to a mini-trial, which the courts do not sanction at the grand jury stage. Therefore, the district court did not err in considering only the evidence submitted by the government." (citations omitted)); *In re Sealed Case*, 676 F.2d 793, 815 n.88 (D.C. Cir. 1982) ("Because of the need for speed and simplicity at the grand jury stage, courts should not employ a standard that requires them to hear testimony or to determine facts from conflicting evidence.").

submissions in the interest of protecting the integrity of the grand jury process.¹⁸³ However, some of those same circuits also recognize that no such concerns require similar treatment in the civil context.¹⁸⁴ To the contrary, some have instead expressly held that denying a civil party the opportunity to rebut evidence indicating the crime-fraud exception should apply denies them due process of law.¹⁸⁵

To so hold in the civil context while yielding to superseding concerns about grand jury secrecy in the criminal context is counterintuitive—it places courts in the dangerous position of vitiating the due process rights of criminal defendants, whose liberty is at stake, while recognizing and protecting those rights for parties to civil cases. Put another way, if there is any difference in the standards governing civil and criminal application of the crime-fraud exception, the criminal standard should be more exacting than the standard applied in civil cases.

183. See, e.g., *In re Grand Jury Subpoena*, 223 F.3d 213, 219 (3d Cir. 2000) (“We today join the ranks of our sister circuits in holding that it is within the district courts’ discretion, and not violative of due process, to rely on an *ex parte* government affidavit to determine that the crime-fraud exception applies”); *In re Grand Jury Proceedings*, Thursday Special Grand Jury Sept. Term, 1991, 33 F.3d 342, 353 (4th Cir. 1994) (“[W]e [have] held that *in camera* proceedings in the context of grand jury proceedings and on-going investigations requiring secrecy are not violative of due process.” (citation omitted)); *In re John Doe, Inc.*, 13 F.3d 633, 636 (2d Cir. 1994) (recognizing that “where an *in camera* submission is the only way to resolve an issue without compromising a legitimate need to preserve the secrecy of the grand jury, it is an appropriate procedure” and “any resultant limit on [those asserting the privilege’s] ability to rebut the government’s submission was . . . not violative of due process”); *In re Grand Jury Proceedings*, 867 F.2d 539, 541 (9th Cir. 1989) (“[W]e hold that Doe was not denied due process by the district court’s *in camera* inspection of the materials upon which the government based its showing of the crime-fraud exception.”); cf. *In re Grand Jury Subpoena as to C97-216*, 187 F.3d 996, 998 (8th Cir. 1999) (“Numerous courts of appeals have held that a court may consider the government’s *ex parte* submission in order to preserve the secrecy of ongoing grand jury proceedings and have rejected appellant’s due process argument.”) (collecting cases from the Second, Fourth, Sixth, and Tenth Circuits) (holding relevant to *in camera* review, rather than outright disclosure).

184. See, e.g., *In re Green Grand Jury Proceedings*, 492 F.3d 976, 984 (8th Cir. 2007) (distinguishing the criminal case at hand from the Eighth Circuit’s previous “suggest[ion] that in a civil case the party opposing the application of the crime-fraud exception is entitled to present countervailing evidence” on the grounds that in the grand jury context “[t]he ‘rules of the game’ may be different” because “grand jury proceedings should not be encumbered with procedures that would frustrate the efficient execution of its investigative purposes” (citation omitted)); *Napster*, 479 F.3d at 1094 (noting agreement with the statement that with regard to the burden of proof required to invoke the exception, “different standards may well be appropriate,” in the civil and criminal contexts (citation omitted)); *In re Grand Jury Subpoena*, 223 F.3d at 218 (distinguishing its holding in a civil case that the privilege holder is entitled to rebut the party seeking to establish the crime-fraud exception and explaining the fundamental differences inherent in criminal proceedings involving the grand jury); *In re Gen. Motors Corp.*, 153 F.3d 714, 716 (8th Cir. 1998) (“This being a civil case, the district court may not . . . compel production without permitting the party asserting the privilege, to present evidence and argument.”); *In re Omnicom Grp., Inc. Sec. Litig.*, No. 02 Civ. 4483, 2007 WL 2376170, at *10 (S.D.N.Y. Aug. 10, 2007) (“There should be no dispute that, at least in a civil case, the party opposing a crime/fraud motion is permitted to proffer evidence to be considered in weighing the strength of the movant’s initial showing.”).

