

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY

3 _____
4 Max Zweizig

5 Plaintiff,

6 Vs.

CIVIL ACTION
NO. 04-2025

7 Timothy Rote, et al,

8 Defendants.
9 _____

10 Mitchell H. Cohen United States Courthouse
11 One John F. Gerry Plaza
Camden, New Jersey 08101
12 July 11, 2005

13 B E F O R E: Honorable Robert B. Kugler
United States District Judge

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15 A P P E A R A N C E S:

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17 Matthew Skahill
Assistant U. S. Attorney

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19 Michael W. Pinsky, Esquire
20 Attorney for Defendant Timothy Rote

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24 Carl J. Nami, C.S.R.
25 Official U. S. Reporter.

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(Open court).

THE DEPUTY COURT CLERK: All rise.

THE COURT: Have a seat, please. Good morning, everybody.

MR. PINSKY: Good morning, your Honor.

MR. SKAHILL: Good morning, your honor.

THE COURT: All right. This is the matter of the return date for an Order to Show Cause issued by this court in the Zweizig versus Rote, Civil case 04-2025. I assume that's Mr. Rote, correct?

MR. PINSKY: That is Mr. Rote, your Honor.

THE COURT: Mr. Pinsky, your appearance, please.

MR. PINSKY: Mike Pinsky, representing Timothy Rote, your Honor.

THE COURT: All right. And I did contact Mr. Solomon at the U. S. Attorney's office. I assume --

MR. SKAHILL: Your Honor, Special Assistant United States Attorney, Matthew Skahill, representing the United States for the purposes of today's hearing with the understanding that your Honor has not formally requested appointment of our office at this time.

THE COURT: I have not formally, as of yet, requested appointment. This is not yet a contempt hearing. This is an Order to Show Cause why I should

1 not proceed with criminal contempt against Mr. Rote.

2 Did you want to say something before I --

3 MR. PINSKY: If you'd like me to argue that
4 point?

5 THE COURT: In a minute.

6 MR. PINSKY: All right.

7 THE COURT: I'll give up plenty of time. Let
8 me put the background of this on the record.

9 MR. PINSKY: Certainly.

10 THE COURT: There may be even some things
11 going on that you're not aware of, Mr. Pinsky.

12 MR. PINSKY: Yes.

13 THE COURT: All right. This all began with a
14 letter faxed to the Court by Mr. Rote. It was not
15 solicited by the Court. It came out of the blue
16 completely. It was dated May 22nd of 2005. I think
17 it's fair to characterize this letter as a complaint
18 about the Court's remand of this case to State Court.
19 And because this letter suggests, Number 1, the reason
20 for this Court's order of remand, it was that some
21 improper contact between a law clerk of this Court and
22 the girlfriend of the plaintiff and then it went on not
23 leaving well enough alone, apparently, to inform me
24 that the plaintiff in the case, the underlying civil
25 case when the defendants got his computer back and

1 apparently examined the hard drive, they claim that,
 2 the defendants claim that the plaintiff has been
 3 downloading video from a pedophile site. The site is
 4 misspelled, but that's okay. And then goes on is it
 5 possible that plaintiff had some contact with your
 6 clerk, thereby suggesting that a law clerk of this
 7 Court had improperly contact with a plaintiff who had
 8 some pedophile site. Thus this Court Order to Show
 9 Cause why it should not proceed with criminal
 10 contempt. Having researched this matter, could not be
 11 a civil contempt, having researched this matter and
 12 according to case law it was that kind of contact with
 13 the Court. That letter is not a direct contact with
 14 the court. So, I proceeded by Order to Show Cause.

