

No. 07-10607

District Court No. 2:04-CR-262-JCM-PAL

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID KENT FITCH,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEVADA

APPELLEE'S ANSWERING BRIEF

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I.

STATEMENT OF JURISDICTION AND BAIL STATUS

This is an appeal from a final judgment of conviction and sentence in a criminal case. The district court, which had jurisdiction under 18 U.S.C. § 3231, imposed sentence on October 19, 2007 and entered its judgment on December 6, 2007. ER 19.¹ Appellant/Defendant David Kent Fitch timely noticed an appeal on December 12, 2007. ER 315; *see* Fed R. App. P. 4. This court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. Fitch is in custody, serving the 262-month sentence imposed by the district court. His projected release date is March 2, 2026. See www.bop.gov (inmate reg. no. 34775-048).

II.

ISSUES PRESENTED

1. Whether the district court correctly found no violation of Fitch's Sixth Amendment right to a speedy trial.
2. Whether the 15-level upward departure and 262-month sentence imposed by the district court was procedurally and substantively reasonable.

¹“ER” denotes Defendant's Excerpts of Record, “SER” denotes the government's Supplemental Excerpt of Record.

III.

STATEMENT OF THE CASE

This case is the second of two separate prosecutions arising from a continuing investigation.

1. The First Case: D.C. No. cr-s-00-50-KJD-RJJ

On February 15, 2000, following Fitch's arrest during a traffic stop, a federal grand jury in the District of Nevada charged him with illegal possession of a firearm. On June 2, 2000, the grand jury returned a ten-count superseding indictment, charging possession of false identification documents with intent to defraud the United States, use of a false passport, and unlawful possession of firearms and ammunition. PSR 00-50 ¶¶ 2-3. On July 13, 2000, Fitch pled guilty without a plea agreement to all counts of the superseding indictment. *Id.* ¶ 4. On November 14, 2000, the district court sentenced Fitch to a within-guideline range sentence of 97 months' imprisonment. CR 128, p. 11. This Court affirmed.² *See United States v. Fitch*, No. 00-10580 memorandum disposition, 2001 WL 1609844 (9th Cir. Dec. 14, 2001).

²This Court also affirmed the district court's denial of Fitch's 28 U.S.C. § 2255 motion alleging ineffective assistance of counsel. *See United States v. Fitch*, No. 06-17217, memorandum decision, 2010 WL 2788 563 (9th Cir. July 14, 2010).

2. This case: D.C. No. 2:04-cr-262-JCM

In June 2004, while Fitch was serving the above custodial sentence, a grand jury returned a new 15-count indictment charging him with access device fraud, bank fraud, and receipt and interstate transportation of a stolen vehicle. CR 1. On March 1, 2005, the grand jury returned an 18-count second superseding indictment charging fraudulent use of an access device (18 U.S.C. § 1029(a)(2)) (counts 1- 2); bank fraud (18 U.S.C. § 1344) (counts 3 - 11); attempted use of a fraudulent access device (18 U.S.C. § 1029(a)(2)) (counts 12 - 13); laundering monetary instruments, (18 U.S.C. § 1956(a)(1)(b)) (counts 14 -15); money laundering (18 U.S.C. § 1957) (count 16); interstate transportation of a stolen motor vehicle (18 U.S.C. § 2312) (count 17); and receipt of a stolen motor vehicle (18 U.S.C. § 2313) (count 18). ER 36-43.

Counts 17 and 18 were dismissed on motion by the government. CR 190. A jury trial from June 18-21, 2007 concluded with Fitch's conviction on all 16 remaining counts. ER 19.

On October 19, 2007, the district court sentenced Fitch to 262 months' imprisonment, representing a 15-level upward departure from the sentencing guidelines range. RT Sentencing 79, ER 10.

This appeal followed.

IV.

STATEMENT OF FACTS

Although Fitch never admitted the ultimate inferences, the facts are not in dispute. The government's theory of the case was that Fitch fell in love with Patricia Molano Guitierrez, but married Maria Bozi for her money, murdered her, stole all she had, and then married Ms. Molano.