185. See *Napster*, 479 F.3d at 1093; *Haines v. Liggett Grp. Inc.*, 975 F.2d 81, 90, 96–97 (3d Cir. 1992); Bricker, *supra* note 103, at 159 (“In the context of civil litigation, all circuits that have addressed the issue have held that privilege holders must have notice of the alleged conduct constituting crime-fraud and must be afforded an opportunity to rebut the claims through an evidentiary hearing before the court rules on the issue.” (emphasis omitted)).

Courts' decisions to adopt different procedures to establish a prima facie case of the crime-fraud exception in the criminal and civil contexts¹⁸⁶ is required neither by *Zolin*¹⁸⁷ nor *Clark*¹⁸⁸ and represents another reason the standard for criminal cases should be higher—to bring it more in line with the protections afforded to civil parties. Make no mistake, the justification for adopting a preponderance standard in the civil context makes sense in that there are no grand jury secrecy issues competing with the attorney-client privilege. However, as explained in Part II.B.1, those seeking to assert the attorney-client privilege often have limited or no opportunity to refute the government's crime-fraud exception allegations in the grand jury context. This situation counsels in favor of at least adopting a slightly higher burden for the government to meet in order to obtain the benefit of the exception. And, as explained in Part II.A.3, the Supreme Court's *in camera* review procedures established in *Zolin* guard against any risk that the balance would tip too far in suspected criminals' favor and allow them to subvert proper application of the exception through the higher standard. Simply put, it should be more difficult to defeat the privilege when the privilege-holder's liberty is at stake than when the privilege-holder is sued civilly.

Courts' justifications for adopting a preponderance of the evidence standard in civil cases are undoubtedly just as relevant and poignant, if not even more so, in the criminal context, where the ultimate result may be deprivation of liberty. In *In re Napster, Inc. Copyright Litigation*, for instance, the Ninth Circuit required a preponderance of the evidence standard to invoke the exception in a civil case for four reasons.¹⁸⁹ First, because the attorney-client privilege is “central to the legal system and the adversary process and thus deserving of unique protection in the courts,” a preponderance of the evidence standard is more “consonant with the importance” of that privilege.¹⁹⁰ Second, the standard is not inconsistent with the Supreme Court's analysis in either *Clark* or *Zolin*.¹⁹¹ Third, the Federal Rules of Evidence and Supreme Court precedent in fact seem to *encourage* the inference

186. Compare *In re Grand Jury Subpoena*, 223 F.3d at 219 (“[I]t is within the district courts' discretion, and not violative of due process, to rely on an *ex parte* government affidavit to determine that the crime-fraud exception applies [in the criminal context]”), with *Haines*, 975 F.2d at 97 (“The importance of the privilege, as we have discussed, as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege.”).

187. *United States v. Zolin*, 491 U.S. 554, 562 (1989) (describing the privilege without distinguishing between parties involved in civil as opposed to criminal proceedings).

188. *Clark v. United States*, 289 U.S. 1, 16 (1933) (making no distinction as to the identity of the party in explaining the privilege's protections).

189. *Napster*, 479 F.3d at 1095–96.

190. *Id.* at 1095 (“It would be very odd if in an ordinary civil case a court could find such an important privilege vitiated where an exception to the privilege has not been established by a preponderance of the evidence.” (citation omitted)).

191. *Id.*

that a preponderance standard is appropriate.¹⁹² Fourth, “judicious use of *in camera* review, combined with a preponderance burden for terminating privilege, strikes a better balance between the importance of the attorney-client privilege and deterring its abuse than a low threshold for outright disclosure.”¹⁹³

Surely, a criminal defendant’s rights to a privilege so “central to . . . the adversary process and thus deserving of unique protection in the courts”¹⁹⁴ are just as important as those exercised by civil litigants, regardless of countervailing concerns like maintaining grand jury secrecy. This is especially true when Supreme Court precedent interpreting the Federal Rules of Evidence appears to recommend such an approach.¹⁹⁵ Moreover, adopting the higher standard merely levels the playing field when other measures, such as the availability of *in camera* review after a minimal showing, are available to protect the privilege from abuse.¹⁹⁶ Courts should therefore adopt a preponderance standard for application of the crime-fraud exception in criminal cases, as doing so will foster uniformity and predictability in application when compared with civil precedent. Adopting a preponderance standard in criminal cases is warranted in the interest of affording adequate protections for criminal defendants’ rights and remedying the current counterintuitive, and even paradoxical, application that provides civil parties with greater protections than criminal defendants and grand jury targets.

