THE USE OF PROSECUTORIAL POWER IN THE INVESTIGATION OF JOSEPH GERSTEN

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

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THE USE OF PROSECUTORIAL POWER IN THE INVESTIGATION OF JOSEPH GERSTEN

FRIDAY, JUNE 15, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The committee met, pursuant to notice, at 11:05 a.m., in room 2154, Rayburn House Office Building, Hon. Christopher Shays (acting chairman of the subcommittee) presiding.

Present: Representatives Shays, Horn, and Waxman.

Staff present: Kevin Binger, staff director; James C. Wilson, chief counsel; David A. Kass, deputy counsel and parliamentarian; Mark Corallo, director of communications; M. Scott Billingsley and Andrew Hollis, counsels; Sarah Anderson, staff assistant; Robert A. Briggs, chief clerk; Robin Butler, office manager; Michael Canty, legislative assistant; Josie Duckett, deputy communications director; John Sare, deputy chief clerk; Danleigh Halfast, assistant to chief counsel; Corinne Zaccagnini, systems administrator; Phil Barnett, minority chief counsel; Sarah Despres, minority counsel; Michael Yeager, minority deputy chief counsel; Ellen Rayner, minority chief clerk; and Jean Gosa and Earley Green, minority assistant clerks.

Mr. SHAYS. Good morning. A quorum being present, the Committee on Government Reform will come to order. I ask unanimous consent that all Members' and witnesses' written opening statements be included in the record and, without objection, so ordered.

I ask unanimous consent that all articles, exhibits, and extraneous or tabular material referred to to be included in the record and, without objection, so ordered.

I ask unanimous consent that a set of exhibits regarding the hearing be included in the record. Without objection, so ordered.

I ask unanimous consent that a staff report regarding this matter be included in the record and, without objection, so ordered.

[NOTE.—The complete set of exhibits and the staff report may be found at the end of this volume.]

Mr. SHAYS. I ask further unanimous consent that questioning under this matter proceed under clause 2(j)(2) of House rule 11 and committee rule 14, in which the chairman and ranking minority member allocate time to the members of the committee as they deem appropriate for extended questioning, not to exceed 60 minutes equally divided between minority and majority and, without objection, so ordered.

I also ask unanimous consent that questioning in the matter under consideration proceed under clause 2(j)(2) of House rule 11

and committee rule 14 in which the chairman and ranking minority member allocate time to committee counsel as they deem appropriate for extended questioning, not to exceed 60 minutes divided equally between the majority and minority and, without objection, so ordered.

I yield myself my time. Last month this committee heard testimony from Joseph Salvati, a man convicted of a crime he did not commit. In that case an innocent man went to prison for 30 years because FBI agents, prosecutors, and local law enforcement officers suppressed exculpatory evidence in a cynical conspiracy to protect a corrupt informant. His life and the lives of his wife and children were destroyed by the very forces of law and justice solemnly sworn to protect and serve.

Another case of alleged official misimprisonment brings us here this morning. In March the committee staff issued a report entitled, "The Joseph Gersten Case: A Study of the Abuse of Government Power." It describes a complex series of events in south Florida, starting in 1992, during which prosecutorial zeal to achieve a preordained conclusion appears to have resulted in the suppression of obviously exculpatory facts.

The committee had hoped to conduct voluntary interviews with two of today's witnesses, Mr. Gregorie and Mr. Band, but they declined. Their lawyers informed us their clients would only appear pursuant to subpoenas, so subpoenas were issued. Still, despite the more formal forum, our purpose in seeking their testimony remains the same: Amplify and clarify the public record on this troubling case.

Bottom line is we're here today because of those subpoenas.

We know the FBI and prosecutors suspected that Joseph Gersten had done something wrong. They received information that he had been involved with prostitutes, had smoked crack cocaine and had filed a false police report. They initiated an investigation. We certainly don't have a problem with that.

But we all should have a problem with apparent failure to follow all the relevant evidence discovered by that investigation. When prosecutors fail to follow potentially exculpatory evidence, there should be a reason. Today I sincerely hope we will hear a plausible explanation why it was ignored in this case.

The committee's investigation has uncovered questions that should have been asked, questions that bring us here today: A government witness was trying to frame Mr. Gersten for murder. According to the FBI, this was one of the government's most reliable witnesses. The government did not ask a single question about why their witness was trying to frame Gersten for a murder. It appears they didn't want to know the answer. Why?

The FBI paid money to the witness who was trying to frame Gersten for the murder, after the false allegation had been made. Why would the FBI pay money to someone who was trying to put an innocent man in the electric chair?

All government prosecutors and investigators have maintained that they knew nothing about the false murder allegation, notwithstanding evidence to the contrary. When the committee asked an FBI agent why a government witness to an alleged sex and drugs matter was trying to frame Gersten for murder, the agent said he

had never been told about the false murder allegation. That's what he said. He said it, "would have been important information." He also said, "I don't know why we weren't given this information." Who knew about the false murder allegation and when did they know it?

The man who was offered money by the government's witness to make the false murder allegation came to the conclusion that, "the FBI is trying to set up the man, Gersten, for something he didn't do." Why did he reach that conclusion and why did the government never ask him why he had reached that conclusion?

The man who was offered money to make the false murder allegation, knew the exact amount involved 2 days before records show the money being requested. How could he have known that, and why did no one ask him why the FBI was prepared to pay a witness who was trying to frame Gersten for a murder?

Someone in the Florida State attorney's office appears to have attempted to cover up the fact there was a false murder allegation. When the committee received documents about the Gersten investigation, the report describing the false allegation, which we did eventually obtain, was not provided. Who was responsible and why was it so important to keep the false murder allegation from coming to the attention of Congress?

Almost every exculpatory statement or piece of evidence appears to have been ignored by the government. Why? Why does this case appear to be a predetermined conclusion in search of proof, not a search for truth?

The Gersten case is not the Salvati case, and I want to emphasize that. Nothing could be like the Salvati case. Gersten was never indicted, never tried. He left the country. He didn't spend 30 years in prison. But he did pay a price for what he was only alleged to have done.

The plight of the Salvatis and Mr. Gersten gives us cause to question presumptions long taken for granted about blind justice and the power to prosecute. Anyone can be accused of a crime. The government can tap telephones, record conversations, obtain bank records and even, as in the Gersten investigation, go so far as to get supermarket purchase records of the suspect's fiancee. We must be sure the power to seize the evidence is wielded objectively, with restraint, and with a profound respect for rights of the accused.

I now recognize my very distinguished colleague Mr. Waxman, the ranking member, for his opening statement.

[The prepared statement of Hon. Christopher Shays follows:]

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Statement of Rep. Christopher Shays
June 15, 2001

Last month this Committee heard testimony from Joseph Salvati, a man convicted of a crime he did not commit. In that case, an innocent man went to prison for thirty years because FBI agents, prosecutors and local law enforcement officers suppressed exculpatory evidence in a cynical conspiracy to protect a corrupt informant. His life and the lives of his wife and children were destroyed by the very forces of law and justice solemnly sworn to protect and serve.

Another case of alleged official misprision brings us here this morning. In March, the Committee staff issued a report entitled, "The Joseph Gersten Case: A Study of the Abuse of Government Power." It describes a complex series of events in south Florida, starting in 1992, during which prosecutorial zeal to achieve a preordained conclusion appears to have resulted in the suppression of obviously exculpatory facts.

The Committee had hoped to conduct voluntary interviews with two of today's witnesses, Mr. Gregorie and Mr. Band, but they declined. Their lawyers informed us their clients would only appear pursuant to subpoenas. So subpoenas were issued. Still, despite the more formal forum, our purpose in seeking their testimony remains the same: amplify and clarify the public record on this troubling case.

We know the FBI and prosecutors suspected that Joseph Gersten had done something wrong. They received information that he had been involved with prostitutes, had smoked crack cocaine, and had filed a false police report. They initiated an investigation. We certainly don't have a problem with that.

But we all should have a problem with the apparent failure to follow all the relevant evidence discovered by that investigation. When prosecutors fail to follow potentially exculpatory evidence, there should be a reason. Today, I sincerely hope we will hear a plausible explanation why it was ignored in this case.

The Committee's investigation has uncovered questions that should have been asked, questions that bring us here today:

- A government witness was trying to frame Mr. Gersten for a murder. According to the FBI, this was one of the government's most reliable witnesses. The government did not ask a single question about why their witness was trying to frame Gersten for a murder. It appears they didn't want to know the answer. Why?
- The FBI paid money to the witness who was trying to frame Gersten for the murder – after the false allegation had been made. Why would the FBI pay money to someone who was trying to put an innocent man in the electric chair?

- All government prosecutors and investigators have maintained that they knew nothing about the false murder allegation, notwithstanding evidence to the contrary. When the Committee asked an FBI agent why a government witness to the alleged sex and drugs matter was trying to frame Gersten for murder, the agent said he had never been told about the false murder allegation. He said it "would have been important information." He also said, "I don't know why we weren't given this information." Who knew about the false murder allegation, and when did they know it?
- The man who was offered money by the government's witness to make the false murder allegation came to the conclusion that: "the FBI [is] trying to set up the man [Gersten] for something he didn't do." Why did he reach that conclusion and why did the government never ask him why he had reached that conclusion?

- The man who was offered money to make the false murder allegation knew the exact amount involved two days before records show the money being requested. How could he have known that, and why did no one ask him why the FBI was prepared to pay a witness who was trying to frame Gersten for a murder?

- Someone in the Florida State Attorney's Office appears to have attempted to cover up the fact there was a false murder allegation. When the Committee received documents about the Gersten investigation, the report describing the false allegation, which we did eventually obtain, was not provided. Who was responsible, and why was it so important to keep the false murder allegation from coming to the attention of Congress?

Almost every exculpatory statement or piece of evidence appears to have been ignored by the government. Why? Why does this case appear to be a predetermined conclusion in search of proof, not a search for truth?

The Gersten case is not the Salvati case. Gersten was never indicted, never tried. He left the country. He didn't spend thirty years in prison. But he did pay a price for what he was only alleged to have done. But it does it appears the path of justice was misdirected when exculpatory information was not pursued.

The facts discovered to date raise significant questions. Just because those facts arose nine years ago does not mean they are unimportant. To the contrary, the long arm and long memory of oversight like this should help sustain confidence the vast powers of the state are being exercised properly and for the public good.

Carved over the entrance to the Supreme Court, the words "Equal Justice Under Law" express both a command and a promise. When the command is ignored, the promise of individual liberty in the Bill of Rights is broken.

The plight of the Salvatis and Mr. Gersten gives us cause to question presumptions long taken for granted about blind justice and the power to prosecute. Anyone can be accused of a crime. The government can tap telephones, record conversations, obtain bank records, and even – as in the Gersten investigation – go so far as to get supermarket purchase records of the suspect's fiance. We must be sure the power to seize that evidence is wielded objectively, with restraint and with a profound respect for the rights of the accused.

Mr. WAXMAN. Thank you very much, Mr. Chairman. In the interest of time, I have a short statement, but I'd like to ask unanimous consent to enter my full written statement into the record.

Mr. SHAYS. Without objection.

Mr. WAXMAN. But I do want to make a few points about this hearing and the case of Joseph Gersten. I believe it's appropriate for Congress to conduct oversight in any case where there is credible evidence of prosecutorial misconduct, but I think, given the thousands of cases we could investigate, the committee's focus on Mr. Gersten is especially odd.

This morning's hearing provides a window into one of the most important powers that comes with being in the majority of the House, the power to choose and set an agenda. There are many cases of overzealous prosecutions. There are countless cases worthy of examination, cases where innocent victims were convicted of capital crimes and even sentenced to death. If the committee wanted to investigate issues involving the State of Florida, we could have looked at the voting irregularities in the 2000 election. We should never be indifferent to any evidence of misconduct by prosecutors, but I simply don't understand how the obscure case of Joe Gersten merits an exhaustive investigation by this committee.

It seems to me that the most important point is that Mr. Gersten was never indicted by the State attorney's office. And I want to repeat that. Mr. Gersten was never indicted. Had he been indicted and prosecuted, the issue of whether he was given all the information the State attorney's office had might be relevant, but—and it's worth repeating again—he was never charged. Instead, despite the fact that he had a grant of immunity, Mr. Gersten chose to flee the country and defy a court order compelling him to testify.

That's why the Florida Supreme Court has concluded that Mr. Gersten's refusal to comply with the court order directly interfered with the State attorney's criminal investigation. That's a quote.

And that's why another Florida court has concluded that Mr. Gersten is a fugitive from justice and not entitled to any judicial relief.

That alone makes it odd that this committee is championing Mr. Gersten's cause. But on top of that, we have to consider the Gersten matter in the context of this committee's work on the Marc Rich case. Just a few months ago we had a hearing focused on President Clinton's Presidential pardon to Marc Rich, and most Members, Republican and Democrat, took a dim view of Mr. Rich's case precisely because he decided to resolve his case by fleeing our country and avoiding prosecution. Fleeing the country seemed to be the decisive factor against Marc Rich.

This morning, it seems in the eyes of some of my colleagues, fleeing the country is the decisive factor in making Mr. Gersten a victim, not a criminal. If the committee wants to highlight the problems of overzealous prosecutions, there are countless cases worthy of examination and, as I said before, the Gersten case is an odd choice by any measure for our committee.

I appreciate the witnesses being here today. I know they've been brought before this committee in order to get their testimony on the record. I know this investigation has amounted to thousands of dollars spent by the taxpayers, the time of Members of the Con-

gress and our staffs, the witnesses today and their attorneys that they had to hire to represent them, the cost they incurred to come here to Washington. All of this is factored into expenditure of money, both private and public, that may or may not produce a conclusion.

I thank all the witnesses for being here and I yield back the balance of my time.

[The prepared statement of Hon. Henry A. Waxman follows:]

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Statement of Representative Henry A. Waxman
Committee on Government Reform
Hearing on
"The Use of Prosecutorial Powers in the Investigations of Joseph M. Gersten"
June 15, 2001

This morning's hearing provides a window into one of the most important powers that comes with being the majority in the House: the power to choose and set an agenda.

Chairman Burton has the sole discretion to choose which subjects the Committee investigates and which national priorities we'll hold hearings on. And today we have a demonstration of how this discretion is exercised.

Today's hearing concerns allegations of government mistakes and misconduct in Florida. Upon hearing this, I think most Americans would assume that we were conducting oversight on Florida's recent election debacle. We could, for instance, hold hearings on the fact that:

- African American voters were approximately nine times more likely than white voters to have their ballots rejected in the November 2000 elections;
- Poorer counties were more likely to use voting systems with higher rates of discarded ballot than more affluent counties;
- Even in counties where the same voting technology was used, blacks were far more likely to have their votes rejected than whites;
- African Americans had a significantly greater chance of being identified on the state's list of people who must be purged from voter rolls. This list was compiled by a private firm and had at least a 14% error rate. The probability of African Americans' names appearing on the list in error was significantly greater than the likelihood of the names of whites being erroneously included on the purge list;
- Despite requirements that voters who are not proficient in English be provided with some form of language assistance, many of these voters were denied that assistance during the 2000 elections. Haitian Americans and Spanish speaking voters were disproportionately affected.

These are problems that affected the fundamental rights of citizens and had an enormous impact on the outcome of the election. But this Committee hasn't spent a dime or any time looking at the failure of Florida's election system.

Instead, we have spent months and thousands of dollars on the case of Joseph Gersten. While I believe it is important to conduct oversight when there are credible allegations of prosecutorial misconduct, I must confess that I'm mystified why the Committee has chosen Mr. Gersten's case – out of all the potential cases of misconduct in the country – for special treatment. And the fact that former Attorney General Janet Reno is involved in a remote way to the case creates an unfortunate appearance problem for the Committee.

As many people know, this Committee has a long record of unfounded allegations against Janet Reno. During the last Congress, our chairman accused her of "deceit" and "corruption." He called her President Clinton's "chief blocker" and said that she brought the Justice Department "to shame and disrepute," "made a mockery of justice," and established a legacy of "incompetence and partisan zeal." Given that history, it's not surprising that there's speculation that today's hearing is more about Janet Reno than Joseph Gersten. In fact, in a recent New York Times story on this hearing, one political figure in Florida was quoted as saying, "This is so old. Why now?...I think he wants to wreak havoc and embarrass Janet Reno."

Not surprisingly, the majority made up its mind about this investigation long before it scheduled this hearing. In fact, the majority published its findings more than two months ago. In that report, the majority said that "[g]overnment law enforcement officials purposefully ignored significant exculpatory information," that if aspects of investigation were not brought to attention of Ms. Reno, then serving as State Attorney, it "almost certainly indicates that her subordinates were involved in improper activities," that "government officials were not acting in good faith," and that the State Attorney's office "appears to be engaged in an ongoing effort to withhold significant information from Congress."

These inflammatory conclusions were reached before the majority interviewed a single prosecutor involved in Mr. Gersten's case. They were reached before holding a single hearing to gather facts. And they were published as "Committee findings" before giving Committee members an opportunity to deliberate and vote on the report.

When it comes to Janet Reno, this Committee's approach seems to be: Shoot first, ask questions later.

There are anomalies apparent in the files of Mr. Gersten's case which the majority recites at length in its staff report and which will be the focus of this hearing today. These include inconsistencies in witness accounts, false information given by unreliable informants, and strange coincidences involving a particular police officer. These could have been the basis for Mr. Gersten's defense if the State Attorney had chosen to prosecute him. Mr. Gersten, however, was never charged with a crime. He left the country before the process ever reached that stage, and the State Attorney had no obligation to provide him or his attorneys exculpatory information.

It is entirely possible that the State Attorney's office would have declined prosecution after exhausting all of its leads and attempting to resolve conflicting information. It is also possible that it would have proceeded with the prosecution, but because of conflicting testimony of witnesses and other problems in the case, Mr. Gersten would have been acquitted of all charges. We will never know what would have happened because Mr. Gersten refused to cooperate with the criminal investigation, even under a grant of immunity, and defied a court order that directed him to testify. Instead, he chose to flee the country and reside in Australia.

The Supreme Court of Florida concluded that Mr. Gersten's "refusal to comply with the court order directly interfered with the State Attorney's criminal investigation." More recently, another Florida court concluded that Mr. Gersten is a fugitive from justice and not entitled to any judicial relief.

Earlier this year, when the Committee conducted a highly publicized investigation of the presidential pardon of fugitive financier Marc Rich, Mr. Burton railed against President Clinton's pardon of Mr. Rich because he felt Mr. Rich "fled the country to avoid prosecution." Most of the Committee members -- Republican and Democrat -- took a dim view of Mr. Rich's case precisely because he decided to resolve his problems by avoiding prosecution. But when it comes to Mr. Gersten, Chairman Burton and others are apparently taking a much kinder view of a fugitive who avoids prosecution by fleeing the country.

There are, of course, differences between Mr. Gersten's case and Mr. Rich's, but there are also striking similarities. Like Marc Rich, Mr. Gersten refused to submit to the criminal justice system and instead chose to seek relief from outside the United States.

But this time -- possibly because Ms. Reno is involved -- the Committee has reversed itself. It now apparently thinks it is acceptable for the target of a criminal investigation to leave the country rather than face our justice system.

If Mr. Gersten is concerned about anomalies in the case file, his recourse is to return to Florida, comply with the court order directing him to testify, and face any charges leveled against him. If he then believes he has been wronged by the State of Florida, he can avail himself of the civil justice system.

If the Committee wants to highlight the problem of overzealous prosecutions, there are countless cases worthy of examination, cases where innocent victims were convicted of capital crimes and even sentenced to death. If the Committee wants to investigate issues involving the state of Florida, we should look at voting irregularities in the 2000 election. We should never be indifferent to any evidence of misconduct by prosecutors, but I simply don't understand how the obscure case of Joseph Gersten merits an exhaustive investigation by this Committee.

Mr. SHAYS. I thank my colleague. We will now recognize our panel and I will swear them in and we will begin questions.

We have Richard Gregorie, assistant U.S. attorney and former assistant State attorney, Miami-Dade County; Michael Band, former assistant State attorney, Miami-Dade County; Mary Cagle, assistant State attorney, Miami-Dade County; and Michael Osborn, retired Miami homicide detective. I would invite you to stand and we'll swear you in. Raise your right hands, please.

[Witnesses sworn.]

Mr. SHAYS. Note for the record that all of our witnesses have responded in the affirmative. I'm going to ask all of you to read your statements in full and then we will proceed with questions.

We'll start with you Mr. Gregorie.

STATEMENTS OF RICHARD GREGORIE, ASSISTANT U.S. ATTORNEY AND FORMER ASSISTANT STATE ATTORNEY, MIAMI-DADE COUNTY; MICHAEL BAND, FORMER ASSISTANT STATE ATTORNEY, MIAMI-DADE COUNTY; MARY CAGLE, ASSISTANT STATE ATTORNEY, MIAMI-DADE COUNTY; AND MIKE OSBORN, RETIRED MIAMI HOMICIDE DETECTIVE

Mr. GREGORIE. Thank you, Mr. Chairman, members of the committee. Thank you for having me here this morning. This is my 30th anniversary of my graduation from Georgetown Law School, and 26 of the following years after that, and little more than that actually, I have spent prosecuting cases in the Federal district and in the State court in Florida, and this is the first time in that entire career anybody has ever questioned my discretion in deciding not to prosecute someone. I'm glad to be here to explain what happened in that case and why I decided not to prosecute.

Mr. Gersten was a well-known public figure in Miami. He calls the city manager of the city of Coral Gables on the night of April 29th, not the police department but the city manager, and asks for a policeman to come over, and says his car was stolen from in front of his driveway. He also says some of the materials that were in it were his personal belongings and they were taken as well. There's no glass on the driveway, there's no indication the car was broken into.

The next day, a local policeman, who unfortunately is now dead, Mr. J.L. Garcia, Mr. Garcia informs the police through an informant that there are some prostitutes and a pimp riding around in a blue Mercedes Benz and he decides to stop that car. He does.

I'm about to tell you something now which I probably will repeat throughout this proceeding. That is, that in the car the police officers found not only two prostitutes and a pimp, but also Mr. Gersten's personal belongings, his briefcase, which contained in it important legal papers as well as the photos of a naked man. They also found his gun, which Mr. Gersten carried with him. They also found a number of other personal belongings. The prostitute indicated that they had taken Mr. Gersten's wallet and his credit cards. The police were then asked to survey the area and they were told that the prostitutes had told him they had taken Mr. Gersten's gold chain off his neck. They found that at a pawnshop. And they said they had taken brand-new clothes that Mr. Gersten had just

bought, and they found those at a tailor shop, which they had pawned. Why is this so significant?

This is significant because in the report that I've read for this committee, it indicates they believe there was a frame-up. It would be impossible for there to be a frame-up and the prostitutes and pimp to have these goods. The only way that could have happened was if these prostitutes were in Mr. Gersten's neighborhood, assuming Mr. Gersten was telling the truth, one of the most wealthy residential neighborhoods of all of Miami, and, Mr. Chairman, you had to see these witnesses.

And I have to tell you the allegation is that they were having crack and Mr. Gersten was using the services of a prostitute, so the only witnesses to be available would be prostitutes and crack addicts. They were exactly that. For these people to be walking in Mr. Gersten's neighborhood of Coral Gables is almost laughable, and for them to have had access to Mr. Gersten's car, his keys, his wallet, his briefcase, the naked pictures in the briefcase, Mr. Gersten's clothes which we recovered, is almost impossible.

Because these witnesses were so bad, I took it upon myself to find corroboration for what they were saying. That's why we subpoenaed the grocery store records of his fiancee. We had to establish the time period. We know from the Peter Kent clothing store records, that Mr. Gersten was at the clothing store at 6:30. In order for him to have driven home, it would have taken him at that time of night at least 40 minutes, so he couldn't have gotten there until after 7 o'clock. By 8 o'clock his housekeeper had arrived. When she arrived, Mr. Gersten's car nor any sign of Mr. Gersten was in the house.

So he had arrived shortly after 7 and his car was stolen and he was hiding upstairs, or he hadn't come home yet. The housekeeper was there from 8 until 9, when she went shopping with Mr. Gersten's fiancee. Mr. Gersten was nowhere in sight, nor was his car. So that means, then, if his car came home after that, came after 9, that he didn't get home and report the car stolen until 10. So there's a 2-hour period, if Mr. Gersten was telling the truth, when his car could have gotten there and the prostitutes and the pimp could have meandered down the most exclusive area of Coral Gables to steal his car with all his goods in it. He would have had to leave his keys, his wallet, his briefcase, the naked pictures, the clothes, his gun, his commissioner's badge all in his car for somebody to steal, rather than taking them into the house.

I tell juries when I argue to them that they should use their common sense, not leave it at home. Common sense will tell you this doesn't make any sense. Mr. Gersten's story didn't make any sense. And it also told me that this couldn't be a frame-up. There is no way that anybody could have known that Mr. Gersten was going to be there that evening, because he had two appointments. He was supposed to be at a chief of police dinner and he was supposed to be at another function. He didn't show up at either. He was not there. His fiancee Carla wanted him to go to his interior decorator, he said he couldn't go. So no one knew where he was that evening. To this day we don't know. And when Mr. Band attempted to ask him those questions he refused to answer, and it's the reason why he's now a fugitive.

Congressman, I don't know what to tell you because when I walked in here it was the first time in my life I've ever met Detective Osborn. He introduced himself to me. I have never talked to him before. I have been asked about a report he wrote. I don't ever remember having seen that report. Now, it's almost a decade ago and I have probably seen thousands of police reports and agent reports over that period of time, but that report wouldn't have been significant to me because I already knew that Lisa McCann—the prostitutes were—exactly what they did for a living, they sell their bodies. They were prostitutes.

Their stories were not significant because they didn't have a hold of time, they didn't have a hold of anything except the facts. And the only reason that I followed up and investigated this case was because they had Mr. Gersten's briefcase, his gun, his badge, his clothes, his gold necklace off his neck. They could not have gotten those without Mr. Gersten having been where they said he was and them having robbed him, as we believed they did.

I'm glad I investigated it. I used my prosecutorial discretion and decided not to prosecute it because of the character of those witnesses. We did everything according to the law, and in the end Mr. Gersten was given immunity. He couldn't have been prosecuted for what he said, and despite that and despite a court order, he refused to testify; and on top of that, he has litigated this in every court he could possibly have gone to. Some of the finest judges in our State and Federal system have said that we handled this case properly, that he should have answered the questions and that he must come in and answer those questions, and he refused to do so and he fled.

Flight, Mr. Chairman and members of the committee, is a sign of guilt. That presumption is given in instructions to juries all the time.

I suggest to you that Mr. Salvati is a much different story. He was here to testify before this committee. He didn't flee. Mr. Gersten is in Australia, asking for you to find us as abusing our prosecutorial authority when all we did was not prosecute him. Thank you, Mr. Chairman.

Mr. SHAYS. Thank you, Mr. Gregorie.

[The prepared statement of Mr. Gregorie follows:]

PREPARED STATEMENT
OF
RICHARD D. GREGORIE

Mr. Chairman and members of the Committee on Government Reform;

I joined the Organized Crime and Racketeering section of the United States Department of Justice in 1972. I served as a trial attorney in Federal Strike Force offices in Washington, D.C., New Jersey, Massachusetts, Rhode Island, and Connecticut until August of 1982. I served as Chief of the Connecticut Organized Crime Field Office from December of 1979, until August 1982. From August of 1982, until January 1989, I served as Chief of Narcotics, Chief of the Criminal Division and Chief Assistant United States Attorney in the United States Attorney's Office for the Southern District of Florida. In February of 1989, I became a partner in the law firm of Wicker Smith until July of 1991, when I became an Assistant State Attorney for the Eleventh Judicial Circuit of the State of Florida. I served in the Organized Crime and Public Corruption Unit of that Office until March of 1994. It was as an Assistant State Attorney that I worked on the Joseph Gersten investigation which is the subject of my testimony. In March of 1994, I rejoined the United States Attorney's Office for the Southern District of Florida where I currently serve as a Senior Litigation counsel. Although, I am currently an Assistant United States Attorney, my testimony in this matter relates solely to events which occurred in 1992 and 1993, when I was in the State Attorney's Office. The facts referred to in this statement came from my work as a State Attorney and files which are now a public record in the State of Florida.

On April 10, 2001, I received a telephone call at my desk from a Miami Herald reporter who summarized for me the Staff Report of this Committee dated April 10, 2001, entitled "The Joseph Gersten Case: A Study of the Abuse of Government Power." (hereinafter "the Report"). My

reaction, as a former Assistant State Attorney who had played a major role in the investigation of Joseph Gersten, was visceral and immediate. I was quoted the next day saying that the report was "Hogwash." I now thank you for the opportunity to provide this committee with a more complete and more erudite recitation of the facts and law. I hope that my prosecutorial experience and first hand knowledge of the Gersten investigation will assist the committee in properly assessing Joseph Gersten and the problems he has brought on himself.

CURRENT STATUS OF JOSEPH GERSTEN

Joseph Gersten is a fugitive. On October 4, 1993, Dade County Circuit Judge Joel Brown issued a Writ of Bodily Attachment for Joseph Gersten. That Writ is still in effect. On September 29, 2000, Maria del Carmen Calzon, an attorney for Joseph Gersten, filed a Motion to Quash Writ of Bodily Attachment and Relief from Order of Contempt of March 15, 1993, on behalf of Joseph Gersten. On October 24, 2000, Judge Victoria Sigler denied that motion. Attached hereto as Exhibit A is a copy of Judge Sigler's order. The Circuit Court of the Eleventh Judicial Circuit in and for Miami Dade County ruled as follows:

> It is the finding of this court that the defendant is a fugitive from an order of this court and thus the "fugitive from justice" doctrine applies. Both United States and the Florida Supreme Court have long held that courts may dismiss the appeals of criminal defendants who flee the jurisdiction while their appeals are pending and otherwise not allow fugitive defendant's to pursue legal matters in court while they are fugitives from justice.
>
> This court finds that a "fugitive from justice is not entitled to call upon the resources of court for determination of his case." It offends this court's basic sense of equity and fair play for the defendant to now ask this court to hear his cause, while still a fugitive. Or to quote another learned colleague, "a fugitive from justice cannot eat his cake and have it too." To grant the petitioner motion at this time would in essence allow him to benefit from the wrongful act of fleeing the jurisdiction of this court, which is contrary to public policy. The proper course for this court would be to hold the matter in abeyance.

It is of constitutional and practical concern that a fugitive from justice can circumvent the rule of law which denies him the benefits of the Judicial branch of government, as long as he flaunts the law and remains a fugitive, by going to the Legislative branch of government and being given a forum to argue his case unopposed. (See Ortega-Rodriguez v. United States, 507 U.S. 234, 239 (1993); Estelle v. Dorrough, 420 U.S. 534, 537 (1975); Molinaro v. New Jersey, 396 U.S. 365, 366 (1970); Smith v. United States, 94 U.S. 97 (1876).

In reading "the report" it should be noted that not one prosecutor in the State Attorney's Office, not one investigator in the State Attorney's Office and not one first hand witness to any of issues raised in the report was interviewed or questioned by this committee before "the report" was written. This report consists of Joseph Gersten's selective presentation of materials through his representatives while Joseph Gersten remains a fugitive in Australia.

Joseph Gersten, however, has not been denied the benefits our Judicial Branch of Government. He had a full and complete hearing before almost every level of State and Federal Court. The arguments he now attempts to make to this committee without opposition were made in court, and the courts have ruled against Joseph Gersten. The report of this committee contains no reference to any of the Judicial rulings in this matter. I have attached hereto and made part hereof as Exhibit B the opinion of Judge Lawrence King of the United States District Court for the Southern District of Florida in Joseph Gersten v. Katherine Fernandez Rundle, 833 F.Supp. 906 (S.D. Fla., 1993). Judge King dismissed Joseph Gersten's Civil Rights Suit and Request for Federal Injunctive Relief. The United States Court of Appeals for the Eleventh Circuit affirmed Judge King's ruling in an unpublished Opinion at 56 F.3d 1389 (11th Cir. 1995). The United States Supreme Court then

denied certiorari at 516 U.S. 1118 (1996).

Joseph Gersten exercised every legal challenge he could raise in every court where he could raise those challenges and has been denied relief by all courts, State and Federal. Furthermore, Joseph Gersten defrauded the court. Dade County Circuit Judge Amy Dean held him in civil contempt on March 18, 1993, for his failure to comply with the Court's order. Joseph Gersten was held in jail until he answered the questions ordered by the Court. Joseph Gersten then requested and was granted a stay of his order of contempt. He was allowed out of jail pending resolution of his appeal. When the decision in his last appeal was filed, he did not report to Court to answer questions or to jail as ordered by the Court, but instead fled from the United States. On October 4, 1993, Judge Joel Brown issued a Writ of Bodily Attachment for Joseph Gersten. His attorney has twice come to court to have the Writ quashed, and the Court has refused. Joseph Gersten remains a fugitive. He was then suspended from the Florida Bar. Through his attorneys, Gersten challenged his suspension from the Florida Bar. The Florida Supreme Court in The Florida Bar v. Joseph M. Gersten, 707 So.2d 711 (1998) upheld the Florida Bar's decision to suspend him. A copy of the Florida Supreme Court decision is attached as Exhibit C.

It should be noted that Joseph Gersten did not remain quietly in hiding while the Court demanded his presence, but rather gave television and newspaper interviews and sent video tapes of statements from Foreign Jurisdictions. In short, he flaunted the fact that he was ignoring the Florida Court's lawful order and he continues to flaunt his contempt of court.

In order to understand the investigation of Joseph Gersten, a knowledge of Florida Law and procedure, a knowledge of the local South Florida neighborhoods and a recitation of facts is necessary. "The Report" claims that there was an abuse of Government Power. However, it does

not specifically say what person or persons or what agency or agencies abused their government power or how, specifically, they abused it. Joseph Gersten was never charged by any agency with a criminal offense. The Dade County Circuit Court held him in contempt for failure to obey a Court Order. The Florida Supreme Court has upheld his suspension from the Florida Bar. The following facts and law should assist the committee in evaluating all of the actions of the State of Florida Agencies and Agents in the matter of Joseph Gersten.

THE FACTS

On April 29, 1992, slightly more than nine years ago, Joseph Gersten, a Commissioner for Dade County, Florida, reported to the City Manager for the City of Coral Gables that his car had been stolen. The city manager then called the police, who sent a policeman to take a report from Joseph Gersten. Joseph Gersten reported to the Coral Gables Police that his blue Mercedes Benz automobile had been stolen, while parked in front of his driveway at 1017 Hardee Road in Coral Gables. The report was made shortly after ten o'clock p.m. on April 29, 1992. With Joseph Gersten, at the time of the report, was William Richey, a Miami attorney, who specialized in commercial fraud litigation and white collar criminal defense and an unidentified female.

In the early afternoon of April 30, 1992, the City of Miami police arrested three people driving in Joseph Gersten's blue Mercedes Benz automobile. They were a prostitute named Claudia Lira, her pimp named Kenneth Elswick and another prostitute, named Debra Facia. Debra Facia had informed the police, prior to the arrest, that Lira and Elswick had been joy riding in a fancy stolen automobile. The police then stopped the blue Mercedes Benz and arrested Lira and Elswick. Lira and Elswick admitted that they had obtained the car from a man meeting Joseph Gersten's description. That man had been having sex and smoking dope with Lisa McCann, one of Lira's

fellow prostitutes, at a small cottage located at 471 N.E. 31st Street, Miami.

As a result of the admissions of Lira and Elswick, sworn statements were taken from five witnesses who had direct contact with Joseph Gersten in the early evening of April 29, 1992. Those five witnesses were Mark Klinger, Claudia Lira, Kenneth Elswick, Lisa McCann a/k/a Tracey Sheehan and Robert Maldonado. Phone records and other documents were also obtained which resulted in an investigative chronology of events which is attached hereto and made part hereof as Exhibit D.

Mark Klinger is the owner of Peter Kent Clothing Store. Klinger sold clothing to Joseph Gersten on the night of April 29, 1992. Lisa McCann and Kenneth Elswick stole Gersten's clothes from his car and took police to the location where they pawned the clothes. The police recovered the clothing still in the Peter Kent clothing bag. Mark Klinger stated that Gersten left the Peter Kent store, which was located at 560 NW 27th Street, about the time Klinger was closing his store. Alarm records show that the alarm was set for the night at 6:27 p.m. The Peter Kent Clothing store is about thirteen blocks from the crack house where Lisa McCann says she took Gersten for sex and drugs. Attached hereto and made part hereof as Exhibit E is a computer street map showing the location of Peter Kent Clothing store, marked ①, and the crack house where Lisa McCann testified she took Joseph Gersten, marked ②. Also, part of Exhibit E is a second street map showing the route from the crack house marked ① to Joseph Gersten's Hardee Road neighborhood marked ②. Travel from Biscayne Boulevard, in Miami, to Hardee Road in 6:30 p.m. traffic would take 30 to 40 minutes. Travel on the same route at 9:30 p.m. would take 20 minutes.

Joe Gersten's schedule called for him to be at two functions on April 29, 1992. He was supposed to attend the Dade County Company of the Year Dinner from 5:30 p.m. to 7:30 p.m. and

the Dade County Chiefs of Police Dinner from 6:45 p.m. to 10:00 p.m. He attended neither function. Joe Gersten had a telephone conversation with his fiancé, Rosario Kennedy, between 6:04 p.m. and approximately 6:17 p.m. while he was outside the Peter Kent Clothing store. Gersten told Kennedy that he could not go with her to their interior decorator that evening.

Lisa McCann and Claudia Lira were prostitutes and crack addicts. Kenneth Elswick was a pimp and a street hustler. Robert Maldonado was a convicted criminal in violation of his New York parole. All of them used crack cocaine, which was readily available on Biscayne Boulevard. The credibility of these witnesses was severely damaged by their drug use, their criminal records, and their character. On the other hand, if Joseph Gersten was having sex with a prostitute in a crack house, the witnesses would be prostitutes and crack addicts. More importantly, however, these witnesses were corroborated by the fact that they had the keys to Joe Gersten's car, Joe Gersten's wallet and credit cards, Joe Gersten's gun, Joe Gersten's newly purchased clothing, Joe Gersten's gold necklace and Joe Gersten's briefcase which contained an assortment of legal papers and pornographic photographs of a naked young man. The witnesses took police to various pawn shops and businesses where they had pawned some of the stolen items. The police then recovered Joseph Gersten's personal property. If Joe Gersten's police report was accurate, then Claudia Lira, Lisa McCann and Kenneth Elswick would have to have been walking the streets of one of the most exclusive residential neighborhoods in South Florida, the French Village section of Coral Gables, miles from Biscayne Boulevard, between 7:00 p.m. and 10:00 p.m. At that same time, Joseph Gersten would have had to park his Blue Mercedes Benz in front of his driveway with the keys in the car, his new clothes, his briefcase with sensitive papers and pornographic photos, his gold chain, his gun and his wallet all sitting inside waiting to be stolen. No windows or locks were broken on

the car and the Coral Gables police found no broken glass in the front of the driveway. Investigators and prosecutors personally interviewed these four witnesses, observed their physical appearance and condition and physically walked through Biscayne Boulevard and the French Village area of Coral Gables in search of evidence. Common sense dictated that Lira, McCann, Elswick and Maldonado had not been walking through an exclusive non-commercial neighborhood in Coral Gables, miles from their sources of crack cocaine and customers for prostitution, between 6:30 p.m. to 10:00 p.m. on April 29, 1992. Moreover, it was very unlikely that Joe Gersten had left his just purchased new clothes, his gold necklace, his gun, sensitive papers and pornographic photos in his car with his keys in the ignition outside of his gated driveway just as the four prostitutes and street hustlers walked through Hardee Road in Coral Gables.

Additionally, Joe Gersten's housekeeper arrived at Gersten's home shortly after 8:00 p.m. and no one was home. Gersten's car was not parked in front of the driveway. Joe Gersten's fiancé left Gersten's house to go to her interior decorator about 7:00 p.m. The housekeeper and the fiancé met at Gersten's house to go shopping at about 9:00 p.m. This means that Gersten would have had to leave the Peter Kent Clothing store by 6:30 p.m., and arrive home after his fiancé had left at 7:00 p.m. He then had to go inside without his car keys and belongings and remain out of sight of the housekeeper until she left to go shopping. His car would have to have been stolen before the housekeeper arrived, shortly after 8:00 p.m. The only other possibility, in keeping with Gersten's police report, was that Joe Gersten arrived home after 9:00 p.m., while the housekeeper and fiancé were shopping, and the car was stolen with the keys and belongings in it before 10:00 p.m.

Finally, a cab driver was located who testified that he had picked up Joe Gersten on Biscayne Boulevard at approximately 9:40 p.m. on April 29, 1992. He testified that he took Gersten to

Hardee Road in Coral Gables that evening. This is about a twenty minute ride at that time of night.

On the day after Joseph Gersten's car was recovered, May 1, 1992, Joe Gersten and his fiancé flew to Europe with a wealthy Miami businessman who was a member of the Dade County Public Hospital Trust and who paid all of Gersten's expenses for the trip. After the investigation uncovered how Gersten's expenses were paid, Gersten reimbursed the businessman. During the next three weeks, Joseph Gersten stayed in Europe and was not available to provide any information about this incident. On June 1, 1992, I offered Joe Gersten the opportunity to come to the State Attorney's Office and provide a complete statement explaining what had happened on that evening. Joseph Gersten, through his attorney, refused to provide a statement. A copy of my letter dated June 1, 1992, is attached hereto and made a part hereof as Exhibit E.

SEPARATION OF POWERS AND JURISDICTION

The Constitution of the State of Florida provides that the State Attorney in each Judicial Circuit has responsibility to investigate and prosecute violations of the criminal laws of the State of Florida. (See Florida Constitution, Art. I § 15 and Art. V § 17.) In so doing, the State Attorney for each Judicial District acts as a one person Grand Jury. (See Wyche v. State, 536 So. 2nd 272, 274 (Fla. 3rd DCA, 1989) and Widener v. Croft, 184 So. 2d 444, 445 (Fla. 4th DCA, 1966). United States' Courts recognize that a prosecutor has broad discretion to initiate and conduct criminal prosecutions. This recognition arises primarily out of regard for the separation of powers. (See United States v. Armstrong, 517 U.S. 456, 464 (1996) citing U.S. Constitution, Art. II § 3 and 28 United States Code, §§ 516 and 547). A prosecutor has far reaching authority to decide whether to investigate a crime (See United States v. Derrick, 163 F.3d 799, 824-825 (4th Cir. 1998); grant immunity (United States v. Flemmi, 225 F.3d 78, 87 (1st Cir., 2000); or plea bargain (United States

v. Laurence, 179 F.3d 343, 348 (5th Cir. 1999)). The investigation of Joseph Gersten for soliciting prostitution, possession of cocaine and filing a false police report was solely a State of Florida investigation. Because the FBI had an unrelated investigation of Joseph Gersten and because the State of Florida Investigation involved a public official with authority over the County Police Department, the FBI was asked to assist the local police and took part in some interviews.

The State Attorney for Dade County Florida, Florida's Eleventh Judicial Circuit, is duty bound to the Citizens of Dade County to investigate violations of state law. The Citizen's of Dade County, for the past two decades, have been especially concerned about violations of law involving public officials. It was, therefore, totally appropriate and lawful for the State Attorney's Office of Dade County to investigate allegations that Joseph Gersten filed a false police report, solicited prostitutes, purchased crack cocaine and was in possession of pornographic photos of a male who possibly was a Dade County employee. The State Attorney in the State of Florida, like a United States Attorney in the Federal System, has great discretion, as part of the executive branch of government, in deciding what cases to investigate and deciding whether or not to bring charges. The United States Supreme Court in Wayte v. United States, 470 U.S. 598, 607-608 (1985) held most clearly that judicial supervision of prosecutorial decisions would potentially hamper law enforcement. The committee on Government Reform should ask whether legislative supervision of prosecutorial decisions are any more appropriate than Judicial supervision based on our constitutional separation of powers? In Wayte v. United States, supra, the Supreme Court held as follows regarding a prosecutor's broad prosecutorial discretion:

> This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities,

> and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

The investigation and prosecution of crime clearly falls under the executive branch of government. The investigation of Joseph Gersten for violation of State of Florida law by State of Florida prosecutors clearly falls within the executive branch of Florida State Government. "The Report" does not explain what legal or constitutional authority the Congressional Committee on Government Reform has over a Florida State Attorney's decision to investigate violations of Florida State law.

ISSUES IN THE INVESTIGATION

Under Florida law (Fla. Stat. 914.04) a witness testifying pursuant to a subpoena is automatically granted use immunity. Therefore, when a prosecutor in the State of Florida subpoenas any witness in an investigation in order to obtain sworn testimony, that witness is, by statute, granted use and derivative use immunity. As part of the investigation of Joseph Gersten it was determined that complete statements under oath should be taken from Lira, McCann, Elswick and Maldonado. However, because they were targets of an investigation which included theft of Joseph Gersten's car, armed robbery of Joseph Gersten, possession of cocaine, possession and sale of Joseph Gersten's personal belongings, each of these witnesses were entitled to the advice of counsel who insisted that they be subpoenaed, and thereby be granted immunity, before they would testify. Therefore, the State Attorney's office created what is referred to in case law as, a "Chinese

Wall". This procedure allowed the prosecutors and investigators, in the Gersten investigation, to use the immunized testimony of Lira, McCann, Elswick and Maldonado to investigate Joseph Gersten while keeping that immunized testimony walled off from the police and prosecutors who were prosecuting Lira, McCann, Elswick and Maldonado. In Kastigar v. United States, 406 U.S. 441 (1972), the United States Supreme Court held that it is permissible to prosecute a witness who has been given immunity, but the prosecution may not use the immunized testimony in any respect to further the prosecution. Thus, when a defendant has been previously immunized, the government carries the burden of demonstrating that it has not used the immunized statements in any way. (See United States v. Schmidgall, 25 F.3d 1523 (11th Cir. 1994)). The prosecution must be able to show that each piece of evidence it introduces, in the prosecution of the immunized parties, was obtained independently of the immunized testimony. United States v. Hampton, 775 F.2d 1479 (11th Cir. 1985). The "Chinese Wall", as used in this case, has been recommended by the United States Department of Justice and different courts around the United States in order to insure that immunized testimony is not used in a prosecution of an immunized party. (See United States v. Crowson, 828 F.2d 1427, 1429 (9th Cir. 1987); United States v. Harris, 973 F.2d 333, 337 (4th Cir. 1992); United States v. Schwimmer, 882 F.2d 22, 26 (2nd Cir. 1989), United States v. Lacey, 86 F.3d 956, 972 (10th Cir. 1996)). The "Chinese Wall" was also cited in Judge King's decision in Joseph Gersten v. Katherine Fernandez Rundle, 833 F.Supp. 906 at 908 (S.D. Fla. 1993), which is attached as Exhibit B.

The State Attorney's Office interviewed and took statements from numerous witnesses besides the five who had personal contact with Gersten on April 29, 1992. Several witnesses claimed to have had sex or used crack cocaine with Joseph Gersten on Biscayne Boulevard in the

past. None of these witnesses, however, contributed any information as to the whereabouts of Joseph Gersten between 6:30 p.m. and 10:00 p.m. on April 29, 1992, and therefore were not relied on. Other witnesses provided evidence which did not seem credible and also were not relied on. Witnesses were also asked if they could identify the man in the pornographic photo, from Gersten's briefcase, as it was thought he might be a Dade County employee and therefore could have been a victim of extortion. To my knowledge, no evidence was uncovered which positively identified the young man in the pornographic photos found in Gersten's briefcase.

Kenneth Elswick attempted to extort Joseph Gersten after the investigation began. Gersten's attorney brought the extortion attempt to State Attorney investigators, who surreptitiously tape recorded Elswick's extortion attempt and arrested Elswick. Elswick wanted $10,000, to change his story and testify that Gersten was not in the crack house on April 29, 1992. Although Elswick clearly was attempting to extort Gersten in the surreptitiously tape recorded conversation, it was also clear that Elswick was stating that Gersten was definitely in the crack house on April 29, 1992. Elswick was jailed and convicted on an unrelated charge. He was sentenced to eight years in prison.

By the end of 1992, the investigation of the events of April 29, 1992, was essentially complete. The investigation remained open as investigators searched for the owner of a burgundy Porsche who was seen talking to Joseph Gersten on Biscayne Boulevard at a gas station just prior to Gersten going to the crack house. The owner or driver of that Porsche was never identified. Investigators were also trying to identify the individual in the pornographic photo.

On other side of the "Chinese Wall", prosecutors decided to go forward with the prosecution of the car thieves. Joseph Gersten was an essential witness in any prosecution of the thieves as they claimed that Gersten willingly let them have his car. The owner of the stolen property, Joseph

Gersten, had to testify that he did not give permission for his property to be taken or used in order for a successful prosecution to go forward. Joseph Gersten would be cross-examined by defense attorneys for the thieves, first, in a deposition on discovery under Florida State law, and then, again, at trial. The State had to know where Joseph Gersten was between 6:30 p.m. and 10:00 p.m. on April 29, 1992, and what he was doing at that time in order to fairly and successfully prosecute that case. Joseph Gersten was subpoenaed to testify and refused to answer relevant questions. As with all witnesses subpoenaed under state law, he was automatically granted use and derivative use immunity. A hearing was held before Judge Amy Dean of the Eleventh Judicial Circuit of the State of Florida on January 14, 1993. Joseph Gersten steadfastly refused to answer relevant questions. He was, therefore, held in direct civil contempt and to this day has not answered questions concerning his whereabouts on April 29, 1992. Joseph Gersten argued that prosecutors would not believe him and that if he testified he would be prosecuted for perjury. However, Joseph Gersten never gave a statement concerning his actions between 6:30 p.m. and 10:00 p.m. on April 29, 1992 and no one, to this day, knows what he would say. Joseph Gersten could not be prosecuted for perjury unless he made a sworn statement under oath, which could be proven to be false. Moreover, in a case directly on point, In re: Grand Jury Proceedings, Kopkowski, 819 F.2d 981, 983, the United States Court of Appeals for the 11th Circuit, referring to a similar decision in the First Circuit Court of Appeals, In Re Poutre, 602 F.2d 1004 (1st Cir. 1979); ruled as follows:

> The witness contended that it was fundamentally unfair to subject him to the possibility of a perjury charge by forcing him to relate his version of the events in question when that version previously had been adjudged to be false. The court there recognized, however, that adoption of such a claim "would frustrate completely the investigative function of the grand jury and would involve the court in the wholly inappropriate and virtually impossible task of probing the witness's veracity and sincerity before he has testified." Id. at 1005. Here, similarly, adoption of

> Kopkowski's argument either would require the court to make this unfeasible determination of veracity, or it would provide practically all potential grand jury witnesses with a foolproof escape from testifying simply by claiming that the grand jury or a prosecutor might disagree with their version of the truth.

It must be remembered that under Florida law an Assistant State Attorney investigating violations of Florida law acts as a one person Grand Jury.

Joseph Gersten was never charged with any criminal offense and therefore was not a defendant. A defendant, in a criminal case, has no constitutional right to discovery. However, Federal and State Courts have provided rules which require disclosure of certain types of evidence in order to protect a defendant's due process rights when a defendant has been charged with a crime. (See Weatherford v. Bursey, 429 U.S. 545, 559 (1977)). Prosecutors must disclose exculpatory evidence that is material to guilt or punishment of an accused. (See Brady v. Maryland, 373 U.S. 83, 87 (1963)) and Gigilio v. United States, 405 U.S. 150 1972)). None of these rules apply to Joseph Gersten, as he has not been accused of any criminal offense. He is not a defendant, but rather a civil contemnor who violated a direct order of a court. The State Attorney's Office, therefore, had no legal or ethical duty to provide any material to Joseph Gersten or his attorneys because Joseph Gersten was never charged with a criminal offense.

CONCLUSION

In short "The Report" was written about a State of Florida investigation of a public official, Joseph Gersten, which took place nine years ago. No criminal charges were ever brought against Joseph Gersten, but rather he was subpoenaed under Florida law which granted him use and derivative use immunity for his testimony. Joseph Gersten refused to answer relevant questions despite a direct court order and was therefore held in contempt of a Florida State Court. Joseph

Gersten was released from incarceration while he appealed the Court's order of contempt. Joseph Gersten appealed through the highest levels of State and Federal Courts and when all of the Courts ruled against him, he fled to Australia rather than answer questions about his whereabouts on April 29, 1992. As a result of being in contempt of a direct court order, the Florida Bar suspended Joseph Gersten and the Florida Supreme Court upheld that suspension. No Florida law enforcement agency nor any Federal agency abused its authority because Joseph Gersten was not charged with any crime or incarcerated for any criminal offense. If the committee on Government Reform has jurisdiction over a State of Florida investigation, which resulted in no criminal charges, and if the committee on Government Reform chooses to give a forum to a fugitive from a civil contempt order of the Florida State Courts, then the committee must recognize that Joseph Gersten's car, wallet, credit cards, gun, legal papers, gold chain and pornographic photos were found in the possession of four crack addicts and street hustlers on Biscayne Boulevard. The truth about how these crack addicts, prostitutes and street hustlers came into possession of Gersten's belongings could only come from them and/or Joseph Gersten. The four witnesses, despite their numerous other legal problems, provided sworn statements of their version of events. State investigators and prosecutors located numerous documents and other witnesses relating to the events of April 29, 1992. Only Joseph Gersten has refused to answer questions concerning the events of that evening. In fact, he fled the country in order to avoid those questions.

In twenty-six years prosecuting cases in six different Federal Districts and in the Eleventh Judicial Circuit for the State of Florida, I have always sought to pursue the truth on behalf of the people of the United States and the people of the State of Florida. I have never abused the awesome authority granted to me as a prosecutor. Everything I did, with regards to the investigation of Joseph

Gersten, was done in accordance with the laws and procedures in the State of Florida and the United States. All of the Assistant State Attorneys who acted in the Gersten case did so honestly, ethically and in the best interest of the people of the State of Florida.

N:\ccampos\gregorie\pstmnt
05/25/01

IN THE CIRCUIT COURT IN THE
11TH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

JOSEPH M. GERSTEN,

Defendant.

CASE NO.: 92-25309
JUDGE: Victoria S. Sigler

FILED
OCT 24 2000
CLERK

ORDER

THIS CAUSE came on to be heard on Defendant's Motion to Quash Writ of Bodily Attachment and after hearing argument of counsel, reviewing the court file and being otherwise fully advised in the premises the court makes the following findings:

1. The facts giving rise to the cause against the petitioner, Joseph M. Gersten, began around April 1992, when the Petitioner called the police and reported the theft of his Mercedes Benz.

2. Law enforcement officers arrested some subjects driving the automobile in question and an investigation into the theft of the car began. Mr. Gersten was subpoenaed to appear as a witness "for a pre-filing statement to assist the Office of the State Attorney in its investigation of an alleged grand theft of his Mercedes Benz."

3. The Petitioner refused to appear pursuant to a duly served subpoena and answer questions and raised "Constitutional" privileges.

4. This litigation resulted in Judge Amy Dean issuing an Order of Civil Contempt, requiring the incarceration of the Petitioner until he answered all questions ordered by the court.

5. This order was appealed. The petitioner's appeal was lost. On October 4, 1993, Judge Joel M. Brown issued a Writ of Bodily Attachment against the Petitioner pursuant to Judge Dean's Order of Contempt.

Exhibit A

6. During the time frame of the appeal, the Petitioner fled the jurisdiction of the court and left the State of Florida. If recent television shows are accurate, then the Petitioner currently resides in Australia. His attorney represents that he has achieved some type of "political persecution" status in that country.

7. The Office of the State Attorney, published a statement in July 2000 that the statute of limitations on prosecution in the grand theft case in which the Petitioner was ordered to testify has run. This court is not in a position to rule on whether the statute of limitation has run, and chooses not to render an opinion on that particular assertion. Petitioner's attorney appeared in court on October 6, 2000 to argue that since the prosecution can no longer go forward with the case, then it is impossible for the Petitioner to comply with the order and thus purge himself of the contempt. Therefore, the attorney for the Petitioner petitions this court to Quash the Writ of Bodily Attachment.

8. This request somewhat strikes the court as akin to the defendant who after killing his or her parents, then begs the court to be lenient in sentencing, as the defendant is now an orphan. It is the passage of time, caused by the Petitioner wilfully fleeing the jurisdiction of the court that has affected the viability of the grand theft case.

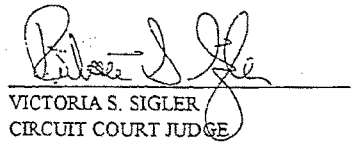
9. It is the finding of this court that the defendant is a fugitive from an order of this court and thus the "fugitive from justice" doctrine applies. Both United States and the Florida Supreme Court have long held that courts may dismiss the appeals of criminal defendants who flee the jurisdiction while their appeals are pending and otherwise not allow fugitive defendant's to pursue legal matters in court while they are fugitives from justice. 1

10. This court finds that a "fugitive from justice is not entitled to call upon the resources of court for determination of his case." 1. It offends this court's basic sense of equity and fair play for the defendant to now ask this court to hear his cause, while still a fugitive. Or to quote another learned colleague, "a fugitive from justice cannot eat his cake and have it too.", To grant the petitioner motion at this time would in essence allow him to benefit from the wrongful act of fleeing the jurisdiction of this court, which is contrary to public policy. The proper course for this court would be to hold the matter in abeyance.

Therefore, it is the finding of this court that this matter is held in abeyance until such time as the Petitioner shall appear before this court, in person and the Petitioner's Motion to Quash is Denied.

ORDERED AND ADJUDGED that the Petitioner's Motion to Quash the Writ of Bodily Attachment is hereby **DENIED**.

DONE AND ORDERED in Miami-Dade County, Florida on this [illegible] day of October 2000.



VICTORIA S. SIGLER
CIRCUIT COURT JUDGE

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[1] AWOL soldiers are not able to petition for writ of habeas corpus, *Bailey v. U.S. Army*, 496 F. 2d 324 (1st Cir. 1974), a fugitive from justice in a related criminal case was not entitles to seek review of a tax assessment made by the Internal Revenue Service, *Schuster v. United States*, 765 F. 2d 1047 (11th Cir. 1985. *State v. Gurican*, 576 So. 2d 709, where the Florida Supreme Court applied the federal fugitive from justice rule. *Garcia v. Metro Dade Police Department*, 576 So. 2d 751 (Fla. 3rd DCA 1991), a defendant who fled from prosecution may not then appeal a civil forfeiture.

[2] *United States v. One Lot of U.S. Currency*, 628 F. Supp. 1473 (S.D. Fla. 1986).

[3] *United States v. Eng*, 951 F. 2d 461, (2d Cir. 1991).

[4] *Jaffe v. Snow*, 610 So. 2d 482 (Fla. 5th DCA 1992).

United States District Court,
S.D. Florida.

Joseph M. GERSTEN, Plaintiff,
v.
Katherine Fernandez RUNDLE, State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida, Defendant.

No. 93-1229-CIV.

Sept. 14, 1993.

Civil rights suit was filed seeking injunctive relief against state court civil contempt order. On motion to dismiss, the District Court, James Lawrence King, J., held that: (1) claim of bad faith prosecution by setting of perjury trap could not be asserted where plaintiff had not yet testified; (2) injunction could not be granted on theory that incarceration for contempt constituted bad faith prosecution where plaintiff had opportunity to raise federal constitutional claims in state court; (3) selective enforcement claim failed because plaintiff failed to adequately allege that other individuals against whom state did not proceed were truly similarly situated; and (4) even if actions alleged by plaintiff actually caused him to lose election, this would not give rise to federal constitutional cause of action.

Motion to dismiss granted.

West Headnotes

[1] Federal Civil Procedure ⟹1721
170Ak1721

District court is generally reluctant to grant motions to dismiss complaint for failure to state claim on which relief can be granted, but when there exists insuperable bar to relief, normal factors counseling court to deny motion to dismiss are not present. Fed.Rules Civ.Proc.Rules 8, 12(b)(6), 28 U.S.C.A.

[2] Federal Civil Procedure ⟹1829
170Ak1829

For purpose of motion to dismiss, complaint is construed in light most favorable to plaintiff, and all facts alleged by plaintiff are accepted as true, except when facts alleged are internally inconsistent or run counter to facts of which court can take judicial notice, and conclusory allegations and unwarranted deductions of fact also are not accepted as true. Fed.Rules Civ.Proc.Rules 8, 12(b)(6), 28 U.S.C.A.

[3] Civil Rights ⟹234
78k234

In context of civil rights claim under § 1983, motion to dismiss will normally be granted only if facts alleged by plaintiff, taken as true, do not show that defendant deprived plaintiff of right, privilege, or immunity secured by Constitution or laws of the United States, and that defendant acted under color of the state law. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rules 8, 12(b)(6).

[4] Courts ⟹508(2.1)
106k508(2.1)

Requirements of *Younger v. Harris* under which federal court can enjoin state court criminal proceedings only where defendant can show bad faith, harassment or some other unusual circumstance that would call for equitable relief extend to state court contempt proceedings.

[5] Courts ⟹508(7)
106k508(7)

Showing of bad faith or harassment is equivalent to showing of irreparable injury under *Younger*, and irreparable injury independent of bad faith prosecution need not be established before federal court may enjoin pending state court criminal proceeding.

[6] Courts ⟹508(7)
106k508(7)

Threat of multiple or repeated prosecutions need not be shown in order to establish bad faith state prosecution, nor must plaintiff prove that prosecution could not possibly result in valid conviction before federal court may enjoin the state prosecution.

[7] Malicious Prosecution ⟹30
249k30

"Perjury trap" for purposes of establishing claim of bad faith prosecution is created when government calls witness before grand jury for primary purpose of obtaining testimony from him in order to prosecute him later for perjury, thereby using subpoena power for perjury indictment on matters which are neither

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Exhibit B

material nor germane to legitimate ongoing investigation of grand jury.

[8] Injunction ⚷27
212k27

Threat of state perjury prosecution was neither actual or imminent so as to warrant federal injunction against enforcement of state civil contempt order on theory that state was attempting to set perjury trap when it subpoenaed plaintiff to give testimony in investigation of theft of his automobile by third parties, where plaintiff had not yet testified, so that federal court could not know with certainty what plaintiff would testify to, and since he could assert perjury trap defense in a subsequent perjury trial.

