BENCH MEMO: United States v. Paul Kirk, a/k/a "Mr. Hollywood" or "Kip", Criminal No. 88-00011-R. Various Motions.

ATTORNEYS
Government: G. Wingate Grant (Asst. U.S. Attorney)
Defendant: Brian K. Miller (sole practitioner)

Judge, this case comes before you on defendant Paul Kirk's motions: (1) for separate trials; (2) to dismiss counts; (3) for clothing to wear at trial; (4) for discovery; and (5) to dismiss the indictment. I will discuss each in turn. The only one with any merit is Kirk's motion for separate trials on the different alleged frauds. The others should be DENIED.

As we have discussed, the indictment charges Kirk with a number of fraudulent act which violated the mail and wire fraud statutes. While Kirk was imprisoned at FCI in Prince George County, Va., he defrauded a woman named Sandra Jean Mortimer. He allegedly ran an advertisement seeking a pen pal, and Sandra Mortimer began writing to him. By letters and phone calls to Mortimer from Dec. 1985 until Jan. 24, 1986, he claimed he loved her. He then told her he needed $2500 to post a bond so he could be set free from prison. After much effort by Kirk, he finally convinced Mortimer to send him the money; she did on Jan. 27, 1986. Kirk had the money transferred to a friend in Michigan. Then on March 25, 1986, Kirk was released from prison on parole. On July 11, he was found in the apartment of his friend, Ramona Manginen, in Minneapolis, Minn.

Count 1 charges Kirk with wire fraud on Dec. 24, 1985 in his scheme to defraud Mortimer. Count 2 also charges him with wire fraud against Mortimer, for his calls on Jan. 24, 1986. Counts 3

- 5 charge him with mail fraud against Mortimer for the letters he sent between Dec. 27 and Jan. 30.

Now, once Kirk was out on parole, he allegedly committed mail fraud on an inmate at Kirk's former prison. The inmate, one Humberto Medrano-Gill, arrived at the FCI on March 11, 1985. He wanted to reduce his sentence and was referred to Kirk as one who could help him file legal papers seeking to have his sentence reduced. Kirk wrote some letters for Medrano-Gill. After Kirk was released, in April of 1986, Medrano-Gill received a letter dated April 22. The letter was signed "Ra Manginen," and was written on stationary of Ra Manginen Associates, which purported to be a law firm in Minneapolis.

The letter states that Kirk, "Mr. Hollywood," had referred Medrano-Gill's matter to the Manginen law firm and that the firm could have the inmate's ten-year sentence reduced to five years. The letter said the costs of representing Medrano-Gill would be $300. The letter was allegedly prepared and signed by Kirk, aka "Mr. Hollywood." Kirk was not a lawyer, nor was the fictitious Manginen Associates; thus, this was fraud on Medrano-Gill.

Count 6 charges Kirk with mail fraud for the April 22 letter to Medrano-Gill. Count 7 also charges mail fraud, for a May 19 letter Kirk sent to Medrano-Gill in prison. I will next discuss the merits of each motion.

I. Kirk's Motion for Separate Trials

Kirk claims he needs two separate trials, one on Counts 1-5, and one for Counts 6-7, to avoid undue prejudice in the mind of the jury. He contends these are two distinct cases facing him:

they involve two different victims, two separate schemes with two distinct sets of facts, and two different and unrelated time periods taking place in different locations. The evidence from witness Mortimer is separate and distinct from the evidence that would come from witness Medrano-Gill. There is no overlapping of the necessary evidence.

As seen above, Counts 1-5 charge wire and mail fraud as to Sandra Mortimer. Counts 6-7 charge mail fraud committed against Humberto Medrano-Gill. Because there would be little or no overlap of evidence between the two criminal schemes, and because joinder could result in prejudice to Kirk, I think you probably should separate the trials and GRANT this motion.

