Judge Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE GRAND JURY SUBPOENAS, KATHERINE OLEJNIK, Subpoenaed Party, MATTHEW DURAN, Subpoenaed Party,	NO. GJ12-149 **OPPOSITION TO MOTION TO QUASH GRAND JURY SUBPOENAS** **FILED UNDER SEAL**

I. INTRODUCTION

The United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington; Michael Dion, Assistant United States Attorney; and John T. McNeil, Assistant United State Attorney, files this opposition to the Motion of Katherine Olejnik and Matthew Duran (collectively, the "witnesses") to quash the Grand Jury subpoenas issued to them. The witnesses have been subpoenaed to testify before the Grand Jury as part of an investigation into the May 1, 2012, vandalism of the William Kenzo Nakamura United States Courthouse, and related criminal activity. The vandalism took place during widespread "May Day" demonstrations and rioting in Seattle.

This is not an investigation of people's political beliefs or activities. The goal of this investigation is to identify the vandals and any co-conspirators or accomplices, and build solid cases against those people. However, the evidence suggests that the

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vandalism of the Courthouse was motivated by politics and ideology. Some of the vandals appear to be anarchists who are fundamentally opposed to the federal government and who attacked the Courthouse to make a political statement. Thus, inevitably, the investigation will incidentally touch on matters of politics and ideology. Those matters, however, are not the focus of the investigation.

In their Motion to Quash, the witnesses argue that the government has randomly subpoenaed them based solely on their political beliefs and activities. They claim that the subpoenas violate their rights, including their First Amendment rights. These arguments are baseless. The investigation has identified several suspects. The witnesses were subpoenaed because they have close connections to one or more of the suspects, and are in a position to know critical information about the suspect[s]' movements, activities, and statements in connection with the rioting and the vandalism of the Courthouse. The First Amendment does not limit the Grand Jury's power to investigate a crime simply because that crime may have been politically motivated, or because it took place during a demonstration. The Court should deny the Motion to Quash.

II. BACKGROUND

The following is a general summary of the investigation.

A. The Vandalism Of The Nakamura Courthouse

On May 1, 2012, there were large political demonstrations in Seattle and throughout the country. The first of May is "May Day," which is traditionally a day of demonstrations and protest. Most of the people who demonstrated in Seattle on May 1st were peaceful. Nevertheless, there was widespread rioting and vandalism in Seattle during May Day. Exhibit 1, Affidavit of Special Agent Geoffrey Maron, at ¶ 2.

Early on that day, hundreds of demonstrators gathered at Seattle's Westlake Park. A sub-group changed into largely or completely black clothing, a tactic known as "black bloc" that makes it hard to identify people who commit vandalism or other crimes. This tactic is commonly used by anarchists, who are people opposed to state authority and the government. Some of the black bloc demonstrators sported anarchist flags and symbols.

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Eventually the entire crowd of demonstrators began marching, including the black bloc group. During the march, demonstrators – primarily the black block group – began breaking windows, spray-painting the anarchist "A" symbol on property, tossing smoke bombs, and committing other crimes. Ex. 1 at ¶ 3.

When the marchers reached the Nakamura Courthouse, roughly ten people in black bloc vandalized the 6th Avenue doors. The vandalism was clearly coordinated: a wave of vandals would run up to the doors, batter them with objects such as poles or sticks (many of which sported flags which are symbols of anarchy), and retire, followed by another wave. Two other black bloc rioters -- one north of the entrance, and one south -- threw objects at the Courthouse. Following the concentrated attack by the black bloc rioters, two other people, "C.W." and "C.I.," emerged from the crowd and battered the Courthouse with flag poles. C.W. and C.I. do not appear to have been part of the organized anarchist group. Finally, somebody threw an object that burned like a road flare at the Courthouse. The object landed on the steps, where it burned and poured out smoke. Paint of various colors was used in paint bombs, signs, and graffiti (including the anarchist "A" symbol) during the attack on the courthouse. The repair costs are estimated at $100,000. Ex. 1 at ¶ 4.

B. The Investigation And The Role Of The Subpoenaed Witnesses

The investigation has identified several suspects in the Nakamura vandalism. At least some of the suspects live in the areas of Olympia and Portland, Oregon, and traveled from those areas to Seattle for May Day. The investigation has not identified all of the vandals. Ex. 1 at ¶ 5.

The investigation has also identified Katherine Olejnik and Matthew Duran as associates of one or more of the suspects, and as people who may have lived with one or more of the suspects. Thus, these witnesses may know whether the targets traveled to Seattle on May Day, who the witnesses traveled with, whether they witnesses made any relevant statements before or after May Day, and other important information. Ex. 1 at ¶ 6.

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Counsel for both witnesses contacted the Assistant United States Attorney ("AUSA") assigned to this investigation. Counsel have asked the AUSA to describe the nature of the investigation, where their clients fit into the case, and what the topics of the Grand Jury testimony would be. The AUSA has deliberately given counsel only limited information.