Fitch's Relationship with Patricia Molano Guitierrez

In September 1996, and on various occasions throughout 1997 and 1998, Fitch traveled to Columbia, where he had an intimate relationship with Patricia Molano Gutierrez. CR 208, p.3, SER 18.³ On May 26, 1998, he traveled to England because Ms. Molano was there. *Id.* at p. 4, SER 19.

Fitch's marriage to Maria Bozi

Fitch met Maria Bozi in England during late 1998 or early 1999. *Id.* Fitch was posing as a chiropractor at the time. *Id.* Ms. Bozi, a naturalized citizen of the United Kingdom, was Romanian by birth. *Id.* She was working in England as a

³CR 208 is the government's sentencing memorandum, upon which Fitch also placed significant reliance in the opening brief, demonstrating the general consensus as to the facts. Additionally, at sentencing, the prosecutor referenced the lack of factual disputes (RT Sent. 16, ER 243) and even defense counsel found it impossible to read the facts (in the 2000 presentence report) and not believe Fitch responsible for the disappearance and demise of his wife Maria Bozi. *Id.* at 28, 31, ER 255, 258.

beauty therapist and she had substantial savings. *Id.* Although Fitch continued his relationship with Patricia Molano, he married Ms. Bozi in England on April 23, 1999. *Id.*

In the months following their wedding, Ms. Bozi prepared to move to the United States. On May 11, 1999, she applied for a United States bank account with Citibank. She was the sole account holder and the only person authorized to access the account. Fitch was neither an authorized user nor a beneficiary. On July 21, 1999, Ms. Bozi transferred \$120,000 into the account. *Id.*, SER 19

Fitch's Plot Begins to Emerge

In May 1999, Ms. Bozi was in England preparing to move to the United States. At the same time, Fitch—while at his parents' residence in Frankston, Texas—ordered an array of “how-to” books on murder, revenge, and assuming a new identity.⁴ In July 1999, Fitch (posing as “Dr. David Fitch”) also ordered

⁴In February 2000, law enforcement agents discovered the following books in Fitch's fifth-wheel trailer:

- Kill Without Joy! The Complete How to Kill Book
- Hit Man - A Technical Manual for Independent Contractors;
- The Death Dealer's Manual;
- Dragon's Touch - Weaknesses of the Human Anatomy;
- How to Make a Silencer for a .45;
- How to Make a Silencer for a .22;
- More Workbench Silencers;
- The Modern Identity Changer;

chloroform-D from a chemical supplier. *Id.* at pp.4-5, SER 19-20.

While in Frankston, Texas, Fitch continued to correspond with Patricia Molano. For example, on July 13, 1999, he sent her an e-mail captioned “Just thinking about you.” The text of the e-mail foreshadowed events to come:

Just thinking about the time when you and I will be together permanently. I cannot wait to see you again. Every minute of every day my thoughts are about you and mi amor. How is she and does she miss me to? ***You should know that everything I do from now on will be to make our lives together as special as it can be.***

E-mail dated 13 July 1999 7:53 p.m. [Appendix A] (emphasis added). *Id.* at 5, SER 20, 48.

In another e-mail later the same day, Fitch discusses plans for Ms. Molano to apply for a student visa that would enable her to join him in Nevada after his impending move to the United States:

Don't cry all the time because it makes me sad to think that you are miserable. Just concentrate on getting your visa as soon as possible. Get me the name and phone # of the school in las vegas and I will pay for it and then you can go to the embassy and get your visa. Please

-
- Acquiring New ID;
 - New ID in America;
 - The Paper Trip I, II, and III - The Master Guide to New Identity;
 - 100 Ways to Disappear and Live Free; and
 - Methods of Disguise.

don't waste any more time because its time that we could be together and be working and getting our own home set up. . . .

Well I need to go back to work and get everything ready to move. I will be out of touch on the computer pretty soon because I'll have no phone line to connect to. So write me as much as you can for the next 4-7 days because we won't be able to talk except by phone whenever I can call you!!!!

