31E-MM-108062

[redacted]

9/5/2014

File - Serial Charge Out
FD-5 (Rev. 10-13-89)

Date 10/2013 –

File 31E MM 1080162
Class. Office of Origin Case No. Last Serial

☐ Pending ☐ Closed

Serial No.	Description of Serial	Date Charged
	MAIN VOLUMES IN HQ FOR FOIPA REQUEST	
	1A RED WALLETS IN THE SUPPLY/STORAGE ROOM NEAR MAILROOM ON THE 5th FLOOR.	
	[redacted]	

Employee

RECHARGE Date

To From

Initials of Clerk

Date

Date charged

Employee

Location

FPI-RBK

EFTA01699639

BOIES, SCHILLER & FLEXNER LLP

401 EAST LAS OLAS BOULEVARD • SUITE 1200 • FORT LAUDERDALE, FL 33301-2211 • PH. 954.356.0011 • FAX 954.356.0022

Sigrid S. McCawley, Esq.
Email: smccawley@bsfllp.com

February 26, 2015

Via Federal Express

Federal Bureau of Investigation
Attn: FOI/PA Request
Record/Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843

Federal Bureau of Investigation
Department of Justice
505 S. Flagler Drive, Suite 500
West Palm Beach, Florida 33401
Attn: FOIA Officer

RE: FOIA Request for pictures, videos and documents relating to [redacted]

Dear FOIA Officer,

I represent [redacted] (a.k.a. [redacted]) and pursuant to the federal Freedom of Information Act, 5 U.S.C. §552, we are requesting the copies of materials relating to [redacted] Specifically, [redacted] was interviewed by the FBI on March 17, 2011. A FD-302 report was entered on July 5, 2013. *See* Exhibit A.

During the interview process, the FBI agents informed [redacted] that they had retrieved from Jeffrey Epstein's homes, video tapes, CDs and DVDs, pictures and documents, that include video tapes of [redacted] pictures of [redacted] and documents (including but not limited to e-mails and other records) discussing [redacted]. It is our understanding that these images include naked images of [redacted] and included images of [redacted] who was a minor at the time, being forced to engage in sexual acts with adults and other minors. We are requesting copies of these materials. It is our understanding that the materials were collected from the following residences owned by Jeffrey Epstein.

1) 358 El Brillo Way
Palm Beach, Florida 33480

2) Little St. James
6100 Red Hook Quarters, Suite B3
St. Thomas, Virgin Islands 00802

31E-MM-108062-255

3) 9 E. 71st Street
New York, NY 10021-4102

4) 49 Zorro Ranch Rd.
Stanley, New Mexico 87056

5) 22 Avenue Foch Apt 2DD
Paris, France 75116

This request covers the time period of June 1999 to December 2002. We agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed $5000, without prior authorization.

If our request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions in the act. We will also expect that you will release all segregable portions of otherwise exempt material. We of course, reserve the right to appeal your decision to withhold any information.

We have included in our submission a Certification of Identity from our client [redacted], such that records can be released to Sigrid McCawley, her attorney.

Sincerely,

Sigrid S. McCawley

SSM
Enclosures

EXHIBIT A

FEDERAL BUREAU OF INVESTIGATION

Date of entry 07/05/2013

[redacted] maiden name [redacted] date of birth [redacted] Social Security Account Number [redacted] United States Citizen and [redacted], residence [redacted] Australia, 2261 was interviewed at the United States Consulate in Sydney, Australia. [redacted] was advised of the identity of the interviewing agents and purpose of the interview. Present during the interview was Federal Bureau of Investigation Special Agent [redacted] and via telephone, Assistant United States Attorney [redacted] provided the following information: b6 b7C

[redacted] was born in [redacted] to parents [redacted] date of birth [redacted] currently resides in [redacted] and [redacted] date of birth [redacted] currently resides in [redacted] moved [redacted] b6 b7C

[redacted] and while living on the streets in Miami, Florida, she met [redacted] b6 b7C

[redacted] was training [redacted] to be an escort [redacted] gave [redacted] a life off of the streets which made her feel

Investigation on 03/17/2011 at Sydney, Australia (In Person)

File # 31E-MM-108062 Date drafted 07/05/2013 b6 b7C

by [redacted]

like she was locked into the relationship. [redacted] gave [redacted] pharmaceutical drugs toward the end of their relationship. b6 b7C

[redacted]

[redacted] relationship with [redacted] ended while she was at a private ranch near Ocala, Florida. [redacted] telephonically contacted a childhood friend, [redacted] from a telephone at the ranch. [redacted] b6 b7C knew [redacted] from elementary school and called him at the home telephone of his parents [redacted] told [redacted] she was very lonely, and [redacted] asked her why she did not leave [redacted] telephone conversation with [redacted] the recreational vehicle (RV) [redacted] was staying in at the ranch [redacted] did not strike her [redacted] pack her belongings and told her she was going to live with another man.

[redacted] b6 b7C felt that she was sent to [redacted] but did not know the specifics of the arrangement. [redacted] engaged in sexual activity with [redacted] who was described as a white male [redacted] [redacted] stated [redacted] [redacted] stayed with [redacted] LNU for approximately one or two weeks before the police located her and returned her to her parents. [redacted] was interviewed by a male detective. [redacted] parents were still married at the time and lived near [redacted] [redacted] Florida. [redacted] believed there was an FBI investigation related to [redacted] She never saw [redacted] again after

In approximately June 1998 or 1999, [redacted] began working at Donald Trump's Mar-A-Lago Club in Palm Beach, Florida. [redacted] father [redacted] [redacted] was able to help her gain employment as a baby sitter and later as a locker room attendant at the club. [redacted] started studying for her GED and wanted to become a massage therapist. In August, [redacted] was reading an anatomy/massage book and was approached by [redacted] b6 b7C [redacted] and help her get her masseuse accreditation. [redacted]

[redacted] consulted her father about the opportunity and at approximately 5:00 p.m. the same day, her father drove her to a residence at [redacted]

[redacted] Florida. [redacted] spoke with [redacted] father and told him it was a wonderful opportunity for [redacted] met [redacted] b6 b7C
[redacted] also known as [redacted] was led upstairs [redacted]

Once upstairs in [redacted] b6 b7C
[redacted] instructed [redacted] to wash her hands prior to beginning the massage. The massage began [redacted] demonstrated massage techniques to [redacted]

During the course of the massage, [redacted] questioned [redacted] about her past, including her time as a runaway. [redacted] was also asked if she took birth control. b6 b7C

[redacted] b6 b7C

[redacted] was given instruction and began kissing [redacted] b6 b7C
[redacted]

At the conclusion, [redacted] instructed [redacted] to obtain two warm wash clothes. One wash cloth was used to clean [redacted] second was [redacted] to help him relax. [redacted] b6 b7C described [redacted] and [redacted] then moved to the steam room and shower where [redacted] massaged [redacted] with soap and a loofah in the shower.

