

No. 07-10607

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

DAVID KENT FITCH,

Defendant-Appellant.

APPEAL

From the United States District Court
For the District of Nevada,
Honorable James C. Mahan, U.S. District Judge
D.C. No. 2:04-CR-0262-JCM

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

I.	ISSUES PRESENTED FOR REVIEW	1
II.	URISDICTIONAL STATEMENT	1
III.	STATEMENT OF THE CASE	2
A.	Nature Of The Appeal	2
B.	Course of The Proceedings and Disposition in The District Court.....	2
C.	Bail Status.....	3
VI.	STATEMENT OF THE FACTS	3
V.	ARGUMENT.....	13
A.	Mr. Fitch’s Sixth Amendment right to a speedy trial was violated; therefore the indictment (and the superseding indictments) in this case should be dismissed with prejudice.....	13
B.	Mr. Fitch’s sentence should be vacated and this matter remanded for resentencing because the 262-month sentence imposed is procedurally erroneous and substantively unreasonable	19
1.	Mr. Fitch’s sentence is procedurally erroneous	19
a.	The district court chose Mr. Fitch’s 262-month sentence based on clearly erroneous facts.....	20
b.	The district court failed to explain the selected sentence, including any deviation from the Guidelines range	27
c.	The district court effectively treated the Sentencing Guidelines as mandatory.....	28
d.	The district court failed to consider the factors from 18 U.S.C. Section 3553(a)	29
2.	Mr. Fitch’s sentence is substantively unreasonable	31

VI. CONCLUSION.....	34
VII. STATEMENT OF RELATED CASES.....	35
VIII. CERTIFICATE OF COMPLIANCE	36

TABLE OF AUTHORITIES

Cases

Barker v. Wingo,
407 U.S. 514 (1972)17

Cruzan v. Director, Missouri Department of Health,
497 U.S. 261 (1990)27

Dillingham v. United States,
423 U.S. 64 (1975)14

Doggett v. United States,
505 U.S. 647 (1992) 16, 17

Edinburgh Assurance Co. v. R. L. Burns Corp.,
669 F.2d 1259 (9th Cir. 1982).....22

Gall v. United States,
552 U.S. 38 (2007) 19, 30, 32

Gay v. Waiters’ and Dairy Lunchmen’s Union, Local No. 30,
694 F.2d 531 (9th Cir. 1982).....21

In re Jobs,
529 A.2d 434 (N.J. 1987).....27

Rita v. United States,
551 U.S. 338 (2007) 19, 32

United States v. Beamon,
992 F.2d 1009 (9th Cir. 1993).....18

United States v. Carty,
520 F.3d 984 (9th Cir. 2008) (en banc)..... 19, 29, 30, 31

United States v. Fischer,
219 Fed.Appx. 683 (9th Cir. 2007)13

United States v. Gregory,
322 F.3d 1157 (9th Cir. 2003).....13

United States v. Kidd,
734 F.2d 409 (9th Cir. 1984).....16

United States v. MacDonald,
456 U.S. 1 (1981)16

United States v. Marion,
404 U.S. 307 (1971)14

United States v. Martinez,
77 F.3d 332 (9th Cir. 1996).....33

United States v. Pike,
473 F.3d 1053 (9th Cir. 2007).....28

United States v. Pineda-Doval,
---F.3d---, 2010 WL 3122862, *18 (9th Cir. August 10, 2010).....27

United States v. Shell,
974 F.2d 1035 (9th Cir. 1992).....17

United States v. Simmons,
536 F.2d 827 (9th Cir. 1976).....16

United States v. Tanh Huu Lam,
251 F.3d 852 (9th Cir. 2001).....13

United States v. United States Gypsum Co.,
333 U.S. 364 (1948)22

Constitutional Provisions

U.S. CONST Am. 6..... passim

Statutes

18 U.S.C. § 1028.....10

18 U.S.C. § 1029.....2, 10

18 U.S.C. § 1344.....2, 10

18 U.S.C. § 1542.....10

18 U.S.C. § 1956.....	2, 11
18 U.S.C. § 1957.....	2, 11
18 U.S.C. § 2312.....	2, 10, 12
18 U.S.C. § 2313.....	2, 3, 11, 12
18 U.S.C. § 3231.....	1
18 U.S.C. § 3282.....	11
18 U.S.C. § 3293.....	11
18 U.S.C. § 3553.....	19, 29, 30, 33
18 U.S.C. § 3742.....	1
18 U.S.C. § 922.....	10
28 U.S.C. § 1291.....	1

Rules

9th Cir. Rule 30-1.10.....	7
FRAP 4(b)(1)(A)(i).....	1

Regulations

USSG § 5K2.1.....	29
USSG § 5K2.23.....	33

APPELLANT'S OPENING BRIEF

I.

ISSUES PRESENTED FOR REVIEW

A. Whether Mr. Fitch's Sixth Amendment right to a speedy trial was violated and thus the indictment should be dismissed with prejudice.

B. Whether Mr. Fitch's procedurally erroneous and substantively unreasonable sentence should be vacated and this matter remanded for resentencing.

II.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Nevada (district court) had jurisdiction pursuant to 18 U.S.C. § 3231. The written Judgment In A Criminal Case (judgment) was entered on December 6, 2007. 1 ER 19-24.¹ David Kent Fitch filed a Notice of Appeal on December 12, 2007. 3 ER 315. Mr. Fitch's appeal is considered timely pursuant to FRAP 4(b)(1)(A)(i). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

¹ The Excerpts of Record are cited to as "ER" followed by the volume number, and then the page number. Thus, for example, "1 ER 19" refers to Excerpts of Record, Volume 1, page 19.

III.

STATEMENT OF THE CASE

A. Nature Of The Appeal

This is a direct criminal appeal from Mr. Fitch's conviction and sentence.

