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8 **UNITED STATES DISTRICT COURT**  
 9 **DISTRICT OF NEVADA**

10 UNITED STATES OF AMERICA,  
 11  
 Plaintiff,  
 12  
 vs.  
 13  
 DAVID K. FITCH,  
 14  
 Defendant.  
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Case No. 02:04-cr-0262 JCM (PAL)

**DEFENDANT’S SENTENCING  
 MEMORANDUM and OPPOSITION TO  
 THE GOVERNMENT’S MOTION FOR  
 UPWARD DEPARTURE**

Sentencing Date: October 19, 2007

Time: 1:30 p.m.

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 18 The Defendant, DAVID FITCH, by and through his counsel, Lisa A. Rasmussen and  
 19 David R. Johnson of the law firm of Watt, Tieder, Hoffar & Fitzgerald, LLP, hereby submits the  
 20 following Sentencing Memorandum pursuant to Rule 32 of the Federal Rules of Criminal  
 21 Procedure. Additionally, Mr. submits herein his Opposition to the government’s Motion for  
 Upward Departure.

22 Mr. Fitch’s sentencing hearing is currently scheduled for October 19, 2007 at 1:30 p.m.

23 **SENTENCING MEMORANDUM**

24 **I.**  
**INTRODUCTION**

25  
 26 This case is presents the Court with several unique and complex considerations with  
 27 regard to determining an appropriate sentence for Mr. Fitch. Mr. Fitch’s counsel, the  
 28 undersigned, previously filed Objections to the Pre-Sentence Report. Following that, Mr. Fitch

1 prepared his own computation of the manner in which he thought his applicable sentence should  
 2 be computed with regard to “grouping” and those computations are also addressed herein.  
 3 Although slightly in error, Mr. Fitch’s computations provide this Court with yet another possible  
 4 application of the Sentencing Guidelines.

5 Additionally, the government has filed a Motion for Upward Departure and Mr. Fitch has  
 6 submits his Opposition to the Motion herein.

7 Finally, Mr. Fitch addresses submits that his sentence herein should be imposed  
 8 concurrently to the 97 month sentence imposed in November 2000.

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 10 **II.**  
**FACTUAL BACKGROUND**

11 **A. Mr. Fitch was convicted of the following counts in this case:**

<b>Date</b>	<b>Activity</b>	<b>Amount</b>	<b>Count(s) / Conduct</b>
7/13/99 to 7/20/99	Deatheridge GM Master Card purchase	\$1,500 (rounded up)	One (access device)
9/7/99	ATM withdrawal	\$1,000	Three (bank fraud) Two (access device)
9/9/99	ATM Withdrawal	\$1,000	Four (bank fraud) Two (access device)
9/9/99	ATM Withdrawal	\$1,000	Five (bank fraud) Two (access device)
9/10/99	ATM Withdrawal	\$1,000	Six (bank fraud) Two (access device)
9/11/99	Check drawn on Citibank account, deposited to Fitch, Norwest Account	\$40,000	Seven (bank fraud)
9/14/99	ATM Withdrawal	\$1,000	Eight (bank fraud) Two (access device)
9/15/99	ATM Withdrawal	\$1,000	Nine (bank fraud) Two (access device)
9/16/99	ATM Withdrawal	\$1,000	Ten (bank fraud) Two (access device)
9/17/99	ATM Withdrawal	\$1,000	Eleven (bank fraud) Two (access device)
10/5/99	Attempt to use Bozi insurance card	\$2500	Twelve (access device)
10/26/99	Attempt to purchase synthetic emeralds	\$5,500	Thirteen (access device)

1	11/17/99	Deposit from ATM withdrawals	(\$2,000, already included above)	Fourteen (money laundering)
2	11/17/99	Deposit from ATM withdrawals, Citibank check	(\$29,000, already included above)	Fifteen (money laundering instruments: §1956)
3	11/17/99	Deposit from ATM withdrawals, Citibank check	(\$29,000, already included above)	Sixteen (money laundering: §1957)
4		<b>TOTAL:</b>	<b>\$55,000</b>	

7 This Court is well acquainted with the facts of this case as this case proceeded to trial.

9 **B. Mr. Fitch Was Convicted Of The Following Counts in The 2000 Case<sup>1</sup>**

11	Date	Activity	Amount	Count(s) / Conduct
12	2/8/00	Possession of Utah Driver's License – David Krause	n/a	One (Poss. false ID documents with intent to defraud US)
13	10/26/99 to 2/8/00	Possession of Utah Driver's License, Birth Certificate— David Krause	n/a	Two (Poss. false ID documents with intent to defraud US)
14	11/25/99	Use of Krause Passport to travel to Canada	n/a	Three (Use of false passport)
15	11/26/99	Use of Krause Passport to enter Canada	n/a	Four (Use of false passport)
16	11/26/99	Use of Krause Passport to enter UK	n/a	Five (Use of false passport)
17	2/7/00	Use of Krause Passport to leave UK and enter US	n/a	Six (Use of false passport)
18	10/30/99	Possession of two firearms: Marlin .22 rifle and Springfield .22 rifle	n/a	Seven (Unlawful poss of firearm by felon)
19	10/1/99 to 2/8/00	Possession of ammunition: 4 boxes of shotgun shells and one box of .44 bullets	n/a	Eight (Unlawful poss of ammunition by felon)

27 <sup>1</sup> *United States v. David Fitch*, Case Number CR-00-0050 KJD (RJJ). Mr. Fitch pled guilty to  
28 the Superseding Indictment as indicated herein.

1	10/1/99 to 2/8/00	Possession of .44 cal revolver	n/a	Nine (Unlawful poss of firearm by felon)
2	2/8/00	Possession of Remington shotgun and Springfield 30-30 rifle	n/a	Ten (Unlawful poss of firearm by felon)

6 **C. Mr. Fitch's Sentence In the 2000 Case**

7 Mr. Fitch was sentenced to 97 months in the Bureau of Prisons in the 2000 case. The  
8 sentence was computed as follows:

9	Base level offense	20
10	The defendant possessed 5 firearms	+2
11	The firearms were stolen	+2
12	Adjusted offense level:	24
13	Obstruction of Justice	+2
14	Total Offense Level	<b>26</b>

15 His criminal history category was III, which proscribed a range of 78-97 months. Mr.  
16 Fitch received the high end of the guideline range.

