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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

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

In re: GRAND JURY INVESTIGATION,
dated February 1, 2006.

No. CR 06-90064 MISC MMC (MEJ)

**ORDER DENYING JOSHUA WOLF'S
MOTION TO QUASH SUBPOENA**

JOSHUA WOLF

I. INTRODUCTION

Before the Court is subpoenaed party Joshua Wolf's Motion to Quash Subpoena, filed February 15, 2006. In his motion, Mr. Wolf seeks to quash a government subpoena requiring production of video footage he shot related to a July 8, 2005 protest in San Francisco. Having considered the arguments of counsel and the papers submitted, the Court hereby DENIES Mr. Wolf's motion for the reasons set forth below.

II. BACKGROUND

On July 8, 2005, a protest and march occurred in San Francisco against the G8 Summit, then taking place in Perthshire, Scotland. Mr. Wolf, a journalist and videographer, filmed video footage of the event. Although the facts surrounding the protest and resulting events are not clear, it appears that two San Francisco police officers on the scene attempted to drive their vehicle through the group of marchers in an attempt to disperse the protest, but were unable to proceed when a foam sign was either placed or dropped under the vehicle. The officers exited the vehicle and one received a

1 serious head injury when struck from behind.

2 Following the incident, the San Francisco Police Department ("SFPD") initiated an
3 investigation, and local charges are pending against three people in connection with the incident: the
4 individual accused of putting the foam in front of the police car, and two observers, charged with
5 misdemeanors and accused of interfering. They are charged in San Francisco Superior Court. As
6 part of its investigation, SFPD solicited the help of the FBI's Joint Terrorism Task Force.

7 On or about February 1, 2006, the government served a grand jury subpoena upon Mr. Wolf
8 requiring him to appear before the grand jury and bring any and all video-related materials in his
9 possession related to the July 8, 2005 protest. Mr. Wolf filed the present motion on February 15,
10 2006.

11 III. DISCUSSION

12 In his motion, Mr. Wolf seeks an order quashing the subpoena on the following grounds: (1)
13 pursuant to Federal Rule of Criminal Procedure ("FRCP") 17(c), compliance with the subpoena
14 would be unreasonable or oppressive and would violate his rights under the First and Fourteenth
15 Amendments; (2) the subpoena is violative of the California Shield law; (3) compelling the
16 production of documents under the subpoena would violate his First Amendment rights and the
17 government cannot meet the burdens compelled by *Branzburg v. Hayes*, 408 U.S. 665 (1972) and
18 related authority; and (4) it is being used improperly in connection with state pending criminal cases
19 and investigation. The Court shall address each argument in turn.

20 A. Legal Standard

21 The grand jury is an investigatory body charged with the responsibility of determining
22 whether or not a crime has been committed. *United States v. R. Enterprises*, 498 U.S. 292, 297
23 (1991). "The function of the grand jury is to inquire into all information that might possibly bear on
24 its investigation until it has identified an offense or has satisfied itself that none has occurred." *Id.*
25 Thus, "the government cannot be required to justify the issuance of a grand jury subpoena by
26 presenting evidence sufficient to establish probable cause because the very purpose of requesting the
27 information is to ascertain whether probable cause exists." *Id.* (citing *Hale v. Hale*, 201 U.S. 43, 65

1 (1906)).

2 The investigatory powers of the grand jury are nevertheless not unlimited. "Grand juries are
3 not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation
4 out of malice or an intent to harass." *Id.* at 299. Thus, under FRCP 17©), the Court may quash or
5 modify the subpoena if compliance would be unreasonable or oppressive. Fed. R. Crim. P. 17©)(2).
6 In grand jury proceedings, a subpoena is presumed to be reasonable and "the burden of showing
7 unreasonableness must be on the recipient who seeks to avoid compliance." *R. Enterprises* at 301.
8 Accordingly, a motion to quash "must be denied unless the district court determines that there is no
9 reasonable possibility that the category of materials the government seeks will produce information
10 relevant to the general subject of the grand jury's investigation." *Id.*

11 **B. Application to the Case at Bar**

12 1. Whether compliance with the subpoena would be unreasonable or oppressive

13 First, Mr. Wolf argues that the subpoena is unreasonable because the government has no
14 discernable jurisdiction to investigate this matter. Specifically, he argues that the government seeks
15 to convert the grand jury into a tool of the executive to assist in a local criminal prosecution and
16 investigation over which the government has no jurisdiction. Mr. Wolf cites *U.S. v. Nixon*, 418 U.S.
17 683, 699-700 (1974), which provides that in order to require production, the government must show:

18 (1) that the documents are evidentiary and relevant; (2) that they are not otherwise
19 procurable reasonably in advance of trial by exercise of due diligence; (3) that the
20 party cannot properly prepare for trial without such production and inspection in
21 advance of trial and that the failure to obtain such inspection may tend unreasonably
22 to delay the trial; and (4) that the application is made in good faith and is not intended
23 as a general 'fishing expedition.'

