



PROGRAM MATERIALS

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Keeping the Fox Out of the Henhouse: How Recent Court Decisions and a Mid-Trial Debacle Can Help Shield Privileged Material from the Government

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Keeping the Fox Out of the Henhouse CLE
Andrey Spektor, Laura Perlov, Eric Chartan

I. Introduction (Chartan)

- a. Our practice / background (Each person provides a brief overview of their practice areas)
- b. Roadmap for the CLE (Chartan)
- c. Disclaimer: This CLE covers US law and concepts. Understand that outside the United States privilege issues get tricky and you should be very careful with respect to what you think might be a privileged communication.

II. The Privileges (Perlov)

a. A/C Communications

- i. The Restatement (Third) of the Law Governing Lawyers §68 says that the privilege may be invoked with respect to:
 - 1. a communication;
 - 2. made between privileged persons;
 - 3. in confidence;
 - 4. for the purpose of obtaining or providing legal assistance for the client.

b. A Work Product

- i. Work product is protected, but differently
- ii. Work product means "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." *Fed.R.Civ.P.* 26(b)(3)(A)
- iii. So oral communications are not work product (except maybe in CA)
- iv. Note that non-attorneys can generate "work product"; this is often a source of confusion
- v. But litigation must still be anticipated (except in California – maybe others?)
- vi. Better have a document hold in place
- vii. Work product can be discovered if the other side "has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means" *Fed.R.Civ.P.* 26(b)(3)(A)(ii)
- viii. However, "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" cannot be discovered. *See Fed.R.Civ.P.* 26(b)(3)(B)
- ix. Work product must be kept confidential from the other side

- x. But it *probably* can be shared with friendlies without waiver. *See* Wright & Miller, Fed. Prac. & Proc. Civ. 2024 (3d. ed. 2018); *Fox v. Alfini*, 2018 CO 94, ¶ 45 (Colo. 2018) (Hood, J., concurring) (“And, unlike the attorney-client privilege, voluntary disclosure of information to third parties does not ordinarily constitute a waiver of exemption from discovery under the work product doctrine, unless such disclosure is to an adversary in the litigation.”)
 - 1. This includes auditors, but take precautions

c. Joint Defense/Common Interest Privilege

- i. Recognized under federal common law. Requires underlying attorney-client privilege.
- ii. For the common interest doctrine to apply, most circuit courts require that: (1) the communications were made in the course of a joint defense effort; (2) the statements were designed to further the effort; and (3) the privilege has not been waived.
- iii. Some states do not recognize the doctrine, most courts apply it only when the participants are in or anticipate litigation, and courts disagree about many of the doctrine's requirements.
 - 1. Courts also vary in their requirements for the type of common interest that ultimately triggers the privilege. The Restatement takes a broad approach, stating that the relevant common interest “may be either legal, factual, or strategic in character.” Range across courts from any interests not completely adverse to identical interests.
 - 2. The timing and substance of the relevant communication is significant. Communications that do not further the common interest normally will not be protected and communications occurring before a common interest agreement is in place are not usually privileged
- iv. To maintain a common interest or joint defense, parties must show that the communications were made in the course of and to further the goals of the common interest or joint defense.
- v. Best practices:
 - 1. The agreements do not need to be in writing (though it’s obviously better if there is a written agreement).
 - 2. Best practice to share information between the two attorneys rather than the two clients. - most courts only apply the common interest privilege to client-to-client communications when a lawyer is either present or has directed the communication;
- vi. Privilege can apply to more than just litigation, i.e., it can apply to mergers or other situations where legal interests are aligned.

- III. DOJ/FBI Search and Seizure Protocols (Spektor)
 - a. Search Warrants vs Subpoena
 - i. Explain the legal standards for obtaining a search warrant;
 - ii. Explain the search warrant process, including the types of information typically included when sought and judicial review.
 - b. Does the government need to seek express permission from judges to seize privileged materials in search warrants? (Preview Harbor case)
 - c. If the government seizes privileged material and it didn't seek express permission to do so, what must it do?
- IV. Background on filter teams (Spektor)
 - a. What are they?
 - b. When are they used?
 - c. Why different from civil litigation where parties responsible for own review.
 - d. Preview of recent criticism.
- V. Recent developments (Spektor)
 - a. DOJ Special Matters Unit
 - b. Examples of DOJ preemptively seeking judicial review
 - i. In re Search Warrant dated April 21 & 28 (SDNY prosecutors requesting appointment of a special master following seizure of documents from Giuliani).
 - c. Harbor Healthcare System v. United States, 5 F.4th 593 (5th Cir 2021) – a “callous disregard” by the government for the company’s rights.
 - d. In re Sealed Search Warrant, 2021 U.S. App. LEXIS 26063 (Aug 30, 2021) (approving taint team protocol but noting that it allows privilege holder to conduct initial review and to seek judicial intervention before any potentially privileged documents are produced).
 - e. United States v. Under Seal, 942 F.3d 159 (4th Cir. 2019) – “prosecutors have a responsibility to not only see that justice is done, but to also ensure that justice *appears* to be done.”
 - f. In re Search of Elec. Commc’ns, 802 F.3d 516, 530 (3d Cir. 2015) – criticizing use of non-lawyers on taint teams.
 - g. In re Grand Jury Subpoenas, 454 F.3d 511, 523 (6th Cir. 2006) – taint team inappropriate where the “exigency typically underlying the use of taint teams is not present”
 - h. District court examples:
 - i. Avenatti mistrial
 - ii. United States v. Gallego (Arizona judge appointing special master over government’s objection)

- VI. What these recent developments mean for challenging taint teams in court (Spektor/Perlov)
- a. For subpoenaed documents, cite lack of exigency + Sixth Circuit opinion
 - b. For search warrants, privilege holder should at least have some input on relevant privilege / names of individuals whose communication could be privileged
 - c. Educate court on evolving precedent and past mistakes
 - d. If taint team protocol institutes insist on:
 - i. Staffing w/experienced attorneys
 - ii. No-contact rule
 - iii. Segregation of networks
 - iv. Process to return/destroy privileged items
 - v. Insist on thorough Brady review, after educating filter team on what would be exculpatory
 - vi. Judicial review for crime-fraud exception
 - vii. Deadlines to finish review
 - viii. Judicial warning for failing to follow rules
- VII. Practical Guidance for In-House Attorneys To Identify Documents and Communications as Privileged. (Chartan)
- a. Clearly Identifying Communications as Legal advice vs. Business advice. This goes for emails and attachments.
 - i. The document/email should be labelled "Attorney-Client Communication – For Purpose of Legal Advice."
 - ii. The lawyer should be the primary sender or recipient of privileged communications.
 - b. Confidential does not mean privileged.
 - c. Keeping communications limited to those who "need to know."
 - d. Educate business folks about waiver of the right to assert privilege.
 - e. Communications should be written as if your adversary or a judge or jury will read them.
 - f. Find teachable moments as you work with your business counterparts. It will prevent mistakes in the application of claiming privilege from recurring.
 - g. Perspectives from prosecution and defense side
 - i. Spektor to discuss how it works on gov side
 - ii. Perlov to discuss defending priv and strategy



Caution

As of: October 13, 2021 7:04 PM Z

United States v. Under Seal (In re Search Warrant Issued June 13, 2019)

United States Court of Appeals for the Fourth Circuit

September 10, 2019, Argued; October 31, 2019, Decided

No. 19-1730

Reporter

942 F.3d 159 *; 2019 U.S. App. LEXIS 32600 **; 2019 WL 5607697

In re: SEARCH WARRANT ISSUED JUNE 13, 2019; UNITED STATES OF AMERICA, Plaintiff - Appellee, v. UNDER SEAL, Defendant - Appellant.

Subsequent History: Rehearing denied by, Rehearing denied by, En banc [United States v. Under Seal \(In re Search Warrant Issued June 13\), 2020 U.S. App. LEXIS 2899 \(4th Cir., Jan. 28, 2020\)](#)

Prior History: **[**1]** Appeal from the United States District Court for the District of Maryland, at Baltimore. 1:19-mj-02155-TCB-1. Liam O'Grady, District Judge.

Disposition: REVERSED AND REMANDED.

Core Terms

Filter, Team, law firm, seized, attorney-client, Protocol, magistrate judge, emails, investigations, district court, prosecution team, search warrant, work-product, communications, Injunction, judicial function, irreparable harm, confidential, privileged, documents, Requests, privileged material, injunctive relief, circumstances, appearance, principles, lawyers, special master, work product, authorization

Case Summary

Overview

HOLDINGS: [1]-The district court erred in denying the law firm's motion seeking to enjoin the government's use of a filter team comprised of federal agents and prosecutors to inspect privileged attorney-client materials that were seized from the firm during the execution of a search warrant issued by a magistrate judge because the use of the team was improper as the team's creation inappropriately assigned judicial functions to the executive branch, the team was approved in ex parte proceedings prior to the search and seizures, and the use of the team contravened

foundational principles that protected attorney-client relationships; the magistrate judge (or an appointed special master) rather than the team had to perform the privilege review of the seized materials.

Outcome

Judgment reversed. Case remanded.

LexisNexis® Headnotes

Civil

Procedure > Remedies > Injunctions > Grounds for Injunctions

Civil

Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HNT](#) Injunctions, Grounds for Injunctions

The award of a preliminary injunction as an extraordinary remedy that is never awarded as of right. To prevail on a request for such preliminary relief, the plaintiff must establish that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm absent the requested preliminary relief, (3) the balance of the equities weighs in its favor, and (4) a preliminary injunction is in the public interest.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil

Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil

Procedure > Remedies > Injunctions > Grounds for Injunctions

[HN2](#) Standards of Review, Abuse of Discretion

When a district court denies a preliminary injunction based on its evaluation of only one of the factors, the appellate court reviews its assessment of that factor for abuse of discretion. In that circumstance, however, the appellate court must perform its own assessment of the factors not addressed by the district court. The appellate court then evaluates the district court's ultimate decision to deny injunctive relief for abuse of discretion.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil

Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN3](#) Standards of Review, Abuse of Discretion

In performing an abuse of discretion review, the appellate court assesses the district court's factual findings for clear error and its legal conclusions de novo. A district court abuses its discretion in denying preliminary injunctive relief when it rests its decision on a clearly erroneous finding of a material fact, or misapprehends the law with respect to underlying issues in litigation. Furthermore, a district court abuses its discretion when it makes an error of law, or when it ignores unrebutted, legally significant evidence.

Civil Procedure > . . > Injunctions > Grounds for Injunctions > Irreparable Harm

[HN4](#) Grounds for Injunctions, Irreparable Harm

With respect to the irreparable harm preliminary injunction factor, the movant is obliged to demonstrate that it is likely to suffer such harm in the absence of injunctive relief.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN5](#) Standards of Review, Abuse of Discretion

A court by definition abuses its discretion when it makes an error of law.

Civil Procedure > . . > Discovery > Privileged Communications > Attorney-Client Privilege

Evidence > Privileges > Attorney-Client Privilege > Scope

[HN6](#) Privileged Communications, Attorney-Client Privilege

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. The attorney-client privilege empowers a client, as the privilege holder, to refuse to disclose and to prevent any other person from disclosing confidential communications between him and his attorney.

Civil Procedure > . . > Discovery > Privileged Communications > Attorney-Client Privilege

Evidence > Privileges > Attorney-Client Privilege > Scope

[HN7](#) Privileged Communications, Attorney-Client Privilege

It is universally accepted that the attorney-client privilege may be raised by the attorney.

Civil Procedure > . . > Discovery > Privileged Communications > Attorney-Client Privilege

Evidence > Privileges > Attorney-Client Privilege > Scope

[HN8](#) Privileged Communications, Attorney-Client Privilege

A lawyer is entitled to raise a claim of privilege on behalf of his client.

Civil Procedure > .. > Discovery > Privileged
Communications > Attorney-Client Privilege

Evidence > Privileges > Attorney-Client
Privilege > Scope

[HN9](#) **Privileged Communications, Attorney-Client Privilege**

The purpose of the attorney-client privilege is to ensure full and frank communication between a client and his lawyer and thereby promote broader public interests in the observance of law and administration of justice. The attorney-client privilege exists because sound legal advice or advocacy serves public ends and such advice or advocacy depends upon the lawyer's being fully informed by the client. The rule which places the seal of secrecy upon communications between client and attorney 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.

Civil Procedure > .. > Privileged
Communications > Work Product Doctrine > Scope
of Protection

Evidence > Privileges > Attorney-Client
Privilege > Scope

[HN10](#) **Work Product Doctrine, Scope of Protection**

A lawyer must be able to work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that a lawyer assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. Absent strong protection for work product, inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial, all to the detriment of clients and the cause of justice.

Civil Procedure > .. > Privileged
Communications > Work Product Doctrine > Scope
of Protection

Evidence > Privileges > Attorney-Client
Privilege > Scope

[HN11](#) **Work Product Doctrine, Scope of Protection**

The United States Supreme Court has explicitly approved what it called a qualified privilege, to be held by lawyer and client alike, for certain materials prepared by an attorney acting for his client in anticipation of litigation. That privilege is the work-product doctrine, which has now been incorporated into the Federal Rules of Civil Procedure, [Fed. R. Civ. P. 26\(b\)\(3\)](#), and the Federal Rules of Criminal Procedure, [Fed. R. Crim. P. 16\(a\)\(2\)](#), [\(b\)\(2\)](#).

Civil Procedure > .. > Privileged
Communications > Work Product Doctrine > Fact
Work Product

Evidence > Privileges > Attorney-Client
Privilege > Scope

Civil Procedure > .. > Privileged
Communications > Work Product
Doctrine > Opinion Work Product

[HN12](#) **Work Product Doctrine, Fact Work Product**

There are two types of attorney work product that are within the ambit of the doctrine: (1) fact work product, which is a transaction of the factual events involved, and (2) opinion work product, which represents the actual thoughts and impressions of the attorney. Opinion work product enjoys a nearly absolute immunity and can be discovered by adverse parties only in very rare and extraordinary circumstances. Fact work product is somewhat less protected, and discovery thereof by others may only be had in limited circumstances, where a party shows both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship.

Civil Procedure > .. > Discovery > Privileged
Communications > Attorney-Client Privilege

Evidence > Privileges > Attorney-Client
Privilege > Scope

Constitutional Law > .. > Fundamental
Rights > Criminal Process > Assistance of Counsel

Civil Procedure > ... > Discovery > Privileged
Communications > Work Product Doctrine

Civil Procedure > . > Discovery > Privileged
Communications > Attorney-Client Privilege

Evidence > Privileges > Attorney-Client
Privilege > Scope

Civil Procedure > ... > Discovery > Privileged
Communications > Work Product Doctrine

[HN13](#) **Privileged Communications, Attorney-Client Privilege**

The attorney-client privilege and the work-product doctrine jointly support the [Sixth Amendment's](#) guarantee of effective assistance of counsel. [U.S. Const. amend. VI](#) provides that in all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence. For example, in assessing the interplay between the attorney-client privilege and the [Sixth Amendment](#), the essence of the [Sixth Amendment](#) right to effective assistance of counsel is, indeed, privacy of communication with counsel. Absent privacy of communications and the full and frank discussions that flow therefrom, a lawyer could be deprived of the information necessary to prepare and present his client's defense.

Civil Procedure > ... > Privileged
Communications > Work Product Doctrine > Scope
of Protection

Constitutional Law > .. > Fundamental
Rights > Criminal Process > Assistance of Counsel

Evidence > Privileges > Attorney-Client
Privilege > Scope

[HN14](#) **Work Product Doctrine, Scope of Protection**

The work-product doctrine fulfills an essential and important role in ensuring the [Sixth Amendment](#) right to effective assistance of counsel. The work-product doctrine is vital to assure the proper functioning of the criminal justice system, in that it provides a privileged area within which a lawyer can analyze and prepare his client's case. Without that privileged area, a lawyer's ability to plan and present his client's defense will be impaired.

[HN15](#) **Privileged Communications, Attorney-Client Privilege**

Although the attorney-client privilege and work-product doctrine are essential components of America's adversarial system, neither is absolute. For example, claims of attorney-client privilege or work-product protection can sometimes be defeated by the crime-fraud exception. Put succinctly, both the attorney-client and work-product privileges may be lost when a client gives information to an attorney for the purpose of committing or furthering a crime or fraud.

Civil Procedure > ... > Discovery > Privileged
Communications > Attorney-Client Privilege

Evidence > Privileges > Attorney-Client
Privilege > Scope

Civil Procedure > ... > Discovery > Privileged
Communications > Work Product Doctrine

[HN16](#) **Privileged Communications, Attorney-Client Privilege**

When a dispute arises as to whether a lawyer's communications or a lawyer's documents are protected by the attorney-client privilege or work-product doctrine, the resolution of that dispute is a judicial function. In deciding whether to enforce an administrative subpoena seeking potentially privileged documents, a court cannot delegate an in camera review of documents to an agency, but must itself decide a claim of privilege. Evaluating privilege claim is always a judicial function. Indeed, the Constitution vests the judicial Power solely in the federal courts, [U.S. Const. art. III, § 1](#), which includes the duty of interpreting and applying the law. Put simply, a court is not entitled to delegate its judicial power and related functions to the executive branch, especially when the executive branch is an interested party in the pending dispute.

Civil Procedure > Discovery &
Disclosure > Discovery > Privileged
Communications

Constitutional Law > The Judiciary

Evidence > Privileges

[HN17](#) [📄] **Discovery, Privileged Communications**

A court simply cannot delegate its responsibility to decide privilege issues to another government branch.

Civil Procedure > Discovery &
Disclosure > Discovery > Privileged
Communications

Evidence > Privileges

Constitutional Law > The Judiciary

[HN18](#) [📄] **Discovery, Privileged Communications**

Non-lawyer federal agents cannot make privilege determinations.

Governments > Courts > Authority to Adjudicate

[HN19](#) [📄] **Courts, Authority to Adjudicate**

It is the fundamental province of a court to decide cases correctly, even if that means considering arguments not raised by the parties at all.

Legal Ethics > Professional Conduct > Opposing
Counsel & Parties

[HN20](#) [📄] **Professional Conduct, Opposing Counsel & Parties**

The Model Rules of Professional Conduct generally bar a lawyer from communicating with a represented party about the subject of the representation without the represented party's lawyer being present. Model Rules of Prof'l Conduct R. 4.2. Rule 4.2 prevents a lawyer from taking advantage of a lay person, and Model Rules of Prof'l Conduct R. 4.1.2 discusses the application of Rule 4.2 to prosecutors. Although an exception to that rule can, in the proper circumstances, be made by a

court, any such court order should be predicated on an individualized assessment of the attorney-client relationship. Rule 4.2. The court must make informed decision regarding whether to authorize lawyer's communication with represented party.

Civil Procedure > ... > Discovery > Privileged
Communications > Attorney-Client Privilege

Evidence > Privileges > Attorney-Client
Privilege > Scope

[HN21](#) [📄] **Privileged Communications, Attorney-Client Privilege**

The attorney-client privilege can extend to the client's identity.

Civil Procedure > ... > Discovery > Privileged
Communications > Attorney-Client Privilege

Legal Ethics > Client Relations > Duties to
Client > Duty of Confidentiality

Evidence > Privileges > Attorney-Client
Privilege > Scope

[HN22](#) [📄] **Privileged Communications, Attorney-Client Privilege**

The breach of the duty of confidentiality is enforceable by civil remedies as well as through the attorney disciplinary process. And a breach of the attorney-client privilege by an attorney is likewise sanctionable.

Constitutional Law > ... > Fundamental
Rights > Search & Seizure > Plain View

[HN23](#) [📄] **Search & Seizure, Plain View**

Under the plain-view doctrine, a law enforcement officer can make a seizure of an object in plain view if, inter alia, the object's incriminating character is immediately apparent.

Civil Procedure > Appeals > Appellate Jurisdiction

[HN24](#) [📄] **Appeals, Appellate Jurisdiction**

The appellate court is a court of review, not of first view.

Counsel: ARGUED: James Patrick Ulwick, KRAMON & GRAHAM, P.A., Baltimore, Maryland, for Appellant.

Derek Edward Hines, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

ON BRIEF: Steven M. Klepper, Louis P. Malick, KRAMON & GRAHAM, P.A., Baltimore, Maryland, for Appellant.

Robert K. Hur, United States Attorney, Aaron S.J. Zelinsky, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

Judges: Before GREGORY, Chief Judge, and KING and RUSHING, Circuit Judges. RUSHING, Circuit Judge, concurring.

Opinion by: KING

Opinion

[*164] KING, Circuit Judge:

The appellant in these proceedings is a Baltimore law firm (the "Law Firm") that challenges the government's use of a so-called "Filter Team" — created *ex parte* by a magistrate judge in the District of Maryland and comprised of federal agents and prosecutors — to inspect privileged attorney-client materials. Those materials were seized from the Law Firm in June 2019 during the execution of a search warrant issued by the magistrate judge. The Law Firm requested **[**2]** that the district court enjoin the Filter Team's review of the seized materials, invoking the attorney-client privilege and the work-product doctrine. When the court denied its request, the Law Firm pursued this appeal. As explained below, we are satisfied that use of the Filter Team is improper for several reasons, including that, inter alia, the Team's creation inappropriately assigned judicial functions to the executive branch, the Team was approved in *ex parte* proceedings prior to the search and seizures, and the use of the Team contravenes foundational principles that protect attorney-client relationships. We therefore reverse and remand.

I.

A.

1.

For about three years, "Lawyer A," a partner of the Law Firm, handled the **[*165]** representation of "Client A" in an investigation conducted by federal authorities in Maryland.¹ Client A — who is also a Maryland lawyer — was suspected of assisting drug dealers in illicit activities, including money laundering and obstruction of federal investigations. According to the government, its investigation of Client A was obstructed by Lawyer A, and the relationship between Lawyer A and Client A triggered an application of the crime-fraud exception to the **[**3]** attorney-client privilege and work-product doctrine. In light of Lawyer A's suspected misconduct, the government also initiated an investigation of Lawyer A.

As part of those investigative efforts, an IRS agent applied for a warrant to conduct a search of the Law Firm's Baltimore offices. On June 13, 2019, the magistrate judge approved the search warrant application and issued the warrant as requested. Based on her review of the supporting affidavit of the IRS agent, the judge found probable cause for the search of the Law Firm and the seizures of client-related materials concerning Lawyer A's representation of Client A.

2.

Contemporaneously with issuance of the search warrant, the magistrate judge authorized the Filter Team, which had been proposed to the judge *ex parte* by the prosecutors in connection with the search warrant application. In so doing, the judge adopted the "Filter Team Practices and Procedures" specified in an attachment to the search warrant application and affidavit (the "Filter Protocol"). See S.J.A. 41-45.² The Filter Protocol defined the membership of the Filter Team and established the process for its review of the materials to be thereafter seized from the Law **[**4]** Firm. Members of the Filter Team included lawyers from the United States Attorney's Office in Maryland's Greenbelt Division (the "Filter Team AUSAs"); a legal

¹ In seeking to protect the identities of those involved in these proceedings, we use the nonspecific terms "Law Firm," "Lawyer A," and "Client A." Our use of those terms is generally consistent with the record on appeal.

² Citations herein to "S.J.A. __" refer to the contents of the Sealed Joint Appendix filed by the parties in this appeal. The government later sought to supplement the Sealed Joint Appendix by filing an *ex parte* appendix, the contents of which would be available only to itself and the Court and were never available to the Law Firm. On September 12, 2019, we rejected the filing of the *ex parte* supplemental appendix.

assistant and a paralegal who also worked there; agents of the IRS and DEA; and forensic examiners. The Filter Team operated in one of the two offices of Maryland's United States Attorney — the Greenbelt office.

Pursuant to the Filter Protocol, the Filter Team members were not involved in the investigations of Lawyer A and Client A (apart from being Filter Team members). The agents and prosecutors conducting the investigations of Lawyer A and Client A (the "Prosecution Team") were excluded from the Filter Team. In contrast to the Filter Team AUSAs who were assigned to the Greenbelt office, the Prosecution Team lawyers were assigned to the United States Attorney's Baltimore office.

As for the Filter Team's process of reviewing attorney-client materials seized from the Law Firm, the Filter Protocol provided for privilege issues to be handled thusly:

- After seizing materials from the Law Firm, the Filter Team would identify and separate privileged and potentially privileged materials from materials that were not **[**5]** privileged. Under **[*166]** the Filter Protocol, privileged materials included "attorney-client information, attorney work product information, and client confidences that have not been waived," see S.J.A. 43, 45;
- When seized materials were found by the Filter Team to be nonprivileged, the Filter Team AUSAs could forward such materials directly to the Prosecution Team, without the consent of the Law Firm or a court order (the "Privilege Assessment Provision");
- For privileged and potentially privileged materials, the Filter Team would decide whether any such seized materials were "responsive to the search warrant," *id.* at 44;
- For privileged and potentially privileged materials that were "responsive to the search warrant," *id.*, the Filter Team AUSAs would place them in one of three categories:
 1. Seized materials that were privileged and could not be redacted;
 2. Seized materials that were privileged but could be redacted; or
 3. Seized materials that were potentially privileged (for example, when the Filter Team identified some possible exception, such as the crime-fraud exception, to a claim of privilege);
- After providing copies to counsel for Lawyer A of

the seized materials identified as within categories **[**6]** 2 and 3, the Filter Team AUSAs would seek an agreement with counsel for Lawyer A concerning whether those materials could be forwarded to the Prosecution Team; and

- If the Filter Team AUSAs and counsel for Lawyer A disagreed on the handling of seized materials, the Filter Team AUSAs would submit such "items to the court for [a] determination regarding privilege and/or proposed redactions of the privileged material," *id.*

The Filter Protocol also authorized the Filter Team to provide the Prosecution Team with seized materials if a Filter Team member "obtain[ed] [a] waiver[] of the attorney-client privilege" by directly contacting the Law Firm client holding the privilege. See S.J.A. 42. Under the Protocol, "[i]f a client waive[d] the attorney-client privilege as to files, no further filter review of [those] files . . . for attorney-client privileged material [was] required." *id.*

3.

Five days after the magistrate judge issued the search warrant, on June 18, 2019, fifteen IRS and DEA agents — who were members of the Filter Team — executed the warrant by conducting a six-hour search of the Law Firm's offices. Those agents seized voluminous materials, including certain "confidential, privileged **[**7]** documents" of the Law Firm concerning, *inter alia*, Lawyer A's representation of Client A. See S.J.A. 66. For example, the agents electronically copied and seized the contents of Lawyer A's iPhone and computer. The electronically seized materials contained all of Lawyer A's email correspondence, including email correspondence related to Client A and numerous other Law Firm clients.³ More specifically, Lawyer **[*167]** A's

³The inventory for the return of the search warrant that was filed under seal in the district court describes in very general terms the items seized. See [Fed. R. Crim. P. 41\(f\)\(1\)\(B\)](#) (requiring officer present during execution of warrant to prepare and verify inventory of property seized). For example, the inventory states that agents performed "extraction[s]" of Lawyer A's iPhone, of an iPad belonging to the Law Firm, and of a laptop belonging to a Firm associate. See S.J.A. 21. The inventory also describes the seizures of, *inter alia*, a laptop, a hard drive, a portable drive, and several compact discs. Additionally, the inventory describes the seizures of various physical documents, including "handwritten notes" found at the desk of a Law Firm associate, "client notes" found at the desk of Lawyer A's assistant, and a redweld folder containing

seized email inbox contained approximately 37,000 emails, of which 62 were from Client A or contained Client A's surname. And Lawyer A's seized email "sent items" folder contained approximately 15,000 emails, of which 54 had been sent to Client A or contained Client A's surname. *Id.* at 80.⁴ An "extensive" portion of the seized emails were "from other [Law Firm] attorneys concerning . . . other attorneys' clients that have no connection with th[e] investigation[s]" of Lawyer A and Client A. *Id.* at 66. Notably, some of those Law Firm clients "are being investigated by, or are being prosecuted by, the United States Attorney's Office [for the District of Maryland] for unrelated crimes." *Id.*⁵

During the execution of the search warrant by the IRS and DEA on June 18, 2019, various Law Firm partners **[**8]** voiced objections, including to the breadth of the search and seizures. Those objections were made directly to the federal agents conducting the search, and were also made to at least two prosecutors, including a member of the Prosecution Team. A Law Firm partner specifically requested that the government's forensic examiners limit their seizures of Lawyer A's emails to those that included Client A's name or other relevant search terms. Those requests were all rejected.⁶

"communications handwritten and typed" found in Lawyer A's office. *Id.* at 22-23.

⁴ Our foregoing explanation of the seizures of Lawyer A's emails is derived in part from the affidavit of an information technology professional filed by the Law Firm in the district court. See S.J.A. 80-81 (affidavit stating that "I electronically reviewed [Lawyer A's] email folders on the [F]irm's computer server and determined that (a) [Lawyer A's] email inbox contained a total of 37,114 emails with a total size of 9,124,544 KB, of which only 62 emails with a total size of 21,582 KB were from [Client A] or contained [Client A's surname]; and (b) [Lawyer A's] email sent items contained 15,219 emails with a total size of 2,308,938 KB, of which only 54 emails with a total size of 20,049 KB were sent to [Client A] or contained [Client A's surname]"). No evidence contradicting that affidavit was presented to the district court.

⁵ In addition to the seizures by federal agents of thousands of emails and other communications between Lawyer A and persons other than Client A, the IRS and DEA agents seized multiple compact discs containing electronic documents that Lawyer A had received from lawyers who had previously represented Client A.

⁶ The facts specified herein with respect to the Law Firm's objections to the execution of the search warrant, and the government's refusal to limit the seizures of Lawyer A's emails, are spelled out in the affidavit of a Law Firm partner

By letter delivered to the United States Attorney on June 21, 2019, the Law Firm asserted that the search and seizures contravened the Constitution, Federal Rules of Criminal Procedure, and United States Attorneys' Manual. Additionally, the Law Firm advised the government that the Firm had a duty "to preserve client confidences and secrets," see S.J.A. 71, and that **[*168]** it was "ethically mandated to urge the return of all items seized by the government," *id.* at 72. The Law Firm's letter objected to the use of the Filter Team and requested that the government return the seized materials so that the Firm could conduct a privilege review — which would have been the process had the government used subpoenas *duces tecum* rather than **[**9]** a search warrant. The Law Firm also requested that the government not examine any of the seized materials until the Firm had an opportunity to complete its privilege review. Alternatively, the Law Firm asked the government to immediately submit the seized materials to the magistrate judge or the district court for *in camera* inspection. The government never responded to the Law Firm's letter.

B.

On June 26, 2019, Client A — whose own office had also been searched by federal agents and whose files were seized — moved in the district court for relief from the Filter Protocol, which also applied to that search. The following day, the court ordered that the Filter Team not deliver to the Prosecution Team any materials that were seized from Client A and the Law Firm, pending further order of the court.⁷

On June 28, 2019, the Law Firm separately moved in the district court for injunctive relief. More specifically, the Law Firm sought a temporary restraining order and

that was filed in the district court. See S.J.A. 67 (affidavit stating that "[o]n June 18, 2019, my law partners and I immediately voiced [the Law Firm's] objections to the search and seizure, both to agents conducting the search and by phone to Assistant United States Attorneys . . . I asked the [g]overnment's forensic examiners to limit the downloading of [Lawyer A's] emails to those that included [Client A's surname] or other relevant search terms, but they refused to do so without explanation"). The government did not rebut the lawyer's affidavit.

⁷ Because all the district judges in the District of Maryland recused themselves from these proceedings, a district judge in the Eastern District of Virginia was designated to handle them. The magistrate judge on this case is also an Eastern District of Virginia judge designated for service in the District of Maryland.

a preliminary injunction, pursuant to [Rule 65 of the Federal Rules of Civil Procedure](#), and the return of seized property, pursuant to [Rule 41\(g\) of the Federal Rules of Criminal Procedure](#) (collectively, the "Injunction Requests"). On July 1, 2019, the government responded to and opposed the Law Firm's Injunction Requests. The Law **[**10]** Firm replied the very next day.

Eight days later, on July 10, 2019, the district court conducted a telephonic hearing on the Injunction Requests.⁸ During that hearing, the Law Firm's counsel explained that the Law Firm had more than twenty lawyers, and he described the Firm's extensive and ongoing law practice in Maryland, including its involvement in a vast amount of criminal and civil litigation and related legal services. Counsel emphasized to the court that Lawyer A's entire email file had been copied and seized by the federal agents and that the file contained privileged communications with and between various lawyers and clients of the Law Firm concerning criminal and civil matters unrelated to the investigations of Lawyer A and Client A. Counsel advised the court that the Law Firm had conducted a search of Lawyer A's emails using Client A's surname and identified only 116 responsive emails in the approximately 52,000 emails that were seized from Lawyer A's email file. The Law Firm's counsel emphasized his objections to any use of a government filter team and argued that the Filter Protocol approved by the magistrate judge was fatally flawed. He stressed the Filter Protocol's illegality **[**11]** as to all clients of the Law Firm. Counsel added that the Filter Team would have access to and would be reviewing seized materials related to Law Firm clients that the Filter Team members could be investigating, or **[*169]** might thereby become interested in investigating.

The government responded that the Filter Team AUSAs had asked the Law Firm for a list of clients with pending matters in the United States Attorney's Office, in order to confirm that no Filter Team member was involved in such matters.⁹ The Law Firm, however, declined to provide that information. The government represented that it had no alternative but to seize Lawyer A's entire

email file because an onsite review was impractical. The government also argued that, if it had provided search terms to the Law Firm, those terms would have revealed what the government was searching for, and those revelations might have allowed Lawyer A to obstruct its investigations. In addition, the government claimed that using search terms might cause the Filter Team to overlook emails relevant to the investigations.

At the conclusion of the telephonic hearing of July 10, 2019, the district court orally denied the Law Firm's Injunction Requests, **[**12]** ruling that the Firm had not shown "any likelihood of irreparable harm." See S.J.A. 122. The court related that "filter teams can be neutral," and that this Filter Team was "operating under the [c]ourt's direction." *Id.* at 120. The court observed that, "absent a finding that there has been some breach of [the prosecutors'] ethical responsibilities and duties in this case, which rarely occurs," the Filter Protocol was not "inappropriate." *Id.* at 121. Additionally, the court related that "having an independent group" of prosecutors review the seized materials did not "create[] great risk or create[] the appearance of unfairness." *Id.* The court said there was no "per se rule that law firms are to be treated so differently that neutral examiners must be appointed in every case." *Id.* Finally, the court remarked that the Law Firm had "delay[ed] in coming to the [c]ourt," and stated that the Filter Team had made substantial progress in reviewing the seized materials. *Id.* at 122.

On July 11, 2019 — the day after the hearing — the district court entered an order denying the Injunction Requests because the Law Firm had not established that it would suffer irreparable harm absent injunctive relief. See *In re Search of Under Seal*, No. 1:19-mj-02155 (D. Md. July 11, 2019), ECF No. 11 **[**13]** (the "Denial Order"). The Denial Order stated, in part:

In reviewing the search warrant, the [m]agistrate [j]udge knew that the search was to be of [a] law firm[] and imposed appropriate and well-established constraints on the [Filter Team] that would be reviewing the seized documents. There is no inherent conflict in having the seized documents reviewed by [the Filter Team] composed of Assistant United States Attorneys who have no connection to the underlying case or [the Law Firm] and no contact with the [Prosecution Team] on this case. . . . As a result, the [c]ourt finds that the limits in the search warrant and the constraints imposed on the [Filter Team] are such that the appointment of a special master or magistrate judge is not necessary to protect [the Law Firm] or its clients

⁸ The district court was not available for an earlier hearing due to the extended Fourth of July holiday weekend and the court's schedule.

⁹ In addition to a list of Law Firm clients with pending matters in the United States Attorney's Office, a Filter Team AUSA requested that a Firm partner supply the Filter Team with a list of all Lawyer A's "cases." See S.J.A. 74.

from irreparable harm.

Id. at 2.

Later that day, the Law Firm noted this appeal, pursuant to [28 U.S.C. § 1292\(a\)\(1\)](#). That jurisdictional provision authorizes appellate review of a district court's decision denying injunctive relief.

[*170] On July 17, 2019, after the Law Firm's appeal was lodged, the district court entered an agreed order modifying the Privilege Assessment Provision **[**14]** of the Filter Protocol. Specifically, the court altered that Provision to require that the Filter Team's forwarding of seized materials to the Prosecution Team be first approved by the Law Firm or by the court (the "Modified Privilege Assessment Provision"). Prior to that modification, the Privilege Assessment Provision authorized the Filter Team to deem seized materials nonprivileged and give them directly to the Prosecution Team.

C.

On July 12, 2019, the Law Firm moved in this Court for an injunction pending appeal. Five days thereafter, on July 17, 2019, we granted the Law Firm some relief, directing the government to "cease review of the seized files and forthwith place the files in the custody of the [m]agistrate [j]udge to be held under seal pending further order of this Court." See ECF No. 39.¹⁰

After expediting this appeal and receiving the Law Firm's opening brief, we directed the government to specifically address four issues in its brief. Especially pertinent here, we requested that the government address whether judicial functions had been improperly assigned to the Filter Team.

