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

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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.

ARGUMENT

POINT I

VALE 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

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[3/](...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,

appointed NYAG to prosecute the criminal contempt case. 406 F. Supp. at 492. At the time the criminal contempt case was brought, the underlying civil action was still pending, and, in fact, while the criminal contempt case was on appeal, the district court ordered the parties in the underlying civil action to submit to the court schedules for the completion of discovery and for the filing of pre-trial orders or motions for summary judgment. 17 F.3d at 578.

Terry makes very clear [4/] that, unlike the situation which is present when a private attorney who litigates a civil case is appointed to prosecute a criminal contempt case, the presumption is that government attorneys may represent the government in an underlying civil proceedings and in a subsequent criminal contempt proceeding:

> Unlike the usual Vuitton situation, this case involves the appointment of a government attorney as the contempt prosecutor. Like the United States Attorney, who was first asked by the district court to prosecute the contempt charges but declined, [NYAG] represents a sovereignty and is presumed to act with a sense of impartiality.

17 F.3d at 577 (emphasis added).

With that presumption in mind, the Second Circuit went on to hold that NYAG could function as a special prosecutor in the

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[4/] In Terry, the same attorneys from NYAG worked on the underlying civil case, the civil contempt cases, and the criminal contempt case. Kleinberg Decl. at ¶ 5. Thus, Terry is directly on point concerning Kleinberg's authority to litigate both the underlying civil case and the subsequent criminal contempt case.

criminal contempt case notwithstanding his participation in the underlying civil case and the earlier civil contempt cases because: (1) NYAG's only financial interest in the underlying civil litigation was the possibility of attorney's fees that would be paid to the State, and not to the coffers of NYAG, an interest too remote to implicate a conflict; (2) any fine in the criminal contempt case would be paid to the United States and not to NYAG; (3) at the time of the criminal contempt case, the civil contempt cases had been dismissed; and (4) most importantly, at the time of the criminal contempt prosecution, the underlying civil case had been inactive for quite some time, even though there was "renewed activity" in the underlying civil case during the appeal of the criminal contempt case. 17 F.3d at 578.

Finally, the Circuit held that under Young v. United States ex rel. Vuitton, 481 U.S. 787 (1987), there is simply no concern whatsoever if the same attorney -- be it a private or a government attorney -- prosecutes both the civil and criminal contempt cases because the "criminal proceeding does not involve vindication of an order issued in the civil contempt proceedings; rather, both proceedings seek vindication of the injunction issued in the underlying civil litigation." Id. Thus, "Vuitton does not suggest that different attorneys need to be appointed to prosecute parallel contempt proceedings." Id.

Terry mandates that the motion to disqualify Kleinberg must be denied. Kleinberg has no financial interest in the civil or

criminal cases whatsoever. Not even the U.S. Attorney's Office will receive any attorney's fees or fines. In any event, the issue of financial interest is irrelevant because, even to the extent that Vale could present some contrived argument to the effect that the U.S. Attorney has an indirect financial interest in the outcome of either the civil or the criminal contempt case, Vale does not object to being prosecuted by another AUSA and Kleinberg has no financial interest, be it a real or imagined financial interest, that would not be possessed equally by any other AUSA.

There have never been any civil contempt proceedings against Vale, and, most importantly, in the instant case, not only is the underlying civil litigation inactive, as was the case in Terry, but indeed it has been completely and finally concluded. Final judgment was entered in the civil case in 2000, over a year and one half before the criminal contempt case was instituted. While there remains the possibility of civil contempt proceedings, Terry makes clear that Kleinberg may jointly prosecute civil and criminal contempt cases against Vale.[5/]

[5/] Vale suggests that there might be a "possible action for modification or clarification" of the final injunction in the civil action (Br. at 12). However, since Vale agreed to the final injunction -- i.e., the final injunction is a consent decree -- Vale may not modify it. Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985) ("a consent decree represents a compromise between parties who have waived their right to litigation and, in the interest of avoiding the risk and expense of suit, have given up something they might have won had they

(continued...)