3. *A Higher Standard Would Better Protect the Attorney-Client Privilege In Light of Appellate Courts’ Deference to District Court Determinations Regarding the Crime-Fraud Exception’s Applicability*

Yet another factor counseling in favor of adopting a preponderance of the evidence standard is the deferential manner in which appellate courts review lower courts’ crime-fraud exception determinations. With the notable exception of the Ninth Circuit, which applies *de novo* review,¹⁹⁷ potential application of the crime-fraud exception is a decision within the discretion of the trial court and will not be reversed on appeal unless the district court abused its discretion and the defendant’s interests were prejudiced.¹⁹⁸ Although courts review the legal conclu-

192. *Id.*

193. *Id.* at 1096.

194. *Id.* at 1095 (citation omitted).

195. See Part II.A; see also *Napster*, 479 F.3d at 1095 (accepting similar arguments to conclude that a preponderance of the evidence standard should govern civil cases).

196. *Napster*, 479 F.3d at 1096.

197. *Id.* at 1089 (“[W]e have held that ‘rulings on the scope of the privilege,’ including the crime-fraud exception, ‘involve mixed questions of law and fact and are reviewable *de novo*, unless the scope of the privilege is clear and the decision made by the district court is essentially factual; in that case only clear error justifies reversal.’” (quoting *United States v. Laurins*, 857 F.2d 529, 541 (9th Cir. 1988))).

198. *Fried*, *supra* note 26, at 480 n.200; *In re Grand Jury Proceedings*, G.S., F.S., 609 F.3d 909, 913 (8th Cir. 2010) (“When, as here, the district court has found probable cause for the application of the crime-fraud exception, we review its decision for abuse of discretion, according its determination considerable deference.”); see also *In re Grand Jury*, 705 F.3d 133, 155 (3d Cir. 2012), *cert. denied*, 134 S. Ct. 63 (2013); *In re Grand Jury*

sion of what quantum of proof applies to invoke the crime-fraud exception *de novo*,¹⁹⁹ the abuse of discretion standard applies to the *application* of that burden of proof, and to whether the evidence presented sufficiently satisfies it. It then goes without saying that decisions reviewed *de novo* are more likely to be reversed than those assessed under a more deferential standard.

The issue is that district courts closely quote their circuits' language when laying out the legal standard to apply in crime-fraud exception cases. As a result, appeals of the articulation of the standard—the part of the inquiry subject to *de novo* review—are rare. Courts then decline to describe in detail (often due to grand jury secrecy concerns) their reasons for concluding the evidence meets those standards, and those conclusions are only reviewed for abuse of discretion.²⁰⁰ This lack of explanation poses a problem when the standard of review is highly deferential, as greater deference may allow appellate courts to affirm trial courts on vague reasoning that allows for differing interpretations. *De novo* review, by contrast, may require more definitive reasoning.

Additionally, some evidence is not thoroughly described in appellate decisions, a situation that some commentators claim “has resulted in conclusory opinions that provide no clear standard for the future.”²⁰¹ This is especially concerning when the district court originally reviewed the government's submission *in camera* or *ex parte*.²⁰² As Professor Fried explained:

[I]t is dispiriting to read scores of cases that state the rule in a sentence and in another sentence state simply that the trial court did not abuse its discretion in determining that the exception applied, without discussing the rationale for the rule, specifying the crime or fraud in furtherance of which the attorney was consulted, discussing the client's intention, reviewing the supporting evidence, or stating whether and how the attorney's testimony is relevant to the case.²⁰³