We conducted oral argument in Richmond on September 10, 2019. Two days later, on September 12, **[**15]** 2019, we entered an order that reversed "the district court's denial of the Law Firm's request that review of the seized materials be made by the magistrate judge, rather than by the Filter Team." See

¹⁰ On July 22, 2019, the government filed with our Court a "Notice of Compliance" with our directive of July 17, 2019, explaining that the Filter Team had provided the magistrate judge with all files — both paper and electronic — seized from the Law Firm. See ECF No. 44. By July 22, 2019, the seized materials had been "substantially reviewed and coded by the Filter Team." *Id.* As of that date, the government had not returned any of the seized materials to the Law Firm.

ECF No. 72 (the "Interim Order"). Our Interim Order reassigned the Filter Team's duties and functions to the magistrate judge and gave guidance in that regard. More specifically, we advised the magistrate judge to review all seized materials, identify those not related to Client A and return them to the Law Firm, and conduct a privilege evaluation of the remaining materials. As promised in the Interim Order, we now issue this opinion to explain our rulings in these proceedings.¹¹


II.

The Supreme Court has described [HN1](#) the award of a preliminary injunction as "an extraordinary remedy [that is] never awarded as of right." See [Winter v. Nat. Res. Defense Council, Inc.](#), 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). To prevail on a request for such **[*171]** preliminary relief, the plaintiff must establish that (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm absent the requested preliminary relief, (3) the balance of the equities weighs in its favor, and (4) a preliminary injunction is in the public interest. See [Centro Tepeyac v. Montgomery Cty.](#), 722 F.3d 184, 188 (4th Cir. 2013) (en banc).

[HN2](#) When a district court denies **[**16]** a preliminary injunction based on its evaluation of only one of the foregoing factors, we review its assessment of that factor for abuse of discretion. See [Fusaro v. Cogan](#), 930 F.3d 241, 248 (4th Cir. 2019) (explaining abuse of discretion standard); cf. [Henderson ex rel. NLRB v. Bluefield Hosp. Co.](#), 902 F.3d 432, 439 (4th Cir. 2018) (recognizing that court can deny preliminary injunction when party fails to satisfy any one of four factors). In that circumstance, however, we must perform our own assessment of the factors not addressed by the district court. See *Hobby Lobby*

¹¹ The government represented at oral argument that it had given the magistrate judge all the Filter Team's work product that related to the seized materials. And the lawyer asserted that the government's July 22, 2019 Notice of Compliance so stated. We are not at all certain, however, that the Notice provides such advice. As will be explained, because the Filter Team was performing judicial functions when conducting its review pursuant to the Privilege Assessment Provision and the Modified Privilege Assessment Provision, the government is obliged to fully advise the magistrate judge as to the work that was performed by the Filter Team and to deliver any Filter Team work product to the judge. See Interim Order 2 ("All work product of the Filter Team shall forthwith be delivered by the [g]overnment to the magistrate judge for filing under seal.").


Stores, Inc. v. Sebelius, 723 F.3d 1114, 1145 & n.21 (10th Cir. 2013) (en banc). We then evaluate the court's "ultimate decision" to deny injunctive relief for abuse of discretion. See [Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal](#), 546 U.S. 418, 428, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006).

HN3  In performing an abuse of discretion review, we assess the district court's factual findings for clear error and its legal conclusions de novo. See [Fusaro](#), 930 F.3d at 248. A court abuses its discretion in denying preliminary injunctive relief when it "rest[s] its decision on a clearly erroneous finding of a material fact, or misapprehend[s] the law with respect to underlying issues in litigation." See [Centro Tepeyac](#), 722 F.3d at 188 (internal quotation marks omitted). Furthermore, a court "abuses its discretion when it makes an error of law," see [Koon v. United States](#), 518 U.S. 81, 100, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996), or when it ignores "unrebutted, legally significant evidence," see [Alvarez Lagos v. Barr](#), 927 F.3d 236, 255 (4th Cir. 2019).

III.

In making our assessment of the various injunction issues, we begin with ****17** whether the Law Firm is likely to suffer irreparable harm absent injunctive relief. We proceed in this manner because the district court's denial of the Law Firm's Injunction Requests was predicated solely on the irreparable harm factor of the four-part preliminary injunction test. We then evaluate the other factors, which the district court did not reach and address. More specifically, we consider and decide whether the Law Firm has demonstrated a likelihood of success on the merits of its challenge to the Filter Team and its Protocol, whether the balance of the equities weighs in the Firm's favor, and whether an award of injunctive relief is in the public interest. See [Centro Tepeyac v. Montgomery Cty.](#), 722 F.3d 184, 188 (4th Cir. 2013) (en banc).¹²

A.

HN4  With respect to the irreparable harm factor, the Law Firm is obliged to demonstrate that it is likely to suffer such harm in the absence of injunctive relief. See [Winter v. Nat. Res. Defense Council, Inc.](#), 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The Law

Firm maintains that, absent relief from the Filter Team and its Protocol, federal agents and ***172** prosecutors on the Filter Team will continue their review of "tens of thousands" of privileged materials concerning Law Firm clients other than Client A. See Br. of Appellant 45. The Law Firm emphasizes (1) that 99.8 percent of the 52,000 emails ****18** seized by the government were not from Client A, were not sent to Client A, and did not mention Client A's surname; and (2) that many of those emails contained privileged information relating to other clients of the Firm, including clients who are potential subjects or targets of government investigations.¹³

1.

In ruling that the Law Firm did not satisfy the irreparable harm factor, the district court failed to address the Law Firm's unrebutted evidence with respect to Lawyer A's emails. See [Alvarez Lagos v. Barr](#), 927 F.3d 236, 255 (4th Cir. 2019) (explaining that failure to address "unrebutted, legally significant evidence" constitutes abuse of discretion). That is, the court ignored evidence that less than one percent of the seized emails were from Client A, were to Client A, or mentioned Client A's surname, and that many seized emails contained privileged communications and attorney work product concerning other Law Firm clients. Additionally, the court failed to acknowledge the fact that some of those communications were from or about clients who "are being investigated by, or are being prosecuted by," federal prosecutors. See S.J.A. 66. As a result, the court did not grapple with the harm that is likely to be inflicted on the Law Firm ****19** and its clients from the Filter Team's review of many of the seized emails.¹⁴ The

¹³ Although the government argues on appeal that the Law Firm's evidence is not accurate and cannot be relied on, it failed to present any contradictory evidence to the district court. See [United States v. Anderson](#), 481 F.2d 685, 702 n.19 (4th Cir. 1973) (emphasizing importance of building appellate record in district court).

¹⁴ During the oral argument in this appeal, the government maintained that the Filter Team is entitled to review materials seized from the Law Firm that are not facially relevant to Client A. The government's justification for that proposition is that the Filter Team needs "context" for its privilege determinations. See Oral Argument at 43:20, *United States v. Under Seal*, No. 19-1730 (4th Cir. Sept. 10, 2019), <http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments>. According to this "context" argument, the government was entitled to seize and review documents for which probable cause was lacking. Unsurprisingly, the government has no supporting authority in that regard. See

¹² Although the district court mentioned the balance of the equities factor during the telephonic hearing of July 10, 2019, the court did not rely on that factor to deny the Injunction Requests.

court thus abused its discretion in that respect.

2.

The district court's failure to consider the Law Firm's un rebutted evidence compounded other errors of law that the court made with respect to the irreparable harm factor. See Koon v. United States, 518 U.S. 81, 100, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996) (explaining that HN5 a court "by definition abuses its discretion when it makes an error of law"). More specifically, the court erred by giving short shrift to the important legal principles that protect attorney-client relationships, which we are compelled to elucidate herein.

a.

As we know, HN6 the attorney-client privilege is "the oldest of the privileges for confidential communications known to the [*173] common law." See Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981); see also In re Grand Jury Subpoenas, 454 F.3d 511, 519 (6th Cir. 2006) (explaining that "[t]he privilege protecting confidential communications between an attorney and his client dates back to the Tudor dynasty"). The attorney-client privilege empowers a client — as the privilege holder — "to refuse to disclose and to prevent any other person from disclosing confidential communications between him and his attorney." See Black's Law Dictionary 129 (6th ed. 1990). And in [*20] proceedings such as these, lawyers are obliged to protect the attorney-client privilege to the maximum possible extent on behalf of their clients. See Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967) (recognizing that lawyer has duty to invoke claim of privilege on client's behalf); Model Rules of Prof'l Conduct r. 1.6(a), (c) (Am. Bar Ass'n 1983) (explaining that lawyer owes duty of confidentiality to client and must prevent unauthorized disclosure of confidential information). That proposition underlies the Law Firm's uncontested standing to pursue the legal positions it advances in this appeal. See Fisher v. United States, 425 U.S. 391, 402 n.8, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976) (HN7) "[I]t is universally accepted that the attorney-client privilege may be raised by the attorney[.]"; In re Grand Jury Proceedings, 727 F.2d 1352, 1354-55 (4th Cir. 1984) (emphasizing that HN8 a lawyer "is entitled to raise

[a claim of] privilege on behalf of his . . . client").

HN9 The purpose of the attorney-client privilege is to ensure "full and frank communication" between a client and his lawyer and "thereby promote broader public interests in the observance of law and administration of justice." See Upjohn Co., 449 U.S. at 389. As the Supreme Court has consistently emphasized, the attorney-client privilege exists because "sound legal advice or advocacy serves public ends and . . . such advice or advocacy depends upon the lawyer's [*21] being fully informed by the client." *Id.*; see also Hunt v. Blackburn, 128 U.S. 464, 470, 9 S. Ct. 125, 32 L. Ed. 488 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney 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.").

Although the work-product doctrine does not trace as far into history as the attorney-client privilege, it is no less important. The Supreme Court explicitly recognized and explained the work-product doctrine more than seventy years ago in its seminal decision in Hickman v. Taylor. See 329 U.S. 495, 510-11, 67 S. Ct. 385, 91 L. Ed. 451 (1947). In Hickman, the Court underscored that HN10 a lawyer must be able to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510. Elaborating on that principle, the Court emphasized that "[p]roper preparation of a client's case demands that [a lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." [*22] *Id.* at 511. As the Court warned, absent strong protection for work product, "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial," all to the detriment of clients and "the cause of justice." *Id.*

Thus, HN11 the Supreme Court has explicitly approved what it called "a qualified privilege," [*174] to be held by lawyer and client alike, "for certain materials prepared by an attorney 'acting for his client in anticipation of litigation.'" See United States v. Nobles, 422 U.S. 225, 237-38, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975) (quoting Hickman, 329 U.S. at 508). That privilege is the work-product doctrine, which has now been incorporated into the Federal Rules of Civil

United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1172 (9th Cir. 2010) (en banc) (criticizing government "overreach[]" in seizure of electronic data unsupported by probable cause), abrogated on other grounds by Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 16-17, 199 L. Ed. 2d 249 (2017).

Procedure, see [Fed. R. Civ. P. 26\(b\)\(3\)](#), and the Federal Rules of Criminal Procedure, see [Fed. R. Crim. P. 16\(a\)\(2\)](#), [\(b\)\(2\)](#).

[HN12](#)[↑] There are two types of attorney work product that are within the ambit of the doctrine: (1) fact work product, which is "a transaction of the factual events involved," and (2) opinion work product, which "represents the actual thoughts and impressions of the attorney." See [In re Grand Jury Subpoena](#), 870 F.3d 312, 316 (4th Cir. 2017) (internal quotation marks omitted). Opinion work product, we have recognized, "enjoys a nearly absolute immunity" and can be discovered by adverse parties "only in very rare and extraordinary circumstances." *Id.* (internal quotation marks omitted). Fact work product is somewhat less protected, and discovery thereof by others may only be had in limited circumstances, where a party shows "both a substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship." *Id.* (internal quotation marks omitted).

Notably, [HN13](#)[↑] the attorney-client privilege and the work-product doctrine jointly support the [Sixth Amendment's](#) guarantee of effective assistance of counsel. See [U.S. Const. amend. VI](#) ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); [Strickland v. Washington](#), 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (analyzing [Sixth Amendment](#) right to effective assistance of counsel). For example, in assessing the interplay between the attorney-client privilege and the [Sixth Amendment](#), we have emphasized that "[t]he essence of the [Sixth Amendment](#) right to effective assistance of counsel is, indeed, privacy of communication with counsel." See [United States v. Brugman](#), 655 F.2d 540, 546 (4th Cir. 1981); cf. [DeMassa v. Nunez](#), 770 F.2d 1505, 1507 (9th Cir. 1985) (describing [Sixth Amendment](#) as a "source" for the expectation of privacy in attorney-client communications); 1 Geoffrey C. Hazard, Jr. et al., *The Law of Lawyering* § 10.14, 10-91 (4th ed. Supp. 2019) (explaining that "[t]he attorney-client privilege has ties to the [Sixth Amendment](#)"). Absent privacy of communications and the "full and frank" discussions [**24](#) that flow therefrom, a lawyer could be deprived of the information necessary to prepare and present his client's defense. See [Upjohn Co.](#), 449 U.S. at 389.

Similarly, [HN14](#)[↑] the work-product doctrine fulfills an essential and important role in ensuring the [Sixth](#)

[Amendment](#) right to effective assistance of counsel. The Supreme Court has recognized that the work-product doctrine is vital to "assur[e] the proper functioning of the criminal justice system," in that it "provid[es] a privileged area within which [a lawyer] can analyze and prepare his client's case." See [Nobles](#), 422 U.S. at 238; see also [In re Grand Jury Subpoenas](#), 454 F.3d at 520 (explaining that "people should be free to make requests of their attorneys without fear, and that their attorneys should be free to conduct research and prepare litigation strategies without fear that these preparations will be subject to review by outside parties"). Without that "privileged area," a lawyer's ability to plan and present his client's defense will be impaired. See [Nobles](#), 422 U.S. at 238; [**175](#) see also [Hickman](#), 329 U.S. at 511.¹⁵

b.

In ruling that the Law Firm had not established a likelihood of irreparable harm, the district court erred as a matter of law by affording insignificant weight to the foregoing principles protecting attorney-client [**25](#) relationships. See [Upjohn Co.](#), 449 U.S. at 389 (emphasizing importance of attorney-client privilege); [Nobles](#), 422 U.S. at 237-38 (recognizing significance of protecting lawyer work product); cf. [Gunnells v. Healthplan Servs., Inc.](#), 348 F.3d 417, 434 (4th Cir. 2003) (explaining that court abuses discretion in ignoring applicable legal principles). Crucially, the court failed to recognize that an adverse party's review of privileged materials seriously injures the privilege holder. See [United States v. Philip Morris Inc.](#), 314 F.3d 612, 622, 354 U.S. App. D.C. 171 (D.C. Cir. 2003) (concluding that a party had demonstrated the likelihood of irreparable harm predicated on "the general injury caused by the breach of the attorney-client privilege and the harm resulting from the disclosure of privileged documents to an adverse party"), *abrogated on other grounds by* [Mohawk Indus., Inc. v. Carpenter](#), 558 U.S.

¹⁵ [HN15](#)[↑] Although the attorney-client privilege and work-product doctrine are essential components of our adversarial system, neither is absolute. For example, claims of attorney-client privilege or work-product protection can sometimes be defeated by the crime-fraud exception. See [In re Grand Jury Proceedings #5 Empanelled Jan. 28, 2004](#), 401 F.3d 247, 251 (4th Cir. 2005). Put succinctly, "[b]oth the attorney-client and work-product privileges may be lost . . . when a client gives information to an attorney for the purpose of committing or furthering a crime or fraud." *Id.* In these proceedings, the government has invoked that exception as to Client A of Lawyer A.

[100, 103, 130 S. Ct. 599, 175 L. Ed. 2d 458 \(2009\)](#); [In re Perrigo Co.](#), [128 F.3d 430, 437 \(6th Cir. 1997\)](#) (explaining that "forced disclosure of privileged material may bring about irreparable harm"); [Klitzman, Klitzman & Gallagher v. Krut](#), [744 F.2d 955, 960-61 \(3d Cir. 1984\)](#) (ruling that law firm had demonstrated likelihood of irreparable harm where government seized thousands of files containing privileged information).

3.

When the pertinent legal principles are properly applied to the unrefuted evidence, the Filter Team's review of the materials seized from the Law Firm was and is injurious to the Firm and its clients. And that harm is plainly irreparable, in that the Filter Team's review of those privileged materials **[**26]** cannot be undone. We are therefore satisfied that the Law Firm will be irreparably harmed absent an award of injunctive relief against the Filter Team and its Protocol.¹⁶

B.


Turning to the injunction factors not reached and addressed by the district court, we begin with the likelihood of success factor. In order to prevail on that **[*176]** factor, the Law Firm must make a "clear showing" that the Filter Team and its Protocol are legally flawed. See [Pashby v. Delia](#), [709 F.3d 307, 321 \(4th Cir. 2013\)](#). Stated differently, the Law Firm is obliged to demonstrate it is likely to succeed on its request that the magistrate judge — rather than the Filter Team — perform the privilege review of the seized materials.

In that regard, the Law Firm maintains that the Filter Team and its Protocol are simply "incompatible with courts' historical protection of the attorney-client privilege and the work-product doctrine." See Br. of Appellant 35. The Law Firm contends that there is a clear appearance of — and potential for — improprieties when government agents are authorized to rummage

through attorney-client communications, particularly when less than one percent of those communications relate to the investigations at issue. And the Law Firm posits that use **[**27]** of the Filter Team in these circumstances will chill the free flow of information between clients and lawyers. Put simply, the Law Firm maintains that judicial functions are involved in all aspects of assessing and deciding privilege issues. The Law Firm thus argues that a magistrate judge or a special master must perform those functions.


As further explained below, we are satisfied that the Law Firm has shown that it is likely to succeed on the merits of its challenge to the Filter Team and its Protocol. In approving the Filter Team and its Protocol, the magistrate judge made several legal errors by, inter alia: (1) assigning judicial functions to the Filter Team; (2) authorizing the Filter Team and its Protocol in *ex parte* proceedings that were conducted prior to the search and seizures at the Law Firm; and (3) failing to properly weigh the foundational principles that protect attorney-client relationships.


1.

To start, the magistrate judge — by authorizing the Filter Team and its Protocol — erred in assigning judicial functions to the executive branch. We have recognized that, [HN16](#)  when a dispute arises as to whether a lawyer's communications or a lawyer's documents are protected by the **[**28]** attorney-client privilege or work-product doctrine, the resolution of that dispute is a judicial function. See [NLRB v. Interbake Foods, LLC](#), [637 F.3d 492, 498, 500 \(4th Cir. 2011\)](#) (concluding that, in deciding whether to enforce an administrative subpoena seeking potentially privileged documents, a court "cannot delegate" an *in camera* review of documents to an agency, but must itself decide a claim of privilege); see also [In re The City of New York](#), [607 F.3d 923, 947 \(2d Cir. 2010\)](#) (observing that evaluating privilege claim is always a judicial function); [In re Grand Jury Proceedings #5 Empanelled Jan. 28, 2004](#), [401 F.3d 247, 256 \(4th Cir. 2005\)](#) (remanding to district court for *in camera* review concerning privileged communications and applicability of crime-fraud exception). Indeed, the Constitution vests "[t]he judicial Power" solely in the federal courts, see [U.S. Const. art. III, § 1](#), which includes "the duty of interpreting and applying" the law, see [Massachusetts v. Mellon](#), [262 U.S. 447, 488, 43 S. Ct. 597, 67 L. Ed. 1078 \(1923\)](#). Put simply, a court is not entitled to delegate its judicial power and related functions to the executive branch, especially when the executive branch is an interested party in the pending dispute. See [Interbake Foods](#), [637](#)

¹⁶ We observe that the Filter Team and its Protocol may inflict other injuries on the Law Firm. For example, adverse publicity about the search of the Law Firm, the Filter Team, and its Protocol could make potential clients less likely to seek out and retain the Firm. Additionally, potential and current clients might be reluctant to candidly communicate with the Law Firm attorneys because they fear government review of their communications and breaches of confidentiality. Consequently, the Law Firm is likely to be deprived of information necessary to the proper handling of its cases. See [Upjohn Co.](#), [449 U.S. at 389](#) (explaining necessity of "full and frank communication" between client and his lawyer).

[F.3d at 501](#) (affirming refusal "to delegate" to an administrative law judge the judiciary's "responsibility to decide the issue of privilege"); [NLRB v. Detroit Newspapers, 185 F.3d 602, 606 \(6th Cir. 1999\)](#) (concluding that "district court had the obligation . . . to determine whether [****29**] the subpoenaed documents [****177**] were protected by some privilege, and had no discretion to delegate that duty").

In these proceedings, the Privilege Assessment Provision of the Filter Protocol contravened that nondelegation principle. Put succinctly, the Privilege Assessment Provision erroneously authorized the executive branch — that is, the Filter Team — to make decisions on attorney-client privilege and the work-product doctrine. As our good colleague Judge Niemeyer recognized in *Interbake Foods*, [HN17](#)  a court simply cannot delegate its responsibility to decide privilege issues to another government branch. See [637 F.3d at 498, 500-01](#) (recognizing that court must decide privilege disputes); see also [In re The City of New York, 607 F.3d at 947](#) (observing that evaluating privilege claim is a judicial function).

To compound that error, the Privilege Assessment Provision delegated judicial functions to *non-lawyer* members of the Filter Team. In other words, the Privilege Assessment Provision authorized paralegals and IRS and DEA agents to designate seized documents as nonprivileged, and allowed the Filter Team AUSAs to deliver such documents to the Prosecution Team without the approval of the Law Firm or a court order. The Third Circuit has strongly criticized a [****30**] similar protocol and explicitly ruled that [HN18](#)  non-lawyer federal agents could not make privilege determinations. See [In re Search of Elec. Commc'ns, 802 F.3d 516, 530 & n.54 \(3d Cir. 2015\)](#).

In addition to the separation of powers issues that arise from the Filter Protocol's delegation of judicial functions to the Filter Team, there are other apparent legal problems therewith. There is the possibility that a filter team — even if composed entirely of trained lawyers — will make errors in privilege determinations and in transmitting seized materials to an investigation or prosecution team. On this point, the Sixth Circuit recognized several years ago that such filter teams present "reasonably foreseeable risks to privilege" and "have been implicated . . . in leaks of confidential information to prosecutors." See [In re Grand Jury Subpoenas, 454 F.3d at 523](#). As Judge Boggs aptly explained, a filter team might "have an interest in preserving privilege, but it also possesses a conflicting

interest in pursuing the investigation, and . . . some [filter] team attorneys will make mistakes or violate their ethical obligations. It is thus logical to suppose that [filter] teams pose a serious risk to holders of privilege." *Id.*

As the Sixth Circuit also emphasized, filter team errors can arise from differences of [****31**] opinion regarding privilege. See [In re Grand Jury Subpoenas, 454 F.3d at 523](#). In explaining that problem, the court elaborated that a filter team's members "might have a more restrictive view of privilege" than the subject of the search, given their prosecutorial interests in pursuing the underlying investigations. *Id.* That "more restrictive view of privilege" could cause privileged documents to be misclassified and erroneously provided to an investigation or prosecution team. *Id.*

The Sixth Circuit also acknowledged that filter team errors can result from mistakes or neglect, and described one infamous occurrence as follows:

In [United States v. Noriega, 764 F. Supp. 1480 \(S.D. Fla. 1991\)](#), . . . the government's [filter] team missed a document obviously protected by attorney-client privilege, by turning over tapes of attorney-client conversations to members of the investigating team. This *Noriega* incident points to an obvious flaw in the [filter] team procedure: *the government's fox is left in charge of the [law firm's] henhouse*, and may err by [****178**] neglect or malice, as well as by honest differences of opinion.

See [In re Grand Jury Subpoenas, 454 F.3d at 523](#) (emphasis added).

Strikingly, the risks to attorney-client privilege and the work-product doctrine that were identified by the Sixth Circuit have been recently realized in the District [****32**] of Maryland, from which this appeal arises. See [United States v. Elbaz, No. 8:18-cr-00157, slip op. at 4-6, 396 F. Supp. 3d 583, 2019 U.S. Dist. LEXIS 103752 \(D. Md. June 20, 2019\)](#), ECF No. 216 (the "*Elbaz* opinion"). According to the *Elbaz* opinion, the government's filter team improperly disclosed thousands of potentially privileged documents to a prosecution team, which then examined some of the documents. *Id.* Those blunders occurred nearly a year before this Filter Team was authorized by the magistrate judge. [2019 U.S. Dist. LEXIS 103752 at *2](#). And the *Elbaz* opinion detailing that filter team's mistakes was filed in the District of Maryland on June 20, 2019, just a week after the magistrate judge's authorization of this Filter Team on June 13, 2019, and three weeks before the district

court's Denial Order of July 11, 2019.

In sum, the Filter Protocol improperly delegated judicial functions to the Filter Team. And the magistrate judge failed to recognize and consider the significant problems with that delegation, which left the government's fox in charge of guarding the Law Firm's henhouse. See [In re Grand Jury Subpoenas](#), 454 F.3d at 523.

2.

Relatedly, the magistrate judge erred by prematurely authorizing the Filter Team and its Protocol in *ex parte* proceedings that it conducted on June 13, 2019, five days before the search warrant was executed and **[**33]** voluminous seizures were made from the Law Firm.¹⁷ First, the timing of the judge's authorization undermined the judge's ability to exercise discretion with respect to the Filter Team and its Protocol, in that the judge could not have been fully informed of what was seized from the Law Firm. See [James v. Jacobson](#), 6 F.3d 233, 238 (4th Cir. 1993) (emphasizing that court's exercise of discretion must be "informed"). And the judge may well have rejected the Filter Team and its Protocol if the judge had known (1) that 99.8 percent of the 52,000 seized emails were not from Client A, were not sent to Client A, and did not mention Client A's surname; and (2) that many of those seized emails contained privileged information concerning other clients of the Law Firm. Put simply, the judge should have deferred the decision concerning the proposed Filter Team and its Protocol pending the execution and return of the search warrant.

Second, the magistrate judge should have declined the government's *ex parte* invitation with respect to the Filter Team, and the judge should have conducted adversarial proceedings on whether to authorize the Filter Team

and the Filter Protocol. See [RZS Holdings AVV v. \[*179\] PDVSA Petroleo S.A.](#), 506 F.3d 350, 356 (4th Cir. 2007) (emphasizing that *ex parte* proceedings are "greatly **[**34]** disfavored"); [In re Ingram](#), 915 F. Supp. 2d 761, 763-64 (E.D. La. 2012) (assessing briefing from parties on propriety of filter team). In such contested proceedings, the judge could have been fully informed of the relevant background on the Law Firm and its clients, as well as the nature of the seized materials. Additionally, the clients of the Law Firm and their lawyers could have been heard by the judge.

In a recent example involving a proposed filter team, federal agents searched the office of Michael Cohen, a New York City lawyer, and seized privileged materials. See *Cohen v. United States*, No. 1:18-mj-03161 (S.D.N.Y. Apr. 13, 2018), ECF No. 6 at 4, 25. Four days after the search — and before the filter team created by the search warrant had reviewed any of the seized materials — the district court conducted adversarial proceedings concerning the prosecutor's proposed use of a filter team. See *generally Cohen*, ECF No. 36 (May 1, 2018). Prior to those proceedings, the court was informed of the materials that had been seized from Cohen's office. See *Cohen*, ECF No. 6 at 18-19. During the proceedings, the court heard from Cohen's lawyer and the lawyer for Cohen's primary client, who each argued against court approval of the filter team request. **[**35]** See *Cohen*, ECF No. 36 at 12-16, 30-31

The sensible procedures adhered to by the *Cohen* court demonstrate that, if the magistrate judge had conducted adversarial proceedings after the search but before approving the Filter Team and its Protocol in this case, the judge would have been fully informed of the materials that were seized from the Law Firm. The judge would then have heard from the Law Firm's counsel, and possibly also from the clients of the Firm through their lawyers, *before* the Filter Team reviewed any seized materials. The upshot is that — in failing to conduct adversarial proceedings prior to authorizing the Filter Team and its Protocol — the magistrate judge prematurely granted the *ex parte* request of the United States Attorney.¹⁸

¹⁷ Although the Law Firm generally contests the *ex parte* actions of the government below and on appeal, the Firm does not specifically argue that the magistrate judge erred by approving the Filter Team and its Protocol in *ex parte* proceedings before the search was conducted. See Br. of Appellant 57; Reply Br. of Appellant 3, 22. We are nevertheless satisfied that the process by which the authorization was made falls within the Law Firm's broad challenge to the Filter Team and its Protocol. Moreover, we are entitled to assess legal issues that have not been squarely raised when it facilitates the correct resolution of an appeal. See [Meyers v. Lamer](#), 743 F.3d 908, 912 (4th Cir. 2014) (emphasizing that [HN19](#) "it is the fundamental province of this Court to decide cases correctly, even if that means considering arguments ... not raised by the parties at all").

¹⁸ The process adhered to by the *Cohen* court is pertinent to these proceedings in several material respects. For example, the *Cohen* filter team did not review any of the seized materials prior to an adversarial hearing and a ruling on the filter team's propriety. Importantly, the court heard from Cohen's lawyer and counsel for Cohen's primary client in those proceedings. The court ultimately rejected the

3.

a.

We are also troubled that, in summarily approving the Filter Team and its Protocol, the magistrate judge — like the district court in thereafter assessing the Injunction Requests — gave no indication that she had weighed any of the important legal principles that protect attorney-client relationships. Put simply, the Filter Protocol authorized government agents and prosecutors to rummage through Lawyer A's email files. **[**36]** Again, many of the emails concerned other clients and other matters. The court's authorization of such an extensive review of client communications and lawyer discussions by government agents and prosecutors was made in disregard of the attorney-client privilege, the work-product doctrine, and the [Sixth Amendment](#). See [Klitzman, Klitzman & Gallagher v. Krut](#), 744 F.2d at 961 (criticizing **[*180]** seizures of client files from law firm because government made no effort to limit seizures of firm's materials, and thereby "tramp[ed]" on attorney-client privilege and work-product protections as to all clients); [United States v. Stewart](#), No. 1:02-cr-00396, 2002 U.S. Dist. LEXIS 10530, 2002 WL 1300059, at *5, *10 (S.D.N.Y. June 11, 2002) (explaining that search of lawyer's office raised [Sixth Amendment](#) concerns and appointing special master where documents seized from law firm were likely to contain privileged information relating to criminal defendants). The magistrate judge erred in failing to explicitly weigh those foundational principles that protect attorney-client relationships.

b.

At this juncture, we emphasize another "serious defect" of the Filter Protocol challenged by the Law Firm as subverting attorney-client relationships. See Reply Br. of Appellant 14 n.4. Specifically, the Filter Protocol prospectively authorized the Filter Team to contact the Law **[**37]** Firm's clients *ex parte* and seek waivers of their attorney-client privileges. [HN20](#)[↑] The Model Rules of Professional Conduct, however, generally bar a lawyer from communicating with a represented party about the subject of the representation without the represented party's lawyer being present. See Model Rules of Prof'l Conduct r. 4.2 (Am. Bar Ass'n 1983); 2 Hazard, Jr. et al., *supra*, § 41.02 (explaining that Rule 4.2 "prevents a lawyer from taking advantage of a lay

person"); *id.* § 41.12 (discussing application of Rule 4.2 to prosecutors). Although an exception to that rule can — in the proper circumstances — be made by a court, any such court order should be predicated on an individualized assessment of the attorney-client relationship. See Model Rules of Prof'l Conduct r. 4.2; see also [United States v. Lopez](#), 4 F.3d 1455, 1462 (9th Cir. 1993) (explaining that court must make "informed decision" regarding whether to authorize lawyer's communication with represented party). That was not even attempted here, in that the Filter Protocol was approved *ex parte* before the search warrant was executed.

By asking the Law Firm to furnish the Filter Team with a client list — which could be used by Filter Team members to directly contact clients and seek privilege waivers under the Filter Protocol — the government **[**38]** demonstrated a lack of respect for the attorney-client privilege and the Firm's duty of confidentiality to its clients. In declining to reveal a client list to the Filter Team, the Law Firm relied on its ethical obligations to protect confidential and privileged information relating to its clients. See Br. of Appellant 37 (asserting that the government's request for a client list ignored the proposition that the Law Firm is "ethically prohibited from disclosing . . . the identity of clients when the relationship remains confidential"); see also Model Rules of Prof'l Conduct r. 1.6(a) (describing duty of confidentiality). Such information will sometimes include the existence of the lawyer-client relationship itself. See [In re Grand Jury Subpoena](#), 204 F.3d 516, 520 (4th Cir. 2000) (recognizing that [HN21](#)[↑] the attorney-client privilege can "extend to the client's identity"); 1 Hazard, Jr. et al., *supra*, § 10.12 (collecting cases where client identity considered confidential or privileged). [HN22](#)[↑] The breach of the duty of confidentiality "is enforceable by civil remedies as well as through the [attorney] disciplinary process." See 1 Hazard, Jr. et al., *supra*, § 10.16, 10-108.1. And a breach of the attorney-client privilege by an attorney is likewise sanctionable. See *id.* Indeed, at least one jurisdiction imposes criminal penalties **[**39]** for improperly breaching attorney-client privilege. See [Tenn. Code Ann. § 23-3-107](#). In short, authorizing the government in *ex parte* proceedings **[*181]** to directly contact any and all clients of the Law Firm is another example of how the Filter Protocol approved by the magistrate judge undermined attorney-client principles.

4.

At bottom, the magistrate judge erred in assigning judicial functions to the Filter Team, approving the Filter

government's filter team proposal and appointed a special master. See *Cohen*, ECF No. 30 (Apr. 27, 2018). Notably, the *Cohen* proceedings were conducted more than a year before the magistrate judge's authorization of this Filter Team.

Team and its Protocol in *ex parte* proceedings without first ascertaining what had been seized in the Law Firm search, and disregarding the foundational principles that serve to protect attorney-client relationships. In these circumstances, we are satisfied that the magistrate judge (or an appointed special master) — rather than the Filter Team — must perform the privilege review of the seized materials. See [Klitzman, Klitzman & Gallagher, 744 F.2d at 962](#) (recommending appointment of special master in similar circumstances); [United States v. Gallego, No. 4:18-cr-01537, 2018 U.S. Dist. LEXIS 152055 at *8 \(D. Ariz. Sept. 6, 2018\), ECF No. 65](#) (appointing a special master "to review the items seized from [the] [d]efendant's law office for privilege and responsiveness to the search warrant"); [Cohen, ECF No. 30 \(Apr. 27, 2018\)](#) (appointing special master to review documents seized from lawyer); [Stewart, 2002 U.S. Dist. LEXIS 10530, 2002 WL 1300059, at *10 \[**40\]](#) (appointing special master to perform privilege review of documents seized from office of criminal defense lawyer).¹⁹ We are therefore satisfied that the Law Firm has demonstrated that it is likely to succeed on the merits.

C.

In order to prevail on the next injunction factor, the Law Firm is obliged to show that the equities weigh in its favor. See [Winter, 555 U.S. at 20](#). And we are satisfied that the Law Firm has done so. Specifically, the harm to the Law Firm and its clients that will be caused by continuing the Filter Team's review outweighs any harm to the government that might result from the magistrate judge conducting the privilege review of the seized materials. Indeed, we discern no harm to the government in barring the Filter Team from rummaging through Law Firm materials that are unrelated to the underlying investigations.

In seeking to convince us otherwise, the government maintains that the magistrate judge's review of the seized materials will unduly delay the government's investigations. And the government claims that it has an

¹⁹ The government contends on appeal that the Filter Team's privilege review of the seized materials is no different than such a review by a magistrate judge or a court-appointed special master. Unlike the Filter Team, however, a magistrate judge and a special master are judicial officers and *neutral* arbiters that have no stake in the outcome of the privilege decisions. See [In re Grand Jury Subpoenas, 454 F.3d at 523](#) (explaining inherent conflict in authorizing filter team to decide privilege claims).

interest in efficiently investigating criminal wrongdoing. Although efficient criminal investigations are certainly desirable, we are not persuaded that the [**41] claimed delay in its investigations weighs in the government's favor. Put simply, the government chose to proceed by securing a search warrant for the Law Firm and seeking and obtaining the magistrate judge's approval of the Filter Protocol. The government should have been fully aware that use of a filter team in these circumstances was ripe for substantial legal challenges, and should have anticipated that those challenges could delay its investigations.²⁰ And, in any event, delay in the [**182] government's investigations here does not outweigh the harm to the Law Firm and its clients caused by the Filter Team's review. See [In re Grand Jury Subpoenas, 454 F.3d at 523-24](#).

The government also argues that the equities weigh against the Law Firm because the Firm waited ten days after the search to file its Injunction Requests. We are unconvinced, however, that the Law Firm somehow slumbered on its rights. Indeed, the Law Firm contested the search and seizures when they were ongoing and — three days thereafter — dispatched a detailed letter to the United States Attorney objecting to what had occurred and what was apparently going on with the Filter Team. The prosecutors ignored that letter, prompting the Law Firm to file its Injunction Requests. [**42] We do not fault the Law Firm for seeking a negotiated resolution of these important disputes before requesting court intervention. And we will not reward the government for ignoring those efforts. See [Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 522, 67 S. Ct. 828, 91 L. Ed. 1067 \(1947\)](#) ("[H]e who seeks equity must do equity."). In these circumstances, the Law Firm has convincingly shown that the equities weigh in its favor.