15 Then Mr. Rote sent another letter to the Court
 16 essentially asking for more time, but I think
 17 compounding the problem I added to the list of
 18 particulars and I wrote to the U. S. Attorney and said
 19 I was considering asking them to step into this case
 20 and to see what would happen. Subsequently,
 21 unfortunate, Mr. -- And fortunately Mr. Pinsky has
 22 become involved in this case. He has made a motion for
 23 recusal. What he may not know is in the meantime, what
 24 he may not know is that in the meantime back on June
 25 8th, Mr. Rote referred charges against me. The

1 Judicial Counsel for the Third Circuit, Judicial
2 Counsel of the Third Circuit alleging judicial
3 misconduct or disability. That is still pending.
4 Essentially in his papers complained that my Order to
5 Show Cause subjects me to some kind of misconduct
6 charges. Even though it has not, the Order to Show
7 Cause is pending and has not yet been resolved.

8 Now, turning to the motions to disqualify, I'll
9 hear your motions to disqualify if you want, Mr. Pinsky
10 but I think also talk to about this complaint of
11 judicial misconduct or disability also. Whether or not
12 that demands that I recuse myself.

13 MR. PINSKY: Well, I have no knowledge of
14 that, first of all, Judge, until this very moment.

15 THE COURT: All right, I figured that.

16 MR. PINSKY: And I would have properly raised
17 the -- probably raised as a ground, too, but I don't
18 think, even think it's necessary because I think the U.
19 S. Code clearly says in Rule 42, that trial and
20 disposition would be the three Section of Rule 42,
21 trial and disposition. A person being prosecuted for
22 criminal contempt is entitled to a jury trial. That's
23 another issue. And further says if the criminal
24 contempt involves disrespect towards or criticism of a
25 judge, that judge is disqualified from presiding at the

1 contempt trial or hearing until the defendant
2 consents. I don't know how much argument that takes.
3 It seems clear, Judge.

4 THE COURT: Well, it's no clear because it
5 has nothing to do with me personally. It's criticism
6 of a law clerk, a member of the staff. Not of the
7 judge. Cases are pretty clear on that point.

8 MR. PINSKY: I don't agree with the Court's
9 interpretation of the letter. I think that the letter
10 would imply criticism of the court.

11 THE COURT: I wasn't -- he didn't accuse me
12 of visiting a pedophile website. He didn't accuse me
13 of videotaping contact with the plaintiff's
14 girlfriend. He accused a law clerk of those things.
15 That's what the basis the Order to Show Cause was.

16 MR. PINSKY: As I read the cases, perhaps,
17 your Honor, I disagree on the interpretation of the
18 cases. I think that the law clerk would fall within
19 the purview of criticism of this Judge as part of his
20 staff and it's part of his administration of justice.
21 And I do think, and, of course, I think the fact that
22 this defendant filed such a complaint would also
23 disqualify this Court from participating in this case.
24 It would have at least the appearance of, very strong
25 appearance of impropriety and that you are being

1 accused of something by Mr. Rote, and yet you're
2 hearing a criminal case against him. That comes up to
3 three years in jail. I think the conflict there,
4 Judge, is obvious.

5 THE COURT: Well, the cases don't support
6 your position. Criticism of a judge's ruling is not
7 sufficient grounds for recusal in a subsequent contempt
8 proceeding. The cases are pretty clear. If you look
9 at the rules of the Third Circuit, Third Judicial
10 Circuit of the United States, the rules governing
11 complaints of judicial misconduct and disability, Rule
12 1E1 states:

13 The complaint procedures may not ordinarily be
14 used to have a judge disqualified or recused from a
15 case. And I think the case law is pretty clear on
16 this, also. That prior written attacks upon a judge
17 are likewise legally insufficient to support a charge
18 of bias or prejudice on the part of the judge towards
19 the author. That's United States versus Bray 546 F.2d
20 841, Tenth Circuit case.

21 I think if you look at the Third Circuit case of
22 Edelstein versus Wilentz, 812 F.2d 128, I think is,
23 also, clear that I need not recuse myself because of
24 the mere filing of this complaint or the criticism of
25 the judge's ruling on the remand motion.

1 So your applications to applications to recuse is
2 denied.

3 MR. PINSKY: Judge, I understand your
4 ruling. I'm not arguing --

5 THE COURT: But in all due respect, those
6 cases did not involve a criminal contempt proceeding
7 against the defendant. The court presiding as
8 effectively judge and jury. There is no criminal
9 contempt proceeding.