Ordinarily, the government would offer to meet with the witnesses and their counsel before the Grand Jury session and talk to them in detail about the topics of their testimony. If a witness is worried about self-incrimination, the government would talk to the witness and counsel about how to deal with that problem. In this case, however, it has been clear from conversations with counsel that the witnesses are strongly opposed to testifying under any circumstances. Under these circumstances, revealing details about the topics of testimony and the kinds of questions that would give the witnesses – whose goal is to never testify – a window into the ongoing investigation. The witnesses would be free to share whatever insights they gleaned with the targets of the investigation.

Accordingly, the government has given the witnesses' counsel only a general, vague, and incomplete description of the investigation and how their clients fit in. The government has told counsel that it is deliberately giving them vague and incomplete information to avoid revealing the details of the investigation.

The government has told counsel the general nature of the investigation – namely, that it focuses on the vandalism of the Nakamura Courthouse and related criminal activity.

The government has told counsel that the witnesses are not targets.

The government has told counsel that the witnesses have been subpoenaed because the investigation has shown that they are associates of one or more of the targets, and that there is information that they may have lived with one or more of the targets at the time of the offense.

Beyond that limited information, the government has told counsel almost nothing. The government has not said who the targets are or how they were identified. The

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government has not named the particular people that the witnesses are expected to give information about. The government has reason to believe that the witnesses may have information about targets other than the target(s) that the witness may have actually lived with. The government has not, however, identified who those targets are or why it thinks the witnesses may have information about them.

Olejnik and Duran were originally subpoenaed to appear before the Grand Jury on August 30, 2012. The government agreed to reschedule their appearances so that this Motion could be resolved. Duran has been subpoenaed for September 13, 2012, and Olejnik has been subpoenaed for September 27, 2012.

III. DISCUSSION

Federal Criminal Rule of Procedure 17(c)(3) governs motions to quash grand jury subpoenas. The Rule permits a subpoena recipient to seek a court order modifying or quashing a subpoena "if compliance would be unreasonable or oppressive." Fed. Crim. R. Proc. 17(c)(3).

Courts have been generally reluctant to interfere in grand jury investigations. "The grand jury occupies a unique role in our criminal justice system." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991). "It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. . . . [T]he grand jury 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" *Id.* (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950).

"'When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation.'" *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972) (quoting *Wood v. Georgia*, 370 U.S. 375, 392 (1962)). To serve this important role, "[t]raditionally the grand jury has been accorded wide latitude to inquire into violations of criminal law." *United States v. Calandra*, 414 U.S. 338, 343 (1973). Indeed, "[a] grand jury investigation 'is not fully carried out until every available clue has been run down and all

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witnesses examined in every proper way to find if a crime has been committed.'" *Branzburg*, 408 U.S. at 701 (internal quotation marks and citations omitted).

Judicial oversight of a grand jury investigation must be circumscribed so as not to "impair the strong governmental interests in affording grand juries wide latitude, avoiding minitrials on peripheral matters, and preserving the necessary level of secrecy." *R. Enterprises*, 498 U.S. at 300. Limited oversight is appropriate because the "law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority." *Id.* Accordingly, "a grand jury subpoena issued through normal channels is presumed to be reasonable." *Id.* at 301.

The witnesses suggest that grand jury investigations that touch on protected speech and association are different, and that the government has the initial burden of showing that its subpoenas are reasonable. This is not the law. As the Supreme Court explained in *R. Enterprises* – which itself involved a subpoena the recipient claimed sought documents prohibited by the First Amendment – the strong presumption of reasonableness places the "burden of showing unreasonableness . . . [onto] the recipient who seeks to avoid compliance." *Id.* As set forth below, the witnesses cannot meet this burden. The subpoenas are a reasonable way for the government to seek evidence in the criminal investigation of the vandalism of the Nakamura Courthouse.

A. The Government Is Not Required To Prove That The Witnesses Have Relevant Information

In their Motion, the witnesses insist that they have "no connection to the investigation," suggesting that they cannot have any relevant information, but rather are victims of a political witch hunt. The Supreme Court has held that a person challenging a grand jury subpoena on relevancy grounds must meet a very heavy burden, namely, to show that there is "no reasonable possibility" that the subpoena will produce relevant information. *United States v. R. Enterprises, Inc.,* 498 U.S. 292, 301 (1991). Courts are not expected to hold mini-trials or evidentiary hearings to determine whether a given subpoena seeks appropriate information. Rather, the law presumes that a properly-issued

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grand jury subpoena is "reasonable," and the party challenging the subpoena has the "burden" to show otherwise. *Id.* at 300-01. The Government does not even need to make a preliminary showing of relevance. *In re Hergenroeder,* 555 F.2d 686 (9th Cir. 1977) (per curiam) (rejecting argument that government must show that grand jury subpoena for handwriting exemplar was "relevant" to an ongoing investigation, rather than being sought for some other purpose).

