

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 THE HONORABLE JAMES C. MAHAN, JUDGE PRESIDING

4
5
6 UNITED STATES OF AMERICA,**COPY**

7 Plaintiff,

8 vs.

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

9 DAVID KENT FITCH,

SENTENCING10 Defendant.
11 _____/12
13 **REPORTER'S TRANSCRIPT OF PROCEEDINGS**

14 FRIDAY, OCTOBER 19, 2007

15
16 1:30 P.M.17
18 **APPEARANCES:**

19 For the Plaintiff: TIMOTHY S. VASQUEZ, AUSA

20 For the Defendant: LISA A. RASMUSSEN, ESQ.

21 Probation Dept.: WENDY BECKNER, USPO

22
23
24 Reported by: Joy Garner, CCR 275
Official Federal Court Reporter

1 LAS VEGAS, NEVADA, FRIDAY, OCTOBER 19, 2007

2 1:30 P.M.

3 * * *

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

5
6 THE CLERK: This is the time set for the
7 imposition of sentencing of David Kent Fitch, Criminal
8 Case Number 2:04-CR-0262-JCM-PAL, United States of
9 America versus David Kent Fitch. Counsel, please note
10 your appearance for the record.

11 THE COURT: Mr. Vasquez.

12 MR. VASQUEZ: Good afternoon, your Honor.
13 With me at counsel table is Special Agent Henry
14 Schlumpf the case agent.

15 THE COURT: Thank you. Ms. Rasmussen.

16 MS. RASMUSSEN: Good afternoon, your Honor,
17 Lisa Rasmussen with Dave Johnson on behalf of David
18 Fitch who is present in custody before the Court.

19 THE COURT: All right. Are you and the
20 defendant ready to proceed this afternoon?

21 MS. RASMUSSEN: We are, your Honor. I do
22 have one question of the government and that was if it
23 intends to call any witnesses, so my answer to your
24 question depends on their answer.

25 THE COURT: You didn't -- I wasn't notified

1 if you wanted to call any witnesses.

2 MR. VASQUEZ: No, your Honor. In fact, I
3 informed Mr. Rasmussen a few days ago -- I think it
4 was a few days ago that I may play a portion of the
5 video of the decedent Maria Bozi's mother, but I don't
6 plan on any live witnesses in court.

7 MS. RASMUSSEN: And then I'm ready to
8 proceed. Thank you.

9 THE COURT: All right. All right, any
10 reason why sentence should not be imposed at this
11 time?

12 MS. RASMUSSEN: No.

13 THE COURT: Let me ask you and Mr. Fitch to
14 approach the podium, please, and Mr. Johnson if you
15 want to.

16 All right, Mr. Fitch, this is the time set
17 for imposition of sentencing upon you in Case Number
18 CR-S-04-00262. On June 21, 2007, following a jury
19 trial you were found guilty of a violation of 18 USC,
20 Section 1029, Subsection (a)(2), two Counts of
21 fraudulent use of an access device; 18 USC, Section
22 1344, nine Counts of bank fraud; 18 USC, Section 1029,
23 Subsection (a)(2), two Counts of attempted use of an
24 access device; and 18 USC, Section 1956, Subsection
25 (a)(1)(b), two Counts of laundering monetary

1 instruments; and 18 USC, Section 1957, one Count of
2 money laundering; a total of sixteen Counts, and the
3 jury found you guilty of all sixteen. Having been
4 found guilty pursuant to a jury verdict, the Court
5 adjudicates you guilty of the above-referenced Counts.

6 Now, the Probation Department filed a
7 presentence report on September 14, 2007. The
8 defendant filed his objections to the presentence
9 report on September 28, 2007, and I also received some
10 a day or two ago that you filed, is that correct?

11 MS. RASMUSSEN: Yes.

12 THE COURT: The Probation Department then
13 filed an addendum to the presentence report on October
14 3, 2007. Have you filed any other addenda?

15 PROBATION OFFICER: Your Honor, the
16 probation office received the most recent -- I guess
17 it was defendant's memorandum and reiteration of the
18 objections just yesterday afternoon at 4:30.

19 THE COURT: I got it yesterday.

20 PROBATION OFFICER: We did not prepare a
21 written response for your Honor as to those now, just
22 the original addendum then.

23 THE COURT: That's fine. I wanted to be
24 sure.

25 MS. RASMUSSEN: They are not -- just to

1 clarify, my objections were filed back in September
2 and the sentencing memorandum just sets forth our
3 position on how we believe the calculations should be.

4 THE COURT: All right. Now, before we
5 discuss your written objections, are there any other
6 objections to the presentence report, Ms. Rasmussen.

7 MS. RASMUSSEN: No, none that I didn't
8 brief.

9 THE COURT: All right. Now, Mr. Fitch, did
10 you read the presentence report?

11 THE DEFENDANT: Yes.

12 THE COURT: Did you discuss it with your
13 attorney?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Did you find any errors or
16 discrepancies other than those she's pointed out to me
17 in writing?

18 THE DEFENDANT: I haven't had a chance to
19 read -- which one?

20 (Attorney-client conference held.)

21 MS. RASMUSSEN: I think that he mailed them
22 to you.

23 (Attorney-client conference held.)

24 THE DEFENDANT: No.

25 THE COURT: All right. All right, let me

1 then hear the argument on your objections to the
2 presentence report.

3 MS. RASMUSSEN: Thank you, your Honor.
4 There's I think --

5 THE COURT: And understand I've reviewed
6 everything that's been written and filed with the
7 court so --

8 MS. RASMUSSEN: I know that you have.
9 Okay, so there's three primary things. One is the
10 criminal history category. He was a category three
11 when he was sentenced in 2000, and it's our position
12 that he is still a category three because that's what
13 the guidelines mandate. They basically say if it's
14 related conduct, you are not to count the most recent
15 term that he provided. And the reason for that is
16 because if would allow the government to do exactly
17 what it's done in this case to manipulate and stagger
18 an increase and make things far worse than are. So
19 that's one issue and it's our position. He has five
20 criminal history points just as he would have if all
21 of these Counts had been charged together in 2000.

22 Secondly is the grouping issue, and I have
23 to tell the Court, and I'm sure that the Court has
24 probably the same reaction, this is one of the more
25 technically complicated sentencings I have ever done,

1 and I've done a lot of them. Before I became a
2 lawyer, I worked exclusively in the sentencing arena.
3 So here's -- there's a couple of different issues with
4 regard to the grouping. First is I regrouped them in
5 the way I believed was proper. Probation grouped them
6 with the bank fraud and access device Counts, the
7 money laundering Count, and the laundering monetary
8 instruments Count.

9 I believe that the proper way to group them
10 is Bozi Deatherage because that's what the guidelines
11 mandate. They say if there's a common victim or an
12 interrelated scheme, that's how they shall be grouped.
13 So within that umbrella I regrouped them and came up
14 with two groups. In the Bozi group there are three
15 possible ways to analyze the sentence. There's the
16 bank fraud and access device where you go to 2B1 or
17 2F1 if you're using the '98 Guidelines. There
18 laundering, money laundering and monetary instruments.
19 So the highest of those I come up with is twenty and
20 that's under the 1998 Guidelines.

21 Then the first group is just the Deatherage
22 Counts, and those are under the traditional fraud
23 charge, and because the amount of the Deatherage loss
24 is less than \$2,000.00, I come up with -- actually in
25 my objections I came up with a level ten, but when

1 I -- I used the wrong amount there. If you use the
2 proper amount, it's actually a level eight, but it
3 doesn't really matter because when you have one group
4 that's a twenty and one group that's a ten, you don't
5 add -- you don't yield to the additional units because
6 they are more than ten levels apart. So whether it's
7 an eight or a ten is irrelevant.

8 So that's leaves the offense level of
9 exactly twenty, and that's where I came up with that,
10 and that's how what I did was distinct and different
11 from the manner in which probation did it. Mr. Fitch
12 also sent to the Court a computation saying that he
13 thought it should be level sixteen under the 2004
14 Guidelines and he's slightly inaccurate because if you
15 use his calculation, it would actually be seventeen
16 because there would be half a unit added because it's
17 not more than ten apart. But besides that issue, I've
18 explained to him this morning why I chose the 1998
19 Guidelines, and I think that that was the proper
20 guideline to choose.

21 So having said all of that, I come up with
22 a level twenty and a criminal history category three
23 which is forty-one to fifty-one months. Those are two
24 of the three primary things that I addressed in the
25 objections. The third substantial thing in the

1 objections was the -- oh, and I might add that my
2 calculations are based on a loss amount of less than
3 \$70,000.00.

4 THE COURT: That's right. I understand
5 your argument with that.

6 MS. RASMUSSEN: Okay, and that part I think
7 is fairly clear. Now, the third substantial thing,
8 which is also addressed in my sentencing memo, is the
9 concurrent versus are we here to avert the whole new
10 sentence, and I think the case law is clear that when
11 they're interrelated, when it's all the same scheme,
12 and guidelines specifically address under 5G1.3 the
13 manner in which the court is to impose sentence, and
14 then it should be concurrent in this instance.

15 And it's specifically designed to prevent
16 the government from doing what it did in this case,
17 charging half the conduct in 2000, waiting four years
18 and charging the other half, when it could have by its
19 own admission charged all of this conduct in 2000. In
20 our trial --

21 THE COURT: And the effect of what you're
22 saying is that then Mr. Bozi, I'd hand him the key out
23 of here today.

24 MS. RASMUSSEN: Mr. Fitch?

25 THE COURT: I'm sorry. Mr. Fitch. I was

1 looking down at the name.

2 MS. RASMUSSEN: Yes, I understand.

3 THE COURT: I apologize, Mr. Fitch.

4 MS. RASMUSSEN: I understand, your Honor,
5 but I think that is the effect because had he been
6 charged with all of these Counts in 2000, he still
7 would have gotten ninety-seven months. That's -- he
8 wouldn't have gotten -- because they knew the grouping
9 would have included the firearm Counts and that would
10 have been the highest level which was twenty-four and
11 then they added two for obstruction, and he was at a
12 twenty-six guideline level criminal history
13 category three which was eighty to ninety-seven and he
14 got the high end of that. And I think what in the one
15 case, the recent case, and I don't know if I brought
16 everything up to the podium.

17 May I jump back to the table for a moment?

18 THE COURT: Yes, certainly.

19 MS. RASMUSSEN: Thank you. I addressed it
20 in the -- in my opposition to the government motion
21 for an upward departure, but the case is a Ninth
22 Circuit case. It's a case out of San Diego. It's
23 United States versus Castillo-Basa, 483 F.3d 890,
24 Ninth Circuit. It's April of this year. In that
25 opinion, Reinhardt says very clearly on the issue

1 of -- of -- in the context of issue preclusion and
2 collateral estoppel the government may not take a
3 Mulligan.

4 The government doesn't get to get
5 ninety-seven in 2000, come back before you today and
6 say, well, here's all the same facts, but here's a
7 little bit stronger presentation than what we
8 presented to Judge Dawson in 2000, and this time we're
9 seeking thirty years or life and here's why. The case
10 is very clear on that, and it's not -- and I think
11 Castillo Basa is a really good case because it
12 illustrates the distinction between the collateral
13 estoppel issue preclusion argument and double jeopardy
14 which is a perfect defense to preclude a subsequent
15 indictment.

16 We can't meet the Blockberger (phonetic)
17 test -- I always want to say Blockbuster -- but we
18 can't meet the Blockberger test under double jeopardy,
19 but an element of double jeopardy is issue preclusion
20 and collateral estoppel and that's what that case
21 addresses. And basically what the government is doing
22 here is taking all of the relevant conduct that it
23 used in 2000, re-presenting it to you today in a
24 different light in a stronger manner by motion and
25 saying now here's what we think he should get. This

1 is what the government can't do. It simply violates
2 the double jeopardy provision, but it's also
3 fundamentally unfair, and the Ninth Circuit prohibits
4 it.