24 *Id.* However, *Nixon* defines what is reasonable in the context of a jury trial, but does not apply in the
25 context of grand jury proceedings. *R. Enterprises*, 498 U.S. at 299-300. Thus, it would be contrary
26 to established law for the Court to place the burden of proof on the government. Instead, Mr. Wolf
27 must show that there is no reasonable possibility that the video footage is relevant to the general
28 subject of the grand jury's investigation.

Here, the general subject of the investigation is the events surrounding the July 8, 2005

1 protest and march. As Mr. Wolf shot video footage of the events, it would appear that the video
2 footage is relevant. Mr. Wolf argues that this is a purely local event, and the events do not appear to
3 transgress any federal criminal law. However, it is not necessary for a federal criminal law to be
4 violated in order for a grand jury to conduct an investigation. Rather, the grand jury may "inquire
5 into all information that might possibly bear on its investigation until it has identified an offense or
6 has satisfied itself that none has occurred." *R. Enterprises*, 498 U.S. at 297. Further, the government
7 need not specify a target crime because "the grand jury 'can investigate merely on suspicion that the
8 law is being violated, or even just because it wants assurance that it is not.'" *Id.* (quoting *United*
9 *States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)). As the government can show that the
10 video footage is relevant to the general subject of the grand jury's investigation, the Court finds that
11 Mr. Wolf has failed to meet his burden.

12 2. Whether the subpoena is violative of the California Shield Law

13 Next, Mr. Wolf argues that even if the video footage is relevant, he has "almost absolute
14 immunity" to refuse to surrender unpublished information sought by the prosecutor under the
15 California Shield Law, Cal. Const., Art. I, § 2(b). The shield law provides:

16 Nor shall a radio or television reporter or other person connected with or employed by
17 a radio or television station, or any person who has been so connected or employed,
18 be so adjudged in contempt for refusing to disclose the source of any information
19 procured while so connected or employed for new or news commentary purposes on
radio or television, or for refusing to disclose any unpublished information obtained
or prepared in gathering, receiving or processing of information for communication to
the public.

20 *Id.* The California Supreme Court has interpreted the shield law as an absolute barrier to a criminal
21 subpoena on the theory that neither the prosecution nor the general public possesses a conflicting
22 federal or state due process or constitutional right. *Miller v. Superior Court*, 21 Cal.4th 883, 898
23 (1999). However, in federal court on a federal charge, federal privilege law governs. Federal Rule
24 of Evidence 501 provides: "the privilege of a witness . . . shall be governed by the principles of the
25 common law as they may be interpreted by the courts of the United States in the light of reason and
26 experience." The Supreme Court applied the federal privilege scheme set forth in Rule 501 in *U.S. v.*
27 *Gillock*, 445 U.S. 360, 368 (1980), even where, as here, a competing privilege emanated from a state

1 Constitutional provision. The federal privilege law applicable to this case is *Branzburg*, as discussed
2 below, which mandates a different result than Mr. Wolf would obtain under the California
3 Constitution. Accordingly, Mr. Wolf is not entitled to immunity in federal court under the California
4 Shield law.

5 3. Whether the subpoena violates the First Amendment

6 Mr. Wolf also argues that the government is doing nothing more than trying to exploit a local
7 incident in order to chill the free expression and association of activists who participate in
8 demonstrations like the July 8, 2005 protest against the G8 Summit. Through its subpoena of his
9 video footage, Mr. Wolf contends that the government has risked making journalists appear to be an
10 investigative arm of the judicial system. In response, the government argues that the United States
11 Supreme Court has already decided this issue squarely against Mr. Wolf.

