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UNITED STATES DISTRICT COURT
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DISTRICT OF NEVADA
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UNITED STATES OF AMERICA,	
Plaintiff	**02:04-CR-262-JCM-PAL**
vs.	
DAVID KENT FITCH,	**UNITED STATES' PROPOSED ORDERS REGARDING DEFENDANT'S PRETRIAL MOTIONS**
Defendant	

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17 THE UNITED STATES OF AMERICA, by and through its undersigned attorneys and in
18 accordance with the Court's rulings on May 30, 2007, hereby submits the following proposed Orders
19 (attached as Appendices I, II and III) regarding:
20 (I) Defendant's Motion to Dismiss Based on (1) Speedy Trial Violation; (2) Double Jeopardy;
21 (3) Res Judicata and Issue Preclusion and (4) Vindictive Prosecution [**Docket No. 128**], and
22 defendant's Motion for Issuance of Order Compelling *In Camera* Production of Defendant's
23 Inmate Central File [**Docket No. 156**];
24 (II) Defendant's Motion for Supplemental Attorney Voir Dire [**Docket No. 131**]; and
25 (III) Defendant's several motions for Production of "Favorable Materials Concerning the
26 Testimony of Special Circumstances Witnesses" [**Docket Nos. 132, 133, 134, 135, 136** and

1 **142**], and defendant's several motions for Inspection and Production of Personnel Files of
2 various government agents and an Assistant United States Attorney [**Docket Nos. 143, 144**
3 and **145**].
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5 RESPECTFULLY SUBMITTED this 5th day of June 2007.
6 Steven W. Myhre,
7 Acting United States Attorney
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9 /s/
Timothy S. Vasquez
10 Assistant United States Attorney
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff **vs.** **DAVID KENT FITCH,** Defendant	**02:04-CR-262-JCM-PAL** **ORDER**

THIS MATTER comes before the Court on defendant's Motion to Dismiss Based on (1) Speedy Trial Violation; (2) Double Jeopardy; (3) Res Judicata and Issue Preclusion and (4) Vindictive Prosecution [**Docket No. 128**]; and defendant's Motion for Issuance of Order Compelling *In Camera* Production of Defendant's Inmate Central File [**Docket No. 156**].

In his Motion to Dismiss, defendant alleges (1) Speedy Trial Violation; (2) Double Jeopardy; (3) Res Judicata and Issue Preclusion and (4) Vindictive Prosecution. Having reviewed the defendant's motion and supporting memoranda, the government's response, and having heard the arguments of counsel at the hearing of May 30, 2007, the Court finds that the none of the defendant's claims or theories will sustain his motion to dismiss the indictment.

Speedy Trial Claims & Motion for Production of Inmate File

Defendant's claim that his right to a speedy trial has been violated is premised upon his allegation that the government placed a "detainer"on him in 2001. The defendant does not allege that he was detained or held as a result of the purported detainer—indeed, defendant was at that time

already in federal custody serving an eight-year sentence from a prior case. Defendant instead asserts that his "custody classification increased as a result of an alleged detainer," Motion to Dismiss at p. 31, and that "*[w]hatever it is the government has placed in his file*, Mr. Fitch continues to experience . . . an unprecedented custodial experience," *id.* at p. 33 (emphasis added). More particularly, defendant complains that the government's alleged action resulted effected his placement within the Bureau of Prisons system and has resulted in his administrative segregation. From this premise, defendant argues that the purported detainer triggered the procedures prescribed in 18 U.S.C. § 3161(j) obligating the government "to obtain the presence of the prisoner for trial" notwithstanding that no charges had yet been brought against him in this case.[1]

Such grievances—whether real or imagined—cannot sustain defendant's claims that his rights to a speedy trial have been violated. Even assuming that the government had taken action that affected the defendant's "custody classification" related to his prior sentence, such administrative action does not invoke the Sixth Amendment's speedy trial provisions. The Ninth Circuit Court of Appeals' opinion in *United States v. Mills*, 810 F.2d 907 (9th Cir.), *cert. denied*, 484 U.S. 832 (1987), is instructive:

