

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 23 2009

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

In re: GRAND JURY PROCEEDINGS,

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GERALD GREEN; PATRICIA GREEN,

Defendants - Appellants,

and

JEFFREY F. ALLEN,

Movant - Appellant.

No. 08-50343

D.C. No. 2:08-cr-00059-GW

MEMORANDUM *

Appeal from the United States District Court
for the Central District of California
Dale S. Fischer, District Judge, Presiding

Argued and Submitted January 15, 2009
Pasadena, California

Before: TROTT, KLEINFELD and FISHER, Circuit Judges.

*This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

Defendant-appellants Gerald and Patricia Green and movant-appellant Jeffrey F. Allen, an attorney, appeal the district court's crime-fraud determination and denial of appellants' motion for a protective order regarding Allen's subpoenaed testimony before the grand jury concerning certain aspects of a confidential joint defense meeting. The district court's orders are "equivalent to a denial of a motion to quash [a] subpoena[] compelling disclosure of privileged information," *United States v. Amlani*, 169 F.3d 1189, 1192 (9th Cir. 1999), and effectively require Allen to testify about communications that would otherwise be subject to the attorney-client privilege. *See Cont'l Oil Co v. United States*, 330 F.2d 347, 350 (9th Cir. 1964) (recognizing the joint-defense privilege over communications made among potential codefendants and their counsel). We dismiss this appeal for lack of subject matter jurisdiction.

We lack jurisdiction over an appeal from a denied motion to quash a subpoena when the subpoenaed party, like Allen, has not disobeyed the subpoena served on him, nor submitted to a contempt citation. *See United States v. Ryan*, 402 U.S. 530, 532-33 (1971). We reject appellants' argument that Allen is a third party the Greens are powerless to control, giving us jurisdiction under the *Perlman* exception. *See In re Grand Jury Subpoena Dated Dec. 10, 1987*, 926 F.2d 847, 853 (9th Cir. 1991) (holding that the *Perlman* exception is "more difficult to apply

when the third party is an attorney with an ongoing relationship” with the investigation target); *cf. Perlman v. United States*, 247 U.S. 7 (1918). The *Perlman* exception does not apply because the Greens are not “powerless” to control Allen, who is corporate counsel for businesses they own and operate. *See In re Grand Jury Subpoena Issued to Bailin*, 51 F.3d 203, 206 (9th Cir. 1995). Moreover, Allen “is necessarily a party to the relationship upon which [the] entire claim of privilege is based. It is in precisely in these circumstances that a third party *can* be expected to risk contempt in order to protect the privileged relationship.” *Id.*

Even if we had jurisdiction, we would conclude that the district court did not err here, because the government’s evidence – which the district court had discretion to view *in camera*, *see In re Grand Jury Proceedings (Doe)*, 867 F.2d 539, 540 (9th Cir. 1989), and which we have reviewed *in camera* on this appeal – provides reasonable cause to believe that Gerald Green used Allen’s services to further a crime or fraud. *See United States v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996).

The government’s motion to expedite decision, filed November 21, 2008, is **GRANTED** and mandate shall issue immediately.

DISMISSED.