At the conclusion of the shower, [redacted] went downstairs and [redacted] b6 b7C
Arrangements were made for [redacted] to return to the house the following day after work. [redacted] cellular phone number was given to [redacted]
[redacted]

The same routine and pattern of massages and sexual activity between [redacted] and [redacted] continued for between one and two weeks. At times, [redacted] offered [redacted] the option to quit her job at Mar-A-Lago and travel [redacted] There was also discussion of [redacted] receiving massage training. [redacted] was to be paid $200.00 per day for travel and $200.00 per hour for massages. b6 b7C

Early in her relationship with [redacted] met [redacted] and was introduced as [redacted] assistant. b6 b7C

[redacted] soon began traveling [redacted] For the initial six months, [redacted] traveled [redacted] around the United States and Caribbean, including California, New York City, New Mexico, and various business trips. During those trips, [redacted] b6 b7C

Six to nine months after [redacted] began working for [redacted] was introduced to [redacted] LNU, [redacted] in [redacted] Florida. [redacted] at the time. [redacted] met the couple at a condominium next to the [redacted] The condominium was bought [redacted] and was a [redacted] In the condominium, [redacted] provided a normal massage to [redacted] LNU. Shortly thereafter, [redacted] LNU [redacted] provided an erotic massage to [redacted] and [redacted] cleaned [redacted] She was paid cash [redacted] In addition, [redacted] was 16 years old at the time [redacted] b6 b7C

[redacted] advised [redacted] introduced her to the drug Xanax. She explained that Xanax helped her escape from reality but allowed her to still function normally. Xanax helped her go forward with what she was doing with [redacted] and others. Her habit went from two pills per day up to eight pills per day. b6 b7C

[redacted] second client was an academic of some sort described as an older American male [redacted] sent [redacted] from Miami International Airport to [redacted] by commercial airline. [redacted] was picked up at the airport by [redacted] and then taken to the island by boat. [redacted] b6 b7C

pointed out that [redacted] instructed [redacted] to entertain the client [redacted] and wanted to ride jet skis and participate in other island activities [redacted] spent two days on the island with the client. [redacted] assumes the client also traveled commercially. b6 b7C

During the following several months, [redacted] traveled internationally [redacted] Prior to her traveling abroad, [redacted] assisted [redacted] in getting her passport. [redacted] got passport photographs of herself and provided them to [redacted] The remaining paperwork was taken care of by [redacted] traveled to Paris, France, the South of France, London, England, Africa, and Spain. While in Paris, [redacted] recalled staying at a hotel overlooking the Champs-Elysees. While traveling [redacted] traveled on [redacted] a black plane. During the international travel, [redacted] At times, [redacted] would [redacted] Rarely a day would pass [redacted] b6 b7C

[redacted] contacted [redacted] through [redacted] and wanted to talk to [redacted] about [redacted] and offered [redacted] a contract. [redacted] agreed to the contract for her story and was paid $140,000 for the story, $10,000 when the article was printed, and another $10,000 to be wired into [redacted] account in May 2011. The contract prevented [redacted] from talking to any other press for a specified period. [redacted] advised that she provided [redacted] with detailed information [redacted] b6 b7C

[redacted] b6 b7C

[redacted] b6 b7C

[redacted] b6 b7C

At age 16, [redacted] met [redacted] believed she and [redacted] were approximately the same age. [redacted] and [redacted] b6 b7C

[redacted] would dress [redacted] b6 b7C

[redacted] b6 b7C

[redacted], though [redacted] explained [redacted] provided an [redacted] described [redacted] b6 b7C

An unknown individual [redacted] saw [redacted] when she arrived at [redacted] had [redacted] said that day was a low stage in her relationship because she could not believe [redacted] never [redacted] b6 b7C

saw [redacted] believed the girls may have been [redacted] but [redacted] was not certain of [redacted] involvement. b6 b7C

[redacted] had a picture of herself she wanted to give [redacted] b6 b7C

[redacted] described some of the unique interior areas of [redacted] b6 b7C

[redacted] which [redacted] referred to [redacted] which was where [redacted] stayed. [redacted]

While in New York, [redacted] also stayed at an apartment on 66th street [redacted] was aware of [redacted] additional apartments in the same building. According to [redacted] the apartment building on 66th street was owned by [redacted] advised that she had a photograph of the interior of the 66th Street apartment among other photos [redacted] b6 b7C

[redacted] advised that some of her photographs that were provided to her civil attorneys by her family were not returned. One of the missing photos depicted [redacted] wearing a pink dress while seated on a quad bike.

[redacted] LNU was [redacted] female that formerly lived in [redacted] b6 b7C

LNU and [redacted] went shopping together and purchased clothing and sex toys. [redacted] explained that [redacted]

b6
b7C

[redacted]

b6
b7C

[redacted] used a cellular telephone [redacted] She believed it was a New York City number but could not recall the number. [redacted] and [redacted] could only remember faces [redacted] not their names. [redacted] did not [redacted] but she did try unsuccessfully to get [redacted]

[redacted] recalled [redacted] but she could not recall the wording. [redacted] LNU. [redacted] advised [redacted]

b6
b7C

[redacted] traveled [redacted] to a self-help conference at a hotel in New Orleans, Louisiana. The hotel was near the Hard Rock Café in New Orleans. [redacted] traveled the world [redacted] including the USVI, New York, Santa Fe, Palm Beach, France, Africa, Spain and the United Kingdom.

b6
b7C

[redacted] recalled visiting Alhambra Castle in Spain. [redacted] eventually traveled to the United Kingdom and

b6
b7C

while there, [redacted] approached [redacted] in a very excited manner and told her they had to go shopping to pick out a dress because [redacted] would be dancing with [redacted] b6 b7C

[redacted] and [redacted] went shopping and purchased makeup, clothing, and a Burberry bag. The items were purchased with [redacted] and [redacted] returned [redacted] instructed [redacted] to get ready. When [redacted] came down after getting ready, she was introduced to [redacted] b6 b7C

[redacted] traveled to CLUB TRAMP [redacted] danced [redacted] at CLUB TRAMP [redacted] stayed at CLUB TRAMP for an hour or hour and a half and drank a couple of cocktails before returning to [redacted] had not received any direction from [redacted] After returning to [redacted] requested [redacted] to take a photograph of her [redacted] advised that she still had the original photograph in her possession and would provide it to the interviewing agents. [redacted] proceeded with [redacted]

Approximately two months later, [redacted] met [redacted] at [redacted] b6 b7C

[redacted] recalled [redacted] LNU, [redacted] recalled [redacted] joking about trading [redacted] in because she was getting too old.

[redacted] recalled meeting [redacted] was using Xanax heavily at the time, and her recollection was not clear. She remembered there were many models on the island that did not speak English along with a modeling person who had an unknown accent. b6 b7C

[redacted] b6 b7C

[redacted] did not have a problem with [redacted] using prescription drugs. [redacted] was described by [redacted] as a [redacted] b6 b7C

[redacted] (TRUE NAME UNKNOWN) [redacted] a ranch employee in [redacted] but [redacted] could not recall his name. She did have a photograph of the ranch employee. b6 b7C

[redacted] met numerous famous people [redacted] including academics, politicians, and celebrities. She met [redacted] and [redacted] and [redacted] b6 b7C

[redacted] received many gifts [redacted] including jewelry, watches, bags, shoes, make up, clothing, and home furnishings. [redacted] left all of the items behind when she traveled to Thailand to receive massage training. b6 b7C

In August 2002, [redacted] traveled by commercial airline to Bangkok, Thailand and began her massage training at International Training Massage School(ITM) where she received her massage certification. She stayed at the Princess Hotel in Thailand [redacted] but never did. [redacted] met her future husband, [redacted] during her visit to Thailand. [redacted] contacted [redacted] telephonically and told him she had fallen in love with someone. [redacted] b6 b7C

[redacted] had not heard from [redacted] received a telephone call from [redacted] During that call, [redacted] stated he was an FBI agent. He was trying to determine what she knew about [redacted]. She did not tell [redacted] anything about her knowledge of [redacted] She also received another telephone call from a person that indicated he was an FBI agent. She did not tell that individual anything either. She also received a call from an attorney that was trying to determine if she had spoken with anyone or was willing to speak to anyone [redacted] She explained that she was receiving telephone calls from people whom she did not know and that she was uncomfortable telling them anything over the telephone. b6 b7C

One or two weeks later, an unknown attorney and [redacted] contacted [redacted] telephonically. [redacted] b6 b7C

[redacted] was using a cellular telephone belonging to her husband. She nor her husband could recall the telephone number but advised that the carrier was OPTUS telephone company.

