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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 In re GRAND JURY SUBPOENA
13 Dated February 1, 2006.

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

14 JOSHUA WOLF,
15 Subpoenaed Party.

**SUBPOENAED PARTY WOLF'S REPLY IN
SUPPORT OF MOTION FOR DE NOVO
DETERMINATION, ADDITION TO THE
RECORD, AND EVIDENTIARY HEARING**

16
17 Date: June 7, 2006
18 Time: 2:30 p.m.
19 Courtroom: 7 (19th Fl.)
20

21 Subpoenaed Party Joshua Wolf, through his undersigned counsel, hereby Replies in
22 Support of his Motion For De Novo Determination of Magistrate Judge Maria-Elena James'
23 April 5, 2006 Order Denying Joshua Wolf's Motion To Quash Subpoena.

24 **AUTHORITY / ANALYSIS**

25 **I. SUMMARY OF THE ARGUMENT**

26 Mr. Wolf seeks a court order to quash the government's grand jury subpoena requiring
27 him to produce the unpublished video footage of a July 8, 2005 protest march, and the personal
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1 appearance subpoena to divulge the identities of the people who participated and organized the
2 protest march for the following reasons:

3 A. The local prosecutor never fought authorization for the grand jury subpoena in
4 violation of 28 C.F.R. § 50.10(n) (requiring approval from the U.S. Attorney General before a
5 subpoena is issued to a journalist)¹;

6 B. The local prosecutor investigator and state investigator are jointly investigating
7 the July 8, 2005 protest march to get around the California Shield law²;

8 C. The local prosecutor is in violation of Rule 6 of the Federal Rules of Criminal
9 Procedure because it has not sought the authority of this Court to share future evidence obtained
10 through the federal grand jury with state agencies³;

11 D. The local prosecutor's search for the identities of the protestors at the march chills
12 Mr. Wolf's journalist activities⁴;

13 E. The local prosecutor has less intrusive means to obtain the information it seeks
14 without infringing on Mr. Wolf's First Amendment rights⁵;

15 F. The full field investigation of anarchists and anarchism by the local prosecutor's
16 office uses the grand jury as a tool of intimidation, and oppression⁶.

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22 ¹ See Motion to Quash, section III.A, and footnote 1 at page 4; Motion for De Novo,
section III.A, pages 6-7.

23 ² See Motion to Quash footnote 1 at page 4; Motion for De Novo, section III.A, pages 6-
24 7.

25 ³ See Motion to Quash, section III.A; Reply to Motion to Quash, section II.B. pages 4-6;
Motion for De Novo, section III.C, pages 10-11.

26 ⁴ See Motion to Quash, section III.B pages 7-13; Reply to Motion to Quash, section II.C.
pages 6-7; Motion for De Novo, section I page 3.

27 ⁵ See Motion to Quash, section III.B page 12; Reply to Motion to Quash, section II.A.
28 pages 3-4; Motion for De Novo, section III.B (2), pages 8-10.

1 For these reasons the Court should conclude that “normal channels” were not followed by
2 the local prosecutor’s office and therefore, the presumption of reasonableness does not attach to
3 the grand jury subpoena in order to allow the intrusion into Mr. Wolf’s privacy and First
4 Amendment rights. The C.F.R. establishes the “normal channel” to issue a grand jury
5 subpoena’s to a journalist. The “normal channel” is to seek approval from a higher authority to
6 insure there is compelling government interest. The “normal channel” is not for the local
7 prosecutor to decide when to intrude on the privacy and First Amendment rights of a journalist,
8 but to seek higher authorities for this decision.

10 Since “normal channels” were not followed the Court should engage in a traditional first
11 amendment analysis requiring the local prosecutor to establish a compelling interest for Mr.
12 Wolf’s unpublished video tape, and a sufficient connection between the information sought and
13 the particular investigation of the grand jury.