[9] Injunction ⚷27
212k27

[9] Injunction ⚷105(1)
212k105(1)

Bad faith by state in investigatory process can be challenged by petition for injunctive relief in federal court only when that bad faith manifests itself in imminent prosecution.

[10] Grand Jury ⚷26
193k26

If questions submitted by state are intended to further legitimate investigation, fact that state believes that witness has lied in previous statements and may well do so under oath is insufficient to establish existence of perjury trap.

[11] Injunction ⚷27
212k27

There was no showing of irreparable injury which would support federal court's granting injunctive relief against enforcement of state civil contempt order on theory of bad faith prosecution by state, where there was no showing of lack of fair opportunity to pursue federal claims in the state contempt proceeding.

[12] Contempt ⚷81
93k81

Though both civil and criminal contempt proceedings may result in incarceration of individual charged, "criminal contempt" is for conduct already taken by individual, who thus has no power to purge contempt prior to expiration of jail sentence imposed by court, while "civil contempt" contemnor "carries the key to his cell in his own pocket."

[13] Contempt ⚷28(1)
93k28(1)

Criminal proceeding is not necessary in order to find impermissible selective enforcement; selective enforcement claims may be sustained in variety of context including administrative, civil, and criminal proceedings, and thus could be entertained with respect to a civil contempt proceeding.

[14] Injunction ⚷27
212k27

Mere fact that no other victim or witness of auto theft had been subject of rule to show cause was not sufficient to support claim of selective enforcement when victim was held in civil contempt for failing to testify in investigation of theft of his own vehicle, so as to support federal injunctive relief against enforcement of the state contempt order, in that victim did not adequately allege that other auto theft cases presented substantially similar situations.

[15] Civil Rights ⚷110.1
78k110.1

Loss of election cannot constitute deprivation of constitutional right and thus is insufficient to satisfy requirement that there be denial of constitutional right as result of bad-faith damage to individual's reputation by public official in order for damage to be actionable in civil rights action under § 1983. 42 U.S.C.A. § 1983.

[16] Civil Rights ⚷110.1
78k110.1

Former county commissioner did not have civil rights cause of action under § 1983 for electoral loss allegedly caused by state attorney's alleged use of political power to oppose commissioner in his election campaign or pursuing bad faith investigation of him after his vehicle was stolen and obtaining civil contempt adjudication against him for refusal to answer questions during investigation of admitted thieves. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 1.

*908 Joseph R. Gomez, Miami, FL, for plaintiff.

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Michael J. Neimand, Asst. Atty. Gen., Michael R. Band, Chief Asst. State Atty., Miami, FL, for defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

JAMES LAWRENCE KING, District Judge.

THIS CAUSE comes before the Court on Defendant's Motion to Dismiss, filed on July 22, 1993. A hearing was held on the motion on August 6, and Plaintiff filed a Memorandum in Opposition to Defendant's Motion to Dismiss on August 9.

Plaintiff has filed suit under 42 U.S.C. § 1983 (1988) seeking injunctive relief against the enforcement of a civil contempt order secured by the State of Florida in a state court, and seeking, as well, financial compensation. Specifically, Plaintiff prays that

> (a) a temporary restraining order and a permanent injunction issue [from this Court,] enjoining Defendant Rundle from further pursuing her petition for rule to show cause and Plaintiff's incarceration deriving therefrom;
>
> (b) this Court vacate the Order of Contempt issued [by the state court] on March 18, 1993 detaining Plaintiff indefinitely ...[;]
>
> (c) Defendant be permanently enjoined from seeking any further rules to show cause in the collateral proceeding being conducted by Mr. Band on behalf of the State Attorney's Office;
>
> (d) Plaintiff be awarded such other and further relief as may be just and equitable under the circumstances, including but not limited to his costs and attorney's fees in this matter.

Pl.'s Compl., pp. 9-10.

Plaintiff bases his suit on actions allegedly taken by Defendant in bad faith, resulting in the denial of his constitutional rights. He asserts that the following constitutional rights were violated: (1) his Fourteenth Amendment due process right to be free from bad-faith prosecutions; (2) his Fourteenth Amendment equal protection right to be free from selective prosecution; and (3) his First Amendment free speech right to seek and hold public office.

I. Factual Background

The following facts are taken from Plaintiff's Complaint for Injunctive Relief and are accepted as true for the purpose of ruling on Defendant's Motion to Dismiss. They are not findings of fact in an official sense; the motion before the Court is one to dismiss, not one for summary judgment, and Defendant has not filed an Answer to Plaintiff's Complaint. These facts are set forth to provide the proper context of this Court's holdings.

Plaintiff was a Dade County Commissioner until his electoral defeat in March 1993. On April 29, 1992, Plaintiff reported to the police that his automobile had been stolen from his home in Coral Gables, Florida.

The automobile in question was recovered by the police within several days and returned to Plaintiff. Two individuals, named Claudia Lira and Kenneth Elswick, were found in possession of the automobile at the time it was recovered. Both are convicted *909 felons and Lira has additionally been convicted of prostitution. After their arrest for the theft of Plaintiff's automobile, they alleged to police that Plaintiff had solicited Lira for prostitution, had engaged in sexual acts with her, had used cocaine at a crack house, and had purchased cocaine from another individual while at the crack house.

The State Attorney commenced an investigation of the allegations made against Plaintiff by Lira and Elswick. Assistant State Attorney Richard Gregorie was placed in charge of this investigation of Plaintiff. Plaintiff was ordered to submit to an FBI test of his hairs for residue of illegal drugs. The results of these tests were negative.

The State then commenced an investigation of Lira and Elswick for the theft of Plaintiff's automobile. This investigation was headed by Assistant State Attorney Michael Band. At that time, both Lira and Elswick were incarcerated on an unrelated warrant. The investigation proceeded despite the fact that both had confessed to the theft of the automobile and were immunized.

The State Attorney maintains that the investigations by Gregorie and Band are independent and segregated, that a "Chinese wall" has been erected between the two investigators. Plaintiff contends that that wall has been breached by the sharing of information between personnel working on opposite investigations and that such breach was in aid of Gregorie's investigation of Plaintiff, not Band's investigation of Lira and Elswick.

The State then subpoenaed Plaintiff to appear on the

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day of the primary election in order to give testimony in the Band investigation of Lira and Elswick. Plaintiff was to be called as a victim and witness to the event, and as such, he was granted use immunity. At the hearing, Plaintiff refused to respond to most of the questions submitted by the investigating attorney, on the grounds that they were irrelevant to an investigation of Lira and Elswick. He contends that he is the true target of Band's investigation and that the State was attempting to set a perjury trap for him.

The state court, at the request of the State Attorney, then held a hearing as to why Plaintiff should not be held in contempt. At that hearing, Plaintiff contended, *inter alia*, that the State was selectively using its subpoena power in a discriminatory and unconstitutional manner. As grounds for this assertion, Plaintiff alleged (and alleges in this Court) primarily four facts. First, no individual situated similarly to Plaintiff has ever been held in contempt for failing to testify in a grand jury investigation of the crime to which he was a witness or of which he was a victim. Michael Strozer, Deputy Chief of the Felony Screening Unit for the State Attorney's Office, testified in state court that no other victim/witness of a crime in Dade County had ever been the subject of a rule to show cause in an auto theft case or even in cases involving more serious crimes. Second, the investigating attorney asked Plaintiff questions Plaintiff considered irrelevant to an investigation of Lira and Elswick, including what Plaintiff ate for breakfast on the day of the theft. Third, the State Attorney evidenced its bad faith by calling Plaintiff to testify on the day of the primary election in which he was a candidate. And fourth, the State Attorney had publicly supported Plaintiff's main opponent in the election.

At the state court hearing, the trial judge denied Plaintiff's motions to quash the subpoena, and, on March 18, 1993, she found Plaintiff in contempt of court. Plaintiff was incarcerated until he agreed to testify in accordance with the trial court's order. Plaintiff was released several weeks later for health reasons, pending an appeal of the trial court's order. That order finding Plaintiff in contempt was affirmed by the Florida Third District Court of Appeal on June 2, 1993. Plaintiff now faces reincarceration until he purges himself by testifying in accordance with the trial court's order of March 18.

II. Legal Standard

(a) *Motion to Dismiss*

[1] This Court is generally reluctant to grant motions made under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss a complaint for failure to state a claim upon which relief can be granted. The liberal pleading rules embraced by Rule 8 of *910 the Federal Rules require only that a complaint set forth a generalized statement of facts from which a defendant will be able to frame a responsive pleading. Fed.R.Civ.P. 8; *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). However, when there exists an insuperable bar to relief, the normal factors counseling a court to deny a motion to dismiss are not present. *United States v. Uvalde Consol. Indep. School Dist.,* 625 F.2d 547, 549 n. 1 (5th Cir.1980), *cert. denied,* 451 U.S. 1002, 101 S.Ct. 2341, 68 L.Ed.2d 858 (1981) [FN1]; 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1357 (1990) ("Wright & Miller").

FN1. In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedents all decisions of the former Fifth Circuit issued before October 1, 1981.

[2] For the purpose of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and all facts alleged by the plaintiff are accepted as true. Wright & Miller at § 1357. There are a few exceptions to this rule, such as when the facts alleged are internally inconsistent or when they run counter to facts of which the Court can take judicial notice. *Id.* Conclusory allegations and unwarranted deductions of fact also are not accepted as true. *Assoc. Builders, Inc. v. Alabama Power Co.,* 505 F.2d 97, 100 (5th Cir.1974).

[3] In the context of a claim under 42 U.S.C. § 1983, a defendant's motion to dismiss will normally be granted only if the facts alleged by plaintiff, taken as true, do not show that the defendant deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or the laws of the United States, and that the defendant acted under color of state law. *Whitehorn v. Harrelson,* 758 F.2d 1416, 1419 (11th Cir.1985).

In ruling on the instant motion, there exist the additional issues associated with the fact that the injunctive relief sought by Plaintiff in his Complaint would enjoin a state, as distinguished from an entity of the federal government.

(b) *Injunctive Relief*

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Under the Anti-Injunction Act, 28 U.S.C. § 2283, a federal court "may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Supreme Court has held that suits brought under § 1983 qualify as an expressly authorized exception. *Mitchum v. Foster,* 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

[4] In the seminal case of *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the Supreme Court held that a federal court could enjoin a state court criminal proceeding only where a defendant could show "bad faith, harassment, or [some] other unusual circumstance that would call for equitable relief...." *Id.* at 54, 91 S.Ct. at 755. The reasons for this restriction are that federal intervention in on-going state criminal proceedings might result in duplicative legal proceedings, could disrupt the state criminal justice system, or could reflect negatively upon the state court's ability to enforce constitutional principles. *Steffel v. Thompson,* 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974); *see also Wooley v. Maynard,* 430 U.S. 705, 709-10, 97 S.Ct. 1428, 1432-33, 51 L.Ed.2d 752 (1977). These same rationales have been extended to limit federal intervention in some state court proceedings that are not criminal in nature, including contempt proceedings. *See Juidice v. Vail, infra* Part III(b), 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977).

[5][6] Thus, if this Court finds that there exists a pending state court proceeding, Plaintiff would have to meet the requirements of *Younger* and show "bad-faith enforcement or other special circumstances." *Steffel,* 415 U.S. at 454, 94 S.Ct. at 1213. Outside the *Younger* context, as explained *infra,* a plaintiff seeking injunctive relief must show, *inter alia,* that he will suffer irreparable harm unless the injunction is granted. In the Eleventh Circuit, "[a] showing of bad faith or harassment is equivalent *911 to a showing of irreparable injury under *Younger,* and irreparable injury independent of the bad faith prosecution need not be established." *Fitzgerald v. Peek,* 636 F.2d 943, 944 (5th Cir.1981); *accord Wilson v. Thompson,* 593 F.2d 1375, 1381 (5th Cir.1979). Further, the threat of multiple or repeated prosecutions need not be shown in order to establish bad faith prosecution, nor must the plaintiff prove that the prosecution could not possibly result in a valid conviction. *Fitzgerald,* 636 F.2d at 944-45; *Wilson,* 593 F.2d at 1381.

Alternatively, if this Court does not consider there to exist an on-going state court proceeding, then Plaintiff would only have to meet the normal equitable requirements for an injunction. *Westin v. McDaniel,* 760 F.Supp. 1563, 1568-69 (M.D.Ga.), *aff'd,* 949 F.2d 1163 (11th Cir.1991). To satisfy the normal equitable requirements, a party seeking injunctive relief in federal court must show: (1) a substantial likelihood that he will prevail on the merits; (2) that he will suffer irreparable harm unless the injunction is granted; (3) that the threatened injury to him outweighs the damage to the opposing party; and (4) that the injunction, if issued, will not be adverse to the public interest. *Shatel Corp. v. Mao Ta Lumber and Yacht Corp.,* 697 F.2d 1352, 1354-55 (11th Cir.1983). Defendant, in her Motion to Dismiss, challenges Plaintiff only on the second of these four requirements: that Plaintiff will suffer irreparable harm unless the injunction is granted.

This Court will examine both tests together, for Plaintiff has failed to satisfy either requirement: that he show a bad-faith prosecution under *Younger,* or that he show irreparable injury under the non-*Younger* scenario. The reason for Plaintiff's failure to satisfy either requirement is the same: even if the actions of the state have been taken in bad faith, they have not risen to the level of an imminent prosecution, and they have, as yet, not infringed on any of Plaintiff's constitutional rights.

III. Whether Plaintiff's Constitutional Rights Were Violated by a Bad-Faith Prosecution

Plaintiff alleges that he is being prosecuted in bad faith or is threatened with such a prosecution. This argument rests upon one of two related grounds: (a) that the state has set a perjury trap for Plaintiff, or (b) that the State's continued attempt to have Plaintiff held in contempt constitutes a bad-faith prosecution since it seeks to incarcerate Plaintiff in the same way as would a criminal prosecution.

(a) *The Perjury Trap*

[7][8] The argument that the State has set a perjury trap that would entitle Plaintiff to injunctive relief is flawed. A perjury trap "is created when the government calls a witness before the grand jury for the primary purpose of obtaining testimony from him in order to prosecute him later for perjury." *United States v. Chen,* 933 F.2d 793, 796 (9th Cir.1991) (citation omitted). For a perjury trap to exist, the

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government must be using its subpoena power to secure the perjury indictment "on matters which are neither material nor germane to a legitimate ongoing investigation of the grand jury." *Id.* (citation omitted); *see also Brown v. United States,* 245 F.2d 549, 555 (8th Cir.1957) (holding that a perjury trap existed where the purpose of the prosecutor was solely to elicit perjured testimony on matters that had "no tendency to support any possible action of the grand jury within its competency"). Thus, when the State is " 'attempting to obtain useful information in furtherance 'of its investigation', or 'conducting a legitimate investigation into crimes which ha[ve] in fact taken place within its jurisdiction', the perjury trap doctrine is, by definition, inapplicable." *Chen,* 933 F.2d at 797 (citations omitted).

[9] In the instant case, then, there are two critical issues: Are the questions being asked by the State designed to elicit useful information in furtherance of a legitimate investigation into local crimes? and Can Plaintiff rely upon this argument at this juncture? Plaintiff may be able to make a prima facie showing that the questions submitted by the State are not, in reality, intended to further the legitimate investigation to which the State claims they are directed--namely, *912 the criminal case against the two individuals accused of stealing Plaintiff's automobile. Nonetheless, Plaintiff is unable to petition for injunctive relief at this time. For this Court to grant injunctive relief under normal equitable standards, the threat of injury must be actual and imminent, not remote and speculative. Here, the injury must be that of prosecution for perjury, and that can only be actual and imminent after Plaintiff has testified. Under the *Younger* standards, Plaintiff must similarly show a bad-faith prosecution, or at least the threat of one, by the State. Again, none can be shown, or indeed is even possible, until after Plaintiff has testified. Bad faith by the State in the investigatory process can only be challenged in federal court when that bad faith manifests itself in an imminent prosecution.

Plaintiff contends that the threat of prosecution for perjury is actual and imminent because the State has stated it will institute such a prosecution if, when Plaintiff testifies, his version of events related to the theft of his automobile differs from that the State believes to be true. Still, this Court cannot know with certainty to what Plaintiff will testify when he is questioned under oath; presumably, he will tell the truth and could prevail on the merits in any subsequent perjury trial. At such a trial, he could also assert a perjury-trap defense. The Ninth Circuit was faced with this same issue (*after* the witness had already testified) and held that the government's anticipation that a witness would commit perjury was insufficient to satisfy the requirements of the perjury trap-doctrine. In *Chen,* the witness argued that the government had anticipated he would commit perjury because he had lied to the government in informal interviews prior to his grand jury testimony. 933 F.2d at 798. The court held that although the government might have anticipated the witness would lie, the government surely also recognized that the witness might testify truthfully. Quoting the Supreme Court, the Eleventh Circuit stated that when a witness "ha[s] been placed under a solemn oath to tell the truth, many witnesses feel obliged to do just that." *Id.* (quoting *United States v. Washington,* 431 U.S. 181, 188, 97 S.Ct. 1814, 1819, 52 L.Ed.2d 238 (1977)).

[10] Thus, it is clear that if the questions submitted by the State are intended to further a legitimate investigation, then the fact that the State believes the witness has lied in previous statements and may well do so under oath is insufficient to establish the existence of a perjury trap. Of course, this begs the question whether the questions submitted by the State in this case are material and germane to a legitimate on-going investigation, but this is an argument Plaintiff was free to advance in the state court contempt hearing and will be free to advance again if he faces an imminent threat of prosecution after he has testified.

(b) *The Order of Contempt*

[11] Plaintiff also contends that his incarceration for contempt constitutes a bad-faith prosecution by the State. He seeks to prevent the irreparable injury which he says will ensue from the State's continued pursuit of its petition for rule to show cause, including damage to his health as a result of re-incarceration on the order of contempt.

The Supreme Court, however, has cautioned federal courts against interfering in state court contempt proceedings. In *Juidice v. Vail,* 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977), the Supreme Court held that the *Younger* principles applied to a case in which the state's contempt process was at issue. In such a situation, the Court said, "federal-court interference with the State's contempt process is 'an offense to the state's interest ... likely to be every bit as great as it would be were [it] a criminal proceeding.' " *Id.* at 336, 97 S.Ct. at 1217, (quoting *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 604, 95 S.Ct.

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1200, 1208, 43 L.Ed.2d 482 (1975)). The Court emphasized that judicial orders must be followed by individuals "however improvidently [those orders were] made, even if it may seem certain that the court acted in granting them under misapprehension or mistake". *Id.* at 336, n. 12, 97 S.Ct. at 1216 n. 12 (quoting *Ketchum v. Edwards,* 153 N.Y. 534, 47 N.E. 918, 920 (1897)). The Court further pointed out that interference with the contempt process would also violate the other interests *Younger* sought to protect: *913 it would " 'unduly interfere[ ] with the legitimate activities of the Stat[e],' " (*Id.* at 336, 97 S.Ct. at 1217 (quoting *Younger,* 401 U.S. at 44, 91 S.Ct. at 750)) and could " 'readily be interpreted "as reflecting negatively upon the state courts' ability to enforce constitutional principles." ' " (*Id.* (quoting *Huffman,* 420 U.S. at 604, 95 S.Ct. at 1208)). The Court in *Juidice* made clear that all that is necessary for federal abstention to be required is that the individual be accorded an opportunity to fairly pursue his federal claims in the state proceedings. *Id.* at 337, 97 S.Ct. at 1218 (citing *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973)).

In the instant case, Plaintiff has indeed had an opportunity to fairly pursue his federal claims in the state contempt proceeding. He can appeal the disposition of those issues through the state court system and can even file a petition for certiorari with the United States Supreme Court. The Supreme Court has made clear that in situations such as this, United States District Courts are not to intervene by granting injunctive relief, at least not absent a showing of bad faith on the part of the state courts; that is, for a United States court to intervene, a plaintiff must show that the opportunity to pursue his federal claims in the state court system was not fair. No such showing has been made by Plaintiff, and this Court consequently is not free to intervene in the state's contempt process.

IV. Selective Enforcement

Plaintiff contends that his constitutional rights have been violated by the State's institution of a selective enforcement proceeding against him. Defendant in her Motion to Dismiss has characterized the State's actions against Plaintiff as an investigation, and Defendant argues that a prosecution, not an investigation, must exist in order for the doctrine of selective enforcement to apply and for Plaintiff's constitutional rights to be implicated.

[12] Plaintiff has responded that the instant case is tantamount to a criminal proceeding, just as if the state had filed an information against Plaintiff. This assertion is incorrect, for the case at hand involves civil contempt, rather than criminal contempt. Although both civil and criminal contempt proceedings may result in the incarceration of the individual charged, the criminal contempt charges are for conduct already taken by the individual, and in that context the individual has no power to purge his contempt prior to the expiration of the jail sentence imposed by the court. In the State of Florida, a criminal contempt proceeding is treated just as a criminal prosecution, with the individual entitled to the full panoply of constitutional rights associated with a criminal prosecution. In the context of civil contempt, by contrast, the proceeding is not treated as a criminal prosecution because the contemnor "carries the key to his cell in his own pocket." *Pugliese v. Pugliese,* 347 So.2d 422, 424 (Fla.1977); *see Andrews v. Walton,* 428 So.2d 663, 665-66 (Fla.1983) (contrasting civil and criminal contempt proceedings under Florida law). Thus, the instant case of contempt cannot be deemed tantamount to a criminal proceeding, as Plaintiff contends.

[13] Defendant, however, is mistaken in the first instance in asserting that a criminal proceeding is necessary in order to find impermissible selective enforcement. The two cases cited by Defendant indeed involve allegations of selective enforcement in the context of a prosecution; however, neither of those cases indicates that a prosecution is a necessary element for the doctrine of selective enforcement to apply. There exist cases where a claim of selective enforcement has been sustained in the absence of a prosecution. *See, e.g., Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (holding a city board's denial of a retail license to a Chinese immigrant to be invalid on the grounds of selective enforcement); *Sea-Gate, Inc. v. United States,* 4 Cl.Ct. 25 (1983) (considering on the merits a claim of selective enforcement where the government sought to enforce easement rights against the plaintiffs). Selective enforcement claims may be sustained in a variety of contexts, including administrative, civil, and criminal proceedings.

Nevertheless, as one court has recognized, "[e]qual protection challenges to prosecutorial [*914 or enforcement] decisions made by the government face an uphill struggle." *Pakis v. City of Chicago,* 1992 WL 159310 at *6, 1992 U.S.Dist. LEXIS 9567 at *17 (N.D.Ill. June 30, 1992) (brackets added). It is the exceptional case where a plaintiff is able to convince

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a federal district court to issue injunctive relief to prevent what he alleges to be selective enforcement by a state. The Supreme Court has cautioned federal courts to generally refrain from interfering in prosecutorial or enforcement decisions because the judiciary is ill-suited to examine the various factors that are relevant to such determinations. *Wayte v. United States,* 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985), *cited in Pakis,* 1992 WL 159310 at *6, 1992 U.S.Dist. LEXIS 9567 at *18.

[14] In *University Club v. City of New York,* 655 F.Supp. 1323 (S.D.N.Y.1987), the district court dismissed the plaintiffs' allegations of selective enforcement. The court quoted the Second Circuit in formulating the test as follows: To make out a prima facie case of selective enforcement, a plaintiff must show "(1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution [or enforcement], and (2) that the government's prosecution [or enforcement] has been invidious or in bad faith, *i.e.,* based upon impermissible considerations...." *Id.* at 1328 (quoting *United States v. Berrios,* 501 F.2d 1207, 1211 (2d Cir.1974)) (brackets added). The court in *University Club* held that the plaintiffs' complaints did not adequately satisfy these two prongs, so the issue never made it to trial.

In *Pakis v. City of Chicago,* 1992 WL 159310, 1992 U.S.Dist. LEXIS 9567 (N.D.Ill. June 30, 1992), the plaintiffs alleged that the city of Chicago had unlawfully engaged in the selective enforcement of its parking ordinances. To avoid encroaching upon the state in an area traditionally reserved to state and local authorities, and to avoid deciding constitutional issues unnecessarily, the court dismissed the case, directing the plaintiffs to seek a state remedy first. As for the allegation of selective enforcement, the court dismissed that count with prejudice, finding the plaintiffs had failed to allege specific facts indicating that the situations where the government had chosen not to enforce the regulations were truly similar.

In *Sea-Gate, Inc. v. United States,* 4 Cl.Ct. 25 (1983), the federal Claims Court reached the merits of a selective enforcement claim. The plaintiffs in that case had sought to develop property adjacent to the Atlantic Inland Waterway, a government-owned and-maintained navigable waterway extending from Massachusetts to Florida; and they contended the United States had selectively enforced its easement rights on that property by denying them certain permits and by litigating the issue in court. As support for their selective enforcement argument, the plaintiffs pointed to numerous situations in Florida, South Carolina, and North Carolina where the government had permitted massive incursions on its easement rights and had not enforced its rights as it had against the plaintiffs. The court in *Sea-Gate* paraphrased the test enunciated in *University Club* and held the plaintiffs to a high standard of specificity. To meet the first prong of the test, the court required the plaintiffs to "establish the magnitude of the violations alleged and show that they [were] of the same or similar characteristics as the one established against them." *Id.* at 31.

The court further explained, "To determine whether other persons not sued are situated similarly to plaintiffs, the court must determine if there are factors permitting some rational basis for distinguishing among them." *Id.* (citing *McGinnis v. Royster,* 410 U.S. 263, 270, 93 S.Ct. 1055, 1059, 35 L.Ed.2d 282 (1973)). The *Sea-Gate* court carefully examined each of the situations to which the plaintiff had pointed, and concluded that "when the type of easement, the availability and responsibility of local sponsors, and the nature, extent and location of construction are considered, [this development] stands out as unique." *Id.*

In the context of a motion to dismiss, then, the inquiry into whether the first prong of the test has been satisfied involves assessing whether a plaintiff has alleged that the individuals referred to in the complaint are indeed similarly situated.

*915 In the instant case, Plaintiff has failed to allege facts that would support a claim of selective enforcement. Although Plaintiff has pointed to the testimony of Michael Strozer, Deputy Chief of the Felony Screening Unit for the State Attorney's Office, that no other victim of, or witness to, an auto theft in Dade County has been the subject of a rule to show cause, Plaintiff has not alleged that the situations and individuals in those other auto theft cases were truly similar to the one in which he was involved. He has not alleged, for example, that the other cases involved discrepancies about the location from which the auto had been stolen or that the State Attorney in the other cases had an equal amount of evidence to pursue. The mere fact (if accepted as true) that no other victim or witness of an auto theft has been the subject of a rule to show cause is not sufficient to support a claim of selective enforcement where Plaintiff has not

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adequately alleged that the other auto theft cases presented substantively similar situations.

V. Plaintiff's Constitutional Right to Seek and Hold Public Office

[15][16] In his Complaint, Plaintiff alleges that Defendant sought to hinder the free exercise of his First Amendment rights. Plaintiff states that Defendant in bad faith used her political power to thwart him in his election campaign. Defendant counters that damage to one's reputation is not actionable under § 1983 and that there is no federally protected right to *win* an election to public office--only to *run* in such an election.

The Eighth Circuit in *Kaylor v. Fields,* 661 F.2d 1177 (8th Cir.1981), involved issues and facts similar to those in the case at hand. There, the plaintiffs were former elected officials who had brought suit against a state attorney after losing their bids for re-election. One of the plaintiffs' claims was that the state attorney had made "continual, baseless accusations of criminal activity without filing any charges and [had] made derogatory statements to the news media." *Id.* at 1181. Citing *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1975), the Circuit Court upheld the dismissal of this claim on the grounds that damage to one's reputation, without some resultant denial of a constitutional right, is not actionable under § 1983. Another of the plaintiffs' claims in that case was that the state attorney "threatened to prosecute them in an attempt to punish them for their political beliefs and for exercising their right to free speech." *Id.* at 1182. The Eleventh Circuit held that this second claim did not require abstention under the *Younger* doctrine and, if properly pleaded, would state a cause of action. However, due to the absence of a single specific factual allegation to buttress the legal claim, the court affirmed the district court's order of dismissal, specifically permitting the re-filing of a complaint that alleged facts with reasonable specificity to support the claim.

In the instant case, as has been pointed out above in Part III(b), there existed at the time of the election, and there continues to exist, no threat of prosecution that can be seen as hindering Plaintiff in the exercise of his First Amendment rights. The *Kaylor* court did not address whether the first of the allegations in that case--that of "continual, baseless accusations of criminal activity without filing any charges and [of making] derogatory statements to the news media"--could, if pleaded with the requisite specificity, constitute a cause of action in light of a consequent electoral loss. The court recognized, as did the Supreme Court in *Paul,* that such a charge, *coupled with a resultant denial of a constitutional right,* would indeed be actionable under § 1983. The question in the instant case, then, becomes whether Plaintiff's electoral loss (allegedly the result of the statements and actions of Defendant state attorney), represents the denial of a constitutional right.

The Eleventh Circuit addressed this question in *Flinn v. Gordon,* 775 F.2d 1551 (11th Cir.1985), *cert. denied,* 476 U.S. 1116, 106 S.Ct. 1972, 90 L.Ed.2d 656 (1986). In *Flinn,* a former state representative brought suit against several individuals for actions connected with charges of sexual harassment which allegedly led to his electoral defeat upon re-election. The party moving to dismiss the charges against her in that case was a state representative who had sat as the chairperson of the house committee which *916 had investigated the harassment charges against the plaintiff. The case dealt most directly with whether the qualified immunity afforded this defendant in her capacity as a public official exempted her from defending the suit. However, one aspect of the case addressed whether the plaintiff had a constitutional right to continued employment as a state legislator. Noting that the plaintiff had not been removed from office during the term to which he had been elected, the court stated, "Although he certainly had a constitutional right to run for office and to hold office once elected, he had no constitutional right to win an election." *Id.* at 1554. Consequently, regardless of the issue of qualified immunity, the court stated, the plaintiff had "failed to allege any act for which he would be entitled to relief under § 1983." *Id.*

Thus, the Eleventh Circuit has resolved that the loss of an election cannot constitute the deprivation of a constitutional right. Such a loss, then, is insufficient to satisfy the *Paul* requirement that there be a denial of a constitutional right as a result of the bad-faith damage to an individual's reputation by a public official. Plaintiff, therefore, does not have a cause of action under § 1983 for actions related to his electoral loss.

VI. Conclusion

The situations in which a federal court can issue injunctive relief against state action are limited when there is an on-going state proceeding, as there appears to be in this case with the state contempt proceeding.

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Even if there is not an on-going proceeding at the state level, Plaintiff's claims still fail to meet the requirements necessary for this Court to issue the injunctive relief sought.

Plaintiff alleges that Defendant (1) has initiated a bad-faith prosecution of Plaintiff either by establishing a perjury trap or by seeking his incarceration for refusing to testify in an official investigation; (2) has selectively enforced a rule against Plaintiff by seeking to have him held in contempt for refusing to testify in the investigation of the theft of his automobile; and (3) has interfered with Plaintiff's rights to seek and hold public office by manipulating the timing of the auto-theft investigation and making public statements in the media--all in violation of Plaintiff's constitutional rights.

The charge of a bad-faith prosecution fails because a perjury-trap defense cannot be asserted until after the individual has testified and because federal courts are constrained in when they can issue injunctive relief from an order of contempt issued by a state court, at least when the plaintiff has had an opportunity to raise his federal constitutional claims in state court. The selective enforcement claim fails because Plaintiff has not adequately alleged that other individuals against whom the state did not proceed were truly similarly situated. And the final claim fails because even if the actions alleged by Plaintiff actually caused Plaintiff to lose the primary election, this would not give rise to a federal constitutional cause of action; one has a right to run for public office but not to win, and it has not been alleged that Defendant interfered with Plaintiff's attempt to run. Section 1983 does not convert into a federal cause of action every claim alleging wrongdoing by a state official. *Baker v. McCollan,* 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979); *Shillingford v. Holmes,* 634 F.2d 263 (5th Cir. Unit A Jan. 1981). In the instant situation, Plaintiff's proper recourse is to the state courts.

Accordingly, after a careful review of the record, and the Court being otherwise fully informed in the premises, it is

ORDERED, ADJUDGED, and DECREED that Defendant's Motion to Dismiss be, and the same is hereby, GRANTED. This Complaint is dismissed with prejudice.

DONE and ORDERED.

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*711 707 So.2d 711

23 Fla. L. Weekly S127

Supreme Court of Florida.

THE FLORIDA BAR, Complainant,
v.
Joseph M. GERSTEN, Respondent.

No. 87248.
March 5, 1998.

Disciplinary proceeding was brought against attorney who was found in contempt of court for failure to provide, after exhausting appeals, court-ordered sworn statement in state attorney's automobile theft investigation. The Supreme Court held that: (1) attorney could not refuse to follow order based on his personal belief of invalidity of order; (2) a finding of fraudulent or dishonest conduct for failure to meet civil obligation was not necessary where refusal directly interfered with state criminal investigation; and (3) suspension from practice until compliance with order and for one year following compliance was warranted.

Suspension ordered.

West Headnotes

[1] Attorney and Client ⇐43

45 ----
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k43 Contempt of Court.

Attorney, subject to disciplinary proceeding for refusal to comply with court order to give sworn statement in relation to state attorney automobile theft investigation, was not justified in continuing to refuse to obey order based upon his subjective belief that no valid obligation existed, where he had exhausted all appeals. West's F.S.A. Bar Rule 4-3.4(c).

[2] Attorney and Client ⇐43

45 ----
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k43 Contempt of Court.

Attorney is not permitted to ignore and refuse to follow a court order based upon his personal belief in the invalidity of that order. West's F.S.A. Bar Rule 4-3.4(c).

[3] Attorney and Client ⇐57

45 ----
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k57 Review.

While referee's recommendation for attorney discipline is persuasive, Supreme Court has ultimate responsibility to determine appropriate sanction.

[4] Attorney and Client ⇐58

45 ----
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k58 Punishment.

Bar disciplinary action must serve three purposes: judgment must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar misconduct.

[5] Attorney and Client ⇐58

45 ----
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k58 Punishment.

Attorney sanction could be of indefinite nature under disciplinary rules. West's F.S.A. Bar Rule 3-5.1(e).

[6] Attorney and Client ⇐43

45 ----
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k43 Contempt of Court.

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Exhibit C

Attorney's refusal to comply with court order to provide sworn statement directly interfered with state's criminal investigation and, thus, was not akin to "private matter" for which he could not be disciplined. West's F.S.A. Bar Rule 4-3.4(c).

[7] Attorney and Client ⟹58

45 ----
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k58 Punishment.

Suspension until attorney complied with court order to provide sworn statement in relation to criminal investigation, and for period of one year thereafter, was warranted against attorney who was found in contempt for continuing to refuse to comply with order after exhaustion of appeals. West's F.S.A. Bar Rules 3-5.1(e), 4-3.4(c).

*712 John F. Harkness, Jr., Executive Director, and John A. Boggs, Staff Counsel, Tallahassee, and Billy J. Hendrix, Bar Counsel, Miami, for Complainant.

Maria Del Carmen Calzon and Gonzalo Alberto Gayoso of Calzon, Gayoso & Gersten, P.A., Miami, for Respondent.

PER CURIAM.

We have for review the complaint of The Florida Bar and the referee's report regarding alleged ethical breaches by Joseph M. Gersten. We have jurisdiction. Art. V, § 15, Fla. Const.

The state attorney subpoenaed Gersten to give a sworn statement as part of her investigation relating to an automobile of Gersten's that was reported stolen. Gersten was granted use immunity, but refused to testify. Judge Amy Dean entered an order holding Gersten in civil contempt for failing to answer questions posed by the state attorney and ordered answered by Judge Dean. Gersten appealed the order but by the fall of 1995 all appeals had been exhausted and the order had been upheld in all respects. Because he continued to refuse to testify, Judge Joel Brown ordered that Gersten be jailed. Rather than report to jail, Gersten departed from Florida and is now living in Australia. The parties stipulated that Gersten has not complied with the order of contempt.

The referee concluded that Gersten had violated Rule Regulating The Florida Bar 4-3.4(c), which reads as follows:

> A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

The referee reasoned that rule 4-3.4(c) should be read *in pari materia* with rule 7-106(A) of the former Code of Professional Responsibility, which states as follows:

> A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

Thus, the referee determined that the exception in rule 4-3.4(c) "for an open refusal based on an assertion that no valid obligation exists," like former rule 7-106(A), requires the attorney to be (1) acting in good faith and (2) seeking redress in an appellate court. The referee concluded that once there were no further appeals seeking to overturn the validity of the court order, Gersten was under an absolute obligation to comply with Judge Dean's order. The referee recommended that Gersten be suspended from the practice of law until he complies with the court order, and that he be suspended from the practice of law for a period of one year after complying with the order.

*713 [1][2] Gersten argues that the referee's findings and conclusions are not supported by competent and substantial evidence. Essentially, he contends that despite the exhaustion of all appeals, he is justified in continuing to refuse to obey the court order based upon his assertion that "no valid obligation exists." He claims that he was denied his right to conduct discovery in order to develop proof that he was not obligated to testify because the state attorney's office was acting illegally, was conducting the investigation in bad faith to harm his political future, and was acting to deny Gersten his constitutional rights. We cannot accept Gersten's contentions. Under Gersten's position, a lawyer who challenges a court order would now be able to avoid disciplinary action under rule 4-3.4

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indefinitely by asserting a subjective belief that no valid obligation exists. Such a result invites disrespect for the judicial system. As we explained in *Florida Bar v. Rubin*, 549 So.2d 1000, 1003 (Fla.1989):

> An attorney is not permitted to ignore and refuse to follow a court order based upon his personal belief in the invalidity of that order. To countenance that course is to court pandemonium and a breakdown of the judicial system.

We conclude that the referee properly precluded Gersten from pursuing discovery for the purpose of going behind the order of contempt. (FN1) We find competent and substantial evidence to support the recommendation of guilt.

[3][4] The final issue this Court must address is the appropriate discipline. While a referee's recommendation for discipline is persuasive, this Court has the ultimate responsibility to determine the appropriate sanction. *Florida Bar v. Reed*, 644 So.2d 1355, 1357 (Fla.1994). A bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar misconduct. *Florida Bar v. Lawless*, 640 So.2d 1098, 1100 (Fla.1994).

[5] Gersten argues that the referee's recommended sanctions are erroneous as a matter of law in that the indefinite nature of the sanction violates the provisions of the "Rules Governing the Florida Bar." Contrary to Gersten's assertion, rule 3-5.1(e) specifically authorizes a definite period of suspension "*or an indefinite period* thereafter to be determined by the conditions imposed by the judgment." R. Regulating Fla. Bar 3-5.1(e) (emphasis added).

[6] Gersten further argues that the disciplinary rules do not grant courts the authority to discipline an attorney for the failure to meet a civil obligation absent a finding of fraudulent or dishonest conduct. In support of his contention, Gersten cites to *Florida Bar v. Taylor*, 648 So.2d 709, 711 (Fla.1995), in which we upheld a referee's conclusion that an attorney in civil contempt for failing to pay child support should not be disciplined for something that was akin to a "private matter." However, unlike the lawyer in *Taylor*, Gersten's refusal to comply with the court order directly interfered with the state attorney's criminal investigation.

[7] It is undisputed that Gersten steadfastly has refused to comply with the March 18, 1993, court order. The referee considered Gersten's refusal to acknowledge the wrongful nature of his conduct as an aggravating factor. *See* Fla. Stds. Imposing Law. Sancs. 9.22(g). On the other hand, the referee considered the absence of a prior disciplinary record and Gersten's character or reputation as mitigating factors. *See* Fla. Stds. Imposing Law. Sancs. 9.32(a). The referee also considered as a mitigating factor Gersten's public service for the past twenty-one years.

Gersten points to prior decisions of this Court involving disobedience of court orders in which we imposed lesser suspensions. *See Florida Bar v. Tobin*, 674 So.2d 127, 129 (Fla.1996) (suspending lawyer for forty-five days where he failed to return funds to court registry pursuant to court order); *Florida Bar v. Langston*, 540 So.2d 118, 121 (Fla.1989) (suspending attorney for ninety-one *714. days where attorney in personal divorce proceeding failed to timely comply with court order to transfer interests in property). However, in these cases, the offending lawyer had complied with the court orders by the time of the hearing before the referee. Gersten continues to be in contempt of the court.

We approve the referee's recommended discipline. We hereby suspend Gersten from the practice of law until he complies with the prior order and for one year thereafter. The suspension will be effective immediately. Gersten shall accept no new business from the date this opinion is filed until the suspension is completed. Judgment for costs in the amount of $3,007.46 is hereby entered against Gersten, for which sum let execution issue.

It is so ordered.

OVERTON, HARDING, WELLS and PARIENTE, JJ., and GRIMES, Senior Justice, concur.

SHAW and ANSTEAD, JJ., recused.

(FN1.) We also reject Gersten's argument that the referee erred in refusing to disqualify bar counsel and denying the suggestion that the referee, himself, be disqualified.

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	Maldonado leaves the house. Mercedes still parked in front of the house.
20:04 (8:04 PM)	Kennedy call (via her car phone) Gersten's car phone less than one minute, incomplete.
20:05 (8:05 PM)	Gersten's car phone receives an incoming phone call. (Charge sheet shows less than one minute, incomplete?)
20:05 (8:05 PM)	Kennedy calls (via her car phone) Gersten's car phone less than one minute, incomplete.
20:05 (8:05 PM)	Gersten's car phone receives an incoming phone call, incomplete.
20:06 (8:06 PM)	Kennedy calls (via her car phone) Gersten's car phone less than one minute, incomplete.
20:06 (8:06 PM)	Gersten's car phone receives an incoming call, less than one minute, incomplete.
Past 8:00 PM already dark	Maria Silva, (domestic) arrives at the 1017 Hardee Road residence. Does not know if anyone home. Hears or sees no one. Gersten's car not in the driveway or at gate.
20:53 (8:43 PM)	Kennedy calls (via her car phone) the 1017 Hardee Road residence. Less than one minute, incomplete?
20:55 (8:55 PM)	Kennedy calls (via her car phone) the 1017 Hardee Road residence. Less than one minute, Maria Silva answers and is told to be ready to meet Kennedy at the front gate of the residence to go grocery shopping. Kennedy will call again when she arrives at the front gate.

21:01 (9:01 PM)	Kennedy call (via her car phone the 1017 Hardee Road residence. Silva answers the phone and is told by Kennedy to come to the gate and meet her so they may go grocery shopping. Gersten's car not in driveway or at the gate. Silva still does not know if anyone is at home.
Evening/dark outside approximately 9:40 PM	Robert Cabanas, driving a Diamond cab is hailed by Gersten at the intersection of Biscayne Boulevard and 29th Street. Takes Gersten to the street dividing 1000 and 1100 block of Hardee Road, Coral Gables. Cabanas stated that this drive took about 15 minutes, but no more than 20 minutes.
21:38 (9:38 PM)	Kennedy uses a personal check to pay for groceries at the Public Supermarket, 1401 Monza Avenue, Coral Gables, Florida. With Silva leaves the store, load groceries in Kennedy's car and proceed to 1017 Hardee Road.
Approximately 10:00 PM	Kennedy and Silva arrive at the 1017 Hardee Road, residence. Gersten, Gersten's attorney Bill Richey are present.
Approximately 10:05 PM	Gersten calls Jack Eads, City Manager, Coral Gables Florida and reports his car stolen. Eads calls the Coral Gables Police Department and speaks to the sergeant on duty and reports Gersten's car stolen and asks that a police officer be sent over to 1017 Hardee Road and take a report.
22:11 (10:11 PM)	Coral Gables Police Officer Paul I. Miyares receives a radio dispatch to 1017 Hardee Road.
22:15 (10:15 PM)	Officer Miyares arrives at 1017 Hardee Road, Gersten a W/M and a W/F are also present. The Officer takes the stolen car report and goes to the Coral Gables Police Department and turns he report into the communications division.

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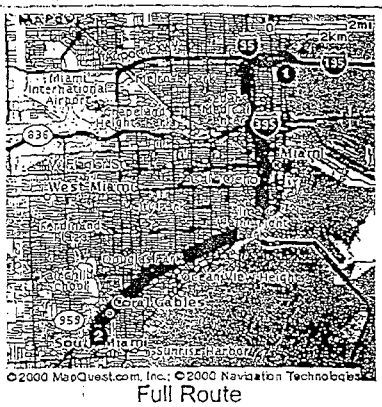
Yahoo! Maps - Driving Directions

Starting from: 471 NE 31 Street, Miami, FL 33137-4236

Arriving at: ★ 1071 Hardee Road, Coral Gables, FL 33146-3300

Distance: 11.3 miles Approximate Travel Time: 19 mins

- Email Directions
- Get Reverse Directions
- Text Only Driving Directions



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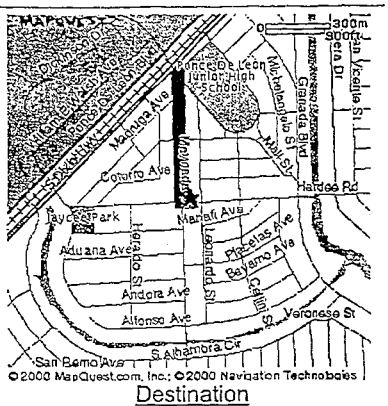
Full Route



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Destination

Exhibit E

Mr. SHAYS. Mr. Band. Bring the mic a little closer to you, if you would.

Mr. BAND. Mr. Chairman, let me first thank the Chair for this opportunity to visit Washington and address this committee in person and answer questions directly and on the record without your staff serving as a filter. As a former public servant and as a citizen, I recognize the importance of having the decisions and actions undertaken by government employees in the exercise of their official powers scrutinized. Those who have undertaken to serve the public should be held accountable and responsible for their actions.

There is no higher calling than public service, nor is there anything more insidious than governmental authorities who abuse their power.

Prior to addressing the issue raised by the committee's report, I will take a brief moment to put my public service into context.

I served my community as a prosecutor in State and in Federal court for approximately 20 years. During my service I prosecuted cop killers and corrupt public officials, including a chief of police, a sitting judge and police officers. I brought to trial a high-profile child killer and tourist killers whose actions almost destroyed south Florida's economy. I have served the Florida bar as chair of the criminal law section, a member of its rules committee and a chair of a bar grievance committee. I've served the local bar as a member of its board of directors, chair of its criminal law committee and judicial poll committee. I have served my city as member of the Mayor's Blue Ribbon Panel to Ensure Minority Participation in Government and Government Contracting. And finally, I was appointed by Florida's Governor to serve on the Judicial Nominating Commission.

Let me turn to my own involvement with the matter at hand. In late June 1992, I was requested by the Dade State attorney to prosecute those responsible for the taking of Mr. Gersten's vehicle. Parenthetically, this is about a decade old, and I'm trying to use my best recollection. To that end, I contacted William Richey, who I knew to be Mr. Gersten's attorney. I explained to Mr. Richey that I was detailed to bring those responsible for taking of that automobile to justice. I inquired of Mr. Richey as to the availability of Mr. Gersten to appear so that I might conduct a pretrial conference. Mr. Richey responded that he would require a subpoena for Mr. Gersten's appearance. Shortly after that conversation, at my direction, on July 8, 1992, a subpoena was prepared for Mr. Gersten with a return date of July 20, 1992. Thus began the unheard of and indeed unprecedented protracted litigation concerning that subpoena.

A brief history of the litigation: July 1992, a motion to quash the subpoena was denied by Judge Phillip Knight.

In August 1992, a second motion to quash the subpoena was denied by Judge Alan Schwartz.

In August 1992, a third motion to quash the subpoena was denied by Judge Amy Dean.

A petition for cert was filed and denied by the Third District Court of Appeal in December 1992.

A second petition for cert was filed and denied by the Third District in March 1993.

An order of contempt was issued by Judge Dean on March 18, 1993.

An order of the Third District of Appeal—Third District Court of Appeal on April 12, 1993, ordered Mr. Gersten released from custody pending order of court.

In June 1993, the Third District Court of Appeal affirmed Judge Dean's order. In July a mandate issued.

U.S. District Judge James Lawrence King entered an order denying relief to Mr. Gersten on September 14, 1993.

U.S. District Judge Stanley Marcus entered an order denying a stay for Mr. Gersten September 17, 1993.

Judge Joel Brown, upon review of the file and after argument of counsel, issued a "writ of bodily attachment" for Mr. Gersten, who apparently had fled the jurisdiction in October 1993.

And, finally, the U.S. Court of Appeal for the 11th Circuit affirmed Judge King's order and the U.S. Supreme Court denied cert. That was in May 1995 and February 1996 respectively.

Mr. Gersten was aided by talented and resourceful counsel who frustrated the best efforts of the State to take testimony for over a year. During that year, individual judges—and I'll submit both Federal judges were Republicans, one appointed by President Nixon, the second appointed by President Reagan—but individual judges in State and Federal court reviewed this matter and consistently ruled against Mr. Gersten. Panels of judges sitting in an appellate capacity in the State and Federal systems affirmed the lower courts in denying Mr. Gersten relief.

Contrary to the assertions of the right of Mr. Gersten—that the rights of Mr. Gersten—contrary to the committee's assertions, the "rights" of Mr. Gersten was given a full airing by the court with the courts uniformly vindicating the State's position. The committee in its report seems to suggest they had a personal animus toward Mr. Gersten. Nothing could be further from the truth. The best evidence is provided in the sworn statement of Mr. Gersten, which is provided in the documents here before me and before the committee. This statement reflects the exchange I had between Mr. Gersten and his attorneys. There is no rancor. There's no evidence of mistrust or distrust. Indeed the statement reflects a collegial exchange between myself and Mr. Gersten. He was accompanied by three lawyers and his aide and was treated professionally, courteously, and civilly. Indeed, in all my dealings with Mr. Gersten he was treated with the utmost respect.

As to the comment I made concerning Mr. Gersten as reported in a newspaper, let me say in retrospect it was a glib and flippant remark, wholly inappropriate but perhaps understandable as an expression of the frustration I felt over a witness'—who was a lawyer and a public servant—deliberate actions in derailing a prosecution.

The report insinuates that a group of prosecutors overstepped the boundaries of fair play in pursuit of Mr. Gersten. With all due respect to the committee, that argument has been rejected by the courts. The report reflects Mr. Gersten's and his apologists line that the State was out to get him. Mr. Gersten reported a crime. The perpetrators of that crime deserved to be brought before the bar of justice. The State's efforts in that regard were stymied by

Mr. Gersten. Every court who reviewed this matter without hesitation or equivocation upheld the State's position. And while I and others now appear before you—after the issuance of the report—I stand ready to respond to your questions. Though not to recognize the irony of Mr. Gersten's continued absence and wonder whether the committee would be any successful than I in questioning Mr. Gersten and determining Mr. Gersten's whereabouts and explanation of his actions and the events of April 29, 1992—is a puzzlement.

Thank you, Mr. Chairman.

Mr. SHAYS. Thank you, Mr. Band.

[The prepared statement of Mr. Band follows:]

PREPARED STATEMENT OF MICHAEL R. BAND

Mr. Chairman and members of the Committee on Government Reform:

First, let me thank the chair for this opportunity to visit Washington and address the committee in person and answer questions directly and on the record without staff serving as a filter. As a former public servant and as a citizen I recognize the importance of having the decisions and actions undertaken by governmental employees in the exercise of their official powers scrutinized. Those who have undertaken to serve the public should be held accountable and responsible for their actions. There is no higher calling than public service nor is there anything more insidious than governmental authorities who abuse their powers. Prior to addressing the issues raised in the Committee's report, I will take a brief moment to put my public service into context:

I served my community as a prosecutor in state and in federal court for approximately 20 years. During my service I prosecuted cop killers and corrupt public officials including, a chief of police, a sitting judge, and police officers. I brought to trial a high profile child killer and tourist killers whose actions almost destroyed South Florida's economy. I have served the Florida Bar as a chair of the criminal law section, a member of the rules committee, and as chair of a Bar grievance committee. I have served the local bar as a member of its Board of Directors, chair of the criminal law committee and judicial poll committee. I have served my city as a member of the mayor's blue ribbon panel to ensure minority participation in government and government contracting. Finally, I was appointed by Florida's governor to serve on the Judicial Nominating Commission.

Let me now turn to my involvement with the matter at hand. In late June of 1992 I was requested by the Dade State Attorney to prosecute those responsible for the taking of Mr. Gertsen's vehicle[1]. To that end, I contacted William Richey who I knew to be Mr. Gersten's attorney. I explained to Mr. Richey that I was detailed to bring those responsible for the taking to justice. I inquired of Mr. Richey as to the availability of Mr. Gersten to appear so that I might conduct a prefile conference. Mr. Richey responded that he would

[1] As this matter is close to a decade old, this reflects my best recollection.

require a subpoena for Mr. Gersten's appearance. Shortly after that conversation at my direction on July 8, 1992, a subpoena was prepared for Mr. Gersten with a return date of July 20, 1992. Thus began the unheard of and unprecedented protracted litigation concerning the subpoena.

A brief history of that litigation follows:

1. July 1992 - Motion to Quash Subpoena denied by Judge Phillip Knight.

2. August 1992 - Second Motion to Quash Subpoena denied by Judge Alan Schwartz.

3. August 1992 - Third Motion to Quash Subpoena denied by Judge Amy Dean.

4. Petition for Certiorari was filed and denied by the Third District Court of Appeal in December 1992.

5. Second Petition for Certiorari was filed and denied by Third District Court of Appeal in March of 1993.

6. Order of Contempt issued by Judge Dean on March 18, 1993.

7. Order of the Third District Court of Appeal on April 12, 1993 orders Mr. Gersten released from custody pending further order of court.

8. June 2, 1993 Order of the Third District Court of Appeal affirming Judge Dean's order of contempt rehearing denied on June 25, 1993. On July 13, 1993 mandate issued.

9. United States District Judge James L. King entered an Order denying relief to Mr. Gersten on September 14, 1993.

10. United States District Judge Stanley Marcus entered an Order denying a stay on September 17, 1993.

11. Judge Joel Brown upon review of the file and after argument of counsel issues a "writ of bodily attachment" for Mr. Gersten who apparently had fled the jurisdiction on October 4, 1993.

12. The United States Court of Appeal for the 11th Circuit affirms Judge King's Order and the U.S. Supreme Court denied certiorari review. (May 15, 1995 and February 20, 1996 respectively).

Mr. Gersten aided by talented and resourceful counsel frustrated the best efforts of the State to take testimony for over a year. During that year, individual judges in state and federal court reviewed the matter and consistently ruled against Mr. Gersten. Panels of judges sitting in an appellate capacity in the state and federal systems affirmed the lower courts in denying Mr. Gersten relief.

Contrary to the committee's assertions the "rights" of Mr. Gersten was given a full airing by the courts with the court's uniformly vindicating the State's position. The committee in its report seems to suggest that I had a personal animus toward Mr. Gersten. Nothing could be further from the truth. The best evidence of this is provided in the sworn statement of Joseph M. Gersten of March 17, 1993 which I am attaching as Exhibit "1". This statement reflects the exchange had between Mr. Gersten and his attorneys and myself. There is no rancor. There is no evidence of distrust. Indeed this statement reflects a collegial exchange between myself and Mr. Gersten. Mr. Gersten accompanied by his three lawyers and aide was treated professionally, courteously and civilly. Indeed in all my dealings with Mr. Gersten he was treated with the utmost respect.

As to the comment I made concerning Mr. Gersten as reported in a newspaper, let me say that in retrospect it was a glib and flippant remark wholly inappropriate but perhaps understandable as an expression of the frustration I felt over a witness' (who was a lawyer and public official)

deliberate actions in derailing a prosecution.

The report insinuates that a group of prosecutors overstepped the boundaries of fair play in pursuit of Mr. Gersten. With all due respect to the committee this argument has been rejected by the courts. The report reflects Mr. Gersten's and his apologists line that the State was out to get him. Nothing could be further from the truth. Mr. Gersten reported a crime. The perpetrators of that crime deserved to be brought before the bar of justice. The State's efforts in that regard were stymied by Mr. Gersten. Every court who reviewed this matter without hesitation or equivocation upheld the State's position. And while I and others finally appear before you - after the issuance of your report - I stand ready to respond to your questions. Though not to recognize the irony of Mr. Gersten's continued absence and wonder whether this committee would be anymore successful than I in questioning Mr. Gersten and determining Mr. Gersten's whereabouts and explanation of his actions and the events of April 29, 1992 is a puzzlement.

Thank you.

Mr. SHAYS. Ms. Cagle. Move the mic a little closer to you as well.

Ms. CAGLE. Thank you, Mr. Chairman and members of the Committee on Government Reform. My name is Mary Cagle. I've been a prosecutor in the State attorney's office in the 11th Judicial Circuit of Florida since 1981. In June 1984, I joined the Public Corruption Unit of that office. In May 1990 I was promoted to the division chief of that unit, and in June 1993 I was promoted to deputy chief of special prosecutions. That is the position that I currently hold. I have spent the majority of my career investigating and prosecuting abuses of government power.

Because of this experience, I was appointed by Governor Bush in 1999 to sit on a Public Corruptions Study Commission to draft legislation regarding public corruption issues. I take seriously the power entrusted in me by the people of the State of Florida, and I'm truly committed to using that power to both protect the innocent and to prosecute the guilty.

With all due respect to the committee, its report was compiled without giving any of the prosecutors involved an opportunity to address the committee's concerns. I appreciate being given the opportunity to respond at this time, and my hope and expectation is that with a full discussion regarding the facts and circumstances of the investigation, the committee will conclude that there was in fact no abuse of government power in this matter.

Our sole motivation was to conduct a fair investigation into the allegations. We did so by following the leads where they took us in attempting to corroborate the testimony of those involved. At the end of the day, there existed no reasonable probability of a conviction, and thus Mr. Gersten was never charged with any crime.

During the Gersten investigation in April and May 1992, I was the supervisor of Dick Gregorie, who was a prosecutor in the corruption unit. I was kept apprised of the investigation and have some recollection of events and meetings. However, I was not involved in the day-to-day investigation, and consequently was never intimately familiar with the investigative file.

The staff report focuses on Mike Osborn's police report which detailed a statement made by a juvenile alleging and immediately recanting an accusation that Gersten was involved in a murder.

In his recantation, the juvenile claimed that Lisa McCann, one of the prostitutes who was a witness against Gersten in the false police report investigation, offered him money to falsely accuse Gersten of murder. Had Gersten been charged with a crime, this information would have been provided to the defense. Gersten was never charged. A prosecutor's obligation to produce exculpatory evidence applies to charged cases. During an investigation exculpatory evidence is rarely given to the subject. There is a policy of confidentiality surrounding an investigation to protect both witnesses and subjects. At no time during the investigative stage would any of the prosecutors involved have even considered parceling out to the subject exculpatory information.

This does not mean that the information regarding Lisa McCann's attempt to coerce the juvenile into giving false testimony was ignored by investigators. From the very beginning of the investigation the credibility of the witnesses was an issue. Consequently, the investigation focused on whether or not there existed corrobora-

tion to the rendition of events given by the initial four witnesses. Lisa McCann's attempt at coercing the juvenile to give false testimony would have been just one more problem with her, credibility problems that we already knew about.

The staff report questions why this information was withheld from the Florida bar and the foreign authorities. When questioned, neither I nor anyone else involved in the investigation had any recollection of the reference. Only Mike Osborn, the city of Miami homicide investigator, recalled this aspect of the case. Clearly that was because Detective Osborn's focus was the murder investigation and his only involvement in the Gersten investigation was the juvenile's statement. No one at the State attorney's office intentionally withheld this information from anyone.

The staff report includes the following statement, "The Osborn police report was part of the State Attorney's Gersten case file. The State Attorney's Office made the Osborn document available to the public for a short period and then apparently removed it. When Congress received all documents relating to the Gersten case from the State Attorney's Office, the information was suspiciously absent."

I take exception to the insinuation that the State attorney's office removed this document from the files and purposefully withheld it from Congress. This did not occur. As the report itself indicates, "A copy of what appears to be a file folder was produced to the committee with the name MPD Osborn on it. Also included in the State Attorney's Office production to the committee are three documents that apparently refer to the Osborn report of investigation."

Clearly there existed numerous documents in the files that were produced for Congress that made reference to Mike Osborn's report. One of the documents contained a synopsis of the very information that was contained in Osborn's report. Certainly if someone had intentionally tried to hide the report, the file folder marked MPD Osborn would have been removed. I do not believe that anyone at the State attorney's office intentionally removed the Osborn report from the file. I do not know why the Osborn document was not in the file. However, I can state with certainty that neither I nor anyone under my direction removed it. I have only addressed the portions of the report that relate directly to my involvement in this matter. I have addressed them more fully in my written statement which has been provided.

Since I was Mr. Gregorie's supervisor at the time of the investigation, I was indirectly responsible for the investigation. We conducted an honest and thorough investigation. We were looking for the truth. Hopefully at the conclusion of the questioning, the committee will have a complete picture of what occurred during the investigation. I respect your right to question government employees regarding their actions and I will attempt to answer any and all of your questions to the best of my ability.

Mr. SHAYS. Thank you, Ms. Cagle.

[The prepared statement of Ms. Cagle follows:]

Prepared Statement of Mary Cagle

Mr. Chairman and Members of the Committee on Government Reform:

I have been an Assistant State Attorney in the State Attorneys Office of the Eleventh Judicial Circuit of Florida since November 23, 1981. I began, as most attorneys in the office do, in County Court, moved through the Felony Divisions and in June of 1984 became an Assistant State Attorney in the Organized Crime/Public Corruption Unit of the office. In May of 1990 I was promoted to Division Chief of the Unit and in June of 1993 I was promoted to Deputy Chief of Special Prosecutions, the position I currently hold. As Division Chief of the Organized Crime/Public Corruption Unit I had direct supervisory responsibilities over cases and investigations involving government employees and elected officials. My current responsibilities are broader and include supervision of narcotics, gangs, forfeitures, organized crime/racketeering, and public corruption cases and investigations. I have spent the majority of my twenty year career investigating, prosecuting and supervising other Assistants who were investigating and prosecuting abuses of government power. Because of this experience, I was appointed by Governor Bush in 1999 to sit on a Public Corruption Study Commission to draft legislation regarding public corruption issues. I take seriously the power entrusted in me by the people of the State of Florida to investigate criminal allegations and am truly committed to using that power to both protect the innocent and prosecute the guilty.