D.

Finally, the Law Firm is obliged to establish, in order to secure the relief it seeks, that "an injunction is in the public interest." See [Winter, 555 U.S. at 20](#). We are satisfied that an award of injunctive relief in these circumstances supports the "strong public interest" in the integrity of the judicial system. See [United States v. Hastings, 461 U.S. 499, 527, 103 S. Ct. 1974, 76 L. Ed.](#)

²⁰ Notwithstanding the government's responsibility for some of the delay about which it complains, we are nevertheless sensitive to its concerns. Indeed, we have expedited this appeal, and we issued our Interim Order within two days of the oral argument.

[2d 96 \(1983\)](#) (Brennan, J., concurring in part and dissenting in part). By creating appearances of unfairness to the Law Firm clients who are unrelated to the government's investigation of Client A, the Filter Team and its Protocol contravene the public interest. See [Gallego, 2018 U.S. Dist. LEXIS 152055, slip op. at 4-6](#) (recognizing appearances of unfairness inherent in use of filter teams and appointing special master to review materials seized from law firm); [Stewart, 2002 U.S. Dist. LEXIS 10530, 2002 WL 1300059, at *8](#) (explaining that "it is important that the procedure adopted [for the review of seized materials] . . . not only be fair but also appear to be fair"); [United States v. Neill, 952 F. Supp. 834, 841 n.14 \(D.D.C. 1997\)](#) (emphasizing **[**43]** that use of filter team creates "appearance of unfairness"). For those clients — and to the public at large — it surely appears, as the Sixth Circuit recognized, that "the government's fox [has been] left in charge of the [Law Firm's] henhouse." See [In re Grand Jury Subpoenas, 454 F.3d at 523](#); see also [In re Search Warrant for Law Offices Executed on Mar. 19, 1992, 153 F.R.D. 55, 59 \(S.D.N.Y. 1994\)](#) ("It is a great leap of faith to expect that members of the general public would believe any . . . wall [between a filter team and a prosecution team] would be impenetrable; this notwithstanding our own trust in the honor of an AUSA.").

Appearances of unfairness are especially apparent in these proceedings, in that the Filter Team includes prosecutors employed in the same judicial district where Law Firm clients "are being investigated by, or are being prosecuted by," the United States Attorney for Maryland. See S.J.A. 66. It would be difficult for reasonable members of the public to believe that Filter Team AUSAs would disregard information **[*183]** in Lawyer A's emails that might be relevant to other criminal inquiries in Maryland. In fact, the government has never disclaimed an intention to use the plain-view doctrine in connection with the Filter Team's access to the **[**44]** materials seized from the Law Firm. See [United States v. Rumley, 588 F.3d 202, 205 \(4th Cir. 2009\)](#) (explaining that, [HN23](#)²¹ under the plain-view doctrine, a law enforcement officer can make a seizure of an object in plain view if, inter alia, "the object's incriminating character is immediately apparent" (internal quotation marks omitted)); cf. [United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1178 \(9th Cir. 2010\)](#) (Kozinski, C.J., concurring) (suggesting that, "[w]hen the government wishes to obtain a warrant to examine a[n] . . . electronic storage medium to search for certain incriminating files, . . . magistrate judges should insist that the government forswear reliance on the plain-view

doctrine" (citation omitted)).²¹

Due to the appearances of unfairness caused by the Filter Team, and in view of the other problems associated with the Filter Team, it is surprising that the government has so vigorously supported it. We simply observe that prosecutors have a responsibility to not only see that justice is done, but to also ensure that justice *appears* to be done. See [In re Search Warrant for Law Offices, 153 F.R.D. at 59](#) ("The appearance of [j]ustice must be served, as well as the interests of [j]ustice."). Federal agents and prosecutors rummaging through law firm materials that are protected by attorney-client privilege and the work-product doctrine is at odds with the **[**45]** appearance of justice.

* * *

As reflected herein, we are satisfied that the magistrate judge's authorization of the Filter Team and the Filter Protocol was improper and that injunctive relief is warranted. The district court thus abused its discretion by failing to enjoin the Filter Team's review of the seized materials.²²

IV.

Pursuant to the foregoing and our Interim Order, we reverse the district court's Denial Order and remand for such other and further proceedings as may be appropriate.

REVERSED AND REMANDED

Concur by: RUSHING

Concur

²¹ Even if the Filter Team AUSAs have been instructed to ignore information relating to possible criminal activity by other Law Firm clients in the seized materials, our plain view concerns would not be assuaged. The review of such information by the Filter Team AUSAs cannot be undone. Additionally, the IRS and DEA agents on the Filter Team have their own superiors. It may well be difficult for those agents to withhold from their superiors information about possible crimes potentially identified in the seized materials.

²² Although the Law Firm has raised [Fourth Amendment](#) contentions, we leave those issues to the district court. See [Lovelace v. Lee, 472 F.3d 174, 203 \(4th Cir. 2006\)](#) (emphasizing that [HN24](#)²³ this Court is "a court of review, not of first view" (internal quotation marks omitted)).

RUSHING, Circuit Judge, concurring:

As the majority correctly concludes, the unique facts and circumstances of this case preclude this Filter Team operating under this Filter Protocol from reviewing the fruits of this search warrant. I write separately to expand upon two points in our analysis of the Law Firm's likelihood of success on the merits.

First, as the majority notes, after the July 10, 2019 hearing on the Law Firm's and Client A's pending motions, the district court modified the Privilege Assessment Provision of the Filter Protocol. Maj. [*184] Op. 12. Under the Modified Privilege Assessment Provision, no documents—including those the Filter Team considers nonprivileged—can [**46] be sent to the Prosecution Team without either the consent of the Law Firm or a court order. The majority does not suggest that the Modified Privilege Assessment Provision, which replaced the original Privilege Assessment Provision, impermissibly usurps a judicial function. See Maj. Op. 25-29.

Second, the Filter Team immediately began reviewing the documents seized from the Law Firm, despite the Law Firm's protests about the attorney-client privilege and work-product doctrine. In other cases, the government has voluntarily delayed review for a brief time until the court could schedule a hearing on the target's motion for a restraining order or injunction. See, e.g., *Cohen v. United States*, No. 1:18-mj-03161 (S.D.N.Y. Apr. 13, 2018), ECF Nos. 6, 36. That sensible procedure preserves the status quo until a court can rule. The majority suggests a procedure by which a magistrate judge could authorize a search but delay ruling on proposed review protocols until the court can *sua sponte* gather the parties for an adversary proceeding. Maj. Op. 29-31. That innovative procedure may be salutary in some circumstances, but the burden remains on the parties to voice their objections, and accommodate [**47] the orderly resolution of those objections, in the normal course.

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an advice-of-counsel defense that has not formally been claimed or asserted by a civil litigant or criminal defendant.

- f. Testimony or materials within the scope of an explicit and unchallenged waiver, or other express form of consent by the attorney's client to disclosure of the subject information.
- g. Information or materials produced or created in discovery, including deposition testimony, if such information or materials are not subject to a protective order.
- h. Testimony or materials that the court presiding over the underlying proceeding has ordered a party to produce or provide.

E. Submitting the Request. Requests for authorization should be submitted to the Policy and Statutory Enforcement Unit (PSEU), Office of Enforcement Operations, Criminal Division. When documents are sought in addition to the testimony of the attorney witness, a draft of the subpoena duces tecum, listing the documents sought, must accompany the submission.

F. No Rights Created by Guidelines. These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

G. Questions. Questions regarding the applicability of the authorization requirement or any of its exceptions should be directed to the Policy and Statutory Enforcement Unit, Office of Enforcement Operations at 202-305-4023 or pseu@usdoj.gov.

[updated March 2016] [cited in [JM 9-11.255](#); [JM 9-13.420](#)]

9-13.420 - Searches of Premises of Subject Attorneys

NOTE: For purposes of this policy only, "subject" includes an attorney who is a "suspect, subject or target," or an attorney who is related by blood or marriage to a suspect, or who is believed to be in possession of contraband or the fruits or instrumentalities of a crime. This policy also applies to searches of business organizations where such searches involve materials in the possession of individuals serving in the capacity of legal advisor to the organization. Search warrants for "documentary materials" held by an attorney who is a "disinterested third party" (that is, any attorney who is not a subject) are governed by 28 C.F.R. 59.4 and [JM 9-19.221](#) *et seq.* See also 42 U.S.C. Section 2000aa-11(a)(3).

There are occasions when effective law enforcement may require the issuance of a search warrant for the premises of an attorney who is a subject of an investigation, and who also is or may be engaged in the practice of law on behalf of clients. Because of the potential effects of this type of search on legitimate attorney-client relationships and because of the possibility that, during such a search, the government may encounter material protected by a legitimate claim of privilege, it is important that close control be exercised over this type of search. Therefore, the following guidelines should be followed with respect to such searches:

A. Alternatives to Search Warrants. In order to avoid impinging on valid attorney-client relationships, prosecutors are expected to take the least intrusive approach consistent with vigorous and effective law enforcement when evidence is sought from an attorney actively engaged in the practice of law. Consideration should be given to obtaining information from other sources or through the use of a subpoena, unless such efforts could compromise the criminal investigation or prosecution, or could result in the obstruction or destruction of evidence, or would otherwise be ineffective.

NOTE: Prior approval must be obtained from the Assistant Attorney General for the Criminal Division to issue a subpoena to an attorney relating to the representation of a client. See [JM 9-13.410](#).

- B. Authorization by United States Attorney or Assistant Attorney General.** No application for such a search warrant may be made to a court without the express approval of the United States Attorney or pertinent Assistant Attorney General. Ordinarily, authorization of an application for such a search warrant is appropriate when there is a strong need for the information or material and less intrusive means have been considered and rejected.
- C. Prior Consultation.** In addition to obtaining approval from the United States Attorney or the pertinent Assistant Attorney General, and before seeking judicial authorization for the search warrant, the federal prosecutor must consult with the Criminal Division through the Office of Enforcement Operations, Policy and Statutory Enforcement Unit (PSEU), which can be reached at (202) 305-4023 or pseu@usdoj.gov.

NOTE: Attorneys are encouraged to consult with PSEU as early as possible regarding a possible search of an attorney's premises. Telephone No. (202) 305-4023; pseu@usdoj.gov.

To facilitate the consultation, the prosecutor should submit a form available to Department attorneys through PSEU. The prosecutor must provide relevant information about the proposed search along with a draft copy of the proposed search warrant, affidavit in support thereof, and any special instructions to the searching agents regarding search procedures and procedures to be followed to ensure that the prosecution team is not "tainted" by any privileged material inadvertently seized during the search. This procedure does not preclude any United States Attorney or Assistant Attorney General from discussing the matter personally with the Assistant Attorney General of the Criminal Division.

If exigent circumstances prevent such consultation before the warrant is presented to a court, the Criminal Division should be notified of the search as promptly as possible. In all cases, the Criminal Division should be provided as promptly as possible with a copy of the judicially authorized search warrant, search warrant affidavit, and any special instructions to the searching agents.

The Criminal Division is committed to ensuring that consultation regarding attorney search warrant requests will not delay investigations. Timely processing will be assisted if the Criminal Division is provided as much information about the search as early as possible. The Criminal Division should also be informed of any deadlines.

As part of the consultation process described above, PSEU shall itself consult with the Office of the Deputy Attorney General, as set forth in the Attorney General's December 30, 2020, memorandum.

- D. Safeguarding Procedures and Contents of the Affidavit.** Procedures should be designed to ensure that privileged materials are not improperly viewed, seized or retained during the course of the search. While the procedures to be followed should be tailored to the facts of each case and the requirements and judicial preferences and precedents of each district, in all cases a prosecutor must employ adequate precautions to ensure that the materials are reviewed for privilege claims and that any privileged documents are returned to the attorney from whom they were seized.
- E. Conducting the Search.** The search warrant should be drawn as specifically as possible, consistent with the requirements of the investigation, to minimize the need to search and review privileged material to which no exception applies.
- While every effort should be made to avoid viewing privileged material, the search may require limited review of arguably privileged material to ascertain whether the material is covered by the warrant. Therefore, to protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a "privilege team" should be designated, consisting of agents and lawyers not involved in the underlying investigation.

Instructions should be given and thoroughly discussed with the privilege team prior to the search. The instructions should set forth procedures designed to minimize the intrusion into privileged material, and should ensure that the privilege team does not disclose any information to the investigation/prosecution team unless and until so instructed by the attorney in charge of the privilege team. Privilege team lawyers should be available either on or off-site, to advise the agents during the course of the search, but should not participate in the search itself.

The affidavit in support of the search warrant may attach any written instructions or, at a minimum, should generally state the government's intention to employ procedures designed to ensure that attorney-client privileges are not violated.

If it is anticipated that computers will be searched or seized, prosecutors are expected to follow the procedures set forth in the current edition of *Searching and Seizing Computers*, published by CCIPS.

F. Review Procedures. The following review procedures should be discussed prior to approval of any warrant, consistent with the practice in your district, the circumstances of the investigation and the volume of materials seized.

- Who will conduct the review, i.e., a privilege team, a judicial officer, or a special master.
- Whether all documents will be submitted to a judicial officer or special master or only those which a privilege team has determined to be arguably privileged or arguably subject to an exception to the privilege.
- Whether copies of all seized materials will be provided to the subject attorney (or a legal representative) in order that: a) disruption of the law firm's operation is minimized; and b) the subject is afforded an opportunity to participate in the process of submitting disputed documents to the court by raising specific claims of privilege. To the extent possible, providing copies of seized records is encouraged, where such disclosure will not impede or obstruct the investigation.
- Whether appropriate arrangements have been made for storage and handling of electronic evidence and procedures developed for searching computer data (i.e., procedures which recognize the universal nature of computer seizure and are designed to avoid review of materials implicating the privilege of innocent clients).

These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

[updated January 2021]

9-13.500 - International Legal Assistance

Some countries reserve official acts to local officials and provide significant criminal penalties for persons who engage in such acts in their territory without authorization. Before attempting to do any unilateral investigative act outside the United States relating to a criminal investigation or prosecution, including contacting a witness by telephone or mail, prior approval must be obtained from the Criminal Division's Office of International Affairs (OIA) (202-514-0000).

In addition, OIA must be consulted before contacting any foreign or State Department official in matters relating to extradition of a fugitive or the obtaining of evidence through compulsory process from a foreign authority in a criminal investigation, prosecution, or ancillary criminal matter.

Any proposed contact with foreign officials, other than United States investigative agents, in a foreign country for the purpose of obtaining the extradition of a fugitive or evidence through compulsory process should first be discussed with OIA.

None of the above is intended to prevent prosecutors from:

1. having preliminary discussions with U.S. law enforcement representatives posted abroad concerning the obtaining of assistance,
2. communications with agents of State Department's Diplomatic Security Service concerning an investigation under their jurisdiction, or
3. participating in standing international committees such as the U.S.-Canada Cross Border Committee.

[cited in JM 9-11.140] [updated April 2018]



Caution

As of: October 13, 2021 7:10 PM Z

In re Fattah

United States Court of Appeals for the Third Circuit

January 12, 2015, Argued; September 2, 2015, Opinion Filed

No. 14-3752

Reporter

802 F.3d 516 *; 2015 U.S. App. LEXIS 15579 **

IN THE MATTER OF THE SEARCH OF ELECTRONIC COMMUNICATIONS (BOTH SENT AND RECEIVED) IN THE ACCOUNT OF CHAKAFATTAH@GMAIL.COM AT INTERNET SERVICE PROVIDER GOOGLE, INC., Chaka Fattah, Appellant

Prior History: **[**1]** On Appeal from the United States District Court for the Eastern District of Pennsylvania. (D.C. No. 2-14-mj-00617-001). District Judge: Honorable Paul S. Diamond.

[Fattah v. United States DOJ, 2015 U.S. Dist. LEXIS 102276 \(E.D. Pa., Aug. 5, 2015\)](#)

[Fattah v. United States, IRS, 2014 U.S. Dist. LEXIS 120021 \(E.D. Pa., Aug. 27, 2014\)](#)

[United States v. Fattah, 2015 U.S. Dist. LEXIS 681 \(E.D. Pa., Jan. 6, 2015\)](#)

Core Terms

search warrant, collateral order doctrine, documents, district court, disclosure, orders, privileged document, attorney-client, contempt, unexecuted, records, merits, privileges, email, non-disclosure, deny a motion, third party, work-product, evidentiary, contends, suppress, holder, appellate jurisdiction, filtering, subpoena, interlocutory appeal, completely separate, legislative process, legally cognizable, immediate appeal

Case Summary

Overview

HOLDINGS: [1]-Because the congressman's claim was not completely separate from the merits and was reviewable upon appeal, the collateral order doctrine was unavailing as a basis for appellate jurisdiction; [2]-The Perlman doctrine did not apply to the [Speech or Debate Clause](#) with respect to records disclosed to the

Government in the course of an investigation, [3]-The [Speech or Debate Clause](#) did not prohibit the disclosure of privileged documents, rather, it forbade the evidentiary use of such documents. The congressman failed to cite a legally cognizable privilege to support his claim, and accordingly, Perlman was inapplicable; [4]-The Perlman Doctrine provided jurisdiction to review the congressman's claims under the attorney-client privilege and work-product doctrine; [5]-The court lacked appellate jurisdiction under [Fed. R. Crim. P. 41\(g\)](#) as well.

Outcome

The court dismissed the congressman's appeal regarding his [Speech or Debate Clause](#) claims for lack of jurisdiction and remanded to the District Court his claim with respect to inadequate filtering procedures.

LexisNexis® Headnotes

Constitutional Law > Congressional Duties & Powers > Speech & Debate Immunity

[HN1](#)  Congressional Duties & Powers, Speech & Debate Immunity

See [U.S. Const. art. I, § 6, cl. 1](#)

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Extraordinary Writs

[HN2](#)  Appellate Jurisdiction, Extraordinary Writs

Mandamus is an extraordinary remedy, available only where (1) there is no other adequate means to attain the

relief sought; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuing court is satisfied that 'the writ is appropriate under the circumstances.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

[HN3](#) Appellate Jurisdiction, Collateral Order Doctrine

Under [28 U.S.C.S. § 1291](#), an immediate appeal may be taken from any final decision of the district court. Although "final decisions" typically are ones that trigger the entry of judgment, they also include a small set of prejudgment orders that are "collateral to" the merits of an action and "too important" to be denied immediate review. Under the collateral order doctrine, however, a prejudgment order is immediately appealable if it: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the case; and (3) is effectively unreviewable on appeal from a final judgment. A litigant must satisfy all three requirements to succeed under the collateral order doctrine. The court narrowly construes this exception, taking into account that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

[HN4](#) Appellate Jurisdiction, Collateral Order Doctrine

The U.S. Supreme Court has noted that application of the collateral order doctrine involves a categorical inquiry and as long as the class of claims, taken as a whole, can be adequately vindicated by other means, the chance that the litigation at hand might be speeded, or a particular injustice averted, does not provide a basis for jurisdiction under [28 U.S.C.S. § 1291](#). The Court emphasized that the crucial question is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders.

Criminal Law & Procedure > Appeals > Appellate

Jurisdiction > Collateral Order Doctrine

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

[HN5](#) Appellate Jurisdiction, Collateral Order Doctrine

The U.S. Supreme Court has defined an "important issue" as one involving interests that are weightier than the societal interests advanced by the ordinary operation of final judgment principles or one that is serious and unsettled. Moreover, an issue is important if the interests that would potentially go unprotected without immediate appellate review are significant relative to efficiency interests sought to be advanced by adherence to the final judgment rule.

Constitutional Law > Congressional Duties & Powers > Speech & Debate Immunity

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

[HN6](#) Congressional Duties & Powers, Speech & Debate Immunity

The type of "important issues" that the "completely separate from the merits" requirement encompasses are those that are important in a jurisprudential sense. The Speech or Debate privilege, as applied to records, is one of non-use versus non-disclosure. That is, while the privilege prohibits evidentiary "use" of records, it does not prohibit disclosure of records to the Government in the course of an investigation. Thus, the issue is not unsettled.

Constitutional Law > Congressional Duties & Powers > Speech & Debate Immunity

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

[HN7](#) Congressional Duties & Powers, Speech & Debate Immunity

The requirements for collateral appeal are particularly "stringent" in the criminal context because the delays and disruptions attendant upon intermediate appeal which the rule is designed to avoid, are especially inimical to the effective and fair administration of the criminal law. Indeed, the only orders that have been held to fall within the collateral order doctrine in a criminal action are: orders denying motions to reduce bail; orders denying motions to dismiss on double jeopardy grounds; orders denying immunity under the [Speech or Debate Clause](#); and orders directing defendants to be medicated against their will to render them competent to stand trial. Unlike these orders, which "finally resolve issues that are separate from guilt or innocence," a motion to suppress an unexecuted search warrant may substantially affect the merits of the case.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

[HN8](#) **Appellate Jurisdiction, Collateral Order Doctrine**

A pretrial ruling on a suppression motion is not a collateral order under [28 U.S.C.S. § 1291](#) because the motion presents an issue that is involved in and will be part of a criminal prosecution in process at the time the order is issued. The same is true of a motion to quash a warrant. The fruits of a search warrant may become part of the criminal prosecution. In most cases, the fruits become part of the evidentiary chain of proof. Therefore, an order denying a motion to quash an unexecuted search warrant stands in stark contrast to orders which, for example, challenge the very authority of the Government to prosecute a defendant.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > General Overview

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

[HN9](#) **Preliminary Proceedings, Pretrial Motions & Procedures**

In *In re Solomon*, a court of appeals denied a defendant's motion to suppress an unexecuted search warrant, holding that the defendant had other available remedies. The court explained that the motion to suppress the search warrant was not effectively unreviewable because the defendant could move to suppress the evidence, and if that motion is denied, and if he is convicted, the denial of the motion to suppress may then be asserted as a ground for appeal from the final judgment.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Collateral Order Doctrine

[HN10](#) **Appellate Jurisdiction, Collateral Order Doctrine**

Binding precedent requires the court to narrowly circumscribe the contours of the collateral order doctrine. And, as the U.S. Supreme Court has emphasized, although the Court has been asked many times to expand the "small class" of collaterally appealable orders, the Court has instead kept it narrow and selective in its membership.

Criminal Law & Procedure > Preliminary Proceedings > Discovery & Inspection > General Overview

[HN11](#) **Preliminary Proceedings, Discovery & Inspection**

The Perlman doctrine refers to the legal principle that a discovery order aimed at a third party may be immediately appealed on the theory that the third party will not risk contempt by refusing to comply. Disclosure orders are not final orders appealable under [28 U.S.C.S. § 1291](#). Rather, to obtain immediate appellate review, a privilege holder must disobey the court's order, be held in contempt, and then appeal the contempt order, which is considered a final order. The U.S. Supreme Court's decision in *Perlman* established an exception when the traditional contempt route is unavailable because the privileged information is controlled by a disinterested third party who is likely to comply with the request rather than be held in contempt for the sake of an immediate appeal. In these

circumstances, a litigant asserting a legally cognizable privilege may timely appeal an adverse disclosure order.

Constitutional Law > Congressional Duties & Powers > Speech & Debate Immunity

[HN12](#) [📄] **Congressional Duties & Powers, Speech & Debate Immunity**

The [Speech or Debate Clause](#) encompasses three main protections, it: (1) bars civil and criminal liability for "legislative acts"; (2) guarantees that a Member, or his alter ego, may not be made to answer questions about his legislative acts; and (3) bars the use of legislative-act evidence against a Member. While courts have recognized that the bounds of these protections vary, they are all rooted in the notion that, to the extent that the [Speech or Debate Clause](#) creates a Testimonial privilege as well as a Use immunity, it does so only for the purpose of protecting the legislator and those intimately associated with him in the legislative process from the harassment of hostile questioning. Courts have interpreted the term "questioning" broadly to forbid submission of legislative act evidence to a jury—whether in the form of testimony or records. It cannot be, however, that the privilege prohibits disclosure of evidentiary records to the Government during the course of an investigation

Constitutional Law > Congressional Duties & Powers > Speech & Debate Immunity

[HN13](#) [📄] **Congressional Duties & Powers, Speech & Debate Immunity**

In re Grand Jury (Eilberg) held that the disclosure of telephone records containing [Speech or Debate Clause](#) privileged documents was permissible. Moreover, the court explained that the evidentiary privilege was not designed to encourage confidences by maintaining secrecy, for the legislative process in a democracy has only a limited toleration for secrecy (citing [U.S. Const. art. I, § 5, cl. 3](#)). This makes good sense. If it were any other way, investigations into corrupt Members could be easily avoided by mere assertion of this privilege. Members could, in effect, shield themselves fully from criminal investigations by simply citing to the [Speech or Debate Clause](#). The [Speech or Debate Clause](#) was not meant to effectuate such deception. Rather, the purpose of the [Speech or Debate Clause](#) is to protect the

individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. That is, the Clause was meant to free the legislator from the executive and judicial oversight that realistically threatens to control his conduct as a legislator. The crux of the Clause is to prevent intimidation by the executive and accountability for legislative acts before a possibly hostile judiciary. It is clear that the purpose, however, has never been to shelter a Member from potential criminal responsibility.

Constitutional Law > Congressional Duties & Powers > Speech & Debate Immunity

Evidence > . > Preliminary Questions > Admissibility of Evidence > General Overview

[HN14](#) [📄] **Congressional Duties & Powers, Speech & Debate Immunity**

While the [Speech or Debate Clause](#) prohibits hostile questioning regarding legislative acts in the form of testimony to a jury, it does not prohibit disclosure of [Speech or Debate Clause](#) privileged documents to the Government. Instead, it merely prohibits the evidentiary submission and use of those documents.

Constitutional Law > Congressional Duties & Powers > Speech & Debate Immunity

Evidence > . > Preliminary Questions > Admissibility of Evidence > General Overview


Criminal Law & Procedure > ... > Witnesses > Subpoenas > Challenges & Modifications

[HN15](#) [📄] **Congressional Duties & Powers, Speech & Debate Immunity**

The Perlman doctrine does not apply to the [Speech or Debate Clause](#) with respect to records disclosed to the Government in the course of an investigation. The [Speech or Debate Clause](#) does not prohibit the disclosure of privileged documents. Rather, it forbids the evidentiary use of such documents. This differs from a challenge to a subpoena requesting attorney-client privileged documents, where, as the saying goes, you

cannot "unring the bell." In that scenario, no remedy assuages disclosure and the privilege may very well be destroyed. The impetus of the Perlman doctrine is to protect privilege holders from the disclosure of privileged materials by a disinterested third-party. Because the attorney-client privilege and work-product doctrine are non-disclosure privileges that may in fact be destroyed by a disinterested third-party, Perlman applies.

Criminal Law & Procedure > Search &
Seizure > General Overview

[HN16](#)  **Criminal Law & Procedure, Search & Seizure**

See [Fed. R. Crim. P. 41\(g\)](#).

Criminal Law & Procedure > Appeals > Appellate
Jurisdiction > General Overview

Criminal Law & Procedure > Search &
Seizure > General Overview

[HN17](#)  **Appeals, Appellate Jurisdiction**

Denial of a pre-indictment [Fed. R. Crim. P. 41\(g\)](#) motion is immediately appealable, only if the motion is: (1) solely for the return of property and (2) is in no way tied to an existing criminal prosecution against the movant.

Constitutional Law > Congressional Duties &
Powers > Speech & Debate Immunity

Criminal Law & Procedure > Appeals > Appellate
Jurisdiction > Interlocutory Appeals

[HN18](#)  **Congressional Duties & Powers, Speech & Debate Immunity**

The court takes seriously the sentiments and concerns of the U.S. Supreme Court that Members are not to be "super-citizens" immune from criminal liability or process. Permitting an interlocutory appeal of an order denying a motion to quash an unexecuted search warrant based on the [Speech or Debate Clause](#) would set bad precedent and insulate Members from criminal investigations and criminal process. This, of course, cannot and should not be the purpose of the Clause.

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Kerry W. Kircher, Esq. ARGUED, United States House of Representatives, Washington, D.C., Amicus Attorney Appellant Bipartisan Legal Advisory Group of the United States House of Representatives.

Donald E. Wieand, Jr., Esq., Stevens & Lee, Bethlehem, PA, Amicus Attorney Appellant Google Inc.

Zane David Memeger, Esq., Jack Smith, Esq., Robert A. Zauzmer, Esq. ARGUED, Eric L. Gibson, Esq., Paul L. Gray, Esq., United States Attorney's Office for the Eastern District of Pennsylvania, Philadelphia, PA, Attorneys for Appellees.


Judges: Before: AMBRO, FUENTES, and ROTH Circuit Judges. AMBRO, Circuit Judge, dissenting in part.

Opinion by: FUENTES

Opinion

[*520] FUENTES, Circuit Judge.

This case implicates the [Speech or Debate Clause of the United States Constitution](#).¹ The Government obtained a search **[*521]** warrant to search the email account of Chaka Fattah, a United States Congressman. Fattah, along with the "Bipartisan Legal Advisory Group of the United States House of Representatives" (as *amicus curiae*), challenged the unexecuted search **[**2]** warrant in the District Court primarily on [Speech or Debate Clause](#) grounds. Fattah now appeals the District Court's order denying his motion to invalidate the unexecuted search warrant. Because an unexecuted search warrant is not separate from the merits of the case and is reviewable on appeal, if a defendant is convicted, it does not qualify for review under the collateral order doctrine. Therefore, we lack jurisdiction to review this unexecuted search warrant and we dismiss Fattah's claims under the [Speech or Debate Clause](#).

¹The [Speech or Debate Clause](#) provides that, [HN1](#)  "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." [U.S. Const. art. I, § 6, cl. 1](#).

I. Factual and Procedural Background

A. The Search Warrant

Fattah is the subject of a federal grand jury investigation pending in the Eastern District of Pennsylvania.² The Department of Justice, the United States Attorney's Office for the Eastern District of Pennsylvania, the Federal Bureau of Investigation, and the Internal Revenue Service are leading the investigation, which centers on whether Fattah violated federal criminal laws relating to fraud, extortion, and bribery.

Fattah maintains an email account hosted by Google, **[**3]** Inc., known as "Gmail." Google acts as a repository, collecting emails sent and received by Gmail account holders like Fattah. Fattah uses this Gmail account for personal matters, but he also uses it for official business relating to his congressional duties.³ For example, Fattah asserts that he uses his Gmail account to "communicat[e] with members of Congress regarding legislative matters"; to email "the schedule and agendas for House Committee meetings and related congressional sessions"; and to communicate "with [his] staff regarding legislative matters and discussions and documents directly relating to proposed legislative matters."⁴ Likewise, Fattah claims that he uses his Gmail account to engage in privileged attorney-client communications with his legal counsel.

In February 2014, the Government served Fattah with a grand jury subpoena seeking various documents, including electronic data from his Gmail account. In response, Fattah turned over some emails but objected **[**4]** to others on the bases of the [Speech or Debate Clause](#), overbreadth, and relevance. Several months later, a magistrate judge issued a search warrant authorizing the FBI to search Fattah's Gmail account. The warrant sought essentially the same information as the grand jury subpoena. Specifically, the search warrant requested: "For the period of January 1, 2008, through the present, concerning Google account [ChakaFattah@gmail.com], all items which constitute evidence of a criminal violation of [18 U.S.C. §§ 1343](#),

[1344](#), [1951](#), and [201](#)."⁵

Pursuant to Google policy, Fattah received an email from Google on June 18, 2014, stating that it had received a search warrant from the Government seeking **[*522]** electronic data from his account. Google explained that it would withhold the documents for seven calendar days, allowing Fattah time to object to the request in a court of competent jurisdiction. Fattah filed a motion to intervene and to quash the search warrant in the Eastern District of Pennsylvania, arguing that the warrant's execution would violate the attorney-client privilege and work-product doctrine, the [Fourth Amendment](#), and the [Speech or Debate Clause](#).

B. The District Court Opinion

The District Court granted Fattah's motion to intervene but denied his motion to **[**5]** quash the search warrant. The Court held that the execution of the warrant would not imperil the attorney-client privilege or the protection afforded by the work-product doctrine because the Government had suggested adequate review procedures, which entailed the use of a "taint team" to review for privileged documents.

Fattah argued that the warrant and affidavit did not make out probable cause and that the warrant was general and overbroad. The Court disagreed and additionally noted the odd procedural posture of the case, observing that Fattah "ha[d] cited no reported decision" supporting his contention that he may raise a [Fourth Amendment](#) challenge to a warrant prior to its execution.⁶ The Court explained that the proper remedy for an improvident search warrant is a suppression hearing.

Likewise, the District Court rejected Fattah's argument that the warrant would violate the [Speech or Debate Clause](#). The Court reiterated this Circuit's standard that the [Speech or Debate Clause](#) secures a privilege of non-use, rather than of non-disclosure. The Court explained that "even if [Fattah's] private emails include a number of privileged documents, the mere disclosure of those documents [would] not impugn the [Speech or Debate Clause](#)."⁷

² Fattah was indicted by a grand jury on July 29, 2015.

³ Each Member of the House of Representatives has an official email account. Presently, there is no policy in place mandating that Members solely utilize the official account to conduct business. [Tr. 28: 18-22].

⁴ Gov't Supp. App. 15.

⁵ Gov't Supp. App. 11.

⁶ App. 12.

⁷ App. 14.

In the alternative to quashing **[**6]** the search warrant, the House requested that the Court modify the warrant and allow Fattah access to the requested records. Denying the House's request, the Court opined that "creating special protections for a Congressman's private email account would encourage corrupt legislators and their aides to make incriminating communications through private emails, knowing that they will be disclosed only with the author's approval."⁸


Fattah also fashioned his motion as a [Federal Rule of Criminal Procedure 41\(g\)](#) motion, a request for return of property. Fattah argued that the Government was in "constructive possession" of his property. The District Court denied this motion as well, explaining that because the Government has neither actual nor constructive possession, [Rule 41\(g\)](#) affords him no legitimate basis for relief.

Following the District Court's rulings, Fattah filed a notice of appeal to this Court from the District Court's order denying the motion to quash the unexecuted search warrant. On the same day, Fattah filed a motion to stay the order pending appeal. The District Court held a hearing on the motion to stay and subsequently denied the motion. Thereafter, we granted Fattah's motion for a status quo order and for a stay of **[**7]** the District Court's order pending appeal.


II. Discussion


Although Fattah presents several issues on appeal, we limit our discussion solely to jurisdiction and the proposed filtering **[**523]** procedures. Fattah proffers three bases for appellate jurisdiction: (1) the collateral order doctrine, (2) the *Perlman* doctrine, and (3) [Federal Rule of Criminal Procedure 41\(g\)](#). For the reasons that follow, we conclude that we lack jurisdiction to consider Fattah's [Speech or Debate Clause](#) claims, but take jurisdiction with respect to his claims regarding the filtering procedures.⁹

⁸ App. 16.

⁹ The House also suggests that jurisdiction to hear Fattah's claims may lie under the All Writs Act, as a petition for mandamus. Fattah, however, has not sought mandamus relief. Furthermore, [HN2](#)  mandamus is an extraordinary remedy, available only where (1) there is "no other adequate means to attain the relief sought;" (2) the right to issuance of the writ is "clear and indisputable;" and (3) the issuing court is "satisfied that 'the writ is appropriate under the circumstances.'" [In re](#)

A. The Collateral Order Doctrine

Fattah first contends that under the collateral order doctrine, we have appellate jurisdiction. [HN3](#)  Under [28 U.S.C. § 1291](#), an immediate appeal may be taken from any final decision of the district court. "Although 'final decisions' typically are ones that trigger the entry of judgment, they also include a small set of prejudgment orders that are 'collateral to' the merits of an action and 'too important' to be denied immediate review."¹⁰ Under the collateral order doctrine, however, a prejudgment order is immediately appealable if it: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the case; and (3) is effectively unreviewable on appeal from a final judgment.¹¹ A litigant must satisfy all three requirements to succeed under the collateral order doctrine. We narrowly construe this exception, taking into account that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated."¹²

Furthermore, [HN4](#)  the Supreme Court has noted **[**9]** that application of the collateral order doctrine involves a categorical inquiry and "[a]s long as the class of claims, taken as a whole, can be adequately vindicated by other means, the chance that the litigation at hand might be speeded, or a particular injustice averted, does not provide a basis for jurisdiction under [§ 1291](#)."¹³ The Court emphasized, "[t]he crucial question .

[Pressman-Gutman Co., Inc.](#), 459 F.3d 383, 399 (3d Cir. 2006) (quoting [In re Briscoe](#), 448 F.3d 201, 212 (3d Cir. 2006)). As previously stated, Fattah has the right to appeal the denial of a motion to suppress if he is convicted. Because Fattah has an adequate remedy in a suppression hearing following execution of the warrant, **[**8]** we decline to grant jurisdiction under this ground.

¹⁰ [Mohawk Indus., Inc. v. Carpenter](#), 558 U.S. 100, 103, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009) (citing [Cohen v. Beneficial Indus. Loan Corp.](#), 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)).

¹¹ [Digital Equip. Corp. v. Desktop Direct, Inc.](#), 511 U.S. 863, 867, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994).

¹² [Id.](#) at 868.

