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I N V O I C E  
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November 1, 2002

TO: Barbara Vale

IN RE: USA v. Jason Vale  
CR-02-466

Transcript of proceedings  
October 22, 2002

Before J. Gleeson

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : CR-02-466 (JG)  
-against- : United States Courthouse  
JASON VALE, : Brooklyn, New York  
Defendant. : October 22, 2002  
: 11:30 a.m.

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JOHN GLEESON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ROSLYNN R. MAUSKOPF  
United States Attorney  
BY: CHARLES KLEINBERG  
Assistant United States Attorney  
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Brooklyn, New York 11201

For the Defendant: THE LEGAL AID SOCIETY  
FEDERAL DEFENDERS DIVISION  
BY: JAN ROSTAL, ESQ.  
THOMAS CONCANNON, ESQ.

Court Reporter: Holly Driscoll, CSR  
225 Cadman Plaza East  
Brooklyn, New York  
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1 THE CLERK: United States versus Jason Vale, docket  
2 number CR-02-466.

3 MR. KLEINBERG: Good morning, Your Honor.

4 THE CLERK: Will the parties state their appearances  
5 parties.

6 MR. KLEINBERG: Charles Kleinberg, Assistant U.S.  
7 Attorney, for the United States.

8 MS. ROSTAL: Good morning, Your Honor. Jan Rostal,  
9 Federal Defenders.

10 MR. CONCANNON: Good morning, Federal Defenders,  
11 Thomas Concannon.

12 THE DEFENDANT: Good morning, Your Honor. Jason  
13 Vale.

14 MR. KLEINBERG: Your Honor, let me just bring you up  
15 to speed as of the last conference. The defendant had  
16 inspected on October 1 the materials that we had made  
17 available for inspection in July but the United States had not  
18 yet copied the materials that the defendant asked to be copied  
19 on October 1. On October 15 we hand delivered to the  
20 defendant the materials that they requested to be copied.  
21 Those materials consist of one box of documents about the size  
22 of a xerox paper box and another box of documents about half  
23 that size. That completes the government's production and as  
24 per our discussion at the last conference, I would ask that we  
25 schedule a motion day and schedule a trial date. We would ask

1 for late January or early February.

2 THE COURT: Ms. Rostal.

3 MS. ROSTAL: Judge, I know you're on trial, there's a  
4 lot going on here but if you'll indulge us for just a moment.

5 THE COURT: Take your time, the jury just retired to  
6 deliberate.

7 MS. ROSTAL: Okay. That was a quick trial.

8 I just want to, first of all, give you some  
9 background to this case because I think that the couple of  
10 times that I've appeared -- in any event, this has all been  
11 sort of overwhelming and new to me and I haven't had a chance  
12 to appreciate and understand the issues.

13 We have some specific requests, one about bail, one  
14 about clarifying a statement the government made last time we  
15 were here about Mr. Vale allegedly continuing to violate the  
16 injunction. We think that's a pressing matter and we want  
17 clarification from both the government and Court, if possible,  
18 on it. But before I get to that, let me just give you a  
19 little background about what I'm learning about this case.

20 I think I said last time that I was here that I had  
21 thought that the government was dealing with this case since  
22 the year 2000. I was wrong and I wasn't corrected by  
23 Mr. Kleinberg. I believe it was at least 1998, that's when  
24 the undercover buys of apricot seeds began. So, it was likely  
25 before then that the FDA got involved in this and lawyers got

1 involved in this.

2           Mr. Vale was targeted by the FDA, if you will,  
3 because he was operating a company, as you know, known as  
4 Christian Brothers, a web site called [www.apricotsfromgod](http://www.apricotsfromgod), and  
5 the backdrop to that which I think is of some importance in  
6 the case is Mr. Vale's own experience, when he was 18 he was  
7 diagnosed with a cancer, a small cell cancer that required  
8 surgery and a grapefruit size tumor was removed from him.  
9 They recommended continued chemotherapy and/or radiation. He  
10 didn't -- he and his mother, who has been here in court, they  
11 told him it was terminal at the time, they elected against  
12 it. The cancer returned when he was 19.

