No. 06-16403

IN THE UNITED STATES COUR OF APPEALS

FOR THE NINTH CIRCUIT

In re: GRAND JURY PROCEEDINGS

JOSHUA WOLF,

Witness-Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

WITNESS-APPELLANT WOLF'S OPENING BRIEF

[RECALCITRANT WITNESS APPEAL]

Appeal from U.S.D.C. No. Dist. Of CA
Case No. CR-06-90064-MMC

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I. JURISDICTIONAL STATEMENT

The district court had jurisdiction over this matter pursuant to 18 U.S.C. § 844(f) (1) and 28 U.S.C. § 1826(b). The Court of Appeals has jurisdiction over this matter pursuant to 28 U.S.C. § 1291. *See In re Grand Jury Subpoena Dated June 5, 1985 (Doe),* 825 F.2d 231, 236 n. 3 (9th Cir. 1987) (finding of civil contempt considered final judgment).

The court issued its order holding appellant Joshua Wolf in civil contempt on August 1, 2006, making this appeal timely under Federal Rule Appellant Procedure 4(a). Excerpts of Record ("EOR") 168-169. *In re Grand Jury Proceedings (Manges),* 745 F.2d 1250, 1251 (9th Cir. 1984) (timeliness of civil contempt appeals governed by Fed. R. App. P. 4(a)).

II. ISSUE PRESENTED FOR REVIEW

1. Standard Of Review:

a. Whether the district court abused its discretion in applying a deferential burden of production on the government in a contempt proceeding while holding Wolf to a higher burden when consequential burdens on newsgathering exist. EOR 157:24-156:2; 156:23-25; 163:9.

b. Whether the district court abused its discretion in applying a deferential burden of persuasion on the government in a contempt proceeding

while holding Wolf to a higher burden when consequential burdens on newsgathering is implicated. EOR 98:17-100:2; 157:24-156:2; 156:23-25; 163:9.

2. Federal Rule of Criminal Procedure 17:

a. Whether the district court abused its discretion by refusing to take into account the consequential burdens on newsgathering placed by the subpoena. EOR 163:12-13.

b. Whether the district court abused its discretion by refusing to take into account the government's failure to exhaust other sources before placing consequential burdens on Wolf's newsgathering. EOR 163:12-13; 156:11-156a:12.

c. Whether the district court abused its discretion by failing to review the subpoena material in camera to determine if unwarranted government harassment exists. EOR 141:24-143:18.

3. Federal Rule of Evidence 501:

a. Whether the district court committed legal error in concluding that the Ninth Circuit is decidedly against the idea of a news gatherer privilege under Rule 501. EOR 161:19-24.

b. Whether the district court abused its discretion in balancing by applying a deferential burden of production on the government in a contempt proceeding while holding Wolf to a higher burden if a news gatherer privilege is

recognize by the Ninth Circuit. EOR 156:11-156A:12; 162:16-163:10.

c. Whether the district court abused its discretion by failing to review the subpoena material in camera to determine if unwarranted government harassment exists. EOR 141:24-143:18.

4. First Amendment Claim:

a. Whether the district court committed legal error in ruling that Joshua Wolf had no First Amendment Privilege. EOR 158:23-25.

b. Whether the district court abused its discretion in failing to consider the consequential burdens on Wolf's newsgathering and to conduct a more searching analysis of Wolf's claim of unwarranted government harassment. EOR 98:17-100:2; 157:24-156:2; 156:23-25; 163:9.

c. Whether the district court abused its discretion by failing to review the subpoena material in camera to determine if unwarranted government harassment exists. EOR 141:24-143:18.

5. Fifth Amendment Claim:

a. Whether the district court committed legal error in applying the Act of Production Doctrine to deny Wolf a Fifth Amendment Privilege. EOR 116:17-25; 118:6-14; 155:6-156:10.

b. Whether the district court committed legal error in denying the objection to Finigan's declaration and exhibit under the Fifth Amendment. EOR 163:22-23.

III. STATEMENT OF THE CASE AND BAIL STATUS

This case presents to the Court the paradox left from *Branzburg v. Hayes*, 408 U.S. 665, 707-708 (1972) when the plurality of justices recognize that the First Amendment applies to grand jury proceedings, but the only example of First Amendment protection against unwarranted government harassment of a news gatherer was bad faith. *See In re Grand Jury 87-3 Subpoena Duces Tecum,* 955 F.2d 229, 234 (4th Cir. 1992).

Appellant Joshua Wolf is a news gatherer who was subpoenaed to testify and produce news gathering materials. The government is investigating who threw a **FIRECRACKER**, after July the 4th , at a San Francisco Police car on July 8, 2006. EOR 19, 69:6-10; 110:17-111:3. The government claims it is investigating an alleged arson of the San Francisco Police car under 28 U.S.C. § 1826(b). EOR 111:1. The government, without observance to the Department of Justice regulation 28 U.S.C. 50.10 et seq designed to protect the media against unwarranted government harassment, has subpoena Wolf to testify and produce documents. There have been consequential burdens placed on Wolf's

newsgathering activities since the subpoena. He refused to testify and requested First and Fifth Amendment protection which where denied by the district court.

The government provided only a conclusory and hearsay-based declaration purporting to affirm that the attorney general authorized the subpoena issued against Wolf. Based on this declaration, the district court found the government's statement adequate to find Wolf in civil contempt pursuant to 28 U.S.C. § 1826(b) and ordered him imprisoned. The district court did not stay the order remanding Wolf pending the filing of an appeal.

On August 4, 2006, Wolf moved this Court for bail pending appeal. The motion is still pending as of the filing of this opening brief.

IV. STATEMENT OF FACTS

As part of his news gathering and editorial process, Joshua Wolf, an independent journalist, posted and sold a video clip of the July 8, 2005, anarchist assembly to Indymedia, NBC, KTVU and KRON. San Francisco Police Department (SFPD) and Joint Terrorism Task Force (JTTF) investigators have been investigating the July 8, 2005, assembly as part of their overreaching effort to silence First Amendment protest and assembly activities. EOR 2:9-19; 69:18-23. The federal government is allegedly investigating the possible attempted arson of a SFPD police vehicle by a **firecracker** at the assembly on July 8, 2005, under 18 U.S.C. § 844(f) (1). EOR 19, 69:6-10; 110:17-111:3. The SFPD is investigating a

physical assault on a police officer at the assembly. EOR 9. The state court is prosecuting an individual involved from the assembly. EOR 48-49; 69. Three days after the assembly, the SFPD requested the assistance of the federal government's JTTF. EOR 3:3-4; 45.

