UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: GRAND JURY PROCEEDINGS GERALD KOCH, MOVANT.	Misc. No.: 13-0153

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE CONTEMPT AND RELEASE WITNESS

Preliminary Statement

Since 2009, when he was only 20 years old, Gerald Koch has refused to testify before two Grand Juries investigating an incident about which he has publicly stated he knows nothing more than any other member of the news-reading public. For his most recent refusal, Mr. Koch was found in contempt by this Court, and was ordered civilly confined. He has been incarcerated since May 21, 2013, nearly seven months as of this writing.

The direct and collateral consequences of his confinement have been severe and persistent. Nevertheless, his belief that his participation in the Grand Jury investigation will function to endanger constitutionally-protected political activity grows stronger with each loss he suffers. Because his confinement is not serving any coercive purposes, this Court should terminate the order of confinement.

Factual Background

In the early hours of March 6, 2008, an individual riding a bicycle detonated a

small incendiary device at an army recruiting center in Times Square. Nobody was injured. The F.B.I. and other agencies began investigating the crime, and a federal grand jury was convened. For reasons that remain unclear – perhaps based on the belief that he overheard some public-house boasting, or was privy to some of the rampant speculation and rumor-mongering that followed in the wake of the event in question – Mr. Koch was subpoenaed to testify before the Grand Jury in 2009.

At that time, Mr. Koch invoked his Constitutional rights, and refused to testify. Contemporaneous with his refusal, he made public his subpoena, as well as his intention not to cooperate with the Grand Jury. In so doing, he joined in a history of grand jury resistance, a tactic associated with political activists who see it as principled resistance to government repression.

In public statements since 2009, Mr. Koch has explained that his resistance is based on his unshakeable belief that the Grand Jury is, if not a fishing expedition, certain to function to disrupt anti-war activist communities in NYC. He has made clear that his study of history has led him to believe that federal grand juries were tools used to dissuade dissident communities from engaging in Constitutionally-protected activity. Furthermore, he has made clear that his cooperation is unlikely to move the investigation forward at all, although it could function to expose more and more people, similarly innocent and ignorant, to the disruptive and traumatizing effects of grand jury subpoenas, not on the basis of their having knowledge, but on the basis of their associations and perceived political ideals.

In 2009, although there was no evidence or suggestion that Mr. Koch had participated in any way in the bombing, Mr. Koch was granted immunity, thus

removing his Fifth Amendment right against compelled self-incrimination. The prosecution, did not take further action at that time.

In October, 2012, another Grand Jury had been convened. Mr. Koch was served through counsel, and after motion practice, he appeared before the Grand Jury as requested on May 16, 2013. Again, although he appeared before and identified himself to the Grand Jury, he invoked his Constitutional rights, and refused to answer any further questions. Again, he maintained publicly that he was not possessed of unique knowledge useful to the investigation. Again he explained his refusal to testify as a matter of principle, a deeply-held belief that the investigation was functioning to interfere with and gather information about anti-war activists and proponents of anarchism.[1]

Following his refusal to testify and a partial contempt hearing on May 16th, a public hearing was held on May 21, 2013. Mr. Koch was found in contempt of court, and was ordered confined for the term of the Grand Jury, or until he agreed to testify.

On May 29, 2013, appeal was taken from the order, based on procedural, statutory, and First Amendment grounds. The appeal was denied by the Second Circuit on December 2, 2013.

Throughout his confinement, Mr. Koch's convictions have only strengthened.

[1] In this context it is crucial to note that anarchism is not, as popularly construed, "anarchy." Proponents of anarchism, particularly in the United States, strive for self-determination and freedom from coercive structures, including and exemplified by the state. The type of aspirational anarchism to which Mr. Koch's community subscribes tends toward valuing order and accountability as defined and maintained by groups of people, and its adherents are not, despite some popular representations, messengers of chaos. Whatever others may think of Mr. Koch and his fellows, they firmly believe that their ideology offers solutions to violence, poverty, racism, and other phenomena almost-universally acknowledged as grave social ills.

Mr. Koch acted on these deeply-held principles in 2009, and he continues to act on them today, more than four years later. Although his confinement is causing serious, long-term damage to his physical and mental health, he is not only unwavering in his conviction, he believes that his refusal to testify is preventing others in his community, similarly innocent, from suffering as he is suffering. His strength of will and commitment to silence has been dearly tested, and is demonstrably even stronger today than it was in May, or in 2009.

