APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20745

IN RE: GRAND JURY SUBPOENAS

Appeal from the United States District Court for the Southern District of Texas (H-01-MC-179)

(Filed Aug. 17, 2001)

Before JOLLY, JONES and EMILIO M. GARZA, Circuit Judges,

PER CURIAM:*[1]

Vanessa Leggett appeals the district court's order finding her in contempt of court for refusing to comply with a grand jury subpoena. *See* 28 U.S.C. § 1826(a). Citing her "journalist's privilege"[2] under the First Amendment Leggett refused to provide the grand jury with certain audio tapes and notes. Because this circuit has held that the journalist's privilege is both limited and qualified, and is especially hedged about in grand jury

[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4

[2] This constitutional protection is also frequently referred to as the "news reporter's privilege."

proceedings, we now affirm the district court's order finding Leggett in contempt.

A federal grand jury for the Southern District of Texas is currently conducting an investigation into possible illegal activities of Robert Angleton. Angleton, a wealthy Houstonian, is under investigation for, inter alia, a murder-for-hire scheme in which he allegedly agreed to pay his brother, Roger Angleton, to kill his wife, Doris Angleton. Robert Angleton was previously tried and acquitted in state court for his role in the 1997 murder. The federal grand jury was convened after the acquittal. Roger Angleton, the alleged triggerman, committed suicide while in custody at the Harris County jail. This notorious "society murder" and the bizarre events surrounding it have garnered a great deal of attention in Houston and throughout Texas.

Vanessa Leggett is an English teacher and aspiring freelance writer[3] who became intrigued by the Angleton case from its inception. In order to write a book about the murder, she began an extensive independent investigation that led to interviews with both Angleton brothers, Roger's wife Jennifer Manning, and numerous other people connected to the case. The interviews were recorded on tapes and in written notes.

Because of her knowledge of the case, Leggett was subpoenaed to appear before the federal grand jury on

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[3] Leggett's body of published work consists of a single article in an FBI publication, *Varieties of Homicide*, and one fictional short story. To date, Leggett has published nothing on the Angleton murder.

December 7, 2000. She was advised of the nature of the grand jury's investigation and was assured that she was neither a target nor a subject of the grand jury proceedings. Leggett testified before the grand jury without protest and answered all of the questions posed to her. She did not object at that time to turning over to the grand jury all notes or tapes or photographs that would help them.

After the grand jury appearance, Leggett resumed her independent investigation. On June 18, 2001, she received another subpoena directing her to appear before the grand jury, and to bring with her

> Any and all tape recorded conversations, originals and copies, of conversations you had with any of the following individuals [identifying 34 people by name], or any other recorded conversations with individuals associated with the prosecution of ROBERT ANGLETON, either with or without their consent, and all transcripts prepared from those tape recordings.

In response, Leggett hired an attorney and moved to quash the subpoena, invoking the journalist's privilege under the First Amendment. Following a hearing on July 6, the district court denied Leggett's motion in a written order. While her pro se motion to reconsider remained pending, she was served on July 18 with a new but virtually identical grand jury subpoena compelling her to appear on July 19. That night Leggett retained her current counsel.

Leggett went before the grand jury, but, armed with claims of First and Fifth Amendment privilege, she refused to produce the tape recordings and notes. The

United States countered her invocation of the privilege against self-incrimination with a "proffer letter" granting use and derivative-use immunity for any testimony given before the grand jury or in statements made to federal agents. Leggett refused to accept this offer.

The government obtained an immediate hearing before the district court to address Leggett's non-compliance. The district court held her in civil contempt pursuant to 28 U.S.C. § 1826(a) and ordered her jailed. The statute authorizes incarceration until Leggett furnishes the materials called for by the subpoena or, if she does not, until the term of the grand jury expires, up to a maximum of 18 months. This expedited appeal followed.