On or about the date of the request, several SFPD and FBI agents, acting in their roles as JTTF, came to Wolf's apartment in San Francisco seeking unpublished video footage of the demonstration. The JTTF questioned him about his connections to anarchist groups. EOR 99:1-8.

Wolf's video does not capture who allegedly threw a firecracker at the police car, nor does it capture the police officer being hit over the head. EOR 69:6-10; 99:9-16. Mr. Wolf disclosed these facts to Suzanne G. Solomon, Special Agent, for the Federal Bureau of Investigation when she visited Wolf residence during the week of July 11, 2005. EOR 99:1-8. Wolf refused -- based on his First Amendment rights-- to turn over any material. EOR 2:25-3:2.

The published video is accessible at: www.joshwolf.net . The video shows that there was no SFPD car on fire. EOR 69:11-18. There was red-orange smoke billowing beside a piece of foam. EOR 69:11-18. However, no police car burned. EOR 69:11-18. There is no evidence anyone intended to, or did anything deliberate, to torch a police car. EOR 69:11-18. There is no evidence that the foam, which the police car ran over, even burned. EOR 69:11-18.

On January 13, 2006, the FBI's David Picard told CBS affiliate Channel 13 in Sacramento that "one of our major domestic terrorism programs is the ALF, ELF, and anarchist movement, and it's a national program for the FBI." On March 9, 2006, FBI Supervisory Senior Resident Agent G. Charles Rasner stated in a guest lecture at the University of Texas School of Law that Indymedia was on a "Terrorist Watch List". EOR 69:19-23.

On January 12, 2006 and February 4, 2006, the FBI served subpoenas on Joshua Wolf for testimony and demanding all documents, writings and recordings related to protest activities conducted in San Francisco, California, on July 8, 2005, between the hours of 6:30 p.m. and 11:59 p.m. EOR 4; 82. The government demanded each camera, video recorder, audio recoding device or other hardware or equipment used to record any part of the above described events of July 8, 2005. EOR 57; 84-86.

The subpoena has significantly interfered with Mr. Wolf's relationship with anarchist and anti-war groups that he covers as a freelance journalist. EOR 99:17-100:2. It has limited his access to protestors and his ability to cover demonstrations. EOR 99:17-100:2.

The grand jury seeks all footage of the assembly and the testimony concerning the footage from Wolf. EOR 4; 82. The government possesses a video clip of the footage broadcast to the public. EOR 111:4-5. Wolf has refused to

comply with a grand jury subpoena based on his Fifth Amendment and First Amendment privileges. EOR 107:17-23; 108:11-19; 109:24-25.

On February 15, 2006, Mr. Wolf filed a Motion to Stay and Quash Subpoena and Subpoena Duces Tecum (Motion). On February 16, 2006, the district court referred Mr. Wolf's Motion to Magistrate Judge Maria-Elena James.
On February 22, 2006, Magistrate Judge James ordered the Motion to be heard on March 30, 2006. On March 9, 2006, the federal government took the legal position that the subject of the grand jury investigation was the alleged arson of the SFPD police car in violation of 18 U.S.C. ¶ 844(f). EOR 111:1.

On March 24, 2006, Magistrate Judge James ordered that all filings and hearings in this matter would occur on the open record, unless otherwise ordered by the Court, and set forth procedures for sealing documents and having closed hearings.

On March 30, 2006, the federal government argued to this Court that the video tape would be analyzed by the investigator for this case to identify the individuals present. EOR 89:24. It was also argued that the evidence obtained by the grand jury in this case could be shared with the state local authority. EOR 88:24-89:6 [March 30, 2006 Transcript, 3:1-3.]

On March 30, 2006, Magistrate Judge James ordered the federal government to produce certain materials for *in camera* review by April 5, 2006. EOR 95:27-

96:2.

On April 5, 2006, Magistrate Judge James signed the Order Denying Joshua Wolf's Motion To Quash Subpoena (Order). Magistrate Judge James stated that the subject matter of the grand jury was the events on July 8, 2005. EOR 92:27-93:1.

On June 5, 2006, Wolf filed a declaration in support of the motion for de novo review stating the following:

> In seeking my testimony and unpublished material, the federal government is turning me into their de-facto investigator. My journalistic activities will be blighted, and my reporter-subject relationship of trust with alleged anarchist protestors will be eviscerated. Protestors will refuse to speak with me and will deny me access to cover demonstrations; in fact, this has already occurred.
>
> I attended the hearing on March 30, 2006, and heard the government's argument that they are seeking the identities of individuals participating in the civil dissent of July 8, 2005. The government's subpoena is driving a wedge between my First Amendment activities and protestors exercising their right to lawfully assemble by instilling fear that the government will use my documentation to catalogue and investigate individuals participating in civil dissent.
>
> Through the subpoena that seeks to uncover the identities of the protestors, the government has driven a wedge between my First Amendment activities by instilling fear among alleged anarchists and political dissidents who have since sought to exclude me from documenting their First Amendment activities.

EOR 99:17-100:2. On June 6, 2006, district judge Maxine M. Chesney summarily denied Wolf's motion for de novo review and adopted Magistrate Judge James'

April 5, 2006 Order. EOR 101.

On June 15, 2006, Wolf appeared before the grand jury and refused to answer questions that required him to confirm whether he had the materials requested by the grand jury and whether he would turn over the materials. EOR 107:17-23; 108:11-19; 109:24-5. Wolf asserted his First, Fourth and Fifth Amendment rights among other Constitutional rights before the grand jury. *Id.* Wolf was directed to appear before district judge William Alsup instead of Maxine Chesney who was the all purpose judge assigned to this case. Wolf's counsel objected to Judge Alsup hearing the case throughout the proceeding. Judge Alsup called the U.S. marshals on Wolf's counsels during the proceeding on June 15, 2006 to silence them from advocating for Wolf. EOR 103:25.

On July 20, 2006 civil contempt proceedings began before Judge Alsup. Judge Alsup tentatively granted Mr. Wolf Fifth Amendment protection, subject to further briefing on the Act of Production Doctrine and the impact of federal immunity on potential state prosecution. EOR 116:17-25;118:6-14. The contempt proceedings were continued until August 1, 2006.

On August 1, 2006, the district court withdrew its tentative grant of the Fifth Amendment privilege, even though the government had offered to grant Fifth Amendment immunity. EOR 134:21-25; 137:25-138:2. Wolf was held in contempt and taken into custody after the denial of his request for bail or in the

alternative a stay.

