

KAM:CSK:ec
CV2-268.wpd

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA,

CR 02-466 (S-1)

- against -

(Gleeson, J.)

JASON VALE,

Defendant.

----- X

UNITED STATES' MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT VALE'S PRE-TRIAL
MOTIONS

ROSLYNN R. MAUSKOPF
United States Attorney
Eastern District of New York
One Pierrepont Plaza, 14th Fl.
Brooklyn, New York 11201

CHARLES S. KLEINBERG
Assistant U.S. Attorney
(Of Counsel)

KAM:CSK:ec
CV2-268.wpd

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X

UNITED STATES OF AMERICA,

CR 02-466 (S-1)

- against -

(Gleeson, J.)

JASON VALE,

Defendant.

- - - - - X

UNITED STATES' MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANT VALE'S PRE-TRIAL
MOTIONS

ROSLYNN R. MAUSKOPF
United States Attorney
Eastern District of New York
One Pierrepont Plaza, 14th Fl.
Brooklyn, New York 11201

CHARLES S. KLEINBERG
Assistant U.S. Attorney
(Of Counsel)

PRELIMINARY STATEMENT

This memorandum of law responds to the pre-trial motions of defendant Jason Vale ("Vale").^{1/} Vale moves the Court:

1. to dismiss, on the grounds that he has not been indicted;
2. to disqualify the Honorable John Gleeson;
3. to disqualify Assistant U.S. Attorney, Charles S. Kleinberg ("Kleinberg");
4. to order the government to provide a bill of particulars;
5. to order the government to provide witness statements pursuant to Fed. R. Crim. P. 16(a)(1)(A); and
6. to suppress statements made by Vale at a civil deposition.

Each of the above motions is without merit and should be denied.

^{1/} The superseding order to show cause alleges that defendants Vale and Christian Bros. Contracting Corp. ("Christian Bros.") violated 18 U.S.C. § 401(3) by willfully disobeying this Court's orders in United States v. Christian Bros., etc., et al., CV99-7683 ("the civil action"). However, the instant motions are made by The Legal Aid Society, which only represents Vale, and not Christian Bros. See Affirmation of Jan Rostal dated December 16, 2002 ("Rostal Decl.") ¶ 1; Declaration of Charles S. Kleinberg dated January 6, 2003 ("Kleinberg Decl.") ¶ 2.

ARGUMENTPOINT IVALE HAD NO RIGHT TO AN INDICTMENT IN A
CRIMINAL CONTEMPT PROSECUTION FOR VIOLATION
OF 18 U.S.C. § 401(3)

Vale is charged with criminal contempt in violation of 18 U.S.C. § 401(3) for willfully disobeying this Court's orders in the civil action. Pursuant to the procedure authorized by Fed. R. Crim. P. 42, Vale was not indicted, but was rather charged by the Court in an order to show cause. Vale moves to dismiss, arguing that he has a constitutional right to an indictment. His motion should be denied.

In Green v. United States, 356 U.S. 165 (1958), the Supreme Court held that in a prosecution for criminal contempt pursuant to 18 U.S.C. § 401, where the defendant is subject to a prison term of more than a year: (1) the defendant has no right to an indictment (Id. at 184-85); and (2) the defendant is not entitled to a trial by jury (Id. at 185-87). While Bloom v. Illinois, 391 U.S. 194 (1968) overruled the holding of Green concerning the right to a jury trial, Bloom does not so much as discuss, let alone overrule, the holding of Green that defendants charged with criminal contempt have no right to an indictment even if they face more than one year in prison. Nor does any other Supreme Court case overrule the holding of Green concerning indictments. Thus, notwithstanding Vale's discussion concerning "trend[s] signalled" by Supreme Court cases which were decided after Green

(Br. at 3-9), Vale and this Court are bound by the Green holding concerning indictments. If Vale wishes to avoid that holding he must make his arguments to the Supreme Court; he cannot make them here.

There is no doubt that the Green holding that an alleged criminal contemnor has no right to an indictment has survived Supreme Court cases decided after Green. Young v. United States ex rel. Vuitton, 481 U.S. 787 (1987), which Vale contends has "great[] significance" for the contrary position he asks this Court to adopt (Br. at 6), expressly states that the Green holding concerning indictments remains the law. As the Court held in Vuitton:

These [earlier Supreme Court] precedents, however, both acknowledge the inherent power of a court to institute contempt proceedings, and assume that in such proceedings the court may summarily determine guilt with respect to serious criminal contempts. Bloom held that the second assumption was incorrect, but did nothing to undermine the first. ... [Bloom] therefore cannot justify ignoring our consistent pronouncements on the inherent authority of a court to institute contempt proceedings.

