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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

HENRY et al.,

Plaintiffs,

v.

RIZZOLO et al.,

Defendants.

2:08-CV-635-PMP-GWF

**MOTION TO CONTINUE MOTION DATE AND
TRIAL DATE REGARDING INTERESTED
PARTY JAMES KIMSEY**

COMES NOW interested party, JAMES KIMSEY, by and through his counsel of record, Franny A. Forsman, Federal Public Defender, and RICHARD F. BOULWARE, Assistant Federal Public Defender, and files this Motion to Continue Motion and Trial Dates for sixty (60) days. This pleading is based upon the attached Memorandum of Points and Authorities and all of the papers and pleadings on file herein.

DATED this 2nd day of March, 2010.

FRANNY A. FORSMAN
Federal Public Defender

/s/ Richard F. Boulware

By: RICHARD F. BOULWARE
Assistant Federal Public Defender

POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

The criminal contempt bench trial in this case arises out of the civil litigation which began in May 2008. The issues in the civil case speak for themselves in the docket and will not be repeated here. They are incorporated by reference. Since its inception, this civil case has had hundreds of filings and involved numerous attorneys. Numerous depositions of witnesses have been taken in this case. Defendant Frederick Rizzolo, who is a key figure in the criminal contempt case, has had three different attorneys in this case.

On September 3, 2009, Plaintiff Kirk Henry filed a Motion to Reveal Pro Se Litigant Rick Rizzolo's Ghostwriter. On October 7, 2009, Magistrate Judge George Foley Jr. held a hearing on this motion. On October 23, 2009, Judge Foley entered an order granting the motion in part and denying the motion in part. On November 30, 2009, Judge Foley filed an order certifying facts to the district court for an order to show cause hearing for criminal contempt of court for interested party James Kimsey.

On January 29, 2010, the Court held a hearing on the order to show cause regarding the criminal contempt for interested party James Kimsey. The Court set a bench trial date of March 9, 2010 and a motion submission deadline of February 12, 2010. Calendar call for the trial is set for March 3, 2010.

II. DISCUSSION

The defense seeks a continuance in this case because additional time is necessary to be able provide an adequate and effective defense in this case. The government opposes any continuation of the motion or trial dates.

The defense motion is based upon several considerations. First, this case does not fall into the typical or ordinary criminal case in terms of the evidence or discovery provided by the government. In this case, the defense has only received copies of alleged prior convictions and judgements against Mr. Kimsey. It has not received any other form of discovery or evidence. This is not to suggest that the government is withholding or refusing to provide relevant discovery. Rather the point is to demonstrate that the defense started with almost no information as it began its investigation into the matters underlying the criminal allegations in this case. Given the hundreds of pleadings in this case and the numerous witnesses in this case, it cannot be suggested that there is little investigation or evidence to explore or review. While much of this information

1 may not ultimately be related to the criminal charges in this case, the defense cannot simply assume no relation
2 without first reviewing the material.

3 Second, the lack of a readily identifiable and small universe of evidence is compounded by the
4 complicated nature of the proceeding in this case. The bench trial in this case arises out of a certification of
5 facts for criminal contempt from the magistrate court. This is a highly unusual and rarely employed method
6 of initiating a criminal trial. The defense is still clarifying all of the legal contours and parameters associated
7 with such a proceeding so as to effectively represent Mr. Kimsey at the bench trial. It would appear based
8 upon a preliminary review of the law in this area, that the certification itself is legally inadequate. Defense
9 counsel, however, cannot adequately and effectively determine what motions should be filed to address the
10 potential infirmity in the certification without a more thorough understanding of the overall facts and context
11 in the civil case – a case that has been going on for almost two years.

12 Third, the defense has already begun its investigation and is in the process of gathering evidence and
13 documents not in the public record. This investigation is not complete. Defense counsel is still awaiting
14 documents and evidence that are crucial to Mr. Kimsey's defense. The defense has been diligently pursuing
15 such evidence but one month is simply not enough to gather documents, interview witnesses, research legal
16 issues, devise a legal strategy, draft possible motions and prepare for trial. Defense counsel takes the charges
17 in this case as seriously as any other criminal case on his docket and requires additional time to prepare in this
18 case. Without this additional time, defense counsel will not be able to adequately or effectively represent Mr.
19 Kimsey in this matter.

20 Fourth, there is no prejudice to the government for allowing the defense to adequately prepare for
21 motions and trial. There has been no delay or even substantial elapsing of time. There does not appear to be
22 any issue of evidence or witnesses not being available. The government in fact has produced and seemingly
23 identified very little evidence of its own that it would offer at trial. The time requested is consistent with the
24 time that the defense is generally allowed in a normal criminal case – a time frame which the United States
25 Attorney's Office regularly accepts as minimally necessary. The government's desire to end this proceeding
26 quickly, while understandable, does not trump Mr. Kimsey's constitutional rights to an adequate and effective
27 defense in a criminal trial.

For the reasons stated, the defense seeks a continuance of sixty (60) days of the motion and trial dates for the criminal contempt case involving James Kimsey.

FRANNY A. FORSMAN
Federal Public Defender

By: RICHARD F. BOULWARE
Assistant Federal Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that she is an employee of the Law Offices of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on March 2, 2010, he served an electronic copy of the above and foregoing **MOTION TO CONTINUE MOTION DATE AND TRIAL DATE REGARDING INTERESTED PARTY JAMES KIMSEY** by electronic service (ECF) to the person named below:

DANIEL BOGDEN
United States Attorney
PETER LEVITT
Assistant United States Attorney
333 Las Vegas Blvd. So., 5th Floor
Las Vegas, Nevada 89101

AND

[Attorneys/Parties Named in Civil Proceeding Receiving ECF Notification]

/s/ Richard F. Boulware

Employee of the Federal Public Defender