5 So I am telling you that I think it should
6 be concurrent, and while that may seem to the
7 government from their point of view unfair, we've been
8 saying this all along, he should have been charged
9 initially with all of this conduct. They don't get to
10 stagger prosecutions hoping that Mr. Fitch will do
11 life two years at a time. And they can't because the
12 relevant conduct is all the same, none of it has
13 changed. Special Agent Schlumpf testified in our
14 trial that on February 8th, 2000, when he stopped Mr.
15 Fitch. Well, he didn't stop him, he took him back to
16 the FBI office and Mr. Fitch according to Special
17 Agent Schlumpf admitted that he done the ATM
18 withdrawals and written the check and laundered money
19 essentially.

20 So all of the information that they knew in
21 this case is the same information that was presented
22 in our trial, and I know that I've been jumping up and
23 down throughout this case saying you can't do this,
24 you can't do this. Okay maybe they can bring a
25 subsequent prosecution, but it's at the sentencing

1 level that they don't get another bite at the apple.
2 That's the primary gist of my argument.

3 THE COURT: All right.

4 MS. RASMUSSEN: Okay?

5 THE COURT: Very good.

6 MS. RASMUSSEN: And I would like, of
7 course, to respond to anything the government is going
8 to say.

9 THE COURT: Sure.

10 MS. RASMUSSEN: Thank you.

11 THE COURT: Thank you. All right, Mr.
12 Vasquez? And I'll give probation a chance to be
13 heard, too.

14 MR. VASQUEZ: Yes, your Honor. Let me
15 begin by asking did the Court receive my response to
16 defendant's sentencing memorandum.

17 THE COURT: Yes, and I applaud you for
18 getting it in on short notice. Thank you.

19 MR. VASQUEZ: Thank you, your Honor. Let
20 me retrieve a copy from probation. Ms. Rasmussen
21 reduces the defendant's objections to three general
22 categories. The first is criminal history, and I
23 haven't addressed that because, quite frankly, the
24 criminal history category is what it is, and I'll just
25 simply defer to probation as to what that is. I take

1 no position on it.

2 With regard to the calculation under the
3 guidelines, Ms. Rasmussen essentially wants her cake
4 and she wants to eat it, too, that is she wants to use
5 the 1998 Guidelines because they're more favorable to
6 her client than the current guidelines are, however,
7 she also wants to group. It's either all of one or
8 all of the other. If you go back and look at the 1998
9 Guidelines and the Ninth Circuit's interpretation of
10 those guidelines in 1998 and under the guidelines as
11 they existed then, the Ninth Circuit had made clear
12 that you did not group money laundering offenses with
13 other offenses because these were involving separate
14 transactions and in the Ninth Circuit's view separate
15 injuries.

16 In 2001 the guidelines were rewritten, and
17 the current version of the guidelines now tells us
18 that we do group. In fact, 2S1.1 was completely
19 revamped. I won't get into all the details here as
20 I've set it forth in writing, but whether you use the
21 2006 Guidelines or you segregate the money laundering
22 offenses from the other offenses as probation has done
23 under the 1998 Guidelines, either way you get to a
24 level twenty-three.

25 So I believe -- and, you know, I suppose

1 it's up to the defendant to elect which he'd like to
2 proceed on because I'm willing to proceed under either
3 category rather than either guidelines, but we have to
4 be consistent in that. So if he wants to use 1998,
5 that's fine, but we don't group. If he wants to use
6 the current guidelines, that's fine, but then let's
7 start talking about the additional enhancements, and
8 I've already set that forth in my response so I won't
9 belabor that point.

10 THE COURT: And you said under 1998 we
11 don't group?

12 MR. VASQUEZ: We would not -- well, there
13 was grouping, but we did not group money laundering
14 with the other underlying transactions.

15 THE COURT: That was my understanding.
16 That's why I asked the question. I want to be sure I
17 understand.

18 MR. VASQUEZ: Yes, there was grouping.

19 THE COURT: Okay.

20 MR. VASQUEZ: There was a shift or a
21 revision in 2001 to change the way the different
22 circuits were handling the money laundering. That's
23 it and now let me turn to what I consider to be the
24 crux of much of the defendant's argument, and that is
25 her attempts to confuse the current prosecution with

1 the case that was tried, or rather to the case to
2 which he pled guilty in front of Judge Dawson.

3 First, let me provide a little bit of
4 context to this. I don't believe there's any dispute
5 at this point in time, at least any factual dispute as
6 to the facts, and that is back after the defendant was
7 arrested, he was immediately indicted on the most
8 easily provable offenses, that is the false passport,
9 the false identification documents, and the firearms
10 were found in his possession. Those didn't take a
11 whole lot of legwork to put together and they were not
12 document intensive. That's the nub of it.

13 While that case was pending, the government
14 was continuing to investigate and develop its case to
15 prove beyond any shadow of a doubt that he committed
16 the financial frauds that he was charged with in the
17 current indictment. Now, had that case continued for
18 a little bit longer, in all likelihood they would have
19 all been brought together to Ms. Rasmussen's
20 satisfaction, however, the defendant relatively early
21 on in that case at a calendar call pled guilty without
22 a plea agreement. At that point in time, he was
23 certainly aware of the ongoing investigation into
24 Maria Bozi's disappearance and the financial frauds.

25 In fact, the presentence report makes clear

1 in no uncertain terms that there's a separate ongoing
2 investigation into those matters. So although Ms.
3 Rasmussen wants to suggest the government was acting
4 with improper motives, as the Court knows, financial
5 crimes are often complex and it takes time to get
6 records together particularly whereas here a lot of
7 the documents came from England. Now, to add a little
8 bit more context to this, we also have to remember the
9 intervening events in 2001 that shifted the
10 government's focus for a while and also hampered
11 international travel at the time during that period.

12 But that's all perhaps getting a little bit
13 into the weeds. I'm simply proffering to the Court
14 that the government's motives here weren't improper.
15 It's simply that it indicted the defendant on the most
16 readily provable offenses. He pled guilty as the
17 investigation continued on the other matters, and
18 that's what brings us here today.

19 Now, the relevance of this is Ms.
20 Rasmussen's suggestion both in her sentencing
21 memorandum and again here in court that Judge Dawson
22 considered all of this and the government doesn't get
23 two bites of the apple. That's demonstrably false.
24 Your Honor, I've cited, and if the Court doesn't have
25 access to it, I would like to go ahead and tender to

1 the Court at this point in time --

2 THE COURT: -- the transcript.

3 MR. VASQUEZ: The transcript you have, but
4 I'm not sure if the PSI or the presentence report was
5 from that case has been available to the Court.

6 THE COURT: I'm not sure either. I have
7 seen the transcript. I'm not sure about the --

8 MS. RASMUSSEN: It was filed under
9 submission with my motion to dismiss, so it is filed
10 under seal because of the PSI, but it is on file in
11 this docket.

12 MR. VASQUEZ: Your Honor, I'll just give
13 the Court a courtesy copy then if it's already part of
14 the record.

15 THE COURT: Sure. This is a presentence
16 report in Judge Dawson's case, the 2000 case?

17 MR. VASQUEZ: Yes, your Honor.

18 THE COURT: Good.

19 MR. VASQUEZ: Now, in her latest filing Ms.
20 Rasmussen quotes at length and takes a lengthy excerpt
21 from the probation officer's report, and I think the
22 point that she's trying to drive home is the
23 commonality of facts between the offenses there and
24 the offenses here, and that's undisputed. These are
25 interrelated. In fact, we're dealing with a single

1 defendant here in a certain span of months, so
2 obviously there's going to be some overlap with some
3 commonality.

4 But what she doesn't include for some
5 reason in her recitation is the concluding paragraph
6 of that narrative which is paragraph 53 on page 12,
7 and it reads, for the purposes of brevity, the
8 majority of the offense conduct was primarily narrowed
9 down to the charges of conviction, however, it's
10 noteworthy to mention that the agents discovered
11 multiple financial transactions by Fitch on Marie
12 Bozi's accounts. Bozi's disappearance and the
13 circumstances concerning her disappearance are still
14 unknown. According to the agents with the Federal
15 Bureau of Investigation, there is an ongoing
16 investigation in this matter.

17 It's not that this matter was presented to
18 Judge Dawson or the Court. In fact, you can look at
19 the sentencing hearing and there's very little
20 mention, if any, of Maria Bozi or the financial
21 crimes. It's not what he was considering, and that's
22 borne out if you look at the offense level
23 computations in this same document, in the PSR, and
24 those begin at page 14. They begin with the offense
25 level computation for the various passport offenses

1 where they come up with the whopping offense level of
2 eight for those identification crimes.

3 Then it goes on, and this is really where
4 the defendant's punishment came from for his
5 possession of weapons, possession of firearms as a
6 convicted felon, base offense level twenty, two levels
7 because he possessed more than five firearms, two
8 levels because some of them were stolen. I'll note
9 they were stolen from Kenneth Deatherage who was also
10 a victim in this case. That brings it to an adjusted
11 offense level of twenty-four. To this was
12 additionally added two levels for obstruction of
13 justice to which the defendant is actually benefitting
14 in the case -- well, I'll get to that later -- which
15 brings him to level twenty-six.

16 The presentence officer recommended in that
17 case that the defendant be sentenced to the higher end
18 of the guideline, that is ninety-seven months, to
19 reflect the identification defenses, the passport
20 fraud, and the use of false identification documents
21 because they have been completely eclipsed in this
22 calculation by the firearms offenses. So to give him
23 some sort of punishment to make a difference, that's
24 how they entered the ninety-seven months.

25 Now, Ms. Rasmussen continues to tell the

1 Court both in her pleadings and here in open court
2 that Judge Dawson sentenced him for this same stuff,
3 for the financial offenses and for the murder of Maria
4 Bozi. I challenge her. Show me a point in the
5 record, the hearing, the PSR, anyplace where Judge
6 Dawson says, well, I'm going to enhance your sentence.
7 I'm going to make this adjustment. It's got to be
8 somehow influenced by Maria Bozi's disappearance and
9 murder or it's got to be somehow influenced by the
10 tens and hundreds of thousand of dollars financial
11 fraud that you committed.

12 It's not there. All of that is simply a
13 red herring that she lays in front of the Court's path
14 because, your Honor, when you look at the record as a
15 whole and defendant comes here convicted of access
16 device fraud, convicted of money laundering offenses,
17 that are completely severed and separate from the
18 offenses he was convicted of there.

19 Now, would Judge Dawson with all that's
20 been put together and presented before him given him a
21 ninety-seven month sentence? Quite frankly, your
22 Honor, we're having a sentencing hearing comparable to
23 the one we're going to have here today in front of
24 Judge Dawson as to what the correct guideline
25 computations would be, how they'd be grouped together,

1 and whether there should be an upward departure. I'll
2 leave that for a moment and return before I leave the
3 subject to that obstruction of justice enhancement.
4 This is further proof that there's not any sort of
5 overlapping in terms of the punishment. His probation
6 officer in this case took the precaution of steering
7 wide of that obstruction of justice enhancement.

8 If you read through the sentencing hearing
9 transcript, you're going to find that the obstruction
10 of justice enhancement predominately concerned this
11 defendant's plot to escape from jail. There is some
12 mention of threats being made to Patricia Molano, but
13 that wasn't the gravamen of the events. He was trying
14 to get out of jail. He was trying to hire people to
15 bust him out of jail, or a police officer to get him
16 out of jail and then set him free.

17 That was the gravamen of the obstruction of
18 justice enhancement, and because there was an
19 obstruction of justice enhancement and because it
20 somehow related to Patricia Molano, Patricia Molano
21 who could have and probably would have been a witness
22 in this case but for the defendant's threats,
23 probation said we're not going to apply that
24 enhancement. We are not going to obstruction of
25 justice because that was already dealt with in the

1 other case.

