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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

KIRK AND AMY HENRY, Plaintiffs, vs. FREDRICK RIZZOLO, *et al.,* Defendants.	2:08-cv-00635-PMP-GWF MOTION TO DISMISS ORDER TO SHOW CAUSE & CERTIFICATION OF FACTS TO DISTRICT COURT

COMES NOW, the Defendant, JAMES KIMSEY, by and through his attorney of record, RICHARD F. BOULWARE, Assistant Federal Public Defender, who moves this court to dismiss the ORDER TO SHOW CAUSE WHY [KIMSEY] SHOULD NOT BE HELD IN CRIMINAL CONTEMPT issued on November 30, 2009 and returnable before the district court. This Motion is based on the following Points and Authorities and brought pursuant to F.R.Crim.P. 12(b)(3)(B) and the First and Sixth Amendments to the United States Constitution.

DATED this March 10, 2010.

FRANNY A. FORSMAN
Federal Public Defender

By: /s/ *Richard F. Boulware*
RICHARD F. BOULWARE
Assistant Federal Public Defender

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

A. Procedural History

The Order to Show Cause arises out of a civil case in which defendant Rick Rizzolo was, at times pertinent to this motion, appearing in proper person. During the course of the civil proceedings, Plaintiffs filed a Motion to Reveal Pro Se Litigant Rick Rizzolo's Ghost Writer, CR 184. Following briefing, the Magistrate Judge held a hearing on that motion. CR 228. The Magistrate Judge issued an Order on October 23, 2009 granting the Motion in part. The court ordered Rick Rizzolo to cease using the "services" of James Kimsey, struck pleadings that were allegedly "filed" by Mr. Kimsey on behalf of Rizzolo and denied without prejudice the request for monetary sanctions against Rizzolo. On November 30, 2009, the Magistrate Judge, pursuant to 28 U.S.C. § 636(e)(6) certified the facts constituting the alleged contempt by James Kimsey which occurred outside the presence of the Magistrate Judge and issued an Order to Show Cause. Critical to the issue in this Motion is the fact that there is no allegation that Kimsey disobeyed any order prohibiting him from preparing motions or pleadings for filing by Rizzolo. This motion is brought because the facts so certified, cannot as a matter of law, constitute criminal contempt and, in the alternative, prosecution for criminal contempt pursuant to the Order would violate Mr. Kimsey's rights to due process of law.

B. Issue Presented

Based upon the facts certified by the Magistrate Judge, the question presented to this court is whether the preparation of motions and other pleadings by a non-attorney for filing by a pro se litigant constitutes the willful violation of a Local Rule of this court and constitutes a criminal offense under Nevada statute.

II. OVERVIEW OF FEDERAL CRIMINAL CONTEMPT

A. General Principles of Due Process Apply To Criminal Contempt

"Criminal contempt is a crime in the ordinary sense," Bloom v. Illinois, 391 U.S. 194, 201 (1968), and "criminal penalties may not be imposed on someone who has not been afforded the

protections that the Constitution requires of such criminal proceedings," Hicks v. Feiock, 485 U.S. 624, 632 (1988). "[I]n proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 444 (1911)(citations omitted) accord Michaelson v. United States, 266 U.S. 42, 66 (1924), International Union, United Mine Workers of America v. Bagwell, 812 U.S. 821, 826 (1994).

B. History And Nature of Criminal Contempt Under 18 U.S.C. §§401 & 402

Title 18 of the United States Code divides criminal contempt into two separate sections. Section 401 provides in part that "a court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other as...Disobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(a)(3). This section "undoubtedly shows a purpose to give courts summary powers to protect the administration of justice against immediate interruption of court business" when an obstructive act is committed in the presence of a court. In re McConnell, 370 U.S. 230, 234 (1962)(citing Ex parte Hudgings, 249 U.S. 378, 383 (1919)).[1]

When a contumacious act occurs outside the presence of a court, the contemnor is subject to prosecution under § 402. Section 402 provides:

> Any person...willfully disobeying any lawful writ, process, order, rule, decree or command of any district court of the United States...by doing any act or thing therein, or thereby forbidden, if the act or thing done be of such character as to constitute also a criminal offense under ant statute of the United States or the laws of any State in which the act was committed, shall be prosecuted for contempt as provided by section 3691 of this title and shall be punished by fine or imprisonment, or both.

