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13 Attorneys for Subpoenaed Party
14 JOSHUA WOLF

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

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18 In re GRAND JURY SUBPOENA dated)
February 1, 2006 and June 8, 2006)
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CR 06-90064 WHA

**MOTION FOR RELEASE FROM
NON-COERCIVE CONFINEMENT;
MEMORANDUM OF LAW
RE: NON-COERCIVE
CONFINEMENT;
REQUEST FOR EVIDENTIARY
HEARING AND ORAL ARGUMENT**

1 **I. MOTION FOR RELEASE FROM NON-COERCIVE CONFINEMENT**

2 The witness, Joshua Wolf, moves this Court for an order releasing him from confinement
3 based upon the memorandum of law, declarations, and records in this matter.

4
5 **II. MEMORANDUM OF LAW RE: NON-COERCIVE CONFINEMENT**

6 As of February 6, 2007, the confinement of Joshua Wolf will be the longest civil-
7 confinement of a journalist in United States history.¹ Despite his long-running incarceration,
8 Wolf’s resolve to uphold the principles of a free press is stronger than ever. Because his
9 confinement is no longer serving coercive purposes, this Court should terminate the order of
10 confinement.

11 **FACTUAL BACKGROUND**

12 On July 8, 2005, Joshua Wolf, as part of his newsgathering and editorial activities,
13 recorded video of a protest of the G-8 Summit in San Francisco’s Mission District. Wolf sold
14 video clips of what he filmed to several major networks, and published an edited version of the
15 video on his own website as well as on www.indybay.com, the website of the Bay Area
16 Independent Media Center.

17 Shortly after the protest, the Federal Bureau of Investigation (“FBI”) along with the San
18 Francisco Police Department (“SFPD”), through the Joint Terrorism Task Force (“JTTF”), began
19 an investigation into possible criminal misconduct during the July 8, 2005 assembly. The federal
20 government’s investigation surrounded the possible attempted arson of an SFPD police vehicle at
21 the assembly under 18 U.S.C. § 844(f) (1). The SFPD’s investigation also involved, among other
22 offenses, a possible physical assault on a police officer.

23 As part of their investigations, several SFPD officers and FBI agents, acting in their roles
24 under JTTF, came to Wolf’s apartment in San Francisco seeking video footage of the possible
25 attempted arson of the police vehicle, and of the possible assault. Wolf declined to turn over any
26 unpublished material, citing his rights as a newsgatherer to protect his journalistic work product.

27
28 ¹Vanessa Leggett, the longest incarcerated author/journalist in history, was incarcerated
for 168 days. As of Feb. 6, 2007, Wolf will be incarcerated for longer than Ms. Leggett.

1
2 On February 4, 2006, the FBI served a subpoena on Wolf demanding his documents,
3 writings and recordings related to the July 8, 2005, protest activities. On June 15, 2006, Wolf
4 appeared before the grand jury but refused to answer questions about whether or not he had the
5 materials requested.

6 On August 1, 2006, Wolf was held in contempt and taken into custody. (Docket # 88, 91)
7 Wolf was released on September 1, 2006, pending his appeal to the 9th Circuit. (Docket #94). On
8 September 8, 2006, the 9th Circuit affirmed the order of civil contempt. The Government's
9 Motion to Revoke Bail, was granted on September 18, 2006. (Docket # 96) Wolf was returned to
10 custody on September 22, 2006.

11 While in custody, Wolf filed a Petition for En Banc Review. The petition was denied on
12 November 15, 2006.

13 The Ninth Circuit's mandate was filed in the District Court on November 28, 2006.

14 Despite his confinement, Wolf's resolve is stronger than ever. He maintains a deeply held
15 belief that supports his professional goals. (Wolf Decl.at p. 2 ln. 9-12) He held these beliefs a
16 year and a half ago, when he was first questioned by investigators. He holds them even more
17 strongly today.