17 The PSI in the 2000 case included the following paragraphs under the heading "**The**  
18 **Offense Conduct**":

19 14. On April 5, 1999, Fitch enters the United States with his United States  
20 passport and Maria Bozi (the defendant's wife) enters the United States with her  
21 United Kingdom passport. Prior to Bozi leaving England, she left her friend,  
22 Michael Novin, in charge of her financial and residential affairs in England.  
23 Novin and Bozi maintained both telephonic and written contact up until September  
24 4, 1999.

25 15. On April 23, 1999, an entry of marriage was filed for David Kent Fitch and  
26 Maria Bozi in England.

27 16. In June of 1999, Ken Deatherage and his wife, who resided at 21363  
28 Stevenson Road, Frankston, Texas, left for a vacation. Sometime in June, Mr.  
Deatherage noticed that the balance of his credit card had increased. Concerned  
that their residence may have been broken into, Deatherage asked a neighbor (who  
held a key to the residence) to check on the house. In doing so, the neighbor did  
not find any signs of forced entry, nor did there appear to be any items missing  
from the residence.

17. On August 2, 1999, Maria Bozi applied for a mailbox at 850 South Boulder

1 Highway, Henderson, Nevada, mailbox #305. She subsequently visited their  
2 establishment on several occasions. On an unknown date, the defendant added his  
3 name and Daniel O'Hare (used as alias) to the mailbox. After this action, no one  
4 observed Bozi retrieve mail. On January 2, 2000, the rental box was terminated.

5 18. On August 13, 1999, Mr. and Mrs. Deatherage returned home from their  
6 vacation and realized that several items were missing from their residence, which  
7 included, but was not limited to: multiple guns (displayed in the chart below); a 35  
8 mm Canon camera, color television, computer and computer equipment, and other  
9 miscellaneous items.

10 19. On August 30, 1999, Maria Bozi registered a trailer space at 268 Lake  
11 Shore Road, space number 1127, for a Carri-Lite fifth wheel camper.

12 20. On September 4, 1999, Bozi and Novin have their last telephonic contact.

13 21. On September 28, 1999, Michael Novin placed a telephone call to the Lake  
14 Mead Service Communications Center, in reference to a welfare check on Maria  
15 Bozi. Mr. Novin informed an officer of the National Park Service that Mr. Bozi  
16 moved to United States and he was tending to Ms. Bozi's mail, financial accounts,  
17 and residence in England. Novin explained that he and Bozi were maintaining  
18 weekly contact; however, he had not heard from her for approximately one month.  
19 Novin went on to explain that a financial institution was attempting to contact Bozi  
20 regarding suspected fraudulent activity on her credit card.

21 22. The following day, the officer made contact with the defendant at the  
22 trailer on space number 1127. The officer asked him if he could speak with Maria  
23 Bozi, at which time, the defendant appeared to become nervous. Fitch informed  
24 the officer that Bozi had left to see her mother in Romania approximately three  
25 weeks prior. Thereafter, Fitch was seen by neighbors parking personal belongings  
26 into his truck and leave Lake Mead trailer park.

27 23. On September 30, 1999, the defendant checked out the key to the dry  
28 storage area of Lake Mead, where he had earlier placed a Carrie-Lite fifth wheel.  
He checked out the key using the name of M. Bozi. Thereafter, Fitch was  
observed leaving the dry storage area pulling the Carrie-Lite fifth wheel.

24 24. Mari Bozi had mysteriously disappeared and authorities believed that she  
25 was a victim of foul play. Thereafter, the trailer parked at 268 Lake Shore Road,  
26 space number 1127, was sealed by police.

27 25. On October 1, 1999, Fitch checked into the Casa Malago Motel in Las  
28 Vegas, Nevada and he met David Lee Krause. According to Krause, the defendant  
stated that he worked for the Secret Service. Subsequently, Fitch and Krause went  
to dinner. Krause informed the defendant that he was currently supporting himself  
by shoplifting. Fitch told Krause that he had a way to make money overseas.  
Krause explained that he was wanted by authorities, but he could possibly get a  
passport in his brother's name. Despite Fitch's attempt to convince Krause to give  
him all of his personal information, Krause explained he needed more time to  
think about it. Krause stated that he needed some drug money and Fitch gave  
Krause \$100.

29 26. Approximately two days after this meeting, Krause gave Fitch all of his  
30 personal information in which Fitch wrote down on a piece of paper (this piece of  
paper was recovered later in the investigation).

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27. The following day, Krause and Fitch went to 8900 West Sahara and opened a post office box in Krause's name. Thereafter, they went to the Social Security Administration in order to obtain a duplicate social security card. After leaving the Social Security Administration office, they argued over money because Krause had understood that Fitch would give him \$1,000 for all of his personal information.

28. On October 9, 2000, Maria Bozi's vehicle bearing Nevada license plate number 620 KEM was stolen from Lake Mead and the police tape on the trailer had been broken.

29. On October 26, 1999, a duplicate of David Lee Krause's birth certificate was issued to the defendant. Subsequently, Fitch, as David Krause requested information regarding the location of passport application office closest to St. George, Utah.

30. On October 28, 1999, a Utah Identification card was issued in the name of David Lee Krause bearing a picture of David Fitch. On October 29, 1999, the defendant used the fraudulently obtained forms of identification and applied for a passport in the name of David Lee Krause.

32. On November 4, 1999, Fitch was issued a United States Passport, passport number 055876825, in the name of David Lee Krause.