[redacted] reviewed a series of photographs of individuals and identified the following:

Page 1, number 1, [redacted]

Page 1, number 2, [redacted] LNU, a.k.a. [redacted] b6 b7C

Page 2, number 1, [redacted]

Page 2, number 6, [redacted]

Page 3, number 2, [redacted]

Page 4, number 3, [redacted] LNU

Page 4, number 7, [redacted]

Page 4, number 8, [redacted]

Page 5, number 1, [redacted]

[redacted] advised that the following were familiar to her, but she could not recall their names or her association to them:

Page 1, number 4

Page 2, numbers 7 and 8

Page 3, number 8

Page 4, number 1

Page 5, numbers 5 and 8

The images reviewed by [redacted] were placed in a 1A envelope of the case file.

When questioned about United States Customs and Border (CBP) Patrol records of her entries into the United States, [redacted] advised that her January 2001 record was the return from her London, England trip [redacted] The April 2001 CBP record was her return to the United States [redacted] could not recall her travel from March and May 2001 CPB records. [redacted] advised that her United States Passport was turned over to the United States Consulate in Sydney, Australia.

b6
b7C

On March 18, 2011, writer, SA [redacted] and [redacted] traveled to [redacted] residence where she provided 20 photographs and her ITM massage school certification. FD-597 Receipts for Property were executed for the items and a copy was provided to [redacted] It is noted that the receipts were dated based on the United States Eastern Standard Time Zone date. The photographs, certification and original FD-597s were placed in a 1A envelopes of case file.

b6
b7C

FORM APPROVED OMB NO. 1103-0016
EXPIRES 03/31/17

Privacy Act Statement. In accordance with 28 CFR Section 16.41(d) personal data sufficient to identify the individuals submitting requests by mail under the Privacy Act of 1974, 5 U.S.C. Section 552a, is required. The purpose of this solicitation is to ensure that the records of individuals who are the subject of U.S. Department of Justice systems of records are not wrongfully disclosed by the Department. Requests will not be processed if this information is not furnished. False information on this form may subject the requester to criminal penalties under 18 U.S.C. Section 1001 and/or 5 U.S.C. Section 552a(i)(3).

Public reporting burden for this collection of information is estimated to average 0.50 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Suggestions for reducing this burden may be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Public Use Reports Project (1103-0016), Washington, DC 20503.

Full Name of Requester [1] [redacted]

Citizenship Status [2] U.S. Citizen Social Security Number [3] [redacted]

Current Address [redacted] Penrose Colorado [redacted]

Date of Birth [redacted] Place of Birth [redacted]

OPTIONAL: Authorization to Release Information to Another Person

This form is also to be completed by a requester who is authorizing information relating to himself or herself to be released to another person.

Further, pursuant to 5 U.S.C. Section 552a(b), I authorize the U.S. Department of Justice to release any and all information relating to me to:

[redacted]

Print or Type Name

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I am the person named above, and I understand that any falsification of this statement is punishable under the provisions of 18 U.S.C. Section 1001 by a fine of not more than $10,000 or by imprisonment of not more than five years or both, and that requesting or obtaining any record(s) under false pretenses is punishable under the provisions of 5 U.S.C. 552a(i)(3) by a fine of not more than $5,000.

Signature [4] [redacted] **Date** 02/25/15

[1] Name of individual who is the subject of the record(s) sought.

[2] Individual submitting a request under the Privacy Act of 1974 must be either "a citizen of the United States or an alien lawfully admitted for permanent residence," pursuant to 5 U.S.C. Section 552a(a)(2). Requests will be processed as Freedom of Information Act requests pursuant to 5 U.S.C. Section 552, rather than Privacy Act requests, for individuals who are not United States citizens or aliens lawfully admitted for permanent residence.

[3] Providing your social security number is voluntary. You are asked to provide your social security number only to facilitate the identification of records relating to you. Without your social security number, the Department may be unable to locate any or all records pertaining to you.

[4] Signature of individual who is the subject of the record sought.

FORM DOJ-361

Grand Jury Material - Disseminate Only Pursuant to Rule 6 (e) Fed. R. Crim. P.

FD-340 (Rev. 4-11-03)

File Number 31E-MM-108062 95 1A 10

Field Office Acquiring Evidence MM

Serial # of Originating Document SUB-SBP-17

Date Received 09/29/2006

From [redacted]

(Address)

(City and State)

By SA T. Sumner

NOT COPIED

To Be Returned ☐ Yes ☒ No

Receipt Given ☐ Yes ☒ No

Grand Jury Material - Disseminate Only Pursuant to Rule 6 (e) Federal Rules of Criminal Procedure

☒ Yes ☐ No

Federal Taxpayer Information (FTI)

☐ Yes ☒ No

Title:

Reference:

(Communication Enclosing Material)

Description: ☐ Original notes re interview of

[redacted]

U.S. Department of Justice

United States Attorney
Southern District of Florida

500 South Australian Ave., Suite 400
West Palm Beach, FL 33401
(561) 820-8711
Facsimile: (561) 820-8777

September 6, 2006

DELIVERY BY FACSIMILE

[redacted]
West Palm Beach, Florida

Re: Federal Grand Jury Subpoena

Dear [redacted]

[redacted]

[redacted]

[redacted]

If you have any questions or concerns, please do not hesitate to call me. Thank you for your assistance.

Sincerely,

[redacted]
United States Attorney

By: [redacted]
Assistant United States Attorney

cc: [redacted]

United States District Court

SOUTHERN DISTRICT OF FLORIDA

[redacted]

SUBPOENA TO TESTIFY BEFORE GRAND JURY

[redacted]

832 F.2d 554
832 F.2d 554, 24 Fed. R. Evid. Serv. 275
(Cite as: 832 F.2d 554)

H

United States Court of Appeals,
Eleventh Circuit.
In re GRAND JURY PROCEEDINGS--Subpoena to State Attorney's Office.
Thomas H. Greene, Dawson A. McQuaig, Jake Godbold, Don McClure, Intervenors-Appellants.
Nos. 87-3228, 87-3412--87-3414, and 87-3472.

Oct. 26, 1987.
Rehearing and Rehearing En Banc Denied Dec. 10, 1987.

Persons whose state grand jury testimony had been subpoenaed by a federal grand jury appealed from order of the United States District Court for the Middle District of Florida, Nos. MISC-J-86-183-14, MISC-J-86-183- 4, Susan H. Black, J., which denied motions to suppress subpoenas. The Court of Appeals, Tjoflat, Circuit Judge, held that: (1) appellants could appeal denial of the motions to the extent that they asserted a privilege, but (2) Florida statute imposing secrecy on grand jury does not create evidentiary privilege.

Affirmed in part and dismissed in part.

West Headnotes

[1] Criminal Law ⇐1023(3)
110k1023(3)
Grand jury proceeding is not a "civil action" for purposes of statute permitting interlocutory appeals in civil actions with respect to controlling questions of law. 28 U.S.C.A. § 1292(b).

[2] Criminal Law ⇐1023(3)
110k1023(3)
Persons whose state grand jury testimony had been subpoenaed by federal grand jury could appeal the denial of their motions to quash the subpoenas to the extent that they asserted a privilege as to the material, but could not raise issues of procedural violations or federal-state comity on appeal.

[3] Criminal Law ⇐1023(3)
110k1023(3)
When party has been subpoenaed to testify or produce records for grand jury and third-party merely fears that privileged material may be disclosed along with other, nonprivileged material, the case is not ripe for appellate review until the subpoenaed party has actually been asked to reveal specific material covered by the assertive privilege.

