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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
THE HONORABLE JAMES C. MAHAN, JUDGE PRESIDING

UNITED STATES OF AMERICA,
Plaintiff,
vs.
DAVID KENT FITCH,
Defendant.

COPY

NO. 2:04-CR-0262-JCM-PAL
MOTION HEARING

REPORTER'S TRANSCRIPT OF PROCEEDINGS
WEDNESDAY, MAY 30, 2007
10:30 A.M.

APPEARANCES:
For the Plaintiff: TIMOTHY S. VASQUEZ, AUSA
For the Defendant: LISA A. RASMUSSEN, ESQ.

Reported by: Joy Garner, CCR 275
Official Federal Court Reporter

1 LAS VEGAS, NEVADA, WEDNESDAY, MAY 30, 2007

2 10:30 A.M.

3 * * *

4 P R O C E E D I N G S

5 THE CLERK: This is the time set for
6 the hearing of defendant's motion to dismiss,
7 motion for supplemental attorney questioning of
8 prospective jurors, and motions to release Brady
9 materials, Criminal Case Number
10 2:04-CR-0262-JCM-PAL, United States of America
11 versus David Kent Fitch. Counsel, please note
12 your appearance for the record.

13 THE COURT: Mr. Vasquez?

14 MR. VASQUEZ: Good morning, your
15 Honor, for the United States, Tim Vasquez.

16 THE COURT: Thank you.

17 Ms. Rasmussen?

18 MS. RASMUSSEN: Good morning, your
19 Honor, Lisa Rasmussen on behalf of David Fitch
20 who is present before the Court in custody.
21 Also with me is David Johnson from my office.

22 THE COURT: How are you, sir?

23 MR. JOHNSON: Good morning, your
24 Honor.

25 THE COURT: Good morning. All right,

1 we've got several motions on for hearing this
2 morning. Let me tell you what I'm inclined to
3 do and then I'll give each of you a chance to
4 argue and say whatever you want to say on the
5 various motions. Let me start with the
6 hearing -- oh, I'm sorry -- with the motion to
7 dismiss filed by the defendant.

8 What I'm inclined to do is to
9 deny that. I think the Ninth Circuit as far as
10 the speedy trial aspect of this, I think the
11 Ninth Circuit has spoken in the Mills case,
12 United States versus Mills, 810 F.2d 907 at 910,
13 a 1985 case out of the Ninth Circuit. The
14 question before us is whether placement and
15 administrative segregation should be treated as
16 an arrest for speedy trial purposes. The courts
17 are unanimous in holding that it should not.
18 Appellate's speedy trial rights attach only with
19 their indictment.

20 Moving along to the -- Mr.
21 Fitch asserts a violation of Section 3161J of
22 the Speedy Trial Act. Again the Ninth Circuit
23 has spoken on this and said dismissal of the
24 indictment is not a remedy for violation of
25 Section 3161J. That's the United States versus

1 Valentine (phonetic), 783 F.2d 1413 at 1415, a
2 Ninth Circuit case from 1986.

3 It seems like implicit in all
4 of this is a preindictment delay argument and
5 the Court -- it's already been denied by
6 Magistrate Leen and adopted by Judge George, but
7 nevertheless I still looked at that argument as
8 well. To claim preindictment delay as a bar to
9 prosecution, the defendant bears a heavy burden
10 of establishing definite nonspeculative proof
11 that the loss of a witness or loss of evidence
12 is prejudicial to his case. And that's United
13 States versus Talbert (phonetic), 51 F.3d 183 at
14 185, a Ninth Circuit case from 1995, and the
15 defendant has not established any actual
16 prejudice that would result from any
17 preindictment delay.

18 Another aspect or another
19 argument is the vindictive prosecution, and in
20 order to establish a prima facie case of
21 prosecutorial vindictiveness a defendant must
22 show either direct evidence of actual
23 vindictiveness or facts that warrant an
24 appearance of such and the defendant is required
25 to prove an improper prosecutorial motive through

1 objective evidence before any presumption of
2 vindictiveness attaches, Ninth Circuit case,
3 United States versus Montoya (phonetic), 45 F.3d
4 1286 at 1299, a 1995 case; and also a Supreme
5 Court case, United States versus Goodwin
6 (phonetic), 457 U.S. 368 at 381 from 1982.