2 So now for the defendant to tell the Court
3 that we're double dipping, quite the contrary. He's
4 getting a windfall from the separation, at least in
5 terms of the obstruction of justice. Your Honor, the
6 rest of this I think is going to go to the art of what
7 I believe the sentencing is about and that is whether
8 we should apply a sentence within the guidelines or
9 not, and so I will simply reserve that until the
10 appropriate time.

11 THE COURT: All right. And, Ms. Beckner,
12 what about probation? Do you have anything to add?

13 PROBATION OFFICER: Your Honor, I don't
14 know if you have specific questions. The probation
15 office would simply rely upon the comments contained
16 within our addendum. I've nothing more to add to that
17 unless your Honor has any specific questions as to our
18 position on a certain --

19 THE COURT: Good, and unless you have
20 something to add about the grouping, about Ms.
21 Rasmussen's argument about the grouping.

22 PROBATION OFFICER: The probation officer's
23 only comment on that would be about using the 1998
24 guideline. It was upon much careful consideration
25 found to be the most technically correct in keeping

1 with the direction in Chapter 3D to group the offenses
2 of conviction to an account for all of that conduct
3 the way in which it's contained within the presentence
4 report. Those calculations do comport also with how
5 the government anticipated the calculations coming out
6 so --

7 THE COURT: All right. I'll give you a
8 chance to respond, Ms. Rasmussen.

9 MS. RASMUSSEN: Thank you, your Honor.
10 Would you like me to come to the podium?

11 THE COURT: Yes, if you would, and
12 understand you are being reported by the court
13 reporter but recorded electronically, too.

14 MS. RASMUSSEN: Yes, thank you.

15 Well, first of all, with regard to the
16 grouping, I think what the government is arguing, if
17 I'm correct and they can correct me if I'm wrong, is
18 that I'm using current case law in 1998 Guidelines,
19 but unfortunately I don't have an option. There is no
20 formula that allows me to use 1999 case law because
21 I'm using the 1998 Guidelines which are the guidelines
22 that are in effect at the time the offenses are
23 alleged to have been committed. Now I'm looking right
24 at the --

25 THE COURT: But what about what Mr. Vasquez

1 Vasquez says, you know, the guidelines were changed in
2 2001?

3 MS. RASMUSSEN: It doesn't say -- it
4 doesn't say what he says. It says under 3D1.2, and
5 this is the '98 book, offenses covered by the
6 following guidelines are to be grouped under this
7 subsection and it includes to 2F1.1 which is the money
8 chart. We moved to the -- now we use 2B1.1, but at
9 this time in '98 we used 2F1.1, and it has 2S1.1,
10 2S1.2, 2S1.3. Those are the money laundering
11 statutes. So it does specifically allow for the
12 grouping of the fraud Counts, the fraud chart Counts,
13 and the money laundering Counts. So it's not
14 accurate. Now, there may have been case law at the
15 time that said that money laundering Counts should not
16 be included, but there's no longer case law at this
17 time. So I can't -- we don't go back to the old case
18 law just because we go back to the old guidelines. So
19 that's my response on that.

20 With regard to the government's position
21 that it was not in a position to charge this case,
22 your Honor, frankly I am shocked that I am standing
23 here today hearing them say that for the first time
24 because myself and all of my predecessors in this case
25 have been filing motions with this Court since he was

1 indicted in this case in June of 2004 saying that this
2 isn't fair, the government should have done this
3 before, and the government has never ever proffered
4 that response to this Court or to the predecessor
5 judge for that matter.

6 Never before as I stand here today have
7 they said, oh, we didn't have time, we couldn't really
8 get all of our ducks in a row. I mean, frankly, it's
9 absurd because had I heard that before, I would have
10 brought in all of the 302's and all of the FBI
11 investigation and shown you the dates on them because
12 I can't think of -- there couldn't be more than a
13 handful, and there were tons of witnesses interviewed.
14 They were interviewed after March of 2000. And it is
15 true that Mr. Fitch came in at calendar call and pled
16 guilty without a plea agreement. He pled to the
17 indictment basically, but that was in July of 2000.
18 He was arrested in February.

19 So the government is telling you we just
20 didn't have time, it was so complicated, yet in our
21 trial Special Agent Schlumpf tells you he basically
22 confessed to everything on February 8th, 2000. How
23 hard could it have been this business of them urging
24 that now we're able to put together a comprehensive
25 presentation? This is the government. My God, they

1 have far more resources than I've ever had to work
2 with a case. I think it's just a stretch for them to
3 even try to attempt to convince this Court that
4 somehow they couldn't bring this case until 2004.

5 They waited until 2004 to bring this case
6 for the very specific reason why we're here and why
7 I've been saying all along it's fundamentally unfair
8 because they want another bite at the apple. And to
9 suggest that Judge Dawson did not consider the fact
10 that Ms. Bozi had not been heard from, that's in the
11 2000 PSI.

12 THE COURT: Where is it in the 2000 PSI?

13 MS. RASMUSSEN: May I grab it?

14 THE COURT: Sure.

15 MS. RASMUSSEN: And I pasted into my
16 sentencing memo in this case the paragraphs that I
17 thought were relevant. But, for example, page -- I
18 think it starts on page 5 -- well, this is what they
19 call the offense conduct. On April 5th he enters --
20 this is on page 5, paragraph 14 -- he enters with
21 Bozi. He marries Bozi. On page 6, Bozi applied for a
22 mailbox. On paragraph 19 on page 6, Bozi registered a
23 trailer space, Bozi and Novin had their last telephone
24 contact. And 21 describes how Novin was concerned,
25 contacted the park service. The rest of those

1 paragraphs basically -- well, several of them -- 24
2 specifically, Maria Bozi had mysteriously disappeared
3 and authorities believed she was the victim of foul
4 play. Thereafter, the space was sealed by police
5 tape.

6 Then page 7 talks about her car. It talks
7 about him going to Social Security and getting
8 identification in the Krause name. It talks about him
9 getting a passport and a Utah driver's license. Page
10 8, there's more of the Utah -- due to the query of
11 license plates, officers were prompted to contact the
12 FBI for details. I mean it's all about the FBI
13 investigation. And then on page 10 at the top, it
14 lists all of books which this Court is familiar with
15 because they were a subject of my motion in limine
16 about the books that were found in the Carri-lite
17 trailer, Kill Without Joy, The Complete How to Kill
18 Book, How to Make a Silencer for a .45, Make Them
19 Talk, Principles of Military Interrogation, Hit Man.

20 I mean was Judge Dawson really supposed to
21 read this and think that nothing had happened to Maria
22 Bozi? I think it's impossible that he could have read
23 this and not believed that Maria Bozi had disappeared
24 and that somehow Mr. Fitch may have been responsible
25 for her demise which is what they are arguing before

1 you, but, more importantly, the rules, the rules. I
2 know the government is upset about the facts of this
3 case and I understand and I'm not a cruel human being,
4 but let's look at the rules because in the judgment of
5 conviction which I submitted to this Court, it says on
6 page 7, and this is the 2007 judgment of conviction,
7 the court adopts the factual findings and guideline
8 application in the presentence report. That's what
9 Judge Dawson did in 2000, that's the JOC.

10 Rule 32 of Criminal Procedure says, the
11 court is required to append to the presentence report
12 a determination concerning any disputed facts or a
13 statement that such facts were not relied upon in the
14 sentencing. There is no such statement, and he says
15 in the sentencing transcript, I find the factual
16 allegations as set forth in the presentence report to
17 be accurate.

18 THE COURT: But it said nothing about Ms.
19 Bozi.

20 MS. RASMUSSEN: Well, I -- I --

21 THE COURT: I mean he doesn't say I'm
22 relying on Ms. Bozi, does he?

23 MS. RASMUSSEN: Well, I --

24 THE COURT: I mean because the report
25 itself says, you know, this investigation is ongoing

1 for Ms. Bozi.

2 MS. RASMUSSEN: It does, and the
3 government, Greg Damm, has always said that these
4 investigations are inextricably intertwined, but
5 beyond that it's all of this information about Ms.
6 Bozi.

7 THE COURT: Well, I mean they are, they are
8 intertwined. I mean this is all tied together.
9 Krause's name came up in this. He was I guess part of
10 the 2000 case, but I mean so they are intertwined, but
11 I don't see anything in the record where Judge Dawson
12 says I'm relying on the disappearance of Maria Bozi to
13 do something, or I think that Mr. Fitch is responsible
14 for Maria Bozi disappearing.

15 MS. RASMUSSEN: He relies on the facts set
16 forth in the presentence report. And you know what?
17 If the government didn't want those facts to be relied
18 upon for Judge Dawson so that they could come back and
19 do this here today, then they shouldn't have given
20 that information to the Probation Department because
21 those facts are in there. And there is no way that
22 someone can read this presentence report and think,
23 wow, Mr. Fitch is somehow responsible for Ms. Bozi's
24 disappearance. So it's not necessary that he
25 specifically state I find that he's responsible for

1 her disappearance. He states, I adopt the facts as
2 set forth in the probation report, and unfortunately
3 that's where we are.

4 THE COURT: I think you misspoke. I think
5 you said there was no way that anyone could read this
6 and say that he's responsible for Maria Bozi's
7 disappearance.

8 MS. RASMUSSEN: No, there's no way that
9 anyone could read this and think that he doesn't have
10 something to do with her disappearance. I don't know
11 how Judge Dawson could have read this at the very
12 least the paragraph that says, one, the last contact
13 anyone had with her was September 4th, 1999; and, two,
14 Maria Bozi had mysteriously disappeared and
15 authorities believed she was the victim of foul play.
16 Thereafter, the trailer parked at 268 Lakeshore Road,
17 Space Number 1127, was sealed by police tape.

18 THE COURT: But it says nothing about Mr.
19 Fitch being responsible for her disappearance.

20 MS. RASMUSSEN: Well, your Honor, you know,
21 I can't argue with the Court. If the Court doesn't
22 believe that Judge Dawson relied upon the fact that
23 Bozi had been missing and no one had heard from her on
24 November 14th, 2000, when her last telephonic contact
25 with anyone was September 4th, '99, then, you know, I

1 can't -- I'm not in a position to argue with the Court
2 over that.

3 All I say is I don't know how anyone can
4 read this and not believe that somehow she's
5 disappeared and the suggestion because of the books
6 that are listed, How to Kill, How to Make a Silencer,
7 I mean these are listed. It's the same PSI
8 essentially that you have before you today. It's
9 really not any different. So for the government to
10 argue that this is different and they needed time to
11 develop their case, it's just completely disingenuous.

12 THE COURT: All right. Anything else?

13 MS. RASMUSSEN: Not at this point.

14 THE COURT: All right.

15 MS. RASMUSSEN: Thank you.

16 THE COURT: Thank you. You know, and these
17 books are: The Modern Identity Changer; How to Make a
18 Silencer for a .45; The Paper Trip 1, 2, and 3 --
19 which I assume is how to come up with new identity
20 papers, but I'm assuming that, I don't know -- The
21 Master Guide to New Identity; Workbench Silencers;
22 Outlaw Reports; Espionage; Unlimited New Identity
23 Services; I. D. By Mail; High Tech Harassment; Pipe
24 and Fire Bomb Designs.

25 I mean these are all paramilitary, if I

1 could use that term, are all titles that --
2 paramilitary I guess is the best way to put it, but I
3 don't see anything in there that specifically -- again
4 if there were one or two books and there's -- let's
5 see there's the last book mentioned, The Complete How
6 to Kill book, but so there are books in there talking
7 with about murder, but they're -- I don't know how
8 many lines.

9 There's 1, 2, 3, 4, 5, 6, 7, 8, 9 lines of
10 books and some of them deal with identify theft, pipe
11 bombs, how to make your own explosives, and radio
12 detonation, The Death Dealer's Manual, I mean so the
13 books cover a wide variety of subjects mostly dealing
14 with either identity theft or violence of some sort,
15 but sometimes explosives with guns, how to interrogate
16 people, and so on. So they're just a wide variety of
17 subjects on the books.