[4] Grand Jury ⇐36.9(2)
193k36.9(2)
Federal common-law presumption of grand jury secrecy cannot be asserted in the form of a privilege by those seeking to prevent disclosure to a federal grand jury of their state grand jury testimony. Fed.Rules Cr.Proc.Rule 6(e), 18 U.S.C.A.

[5] Grand Jury ⇐41.10
193k41.10

[5] Witnesses ⇐184(1)
410k184(1)
Florida statute imposing secrecy on grand jury proceedings does not create an evidentiary privilege. West's F.S.A. § 905.27; Fed.Rules Evid.Rule 501, 28 U.S.C.A.

*555 Lamar Winegeart, III, Arnold, Stratford & Booth, Jacksonville, Fla., for Greene.

Elizabeth L. White, Sheppard & White, William Sheppard, Jacksonville, Fla., for McQuaig.

Lacy Mahon, Jr., Jacksonville, Fla., for appellants.

Robert W. Merkle, Curtis S. Fallgatter, M. Alan Ceballos, Asst. U.S. Attys., U.S. Attorney's Office, Jacksonville, Fla., for appellee.

Appeals from the United States District Court for the Middle District of Florida.

Before TJOFLAT and KRAVITCH, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

Appellants appeal from an order of the district court denying their motion to quash a federal grand jury subpoena directing a state prosecutor to produce transcripts of their testimony before a state grand jury. We affirm.

I.

In 1985, the State Attorney's Office for the Fourth Judicial Circuit of the State of Florida initiated a grand jury investigation into allegations of improper

influence peddling by certain public officials of the City of Jacksonville. Witnesses appearing before the state grand jury included the four appellants in this case: Jake Godbold, then the mayor of Jacksonville, Don McClure, Godbold's chief administrative aide, Dawson McQuaig, a former general counsel for the city, and Thomas Greene, a practicing attorney and an associate of Godbold's. Each of these witnesses appeared and testified voluntarily.

No criminal charges resulted from the state grand jury investigation. In August 1985, however, the state grand jury issued a report that identified several instances in *556 which "political favors and game-playing for friends" had infected the City's process of awarding contracts for professional services. Godbold, McClure, McQuaig, and Greene each waived his right under Fla.Stat. § 905.28(1) (1985) to suppress the report. The report, however, did not contain the substance of their testimony.

Meanwhile, federal prosecutors had initiated a federal grand jury investigation into substantially the same matters investigated by the state grand jury. Godbold, McQuaig, McClure, and Greene each indicated that he would assert the fifth amendment if subpoenaed to testify before the federal grand jury. Relying on the disclosure provisions of Fla.Stat. § 905.27(1)(c) (1985), [FN1] the United States in August 1985 petitioned a state judge to order the State Attorney to turn over to the federal grand jury the appellants' state grand jury testimony. The United States made no factual submission in support of its petition. The state judge refused to enter the order, characterizing the effort to obtain the testimony as a "fishing expedition."

FN1. Under this provision, a court may order disclosure of grand jury testimony for the purpose of "[f]urthering justice."

In October 1986, the federal grand jury issued a subpoena duces tecum ordering the State Attorney to produce appellants' state grand jury testimony. The State Attorney moved the federal district court to quash the subpoena, arguing that disclosure of grand jury transcripts was unlawful under Florida law, that the United States had not demonstrated sufficient need for the transcripts, and that comity required the district court to honor the state court's ruling against disclosure. Greene and McQuaig then moved the court to permit them to intervene pursuant to Fed.R.Civ.P. 24 and to file similar motions to quash. In his motion to intervene, McQuaig asserted that prior to testifying before the state grand jury, he had received assurances from the State Attorney that Florida law prohibited any disclosure of his grand jury testimony. Greene did not allege in his motion that he had received similar assurances, but stated that he was entitled to intervene because "state grand jury proceedings [are] secret and confidential by virtue of the provisions of Chapter 905 of the Florida Statutes." The district court granted the motions to intervene, and subsequently permitted Godbold and McClure to intervene as well. [FN2]

FN2. Godbold and McClure also based their motions to intervene on the Florida grand jury secrecy requirement. The substance of the privilege that appellants assert is discussed in Part III, *infra*.

In November 1986, the district court entered an order inviting the United States to make an ex parte factual submission showing why it needed the state grand jury transcripts. The government declined to accept the invitation and made no submission. The court then entered an order granting the motions to quash. Applying the balancing test set forth in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979), the court found that the government had failed to establish a sufficient need for the testimony.

Twenty-eight days after the court granted the motions to quash, the United States filed a "Motion for Reconsideration of Opinion and Order" along with an ex parte affidavit identifying facts supporting the grand jury's need for the testimony. The district court questioned the procedural correctness of the government's motion for reconsideration, and stated that under ordinary circumstances it would not consider the motion. In the court's view, however, denial of the motion would not prevent the United States from obtaining the testimony: the United States could simply reissue the subpoena and defeat any motion to quash on the strength of the information contained in the ex parte affidavit. The court concluded that the most efficient solution was to consider the newly submitted information in the context of the government's motion for reconsideration. After

considering the new information in camera, the district court entered an amended order in which it reversed its original order denying the motion to quash. The district court certified its amended order for interlocutory *557 appeal pursuant to 28 U.S.C. § 1292(b) (1982 & Supp. II 1984), and this court granted permission to appeal. The four intervenors appealed, although the State Attorney did not.

Appellants make two arguments before this court. First, they argue that the government's motion for reconsideration was untimely and that the district court therefore had no authority to hear it. According to appellants, the applicable time limit for the motion was the ten-day limit of Fed.R.Civ.P. 59(e), not, as the government contends, the thirty-day limit of 18 U.S.C. § 3731 (1982 & Supp. II 1984). Second, appellants argue that the district court's amended order was in error for the following reasons: (1) the government had failed to demonstrate a sufficient need for appellants' grand jury testimony, and (2) comity required the court to give greater deference to the state judge's decision against releasing the testimony. Because of the nature of our ruling today, we do not reach the merits of these arguments.

II.

We first address the threshold issue whether we have jurisdiction to hear this appeal. Although this court granted the intervenors permission to appeal pursuant to section 1292(b), we must of course dismiss the appeal if we are without jurisdiction. *See Robinson v. Tanner,* 798 F.2d 1378, 1379 (11th Cir.1986), *cert. denied,* 481 U.S. 1039, 107 S.Ct. 1979, 95 L.Ed.2d 819 (1987).

Under section 1292(b), a district court may certify for appeal a non-final order entered in a civil action if the court is of the opinion that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion" and that resolution of the question "may materially advance the ultimate termination of the litigation." By its terms, section 1292(b) applies only to orders in civil actions, and has no application to appeals in criminal cases. *See United States v. Doucet,* 461 F.2d 1095 (5th Cir.1972); *United States v. Lowe,* 433 F.2d 349 (5th Cir.1970). Therefore, we have no jurisdiction to hear this appeal pursuant to section 1292(b) unless the district court's order denying the motion to quash can be considered an order entered in a "civil action."

[1] We hold that a grand jury proceeding is not a "civil action" for purposes of section 1292(b). Just in terms of the plain meaning of words, it seems self-evident that an order denying a motion to quash a subpoena issued by a grand jury investigating possible criminal violations is not part of a "civil action." We base our conclusion on more than a mechanical labeling of the proceedings below, however. By expressly limiting section 1292(b)'s application to "controlling question[s] of law" in "civil" cases, Congress clearly indicated its intent not to disturb well-established precedent forbidding piecemeal review of grand jury proceedings. In *Cobbledick v. United States,* 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940), decided eighteen years before Congress enacted section 1292(b), the Supreme Court held that a district court's denial of a motion to quash a grand jury subpoena was not an appealable final decision within the meaning of the predecessor section of 28 U.S.C. § 1291 (1982). Noting that the Constitution itself makes the grand jury part of the criminal process, the Court concluded that "[i]t is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found." *Id.* at 327, 60 S.Ct. at 542; *see also Di Bella v. United States,* 369 U.S. 121, 124, 82 S.Ct. 654, 656-57, 7 L.Ed.2d 614 (1962) ("This insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases.").