In this case, the witnesses claim that they had nothing to do with the vandalism of the Courthouse. The Court is not required to accept that claim at face value. *R. Enterprises,* 498 U.S. at 303 ("A grand jury need not accept on faith the self-serving assertions of those who may have committed criminal acts. Rather, it is entitled to determine for itself whether a crime has been committed.").

In any event, assuming for argument's sake that those claims are true, that would not make the subpoena unreasonable. A grand jury may subpoena witnesses who are "suspected of no misconduct" but who may be able to "provide links in a chain of evidence relating to the criminal conduct of others." *United States v. Suleiman,* 208 F.3d 32, 40 (2nd Cir. 2000). The government is not required to prove that the subpoenas will lead to the identification of suspects, charges, or any other outcome: "the "scope of [the grand jury's] inquiries is not to be limited narrowly by . . . forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Branzburg* at 688.

Indeed, the "'identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.'" *R. Enterprises*, 498 U.S. at 297 (quoting *Blair v. United States*, 250 U.S. 273, 282 (1919)). A showing of probable cause is not required because, as the Supreme Court explained, "the government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists." *R. Enterprises*, 498 U.S. at 297.

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In this case, the Government has identified a number of suspects and potential suspects in the vandalism of the Nakamura courthouse. The Government has information that the witnesses were close associates of one or more of the suspects and may have lived with one or more of them. Thus, it is reasonable to believe that the witnesses have relevant information such as: (1) whether the suspect[s] had any motive to vandalize the courthouse; (2) whether the suspect[s] traveled, or planned to travel, to Seattle for May Day; (3) whether the suspect[s] had any contact with other suspects; and (4) whether the suspect[s] made any relevant statements.

In their Motion to Quash, the witnesses argue that, even if they lived with or are close associates of one or more suspects, "mere proximity does not make for relevant information." Motion to Quash at p. 8. That is impressive sounding nonsense. There are many situations where proximity may make for relevant evidence. For example, if you wanted to know where somebody was on a given day, or who they were with, or why they went wherever they went, it would be logical to ask that person's roommates or close associates. That is the case here. The witnesses have not been subpoenaed because of their politics. They have been subpoenaed because they are likely to have relevant information about rioting and the vandalism of the Courthouse.

The witnesses also claim that – based on their interpretation of the state of the investigation – there must be only "scant" evidence against the suspects. The government will not comment on this characterization, and it is a red herring in any event. The very purpose of the Grand Jury investigation is to identify suspects and gather evidence. For that reason, there is no requirement of probable cause or any other level of suspicion for a Grand Jury investigation. *R. Enterprises*, 498 U.S. at 297.

If the Court feels that it needs further information about relevance, the Government would ask to provide that information *in camera,* to avoid disclosing information about the progress of the investigation. *In camera* review of information provided by the government *ex parte* is a well-accepted mechanism that permits the government to provide the Court with important information regarding its investigation,

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while maintaining the secrecy of the grand jury's investigation. *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991). The rationale underlying this well-established process is obvious. "Requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise 'the indispensable secrecy of grand jury proceedings.'" *Id.* (*citing United States v. Johnson*, 319 U.S. 503, 513 (1943)). Indeed, the Ninth Circuit has endorsed this process in connection with motions to quash grand jury subpoenas because the "disclosure of sensitive grand jury materials to the target of the investigation could seriously impede the function of the grand jury." *In re Grand Jury Proceedings*, 867 F.2d 539, 540 (1988) (motion to quash subpoena on basis of attorney-client privilege; collecting cases)

B. The Subpoenas Do Not Violate The First Amendment

The witnesses argue that requiring them to testify would violate the First Amendment by chilling their rights of speech and association. The witnesses accuse the government of harassing and oppressing them based on their political activities. These arguments are legally and factually baseless.

This is not an investigation into political activity. This is an investigation of a crime. Several masked people vandalized a United States Courthouse. The Grand Jury is trying to find out who those people were. Incidentally, the investigation will touch on matters related to speech and association. It is impossible to completely avoid these issues because the Courthouse was vandalized during a political demonstration, and by people who probably wanted to make a political statement. The very poles that the vandals used to smash the Courthouse doorpanes also sported flags with political meaning. Thus, to some degree, the crime and political activity are intertwined.

Accordingly, if there is to be any meaningful Grand Jury investigation in this case, the Grand Jury must be allowed to inquire into matters such as: (1) whether the suspects had any motive – political or otherwise – to vandalize the Courthouse; (2) whether the suspects had the opportunity to commit the crime – that is, were they in Seattle during the May Day demonstrations and marches, and were they part of the group of protesters that

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marched to the Courthouse; (3) the suspects' purposes for being in Seattle during May Day; (4) whether the suspects have possessed relevant items of evidence (such as black bloc clothing or anarchist flags); and (5) whether others traveled with the suspects to the May Day demonstrations.

To forbid the Grand Jury from looking into these topics is tantamount to forbidding the Grand Jury from investigating the crimes at all.

