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8  
9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 In re GRAND JURY SUBPOENA  
12 dated February 1, 2006, and June 8, 2006

**No. CR 06-90064 MISC MMC**

13 JOSHUA WOLF,  
14  
15 Subpoenaed Party.

**PROSPECTIVE APPELLANT WOLF'S  
MOTION FOR BAIL PENDING APPEAL OR  
IN THE ALTERNATIVE A STAY OF THE  
DISTRICT COURT MANDATE PENDING  
APPEAL**

**RECALCITRANT WITNESS APPEAL**

16  
17 **I. INTRODUCTION AND STATEMENT OF FACTS**

18 Appellant Joshua Wolf moves this Court for bail pending the determination of this appeal  
19 pursuant to 28 U.S.C. § 1826(b) in case this Court finds him in civil contempt. The appeal will  
20 be as of right. *In re Grand Jury Subpoena Dated June 5, 1985 (John Doe)*, 825 F.2d 231, 236 n.  
21 3 (9th Cir. 1987).

22 Wolf has been subpoenaed by a federal grand jury as a witness with possible information  
23 concerning the grand jury's investigation of a July 8, 2006, assembly of anarchist activists.  
24 Investigators have asked Wolf to confirm his association with the anarchists and wanted  
25 information on an "Anarchist Action." They have asked him to provide the raw video footage of  
26 the July 8, 2006 assembly. Mr. Wolf has provided fully truthful responses to these inquiries.  
27 The government has the edited video footage and has not exhausted other avenues.  
28

1 Wolf has not been granted immunity from prosecution and has been subpoenaed to testify  
2 before the grand jury. However, Wolf does not wish to provide the video footage to the grand  
3 jury, arguing in open court on March 30, 2006, June 15, 2006, and July 20, 2006, that as a  
4 journalist under the First Amendment to the United States Constitution and Article I, Section  
5 2(b) of the California Constitution and state statute<sup>1</sup> protects him from compelled production.  
6 He has previously asserted his First and Fifth Amendment privileges against compelled  
7 production of the video tape to the grand jury and asserts the same privileges now. Furthermore,  
8 Wolf claims that the compelled production of the video tape subjects him to self-incrimination  
9 and, as a result, he need not produce the video footage. *See, e.g., In re Grand Jury Subpoena,*  
10 *Dated April 18, 2003, 383 F.3d 905 (9th Cir. 2004).* In an in camera filing, Wolf provided his  
11 reasoning for invoking the Fifth Amendment to the United States Constitution.  
12

13 This Court summarily denied Mr. Wolf's First and Fifth Amendment privilege claims  
14 against compelled disclosure of the video footage on June 15, 2006. After Wolf confirmed that  
15 he would still refuse to provide the video footage to the grand jury based on the privileges, a civil  
16 contempt proceeding was scheduled for July 20, 2006. Based on this Court's ruling in the Greg  
17 Anderson case and the June 15, 2006 hearing, Wolf believes that this Court will find him in civil  
18 contempt.

19 Wolf assumes for the purposes of this motion that he will be remanded to custody  
20 immediately on July 20, 2006, and Wolf asks for bail pending or, in the alternative, a stay of the  
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22 <sup>1</sup> Art. I, § 2(b) of the California Constitution, and Evidence Code § 1070(a) provide  
23 identically, in pertinent part:

24 A publisher, editor, reporter, or other person connected with or employed upon a  
25 newspaper, magazine, or other periodical publication, or by a press association or wire service,  
26 or any person who has been so connected or employed, cannot be adjudged in contempt by a  
27 judicial, legislative, administrative body, or any other body having the power to issue subpoenas,  
28 for refusing to disclose, in any proceeding as defined in Section 901, the source of any  
information procured while so connected or employed for publication in a newspaper, magazine  
or other periodical publication, or for refusing to disclose any unpublished information obtained  
or prepared in gathering, receiving or processing of information for communication to the public.