18 All right. Okay, let me ask you and Mr.
19 Fitch to come back up to the podium, please, ma'am.
20 David, let's make this a court exhibit. I want to be
21 sure that all of this is in the record, and so I'm
22 going to make that --

23 MS. RASMUSSEN: I have no objection.

24 THE COURT: Any objection if I do that, the
25 Judge Dawson PSR, that's the 2000 case?

1 MR. VASQUEZ: No, your Honor. Many of
2 these are kept under seal. I'm not sure as to how the
3 Court wants to treat that, but I have no objection to
4 the entering.

5 THE COURT: Was it filed under seal?

6 MS. RASMUSSEN: Well, we don't have any
7 objection, so if the government doesn't object, and we
8 don't object, and if probation doesn't object, I don't
9 know why -- I guess I would ask if it's available on
10 the docket that we just redact his Social Security
11 number.

12 THE COURT: Well, if it was filed under
13 seal, let's just maintain that just to -- I don't
14 know, I'm just not familiar enough with the 2000 case
15 that I can say I know the ins and outs of it. So if
16 it was filed under seal, let's maintain it under seal
17 then, please, David.

18 THE CLERK: Yes, sir.

19 THE COURT: All right. Let's see, the
20 Probation Department calculated the base offense level
21 to be twenty. Three levels were added because of a
22 multiple Count adjustment under United States
23 Sentencing Guidelines, Section 3D1.4, making an
24 adjusted offense level of twenty-three, and that's
25 part of the your objection, is that correct?

1 MS. RASMUSSEN: Yes.

2 THE COURT: All right. The total criminal
3 history points are eight resulting in a criminal
4 history category of four, and you say they should be
5 category three, Roman numeral III, a total of five
6 points. Let me say that again, a total of five
7 points, criminal history category of Roman numeral
8 III. The maximum statutory term of imprisonment would
9 be 30 years per Count for bank fraud, which is Counts
10 3 through 11.

11 The maximum statutory fine would be \$1
12 million per Count for bank fraud, Counts 3 through 11.
13 A special assessment of \$100.00 per Count is
14 mandatory. Based on a total offense level of
15 twenty-three and a criminal history category of Roman
16 numeral IV, the guideline range would be seventy to
17 eighty-seven months with a supervised release term of
18 two to three years except I guess it would be three to
19 five years for Counts 3 through 11. So the maximum
20 then would be a supervised release term of three to
21 five. The guideline fine range is \$10,000.00 to
22 \$1 million. And your objection is you say that it
23 should be Roman numeral III.

24 MS. RASMUSSEN: Level twenty.

25 THE COURT: Twenty, base offense level of

1 twenty, Roman numeral III, which would put it at
2 forty-one to fifty-one, is that correct?

3 MS. RASMUSSEN: That's correct.

4 THE COURT: All right.

5 Mr. Vasquez, any additional comments before
6 I impose sentence?

7 MR. VASQUEZ: Yes, your Honor, and I'll be
8 brief because I've submitted --

9 THE COURT: I mean be as brief -- I don't
10 mean to go on and on and on, but I don't want you to
11 try to rush your presentation. If there is something
12 you want to say, you can say it, but I've reviewed
13 everything that's been filed.

14 MR. VASQUEZ: Yes, your Honor, just to
15 touch on a couple of points, the government's position
16 with regard to Judge Dawson's case, and I hope I made
17 this clear isn't that there was no mention of Maria
18 Bozi, rather when it came time to impose sentence on
19 the defendant, probation made clear, and Judge Dawson
20 in the sentencing hearing made clear that that
21 sentence was being imposed because of the firearms
22 Counts and because of those identification offenses.
23 There's no mention of anything that's before his
24 Court.

25 Additionally with regard to the amount of

1 the financial loss, in my response to the defendant's
2 sentencing memorandum I offered the Court an
3 assessment of how at least the government came up to
4 over \$120,000.00 in losses. They're at least I think
5 it's \$51,000.00 or it's \$51,000.00 and some change in
6 actual losses to Maria Bozi's accounts and to the
7 Deatherages. And in addition to that, you add the
8 attempted losses with regard to Ms. Bozi's credit card
9 of approximately \$5,000.00, \$2,500.00 on her health
10 card, and the big one was clear through the record at
11 trial, the defendant didn't simply intend to take
12 \$40,000.00 to \$48,000.00 from Ms. Bozi's account.
13 After that account was frozen, he made repeated
14 efforts to get access to all of the funds in there.

15 The \$64,000.00 remained and it, therefore,
16 needs to get added to the mix. This is intended loss
17 which puts us over \$120,000.00 before we even start
18 talking about the car and the trailer, and that's how
19 the government comes to its conclusions in its
20 sentencing memorandum. But, your Honor, that said --
21 I'm not sure if this is on.

22 THE COURT: Let the record reflect that
23 he's speaking of the Elmo, the overhead projector.

24 MR. VASQUEZ: Your Honor, it's important to
25 remember what this case is about. The primary victim

1 in this case is Maria Bozi. What I've put on the
2 screen is a photograph which was previously produced
3 in discovery, one of the last known photographs --

4 THE COURT: Just a second. Can you see
5 that? Do you want to see it? I'm talking to the
6 probation officer now. Just so probation -- so we can
7 all be on the same page. Go ahead now. I'm sorry.

8 MR. VASQUEZ: Yes, your Honor. This is one
9 of the last known photographs of Ms. Bozi. While she
10 was here in the United States, she had written her
11 friend, Michael Novin, and let him know that she'd
12 been to the Grand Canyon. He later turned this
13 picture, the original picture, over to the police in
14 England. The other photograph I'd like to put on the
15 screen is a little bit better shot of Ms. Bozi.

16 You've read the government's sentencing
17 memorandum and our recommendations and our arguments,
18 and I'd be happy to answer any questions that you
19 have, but it fundamentally comes down to this. There
20 was a victim to this crime. That victim was Ms. Bozi,
21 and the amount of the loss can't simply be measured in
22 dollars and cents in this case because -- well, let me
23 grab something, your Honor, one second.

24 While I was preparing for trial and again
25 for this hearing, I went back over some of this stuff

1 that the FBI had collected from the defendant, and
2 this is just -- this shoebox I have before the Court
3 is just a smattering that as we sifted through the
4 evidence at trial and other documents that weren't
5 introduced, what we have here are the remnants of a
6 woman's life. Defendant had her passport, her
7 identification documents, her checkbook, her credit
8 cards, her clothing, her shoes. You recall the
9 testimony at trial that he was even trying to sell her
10 clothing to a neighbor in the trailer park, the
11 temporary trailer park he moved to.

12 Although I never met Ms. Bozi, it's
13 touching, it's poignant when I go through this stuff
14 and realize that there is a -- or was a real human
15 being at the end of this. Additionally, there's
16 jewelry, there's everything, everything Ms. Bozi had
17 the defendant took. In addition to her worldly
18 possessions, and I know the Court is familiar with the
19 facts, and defense counsel said it herself, you look
20 at these facts and there's no mistaking what happened
21 here. There is nothing but a clear inference that
22 this defendant was responsible for Ms. Bozi's
23 disappearance.

24 Given that he had all of her vital
25 documents, given that friends and family haven't heard

1 from her in years ever since she came here with the
2 defendant, it's apparent by this point in time that
3 this defendant killed her and took her things, and
4 that's what culminated in the financial frauds that
5 are here before the Court.

6 Now, your Honor, we've been discussing up
7 to this point in time the guideline range and whether
8 the sentence should be -- I think it was fifty-one
9 months under the defense calculations or eighty-some
10 months under probation's calculations, but, quite
11 frankly, it's the government's position that whatever
12 guidelines the Court uses, the guidelines for
13 financial frauds and money laundering simply don't
14 capture this offense. This offense was far greater.
15 The victim here simply didn't lose her money, she lost
16 everything.

17 I ask the Court to impose a sentence
18 commiserate with that offense, commiserate with the
19 fact there is a victim. The victim is no longer with
20 us. I'd also -- and you may recall at trial we had a
21 deposition, a video deposition of Ms. Cabascu, Maria
22 Bozi's mother. We listened to part of it and because
23 it was very awkward because you have the video
24 component coming from overseas and you have the
25 Romanian translator.

1 We eventually just read that transcript
2 into the evidence, but what I wanted to proffer to the
3 Court, and I have it available if the Court would like
4 to see it firsthand is at the conclusion of that
5 deposition as we were wrapping up and everybody was
6 putting away their things, Ms. Cabascu asked if she
7 could ask me a question. Counsel was still there as
8 was the defendant and she had no objection, so I said
9 go ahead expecting she would ask some procedural
10 question. Her question was more basic and more human.
11 She asked me, what's become of my daughter? She
12 persisted, what's become of my daughter.

13 She was a witness and we were at a
14 deposition and it wasn't my place to tell her. I told
15 her essentially, well, you have the same information I
16 have. And she just repeated, my daughter, you know,
17 I'm distraught, I'm frantic because I'm worried about
18 my daughter. Where is she? Can you tell me? I told
19 Ms. Bozi that I don't know where her daughter is or
20 where her body is, she knows the same facts as I do.
21 In fact, one of the things she pointed out was over
22 the past few years she's received boxes and boxes of
23 her daughter's personal effects that had been sent to
24 her by the FBI.

25 But I bring that up to the Court -- and if

1 the Court wants to listen to her, I can play the
2 excerpt from the DVD or the video -- I bring that up
3 to the Court because again it's a touching reminder
4 that there is a human victim here with human
5 connections. This defendant pulled her up by the
6 roots and extracted her from England, from Romania,
7 brought her here, not only to Nevada, but out to an
8 isolated trailer park near Lake Mead, and that's where
9 he got rid of her. He got rid of her because she was
10 simply an instrument and then an obstacle on his path
11 to the idyllic life he envisioned that he was going to
12 have with Patricia Molano, a life that was going to be
13 funded by the money he received from Patricia -- I
14 mean from Maria Bozi.

15 And the Court has had an opportunity to
16 review the defendant's letters to Patricia Molano.
17 They're filled with truth and half-truths, and perhaps
18 quarter-truths and complete fiction, but the recurring
19 theme there is he married Maria Bozi for money. And I
20 submit to the Court that that is a chilling admission
21 particularly under the circumstances of this case.
22 There's nobody that was paying him. She didn't need a
23 visa to come to the United States. She had a UK
24 passport. He married her for money, and then he
25 disposed of her or otherwise he couldn't get to that

1 that money.

2 So once again, your Honor, the financial
3 frauds that the defendant has been convicted of are
4 the tip of this iceberg. When the Court is imposing
5 this sentence, particularly now in a post-Booker
6 world, it's the judges' responsibility and perhaps
7 privilege to get a chance to do justice in a case like
8 this. When you look at the factors set forth in
9 Section 3553, those factors as well as basis for
10 departure set forth in the guidelines all lead to one
11 conclusion, that the guidelines whether they be
12 eighty-seven months, or fifty-one months, or anyplace
13 in between, don't reflect that harm that was done
14 here.

15 It's for that reason that the government
16 recommends to the Court that the Court either depart
17 under the guidelines or simply do a variance pursuant
18 to Booker and give this defendant the sentence he
19 deserves, the sentence that reflects the harm that he
20 inflicted, and that sentence, your Honor, the
21 government requests would be a sentence of
22 thirty years. Thank you.

23 THE COURT: All right. Mr. Fitch, would
24 you like to address the Court, or would you like to
25 have your counsel speak on your behalf, or both of you

1 may speak? Let me ask you both to come back up to the
2 podium again so we can capture you on tape -- on the
3 electronic tape and for the court reporter.

