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8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

10 UNITED STATES OF AMERICA,
11
12 Plaintiff,

13 vs.

14 DAVID K. FITCH,
15 Defendant.

Case No. 02:04-cr-0262 JCM (PAL)

**DEFENDANT’S OBJECTIONS TO
THE PRE-SENTENCE REPORT**

16 The Defendant, DAVID FITCH, by and through his counsel, Lisa A. Rasmussen and
17 David R. Johnson of the law firm of Watt, Tieder, Hoffar & Fitzgerald, LLP, hereby submits the
18 following Objections to the Presentence Investigation Report (hereinafter “PSI”).

19 **OBJECTIONS**

20 **1. Page 5, Paragraph 12.**

21 “... a neighbor ... heard a scream late one evening. The neighbor later observed the
22 defendant exiting the trailer carrying a rolled-up rug. Ms. Bozi was never seen again by her
23 neighbor.”

24 **Objection:** This case proceeded to trial and there was no such testimony at trial.

25
26 **2. Pages 10-11, Paragraphs 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49.**

27 **Objection:** The conduct alleged in these paragraphs should be stricken absent the
28

1 following:

2 A. An opportunity to review all discovery relevant to these allegations,
3 including *Brady, Giglio* and *Jencks* material;

4 B. An evidentiary hearing permitting Mr. Fitch an opportunity to confront and
5 cross-examine the witnesses, agents and/or informants to whom Mr. Fitch allegedly made these
6 statements.

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8 **3. Page 15, Paragraph 61:**

9 “Since the loss was determined to be at least \$120,000, but less than \$200,000, a seven-
10 level increase is applied.”

11 **Objection:** The PSI computes the loss level by duplication of the amounts actually
12 involved. The actual and contemplated loss, for which Mr. Fitch was convicted, is as follows:

| Date | Activity | Amount | Count(s) / Conduct |
|--------------------|--|----------------------|--|
| 7/13/99 to 7/20/99 | Deatheridge GM Master Card purchases | \$1,500 (rounded up) | One (access device) |
| 9/7/99 | ATM withdrawal | \$1,000 | Three (bank fraud) Two (access device) |
| 9/9/99 | ATM Withdrawal | \$1,000 | Four (bank fraud) Two (access device) |
| 9/9/99 | ATM Withdrawal | \$1,000 | Five (bank fraud) Two (access device) |
| 9/10/99 | ATM Withdrawal | \$1,000 | Six (bank fraud) Two (access device) |
| 9/11/99 | Check drawn on Citibank account, deposited to Fitch, Norwest Account | \$40,000 | Seven (bank fraud) |
| 9/14/99 | ATM Withdrawal | \$1,000 | Eight (bank fraud) Two (access device) |
| 9/15/99 | ATM Withdrawal | \$1,000 | Nine (bank fraud) Two (access device) |
| 9/16/99 | ATM Withdrawal | \$1,000 | Ten (bank fraud) Two (access device) |
| 9/17/99 | ATM Withdrawal | \$1,000 | Eleven (bank fraud) Two (access device) |

| | | | | |
|---|----------|--|------------------------------------|---|
| 1 | 10/5/99 | Attempt to use Bozi insurance card | \$2500 | Twelve (access device) |
| 2 | 10/26/99 | Attempt to purchase synthetic emeralds | \$5,500 | Thirteen (access device) |
| 3 | 11/17/99 | Deposit from ATM withdrawals | (\$2,000, already included above) | Fourteen (money laundering) |
| 4 | 11/17/99 | Deposit from ATM withdrawals, Citibank check | (\$29,000, already included above) | Fifteen (money laundering instruments: §1956) |
| 5 | 11/17/99 | Deposit from ATM withdrawals, Citibank check | (\$29,000, already included above) | Sixteen (money laundering: §1957) |
| 6 | | TOTAL: | \$55,000 | |

9 Accordingly, the total actual loss, plus the contemplated loss is \$55,000, not more than
10 \$120,000. Thus, a five level adjustment, is appropriate, not a seven level adjustment.