> A defendant's right to a speedy trial attaches when he is accused. *United States v. Lovasco*, 431 U.S. 783, 788-89, 97 S.Ct. 2044, 2047-48, 52 L.Ed.2d 752 (1977). In sixth amendment jurisprudence, a defendant is accused when he is indicted or when he is subject to "the actual restraints imposed by arrest and holding to answer a criminal charge." *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971). The question before us is whether placement in administrative segregation should be treated as an arrest for speedy trial purposes.
>
> The courts are unanimous in holding that it should not. *United States v. Mills*, 704 F.2d 1553, 1556-57 (11th Cir.1983), *cert. denied*, 467 U.S. 1243, 104 S.Ct. 3517, 82 L.Ed.2d 825 (1984); *United States v. Daniels*, 698 F.2d 221, 223 (4th Cir.1983); *Mills*, 641 F.2d at 787; *United States v. Blevins*, 593 F.2d 646, 647 (5th

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[1] An indictment was returned against the defendant in the present case on June 29, 2004.

> Cir.1979) (per curiam); *United States v. Bambulas*, 571 F.2d 525, 527 (10th Cir.1978) (per curiam); *United States v. Clardy*, 540 F.2d 439, 441 (9th Cir.), *cert. denied*, 429 U.S. 963, 97 S.Ct. 391, 50 L.Ed.2d 331 (1976).
>
> These cases refuse to equate administrative segregation with arrest because the consequences of administrative segregation are different from those of arrest. As we recognized in *Clardy*, the effects of administrative segregation on employment, financial resources, and standing in the community are much less severe than are those of arrest. 540 F.2d at 441. While administrative segregation limits freedom of movement and association, such limitations "bear little weight in the peculiar context of a penal institution where the curtailment of liberty is the general rule not the exception." *Id.* . . . . Moreover, as Justice Stevens noted in *Gouveia*, "there is no reason to believe that the segregation of suspected murderers from the general prison population either was intended to or had the effect of facilitating a criminal investigation rather than simply serving legitimate institutional policies." 467 U.S. at 198, 104 S.Ct. at 2303 (Stevens, J., concurring in the judgment).
>
> Appellants' speedy trial rights attached only with their indictment . . . . Any delay after that point was occasioned by appellants. Accordingly, no speedy trial violation occurred.

Mills, 810 F.2d at 909-910.

Moreover, even assuming that federal authorities placed a detainer on the defendant in 2001 notwithstanding that he already in federal custody, this alleged violation of 18 U.S.C. § 3161(j) would not sustain defendant's motion to dismiss. *See United States v. Valentine*, 783 F.2d 1413, 1415-16 (9th Cir.1986) ("we conclude that dismissal of the indictment is not a remedy for a violation of section 3161(j)(1)"); *United States v. Stoner*, 799 F.2d 1253, 1257 (9th Cir. 1986) ("We follow *Valentine* and hold that dismissal of the indictment is not a remedy for violation of section 3161(j)(3). Even assuming appellant has established a violation of section 3161(j)(3), he is not entitled under the Speedy Trial Act to have the indictment dismissed.").

1 Furthermore, there is no need for the Court to review the defendant's inmate file for purposes
2 of resolving his Motion to Dismiss. Again, even assuming that a "detainer" within the meaning of
3 § 3161(j) could be found in the defendant's inmate file, the dismissal of the indictment is not an
4 authorized remedy for the alleged violation of § 3161(j). The contents of the defendant's inmate file
5 are therefore not material to the resolution of the defendant's motion to dismiss.
6
7 **Estoppel, Res Judicata, and Double Jeopardy Claims**