The Staff Report is entitled "A Study of the Abuse of Government Power". With all due respect to the Committee, the Report was compiled without giving any of the prosecutors involved an opportunity to address the Committee's concerns. I appreciate being given the opportunity to respond at this time and my hope and expectation is that with a full discussion

regarding the facts and circumstances of the investigation the Committee will conclude that there was in fact no abuse of Government power in this matter. Our sole motivation was to conduct a fair investigation into the allegations and we did so by following the leads where they took us and attempting to corroborate the testimony of those involved. At the end of the day there existed no reasonable probability of conviction and thus Mr. Gersten was not charged with any crime.

The following is a brief synopsis of my involvement in the investigation of Joseph Gersten: During the period in question, April/May of 1992, as the Division Chief of the Public Corruption Unit at the State Attorney's Office in Miami, I was the supervisor of Assistant State Attorney Richard Gregorie, an Assistant in the Corruption Unit. I was kept apprised, generally speaking, of the investigation and have some recollection of events and meetings, however, I was not involved in the day to day investigation and consequently was never intimately familiar with the investigative file. I do not recall any involvement in this matter from the point in time that Gersten fled to Australia in 1993 until I was informed by Mr. Joel Rosenblatt, an Assistant State Attorney in my office, that he had been requested by the Law Society of New South Wales to come to Australia to testify in the year 2001.

Prior to Mr. Rosenblatt leaving for Australia, he asked me if I recalled anything about Joe Gersten having been involved in a murder. I told him that I had no recollection of a murder having been part of the Joe Gersten investigation. I had no other conversations with Mr. Rosenblatt regarding the Joe Gersten investigation prior to his leaving for Australia.

While Mr. Rosenblatt was in Australia, I was contacted by the Law Society of New South Wales regarding a police report written by MPD Detective M. Osborn. In my initial conversation with the attorney from the Law Society, he asked me if I recalled receiving or seeing a report

written by Osborn back in 1992 during the Gersten investigation. I told him I had no recollection of the report, however, I suggested that he fax it to me to see if it would refresh my memory. The Law Society then faxed Osborn's report to me. I noted on page 10 of Osborn's report that he stated that he had advised me regarding his findings (which were related to the testimony and recantation of a juvenile who alleged that Gersten had been involved in a murder) and that I requested that he provide me with written documents. He stated he would write it up and deliver it to me the following Monday. He further stated that I advised him that Gersten was out of town and that Osborn not contact him until after we had a meeting on Monday. After reviewing page 10 of the report, I told the lawyer from the Law Society that I did not have any independent recollection of that conversation. I further indicated to him that I have no reason to disbelieve Osborn's report, I just don't remember discussing it with him. I reiterated to the Law Society lawyer that I do recall the allegations surrounding the investigation into Gersten filing a false police report and some of the surrounding circumstances, but I have no recollection of the Osborn report or the fact that it contained a reference to Gersten being involved in a murder. It is clear from my recent reading of the homicide report that the juvenile recanted his allegation in the same interview, or shortly thereafter, and thus no one ever believed for a moment that Gersten was involved in a murder. The immediate recantation may explain why those of us who were involved had no recollection of the allegation.

The Staff Report of the Committee on Government Reform focuses on the Osborn report and finds that "Government law enforcement officials purposefully ignored significant exculpatory information in their investigations of Joseph Gersten." In his recantation, the juvenile claimed that Lisa McCann (one of the prostitutes who was a witness against Gersten in the false police report investigation) offered him money to falsely accuse Gersten of murder.

Had Joseph Gersten been charged with filing a false police report, this information would have become part of the discovery information provided to the defense. Joseph Gersten was never charged. A prosecutor's obligation to produce exculpatory evidence applies to charged cases. During an investigation, exculpatory evidence is rarely given to the subject. There is a policy of confidentiality surrounding an investigation to protect both witnesses and subjects. That policy of confidentiality is supported by the public records law which allows prosecutors to exempt from a public records disclosure any information involving on-going investigations. This policy of confidentiality prevents possible retaliation against witnesses and prevents the giving of information to the subject at a time when he might be in a position to fabricate evidence. Furthermore, the subject, if charged, will receive the exculpatory information according to law. At no time during the investigative stage would any of the prosecutors involved have even considered parceling out, to the subject, exculpatory information. This does not mean that the information regarding Lisa McCann's attempt to coerce the juvenile into giving false testimony was ignored by investigators. Although I have no independent recollection of this matter, I do recall that the initial witnesses to the false police report, Lisa McCann included, had tremendous "baggage". They had long criminal records, they were involved in prostitution and drug dealing at a minimum and there were inconsistencies in their rendition of events. From the very beginning of the investigation, the credibility of the witnesses was an issue. Consequently the investigation focused on whether or not there existed corroboration to the rendition of events given by the initial four witnesses. Lisa McCann's attempt at coercing the juvenile to give false testimony, if true, would have been one more problem with her credibility in the minds of the investigators.

The Staff Report, on page 12, asks "Why did state and federal law enforcement officers fail to conduct a thorough investigation of the false murder allegation against Gersten...?" In my recent review of the file I see nothing to indicate that Lisa McCann was investigated regarding this issue, however, I do not know that to be true. Whether or not follow-up questioning and investigation was done regarding this issue is a question to which I do not have an answer.

The Staff Report goes on to question why this information was "withheld" from the Florida Bar, and the foreign authorities. Nine years after the events occurred, when questioned regarding this reference by a juvenile to Gersten's involvement in a murder, neither I, nor anyone else involved in the investigation, had any recollection of the reference. Only Mike Osborn, the City of Miami Homicide investigator recalled this aspect of the case. Clearly, that was because Detective Osborn's focus was the murder investigation and his only involvement in the Gersten investigation was the juvenile's statement. No one at the State Attorney's Office intentionally "withheld" this information from Congress, The New South Wales Law Society, the Florida Bar or anyone else.

On page 11 of the Staff Report the following statement is made,

> "The Osborn police report was part of the State Attorney's Gersten case file. The State Attorney's Office made the Osborn document available to the public for a short period and then **apparently** removed it. When Congress received all documents relating to the Gersten case from the State Attorney's Office, the information was **suspiciously** absent." (emphasis added)

I take exception to the insinuation by the author of the Report that the State Attorney's Office secretly went in and removed this one document from the files that were provided pursuant to the public records request and purposefully withheld it from Congress. That is a totally false assumption. As the Report itself indicates in foot note 48,

> "A copy of what appears to be a file folder was produced to the Committee with the name 'MPD Osborne' on it. ... Also included in the State Attorney's Office production to the Committee are three documents that apparently refer to the Osborn Report of Investigation..."

Clearly there existed numerous documents in the files that were produced for Congress that made reference to Osborn's report. One of the documents contained a synopsis of the very information that was contained in Osborn's report. Certainly if someone had intentionally tried to hide the report, the file folder marked "MPD-Osborne" would have been removed. The Staff Report acknowledges that the report was "available to the public for a short period..." What possible reason could there be for initially making it available and then intentionally removing it from the file. I do not believe that anyone at the State Attorneys Office intentionally removed the Osborn report from the file. In fact, all of those asked had no recollection of the existence of the report. In sum, I do not know why the Osborn document was not in the file, however, I can state with certainty that neither I nor anyone under my direction removed it.

In July of 2000, numerous public records requests were made regarding the Gersten file. The files were made available to Carmel Cafero, a local television reporter, Mr. Jay Weaver, a Miami Herald reporter, and on three separate occasions to Ms Calzone, Mr. Gersten's attorney, and to Dr. Andrew McNaughtan, a friend of Mr. Gersten. All of these individuals were given access to the five boxes without supervision from anyone in the State Attorneys Office. Clearly, in retrospect, that may have been a mistake.

Subsequent to the issuance of the Staff Report, I was informed by the supervisor of our support staff in Special Prosecutions that she had been in the Special Prosecutions file room, organizing files to make room for more, when she spotted an additional box file related to the Joe Gersten investigation. She indicated that the box had a different case number than any of the

other five boxes already produced. Much of the additional box is duplicative, however, it also has a manila file folder marked police reports and inside the folder is a copy of the Osborn report. After discovering the file, it was provided to our records custodian who made copies of the additional box for all those who had made public records requests. Obviously our office should have discovered this file previously and we apologize to the Committee for our failure to do so.

I have only addressed the portions of the Report that relate directly to my involvement in this matter. Since I was Mr. Gregorie's supervisor at the time of the investigation, I was indirectly responsible for the investigation. We conducted an honest and thorough investigation. We were looking for the truth. Hopefully, at the conclusion of the questioning the Committee will have a complete picture of what occurred during the investigation. I respect your right to question government employees regarding their actions and will attempt to answer any and all questions to the best of my ability.

Mr. SHAYS. Mr. Osborn.

Mr. OSBORN. I don't have any prepared statement. I'm just here to answer your questions.

Mr. SHAYS. Let me start my round of questioning. Mr. Gregorie, you're here because you refused to answer questions by the staff in Miami, and you basically requested that we do it by subpoenas; is that correct?

Mr. GREGORIE. The problem was I was called on the telephone and read this committee's staff report before anybody ever talked to me.

Mr. SHAYS. That's not an answer to my question.

Mr. GREGORIE. Yes, it is. Excuse me, Congressman.

Mr. SHAYS. Mr. Gregorie, we are going to have some real rules here and I'm going to be very, very fair. I want you to know something. I don't know how this hearing is going to turn out. I have no idea. I don't know ultimately if I'm going to have tremendous sympathy for your position or are going to find that you tend to not answer my questions, and then I'm going to become very suspicious and we can play it any way you want.

Mine is just a simple issue of fact. I will allow you after you answer the question, to elaborate, I promise you that, because I'm willing to stay here all day long. So I promise you that and I am willing to have you tell me if you think I'm out of line.

But the bottom line is I just want to know the following, because I'm not thrilled to be here today. And I just want to know if I'm here because my staff made me be here or I'm here because we had to subpoena you.

The question I'll ask, again, is were you willing to voluntarily answer questions by our staff without a subpoena?

Mr. GREGORIE. Absolutely.

Mr. SHAYS. So the allegation that we had to subpoena you is false.

Mr. GREGORIE. No. What happened was, I was informed that this committee wished to speak to me and I was informed of that after a report had already been written which indicated that there was wrongdoing, without anyone having spoken to me. I then contacted someone who knows the system up here, lawyers who deal with Senate and Congress Judiciary Committees, and they told me, Dick, you shouldn't go in and answer questions where a part of your answer may be taken—you may not be able to have your full story told. Make sure that you go before the committee, where there are rules, where everyone will be there and where the public will be able to hear and see all that is said to you and all that you answer.

Mr. SHAYS. So the answer is yes and no. I'm still going to have to pursue it. There wasn't going to be a full transcript because we had made arrangements with the Justice Department to provide a full transcript, and we were going to ask your permission to do that and did that. So I just need to know if in fact you're here today because we needed to subpoena you. Would you have responded voluntarily to the questions of the staff down in Miami under a full transcript?

Mr. GREGORIE. I would have if the committee had not already written a report arriving at their own conclusions before I was contacted.

Mr. SHAYS. OK. The staff wrote a report, and that is correct. So your testimony is because the staff wrote a report, you are not willing to respond to questions without a subpoena and that was your decision, is that correct? I just want to know the truth, Mr. Gregorie, and we can spend all the time on you, and I'll take another 30 minutes later, and we'll go back and forth. This is the silly stuff I just want to know.

Mr. GREGORIE. The answer is yes.

Mr. SHAYS. The answer is yes, you required us to have a subpoena to bring you here.

Mr. GREGORIE. Yes, that's correct. I wanted the rules to be in place so that I could make sure that the rules were being followed in this committee.

Mr. SHAYS. The bottom line is you refused to answer questions voluntarily with the staff, in spite of the fact that they would have a transcript, and that could have happened and I want the record to show that, and that is accurate. Your attorney seems to nod his head behind you and you seem to be shaking your head, but you're the one who's under oath, you're the one who's before this committee.

Mr. GREGORIE. My answer is because the committee had already written a report.

Mr. SHAYS. The committee staff.

Mr. GREGORIE. The committee staff. They—well, they didn't say the committee staff. If you read the report that was written, there are seven places in that report that says the committee finds and the committee didn't find. What the report says is not really accurate, because it says the committee finds. The committee didn't have a hearing. That's why I wanted a hearing where all the rules would be in place.

Mr. SHAYS. Mr. Gregorie.

Mr. GREGORIE. Yes.

Mr. SHAYS. The bottom line is you wanted this hearing.

Mr. GREGORIE. I wanted the rules in place, yes.

Mr. SHAYS. No, no. The bottom line is you wanted this hearing.

Mr. GREGORIE. Yes, sir, I did.

Mr. SHAYS. And so we are here because you wanted to be here.

Mr. GREGORIE. Yes, sir.

Mr. SHAYS. That is the bottom line to this question.

Mr. GREGORIE. I agree with you 100 percent.

Mr. SHAYS. So we are not going to complain about you being up here because, bottom line, you wanted to be up here.

Now we can go—use all this time to just basically establish fact. That may be significant; it may not be significant. I just want to know. And what it's telling me is it's going to be a very interesting task to have you answer a question clearly.

Mr. Band, would you have been willing to answer questions by the staff under oath, under a full transcript—excuse me, not even under oath, just to respond to the questions?

Mr. BAND. My answer—and I don't mean to be any more difficult than Mr. Gregorie was with the Chair—it's a simple question. It

is a somewhat convoluted answer. Had counsel for the committee contacted me some 6 months ago, I believe I would have happily met with him on or off the record. I was not contacted until after the report was issued. I believed the report made insinuations which were unfair and I felt, not knowing the system, not having the experience of Mr. Gregorie, that given the filter of staff, I'd much rather address my comments—and in consultation with a lawyer I wound up hiring, he suggested that we go the route of the subpoena.

Now I tell you, and I don't know if this was communicated to you, it was my feeling that had Mr. Wilson traveled to Miami and took our statements under oath with a transcript, and that would have ended this matter then and there, I would have happily have answered his questions. But apparently staff was unwilling to guarantee that it would not end there, that we might be called before the full committee.

Mr. SHAYS. Well, they couldn't guarantee that because it's the decision of the full committee.

Mr. BAND. Again——

Mr. SHAYS. So the bottom line to your response is that given that there was a staff report on this, which you had an opportunity to see and therefore have an opportunity to respond to, you decided that you wanted to be subpoenaed and to come before the committee.

Mr. BAND. That's correct.

Mr. SHAYS. OK.

OK. Ms. Cagle, you're here because you basically supervised Mr. Gregorie and Mr. Band; is that correct?

Ms. CAGLE. I never supervised Mr. Band, but I was Dick Gregorie's supervisor when he was in the corruption unit at the State attorney's office.

Mr. SHAYS. Let me proceed with the questioning. This deals with the Pearce interview. Committee staff obtained an interview of Wayne Pearce just a few weeks ago. The interview was conducted May 1, 1992, 2 days after the alleged Joseph Gersten sex and drugs episode occurred.

This document is exhibit 1. On page 12 there is an interesting exchange. Now I'm assuming that every one of you has this, is that correct, and it's exhibit 1. On page 12 there, this exchange goes.

Question: "Okay. As far as you know, that guy"—and we're putting in Joseph Gersten—"has nothing to do with Champaign?"—and who is the murder victim.

Answer: "No. She know the man, Gersten Rich. That's why she"—this is the government witness—"Lisa McCann want for rob the man. Like she going—FBI man going to pay her $400 to call the man. Then the FBI trying to set up the man for something he didn't do and all she want to do was to get the money."

Question: "And the whole thing is a lie?"

Answer: "Yeah. The whole thing is a lie that man didn't do nothing."

[Exhibit 1 follows:]

STATEMENT OF:	Wayne Pearce
REFERENCE:	City of Miami Police Dept. Case# 1191174R
DATE:	May 1, 1992
PRESENT:	Wayne Pearce (Deponent) Detective Michael Osborn Homicide Unit Detective Howard Johnson Homicide Unit
TRANSCRIBED BY:	Teresita Lopez I.A. Stenographer

City of Miami Case #1191174R
Statement of Wayne Pearce

(At this point in time, the deponent, Wayne Pearce, was duly sworn, at which time the following statement was obtained.)

DET. MICHAEL OSBORN: This is going to be a formal statement into the homicide of Gregory Wellons, which occurred on 4/28/92, at 560 N.W. 45 Street, at approximately 7:30 a.m.

Present for this interview is myself, Detective Mike Osborn from Homicide, Detective Howard Johnson from Homicide and we're going to be taking the statement in the office of the Internal Security building here at the Miami Police Department. Also present in the room is Wayne Pearce; is that right?

WAYNE PEARCE: Yeah.

DET. MIKE OSBORN: Is that your real name, Pearce?

WAYNE PEARCE: Yeah.

DET. MIKE OSBORN: P-E-A-R-C-E?

WAYNE PEARCE: Yeah.

BY DET. MIKE OSBORN:

Q. You have been sworn to tell the truth and everything, right?

A. Yeah.

Q. How old are you?

A. Fifteen.

City of Miami Case #1191174R
Statement of Wayne Pearce

Q. Your Fifteen years old. Did you come down here kind of voluntarily, on your own, because somebody told you to come down here?

A. No, I was trying to tell the other man there that when -- I don't want to go -- I have nothing to do with this.

Q. Did somebody other than the police tell you to come down here and lie to us?

A. Yeah. I'm telling you he said -- told me.

Q. Are you aware that we are recording this on the machine here? You have any problem with that?

A. No.

Q. Where is your mother at?

A. Home.

Q. What is your mother's name?

A. Juanita Pearce.

Q. Where is home?

A. [redacted]

Q Do you know what the numbers are?

A. What numbers?

Q. The numbers? Your house numbers?

A. There ain't no numbers.

Q. Is it an apartment?

A. Uh-huh.

Q. Is it around the corner of [redacted]

1 Street?
2 A. Yeah, right in back.
3 Q. Earlier you told me [redacted]
4 A. [redacted].
5 Q. Is that the address?
6 A. Yeah.
7 Q. Is there an apartment number there?
8 A. There ain't no numbers.
9 Q. What is your birth date?
10 A. [redacted].
11 Q. What year?
12 A. [redacted]
13 Q. Do you normally live at home with Juanita?
14 A. Yeah, but I be doing over there sometime with my
15 friend's house.
16 Q. Where is your friend's house?
17 A. On [redacted] I spend weekends there. Then he came
18 to pick me up from there. My friend, he was coming
19 from the store, this is older guy. I know him for
20 a long time.
21 DET. MIKE OSBORN: I just want to back up to put
22 the starting time at 9:40 p.m.
23 Q. (Det, Osborn) All right, let's just talk about the
24 murder okay so we don't get carried away.
25 We're investigating a murder of a person whose

1 real name is Gregory Wellons. He goes by the name
2 of Champaign. Do you know that person?
3 A. Yeah.
4 Q. How long have you known Champaign?
5 A. For about almost a month.
6 Q. A month?
7 A. Almost, yeah.
8 Q. And where do you know Champaign from?
9 A. I been seeing him -- I met him at Publix one time.
10 Met him, met him.
11 Q. Do you normally hang around the hotels where he's
12 at or she's at?
13 A. No, I know some people.
14 Q. Is Champaign a boy that dresses like a girl?
15 A. Yeah.
16 Q. Have you ever seen Champaign around the Laura
17 Hotel?
18 A. Yeah she stay there, apartment Fifteen.
19 Q. Do you know who she stays with?
20 A. Yeah.
21 Q. Who?
22 A. Her boyfriend, his boyfriend.
23 Q. What is that person's name?
24 A. I don't know the name. He in jail now. I know his
25 name Kenny Watson, he's already in jail. He killed

1 -- the one he killed the preacher's girlfriend,
2 Kenny Watson.
3 Q. Kenneth Watson?
4 A They was going to go get married in prison. That
5 what he was telling me, Champaign.
6 Q. I'm talking about, does he have a boyfriend down
7 here now?
8 A. Down here now?
9 Q. That was staying with her?
10 A. Yeah.
11 Q. What is that person's name?
12 A. I don't know his name.
13 Q. Street name or anything on him?
14 A. No. They only call him "Black."
15 Q. They call him Black?
16 A. Uh-huh.
17 Q. Was he a black male?
18 A. Yeap.
19 Q. When is the last time you saw Black?
20 A. I saw him about two weeks ago. I ain't seen him in
21 a while. I seen him two weeks ago.
22 Q. How tall is he?
23 A. He tall like me. He little bit taller then me. He
24 like muscular bound.
25 Q. How tall are you?

1 A. Five two.
2 Q. Five two?
3 A. Uh-huh.
4 Q. How old is he?
5 A. I don't know.
6 Q. Does he drive a car?
7 A. No he just got out stockade.
8 Q. When?
9 A. I don't know it was, a while ago.
10 Q. You don't have any idea what his first name might
11 be?
12 A. No.
13 Q. Have you ever heard of a person called Prince Dunn
14 (phonetic)?
15 A. Prince yeah.
16 Q. Who is that?
17 A. That's him.
18 Q. That's him?
19 A. Uh-huh. He built. He got like a fade and he
20 black, and like kind of like built.
21 Q. This is the person called Black?
22 A. Uh-huh.
23 Q. When is the last time you saw Prince?
24 A. About two weeks ago.
25 Q. You came in here earlier today and you told us that

1 you witnessed Champaign get shot by a bald man.
2 A. I didn't see what happened.
3 Q. I'm just telling you what you said earlier, okay?
4 A. Uh-huh.
5 Q. You said that you saw a man in a light blue
6 Mercedes shoot Champaign in the head and threw her
7 out on the street at 52, Biscayne Boulevard; is
8 that correct, what you told us?
9 A. Yes.
10 Q. Was that the truth?
11 A. No.
12 Q. Why did you come in here and tell us that?
13 A. Lisa told me, "Tell them that."
14 Q. That's all she said, "Tell them?"
15 A. "You can't do me no favor? Boy, we gonna do good."
16 Q. Why did she want you to do this?
17 A. She was planning on suing the man.
18 Q. Suing the man?
19 A. She talk about the man trying to kill her --
20 somebody tried -- somebody -- her friend, she said
21 her friend, a man robbed the man for Forty Dollars
22 and then yesterday she gave me a letter telling to
23 tell the man's son about denying him -- tell him if
24 I see him that she had nothing to do with it about
25 what the man robbed him.

1 Q. This is the bald headed guy?
2 A. No that's the Lisa that was -- Lisa told me that
3 her friend did.
4 Q. I'm talking about the man with the Mercedes.
5 A. I don't know him. I never seen him.
6 Q. All right. So we don't have a statement this
7 thick, answer yes or no, or with a short
8 explanation, okay. Don't ramble on on something
9 totally unrelated. Stick to what we are talking
10 about here.
11 A. Uh-huh.
12 Q. You told me that you saw an older, bald headed,
13 heavy-set man shoot Champaign in the head. Then
14 later on you told me that Lisa told you to say that
15 because the FBI was going to give you $400.00.
16 A. She already had told me something before it
17 happening.
18 Q. Okay. Is Lisa the one that told you about
19 Champaign being killed?
20 A. No.
21 Q. Who is?
22 A. Another drag queen.
23 Q. Where does this drag queen live?
24 A. Same place where my friend over spending weekends
25 with.

1 Q. You're spending the weekends with --
2 A. Not him. She said the same place, same motel.
3 Q. What's the name of motel?
4 A. We stay in the New Deal.
5 Q. New Deal Motel?
6 A. Uh-huh.
7 Q. Where is it at?
8 A. At 1st Terrace.
9 Q. 1st Terrace and Biscayne Boulevard?
10 A. Yeah.
11 Q. What room number you staying in?
12 A. I'm staying apartment eight on top.
13 Q. With who?
14 A. My friend.
15 Q. Who is your friend?
16 A. He use to go with my mama. My mama's ex-boyfriend.
17 I just go around his house and watch cable
18 sometimes on weekend.
19 Q. What's his name?
20 A. His name Mike.
21 Q. The he-she lives in what apartment number, the one
22 that told you about Champaign being shot, lives in
23 what apartment number?
24 A. I don't know. You have to ask the manager, Pedro.
25 Q. The manager Pedro?

A. He owner.
Q. First floor, second floor?
A. Like two of them. One got first and second, that's one I said, and the one next to it got the same one. It's floor like low. It's low down. Soon as you go --
Q. Never mind. Never mind.
The he-she, you don't know the he-she's name?
A. No. I told you -- I told other man earlier that I don't know her. Know from Champaign; Champaign use his phone. He just told me to walk with him; I walked with him. That's how I met the other dude. This other dude told me about what happened about the murder, cause I don't know.
Q. The he-she your talking about?
A. Uh-huh.
Q. Tell us again exactly what the he-she told you?
A. Which one?
Q. The one that told you about the murder.
A. She just told me, "You heard what happened about Champaign?" I said, "No, what happened?" "Somebody killed her." I said, "Oh" and I just walked off. First I thought he was just joking.
Q. You told me she was shot in the head and pushed out of --

1 A. You asked me what the other drag queen told me.
2 Q. How many people told you about it?
3 A. One person.
4 Which one you talking about Champaign or other
5 one?
6 Q. I'm talking about Champaign. Who told you about
7 Champaign getting killed?
8 A. The drag queen.
9 Q. What did that drag queen tell you?
10 A. She told me, "You heard about what happened to
11 Champaign?" I said, "No." "Somebody gone killed
12 her and kick her out of car and stuff." I said,
13 "Yeah," cause I hardly believe her really. I just
14 walked out.
15 DET. MIKE OSBORN: (Directed to Det. Johnson) You
16 got any questions?
17 DET. HOWARD JACKSON: No.
18 A. Cause I don't know nothing really about the murder.
19 Q. (Det. Mike Osborn) You just know what you were
20 told by this he-she?
21 A. Yeah.
22 Q. The reason why you came in here and told us this
23 stuff cause Lisa wanted $400.00?
24 A. No, because man, citizen, something -- not a
25 citizen. He got something like -- I can't -- I

1 can't pronounce the thing.
2 Q. The Black --
3 A. No she want to sue him. She said, "They ain't
4 going to believe me unless you there." I said,
5 "Okay. I don't care."
6 Q. She told you to come in an say that?
7 A. I wasn't even thinking about Champaign no more.
8 Q. Okay. As far as you know, that guy has nothing to
9 do with Champaign?
10 A. No. She know the man rich. That's why she want
11 for rob the man. Like she going -- FBI man going
12 to pay her $400.00 to call the man. Then the FBI
13 trying to set up the man for something he didn't do
14 and all she want to do was to get the money.
15 Q. And the whole thing is a lie?
16 A. Yeah. The whole thing is lie that man didn't do
17 nothing.
18 Q. He didn't do nothing to her.
19 A. Lisa told about man going to try to kill her.
20 Q. Was the man going to try kill her?
21 A. That what she trying to say, like for man, they
22 going to try and set the man up for something he
23 didn't do.
24 Q. You know who this man is?
25 A. No.

1 Q. You know his name?
2 A. I don't know him.
3 Q. He drives a light blue Mercedes?
4 A. Yeah, that's what she said.
5 Q. She said. Did you see him drive it?
6 A. No. I told you I don't know him.
7 Q. You ever see him?
8 A. No.
9 Q. So the fact that he was heavy set and bald --
10 A. That's what she told me.
11 Q. -- was something she told you?
12 A. That's how she described him.
13 Q. You never seen the man?
14 A. I don't know him.
15 Q. I don't have anymore questions.
16 Have you told us the truth now?
17 A. I told you all the truth.
18 DET. OSBORN: Let's stop at 2155.
19
20
21
22
23
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25

Mr. SHAYS. Now, let's look at Exhibit 16. This is an excerpt from the exchange I just read, "Then the FBI trying to set up the man for something he didn't do."

Now let's put the information from the Pearce statement in order. A person makes an allegation against Gersten that could have put him in the electric chair. That person recants after the inconsistencies in his testimony are pointed out to him. He says his story is a lie. He explains that he told the story because he was offered money to tell the story. The person that offered him the money to make the false murder allegation was one of the main witnesses against Gersten in the sex and drugs scandal being investigated by the FBI and the State's attorney's office. He clearly states, "The FBI trying to set up the man for something he didn't do."

Now, given all of these facts, don't you think a fair-minded investigator would ask why his or her own witness was trying to frame the target of the investigation for murder? Mr. Gregorie.

[Exhibit 16 follows:]

PRINCAD-Reporting, N. J.
EXHIBIT
16

Mr. GREGORIE. I have never seen this statement. I did not know who Wayne Pearce was, and I don't remember anybody ever telling me about it. But having looked at it now, 10 years later, it still wouldn't have changed my mind one bit. This is a 15-year-old who was hanging around with crack addicts and prostitutes on the street after we had done a canvass of the community. The police had gone out and bought back the gold chain from the jeweler or from the pawnshop. They had gone and got the clothes out of the shop where they had kept the clothes. There was money being given to these people to get these items back. There were police officers canvassing, and we must have had somewhere between seven or eight different prostitutes who came in and claimed to have had sex with Joe Gersten, some of which might have been true, some might not, none of which contributed to our investigation—with our investigation, which was to determine where was Joe Gersten during that small 2-hour period between 7 and 8 or between 9 and 10, and was it true that his car was in front of his driveway or was it at the prostitute's house.

Mr. SHAYS. Let me understand. And the whole basic reason why we're investigating this man is because he made a false charge?

Mr. GREGORIE. The investigation was a public official who filed a police report which stated that his car was stolen in front of his driveway.

Mr. SHAYS. Right. So the bottom line to this whole incredible investigation is that he said his car was stolen and there's a question whether you think his car was stolen or not. Correct?

Mr. GREGORIE. Well, that and whether or not he was at a crack house having sex and smoking crack and buying crack cocaine from addicts down on Biscayne Boulevard.

Mr. SHAYS. But the bottom line is what triggered this whole thing was giving a false statement.

Mr. GREGORIE. That's correct.

Mr. SHAYS. OK. And we have this young man giving a false statement.

Mr. GREGORIE. This young man corrected his false statement within 20 minutes of the time he gave it.

Mr. SHAYS. Right. Which is not entirely true. I mean, let me ask you, how do you know that?

Mr. GREGORIE. Because I have been given a copy of the statement.

Mr. SHAYS. Yeah, but I don't understand; you don't know when he made the statement earlier.

Mr. GREGORIE. Testimony time I was given on May 7th, Mary Cagle was mailed by the people in Australia a copy of this statement. And Mary Cagle said to me, do you know about it and showed me a copy of it. I have a copy in my bag here.

Mr. SHAYS. The bottom line is we're investigating a man who gave a false statement, who is a public official.

Mr. GREGORIE. That's correct.

Mr. SHAYS. Who is alleged by prostitutes and others—and, frankly, they may be true—of prostitution and crack cocaine involvement. And so you're investigating, but it was triggered by the whole issue—and I want to just have this affirmed—it was trig-

gered by his saying his car was stolen, and you believed that may have been incorrect.

Mr. GREGORIE. I had two conflicting stories. I had Mr. Gersten's statement that it was stolen from the front of his driveway, and I had four people on Biscayne Boulevard saying it was stolen from in front of a crack house where he was smoking crack and having sex.

Mr. SHAYS. By reputable people making those allegations.

Mr. GREGORIE. No, they were four people who were unreputable people. However, they had his car, his wallet, his credit cards, his gun, his badge, his briefcase, and the clothes he had just bought at 6:30 at a clothing store.

Mr. SHAYS. Yeah, right.

Mr. GREGORIE. That corroboration, together with the fact that clothing store that he was at at 6:30, is a mere 3-minute ride from the place where he was supposedly having sex and drugs, led me to believe that Mr. Gersten was not telling us the truth.

Mr. SHAYS. Mr. Band.

Mr. BAND. This is the first time I have had an opportunity to look at this excerpt, I guess, of Mr. Pearce's statement. My side of the investigation, my side of the wall, had nothing to do with Mr. Pearce, with Ms. McCann. This was not relevant to me. My task was to investigate the individuals responsible for the taking of Mr. Gersten's car. My object in that was to get a statement from the victim, Mr. Gersten, so I could pursue that case. This had nothing to do with my investigation and I was completely—well this is the first time I have seen Mr. Pearce's statement.

Mr. SHAYS. So the bottom line is this is the first time you've seen it. Given that you have seen it, I want you to react to it. What does it tell you?

Mr. BAND. It's not surprising to me in the sense that—and I'm sure Mr. Osborn will confirm this—I handled literally hundreds if not thousands of homicide and other investigations. The suggestion that a witness comes in there initially and tells story A, retracts it and tells story B, and even retracts it and tells story C is not surprising to me and is of no moment because, without corroboration, it had very little if any value, and certainly to me in my side of the investigation, this was of no moment and of no value.

Mr. SHAYS. Ms. Cagle.

Ms. CAGLE. I think it's important to put it into context, because I can understand, like when I read your report, it's like the focus is the Osborn report there. And even in your comments, you're talking about a witness who made a murder allegation, he was looking at the electric chair. From our perspective, there was no murder investigation ever as it related to Joe Gersten. It just didn't exist.

Mr. SHAYS. Doesn't this speak, though, ultimately to the veracity of the witnesses?

Ms. CAGLE. Absolutely.

Mr. SHAYS. OK. Sure does.

Ms. CAGLE. No. I think that's the issue, you know, but as far as him looking at the electric chair or anything like that, I mean you folks I think must wonder why none of us remember, you know, Gersten and a murder investigation. You know, you've been

through all of the documents and you know Joe Rosenblatt, an assistant in our office, goes to Australia and he says to us, what do you know about Joe Gersten and a murder investigation? And we say, nothing.

And the reason for that, 10 years later we didn't remember anything about Joe Gersten and a murder. The only relevance it has is to Lisa McCann's credibility. And I guess the point, from our point of view, was Lisa McCann was one of four people who told this initial—or made these initial allegations against Gersten, and Lisa McCann had a rap sheet that was probably, you know, 20 pages long. She was an incredible witness. But her statements taken together with the statements of the other three people initially, and then as Mr. Gregorie points out all of the—I mean, our job and our sole focus from the very beginning was, we get this allegation and we take the testimony of these people, and we begin doing what we do in every case as prosecutors.

We begin trying to corroborate what they said. And in this particular case, right from the beginning, there actually was a lot of corroboration to what these four people said, even though, as your report correctly points out, there were inconsistencies in their rendition of events. But there were many things from the statement of the maid, Gersten's maid to his——

Mr. SHAYS. I mean, Ms. Cagle, you're going on and on. Really, I'm happy to have you go on, but you're going to have an opportunity to respond to a lot of the things that you're starting to ask. The bottom line is, we had a 15-year-old individual who basically accused Gersten of committing a murder. He was interviewed, and he was then cross-examined again, reinterviewed, and then he starts to bring the FBI into this. And it is kind of curious that didn't seem to catch anybody's fancy.

If you were going to conduct an investigation that relied, in part, on the testimony of the person who was trying to frame Gersten for murder, don't you think it is a matter of fundamental fairness to look into this matter? And I'm asking you, Mr. Gregorie.

Mr. GREGORIE. I'm sorry. Sir, could you repeat that?

Mr. SHAYS. Sure can. If you were going to conduct an investigation that relied in part on the testimony of the person who was trying to frame Gersten for murder, don't you think it is a matter of fundamental fairness to look into this matter?

Mr. GREGORIE. Well, first I would have had to know about it and I don't remember ever being told about it. This is the first time that I had seen this, May 7th of this year.

Mr. SHAYS. No. I understand and you will not have to keep saying that again. I believe when you have said that, and I believe you're saying it under oath. So it's done. The question is, don't you think as a matter of fairness that this should be looked into and should have been looked into?

Mr. GREGORIE. No, because, first of all—I'm sorry.

Mr. SHAYS. No. Go on. Go on.

Mr. GREGORIE. I didn't mean to interrupt you, sir.

Mr. SHAYS. No. That's all right.

Mr. GREGORIE. No. Because first of all, the person making the statement, the 15-year-old, had already admitted to being a liar. The allegation that there was money coming from the FBI, there

had been no money given yet so far. From what I can see from the statement, nobody gave anybody any money. The FBI had nothing to do with my investigation. I never saw an FBI agent. No FBI agent ever sat in with me on any part of the investigation. I never had anything to do with the FBI in this case.

So that it's clear to you—and I think you need to understand this was a State investigation. The FBI was called in, because in Miami Dade County, if a politician is being investigated, the local police don't like to be solely involved in the investigation. They might end up on the night shift somewhere in the most desolate part of south Florida. So they usually call the FBI for assistance. The FBI was called in for assistance, as I understand it. I never talked to an FBI agent. No FBI agent was present at any sworn statement I took. No FBI agent ever consulted with me on how this investigation ought to take place. So as far as I know, the FBI had absolutely nothing to do with my investigation, and I would have had no reason to believe that the FBI was doing anything in this case.

Mr. SHAYS. Mr. Band, do you think it's a matter of fundamental fairness that if you have an individual accuse your subject of your investigation of murder and he doesn't voluntarily, until confronted, acknowledge that he was lying, points out that he was—that the FBI was trying to get this man, don't you think he'd just want to find out a little bit more?

Mr. BAND. Well, again, Mr. Gersten was not the focus of my investigation. As a general principle and as a prosecutor of long standing, it is clear we want to get ultimately to the truth and test the veracity of individual witnesses. It, in effect, was done and accomplished by Mr. Osborne that day. Mr. Osborne spoke to him a few hours later or a few moments later. I'm not sure which. He recanted. It speaks volumes about Mr. Pierce's testimony. The next logical step would be to approach Ms. McCann and weigh her interest, if you will, in why she put Mr. Pierce up to this.

Now, the question is, what value does Ms. McCann have, and as Mr. Gregorie points out, we know who she was. She was a disreputable individual who practiced a profession that presumably we all understand as not one of liking, one who will sell things, will virtually do anything. That aside, how does her testimony compare with others? Is it corroborated? Is it not corroborated? So——

Mr. SHAYS. From what I can gather, if you were aware of this, you would have been a bit curious and would have wanted to check into this?

Mr. BAND. If that was my side of the investigation, if you will, if I planned to use Lisa McCann as a witness, obviously it would be of importance, because I know that later on, had I made a decision to charge an individual, my obligations under Brady would be to forward that information.

Mr. SHAYS. So the answer is yes?

Mr. BAND. I guess the answer is yes.

Mr. SHAYS. Ms. Cagle, should you—are you at least a bit curious about—did you have knowledge—again, I'm—the answers have been so long, I have to kind of just get focused again here. Mr. Gregorie and Mr. Band have both said that they did not know about this interview, did not know about this murder allegation. Did you know about the murder allegation?

Ms. CAGLE. When I read Mike Osborn's report that was faxed to me by the lawyers in Australia, it's clear from reading that report and I——

Mr. SHAYS. So you didn't know about that till recently?

Ms. CAGLE. No. My testimony clearly would be that I have no reason to disbelieve anything in Mike Osborn's report, but——

Mr. SHAYS. Are you saying that you did not—you were not told about this murder allegation?

Ms. CAGLE. Mike——

Mr. SHAYS. At the time of the investigation?

Ms. CAGLE. Mike Osborn's report recites that he made me aware of that at the time the investigation was going on, and I have absolutely no reason to disbelieve that Mike did that. All I'm saying is 10 years later——

Mr. SHAYS. Right.

Ms. CAGLE [continuing]. I didn't have a recollection of it.

Mr. SHAYS. But it's clear that it didn't even make you curious, because you would have remembered it? In other words, when it was presented to you, it was something that didn't even catch your interest in.

Ms. CAGLE. I can't really tell you whether 10 years later it caught my interest at the time or not. I believe when Mike says he made me aware of it, it certainly would have been one more thing that made us think Lisa McCann was not credible.

Mr. SHAYS. You see, the thing is that when you are investigating, in this case a public official, and you bring in an FBI agent, it's not plausible to me to have any of you suggest this is just any case. I believe you have lots of cases—but this wasn't any case. You know why? I even knew about the case being up here, because it was a sensationalized case that was discussed here and around the country. He was a prominent public official. I think he was running potentially for mayor of Dade County. One of the extraordinary things about the transcript of the Pierce statement, at least to me, is that Pierce told Detective Osborn that the FBI was going to pay Lisa McCann $400. Look again at page 12. It says, FBI man going to pay her $400 to call the man. When we interviewed Supervisor Special Agent Michael Bonner about this, he said he only considered paying McCann money after Gersten's car was stopped, and the car thieves were brought in for questioning. It is important to go back and revisit the chronology of what happened.

At about 1:15 on April 30, 1992, the three thieves were taken into custody. According to Bonner, it was only after this that he thought about paying McCann. At 6 p.m. the next day, Pierce was in police custody. Between 1:15 and 6 p.m. the next day, the FBI decided to pay McCann $400, communicated this fact to her, and she told Pierce. Because McCann was not brought in until just before Pierce was brought in, it seems likely that McCann was offered money before she was interviewed.

Do any of you have any information about McCann being offered $400? Mr. Gregorie.

Mr. GREGORIE. No, sir. No one——

Mr. SHAYS. Mr. Band.

Mr. BAND. No.

Mr. SHAYS. Ms. Cagle.

Ms. CAGLE. No.

Mr. SHAYS. Do you think it odd that there are no records to the contact when the FBI offered McCann money? Mr. Gregorie.

Mr. GREGORIE. I have no way of knowing what the FBI did.

Mr. SHAYS. Mr. Band.

Mr. BAND. I have no clue as to the FBI's——

Mr. SHAYS. Ms. Cagle.

Ms. CAGLE. No.

Mr. BAND [continuing]. Procedure.

Mr. SHAYS. Is this something that in retrospect should have been checked out?

Mr. GREGORIE. Well, since we didn't know that any money was offered or given, I don't know how we could have checked it out.

Mr. SHAYS. Should it have been checked out if you knew?

Mr. GREGORIE. Oh, if somebody told me they were giving a witness money, absolutely I would have wanted to know it.

Mr. SHAYS. Mr. Band.

Mr. BAND. I concur.

Mr. SHAYS. Ms. Cagle.

Ms. CAGLE. If we had charged the case, it's something that should have gone out in discovery, so we would have needed to know.

Mr. SHAYS. You know, when we started looking at this, we began to say, gosh, there is something kind of interesting going on here. You didn't know about the $400, and that's what your testimony is, but evidently $400 was making its way to a witness, and we want to know why.

Mr. GREGORIE. Mr. Chairman, may I add something?

Mr. SHAYS. Yeah.

Mr. GREGORIE. I do know that because these were crack addicts and prostitutes, we attempted to get them off the street while we were going to take their testimony. We wanted to try to make sure that their heads were clear, that they weren't on crack, that they weren't being used, and I know that we did put them in a hotel overnight, and we paid for it. My instructions to our investigators in the State attorney's office—now, the FBI wasn't there, we didn't talk to them—was to make sure that they were put up for a night, fed, and make sure that they didn't get any crack cocaine, and no money was to be given to them whatsoever. Our investigators paid for whatever bills there were. So I do know that occurred.

Mr. SHAYS. OK. Do any of you know when Special Agent Bonner actually requisitioned the $400 to pay McCann?

Mr. GREGORIE. I never talked to the FBI. So I have no idea what they did.

Mr. SHAYS. Mr. Band.

Mr. BAND. No clue.

Mr. SHAYS. Ms. Cagle.

Ms. CAGLE. No.

Mr. SHAYS. Does it strike you as curious that the man who made the false murder allegation against Gersten knew about a $400 payment to the woman who was putting him up to the false testimony and that he knew about it 2 days before the money was actually requested?

Mr. Gregorie.

Mr. GREGORIE. Again, I don't know that the FBI gave anybody any money.

Mr. SHAYS. No. But I asked you does it strike you as strange?

Mr. GREGORIE. I'm sorry. I——

Mr. SHAYS. Does it strike you as strange that the gentleman knew, even before the money was given, that she was getting $400?

Mr. GREGORIE. I don't know what was told her or what she told him. I have no idea.

Mr. SHAYS. I know, but if, in fact, it was true that he said that she was going to get $400 and that's what he did say, and in fact that he knew 2 days before the money was actually requisitioned and paid, doesn't that strike you as curious?

Mr. GREGORIE. Not under the circumstances in this case. Again, as I say to you, we had been on the street attempting to buy back the items that had been sold by the prostitutes, the witnesses had been talked to——

Mr. SHAYS. No. I didn't ask whether it was strange about the $400. We've already covered that. I asked if it's kind of strange that Pierce knew about the $400 before it was actually requisitioned.

Mr. GREGORIE. These are street hustlers, Congressman. They look for money anywhere they can get it. This man thought——

Mr. SHAYS. I didn't ask whether he was looking for money. I asked this question. I asked the question of whether it was strange that he knew 2 days before she got the money that she was going to get $400. That's what I asked.

Mr. GREGORIE. What I'm answering to you is, that knowing a street hustler like this young man, if he believed that there was money to be had, either from the police or some law enforcement authority, I'm not surprised at all he thought he could get money by coming in and telling the police the story.

Mr. SHAYS. This wasn't money going to him.

Mr. GREGORIE. Well, I don't know where he thought the money was going, because I don't know anything about it. We're dealing in speculations.

Mr. SHAYS. Listen to the questions. I want you to listen a little better, please. I asked the question, he was saying that McCann was going to get $400 from the FBI. Correct? Isn't that what this testimony says?

Mr. GREGORIE. If that is what is in here, if that's what he says, I still—you're asking me——

Mr. SHAYS. That's the question I'm asking. The question I'm asking is do you find it strange that he would have known 2 days before that the person who was setting him up to say that Gersten had committed the crime, McCann, actually was going to get $400? He knew 2 days before she actually got the money. You can answer yes or no. It's not a difficult question.

Mr. GREGORIE. It's speculation, Congressman, and I can't speculate without a lot more facts than you're giving me.

Mr. SHAYS. No. Well—so we'll come back to it. The bottom line is you're not speculating that he made the statement, because it's in the testimony. Do you agree that he made the statement? You're looking at it.

Mr. GREGORIE. The statement that's in here?

Mr. SHAYS. Yes. No, we're not debating that, are we?

Mr. GREGORIE. No. What we're debating is whether somebody told him they were getting $400 or that's a number he came up with out of the top of his head. I have no idea about where he got that number. I know nothing about any——

Mr. SHAYS. I didn't ask you how he got the number. I'm just asking you—excuse me.

I'll be happy to give you your time.

We're going to come back, and we'll have more time. We are going to go through this page by page by page.

You have a half hour, Mr. Waxman——

Mr. WAXMAN. Thank you, Mr. Chairman.

Mr. SHAYS [continuing]. Or more if you need it.

Mr. WAXMAN. Mr. Gregorie, you're being treated like you're a simpleton. Now, as I understand, you have a pretty distinguished record of prosecutions—or am I incorrect? Is this Joe Gersten case the only one you've been involved with?

Mr. GREGORIE. No, sir, not at all. I have two attorney generals distinguished service awards, one from Attorney General Meese in 1986, a second from Attorney General Reno in the year 2000. I have been a Federal prosecutor for 27 years in six different districts. I've got numerous awards. I have been chief assistant, chief of the criminal division, chief of the narcotic section in the U.S. attorney's office in Miami. I have run the strike force field office in Connecticut. I am very proud of my Federal record. Thank you, sir.

Mr. WAXMAN. Well, I want to say to all the witnesses here, I don't take a back seat to anybody when it comes to questions of prosecutor misconduct or indiscretion or abuse, and I know there are people sitting in prison today because of prosecutors zealousness and abuse of their powers, but I'm mystified why you're here. I'm mystified why we're holding this hearing. It just seems to me very, very peculiar.

I have a feeling that you might—the three of you—see yourself here today as if you're on trial, and I could see why you'd come to that conclusion, because the committee majority—the Republicans that run this committee—have already issued a report with conclusions. And the questions that you've been asked suggest not that we're trying to get the information from you—but that the majority knows the answers. Only you're not saying what the majority wants you to say. And I haven't heard that you've covered up anything. But I want to talk about this committee report and give you a chance to talk about some of the allegations that have been made.

The majority apparently has made up its mind about this investigation long before it scheduled this hearing, and in fact, the majority published its finding more than 2 months ago. In that report, the majority said, "government law enforcement officials purposefully ignored significant exculpatory information," that if aspects of investigation were not brought to the attention of Ms. Reno, then serving as State attorney, it, "almost certainly indicates that her subordinates were involved in improper activities." That, "government officials were not acting in good faith." And that the State attorney's office, "appears to be engaged in an ongoing effort to withhold significant information from Congress."

Now, these are inflammatory conclusions. They were reached before the majority interviewed a single prosecutor involved in Mr. Gersten's case. They were reached before holding a single hearing to gather facts. And they were published as committee findings before giving the committee members an opportunity to deliberate and vote on this report.

Now, let me begin by saying that all our witnesses are either current or former public servants. Richard Gregorie has been a State and Federal prosecutor for nearly 30 years. He had prosecuted a number of high profile narcotics and other cases, including the prosecution of Manuel Noriega. Mary Cagle has been a career prosecutor for nearly 20 years. She is now deputy chief of special prosecutions in the State attorney's office in Miami Dade County. In 1999, she was appointed by Governor Jeb Bush of Florida, to serve on the Public Corruptions Study Commission. Michael Band served as a prosecutor for approximately 20 years. He served as chair of the criminal law section and as chair of the bar grievance committee of the Florida bar. And I understand that Mike Osborn is here to answer questions. He has had a distinguished career as a homicide detective.

I want to go through these allegations. The majority states in its staff report that the vast power of the State was used to destroy Mr. Gersten. Mr. Gregorie, would you care to respond, or, Ms. Cagle or Mr. Band, on this allegation?

Mr. GREGORIE. Mr. Gersten destroyed himself, Congressman. We did not prosecute him. We never charged him with any offense. Mr. Gersten was given use and derivative use immunity. I think we need to explain this. In the State of Florida, under Florida law when you were served with a subpoena, you are automatically under Florida law given use and derivative use immunity. So that when Mr. Gersten was given a subpoena and called to testify, it meant that he could not be prosecuted for anything that he said.

Mr. Gersten refused to testify. He was not sent to jail for anything that I did or anybody in our office did. Mr. Gersten held the keys to the prison cell. He could have let himself out at any time. He chose to come and testify. He was the one who refused to testify and, therefore, was held in civil contempt. Rather than do what most people do who decide to be held in contempt, they find some reason that they feel that they are going to not answer. He did not report. He turned himself into a fugitive. He fled the country.

Mr. WAXMAN. Mr. Band, I'd like you to respond to this allegation. The vast power of the State was used to destroy Mr. Gersten. You're part of that vast power of the State. Tell us about it.

Mr. BAND. Yes, and I wither at the thought of the vast power of the State. The vast power of the State, or indeed of the government, is often held in check by the judiciary. Often, as—both as a State prosecutor and indeed as well as a Federal prosecutor, witnesses have refused to testify. I don't know of any instance where the individual who was brought before the judge in that circumstance was not forced by the judge, either the U.S. district judge or a circuit judge, or indeed a county judge in Florida, within a day. You're brought in. You're explained your obligations, immunity, and you testify or you go to jail.

In this case, as I suggested in my opening statement, it was unprecedented, unheard of the length of time it took to get it to the point, to get Mr. Gersten to testify. He appeared or challenged the subpoena before a number of judges. It was reviewed by district court of appeals in the State of Florida. He went to Federal court. It was reviewed by Federal judges and by Federal courts of appeal, rejected his arguments in its entirety.

Mr. WAXMAN. So he had a chance to make his case. He had lawyers pursuing his interests about refusing to testify? He went to even the appellate court and lost?

Mr. BAND. And lost up and down at every turn.

Mr. WAXMAN. So, Ms. Cagle, how do you respond, the vast power of the State being used to persecute Mr. Gersten?

Ms. CAGLE. Our sole motivation as prosecutors and at the State attorney's office was to do a fair, thorough and complete investigation. I feel we did that. We followed the leads where they took us. We tried to corroborate the testimony of the witnesses. At the end of the day, there was no reasonable probability of a conviction in the case, and so we didn't charge him. I believe that was the right decision. Had we charged him, there would have been much exculpatory information, we would have had to give to the defense. I take those obligations incredibly serious. I make Brady disclosures in my cases. Mr. Gersten was never charged, consequently there was no obligation in this case to give exculpatory information to the defense.

Mr. WAXMAN. Well, you've answered the second allegation made by the Republican staff in their report, because they concluded that prosecutors purposefully ignored significant exculpatory information.

Ms. CAGLE. I don't believe we did that. I believe we followed the leads where they took us. You know, we followed up on the allegations that were made. We created an ethical wall in this case, which was the right and proper thing to do, and at the end of the day, you know, our standard is, is there a reasonable probability of a conviction in this matter, and we came to the conclusion that there was not. And consequently, we didn't charge him.

Mr. WAXMAN. The Republican majority concluded in their staff report that the investigation into the theft of Mr. Gersten's car was, "merely a pretext to obtain statements from Gersten that would permit an indictment for perjury."

The three of you want to respond to that?

Mr. GREGORIE. Well, I think they're talking about what was referred to often as a perjury trap. That, Congressman, is a legal fiction under the law. You can't trap somebody into lying. They either tell the truth or they lie. But under the law, if someone is charged with perjury and the questions he is asked are questions which are not designed to further the investigation but rather are designed solely, for the purpose of making him tell a lie, then that is a perjury trap. That is in the law called an affirmative defense. What that means is that once you are charged, you can admit your guilt but say I'm guilty, because the government put me in a position of making me lie. You can't be put in that position until you've testified.

Mr. Gersten refused to give any testimony. So they couldn't have used the perjury trap. There are numerous cases. I've cited them in the cases in my statement, and you can find them there. But there was no perjury trap, because Mr. Gersten repeatedly, throughout this investigation refused to give any statement or any sworn testimony of any kind.

Mr. WAXMAN. Do either of the two of you disagree with that?

Mr. BAND. No. As a matter of fact, in Judge King's published opinion, he addressed the perjury trap issue and rejects it as indeed did the other courts who reviewed this.

Mr. WAXMAN. So a judge heard evidence that Mr. Gersten's lawyer presented to the court, indicating there might have been a perjury trap?

Mr. BAND. That's correct.

Mr. WAXMAN. And rejected that argument?

Mr. BAND. That is correct.

Mr. WAXMAN. But our Republican staffers, nevertheless, reached the conclusion there was a perjury trap, even though the judge heard the evidence and reached a different conclusion?

Mr. BAND. I do not know what the staff read, but there are certainly published opinion. *Gersten* v. *Rundle.* I appeared actually as counsel in that case before, again, a Republican-appointed, Nixon-appointed U.S. district judge. And there's a full discussion in there about perjury trap. It was rejected by that judge.

Mr. WAXMAN. The majority states that the prosecutors acted in, "extreme bad faith by engaging in a head-long rush to destroy Gersten." Any of you want to comment on that?

Mr. GREGORIE. Congressman, we never charged him with an offense. This was a public indecency case because two prostitutes and a pimp were found in his car with his briefcase, with his naked man pictures, with his gun, with his badge, with his clothes that he had just bought from the clothing store. We didn't create this incident, Congressman. This was public information. It was put out in the press. We didn't seek to destroy him. We merely sought to find the truth, who was telling the truth. And we got statements from the prostitutes and the pimp, who themselves were facing criminal charges. So they, too, could have been in some difficulty. They came in and gave statements. The government then sought to get a statement from Mr. Gersten. He ran to Australia. That is where the case stands.

Mr. WAXMAN. Well, look, these are charges that have been made against the three of you before any of you were talked to by our staff; is that correct?

Mr. GREGORIE. That is correct, and I——

Mr. WAXMAN. Charges about your conduct and your professional integrity, but none of you had been interviewed by the staff before these allegations were made. Is that correct?

Mr. BAND. That's correct, Congressman.

Ms. CAGLE. That's correct.

Mr. WAXMAN. Well, let me just give the last one in the Republican report. They say that the State attorney's office appears to be engaged in an ongoing effort to withhold significant information from Congress.

Ms. Cagle, would you care to respond to that?

Ms. CAGLE. That's just not so. A request was made for our files. The staff at the State attorney's office gathered the files. I was not personally involved in that, but there were about five boxes of files that they gathered. All of that was produced to Congress. It was produced to Congress after approximately seven groups of individuals from various agencies, six or seven. I'm not sure—had already made public records requests, and in a conference room at the State attorney's office, unsupervised, had been through all of those records.

Mr. WAXMAN. Well, maybe the allegation has been made, because Mr. Gregorie, you didn't agree to an interview without a subpoena being issued. That seems to me hardly to justify an allegation that you appear to be engaged in an ongoing effort to withhold significant information from Congress.

Mr. GREGORIE. Well, that's a strange allegation, since I haven't been in the State attorney's office since 1994. I left the State attorney's office in March 1994. So for them to say that I engaged in some sort of effort to keep them from information in this case, I wasn't even aware where the State attorney's office records are, and I haven't been in that office in 7 years.

Mr. WAXMAN. Ms. Cagle, you're with the State attorney's office?

Ms. CAGLE. I am.

Mr. WAXMAN. And everything you've been asked for, you've turned over?

Ms. CAGLE. Again, I wasn't involved in the process. Staff members at the State attorney's office gathered together, when requests came from a whole wide variety of people, I think starting with the Channel 7 reporter, Gersten's lawyer, a friend of Gersten, the Florida bar, the Miami Herald. After an initial report was made by the TV reporter, all of these entities asked for—made public records requests. The files were reviewed by someone other than myself. A decision was made that they were a public record because the statute of limitations had run on everything involved, and they were made available to everyone who asked.

At one point in time, a request for public records was made from Congress. All of the files were, you know, copied and sent to Congress. I know there is an allegation that, you know, the Osborn report was not in the file. I tried to address that in my opening statement.

Mr. WAXMAN. I think you've answered it to my satisfaction.

Ms. CAGLE. Thank you.

Mr. WAXMAN. I don't think you need to do anything more to prove your innocence. Because no one in my mind has even come close to establishing that you've done anything wrong.

Ms. CAGLE. Thank you, Congressman.

Mr. WAXMAN. For the past 6 months, this committee has been investigating President Clinton's pardon of fugitive financier Mark Rich, and both the Republicans and Democrats on this committee criticized Mr. Rich's decision to flee the country rather than face the charges against him. For example, Representative Shays said, "of all the pardons, the hardest one for us to understand and justify is the pardon of Mark Rich, an individual who fled the country and became a 17-year fugitive from justice."

Mr. SHAYS. Finish the sentence.

Mr. WAXMAN. That's all I have.

Mr. SHAYS. No. You left out a little bit.

Mr. WAXMAN. Well, I agree with that statement.

Mr. SHAYS. A traitor to the country, etc.

Mr. WAXMAN. Well, but just the fact that he's a fugitive, to me it's damning enough. Chairman Burton said if Mr. Rich thought he wasn't guilty, you can bet your bottom dollar he wouldn't have given up his American citizenship and fled the country, end quote.

The irony is that the majority is rushing to the defense of another person who has been found to be a fugitive from justice.

I have a few questions about the contempt order issued against Mr. Gersten and the meaning of his departure from the United States. Ms. Cagle, I understand that Mr. Gersten refused to answer questions, even under a grant of immunity. Is that correct?

Ms. CAGLE. That's correct.

As in all cases of this nature, you——

Mr. WAXMAN. Well, I'm just asking that.

Ms. CAGLE. Sure.

Mr. WAXMAN. Now, was he held in contempt of court?

Ms. CAGLE. Yes, he was.

Mr. WAXMAN. Was he eventually thrown in jail?

Ms. CAGLE. Yes, he was.

Mr. WAXMAN. He appealed his contempt order. Is that right?

Ms. CAGLE. That's correct.

Mr. WAXMAN. And how many judges ruled on his various appeals?

Ms. CAGLE. I think about seven.

I wasn't really involved in that litigation. I'll defer that question to Mr. Band, but I believe it was about seven——

Mr. WAXMAN. And was Mr. Gersten released from jail during the pendency of his appeals?

Ms. CAGLE. Yes, he was. At one point in time he got out on bond.

Mr. WAXMAN. And when the decision came down that Mr. Gersten had to testify, where was Mr. Gersten?

Ms. CAGLE. He had fled the country.

Mr. WAXMAN. Well, I want to make sure I have all of this straight. This hearing is about someone who refused to cooperate in a criminal probe. He hired the best attorneys possible, and he spared no expense in his defense. And when faced with a court order, rather than obey the law, he fled the country. Then he kept trying to get courts to look at his case, and the courts ruled against him.

Now, it's 10 years later, and this committee has bought Mr. Gersten's line that he's a victim, hook, line and sinker. Is that the conclusion that is appropriate to reach when you looked at the committee staff report and this investigation to date? Any of you want to respond to that?

Mr. GREGORIE. Well, I would like to add a thing to one of your earlier questions.

I know the report indicates that we didn't examine exculpatory information. 2 days after this incident occurred, we received information in the office that the prostitutes and the pimp were trying to extort Mr. Gersten. We wired a private investigator, sent him to see Mr. Elswick, the pimp, recorded his conversation and arrested

him for extortion. He has gone to jail for 8 years on another charge run concurrent with this extortion charge.

During that tape recording, it's interesting to note, Congressman, we did this. We examined the exculpatory information. On that tape recording, although he is extorting Mr. Gersten, he is also saying, the truth is we were there with you in the crack house, but I will lie about that and say I wasn't there if you pay me $10,000. This is an indication of the character of the witnesses, but it is also an indication of what the truth was in this situation.

Mr. WAXMAN. Well, I can't reach any judgment on all of these facts. This strikes me as just an incredible hearing. Talk about the abuse of government power. I mean, this committee has government power. Our committee could just issue subpoenas. Our staffs can just write reports. They don't have to talk to witnesses. They don't have to get the facts. They can reach their conclusions and issue them in the name of the committee even though they were careful, I guess somewhere, to have a disclaimer that it is a committee staff reports.