Proceedings #5, 401 F.3d 247, 254 (4th Cir. 2005); *In re Grand Jury Proceedings*, 417 F.3d 18, 21 (1st Cir. 2005); *In re Grand Jury Subpoena*, 220 F.3d 406, 410 (5th Cir. 2000); *United States v. Jacobs*, 117 F.3d 82, 87, 89 (2d Cir. 1997), *abrogated on other grounds by* *Loughrin v. United States*, 134 S. Ct. 2384 (2014); *United States v. Boender*, 649 F.3d 650, 655 (7th Cir. 2011); *In re Grand Jury Subpoenas*, 144 F.3d 653, 659 (10th Cir. 1998); *In re Grand Jury Investigation*, 842 F.2d 1223, 1226–27 (11th Cir. 1987); *In re Antitrust Grand Jury*, 805 F.2d 155, 166, 169 (6th Cir. 1986); *In re Sealed Case*, 754 F.2d 395, 399–400 (D.C. Cir. 1985). *But see* *Napster*, 479 F.3d at 1089 (“[R]ulings on the scope of the privilege, including the crime-fraud exception, involve mixed questions of law and fact and are reviewable *de novo*, unless the scope of the privilege is clear and the decision made by the district court is essentially factual; in that case only clear error justifies reversal.” (citation omitted)).

199. *In re Grand Jury*, 705 F.3d at 153 n.18.

200. *See, e.g., In re Grand Jury Subpoena*, No. 10-127-02, 2013 WL 228115, at *4 (E.D. Pa. Jan. 18, 2013) (“[T]he Third Circuit Court of Appeals held that the ‘reasonable basis’ standard applies to crime-fraud exception determinations.” (quoting *In re Grand Jury*, 705 F.3d at 154)), *aff'd*, 745 F.3d 681, 691 (3d Cir. 2014), *cert. denied sub nom. Corp. & Client v. United States*, 135 S. Ct. 510 (2014).

201. Fried, *supra* note 26, at 480.

202. *Id.* at 480 n.200.

203. *Id.*

It is a similarly dispiriting endeavor, given circuits' reluctance to discuss evidence in detail and fill the gaps identified by Professor Fried, to comprehend the exact amount of proof required to establish the crime-fraud exception and accurately assess whether the required showing is more stringent in some circuits than in others. That lack of transparency presents the possibility that different circuits' articulations of the prima facie standard are producing disparate results that have gone, and will continue to go, unnoticed.

With such a deferential standard of review, the likelihood for expansion of the exception and error in its application rises. This means that the attorney-client privilege may be breached on occasions when it should be upheld. That effect is even more possible when, as discussed in Part II.B.1, opportunities for the privilege holder to meaningfully contest the exception's application are rare.

This is not to say that district courts will always get it wrong, or that appellate courts will simply affirm if a mistake is made. Instead, this Article suggests only that the current, low standard necessary to pierce the attorney-client privilege creates a greater risk that a decision incorrectly piercing a criminal defendant's privilege could be upheld without clear analysis. When the risk of this possibility exists, however slim, it may be desirable to adopt a higher threshold to defeat the privilege in the first instance, namely a preponderance of the evidence standard.

III. ANALYZING *IN RE GRAND JURY SUBPOENA* IN LIGHT OF THE ARGUMENTS RAISED

In re Grand Jury Subpoena, the opinion described in this Article's Introduction, provides a concrete example of a case that may have yielded a different outcome if the government had to make a more rigorous showing to establish the crime-fraud exception's applicability.²⁰⁴ As an initial matter, the court noted that the scenario presented a "close case,"²⁰⁵ and proceeded to describe (in necessarily vague terms to protect grand jury secrecy²⁰⁶) somewhat inconclusive facts to uphold the district court's application of the crime-fraud exception.

With regard to the exception's first prong, for instance, the court recognized that the executive must have formed the intent to commit a crime *before* consulting with the attorney for the exception to apply.²⁰⁷ However, the court then accepted the government's submission that there was "reasonable basis to suspect" the first prong was met.²⁰⁸ The court ruled based on evidence that the executive informed

204. This discussion is largely limited to the points raised in Part II, and does not address the numerous other issues worthy of further analysis raised in this case. See *generally Corp. & Client Certiorari Petition*, *supra* note 102; Nat'l Ass'n of Criminal Def. Lawyers Amicus Brief, *supra* note 104.

205. *In re Grand Jury Subpoena*, 745 F.3d 681, 691 (3d Cir. 2014), *cert. denied sub nom. Corp. & Client v. United States*, 135 S. Ct. 510 (2014).

206. See *id.* at 685 (explaining that due to confidentiality concerns pertaining to the ongoing grand jury investigation, "we are hampered in our ability to articulate the background information underlying our conclusions").