15 II. ARGUMENT

16 A. Standard of Review

17 The government has conceded that this Court’s order of April 25, 2006 to review
18 Magistrate Judge Maria-Elena James’ April 5, 2006 order (hereafter “Order”) de novo is within
19 the Court’s discretion. (United States’ Opposition To Motion For De Novo Review (“Opp.”) at
20 p.4.)

22 B. Burden of Proof

23 Movant has argued and proved that the government has not followed “normal channels”
24 in issuing the grand jury subpoena in order for the presumption that a grand jury subpoena
25 “issued through the normal channels is presumed to be reasonable” R. Enterprises, Inc., 498 U.S.
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27 ⁶ See Motion to Quash, section III.B pages 7-13; Reply to Motion to Quash, section II.C.
28 pages 6-7; Motion for De Novo, section III.B (1), pages 7-8.

1 292, 300 (1991) The government has not procedurally or substantively complied with 28 C.F.R.
2 § 50.10(n) (requiring approval from the U.S. Attorney General before a subpoena is issued to a
3 journalist). Therefore, the presumption of reasonableness to the government’s subpoena stated in
4 R. Enterprises does not attach. Id. at 498 U.S. 300.

5
6 Since the R. Enterprise presumption is not applicable to the facts of this case and because
7 Movant’s First Amendment rights are implicated, the heavy burden to show reasonableness of
8 the grand jury subpoena to invade Movant’s First Amendment rights is on the government under
9 Fed. R. Crim. P. 17(c). See Morton v. Ruiz, 415 U.S. 199, 235, 94 S.Ct. 1055 (1974) [where the
10 rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.
11 This is so even where the internal procedures are possibly more rigorous than other wise would
12 be required.]; United States v. R. Enterprises, 498 U.S. 292, 293 (1991){to meet its burden of
13 unreasonableness the movant “might demonstrate that compliance would have First Amendment
14 implications”]; In re Grand Jury 87-3 Subpoena Duces Tecum, 955 F.2d 229 (4th Cir. 1992)
15 [Reversed and Remanded by the United States Supreme Court, issue was whether the First
16 Amendment requires heightened scrutiny of the grand jury subpoena]; Beverly v. United States,
17 468 F.2d 732, 748 (5th Cir. 1972);Gibson v. Florida Legislative Investigation Comm., 372 U.S.
18 539, 546, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963).

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20 Therefore, the proper test is for the government to demonstrate: (1) a compelling interest
21 in or need for the information sought; and (2) a sufficient connection between the information
22 sought and the criminal investigation. See Branzburg v. Hayes, 408 U.S. 665, 700 (1972).

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24 **C. The Court Is Not Being Asked To Rule On Whether The Department of**
25 **Justice Guidelines Create An Enforceable Right For The Movant, But The Court Is Being**
26 **Asked To Determine Whether The Grand Jury Subpoena Was Issued Through Normal**
27 **Channels**

1 The Court’s power to supervise the use of grand jury subpoenas is inherent in the Court’s
2 ability to supervise the use of process and to oversee the grand jury which it empanels. In Re
3 Seiffert, 446 F.Supp. 1153, 1155 (N.D.N.Y. 1978). As recognized by the Third Circuit,
4 “[f]ederal courts have an institutional interest in preserving and protecting the appearance and
5 the reality of fair practice before the grand jury.” United States v. Serubo, 604 F.2d 807, 816 (3d
6 Cir. 1979). In Serubo, the Court acknowledged the judiciary’s responsibility to oversee the
7 process, stating:

9 Where the potential for abuse is so great, and the consequences of a mistaken
10 indictment so serious, the ethical responsibilities of the prosecutor, and the
11 obligation of the judiciary to protect against even the appearance of unfairness,
12 are correspondingly heightened.