The joinder of offenses in an indictment is governed by Rule 8(a), Fed.R.Crim.P. That rule permits two or more offenses to be joined in the same indictment if the offenses are:

> of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Rule 8(a) is to be construed broadly in favor of initial joinder in the indictment. United States v. Davis, 752 F.2d 963, 971 (5th Cir. 1985). The government argues that the two offenses are of a "similar character." The first involved mail and wire use to deceive Mortimer into sending Kirk some money, based on misrepresentations. The second involved use of the mails in an attempt to deceive Medrano-Gill into sending money based on other misrepresentations. Since all counts relate to "a fraud of one

type or another," the government argues that they are thus of a "similar character."

But this overlooks the potential prejudice to Kirk at trial. Rule 14 allows separate trials on different offenses, if the defendant or the government will be prejudiced by joinder of the offenses at trial. Rule 14 reads as follows:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses ... in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Kirk contends that because the various counts relate to two distinct schemes to defraud two different victims, he will be prejudiced when the jury hears the two allegations. His defense will be compromised when the jury hears this and and learns that he is charged with having devised two different and unrelated criminal schemes. He has a good argument here.

The courts generally hold that to obtain a severance, the defendant must show actual prejudice resulting from the joinder, not merely that he would have a better chance of acquittal if the counts were severed. United States v. L'Allier, 838 F.2d 234, 241 (7th Cir. 1988). In the Third Circuit, a defendant must show that joinder would result in "a manifestly unfair trial." United States v. Reicherter, 647 F.2d 397, 400 (3d Cir. 1981). And some courts have recognized that:

> When similar but unrelated offenses are jointly charged to a single defendant, some prejudice almost necessarily results. Rule 8(a) permits this sort of prejudice.

United States v. Vastola, 670 F.Supp. 1244, 1261 (D.N.J. 1987).

Nonetheless, the Fourth Circuit has taken a view more protective of the defendant's rights. In United States v. Jamar, 561 F.2d 1103 (4th Cir. 1977), it held that in ruling on a motion for severance of counts:

> the trial court is vested with discretion; it must carefully weigh the possible prejudice to the accused against the often equally compelling interests of the judicial process, which include the avoidance of needlessly duplicative trials involving substantially similar proof.

Jamar, 561 F.2d at 1106. But in Kirk's case, the two trials would not be "needlessly duplicative ... involving substantially similar proof." The two alleged fraud schemes were distinct in time and place, and involved two entirely different and unrelated victims. The only overlapping evidence would be background as to where Kirk had been--in prison. In light of the risk of great prejudice to Kirk before the jury, this small amount of overlap in evidence is not weighty enough to override his interest in an unbiased jury.

The Fourth Circuit went on to explain this risk of prejudice when the defendant is faced with two, unrelated criminal charges:

> Firmly rooted in our jurisprudence is the proposition that evidence of other crimes of the defendant is ordinarily inadmissible in a criminal trial, except in limited circumstances or for limited purposes, because the minds of the jurors could be influenced against the accused to a degree out of proportion to the probative value of the evidence . . . For similar reasons, there is always a danger in joining different offenses for trial in a single indictment. The jury might improperly cumulate the evidence pertinent to different crimes either to infer a criminal disposition on the part of the accused, or to find guilt on all offenses when the evidence of each separate crime, if presented in separate trials, would be unpersuasive of guilt on any single offense. Drew v. United States, 331 F.2d 85 (D.C.Cir. 1964).

United States v. Jamar, 561 F.2d at 1106. The court concluded by saying that: "the most a trial court can do is to judge whether in a given case the prejudice resulting from joinder is too great to be justified by the broader interests of avoiding duplicative trials." Jamar, 561 F.2d at 1108.

In addition, the Fifth Circuit has indicated that under Rule 8(a), the offenses should be severed for trial "when there is no 'substantial identity of facts or participants between the two offenses. . .'" United States v. Lane, 735 F.2d 799, 804 (5th Cir. 1984).