12 The Court agrees that a qualified First Amendment privilege against compelled testimony for
13 journalists exists. *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995); *see also Gonzales v. Nat'l*
14 *Broadcasting Co.*, 194 F.3d 29, 35-36 (2nd Cir. 1999). However, in *Branzburg v. Hayes*, 408 U.S.
15 665 (1972), the Supreme Court held that the public interest in a press unburdened by subpoenas did
16 not outweigh the public interest in assuring that criminal proceedings are based on the fullest record
17 possible. *Branzburg*, 408 U.S. at 690-91. The central tenet of *Branzburg* is that the First
18 Amendment does not shield a reporter or news organization from responding to a subpoena in a
19 criminal case, unless the reporter can show that the grand jury investigation was conducted in bad
20 faith. *Id.* at 708. Thus, while the burden of persuasion in a civil matter rests on the party seeking
21 materials, the journalist in a criminal investigation must demonstrate that it is proceeding in bad
22 faith, or that the government has otherwise exhibited "harassment of newsmen." *Id.* at 709 (Powell,
23 J., concurring).

24 Mr. Wolf argues that the investigation itself is in bad faith. Specifically, he argues that the
25 government is misusing its grand jury subpoena power as a tool in an illicit witch-hunt against
26 people and groups who identify as anarchist, reminiscent of the government's behavior during the
27 Red Scare. Although the Court appreciates Mr. Wolf's concerns as a journalist and his efforts to
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1 protect the qualified privilege against compelled testimony for journalists, the facts in this case do
2 not give rise to a finding of bad faith.

3 First, the Court notes that Mr. Wolf seeks to withhold video footage of a public
4 demonstration, parts of which he has already sold for profit. Given the grand jury's broad
5 investigatory mandate - to inquire into all information that might possibly bear on its investigation
6 until it has identified an offense or has satisfied itself that none has occurred - the unreleased video
7 footage is properly a part of its investigation. *R. Enterprises*, 498 U.S. at 297. Second, Mr. Wolf has
8 brought forth no argument that the unreleased video footage contains any confidential information.
9 Regardless, the fact that it is footage of a public demonstration would seem to render any such
10 argument meaningless. Third, in support of his bad faith allegations, Mr. Wolf does not present
11 evidence related to this specific investigation, other than the fact that he was subpoenaed. Instead,
12 Mr. Wolf's allegation, that the subpoena targets people based on their political identification and
13 association, seems to rest upon allegations that this subpoena is part of "an overbroad, overzealous,
14 illegal 'national program' to, in the FBI's own words, investigate the 'anarchist movement' (whatever
15 that might be), as 'a mass of irrelevant political rhetoric.'" Plaintiff's Reply at 2:16-18. While the
16 general scope of the government's investigation into the "anarchist movement" is not before it, the
17 Court notes that there is no evidence of any such investigation *in this case*. Rather, Mr. Wolf
18 videotaped a demonstration during which it is alleged that an attempt was made to set an SFPD care
19 ablaze. The incident is under investigation so that the grand jury can determine what, if any, crimes
20 were committed. Based on the information before it, the Court finds that this investigation does not
21 rise to the level of bad faith. Accordingly, the public interest in a press unburdened by subpoenas
22 does not outweigh the public interest in assuring that this criminal proceeding is based on the fullest
23 record possible. *Branzburg*, 408 U.S. at 690-91.

24 4. Whether the subpoena is being used improperly in connection with state pending
25 criminal cases and investigations.

26 Finally, Mr. Wolf argues that the subpoena is being used improperly in connection with state
27 pending criminal cases and investigations. However, on April 5, 2006, the government submitted
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the subject of the grand jury's investigation, including any instructions to the grand jury, for *in camera* review. Based on its *in camera* review of the investigation and the arguments submitted by the parties, the Court finds no evidence that the investigation is being used to aid the criminal cases in state court.

IV. CONCLUSION

Based on the analysis above, the Court hereby DENIES Joshua Wolf's Motion to Quash.
IT IS SO ORDERED.

Dated: 4-5-06



MARIA ELENA JAMES
United States Magistrate Judge

UNITED STATES DISTRICT COURT
for the Northern District of California

* * CERTIFICATE OF SERVICE * *

Case Number: CR-06-90064 MISC MMC

I, the Undersigned, Hereby, Certify That I Am an Employee in the Office of the Clerk,
U.S. District Court, Northern District of California.

That on April 5, 2006, I SERVED a true and correct copy(ies) of the attached, by placing
said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office
delivery receptacle located in the Clerk's office.

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