10 MR. PINSKY: I don't know why we're here.

11 THE COURT: On the Order to Show Cause, Mr.
12 Pinsky I'm here to find out what we should do about
13 what he did. Whether or not I should prefer criminal
14 contempt and ask the U. S. Attorney to proceed with a
15 criminal contempt. That's all that's before the Court
16 at the moment.

17 MR. PINSKY: Very well, your Honor.

18 THE COURT: I guess that now is up to you,
19 Mr. Pinsky, and your client to convince me why we
20 should not proceed with a criminal contempt in this
21 case.

22 MR. PINSKY: Certainly, your Honor. Your
23 Honor, I will start out by posing the premise that this
24 court has no power to hear or to hold Mr. Rote in
25 contempt whatsoever because this case is closed and the

1 court did not retain jurisdiction. And in support of
 2 that, Judge, I will cite Pennekamp versus the State of
 3 Florida, which is 328 U.S., 331, 66 Supreme Court 1029
 4 in which it said:

5 Beside holding that the publications were
 6 legitimate criticism and comment within the Federal
 7 guarantees of free press and created no clear and
 8 present danger to the administration of justice.

9 The Court, also, held, we, also, agree that
 10 publications about a case that is closed, no matter how
 11 scandalous, are not punishable as contempt.

12 And I think it's clear that the court had
 13 divested itself of jurisdiction. The matter had been
 14 remanded to the State court. The papers were filed,
 15 and I'm not here to argue that Mr. Rote's letters were
 16 wise. I'm not here to argue that these were
 17 appropriate. I'm not here to argue any of that. Had I
 18 had a chance to peruse them before he sent them, I
 19 would have torn them up, frankly. But the fact is he
 20 did it. He done whatever he did and isn't contempt and
 21 it can't be contempt.

22 I want to cite another case Hunt versus Acromed,
 23 961 Fed 2nd, 1079, 1081 to 1082 a Third Circuit 1992
 24 case. Holding that the District Court loses
 25 jurisdiction over a remanded case once the clerk sends

1 a certified copy of the Remand Order. Which happened
2 in this case.

3 THE COURT: There's no question I have no
4 jurisdiction over the civil case.

5 MR. PINSKY: Therefore, you have no
6 jurisdiction.

7 THE COURT: That's --

8 MR. PINSKY: We're dealing with contempt. In
9 Pennekamp versus State of Florida the Supreme Court was
10 dealing with a contempt proceeding and the Pennekamp
11 Court said that it can't be contempt. It's not
12 punished as a contempt no matter how scandalous. I
13 don't see how this court could get around that holding
14 and maintain that you have the jurisdiction to punish
15 contempt when you no longer have any contact with the
16 case. It's a position factor as the case was
17 remanded. It was after the paper was sent. The case
18 was sent back in State court. There's another grounds
19 in which this court cannot proceed with contempt. It's
20 a question of First Amendment and free speech no matter
21 how scandalous. I would cite to this case the Clear
22 and Present Danger Rule which was enunciated by Justice
23 Black in Bridges versus Superior Court of the State of
24 California, 314 U. S. 252, 62 Supreme Court, 190. The
25 Clear and Present Danger Rule is a working principle

1 that substantive evil must be extremely serious and the
2 degree of imminence is extremely high before utterances
3 can be punished. And I'm quoting.

4 For it is an American privilege to speak one's
5 mind, although not always with perfectly good taste on
6 all public institutions.

7 This case, if you even get past the question of
8 jurisdiction, in that, this case is not amenable to
9 being punished by contempt. The court has not retained
10 any jurisdiction and, therefore, if you don't have
11 jurisdiction over the civil case, then there is no way
12 you can have jurisdiction over contempt arising from
13 those publications to you. You may have, your Honor,
14 speaking frankly, you may have been insulted. Your
15 clerk may have been insulted.