Therefore, because there would be little overlap in evidence between the two alleged schemes, and because the jury could well be prejudiced on the issue of intent by hearing that Kirk is charged with two such schemes, I think the safer path is to allow the separate trials. As you noted, Judge, this may make little practical difference: whether Kirk is convicted only on the first 5 counts, or on all 7, would probably have little impact on his sentence. If the government really wants to convict him on both schemes, give them a choice and they can proceed.

By the way: I had to do this research on Kirk's behalf by myself, since his lawyer provided no law to support Kirk's claim. Kirk's lawyer simply filed the motion, and left it to us to do his homework on the law. This should bear on Miller's request for time and attorney fees later.

II. Kirk's Motion to Dismiss Counts

Kirk next moves to dismiss Counts 2 - 5 and 7, claiming that these counts are multiplicitous or duplicitous. (Multiplicitous

means that an indictment charges one offense in several counts. An indictment is duplicitous when it charges many crimes in a single count.) He contends that Counts 2-5 are restatements of the scheme to defraud Sandra Mortimer that is stated in Count 1. Likewise, he says that Count 7 is a restatement of the scheme to defraud Medrano-Gill that is alleged in Count 6. This motion is garbage and should be DENIED.

Counts 1 - 5 all allege Kirk's defrauding of Mortimer, but each count alleges a distinct, specific act committed in the scheme to defraud. Count 1 relies on the use of the wires by a telephone call on Dec. 24, 1985. Count 2 alleges wire fraud by citing the telephone call on Jan. 24, 1986. Each call was a separate act in use of the wires, in violation of 18 U.S.C. § 1343. Counts 3-5 all charge mail fraud offenses, and each count charges a distinct mailing that occurred on a separate date. The dates were Dec. 27 (count 3), Jan. 23 (count 4) and Jan. 30, 1986 (count 5).

Similarly, Count 6 charges Kirk with mail fraud against Medrano-Gill by use of the mails on April 22, while Count 7 says Kirk used the mails on May 19, 1986. Thus, while Counts 1-5 and 6-7 are related by the respective schemes to defraud, each count charges an entirely separate offense under the statutes. It is well settled law that "each separate use of the mails in furtherance of the scheme constitutes a separate offense." United States v. Contenti, 735 F.2d 628, 631 (1st Cir. 1984). This is true even though the defendant may have engaged in only a single fraudulent scheme, and the same applies to use of the wires in a

wire fraud charge. United States v. Calvert, 523 F.2d 895, 914 (8th Cir. 1975), cert. denied 424 U.S. 911 (1976).

Over seventy years ago the Supreme Court, in construing the predecessor to § 1341, held that "there is no doubt that the law may make each putting of a letter into the post office a separate offense." Badders v. United States, 240 U.S. 391 (1916). This rationale has been followed in numerous federal cases and remains the law today. See, e.g., United States v. Saxton, 691 F.2d 712, 714-15 (5th Cir. 1982); United States v. Jones, 648 F.Supp. 241, 243 (S.D.N.Y. 1986) (each mailing or use of the wires constitutes a separate offense, for which consecutive sentences may be imposed).

Therefore, since each count relies on a separate mailing or use of the wires, the counts are not multiplicitous. The motion is without merit and must be DENIED.

III. Kirk's Motion to Provide Garments

In this motion, Kirk claims he needs to be provided with "appropriate civilian attire in order to make a respectable appearance before a jury of this Court." He says he has only the prison clothes he was wearing when transferred to the Richmond city jail, and that he is without the means required to purchase these clothes. These civilian clothes are necessary to prevent prejudice when the jury sees him in court. See Estelle v. Williams, 435 U.S. 501 (1976).

This motion may be resolved or mooted, Judge. In response, the government says that while Kirk is a pauper, he has been married since August 1986. His wife has been employed and Kirk's

former civilian clothes should be in her possession. Presumably she could send these clothes to him to wear at trial.

The government has asked Kirk's counsel for Kirk's clothing sizes and says that "efforts will be made to borrow clothing from a government facility for his use at trial, if his wife is for some reason unable to send the defendant's own clothing to him." You should ask about this at the hearing, Judge, and if it proves true, then you should DENY the motion as resolved or mooted.