But the great irony to me is not only the connection to Mr. Rich. The great irony to me is that the Republicans are defending a man who was a public official and trying to minimize the fact that not only was it a public official but he might have been lying to cover up sex. Does any of that sound familiar? We have the Republicans in this Congress trying to indict the President of the United States through an impeachment in this House because they said he was a public official who lied to cover up sex, and that was wrong, and they were going to go after him and drive him from office.

And here we have a public official, who may or may not have lied to cover up sex with a prostitute and using crack cocaine—that may or may not be true—and they want to bring him back to the United States and excuse him from any offenses because he's been charged by people who are out to get him. I just find the whole thing quite amazing.

That green light is still shining, which means I have more time, but I can't think of any more to ask you. So I'll yield back my time, and I guess I'll get a chance later if there's something else comes up to inquire about.

Mr. SHAYS. This is going to take a little longer. We're going to do 5 minutes, 5 minutes. We're going to go back.

But, you know, I heard some laughter and I heard some amazement. I am eager to give you the opportunity to tell your story, I am eager to get at the truth, and I am eager to know why we have information that we will be asking that conflicts with things that have already been said. You will have your opportunity to answer those questions, but it necessitates my going down through these questions. But if we have faith in the system, of your being able to respond to the questions, we'll ultimately know where the truth lies.

Mr. Gregorie, I just want to ask you a question that is not in line with the questions. You have continually brought up what was found in the car and what the accusations were. Did you ever, during the course of this investigation, speak to the press about this case?

Mr. GREGORIE. I don't remember any direct action with the press. It's very possible there may have been times in the court.

I do remember that I went to examine the crack house where the prostitution occurred, and when we got there the press was there, and there were cameras there, and they took pictures of us examining that crack house. I was there with the police officers examining the crack house. So I do remember that. Of course, this is 10 years back; and, to be honest with you, Congressman, if I am quoted somewhere, please refresh my recollection.

Mr. SHAYS. Did you ever provide any information to the press, leaking information that was—of information that you had not made available to the press?

Mr. GREGORIE. You've used two questions, if you don't mind, Congressman. One is leaking information and the other is talking to them. I may well have answered press questions. I may have seen them. I'm not sure. I don't remember any specific instance, but I know I've talked to a lot of press.

Mr. SHAYS. How about the second question?

Mr. GREGORIE. Did I leak any information to them? No.

Mr. SHAYS. Are you aware of anyone else in your office who leaked information?

Mr. GREGORIE. You mean in the State attorney's office?

Mr. SHAYS. Yes.

Mr. GREGORIE. Not that I'm aware of.

Mr. SHAYS. Did you ever encourage anyone to leak information?

Mr. GREGORIE. Absolutely not.

Mr. SHAYS. Mr. Band, same questions.

Mr. BAND. As to leaking information, no. Again, the side I was on, I had no information to leak. It was out in—if you will, out in the public. He refused to answer a subpoena. There was nothing to leak.

Mr. SHAYS. No. The subpoena before then, the accusations were fairly well known early on. Is that just public information that, you know—can a prostitute and a drug dealer basically make an accusation against someone and in the process of your investigating, that's public information?

Mr. BAND. I was not privy, prior to my involvement, to any of the information. You're asking me to speculate. If you want me to speculate——

Mr. SHAYS. No. I don't want you to speculate. I want to know, in your official duties, did you ever have information that you leaked to the press that was basically still confidential information? Did you know of anyone who did?

Mr. BAND. No, I did not.

Mr. SHAYS. Have you ever had any discussions with anyone who did?

Mr. BAND. No.

Mr. SHAYS. Ms. Cagle, the same questions.

Ms. CAGLE. I don't recall whether or not I had a conversation with anybody from the press in my official capacity, and I didn't leak any information.

Mr. SHAYS. OK. Mr. Gregorie, you continually make reference to the fact that, you know, he had a briefcase, he had a necklace, and

that the four individuals had his personal belongings and so on. You've constantly made reference to that fact.

First, tell me why that's important, and then I want to ask you a question.

Mr. GREGORIE. Well, because the four individuals by themselves would have been incredible. If they had walked in my office by themselves in the condition that they were—and I have to tell you these were crack addicts. They couldn't stay more than 30 or 40 minutes without a fix. The women were in very bad shape. I would never have based an investigation on those four people walking in and telling me that they had sex and drugs with Mr. Gersten. However, that put together with their having his most intimate personal belongings, indicated to me that there was a good possibility. In fact, there was a probability that they were with him and took his items from him, because I could not possibly, in all good common sense, tell you that there was any other way they could have gotten those items.

Mr. SHAYS. In other words, a briefcase wouldn't be left in a car. What was left in the car that might not have been or shouldn't—or is absurd to have been left in a car.

Mr. GREGORIE. His car keys.

Mr. SHAYS. OK.

Mr. GREGORIE. His briefcase with not only important legal papers but the naked photos of this man we've never been able to identify.

Mr. SHAYS. Let me ask you this. And you know for a fact those were his photos and not put in there?

Mr. GREGORIE. Well, his lawyer said so. His lawyer said that he would claim a lawyer-client privilege to them except that he never asserted the privilege. In other words, how——

Mr. SHAYS. Let me be clear, because it's, you know, on the record.

Mr. GREGORIE. Sure.

Mr. SHAYS. You're saying that there is no question that those were his photos?

Mr. GREGORIE. Well, his lawyer said that.

Mr. SHAYS. His lawyer——

Mr. GREGORIE. His lawyer said that he would claim—in fact, she wanted to get the papers back, indicating that he would assert a lawyer-client privilege.

Mr. SHAYS. I want to be precise, and you want to be precise, too.

Mr. GREGORIE. Sure.

Mr. SHAYS. The papers or the pictures?

Mr. GREGORIE. The pictures. We're talking about the pictures of the naked man.

Mr. SHAYS. OK.

Mr. GREGORIE. Yes. His lawyer wanted us to take them out of—because once these public documents became public, those pictures are there, the news media can go—I mean, I don't know if they want to look at them.

Mr. SHAYS. These were not pictures of him. They were pictures of someone else?

Mr. GREGORIE. No. It's a young man, probably in his early 20's, fully naked, sitting in a chair. There were about three or four of

these pictures. We were concerned that it was a Dade County employee and that there was a possibility of some extortion here, and we tried to identify this man.

Unfortunately, nobody has come forward to be able to tell us who this man was, or did come forward, but his lawyer indicated to us that these were covered by lawyer-client privilege. In order to assert that privilege, you have to do more than just say they're covered. You have to do something to assert your privilege.

Mr. SHAYS. Why didn't you prosecute Mr. Gersten?

Mr. GREGORIE. Because I would have had to put on the witness stand four of the most disreputable witnesses probably that could have been found. And although I felt that the corroboration was strong, I did not believe I could carry the case and I could meet my standard of getting a probable conviction if I had to put those witnesses on the stand.

Mr. SHAYS. You basically have described that you had people who couldn't last even hours practically without it, and——

Mr. GREGORIE. That's the problem.

Mr. SHAYS [continuing]. And without—yeah. OK. And so basically you didn't have credible witnesses to prosecute him for filing a false statement about his automobile?

Mr. GREGORIE. That's correct.

Mr. SHAYS. Now, what about the drugs, though? They said he was taking crack.

Mr. GREGORIE. Well, the witness for that was a man named Mr. Maldonado, who was I think, of the four, the most credible. Unfortunately for Mr. Maldonado, he was convicted of murder in New York and was on parole from New York and wanted in New York for those charges. And once I had seen his entire record and that he was a fugitive from New York and he was the one who claimed that he was buying the crack for Mr. Gersten, I felt he was another witness who would, before a jury, not have been a credible witness; and therefore I did not feel that there was a probability I could get a conviction.

Mr. SHAYS. So you had no credible witnesses?

Mr. GREGORIE. I had no witnesses—no credible witnesses, correct.

Mr. SHAYS. Right. But what about the whole accusation about him taking drugs? Was he taking drugs?

Mr. GREGORIE. I can only tell you what the four witnesses told me.

Mr. SHAYS. He wasn't tested?

Mr. GREGORIE. He was tested, and the tests came back. Unfortunately, Mr. Gersten, the day after this event, flew to Europe and stayed an extra 2 weeks in—or 3 weeks in Europe before he came back. When the test finally was taken, the FBI came back and said he was not a regular user of cocaine, although they could not rule out that he was an occasional one or two-time——

Mr. SHAYS. No. This is——

Mr. WAXMAN. Mr. Chairman.

Mr. SHAYS. Yeah.

Mr. WAXMAN. I'd like to pass——

Mr. SHAYS. Sure.

Mr. WAXMAN [continuing]. On my first round and proceed with my questions, the second round of 5 minutes.

Mr. SHAYS. Let me just say, Mr. Waxman, I want to religiously protect the 5-minute rule, and if I go over it, it's just that I am interested in getting answers here, and I have no problem with you just asserting your right to exercise your 5 minutes.

I just want to understand something. So is your accusation that, by being away 5—3 weeks, that the test wouldn't have been a valid test, or do you acknowledge that in fact when he took the test it showed that he was not a user of cocaine?

Mr. GREGORIE. That he was not a regular user of cocaine.

Mr. SHAYS. OK. And my understanding is if he used cocaine, you're either a regular or—you can use cocaine just periodically, just at will, just show that restraint?

Mr. GREGORIE. I am not a scientist. I'll let the report speak for itself, Congressman. But if you look at the report, you'll see what it says is, we cannot tell you that he did not use cocaine. What we can tell you is that he is not a regular user, that it is possible that he used it once or twice. We can't tell you that. That's what the report says.

Mr. SHAYS. They really—and, in fact, they can't tell you that he did take cocaine, but they can tell you—it's stated a little differently, I think is accurate. They can tell you emphatically that he was not a regular user, and they can't tell you that he took any cocaine.

Mr. GREGORIE. That's correct.

Mr. SHAYS. That's correct. So, you know, from our standpoint, looking down on this thing, there are three things that start to raise some real question marks. You've got a witness who basically comes in and accuses someone you're prosecuting of committing murder, who says the FBI is paying $400 to one of your witnesses. You have the accusation that he was taking crack cocaine, and you have a test that said he definitely wasn't a regular user, and they can't substantiate that he took cocaine, and he was willing to take that test. And—or he did take it. He did take it. And so—and then we have—we start to ask for this information; and a key document, whether inadvertently or not, was left out. So we begin to say, what's going on here.

Mr. GREGORIE. What key document? I'm sorry, Congressman, but what key document was left out?

Mr. SHAYS. Information that he would have been accused of murder and that—you don't think it's a key document?

Mr. GREGORIE. No.

Mr. SHAYS. Yeah. That's interesting.

Mr. GREGORIE. I don't see at all.

Two things, if I may, in response to what you've said.

Mr. SHAYS. Sure.

Mr. GREGORIE. First, although I couldn't use it as evidence, shortly after this incident, Mr. Gersten's lawyer came in to see me and Mary Cagle, and then we took him down to see Janet Reno. The lawyer said to us, Mr. Gersten's family is worried about him. We want to see if we can work this thing out. They think he's sick. They think he has a crack problem. They'd like to work this thing out. That told me that it wasn't just——

Mr. SHAYS. That was family members?

Mr. GREGORIE. That was Mr. Gersten's lawyer, Mr. Richey.

Mr. SHAYS. OK.

Mr. GREGORIE. He came in, and what—I can't say it's a plea bargain, because he wanted to see what we could do to help him.

Mr. SHAYS. Let me ask you, if it was a plea bargain, would you be able to talk about this?

Mr. GREGORIE. No, I would not—well, I couldn't talk about it——

Mr. SHAYS. I just—I'm sorry to interrupt you. But you know, when Mr. Waxman was asking if I was treating you respectfully, I just am trying to listen carefully, and so when you insert the word, you know, it wasn't a plea bargain, it enables you to say things that if it was a plea bargain maybe you wouldn't say. That's what I'm asking.

Mr. GREGORIE. No. What I'm saying is I couldn't use it as evidence in court. I can use it here to answer your questions. It certainly—in fact, we testified to it. I testified and Ray Havens, who was also present, testified to it in a hearing before Judge Dean in one of these proceedings in which Joe Gersten was challenging the initial subpoena. Both of us were called to testify. So I'm really repeating to you today exactly what—or close to I hope what was said before the judge. And I know Ray Havens has testified in that proceeding as well, and I think you'll find it in his testimony as well.

Mr. SHAYS. Something you'll know, Mr. Gregorie, I'm not reluctant to ask a question I don't know, because I am not trying to prove a case, and hopefully you'll have that understanding. I don't care if you tell me something that basically says that Mr. Gersten was—in fact, I care to know. I'm not here to try to prove or back up a report or anything else. By the end of the day, though, I hope to God I have the truth, and I hope this committee does. And all I'm saying to you is that there are three issues on the table of curiosity to us and to me, and it is something that we would like to have more information about, because there's other information that we haven't shared.

Mr. GREGORIE. Congressman, I apologize if I answer aggressively. It's just that being accused of abusing my prosecutorial power, when I didn't charge this man, when I used my prosecutorial discretion not to charge him, somewhat has me a little charged up here, so to speak. So if I sound aggressive, I apologize.

Mr. SHAYS. No. You can be aggressive. I just want you to understand that I am happy to ask any question and get whatever is the truth.

In your opinion, should the FBI pay money to cooperating witnesses without checking out why the witness is committing a crime involving the target of an investigation? I would like to ask you that, Ms. Cagle.

Ms. CAGLE. Could I ask you to repeat the question?

Mr. SHAYS. Yeah. In your opinion, should the FBI pay money to a cooperating witness without checking out why the witness is committing a crime involving the target of an investigation?

Ms. CAGLE. You're asking me to comment on——

Mr. SHAYS. Yeah. I am. I'm asking you to comment.

Ms. CAGLE [continuing]. Whether they should pay money to a witness?

Mr. SHAYS. I have no problem asking you your opinion about the FBI. They got involved in your case, and I have no problem asking you about that. Do you want to——

Mr. WAXMAN. Finish this, and then I will.

Mr. SHAYS. Yeah. So the question I'm asking, in your opinion, should the FBI pay money to a cooperating witness without checking out why the witness is committing a crime involving the target of an investigation?

Ms. CAGLE. No. They probably should check it out. Yeah. They probably should followup. I think, you know, people should followup and ask questions about——

Mr. SHAYS. I mean, wouldn't it make sense? Why would you pay someone $400 when you understand that person is being accused of having someone come to the police about the same person who is being investigated and saying that he committed a murder? Why would we pay them $400? I want to know that.

Ms. CAGLE. I don't know why they paid the $400. I don't know if they paid the $400. I've never had a conversation with anybody about the $400. If they paid the $400 to put the witness up in a hotel like we were doing through the State attorney's office, I guess I could understand that.

Mr. SHAYS. Let me just say, we have documentation that says they did pay the $400.

Ms. CAGLE. OK.

Mr. SHAYS. So now—and we'll show that to you. But the question is, should that happen?

Ms. CAGLE. I mean, I would say you should ask the FBI why they paid the money and what they did it for. Like I say, if they were using the $400 to dry her out or something like that, I guess I would think maybe that would be appropriate. Should they ask followup questions? Sure, I think we should always ask followup questions.

Mr. SHAYS. OK. Mr. Waxman, thank you for your patience.

Mr. WAXMAN. You know, another thing I'm confused about, Janet Reno. This committee has a long history attacking Janet Reno, at least the chairman has a long history—not this chairman but Chairman Burton has a long history of attacking Janet Reno. How does she fit into all of this? What does Janet Reno have to do with any of this that we've heard about today?

Ms. CAGLE. She was the State attorney at the time that this case was investigated.

Mr. WAXMAN. So she was the State attorney. Were you at the office at that time?

Ms. CAGLE. I was.

Mr. WAXMAN. And was she involved in this case?

Ms. CAGLE. She was briefed on this case like she was briefed on all cases in the corruption unit.

Mr. WAXMAN. And what role did she play, other than having been briefed?

Ms. CAGLE. Well, she was present at the conversation. When Mr. Richey contacted us and said that he wanted to come in and talk to us and we had a meeting and——

Mr. WAXMAN. Mr. Richey is who again?

Ms. CAGLE. Mr. Richey was Mr. Gersten's lawyer at the time, and we had a meeting with Mr. Richey, somebody else in his office. And he had called for the meeting, and we had the meeting in Ms. Reno's office, and there were discussions regarding the fact that he had a problem.

Mr. WAXMAN. Mr. Richey had a problem, or Mr. Gersten did?

Ms. CAGLE. Mr. Gersten had a drug problem and was there any way we could resolve all of this, short of going forward with the investigation.

Mr. WAXMAN. And what was Ms. Reno's response?

Ms. CAGLE. We all listened to Mr. Richey. It wasn't sort of the setting where any action was going to be immediately taken. It was just sort of a discussion where he came in and said, look, Mr. Gersten has a problem. We're concerned about him. You know, is there some way we can resolve this, you know? It was just a general discussion where he came in and acknowledged Mr. Gersten's drug problem.

Mr. WAXMAN. And what other activities did she personally have in this whole issue?

Ms. CAGLE. That is the only meeting 10 years later that I have a recollection that she was a part of, but that is not to say that we didn't brief her as we went along. I just—you know, it's 10 years ago. It's hard to say, you know, what she was involved in and what she wasn't, but, you know, I mean, we did brief her on cases. So she would have had some knowledge, but——

Mr. WAXMAN. Did you know of any wrongdoing on her part?

Ms. CAGLE. Absolutely not.

Mr. WAXMAN. Do any of the other witnesses have any knowledge about any unprofessional conduct or wrongdoing on the part of Janet Reno?

Mr. GREGORIE. I doubt I'd be sitting here today if she thought I did something wrong.

Mr. WAXMAN. Why is that?

Mr. GREGORIE. She would have fired me so fast that my head would have spun. I wouldn't be allowed to be a lawyer any longer if she had anything to do with it if I did something wrong. If I did what this is saying that we did, Janet Reno would have fired me and thrown me out of the office so fast that my head would have spun.

Mr. WAXMAN. Well, that's if you did something, but do you know of anything—any information that she did something wrong?

Mr. GREGORIE. Absolutely not.

Mr. WAXMAN. Mr. Band.

Mr. BAND. No, Congressman. I don't believe she did anything wrong.

Mr. WAXMAN. Well, she was there as the head of the State attorney's office. Was it——

Ms. CAGLE. Correct.

Mr. WAXMAN [continuing]. At the same time that the State attorney's office refused to prosecute? Is that right?

Ms. CAGLE. That's correct.

Mr. WAXMAN. Is that prosecutorial abuse?

Ms. CAGLE. I don't believe so.

Mr. WAXMAN. You other gentlemen, you lawyers?

Mr. GREGORIE. Absolutely not.

Mr. BAND. No, Congressman.

Mr. WAXMAN. Well, that was the only other reason I hear that this investigation loomed so large in the minds of those who—on this committee—have made decisions to use our staff resources and our committee time.

I have other things I would have liked to have done today, but it's important that we're all here. We're spending the taxpayers' dollars, so I thought maybe we knew something that Ms. Reno did improperly. None of you know anything about that?

Ms. CAGLE. No.

Mr. BAND. No.

Mr. WAXMAN. Well, I don't either. I know that she did a fine job as far as I could tell as Attorney General, but I have no judgment to make, from my observation. I can't comment on everything she did one way or the other because I wasn't close enough to her. When did she complete her job as State attorney in Florida?

Mr. BAND. It would have been spring of 1993, Congressman. I am sure you will recall the difficulty President Clinton had finding an Attorney General. My recollection was he settled on or chose Ms. Reno probably around February or March, and she would have been confirmed sometime after that.

Mr. WAXMAN. And the Gersten issue was all in what year?

Mr. BAND. It commenced in April 1992 and continued through its tortured path through the courts. The order of contempt was March 1993, but it continued to into Federal court.

Mr. WAXMAN. If there were prosecutorial abuse, what year would that have been? That's like saying if you had beaten your wife and stopped, what year would that have been. If the Republicans were trying to use it for political purposes to go after Janet Reno because they never liked her anyway, and she might even run for office, they had to dig pretty far back in history to find something. And then it turns out they haven't found anything. It to me is inexplicable.

I yield back the balance of my time.

Mr. SHAYS. The gentleman's time has expired.

I would like to ask you, Mr. Band and Mr. Gregorie, the same question I asked Ms. Cagle. In your opinion should the FBI pay money to a cooperating witness without checking out if and why the witness is committing a crime involving the target of an investigation? Mr. Band.

Mr. BAND. Again, I was not privy to this, so I'm answering as a general proposition.

Mr. SHAYS. We truly understand that.

Mr. BAND. I presume that the FBI has administrative procedures in terms of the payment of money and how it's documented. The whys and the wherefores as suggested by your question, I really do not have enough facts to answer the question appropriately.

Mr. SHAYS. I asked you this question. I didn't ask you as it related to any specific person. I asked a hypothetical question, and I think I have a right to expect an answer. In your opinion should the FBI pay money to a cooperating witness without checking out

if and why the witness is committing a crime involving a target of an investigation? It's not a hard question.

Mr. BAND. If we break it down, Congressman, nothing's hard about the question. The answer, though, I suggest, may be a little more difficult. One would presume before the expenditure of any government money there is a justification for it. Should the FBI spend government money, taxpayer money, to promote an investigation? The easy answer is obviously yes. Should they check the witness out? Should they corroborate information? Where are they going to court? Sometimes they need to make a decision right away.

Mr. SHAYS. So what's the answer to that?

Mr. BAND. Right away? The individual agent will make a decision whether or not the money should be expended.

Mr. SHAYS. So you think that—your answer is you don't have a problem with that.

Mr. BAND. Well, I'm not sure I have a problem because I don't understand, with all due respect, the Congressman's question.

Mr. SHAYS. OK. That's my question. And the question is in your opinion should the FBI pay money to a cooperating witness without checking if and why the witness is committing a crime involving a target of the investigation. So you would, I presume, say there are conditions in which they should.

Mr. BAND. That is correct.

Mr. SHAYS. Why don't you just say the answer. Good grief.

How about you, Mr. Gregorie?

Mr. GREGORIE. You just answered it for me, Congressman. There are conditions in which they should. I don't know what it is they are paying for, and so therefore I can't be more specific than that.

Mr. SHAYS. Fair enough. These are not trick questions.

Does it strike you as odd that one of two things necessary had to happen; either McCann was offered money before the alleged sex and drugs event took place, or McCann found Pearce after the alleged sex and drug event and offered him money to frame Gersten for a murder?

Could you put up exhibit 15. And all three of you can respond.

This is one of your witnesses, Mr. Gregorie. Would you respond?

[Exhibit 15 follows:]

ONE OF THESE HAD TO HAPPEN

1. McCann was offered money by the FBI before the alleged sex and drugs events.

2. McCann was promised money by the FBI after the alleged sex and drugs events. She then offered Wayne Pearce money to make a false murder allegation against Gersten. The offer was made either before or after she was interviewed by the FBI.

PENGAD-Bayonne, N. J.
EXHIBIT
15

Would a fair investigation have required an understanding of what happened and the ramifications of what happened?

Mr. GREGORIE. It's one of whose best witnesses?

Mr. SHAYS. McCann was one of your witnesses.

Mr. GREGORIE. She was one of my witnesses. You said one of my best witnesses.

Mr. SHAYS. I didn't say "best." I am happy to clarify. I said that she was one of your witnesses.

Mr. GREGORIE. Yes.

Mr. SHAYS. This witness was paid $400, she was, and the question is one of these two things happened. Was either one acceptable?

Mr. GREGORIE. Well, first of all, if I may clear that up, I don't know that she was paid $400, and I don't think—I would be amazed if the FBI handed her $400 in cash. If I may, Congressman, I gave specific instructions to the police officers I was dealing with not to give any of these people cash because I was concerned it would go right out on the street as crack money. These were witnesses who were so addicted that if they got that money, they would have spent it on crack immediately. So I can't agree that anybody gave them cash, and if this woman had cash, believe me, a crack dealer had it within the next hour.

Mr. SHAYS. I want to ask staff a question here.

We will come back. We will either assert whether it was supposed to be paid or was paid, and then we'll ask you that question. That's a fair response.

Mr. GREGORIE. Congressman, can I ask you if there is a document of some kind——

Mr. SHAYS. I just made the point. You want to see the document, and then you will answer the question. I think that's fair, a document of, one, that it was to be paid and, two, was it paid.

Mr. GREGORIE. You will have to forgive me. Working with the FBI all the time, I have an advantage over my colleagues because I am used to FBI procedures.

The FBI cannot give out money without documenting who received it, and the recipient would sign a receipt of some sort. So if there is an FBI payment, there is an indication of who received that money. So that would help me tremendously.

Mr. SHAYS. One of the helpful pieces of information you provided is you wouldn't provide that money.

Mr. GREGORIE. I would certainly want to know—if somebody gave her $400, I want to know who gave it to her and how much she was given and how it was delivered to her.

Mr. SHAYS. Let me ask you this, and we will come back to that. I think this is a fair request. When did you first hear that Joseph Gersten was accused of committing a murder? Mr. Gregorie, when did you first hear it? When did you first hear? The question is when did you first hear he was accused of committing a murder?

Mr. GREGORIE. I don't know that he was ever accused of committing a murder. I know that Wayne Pearce walked in and gave his false statement.

Mr. SHAYS. Is that not an accusation? Am I splitting hairs, or are you splitting hairs?

Mr. GREGORIE. Under Florida law if a man recants his statement in the same proceeding in which he gave it, then the statement is no longer a false statement.

Mr. SHAYS. Was he in front of a judge?

Mr. GREGORIE. He was giving it to a police officer.

Mr. WAXMAN. Mr. Chairman, I allow you another 5 minutes. If you would like the clock started again.

Mr. SHAYS. Thank you. The question I'm asking is it didn't happen like that. He gave his testimony, and then a while later he came back and was confronted a second time. It didn't happen in the first episode.

Mr. GREGORIE. It happened in the same proceeding. So that I'm clear and I'm looking——

Mr. SHAYS. How do you define "proceeding"?

Mr. GREGORIE. The same interview. The police officer and he were sitting in the same interview.

Mr. SHAYS. Mr. Osborn, maybe we need to bring you in here. You've been very quiet. Tell us about it. We're talking about you, and you're right here, and that's the reason why you're here.

Mr. OSBORN. What do you want me to answer?

Mr. SHAYS. I want to know your interviews with this individual. I want you to describe the interview, and I want you to describe what you learned, and then I want you to describe what you wondered.

Mr. OSBORN. I first met Wayne Pearce——

Mr. SHAYS. Put the mic a little closer, Mr. Osborn. Thank you.

Mr. OSBORN. I first met Wayne Pearce when I did take his statement. He was brought in by Officer Garcia. Basically I was called into my office in Homicide and briefed that Internal Affairs had a witness that was involved in the homicide of Gregory Wellons. I then met with Sergeant Meeks and Lieutenant Fleites from Internal Affairs at which time they informed me that Commissioner Gersten might be involved in this homicide. Shortly after they briefed me on this——

Mr. SHAYS. A little louder and put the mic closer.

Mr. OSBORN. Shortly after they briefed me on that, we received a phone call that J.L. Garcia actually had Wayne Pearce and was bringing him in. I then went to the Office of Internal Affairs.

Mr. SHAYS. Let me ask you this. So Mr. Pearce wasn't there. The Miami/Dade police had heard that this individual was a witness to a crime.

Mr. OSBORN. The information came from Officer Garcia. Apparently he had contacted this kid on the street.

Mr. SHAYS. So Mr. Garcia had learned that Mr. Pearce had an accusation to make, and you went and found him and brought him in.

Mr. OSBORN. That's correct.

When Pearce was brought in basically—well prior to that, let me back up a hair. I was told that they had stopped Commissioner Gersten's car, and these people were in it, and the gun was in the car. So I was given the gun and told that the witness had information about the homicide. I then asked, where's the car?

Mr. SHAYS. Was this your case?

Mr. OSBORN. Yes, sir.

Mr. SHAYS. OK.

Mr. OSBORN. I then asked, where's the car, and the car had been released. That didn't go over too well.

Mr. SHAYS. That should not have happened?

Mr. OSBORN. No, sir.

Mr. SHAYS. Tell me why that car shouldn't have been released.

Mr. OSBORN. The accusation was that he was shot in the head while he was in the car. The car would be a key piece of evidence. We would want to look for blood splatter and things like that. So once I obtained the information about the car, and I immediately called down to property and found it had been released to Mr. Gersten's aide. So then we get back to Mr. Pearce. I interviewed him, and he gave the story that's in the documents and on his statement.

Mr. SHAYS. Let me say I can barely hear your voice. Just move the mic closer. You can still lean back. This is interesting testimony. Thank you.

Mr. OSBORN. I interviewed Mr. Pearce, and he told me the story about the homicide, that he observed an argument about Gregory Wellons—he was known as Champaign—and a heavyset, baldheaded man in a light blue Mercedes on Biscayne Boulevard and about 53rd Street. He then stated he heard them arguing about money and that he was shot and pushed out of the car.

Well, this did not match up with the facts of the case. Mr. Wellons was dumped several blocks from that area, and he died on a different day.

Mr. SHAYS. But he was interrogated, correct?

Mr. OSBORN. He was questioned.

Mr. SHAYS. He was questioned. Is "interrogated" a different word?

Mr. OSBORN. With a witness is more of a questioning. He was offering the information.

Mr. SHAYS. He volunteered all of this information?

Mr. OSBORN. Right. He was brought in by Garcia. He was offering the information. I was absorbing the information and comparing it with the facts of the actual case. After he gave his information, I left the room and I briefed the people in Internal Affairs, Fleites and the people there, that this was a crock, that this didn't happen. And eventually we went ahead and confronted him with the discrepancies in his statement, and that's when he began to give the version with Lisa McCann. He referred to her as Lisa, but I understood her to be Lisa McCann.

Mr. SHAYS. Did you know her, by any chance?

Mr. OSBORN. No, I did not.

Mr. SHAYS. So how much time between the first interview and the second interview?

Mr. OSBORN. I can't remember exactly. It was probably about an hour and a half, an hour and 25 minutes, an hour and a half after I first got his story before I actually took his statement and confronted him with the——

Mr. SHAYS. OK. So, Mr. Gregorie, tell me again, are we arguing over words here when you say he did recant? Your point was what?

Mr. GREGORIE. It's the same proceeding, Congressman. In other words, when he walked in to give his statement, the fact that Detective Osborn walked out and came back in doesn't change the fact that it's the same interview. So when he takes his statement back,

it is no longer a false statement to the police department. That was merely my point.

Mr. SHAYS. I can actually make a false statement and then change it an hour later, and it's not a false statement?

Mr. GREGORIE. That's right. You can't be charged for a false statement. You have corrected it in the same proceeding. It's like if I told you it's dark outside now, and then I said, wait, I'm sorry, Congressman, I'm really lying about that it really is light outside, it would not be a perjurious statement because I've corrected it in the same proceeding. That's assuming we're in the State of Florida.

Mr. WAXMAN. Mr. Chairman.

Mr. SHAYS. Mr. Waxman, I wanted to apologize to you when I said your time had ended when you said you yielded back. That was disingenuous, and I apologize.

Mr. WAXMAN. No apologies necessary. I almost feel like I missed part of this movie.

Who was killed, Mr. Osborn?

Mr. OSBORN. A man by the name of Gregory Wellons.

Mr. WAXMAN. He was known as Champaign.

Was he a transvestite?

Mr. OSBORN. Yes, sir he was.

Mr. WAXMAN. So he had been shot?

Mr. OSBORN. Yes, in the head.

Mr. WAXMAN. He had been shot by Mr. Gersten's gun?

Mr. OSBORN. No, sir.

Mr. WAXMAN. Did anybody ever find a weapon?

Mr. OSBORN. Yes, we did.

Mr. WAXMAN. Was that weapon traceable to Mr. Gersten in any way?

Mr. OSBORN. No.

Mr. WAXMAN. So Mr. Gersten is brought into all of this because—this is, again, about Mr. Gersten—because someone accused Mr. Gersten of having done the murder?

Mr. OSBORN. Yes.

Mr. WAXMAN. Who was that?

Mr. OSBORN. Wayne Pearce.

Mr. WAXMAN. Who was Wayne Pearce?

Mr. OSBORN. He was a 15-year-old boy that pretty much lived on Biscayne Boulevard.

Mr. WAXMAN. So he made this statement and retracted it?

Mr. OSBORN. Yes. He said he lied because Lisa sent him in and was going to give him money.

Mr. WAXMAN. Lisa is the woman——

Mr. OSBORN. Lisa McCann.

Mr. WAXMAN. Who is she again?

Mr. OSBORN. She's a witness in this case.

Mr. WAXMAN. She was one of people that presumably Mr. Gersten had sex and cocaine with?

Mr. OSBORN. Correct.

Mr. WAXMAN. So this fellow said that he was going to make this accusation because she wanted him to make that accusation?

Mr. WAXMAN. That is correct.

Mr. WAXMAN. And who got the $400?

Mr. OSBORN. Lisa McCann.

Mr. WAXMAN. Do you know anything about that $400, why she was given $400?

Mr. OSBORN. No, I don't. I just know she was given it.

Mr. WAXMAN. You know she was given $400?

Mr. OSBORN. Yes, sir.

Mr. WAXMAN. By whom?

Mr. OSBORN. Mike Bonner of the FBI.

Mr. WAXMAN. Did it have anything to do with this accusation of murder, or is this accusation of murder just out there and done? Do you take that seriously, the accusation of murder?

Mr. OSBORN. Do I take it seriously?

Mr. WAXMAN. Mr. Osborne; you don't take any of that seriously, do you?

Mr. OSBORN. Well, after he admitted he lied, no, I did not.

Mr. WAXMAN. After the accuser admitted he lied?

Mr. OSBORN. Yes. Wayne Pearce.

Mr. WAXMAN. It's interesting—Mr. Gregorie, do you want do say something?

Mr. GREGORIE. I think you remember early in my opening statement I said when you look at facts like this, you have to use your common sense. For this committee to be considering that Mike Bonner, who is a former Pennsylvania State trooper, a good FBI agent, who is now the legatee in Africa, Mr. Bonner, to pay a witness to come in to say someone committed murder and then not give him the right location, not give him the right time of day or even the right date or even the circumstances under which it was committed—I mean, if the FBI—I understand maybe some of the Congressmen here don't think the FBI are very competent, but if they are going to frame somebody, aren't they at least going to tell them the right day of week the murder happened on, or the right time of day, or how the murder occurred or where it occurred?

This allegation of a frame-up, a payment for a man to come in and say that, I apologize, it is laughable. I mean, for the FBI to frame the man, at least they should have told him the right day of the week or the right time of day or the manner in which the crime was committed. Common sense tells you this is nonsense.

Mr. WAXMAN. Maybe they didn't realize they would have this whole issue before a committee of the U.S. Congress.

Mr. GREGORIE. It is 10 years ago.

Mr. WAXMAN. It is an interesting aspect of the law. Someone makes an accusation, false statement, to the police, but then retracts it, they're not guilty of any crime.

Mr. GREGORIE. If they do it in the same proceeding, then under Florida law you are not guilty of giving a false statement because you have corrected it in the same proceeding. Even if the interview was continued over 2 or 3 days, but it was the same interview, then you would not be guilty of a crime.

Mr. WAXMAN. We work under different rules here in the Congress of the United States. A Member of Congress or our staffs can make false statements or accusations, and nothing ever happens to us. We never have to say we're sorry, and we can never be prosecuted, and we can always come up with another false accusation if it looks like the first one wasn't substantial enough. I have seen that happen.

So this could be a good dime novel, but it doesn't seem to me like it is worth 10 cents.

I yield back my time.

Mr. SHAYS. Thank you.

We have Mr. Osborn testifying that he received the $400.

How do you know that, Mr. Osborn?

Mr. OSBORN. I learned it from Mr. Wilson.

Mr. SHAYS. So you don't have your knowledge that he received the $400?

Mr. OSBORN. No, not at all.

Mr. SHAYS. OK. Thank you.

What I'm going to do now—Mr. Gregorie, I see you shaking your head.

Mr. GREGORIE. I am amazed that a witness would testify that the $400 was paid because a member of this staff of this committee told him 10 years later. That's what they wrote in the staff report, Congressman.

Mr. SHAYS. Mr. Gregorie, the reason I asked the question was to know the answer to the question. So you should have sense that we're trying to understand this issue.

Now, what I'm going to do, with your permission, is I'm going to give some of the 30 minutes to staff now to just introduce some information to the committee, and then we'll keep exact track of the time and then allow minority to have that same amount of time or use their 30 minutes if they wish.

Mr. WAXMAN. Point of inquiry. Do you want to have the staff take the staff's time now?

Mr. SHAYS. Some of the staff time now.

Mr. WAXMAN. But we're still working within the limits of staff time, 30 minutes on each side.

Mr. SHAYS. Absolutely. Is that a problem?

Mr. WAXMAN. I have no problem with that.

Mr. SHAYS. Thank you.

Let me be very clear that each staff has 30 minutes of time, and we are giving staff time now. You will not be using the entire 30 minutes.

Mr. WILSON. I think so.

Mr. SHAYS. So we're keeping track, and since the staff hit the clock, it does say 30 minutes.

Let me say before we start, we want to provide a document to all of the witnesses, so we won't start the 30 minutes before we give you the document. Please give a copy to Mr. Waxman, and I would like a copy of it.

We will just give you a second for people to look at the document so it is not strange to anyone.

I understand counsel is going to ask you on the last page, and it is very difficult to read, so you may want to read the last page with a little more attention. I apologize for the condition of this handwritten note.

Have you all read that? When you're ready, let me know.

Are you prepared to start?

Mr. GREGORIE. Congressman, I'm having a real hard time reading this.

Mr. SHAYS. The last page has been typed out, and I think really we should have typed the whole darn letter. We got this this morning. Let's struggle through it and do the best we can and go from there.

OK. I am going to have the counsel's time begin, and if you would hit the button, please.

Mr. WILSON. Good afternoon. It will take a little while to get through this, but I think I know you have correctly perceived, for all of your concerns about the staff report, that our concern was that one of principal witnesses, indeed the witness deemed to be one of the most reliable by the FBI in the Gersten case, had apparently, according to Mr. Osborn's report, been part of an effort to frame Mr. Gersten for a murder. And one of the things that has been said in the staff report and that has been communicated today is that we're not certain why no one would have taken the time to go back to the witness and, after hearing the story about the many things that she said, ask her, why are you trying to suborn this young fellow to come in and tell a story about how Gersten murdered somebody? So that is a conundrum for us why nobody went back and did that.

Now, we asked in the committee for the underlying notes of the FBI 302 of the May 1, 1992, interview of Ms. McCann by Special Agent Bonner, and this morning we received a copy of the underlying handwritten notes, and the reason we were interested in that was because we wanted to receive the time of the interview, and for reasons that will become apparent later, that is of some importance. But when we reviewed this document this morning, we saw something that we had never seen before because we had received the typed 302 interview of Ms. McCann prepared by Mr. Bonner, and there's something in the handwritten notes that was not included in the ultimate FBI 302. And it's on this last page, and it goes to this murder allegation that was brought against Mr. Gersten, and slightly offensive in its language, but there's no way around reading it.

I'll just read what I believe to be Mr. Bonner's handwritten notes saying—these were notes taken on May 1, 1992. They say, yesterday some kid asked me if I had some rolling paper.

Mr. OSBORN. Speak up.

Mr. WILSON. I'm sorry.

"Yesterday some kid asked me if I had some rolling paper. I said aren't you kind of young. It turns out he is about 15 years old. He asked me if I know about this faggot got shot last week. He said the faggot was named Champaign. He said a guy in a blue Mercedes shot him. He said some how Champaign got in the car. Champaign got his keys wouldn't give them back and the guy shot and killed him. He paid the kid $300 to keep his mouth shut."

Now, the first thing that was of some interest to us is why Mr. Bonner would not have in his typed-up notes reflected fully the information that Ms. McCann brought to him. So recognizing that Mr. Bonner is not here, I will ask that question of each of you. Did any of you—and I will start with you, Ms. Cagle—ever talk to Mr. Bonner about his investigation of this matter, specifically the murder allegation?

Ms. CAGLE. I have no recollection of ever talking to Mr. Bonner about this.

Mr. WILSON. Now, since relatively recently you had an opportunity to look at this police report that Mr. Osborn prepared, did that refresh your recollection in any way as to people you might have talked to in 1992?

Ms. CAGLE. I have no reason to believe anything in Detective Osborn's report isn't true. I mean, I read it; I looked at it. There was some reference in the middle of the report to a conversation I had with Lieutenant Fleites, who I worked with all the time. It did refresh my recollection as to that sort of unrelated piece. But my recollection was not refreshed as to the exchange Mr. Bonner or Detective Osborn and I had.

But, again, I say it's not to say that we didn't have it. I'm sure what Detective Obsorn put in his report is accurate. I have no reason to think that it isn't.

Mr. WILSON. OK. Now, Mr. Band, did you talk to Mr. Bonner at all about anything to do with the murder allegation?

Mr. BAND. No, I did not.

Mr. WILSON. Mr. Gregorie, did you talk to Mr. Bonner at all about the murder allegation?

Mr. GREGORIE. Absolutely not.

Mr. WILSON. I think by your answers—and I think you are probably going to answer the next question—it's a question we ask, and you may not be able to answer it, but we're trying to determine why Mr. Bonner chose to omit this information from his prepared report of the interview with Lisa McCann. Do you have any information that would go to that question, Mr. Gregorie?

Mr. GREGORIE. This report does not indicate who it is that was in the blue Mercedes. If you have been to Miami, there are an awful lot of blue Mercedes. This doesn't say it is Joe Gersten.

Mr. WILSON. We're not saying it is. One of the things we're trying to determine is whether or not any of you have information as to why this was included in the ultimate report prepared in the FBI, the typed FD–302. Do you have any information on that?

Mr. GREGORIE. As far as my case is concerned, this would have absolutely nothing to do with my investigation of Joe Gersten smoking crack and having sex with prostitutes in a whorehouse on Biscayne Boulevard.

Mr. WILSON. Is it fair to say you do not have any knowledge as to why this is not incorporated in the ultimate FD–302? That's the question.

Mr. GREGORIE. I have no idea.

Mr. WILSON. Mr. Band.

Mr. BAND. I never saw the 302, and specifically to your question, I have no idea why Agent Bonner did not include it.

Mr. WILSON. Ms. Cagle, do you have any information as to why this was not included?

Ms. CAGLE. No, I don't know.

Mr. WILSON. Now, one of our concerns is that this handwritten notation here indicates that Lisa McCann told then Special Agent Bonner, about the allegation of the murder, and as Mr. Gregorie pointed out, it does not provide a name of any individual, but it does provide an indication that a kid saw a murder in a blue Mer-

cedes, and it tracks fairly closely the allegation that Mr. Pearce had made to Mr. Bonner. I mean, Mr. Bonner, does this look like the same type of fact pattern that Mr. Pearce brought to your attention when he made the allegation of the Wellons murder?

Mr. OSBORN. It's close, but the last part wasn't there, no.

Mr. WILSON. The last part being the part about paying the kid $300 to keep his mouth shut?

Mr. OSBORN. That is correct.

Mr. WILSON. Now, I'm not going to go too much longer on this because I think you legitimately don't know much about this, but there is a question that we feel, and feel with some sincerity, and that is if information had been brought to your attention, Mr. Osborn, that somebody had paid $300 to have this kid keep his mouth shut in a murder situation, would you have wanted to followup on this information?

Mr. OSBORN. Yes.

Mr. WILSON. Ms. Cagle, would you have thought this of some relevance if you had been aware of this at the time?

Ms. CAGLE. Can I have some time to respond about what we're talking about, because you keep referring to this murder allegation, and in the context of what we were doing, I think if you're trying to figure out what was in our minds, it's so important for you to understand that this kid came in, was interviewed by the homicide detective who was investigating the homicide. So it was important to Detective Osborn. And he found out, as he just stated in his own words, that it was all a crock, right then and there. And so this was never about any sort of—from our perspective, this was never about a murder in any way, shape or form.

Mr. WILSON. We understand, but you raise an important point. I think what Mr. Osborn was referring to, and please correct me if I'm wrong, is that the facts of the murder made it appear that Mr. Pearce had not seen what he said he saw. Is that what you referred to as a crock?

Mr. OSBORN. Yes. It would mean that he fabricated the story.

Mr. WILSON. But, Mr. Osborn, you don't have any knowledge one way or the other about Mr. Pearce's observations about Lisa McCann offering him money. You don't know whether that's true or not true, do you, at this point?

Mr. OSBORN. No, I don't.

Mr. WILSON. Ms. Cagle, do you know whether that's true or not true?

Ms. CAGLE. No.

Mr. WILSON. Should you know whether that's true or not true?

Ms. CAGLE. I guess that would be your judgment. I guess you're saying I should know that. I'm saying I have no recollection of that.

Mr. WILSON. No, I'm not. It just goes to a question that we have. And that is you were investigating something in your office and you spent approximately a year following up leads and nobody has said anything about what should have been done in terms of investigating the allegations. But there was a piece of what may have been exculpatory evidence or interesting evidence that went toward whether one of the principal witnesses in this case had been trying to frame somebody for murder, and so our question I think is boiled down to: With all of the interviews you conducted, would it not

have made sense for one question to have been asked about Ms. McCann, why are you involved in an effort to frame Mr. Gersten for murder?

Ms. CAGLE. Sure, and the issue would have been McCann, whether or not she really did solicit Wayne Pearce to commit perjury, I guess would have been the issue, and should there have been a followup question to that and was there. I don't really have any knowledge of that. I have looked at the file. I don't see anything in the file that shows that there were followup questions. But I'm not sure that means there weren't.

You know what I'm saying? Very easily some of the people involved could have followed up on some of that, asked a question here or there. But if you're asking me whether or not I know, whether or not the investigator involved did ask any followup questions to Lisa McCann about that issue, I don't know.

Mr. WILSON. I understand. But when Mr. Pearce made the observation, the FBI trying to set up the man for something he didn't do, do you know what Mr. Pearce meant? I think you said you don't know much about this, so maybe the answer is no, but do you know what he meant?

Ms. CAGLE. I'm not sure I understand the question.

Mr. WILSON. When Mr. Pearce's statement was taken by Mr. Osborn, one of the things that Mr. Pearce said was the FBI is trying to set up the man for something he didn't do.

Ms. CAGLE. I don't know anything about that.

Mr. WILSON. And that is one of the things we're looking to try and understand. If at the time, if you had been standing in the room with Mr. Osborn and Mr. Pearce and you had heard this young man make a murder allegation and then recant and then one of his justifications for that was I was offered money for this and the FBI is trying to set a man up for something he didn't do, wouldn't it have been a logical question to ask?

Ms. CAGLE. If I thought there was any credibility whatsoever saying this kid—saying the FBI was trying to set up Joe Gersten in a murder, I would have definitely followed up.

Mr. WILSON. But even you raise the issue if there was credibility. But even if you made the statement, would you not have been curious as to why of all agencies the FBI—this is a 15-year-old street kid who is not—from reading his interview, not a particularly savvy person, and he makes the observations unprompted, the words weren't put in his mouth by Mr. Osborn. He makes the unprompted observation the FBI is trying to set up the man for something he didn't do. And my first question is why would he even think of the FBI? And I don't know the answer. I just legitimately don't know the answer.

Ms. CAGLE. Me either.

Mr. WILSON. But if you had been there at the time, would you have asked the question, what do you mean, Mr. Pearce?

Ms. CAGLE. Sure. Detective Osborn may have asked him that. I don't know.

Mr. WILSON. Mr. Band—and we don't have to go further on this—would you have asked the question, what do you mean, Mr. Pearce?

Mr. BAND. Perhaps.

Mr. WILSON. Perhaps. Fair enough. That's a fair answer. Mr. Gregorie, would you ask what did you mean, Mr. Pearce?

Mr. GREGORIE. The only thing Mr. Pearce was there to talk about was the murder. So when he said he was trying to frame him for something he didn't do, he was clearly talking about a murder. He wasn't talking about anything else.

Mr. WILSON. So the answer is yes?

Mr. GREGORIE. The answer is no. I wouldn't have asked him any further questions. He said that's what he was doing.

Mr. WILSON. Well, that's interesting. Mr. Osborn, has anybody ever made an allegation and then recant and you have doubted their recantation? For example, Mr. Pearce said I saw something, and then he comes back and says, well, I don't know about this, I didn't see it. Is that the end of the issue for you?

Mr. OSBORN. After they recant?

Mr. WILSON. Yes.

Mr. OSBORN. Not always, no.

Mr. WILSON. Now, one of things, and we'll get to this perhaps a little bit later, but apparently, Mr. Osborn, you spoke with Ms. Cagle about the murder allegation, is that correct?

Mr. OSBORN. Yes, I did.

Mr. WILSON. And you wanted to speak to Mr. Gersten about this allegation, did you not?

Mr. OSBORN. I did.

Mr. WILSON. And from your report you have written that Ms. Cagle asked you not to talk to Mr. Gersten about the murder allegation, is that correct?

Mr. OSBORN. That is correct.

Mr. WILSON. Ms. Cagle, do you remember whether you instructed Mr. Osborn not to talk to Mr. Gersten about the murder allegation?

Ms. CAGLE. I don't have any current recollection about my interactions with Detective Osborn. But in reading the report, it's very likely I would have said something like that, because if I had a conversation with the detective and he was doing something and we were involved in an investigation prior to him going and confronting the subject, references something, it would be, you know, a normal course of conduct for me to say, Detective Osborn, we're having a meeting on Monday. Let's not go talk to him until after we see where we're at and what's going on.

Mr. WILSON. Thank you. We can resume this a little bit later. That's half of my time.

Mr. SHAYS. Do you want to use any of your time now? Let me say this. I had the opportunity to use the restroom. You all haven't. I'm going to have a 15-minute break. I'm going to sit down with Mr. Waxman. We're going to determine when we're going to conclude this hearing and what other lines of questions we're going to have. So is the cafeteria open downstairs? I think it is. There's food downstairs.

Let me say we will be sharp at 2 o'clock. We will be sharp at 2 o'clock. OK, so we are recessing until 2.

[Recess.]

Mr. SHAYS. We're back in session, and the witnesses are under oath. Let me explain to the witnesses that I have gone through only 5 pages of 23 pages of questions. And I am more than happy

to stay late, but we're not going to do all of those questions. But what I will be doing is I will be asking you about the equivalent of probably five more pages of questions and then what we will be doing is sending you in a week the remaining questions and having you fill them out. So that's what we will be doing. The counsel only has 15 minutes left in his questions. The minority counsel has 30 minutes. I will ask my questions. We'll have minority counsel. You can interrupt every 5 minutes if you want or whatever, Mr. Waxman, and we will have our counsel, I guess, go first. Is that what you prefer? And then their counsel and then Mr. Waxman, and I will just conclude with maybe some brief comments and then we'll get on our way.

So it's not an incentive to try to have you answer shorter answers but where possible, it would be appreciated if ultimately we're going to get to a conclusion. I am going to start and I am going to have counsel wait until I'm done. But at any rate I have taken about 10 pages out of the questions, about half. Mr. Band, please take a look at exhibit 3, and I would like to know is this your handwriting?

[Exhibit 3 follows:]

ROI

5-7-92 (report)

Det. M. Osborn

1 May

6:00pm - briefing by Sgt. Meeks -

J.L. Garcia & L. Iglesias stopped at stolen mercedes (Gerston) on 4-30 - driver of mercedes stated car not stolen but given by Joe to buy drugs - Lisa also in car

Joe at the Laurel Motel - grey Gold reported stolen by Joe

6:55 - spoke w/ Lt. Fleites

Lisa - witnessed a heavy set bald man in a blue mercedes

had .38 belonging to Joe

7:10 - mercedes released to aide

J. Diaz arrest report:

4/30/92 - mercedes recovered at 480 NE 30 St.

car stolen from C.G. on 4/29/92 - driver of car Kenneth Elswick 540 NE 31 St.

7:45 - Det Garcia arrives w/ Wayne Pierce

Pierce - describes shooting

9:10 - Pierce recants story

Pierce explains that Lisa told him to go to police w/ story because she was to be paid by FBI - denied witnessing shot

EXHIBIT 3

11:00 weapon found near scene was murder weapon
Joe's not involved

5 May
5:10 - Michael Bunney, FBI
4-29-92
Lisa McCann picked up at Boulevard & 36 St. by Joe
went to her house (east of Boule on 31 St.) had
sex
joined by Claudia Lira & Roberto Waldorado
[illegible]
Joe gave $ to Claudia & Roberto to buy drugs
Claudia & Roberto planned [illegible]
took gold chain, $, car
all left - leaving Joe alone - to buy drugs
upon return, learned that Joe took a cab out of
area
540 NE 31 St. where incident took place

5:30 C.G. report - Joe reported car stolen on 4/29/92 at 8:30 P.

Mr. BAND. I believe it is, Mr. Chairman.

Mr. SHAYS. Is this your handwriting?

Mr. BAND. Yes, I believe it to be my handwriting.

Mr. SHAYS. It is a little hard to read here, but Mr. Band, does the fact you took such copious notes not indicate that you thought the false allegation was significant?

Mr. BAND. I'm sorry, I didn't hear you.

Mr. SHAYS. I'm sorry, I will speak a little louder. Does the fact that you took such copious notes not indicate that you thought the false murder allegation was significant?

Mr. BAND. No, I think most of my notes are fairly copious. I would not attribute anything more than that.

Mr. SHAYS. But you have taken a look at this document?

Mr. BAND. Yes.

Mr. SHAYS. And now that your memory has been somewhat just brought up to date, how did you learn that Gersten had falsely been accused of murder?

Mr. BAND. Again after 10 years my recollection is somewhat refreshed by my notes. Apparently I learned of it through Detective Osborn's report of May 7, 1992. My estimation is I did not read that report till either late June or early July of that year.

Mr. SHAYS. Mr. Osborn, did you talk to Mr. Band about these allegations?

Mr. OSBORN. I'm not 100 percent sure what the conversation was with Mr. Band about this case. If we spoke it would have been very briefly and it was probably, my recollection recalls that I did see him the same day I talked to Ms. Cagle and I brought the report.

Mr. SHAYS. Mr. Band, to whom did you speak about the false murder allegation? Did you talk to Mr. Gregorie, Ms. Cagle, Karen Jacobson, Ray Havens, Ron Olson?

Mr. BAND. I don't believe I spoke to any of those people about the homicide allegations.

Mr. SHAYS. Did you ever have a discussion with Detective Mike Osborn about the murder allegation?

Mr. BAND. I was a homicide prosecutor. I'm sure, and I know this to be true, that I met with Detective Osborn probably hundreds of times during the course of our affiliation. I have no independent recollection of discussing the Gersten homicide allegation with Detective Osborn.

Mr. SHAYS. OK. I am going to ask all three of you, so if you all would listen to this question I will not have to repeat it three times. When was the FBI first asked to help question witnesses on this sex and drugs allegation?

Mr. GREGORIE. I never asked the FBI to do anything in this case.

Mr. BAND. I have no idea.

Ms. CAGLE. I don't know.

Mr. SHAYS. Ms. Cagle, is yours on?

Ms. CAGLE. Hello? Now it is.

Mr. SHAYS. Sorry. And the answer is?

Ms. CAGLE. I don't know.

Mr. SHAYS. But Mr. Gregorie, you had mentioned that the FBI is invited in when there is—I think it was you—invited in when there is a politician involved. So you seemed like you're surprised you didn't invite them, but yet you're acknowledging that they get

invited. Straighten me out here. You have an opportunity. Just tell me.

Mr. GREGORIE. The local police officers told me that they had called in the FBI, that they had talked to the FBI. I never talked to the FBI, the FBI never brought me any information and they never came to me. If you look at all the sworn statements, you will see who was present, you will see no FBI agent was present. The investigation was done by our own internal State attorney's office investigators. George Ray Havens, who was the deputy at the Marshals Service and now is at the Federal Training Center in New Mexico, I think, handled the investigation. So to my knowledge I never gave any instructions to the FBI nor did the FBI call and ask me for them.

Mr. SHAYS. All three of you have testified that none of you asked, you did not know when the FBI was brought in. Is that true, all three of you have basically responded?

Ms. CAGLE. My recollection is they were called by the local police initially when it happened.

Mr. SHAYS. Now, asking again all three of you, did you coordinate or seek to coordinate with the Federal investigation of Gersten?

Mr. GREGORIE. To my knowledge I had no idea what the Federal Government at that point was doing.

Mr. SHAYS. You knew——

Mr. GREGORIE. Talking about 1992?

Mr. SHAYS. Yeah.

Mr. GREGORIE. At that point I had no idea what, if any, investigation the Federal Government had.

Mr. SHAYS. OK, Mr. Band—so you didn't coordinate or seek to coordinate with the FBI or the Federal Government?

Mr. GREGORIE. No. I think at most somebody may have called me at one time and asked me something from the U.S. attorney's office or from the FBI, although I don't have any real recollection of that. I don't want to say absolutely 100 percent. It's 10 years ago, Congressman, but I have no recollection of anyone from the Federal side calling me on this case.

Mr. SHAYS. Mr. Band.

Mr. BAND. Again, Mr. Chairman, I was on the other side of the law. Mr. Gersten was my witness. Anything going on had to do with the taking of his car, that the Federal Government to my knowledge was not involved in my part of this whatsoever, nor did I really use any agent.

Mr. SHAYS. How was the FBI involved?

Mr. BAND. I don't know. To this day I don't know their involvement other than what I have learned during the course of this hearing.

Mr. SHAYS. Ms. Cagle.

Ms. CAGLE. My recollection is that the local police called the FBI initially and that subsequent to that our investigator did the investigation.

Mr. SHAYS. And you didn't coordinate or seek to coordinate any of this investigation with the FBI?

Ms. CAGLE. No. In fact, I think it was more a subsequent thing. It wasn't that anybody did anything together. I think they were initially called and then we took it over.

Mr. SHAYS. Why bring in the FBI, Mr. Gregorie?

Mr. WAXMAN. We can start a new 5-minute round.

Mr. SHAYS. Yes, I'm sorry.

Mr. GREGORIE. Again, Congressman, when the local police have a case again a local——

Mr. SHAYS. Excuse me 1 second.

Mr. GREGORIE. I'm sorry.

Mr. SHAYS. Thank you.

Mr. GREGORIE. When the local police have a case against a local politician, especially one who has control over the county police department, they get nervous about being directly responsible for the investigation. So they will often call in the FBI rather than being the one pointing the finger at a politician, which may result in their being assigned.

Mr. SHAYS. Mr. Band.

Mr. BAND. The question was? I apologize.

Mr. SHAYS. These are all for all three of you. And if you can—I won't try to keep saying them twice and we will get out sooner. Why bring in the FBI?

Mr. BAND. I have no clue. Again on my side of the wall Mr. Gersten was the victim. I was looking to prosecute Ms. Lira and Mr. Elswick.

Mr. SHAYS. OK, Ms. Cagle.

Ms. CAGLE. I don't know why they called them.

Mr. SHAYS. So in all cases none of you know who made that decision other than you believe it was the local? OK. Did you discuss the case with any FBI agent? That's to all three of you.

Mr. GREGORIE. I have no recollection of talking with them. I must tell you that I went from the State attorney's office to the U.S. attorney's office. So I have talked with an awful lot of agents over the last 9 years. But to the best of my recollection no FBI agent that I remember talked to me about this case.

Mr. SHAYS. Mr. Band.

Mr. BAND. I have no recollection of speaking with any agent of the Bureau in regard to this case.

Mr. SHAYS. Ms. Cagle.

Ms. CAGLE. I don't remember.

Mr. GREGORIE. Congressman, if I may, I want to make it clear. When I went to the U.S. attorney's office, then there may have been discussions with the FBI agent. That would have been 1994, 1995, well beyond this incident.

Mr. SHAYS. Do you know when Michael Bonner first started working on any Gersten matter?

Mr. GREGORIE. I have no idea.

Mr. BAND. No idea.

Ms. CAGLE. No idea.

Mr. SHAYS. Were any of you aware of what he was doing?

Mr. GREGORIE. At the time? No.

Mr. BAND. No.

Ms. CAGLE. No.

Mr. SHAYS. When we interviewed Mr. Bonner, he told us that some of those who brought allegations of wrongdoing by Mr. Gersten were later indicted. Do you know of anyone who brought derogatory information forward about Mr. Gersten who later got indicted?

Mr. Gregorie.

Mr. GREGORIE. If I may consult just one moment?

Mr. SHAYS. Sure.

Mr. GREGORIE. Congressman, there is a problem with rule 6(e) in the Federal Rules of Criminal Procedure which prohibit us from discussing grand jury matters. There is a transcript of a proceeding involving a defendant named Grigsby, who was tried and acquitted in Miami in two separate cases involving the port. That's all I can tell you and stay within the Rules of Criminal Procedure.

Mr. SHAYS. Mr. Band.

Mr. BAND. I prosecuted Ms. Lira and Mr. Elswick for crimes, for a crime unrelated to Mr. Gersten. However, I did prosecute Mr. Elswick——

Mr. SHAYS. Let me just clarify those were two of the people who were making an allegation against Mr. Gersten.

Mr. BAND. That is correct, as I understand it, but I did prosecute Mr. Elswick for the extortion attempt of Mr. Gersten and his attorneys.

Mr. SHAYS. Ms. Cagle.

Ms. CAGLE. I don't know.

Mr. SHAYS. Did you ever see any of the FBI write-ups of their interviews? Did you ever discuss the FBI interviews of the sex and drug witness with the FBI?

Ms. CAGLE. No.

Mr. BAND. No.

Mr. GREGORIE. Not that I can recall.

Mr. SHAYS. We are moving along quite nicely. Thank you. Mr. Band, could you explain the Chinese wall that was set up during the Gersten investigation? What is that all about?

Mr. BAND. What is now referred to as an ethical wall referred to in case law and I believe in the Justice Department as well, for a long time, always the Chinese wall. It is designed primarily when a governmental agency, a prosecutor's office has individuals they are prosecuting or investigating that are both subjects of the investigation as well as——

Mr. SHAYS. Excuse me. I'll let you finish your answer, I'm sorry. Please finish your answer.