¹³ [Mohawk Indus., Inc.](#), 558 U.S. at 107 (internal quotation marks and alterations omitted).

. . . is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders."¹⁴

Fattah appeals from the District Court's order denying a motion to quash an unexecuted search warrant on [Speech or Debate Clause](#) grounds. He relies on our decision [*524] in *United States v. McDade* where we held that we had jurisdiction to entertain an appeal regarding a motion to dismiss an indictment under the [Speech or Debate Clause](#).¹⁵ Fattah cites to our language in *McDade* stating, "[w]e also have jurisdiction to review any of the district court's other rulings regarding the [Speech or Debate Clause](#) that satisfy all of the requirements of the collateral order doctrine."¹⁶ Notably, we followed this statement with the caveat [**10] that "[o]ur jurisdiction, however, extends no further," recognizing the limits of the collateral order doctrine.¹⁷ *McDade*, however, is inapplicable because Fattah's claim under the collateral order doctrine falters. We review each requirement below.

1. The first prong of the collateral order doctrine requires us to determine whether the District Court's order conclusively determines the disputed issue. Fattah satisfies the first prong of the test. His motion to quash raised the issue of whether the search warrant could be executed, and the District Court conclusively answered that question in the affirmative. Thus, the order conclusively determined the disputed issue. Fattah, however, fails to satisfy either the second or third prongs, dooming his argument.

2. The second inquiry of the collateral order doctrine asks whether the District Court's order resolves an important question completely separate from the merits. Fattah argues that the [Speech or Debate Clause](#) issues are "extremely important issues" that are separate from the merits of the case. He contends that because no indictment has been returned, the issue is separate from the merits because there is no "underlying action." He is incorrect.

[HN5](#)¹⁸ The Supreme [**11] Court has defined an "important issue" as "one involving interests that are 'weightier than the societal interests advanced by the ordinary operation of final judgment principles' or one that is 'serious and unsettled.'"¹⁸ Moreover, "an issue is important if the interests that would potentially go unprotected without immediate appellate review are significant relative to efficiency interests sought to be advanced by adherence to the final judgment rule."¹⁹ Here, Fattah contends that the Speech or Debate privilege is one of non-disclosure and that "[t]he district court's ruling is one of important constitutional dimensions broader in scope than just the interest of an individual Congressman, being 'of great institutional interest to the House as a whole.'"²⁰

Fattah's argument, however, misconstrues the term "important." We have held that, [HN6](#)²¹ "[t]he type of 'important issue[s]' that the 'completely separate from the merits' requirement encompasses are those that are important in a jurisprudential sense."²¹ First, as we have previously [*525] said, the Speech or Debate privilege, as applied to records, is one of non-use versus non-disclosure. [**12] That is, while the privilege prohibits evidentiary "use" of records, it does not prohibit disclosure of records to the Government in the course of an investigation. Thus, the issue is not unsettled—indeed, this Court has decisively settled the issue in a manner that forecloses Fattah's argument.²²

Second, in addition to failing to raise an important issue, we believe Fattah's claim is not completely separate from the merits. [HN7](#)²³ The requirements for collateral

¹⁸ *United States v. Wecht*, 537 F.3d 222, 230 (3d Cir. 2008) (quoting *Digital Equip. Corp.*, 511 U.S. at 879; *Cohen*, 337 U.S. at 547).

¹⁹ *Pierce v. Blaine*, 467 F.3d 362, 370-71 (3d Cir. 2006) (internal quotation marks and citation omitted).

²⁰ Appellant's Br. 25 (quoting *In re Grand Jury (Eilberg)*, 587 F.2d 589, 593 (3d Cir. 1978)).

²¹ *Praxis Props., Inc. v. Colonial Sav. Bank, S.L.A.*, 947 F.2d 49, 54 (3d Cir. 1981) (second alteration in original) (quoting *Nemours Found. v. Manganaro Corp., New England*, 878 F.2d 98, 100 (3d Cir. 1989)) (internal quotation marks omitted).

²² See *United States v. Helstoski*, 635 F.2d 200, 203 (3d Cir. 1980); *In re Grand Jury Investigation (Eilberg)*, 587 F.2d at 597; *In re Grand Jury (Cianfrani)*, 563 F.2d 577, 584 (3d Cir. 1977).

¹⁴ *Id.* at 108.

¹⁵ 28 F.3d 283 (3d Cir. 1994).

¹⁶ *Id.* at 288.

¹⁷ *Id.*

appeal are particularly "stringent" in the criminal context because "'the delays and disruptions attendant upon intermediate appeal,' which the rule is designed to avoid, 'are especially inimical to the effective and fair administration of the criminal law.'" ²³ Indeed, the only orders that have been held to fall within the collateral order doctrine in a criminal action are: orders denying motions to reduce bail; orders denying motions to dismiss on double jeopardy grounds; orders denying immunity under the [Speech or Debate Clause](#); and orders directing defendants to be medicated against their will to render them competent to stand trial. ²⁴

Unlike these orders, **[**13]** which "finally resolve issues that are separate from guilt or innocence," ²⁵ a motion to suppress an unexecuted search warrant may substantially affect the merits of the case. We have held that [HN8](#) ^(↑) "a pretrial ruling on a suppression motion is not a collateral order under [28 U.S.C. § 1291](#) because the motion 'presents an issue that is involved in and will be part of a criminal prosecution in process at the time the order is issued.'" ²⁶ The same is true of a motion to quash a warrant. The fruits of a search warrant may become part of the criminal prosecution. In most cases, the fruits become part of the evidentiary chain of proof. Therefore, an order denying a motion to quash an unexecuted search warrant stands in stark contrast to the orders previously mentioned, which, for example, challenge the very authority of the Government to prosecute a defendant. ²⁷ Accordingly, Fattah fails to

satisfy this requirement of the collateral order doctrine.

3. The third prong of the collateral order doctrine focuses on whether the District Court's order is effectively unreviewable on appeal. Fattah asserts that the District Court's order leaves him with no remedy since it does not limit the Government's access to or use of [Speech or Debate Clause](#) documents. First, this argument relies on Fattah's misconception that the [Speech or Debate Clause](#) provides **[*526]** a privilege of non-disclosure. Instead, as we discuss further below, because we have held that it is a privilege of non-use when applied to documents, the Government is not prohibited from accessing the documents. In addition, his argument is plainly belied by our own precedent. [HN9](#) ^(↑) In [In re Solomon](#), we denied a defendant's motion to suppress an unexecuted search warrant, holding that the defendant had other available remedies. ²⁸ We explained that the motion to suppress the search warrant was not effectively unreviewable because the defendant could move to suppress the evidence, and "[i]f that motion is denied, and if [he] is convicted, the denial of the motion to suppress may then be asserted as a ground for appeal from the **[**15]** final judgment." ²⁹ The same is true here.

Our [HN10](#) ^(↑) binding precedent requires us to narrowly circumscribe the contours of the collateral order doctrine. And, as the Supreme Court has emphasized, "although the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." ³⁰ As such, we decline Fattah's invitation to expand this discerning membership to motions to quash unexecuted search warrants. Because Fattah's claim is not completely separate from the merits and is reviewable upon appeal, the collateral order doctrine is unavailing as a basis for appellate jurisdiction. We therefore lack jurisdiction under the collateral order doctrine to entertain this appeal.

B. The *Perlman* Doctrine

into court to face trial on the charge against him").

²³ [Abney v. United States](#), 431 U.S. 651, 657, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977) (quoting [Di Bella v. United States](#), 369 U.S. 121, 126, 82 S. Ct. 654, 7 L. Ed. 2d 614 (1962)).

²⁴ See [Stack v. Boyle](#), 342 U.S. 1, 6, 72 S. Ct. 1, 96 L. Ed. 3 (1951); [Abney](#), 431 U.S. at 659; [Helstoski v. Meanor](#), 442 U.S. 500, 506-08, 99 S. Ct. 2445, 61 L. Ed. 2d 30 (1979); [Sell v. United States](#), 539 U.S. 166, 176, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).

²⁵ [Flanagan v. United States](#), 465 U.S. 259, 266, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984).

²⁶ [United States v. Williams](#), 413 F.3d 347, 355 (3d Cir. 2005) (quoting [Di Bella](#), 369 U.S. at 127).

²⁷ See, e.g., [Abney](#), 431 U.S. at 659 (explaining that "the very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged" and **[**14]** instead the claim "contest[s] the very authority of the Government to hale him

²⁸ [465 F.3d 114, 122-23 \(3d Cir. 2006\)](#).

²⁹ [Id.](#) at 122.

³⁰ [Will v. Hallock](#), 546 U.S. 345, 349-50, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006).

1. The *Perlman* Doctrine Does Not Provide Jurisdiction for Fattah's [Speech or Debate Clause](#) Claims.

Fattah's claims regarding the [Speech or Debate Clause](#) fare no better under the so-called *Perlman* doctrine. [HN11](#)³¹ The *Perlman* doctrine refers to the legal principle that a discovery order aimed at a third party may be immediately appealed on the theory that the third party will not risk contempt by refusing to comply.³¹ Disclosure orders are not final orders appealable **[**16]** under [28 U.S.C. § 1291](#). Rather, "[t]o obtain immediate appellate review, a privilege holder must disobey the court's order, be held in contempt, and then appeal the contempt order," which is considered a final order.³² The Supreme Court's decision in [Perlman v. United States](#) established an exception when the traditional contempt route is unavailable because the privileged information is controlled by a disinterested third party who is likely to comply with the request rather than be held in contempt for the sake of an immediate appeal.³³ In these circumstances, a litigant asserting a legally cognizable privilege may timely appeal an adverse disclosure order. The reasoning behind *Perlman* lies in the inequity of leaving a privilege-holder "powerless to avert the mischief of the order," and forcing him to "accept its incidence and seek a remedy at some other time and in some other way."³⁴ Moreover, *Perlman* "reflected concern that where the subject of **[**527]** the discovery order (characteristically the custodian of documents) and the holder of a privilege are different, the custodian might yield up the documents rather than face the hazards of contempt, and would thereby destroy the privilege."³⁵ The question we address **[**17]** today is whether *Perlman* should apply even where Fattah fails to cite a legally cognizable privilege.

Fattah argues that the [Speech or Debate Clause](#)

precludes execution of the search warrant. He contends that the privilege is one of non-disclosure and that the search warrant was served on Google, which "is a disinterested third party which is not likely to permit itself to be placed in contempt" on his behalf.³⁶ As such, he asserts that his is the paradigmatic *Perlman* case, and that he is entitled to immediately appeal the District Court's order. We disagree.

Fattah urges that our decision in [In re Grand Jury](#) is instructive.³⁷ There, the Government moved to compel a law firm to provide documentation regarding its representation of a corporation that was the subject of a federal criminal investigation. The corporation objected to the subpoenas served upon the law firm, but the district court granted the Government's motions to enforce. The corporation sought an immediate appeal under the *Perlman* doctrine predicated on the attorney-client privilege and work-product doctrine. **[**18]** We held that the corporation was entitled to immediately appeal the adverse disclosure order to protect those privileges.³⁸

In this case, there is an important distinction to be drawn: Fattah fails to cite a legally cognizable privilege. Indeed, Fattah relies heavily on our case law discussing the *Perlman* doctrine in the attorney-client privilege context.³⁹ He fails to cite any precedent discussing

³⁶ Appellant's Br. at 28-29.

³⁷ [705 F.3d at 133](#).

³⁸ [Id. at 149](#).

³⁹ See, e.g., [In re Grand Jury Subpoena](#), [745 F.3d 681, 686-87 \(3d Cir. 2014\)](#) (permitting a client and corporation to intervene and quash a subpoena directed to their attorney for testimony under the *Perlman* doctrine on the basis of the attorney-client privilege and work-product doctrine); [In re Grand Jury Proceedings \(FMC Corp.\)](#), [604 F.2d 798, 800-01 \(3d Cir. 1979\)](#) (permitting a corporation to intervene and immediately appeal an adverse disclosure order to protect the attorney-client privilege and work-product doctrine). The only case Fattah cites to **[**19]** applying the *Perlman* doctrine in the context of the [Speech or Debate clause](#) is [In re Grand Jury \(Cianfrani\)](#), [563 F.2d 577 \(3d Cir. 1977\)](#). That case, however, is distinguishable. First, the case involved a state senator who was charged in a federal prosecution. We ultimately held that neither the state nor federal [Speech or Debate Clause](#) privileges extended in such a case. [Id. at 580-82](#). Second, the case involved a subpoena versus an unexecuted search warrant. A subpoena, of course, may be challenged prior to compliance. In stark contrast, a search warrant is properly

³¹ As previously noted, Google, as custodian of the records at issue, is the third party in this case.

³² [In re Grand Jury](#), [705 F.3d 133, 138 \(3d Cir. 2012\)](#).

³³ [247 U.S. 7, 12-13, 38 S. Ct. 417, 62 L. Ed. 950 \(1918\)](#).

³⁴ [Id. at 13](#).

³⁵ [In re Flat Glass Antitrust Litig.](#), [288 F.3d 83, 90 n.9 \(3d Cir. 2002\)](#) (quoting [In re Sealed Case](#), [141 F.3d 337, 340, 329 U.S. App. D.C. 374 \(D.C. Cir. 1998\)](#)).

Perlman's applicability to the Speech or Debate Clause.⁴⁰ HN12 The Speech or Debate Clause encompasses three main protections, it: (1) bars civil and criminal liability for "legislative [*528] acts";⁴¹ (2) guarantees that a Member, or his alter ego, may not be made to answer questions about his legislative acts;⁴² and (3) bars the use of legislative-act evidence against a Member.⁴³ Here, we address the evidentiary privilege as applied to records.

While courts have recognized that the bounds of these protections vary, they are all rooted in the notion that, "to the extent that the Speech or Debate Clause creates a Testimonial privilege as well as a Use immunity, it does so only for the purpose of protecting the legislator and those intimately associated with him in the legislative process from the harassment of hostile questioning."⁴⁴ Courts have interpreted the term "questioning" broadly to forbid submission of legislative act evidence to a jury—whether in the form of testimony

or records.⁴⁵

It cannot be, however, that the privilege prohibits disclosure of evidentiary records to the Government during the course of an investigation. HN13 In *re Grand Jury (Eilberg)* provides a good example. There we held that the disclosure of telephone records containing Speech or Debate Clause privileged documents was permissible.⁴⁶ Moreover, we explained that the evidentiary privilege "[was] not designed to encourage confidences by maintaining secrecy, for the legislative process in a democracy has only a limited toleration for secrecy."⁴⁷

This makes good sense. If it were any other way, investigations into corrupt Members could be easily avoided by mere assertion of this privilege. Members could, in effect, shield themselves fully from criminal investigations by simply citing to the Speech or Debate Clause. We do not believe the Speech or Debate Clause was meant to effectuate such deception. Rather, the "purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process."⁴⁸ That is, the Clause was meant to free "the legislator from the executive and judicial oversight that realistically threatens to control his conduct as a legislator."⁴⁹ The crux of [*22] the Clause is to "prevent intimidation by the executive and accountability [for legislative acts] before a possibly hostile judiciary."⁵⁰ It is clear [*529] that the purpose,

challenged after it is executed. Accordingly, *In re Grand Jury (Cianfrani)* is of limited utility to Fattah.

⁴⁰ For its part, the House of Representatives as amicus insists that Gravel v. United States, 408 U.S. 606, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972), is "on all fours." House Br. 22. We disagree. In *Gravel*, a Senator moved to prevent the questioning of his aide in a grand jury proceeding. The Court held that the privilege established by the Speech or Debate Clause that prevents the questioning of a Member of Congress regarding legislative acts likewise bars the questioning of a Member's aide regarding actions which would have been legislative acts, and therefore privileged, if performed by the Member personally. The Court, however, did not squarely address the *Perlman* issue. *Id.* at 608, n.1 ("The Court of Appeals, United States v. Doe, 455 F.2d 753, 756-757 (CA1 1972), held that because the subpoena [*20] was directed to third parties, who could not be counted on to risk contempt to protect intervenor's rights, Gravel might be 'powerless to avert the mischief of the order' if not permitted to appeal, citing Perlman v. United States, 247 U.S. 7, 13, 38 S. Ct. 417, 62 L. Ed. 950 (1918). The United States does not here challenge the propriety of the appeal.").

⁴¹ Doe v. McMillan, 412 U.S. 306, 311-12, 93 S. Ct. 2018, 36 L. Ed. 2d 912 (1973).

⁴² Gravel, 408 U.S. at 616.

⁴³ United States v. Helstoski, 442 U.S. 477, 487, 99 S. Ct. 2432, 61 L. Ed. 2d 12 (1979).

⁴⁴ In re Grand Jury (Eilberg), 587 F.2d at 597.

⁴⁵ United States v. Renzi, 769 F.3d 731, 746 (9th Cir. 2014), petition for cert. filed, No. 14-1082 (Mar. 9, 2015) ("Evident from its plain language, the focus is on the improper questioning of a Congressman. As such, the Clause is violated when the government reveals legislative act information to a jury because this would subject a Member to being 'questioned' in a place other than the House or the Senate." (internal quotation marks omitted)). [*21]

⁴⁶ In re Grand Jury (Eilberg), 587 F.2d at 597.

⁴⁷ *Id.* (citing U.S. Const. art. 1 § 5, cl. 3).

⁴⁸ United States v. Renzi, 651 F.3d 1012, 1036 (9th Cir. 2011) (quoting United States v. Brewster, 408 U.S. 501, 524-25, 92 S. Ct. 2531, 33 L. Ed. 2d 507 (1972)).

⁴⁹ Helstoski, 442 U.S. at 492 (quoting Gravel, 408 U.S. at 618).

⁵⁰ *Id.* at 491 (quoting United States v. Johnson, 383 U.S. 169, 181, 86 S. Ct. 749, 15 L. Ed. 2d 681 (1966)).

however, has never been to shelter a Member from potential criminal responsibility.

Any other reading of this privilege would eradicate the integrity of the legislative process and unduly amplify the protections to the individual Member. Indeed, "financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation. *Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence.*"⁵¹ We decline to strip the legislative process, and the public, of this protection.

Accordingly, [HN14](#)[↑] while the [Speech or Debate Clause](#) prohibits hostile questioning regarding legislative acts in the form of testimony to a jury, it does not prohibit disclosure of [Speech or Debate Clause](#) privileged documents to the Government. Instead, as we have held before, it merely prohibits the evidentiary **[**23]** submission and use of those documents.

Thus, based on these distinctions, we hold that [HN15](#)[↑]] the [Perlman](#) doctrine does not apply to the [Speech or Debate Clause](#) with respect to records disclosed to the Government in the course of an investigation. The [Speech or Debate Clause](#) does not prohibit the disclosure of privileged documents. Rather, it forbids the evidentiary use of such documents. As such, there is no "mischief" for Fattah to stymie as there is no privilege in danger of destruction. Fattah is unable to challenge the disclosure regardless of to whom the request is made. This differs from a challenge to a subpoena requesting attorney-client privileged documents, where, as the saying goes, you cannot "unring the bell." In that scenario, no remedy assuages disclosure and the privilege may very well be destroyed. Fattah's challenge is far less serious and therefore should not receive such protections. There is no bell to unring here—the privileged documents may be disclosed without violating the privilege, and Fattah may avail himself of several remedies to any alleged illegal search or seizure.

The impetus of the *Perlman* doctrine is to protect privilege holders from the disclosure of privileged materials by a disinterested third-party. **[**24]** Here,

Fattah fails to cite a legally cognizable privilege to support his claim. Accordingly, [Perlman](#) is inapplicable, and we hold that we lack jurisdiction to entertain this appeal under this ground as well.

2. The *Perlman* Doctrine Provides Jurisdiction to Review Fattah's Claims Under the Attorney-Client Privilege and Work-Product Doctrine.

Fattah contends that the *Perlman* doctrine provides appellate jurisdiction for this Court to review the merits of his attorney-client privilege and work-product doctrine claims regarding inadequate filtering procedures. We agree. Unlike Fattah's [Speech or Debate Clause](#) claim, this claim succeeds because it is predicated on legally cognizable privileges continuously recognized under the *Perlman Doctrine*.⁵² Because the attorney-client privilege and work-product doctrine are non-disclosure privileges that may in fact be destroyed by a disinterested third-party, *Perlman* applies.

[*530] On the merits of this issue, Fattah argues that the District Court erred in approving the Government's proposed filtering procedures regarding documents protected by the attorney-client privilege and work-product doctrine. These procedures involved the use of a "taint team" to review for privileged **[**25]** documents, a common tool employed by the Government.⁵³ The team, however, is structured to include a non-attorney federal agent at the first level of review, followed by review by independent attorney federal agents. Moreover, Fattah contends that he does not have the opportunity to assert his privilege with respect to certain documents deemed to be "clearly not privileged" until

⁵² See, e.g., [In re Grand Jury Subpoena](#), 745 F.3d at 686.

⁵³ Certain courts have limited the circumstances in which prosecutors may employ taint teams during criminal investigations. See, e.g., [In re Grand Jury Subpoenas](#), 454 F.3d 511, 522 (6th Cir. 2006). But because Fattah does not argue that the use of a taint team is inappropriate in his case, we have no occasion to consider the appropriate limits, if any, on their use. Of course, a court always retains the prerogative to require a different method of review in any particular case, such as requiring the use of a special master or reviewing the seized documents *in camera* itself. See, e.g., [Klitzman, Klitzman & Gallagher v. Krut](#), 744 F.2d 955, 962 (3d Cir. 1984); [Black v. United States](#), 172 F.R.D. 511, 516 (S.D. Fla. 1997); [United States v. Abbell](#), 914 F. Supp. 519, 520-21 (S.D. Fla. 1995); [In re Search Warrant for Law Offices Executed on Mar. 19, 1992](#), 153 F.R.D. 55, 59 (S.D.N.Y. 1994).

⁵¹ [Renzi](#), 651 F.3d at 1036 (emphasis in the original) (quoting [Brewster](#), 408 U.S. at 524-25).

after they are turned over to those prosecuting his case.

Fattah maintains that only attorneys should be involved in this type of privilege review and that the District Court did not realize a non-attorney agent would be **[**26]** the first line review.⁵⁴ Thus, Fattah argues that "eliminated from the initial determination of what may be privileged is the only professional qualified to make that determination."⁵⁵ Fattah also argues that he should have an opportunity to work with prosecutors to identify privileged documents and that he should be entitled to a court ruling on any documents he claims are privileged before the filter agents turn these documents over to the prosecutorial arm of the Department of Justice (DOJ). Because of the legal nature of the privilege issues involved, we agree that the first level of privilege review should be conducted by an independent DOJ attorney acceptable to the District Court. Fattah's remaining arguments regarding the structure of the review process, we believe, are more appropriately addressed by a district court in the first instance on a case-by-case basis. On remand, the District Court may thus, in its discretion, implement those procedures it deems necessary to protect Fattah's privileges.

C. Fattah's Federal Rule of Criminal Procedure 41(g) Motion

Fattah also styled his pre-indictment motion as a request for relief under Federal Rule of Criminal Procedure 41(g) and contends that under this rule we have appellate jurisdiction. The Rule sets out the procedures criminal defendants should employ for the return of property, providing:

[*531] HN16 (g) Motion to Return Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return. The motion must be filed in the district where the property was

seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

HN17 Denial of a pre-indictment Rule 41(g) motion is immediately appealable, only if the motion is: (1) solely for the return of property **[**28]** and (2) is in no way tied to an existing criminal prosecution against the movant.⁵⁶ In this case, the warrant has yet to be executed, and the Government has yet to seize the evidence Fattah seeks returned. Therefore, there is no property to return. As such, we lack appellate jurisdiction under this ground as well.

III. Conclusion

HN18 We take seriously the sentiments and concerns of the Supreme Court that Members are not to be "super-citizens" immune from criminal liability or process.⁵⁷ Permitting an interlocutory appeal of an order denying a motion to quash an unexecuted search warrant based on the Speech or Debate Clause would set bad precedent and insulate Members from criminal investigations and criminal process. This, of course, cannot and should not be the purpose of the Clause. Thus, for all of the reasons above, we dismiss Fattah's appeal regarding his Speech or Debate Clause claims for lack of jurisdiction and we remand to the District Court his claim with respect to inadequate filtering procedures.

Dissent by: AMBRO (In Part)

Dissent

AMBRO, Circuit Judge, dissenting in part:

I agree with my colleagues that the Speech or Debate Clause does not confer a privilege of confidentiality. Thus, the motion to quash the search warrant on that basis must be denied. Any **[**29]** other conclusion is

⁵⁴ Indeed, the District Court held that the use of "taint teams" had been cited with approval in this Circuit. The cases the District Court cited to, however, all involved an attorney at **[**27]** the first level of review. See, e.g., Manno v. Christie, No. 08-cv-3254, 2009 U.S. Dist. LEXIS 31470 (D.N.J., Apr. 13, 2009). Likewise, the District Court never explicitly acknowledged that review would be conducted by a non-lawyer. Rather, the court stated review would be conducted by "FBI Special Agents not involved in the investigation." App. 10.

⁵⁵ Fattah Br. 61.

⁵⁶ Di Bella, 369 U.S. at 131-32; see also In re Grand Jury, 635 F.3d 101, 103-05 (3d Cir. 2011).

⁵⁷ Brewster, 408 U.S. at 516.

foreclosed by a long line of precedent.¹ However, that Fattah's argument lacks merit does not, in my view, deprive us of jurisdiction to review his claim under the *Perlman* doctrine. "Rather, the lack of merit means that the claim of [privilege] should be denied for just that reason—it lacks merit." [Powell v. Ridge](#), 247 F.3d 520, 527 (3d Cir. 2001) (Roth, J., dissenting). I thus respectfully dissent in part.

"When a district court orders a witness—whether a party to an underlying litigation, a subject or target of a grand jury investigation, or a complete stranger to the proceedings—to testify or produce documents, its order generally is not considered an immediately appealable 'final decision[]' under § 1291." [In re Grand Jury](#), 705 F.3d 133, 142 (3d Cir. 2012) (alteration in original). **[**30]** The appellant instead only secures the right to an immediate appeal when he defies the order, is held in contempt, and appeals the contempt **[*532]** order. This rule, "though at times a harsh one," discourages "all but the most serious" appeals because "[i]t forces the objector to weigh carefully the likelihood of success of its challenge" along with "the importance it attaches to avoiding the ordered disclosure and protecting any associated privileges." *Id.* at 143 (quoting [In re Grand Jury Proceedings](#), 604 F.2d 798, 800 (3d Cir. 1979)). In effect, review remains available through this route even where the likelihood of success is low so long as the importance attached is high.

Where a disclosure order is addressed to a disinterested third party, however, the incentive structure shifts. Unlike the holder of a privilege, a mere custodian of records cannot be "expected to risk a citation for contempt in order to secure [the privilege holder] an opportunity for judicial review." [United States v. Ryan](#), 402 U.S. 530, 533, 91 S. Ct. 1580, 29 L. Ed. 2d 85 (1971). Moreover, without a means to force the third party to protect the privilege holder's rights, it is "left . . . 'powerless to avert the mischief of [a disclosure] order.'" *Id.* (quoting [Perlman v. United States](#), 247 U.S. 7, 13, 38 S. Ct. 417, 62 L. Ed. 950 (1918)). Under the *Perlman*

doctrine, we allow a party opposing a discovery order on grounds of privilege to appeal **[**31]** immediately where the order is directed at a third party who lacks a sufficient stake in the proceeding to risk contempt by refusing compliance. *See id.*

The same principle applies here: As the party on which the warrant was served, Google could refuse to comply and seek appellate review through a separate proceeding for contempt.² However, it presumably has little incentive to do so because the asserted privilege belongs not to Google but to Fattah. Moreover, without custody of the allegedly privileged documents, Fattah cannot himself defy the order to force an interlocutory appeal. Accordingly, Fattah's case falls squarely within *Perlman*'s rationale.

My colleagues of course suggest otherwise. They conclude that we are without jurisdiction because there is no confidentiality privilege under the [Speech or Debate Clause](#). But "[t]he question of the existence of a privilege . . . pertain[s] to the merits," [Slark v. Broom](#), 7 La. Ann. 337, 342 (1852), and it is well established that "jurisdiction under the *Perlman* doctrine does not rise or fall with the merits of the appellant's underlying claim for relief," [Doe No. 1 v. United States](#), 749 F.3d 999, 1006 (11th Cir. 2014). *See also* [Ross v. City of Memphis](#), 423 F.3d 596, 599 (6th Cir. 2005) ("[*Perlman*] jurisdiction does not depend on the validity of the appellant's underlying claims for relief."). Rather, "[i]t is the possibility of disclosure of information which is *thought* to be confidential that is central to the *Perlman* exception." [United States v. Calandra](#), 706 F.2d 225, 228 (7th Cir. 1983) (emphasis added).

Not only do my colleagues fail to cite any case law for

¹ Of course, our binding precedent also provides that, while the Government has a right to review the documents and argue privilege, Fattah has an equal right to participate in that process, particularly given "the information as to [what] were legislative acts is in his possession alone." [In re Grand Jury Investigation \(Eilberg\)](#), 587 F.2d 589, 597 (3d Cir. 1978); *see also id.* (holding that a congressman asserting the [Speech or Debate Clause](#) privilege in a grand-jury proceeding "should be permitted to indicate by affidavit or testimony those calls which he contends are privileged").

² To the extent the Government argues that even contempt proceedings are unavailable for review of an unexecuted search warrant issued under [18 U.S.C. § 2703\(b\)\(1\)](#), this position is directly inconsistent with its position in a pending Second Circuit case. *See* Brief of the United States of America at 8 n.5, [In re Warrant To Search Certain E-Mail Account Controlled & Maintained by Microsoft Corp.](#), No. 14-2985 (2d Cir. Mar. 9, 2005) (noting that the District Court's "entry of a contempt order" gave the Second Circuit jurisdiction to review an unexecuted search warrant issued under [§ 2703](#)); *see also* [In re Warrant To Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.](#), No. 13-mj-2814, 2014 U.S. Dist. LEXIS 133901, 2014 WL 4629624 (S.D.N.Y. Aug. 29, 2014) (Preska, C.J.). **[**32]** (Interestingly, in that case the Government also has taken the contrary position that this type of search warrant isn't really a search warrant at all.)

their novel proposition that the *Perlman* doctrine depends on the [*533] cognizability of the privilege asserted, they also overlook numerous cases to the contrary. This includes *Perlman* itself, where the Supreme Court reviewed the petitioner's [*33] claims on interlocutory appeal despite concluding his arguments lacked merit. See *Perlman*, 247 U.S. at 13-15. Indeed, we have routinely invoked the *Perlman* doctrine as the basis for our jurisdiction, only to decide ultimately that the appellant lacks the privilege asserted. See, e.g., *In re Grand Jury Impaneled Jan. 21, 1975*, 541 F.2d 373, 381, 383 (3d Cir. 1976) (rejecting "the application of a state required reports privilege as a matter of federal common law" though concluding the appellant "had standing to intervene below and challenge the subpoena on the basis of his claim of privilege"); *In re Grand Jury*, 103 F.3d 1140, 1144, 35 V.I. 516 (3d Cir. 1997) (refusing to recognize a cognizable "parent-child privilege" but citing *Perlman* as the basis for its jurisdiction).

We are not without company; other appellate courts have done the same. See, e.g., *In re Grand Jury Proceedings*, 832 F.2d 554, 560 (11th Cir. 1987) (permitting an interlocutory appeal, but holding "that the privilege asserted by [the] appellants [was] without a basis in Florida law" and that they "ha[d] no privilege of nondisclosure under state law"); *In re: a Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 291, 295 (7th Cir. 2002) (invoking *Perlman* for the court's jurisdiction though refusing to extend the attorney-client privilege to communications between government attorneys and their state clients).

The failure to recognize our jurisdiction [*34] under *Perlman* is particularly puzzling given that we have previously relied on that doctrine to review—and reject—indistinguishable attempts to bar disclosure under the *Speech or Debate Clause*. While my colleagues distinguish one such case, *In re Grand Jury Proceedings (Cianfrani)*, 563 F.2d 577 (3d Cir. 1977), as having involved a state, rather than federal, congressperson, I fail to see the relevance of that distinction. Neither did a panel of our Court the following year when U.S. Congressman Eilberg intervened in grand-jury proceedings and appealed. See *Eilberg*, 587 F.2d at 597 (concluding we had jurisdiction to review the interlocutory appeal, but holding, that, "as we ha[d] said on two other occasions, the [Speech or Debate] privilege when applied to records or third-party testimony is . . . not [one] of non-disclosure" (citing *United States v. Helstoski*, 576 F.2d 511 (3d Cir. 1978), *aff'd*, 442 U.S. 477, 99 S. Ct. 2432, 61 L. Ed. 2d 12

(1979), *aff'd sub nom. Helstoski v. Meanor*, 442 U.S. 500, 99 S. Ct. 2445, 61 L. Ed. 2d 30 (1979); *Cianfrani*, 563 F.2d 577)).

Finally, that these prior *Speech or Debate Clause* cases arose in the context of a subpoena *duces tecum* (rather than search warrant) is also an irrelevant distinction. If the *Perlman* doctrine did not apply to search warrants, Fattah would similarly be unable to rely on that doctrine to appeal his attorney-client privilege and work-product claims. Yet here my colleagues correctly rely on the *Perlman* doctrine to conclude that "this claim succeeds." Majority Op. 22. Similarly, [*35] other courts have applied *Perlman* even though a search warrant has been used. See, e.g., *In re Berkley & Co.*, 629 F.2d 548, 551-52 (8th Cir. 1980) (applying *Perlman* to consider the denial of a motion to prevent the Government from disclosing to the grand jury certain privileged documents it had previously seized); *United States v. Griffin*, 440 F.3d 1138, 1143 (9th Cir. 2006) (applying the *Perlman* doctrine where seized documents were in the temporary possession of a special master); *In re Sealed Case*, 716 F.3d 603, 612, 405 U.S. App. D.C. 36 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (suggesting that if a search warrant is used to seize allegedly privileged documents, the [*534] order would be appealable under *Perlman* (citing *Berkley*, 629 F.2d 548)).

The Supreme Court has repeatedly admonished appellate courts not to "conflate[e] the jurisdictional question with the merits of the appeal." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 627, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009). I believe that, by intertwining the cognizability of the privilege with that of an appellate court's jurisdiction, the majority contravenes this mandate. I therefore respectfully dissent in part.

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In re Grand Jury Subpoenas (04-124-03 and 04-124-05)

United States Court of Appeals for the Sixth Circuit

April 18, 2006, Argued ; July 13, 2006, Decided ; July 13, 2006, Filed

File Name: 06a0245p.06

Nos. 05-2274 / 05-2275

Reporter

454 F.3d 511 *; 2006 U.S. App. LEXIS 17475 **; 2006 FED App. 0245P (6th Cir.) ***

In re: GRAND JURY SUBPOENAS 04-124-03 AND 04-124-05

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 04-73533. Paul D. Borman, District Judge.

In re Grand Jury Subpoenas, 2005 U.S. Dist. LEXIS 21081 (E.D. Mich., Sept. 27, 2005)

Core Terms

documents, Venture, grand jury, team, district court, appellants', privileged, subpoenas, secrecy, attorney-client, affiliated company, work-product, special master, parties, log, grand jury investigation, investigators, law firm, proceedings, disclosure, discovery, grand jury subpoena, privilege claim, confidential, protections, Affiliated, occurring, concedes, entities, matters

Case Summary

Procedural Posture

As part of a grand jury investigation, appellant companies moved to intervene and to assert a privilege with regard to certain documents requested by appellee government. The United States District Court for the Eastern District of Michigan allowed the companies to intervene but denied their request as to how the documents would be reviewed for privilege. The companies appealed.

Overview

The government investigated the companies with regard to the improper movement of assets and a number of grand jury subpoenas duces tecum were issued. The companies sought to modify the subpoenas in order to

preserve privilege. The government proposed that a "taint team" composed of government attorneys who were not involved in the grand jury investigation be established to segregate privileged documents from the residue of non-privileged material. The companies wanted their own attorneys to make initial privilege determinations with respect to documents in the third-party subpoena recipient's possession. The appellate court found that while the government obviously had an interest in assisting the grand jury's investigation, the government also had a genuine, if conflicting, interest in preventing investigators from accessing privileged materials. The taint team procedure would present a great risk to the companies' continued enjoyment of privilege protections. The appellate court mandated that the district court should employ a special master to perform the segregation of documents, which the companies would be responsible for paying for.

Outcome

The appellate court reversed the district court's order, and mandated that the district court institute a procedure whereby a special master would conduct the first mechanical review of the implicated documents, and appellants would then conduct a privilege review of the documents provided to them. The matter was remanded to the district court for further proceedings consistent with the opinion.

LexisNexis® Headnotes

Criminal Law & Procedure > .. > Standards of Review > Abuse of Discretion > Discovery

Criminal Law & Procedure > .. > Subpoenas > Challenges to

Subpoenas > General Overview

Criminal Law & Procedure > .. > Standards of Review > De Novo Review > General Overview

[HN1](#)  Abuse of Discretion, Discovery

A district court's denial of a motion to modify grand jury subpoenas is reviewed for an abuse of discretion. A district court abuses its discretion, *inter alia*, when it applies the incorrect legal standard or misapplies the correct legal standard. A district court by definition abuses its discretion when it makes an error of law. If a district court rested its opinion on legal grounds alone, an appellate court reviews that decision *de novo*.