IV. The Discovery Motions

Kirk has also filed a motion for discovery, Judge. According to Kirk's counsel, all but two of these discovery requests have been resolved by the government's response. However, Kirk still seeks responses to part of his requests Nos. 4 and 6. In his request No. 4, Kirk seeks to discover all "immigration records or proof of citizenship of Sandra Jean Mortimer." Mortimer, as you know, Judge, is the victim of Kirk's first scam. In his No. 6 request, Kirk seeks to discover copies of grand jury transcripts. I think both of his requests should be DENIED.

First, as to the immigration and citizenship records of Ms. Sandra Mortimer: The government says it is unaware of the existence of any such documents. In addition, even if such documents may exist or be held by some other government agency, Kirk is not entitled to obtain them through discovery. Rule 16(a)(2), Fed. R. Crim. P., provides that only certain specified types of materials are subject to a disclosure request. These records do not fall into any enumerated category.

Rule 16(a)(1)(C) is an exception allowing certain document discovery. It provides that the defendant may:

> inspect or copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, ... which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Rule 16(a)(1)(C). The government says that nothing covered by this request is intended to be used as evidence at trial. And the defendant has not shown how these records would be material to his defense at trial. Therefore, Kirk has failed to make any showing under Rule 16(a) which would entitle him to discover this information. The government also says it is not required to poll all gov't agencies for any examinations, immigration or citizenship records regarding Ms. Mortimer. Kirk has cited no law to the contrary.

Second, as to the grand jury transcripts. Kirk has again filed no brief in support, so I do not know what legal basis he is relying on. However, Rule 16(a)(1) allows him access to grand jury transcripts only if they include testimony of the defendant. As the government represents, in this case the only witness to testify before the grand jury was an FBI agent who will not testify at trial. Thus, Kirk is not entitled to this discovery under Rule 16(a).

Rule 6(e) generally governs the disclosure of grand jury transcripts and it prohibits such disclosure absent one of the specifically stated exceptions. These exceptions are listed

under 6(e)(3)(C). Under this part of the Rule, disclosure may be made only:

> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding;
> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

As the government argues, Kirk has not filed a motion to dismiss the indictment "because of matters occurring before the grand jury." While he has filed a motion to dismiss the indictment, it is based on some alleged speedy trial problems. Thus, he cannot claim a right to the transcripts under exception (ii).

The only other argument for Kirk is under exception (i), that he needs these grand jury transcripts for his defense. The legal standard governing grand jury discovery under exception (i) is now well-settled:

> Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed.

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); In re Grand Jury Proceeding, 800 F.2d 1293, 1298 (4th Cir. 1986); see also United States v. Sells Engineering, Inc., 463 U.S. 418, 443 (1983).

The Supreme Court has also declared that an applicant for disclosure under Rule 6(e) is required to make "a strong showing of particularized need for grand jury material before any disclosure will be permitted." Sells Engineering, 463 U.S. at 443. In

light of the burden which this standard places on Kirk, he has clearly failed to allege any particularized need that would justify disclosure of the transcripts. His request should be DENIED.

Finally, the Government has filed its own reciprocal motion for discovery. Under Rule 16(b), this motion should be GRANTED. That Rule provides that once the defendant requests disclosure under Rules 16(a)(1)(C) or (D), upon compliance by the government the defendant must in turn make certain disclosures to the government, if so requested. The government's motion here simply quotes Rule 16(b), subparts (1)(A) and (1)(B). It is entitled to such discovery and the motion should be allowed.

V. Kirk's Motion to Dismiss the Indictment

I will read this over, Judge, and tell you what I think of it. Kirk seems to have drafted and filed this by himself, though his counsel signed it. He argues something about the speedy trial act, but Winn Grant's response seems to rebut any claim Kirk is trying to make. I'll let you know before the hearing.