33. On November 15, 1999, the defendant obtained a Utah Driver's License in the name of David Lee Krause.

34. In late 1999, William Healey, residing at 1920 Thoroughbred Road, Henderson, Nevada, sold a 1984 gold Chevy pickup truck for \$ 4,000 to a man he knew as "Daniel", and who had an Irish last name, later determined to be Daniel O'Hare. Thereafter, Healey and the defendant became friends and the defendant would visit Healey with the maintenance of some cars. During this time, the defendant told Healey that he had 35-foot cream travel trailer with Texas license plates and a 1989 black and silver pickup truck with Texas license plates. The defendant informed Healey that he was storing the vehicles within walking distance of the Hitching Post bar on Las Vegas Boulevard.

35. On November 25, 1999, Fitch flew from Las Vegas, Nevada to Toronto to London as David Lee Krause. On November 26, 1999, Fitch used his fraudulently obtained passport in the name of Krause to enter Canada and England.

36. On January 20, 2000, Fitch under the assumed name of David Lee Krause, married Patricia Malano Guitierrez in England. Fitch, while still married to Maria Bozi, attempted to obtain a United States passport for Ms. Guitierrez (also known as Mrs. Patria Krause) through a fraudulent marriage.

37. On February 7, 2000, the defendant entered the United States, using the above-mentioned passport. Thereafter, Fitch was dropped off at 1920 Thoroughbred Road, Henderson, Nevada. Healey told Fitch that he could stay in on of his bedrooms.

38. On February 8, 2000, officers of the Henderson Police Department observed a vehicle, bearing Nevada License Plates 620 KEM, traveling at a high rate of speed. The officers conducted a traffic stop and made contact with Fitch

1 who identified himself as David Lee Krause with a Utah Driver's License. He  
 2 further provided the officers with Nevada registration papers that listed Maria Bozi  
 3 as the owner. The insured persons listed were Maria Bozi and David Fitch. The  
 4 officers conducted a check of the license plate which revealed the vehicle,  
 5 "belonged to a missing person with suspicious circumstances." Additionally,  
 6 NCIC revealed that the defendant had outstanding warrants out of Clark County.  
 7 The defendant provided "numerous inconsistencies" in his statements and he was  
 8 placed under arrest.

39. Due to the query on the license plates, the officers were prompted to  
 6 contact the FBI for details. The FBI agent asked the officers to detain the  
 7 defendant and the agents would respond to their location. During and inspection  
 8 of the vehicle, officers noted several blood spots in the vehicle.

Date of Recovery	Location/ Means of Recovery	Instant Offense	Miscellaneous Items
02/08/00	Traffic stop at Santiago Avenue	Count One: Utah Driver's License with name of David Lee Krause Count Two: Utah Identification Card and Birth Certificate in name of David Lee Krause	Nevada car registration papers in name of Maria Bozi; Nevada Proof of Insurance form with names of Maria Bozi and David Fitch; documents for Patricia Molano and Patricia Krause
02/08/00	1920 Thoroughbred Road, Henderson, Nevada/Seasrch	Counts Three through Six: Recovered passport in name of David Lee Krause, passport number 055876825	\$6,300 in U.S. currency 35mm film; Canon camera; passport in name of Maria Bozi; briefcase with miscellaneous documents in name of Bozi; documents in name of Fitch and O'Hare, and Krause
02/09/00	4180 Boulder Highway, storage units 1487 and 1327, Las Vegas, Nevada/Seasrch	Count Ten: Remington shotgun, model 1100 (serial number M881930V) and a Springfield 30-30 rifle, model 840 (serial number 249828) found in Unit #1327	Unit 1327: box of miscellaneous documents, hatchet with wooden handle, bolt cutters Unit 1487: hammer
02/25/00	400 Forrest, Henderson, Nevada/ Voluntary surrender by Alicia Ramos	Count Seven: Marlin Glenfield, model 60, .22 caliber long rifle with a Telstar 4 x 15 scope (serial number 24454819) and a Springfield .22 long rifle, model 15 (no serial number).	N/A

02/18/00	3440 North Las Vegas Boulevard, Carri-Lite Fifth-Wheel/Search	Count Eight: Four boxes of 12-gauge shotgun shells and one box .44 caliber handgun cartridges Count Nine: Charter Arms .44 caliber revolver, serial #292444 (loaded with five rounds)	Computer, scanner, book, books*, blank Special Agent identification card, miscellaneous items
02/18/00	3440 North Las Vegas Boulevard, 1988 Ford pick-up truck/Search	N/A	Knife, roll of duct tape, roll of electric tape, package of two Taser Air cartridges (one missing), 9 volt batter, color copies of various vehicle titles and deposit slips (torn up)

\* The Modern Identity Changer; How to Make a Silencer for a 45; The Paper Trip I, II, and III – The Master Guide to New Identity; More Workbench Silencer; Outlaw Reports; Espionage Unlimited New Identity Services; ID by Mail; High-Tech Harassment; Pipe and Fire Bomb Designs; The Revenge Encyclopedia; 100 Ways to Disappear and Live Free; Make'Em Talk! Principles of Explosives, How to Make Your Own; Improvised Radio Detonation Techniques; The Death Dealer's Manual; Deadly Brew, Advanced Improvised Explosives; Dragon's Touch, Weaknesses on the Human Anatomy; How to Make a Silencer for a 22; Methods of Disguise; Acquiring New ID; New ID in America; and Kill Without Joy! The Complete How To Kill Book.

49. On August 30, 2000, the FBI received handwritten documents (Fitch's) from CI-3. Included in the documents were biographical information about Maria Bozi, instructions, and scripts for speaking to individuals about Maria Bozi and her whereabouts.

(See 2000 PSI, previously filed under seal in this case.)

Additionally, the following paragraph was also included in the 2000 PSI and it does not limit any of the conduct at issue herein:

83. Offense Behavior Not Part of Relevant Conduct

On an unknown date, several of Fitch's possessions were handed over to the Bromley England Police Station by Patricia Molano Guterrez. On March 20, 2000, these items were inspected by a Forensic Scientist with the Metropolitan Laboratory. The items included an Auto-Ordinance Corporation model 1911AJ U.S. Army model, .45 caliber pistol, in which the serial number had been erased. In addition, the officers located on magazine, three rounds of ammunition, a box of ammunition that contained 44 live bullets, one plastic tube with drilled holes, one handgun barrel (inside of a sock) and one dismantled Air Taser (made in Mexico with a discharge of 50,000 volts). The handgun and ammunition were produced in the United States; however, it was not determined where Fitch purchased these items. According to the Forensic Scientist, the plastic tube was similar to that of a sound moderator (or silencer).