E-mail dated 15 July 1999 10:35 p.m. [Appendix B]. *Id.* at pp. 5-6, SER 20-21, 50.

Fitch and Maria Bozi Begin Married Life Together In Nevada

On July 30, 1999, Maria Bozi left her home and friends in England and flew to the United States to rendezvous with Fitch in Nevada. 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. On August 19, 1999, Ms. Bozi registered this vehicle solely in her name. *Id.* p. 6, SER 21.

In August 1999, Ms. Bozi purchased a mobile home, situated in Lake Shore Trailer Village at Lake Mead National Recreation Area, for \$14,000. Although events overtook Ms. Bozi before she had time to record the purchase, on August 30, 1999, she registered and obtained a lease at Lake Shore Trailer Village as the owner of the mobile home. *Id.* pp. 6-7, SER 21-22; *see also* PSR 04-262 ¶ 9.

Fitch Furthers His Plan to be With Ms. Molano

Ms. Bozi had been in the United States only one month when she and Fitch moved into her newly-acquired mobile home at the Lake Shore Trailer Village. Meanwhile, with Fitch's encouragement, Patricia Molano had applied for a nonimmigrant visa to enter the United States. Although this visa was later denied,⁵ in late August and early September, Fitch hoped her arrival in the United States was imminent. In the pre-dawn hours of August 25, 1999, Fitch found an opportunity to send Ms. Molano an e-mail encouraging her to come to the United States:

I've been kind of down after our conversation today, so I went to a computer so I could email you. I really hope that you are still coming, but everything seemed like you are going to find an excuse not to come. I hope that you can think about how we feel when we are together and then maybe you will still want to come over here.

E-mail dated 25 August 1999 at 3:34 a.m. [Appendix E]. *Id.* at p.7, SER 22, 57.

At the time, Fitch was unemployed, he had no home, assets⁶ or money of his own,

⁵ On September 22, 1999, immigration authorities denied Ms. Molano's application for a nonimmigrant visa. Appendix D. *Id.*, at p. 7, SER 22, 55.

⁶ Fitch apparently arrived in Nevada in an old Ford pickup truck towing a travel trailer. These were Fitch's only identifiable possessions, and even these modest belongings were tainted by fraud. As demonstrated at trial, Fitch had used a credit card assigned to Kenneth

and he depended on Ms. Bozi's largess with her savings. *Id.*

Maria Bozi Disappears

Throughout August 1999, Ms. Bozi maintained regular contact with her mother in Romania and Michael Novin in England. However, within a few days of moving into the mobile home at Lake Shore Trailer Village with Fitch, Ms. Bozi's communications with her mother and Mr. Novin abruptly ended. With the exception of Fitch, Mr. Novin was the last person to speak with Ms. Bozi when they conversed by telephone on September 4, 1999. Following that telephone conversation, Ms. Bozi vanished. *Id.* at p. 8, SER 23.

Fitch—Ms. Bozi's husband, companion, and the last person to see her alive—offered inconsistent accounts of her whereabouts. Fitch told Ms. Silvers—a neighbor who had invited Fitch and Ms. Bozi to dinner—that Ms. Bozi had returned to England. Fitch next told Michael Novin—who was in England—that Ms. Bozi had “gone ahead” to Vancouver and that he would soon follow her there. When National Park Service Ranger Gary Sebade inquired about Ms. Bozi's welfare, Fitch told him that she had returned to her mother in Romania. *Id.*; *see also* PSR 04-262 ¶¶ 18-20. None of Fitch's contradictory accounts regarding Ms.

Deatherage—then a neighbor of his parents in Texas—to purchase parts for the pickup truck while he was in Texas in July 1999.

Bozi's whereabouts withstood the test of time. No one has seen or heard from Ms. Bozi since she spoke with Mr. Novin on September 4, 1999. *Id.*; see also PSR 04-262 ¶ 11.