A district court's order holding a recalcitrant witness in contempt under 28 U.S.C. § 1826(a) is reviewed for abuse of discretion. *See In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 n.1 (5th Cir. 1991); *In re Grand Jury Proceedings (Mallory)*, 797 F.2d 906, 907 (10th Cir. 1986). Similarly, an order denying a motion to quash a subpoena is reviewed for abuse of discretion. *See In re Grand Jury Proceedings*, 115 F.3d 1240, 1243 (5th Cir. 1997).

Generally applicable laws, including the obligation to answer a grand jury subpoena, "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* Further, the Supreme Court has admonished that evidentiary privileges – including by logical extension the journalist's privilege – are generally disfavored in the law. *See Herbert v. Lando*, 441 U.S. 153, 175, 99 S.Ct. 1635 (1979).

Nevertheless, a qualified privilege protects journalists from divulging confidential sources under limited circumstances. *See Branzburg v. Hayes*, 408 U.S. 665, 92 S.Ct. 2646 (1972); *Miller v. Transamerica Press*, 621 F.2d 721, 726 (5th Cir. 1980); *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983). The strength of this journalist's privilege is at its apex in the context of civil cases where the disclosure of confidential sources is at issue. *See Miller*, 621 F.2d at 726; *Selcraig*, 705 F.2d at 789. However, the privilege is far weaker in criminal cases, reaching its nadir in grand jury proceedings: "[n]either does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation even though the reporter might be required to reveal a confidential source." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (citing *Branzburg*, 408 U.S. 665).

Even assuming that Leggett, a virtually unpublished freelance writer operating without an employer or a contract for publication, qualifies as a journalist under the law,[4] the journalist's privilege is ineffectual against a

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[4] Because the First Amendment news reporter's privilege is inapplicable in this case whether or not Leggett is a journalist, we do not reach this issue. While this circuit has yet to consider who qualifies as a journalist for the purpose of asserting privilege, our inquiry into this question would be guided by the three part test used in other circuits, which asks whether the person claiming the privilege (1) is engaged in investigative reporting; (2) is gathering news; and (3) possesses the intent at the inception of the news gathering process to disseminate the news to the public. *See In re Madden*, 151 F.3d 125, 128 (3rd Cir. 1998). *See also von Bulow v. von Bulow*, 811 F.2d 136, 142 (2nd Cir. 1987); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). Thus the

grand jury subpoena absent evidence of governmental harassment or oppression. As this court has explicitly held, "[s]hort of such [governmental] harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen." *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998). This court takes a narrow view of the journalist's privilege in criminal cases, particularly in grand jury proceedings. *Smith*, 135 F.3d at 969. Only when the "grand jury investigation is not being conducted in good faith" is the journalist's privilege valid. *Id.* (citing *Branzburg*, 408 U.S. at 710).

In the present case, Leggett has not demonstrated that the district court abused its discretion by finding that the Angleton grand jury investigation is proceeding in good faith. The record does not indicate that Leggett has been harassed or oppressed by these grand jury proceedings. While perhaps not as narrowly tailored as would be ideal, the subpoena directing Leggett to produce her tape recordings and interview notes is not so overly broad as to be oppressive. Indeed, the subpoena clearly seeks material that is closely related to the subject of the grand jury investigation. *See United States v. R. Enterprises, Inc.*, 498 U.S. 292, 111 S.Ct. 722 (1991) (motion to quash grand jury subpoena may not be granted unless the movant demonstrates no reasonable possibility that the materials sought will produce information relevant to the general

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journalist's privilege is available to persons "whose purposes are those traditionally inherent to the press; persons gathering news for publication." *Madden*, 151 F.3d at 129-30. The party claiming the privilege has the burden to establish his or her right to protection. *Id.*; *von Bulow*, 811 F.2d at 144. The district court made no factual finding on Leggett's status as a journalist.

subject of the grand jury's investigation). Contrary to Leggett's insinuations, the record does not reflect that the grand jury is acting with any sort of malice toward her. Leggett's efforts to invoke the qualified journalist's privilege with conclusory assertions fail.