As the attached letters, articles, petition and report demonstrate, Mr. Koch's principles have always been strong, and being incarcerated has served only to vindicate his beliefs. If anything, there is an inverse correlation between Mr. Koch's increased suffering and his willingness to testify. Even the extremely traumatizing experience of having been placed in the SHU (immediately prior to, and by all appearances as punishment for a demonstration of support by his friends that took place outside the M.C.C.) only strengthened his resolve never to contribute to anyone else having to suffer through solitary confinement.

At this point, as demonstrated by his own declaration, he has suffered serious deterioration in his physical and mental health, the interruption of his schooling, the loss of home and employment, and most devastating for him, the breakup with his fiancée. The further loss of community and self-worth that would be occasioned by his cooperation with the Grand Jury would make all these prior sacrifices for naught, in his mind, and is simply not within his contemplation.

Although Mr. Koch is deeply unhappy, he is prepared to spend the full term of the Grand Jury in confinement, and in no way does he see cooperation with the

Grand Jury as a possible solution to his unhappiness. Whatever objections may legitimately be raised, and however much others may disagree with his decision, it is clear that he is prepared to sacrifice his long-term health and welfare to his political convictions. Having none of its intended coercive effect, his confinement has been converted into a punishment, contrary to the mandate of 28 U.S.C. §1826, under which he is confined.

Argument

The relevant question in the instant proceeding is not that which was asked on appeal, whether Mr. Koch had "just cause" for his refusal to testify. Rather, the inquiry must be into whether his current confinement is likely ever to lead Mr. Koch to testify before the Grand Jury. The law in the Second Circuit is unambiguous: If the witness can show by a preponderance of the evidence that there is no reasonable possibility that he will testify, then continued confinement is unconstitutional, and contrary to the mandate of 28 U.S.C. §1826.

The civil contempt sanction is one that may be imposed without the protections afforded criminal defendants. This is because the confinement is conditioned upon the contemnor's own conduct. Shillitani v. United States, 86 S.Ct. 1531 (1966). Thus, under both the common law governing the court's traditional contempt powers, and its codification in 28 U.S.C. §1826, civil confinement is intended only to be coercive. "If a judge orders continued confinement without regard to its coercive effect upon the contemnor, or as a warning to others who might be tempted to violate their testimonial obligations, he has converted the civil

remedy into a criminal penalty." Simkin v. United States, 715 F.2d 34 (2d Cir. 1983) at 38.

A trio of cases make up the controlling Second Circuit precedent. In 1983 Simkin resolved a split that had caused a spate of inconsistent rulings, by making clear that §1826 does not posit 18 months or the term of the grand jury as a *necessary*, but a maximum term of confinement. (Simkin, overruling the logic of United States v. Dien, 598 F,2d 743 (2d Cir. 1979)). In 1984, Sanchez v. United States, the Circuit clarified Simkin, explaining that although a long civil confinement does not in and of itself constitute a due process violation, a witness is not required to demonstrate unusual circumstances in order to show that confinement has lost its coercive impact. 725 F.2d 29 (2d Cir. 1984). Finally, in 1985, addressing a direct challenge to Simkin, the Circuit affirmed unequivocally that "there is no presumption that any period of incarceration up to 18 months … is coercive, not punitive." In re Parrish, 782 F.2d 325 (2d Cir. 1985).

Confronting the asseverations of several district judges that Congress intended 18 months to be "categorically coercive," the Parrish court cited directly to the legislative history of §1826. "A court is free to conclude at any time that further incarceration of a recalcitrant witness will not cause the witness to relent and testify, and, upon such grounds, to release the witness from confinement." Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. On Immigration, Citizenship, and International Law of the House Comm on the Judiciary, 95th Cong., 1st Sess. 713 n. 1 (1977) (statement of Asst. Atty. Gen. Civiletti).