Thus, even if Vuitton and its progeny can be applied to the U.S. Attorney's Office, Vale's motion to disqualify Kleinberg must be denied.

B. Under Vuitton, There Is No Reason To Disqualify An AUSA Merely Because He Prosecutes Both A Civil Case And A Subsequent Criminal Contempt Case Arising Out Of That Civil Case.

In Vuitton, the Supreme Court placed limits on a Court's ability to appoint the attorney for a private litigant in a civil case to prosecute a criminal contempt case arising out of that civil case. As seen by Terry, there are cases which have sought to apply Vuitton, in modified form, to a situation in which the Court seeks to appoint government attorneys who litigated a civil case to prosecute their adversaries in the civil case under criminal contempt charges initiated by the Court. These cases involve appointments of NYAG or federal agency attorneys as special prosecutors. However, there is absolutely no case which applies Vuitton to the joint prosecution of a civil action and a subsequent criminal contempt action by the U.S. Attorney's

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5/ (...continued)
proceeded with the litigation"; "The court is not entitled to expand or contract the agreement of the parties as set forth in the consent decree"). Further, since more than one year has passed since final judgment was entered in the civil case and since Vale has not brought a motion for post-judgment relief "within a reasonable time", it is too late for Vale to move to modify the final injunction. Fed. R. Civ. P. 60(b). In any event, the underlying civil case has been completely inactive for over two years, and thus, under Terry, for that reason alone, the civil case does not affect Kleinberg's ability to prosecute the criminal contempt case.

Office. It would be fundamentally inconsistent with the rationale of Vuitton to attempt to apply it to the U.S. Attorney's Office.

Vuitton, by its express terms, only applies to a district court's authority to appoint a special prosecutor to prosecute a criminal contempt case. 481 U.S. at 790. The U.S. Attorney's Office does not need to be appointed as a special prosecutor to prosecute a criminal contempt case; the U.S. Attorney is the representative of the people whose job it is to prosecute such cases. 481 U.S. at 803-04. As noted in Vuitton, in most cases, the U.S. Attorney's Office will in fact prosecute a criminal contempt case. 481 U.S. at 801-02. However, as Vuitton also observed, since a court cannot be at the mercy of the executive branch in order to vindicate respect for its own orders, a court has the authority to appoint a special prosecutor if the U.S. Attorney declines to prosecute a criminal contempt case. 481 U.S. at 796. But Vuitton makes clear that a court should first request the U.S. Attorney's Office to prosecute and should appoint a special prosecutor only if that request is declined. 481 U.S. at 801.

There is a limitation on a court's authority to appoint a special prosecutor because a "private attorney appointed to prosecute ... should be as disinterested as a public prosecutor who undertakes such a prosecution." 481 U.S. at 804. As stated in Vuitton, "the United States Attorney is the representative not

of an ordinary party to a controversy, but of a sovereignty", 481 U.S. at 803, whereas private attorneys ordinarily are not. 481 U.S. at 804. Vuitton is inapplicable to the instant case because, by definition, the U.S. Attorney is "as disinterested as a public prosecutor who undertakes ... a prosecution," Vuitton, 481 U.S. at 804, and when she chose to prosecute the instant case, the court's authority to appoint a special prosecutor was in no way invoked.

That Kleinberg is in the Civil Division is completely irrelevant:

> [I]t is immaterial that certain attorneys happen to be assigned to a unit called the Civil Division, or that their usual duties involve only civil cases. If, for example, the Attorney General ... were to detail a Civil Division attorney to conduct a criminal grand jury investigation, nothing ... would prevent that attorney from doing so.

United States v. Sells Engineering, Inc., 463 U.S. 418, 428 (1983).

