No. 21-A-

IN THE SUPREME COURT OF THE UNITED STATES

JULIAN OMIDI,
Defendant-Appellant,
v.

UNITED STATES OF AMERICA,
Appellee.

DEFENDANT-APPELLANT'S APPLICATION FOR A STAY OF DISCLOSURE OF CLAIMED PRIVILEGED JOINT DEFENSE COMMUNICATIONS

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Defendant-Appellant Julian Omidi states that he is an individual, not a corporation, and as such there is no parent or publicly held company owning 10% or more of the stock of Defendant-Appellant.

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

INTRODUCTION

This important appeal involves critical issues of Julian Omidi, a defendant in a federal criminal healthcare fraud prosecution, hereby seeks a stay of the disclosure to the Government's prosecution team of surreptitious recordings of joint defense meetings. Mr. Omidi seeks this stay so that he may file a petition for a writ of certiorari seeking review of the question as to whether the *Perlman* Doctrine[1] or the Collateral Order Doctrine allow for an interlocutory appeal from an order to disclose putatively privileged materials in a criminal case. This is an issue of significant importance because, like no other party, the Government has the power to forcibly seize privileged materials belonging to the targets of criminal investigations and the defendants in criminal prosecutions. Indeed, in this and too many other cases, the Government deliberately intrudes into privileged attorney-client communications or work product but claims the automatic right to do so provided the review is conducted with a separate team of agents and attorneys known as a "taint team" or "filter team."

The question therefore is whether (under what once were extraordinary circumstances) a defendant has the ability to appeal from an order denying relief or whether the defendant must wait for the

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[1] *Perlman v. United States*, 247 U.S. 7 (1918).

conclusion of the criminal case. The Court of Appeals are divided as to the scope of appellate jurisdiction to seek review of an order regarding the disclosure of claimed privileged material under the *Perlman* Doctrine and whether this Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009) narrows the scope of appellate jurisdiction of such an issue in a criminal case.

In order to seek review of these issues of appellate jurisdiction, an appellant must be afforded a stay of disclosure because the Government or a third party already has possession of the materials claimed to be privileged. In this instance, while a stay would afford this Court the opportunity to clarify these significant issues, the stay would impose no real hardship on the Government or other interested party. In this case, when Mr. Omidi first sought relief for the Government's deliberate intrusion into confidential joint defense meetings, the Government volunteered that it would not use the recordings in its case in chief in the trial.

OPINIONS BELOW

The opinion of the court of appeals (Pet.App. 1a and 3a) are not reported. The opinion of the district court is not reported.

STATEMENT OF THE CASE

During a lengthy investigation of a corporation and various employees, the Government sent a cooperating witness to covertly participate in and record more than thirty hours of joint defense group meetings, involving Mr. Omidi, his counsel, and other members of a joint defense group. (Defendant Julian Omidi's Supplemental

Memorandum (Doc. # 870) at p. 1). Cognizant of the intrusion upon potentially privileged communications, the Government established a separate group of attorneys or agents known as a "taint team" or "filter team" to review the recordings. This group determined that five entire recordings should be withheld on the basis of privilege from the investigation team (later the prosecution), and that privileged portions of the other recordings should be redacted. (Filter Brief (Doc. # 906) at p. 5). In fact, the Filter Team later wrote "(t)he scope of the alleged intrusion and resulting harm were minimized by withholding such material and employing redactions to the other recordings." (*Id.* at p. 10).

Believing that he was still prejudiced by the Government's misappropriation of privileged communications and defense strategy, Mr. Omidi filed a Fifth Amendment outrageous conduct claim and Sixth Amendment claim seeking dismissal of the Indictment. The Government responded with "no harm, no foul" arguments, including representing that it would not use the recordings in its case- in-chief. And while the Government's own Filter Team had reportedly withheld and redacted recordings, the District Court not only denied the motion, but ruled that *all* of the recordings could be disclosed by the Clerk of Court to the prosecution team. (*See* District Court Order at 17, n.30.)

Mr. Omidi appealed relying for appellate jurisdiction on the *Perlman* Doctrine and the Collateral Order Doctrine as interpreted by this Court's decision in *United States v. Ryan*, 402 U.S. 530, 533 (1971) (explaining logic for allowing

interlocutory appeals "in the limited class of cases where denial of immediate review would render impossible any review whatsoever."). A motions panel of the Ninth Circuit dismissed the appeal for lack of appellate jurisdiction. Mr. Omidi sought panel rehearing, but the Panel denied further review. Mr. Omidi now applies for a stay of the disclosure order so that he may petition for review of the important questions of appellate jurisdiction in criminal cases at issue in this case.