18 ARGUMENT

19 A. THERE IS "NO SUBSTANTIAL LIKELIHOOD" THAT WOLF WILL BE 20 COERCED

21 A civil contemnor must be released from confinement when confinement ceases to exert
22 its intended coercive effect. *Lambert v. Montana*, 545 F.2d 87, 90 (9th Cir. 1976). "[D]ue process
23 considerations oblige a court to release a contemnor from civil contempt if the contemnor has
24 then shown that there is *no substantial likelihood* that continued confinement will accomplish its
25 coercive purpose." *Simikin v. U.S.*, 715 F.2d 34, 37 (2nd Cir. 1983) (emphasis added) citing
26 *Lambert v. Montana*, 545 F.2d 87, 90 (9th Cir.1976); *In re Farr*, 36 Cal.App.3d 577, 584 (1974);
27 *Catena v. Seidl*, 343 A.2d 744, 746 (1974).

1 The Ninth Circuit also recognizes a principle of proportionality. Due process requires that
2 a contemnor be released from confinement for civil contempt when the “duration of an
3 individual’s confinement no longer bears a reasonable relationship to the purpose for which he is
4 committed.” *Lambert v. Montana*, 545 F.2d 87, 89, 91, citing *Jackson v. Indiana*, 406 U.S. 715,
5 720 (1972). A lengthy confinement that is not serving a coercive purpose is thus unconstitutional.
6 *Id.* at 90, 91.²

7 “[A]n independent evaluation of all the particular facts” is required to determine if the
8 order of confinement should be vacated. *Lambert*, 545 F.2d at 91. Especially relevant to this
9 determination is the length of time served, *Cantena*, 324 A.2d at 747, and the lack of effect of
10 incarceration to dampen the contemnor’s resolve. *Matter of Dohrn*, 560 F.Supp 179, 181 (1983).
11 All of the surrounding circumstances are evaluated, including whether the need for the testimony
12 has diminished over time. *Id.* See also *In Re Jean-Baptiste*, 1985 U.S. Dist. LEXIS 18189.³

13 **1. WOLF’S CONFINEMENT WILL BE THE LONGEST CIVIL**
14 **CONFINEMENT OF A JOURNALIST IN U.S. HISTORY**

15 Wolf’s sentence has reached historic proportions. As of the date of this filing, Mr. Wolf
16 has been in confinement for 155 days. As of February 6, 2007, Wolf will have been incarcerated
17 longer than any other journalist in U.S. history. On February 6 Wolf’s incarceration will surpass
18 that of author/journalist Vanessa Leggett, who was incarcerated for 168 days before she was
19 released from confinement upon the cessation of the criminal proceeding for which her testimony
20 was sought. (<http://www.firstamendmentcenter.org/news.aspx?id=14961>)
21
22
23

24 ²As this Court recognized, the grand jury was entitled to pursue a “Mickey Mouse”
25 investigation. Transcript of Proceedings, August 1, 2006 at 37:20-21. However, due process
26 requires that there be more than a “Mickey Mouse” investigation to justify the hefty confinement
of five months – or longer.

27 ³It bears noting that unlike the contempt citations issued in the cases cited above, Wolf’s
28 testimony was not sought based on any belief that he was a participant in the criminal activity
being investigated.

1 **2. WOLF’S RESOLVE HAS ONLY STRENGTHENED SINCE HIS**
2 **CONFINEMENT**

3 The duration of Wolf’s confinement, without any wavering in his resolve, makes it clear
4 that further incarceration will not compel him to comply with the subpoena. Indeed, despite his
5 tenure in jail, his resolve is stronger than ever. (Wolf Decl. at p. 2 ln. 18-19) Wolf remains
6 steadfast in his belief that his compliance with the subpoena will have irreparably negative
7 consequences not only for his own career as a journalist, but for the profession of journalism as a
8 whole, and the public’s right to know. (Wolf Decl. at p. 2 ln. 9-16) His time served in
9 confinement has only strengthened his belief that should he comply with the subpoena, his trust
10 relationship with the activist community he covers as a journalist will be irreparably damaged,
11 and thus his ability to report on, and the public’s right to receive information about, their
12 activities will be severely hampered. Wolf continues to believe, just as he did six months ago,
13 and indeed a year and a half ago, that journalists should not serve as investigative tools for
14 criminal investigations. (Wolf Decl. at p. 2 ln. 4-7) Confinement has only strengthened Wolf’s
15 commitment to these principles.⁴