7 And Mr. Fitch raises several
8 assertions that Mr. Damm, who was the previous
9 prosecutor, waited four-and-a-half years after
10 the events to charge him with allegations -- I'm
11 sorry -- to charge him with the indictment in
12 this case and also alleges allegations of
13 unusual treatment by the Bureau of Prisons, but
14 that don't rise to an objective standard of
15 vindictiveness.

16 As far as the double jeopardy
17 or res judicata claims, I think the case of
18 Blakberger (phonetic) versus United States, 284
19 U.S. 299 at 304, a 1932 case, the test to
20 determine whether there has been a violation of
21 the double jeopardy clause is whether there are
22 two offenses or only one is whether each
23 statutory provision requires proof of an
24 additional fact which the other does not and so
25 long as each violation requires proof of an

1 element which the other does not, double
2 jeopardy is not implicated and here each charge
3 in the indictment requires proof separate and
4 distinct from the charges in the earlier
5 indictment.

6 Another case on point is the
7 United States Supreme Court case of Witte,
8 W-I-T-T-E, Wit (phonetic) or Wittie (phonetic)
9 maybe, versus United States, 515 U.S. 389, a
10 1985 case, and the Supreme Court there said that
11 use of evidence of related criminal conduct to
12 enhance a defendant's sentence for a separate
13 crime within the authorized statutory limits
14 does not constitute punishment for that conduct
15 within the meaning of the double jeopardy
16 clause, and so I'm inclined then to deny the
17 defendant's motion to dismiss, and rather than
18 run through all the motions, I'll give you a
19 chance to argue on that point on that motion.

20 MS. RASMUSSEN: Thank you.

21 THE COURT: Ms. Rasmussen?

22 MS. RASMUSSEN: May I approach the
23 podium?

24 THE COURT: Yes, ma'am, please.

25 MS. RASMUSSEN: A couple of things

1 with regard to the motion to dismiss, I think it
2 would be my request that the Court order or
3 authorize the order that I've proposed before
4 making a final ruling on it because I don't
5 believe that the Court stands in a position to
6 make an ultimate determination on the motion to
7 dismiss without having reviewed the BOP file and
8 here is why.

9 I think that if a detainer was
10 placed upon Mr. Fitch, if there is
11 correspondence from the government, if there's a
12 detainer, he was clearly denied his right to act
13 upon the detainer. In other words, under the
14 statute, he has a certain time frame to say I'm
15 requesting that you bring me to trial on these
16 charges. I'm requesting that you bring me to
17 court and that I have the opportunity to be
18 tried on these charges.

19 The statute on that is very
20 clear. If then, in fact, there is a detainer in
21 the file, or if there is correspondence that is
22 tantamount to a detainer, his speedy trial right
23 under the statute was violated. That's the
24 primary premise I believe of the motion to
25 dismiss. So I'm not certain that the Court is

1 in a position to make that determination without
2 seeing the file.

3 Now, having said that, the
4 government yesterday filed a response to my
5 proposed order saying that it should not issue,
6 that I am on a fishing expedition, and this
7 would not be the first time that I've been
8 accused of that certainly, and that there is
9 isn't anything relevant in the file, but I
10 disagree with that because it's the detainer
11 that kicks in the statutory right to speedy
12 trial, and it's a clear statutory right.

13 So I think I was fairly
14 gracious by suggesting that the Court review the
15 BOP file in camera, and I'll also say this, at
16 the very least the documents maintained in that
17 file give Mr. Fitch if the motion is denied, if
18 he goes to trial, and if he's convicted, they
19 are certainly at a minimum relevant to
20 sentencing because governmental misconduct and
21 vindictiveness is a topic or an issue that would
22 warrant a downward departure. So there --

23 THE COURT: You raise some issues that
24 are issues for sentencing if and when Mr. Fitch
25 is found guilty or pleads guilty.

