

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

CHRISTIAN BROS. CONTRACTING  
CORP. AND JASON VALE

Defendant.

NOTICE OF MOTION

02 CR 466 (JG)

**FILED**

IN CLERK'S OFFICE  
U.S. DISTRICT COURT, E.D.N.Y.

★ DEC 16 2002 ★

U.S. ATTORNEY  
EASTERN DISTRICT OF NEW YORK  
DEC 16 2002

PLEASE TAKE NOTICE, that the defendant JASON VALE by and through his attorney

JAN A. ROSTAL, ESQ., of the Federal Defender Division of the Legal Aid Society, and upon the annexed declaration and all papers and proceedings heretofore and herein, will move the Court, before the Honorable John Gleeson for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on January 24, 2003 at 3:00 p.m., for an Order:

I. Pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution, dismissing the Order to Show Cause, based on the government's failure to obtain an indictment;

II. Pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution, and F.R.Cr.P. 42(a)(3), disqualifying the Hon. John Gleeson and Charles Kleinberg, Esq., from this case; and

III. Pursuant to the Federal Rules of Criminal Procedure, ordering the government to provide the defendant with a Bill of Particulars and with certain discovery; and

IV. Pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution, suppressing statements made by the defendant as a civil deposition; and

V. Allowing defendant to make further motions after reviewing computerized discovery

turned over too late to review prior to the filing of motions; and

VI. Granting such other and further relief as the Court may deem just and proper.

DATED:       BROOKLYN, N.Y.  
              December 16, 2002

JAN A. ROSTAL, ESQ.  
FEDERAL DEFENDER DIVISION  
THE LEGAL AID SOCIETY  
16 COURT ST., 3<sup>RD</sup> FLOOR  
BROOKLYN, N.Y. 11241  
ATTORNEY FOR DEFENDANT  
Jason Vale

TO:    ASSISTANT U.S. ATTORNEY Charles Kleinberg  
          CLERK OF THE COURT  
          DEFENDANT

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

v. : AFFIRMATION

CHRISTIAN BROS. CONTRACTING  
CORP. AND JASON VALE : 02 CR 466 (JG)

Defendant. :

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STATE OF NEW YORK )  
) ss.:  
KINGS COUNTY )

JAN ROSTAL, an attorney admitted to practice in this Court, affirms under penalties of perjury pursuant to Title 28, United States Code, Section 1746, that:

1. I am a staff attorney at the Federal Defender Division of the Legal Aid Society and I am assigned to represent the defendant in the above-captioned case, Jason Vale. This declaration is made in support of Jason Vale's for relief in the NOTICE OF MOTION submitted herewith.

2. This affirmation is based upon my review of the discovery provided by the government, all court proceedings, and conversations with the prosecutor and my client.

3. This prosecution for criminal contempt arises out of the government's allegations that Jason Vale violated a Preliminary and Permanent Injunction issued by this Court in April and November, 2000. On November 24, 1999, the government filed a Civil Complaint, CV 99-7683, against Mr. Vale and his corporation, requesting that they be enjoined from, among other things, continuing to run their business of selling amygdalin products. The parties conducted discovery pursuant to the Federal Rules of Civil Procedure, including Notice to Mr. Vale and the taking of his deposition on April 14, 2000. At the time of the deposition, there were no pending criminal

charges against Mr. Vale. I have reviewed the transcript of that deposition, and there were no warnings given to Mr. Vale of any contemplated criminal charges. I have also spoken with the attorney who appeared on Mr. Vale's behalf at the deposition, and he tells me that the government represented during the deposition that the deposition was being taken only for the civil case and that there was at that time no active criminal investigation against Mr. Vale. The parties agreed to an Order Granting Preliminary Injunctive Relief On Consent on April 20, 2000. The parties agreed to an Order Granting Permanent Injunctive Relief on Consent on November 16, 2000.

4. On April 16, 2002, the government filed an Order to Show Cause (OSC) why he should not be held in contempt of court. The government did not prosecute Mr. Vale by way of indictment. The alleged contemptuous conduct involves the sale of apricot seeds and related amygdalin products by persons whom the government contends were working on Mr. Vale's behalf. See Government's Declaration In Support of Order to Show Cause.

