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JOSHUA WOLF

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re GRAND JURY SUBPOENA Dated February 1, 2006. JOSHUA WOLF, Subpoenaed Party.	**Case No. CR-06-90064-MISC-MMC** **SUBPOENAED PARTY WOLF'S CORRECTED REPLY IN SUPPORT OF MOTION TO QUASH SUBPEONA *DUCES TECUM*** ***[FILED UNDER SEAL]*** Date: March 30, 2006 Time: 10:00 a.m. Courtroom: Grand Jury Room B (15th Fl.)

Subpoenaed Party Joshua Wolf, through his undersigned counsel, hereby Replies in Support of his Motion To Quash the Subpoena Duces Tecum issued to him and dated February 6, 2006. This "Corrected" version of the Reply contains a number of cosmetic, typographical, and structural changes from the Reply filed on March 16, 2006. It does not contain substantive changes to the arguments advanced. Mr. Wolf requests that the Court read and consider this corrected Reply in lieu of the uncorrected one.

AUTHORITY / ANALYSIS

I. SUMMARY OF THE ARGUMENT

Mr. Wolf has moved to quash the testimonial subpoena and subpoena *duces tecum* on several, inter-related grounds. The government has failed to show that the material sought is relevant, specific, and unavailable elsewhere, as required under Branzburg v. Hayes, 408 U.S. 665 (1972), and U.S. v. Nixon, 418 U.S. 683, 699-700 (1974) (otherwise, subpoena may be quashed as oppressive and unreasonable).[1] Furthermore, the subpoena constitutes a misuse of the grand jury, both because it seeks to convert the grand jury, an arm of the judiciary, into a tool of the executive to assist in a local criminal prosecution, and because it has been issued for ulterior purposes in violation of the movant's First Amendment rights. Lastly, the government's jurisdictional claim under 18 U.S.C. ¶ 844(f) is unsupported by the facts, unsupported by a Schofield affidavit, unreasonable under the Fourth Amendment, and contrary to federal law. See In re Grand Jury Proceedings, 486 F.2d 85 C.A.3, 1973 (3rd Cir. 1973).

The government seeks to dismiss Mr. Wolf's evidence, demonstrating that its subpoena of him is part of an overbroad, overzealous, illegal "national program" to, in the FBI's own words, investigate the "anarchist movement" (whatever that might be), as "a mass of irrelevant political rhetoric". (Gov't's Opposition, p1:25-26). Evidence of this FBI witch-hunt is growing day by day. In addition to the evidence already presented in the Motion, and the FBI's plain statement that it is engaged in such a program (see discussion, Part C, below), another FBI agent just disclosed during a speech in Texas on March 9, 2006 that the FBI has placed Indymedia (an amalgam of independent media websites), Food Not Bombs (a homeless food relief organization), and "Anarchists" (a diverse set of political beliefs) on a "Terrorist Watch List."[2] In addition, both Indymedia and Food Not Bombs are well-known for espousing anarchist

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[1] See Exhibit F, to Jose Luis Fuentes ("JLF") declaration, citing Judge Susan Illston order in U.S. v. Jerome Schneider, No. CR 02-0403 SI.

[2] See http://www.probative.blogspot.com/

politics. In sweeping aside extensive evidence of its illegal investigation of individuals and groups based on their political association and expression, in violation of cherished democratic principles and constitutional rights, the government is ignoring Mr. Wolf's rights under the First Amendment to be free from such pretextual intrusion into his own political association and expression, and asking this Court to endorse government behavior which recalls some of the darkest times in this country's history.

Put simply, the federal government has no business investigating this purely local matter. That it is doing so in the context shown, and in the wake of asking Mr. Wolf impertinent and irrelevant questions about anarchists and anarchist groups, is stark evidence that its claimed jurisdiction under 18 U.S.C. ¶ 844(f) – false as it is in any case, a discussed further below – is just another flimsy pretext and cover for political harassment, like the government has always resorted to in the past when it has stooped to such base behavior.

For these reasons, the Court should quash the subpoena, or at the very least, conduct an evidentiary hearing.

II. ARGUMENT

A. The government has failed to show that the material sought is relevant, specific, and unavailable elsewhere, as required under Branzburg v. Hayes, supra, and U.S. v. Nixon, supra.

