

SOUTHERN DISTRICT CIVIL ROUNDUP

The High Bar for Obtaining Appellate Review of an Interlocutory Order

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Under 28 U.S.C. §1292(b), a party dissatisfied with a district court's interlocutory order may seek leave to file an immediate appeal if the order "involves a controlling question of law" as to which "there is substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." The statute provides a limited exception to the otherwise-applicable final judgment rule—which exception courts have emphasized must be "strictly limited"—because "only exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990).

Southern District Judge Lewis J. Liman's recent decision in *Williams v. NBC Universal Media LLC*, 2026 WL 986271 (S.D.N.Y. Apr. 13, 2026), concerning outtakes from Dateline episodes, illustrates the high bar that a litigant must meet to obtain interlocutory appeal under Section 1292(b) while also providing important guidance on the application of the journalists' privilege to subpoenas seeking outtakes of media



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interviews. The journalists' privilege, often called the "reporter's privilege," allows journalists to refuse to disclose their confidential sources, as well as unpublished information from both confidential and non-confidential sources.

In *Williams*, Liman considered whether NBC Universal (NBCU) could invoke the journalists' privilege to withhold an outtake of an interview with the wife of a defendant who had been convicted of capital murder when (1) the wife had testified against him during the penalty phase of his trial and (2) during her subsequent published interview had recanted portions of her trial testimony. Judge Liman held NBCU could not and then denied NBCU's application for an interlocutory appeal under Section 1292(b).

'Williams v. NBC Universal Media'

Eric Lyle Williams is facing a death sentence stemming from his conviction for capital murder in Texas. As part of his federal habeas proceedings pending in the Northern District of Texas, Williams served a subpoena on NBCU seeking footage of interviews recorded in the production of two Dateline episodes about his case. NBCU objected to the subpoena on the basis of the journalists' privilege, and Williams filed a motion to compel in the Southern District of New York.

Liman granted in part and denied in part the motion to compel. *Williams v. NBC Univ. Media LLC*, 2025 WL 2437381 (S.D.N.Y. Aug. 25, 2025). Liman applied the standard established by *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999), which is the seminal case in the Second Circuit on the standard to apply for outtakes of interviews with non-confidential sources. The Gonzales standard requires a party seeking outtakes from non-confidential sources to demonstrate that: (1) the footage sought is "of likely relevance to a significant issue in the case," and (2) that the information contained in the footage is "not reasonably obtainable from other available sources."

Liman rejected Williams's request for outtakes of interviews with four attorneys and four law enforcement officers involved in the investigation and prosecution of his case, finding Williams had "ma[de] only general claims that the outtakes [were] likely to contain relevant material' and failed to point to any 'particular interview or outtake that would provide the evidence [he sought].'" *Williams*, 2025 WL 2437381, at *9 (quoting *In re McCray, Richardson, Santana, Wise, Salaam Litig.*, 991 F. Supp. 2d 464, 470 (S.D.N.Y. 2013)).

Liman, however, reached a different conclusion with respect to outtakes of an interview with Kim Williams, the defendant's wife, who

was involved in the murder scheme and testified against him at the penalty stage of his death penalty trial. At trial, Kim Williams testified that after Williams had killed two of his victims, they celebrated by grilling steaks and were in a "happy, joyous" mood. But in her subsequent *Dateline* interview, she gave a different account. There she stated that she and Williams did not celebrate the murders, but had a pre-arranged Easter weekend meal, her testimony at trial was untrue, and she was using drugs at the time of the murders.

Liman ultimately held that the outtakes of Kim Williams's interview were likely relevant to whether the State of Texas had withheld material impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), which was a significant issue in the defendant's habeas petition. Further, based on several factors "considered in combination," Judge Liman determined that this information was not reasonably obtainable from other sources. Among these factors were that if Kim Williams were deposed (the alternate way identified for Williams to obtain the information he sought relating to her), she would be forced to address the person who, on her account, had manipulated her into participating in a conspiracy to kill three people, and she could invoke her Fifth Amendment rights.

Following the ruling, NBCU moved for leave to file an interlocutory appeal under Section 1292(b), arguing that interlocutory review was warranted (and it should not be required to violate Liman's decision and be held in contempt before being able to appeal) because (1) this would be the first case in which an appellate court addressed the reporter's privilege in the context of a subpoena served in connection with a habeas proceeding, and (2) the Second Circuit had only addressed one case applying the

journalists' privilege to newsgathering involving a non-confidential source since *Gonzales* was decided in 1999.

The Section 1292(b) Standard

In considering whether to grant NBCU's motion, Liman began by summarizing the "narrow and demanding" requirements for interlocutory appeal under Section 1292(b). The party seeking leave to appeal bears the burden of demonstrating all three criteria of the statute, which provides that "(1) the appeal 'involves a controlling question of law,' (2) 'as to which there is substantial ground for difference of opinion,' and (3) 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *In re Lehman Bros. Holdings Inc.*, 2019 WL 2023723, at *3 (S.D.N.Y. May 8, 2019) (quoting 28 U.S.C. §1292(b)). He explained that even when these elements are satisfied, the district court retains "unfettered discretion" to deny leave to appeal for "any reason," including judicial economy.