As discussed below, the law does not immunize witnesses from giving relevant testimony to a Grand Jury simply because that testimony may incidentally involve matters of speech and association. To the contrary, the Supreme Court and the Ninth Circuit have held that the First Amendment does not prevent a Grand Jury from fully investigating crimes, even if there is some political aspect to the crimes. Unless the government acts in bad faith, First Amendment rights are not implicated and First Amendment protections are not triggered. *In re Grand Jury Proceedings, James Richard Scarce ("Scarce"),* 5 F.3d 397, 400 (9th Cir. 1993)

1. Courts Have Repeatedly Held That Evidence Of Political Beliefs May Be Relevant And Admissible In Criminal Cases

Politically motived crimes are nothing new. To cite examples from distant and recent history, the assassinations of President Lincoln and Martin Luther King, the Oklahoma City bombing, and the arson of the University of Washington horticulture building were all motivated by politics and ideology. Obviously, these crimes must be investigated and prosecuted, and the investigations and prosecutions will often involve ideology and speech to some degree.

Accordingly, courts have recognized that, although certain speech or political beliefs may be Constitutionally protected against suppression or persecution, that protection does not bar evidence of that speech or belief where it is relevant to a legitimate prosecution. The Supreme Court has held that the "First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (evidence of defendant's hostility

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to white people admissible in hate crimes prosecution); *Haupt v. United States*, 330 U.S. 631 (1947) (First Amendment does not prevent the admission in evidence of a defendant's political views to demonstrate the defendant's relevant motive in a prosecution for treason); *see also United States v. Soblen*, 301 F.2d 236, 240 (2nd Cir. 1962) (evidence of alleged conspirators' political activities properly admitted because it was "relevant background to the prosecution's case, to show the motivation and community of interest of the conspirators"). These cases establish that the First Amendment does not bar the government from using the kind of evidence it seeks from the witnesses in this investigation at trial.

2. In The Grand Jury Context, First Amendment Protections Are Triggered Only By A Showing Of Bad Faith Or Abuse

The witnesses argue that the Ninth Circuit's decision in a 1972 case, *Bursey v. United States,* 466 F.2d 1058, 1083 (9th Cir. 1972), requires the court to use a three-step balancing analysis to determine whether the subpoenas in this case are permissible under the First Amendment. Under the *Bursey* analysis, a subpoena that implicates First Amendment rights will be upheld if: (1) the government's interest is "immediate, substantial, and subordinating;" (2) there is a "substantial connection" between that interest and the information that the government seeks from the witness; and (3) the means of obtaining the information is "not more drastic than necessary" to further the interest. *Id.* at 1082.

The witnesses are right that Grand Jury proceedings are generally subject to the First Amendment, and they state the elements of the *Bursey* balancing standard correctly. However, their brief leaves out something very important: in post-*Bursey* decisions, the Ninth Circuit has made clear that the *Bursey* analysis is only triggered where there is a showing of harassment, bad faith, dubious relevance, or similar indicia of abuse. *In re Grand Jury Proceedings, James Richard Scarce ("Scarce"),* 5 F.3d 397, 400 (9th Cir. 1993) (discussing *Bursey*). The law as set forth by the Supreme Court and the Ninth Circuit is clear that – absent some showing of irrelevancy, bad faith, or harassment – the

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First Amendment does not restrict the scope of otherwise valid subpoenas issued as part of a good faith criminal investigation. *Id.; see also Branzburg v. Hayes*, 408 U.S. 665 (1972) (refusing to create a First Amendment free speech and free press privilege for news reporters to protect their sources from grand jury inquiries, but nothing that First Amendment would protect against harassment); *In re Grand Jury Subpoenas Duces Tecum,* 78 F.3d 1307, 1313 (8th Cir. 1996) (upholding contempt findings against parties who made illegal campaign contributions and rejecting claim that subpoenas violated the freedom of association).

In *Bursey,* the Ninth Circuit announced that it was setting forth a test to govern situations where Grand Jury activity "collides" with First Amendment rights. *Bursey,* 466 F.2d at 1083. When there is a "collision," the three part balancing test is used to make sure that the subpoena advances "compelling" interests and that the infringement on the First Amendment is "no greater than is essential." *Id.* The *Bursey* case itself involved a "collision," as many of the information that the government sought had little or "no justification" and little or no connection to the legitimate purposes of the investigation. *Id.* at 1088.

The *Bursey* case did not, however, definitely state what kind of Grand Jury activity would amount to a "collision" that implicates First Amendment rights. The Ninth Circuit has addressed that question in a line of subsequent cases that began almost immediately after *Bursey* and have spanned almost forty years. During that period, the Ninth Circuit has stated time and time again that, in the context of a Grand Jury investigation, First Amendment protections only come into play where there is a showing of bad faith, harassment, or dubious relevance.