Criminal Law & Procedure > .. > Standards of Review > De Novo Review > General Overview

Evidence > Privileges > Attorney-Client Privilege > Waiver

[HN2](#)  Standards of Review, De Novo Review

If a district court reaches a substantive judgment regarding the waiver of attorney-client privilege, an appellate court reviews that decision *de novo*.

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

[HN3](#)  Discovery, Subpoenas

[Fed. R. Civ. P. 45\(d\)\(2\)](#) is generally satisfied by the submission of a privilege log detailing each document withheld and the reason.

Civil Procedure > .. > Discovery > Privileged Communications > General Overview

[HN4](#)  Discovery, Privileged Communications

It is not a *per se* waiver of privilege for one entity to leave privileged materials on the premises of another entity. Actual determination of the merits of any claim of privilege must await adjudication after the parties have agreed to a subset of documents over which they disagree as to privilege.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Grand Juries > General Overview

[HN5](#)  Commencement of Criminal Proceedings, Grand Juries

Grand juries have lain at the very heart of our criminal justice system since time immemorial, so much so that the founders chose to incorporate the grand jury into the United States Constitution explicitly. It goes almost without saying that grand juries enjoy a broad delegation of authority to conduct investigations. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. The grand jury is, to a degree, an entity independent of the courts, and both the authority and obligation of the courts to control its processes are limited.

Criminal Law & Procedure > ... > Grand Juries > Investigative Authority > General Overview

[HN6](#)  Grand Juries, Investigative Authority

Grand juries are not empowered to override private rights in all cases. Grand juries may not use their investigatory authority to violate a valid privilege, whether established by the United States Constitution, statutes, or the common law. Yet, as the assertion of privilege may jeopardize an effective and comprehensive investigation into alleged violations of law, courts must ensure that the application of the privilege does not exceed that which is necessary to effect the policy considerations underlying the privilege. Thus, the United States Court of Appeals for the Sixth Circuit holds that the government must make a preliminary showing to justify violating work-product privilege pursuant to a grand jury investigation and that grand juries may not breach a valid privilege. .

Civil Procedure > .. > Privileged Communications > Work Product Doctrine > General Overview

Evidence > Privileges > Attorney-Client Privilege > General Overview

[HN7](#)  Privileged Communications, Work Product

Doctrine

The attorney-client privilege and the work-product doctrine are well-established and integral to the proper functioning of the United States legal system. A lawyer who is of counsel may be examined upon oath as to the matter of agreement, not to the validity of an assurance, or to matter of counsel.

Evidence > Privileges > Attorney-Client
Privilege > General Overview

[HN8](#) Privileges, Attorney-Client Privilege

The United States Supreme Court has justifiably recognized the attorney-client privilege as the oldest of the privileges for confidential communications known to the common law. The purpose of attorney-client privilege is to ensure free and open communications between a client and his attorney. Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. The rule which places the seal of secrecy upon communications between client and attorney 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.

Civil Procedure > ... > Privileged
Communications > Work Product
Doctrine > General Overview

Civil Procedure > ... > Privileged
Communications > Work Product Doctrine > Scope
of Protection

[HN9](#) Privileged Communications, Work Product Doctrine

The work-product privilege applies solely to attorney work product compiled in anticipation of litigation. Work-product privilege, while properly construed more narrowly than attorney-client privilege, nevertheless operates for a similar purpose: that is, that people should be free to make requests of their attorneys without fear, and that their attorneys should be free to

conduct research and prepare litigation strategies without fear that these preparations will be subject to review by outside parties. The United States Court of Appeals for the Sixth Circuit applies a five-step analysis to determine whether the doctrine applies.

Civil Procedure > ... > Privileged
Communications > Work Product Doctrine > Scope
of Protection

Evidence > Privileges > Attorney-Client
Privilege > Scope

[HN10](#) Work Product Doctrine, Scope of Protection

Neither attorney-client nor work-product privilege is absolute, but the government must show sufficient cause for overcoming the privilege. The fullest extent of the privileges are not necessarily mandated by the United States Constitution. The attorney-client privilege doctrine protects only those disclosures that are necessary to obtain informed legal advice and that would not be made without the privilege. The privilege cannot stand in the face of countervailing law or strong public policy and should be strictly confined within the narrowest possible limits underlying its purpose. Both privileges may be overridden, for instance, by the so-called crime-fraud exception, encompassing advice given with respect to ongoing or future wrongdoing. However, the United States Supreme Court has authorized even the mere use of in camera inspections by district judges of privileged documents to ascertain the applicability of the crime-fraud exception only when the moving party has made a showing of a factual basis adequate to support a good faith belief by a reasonable person that in camera review of the materials may reveal evidence to establish that the crime-fraud exception applies.

Civil Procedure > ... > Privileged
Communications > Work Product
Doctrine > General Overview

Evidence > Privileges > Attorney-Client
Privilege > General Overview

[HN11](#) Privileged Communications, Work Product Doctrine

With regard to the attorney-client nor work-product privilege, even inspections by the district judge, which do not destroy privilege, require a prior showing that is weakly analogous to probable cause.

Criminal Law &
Procedure > ... > Secrecy > Disclosure > General
Overview

[HN12](#) **Secrecy, Disclosure**

[Fed. R. Crim. P. 6\(e\)\(2\)\(B\)](#) states that certain persons, including government attorneys and grand jurors, must not disclose a matter occurring before a grand jury. Grand jury secrecy is thus a strong command, and federal courts must recognize that, for the system to function properly, grand jury proceedings must be conducted essentially in a vacuum, free from outside influence and sufficiently enveloped so that grand jury information is not disclosed to the general public. Moreover, in general, any holding that would saddle 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.

Criminal Law & Procedure > ... > Grand
Juries > Investigative Authority > Authority of Jury

[HN13](#) **Investigative Authority, Authority of Jury**

A grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it. The jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge. No grand jury witness is entitled to set limits to the investigation that the grand jury may conduct. And a sufficient basis for an indictment may only emerge at the end of an investigation when all the evidence has been received.

Criminal Law & Procedure > ... > Investigative
Authority > Subpoenas > General Overview

Criminal Law & Procedure > ... > Grand
Juries > Secrecy > Rule of Secrecy

[HN14](#) **Investigative Authority, Subpoenas**

A grand jury subpoena is not some talisman that dissolves all constitutional protections. Although the rules of evidence do not fully operate before the grand jury, the investigatory powers of the grand jury are nevertheless not unlimited. While it is certain that matters before a grand jury are protected by [Fed. R. Crim. P. 6\(e\)\(2\)\(B\)](#). The secrecy rule is designed to protect from disclosure only the essence of what takes place in the grand jury room, in order to preserve the freedom and integrity of the deliberative process, it is equally certain that not all documents reviewed by a grand jury constitute "matters occurring before a grand jury," within the meaning of [Rule 6](#).

Criminal Law & Procedure > ... > Secrecy > Matters
Occurring Before Grand Jury > Documents

Criminal Law & Procedure > ... > Secrecy > Matters
Occurring Before Grand Jury > Future Protections

[HN15](#) **Matters Occurring Before Grand Jury, Documents**

The United States Court of Appeals for the Sixth Circuit holds that confidential documentary information not otherwise public obtained by the grand jury by coercive means is presumed to be a "matter occurring before the grand jury" just as much as testimony before the grand jury. The moving party may seek to rebut that presumption by showing that the information is public or was not obtained through coercive means or that disclosure would be otherwise available by civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry, but it must bear the burden of making that showing.

Criminal Law & Procedure > ... > Secrecy > Matters
Occurring Before Grand Jury > Documents

[HN16](#) **Matters Occurring Before Grand Jury, Documents**

Documents prepared by a company for ordinary business purposes become presumptively matters occurring before the grand jury only if they are obtained by the grand jury through coercion. This discovery exception to grand jury secrecy has been interpreted somewhat broadly. Documents such as the business records created for purposes independent of grand jury investigations, and such records have many legitimate

uses unrelated to the substance of the grand jury proceedings.

Criminal Law & Procedure > .. > Grand Juries > Secrecy > Legislative Intent

[HN17](#) **Secrecy, Legislative Intent**

Unless sought information reveals something about the grand jury proceedings, secrecy is unnecessary.

Evidence > Privileges > General Overview

[HN18](#) **Evidence, Privileges**

Government taint teams seem to be used primarily in limited, exigent circumstances in which government officials have already obtained the physical control of potentially-privileged documents through the exercise of a search warrant. In such cases, the potentially-privileged documents are already in the government's possession, and so the use of the taint team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege.

Evidence > Privileges > General Overview

[HN19](#) **Evidence, Privileges**

With regard to privilege documents, government taint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors. That is to say, the government taint team may have an interest in preserving privilege, but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations. It is thus logical to suppose that taint teams pose a serious risk to holders of privilege, and this supposition is substantiated by past experience.

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ON BRIEF: David M. Zinn, WILLIAMS & CONNOLLY,

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Judges: Before: BOGGS, Chief Judge; SUTTON, Circuit Judge; and SCHWARZER, District Judge. *

Opinion by: BOGGS

Opinion

[*512] [*1]** BOGGS, Chief Judge. These two cases, filed under seal, present a legal question regarding the conduct of reviews of documents for privilege.¹ Specifically, we must determine who has the right to conduct a review for privilege of documents subject to a grand jury subpoena directed to a third party who possesses the documents but has not yet produced **[**2]** them to the government: the targets of the investigation whose rights of privilege are potentially implicated, or the federal government, operating a "taint team" behind a "Chinese wall" or protective screen

[*2] [*513]** These cases arise from events leading up to the 2003 bankruptcy filing of Venture Holdings LLC ("Venture"), a company once controlled by appellant Larry Winget. After Venture's new (post-filing) management conducted an internal investigation, the company filed suit against Winget for allegedly fraudulent conveyances of goods and services from Venture to other entities that Winget owned or controlled. Shortly thereafter, a federal grand jury issued two subpoenas *duces tecum*, filed under seal, to Venture. Winget filed a motion to intervene, and seven companies affiliated with Winget (the "Affiliated Companies") later joined this motion. The documents in question have not been examined by **[**3]** any of the parties, and they remain in locations under Venture's control. Winget and the Affiliated Companies demanded the right to conduct their own privilege review of the documents responsive to the subpoenas, as both the government and Venture are actually or possibly litigation opponents of Winget's or the Affiliated

*The Honorable William W Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

¹As the two cases present essentially identical issues of law and fact, we will address them together.

Companies'. The government opposed this motion, and asserted that any privilege review be conducted by its own "taint team." The district court granted Winget's and the Affiliated Companies' motions to intervene, but agreed with the government with respect to the "taint team" review procedure. The district court issued an alternative holding that Winget had also failed to meet the threshold requirement of showing any rights of privilege in the requested documents. For the reasons stated below, we reverse and remand

The circumstances leading to the instant controversy are sufficiently convoluted to require some summary description despite the fact that the documents in the suit remain under seal. Larry Winget was once the sole owner of Venture, a global automotive supplier, and had served as its Chairman and Chief Executive Officer. Winget also owned or **[**4]** controlled numerous other companies, including the Affiliated Companies. The headquarters of Venture and of each of the Affiliated Companies were located in the same office in Fraser, Michigan.

In 1999, Venture purchased a German company called Peguform. In October 2002, a German court declared Peguform insolvent under Germany's bankruptcy regime. This threatened Venture's solvency and caused a group of bank creditors to assert more control over the company. Consequently, Joseph Day was installed as a director in January 2003. Venture then filed for bankruptcy on March 28, 2003 under Chapter 11 in the Eastern District of Michigan. At the same time, Day replaced Winget as Venture's Chief Executive Officer. Six months later, on September 22, 2003, Winget and Venture entered into a Contribution Agreement ("Contribution Agreement"), whereby several entities owned by Winget and certain of his affiliates would transfer their assets and ownership to a new company that would be formed in connection with Venture's reorganization.

Also in September 2003, Venture's new management hired an accounting firm to conduct a forensic audit of related-party transactions between Venture and some of the **[**5]** many companies associated with Winget. In March 2004, Venture's auditors concluded that Venture had in the past paid millions of dollars to some Winget-owned or -controlled companies for products and services whose fair market value was allegedly substantially less than the price paid, which would have contradicted certain statements in Venture's SEC filings

during the relevant years. The auditors' **[*514]** conclusions remain untested, and we will not venture to assess their accuracy.

On April 5, 2004, as part of the bankruptcy proceedings, Venture and its official committee of unsecured creditors filed a still-pending civil suit against Winget, some of his family members, and numerous associated entities, asserting claims of unjust enrichment, breaches of fiduciary duties, and fraudulent transfers arising from Venture's payment of funds to Winget's affiliated companies. *Venture v. Winget*, Adversary Proc. 04-4374, [In re Venture Holdings Company LLC, 2005 Bankr. LEXIS 76, No. 03-48939 \(Bankr. E.D. Mich.\) On May 13, 2004](#), Venture and Winget signed a Separation Agreement ("Separation Agreement"), whereby Winget agreed to terminate his employment by Venture and resign as officer and director. In exchange, **[**6]** he was to receive \$50,000 every month while Venture remained under Chapter 11 protection, and he was further entitled to "continue the exclusive, **[***3]** uninterrupted use of the office which he currently occupies" at James J. Pompo Drive. This agreement forms part of the substantive basis for Winget's claims to privilege in the instant case, but we are in no position now to assess its substance or legal effect because the instant controversy involves a matter that is logically antecedent to the substance of any privilege disputes.

On January 21, 2005, the bankruptcy court rejected Venture's proposed reorganization plan, and, therefore, the Contribution Agreement as well. On April 8, 2005, with an April 29 amendment, New Venture Holdings LLC ("New Venture") was formed by Venture's pre-petition lenders, who agreed to buy the assets and assume the liabilities of (old) Venture and nine other companies owned or controlled by Winget that had filed for Chapter 11 in May 2004. The bankruptcy court subsequently approved this transaction. On May 2, 2005, (old) Venture and the nine affiliated companies formally transferred their assets and liabilities to New Venture. In October 2005, New **[**7]** Venture changed its name to Cadence Innovation LLC.

Meanwhile, the federal government began investigating the matter. In the fall of 2004, a number of grand jury subpoenas *duces tecum* were issued. Relevantly to the case at hand, New Venture received two such subpoenas, and the company soon agreed to cooperate with the federal investigation, waiving its corporate attorney-client and work-product privileges in October 2004. As the subpoenas in question were filed under seal, and as their precise substance is not particularly

relevant to the instant controversy, we will respect grand jury secrecy and exercise our discretion by not discussing their contents. Instead, we simply note that the subpoenas were directed to New Venture, and they demanded production of some documents that, all sides concede, may be protected by either Winget's or the Affiliated Companies' attorney-client or work-product privileges.

On March 1, 2005, Winget filed a motion in the Eastern District of Michigan to intervene and to modify the subpoenas in order to preserve privilege. In this motion, he claimed that some of the records that New Venture had been called upon to produce were protected by Winget's **[**8]** *personal* attorney-client or work-product privileges even though the documents remained in offices under Venture's control. Winget therefore asked the court to approve a procedure, described in greater detail below, whereby his attorneys would conduct a privilege review of the responsive documents. On April 29, 2005, the Affiliated Companies filed a motion to join Winget's intervention, arguing that the subpoenas called for documents that could **[*515]** be protected by their corporate attorney-client and work-product privileges.

The government opposed Winget's motion, claiming that he was

requesting this Court to allow him to insert himself into the middle of a grand jury investigation so that he can be the first to screen documents produced . . . in response to the two subpoenas. . . . [S]uch a procedure would subvert the orderly functioning of the grand jury process and would be, to the best of the government's knowledge, *unprecedented* .

(emphasis in original). Instead, the government proposed that a "taint team" composed of government attorneys who are not involved in the grand jury investigation be established to segregate privileged documents from the residue **[**9]** of non-privileged material. As we discuss more extensively below, the proposed taint team would return to Venture any documents that it determined to be privileged, sending copies to Winget where appropriate, and would submit the materials it determined to be potentially protected by privilege to Winget and the district court for final adjudication. However, the taint team would send documents it deemed not to be protected by appellants' privilege directly to the grand jury, and so they would not provide appellants with any opportunity to review or challenge the team's privilege determinations with respect to those documents.

[*4]** The district court conducted a closed hearing on August 3, 2003. At this hearing, the court sternly questioned the parties regarding the legal merit of any privilege claims, and criticized Winget and the Affiliated Companies for failing to provide a log that detailed specific documents that they claimed to be privileged. It is not clear how they could have done so, for it is certain that neither Winget, nor the Affiliated Companies, nor even the government, has yet had any access to the subpoenaed documents. On September 7, the district court issued **[**10]** an order denying Winget's requested relief, and approved instead the government's proposed taint team. The court issued an alternative ruling wherein it held that the appellants had failed to meet their burden of proving that one or more of them held a privilege over the documents. Winget and the Affiliated Companies filed a timely notice of appeal.

II

The appellants essentially moved to "modify" the grand jury subpoenas, [Fed. R. Crim. P. 17\(c\)\(2\)](#), see [Fed. R. Civ. P. 45\(d\)\(2\)](#), and the resulting discovery order is immediately appealable. See [In re Subpoena Duces Tecum](#), 370 U.S. App. D.C. 113, 439 F.3d 740, 743 (D.C. Cir. 2006). The [HN1](#) district court's denial of this motion is reviewed for abuse of discretion. See [United States v. Hughes](#), 895 F.2d 1135, 1145 (6th Cir. 1990). A district court abuses its discretion, *inter alia*, "when it applies the incorrect legal standard [or] misapplies the correct legal standard." [Deja Vu of Cincinnati, LLC v. Union Twp. Bd. of Trustees](#), 411 F.3d 777, 782 (6th Cir. 2005) (en banc), cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (2006) **[**11]** (quoting [Schenck v. City of Hudson](#), 114 F.3d 590, 593 (6th Cir. 1997)). "A district court by definition abuses its discretion when it makes an error of law." [Koon v. United States](#), 518 U.S. 81, 100, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996). As the district court rested its opinion on legal grounds alone, we review that decision *de novo*. Moreover, to the extent that the [HN2](#) court below reached a substantive judgment regarding the waiver of attorney-client privilege, we also review that decision *de novo*. [In re Powerhouse Licensing, LLC](#), 441 F.3d 467, 472 (6th Cir. 2006).

[*516] The only question before us is whether the district court erred in preferring the government's proposed taint team to the appellants' own attorneys to make initial privilege determinations with respect to documents in the third-party subpoena recipient's possession. We have not been asked to determine

whether any of these documents are actually privileged, and the time is clearly not ripe to adjudicate the merits of any potential privilege claims. Instead, our duty here is to determine the logically antecedent issue as to which party -- the government or the appellants -- has **[**12]** the right to conduct a privilege screen of documents responsive to a grand jury subpoena issued to a third party. The government in fact concedes that some of the documents responsive to the subpoena may be protected by appellants' privilege, does not challenge the appellants' general rights of privilege, and does not seem to contest that the appellants would have had the right to conduct their own privilege review had the subpoena been directed to them instead of New Venture. Instead, the government complains that allowing the appellants' own attorneys to conduct a privilege review of the subpoenaed documents at New Venture would interfere with a government investigation and undermine grand jury secrecy. This controversy thus calls for us to weigh, to some degree, grand jury investigations and grand jury secrecy against attorney-client and work-product privilege.

A

In the first step of the appellants' proposed procedure,² their own counsel would provide the government and New Venture with a "list of the law firms, attorneys, and agents" who represented them. Then, a paralegal retained by appellants' counsel would review the implicated documents in **[***5]** offices controlled **[**13]** by New Venture,³ and segregate those documents that had been "authored by, received by, copied to, or that mention anyone identified on the list" from the remainder. Third, the appellants' attorneys would review "copies of the segregated documents and prepare a privilege log for any documents that [appellants] claim as privileged." The appellants would thus create a log documenting materials for which they claim the protection of privilege, and this log would presumably

include sufficient information about the privilege claims that the government could intelligently evaluate appellants' assertions by reviewing the log. Finally, "the parties would bring any privilege disputes before the Court." This seems to reflect a fairly standard practice by which law firms conduct privilege reviews when responding to government subpoenas or other discovery requests. See [Cheney v. United States Dist. Ct. for D.C., 542 U.S. 367, 399 n.5, 124 S. Ct. 2576, 159 L. Ed. 2d 459 \(2004\)](#); [Lexicon, Inc. v. Safeco Ins. Co. of Am., 436 F.3d 662, 665-73 \(6th Cir. 2006\)](#); [McAlpin v. Lexington 76 Auto Truck Stop, Inc., 229 F.3d 491, 499 \(6th Cir. 2000\)](#). See also [In re Subpoena Duces Tecum, 439 F.3d at 751](#) **[**14]** ([HN3](#)) "[Civil] Rule 45(d)(2) is generally satisfied by the submission **[*517]** of a privilege log detailing each document withheld and the reason."). Alternatively, the appellants request that the district court appoint a Special Master to conduct the privilege review.⁴

[15]** While the government obviously has an interest in assisting the grand jury's investigation, the government also has a genuine, if conflicting, interest in preventing investigators from accessing privileged materials. Indeed, the government concedes that the leaking of privileged materials to investigators would raise the spectre of *Kastigar*-like evidentiary hearings, see [Kastigar v. United States, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 \(1972\)](#), and argues that it would therefore act conservatively, and err on the side of caution, in assessing the existence of privilege and in screening privileged documents from investigators. In the government's proposed procedure, a taint team consisting of at least one Assistant United States Attorney (from the same Eastern District of Michigan office as the prosecutors) and at least one Postal Inspector would review for privilege all documents produced by Venture. Materials that the taint team finds clearly to be privileged would then be returned to New Venture, with copies provided to the appellants. However, materials that the taint teams finds clearly not to be privileged would be provided directly to the investigators and the grand **[**16]** jury, and the appellants would have no opportunity to review those

²Winget proposed this procedure in his motion to intervene docketed on March 1, 2005. The Affiliated Companies joined in that motion, and in the requested procedure, in their motion filed on April 28, 2005.

³[HN4](#) It is not, to be sure, a *per se* waiver of privilege for one entity to leave privileged materials on the premises of another entity. See [Schwimmer v. United States, 232 F.2d 855 \(8th Cir. 1956\)](#). Actual determination of the merits of any claim of privilege must await adjudication *after* the parties have agreed to a subset of documents over which they disagree as to privilege.

⁴No party seems to have offered a concrete procedural mechanism by which the suggested Special Master would segregate privilege documents, nor whether the master would be expected to perform the entire task or just portions of it. Although the government opposed the request, it did concede before the trial court that "it would be Uncle Sam one way in on way [*sic*] or the other" who paid for the Special Master.

documents. Finally, materials whose status is unclear in the taint team's estimation would be submitted by the taint team to the district court for judicial determination, with copies provided to the appellants.

The district court decided in favor of the government's proposed taint team procedure. The court also reached a substantive finding, concluding that "any rights created between the parties in this [Separation Agreement] between [Winget] and Venture, do not undercut the grand jury's right to secure evidence from Venture." The district court framed the issue before it as one primarily of substance, rather than of procedure:

The critical issue is whether Intervenor has a valid attorney-client privilege or work product protection with regard to documents located in Venture's buildings sought by the subpoenas at issue, and further, if such protections could apply, whether examination of documents at issue should be done initially by the Court, a master **[***6]** appointed by the Court, a paralegal in the employ of Intervenor's counsel, or a government privilege/taint team.


Thus, the district **[**17]** court had it exactly backward: the parties do not presently dispute that there *might* be material in New Venture's possession over which the appellants *might* have a right of privilege. The government explicitly concedes that there *may* be documents over which appellants hold privilege in New Venture's offices. Rather, they disagree as to *how* to determine whether any of these documents are in fact protected by appellants' privilege. Therefore, the district court's extensive discussion of the agreements and contracts that may or may not have rendered the documents privileged to the appellants is almost wholly irrelevant to the inquiry properly before us. Until the parties raise concrete substantive disputes over whether particular documents are privileged, **[*518]** which they cannot do until a review of the documents for privilege is undertaken in some fashion, the question of privilege is simply not ripe for adjudication.

In addition to its alternative holding that we now reverse in its entirety, the district court specifically granted the government's motion to conduct the privilege review under the aegis of a taint team, holding that any documents that the taint team finds **[**18]** to be privileged "shall be submitted to the Court for a final determination. At that point, if the Court determines that the documents might be deserving of attorney client and/or work product protection(s), the Court will require Intervenor to prove that they were not expose[d] to third

parties." ⁵ The district court thus held that the public policy underlying grand jury secrecy and the effective investigation of criminal activity outweighed the appellants' privilege claims.

[19] B**

This controversy requires us to address two rules of our common law inheritance that were already ancient when the Founders drafted the Constitution. In our inquiry, we must first determine whether the grand jury's investigative authority trumps appellants' claims of privilege. Answering that question in the negative, we must then discern whether the government's claim regarding the importance of grand jury secrecy countervails the possible protections of privilege that appellants may enjoy. We also answer that question in the negative. Finally, we will outline a procedure that, we think, appropriately addresses the situation before us.

HN5  Grand juries have lain at the very heart of our criminal justice system since time immemorial, ⁶ so

⁵ The court below thus substantially altered the government's proposal. Whereas the government had proposed a procedure whereby the taint team would first identify and segregate (a) definitely privileged, (b) definitely not privileged, and (c) questionably privileged documents, providing only the questionably privileged documents to the court for adjudication, the district court effectively ordered that all documents deemed by the taint team to be definitely or potentially privileged were to be subject to the court's independent determination. The court would thus require the appellants to prove that documents were actually privileged on a case-by-case basis. As there is no case or controversy regarding the substantive adjudication of privilege disputes, we take no position with respect to that portion of the district court's original order.

⁶ This is literally so, for grand juries, albeit in their relatively inchoate nascence, predate the accession of King Richard I in 1189 A.D., which the Statute of Westminster I in 1275 established as the day demarcating "time immemorial" from historical (legal) time. 3 Edw. I. c. 39. See *R v. Oxfordshire County Council ex parte Sunningwell Parish Council*, (2000) 1 A.C. 335, 349 (H.L.) (appeal taken from C.A. (Civ. Div.)). See generally, *Lipari v. Kawasaki Kisen Kaisha, Ltd.*, 923 F.2d 862, 1991 WL 3060 at **3 (9th Cir. 1991), [Grace v. Koch](#), 1996 Ohio App. LEXIS 4432, No. C-90802, 1996 WL 577843 at *3 n. 7 (Ohio Ct. App. Oct. 9, 1996); [Macy v. Ok. City Sch. Dist.](#) No. 391998 OK 58, 961 P.2d 804, 813-14 (Ok. 1998) (Opala, J., concurring); *Morning Call, Inc. v. Bell Atlantic-Pennsylvania, Inc.*, 2000 PA Super 294, 761 A.2d 139, 143 n. 7 (Pa. Super. Ct. 2000); *Mercer v Denne* [1905] 2 Ch. 538,

much so that the founders chose to incorporate the grand jury into our Constitution explicitly. It goes almost without saying that grand juries enjoy a broad delegation of authority to conduct investigations. "As a necessary consequence of its investigatory function, the grand jury [***7] paints with a broad brush" [*United States v. R. Enters., Inc.*, 498 U.S. 292, 297, 111 S. Ct. 722, 112 L. Ed. 2d 795 \(1991\)](#). As then-Judge Kennedy wrote, [**20] "[t]he grand jury is, to a degree, an entity independent of the courts, and both the authority and obligation of the courts to control its processes are limited." [*In re \[**519\] Grand Jury Investigation of Hugle*, 754 F.2d 863, 864 \(9th Cir. 1985\)](#).

[**21] Nevertheless, [HN6\[↑\]](#) grand juries are not empowered to override private rights in all cases. Pertinently, we have held that grand juries may not use their investigatory authority "to violate a valid privilege, whether established by the Constitution, statutes, or the common law." [*In re Grand Jury Investigation \(Detroit Police Dep't Special Cash Fund\)*, 922 F.2d 1266, 1269-70 \(6th Cir. 1991\)](#) (citations and internal quotation marks omitted) (finding that informant privilege did not operate to prohibit witness from testifying to grand jury). Yet, as the assertion of privilege "may jeopardize an effective and comprehensive investigation into alleged violations of law," courts must ensure that the "application of the privilege [does] not exceed that which is necessary to effect the policy considerations underlying the privilege." [*In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 451 \(6th Cir. 1983\)](#). Thus, we have held that the government must make a preliminary showing to justify violating work-product privilege pursuant to a grand jury investigation, [*In re Grand Jury Subpoena Dated Nov. 8, 1979*, 622 F.2d 933 \(6th Cir. 1980\)](#), and that [**22] grand juries may not breach a valid psychotherapist-patient privilege. See [*In re Zuniga*, 714 F.2d 632, 639-40 \(6th Cir. 1983\)](#). See also [*In re Grand Jury Subpoena \(Maltby\)*, 800 F.2d 981 \(9th Cir. 1986\)](#) (remanding because district court failed to rule on claims of attorney-client privilege); [*Schwimmer v. United States*, 232 F.2d 855 \(8th Cir. 1956\)](#) (authorizing Special Master to make privilege determinations in grand jury context so long as attorney had a right of review).

The two privileges that all sides concede to be potentially at stake [HN7\[↑\]](#) attorney-client privilege and the work-product doctrine -- are well-established and integral to the proper functioning of our legal system. The privilege protecting confidential communications between an attorney and his client dates back to the

Tudor dynasty at least, although the reasoning behind the early modern version of this privilege was different from, and far narrower than, that espoused in modern times. See *Dennis v. Codrington*, (1580) 21 Eng. Rep. 53 (Ch.) (regarding a motion to examine a Mr. Oldsworth, "touching a matter in variance, wherein he hath been of Counsel, it [**23] is ordered he shall not be compelled by subpoena or otherwise to be examined upon any matter concerning the same, wherein he the said Mr. Oldsworth was of counsel."); *Onbie's Case*, (1642) 82 Eng. Rep. 422 (K.B.) ("a lawyer who was of counsel may be examined upon oath as to the matter of agreement, not to the validity of an assurance, or to matter of counsel."). See generally, 8 Wigmore on Evidence § 2290 *et seq.* (McNaughton rev. ed. 1961).

[HN8\[↑\]](#) The Supreme Court has thus justifiably recognized the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law." [*Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 \(1981\)](#). The purpose of attorney-client privilege is to ensure free and open communications between a client and his attorney. See [*Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 \(1976\)](#) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. The purpose of the privilege is to encourage clients to make full disclosure to their attorneys." (citations omitted)); [*Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S. Ct. 125, 32 L. Ed. 488 \(1888\)](#) [**24] ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of [**520] 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.").

On the other hand, [HN9\[↑\]](#) work-product privilege applies solely to attorney work product compiled in anticipation of litigation. [*Hickman v. Taylor*, 329 U.S. 49, 511 \(1947\)](#). Work-product privilege, while properly construed more narrowly than attorney-client privilege, nevertheless operates for a similar purpose: that is, that people should be free to make requests of their attorneys without fear, and that their attorneys should be free to conduct research and prepare litigation strategies without [***8] fear that these preparations will be subject to review by outside parties. We apply a five-step analysis to determine whether the doctrine applies, [*In re Powerhouse Licensing, LLC*, 441 F.3d at 473](#), though, as noted, that issue is not presently ripe for

adjudication.

[HN10](#) Neither attorney-client **[**25]** nor work-product privilege is absolute, but the government must show sufficient cause for overcoming the privilege. *In re Grand Jury Subpoena Dated Nov. 8, 1979*, 622 F.2d at 935-36. The fullest extent of the privileges are not necessarily mandated by the United States Constitution. See *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 504 (2d Cir. 1991) ("The [attorney-client privilege] doctrine protects only those disclosures that are necessary to obtain informed legal advice and that would not be made without the privilege. The privilege cannot stand in the face of countervailing law or strong public policy and should be strictly confined within the narrowest possible limits underlying its purpose." (citations omitted)). Both privileges may be overridden, for instance, by the so-called crime-fraud exception, encompassing advice given with respect to ongoing or future wrongdoing. However, the Supreme Court has authorized even the mere use of *in camera* inspections by district judges of privileged documents to ascertain the applicability of the crime-fraud exception only when the moving party has made a "showing of a factual basis adequate **[**26]** to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish that the crime-fraud exception applies." *United States v. Zolin*, 491 U.S. 554, 572, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989). Thus, [HN11](#) even inspections by the district judge, which do not destroy privilege, require a prior showing that is weakly analogous to probable cause. In the instant case, the government has not suggested that the crime-fraud exception, or any other exception to privilege, is applicable, and, in any case, a government taint team's review of documents is far riskier to the non-moving party's privilege than is a judge's *in camera* review.

The government prefers a taint team procedure, whereby its lawyers, behind a protective screen or "Chinese wall," would sift the documents for privilege. The government argues that grand jury secrecy requires this procedure, that the appellants' alternative would present an inexcusable intrusion into the grand jury investigative process, and that appellants' alternative would likely be ineffective because appellants' attorneys would have an incentive to drag their feet. The first two arguments require **[**27]** us to weigh the potential protection of privilege against the potential violation of grand jury secrecy, and we find that the arguments have less merit than the government suggests. The last two arguments are well-taken, however, and so they must


be addressed by our remedy.

[521]** First, the government overstates the role of grand jury secrecy in the present controversy. It has long been recognized that grand juries require a generous zone of secrecy in order to perform their investigative functions. Although grand jury secrecy did not always go unchallenged, it seems to have been well-established long before our independence from Great Britain. As the foreman of the grand jury convened in 1681 for the treason trial of the Earl of Shaftesbury is reported to have said to the Lord Chief Justice, in response to the justice's granting of a motion requiring grand jury evidence to be heard publicly:


My Lord Chief Justice, it is the opinion of the jury, that they ought to examine the witnesses in private, and it hath been the constant practice of our ancestors and predecessors to do it; and they insist upon it as their right to examine in private, because they are bound to keep the king's **[**28]** secrets, which they cannot do, if it be done in court. . . . [I]t is contrary to the sense of what the jury apprehend. First, they apprehend that the very words of the oath doth bind them, it says, "That they shall keep the counsel's, and their own secrets:" Now, my lord, there can be no secret in public; the very intimation of that doth imply, that the examination should be secret; besides, my lord, I beg your lordship's pardon if we mistake, we do not understand anything of law.


[*9]** *Earl of Shaftesbury's Trial*, (1681) 8 How. St. Tr. 759, 771-74. That ancient rule crossed the Atlantic and has been preserved in some fashion since; the federal courts' modern version is established by [HN12](#) *Rule 6(e)(2)(B) of the Federal Rules of Criminal Procedure*, which states that certain persons, including government attorneys and grand jurors, "must not disclose a matter occurring before a grand jury." Grand jury secrecy is thus a strong command, and federal courts must recognize that, "for the system to function properly, grand jury proceedings must be conducted essentially in a vacuum, free from outside influence and sufficiently **[**29]** enveloped so that grand jury information is not disclosed to the general public." *In re Grand Jury Investigation (90-3-2)*, 748 F. Supp. 1188, 1194 (E.D. Mich. 1990). Moreover, in general, "[a]ny holding that would saddle 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." *United States v. Dionisio*, 410 U.S. 1, 17, 93 S. Ct. 764,

[35 L. Ed. 2d 67 \(1973\)](#). Indeed,


[HN13](#)  A grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it. The jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge. No grand jury witness is entitled to set limits to the investigation that the grand jury may conduct. And a sufficient basis for an indictment may only emerge at the end of an investigation when all the evidence has been received.


[Id. at 15-16](#) (citations and internal quotation marks omitted).

But "[t]his is not to say that [HN14](#)  a grand jury subpoena is some talisman that dissolves all constitutional protections." **[**30]** [Id. at 11](#). Although the rules of evidence do not fully operate before the grand jury, "[t]he investigatory powers of the grand jury are nevertheless not unlimited" [United States v. R. Enters.](#), 498 U.S. at 299. While it is certain that matters before a grand jury are protected by Criminal [Rule 6\(e\)\(2\)\(B\)](#), see [Douglas Oil Co. of Cal. v. Petrol Stops Nw.](#), 441 U.S. 211, 99 S. Ct. 1667, 60 L. Ed. 2d 156 (1979) (setting forth general standards for revealing matters occurring **[**522]** before a grand jury); [In re Antitrust Grand Jury](#), 805 F.2d 155 (6th Cir. 1986); [In re Grand Jury Proceedings Relative to Perl](#), 838 F.2d 304, 306 (8th Cir. 1988) (the secrecy rule "is designed to protect from disclosure only the essence of what takes place in the grand jury room, in order to preserve the freedom and integrity of the deliberative process"), it is equally certain that not all documents reviewed by a grand jury constitute "matters occurring before a grand jury," within the meaning of Criminal [Rule 6](#). We have previously held that


[HN15](#)  confidential documentary information not otherwise public obtained by the grand jury by coercive **[**31]** means is presumed to be [a] "matter[] occurring before the grand jury" just as much as testimony before the grand jury. The moving party may seek to rebut that presumption by showing that the information is public or was not obtained through coercive means or that disclosure would be otherwise available by civil discovery and would not reveal the nature, scope, or direction of the grand jury inquiry, but it must bear the burden of making that showing . . .