B. Course of The Proceedings and Disposition in The District Court

The indictment in this case was filed on June 29, 2004. CR #1. The Government filed a first superseding indictment on July 27, 2004 (CR #10), and then a second superseding indictment on March 1, 2005. 2 ER 36-43. The second superseding indictment charged Mr. Fitch with two counts of Fraudulent Use of an Access Device (a violation of 18 U.S.C. § 1029(a)(2)), with nine counts of Bank Fraud (a violation of 18 U.S.C. § 1344), with two counts of Attempted Fraudulent Use of an Access Device (a violation of 18 U.S.C. § 1029(a)(2) and (b)(1)), with two counts of Laundering Monetary Instruments (a violation of 18 U.S.C. § 1956(a)(1)(B)), with one count Money Laundering (a violation of 18 U.S.C. § 1957), with one count of Interstate Transportation of a Stolen Motor Vehicle (a violation of 18 U.S.C. § 2312), and one count of Receipt of a Stolen Motor Vehicle (a violation of 18 U.S.C. § 2313). *Id.*

On June 8, 2007, the Government moved to dismiss count 17 (charging Interstate Transportation of a Stolen Motor Vehicle in violation of 18 U.S.C. § 2312) and count 18 (charging Receipt of a Stolen Motor Vehicle in violation of

18 U.S.C. § 2313). CR #168. The district court granted that motion on June 15, 2007. CR #190.

Mr. Fitch pled not guilty to the charges. His case went to trial. The case was tried on June 18, 19, 20 and 21, 2007. At the end of the trial, a jury found Mr. Fitch guilty on all sixteen remaining counts of the second superseding indictment.

Mr. Fitch was sentenced on October 19, 2007. 3 ER 228-314. After determining that the appropriate Guidelines range was 41 to 51 months (1 ER 6), the district court departed upwards 15-levels resulting in a Guidelines range of 210 to 262 months. 1 ER 10. The district court then sentenced Mr. Fitch to 262 months in prison. *Id.*

The judgment was not entered until December 6, 2007. 1 ER 19-24. Mr. Fitch filed a time notice of appeal on December 12, 2007. 3 ER 315.

C. Bail Status

Mr. Fitch is incarcerated in the Federal Correctional Institution in Edgefield, SC (FCI Edgefield). His projected release date is March 2, 2026.

VI.

STATEMENT OF THE FACTS

According to the Government, through 1997 and 1998, Mr. Fitch traveled to Colombia on several occasions and spent considerable time there. CR #208.

While in Colombia, Mr. Fitch entered into an intimate relationship with Patricia

Molano Gutierrez. *Id.* Then in May 1998, Mr. Fitch began traveling to England because Ms. Molano moved there. *Id.*

At some point in time while he was in England, Mr. Fitch met Maria Bozi. *Id.* Although Romanian by birth, Ms. Bozi was a naturalized citizen of the United Kingdom. *Id.* Mr. Fitch and Ms. Bozi got married in England on April 23, 1999. *Id.*

Following their marriage, Ms. Bozi prepared to move to the United States. *Id.* She sublet her apartment in England, shipped, sold or stored her furniture and personal property. *Id.* She also applied for a United States bank account with Citibank's North America on May 11, 1999. *Id.* Ms. Bozi was listed as the sole account holder. *Id.* She did not list a co-account holder, nor did she list Mr. Fitch as a beneficiary. *Id.* On July 21, 1999, Ms. Bozi transferred \$120,000 into this Citibank account. *Id.* On July 30, 1999, Ms. Bozi flew to the United States to be with Mr. Fitch in Nevada. *Id.*

On August 6, 1999, within a week of arriving in Nevada, Ms. Bozi purchased a 1994 Ford Thunderbird from an automobile dealership in Henderson, Nevada. *Id.* On August 13, 1999, Ms. Bozi made a \$1,000 down payment to Virginia Frye for a mobile home situated in the Lake Shore Trailer Village at the Lake Meade National Recreation Area. *Id.* Ms. Bozi completed this purchase and paid the balance of \$13,000 on August 27, 1999. *Id.* Three days later, on August 30, 1999, Ms. Bozi entered into a lease at the Lake Shore Trailer Village. *Id.*

Throughout the month of August 1999, Ms. Bozi maintained regular contact with her mother in Romania and Michael Novin [a former boyfriend and the person Ms. Bozi left in charge of all her personal belongings and affairs in England after she married Mr. Fitch and moved to the United States]. *Id.* Shortly after moving into the mobile home at Lake Shore Trailer Village, however, Ms. Bozi's communications with her mother and Mr. Novin abruptly ended. *Id.* Mr. Novin last spoke with Ms. Bozi on September 4, 1999. *Id.*

On September 7, 1999, Mr. Fitch—wearing a hat, sunglasses and fake moustache—made an ATM withdrawal, withdrawing \$1,000 from Ms. Bozi's Citibank account.² *Id.*; *see also*, 2 ER 39. Similar withdrawals were made on September 9 and 10, 1999.³ 2 ER 39.

On September 13, 1999, Mr. Fitch deposited a \$40,000 check into his own account at Norwest Bank. CR #208. The check was drawn on Ms. Bozi's Citibank account and was for a purported down payment on a house. *Id.* Citibank paid the check, but the check provoked further inquiries because the portion where

² It should be noted, however, that the evidence at trial showed that on August 17 and 19, 1999, Mr. Fitch accompanied by Ms. Bozi made ATM withdrawals of \$1,000 each from her Citibank account. *See*, CR #239 (Trial Transcript, Day 2 (June 19, 2007) at 75-76); CR #240 (Trial Transcript, Day 3 (June 20, 2007) at 165-68).

³ According to the second superseding indictment, there were two \$1,000 ATM withdrawals on September 9, 1999. 2 ER 39. Both from the ATM machine at Mall Ring Circle, Henderson, Nevada. *Id.* Yet, the evidence at trial was that the limit on ATM withdrawals was \$1,000 per day. CR #239 (Trial Transcript, Day 2 (June 19, 2007) at 51); *see also* CR #208 at 9, ¶16(c).

one prints the amount of the check in numbers said \$44,000, but the portion where one writes out the amount of the check said “forty thousand dollars.” *Id.* There was a pen-and-ink correction made to the check with the initials “D.F.” to reconcile the discrepant sums, rather than the initials of Maria Bozi – the account holder and purported signatory. *Id.*

Then there were \$1,000 ATM withdrawals from Ms. Bozi’s Citibank account on September 14, 15, 16 and 17, 1999. 2 ER 39. As a result of the ATM withdrawals and the check, Citibank froze Ms. Bozi’s account on September 17, 1999. CR #208.

According to Mr. Novin, Citibank called him sometime around September 11, 1999 about the \$40,000 check and “some urgent matter.” 2 ER 103-04. Mr. Novin gave Citibank Ms. Bozi’s phone number—presumably here in the United States. *Id.*

On September 28, 1999, Mr. Fitch posing as “Mario Bozi” used Ms. Bozi’s health insurance card and account number to obtain medical services, and to schedule surgery for October 5, 1999 to treat a hernia. CR #208.

