UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE GRAND JURY SUBPOENAS FGJ 07-103(WPB)
DUCES TECUM NUMBERS
OLY-63 and OLY-64
_____ /

UNITED STATES' RESPONSE TO MOTION OF JEFFREY EPSTEIN TO INTERVENE AND TO QUASH GRAND JURY SUBPOENAS AND CROSS-MOTION TO COMPEL

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The United States of America, by and through the undersigned Assistant United States Attorney, hereby files its response to Jeffrey Epstein's motion to intervene and to quash two grand jury subpoenas issued to William Riley (Subpoena No. OLY-63) and to the Custodian of Records for Riley Kiraly (Subpoena No. OLY-64). [F1] The subpoenas originally called for the witnesses to appear on July 10, 2007, but pursuant to an agreement between the parties, the appearance was moved to July 17, 2007. Neither Mr. Riley nor the records custodian appeared, and counsel for Jeffrey Epstein filed the instant motion on July 17, 2007, shortly before the 4:00 p.m. appearance time. The United States did not excuse the witnesses' appearances and an assertion of the attorney-client or Fifth Amendment privilege does not excuse a witness' appearance from a judicial proceeding, it only excuses the witness from having to answer questions that call for responses covered by the privilege. *See Roe v. Slotnick* , 781 F.2d 238 (2d Cir. 1986); *McKay v. C.I.R.* , 886 F.2d 1237 (9th Cir. 1989). Accordingly, the United States asks the Court to compel the witnesses to appear before the grand jury on the next available date.

Epstein's counsel argues first that his client should be allowed to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). Assuming that the Court grants that request, Epstein raises six arguments against the enforceability of the two grand jury subpoenas: first, that *Epstein's* Fifth Amendment privilege bars the subpoenas to Riley and Riley Kiraly; second, that the subpoenas violate Epstein's Fourth, Fifth, and Sixth Amendment rights; third, that the subpoenas are unreasonable because they seek items "unconnected to any crime under investigation," fourth, that the subpoenas are unreasonable because they are "oppressive, overbroad, and unparticularized;" fifth, that the subpoenaed items contain information and documents protected by the

attorney-client and work product privileges; and sixth, that the subpoena of "purely private papers violates the Fifth Amendment under *Boyd* ."

In response, as an initial matter, the United States does not object to the motion to intervene to allow Epstein to assert his claim that enforcement of the subpoenas would violate the attorney-client and/or work product privileges. However, Epstein does not have standing to assert the remaining challenges to the subpoenas. As to the motion to quash, Epstein has no Fifth Amendment privilege to keep Riley from responding to the subpoenas and he has failed to carry his burden to establish that the subpoenas seek information covered by the attorney-client or work product privileges. Even if Epstein had standing to assert these challenges, the subpoenas are not unreasonable and do not violate any act of production privilege. For these reasons, the United States asks the Court to deny the Motion to Quash and to order the prompt production of the requested items and the witnesses' appearances before the Grand Jury.

BACKGROUND

Contrary to the assertions of Epstein's counsel, he is not fully apprised of the scope of the federal grand jury investigation, which is broader than the state investigation. The federal investigation, as conducted by the Federal Bureau of Investigation ("FBI"), is broader both in terms of the crimes being investigated and the number of victims identified. [F2] Epstein's counsel is correct, however, in asserting that Epstein's criminal conduct first came to the attention of the FBI when the City of Palm Beach Police Department became concerned about the manner in which the Palm Beach County State Attorney's Office was handling the state prosecution. The investigation of the Palm Beach Police Department ("PBPD") revealed multiple instances of minor females traveling to Epstein's home to engage in lewd and lascivious conduct [F3] in exchange for money.

PBPD's investigation was presented to the State Attorney's Office for further investigation. Soon thereafter, Epstein's team of attorneys began approaching the State Attorney's Office, applying pressure against prosecuting the case. The team of attorneys included Mr. Black and his firm, Jack Goldberger, Gerald Lefcourt, and Professor Alan Dershowitz. [F4]

As explained in the Declaration of Joseph Recarey, Epstein knew of the state investigation by the first week of October, 2005. On October 18, 2005, a search warrant was applied for and executed. The search warrant called for the seizure of:

> (1) Computers, including any electronic magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions; data storage facilities such as magnetic tape, hard disk, floppy disk or drum, or cd rom; communications facilities

directly relating to or operating in conjunction with such device; devices for printing records of data; and such records or data produced in various forms; manuals, documents, or instructional material relating to such devices.

(2) Computer, personal computers, computer peripherals, modems, computer printers, floppy disk drives, hard disk drives, diskettes, tapes, computer printouts, software, computer programs and applications, computer manuals, system documentation.

At the time of the execution, several items were conspicuously missing, including three computers. [F5] One of the officers who executed the search warrant had previously visited Epstein's home (at Epstein's invitation) and had observed the three computers, one in the pool cabana, one in an area he refers to as Epstein's office, and one in an area he refers to a [redacted] office. [F6]

The removed computers are believed to be in the custody of William Riley and/or Riley Kiraly, the subpoenaed parties.

The United States has sought the whereabouts of those computers since the start of the investigation. When Guy Lewis stated that Mr. Epstein was willing to assist in the federal investigation and to turn over any requested items, the United States prepared the letter that appears as Exhibit D to Mr. Black's affidavit. To date, none of the items mentioned in requests 1, 2, 4, 5, 6 (the computer equipment), 7, 8, 9, 10, 11, or 13 have been provided. The items in request 12 were provided in response to subpoenas directed to the corporations that own the aircrafts.

Since Epstein was not, in fact, willing to cooperate with the federal investigation, grand jury subpoenas have been issued to obtain the necessary information. The subpoenas at issue here are narrowly tailored and seek only two things: first, the physical computers removed from Epstein's residence in advance of the execution of the search warrant; second, the unprivileged material related to Epstein's hiring of William Riley's firm. Neither William Riley nor his firm has filed any motions to quash or modify, but the witnesses also have failed to appear as commanded. Accordingly, the United States hereby opposes Epstein's motion and moves for an order to compel the appearance of witnesses and production of the requested items.

ARGUMENT

I. THE UNITED STATES DOES NOT OPPOSE THE MOTION TO INTERVENE, IN PART.

The Eleventh Circuit has ruled that a target of a grand jury investigation should be allowed to intervene once the claim of attorney-client privilege between the subpoenaed witness and target surfaces. *In re Grand Jury Proceedings in Matter of Freeman* , 708 F.2d 1571, 1574-75 (11th Cir. 1983) (citing *In re Grand Jury*

Proceedings (Jeffrey Fine) , 641 F.2d 199, 201-03 (5th Cir. 1981)). *See also In re Grand Jury Subpoena* , 274 F.3d 563, 570 (1st Cir. 2001) ("Colorable claims of attorney-client and work product privilege qualify as sufficient interests to ground intervention as of right.") (citation omitted). As explained below, Mr. Riley is not an attorney; Riley Kiraly is not a law firm; and the information sought does not fall within the attorney-client privilege. However, the United States recognizes that Epstein has asserted claims that he has an attorney-client privilege in the subpoenaed items, and that is the issue presented for the Court's determination. Accordingly, the United States does not oppose the motion to intervene in so far as Epstein wishes to assert the attorney-client and work product privileges. However, Epstein has not cited any authority and the United States has found none that allows a non-subpoenaed party to assert challenges to the reasonableness or oppressiveness of a subpoena. Accordingly, the United States opposes Epstein's motion to intervene to assert those claims. [F7]

II. BLANKET ASSERTIONS OF THE FIFTH AMENDMENT, ATTORNEY-CLIENT, AND WORK PRODUCT PRIVILEGES ARE UNENFORCEABLE; THE COURT MUST BE ALLOWED TO JUDGE EACH ASSERTION ON ITS FACTS.

Although Epstein's motion is painted in broad strokes, most of his arguments relate only to the demand for the production of the computer equipment removed from his home prior to the execution of the search warrant. Accordingly, the United States first discusses the claims of privilege regarding the computers, and then addresses the demand for general billing records.

As to both categories, however, Epstein's motion should be denied for failure to provide detailed and specific assertions as to which privilege he claims applies to which documents.

In his motion, Epstein asserts that *all* of the items called for by the subpoenas will violate his Fifth Amendment privilege, the attorney-client privilege, and the work product doctrine. He also implicitly asserts that *every* question addressed to the witnesses would violate these privileges and, therefore, the witnesses cannot be compelled to appear before the grand jury. [F8] These blanket assertions are not authorized and undermine the Court's ability to make an independent evaluation of the applicability of the privileges.