In *Lewis v. United States,* 501 F.2d 418 (9th Cir. 1974), a radio station manager argued that a grand jury subpoena requiring him to testify and to produce documents and recordings violated the First Amendment. The Ninth Circuit acknowledged that the protections of the Constitution governed Grand Jury proceedings. *Id.* at 422. However, the court also found that the subpoena to the radio station manager posed no problems

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under the First Amendment. The court relied on the Supreme Court's *Branzburg* decision, which refused to create a First Amendment privilege for reporters in Grand Jury proceedings. *Id.* at 422-23. The Ninth Circuit noted that *Branzburg* recognized that "grand jury investigations instituted or conducted other than in good faith" or which amounted to "[o]fficial harassment" would infringe on the First Amendment. *Id.* at 423. Applying this standard to the subpoena to the radio station manager, the court found "no evidence" that the Grand Jury activity was "harassment" or otherwise "not for legitimate purposes of law enforcement." *Id.* Accordingly, the court rejected the First Amendment argument without conducting the three part *Bursey* inquiry.

The Ninth Circuit re-iterated this ruling a year later, in a subsequent appeal in the *Lewis* litigation, *Lewis v. United States,* 517 F.2d 236 (9th Cir. 1975) (*"Lewis II"*). In *Lewis II,* the Ninth Circuit stated that – pursuant to *Branzburg* – First Amendment protections were triggered "where a grand jury investigation is 'instituted or conducted other than in good faith.'" *Id.* at 238 (quoting *Branzburg*). The court explained that the grand jury witness would have a "remedy" under the First Amendment if the investigation was not in "good faith" or sought information "bearing only a remote and tenuous relationship to the subject of the investigation." or otherwise did not further a "legitimate need of law enforcement." *Id.* The court concluded that, because radio station manager failed to establish any of those things, he had no First Amendment claim. *Id.* Once again, the court did not conduct the three part *Bursey* inquiry.

The Ninth Circuit's most comprehensive statement about the limits on the application of *Bursey* came in its 1993 *Scarce* decision. In *Scarce*, a graduate student claimed a First Amendment privilege not to answer questions about vandalism at a university animal research facility. The Ninth Circuit noted that, per *Branzburg*, First Amendment protection was only triggered by "bad faith," a "remote and tenuous relationship" between the information sought and the subject of the investigation, or some other reason to believe that law enforcement has no "legitimate need" for the information. *Scarce,* 5 F.3d at 400. The Ninth Circuit specifically stated that, under the holding of

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Branzburg, a case-by-case balancing of the government's need for information against the infringement on the First Amendment was proper only "in the limited circumstances . . . where there is, in effect, an abuse of the grand jury function." *Id.* The court noted that it had rejected First Amendment claims out of hand in the two *Lewis* cases because the radio station manager did not show abuse. *Id.*

This language from *Scarce* clearly limits the application of the *Bursey* three part test to cases of Grand Jury abuse. No interpretation is required on this point, because the Ninth Circuit went on in the *Scarce* decision to specifically limit *Bursey* to cases of grand jury abuse. The court explained that *Bursey* was consistent with *Branzburg* because, under the facts in *Bursey*, there was a showing of abuse -- namely, a "lack of a substantial connection between the information sought and the criminal conduct" under investigation. *Id.* at 402. That lack of substantial connection put *Bursey* in "the limited area for balancing of interests" permitted by *Branzburg*. *Id.* Thus, the three part balancing test was properly applied in *Bursey,* because *Bursey* involved a showing of abuse in the form of dubious relevance.

The rule from the *Lewis* and *Scarce* decisions is clear and simple: the three part *Bursey* analysis applies *only* when there is a showing of bad faith and abuse. Applying it without such a showing would conflict with the Supreme Court's *Branzburg* decision, because that decision held that First Amendment interests are not implicated by a Grand Jury investigation absent bad faith or abuse. *Scarce*, 5 F.3d 400-402. The Ninth Circuit summarized this rule in one sentence last year: "bad faith investigations implicate First Amendment rights." *Lacey v. Maricopa County,* 649 F.3d 1118, 1133 (9th 2011); *see also In the Matter of Grand Jury Subpoena (Chinske),* 785 F.Supp. 130, 134 (D. Mont. 1991) (Constitutional "balancing" test triggered only when the exercise of First Amendment religious freedoms is the "object" of the Grand Jury activity, and is not triggered when it is "merely the incidental effect" of an otherwise valid investigation").

3. The Witnesses Have Failed To Show Bad Faith Or Abuse

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In their Motion to Quash, the witnesses claim that the subpoenas do not further a legitimate investigation, but rather are meant to harass them based on their political activities. The witnesses, however, are not being subpoenaed to testify about politics. They have been subpoenaed because a crime was committed and they may have relevant information. In short, they are potential witnesses to a crime – nothing more, nothing less. Their testimony will only touch on speech and association to the extent that those matters are incidental to investigating the crime.

With respect to the argument that the witnesses do not have relevant information, as shown in Section III(A) of this Brief, the information that the government seeks from the witnesses is clearly relevant to identifying the suspects in the vandalism and to building cases against them.

The witnesses base their claim of harassment on matters that have nothing to do with this investigation. They cite to historical examples of the abuse of the Grand Jury and the government's power of prosecution, including events from the administrations of Thomas Jefferson and Richard Nixon. All these examples only show that the Grand Jury process can be abused. They reveal nothing about the subpoenas issued to these witnesses in this investigation.