On August 3, 2006, Wolf filed his notice of appeal from the contempt order. EOR 170.

On August 4, 2006, Wolf filed the transcripts of the grand jury proceedings and motion for bail or in the alternative a stay pending appeal. The motion is still pending.

V. ARGUMENT

A. Standard of Review

This Court reviews the district court's finding of civil contempt for abuse of discretion. *In re Grand Jury Proceedings (Lahey)*, 914 F.2d 1372, 1373 (9th Cir. 1990). Legal errors are reviewed de novo. *See In re Grand Jury Subpoena to Nancy Bergeson*, 425 F.3d 1221, 1225-26 (9th Cir. 2005).

B The Subpoena Did Not Meet The Proper Standards

The district court erred in finding Wolf in civil contempt for refusing to comply with the grand jury subpoena. Primary among the district court's errors was its failure to apply the special protections that the First Amendment requires whenever a contempt citation, or a subpoena, implicates First Amendment rights. The Court should overturn Wolf's contempt conviction or, at the very least, remand the issue to the district court and instruct it to reconsider the issue applying the proper First Amendment protections.

1. Whether The District Court Abused Its Discretion In Applying A Deferential Burden Of Production On The Government In A Contempt Proceeding While Holding Wolf To A Higher Burden When Consequential Burdens On News Gathering Is Implicated.

> Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press.

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 51 (1971) (quoting James Madison). A subpoena that intrudes upon the First Amendment activity of newsgathering thus raises serious concerns. Such subpoenas threaten not only the relationship between the news gatherer and his sources, but his relationship between the news gatherer and those who receive his information. Moreover, the chilling effect of such subpoenas threatens newsgathering as a whole. Without special protections, subpoenas aimed at newsgathering risk "converting the press . . . into an investigative arm of prosecutors and the courts." *Shoen v. Shoen*, (*Shoen I*) 5 F.3d 1289, 1295 (9th Cir. 1993).

For this reason, "when governmental searches trench on First Amendment concerns, courts have been careful to scrutinize the searches much more closely." *In re Grand Jury Subpoena: Subpoena Duces Tecum* 829 F.2d 1291, 1299-1300 (4th Cir.1987). *See Bursey v. U.S.*, 466 F.2d 1059, 1088 (9th Cir. 1972), overruled on other grounds by *In re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988);

Lewis v. United States, 517 F.2d 236, 237 (9th Cir. 1975) ("In determining the federal law of privilege in a federal question case, absent a controlling statute, a federal court may consider state privilege law."); *In re Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993) ("*Scarce*").

2. Whether The District Court Abused Its Discretion By Refusing To Take Into Account The Consequential Burdens On News Gathering Placed By The Subpoena.

Federal Rule of Criminal Procedure 17(c), in any context, deems unenforceable any subpoena that is oppressive. FRCP 17(c). In seeking to identify oppressiveness, a court must be especially mindful of situations in which a subpoena threatens First Amendment rights. An otherwise acceptable subpoena may be oppressive if it threatens First Amendment rights because such action creates a chilling effect that can reach far beyond the matter before the grand jury. As the Fourth Circuit has explained that "[t]o prevent the chilling effect such prosecutorial abuse would cause, we caution district courts to apply with *special sensitivity*, where values of expression are potentially implicated, the traditional rule that '[g]rand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice of an intent to harass,'" *In Re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 234 (4th Cir. 1992) (*citing U.S. v. R. Enterprises*, 498 U.S. 292, 299 (1991) (emphasis added)). [1] The

[1] This case was a remand of U.S. v. R. Enterprises, 498 U.S. 292, 299 (1991). In *R. Enterprise*. The Supreme Court has chosen to express no view as to the First Amendment implications on Rule 17(c), but referred the issue back to

Fourth Circuit has applied this special sensitivity in a case in which the subpoena sought videotapes. The Fourth Circuit reversed a conviction for civil contempt holding that when a subpoena seeks video tapes "presumptively protected" by the First Amendment "greater care" must be taken in reviewing the subpoena. *In Re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1296 n.5, 1301-02, (4th Cir. 1987)(That these [subpoenaed] videotapes are presumptively protected is clear, citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (It cannot be doubted that motion pictures are a significant medium for the communication of ideas).

The First Amendment implications of the subpoena issued to Wolf compel the Ninth Circuit to identify oppressiveness with special sensitivity to the First Amendment implications of the subpoena. Indeed, this Court has conducted the Rule 17(c) analysis with special sensitivity in the analogous situation in which a subpoena is issued to an attorney and seeks information obtained during the course of legal representation. *See In re Grand Jury Subpoena to Nancy Bergeson*, 425 F.3d 1221, 1225-26.

In *Bergeson*, this Court held that "[t]he factors the district court must consider under Rule 17(c) (2) - unreasonable and oppressiveness- cannot sensibly be converted into a mechanical rule enabling an escape from case-by-case judgment."

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the Fourth Circuit. *United States v. R. Enterprises, Inc.*, 498 U.S. at 299 (1991). On remand, the Fourth Circuit declined to address the issue directly.

To ensure that the subpoena was not oppressive, this Court required the government to establish a "compelling purpose" for issuing the subpoena to an attorney that might impact the attorney-client relationship. 425 F.3d at 1225-27.

3. Whether The District Court Abused Its Discretion By Refusing To Take Into Account The Government's Failure To Exhaust Other Sources Before Placing Consequential Burdens On Wolf's Newsgathering.

In conducting its case-by-case judgment, the *Bergeson* court strongly factored whether the government had followed the Department of Justice guidelines in issuing the subpoena to an attorney, as well as the impact on the relationship between the attorney and client regardless of whether the communications where privileged or confidential. 425 F.3d at 1225. The Court of Appeal affirmed the district court's quashing of the subpoena pursuant to Rule 17 (c). *Id.* at 1227.

The Ninth Circuit should endorse a similarly rigorous case-by-case inquiry when a subpoena is issued to a reporter and seeks information obtained during newsgathering. This analysis is necessary because like in the attorney-client relationship, the potential for oppressiveness is extremely high.

The Court should specifically look at, as it did in *Bergeson*, whether the Department of Justice followed its own regulations for obtaining subpoenas. The regulations governing the issuance of subpoenas to reporters about their

newsgathering are found at 28 C.F.R. 50.10.[2] These regulations require the following : 1) the grand jury subpoena was authorized by the United States Attorney General 28 C.F.R. § 50.10 (e); 2) that the materials sought in the criminal cases are not peripheral, nonessential, or speculative information. 28 C.F.R. § 50.10(f)(1); 3) that the information sought is not already in the government's possession; and 4) all reasonable alternative attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media. 28 C.F.R. § 50.10 (b).