REASONS FOR GRANTING THE APPLICATION FOR STAY

I. This Court Should Grant A Stay of the Disclosure Order Pending Determination of Mr. Omidi's Anticipated Petition For A Writ of Certiorari.

"To obtain a stay pending filing and disposition of a petition for a Writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). This challenging standard is met in this case.

A. The Issues of Appellate Jurisdiction To be Presented Are of Substantial Importance to the Fair Administration of the Courts and There is Significant Disagreement and Uncertainty in the Courts Below.

Mr. Omidi seeks to petition for a writ of

certiorari as to two significant issues impacting the right of defendants in criminal cases to appeal to protect privileged communications: (1) whether the *Perlman* Doctrine applies to allow for an interlocutory appeal when the appellant is a party to the criminal case and the claimed privileged material is possessed by the Government; and (2) whether this Court's decision in *Mohawk Industries* forecloses an interlocutory appeal in a criminal case.

In a unanimous decision, this Court confirmed the right to an interlocutory appeal "in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims…" *Ryan*, 402 U.S. at 533. Explaining this principle, this Court further stated "(s)imilarly, in *Perlman v. United States*…we allowed immediate review of an order directing a third party to produce exhibits which were the property of appellant and, he claimed immune from production. To have denied review would have left Perlman 'powerless to avert the mischief of the order,' …for the custodian could hardly have been expected to risk a citation of contempt in order to secure Perlman an opportunity for judicial review." (*Id.* (*quoting Perlman*, 247 U.S. at 13).

Litigants for decades have relied on *Perlman* (as interpreted by *Ryan* and other decisions of this Court) to allow for interlocutory appeals of orders to disclose privileged material. Nevertheless, the Courts of Appeals have struggled with the precise contours of what is commonly referred to as the *Perlman* doctrine or exception. *See e.g.*, *In re Grand Jury*, 705 F. 3d 133, 144 (3rd Cir. 2012) ("the Perlman doctrine's reach has not been set precisely by the

Supreme Court…"). While the plain language of this Court's decision in *Ryan* supports appellate jurisdiction in this case where Mr. Omidi cannot "avert the mischief of the order" by refusing to produce the privileged recordings (the Government's filter team already has them), the scope of *Perlman* jurisdiction and indeed continued viability of the *Perlman* doctrine is now only more uncertain because of this Court's later decision in *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009). *See e.g., Wilson v. O'Brien*, 621 F. 3d 641, 643 (7th Cir. 2010) ("*Mohawk Industries* calls *Perlman* and its successors into question…"); *United States v. Copar Pumice Co.*, 714 F. 3d 1197, 1208 n.5 (10th Cir. 2013) (collecting cases showing "varying results" on issue as to "the impact of the *Mohawk* decision on the *Perlman* doctrine.")

The Ninth Circuit's one sentence denying jurisdiction under *Perlman* is less than clear on the rationale. The Government had argued that Mr. Omidi could not rely upon jurisdiction under *Perlman* because he is a defendant in the criminal case with a right to appeal after conviction. On this significant question, there is substantial disagreement in the Circuits. Because *Mohawk Industries* held that "the collateral order doctrine does not extend to disclosure orders adverse to the attorney-client privilege" because "effective appellate review can be had by other means," 558 U.S. at 609, some Circuits have held that similar reasoning should narrow the scope of the *Perlman* doctrine. *See Holt-Orsted v. City of Dickson*, 641 F. 3d 230 (6th Cir. 2011) ("The *Mohawk* decision, however, appears to have narrowed the scope of the *Perlman* doctrine."); *accord, O'Brien*, 621 F.3d at 643 (As a

result of *Mohawk*, "(o)nly when the person who asserts a privilege is a non-litigant will an appeal from the final decision be inadequate.)