1 mandate for 2 weeks to permit Wolf time to file a notice of appeal and to seek a further stay from  
2 the Court of Appeals. **Declaration of Jose Luis Fuentes In Support of Motion for Bail**  
3 **(“Fuentes Decl.”) Exh. A, Notice of Appeal.**

## 4 **II. LEGAL STANDARD**

5 Under 28 U.S.C. § 1826(b), “no person confined pursuant to subsection (a) of this section  
6 shall be admitted to bail pending the determination of an appeal . . . if it appears that the appeal is  
7 frivolous or taken for delay.” Thus, if the appeal is neither frivolous nor taken for the purposes  
8 of delay, bail should be granted. *In re Grand Jury Proceedings (Kimberly Trimiew)*, 9 F.3d 1388  
9 (9th Cir. 1993).

10 Alternately, Wolf requests a stay of the district court’s order, pursuant to Fed. R. Civ. P.  
11 62. Factors to be considered include: 1) the likelihood of Wolf’s success on the merits of his  
12 appeal; 2) the likelihood of irreparable injury unless the stay is granted; 3) no substantial harm  
13 to third parties; and 4) and no harm to the public interest. *Delaware Valley Citizen’s Council for*  
14 *Clean Air V. Commonwealth of Pa.*, 674 F.2d 987 (3d Cir. 1982); *Ruiz v. Estelle*, 666 F.2d 854  
15 (5<sup>th</sup> Cir.) cert. denied, 460 U.S. 1042 (1982); *Decker v. U.S. Department of Labor*, 661 F.2d 598  
16 (7<sup>th</sup> Cir. 1980); *Long v. Robinson*, 432 F.2d 977 (4<sup>th</sup> Cir. 1970).

## 18 **III. WOLF’S APPEAL IS NOT FRIVOLOUS**

### 19 **A. Fifth Amendment Privilege Against Self Incrimination**

20 Wolf has raised colorable arguments for appeal. A grand jury witness is entitled to refuse  
21 to answer questions based on the Fifth Amendment privilege against self incrimination.  
22 *Branzburg v Hayes*, 408 U.S. at 689-90, 92 S.Ct. 2646 (1972). Here, the government has failed  
23 to grant Wolf immunity and refused to agree to a protective order re: disclosure of the video tape  
24 to state authorities, and thus, Wolf may properly decline to testify before the grand jury. *See* 28  
25 U.S.C. §§ 6002-03. Wolf claims two types of Fifth Amendment privilege against compelled  
26 production: 1) the materials themselves, and 2) the act of producing the materials.  
27  
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1 Wolf submitted in camera the underlying reasons for his assertion of a Fifth Amendment  
2 privilege as to the materials themselves. See *U.S. v. Drollinger*, 80 F.3d 389 (9th Cir. 1996)  
3 (Fifth Amendment “inquiry is best made in an in camera proceeding, where the defendant is  
4 given ‘the opportunity to substantiate his claims of the privilege and the district court is able to  
5 consider the questions asked and the documents requested by the summons’” citing *United States*  
6 *v. Argomaniz* 925 F.2d 1349, 1355 (11<sup>th</sup> Cir. 1991)). The government refuses to grant Wolf  
7 immunity and enter into a protective order not to disclose grand jury evidence to state authorities.  
8