4 MS. RASMUSSEN: Thank you, your Honor.

5 THE COURT: Yes, ma'am.

6 THE DEFENDANT: Yes, your Honor, I'd like
7 to --

8 MS. RASMUSSEN: Let me address the Court
9 first and then you can talk.

10 THE DEFENDANT: Okay.

11 MS. RASMUSSEN: There are a couple of
12 things that I want to point out, and that's that this
13 ha been a frustrating case to deal with because the
14 government keeps suggesting that this Court should
15 hold Mr. Fitch responsible for the disappearance of
16 Ms. Bozi or that this Court should assume her demise
17 and punish Mr. Fitch accordingly, but he's never been
18 charged with murder, and I keep saying this, and I
19 can't defend something he's not charged with. So I
20 would ask the Court specifically not to take that into
21 consideration, and this is also why I argue.

22 The government doesn't get to come back now
23 seven years later and do a more beefed-up presentation
24 on the fact that -- on a fact that hasn't changed
25 since November 14th, 2000. In seven years nothing

1 flog has changed, and it's now asking you, even though
2 he got ninety-seven months before, to sentence you to
3 thirty years. I think it's inappropriate. I think
4 the Court needs to analyze the guidelines, the
5 applicable guidelines, in this case, and it's still my
6 contention that the charges in this case whatever
7 sentence the Court imposes should be concurrent to the
8 sentence he's already served because that's what the
9 guidelines mandate under 5G1.3.

10 Having said that, there are a couple of
11 other things I want to point out to the Court, and one
12 of those is the onerous conditions of his custody, and
13 I know that I've litigated this issue and the Court is
14 aware of the Court is aware of the fact that Mr. Fitch
15 has despite the fact that even with his
16 ninety-seven months' sentence, he would have qualified
17 for an FCI facility. He was transferred to a USP. He
18 was placed in central inmate monitoring.

19 He has been subject from day one to onerous
20 conditions. I have never had another client subject
21 to those types of conditions. I understand everybody
22 doesn't like Mr. Fitch. I understand that, but I
23 represent Mr. Fitch, and it's my job so tell you that
24 that would in any case be a grounds for a downward
25 departure just because it's been so onerous.

1 So that is one factor. The other factor as
2 I mentioned in my sentencing memo, and I attached the
3 report from the doctor that he recently had an MRI.
4 He needs reconstructive surgery. If the Court is
5 going to sentence him to an additional custodial term,
6 I'd ask that the Court make a recommendation that he
7 go to a facility where he can receive the appropriate
8 medical attention which he needs back surgery, so I
9 think that Rochester would probably be the appropriate
10 facility.

11 THE COURT: Say that again, Rochester?

12 MS. RASMUSSEN: Rochester, yes.

13 THE COURT: Minnesota?

14 MS. RASMUSSEN: Yes, sir.

15 Now, I think -- I have -- there's a lot in
16 the record in this case. I've litigated a lot of
17 issues, everything from pre-indictment delay to
18 fundamental fairness. Essentially I believe that if
19 this Court is going to sentence him to any additional
20 time, that the appropriate range is forty-one to
21 fifty-one months, and then there's an issue of how
22 much time he gets for credit for time served.

23 You know, where are we with that? He was
24 brought before this Court on July 12, 2004. He
25 completed his underlying sentence on February 22nd,

1 2007, so whatever the Court is going to do, I'd like
2 an opportunity to address where we are in the
3 computation of time served.

4 THE COURT: That's something that the
5 Bureau of Prisons figures out. I don't get involved
6 in the computations of time. It's more that they
7 follow their rules.

8 MS. RASMUSSEN: Well, I think this is the
9 problem, and this is why I raise these issues now.
10 He's been in custody since February 8th, 2000. So --
11 and in --

12 THE COURT: But I mean he's been in custody
13 on these charges since when?

14 MS. RASMUSSEN: Since July 12, 2004, and so
15 if --

16 THE COURT: Is that what you wanted to say?

17 PROBATION OFFICER: No, your Honor.
18 Actually I wanted to try to clarify if I might, but
19 this defendant expired his sentence in the 2000 case
20 on February 22nd of '07. Since that time the custody
21 that -- he's been in custody on this case, and that is
22 what the Bureau of Prisons will use as credit toward
23 any new sentence imposed by this Court. There is no
24 undischarged term of prison remaining as to that
25 Count -- or as to that case rather.

1 MS. RASMUSSEN: Well, he's on supervised
2 release in that case, but he's in custody, and I
3 disagree with probation. That may be how the Bureau
4 of Prisons interprets it, but the problem is he was
5 detained in this case. Magistrate Johnston detained
6 him in this case, and he's been detained in this case
7 since July 12th. And when that circumstance changed,
8 as the Court is aware, I brought that to the Court's
9 attention and he's still detained in this case. So
10 he's been detained in this case since July 12th, 2004.

11 THE COURT: And he was detained because he
12 was a flight risk.

13 MS. RASMUSSEN: He was detained because he
14 was a flight risk and because of the underlying term,
15 and then when the underlying term was discharged on
16 February 22nd, I filed a motion to reopen detention
17 and that was denied. So, yes, we've been detained
18 because he was considered a flight risk. I think that
19 Mr. Fitch has a couple of issues that he would like to
20 address with the Court.

21 THE COURT: All right, Mr. Fitch.

22 THE DEFENDANT: Yes, your Honor. First of
23 all, no one in this case has addressed the fact that I
24 wouldn't be here right if my prior counsel, Art Allen,
25 hadn't deliberately defrauded me and gave me the legal

1 advice to plead guilty. He told me that I was through
2 and I wasn't going to have any further charges and
3 that once I did this I was done. So I took his advice
4 and I pled guilty without a plea agreement.

5 Then when I got reindicted, I filed a 2255
6 for an ineffective assistance of counsel because at
7 that time was when I knew he had become ineffective
8 because he had told me to plead guilty basically
9 telling me there wasn't going to be any more charges.
10 So if it wasn't for his advice, I wouldn't be here. I
11 would have demanded that all these charges be run
12 together or that I have a plea agreement or that I go
13 to trial at the time. I mean I'm being held
14 responsible for the erroneous advice of Art Allen.

15 Also, let's see -- Art Allen knew at that
16 time I had no knowledge of the legal system and they
17 knew with my limited knowledge I would be in the dark
18 about what the consequences would be for me in regards
19 to pleading guilty without a plea agreement. They use
20 their superior knowledge of the law to subvert the
21 judicial process. This current indictment was brought
22 in bad faith and it should be clearly evident to this
23 Court that I was set up by my former attorneys from
24 the public defender's office and by the U.S.
25 Attorney's office, specifically Greg Damm.

1 If the government had charged me at one
2 time as it should have, I would have been not guilty
3 on these current charges because my father would have
4 truthfully testified that Maria Bozi was still alive
5 after the government said she disappeared which would
6 have destroyed the government's case against me. Of
7 course, I believe that is why they waited until he
8 died before they brought the charges against me.

9 My case has been a carefully crafted and
10 manipulated conspiracy to subvert the judicial process
11 and to protect Agent Schlumpf and Greg Damm from
12 having criminal charges brought against them for
13 falsifying government documents. The Court can look
14 at my motion to dismiss and see the evidence that was
15 given in support of this allegation. In response to a
16 kite that I submitted on 12-12-01 to BOP Staff Case
17 Manager Holland (phonetic) states, your are pending an
18 indictment for murder. Based on the seriousness of
19 the offense, you have been assessed a greater security
20 detainer, and based on the prior escape attempt plots
21 a greater security manager variable has been placed.

22 COURT REPORTER: Would you slow down just a
23 bit, please?

24 THE DEFENDANT: I'm sorry. Therefore, you
25 are ineligible for a transfer to a lesser security

1 institution. So if the Court were to consider what
2 time I have been in custody for these current charges,
3 it could have started at 12-12 of '01, which is when
4 the detainer was placed. The fact is that my speedy
5 trial rights have been violated because either the BOP
6 falsified documents to accommodate FBI in assisting
7 U.S. Attorney Greg Damm, which constitutes outrageous
8 government conduct and vindictive prosecution, or a
9 detainer that allegedly placed on me should be
10 considered valid and subsequently my speedy trial
11 rights were violated.

12 This case should have been dismissed in my
13 opinion. The evidence that has been presented to this
14 Court even without further documentation substantiates
15 my claim to a speedy trial violations and/or
16 vindictive prosecution. Agent Schlumpf gave false
17 testimony to this Court repeatedly and also falsified
18 FBI 302's and other documents in this case, and Greg
19 Damm has worked in collusion with Schlumpf to defraud
20 this Court. I know this to be a fact because the
21 evidence shows this to be true and also because BOP
22 staff members told me to my face who was responsible
23 for the treatment I was receiving and why I had been
24 transferred to a higher security prison. If this
25 weren't true, then why did the BOP transfer me

1 immediately to a lower security prison as soon as
2 Senator Kennedy started checking into what was going
3 on.

4 Um, my mouth is dry.

5 Also, if I had been tried in a timely
6 manner, I would have been privy to the Cunningham
7 ruling, but because of the delay in the trial -- let's
8 see -- the law changed. So now being sentenced u
9 under the recent Supreme Court ruling. It took
10 thirty-six months for this case to come to trial.
11 There was no reason to postpone my trial that long.
12 All I asked was for the evidence from the BOP that
13 would have conclusively shown that the government
14 broke the law and were in collusion with the BOP to
15 falsify documents in order to have me transferred to a
16 maximum security prison where I was further retaliated
17 against and constantly in danger.

18 Let's see. The only reason I'm not home
19 with my family right now is because father died and
20 was not able to testify in my defense. I don't
21 believe the prosecution would have been able to charge
22 me with the crimes concerning the money in the
23 Citibank account if he were to have testified. This
24 Court must consider the fact that the government
25 intentionally waited until after my father died before

1 they charged me with these crimes. The government
2 knew that his testimony would destroy their theory
3 that I killed Maria Bozi and stole her money. The
4 government never proved where the money in the
5 Citibank account came from.

6 There hasn't been any -- I hope that --
7 let's see -- also that I hope this Court will take
8 notice that there hasn't been any mention whatsoever
9 by the prosecution about what my father would have
10 been able to testify to concerning the phone call he
11 received from Maria, nor was there any mention in the
12 paper about it, and that brings me to another point.
13 I've been continually slandered by the press at the
14 behest of the U.S. Attorney's office. There hasn't
15 been any evidence brought forth that would even
16 slightly prove that I killed Maria Bozi.

17 The Probation Department stated that I'm
18 responsible for causing harm to those around me. What
19 evidence is there to show that I've caused harm to
20 anyone? And the Probation Department says that I'm
21 dangerous. What evidence is there to show that I'm
22 dangerous? I haven't hurt anyone. There's -- my
23 record speaks to that. I've never arrested for an
24 assault or hurting anyone ever. I'm not a violent
25 person.

1 In the PSI, the Probation Department
2 doesn't even acknowledge that I've spent the last
3 seven-and-a-half years of my life in prison, and that
4 while there I never once had write-up or a
5 disciplinary problem. It doesn't acknowledge that
6 nothing new has happened in the last seven-and-a-half
7 years of my life. In fact, the Probation Department
8 would have this Court punish me for the same conduct
9 it alleged (sic) against me in a the previous PSI
10 from the 2000 case which I think violates the double
11 jeopardy clause in the Fifth Amendment to the U.S.
12 Constitution.

13 The Probation Department and the U.S.
14 Attorney's office wants this Court to look at this
15 current case as though I have never before -- as
16 though I have never been before this Court and have
17 never served a day in confinement for the crimes of
18 which I have been charged. Instead, the Probation
19 Department and the U.S. Attorney's office wants me to
20 be dealt with as though none of these current charges
21 were ever used before as an enhancement. In
22 paragraphs 147, 148, and 149, it states -- in the
23 current PSI -- it states that the government's
24 analysis of the evidence support the clear and
25 convincing inferences that Maria Bozi is dead and her

1 death facilitated the defendant offenses of
2 conviction.