Section 3691 provides:

> Wherever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing any act or thing in

[1] Generally speaking, a contemnor charged under § 401 is not entitled to a jury trial. See, e.g., Muniz v. Hoffman, 422 U.S. 454, 475-76 (1975), see also United States v. Barnett, 376 U.S. 681, 692-93 (1964)(except where specifically excluded by statute, courts may proceed summarily in contempt matters).

> violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

Analysis of the legislative history by the court in United States v. Pyle, 518 F.Supp. 139 (E.D. Penn. 1981), affirmed by 722 F.2d 736 (3rd Cir. 1983) reveals that §§ 402 and 3691 "were intended to end an abuse of the contempt power in which, in some circumstances, persons were prosecuted for contempt of injunction instead of for violations of criminal laws stemming from the same conduct," thus depriving them of their right to trial by jury. Id. at 146. According to the extensive analysis of the Pyle court, the language of §§ 402 and 3961 first appeared in a 1912 bill introduced in the House of Representatives by Representative Henry Clayton. Id. at 150 (citing H.R. 22591, 62d Cong. 2d Sess., 48 Cong. Rec. 4068). Although H.R. 22591 never passed into law, key provisions of the bill, including large portions of §§ 402 and 3691, appeared two years later in the Clayton Act, ch. 323, 38 Stat. 730 (1914). Id. at 151.[2] The extensive debates surrounding H.R. 22591 reveal that a paramount concern of the legislation's sponsors was checking the abuse of criminal contempt, particularly in labor disputes:

> H.R. 22591 embodied a general principle intended for a specific purpose. Until only recently, a person charged with criminal contempt was thought to have no right to a trial by jury. See, e. g., Green v. United States, [356 U.S. 165, 183-87 (1968)]. If an injunction were obtained proscribing conduct also proscribed by criminal law, a person accused of such conduct could be subjected to criminal prosecution without the benefit of a jury trial by charging him or her with criminal contempt instead of the applicable criminal offense. The proponents of H.R. 22591 considered this to be wrong, and sought to correct it with the bill they proposed.
>
> The principle objective of the bill, however, was to curb the abuse of the criminal contempt power in labor disputes. In such cases, corporations were seeking and obtaining federal court injunctions prohibiting acts which interfered with the conduct of the business and which occurred in the course of union activity. The corporations would then cause employees participating in such activity to be prosecuted for criminal contempt of the injunction instead of for violation of criminal laws, even in those cases where the union

[2] Section 402 comprised section 21 of the Clayton Act, and was originally codified at 28 U.S.C. § 386. In 1948, the provision was recodified as § 402 of Title 18 of the United States Code. See Act of June 25, 1948, c. 645, 62 Stat. 701.

> activity also constituted a criminal offense such as disorderly conduct. The result was that many employees participating in strikes or similar conduct were summarily tried and punished without a jury trial for criminal conduct. As stated by one of the bill's advocates: "The purpose of this bill is to prevent injustice in certain classes of cases which chiefly grow out of labor disputes, where great and powerful corporations, on the one hand, go into the Federal courts and seek to enforce their decrees and judgments against laboring people." 48 Cong.Rec. 8779-8880 (remarks of Rep. Floyd).

Id. at 152.

III. CERTIFIED FACTS DO NOT STATE VIOLATION OF SECTION 402

A. Violation of 18 U.S.C. §402 Must Be Based On Two-Step Inquiry

It is clear from the Certification that the Magistrate Judge was proceeding under 18 U.S.C. §402 and was aware of the elements. Section 402 "is of narrow scope, dealing only with the single class where the act or thing constituting contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, and is in express terms carefully limited to the cases of contempt specifically defined." Michaelson, 266 U.S. at 66, accord Armstrong v. United States, 18 F.2d 371, 373 (7th Cir. 1927). By its very terms, prosecution for contempt is only appropriate where (1) the court has entered an order prohibiting specific conduct which the defendant subsequently violates, and (2) in engaging in said conduct, the defendant also violates some Federal or state statute. See Steinert v. United States, 543 F.2d 69, 70 (9th Cir. 1976)("Section 402 refers to contemptuous act which, besides being contemptuous, are also violative of federal criminal statutes.").