16 THE COURT: Not me. He didn't direct them at
17 me personally.

18 MR. PINSKY: I understand that, Judge.

19 THE COURT: It was directed at a member of
20 the staff of the Court.

21 MR. PINSKY: I understand. But the Court
22 reacted to it by this Order to Show Cause and you may
23 find it to be an affront to someone. You may find it
24 to be scandalous.

25 THE COURT: You don't think it is?

1 MR. PINSKY: Do I?

2 THE COURT: Yes. Do you?

3 MR. PINSKY: Do I think it is?

4 THE COURT: Yes.

5 MR. PINSKY: I think it's protected by the
6 First Amendment to the United States Constitution.

7 THE COURT: That's a good answer. That's a
8 great lawyer's answer, Mr. Pinsky, but --

9 MR. PINSKY: I don't think it's scan -- it
10 may be scandalous to say that, it may be unwise to say
11 that, Judge. It may even be stupid to say that. It's
12 just not subject to contempt. You are in effect,
13 Judge, no more than a private citizen after you lose
14 jurisdiction over the case. And there's no case in
15 front of you. And this defendant has as much right to
16 address a complaint no matter how scandalous to you, as
17 he does to me.

18 THE COURT: Mr. Pinsky, I don't argue the
19 point that he has the right to complain and rule he
20 doesn't agree. I get those letters all the time.
21 That's fine. That's his right and that is any
22 litigant's right to disagree with the Court's ruling.
23 It's not the problem here. The problem is to the
24 suggests, the situation of improper contact based upon
25 no evidence that I'm aware of to a pedophile website

1 and contact with a litigant's girlfriend for which
2 there's no evidence that he cites.

3 MR. PINSKY: It may be other things, Judge.
4 It may be civilly a civil matter for which claims can
5 be sought. It cannot be, in my opinion, Judge, and
6 I'll argue it cannot be criminal contempt in this
7 case. There's another thing, again we're talking
8 scandalous and Clear and Present Danger. You have to
9 balance here the fact that a man has a First Amendment
10 right to be unwise, to be scandalous, to be shocking
11 sometimes that's a First Amendment right. And anything
12 that would prohibit that right is chilling the First
13 Amendment. That's why we have the Clear and Present
14 Danger. It may be those things you said and it may be
15 not as a person that I would agree with those things.
16 It may very well be. I think the Court's known through
17 my career that I am always respectful to the courts of
18 the United States and to the State. But I still would
19 stand up to the First Amendment and I would say that
20 the Clear and Present Danger Rule is an appropriate
21 Rule. It's a necessary Rule and we do have the right
22 to be stupid in this country sometimes. It's a
23 protected First Amendment right.

24 I just want to go back again and talk with what
25 Justice Black said. There has to be clear and present

1 danger and the subject substantive evil must be
2 extremely serious, a degree of immense. Extremely
3 high. Those letters for all the things I said they
4 are, are not that. They're not that. They're
5 shocking, perhaps. As I said scandalous, unwise, but
6 they're not, that they're not that clear and present
7 danger to the administration of justice at all.

8 So, your Honor, without belaboring the issue,
9 because if this is going to be a criminal contempt
10 prosecution as a result of this Order to Show Cause,
11 certainly in subsequent briefs I will present many
12 cases to the court, not just this case, that all rely
13 upon the Clear and Present Danger and many rely upon
14 publication either privately or through the media. And
15 that right must be protected, Judge, no matter how it
16 offends a judge's staff, a judge in a particular case.
17 Someone else mentioned this letter. They may have
18 particular civil remedies, Judge, but this is not an
19 appropriate case for an Order to Show Cause for a
20 criminal contempt prosecution which it would have to be
21 proved beyond a reasonable doubt.

22 THE COURT: I understand.

23 MR. PINSKY: I know you do.

24 THE COURT: The standard he would be entitled
25 that jury trial were I to consider imprisonment of

1 greater than six months.