In the present case, the record is noticeably thin of any evidence that DOJ complied with any of its own regulations. The government has been hiding the ball on the issue of whether they complied with 28 C.F.R. 50.10 by seeking the post-hoc approval of the attorney general until the district court asked them to state whether they had complied. EOR 118:17-25 [July 20, 2006 Transcript 28:2-29:5; 42:1-9]. Neither in candor to the district court, nor Wolf, has the government stated whether it exhausted all other sources after it obtained the video clip of Wolf as required by 28 C.F.R. 50.10(b), (c), and (f)(1). The DOJ regulations should be adhered to especially when the government is asking the Court to imprison someone in custody for refusing to adhere to a subpoena.

[2] These regulations are internal guidelines and do not vest a private cause of action in one who has been injured by the Department of Justice's failure to follow the regulations. As this Court found in *Bergeson*, however, DOJ's failure to comply with the regulations is a significant factor in resisting a subpoena.

The subpoena issued to Wolf is also oppressive because of the destructive impact it is having on his confidential source relationship. EOR 99:22-100:2. The subpoena has significantly interfered with Mr. Wolf's relationship with the anarchist and anti-war groups he covers as a freelance journalist. EOR 99:22-100:2. It has limited his access to protestors and his ability to cover demonstrations. EOR 99:22-100:2. Wolf's ability to inform the public on matters of public concern has been directly and severely impeded by the subpoena.

The oppressiveness of the subpoena is especially evident given the tenuous connection the subpoenaed materials have to the federal offense with which the grand jury is charged with investigating. *See In re Grand Jury Proceedings (Scarce),* 5 F.3d 397, 401. The government is investigating who threw a **FIRECRACKER**, after July the 4th , at a San Francisco Police car on July 8, 2006. EOR 19, 69:6-10; 110:17-111:3. The government claims it is investigating an alleged arson of the San Francisco Police car under 28 U.S.C. § 1826(b). EOR 111:1. The district court question whether there was even a crime committed. EOR 116:13-15; 150:10-12.

The subpoena is oppressive because it threatens not only Wolf's First Amendment rights as a news gatherer but the First Amendment associational rights of the protestors. *See Bursey v. U.S.,* 466 F.2d 1059, 1088 (9th Cir. 1972),

overruled on other grounds by *In re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988).

The government has the published video footage [EOR 111:4-5], the state police report [EOR 9], the help of the state investigators [EOR 45], and now has the state preliminary hearing transcripts of what occurred on July 8, 2005. In other words, the government has a fishing pond full of names, witnesses, pictures, reports, and testimony that it can exhaust before impinging on newsgathering activity. Furthermore, Wolf has stated in declarations to the district court that he does not have information related to 18 U.S.C. ¶ 844(f).

Additionally, the government has presented no evidence that it undertook any efforts to exhaust these alternative sources before subpoenaing a reporter. The video tape the government possesses shows numerous individuals and police officers. Some people have cameras. The district court did not conduct any sort of exhaustion analysis in denying Wolf challenge under Rule 17(c) based on oppression.

In re Miller, 438 F.3d at 1180, 1182 (Tatel, J., concurring) the court relied on "the compelling showing of need and exhaustion" based on the Special Counsel's ex parte affidavit and his "voluminous classified filings". Wolf's video is not the *only* source of information about what happened to the police car. EOR 9;111:4-5. Wolf has stated that he does not have information besides what has been

published regarding the police vehicle. EOR 99:13-16. If Wolf's credibility is in question, he has offered the video tape for in camera inspection. EOR 141:14-21.

There is no compelling reason for the prosecutor to cast his fishing line in Wolf's pool, which is protected by the First Amendment. The government can learn what Mr. Wolf knows by replicating Mr. Wolf's knowledge, e.g., speaking to witnesses identified in the edited video tape, speaking with the SFPD, or reviewing the preliminary hearing transcripts in state criminal proceedings.

4. Whether The District Court Abused Its Discretion In Applying A Deferential Burden Of Persuasion On The Government In A Contempt Proceeding While Holding Wolf To A Higher Burden When Consequential Burdens On News Gathering Is Implicated.

In a civil contempt proceeding, the contempt must be proved by clear and convincing evidence. *United States v. Powers*, 629 F.2d 619, 626 n.6 (9th Cir. 1980).

The government has the burden of disproving the existence of affirmative defenses actually raised. *In the Matter of Battaglia v. United States*, 653 F.2d 419, 423 (citing *United States v. Hearst,* 563 F.2d 1331 (9th Cir. 1977); cert. denied, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.2d 90 (1978); *United States v. Carrasco,* 537 F.2d 372 (9th Cir. 1976).

In determining whether to hold a subpoenaed person in civil contempt for failing to comply, a district court must consider the four elements listed above. Once the government has presented its prima facie case, the district court must

consider the fifth element: the witness's explanation on the record for his failure to comply, or whether he had just cause to refuse to comply with the subpoena, 28 U.S.C. §1826.

5. Whether The District Court Abused Its Discretion By Failing To Review The Subpoena Material In Camera To Determine If Unwarranted Government Harassment Exists.

This contempt analysis should also be conducted with the same "special sensitivity" the First Amendment required of the FRCP 17(c) analysis. However, the district court granted great deference to the government's meager prima facie arguments and all but ignored Wolf's repeated invocations of the First Amendment.

The district court's starkest error was its refusal to review Wolf's unedited video *in camera*. EOR 141-145. Wolf's counsel offered to submit the unedited video for in camera review [EOR 141:18-25], but the district court declined stating, "That's what the grand jury is for," [EOR 142:1]. The district court believed that it is the grand jury's job to "sort[] it out. And if they aren't convinced then they don't return an indictment." [EOR 142:19-20.]

The failure to perform an in camera review was reversible error. *In camera* review provides a crucial extra level of First Amendment protection. *See, e.g., U.S. v. Alperin*, 128 F. Supp. 2d 1251, 1255 (N.D. Cal. 2001) (holding that the district court will conduct in camera review of records to inform its evidentiary ruling). *Cf.*

R. Enterprises, 498 U.S. at 302 ("a district court may require that the Government reveal the subject of the investigation to the trial court *in camera* [] so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party.") An in camera review enables the court to determine whether or not the material that is subject to the subpoena meets a minimum standard of probity such that it may be submitted to the grand jury. In camera review is thus a crucial protection that ensures that the resulting incursion on freedom of the press was truly necessary. The intermediate step of in camera review provides added protection against "converting the press . . . into an investigative arm of prosecutors and the courts." *Shoen I*, 5 F.3d at 1295.