With respect to the Fifth Amendment privilege against self-incrimination, the protection does not cover every instance where the target of an investigation is called to testify or produce documents. Instead, the protection of the Fifth Amendment is confined to instances where the witness "has reasonable cause to apprehend danger" of criminal prosecution. *Hoffman v. United States* , 341 U.S. 479, 486 (1951). "The central standard for the . . . application of the Fifth Amendment is whether the claimant is confronted by substantial and 'real,' not merely trifling or imaginary, hazards of incrimination." *Marchetti v. United States* , 390 U.S. 39, 53 (1968).

> Furthermore, a witness is not exonerated from answering questions merely because he declares that in so doing he would incriminate himself – his say-so does not itself establish the hazard of incrimination. It is the role of the court, not the witness, to evaluate the witness's claim of incrimination and determine whether it is reasonable.
> In evaluating the validity of a witness's invocation of Fifth Amendment privilege against self-incrimination, the court must make a particularized inquiry, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded. Thus, the court must review the witness's assertion of the privilege on a question-by-question basis and decide whether a witness's silence is justified.

United States v. Koubriti , 297 F. Supp. 2d 955, 962 (E.D. Mich. 2004) (citing *Hoffman* , 341 U.S. at 53; *United States v. Melchor Moreno* , 536 F.2d 1042, 1049 (5th Cir. 1976); *United States v. Rue* , 819 F.2d 1488 (8th Cir. 1987); *In re Morganroth* , 718 F.2d 161, 167 (6th Cir. 1983)). *See also United States v. Argomaniz* , 925 F.2d 1349, 1355 (11th Cir. 1991) (court must review assertions of Fifth Amendment privilege on question-by-question basis to provide presiding judge specific information needed to determine applicability of privilege).

Similarly, blanket assertions of the attorney-client privilege are unacceptable. Instead, claims of privilege must be made on a document-by-document basis. *United States v. Davis* , 636 F.2d 1028, 1038 (5th Cir. 1981); [F9] *In re Grand Jury Subpoena* , 831 F.2d 225, 227 (11th Cir. 1987). A blanket assertion cannot be used to avoid testifying; instead, a witness' claims of attorney-client privilege are tested by refusing to answer specific questions. *Davis* , 636 F.2d at 1039. *See also Nguyen v. Excel Corp.* , 197 F.3d 200 (5th Cir. 1999); *Clarke v. American Commerce Nat. Bank* , 974 F.2d 127 (9th Cir. 1992); *United States v. White* , 950 F.2d 426, 430 (7th Cir. 1991).

In his motion, Epstein has proceeded like the litigants in the case of *In re Grand Jury Subpoena* , 274 F.3d 563 (1st Cir. 2001), generally asserting a blanket attorney-client and work product privilege to all documents called for by a subpoena without providing a privilege log or any other specific information. Judge Selya strenuously criticized this practice, commenting:

> they do not identify any particular documents as privileged, nor do they specify the reasons why certain communications should be considered privileged. Thus, like soothsayers scrutinizing the entrails of a goat, we are left to scour the record for indications of what these documents might be and what they might contain.

Id. at 569. The First Circuit affirmed the district court's denial of the litigants' motion to quash because of their failure "to present sufficient information with respect to the items to which their claim of privilege attaches." *Id.* at 575.

> A party that fails to submit a privilege log is deemed to waive the underlying privilege claim. . . . Although most of the reported cases arise in the context of a claim of attorney-client privilege, the "specify or waive" rule applies equally in the context of claims of work product privilege. . . . Despite this knowledge, the intervenors made no effort to prepare a privilege log. *That omission is fatal.*

Id. at 576 (internal citations omitted; emphasis added). *See also United States v. Construction Prods. Research, Inc.* , 73 F.3d 464, 473 (2d Cir. 1996) ("if the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of the legal requirements for application of the privilege, his claim will be rejected") (citations omitted); *Dorf & Stanton Communications, Inc. v. Molson Breweries* , 100 F.3d 919 (Fed. Cir. 1996) (a party who fails to submit a privilege log is deemed to have waived the underlying privilege claim).

Epstein's failure to provide a privilege log dooms his motion to quash, as well. As shown by his motion, Epstein is represented by extremely competent counsel. In addition to Mr. Black and his partners, Epstein has retained at least six other attorneys with extensive experience in federal court. Epstein and his counsel have had access to the subpoenaed computers since at least October 2005, when they were removed from Epstein's home, and they have known about the United States' attempts to locate those computers for at least two months, when a subpoena for the same items was served upon Paul Lavery, another private investigator who worked with Riley. This is not a situation where failure to abide by the Court's rules should be tolerated.

III. IN LIGHT OF THE GRAND JURY'S INVESTIGATORY ROLE, THE FIFTH AMENDMENT AND ATTORNEY-CLIENT PRIVILEGES MUST BE NARROWLY CONSTRUED.

Assuming that the Court finds that Epstein has adequately asserted his Fifth Amendment, attorney-client, and work product privileges, the Court must construe the privileges narrowly in deciding their applicability in light of the important role of the Grand Jury in the investigation of these crimes involving the sexual exploitation of minors.

The Supreme Court has routinely recognized the grand jury's unique role in the United States' criminal justice system. The grand jury "belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people." *United States v. Williams* , 504 U.S. 36, 47 (1992). Thus, the Court's authority over the grand jury's subpoena and indictment power is limited. *See, e.g., Williams* , 504 U.S. at 54-55 (Court cannot require prosecutors to present exculpatory evidence to the grand jury); *Costello v. United States* , 350 U.S. 359, 363-64 (1956) (Court cannot create rule permitting defendants to challenge grand jury indictments because of inadequate or incompetent evidence). Instead, to fulfill its investigatory role, the 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." *United States v. Calandra* , 414 U.S. 338, 343 (1974). Courts are "mindful of the policy that 'nowhere is the public's claim to each person's evidence stronger than in the context of a valid grand jury subpoena.'" *In re Grand Jury Proceedings* , 219 F.3d 175, 186 (2d Cir. 2000) (quoting *In re Sealed Case* , 676 F.2d 793, 806 (D.C. Cir. 1982)). *See also In re Grand Jury Subpoena* , 223 F.3d 213, 218 (3d Cir. 2000) ("One

of the most significant, if not the most significant, differences stemming from the investigative role of the grand jury is the importance of secrecy, particularly when an investigation is on-going.") (citations omitted).

The grand jury is "a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions or propriety or forecasts of the probable result of the investigation . . ." *Blair v. United States* , 250 U.S. 273, 282 (1919). A grand jury may "inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. *United States v. R. Enterprises, Inc.* , 498 U.S. 292, 297 (1991). "As a necessary consequence of its investigatory function, the grand jury paints with a broad brush." *Id.* Accordingly, it is a well-recognized principle that courts should not intervene in the grand jury process absent compelling reason. *United States v. Dionisio* , 410 U.S. 1, 16-18 (1973).

A district court also should be mindful of a target's attempts to "saddle a grand jury with mini-trials and preliminary showings [that] would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *Id.* at 17. The Court must be wary of a motion made by a target that seeks to gather information about the scope of the investigation. As the Supreme Court has held, "[r]equiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise 'the indispensable secrecy of the grand jury proceedings.'" *R. Enterprises* , 498 U.S. at 299 (quoting *United States v. Johnson* , 319 U.S. 503, 513 (1943)). "The need to preserve the secrecy of an ongoing grand jury investigation is of paramount importance." *In re Grand Jury Proceedings in Matter of Freeman* , 708 F.2d 1571, 1576 (11th Cir. 1983) (extensive citations omitted).

A. The Fifth Amendment Privilege

Thus, in *Hale v. Henkel* , 201 U.S. 43 (1906), the Supreme Court refused a grand jury witness' demand that he be advised of the charges that the grand jury was investigating prior to giving testimony. [F10] The Court also limited the assertion of the Fifth Amendment privilege in response to questions before the grand jury: the Amendment does "not declare[] that [the witness] may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him; but the line is drawn at testimony that may expose him to prosecution." *Id.* at 66-67. As explained above, Epstein has attempted to assert a blanket Fifth Amendment privilege covering *every* document contained on the three computers removed from his home and *all* of the billing records requested from Riley. The Supreme Court has rejected this attempt to restrict the grand jury's access to information relevant to its investigation.