In conflict, other Circuits have held that *Mohawk* did not impact the viability or scope of jurisdiction under *Perlman*. *See In re Grand Jury*, 705 F. 3d at 145-146 (Third Circuit declines to hold that the scope of jurisdiction under *Perlman* was impacted "on the basis of a later case, *Mohawk*, that never cites, let alone discusses, *Perlman*."). Similarly, the Ninth Circuit has held that "(t)he Perlman rule survives the Supreme Court's recent decision in *Mohawk*…*Perlman* and *Mohawk* are not in tension…(w)hen assessing the jurisdictional basis for an interlocutory appeal, we have considered the *Perlman* rule and the *Cohen* 'collateral order' (at issue in *Mohawk*) exception separately, as distinct doctrines." *United States v. Krane*, 625 F. 3d 568, 572 (9th Cir. 2010). But the Ninth Circuit is in conflict with itself. In this and other appeals, the Ninth Circuit has read into the *Perlman* doctrine limitations arising from *Mohawk*.[2] *See e.g.*, *Gopher Media LLC v. Spain*, 2021 WL 672935 (9th Cir. Feb. 11, 2021) ("Because appellant Thakore is the CEO to a party to this case, his interest aligns with that of a party so that the *Perlman* exception does not apply. Accordingly, this appeal is dismissed).

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[2] *Perlman*, as interpreted by this Court, was never concerned whether the holder of the privilege is a party to the action, but whether the party in possession of the claimed privileged materials has an interest sufficient to defy the disclosure order so as to make the order appealable.

To the extent that the Ninth Circuit's Order is predicated on a finding that the Government (custodian of the recordings claimed to be privileged) is not "a disinterested third party," this decision too is in conflict with the logic of *Perlman* and other decisions of this Court. As this Court stated in *Ryan*, the Perlman doctrine applies when the "custodian (holder of the privileged material) could hardly have been expected to risk a citation for contempt in order to secure Perlman an opportunity for judicial review." 402 U.S. at 533. This circumstance has been referred to sometimes in brief as a "disinterested third party," but the logic underlying *Perlman* applies equally to a Government taint team which, of course, is not going to disobey an order to disclose to afford a defendant the right to an interlocutory appeal. *See Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992) (Under *Perlman*, "a discovery order directed at a *disinterested third party* is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance.") "The *sine qua non* of the *Perlman* exception is the inability of the privilege holder to obtain appellate review at the juncture when documents otherwise would be produced." *In re Grand Jury Subpoenas*, 974 F. 3d 842, 844 (8th Cir. 2020). The Ninth Circuit's denial of jurisdiction in this case is in conflict with the basic reasoning underlying the *Perlman* exception as interpreted by this Court and demonstrates well the increasingly unpredictable and inconsistent interpretation of *Perlman* jurisdiction in the Circuits.

As to the second related issue, uncertainty remains whether *Mohawk* applies to an interlocutory

appeal in a criminal case. *See United States v. Guerrero*, 693 F. 3d 990, 998 (9th Cir. 2012) ("*Mohawk* thus establishes that, *at least in the civil context*, adverse attorney-client privilege rulings are not effectively unreviewable on appeal."); *Copar Pumice Corp*., 714 F. 3d at 1207 ("courts that have applied *Perlman* more broadly in civil actions have recognized that *Mohawk* limits interlocutory appeals of discovery orders regarding attorney-client privilege when brought by a party *in civil litigation*); *Scott v. Chappell*, 547 Fed Appx. 815, 816 (9th Cir. 2013) (finding appellate jurisdiction to exist because *Mohawk* was concerned with ordinary civil litigation" as opposed to capital case habeas corpus litigation.).

B. There Is At Least a Fair Probability That This Court Would Reverse the Denial of Appellate Jurisdiction.

In this case, the Ninth Circuit held that *Mohawk* precludes an interlocutory appeal pursuant to the collateral order doctrine "because post-judgment appeals suffice to remedy the improper disclosure of privileged material." (Pet.App. 1a-2a). This holding is subject to reversal because *Mohawk* was an ordinary civil case that relied upon civil cases for its reasoning. There is simply no language in *Mohawk* to support its extension to the criminal context. Indeed, the burden on the criminal defendant to wait for a final judgment before appealing an extraordinary order to disclose claimed privileged material is significantly greater. If forced to wait, Mr. Omidi might potentially remain in jail for years before the Ninth Circuit reviewed the disclosure of his privileged communications and defense strategy to the Government. And because

the district court did not even afford him an evidentiary hearing before denying his motion, he may be prejudiced by the passage of time in seeking relief following a remand. Moreover, further supporting a distinction between civil and criminal cases, the Government in criminal investigations and prosecutions is an adversary like no other. The Government can use its investigative powers to seize and otherwise misappropriate privileged communications and work product. The abuse of this power, which is evidenced in this case, must be checked by the ability to seek judicial review before the harm is done.