8 Next, defendant's observation that "[t]he doctrines of Issue Preclusion, Claim Preclusion and
9 Res Judicata are designed to prevent persons from having to litigate the same issues on multiple
10 occasions," Motion to Dismiss at p. 36, is subsumed in criminal actions by the Fifth Amendment's
11 proscription that no person shall "be subject for the same offence to be twice put in jeopardy of life
12 or limb." "The Double Jeopardy Clause prohibits the imposition of multiple trials, convictions and
13 punishments for the same offense." *United States v. Arlt*, 252 F.3d 1032, 1035 (9th Cir.2001) (*en*
14 *banc*). For purposes of double jeopardy, "the test to be applied to determine whether there are two
15 offenses or only one is whether each [statutory] provision requires proof of an additional fact which
16 the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

17 > The *Blockburger* test focuses on the statutory elements of each offense, not on the actual evidence presented at
18 > trial. *Illinois v. Vitale*, 447 U.S. 410, 416, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). Thus, it matters not that
19 > there is "substantial overlap" in the evidence used to prove the two offenses, so long as they involve
20 > different statutory elements. *United States v. Cuevas*, 847 F.2d 1417, 1429 (9th Cir.1988) (citation omitted).
21
22 *United States v. Kimbrew*, 406 F.3d 1149, 1151-52 (9th Cir. 2005).

23 The defendant was previously charged and convicted in the case of United States v. Fitch,
24 CR-S-2000-050-KJD(RJJ) of: possession of false identification documents in violation of 18 U.S.C.
25 § 1028(a)(4) [Counts One and Two]; use of a fraudulently procured passport in violation of 18 U.S.C.
26 § 1542 [Counts Three, Four, Five and Six]; possession of firearms and ammunition by a convicted

felon in violation of 18 U.S.C. § 922(g)(1) [Counts Seven, Eight, Nine, and Ten]. *See* Superseding Criminal Indictment, CR-S-2000-050-KJD(RJJ) (June 20, 2000). Conversely, the indictment pending in the present case charges that the defendant committed the offenses of: access device fraud and attempted access device fraud in violation of 18 U.S.C. § 1029 [Counts One, Two, Twelve and Thirteen]; bank fraud in violation of 18 U.S.C. § 1344 [Counts Three through Eleven]; laundering monetary instruments in violation of 18 U.S.C. §1956(a)(1)(B) [Counts Fourteen and Fifteen]; money laundering in violation of 18 U.S.C. §1957 [Count Sixteen]; and interstate transportation of a stolen motor vehicle in violation of 18 U.S.C. § 2312 [Counts Seventeen and Eighteen].

The offenses charged in the indictment pending in this case are distinct from the offenses charged in the earlier case. More to the point, the charges awaiting trial in this case involve different statutory elements than the charges in the prior case. *Compare* 9TH CIR. CRIM. JURY INSTR. 8.69 (access device fraud), 8.106 (bank fraud), and 8.121 (laundering of monetary instruments), *with* 9TH CIR. CRIM. JURY INSTR. 8.59 (unlawful possession of firearm), *United States v. McCormick*, 72 F.3d 1404, 1407 (9th Cir. 1995) (sufficient to instruct jury that the essential elements for a conviction under 18 U.S.C. § 1028(a)(4) are (1) that defendant knowingly possessed a false identification document, and (2) that he did so with the intent to defraud the United States); and *United States v. White*, 1 F.3d 13, 16 (D.C. Cir. 1993) (passport fraud under 18 U.S.C. § 1542 "requires proof that the accused (i) willfully and knowingly make a false statement in a passport application, (ii) with the intent to secure issuance of a United States passport contrary to the laws and regulations governing the issuance of passports").

Defendant's claims of double jeopardy therefore do not satisfy the *Blockburger* criteria. *See also Witte v. United States*, 515 U.S. 389 (1995) (holding that the use of relevant conduct to increase the punishment for a charged offense within statutory limits does not "punish" the offender for such conduct for purposes of double jeopardy).