DRW, 4/15/1988

Mark H.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | Criminal Number 88-00011-R |
| | ) | |
| PAUL KIRK, a/k/a "KIP," "MR. HOLLYWOOD" | ) | |

MEMORANDUM OPINION

I. PROCEDURAL HISTORY:

This matter is before the Court on the Defendant's motion for a new trial, pursuant to Fed. R. Crim. P. 33, on the grounds of newly discovered evidence and knowing use of perjured testimony by the Prosecutor.

On May 13, 1988, a jury convicted Mr. Kirk on five counts of wire fraud for transactions with Sandra Jean Mortimer. The conviction was affirmed by the U.S. Court of Appeals for the Fourth Circuit. Case No. 88-5096, decided June 2, 1989. Defendant filed his motion for a new trial on April 9, 1990.

II. DEFENDANT'S CLAIMS:

The Defendant claims that new evidence establishes perjury on behalf of the Government's key witness, Sandra Jean Mortimer. Defendant's Memorandum in Support of Motion for a New Trial sets forth several instances of alleged perjury by Mortimer. The only claim with evidentiary support, however, is that Mortimer lied when

she testified that she was "protected under the amnesty law of November, 1986."

The Defendant attaches as Exhibits B-D copies of what purport to be the relevant immigration laws. The Defendant alleges that Mortimer never complied with these statutory provisions and was therefore not "protected" under the amnesty law. This claim is supported by reference to Freedom of Information Act (FOIA) inquiries, but neither the FOIA responses or other evidence is provided. Defendant thus fails to produce any evidence to demonstrate that Mortimer was not in fact covered by the Amnesty Act.

Defendant also submits what appears to be a phone message as Exhibit E. This exhibit reports an inquiry about the Defendant filed by someone named "Sandy". Although Defendant claims that this inquiry was made by Mortimer under false pretenses, there is nothing in the document to support this claim.

Finally, in a Supplemental filing, Defendant contends that he was denied Ms. Mortimer's address. Yet this address was supplied to counsel for Defendant over two months prior to trial, in the FBI 302 (report of interview) provided on March 18, 1988. Moreover, Defendant clearly knew the address at the time he was making the criminal solicitations. Ms. Mortimer did not change addresses during the relevant time.

## III. THE GOVERNING LAW

In order for the Defendant to be entitled to a new trial, he

must show that:

1) Evidence was discovered after the trial;

2) The evidence could not have been discovered prior to trial with the exercise of due diligence;

3) That the evidence is not merely cumulative or impeaching;

4) That the evidence is material to the issues of the case; and

5) The evidence is such that it would probably have produced a different result had it been presented at trial.

United States v. Bales, 813 F.2d 1289, 1295 (4th Cir. 1987); Mills v. United States, 281 F.2d 736, 738 (4th Cir. 1960). Each of these must be answered affirmatively, or a new trial is inappropriate. United States v. Chavis, 880 F.2d 788, 793 (4th Cir. 1989).

## IV. DISCUSSION

The Defendant fails to produce any evidence which could not have been obtained prior to trial. Exhibit A is a letter from his attorney which was in Defendant's possession before trial. Exhibits B-D are simply copies of existing laws. They were obviously available prior to trial. Although Defendant used a FOIA request to get these laws, there is no allegation that they were not available to Defendant and his counsel prior to trial.

Exhibit E is dated 12/12/87, but Defendant fails to allege that he made efforts to obtain this document prior to trial. Defendant contends that he could not anticipate Ms. Mortimer's testimony, and therefore none of these documents were necessary before trial. Yet in his Memorandum in Support of Motion for New Trial (p. 6), Defendant states that he was intimately aware of her

status as an "illegal" alien. Defendant had such knowledge prior to trial. Indeed, the question about immigration status was posed by defense counsel. Trial Transcript 66. Defendant is not permitted to reconsider Mortimer's immigration status under the pretense of "newly" discovered immigration laws.