13           He then underwent very serious surgery where they  
14 removed not only tumors but a part of his lung, three ribs,  
15 he's got a back covered with scars from the surgeries. He  
16 went through a pretty critical course of radiation and  
17 chemotherapy which was very, very hard, as you can imagine, on  
18 him and his family. He came out of that and five or six years  
19 later the cancer returned, only this time in a different site,  
20 and he and his family decided that time not to go through the  
21 conventional chemotherapy and surgery treatments. He changed  
22 his diet. He is convinced that through nutrition and prayer  
23 that he was able to not only beat the cancer that he had but  
24 prevent its reoccurrence.

25           He found out about apricot seeds, believed that they

1 contained something called -- a compound, if you will, called  
2 nitrilocite which there are people out there, I remember the  
3 Laetrile debate myself from the seventies but I haven't given  
4 it much thought in recent years, and there are a lot of people  
5 out there who seem to think, rightly or wrongly, that the  
6 anecdotal evidence is that people who eat apricot seeds and  
7 lima beans and millet and certain readily available foods that  
8 have nitrilocites in them are able to not only prevent but  
9 shrink tumors.

10           There hasn't been much scientific debate on the  
11 subject because in the seventies the FDA decided that that was  
12 not a -- there was no scientific basis for that being a cure  
13 or prevention. The folks who believe in this think that that  
14 was a result of the fact that the compound itself is a food  
15 and cannot be patented and, therefore, the pharmaceutical  
16 companies couldn't get convinced to do the sort of studies and  
17 tests that would result in it becoming a new drug approved by  
18 the FDA and, therefore, no longer putting people like Mr. Vale  
19 in the position of having to sell it in some illicit way.

20           Well, race forward to the present or at least the  
21 past few years, Mr. Vale after his own experience, after what  
22 he believes are the experience of many, many other rational  
23 people and healthy people, started this company Christian  
24 Brothers and started quite openly selling apricot seeds. The  
25 FDA as early as I believe 1998 and possibly earlier started

1 sending him warning letters and that culminated in the  
2 litigation with which Your Honor is quite familiar and,  
3 ultimately, the consent decree and the injunction at hand.

4           Now, the problem that we face is that, and I say a  
5 problem only because as things -- I've learned in the course  
6 of my brief career here I guess, you know, the more  
7 interesting it seems, the less interesting it is depending on  
8 how much time you have. This is a fascinating case. There  
9 are I think important issues not only of First Amendment  
10 concerns but also free exercise of religion concerns, the  
11 question of the contempt, the nature of a contempt charge,  
12 whether it needs to be brought by grand jury indictment,  
13 whether the government can proceed by order to show cause,  
14 what are some of the defenses to this, is there an intent  
15 defense, is there a necessity defense.

16           These are all issues that we're struggling with and  
17 that at this point we can't even tell Mr. Vale what we think  
18 he ought to do. And as you can see, he's quite able himself  
19 to figure out his own course, he went pro se in the civil --  
20 parts of the civil litigation. He's very active obviously in  
21 his own defense but we're trying to give him some rational  
22 guidance here that, you know, won't waste the Court's time and  
23 is consistent with our obligations as his attorneys.

24           Now, when we stood up in court last time, what was  
25 that, a month ago or three weeks ago, we told the Court that

1 we went to the FDA offices and reviewed some 30 boxes.  
2 Mr. Kleinberg corrected me and said it was 20. It turns out,  
3 I talked to the agent, it was 27, not that I care about these  
4 things but we were in a room for many hours that day where we  
5 couldn't be in the room with any of the boxes alone, the doors  
6 were locked if somebody left or somebody came in, there's a  
7 mirror there so they could watch you going through, we had no  
8 moments of privacy to go through the boxes or the documents.  
9 They're obviously taking this very, very seriously which I  
10 don't begrudge them, they're entitled to do so, but making it  
11 that much more difficult for us to do our jobs.

12           To give you an example, I think the first time we  
13 were here, if I remember right, I remember looking at the  
14 order to show cause and there was a reference in there to an  
15 affidavit underlying the order to show cause that was sworn to  
16 by the FDA agent. I think I might have said something about  
17 it on the record, I frankly don't recall. I do recall saying  
18 something to Mr. Kleinberg about it and then I forgot about  
19 it, quite honestly. We got involved in all the other  
20 discovery. I've, you know, been collecting all the other  
21 discovery as well as boxes of things that Mr. Vale has given  
22 me and I think it was on the 15th, the day we got the  
23 discovery letter, I hadn't yet received the copies that they  
24 were going to give me and I went back to the order to show  
25 cause because I was thinking about an issue and I remembered



1 that affidavit.

