UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 08-364 (RHK/AJB)
Civil No. 13-01110 (RHK)

THOMAS JOSEPH PETTERS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT PETTERS' MOTIONS TO ALTER AND AMEND JUDGEMENT PURSUANT TO RULE 59(E) AND MOTION TO DISQUALIFY UNDER 28 U.S.C. § 445

The United States of America, by and through John R. Marti, Acting United States Attorney, moves this Court pursuant to Local Rule 1.3 to strike defendant Petters' Motion to Alter and Amend (Doc. 630) and Motion to Disqualify (Doc. No. 631) or, in the alternative, to deny the motions as meritless and procedurally foreclosed.

1. **Because Petters' is represented by a non-lawyer not authorized to appear in this Court, the motions should be stricken.**

Petters is represented by Steven Meshbesher, Esq., (who has not been relieved as counsel) yet a "jailhouse lawyer" (prisoner John G. Lambros) purports to appear on Petters' behalf even though the jailhouse lawyer is not authorized to practice law in this Court under Local Rule 83.5. Petters has two choices concerning his legal representation, he can chose to stick with Steven Meshbesher, Esq. (or another lawyer) or he may proceed *pro se*. There are no other choices. Petters cannot choose to be represented by a non-lawyer prisoner yet that is exactly what Petters does here. Therefore, because these

motions violate this Court's rules governing representation, the Court should strike these motions under Local Rule 1.3 (establishing sanctions for violations of the Local Rules, including "striking pleadings or papers").

A defendant in a criminal case does not have a sixth amendment right to the assistance of a non-lawyer. *United States v. Buttorff*, 572 F.2d 619, 627 (8th Cir. 1978); *United States v. Grismore*, 546 F.2d 844, 847 (10th Cir.1976) (the right to "counsel" means "an individual who is authorized to the practice of law"). And federal courts have inherent authority to prohibit frivolous and other filings by non-parties and non-lawyers. *Harlan v. Lewis*, 982 F.2d 1255, 1259 (8th Cir. 1993). Moreover, a prisoner cannot sign a pleading on behalf of another prisoner in a legal proceeding in federal court. *United States v. Agofsky*, 20 F.3d 866, 872 (8th Cir. 1994); *Valiant–Bey v. Morris*, 620 F.Supp. 903, 904 (E.D.Mo.1985).[1]

Precluding Lambros from improperly appearing as counsel in this Court does not impermissibly limit Petters' right to seek advice from an unlicensed jailhouse lawyer. To the contrary, Petters may still file pleadings directly or through an attorney. "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. § 1654. While the cases cited by Lambros (e.g., *Munz v. Nix*, 908 F.2d 267, 268 n.3 (8th Cir. 1990), citing *Johnson v. Avery*, 89 S.Ct. 747, 751 (1969)) "guarantee prisoners the right to seek assistance and advice on legal matters from other

[1] That Petters also signed the pleadings does not eliminate Lambros' and Petters' flagrant disregard of this Court's rules concerning persons authorized to appear before the Court.

inmates in certain matters, these cases do not sanction representation during litigation by non-party laypersons." *Herrera-Venegas v. Sanchez*-Rivera, 681 F.2d 41, 42 (1st Cir. 1982); *Georgakis v. Illinois State University*, 722 F.3d 1075, 1077 (7th Cir. 2013) ("A nonlawyer can't handle a case on behalf of anyone except himself.")

For the foregoing reasons, Petters' motions filed by a "jailhouse lawyer" should be stricken.

2. Petters' Rule 59(e) Motion should be summarily denied because it merely restates facts and arguments previously raised and disposed of in the Court's order denying his § 2255 motion.

