UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

CHRISTIAN BROS. CONTRACTING CORP. AND JASON VALE

Defendant.

NOTICE OF MOTION

02 CR 466 (JG)

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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., 3RD 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 my 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 (9th 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,

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 Consititution. 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

an offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment.

In early discussions concerning which constitutional rights apply in a criminal contempt prosecution, the United States Supreme Court stated that the Grand Jury Clause does not. Green v. United States, 356 U.S. 165, 187, 78 S.Ct. 632, 645, 2 L.Ed.2d 672 (1958). Nevertheless, the rule in Green v. United States, supra, has been undermined, if not overruled, by more recent Supreme Court decisions, particularly Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968), where the Supreme Court held that jury trials are indeed constitutionally required under the Fifth and Fourteenth Amendments in serious criminal contempt cases. See also Taylor v. Hayes, 418 U.S. 488, 500 (1974). The Bloom decision calls Green into serious question, as Green itself relies upon a long line of cases holding that no *jury trial* is constitutionally required in criminal contempt–a proposition Bloom reversed. 356 U.S. at 183 n.14, 187, 78 S.Ct. at 643 n.14, 644-645.

In reversing the earlier decisions, the Bloom Court acknowledged that the historical view of contempt as wholly distinct from other types of "crime" had to fall in the face of fundamental fairness:

> Given that criminal contempt is a crime in every fundamental respect, the question is whether it is a crime to which the jury trial provisions of the Constitution apply. We hold that it is, primarily because in terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes. Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court.

Bloom v. State of Illinois, 391 U.S. 194, 202 (1968).[1]

More recently, the Supreme Court further extended the right to a jury trial in a case where the trial court tried to avoid one by characterizing a multimillion dollar fine against a union for violating an injunction as "civil" rather than "criminal." United Mine Workers v. Bagwell, 512 U.S. 821 (1994). The United Mine Workers case settled the rule that petty summary contempt procedures are now permissible only when the contempt occurs in the court's presence (and thus must be dealt with immediately to maintain order and judicial authority). United Mine Workers, supra, at 832. However, even where the contempt is committed in the court's presence, it cannot deny the contemnor the right to trial by jury if he delays punishment until the end of the trial. See Taylor v. Hayes, 418 U.S. 488, 496-503 (1974).

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[1] In a recent article, Professor Robert Pushaw describes the Supreme Court's evolution between Green and Bloom, noting that

> in his dissent in Green, Justice Black chided the Court for distorting English history and ignoring that the Constitution's criminal procedure provisions (including those guaranteeing a jury trial) contained no exception for contempt. Moreover, he rejected a claim of inherent power, as courts would never truly need to act with "special dispatch in punishing criminal contempts, especially those occurring beyond the courtroom[:]" "[N]ecessity," if it can justify at all, must at least refer to a situation where the extraordinary power to punish by summary process is clearly indispensable to the enforcement of court decrees and the orderly administration of justice. Or as this Court has repeatedly phrased it, the courts in punishing contempts should be rigorously restricted to the "least possible power adequate to the end proposed." Here the trial judge had used summary process merely because it was "convenient or desirable"-- i.e., "faster and cheaper than a jury." The Constitution, however, required impartial juries to ensure justice--an especially compelling need in the crime of contempt, where judges were often biased and could not be effectively checked. A decade later, the Court accepted Justice Black's reasoning, overruled Green, and held that the constitutional right to a jury trial for serious criminal contempts outweighed concerns for preserving judicial independence, dignity, and efficiency.

Pushaw, Robert J., Jr., "The Inherent Powers of Federal Courts and the Structural Constitution," 86 Iowa Law Rev. 735, 771-72 (March 2001).

The United Mine Workers Court stressed that the contempt power is "uniquely . . . liable to abuse." United Mine Workers, 512 U.S. at 831 (quoting Bloom, 391 U.S. at 202 and Ex parte Terry, 128 U.S. 289 (1888). "Unlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." United Mine Workers, 512 U.S. at 831. The United Mine Workers Court also discussed the different types of contempt, and appears to conclude that in the unique case of indirect contempt involving "out-of-court disobedience to complex injunctions," the most pressing case can be made for the full ballast of criminal procedural protections to "protect the due process rights of the parties and prevent the arbitrary exercise of judicial power. Id. at 834.