207. *Id.* at 692.

208. *Id.*

the attorney he would proceed with the payment *after* consulting the attorney and the executive later made a payment during the same month that the bank approved the company's project.²⁰⁹ Not only would that justification possibly fail under a slightly higher standard, it would also almost certainly fail under a preponderance of the evidence standard. First, it would make no sense for the executive to consult with the attorney about the legality of a proposed action after already resolving to commit the crime. Second, the attorney himself testified that his research on the subject was inconclusive,²¹⁰ which indicates that the situation was legally complex and perhaps the court should have given the executive the benefit of the doubt.

With regard to the exception's second prong, the court explained that a client must use the attorney's advice to advance his criminal scheme.²¹¹ However, the court then found no abuse of discretion in the district court's holding that there was a reasonable basis to suspect the executive used the attorney's description of "the types of conduct that violate the law" to act in a manner that furthered his intent to violate the FCPA.²¹² The Third Circuit affirmed the district court's holding that the company and executive "could easily have used" the attorney's advice to further the alleged crime—the mere *possibility* was enough to satisfy the Third Circuit's low threshold to vitiate the privilege altogether.²¹³ Requiring the government to prove this element by a preponderance of the evidence would have better comported with the crime-fraud exception's purpose of only defeating the privilege and exposing confidential communications when they truly are used in furtherance of a crime,²¹⁴ rather than simply when the client is accused of using those communications to further an unlawful intent.

As commonly occurs in criminal cases, the district court denied the company and executive (those asserting the attorney-client privilege) the opportunity to review the government's *ex parte* submission arguing for application of the crime-fraud exception, citing grand jury secrecy concerns.²¹⁵ The court also denied requests to review the transcript of the *in camera* questioning of the attorney to better defend the allegations.²¹⁶ The Third Circuit upheld this determi-

209. *Id.*

210. *Id.* at 685.

211. *Id.* at 693.

212. *Id.*

213. *Id.* (internal quotation omitted).

214. *United States v. Zolin*, 491 U.S. 554, 563 (1989) ("It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." (citations omitted)).

215. *In re Grand Jury Subpoena*, No. 10-127-02, 2013 WL 228115, at *2 (E.D. Pa. Jan. 18, 2013), *aff'd*, 745 F.3d 681 (3d Cir. 2014), *cert. denied sub nom.* Corp. & Client v. United States, 135 S. Ct. 510 (2014).

216. *See id.* at *3 ("Because the grand jury proceeding at issue here is ongoing and because the transcript almost certainly reflects a preview of Attorney's eventual grand jury testimony, i.e., for the same reasons that the

nation²¹⁷ and affirmed the district court's application of the crime-fraud exception.²¹⁸ The Circuit reviewed those holdings for abuse of discretion.²¹⁹

The court also reaffirmed its belief that concerns for the integrity of the grand jury process necessitated a limited discussion of the relevant facts in the published opinion.²²⁰ Notwithstanding this concern, the court provided some facts, recognizing that "even this vague recitation of the communications between Attorney and Client would ordinarily be covered by the attorney-client privilege" but proceeding because "we have found that the crime-fraud exception applies."²²¹ That discussion could be read as doing too little and too much at the same time, however, as the opinion provided too little factual discussion to truly analyze the court's legal conclusions but also disclosed some contents of otherwise-privileged communications in a published opinion before all appeals had been exhausted.²²² Had the court required the government to establish the crime-fraud exception by a preponderance of the evidence, the risk for error in both the court's limited factual discussion and disclosure of privileged information would be reduced.

Granted, this assessment presupposes that the privilege *should* win out in this case. It assumes the executive truly was not intending to commit a crime when he consulted with the attorney and that he then did not use the attorney's advice to further that crime. However, when the scales of justice are tipped against the executive with regard to the issues set out in Part II.B.1–3,²²³ any risk that a heightened standard would allow the executive to shield communications obtained to further a criminal scheme is greatly mitigated.

As explained in Part II.A, the Supreme Court adopted procedural protections in *Zolin*, which allow for a lesser showing to justify reviewing the privileged communications *in camera* and permit evidence not wholly independent from the privileged communications to be used in making that showing. These protections largely guarantee a district court will not be fooled into preserving the privilege for

Court excluded Intervenor from the *in camera* interview of Attorney, secrecy concerns outweigh any need for Intervenor to review the transcript of Attorney's *in camera* interview.").