Although *Cobbledick* was based on the principle of finality found in section 1291, that same principle finds expression in section 1292(b). We are unable to conclude that Congress, by authorizing permissive interlocutory appeals of "controlling question[s] of law" in "civil" actions, intended to undermine the strong policy against permitting appellate interruption of grand jury *558 proceedings. *Accord In re April 1977 Grand Jury Subpoenas,* 584 F.2d 1366, 1369 (6th Cir.1978) ("[Section 1292(b)] limits interim review of 'a controlling question of law' to *civil* cases only and, therefore, should not be read to allow interlocutory review of grand jury proceedings."), *cert. denied,* 440 U.S. 934, 99 S.Ct. 1277, 59 L.Ed.2d 492 (1979).

[2] We next examine whether there is a separate basis for appellate jurisdiction in this case. As we have already indicated, orders denying motions to quash grand jury subpoenas are ordinarily not appealable final orders under section 1291. The subpoenaed party can obtain review by refusing to comply with the subpoena and then contesting a contempt citation, which is immediately appealable. *See United States v. Ryan*, 402 U.S. 530, 532-33, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971). The contempt route for obtaining review, however, is not open to a third party who claims a privilege of nondisclosure with respect to materials in the custody of the subpoenaed party. In such a case, the putative privilege-holder has no power to compel the subpoenaed party to incur a contempt citation. And the subpoenaed party, unless he has either a particularly close relationship to the putative privilege-holder or a personal interest in nondisclosure of the material, is unlikely to risk a contempt citation simply to vindicate the rights of the third party. In this situation, the order denying the motion to quash is indeed final with respect to the putative privilege-holder, for any prejudice he suffers as a result of disclosure will remain forever unredressed unless appeal is permitted.

Accordingly, this circuit follows the so-called *Perlman* exception to the general rule prohibiting interlocutory appeal of orders denying motions to quash grand jury subpoenas. *See In re Grand Jury Proceedings (Twist)*, 689 F.2d 1351 (11th Cir.1982) ; *In re Grand Jury Proceedings (Fine)*, 641 F.2d 199 (5th Cir. Unit A Mar. 1981); *cf. In re International Horizons, Inc.*, 689 F.2d 996 (11th Cir.1982) (discovery order in bankruptcy proceedings). This exception, derived from *Perlman v. United States*, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918), and confirmed in *United States v. Nixon*, 418 U.S. 683, 691, 94 S.Ct. 3090, 3099, 41 L.Ed.2d 1039 (1974), permits an order denying a motion to quash to be "considered final as to the injured third party who is otherwise powerless to prevent the revelation." *Fine*, 641 F.2d at 202.

[3] The circumstances supporting application of the *Perlman* exception are present in this case. Relying on the Florida grand jury secrecy requirement, appellants in essence assert a privilege of nondisclosure. The material with respect to which they assert the privilege--transcripts of their state grand jury testimony--is in the custody of the State Attorney. The State Attorney has indicated his intention to produce the transcripts. In light of these circumstances, the order denying the motion to quash is a final order as far as appellants are concerned. We therefore have jurisdiction to hear their appeal. [FN3]

FN3. We note that the only material sought from the subpoenaed party in this case is material that falls squarely within the privilege asserted by the third parties. This is not a case, then, where a party has been subpoenaed to testify or produce records and a third party merely fears that privileged material may be disclosed along with other, nonprivileged material. In the latter situation, the case is not ripe for appellate review until the subpoenaed party has actually been asked to reveal specific material covered by the asserted privilege. *See In re Grand Jury Proceedings (Doe)*, 831 F.2d 222 (11th Cir.1987).

III.

In deciding that the narrow *Perlman* exception applies in this case, we have also necessarily defined the scope of the matters properly before us for review. Appellants raise several objections to disclosure, including procedural objections and objections based on comity considerations and the need to protect the integrity of the Florida grand jury system. However, the only matter that the *Perlman* exception gives us jurisdiction to review is the appellants' claim of privilege to prevent disclosure of their state grand jury testimony. *559 The rationale of the *Perlman* exception extends only to appeals based on privileges personal to the third party seeking review: if the subpoenaed party has a direct or primary interest in the right or privilege in question, the concerns giving rise to the *Perlman* exception simply are not present. Here, to the extent that their objections to disclosure are based on concerns relating to comity and the integrity of the Florida grand jury, appellants cannot argue that the subpoenaed party had no interest in seeking to vindicate their derivative rights. Indeed, the subpoenaed party--the State of Florida as represented by the State Attorney-- had as its *primary* interest the protection of its grand jury system. Accordingly, the *Perlman* exception does not give us jurisdiction to review the appellants' arguments concerning comity and the need to preserve the integrity of the Florida grand jury. [FN4] Nor does it give us jurisdiction to review their procedural arguments. Thus, we do not pass upon the district court's disposition of

those matters and we turn to appellants' claims of privilege.

FN4. We should emphasize that this discussion relates only to appellants' right to appeal under the *Perlman* exception. It does not relate to their standing to raise these claims before the district court.

The appellants' motions to intervene in the district court proceedings reveal the nature of the privilege they assert. Appellant McQuaig's motion stated that "[p]rior to appearing before the [state] Grand Jury, Mr. McQuaig was advised by the State Attorney that pursuant to Section 905.27, Fla.Stat. (1985): a) none of the testimony he provided to the Grand Jury was disclosable under the law; and b) any disclosure of said testimony was a crime." Appellant Green's motion stated that "[the] state grand jury proceedings were secret and confidential by virtue of the provisions of Chapter 905 of the Florida Statutes." Appellant Godbold's motion stated that "testimony was provided with the understanding on the part of Jake Godbold that pursuant to § 905.27 of the *Florida Statutes*, his testimony would not and could not be disclosed under the law." Finally, appellant McClure's motion stated that "[t]he substantial interest of Don McClure is equal to or greater than that of the two other parties previously allowed to intervene."

In essence, then, appellants derive the privilege they assert from the Florida statutory grand jury secrecy requirement. The statute imposing that requirement provides as follows:

(1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:
(a) Ascertaining whether it is consistent with the testimony given by the witness before the court;
(b) Determining whether the witness is guilty of perjury; or
(c) Furthering justice.
Fla.Stat. § 905.27 (1985). [FN5]

FN5. The remainder of section 905.27 provides as follows:

(2) It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged, or communicated to any other person, in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof, except when such testimony is or has been disclosed in a court proceeding. When a court orders the disclosure of such testimony pursuant to subsection (1) for use in a criminal case, it may be disclosed to the prosecuting attorney of the court in which such criminal case is pending, and by him to his assistants, legal associates, and employees, and to the defendant and his attorney, and by the latter to his legal associates and employees. When such disclosure is ordered by a court pursuant to subsection (1) for use in a civil case, it may be disclosed to all parties to the case and to their attorneys and by the latter to their legal associates and employees. However, the grand jury testimony afforded such persons by the court can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever.
(3) Nothing in this section shall affect the attorney-client relationship. A client shall have the right to communicate to his attorney any testimony given by the client to the grand jury, any matters involving the client discussed in the client's presence before the grand jury, and any evidence involving the client received by or proffered to the grand jury in the client's presence.
(4) Persons convicted of violating this section shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.083, or by fine not exceeding $5,000, or both.
(5) A violation of this section shall constitute criminal contempt of court.

