IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IN RE SPECIAL GRAND JURY 81-1	)
	)
(Clark Van Dresser Swift,	)
	)
Intervenor.)	)

MEMORANDUM OPINION

This matter comes before the court on intervenor Swift's motion to stay enforcement of a subpoena duces tecum until decision of intervenor's appeal of this court's denial of his motion to quash that subpoena. For reasons stated below, the court grants intervenor's motion.

Certain personal property of Swift, enumerated in the court's Memorandum Opinion and Order of December 11, 1981, was taken pursuant to a search warrant issued by Fairfax County, Virginia, authorities. Swift was subsequently tried and convicted of a narcotics offense in state court. After conviction, the state court ordered return of the property at issue here to Swift. However, before the property was returned, a federal subpoena duces tecum was served on those in possession of the property, Assistant Commonwealth's Attorney Thomas Gallihue and Trooper Robert Miller of the Virginia State Police. Next, the state court vacated its order directing return of the property to Swift. Swift then moved this court to quash the subpoena. The court denied his motion.

Had this court quashed the subpoena, Swift could then have moved the state court to reinstate its order of return of the property. If he had received the property, federal authorities could have served a subpoena duces tecum on him personally. Swift then could have refused to honor the subpoena, and could have appealed from a holding of contempt. See Cobbledick v. United States, 309 U.S. 323 (1940); United States v. Ryan, 402 U.S. 530 (1971).

However, Swift is not in possession of the property, and therefore cannot obtain an appeal in the manner outlined above. Moreover, he cannot count on those now in possession risking contempt rather than "letting the cat out of the bag."[1] Unless he is able to appeal now, he will lose the

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[1] Indeed, Swift has every reason to suspect that the state authorities will gladly comply with the subpoena. The state government took the property from Swift against his will in the first place. This is not a case in which a party has voluntarily submitted documents to another party who later becomes subject to a subpoena duces tecum commanding the production of those documents. Cf., e.g., Fisher v. United States, 425 U.S. 391 (1975) (Internal Revenue Service summons).

the opportunity to contest the right of the government to have the property, because the government already will have it. Immediate appeal is appropriate. See Perlman v. United States, 247 U.S. 7 (1918); In re Katz, 623 F.2d (2d Cir. 1980); United States v. Doe, 455 F.2d 753 (1st Cir. 1972), vacated and remanded on other grounds sub nom. Gravel v. United States, 408 U.S. 606 (1972). Without a stay of the subpoena, immediate appeal would be pointless. Therefore the court stays execution of the subpoena as to the property enumerated in this court's order of December 11, 1981, until intervenor has obtained a decision on appeal.

Date: Dec. 22, 1981

Richard C. Williams
United States District Judge