1 MS. RASMUSSEN: That's right and I
2 think so. What I'm telling the Court is I think
3 that without the Court's in camera review, and I
4 didn't ask that it come to me, I understand that
5 they are privileged documents, I think I was
6 gracious by saying let's allow the Court to
7 review it in camera.

8 THE COURT: What's your authority for
9 having an in camera review? I mean your motion
10 seems to be bare of any authority.

11 MS. RASMUSSEN: Well, I think that I
12 attached in my proposed -- to my proposed order
13 the BOP statute, or the BOP regulation, which is
14 5800.011 which identifies certain portions of
15 the file that are confidential, and it also
16 identifies that they could be released upon
17 order of the Court.

18 So out of an abundance of
19 caution and to make things more efficient, I
20 simply said why don't we just have the Court
21 authorize the order, have them come to the
22 Court. The Court, you know, certainly we'd
23 defer to the Court's judgment if there's nothing
24 -- I've already made a prima facie showing that
25 things happened to him that should not have

1 happened. In other words, he was placed in
2 central inmate monitoring status that --

3 THE COURT: But that has nothing to
4 do -- that doesn't support a motion to dismiss.

5 MS. RASMUSSEN: Right, but he also was
6 given correspondence saying there's a detainer
7 on you for murder, and then he was given later
8 correspondence saying oh, no, no, you are here
9 because you tried to escape from an FCI, which
10 he didn't. And if the Court wants, I could
11 offer testimony from him on that issue, but I
12 think it's well documented in the plethora of
13 exhibits that I attached. So he was told --

14 THE COURT: But how do those things
15 bear on a motion to dismiss the indictment?

16 MS. RASMUSSEN: Because if there's a
17 detainer, the statute was violated because he
18 wasn't given the paperwork to demand that he be
19 brought to trial. His rights were not given to
20 him, the rights you get when there's a detainer.
21 He missed out on that whole part. That's his
22 statutory violation. That's a basis for a
23 motion to dismiss.

24 THE COURT: Let me here from Mr.
25 Vasquez, and I realize there's a question about

1 what a detainer is.

2 MR. VASQUEZ: Your Honor, I was going
3 to touch on that briefly because I think there's
4 some ambiguity in the documents provided by
5 counsel and what a detainer means within the
6 statute. As the Court is aware, a detainer is
7 usually cross jurisdictional, that is if state
8 authorities want a federal inmate or federal
9 authorities want a state inmate, a detainer
10 might be placed on him.

11 The whole concept is simply
12 inapplicable where a federal prisoner may later
13 face federal charges. He's already in our
14 custody so there's no need for a detainer, but
15 even if you were to assume that some sort of
16 detainer had been placed on him, for purposes of
17 argument let's assume that Ms. Rasmussen's
18 suspicions are based on some sort of fact and if
19 the Court were to receive the file, you'd open
20 it up and on the first page there would be some
21 sort of formal document, a 3161 detainer.

22 Assume all of that, I'm not
23 saying it's true. I don't see any reason that
24 there would be a detainer, but assume that
25 somehow a detainer had been placed on him in

1 that sense, but even then the Ninth Circuit has
2 been clear that that would not support the
3 remedy she seeks. That would not be grounds for
4 a motion to dismiss.

5 THE COURT: Well, that's what I said.
6 I don't see it.

7 MR. VASQUEZ: So I don't believe it
8 would be material to anything, any issue before
9 the Court.

10 THE COURT: Okay, and there's an issue
11 also on what a detainer -- what a detainer is.

12 MR. VASQUEZ: Yes, your Honor.

13 THE COURT: All right. Let me move on
14 to the next motion, the motion for supplemental
15 attorney voir dire. By now you should have
16 gotten the Court's order for trial and you see
17 that -- well, let me say Federal Rule of
18 Criminal Procedure 24(a) says if the Court
19 examines the jury, it should permit the
20 attorneys for the parties to (a) ask further
21 questions; or (b) submit further questions that
22 the Court may ask if it considers them proper.