A court cannot simply leave this threshold determination to the grand jury. Irreparable First Amendment damage occurs once the video is submitted to the grand jury. Even if the grand jury decides that the material was not probative, the news gatherer's ability to function has been damaged. EOR 99:17-100:2. The district court erred by abrogating its responsibility to review Wolf's footage to the grand jury, thus negating the First Amendment protection to which Wolf is entitled.

Consider the district court's contradictory assertion that the unedited video was "very good evidence about what happened," [EOR 144:1-2], with "the clipping

on the cutting room floor that are stake here." EOR 163:1-2. The district court was unable to make such judgments without seeing the videotape. Without the requested in camera review, the district court's finding was mere surmise. The First Amendment requires more. It was the district court's duty to determine whether the video was actually probative – not to defer to the government's presumption that the video was potentially probative of the federal crime of arson. EOR 135:2-136:17 (government attorney discussing "relevancy"). *See Branzburg v. Hayes*, 408 U.S. 665, 707-708; *Bursey v. U.S.*, 466 F.2d 1059, 1088; *Lewis v. United States*, 517 F.2d 236, 237; *In re Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993) ("*Scarce*").

The district court failed to apply a heightened level of scrutiny to its civil contempt analysis in light of the subpoena's First Amendment implications. For this reason alone, this Court should overturn Wolf's contempt conviction. However, at the very least, this Court should remand the contempt issue and order the district court to more rigorously review the government's prima facie case while paying greater deference to Wolf's free press rights under the First Amendment.

C. Federal Rule of Evidence, 501

1. Whether The District Court Committed Legal Error In Concluding That The Ninth Circuit Is Decidedly Against The Idea Of A News Gatherer Privilege Under Rule 501.

The government has not carried its burden of production and persuasion because it failed to satisfy the exhaustion requirement, and this Court's analysis may stop with this factor. The government has not made a showing that alternative sources where consulted, let alone exhausted, or that Mr. Wolf's videotape is unique. The police report by the SFPD [EOR 9] and the published portion of Wolf's video identify many participants and onlookers (some with cameras) and dozens of police officers at the event on July 8, 2006. The record reveals a sea of fish, including possible eye-witnesses from law enforcement. The government presented no evidence at the contempt hearing explaining what efforts it had undertaken to exhaust these alternative sources. The government's response to this issue all along has been that it need not provide Wolf or the district court with a response to Wolf's claim of failure to exhaust because he has no First Amendment rights. July 20, 2006 Transcript 41:22-42:2. The district court has agreed with the government and has not conducted any sort of exhaustion analysis whatsoever in finding that, even if a common-law privilege exists, this case is "a slam dunk for the government." EOR 163:9. *Compare In re Miller*, 438 F.3d at 1180, 1182 (Tatel, J., concurring) (relying on "the compelling showing of need and exhaustion" based on the Special Counsel's ex parte affidavit and his "voluminous classified filings"). The government seems to want Mr. Wolf's video because it believes that it can easily obtain the video and not because the video has any

information relevant to its investigation. This Court should hold that this is insufficient to satisfy the exhaustion requirement, and reverse with directions that the contempt order be vacated and Mr. Wolf released forthwith.

The Ninth Circuit's analytical framework in interpreting common law privileges under Rule 501 is in conflict with the Supreme Court's decision in *Jaffee*. *Id.*, 518 U.S. at 7 (citing *In re Grand Jury Proceedings,* 867 F.2d 562 (9th Cir. 1989). The 9th Circuit was on the losing side having rejected a privilege under Rule 501 seven years before *Jaffe*. *In re Grand Jury Proceedings,* 867 F.2d 562. *Jaffee* is the only Rule 501 case binding on this Court. *See Miller v. Gammie*, 335 F.3d 899, 900 (9th Cir. 2003)(en banc)(where Supreme Court authority is clearly irreconcilable with prior circuit authority, "district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court [the 9th Circuit] as having been effectively overruled").

Similar to *In re Grand Jury Proceedings,* 867 F.2d 562 , in *Scare* the Ninth Circuit was looking for federal common law rooted in historical common-law which *Branzburg* had determined did not exist. 867 F.2d 562. However, three years after *Branzburg,* Rule 501 was enacted, and *Jaffe* stated that Congress "manifested an affirmative intention not to freeze the law of privilege," but rather to "leave the door open to change," *Trammel v. United States*, 445 U.S. 40, 47 (1980), and to "continue the evolutionary development of testimonial privileges."

Jaffee, 518 U.S. at 9 (quoting *Trammel*, 445 U.S. at 47). Therefore, whether this Court should recognize a reporter's privilege under Rule 501 must be reevaluated by this Court due to the development of the law base on reason and experience as argued by Amici Curiae Reporters Committee for Freedom of the Press.

2. Whether The District Court Abused Its Discretion In Balancing By Placing A Deferential Burden Of Production On The Government In A Contempt Proceeding While Holding Wolf To A Higher Burden If A News Gatherer Privilege Is Recognized By The Ninth Circuit.

One of the factors recognized in *Bursey* that this Court must balance is the critical public function of reporters in keeping the public informed:

> The First Amendment interests in this case are not confined to the personal rights of [journalist]. Although their rights do not rest lightly in the balance far weightier than they are the public interests in First Amendment freedoms that stand or fall with the rights that these witnesses advance for themselves. Freedom of the press was not guaranteed solely to shield persons engaged in newspaper work from unwarranted governmental harassment. The larger purpose was to protect public access to information... In the context of litigation, vindication of these public rights secured by the First Amendment is primarily committed to persons who are also asserting their individual constitutional rights. *Bursey*, 466 F.2d at 1083-84; *see also Shoen v. Shoen*, 5 F.3d 1289, 1292.

A second factor for this Court to consider is the public policy of the State of California and the people of California in protecting reporters from forced disclosures. *See Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996) (the court "may also look to state privilege law-here, California's- if it is enlightening"); *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975) ("In determining the federal law of privilege in a federal question case, absent a

controlling statute, a federal court may consider state privilege law.")