9 The Court’s order compelling Wolf to turn over his personal video tape on June 15, 2006  
10 violates the act of production doctrine and is equivalent to ordering him to “produce the firearm  
11 allegedly used in an offense.” See *Goldsmith v. Superior Court*, 152 Cal.App.3d 76, 199  
12 Cal.Rptr. 366 (1984) (holding that defendant is not required to produce the firearm allegedly  
13 used in offense); *Fisher v. U.S.* 391, 410 n.11 (1976)(holding that an act of producing a self-  
14 authored document is the same as that of producing chattel or a document authored by another);  
15 *In re Grand Jury Subpoenas Served February 27, 1984*, 599 F. Supp. 1006 (E.D. Wash.  
16 1984)(holding that petitioner could claim privilege as to contents of only those nonbusiness  
17 documents authored by him which contained thoughts so personal that disclosure would infringe  
18 on right to privacy). The Ninth Circuit has applied the act of production doctrine to quash a  
19 grand jury subpoena under the Fifth Amendment. See *Grand Jury Proc. On February 4, 1982*,  
20 759 F.2d 1418 (9<sup>th</sup> Cir. 1985) (holding that the subpoena must nonetheless be quashed as  
21 production of the defendant’s documents would “relieve the government of proving the  
22 existence, possession, or authenticity of the records, and, thus could be incriminating.”) *Id.* at  
23 1421.

24 **B. The Traditional Rule That Grand Juries Are Not Licensed To Engage In Arbitrary**  
25 **Fishing Expeditions, Nor Select Targets For Investigation Out Of Malice Or Intent To**  
26 **Harass Should Apply Because The Government Is Prosecuting First Amendment Activity**  
27

28 Grand juries “are not licensed to engage in arbitrary fishing expeditions, nor may they

1 select targets of investigation out of malice or an intent to harass.” *United States v. R.*  
2 *Enterprises, Inc.*, 498 U.S. at 299 (1991). In *R. Enterprises* the Supreme Court placed the  
3 burden of showing unreasonableness on the subpoenaed party under Fed.R.Crim. P. 17(c) if the  
4 subpoena was issued through normal channels. *Id.* 498 U.S. at 293. Wolf has met his burden to  
5 show that this subpoena was not issued through normal channels. *See In re Atterbury*, 316 F.2d  
6 106, 111 (6th Cir. 1963) (where the government attorney does not deny facts set forth by counsel  
7 for the witness concerning the background circumstances, court may properly assume statements  
8 have factual support.). Furthermore, Wolf has met his burden to show that under Rule 17 (c) this  
9 subpoena is oppressive and intended to harass.  
10

11 The government has presented no evidence through declarations to dispel Wolf’s claim  
12 that the grand jury subpoena is being issued as a fishing expedition or with the intent to harass  
13 for the following reasons: the government has not procedurally or substantively complied with  
14 28 C.F.R. § 50.10(n) (requiring approval from the U.S. Attorney General before a subpoena is  
15 issued to a journalist); the government’s investigator and state investigator are jointly  
16 investigating the July 8, 2005 assembly to get around the California Shield Law; and the full  
17 field investigation of anarchists and anarchism by the government uses the grand jury as a tool of  
18 intimidation, and oppression. ***See Fuentes Decl. In Support of Motion to Quash.***

19  
20 Furthermore, the government has argued that it is searching for identities of the protestors at the  
21 march and once it obtains the unpublished video footage it might share the evidence to aid in  
22 state prosecution. ***See, Hearing Transcript before Maria Elena James, 11:19-25; 10-11:24-6.***

23 The government’s recent filing is indicative of the fishing expedition the government has taken.

24 The government’s position to keep the grand jury transcript sealed is based on speculation that  
25 somewhere in the universe there exist “potential future witnesses...who are amendable to  
26 offering relevant testimony,” and there exist “unidentifiable witnesses who have so far avoided  
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1 having to disclose their knowledge,” and somehow these “unidentifiable witnesses” who might  
2 be unidentifiable targets “may flee or take other measures to avoid detection.” U.S. Response re  
3 Unsealing Grand Jury Transcript, 2:15-22.