13 Id. at 817; see United States v. Owen, 580 F.2d 365 (9th Cir. 1978) (citing to courts’
14 inherent supervisory powers in connection with grand jury proceedings); United States v.
15 Basurto, 497 F.2d 781 (9th Cir. 1974) (“[a]n important function of our supervisory power is to
16 guarantee that federal prosecutors act with due regard for the integrity of the administration of
17 justice”); see also United States v. Samango, 607 F.2d 877 (9th Cir. 1979) (dismissing
18 indictment under the exercise of the court’s supervisory power). Fundamental principles of due
19 process likewise encompass the Court’s duty to provide oversight in the grand jury context. *See,*
20 *e.g.*, United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975); United States v. Leahey, 434 F.2d
21 7 (1st Cir. 1970); United States v. Heffner, 420 F.2d 809 (4th Cir. 1969).

23 Because Congress has delegated to Justice Department the power to give meaning to
24 statutory provisions and to promulgate standards, regulations adopted by Justice Department in
25 exercise of that delegated authority has the force of law, and they are bound by their own
26 regulations. U.S. v. Krieger, 773 F.Supp. 580 (S.D.N.Y.1991). In re: Grand Jury Subpoena,
27 Judith Miller, 397 F.3d 964, 975 (D.C. Cir. 2005) is distinguishable from the question being
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1 asked for determination by this Court. In Miller, Movant’s counsel asked the court to overturn
2 the contempt order on the grounds that 28 C.F.R. § 50.10 was violated. In this case, Movant is
3 not asking the Court to overturn a contempt order and is not asking the Court to quash the
4 subpoena because of non-compliance with C.F.R. However, Movant is asking the Court to use
5 its oversight duty of these grand jury proceedings and not apply the presumption stated in
6 Enterprises because the subpoena was not issued through “normal channels”.
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8 **D. The Evidence Before This Court Is More Than Sufficient For A**
9 **Determination That This Grand Jury Subpoena Was Issued In Bad Faith.**

10 The basic principle of law underlying Movant’s argument of bad faith is that the
11 government attorney does not deny facts set forth by counsel for Movant concerning the
12 background circumstances and intended use of the grand jury evidence, and therefore, the court
13 properly may assume the statements have factual support. See In re Atterbury, 316 F.2d 106,
14 111 (6th Cir. 1963).
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16 The government has presented no evidence through declarations to dispel Movant’s claim
17 that the grand jury subpoena was issued in bad faith for the following reasons: the government
18 has not procedurally or substantively complied with 28 C.F.R. § 50.10(n) (requiring approval
19 from the U.S. Attorney General before a subpoena is issued to a journalist); The government’s
20 investigator and state investigator are jointly investigating the July 8, 2005 protest march to get
21 around the California Shield law; and the full field investigation of anarchists and anarchism by
22 the government uses the grand jury as a tool of intimidation, and oppression. Furthermore the
23 government has argued that it is searching for identities of the protestors at the march and once it
24 obtains the unpublished video footage it might share the evidence to aid in state prosecution.
25 Therefore, not only was there bad faith in issuing the subpoena but there is bad faith in the
26 purpose and intended use of the grand jury evidence.
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1 **E. The Information Sought By The Local Prosecutor Is Available**
2 **Through Less Intrusive Means That Do Not Infringe On Movant’s First**
3 **Amendment Rights.**

4 Movant is challenging the subpoena on relevancy grounds and that it is oppressive
5 because it has been issued in “bad faith”. Movant is also challenging the subpoena because
6 “normal channels” were not followed in issuing the subpoena.
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8 The subpoena seeks un-published video footage of a journalist and the subpoena was not
9 issued through “normal channels” the government has the burden of showing that there are no
10 less intrusive means to obtain the identities of the protestor involved in the July 8, 2005 march.
11 See supra section B and C.