Because the witnesses have failed to show bad faith or abuse, under Ninth Circuit law, their First Amendment rights are not infringed upon and the three part *Bursey* test does not apply. *Scarce*, 5 F.3d 400-402.

4. Even If The *Bursey* Balancing Test Were Applied, The Subpoenas Should Be Upheld

Even if the court applied the *Bursey* test, the witnesses' First Amendment argument would fail. Under the *Bursey* analysis, a subpoena that infringes upon First Amendment rights will be upheld if: (1) the government's interest is "immediate, substantial, and subordinating;" (2) there is a "substantial connection" between that interest and the information that the government seeks from the witness; and (3) the means of obtaining the information is "not more drastic than necessary" to further the interest. *Id.* at 1082.

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With respect to the first factor, the government has a compelling interest in investigating the Nakamura vandalism. *Bursey,* 466 F.2d at 1086; *Branzburg*, 408 U.S. at 700; *see also R. Enterprises*, 498 U.S. at 730-31 (Stevens, J., concurring). With respect to the second factor, the information the government seeks is directly relevant to identifying the culprits and building cases against them. Finally, the subpoenas are not unnecessarily drastic. Although the government's only interest is in investigating the crimes, the fact remains that the crimes were committed in the middle of a political demonstration, and most likely by people with political motives. The political aspect to the case is incidental, but it exists nonetheless, and there is no way to purge it from the investigation.

C. Fifth Amendment Issues

The witnesses argue that they have a Fifth Amendment right not to testify before the Grand Jury. Their invocation of their Fifth Amendment right is hard to square with their insistence that they had nothing to do with the vandalism of the Courthouse and cannot possibly even have relevant information about the crimes being investigated. In any event, since the Motion to Quash was filed, this Court has a compulsion order granting Olejnik immunity and requiring her to testify. Ex. 2. Accordingly, she cannot claim a Fifth Amendment privilege.

The government expects that Duran's Fifth Amendment claim will be addressed and resolved before this Motion is argued.

D. The Government Is Not Required To Reveal Any Information About Electronic Surveillance

The witnesses argue that the government must disclose whether they have been the targets of electronic surveillance, i.e., a wiretap. The witnesses rely on two statutes, 18 U.S.C. § 2518, *et seq.,* and 18 U.S.C. § 3504, and caselaw based on those statutes holding that a Grand Jury witness defending a contempt proceeding may argue that he was not required to answer questions based on the fruits of an illegal wiretap. In this case, the witnesses will not be asked any questions based on information obtained from a wiretap. As discussed below, no further disclosure is required.

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With respect to Section 2518, this statute provides that, where the government seeks to introduce into evidence or otherwise disclose at an adversarial hearing the contents or fruits of any communication intercepted pursuant to Title III, it must first produce to the defense a copy of "the court order, and accompanying application, under which the interception was authorized or approved." Section 2518(9) states, in full:

> The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

18 U.S.C. § 2518(9).

Section 3504, in relevant part, effectively applies Section 2518 *et seq.* to Grand Jury proceedings, and makes clear that Grand Jury witnesses may refuse to answer questions "based upon the illegal interceptions of their communications." *Gelbard v. United States*, 408 U.S. 41, 52-54 (1972). In *Gelbard*, the Supreme Court held that a witness had a right to defend a civil contempt proceeding by challenging the legality of the wiretap. *Id.* at 61.

As an initial matter, the witnesses' request for disclosure is premature. *Gelbard* recognized a right to disclosure at the contempt hearing stage. The witnesses have cited no authority stating that there is any right to disclosure before that point. To the contrary, the disclosure requirement is triggered only when wiretap evidence, or the fruits thereof, is offered and "*received in evidence or otherwise disclosed*" at a hearing or other proceeding. *See* 18 U.S.C. § 2518(9) (disclosure requirement is triggered only when wiretap evidence, or the fruits thereof, is offered and "*received in evidence or otherwise disclosed*" at a hearing or other proceeding) (emphasis added). The witnesses claim that it is "appropriate" to make a disclosure demand in a motion to quash, but the only case they cite, *In re Lewis,* 501 F.2d 418, 421 (9th Cir. 1974), says nothing about that issue, and

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deals only with a claim of illegal wiretapping raised after contempt proceedings were already underway. Rather – as made clear in a case cited elsewhere in the Motion to Quash – *Gelbard* "applies only to grand jury witnesses who, after refusing to testify, seek to show good cause for doing so as a defense to a contempt citation and imprisonment." *In re Grand Jury Investigation,* 431 F.Supp.2d 584 (E.D. Va. 2006) (explaining that *Gelbard* "is properly limited to the precise procedural posture in which it was presented, namely grand jury witnesses defending against contempt charges").