3 If this were true, then why didn't the
4 government charge me with murder? It stated that it
5 did not have jurisdiction to charge me with murder.
6 Even with my limited knowledge of the law, I'm pretty
7 sure that this mean it didn't have any evidence to
8 prove I murdered anyone. So how the Probation
9 Department and the U.S. Attorney's office has -- was
10 able to come to the conclusion that clear -- the U.S.
11 Attorney's office -- how the U.S. Attorney's just --
12 uh, excuse me -- how the U.S. Attorney's office has
13 come to the conclusion -- excuse me, your Honor, I
14 lost my place.

15 THE COURT: You've got it written out. If
16 you want, I'll make it a part of the record as well.

17 (Attorney-client conference held.)

18 THE DEFENDANT: Do you want to just read it
19 yourself? Would it be easier?

20 THE COURT: I can. It's up to you, Mr.
21 Fitch. If you want, I'll make it -- I'll read it.
22 Hand it up to me and I'll read it myself, and give you
23 a chance to say anything else you want to say, and
24 then we'll make it a part of the record. I mean it's
25 what you want to do, it's up to you.

1 THE DEFENDANT: I need some water.

2 THE COURT: Yes, that's fine.

3 THE DEFENDANT: My mouth to real dry.

4 (Defendant drinks water.)

5 THE DEFENDANT: Okay, excuse me, I'm sorry.

6 THE COURT: That's all right.

7 THE DEFENDANT: Okay, excuse me. The U.S.

8 Attorney's office -- I don't know how the U.S.

9 Attorney's office was able to come to the conclusion
10 that clear and convincing inferences that Ms. Bozi is
11 dead and her death facilitated the defendant's offense
12 of conviction has been established by the government.

13 It is without foundation. Almost eight years has gone
14 by and still no evidence has been found to prove I
15 murdered Maria. The government hasn't even proved
16 where the money in the Citibank account came from.
17 The only thing that the government can say is that we
18 think he did it, but no evidence has been brought
19 forth to substantiate these allegations, not one.

20 The Probation Department essentially used
21 the same PSI information from the prior PSI from the
22 2000 case to try and make this Court believe I'm
23 dangerous and without any redeeming qualities, but
24 where is the proof to substantiate that I am all of
25 these things that they accuse me of? How does the

1 government and the Probation Department figure that
2 the use of the same information and evidence that was
3 used in the prior case is not double jeopardy? How
4 can this not be double jeopardy? The government seeks
5 to punish me over and over again for the same thing
6 using the same evidence for the same crimes.

7 The 2000 PSI proves this to be true. As I
8 repeatedly asserted, why does the government and the
9 Probation Department refuse to acknowledge that my
10 father talked to Maria after they said she had
11 disappeared. There is nothing new that the government
12 has now that it did not have and used against me in
13 2000. This current case is part and parcel to the
14 prior case. The appellate excerpts of records from my
15 2000 case show this to be true. All of the charges I
16 was convicted on in this case were already used to
17 enhance my sentence to the maximum level of
18 ninety-seven months in the prior case. This case
19 cannot be separate from the original case.

20 My sentence should be run concurrent with
21 my prior case according to USSG 4A1.2. Application
22 note 3 addresses related cases. It says, prior
23 sentences are not considered related if they were for
24 offenses that were separated by an intervening arrest,
25 i.e., the defendant is arrested for the first offense

1 prior to committing the second offense, otherwise,
2 prior sentences are considered related if they
3 resulted from offenses that occurred on the same
4 occasion; B, were part of a single scheme or plan or;
5 C, were consolidated for trial or sentencing. In this
6 case there was no intervening arrest. There was only
7 one arrest on February of 2000.

8 Additionally, the offense scheme occurred
9 during the period of time and was part of a common
10 scheme or plan. I met Mr. Krause in October of 1999.
11 The conduct here occurred between dates of July, 1999,
12 and November 17th, of 1999. The conduct is part of
13 what the government characterizes as a common scheme
14 to defraud Ms. Bozi and to convert her money for his
15 personal use. Obtaining Krause's identity was part of
16 the scheme and a Krause account was used according to
17 the government to launder Bozi's money. According to
18 the cases -- accordingly the cases are related. They
19 have always been considered related according to Greg
20 Damm.

21 In the Las Vegas Review Journal
22 February 16th of 2000, Greg Damm says he expects to
23 file additional charges against Fitch in the future,
24 but that is probably some months away. Well, last
25 week Damm said that these cases were inextricably

1 intertwined with the disappearance of Maria Bozi, a
2 forty-six year old Englishwoman. On February 26th,
3 the Las Vegas Review Journal in 2000, this case is
4 inextricably intertwined for the disappearance of
5 Maria Bozi. Damm said he expect to file a variety of
6 charges against Fitch in connection with the man's
7 recent activities.

8 And then again on July 14th in 2000, this
9 case is inextricably intertwined with the
10 disappearance of Maria Bozi. On Thursday, Damm said,
11 he expects to file additional charges against Fitch in
12 the future, but he could not say when that might
13 occur. At a previous court hearing, the prosecutor
14 said he believes Fitch killed Bozi so he could steal
15 all of her property. This case is inextricably
16 intertwined with the disappearance of Maria Bozi. It
17 is my opinion -- it is my position that Mr. Fitch
18 murdered Ms. Bozi, the prosecutor said, and his motive
19 was to steal her property.

20 And then July 5th of 2004, bank fraud and
21 other charges -- of the Las Vegas Review Journal, July
22 5th, 2004, bank fraud and other charges were filed
23 last week against a man suspected of killing his wife
24 in 1999 to steal all her property. These charges have
25 always been contemplated by me every since we indicted

1 him the first time around, Assistant U.S. Attorney
2 Greg Damm said Thursday. Excuse me a second.

3 As it is plainly clear, the government says
4 it is a related case and states that this is so to the
5 Las Vegas Review Journal. It is also clear from these
6 articles and from the excerpts of record that my prior
7 attorney, Art Allen, knew that I was going to be
8 reindicted, but deliberately defrauded me in order to
9 help the government. Therefore, under the law the
10 Court cannot say that this case is not related to the
11 prior case and thus run this current sentence
12 consecutive to the prior sentence and must run this
13 2004 case concurrent with the one I finished up in
14 February of this year.

15 Since my arrest back in February of 2000,
16 I've experienced what I feel to be an extreme amount
17 of abuse by the government. I realize that when you
18 go to prison that you are being punished. The Court
19 might think that, oh, he's exaggerating, but the
20 medical files don't lie. I've given more than a pound
21 of flesh to this government, and the sad part is they
22 have broken the same laws that I was given eight years
23 for. And because of their need to cover up their own
24 criminal conduct, they have manipulated the court
25 system and waited until my dad died so I won't have a

1 witness to testify in me defense.

2 If that weren't enough, it appears that the
3 government enlisted the help North Las Vegas Detention
4 Center. I've been locked in the hole for over fifteen
5 months now on bogus allegations as my attorney will
6 attest to. Here's why this Court should give me time
7 served. The letters --

8 (Attorney-client conference held.)

9 MR. FITCH: I was already punished in the
10 last case for the crimes I was convicted of in this
11 case because all of the crimes alleged in this case
12 were used to enhance my sentence in the last case as
13 well as the alleged disappearance of Maria, plus all
14 of the money was seized under the Money Laundering Act
15 of 1986 and was never returned back in the 2000 case.
16 So I was already punished for the money laundering in
17 the last case. That's three different double jeopardy
18 violations alone, plus double jeopardy -- excuse me,
19 this is a case law here. Double jeopardy prohibits an
20 increase in the defendant's sentence when legitimate
21 expectation of finality has attached to his sentence,
22 U.S. versus De Francisco (phonetic), 449 U.S. 117,
23 66 -- okay.

24 I have been prejudiced by pre-indictment
25 delay because if my father were still alive, the

1 government wouldn't have been -- wouldn't have had a
2 case against me. That's the reason why they waited
3 for him to die before they recharged me in this case,
4 plus the government waited until the very last minute
5 to file these charges which was right after my dad
6 died and was also right after I had filed a complaint
7 with the Office of Professional Responsibility, and
8 the inspector general in the Civil Rights Department
9 because of the fraud that was used to have my custody
10 level increased and all of the other retaliatory
11 things Greg Damm and Henry Schlumpf had done to me
12 while I was in the BOP.

13 It wasn't a coincidence that these charges
14 were brought right at that exact same time. In this
15 case I assert that the government is guilty of
16 violating my substantive due process rights by
17 arbitrary wrongful government action acting under the
18 color of federal law. The substantive component of
19 the due process clause bars certain arbitrary wrongful
20 government actions regardless of the fairness of the
21 procedures used to implement them. The right to be
22 free from arbitrary state or federal action is a
23 substantive due process right that arises directly
24 from the constitution.

25 As to this type of claim, the

1 constitutional violation actionable under 19 -- 19 --
2 Subsection 1983 is complete when the wrongful action
3 is taken. The existence of federal or state post
4 deprivation remedies, therefore, has no bearing on
5 whether the plaintiff has stated a constitutional
6 claim. The touchstone of due process is protection of
7 the individual against arbitrary exercise of the
8 powers of the government.

9 The government should have been barred from
10 prosecuting me because I clearly did what the law
11 allowed me to do, and also due process is violated
12 when the government for retaliation purposes brings
13 charges against someone who has tried to address a
14 grievance from another federal entity. The U.S.
15 Attorney's office and the FBI have used and abused
16 their positions of power to harass and retaliate
17 against me for asserting my constitutional right to
18 address wrongful actions taken against me by Gregory
19 Damm and Henry Schlumpf while acting under the color
20 of federal law.

21 My due process rights have been violated
22 over and over again by these two federal employees and
23 also by the BOP at the behest of Greg Damm and Henry
24 Schlumpf. The evidence that has already been given to
25 this Court proves this to be true, and I am still

1 being retaliated against even while I was in pretrial
2 detention and now after -- how do you say it?

3 Presentence? Pre-post conviction detention.

4 If you don't mind, I would like to review
5 what has happened to me since I was in the BOP. I was
6 on the prison yard less than four months before Greg
7 Damm and Henry Schlumpf contacted the Bureau of
8 Prisons and told them to start harassing me. I was
9 thrown in the hole for no reason for five or six
10 months. While in the hole, I was attacked by an
11 inmate who has HIV and Hepatitis C and was mentally
12 ill. He cut his hands with a razor blade and then
13 attacked me while I was asleep. So I've had to deal
14 with the fact that I might have contracted HIV or
15 Hepatitis C for the last six years.

16 Then I was transferred to Beaumont USP with
17 only six points for no reason, for no apparent reason,
18 but once I got there and was evaluated by the unit
19 team, I was told I wasn't supposed to be in a USP and
20 was going to be transferred the proper level security
21 prison, but right as I was at the door, I suddenly had
22 this detainer put on me by Greg Damm for murder, yet
23 the BOP never told me about any rights concerning
24 speedy trial and I never received an indictment or any
25 verification of the detainer other than falsified BOP

1 documents.

2 After I proved to the BOP that I didn't
3 have a detainer, the BOP then stated that I had tried
4 to escape from the FCI I was at and that was the real
5 reason I was at a USP. They just forgot to mention
6 that in the earlier paperwork that was given to me.
7 And they also forgot to charge me for trying to
8 escape, and they also forgot to give me a DHO hearing
9 for trying to escape. I was never shown any
10 documentation alleging this or any charges stating
11 that I had tried to escape or a hearing for my alleged
12 he escape attempt.

13 In fact, there was never any proof shown to
14 me that I had ever even attempted an escape. I guess
15 the staff thought that I dreamed about it, so I must
16 be guilty if I was dreaming about it. SIS Captain
17 Wilson told me that Henry Schlumpf and Greg Damm had
18 called him and told him that I had killed my wife so I
19 needed to be put in the USP, and that I was an escape
20 risk. This was also told to me by Unit Manager
21 Macintosh and Unit Manager, Mr. Parker. They asked
22 me -- excuse the French -- they said, Man, who did you
23 piss off? Excuse my language.