B. The Attorney-Client Privilege

In the context of the grand jury, courts have acknowledged that the attorney-client privilege "impedes the full and free discovery of the truth." *In re Grand Jury Proceedings* , 727 F.2d 1352, 1355 (4th Cir. 1984) (citation omitted). Thus, the attorney-client privilege should be narrowly construed, *id.* , and should be recognized "only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel v. United States* , 445 U.S. 40, 50 (1980) (internal quotation omitted). *See also In re Grand Jury Subpoena* , 274 F.3d 563, 571 (1st Cir. 2001) ("Because [the attorney-client privilege] stands in the way of a grand jury's right to every man's evidence, the privilege applies only to the extent necessary to achieve its underlying goal of ensuring effective representation through open communication between lawyer and client.") (citation omitted).

In the context of a grand jury subpoena, the Eleventh Circuit explains:

> the [attorney-client] privilege is not all-inclusive and is, as a matter of law, construed narrowly so as not to exceed the means necessary to support the policy which it promotes. Thus, the argument that *any* communication between an attorney and client is protected by the privilege is overbroad. Merely because a matter which a lawyer is asked to reveal might incriminate a client does not make that matter privileged. The privilege is not designed to protect revelation of incriminating matters, only confidential communications between the attorney and client regarding the matter of representation.

In re Grand Jury Matter No. 91-01386 , 969 F.2d 995, 997 (11th Cir. 1992) (citation omitted).

Mindful of this case law, Epstein's attempt to completely bar the grand jury's access to pre-existing, voluntarily-created documents cannot stand.

IV. THE COMPUTERS AND THEIR CONTENTS WERE PROPERLY SUBPOENAED AND MUST BE PRODUCED.

A. Epstein Has No Fifth Amendment Privilege in the Computers.

While denying the existence of the subpoenaed computer equipment, Epstein spends several pages telling the Court that requiring William Riley and Riley Kiraly to produce items in their custody implicates and violates *Epstein's* Fifth Amendment privilege. Epstein's motion incorrectly conflates several concepts involving different privileges that, when dissected, do not apply to the subpoenaed items.

The first issue is whether *Epstein's* Fifth Amendment privilege applies to Riley's production of the computers removed from Epstein's home. The Fifth Amendment privilege "protects a person . . . against being incriminated by his own compelled testimonial communication." *Fisher v. United States* , 425 U.S. 391, 409 (1976). Thus, to receive Fifth Amendment protection, a person's statement or act must be: (1) compelled; (2) testimonial; and (3) incriminate *that person* in a criminal proceeding.

The Fifth Amendment privilege is a personal one which may not be asserted vicariously. *United States v. Davis* , 636 F.2d 1028, 1034 (5th Cir. 1981) . Thus, "compelled production of documents from an attorney does

not implicate whatever Fifth Amendment privilege the taxpayer might have enjoyed from being compelled to produce them himself." *Fisher v. United States* , 425 U.S. 391, 397 (1976).

> The right of a person under the 5th Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person.

Hale v. Henkel , 201 U.S 43, 69-70 (1906).

In *Couch v. United States* , 409 U.S. 322 (1973), the Supreme Court rejected a taxpayer's assertion of her Fifth Amendment privilege to keep her attorney from turning over documents that had been in the custody of her accountant. [F11] "In the case before us the ingredient of personal compulsion against an accused is lacking. The summons and the order of the District Court enforcing it are directed against the accountant. He, not the taxpayer, is the only one compelled to do anything. And the accountant makes no claim that he may tend to be incriminated by the production." *Id.* at 329. The Court then explained:

> the Fifth Amendment privilege is a *personal* privilege; it adheres basically to the person, not to information that may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence, but not from its production." The Constitution explicitly prohibits compelling an accused to bear witness "against himself;" it necessarily does not proscribe incriminating statements elicited from another. . . . It is extortion of information from the accused himself that offends our sense of justice.

Id. at 328 (quoting *Johnson v. United States* , 228 U.S. 457, 458 (1913)) (emphasis in original). Thus, the Court found that the accountant did not have a Fifth Amendment privilege and could be compelled to produce the documents. *See also SEC v. Jerry T. O'Brien, Inc.* , 467 U.S. 735, 742 (1984) (There is no Fifth Amendment violation against the target of an investigation when a subpoena is issued to third party because the target was not compelled to produce materials.) The Eleventh Circuit has even authorized the government to demand that a target sign a written authorization allowing unidentified third-party banks to produce records within the banks' custody that relate to the target. *United States v. Ghidoni* , 732 F.2d 814 (11th Cir. 1984).

In this case, the subpoenas are addressed to William Riley and to the Custodian of Records of Riley Kiraly. Neither Riley nor his firm has asserted a legitimate fear of incrimination (and of course they have none), only Epstein has done so. As such, the Fifth Amendment claim must fail. Furthermore, Riley Kiraly is an artificial entity, not a natural person, and therefore has no Fifth Amendment privilege at all. *See, e.g., Doe v. United States* , 487 U.S. 201, 206 (1988); *Bellis v. United States* , 417 U.S. 85, 90 (1974).

B. The Attorney-Client Privilege and the Work Product Doctrine Also Do Not Bar the Production of the Computers.

Despite the fact that Epstein cannot assert his own Fifth Amendment privilege to bar the production of documents by Riley, in certain circumstances, an attorney (or his agent) can use the attorney-client privilege to

assert an act of production immunity on behalf of his client. *See, e.g., Fisher* , 425 U.S. at 402-04. Those circumstances do not apply here.

In *Fisher* , the Supreme Court determined that a defendant does *not* suffer a Fifth Amendment violation when his attorney is compelled to produce documents he had received from the defendant because the *defendant* was not compelled to testify against himself. However, the Supreme Court went on to decide that the protections of the attorney-client privilege would be eroded if documents that a defendant could not be forced to produce due to the defendant's Fifth Amendment privilege lost their protection if given to the attorney as part of a confidential communication. The Court thus concluded that where a defendant confidentially communicates preexisting documents to an attorney for purposes of obtaining legal advice, the attorney-client privilege prevents the government from compelling the attorney to produce those items *unless* the government could have compelled the defendant to produce them himself. *Id.* at 404-05.

Thus, to succeed in using the attorney-client privilege to vicariously assert the Fifth Amendment privilege, Epstein must show that the removal of the computers from his home constituted a "confidential communication" where legal advice was sought – *i.e.* , that the attorney-client privilege applied; and, second, that the government could not have obtained the computers directly from Epstein if they had remained in his custody. [F12] Epstein has failed to show either.

1. Epstein has not shown that the transfer of the computers to Riley was done in confidence.

"The burden of proving that a communication falls under the attorney-client privilege rests on the proponent of the privilege." *Hawkins v. Stables* , 148 F.3d 379, 383 (4th Cir. 1998) (citation omitted).

> The party invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were confidential. In order to show that communications made to an attorney are within the privilege, it must be shown that "the communication was made to him confidentially, in his professional capacity, for the purpose of securing legal advice or assistance.

United States v. Schaltenbrand , 930 F.2d 1554, 1562 (11th Cir. 1991) (citations omitted). *See also XYZ Corp. v. United States* , 348 F.3d 16, 22 (1st Cir. 2003) ("The privilege protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice.") (citations omitted).

The attorney-client privilege protects only communications between attorney [F13] and client for the purpose of seeking legal advice. The "mere fact that an attorney [or in this case, his alleged agent] is present at a meeting or is copied on a document does not in and of itself afford privilege protection to such a meeting or document. [And,] the mere fact that one is an attorney does not render everything he does for or with the client privileged." *Gutter v. E.I. DuPont de Nemours and Co.* , 1998 WL 2017926, *1 (S.D. Fl. May 18, 1998)

(citations omitted). If an attorney (or his agent) was doing something other than rendering legal advice, neither the attorney-client nor work product privilege applies. *Id.*

In this case, Epstein has not carried his burden of proving the application of the privilege to the computers. In particular, Epstein has not showed that the "communication" was confidential. Even if Riley could stand in the shoes of Attorney Black, Epstein has not shown that the removal of the computers from Epstein's home was done in confidence. If others wer present, there was an implied waiver of the privilege. *See, e.g., XYZ Corp.* , 348 F.3d at 23 ("The privilege evaporates the moment that confidentiality ceases to exist. With isthmian exceptions not pertinent here, the presence of third parties is sufficient to undermine the needed confidentiality.") (citation omitted); *Liggett Group Inc., v. Brown & Williamson Tobacco Corp.* , 116 F.R.D. 205, 210 (M.D.N.C. 1986) (citations omitted) ("For communications between an attorney and client . . . to be privileged, they must be confidential. Ordinarily, the presence of a third party destroys the element of confidentiality and, therefore, any claim of privilege.").