[In re Grand Jury Proceedings](#), 851 F.2d 860, 866-67

([6th Cir. 1988](#)) (alterations added). Thus, [HN16](#)  documents prepared by a company for ordinary business purposes become presumptively "matters occurring before the grand jury" only if they are obtained by the grand jury through coercion. [FDIC v. Ernst & Whinney](#), 921 F.2d 83, 86-87 (6th Cir. 1990). This discovery exception to grand jury secrecy has been interpreted somewhat broadly. [In re Grand Jury Proceedings](#), 196 F.R.D. 57, 62-64 (S.D. Ohio 2000); [Phillips v. United States](#), 843 F.2d 438 (11th Cir. 1988); [In re Grand Jury Investigation](#), 630 F.2d 996, 1000 (3d Cir. 1980) ("Documents such as **[**32]** the business records sought by the Commission here are created for purposes independent of grand jury investigations, and such records have many legitimate uses unrelated to the substance of the grand jury proceedings.");

[10]** [United States v. Stanford](#), 589 F.2d 285, 291 (7th Cir. 1978) ([HN17](#)  "Unless [sought] information reveals something about the grand jury proceedings, secrecy is unnecessary").

Here, the government does not contend that the appellants would not have had the opportunity to review for privilege documents responsive to the subpoenas if the grand jury's subpoena had been directed to them instead of New Venture. Nor can the government claim that the appellants would not have had independent access in the ordinary course of business to the documents in question. We therefore believe that the discovery exception to the secrecy requirement would apply. Moreover, the appellants are not necessarily demanding access to the entire set of documents responsive to the subpoena; rather, they seek only to conduct a privilege review of documents that contain the names of particular lawyers, law firms, and other entities. The marginal increase in the risk **[**33]** that the appellants could divine or reverse-engineer the grand jury's investigative purpose by reviewing a set of their own documents that involved some sort of communication between them and their counsel seems to us to be minimal at best.

Yet the taint team procedure would present a great risk to the appellants' continued enjoyment of privilege protections. In the first place, [HN18](#)  government taint teams seem to be used primarily in limited, exigent circumstances in which government officials have already obtained the physical control of potentially-privileged documents through the exercise of a search warrant. In such cases, the potentially-privileged documents are already in the government's possession,

and so the use of the taint team to sift the wheat from the chaff [*523] constitutes an action respectful of, rather than injurious to, the protection of privilege. See United States v. Abbell, 914 F. Supp. 519 (S.D. Fla. 1995) (after seizing law firm documents through a search warrant, the government employed a taint team to determine privilege; however, court appointed a special master to review the documents, with costs charged to the government). But the government does [*34] not actually possess the potentially-privileged materials here, so the exigency typically underlying the use of taint teams is not present.

Furthermore, HN19 [↑] taint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors. That is to say, the government taint team may have an interest in preserving privilege, but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations. It is thus logical to suppose that taint teams pose a serious risk to holders of privilege, and this supposition is substantiated by past experience. In United States v. Noriega, 764 F. Supp. 1480 (S.D. Fla. 1991), for instance, the government's taint team missed a document obviously protected by attorney-client privilege, by turning over tapes of attorney-client conversations to members of the investigating team. This *Noriega* incident points to an obvious flaw in the taint team procedure: the government's fox is left in charge of the appellants' henhouse, [*35] and may err by neglect or malice, as well as by honest differences of opinion.

It is reasonable to presume that the government's taint team might have a more restrictive view of privilege than appellants' attorneys. But under the taint team procedure, appellants' attorneys would have an opportunity to assert privilege *only* over those documents which *the taint team has identified* as being clearly or possibly privileged. As such, we do not see any check in the proposed taint team review procedure against the possibility that the government's team might make some false negative conclusions, finding validly privileged documents to be otherwise; that is to say, we can find no check against Type II errors in the government's proposed procedure. On the other hand, under the appellants' proposal, which incidentally seems to follow a fairly conventional privilege review procedure employed by law firms in response to discovery requests, the government would still enjoy the

opportunity to challenge any documents that appellants' attorneys misidentify (via the commission of Type I errors) as privileged. We thus find that, under these circumstances, the possible damage to the appellants' [*36] interest in protecting privilege exceeds the [*11] possible damage to the government's interest in grand jury secrecy and exigency in this case. Therefore, we reverse the district court, and hold that the use of a government taint team is inappropriate in the present circumstances. Instead, we hold that the appellants themselves must be given an opportunity to conduct their own privilege review; of course, we can presently make no ruling with respect to the merits of any claimed privilege that may arise therefrom.

Finally, the government argues that the appellants' proposal would allow them to delay the proceedings in an unreasonable manner that could threaten the grand jury investigation. This stance has some obvious merit, for the targets of a grand jury investigation would logically have an interest in delaying matters. However, we do not think this is necessarily dispositive, for the appellants have asked only to conduct a privilege review of the subset of documents [*524] that contain names of attorneys or law firms that they will place on a list that will then be provided to the government. Therefore, assuming this "first cut" proceeds apace, the government should obtain the bulk [*37] of the responsive documents rather quickly.

To ensure that the first cut does, in fact, proceed in a timely fashion, and to address in addition the government's legitimate interest in preventing the appellants from themselves reviewing the entire set of subpoenaed documents, we mandate that the district court employ a Special Master to perform this first segregation of documents. The Special Master should conduct a word search of the documents, searching for those words contained in the list to be provided by the appellants and approved by the district court, and should then separate documents containing any of those words from the rest. As this is done, the master should provide appellants with copies of the documents containing any of the words on appellants' list, returning the originals to New Venture's offices, and provide the responsive documents not containing any of the list's words to the grand jury. As we have been led to believe that this first cut would be merely mechanical in nature, we hope that the Special Master should be able to perform the task rather quickly, thereby ensuring that the grand jury receives the bulk of the responsive documents in short order, and we [*38] think that the master's production should be done on a rolling basis if

practical. Appellants would then be authorized to conduct a privilege review of the documents given to them by the Special Master. As this review progresses, appellants should provide all documents that their attorneys find not to be privileged, as well as a standard privilege log respecting documents over which they claim privilege protection, on a timely and rolling basis to the grand jury. This log should contain summary information, as well as some intelligible explanation of their privilege claims, for each document.

Finally, while we think it would be appropriate to charge the appellants for the Special Master's services, as they would themselves have been responsible for the costs in the ordinary course, we leave it to the district court's sound discretion to determine and enforce proper procedures for implementing our remedy. Moreover, we note that the district court retains its inherent authority to adjudicate legitimate disputes that may arise over issues such as, *inter alia*, cost, timing, the identity and makeup of the Special Master's team, and the word lists. As there remains a legitimate concern [**39] regarding the possibility of unreasonable delays, we remind the appellants that the district court also possesses the authority to issue reasonable deadlines within which particular review tasks must be completed, and to sanction them, or their attorneys, or both,

for failure to meet those deadlines.

III

For the reasons noted above, we **REVERSE** the district court's order, **MANDATE** that the district court institute a procedure whereby a Special Master will conduct the first mechanical review of the implicated documents, and the appellants will then conduct a privilege review of the documents provided to them; and **REMAND** to the district court for further proceedings consistent with our opinion.

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Keeping the Fox Out of the Henhouse: How Recent Court Decisions and a Mid-Trial Debacle Can Help Shield Privileged Material From the Government

This article draws on recent developments to offer companies (and individuals) concrete steps they can take to protect privileged communications. It also outlines arguments they can make in persuading judges to reject the use of filter teams altogether or, failing that, what relief they can obtain to limit potential harm to their businesses.

By **Andrey Spektor, Laura Perlov, Eric Chartan and Jaclyn Gallian** | September 08, 2021



Businesses that have been forced to sit back as the government makes unreviewable determinations about which of their sensitive documents are privileged can finally start fighting back. Recent U.S. Court of Appeals decisions and a highly publicized mid-trial debacle involving a government “filter team” (or “taint team”) have given privilege holders much needed ammunition to tell courts why they should stop rubber-stamping prosecutors’ requests to make determinations about a company’s assertion of privilege.

In *Harbor Healthcare System LP v. United States of America*, 5 F.4th 593 (5th Cir. 2021), a Fifth Circuit panel found that the prosecutors displayed a “callous disregard” of the rights of the targeted company in the way the government’s filter team conducted itself. The Fifth Circuit is not alone. The most fervent critic to date, the Fourth Circuit, had previously borrowed the Sixth Circuit’s metaphor of likening prosecutor-run filter teams to leaving the “government’s fox in charge of guarding the ... henhouse.”^[1] Perhaps sensing the tide turning, the government has, in a recent high-profile matter, asked for the appointment of an independent special master to review certain potentially privileged material. It was too late, however, for a Los Angeles prosecution team that, in late August 2021, watched a federal judge declare a mistrial in another prominent case—this one against Michael Avenatti—over a mistake apparently made by the filter team.

This article draws on these recent developments to offer companies (and individuals) concrete steps they can take to protect privileged communications. It also outlines arguments they can make in persuading judges to reject the use of filter teams altogether or, failing that, what relief they can obtain to limit potential harm to their businesses.

Overview

Department of Justice Taint Teams. The purpose of taint teams is to review seized material and provide a barrier between the privileged material and the prosecutors or investigators handling a matter. The problem, however, is that the taint teams are still comprised of DOJ employees and FBI agents—individuals, who are by no means disinterested parties, even though they supposedly have no connection to the prosecution team.^[2] In addition to fundamental issues in leaving the proverbial fox in charge of the henhouse, courts have noted repeated errors in the administration of taint teams, some of which are noted below.

To preempt some of these concerns, in 2020, the U.S. Department of Justice (DOJ) created a Special Matters Unit (SMU) to oversee DOJ taint teams when reviewing seized privilege material.^[3] According to the DOJ, the unit was created

to focus on issues related to privilege and legal ethics, including evidence collection and processing, pre- and post-indictment litigation, and advising and assisting Fraud Section prosecutors on related matters. The SMU: (1) conducts filter reviews to ensure that prosecutors are not exposed to potentially privileged material, (2) litigates privilege-related issues in connection with Fraud Section cases, and (3) provides training and guidance to Fraud Section prosecutors.

In addition, some prosecutors, most notably in high-profile matters in New York, have sought judicial review of potentially privileged material, either in lieu of seeking a search warrant^[4] or following the execution of one.^[5] The upshot of these developments is that in the vast majority of cases where the DOJ refuses to deviate from its traditional practice of employing taint teams, privilege holders now have precedent on which they can rely to start fighting back. We review some of that precedent below.

‘Harbor Healthcare System LP v. United States of America’, 5 F.4th 593 (5th Cir. 2021). Harbor Healthcare System identified as privileged almost 4,000 emails seized by the government. The company provided a list of names of all attorneys and law firms it used and made several failed attempts to meet with the head of the taint team to discuss the return of the privileged material. The government had already determined that certain material was privileged but refused to return or destroy it.

Because Harbor Healthcare System was not under indictment, it requested return of those documents under Federal Rule of Criminal Procedure 41(g). The district court denied the request.^[6] The Court of Appeals reversed, agreeing with the company that there had not been a process in place to protect Harbor Health’s privileged documents and that the “government’s ongoing intrusion on Harbor’s privacy constitutes an irreparable injury that can be cured only by Rule 41(g) relief.”^[7] In the court’s view, the government showed a “callous disregard” for the company’s rights when it failed to seek approval from a magistrate judge before it seized documents it knew would contain privileged information.^[8] The prosecutors, the court continued, “made no attempt to respect Harbor’s rights to attorney-client privilege in the initial search.”^[9] Finally, the government’s only proffered reason for failing to return or destroy the privileged documents—its purported need for potential use in a potential future criminal action—meant the government had “no intent to respect Harbor’s interest in the privacy of its privileged materials” and the filter team, as a result, “serve[d] no practical effect.”^[10] Notably, the court left open the possibility of suppression, but disagreed with the government that it was an adequate remedy, in part because it was not clear that Harbor would ever face criminal charges.^[11]

‘United States of America v. Under Seal’, 942 F.3d 159 (4th Cir. 2019). Law Firm (name under seal) was subject to a large seizure by the government resulting from the investigation of Law Firm’s dealings with Client A. The seizure resulted in several thousands of emails, 99.8% of which had nothing to do with Client A.

Several of those documents contained privileged communications with Law Firm's other clients who were under active but unrelated criminal investigations and prosecutions. In addition, the taint team protocol permitted federal agents and paralegals to designate documents as nonprivileged.

The court criticized the government for allowing non-lawyers to make privilege determinations.^[12] Collecting authority, it also leveled useful criticisms that apply to taint teams regardless of how they are staffed. First, "[t]here is the possibility that a filter team—even if composed entirely of trained lawyers—will make errors in privilege determinations and in transmitting seized materials to an investigation or prosecution team."^[13] Second, "a filter team's members might have a more restrictive view of privilege than the subject of the search, given their prosecutorial interests in pursuing the underlying investigations. That more restrictive view of privilege could cause privileged documents to be misclassified and erroneously provided to an investigation or prosecution team."^[14] Third, the ex parte proceeding in which the review protocol was authorized (as is almost always the case, if the government seeks authorization at all), in the court's view, ran counter to the general preference for adversarial resolutions.^[15] Fourth, any delay to the government's investigation, at least in that case, did not outweigh the harm to the privilege holders.^[16] Fifth, there was the appearance of unfairness, because "reasonable members of the public" would find it difficult to believe the filter team agents or prosecutors would ignore privileged information they reviewed.^[17] As the court put it, "prosecutors have a responsibility to not only see that justice is done, but to also ensure that justice *appears* to be done," and federal agents and prosecutors "rummaging" through privileged material subverts that goal.^[18]

Other precedent. In reaching its conclusions in *Under Seal* (profiled immediately above), the Fourth Circuit praised the "sensible approach" taken by a Southern District of New York judge in the seizure of Michael Cohen's documents.^[19] There, after hearing from all sides and before the government reviewed any sensitive material, the magistrate judge rejected the government's taint team proposal and appointed a special master,^[20] just as other courts had done.^[21] Although the DOJ resisted the appointment of a special master for Cohen's documents, in April 2021, prosecutors in the same office themselves requested the appointment of a master following the seizure of documents from Rudy Giuliani.^[22] To be sure, the request was defensive; it noted that filter teams are "common" and adequately protective of privilege holders' rights, but conceded that it was prudent to use a different method in some "exceptional circumstances."^[23] The government's redacted filing emphasized other unusual features of the case, obviously aware that the government's request would be cited against it in cases where it would continue defending the use of taint teams.^[24]

Although the Fourth and Fifth Circuit opinions, along with the high-profile cases in the Southern District of New York, have received the most recent attention, privilege holders would do well to educate trial-level courts on the growing body of authority around the country. Other examples include the Third Circuit's 2015 criticism of the use of non-lawyers to make privilege determinations—a common feature of taint teams.^[25]

The first high-profile and oft-cited disapproval of taint teams came in 2006, from the U.S. Court of Appeals for the Sixth Circuit.^[26] Although no longer the most recent or harshest critic, the Sixth Circuit's opinion offers useful observations. In that case, which arose in the pre-production subpoena context, the court acknowledged that filter team protocols can be "respectful of, rather than injurious to, the protection of privilege" in situations where the government has no choice but to "sift the wheat from the chaff."^[27] But those same procedures were inappropriate, the court wrote, where the "exigency typically underlying the use of taint teams is not present,"^[28] such as in cases in which a seizure of potentially privileged material had not yet occurred. Filter teams present "inevitable, and reasonably foreseeable risks, to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors."^[29] "[T]he government taint team may have an interest in preserving privilege," the court continued, "but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations."^[30] The court therefore allowed the

subpoenaed party itself to make an initial privilege review because that would guard against the unchecked authority by the government to “make some false negative conclusions, finding validly privileged documents to be otherwise.”^[31]

Fifteen years later, on Aug. 24, 2021, a federal judge declared a mistrial over a month into a highly publicized trial involving Michael Avenatti.^[32] The court blamed the taint team’s failure to produce certain information from the server from Avenatti’s law firm, which had potential exculpatory value. The judge found no misconduct—just a mistake: “I think the taint team has fairly acknowledged that there may have been some shortcomings in the review process.”^[33] Notably, the government attempted to argue that the taint team’s possession of any of the exculpatory material should not be imputed onto the prosecution team for purposes of satisfying its *Brady* obligations; the judge rejected that argument and agreed with Avenatti that it was inappropriate for the supposedly neutral representative of the filter team to turn into an advocate on a motion for a mistrial.^[34]

The Avenatti trial debacle and the fervor with which a member of the filter team advocated to salvage the trial shows that (1) taint teams, as the Fourth Circuit noted, have, at the very least, the appearance of non-neutrality, and (2) errors related to taint teams can materialize in different and unexpected ways. When special masters or magistrate judges conduct the review, with defendants having access and input, the error rate will necessarily decline or evaporate.

Practical Guidance

There are steps that corporations and their attorneys can take today, before any issues with respect to filter teams even arise.

- **Labels:** Corporations should clearly label all materials that are privileged. This would include any documents seeking legal advice and documents prepared in anticipation of litigation. Merely stamping “privilege” on documents or, as is commonly done, just copying attorneys on emails will not automatically make the underlying communications privileged, but it lays the groundwork to put the viewer on notice. When done in good faith (rather than labeling every document privileged), it will make it more difficult for any government agency to ignore the potential privilege issue.
- **Limitations.** Limiting the number of people receiving the privileged information is also beneficial. Quickly identifying custodians is paramount when documents are seized. This allows the entity (and its counsel) to (1) determine what documents they need to protect by filing an emergency motion with a court or (2) compare known sensitive documents to those deemed not privileged by the taint team prior to their delivery to the investigation/prosecution team.
- **Localize.** A standard operating procedure on the internal handling of privileged documents, while tedious, would be beneficial for any entity looking to keep privileged materials secure through so-called “localization”—that is, segregating purely business matters from legal advice and establishing policies against forwarding legal advice contained in emails to anyone outside the designated group of individuals. Dual-purpose communications—those made both, to provide legal advice (or in anticipation of litigation) and to serve a business purpose—have led to intense litigation from magistrate courtrooms all the way to appellate courts^[35]; demonstrating that access to the disputed communications or documents had been limited would aid in that fight. Relatedly, as part of localizing and labeling, a company should consider segregating, either physically or electronically, the most sensitive privileged documents, so that it could attempt to prevent their seizure by immediately contacting the judge who authorized the warrant.

Arming Privilege Holders for a Fight

When the government seizes or requests to seize potentially privileged information, the company (or individual) must act immediately. The first step depends on whether the government is demanding the material via a subpoena or whether it has already executed a search warrant.

- **Subpoena Requests:** Drawing on the Sixth Circuit's opinion profiled above,^[36] the subpoena recipient could argue that no exigency exists to justify the government's invasion of the attorney-client privilege. The privilege holder could volunteer to produce, on a rolling basis, all the material that is clearly not privileged and provide a privilege log of the rest, just as it is routinely done in civil litigation. In the face of growing criticism by appellate courts reviewed in this article, in these circumstances, a court is less likely to rubber-stamp the filter team protocol.

- **Search Warrants:** Search warrants leave privilege holders in a more precarious position, especially if the searched party had not segregated privileged material as advised above. Once a warrant has been executed, the government has, or will soon have, the subject material and could begin reviewing it. Search warrants are obtained ex parte, often under seal, and there is almost always some proffered justification for the ongoing secrecy. Unless there is a relevant indictment already filed and assuming the government is not receptive to the searched party's request to conduct its own privilege review, the privilege holder should file an emergency motion under Rule 41(g) in the district where the material was seized, even if an agency from a different district is conducting the investigation. In that motion, the searched party should demand the return of the seized documents, request to conduct its own privilege review or at least have a special master do so, and, drawing on the authority summarized in this article, make the following arguments:

- Explain why certain seized documents and communications may be privileged or protected as work product.
- Provide examples of the types of communications, such as dual-purpose communications discussed above, that to the government may appear not covered by attorney-client privilege or work product protection, but are in fact privileged and could only be properly evaluated by attorneys who understand the nature and purpose of the communications. No matter how well-intentioned, taint team members cannot be expected to consistently spot privileged communications without being steeped in the business.
- Educate the court on evolving precedent criticizing the use of filter teams and the preemptive steps the government has recently taken agreeing to the use of special masters and for judicial intervention.
- Argue that a filter team's review of seized material is itself an invasion into a sacred legal right, a harm that cannot be cured regardless whether the prosecution team receives the material.
- Highlight the recent mistakes committed by filter teams, citing precedent discussed above and in other cases,^[37] most recently even causing a mistrial, over a month into a resource-intensive trial. Be mindful, however, that not all courts have disapproved of taint team protocols, though even some of those opinion include helpful observations.^[38]
- Note that even seemingly error-free taint team reviews could always lead to a prosecutor or agent learning something that is later indirectly used to develop leads in another investigation. Worse than a bell that cannot be unrung, this harm could remain silent and undetected. As the Sixth Circuit observed, "human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations."^[39]

If the district judge still approves the filter team protocol (or affirms a magistrate judge's order), the company should continue to fight:

- Identify the categories or individual pieces of material that are most sensitive and likely privileged, provide the list to the government, and ask the court that if the government disagrees that those materials are privileged, then they must be reviewed *in camera* before they are passed to the prosecution team.
- Demand the names of the prosecutors and/or agents on the filter team, so that any future defendants who may face these individuals in a related case could request a *Kastigar*^[40]-like hearing, where the government would have the burden to show that its case did not originate—directly or indirectly—from any of the privileged materials.
- Request a set of ground rules from the beginning that go beyond the bare-bone instructions provided in the DOJ Justice Manual^[41]:
 - (1) filter team staffing requirements that mandate (a) involvement of experienced attorneys and (b) staffing by an office separate from the one conducting the investigation
 - (2) strict no-contact rules between members of the filter and prosecution teams, on *any* matters, to prevent inadvertent leaks. The only permitted communication should be in writing and preserved, and it should be limited to the underlying matter, so that the filter team is fully educated on the case and the potential privilege issues
 - (3) segregation on government networks that would not permit any member of the prosecution team to inadvertently access potentially privileged material
 - (4) process by which material deemed privileged by the filter team is destroyed or returned
 - (5) requirement that any exculpatory evidence or any information material to the defense reviewed by the filter team is immediately flagged and produced to the defense to avoid it falling between the filter/prosecution team cracks like in the Avenatti trial
 - (6) mandate that the application of the “crime fraud exception”—a common justification by prosecutors to review potentially privileged information—be approved by a judge or independent special master
 - (7) request deadlines by when the filter team must finish reviewing seized material
 - (8) seek an order similar to the one now required by Rule 5(f) of the Federal Rules of Criminal Procedure, which informs prosecutors of potential sanctions for failing to follow their obligations.

Endnotes:

^[1] See, e.g., *United States of America v. Under Seal*, 942 F.3d 159, 178 (4th Cir. 2019) (quoting *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006)).

^[2] See, e.g., *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) (summarizing that “taint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors. That is to say, the government taint team may also have an interest in preserving the privilege, but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint team attorneys will make mistakes or violate their ethical obligations. It is thus logical to suppose that taint teams pose a serious risk to holders of the privilege, and this supposition is supported by past experience.”).

^[3] DOJ Fraud Section Year in Review (<https://www.justice.gov/criminal-fraud/file/1370171/download>), 2020, at 4.

- [4] See, e.g., Mathews, Christopher, *Prosecutors Pierced Shkreli, Attorney's Legal Privilege* (<https://www.wsj.com/articles/BL-LB-53018>), Wall Street Journal (Jan. 28 2016) (noting that before bringing charges, prosecutors sought a judicial order to obtain unredacted communication from a company).
- [5] See, e.g., Hurtado, Patricia, et al., *Giuliani Evidence Should Be Reviewed for Privilege, U.S. Says* (<https://www.bloomberg.com/news/articles/2021-05-04/u-s-seeks-special-master-to-review-giuliani-raid-materials>), Bloomberg News (May 4, 2021) (noting that federal prosecutors requested an appointment of a special master to determine if documents seized from Giuliani's home and office were privileged).
- [6] *Id.* at *2.
- [7] *Id.* at *6.
- [8] *Id.* at *4-5.
- [9] *Id.* at *9.
- [10] *Id.* at *9.
- [11] *Id.* at *11-12.
- [12] *United States of America v. Under Seal*, 942 F.3d 159, 164, 177 (4th Cir. 2019).
- [13] *Id.* at 177.
- [14] *Id.* (internal quotation marks omitted).
- [15] *Id.* at 178.
- [16] *Id.* at 181-82.
- [17] *Id.* at 182-83.
- [18] *Id.* at 183 (emphasis in original).
- [19] *Id.* at 179.
- [20] *United States of America v. Under Seal*, 942 F.3d 159, 179 (4th Cir. Oct. 31, 2019).
- [21] See, e.g., *United States v. Gallego*, 2018 WL 4257967, at *3 (D. Ariz. Sept. 6, 2018) (appointing special master over government's objection advocating for a taint team).
- [22] See *In re Search Warrant dated April 21 & 28, 2021*, 21-MC-425, Dkt. Entry 1 (JPO) (S.D.N.Y.).
- [23] *Id.* at 2.
- [24] *Id.* at 3.
- [25] *In re Search of Elec. Commc'ns*, 802 F.3d 516, 530 (3d Cir. 2015).
- [26] *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).
- [27] *Id.* at 522-23.
- [28] *Id.* at 523.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] See Clough, Craig, *Avenatti Wins Calif. Wire Fraud Mistrial Over Brady Violation* Law360 (Aug. 24, 2021).

[33] Cuniff, Meghann, *Judge Declares Mistrial in Michael Avenatti's Wire Fraud Case Over Missing Financial Data* (<https://www.law.com/2021/08/24/judge-declares-mistrial-in-michael-avenattis-wire-fraud-case-over-missing-financial-data/>), Law.com (Aug. 24, 2021).

[34] *Id.*

[35] See, e.g., *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900 (9th Cir. 2004) (holding that documents prepared for both, determining compliance and for potential litigation with the EPA were protected because their "litigation purpose so permeated any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole."); *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (holding that a document created because of the prospect of litigation, "analyzing the likely outcome of that litigation ... , does not lose protection ... merely because it is created in order to assist with a business decision").

[36] *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).

[37] See, e.g., *United States v. Sullivan*, No. 17-00104 JMS-KJM, 2020 U.S. Dist. LEXIS 64508, at *24 (D. Haw. April 9, 2020) (noting a "disappoint lack of recognition" of the government's privilege review, but finding dismissal and total suppression as inappropriate remedies; relying on government's submission to find defendant had not been prejudiced, but ordering limited suppression); *United States v. Esformes*, No. 16-20549-CR, 2018 WL 5919517, at *34 (S.D. Fla. Nov. 13, 2018) (noting that "Government's 'taint' protocol was to a large extent inadequate and ineffective" and the government attorneys' and agents' "execution of their duties was often sloppy, careless, clumsy, ineffective, and clouded by their stubborn refusal to be sufficiently sensitive to issues impacting the attorney client privilege").

[38] See, e.g., *In re Sealed Search Warrant*, No. 20-14223 (11th Cir. Aug. 30, 2021) (affirming district court's denial of injunctive relief against a taint team protocol but observing the that it "allows the Intervenors to conduct the initial privilege review. It also requires the Intervenors' permission or court order for any purportedly privileged documents to be released to the investigation team. This means that the filter team cannot inadvertently provide the investigation team with any privileged materials.").

[39] *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).

[40] See generally *Kastigar v. United States*, 406 U.S. 441, 453 (1972).

[41] Justice Manual (<https://www.justice.gov/jm/jm-9-13000-obtaining-evidence>) §9-13.420(E) ("Instructions should be given and thoroughly discussed with the privilege team prior to the search. The instructions should set forth procedures designed to minimize the intrusion into privileged material, and should ensure that the privilege team does not disclose any information to the investigation/prosecution team unless and until so instructed by the attorney in charge of the privilege team. Privilege team lawyers should be available either on or off-site, to advise the agents during the course of the search, but should not participate in the search itself.").

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Neutral

As of: October 13, 2021 7:15 PM Z

[United States v. Korf](#)

United States Court of Appeals for the Eleventh Circuit

August 30, 2021, Decided

No. 20-14223

Reporter

2021 U.S. App. LEXIS 26063 *, 29 Fla. L. Weekly Fed. C 310

In re: Sealed Search Warrant and Application for a Warrant by Telephone or Other Reliable Electronic Means. UNITED STATES OF AMERICA, Plaintiff - Appellee, versus MORDECHAI KORF, URIEL LABER, CHAIM SHOCHET, OPTIMA INTERNATIONAL, LLC, OPTIMA VENTURES, LLC, OPTIMA MANAGEMENT GROUP, LLC, OPTIMA ACQUISITIONS, LLC, NIAGARA LASALLE CORPORATION, OPTIMA GROUP, GEORGIAN AMERICAN ALLOYS, INC., CC METALS AND ALLOYS, LLC, FELMAN PRODUCTIONS, LLC, FELMAN TRADING, INC., FELMAN TRADING AMERICAS, INC., GEORGIAN AMERICAN ALLOYS SARL, GEORGIAN AMERICAN ALLOYS MANAGEMENT, LLC, OPTIMA FIXED INCOME, LLC, OPTIMA HOSPITALITY, LLC, OPTIMA 777, LLC, OPTIMA 925, LLC, OPTIMA 925 II, LLC, OPTIMA 1300, LLC, OPTIMA 1375, LLC, OPTIMA 1375 II, LLC, OPTIMA 55 PUBLIC SQUARE, LLC, OPTIMA 7171, LLC, OPTIMA 500, LLC, OPTIMA CBD INVESTMENTS, LLC, CBD 500, LLC, Movants - Appellants.

Prior History: [*1] Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:20-mj-03278-JJO-1

[United States v. Korf \(In re Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means\), 2021 U.S. App. LEXIS 2145 \(11th Cir., Jan. 26, 2021\)](#)

Disposition: AFFIRMED.

Core Terms

team, protocol, filter, seized, documents, Filter-Team, district court, privileged, magistrate judge, Modified, privileged document, parties, injunctive relief, search warrant, communications, privileged material, seizure, attorney-client, suppression, movant, criminal

investigation, criminal prosecution, proceedings, preliminary injunction, orders, privilege log, work-product, injunction, entities, merits

Case Summary

Overview

HOLDINGS: [1]-The order denying the Intervenors' motion under Fed. R. Crim. P. 41(g) to enjoin the use of a filter team to review seized materials that were claimed to be privileged was affirmed because the intervenors had not showed a substantial likelihood of success on their argument that government filter teams per se violated privilege holders' rights.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN1 [📌] **Standards of Review, De Novo Review**

An appellate court reviews de novo whether it has jurisdiction to decide an interlocutory appeal, before it can address the merits of a case.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

[HN2](#)  Appellate Jurisdiction, Final Judgment Rule

Generally, courts of appeals have jurisdiction of appeals from all final decisions of the district courts of the United States.

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Evidence > Privileges

[HN3](#)  Pretrial Motions & Procedures, Suppression of Evidence

Suppression of evidence protects against only the procedural harm arising from the introduction at a criminal trial of unlawfully seized evidence. And even if defendants are charged and may seek suppression, suppression does not redress the government's intrusion into the Intervenor's personal and privileged affairs. In contrast, [Fed. R. Crim. P. 41\(g\)](#) can. It offers the remedy of returning to the Intervenor any improperly seized documents protected by privilege before the government has reviewed them. [Fed. R. Crim. P. 41\(g\)](#). Unlike suppression, that is a remedy that can redress any potential injury by ensuring it does not occur in the first place. And if a district court incorrectly denies [Rule 41\(g\)](#) relief when it is required, immediate review is necessary to preserve that same remedy of return of the documents before the government reviews them.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

[HN4](#)  Grounds for Injunctions, Balance of Hardships

To obtain a preliminary injunction, the movant must clearly establish four showings: (1) it has a substantial likelihood of success on the merits; (2) it will suffer irreparable injury in the absence of the injunction

sought; (3) any threatened harm to the movant that might be inflicted because of the proposed injunction will outweigh any damage to the opposing party; and (4) the injunction sought would not be adverse to the public interest. A preliminary injunction is an extraordinary and drastic remedy.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN5](#)  Standards of Review, Abuse of Discretion

On appeal, an appellate court reviews the denial of a preliminary injunction for abuse of discretion. A district court abuses its discretion if its factual findings are clearly erroneous, it follows improper procedures, it applies the incorrect legal standard, or it applies the law in an unreasonable or incorrect manner. Under this standard, a district court may make any of a range of permissible choices.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN6](#)  Standards of Review, Abuse of Discretion

Appellate review of a preliminary-injunction decision is exceedingly narrow because of the expedited nature of the proceedings. This means appellate review is deferential. Appellants face a "tough road" in establishing the four prerequisites to obtain a preliminary injunction. And on appeal, they must also overcome the steep hurdles of showing that the district court clearly abused its discretion in its consideration of each of the four prerequisites. The failure to meet even one factor dooms an appeal.

Evidence > Privileges > Attorney-Client Privilege > Exceptions

Evidence > Privileges > Attorney-Client

Privilege > Scope

[HN7](#) Attorney-Client Privilege, Exceptions

The attorney-client and work-product privileges play a vital role in assuring the proper functioning of the criminal justice system and provide a means for a lawyer to prepare her client's case. Courts have recognized exceptions that allow for their breach. For example, when the crime-fraud exception applies, it effectively invalidates the privileges.

Evidence > Privileges > Attorney-Client
Privilege > Exceptions

[HN8](#) Attorney-Client Privilege, Exceptions

The crime-fraud exception to the attorney-client applies if (1) the client was involved in or was planning criminal conduct when he sought advice of counsel, or that he committed a crime after he received the benefit of legal counsel; and (2) the attorney's assistance was obtained in furtherance of the criminal activity or was closely related to it.

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For CBD 500, LLC, CC METALS AND ALLOYS, LLC, FELMAN PRODUCTIONS, LLC, FELMAN TRADING AMERICAS, INC., FELMAN TRADING, INC., GEORGIAN AMERICAN ALLOYS MANAGEMENT, LLC, GEORGIAN AMERICAN ALLOYS SARL, GEORGIAN AMERICAN ALLOYS, INC., MORDECHAI KORF, URIEL LABER, NIAGARA LASALLE CORPORATION, OPTIMA 1300, LLC, OPTIMA 1375 II, LLC, OPTIMA 1375, LLC, OPTIMA VENTURES, LLC, OPTIMA MANAGEMENT GROUP, LLC, OPTIMA ACQUISITIONS, LLC, OPTIMA GROUP, OPTIMA FIXED INCOME, LLC, OPTIMA HOSPITALITY, LLC, OPTIMA 777, LLC, OPTIMA 925, LLC, OPTIMA 925 II, LLC, OPTIMA 55 PUBLIC SQUARE, LLC, OPTIMA 7171, LLC, OPTIMA 500, LLC, OPTIMA CBD INVESTMENTS, LLC, Movants - Appellants: Howard M. Srebnick, Robert T. Dunlap, Benjamin Samuel Waxman, Black Srebnick Kornspan & Stumpf, PA, MIAMI, FL; Marc E. Kasowitz, Sarmad M. Khojasteh, Joshua [*2] Paul, Mark P. Ressler, Ronald R. Rossi,

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Judges: Before MARTIN, ROSENBAUM and LUCK, Circuit Judges.

Opinion

PER CURIAM:

This case requires us to consider whether the use of a government filter team to review seized materials that are claimed to be privileged necessarily violates the privilege holder's rights. Here, the government obtained and executed a search warrant at a suite of offices where the Optima Family Businesses were located. Among the materials seized were items from the office of an in-house attorney. The Optima Family Businesses and their owners, managers and controllers (collectively, the "Intervenors") assert attorney-client and work-product [*3] privilege over at least some of these documents.

They filed a motion under [Rule 41\(g\), Fed. R. Crim. P.](#), to obtain injunctive relief prohibiting the United States's filter team—which included attorneys and staff who were not involved in the criminal investigation of the Optima Family Companies and the individual owners, managers, and controllers—from reviewing any potentially privileged documents unless either the Intervenors agree or the court, after conducting its own privilege review, orders disclosure.

The district court held a hearing on the Intervenors' motion and imposed a modified filter protocol but denied the Intervenors' request to prohibit anyone from the government from reviewing potentially privileged documents unless the Intervenors agree or the court orders disclosure. The Intervenors now appeal that denial. After careful consideration and with the benefit of oral argument, we now affirm the district court's order

denying the Intervenor's motion to enjoin the use of a filter team. We agree with the district court that the Intervenor has not showed a substantial likelihood of success on their argument that government filter teams *per se* violate privilege holders' rights.

I.

The Northern District [*4] of Ohio was conducting a criminal investigation into money laundering, conspiracy to money launder, and wire fraud. As it followed its leads, it decided it needed to search a suite of offices in Miami, Florida. So the Federal Bureau of Investigation ("FBI") applied for a search warrant in the Southern District of Florida.