A review of case law in the Ninth Circuit demonstrates that the **same conduct** must constitute a violation of **both** a court order and a state or federal law in order for an individual to be found guilty under § 402. A fairly straightforward example of this dual requirement is found in Morgan v. United States, 456 F.2d 1296 (9th Cir. 1972). There, the district court entered an order permanently enjoining the defendant, a president of a Nevada corporation, from using the mails to sell corporate stock. Id. at 1296. The defendant was subsequently indicted by information for conspiracy and the sale of unregistered stock in violation of 15 U.S.C. § 77e. Id. On appeal, the

defendant claimed the information failed to charge hin with a crime. The Ninth Circuit disagreed, and held the information stated a crime under §402. Id.

Case law from outside the Ninth Circuit also supports the notion that §402 requires a defendant's single act to violate both the substance of an order and also constitute a separate federal or state offense. In Hill v. United States, 84 F.2d 27 (3d Cir. 1936), rev'd on other grounds by 300 U.S. 105 (1937), realtor Joseph Weiner was convicted in the United States District Court for the Southern District of New York for violating a decree entered against him and numerous others by that court in an in equity proceeding brought by the United States under the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2, 3. Id. at 28. The government subsequently charged him by information with the commission of several specified acts in violation of the decree, including criminal contempt. Id. at 29. The district court sentenced Weiner to two years' imprisonment.

On appeal, Weiner challenged the length of his sentence. In considering whether Weiner's sentence was appropriate, the court first had to determine whether Weiner was prosecuted under § 20 or § 21 of the Clayton Act. Id.[3] The court noted that a threshold requirement for prosecution under section 21 was that the acts or things done by Weiner in violation of the decree must constitute criminal offenses. Id. at 30. The court found that the acts Weiner committed in violation of the decree also ran afoul of the Sherman Anti-Trust Act, and thus "constituted independent criminal offenses," he was prosecuted under § 21. Id.

So there are two elements which the government must prove in order to find Kimsey in criminal contempt: 1) that Kimsey violated a rule of this court (as there was no order issued or referenced in the Certification); 2) that the conduct which violated the Rule also constituted a violation of Nevada Revised Statute 7.285. The Certification alleges that Mr. Kimsey drafted documents on behalf of pro se litigant Frederick Rizzolo and that these documents were subsequently filed in this case. The Certification asserts that the elements of Section 402 are met because Kimsey

[3] As noted supra at n. 3, 18 U.S.C § 402 was originally § 21 of the Clayton Act. Section 401 comprised § 20 of the Clayton Act, and was codified as 28 U.S.C. § 385. See Act of June 25, 1948, c. 645, 62 Stat. 701 (recodifying 28 U.S.C. § 385 as 18 U.S.C. § 401).

violated LR 10-1 and 10-2[4] of the Local Rules of Practice and that the conduct which violated the rule constituted a crime in Nevada under NRS 7.285.

B. The Certification Fails On First Element of Section 402 Violation

The Certification is deficient as to the first element of a Section 402 violation because there is no court order, rule or decree that Kimsey has violated. There is no Local Rule which prohibits the preparation of pleadings by a non-lawyer for filing by a pro se litigant-the conduct which is described in the Certification. Order Certifying Facts, p. 2, lines 14-16 and p. 4, line 5. The Certification alleges that the authoring documents by a layperson for a pro se litigant violates LRIA 10-1 and 10-2. These local rules, however, are not addressed to nonattorneys. Rather, they provide procedures for attorneys who want to appear in the District of Nevada on behalf of clients. Nothing in either rule prohibits the preparation of pleadings or motions by a non-attorney for filing by a *pro se* litigant. In fact, our rules do not prohibit "a person who is not an attorney from acting as counsel for others in a civil matter" as did the rules which were the subject of the contempt proceeding in United States v. Marthaler, 571 F.2d 1104, 1105 (9th Cir. 1978). This is important because, as noted above, the conduct which is described in the Certification must violate a Local Rule or Order. Moreover, unlike Marthaler, the Magistrate Judge did not certify facts that would support a finding that Kimsey represented himself as an attorney, signed any pleadings as counsel or claimed to be counsel for any litigant in any pleading filed with the court. Similarly United States v. Johnson, 327 F.3d 554, 558 (7th Cir. 2003) is inapplicable because the court did not find the paralegal firm in contempt but rather issued orders pursuant to its supervisory authority limiting the conduct of the firm.