4           The raw video footage sought by the government is irrelevant, *inter alia*, because the  
5 government admits having the edit video footage that captures the police car and there is no  
6 nexus between the alleged arson of the SFPD police car and federal financial assistance to  
7 establish federal jurisdiction under 18 U.S.C. ¶ 844(f). The government claims, vaguely, that “it  
8 is indisputable that SFPD receives financial assistance from a variety of local, state, and federal  
9 sources.” **See Gov’t’s Opposition to Motion To Quash, 4:8-9.** The government does not say  
10 that it bought the squad car in question, or owns it. Nor is it likely that the Commerce Clause,  
11 after *United States v. Lopez*, 514 U.S. 549 (1995), would even support such an attenuated claim  
12 of federal jurisdiction. Without a nexus between federal financial assistance and the specific  
13 SFPD police car alleged to have been the subject of arson, there is no federal jurisdiction to  
14 conduct a grand jury investigation unless the government is engaged in a fishing expedition to  
15 harass and drive a wedge between Wolf’s coverage of anarchist assembly and anarchists. The  
16 government’s proffered basis for federal jurisdiction is thus a transparent ruse and pretext. *See*  
17 *U.S. v. Archer* 486 F.2d 670 (2<sup>nd</sup>. Cir. 1973).

18           In this case the government has the edited video footage, the state police report, the help  
19 of the state investigators, and now has the state preliminary hearing transcripts of what occurred  
20 on July 8, 2005. There is no compelling reason for the prosecutor to cast his fishing line in  
21 Wolf’s pool that is protected by the First Amendment. The government can learn what Mr. Wolf  
22 knows by replicating Mr. Wolf’s knowledge, e.g., speaking to witnesses identified in the edited  
23 video tape, speaking with the SFPD and reviewing the preliminary hearing transcripts in state  
24 criminal proceedings. *See Zerilli v. Smith*, 656 F.2d 705, 712-14 (D.C. Cir. 1981); *United States*  
25 *v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000); *Carey v. Hume*, 492 F.2d 631, 636-37 (D.C. Cir. 1974);  
26  
27  
28

1 28 C.F.R § 50.10 [emphasizing the balancing of the need for the evidence, and exhaustion of  
2 alternative sources].

3 **C. Branzburg’s First Amendment Ruling Does Not Preclude Rule 501’s Post-**  
4 **Branzburg Ruling To Develop Federal Common-Law Privileges**

5 Three years after the 1975 *Branzburg* decision, Congress enacted the Federal Rules of  
6 Evidence including Rule 501, which governs evidentiary privileges, Rule 501 explicitly  
7 establishes new standards that did not exist when the Court decided *Branzburg* and “authorizes  
8 federal courts to define new privileges by interpreting ‘common law principles... in the light of  
9 reason and experience.’” *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996)(quoting Rule 501). As of  
10 today, “forty-nine states and the District of Columbia, as well as federal courts and federal  
11 government, support recognition of a privilege for reporters’ confidential sources.” *In re: Grand*  
12 *Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1172 (D.C. Cir. 2006).

13  
14 The Third Circuit in *Riley v. Chester*, 612 F.2d 708 (3d. Cir. 1979) recognized a  
15 reporter’s privilege under Rule 501. California Supreme Court has ruled that the California  
16 shield statute is absolute when the district attorney seeks evidence from a newsperson. *Miller v.*  
17 *Superior Court* (1999) 21 Cal.4th 883, 887. The Ninth U.S. Circuit Court of Appeals has also  
18 recognized a qualified First Amendment privilege. *Shoen v. Shoen*, 5 F.3d 1289, 1292-93 (9th  
19 Cir. 1993) (*Shoen I*) (“[w]e held in *Farr* that the journalist's privilege recognized in *Branzburg*  
20 was a “partial First Amendment shield” that protects journalists against compelled disclosure in  
21 all judicial proceedings, civil and criminal alike. *Farr*, 522 F.2d at 467. Nevertheless, we stressed  
22 that the privilege is qualified, not absolute, and held that the process of deciding whether the  
23 privilege is overcome requires that “the claimed First Amendment privilege and the opposing  
24 need for disclosure be judicially weighed in light of the surrounding facts, and a balance struck  
25 to determine where the paramount interest lies.”) Recently, Circuit Judge Tatel from the District  
26 of Columbia Circuit issued a well-reasoned concurring judgment in which he would recognize a  
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1 federal common law reporter's privilege in light of reason and experience. *In re: Grand Jury*  
2 *Subpoena, Judith Miller*, 438 F.3d 1141, 1172, 1177 (D.C. Cir. 2006).