11
12 **4. Page 15, Paragraph 63.**

13 *“The instant offenses involved both relocation and sophisticated means, a two-level
14 increase is applied.”*

15 **Objection:** The offense did not involve relocation, nor did it involve sophisticated
16 means. While an argument can be made that more than minimal planning was utilized, this does
17 not equate to sophisticated means. The offense conduct involved use of an access card and use of
18 a checkbook. There is nothing sophisticated about it. Thus, a two-level adjustment is not
19 warranted.

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21 **5. Page 15, Paragraph 67.**

22 *“Adjusted Offense Level: 17.”*

23 **Objection:** Pursuant to the objections set forth herein in paragraphs 3 and 4, the
24 Adjusted Offense Level is 13, not 17.

25 ...

26 ...

27 ...

1 **6. Page 17, Paragraphs 82 through 89:**

2 *“Multiple Count Adjustment, per U.S.S.G. §3D1.4”*

3 **Objection:** The grouping computations are miscalculated because the events are not
4 properly grouped.

5 According to USSG §3D1.2(b), “when counts involve the same victim and two or more
6 acts or transactions connected by a common criminal objective or constituting part of a common
7 scheme or plan,” they are to be grouped together in a single group. Additionally, “When counts
8 involve the same victim and the same act or transaction,” they are to be grouped together into a
9 single group. USSG §3D1.2(a). Offenses covered under the “closely related counts” provision
10 include offenses computed under §§ 2F1.1 and 2S1.1, and 2S1.2. *See* USSG §3D1.2(d).

11 Thus, there should be two groups, not three. Group 1 should include all conduct
12 involving Maria Bozi and Group 2 should include only the conduct relating to Deatheridge, a
13 separate victim.

14 Pursuant to USSG §3D1.3, the highest of the offense levels included in each group is to be
15 used for computing the applicable guidelines for that group.

16 Group 1:

17 The highest applicable offense level for Group 1 is 20, for the “Laundering Money
18 Instruments” under USSG §2S1.1(a)(2).

19 Group 2:

20 Should be recomputed as follows, per USSG §2F1.1:

| | |
|--|----|
| 21 Base level | 6 |
| 22 Specific Characteristic (\$5,500) | +2 |
| 23 More than minimal planning | +2 |
| 24 Adjusted offense level | 10 |

25
26 Accordingly, the “Multiple Count Adjustment,” pursuant to USSG §3D1.4 should be
27 computed as follows:

| | | | |
|---|---|----|-------------------|
| 1 | Adjusted offense level for Group 1 | 20 | 1 unit |
| 2 | Adjusted offense level for Group 2 | 10 | 0 (per §3D1.4(c)) |
| 3 | Total number of units: | | 1 |
| 4 | Increase in offense level per units: | | 0 |
| 5 | Combined Adjusted Offense Level | | 20 |
| 6 | Total Offense Level | | 20 |

7

8 **7. Page 17 and 18, Paragraphs 90 and 91.**

9 *“Offense Behavior Not Part of Relevant Conduct”*

10 **Objection:** Offense behavior that is not relevant conduct should not be included in the
 11 PSI. These paragraphs, as well as those indicated in Objection #2 should be stricken from the PSI.

12

13 **8. Page 20, Paragraph 96.**

14 The PSI indicates that three (3) criminal history points are attributable to Mr. Fitch’s
 15 conviction, sustained on November 14, 2000.

16 **Objection:** The prison sentence imposed on November 14, 2000 does not constitute
 17 part of Mr. Fitch’s prior criminal history for the purpose of computing his criminal history score
 18 in this case.

19 The Introductory Commentary to Chapter 4, Part A of the 1998 Sentencing Guidelines
 20 states, in pertinent part, as follows:

21 The comprehensive Crime Control Act sets forth four purposes of
 22 sentencing. . . . A defendant’s record of past criminal conduct is directly relevant
 23 to those purposes. A defendant with a prior criminal behavior is more culpable
 than a first offender and thus deserving of greater punishment. . . .