23 And that's Rule 24(a)(2), and
24 you'll see that I give you option (b). In other
25 words, you submit proposed voir dire questions

1 to me and I will ask those that I think are
2 pertinent to the jury. So the motion -- now, I
3 don't know how you want to put this -- the
4 motion is moot in light of the order, or the
5 motion is granted in part that you can submit
6 proposed voir dire questions to me. Some of the
7 questions that you outlined, Ms. Rasmussen, are
8 questions that I routinely ask anyway.

9 But anyway under Rule 24(a)(2),
10 the Court can either give the attorneys the
11 opportunity to ask voir dire or can give you the
12 opportunity to submit voir dire questions to the
13 Court. I follow the second procedure, so I
14 think that motion is moot. If you want to add
15 anything, I will be glad to hear anything you
16 have to say on that.

17 MS. RASMUSSEN: Well, your Honor, the
18 only thing I would add to that is if, during the
19 course of voir dire, there are issues that come
20 up where we believe there is further questioning
21 needed and there's perhaps a cause challenge
22 issue at bay, then there may be a circumstance
23 where we would request that the Court allow us
24 to question further, and without that happening,
25 it's kind of hard to identify.

1 THE COURT: Well, I understand and
2 anything can happen in a trial as you know. You
3 know, so typically we handle those at side bar
4 if you have some question. Generally, I do the
5 questioning of the jurors, but it's something we
6 can discuss at side bar.

7 MS. RASMUSSEN: Okay.

8 THE COURT: Okay?

9 MS. RASMUSSEN: Thank you.

10 THE COURT: Thank you. We've got a
11 number of motions that deal with Brady materials
12 and Giglio and Jenks. What I'm inclined to do
13 is to deny these motions where they say Brady
14 materials, Documents 132, 136, and 142 to 145.
15 The government says that it has turned over all
16 the Brady material, and the penalties for
17 failing to produce this information are harsh as
18 I'm sure you know, Mr. Vasquez, and you know my
19 record when it comes to Brady materials.

20 MR. VASQUEZ: Yes, your Honor.

21 THE COURT: And I treat the government
22 just as I would any other party. You know, the
23 government has obligations, too, and so I expect
24 all the Brady materials have been turned over or
25 will be turned over at an appropriate time if

1 something develops at the last minute.

2 The defendant's request for
3 pretrial disclosure of the identities and
4 information regarding prospective witnesses to
5 me is equivalent to a request for a list of the
6 government's witnesses which the defendant is
7 not entitled to, and so I'm going to deny that.
8 Also what looms large is that the government has
9 agreed to turn over all Giglio material at least
10 ten days prior to trial. So I think that moots
11 a lot of the concerns that the defendants raised
12 and a lot of the concerns that I have.

13 As far as the motion dealing
14 with Documents number 142 to 145, which is a
15 request by the defendant for an order permitting
16 the inspection and production of the personnel
17 file of various government agents and employees,
18 I think the case of the case of United States
19 versus Henthorne (phonetic), 931 F.2d 29 at 30
20 and 31, which is a Ninth Circuit case from 1990,
21 is directly on point.

22 And that states the government
23 has a duty to examine the personnel files of law
24 enforcement officers it intends to call as
25 witnesses if a defendant requests production of

1 the files. Following that examination the files
2 need not be furnished to the defendant or the
3 court unless they contain information that is or
4 may be material to the defendant's case.

5 And so I'm going to deny the
6 defendant's motion based on the authority of
7 Henthorne. And I'll give you a chance to say
8 anything you want to say on that, Ms. Rasmussen.

9 MS. RASMUSSEN: Well, I think it's
10 clear under Henthorne that that all I need do is
11 make the request.

12 THE COURT: You made your request, and
13 now the government has an obligation now to
14 examine the personnel files and then turn
15 over -- and it may be turned over to me or it
16 could be turned over to you, but turned over
17 appropriately the information that would be
18 relevant from the files.