2. Epstein has failed to establish that the pre-existing documents were a privileged "communication" for purposes of seeking legal advice.

In asserting that the contents of the computers are covered by the attorney-client privilege or the work product doctrine, Epstein attempts to stretch the privileges beyond their limits. There has been no assertion that the computers themselves were communications or that the computers contain attorney-client communications, nor were the computers or their contents produced in anticipation of litigation.

In *Upjohn v. United States* , 449 U.S. 383 (1981), the Supreme Court made clear that an attorney cannot create a "zone of silence" over factual matters. The Court wrote: the attorney-client "privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Id.* at 395.

> The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney. . . . [T]he courts have noted that a party cannot conceal a fact merely be revealing it to his lawyer.

Id. at 396 (internal citations and quotations omitted).

Likewise, despite a claim of attorney work product, "[w]here relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to that preparation of one's case, discovery may properly be had." *Hickman v. Taylor* , 329 U.S. 495, 511 (1947). Furthermore, the "work product rule protects work done by an attorney in anticipation of, or during, litigation," *In re Grand Jury Subpoena* , 274 F.3d at 574, not physical objects, like the computers, or the pre-existing records contained therein, which were created by Epstein or third parties, not attorneys. *Cf. In re Grand Jury Matter No. 91-01386*

, 969 F.2d 995 (11th Cir. 1992) (holding that the attorney-client privilege did not bar the disclosure of the names of clients who paid their attorneys with counterfeit bills because "[d]isclosure of the clients' identities will link them with only the payment of a counterfeit one hundred dollar bill, *which is not a communication at all* . . . . To apply the privilege under these facts would be an affront to that very system, as it would effectively insulate discoverable *acts* merely because they were enacted in the presence of an attorney.") (emphasis added).

Just a month ago, the Second Circuit addressed this issue when a defendant tried to disqualify prosecutors who had seen four documents that the defense alleged were privileged. *United States v. Walker* , 2007 WL 1743273 (2d Cir. Jun. 18, 2007). The court wrote:

> Even assuming the documents (or the handful of corrections and clarifications handwritten thereon) were work product or were privileged, they contain solely factual information about [a] business, and shed no light on [defendant's] confidential communications with counsel or defense strategy. Moreover, we agree with the district court that these documents were neither work product nor attorney-client communications. The attorney-client privilege protects from disclosure the contents of confidential attorney-client communications, but does not prevent disclosure from the client's records the underlying factual information included in attorney-client communications. *See Upjohn Co. v. United States* , 449 U.S. 383, 395 (1981). For this reason, putting otherwise non-privileged business records . . . in the hands of an attorney–or printing out such records for an attorney to review–does not render the documents privileged or work product. *See Ratliff v. Davis Polk & Wardwell* , 354 F.3d 165, 170-71 (2d Cir. 2003) ("Documents obtain no special protection because they are housed in a law firm; any other rule would permit a person to prevent disclosure of any of his papers by the simple expedient of keeping them in the possession of his attorney.") *In re Grand Jury Subpoenas* , 318 F.3d 379, 384 (2d Cir. 2003) (stating that the work product doctrine generally does not shield from discovery materials in an attorney's possession that were prepared neither by the attorney nor his agents). Moreover, the "selection and compilation of . . . documents by counsel transforms that material into attorney work product" only if there is "a real, rather than speculative, concern that counsel's thought processes in relation to pending or anticipated litigation will be exposed through disclosure of the compiled documents." *In re Grand Jury Subpoenas* , 318 F.3d at 386.

Id. at *2 (some internal citations and quotations omitted).

Here, like in *Walker* , Epstein's counsel contends that the computers–which contain only pre-existing documents–are privileged and that counsel's decision to have his investigator remove those computers from Epstein's home is the "selection and compilation of documents" that would disclose his "thought processes." These arguments fail for the same reasons. First, the computers and their contents are not "communications," they are pre-existing documents and, as in *Ratliff* , putting them into the hands of an attorney (or his investigator) does not convert them into "privileged" communications. Second, the removal of the three computers from Epstein's home is not the "selection and compilation of documents by counsel." As Epstein himself argues, each computer can hold literally thousands of documents. Removing *all* of the file cabinets in an entire home is not the strategic "selection and compilation" of documents, it is simply the wholesale removal of potentially incriminating evidence. Taking Epstein's argument to its logical conclusion, sending an investigator to a client's

home to remove a murder weapon would make that physical item privileged or "work product" because its removal shows the attorney's "thought process" that the murder weapon would incriminate his client. [F14] *Cf. In re Grand Jury Subpoena* , 204 F.3d 516, 523 (4th Cir. 2000) ("The attorney-client privilege is not intended to permit an attorney to conduct his client's business affairs in secret. . . . A client may not 'buy' a privilege by retaining an attorney to do something that a non-lawyer could do just as well.") (internal quotations omitted)).

3. Even if the transfer fo the computers was a privileged communication, Epstein cannot show that the computers were privileged in his hands.

Even if the Court finds that the transfer of the computers to Riley was covered by the attorney-client privilege, "documents created outside the attorney-client relationship should not be held privileged in the hands of the attorney unless otherwise privileged in the hands of the client, lest the client immunize incriminating evidence merely by depositing it with his attorney." *Davis* , 636 F.2d at 1041. Thus, the Court must determine whether Epstein has shown that he would have had a Fifth Amendment privilege against producing the computers if they had remained in his custody. The computers are not testimonial communications, so Epstein would not.

The computers themselves are not protected by the Fifth Amendment because they are physical evidence–they are not testimonial. "[T]he distinction to be drawn under the Fifth Amendment privilege against self-incrimination is one between an accused's 'communications,' in whatever form, vocal or physical, [which violates the privilege], and 'compulsion which makes a suspect or accused the source of 'real or physical evidence' [which does not].'" *United States v. Wade* , 388 U.S. 218, 223 (1967) (quoting *Schmerber v. State of California* , 384 U.S. 757, 764 (1966)). And the contents of the computers are not protected because the creation of the contents was not compelled, instead, the contents were voluntarily created by the persons who used them. [F15] *See, e.g., United States v. Doe* , 465 U.S. 605, 612 (1984); *In re Grand Jury Proceedings* , 393 F.3d 905, 909 (9th Cir. 2004); *In re Foster* , 188 F.3d 1259, 1269 (10th Cir. 1999). This reasoning applies even when the documents or information are classified as "personal papers" rather than business documents. *See United States v. Feldman* , 83 F.3d 9, 14 (1st Cir. 1996) (defendant's letters of apology not protected because voluntarily prepared); *In re Grand Jury Subpoena Duces Tecum* , 1 F.3d 87, 90 (2d Cir. 1993) (defendant's personal calendar not protected because voluntarily prepared); *Barrett v. Acevedo* , 169 F.3d 1155, 1168 (8th Cir. 1999) (defendant's journal not protected because voluntarily written); *United States v. Wuykowski* , 929 F.2d 981, 983 (4th Cir. 1991) (Fifth Amendment does not protect the contents of voluntarily prepared documents, whether business or personal); *United States v. Hubbell* , 167 F.3d 552, 567 (D.C. Cir. 1999) (same), *aff'd on other grounds* , 530 U.S. 27 (2000); *In re Grand Jury Proceedings* , 759 F.2d 1418, 1419 (9th Cir. 1985) (same).

At the very end of his motion, Epstein urges the Court to resurrect *United States v. Boyd* , arguing that the subpoena seeks "purely private papers," and that a subpoena demanding those papers violates Epstein's Fifth Amendment rights, pursuant to *Boyd* , 116 U.S. 616 (1886). Epstein's counsel correctly notes that *Boyd* 's analysis has been severely limited, but asserts that the "purely private paper" doctrine is still alive and applies to the contents of Epstein's computers.

Boyd 's statement that "purely private papers" cannot be obtained through compulsory process from a target/defendant has been eroded to the point where it no longer has any force or effect. The Supreme Court has written, as early as 1976, that "the continued validity of the broad statements contained in some of the Court's earlier cases [referring to *Boyd*], have been discredited by later opinions." *Andresen v. Maryland* , 427 U.S. 463, 472 (1976). In 1984, Justice O'Connor wrote a concurring opinion in *United States v. Doe* , 465 U.S. 605 (1984),

> just to make explicit what is implicit in the analysis of that opinion; that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind. The notion that the Fifth Amendment protects the privacy of papers originated in *Boyd v. United States* , . . . but our decision in *Fisher v. United States* , . . . sounded the death knell for *Boyd* . Several of *Boyd* 's express or implicit declarations [had] not stood the test of time, . . . and its privacy of papers concept had long been a rule searching for a rationale . . . Today's decision puts a long overdue end to that fruitless search.