Fitch Steals Maria Bozi's Money and Possessions

Ms. Bozi's vital documents and worldly possessions were found in Fitch's possession. Following his arrest in February 2000, searches of his briefcase, travel trailer and storage facilities revealed that Fitch had taken Ms. Bozi's passport, personal documents, financial records, address book, clothing, shoes, and personal effects, and also revealed that he was attempting to sell Ms. Bozi's mobile home and car. Fitch retained and used Ms. Bozi's credit cards, health insurance cards, and the debit cards and checkbook that gave him access to Ms. Bozi's life's savings. *Id.*

On September 5, 1999—the day after Ms. Bozi's last communication with friends or family—Fitch began using her telephone account to place numerous and lengthy calls to Colombia and to Patricia Molano in England. *Id.* at p. 9, SER 24. Then he began to plunder Ms. Bozi's assets, accounts and possessions. On September 7, 1999, Fitch—disguised in a hat, sunglasses and fake moustache—made the first in a series of forays to a Citibank ATM where he withdrew funds from Ms. Bozi's accounts. *Id.* These ATM transactions

continued until Citibank froze Ms. Bozi's principal account on September 17, 1999. However, during the intervening ten days, Fitch succeeded in taking over \$8,000 from Ms. Bozi's Citibank accounts through the fraudulent ATM transactions that became the substance of Counts Two through six and eight through eleven of the Second Superseding Indictment.⁷ *Id.* ; *see also* PSR 04-262 ¶ 13.

After draining Ms. Bozi's account of \$1,000 per day—the daily maximum allowable ATM withdrawal from the account—Fitch forged a check drawn on Ms. Bozi's account instructing Citibank to pay him the discrepant sums of “forty thousand dollars” and “\$44,000” as a purported “down payment for a house.” Fitch deposited this check into his own account at Norwest Bank on September 13, 1999. *Id.*; *see also* PSR 04-262 ¶ 14.

Although Citibank paid the forged check, the transaction provoked suspicion. Fitch had made a pen-and-ink correction to reconcile the discrepant sums appearing on the check, marked with his own initials (“D.F.”) rather than with the initials of Maria Bozi—the account holder and purported signatory. The odd notations and the series of withdrawals prompted Citibank to make an inquiry.

⁷ In the midst of this scheme, on September 10, 1999, Fitch purchased a cashier's check from Norwest Bank made payable to Patricia Molano Gutierrez in the sum of \$8,000. *Id.* at p.9.

Seeking to alleviate Citibank's suspicions, Fitch—posing as Maria Bozi—apparently called Citibank on September 16 and 21, 1999 in a bid to keep Ms. Bozi's account open. In spite of—or perhaps because of—Fitch's efforts, Citibank froze Ms. Bozi's account on September 17, 1999. By that time, Fitch had taken \$48,000 from Ms. Bozi's Citibank checking account. His actions reveal an intent to take the money that remained in her account (\$64,593) when it was frozen by Citibank. *Id.* at p. 10, SER 25.

Undaunted by Citibank's suspicions, Fitch posed as “Mario Bozi” and used Maria Bozi's health insurance card and account number to obtain medical services on September 28, 1999, and to schedule surgery for October 5, 1999, to treat a hernia. PSR 04-262 ¶ 27.

Fitch Leaves the Mobile Home, But Continues His Plunder

Fitch remained in Ms. Bozi's mobile home at Lake Shore Trailer Village until September 28, 1999, when a Park Service Ranger questioned him about Ms. Bozi's welfare. *Id.* at p. 9, SER 24. Following the ranger's visit, Fitch vacated Ms. Bozi's trailer and left Lake Shore Trailer Village. Fitch then assumed the identities of “Daniel O'Hare” and “David Krause” to conceal himself from law enforcement authorities. He cancelled the surgery for “Mario Bozi” that had been scheduled under (and for which preliminary treatment had been billed to) Maria

Bozi's health insurance account. CR 208, p.10, SER 25.

On October 1, 1999, National Park Service Rangers saw Fitch loading his truck. They followed Fitch to a dumpster where he discarded items, including a receipt from his purchase of chloroform under the name of Dr. David Fitch on July 7, 1999. PSR 04-262 ¶ 21.