217. *In re Grand Jury Subpoena*, 745 F.3d 681, 690 (3d Cir. 2014), *cert. denied sub nom.* Corp. & Client v. United States, 135 S. Ct. 510 (2014).

218. *Id.* at 693.

219. *Id.* at 687, 691.

220. *Id.* at 684–85.

221. *Id.* at 685 n.1.

222. The Supreme Court has since denied *certiorari* in the case, *Corp. & Client v. United States*, 135 S. Ct. 510 (2014), but had the Court taken the case and reversed, the damage of disclosing privileged communications would have already been done. *Cf. Haines v. Liggett Grp. Inc.*, 975 F.2d 81, 97 (3d Cir. 1992), *as amended* (Sept. 17, 1992) ("Because of the sensitivity surrounding the attorney-client privilege, care must be taken that, following any determination that an exception applies, the matters covered by the exception be kept under seal or appropriate court-imposed privacy procedures until all avenues of appeal are exhausted.") (holding in the civil context).

223. Namely, the district court denied him the opportunity to rebut the government's *ex parte* and *in camera* submissions and concluded that barring him from doing so was not a denial of due process (though it may have been in the civil context). The Court of Appeals only reviewed the district court's decision for abuse of discretion.

communications truly used to further a crime. Especially when many executives and companies like those involved in the Third Circuit's case are operating in "complex legal and regulatory environments," in which consulting with their attorneys is necessary before taking any action at all,²²⁴ courts should grant them the benefit of the doubt by adopting a preponderance of the evidence standard to require outright disclosure of otherwise privileged attorney-client communications.

In this and other "close case[s]"²²⁵ in the criminal context, requiring a preponderance standard to invoke the exception would strike an appropriate balance between government interests and those of grand jury targets attempting to maintain confidential communications with their attorneys. It would also ameliorate the confusion that has led some courts to apply a similar standard to defeat the privilege as that adopted for *in camera* review, as discussed in Part II.A.2, while still ensuring district courts are adequately equipped to weigh whether the privilege should yield in a specific case.

CONCLUSION

The crime-fraud exception to the attorney-client privilege presents a unique set of challenges to privilege holders in criminal cases. These challenges are compounded by the fact that the Supreme Court has declined to articulate a clear standard for lower courts to apply when deciding whether the government has made an adequate showing of the prima facie case necessary to overcome the privilege. In the wake of the Supreme Court's failure to articulate a clear standard, the circuits have come up with varying conceptions of the requisite showing. While it is difficult to definitively conclude the circuits have applied those various articulations to achieve inconsistent results (meaning the same factual situation would come out differently in a different circuit), there is undoubtedly a risk of such disparate conclusions arising.

Despite this qualified conclusion regarding whether the various articulations in fact lead to disparate results, that the current standards required by all circuits is quite low is obvious. Many reasons counsel in favor of raising those low standards and requiring a preponderance of the evidence to establish the requisite "prima facie case" referenced by the Supreme Court in *Clark*.²²⁶ Among the most pertinent are that such a standard would be consistent with Supreme Court precedent and would better protect the rights of criminal defendants. This latter point cannot be overstated in light of the fact that criminal defendants already face a stacked deck when it comes to defending their claim of attorney-client privilege.

224. See *In re Sealed Case* 107 F.3d 46, 50 (D.C. Cir. 1997) ("Companies operating in today's complex legal and regulatory environments routinely seek legal advice about how to handle all sorts of matters, ranging from their political activities to their employment practices to transactions that may have antitrust consequences. There is nothing necessarily suspicious about the officers of this corporation getting such advice.").

225. *In re Grand Jury Subpoena*, 745 F.3d at 691.

226. *Clark v. United States*, 289 U.S. 1, 14 (1933).

Among the procedures already weighing against them are the limited rebuttal opportunities available to targets in the grand jury context, the counterintuitive application of greater protections for civil parties over that given to criminal defendants, and the deferential standard by which appellate courts review the decisions of district courts to apply the crime-fraud exception. Given these considerations, the Supreme Court should heighten the showing required to vitiate the attorney-client privilege through the crime-fraud exception if the issue is again presented.