24 The introductory conduct makes it clear that the purpose of establishing the criminal
 25 history of a defendant is to contemplate their past pattern of criminal behavior, not that which
 26 occurred following the conduct in the case at issue.

27 Here, the PSI contemplates three (3) criminal history points added as a result of Mr.
 28

1 Fitch's November 14, 2000 conviction. The conviction was for offense conduct occurring in
2 November 1999 and on February 8, 2000. Those offenses are considered relevant conduct
3 herein. Mr. Fitch purchased the identity of David Krause and later used it to obtain a passport
4 and to open a bank account. Mr. Fitch was convicted herein of using the bank account to launder
5 money taken from Ms. Bozi's accounts.

6 USSG §4A1.1(a) directs the probation officer to "Add 3 points for each prior sentence of
7 imprisonment exceeding one year and one month." A "prior sentence" is further defined at
8 USSG 4A1.2(a). *See* Application Note 1 to §4A1.1(a). USSG 4A1.2(a)(1) states:

9
10 The term "prior sentence" means any sentence previously imposed on
11 adjudication of guilty, whether by guilty plea, trial or plea of nolo contendere for
12 **conduct not part of the instant offense.**

13 (Emphasis added.)

14 Application note 1 to §4A1.2 states as follows:

15 *A sentence imposed after the defendant's commencement of the instant*
16 *offense, but prior to sentencing on the instant offense, is a prior sentence if it was*
17 *for conduct **other than conduct that was part of the instant offense.** Conduct that*
18 *is part of the instant offense means conduct that is relevant conduct to the instant*
19 *offense under the provisions of §1B1.3 (Relevant conduct).*

20 (Emphasis added.) Here, the conduct for which Mr. Fitch was convicted on November 14, 2000
21 is relevant conduct related to this offense. Similarly, the instant offense conduct was considered
22 relevant conduct to Mr. Fitch's 2000 case when he was sentenced in November 14, 2000. (*See*
23 *PSI, filed separately under seal in this case.*) Furthermore, the offense conduct herein occurred
24 from July 13, 1999 to November 17, 1999. The prior offense conduct was in November 1999 and
25 February 8, 2000.

26 USSG §4A1.2, Application Note 3 addresses "related cases." It states, in pertinent part, as
27 follows:

28 *Prior sentences are not considered related if they were for offenses that*
were separated by an intervening arrest (i.e., the defendant is arrested for the first
offense prior to committing the second offense). Otherwise, prior sentences are
considered related if they resulted from offenses that (A) occurred on the same

1 *occasion, (B) were part of a single common scheme or plan, or (C) were*
2 *consolidated for trial or sentencing.*

3 In this case, there is no intervening arrest. There was one arrest on February 8, 2000.
4 Additionally, the offense scheme occurred during the same period of time and was part of a
5 common scheme or plan. Mr. Fitch met Mr. Krause in October 1999. He began using Mr.
6 Krause's identity and obtained a passport in November 1999. The conduct herein occurred
7 between the dates July 1999 and November 17, 1999. The conduct is part of what the
8 government characterizes as a common scheme to defraud Ms. Bozi and to convert her money for
9 his personal use. Obtaining Krause's identity was part of that scheme and a Krause account was
10 used, according to the government, to launder Bozi's money. Accordingly the cases are related.
11 They have always been considered related.

12 Based upon the foregoing, the three (3) contemplated by the PSI cannot be considered as
13 part of Mr. Fitch's criminal history. To add them to his criminal history would be to defeat the
14 legislative intent of the applicable guidelines addressed herein.

15 **9. Page 21, Paragraph 97.**

16 *"The total of the criminal history points is 8, which establishes a Criminal History*
17 *Category of IV."*

18 **Objection:** The total criminal history points are five (5), not eight (8). This places Mr.
19 Fitch in a criminal history category III, not IV.