The burden rests with the contemnor to convince the judge of his or her intransigence, and the district judge retains "virtually unreviewable discretion." Nevertheless, the Second Circuit made clear that such deference can be extended "only if it appears that the judge has assessed the likelihood of a coercive effect upon the particular contemnor. There must be an individualized decision, rather than application of a policy…" Simkin at 37. *See also* In re Cocilovo, 618 F.Supp. 1378 (S.D.N.Y. 1985) (Under *Simkin* a district court in each and every case must … make an individual decision whether the particular contemnor before it is likely to yield to further incarceration."); In re Papadakis, 613 F.Supp. 109 (S.D.N.Y. 1985) ("…the *Simkin* case unambiguously commands me to make 'a conscientious effort to determine whether there remains a realistic possibility that continued confinement might cause the contemnor to testify.'"); In re Jean-Baptiste, 1985 WL 1863 (S.D.N.Y. 1985) ("I must determine, in accordance with the Second Circuit's rulings in *Simkin* and *Sanchez*, only whether the purposes of 28 U.S.C. §1826(a) will be served by keeping Jean-Baptiste in confinement."); United States v. Buck, United States v. Shakur, 1987 WL 15520 (S.D.N.Y. 1987) ("If confinement may coerce compliance with his order, the trial judge is under a duty to make the effort. If it is apparent that confinement will not coerce compliance, the judge is under a correlative duty to refrain from confinement for civil contempt."). The judge's virtually unreviewable discretion therefore in no way detracts from their "duty to follow the clear pronouncements of a higher court…[which] compels a finding" that a truly intransigent witness, "ready, willing, and able to persist in [his] defiance," be set free. In re Dorie Clay, 1985 WL 1977 (S.D.N.Y. 1985).

Several factors play into the individualized determination of a witness's intransigence. The relevant factors in a conscientious assessment of the likelihood that a contemnor will testify include the length of confinement, the witness's connection with the activity under investigation and continued need for the witness's unique evidence, the articulated moral basis for the refusal, the witness's perception of community support, and the witness's past conduct. Simkin, at 38, n. 2. These are factors that have been used as the basis for judges' individualized assessments, although the weight, and presence of each factor in any given inquiry appears to be entirely at the discretion of the judge. See, generally, In re Cueto, 443 F.Supp. 857 (S.D.N.Y.)(two women working for Episcopal Church released after ten months, based on "humane factors" as well as their unwavering belief, supported by the church, that they were suffering religious persecution); In re Dohrn, 560 F.Supp. 179 (S.D.N.Y. 1983) (Witness released despite Judge's antipathy, based on the intransigence of her beliefs and the diminished need for her cooperation); Clay, supra, at 4, (Contemnor released based on her intransigence, despite the need for her unique and relevant testimony: "To infer that a [grand jury resister] is likely to remain silent … does not require a great leap of logic. That she is wrong is beside the point." at 2.); Buck, supra, (contemnors' motions granted *prior to confinement* based on the strength of their convictions); Cocilovo, (contemnor released after ten months with no indication that he would yield); In re Thomas, 614 F.Supp. 983 (S.D.N.Y. 1985) (contemnor released based on her articulated principles, strengthened by her awareness of "the collective disapproval that would follow a decision to testify." at 984."); Papadakis, (Finding that the contemnor's desire to

"obtain the fruits of his friends' criminal activity," however ignoble, precluded the possibility of his ever testifying); In re Grand Jury Proceedings, 2001 WL 527401 (E.D.N.Y. 2001) (release denied; sole evidence was contemnor's "bald assertion" that he would not cooperate); and S.E.C. v. Princeton Economic International, Ltd., 152 F.Supp.2d 456 (S.D.N.Y. 2001) (denied because contemnor's unique access to crucial evidence relevant to a matter of public interest, combined with his desperate and disingenuous paper-shuffling and filing motions for evermore extraordinary relief, convinced the Judge only that he was in fact susceptible to the coercive effects of incarceration).

The *Simkin*/*Sanchez* rule, and the attendant factors relevant in individualized assessment, have been endorsed and adopted by courts in the 1st, 3d, 4th, 6th, 7th, 9th, and 11th Circuits. *See* In re Grand Jury Proceeding, 13 F.3d 459 (1st Cir. 1994); In re Impounded, 178 F.3d 150 (3d Cir. 1999); Humphrey v. Humphrey, 434 F.3d 243, 248 (4th Cir. 2006); United States v. Hallahan, 768 F.2d 754 (6th Cir. 1985); United States v. Jones, 880 F.2d 987, 989 (7th Cir. 1989); Matter of Crededio, 759 F.2d 589, 592 (7th Cir. 1985); United States v. Clough, 946 F.2d 899 (9th Cir. 1991); In re Grand Jury Proceedings, 877 F.2d 849 (11th Cir. 1989).