Mr. BAND [continuing]. As well as perhaps victims or witnesses to an investigation. In this particular case, as I have put this together in retrospect, Mr. Gregorie had Mr. Gersten as a subject of his investigation involving the filing of a false police report. I on the other side of that wall was engaged in the investigation of the taking of Mr. Gersten's car. Mr. Gersten therefore was my witness. My targets were Ms. Lira and Mr. Elswick. It is designed again to preclude what has become the castigar line of cases of certainly a recent vintage. I am sure the Chair is—well, the Ollie North situation is probably the best example of castigar.

Mr. SHAYS. I remember mostly the potted plant.

Mr. BAND. I have a few behind me now.

Mr. SHAYS. They are doing a fine job.

Mr. SHAYS. We will go for another 5 minutes. Mr. Gregorie, is that consistent with your recollection?

Mr. GREGORIE. I think what you have to understand is that Florida has a strange law that in Florida as soon as you subpoena——

Mr. SHAYS. You also have strange palates.

Mr. GREGORIE. Yes. Under Florida law when you subpoena somebody you automatically give them use and derivative use immunity. In this case we had a specific project because we had both the victim and a witness involved in this case. Mr. Gersten was either the victim to the car theft or a victim to an armed robbery, and at the same time the people who were the defendants in that case were witnesses to Mr. Gersten's false statements and using crack cocaine and prostitution. In order to protect against crossing over that line, putting tainted information into the hand of the investigators and prosecutors who would try the two different cases, you have to build a wall. And so I did not disclose to Mr. Band the sworn statements, immunized statements of the prostitutes, the crack dealers, etc., and he did not and would not have—unfortunately Mr. Gersten never testified, but if he had he would not have disclosed to me what it is that Mr. Gersten said in his testimony.

Mr. SHAYS. One of the bizarre things, you brought up this whole issue of common sense. Help sort out for me why we would believe the people who stole the car, who were the drug dealers and the prostitutes, when the person whose car was stolen is then the target. You talk about him being both the victim and the target. And it's to me—I have a hard time getting beyond that. I mean, what would be the logic—and there may be, but what would be the logic of Mr. Gersten having you arrest people and find his car if in fact you know he did those things?

Mr. GREGORIE. At 10 p.m. on April 29 Mr. Gersten found himself between a rock and a hard place. His car was gone. His briefcase with all of his important legal papers and the pictures we told you about, his wallet with all of his credit cards, his gun, his commissioner's badge and his brand new clothes were gone. He had to report them stolen. Otherwise a number of things could have occurred with those items, and he knew he couldn't have that happen. In order to do that, he had to report the car stolen. On the other hand, he did not want to tell anybody that he was in a crack house smoking dope and having sex with prostitutes. So in order to do it, he had to say the car was stolen from in front of his house, and this is where common sense came into me saying they may be prostitutes and crack addicts but the likelihood of them being on Hardy Road in Coral Gables on a late spring evening wandering down the street and finding Mr. Gersten's car with the keys in the ignition and all of those items still in the car doesn't make common sense.

Mr. SHAYS. Well, there's a lot that doesn't make common sense here, that's for sure. Mr. Band, what is your understanding of the reason why a Chinese wall was established? Were you a participant in the discussions leading to the creation of the wall?

Mr. BAND. The purpose of the wall, as explained by Mr. Gregorie, was designed to protect the integrity of two separate investigations,

to protect Mr. Gersten's rights and the rights as well of Mr. Elswick and Ms. Lira.

Mr. SHAYS. Were you a participant in that discussion?

Mr. BAND. No, I was not a participant in that discussion at all.

Mr. SHAYS. Whose idea was it?

Mr. BAND. To this day I don't know.

Mr. GREGORIE. It was my idea, Congressman.

Mr. SHAYS. Fair enough.

Mr. GREGORIE. I will take credit for it or blame for it, however you wish to look at it. It is a complicated procedure, one that I had dealt with a lot in the Justice Department. I was very familiar with it, so I was the one that decided to do it.

Mr. SHAYS. Was the Chinese wall erected after any of the car thieves were told they would not be prosecuted for the theft of Gersten's car?

Mr. GREGORIE. No, it was constituted before that. I think again this has been 10 years, but if you look back on the advice of rights I gave them, I may not have done it very artfully but I'm pretty sure I told all of them although they couldn't be prosecuted for what they were telling me, there was a possibility that somebody else who didn't know about their testimony could use it against them.

Mr. SHAYS. Mr. Band, did you have any communications with Richard Gregorie about the Gersten case after the Chinese wall was established?

Mr. BAND. No. Well, just to be clear, no substantive conversations about the case.

Mr. SHAYS. OK. What does that mean?

Mr. BAND. What that means was I'm sure I had many conversations with Mr. Gregorie.

Mr. SHAYS. But the word "substantive" about the case; did you have any about the case?

Mr. BAND. No.

Mr. SHAYS. Did you check with each other on prosecutorial decisions regarding this?

Mr. BAND. No.

Mr. SHAYS. If there were—OK. So there were no communications other than other dialog that you had.

Mr. Gregorie, did you make any decisions about how Mr. Band would run the investigation on his side of the Chinese wall?

Mr. GREGORIE. Absolutely not. So it was clear, Congressman, I was three floors different from Mr. Band. I might see him walking through the elevator or going through the courthouse, but other than that we had no contact.

Mr. SHAYS. OK. I am sorry, I am just going to ask you to make that comment again. I apologize.

Mr. GREGORIE. OK. I was three floors away from Mr. Band and we were on different units. I was in the Public Corruption and Organized Crime Unit. He was in the unit Felony as Major Crimes. We did different kinds of cases. We would have only seen each other if we passed each other getting on the elevator or maybe walking through the courthouse.

Mr. SHAYS. Did you ever offer any input on what he should do in this investigation, and when and what? And the answer is no?

Mr. GREGORIE. Absolutely not.

Mr. SHAYS. Mr. Band, did you confer with Mr. Gregorie about whether to accept Mr. Sharpstein's offer for Gersten to provide limited testimony about the theft of the car and how do you explain the notation——

Mr. BAND. Mr. Chairman, I apologize. I didn't hear part of that question.

Mr. SHAYS. I don't blame you. I ran two sentences in. Let's put exhibit 13 up. Don't put it up yet. Just answer the question, which is, Mr. Band, did you confer with Mr. Gregorie about whether to accept Richard Sharpstein's offer for Gersten to provide limited testimony about the theft of his car?

Mr. BAND. I don't recall any conversation with Mr. Gregorie at all about any conversation had or any offer made by Mr. Sharpstein.

Mr. SHAYS. Let's look at exhibit 13 and let's see what we see here. Exhibit 13, could you get it for me?

It just says "spoke with Dick, no." what does that mean? Who is Dick?

[Exhibit 13 follows:]

Exhibit No. 93

SHARPSTEIN & SHARPSTEIN, P.A.
Penthouse One
3043 Grand Avenue
Coconut Grove, Florida 33133

Telephone No. (305) 442-8100
Fax No. (305) 441-0664

FAX COVER SHEET

TO: Michael Band DATE: 7/31/92

RE: Joseph Gersten

RECEIVER'S FAX NUMBER: 547-3215

COVER SHEET PLUS 2 PAGES

FROM: Richard Sharpstein/Sharpstein & Sharpstein, P.A.

NOTE: This facsimile contains PRIVILEGED AND CONFIDENTIAL INFORMATION intended only for the use of the addressee(s) named above. If you are not the intended recipient, you are hereby notified that any dissemination or copying of this fascimile is strictly prohibited. If you have received this fascimile in error, please immediately notify us by telephone and return the original fascimile to us at the above address via the United States Mail. Receipt by anyone other than the intended recipient is not a waiver of any attorney-client or work-product privilege. Thank you.

SPECIAL INSTRUCTIONS

3 Aug '92
Spoke w/ Dick
— No —
MB

EXHIBIT
13

(11) ~12

Mr. BAND. May well be Mr. Gregorie. There is apparently—I don't know the context of this. Apparently it's a fax from Mr. Sharpstein in regard to Mr. Gersten but—oh, actually Ms. Cagle points this out, and she may be—right, it says I spoke with Dick. It's Dick Sharpstein. I really don't know the context of this.

Mr. SHAYS. Fair enough. Fair enough.

Did the State attorney know of any communications between—hold on 1 second. Never mind. Was the Special Agent Bonner kept informed of what was going on in the investigation on both sides of the wall, Mr. Gregorie?

Mr. GREGORIE. Special Agent Bonner?

Mr. SHAYS. Yes.

Mr. GREGORIE. We didn't talk to Bonner.

Mr. SHAYS. OK.

Mr. BAND. I have no recollection nor would I have a need to talk with Agent Bonner, and I don't recall. I believe I know Agent Bonner. I may well have worked with him on other cases, but I have no recollection of speaking to the agent in regard to this case.

Mr. GREGORIE. Again, Congressman, I make clear I have no recollection of talking to him during this time period. Again I may have worked with Agent Bonner years ahead of this, but not at this time.

Mr. SHAYS. Fair enough. Ms. Cagle, which side of the wall were you on?

Ms. CAGLE. The same side as Dick Gregorie.

Mr. SHAYS. Pardon me?

Ms. CAGLE. The investigation into the filing of the false police report.

Mr. SHAYS. Any other questions—who supervised Mr. Band? Who would have supervised Mr. Band if Ms. Cagle wasn't supervising?

Mr. BAND. I don't believe I had a supervisor in regard to this. Probably should have but I didn't.

Mr. SHAYS. All right. Who knows. We have basically got a page and a half left, two pages at most, and I think we're making progress here. Mr. Band, Mr. Gersten—and this is in regards to the perjury issue——

Mr. BAND. In regard to what issue, I'm sorry?

Mr. SHAYS. In regards to the perjury issue.

Mr. BAND. All right.

Mr. SHAYS. If Mr. Gersten had answered your questions and had denied the account of the events given by the car thieves, what would you then have done in relation to prosecuting the car thieves?

Mr. BAND. If he gave me a full and complete statement which I believed to be truthful, I would have prosecuted the thieves. Again, I don't know if they were thieves or robbers.

Mr. SHAYS. Yeah. What would you then have done in relation to the conflict of evidence between Gersten on the one hand, McCann, Lira, Elswick, and Maldonado.

Mr. BAND. Maldenado? I would have done nothing in that regard, but again that did not reflect upon my targets, Ms. McCann—I'm sorry, Ms. Lira and Mr. Elswick. I was looking at prosecuting them for either the robbery or the theft of that automobile. So in regard to the allegation surrounding the crack house or the use of the

crack or the sex had no never mind to me. Had I believed him, we would have prosecuted Ms. Lira. Had he given me cause to believe him, had he given me a statement, I would have prosecuted Ms. Lira and Mr. Elswick.

Mr. SHAYS. Would you have considered charging Gersten with perjury?

Mr. BAND. No. Presuming truthful testimony, there would be no need.

Mr. SHAYS. In his affidavit Gersten's then lawyer, William Richey, said that Ray Havens, Richard Gregorie and Karen Jacobson, "made it absolutely clear that if Gersten were to give testimony that deviated in any way from what Mr. Havens and Mr. Gregorie were positive had happened that evening, then Mr. Gersten would be charged with perjury."

Let's look at that. That's exhibit 17. I want to know, is Mr. Richey's affidavit incorrect, wrong, misleading, what? How would you characterize it?

[Exhibit 17 follows:]

Affidavit of William L. Richey

I, WILLIAM L. RICHEY, ESQUIRE, after being duly sworn, state as follows:

1. I am an attorney licensed to practice law in the State of Florida.

2. I previously represented Joseph M. Gersten for several years, including in the earlier stages of the State Attorney's investigation of the events of April 29, 1992.

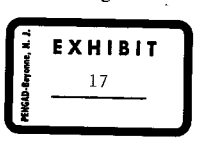
3. After it became public that the State Attorney's office was investigating Mr. Gersten for the events of April 29, 1992, I telephoned then-Chief Investigator George Ray Havens of the Miami-Dade County State Attorney's office. I arranged a meeting with Mr. Havens in his office. That meeting occurred on the afternoon of May 21, 1992. In attendance at the meeting were Mr. Havens, then-Assistant State Attorney Richard Gregorie, Investigator Karen Jacobsen, and myself.

4. At the meeting, Mr. Gregorie and Mr. Havens made it clear to me that they were absolutely positive that Mr. Gersten had been with a man named Kenneth Elswick, a prostitute known as Claudia Lira and a prostitute known as Tracey Sheehan on the evening of April 29, 1992, and that he had been robbed by Ms. Lira and Mr. Elswick. It was their absolutely firm position that Mr. Gersten had filed a false police report.

5. Mr. Havens and Mr. Gregorie made clear their desire for Mr. Gersten to come to Mr. Havens' office and give a full statement under oath confessing to what they represented to be the true events of that evening. They made it absolutely clear that if Mr. Gersten were to give testimony that deviated in any way from what Mr. Havens and Mr. Gregorie were positive had happened that evening, then Mr. Gersten would be charged with perjury. They very clearly meant exactly what they said.

6. In my professional opinion, had Mr. Gersten testified before the State Attorney's office and told any story other than what Mr. Havens and Mr. Gregorie represented to be the truth, he would have been charged with perjury.

7. During my discussions with the Miami-Dade County State Attorney's office, I was never told that their investigation had turned up false murder allegations against Gersten. I did not know that one of the government's witnesses had attempted to frame Mr. Gersten for a murder until this year. In my opinion, the government's investigation would have necessarily



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GOVERNMENT REFORM

been terminated if I had learned, or the public had known, that one of the government's witnesses was trying to frame Mr. Gersten for murder and had been paid federal money after she had suborned the false allegation.

8. One of the key witnesses against Gersten, Kenneth Elswick, indicated that he would change his sworn statement to the State Attorney's Office for $10,000 dollars. State and federal prosecutors did not appear to be interested in developing this information.

9. The representations made in this affidavit are consistent with representations made in an affidavit executed by me on August 13, 1992.

10. The representations made in this affidavit are consistent with sworn testimony given by myself in an Australian legal proceeding on March 7, 2001.

William L. Richey, Esq.
201 South Biscayne Boulevard
34th Floor, Miami Center
Miami, FL 33131

William L. Richey, Esq.

STATE OF FLORIDA
COUNTY OF DADE

The foregoing instrument was acknowledged before me this 25th day of MAY, 2001, by WILLIAM L. RICHEY, who is personally known to me or who has produced Florida Driver's License Number _____ as identification and who did/did not take an oath.

Karen J. Gackle
Notary Public, State of Florida
My Commission Expires:

KAREN J. GACKLE
My Comm Exp. 1/30/2002
Bonded By Service Ins
No. CC691850
[ ] Personally Known [ ] Other I.D.

Mr. GREGORIE. Well, as you see this says, At the meeting Mr. Gregorie and Mr. Havens, on—regarding April 29th. You'll see attached to my materials, I provided you a letter. I invited Mr. Gersten to come in and give us a full statement of what happened. What I told Mr. Richey is what I tell all witnesses: You are going to have to come in and tell me the truth because if you lie to me I'll charge you with perjury. So I realize you're between a rock and hard place Mr. Richey. Your client doesn't want to say that he was in a crack house, smoking coke, but if that's the truth, then he's going to come in and tell us that. And if he lies, then we'll charge him with perjury. So I believe that was the initial interview, initial meeting he had with us, and that's what I told him after I invited him to come in.

Mr. SHAYS. I'd like you to take a look at the affidavit. I'm sorry, I should have thrown that out first and then I'd like you to comment on it. What he's saying is quite specific, they made it absolutely clear—on citation 5—they made it absolutely clear that if Mr. Gersten were to give testimony that deviated in any way from what Mr. Havens and Mr. Gregorie were positive had happened that evening, then Mr. Gersten would be charged with perjury. They very clearly meant exactly what they said. How would you—just comment on that.

Mr. GREGORIE. So if you look at the paragraphs earlier, that meeting occurred on May 21, 1992. This was merely a couple of weeks after the incident. We were still in initial investigation, and in fact Mr. Gersten was still off in Europe somewhere at the time. My invitation, I was talking to him about, look, I'd like to have your client come in. Again, remembering the law in the State of Florida being that if I had to subpoena him I'd have to give him immunity. I didn't want to do that.

So I was inviting him to come in, and what I told Mr. Richey is what I would tell all witnesses. We had done a bit of investigation up till that point. We had been able to establish time. We had interviewed the owner of the clothing store and knew that Mr. Gersten was there at 6:30 at night. We had gotten a number of other records, so we knew where he was. What I told Mr. Richey is what I'll tell all witnesses: I'm going to call him in and ask questions. You don't know how much I know. So if you're lying to me, I'll charge you with perjury if you lie. And I advise all witnesses of that in any proceeding in which I take their testimony.

Mr. SHAYS. So you don't dispute the affidavit but you put an interpretation—and I'm not saying misinterpretation but you are explaining what you meant. But first, you don't dispute this affidavit basically?

Mr. GREGORIE. I dispute it only in the sense that what is being said is being taken out of context. You have to know the context of it. Mr. Gersten wasn't there. I was inviting him to come in to testify without a subpoena, without immunity, and what I'm saying to Mr. Richey is if he comes in without this immunity he's going to have to tell us the truth, because if he lies to me I'll prosecute him for perjury. And I think I told him, look, we've done some investigation, we know some of the times, we've talked to a number of people. If he's lying to me, I'll prosecute him.

Mr. SHAYS. Let me just ask you, this is an affidavit and it's under oath? It's under oath. Mr. Havens and Mr. Gregorie made clear—I'm reading citation 5. Mr. Havens and Mr. Gregorie made clear their desire for Mr. Gersten to come to Mr. Havens' office and give a full statement, under oath, confessing to what they represented to be the true events of that evening. They made it clear that if Mr. Gersten were to give testimony deviated in any way from what Mr. Havens and Mr. Gregorie were positive had happened that evening, then Mr. Gersten would be charged with perjury. They very clearly meant exactly what they said.

Now, is this an accurate statement and you want to add to it or subtract to it, or is there something said here that's simply not correct?

Mr. GREGORIE. Mr. Richey is a very good criminal law.

Mr. SHAYS. OK.

Mr. GREGORIE. He is an advocate. He's writing this as the advocate for Joe Gersten. What he was told, and I will say to you again, was we have been doing investigation, we have gotten records, we've talked to witnesses. If your client comes in and lies to us and doesn't tell us the truth, we'll prosecute him for perjury.

Mr. SHAYS. And you had a pretty good sense of what the truth was, at least in your mind?

Mr. GREGORIE. Well, at that point, I think we had done enough investigation, so I was satisfied and my common sense told me that it didn't make sense what he was claiming.

Mr. SHAYS. But think about it in the sense, I find it a little curious, you basically chose not to prosecute?

Mr. GREGORIE. Yes.

Mr. SHAYS. So what you thought to be the truth wasn't the truth.

Mr. GREGORIE. Congressman, there are an awful lot of times that I think somebody is guilty as can be and I still won't prosecute that case because I'm not satisfied that there's a good probability that I'll convict that person with proof beyond a reasonable doubt.

Mr. SHAYS. So is this wrong; you wouldn't have prosecuted him?

Mr. GREGORIE. I didn't prosecute him.

Mr. SHAYS. OK. But I just want to know—I want to get back to No. 5, and it's an important question as far as I'm concerned. So I don't want to rush.

Mr. GREGORIE. Sure. Oh, please.

Mr. SHAYS. I want to know if No. 5 is accurate, and I think you have qualified how you interpret it, but is this an accurate statement?

Mr. GREGORIE. I did tell Mr. Richey that if his client came in and lied and that we had done a good deal of investigation, if he came in and gave a statement that did not comport with the evidence I had, that I would charge him with perjury.

Mr. SHAYS. Well, you're saying it a little different, because the way I read it is, it says you had a sense of exactly what happened; and if it deviated from that, then you would prosecute him.

Mr. GREGORIE. Again, Congressman, Mr. Richey's a good advocate. He's writing it on his client's behalf. I'm telling you the same thing he's saying. It's just I'm telling you from what I believe I said, and he's saying it to protect his client.

Mr. SHAYS. OK. But the bottom line is you are not saying that this statement is wrong? You're not saying that this statement that he's presented is incorrect?

Mr. GREGORIE. I'm saying it is put on an interpretation beneficial to Joe Gersten.

Mr. SHAYS. All right. I'll live with that.

Mr. WAXMAN. I think I'll take a few minutes.

Mr. SHAYS. You can, sure. You can take 10, or whatever you want. The gentleman has as much time as he'd like.

Mr. WAXMAN. I'm entitled to 5 minutes and then we'll see after that. These witnesses, the prostitutes and the pimps and the 15-year-old kids who make accusations and retract them, is this an unusual thing to have people like that make these kinds of statements? In other words, I'm trying to figure out the context in which you did your work in those days. One would think this is an isolated case and you should have given more weight to this, less weight to that. But don't you have—I'll start with you, Mr. Osborn. Don't you have pimps and prostitutes and junkies come in all the time and say things, and sometimes they're true and sometimes not, and you have to make some evaluations of that?

Mr. OSBORN. Well, unfortunately, we do have credibility problems with a lot of witnesses in the city of Miami, but you have to corroborate what they say or disprove and followup on it.

Mr. WAXMAN. So whatever anybody says, you've got to evaluate whether it's true or not. Now that's for you. I assume for prosecutors you've got to decide whether it will hold up in court.

Ms. CAGLE. Absolutely true. In every case we deal with witnesses, and you have to evaluate the witness and decide whether or not this piece is credible, are they telling the truth on this piece. It's an everyday occurrence, evaluating the credibility of witnesses in your cases.

Mr. WAXMAN. Mr. Gregorie, you looked at the accusations against Mr. Gersten and the kinds of people who were making them and made an evaluation not to prosecute Mr. Gersten, not because you didn't think he might have been guilty but because you thought you couldn't get a conviction; is that an accurate——

Mr. GREGORIE. That's correct. Congressman, we are constantly faced with the problem that if you're investigating crime, that you're going to have to talk to criminals, and you have to weigh exactly how bad they are. I have put on some of the worst criminals in the United States for testimony in some of the biggest cases tried in the United States. I do that by corroborating those witnesses, by satisfying myself they're telling the truth, by determining that what they have to say comports with the other evidence in the case. And I am satisfied that these witnesses would not have withstood cross-examination based on their prior records, their addiction to narcotics, their occupations, and their other statements in this case.

These people were on Biscayne Boulevard. You have to be in Miami to understand this. But Biscayne Boulevard, especially 10 years ago, was a place that was crack cocaine on the corners, prostitutes standing in the street. It's a little better now, not a whole heck of a lot, and there are con artists, fraud artists, people like this on the street all the time. So the witnesses we were dealing

with were people who we knew were real problems in terms of testimony, and I had to make the determination would they be believable if I put them before a jury.

Mr. WAXMAN. So I'm trying to think to myself, since this hearing before the House of Representatives of the U.S. Congress is being held on prosecutorial abuse, what theories to look at. You didn't prosecute.

Mr. GREGORIE. No.

Mr. WAXMAN. So then the question is, was it prosecutorial abuse to bring the FBI in this case. You didn't bring the FBI in the case.

Mr. GREGORIE. No.

Mr. WAXMAN. Mr. Band, you think the FBI was brought in, or Ms. Cagle, whatever you said, you thought they were brought in by the local police officials because Mr. Gersten was a county commissioner; is that correct?

Ms. CAGLE. I believe that's what happened.

Mr. WAXMAN. Mr. Band, do you know anything other than that?

Mr. BAND. No, I don't.

Ms. CAGLE. But they didn't stay long because I don't think they really have any jurisdiction. It was a State crime. It was filing a false police report that was being investigated.

Mr. GREGORIE. I have not seen the 302s, but I'd be interested to see when the 302s end what's the date at the end, because I don't think the FBI stayed in this case for more than a few days. I'd be surprised if they did.

Mr. WAXMAN. So then I thought one theory that the Republicans were advancing was that because the FBI was brought in, that just showed how Mr. Gersten was set up to be persecuted, but that doesn't seem to sound right. So then the other part of it was the prosecutorial abuse was not giving Mr. Gersten information that would have been exculpatory; that was the accusation. And I'm trying to think of what that was. Do any of you have any idea what the exculpatory information that——

Mr. GREGORIE. Well, I guess it's Detective Osborn's report.

Mr. WAXMAN. That's the report that was taken of Lisa McCann; is that right, Mr. Osborn?

Mr. OSBORN. No, sir. That's my synopsis of the initial investigation when Wayne Pearce was first brought in. I did a chronological breakdown of a chain of events that happened.

Mr. WAXMAN. Had charges been brought against Mr. Gersten, he would have been given everything?

Ms. CAGLE. Correct.

Mr. GREGORIE. Most certainly. If the charges had been brought, the Brady material that would have had to have been turned over on those witnesses would have been mountainous.

Mr. WAXMAN. So he would have gotten all this had he been prosecuted. But the claim is that he didn't get the exculpatory information, which is from the garbled statements of witnesses who were not considered sufficiently credible for their testimony to stand if used for prosecution—he didn't have the benefit of what they had to say.

Mr. GREGORIE. I guess that's the allegation.

Mr. WAXMAN. And then we had particularly singled out this last paragraph of this very long summary by Mr. Osborn where Lisa

McCann said yesterday, "some kid asked me if I had some rolling paper. I said, aren't you kind of young? It turns out he's about 15 years old. He asked me if I knew about this faggot got shot last week. He said the faggot was named Champaign. He said a guy in a blue Mercedes shot him. He said somehow Champaign got in the car. Champaign got his keys, wouldn't give them back. The guy shot and killed him. He paid the kid $300 to keep his mouth shut." So I'm trying to think, were they talking about Mr. Gersten?

Mr. OSBORN. That's not my report.

Mr. WAXMAN. Oh that's not your report.

Mr. OSBORN. That's Bonner's report.

Mr. WAXMAN. Oh, I see. Well, it's not clear who they're talking about, but it could have been Mr. Gersten. It could have been someone else. We do know that Champaign was murdered, right?

Mr. OSBORN. We do know that; yes, sir.

Mr. WAXMAN. There was even less of a basis to say that Mr. Gersten had something to do with that.

Mr. OSBORN. Pardon me?

Mr. WAXMAN. There was even less of a basis to say Mr. Gersten had anything to do with that murder than there was to say that Mr. Gersten should be prosecuted for whatever. What would you have prosecuted him on? What charge would you have brought him on?

Mr. GREGORIE. Solicitation of prostitution, false statement on a police report.

Mr. WAXMAN. OK. You didn't have enough to bring a charge of solicitation and all of that, and there was even less to say that he might have murdered somebody.

Mr. OSBORN. I had nothing to go on with the murder.

Mr. WAXMAN. So you have something that's so flimsy that might even connect him to a murder that—it's so flimsy to start with. And then the question is, not giving Mr. Gersten the flimsiest of information that somebody said he might have had connection with the murder was denying him what he should have had, and therefore proves prosecutorial discretion under the direction of Janet Reno. But we will leave that part out. I just am having trouble.

Mr. GREGORIE. Congressman, what's worse with that is that had there really been some sort of conspiracy to frame him, why wasn't this leaked out that he was involved in a murder investigation? In fact, if we had made this information public, had sent a letter to his attorney, it had become public under the public records law in Florida, the newspapers all would have had a report. There would have been a headline in the newspaper the next day saying Joe Gersten suspected of murder.

That didn't happen because nobody credited this information. I don't even remember it ever coming across my desk and seeing it, although the report—there is some evidence that somebody gave me a copy of the report. I don't ever remember having seen it. I have never talked to Detective Osborn before today. I'm glad to see him but I never talked to him before. So it seems to me, again, common sense would tell you, if this really was a plot to smear Gersten, that this murder information would have been in the newspaper, leaked out to somebody, and we would have prosecuted

him, except that nobody even considered this information reliable after Detective Osborn talked to the man 25 minutes.

Mr. WAXMAN. But he started the whole business by making a complaint about his car being stolen, and that turned up all these sordid events that seemed to have transpired. And then he was asked to come in and testify, and he refused to do that. All of this could have been cleared up by his testimony, couldn't it?

Mr. GREGORIE. That's correct.

Mr. WAXMAN. And then he appealed the decision that he should testify and be given immunity from whatever he had to say. And then he fled to Australia, as I understand it, where he's seeking asylum on the basis that he's being politically persecuted in the United States.

This is really quite amazing to me. I hope that we make this transcript available to the officials in Australia who are looking at whether he ought to be given asylum, because this might help them further discern whether that's an accusation that ought to be taken seriously.

But anyway, that's his accusation. But here we have the accusations in the staff report by the Republican majority that there's prosecutory abuse. And I still don't see why we should take this whole matter seriously for a congressional hearing. There's not even I don't know what—a scintilla of evidence, nothing credible. And yet we have the U.S. Congress sitting and holding a hearing all day. Well maybe we'll get more. I'm rushing to judgment. I'll let the chairman proceed.

Mr. SHAYS. Thank you, Mr. Waxman. We all find bizarre things. I find it bizarre that the person, when he makes a complaint that his car is stolen by some incredibly questionable people, that they then make a charge not that they didn't steal the car but that they stole the car somewhere else, and then everything unfolds there. And I find it extraordinarily bizarre that the FBI is involved. When I was growing up, I thought the FBI got involved in cases other than this. So tell me, what is the legal right for the FBI to get involved, Mr. Gregorie?

Mr. GREGORIE. The FBI will often assist the local police department in cases of sensitivity where there is a request by the local police department and they can form a basis for that assistance.

Mr. SHAYS. They couldn't come in unless there was that request?

Mr. GREGORIE. They'd have to be requested.

Mr. SHAYS. And I'm going to conclude my questions with just asking about the FBI, and I may have some questions after Mr. Wilson asks his and after minority counsel asks theirs, but I'm basically coming to a close here. I want to be clear from each of you as to what the extent was of the FBI involvement.

Mr. GREGORIE. What the extent of the FBI participation?

Mr. SHAYS. Yes.

Mr. GREGORIE. I had no dealings with the FBI on this case.

Mr. SHAYS. Mr. Band.

Mr. BAND. I had no dealings with the FBI on my part of this case.

Mr. SHAYS. Ms. Cagle.

Ms. CAGLE. I believe the local police called the FBI in to help them the night they first obtained the allegation against Mr. Gersten.

Mr. SHAYS. And then disappeared?

Ms. CAGLE. Yeah. I don't have any recollection of dealing with them much after that or at all after that.

Mr. SHAYS. Did your office, Ms. Cagle, have specific guidelines on investigations involving public figures; in other words, to avoid political interference or manipulation?

Ms. CAGLE. I don't think we have any written guidelines to that effect.

Mr. SHAYS. OK. So the issue with the FBI is just that it's a casual thing that is up to not the prosecutors but up to the police to decide whether they invite the FBI in?

Ms. CAGLE. Yeah.

Mr. SHAYS. OK. I want to conclude because there was one thing left dangling, and that is that basically we do not have a document in our possession that says the money was paid. The only document we have was a document that said on—it is recommended that, and the name is crossed out, be paid $400 on a one-time payment for information furnished. And this is a document that we will provide in our questions. We also have the documentation by the FBI agent that he in fact, to our staff, paid the $400. But given that I don't have—paid the $400 to Ms. McCann.

So what we will do is we'll submit that in writing to you all as a question. And then my question about the appropriateness will be asked, when we can establish to your satisfaction that it was paid. So there won't even be a hypothetical.

Mr. GREGORIE. Mr. Congressman, so that it is clear, the FBI regulations haven't changed. If an informant is given money, two things have to happen. There have to be two agents present. They both have to sign the receipt and the witness is given the money. I would be amazed in this case if Bonner said he gave that person, this prostitute, the money and there isn't a receipt signed by the witnessing agent and Agent Bonner when that money was handed over.

Mr. SHAYS. Right. And what we need to do is establish that this document here makes reference to the $400. It says it is recommended that, then the name is crossed out, be paid $400 on a one-time payment for information furnished.

So what we will do, and I want the staff to be very clear on this, when we send you your questions, we will state whether there is proof, or isn't proof. We'll try to provide that documentation, and then we want an answer to the question because it's an answer that we want.

Mr. WAXMAN. I thank you for yielding to me. I think we ought to find out more about this money.

Mr. SHAYS. That's what we've been trying to do, trust me.

Mr. WAXMAN. OK. So once we find out, to know everything with as much certainty as we can about these events over 10 years ago, the suggestion here is that the FBI paid $400 to somebody to frame Mr. Gersten. Is that what one can read into this whole thing?

Mr. SHAYS. No, absolutely not. That would be a mischaracterization. The issue is whether it was appropriate to pay

someone $400 after there was an allegation that she had asked someone to go to the police and accuse the targeted figure that he had committed a murder and the appropriateness of that. That's the only thing that it means.

Mr. WAXMAN. So are we looking at the misconduct by the FBI?

Mr. SHAYS. Exactly.

Mr. WAXMAN. Why aren't they here?

Mr. SHAYS. I can tell you——

Mr. WAXMAN. Are we going to have another day of hearing on this?

Mr. SHAYS. Well, you know what—possibly, possibly not.

Mr. WAXMAN. Could I ask Mr. Gregorie, because he seems to have some knowledge about this.

Mr. GREGORIE. Congressman, that was one of my concerns when I was asked earlier on why I wasn't cooperating. Mr. Bonner isn't here in public to explain what that $400 was for. Now, that receipt, what you have there seems to be a withdrawal of $400 from some fund that the FBI had. It is not an indication that money was paid to anybody.

Mr. SHAYS. No, but you know, Mr. Gregorie, I agree with that, and I agree that it is a question to be answered. And I also, agree by the intensity of your responding to the question, that I almost have an answer and that that, in fact, would not be appropriate under certain circumstances, which was really the basis for my question in the first place. It wasn't a question about you, It was a question about the FBI. And it was a question on whether there was something we needed to look at here. That's all. It didn't involve you.

Mr. GREGORIE. I understand, Congressman.

Mr. SHAYS. It involved your expertise.

Mr. WAXMAN. Can I be recognized?

Mr. SHAYS. Yes. The gentleman has 5 minutes.

Mr. WAXMAN. What were you going to say?

Mr. GREGORIE. Well I'm concerned only insofar as, because I understand FBI procedure, I would expect that if there was an informant payment as that indicates then there should be a receipt witnessed by another agent, and it would say who the money was given to.

Mr. WAXMAN. I would hope we could find out how much this investigation has cost the taxpayers of this country. As I understand, the Republican staff may have been working on this issue for a year. They've gone back and forth between Washington and Florida. They've interviewed witnesses——

Mr. GREGORIE [continuing]. It's nice in Florida in the wintertime.

Mr. WAXMAN. And if all we're left with is a waste of $400 by the FBI, then I think somebody ought to do an investigation of why this committee would waste thousands of dollars to try to find out whether that $400 was used appropriately or not. Maybe that's all we have left after—of course, if you look at——

Mr. SHAYS. Would the gentleman yield just a second, like I yielded to you?

Mr. WAXMAN. Sure.

Mr. SHAYS. I have been noticing you, Mr. Band, for a bit of time, and there's lots of laughter. Should I misinterpret the laughter——

Mr. BAND. I apologize, Mr. Chairman.

Mr. SHAYS. Is this a joke to you?

Mr. BAND. No, not at all.

Mr. SHAYS. OK. I misunderstood your laughter, and I'm happy to know that it isn't that you don't take this seriously. Thank you. I'm sorry.

Mr. WAXMAN. I was happy to yield to you and now, to reclaim my time, I don't see how somebody can't laugh at this whole day of hearing. I have never seen anything more absurd in my life. I think the Republican staff has done such a disservice to the Congress of the United States. I think this whole investigation has brought into disrepute the idea that Congress can do an investigation and it serves an important oversight and investigative purpose. I just can't tell you how absurd this whole thing is, and it's much healthier to laugh at it than to cry, and I'm glad no one criticized me for laughing because there are times during this hearing I can't help but laugh at the absurdity of the circumstances.

I think we could go through the prison system. We're now finding out with DNA testing that lots of people have been convicted improperly, some have been executed for crimes that were capital offenses, improperly. And what we have is an investigation of prosecutorial abuse for not prosecuting, especially not prosecuting a man who fled the country.

I suppose the decorum of the circumstances under which we're meeting should require all of us to pretend like this is serious, but I find it very hard to do that. And, again, the irony of this committee and the Republican staff on this committee investigating a man who presumably is the victim, when he's one who's fled prosecution after we investigated the Marc Rich case, and the irony again of this man being persecuted because he's a public official who may have lied to cover up sex and drug use, it really is astonishing to me that all this money has gone into this investigation.

I'm not going to ask the witnesses to put on the record how much money they've had to spend because it would be improper. It's not our business how much money they have had to spend. They're all here taken away from their employment, their ordinary activities of the day to answer these questions. I just think that before we get to a point of investigation there ought to be more substance. If it turns out you pursue an investigation and it's not worth pursuing, then you drop it, but this investigation's been pursued and pursued and pursued with dollar after dollar after dollar being shovelled after it.

I'm a liberal Democrat, but I don't like the waste of taxpayers' dollars by those people who call themselves conservatives. I guess I'm more conservative than they are, because I don't think tax dollars ought to be wasted.

Mr. SHAYS. I don't know if I'm a liberal Republican or a conservative Republican, but I always felt that liberal Democrats cared about what happened when people were falsely accused and then not prosecuted. And I've known liberal Democrats and Republicans as well that sometimes have made the accusation that you take a public official and you make all these accusations and then you don't prosecute them, and you all in a sense feel like you're going

through the same thing, and there is some irony, but that's what Mr. Gersten went through.

And I heard the laughter. I happen to believe that he's probably got some really despicable past, but usually what I hear the ranking member say is you're innocent until proven guilty, but Mr. Gersten evidently is guilty. He's guilty of one thing. He's guilty of one thing. He's guilty of contempt of court. He's not guilty of any of the crimes that he was accused of by the pimps and prostitutes and everything else. He may have been guilty, but as Mr. Waxman will point out to me quite often, you're not guilty until you've been found guilty; and so I understand that we have a disagreement as to the worth of this.

I wanted to know why I was going to be here on Friday, and we're here because two gentlemen here wanted to come and speak before the full committee. And so you're here, and I'm here, and I'm not complaining about it. You exercised your right. I would have preferred that the committee staff could have asked these questions to you under oath, and that didn't happen and——

Mr. WAXMAN. Would you yield on that?

Mr. SHAYS. Definitely would yield.

Mr. WAXMAN. I want to tell you that I'm pleased the committee staff didn't have a chance to ask you questions under oath in private and that you insisted on coming before a public hearing of the committee. And after all, Mr. Gregorie particularly, you're a very distinguished prosecutor of many years' duration. You prosecuted Mr. Noriega, and you didn't see a good enough reason to prosecute Mr. Gersten, and you were faced with a committee staff report that accused you of unprofessional conduct. That was an accusation that was made, and then they wanted you to go into a private room and answer questions?

I wish more people would insist on a full hearing so the public can see the absurdity, rather than allow a staff lawyer to abuse people in a room asking questions, because they don't want to stand up and fight. Many believe that government is so powerful, the Congress of the United States acting on the part of the government has so many resources, that they might as well just give in and be bullied into doing what those bullies want them to do. Because that's what it is. It's bullying people. So I think the best disinfectant is a public hearing, and this is a very good public hearing to illustrate the bullying and abusive tactics of this committee.

Mr. SHAYS. Mr. Gregorie, have we bullied you here today?

Mr. GREGORIE. Congressman, I'm always glad to come here before you and testify anytime you would like information I can give you.

Mr. SHAYS. I'm asking you a very sincere question. Have we been unfair to you today?

Mr. GREGORIE. The report bullied me, Congressman. The report wrote things without talking to me, without hearing the testimony from other people. And I'm concerned also about poor Mike Bonner, who is now representing the United States of America in Africa; and I would hope when this committee is through that they don't throw allegations at Mike Bonner without investigating this thing thoroughly and don't make that man, who is one excellent FBI

agent, suffer because he gave the testimony he gave to staff members, not here in public today.

Mr. SHAYS. Right. I'm just asking you if you were bullied today, and your answer was, no, but you felt the report was unfair to you. Have you been given the opportunity to present your story here today?

Mr. GREGORIE. And I thank you very much for it.

Mr. SHAYS. And I mean this sincerely.

Mr. Band.

Mr. BAND. Mr. Chairman, you were most civil, and I appreciate that. Was I bullied? I don't know if that's the proper word. I think it held our office—my former office in disrepute. I am surrounded by folks who have dedicated their lives to public service. They were not given an opportunity prior to the publication of the report to answer any questions, to assist counsel, to assist this committee. And, as I indicated preliminarily, had I been contacted by counsel before the issuance of the report, I would have spoken with him. But once that report was issued, given the bias, the tilt, the spin of that document, the only proper place for me to address those issues, indeed for all of us to address those issues, as Congressman Waxman points out, is here in the open, in public.

Mr. SHAYS. Right, and Mr. Band I just make the point to you, and that's why we need to have this hearing today, whether or not you are—the one point I just would like to say to my colleague, Mr. Waxman, who I have tremendous respect for, we tried to conduct these hearings fair and give you the opportunity to say whatever you wanted to say.

Ms. Cagle, I want to know if you felt bullied today.

Ms. CAGLE. I would concur with Mr. Band. I thought the staff report was extremely unfair. In fact, it called for I think a bar investigation of my conduct. That will be the only bar complaint referral I have had in 20 years of being a public servant to the people of the State of Florida. So in terms of the staff report, I felt it was unfair. In terms of this hearing, I'm more than happy to come and answer your questions anytime you ask.

Mr. SHAYS. Thank you.

I want to say something about the staff of this committee. They work extraordinarily hard. They work hundred hour weeks. They believed that information was withheld that could not be explained, and they thought it was purposeful. I might as chairman have made a decision that a report not be issued until I was convinced that all sides had been asked questions, and maybe that should have happened, maybe it shouldn't have. I reserve judgment still. I know Mr. Waxman doesn't. But I have never seen my staff or this staff bully anyone. But you may not agree with their conclusions, and you may think they were unfair, but as far as bullying I don't think that comes close.

I'd like to give our counsel the 15 minutes that he still has left, and then the minority has their 15 minutes.

Mr. WAXMAN. Before you do that, just one observation. All of these witnesses are here, and none of them fled the country to avoid coming before Congress and answering questions.

Mr. SHAYS. And I'd like to say that the gentleman who left to go to Australia wasn't a spy. He wasn't someone who had taken $50

million. He wasn't a traitor to our country. He was probably a man who has a past that he has some questions with, and I agree with you, that for whatever reason, he's in another country, and he should be here. So I concur with that.

Mr. BAND. Mr. Shays, may I just briefly, because I'm not sure——

Mr. SHAYS. Sure.

Mr. BAND [continuing]. You understand this. The writ of bodily attachment issued for Mr. Gersten extends only to the borders of the State of Florida. He could be on the Georgia line. Florida would have no jurisdiction, no right to seek help to get him back within the jurisdiction.

Mr. SHAYS. For what? Not for stealing, not for murder, for what?

Mr. BAND. For contempt.

Mr. SHAYS. For contempt of court. Well, I would like to confess to everyone here, I have been in contempt of court, and I've even spent 7 days in jail. I think there's a big difference than some of the other issues we're talking about.

Mr. Wilson.

Mr. WILSON. Mr. Gregorie, if we could just go back very briefly to exhibit No. 17, and we will not spend long on this, but Mr. Shays asked you a number of questions about paragraph five, and I just wanted to ask you about this one sentence as clearly as possible. Mr. Richey provided this sworn testimony, said they made it absolutely clear that if Mr. Gersten were able to give testimony—were to give testimony that deviated in any way from what Mr. Havens and Mr. Gregorie were positive had happened that evening then Mr. Gersten would be charged with perjury. Is this a correct or an incorrect statement of fact?

[Exhibit 17 follows:]

Affidavit of William L. Richey

I, WILLIAM L. RICHEY, ESQUIRE, after being duly sworn, state as follows:

1. I am an attorney licensed to practice law in the State of Florida.

2. I previously represented Joseph M. Gersten for several years, including in the earlier stages of the State Attorney's investigation of the events of April 29, 1992.

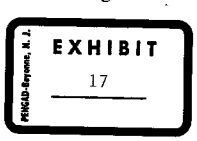
3. After it became public that the State Attorney's office was investigating Mr. Gersten for the events of April 29, 1992, I telephoned then-Chief Investigator George Ray Havens of the Miami-Dade County State Attorney's office. I arranged a meeting with Mr. Havens in his office. That meeting occurred on the afternoon of May 21, 1992. In attendance at the meeting were Mr. Havens, then-Assistant State Attorney Richard Gregorie, Investigator Karen Jacobsen, and myself.

4. At the meeting, Mr. Gregorie and Mr. Havens made it clear to me that they were absolutely positive that Mr. Gersten had been with a man named Kenneth Elswick, a prostitute known as Claudia Lira and a prostitute known as Tracey Sheehan on the evening of April 29, 1992, and that he had been robbed by Ms. Lira and Mr. Elswick. It was their absolutely firm position that Mr. Gersten had filed a false police report.

5. Mr. Havens and Mr. Gregorie made clear their desire for Mr. Gersten to come to Mr. Havens' office and give a full statement under oath confessing to what they represented to be the true events of that evening. They made it absolutely clear that if Mr. Gersten were to give testimony that deviated in any way from what Mr. Havens and Mr. Gregorie were positive had happened that evening, then Mr. Gersten would be charged with perjury. They very clearly meant exactly what they said.

6. In my professional opinion, had Mr. Gersten testified before the State Attorney's office and told any story other than what Mr. Havens and Mr. Gregorie represented to be the truth, he would have been charged with perjury.

7. During my discussions with the Miami-Dade County State Attorney's office, I was never told that their investigation had turned up false murder allegations against Gersten. I did not know that one of the government's witnesses had attempted to frame Mr. Gersten for a murder until this year. In my opinion, the government's investigation would have necessarily



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been terminated if I had learned, or the public had known, that one of the government's witnesses was trying to frame Mr. Gersten for murder and had been paid federal money after she had suborned the false allegation.

8. One of the key witnesses against Gersten, Kenneth Elswick, indicated that he would change his sworn statement to the State Attorney's Office for $10,000 dollars. State and federal prosecutors did not appear to be interested in developing this information.

9. The representations made in this affidavit are consistent with representations made in an affidavit executed by me on August 13, 1992.

10. The representations made in this affidavit are consistent with sworn testimony given by myself in an Australian legal proceeding on March 7, 2001.

William L. Richey, Esq.
201 South Biscayne Boulevard
34th Floor, Miami Center
Miami, FL 33131

William L. Richey, Esq.

STATE OF FLORIDA
COUNTY OF DADE

The foregoing instrument was acknowledged before me this 25th day of MAY, 2001, by WILLIAM L. RICHEY, who is personally known to me or who has produced Florida Driver's License Number _____ as identification and who did/did not take an oath.

Karen J. Gackle
Notary Public, State of Florida
My Commission Expires:

STATE OF FLORIDA NOTARY PUBLIC
KAREN J. GACKLE
My Comm Exp. 1/30/2002
Bonded By Service Ins
No. CC691850
[ ] Personally Known [ ] Other I.D.

Mr. GREGORIE. That's Mr. Richey's interpretation representing his client of what was told him.

Mr. WILSON. I understand, but he's testified twice in court to the same thing, and his interpretation is an incorrect interpretation?

Mr. GREGORIE. Well, now I'm—yes, it is an incorrect interpretation. Because I do this with all witnesses that come before grand juries, that come in to give sworn testimony of any kind. I warn them that if you say something which is untrue you will be prosecuted for perjury.

Mr. WILSON. That's fine. I was just trying to decide whether you agreed or disagreed with the statement, and I think it's fair to characterize you disagree with this statement. You think it is incorrect.

Mr. GREGORIE. I think it is tilted in favor of his client. He is an advocate. He's a criminal lawyer being paid for by Mr. Gersten. He is not going to write something that is to my benefit. If I were to write the same thing about what happened that day, and I'm telling you again what happened, we told him we've done extensive investigation. We have subpoenaed documents. We've subpoenaed other witnesses. We believed that if your client comes in and says the same thing that is in his police report, then he may be committing perjury, and we will prosecute him for perjury. You've got to understand that perjury is a very difficult crime to prove. You've got to have a specific statement that says something which we can prove is absolutely false. It's one of the most difficult crimes on the books to prove.

Mr. WILSON. Fair enough.

If we could just turn briefly to exhibit No. 20. It's in the book in front of you. It is a sworn affidavit that was executed by an investigator, Ron Ohlzen; and we are not—we don't want to go back and try and determine whether somebody did or did not do something, but there's a very specific thing we want to get to here. In the affidavit——

[Exhibit 20 follows:]

STATE OF FLORIDA)
)
COUNTY OF DADE)

FILED FOR RECORD
1992 JUN 12 PM 1:
CLERK, CIRCUIT COURTS
DADE COUNTY, FLA.

AFFIDAVIT

On June 5, 1992 I received from Motorola, Inc. copies of subscriber calls for phone numbers (305) 775-2644, (305) 794-6473 pursuant to a subpoena issued to Motorola Cellular Service, Inc. for the period of April 29, 1992 and April 30, 1992. These two telephones are mobile phones listed to Joseph M. Gersten and were located in his automobile on the evening of April 29, 1992 and the following day April 30, 1992. A copy of these records are attached hereto and made part hereof.

In the affidavit submitted by me on June 4, 1992 in support of a search warrant for the body of Joseph M. Gersten, I related information provided to me and other investigators by witnesses in the Gersten investigation. One witness, Lisa McCann, told me that she was picked up by Joseph M. Gersten on April 29, 1992 between 6:16 and 7:00 p.m. This time was estimated by her and can not be correct in view of the attached toll records. However, information provided in my original search warrant affidavit includes statements from Claudia Lira, Kenny Elswick and Roberto Maldonado. All of these witnesses estimated the time of Gersten's arrival at 471 NE 31st Street, Miami to be in the early evening hours of April 29, 1992. Also in my original affidavit I included information provided me by cab driver Robert Cabanas. Robert Cabanas stated that he picked up Joseph M. Gersten from Biscayne Boulevard and 29th Street in the evening of April 29, 1992. Gersten reported his automobile stolen to Jack Eads, City Manager of Coral Gables who immediately called the Coral Gables police at 10:11 p.m.

The information provided in this affidavit was relayed to Judge Thomas S. Wilson, Jr. by Assistant State Attorney Richard D. Gregorie at approximately 4:00 p.m. on June 5, 1992 and Judge Thomas S. Wilson, Jr. stated that this additional information did not affect the probable cause in the original affidavit in support of the search warrant for Joseph Gersten's body.

Ronald C. [illegible]
AFFIANT

Sworn to and subscribed before me this
the 5th day June, 1992. (personally known to me)

Jean Bowman Ward
NOTARY PUBLIC STATE OF FLORIDA AT LARGE

My Commission Expires: JEAN BOWMAN WARD
My Comm. Exp. Nov. 19, 1992
Bonded thru Notary Public Underwriters

KSM1100 00H/M5382 BILLED USAGE MOTOROLA 06/03/92 12:2
CMD ==>
ACCOUNT: 77008985 C NAME: METRO DADE COUNTY-313627 CTL: 1277
INVOICE MONTH: PHONE: 305 794 6473 CALL DATE: TO

CALLED LOCATION	CALLED NUMBER	DATE	TIME	BILL DUR	AIR	TAX/ LAND	TOTAL	C I	ROAME SYSTE
PHONE: 305/794-6473	ESN: 820A2887			RATE	PLAN: E				
INCOMING		04/29	8:0515P	1.0	0.25	0.00	0.25	C	00037
INCOMING		04/29	8:0545P	1.0	0.25	0.00	0.25	C	00037
INCOMING		04/29	8:0627P	1.0	0.25	0.00	0.25	C	00037
MIAMI FL	305/576-4521	04/30	4:1011A	1.0	0.25	0.00	0.25	C	00037

ASM1100 00H/M5382 BILLED USAGE MOTOROLA 06/03/92 12:

CMD ==>

ACCOUNT: 77008985 C NAME: METRO DADE COUNTY-313627 CTL: 1277

INVOICE MONTH: PHONE: 305 794 6473 CALL DATE: TO

CALLED LOCATION		CALLED NUMBER	DATE	TIME	BILL DUR	AIR	TAX/ LAND	TOTAL	C I	ROAMI SYSTI
PHONE: 305/794-6473		ESN: 820A2887			RATE PLAN: E					
MIAMI	FL	305/375-5121	04/29	11:1923A	2.0	0.70	0.00	0.70	C	00037
MIAMI	FL	305/375-5121	04/29	11:2100A	1.0	0.35	0.00	0.35	C	00037
MIAMI	FL	305/371-2000	04/29	11:2156A	2.0	0.70	0.00	0.70	C	00037
MIAMI	FL	305/375-5121	04/29	11:2430A	1.0	0.35	0.00	0.35	C	00037
MIAMI	FL	305/596-8053	04/29	11:4407A	1.0	0.35	0.00	0.35	C	00037
MIAMI	FL	305/371-2000	04/29	12:3542P	3.0	1.05	0.00	1.05	C	00037
INCOMING			04/29	12:3849P	4.0	1.40	0.00	1.40	C	00037
MIAMI	FL	305/371-2000	04/29	12:4314P	2.0	0.70	0.00	0.70	C	00037
MIAMI	FL	305/371-2000	04/29	3:3831P	2.0	0.70	0.00	0.70	C	00037
MIAMI	FL	305/375-5121	04/29	3:3953P	3.0	1.05	0.00	1.05	C	00037
MIAMI	FL	305/371-2000	04/29	4:5046P	9.0	3.15	0.00	3.15	C	00037
MIAMI	FL	305/661-1518	04/29	6:0421P	13.0	4.55	0.00	4.55	C	00037
INCOMING			04/29	7:0530P	1.0	0.25	0.00	0.25	C	00037

MESSAGE MOTOROLA CELLULAR SVCS

KSM1190 OOH/M5382 BILLED USAGE MOTOROLA 06/03/92 12:
CMD ==>
ACCOUNT: Z7008985 C NAME: METRO DADE COUNTY-313627 CTL: 1277
INVOICE MONTH: PHONE: 305 794 6473 CALL DATE: TO

CALLED LOCATION	CALLED NUMBER	DATE	TIME	BILL DUR	AIR	TAX/ LAND	TOTAL	C ROAM I SYST

PHONE: 305/794-6473 ESN: 820A2887 RATE PLAN: E

[redacted]

KSM1100 00H/M5382 BILLED USAGE MOTOROLA 06/03/92 12:3
CMD ==>
ACCOUNT: 77012243 C NAME: METRO DADE COUNTY CTL: 1277
INVOICE MONTH: PHONE: 305 775 2644 CALL DATE: TO

CALLED LOCATION	CALLED NUMBER	DATE	TIME	BILL DUR	AIR	TAX/ LAND	TOTAL	C I	ROAME SYSTE
PHONE: 305/775-2644		ESN: 8215CAA5		RATE	PLAN:	BAS			
PERRINE	FL 305/253-7560	04/30	10:4542A	5.0	1.75	0.00	1.75	C	00037
PERRINE	FL 305/253-7560	04/30	10:5134A	2.0	0.70	0.00	0.70	C	00037
PERRINE	FL 305/252-3739	04/30	10:5333A	1.0	0.35	0.00	0.35	C	00037
PERRINE	FL 305/253-7560	04/30	11:0016A	1.0	0.35	0.00	0.35	C	00037
MIAMI	FL 305/670-9424	04/30	3:5714P	3.0	1.05	0.00	1.05	C	00037
PERRINE	FL 305/253-7560	04/30	3:5951P	1.0	0.35	0.00	0.35	C	00037

KSM1106 00H/M5382 BILLED USAGE MOTOROLA 06/03/92 12:
CMD ==>
ACCOUNT: 77012243 C NAME: METRO DADE COUNTY CTL: 1277
INVOICE MONTH: PHONE: 305 775 2644 CALL DATE: TO

CALLED LOCATION		CALLED NUMBER	DATE	TIME	BILL DUR	AIR	TAX/ LAND	TOTAL	C I	ROAM SYST
PHONE: 305/775-2644		ESN: 8215CAA5			RATE PLAN: BAS					
MIAMI	FL	305/375-5121	04/29	2:0610P	1.0	0.35	0.00	0.35	C	0003
PERRINE	FL	305/232-9755	04/29	2:4952P	2.0	0.70	0.00	0.70	C	0003
PERRINE	FL	305/238-6694	04/29	3:1044P	2.0	0.70	0.00	0.70	C	0003
PERRINE	FL	305/251-0191	04/29	7:1306P	1.0	0.25	0.00	0.25	C	0003
PERRINE	FL	305/252-2355	04/29	7:3104P	1.0	0.25	0.00	0.25	C	0003
PERRINE	FL	305/253-7560	04/29	7:4043P	2.0	0.50	0.00	0.50	C	0003
PERRINE	FL	305/253-7560	04/29	8:0612P	2.0	0.50	0.00	0.50	C	0003
PERRINE	FL	305/233-8787	04/29	8:0739P	1.0	0.25	0.00	0.25	C	0003
MIAMI	FL	305/375-3423	04/30	9:1825A	2.0	0.70	0.00	0.70	C	0003
PERRINE	FL	305/235-6661	04/30	9:3657A	2.0	0.70	0.00	0.70	C	0003
PERRINE	FL	305/253-7560	04/30	9:4029A	1.0	0.35	0.00	0.35	C	00037
DIR. ASST.	FL	305/411-	04/30	9:4106A	1.0	0.35	0.60	0.95	C	00037
PERRINE	FL	305/238-9882	04/30	9:4136A	1.0	0.35	0.00	0.35	C	00037

MESSAGE MOTOROLA CELLULAR SVCS

MOTOROLA INC.

Law Department

June 4, 1992

Investigator Ronald C. Ohlzen
Criminal Investigations Division
State Attorney's Office
1351 N.W. 12th Street
Miami, FL 33125

Re: Subpoena issued to
Motorola Cellular Service, Inc.
Subscriber No. (305) 775-2644;794-6473

Dear Mr. Ohlzen:

Motorola is in receipt of the above-referenced subpoena dated May 12, 1992. I have enclosed billing information for April 29, 1992 through April 30, 1992.

If you have any questions, please feel free to contact me at [redacted]

Sincerely yours,
MOTOROLA, INC.

Terri L. Leff
Legal Assistant

Enclosures

1501 W. Shure Drive, Arlington Heights, IL 60004 • (708) 632-4000

Mr. GREGORIE. You talking about 18?

Mr. WILSON. Exhibit No. 20.

Mr. GREGORIE. Oh, I'm sorry.

Mr. WILSON. In this affidavit, Mr. Ohlzen states that Lisa McCann could not have been correct when she said that Gersten picked her up between 6:16 and 7 p.m. That statement is found in the middle of the first page. He says, one witness, Lisa McCann, told me that she was picked up by Joseph M. Gersten on April 29, 1992, between 6:16 and 7 p.m. This time was estimated by her and cannot be correct in view of the attached toll records.

Do you have any reason to dispute Mr. Ohlzen's affidavit here?

Mr. GREGORIE. Oh, none whatsoever.

Mr. WILSON. OK.

Mr. GREGORIE. I don't think Lisa McCann knew what time of day it was at any time.

Mr. WILSON. Fair enough.

Now if you can turn to the second to last page of exhibit 20, please, there's a list of toll records here, and if you go down four from the top of the telephone calls here, there's a telephone call listed for 7:13 p.m. It's a number in Perrine in south Florida. Do any of you here know who was called at 7:13?

Mr. GREGORIE. Do you have a telephone number for that?

Mr. WILSON. Well, it's right next to the 7:13, yes.

Mr. GREGORIE. I remember reading your report, and I remember getting information that there is a staff member on Gersten's staff, you mentioned the name in the report, and I don't know if this is the same number you're referring to. So I can't——

Mr. WILSON. Well, the—in exhibit 21, we have Mr. Ohlzen's handwritten notes; and if you look at the—I believe it's the fourth entry, 7:13, there's a listing for a Dorsey Desmond. Now, do any of you know who Dorsey Desmond is?

[Exhibit 21 follows:]

6/8/92 Telephone toll records

775-2644 - Portable px.

4/29	2:06 pm	375-5121	G's Office (Comm.)
"	2:49	232-9755	Bell Short Stop 17452 S.W. 104 Ave.
"	3:10	238-6694	- not in bressers
"	7:13	251-0191	~~not in bressers~~ Desmond Dorsey 17272 S.W. 103 Ave.
	7:37	252-2355	
	7:40	253-7560	Darlene Alexander bill: Audwin Alexander 14235 Madison St.
	8:06	253-7560	"
	8:07	233-8787	Desiree Davis 11401 S.W. 193 ST.
4/30	9:18 am	375-3423	not in bressers
	9:36 am	235-6661	Prof. Fed. Savings Bk. 11205 S. Dixie Hi.
	9:40 am	253-7560	Darlene Alexander
	9:41 am	238-9882	Spicey Nails 13734 S.W. 152 St.
	10:45 am	253-7560	Darlene Alexander
	10:51 am	"	
	10:53 am	252-3739	Wilbur B. Bell 17452 S.W. 104 Ave.

EXHIBIT 21

11 00 am	253-7560	Darlene Alexander
3 52 pm	670-9424	not in bressers
3 59 pm	253-7560	Darlene Alexander

Mr. GREGORIE. I don't.

Ms. CAGLE. No.

Mr. OSBORN. No.

Mr. WILSON. Did anybody interview Dorsey Desmond?

Mr. GREGORIE. We tried to identify all of the people whose numbers were here. This is 10 years ago. That name doesn't mean anything to me today, but I would be very surprised if we didn't determine who she was or somebody didn't go out to that address and try to find out who she was.

Mr. WILSON. This is something you can help us. Because in the records of the State attorney's office there's no interview notes or indication of any interviews with any of these individuals. It appears from the records, although we can't tell this, that this was a call made when the car was in the possession of the individuals who stole the automobile.

Mr. GREGORIE. I don't know who she is, but at 7:40 there's a call to Darlene Alexander, and that was one of the people on Mr. Gersten's staff. So I—you know, I know we found that one, but Desiree Davis, you'd have to ask the investigators. It really is too long ago for me to remember.