Perhaps of even greater significance to Mr. Vale's case is Young v. United States ex rel. Vuitton, 481 U.S. 787, 808 (1987). In Young, the district court appointed Vuitton's own attorneys to prosecute a criminal contempt charge of violating the court's injunction prohibiting Young from infringing Vuitton's trademark. While acknowledging that federal judges have inherent power and discretion to appoint a private prosecutor to vindicate the Court's authority to punish disobedience of their orders, the Court held that the attorney appointed cannot be an interested party (i.e., the attorney representing the beneficiary of the order allegedly violated). Young, 418 U.S. at 804-09. [2]

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[2] In his concurrence, Justice Scalia argued that courts had no "judicial power" to prosecute, either directly or by appointment, disobedience of their judgments (including injunctions). Young, id. at 815-825 (Scalia, J. concurring in the judgment). Justice Scalia appears to take a distinct view toward criminal contempt cases that would require even more procedural protections than the Court's majority has explicitly afforded. In his Young concurrence, Justice Scalia writes: "That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of

The Young case is particularly instructive on the question of whether Green should be considered overruled by the Supreme Court and the defendant viewed as constitutionally (at least through the Fifth and Fourteenth Amendments) guaranteed the right to be indicted by a grand jury. We submit that Young further solidifies the Supreme Court's evolving approach toward applying the traditional checks and balances inherent in our criminal justice system to contempt cases. In reaching its conclusion requiring an independent prosecutor, the Young Court stated:

> It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters. We have always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty.

418 U.S. at 810.

Thus, the Supreme Court has stated that a defendant in a serious contempt case has a right

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fairness and separation of powers." Id. at 841. Indeed, Justice Scalia's opinions in the enforcement of injunctions and the contempt area reflect a "profound suspicion of expansive interpretations of judicial power." Slotnick, David M., "Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology," 48 Emory L.J. 1377, 1429 (Fall 1999). See Lewis v. Casey, 518 U.S. 343, 362 (1996) (Justice Scalia writing for the majority stated that "the injunction imposed by the District Court was inordinately--indeed, wildly--intrusive.... [I]t is the *ne plus ultra* of what our opinions have lamented as a court's 'in the name of the Constitution, becom [[ing] ... enmeshed in the minutiae of prison operations." '); Madsen v. Women's Health Ctr, Inc., 512 U.s. 753, 815 (1994 (Scalia, J., concurring in part, dissenting in part) (describing a "misguided trial court injunction" permitted by the Court as a "powerful loaded weapon lying about"); United Mine Workers v. Bagwell, 512 U.S. 812, 842 (1994) (Scalia, J, concurring) (criticizing contemporary court that "routinely issue complex decrees which involve them in extended disputes and place them in continuing supervisory roles over parties and institutions" without historical foundation); Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 106-07 (1993) (Scalia, J., concurring) (supporting "traditional view . . . that prospective decision making is quite incompatible with the judicial power" and is clearly a "practical tool of judicial activism.").

to criminal procedural protections that include the most fundamental to our system. Bloom, supra. It has also been careful to focus on the particular need for those protections in cases involving out-of-court violations of complex injunctions. United Mine Workers, supra. And, finally, the Court has reiterated the unique threats to liberty present in contempt cases, and the resulting heightened need for prosecutorial disinterest. Young, supra.

The trend signaled by the Supreme Court in these modern cases appears to answer affirmatively the question of whether fundamental fairness requires the insertion of a Grand Jury as a check on the discretion of an interested prosecutor who represented the plaintiff in the civil lawsuit, and the power of the Court whose Order was allegedly violated.[3] By bypassing the Grand Jury process, the prosecutor has asked the very Court which *issued* the order to pass on whether there is probable cause to believe the order was violated. As in Bloom, an "even more compelling argument can be made for providing a right" to be indicted by a grand jury "as a protection against the arbitrary exercise of official power." 394 U.S. at 202. The Court should not be placed in the position of victim, judge, and Grand Jury all at once.

One last point should not be forgotten. The defendant is charged with having engaged in conduct that Congress has *independently* described as a crime. 21 U.S.C. §331. The prosecutor, presumably unhappy with the one year, or at most, three year, maximum incarceratory penalty Congress associated with that crime, chose to charge him with contempt, a crime carrying no statutory maximum at all. 18 U.S.C. § 403. The fact that the very conduct that the government

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[3] We note that there are many reported cases in which the grand jury process has been used, without discussion, in criminal contempt cases. See, e.g., U.S. v. Duncan, 502 F.2d 1021 (10th Cir. 1974) (contemnor indicted by grand jury on charges of violating injunction against him by the SEC); U.S. v. Neely, 966 F.2d 1445 (4th Cir. 1992) (unpublished); U.S. v. Sweeny, 52 F.Supp 2d 164 (D.Mass. 1999); U.S. v. Brummitt, 503 F.Supp 852 (D.C.Texas 1980).

claims gives rise to the contempt charge is itself a crime suggests that the prosecutor is attempting to circumvent both the applicable punishments and the constitutional process that would apply without question had he charged 21 U.S.C. §331.