2 I called the agent and I said I just want to make  
3 sure that affidavit is coming as part of this. Oh, I'll get  
4 back to you on that, he told me. And I got a call a little  
5 while later and a letter that afternoon from Mr. Kleinberg  
6 telling me that the affidavit was under seal and that we had  
7 to make a motion to the Court to unseal the affidavit that was  
8 underlying the order to show cause. That is the charging  
9 instrument against my client.

10 Now, I don't dispute that and I doubt -- and  
11 Mr. Kleinberg tells me he's not going to object to my making  
12 such a motion but never, I don't think in my practice, have I  
13 seen a situation where, for example, at an arraignment on a  
14 complaint or an arrest warrant that there's an underlying  
15 sealed affidavit and that it becomes the defense attorney's  
16 obligation to not only discover it and find it amid all of the  
17 other pieces of the puzzle that we're trying to put together,  
18 and make an affirmative motion to unseal it. This is what  
19 we're dealing with. We're trying to, you know, understand all  
20 of this and things are being kept from us that unless we  
21 figure them out, we don't have access to them, something as  
22 important as that.

23 So, one of the things that I need to ask the Court  
24 today is to unseal the affidavit which was attached to the  
25 charging instrument against my client.

1 THE COURT: Granted.

2 MS. ROSTAL: Thank you.

3 I just also want to point out just so the Court knows  
4 that in terms of what the government is seeking in this case,  
5 I have from one of the other -- from the previous litigation  
6 with Mr. Vale, one of his previous lawyers had given him what  
7 was described as the government's -- U.S. Attorney's federal  
8 sentencing guidelines calculations in the event that they did  
9 bring contempt charges against him and it refers to a section  
10 of the guidelines that they believe is an analogous guideline  
11 to a contempt count of conviction and they telling Mr. Vale  
12 that he faced a potential sentence of 235 to 293 months under  
13 the sentencing guidelines.

14 Now, I'm not suggesting that we agree with that or  
15 that that in any way has any rational basis but I know from my  
16 discussions with Mr. Kleinberg here he's looking for time and  
17 serious time and so this isn't -- it's a very simple case to  
18 them but it's complicated to us for a host of reasons I think  
19 I've outlined to the Court. I'd love to get it, you know, in  
20 many ways I'd love to get it going, I'd love to get the case  
21 tried in January. I don't think that's reasonable. I don't  
22 think it's reasonable for all of the reasons that I've stated  
23 but for my own personal concerns, I know I'm going to be gone  
24 over a week in Thanksgiving, I'm going to be gone two weeks in  
25 December over the Christmas holidays. That leaves about three

1 or four weeks maybe to prepare for this trial, not to mention  
2 that, I don't intend to bring frivolous motions by any  
3 stretch, but not to mention that I think that there are  
4 critical and really fascinating issues to think about and  
5 perhaps litigate prior to the trial in this case.

6           There was recently, just so you know, a case in the  
7 Supreme Court that the FDA -- that where the Supreme Court  
8 struck down as unconstitutional a series of FDA regulations in  
9 a declaratory judgement brought by pharmacies claiming that  
10 the FDA was infringing upon their commercial speech by  
11 refusing to let them sell or advertise certain drug  
12 compounds. There was a recent case, a First Amendment case  
13 in which -- I'm sorry, I don't have the name of it in front  
14 of me -- Ashcroft versus Free Speech Coalition, a virtual  
15 child pornography case, the Court may recall that, in which  
16 surprisingly, quite frankly, the Court found that even though  
17 child pornography is of itself illegal to possess and  
18 certainly to transport through interstate commerce, speech  
19 regarding child pornography and even in the guise of virtual  
20 pornography is protected by the First Amendment.

21           Given those cases, I think the government is going to  
22 have some serious problems in claiming that at least much of  
23 Mr. Vale's conduct is somehow outside of the First Amendment,  
24 First Amendment activity. Okay.

25           So, thank you for your indulgence. The specific

1 questions I think we want to get to are -- well, there's one  
2 issue that's related to the First Amendment issue and that is  
3 that Mr. Vale has been invited to appear on a program called  
4 PTL, Praise The Lord is the name of the program. It's through  
5 the TBN Network which stands for Trinity Broadcast Network.  
6 It is a satellite network that's -- I've never seen it but I  
7 guess is a very popular religious network, christian religious  
8 network and they've asked him to come speak, really give his  
9 so-called testimony, in the parlance of that world, about his  
10 own fight with cancer and struggle with cancer, his own belief  
11 that through prayer and nutrition he was able to combat the  
12 cancer.