Leggett's reliance on this court's decisions in *Miller*, 621 F.2d at 726, and *Selcraig*, 705 F.2d at 789, is also misguided. Both cases deal with the journalist's privilege in civil libel suits. Their test that balances the civil litigants' need for disclosure against the journalist's legitimate desire to protect confidential sources is entirely inapplicable in criminal cases in this court.[5] In contrast, the Supreme Court has emphasized that in criminal cases – especially grand jury proceedings – the public's interest in effective law enforcement virtually always outweighs the press's privilege against disclosing confidential sources or information. *See Branzburg*, 408 U.S. at 690; *Smith*, 135 F.3d at 972. Further, no circuit court has recognized a qualified testimonial privilege in the context of a criminal grand jury, and other courts have drawn a distinction between grand jury and non-grand jury cases. *See, e.g., In re: Grand Jury Proceedings*, 5 F.3d 397, 402 (9th Cir. 1993) (noting that the court had earlier established a qualified privilege in a non-grand jury context "only because that case – unlike *Branzburg* or the present case – did not involve testimony before a grand jury.").

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[5] In a *civil* case in which the journalist's privilege is invoked, the party seeking to obtain the confidential information must show that: (1) the information is relevant; (2) it cannot be obtained by another means; and (3) there is a compelling interest in the information. *See Miller*, 621 F.2d at 726.

Equally unavailing is Leggett's attempt to invoke the Fifth Amendment privilege against self-incrimination. She has been repeatedly advised that she is neither a target nor a subject of the grand jury investigation. She has made no meaningful argument that the disclosure of her tape recordings and interview notes could be used against her in some future criminal prosecution. Leggett's vague and speculative effort to invoke the Fifth Amendment is further undermined by the government's proffer of a written non-prosecution agreement.[6] Because Leggett has not shown any "reasonable cause to apprehend danger from a direct answer," and because her answers would not "furnish a link in the chain of evidence needed for a prosecution" of her, she cannot properly invoke the Fifth Amendment's privilege against self-incrimination. *United States v. Whittington*, 786 F.2d 644, 645-646 (5th Cir. 1986).

For the foregoing reasons, the district court did not abuse its discretion in ordering Leggett incarcerated for

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[6] The written non-prosecution agreement read as follows:

> Any information you provide in response to questions posed by law enforcement agents or a subsequent grand jury shall receive protections coextensive with and limited by those conferred for testimony given pursuant to a compulsion order issued under the provisions of 18 U.S.C. § 6001 et seq. That is, such information shall not be used directly or indirectly against you in any criminal case, except that such information may be used against you in any prosecution for perjury, giving a false statement to a federal official in a matter within the official's jurisdiction, and/or obstruction of justice.

contempt under 28 U.S.C. § 1826(a). We therefore AFFIRM its judgment.

AFFIRMED.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

MISCELLANEOUS NO. 01-179

JUDGMENT AND COMMITMENT FOR CONTEMPT

(Filed July 20, 2001)

FILED UNDER SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20745

In Re: Grand Jury Subpoenas

Appeal from the United States District Court
for the Southern District of Texas, Houston

(Filed Nov. 12, 2001)

O R D E R:

IT IS ORDERED that sealed appellant's motion for leave to file out of time motion for reconsideration of this Court's order of September 18, 2001, denying bond pending petition for rehearing en banc is DENIED.

IT IS FURTHER ORDERED that the motion for leave to file brief of amicus in support of sealed appellant's motion for reconsideration is DENIED.

/s/ Edith H. Jones
EDITH H. JONES
UNITED STATES CIRCUIT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-20745

In Re: Grand Jury Subpoenas

Appeal from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Nov. 13, 2001)

(Opinion 08/17/01, 5. Cir., ___, ___ F.3d ___)

Before JOLLY, JONES and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service

not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge
REHG-5a