16 **3. LOCAL PROSECUTORS RECENTLY DISMISSED THE ONLY**
17 **CRIMINAL CHARGES FILED IN RELATION TO THE EVENTS OF**
18 **JULY 8, 2005**

19 A recent development also bears on the “reasonable relationship” of Wolf’s confinement
20 to the purpose for which he is confined. San Francisco prosecutors recently abandoned the
21 prosecution of the only person charged with committing a crime in and around the police car at
22 issue on July 8, 2005. The San Francisco District Attorney had charged Gabriel Meyers, who
23 they had suspected of placing the styrofoam under the police car, with attempted lynching,
24 resisting arrest and participation in a riot, all based on Meyers’s presence at the protest at the very
25 time the alleged attempted arson being investigated by the grand jury purportedly occurred. On

26
27 ⁴Should this Court not find Wolf’s declaration sufficient in and of itself, Wolf has filed
28 with this motion a Request for an Evidentiary Hearing and Oral Argument. At the hearing, Wolf
will testify in person, along with others, as to his strengthening resolve.

1 January 8, 2007, just as jury selection was about to begin, the charges were dismissed after
2 Meyers's public defender proffered witness statements and videotaped evidence demonstrating
3 that the police car had dangerously sped into the protest. (Garbus Decl. at p. 2 ln. 8-11)

4 The fact that local prosecutors were unable to build a case for criminal conduct, even
5 when the identity of the offender was known, certainly bears on the "reasonable relationship to
6 the purpose for his confinement." As this Court has recognized, Wolf's testimony is most likely
7 to have value to the grand jury as a means of identifying participants in the attempted arson.
8 However, the dismissal of the local prosecution demonstrates that even without an identification
9 hurdle, prosecutors are hard-pressed to find that any criminal activity occurred.⁵

10 **4. THE NEED FOR WOLF'S TESTIMONY HAS DIMINISHED**

11 Additionally, the need for Wolf's video has diminished since this Court's order holding
12 Wolf in contempt. There is no indication that the JTTF or federal prosecutors have continued to
13 pursue their investigation of the attempted arson of the police car.⁶ They have declined to state
14 whether there is any continuing investigation, or whether any witnesses have been called since
15 Wolf's confinement. (Garbus Decl. at p. 2 ln. 19-21)

16 The failure to pursue the investigation cannot itself be blamed on Wolf's refusal to
17 cooperate. Numerous alternate sources of the very same information sought from Wolf are
18 readily identifiable. In addition to Wolf's own published video, numerous other videos from that
19 evening have been published online, and are easily found. (See e.g.
20 <http://www.indybay.org/newsitems/2005/07/15/33992.php>) Photographs and first-hand accounts
21 are also available. (See e.g. <http://www.indybay.org/newsitems/2005/07/15/33992.php>)

22
23 ⁵Wolf would offer additional evidence regarding the dismissal of the Meyers case at the
24 evidentiary hearing, should this Court find such a hearing necessary.

25 ⁶Wolf is obviously unable to know the details of the proceedings before the grand jury
26 since the entry of the contempt order against him. To the extent the continuing vitality of the
27 grand jury's investigation is an important factor in this court's present analysis, and Wolf
28 contends that it is, the Court will need information about the continued vitality of that
investigation. Thus Wolf asks either that the Court make a limited inquiry, or that Wolf be
granted permission to conduct limited discovery in this regard. Wolf has thus submitted a
Request Regarding Discovery and Proposed Interrogatories.

1 Moreover, federal prosecutors likely also have access to the video and witness statements
2 provided to the San Francisco District Attorney in the Gabriel Meyers case.

3 **CONCLUSION**

4 As Wolf's resolve to uphold his principles has only strengthened since his confinement,
5 his confinement is not serving its coercive purpose. Moreover, Wolf's confinement no longer
6 bears a reasonable relationship to its purpose. Indeed, his confinement of five months – and
7 counting – is far disproportionate to the purpose for which his testimony was sought. Due
8 process thus requires that Wolf be released from confinement.