* * *

while the prosecution of in-court and out-of-court contempts must proceed in a different manner, they both proceed at the instigation of the court.

Vuitton, 481 U.S. at 796 n.8, 799 (emphasis added).

As the Second Circuit held, in a decision that is directly on point:

In this case, however, the government elected to prosecute Lohan for criminal contempt by

an order to show cause, rather than an indictment. Therefore, the grand jury clause is not implicated.

United States v. Lohan, 945 F.2d 1214, 1217 (2d Cir. 1991)

(emphasis added).^{2/}

Thus, Vale's motion to dismiss is without merit and should be denied.

POINT II

THERE IS NO BASIS UPON WHICH TO DISQUALIFY JUDGE GLEESON

Vale moves to disqualify the Honorable John Gleeson. The only reason which Vale offers as to why Judge Gleeson should be disqualified is that he presided over the underlying civil case which led to the instant criminal contempt prosecution (Br. 9-10). However, the law is very clear that Vale has not provided a sufficient reason to support his motion for disqualification. That is why, in his argument in support of that motion, Vale only relies upon dissenting opinions and cases which are totally inapposite because, unlike the instant case, they relate to in-court contempts.^{3/}

^{2/} In Lohan, the Second Circuit remanded the case to the district court with directions to apply a guideline provision which would require that Lohan be sentenced to no less than 46 months in prison. 945 F.2d at 1220.

^{3/} For example, United States v. Martin-Trigona, 759 F.2d 1017, 1025 (2d Cir. 1985) only states that when the trial judge is confronted with an in-court contempt in which immediate action is not necessary that the better practice is to refer the contempt charge to another judge after the conclusion of the

(continued...)

The judge in an underlying civil action is required to disqualify himself from presiding over the trial of the criminal contempt charge which he instituted only "where the contempt charged involves disrespect to or criticism of [the] judge." Nilva v. United States, 352 U.S. 385, 395-96 (1957); Fed. R. Crim. P. 42(b). Mere disobedience to a court order does not fall within that category. In re Puerto Rico Newspaper Guild Local 225, 476 F.2d 856, 859 (1st Cir. 1973); United States v. Griffin, 84 F.3d 820, 830 (7th Cir. 1996). Moreover, while a judge who has been "reviled" by a defendant may not preside over the criminal contempt trial, not every challenge to the court's authority will result in disqualification. Puerto Rico, 476 F.2d at 859; Unger v. Sarafite, 376 U.S. 575, 584 (1964) ("Unger claimed he was being 'badgered' and 'coerced' and that the court was 'suppressing the evidence.' This was disruptive, recalcitrant, and disagreeable commentary, but hardly an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification"). Vale is not charged with disrespect to or criticism of Judge Gleeson.

Where, as here, the defendant is not charged with disrespect to or criticism of the judge in the underlying civil case, then the defendant is entitled to have a different judge preside over

^{2/}(...continued)
trial in which the in-court contempt took place. Martin-Trigona is irrelevant to out-of-court contempts, such as the ones Vale is charged with.

his criminal contempt case only if he can show that the judge in the civil case abuses his discretion by not disqualifying himself. Nilva, 352 U.S. at 396; Fed. R. Crim. P. 42(b); United States v. Prugh, 479 F.2d 611, 613 (8th Cir. 1973) ("[T]here [must] be an abuse of discretion before the failure to assign the contempt case to another judge would be held to be error.

[Defendant] made no showing of an abuse here."). It is very difficult for a defendant to make the required showing of abuse.

"Generally, grounds for recusal may not be predicated on a judge's prior judicial rulings or involvement in the case, but must arise instead from some extrajudicial source." In Re Criminal Contempt Proceedings Against Crawford, 133 F. Supp. 2d 249, 264 (W.D.N.Y. 2001), citing Litaky v. United States, 510 U.S. 540, 554-55 (1994).