24 THE COURT: That's fine.

25 THE DEFENDANT: They said that there was

1 nothing that they could do because my security
2 classification was changed by the regional office in
3 the Bureau of Prisons. While I was at the USP, I was
4 poisoned and thrown in the hole again for no reason,
5 and taken to a hospital where I was operated on by
6 students who subsequently cut the nerves in my groin
7 and now I am not a complete man anymore and will be
8 again. So then I started writing to senators and
9 congressmen because I figured if I didn't get out of
10 this, then something even worse was bound to happen to
11 me. Consequently, Senator Kennedy sent a letter to
12 the Bureau of Prisons in Washington and I was
13 transferred in two days' time after they received a
14 letter from him. You should have -- oh, you don't
15 have it because you don't have those allocation
16 statements. Would you like to see a copy of that
17 letter?

18 THE COURT: No, that's fine. I'll accept
19 your representation.

20 THE DEFENDANT: All right. I was sent -- I
21 was then sent to Victorville medium. While I was
22 there, I sent letters to the aforementioned government
23 agencies and got a response from the Inspector
24 General's office. This was in May or June of 2004.
25 It wasn't two weeks later that Henry Schlumpf shows up

1 and tries to harass me again. He brings me a copy of
2 the indictment and says I'm being indicted again, and
3 he was going to make sure I went down for murder this
4 time. That was in June of 2004. And he and Greg Damm
5 still haven't got a murder indictment, but they have
6 made sure I have done some serious time in the hole
7 and have tried their best to make sure my trial was
8 prejudiced as well as my sentencing.

9 I'm not -- I don't know how much time the
10 Court thinks a man's manhood is worth in years in
11 prison or as a downward departure, but I would ask you
12 to try to imagine for yourself how much it is worth to
13 you. To me, life is hardly worth living without being
14 a complete person. Try to imagine how you would feel
15 if these circumstances were your own. I have been in
16 a lot of pain for a very long time because of my
17 spinal problems, and after sleeping on a steel bunk
18 for three-and-a-half, my back hurts so much that I can
19 barely stand the pain anymore. You can look at the
20 doctor's report and see what I'm talking about. I
21 have a migraine headache that never goes away and
22 pinched nerves that go all the way up and down my
23 spine. As I have aged, it has continually gotten
24 worse. I have received zero care for this serious
25 medical need except an eight-year prescription of

1 Tylenol and Motrin.

2 If you could look at the x-rays, you would
3 be able to tell how inappropriate to prescribe someone
4 with my spinal problems with what has been prescribed
5 to me. This is the recommended treatment that the BOP
6 doctors and the county jail doctors have given me to
7 treat this serious medical need. This is deliberate
8 indifference and wanton infliction of pain.

9 (Attorney-client conference held.)

10 THE DEFENDANT: Basically the government
11 and Probation Department want the Court to violate the
12 double jeopardy clause and punish me again for crimes
13 I have already been severely punished for the last
14 almost eight years.

15 MS. RASMUSSEN: Your Honor, he has one
16 other thing he wants to pull out, and while he's doing
17 that there are a couple of points that I forgot to
18 raise with the Court. One is the fine that was
19 recommended by Probation Department. The Probation
20 Department recommended a \$75,000.00 fine, and I, for
21 the life of me, he can't pay the \$12,500.00 fine that
22 was levied upon him in the 2000 case. He is indigent.
23 I mean I don't know where this notion that he has
24 access to assets comes from, but he doesn't.

25 He doesn't have any money. He gets -- any

1 resources that he gets even in custody once in a while
2 his mom is able to send him \$25.00 or he gets stamps
3 because he's indigent. So I would ask that the Court
4 not impose a fine. There is by virtue of the fact
5 that there are sixteen Counts, a \$1,600.00 assessment
6 because it's sixteen times one hundred, and I think
7 that that's unduly onerous, too, but there's nothing
8 we can do if about that.

9 And then I did point out in the sentencing
10 memo that he has had no problems, no reprimand, no
11 disciplinary proceedings the entire time he's been in
12 prison which is close to ninety months. And I also
13 need to point out to the Court that under Rule 32(h),
14 I think that the Court is required to give me notice
15 if it plans to impose a sentence above the potential
16 advisory range whatever that range may be.

17 THE COURT: Say that again. I'm sorry.

18 MS. RASMUSSEN: Under 32(h) if the Federal
19 Rules of Criminal Procedure, it appears to me from my
20 read of it in the case law that if the Court is going
21 to impose a sentence based on something that's not in
22 the Probation Department report, in other words the
23 government is asking you to impose a thirty-year
24 sentence, that the Court is required to give me notice
25 in advance of that if it's -- if it's a departure from

1 the advisory guideline range however that would be
2 calculated whether it's my calculation or theirs.

3 THE COURT: All right.

4 THE DEFENDANT: May I step back to the
5 table?

6 THE COURT: Sure.

7 (Defendant retrieves documents.)

8 (Attorney-client conference held.)

9 THE DEFENDANT: Your Honor, I therefore
10 respectfully request that this Court consider that
11 I've already been punished previously for the instant
12 crimes and that any enhancement of my sentence will
13 violate the double jeopardy clause and will also not
14 comply with the U.S. Sentencing Guideline under USSG
15 5G1.3 because the concept of relevant conduct under
16 the guidelines is reciprocal, and 5G1.3 operates to
17 mitigate the possibility that the fortuity of two
18 separate prosecutions will grossly increase the
19 sentence of defendant's sentence.

20 I assert that under the current guidelines
21 which are the correct guidelines to use that my
22 offense level -- oh, never mind, excuse me for that --
23 that my current offense level is twenty under the '98
24 guidelines and not thirty-eight as the prosecution has
25 stated. And also this case sentence should be run

1 concurrent with my previous sentence because of the
2 reasons I have previously stated. This case is part
3 of the first case and there can be no denial of that
4 fact. The U.S. Attorney said so himself many times.

5 I respectfully request that this Court give
6 me served and release me immediately and let me go
7 back to Waco, Texas, so I can be with my mother who
8 doesn't have much more time on this earth. She is
9 extremely sick and my sister doesn't expect she will
10 make it much longer. I've also already lost my father
11 while in prison. I hate the thought of losing my
12 mother as well, and also that this Court use the prior
13 terms of probation from the 2000 case, and I
14 respectfully submit this to your Honor.

15 THE COURT: All right. Do you want to make
16 any of that a part of the record? It's up to you, Mr.
17 Fitch. You can talk Ms. Rasmussen.

18 (Attorney-client conference held.)

19 THE COURT: And here's a letter Mr. Fitch
20 sent me, I want to make sure that's part of the
21 record, too.

22 (Attorney-client conference held.)

23 THE DEFENDANT: She says no.

24 THE COURT: Take your attorney's advice.
25 That's why I want you to talk to her. You say no, you

1 don't want him --

2 MS. RASMUSSEN: I think he's read almost
3 all -- just for the record, he's read almost his
4 entire seven-page statement into the record, and there
5 were a couple of paragraphs that I recommended that he
6 not read and he's withheld those. So I think that the
7 record is complete.

8 THE COURT: All right.

9 MS. RASMUSSEN: Just for the purpose of the
10 record.

11 THE COURT: Now, 32(h) it says before the
12 Court may depart from the applicable sentencing range
13 on a ground not identified for departure either in the
14 presentence report or the parties' prehearing
15 submission. And here, of course, the government made
16 a prehearing submission requesting the upward
17 departure and the grounds for the upward departure.

18 MS. RASMUSSEN: I understand and I --

19 THE COURT: I mean what the rule is
20 designed to do is if I say, wait, I'm going to grant
21 an upward -- I'm going to give -- to impose an upward
22 departure because -- you know, whatever. I think
23 something none of the parties has raised, I think
24 under due process you are entitled to notice of that,
25 but I think the notice you are entitled to is either

1 what's in the presentence report or the parties
2 prehearing submission.

3 MS. RASMUSSEN: You may be right, your
4 Honor. I'm just trying to cover all my bases because
5 I'm pleading -- it's an unpublished case, but it's out
6 of the Ninth Circuit, August 10th, 2007, and in that
7 case defense counsel didn't object at the time of
8 sentencing. They ended up reversing because they said
9 it was plain error. I'm looking at the case which is
10 all post-Booker and it says, although the cases may be
11 different, there may not have been something filed by
12 the government, but they just say the defense has to
13 object.

14 THE COURT: I understand, and the way I
15 read the rule and the way I read that case is that
16 they -- I think the language of the rule controls and
17 the facts are different there --

18 MS. RASMUSSEN: Okay.

19 THE COURT: -- and here the government gave
20 notice.

21 All right, let's take a -- we've been at
22 this for an hour and forty minutes almost, and we've
23 got several spectators here. And, let's say, just
24 take a -- let's make it like a recess until 3:20 and
25 just give everybody a little bit of a break, all

1 right?

2 MS. RASMUSSEN: Okay. Thank you.

3 THE COURT: Thank you.

4 THE DEFENDANT: Thank you, your Honor.

5 THE COURT: Yes, sir.

6 (Recess taken from

7 3:10 p.m. to 3:20 p.m.)

8 THE COURT: It's a little unusual to take a
9 break in the middle of a sentencing like that, but
10 we've been going at this for, as I said, an hour and
11 forty minutes, or whatever, forty-five minutes,
12 whatever it was, and it's just I want everybody to be
13 comfortable.

14 All right, having heard statements of
15 counsel for the government, counsel for the defendant,
16 and the defendant's remarks, having read the
17 presentence report submitted by the Probation
18 Department and considering its contents, and there
19 being no plea agreement in the case and, of course
20 most importantly, considering the factors set forth in
21 18 USC, Section 3553, I have to agree with the
22 government that this is a case that calls for an
23 upward departure.

24 First of all, the Court has considered the
25 guidelines. Of course, the guidelines are advisory

1 under Booker, but the Court still considers the
2 guidelines and gives due consideration to them. What
3 I'm inclined to do is to agree with the defense on the
4 two objections saying criminal history and the
5 criminal conduct category, the offense category, which
6 would put us at level twenty and a sentence of
7 forty-one to fifty-one months, but as I say I think an
8 upward departure is warranted.

9 The Court, of course, under 3553 exercises
10 its discretion in imposing any sentence that the Court
11 considers to be reasonable. Section 3553(a) sets out
12 the factors to be considered in imposing a sentence,
13 and considering all of those factors and trying to
14 give equal weight to all but not to impose a
15 sentence -- I'm sorry -- to impose a sentence that is
16 sufficient but not greater than necessary to comport
17 with those factors. I find under Section 3553(b) that
18 there is an aggravating circumstance of a kind or to a
19 degree not adequately taken into consideration by the
20 Sentencing Commission, and that an appropriate
21 sentence is higher than the sentence called for by the
22 guidelines. So under Section 3553(c), the upward
23 departure is necessary to achieve a sentence which is
24 sufficient under the principles embodied in 18 USC,
25 Section 3553(a).

1 The Court finds here, and let me say that
2 all of these findings, by the way, are based on clear
3 and convincing evidence and that's primarily the
4 evidence heard at trial and the jury's verdict. The
5 jury returned a verdict finding Mr. Fitch guilty of
6 all sixteen Counts, and so applying the standard of
7 clear and convincing evidence, I think that all of
8 these factors have been found by clear and convincing
9 evidence, but I find here that the death of Maria Bozi
10 was the means that Mr. Fitch used to effectuate the
11 offenses of which he was found guilty.

12 So I think the finding of her death as set
13 out as an aggravating factor in Guideline, Section
14 5K2.1, is supported by clear and convincing evidence.
15 I think there's a case, the closest case on point that
16 I can find and I believe it was cited by you, Mr.
17 Vasquez, is United States of America versus Mayle,
18 M-A-Y-L-E, Mayle, 334 F.3d 552, out of the Sixth
19 Circuit, a 2003 case. And in that case it's very
20 similar factually to this case if the parties want to
21 review that, and I'm sure you probably have.