9 10 **III. REQUEST FOR AN EVIDENTIARY HEARING AND ORAL ARGUMENT**

11 In the event that this Court does not find that the above evidence alone is sufficient to
12 terminate Wolf's order of confinement, Wolf respectfully requests an evidentiary hearing as soon
13 as possible to present evidence on the following:

14 **To Further Demonstrate the Failure of the Confinement to Exert a Coercive Effect**

- 15 • Wolf will testify as to his principles and his continued and strengthening resolve to abide
16 by them despite his confinement;
- 17 • Wolf's friends and family who have been in contact with him since his confinement will
18 attest to his resolve, both before and since his confinement;
- 19 • Wolf will present letters and affidavits from those who know him who attest to his
20 earnest beliefs in the principles he is upholding;
- 21 • Evidence will be presented as to the support that Wolf has received from journalists
22 around the world. An expert in journalism ethics will testify that Wolf's principles are
23 consistent with professional journalistic ethics.

24 **To Further Demonstrate the Lack of Need**

- 25 • Wolf will present recently discovered evidence that law enforcement took their own
26 video the night of the protest.
- 27 • Wolf hopes to present further evidence regarding the dismissal of the Gabriel Meyers
28 prosecution.

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- Wolf will present evidence that the United States has not actively pursued the investigation into the alleged attempted arson since Wolf's confinement, and has not pursued alternative sources of the information it seeks from Wolf. To this end, Wolf has filed a Request Regarding Discovery, to have the Court conduct its own limited inquiry, or in the alternative allow Wolf to serve the proposed interrogatories.

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14 IN THE UNITED STATES DISTRICT COURT
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16

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February 1, 2006 and June 8, 2006)
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21 JOSHUA WOLF,
22 Subpoenaed Party.
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CR 06-90064 WHA

**[PROPOSED] ORDER RELEASING
WOLF FROM CONFINEMENT;
[PROPOSED] ORDER GRANTING AN
EVIDENTIARY HEARING AND
ORAL ARGUMENT**

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There is no substantial likelihood that continued confinement will coerce Wolf.
Therefore, the request to remove him from civil confinement is GRANTED.

[In the Alternative]

Wolf's request for an evidentiary hearing and oral argument is GRANTED. The hearing shall occur on ____ day of February, 2007.

Dated:

THE HONORABLE WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

[PROPOSED] ORDER

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CR 06-90064 WHA

**DECLARATION OF MARTIN
GARBUS IN SUPPORT OF MOTION
FOR RELEASE FROM NON-
COERCIVE CONFINEMENT AND
MEMORANDUM OF LAW RE: NON-
COERCIVE CONFINEMENT**

I, MARTIN GARBUS, DECLARE:

1. I am a member in good standing of the State Bar of New York. I am a partner in the law firm of Davis & Gilbert, co-counsel for witness Joshua Wolf. I make this declaration based on

1 my personal knowledge, and if called to testify, could and would testify as stated herein.

2
3 2. On January 18, 2007, I spoke with San Francisco Assistant District Attorney James
4 Thompson, the district attorney who prosecuted Gabriel Meyers, the protestor arrested on July 8,
5 2005, and charged for offenses in around the police car that is the subject of the grand jury
6 investigation for which Wolf's testimony is sought.

7
8 3. I asked why he had dismissed the Meyers case on January 8, 2007. He replied that he did
9 not believe the prosecution could carry its burden in light of the witness statements and video
10 evidence that had been proffered by Meyers's defense attorney that supported the claim that the
11 police car dangerously sped into the crowd of protestors.

12
13 4. On Friday I spoke to Mr. Jeffrey Finnigan, the U.S. attorney in charge of the federal
14 investigation and asked him whether that investigation was still continuing. I asked him wether
15 any witnesses had been called to the grand jury since the date of Mr. Wolf's confinement. And I
16 asked him whether, in view of the disposition of the state court proceeding he would join us in an
17 application to have Mr. Wolf released from prison.

18
19 5. Mr. Finnigan declined to tell me whether or not there was any continuing investigation
20 and he declined to tell me whether any witnesses had been called since the date of Mr. Wolf's
21 confinement. He had previously told me that he agreed with my interpretation of the conversation
22 with the state district attorney concerning the reasons for the dismissal of the Meyer's case.
23 Nonetheless, he refused to join us in this application to release Mr. Wolf and advised us that he
24 would oppose this application.

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26
27 I declare under penalty of perjury that the foregoing is true and correct and executed this 19th day
28 of January 2007 in Dublin, California.