Even assuming for argument's sake that the witnesses can properly make a disclosure demand at this stage, the law entitles them to minimal information (at best). The defense notes that the Ninth Circuit has held that the government's obligation to affirm or deny a wiretap is triggered by "the mere assertion that unlawful wiretapping has been used against a party." *United States v. Vielghth,* 502 F.2d 1257, 1258 (9th Cir. 1974). In this case, the witnesses have not actually asserted that they were unlawfully wiretapped – rather, they offer only a "suspicion" of illegal wiretapping. Def. Mot. at pp. 18, 22. That "suspicion" does not amount to the "positive statement that illegal surveillance has taken place" that is required to trigger the disclosure requirements. *United States v. Apple,* 915 F.2d 899, 905 (4th Cir. 1990) (citing *United States v. Tucker,* 526 F.2d 279, 282, n. 4 (5th Cir. 1976)); *In re Grand Jury Investigation,* 431 F.Supp.2d at 590.

Finally, even if the witnesses' "suspicion" was enough to trigger a disclosure obligation, that obligation would be extremely minimal. In post-*Vielghth* cases, the Ninth Circuit has explained that "the specificity required of the government's response is measured by the specificity and strength of the witness's allegations." *In re Grand Jury Investigation,* 437 F.3d 855, 857 (9th Cir. 2006) (citing cases). The Ninth Circuit has explained that, because of the "awesome burden" the government would face in responding to "ill-founded claims of electronic surveillance," a claim of an illegal wiretap "must be sufficiently concrete and specific" before a "factual, unambiguous, and

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unequivocal" response is required from the Government. *United States v. Sel*, 505 F.2d 845, 856 (9th Cir. 1975).

In this case, the witnesses' claim of electronic surveillance is "vague to the point of being a fishing expedition." *Id.* The witnesses cite to unrelated investigations where other law enforcement agencies have allegedly done something bad. These other investigations have nothing to do with wiretapping, nothing to do with this investigation, and offer absolutely no reason to think that the witnesses have been subject to illegal wiretapping as part of *this investigation*. ~~Beyond that~~, the witnesses merely conclude that – because they supposedly had nothing to do with the May Day vandalism – they might have come to the government's attention through a wiretap. The government, however, has explained in general terms why it subpoenaed the witnesses, namely, because they are associates and suspected roommates of the targets and may have relevant information. In short, the witnesses have made a "general or unsupportable claim" that "requires only a general response." *In re Grand Jury Investigation,* 437 F.2d at 857 (citation and internal quotation marks omitted). Accordingly, the government responds that the witnesses have not been subpoenaed as a result of any wiretapping, and no questions will be asked of the witnesses based on any wiretapping. No further response is required.

E. The U.N. Charter Is Not A Basis To Quash The Subpoenas

The witnesses argue that the subpoenas should be quashed because requiring them to testify would violate the United Nations Charter, and in particular its provisions on human rights. This argument is frivolous. The witnesses cannot cite any authority stating that the U.N. Charter is a basis to quash a subpoena, suppress evidence, or grant any other relief in connection with a criminal case. Even if the U.N. Charter somehow applied, requiring the witnesses to testify would hardly violate their human rights. The witnesses have been duly subpoenaed, are represented by counsel, and are protected by immunity. Requiring them to answer legitimate questions as part of a criminal investigation is consistent with any reasonable notion of human rights.

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IV. CONCLUSION

The First Amendment protects speech and association. It does not protect crimes, even if those crimes were committed for political reasons. The First Amendment prohibits the Grand Jury from making protected speech and association the object of an investigation. It does not restrict the Grand Jury's ability to investigate a crime just because the investigation will incidentally involve matters of speech and association.

In this case, the Grand Jury is not investigating anarchists. It is investigating crimes that may have been committed by anarchists. It should be allowed to do a full and complete investigation. The witnesses' First Amendment argument, if accepted, would hamstring not only this investigation, but would also hinder future investigations of politically and ideologically motived crimes of all sorts. The Ninth Circuit and the Supreme Court have clearly held that the First Amendment does not hobble legitimate Grand Jury investigations in this way. The witnesses have not met their burden to show that the subpoenas are unreasonable, and the Court should deny the Motion to Quash.

DATED this 7th day of September, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2012, I filed the foregoing with the Clerk of Court. I further certify that I have served a copy of the foregoing via email to Kimberly N. Gordon, counsel for Matthew Duran, and Jennifer Kaplan, counsel for Katherine Olejnik.

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Assistant United States Attorney

EXHIBIT 1

AFFIDAVIT

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, Geoffrey Maron, being first duly sworn, depose and state as follows:

Affiant's Background

1. I have been a Special Agent ("SA") of the Federal Bureau of Investigation ("FBI") since 2003. I am trained and experienced in investigating a wide variety of violations of federal criminal law. I am currently assigned to the FBI's Seattle office, and work on the Joint Terrorism Task Force ("JTTF").

2. On May 1, 2012, there were large political demonstrations in Seattle and throughout the country. The first of May is "May Day," which is traditionally a day of demonstrations and protest. Most of the people who demonstrated in Seattle on May 1st were peaceful. Nevertheless, there was widespread rioting and vandalism in Seattle during May Day.