In his haste to leave the Lake Shore Trailer Village, Fitch abandoned Ms. Bozi's mobile home and car. However, late on the night of October 9, 1999, he returned to the mobile home and took the car. He forged receipts and fraudulently endorsed the title, transferring it to his aliases with an intent to sell it. Similarly, he obtained an appraisal and forged ownership documents for the mobile home as part of an attempt to sell it. CR 208, p. 11, SER 26.

Fitch even sought to sell Ms. Bozi's clothing and shoes. While residing at the Hitchin' Post RV Park in October 1999 under the alias "Daniel O'Hare," Fitch attempted to sell a woman's clothing, shoes and personal effects to another tenant, Lorinda Brodoski. Fitch told her that his wife had left him and he was selling her things. *Id.*

On October 26 to 28, 1999, Fitch attempted to buy over \$5,000 of man-made emeralds over the internet with one of Maria Bozi's credit cards, however the charge to the credit card was declined. *Id.*

Fitch Assumes the Alias of David Lee Krause and Returns to England

On October 26, 1999, Fitch obtained a birth certificate for “David Lee Krause,” having previously purchased the real Mr. Krause’s personal information for this purpose. See PSR 04-262 ¶¶ 23-25. Fitch used this document to obtain a Utah Identification Card, a United States passport, and a Utah driver’s license in the name of David Lee Krause. On November 26, 1999, Fitch left Las Vegas and flew to London under his new false name, using the fraudulently obtained passport. CR 208, p. 11, SER 26; PSR 04-262 ¶¶ 28-33.

Fitch Marries Patricia Molano Gutierrez

Fitch remained in England for several months. On January 20, 2000—approximately 10 months after marrying Maria Bozi and a little more than 4 months after she was last seen alive—Fitch (under his alias “David Krause”) married Patricia Molano Gutierrez in England. *Id.* pp. 11-12, SER ; PSR 04-262 ¶ 34.

On February 7, 2000, Fitch returned to the United States using the David Krause passport. PSR 04-262 ¶ 35. The next day, while driving Ms. Bozi’s car, he was stopped for speeding in Henderson, Nevada and, ultimately, arrested. *Id.* at 36; PSR 04-262 ¶¶ 35-37. At the time of the arrest, Fitch identified himself as David Krause and said he was looking for a car and taking this one for a test drive.

He said he did not know David Fitch and he did not know Maria Bozi. RT Trial, Day 3:59-62, SER 146-159. After the arrest, investigators conducted multiple warrant searches, including the car and several storage units. The searches yielded abundant evidence. PSR ¶ 39.

V.

ARGUMENT SUMMARY

Fitch argues that the prosecution of this case denied him the constitutional right to a speedy trial. His argument rests on the misplaced premise that the Sixth Amendment guarantee applied from the time of his arrest in the *prior* case, on different charges, in February 15, 2000. But the Sixth Amendment guarantee applies to an “accused,” and Fitch was not accused of the crimes he committed in *this* case until much later. The law supports the district court’s determination that the indictment in *this* case triggered the Sixth Amendment right to a speedy trial.

A review of the record and the complete sentencing proceedings demonstrates both the procedural and substantive reasonableness of the sentence, notwithstanding the significant upward departure. The district court carefully complied with the procedural requirements of sentencing, including consideration of the 18 U.S.C. § 3553(a) factors, and expressed reasons for the sentence that are logical and consistent with the 3553(a) factors.

VI.

ARGUMENT

A. **THE DISTRICT COURT CORRECTLY FOUND THAT FITCH'S ARREST IN 2000 DID NOT TRIGGER ANY SIXTH AMENDMENT SPEEDY TRIAL RIGHTS ASSOCIATED WITH HIS 2004 INDICTMENT IN THIS CASE.**

1. Standard of Review

This Court reviews the district court's decision on a Sixth Amendment speedy trial claim de novo, *United States v. Gregory*, 322 F.3d 1157, 1160 (9th Cir. 2003), and the district court's factual determinations for clear error. *Id.* at 1160-61.