Second, even if the Defendant's claims are taken as true, the evidence is merely impeaching. Defendant makes no showing that this evidence impacts on an essential element of his conviction. Moreover, Mortimer testified that she lied about how long she had known the Defendant. Trial Transcript 85. Indeed, Mortimer's credibility was argued to the jury. Trial Transcript 197. Thus, even assuming Exhibit E proves that Mortimer made a false statement, it is simply cumulative and impeaching evidence.

Moreover, the relevance of Mortimer's immigration status has been previously considered in connection with this Court's denial of a subpoena duces tecum. As the Fourth Circuit noted on appeal, "the (immigration) documents have not been shown to be material to Kirk's defense." United States v. Kirk, No. 86-5095 (4th Cir. 1989) Slip Op. at 6. Since the question posed by defense counsel was irrelevant, an incorrect answer could hardly be prejudicial. Defendant makes no showing that Mortimer's immigration status was material at trial acquittal.

Furthermore, even assuming that Mortimer was incorrect about her status under the amnesty law, and that she used false pretenses at the Parole Commission, these facts would not be likely to support an acquittal. Mortimer's statement, if false, probably

resulted from a simple misunderstanding of the amnesty law. Even if it constituted perjury, the statement was irrelevant to the central issue of the trial. Mortimer had motives to lie about her alien status. These motives would not affect her testimony concerning the Defendant. Similarly, the phone message does not contain any information sufficient to support the Defendant's claim of perjury; nor it is relevant to any issue in the case.

The case against Kirk was very strong. Audio tape recording, telephone records, and Kirk's own testimony supported the conviction. Proof that Mortimer responded incorrectly to a immigration question would not have any likelihood of producing a different result at trial.

Finally, this Court finds no merit in Defendant's allegation that the Prosecution knew or should have known that Mortimer was committing perjury. The Defendant has produced no evidence suggesting that the Prosecution had reason to believe that Mortimer was not covered by the Amnesty Act. There is no reason to doubt the sworn declaration of Assistant United States Attorney G. Wingate Grant which states that the Prosecutor did not, and does not now have any reason to believe that Ms. Mortimer testified falsely.

## V. CONCLUSION

Defendant Paul Kirk has not produced any new evidence that is material to the issues tried to the jury on May 13, 1988. All of the purportedly "new" evidence with the possible exception of

Exhibit E was available to the Defendant prior to trial. Defendant has made no showing of his efforts to procure the evidence prior to trial. It is doubtful that the evidence presented by Defendant establishes perjury by witness Mortimer; but even assuming that it does, such evidence is not material to the issues involved in the case. Rather, it is simply cumulative and impeaching.

Finally, there is no reason to believe that the presentation of the Defendant's Exhibits would have any likelihood of producing a different result at trial. There is no evidence to substantiate Defendant's claim that the Prosecutor knew or should have known that Mortimer was lying under oath.

The Defendant in this case has combed the record to find potentially inconsistent testimony. Having isolated a suspect response to a question, Defendant submits evidence which purports to show that the response was incorrect, and asks for a new trial on the grounds of perjury. This request must be denied.

Rule 33 allows a new trial when evidence emerges that seriously questions the justice of the original verdict. This Defendant raises no doubts about his conviction for the crimes he committed. For these reasons, this Court finds that a new trial is inappropriate, and that Defendant's Motion should therefore by DENIED.

An appropriate Order will issue with this Memorandum Opinion.

DATE

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | Criminal Number 88-00011-R |
| | ) | |
| PAUL KIRK, a/k/a "KIP," "MR. HOLLYWOOD" | ) | |

FINAL ORDER

This matter is before the Court on the Defendant's motion pursuant to Fed. R. Crim. P. 33 for a new trial on the grounds of newly discovered evidence and knowing use of perjured testimony by the Prosecutor.

For the reasons stated in the accompanying Memorandum Opinion, Defendant's Motion is hereby DENIED.

It is so ORDERED.

Let the Clerk send a copy of this Final Order and the accompanying Memorandum Opinion to the Defendant and to counsel of record.

DATE

UNITED STATES DISTRICT JUDGE