1 **Claims of Vindictive Prosecution**

2 Defendant's claims of vindictive prosecution have previously been considered and rejected
3 by other judicial officers of this District Court. *See* Motion to Dismiss Due to Vindictive Prosecution
4 [**Docket No. 28**]; Order and Findings and Recommendations [**Docket No. 46**]; Order [**Docket No.**
5 **59**]. Although the Court has revisited this matter and reexamined the defendant's arguments in his
6 latest motion to dismiss, defendant's allegations are again insufficient to sustain his claim of
7 vindictive prosecution.

8 "To establish a *prima facie* case of prosecutorial vindictiveness, a defendant must show
9 either direct evidence of actual vindictiveness or facts that warrant an appearance of such." *United*
10 *States v. Sinigaglio*, 942 F.2d 581, 584 (9th Cir.1991). The Court of Appeals for the Ninth Circuit has
11 recently explicated the parameters of such claims:

12 > "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense
13 > defined by statute, the decision whether or not to prosecute, and what charge to file ... generally rests
14 > entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). .
15 > . .
> A prosecutor's discretion is not without limitations,
16 > however. While the Supreme Court demands
17 > "exceptionally clear proof" before inferring an abuse of prosecutorial discretion, *McCleskey v. Kemp*, 481 U.S.
18 > 279, 297, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), the Court does prohibit punishing "a person because he has
19 > done what the law plainly allows him to do." *United States v. Goodwin*, 457 U.S. 368, 372, 102 S.Ct. 2485,
20 > 73 L.Ed.2d 74 (1982) (internal quotation marks and citation omitted). For example, a "prosecutor violates
21 > due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or
22 > statutory right." *United States v. Hernandez-Herrera*, 273 F.3d 1213, 1217 (9th Cir.2001) (citation omitted).
>
23 > Nevertheless, "[o]rdinarily, [courts] presume that public officials have properly discharged their official
24 > duties." *Banks v. Dretke*, 540 U.S. 668, 696, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (citations omitted). As
25 > such, where a defendant contends that a prosecutor made a charging decision in violation of the
26 > Constitution, the defendant's "standard [of proof] is a

> demanding one." *United States v. Armstrong*, 517 U.S. 456, 463, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996).

Nunes v. Ramirez-Palmer, __ F.3d ___, 2007 WL 1227513, 07 Cal. Daily Op. Serv. 4613 (9th Cir. 2007).

Returning to case at hand, the defendant has alleged that one of the prosecutor's involved in this case bore "personal animus" toward him. *See* Motion to Dismiss at p. 37. The defendant does not suggest that the prosecutors lacked probable cause to believe that he committed the charged offenses but instead posits that "[i]ndicting Mr. Fitch on additional charges because he pled guilty to the initial charges before the government got around to indicting him upon the additional charges is tantamount to indicting a defendant on additional charges because he appealed his conviction." Motion to Dismiss at p. 38. The defendant's analogy is inexact and his argument unpersuasive. The claim that the defendant "pled guilty to the initial charges before the government got around to indicting him upon additional charges" is not tantamount to penalizing a defendant for exercising a constitutional right. Moreover, as discussed in reference to defendant's double jeopardy claims, the fact that the defendant quickly pled guilty to charges regarding false identification documents, a fraudulently procured passport, and firearms, does not preclude the government from continuing its investigation and subsequently bringing distinct charges against the defendant. Defendant's conclusory allegations are insufficient to sustain his claim of vindictive prosecution. Furthermore, even if the defendant had presented a *prima facie* case of vindictiveness, he would still not be entitled to dismissal because the government has met its counter-burden of justifying the charging decision; irrespective of any alleged ill-will toward the defendant, the government has demonstrated that it had probable cause to believe that the defendant committed the offenses charged in the pending indictment.

1 THE COURT THEREFORE DENIES defendant's Motion to Dismiss [**Docket No. 128**] and
2 defendant's Motion for Issuance of Order Compelling *In Camera* Production of Defendant's Inmate
3 Central File [**Docket No. 156**].
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5 IT IS SO ORDERED this 11th day of June, 2007.
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9 JAMES C. MAHAN
United States District Judge
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