12 The government does not deny that it has in its possession the published version of the
13 July 8, 2006 video tape. The published video footage captures the identities of the people around
14 the police car who might have potentially violated 18 U.S.C. § 844(f)(1). The government can
15 have its paid investigators actually do the work by tracking down these people and using legal
16 means to obtain their information about the alleged subject of the grand jury investigation
17 without infringing on Movant’s First Amendment Activities. See, e.g., United States v. Ryan,
18 455 F.2d 728 (9th Cir. 1972) (court reversed conviction where the IRS sought records which it
19 could not have obtained through enforcement of an administrative subpoena, but which the
20 Government obtained instead through subpoenas *duces tecum*); In re September 1972 Grand
21 Jury, 454 F.2d 580, 585 (7th Cir. 1971) (“[I]t would be an abuse of the grand jury process for the
22 government to conduct a general fishing expedition under grand jury sponsorship with the mere
23 explanation that the witnesses are potential defendants”; “[W]e hold it to be an abuse of the
24 grand jury process for the Government to impose on that body to perform investigative work that
25 can be, and theretofore has been successfully accomplished by the regular investigative agencies
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1 of Government.”); *see also* Donner & Cerruti, “The Grand Jury Network,” The Nation, Jan. 2,
2 1972; Cowan, “The New Grand Jury,” *New York Times Magazine*, April 29, 1973⁷; In re Grand
3 Jury Proceedings (Scarce), 5 F.3d 397 (9th Cir. 1993).

4 In this case the government has the published video footage, the state police report, the
5 help of the state investigators, and now has the state preliminary hearing transcripts of what
6 occurred on July 8, 2005. There is no compelling reason for the prosecutor to cast his fishing
7 line in Movant’s pool that is protected by the First Amendment. The government can learn what
8 Mr. Wolf knows by replicating Mr. Wolf’s knowledge, e.g., speaking to witnesses identified in
9 the edited video tape, speaking with the SFPD and reviewing the preliminary hearing transcripts
10 in state criminal proceedings. See Zerilli v. Smith, 656 F.2d 705, 712-14 (D.C. Cir. 1981);
11 United States v. Ahn, 231 F.3d 26, 37 (D.C. Cir. 2000); Carey v. Hume, 492 F.2d 631, 636-37
12 (D.C. Cir. 1974); 28 C.F.R § 50.10 [emphasizing the balancing of the need for the evidence, and
13 exhaustion of alternative sources].
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16 CONCLUSION

17 Movant agrees with the government that the “issue here could not be more
18 straightforward” but disagrees that the grand jury subpoena is the least intrusive means to cast
19 the local prosecutor’s fishing line. The local prosecutor has not followed “normal channels” in
20 issuing the subpoena. The local prosecutor investigator and the state investigator are trying to
21 get around the California shield law in order to obtain the video footage. The government is
22 engaged in a full field investigation of anarchists and anarchism: The local prosecutor is using
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25 ⁷ “Officials of the Justice Department ... firmly endorse the idea that the juries should be
26 used to extract information the FBI can’t obtain ... A. William Olson, then head of the
27 department’s Internal Security Division, saw nothing wrong with the use of the grand jury as a
28 tool to develop broad information for the Government.” Cowan, “The New Grand Jury,” *New*
York Times Magazine, April 29, 1973.

1 the grand jury as a tool of intimidation, and oppression in this action. The local prosecutor is
2 searching for identities of the protestors and does not rule out sharing the grand jury evidence
3 with the state investigators which has the potential of violating Rule 6.

4 The local prosecutor's legal position taken in these proceeding is that it is seeking
5 identities of protestor at the march, that it can share grand jury information with state agencies
6 contrary to Rule 6, that it need not follow their own regulations promulgated in the C.F.R., and
7 that it is engaged in a national campaign against anarchists and anarchism. Because Movant's
8 First Amendment rights are implicated and "normal channels" where not followed the Court
9 must apply a heighten scrutiny when considering the governments position.
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11 Because the government has not shown that it has taken the least intrusive means to
12 obtain the information sought without infringing on Movant's First Amendment activity the
13 subpoena must be quashed.
14

15 Dated: June 5, 2006

Respectfully Submitted,

SIEGEL & YEE

Attorneys for Joshua Wolf
Subpoenaed Party

By:

JOSE LUIS FUENTES

CERTIFICATE OF SERVICE

I, Jose Luis Fuentes, certify that I served the Movant’s Reply in Support of his Motion De Novo, on the U.S. Attorney’s Office, Northern District of California, by causing personal service of these papers.

DATED: June 5, 2006

Jose Luis Fuentes