1 Thus, the scheme of conduct for which Mr. Fitch stands convicted herein was considered  
2 relevant conduct in the former case wherein Mr. Fitch was sentenced to 97 months.

3  
4 **III.**  
5 **THE APPROPRIATE SENTENCE IN THIS CASE IS LEVEL 20 WITH A CRIMINAL**  
6 **HISTORY CATEGORY III**

7 It is respectfully submitted that the applicable Sentencing Guideline range in this case is  
8 offense level 20, criminal history category III, for a Guideline range of 41-51 months. This  
9 computation is based on the 1998 Sentence Guidelines.

10 **A. The Total Loss In This Case Is Approximately \$58,000**

11 The probation report avers that the loss figure applicable to this case is more than  
12 \$120,000, but less than \$200,000. That is incorrect. Here, there are 8 ATM withdraws for  
13 \$1,000 each (\$8,000 total) and there is a check written on Ms. Bozi's account for \$40,000. There  
14 is also the intended medical services count and the value of those services was estimated to be  
15 approximately \$2,500. There is also the attempt to purchase synthetic emeralds totaling \$5,500.  
16 Finally, there are the Deatheridge credit card losses which do not exceed \$2,000. Thus, the total  
17 loss amount, actual and intended is not more than \$58,000. The two money laundering acts,  
18 depositing \$29,000 into another account, does not represent additional money, it represents the  
19 money already taken from Ms. Bozi. Thus, those funds should not be counted twice. It is the  
20 same money, moving through different accounts.

21 Under the 1998 Guidelines, this leads to an increase of 5 levels (more than \$30,000, less  
22 than \$70,000). **1998 USSG §2F1.1.** Under the 2004 Guidelines, this leads to an increase of 6  
23 levels (more than \$30,000, less than \$70,000). **2004 USSG §2B1.1.** As a result, the 1998  
24 Sentencing Guidelines were used to compute the figures in this case. *See United States v.*  
25 *Warren*, 980 F.2d 1300, 1304 (1992) (Ordinarily the district court is to apply the version of the  
26 Sentencing Guidelines in effect on the date of the sentencing. The recognized exception to this  
27 rule is when doing so when violate the ExPostFacto Clause of the United States Constitution).<sup>2</sup>

28 <sup>2</sup> Additionally, the disparity is greater when using the probation officer's figure. Her figure is  
greater than \$120,000, but less than \$200,000. Under the 1998 Guidelines, this is an increase of 7  
levels. Under the 2004 Guidelines, this is an increase of 10 levels. This further reinforces the

1 **B. Under The Applicable Principles of Grouping, The Highest Applicable Offense Level**  
2 **is 20**

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

9 Thus, there should be two groups. Group 1 should include all conduct involving Maria  
10 Bozi and Group 2 should include only the conduct relating to Deatheridge, a separate victim.

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

13 **Group 1—The Bozi Counts**

14 There are three means (schemes) by which to compute the Bozi counts. They are as  
15 follows:

- 16 1. Access Fraud and Bank Fraud (Counts 3 through 13)

Base Level	6
Loss Amount (\$56,000)	+5
More than minimal planning	+2
<u>Adjusted Offense Level: 13</u>	
- 21 2. Laundering Monetary Instruments (Counts 14 and 15)

Base Level	20
No adjustments applicable	0
<u>Adjusted Offense Level: 20</u>	
- 25 3. Money Laundering (Count 16)

Base Level	17
Proceeds of unlawful activity	+2

28 appropriateness of using the 1998 Guidelines when computing Mr. Fitch’s sentence.

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Adjusted Offense Level: 19

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

**Group 2—The Deatheridge Counts:**

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

Base level	6
Specific Characteristic (\$2000 or less)	+0
More than minimal planning	+2

Adjusted offense level 8

**The Grouping Computation**

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

Adjusted offense level for Group 1	20	1 unit
Adjusted offense level for Group 2	8	0 (per §3D1.4(c))
<b>Total number of units:</b>		<b>1</b>
<b>Increase in offense level per units:</b>		<b>0</b>
<b>Combined Adjusted Offense Level</b>		<b>20</b>
<b>Total Offense Level</b>		<b>20</b>

**C. MR. FITCH’S CRIMINAL HISTORY IS CATEGORY III**

Mr. Fitch has 5 prior criminal history points applicable to this offense. The PSI indicates that three (3) criminal history points are attributable to Mr. Fitch’s conviction, sustained on November 14, 2000. This is inaccurate because the prison sentence imposed on November 14, 2000 cannot constitute part of Mr. Fitch’s prior criminal history for the purpose of computing his criminal history score in this case.

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

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

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

8           Here, the PSI contemplates three (3) criminal history points added as a result of Mr.  
9 Fitch’s November 14, 2000 conviction. The conviction was for offense conduct occurring in  
10 November 1999 and on February 8, 2000. Those offenses are considered relevant conduct  
11 herein. Mr. Fitch purchased the identity of David Krause and later used it to obtain a passport  
12 and to open a bank account. Mr. Fitch was convicted herein of using the bank account to launder  
13 money taken from Ms. Bozi’s accounts.

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

17           The term “prior sentence” means any sentence previously imposed on adjudication  
18 of guilty, whether by guilty plea, trial or plea of nolo contendere for **conduct not  
19 part of the instant offense.**

(Emphasis added.)