3. Early on that day, hundreds of demonstrators gathered at Seattle's Westlake Park. A sub-group changed into largely or completely black clothing, a tactic known as "black bloc," that makes it hard to identify people who commit vandalism or other crimes. This tactic is commonly used by anarchists, who are people opposed to authority and the government. Some of the black bloc demonstrators sported anarchist flags and symbols. Eventually the entire crowd of demonstrators marched, including the black bloc group. During the march, demonstrators – primarily the black block group – broke windows, spray-painted the anarchist "A" symbol on property, tossed smoke bombs, and committed other crimes.

4. When the marchers reached the Nakamura Courthouse, roughly ten people in black bloc vandalized the 6th Avenue doors. The vandalism was clearly coordinated: a wave of vandals would run up to the doors, batter them with objects such as poles or

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sticks (many of which sported flags which are symbols of anarchy), and retire, followed by another wave. Two other black bloc rioters -- one north of the entrance, and one south -- threw objects at the Courthouse. Following the concentrated attack by the black bloc rioters, two other people, "C.W." and "C.I.," emerged from the crowd and battered the Courthouse with flag poles. C.W. and C.I. do not appear to have been part of the organized anarchist group. Finally, somebody threw an object that burned like a road flare at the Courthouse. The object landed on the steps, where it burned and poured out smoke. Paint of various colors was used in paint bombs, signs, and graffiti (including the anarchist "A" symbol) during the attack on the courthouse. The repair costs are estimated at $100,000.

5. The investigation has identified several suspects in the Nakamura vandalism. At least some of the suspects live in the areas of Olympia and Portland, Oregon, and traveled from those areas to Seattle for May Day. The investigation has not identified all of the vandals.

6. The investigation has also identified Katherine Olejnik and Matthew Duran as associates of one or more of the suspects, and as people who may have lived with one or more of the suspects. Thus, these witnesses may know whether the targets traveled to Seattle on May Day, who the witnesses traveled with, whether the witnesses made any relevant statements before or after May Day, and other important information.

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7. I have been directly involved in discussions about subpoenaing Olejnik and Duran as witnesses and about what questions they should be asked when they testify. Olejnik and Duran were identified as witnesses in this investigation through means that are independent of any wiretap information, or any information derived from a wiretap. The basis for any questions that they will be asked will also be independent of any wiretap information, or any information derived from a wiretap.

GEOFFREY MARON, SPECIAL AGENT
Federal Bureau of Investigation

Dated: September 6, 2012

State of Washington
County of King

SUBSCRIBED TO AND SWORN to before me on this the 6th day of September, 2012.

Andrea L. Motturi

Notary Public in and for the State of Washington
Residing in Seattle. My commission expires 09-09-2013.

ANDREA L. MOTTURI NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 9-9-13

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EXHIBIT 2

Judge Jones

FILED ENTERED
LODGED RECEIVED

AUG 30 2012

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

CERTIFIED TRUE COPY
ATTEST: WILLIAM M. McCOOL
Clerk, U.S. District Court
Western District of Washington
By Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE GRAND JURY TESTIMONY OF KATHERINE OLEJNIK

NO. 6312-145

~~[PROPOSED]~~ COMPULSION ORDER

FILED UNDER SEAL

On motion of Jenny A. Durkan, United States Attorney for the Western District of Washington, by Michael Dion, Assistant United States Attorney, filed in this matter, and it appearing to the satisfaction of the Court:

1. That Katherine Olejnik has been subpoenaed to testify before the Grand Jury on September 27, 2012, as part of an investigation into the May 1, 2012, vandalism of the William Kenzo Nakamura United States Courthouse and related criminal activity;

2. That Katherine Olejnik has stated, through her counsel, that she will not testify on the basis of her claimed privilege against self-incrimination; and

3. That in the judgment of the United States Attorney, the testimony or other information from Katherine Olejnik may be necessary to the public interest; and

4. That this Motion has been made with the approval of the Assistant Attorney General in charge of the Criminal Division of the Department of Justice, pursuant to the

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EXHIBIT 2

authority vested in him by Title 18, United States Code, Section 6003, and 28 C.F.R. § 0.175.

NOW, THEREFORE, IT IS ORDERED, pursuant to Title 18, United States Code, Section 6002, that Katherine Olejnik give testimony or provide other information which she has refused to give or to provide on the basis of her privilege against self-incrimination as to all matters about which she may be questioned during the Grand Jury investigation of this matter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in accordance with the provisions of Title 18, United States Code, Section 6002, Katherine Olejnik shall be forever immune from the use of such testimony or any information directly or indirectly derived from such testimony against her in any prosecution, penalty or forfeiture, either State or Federal or otherwise; but the witness shall not be exempt from prosecution for perjury, giving a false statement, or contempt committed while giving testimony or producing evidence under this Order.

DATED this 30th day of August, 2012.

Richard A Jones

HON. RICHARD A. JONES
UNITED STATES DISTRICT JUDGE

Presented by:

s/Michael Dion

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