Id. at 618 (internal citations and quotations omitted). The full Court wrote that it is well-settled that "if the party asserting the Fifth Amendment privilege has voluntarily compiled [a] document, no compulsion in present and the contents of the document are not privileged." *Id.* at 612 n.10. *See also United States v. Hubbell* , 530 U.S. 27, 35-36 (2000) (It is a "settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the privilege. . . [Where] papers had been voluntarily prepared prior to the issuance of the summonses, they could not be 'said to contain compelled testimonial evidence, either of the [target] or of anyone else.' Accordingly, the [target] could not 'avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else. It is clear, therefore, that respondent Hubbell could not avoid compliance with the subpoena served on him merely because the demanded documents contained incriminating evidence, whether written by others or voluntarily prepared by himself.") (quoting *Fisher v. United States* , 425 U.S. 391, 409-10 (1976); and citing *United States v. Doe* , 465 U.S. 605 (1984)); *In re Grand Jury Subpoena Duces Tecum* , 1 F.3d 87, 90 (2d Cir. 1993) ("While we have previously left undecided the question of whether the Fifth Amendment protects the contents of private papers that are not business documents, we now rule that it does not." (internal

citation and quotations omitted)); *United States v. Wujkowski* , 929 F.2d 981 (4th Cir. 1991); *In re Sealed Case* , 877 F.2d 83, 84 (D.C. Cir. 1989) (Fifth Amendment privilege "does not cover the *contents* of any voluntarily prepared records, including personal ones"); *In re Grand Jury Proceedings* , 759 F.2d 1418, 1419 (9th Cir. 1985); *United States v. Bedell & Co.* , 2006 WL 3813792, *1 (E.D.N.Y Oct. 30, 2006) ("It is well settled that the Fifth Amendment 'does not protect the *contents* of voluntarily prepared documents, whether business or personal.'" (quoting *In re Hyde* , 235 B.R. 539, 543 (S.D.N.Y. 1999) (emphasis in *Bedell*)). F16

Even if the *Boyd* analysis was still good law, it would only apply to *Epstein's* private papers. There has been no showing by Epstein that all of the documents contained on the three computers were his private papers. As set forth in the Recarey Declaration, one of the computers was in an area that appears to be the office of [redacted] and another was in the pool cabana.

4. The act of production doctrine would not have protected Epstein from producing the computers if they had remained in his custody.

Even if Epstein could successfully show that the transfer of the computers to Riley were covered by the attorney-client privilege, such that Riley could assert the act of production privilege on behalf of Epstein, the production of the computers would not tend to incriminate Epstein.

Under the act of production doctrine, even if documents responsive to a subpoena are not themselves covered by the Fifth Amendment, "the act of production itself may implicitly communicate statements of fact. By producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic." *United States v. Hubbell* , 530 U.S. 27, 36 (2000) (internal quotations and extensive citations omitted).

However, the act of production privilege applies only if the production would be "testimonial" and "incriminating." *Butcher v. Bailey* , 753 F.2d 465, 469 (6th Cir 1985) (citing *United States v. Doe* , 465 U.S. 605, 612-13 (1984)).

> Production of documents may be testimonial in any of three ways: by acknowledging that the documents exist; by acknowledging that they are in control of the person producing them; or by acknowledging that the person producing them believes they are the documents requested and thereby authenticating them for purposes of Fed. R. Evid. 901. . . . Production of documents is not considered testimonial if each of these consideration is a "foregone conclusion."

Id. (citing *Doe* , 465 U.S. at 613, n.11, n.13). Accordingly, where the government already knows about the existence of the documents, their whereabouts, and has an independent basis for authentication, a party can be compelled to produce the documents. *See, e.g., Hubbell* at 44-45; *see also In re Grand Jury Subpoena Duces Tecum* , 1 F.3d 87, 93 (2d Cir. 1993) ("Production may not be refused if the government can demonstrate with reasonable particularity that it knows of the existence and location of subpoenaed documents.") (citation

omitted). In this case, as set forth in the Recarey Affidavit and the two *Ex Parte* Affidavits, the government already knows that: (1) the computers exist; (2) they are in the custody or control of Riley; and (3) there is an independent basis to authenticate them. Thus, Riley's "compliance with the subpoena would require mere 'surrender' of the [computers]," not a "testimonial communication" for purposes of *Doe* , and, thus, the subpoenas are enforceable (regardless of the computers' contents). *Id.* at 93-94 (citation omitted). [F17]

Even if the act of production were testimonial for purposes of *Doe* , production can be refused *only* if the act of production also is *incriminating* . *Butcher* , 753 F.2d at 469-70. In other words, the act of authentication is incriminating only if the documents are incriminating. As explained above, Epstein has failed to make the slightest showing that the computers' contents are incriminating. Where a party fails to provide "sufficient facts to state with reasonable certainty that the privilege applies, the burden is not met." *United States v. Blackburn* , 538 F. Supp. 1376, 1382 (M.D. Fl. 1982) (citing *Federal Trade Commission v. TRW, Inc.* , 628 F.2d 207, 213 (D.C. Cir. 1980); *In re Katz* , 623 F.2d 122, 125 (2d Cir. 1980); *United States v. Landof* , 591 F.2d 36, 38 (9th Cir. 1978); *In re Grand Jury Proceedings* , 73 F.R.D. 647, 651 (M.D. Fl. 1977)).

In *Blackburn* , the Middle District of Florida applied the act of production privilege under the premise that *Boyd* was still binding precedent. Even applying *Boyd* , the court found that the vicarious assertion of act of production immunity via the attorney-client privilege required a showing that the subpoenaed documents were transferred by the target for purposes of obtaining legal advice *and* that the documents were exclusively prepared by the target or under the target's immediate supervision *and* that they were confidential. When the target failed to provide adequate evidence of any *one* of these elements, the court held that the documents were not privileged. Epstein has made *none* of these showings.

Thus, because Riley's compliance with the subpoenas' demand for the production of the computers would not be testimonial and neither Riley nor Epstein has shown that the computers' contents incriminate either of them, the Court should enforce the subpoenas.

V. THE ITEMS SOUGHT IN REQUEST NUMBER THREE ARE NOT COVERED BY THE ATTORNEY-CLIENT PRIVILEGE OR THE WORK PRODUCT DOCTRINE.

The third request contained in the subpoenas to Riley and Riley Kiraly seeks:

3. All documents and information related to the nature of the relationship between Mr. William Riley and/or Riley Kiraly and Mr. Jeffrey Epstein, including, but not limited to, retainer agreements; employment agreements; billing statements (whether submitted directly to Mr. Epstein or to a third party for reimbursement); records of the dates when services were performed and the hours worked; telephone logs or records of dates of communications with Mr. Epstein (or with a third party on Mr. Epstein's behalf); appointment calendars/datebooks and the like (whether in hard copy or electronic form) for any period when work was performed on behalf of Mr. Epstein or when any communication was had with Mr. Epstein (or with a third party on Mr. Epstein's behalf); and records of fee arrangements and payments received for work performed on Mr. Epstein's behalf. [F18]

Although not clear from Epstein's motion, he does not appear to assert the act-of-production privilege as to the billing records, nor could he, since: (1) he did not create or possess the documents and, therefore, could not authenticate them; and (2) since the Affidavit filed by Epstein's counsel admits that William Riley and Riley Kiraly were hired to assist Epstein's defense, the existence of the documents is not contested.

Instead, Epstein makes a blanket assertion that *all* of the billing records are either work product or attorney-client communications that need not be produced. This assertion fails both procedurally and legally.

A. Epstein's Claim of Privilege Is Waived by His Failure to Carry His Burden of Proving Its Applicability.

Procedurally, the person asserting the privilege bears the burden of establishing its applicability. *See, e.g., United States v. Schaltenbrand* , 930 F.2d 1554 (11th Cir. 1991); *United States v. Muñoz* , 233 F.3d 1117 (9th Cir. 2000); *Hawkins v. Stables* , 148 F.3d 379 (4th Cir. 1998); *Motley v. Marathon Oil Co.* , 71 F.3d 1547 (10th Cir. 1995); *Christman v. Brauvin Realty Advisors, Inc.* , 185 F.R.D. 251 (N.D. Ill. 1999). In making that showing, blanket assertions of the privilege are not proper–the assertion must be made on a question-by-question and document-by-document basis. *See, e.g., Nguyen v. Excel Corp.* , 197 F.3d 200 (5th Cir. 1999); *Clarke v. American Commerce Nat. Bank* , 974 F.2d 127 (9th Cir. 1992); *United States v. White* , 950 F.2d 426, 430 (7th Cir. 1991).