13           He has no intention of selling products in this  
14 program but it would be a discussion of his own experience as  
15 well as his experience and knowledge of what other people have  
16 told him and what he's seen in other people who have used  
17 nutrition as a way of treating themselves and I think that's  
18 one of the issues that we have for you. That would be  
19 November 21st.

20           THE COURT: Why is my permission necessary?

21           MS. ROSTAL: Well, first of all, because the bail  
22 restrictions contain geographical restrictions and this would  
23 require him to go to California to appear on the program, so  
24 that -- I guess that's the short answer. The longer answer is  
25 that I think we're concerned that given the statements the

1 government made last time we were here in court, which was  
2 that Mr. Vale continues to flagrantly, you know, violate the  
3 injunction, we're wondering are they talking about speech  
4 because if that's the case, then we got a whole different  
5 issue here and because he, you know, he feels very strongly  
6 about this and we need some clarification about how to advise  
7 him for the future or whether we need to litigate that issue.

8 THE COURT: So, apart from enlarging the bail  
9 restrictions to allow him to go to California, what relief are  
10 you seeking from me in connection --

11 MR. CONCANNON: I didn't hear.

12 THE COURT: What relief are you seeking from me in  
13 connection with this?

14 I don't really care what his testimony is. I mean  
15 there's an injunction -- there's a long answer to much of --  
16 there are many things to talk about but I deal with cases,  
17 right. It's entirely possible to commit a crime and to  
18 include in the crime of contempt by speech. I mean is your  
19 question whether if he goes and gives this speech, he's going  
20 to be -- are you asking me to decide whether that's contempt?

21 MR. CONCANNON: No.

22 THE COURT: What are you asking me?

23 MR. CONCANNON: Your Honor, well, I think it was not  
24 so much to ask you but in this forum to ask that the  
25 government make some statement as to whether or not what was

1 just described, what's been described thus far would be a  
2 violation of the injunction. What we're trying to do is at  
3 least not make things worse.

4           We're not prepared, as Jan Rostal indicated, to tell  
5 him what we ought to do, whether we should go to trial,  
6 whether or not we -- we don't know, for example, whether or  
7 not the consent decree, whether or not he could have waived  
8 First Amendment rights by agreeing to those conditions back  
9 whenever that was signed and made into a court order, that's  
10 not clear to us yet, but I don't think that you really --  
11 we're not asking for an advisory opinion, we know the Court  
12 really can't do that but we're hoping that Mr. Kleinberg will  
13 tell us whether or not the things that we specifically  
14 described right now, whether or not those things are, in the  
15 government's opinion, violative of the decree so at least  
16 we're not making things worse and we're not facing obstruction  
17 and, you know, other bail difficulties, other things that  
18 would complicate the sentence.

19           We don't know whether, for example, if we're going to  
20 go to trial, whether to suggest that we have a non-jury trial,  
21 that's one of the possibilities, but all of the things that  
22 Jan Rostal has mentioned and I've mentioned, they've not been  
23 given very little attention, we've got two NYU law students  
24 helping us and putting a lot of hours in to do it as well.

25           I mean it is very complicated. At one level it is

1 California is granted. This other business about asking of  
2 the government whether they think it is a contempt, go ahead,  
3 do it, just do it on your time. You're right, I can't give an  
4 advisory opinion. Each time that we appear and I hear that  
5 this is new and there's lot of issues, it has less and less  
6 persuasive force, right. I've been hearing it for weeks. It  
7 is an interesting case, you'll make some interesting motions  
8 perhaps, and we'll deal with them. Let's get on with it.

9 How much time do you think you need to make your  
10 motions?

11 MS. ROSTAL: I think we need at least a month.

12 THE COURT: All right. Is a month enough?

13 MR. CONCANNON: I don't think so.

14 THE COURT: All right, six weeks from now the  
15 defendant will make his motions.

16 MR. CONCANNON: Thank you, Your Honor.

17 THE COURT: Put some dates on this.

18 THE CLERK: December 6th.

19 THE COURT: December 6th for motions. How much time  
20 do you think you'll need to respond?

21 MR. KLEINBERG: Not entirely clear until I see it but  
22 I would ask, since I have a trial in December, for three weeks  
23 from then.