3 Indeed the United States Department of Justice has recognized and adopted a policy and  
4 guideline to respect a reporter's privilege. *See* 28 C.F.R. § 50.10. The Guideline admonishes:

5 Because freedom of the press can be no broader than the freedom of reporters to  
6 investigate and report the news, the prosecutorial power of the government should not be  
7 used in such a way that it impairs a reporter's responsibility to cover as broadly as  
8 possible controversial public issues. This policy statement is thus intended to provide  
9 protection for the news media from forms of compulsory process, whether civil or  
10 criminal, which might impair the news gathering function.

11 This Court summarily denied a news gather privilege under the First Amendment and federal  
12 common law to refuse to testify and turn over First Amendment material on June 15, 2006. Wolf  
13 anticipates a similar ruling on July 20, 2006, when he raises the same defense in the contempt  
14 proceedings.

15 Wolf's appeal is not frivolous and is not interposed for the purpose of delay. These very  
16 same First Amendment issues are being litigated before Judge White of this district and will be  
17 argued on August 4, 2006. Absent a different ruling than what is anticipated from this Court, an  
18 appeal will follow in the case before Judge White in which the same First Amendment issues  
19 which the 9<sup>th</sup> Circuit has not ruled on, will be litigated. Thus, Wolf's request for bail pending the  
20 determination of this appeal should be GRANTED.

21 **C. Stay Pending Appeal Is Warranted.**

22 Here, for the reasons previously stated, Wolf has a strong likelihood of success on the  
23 merits of his appeal and, if the request for a stay is denied, he will be incarcerated immediately.  
24 Wolf's loss of liberty, if the stay is denied, constitutes irreparable injury. Wolf is currently  
25 working at the Peralta Community College District as the Outreach Director at Peralta Colleges  
26 Television. The station has been on the air since 1980. Wolf's work at the award-winning  
27 public television station is invaluable to the service area of over 200,000 households. **Exhibit B,**  
28 **Letter of Support, Jeffrey Heyman, Executive Director.** Given that the appeal under the  
recalcitrant witness statute must be resolved in an expedited manner, there will be no harm to

1 other parties or the public interest in permitting Wolf to remain on bail pending the prompt  
2 resolution of this matter. **See Fuentes Decl. Exhibit C, San Francisco Board Of Supervisors,**  
3 **Ross Mirkarimi Proposed Resolution resisting the federal government’s intervention in**  
4 **the City and County of San Francisco’s investigation of the July 8th, 2005 G-8 protest and**  
5 **expressing support for the California Shield Law submitted on July 18, 2006 for Board**  
6 **consideration; Exhibit D, Jill Henry, letter from member of the public in support of Josh**  
7 **Wolf.**

8 **D. Release Without Money Bond**

9 Under 18 U.S.C. § 3146 there is a strong presumption in favor of release on personal  
10 recognizance or unsecured bond. Section 3146 requires such release unless the Court determines  
11 “that such a release will not reasonably assure the appearance of the person as required.”

12 Mr. Wolf has lived in San Francisco since 2004. His family resides in California. He has  
13 worked at Peralta Community College District since 2005. He has attended all mandatory Court  
14 appearance. He is not a risk of flight and poses no danger to other persons in the community.  
15 Based on information and belief he has no criminal record to speak of. Mr. Wolf should be  
16 release on his own recognizance.

17 **IV. CONCLUSION**

18 For the foregoing reasons, Wolf’s request for bail pending appeal or, in the alternative,  
19 for a stay of the district court’s mandate, should be granted.

20 July 20, 2006

Respectfully Submitted  
Siegel & Yee

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22  
23 By: \_\_\_\_\_  
24 JOSE LUIS FUENTES, Attorney for  
25 Joshua Wolf  
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