As explained above, a party's failure to provide a privilege log or to otherwise substantiate its claims of privilege can act as a waiver of the privilege. That standard should apply here and all of the items in Request Number Three should be ordered produced.

B. The Categories of Documents Sought All Fall Outside the Privilege.

Legally, each of the categories of documents contained in the third request has been discussed by courts and determined to be outside the privilege. The Eleventh Circuit holds that the "identity of a client and the receipt of attorney's fees normally are not privileged matters." *In re Grand Jury Matter No. 91-01386* , 969 F.2d 995, 997 (11th Cir. 1992) (citation omitted). In *United States v. Legal Servs. for New York City* , 249 F.3d 1077 (D.C. Cir. 2001), the D.C. Circuit stated that "[c]ourts have consistently held that the general subject matters of clients' representations are not privileged. Nor does the general purpose of a client's representation necessarily divulge a confidential professional communication, and therefore that data is not generally privileged." *Id.* at 1081 (citation omitted). *See also Nguyen v. Excel Corp.* , 197 F.3d 200, 206 (5th Cir. 1999) ("the general nature of [an attorney's] services is not protected by the privilege."); *In re Horn* , 976 F.2d 1314, 1317 (9th Cir. 1992) ("the attorney-client privilege ordinarily protects neither a client's identity nor information regarding the fee arrangements reached with that client," including the amount paid for legal services and the form of payment)

(citation omitted); *Clarke v. American Commerce Nat'l Bank* , 974 F.2d 127, 129 (9th Cir. 1992) ("the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege") (citations omitted); *In re Grand Jury Proceedings in Matter of Fine* , 641 F.2d 199, 204 (5th Cir. 1981) (same); *O'Neal v. United States* , 258 F.3d 1265 (11th Cir. 2001) (information regarding the receipt of attorney's fees is not protected).

In *Matter of Grand Jury Proceeding* , 68 F.3d 193 (7th Cir. 1995), the Seventh Circuit discussed specific questions asked of an attorney during his testimony before the grand jury. There, unlike here, the attorney properly appeared to testify and then asserted a claim of privilege in response to particular questions. The Seventh Circuit found that the following questions did *not* call for privileged communications:

> (1) Whom did you direct [in the search of documents responsive to the subpoena]?
>
> (2) From whom did you get [the documents you produced in response to the subpoena]?
>
> (3) Did [the person who supplied the documents to you] understand they were given in response to a subpoena? (Brackets in original.)
>
> (4) Did that person understand you were to forward them to the Grand Jury in response to a subpoena?
>
> (5) Did you tell your client . . . you were going to convey them to the government pursuant to Grand Jury subpoena?

Id. at 194-95, 196.

In reaching its decision, the Seventh Circuit relied on *In re Feldberg* , 862 F.2d 622 (7th Cir. 1988). In *Feldberg* , an attorney was subpoenaed to appear before the grand jury after the grand jury suspected obstruction of justice based upon the delayed disclosure of certain documents. The attorney appeared but asserted the attorney-client privilege in response to several questions. The *Feldberg* court determined that the following questions did not call for privileged information:

> (1) Did you direct someone else to [conduct a search of the files for purposes of gathering the information responsive to this subpoena]?
>
> (4) Did you have a conversation with anyone affiliated with World Sports Entertainment in which you told them that you were going to [contact the U.S. Attorney's Office and say you represented World Sports and would handle compliance with the subpoena]?
>
> (6) Did you tell [the president of World Sports and an associate] that you were going to convey these contracts to the Government, with the representation that they were all contracts called for

by the subpoena?

(7) [D]id you direct anyone to produce such a list [of contracts] for disclosure to the Government?

(8) Did you have a conversation in which you asked someone to give those [51 contracts] to you for disclosure to the Government?

Fine , 68 F.3d at 196 (quoting *Feldberg* , 862 F.2d at 624) (brackets in original). In both instances, the Seventh Circuit held that questions that "deal with whether the attorney 'directed someone to search the files; if so, who and how'" were not privileged. *Fine* at 196 (quoting *Feldman* at 628). Questions that "involve whether the client or the person collecting the documents knew they were acting pursuant to a subpoena" likewise did not violate the privilege. *Id.* While these cases address testimonial questions, the information that they seek to elicit is similar to the information contained in some of the documents subpoenaed from Riley, including, for example, billing statements, records of dates of services performed and dates of communications with Epstein.

Other cases have held that the scope or objective of an attorney's employment is not protected, *In re Grand Jury Proceedings-Gordon* , 722 F.2d 303 (6th Cir. 1983), nor are telephone records and appointment calendars of the attorney. *McArthur v. Robinson* , 98 F.R.D. 672 (E.D. Ark. 1983). Thus, the dates on which the client first contacted his attorney, the dates on which services were rendered, and the dates that the client communicated with his attorney are not privileged. *Condon v. Petaque* , 90 F.R.D. 53 (N.D. Ill. 1981). *See also Matter of Walsh* , 623 F.2d 489 (7th Cir. 1980) (ledgers, bills, time records, and retainer agreements in the possession of the attorney not privileged); *Coalition to Save Our Children v. State Bd. of Educ.* , 143 F.R.D. 61 (D. Del. 1992) (time sheets and billing records not privileged).

One of Epstein's other attorneys, Gerald Lefcourt, is certainly aware that a client's identity, his payment of fees, and the method and amount of payment are not privileged, even when the information would incriminate the client "in the very case in which the Firm was engaged to provide criminal defense representation." *Gerald B. Lefcourt, P.C. v. United States* , 125 F.3d 79, 87 (2d Cir. 1997). In that case, Attorney Lefcourt refused to identify in an IRS reporting form a client who paid him more than $10,000 cash, and Lefcourt was fined $25,000. Lefcourt sought to avoid the fine, claiming that he had an objectively reasonable belief that the information was privileged. The Second Circuit determined that he did not, noting its series of cases holding that the attorney-client privilege did not bar the disclosure of fee information, even where that information could incriminate the client. *Id.* Epstein's attempt to assert similar arguments here should also fail.

VI. EPSTEIN DOES NOT HAVE ANY SIXTH AMENDMENT RIGHTS IN CONNECTION WITH THE GRAND JURY'S INVESTIGATION.

Epstein spends several pages arguing that the grand jury subpoenas violate his Sixth Amendment right to counsel and to the effective assistance of counsel. Yet Epstein has no rights under the Sixth Amendment in connection with this investigation. The right to effective assistance of counsel does not attach until adversary judicial proceedings have been initiated against a defendant. *Kirby v. Illinois* , 406 U.S. 682 (1972). For this reason, the Sixth Amendment does not apply to a grand jury investigation, and a demand for information related to the attorney-client relationship prior to that time does not violate the client's right to counsel or interfere with his future right to counsel. *In re Special September 1978 Grand Jury (II)* , 640 F.2d 49, 64 (7th Cir. 1980); *Tornay v. United States* , 840 F.2d 1424 (9th Cir. 1988).

Adversary judicial proceedings have yet to begin in the federal system and also had not begun in the state system at the time the computers were removed; thus, the Sixth Amendment is not implicated. Epstein tries to avoid this conclusion by dropping a footnote asserting that, pursuant to *Texas v. Cobb* , 532 U.S. 162 (2001) , his Sixth Amendment rights attached at the time he was charged in the state system. This misstates *Cobb* and its progeny which hold that a defendant's Sixth Amendment right to counsel is *charge-specific* , and that Sixth Amendment rights in connection with prosecution by one sovereign do not carry over to prosecution by another sovereign.

In *Cobb* , the Supreme Court clarified its holding in *McNeil v. Wisconsin* , 501 U.S. 171 (1991) that the "Sixth Amendment right to counsel is offense specific. It cannot be invoked once for all future prosecutions." *Id.* at 167 (quoting *McNeil* at 175). The *Cobb* Court noted that some other courts:

> have read into *McNeil* 's offense-specific definition an exception for crimes that are 'factually related' to a charged offense. Several of these courts have interpreted *Brewer v. Williams* , 430 U.S. 387 (1977) and *Maine v. Moulton* , 474 U.S. 159 – both of which were decided well before *McNeil* – to support this view, which respondent now invites us to approve. *We decline to do so.*

Cobb at 168 (emphasis added).