Copies of Ms. Bozi’s bank statements and cancelled checks were sent to Mr. Novin in England, as well as health insurance statements regarding the medical services Mr. Fitch obtained as “Mario Bozi.” 2 ER 104-05, 108-09, 112-13. Mr. Novin became concerned and called the National Park Service Officers at Lake Meade on or about September 28, 1999. CR #239 (Trial Transcript, Day 2 (June

19, 2007) at 83-84). He also faxed them copies of Ms. Bozi's Citibank statements, cancelled checks and the health insurance information regarding "Mario Bozi." 2 ER 167; *see also*, CR #240 (Trial Transcript, Day 3 (June 20, 2007) at 84-85).

The Park Service then contacted the FBI on or about October 12 or 13, 1999. 2 ER 162. They faxed the materials they received from Mr. Novin to the FBI, and requested help getting subpoenas. 2 ER 162-63. Special Agent Henry Schlumpf with the FBI was informed about the ATM transactions at Citibank and was asked to get a subpoena to get information from the bank. 2 ER 165, 167. Agent Schlumpf obtained surveillance tapes from Citibank. *Id.* He looked at the surveillance tapes, he obtained identification information about Mr. Fitch, including a copy of his passport, put the information into the National Criminal Information Center (NCIC), and began looking for Mr. Fitch. 2 ER 166-68.

Meanwhile, according to the Government, Mr. Fitch met a gentleman by the name of David Lee Krause. PSR (dated October 25, 2000) at 6.⁴ Mr. Fitch paid Krause for his personal information, and then used that information to obtain a duplicate social security card, a birth certificate, a Utah driver's license, and a passport in Krause's name. *Id.* at 6-7.

⁴ The presentence investigation report is cited to as "PSR." There are two PSRs in this case. One from 2000 and the one prepared in this case. Both have been submitted under seal, pursuant to 9th Cir. Rule 30-1.10, for the Court's consideration.

On November 26, 1999, Mr. Fitch left the United States and traveled to Canada and then to England using the Krause passport. *Id.* at 8. On January 20, 2000, Mr. Fitch married Ms. Molano in England under the assumed name David Lee Krause. *Id.* On February 7, 2000, Mr. Fitch re-entered the United States using the Krause passport. *Id.*

On February 8, 2000, officers of the Henderson Police Department observed a vehicle traveling at a high rate of speed and conducted a traffic stop. *Id.* Mr. Fitch was the driver of the vehicle (the 1994 Ford Thunderbird) but he identified himself as David Lee Krause. *Id.* The registration papers to the car listed Maria Bozi as the owner, and Ms. Bozi and David Fitch as the insureds. *Id.* A license plate check revealed that the car “belonged to a missing person with suspicious circumstances.” *Id.* The officers contacted the FBI. *Id.*

Agent Schlumpf and Agent Beasley of the FBI drove out to where Mr. Fitch was stopped, got his permission to search the vehicle, and transported him to the FBI offices to interview him. CR #240 (Trial Transcript, Day 3 (June 20, 2007) at 61-62. While they searched the vehicle, these FBI agents interviewed Mr. Fitch. *Id.* at 63.

According to the agents, Mr. Fitch admitted he was not Krause (*id.* at 64-65). They questioned him about the ATM transactions, and the \$40,000 check, and the health insurance charges as “Mario Bozi.” Mr. Fitch admitted to using Ms. Bozi’s health insurance card and posing as “Mario Bozi.” *Id.* at 85. He was shown

surveillance videos or photographs from the Citibank ATM machine, Mr. Fitch admitted it was him in disguise taking money from Ms. Bozi's account. 2 ER 169-75; *see also*, 2 ER 33. He admitted to filling out the \$40,000 check, making it out to himself, and presenting it to the bank to take money out of Ms. Bozi's account. 2 ER 175; *see also*, 2 ER 33. Mr. Fitch also admitted to putting the money in a bank account under Krause's name to hide it. 2 ER 176; *see also*, 2 ER 33. Mr. Fitch was then placed under arrest.

The following day, February 9, 2000, a criminal Complaint was filed against Mr. Fitch that, among other things, alleged the following:

FITCH eventually admitted that he was **DAVID KENT FITCH**, and that he was married to **MARIA BOZI**. He admitted to fraudulently taking money from **BOZI**'s account by using her ATM card and wearing disguises to conceal his identity from the bank surveillance cameras. He also admitted to cashing a fraudulent \$40,000 check after her disappearance, and concealing the money in an account that he opened under a false name. He also admitted to owning two firearms, which he kept in his storage unit, knowing full well that this was a violation of his ex-felon status.

2 ER 64 (emphasis included).

The FBI then conducted a series of searches. These were all conducted in mid-February 2000. The FBI searched two storage units rented by Fitch, three automobiles, and a fifth wheel trailer. CR #26; *see also* CR #240 (Trial Transcript, Day 3 (June 20, 2007) at 67-157). No other searches were conducted. CR #26.

On February 15, 2000, the Government filed a one count indictment against Mr. Fitch for Unlawful Possession of a Firearm by a Felon. 2 ER 60-61. On June 2, 2000, the Government filed a ten count superseding indictment in that case (2:00-cr-050-KJD). PSR (dated October 25, 2000) at 3. They charged Mr. Fitch with two counts Possession of False Identification Documents with Intent to Defraud the United States (a violation of 18 U.S.C. § 1028(a)(4)), four counts of Use of a False Passport (a violation of 18 U.S.C. § 1542), two counts Unlawful Possession of a Firearm by a Felon (a violation of 18 U.S.C. § 922(g)(1)), one count Unlawful Possession of Ammunition by a Felon (a violation of 18 U.S.C. § 922(g)(1)), and one count Unlawful Possession of Ammunition and a Firearm by a Felon (a violation of 18 U.S.C. § 922(g)(1)). *Id.* at 1.

Mr. Fitch pled guilty to all ten counts without the benefit of a plea agreement on July 13, 2000. *Id.* at 4. Mr. Fitch was sentenced on November 14, 2000. *Id.* at 1. He was sentenced to 97 months on all ten counts. *See* CR #221-1.

Nearly 4 ½ years after he was arrested, the Government filed the indictment in this case. CR #1. The indictment charged Mr. Fitch with two counts of Fraudulent Use of an Access Device (a violation of 18 U.S.C. § 1029(a)(2)), nine counts of Bank Fraud (a violation of 18 U.S.C. § 1344), two counts Attempted Fraudulent Use of an Access Device (a violation of 18 U.S.C. § 1029(a)(2) and (b)(1)), one count Interstate Transportation of a Stolen Motor Vehicle (a violation of 18 U.S.C. § 2312), and one count Receipt of a Stolen Motor Vehicle (a violation

of 18 U.S.C. § 2313). *Id.* The indictment was filed just a few months before the five-year statute of limitations ran on all but the bank fraud charges. *See* 18 U.S.C. § 3282; 18 U.S.C. § 3293.