Application to 'Williams'

Judge Liman then applied the statutory criteria to the facts here, including addressing NBCU's proffered justifications for seeking interlocutory appeal. Before doing so, however, he observed that in *Gonzales*, the appeal was heard only after the subpoena recipient failed to comply and was held in contempt. Further, Liman explained that he had previously applied the standards established in *Gonzales*, and the context of a habeas proceeding does not alter applicability of the journalists' privilege. He preliminarily saw no reason why the same route should not be followed here.

Liman then explained that under the requirements for an interlocutory appeal under Section 1292(b), NBCU failed to meet the requirement

of identifying a controlling question of law as to which there is substantial ground for difference of opinion. He explained that the standard is "genuine doubt as to whether the district court applied the correct legal standard in its order," and NBCU did not dispute that the court applied the correct standard established in *Gonzales*. Liman noted that instead, NBCU argued that he had misapplied the *Gonzales* factors of: (1) whether the footage sought was "of likely relevance to a significant issue in the case" and (2) that the information contained in the footage is "not reasonably obtainable from other available sources."

As to "likely relevance," NBCU argued that Judge Liman departed from the ruling in *Pugh v. Avis Rent a Car Systems*, 1997 WL 669876, at *5 (S.D.N.Y. Oct. 28, 1997), which recognizes that the journalists' privilege exists to prevent "fishing expeditions." In rejecting this argument, Liman noted that he had in fact relied on *Pugh* in finding that (1) Williams' request for the outtakes of the eight other interviews was based on mere speculation, and (2) the journalists' privilege thus protected them.

With respect to "likely relevance," NBCU also objected to Liman's citation to *Sokolow v. Pal. Liberation Org.*, 2012 WL 3871380 (S.D.N.Y. Sept. 6, 2012), for the proposition that the standard of likely relevance is "low" when non-confidential sources are involved. Liman explained, however, that he was simply reiterating a statement from *Gonzales* itself that a subpoena seeking information about non-confidential sources need not meet the more stringent standards applicable to confidential sources because "the nature of the press interest protected by the privilege is narrower."

Moving on to the "not reasonably available from other sources" factor, Judge Liman rejected

NBCU's argument that substantial grounds existed for disagreement regarding his determination that subpoenaed outtakes from Kim Williams were not "reasonably obtainable from other available sources," *i.e.*, from Kim Williams herself. NBCU asserted that Liman should have applied an "exhaustion" requirement and it questioned his reliance on Kim Williams's potential assertion of Fifth Amendment rights.

Liman rejected NBCU's "exhaustion" argument by explaining that the correct standard is whether the information was not "reasonably obtainable" from other available sources, a standard under which he explained the court considered a combination of factors, including (1) the "unusually high probability" that Kim Williams's testimony in a deposition with Williams's counsel would not yield the same information as in her interview given the unique circumstances of the case (she alleged Williams manipulated her and she faced charges that could result in her execution), and (2) that if Williams seeks to depose Kim Williams concerning her potential untruthful testimony, she would be entitled to invoke her Fifth Amendment privilege against self-incrimination. Together, Judge Liman explained, the factors of this case supported his conclusion.

Liman also emphasized that the application of an established privilege to the particular facts of a case presents, at best, "mixed questions of law and fact," the resolution of which would require the appellate court "'to review [his] application of the law to the evidence adduced' in the motion to compel." *In re Aggrenox Antitrust Litig.*, 2018 WL 834228, at *6 (D. Conn. Feb. 12, 2018).

Acknowledging that reasonable persons might reach different conclusions regarding the

application of the facts to the law, Liman observed that that is true "in many cases involving discovery questions," and itself "is not enough to justify interlocutory review of a 'matter[] ... that rest[s] primarily in the wise discretion of experienced trial judges.'" *In re Aggrenox*, 2018 WL 834228, at *8 (quoting *Am. Exp. Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 280 (2d Cir. 1967)). Having found that NBCU did not meet the standard for interlocutory appeal, Judge Liman denied its Section 1292(b) motion.

Conclusion

Williams underscores the high bar for obtaining interlocutory review under Section 1292(b). Although it arose in a criminal habeas context, the decision has broad applicability to civil litigation, particularly with respect to litigants serving subpoenas for media outtakes. If such a litigant convinces the district court that information in an outtake likely is relevant to a significant issue and is not reasonably obtainable from other sources, the media outlet is unlikely to obtain interlocutory review of the determination under Section 1292(b) and likely will have to violate an order to produce the outtake before obtaining appellate review.

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