A. The Search Warrant and Filter Team Protocol

On July 31, 2020, a magistrate judge in the Southern District of Florida issued that search warrant to be executed at the Miami offices of some of the entities that comprise the Optima Family Companies. The offices that were the subject of the warrant were located in a business suite.

The warrant identified the items to be seized, including records of and concerning Ukrainian nationals Ihor Kolomoisky and Gennadiy Bogolyubov and American citizens Mordechai Korf, Uriel Laber, and Chaim Schochet. Korf, Laber, and Schochet allegedly own, control, or manage the more than thirty entities that fall under the name "Optima" and have offices in the Miami suite that was the subject of the warrant.

Among the documents sought concerning the five individuals were "all documents for Ihor Kolomoisky, Gennadiy Bogolyubov, Mordechai Korf, [*5] Uriel Laber, and Chaim Schochet," from "2008 to the present," including "[r]ecords of receipt of income," "[r]ecords of all accounts and transactions at financial institutions," "[r]ecords of loans and financing transactions," and "all communications between [these persons] and any employee or agent of [any of the entities, persons, or properties of the Optima Family Companies and Subsidiaries and other entities and properties identified in Attachment B.3 to the warrant¹]."

¹ The Optima Family Companies and Subsidiaries identified in Attachment B.3 to the warrant included Optima International, LLC, also known and operated as Optima International of Miami; Optima Ventures, LLC; Optima Management Group LLC; Optima Acquisitions, LLC; Optima Specialty Steel; Kentucky Electric Steel; Corey Steel Company; Niagara

The warrant also authorized seizure of "all emails sent to or from any of the above-referenced Optima-family companies, [and entities, persons, or properties] outlined in Attachment B.3." Besides the seizure of paper records, the warrant authorized seizure, imaging, or copying of all computers or other electronic storage media that might contain the evidence described in the warrant.

If the government identified seized communications that were to or from an attorney during the seizure, the warrant outlined a protocol that would be followed concerning the handling of those materials. That protocol required the following:

Filter for Privileged Materials: If the government identifies seized communications to/from an attorney, [*6] the investigative team will discontinue review until a filter team of government attorneys and agents is established. The filter team will have no previous or future involvement in the investigation of this matter. The filter team will review all seized communications and segregate communications to/from attorneys, which may or may not be subject to attorney-client privilege. At no time will the filter team advise the investigative team of the substance of any of the communications to/from attorneys. The filter team then will provide all communications that do not involve an attorney to the investigative team and the investigative team may resume its review. If the filter team decides that any of the communications to/from attorneys are not actually privileged (e.g., the communication includes a third party or the crime-fraud exception applies), the filter team must obtain a court order before providing these attorney communications to the investigative team.

(the "Original Filter-Team Protocol").

LaSalle Corporation; Michigan Seamless Tube, LLC; Optima Group; Georgian American Alloys, Inc.; CC Metals and Alloys, LLC; Felman Production, LLC; Felman Trading, Inc.; Felman Trading Americas, Inc.; Georgian American Alloys Sarl; Georgian Manganese, LLC; Georgian American Alloys Management, LLC; Vartisikhe 2005, LLC; Optima Fixed Income, LLC; Optima Hospitality, LLC; Optima 777 LLC; Optima 925 LLC; Optima 925 II LLC; Optima Harvard Facility LLC; Optima 1300 LLC; Optima 1375 LLC; Optima 1375 II LLC; Optima 55 Public Square LLC; Optima 7171 LLC; Optima 500 LLC; Optima Stemmons LLC; Optima CBD Investments LLC; CBD 500 LLC. Attachment B.3 also identified a number of United States properties, third-party companies, foreign companies, and additional ownership entities.

Federal law enforcement agents executed the search warrant on August 4, 2020. As part of that process, agents seized various documents and equipment, including internal servers containing electronic [*7] documents and correspondence. In-house lawyers and paralegals worked (or had worked) in the business suite for the Optima Family Companies and other affiliated individuals, and for Korf, Laber, and Schochet. And the seized documents contained some items that were allegedly privileged.

B. Motion to Intervene and Motion for Injunctive Relief

Following the seizure, Korf, Laber, Schochet and various Optima Family Companies and Subsidiaries (whom we have previously described as the Intervenor) filed a motion to intervene in the search-warrant proceedings in the United States District Court for the Southern District of Florida. The motion advised that the electronic data the government had seized when it executed the warrant contained privileged documents. Contemporaneously with the motion to intervene, the parties filed a document entitled Motion for Preliminary Injunction to Prohibit Law Enforcement Review of Seized Materials Until an Appropriate Procedure for Review of Privileged Items is Established ("Motion for Injunctive Relief").

Asserting that the execution of the search warrant was the functional equivalent of a law-office search, the Motion for Injunctive Relief primarily challenged [*8] the use of the filter team to review privileged documents. The Intervenor objected to the protocol's limited provision of judicial review for potentially privileged documents since review was available only if a communication was clearly sent "to/from attorneys." In the Intervenor's view, this exception for judicial review was inadequate because (1) the substance of the privileged information would initially be exposed to filter attorneys before judicial review, and (2) the scope of the documents subject to judicial review was underinclusive. The Intervenor contended that the protocol did not account for the existence of documents subject to the work-product doctrine, nor did it account for the existence of communications between non-lawyers reasonably necessary for the transmission of attorney-client communication.

The Intervenor also expressed particular concern over the government's review of the privileged documents because in May of 2019, a bank filed suit in Delaware against Korf, Laber, Schochet, and various Optima

Family Companies, alleging fraudulent activity.² See *Joint Stock Co Comm. Bank PrivatBank v. Igor Valeryevich Kolomoisky, et al.*, Del. Ch. C.A. No. 2019-0377-JRS [*9] (May 21, 2019). According to the Intervenor, the transactions and occurrences in the Delaware case overlapped with and were "substantively identical to the factual predicate for the grand jury investigation [in the Northern District of Ohio]" associated with the search warrant here.³ Based on this overlap, the Intervenor claimed a "clear risk" existed that "the government will be able to view a roadmap to the privilege-holders[]" defenses." To prevent these alleged harms, the Intervenor sought to perform their own privilege review of the documents and, more generally, they sought an injunction to prohibit law enforcement from reviewing the seized materials until a more protective protocol was put into place.

In mid-August 2020, the magistrate judge granted the motion to intervene and ordered the parties to meet and confer to see if they could narrow the issues addressed in the Motion for Injunctive Relief. In the meantime, with the agreement of the Intervenor, the government continued processing the seized materials, which meant it could arrange to have the materials copied and scanned, but it could not review their contents. Within forty-eight hours of processing any particular [*10] record, the court required, the government was to provide a copy of that record to counsel for the Intervenor.

In the government's response to the Motion for Injunctive Relief, the government expressed deep concern over the Intervenor's proposal that they be trusted with the task of reviewing for privilege on their own. According to the government, that type of approach would cause its investigation to cease in its

²The PrivatBank lawsuit alleges Racketeer Influenced and Corrupt Organization ("RICO") violations that arise out of "a series of brazen fraudulent schemes orchestrated by Ukrainian oligarchs and . . . Kolomoisky and . . . Bogolyubov . . . and their agents . . . to acquire hundreds of millions of dollars-worth of U.S. assets through the laundering and misappropriation of corporate loan proceeds issued by PrivatBank." The Intervenor note that Korf, Laber, Schochet, and the Optima Family Companies have been defending against the lawsuit since it was filed on May 21, 2019.

³The Intervenor also claimed that the Delaware case overlapped with civil forfeiture claims filed in the Southern District of Florida. Those claims sought forfeiture of the properties listed in Attachment B.3 of the search warrant, which were owned by many of the Intervenor.

tracks.

The government also pushed back on the Intervenor's assertion that the search was the equivalent of a law-office search. It emphasized that within the multi-office complex, only a single office was used by a single in-house lawyer, and although three other lawyers had previously served as in-house counsel over the past decade, they no longer had offices there. Besides that, the government noted, it had seized only three boxes of materials from the in-house lawyer's office, and those boxes had been segregated and marked.⁴ Ultimately, the government asked that the district court deny the Motion for Injunctive Relief or, in the alternative, limit the scope of the Intervenor's proposed review of the documents seized. It further requested that its own filter team be afforded [*11] an opportunity to review all the documents seized.

In late August 2020, the parties attempted to resolve the issues relating to the document review. During the course of these efforts, the government provided an inventory of the items seized. Ultimately, though, the parties were not able to agree on a modified approach.

C. Resolution of Motion for Injunctive Relief

Because the parties were unable to resolve the dispute, the magistrate judge heard arguments by the parties in mid-September. A few days later, the magistrate judge entered an order granting in part and denying in part the Motion for Injunctive Relief.

First, the magistrate judge rejected the Intervenor's argument that the use of government filter teams to conduct privilege reviews is *per se* legally flawed. Nevertheless, the magistrate judge voiced reservations about the Original Filter-Team Protocol and concluded it did not provide sufficient protection. He found the case

differed from the ordinary search of a business since the Intervenor anticipated asserting the attorney-client or work-product privileges over numerous communications relating to matters at issue in the Delaware RICO litigation and the [*12] two civil forfeiture actions brought in the Southern District of Florida. And he expressed concern that if the documents were inadvertently disclosed to the investigation and prosecution team, the government could become privy to privileged materials concerning the Delaware litigation. For these reasons, the magistrate judge concluded that the Intervenor had showed a likelihood of success on the merits with respect to the Original Filter-Team Protocol as applied to the seized items. To address the perceived problem, the magistrate judge decided that allowing the Intervenor to conduct the initial privilege review would protect both the Intervenor and the government from the inadvertent disclosure of privileged materials to the investigation and prosecution team.

Second, the magistrate judge determined that the Intervenor showed a danger of irreparable harm with respect to the Original Filter-Team Protocol, since it required the filter team to segregate only communications that were "to/from attorneys." Because of the potentially underinclusive way of identifying privileged communications, the magistrate judge reasoned, the Original Filter-Team Protocol presented a danger that some [*13] items protected by the attorney-client or work-product privileges might be inadvertently disclosed to the investigative team.

Third, when the magistrate judge analyzed the balance of the harms, he found them to favor enjoining the Original Filter-Team Protocol.

Finally, although the magistrate judge concluded that the parties had identified important competing public interests, he ruled that the public interest would be best served by applying a modified filter-team protocol, which he then described. Under the new protocol, the Intervenor were to conduct an "initial privilege review of all seized items [and] provide a privilege log to the government's filter team." Then the government's filter team, which the magistrate judge required to be composed of attorneys and staff from outside the investigating office (the United States Attorney's Office for the Northern District of Ohio's Cleveland branch office), would have the opportunity to challenge any privilege designation on that log. Although the filter team would be "permitted to review any item on the privilege log in order to formulate a challenge[.]" the investigation

⁴In its opposition to the Motion for Injunctive Relief, the government discussed how agents "carefully watched for potentially privileged materials" on the day the search warrant was executed. And when they came across information that might be privileged, they stopped searching and separately designated "filter agents" (*i.e.*, non-investigative agents) to review and segregate the materials. Additionally, *only filter agents* searched the in-house lawyer's office, from where the three boxes of materials were seized. As we have noted, those materials were segregated, and the filter team informed the FBI's document processors that they were to be treated as potentially privileged. Of the three offices occupied by unrelated lawyers, only one had relevant material, which was collected in a single box.

and prosecution team would be prohibited from receiving any items [*14] on the privilege log "unless agreed to by the parties or the Court/special master ha[d] overruled the privilege."

The more specific details of the modified filter-team protocol the magistrate judge imposed are set forth below:

- a. The government shall process the items and provide them to the movants, on a rolling basis, so that the movants may perform the initial privilege review. Within **forty-five (45) days of receipt** of these items, the movants shall release all non-privileged items to the government's investigative/prosecution team and provide a privilege log to the government's filter team for all items for which they assert a privilege.
- b. The government's filter team shall be comprised of attorneys and staff from outside the United States Attorney's Office for the Northern District of Ohio's Cleveland branch office. The filter team shall not share a first level supervisor with anyone on the investigative/prosecution team. Any supervisor involved in the filter team review shall be walled off from the underlying investigation.
- c. The government's filter team is permitted to review any items listed on the movants' privilege log and may challenge any of the movants' privilege designations. [*15]
- d. The government's filter team and the movants' counsel shall confer and attempt to reach a resolution as to those items challenged by the government's filter team.
- e. If the parties are unable to reach a resolution, the parties shall file a joint notice with the Court. Either the Court or a special master shall rule on the parties' privilege disputes.
- f. The filter team will provide to the investigative team only those items for which the parties agree or for which the privilege has been overruled

(the "Modified Filter-Team Protocol").

D. Objection to the Order and Appeal to the District Court Judge

With the district court, the Intervenor's filed an appeal from and objections to the magistrate judge's order and revised protocol. The Intervenor's suggested the court should review materials first or use a special master to evaluate claims of privilege. They sought for the district court to vacate the portion of the Modified Filter-Team Protocol that authorized a filter team composed of

government employees to review documents identified as privileged.

The district court set a hearing on the matter and after hearing from the parties, entered an order overruling the Intervenor's objections and [*16] affirming the magistrate judge's revised protocol. Among other conclusions, the district court reasoned that improper disclosure of privileged documents to the prosecution team was not a concern since "[n]ot only do [the Intervenor's] have the opportunity to review the documents *before* the filter team, but any documents identified by the [Intervenor's] in their privilege log may not be released to the prosecution team until the parties agree to do so, or the Court or special master has ruled on the privilege objections." In this way, the district court found the Modified Filter-Team Protocol incorporated "several layers of safeguards that prevent[ed] anyone other than the filter team and [the Intervenor's] from reviewing the potentially privileged documents." The district court also expressed concern that requiring the district-court judge, magistrate judge, or special master to routinely review lawfully seized documents would be too burdensome. Overall, the district court determined that the Modified Filter-Team Protocol had been carefully crafted to afford protection of the attorney-client and work-product privileges.

This appeal ensued.


II.

A. We have jurisdiction over this appeal

We begin [*17] by considering our jurisdiction. [HN1](#) [↑] We review *de novo* whether we have jurisdiction to decide this interlocutory appeal, before we can address the merits of the case. [Doe No. 1 v. United States, 749 F.3d 999, 1003 \(11th Cir. 2014\)](#).

The government contends that we lack jurisdiction because of the procedural posture of this case. In support of this contention, the government notes that the Intervenor's invoked [Rule 41\(g\) of the Federal Rules of Criminal Procedure](#)—which governs motions for return of property—as a basis for seeking to bar government employees from reviewing lawfully seized materials. The government relies on [DiBella v. United States, 369 U.S. 121, 82 S. Ct. 654, 7 L. Ed. 2d 614 \(1962\)](#), to argue that the Intervenor's case does not involve the "narrow circumstances" under which the

denial of a [Rule 41\(g\)](#) motion is immediately appealable. As a result, the government asserts, we do not have jurisdiction over the Intervenor's appeal.

HN2  Generally, "courts of appeals 'have jurisdiction of appeals from all final decisions of the district courts of the United States[.]'" [Doe No. 1, 749 F.3d at 1004](#) (quoting [28 U.S.C. § 1291](#)) (alteration adopted). In *DiBella*, the Supreme Court considered whether orders on two preindictment motions to suppress the use of evidence in a forthcoming criminal trial (evidence that was allegedly procured through an unreasonable search and seizure) were exceptions to the final-judgment rule and immediately [*18] appealable as a final order. [369 U.S. at 121-23](#). It decided they were not.

To determine whether the district court's orders were immediately appealable as a final judgment, the *DiBella* court said the orders must be "independent" from the judgment. [369 U.S. at 126](#). In other words, they must be "fairly severable from the context of a larger litigious process." [Id. at 127](#) (citation and quotation marks omitted). "Only if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse [(in actual existence)] against the movant can the proceedings be regarded as independent," and an immediate appeal taken therefrom. See [id. at 131-32](#). This is known as the *DiBella* test. The Supreme Court held the pre-indictment suppression motions failed that test because motions to suppress will "necessarily determine the conduct of the trial and may vitally affect the result" such that they are intertwined with the entire case. [Id. at 127](#) (quotation marks omitted).

DiBella also considered two other principles that reinforced its determination. First, it concluded that suppression orders were not of the type "where the damage of error unreviewed before the judgment is definitive and complete." [Id. at 124](#). Of course, that is so because if the district [*19] court erred in denying the motion to suppress, any damage could be fixed on appeal by excluding the documents at issue and remanding for a new trial or dismissal. Second, noting the "[Sixth Amendment](#) guarantees [of] a speedy trial," the Court expressed concerns about "delays and disruptions" that might interfere with "the effective and fair administration of the criminal law," if pre-indictment suppression motions could be immediately appealed.⁵

⁵ Both the cases before the Court in *DiBella* involved defendants who had been arrested but not yet indicted when they filed their suppression motions. [368 U.S. at 122-23](#).

[Id. at 126](#); see also [id. at 129](#) ("The fortuity of a pre-indictment motion may make of appeal an instrument of harassment, jeopardizing by delay the availability of other essential evidence."). With these considerations in mind, the Court ruled that "the mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability." [Id. at 131](#).

Because the Intervenor moved the district court for the return of their property under [Rule 41\(g\)](#), we must apply the *DiBella* test to determine whether we have jurisdiction over their appeal.⁶ See, e.g., [Harbor Healthcare Sys., L.P. v. United States, 5 F.4th 593, slip op. at 6-7 \(5th Cir. 2021\)](#); [In re Search of Elec. Commc'ns in the Acct. of chakafattah gmail.com at Internet Serv. Provider Google, Inc., 802 F.3d 516, 530 \(3d Cir. 2015\)](#); [In re Sealed Case, 716 F.3d 603, 605-09, 405 U.S. App. D.C. 36 \(D.C. Cir. 2013\)](#); [In re Grand Jury, 635 F.3d 101, 103 \(3d Cir. 2011\)](#). We believe the Intervenor's claims are sufficiently independent from any forthcoming criminal judgment to pass the *DiBella* test here.

The Intervenor's [*20] clearly seek only the return of their property. They sought to prohibit the government from reviewing seized materials until a protocol protective of the attorney-client privilege was ordered. To protect the privileged materials, they primarily asked for the court to order the return of the seized documents to prevent law enforcement from reviewing the materials and suggested, in the alternative, that an independent party could act as the filter. They do not seek to invalidate the seizure—indeed, the government currently remains in possession of the materials seized. See Oral Argument Recording at 2:36-44 (July 1, 2021) ("To be clear as we sit here today hearing the case, the materials are safe. They are in the possession of the government."). Nor do they seek to suppress the seized materials or ask for any other relief. This is sufficient to conclude the motion was solely for the return of property. See [Richey, 515 F.2d at 1242-44](#) & n.5 (noting that by abandoning the motion to suppress the "*DiBella*

⁶ The parties dispute whether the Intervenor actually invoked [Rule 41](#), but we believe this is the proper way to come before the court to seek an injunction regarding the government's use of a filter team to review seized documents. Cf. [Richey v. Smith, 515 F.2d 1239, 1243 \(5th Cir. 1975\)](#) (explaining that motions for the return of property are governed by equitable principles, whether viewed as based on [Rule 41\(g\)](#) or on a federal court's general equitable jurisdiction).

test would seem to be satisfied," and that "prayers for injunctive relief to prevent examining, analyzing, scheduling, or copying of the documents [are] an integral part of the . . . motion for return of property"). [*21]

Neither was the Intervenor's motion in any way tied to an ongoing criminal prosecution. See [DiBella](#), 369 U.S. at 131-32. *DiBella* suggested there was a criminal prosecution "in esse," or in existence, "[w]hen at the time of the ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment." *Id.* (emphasis added). There is currently no complaint, arrest, detention, or indictment in this case. Therefore, "according to the literal language of *DiBella*," there is no criminal prosecution in esse. [United States v. Glassman](#), 533 F.2d 262, 262-63 (5th Cir. 1976).

But the inquiry doesn't stop there. In [In re Grand Jury Proceedings \("Berry"\)](#), 730 F.2d 716 (11th Cir. 1984) (per curiam), where this Court previously applied *DiBella* to a motion characterized as seeking the return of property, we said that a "pending criminal investigation, even in the absence of a formal charge," may be enough to show that the motion is tied to a criminal prosecution. *Id.* at 717. *Berry* explained that determining whether a motion meets the "no way tied to an ongoing criminal prosecution" rule from *DiBella* may be relatively straightforward from the procedural standpoint of the case. But *Berry* directed us to consider not only the existence of a pending criminal investigation, but also to look to the purpose of [*22] the motion for the return of property. See *id.* at 717-18. If it "is obvious from a reading of the motion that appellants are attacking the validity of the search and seizure under the [fourth amendment](#)," then it is "clear that the motion is tied to the ongoing criminal investigation and to issues that may be litigated in any subsequent criminal proceedings arising out of the seizure." *Id.* at 718; see also [Glassman](#), 533 F.2d at 262-63 ("Only if this motion was a collateral attempt to retrieve property and not an effort to suppress evidence in related criminal proceedings is it appealable.").

The Intervenor's are subjects of an ongoing criminal investigation. But under *Berry*, an ongoing criminal investigation isn't—by itself—dispositive. See [Berry](#), 730 F.2d at 717 ("A pending criminal investigation, even in the absence of a formal charge, may be sufficient to show that the motion is tied to an existing criminal prosecution." (emphasis added)). And for the same reasons we have already described, the Intervenor's

[Rule 41\(g\)](#) motion in no way attacked the validity of the search and seizure of the materials.

The Intervenor's sought equitable relief in the form of an injunction in a civil case to prohibit the government from reviewing seized materials until a protocol protective of the attorney-client [*23] privilege was ordered. They argued they could prove the four elements required to obtain an injunction in a civil case. And they sought return of the seized documents to protect privileged materials by preventing law enforcement from reviewing the materials, asking in the alternative for an independent party to act as the filter. Both the magistrate judge and the district court treated the motion as a civil preliminary injunction to protect privileged documents. So it is clear that the purpose of the Intervenor's motion is not to attack the validity of the search and seizure under the [Fourth Amendment](#) and is therefore not tied to any criminal prosecution. Cf. [Berry](#), 730 F.2d at 717-18.

Appellate jurisdiction here also satisfies the concerns underlying the need for appellate review of interlocutory orders as explained in *DiBella*. See [369 U.S. at 124-29](#). The damage from any error in the district court would be "definitive and complete," if interlocutory review is not available, and would outweigh any "disruption caused by the immediate appeal." *Id.* "The whole point of privilege is privacy." [Harbor Healthcare](#), 5 F.4th 593, *slip op.* at 10. So the Intervenor's interests in preventing the government's wrongful review of their privileged materials lie in safeguarding their privacy. See *id.* Once [*24] the government improperly reviews privileged materials, the damage to the Intervenor's interests is "definitive and complete." [DiBella](#), 369 U.S. at 124.

Contrary to the government's suggestion, suppression is not an adequate remedy for any violations. We cannot know whether criminal charges will be brought against the Intervenor's. [HN3](#) [↑] Yet suppression protects against only "the procedural harm arising from the introduction [at a criminal trial] of unlawfully seized evidence." [Harbor Healthcare](#), 5 F.4th 593, *slip op.* at 12. If the Intervenor's are not charged, they will not have suppression available to them as a potential remedy. See *id.* And even if they are charged and may seek suppression, suppression does not redress the government's intrusion into the Intervenor's personal and privileged affairs. See *id.*

In contrast, [Rule 41\(g\)](#) can. It offers the remedy of returning to the Intervenor's any improperly seized

documents protected by privilege *before* the government has reviewed them. See [Fed. R. Crim. P. 41\(g\)](#); see also [Harbor Healthcare, 5 F.4th 593, slip op. at 12](#). Unlike suppression, that is a remedy that can redress any potential injury by ensuring it does not occur in the first place. And if a district court incorrectly denies [Rule 41\(g\)](#) relief when it is required, immediate review is necessary to preserve that same remedy of return of the [*25] documents before the government reviews them. Review later would be incapable of vindicating the Intervenor's privacy interests. See [Richey, 515 F.2d at 1243 n.6](#) ("[A]ppellate review might be appropriate where to deny the right to appeal at a specific time would in effect deny the right to appeal at all on the specific issue.").

Interlocutory review also comports with *DiBella's* concern that the motion for injunctive relief at issue here is severable and distinct from any other proceedings. See [DiBella, 369 U.S. at 126-27](#). Indeed, the Intervenor's motion, which seeks only to address the review protocol as it relates to allegedly privileged documents and to obtain return of privileged documents, "is a discrete action, not tied to any other civil or criminal proceedings, [so granting] review would not frustrate the policy against piecemeal review in federal cases." [Richey, 515 F.2d at 1243 n.6](#).

As for *DiBella's* concern for delaying criminal proceedings, that can be minimized by expediting review of motions of this type. The merits of a motion seeking only injunctive relief in the form of a preferred protocol for the government's review of allegedly privileged materials and the return of those items that the protocol determines are protected are not complex. A review protocol [*26] for privileged documents either does or does not sufficiently protect the interests of the person or entity that owns the allegedly privileged documents. And we are hopeful that our analysis below on the merits, *see infra* at Section II.B., will make that straightforward issue even simpler. In short, the specific motion before us here meets the *DiBella* test.⁷

⁷The government relies on other cases to further its jurisdiction argument, but each is distinguishable. First, it points to [Sealed Case, 716 F.3d 603](#), and [Grand Jury, 635 F.3d 101](#), to argue that as in those cases, the purpose of the Intervenor's motion was "to place an additional layer of screening between the government and the seized materials, inevitably causing delays and restrictions that could shape the course of the criminal investigation and the content of the case" the government will eventually present. But both of those cases involved challenges to the validity of the search

B. The district court did not abuse its discretion in issuing the Modified Filter-Team Protocol and denying the Intervenor's motion to the extent it sought to preclude any government review of documents before the Intervenor agreed or the court ordered disclosure

The Intervenor's assert that the district court abused its discretion in denying their motion for a preliminary injunction to prohibit any federal prosecutors or their agents—including the filter team—from reviewing documents the Intervenor identifies as privileged unless the Intervenor agrees or the court permits government review after first conducting its own privilege review. We disagree.

HN4 [↑] To obtain a preliminary injunction, the movant must clearly establish four showings: (1) it has "a substantial likelihood of success on the merits;" (2) it will [*27] suffer "irreparable injury" in the absence of the injunction sought; (3) any threatened harm to the movant that might be inflicted because of the proposed injunction will outweigh any damage to the opposing party; and (4) the injunction sought "would not be adverse to the public interest." [Siegel v. LePore, 234 F.3d 1163, 1176 \(11th Cir. 2000\)](#) (en banc) (per curiam). We have said that a preliminary injunction is an "extraordinary and drastic remedy." *Id.*

HN5 [↑] On appeal, we review the denial of a preliminary injunction for abuse of discretion. [Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1247 \(11th Cir. 2016\)](#). A district court abuses its discretion if "its factual findings are clearly erroneous, . . . it follows improper procedures, . . . it applies the incorrect legal standard, or . . . it applies the law in an unreasonable or

warrant, so under *Berry*, they *would* be tied to an ongoing criminal prosecution. The D.C. Circuit's and the Third Circuit's holdings that they did not have jurisdiction do not apply here.

The government also makes a fleeting reference to [Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100, 130 S. Ct. 599, 175 L. Ed. 2d 458 \(2009\)](#), in which the Supreme Court noted that rulings on privilege are typically not immediately appealable. That case, though, did not involve a claim that the government was invading privilege for the purpose of possibly taking action against the privilege holders. Not only that, but *Mohawk* involved a claimant who was a party to the suit and could appeal a final judgment. The *Mohawk* Court did not address appeals like this one, by privilege claimants who are intervenors in a proceeding ancillary to a criminal investigation. See [Doe No. 1, 749 F.3d at 1007](#).

incorrect manner." *Id.* at 1247. Under this standard, a district court may make any of a range of permissible choices. *Id.*

HN6 [↑] We have recognized that appellate review of a preliminary-injunction decision is "exceedingly narrow" because of the expedited nature of the proceedings. *Wreal*, 840 F.3d at 1248. This means our review is deferential. *Id.* We have commented that appellants face a "tough road" in establishing the four prerequisites to obtain a preliminary injunction. And on appeal, they "must also overcome the steep [*28] hurdles of showing that the district court clearly abused its discretion in its consideration of each of the four prerequisites." *Id.* The "failure to meet even one [factor] dooms [an] appeal." *Id.*

While we have described a showing of irreparable injury as "the sine qua non of injunctive relief," *Siegel*, 234 F.3d at 1176, here, we need proceed no further than consideration of the Intervenor's likelihood of success on the merits. We conclude the district court did not abuse its discretion in determining that the Intervenor did not show a substantial likelihood of success on their position that government filter teams are *per se* violative of their rights. Nor did it abuse its discretion in effectively concluding that the Intervenor did not show a substantial likelihood of success on their argument that the Modified Filter-Team Protocol violates their rights. Indeed, because of the great weight of authority that supports the district court's conclusions here, our holding on this front is not even close.

HN7 [↑] We begin by recognizing that the attorney-client and work-product privileges play a vital "role in assuring the proper functioning of the criminal justice system" and provide a means for a lawyer to prepare her [*29] client's case. See *United States v. Nobles*, 422 U.S. 225, 238, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975). They are deeply important and must be respected. Nevertheless, they are not inviolate. We have recognized exceptions that allow for their breach. For example, when the crime-fraud exception applies, it effectively invalidates the privileges.⁸ See *In re Grand Jury Investigation*, 842 F.2d 1223 (11th Cir. 1987). But

⁸ **HN8** [↑] The crime-fraud exception applies if (1) the client was involved in or was planning criminal conduct when he sought advice of counsel, or that he committed a crime after he received the benefit of legal counsel; and (2) "the attorney's assistance was obtained in furtherance of the criminal activity or was closely related to it." *In re Grand Jury Investigation*, 842 F.2d at 1226.

to be sure, any filter protocol must appropriately take into account the importance of these privileges.

With that in mind, we turn to the Modified Filter-Team Protocol. Significantly, the Modified Filter-Team Protocol allows the Intervenor to conduct the initial privilege review. It also requires the Intervenor's permission or court order for any purportedly privileged documents to be released to the investigation team. This means that the filter team cannot inadvertently provide the investigation team with any privileged materials. For three reasons, we conclude that this Protocol suffices under the law.

First, though we have not previously issued any published opinions on point, some of our sister circuits have approved of the use of a walled-off government filter team to review documents for privilege. In *United States v. Jarman*, 847 F.3d 259 (5th Cir. 2017), for instance, the Fifth Circuit upheld the filter team's screening for privileged materials. *Id.* at 266. There, the [*30] court stated that the filter team process was "designed to protect [the] privileged information." *Id.* The Second, Third, Fourth, Seventh, Eighth, Ninth and Tenth Circuits, in at least some cases, have also either approved of or recognized and declined to criticize the use of government filter teams to screen materials for privilege before items are released to the investigators in the case. See, e.g., *S.E.C. v. Rajaratnam*, 622 F.3d 159, 183 & n.24 (2d Cir. 2010); *Search of Elec. Commc'ns in the Acct. of chakafattah gmail.com at Internet Serv. Provider Google, Inc.*, 802 F.3d at 530; *United States v. Myers*, 593 F.3d 338, 341 n.5 (4th Cir. 2010); *United States v. Proano*, 912 F.3d 431, 437 (7th Cir. 2019); *United States v. Howard*, 540 F.3d 905, 906 (8th Cir. 2008); *United States v. Christensen*, 828 F.3d 763, 799 (9th Cir. 2015); *United States v. Ary*, 518 F.3d 775, 780 (10th Cir. 2008).

Second, the Intervenor cites no cases for the broad remedy they seek: a holding that government agents "should never . . . review documents that are designated by their possessors as attorney-client or work product privileged" until after a court has ruled on the privilege assertion." Nor has our research unearthed any.

Third, to the extent that courts have disapproved of particular filter-team protocols, the Modified Filter-Team Protocol suffers from none of the defects those courts found disqualifying. The Intervenor relies primarily on *In re Grand Jury Subpoenas 04-124-03 and 04-124-05 ("Winget")*, 454 F.3d 511 (6th Cir. 2006), and *In re: Search Warrant Issued June 13, 2019 ("Baltimore Law*

Firm"), 942 F.3d 159 (4th Cir. 2019), to support their contention that the Modified Filter-Team Protocol violated their rights. But both cases are materially different.

Winget arose when the plaintiffs there [*31] learned that a third party had received a grand-jury subpoena for documents, some of which allegedly were subject to the plaintiffs' claims of privilege. 454 F.3d at 512. There, the district court permitted a government-filter-team protocol under which the government's filter team—not the purported privilege possessors or the court—determined which documents were privileged. See *id.* at 515. Only if the team found a document definitely or possibly privileged did it submit it to the court for a privilege review. See *id.* at 515, 518 n.5.

The Sixth Circuit held that this protocol failed to sufficiently protect the plaintiffs' claims of privilege. First, the court questioned the use of a government filter team in non-search-warrant situations like the one at issue there. *Id.* at 522-23. But after a search warrant is executed, the court recognized, the government has physical control of potentially privileged documents. *Id.* at 522. So, the court reasoned, "the use of the [filter] team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege." *Id.* at 522-23. And second, the court expressed concern that a government filter team that takes the first pass at the materials for privilege can miss privileged [*32] items and mistakenly pass them along to the investigative team. *Id.* at 523. In other words, a protocol of that sort imposes no check on any of the filter team's determinations that an item is not privileged. *Id.*

But neither of these problems exists here. In fact, the records here are already in the government's possession as the result of the execution of a search warrant, so under *Winget*, the use of a filter team to review them is "respectful of, rather than injurious to, the protection of privilege." *Id.* at 522-23. And unlike in *Winget*, under the Modified Filter-Team Protocol, the Intervenor's identify all allegedly privileged materials in the first instance. So there is no possibility here that privileged documents will mistakenly be provided to the investigative team.

Baltimore Law Firm is also different from the Intervenor's case in important ways. There, the government seized documents in accordance with a search warrant. *Baltimore Law Firm*, 942 F.3d at 164. The search warrant was for a lawyer's records as they

concerned one specific client. *Id.* at 166. In seizing that lawyer's materials, the government took all the lawyer's email correspondence, including his correspondence with clients other than the one whose materials were authorized to be seized. [*33] *Id.* at 166-67. In fact, of the 37,000 emails seized from the lawyer's inbox, only 62 were from the designated client or contained that client's surname. *Id.* at 167. Similarly, only 54 of the 15,000 emails seized from the lawyer's "sent items" folder had been sent to the designated client or contained that client's surname. *Id.* The vast majority of the rest of the correspondence was from other attorneys and concerned other attorneys' clients who had no connection at all with the investigation that led to the search warrant. *Id.* But notably, some of those other clients were being investigated by or prosecuted by the same United States Attorney's Office for unrelated crimes. *Id.*

At the time the magistrate judge issued the search warrant, the magistrate judge also authorized a government filter-team protocol. *Id.* at 165. Like under the *Winget* protocol, the *Baltimore Law Firm* protocol allowed the government filter team to determine initially whether items were potentially privileged or not. *Id.* at 166. And when the filter team found materials not to be privileged, it could forward them directly to the investigative team. *Id.* As for items the filter team deemed privileged or potentially privileged, the filter team could [*34] provide those materials to the investigative team only if the parties agreed or the court concluded after review that the items could be turned over. *Id.* at 166.

The Fourth Circuit held that the filter-team protocol that the magistrate judge approved was legally flawed.⁹ *Id.* at 176. As relevant here, it objected first to the protocol's assignment of judicial functions to the executive branch. *Id.* In particular, the court noted that the resolution of a privilege dispute is a judicial function. *Id.* So the protocol should not have authorized the government filter team

⁹ The district court modified the protocol to require the filter team to forward any materials it deemed nonprivileged to the plaintiff or the court for approval before providing them to the investigative team. *Baltimore Law Firm*, 942 F.3d at 170. A concurring opinion in *Baltimore Law Firm* suggests that the majority decision did not address or otherwise call into question the modified filter protocol, which was more similar to the protocol at issue here. See *id.* at 169-70, 183-84. And the concurring opinion noted that the majority opinion did not suggest the modified protocol "impermissibly usurp[ed] a judicial function." *Id.* at 184 (Rushing, J., concurring).

to determine in the first instance whether materials were privileged. [Id. at 176-77](#). The court also concluded that the magistrate judge should not have authorized the filter-team protocol *ex parte* and before the magistrate judge knew what had been seized. [Id. at 178](#). Noting that the great majority of emails seized appeared not to be relevant to the client who was the subject of the government's investigation, the court opined that that information should have affected the protocol that was put into place. *Id.* Not only that, the court explained, but the magistrate judge should have waited to determine the protocol in an adversarial proceeding where the privilege holder [*35] could be heard. [Id. at 178-79](#).

