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Date: September 14, 2006 Page(s): 12 including cover

Re: JOSHUA WOLF

COMMENTS:

Please see attached. A copy will be FedEx to you. Thank you!

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No. 06-16403

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN RE: GRAND JURY PROCEEDINGS,
GRAND JURY 06-1

JOSHUA WOLF,
Witness-Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

GOVERNMENT'S MOTION TO REVOKE BAIL

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CR 06-90064 WHA

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No. 06-16403

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IN RE: GRAND JURY PROCEEDINGS,
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JOSHUA WOLF,
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v.

UNITED STATES OF AMERICA,
Appellee.

GOVERNMENT'S MOTION TO REVOKE BAIL

The United States requests that this Court issue an order revoking Appellant's bail and ordering him confined or, alternatively, remanding the matter for the district court to do so. Appellant's motion for bail pending determination of his appeal from the district court's order of confinement (the "Motion for Bail") was granted on August 31, 2006. This Court issued a memorandum opinion on September 8, 2006, affirming the district court's civil contempt order. Because Appellant's appeal was decided against him, he should no longer be free on bail pursuant to 28 U.S.C. § 1826(b).

PROCEDURAL BACKGROUND

On August 1, 2006, District Court Judge William Alsup found Joshua Wolf ("Wolf") in civil contempt pursuant to 28 U.S.C. § 1826 for his refusal to testify

and produce materials before a grand jury, denied his request for bail, and remanded him into custody. In so doing, the district court found that Wolf's "appeal would be frivolous and interposed for delay." SER 0092-0093.^{1/}

On August 3, 2006, Wolf filed his notice of appeal. EOR 170.^{2/} Because Wolf was confined pursuant to the district court's order, this Court was thereafter required to decide the appeal within 30 days of the filing of the notice of appeal, *i.e.*, by September 5, 2006.^{3/} 28 U.S.C. § 1826(b).

On August 4, 2006, Wolf filed the Motion for Bail.

On August 31, 2006, this Court granted Wolf's Motion for Bail and stated in its Order that "[t]his appeal and all other pending motions will be decided by the next motions panel." Wolf was released from custody on August 31, 2006, and remains out of custody now.

On September 8, 2006, this next motions panel issued its memorandum opinion affirming the district court's civil contempt order. The Court expressly rejected each of Wolf's claims on appeal. Although the Court did not specifically

^{1/} The government previously filed Supplemental Excerpts of Record in support of its opposition to bail motion and reply brief. These excerpts are referred to herein as "SER" and referenced by bates stamp page number.

^{2/} Appellant's Excerpts of Record filed with the underlying appeal are abbreviated "EOR," and referenced by page number.

^{3/} The 30th day from August 3, 2006, was Saturday, September 2, 2006, and Monday, September 4, 2006, was a holiday.

address Wolf's confinement or bail status, in affirming the district court's civil contempt order, which included an order of confinement, the Court implicitly affirmed that portion of the district court's order as well. SER 0092-0093.

ARGUMENT

BECAUSE THIS COURT RULED UPON WOLF'S APPEAL AND AFFIRMED THE DISTRICT COURT'S CIVIL CONTEMPT ORDER, WHICH INCLUDED A TERM OF CONFINEMENT, WOLF'S BAIL SHOULD BE REVOKED

The recalcitrant witness statute states that whenever a witness refuses "without just cause" to comply with a court order "to testify or provide other information," the district court may "summarily order his confinement" until "such time as the witness is willing to give such testimony or provide such information." 28 U.S.C. § 1826. The period of confinement is limited to the term of the grand jury. *Id.*

The clock is ticking on this grand jury's term of service and thus the coercive intent behind the recalcitrant witness statute is lessened with each passing day. The statute itself provides that bail may be granted only "pending the determination of an appeal taken by him from the order for his confinement." 28 U.S.C. § 1826(b). The Court's August 31st Order granting bail noted that it applied to "this appeal" and that "this appeal" would be decided by the next motions panel. The next motions panel has now spoken; Wolf's appeal is without

merit. Wolf's bail should be revoked.

Now that Wolf's appeal has been rejected, this Court is no longer bound by the requirement of 28 U.S.C. § 1826(b) relating to bail. In other words, nothing in the statute requires this Court to find that Wolf's further request(s) for review will be frivolous or for delay, although it is certainly the government's and district court's opinions that they would be. Further, the statute only defines who should not be admitted to bail, *i.e.*, if a contemnor's appeal is frivolous or taken for delay, he cannot be admitted to bail. It simply does not follow that anyone whose appeal is neither frivolous nor taken for delay is entitled to bail as a matter of right.

While authority on this specific issue is scarce, the Fourth Circuit addressed a similar situation in *In re July 1979 Term Special Grand Jury (Donahue)*, 656 F.2d 64 (4th Cir. 1981), *cert. denied*, 454 U.S. 964 (1981).^{4/} Donahue was confined for civil contempt after refusing to produce a document to a grand jury. *Donahue*, 656 F.2d 65. The Fourth Circuit affirmed the contempt order, denied his motion for a stay pending filing a petition for a writ of certiorari, and ordered him confined. *Id.* Once Donahue's petition was actually filed, he again sought bail pending determination of the petition. *Id.* The Fourth Circuit noted that it

^{4/} One decision by this Court, albeit under different circumstances than Wolf's, suggests that release on bail at this juncture is within the Court's discretion. *See In Re Michaelson*, 511 F.2d 882 (9th Cir. 1975), *cert. denied*, 421 U.S. 978 (1975).

was unclear whether the “frivolous or taken for delay” standard of 28 U.S.C. § 1826 applied to Donahue’s situation, but nevertheless denied bail for two reasons. *Id.* at 66. First, assuming § 1826 applied, the court found that Donahue’s petition was frivolous. *Id.* Second, and more important here, the Court distinguished Donahue’s situation on the basis that he had already lost on appeal. *Id.* Noting that the “frivolous or taken for delay” standard under § 1826 must consider that fact, the court reasoned that

[i]f § 1826(b) provides the appropriate standard, the differences between an appeal and a writ of certiorari should be considered in determining whether an appeal is frivolous or taken for purposes of delay. Here the small possibility of success measured against the effect of delay dictates a conclusion that the appeal is frivolous.