The district court was asked to take judicial notice of the affidavit submitted to Judge White of this district in *In re Grand Jury Subpoenas To Mark Fainaru-Wada and Lance Williams,* No. CR-06-90225 MISC-JSW (N.D. Cal. 1996) by Attorney General Bill Lockyer who states:

> When California voted to include a strong shield law in their state Constitution, they made a deliberate policy choice on where to strike the balance between the public's interest in forcing reporters to disclose confidential sources and its interest in a robust free press. *** California voters understood that an intimidated press cannot effectively inform the public, and when the public is not informed, our democracy cannot properly function. When the government can compel journalists to reveal their sources, and jail them for refusing, it endangers not just the freedom of the press, but the people's liberty.

EOR 127:24-128:12; 165:16-166:2. Wolf did not suggest that the California Constitution governs in a federal case but argued that the Court should consider the people of California's policy choice in protecting a journalist in this case where the alleged federal government's investigation involves California property and not federal property. However the district court summarily denied the request for judicial notice. Wolf request that this Court consider the affidavit as the denial of the district court was an abuse of discretion.

A third factor for the Court to consider is the alleged wrongdoing. So far the government is not claiming that Wolf has committed any crime.[3] The alleged

[3] However, the government reluctance to grant Wolf immunity has cause Wolf to fear that he is a targeted of the criminal investigation.

underlying crime the government alleges it is investigating to make the tenuous connection with a federal crime does not involve national security concerns as in *Miller*, 438 F.3d 1141, nor does it involve terrorism, or violence against a federal person or property. The federal interest in this case is not of national security, acts of terrorism, or violent federal crime that would go unpunished. All there is in this case is a reporter's newsgathering and editorial process that has been harmed and continues to be harmed by these oppressive and harassing proceedings. The only articulated interest by the government is one that misleads this Court into believing there is some tenuous federal crime.

The fourth factor the Court should consider is whether the government has exhausted all other avenues in accordance with the DOJ. *See Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995); *In re Grand Jury Subpoena to Nancy Bergeson*, 425 F.3d 1221, 1225-26.

The fifth factor the Court should consider is the harm already caused to Wolf and that will be caused to reporters in general who cover anti-war protest and anarchist because Wolf "appear[s] to be an investigative arm of the judicial system or the research tool of government . . . ." *Shoen,* 5 F.3d at 1294-95. In *Shoen* the court stated:

> It is their independent status that often enables reporters to gain access, without a pledge of confidentiality, to meetings or places where a policeman or politician wouldn't be welcome. If perceived as an adjunct of the police or the courts, journalists might well be shunned by persons who might

> otherwise give them information without a promise of confidentiality, barred from meetings which they should otherwise be free to attend and to describe, or even physically harassed if, for example, *observed taking notes or photographs at a public rally*.

Id. at 1295 (quoting Morse and Zucker, *supra*, at 474-75) (emphasis added).

The subpoena issued against Wolf and the proceedings that have had a destructive impact on his confidential source relationships. The subpoena has significantly interfered with Wolf's relationship with anarchist and anti-war groups that he covers as a freelance journalist. It has limited his access to protestors and his ability to cover demonstrations. EOR 99:17-100:2. Wolf's ability to inform the public on matters of public concern has been directly interfered with by the subpoena. Jailing Wolf has sent a clear message to all reporters, activists, anti-war groups, anarchist or groups viewed as unpopular by the federal government that the "clipping on the cutting room floor" in the editorial space will no longer be safe without government interference.

D. First Amendment To The United States Constitution

1. Whether The District Court Committed Legal Error In Ruling That Joshua Wolf Had No First Amendment Privilege.

Wolf walks into these proceeding as a reporter with the protection of the Constitution which required the district judge to show some sensitivity and not to apply a deferential test to Wolf's claim of harassment. *Houchins v. KQED, Inc.*, 438 U.S. 1, 17 (1978) (The Constitution requires sensitivity . . . to the special needs

of the press in performing [its role] effectively).

Wolf also walks into these contempt proceedings with the government having the burden to prove by clear and convincing evidence that the "incidental burdening of the press that may result from the enforcement" of these grand jury proceedings should be invalidated. *Branzburg,* 408 U.S. at 682; *In the Matter of Battaglia v. United States*, 653 F.2d at 424

The district judge ruled that Wolf had no First Amendment privilege to withhold private unpublished reporter materials to the grand jury. EOR 157:24-156:2. The district court held that the Ninth Circuit "firmly rejected any privilege, including a balancing test, including a First Amendment test, just as the Supreme Court had earlier done in *Branzburg.*" EOR 156:23-25. The district court is just simply wrong on the holding of *Branzburg* and the law in the Ninth Circuit.

In *Branzburg*, the Court was unwilling to quash the press subpoenas "[o]n the records now before [it]," *id.* at 690, but it also recognized that "news gathering is not without its First Amendment protections," that grand juries "must operate within the limits of the First Amendment as well as the Fifth," and that courts *should* quash press subpoenas in some cases, *id.* at 707-08.

In *Bursey v. United States*, 466 F.2d 1059 (1972), *overruled on other grounds, In re Grand Jury Proceedings,* 863 F.3d 667, 669-70 (9th Cir. 1988) the Ninth Circuit addressed the *Branzburg* decision in a grand jury context for the first

time. The ruling was issued the day after *Branzburg*, and the court held that the grand jury questions posed to reporters for the Black Panther Party newspaper abridged constitutional protections for the press. The court balanced the respective interests and stated that "[w]hen First Amendment interests are at stake, the Government must use a scalpel, not an ax." *Id.* at 1088. The court went on to say:

> We reject the Government's second contention that the First Amendment is nugatory in a grand jury proceeding. No governmental door can be closed against the Amendment. No governmental activity is immune from its force. That the setting for the competition between rights secured by the First Amendment and antagonistic governmental interests is a grand jury proceeding is simply one of the factors that must be taken into account in striking the appropriate constitutional balance. *Id.* at 1082.

On petition for rehearing the Ninth Circuit rejected that broad reading of *Branzburg*: "We have reexamined our analysis of the factors involved in balancing the First Amendment rights against the governmental interests asserted to justify compelling answers to the questions here involved, and we have concluded that the balance we struck is not impaired by *Branzburg*." *Id.* at 1091.

One of the factors recognized in *Bursey* that this Court must balance is the critical public function of reporters in keeping the public informed.