Mr. WILSON. OK. Fair enough.

Briefly, we'll just turn to one other issue, and that will be me finished.

Exhibit 3a is a copy of what Mr. Band indicated were his handwritten notes.

[Exhibit 3a follows:]

201

5-7-92 (reprint)

Det. M. Osborn

1 May

6:00pm - briefing by Sgt. Meeks -

M.L. Garcia & L. Iglesias stopped at stolen mercedes (Gerston) on 4-30 - driver of mercedes stated car not stolen but given by Joe to Soy dogs - Lisa also in car. Joe at the Laurel Motel - given SOW reported stolen by Joe

6:55 - spoke w/ Lt. Flores

Lisa - witnessed a heavy set bald man in a blue mercedes had .38 belonging to Joe

7:10 - mercedes released to aide

J. Diaz arrest reprint:

4/30/92 - mercedes recovered at 480 NE 30 St.

car stolen from C.G. on 4/29/92 - driver of car Kenneth Elswick 540 NE 31 St.

7:45 - Det. Garcia arrives w/ Wayne Pierce

Pierce - describes shooting

9:10 - Pierce recants story

Pierce explains that Lisa told him to go to police w/ story

EXHIBIT 3 a

11:00 weapon found near scene was murder weapon
Joe's not involved

5 May
5:10 - Michael Bonney, FBI
4-29-92:
Lisa McCann picked up at Boulevard & 36 St. by Joe
went to her house (east of Boule on 31 St.) had
sex
joined by Claudia Lira & Roberto Maldonado
later joined by Ken Elswick
Joe gave $ to Claudia & Roberto to buy drugs
Claudia & Roberto planned to rob Joe
took gold chain, $, car
all left - leaving Joe alone - to buy drugs
upon return, learned that he took a cab out of
area
540 NE 31 St. where incident took place

5:30 CG report - Joe reported car stolen on 4/29/92 at 8:30 p.m.

Mr. BAND. I'm sorry.

Mr. WILSON. Mr. Band, if you could turn to exhibit 3a.

Mr. BAND. 3a. OK.

Mr. WILSON. And in the first full entry on this page under May 1 there's an indication that Lisa also in car, Joe at the Laurel Motel. Do you have any recollection of what this refers to?

Mr. BAND. No, I don't. Again, these notes reflect what I gleaned from Detective Osborn's report.

Mr. WILSON. Did any of you make any effort to determine whether any of the witnesses indicated that the events from April 29 actually took place at the Laurel Motel? I know there's a lot of testimony that it didn't, but there is indication that somebody testified that it did.

Mr. GREGORIE. When they were first stopped, their first explanation to the police was, we're just borrowing Joe's car. He's back at the Laurel Motel. I think that was a lie in an attempt to convince the police that they hadn't stolen the car, that it belonged to somebody that they were friends with. I have no information whatsoever that the Laurel Motel was in any way involved in this case.

Mr. WILSON. OK. And I ask this question only because the Laurel Motel is also the site for the allegation that Mr. Gersten had murdered the transvestite at the Laurel Motel as well, and so I bring this to you to ask the question whether anybody wanted to check at the time and see if this was a coincidence that needed to be thought about more.

Mr. GREGORIE. I don't know what the Laurel Motel is, so I can't help you with that one.

Mr. WILSON. Mr. Band.

Mr. BAND. I have no association or knowledge of the involvement of this Laurel Motel.

Mr. WILSON. Ms. Cagle.

Ms. CAGLE. No recollection.

Mr. WILSON. Mr. Osborn, do you have any recollection of any of the details that include the Laurel Motel?

Mr. OSBORN. Well, the Laurel Motel is where Gregory Wellons was staying along with some other people. So I spent quite a bit of time there, yes.

Mr. WILSON. OK. Do you have any recollection, though, about the statement that Mr. Gersten had any connection with the Laurel Motel?

Mr. OSBORN. Just from Wayne Pearce and him—seeing him at Biscayne and five three, which is where Laurel is.

Mr. WILSON. Thank you very much. Thank you all.

Mr. SHAYS. Majority counsel has used his time and yields back the rest; and the minority counsel, if they would like to use time, has 30 minutes.

Mr. WAXMAN. We have no questions further to ask.

Mr. SHAYS. Mr. Waxman, if you'd like to make a concluding comment, I'll be happy to make one. Then we can adjourn.

Excuse me, I will say this. I would like to—beforehand, I would like to give each—all four of you—an opportunity to make any comment you would like before we adjourn.

Mr. Osborn do you have any comment you'd like to make?

Mr. OSBORN. No, I'm fine.

Mr. SHAYS. Appreciate you being here.

Ms. Cagle, any comment that you would like to make?

Ms. CAGLE. No, I have no comment.

Mr. SHAYS. Thank you for being here.

Mr. BAND. I appreciate your consideration, but I have no further comment.

Mr. SHAYS. Thank you, Mr. Band.

Thank you for being here, Mr. Gregorie.

Mr. GREGORIE. Thank you for consideration, Mr. Chairman. Thank you very much.

Mr. SHAYS. Thank you.

Thank you for being here. Mr. Waxman.

Mr. WAXMAN. I have nothing to say that I haven't already said. I yield back my time, and I'm ready to leave.

Mr. SHAYS. Thank you gentlemen and lady. We may be sending you—in fact, will be sending you some questions that we would like you to answer. We would give you, obviously, ample time to answer the questions and appreciate you all being here and appreciate our recorder; and I appreciate the hard work of our staffs on both sides of the aisle.

This hearing is adjourned.

[Whereupon, at 3:25 p.m., the committee was adjourned.]

[The staff report and the complete set of exhibits follow:]

THE JOSEPH GERSTEN CASE: A STUDY OF THE ABUSE OF GOVERNMENT POWER

Staff Report
Committee on Government Reform
April 10, 2001

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THE JOSEPH GERSTEN CASE: A STUDY OF THE ABUSE OF GOVERNMENT POWER

FINDINGS OF THE COMMITTEE ON GOVERNMENT REFORM

In 1992, the Miami State Attorney's Office and the Federal Bureau of Investigation conducted an investigation of allegations that Dade County Commissioner Joseph Gersten had consorted with prostitutes, smoked crack cocaine, and filed a false police report. A review of the evidence suggests that, at a minimum, individuals participated in a conspiracy to make allegations that they knew to be false. It also appears that government officials failed to develop and disclose evidence that was obviously exculpatory. The use of government authority to conduct an examination that purposefully ignores relevant information offends notions of fundamental fairness and should not be tolerated.

Notwithstanding the passage of nearly nine years since the underlying events, state and federal government officials have continued to rely on, and perpetuate, obviously suspect allegations against Gersten to his detriment. Based on available information, the Committee finds that state and federal law enforcement officials acted in a way that indicates extreme bad faith in their investigations of Joseph Gersten.

The Committee finds the following:

1. Government law enforcement officials purposefully ignored significant exculpatory information in their investigations of Joseph Gersten. For example, one of Gersten's main accusers, and a witness heavily relied upon by state and federal law enforcement officials in the sex and drugs allegations, was involved in a contemporaneous effort to frame Gersten for a murder. Moreover, this witness offered money in exchange for false testimony. State and federal officials failed to ask why their primary witness in one case was trying to frame Gersten for murder.

2. State and federal prosecutors failed to investigate the attempt to frame Gersten for murder. In doing so, they failed to address the implication that the sex and drugs allegations might be false, and that there was a coordinated effort to damage Gersten's reputation and professional career.

3. State and federal law enforcement officials appear to have made little effort to challenge witnesses who offered testimony that was materially inconsistent. Rather, they appear to have embraced incriminating evidence that was highly suspect while, at the same time, they rejected evidence that was exculpatory.

4. State law enforcement officials appear to have made inappropriate efforts to develop information in order to indict Gersten for perjury.

5. The State Attorney's Office of the Eleventh Judicial Circuit of Florida appears to be engaged in an ongoing effort to withhold significant information from Congress.

I. WHY THE COMMITTEE INVESTIGATED THIS MATTER

Congressional oversight committees are often the last resort for those who believe that they have suffered an injustice, or for individuals who allege misconduct by government officials. More often than not, the stories that are brought to Congress can be easily dismissed. Sometimes, however, they have merit and deserve scrutiny. Occasionally, an investigation brings to light evidence of wrongdoing. The Gersten case appears to be such a matter.

Upon first consideration, Joseph Gersten's claims appear far-fetched. A once-powerful politician claims that government officials used false allegations against him to destroy his personal and professional life. He also claims that, to this day, government officials continue to act improperly, and that he continues to suffer as a result of abuses of government power.[1]

It is easy to argue that Congress should pay no attention to such a matter. Indeed, some have already made such an argument.[2] The Committee, however, takes a different view. The citizens of this country convey extraordinary power to their government. They have a right to expect that this power will be used in the pursuit of appropriate ends. If the people and their government eschew oversight of this power, then they cannot complain when that power is unfairly used against them.

By all accounts, Joseph Gersten was an irascible, reform-minded politician who made many enemies. He upset a number of entrenched interests in Miami. Nevertheless, as are all citizens of this country, Joseph Gersten was entitled to "the equal protection of the laws."[3] It appears, as new facts emerge, that the vast power of the state was used to destroy him. With this concern in mind, the Committee conducted an investigation of the Gersten matter.

The following considerations were important in the drafting of this report:

- If government officials abused their positions to destroy one man, there is a responsibility to right that wrong and to ensure that others do not suffer the

[1] *See, e.g.*, Letter from Joseph M. Gersten to The Honorable Henry Waxman, Ranking Minority Member, Committee on Government Reform (January 4, 2001) (Exhibit 1).
[2] Al Kamen, *GOP Prober Won't Rule Reno Out*, THE WASHINGTON POST, at A45 (December 13, 2000) (Exhibit 2).
[3] U.S. CONST. amend. XIV, § 1.

same fate. In a prospective sense, it is important that the same abuses are not allowed to occur again. In a retrospective sense, one can only wonder if others were similarly harmed.

- There should be no statute of limitations on exposing improper conduct by government officials. Indeed, the fear that someday, years after the fact, someone might stumble across improper conduct and have the courage to shine the light of truth on it serves to deter wrongdoing.

- It should be the goal of government to ensure that everyone is treated fairly by the government.

Under normal circumstances, the allegations made by Gersten might simply have been referred to law enforcement authorities. However, because the underlying allegations raise concerns about the conduct of law enforcement officials, and because there are concerns about the failure of law enforcement to police itself successfully, a preliminary review of evidence was commenced by the Committee. Once the Committee became satisfied that there might be merit to the issues raised by Gersten, it made four letter requests for documents.[4] The review of the documents produced, which included materials from the State Attorney's Office of the Eleventh Judicial Circuit ("SAO") and the Federal Bureau of Investigation, led to significant information that resulted in the writing of this report.

II. WHAT THE COMMITTEE HOPES TO ACHIEVE BY ISSUING THIS REPORT

It is the Committee's hope that the matters discussed in this report will be fully and fairly reviewed by the United States Department of Justice, the Attorney General's Office of the State of Florida, and the Florida Bar Association.

Given the depth of records recently provided to the Committee by the State Attorney's Office, and the number of inconsistencies in the original allegations against Gersten, this report could be very lengthy. However, it is the goal of the Committee to provide a brief recitation of the available facts in order to demonstrate that there is good cause for the state government in Florida, and the federal government, to police themselves and conduct thorough investigations of the underlying events. Not every aspect of the investigations into allegedly illegal conduct is catalogued in this report. Nevertheless, the Committee has made a sincere effort to be fair to those whose work is called into question.

[4] The Committee requested that the Department of Justice, the Federal Bureau of Investigation, the State Department, and the State Attorney's Office of the Eleventh Judicial Circuit of Florida produce documents regarding Joseph Gersten (Exhibit 3).

III. THE STATE AND FEDERAL GOVERNMENT INVESTIGATIONS OF JOSEPH GERSTEN

By 1992, when he became the suspect in a sex and drugs scandal, Joseph Gersten had already served terms as a Democrat in the Florida House of Representatives and the Florida Senate. He had unsuccessfully run for Florida Attorney General, and he had successfully run a campaign to become one of the Dade County Commissioners. He also had taken preliminary steps to announce his candidacy to become Mayor of Dade County.[5]

As a prominent politician, Gersten had also attracted a great deal of media attention, and had become the target of allegations that he had abused his position as Chair of the Dade County Finance Committee to benefit from illegal bond transactions. Indeed, the Federal Bureau of Investigation had commenced an investigation of allegations that Gersten had participated in illegal bond deals, and had specifically looked into allegations that he had been involved in illegal financial transactions with, among others, former Atlanta Mayor Maynard Jackson.[6]

A. Allegations that Gersten Was Involved in Illegal Bond Deals

A review of records produced to the Committee by the FBI indicates that Gersten was investigated extensively after allegations were made that he was involved in illegal financial transactions. Even though confidential informants wore wires to entrap him, and even though a court-ordered telephone monitor was employed,[7] the FBI was unable to develop any evidence beyond the underlying allegations that Gersten had been a party to illegal bond transactions.

It is particularly significant to note that in an interview conducted on January 12, 2001, the FBI's chief investigator on the Gersten case told the Committee that some of those who had made allegations against Gersten had themselves been subsequently indicted.[8] The FBI would not divulge the names of their confidential informants in this case, and the Committee therefore does not know who these individuals are. Nevertheless, it is significant to note that while the FBI could not develop evidence that Gersten broke the law, some of those who told the FBI that he had been involved in illegal conduct were themselves ultimately indicted for criminal conduct. At a minimum,

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[5] On April 8, 1992, Gersten opened a campaign account to run for mayor, and told the press that he planned a formal announcement soon. *In Brief*, THE MIAMI HERALD, at 2B (April 9, 1992).

[6] Interview with Michael Bonner, then-Special Agent, Federal Bureau of Investigation, in Washington, D.C. (January 12, 2001) (although Bonner did not specifically mention former Mayor Jackson by name, the FBI confirmed that he was investigated for his role in financial transactions with Gersten). Mr. Bonner has since been promoted and is currently a Supervisory Special Agent; *see also* Dexter Filkins, "SEC Begins Own Probe of Two Dade Bond Deals," THE MIAMI HERALD, at 1B, 8B (August 3, 1994).

[7] Exhibit 4 includes FBI requests, including one made by Special Agent Michael Bonner, for consensual monitors of telephone conversations.

[8] Interview with Michael Bonner, Special Agent, Federal Bureau of Investigation, in Washington, D.C. (January 12, 2001).

this raises some doubt as to the reliability of their allegations. It is also consistent with the view that Gersten's political opponents were trying to harm his political career by making unfounded allegations against him.[9]

B. The Sex and Drugs Allegations

On April 29, 1992, Gersten told the police that his car had been stolen from the driveway in front of his house. The following day, his car was recovered. The individuals apprehended when the car was located told a story markedly different than that which had been offered by Gersten. Simply put, they explained that the car had been taken while Gersten was smoking crack cocaine and consorting with prostitutes.[10] Gersten left the country a few days later on a previously planned vacation to the Cannes Film Festival in France, and the salacious version of events soon became widely known through print and broadcast media.

On the advice of counsel, Gersten extended his two week holiday by an additional two weeks.[11] By the time he returned to Miami, there was already a widely held belief that he had done what he had been accused of doing. At the insistence of prosecutors, a follicle test was conducted to prove that Gersten had been using cocaine on the evening of April 29, 1992. Although the test came back negative,[12] and it was clear that Gersten could not have done a significant part of what his accusers claimed, the government continued to investigate the allegations that Gersten was involved in illegal conduct. The government also claimed that it was investigating the theft of Gersten's automobile, although records produced to the Committee support the conclusion that this "investigation" was merely a pretext to obtain statements from Gersten that would permit an indictment for perjury.[13] Indeed, there appears to have been little real interest in pursuing charges for the theft of Gersten's automobile.[14]

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[9] The Committee has not been informed of the identities of the people making the allegations. It is suggested, however, that federal law enforcement determine if any of these individuals were involved in interests that Gersten was attempting to reform, such as the Port of Miami or the Miami International Airport.

[10] FBI interview of Kenneth Elswick (April 30, 1992) (Exhibit 5); FBI interview of Claudia Lira (April 30, 1992) (Exhibit 6).

[11] Interview with William Richey (January 9, 2001). Mr. Richey, who was Gersten's attorney at the time, explained that in his opinion the evidence was so poor that he thought it best that Gersten remain out of the country while the allegations and witnesses undercut each other. Rather than have Gersten return to a media feeding frenzy, he advised that it would be best to have the story told by the government's witnesses collapse under the weight of its many contradictions and fundamental implausibility.

[12] Memorandum from Federal Bureau of Investigation Laboratory to Ronald C. Ohlzen, Investigator, Criminal Investigations Division, State Attorney's Office (June 10, 1992) (Exhibit 7).

[13] This investigation appears to have been a pretext to accomplish other objectives. In a March 18, 1993, hearing to show cause as to why Gersten should not be held in contempt, Michael Strozer, the Deputy Chief of the State's Felony Screening Unit, testified that if a victim of a crime such as automobile theft – or even a more serious crime – does not appear voluntarily, then further action is not routinely taken. Strozer further testified that of the tens of thousands of cases that were processed by the Felony Screening Unit each year, none of those victims – with the possible exception of domestic violence victims – had ever been the subject of a show cause hearing to determine if contempt sanctions should be applied. The Gersten case was the first such case of which he was aware. Testimony of Michael Strozer, In Re: The Investigation by

As the simultaneous investigations of the car theft and the sex and drugs allegations progressed, Gersten, on advice of counsel, decided not to cooperate with the car theft investigation. Gersten and his lawyers already had developed a concern that the investigations were proceeding in bad faith, and that the ultimate goal of the prosecutors was not to convict the car thieves, but to destroy Gersten personally and professionally. The sex and drugs allegations were so inconsistent, and the witnesses so weak, that there appeared to be little likelihood that a case could be advanced. However, there was a real concern that the State Attorney's Office would indict Gersten for perjury if he did not agree with the version of events offered by those who had originated the sex and drugs allegations,[15] and that the indictment, standing alone without any finding of guilt, would result in Gersten being suspended from the County Commission, even as Gersten defended himself.[16] Consequently, on the advice of counsel, Gersten refused to answer questions regarding the circumstances of the theft of his car. Gersten, however, did tell prosecutors that he would cooperate by providing the testimony needed to prosecute the car thieves; specifically, that the car was his, and that the people who were apprehended in possession of his car did not have his permission to be in control of the car.[17] Prosecutors, however, insisted that he provide more information.

As a result of his refusal to cooperate, prosecutors in the State Attorney's Office sought to have him held in contempt of court. On March 15, 1993, the day before the

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State Attorney's Office of County Commissioner Joseph Gersten, at 49-54 (S.D. Fla. March 18, 1993) (No. 92-25309) (Exhibit 8); *see also* Plaintiff's Memorandum in Support of Emergency Motion for Temporary Restraining Order and Preliminary Injunction, at 9, *Gersten v. Rundle* (S.D. Fla. June 25, 1993) (No. 93-1229) (Exhibit 9).

[14] On June 10, 1992, one of the individuals responsible for stealing Gersten's automobile had an exchange with prosecutors and investigators that made it quite clear that the State's Attorney was not interested in prosecuting the car thieves. In this exchange, Claudia Lira stated under oath to government officials Richard Gregorie, George Havens, Karen Jacobson and Ron Ohlzen that the FBI "said we weren't going to get arrested. No one's going to get arrested for stealing the car." Transcript of Interview of Claudia Lira, State Attorney's Office, at 34 (June 10, 1992) (Exhibit 10). When she was arrested on May 3, 1992, for carrying a concealed weapon, possession of Gersten's credit cards and other crimes, Lira told Officer Palacios that "Gersten came by my house to visit. He left them at my house. My boyfriend used his car. I spoke with the F.B.I. and they told me not to say anything." Complaint/Arrest Affidavit of Claudia Lira (May 3, 1992) (Exhibit 11). Perhaps more important, Lira appeared pursuant to a subpoena and was told she would receive use immunity, which meant that she could not be prosecuted for the car theft. Id. at 3. Thus, it appears that there was an improper motive for forcing Gersten to testify. Representations that his testimony was needed to prosecute the automobile theft appear to have been made in bad faith.

[15] *See, e.g.,* Letter from William Richey to The Honorable Janet Reno, State Attorney of the Eleventh Judicial Circuit of Florida (July 1, 1992) (Exhibit 12).

[16] FLA. STAT. ch. 112.51(2) (2000) ("[w]henever any elected or appointed municipal official is arrested for a felony or for a misdemeanor related to the duties of office or is indicted or informed against for the commission of a federal felony or misdemeanor or state felony or misdemeanor, the Governor has the power to suspend such municipal official from office").

[17] In a letter to Assistant State Attorney Michael Band, Gersten's attorney indicates that "Gersten would graciously assist in the prosecution of Mr. Elswick and Mrs. Lira by testifying as to the basic and fundamental requirements necessary for this type to prosecution to-wit: 1. He does not know either of these individuals; and 2. He gave no permission to either of them to use his vehicle at any time." Letter from Richard Sharpstein to Michael Band, Assistant State Attorney of the Eleventh Judicial Circuit of Florida (August 10, 1992) (Exhibit 13).

election to determine who would sit on the Dade County Commission,[18] the Fourth District Court of Appeals refused to hear Gersten's appeal of a lower court order that he answer prosecutors' questions. On election day, the headline of *The Miami Herald* newspaper read "State Gets Go-Ahead to Quiz Gersten."[19] Gersten ultimately was found to be in contempt of court, and he served almost three weeks in jail.[20]

Gersten was released from jail on April 12, 1993, remained for another five months in the United States, and then left the country in September of 1993. Currently, he resides in Australia.

IV. SIGNIFICANT INFORMATION NOT ONLY UNDERCUTS THE ALLEGATIONS AGAINST GERSTEN, IT SUGGESTS THAT GOVERNMENT PROSECUTORS AND INVESTIGATORS PURPOSEFULLY COVERED UP EXCULPATORY EVIDENCE

If government officials had made a good faith effort to consider exculpatory material in the Gersten case, the Committee would not have considered issuing a report about this matter. However, there are so many indications of unfair – and possibly corrupt – practices by state and federal government officials that the Committee believes it important to provide a public explanation of events. Some of the important evidence uncovered by the Committee was kept from the public and, apparently, from key investigators. Indeed, one of the most important matters was deliberately kept from Gersten and his lawyers. Furthermore, it appears that there was even an effort to keep the most significant matter from this Committee.

This section attempts to explain how one element in the Gersten case indicates that government officials acted in extreme bad faith. The principal concern of the Committee is the appearance that government officials were engaged in a headlong rush to destroy Gersten, and that they did so knowing that they were using the sex and drugs allegations as a means to achieve that end. In addition, it appears that government officials also purposefully ignored clear-cut evidence of a crime that, if pursued, might have undercut their rationale for investigating Gersten.

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[18] Gersten decided against running for mayor and, instead, on July 14, 1992, filed papers to run for re-election to the Dade County Commission. Dexter Filkins, *Gersten Runs for Old Seat, Not Mayor*, THE MIAMI HERALD, at 1B (July 15, 1992).

[19] Dexter Filkins, "State Gets Go-Ahead to Quiz Gersten," THE MIAMI HERALD, at 1B (March 16, 1993). Gersten apparently believes that the timing of the rejection and appeal were unfair and contributed to his defeat for reelection to the Dade County Commission.

[20] The Committee certainly does not condone a refusal to obey a lawful court order. In retrospect, however, it appears as though, at a minimum, the State Attorney's Office should not have put Gersten in the position he was in without investigating the exculpatory information that they possessed. The decision to compel Gersten's testimony, while ignoring critical evidence in his favor – and the ultimate decision to withhold this evidence from Gersten or the court – is a powerful indication of bad faith by the prosecutors. For the sake of completeness, the Supreme Court of Florida's opinion regarding bar association proceedings against Gersten is included at Exhibit 14.

A. The Allegation that Gersten Murdered a Transvestite

The sex and drugs story was initially derived from the testimony of two female prostitutes, Lisa McCann and Claudia Lira, as well as a male friend of theirs, Robert Maldonado, and a pimp, Kenneth Elswick.[21] There were numerous reasons to question the reliability of the witnesses, even if one did not factor in their professional backgrounds. For example:

- Witnesses Kenneth Elswick and Claudia Lira were, at the time of the allegation, wanted for kidnapping and armed robbery.[22] In addition, Elswick had been dishonorably discharged from the military, and Lira had at least 16 convictions for drug possession, prostitution and theft. Witness Lisa McCann had 18 convictions for prostitution, possession of cocaine, and other crimes. Robert Maldonado had been convicted of manslaughter in New York, served nine years in prison and then skipped parole.[23]

- The witnesses' stories were fatally inconsistent.

- Witness Elswick offered to change his testimony for a cash payment of $10,000.

- The stories were told after Elswick and Lira had been apprehended for stealing Gersten's automobile.

Notwithstanding the above indicia of unreliability, a contemporaneous matter arose that should have been of immediate concern to state and federal prosecutors and investigators. Specifically, Lisa McCann, the witness deemed to have been one of the two most reliable according to FBI Special Agent Michael Bonner — who took the statements of the witnesses [24] — offered an individual money to make the false allegation that Gersten had

[21] FBI interview of Kenneth Elswick (April 30, 1992) (Exhibit 5); FBI interview of Claudia Lira (April 30, 1992) (Exhibit 6); FBI interview of Robert Maldonado (April 30, 1992) (Exhibit 15); FBI interview of Lisa McCann (May 1, 1992) (Exhibit 16).

[22] On April 9, 1992, less than three weeks before the alleged sex and drugs encounter, Elswick and Lira had participated in a robbery, during which they had threatened to kill their victims. Complaint/Arrest Affidavits of Claudia Lira (June 2, 1992) and Kenneth Elswick (June 24, 1992) (Exhibit 17). Notwithstanding the crimes committed by Elswick, the State Attorney's Office provided $370.35 to Elswick for expenses in late-June, 1992. State Attorney's Office Expense Vouchers (June 22 and 30, 1992) (Exhibit 18).

[23] Charles Strouse and Dexter Filkins, "Gersten Saga: Who's Telling the Truth," THE MIAMI HERALD, at 1B (May 23, 1992). On May 13, 1992, a New York parole officer faxed Karen Jacobson a warrant for Maldonado's arrest. The officer requested that Jacobson "kindly execute the warrant and advise us, when subject is arrested . . . Subject owes NYS 2 yrs 9 mos 25 days on a sent [sic] . . . for a conviction of manslaughter. We will extradite." Fax cover sheet and attached Robert Maldonado warrant (dated July 20, 1990) from Parole Officer James Kelly, Absconder Apprehension Task Force, City of New York Police Department, to Karen Jacobson, Deputy Chief, Criminal Investigations Division, State Attorney's Office of the Eleventh Judicial Circuit of Florida (May 13, 1992) (Exhibit 19).

[24] Interview with Special Agent Michael Bonner, Federal Bureau of Investigation, in Washington, D.C. (January 12, 2001).

murdered a transvestite on the same night as the alleged sex and drugs activity.[25] According to Special Agent Bonner, he did not learn of this fact until January 12, 2001, when the Committee interviewed him. He also indicated that this information would have been important for him to have had at the time of the investigation.[26]

On the evening of Friday, May 1, 1992, at 6:00 p.m., Detective Mike Osborn of the City of Miami Police Department was briefed on the allegations that Dade County Commissioner Gersten had been involved in activities involving prostitutes and drugs on April 29, 1992.[27] At 7:45 p.m. that same evening, Officer J. L. Garcia brought him a witness named Wayne Pierce. Pierce told Detective Osborn that on Wednesday, April 29, 1992 — the same day as the alleged sex and drugs transgressions — he saw an individual murder a transvestite and push the body out of an automobile shortly after 7:00 p.m.[28] The description of the individual matched that of Gersten, and the description of the automobile matched that of Gersten's automobile. Detective Osborn understood that the allegation was directed at Commissioner Gersten.[29]

Detective Osborn recognized a number of inconsistencies in Pierce's statement and reinterviewed him one hour and twenty-five minutes later.[30] At this time, Pierce told Osborn "that he was told by Lisa to come to the police and tell this story because she was going to be paid some money by the FBI."[31] Osborn further wrote in his report: "Pierce stated that the entire story was a lie and that he has never seen anyone known as Joseph Gersten. Pierce denied seeing any shooting and said he only did it because Lisa told him to and that she would give him some money also."[32] Detective Osborn understood that the "Lisa" referred to by Pierce was the same Lisa McCann who had alleged that Gersten was with her when he consumed crack cocaine on April 29, 1992.[33]

Detective Osborn notified his superiors of the fabricated story,[34] and three days later he told one of his supervisors that he would "probably have to talk with Commissioner Gersten about this incident."[35] On May 6, 1992, Osborn contacted Assistant State Attorney Mary Cagle "and advised her of our findings."[36] At that time, she asked Osborn for a written report of what he had told her,[37] and she told Osborn that

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[25] Report of Investigation prepared by Detective Mike Osborn at 5 (May 5, 1992) (Exhibit 20); handwritten notes apparently prepared by Assistant State's Attorney Michael Band, at 1 (produced to the Committee by the State Attorney's Office on September 13, 2000) (Exhibit 21).
[26] Interview with Special Agent Michael Bonner, Federal Bureau of Investigation, in Washington, D.C. (January 12, 2001).
[27] Report of Investigation prepared by Detective Mike Osborn, at 1 (May 5, 1992) (Exhibit 20).
[28] Id. at 3.
[29] Telephone interviews with Detective Mike Osborn (December 18, 2000, and January 12, 2001).
[30] A transvestite named Greg "Champagne" Wellons had been murdered that week. However, Pierce made significant factual errors in his description of the murder. *See* Report of Investigation prepared by Detective Mike Osborn, at 4 (May 5, 1992) (Exhibit 20).
[31] Id. at 5.
[32] Id. at 5-6.
[33] Telephone interviews with Detective Mike Osborn (December 18, 2000, and January 12, 2001).
[34] Report of Investigation prepared by Detective Mike Osborn, at 6 (May 5, 1992) (Exhibit 20).
[35] Id. at 8.
[36] Id. at 10.
[37] Id.

"Commissioner Gersten is out of town, and she requested that we not contact him until our meeting on 5/11/92."[38]

Although Osborn's report of this incident was provided to the State Attorney's Office, Gersten was never told of the false allegation made against him. Perhaps more important, he was never told that the principal witness against him in the sex and drugs case, prostitute Lisa McCann, was also involved in an effort to implicate him in a murder, and that according to the witness who admitted to falsifying the allegation, she was going to use money derived from the FBI to pay for his false testimony.[39]

The false murder allegation raises a number of significant questions:

- Was FBI Special Agent Michael Bonner telling the truth when he said that he had never heard about the murder allegation? According to Detective Osborn's report, he contacted Bonner at 5:10 p.m. on May 5, 1992.[40] Furthermore, Detective Osborn indicated that he had discussed the false murder allegation with Bonner.[41]

- Special Agent Bonner was brought into the sex and drugs investigation to help local officials. FBI agents conducted all of the initial interviews of the primary witnesses. If it is true that Bonner did not know about the false murder allegation, why was this information withheld from him? Bonner indicated to the Committee that one of the two witnesses considered most reliable was Lisa McCann.[42] Yet he maintains that he was unaware that she was attempting to frame Gersten for a murder. Given the fact that Bonner was brought into the investigation from the outset to interview the key witnesses, there can be no good faith reason this information was kept from him. Furthermore, Bonner told the Committee that the information would have been important for him to have had at the time.[43]

- Why were Gersten and his lawyers never informed of this information? Not only was the information withheld from Gersten and his counsel at the time of the investigation, it also was withheld during court proceedings, Florida Bar Association disciplinary proceedings, and it has not been factored into information provided to foreign authorities about Gersten's involvement in the sex and drugs episode. Fundamental fairness would require this information to be factored into any analysis of the allegations made against Gersten.

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[38] Id.
[39] Id. at 5-6.
[40] Id. at 8.
[41] Telephone interview with Detective Mike Osborn (January 12, 2001).
[42] The other "reliable" witness was Robert Maldonado, the witness who had been convicted of manslaughter in New York, served nine years in prison, and then failed to satisfy his parole requirements by fleeing to Florida. Fax cover sheet and attached Robert Maldonado warrant (dated July 20, 1990) from Parole Officer James Kelly, Absconder Apprehension Task Force, City of New York Police Department, to Karen Jacobson, Deputy Chief, Criminal Investigations Division, State Attorney's Office of the Eleventh Judicial Circuit of Florida (May 13, 1992) (Exhibit 19).
[43] Interview with Special Agent Michael Bonner, Federal Bureau of Investigation, in Washington, D.C. (January 12, 2001).

- The Osborn police report was part of the State Attorney's Gersten case file. The State Attorney's Office made the Osborn document available to the public for a short period and then apparently removed it.[44] When Congress received all documents relating to the Gersten case from the State Attorney's Office, the information about the attempt to frame Gersten for murder was suspiciously absent. The Committee asked the State Attorney's Office for a certification that all relevant documents had been produced, and was informed that: "the five (5) boxes of documents made available to the Committee represent copies of the State Attorney's complete file relating to the Joseph Gersten investigation."[45] Why did the State Attorney's Office withhold this information from Congress when it produced documents to the Committee on Government Reform in September of 2000?

- If the Osborn report was intentionally removed from the file more than eight years after it was included in the official record, this would indicate a heightened sensitivity to the presence of this information. Why was this information removed after Congress made a request for information pertaining to the Gersten case?

- On January 17, 2001, the Committee requested that the State Attorney's Office provide all documents "relating to allegations that Joseph M. Gersten was involved in the murder of Gregory Wellons in April of 1992."[46] On January 30, 2001, the Committee was told that the State Attorney's Office was "unable to locate any documents or records relating to allegations that Joseph M. Gersten was involved in the murder of Gregory Wellons[.]"[47] It is clear that the State Attorney's Office were at one time in possession of the Osborn report. Why has this document disappeared from the files of the State Attorney's Office?[48]

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[44] Affidavit of Maria Del Carmen Calzon, Esq. (Exhibit 22). The report was made available to the Committee by Gersten's attorney, Maria Del Carmen Calzon.

[45] Letter from Alvera M. Pritchard, Administrative Records Custodian, State Attorney's Office of the Eleventh Judicial Circuit of Florida, to James C. Wilson, Chief Counsel, Committee on Government Reform (October 3, 2001) (Exhibit 23). Although a commercial copy service did the actual copying of the documents, it is far-fetched to think that the one document that was inadvertently misplaced was the 10-page police report about the false murder accusation against Gersten.

[46] Letter from Dan Burton, Chairman, Committee on Government Reform, to Katherine Fernandez Rundle, State Attorney of the Eleventh Judicial Circuit of Florida (January 17, 2001) (misdated January 17, 2000) (Exhibit 24).

[47] Letter from Alvera M. Pritchard, Administrative Records Custodian, State Attorney's Office of the Eleventh Judicial Circuit of Florida, to James C. Wilson, Chief Counsel, Committee on Government Reform (January 30, 2001) (Exhibit 25).

[48] A copy of what appears to be a file folder was produced to the Committee with the name "MPD Osborne" on it. (Exhibit 26) There were no documents referring to the Wellons murder, with the exception of brief handwritten notes apparently prepared by former Assistant State Attorney Michael Band. (Exhibit 21) Furthermore, Detective Osborn has indicated that there should be documents in addition to the 10-page report. Telephone interviews with Detective Mike Osborn (December 18, 2000, and January 12, 2001). Also included in the State Attorney's Office production to the Committee are three documents that apparently refer to the Osborn Report of Investigation. The first is a SAO Inter-Office Memorandum of items provided by Richard Gregorie to Michael Band that notes: "Report of investigation, dated 5/5/92." (Exhibit 27), the second is a handwritten page of items including a "report of Investigation dated 5/5/92" (Exhibit 28), and the third is a handwritten notation: "ROI – Mike Osborn – 5/7/92 10 pages" (Exhibit 29).

- Why did state and federal law enforcement officers fail to conduct a thorough investigation of the false murder allegation against Gersten, and why was nobody prosecuted for making a false report to the police?[49] There is not a single indication in the State Attorney's Office Gersten file that an inquiry into the false allegation was made. From the records produced to the Committee, there is no discernible good faith reason for the failure to investigate this matter. Indeed, it does not even appear that Lisa McCann was asked about her role in attempting to frame Gersten for murder.[50]

- An investigation into the false murder allegation and the conspiracy surrounding it would have been material to determining the veracity of Lisa McCann's testimony. Furthermore, the coddling of McCann, evidenced by the failure to confront her with the fact that she was implicated in a felony, indicates bad faith. The false murder allegation also suggests that someone other than McCann was involved in a conspiracy to implicate Gersten in the murder. It is not likely that these facts were lost on attorneys in the SAO.[51]

- Why did the FBI give money to prostitute Lisa McCann after she suborned the false murder allegation?[52] If it is true that the FBI did not know about McCann's conduct, why did local law enforcement fail to point out that payments to McCann might be inappropriate given the circumstances? Notwithstanding the unreliability of witnesses often encountered by law enforcement, paying money to someone who appeared to be using government money to frame the suspect of an investigation for murder is inappropriate.

- Why was the State Attorney not informed of the Gersten murder allegation?[53] It is reasonable to expect that the head of the office would hear about an allegation that

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[49] It is a matter of some concern that the State Attorney's Office made great efforts to determine whether Gersten filed a false police report regarding his stolen car, and yet appears to have made no effort to determine why a demonstrably false report was made linking Gersten to a murder. It appears, in hindsight, that the State Attorney's Office was protecting the person responsible for the false murder allegation.

[50] To the contrary, the FBI worked with McCann to entrap Gersten into an admission of guilt. *See* Transcripts produced by the State Attorney's Office to the Committee of telephone calls placed by FBI Special Agent Michael Bonner and Lisa McCann to Joseph Gersten. (Exhibit 30) This effort – as with efforts to obtain inculpatory information about allegedly illegal bond activities – was unsuccessful.

[51] Both Assistant State Attorney Mary Cagle and Assistant State Attorney Michael Band appear to have been aware that the murder allegation had been made. *See* Report of Investigation prepared by Detective Mike Osborn, at 10 (May 5, 1992) (Exhibit 20); handwritten notes apparently prepared by Assistant State's Attorney Michael Band (produced by the State Attorney's Office to the Committee on September 13, 2000) (Exhibit 21).

[52] Special Agent Michael Bonner requested a one-time payment of $400 to be made to a redacted source for information furnished regarding Joseph Gersten. *See* Memorandum from Special Agent Michael Bonner to Special Agent in Charge, Miami (May 4, 1992, date stamped May 3, 1992) (Exhibit 31). It is apparent from this memorandum, and from the details of Lisa McCann's FBI 302 interview (Exhibit 16), that the $400 payment was to Lisa McCann.

[53] Transcript of interview of Attorney General Janet Reno, in Washington, D.C., at 75-77 (October 5, 2000). When asked: "Were you aware in 1992 that allegations were made that Joseph Gersten had committed a homicide," the Attorney General replied: "I have not had anything to do with this case since

one of the most prominent political figures in South Florida murdered a transvestite. This is particularly so when three of her closest advisers — Michael Band, Mary Cagle and Ray Havens — all played prominent roles in the Gersten investigation. It is also reasonable to expect that the subsequent revelation that someone was attempting to frame a prominent politician for murder, and was allegedly using FBI money to do so, would also be a matter of passing interest to the head of the office. Indeed, if it is true that the State Attorney did not know about the false murder allegation, and if it is also true that she did not know that the person who was responsible for the false allegation was a significant witness in the Gersten investigation, then the failure to make her aware of these developments almost certainly indicates that her subordinates were involved in improper activities.

- According to Detective Osborn, Officer J. L. Garcia – who was responsible for bringing in the witness who made the allegation that Gersten committed a murder – continued to ask why Gersten was not being indicted for the murder.[54] This occurred after the witness recanted, and after the homicide detectives investigating the murder had developed other suspects. Why was Garcia so interested in pushing the Gersten murder allegation?

The false allegation that Gersten murdered a transvestite is far from the only matter that casts doubt on the sex and drugs investigation and the conduct of law enforcement officials. Nevertheless, the failure to acknowledge the fact that one of the most "reliable" witnesses in the sex and drugs investigation was involved in a contemporaneous attempt to frame Gersten for a murder is a powerful indication that government officials were not acting in good faith.

B. Other Matters that Call Into Question the Allegations Against Gersten

There are a number of inexplicable events in the Gersten investigation – in addition to the murder allegation – that make it appear that something very unusual was happening. This section briefly explains some of these matters.

1. Gersten Tested Negative for Cocaine Usage

All four eyewitnesses told the FBI that Gersten smoked significant amounts of crack cocaine on the evening of April 29, 1992.[55] Pursuant to a court order obtained by the State Attorney's Office, the FBI conducted a follicle test to determine whether Gersten had used cocaine in any form on April 29, 1992. The test came back negative.[56]

1992, and I have not had access to the file. I have no memory of any such -- independent of the file, I have no memory of any such allegation." Id. at 75.

[54] Telephone interview with Detective Mike Osborn (December 18, 2000).

[55] *See* Exhibits 5, 6, 15, and 16.

[56] Memorandum from Federal Bureau of Investigation Laboratory to Ronald C. Ohlzen, Investigator, Criminal Investigations Division, State Attorney's Office (June 10, 1992) (Exhibit 7). A FBI forensic

Given the high degree of accuracy of this test, the eyewitness accounts were significantly discredited. Even the Dade County chief toxicologist recognized that, because of the negative test results, "[e]ssentially, [Gersten] has been exonerated[.]"[57]

At a minimum, the negative test results should have suggested to federal and state law enforcement officials that they make a serious effort to challenge the many contradictions in the testimony provided. As is discussed in the remainder of this report, there appears to have been no legitimate effort to reconcile the discrepancies in testimony. To the contrary, there appears to have been a blind acceptance of the stories as told by the different witnesses.

2. Forensic Evidence Did Not Indicate Gersten Was Where He Was Alleged to Have Been

After the sex and drugs encounter was described to investigators, the site was examined for forensic evidence on May 8, 1992. No evidence of Gersten's physical presence was found.[58]

3. A Key Witness Offered to Alter His Testimony in Exchange for Money

Less than one month after he first gave a statement to the FBI, Kenneth Elswick approached Gersten's lawyers and indicated that he would change his story for $10,000.[59] Gersten's lawyer reported this effort to extort money to the prosecutors. According to Gersten's then-lawyer, the State Attorney's Office showed little enthusiasm for attempting to determine whether Elswick was trying to extort money from Gersten.[60] From the perspective of Gersten's lawyer, it was as if the prosecutors did not want to know that Elswick was an even more unreliable witness than he had previously proved himself to be.[61]

During the course of the recorded conversation between Elswick and a private investigator hired by Gersten's attorney, Elswick provided insight into what was really happening:

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chemist examiner with the Chemistry/Toxicology Unit of the FBI Laboratory in Washington, D.C. advised the SAO that the ingestion of cocaine "will remain within the hair shaft until the hair is physically removed by pulling or cutting this hair from the body." Affidavit for Search Warrant, at 5 (June 5, 1992) (Exhibit 32).

[57] Don Van Natta, Jr. and Dexter Filkins, *Gersten's Hair Tests Negative for Cocaine*, THE MIAMI HERALD, at 1A (June 11, 1992) (Exhibit 33).

[58] City of Miami Police Department, Technical Services Unit, Latent Print Comparison Report (May 26, 1992) (Exhibit 34); *see also* telephone slip from Ms. Nelson to Karen [Jacobson] that states "Neg. on latents." (Exhibit 35)

[59] Elswick's efforts to extort money from Gersten were captured in a tape recorded conversation. Transcript of William Riley and Kenneth Elswick (June 24, 1992) (Exhibit 36).

[60] Interview with William Richey (January 9, 2001).

[61] Id.

Elswick:	Attorneys, everybody involved will be [better off]. The only people that's gonna, uh, not be better off are the people that are really trying to get him anyway. And where, you know, I've never in my life seen people willing to look over, you know, so much to get one man. Willing, cops willing to walk into drug houses and leave the people's drugs and money alone, just to get items.
Investigator:	And they did that to you guys?
Elswick:	They took, they went with us. They gave us the money to get the gold chain,[62] and to get the pistol, went into the drug house, the man's got, you know, rocks [of crack cocaine] laying there. Now these are two police officers, rocks laying all over the table, about eight thousand dollars in cash on the table, and they say, we don't want your dope, we don't want your money, show them the badges, we want the gun, that's all they did.
Investigator:	Um.
Elswick:	See what I mean?
Investigator:	Yeah.
Elswick:	Now how much can they look over to get one man?[63]

The gun referred to in this exchange had been stolen from Gersten's car.[64] Once the gun had been obtained by Officer Garcia, it was tested and shown to be a different weapon

[62] Rosario Kennedy testified that Gersten had a gold chain that was broken. At the time of the automobile theft, it was apparently in Gersten's briefcase. Transcript of Interview of Rosario Kennedy, Coral Gables, Florida, at 4 (June 11, 1992) (Exhibit 37). In a statement to the contrary, Lira said that "she and Elswick robbed Gersten with a knife and took his car keys and a gold chain" on April 29, 1992. FBI interview of Claudia Lira (May 2, 1992) (Exhibit 38). This statement about the chain was made for the first time when Lira contacted the FBI two days after making her original statement, parts of which she admitted were untrue. Id. Then, on June 10, 1992, Lira told the SAO that Gersten removed his gold chain from around his neck and gave it to her when Elswick was not in the room." Transcript of Interview of Claudia Lira, State Attorney's Office, at 11, 15 (June 10, 1992) (Exhibit 10).

[63] Transcript of William Riley and Kenneth Elswick, at 9-10 (June 24, 1992) (Exhibit 36).

[64] The gun was stolen from Gersten's car, and Gersten reported that it had been stolen. Offense Incident Report No. 92-8249, at 2 (April 29, 1992) (Exhibit 39). The gun was pawned by Claudia Lira and Kenneth Elswick with a drug dealer named Rico. FBI interview of Kenneth Elswick, at 2 (April 30, 1992) (Exhibit 5). Although it is not known how the gun was obtained from Rico, it was given to Detective Osborn on May 1, 1992. Lira indicated that "[t]he street told me that they had — Officer Garcia had Rico handcuffed to a tree . . . until Rico decided to give him the gun back. . . . The street told me he had to give the gun back in order to stay in business." Report of Investigation prepared by Detective Mike Osborn, at 1 (May 5, 1992) (Exhibit 20); transcript of Interview of Claudia Lira, State Attorney's Office, at 27 (June 10, 1992) (Exhibit 10).

than the one used in the Wellons homicide.[65] Nevertheless, it is curious that Garcia was willing to turn a blind eye to the possession of a significant amount of crack cocaine in his efforts to obtain Gersten's gun.

4. Officer J. L. Garcia's Explanation About Finding Gersten's Stolen Car Raises Questions

Officer J. L. Garcia located the witness who claimed that Gersten committed the Wellons homicide. The very same day, he also recovered Gersten's stolen automobile. This, in itself, appears to be a remarkable coincidence. However, the story told by Garcia regarding the identification of the automobile raises a number of concerns.

When Gersten reported the theft of his automobile on April 29, 1992, he informed Officer Paul Miyares of the Coral Gables Police Department that the license plate for the car was JLW30Y. This was duly recorded in the report filed that night.[66]

The following day, according to Officers Garcia and Diaz, they observed an automobile with the license tag number YBI99I (or YBJ991).[67] In the incident reports, the officers note that they ran a routine computer check of this license number and learned that that it was Gersten's car through a match with Coral Gables Police Department Report Number 92-8249.[68] Thereafter, he stopped the car and arrested the occupants.[69]

The license plate on Gersten's car had been changed after it had been stolen,[70] and the changed plate is the one that Garcia would have seen when observing the thieves in

[65] Report of Investigation prepared by Detective Mike Osborn, at 7 (May 5, 1992) (Exhibit 20).
[66] Offense Incident Report No. 92-8249 (April 29, 1992) (Exhibit 39).
[67] Complaint/Arrest Affidavit No. 1211561R (April 30, 1992) (Exhibit 40) (noting FL license plate YBI99I); Miami Police Report No. 1211561-R, at 2 (Exhibit 41) (noting FL License Plate YBJ99I).
[68] Exhibit 40 states that "[w]e observed the def. driving a blue Mercedes Benz (4D) blue in color bearing FLA YBI99I westbound on NE 1st. Computer check revealed the veh. stolen on 4-29-92 C.G. PD case 92-8249." Exhibit 41 states that "Garcia ran a routine computer check on T/YBJ99I and it revealed the veh to be stolen as of 4-29-92." Detective Osborn's report also notes that he reviewed the City of Miami Police Report #1211561-R, and noted the stolen car to have FL tag GBI-99I (Exhibit 20 at 2).
[69] An FBI document requesting authority to monitor telephone conversations between [redacted name] and Gersten, sheds additional light on a coincidental series events surrounding Officer Garcia's apprehension of the thieves. The document indicates that a prostitute approached two police officers and advised them "that she had information concerning two people that had possession of a stolen car. The officers requested that the prostitute assist them by soliciting a ride from the suspects. The prostitute positioned herself near the stolen vehicle and the suspects arrived in a second stolen vehicle, a blue Mercedes Benz. The officers stopped the vehicle and arrested the suspects." FBI Memorandum from Special Agent Michael Bonner to SAC, Miami (May 2, 1992) (Exhibit 42).
[70] Several documents produced to the Committee by the State Attorney's Office, including police reports and Gersten's vehicle storage receipt, indicate that it was known by authorities that the license plate was changed on Gersten's car. *See, e.g.*, Offense Incident Report No. 92-8249, at 3 (April 29, 1992) (Exhibit 39) (stating that the "ORIGINAL TAG/JLW30Y WAS NOT RECOVERED"); *see also* handwritten notes produced by the State Attorney's Office to the Committee on September 11, 2000, and taken from the SAO "Auto Tags" file (Exhibit 62) (indicating that the proper tag number and the number on Gersten's car when it was found); City of Miami Police Department Vehicle Claim Check Number 44336 (April 30, 1992)

the stolen car before they were pulled over and apprehended. Thus, Garcia's report that he was able to identify Gersten's stolen car through a computer check cannot be true. It is not plausible that he entered the number YBI99I into the computer and learned that this was Gersten's car, a car that had been correctly reported as having the JLW30Y tag.

5. A Telephone Call Made by Officer Garcia Raises Additional Questions About his Role in the Gersten Allegations

Another unexplained matter involving Officer J. L. Garcia pertains to something that happened after he apprehended the car thieves and had sole possession of Gersten's car. During the time that the thieves had control of the car, they made a number of telephone calls on Gersten's car phone to a Darlene Alexander in Perrine, Florida.[71] The following day, after the thieves had been apprehended, and at a time when Garcia had custody of the car, he too placed a call to Darlene Alexander in Perrine.[72]

Although the prosecutors and investigators had the telephone records for the car phone, there are no records of them questioning Garcia about this odd "coincidence." [73] This raises the possibility that Garcia was either with the thieves just after the car was stolen, or that Garcia knew the people that had been called by the thieves. It does not appear that this telephone call can be attributed to using a redial button on the telephone.[74]

The fact that telephone calls were made when the car was in Garcia's possession was known to prosecutors in the SAO office,[75] and they appear to have ignored this fact. There are no records of anyone asking Garcia why he used the telephone, or what he accomplished when he did use the telephone, and why he made a telephone call to the same number called by the car thieves.

(Exhibit 63) (listing the stolen tag number located on Gersten's car when it was driven in and impounded by Officer J. L. Garcia, as well as Gersten's correct tag number superimposed on top of this stolen tag number).

[71] Telephone records of Gersten's phone (April 29-30, 1992) (Exhibit 43); *see also* handwritten notes produced by the State Attorney's Office to the Committee on September 11, 2000, and apparently taken from investigator Ron Ohlzen's working file (Exhibit 44).

[72] Id.

[73] Additionally, no documents produced by the State Attorney's Office indicate that the individuals who were called from Gersten's car phones after his car was stolen were interviewed. Such interviews could have brought to light important information in the Gersten case.

[74] It is not known whether this telephone had a redial function. However, two minutes prior to placing the call to Darlene Alexander's number, Garcia appears to have made a three minute call to a number that had not been used by the car thieves. Thus, it appears that he was using the telephone for reasons other than to learn who had been called by the thieves.

[75] *See* Telephone records of Gersten's phone (April 29-30, 1992) (Exhibit 43) and handwritten notes produced by the State Attorney's Office to the Committee on September 11, 2000, and apparently taken from investigator Ron Ohlzen's working file (Exhibit 44).

6. Officer Garcia's Eagerness to Have Gersten Indicted for Murder Raises Questions about his Motives

Garcia was responsible for locating the witness who made the false murder allegation against Gersten. Notwithstanding his knowledge that the witness recanted and said he was offered money to tell a false story, Garcia repeatedly asked Detective Osborn if Gersten would be indicted for the murder.[76] Given what ultimately happened, it is also curious that Officer Garcia was never questioned about how he came to locate the witness who made the false murder allegation against Gersten.

7. Testimony by a Cab Driver Raises Significant Concerns

Over two weeks after the sex and drugs story first became public, a cab driver named Robert Cabanas came forward and told the State Attorney's Office prosecutors and investigators that he had picked Gersten up after the alleged events and taken him to the block near his home. The likelihood of this story being true is diminished by the chronology of events on April 29, 1992.[77] Nevertheless, the story told by Cabanas corroborated some of the testimony provided by McCann, Lira, Maldonado and Elswick, and convinced many that the allegations against Gersten were true. An odd twist to the story, however, undercuts Cabanas' testimony.

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[76] Telephone interviews with Detective Mike Osborn (December 18, 2000, and January 12, 2001).

[77] Cabanas' timing of events is difficult to reconcile with the facts known to the State Attorney's Office. In a transcript of the State Attorney's Office interview, Cabanas indicated that he was at a gas station having coffee at 9:40 p.m., and that he remembers this because he looked at a clock. Transcript of Interview of Robert Cabanas, State Attorney's Office, at 4 (June 17, 1992) (Exhibit 45). Cabanas said that he then "headed back south on Biscayne Boulevard" and picked up Gersten. Id. Cabanas said he estimated it took "under 20 minutes" to take Gersten to Hardee Road." Id. at 7. Yet, handwritten interview notes of Robert Cabanas dated from May 14, 1992 — more than a month before the transcribed interview, state: "Picked him up bet. 10:00-10:30, could have been earlier but not much – about 20 min ride." Handwritten notes from the State Attorney's Office interview of Robert Cabanas, at 2 (May 14, 1992) (Exhibit 46). Noting the times Cabanas has given, the earliest it appears he could have dropped Gersten at the end of the 1000 block of Hardee Avenue was 10:00 p.m. Gersten would then have had to walk to his home at 1017 Hardee Avenue and enter his home. However, City Manager Jack Eades told the State Attorney's Office that Gersten called him at approximately 9:45 p.m. regarding his car theft. Handwritten notes from the State Attorney's Office Interview of Jack Eades (May 11, 1992) (Exhibit 47). By this time, Gersten's attorney William Richey *already* had arrived at Gersten's home in response to the car theft. Eades reported the car stolen to the Coral Gable's police at 10:11 p.m. Offense Incident Report No. 92-8249 (April 29, 1992) (Exhibit 39). Rosario Kennedy told the State Attorney's Office that she and the maid arrived at Gersten's home from the grocery store at approximately 9:48 p.m., and that William Richey was at Gersten's home when they entered the house. Transcript of Interview of Rosario Kennedy, Coral Gables, Florida, at 7-8 (June 11, 1992) (Exhibit 37). Noting these facts, Cabanas' story cannot be reconciled with the testimony offered by others. Additionally, it is a matter of some concern that the initial handwritten notes of the State Attorney's Office interview of Cabanas state that: "Last fare before that out at about 9:45." Handwritten notes from the State Attorney's Office interview of Robert Cabanas, at 2 (May 14, 1992) (Exhibit 46). This interview occurred more than one month before the transcribed interview where Cabanas mentions looking at the gas station clock which read 9:40. Transcript of Interview of Robert Cabanas, State Attorney's Office, at 4 (June 17, 1992) (Exhibit 45).

During a May 14, 1992, State Attorney's Office interview with Cabanas, an extraordinary "coincidence" came to light. Cabanas said that his roommate, Luke Webster, knew Gersten. According to the statement taken by the State Attorney's Office, Webster told Cabanas that "we have something in common – we both took him for a ride. Roommate said he had sex w/ this guy 6 mos. ago for $60 on Bisc Blvd. & 31st St."[78] The typed State Attorney's Office Criminal Investigations Division Supplemental Report referring to this interview also indicates that "Webster had oral sex with Mr. Gersten for $65.00 and drugs."[79]

The day following his interview, Cabanas contacted the State Attorney's Office and indicated that he was attempting to hold Webster at the Miami Herald Building so that the investigators could speak with him.[80] When investigators arrived on the scene, they:

> [F]ound Mr. Webster in the back of a Miami Police car. Officer Zabinski advised that he found Mr. Webster running, being chased by Mr. Cabanas, and he detained Mr. Webster to ascertain what the situation was. Officer Zabinski was advised of the situation, and Investigative Supervisor Alonso spoke to Mr. Webster who after calming down and being reassured of who we were, voluntarily agreed to be transported to the State Attorney's Office, Criminal Investigations Division to be interviewed by Assistant State Attorney Gregorie. Mr. Webster was transported and subsequently provided a statement to Assistant State Attorney Gregorie (for details refer to Webster's statement).[81]

The Committee did not find Webster's interview included as part of the State Attorney's Office production. However, the Committee reviewed a *Miami Herald* article that refers to the Webster story as a "strange twist," and the May 15, 1992, *Miami Herald* building event as "an unlikely coincidence."[82] The newspaper article, stating the obvious, called Webster's claim "potentially damaging" to Cabanas' credibility.[83] Cabanas told the newspaper that, on May 15, 1992, "he was driving near the building when his friend panicked, got out of the car and rushed inside, demanding to see a reporter."[84] The article indicates that Cabanas and Webster started fighting in the building, and that Webster "said several times that he had a story to tell about having sex and smoking crack with Gersten."[85] Even The Miami Herald recognized that "[t]he episode poses obvious problems for prosecutors: If the cabbie really picked up Gersten that night, what are the

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[78] Handwritten notes from the State Attorney's Office interview of Robert Cabanas, at 2 (May 14, 1992) (Exhibit 46).
[79] State Attorney, Dade County, Criminal Investigations Division Supplemental Report, at 2 (May 15, 1992) (Exhibit 48).
[80] State Attorney, Dade County, Criminal Investigations Division Supplemental Report, at 2 (May 15, 1992) (Exhibit 49).
[81] Id.
[82] Charles Strouse and Dexter Filkins, *Gersten Saga: Who's Telling the Truth*, THE MIAMI HERALD, at 2B (May 23, 1992).
[83] Id.
[84] Id.
[85] Id.

chances that he just happens to have a friend who once had sex with the commissioner? Even if the young man made up the story, it could hurt the cabbie's credibility if he's ever asked to take the witness stand."[86]

As with the false allegations that Gersten murdered a transvestite, there appears to be no evidence in the documents provided to this Committee that the prosecutors and investigators did anything other than accept Cabanas' story at face value. Given the extraordinary coincidence of the roommate – and the peculiar elements of this episode – the failure of the SAO to dig deeper is troubling.[87]

8. State and Federal Investigators Inexplicably Failed to Interview the Third Person Apprehended in Gersten's Automobile

When Gersten's car was stopped on the afternoon on April 30, 1992, three individuals were apprehended.[88] Kenneth Elswick and Claudia Lira were interviewed by the FBI later that day.[89] Given the number of potentially fatal inconsistencies in the stories of the witnesses who made allegations against Gersten, it is difficult to understand why the third individual was not properly interviewed. This failure seems even more consequential in light of the representations by prosecutors that Gersten was required to answer questions because there was an interest in prosecuting the car thieves. It is also troubling that Officer J. L. Garcia appears to have — at least on one occasion — covered up the fact that there was a third person.[90]

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[86] Id.

[87] There is also the possibility, seen in a handwritten letter from Claudia Lira to Kenneth Elswick, that Cabanas was also known by the State Attorney's Office investigator Ron Ohlzen. Documents from Claudia Lira, at 2-3 (Exhibit 50) (indicating that "Ron came to see me tonight, we had a very nice visit, but guess what?, he knows the cabbie.")

[88] In Elswick and Lira's initial interviews with the FBI, both mention that a person named "Road Runner" was with them in Gersten's car when they were apprehended by the police on April 30, 1992. FBI interview of Kenneth Elswick, at 2 (April 30, 1992) (Exhibit 5); FBI interview of Claudia Lira, at 4 (April 30, 1992) (Exhibit 6). In Elswick's 302, the FBI notes that "[a]ll three (3) individuals were apprehended by the MIAMI POLICE DEPARTMENT." FBI interview of Kenneth Elswick, at 2 (April 30, 1992) (Exhibit 5). The State Attorney's Office reviewed these FBI 302s and took investigative notes of the content of these interviews, but no document produced to the Committee indicates that the SAO interviewed "Road Runner." Additionally, in his 10-page Investigative Report, the SAO's Ronald Ohlzen notes the fact that Lira, Elswick, and Debra Facia [the likely name of "Road Runner"] were arrested in Gersten's car. Investigative Supplemental Report, at 2 (July 1992) (Exhibit 51). Additionally, the press mentions that the three people apprehended were taken to the FBI and questioned: "[T]hree people walked out of the house, got in the car, and drove off. Garcia quickly pulled them over at 408 NE 30th St. Inside the car were Elswick, Lira and a woman named Deborah. . . . In separate cars, the three got a ride to the FBI headquarters in North Dade for interrogation. Agents questioned them for several hours. They told their tale of the crack house and the rip-off. Lira and the other woman were later freed." Charles Strouse and Dexter Filkins, *Gersten Case a Mystery*, THE MIAMI HERALD, at 1A, 8A (May 10, 1992).