Id. Moreover, the court recognized that

[t]he contemnor's interest is lessened, because the validity of the contempt citation has been affirmed on appeal . . . The government's interest is significantly heightened as the duration of the delay increases. If a contemnor remains free on bail pending both an appeal and a petition for writ of certiorari, a grand jury's investigation may be seriously hampered. The contemnor, in some circumstances, may be able to outlast (or materially lessen the time to be served until) a grand jury expiration date. Bail during a possibly extended period pending resolution of the certiorari application may serve unreasonably to minimize the effect the contempt power is designed to achieve.

Id. at 66 n.3.

Like Donahue, Wolf’s interest has lessened because each of his claims was rejected on appeal. In fact, this Court’s opinion brings the total number of

to unequivocally reject Wolf's claims to six.

In rejecting Wolf's primary claim that he, as an alleged journalist, is entitled to refuse to comply with the grand jury subpoena pursuant to the First Amendment, this Court found that "the Supreme Court has declined to interpret the First Amendment to 'grant newsmen a testimonial privilege that other citizens do not enjoy.'" Memorandum 3, citing *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972). This Court went on to point out that "none of the authorities cited by either Wolf or the *amici* requires the district court to conduct a balancing test where, as here, there is no showing of bad faith and the journalist refuses to produce non-confidential material depicting public events." Memorandum 4.

The Court next summarily dispatched Wolf's second argument, *i.e.*, that the Court should recognize a common law journalist's privilege pursuant to Federal Rule of Evidence 501, by declaring that Wolf's argument "has been squarely rejected." Memorandum 5. And, Wolf's arguments based upon the Fifth Amendment fared no better. The Court unequivocally stated that "Wolf voluntarily created this videotape and, thus, the Fifth Amendment does not protect him from disclosing its contents," Memorandum 6-7, and found that Wolf "fail[ed] to explain how" producing the videotape would incriminate him. Memorandum 7. Wolf has exhaustively litigated his objections to testify and produce materials before the grand jury for seven months before six judges and

has lost every time. Even if his claims are not deemed frivolous, his chances for success if he seeks further review are measurably less than they were when he was released on bail.

As for prejudice to the government, it goes without saying that the district court's finding of civil contempt is undermined unless accompanied by confinement. Continued release of the defendant in the midst of his sentence vitiates the purpose of the recalcitrant witness statute and unjustly frustrates what six judges have deemed is a good-faith and lawful investigation.

Specifically, if bail is not revoked, Wolf will have – and no doubt take – 45 days to file a petition for rehearing of this Court's opinion after the mandate issues. Fed. Rules App. Proc. 40(a)(1) and 41(a). Further litigation in the form of a petition for certiorari are certain to prolong Wolf's release for an undeterminable time. A contemnor's ability, to some extent, to manipulate the speed of this process, was a significant concern in *Donahue*:

[r]eview of a writ of certiorari virtually without exception takes much longer than 30 days. Whether certiorari will be granted is extremely speculative. And the court that is to decide the bail motion has no control over whether, and, if so, when, there shall be review on the merits. The court cannot minimize the effect of bail on the contempt order.

656 F.2d at 66. If bail is revoked, Wolf's counsel will have an incentive to move more expeditiously if they intend to seek further review.

Criminal defendants released on appeal will inevitably serve their

sentences. In contrast, the grand jury's term will end and, as it stands now, Wolf has an incentive to protract these proceedings as long as possible to avoid serving the sentence Judge Alsup lawfully imposed. Revoking bail is thus consistent with the purpose of the recalcitrant witness statute, which is to coerce a witness who has unlawfully refused to comply with a lawful grand jury subpoena to comply.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that this Court issue an order revoking Wolf's bail status and ordering him confined and to surrender to the United States Marshals Service at 450 Golden Gate Avenue in San Francisco forthwith. Alternatively, the United States respectfully

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requests that this Court issue an order remanding the matter to the district court to revoke bail and order Wolf into confinement.

Dated: September 14, 2006

Respectfully submitted,

KEVIN V. RYAN
United States Attorney

BARBARA J. VALLIERE
Chief, Appellate Section



JEFFREY R. FINIGAN
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UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

Joshua Wolfe v. United States of America
No. 06-16403

The undersigned hereby certifies that she is an employee of the Office of the United States Attorney for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that she caused a copy of:

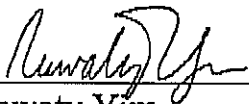
GOVERNMENT'S MOTION TO REVOKE BAIL

to be served this date upon the party in this action by placing the true copy thereof in a sealed envelope, and served by fax and Federal Express mail to the party addressed as follows:

Jose Luis Fuentes, Esq.
Siegel & Yee
499 14th Street, Suite 220
Oakland, CA 94612
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I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 14th day of September 2006, at San Francisco, California.



Rawaty Yim
Legal Assistant