Importantly, the Local Rules of this District actually contemplate and allow for the drafting of documents to be filed by nonattorneys for pro se litigants. For example, LR 9011, entitled "Pro Se Parties," explicitly refers to "nonlawyer petition preparer[s]" who are not only authorized to draft documents for pro se parties to file but who are actually **paid by the court** for

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[4]The court must be referring to LR IA 10-1 and LR IA 10-2.

the drafting of such documents. LR9011 describes the standards governing the payment of 'petition preparers' and the standards and process for sanctioning these nonlawyers when they do not follow the procedures delineated. This Rule does not include any text which would suggest that it is somehow an exception to a general prohibition by the Local Rules of the preparation of documents for filing by a nonattorney. Since the Local Rules explicitly allow for the preparation of documents for filing by nonattorneys, the mere drafting of documents to be filed as alleged in the Certification cannot be said to violate any rule or order of the District.

That the mere preparation of documents by a nonattorney to be filed in federal court for a pro se party is not prohibited is further confirmed by 11 U.S.C. § 110 – the statute referenced in LR 9011. Section 110 describes the procedures and governing principles for nonattorneys who draft documents to be filed by pro se parties in federal court in bankruptcy-related proceedings. The statute does not refer to such drafting as the unauthorized practice of law nor does it refer to such drafting as an exception in the bankruptcy context to a general federal prohibition against the drafting of documents for filing by nonattorneys. Indeed, the language of the statute explicitly distinguishes the drafting of documents for filing from the practice of law or the provision of legal advice. It indicates that while a nonattorney may draft documents for filing, this person may not offer "any legal advice." Section 110(e)(2)(A). The statute then goes on to describe the types of conduct which would constitute the provision of legal advice in the bankruptcy context. Id.

The Certification thus fails to allege a violation of any order or rule of a federal court in this District.

C. The Certification Fails On Second Element of Section 402

The Certification also fails the second element of Section 402 because it does not allege a violation of Nevada law. That is to say that the mere drafting of documents to be filed without more does not constitute the unauthorized practice of law in Nevada.

NRS §7.285 sets forth the elements of Unauthorized Practice of Law:[5]

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[5]Whether the conduct is violative of the Nevada statute is addressed below.

> 1. A person shall not practice law in this state if the person:
> (a) is not an active member of the State Bar of Nevada or otherwise authorized to practice law in this state pursuant to the rules of the Supreme Court...

The explicit language of the statute does not indicate that it proscribes or even addresses the preparation of documents for filing by nonattorneys for pro se litigants. There is no definition of "practicing law" in the Nevada Revised Statutes. There is nothing in the Nevada statute which makes it a crime to take or fail to take any of the actions set forth in LR IA 10-1 and LR IA 10-2. There is no general prohibition in Nevada against the preparation of legal documents by nonattorneys for pro se or pro per litigants.

The Supreme Court of Nevada has also clarified that the mere preparation of documents by a nonattorney for filing in state court does not constitute the unauthorized practice of law under NRS §7.285. In its decision in Pioneer Title Ins. & Trust Co. v. State Bar, 74 Nev. 186 (1958), the Court addressed for the first (and last) time the issue of the drafting of legal documents by nonattorneys. In Pioneer, the Court was presented with the issue of whether the drafting of legal documents related to the purchase of a home, such as escrow agreements, by nonattorneys constituted the unauthorized practice of law. Id. at 187-92. While the Court found that the title company had engaged in the unauthorized practice of law, it based its decision on the provision of legal advice and **not** the drafting of the documents. Id. at 192. The Court explained that "[i]n the drafting of any instrument, simple or complex, th[e] exercise of judgment distinguishes the legal from the clerical service." Id. The Court concluded that the title company had engaged in the unauthorized practice of law because it had exercised its judgment in determining the "legal sufficiency" of the documents and provided this advice to the client. Id. Thus, the decision in Pioneer clearly stands for the proposition that the mere preparation of legal documents does not by itself constitute the unauthorized practice of law.