In *Lewis v. United States*, 517 F.2d 236, 238 (9th Cir. 1975)(Lewis II), the court stated the opposite of Judge Alsup's ruling:

> The opinion of the Court in *Branzburg* stated that a reporter will be protected where a grand jury investigation is "instituted or conducted other than in good faith." 408 U.S. at 707, 92 S.Ct. at 2670. The Court continued, "Official harassment of the press undertaken not for purposes of law

> enforcement but to disrupt a reporter's relationship with his news sources would have no justification." 408 U.S. at 707-08, 92 S.Ct. at 2670.
> ...
> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

The district court refused to recognize that Wolf-- as a news gatherer-- does not lose his First Amendment rights in the context of a federal grand jury subpoena. The district court showed no sensitivity to the First Amendment and gave deference to the prosecution despite its their burden to show by clear and convincing evidence the elements of contempt—including the non-applicability of Wolf's First Amendment defenses. The district court stated that this case is a "slam dunk" for the government. EOR 163:9 The district court stated that it was not its job to review the video tape that would bolster Wolf's claim of bad faith, non-legitimate investigation, or of a remote and tenuous connection to the investigation. EOR 141:14-142:1; 143:8-18 The district court stated that a violation by the government of 28 C.F.R. 50.10 should not "interfere with the wheels of justice." EOR 117:7-8; 156:11-156A:12. For this reason alone, this Court should overturn Wolf's contempt conviction. However, at the very least, this Court should remand the contempt issue and order the district court to more

rigorously review whether the government has rebutted Wolf's affirmative defense while paying greater deference to Wolf's free press rights under the First Amendment.

2. Whether The District Court Abused Its Discretion In Failing To Consider The Consequential Burdens On Wolf's Newsgathering In Order To Conduct A More Searching Analysis Of Wolf's Claim Of Unwarranted Government Harassment.

Branzburg left a paradox that appears to have misguided the district court analysis. *See In Re Grand Jury 87-3 Subpoena Duces Tecum, 955 F.2d 229, 234* (On one hand, the *Branzburg* plurality stated that the First Amendment applies to grand jury proceedings. *Branzburg,* 408 U.S. at 708, 92 S.Ct. at 2670. On the other hand, the plurality only example of First Amendment applicability was as protection against an investigation instituted or conducted in bad faith. *Id.* at 707, 92 S.Ct. at 2670.) The district court's mistake was ruling that Wolf had no First Amendment protection in a grand jury proceeding instead of using the First Amendment to conduct a more searching investigation of the government's conduct while giving deference to the First Amendment concerns.

The most recent word by the Ninth Circuit in the First Amendment versus grand jury dilemma was in *In re Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993) ("*Scarce*"). Yet *Scarce* did not repudiate the need for judicial balancing in cases such as the instant case, where there have been credible questions raised about whether the federal investigation is supported by legitimate federal law

enforcement interests and whether the subpoena for the unpublished videotapes has more than a tenuous connection to legitimate federal interests. *Id.* at 401.

3. Whether The District Court Abused Its Discretion By Failing To Review The Subpoena Material In Camera To Determine If Unwarranted Government Harassment Exists.

The district court –without looking at the videotape--decided that the materials sought by the grand jury did not have a remote and tenuous relationship to the federal criminal investigation. EOR 143:8-24. The district court refused to look at the private resource material to make this determination stating "that's what the grand jury is for." EOR 141:14-142:1. Wolf presented evidence to the district court that the material being subpoenaed does not contain footage of the alleged burned SFPD car or who threw the firecracker at the car, or who hit a police officer over the head. EOR 69:6-18; 99:9-16 The district court stated without viewing the video, "I'm making the decision that there is more than a remote and tenuous relationship. That this is a direct photographic evidence of what happened. So that's a very reasonable—you can't say that this is remote and tenuous. It may be that you don't like that idea that they would prosecute somebody for trying to burn up a police car, and that you think that's too Mickey mouse. Well, that's your opinion. *And that's not my—I don't have to—that's not my job to evaluate what the government prosecutes or not prosecutes...maybe it is Mickey Mouse. But that's what they are entitled to do if it is Mickey Mouse.* But assuming that it is a

legitimate prosecution, this is not remote. It is directly right on point. This video is right on point." EOR 143:8-24. The district court also stated that, "I want to say again it's not even clear to the court that there was a crime committed, but that is the purpose of the grand jury to sort out whether there was or there was not. And then, if they think there was probable cause, and they want to issue an indictment, then you proceed to having your day in court." EOR 150:10-15.

The First Amendment requires at a minimum that the district court not abrogate its responsibility to the grand jury to make the determination that the requested news gathering material is sufficiently relevant. Judicial review is necessary to protect the news gatherer's First Amendment rights. Once the material is furnished to the grand jury, the news gatherer's First Amendment rights have been irreversibly injured. Had the district court exercised its proper role, the contempt charges would have been dismissed pursuant to *In re Scarce,* 5 F.3d 397, 401 (Ninth Circuit reaffirmed the need for judicial balancing when the federal investigation is not supported by legitimate federal law enforcement interests, or the subpoena material has a tenuous connection to a legitimate federal interest).

In *Branzburg v. Hayes*, 408 U.S. 665, 707-708 (1972), the United States Supreme Court addressed the news gathering privilege in a federal grand jury subpoena situation. The Court recognized that compelled disclosure of First

Amendment materials required constitutional protection from government overreaching:

> News gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. *Id.* at 707-708.

The Court further recognized that:

> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. *The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.* *Id.* at 710 (Powell, J., concurring) (emphasis added).

The Supreme Court reaffirmed that grand juries "are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass" in *United States v. R. Enterprises, Inc.*, 498 U.S. at 299 (1991). The Ninth Circuit reaffirmed the *Bursey* ruling in *In re Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993) ("*Scarce*"). In *Scarce* the Ninth Circuit reaffirmed the need for judicial balancing when the federal investigation is not supported by legitimate federal law enforcement interests, or the subpoena material

has a tenuous connection to a legitimate federal interest. *Id.* at 401.

The district court refused to heed the law cited above in this case. EOR 143:8-24. While stating that it was bound to follow the law as set forth by the Supreme Court and Ninth Circuit, the district court refused to be the filter to determine if the government was engaged in a fishing expedition, or the federal investigation is not supported by legitimate federal law enforcement interests, or the subpoenaed material has a tenuous connection to a legitimate federal interests. EOR 143:8-24; 150:10-15. The district court stated that it was the grand jury's duty to determine if there was a legitimate investigation, or if the subpoena material had a tenuous connection to a legitimate federal interest. The district court refused to review the video tape being requested by the grand jury to determine whether the *Scarce* factor delegating this duty to the grand jury. This delegation of authority was contrary to the law.

E. Fifth Amendment To The United States Constitution

1. Whether The District Court Committed Legal Error In Denying The Objection To Finigan's Declaration And Exhibit Under The Fifth Amendment.