The Ninth Circuit set forth the framework for analysis, requiring the government to establish the following under Federal Rule of Criminal Procedure 17(c):

> (1) that the [materials] are evidentiary and relevant; (2) that they are not otherwise procurable reasonably inadvance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production…; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'

Nixon, 418 U.S. at 699-700 (internal citation omitted), citing order by Judge Illston. (See JLF Dec. exhibit F.) The materials sought by the government are irrelevant, *inter alia*, because there is no nexus between the alleged arson of the SFPD police car and federal financial assistance to establish federal jurisdiction under 18 U.S.C. ¶ 844(f). *See* Govt's Opposition 4:9-12. That is, the government claims, vaguely, that "it is indisputable that SFPD receives financial assistance

from a variety of local, state, and federal sources." (Gov't's Opposition, p4:8-9). The government does not say that it bought the squad car in question, or owns it. Nor is it likely that the Commerce Clause, after United States v. Lopez, 514 U.S. 549 (1995), would even support such an attenuated claim of federal jurisdiction any more. Without a nexus between federal financial assistance and the specific SFPD police car alleged to have been the subject of arson there is no federal jurisdiction. The government's proffered basis for federal jurisdiction is thus a ruse and a pretext. *See* U.S. v. Archer 486 F.2d 670 (2nd. Cir. 1973).

B. The government has subpoenaed Mr. Wolf's testimony and property for the improper purpose of aiding a local prosecution, in violation of Fed. R. Crim. P. Rule 6.

The government concedes, as it must, that it is aiding in a local criminal prosecution. (Gov't's Opposition, p3:10). Records show that Inspector Militello solicited the help of the FBI's Joint Terrorism Task Force, and that FBI Special Agent Scott A. Merriam thereafter eagerly informed Ms. Militello that the FBI would be "assisting", on the pretext that someone had attempted an arson on a police vehicle. (JLF dec. Exhibit C.) It is an abuse of the grand jury process to seek to acquire information or discovery from a grand jury witness where the sole or dominant purpose is to use the information to support an already pending indictment. United States v. Star, 470 F.2d 1214, 1217 (9th Cir. 1972); United States v. Jenkins, 904 F.2d 549 (10th Cir. 1990); United States v. (Under Seal), 714 F.2d 347, 349 (4th Cir. 1983); In re Grand Jury Proceedings (Johanson), 632 F.2d 1033 (3d Cir. 1980); United States v. Gibbons, 607 F.2d 1320 (10th Cir. 1979); United States v. Beasley, 550 F.2d 261 (5th Cir.), cert denied, 434 U.S. 863 (1977); United States v. Woods, 544 F.2d 242, 250 (6th Cir. 1976), cert denied sub nom., Hurt v. United States, 429 U.S. 1062 (1977); United States v. Dardi, 330 F.2d 316 (2d Cir.), cert denied, 379 U.S. 845 (1965); In re Grand jury subpoenas issued May 3, 1994 for Walter B. Nash III, et. al., 858 F.Supp. 132 (D.Ariz. 1994).

"The relevant inquiry ... is ... whether [the party] has made a colorable showing that the dominant purpose of the inquiries was an improper one."); *see also* Simels, 767 F.2d at 29 ("The question of a grand jury's dominant purpose is not the typical question of historical fact nor even

the typical inquiry as to the state of mind of a witness or a party. It is the application of a legal standard designed to ensure that the grand jury, a body operating peculiarly under court supervision, [citation omitted], is not misused by the prosecutor for trial preparation. In applying that standard, we therefore must give more scrutiny than would be appropriate under the 'clearly erroneous' standard.").

The government claims that it "has broad subpoena power to aid in prosecuting criminal cases." (Govt's Opposition, p3:10-11). In fact, this is not true. The government does not have the authority to issue a subpoena to "aid" or "assist" in a pending criminal prosecution – not a federal one, and certainly not a local one. Rather, Rule 6 prohibits the federal government even from sharing information gleaned by way of grand jury inquisition with local authorities. See In Re Grand Jury Subpoenas served upon Edward Kiefaber, et al., 774 F.2d 969 (9th Cir. 1985) (quashing grand jury subpoenas as sanction for Government's disclosure of grand jury materials to local law enforcement agencies).