20           Furthermore, Application note 1 to §4A1.2 states as follows:

21           *A sentence imposed after the defendant’s commencement of the instant*  
22 *offense, but prior to sentencing on the instant offense, is a prior sentence if it was*  
23 *for conduct **other than conduct that was part of the instant offense.** Conduct that*  
24 *is part of the instant offense means conduct that is relevant conduct to the instant*  
*offense under the provisions of §1B1.3 (Relevant conduct).*

25 (Emphasis added.) The conduct for which Mr. Fitch was convicted on November 14, 2000 is  
26 relevant conduct related to this offense. Similarly, the instant offense conduct was considered  
27 relevant conduct to Mr. Fitch’s 2000 case when he was sentenced in November 14, 2000. (*See*  
28 PSI, filed separately under seal in this case.) Furthermore, the offense conduct herein occurred

1 from July 13, 1999 to November 17, 1999. The prior offense conduct was in October and  
2 November 1999 and February 2000.

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

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

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

18 Based upon the foregoing, the three (3) contemplated by the PSI cannot be considered as  
19 part of Mr. Fitch’s criminal history. To add them to his criminal history would be to defeat the  
20 legislative intent of the applicable guidelines addressed herein. Mr. Fitch is a criminal history  
21 category III offender.

22 **D. 41-51 Months Is The Applicable Sentence**

23 Under the 1998 Sentencing Guidelines, an offense level 20 and a criminal history category  
24 III offender yields an applicable sentencing range of 41 to 51 months.

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1 the determination of the offense level for the instant offense, the sentence for the  
2 instant offense shall be imposed to run concurrently to the undischarged terms of  
imprisonment.

3 (c) (Policy Statement) In any other case, the sentence for the instant  
4 offense may be imposed to run concurrently, partially concurrently, or  
5 consecutively to the prior undischarged term of imprisonment to achieve a  
reasonable punishment for the instant offense.

6 In this case, subsection (a) does not apply and subsection (b) does apply. The scheme of  
7 conduct for each case is a common scheme and both PSI reports take the conduct of each  
8 indictment into account. Application Note 2 to USSG §5G1.3 states, in pertinent part, as  
9 follows:

10 *Adjusted concurrent sentence—subsection (b) cases.* When a sentence is  
11 imposed pursuant to subsection (b), the court should adjust the sentence for any  
12 period of imprisonment already served as a result of the conduct taken into  
13 account in determining the guideline range for the instant offense if the court  
determines that period of imprisonment will not be credited to the federal sentence  
by the Bureau of Prisons.

14 **B. The Courts Have Upheld This Application of §5G1.3 In Order To Avoid Double  
Jeopardy Violations**

15 1. The General Principal of Double Jeopardy

16 The Double Jeopardy Clause provides “[N]or shall any person be subject for the same  
17 offence to be twice put in jeopardy of life or limb.” *5<sup>th</sup> Amendment to the United States  
18 Constitution*. The clause serves the function “of preventing both successive punishment and  
19 successive prosecution.” *United States v. Dixon*, 509 U.S. 688, 704 (1993), citing *North  
20 Carolina v. Pearce*, 395 U.S. 711 (1969). “The Constitution was designed as much to prevent  
21 the criminal from being twice punished for the same offense as from being twice tried for it.”  
22 *Witte v. United States*, 515 U.S. 389, 396 (1995), quoting *Ex parte Lange*, 18 Wall, 163, 173  
23 (1874), and citing *Schiro v. Farley*, 510 U.S. 222, 229-230 (1994); *United States v. Halper*, 490  
24 U.S. 435, 440, 451, n.10 (1989).

25 2. Determining What Constitutes Double Punishment

26 Recidivism statutes that impose a harsher punishment for successive criminal conduct  
27 have survived double jeopardy challenges. *Gryger v. Burke*, 334 U.S. 728, 732 (1948); *Spencer  
28 v. Texas*, 385 U.S. 554, 560 (1967); *Oyler v. Boles*, 368 U.S. 448, 451 (1962); *Moore v.*

1 *Missouri*, 159 U.S. 673, 677 (1895). The repeated application of relevant conduct, versus  
2 offender characteristics is not so clear cut. In *Witte v. United States*, the United States Supreme  
3 Court noted that the “relevant conduct provisions, like their criminal history counterparts and the  
4 recidivism statutes. . ., are sentencing enhancement regimes evincing the judgment that a  
5 particular offense should receive a more serious sentence within the authorized range if it was  
6 either accompanied by or preceded by additional criminal activity.” *Witte*, 515 U.S. at 403. As  
7 a result, the Supreme Court held that a particular punishment within the sentencing guideline  
8 range constitutes punishment only for the offense of conviction and not for the relevant conduct  
9 for the purpose of a double jeopardy analysis. *Id.* at 403-04.

10 3. Double Jeopardy and the Sentencing Guidelines

11 In *Witte*, the United State Supreme Court specifically noted that its analysis and decision  
12 that the Double Jeopardy Clause was not implicated was based on the provisions of the  
13 Sentencing Guidelines that spared a defendant from such a result. In *Witte*, the circumstances  
14 were similar to this case. The defendant was charged with conspiracy to possess marijuana with  
15 the intent to distribute it. *Id.* at 392. After he pled guilty, the probation report considered  
16 quantities of cocaine possessed by the co-conspirators as “relevant conduct.” *Id.* at 393. The  
17 conduct was considered at sentencing and a base offense level of 40 was utilized for Witte’s  
18 sentence, resulting in a minimum term of 292 months. *Id.* at 394. The court sentenced him to 148  
19 months based on his assistance to the government. *Id.* A year later and two years after the  
20 alleged offense conduct, Witte was indicted for conspiracy to import cocaine. *Id.* He argued that  
21 he could not be charged with that conduct as it was considered as relevant conduct in his sentence  
22 a year prior. *Id.*

23 The Court ultimately disagreed, but stated that:

24 [W]hile the Sentencing Guidelines certainly envision that sentences for  
25 multiple offenses arising out of the same criminal activity ordinarily will be  
26 imposed together, they also explicitly contemplate the possibility of separate  
27 prosecutions involving the same or overlapping “relevant conduct.” *Id.* at 404,  
28 citing to *USSG §5G1.3*, comment n.2 (addressing cases in which “a defendant is  
prosecuted in . . . two or more federal jurisdictions for the same criminal conduct or  
for different criminal transactions that were part of the same course of conduct.”)