MOTION DISQUALIFY THE DISTRICT COURT JUDGE WHO IS THE VICTIM OF THE CHARGED CRIME AND APPOINTMENT OF A DISINTERESTED PROSECUTOR

Under the unique circumstances of this case and the authority cited above, the defendant respectfully moves for disqualification of both the Judge and the prosecutor, as both were involved in the underlying civil litigation.

As to the question of judicial disqualification, we are mindful of F.R.Cr.P. 42(a)(3). While Rule 42(a)(3) does not *require* disqualification except where the contempt involves "disrespect to or criticism of a judge," there may be cases "in which it is the better practice to assign a judge who did not preside over the case in which the alleged contumacy occurred to hear the contempt proceeding." Nilva v. U.S., 77 S.Ct 431 (1957) (discussing F.R.Cr.P. 42(b), the predecessor to F.R.Cr.P. 42(a)(3)). Furthermore, in the Nilva dissent, Justice Black, joined by then Chief Justice Warren, Justices Douglas and Brennan, wrote:

> The majority relies on [Rule 42(b)'s] silence to reject petitioner's contention that the trial judge here should have stepped aside . . . But at most Rule 42(b) only permits a negative inference that a judge who prefers contempt charges for violations of his orders and who is intimately involved in related proceedings bearing on these charges can sit in judgment on the alleged contempt. In any event, Rule 42(b) is a rule promulgated by this Court and where it is not explicit we should not interpret it in a manner to deny a fair trial before an impartial arbiter.

Nilva, 77 S.Ct. at 404 (Black, J. dissenting); see also Mayberry v. Pennsylvania, 91 S.Ct 499,

505 (1971) (in in-court contempt case, "[o]ur conclusion is that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor."); U.S. v. Martin-Trigona, 759 F.2d 1017, 1025 (2d Cir. 1985) (suggesting that where contempt is not summary, i.e. the trial and sentence for contempt can be delayed until after trial on the underlying matter, "the desirable procedure is to cite the individual and refer the contempt charge to another judge").

Even if viewed as discretionary, judicial disqualification seems particularly appropriate where, as here, the defendant has been charged in an Order to Show Cause, thus bypassing the Grand Jury's neutral role in passing upon the question of whether probable cause exists to charge the defendant. The Court was also privy to information submitted in the underlying civil case in support of the original complaint, and during the ongoing litigation, that is beyond the time period charged in the indictment. It presents an appearance of impropriety for this Court, which has viewed evidence in the civil case that is inadmissible in the criminal case, to preside over the criminal matter.

Once again, the Young case, discussed *supra*, represents a shift in the Supreme Court's view of contempt cases that supports the defense position that both this Court and the prosecutor ought to disqualify themselves. Specifically as to the continuation of the same prosecutor who represented the plaintiff in the *civil* case, theYoung Court held that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order." Young v. United States ex rel. Vuitton, 481 U.S. 787, 809 (1987).

In United States v. Terry, 17 F.3d 575 (2d Cir. 1994), the Second Circuit considered the

question of whether the Supreme Court's ruling in Young extended to the appointment of a government attorney as the contempt prosecutor. In Terry, the government attorney was the Attorney General for the State of New York, who had litigated the underlying petition for injunctive relief. The Young court reviewed two post-Young cases, S.E.C. v. Carter, 907 F.2d 484 (5th Cir. 1990) and F.T.C. v. American National Cellular, 868 F.2d 315 (9th Cir. 1989), both of which held that Young's concerns may be implicated by appointment of a government attorney as prosecutor in a contempt proceeding. The Terry court ultimately sided with the Ninth Circuit in American National Cellular, finding that while Young "does not automatically disqualify government attorneys who bring a civil action from serving as special prosecutors in a subsequent contempt proceeding," the unique facts and circumstances of a given case may give rise to disqualification. Terry, 17 F.3d at 578.

We respectfully submit that the Young case compels a finding that because Charles Kleinberg, Esq. represented the F.D.A. in the underling civil action, and continues to do so, he represents an interested party and is not the sort of disinterested attorney contemplated under Young. Once cast in his role as advocate for his client, the F.D.A., and embroiled in civil litigation, Mr. Kleinberg loses his ability to distinguish between his duty to the public in even-handedly enforcing the law and his obligations to his client in advancing their interests. Moreover, he continues to represent the F.D.A. on the ongoing enforcement power over the Permanent Injunction, and could unfairly use information obtained in one case to gain leverage in further civil proceedings against Mr. Vale, or anyone else it claims is or was involved with him.

Mr. Kleinberg has already suggested in court proceedings that he is continuing to monitor the defendant's compliance with the outstanding Injunction. Moreover, we have asked the Court