The Nevada Supreme Court's decision in Pioneer confirms that the Certification in this case is deficient as to the second element of Section 402 because it does not allege a violation

of Nevada law. The drafting of legal documents for filing does not constitute the unauthorized practice of law under NRS §7.285

Punishment for criminal contempt does not lie in this case because the preparation of pleadings by a non-lawyer for a pro se litigant is not conduct which is prohibited by a Local Rule and the state statute does not penalize the conduct which is the subject of the Local Rule.

IV. SECTION 402 WOULD BE UNCONSTITUTIONALLY VAGUE IF APPLIED TO FACTS OF THIS CASE

If this Court were to determine that the Certification did allege a legitimate violation of Section 402, such a determination would render the statute unconstitutionally vague as applied.

"A statute is void for vagueness if it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary or discriminatory enforcement." Anderson v. Morrow, 371 F.3d 1027, 1031 (9th Cir. 2004). The notice test of vagueness looks at the "very words" of the statute in question to determine whether the statutory language is "sufficiently precise to provide comprehensible notice" of the prohibited conduct. Id. at 1032.

A. Vagueness As To First Element of Section 402

The application of Section 402 to the alleged facts of this case would create a vagueness problem as to the first element of the Section The first element of Section 402 requires that a person violate or defy an order or rule of the federal court. As elaborated above, there is no local rule or specific order that Mr. Kimsey has allegedly violated. While the Certification refers to LR IA 10-1 and LR IA 10-2, these Rules could not provide the basis for a prosecution because they are directed to attorneys. The plain language of these Rules indicates that they relate to and are directed to attorneys. A person of ordinary intelligence could not possibly perceive or understand these rules to apply to nonattorneys.

Additionally, it would likewise not be forseeable by a person of ordinary intelligence that Rules LR IA 10-1 and LR IA 10-2 create a unwritten and implicit rule that nonattorneys may not draft documents for filing by pro se litigants. These Rules do not refer to nonattorneys and they certainly do not refer to what conduct is permissible by nonattorneys in relation to cases in federal court. Nothing in the language of these Rules suggests such an unwritten yet specific prohibition. Indeed, as noted above, the Local Rules actually contemplate the drafting of documents for filing by nonattorneys and have provisions governing such drafting. A person of ordinary intelligence viewing these Rules would not understand them to create a general and unwritten court rule prohibiting the conduct in this case.

B. Vagueness As Applied To Second Element of Section 402

Allowing the alleged facts in the Certification to serve as a basis for the second element under Section 402 would also create a fatal vagueness problem. The second element of Section 402 requires that the conduct also be a violation of state or federal law. However, as elaborated above, the drafting of legal documents by nonattorneys does not constitute the unauthorized practice of law in Nevada. NRS § 7.285 does not expressly or impliedly prohibit such conduct. And the Nevada Supreme Court has explained that the drafting of legal documents by nonattorneys does not by itself constitute the unauthorized practice of law. Pioneer, 74 Nev. at 192. Given the language of the statute (and the discussion in Pioneer), a person of ordinary intelligence would not reasonably understand that NRS §7.285 criminalizes the mere drafting of legal documents by a nonattorney.

V. CONCLUSION

The Certification in this case should be dismissed for three reasons: 1) It does not allege a violation of a applicable order or rule; 2) The alleged facts do not constitute the unauthorized practice of law under Nevada law; 3) If an action for Criminal Contempt can proceed under the Certification then 18 U.S.C. §402 is unconstitutionally vague as applied to

those facts.

Finally, there are serious policy concerns which should be considered before deciding the issue. If, indeed, the preparation of pleadings by a non-attorney for a pro se litigant is a crime, then a number of Self-Help programs, Inmate Law Clerks designated by the Department of Corrections to do just that, and other assistance provided to persons of limited means and limited education will be subject to criminal prosecution. These programs would all constitute the unauthorized practice of law if the Court were to define it as it is alleged in the Certification. That is not the intent of the criminal contempt statute.

Respectfully submitted this 10th day of March, 2010.

FRANNY A. FORSMAN
Federal Public Defender

/s/ Richard F. Boulware

By: _____
RICHARD F. BOULWARE
Assistant Federal Public Defender

CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that he 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 10, 2010, he served an electronic copy of the above and foregoing

MOTION TO DISMISS ORDER TO SHOW CAUSE & CERTIFICATION OF FACTS TO

DISTRICT COURT by electronic service (ECF) to the person named below:

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