19 MS. RASMUSSEN: Yet the rule is that
20 they are to be turned over to me, and they are
21 to be turned over to you I believe if there is
22 any concern, if they're questionable, if there's
23 some borderline issue for the Court's further
24 determination. And what I would simply ask on
25 the Henthorne motions is that the Court set a

1 deadline for the government to advise the Court
2 and defense counsel whether there are or are not
3 Henthorne materials either way so that we're not
4 just left hanging and dangling in the wind.

5 THE COURT: All right.

6 MS. RASMUSSEN: Okay.

7 THE COURT: And what about that, Mr.
8 Vasquez, can you do that ten days before trial?

9 MR. VASQUEZ: I believe so, your
10 Honor. In fact, the letters have already gone
11 out to the agencies. And let me note while I
12 have the podium that I've given a list of the
13 government witnesses or former employees that I
14 intend to call at trial. There's been one
15 change. Instead of Special Agent Gregory Rice
16 of the FBI, the government now contemplates
17 calling Special Agent Lee Zechter. So I'll be
18 sending out the letter to the FBI on that. The
19 letters have gone out, and I don't see any
20 problem in getting it out to defendant or to the
21 Court and --

22 THE COURT: Special Agent Bright
23 (phonetic)?

24 MR. VASQUEZ: I'm sorry. Previously I
25 had listed Special Agent Gregory Rice.

1 THE COURT: Wright (phonetic), I'm
2 sorry. I want to get the names right for the
3 record. Gregory Wright, Special Agent Gregory
4 Wright, W-R-I-G-H-T --

5 MR. VASQUEZ: No, sir, Rice, R-I-C-E,
6 Romeo, India, Charlie, Echo.

7 THE COURT: Okay, Rice.

8 MR. VASQUEZ: Gregory Rice will not be
9 called and in his place will be Special Agent
10 Lee, L-E-E, Zechter, Zero, Echo, Charlie, Hotel,
11 Tango, Echo, Romeo.

12 THE COURT: Okay, so as in Uncle Ben's
13 Rice, so Special Agent Rice is replaced by
14 Special Agent Zuchter (phonetic)?

15 MR. VASQUEZ: Zechter.

16 THE COURT: Zechter, Zechter,
17 Z-E-C-H-T-E-R.

18 MR. VASQUEZ: Yes, sir.

19 THE COURT: All right. All right,
20 anything else to come before the Court then?

21 MS. RASMUSSEN: Well, could we just
22 have a deadline for Henthorne?

23 THE COURT: Oh, I'm sorry. Thank you.
24 What about ten days before trial on the
25 Henthorne matters, the Henthorne materials, or

1 the Henthorne inquiry?

2 MR. VASQUEZ: Your Honor, I will do my
3 best to comply with that. If I'm not able to,
4 I'll inform the Court of that fact within that
5 time frame. In any case, that will be my goal.

6 THE COURT: Okay, and understand part
7 of what I -- let's not waste time, and that's
8 why I appreciate the offer on the Giglio
9 materials. Let's get the materials out, put it
10 on the table and see what's there, and if
11 there's a problem, then we'll deal with it. If
12 not, then we'll go to trial, but so that we know
13 and so that the defendant can adequately prepare
14 for trial. So let's shoot for that. Either let
15 us know, either do the Henthorne search, and
16 then let us know if there's a problem or produce
17 the materials ten days before, all right?

18 MR. VASQUEZ: I will follow-up on
19 that.

20 MS. RASMUSSEN: And, your Honor, there
21 are just a couple of other things. I believe
22 that with the Court's permission, the government
23 and I have contemplated doing some videotape
24 depositions for use at trial, but my
25 understanding of the rules is that we need the

1 Court's permission to do that.

2 I filed a motion regarding my
3 client's mother, Joyce Fitch, who is unable to
4 travel and resides in the Western District of
5 Texas nearest Waco which is a smaller division
6 of the district court there, and I believe that
7 the government is amenable to us doing a
8 videotape deposition from here having her come
9 into the courthouse there and doing it in their
10 office using it at trial.

