

APPENDIX

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App. 1

APPENDIX A

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 18-50321

D.C. No. 2:18-cm-00771-UA-1

[Filed December 28, 2018]

In re: GRAND JURY SUBPOENA,)
Dated March 21, 2018,)
)
UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
DOE,)
)
Defendant-Appellant.)
)

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

App. 2

Appeal from the United States District Court
for the Central District of California
John A. Kronstadt, District Judge, Presiding

Argued and Submitted December 4, 2018
Pasadena, California

Before: D.W. NELSON and WARDLAW, Circuit
Judges, and PRATT, ** District Judge.

Doe appeals the district court's order holding her in civil contempt for refusing to produce records of her foreign bank activity for the years 2011 through 2016 as sought by a federal grand jury subpoena *duces tecum*. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

Doe asserts that the spousal testimonial privilege protects her from producing documents responsive to the subpoena because the grand jury is currently investigating possible federal tax crimes committed by her husband.¹ For the spousal testimonial privilege to apply, "the anticipated testimony '[must] in fact be adverse' to the nonwitness spouse." *United States v. Van Cauwenbergh*, 827 F.2d 424, 431 (9th Cir. 1987) (citation omitted); *see also United States v. Fomichev*,

** The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

¹ Although Doe also raised claims of privilege under the Fifth Amendment, and the marital communications privilege, before the district court, these arguments were not raised on appeal and are therefore waived. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.").

App. 3

899 F.3d 766, 771 (9th Cir. 2018) (“[T]he witness-spouse alone has a privilege to refuse to testify *adversely*.”) (emphasis added) (citation omitted). Here, “the testimonial aspect of [Doe’s] response to a subpoena *duces tecum* does nothing more than establish the existence, authenticity, and custody” of any responsive foreign bank account records. *United States v. Hubbell*, 530 U.S. 27, 40–41 (2000). Because this bare testimonial aspect of Doe’s act of production does not itself adversely affect her husband’s case, Doe is not relieved of her obligation to produce foreign bank account records over which she has care, custody, or control.

AFFIRMED.

App. 4

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF
CALIFORNIA

No. MISC CR 18-00771-JAK

[Filed August 31, 2018]

In re:)
)
GRAND JURY SUBPOENA)
DATED MARCH 21, 2018 (LIU))
)

SEE SEALED APPENDIX

App. 4-App. 7

App. 8

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
*****SEALED CASE*****

CRIMINAL MINUTES - GENERAL

CM18-00771 UA-1
Case In re Grand Jury Subpoena Date June 19,
No. Dated March 21, 2018

SEE SEALED APPENDIX

App. 8-App. 18

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 18-50321

**D.C. No. 2:18-cm-00771-UA-1
Central District of California, Los Angeles**

[Filed February 12, 2019]

In re: GRAND JURY SUBPOENA,)
Dated March 21, 2018,)
_____)
UNITED STATES OF AMERICA,)
_____)
Plaintiff-Appellee,)
_____)
v.)
_____)
DOE,)
_____)
Defendant-Appellant.)
_____)

ORDER

Before: D.W. NELSON and WARDLAW, Circuit
Judges, and PRATT,* District Judge.

* The Honorable Robert W. Pratt, United States District Judge for
the Southern District of Iowa, sitting by designation.

App. 20

Judge Nelson, Judge Wardlaw, and Judge Pratt vote to deny Appellant Doe's petition for rehearing. Judge Wardlaw votes to deny Appellant Doe's petition for rehearing en banc, and Judge Nelson and Judge Pratt so recommend.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc is therefore **DENIED**.