All of the crimes charged in the indictment were committed between September and November 1999. CR #1. These were all crimes the Government was aware of in February 2000 when they arrested and indicted Mr. Fitch. They were certainly aware of these crimes by June 2, 2000 when they had completed their searches and filed a superseding indictment in case number 2:00-cr-050-KJD.

The discovery in both cases—the 2000 case and this case—was the same. CR #128 at 28. The Government did not provide Mr. Fitch with anything new that it did not have in 2000. *Id.*

On July 27, 2004, the Government filed a superseding indictment in this case. CR #10. They added two counts of Laundering Monetary Instruments (a violation of 18 U.S.C. § 1956(a)(1)(B)), and one count Money Laundering (a violation of 18 U.S.C. § 1957). *Id.* All three additional charges were committed in November 1999. *Id.*

On March 1, 2005, the Government filed a second superseding indictment that made some factual corrections to the allegations but charged Mr. Fitch with the same crimes alleged in the first superseding indictment. *See* 2 ER 36-43; *see also* CR #128 at 27.

Mr. Fitch filed several pretrial motions to dismiss the indictment(s) against him because of pre-indictment delay, vindictive prosecution, and for violating his Sixth Amendment right to a speedy trial and his rights under the Speedy Trial Act. *See e.g.*, CR #26, #28, 56, and #128. These motions were all denied. *See* CR #46; 1 ER 1-3; CR #177.

On June 8, 2007, the Government moved to dismiss count 17 (charging Interstate Transportation of a Stolen Motor Vehicle in violation of 18 U.S.C. § 2312) and count 18 (charging Receipt of a Stolen Motor Vehicle in violation of 18 U.S.C. § 2313). CR #168. The district court granted that motion on June 15, 2007. CR #190.

Mr. Fitch's case was tried on June 18, 19, 20 and 21, 2007. At the end of the trial, a jury found Mr. Fitch guilty of all sixteen remaining counts of the second superseding indictment.

Mr. Fitch was sentenced on October 19, 2007. 3 ER 228-314. After determining that the appropriate Guidelines range was 41 to 51 months (1 ER 6), the district court departed upwards 15-levels resulting in a Guidelines range of 210 to 262 months. 1 ER 10. The district court then sentenced Mr. Fitch to 262 months in prison. *Id.*

V.

ARGUMENT

A. Mr. Fitch’s Sixth Amendment right to a speedy trial was violated; therefore the indictment (and the superseding indictments) in this case should be dismissed with prejudice

The Court reviews a district court’s decision on whether to dismiss an indictment for violation of the Sixth Amendment’s Speedy Trial Clause *de novo*. *United States v. Fischer*, 219 Fed.Appx. 683, 684 (9th Cir. 2007) (citing *United States v. Gregory*, 322 F.3d 1157, 1160-61 (9th Cir. 2003)). Its factual determinations on this claim are reviewed for clear error. *Gregory*, 322 F.3d at 1160-61 (citing *United States v. Tanh Huu Lam*, 251 F.3d 852, 855 (9th Cir. 2001)).

Prior to trial, Mr. Fitch moved to dismiss the indictment based on a violation of his Sixth Amendment right to a speedy trial. 2 ER 44-49. The Government opposed the motion. 2 ER 50-57. The Government conceded that “a share of the evidentiary support for the [2004] indictment arose from the same aggregate set of facts supplying the basis for the 2000 indictment. Both indictments have similar factual predicates.” 2 ER 52:20-23. The Government further admitted that Mr. Fitch’s February 8, 2000 “arrest”—not the 2000 indictment—triggered “Mr. Fitch’s Sixth Amendment speedy trial right in the 2000 matter.” 2 ER 52-53. The Government disagreed with Mr. Fitch, however, that the February 2000 arrest also

served “as the basis for computing the attachment of the speedy trial protection in the case presently at hand.” 2 ER 53. According to the Government, since the indictment in this case charged Mr. Fitch with “separate and distinct crimes” from those he was charged with and convicted in 2000, “a new speedy trial right attache[d]” that was not triggered until the indictment was filed on June 29, 2004. 2 ER 52-56.

The district court agreed with the Government and denied Mr. Fitch’s motion. The order denying the motion states in relevant part:

While some evidentiary support for the current indictment arose from the same set of facts which supported the 2000 indictment, these indictments charge defendant of separate, independent crimes. The current indictment triggered defendant’s Sixth Amendment right to a speedy trial on crimes charged therein. His arrest on similar charges in 2000 was not the triggering event. Likewise, no violation of the Speedy Trial Act has occurred.

1 ER 2. The district court erred.

Invocation of the Sixth Amendment’s speedy trial provision ““need not await indictment, information, or other formal charge.”” *Dillingham v. United States*, 423 U.S. 64, 65 (1975) (quoting *United States v. Marion*, 404 U.S. 307, 320-321 (1971)). The Sixth Amendment kicks in when a person is accused, and the “Government constituted [Mr. Fitch] an ‘accused’ when it arrested him and thereby commenced its prosecution of him.” *Dillingham*, 423 U.S. at 64-65. Not

only is this true for the 2000 case—as the Government concedes (2 ER 52-53)—it is true for this case.

The crimes charged in the 2000 case are different than the crimes charged in this case. However, they are not “separate, independent crimes.” 1 ER 2. The Government has always maintained that all of these crimes—those charged in 2000 and those charged in 2004—were part of one “elaborate and lengthy” scheme to marry Ms. Bozi, “lure her to the United States where—isolated from [her] friends and family—[Mr. Fitch] disposed of her and took, or attempted to take, all of her money, property and worldly possessions.” CR #208 at 29; *see also*, CR #28. These crimes were all committed between June 1999 and February 2000.

The Government knew in 2000 about these crimes and had evidence to prove them. They questioned Mr. Fitch about the crimes on February 8, 2000, and arrested him after he admitted to the crimes. *See e.g.*, 2 ER 30-35, 64, 85, 169-76. The day after Mr. Fitch was arrested, February 9, 2000, the Government filed a criminal Complaint wherein they accused Mr. Fitch of most of the crimes alleged in this case—the 2004 case. 2 ER 62-64.

All of the searched that provided the evidence used at trial were conducted in mid-February 2000; there were no other searches. CR #26; *see also* CR #240 (Trial Transcript, Day 3 (June 20, 2007) at 67-157). The discovery in both cases—the 2000 case and this case—was the same. CR #128 at 28. The Government did not provide Mr. Fitch with anything new that it did not have in 2000. *Id.*

Furthermore, Mr. Fitch has been in continuous custody since his arrest in February 2000. The Government therefore constituted Mr. Fitch an “accused” at the time they arrested him; not only for the crimes for which they indicted him in 2000, but for the crimes they purposely or negligently did not indict him for until 2004.