Analysis

Mr. Koch can hardly be said to have escaped sanction, having now been incarcerated for seven of the approximately eleven months that remained on the Grand Jury's term at the time of his confinement. The service of well over half his possible term stands in stark contrast to Buck/Shakur, where contemnors were released *prior* to their confinement; Clay, who was released after just over one

month; and Parrish, where the contemnor was released after "several" months. Mr. Koch has given absolutely no indication to any person at any time since his 2009 subpoena that he will agree to testify before this or any Grand Jury. Indeed, he has repeatedly, consistently, and publicly sworn that he will not. Given that the central inquiry involves the strength of his conviction, and the likelihood that his testimony will be coerced, every case decided under Simkin/Sanchez would weigh in favor of his release on this factor.

He has been well-supported by his political community both here and around the country. Mr. Koch has been written about sympathetically by scholars and journalists from the Village Voice to the New York Times and Salon.com. His actions have been supported by widely-respected philosophers and historians, and by his Mother's faith community and world-wide audience. No less a personage than M.I.T. Professor Emeritus and public intellectual Noam Chomsky was the first signatory onto a petition endorsing Mr. Koch's contribution to the tradition of grand jury resistance and calling for his release. His incarceration is understood by his political community as a sacrifice in the name of civil liberties, the integrity of dissident communities, and individual activists who are innocent of criminal activity. His incarceration is understood by many academics as a contribution to a long and storied tradition of resistance to political repression. And it is understood by members of the faith community as punishment for strongly-held beliefs that are, no matter how unpopular, in no way criminal. *See* Cueto, where the support of those religious officials, whose approval most mattered to contemnors was deemed a significant factor; Clay, the support of whose community played a role in her

release; and Ford, whose "newfound status as a hero" militated against his further confinement. Cueto, 443 F. Supp. at 860; Clay, 1985 WL 1977 at 2; Ford, 615 F.Supp. at 262.

At this late date, given the sacrifices he has already made, and the almost certain ostracization he would face from supporters, it is inconceivable that Mr. Koch will agree to testify. As far as he is concerned, there has never been any relationship between his confinement and his willingness to testify before the Grand Jury. There was no possibility that Mr. Koch would have agreed to testify in 2009, and there is no chance that he will agree now, seven months into his eleven-month term.

Unlike all of the other grand jury resistors who have been released under the Simkin/Sanchez calculus, there has never been any allegation that Mr. Koch is closely – or even knowingly – associated with the targets of the investigation. (*See e.g.*: Ford, 615 F.Supp. 259, Dickinson, 763 F.2d 84, Papadakis, 613 F.Supp. 109, Thomas, 614 F.Supp. 983, Esposito, 1986 WL 1435, and Cocilovo, 618 F.Supp. 1378, in all of which contemnors were subpoenaed precisely because they were known associates or unindicted co-conspirators of targets, but were nevertheless released under the mandate of §1826 as interpreted by the Circuit under Simkin/Sanchez.) Mr. Koch himself is puzzled at having been subpoenaed. There have been no further bombings since 2008, and it is not clear that there has been much headway made in this investigation. There have been, to our knowledge, no criminal charges filed in this investigation. The F.B.I. has raised the amount of the offered reward, in an apparent bid to bring forth information. The public description of the so-called

"Bicycle Bomber" is astonishingly vague, failing even to identify the suspect's gender or what kind of pants they were wearing[2]. It strains credulity to believe that Mr. Koch's resistance is all that stands between the Grand Jury and its object.

Given Mr. Koch's many public statements, it seems unlikely that the prosecution or investigators see Mr. Koch as a source of crucial information. And indeed, assuming *arguendo* that Mr. Koch's testimony would not be useful for the purposes for which it is ostensibly sought, the only way in which it would be useful would be in helping intelligence-gathering around the activist community in New York. This intelligence-gathering is precisely what Mr. Koch fears, and precisely the reason he has declined to testify before the Grand Jury.