22 The factors that I refer to -- or I should
23 say the facts that I referred to earlier, the
24 evidentiary facts, that support an upward departure I
25 believe Mr. Vasquez identified some in his filings,

1 but the Court independently, and prior to receiving
2 your filing, it listed several that I think are
3 controlling. There are a number of factors you could
4 look at -- a number of facts, I should say -- a number
5 of facts in the evidence supporting an upward
6 departure, supporting a finding that Mr. Fitch caused
7 Ms. Bozi's death.

8 And, by the way, I want to say that I don't
9 think those -- her death was relied upon by Judge
10 Dawson in the slightest. The transcript doesn't show
11 that and I don't think that the presentence -- the
12 presentence report does not either, and so I don't see
13 any evidence at all that Judge Dawson has previously
14 considered any of these facts. Also, of course, I
15 heard the trial and his was simply a guilty plea, but
16 the facts that I think that support a finding of an
17 upward departure are, one, Mr. Fitch failed to report
18 his wife's disappearance to the police. If you have a
19 loved one who disappears, I think your first reaction
20 is you report the disappearance to the police. Mr.
21 Fitch didn't do that here. Two, he told various
22 stories concerning her whereabouts, that is that she
23 had gone to Vancouver, that she had returned to
24 Romania, and that she had returned to London.

25 So he told different individuals that asked

1 where she was and he would tell them one or the other
2 of those stories, but the evidence was that he told
3 various stories as to where she had gone. Three, he
4 tried to sell her clothing and personal effects,
5 including her car. Four, he remarried shortly after
6 her disappearance without first seeking a divorce. Of
7 course, he's got to have a divorce. He cannot be
8 married to be remarried, and so the first marriage has
9 to be terminated, and I think here it was terminated
10 by the death of Ms. Bozi.

11 Five, he had possession of her checkbook,
12 her credit cards, and other personal information that
13 she would have on -- that any person would have on
14 their person. And, six, he raided her accounts and
15 credit cards by deception either disguises or forgery
16 and he withdrew the daily limit of \$1,000.00 from her
17 ATM -- or from her bank's ATM over a period of about
18 two weeks while wearing disguises. And those of you
19 who sat through the trial will recall that evidence
20 I'm sure.

21 So I think that causing death to effectuate
22 the fraud scheme is sufficiently outside the heartland
23 of the fraud, forgery, and false statement offenses to
24 warrant a departure from the sentencing guidelines.
25 The Court considers under 5K2.1 the dangerousness of

1 the defendant's conduct, the extent to which death or
2 serious injury was intended or knowingly risked. And,
3 three, the extent to which the offense level for the
4 offense of conviction already reflects the risk of
5 personal injury, I find here that Ms. Bozi's death was
6 intended and that was the means that Mr. Fitch used
7 and intended to use to effectuate his scheme.

8 Now, first degree murder, of course, is a
9 very serious offense in the Mayle case. The court
10 departed upward by twenty-three levels, but I'm going
11 to follow the recommendation of the government here,
12 and I realize, Mr. Vasquez, that this is not exactly
13 what you were recommending, but I think a fifteen
14 level upward departure to an offense level of
15 thirty-five with a criminal history category of Roman
16 numeral III yields a sentence of two hundred and ten
17 to two hundred sixty-two months, and I think two
18 hundred sixty-two months is appropriate, the upward
19 end of the guideline.

20 So you are hereby committed to the Bureau
21 of Prisons, Mr. Fitch, for a term of two hundred
22 sixty-two months. The Court I think has outlined the
23 reasons for departure supporting that sentence. A
24 mandatory penalty assessment of \$1,600.00 is required
25 by statute and due immediately. Restitution does not

1 apply in the case. When it comes down to a fine, you
2 claim now to be indigent, but in the presentence
3 report there are statements that various people have
4 made that you told them that you had money stashed
5 here, or there, or elsewhere. So I think, Ms.
6 Rasmussen, that's what supports a fine in the amount
7 of \$7,500.00 and that's the amount that will be
8 imposed.

9 Supervised release will be imposed for a
10 term of five years as called for under the guidelines
11 for Counts 3 through 11. While on supervised release,
12 the defendant shall comply with the standard
13 conditions of supervision recommended by the
14 Sentencing Commission and the following mandatory
15 conditions required by statute: First, you shall not
16 commit another federal, state, or local crime during
17 the term of supervision. Second, you shall not
18 possess illegal controlled substances, and understand
19 please that revocation of supervision is mandatory for
20 possession of illegal controlled substances.

21 Third, you shall refrain from any unlawful
22 use of a controlled substance and shall submit to one
23 drug test within fifteen days of the commencement of
24 supervision to be followed by at least two periodic
25 drug tests thereafter not to exceed one hundred four

1 drug tests annually. Once again revocation is
2 mandatory for refusal to comply. Number four, the
3 defendant shall submit to DNA collection and analysis
4 as directed by the probation officer.

5 In addition, the following special
6 conditions are imposed: Number one, possession of
7 weapons, you shall not possess, have under your
8 control, or have access to, any firearm, explosive
9 device, or other dangerous weapons as defined by
10 federal, state, or local law. Number two, warrantless
11 search, you shall submit to the search of your person,
12 property, or automobile under your control, by the
13 probation officer, or by some other authorized
14 individual under the immediate and personal
15 supervision of the probation officer without a search
16 warrant in order to ensure compliance with all
17 conditions of release.

18 Three, debt obligations, you shall be
19 prohibited from incurring new credit charges, opening
20 additional lines of credit, or negotiating or
21 consummating any financial contracts without the
22 approval of the probation officer. Number four,
23 access to financial information, you shall provide the
24 probation officer access to any requested financial
25 information, including personal income tax returns,

1 authorization for release of credit information, and
2 any other business financial information in which you
3 have a control or interest.

4 Five, mental health treatment, you shall
5 participate in and successfully complete a mental
6 health treatment program which may include testing,
7 evaluation, medication management, outpatient
8 counseling, or residential placement as approved and
9 directed by the probation officer. Further, you shall
10 be required to contribute to the cost of services for
11 such treatment as approved and directed by the
12 probation officer based upon your ability to pay.

13 Six, financial polygraph/truth verification
14 testing, you shall submit to polygraph/truth
15 verification testing as directing by the probation
16 officer to ensure compliance with your financial
17 condition. Number seven, true names, you shall use
18 your true name at all times and will be prohibited
19 from the use of any aliases, false dates of birth,
20 Social Security numbers, places of birth, and any
21 other pertinent demographic information. And, number
22 eight, you must report to the probation office in the
23 district to which you are released within seventy-two
24 hours of release from custody.

25 Do you understand all of that, sir?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: In the event that you desire to
3 appeal your conviction and sentence, you must file a
4 notice of appeal with this court within ten days from
5 today's date. In the event that you cannot afford to
6 pay the cost on appeal, you may request permission to
7 proceed in forma pauperis. If you require the
8 services of an attorney to represent you on the appeal
9 and cannot afford to pay an attorney, one will be
10 appointed to represent you no cost to yourself but at
11 government expense. And if you require any
12 transcripts of any proceedings in order to prosecute
13 your appeal and cannot afford to pay for those
14 transcripts, they also will be provided at government
15 expense.

16 Do you understand that?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: And do you have a copy of those
19 conditions, Ms. Beckner, for Mr. Fitch so that he can
20 have them with him and study them as he needs to?

21 Thank you ma'am.

22 PROBATION OFFICER: Your Honor?

23 THE COURT: Yes, ma'am.

24 PROBATION OFFICER: I'd ask the Court for
25 purposes of our clarifications that for the sentence

1 imposed, that would be actually a term of one hundred
2 and twenty months as to Counts 1 and 2, 12 and 13, and
3 Count 16, a sentence of two hundred and forty months
4 as to Counts 14 and 15, and a sentence of two hundred
5 sixty-two months as to Counts 3 through 11, inclusive,
6 to run concurrent to one another.

7 THE COURT: That's exactly right. Thank
8 you.

9 PROBATION OFFICER: Thank you, sir.

10 THE COURT: All right, and then you wanted
11 a recommendation of Rochester, Minnesota? Tell me
12 again.

13 MS. RASMUSSEN: Yes, your Honor, if the
14 Court would be so kind as to make that recommendation,
15 and also I have to ask another question because my
16 understanding is that his current term of supervised
17 release, which he's technically on now even though
18 he's in custody in this case --

19 PROBATION OFFICER: It stops while he's in
20 custody.

21 MS. RASMUSSEN: Well, my understanding is
22 that it does not. So I mean now we are in a situation
23 where there's a question as to whether when he gets
24 out if there's an eight-year supervised release free
25 from the prior class five from this or simply five

1 from this. My understanding is that unless he has
2 committed a new offense while in custody, it does not
3 toll, and I think that I would definitely request that
4 the Court make a specific finding that it is he is
5 currently on supervised release because otherwise --

6 THE COURT: Go ahead.

7 MS. RASMUSSEN: -- otherwise it's an
8 eight-year supervised release. I mean the case law
9 does not say what probation is saying that it's
10 tolled.

11 THE COURT: Ms. Beckner?

12 PROBATION OFFICER: Your Honor, I have to
13 respectfully disagree. The supervision term is not
14 effective at this time. My understanding is, though,
15 when he finishes this term of imprisonment whatever
16 the original unfulfilled term of supervised release is
17 concurrent with whatever the new term is that is
18 imposed.

19 THE COURT: And that's my understanding as
20 well. So then I'll make the recommendation of
21 Rochester, Minnesota.

22 MS. RASMUSSEN: Okay, as long as it's
23 concurrent, then I don't think there's an issue. And
24 also I would request before we leave today that the
25 Court permit me to withdraw and appoint someone else

1 for the purpose of appeal.

2 THE COURT: Let me ask this, and I'm
3 willing to grant that, if you will go down and talk to
4 Ruthann and tell you her that you are off, and so if
5 he wants an appellate attorney, then she needs to
6 appoint somebody immediately.

7 MS. RASMUSSEN: I will and I will speak to
8 her immediately when I leave.

9 THE COURT: And you understand you must
10 file notice of appeal within ten days from today's
11 date, Mr. Fitch?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: So I want to get you an
14 attorney right away to accomplish that if you want to
15 do it.

16 MS. RASMUSSEN: And I will make sure
17 regardless of whether or not someone is appointed yet
18 that the notice gets filed.

19 THE COURT: That's good. Thank you.

20 THE DEFENDANT: Your Honor --

21 THE COURT: Take a moment to talk to your
22 attorney first.

23 THE DEFENDANT: Okay.

24 (Attorney-client conference held.)

25 MR. VASQUEZ: Your Honor, a brief matter of

1 housekeeping before we go off the record. I'd like to
2 go ahead and make the photographs that I displayed to
3 the Court part of the record.

4 THE COURT: Oh, if you want to, sure. I'll
5 be glad to do that. That's fine.

6 MR. VASQUEZ: I'll go ahead and present
7 them to the clerk at this point in time.

8 THE COURT: All right. Anything else then?

9 MS. RASMUSSEN: I don't think so. Thank
10 you.

11 THE COURT: All right. Thank you. We will
12 be in recess.

13

14

15 (Whereupon, the proceedings concluded.)

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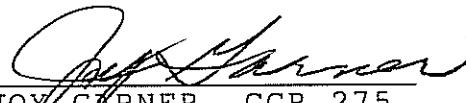
18 I hereby certify that pursuant to Section
19 753, Title 28, United States Code, the foregoing is a
20 true and correct transcript of the stenographically
reported proceedings held in the above-entitled
matter.

21

22

Date:

March 12, 2008


JOY GARNER, CCR 275
U.S. Court Reporter

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