The facts and circumstances of this case thus distinguish it from cases like *United States v. Kidd*, 734 F.2d 409, 412 (9th Cir. 1984) where the defendant was released without being charged thus no Sixth Amendment violation occurred; or *United States v. MacDonald*, 456 U.S. 1 (1981) where the defendant was arrested and then the charges were dropped; or *United States v. Simmons*, 536 F.2d 827, 830 (9th Cir. 1976), *cert. denied*, 429 U.S. 854 (1976), stating the Sixth Amendment does not apply to delay between “commission of the crime” and indictment.

The Supreme Court has established a four-part balancing test to evaluate claims under the Sixth Amendment’s Speedy Trial Clause. The court must consider (1) whether delay before trial was uncommonly long, (2) whether the Government or the defendant is more to blame for that delay, (3) whether, in due course, the defendant asserted his right to a speedy trial, and (4) whether the defendant suffered prejudice because of the delay. *Doggett v. United States*, 505 U.S. 647, 651 (1992). No factor is, however, “either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they

are related factors and must be considered together with such other circumstances as may be relevant.” *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

The four-year delay—almost four and a half years—from the time Mr. Fitch was arrested in February 2000 to the time he was indicted in this case in June 2004 meets the threshold requirement of a “presumptively prejudicial” delay. *See Doggett*, 505 U.S. at 651 n. 1 (“post accusation delay [is] ‘presumptively prejudicial’ at least as it approaches one year”). The Government is entirely to blame for the delay. Mr. Fitch asserted his speedy trial right in due course, just a few months after the second superseding indictment was filed and a little over a year after the initial indictment was filed. 2 ER 44. And, he asserted his speedy trial right two years before his case went to trial in June 2007. *Id.*

As for prejudice, Mr. Fitch is entitled to a presumption of prejudice. *Doggett*, 505 U.S. at 651 n. 1. Moreover, this Court has interpreted *Doggett* to mean that “no showing of prejudice is required when the delay is great and attributable to the government.” *United States v. Shell*, 974 F.2d 1035, 1036 (9th Cir. 1992).

But even if Mr. Fitch were required to show prejudice, he has done so. Actual prejudice is typically demonstrated in three ways: “oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the [accused’s] defense will be impaired.” *Doggett*, 505 U.S. at 654 (internal quotation marks and citations omitted); *United States v. Beamon*, 992 F.2d 1009,

1014 (9th Cir. 1993). By the time his case went to trial in June 2007, Mr. Fitch had been in pretrial incarceration for nearly 7 ½ years. He had suffered through some very difficult circumstances, including undergoing a groin surgery that left him partially incontinent. 2 ER 217-18. He still experiences difficulty urinating or refraining from urinating. *Id.* This tragic circumstance and the extent of the pretrial incarceration can easily be characterized as oppressive.⁵

Mr. Fitch's defense was also impaired by the extreme preindictment delay. During the delay, Mr. Fitch's father died. CR #26. According to Mr. Fitch his father would have provided testimony to contradict the Government's theory that Ms. Bozi disappeared on or about September 4, 1999 because he spoke to her a year later in December 2000. *Id.*

Mr. Fitch's Sixth Amendment right to a speedy trial was clearly violated. The indictment—and the superseding indictments—in this case should be dismissed with prejudice.

⁵ Mr. Fitch also suffered great anxiety and concern during this extended pretrial incarceration. He had already been confronted with evidence regarding the crimes alleged in this case, questioned about them, and admitted to committing them. Yet, he was initially only indicted on the firearms and passport crimes. He had to wonder when, and if, he would be indicted on the other crimes. The Government also kept promising (threatening) to bring murder charges against him.

B. Mr. Fitch's sentence should be vacated and this matter remanded for resentencing because the 262-month sentence imposed is procedurally erroneous and substantively unreasonable

A district court's sentencing decisions are reviewed for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 49 (2007); *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). Sentences are reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *Rita v. United States*, 551 U.S. 338, 351 (2007); *Gall*, 552 U.S. at 46 (2007); *Carty*, 520 F.3d at 993. Procedural error includes failing to calculate (or calculating incorrectly) the proper Guidelines range, treating the Guidelines as mandatory, failing to consider the factors from 18 U.S.C. § 3553(a), choosing a sentence based on clearly erroneous facts, or failing to explain a selected sentence, including any deviation from the Guidelines range. *See Carty*, 520 F.3d at 993.

1. Mr. Fitch's sentence is procedurally erroneous

The sentence in this case is procedurally erroneous because the district court (1) chose the sentence based on clearly erroneous facts, (2) failed to explain the selected sentence, including any deviation from the Guidelines range, (3) treated the Guidelines as mandatory, and (4) failed to consider the factors from 18 U.S.C. § 3553(a).

- a. *The district court chose Mr. Fitch's 262-month sentence based on clearly erroneous facts*

The district court determined that Mr. Fitch's proper Guidelines range was 41 to 51 months. 1 ER at 5-6.⁶ However, the court decided that a "fifteen level upward departure to [the] offense level" was warranted.⁷ 1 ER 10. That raised the offense level to 35. *Id.* The resulting Guidelines range—based on an offense level 35 and criminal history category III—was 210 to 262 months. *Id.* The district court sentenced Mr. Fitch to 262 months in prison. *Id.*

According to the judge, the upward departure was warranted because Mr. Fitch "caused" Ms. Bozi's death, and her death "was the means that Mr. Fitch used to effectuate the offenses of which he was found guilty." 1 ER 7-8. In support of

⁶ The district court agreed with Mr. Fitch that the appropriate offense level (after all applicable adjustments and groupings) was 20 and his appropriate criminal history category was III. 1 ER 6; 3 ER 233-36. That resulted in a Guidelines range of 41 to 51 months. 1 ER 6.