Mr. Koch asserts that he is not possessed of substantive or unique knowledge. These assertions are bolstered by reports, articles, and even a book on the overreach of the NYPD Intelligence Division, that suggest that activists have been caught in a "very wide net of police surveillance," in the course of this particular investigation. *See* Michael Powell, *On Reed-Thin Evidence, a Very Wide Net of Police Surveillance*, Sept. 9, 2013, *available at* http://www.nytimes.com/2013/09/10/nyregion/on-reed-thin-evidence-a-very-wide-net-of-police-surveillance.html?_r=0, (last visited December 19, 2013), and MATT APUZZO AND ADAM GOLDMAN, ENEMIES WITHIN; INSIDE THE NYPD'S SECRET SPYING UNIT AND BIN LADEN'S FINAL PLOT AGAINST AMERICA, 142-147 (Simon & Schuster 2013). Given that his association with this crime appears to have been based almost exclusively

[2] "The suspect on the bicycle was last seen wearing a grey sweatshirt and pants of an unknown color." http://www.fbi.gov/newyork/press-releases/2013/65-000-reward-offered-for-information-in-search-for-bomber-in-2008-times-square-attack

on his alleged political affiliations, the legitimate need for his testimony would not appear to be (or ever to have been) particularly great. Whatever need the justice system had for vindication ought to have been well-satisfied by Mr. Koch's seven months in prison.

Despite deep losses, and his relative youth, Mr. Koch has been steadfast in his silence. Even in the face of sympathetic reminders that he may end his confinement by agreeing to testify, Mr. Koch has been adamant and unambiguous in his resolve.

As set forth in his declaration, and in the report of Dr. Sanford Drob, filed under seal with this Court, Mr. Koch has endured great psychological pain as a result of his confinement. Not only has he remained steadfast in the face of his misery, his conviction is reinforced by his pathology. Inasmuch as Mr. Koch believes that his suffering prevents the suffering of other innocent people who also have no special knowledge of the events under investigation, his continued anguish has become for him significant of his righteousness. Moreover, because he is intelligent, exhibits obsessive thinking, and has unlimited time for self-reflection, his beliefs about the Grand Jury are continually and painstakingly developed. Every fresh insult associated with his imprisonment serves only to vindicate his beliefs about the failure of the grand jury system to comport with his vision of justice.

Since Simkin/Sanchez requires an assessment of a contemnor's susceptibility to coercion, recent denials of motions to vacate contempt have been made on the basis of the contemnor's failure to convince the court that confinement is no longer coercive. For example, one contemnor submitted no evidence of any moral basis for his recalcitrance, or any evidence of his steadfastness, making only a "bald assertion"

that he would not testify. In re Grand Jury Proceedings, 2001 WL 527401 (E.D.N.Y. 2001). In another case, release was denied to a man associated with organized crime, who had written an autobiography disclosing details of criminal activity and associations, and whose refusals to testify explicitly turned only upon his own callow self-interest. U.S. v. Salerno, 632 F.Supp. 529 (S.D.N.Y. 1986) "Bonanno's decision not to testify … appears not to be a matter of absolute principle, but a reflection of Bonanno's view that it is not yet in his personal interest to testify." Id. at 531. Most recently, the court declined to vacate the contempt of a crucial material witness to large-scale financial misconduct, the proliferation of whose desperate requests for extraordinary relief appeared only to prove that confinement was in fact exerting precisely the intended coercive effect. S.E.C. v. Princeton Economic International, Ltd., 152 F.Supp.2d 456 (S.D.N.Y. 2001).

Mr. Koch's articulated moral basis for refusing to testify stands in stark contrast. As should be clear from his declaration and the many letters of support annexed hereto, Mr. Koch is a deeply principled young person. Whatever one may make of his beliefs, it is clear that they are well-developed, well-researched, and dearly held. He will continue to cleave to them as his last and only trustworthy touchstone.

As noted above and in his declaration, Mr. Koch is supported by several communities, and that support will be withdrawn if he testifies. Likewise, he has never given any indication that he can be convinced to testify before a grand jury, but he has made many public statements indicating that he will not, and in fact has refused to do so for more than four years.

Conclusion

As Mr. Koch's resolve not to testify has been unwavering for more than four years, and as his moral conviction has become only more developed since his confinement, his incarceration is no longer serving its coercive purpose. Moreover, Mr. Koch's confinement has no reasonable relation to its purpose. Indeed, his seven-month confinement is far disproportionate to the utility of his testimony, which he firmly believes will yield no information useful to the purported object of the investigation.

For all the reasons set forth above, we respectfully request that the relief being sought be granted in its entirety.

Dated: New York, New York
December 20, 2013

Respectfully submitted,

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