In affirming the district judge's decision not to disqualify himself from the criminal contempt case that he initiated, the Seventh Circuit held that:

There is no reasonable inference to be drawn from the record that Judge Zagel became "personally embroiled" with Mr. Hill or descended into "intemperate wrangling." See Ungar, 376 U.S. at 585, 84 S.Ct. at 847. The record does indeed illustrate Judge Zagel's frustration with Mr. Hill's continued efforts to circumvent the court's rulings. An appointment under Article III does not divest a judge of human reaction, and nothing in the record suggests that Judge Zagel's understandable frustration at trial tainted his ability to discharge his judicial duty at the posttrial contempt hearing.

United States v. Griffin, 84 F.3d at 830-31.

Not only has Vale completely failed to make the strong showing that would be required to justify Judge Gleeson's disqualification, but in fact, the only reason Vale cites, to wit, that Judge Gleeson presided over the civil case, is insufficient as a matter of law. Griffin, 84 F.3d at 830; In Re Puerto Rico Newspaper Guild, 476 F.2d at 859; Nilva, 352 U.S. at 395-96.

Moreover, in this case, there is an excellent affirmative reason to deny the motion to disqualify, namely, to prevent Vale from obtaining yet another excessive and unnecessary delay in this prosecution. Vale has already improperly and excessively delayed the prosecution in this case by absconding from the original order to show cause. Vale should not be allowed to compound the unjustified delays he has already obtained in this prosecution by obtaining an additional, excessive and unnecessary delay.

Thus, Vale's motion to disqualify Judge Gleeson should be denied.

POINT III

VALE IS NOT ENTITLED TO THE DISQUALIFICATION OF ASSISTANT UNITED STATES ATTORNEY KLEINBERG

Vale asks that Kleinberg, an Assistant United States Attorney ("AUSA") in the Civil Division who represented the United States in the underlying civil action, be disqualified from prosecuting the instant criminal contempt case, and that

instead, an AUSA from the Criminal Division be assigned to prosecute the criminal contempt case (Br. at 13). In a sense, Vale already has what he seeks.

Vale alleges "that a disinterested attorney from the Criminal Division of the U.S. Attorney's Office who has not been involved in the underlying civil litigation ought to be assigned to the case." Br. at 13 (emphasis in original). However, all of Kleinberg's activities in prosecuting the criminal contempt case have been reviewed and supervised by AUSA Patricia Pileggi, Chief of the Special Prosecutions Section (now the Public Integrity Section) of the Criminal Division, who has in turn regularly reported on developments in the case to the Chief of the Criminal Division. Kleinberg Decl. at ¶ 3. Moreover, Kleinberg has absolutely no personal interest in either the civil or the criminal cases against Vale, and in both cases, he represents the United States of America. Kleinberg Decl. at ¶ 4.

As shown below, Vale's motion to disqualify Kleinberg should be denied because: (1) the caselaw concerning the circumstances under which a Court may appoint a government attorney from outside the Department of Justice ("DOJ") to prosecute a criminal contempt case is inapposite because, in the instant case, the United States Attorney, who does not require judicial appointment, is prosecuting the criminal contempt charge (see Section B., below); (2) even if the caselaw concerning the circumstances under which a government attorney who litigated a

civil case may be appointed to prosecute a subsequent criminal contempt case is assumed to be applicable, that caselaw very clearly shows that Kleinberg should not be disqualified from prosecuting the instant criminal contempt case (see Section A., below).

A. Even Assuming the Applicability Of the Cases Upon Which Vale Relies, the Motion to Disqualify Kleinberg Must Be Denied

Vale relies on cases in which the United States Attorney had already declined, or was not asked, to prosecute a criminal contempt charge. See Section B., Infra. Those cases discuss the standard which the Court should apply in deciding whether to appoint a government attorney other than the Assistant U.S. Attorney who litigated the civil case (such as an attorney from a federal agency or from a State) to prosecute the criminal contempt charge. (Br. at 10-11). We assume, arguendo, in this section that those cases are applicable.

The controlling authority in the Second Circuit is United States v. Terry, 806 F. Supp. 490 (S.D.N.Y. 1992), aff'd, 17 F.3d 575 (2d Cir. 1994). In Terry, the New York State Attorney General ("NYAG") (1) sought and obtained a preliminary injunction in a civil action, and (2) brought civil contempt cases for violation of that preliminary injunction. 806 F. Supp. at 494. The Court thereafter referred criminal contempt charges to the United States Attorney, and when she declined to prosecute,