⁷ Before Mr. Fitch was sentenced, the Government filed a sentencing memorandum wherein they moved for an upward departure pursuant to USSG § 5K2.1. CR #208. According to the Government, this was "not a typical case of access device fraud, bank fraud or money laundering." *Id.* at 17. That is because they believe Ms. Bozi is dead - even though they have no body, no murder weapon, and they have no idea where she is - and that Mr. Fitch "killed" her in order to "consume all of [her] wealth and property." *Id.* at 15-17. The Government therefore requested a 15-level upward departure, which they mistakenly believed resulted in a base offense level 38, and recommended Mr. Fitch be sentenced to 30 years (360 months) in prison. *Id.* at 30-31. Mr. Fitch opposed the motion for an upward departure. CR #218; 2 ER 212-220.

these findings, the court relied on the following “facts,” which he claimed were “primarily the evidence heard at trial and the jury’s verdict [1 ER 7]:”

1. Mr. Fitch failed to report his wife’s disappearance to the police. 1 ER 8.
2. Mr. Fitch told various stories concerning her whereabouts, that is that she had gone to Vancouver, that she had returned to Romania, and that she had returned to London. *Id.*
3. Mr. Fitch tried to sell her clothing and personal effects, including her car. 1 ER 9.
4. Mr. Fitch remarried shortly after her disappearance without first seeking a divorce. *Id.*
5. Mr. Fitch had possession of her checkbook, her credit cards, and other personal information that she would have on – that any person would have on their person. *Id.*
6. Mr. Fitch raided her accounts and credit cards by deception either disguises or forgery and he withdrew the daily limit of \$1,000.00 from her ATM – or from her bank’s ATM over a period of about two weeks while wearing disguises. *Id.*

According to the judge, these “facts” proved by “clear and convincing” evidence that Mr. Fitch murdered his wife. Most of these “facts,” however, are clearly erroneous. 1 ER 7.

“A finding of fact is clearly erroneous only when, although there is evidence in the record to support it, the court of appeals is left with the ‘definite and firm conviction’ that a mistake has been committed.” *Gay v. Waiters’ and Dairy Lunchmen’s Union, Local No. 30*, 694 F.2d 531, 539 (9th Cir. 1982) (quoting

United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); *Edinburgh Assurance Co. v. R. L. Burns Corp.*, 669 F.2d 1259, 1261 (9th Cir. 1982).

In this case, for some of these factual findings, there is nothing in the record to support them. For example, there was no evidence presented to the jury about whether Mr. Fitch reported his wife's disappearance, or whether he filed for divorce. This was not a murder trial. Had it been Mr. Fitch would have presented evidence either to contradict such claims or to explain why perhaps he may not have reported Ms. Bozi missing or filed for divorce. Moreover, the Government did not use these "facts" to support its motion for an upward departure. *See* CR #208.

There was evidence presented at trial that Mr. Fitch had possession of some of Ms. Bozi's personal information (credit cards, checkbook, etc.). It is a mistake to conclude, however, that this means Mr. Fitch murdered his wife. Were that the case, then perhaps one of the Government's key witnesses, Mr. Novin, murdered Ms. Bozi.

Mr. Novin was Ms. Bozi's live-in boyfriend from 1994 to 1997.⁸ 2 ER 87-91. Mr. Novin and Ms. Bozi, however, maintained a very close relationship, even after she married Mr. Fitch. For example, after Ms. Bozi married Mr. Fitch and moved from England to the United States, she would call Mr. Novin every week,

⁸ Mr. Novin real name is Mohammed Rasa Hamidi (phonetic spelling), and although he lived in England he is originally from Iran. 2 ER 85-86.

sometimes twice a week.⁹ 2 ER 152. She also kept her flat in England where Mr. Novin lived—subletting it out to another couple—just in case things did not work out with Mr. Fitch. 2 ER 96-97. In fact, after she sublet her apartment, she lived with Mr. Novin for two weeks before coming to the United States. 2 ER 97. Ms. Bozi left Mr. Novin in charge of her personal affairs in England and used his address as the forwarding address for all of her mail. 2 ER 99-100, 103-04, 107-09, 130-31. Mr. Novin received all of Ms. Bozi’s person mail from health insurance companies, banks, and those “kind[s] of institutions.” 2 ER 131. What is more, Ms. Bozi left a red and gray file box with Mr. Novin, for him to look after, containing “many of [her] personal files including details about her bank account statements, her vehicle documents, credit cards, tax statements, letters, things of that sort.” 2 ER 132. Mr. Novin still had in his possession all of this personal information when he was deposed in 2007 just days before Mr. Fitch’s trial. *Id.*

It is clearly erroneous to conclude Mr. Fitch murdered Ms. Bozi because he had some of her personal information in his possession.

Likewise, the factual finding that Mr. Fitch gave various stories concerning Ms. Bozi’s whereabouts and therefore he murdered his wife is clearly erroneous.

⁹ According to Mr. Novin, not only did Ms. Bozi call him once or twice a week from the United States, she also sent him cards, photographs and letters. 2 ER 99-100. Yet, Mr. Novin testified, he never wrote any letters to Ms. Bozi while she was here in the United States before she “disappeared,” because “it was such a short period there was no need for me to write a letter anyway.” 2 ER 150.

At trial the Government had Gracie Silvers testify. Ms. Silvers started her testimony by saying, “It’s hard for me to remember things anymore.” 2 ER 71. She was supposedly Mr. Fitch’s and Maria Bozi’s neighbor, although she testified that she did not know Mr. Fitch by name—even though she had had them over for dinner. 2 ER 72. Ms. Silvers could not identify Mr. Fitch at trial. 2 ER 75. Yet, she “remembered” that after she had them over for dinner—and we have no idea of the exact date of the dinner—she saw Mr. Fitch and asked him about Ms. Bozi. 2 ER 73-74. She testified he told her she went back to England. 2 ER 74.¹⁰ Under the circumstances, Ms. Silvers’ testimony about exactly what was said, when it was said, and under what circumstances is suspect to say the least.

¹⁰ On cross-examination, Ms. Silvers pretty much admitted that she did not remember anything from when she lived at the trailer park next door to Mr. Fitch and Ms. Bozi. The exchange was as follows:

Q. Do you recall speaking to my investigator, Larry Hoffman, on the phone a couple of weeks ago?

A. Yes.

Q. And do you remember telling him that you don’t remember anything from when you lived at the trailer park?

A. I don’t remember very much at all, huh-uh, because my memory is not good anymore. I have a stroke.

2 ER 75.

Mr. Novin testified he last “spoke” with Ms. Bozi by telephone on September 4, 1999.¹¹ 2 ER 100. When he spoke to her, Ms. Bozi told him that she was going on a “mini-trip” for about a week to ten days. 2 ER 101-02. She would not tell him where she was going. *Id.* She did inform him, however, that she would not be calling him for about ten days or so. 2 ER 102. Two weeks later, on September 18, 1999, Mr. Novin testified he called Ms. Bozi and left a voice mail message for her. 2 ER 102-03. According to Mr. Novin, Mr. Fitch called him back about a half-hour later and told him Ms. Bozi had gone to Vancouver. *Id.*

That may very well have been the case. As the evidence shows, Ms. Bozi was taking a trip. She would not tell Mr. Novin where she was going, or exactly how long she would be gone. Yet, we know she was not going to call him during this time. Adding some credence to the fact that Ms. Bozi may have gone to Vancouver – or at least told Mr. Fitch that is where she was going – is the testimony of Aurelia Cabascu, Ms. Bozi’s mother. Ms. Cabascu testified that Ms. Bozi sent her a letter in August 1999 (or it may have been during a telephone conversation), saying she was “looking for work, for a job” and that she “intend[ed] to move” from Nevada because “it’s too hot.” 2 ER 191-92.