1 There are often valid reasons why related crimes committed by the same defendant  
2 are not prosecuted in the same proceeding, and **§5G1.3 of the Guidelines**  
3 **attempts to achieve some coordination of sentences imposed in such situations**  
4 **with an eye toward having such punishments approximate the total penalty**  
5 **that would have been imposed at the same time (i.e, had all of the offenses**  
6 **been prosecuted in a single proceeding). [Citation omitted.]**

5 Because the concept of relevant conduct under the Guidelines is reciprocal,  
6 §5G1.3 operates to mitigate the possibility that the fortuity of two separate  
7 prosecutions will grossly increase a defendant's sentence.

7 *Id.* at 404-405. (Emphasis added.)

8 Thus, it is only the application of §5G1.3 that spares the type of deliberate staggered  
9 prosecution seen in the instant case from a double jeopardy violation. Here, the relevant conduct  
10 the government previously introduced is the same conduct that (a) Mr. Fitch is charged with, or  
11 (b) the conduct which the government seeks to enhance any sentence imposed herein. The  
12 question is when does the government stop seeking to punish Mr. Fitch repeatedly for the same  
13 conduct.

14 In 2000, Mr. Fitch received a 97 month sentence, substantially enhanced from the  
15 sentence he would have otherwise received. The enhancement was based on all of the same  
16 factors raised herein. Were the offenses to have been grouped, he would not have received any  
17 more time than he received in 2000. Additionally, Mr. Fitch's case differs from *Witte* in two  
18 ways: (1) Mr. Fitch has already served his sentence in the underlying case and (2) *Witte* was  
19 decided prior to *Booker* which rendered the Sentencing Guidelines advisory. If the Guidelines  
20 are applied, Mr. Fitch cannot receive a sentence higher than the one he has already received. If  
21 the Guidelines are not followed, the Court cannot impose a sentence in a fashion that would  
22 violate the constitutional provisions of the Double Jeopardy Clause.

23 For each of these reasons, the sentence imposed herein must be concurrent to the sentence  
24 imposed in the 2000 case, even though Mr. Fitch has completed his term of release in the  
25 underlying case.

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**V.**  
**MR. FITCH HAS BEEN IN CUSTODY SINCE FEBRUARY 2000**

Mr. Fitch has been in custody since February 2000. As this Court is well aware, the conditions of his confinement have been onerous. For the sake of brevity, the entire saga of Mr. Fitch's custody will not be reiterated herein. It is however, accurately described on pages 14 through 25 and pages 28-29 of his Motion to Dismiss (docket #128), incorporated herein by this reference.

In sum, Mr. Fitch was transferred to a United States Prison, versus a Federal Correctional Institute or a lower security designated facility, due to the retaliatory conduct of the government. Additionally, he was placed in central inmate monitoring, without due process, for no justifiable reason whatsoever. His 97 months in custody were served in conditions above and beyond the type of conditions to which he would have otherwise been subjected.

Mr. Fitch has not engaged in any conduct warranting discipline the entire time he has been in custody in this case. Furthermore, while in custody, Mr. Fitch has completed the following programs:

- Challenge, Opportunity, Discipline and Ethics
- Yoga
- Navigation
- Basic Sign Language
- Conversational Spanish

(See Exhibit A, program certificates.)

**VI.**  
**MR. FITCH NEEDS MEDICAL TREATMENT**

As this Court is also aware, Mr. Fitch currently suffers from various medical issues. While in prison in Texas, he underwent groin surgery (related to the hernia operation he tried to obtain with Ms. Bozi's insurance card). The surgery left him partially incontinent and he still experiences difficulty urinating or refraining from urinating.

Mr. Fitch also has severe back pain and disintegration of his spinal disc structure. A letter from Dr. Grover is attached hereto as Exhibit B. Dr. Grover's conclusion is that spinal surgery

1 involving decompression and restructuring of his spine at the C6-7 discs is reasonable and  
2 appropriate at this time. (Id.)

3 Thus, if any additional custody is imposed it in this case, it is respectfully requested that  
4 Mr. Fitch be recommended to a facility where he can receive the medical treatment he requires,  
5 such as the facility located in Rochester, Minnesota.

6 **VII.**  
7 **A FINE IS NOT APPROPRIATE IN THIS CASE**

8 When Mr. Fitch was sentenced in 2000, a \$12,500 fine was imposed. Here, the PSI  
9 recommends a \$75,000 fine, without any justification for the same. Mr. Fitch is indigent and it  
10 should be abundantly clear to this Court, having presided over his trial, that he has no assets and  
11 no resources. Everything he owned was seized in 2000 and none of it has been released or  
12 returned to Mr. Fitch. The government seized his assets without filing a forfeiture action. This  
13 alone creates problems with issues of double jeopardy, not to mention the irreparable harm it has  
14 caused to Mr. Fitch. For each of these reasons, the imposition of *any* fine is absolutely  
15 inappropriate in this case, let alone a \$75,000 fine.

16  
17 **OPPOSITION TO THE GOVERNMENT'S MOTION**  
18 **FOR AN UPWARD DEPARTURE**

19 The government requests that this Court impose an upward adjustment of 15 levels  
20 because it can be inferred that Ms. Bozi is deceased and that Mr. Fitch is responsible for her  
21 demise. This court is precluded from imposing any such upward adjustment because these issues  
22 were already litigated in the 2000 case and the government cannot seek to relitigate those issues  
23 with the hope of achieving a better result in this case.

24 The doctrines of Issue Preclusion, Claim Preclusion and Res Judicata are designed to  
25 prevent persons from having to litigate the same issues on multiple occasions. The principles  
26 apply when the parties are litigating the same or substantially the same issues and the parties to  
27 the litigation are the same. Although the doctrines were founded in the civil context, there is  
28

1 would be no reason for their application to be limited to issues involving pecuniary loss versus  
2 issues involving a more severe risk of the loss of liberty. *See generally, United States v.*  
3 *Castillo-Basa*, 483 F.3d 890 (9<sup>th</sup> Cir. 2007); *United States v. Crooks*, 804 F.2d 1441 (9<sup>th</sup> Cir.  
4 1986).