[4] Federal Rule of Evidence 501 provides that privileges in federal court proceedings "*560 shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The privilege appellants assert, as stated in their motions to intervene, is based solely on state law. [FN6] We acknowledge that some federal courts have recognized state law evidentiary privileges in particular cases when to do so would not substantially burden federal policies. *See, e.g., Lora v. Board of Education*, 74 F.R.D. 565, 576 (E.D.N.Y.); *cf. ACLU v. Finch*, 638 F.2d 1336, 1342-45 (5th Cir. Unit A Mar. 1981).

FN6. In their briefs, appellants suggest that the privilege they assert has an independent basis in the federal common law presumption of grand jury secrecy. That presumption, which is codified in

Fed.R.Crim.P. 6(e), relates to disclosure of federal grand jury records. It cannot be asserted in the form of a privilege by appellants, who seek to prevent disclosure of their *state* grand jury testimony.

[5] We need not apply any such balancing test here, however, because we find that the privilege asserted by appellants is without a basis in Florida law. We find no evidence that the Florida courts derive an evidentiary privilege from Fla.Stat. § 905.27. Indeed, the Florida Supreme Court has noted that

> [t]he rule of secrecy concerning matters transpiring in the grand jury room is not designed for the protection of witnesses before the grand jury, but for that of the grand jurors, and in furtherance of the public justice. A witness before the grand jury has no privilege of having his testimony there treated as a confidential communication....

State ex rel. Brown v. Dewell, 167 So. 687, 690 (Fla.1936). Florida case law directly construing section 905.27 fails to provide a contrary interpretation of the relationship between the secrecy requirement and the rights of grand jury witnesses. [FN7] Accordingly, we conclude that appellants have no privilege of nondisclosure under state law. A federal court will not selectively reach into a state code and fashion evidentiary privileges merely to suit the purposes of the parties before it.

FN7. Some Florida cases refer to the "privilege" of a grand jury witness, but only with reference to the general principle under Florida law that a witness' testimony in a judicial proceeding cannot be used as the basis of a defamation action. *See, e.g., State v. Tillett*, 111 So.2d 716 (Fla.Dist.Ct.App.1959).

IV.

In light of our conclusion that appellants have no privilege of nondisclosure under state law, we affirm the district court's order denying their motion to quash. Because we must observe the limitations on our appellate jurisdiction discussed above, we dismiss their appeal to the extent that it is based on other objections to disclosure.

AFFIRMED in part; DISMISSED in part.

832 F.2d 554, 24 Fed. R. Evid. Serv. 275

END OF DOCUMENT

United States District Court,
W.D. New York.
In the Matter of Subpoena Duces Tecum Directed to the Honorable Kevin M.
DILLON, District Attorney of Erie County.
Civ. No. 92-13A.

Feb. 20, 1992.

State district attorney moved to quash **subpoena duces tecum** issued by **federal grand jury** seeking production of **state grand jury** records as part of investigation into whether police officers violated federal criminal civil rights statute when making arrests. The District Court, Arcara, J., held that **federal grand jury** was entitled to **transcripts** and tapes of **state grand jury** testimony of uncooperating police officers.

Motion to quash denied.

West Headnotes

[1] Grand Jury ⇐25
193k25
Grand jury is to be afforded wide latitude in conducting its investigation.

[2] Grand Jury ⇐36.4(2)
193k36.4(2)
Federal grand jury subpoena may not be unreasonable or oppressive, it may not violate constitutional, common law or statutory privilege. Fed.Rules Cr.Proc.Rule 17(c), 18 U.S.C.A.

[3] Grand Jury ⇐36.9(2)
193k36.9(2)
Federal grand jury subpoenas are presumed to be reasonable and party seeking to quash subpoena bears burden of showing that compliance would be unreasonable or oppressive. Fed.Rules Cr.Proc.Rule 17(c), 18 U.S.C.A.

[4] Grand Jury ⇐36.4(2)
193k36.4(2)
Federal grand jury was entitled to subpoena transcripts and tapes of state grand jury testimony of police officers as part of investigation to determine whether officers violated federal criminal civil rights laws during or after arrests; disputed testimony was relevant and necessary to federal grand jury investigation after police officers refused to cooperate, subpoena was definite and did not call for production of unreasonable amount of documents, United States had strong interest in insuring just enforcement of its criminal laws, and privacy limitations on federal grand jury documents limited potential harm from disclosure. Fed.Rules Cr.Proc.Rules 6(e), 17, 18 U.S.C.A.; N.Y.McKinney's CPL § 190.25, subd. 4.

[5] Grand Jury ⇐36.3(1)
193k36.3(1)

[5] States ⇐18.63
360k18.63
State statutes which preclude disclosure of state grand jury records to general public cannot be used to prevent federal grand juries from obtaining records through subpoena.

[6] Grand Jury ⇐36.4(1)
193k36.4(1)
Custodian of records, who is proper party for service of federal grand jury subpoena, is person or entity who is in actual possession of documents at time subpoena is issued. N.Y.McKinney's CPL § 190.25, subd. 4.

[7] Grand Jury ⇐41.10
193k41.10
Basic purposes of New York grand jury secrecy laws are: to prevent accused from escaping before being indicted; to prevent tampering with witnesses; and to protect accused person who is not indicted from unwarranted exposure. N.Y.McKinney's CPL § 190.25, subd. 4.

[8] Witnesses ⇐184(1)
410k184(1)
Evidentiary privileges protect confidential communications between persons in special relationships from disclosure and are generally disfavored in that privileges impede search for truth.

[9] Grand Jury ⇐36.3(2)
193k36.3(2)
When faced with claim that grand jury should be denied evidence because of privilege, reviewing court must weigh potential harm from disclosure against benefits of disclosure.

*331 John J. DeFranks, J. Michael Marion, Asst. Erie County Dist. Attys. (Kevin Dillon, Erie County Dist. Atty., of counsel), Buffalo, NY.

Russell P. Buscaglia, Asst. U.S. Atty. (Dennis C. Vacco, U.S. Atty., W.D.N.Y., of counsel), Buffalo, NY.

DECISION AND ORDER

ARCARA, District Judge.

Presently before the Court is a motion to quash a subpoena *duces tecum*, pursuant to Fed.R.Crim.P. 17, filed by Kevin M. Dillon, District Attorney for Erie County, New York. The District Attorney's motion seeks an order from this Court quashing a federal grand jury subpoena for state grand jury records. The parties were given an opportunity to brief and argue their respective positions. After reviewing the submissions of the parties and hearing argument from counsel, the Court denies the District Attorney's motion to quash the subpoena.

BACKGROUND

A federal grand jury investigation is currently being conducted regarding an incident which occurred on March 8, 1990 in the Main Place Mall, Buffalo, New York, involving the arrest of Mark Aiken and Steven Johnson by officers of the Buffalo Police Department. Specifically, a federal grand jury is investigating allegations that certain officers of the Buffalo Police Department violated federal criminal civil rights laws during and after the arrest of Mr. Aiken and Mr. Johnson. [FN1]

FN1. The background and focus of the federal grand jury investigation is set forth in greater detail in an *in camera* submission of facts surrounding the federal grand jury investigation submitted by the United States.

The District Attorney's Office prosecuted Mr. Aiken and Mr. Johnson on numerous state misdemeanor charges arising from this incident. During the state trial, only two of the six or more officers who were either involved in or witnessed the incident in question actually testified. Consequently, the state trial shed little light on the officers' versions of the allegations that are the focus of the federal criminal civil rights investigation.