20 **10. Page 27, Paragraphs 133, 134 and 135.**

21 *"Analysis: Ability to Pay."*

22 **Objection:** Mr. Fitch is indigent and a fine is not warranted. Furthermore, the
23 government seized all of his assets in this case. The notion that Mr. Fitch has substantial assets is
24 contradicted by the government's theory in this case, that he has not held a job for many years
25 and that he gets by in life by taking advantage of others.

26 The probation officer states that Mr. Fitch told a confidential information that he held
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1 \$650,000 in a bank account in Europe, that he stated he had money in an English account and that
2 he owned a \$500,000 sailboat in Ipswich, England and that he would pay \$100,000 for assistance
3 in escaping from jail. Aside from the fact that this is pure hearsay and that it is not corroborated
4 by a shred of evidence, it is directly contradicted by the probation officer's interview with Mr.
5 Fitch's mother who stated that he had no assets and that she sends him what little money she can.

6 While it would not be inappropriate to suggest that Mr. Fitch disgorge any ill-gotten gains
7 as a result of the offense conduct herein, the Court is respectfully reminded that the government
8 seized everything Mr. Fitch owned or otherwise held possession to in February 2000. The seized
9 assets have never been returned to Mr. Fitch, including any money in the Bozi account that may
10 have rightfully been his.¹ Additionally, Mr. Fitch has been represented by appointed counsel,
11 based on his indigent status, since his February 8, 2000 arrest.

12 Accordingly, a fine is not appropriate in this case.

13
14 **11. Page 27, Paragraph 137.**

15 *“Based on a total offense level of 23 and a criminal history category of IV, the guideline*
16 *range for imprisonment is 70 to 87 months.”*

17 **Objection:** The total offense level in this case is 20 and Mr. Fitch's criminal history
18 category is III, not IV. Thus, the guideline range for imprisonment is **41 to 51 months**, not 70 to
19 87 months.

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21 **12. Page 29, Paragraphs 147, 148 and 149.**

22 Factors that May Warrant Departure.

23 **Objection:** Mr. Fitch disagrees that the government's analysis of the evidence
24 “supports the clear and convincing inferences that Ms. Bozi is dead, and her death facilitated the
25 defendant's offense of conviction.”

26 Furthermore, the PSI does not address the issue that Mr. Fitch, through is counsel, asked

27 _____
28 ¹ The government cannot establish the source of the Bozi account money. The account was
opened after Mr. Fitch married Ms. Bozi.

1 the probation officer to address and that is whether the sentence herein should run concurrent to
2 the sentence imposed in the 2000 case pursuant to USSG §5G1.3.

3
4 **13. Page 32, Recommendation**

5 **Objection re: Recommended Sentence**

6 For each of the reasons set forth herein in paragraphs 3, 4, 5, 6, 8, 9 and 11, the applicable
7 guideline range does not exceed 51 months. Thus, a recommendation for 87 months is not
8 applicable in this case.

9 **Objection re: Fine**

10 For each of the reasons set forth in paragraph 10, it is not appropriate to impose any fine
11 upon Mr. Fitch, let alone a \$75,000 fine. He has no known means of paying the \$12,500 fine
12 imposed upon him in the 2000 case. He has been in continuous custody since February 8, 2000,
13 he has no job, no income and no assets. It is respectfully requested that the fine recommended in
14 the PSI be reconsidered.

15
16 **CONCLUSION**

17 It is respectfully submitted that the foregoing objections should be corrected in the manner
18 proposed herein prior to the imposition of sentence upon Mr. Fitch.

19 Dated: September 28, 2007

WATT, TIEDER, HOFFAR & FITZGERALD, LLP

21
22 /s/ Lisa A. Rasmussen

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Watt, Tieder, Hoffar & Fitzgerald, LLP, that I am a person competent to serve papers and not a party to the above-entitled action and that on the 28th day of September, 2007, I served a copy of the foregoing:

DEFENDANT'S OBJECTIONS TO THE PRE-SENTENCE REPORT

upon the following via the CM/ECF system as follows:

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