24 THE COURT: All right. That would be December 27th.  
25 Okay. Two weeks after that, V, could you put a date on this

1 for us.

2 MR. KLEINBERG: Actually, hold on, Your Honor.

3 THE CLERK: January 10th.

4 MR. KLEINBERG: I'm sorry, I don't have my calendar  
5 out, let me just check one thing on that.

6 (Pause.)

7 MR. KLEINBERG: Actually I would -- the 27th is a  
8 Friday, I would ask until the 31st -- no, the 30th which is  
9 the Monday thereafter.

10 THE COURT: You want to work the weekend?

11 MR. KLEINBERG: I will be working over the weekend,  
12 I'm not getting off trial.

13 THE COURT: And then two weeks after that, V, for the  
14 reply papers.

15 THE CLERK: January 10th.

16 MS. ROSTAL: I won't be back until the 8th, is that a  
17 Monday?

18 THE CLERK: The 8th is a Wednesday.

19 THE COURT: When are you leaving?

20 MS. ROSTAL: I believe --

21 (Ms. Rostal confers with the clerk.)

22 MS. ROSTAL: I'm back the week of the 6th, so I'm  
23 back the 6th.

24 THE COURT: So make it a week after Ms. Rostal  
25 returns.



1 THE CLERK: The 17th.

2 THE COURT: The 17th for reply papers. What is the  
3 following Friday?

4 THE CLERK: 24th.

5 THE COURT: That's oral argument and hearing, if  
6 necessary, on any motions.

7 What are the Mondays in February?

8 THE CLERK: That will be at three o'clock on the  
9 24th.

10 THE COURT: Three o'clock on the 24th for oral  
11 argument and hearing on the defendant's motions. The Mondays  
12 in February are when?

13 THE CLERK: Mondays in February, you've got the 3rd,  
14 the 10th, 17th.

15 THE COURT: February 17th for trial, 9:30.

16 What else do we need to address today?

17 MR. CONCANNON: I don't think anything, Your Honor.

18 MS. ROSTAL: There's -- I don't know if it is a  
19 property issue or not but there were some computers that were  
20 seized from Mr. Vale's I guess residence or somebody's  
21 residence, in any event, before I came into the case -- well,  
22 before we came into the case, several years ago I believe.

23 Now, the government tells me they're going to get the  
24 contents of the hard drives to us, that I don't think has  
25 happened yet, they're not -- I don't think they're in the

1 stuff we have. In any event, Mr. Vale would like the  
2 computers back. Once the government has taken whatever they  
3 need off of the hard drives, Mr. Vale very much would like the  
4 computers back and so I guess I'm making a request for return  
5 of property, of the computers.

6 MR. KLEINBERG: I have no problem with that once we  
7 retrieve what's on the hard drive. I will consult and  
8 determine how much time we need.

9 THE COURT: Is this the first time --

10 MR. KLEINBERG: It is the first time.

11 THE COURT: Why are we doing it this way?

12 THE DEFENDANT: This is three years.

13 THE COURT: Stop talking. It is never in your  
14 interest to speak out loud in a criminal case. Speak to your  
15 lawyer privately.

16 Why are we doing this for the first time here in open  
17 court? Is there no communication?

18 Why did you wait until today to have the underlying  
19 affidavit unsealed, what sense does that make?

20 MR. KLEINBERG: Actually I misunderstood that's what  
21 she wanted. She will have it this afternoon.

22 THE COURT: You should talk to each other. So much  
23 of this should be done informally. It doesn't seem right to  
24 me that a request under Rule 41 for return of property gets  
25 made for the first time in court.

1 MR. CONCANNON: Your Honor, I agree, I mean we  
2 agree. It just seemed that when we were told that we had to  
3 make a motion to get part of an accusatory instrument  
4 unsealed, that that was a way of telling us don't bother,  
5 there's no -- because I had called Mr. Kleinberg, he did call  
6 me back, we left messages but the answer to the question about  
7 the unsealing of that I thought answered many others about how  
8 we might communicate, so I apologize for bringing some of  
9 these things to your attention here.

10 MR. KLEINBERG: I'm happy to speak to defense counsel  
11 any time. I return the calls. I'll be happy to speak, I  
12 really will.

13 MR. CONCANNON: Thank you, Your Honor.

14 THE COURT: Have a good day.

15 MS. ROSTAL: Thank you, Judge.

16 MR. KLEINBERG: Thank you, Your Honor.

17 (End of proceedings.)  
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