2. The Ruling of the District Court

Fitch filed a pre-trial motion to dismiss alleging a violation of his Sixth Amendment right to a speedy trial. ER 44. The government opposed the motion. ER 50. The district court denied the motion. ER 1.

3. Fitch's February, 2000 Arrest on a Weapons Charge Did Not Trigger Any Sixth Amendment Speedy Trial Right Related to His Indictment in this Case in June, 2004 for Fraud, Money Laundering and Other Crimes.

Fitch argues that the time which elapsed between his February 2000 arrest on gun charges and the June 2004 indictment on fraud and other charges constituted a delay in violation of his constitutional right to a speedy trial. He premises the argument on the erroneous contention that the Sixth Amendment right

to a speedy trial attached at the time of his arrest for purposes of both this case and the 2000 case. *See* Opening Brief (Br.) at 17 and 18. To the contrary, the Sixth Amendment speedy trial right was neither violated – nor implicated – during the challenged time period.

The Constitution provides separate safeguards against delay at different stages of a criminal investigation and prosecution. In the pre-indictment or pre-arrest stage, delay is tested by statutes of limitation and, to a limited extent, the Due Process Clause, in protecting against oppressive delay. *United States v. Lovasco*, 431 U.S. 783, 789 (1977). Under the Due Process Clause, pre-indictment or pre-arrest delay is permissible unless it violates “fundamental conceptions of justice which lie at the base of our civil and political institutions.” *Rochin v. California*, 342 U.S. 165, 173 (1952).

The more stringent requirements of the Sixth Amendment right to a speedy trial apply only after a person is “accused:”

The Sixth Amendment provides that ‘[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .’ On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been ‘accused’ in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The amendment would appear to guarantee to a criminal defendant that the Government will move with dispatch that is

appropriate to assure him an early and proper disposition of the charges against him.

...

The framers could hardly have selected less appropriate language if they had intended the speedy trial provision to protect against pre-accusation delay.

United States v. Marion, 404 U.S. 307, 313-315 (1971).

A person becomes an “accused” when there is “either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge.” *Id.* at 320. At that stage, although standards are still imprecise, courts have been more willing to find delay constitutionally impermissible. *See, e.g., Doggett v. United States*, 505 U.S. 647, 648-58 (1992) (finding an 8 ½ year delay between formal indictment and arrest and trial violated 6th Amendment right to speedy trial).

Relying on a statement in *Dillingham v. United States*, 423 U.S. 64, 65 (1975), that the Sixth Amendment speedy trial provision “need not await indictment, information, or other formal charge,” Fitch maintains he became an “accused” at the time of his arrest. The government conceded as much with respect to the 2000 case, but not so with respect to this case. The Supreme Court in *Dillingham* continued, “[I]t is either a formal indictment or information or else the actual restraints imposed by arrest *and holding to answer to a criminal charge*

that engage the particular protections of the speedy trial provision of the Sixth Amendment.” *Id.* at 65 (emphasis added). Fitch was not under the actual restraint of arrest in *this* case, nor being held to answer to the criminal charges in this case until the grand jury returned the indictment in June, 2004.

There is no dispute that the offenses charged in this case (the case indicted in 2004) are different than those charged in the 2000 case. Nevertheless, Fitch urges that this case should fall within the ambit of the Sixth Amendment because 1) the offenses arose from one “elaborate and lengthy scheme” (Br. at 15); 2) the government allegedly “knew in 2000 about these crimes and had evidence to prove them” (Br.at 15); and 3) Fitch “has been in continuous custody since his arrest in February 2000.” Br. at 16. None of these arguments has merit.