As with [Winget](#), none of the concerns the Fourth Circuit identified in [Baltimore Law Firm](#) apply here. Though the magistrate judge originally approved the Original Filter-Team Protocol *ex parte*, before the investigative team could review any documents, the court held an adversarial hearing and, after considering the Intervenor's concerns, put the Modified Filter-Team Protocol into place. Also unlike in [Baltimore Law Firm](#), this case involves no claims that the majority of seized materials were both privileged and irrelevant to the subject of the investigation. And finally, the Modified Filter-Team Protocol did not assign judicial functions to the executive branch. Rather, and as we have noted, under the Modified Filter-Team Protocol, the Intervenor has the first opportunity to identify potentially privileged materials. And before any of those items may be provided to the investigative team, either the Intervenor or the court must approve. Put simply, the Modified Filter-Team Protocol complies with the recommendations both the Sixth and Fourth Circuits have made concerning the use of filter teams.¹⁰

So once again, we return to the observation that [*36] the Modified Filter-Team Protocol appears to us to comply with even the most exacting requirements other courts that have considered such protocols have deemed appropriate. In short, the Intervenor has not clearly established a substantial likelihood of success on the merits.

III.

¹⁰ We do not prejudge other filter protocols that are not before us. Rather, we evaluate only the Modified Filter-Team Protocol and simply conclude that, under the circumstances here, that Protocol suffices, even under frameworks of analysis that other Circuits have used to invalidate other protocols.

For the reasons we have explained, we affirm the district court's order.

AFFIRMED.

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As of: October 13, 2021 7:12 PM Z

United States v. Sullivan

United States District Court for the District of Hawaii

April 9, 2020, Decided; April 9, 2020, Filed

CR. NO. 17-00104 JMS-KJM

Reporter

2020 U.S. Dist. LEXIS 64508 *; 2020 WL 1815220

UNITED STATES OF AMERICA, Plaintiff, vs.
LEIHINAHINA SULLIVAN, Defendant.

Prior History: [United States v. Sullivan, 2019 U.S. Dist. LEXIS 230152 \(D. Haw., Oct. 4, 2019\)](#)

Core Terms

documents, files, team, prosecution team, HEIC, attorney-client, Lexus, Nexus, privileged, iCloud, boards, bag, suppress, images, contents, privileged material, search warrant, motions, seized, Declaration, box, non-privileged, rights, work-product, disclosure, discovery, possessed, evidentiary hearing, motion for leave, confidential

Counsel: [*1] Leihinahina Sullivan, also known as Jen, also known as Jennifer Sullivan, also known as Jennifer, also known as Lei Sullivan, Defendant, Pro se, HONOLULU, HI

For Leihinahina Sullivan, also known as Jen, also known as Jennifer Sullivan, also known as Jennifer, also known as Lei Sullivan, Defendant: Richard L. Hoke, Jr., LEAD ATTORNEY, Kailua, HI.

For USA, Plaintiff: Mohammad Khatib, LEAD ATTORNEY, Office of the United States Attorney, Honolulu, HI; Rebecca Ann Perlmutter, LEAD ATTORNEY, Office of the U.S. Attorney, Honolulu, HI

Judges: J. Michael Seabright, Chief United States District Judge.

Opinion by: J. Michael Seabright

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTIONS ALLEGING VIOLATIONS OF THE ATTORNEY-CLIENT PRIVILEGE, ECF NOS. 345, 667 & 670

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTIONS ALLEGING VIOLATIONS OF THE ATTORNEY-CLIENT PRIVILEGE, ECF NOS. 345, 667 & 670

I. INTRODUCTION

Before the court are pro se Defendant Leihinahina Sullivan's ("Defendant" or "Sullivan") "Motion to Dismiss Based on Violation of Attorney Client Privilege Communication," ECF No. 345; "Motion for Leave to File This Motion in Limine to Exclude All Evidence Derived From All 'Native' Files," ECF No. [*2] 667; and "Motion for Leave to File This Motion in Limine Because Non-Discoverable Attorney-Client Privileged (sic) & Defense Work Product Information was Unconstitutionally Disclosed on Discoverable Disc 13, 16, 18, 22," ECF No. 670. Defendant argues, among other things, that the United States seized various documents protected by the attorney-client relationship and that this intrusion violated her [Sixth](#) and [Fourteenth Amendment](#)¹ rights.

Essentially, Defendant's arguments turn on the allegedly deficient "taint team" process² implemented by the

¹ The court liberally construes Sullivan's [Fourteenth Amendment](#) due process claim as one brought under the [Fifth Amendment](#).

² As described in more detail below, a "taint team," sometimes called a "filter team," consists of individuals from an investigating agency (in this case, the Internal Revenue Service Criminal Investigation Division ("IRS-CI")) and the United States Attorney's Office, who are walled off from the "prosecution team." The taint team is responsible for reviewing seized documents for potentially privileged material, and thus insuring that the prosecution team is not provided with any privileged material. See, e.g., [In re Grand Jury Subpoena, JK-15-029, 828 F.3d 1083, 1087 \(9th Cir. 2016\)](#).

United States in relation to the execution of two search warrants. As discussed below, although the court finds that the taint team process was clearly lacking, resulting in a small number of privileged documents being disclosed by the taint team to the prosecution team, this lapse does not amount to any violation of Defendant's constitutional rights and does not warrant the ultimate sanction sought by Sullivan—dismissal of the Fourth Superseding Indictment ("FSI"). The court does find, however, that a lesser sanction is both appropriate and necessary. Accordingly, the motions are GRANTED to the extent Defendant seeks to suppress all the "HEIC" files obtained from the [*3] seizure and search of Defendant's iCloud account records, but the motions are otherwise DENIED.

II. BACKGROUND

Defendant raises two claims related to the taint team process employed by the United States during the execution of two separate search warrants. First, she claims that the United States seized privileged documents, which she labeled in a folder titled "Lexus Nexus," and these documents were listed on an inventory of seized items as non-privileged documents. Second, Defendant alleges that the United States seized images that included photographs of defense strategy boards protected under the attorney-client privilege and/or the work-product doctrine. The court describes the background to each allegation as follows.

A. "Lexus Nexus" Documents³

On March 21, 2019, the United States executed a search warrant on Defendant's residence. See ECF No. 625-1 at PageID #7134 (Rogers Aff. ¶ 3). Defendant then filed a November 19, 2019 "Motion to Dismiss Based on Violation of Attorney Client Privilege Communication," ECF No. 345, making various claims that the agents violated her attorney-client privilege during the execution of the warrant.⁴

³ The inventory label states "Lexus Nexus docs.," which appears misspelled. It is undisputed for the purposes here that this was a reference to "LexisNexis," a company providing legal research tools, cases, and legal news, among other things.

⁴ The original indictment against Sullivan was returned by the grand jury on February 15, 2017. ECF No. 1. Prior to the execution of the March 21, 2019 search warrant, Sullivan had been represented by privately-retained counsel William

A hearing [*4] was held on January 23, 2020. IRS-CI Special Agent Mark Macpherson ("SA MacPherson"), the lead agent overseeing the investigation, was asked about the search's inventory list that included a reference to the seizure of "Lexus Nexus docs," which Defendant claims were protected by an attorney-client or work-product privilege. SA MacPherson was unable to recall the contents of the "Lexus Nexus" documents.

Based on the uncertainty of the status of the "Lexus Nexus" documents, on January 24, 2020, the court ordered the United States to produce the purported "Lexus Nexus" documents for an in-camera review. ECF No. 610. Although the United States provided other seized documents, it could not locate any "Lexus Nexus" documents as listed on the inventory. ECF No. 611; *see also* ECF No. 614 (sealed). This response then led to further briefing and a March 4, 2020 evidentiary hearing.

The discovery that the United States possessed no "Lexus Nexus" documents then prompted further briefing and a March 4, 2020 continued evidentiary hearing. The following evidence was adduced from various declarations and the January 23 and March 4 evidentiary hearings.

Because Defendant was represented by counsel in [*5] the ongoing prosecution against her when the search was executed, the United States initiated a "taint team" process to preclude privileged or potentially privileged materials (under either the attorney-client privilege or work-product doctrine) from reaching the "prosecution team" (i.e., the agents and the prosecutors assigned to the actual investigation and prosecution of Defendant). Accordingly, the United States created a "taint team," consisting of agents, Assistant United States Attorneys ("AUSAs"), and paralegals, who were "walled off" and separated from the prosecution team.⁵

Two taint team agents were on site at Defendant's residence to conduct an initial taint review of all seized materials—IRS-CI Special Agents Clement Rogers ("SA Rogers") and Mark Pahnke ("SA Pahnke"). During the

Harrison, followed by Assistant Federal Public Defender Craig Jerome. At the time the warrant was executed, Sullivan was represented by Criminal Justice Act counsel Megan Kau. She is now pro se.

⁵ The use of this specific "taint team" process was set forth in the affidavit in support of the search warrant and approved by a United States magistrate judge. See Mag. No. 19-00267 RT, ECF No. 1 at PageID #19.

January 23, 2020 hearing, SA MacPherson⁶ explained that the taint team agents were tasked with sorting and placing the seized material into three boxes: a "white box," which contained materials that were clearly not privileged; a "gray box," which contained materials that were questionable as to whether they were privileged; and a "black box," which contained materials that were clearly privileged. **[*6]** ECF No. 637 at PageID #7271-72.⁷

SA Rogers collected and sorted various material, including documents placed into a "white box" evidence bag titled "Control #6."⁸ ECF No. 625-1 at PageID #7135. He handwrote "a general description of the items in [evidence bag] control #6," to include "lexus nexus" docs. *Id.* at PageID #7135. He then provided the unsealed Control #6 bag to SA Pahnke, who

ensur[ed] that each item was responsive to [the list of items to be seized] and . . . determine[d] if there were any items that could potentially be protected by attorney-client privilege. If [he] determined that there were any non-responsive items or items that could be potentially protected by attorney-client privilege, then [SA Pahnke] removed those items from the unsealed bag before officially sealing the bag. [He] would [then] initial the hand written (sic) tag.

ECF No. 625-2 at PageID #7139. SA Pahnke had no "specific memory of reviewing items resembling 'lexus nexus' documents in control #6." *Id.* at PageID #7140.

After SA Pahnke sealed the bags containing "responsive documents and non-privileged information, including items in control #6," he "provided and transferred [evidence bag Control **[*7]** #6] to the custody and control of . . . [SA] Mark MacPherson. Any items that were identified to contain potentially privileged information (i.e., "gray box" material) were

sealed and sent to Portland, Oregon, and were not given to [SA] MacPherson." *Id.* Items determined to be privileged (i.e., "black box" material) were left at Defendant's residence. *Id.*

SA MacPherson explained that upon receiving the non-privileged "white box" documents,⁹ including evidence bag Control #6,¹⁰ he unsealed the bag, scanned each document, and forwarded these scanned copies to the prosecution team. ECF No. 738 at PageID #7982. He further testified that although he reviewed the description of each bag generally, e.g., to determine if a thumb-drive listed as being in the bag was actually in the bag, he did not specifically check the contents of a particular envelope against the inventory listed for that envelope. *Id.* at PageID #7994-95. SA MacPherson further testified he did not recall coming across any documents that may be considered "Lexus Nexus" documents. *Id.* at PageID #7985-86.

Once he scanned and reviewed the contents of Control #6, SA MacPherson placed the bag and its contents in a locked room within the **[*8]** IRS offices in the federal building. See *id.* at PageID #8004. The bag and its contents stayed in this secure room until the court requested an in-camera review. SA MacPherson testified that he did not remove, destroy or alter any documents in the control envelopes, including Control #6. *Id.* In other words, although SA MacPherson cannot explain where the "Lexus Nexus" documents are, he testified that under the procedures he used, no documents that could be described as "Lexus Nexus" were in Control #6 when he received it. Based on SA MacPherson's manner of testifying, demeanor, and

⁶To be clear, SA MacPherson was part of the prosecution team and oversaw the March 21, 2019 execution of the search warrant. However, SA MacPherson stood outside the premises the entire time the taint agents were reviewing documents and was not a part of the search team inside the house. See ECF No. 637 at PageID #7194-95.

⁷Members of the taint team were provided a specific "Filter Team Instruction." See e.g., ECF No. 693-1.

⁸The inventory is broken down into separate "Control" numbers. "Control #6" lists the contents of its envelope as: "State tax Docs., Lexis Nexus Docs., 10 copies, W-2, and College Docs." ECF No. 614-1 at PageID #6865.

⁹There was inconsistent testimony as to when SA MacPherson received the non-privileged documents. At the January 23, 2020 hearing, SA MacPherson testified that the non-privileged documents were mailed to him on Oahu. ECF No. 637 at PageID #7624. At the continued March 4, 2020 hearing, he testified that upon having his recollection refreshed by SA Pahnke, he recalled receiving the non-privileged documents (including control item # 6) in Kauai immediately after the search was conducted, which he kept secured in his hotel room, until he brought the documents back to Oahu for processing. ECF No. 738 at PageID #7980-82, 7992. Although this discrepancy is not particularly relevant to the court's analysis, the court finds the March 4, 2020 explanation to be credible.

¹⁰SA MacPherson also testified that he received three other "white" box evidence bags—Control Numbers 1, 7, and 8. ECF No. 738 at PageID #7982. The contents of these bags are not at issue.

memory of events, the court finds this testimony to be fully credible.

On January 31, 2020, the United States submitted two declarations—one from SA Rogers and one from SA Panhke. See ECF Nos. 625-1 & 625-2. Essentially, both agents attested to the taint procedure itself, but could not answer (i) exactly what was contained in the documents labeled "Lexus Nexus;" and (ii) the whereabouts of these documents. Accordingly, the court requested the United States to conduct a search of all privileged and non-privileged documents in an attempt to locate any documents that may potentially be "Lexus Nexus." See ECF [*9] No. 638. The United States conducted its review of the non-privileged (by the prosecutorial team) and privileged materials (by the taint team), which did not reveal any documents that may have been "Lexus Nexus" documents. ECF No. 656.

During the March 4, 2020 hearing, Defendant testified as to the contents of the "Lexus Nexus" folder in her home. She testified that she created a folder named "Lexus Nexus," which included her research notes and notes regarding discussions she had with her former attorney, William Harrison. ECF No. 738 at PageID #8008-09. She testified that she created the folder after the first search warrant was executed in June 1, 2016, and that this file was still in her home as of March 19, 2019, but was no longer there as of March 24, 2019, after the March 21, 2019 search. *Id.*

B. Defendant's Four Strategy Boards

On April 26, 2019, pursuant to a search warrant, a copy of Defendant's iCloud account was produced from Apple, Inc. to the United States. In a November 19, 2019 motion, Defendant alleged that the prosecution team was provided with privileged material from this iCloud search. In support of that motion, she attached a litany of documents, including three unredacted [*10] photographs of defense strategy boards relating to her pending case. See *generally* ECF No. 345-1; see *also id.* at PageID #3240-42. As discussed below, the United States now concedes that the strategy boards are privileged.

In its response to the November 19 motion, the United States took the position that "until the [D]efendant herself disclosed [the strategy boards and other documents] to the public writ large" that "the prosecution team had not seen the vast majority of the materials contained" in the exhibit. ECF No. 471 at PageID #5067. The United States surmised that Defendant may have

"received copies of her own iCloud materials through independent means, i.e., from her family members" and that "[h]er receipt of documents through those avenues has no bearing on how the United States conducted its search and seizures or how it conducted discovery." *Id.* The United States reasserted this position during the January 23, 2020 hearing—that Defendant procured these privileged documents independently, and thus the prosecution team had no knowledge of these documents outside of Defendant's own disclosure. See ECF No. 637 at PageID #7202-03.

In the interim, Defendant continued to review [*11] discovery.¹¹ And on February 18, 2020, after completing that review, Defendant filed two motions for leave to file motions alleging, among other things,¹² a violation of the attorney-client privilege. ECF Nos. 667 and 670. Specifically, Defendant was able to identify four images containing her defense strategy boards that were possessed by *the prosecution team* (three of these four images were previously attached to her November 19 motion at ECF No. 345-1 at PageID #3240-42). See ECF No. 708. In other words, what Defendant was unable to prove in her November 19 motion—that the defense strategy boards were possessed by the prosecution team—she was able to prove after her continued discovery review.

These new motions then prompted further briefing¹³ and the March 4, 2020 evidentiary hearing. The following

¹¹ Defendant was having difficulty opening files on certain electronic discovery discs at Honolulu's Federal Detention Center. In order to provide Defendant with needed assistance, the court obtained certain discs from Defendant's stand-by counsel, had those discs downloaded on a laptop by the court's IT staff, and then permitted Defendant to review that discovery from the cellblock in the courthouse. See, e.g., ECF Nos. 638, 640, 647, 651, 663, and 674.

¹² These other issues were addressed separately by the court—ECF No. 667 was denied in part, noting that "[i]ssues not resolved by this [March 4, 2020 electronic order] will be addressed by separate order following a March 4, 2020 hearing." ECF No. 702.

¹³ The United States filed its response to ECF Nos. 667 and 670 on February 28, 2020. ECF No. 693. The parties submitted supplemental briefing after the March 4 hearing. ECF Nos. 739 (the United States) and 748, 754, 756 (Defendant). Defendant filed ECF Nos. 748, 754, and 756 as separate motions for leave, which the court construed as Replies and considers for purposes of this Order. See ECF No. 760.

evidence was adduced from declarations and the March 4 evidentiary hearing.

SA MacPherson "coordinated the delivery of [the] hard drive containing Apple's response to the iCloud search warrant to IRS-CI Computer Investigative Specialist Mike Hammond ["CIS Hammond"]." ECF No. 693-2 at PageID #7742. SA MacPherson did not otherwise receive the hard drive, as it was "sent directly from [*12] Apple to CIS Hammond." *Id.* Similar to the search of Defendant's home in March 2019, because the United States was aware that Defendant was represented by counsel, the United States utilized a taint team to review the iCloud production.¹⁴

CIS Hammond and IRS-CI Special Agent Clint Kindred ("SA Kindred") were on the taint team charged with reviewing the iCloud account production for privileged materials. *Id.* CIS Hammond conducted various keyword searches for documents that may contain the names of Defendant's prior counsel. ECF No. 693 at PageID #7717. Responsive and non-privileged materials were provided to SA MacPherson, who subsequently turned these documents over to the prosecution team. ECF No. 693-2 at PageID #7742-43.

Documents that were potentially privileged (i.e., contained the names of Defendant's prior counsel in their text), along with all images, were sent to SA Kindred for review. ECF No. 693-3 at PageID #7747. The image files he received included HEIC files,¹⁵ JPEG files, JPG files, and PNG files. *Id.* at PageID #7748. He opened and reviewed each JPEG, JPG, and PNG file. *Id.* SA Kindred explained the extent of his work on the HEIC files: "[t]he HEIC files require downloading [*13] and installing additional codecs to work with those files, which we cannot do on our government computers. As such, they were not viewable by me and so I was unable to see or review the contents of those files." *Id.* at PageID #7748.

SA Kindred also reviewed an "Apple iCloud (Backup)_2019-06-28_Report.pdf" ("iCloud Extract Report") created by CIS Hammond. *Id.* at PageID

#7749. That report contained thumbnail images of the HEIC files. Per SA Kindred:

I could not determine if potentially privileged information was contained in the thumbnail images in that report because they were too small to be pixelated. I also reviewed the file in the folder titled "thumbnails" which contained small images that also were too small and pixelated to be legible. Therefore, the images were unintelligible and revealed no potentially privileged information.

Id. Approximately 100 MB of potentially privileged material was sent to a taint team AUSA for further review. *Id.* SA Kindred then "cleared" the remaining items, including the HEIC files that he could not open or view, and provided them directly to the prosecution team. *Id.*

On February 21, 2020, in response to Defendant's motion, AUSA Michael Albanese (who [*14] is not part of the prosecution team) was assigned to conduct a further review of the documents, including the HEIC files, that Defendant alleged were privileged and possessed by the prosecution team. ECF No. 693-5. After conducting his review, AUSA Albanese concluded that four HEIC files—Defendant's "strategy boards" (contained on discovery disc 18 at #1620, #1623, #1625, and #1627)—were in fact privileged but nonetheless provided to the prosecution team. *Id.* at PageID #7758, 7760. According to AUSA Albanese, these four documents were not legible in thumbnail view in the iCloud Extract Report, and that "[f]iles in .heic format cannot be opened on the current configuration of computers used by employees at the United States Attorney's Office for the District of Hawaii, which run a 2015 edition of Windows 10. According to Microsoft.com, the software needed to open .heic files was released in January 2018." *Id.* at PageID #7758.

Only after consulting with the Department of Justice's IT staff was AUSA Albanese able to devise a "work-around" solution to open the files—emailing the HEIC files to an Apple iPhone, and then opening the files on that phone. *Id.* at PageID #7759-60. Upon opening [*15] the HEIC strategy board files identified by Defendant in her motion, AUSA Albanese was then able to confirm that these images were "privileged." *Id.* at PageID #7760. Members of the prosecution team, other than viewing Defendant's own publicly-filed exhibits (as discussed further below), have not viewed the HEIC images of the four strategy boards. See ECF No. 693-4 at PageID #7752-53 (Declaration of prosecution paralegal); ECF No. 693-6 at PageID #7764

¹⁴And similarly, the use of the taint team process for the iCloud production was reviewed and approved by a neutral United States magistrate judge. See Mag. No. 19-00374 KJM, EFC No. 1 at PageID #25-26.

¹⁵A ".heic" file "contains one or more images saved in High Efficiency Image Format (HEIF), a file format commonly used to store photos on mobile devices." ECF No. 693-5 at PageID #7758.

(Declaration of AUSA Perlmutter); ECF No. 693-8 at PageID #7769 (Declaration of AUSA Khatib); ECF No. 693-2 at PageID #7744 (Declaration of SA MacPherson).¹⁶ Given this somewhat tortured history, the court now considers three separate motions,¹⁷ making redundant and overlapping arguments. The remedies Defendant seeks include dismissal of the FSI (ECF No. 345), to exclude "all evidence" derived from "Native Files" (ECF No. 667), and to "suppress[] . . . all evidence" (ECF No. 670). At the hearing and in her supplemental briefing, Defendant clarified that the specific remedy she seeks is the suppression of all evidence obtained through the iCloud search warrant. See ECF Nos. 731 & 733.

III. LEGAL STANDARDS

A. The Attorney-Client Privilege [*16] and Work-Product Doctrine

As stated by the Supreme Court:

We readily acknowledge the importance of the attorney-client privilege, which is one of the oldest recognized privileges for confidential communications. 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. This, in turn, serves broader public interests in the observance of law and administration of justice.

Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 108, 130 S. Ct. 599, 175 L. Ed. 2d 458, (2009) (internal citations and quotation marks omitted).

An intrusion by the government into an attorney-client relationship in order to obtain confidential information

¹⁶ When Defendant was given access to discovery on a laptop provided by the court (see footnote 11), that laptop contained the software required to open an HEIC file on a windows device. This explains why Defendant was able to view the full image of the strategy boards, while SA Kindred and AUSA Albanese could not (at least without a software update or a "workaround").

¹⁷ Defendant filed a fourth motion relating to the alleged violation of her attorney-client privilege. See ECF No. 668. This motion was denied in its entirety by a separate order. ECF No. 701.

may be deemed a violation of a defendant's Sixth Amendment right to effective assistance of counsel. See Nordstrom v. Ryan, 762 F.3d 903, 910 (9th Cir. 2014) ("When the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel, that interference violates the Sixth Amendment right to counsel if it substantially prejudices the criminal defendant.") (citing Williams v. Woodford, 384 F.3d 567, 584-85 (9th Cir. 2004) and United States v. Irwin, 612 F.2d 1182, 1186-87 (9th Cir. 1980)). In such situations, a court may suppress evidence gathered as a result of the communication or, in egregious cases where the prejudice cannot otherwise be cured, dismiss the indictment. [*17] See United States v. Haynes, 216 F.3d 789, 796 (9th Cir. 2000), cert. denied, 531 U.S. 1078, 121 S. Ct. 776, 148 L. Ed. 2d 674 (2001); United States v. Marshank, 777 F. Supp. 1507, 1521-22 (N.D. Cal. 1991). See also United States v. Morrison, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981) ("Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.").

Relatedly, the work-product doctrine covers documents or materials prepared by an attorney or an attorney's agent in preparation for litigation and protects such documents or materials from discovery. See United States v. Nobles, 422 U.S. 225, 238-39, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975). This doctrine is essential to the attorney-client relationship because attorneys must "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." Hickman v. Taylor, 329 U.S. 495, 510, 67 S. Ct. 385, 91 L. Ed. 451 (1947). "Proper preparation of a client's case demands that [a lawyer] assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." Id. at 511. Together, "the attorney-client privilege and the work-product doctrine jointly support the Sixth Amendment's guarantee of effective assistance of counsel." In re Search Warrant Issued June 13, 2019, 942 F.3d 159, 174 (4th Cir. 2019).

B. The Court's Inherent Supervisory Power Under the Fifth Amendment

A federal court may also exercise its inherent supervisory powers to dismiss an [*18] indictment when outrageous government conduct violates "a recognized

statutory or constitutional right." United States v. Chapman, 524 F.3d 1073, 1085 (9th Cir. 2008). And under this rubric, a court may dismiss an indictment on the ground of outrageous government conduct where the conduct amounts to a due process violation. United States v. Barrera-Moreno, 951 F.2d 1089, 1091 (9th Cir. 1991); see also Haynes, 216 F.3d at 796 (deliberate intrusion into attorney-client relationship may violate Fifth Amendment). But dismissal based on prosecutorial misconduct may be warranted "only in cases of flagrant prosecutorial misconduct," that results in "substantial prejudice" to the defendant. Chapman, 524 F.3d at 1085, 1087 (internal quotation marks omitted); see United States v. Landeros, 748 F. App'x 135 (9th Cir. 2019) (mem.) (citing cases). "[A]ccidental or merely negligent governmental conduct is insufficient to establish flagrant misbehavior." Chapman, 524 F.3d at 1085.

IV. ANALYSIS

A. The "Lexus Nexus" Documents

As to the missing "Lexus Nexus" documents, the court finds no wrongdoing by the United States. While the court cannot speculate as to what happened to the missing documents, the court finds SA MacPherson's testimony that he did not remove, destroy, or alter the documents in Control #6 to be fully credible. Stated differently, the court determines that there was no violation of the attorney-client privilege by the United States because there is no evidence [*19] that the prosecution team ever obtained any "Lexus Nexus" documents, let alone then hid or destroyed them.¹⁸

¹⁸ Relatedly, Defendant also seeks, in a separate motion, for the United States to return all privileged documents obtained from the March 21, 2019 search. See ECF No. 801 (denying motion, but noting that "[t]o the extent Defendant seeks the return of privileged materials seized during the March 21, 2019 search, the court will address this request in its order"). However, because the court finds that the United States does not possess any privileged materials from the March 21, 2019 search, such request is DENIED. Further, to the extent Defendant is seeking to have returned *all* privileged materials (i.e., the images of the four strategy boards procured from the iCloud search warrant), there is no physical property to return as the images are all digital—accordingly, as discussed further below, the *suppression* of the HEIC files is the appropriate remedy.

B. The Four Strategy Boards

Understanding the importance of the attorney-client and work-product privileges to our system of justice, the court entrusted the United States with a unique responsibility to ensure that *any and all* privileged material seized pursuant to the iCloud warrant was not provided to the prosecution team. And in this task, the United States failed.

As the United States was certainly aware, the responsibility to protect these privileges is particularly important when using a taint team in a criminal proceeding—some courts have concluded, rightfully so, that taint team procedures may "create an appearance of unfairness." United States v. Neill, 952 F. Supp. 834 (D.D.C. 1997); see In re Search Warrant Issued June 13, 2019, 942 F.3d at 182 ("Appearances of unfairness are especially apparent in these proceedings, in that the [Taint] Team includes prosecutors employed in the same judicial district where Law Firm clients are being investigated") (internal quotation marks omitted). Further, many courts have also been highly critical of taint teams because "the government's fox is left in charge of the [criminal defendants'] [*20] henhouse, and may err by neglect or malice, as well as by honest differences of opinion." In re Grand Jury Subpoenas, 454 F.3d 511, 523 (6th Cir. 2006); see also United States v. SDI Future Health, Inc., 464 F. Supp. 2d 1027, 1038 (D. Nev. 2006) ("[T]he court recognizes that other courts have questioned and/or rejected the use of the taint team procedure."). Specifically,

taint teams present inevitable, and reasonably foreseeable, risks to privilege That is to say, the government taint team may have an interest in preserving privilege, but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations.

In re Grand Jury Subpoenas, 454 F.3d at 523.

Here, SA Kindred was tasked with "conduct[ing] . . . [the] filter review for potentially privileged material from the iCloud search warrant." ECF No. 693-3 at PageID #7747 (Kindred Decl. ¶ 3). When he could not open the HEIC files, instead of seeking IT assistance or even simply conducting a Google search to determine why the file would not open, he *presumed* the documents were not privileged and thus provided them to the prosecution team. *Id.* at PageID #7748-49. Of course,

the exact opposite presumption should apply—if a taint team cannot determine if a document is privileged or not, [*21] that document must be shielded from the prosecution team. Stated differently, only documents *known* to be privilege-free should pass from the taint team to the prosecution team. And because SA Kindred did not take *any* steps to try to open the HEIC files prior to forwarding them to the prosecution team, his action can best be characterized as demonstrating a total disinterest in both the rights of Defendant and the court's expectation that the taint team would fulfill its obligation to the court.¹⁹

In fact, as the United States has shown through AUSA Albanese's declaration, the extra precautions SA Kindred could have taken to protect Defendant's rights would have been minimal. AUSA Albanese, in conducting a further taint review of the HEIC files, discovered a rather simple "work-around"—email the files to an Apple device and then open the files on that device. Similarly, a quick search on the internet would have identified the software update needed to open HEIC files on a Windows device. See ECF No. 693-5 at PageID #7758. In short, the court is deeply troubled with the lack of effort and concern demonstrated by the United States when entrusted with such a vital responsibility.

And the United [*22] States' written responses to Defendants' motions reflect a disappointing lack of recognition of this wrongdoing—in fact, several astonishing statements were made in its response. See ECF No. 693 at PageID #7727 ("[I]t has been determined that item numbers 1620, 1623, 1625, and 1627 are in fact privileged, but there was no failure to follow taint review protocols. Similarly, based on the facts here, there was no improper disclosure of privileged material to the prosecution team.");²⁰ *see also*

¹⁹ And this indifference was also evident in SA Kindred's declaration, even after he learned about the disclosure of privileged information to the prosecution team. That is, his declaration states that because the "thumbnail" files were too small to view, "the images were unintelligible and revealed no potentially privileged information." ECF No. 693-3 at PageID #7749. In other words, because SA Kindred could not determine if the images were privileged after a cursory inspection, in his mind they were not.

²⁰ As the court stated during the March 4, 2020 hearing, this statement may be *literally* true, but nonetheless is shocking. That is, perhaps there was no failure to follow taint review protocols; but, if true, those protocols were obviously wholly deficient.

ECF No. 693-3 at PageID #7750 (Kindred's declaration attesting "[he] followed filter team protocols in [his] review for potentially privileged materials and exercised due diligence in executing [his] responsibilities as the filter agent.").²¹

With this analysis, the court turns to the appropriate remedy.

C. Appropriate Remedy and Sanction

Regardless of its conduct,²² the United States points out that there was no prejudice or harm to Defendant because no member of the prosecution team has actual knowledge of the contents of the four strategy boards (despite having constructive knowledge), and it has now revised its taint team procedure to prevent such a future error.²³

The court agrees that [*23] Defendant was not prejudiced. The prosecution team has shown that nobody on the team has viewed the contents of the four strategy boards. In fact, not until AUSA Albanese, as a taint AUSA, discovered the work-around, no one on the taint team *nor* the prosecution team viewed *any* HEIC files, let alone the HEIC files containing the four strategy boards. And Defendant has not shown that the prosecution team possesses or has viewed any other privileged documents (either as a HEIC file or any other file).²⁴ Thus, there is no evidence that anyone on the

²¹ Unlike the almost defiant tone in the United States' briefing, the United States Attorney's Office chief of the criminal division appeared at the March 4 hearing and recognized that the United States fell well short of the court's expectations.

²² And, to be clear, the court's finding of misconduct is limited *solely* to the taint team procedure reviewing the items seized from Defendant's iCloud account. As stated earlier, the court finds no misconduct in the taint team process as to the missing "Lexus Nexus" documents.

²³ The United States also argues that any error was harmless because Defendant waived any privilege over three strategy boards that she herself disclosed in her November 19, 2019 motion. While Defendant should have sought leave to file those strategy boards under seal, she is pro se and was simply attempting to notify the court of the United States' potential wrongdoing. Regardless, any error made by Defendant does not mitigate the United States' obvious negligence.

²⁴ During a February 21, 2020 hearing, Defendant identified numerous other documents provided to the prosecution team

prosecution team had actual knowledge of the contents of the four boards (despite having constructive knowledge) or any other privileged materials; to the extent anyone on the prosecution team may have viewed the contents of the three of the four strategy boards, it was through Defendant's own disclosure by attaching these images as exhibits in her own filings. See ECF No. 345-1 at PageID #3240-42. Accordingly, Defendant has not shown any actual injury or prejudice from the disclosure of the four strategy board HEIC files to the prosecution team, let alone any injuries arising to a violation of her constitutional rights. Put differently, Defendant [*24] has not shown, and the court does not find, that Defendant's constitutional rights have been violated by the disclosure of the four strategy boards. See Clutchette v. Rushen, 770 F.2d 1469, 1470 (9th Cir. 1985) ("Standing alone, the attorney-client privilege is merely a rule of evidence . . . In some situations, however, government interference with the confidential relationship between a defendant and his counsel may implicate Sixth Amendment rights . . . [but] only when it substantially prejudices the defendant.") (internal citations omitted). Given this finding, dismissal of the FSI is unwarranted. Dismissal is an extraordinary remedy, and requires a showing that Defendant was substantially prejudiced from the United States' outrageous conduct. Chapman, 524 F.3d at 1087.

As an alternative, Defendant seeks the suppression of all the materials obtained from her iCloud account, ECF No. 748 at PageID #8129, while the United States in turn argues that the appropriate remedy is to suppress only the images of the four strategy boards, ECF No. 739 at PageID #8105-06. And at the March 4, 2020 hearing, the attorney for the United States suggested another possible remedy—suppression of all HEIC files on the iCloud account, whether privileged or not. ECF No. 738 at Page ID #8054. [*25]²⁵

that she alleges are privileged. See ECF No. 679. The court directed Defendant to explain how these documents were privileged, see *id.*, and she then provided her response in two filings, ECF Nos. 731 & 733, which were docketed as motions. But none of the explanations provided by Defendant demonstrates that either the attorney-client privilege or work-product doctrine are implicated in any of those documents. Defendant also raised matters in these two filings beyond the scope of this court's February 21, 2020 order, ECF No. 679, which thus are not properly before the court.

²⁵ During the March 4, 2020 hearing, the United States represented that the iCloud production contained 473 HEIC documents. *Id.* at PageID #8046; see also Kindred Decl., ECF No. 693-3 at PageID #7748.

The court finds Defendant's proposed sanction, suppression of all the documents obtained from the iCloud account, to be too disproportionate to the violation. See United States v. Esformes, 2018 U.S. Dist. LEXIS 193190, 2018 WL 5919517, at *34-35 (S.D. Fla. Nov. 13, 2018) (adopting the magistrate judge's findings "that the prosecutors and agents . . . failed to uphold the high standards expected from federal agents and prosecutors from the [federal Government]" including that "the Government conducted multiple errors over the course of its investigation and infringed on [defendant's] attorney-client and/or work product privileges," but declined to dismiss the indictment, and instead, suppressed privileged evidence, because it found that the defendant was minimally prejudiced). Thus, the court declines to suppress all files from the iCloud search warrant (amounting to over 6,563 pages) as overly broad.

The court finds the appropriate remedy is to suppress all 473 HEIC files obtained from the iCloud account. First, the court finds this sanction appropriate given the reckless and grossly negligent conduct demonstrated by the taint team. As set forth above, the United States' conduct cannot be described as a mistake or honest disagreement of opinion; instead, it demonstrated a clear [*26] lack of concern for Defendant's rights and its obligations to this court. This sanction will also serve as a deterrent. Although the United States will be precluded from using files that contain non-privileged information, at the same time, this sanction is proportionate because the taint team turned over all HEIC files (not just the four strategy boards) to the prosecution team before determining whether those files contained privileged information.

V. CONCLUSION

Based on the foregoing, Sullivan's "Motion to Dismiss Based on Violation of Attorney Client Privilege Communication," ECF No. 345; her "Motion for Leave to File This Motion in Limine to Exclude All Evidence Derived From All 'Native' Files," ECF No. 667; and her "Motion for Leave to File This Motion in Limine Because Non-Discoverable Attorney-Client Privilege (sic) & Defense Work Product Information was Unconstitutionally Disclosed on Discoverable Disc 13, 16, 18, 22," ECF No. 670, are DENIED in part and GRANTED in part. They are DENIED to the extent the motions seek to dismiss the FSI or to suppress the use of all documents obtained from the iCloud search.

The Motions are GRANTED to extent all 473 HEIC files obtained from the [*27] iCloud search warrant are hereby suppressed for use at trial.

ECF Nos. 731 and 733 are DENIED as moot.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 9, 2020.

/s/ J. Michael Seabright

J. Michael Seabright

Chief United States District Judge

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