11 Along those same lines, there
12 are some European witnesses that they propose to
13 handle in the same manner to avoid the expense
14 of having those witnesses travel here, and I
15 have agreed to do that. Mr. Fitch has, more
16 importantly, has agreed so long as he can be
17 present in the U.S. Attorney's office while we
18 are doing the depositions, which I believe he
19 has a right to do because he is a defendant and
20 it's a critical stage. I mean it's testimony
21 that would be offered at trial.

22 So these are things that we I
23 believe need to address now prior to the trial.
24 I'll let Mr. Vasquez address that. And then the
25 only other thing I wanted to address is it's my

1 understanding pursuant to the joint discovery
2 order that the government will produce Jenks
3 material five days prior to trial, and I just
4 wanted to clarify that.

5 THE COURT: All right.

6 MR. VASQUEZ: Well, your Honor, in
7 terms of the Jenks material, it's already been
8 filed. We'll try to get it out within ten days
9 before trial. We'll try to just do everything
10 in one fell swoop. With regard to the
11 depositions, Ms. Rasmussen has correctly
12 articulated the agreement the parties have
13 reached subject to the Court's consent to go
14 ahead and try to take video depositions of
15 certain witnesses that it would be difficult to
16 arrange their travel.

17 THE COURT: All right, and that's
18 certainly -- I don't have any problem with the
19 video depositions. So if you want to submit a
20 stipulation, or however you want to handle it,
21 and I'll be glad to sign off on it.

22 MS. RASMUSSEN: I'll prepare a
23 stipulation.

24 THE COURT: All right.

25 MR. VASQUEZ: And at some point in the

1 near future, we'll be filing a motion with the
2 Court asking for the defendant -- well, I'll
3 coordinate with the marshals as to how to get
4 him to a place where we have that video
5 telephone conference capability. We have it
6 up -- or downstairs, we have it in the U.S.
7 Attorney's office, and so that would be I think
8 the most convenient. I'll double check with the
9 marshals on the situation concerns.

10 THE COURT: All right, and again check
11 with the marshals and see. All right, let me
12 ask you -- I'm sorry.

13 MS. RASMUSSEN: Oh, your Honor, again
14 there is one other thing, and I apologize for
15 not addressing it sooner. My client has some
16 medical issues. He is at the moment suffering a
17 compressed disk and is undergoing what I would
18 describe as nerve damage that is even affecting
19 his speech, and I would ask if the Court would
20 ask the marshals to take whatever options
21 necessary to see that because we do have a trial
22 coming up that he gets the medical attention
23 that he needs.

24 THE COURT: All right. Would you do
25 that?

1 THE MARSHAL: Yes, sir.

2 THE COURT: Yes, sir. All right,
3 thank you.

4 MS. RASMUSSEN: Thank you.

5 THE COURT: Mr. Vasquez, if you would,
6 prepare an order on -- just a short order on
7 today's motions.

8 MR. VASQUEZ: Yes, sir. If I could
9 follow up on what Ms. Rasmussen just said and
10 inquire -- or have the Court inquire as to
11 whether there would be any concern here with his
12 ability to proceed to trial on the 18th as
13 scheduled, that is if the medical conditions
14 might interfere with his ability to assist
15 counsel.

16 THE COURT: Is that a problem?

17 MS. RASMUSSEN: I don't believe that
18 it interferes with his ability to assist
19 counsel. I think that he is in extreme
20 discomfort, and at this time I'm not concerned
21 about his ability to assist me. If it gets
22 worse, it could be a problem, and I just think
23 we need to have someone look at him and perhaps
24 do an x-ray of his spine and make sure he is
25 okay.

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THE COURT: All right, and we'll do that. Good. Thank you.

MS. RASMUSSEN: Thank you.

THE COURT: Thank you. All right, then we'll be recess.

(Whereupon, the proceedings concluded.)

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter.

Date: January 17, 2008 Joy Garner
JOY GARNER, CCR 275
U.S. Court Reporter