[89] No documents produced to the Committee indicate that "Road Runner," a person who would be considered a fundamental witness to the case, was questioned by authorities when apprehended on April 30, 1992. Given the purported interest by the State Attorney's Office in prosecuting the car thieves, it appears to be an indication of extreme bad faith that one of the thieves was not even interviewed.

[90] One document produced by the SAO shows that Officer Garcia purposefully avoided mentioning a third individual. The document recounts that on May 7, 1992, "Officer Garcia stated that on 4/30/92 at approx

In retrospect, it appears that the failure of the FBI or State Attorney's Office to conduct an interview of the third individual when apprehended on April 30, 1992, is consistent with the pattern of avoiding steps that would lead to a complete understanding of what really happened in the Gersten matter.

9. Evidence that Corroborated Gersten's Story that his Car was Parked in his Driveway on the Night that it was Stolen was Discounted

One document provided to the Committee provides potential corroboration that Gersten arrived home, left his car parked in his driveway, and that his car was stolen from this location. A memorandum from Detective R. Santiago to Captain J. Harley, states:

> On Saturday, June 20, 1992; [sic] I received a telephone call from Ms. Marlene Ickoviz[sic] [.] . . . She stated that on April 29, 1992, she saw what appeared to be Mr. Joe Gersten; [sic] '87 Mercedes-Benz parked in front of 1017 Hardee Road. The time was between 6:30 and 7:30 p.m. She would like to talk to someone about this incident.[91]

Ms. Ickovitz was interviewed one week later and stated that between April 20 and April 30, 1992, she saw Gersten's car parked in his driveway, blocking the sidewalk. This caused her and her husband "to leave the sidewalk and walk around."[92] Apparently, this testimony was discounted.[93]

10. Prosecutors Appear to Have Given Inaccurate Stories to the Media

Throughout the Gersten investigation, prosecutors appear to have been more interested in spin than in fact. For example, prior to a February 3, 1993, article in *The Miami Herald*, Michael Band made the following on-the-record statement: "As far as I'm concerned, Elswick is still a potential defendant for the theft of Gersten's car[.][94] Band could not, however, have been oblivious to the fact that more than six months

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1:00 p.m. he had arrested 2 subjs. That were in a stolen Mercedes Benz." State Attorney Report (May 28, 1992) (Exhibit 52).

[91] Memorandum from Det. R. Santiago to Capt. J. Harley (June 23, 1992) (Exhibit 53).

[92] Report of Telephone Interview conducted by Ronald C. Ohlzen of Marlene Ickovitz (June 30, 1992) (Exhibit 54).

[93] It is troubling that the Gersten case file produced by the State Attorney's Office contained very little information about Marlene Ickovitz, someone who may have had significant information that could confirm Gersten's claim that he left his car parked across the sidewalk on the evening of April 29, 1992, prior to its being stolen. Although there was a one-page report of a telephone interview with Ickovitz, there was neither a transcript of a formal SAO interview, nor a SAO Supplemental Report.

[94] Don Van Natta, Jr. and Dexter Filkins, *Gersten's Hair Tests Negative for Cocaine*, THE MIAMI HERALD, at 1A (June 11, 1992) (Exhibit 33).

earlier his colleague Mary Cagle had closed the auto theft case against Elswick.[95] Band's personal feelings about Gersten are most apparent in a statement made in 1994: "Frankly, I think Dade County is a lot cleaner and prettier place without him[.]"[96] This type of statement, which certainly indicates a personal bias against Gersten, is consistent with the numerous failures to follow leads exculpatory to Gersten.[97]

C. Inconsistencies in the Testimony of Supposed "Eyewitnesses"

There are also many inconsistencies in the eyewitness accounts of what Gersten supposedly did while he was with the prostitutes. In themselves, these inconsistencies would probably have been enough to make a prosecution impossible. Of greater significance, however, is the fact that two of the three eyewitnesses interviewed by the FBI the day after the alleged improper conduct involving Gersten said that the events involving Gersten commenced after 11:00 p.m.[98] This is particularly significant because law enforcement officials were aware that the theft of the automobile had been reported long before this time, and that Gersten was at home at 10:00 p.m. consulting in person with his attorney about items that were in the automobile.

The version of events that was accepted at the time had Gersten smoking crack cocaine and consorting with prostitutes between the hours of 6:30 p.m. and 9:45 p.m. These times are important because Gersten could provide corroboration for his whereabouts before and after these times. Notwithstanding how important it was for government officials to be able to place Gersten with the prostitutes during this time period, the eyewitnesses told a different story. The following day, three alleged eyewitnesses were interviewed. Their stories could not be reconciled:

- Claudia Lira told the FBI that she was in the shower when another prostitute brought Gersten to their residence. She testified that she spent what appears to be a considerable period of time with Gersten after 11:00 p.m.[99]

- Kenneth Elswick told the FBI that he returned to where he resided at 11:30 p.m. and Gersten was, at that time, with Lira and McCann in the residence.[100]

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[95] *See* Disposition (June 5, 1992) (Exhibit 55) (indicating that the April 30, 1992, grand theft auto charge against Elswick was to be no-actioned per Mary Cagle).

[96] Sydney P. Freedberg, *Where in the World is Joe Gersten Now?*, THE MIAMI HERALD, at 1A, 2A (April 17, 1994).

[97] It should be noted that Band left the State Attorney's Office after assertions that he had exhibited a decade-long pattern of sexual harassment in his office. A $235,000 jury verdict against the office was awarded in July of 2000. At this time, prosecutors from Naples, Florida were pursuing criminal charges against Band for battery. David Kidwell, *Rundle Loses Sex Harassment Case*, THE MIAMI HERALD, at 1A (July 28, 2000).

[98] FBI interview of Kenneth Elswick, at 1 (April 30, 1992) (Exhibit 5); FBI interview of Claudia Lira, at 1 (April 30, 1992) (Exhibit 6). It is worth noting that the testimony that Gersten arrived with McCann at or after 11:00 p.m. is consistent with the effort to implicate Gersten in the Wellons murder. The stories initially told were consistent with a coordinated effort to destroy Gersten. After the murder allegation was disproved, some initial testimony appears to have been revised.

[99] FBI interview of Claudia Lira, at 1 (April 30, 1992) (Exhibit 6).

- The third eyewitness, Robert Maldonado, gave the FBI a number of details that were inconsistent with the other two witnesses, although he did place Gersten in the residence at 7:00 p.m.[101]

- The fourth eyewitness, Lisa McCann, was interviewed the following day, on May 1, 1992. Like Maldonado, she put the time of the events earlier in the evening, telling the FBI that she saw Gersten at about 6:00 p.m. or 7:00 p.m.[102] However, she added an element to the story that the other three eyewitnesses appear to have missed: she said that Elswick robbed Gersten at knifepoint, went after her for money, and that she ran out of the house.[103] It is, of course, curious that the other eyewitnesses would have failed to recollect a robbery at knife point.[104]

FBI Special Agent Bonner explained that the contradictions in the time of the alleged events were not particularly significant to him because Elswick and Lira were less reliable than the other two witnesses.[105] However, according to Bonner, one of the supposedly more reliable witnesses was Lisa McCann, the same individual who had offered money in exchange for the false murder allegation.[106] It is troubling to think that the FBI failed to question her about the false murder allegation and still regarded her as a reliable witness.[107] It is also troubling that the FBI never made an effort to reconcile the divergent times.[108]

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[100] FBI interview of Kenneth Elswick, at 1 (April 30, 1992) (Exhibit 5).
[101] FBI interview of Robert Maldonado, at 1 (April 30, 1992) (Exhibit 15).
[102] FBI interview of Lisa McCann, at 2 (May 1, 1992) (Exhibit 16).
[103] Id. at 4.
[104] In subsequent interviews, Lira and Elswick add the element of robbery at knife point or robbery with a concealed knife to their stories.
[105] Interview with Michael Bonner, Special Agent, Federal Bureau of Investigation, in Washington, D.C. (January 12, 2001).
[106] The other supposedly reliable witness was Robert Maldonado, a heavy crack user who had fled probation in New York after being released from prison after serving a sentence for manslaughter. Id.
[107] Even the State Attorney's Office recognized the fact that a portion of McCann's testimony was considered unreliable. As a result, the SAO was forced to amend an affidavit to the Circuit Court of the Eleventh Judicial Circuit. Specifically, McCann told the SAO that "she was picked up by Joseph M. Gersten on April 29, 1992 between 6:16 and 7:00 pm." Affidavit from Ronald C. Ohlzen, Investigator, Criminal Investigations Division, State Attorney's Office of the Eleventh Judicial Circuit of Florida, at 1 (June 5, 1992) (Exhibit 56). The SAO, in a second affidavit from Ohlzen, recognized that "[t]his time was estimated by her and cannot be correct in view of the attached toll records." Id.
[108] The State Attorney's Office also was aware of the conflicting version of events recounted by Lira, Elswick, Maldonado, and McCann to the FBI. It is evident from the handwritten notes entitled "FBI" produced by the SAO to the Committee that the SAO reviewed the content of the FBI 302s, and therefore had knowledge of the eyewitnesses' inconsistencies. Handwritten notes entitled "FBI" (Exhibit 57) (citing information from FBI 302s found at Exhibits 5, 6, 15, 16). The SAO also encountered additional inconsistencies in interviews of the eyewitnesses. For example, regarding the timing of the sex and drugs encounter, eleven days after telling the FBI that his involvement began at 11:30 p.m., Elswick told the SAO that it had "just gotten dark — 8:30 p.m." Handwritten notes from the State Attorney's Office interview of Kenneth Elswick, at 2 (May 27, 1992) (Exhibit 58). In addition to admitting she was untruthful about one-fourth of the story she told the FBI, Claudia Lira changed her timing of events from 11:00 p.m. to "I honestly don't know what time it was. I really don't. I was getting ready to go to work so it was getting

Although Kenneth Elswick later was recorded offering to change the substance of his story in exchange for a payment of $10,000, he was never asked to reconcile how he could have been so mistaken when it came to the time of the alleged events. Similarly, the FBI does not appear to have attempted to reconcile how Claudia Lira could have been so mistaken. The investigators and prosecutors who reviewed the FBI interviews simply appear to have been content to accept the significant discrepancies in the stories of the various witnesses. The fact that they do not even appear to have checked with the witnesses about the discrepancies indicates that they were more satisfied with the implications of the stories than their accuracy. It is troubling that law enforcement, from the records provided to the Committee, appears to have exhibited no skepticism, and appears to have taken the word of the accusers without any effort to challenge the inconsistencies in the stories.

The disturbing implication of the many inconsistencies in the eyewitness accounts is that the eyewitnesses were making an effort to mislead law enforcement. If the officials who purported to believe the testimony against Gersten were sincere, they would have made a serious effort to reconcile the significant discrepancies in testimony. The fact that they did not do so makes it appear that they were aware that if they went too far beneath the surface of the allegations, they would arrive at the same place they had come to with the murder allegation. Specifically, it might have become clear that someone was involved in an effort to frame Gersten for crimes he did not commit.

D. Fundamental Fairness Would Seem to Require A Different Approach to this Case than the One Taken by Government Officials

The manner in which information was used in this case raises questions about whether Gersten was treated fairly. Although the Committee does not take a position on whether, in this case, there was a legal obligation to provide all information acquired by law enforcement authorities to the public, Gersten's attorneys, the Florida Bar Association, or the Australian government, [109] fundamental fairness requires that

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ready to be dark or it was already dark. I don't know. I keep the shades down because we always, you know, you don't know, everybody comes in, we are smoking we don't like the neighbors to know what we are doing." Transcript of Interview of Claudia Lira, State Attorney's Office, at 7 (June 10, 1992) (Exhibit 10). Maldonado changed his timing of events from 7:00 p.m. to "between 8:30 p.m. – 8:30 p.m., just as it was getting dark" and "8:30, 9:00 o'clock, around there, just when it was getting dark." State Attorney, Dade County, Criminal Investigations Division Supplemental Report, at 1 (May 13, 1992) (Exhibit 59); Transcript of Interview of Robert Maldonado, State Attorney's Office, at 4 (June 17, 1992) (Exhibit 60). McCann's variations include 5:55 p.m. and "6:00 or 7:00 p.m." Investigative Supplemental Report, at 1 (May 11, 1992) (Exhibit 61); FBI interview of Lisa McCann, at 2 (May 1, 1992) (Exhibit 16). Yet, the SAO stated that McCann's timing of events cannot be correct. Affidavit from Ronald C. Ohlzen, Investigator, Criminal Investigations Division, State Attorney's Office of the Eleventh Judicial Circuit of Florida, at 1 (June 5, 1992) (Exhibit 56).

[109] Gersten has applied for Australian citizenship. He has also requalified to practice law in Australia and has submitted the equivalent of a U.S. bar application. Pursuant to Gersten's requests to be permitted to reside in Australia, and practice law there, Australian authorities have requested that the U.S. government provide information. The U.S. government – through the State Department and the FBI – has provided the

government officials provide a balanced analysis of what happened to Gersten. Selective use of salacious allegations against a citizen, combined with a purposeful withholding of information that would undercut those allegations, is wrong. Furthermore, selective use of information in this matter provides a circumstantial indication that the government officials who were privy to exculpatory information, and who failed to ensure that this information was included in any analysis of the allegations against Gersten, themselves had an improper motive.

When all facts are considered, it appears that Gersten was being treated unfairly, and that government officials were more concerned about using allegations to harm Gersten than to find the truth. Furthermore, prosecutors and investigators did not want to take the obvious step and investigate the murder allegation. Indeed, at least one prosecutor took the position that Gersten should not even be told about the allegation.[110] One can only wonder whether the failure to investigate the false allegation was derived from a concern that such an investigation might expose conduct that not only would undercut the allegations damaging to Gersten, but would expose misconduct by government officials or Gersten's political enemies.

V. CONCLUSION

Joseph Gersten was a very successful politician. He was, however, also very abrasive. He generated strong passions, and he had his share of detractors and enemies. He also generated allegations that he was himself corrupt. From the record before this Committee, however, law enforcement could not develop evidence to support these allegations. Indeed, it is telling that the FBI recently admitted that individuals who accused him of illegal conduct were themselves subsequently indicted.

It may well be that some prosecutors and investigators, in their zeal to "get Gersten," turned a blind eye to weaknesses in allegations against him, not because they were corrupt, but because they thought that the end justified the means. For example, Assistant State's Attorney Michael Band's statement about Dade County being a "lot cleaner and prettier place" without Gersten,[111] speaks volumes. If there was a personal bias against Gersten, and this led to selective use of information to harm him, such conduct should not be condoned. The public is already too cynical when it comes to law enforcement. Although exposing this type of conduct does not restore confidence, it does at least show that when the government acts inappropriately, and that conduct is identified, it will not go unremarked and unpunished.

Australian government with information about Gersten. At a minimum, some of the conclusions provided to the Australian government appear to be erroneous.

[110] Prosecutor Mary Cagle requested that Detective Osborn not contact Gersten about the false murder allegation. Report of Investigation prepared by Detective Mike Osborn, at 10 (May 5, 1992) (Exhibit 20). There is no indication that Cagle ever reversed this position.

[111] Sydney P. Freedberg, *Where in the World is Joe Gersten Now?*, THE MIAMI HERALD, at 1A, 2A (April 17, 1994).

While the Committee does not take the position that all law enforcement officials involved in the Gersten case acted inappropriately, it is clear that some did. For example, the failure to investigate the false murder allegation — suborned by one of the principal witnesses regarding the sex and drugs allegations — indicates improper motive. At a minimum, it should be determined why the State Attorney's Office elected to protect witnesses who were clearly involved in illegal conduct. It should also be determined who was aware of the false murder allegation and why it was covered up.

The Committee does not purport to understand fully what happened to Joseph Gersten in 1992. It does, however, believe that the United States Department of Justice, the Attorney General of Florida, and the Florida Bar Association should conduct serious, independent investigations of this matter.

EXHIBIT NO.

REPORT OF INVESTIGATION

VICTIM, COMPLAINANT OR CASE TITLE	TYPE OF INVESTIGATION	INCIDENT NUMBER
Gregory Wellons	Murder	1191174-R

		OTHER OFFICERS	RELATED CASES
INV. BY	Det. M. Osborn		CROSS FILES
LOCATION	Station		☐ ☐ ☐ ☐ ☐
DATE	05 May 92		
TIME	1710		

THIS REPORT RE: Follow Up Investigation

NARRATIVE:
5-1-92

1710 Hrs - I was notified by Sgt. Meeks to respond to the Homicide office reference a possible witness to this murder.

1800 Hrs - Upon arrival at the office, I was briefed by Sgt. Meeks. I was told that Officers J.L. Garcia and L. Iglesias had stopped a stolen Mercedes Benz belonging to County Commissioner Joseph Gersten. This incident happened on 4/30/92. The driver of the Mercedes told the officers that the car was not stolen and that Joe had let him use the car to go buy drugs. A white female hooker named Lisa was also in the car. They said that Joe loaned the car to them and that he was at the Laurel Motel and when they returned to the Laurel Joe was not there. I was then given a two inch .38 Smith & Wesson revolver, model 649, serial #A1B6401 and four live rounds by Sgt. Meeks. Sgt. Meeks told me that this gun was also reported stolen by Commissioner Gersten and was recovered from the vehicle.

Captain Kamenesh called and said he was just advised by Lt. Fleites that Officer Garcia had located a possible witness to the Wellons murder and was enroute to the station with this witness. I was then told by Sgt. Meeks and Captain Kamenesh to contact Lt. Fleites in the office of Internal Affairs and continue the investigation.

EXHIBIT 20

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	Sgt. [signature] REVIEWED BY (NAME, TITLE)	5/7/92 DATE

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1855 Hrs - I went to Internal Affairs and spoke with Lt. Fleites. Fleites said that the witness that Officer Garcia was coming in with had told the prostitute, Lisa, that he witnessed a heavy set bald male in a blue Mercedes kill someone and then throw the victim out of the car and that Lisa had a .38 caliber handgun belonging to Gersten, which was the same caliber used during the murder At this time I was given only limited information and the only name known on the prostitute at this time was the name Lisa. Lisa had apparently been turned over to the FBI because they were notified of this incident and were conducting an investigation into the allegation against Commissioner Joseph Gersten.

1910 Hrs - The Property Unit was contacted, and I was advised that the Mercedes belonging to Commissioner Gersten had been released on this same date and was picked up by Mr. Gersten's aide. Lt. Fleites provided me with the City of Miami police report #1211561-R, which is a stolen car recovery and an arrest report prepared by Officer J. Diaz, IBM #1442.

This report indicates that on 4/30/92 a 1987 Mercedes Benz 450 SL, blue in color, Florida tag GBI-99I, had been recovered at 480 N.E. 30 Street, Miami, Florida. The police report indicates the owner of this car is Joseph M. Gersten and that

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the car was reported stolen from Coral Gables on 4/29/92 under Coral Gables case number 92-8749. According to the arrest report, the driver of the car is a white male, Kenneth Elswick, [redacted] According to Lt. Fleites, Elswick was in the Dade County Jail and had also been interviewed by the FBI. (For further information see attached police reports attached to these 301's)

1945 Hrs - Ofc. Garcia arrived at Internal Affairs with B/M Wayne Pierce, [redacted]. Pierce stated that on Wednesday he was outside the Budget Hotel located at Biscayne Boulevard and 53 Street and saw a he/she known to him as "Champagne" inside of a light blue Mercedes Benz in the passenger seat. Pierce describes the driver of the car as a white male heavy set bald man with some grey hair. According to Pierce, he observed these two people at 7:00 P.M. Pierce said he hears "Champagne" arguing with the man over eighty dollars ($80.00) and then he sees the white man shoot "Champagne" in the head and then kick "Champagne" out of the car. Pierce then sees the Mercedes drive off south on Biscayne Boulevard. Pierce was asked if he saw the police respond to where "Champagne" had been shot, and he stated that he had left and did not actually see the police arrive. He

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heard that "Champagne" had died the next day. I asked Pierce if he was sure about the day being Wednesday, and he said yes because he had just bought some new clothes yesterday, which was Thursday, and that the incident happened the day before that. At this time we had Ofc. Garcia take Pierce into a separate room, and I informed Lt. Fleites that the information being given was inaccurate and that my victim was shot between 7:00 and 7:30 in the morning on Tuesday and was thrown into an alleyway behind 560 N.W. 45 Street. When my victim was found he was still alive with a gunshot wound to the head and did not die until late afternoon.

2020 Hrs - Captain Kamenesh was notified by phone of the pre-interview. This was a three-way conversation between myself, Lt. Fleites and the captain. It was agreed upon that due to the inconsistencies of Pierce's pre-interview our first step would be to try to get the weapon taken from Commissioner Gersten's car and also the weapon that was located near the scene of the homicide to the Dade County Lab. Captain Kamenesh told me to go ahead and start calling the necessary people to facilitate the testing of the weapon. Captain Kamenesh also told me to go ahead and take a formal statement from Wayne Pierce.

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2030 Hrs - Major Exposito was notified by telephone, and he advised that he agreed with our decision and authorized us to call in off-duty personnel to assist. Also, we were advised to go ahead and contact a state attorney on the legality of taking a statement from a fifteen year old without the presence of his parents or a juvenile officer.

2045 Hrs - Lt. Fleites contacted Lt. Kelly from the Property Unit and requested he respond and retrieve the evidence from the safe.

2050 Hrs - Lt. Fleites contacted Mary Cagle of the State Attorney's office in regards to the statement of Wayne Pierce. Ms. Cagle advised that there would be no problem in taking his statement without the presence of his parents or juvenile officer because he is only a witness. Lt. Fleites also contacted an Internal Affairs stenographer to respond for the taking of the statement.

2110 Hrs - I then went back and questioned Wayne Pierce about the inconsistencies of his statement. At this time Pierce stated that he was told by Lisa to come to the police and tell this story because she was going to be paid some money by the FBI. Pierce stated that the entire story was a lie and that he has

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never seen anyone known as Joseph Gersten. Pierce denied seeing any shooting and said he only did it because Lisa told him to and that she would give him some money also.

2115 Hrs - Both Captain Kamenesh and Major Exposito were again called and advised of the admission of Wayne Pierce indicating that he had lied about the entire incident. It was agreed upon to go ahead and still take a formal statement and document this admission.

2130 Hrs - Lt. Kelly arrived at the Property Unit, and I received the RG .38 revolver and ammunition recovered near the original murder scene.

2145 Hrs - A formal statement was taken from Wayne Pierce indicating what was stated previously.

2155 Hrs - End of statement.

2200 Hrs - I contacted the shift commander of Metro Dade Communications and requested the on-call firearms technician to call me.

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2210 Hrs - I received a call from Tom Quirk of Metro Dade Firearms. I explained the urgency, without going into detail, of our need of his services, and he told us to meet him at his office at 2300 hours.

2300 Hrs - Det. Johnston and I took both weapons to the Dade County Firearms Lab and turned them over to Tom Quirk. We remained there during the entire testing period and waited for the results. Mr. Quirk advised us that the weapon used to kill Gregory Wellons was positively the RG .38 that we found near the scene.

0030 Hrs - I contacted Sgt. Meeks via the police radio and advised him of the results of these tests. I advised Sgt. Meeks that we would be finishing up for the night and that I would contact him tomorrow and advise him of the full details.

0100 Hrs - 06.

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THIS REPORT RE

5/2/92

1130 Hrs - I contacted Sgt. Meeks in the homicide office via the telephone. I completely updated Sgt. Meeks on what had transpired the day before. Sgt. Meeks advised that he would notify Captain Kamenesh of the full details.

5/4/92

1530 Hrs - I met with Captain Kamenesh and again updated him on the investigation of this lead. I advised him that at this time I felt that the lead was fabricated and had nothing to do with the homicide of Gregory Wellons. I did indicate that we would probably have to talk with Commissioner Gersten about this incident.

5/5/92

1710 Hrs - I contacted Special Agent Michael Bonner with the FBI. Agent Bonner indicated that he had interviewed all the people that were supposedly with Commissioner Gersten. Agent Bonner related the following story: On 4/29/92, in the late

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afternoon, a white female prostitute named Lisa McCann was picked up at the Boulevard and 36 Street by Commissioner Gersten. They went to her house, which is located east of the Boulevard on 31 Street, and had sex and were later joined by a white female named Claudia Lira and a homosexual male named Roberto Maldonado. They all engaged in various sex acts and drugs. They were later joined by a white male named Ken Elswick. According to Lisa, Commissioner Gersten had given an unknown amount of money to Claudia and Roberto, and they wanted to go buy some more drugs. It was later planned by Claudia and Roberto to rob the commissioner because he had a lot of money. According to Lisa, they ripped the commissioner off of a gold chain, some money and stole his car. They all left, leaving the commissioner alone, and went to buy drugs. Upon their return, they had heard that the commissioner had taken a cab away from that area. The address where this took place is 540 N.E. 31 Street. Agent Bonner has documented statements from all of the parties involved.

1730 Hrs - I contacted Coral Gables Police Department and requested that they fax police report #92-8249 to our police department. I received a copy of the report and discovered that Commissioner Gersten did report his car stolen on 4/29/92 at 8:30 P.M.

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1750 Hrs - Sgt. Ochoa, Detective Johnston and I met with Assistant Chief March and advised him of the results of the investigation to this point. We were advised to make written reports of the investigation so far in regards to the allegations against Commissioner Gersten and to contact the State Attorney's office.

5/6/92

1610 Hrs - I contacted Assistant State Attorney Mary Cagle and advised her of our findings. She requested that I provide her with any written documents in regards to this lead. I told her I would write it up today and that I would deliver it to her personally on Monday, 5/11/92. I was also informed by Ms. Cagle that Commissioner Gersten is out of town, and she requested that we not contact him until our meeting on 5/11/92.

1630 Hrs - The conversation between Mary Cagle and I was related to Captain Kamenesh and Assistant Chief March.

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STATEMENT OF:	Wayne Pearce
REFERENCE:	City of Miami Police Dept. Case# 1191174R
DATE:	May 1, 1992
PRESENT:	Wayne Pearce (Deponent) Detective Michael Osborn Homicide Unit Detective Howard Johnson Homicide Unit
TRANSCRIBED BY:	Teresita Lopez I.A. Stenographer

City of Miami Case #1191174R
Statement of Wayne Pearce

(At this point in time, the deponent, Wayne Pearce, was duly sworn, at which time the following statement was obtained.)

DET. MICHAEL OSBORN: This is going to be a formal statement into the homicide of Gregory Wellons, which occurred on 4/28/92, at 560 N.W. 45 Street, at approximately 7:30 a.m.

Present for this interview is myself, Detective Mike Osborn from Homicide, Detective Howard Johnson from Homicide and we're going to be taking the statement in the office of the Internal Security building here at the Miami Police Department. Also present in the room is Wayne Pearce; is that right?

WAYNE PEARCE: Yeah.

DET. MIKE OSBORN: Is that your real name, Pearce?

WAYNE PEARCE: Yeah.

DET. MIKE OSBORN: P-E-A-R-C-E?

WAYNE PEARCE: Yeah.

BY DET. MIKE OSBORN:

Q. You have been sworn to tell the truth and everything, right?

A. Yeah.

Q. How old are you?

A. Fifteen.

City of Miami Case #1191174R
Statement of Wayne Pearce

Q. Your Fifteen years old. Did you come down here kind of voluntarily, on your own, because somebody told you to come down here?

A. No, I was trying to tell the other man there that when -- I don't want to go -- I have nothing to do with this.

Q. Did somebody other than the police tell you to come down here and lie to us?

A. Yeah. I'm telling you he said -- told me.

Q. Are you aware that we are recording this on the machine here? You have any problem with that?

A. No.

Q. Where is your mother at?

A. Home.

Q. What is your mother's name?

A. Juanita Pearce.

Q. Where is home?

A. [redacted]

Q Do you know what the numbers are?

A. What numbers?

Q. The numbers? Your house numbers?

A. There ain't no numbers.

Q. Is it an apartment?

A. Uh-huh.

Q. Is it around the corner of [redacted]

1 Street?
2 A. Yeah, right in back.
3 Q. Earlier you told me [redacted]
4 A. [redacted].
5 Q. Is that the address?
6 A. Yeah.
7 Q. Is there an apartment number there?
8 A. There ain't no numbers.
9 Q. What is your birth date?
10 A. [redacted].
11 Q. What year?
12 A. [redacted]
13 Q. Do you normally live at home with Juanita?
14 A. Yeah, but I be doing over there sometime with my
15 friend's house.
16 Q. Where is your friend's house?
17 A. On [redacted] I spend weekends there. Then he came
18 to pick me up from there. My friend, he was coming
19 from the store, this is older guy. I know him for
20 a long time.
21 DET. MIKE OSBORN: I just want to back up to put
22 the starting time at 9:40 p.m.
23 Q. (Det, Osborn) All right, let's just talk about the
24 murder okay so we don't get carried away.
25 We're investigating a murder of a person whose

1 real name is Gregory Wellons. He goes by the name
2 of Champaign. Do you know that person?
3 A. Yeah.
4 Q. How long have you known Champaign?
5 A. For about almost a month.
6 Q. A month?
7 A. Almost, yeah.
8 Q. And where do you know Champaign from?
9 A. I been seeing him -- I met him at Publix one time.
10 Met him, met him.
11 Q. Do you normally hang around the hotels where he's
12 at or she's at?
13 A. No, I know some people.
14 Q. Is Champaign a boy that dresses like a girl?
15 A. Yeah.
16 Q. Have you ever seen Champaign around the Laura
17 Hotel?
18 A. Yeah she stay there, apartment Fifteen.
19 Q. Do you know who she stays with?
20 A. Yeah.
21 Q. Who?
22 A. Her boyfriend, his boyfriend.
23 Q. What is that person's name?
24 A. I don't know the name. He in jail now. I know his
25 name Kenny Watson, he's already in jail. He killed

1 -- the one he killed the preacher's girlfriend,
2 Kenny Watson.
3 Q. Kenneth Watson?
4 A They was going to go get married in prison. That
5 what he was telling me, Champaign.
6 Q. I'm talking about, does he have a boyfriend down
7 here now?
8 A. Down here now?
9 Q. That was staying with her?
10 A. Yeah.
11 Q. What is that person's name?
12 A. I don't know his name.
13 Q. Street name or anything on him?
14 A. No. They only call him "Black."
15 Q. They call him Black?
16 A. Uh-huh.
17 Q. Was he a black male?
18 A. Yeap.
19 Q. When is the last time you saw Black?
20 A. I saw him about two weeks ago. I ain't seen him in
21 a while. I seen him two weeks ago.
22 Q. How tall is he?
23 A. He tall like me. He little bit taller then me. He
24 like muscular bound.
25 Q. How tall are you?

1 A. Five two.
2 Q. Five two?
3 A. Uh-huh.
4 Q. How old is he?
5 A. I don't know.
6 Q. Does he drive a car?
7 A. No he just got out stockade.
8 Q. When?
9 A. I don't know it was, a while ago.
10 Q. You don't have any idea what his first name might
11 be?
12 A. No.
13 Q. Have you ever heard of a person called Prince Dunn
14 (phonetic)?
15 A. Prince yeah.
16 Q. Who is that?
17 A. That's him.
18 Q. That's him?
19 A. Uh-huh. He built. He got like a fade and he
20 black, and like kind of like built.
21 Q. This is the person called Black?
22 A. Uh-huh.
23 Q. When is the last time you saw Prince?
24 A. About two weeks ago.
25 Q. You came in here earlier today and you told us that

1 you witnessed Champaign get shot by a bald man.
2 A. I didn't see what happened.
3 Q. I'm just telling you what you said earlier, okay?
4 A. Uh-huh.
5 Q. You said that you saw a man in a light blue
6 Mercedes shoot Champaign in the head and threw her
7 out on the street at 52, Biscayne Boulevard; is
8 that correct, what you told us?
9 A. Yes.
10 Q. Was that the truth?
11 A. No.
12 Q. Why did you come in here and tell us that?
13 A. Lisa told me, "Tell them that."
14 Q. That's all she said, "Tell them?"
15 A. "You can't do me no favor? Boy, we gonna do good."
16 Q. Why did she want you to do this?
17 A. She was planning on suing the man.
18 Q. Suing the man?
19 A. She talk about the man trying to kill her --
20 somebody tried -- somebody -- her friend, she said
21 her friend, a man robbed the man for Forty Dollars
22 and then yesterday she gave me a letter telling to
23 tell the man's son about denying him -- tell him if
24 I see him that she had nothing to do with it about
25 what the man robbed him.

1 Q. This is the bald headed guy?
2 A. No that's the Lisa that was -- Lisa told me that
3 her friend did.
4 Q. I'm talking about the man with the Mercedes.
5 A. I don't know him. I never seen him.
6 Q. All right. So we don't have a statement this
7 thick, answer yes or no, or with a short
8 explanation, okay. Don't ramble on on something
9 totally unrelated. Stick to what we are talking
10 about here.
11 A. Uh-huh.
12 Q. You told me that you saw an older, bald headed,
13 heavy-set man shoot Champaign in the head. Then
14 later on you told me that Lisa told you to say that
15 because the FBI was going to give you $400.00.
16 A. She already had told me something before it
17 happening.
18 Q. Okay. Is Lisa the one that told you about
19 Champaign being killed?
20 A. No.
21 Q. Who is?
22 A. Another drag queen.
23 Q. Where does this drag queen live?
24 A. Same place where my friend over spending weekends
25 with.

1 Q. You're spending the weekends with --
2 A. Not him. She said the same place, same motel.
3 Q. What's the name of motel?
4 A. We stay in the New Deal.
5 Q. New Deal Motel?
6 A. Uh-huh.
7 Q. Where is it at?
8 A. At 1st Terrace.
9 Q. 1st Terrace and Biscayne Boulevard?
10 A. Yeah.
11 Q. What room number you staying in?
12 A. I'm staying apartment eight on top.
13 Q. With who?
14 A. My friend.
15 Q. Who is your friend?
16 A. He use to go with my mama. My mama's ex-boyfriend.
17 I just go around his house and watch cable
18 sometimes on weekend.
19 Q. What's his name?
20 A. His name Mike.
21 Q. The he-she lives in what apartment number, the one
22 that told you about Champaign being shot, lives in
23 what apartment number?
24 A. I don't know. You have to ask the manager, Pedro.
25 Q. The manager Pedro?

A. He owner.
Q. First floor, second floor?
A. Like two of them. One got first and second, that's one I said, and the one next to it got the same one. It's floor like low. It's low down. Soon as you go --
Q. Never mind. Never mind.
The he-she, you don't know the he-she's name?
A. No. I told you -- I told other man earlier that I don't know her. Know from Champaign; Champaign use his phone. He just told me to walk with him; I walked with him. That's how I met the other dude. This other dude told me about what happened about the murder, cause I don't know.
Q. The he-she your talking about?
A. Uh-huh.
Q. Tell us again exactly what the he-she told you?
A. Which one?
Q. The one that told you about the murder.
A. She just told me, "You heard what happened about Champaign?" I said, "No, what happened?" "Somebody killed her." I said, "Oh" and I just walked off. First I thought he was just joking.
Q. You told me she was shot in the head and pushed out of --

1 A. You asked me what the other drag queen told me.
2 Q. How many people told you about it?
3 A. One person.
4 Which one you talking about Champaign or other
5 one?
6 Q. I'm talking about Champaign. Who told you about
7 Champaign getting killed?
8 A. The drag queen.
9 Q. What did that drag queen tell you?
10 A. She told me, "You heard about what happened to
11 Champaign?" I said, "No." "Somebody gone killed
12 her and kick her out of car and stuff." I said,
13 "Yeah," cause I hardly believe her really. I just
14 walked out.
15 DET. MIKE OSBORN: (Directed to Det. Johnson) You
16 got any questions?
17 DET. HOWARD JACKSON: No.
18 A. Cause I don't know nothing really about the murder.
19 Q. (Det. Mike Osborn) You just know what you were
20 told by this he-she?
21 A. Yeah.
22 Q. The reason why you came in here and told us this
23 stuff cause Lisa wanted $400.00?
24 A. No, because man, citizen, something -- not a
25 citizen. He got something like -- I can't -- I

1 can't pronounce the thing.
2 Q. The Black --
3 A. No she want to sue him. She said, "They ain't
4 going to believe me unless you there." I said,
5 "Okay. I don't care."
6 Q. She told you to come in an say that?
7 A. I wasn't even thinking about Champaign no more.
8 Q. Okay. As far as you know, that guy has nothing to
9 do with Champaign?
10 A. No. She know the man rich. That's why she want
11 for rob the man. Like she going -- FBI man going
12 to pay her $400.00 to call the man. Then the FBI
13 trying to set up the man for something he didn't do
14 and all she want to do was to get the money.
15 Q. And the whole thing is a lie?
16 A. Yeah. The whole thing is lie that man didn't do
17 nothing.
18 Q. He didn't do nothing to her.
19 A. Lisa told about man going to try to kill her.
20 Q. Was the man going to try kill her?
21 A. That what she trying to say, like for man, they
22 going to try and set the man up for something he
23 didn't do.
24 Q. You know who this man is?
25 A. No.

1 Q. You know his name?
2 A. I don't know him.
3 Q. He drives a light blue Mercedes?
4 A. Yeah, that's what she said.
5 Q. She said. Did you see him drive it?
6 A. No. I told you I don't know him.
7 Q. You ever see him?
8 A. No.
9 Q. So the fact that he was heavy set and bald --
10 A. That's what she told me.
11 Q. -- was something she told you?
12 A. That's how she described him.
13 Q. You never seen the man?
14 A. I don't know him.
15 Q. I don't have anymore questions.
16 Have you told us the truth now?
17 A. I told you all the truth.
18 DET. OSBORN: Let's stop at 2155.
19
20
21
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25

REPORT OF INVESTIGATION

VICTIM, COMPLAINANT OR CASE TITLE		TYPE OF INVESTIGATION	INCIDENT NUMBER
Gregory Wellons		Murder	1191174-R
INV. BY	Det. M. Osborn	OTHER OFFICERS	RELATED CASES CROSS FILES
LOCATION	Station		☐ ☐
DATE	05 May 92		☐ ☐
TIME	1710		☐

THIS REPORT RE
Follow Up Investigation

NARRATIVE:

1710 Hrs - I was notified by Sgt. Meeks to respond to the Homicide office reference a possible witness to this murder.

1800 Hrs - Upon arrival at the office, I was briefed by Sgt. Meeks. I was told that Officers J.L. Garcia and L. Iglesias had stopped a stolen Mercedes Benz belonging to County Commissioner Joseph Gersten. This incident happened on 4/30/92. The driver of the Mercedes told the officers that the car was not stolen and that Joe had let him use the car to go buy drugs. A white female hooker named Lisa was also in the car. They said that Joe loaned the car to them and that he was at the Laurel Motel and when they returned to the Laurel Joe was not there. I was then given a two inch .38 Smith & Wesson revolver, model 649, serial #A1B6401 and four live rounds by Sgt. Meeks. Sgt. Meeks told me that this gun was also reported stolen by Commissioner Gersten and was recovered from the vehicle.

Captain Kamenesh called and said he was just advised by Lt. Fleites that Officer Garcia had located a possible witness to the Wellons murder and was enroute to the station with this witness. I was then told by Sgt. Meeks and Captain Kamenesh to contact Lt. Fleites in the office of Internal Affairs and continue the investigation.

EXHIBIT 2

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INV. BY		OTHER OFFICERS	RELATED CASES CROSS FILES ☐ ☐ ☐ ☐ ☐
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THIS REPORT RE

1855 Hrs - I went to Internal Affairs and spoke with Lt. Fleites. Fleites said that the witness that Officer Garcia was coming in with had told the prostitute, Lisa, that he witnessed a heavy set bald male in a blue Mercedes kill someone and then throw the victim out of the car and that Lisa had a .38 caliber handgun belonging to Gersten, which was the same caliber used during the murder At this time I was given only limited information and the only name known on the prostitute at this time was the name Lisa. Lisa had apparently been turned over to the FBI because they were notified of this incident and were conducting an investigation into the allegation against Commissioner Joseph Gersten.

1910 Hrs - The Property Unit was contacted, and I was advised that the Mercedes belonging to Commissioner Gersten had been released on this same date and was picked up by Mr. Gersten's aide. Lt. Fleites provided me with the City of Miami police report #1211561-R, which is a stolen car recovery and an arrest report prepared by Officer J. Diaz, IBM #1442.

This report indicates that on 4/30/92 a 1987 Mercedes Benz 450 SL, blue in color, Florida tag GBI-99I, had been recovered at 480 N.E. 30 Street, Miami, Florida. The police report indicates the owner of this car is Joseph M. Gersten and that

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INV. BY		OTHER OFFICERS	RELATED CASES CROSS FILES ☐ ☐ ☐ ☐ ☐
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THIS REPORT RE

the car was reported stolen from Coral Gables on 4/29/92 under Coral Gables case number 92-8749. According to the arrest report, the driver of the car is a white male, Kenneth Elswick, [redacted], DOB: [redacted] According to Lt. Fleites, Elswick was in the Dade County Jail and had also been interviewed by the FBI. (For further information see attached police reports attached to these 301's)

1945 Hrs - Ofc. Garcia arrived at Internal Affairs with B/M Wayne Pierce, DOB: [redacted] - Add: [redacted]. Pierce stated that on Wednesday he was outside the Budget Hotel located at Biscayne Boulevard and 53 Street and saw a he/she known to him as "Champagne" inside of a light blue Mercedes Benz in the passenger seat. Pierce describes the driver of the car as a white male heavy set bald man with some grey hair. According to Pierce, he observed these two people at 7:00 P.M. Pierce said he hears "Champagne" arguing with the man over eighty dollars ($80.00) and then he sees the white man shoot "Champagne" in the head and then kick "Champagne" out of the car. Pierce then sees the Mercedes drive off south on Biscayne Boulevard. Pierce was asked if he saw the police respond to where "Champagne" had been shot, and he stated that he had left and did not actually see the police arrive. He

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heard that "Champagne" had died the next day. I asked Pierce if he was sure about the day being Wednesday, and he said yes because he had just bought some new clothes yesterday, which was Thursday, and that the incident happened the day before that. At this time we had Ofc. Garcia take Pierce into a separate room, and I informed Lt. Fleites that the information being given was inaccurate and that my victim was shot between 7:00 and 7:30 in the morning on Tuesday and was thrown into an alleyway behind 560 N.W. 45 Street. When my victim was found he was still alive with a gunshot wound to the head and did not die until late afternoon.

2020 Hrs - Captain Kamenesh was notified by phone of the pre-interview. This was a three-way conversation between myself, Lt. Fleites and the captain. It was agreed upon that due to the inconsistencies of Pierce's pre-interview our first step would be to try to get the weapon taken from Commissioner Gersten's car and also the weapon that was located near the scene of the homicide to the Dade County Lab. Captain Kamenesh told me to go ahead and start calling the necessary people to facilitate the testing of the weapon. Captain Kamenesh also told me to go ahead and take a formal statement from Wayne Pierce.

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INV. BY		OTHER OFFICERS	RELATED CASES CROSS FILES ☐ ☐ ☐ ☐ ☐
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THIS REPORT RE

2030 Hrs - Major Exposito was notified by telephone, and he advised that he agreed with our decision and authorized us to call in off-duty personnel to assist. Also, we were advised to go ahead and contact a state attorney on the legality of taking a statement from a fifteen year old without the presence of his parents or a juvenile officer.

2045 Hrs - Lt. Fleites contacted Lt. Kelly from the Property Unit and requested he respond and retrieve the evidence from the safe.

2050 Hrs - Lt. Fleites contacted Mary Cagle of the State Attorney's office in regards to the statement of Wayne Pierce. Ms. Cagle advised that there would be no problem in taking his statement without the presence of his parents or juvenile officer because he is only a witness. Lt. Fleites also contacted an Internal Affairs stenographer to respond for the taking of the statement.

2110 Hrs - I then went back and questioned Wayne Pierce about the inconsistencies of his statement. At this time Pierce stated that he was told by Lisa to come to the police and tell this story because she was going to be paid some money by the FBI. Pierce stated that the entire story was a lie and that he has

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INV. BY		OTHER OFFICERS	RELATED CASES CROSS FILES ☐ ☐ ☐ ☐ ☐
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THIS REPORT RE

never seen anyone known as Joseph Gersten. Pierce denied seeing any shooting and said he only did it because Lisa told him to and that she would give him some money also.

2115 Hrs - Both Captain Kamenesh and Major Exposito were again called and advised of the admission of Wayne Pierce indicating that he had lied about the entire incident. It was agreed upon to go ahead and still take a formal statement and document this admission.

2130 Hrs - Lt. Kelly arrived at the Property Unit, and I received the RG .38 revolver and ammunition recovered near the original murder scene.

2145 Hrs - A formal statement was taken from Wayne Pierce indicating what was stated previously.

2155 Hrs - End of statement.

2200 Hrs - I contacted the shift commander of Metro Dade Communications and requested the on-call firearms technician to call me.

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THIS REPORT RE

2210 Hrs - I received a call from Tom Quirk of Metro Dade Firearms. I explained the urgency, without going into detail, of our need of his services, and he told us to meet him at his office at 2300 hours.

2300 Hrs - Det. Johnston and I took both weapons to the Dade County Firearms Lab and turned them over to Tom Quirk. We remained there during the entire testing period and waited for the results. Mr. Quirk advised us that the weapon used to kill Gregory Wellons was positively the RG .38 that we found near the scene.

0030 Hrs - I contacted Sgt. Meeks via the police radio and advised him of the results of these tests. I advised Sgt. Meeks that we would be finishing up for the night and that I would contact him tomorrow and advise him of the full details.

0100 Hrs - 06.

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INV. BY		OTHER OFFICERS	RELATED CASES CROSS FILES ☐ ☐ ☐ ☐ ☐
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THIS REPORT RE

5/2/92

1130 Hrs - I contacted Sgt. Meeks in the homicide office via the telephone. I completely updated Sgt. Meeks on what had transpired the day before. Sgt. Meeks advised that he would notify Captain Kamenesh of the full details.

5/4/92

1530 Hrs - I met with Captain Kamenesh and again updated him on the investigation of this lead. I advised him that at this time I felt that the lead was fabricated and had nothing to do with the homicide of Gregory Wellons. I did indicate that we would probably have to talk with Commissioner Gersten about this incident.

5/5/92

1710 Hrs - I contacted Special Agent Michael Bonner with the FBI. Agent Bonner indicated that he had interviewed all the people that were supposedly with Commissioner Gersten. Agent Bonner related the following story: On 4/29/92, in the late

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INV. BY		OTHER OFFICERS	RELATED CASES CROSS FILES ☐ ☐ ☐ ☐ ☐
LOCATION			
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THIS REPORT RE

afternoon, a white female prostitute named Lisa McCann was picked up at the Boulevard and 36 Street by Commissioner Gersten. They went to her house, which is located east of the Boulevard on 31 Street, and had sex and were later joined by a white female named Claudia Lira and a homosexual male named Roberto Maldonado. They all engaged in various sex acts and drugs. They were later joined by a white male named Ken Elswick. According to Lisa, Commissioner Gersten had given an unknown amount of money to Claudia and Roberto, and they wanted to go buy some more drugs. It was later planned by Claudia and Roberto to rob the commissioner because he had a lot of money. According to Lisa, they ripped the commissioner off of a gold chain, some money and stole his car. They all left, leaving the commissioner alone, and went to buy drugs. Upon their return, they had heard that the commissioner had taken a cab away from that area. The address where this took place is 540 N.E. 31 Street. Agent Bonner has documented statements from all of the parties involved.

1730 Hrs - I contacted Coral Gables Police Department and requested that they fax police report #92-8249 to our police department. I received a copy of the report and discovered that Commissioner =Gersten did report his car stolen on 4/29/92 at 8:30 P.M.

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THIS REPORT RE

1750 Hrs - Sgt. Ochoa, Detective Johnston and I met with Assistant Chief March and advised him of the results of the investigation to this point. We were advised to make written reports of the investigation so far in regards to the allegations against Commissioner Gersten and to contact the State Attorney's office.

5/6/92

1610 Hrs - I contacted Assistant State Attorney Mary Cagle and advised her of our findings. She requested that I provide her with any written documents in regards to this lead. I told her I would write it up today and that I would deliver it to her personally on Monday, 5/11/92. I was also informed by Ms. Cagle that Commissioner Gersten is out of town, and she requested that we not contact him until our meeting on 5/11/92.

1630 Hrs - The conversation between Mary Cagle and I was related to Captain Kamenesh and Assistant Chief March.

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Exhibit No. 1

REPORT OF INVESTIGATION

VICTIM, COMPLAINANT OR CASE TITLE	TYPE OF INVESTIGATION	INCIDENT NUMBER
Gregory Wellons	Murder	1191174-R

		OTHER OFFICERS	RELATED CASES
INV. BY	Det. M. Osborn		CROSS FILES
LOCATION	Station		☐ ☐ ☐ ☐ ☐
DATE	05 May 92		
TIME	1710		

THIS REPORT RE: Follow Up Investigation

NARRATIVE:
5-1-92

1710 Hrs - I was notified by Sgt. Meeks to respond to the Homicide office reference a possible witness to this murder.

1800 Hrs - Upon arrival at the office, I was briefed by Sgt. Meeks. I was told that Officers J.L. Garcia and L. Iglesias had stopped a stolen Mercedes Benz belonging to County Commissioner Joseph Gersten. This incident happened on 4/30/92. The driver of the Mercedes told the officers that the car was not stolen and that Joe had let him use the car to go buy drugs. A white female hooker named Lisa was also in the car. They said that Joe loaned the car to them and that he was at the Laurel Motel and when they returned to the Laurel Joe was not there. I was then given a two inch .38 Smith & Wesson revolver, model 649, serial #A1B6401 and four live rounds by Sgt. Meeks. Sgt. Meeks told me that this gun was also reported stolen by Commissioner Gersten and was recovered from the vehicle.

Captain Kamenesh called and said he was just advised by Lt. Fleites that Officer Garcia had located a possible witness to the Wellons murder and was enroute to the station with this witness. I was then told by Sgt. Meeks and Captain Kamenesh to contact Lt. Fleites in the office of Internal Affairs and continue the investigation.

EXHIBIT 2 a

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	Sgt. [signature] REVIEWED BY (NAME, TITLE)	5/7/92 DATE

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VICTIM, COMPLAINANT OR CASE TITLE		TYPE OF INVESTIGATION	INCIDENT NUMBER
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HIS REPORT RE

1855 Hrs - I went to Internal Affairs and spoke with Lt. Fleites. Fleites said that the witness that Officer Garcia was coming in with had told the prostitute, Lisa, that he witnessed a heavy set bald male in a blue Mercedes kill someone and then throw the victim out of the car and that Lisa had a .38 caliber handgun belonging to Gersten, which was the same caliber used during the murder At this time I was given only limited information and the only name known on the prostitute at this time was the name Lisa. Lisa had apparently been turned over to the FBI because they were notified of this incident and were conducting an investigation into the allegation against Commissioner Joseph Gersten.

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This report indicates that on 4/30/92 a 1987 Mercedes Benz 450 SL, blue in color, Florida tag GBI-99I, had been recovered at 480 N.E. 30 Street, Miami, Florida. The police report indicates the owner of this car is Joseph M. Gersten and that

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IIS REPORT RE

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HIS REPORT RE

heard that "Champagne" had died the next day. I asked Pierce if he was sure about the day being Wednesday, and he said yes because he had just bought some new clothes yesterday, which was Thursday, and that the incident happened the day before that. At this time we had Ofc. Garcia take Pierce into a separate room, and I informed Lt. Fleites that the information being given was inaccurate and that my victim was shot between 7:00 and 7:30 in the morning on Tuesday and was thrown into an alleyway behind 560 N.W. 45 Street. When my victim was found he was still alive with a gunshot wound to the head and did not die until late afternoon.

2020 Hrs - Captain Kamenesh was notified by phone of the pre-interview. This was a three-way conversation between myself, Lt. Fleites and the captain. It was agreed upon that due to the inconsistencies of Pierce's pre-interview our first step would be to try to get the weapon taken from Commissioner Gersten's car and also the weapon that was located near the scene of the homicide to the Dade County Lab. Captain Kamenesh told me to go ahead and start calling the necessary people to facilitate the testing of the weapon. Captain Kamenesh also told me to go ahead and take a formal statement from Wayne Pierce.

DISTRIBUTION	INVESTIGATOR'S SIGNATURE
	REVIEWED BY (NAME, TITLE) / DATE

OFFICIAL USE ONLY

NOTE: WHITE COPY—CASE FILE PINK COPY—COMMANDING OFFICER YELLOW COPY—WORKING COPY

REPORT OF INVESTIGATION

VICTIM, COMPLAINANT OR CASE TITLE	TYPE OF INVESTIGATION	INCIDENT NUMBER

		OTHER OFFICERS	RELATED CASES CROSS FILES
IV. BY			☐
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ATE			☐
			☐
ME			☐

HIS REPORT RE

2030 Hrs - Major Exposito was notified by telephone, and he advised that he agreed with our decision and authorized us to call in off-duty personnel to assist. Also, we were advised to go ahead and contact a state attorney on the legality of taking a statement from a fifteen year old without the presence of his parents or a juvenile officer.

2045 Hrs - Lt. Fleites contacted Lt. Kelly from the Property Unit and requested he respond and retrieve the evidence from the safe.

2050 Hrs - Lt. Fleites contacted Mary Cagle of the State Attorney's office in regards to the statement of Wayne Pierce. Ms. Cagle advised that there would be no problem in taking his statement without the presence of his parents or juvenile officer because he is only a witness. Lt. Fleites also contacted an Internal Affairs stenographer to respond for the taking of the statement.

2110 Hrs - I then went back and questioned Wayne Pierce about the inconsistencies of his statement. At this time Pierce stated that he was told by Lisa to come to the police and tell this story because she was going to be paid some money by the FBI. Pierce stated that the entire story was a lie and that he has

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REPORT OF INVESTIGATION

:TIM, COMPLAINANT OR CASE TITLE	TYPE OF INVESTIGATION	INCIDENT NUMBER
BY	OTHER OFFICERS	RELATED CASES CROSS FILES ☐ ☐ ☐ ☐ ☐
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S REPORT RE

never seen anyone known as Joseph Gersten. Pierce denied seeing any shooting and said he only did it because Lisa told him to and that she would give him some money also.

2115 Hrs - Both Captain Kamenesh and Major Exposito were again called and advised of the admission of Wayne Pierce indicating that he had lied about the entire incident. It was agreed upon to go ahead and still take a formal statement and document this admission.

2130 Hrs - Lt. Kelly arrived at the Property Unit, and I received the RG .38 revolver and ammunition recovered near the original murder scene.

2145 Hrs - A formal statement was taken from Wayne Pierce indicating what was stated previously.

2155 Hrs - End of statement.

2200 Hrs - I contacted the shift commander of Metro Dade Communications and requested the on-call firearms technician to call me.

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REPORT OF INVESTIGATION

TIM, COMPLAINANT OR CASE TITLE	TYPE OF INVESTIGATION	INCIDENT NUMBER
BY	OTHER OFFICERS	RELATED CASES CROSS FILES ☐ ☐ ☐ ☐ ☐

REPORT RE

2210 Hrs - I received a call from Tom Quirk of Metro Dade Firearms. I explained the urgency, without going into detail, of our need of his services, and he told us to meet him at his office at 2300 hours.

2300 Hrs - Det. Johnston and I took both weapons to the Dade County Firearms Lab and turned them over to Tom Quirk. We remained there during the entire testing period and waited for the results. Mr. Quirk advised us that the weapon used to kill Gregory Wellons was positively the RG .38 that we found near the scene.

0030 Hrs - I contacted Sgt. Meeks via the police radio and advised him of the results of these tests. I advised Sgt. Meeks that we would be finishing up for the night and that I would contact him tomorrow and advise him of the full details.

0100 Hrs - 06.

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REPORT OF INVESTIGATION

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IV. BY		OTHER OFFICERS	RELATED CASES CROSS FILES ☐ ☐ ☐ ☐ ☐
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HIS REPORT RE

5/2/92

1130 Hrs - I contacted Sgt. Meeks in the homicide office via the telephone. I completely updated Sgt. Meeks on what had transpired the day before. Sgt. Meeks advised that he would notify Captain Kamenesh of the full details.

5/4/92

1530 Hrs - I met with Captain Kamenesh and again updated him on the investigation of this lead. I advised him that at this time I felt that the lead was fabricated and had nothing to do with the homicide of Gregory Wellons. I did indicate that we would probably have to talk with Commissioner Gersten about this incident.

5/5/92

1710 Hrs - I contacted Special Agent Michael Bonner with the FBI. Agent Bonner indicated that he had interviewed all the people that were supposedly with Commissioner Gersten. Agent Bonner related the following story: On 4/29/92, in the late

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REPORT OF INVESTIGATION

CTIM, COMPLAINANT OR CASE TITLE	TYPE OF INVESTIGATION	INCIDENT NUMBER
BY	OTHER OFFICERS	RELATED CASES CROSS FILES ☐ ☐ ☐ ☐ ☐
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S REPORT RE

afternoon, a white female prostitute named Lisa McCann was picked up at the Boulevard and 36 Street by Commissioner Gersten. They went to her house, which is located east of the Boulevard on 31 Street, and had sex and were later joined by a white female named Claudia Lira and a homosexual male named Roberto Maldonado. They all engaged in various sex acts and drugs. They were later joined by a white male named Ken Elswick. According to Lisa, Commissioner Gersten had given an unknown amount of money to Claudia and Roberto, and they wanted to go buy some more drugs. It was later planned by Claudia and Roberto to rob the commissioner because he had a lot of money. According to Lisa, they ripped the commissioner off of a gold chain, some money and stole his car. They all left, leaving the commissioner alone, and went to buy drugs. Upon their return, they had heard that the commissioner had taken a cab away from that area. The address where this tock place is 540 N.E. 31 Street. Agent Bonner has documented statements from all of the parties involved.

1730 Hrs - I contacted Coral Gables Police Department and requested that they fax police report #92-8249 to our police department. I received a copy of the report and discovered that Commissioner =Gersten did report his car stolen on 4/29/92 at 8:30 P.M.

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REPORT OF INVESTIGATION

PAGE 10 OF 10

VICTIM, COMPLAINANT OR CASE TITLE		TYPE OF INVESTIGATION	INCIDENT NUMBER
NV. BY		OTHER OFFICERS	RELATED CASES CROSS FILES ☐ ☐ ☐ ☐ ☐
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DATE			
TIME			

THIS REPORT RE

1750 Hrs - Sgt. Ochoa, Detective Johnston and I met with Assistant Chief March and advised him of the results of the investigation to this point. We were advised to make written reports of the investigation so far in regards to the allegations against Commissioner Gersten and to contact the State Attorney's office.

5/6/92

1610 Hrs - I contacted Assistant State Attorney Mary Cagle and advised her of our findings. She requested that I provide her with any written documents in regards to this lead. I told her I would write it up today and that I would deliver it to her personally on Monday, 5/11/92. I was also informed by Ms. Cagle that Commissioner Gersten is out of town, and she requested that we not contact him until our meeting on 5/11/92.

1630 Hrs - The conversation between Mary Cagle and I was related to Captain Kamenesh and Assistant Chief March.

DISTRIBUTION

INVESTIGATOR'S SIGNATURE

REVIEWED BY (NAME, TITLE) | DATE 5/7/92

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ROI

5-7-92 (report)

Det. M. Osborn

1 May

6:00pm - briefing by Sgt. Meeks -

J.L. Garcia & L. Iglesias stopped at stolen mercedes (Gerston) on 4-30 - driver of mercedes stated car not stolen but given by Joe to buy drugs - Lisa also in car

Joe at the Laurel Motel - grey Gold reported stolen by Joe

6:55 - spoke w/ Lt. Fleites

Lisa - witnessed a heavy set bald man in a blue mercedes

had .38 belonging to Joe

7:10 - mercedes released to aide

J. Diaz arrest report:

4/30/92 - mercedes recovered at 480 NE 30 St.

car stolen from C.G. on 4/29/92 - driver of car Kenneth Elswick 540 NE 31 St.

7:45 - Det Garcia arrives w/ Wayne Pierce

Pierce - describes shooting

9:10 - Pierce recants story

Pierce explains that Lisa told him to go to police w/ story because she was to be paid by FBI - denied witnessing shot

EXHIBIT 3

11:00 weapon found near scene was murder weapon
Joe's not involved

5 May
5:10 - Michael Bunney, FBI
4-29-92
Lisa McCann picked up at Boulevard & 36 St. by Joe
went to her house (east of Boule on 31 St.) had
sex
joined by Claudia Lira & Roberto Waldorado
[illegible]
Joe gave $ to Claudia & Roberto to buy drugs
Claudia & Roberto planned [illegible]
took gold chain, $, car
all left - leaving Joe alone - to buy drugs
upon return, learned that Joe took a cab out of
area
540 NE 31 St. where incident took place

5:30 C.G. report - Joe reported car stolen on 4/29/92 at 8:30 P.

201

5-7-92 (reprint)

Det. M. Osborn

1 May

6:00pm - briefing by Sgt. Meeks -

M.L. Garcia & L. Iglesias stopped at stolen mercedes (Gerston) on 4-30 - driver of mercedes stated car not stolen but given by Joe to Soy dogs - Lisa also in car. Joe at the Laurel Motel - given SOW reported stolen by Joe

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EXHIBIT 3 a

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5 May
5:10 - Michael Bonney, FBI
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went to her house (east of Boule on 31 St.) had
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later joined by Ken Elswick
Joe gave $ to Claudia & Roberto to buy drugs
Claudia & Roberto planned to rob Joe
took gold chain, $, car
all left - leaving Joe alone - to buy drugs
upon return, learned that he took a cab out of
area
540 NE 31 St. where incident took place

5:30 C.G report - Joe reported car stolen on 4/29/92 at 8:30 p.m.

OFFICE OF THE STATE ATTORNEY

JANET RENO
STATE ATTORNEY

INTER-OFFICE MEMORANDUM

TO: File

DATE: 6/29/92

DEFT NAME:
CASE NO:

FROM: Richard Gregorie
Assistant State Attorney

SUBJECT: Investigation of Richard Gersten

The following items are being provided to Michael Band, Assistant State Attorney.