In addition, the timing and sequence of events cast significant doubt on the government's claims of good faith. AUSA Mark Zanides, head of the Northern District U.S. Attorney's Office's anti-terrorism unit, first subpoenaed Mr. Wolf to appear on February 2, 2006 – just a month before the preliminary hearing in the San Francisco District Attorney's case against Gabriel Myers, charged in the July 8, 2005 incident, was set to begin on March 1, 2006. (It was later continued.) *See* United States v. Furrow, 125 F.Supp.2d 1170, 1176 (C.D.Cal. 2000) ("The timing of the subpoena casts significant light on its purposes."), citing and quoting In re Grand Jury Subpoena (Simels), 767 F.2d 26, 29 (2d Cir. 1985); United States v. Kovaleski, 406 F.Supp. 267, 270 (E.D.Mich. 1976) (describing the timing of the subpoena as "unusual," court found that government acted improperly when the prosecutor called an unindicted coconspirator to testify before the grand jury in connection with an investigation of potential perjury charges against defendant after the court declared a mistrial and the government stated its intention to persist in its prosecution of defendant); United States v. Raphael, 786 F.Supp. 355, 359 (S.D.N.Y. 1992) (government's service of grand jury subpoenas on three defense witnesses on Christmas Eve

returnable the day after New Year's Day during preparation for a third trial of defendant "appears questionable").

C. The government has issued the subpoena as part of an overbroad, overzealous, and illegal political witch-hunt against anarchists, in violation of Mr. Wolf's First Amendment rights, and constituting a further misuse of the grand jury.

Mr. Wolf has already adduced strong evidence that the government is misusing its grand jury subpoena power, as it has done other times in history, as a tool in an illicit witch-hunt against people and groups who identify as anarchist, reminiscent particularly of the government's behavior during the Red Scare. The government has not contested most of this evidence. *See* In re Atterbury, 316 F.2d 106, 111 (6th Cir. 1963) (where government attorney does not deny facts set forth by counsel for the witness concerning the background circumstances, court properly may assume statements have factual support). Moreover, since Mr. Wolf filed his petition, the FBI's David Picard told Sacramento CBS affiliate Channel 13 on January 13, 2006 that "one of our major domestic terrorism programs is the ALF, EFF, and anarchist movement, and it's a national program for the FBI."[3] Thus, the FBI admitted that it is again investigating an entire ideology as if it constitutes a domestic security threat.

More recently, on March 9, 2006, FBI Supervisory Senior Resident Agent G. Charles Rasner stated to an audience at the University of Texas School of Law that Food Not Bombs, Indymedia, and "anarchists" are all on an FBI "Terrorist Watch List". (See footnote 3, supra.) Such an "investigation" – if it can even be called that – of an abstract noun ("anarchism") is an invitation to manifold violations of civil liberties and constitutional rights, as history has already shown. It strikes at the heart of people's most fundamental constitutional rights of free association, free expression, and the right not to be harassed and investigated by the national police based on guilt by association. Moreover, such an "investigation" is illegal even under the FBI's own strained conception of the extent to which it can intrude on people's First Amendment

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[3] See second television news broadcast via link at http://cbs13.com/local/local_story_013171750.html.

activities under the Attorney General Guidelines, revised by General Ashcroft to allow the federal government "to go anywhere the public can go." The FBI arrogates to itself the right to open preliminary investigations on groups. But anarchism is not a group. It is a variegated political philosophy. Following its impertinent and irrelevant questions to Mr. Wolf about anarchist groups and politics, the subpoena must be seen as a cog in this overbroad, overzealous, and unlawful "national program" of investigating the "anarchist movement."

Despite all of this, the government nevertheless insists that it has issued the subpoena in good faith. (Govt's Opposition, p6:2-3). However, Mr. Wolf is entitled to the Court's independent scrutiny of the government's self-serving claim. Moreover, because the subpoenaed party's First Amendment interests of association, assembly, expression, and redress of grievances are implicated – both as a private individual and as a reporter – the Court must engage in heightened scrutiny of the government's conduct to ensure, *inter alia*, that questions are not posed in bad faith, that no question has a tenuous relationship to the stated subject of the investigation, that law enforcement has a legitimate need for the information, or that the questions and the proceedings are not undertaken as a means of harassment. *In re Grand Jury Proceedings (Scarce)*, 5 F.3d 397 (9th Cir. 1993); *see also* Branzburg v. Hayes, 408 U.S. 665, 690-91, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972). Mr. Wolf therefore requests, at the very least, that the Court conduct an evidentiary hearing in order to further examine his well-founded claims that the government has subpoenaed him in bad faith, and for ulterior and unconstitutional purposes, or that the government be required to produce a Schofield affidavit. In re Grand Jury Proceedings, 486 F.2d 85 C.A.3, 1973 (3rd Cir. 1973).