5. The prosecutor who filed the OSC is Charles Kleinberg, Esq, an Assistant United States Attorney for the Civil Division of the United States Attorney's Office. To my knowledge, no Assistant United States Attorney for the Criminal Division has been involved in this case. Mr. Kleinberg represented the F.D.A. in its civil lawsuit against Mr. Vale for injunctive relief.

6. While the civil case was pending, the F.D.A. continued to conduct undercover operations, and it will attempt to introduce evidence obtained in these operations in the criminal contempt case.

7. At the defendant's request, the government has provided certain discovery after the defense visited the F.D.A. offices and reviewed some boxes containing physical evidence and written materials seized pursuant to a search warrant. We requested copies of some of the

materials, and those copies have numbered in the thousands. (While I have not personally counted them, my eyeball estimate of the documents I have organized into binders suggests that the discovery includes between 8,000 and 10,000 pages). These documents do not include the physical evidence, of which there are several boxes of materials. The defendant also requested a Bill of Particulars, which the government refused to answer. See Letter of Jan A. Rostal, dated November 19, 2002; Letter of Charles Kleinberg, dated November 27, 2002. Attached as Exhibit A. As of this writing, the government contends that it has turned over "all Rule 16 discovery materials, although it has been unclear whether the government fully understands its obligations under Rule 16 (a)(1)(A) where it has charged both an individual and a corporation. After a specific request was made under Rule 16(a)(1)(A) requesting that all discovery be provided under the last section of the Rule (applying where the defendant is a corporation), Mr. Kleinberg responded that "I am not turning over any discovery for Christian Bros., since nobody has demanded that on behalf of Christian Bros. That can only be demanded by Christian Bros. itself which must be represented and it's not in the case."

8. The government also agreed at our last status conference in October, 2002, to turn over computers seized in a search of a residence in the year 2000. I expected to get copies of the hard drives from the computers, but those copies were never forthcoming. Instead, the government dropped off a number of computers at my office while I was on vacation during the week of Thanksgiving. When I returned to the office on December 2, 2002, I had to consult with a computer expert to determine how to get the hard drive information out of the computers. My expert tells me that this is going to take time, and I do not believe that I will receive the information until January, 2003. I have no idea at this point how long it will take me to review it. Once I have reviewed these materials, I may need to seek the Court's permission to file further

motions.

9. The continuation of Mr. Kleinberg as the criminal prosecutor as well as the civil attorney representing the FDA in the underlying presents various conflicts of interests as well as unfair advantage. Among others, Mr. Kleinberg represents the government on Mr. Vale's continuing obligations under the Permanent Injunction. Should Mr. Vale anyone associated with him wish to file a civil action for modification or clarification of the injunction, the attorney representing the FDA would presumably be Mr. Kleinberg.

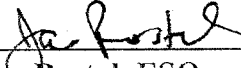
10. Mr. Vale is a cancer survivor who attributes his recovery to the ingestion of apricot seeds and the use of their related products. He continues to believe in the efficacy of the products for both himself and others, based on his own experience, his religious convictions (he believes that the Bible prescribes foods containing amygdalin), and his observations of others' experiences. He may in the future wish to bring a civil action for clarification of the underlying Injunction against him as it applies to his future conduct. I cannot represent Mr. Vale on any civil action in this regard, and he would have to retain an attorney to do so. However, I do not believe that the FDA can regulate "pure speech" on the subject. There is nothing in the FDCA to prohibit pure speech, so long as it is not coupled with labeling or selling of products, and if the issue were properly raised to the Court for clarification, I believe that Mr. Vale might prevail.

See, e.g., Thompson v. Western States Medical Center, 122 S.Ct 1497 (2002) (pharmacies brought action for declaratory relief against FDA Modernization Act, prohibiting advertising and *promotion* of particular compounded drugs; provisions held unconstitutional restrictions of commercial speech); Ashcroft v. Free Speech Coalition, Inc., 122 S.Ct 1389 (2002) (pornographers brought action to enjoin prosecution against purveyors of virtual child porn; held that application of law to virtual, as opposed to real, child porn violated the First Amendment);

Conant v. Walters, 2002 WL 31415494 (9<sup>th</sup> Cir. 2002) (upholding injunction prohibiting government from investigating physicians who recommend, but do not prescribe, medical marijuana to patients).