(1) Tape transcription
(2) Statement of Robert Maldonado
(3) Vehicle storage report
(4) Report of investigation, dated 5/5/92
(5) Statement of Maria Silva
(6) Statement of Rosario Kennedy, dated 6/5/92 and 6/11/92
(7) Chronology report
(8) Offense-incident report, dated 4/29/92
(9) SAO report, dated 5/12/92
(10) SAO report, dated 5/15/92
(11) SAO report, dated 5/28/92
(12) SAO report, dated 6/1/92
(13) SAO report, dated 6/2/92
(14) SAO report, dated 6/3/92
(15) SAO report, dated 6/15/92
(16) SAO report, dated 6/18/92
(17) Telephone statement, dated 6/4/92
(18) Notes and diagrams
(19) Notes entitled "Gersten's Secretary"
(20) Notes entitled "Sgt-at-arms"
(21) Notes entitled "Cab driver", dated 5/14/92
(22) Notes entitled "Cab driver", dated 6/17/92
(23) Notes entitled "What Lisa told the FBI"
(24) Notes entitled "Lisa's sugar daddy"
(25) Notes entitled "Jack Eades"
(26) Miami Police report, dated 4/30/92
(27) Copy of Publix check
(28) Copy of toll records of Rosario's portable phone where she calls Gersten's car phone.
(29) Draft report of interview with Lisa McCann aka Tracy Sheehan

memohead - 6/29/92

transcription

stmt. of Robert maldonado

vehicle storage report

report of Investigation
dated 5/5/92

stmt. of maria Silva

stmt. of Rosario Kennedy
dated 6/11/92

stmt. of Rosario Kennedy
dated 6/5/92.

EXHIBIT
5

1 June '92

rec'd from ASA Gregorie:

1- transcription of tape - Riley, Elswick, Fenidet
11 pages

2- RO1 - Mike Osborn - 5-7-92
10 pages

3- statement - Robert Maldonado - 5-13-92

4- vehicle storage receipt - 4-30-90

5- statement - Maria Silva - 6-15-92

6- statement - Rosario Kennedy - 6-11-92 - 9 pages - 3:20pm

7- statement - Rosario Kennedy - 6-5-92 - 56 pages - 5:20pm

EXHIBIT
6

MID - 050044VC

COMPLAINT/ARREST AFFIDAVIT ATTN TESCHE

Police Case No: 121156IR

Agency Code: 01

[redacted] NAME: ELSWICK, KENNETH C.

DOB: [redacted] Sex: M Race: W Ethnic: A Height: 5'10 Weight: 160 Hair: RED Eyes: BLUE

[redacted]

Occupation: UNEMP

Place of Birth: [redacted]

Social Security No.: [redacted]

Scars, Tattoos, Unique Physical Features: ENTER ON LEFT - SNAKE ON RIGHT

Arrest Date: 04/30/92 Arrest Time: 1:15 A.M.

Citizenship: US

Residence Type: City

DEFENDANTS: X

X

CHARGES	Activity	Type	Counts	STATUTE	O.V.	IDAC	CAPIAS	BW	PW	PWO	OTH	VIOLATION OF SECT.
GRAND THEFT AUTO	N	N	1	812.014								371

OF THE CODE OF MIAMI

30 day of APRIL, 19 92, at 11 A.M. P.M.

480 NE 30ST.

(Location, include name of business)

WE OBSERVED THE DEF. DRIVING A BLUE MERCEDES 280Z (4D) BLUE IN COLOR BEARING FLA YBI99I WESTBOUND ON NE 1ST. COMPUTER CHECK REVEALED THE VEH. STOLEN ON 4-29-92 C.G. PD CASE 92-8249. WE STOPPED THE VEH. AT THE ABOVE AT WHICH TIME THE DEF. (DRIVING) OPENED THE DOOR AND RAN SOUTHBOUND BETWEEN THE BLDG. THE DEF. WAS APPREHENDED SHORTLY AFTER.

PAGE 1 OF

HOLD FOR BOND HEARING. DO NOT EXTEND OUT (Officer Must Appear at Bond Hearing)

Sworn to and subscribed before me, the undersigned 30 day of APR 19 92

Deputy of the Court or Notary Public

MPD 01167 29

7c -18

Signature of Defendant, Juvenile and Parental Guardian

EXHIBIT 8

Memorandum

To : SAC, MIAMI (194B-MM-52974) (P) Date 5/2/92

From : SA MICHAEL H. BONNER (SQ. PC-1)

Subject: METROCON;
CSLPO - LOCAL LEVEL;
OO:MM
(REQUEST FOR SAC AUTHORITY TO CONSENSUALLY MONITOR TELEPHONE CONVERSATIONS)

The purpose of this memorandum is to request SAC authority to consensually monitor and/or record telephone conversations between [redacted] and JOSEPH M. GERSTEN, and others at present unknown, in order to gather evidence of a possible violation of Title 21, USC; SS 844.

AUSA STEVEN CHAYKIN was contacted on 4/30/92, and concurs with the use of this technique and advised that entrapment would not appear to be a viable defense in this matter.

The consenting party has executed an FD-472, providing the Bureau with consent to monitor/record the telephone conversations, and has agreed to testify in court.

It is anticipated that monitoring will in this matter will commence on 4/30/92. SAC authority was orally granted by SSA JOSEPH PERSICHINI, JR.

Synopsis of investigation:

On 4/30/92 MAJOR MIGUEL A. EXPOSITO, Miami, Fla., Police Department, Internal Affairs Section, advised that two of his officers were approached by a prostitute that frequented the area of [redacted] The prostitute advised the officers that she had information concerning two people that had possession of a stolen car.

The officers requested that the prostitute assist them by soliciting a ride from the suspects. The prostitute positioned herself near the stolen vehicle and the suspects arrived in a second stolen vehicle, a blue Mercedes Benz. The officers stopped the vehicle and arrested the suspects.

2 - Miami
(1 - 194B-MM-52974 Sub X)
mhb

Oral authority granted on 4/30/92 by SAC [illegible] 5/2/92.

FBI-00000135
194B-MM-52974 S-119

MAY 06 1992

EXHIBIT 9

Through investigation, Miami PD determined that the blue Mercedes was reported stolen on 4/29/92, to the Coral Gables Police Department, by JOSEPH M. GERSTEN. The suspects, CLAUDIA LIRA and KENNETH ELSWICK advised that GERSTEN had been smoking crack cocaine with a prostitute in a house that they all share and he gave them the keys to his car to go purchase more crack cocaine. The suspects advised that instead of returning with the cocaine, they kept the car for several hours. When the suspects returned to the house, GERSTEN was no longer there.

The suspects advised that they had contacted GERSTEN, on 4/30/92, and arranged to return the car later that day, however, they were arrested before they could return the car. MAJOR EXPOSITO advised that Miami PD notified the Coral Gables PD about the recovery of GERSTEN'S car. Coral Gables PD later notified Miami PD that GERSTEN no longer wanted to pursue charges against the suspects.

OWNERSHIP OF HOUSE

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

P. O. Box 592418, MIA
Miami, Florida 33159
May 12, 1992

Honorable JAMES MCADAMS
United States Attorney
155 South Miami Avenue
Seventh Floor
Miami, Florida 33130

Attention: STEVEN E. CHAYKIN
Assistant United States Attorney

RE: JOE GERSTEN
DADE COUNTY COMMISSIONER

Dear Sir:

Attached you shall find rough drafts of Federal Bureau of Investigation (FBI) reports (FD-302s) with information supplied by the following individuals:

CLAUDIA LIRA
Date of Investigation - April 30, 1992
By: SAs MICHAEL H. BONNER and MARTIN I. RUIZ DE GAMBOA

KENNETH ELSWICK
Date of Investigation - April 30, 1992
By: SAs JACQUELINE BOUCHER and MICHAEL LOWE

DEBORAH FASCIA
Date of Investigation - April 30, 1992
By: SAs ROBIN SKILLINGTON and DEAN C. BRYANT

ROBERT MALDONADO
Date of Investigation - April 30, 1992
By: SAs RICARDO G. CRUZ-TAURA and MICHAEL H. BONNER

Enclosures: 10

FBI-00000110

194B-MM-5297X-133

INDEXED
JUN 18 1992

EXHIBIT
10

LISA MCCANN
Date of Investigation - May 1, 1992
By: SAs JACQUELINE BOUCHER and MICHAEL H. BONNER

CLAUDIA LIRA
Date of Investigation - May 2, 1992
By: SA MICHAEL H. BONNER

JOE GERSTEN
Date of Investigation - May 3, 1992
By: SSA CHRISTOPHER MAZZELLA

Also, I am enclosing a Letterhead Memorandum (LHM) dated May 12, 1992, and two (2) cassettes with tape recordings conducted by CLAUDIA LIRA on April 30, 1992, and LISA MCCANN on May 1, 1992.

The above-listed information is given to your agency in furtherance of the criminal investigation as indicated on each FD-302. Their contents are not to be distributed outside your agency.

Sincerely,

WILLIAM A. GAVIN
Special Agent in Charge

By:

M. I. Ruiz de Gamboa
MARTIN I. RUIZ DE GAMBOA
Acting Supervisory Special Agent

FBI-00000111

INVESTIGATION

There appeared in the Office of the State Attorney, Ninth Floor, Metropolitan Dade County Justice Building, Miami, Florida, on Wednesday, June 10, 1992, at approximately 2:00 PM, the following:

RICHARD GREGORIE
Assistant State Attorney

GEORGE R. HAVENS
Chief Investigator

KAREN JACOBSON
Deputy Chief Investigator

RON OHLZEN
Investigator

WITNESS: CLAUDIA LIRA

PRESENT: MANNY ALVAREZ
Assistant Public Defender

MARGIE JOHNSON
Reporter

EXHIBIT
11

THEREUPON, THE WITNESS, AFTER FIRST HAVING BEEN SWORN BY THIS REPORTER, TESTIFIED AS FOLLOWS:

CLAUDIA LIRA

Q (By Mr. Gregorie) Miss Lira, this is a statement for the State Attorney's office in the presence of me, Assistant State Attorney Richard Gregorie. We have with us Karen Jacobson, Ron Ohlzen and Ray Havens from the State Attorney's Office, Investigations Division. You also have counsel with you, Mr. Alvarez. He's here to provide you with assistance.

If there is any question that you don't understand or that you have a question about or you think is a problem you just say so and we will give you time to talk to your lawyer. Do you understand that?

A Yes.

Q Okay, this statement is limited to the events which occurred on April 29th and April 30th of 1992 involving Joseph M. Gersten.

I don't intend to ask you about anything else.

A Okay.

Q And, if you feel anything that we are asking is going to involve other matters you consult with your lawyer because we are limiting this statement to that issue.

A Okay.

Q Do you understand that?

A Um hum.

the chain was already gone.

Q After this did you make some calls at the direction of the FBI?

A Yes, three.

Q And, those calls were recorded?

A Yes.

Q And, you agreed to do that?

A Yes.

Q Okay.

A They said we weren't going to get arrested. No one's going to get arrested for stealing the car. But, Gersten kept saying he don't know who I am. "We are going to have you arrested."

Q Did you threaten him?

A On the phone, no.

Q You didn't tell him you had the pictures of the naked guy?

A I don't think I brought that up. I don't remember. I told him, I said in a way, I said--how did I put it? I said, "Don't arrest my boy friend." Yeah.

I don't remember the exact words. They wrote everything down. That's why I don't remember.

Q Prior to your coming here today did anybody talk to you about Mr. Gersten's phone in the car or it ringing that night that you took it?

Exhibit No. 89

1

IN RE: INVESTIGATION

Metropolitan Justice Building
1351 N.W. 12th Street
Miami, Florida 33125
Tuesday, August 11th, 1992
10:15 A.M.

SWORN STATEMENT OF JOSEPH GERSTEN

Taken before Sylvia Evans, Notary Public for the State of Florida at Large, pursuant to Notice of Taking Deposition filed in the above cause.

(11)-13

EXHIBIT
12

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7 A P P E A R A N C E S
8 MICHAEL BAND, ESQ.
Assistant State Attorney
9 On behalf of State of Florida.
10 RICHARD SHARPSTEIN, ESQ.
RANDY ROSENBLUM, Law Clerk
11 JEFF KASKY
SHARPSTEIN & SHARPSTEIN, P.A.
12 3043 Grand Avenue
Penthouse One
13 Coconut Grove, Florida 33133
On behalf of Witness.
14
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(11) -13

1 exception under the Public Records Act based upon what
2 he considered an active criminal investigation.
3 Realizing that this very office is conducting
4 an active and criminal investigation with Commissioner
5 Gersten as the alleged subject in something that's
6 gone on for quite some time without any charges being
7 filed --
8 MR. BAND: In all respect, I understand that
9 occurred. You told me yesterday when we saw one
10 another that you planned to make a request and
11 apparently you have done that pursuant to letter, and
12 that you were going to address, pursuant to the Public
13 Records Act, a request of Mr. Gregory as to that
14 area.
15 And I will emphasize this, I have not talked
16 to Mr. Gregory concerning my investigation. Whatever
17 is going on there, that's fine. I'm only concerned
18 with my investigation.
19 MR. SHARPSTEIN: Well, it's my belief that --
20 with all due respect to you as an advocate and as a
21 member of this office -- that the same office is
22 conducting two separate investigations that dovetail
23 together. And that because of the public nature of
24 this investigation, that you probably have been
25 exposed to any number of allegations made and evidence

(11)-13

Exhibit No. 93

SHARPSTEIN & SHARPSTEIN, P.A.
Penthouse One
3043 Grand Avenue
Coconut Grove, Florida 33133

Telephone No. (305) 442-8100
Fax No. (305) 441-0664

FAX COVER SHEET

TO: Michael Band DATE: 7/31/92

RE: Joseph Gersten

RECEIVER'S FAX NUMBER: 547-3215

COVER SHEET PLUS 2 PAGES

FROM: Richard Sharpstein/Sharpstein & Sharpstein, P.A.

NOTE: This facsimile contains PRIVILEGED AND CONFIDENTIAL INFORMATION intended only for the use of the addressee(s) named above. If you are not the intended recipient, you are hereby notified that any dissemination or copying of this fascimile is strictly prohibited. If you have received this fascimile in error, please immediately notify us by telephone and return the original fascimile to us at the above address via the United States Mail. Receipt by anyone other than the intended recipient is not a waiver of any attorney-client or work-product privilege. Thank you.

SPECIAL INSTRUCTIONS

3 Aug '92
Spoke w/ Dick
— No —
MB

EXHIBIT
13

(11) ~12

RILEY, KIRALY & ASSOCIATES

COMMERCIAL CENTER OF MIAMI
6135 NORTHWEST 167TH STREET, SUITE 26
MIAMI, FLORIDA 33015
(305) 825-6120
FAX: 305-825-1101
1-800-369-4095

June 24, 1992

Received this 24th day of June, 1992, documents belonging to or associated to Claudia Lira from William H. Riley.

Brenda Fenichet

EXHIBIT
14

5-27-92

I'm sitting in my room
looking at your picture
in the paper. (Nasty Picture)
saying why won't he call
or at least talk with
me, I'm not even that
hurt anymore. I still
care but it's not hurting
the same ways it use to.
we when they told me
you took off with Becky
on 10.5. mins before rely
all left with Any it did

Its Wed. ~~night~~ night and
I'm feeling pretty good, I
poke with you on the
phone and I'll be feeling
wonderful for a little while
until you fuck up again
I can't find you for a little
* while again, Anyway Ron came
→

o see me tonight, we had
very nice visit, but guess
what? He knows to Cabbie
he Cabbie live at the
Tandery beach Hotel Calliors
- 7154. I maybe the 4th floor
he cabbie does smoke, he
use Pon has seen him do
t before. It really is a
small world now isn't it,
I got into a fight today
he stupid girl, nothing
append to me at all the
ils on they count blamed it
ll on Faith (Baldwin) She
went to look up & went
talk with Gersten's Layum
an the girls are not only
alling me "Gerstin's girl" but
Rocky #2 cute huh. Well

hitneid, love you, sure hop
o see ya. Claudo

ONE OF THESE HAD TO HAPPEN

1. McCann was offered money by the FBI before the alleged sex and drugs events.

2. McCann was promised money by the FBI after the alleged sex and drugs events. She then offered Wayne Pearce money to make a false murder allegation against Gersten. The offer was made either before or after she was interviewed by the FBI.

PENGAD-Bayonne, N. J.
EXHIBIT
15

Would a fair investigation have required an understanding of what happened and the ramifications of what happened?

"THEN THE FBI TRYING TO SET UP THE MAN FOR SOMETHING HE DIDN'T DO[.]"

PENGAD-Bayonne, N. J.
EXHIBIT
16

Affidavit of William L. Richey

I, WILLIAM L. RICHEY, ESQUIRE, after being duly sworn, state as follows:

1. I am an attorney licensed to practice law in the State of Florida.

2. I previously represented Joseph M. Gersten for several years, including in the earlier stages of the State Attorney's investigation of the events of April 29, 1992.

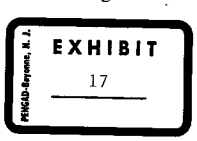
3. After it became public that the State Attorney's office was investigating Mr. Gersten for the events of April 29, 1992, I telephoned then-Chief Investigator George Ray Havens of the Miami-Dade County State Attorney's office. I arranged a meeting with Mr. Havens in his office. That meeting occurred on the afternoon of May 21, 1992. In attendance at the meeting were Mr. Havens, then-Assistant State Attorney Richard Gregorie, Investigator Karen Jacobsen, and myself.

4. At the meeting, Mr. Gregorie and Mr. Havens made it clear to me that they were absolutely positive that Mr. Gersten had been with a man named Kenneth Elswick, a prostitute known as Claudia Lira and a prostitute known as Tracey Sheehan on the evening of April 29, 1992, and that he had been robbed by Ms. Lira and Mr. Elswick. It was their absolutely firm position that Mr. Gersten had filed a false police report.

5. Mr. Havens and Mr. Gregorie made clear their desire for Mr. Gersten to come to Mr. Havens' office and give a full statement under oath confessing to what they represented to be the true events of that evening. They made it absolutely clear that if Mr. Gersten were to give testimony that deviated in any way from what Mr. Havens and Mr. Gregorie were positive had happened that evening, then Mr. Gersten would be charged with perjury. They very clearly meant exactly what they said.

6. In my professional opinion, had Mr. Gersten testified before the State Attorney's office and told any story other than what Mr. Havens and Mr. Gregorie represented to be the truth, he would have been charged with perjury.

7. During my discussions with the Miami-Dade County State Attorney's office, I was never told that their investigation had turned up false murder allegations against Gersten. I did not know that one of the government's witnesses had attempted to frame Mr. Gersten for a murder until this year. In my opinion, the government's investigation would have necessarily



RECEIVED
JUN 04 2001
HOUSE COMMITTEE ON
GOVERNMENT REFORM

been terminated if I had learned, or the public had known, that one of the government's witnesses was trying to frame Mr. Gersten for murder and had been paid federal money after she had suborned the false allegation.

8. One of the key witnesses against Gersten, Kenneth Elswick, indicated that he would change his sworn statement to the State Attorney's Office for $10,000 dollars. State and federal prosecutors did not appear to be interested in developing this information.

9. The representations made in this affidavit are consistent with representations made in an affidavit executed by me on August 13, 1992.

10. The representations made in this affidavit are consistent with sworn testimony given by myself in an Australian legal proceeding on March 7, 2001.

William L. Richey, Esq.
201 South Biscayne Boulevard
34th Floor, Miami Center
Miami, FL 33131

William L. Richey, Esq.

STATE OF FLORIDA
COUNTY OF DADE

The foregoing instrument was acknowledged before me this 25th day of MAY, 2001, by WILLIAM L. RICHEY, who is personally known to me or who has produced Florida Driver's License Number _____ as identification and who did/did not take an oath.

Karen J. Gackle
Notary Public, State of Florida
My Commission Expires:

KAREN J. GACKLE
My Comm Exp. 1/30/2002
Bonded By Service Ins
No. CC691850
[ ] Personally Known [ ] Other I.D.

AFFIDAVIT

I, MICHAEL OSBORN, after being duly sworn, state as follows:

1. I am a former detective with the City of Miami Police Department.
2. I was involved in the 1992 investigation of the homicide of Gregory Wellons.
3. On May 1, 1992, at 6:00 p.m., I was briefed on the allegations against then-Dade County Commissioner Joseph Gersten involving consumption of cocaine and consorting with prostitutes.
4. At 7:45 p.m. of that same evening, Officer J. L. Garcia brought a witness to me named Wayne Pearce. Pearce told me that on Wednesday, April 29, 1992 — the same day as the alleged sex and drugs transgressions — he saw an individual murder a transvestite and push the body out of an automobile shortly after 7:00 p.m. The description of the individual matched that of Gersten, and the description of the automobile matched that of Gersten's automobile. I understood that Pearce's allegation was directed at Gersten.
5. Recognizing a number of inconsistencies in Pearce's statement, I re-interviewed him an hour and twenty-five minutes later.
6. In the second interview, Pearce told me that he had been told by an individual named Lisa to come to the police and tell this story because she was going to be paid some money by the FBI. He also stated that his entire original story had been a lie and that he had never seen anyone known as Joseph Gersten. Pearce denied seeing any shooting and said he only told the story he did because Lisa told him to and that she would give him some money as well. I understood "Lisa" to mean Lisa McCann, the prostitute who had alleged that Gersten was with her when he consumed crack cocaine on April 29, 1992.
7. I immediately notified my superiors about Pearce's fabricated story. Three days later, on May 4, 1992, I told one of my supervisors that I would probably have to interview Gersten about this incident.
8. On May 5, 1992, I contacted FBI Special Agent Michael Bonner and discussed the false murder allegation with him. At the time, he told me that Lisa McCann was working with him.
9. On May 6, 1992, I contacted Assistant State Attorney Mary Cagle and advised her of our findings, including the false murder allegation. Cagle told me that Gersten was out of town and requested that I not contact him before our meeting on May 11, 1992.
10. Cagle asked me for a written report of what I had told her. I personally provided a copy of the report to Cagle on May 11, 1992. I also met personally with Cagle in her office to discuss the report, including the false murder allegation. At that time, she again told me not to talk to Gersten.
11. On the same day that I met with Mary Cagle, May 11, 1992, I also spoke personally with then-Assistant State Attorney Michael Band about the false murder allegation.

12. I was surprised that Officer J. L. Garcia repeatedly asked me if Gersten would be indicted for murder even after Wayne Pearce confessed that he was offered money to accuse Gersten of murder.
13. I was concerned that Commissioner Gersten's car was released at a time when an allegation had been made that a homicide had been committed in the car.

Detective Michael Osborn (ret.)
19451 Southwest 100th Loop
Dunnellon, FL 34432

Michael Osborn Fl Dr Lic

State of Florida
County of Marion

The foregoing was sworn to by Michael Osborn, who is personally known to me.

Mary K. Richardson
Notary Public

My Commission Expires:

MARY K. RICHARDSON
MY COMMISSION # CC 588179
EXPIRES: October 6, 2001
Bonded Thru Notary Public Underwriters

AFFIDAVIT

I, MARIA DEL CARMEN CALZON, ESQ., after being duly sworn, state as follows:

1. I am an attorney admitted to the Bar in the State of Florida;
2. I conducted a partial examination of the original files of the Dade County, Florida, State Attorney's Office in the Joseph M. Gersten case, beginning on August 2, 2000 and continuing through September 8, 2000;
3. The aforementioned examination took place in the offices of the State Attorney for Miami-Dade County, 1350 N.W. 12th Avenue, Miami, Florida, in a conference room adjacent to the offices of Assistant State Attorneys Joel Rosenblatt and Trudi Novicki;
4. During the examination, I personally examined, retrieved and had duplicated by employees of the Dade County, Florida, State Attorney's Office, documents including:
   a. Report of the investigation into the murder of Gregory Wellons, prepared by Det. M. Osborn of the City of Miami Police Department, and dated 05 May 1992 (10 pages);
   b. Handwritten summary of the previous report in Michael Band's handwriting (2 pages);
   c. Handwritten listing of items received from "ASA Gregorie" in Michael Band's handwriting and dated June 29, 1992 (1 page) which includes a reference to the Wellons murder investigation report;
   d. Handwritten note "To: Michael Band" containing a listing of 23 items (1 page) including a reference to the Wellons murder investigation report;
5. On the date of my initial examination, the Wellons murder investigation report was contained inside a labeled file folder, and that subsequent to its duplication by an employee of the State Attorney's Office, the report was placed back inside the file;
6. On a subsequent date, when my examination of the files continued, the file folder previously containing the report was empty and I could not locate the report within the boxes containing the Gersten documents;
7. The other documents listed above which substantiated the existence of the report, however, were still in their files within the boxes containing the Gersten documents and I obtained copies of those documents from a State Attorney's employee;
8. The original files of the State Attorney were removed from the Office of the State Attorney on September 8, 2000, in my presence, by employees of the company contracted by the Office of the State Attorney to copy their files, International Legal Imprints, and I gave said company instructions to copy every document, file label, note, notation, message pad, handwriting on files, and every item whatsoever its nature contained in the files provided by the State Attorney;
9. On September 7, 2000, I had the following conversation with Mr. Joel Rosenblatt:

Ms Calzon: "I want a complete copy of the Gersten files"
Mr. Rosenblatt: "We have requests from other people for the same file, you know. We are going to send it out to be copied all at once for everyone that wants copies, but I have to call Australia

to get approval for the payment of the cost of copying."

10. On September 8, 2000, the secretary at the State Attorney's Office who was supervising the copying of the file, Gwen Lowery, brought me an order form for me to detail what I wanted copied and introduced me to the representative of International Legal Imprints.
11. On September 8, 2000, I heard Gwen Lowery instruct the copy service to make 4 copies of the file. She further stated "Ms. Calzon gets whatever she ordered, but the other three copies are to be 'bland' copies." I then asked "what are 'bland copies'?" Ms. Lowery stated "You know, just the usual copies of typewritten documents." I then reiterated to the representative of the copy service "I want complete copies, I want everything copied just as I have outlined in the order form." Ms. Lowery then again said "the other three copies are to be 'bland copies';"
12. On September 8, 2000, as I was leaving the State Attorney's Office I had a conversation with Joel Rosenblatt as follows:

Ms. Calzon: "Have you obtained approval from Australia?"
Mr. Rosenblatt: "I did not get through to the gentleman but I will try again tonight."
After a discussion about the difference in time and what time it was in Australia. Mr. Rosenblatt then said "A lot of people are interested in these files. We have requests for a copy from the Congress and from the Australian Law Society." I then asked him "Really? Why is Congress interested?" He then went into his office retrieved documents and read me the name of the person requesting the file and the name of the Congressional committee, the House Committee on Governmental Reform.

13. On September 11, 2000, I was notified by the copy service that the copies would be available on September 12, 2000;
14. On September 12, 2000, I received a telephone call from Gwen Lowery at the State Attorney's Office. Ms. Lowery stated "we have your copies and you bring your payment to me and I will give you your copies."
15. I called the copy service and advised them that "I had not want my copies delivered to the State Attorney's Office for fear of tampering." I had instructed them to deliver the copies directly to me to avoid any opportunity for the State to tamper with my copies.
16. When the copy service realized that I would not accept the copies that had been returned into the custody of the State Attorney, they told me that "we have a set of copies which we have been instructed to mail to the Law Society in Australia. We could give you that copy that has been in our custody all the time, and send the Law Society the copies that were delivered to the State Attorney."
17. I then stated "I don't want those copies because those are 'bland' copies and I wanted a complete set." He then explained that "as it turned out we made four complete sets just like you ordered them because it was not cost effective to run the production line two separate times;"
18. On September 13, 2000, at 11:50 p.m. International Legal Imprints provided me with what purported to be a copy of the complete file contained in five boxes in the same condition as they had received it from the State Attorney's Office;
19. Upon inspecting the contents of the copied boxes, I found that documents

previously contained in the files I examined at the State Attorney's Office were missing, although the folders previously containing the missing documents were enclosed. Specifically, the file folder labeled "MPD-Osborn" was in the boxes. However, Det. Osborn's murder investigation report was missing.

Maria del Carmen Calzon, Esq.
1050 Spring Garden Road
Miami, Florida 33136

Maria del Carmen Calzon, Esq.

State of Florida
County of Dade

The foregoing was sworn to by Maria del Carmen Calzon, Esq., who is personally known to me.

Maria C. Cruz
Notary Public

My Commission Expires:

STATE OF FLORIDA)
)
COUNTY OF DADE)

FILED FOR RECORD
1992 JUN 12 PM 1:
CLERK, CIRCUIT COURTS
DADE COUNTY, FLA.

AFFIDAVIT

On June 5, 1992 I received from Motorola, Inc. copies of subscriber calls for phone numbers (305) 775-2644, (305) 794-6473 pursuant to a subpoena issued to Motorola Cellular Service, Inc. for the period of April 29, 1992 and April 30, 1992. These two telephones are mobile phones listed to Joseph M. Gersten and were located in his automobile on the evening of April 29, 1992 and the following day April 30, 1992. A copy of these records are attached hereto and made part hereof.

In the affidavit submitted by me on June 4, 1992 in support of a search warrant for the body of Joseph M. Gersten, I related information provided to me and other investigators by witnesses in the Gersten investigation. One witness, Lisa McCann, told me that she was picked up by Joseph M. Gersten on April 29, 1992 between 6:16 and 7:00 p.m. This time was estimated by her and can not be correct in view of the attached toll records. However, information provided in my original search warrant affidavit includes statements from Claudia Lira, Kenny Elswick and Roberto Maldonado. All of these witnesses estimated the time of Gersten's arrival at 471 NE 31st Street, Miami to be in the early evening hours of April 29, 1992. Also in my original affidavit I included information provided me by cab driver Robert Cabanas. Robert Cabanas stated that he picked up Joseph M. Gersten from Biscayne Boulevard and 29th Street in the evening of April 29, 1992. Gersten reported his automobile stolen to Jack Eads, City Manager of Coral Gables who immediately called the Coral Gables police at 10:11 p.m.

The information provided in this affidavit was relayed to Judge Thomas S. Wilson, Jr. by Assistant State Attorney Richard D. Gregorie at approximately 4:00 p.m. on June 5, 1992 and Judge Thomas S. Wilson, Jr. stated that this additional information did not affect the probable cause in the original affidavit in support of the search warrant for Joseph Gersten's body.

Ronald C. [illegible]
AFFIANT

Sworn to and subscribed before me this
the 5th day June, 1992. (personally known to me)

Jean Bowman Ward
NOTARY PUBLIC STATE OF FLORIDA AT LARGE

My Commission Expires: JEAN BOWMAN WARD
My Comm. Exp. Nov. 19, 1992
Bonded thru Notary Public Underwriters

KSM1100 00H/M5382 BILLED USAGE MOTOROLA 06/03/92 12:2
CMD ==>
ACCOUNT: 77008985 C NAME: METRO DADE COUNTY-313627 CTL: 1277
INVOICE MONTH: PHONE: 305 794 6473 CALL DATE: TO

CALLED LOCATION	CALLED NUMBER	DATE	TIME	BILL DUR	AIR	TAX/ LAND	TOTAL	C I	ROAME SYSTE
PHONE: 305/794-6473	ESN: 820A2887			RATE	PLAN: E				
INCOMING		04/29	8:0515P	1.0	0.25	0.00	0.25	C	00037
INCOMING		04/29	8:0545P	1.0	0.25	0.00	0.25	C	00037
INCOMING		04/29	8:0627P	1.0	0.25	0.00	0.25	C	00037
MIAMI FL	305/576-4521	04/30	4:1011A	1.0	0.25	0.00	0.25	C	00037

KSM1100 00H/M5382 BILLED USAGE MOTOROLA 06/03/92 12:

CMD ==>

ACCOUNT: 77008985 C NAME: METRO DADE COUNTY-313627 CTL: 1277

INVOICE MONTH: PHONE: 305 794 6473 CALL DATE: TO

CALLED LOCATION		CALLED NUMBER	DATE	TIME	BILL DUR	AIR	TAX/ LAND	TOTAL	C I	ROAMI SYSTI
PHONE: 305/794-6473		ESN: 820A2887			RATE PLAN: E					
MIAMI	FL	305/375-5121	04/29	11:1923A	2.0	0.70	0.00	0.70	C	00037
MIAMI	FL	305/375-5121	04/29	11:2100A	1.0	0.35	0.00	0.35	C	00037
MIAMI	FL	305/371-2000	04/29	11:2156A	2.0	0.70	0.00	0.70	C	00037
MIAMI	FL	305/375-5121	04/29	11:2430A	1.0	0.35	0.00	0.35	C	00037
MIAMI	FL	305/596-8053	04/29	11:4407A	1.0	0.35	0.00	0.35	C	00037
MIAMI	FL	305/371-2000	04/29	12:3542P	3.0	1.05	0.00	1.05	C	00037
INCOMING			04/29	12:3849P	4.0	1.40	0.00	1.40	C	00037
MIAMI	FL	305/371-2000	04/29	12:4314P	2.0	0.70	0.00	0.70	C	00037
MIAMI	FL	305/371-2000	04/29	3:3831P	2.0	0.70	0.00	0.70	C	00037
MIAMI	FL	305/375-5121	04/29	3:3953P	3.0	1.05	0.00	1.05	C	00037
MIAMI	FL	305/371-2000	04/29	4:5046P	9.0	3.15	0.00	3.15	C	00037
MIAMI	FL	305/661-1518	04/29	6:0421P	13.0	4.55	0.00	4.55	C	00037
INCOMING			04/29	7:0530P	1.0	0.25	0.00	0.25	C	00037

MESSAGE MOTOROLA CELLULAR SVCS

KSM1190 OOH/M5382 BILLED USAGE MOTOROLA 06/03/92 12:
CMD ==>
ACCOUNT: Z7008985 C NAME: METRO DADE COUNTY-313627 CTL: 1277
INVOICE MONTH: PHONE: 305 794 6473 CALL DATE: TO

CALLED LOCATION	CALLED NUMBER	DATE	TIME	BILL DUR	AIR	TAX/ LAND	TOTAL	C ROAM I SYST

PHONE: 305/794-6473 ESN: 820A2887 RATE PLAN: E

[redacted]

KSM1100 00H/M5382 BILLED USAGE MOTOROLA 06/03/92 12:3
CMD ==>
ACCOUNT: 77012243 C NAME: METRO DADE COUNTY CTL: 1277
INVOICE MONTH: PHONE: 305 775 2644 CALL DATE: TO

CALLED LOCATION	CALLED NUMBER	DATE	TIME	BILL DUR	AIR	TAX/ LAND	TOTAL	C I	ROAME SYSTE
PHONE: 305/775-2644		ESN: 8215CAA5		RATE	PLAN:	BAS			
PERRINE	FL 305/253-7560	04/30	10:4542A	5.0	1.75	0.00	1.75	C	00037
PERRINE	FL 305/253-7560	04/30	10:5134A	2.0	0.70	0.00	0.70	C	00037
PERRINE	FL 305/252-3739	04/30	10:5333A	1.0	0.35	0.00	0.35	C	00037
PERRINE	FL 305/253-7560	04/30	11:0016A	1.0	0.35	0.00	0.35	C	00037
MIAMI	FL 305/670-9424	04/30	3:5714P	3.0	1.05	0.00	1.05	C	00037
PERRINE	FL 305/253-7560	04/30	3:5951P	1.0	0.35	0.00	0.35	C	00037

KSM1106 00H/M5382 BILLED USAGE MOTOROLA 06/03/92 12:
CMD ==>
ACCOUNT: 77012243 C NAME: METRO DADE COUNTY CTL: 1277
INVOICE MONTH: PHONE: 305 775 2644 CALL DATE: TO

CALLED LOCATION		CALLED NUMBER	DATE	TIME	BILL DUR	AIR	TAX/ LAND	TOTAL	C I	ROAM SYST
PHONE: 305/775-2644		ESN: 8215CAA5			RATE PLAN: BAS					
MIAMI	FL	305/375-5121	04/29	2:0610P	1.0	0.35	0.00	0.35	C	0003
PERRINE	FL	305/232-9755	04/29	2:4952P	2.0	0.70	0.00	0.70	C	0003
PERRINE	FL	305/238-6694	04/29	3:1044P	2.0	0.70	0.00	0.70	C	0003
PERRINE	FL	305/251-0191	04/29	7:1306P	1.0	0.25	0.00	0.25	C	0003
PERRINE	FL	305/252-2355	04/29	7:3104P	1.0	0.25	0.00	0.25	C	0003
PERRINE	FL	305/253-7560	04/29	7:4043P	2.0	0.50	0.00	0.50	C	0003
PERRINE	FL	305/253-7560	04/29	8:0612P	2.0	0.50	0.00	0.50	C	0003
PERRINE	FL	305/233-8787	04/29	8:0739P	1.0	0.25	0.00	0.25	C	0003
MIAMI	FL	305/375-3423	04/30	9:1825A	2.0	0.70	0.00	0.70	C	0003
PERRINE	FL	305/235-6661	04/30	9:3657A	2.0	0.70	0.00	0.70	C	0003
PERRINE	FL	305/253-7560	04/30	9:4029A	1.0	0.35	0.00	0.35	C	00037
DIR. ASST.	FL	305/411-	04/30	9:4106A	1.0	0.35	0.60	0.95	C	00037
PERRINE	FL	305/238-9882	04/30	9:4136A	1.0	0.35	0.00	0.35	C	00037

MESSAGE MOTOROLA CELLULAR SVCS

MOTOROLA INC.

Law Department

June 4, 1992

Investigator Ronald C. Ohlzen
Criminal Investigations Division
State Attorney's Office
1351 N.W. 12th Street
Miami, FL 33125

Re: Subpoena issued to
Motorola Cellular Service, Inc.
Subscriber No. (305) 775-2644;794-6473

Dear Mr. Ohlzen:

Motorola is in receipt of the above-referenced subpoena dated May 12, 1992. I have enclosed billing information for April 29, 1992 through April 30, 1992.

If you have any questions, please feel free to contact me at [redacted]

Sincerely yours,
MOTOROLA, INC.

Terri L. Leff
Legal Assistant

Enclosures

1501 W. Shure Drive, Arlington Heights, IL 60004 • (708) 632-4000

6/8/92 Telephone toll records

775-2644 - Portable px.

4/29	2:06 pm	375-5121	G's Office (Comm.)
"	2:49	232-9755	Bell Short Stop 17452 S.W. 104 Ave.
"	3:10	238-6694	- not in bressers
"	7:13	251-0191	~~not in bressers~~ Desmond Dorsey 17272 S.W. 103 Ave.
	7:37	252-2355	
	7:40	253-7560	Darlene Alexander bill: Audwin Alexander 14235 Madison St.
	8:06	253-7560	"
	8:07	233-8787	Desiree Davis 11401 S.W. 193 ST.
4/30	9:18 am	375-3423	not in bressers
	9:36 am	235-6661	Prof. Fed. Savings Bk. 11205 S. Dixie Hi.
	9:40 am	253-7560	Darlene Alexander
	9:41 am	238-9882	Spicey Nails 13734 S.W. 152 St.
	10:45 am	253-7560	Darlene Alexander
	10:51 am	"	
	10:53 am	252-3739	Wilbur B. Bell 17452 S.W. 104 Ave.

EXHIBIT 21

11^{00} am	253-7560	Darlene Alexander
3^{57} pm	670-9424	not in bressers
3^{59} pm	253-7560	Darlene Alexander

COULD GERSTEN HAVE DONE WHAT HE WAS ACCUSED OF DOING?

6:28 p.m.	Gersten was with Marc Klinger at Klinger's clothing store.
7:00 p.m.	State Attorney's Office Investigator Ron Ohlzen filed a sworn affidavit stating that Gersten could not have solicited McCann before 7:00 p.m.
7:13 p.m.	Gersten's car was in the possession of thieves.

Lisa McCann said Gersten did the following before his car was stolen:

- picked her up;
- drove to the crack den;
- had sex with McCann;
- smoked crack;
- sent Maldonado out for more crack **three times**; and
- got robbed at knifepoint by Elswick and Lira.

COULD ALL OF THIS HAVE HAPPENED IN 13 MINUTES?

AN ANALYSIS PREPARED BY AUSTRALIAN SOLICITOR A.H. SWANWICK AND SUBMITTED IN AN AUSTRALIAN LEGAL PROCEEDING

This section uses telephone records to explain how Gersten could not have done what he was accused of doing.

E51 Upon analysis, there is no credible scenario which can reconcile the stories of McCann, Lira, Elswick and Maldonado with the objective fact of the telephone records. The only explanation for those telephone records is that by 7.13 pm

EXHIBIT
23

somebody had already accessed Gersten's car and was using the mobile phone located in the car. That is, the car was stolen very shortly after he arrived home and went upstairs to sleep.

An analysis designed to test the hypothesis that Gersten is guilty would be as follows:

(i) Assuming Gersten solicited McCann at 6.45-7.00pm, could the alleged events have concluded so as to enable the thieves to be in possession of the phone by 7.13pm? That is an elapsed time of 13-28 minutes – clearly an insufficient time. Hence if Gersten was at the crack-house at all, he must have arrived after 7.13 pm and it must have been he who made the call at 7.13pm.

(ii) Could the alleged events (commencing at 6.45-7.00pm) have concluded so as to enable the thieves to be in possession of the phone by 7.31pm? That is an elapsed time of 31-46 minutes (and only 18 minutes after the 7.13 call) – likewise a clearly insufficient time for the events as described to have occurred. Hence if Gersten was at the crack-house at all, he must have arrived after 7.31 pm and it must have been he who made the calls at both 7.13pm and 7.31 pm.

(iii) <u>But</u> if he arrived just after 7.31 pm , that does not leave time for the events to have occurred before the next call at 7.40 pm (only 9 minutes), so it must have been Gersten who also made the 7.40pm call, and he arrived at the crack-house after 7.40pm.

(iv) <u>But</u> if he arrived about 7.40pm, there is clearly an insufficient time for the events to have occurred and the phone to be in possession of the thieves by the *next* phone calls at 8.06 pm and 8.07 pm: a gap of only 26-27 minutes. So he can't have arrived before 7.40pm, and he can't have arrived between 7.40pm and 8.07pm. Hence if Gersten was at the crack-house at all, he must have arrived after 8.07pm and it must have been he who made the calls at 7.13pm and 7.31pm and 7.40pm and 8.06pm and 8.07pm.

(v) Could the alleged events have occurred if Gersten did not arrive until after 8.07pm? Unfortunately for the hypothesis, that would not leave sufficient time for the crack-house events to have occurred, and for Gersten to then have arrived home before Kennedy (and with Richey already having attended). Allowing for a 20-minute drive, Gersten <u>must</u>

> have caught a cab by 9.30 in order to be home before Kennedy at 9.50pm. But allowing even only 25 minutes for Richey to have been called and attended, that means that Gersten must have been home by 9.25 and therefore must have caught a cab no later than 9.05pm (even assuming that Richey arrived virtually simultaneously with Kennedy). And that means that the crack-house events can have occupied no more than 58 minutes from the moment of solicitation to the moment of catching a cab (8.07pm-9.05pm). That is clearly insufficient. If one assumes that Richey had arrived for <u>any</u> period of time before Kennedy, the hypothesis becomes even less credible.

In fact, much of the above analysis is scarcely necessary because another piece of evidence makes the point just as clearly. At Paragraph E122 hereunder it is pointed out that during the morning of April 30th while the car was indisputably in the possession of the car thieves, a particular telephone number (unassociated with Gersten) was rung on the car phone on several occasions. That same telephone number was also rung on that phone during the evening of April 29th at each of 7.40pm and 8.06pm. [58] Unless one is to postulate the extraordinary coincidence of Gersten ringing a phone number at 7.40pm and 8.06pm which just happens to be a number that the thieves also ring several times the following morning, it necessarily follows that it was the thieves who made those calls on April 29th. That means they must have had possession of the car by 7.40 pm. As pointed out above, it is physically impossible for the "crack-house" events to have occurred <u>and</u> for the thieves to have gotten possession of the phone by 7.40pm. They did have possession of the phone by 7.40pm. Hence as a matter of inexorable logic, the "crack-house" events did not occur – at least, not involving Gersten.

Ohlzen knew all of these matters. He had the phone records. They forced him to concede that McCann's estimate of the time she supposedly met Gersten must be wrong. As a matter of stark indisputable logic they revealed that the crack-den scenario must necessarily be false – and yet he simply adjusted the facts so as to leave his theory looking tenable, rather than abandoning the theory when it was disproven by the facts.

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[58] McNaughtan Exhibit 7A.12

ED-302 (REV. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 5/11/92

LISA McCANN, also known as (AKA) LISA MARIE McCANN, TRACY MARIE SHEEMAN, ELIZABETH HALE and LISA MCCORMACK, date of birth [redacted], was interviewed by Special Agents (SA) of the FEDERAL BUREAU OF INVESTIGATION. After being advised of the identity of the interviewing agents and that the nature of the investigation concerned allegations of drug use by Dade County Commissioner JOSEPH M. GERSTEN, McCANN provided the following information:

She is a prostitute and a crack cocaine user that has frequented Biscayne Blvd. for several years. She first met GERSTEN, whose identity she recently learned, approximately two years ago. McCANN believed the meeting occurred several months before she went to jail, in January, 1991, for violating the terms of her probation. McCANN stated that she was walking along the street, when GERSTEN drove up in a blue Mercedes Benz.

GERSTEN motioned her to the car and informed her that he wanted to have a good time, smoke some crack (cocaine) and have oral sex performed on him. GERSTEN stated that he didn't want to be anyplace where a lot of people would be running in and out. GERSTEN stated that he just wanted to enjoy himself and get "some head" (fellatio).

McCANN directed GERSTEN to drive over to an apartment, she lived in at the time, located near 29th. Street between Northeast 2nd. Avenue and Miami Avenue. McCANN advised that the building has since been torn down. McCANN occupied an apartment on the first floor. She stated that the building was owned by a guy named FELIPE last name unknown (LNU). McCANN described the apartment as a one room place with a bed. McCANN advised that she took GERSTEN inside, he gave her fifty dollars to buy some crack cocaine and took his clothes off.

see main for indexing

FBI-00000556

EXHIBIT 24

Investigation on 5/1/92 at Miami, Florida File # 194B-MM-52974 194B-MM-62974 SUB A

by SA JACQUELINE BOUCHER SA MICHAEL H. BONNER Date dictated 5/6/92

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

McCANN advised that she ran up to a second floor apartment to purchase the crack cocaine from a dealer, named ANGEL, who lived there. McCANN advised that GERSTEN provided her with the money to purchase the crack cocaine. She stated that she cut the crack rocks in half and then she sold the rocks to GERSTEN at full price.

McCANN estimated that GERSTEN personally smoked about $250 worth of crack cocaine. McCANN stated that she made at least seven or eight trips to the second floor apartment. She stated that she made $450 from GERSTEN that night which included the money she made from selling him the crack cocaine and money he paid her for her services. McCANN stated that GERSTEN asked her a lot of strange questions.

One question in particular concerned how much money would she charge him to take a enema. McCANN stated that GERSTEN offered her fifty dollars to take an enema. McCANN stated that she declined and he offered her a hundred dollars. McCANN stated that she again declined. McCANN stated that she probably would have taken the enema, however, she wanted to see how much money he was willing to pay for it. She stated that she knew he had a lot of money.

GERSTEN told McCANN that he was a medical doctor. McCANN stated that she thought he stated that his name was Mike or some other common name. McCANN stated that GERSTEN stayed for several hours. She stated that she tried several times to get rid of him by commenting that she had to go out and make some more money. McCANN stated that GERSTEN'S response was to give her more money. She stated that once she found out that he was willing to give her more money for her time, she used the ploy over and over again. McCANN stated that finally she had to kick GERSTEN out of her apartment to get rid of him.

McCANN stated that the next time she saw GERSTEN was on Wednesday evening, April 29, 1992, around 6::00 or 7:00 p.m.. McCANN stated that she was on Northeast 2nd. Avenue and 35th. Street. McCANN stated that GERSTEN pulled up in the same blue Mercedes Benz that he drove the first time. GERSTEN asked McCANN to get inside the vehicle. McCANN stated that she told GERSTEN that she had to do something first and asked him to give her ten minutes. McCANN stated that she had to stop by a Dentist office to pick up some of her clothes.

McCANN stated that approximately ten minutes later, she met GERSTEN at a corner gas station located at Northeast 2nd. Avenue and 36th. Street. McCANN advised that she didn't recognize GERSTEN until after he told her that he just wanted a safe place to smoke some crack and a blow job.

McCANN advised that she directed GERSTEN to drive to a garage apartment, that she occasionally stays at, located at 471 Northeast 31st. Street. GERSTEN gave McCANN twenty dollars for the blow job and two twenty dollar bills to purchase the crack. McCANN advised that when they arrived at the apartment, ROBERT LNU was at the apartment. She informed ROBERT that she needed to use the back room, gave him the forty dollars and asked him to get some crack cocaine for her.

McCANN advised that CLAUDIA LNU was also in the apartment and she tried to get CLAUDIA to leave because she knew CLAUDIA would beg for some money. McCANN stated that she gave CLAUDIA ten dollars for her glass stem crack pipe so GERSTEN would have his own pipe to use. McCANN advised that she had a piece of crack cocaine with her when GERSTEN picked her up and she sold that to him for twenty dollars while they waited for ROBERT to return.

McCANN stated that ROBERT returned with the crack approximately ten to fifteen minutes later. McCANN advised that they smoked the crack cocaine that ROBERT brought back and that they sent ROBERT out for crack cocaine at least three times. McCANN stated that again she cut the crack rocks and sold him the cut rocks at full value. McCANN stated that this time, however, GERSTEN was a little more knowledgeable about crack because he knew that she wasn't selling him twenty dollars worth of crack.

McCANN stated that on one of ROBERT'S trips, they asked him to also stop and buy some cigarettes and sodas. She stated that while ROBERT was gone, GERSTEN gave her twenty dollars to buy a pair of fishnet stockings that he wanted her to wear. McCANN stated that she just pocketed the money, went into the living room and told CLAUDIA what GERSTEN wanted. McCANN instructed CLAUDIA not to bother going for the stockings, but to act like she was going to go.

McCANN stated that ROBERT returned with the dope, cigarettes and sodas. McCANN advised that she had paid ROBERT about $30 for making the trips and he left to get his own crack. McCANN stated that She, CLAUDIA and GERSTEN are the only people in the apartment. CLAUDIA was in the living room, while McCANN and GERSTEN were in the bedroom. McCANN advised that she heard a knock on the door and she assumed that it was ROBERT.

McCANN stated that she heard CLAUDIA open the door. McCANN could hear CLAUDIA in the living room speaking with someone. Several minutes later, there was a knock on the bedroom door. McCANN put her clothes on and answered the door. McCANN stated that when she opened the door, CLAUDIA and her boyfriend KENNY LNU were at the door. McCANN stated that KENNY had a large knife and CLAUDIA told her to get out of the way.

McCANN stated that she moved out of the way and went into the living room because she knew that they were going to rob GERSTEN. McCANN stated that she heard KENNY ask GERSTEN for his money. After several minutes, KENNY came out of the bedroom and asked McCANN where the money was that GERSTEN paid her. KENNY stated that GERSTEN claimed that he gave McCANN a hundred dollars.

McCANN advised that she informed KENNY that GERSTEN only paid her sixty-five dollars, although he actually had given her eighty-five dollars. McCANN stated that she had no intention on giving her money to KENNY so she ran out of the house in her stocking feet. McCANN stated that she ran into ROBERT, who was coming up the street, and told him that CLAUDIA and KENNY were ripping her date (customer) off.

McCANN stated that she returned to the apartment approximately one hour later. McCANN stated that all the doors to the apartment were open. McCANN stated that after she walked inside, KENNY ran up behind her and pointed a gun to her head. KENNY accused McCANN of setting him up. KENNY informed McCANN that her date was a state senator or a state commissioner. McCANN stated that KENNY told her that he had GERSTEN'S badge, credit cards and his car.

McCANN estimated that she was at the house with GERSTEN for approximately one hour prior to CLAUDIA and KENNY robbing him (GERSTEN).

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

June 15, 2001

James C. Wilson, Esq.
U.S. House of Representatives
Committee on Government Reform
Washington, DC 20515

Dear Jim:

I am writing in response to Chairman Burton's letter to John Collingwood dated June 14, 2001, requesting the notes taken by Special Agent Michael Bonner during his interview of Lisa McCann on May 1, 1992.

As you know, the FBI's practice is to provide its oversight Committees with relevant FD-302s, the official forms completed by Agents in documenting their interviews of witnesses. We have, in fact, provided the Committee with the FD-302 of the May 1, 1992 interview of Lisa McCann. Nevertheless, because of the Chairman's specific interest in the notes for this interview, we have agreed to make an exception to our ordinary practice and provide the notes as requested.

Please contact me at 202/324-5051 if you have any questions.

Sincerely,

Eleni P. Kalisch

Eleni P. Kalisch
Section Chief
Government Relations

Enclosure

LISA MCCAN- 12-21-65 — SSAN 072-60-7851
5'8" 125 LBS. BROWN HAIR HAZEL EYES.
AROUND BUCKNER IN & OUT 471 N.E. 81ST STREET

LISA
I PICKED HIM UP ONE TIME ABOUT TWO YEARS AGO - BEFORE I WENT TO PRISON - WENT TO PRISON JAN 1991 VIOLATION OF PROBATION - POSSESSION OF COCAINE - PERCOCETS AFTER I PICKED HIM UP WHILE BEFORE I WENT TO JAIL CITY OF MIAMI. DRIVING A BLUE MERCEDES - I WAS WALKING UPTOWN - HE MUST HAVE STOPPED ME. HE SAID COOK THIS IS WHAT I WANT TO DO. I WANT TO HAVE A GOOD TIME - SMOKE SOME CRACK BUT I DON'T WANT TO DO WHERE PEOPLE WILL BE RUNNING IN AND OUT. HE SAID HE JUST WANTED TO ENJOY HIMSELF AND GET SOME HEAD. I TOOK HIM TO 79TH STREET BETWEEN N.E. 2ND & NORTH MIAMI AVE - A GUY NAMED ~~[illegible]~~ BILLY OWNED THE PLACE - IT HAD BEEN TORN DOWN - I STAYED THERE TWICE. I TOOK HIM THERE. I RAN UPSTAIRS TO GET THE CRACK I MADE $450 ON THAT NIGHT. I GOLD CUT HIS CRACK AND GIVE HIM HALF. I WAS SELLING HIM HIS OWN CRACK. HE DIDN'T CARE - HE SMOKED ABOUT $350 OF CRACK. ASKED ME A LOT A STRANGE QUESTIONS LIKE IF I PAID YOU ENOUGH WOULD YOU TAKE AN ~~[illegible]~~ ENEMA. ~~[illegible]~~ ASK IF I WOULD DO IT FOR FIFTY. I SAID NO - $100. I SAID NO. I WAS JUST TRYING TO GET HIM TO GET IT UP. THERE I KNOW HE HAD A LOT OF MONEY. HE TOLD ME HE WAS A MEDICAL DOCTOR. I THINK HE SAID HIS NAME WAS MIKE I THINK A REAL COMMON NAME. I BROUGHT THE CRACK FROM SOME GUY NAME ANGEL. HE STAYED HOURS. I COULDN'T WAIT TO GET RID OF HIM - I HAD TO THROW HIM OUT.

ONE DOWN PLACE WITH GEO. TAKES HIS CLOTHING OFF.
HE HANDED ME ABOUT $50.00, WENT ABOUT THE
CRACK. CAME DOWN STARTED SMOKE, I GAVE
HIM A BLOW JOB WHILE HE SMOKE - DON'T
THINK OF ANYONE PREMIUM ABOUT HIM.
WHEN I CUT THE CRACK UP STAIRS I WENT UP
AT LEAST 7 OR EIGHT TIMES I MADE AT
LEAST $400. FROM SELLING THE CRACK AND
TRICKING WITH HIM. IT STARTED OUT GIVING
ME $40.00 AND [illegible] I TOLD HIM I DON'T
HAVE TIME FOR THIS BECAUSE I HAD TO GO OUT AND
MAKE MORE MONEY SO HE GAVE ME MORE MONEY
TO STAY. WHEN I FOUND THAT WORKED I KEPT
TELLING HIM THAT I HE KEPT PAYING ME
MORE MONEY. AFTER HE LEFT THE
NEXT TIME I SAW HIM WAS WEDNESDAY.
I WAS ON 2ND AVE AND 25 ST. STREET.
HE PULLED UP ON THE MEDIAN. HE SAID
COME ON GET IN. I SAID I DON'T HAVE
TIME BUT GIVE ME 10 MINUTES AND I'LL
MEET AT THE GAS STATION AT 36TH AVE.
2ND AVE. I STOPPED BY THE DRUG DEALER
OVER THERE I HAD HIS CLOTHES THERE
I MET HIM AT THE GAS STATION AT 1ST
FIRST I DIDN'T RECOGNIZE WHEN I GOT IN THE
CAR AND HE STARTED TALKING HE SAID LOOK
I JUST WANT TO GET SOME CRACK AND ASK
IF I HAD SOME PLACE TO GO I WANTED A
SAFE PLACE TO GET A BLOW JOB AND GET
HIGH SO I TOOK HIM TO 25 ST STREET
HE GIVES ME $20.00 AND GOES TO GET
CRACK - I GAVE HIM THE RESULT I TOLD
THEM I NEEDED TO USE THE BACK ROOM
AGAIN TRIED TO GET THEM TO GET OUT OF
THE HOUSE BECAUSE THEY WOULD BE FOR
MONEY. I GAVE CLAUDIA TWO DOLLARS
FOR HER PIOF BECAUSE I DON'T WANT
[illegible] MORE PROMPT TOUCH ANYMORE

A PIECE OF DOPE WITH ME AND I GAVE HIM A HIT
HE PAID HIM TWENTY DOLLARS FOR - ROBERT CAME
BACK. I GUESS HE SENT FOR MORE DOPE - I
GUESS I CUT HIS DOPE WE SENT ROBERT BACK
WE JUST HE AND I IN THE ROOM WE SMOKE THE
DOPE - GIVES ME MORE MONEY, FOR DOPE I GIVE
IT TO ROBERT + ROBERT IS ACSO SUPPOSE TO STOP AT
THE STORE FOR SODA + CIGARETTES - AFTER
HE LEAVES WE WERE IN THE BACK SMOKING
HE GAVE ME $70 FOR STICKING AND A CRACK
BUT I JUST PICKED THE $70.00 BUCKS -
I TOLD CLAUDIA WHAT HE WANTED BUT DID
HER NOT TO DO THING BUT TO ACT LIKE SHE WAS GOING
TO GO THAN ROBERT COME BACK AND WE SMOKE
DOPE - ROBERT HAS MADE A LITTLE MONEY SO
HE COMES TO GET DOPE ON HIS OWN - SO ITS
ME + CLAUDIA + JOE + I AT BACK - THEN
I HEAR A KNOCK AT THE DOOR - CLAUDIA -
OPEN THE DOOR I GET KEN ... (I THOUGHT IT
WAS ROBERT AGAIN) - THEY TALK FOR A WHILE IN
FRONT THEN THEY KNOCK ON THE DOOR - I PUT ON
MY CLOTHES AND - I ANSWER THE DOOR - KEN AND
CLAUDIA ARE AT THE DOOR CLAUDIA SAY LISA
JUST GET OUT OF THE WAY AND KEN HAD THIS BIG
KNIFE - KNOCKED OUT OF THE WAY BECAUSE I
KNEW THEY WERE COMING TO ROB US. THEY WENT
INTO THE BEDROOM AND ~~KEN CAME OUT AND~~
WHERE THE MONEY. KEN COME OUT AND ASK
ME WHERE THE MONEY KENNY SAID THIS
GUY SAID HE GAVE YOU $100. I SAID LOOK ALL I HAVE
IS $65.00 - I HAD $85.00 BUT I WASN'T GOING
TO GIVE IT TO HIM I SAID LOOK I WORKED TO
HARD FOR MY MONEY. I RAN OUT OF
THE HOUSE WITH NO SHOES ON - I THEN RAN
INTO ROBERT I TOLD HIM THEY WERE TRYING
TO RIP THIS GUY OFF. [I FIRST MET HIM
HIM ABOUT MAYBE 6 OR 7:O'CLOCK - IT ~~WAS~~ HAPPENED
AGAIN WITHIN A HOUR.

KEN COMES RUNNING UP WITH A GUN HE SAID
BITCH I BLOW YOUR FUCKING HEAD OFF -
HE SAID WHY YOU SET ME UP LIKE THAT HE
SAID THE GUY WAS A STATE SENATOR IN
STATE COMMISSIONER OR SOMETHING HE HAD
A BADGE AND ALL THESE FUCKING CARDS -
AND HE SAID HE HAD HIS FUCKING
CAR.
YESTERDAY SOME KID ASKED ME IF
I HAD SOME ROLLING PAPER. I SAID ALRIGHT
YOU KIND OF YOUNG. IT TURNS OUT HE'S ABOUT
15 YEARS OLD: HE ASKED ME IF I KNEW ABOUT
THIS FAGGOT BUT SHOT LAST WEEK. HE SAID
THE FAGGOT WAS NAMED CHAMPAIGN - HE
SAID A GUY IN A BLUE MERCEDES SHOT
HIM. HE SAID SOME AND CHAMPAIGN
GOT IN THE CAR - CHAMPAIGN GOT HIS KEY
WOULDN'T GIVE THEM BACK AND THE GUY
SHOT & KILLED HIM - HE PAID THE KID
$300.00 TO KEEP HIS MOUTH SHUT.

EXCERPT OF HANDWRITTEN NOTES TAKEN BY FBI AGENT MICHAEL BONNER OF INTERVIEW OF LISA MCCANN

Yesterday, some kid asked me if I had some rolling paper. I said aren't you kind of young. It turns out he is about 15 years old. He asked me if I know about this faggot got shot last week. He said the faggot was named Champaign. He said a guy in a blue Mercedes shot him. He said some how Champaign got in the car. Champaign got his keys wouldn't give them back and the guy shot and killed him. He paid the kid $300.00 to keep his mouth shut.

○