The district court erred in denying Wolf's objection and request to strike Jeffrey Finigan's Declaration in Support of United States' Request For Order To Show Cause Why Joshua Wolf Should Not Be Held In Civil Contempt paragraph 2, lines 8-11, and Exhibit A to said declaration. The evidence cited by Mr. Finigan

and Exhibit A is inadmissible against Wolf under the Fifth Amendment to the United States Constitution. *Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247 (1968) (when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection); *See* also *Pettyjohn v. United States*, 419 F.2d 651, 653 n. 5 (1969) (extending the holding in Simmons to motions alleging Fifth Amendment grounds for suppression). The court in *U.S. v. Moran-Garcia* summoned up the law clearly:

> In selecting a policy designed to effectively preserve scarce judicial resources, the Court does not sacrifice defendants' Fifth Amendment right against compelled self-incrimination. It is true that often the only individual who both (a) has personal knowledge of material facts and (b) is available to the defense is the defendant himself. Moreover it also is true that when a defendant desiring an evidentiary hearing is the only suitable declarant, it becomes incumbent upon the defendant to file a testimonial statement-even one which may include incriminating evidence. The filing of such a statement, however, will not interfere with the defendant's Fifth Amendment right.

783 F.Supp. 1266, 1271 (S.D. Cal. 1991). The district court's summary denial of Wolf's request that the Court strike EOR 111: 8-11, and EOR 98 was contrary to the law.

2. Whether The District Court Committed Legal Error In Applying The Act Of Production Doctrine To Deny Wolf A Fifth Amendment Privilege.

Wolf claims Fifth Amendment privilege against compelled production

regarding: 1) the materials themselves, and 2) the act of producing the materials. The district court initially concluded that the statements made by Wolf in the material could be incriminating and he could be charged. EOR 116:17-25; 118:6-14. In a grand jury investigation and to determine potential charges, the grand jury will need to know, before it indicts, where the resource material came from. In this case, the grand jury advised Wolf of his Fifth Amendment rights. EOR 105:1-18. The grand jury asked Wolf whether he brought the material requested to be produced by the subpoena. GJ Transcript, 6:10-11; 8:20-22. The grand jury asked him if he possessed the documents requested in the subpoena. EOR 107:17-19; 108:4-5; 109:24-25. The grand jury asked Wolf if he would turn over the documents request by the subpoena. EOR 108:14-22. Wolf asserted his First and Fifth Amendment rights despite the numerous requests by the prosecutor for him to authenticate and show control of the material requested in the subpoena. EOR 108:20-22. If the material is turned over, the government's representative can testify to the grand jury that the material came from Wolf under a subpoena or district court order thereby authenticating and establishing control of the material needed to potentially indict and prosecute him in the future.

The Ninth Circuit examined the propriety of a subpoena *duces tecum* in the grand jury context in *In Re Grand Jury Subpoena, Dated April 18, 2003*, 383 F.3d 905 (9th Cir. 2004) ("*Doe*"). The Court focused on the inherent testimonial nature

of such a potential production:

> Doe's claim of privilege is directed, however, not to the documents themselves but to the act of producing the documents. [Footnote omitted.] A witness' production of documents in response to a subpoena may have incriminating testimonial aspects. *See United States v. Hubbell*, 530 U.S. 27, 36, 120 S.Ct. 2037, 147 L.Ed.2d 24 (2000) (*Hubbell II*); Fisher [*v. United States*], 425 U.S. 391, 410, 96 S.Ct. 1569 [(1976)]. By producing documents in compliance with a subpoena, the witness admits that the documents exist, are in his possession or control, and are authentic. *See Hubbell II,* 530 U.S. at 36, 120 S.Ct. 2037. These types of admissions implicitly communicate statements of fact that may lead to incriminating evidence. *See id.* at 36, 38, 120 S.Ct. 2037. Whether the act of production has a testimonial aspect sufficient to attract Fifth Amendment protection is a fact-intensive inquiry. *See Fisher*, 425 U.S. at 410, 96 S.Ct. 1569 (stating the resolution of whether documents are testimonial "depend[s] on the facts and circumstances of particular cases or classes thereof"). *Id.* at 909-10.

The district court ruling on the act of production doctrine and the evidentiary objections after having found that Wolf had a legitimate free of prosecution was contrary to the law.

VI. CONCLUSION

Wolf takes seriously the events that occurred on July 8, 2006 to a SFPD officer and by no means diminishes these events. However the federal government's involvement is alarming. The government is investigating who threw a **FIRECRACKER**, after July the 4th , at a San Francisco Police car on July 8, 2006. EOR 19, 69:6-10; 110:17-111:3. The government claims it is investigating an alleged arson of the San Francisco Police car under 28 U.S.C. § 1826(b). EOR 111:1. The district judge question whether this was a federal crime.

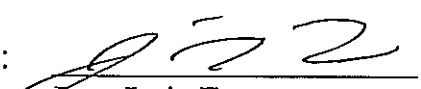
Wolf has shown that under any standard of balancing, whether public benefit versus public harm, reasonableness and oppressiveness, or need for exhaustion of the facts in this case, are heavy on the side of dismissing the civil contempt proceedings under the First Amendment since the government did not meet its burden to show by clear and convincing evidence the non-applicability of Wolf's affirmative defenses. Furthermore the district court erred by placing the burden on Wolf to establish the affirmative defense and to carry throughout the analysis the burden of persuasion.

The district court also erred by refusing to recognize that the Fifth Amendment applied. The district court found that Wolf could be in jeopardy, and then compelled the production of the material, thereby sentencing Wolf to a self fulfilling prophesy under the Act of Production. Because Wolf has no immunity the Court should reverse with directions that the contempt order be vacated and Mr. Wolf released from prison.

Dated: August 11, 2006

Respectfully Submitted

SIEGEL & YEE

By: 

Jose Luis Fuentes
Attorneys for
JOSHUA WOLF

CERTIFICATE OF SERVICE

I, Jose Luis Fuentes, certify that on the 11th day of August, 2006, I caused the foregoing:

1. Witness-Appellant Wolf's Opening Brief
2. Witness-Appellant Wolf's Excerpt of Record

to be served on the U.S. Attorney's Office, Northern District of California, by personally serving a copy of the documents to the Assistant United States Attorney, Jonathan Schmidht. In addition, electronic mail copy of all documents were sent to the U.S. Attorney's office on the 11th day of August, 2006 at Jonathan.Schmidt@usdoj.gov

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Jose Luis Fuentes