Instead, the *Cobb* Court made clear that the Sixth Amendment right is truly *offense-specific* , meaning limited to the same offense for purposes of the Double Jeopardy Clause. *Id.* at 172-173 ("We see no constitutional difference between the meaning of the term 'offense' in the contexts of double jeopardy and of the right to counsel. Accordingly, we hold that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test.") The Supreme Court also noted that "offense-specific" is synonymous with "prosecution specific." *Id.* at n.3. [F19]

The Supreme Court chose to clearly delineate the scope of those interrogations subject to suppression because:

> it is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.

> "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers are more than merely desirable" they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.

Id. at 172-73 (quoting *McNeil* , 501 U.S. at 181).

Two Courts of Appeals have addressed *Cobb* in the context of persons charged by state prosecutors who are later interrogated by federal agents. In those cases, the courts have found that, so long as the state charge and the federal charge contain different elements under the *Blockburger* test, there is no Sixth Amendment violation, even if the charges arise from the same act. *See United States v. Avants* , 278 F.3d 510, 512-13 (5th Cir. 2002) ("[T]he federal and state murder prosecutions in this case, *although identical in their respective elements* , are separate offenses for purposes of the Sixth Amendment because they were violations of the laws of two separate sovereigns – specifically the State of Mississippi and the United States. Therefore, because the Sixth Amendment is offense-specific, Avants's statements during the 1967 interview, when he was represented by counsel only in the state proceeding, are not barred in this federal proceeding."); *United States v. Coker* , 433 F.3d 39 (1st Cir. 2005) (same). *See also United States v. Lall* , ___ F. Supp. 2d ____, 2007 WL 1521487, *7 (M.D. Fl. May 23, 2007) ("Lall's state and her federal charges, although pertaining to the same criminal episode, are separate offenses for Sixth Amendment purposes. The reason is that each prosecution involves separate sovereigns."); *United States v. McCloud* , ___ F. Supp. 2d ___, 2007 WL 1706353 (S.D. Ga. June 11, 2007) (same).

Even if Epstein could assert a Sixth Amendment violation based upon the issuance of the subpoenas, his assertion that the subpoenas should be quashed because "his entire attorney-client relationship would be endangered [fails,] for it is confidential communications that are protected, not the relationship as a whole. *McKay v. C.I.R.* , 886 F.2d 1237 (9th Cir. 1989).

VII. THE SUBPOENAS ARE NOT OPPRESSIVE, OVERBROAD, AND UNPARTICULARIZED.

Epstein also asserts that the subpoenas seeking the computer equipment are unreasonable because they are oppressive, overbroad, and unparticularized. Epstein has failed to cite any legal authority that allows him to intervene to assert these challenges. "In the absence of a claim of privilege, a party usually does not have standing to a subpoena directed to a non-party witness." *Langford v. Chyrsler Motors Corp.* , 513 F.2d 1121, 1126 (2d Cir. 1975). For example, in *United States v. Wells* , 2006 WL 3203905 (E.D. Mich. Nov. 3, 2006), a party sought to quash a subpoena issued to his bank, objecting that he was "unsure of what information the United States [sought] to gain from [the bank's] records." *Id.* at *2. The district court denied the motion, noting the party's lack of standing in the absence of the assertion of a privilege. As set forth above, the United States

does not object to Epstein's intervention to assert his Fifth Amendment, attorney-client, and work product privileges, but there is no basis for him to intervene to assert that the subpoenas are burdensome when he is not the person who will bear that burden, and the subpoenaed parties have not raised a complaint.

If the Court finds that Epstein has standing to assert these challenges, he also bears the burden of establishing his allegation that the subpoenas are oppressive or overbroad. A "grand jury subpoena is presumed reasonable unless its recipient demonstrates otherwise. Fed. R. Crim. P. 17(c) permits judicial oversight only when 'compliance would be unreasonable or oppressive.' Thus the Court held trial courts can not place an initial burden on the government to prove a grand jury subpoena is necessary and relevant." *In re Impounded* , 241 F.3d 308, 314 (3d Cir. 2001) (quoting *R. Enter.* , *supra* , 498 U.S. at 298-99). *See also Blair v. United States* , 250 U.S. 273, 282 (1919) (a grand jury witness cannot refuse to respond to a subpoena on the grounds that the information sought by the grand jury is not relevant to its investigation). The burden of showing unreasonableness rests with the person seeking to avoid compliance. *R. Enterprises* , 498 U.S. at 301.

The Supreme Court has noted the grand jury's broad powers to issue subpoenas: "the grand jury's authority to subpoena witnesses is not only historic . . . but essential to its task. . . . The "longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law or statutory privilege, . . . is particularly applicable to grand jury proceedings." *Branzburg v. Hayes* , 408 U.S. 665, 688 (1972) (citations omitted). In *R. Enterprises* , the Supreme Court held that subpoenas cannot be quashed on the basis of irrelevance if there is a reasonable possibility that the materials sought by the government will produce information relevant to the grand jury investigation. *R. Enter.* , 498 U.S. at 300.

Despite these broad powers, Epstein objects to the subpoenas that specifically call for and describe three computers, arguing that they are "unparticularized" and "oppressive." A grand jury subpoena must be reasonable, and, in making that determination, "what is reasonable depends on the context." *New Jersey v. T.L.O.* , 469 U.S. 325, 337 (1985). Likewise, whether a subpoena is oppressive depends on the context. *In re August, 1993 Regular Grand Jury* , 854 F. Supp. 1392, 1401 (S.D. Ind. 1993). The context here is the wholesale removal of these computers just days before a court authorized a warrant for their seizure. The context of this investigation is Epstein's sexual exploitation of numerous girls from local high schools; the known existence of surveillance video equipment in the home; computer printouts showing electronic messages for "appointments" with the minors; and printouts showing payments made to girls.

In determining the reasonableness of a subpoena, the most important facts are whether the subpoena commands the production of items relevant to the grand jury's investigation, the particularity with which the

items sought are described, and the burden involved in compliance. *See R. Enterprises* , 498 U.S. at 300. Since the investigation's subject is secret, Epstein must persuade the Court that the subpoena could serve no legitimate purpose that the grand jury could possibly investigate. *Id.* Epstein has failed to do so.

A claim of oppressiveness requires a showing that compliance is excessively difficult. *See In re Grand Jury Proceedings* , 115 F.3d 1240, 1244 (5th Cir. 1997). Oppression is difficult to establish, even if the cost of compliance is "crippling." *In re August, 1993 Regular Grand Jury* , 854 F. Supp. at 1402. With respect to the particularity and oppressiveness, the Riley subpoenas specifically describe the items to be produced, and, as written, impose a minimal burden, they simply call for Riley to return the equipment that was removed. [F20]

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny the Motion to Quash filed by Jeffrey Epstein and order the subpoenaed parties, William Riley and Riley Kiraly, to appear and provide testimony and evidence in accordance with the issued subpoenas at the next meeting of the Grand Jury.

Respectfully submitted,
R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

By: _ _____ _____
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West Palm Beach, FL 33401
Telephone: [redacted]
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July ____, 2007, the foregoing document and the Declaration of Joseph Recarey will be served via hand delivery on Attorney Roy Black, counsel for Jeffrey Epstein. The same documents will be served on William Richey, counsel for William Riley and Riley Kiraly, via Federal Express. This document was not filed using CM/ECF because it is being filed under seal.

__ _____ _____
[redacted]
Assistant U.S. Attorney

SERVICE LIST

In re Federal Grand Jury Subpoenas No. OLY-63 and OLY-64
United States District Court, Southern District of Florida

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[F1]Riley Kiraly is the firm that employs William Riley. For purposes of this Response, they will be referred to jointly as "Riley." Riley Kiraly and William Riley are represented by William Richey, Esq. Mr. Richey has not filed any motions on behalf of his clients.

[F2]Due to the rules governing Grand Jury secrecy, the full details of the Grand Jury's investigation cannot be disclosed except *in camera* . The facts contained herein relate to public information regarding the State's investigation and information disclosed as part of that investigation or information related to the FBI's investigation. A motion to file *ex parte* affidavits that contain information regarding the Grand Jury investigation is filed simultaneously with this motion.