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D. Even if it were entitled to the testimony and material it seeks, which it is not, the government's need for it is negligible or non-existent, thus failing the Fourth Amendment balancing test which must be applied.

Apart from the First Amendment intrusions, Mr. Wolf is entitled to protection under the Fourth Amendment. The Fourth Amendment requires that the request for the production of documents by subpoena be reasonable and not oppressive. A grand jury cannot compel production of documents through a subpoena duces tecum if that production is unreasonable or oppressive. Federal Rule of Criminal Procedure17(c); U.S. v. United States District Court, 238 F2d 713 (4rth Cir. 1956), *cert denied*, 352 US 981 (1957). "[I]t is beyond cavil that the touchstone of [the court's] analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion..." Justice Sandra Day O'Connor, dissenting in Atwater v. Lago Vista, 532 U.S. 318, 360 (2001). A court should "evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." See also, Wyoming v. Houghton, 526 U.S. 295, 300 (1999).

In the case at bar, the government asserts, incorrectly, that it is undisputed that a fire was started beneath an SFPD patrol vehicle on July 8, 2004. In fact, video posted on the internet,[4] available to the government, and in fact already obtained by FBI Special Agent Suzanne G. Solomon, shows bright red-orange smoke – obviously from a smoke bomb, not burning foam – billowing from beside a piece of foam which a police car is parked on top of. Other posted video shows protesters carrying the foam, which was used as a sign. And the fact that police car's front wheels drove over it puts the lie to the claim that it in any way immobilized the police car. It is only several inches high. No police car burned. Not even slightly. It is unclear whether any foam even burned. So the claim that any fire was started – much less started deliberately, in circumstances where two cowboy police officers drove their car at a high rate of

[4] The video is accessible at: http://ia300117.us.archive.org/0/items/JoshWolfAllEmpiresMustFall/AllEmpiresMustFall.mov

speed through a crowd on a dark street, causing people to drop what they were carrying and scatter for safety, then jumped out and, by theirs and the SFPD's own admission, started swinging their batons indiscriminately, choking one man and punching another – is very much disputed.

The government's subpoena of video from a photographer who submits his work to, among other outlets, indymedia – one of the groups the government has now outrageously and bullyingly labeled a terrorist organization – is a huge, and by its very nature, extremely chilling, intrusion on his liberties in service of an extremely faint government interest – if one actually takes the asserted interest at face value, which for the reasons stated above, one cannot. (Faint because (1) the evidence already available to the government shows that it has no jurisdiction under its claimed statute, (2) the San Francisco District Attorney can and is handling the matter, and has recourse to local grand jury proceedings if it wants to use them, and (3) the government admits that it is endeavoring to aid local police and a local prosecution – a plain misuse of the Grand Jury and violation of Fed. R. Crim. P. Rule 6. The government's jurisdictional claim is transparently pretextual.

CONCLUSION

WHEREFORE, the Court should quash both the testimonial subpoena and the subpoena *duces tecum*, or, at the very least, order an evidentiary hearing in order to further explore Mr. Wolf's well-founded claims that the government is engaged in a misuse of the grand jury.

Respectfully Submitted,

Dated: March 17, 2006

SIEGEL & YEE

Attorneys for Joshua Wolf
Subpoenaed Party

By:

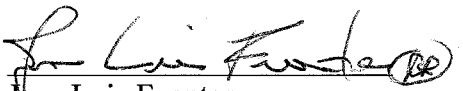
JOSE LUIS FUENTES

Attorney Ben Rosenfeld assisted in the preparation of this memorandum.

CERTIFICATE OF SERVICE

I, Jose Luis Fuentes, certify that I served the movant's Reply in Support of his Motion to Quash, Corrected Reply in Support of his Motion to Quash, Declaration, and Exhibits, on the U.S. Attorney's Office, Northern District of California, by mailing them true and correct copies of these documents, via First Class U.S. mail, postage prepaid

DATED: March 17, 2006.



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