DECLARATION OF MARTIN GARBUS

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By: _____

Declarant Martin Garbus

DECLARATION OF MARTIN GARBUS

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14 JOSHUA WOLF

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February 1, 2006 and June 8, 2006)

CR 06-90064 WHA

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21 JOSHUA WOLF,)
22 Subpoenaed Party.)
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24 _____)

**DECLARATION OF JOSHUA WOLF
IN SUPPORT OF MOTION FOR
RELEASE FROM NON-COERCIVE
CONFINEMENT AND
MEMORANDUM OF LAW RE: NON-
COERCIVE CONFINEMENT**

25
26 I, JOSHUA WOLF, DECLARE:

27 1. Since September 22nd, I have been incarcerated at the Federal Detention center in Dublin,
28 CA; prior to this, I have been detained at the aforementioned institution from August 1st to

1 September 1st. This extended period of incarceration has not had any coercive effect on my
2 decision not to testify, nor will any term of imprisonment.

3
4 2. I cannot in good faith comply with the orders of the Honorable Judge William Alsup. As
5 a journalist, it is vital that I maintain a level of independence from prosecutorial investigations.
6 The relationship between me and my contacts is one based on trust. Compelling me to testify
7 violates this trust relationship.

8
9 3. If I were to comply with the demands of the subpoena I would obliterate my credibility as
10 a reporter. I would be denied the access I have been granted over years and I would jeopardize
11 my future as a professional journalist. And were I to comply, the ability of other journalists to
12 assert their First Amendment rights in the future would be hindered.

13
14 4. Forcing me to testify before the grand jury undermines my view of democratic principles
15 and, in my belief, threatens to eviscerate the free press guaranteed under the first amendment of
16 The US Constitution.

17
18 5. My confinement has not diminished either my belief in these principles or my resolve to
19 uphold them. Everyday I spend in custody makes the next day behind bars easier.

20
21 I declare under penalty of perjury that the foregoing is true and correct and executed this 19th day
22 of January 2007 in Dublin, California.

23
24 By: _____

25 Declarant Joshua Wolf

26
27
28
DECLARATION OF JOSHUA WOLF

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CR 06-90064 WHA

REQUEST REGARDING DISCOVERY

21 JOSHUA WOLF,
22 Subpoenaed Party.
23

1 **REQUEST REGARDING DISCOVERY**

2 Wolf respectfully requests this Court to conduct a hearing into whether the grand jury is
3 actively pursuing their investigation, and to what extent those activities have continued since
4 August 1, 2006, the date of this Court’s order of confinement.

5 In the alternative, Wolf respectfully requests permission to serve the proposed
6 interrogatories attached as Exhibit A. Discovery is necessary, because given the nature of grand
7 jury proceedings, Wolf is limited in his knowledge of the JTTF’s continued efforts to investigate
8 the attempted arson on the police car. Due process thus requires that Wolf have the opportunity
9 to conduct discovery so that he can carry his burden of establishing the proportionality of his
10 incarceration against the grand jury’s continuing need for the subpoenaed information.

11 The discovery which Wolf seeks to take is attached as Exhibit A. As this Court will see,
12 this single set of special interrogatories is very limited in scope. It seeks only numerical data
13 about the continued vitality of the investigation, and the efforts investigators have made to obtain
14 the information from alternative sources. It does not require the government to reveal any witness
15 names, the content of witness testimony, or any other confidential information.

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20 By : _____
21 JAMES R. WHEATON
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EXHIBIT A

1 DAN SIEGEL (Cal. Bar No. 056400)
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[PROPOSED] INTERROGATORIES

21 JOSHUA WOLF,
22 Subpoenaed Party.
23

1 **[PROPOSED] INTERROGATORIES**

2
3 **SET: ONE**
4 **RESPONSE DATE: WITHIN TEN DAYS OF SERVICE.**

5
6 **DEFINITIONS**

7 These interrogatories seek only investigatory activities and activities of the grand jury
8 from the dates between August 1st, 2006 (the original date of Mr. Wolf’s confinement) and the
9 date that these interrogatories are served.