Moreover, joint criminal/civil prosecutions by AUSAs are the rule, rather than the exception. United States v. Gel Spice Company, Inc., 773 F.2d 427, 432 (2d Cir. 1985) ("It would stultify enforcement of federal law to require [the government] ... invariably to choose either to forgo ... criminal prosecution once it seeks civil relief or to defer civil proceedings pending the ultimate outcome of a criminal trial"). Only DOJ and not the FDA could have represented the United States in the underlying

civil suit.[6/] 28 U.S.C. §§ 515-19, 547. The law is clear that a DOJ attorney who conducts a grand jury investigation may later use the knowledge he obtained from the grand jury investigation to bring a subsequent civil case. United States v. John Doe, Inc., 481 U.S. 102, 108-10 (1987). Unlike any private attorney or non-DOJ government attorney, Kleinberg is the authorized representative of the United States Attorney, who, in turn, was authorized by law, without need for judicial appointment, to represent the sovereignty in both the civil case and the subsequent criminal contempt case.

Thus, Vuitton and its progeny are completely irrelevant to the instant case, and hence, for this second reason, the motion to disqualify Kleinberg should be denied.

POINT IV

VALE IS NOT ENTITLED TO A BILL OF PARTICULARS

Vale moves the court for a bill of particulars. His motion should be denied.

It is well-settled that if a defendant has received adequate notice of the charges against him in the indictment or in some other pretrial disclosure, a bill of particulars is not required.

[6/] While certain federal agencies, such as the Securities and Exchange Commission, are authorized to represent themselves in court, 15 U.S.C. § 77t(d)(1), the FDA is not. Thus, all proceedings in which the FDA has an interest must be brought or defended by DOJ. 28 U.S.C. § 516. Final decision-making in FDA litigation is vested exclusively with DOJ. 28 U.S.C. §§ 516, 518-19.

See United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987); United States v. Salazar, 485 F.2d 1272, 1277 (2d Cir. 1973) (finding sufficient "indictments which [merely] track the language of a statute and, in addition, do little more than state time and place in approximate terms"); United States v. Volpe, 42 F. Supp. 2d 204, 224 (E.D.N.Y. 1999) (denying defendants' requests for information pertaining to witness identification and the exact dates, times, places and manner in which the alleged acts occurred). In United States v. Gotti, the district court summarized the law in this circuit governing requests for a bill of particulars:

> Our Circuit has "consistently sustained indictments which track the language of a statute and, in addition, do little more than state time and place in approximate terms."
>
> * * *
>
> A bill of particulars is not meant to be a tool to compel disclosure of the Government's case before trial. The Government will not be compelled through this device to preview its evidence or legal theory. Further, the government is not required to disclose the manner in which it will attempt to prove the charges, nor the means by which the crimes charged were committed. Thus, the precise manner in which the crimes charged in the Indictment are alleged to have been committed, and the exact time, place and persons present at each overt act named in the Indictment need not be revealed.

42 F. Supp.2d 252, 293-94 (S.D.N.Y. 1999) (citations omitted).

A decision to grant or deny a bill of particulars rests in the sound discretion of the trial court. United States v. Tramunti, 513 F.2d 1087, 1113-14 (2d Cir. 1975).

Under these standards, it is clear that Vale's demand for a bill of particulars (Br. at 13-16) is nothing more than a request for the government's "evidence," its "legal theory," its allegations concerning the "means by which [Vale committed] the crimes charged," and a recitation of "the exact time, place and persons present" at each sale of any product which was, or was represented to be, Laetrile. In short, Vale's demand for a bill of particulars is a request for precisely what he is not entitled to. Gotti, 42 F. Supp.2d at 293-94.

This case is not a RICO prosecution. United States v. Davidoff, 845 F.2d 1151, 1154 (2d Cir. 1988) (there is a heightened need for specificity under RICO). Moreover, the superseding order to show cause is quite specific. The injunctions in the civil case prohibit Vale from doing specifically enumerated acts with respect to specifically enumerated Laetrile products or "any drug product that is an unapproved new drug," see, e.g., Preliminary Injunction ¶ 5 (emphasis added). However, the superseding order to show cause only charges Vale with doing the specifically enumerated acts with respect to the specifically enumerated Laetrile products, and not with respect to other "unapproved new drug[s]." Further, whereas the injunctions prohibit Vale from "promoting" Laetrile products, the superseding order to show cause only charges Vale with "promoting [specifically enumerated Laetrile products] for the cure, treatment, mitigation, and prevention of cancer."