Following the conclusion of the state trial, the District Attorney's Office presented the case to an Erie County grand jury that considered whether the officers' actions during and after the arrest of Mr. Aiken and Mr. Johnson constituted violations of state law. The United States, which was then conducting *332 its own investigation, delayed taking any action in the matter in order to prevent interference with the state investigation. The Erie County grand jury declined to return criminal charges against any of the police officers. As a result, the state investigation into the police officers' conduct concluded in approximately November, 1990.

When the District Attorney's Office concluded its investigation, the United States conducted an independent review of the matter and concluded that a federal grand jury investigation was warranted. After further investigation, evidence was presented to a federal grand jury in October, 1991.

The United States claims that the federal grand jury investigation has reached a logjam because of the refusal of the police officers to cooperate with the Federal Bureau of Investigation ("FBI"). Moreover, none of the officers who are most seriously implicated in the investigation submitted any written reports regarding the alleged incident, nor did most of the officers who were present and should have witnessed the incident. Thus, the United States argues that reviewing the transcripts and tapes of the state grand jury testimony of the police officers is the only way that it will be able to learn the officers' versions of what happened.

The United States initially attempted to obtain the state grand jury material through informal means. When these efforts failed, a grand jury subpoena was issued to the District Attorney's Office on October 25, 1991 for the production of the grand jury transcripts or tapes of all witnesses who testified in this matter before the Erie County grand jury. At the request of the District Attorney's Office, the return date was delayed until January 8, 1992, in an effort to facilitate the resolution of this matter.

When further efforts to resolve the matter failed, the District Attorney filed the present motion to quash, raising four objections to the production of the state grand jury material. First, the District Attorney argues that compliance would be

unreasonable because it would force him to violate state law relating to grand jury secrecy. Second, he argues that the subpoena was served upon the wrong party. Third, the District Attorney contends that compliance would be unreasonable because it would violate policies of comity. Finally, he contends that the subpoenaed grand jury records are privileged.

DISCUSSION

[1][2][3] It is well-established that a federal grand jury is to be afforded wide latitude in conducting its investigation. *See United States v. R. Enters., Inc.*, 498 U.S. 292, 297-98, 111 S.Ct. 722, 726, 112 L.Ed.2d 795 (1991); *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.' " *Branzburg v. Hayes*, 408 U.S. 665, 701, 92 S.Ct. 2646, 2667, 33 L.Ed.2d 626 (1972) (quoting *United States v. Stone*, 429 F.2d 138, 140 (2d Cir.1970)); *In re Grand Jury Subpoena for the Prod. of Certain New York State Sales Tax Records*, 382 F.Supp. 1205, 1206 (W.D.N.Y.1974) (quoting *Stone*, 429 F.2d at 140). In accordance with its broad mandate to investigate possible criminal activity, a federal grand jury has few limitations placed on its subpoena powers. *R. Enters.*, 498 U.S. at 297-98, 111 S.Ct. at 726. "A grand jury 'may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.' " *Id.* (quoting *Calandra*, 414 U.S. at 343, 94 S.Ct. at 617). The only restrictions that have been placed upon the grand jury concern reasonableness and privileges. A grand jury subpoena may not be unreasonable or oppressive, and it may not violate a constitutional, common law or statutory privilege. *Branzburg*, 408 U.S. at 688, 92 S.Ct. at 2660; Fed.R.Crim.P. 17(c). Grand jury subpoenas are presumed to be reasonable and the party seeking to quash the subpoena bears the burden of showing that compliance would be unreasonable or oppressive. *R. Enters.*, 498 U.S. at 300-02, 111 S.Ct. at 728.

*333 In this case, the District Attorney contends that compliance with the subpoena would be unreasonable. In order to meet his heavy burden of showing that compliance with the subpoena would be unreasonable or oppressive, the District Attorney must prove that (1) "there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation;" or (2) the subpoena is too indefinite; or (3) compliance would be overly burdensome. *Id.* After applying these tests to the instant case, the Court finds that the District Attorney is unable to rebut the presumption that the federal grand jury subpoena is reasonable.

[4] Regarding the relevancy question, the United States has set forth in some detail, both in its motion papers and in its *in camera* submission, the reasons underlying the need for the state grand jury records. The United States has been unable to obtain the information contained in the grand jury records from other sources because the police officers have been unwilling to cooperate with the investigation. Accordingly, the Court finds that the statements of the police officers and other witnesses who testified before the state grand jury are relevant and necessary to the federal grand jury investigation.

It does not appear that the District Attorney challenges the subpoena as being too indefinite or overly burdensome. The Court notes that the subpoena is discreet and calls for the production of specific material stemming from a particular state grand jury investigation. Thus, the subpoena is sufficiently definite. Further, the subpoena does not call for the production of an unreasonable amount of documents. Consequently, producing the requested material would require minimal effort on the part of the District Attorney's Office and therefore would not be overly burdensome.

The District Attorney argues that compliance with the subpoena would be unreasonable because it would place him in a position where he would be violating state law provisions relating to grand jury secrecy. Specifically, the District Attorney argues that N.Y.Crim.Proc.Law § 190.25, subd. 4, requires that state grand jury materials be kept secret and therefore prohibits him from turning over the subpoenaed grand jury records to the United States. He contends that the only way the United States can gain access to these materials is to file a motion in state court pursuant to N.Y.Crim.Proc.Law § 190.25, subd. 4. The Court finds this argument without merit.

[5] Federal courts have consistently held that state statutes which preclude disclosure of records to the general public cannot be used to prevent federal grand juries from obtaining the records through a subpoena. The cases of *In re Grand Jury Subpoena for New York State Income Tax Records,* 468 F.Supp. 575 (N.D.N.Y.), *appeal dismissed,* 607 F.2d 566 (2d Cir.1979), and *In re Grand Jury Subpoena for the Prod. of Certain New York State Sales Tax Records,* 382 F.Supp. 1205 (W.D.N.Y.1974), are particularly relevant to the case at hand. Both cases involved federal grand jury subpoenas issued to officials of the New York State Department of Taxation for the production of certain tax records. The petitioners moved to quash the subpoenas on the grounds that compliance would be in violation of certain secrecy provisions of New York State tax laws. These laws are very similar to N.Y.Crim.Proc.Law § 190.25, subd. 4, which the District Attorney relies on in his motion. The courts in these cases explicitly rejected the argument that compliance was unreasonable because it would force the state officials to violate state law secrecy provisions. The courts ruled that the Supremacy Clause must prevail over the state nondisclosure provisions. As the court in *In re Grand Jury Subpoena for New York State Income Tax Records* stated:

> The Supreme Court has several times indicated that, by virtue of the supremacy clause, state legislation must yield whenever it comes into conflict with an Act of Congress or the superior authority of the Constitution. Thus, inasmuch as the federal *334 grand jury is a product of the Fifth Amendment and its powers, as a result of its long history and specific Congressional attention, the conflict between state confidentiality provisions and Congressional or constitutional investigatory powers has resulted in enforcement of federal grand jury subpoenas despite state statutes which would otherwise prohibit compliance.

In re Grand Jury Subpoena for New York State Income Tax, 468 F.Supp. at 577 (citations omitted). Courts in other Circuits, relying on the Supremacy Clause, have similarly rejected claims from state officials that compliance with a federal subpoena would force them to violate state confidentiality laws. *See, e.g., In re Special April 1977 Grand Jury,* 581 F.2d 589, 593 n. 3 (7th Cir.), *cert. denied,* 439 U.S. 1046, 99 S.Ct. 721, 58 L.Ed.2d 705 (1978); *Carr v. Monroe Mfg. Co.,* 431 F.2d 384, 388 (5th Cir.1970), *cert. denied,* 400 U.S. 1000, 91 S.Ct. 456, 27 L.Ed.2d 451 (1971); *In re 1980 United States Grand Jury Subpoena Duces Tecum,* 502 F.Supp. 576, 579-80 (E.D.La.1980); *United States v. Grand Jury Investigation,* 417 F.Supp. 389, 393 (E.D.Pa.1976). Thus, the case law clearly establishes that state law provisions relating to grand jury secrecy do not preclude a federal grand jury from obtaining state grand jury records pursuant to a subpoena.