10 The term “GRAND JURY” is defined as the federal grand jury sitting in the Northern
11 District of California with regard to the investigation of the July 8, 2005, protest in San Francisco
12 California, for which Mr. Wolf was subpoenaed.

13 The term “JULY 8, 2005, PROTEST” means any and all events that occurred in the San
14 Francisco Mission District, on the evening of July 8, 2005.

15 The term “PUBLICLY AVAILABLE” means accessible to members of the public.

16 The term “LAW ENFORCEMENT” means any officer of the law, or government official
17 whether working for the state of California or the federal government, responsibly for
18 investigatory activities.

19
20 **INTERROGATORY NO. 1**

21 Videos of the July 8, 2005, protest are publicly available at
22 <http://www.indybay.org/newsitems/2005/07/15/33992.php> and other websites.

- 23 a) How many of these publicly available videos have been requested for the grand jury’s
24 use?
25 b) For how many of these publicly available videos has the grand jury issued a subpoena?
26 c) How many of these publicly available videos have been presented to or reviewed by
27 the grand jury?
28

1 **INTERROGATORY NO. 2**

2 Videos of the July 8, 2005, protest may have been taken by law enforcement.

- 3 a) How many law enforcement videos have been requested for the grand jury's use?
4 b) For how many law enforcement videos has the grand jury issued a subpoena?
5 c) How many law enforcement videos have been presented to or reviewed by the grand

6 jury?

7 **INTERROGATORY NO. 3**

8 Videos of the July 8, 2005, protest were taken by private parties that are not law enforcement,
9 and have not been made publicly available.

- 10 a) How many videos taken by private parties have been requested for the grand jury's
11 use?
12 b) For how videos taken by private parties has the grand jury issued a subpoena?
13 c) How many videos taken by private parties have been presented to or reviewed by the

14 grand jury?

15 **INTERROGATORY NO. 4**

16 Photographs of the July 8, 2005, protest are publicly available at
17 <http://www.indybay.org/newsitems/2005/07/15/33992.php> and other websites.

- 18 a) How many of these publicly available photographs have been requested for the grand
19 jury's use?
20 b) For how many of these publicly available photographs has the grand jury issued a
21 subpoena?
22 c) How many of these publicly available photographs have been presented to or reviewed
23 by the grand jury?

24 **INTERROGATORY NO. 5**

25 Photographs of the July 8, 2005, protest may have been taken by law enforcement.

- 26 a) How many law enforcement photographs have been requested for the grand jury's
27 use?
28 b) For how many law enforcement photographs has the grand jury issued a subpoena?

[PROPOSED] INTERROGATORIES

1 c) How many law enforcement photographs have been presented to or reviewed by the
2 grand jury?

3 **INTERROGATORY NO. 6**

4 Photographs of the July 8, 2005, protest were taken by private parties that are not law
5 enforcement, and are not publicly available.

6 a) How many photographs taken by private parties have been requested for the grand
7 jury's use?

8 b) For how photographs taken by private parties has the grand jury issued a subpoena?

9 c) How many photographs taken by private parties have been presented to or reviewed by
10 the grand jury?

11 **INTERROGATORY NO. 7**

12 First hand accounts of the July 8, 2005, protest are publicly available at
13 <http://www.indybay.org/newsitems/2005/07/15/33992.php> and other websites.

14 a) How many authors of these publicly available first hand accounts have been requested
15 for the grand jury's use?

16 b) For how many authors of these publicly available first hand accounts has the grand jury
17 issued a subpoena?

18 c) How many authors of these publicly available first hand accounts have appeared or
19 testified before the grand jury?

20 **INTERROGATORY NO. 8**

21 First hand accounts of the July 8, 2005, protest that have not been posted online are available
22 from individuals present at the protest.

23 a) How many of these individuals have been requested to testify before for the grand
24 jury?

25 b) For how many of these individuals has the grand jury issued a subpoena?

26 c) How many of these individuals have appeared or testified before the grand jury?
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INTERROGATORY NO. 9

On how many occasions has the grand jury met to receive testimony on the same matter for which Mr. Wolf has been subpoenaed?

INTERROGATORY NO. 10

On how many occasions has the grand jury met to receive any evidence on the same matter for which Mr. Wolf has been subpoenaed?

By : _____
JAMES R. WHEATON