2 MR. PINSKY: Correct.

3 THE COURT: We're not there. We're not even
4 at that stage.

5 MR. PINSKY: That's my argument, Judge.

6 THE COURT: Does your client want to say
7 anything?

8 MR. PINSKY: No, your Honor.

9 THE COURT: All right.

10 MR. PINSKY: Oh I can say one thing for him.
11 I've actually advised him not to say anything today
12 because I thought it was wise not to.

13 THE COURT: Well, unfortunately, he didn't
14 seek your advice before he sent these letters.

15 MR. PINSKY: But, of course, as the Court
16 knows, this case had been in litigation in a civil case
17 for a long time prior to the court ruling that there
18 was -- that the diversity was not alleged in the
19 pleadings. He had been confident in his attorneys. He
20 had felt his attorneys had jurisdiction. He had spend
21 a great deal of money on this case, and when the court
22 divested himself of jurisdiction, he was shocked. He
23 was shocked and he was angry. And it was an angry
24 response that people make sometimes. It was a
25 knee-jerk response that people make sometimes and it

1 was a response to that he made without consulting with
2 counsel. Would he do it again? No. I would hope not
3 and I would think not. Okay. But okay. But, of
4 course, he regrets it. Apologizes for sending the
5 letters to the Court. And he's authorized me to say
6 that he apologizes for sending the letter to the court
7 and the grievance that he feels should not have been
8 directed toward the Court or his staff but towards
9 someone else. Some others or others. Clearly, there
10 was jurisdiction had it been alleged properly. He was
11 told that your Honor's decision is unappealable. He's
12 out the money that he spent in litigating this case.
13 All the times he came in for this case. It was a
14 shocking thing to him. It was an expensive thing for
15 him. He may have civil remedies and it should not have
16 been directed to the court, but I'm still saying to
17 this court that you have to protect his First Amendment
18 rights to vent to some degree. And it doesn't make it
19 criminal contempt.

20 Thank you, Judge.

21 THE COURT: All right. Mr. Skahill, did you
22 want to say anything for the Government? You need not
23 say anything if you don't want to, but if you want to
24 say something.

25 MR. SKAHILL: No, your Honor.

1 THE COURT: All right. Well, Mr. Pinsky,
2 raises a number of salient points as he always does as
3 to whether or not this court has jurisdiction because
4 the underlying civil case has been remanded. I believe
5 that we do, the Court always has jurisdiction to punish
6 contempt whether or not there is a case pending or not,
7 but I think actually his better points were that mere
8 insult to a member of the staff of the Court is not
9 sufficient to trigger a contempt proceeding for which
10 his client may face a term of incarceration. And the
11 rational part of me agrees with Mr. Pinsky, the
12 personal part of me is just furious on behalf of my
13 staff as to what he said. It's a loathsome comment
14 that he made. Mr. Pinsky has attempted to explain why
15 and it reminds me of old days in municipal court where
16 you get up and say I don't have an excuse but they have
17 an explanation, your Honor. It still doesn't remedy
18 the difficulty that he caused for a member of my staff
19 who works very hard and I have great faith in and who I
20 know would never contemplate any kind of improper
21 contact with a litigant in a case pending in this case
22 quite ridiculous to think such a thing would happen by
23 a member of my staff. Ridiculous. I will accept Mr.
24 Pinsky's explanation. I will accept his excuse on
25 behalf of his client. I assume that everything Mr.

1 Pinsky says is correct, that this will not happen. Mr.
2 Rote understands what he did was awful. He can never
3 do it again. And I will agree within Mr. Pinsky that
4 this does not rise to the level of criminal contempt.
5 I will dismiss the Order to Show Cause. Anything
6 further?

7 MR. PINSKY: Nothing further, your Honor.

8 THE COURT: Thank you, everybody.

9 MR. PINSKY: Thank you, sir.

10 (The matter was then concluded)

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C E R T I F I C A T E

I, CARL J. NAMI, Official Court Reporter for the United States District Court for the District of New Jersey, Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes to the best of my ability of the matter hereinbefore set forth.



CARL J. NAMI
Official U. S. Reporter
N. J. Certificate XI557

DATE: 9-12-05