"Federal Rule of Civil Procedure 59(e) was adopted to clarify a district court's power to correct its own mistakes in the time period immediately following entry of judgment. Rule 59(e) motions serve a limited function of correcting manifest errors of law or fact or to present newly discovered evidence." *Innovative Home Health Care, Inc. V. P.T.-O.T. Associate of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir. 1998) (citations omitted). Such motions are not proper vehicles for raising new arguments. *Capitol Indemnity Corp. V. Russellville Steel Co., Inc.*, 367 F.3d 831, 834 (8th Cir. 2004). "A Rule 59(e) motion cannot be used to raise arguments which could, and should, have been made before the trial court entered final judgment." *Bannister v. Armontrout*, 4 F.3d 1434, 1440 (8th Cir.1993) (internal quotations omitted); *Howard v. United States*, 533 F.3d 472 (6th Cir. 2008) ("Rule 59(e) allows for reconsideration; it does not permit parties to effectively 're-argue a case.'").

Petters' motion under Rule 59(e) adds next to nothing new to the litigation in this case and the Government will not further lengthen the record by re-stating its prior

arguments or this Court's disposition of those arguments. Petters essentially re-argues his prior § 2255 motion and this Rule 59(e) motion should be denied on that basis alone. Petters also should not be permitted to present new arguments that were not presented below. Petters spends much time re-hashing the evidence of which this Court was obviously cognizant. He fails to identify evidence which this Court did not consider or new evidence which was unavailable previously.

Petters fails to demonstrate that this Court made a mistake of fact or law. He merely disagrees with this Court's legal findings. Thus, he is not entitled to relief under Rule 59(e).

3. Petters' Disqualification Motion should be rejected as an unauthorized second § 2255 motion.

Petters, through creative pleading, impermissibly attempts to bootstrap his judicial disqualification claim into his first § 2255 motion using Rule 59(e). Petters' judicial disqualification claim could have been presented at trial, on direct appeal, and in the prior habeas action. This claim constitutes a second or successive § 2255 motion. 28 U.S.C. § 2244;[2] *Kuhlmann v. Wilson*, 477 U.S. 436, 445 n. 6, 106 S.Ct. 2616 (1986) ("where a prisoner files a petition raising grounds that were available but not relied upon in a prior

[2] "[A] second or successive habeas corpus application ... that was not presented in a prior application shall be dismissed unless—
(A)the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
(B)(i)the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and(ii)the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2).

petition...the federal court may dismiss the subsequent petition on the ground that the prisoner has abused the writ."). Prior to filing a second or successive § 2255 petition, Petters' disqualification claim "must be certified as provided in section 2244 by a panel of the appropriate court of appeals." 28 U.S.C. § 2255. Petters must first move in the Court of Appeals for an order that authorizes the district court to consider the petition. 28 U.S.C. § 2244(b)(3). Petters has not done so.

By attempting to bootstrap the disqualification claim into his Rule 59(e) motion, Petters (through his jailhouse lawyer) is engaging in creative pleading intended to avoid the certificate requirement. "[I]nmates may not bypass the authorization requirement of 28 U.S.C. § 2244(b)(3) for filing a second or successive § 2254 or § 2255 action by purporting to invoke some other procedure." *United States v. Lambros*, 404 F.3d 1034, 1036 (8th Cir. 2005) ("the certificate requirement ... may not be circumvented through creative pleading.")[3] Because Petters did not obtain authorization from the Court of Appeals to raise a judicial disqualification claim in a successive § 2255 petition, this Court must dismiss this claim. *Id.*

Conclusion

As Petters' latest motions make clear, he will continue to violate and ignore the law if he believes doing so gains him an advantage. These motions are one more "con." Petters has spurned this Courts' rule that defendants appear *pro se* or through qualified

[3] Mr. Lambros, Petters' jailhouse lawyer, should be very familiar with this requirement in that his attempts at "creative pleading" in his own case were repeatedly and summarily rejected. See *Lambros*, 404 F.3d at 1035-35 (summarizing extensive post-conviction motions filed by Lambros and repeatedly rejected by the Court of Appeals and District Court).

counsel, and then invokes "creative pleading" in an attempt to raise claims that are procedurally foreclosed. Once again, but perhaps not for the last time, the Court should deny Petters' motions seeking relief from his sentence.

Dated: 1/8/2014

Respectfully submitted,

s/ John R. Marti

JOHN R. MARTI
Acting United States Attorney