5 In *United States v. Castillo-Basa*, the Ninth Circuit stated that “[w]hen an issue of fact or  
6 law is actually litigated and determined by a final and valid judgment, and the determination is  
7 essential to the judgment, the determination is conclusive in a subsequent action between the  
8 parties, whether on the same or a different claim.” *Id.* at 897, *citing to United States v.*  
9 *Hernandez*, 572 F.2d 218, 200 (9<sup>th</sup> Cir. 1978) and Restatement (Second) of Judgments § 68,  
10 (1973). Maria Bozi’s disappearance was considered when Mr. Fitch was sentenced in November  
11 2000. All of the facts suggesting that Mr. Fitch was responsible for her demise were the same.  
12 For example, both PSI’s include reference to the books located in the Carri-Lite fifth wheel  
13 trailer, such as: How to Make a Silencer for a .45; More Workbench Silencers; Hit Man;  
14 Improve Explosives; The Death Dealer’s Manual; Deadly Brew; Weaknesses of the Human  
15 Anatomy; How to Make a Silencer for a .22; and Kill Without Joy! The Complete How to Kill  
16 Book. The fact that spots of blood appeared in the Thunderbird Mr. Fitch was driving was  
17 referenced in the 2000 case as was the fact that no one had heard from her since September 4,  
18 1999, some 14 months prior to Mr. Fitch’s sentencing hearing in November 2000.

19 The government must not be permitted to come before this Court 7 years later seeking a  
20 different result than the result it obtained in November 2000 on the same set of facts presented to  
21 the Court at that time. Collateral estoppel, which is a component of double jeopardy, prevents the  
22 government from doing so. As such, the government’s motion should be denied.

### 23 CONCLUSION

24 Based on the foregoing, it is respectfully requested that Mr. Fitch be sentenced to a  
25 sentence within the applicable guideline range, 41-51 months, and that the sentence be imposed  
26 concurrent to the sentence that Mr. Fitch has completed, his 97 month sentence imposed in  
27 November 2000. This requires the court to make a specific finding that Mr. Fitch has completed  
28 the sentence to be imposed herein by virtue of the time he has already served in the underlying

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case.

Dated: October 18, 2007

WATT, TIEDER, HOFFAR & FITZGERALD, LLP

/s/ Lisa A. Rasmussen  
LISA A. RASMUSSEN  
Nevada Bar No. 007491  
DAVID R. JOHNSON  
Nevada Bar No. 006696  
3993 Howard Hughes Parkway, Suite 400  
Las Vegas, Nevada 89169  
  
Attorneys for Defendant  
David Fitch

**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Watt, Tieder, Hoffar & Fitzgerald, LLP, that I am a person competent to serve papers and not a party to the above-entitled action and that on the 18<sup>th</sup> day of October, 2007, I served a copy of the foregoing:

**DEFENDANT’S SENTENCING MEMORANDUM AND OPPOSITION TO THE GOVERNMENT’S MOTION FOR UPWARD DEPARTURE**

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

**For Plaintiff United States:**  
TIMOTHY S. VASQUEZ  
333 Las Vegas Blvd., South, Ste. 5000  
Las Vegas, NV 89101  
[timothy.s.vasquez@usdoj.gov](mailto:timothy.s.vasquez@usdoj.gov)

**For United States Probation:**  
Ms. Wendy B. Beckner  
United States Probation Officer  
300 Las Vegas Boulevard South, Suite 1200  
Las Vegas, NV 89101

Also via facsimile: 388-6731

/s/ Lisa A. Rasmussen  
An Employee of Watt, Tieder, Hoffar & Fitzgerald, LLP

# **EXHIBIT A**

# Certificate of Graduation

for the CODE Program

is awarded to


**David Fitch**


Register No. 34775-048

Congratulations on your completion  
of the twelve month

# Challenge, Opportunity, Discipline, and Ethics Program

  
M. Mattes, CODE Treatment Specialist

  
P. Powdrill, CODE Treatment Specialist

  
B. Ennis, Psy.D., CODE Coordinator



July 1, 2003  
United States Penitentiary, Beaumont

# Certificate of Achievement

This certifies that

**DAVID FITCH**

is presented this Certificate of Recognition for

Completion of Thirty Hours in

**YOGA**

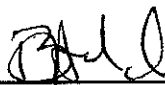
from the

**Recreation Department**

DECEMBER 23, 2002

Date

**FCC Beaumont - USP Beaumont**  
BEAUMONT, TEXAS



B.A. Melancon, Recreation Specialist



# Certificate of Completion

This certifies that

**David Fitch**

Has successfully completed 15 Adult Continuing Education  
credit hours of

**NAVIGATION**

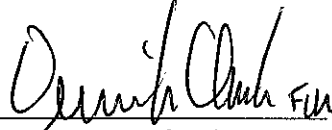
*Awarded by the*

***Education Department***

***USP Beaumont, Texas***

*On this 27th day of June, 2002*

  
ACE Coordinator

  
Supervisor of Education

# CERTIFICATE OF COMPLETION

**FCI VICTORVILLE EDUCATION DEPARTMENT**  
ADULT CONTINUING EDUCATION PROGRAM

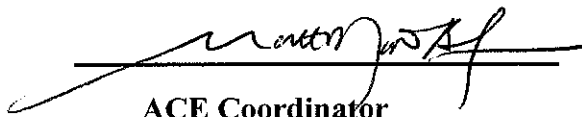
This certifies that


**David Fitch**

has satisfactorily completed the following course during Jan. to March, 2004:

**Basic Sign Language**

Issued this 29th Day of March 2004

  
ACE Coordinator

  
Supervisor of Education

# CERTIFICATE OF COMPLETION

FCI VICTORVILLE EDUCATION DEPARTMENT  
ADULT CONTINUING EDUCATION PROGRAM

This certifies that

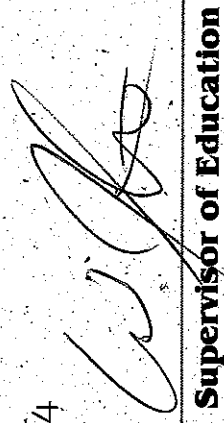
## David Fitch

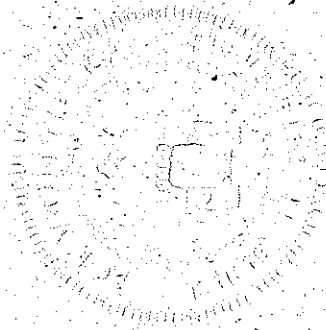
has satisfactorily completed the following three month course in