Furthermore, as discussed above, a majority of this Court is more than likely to find that this appeal in fact qualifies for appellate jurisdiction under the *Perlman* exception because he was "powerless to avert the mischief of the order." *Perlman*, 247 U.S. at 13. Unable to make this appealable by refusing to comply with the order and being held in contempt, Mr. Omidi's appeal plain falls within the logic of the Perlman exception.

C. Mr. Omidi Will Suffer Irreparable Harm If The Disclosure Order is Not Stayed.

The forced disclosure of attorney-client privileged materials and work-product constitutes irreparable harm. *See In re Search Warrant Issued June 13, 2019*, 942 F. 3d 159, 175 (4th Cir. 2019). Indeed, "mandatory disclosure is the exact harm the privilege is meant to guard against." *In re Lott*, 424 F. 3d 446, 451-52 (6th Cir. 2005).

As to the harm to other parties from a stay, the Government has previously represented that it

would not use any of the recordings at least in its case- in-chief. Furthermore, as stated above, the Filter Team had determined that five recordings in full and the rest in part should not be disclosed to the Prosecution Team. Accordingly, the Government has voiced no reason why it would be prejudiced by simply maintaining the status quo.[3]

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should grant a stay of the disclosure order to allow for the filing of a petition for a writ of certiorari.

Respectfully submitted,

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[3] All of which invites the question why the District Court *sua sponte* ordered a disclosure the Government never even sought?

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APPENDIX

INDEX TO APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 22 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JULIAN OMIDI, AKA Combiz Omidi, AKA Combiz Julian Omidi, AKA Kambiz Omidi, AKA Kambiz Beniamia Omidi, Defendant-Appellant.	No. 21-50020 D.C. No. 2:17-cr-00661-DMG-1 Central District of California, Los Angeles ORDER

Before: THOMAS, Chief Judge, TASHIMA and SILVERMAN, Circuit Judges.

Appellee's motion (Docket Entry No. 6) to unseal its provisionally sealed statement of related cases is granted. The Clerk will file Docket Entry No. 6 on the public docket.

Appellant's motion (Docket Entry No. 19) for leave to file a surreply to appellee's reply in support of its motion to dismiss is granted. The court has considered appellant's surreply.

Appellant's unopposed request (Docket Entry No. 18) for judicial notice of the district court's March 23, 2021, order is granted.

Appellee's motion to dismiss this case for lack of jurisdiction (Docket Entry No. 3) is granted. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 109-10 (2009) (because post-judgment appeals suffice to remedy the improper disclosure

of privileged material, collateral order doctrine does not extend to disclosure orders adverse to attorney-client privilege); *see also United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012) (joint defense privilege is an extension of attorney-client privilege). Moreover, the jurisdictional rule set forth in *Perlman v. United States,* 247 U.S. 7 (1918), does not confer jurisdiction over this appeal because a disinterested third party is not involved. *See United States v. Krane*, 625 F.3d 568, 572-73 (9th Cir. 2010). Finally, construing the appeal as a petition for a writ of mandamus, the petition is denied because appellant has not shown that he is entitled to the extraordinary remedy of mandamus relief. *See Bauman v. United States Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977).

DISMISSED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 27 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JULIAN OMIDI, AKA Combiz Omidi, AKA Combiz Julian Omidi, AKA Kambiz Omidi, AKA Kambiz Beniamia Omidi, Defendant-Appellant.	No. 21-50020 D.C. No. 2:17-cr-00661-DMG-1 Central District of California, Los Angeles ORDER

Before: THOMAS, Chief Judge, TASHIMA and SILVERMAN, Circuit Judges.

Appellant's motion for reconsideration (Docket Entry No. 22) is denied. *See* 9th Cir. R. 27-10.

Appellant's request for a stay of the district court's January 25, 2021, order is also denied.

No. 21-A-

IN THE SUPREME COURT OF THE UNITED STATES

JULIAN OMIDI,
Defendant-Appellant,
v.

UNITED STATES OF AMERICA,
Appellee.

CERTIFICATE OF SERVICE

I, Michael S. Schachter, counsel for Defendant-Appellant and a member of the Bar of this Court, certify that on June10, 2021, one copy of the Application for a Stay of Disclosure of Claimed Privileged Joint Defense Communications in the above titled proceeding was served on Elizabeth Prelogar, Acting Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530-00001 by delivering to Federal Express, a commercial carrier, for delivery within 3 calendar days in accordance with Rules 29(3) and 29(4)(a) of this Court. I

further certify that all parties required to be served have been served.

/s/ Michael S. Schachter
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