[F3]Epstein's counsel refers to these as "massages." The conduct involved asking girls to partially or fully disrobe and to "massage" Epstein, including straddling him and pinching his nipples, while he masturbated. Epstein would fondle the girls, becoming more sexually aggressive with each visit, graduating to digital penetration of the girls' vaginas, using a massager/vibrator on the outside of their vaginas, having the girl engage in a sexual performance with Epstein's adult girlfriend, and engaging in vaginal intercourse. With the possible exception of one girl, none of the minors had any training in massage therapy, and, as shown by Attachment E to the Black Affidavit, Epstein was receiving professional chiropractic services from a licensed chiropractor, Dr. Thomas Rofrano.

Epstein's counsel misstates the state charges pending against his client. The state grand jury returned a three-count indictment. Each count charges solicitation of a prostitute. Under Florida law, the first two counts are classified as misdemeanors. A third solicitation offense is a felony.

[F4]Since the start of the federal investigation the team has grown to include former Southern District of Florida U.S. Attorney Guy Lewis and former Southern District of Florida Assistant U.S. Attorneys Lilly Ann Sanchez and Michael Tien.

[F5]The wires and peripheral devices were present but the central processing units ("CPUs") were gone.

[F][redacted] is one of Epstein's personal assistants.

[F7]As stated above, neither of the subpoenaed parties has raised any objection to the subpoenas and the time for production has passed. Thus, these objections have been waived.

[F8]The government uses the word "implicitly" because Epstein's motion to quash does not mention witness testimony and the witnesses themselves have not filed a motion to quash; they simply failed to appear before the grand jury.

[F9]In *Bonner v. City of Prichard* , 661 F.2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as precedent all decisions of the prior Fifth Circuit court of Appeals decided prior to October 1, 1981.

[F10]The Supreme Court called this "a novelty in criminal procedure with which we are wholly unacquainted, and one which might involve a betrayal of the secrets of the grand jury room." *Id.* at 59. Epstein

counsel's assertion that he is well acquainted with the subject of the grand jury investigation and that, therefore, he purports to inform the Court of the relevance (or irrelevance) of the subpoenaed items treads upon the grand jury's investigatory powers as described in *Hale* . *See id.* at 59-64.

F11 The summons had been directed to the accountant but, at the direction of the taxpayer, the accountant had turned the documents over to the attorney.

F12 The Fifth Circuit described *Fisher* 's holding as follows: "preexisting documents transferred to an attorney are protected by the attorney-client privilege only if two conditions are met. First, the usual common-law prerequisites for the privilege must be satisfied: the information in the documents must be confidential and the transfer must have been made to obtain legal advice. Second, the documents must have been privileged from production in the client's hands, either at common law or under the fifth amendment." *Davis* , 636 F.2d at 1040.

F13 For purposes of this discussion, the United States assumes that Riley, a private investigator, and his firm were working as agents of Attorney Black. The billing documents subpoenaed by the United States would assist the United States in evaluating that claim, but Epstein has objected to the production of those documents.

F14 Although unpublished, the case of *United States v. Hunter* , 1995 WL 12513 (N.D. Ill. Jan. 6, 1995), contains facts similar to the ones at bar and gives a detailed analysis of the applicability of the attorney-client privilege to physical items. In *Hunter* , a defendant, subsequent to his arrest, informed his attorney of the existence of currency and ammunition in his home. The attorney went to his client's home; opened two boxes that contained $30,000 to $50,000; and removed them from the home. The boxes were thereafter kept in the attorney's custody or control. The attorney later revealed the existence of and whereabouts of the boxes and a search warrant was obtained and executed. The defendant moved to bar the introduction of the boxes of cash against him at trial, asserting the attorney-client and work product privileges.

The district court began its analysis by noting that "the boxes themselves do not fall within the protection of the attorney-client privilege, since their existence is a fact and not a 'communication.'" *Id.* at *2 (citing *Upjohn* , 449 U.S. at 391). The District Court noted that if the boxes had never been removed from the home and the government had learned of their existence only through the use of a protected communication, then the defendant *may* have had an argument against their admission. *Id.* However, "these are not the facts of this case. Here, defendants' attorneys removed the evidence from [the defendant's] house, thereby preventing police from recovering the boxes at a later date. At this point, [the attorneys] may have violated their ethical obligation not to 'unlawfully obstruct another party's access to evidence.' Indeed, it is this alteration of criminal evidence that forecloses [the defendant's] attorney-client privilege argument . . ." *Id.* The district court addressed the cases of *Clutchette v. Rushen* , 770 F.2d 1469 (9th Cir. 1985), and *People v. Meredith* , 631 P.2d 46 (Cal. 1981). In *Clutchette* , the defendant's attorney had sent an investigator to collect incriminating evidence from a shopkeeper, and the trial court had allowed that evidence to be admitted at trial over the defendant's assertion of the attorney-client privilege. The Ninth Circuit wrote that once the attorney made the strategic choice to take possession of the evidence–a step which was not necessary to evaluate the significance of the [evidence] for the defendant's case–he was legally and ethically obligated to turn it over to the prosecution. Therefore, introduction of the evidence did not implicate the privilege. *Hunter* at *2 (citing *Clutchette* at 1472).

In *Meredith* , a murder suspect informed his attorney that the murder victim's wallet was in the garbage can behind the suspect's house and the attorney sent a private investigator to retrieve it. After reviewing the wallet, the attorney gave it to law enforcement. The prosecution then introduced the wallet at trial, as well as testimony from the investigator that he recovered the wallet from behind the defendant's home over the defendant's assertion of the attorney-client privilege. The California Supreme Court held that the introduction of the wallet and the investigator's testimony was proper because "whenever defense counsel removes or alters evidence, the [attorney-client] privilege does not bar revelation of the original location or conduction of the evidence in question." *Hunter* at *3 (quoting *Meredith* at 54). While the investigator could not testify about the substance of any communications with the attorney, he had to tell the jury where the wallet was found. The California Supreme Court stated that, to hold otherwise, "permits the defense in effect to 'destroy' critical information; it is as if . . . the wallet in this case bore a tag bearing the words 'located in the trash can by [defendant's] residence,' and the defense, by taking the wallet, destroyed this tag." *Hunter* at n.5 (quoting *Meredith* at 53).

It should be noted that removal of the computers was not necessary to the ability of Epstein's counsel to evaluate their significance; copies of the hard drives could have been made. Of course, unlike counsel in *Clutchette* and *Meredith* , Epstein's counsel *never* provided the evidence to law enforcement and, instead, tries to

aver that the items may not exist. If that is so, then not only did the investigator working for Epstein's counsel remove the evidence, he also destroyed it.

Lastly, the defendant asserted that defense counsel's search of the defendant's home "was part of the preparation of the defense case, and therefore 'the basis for conducting such an investigation is attorney-work product because it reflects the thought processes and strategies, if not actual privileged communications.'" *Hunter* at *4. The district court rejected this argument: "[t]aking possession of the boxes did not somehow transform them into 'materials prepared in anticipation of litigation,' which would subsequently be undiscoverable." *Id.* Epstein makes the identical arguments and those arguments should be rejected for the same reasons.

F15It should be noted that Epstein has failed to allege that *he* is the person who prepared the contents of the computers. As stated above, one of the computers was removed from an area used by [redacted], not Epstein.

F16Epstein's Fourth Amendment claim also fails under the post- *Boyd* case law. *Andresen v. Maryland, supra* , addressed a claim of a Fourth Amendment violation when a search warrant authorized the seizure of papers that the defendant asserted were "personal." The *Andresen* Court rejected the claim, announcing the "general rule: 'There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant.'" *Andresen* , 427 U.S. at 474 (quoting *Gouled v. United States* , 255 U.S. 298, 309 (1921)).

It should be noted that a search warrant for Epstein's house was obtained, which included the authority to seize the computers that are the subject of this motion, but Epstein had already removed the computers from the home. (*See* Recarey Declaration.)

F17As explained in the *Ex Parte* Affidavits, the United States has established that it can authenticate the computers without Riley's testimony. Even if it could not, however, that is not a basis for refusing to produce the items. In *United States v. Koubriti* , 297 F. Supp. 2d 955, 969-70 (E.D. Mich. 2004), the court ordered the production of the defendant's handwritten notes that were in the possession of defense counsel where the United States knew of the existence and location of the notes.

F18For purposes of this discussion, the requested documents will be jointly referred to as "billing records."

F19In *Cobb* , the Court went on to decide that Texas police officers did not violate Cobb's Sixth Amendment rights when they questioned him regarding murders that occurred during a burglary even though the defendant was already represented in connection with the pending burglary charge.

F20It would be more burdensome to attempt to craft a list of computer files for Riley to produce, which would require Riley to conduct a manual search of the computer equipment himself.