*Conversational Spanish*

issued this 23rd Day of March, 2004

  
ACE Coordinator

  
Supervisor of Education



# **EXHIBIT B**

## NEVADA SPINE CLINIC

**PATIENT NAME:** FITCH, DAVID  
**DOS:** 09/14/2007

**DOB:** 10/04/1958

**HISTORY OF PRESENT ILLNESS:** David returns today. He has persistent neck and interscapular pain. He reports numbness, tingling, and paresthesias affecting the upper extremities.

**ALLERGIES:** No known drug allergies.

**PHYSICAL EXAMINATION:** Clinically, he has tenderness to palpation in the paracervical area with axial compression positive for reproduction of interscapular and suboccipital pain and Spurling sign equivocal. He does not demonstrate focal myotomal or dermatomal deficit to clinical neurological assessment. He does not demonstrate any clear long tract signs of hyperreflexia at this time.

**RADIOGRAPHS AND TESTING:** MRI scan of the cervical spine has been performed. The actual images are not available for me, but the report is dated July 25, 2007, which reveals a right-sided disc herniation at C6-7 with a mild broad-based disc bulge at C4-5.

**IMPRESSION:** Autogenous congenital fusion at C5-6 with C6-7 disc herniation, disc osteophyte complex identified on MRI scan and x-ray.

**RECOMMENDATIONS:** I have counseled this patient as it relates to his condition. He has a structural problem in his cervical spine for which he may indeed ultimately benefit from surgical treatment in the form of an anterior cervical decompression and reconstruction at C6-7. I believe that, that is reasonable and appropriate option of treatment that should be afforded to this patient who is incarcerated at this time. He is aware of the risks, benefits, and limitations of such. We should try to obtain the actual MRI scan of the cervical spine for my personal review if indeed such current treatment is authorized for him.

The risks of opioid medications were explained to the patient. The patient understands and agrees to use these medications only as prescribed. The patient agrees to obtain pain medications from this practice only. We have fully discussed the potential side effects of the medication with the patient, which include but are not limited to, constipation, drowsiness, addiction, impaired judgment and the risk of fatal overdose if not taken as prescribed. We have warned the patient that sharing medications is a felony. We have warned the patient against driving while taking sedating medications.

cc: North Las Vegas Detention Center  
2332 North Las Vegas Blvd Suite 200  
North Las Vegas, NV 89030

7140 Smoke Ranch Rd. Ste. 150, Las Vegas, NV. 89128  
10001 S. Eastern Ave. Ste. 208, Henderson, NV. 89052  
Ph. (702) 320-8111 Fax: (702) 320-8112

## NEVADA SPINE CLINIC

**PATIENT NAME: FITCH, DAVID**

**DOB: 10/04/1958**

**DOS: 09/14/2007**

Lisa Rasmussen, Esq.  
3993 Howard Hughes Parkway Suite 400  
Las Vegas, NV 89109

---

Jaswinder S. Grover, M.D.  
Diplomate, American Board of Orthopaedic Surgery  
Fellowship Trained Spinal Surgeon

M2/prv/sur  
DT: 09/15/2007

7140 Smoke Ranch Rd. Ste. 150, Las Vegas, NV. 89128  
10001 S. Eastern Ave. Ste. 208, Henderson, NV. 89052  
Ph. (702) 320-8111 Fax: (702) 320-8112

To: RelayFax via port COM3

From: 17026339188

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07/25/2007 10:09:43 AM -0800

NAPHCARE

PAGE 1 OF 2 PAGE 01/02

**UNIVERSITY MEDICAL CENTER OF SOUTHERN NEVADA**  
**DEPARTMENT OF RADIOLOGY**  
1800 W. CHARLESTON BLVD. LAS VEGAS, NV. 89102  
(702) 383-2241

Name: FITCH, DAVID KENT

Sex: M Age: 48Y

Date of Birth: 10/04/1958

Location: RAD - Medical Record Number: 001-761-195

AUG 02 2007

Ordering Physician: UNASSIGNED

Order Number: 90001

Order Date: 07/25/2007

**\*\*\*Preliminary Report\*\*\***

Exam Charge Date: Jul 25 2007 8:12AM

PROCEDURE: MRI 0048 - MRI C-SPINE W/O CONTRAST -- 4564854

CLINICAL HISTORY: Pain.

TECHNIQUE: Multiplanar imaging was performed using a variety of different pulse sequences on a high field strength magnet.

COMPARISON STUDIES: \

FINDINGS: C5-6 fusion. No cord lesions are identified. Cervicomedullary junction appears unremarkable.

C2-3: Unremarkable level.

C3-4: Tiny central midline disk bulge, spur. No stenosis identified.

C4-5: Diffuse mild broad-based disk bulge, spur. Neural foramina appear patent.

C5-6: Fusion. No stenosis identified.

C6-7: Right sided herniated disk with annular tear. This indents upon the ventral aspect of the epidural space. This disk protrudes back about 3 mm.

C7-T1: Essentially unremarkable level.

**IMPRESSION:**

1. Disk herniation at C6-7.

Physician notification system implemented

Edited by: sf 7/25/07 1003

Interpreting Radiologist: BRUCE TOPPER M.D.

Dictated at: Jul 25 2007 10:07A

Final Report Signed at:

Patient: FITCH, DAVID KENT

DOB: 10/04/1958

Account Number: 004035790130 Seq#: 1

Medical Record Number: 001-761-195

Order Number: 90001 MRI C-SPINE W/O CONTRAST

Exam Charge Date: Jul 25 2007 8:12AM

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