[6] The District Attorney further argues that the grand jury subpoena was not served upon the proper party. Specifically, the District Attorney contends that pursuant to the state grand jury secrecy law, N.Y.Crim.P.Law § 190.25, subd. 4, the state court has the ultimate and exclusive control over the subpoenaed grand jury material and, therefore, is the actual custodian of the grand jury records. Thus, the District Attorney argues that the grand jury subpoena should have been served on the presiding state court judge rather than the District Attorney. The Court disagrees.

A custodian of records is the person or entity who is in actual possession of the documents at the time the subpoena is issued. *In re Grand Jury Impaneled Jan. 21, 1975,* 541 F.2d 373, 377 (3d Cir.1976) (citations omitted). In order to testify competently as a records custodian, a witness must be able to verify the authenticity and completeness of the requested documents.

In this case, the District Attorney does not dispute the fact that his office possesses the requested grand jury material, nor does he deny that the grand jury materials were generated as a result of an investigation conducted by his office. Accordingly, the District Attorney's office is the sole entity that can competently testify as to the authenticity and completeness of the requested material. The presiding state court judge does not possess the subpoenaed materials nor would he or she have any knowledge concerning the authenticity or completeness of the grand jury records. Thus, the Court finds that the District Attorney's Office is the custodian of the state grand jury records and is therefore the proper party to be served with the subpoena.

The District Attorney also contends that compliance with the federal grand jury subpoena would be unreasonable because it would violate policies of comity. Specifically, the District Attorney

contends that, just as the federal government has an interest in protecting the secrecy of federal grand jury material, the state has an interest in protecting state grand jury material from disclosure. Thus, the District Attorney argues that, in order to show proper deference to the State's interest in the confidentiality of the grand jury records, the United States should be required to move initially for disclosure before the presiding state court judge. The Court finds that no such requirement exists.

[7] The Court recognizes that "policies of comity and federalism require some deference to the objective sought to be achieved by state confidentiality provisions." *In re Grand Jury Subpoena for New York State Income Tax Records,* 468 F.Supp. at 577. The basic purposes of the state grand jury secrecy laws in question are: (1) to prevent an accused from escaping before he is indicted; (2) to prevent tampering with witnesses; and (3) to protect an accused person who is not indicted from unwarranted exposure. *People v. McAdoo,* 45 Misc.2d 664, 257 N.Y.S.2d 763, *aff'd,* 51 Misc.2d 263, 272 *335 N.Y.S.2d 412, *cert. denied,* 386 U.S. 1031, 87 S.Ct. 1479, 18 L.Ed.2d 592 (1967).

In this case, compliance with the federal grand jury subpoena will not subvert New York's interest in maintaining the secrecy of grand jury proceedings because federal grand jury proceedings are also conducted secretly. The secrecy requirements of Fed.R.Crim.P. 6(e), will adequately ensure that none of the purposes of the state grand jury secrecy laws are undermined by compliance with the federal grand jury subpoena. *See In re New York Grand Jury Subpoena for State Income Tax Records,* 468 F.Supp. at 577-78; *see also United States v. Field,* 532 F.2d 404, 407-08 (5th Cir.1976), *cert. denied,* 429 U.S. 940, 97 S.Ct. 354, 50 L.Ed.2d 309; *In re Grand Jury Empaneled Jan. 21, 1975,* 541 F.2d at 377-78.

Moreover, it is important to note that comity is a policy which must be balanced against "the necessity of thorough grand jury investigations into violations of federal law." *In re Grand Jury Subpoena for New York State Income Tax Records,* 468 F.Supp. at 577. In this case, the subpoenaed documents are necessary to the federal grand jury investigation. Thus, the policy of comity must yield to the constitutional right and duty of the federal grand jury to conduct a broad investigation. *Id.* 468 F.Supp. at 578.

Finally, the District Attorney contends that the motion to quash should be granted because the subpoenaed materials are privileged. Specifically, the District Attorney argues that the state grand jury secrecy law creates a federal privilege under Federal Rule of Evidence 501. The Court finds this argument without merit.

[8] Evidentiary privileges protect confidential communications between persons in special relationships from disclosure. By their very nature they impede the search for the truth and are therefore generally disfavored. *Trammel v. United States,* 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980); *Herbert v. Lando,* 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979); *United States v. Nixon,* 418 U.S. 683, 709-10, 94 S.Ct. 3090, 3108- 09, 41 L.Ed.2d 1039 (1974). Accordingly, "the party asserting a privilege bears the burden of proving the applicability of the privilege," *In re Bevill, Bressler & Schulman Asset Management Corp.,* 805 F.2d 120, 126 (3d Cir.1986), and privileges, "whatever their origins ... [should] not [be] lightly created or expansively construed." *Nixon,* 418 U.S. at 710, 94 S.Ct. at 3109.

[9] When faced with a claim that a grand jury should be denied evidence because of privilege, the reviewing court must weigh the potential harm from disclosure against the benefits of disclosure. *American Civil Liberties Union of Miss., Inc. v. Finch,* 638 F.2d 1336, 1343 (5th Cir.1981). In this case, the federal grand jury is investigating possible violations of federal criminal civil rights laws by police officers of the Buffalo Police Department. As fully explained in the United States' *in camera* statement of facts, the subpoenaed documents are vital to the grand jury investigation and are not simply needed to assess credibility of potential witnesses. In addition, the information sought to be obtained from the subpoenaed material is not otherwise available since the police officers are unwilling to talk to the FBI. Thus, the grand jury may not be able to learn the truth of the allegations without the subpoenaed material.

On the other side of the scale, the potential harm from disclosure of the state grand jury material is minimal. Because Fed.R.Crim.P. 6(e) limits disclosure of federal grand jury material, the

secrecy of the subpoenaed documents would be closely guarded. Thus, since the benefits of disclosure in this case substantially outweigh the potential harm from disclosure, the Court finds that the state grand jury records are not privileged as a matter of federal common law. *See Matter of Special April 1977 Grand Jury,* 581 F.2d at 592-93; *In re Grand Jury Proceeding,* 563 F.2d 577, 582-85 (3d Cir.1977); *In re Grand Jury Empaneled January 21, 1975,* 541 F.2d at 382-83.

In sum, the United States has a strong interest in ensuring the just enforcement of its criminal laws. Public policy has long favored giving the grand jury broad powers of investigation. The District Attorney, who has the burden of proving that the subpoena should be quashed, has failed to establish *336 that the subpoena is unreasonable or that it violates any recognized privilege. Furthermore, because of the secrecy provisions of the federal grand jury, little or no prejudice would result to the state from compliance with the federal grand jury subpoena.

CONCLUSION

For the reasons stated, the Court denies the District Attorney's motion to quash the federal grand jury subpoena. This Decision and Order and the entire file are to be filed under seal.

It is so ordered.

824 F.Supp. 330

END OF DOCUMENT

CIRCUIT COURT
CRIMINAL DIVISION
P.O. Box 2906
West Palm Beach, FL 33402-2906

SHARON R. BOCK
Clerk & Comptroller
Palm Beach County

[redacted]
West Palm Beach, FL 33401-6235

HASLER $2.31
SEP 27 2006
US POSTAGE
FIRST CLASS
MAILED FROM 33401
011A0413001277

GJ

31E-MM-108662-1A

ENVELOPE

EMPTY

Official DocLab Instruction(s) – Revised 10-Apr-2014