¹¹ It seems that was not the last time, however, Mr. Novin heard from Ms. Bozi. Sometime after September 4, 1999, Mr. Novin received a letter from Ms. Bozi referring to their September 4, 1999 telephone conversation, and confirming that she would not call him for about a week or ten days. 2 ER 101-02.

Likewise, the factual finding that Mr. Fitch was selling Ms. Bozi's personal effects and car is clearly erroneous. The car (a 1994 Ford Thunderbird) was bought after Mr. Fitch and Ms. Bozi were married,¹² and it was insured in both their names. 2 ER 67-68. It is also worth noting that the Government voluntarily dismissed counts 17 and 18 of the second superseding indictment (interstate transportation of a stolen motor vehicle, and receipt of a stolen motor vehicle), both of which dealt with the 1994 Ford Thunderbird. *See* CR #168; CR #190.

Lorinda Brodoski testified at trial that Mr. Fitch tried to sell her some shoes and clothing. 2 ER 79-80. She said Mr. Fitch told her he was "selling these things because his wife left him." 2 ER 80. Assuming *arguendo*, the shoes and clothing belonged to Ms. Bozi – there was no evidence presented at trial to substantiate these items were in fact Ms. Bozi's personal things – it is possible Ms. Bozi left Mr. Fitch. She had kept her flat in England in case things did not work with Mr. Fitch (subletting to another couple). She kept in touch with her former boyfriend, left him in charge of her personal affairs in England, and told her mother in August 1999 she was leaving Las Vegas. 2 ER 191-92. It was too hot and she was not happy. *Id.*

¹² Mr. Fitch and Ms. Bozi were married in England on April 23, 1999. *See e.g.*, CR #208 at 4. Findlay Toyota in Nevada sold the vehicle to Ms. Bozi on August 6, 1999. 2 ER 159.

In short, many of the court's factual findings were clearly erroneous. Again, clearly erroneous does not mean there is no support for them in the record. *See, Gay*, 694 F.2d at 539. It simply means that the court of appeals is left with the "definite and firm conviction" that a mistake has been committed.¹³ *Id.*

- b. *The district court failed to explain the selected sentence, including any deviation from the Guidelines range*

The district court imposed a 15-level upward departure and sentenced Mr. Fitch outside of the applicable Guidelines range (41 to 51 months) because he found that "causing death to effectuate the fraud scheme is sufficiently outside the heartland of the fraud, forgery, and false statement offenses to warrant a departure from the sentencing guidelines." 1 ER 9.

The court, however, did not explain the selected sentence of 262 months. For example, the judge did not explain why he believed the departure should be 15

¹³ The district court also found these facts satisfied the Government's burden of proving by "clear and convincing" evidence that Mr. Fitch murdered his wife and therefore a significant upward departure, under USSG § 5K2.1, was warranted. 1 ER 7; *see also*, CR # 208 (Government's Motion for Upward Departure conceding clear and convincing evidence standard of proof applied); *United States v. Pineda-Doval*, ---F.3d---, 2010 WL 3122862, *18 (9th Cir. August 10, 2010). The clear and convincing evidence standard of proof has been defined as evidence which "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 285 n.11 (1990) (quoting *In re Jobes*, 529 A.2d 434, 441 (N.J. 1987) (quotation omitted)). The facts upon which the court relied (1 ER 8-9) do not meet this heightened standard of proof.

levels; as opposed to six or eight or even ten (all of which would also be significant upward departures). *See e.g., United States v. Pike*, 473 F.3d 1053, 1057 (9th Cir. 2007) (reiterating that one of the factors to consider when determining whether an enhancement will have an “extremely disproportionate effect” on the sentence is whether the increase in number of offense levels “is less than or equal to *four*.” (emphasis added)).

In applying a 15-level upward departure to the offense level, the resulting Sentencing Guidelines range was 210 to 262 months. 1 ER 10. Any sentence within that range is an extremely long prison term. Yet, the district court did not explain why the high-end of the Guidelines range was necessary or appropriate as compared to the low-end of the range or some other sentence within that range.

Meaningful appellate review of how the district court selected the sentence and whether the sentence is reasonable in light of the district court’s findings and analysis therefore becomes very difficult if not impossible.

c. *The district court effectively treated the Sentencing Guidelines as mandatory*

The district court gave lip service to the fact that the Guidelines are now advisory,¹⁴ but effectively treated them as mandatory. For example, the district

¹⁴ The district court stated, “First of all, the Court has considered the guidelines. Of course, the guidelines are advisory under Booker, but the Court still considers the guidelines and gives due consideration to them.” 1 ER 6.

court ruled on Mr. Fitch's objections to the Guidelines calculations in the PSR and the Government's sentencing memorandum, and determined the appropriate offense level was 20 and the appropriate criminal history category was III, resulting in a Guidelines range of 41 to 51 months. 1 ER 6. He then determined that an upward departure was warranted under the Guidelines (*i.e.*, USSG § 5K2.1), and he "departed" upwards 15 levels. 1 ER 9-10. The upward departure resulted in "an offense level thirty-five with a criminal history category of Roman numeral III yield[ing] a sentenc[ing Guidelines range] of two hundred and ten to two hundred sixty-two months." 1 ER 10. The court then imposed a sentence of 262 months. *Id.*

Clearly, the district court only considered the Sentencing Guidelines—he did not even mention any of the other 18 U.S.C. § 3553(a) factors—and gave the Guidelines way more weight than the other § 3553(a) factors. *Carty*, 520 F.3d at 991 (the Guidelines factor should not be given more or less weight than any other; they are to be respectfully considered but are one factor among the § 3553(a) factors that are to be taken into account in arriving at an appropriate sentence). Thus, the district court effectively treated the Guidelines as mandatory.

- d. *The district court failed to consider the factors from 18 U.S.C. Section 3553(a)*

The district court began by saying that he believed a "departure [was] necessary to achieve a sentence which is sufficient under the principles embodied

in 18 U.S.C. § 3553(a).” 1 ER 6. Then he never talked about the § 3553(a) factors.