Dated: Brooklyn, New York  
December 16, 2002

Signed and Sworn,

  
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Jan Rostal, ESQ.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

v. :

MEMORANDUM OF LAW

**CHRISTIAN BROS. CONTRACTING  
CORP. AND JASON VALE** :

**02 CR 466 (JG)**

Defendant. :

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PRELIMINARY STATEMENT

This prosecution for criminal contempt arises out of the government's allegations that Jason Vale violated a Preliminary and Permanent Injunction issued by this Court in April and November, 2000. The government has already taken the position that the case is serious enough to warrant a jury trial. The alleged contemptuous conduct involves the sale and promotion of apricot seeds and related amygdalin products in violation of the Food Drug and Cosmetic Act (FDCA) by Mr. Vale, his corporation, and persons whom the government contends were working on Mr. Vale's behalf.

Despite the grave consequences that the government believes Mr. Vale should suffer for his involvement with these products—which are for the most part regulated by the Food and Drug Administration (FDA) only to the extent that claims are made about their efficacy--it has proceeded against Mr. Vale in a most unusual way.

Instead of conducting an investigation and turning the case over to the Criminal Division of the United States Attorney's Office for prosecution under 21 U.S.C. sec. 331—the statute

Congress enacted proscribing the very conduct the FDA sought to stop—the FDA chose instead to embroil Mr. Vale in a lengthy and costly civil action to enjoin him from doing what the law already apparently proscribed: selling apricot seeds while making claims they could treat, cure, or mitigate disease.

The government's strategy was clever. In the civil proceeding, Mr. Vale had retain counsel. Prolonged litigation with the FDA would have cost him more than he could afford to stay in business. That the government fully expected Mr. Vale to violate the order is clear from the fact that it continued undercover operations throughout the pendency of the civil litigation.

Nearly two years after the end of the civil case, the government brought this contempt action by way of an Order to Show Cause (OSC) rather than by indictment despite having acknowledged the serious penalties for the crime alleged. The government attorney who pursued the contempt charges, Charles Kleinberg, is an Assistant United States Attorney from the Civil Division who was intimately involved in the underlying civil action, and whose name appears as representing the FDA on both the Preliminary and Permanent Injunctions. Furthering the appearance of a conflict of interest, the government did not put the case in the "wheel" for random selection of judges, but rather brought the case directly before Your Honor, knowing that this Court had presided over and made rulings concerning the very Injunctions that will be at issue in the contempt case.

Finally, the government has pressed for an early trial date knowing that the only party unfamiliar with the underlying civil litigation is defense counsel, and has even denied defense counsel the most rudimentary information she needs to mount a defense, such as when, where, and by and to whom the apricot seeds were sold.

Based on all of these concerns, the defense most respectfully submits the following motions for the Court's consideration. We also request the opportunity to present any further motions that become apparent after defense counsel has had an opportunity to review computer-generated discovery material provided by the government too late to review prior to the motions filing deadline.

MOTION TO DISMISS ORDER TO SHOW CAUSE BASED ON GOVERNMENT'S  
BYPASS OF THE FIFTH AMENDMENT GRAND JURY CLAUSE

The first question presented in this motion is whether the defendant in a serious criminal contempt proceeding should have the right to be indicted by a Grand Jury. Although other motions (such as the Motion to Disqualify, discussed below) might logically be considered first, the issue of what constitutional procedures applies in a contempt case informs the remaining motions, and it will be discussed first.

It is clear under the United States Supreme Court precedent that an accused contemnor is entitled to fundamental fairness as guaranteed under the Fifth and Fourteenth Amendments to the Constitution. We respectfully submit that a recent Supreme Court trend toward procedurally conforming serious criminal contempt cases to other criminal cases supports the Grand Jury right as necessary to guarantee fundamental fairness.

The Fifth Amendment to the United States Constitution states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." Federal Rule of Criminal Procedure 7 also states that