“The district court should [] consider the § 3553(a) factors to decide if they support the sentence suggested by the parties, *i.e.*, it should consider the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed; the kinds of sentences available; the kinds of sentence and the sentencing range established in the Guidelines; any pertinent policy statement issued by the Sentencing Commission; the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims.” *Carty*, 520 F.3d at 991 (citing 18 U.S.C. § 3553(a)(1)-(7); *Gall*, 552 U.S. at 50 n.6).

None of that happened in this case. Other than knowing that the district court believed a departure was necessary from the Guideline range of 41 to 51 months, we have no idea why or how the court determined that a 262 month sentence was “sufficient, but not greater than necessary, to comply with the purposes set forth” in 18 U.S.C. § 3553(a)(2). We do not know, for example, why a 120-month or 150-month prison sentence would not satisfy the principles embodied in 18 U.S.C. 3553(a), at least in the court’s mind; or whether he even consider other possible sentences. *See*, 18 U.S.C. § 3553(a)(3).

“Once the sentence is selected, the district court must explain it sufficiently to permit meaningful appellate review. A statement of reasons is required by statute, § 3553(c), and furthers the proper administration of justice.” *Carty*, 520 F.3d at 992. Section 3553(c)(1) requires the district court to describe the “reason for imposing a sentence at a particular point within the range.” The court did not do that. Moreover, § 3553(c)(2) requires the district court—in cases like this where the court departed from the applicable Guidelines range—to describe the “specific reason” for imposing the sentence it did, “which reasons *must* be stated with specificity in the written order of judgment and commitment.” (Emphasis added). This too was not done.

For all of these reasons, the sentence imposed on Mr. Fitch was procedurally erroneous. His 262-month sentence therefore should be vacated and this matter remanded for resentencing.

2. Mr. Fitch’s sentence is substantively unreasonable

Mr. Fitch’s sentence is also substantively unreasonable.

In determining substantive reasonableness, the court of appeals considers the totality of the circumstances, including the degree of variance for a sentence imposed outside the Guidelines range. *Carty*, 520 F.3d at 993. For a non-Guidelines sentence, the court of appeals gives “due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the *extent* of the

variance.”¹⁵ *Id.* (citations omitted) (emphasis added). “But the judge must explain why he imposes a sentence outside the Guidelines.” *Id.* at 992 (citing *Rita*, 551 U.S. at 356; *Gall*, 552 U.S. at 46 (indicating that a district judge “must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications”)).

In this case the applicable Guidelines range was 41 to 51 months. 1 ER 6. The district court nevertheless sentenced Mr. Fitch to 262 months—about five to seven times the applicable Guidelines range. 1 ER 10. This is a very harsh sentence in light of the applicable Guidelines range.

As noted above, there is insufficient evidence to prove Mr. Fitch killed Ms. Bozi. There is no body, no murder weapon, and most of the facts upon which the court relied to make that factual determination are clearly erroneous. Furthermore, since the Government could not prove Mr. Fitch murdered his wife—not to a jury and not beyond a reasonable doubt—it appears they purposely chose to stagger the charges. This resulted in an initial prison term of 97 months. The Government then brought the current charges—after Mr. Fitch had been in prison for about 4 years—resulting in an additional 262 months. The court did not give Mr. Fitch any

¹⁵ The district court did say that an upward departure was necessary to “achieve a sentence which is sufficient under the principles embodied in 18 USC Section 3553(a).” 1 ER 6. He did not say, however, that the § 3553(a) factors justify a 15-level upward departure (*i.e.*, justify the “extent” of the variance). Nor did he explain how the § 3553(a) factors justify such an enormous variance.

credit for the 97 months he had already served for conduct arising out of the same criminal scheme.

Although Mr. Fitch did not specifically request a downward departure for the 97 months he had already served, which he could have done (*see* USSG § 5K2.23 “Discharged Terms of Imprisonment” (Policy Statement)), and the very lengthy pre-indictment delay, he did ask the court to take these factors into consideration when sentencing him. *See*, 2 ER 212-20. The district court however did not do that.

The sentencing hearing transcript shows that the judge failed to consider the pre-indictment delay and the 97 months already served as mitigating factors that, under 18 U.S.C. § 3553(b) and *United States v. Martinez*, 77 F.3d 332, 337 (9th Cir. 1996), warrant a downward departure.

The district court did say, “And the effect of what you’re saying is that then Mr. Bozi, I’d hand the key out of here today.” 3 ER 236. He then corrected himself and said “Mr. Fitch.” 3 ER 236-37. These were the court’s only statements (responses) to Mr. Fitch’s arguments that he was prejudiced (sentencing wise) by the staggered cases because, had all the charges been brought in 2000, they would have been grouped together; under the then mandatory Guidelines scheme his total Guidelines range would have remained the same (thus he would have probably been sentenced to 97 months total); and he should have been given credit (in some way) for the time he had already served.

For these reasons, the sentence imposed by the district court is substantively unreasonable. Mr. Fitch's 262-month sentence should be vacated and this matter remanded for resentencing.

VI.

CONCLUSION

Mr. Fitch's conviction and sentence should be vacated and the indictment (filed on June 29, 2004) and all superseding indictments dismissed with prejudice because Mr. Fitch's Sixth Amendment right to a speedy trial was violated. At the very least, Mr. Fitch's sentence should be vacated because it is procedurally erroneous and substantively unreasonable. This matter therefore should be remanded for resentencing.

DATED: September 2, 2010.

s/ Mario D. Valencia
MARIO D. VALENCIA
Counsel for Mr. Fitch

VII.

STATEMENT OF RELATED CASES

Mr. Fitch is aware of no other related cases pending before this Court. However, Mr. Fitch filed at least two other appeals that are related to this case, but the Court has already resolved them. They are *United States v. David Kent Fitch*, No. 00-10580, decided on December 14, 2001 (27 Fed.Appx. 888, 2001 WL 1609844 (9th Cir. (Nev))); and *United States v. David Kent Fitch*, No. 06-17217, decided on July 14, 2010.

VIII.

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32, the brief's line spacing is double spaced and proportionally spaced. The typeface is Times New Roman 14 point and the word count is **8,517**.

DATED: September 2, 2010.

Respectfully submitted,

s/ Mario D. Valencia
MARIO D. VALENCIA
Counsel for Mr. Fitch

CERTIFICATE OF SERVICE

I hereby certify that, on September 2, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in this case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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s/ Mario D. Valencia
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