Additional Charges from Same Course of Conduct

The fact that the distinctly different offenses charged in the 2000 and 2004 arose from the same arrest and related, at least partially, to one “elaborate and lengthy scheme,” or continuing course of conduct, does not establish a constitutional violation. There is no constitutional prohibition against filing a new indictment that arises out of the same course of conduct charged in a prior indictment. This Court reversed a district court dismissal of an indictment in *United States v. Gregory*, 322 F.3d 1157 (2003), under circumstances similar to

those presented here. In *Gregory*, the defendant pled guilty to drug charges, served a prison sentence and was on home detention when the government filed a third superseding indictment in the same case, charging him with money laundering in connection with the same drug deals. The district court found the government had been negligent in bringing the third superseding indictment and dismissed it as violating the Fifth Amendment due process and Sixth Amendment speedy trial guarantees. This Court reversed instructing:

The government's decision to delay filing a third superseding indictment may be unusual, but charging Gregory later for money laundering arising out of the same course of conduct as his drug offenses is not in and of itself a constitutional violation. The government was free to file a new indictment, rather than a superseding indictment, for Gregory's money laundering charges in March 2001 [while he was on home detention after prison sentence]. *Such a new indictment*, issued five months before Gregory's August 14, 2001, trial date, *would have presented no constitutional speedy trial problems*. The question before us, however, is not whether the government should have chosen to charge Gregory in a new indictment, but whether its choice to issue a superseding indictment created a delay which violated Gregory's Fifth or Sixth Amendment rights.

Gregory 322 F.3d at 1161(citations omitted)(emphasis added).

Even defense counsel conceded at sentencing, notwithstanding her prior vigorous opposition, that "Okay, maybe they can bring a subsequent prosecution." RT Sent. P.12; ER 239. Accordingly, no constitutional violation is shown to the extent the charges here arose from one scheme.

Government's Earlier Knowledge and Evidence of Crimes

Nor does the constitution require the government to file charges as soon as they may become known. In *United States v. Lovasco*, 431 U.S. 783, 790-91 (1977), the Supreme Court held the prosecution of a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by lapse of time. The Court explained:

It requires no extended argument to establish that prosecutors do not deviate from “fundamental conceptions of justice” when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect’s guilt beyond a reasonable doubt.

* * *

It might be argued that once the Government has assembled sufficient evidence to prove guilt beyond a reasonable doubt, it should be constitutionally required to file charges promptly, even if its investigation of the entire criminal transaction is not complete. Adopting such a rule, however, would have many of the same consequences as adopting a rule requiring immediate prosecution upon probable cause.

* * *

The determination of when the evidence available to the prosecution is sufficient to obtain a conviction is seldom clear-cut, and reasonable persons often will reach conflicting conclusions.

* * *

Rather than deviating from elementary standards of “fair play and decency,” a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of “orderly expedition” to that of “mere speed.

Lovasco, 431 U.S. at 790-91, 792-93, 795-96.

The government did not violate any constitutional right by foregoing an indictment during the continuing investigation in this case. During the time period between Fitch’s arrest in 2000 and the 2004 indictment in this case, the government continued its investigation both domestically and internationally. For example, the government obtained the interview of Fitch’s Father, Burl Fitch, in March 2003, and had Mutual Legal Assistance Requests (MLATS) pending in both Romania and the United Kingdom, the results of which were obtained in 2003. The witness statements of Patricia Molano Gutierrez were transmitted to the United States in September 2003, all well after Fitch’s sentencing in the first case. Additionally, hope remained that Maria Bozi would be located, but that did not come to pass. CR 29 pp. 2, 6-7, SER 76, 91-92(Ex.B), 80-81.

Fitch’s conduct also compelled the government to investigate information from inmate informants, including Fitch’s planning for an escape attempt, his threats to Ms. Molano in an attempt to coerce a statement that she had seen Maria

Bozi alive after her disappearance, and a plan to have someone impersonate Maria Bozi. CR 29 p. 6, SER 80.

Continued Custody

Fitch argues the government “constituted him an accused” in this case at the time of his arrest in February, 2000, simply because he has been in continuous custody thereafter. Br. at 16. Fitch has remained in custody, but he has *not* always been in custody in *this case*. Fitch was held in pre-trial custody on the first indictment (PSR 00-50, Release Status) and he received a prison sentence upon conviction. He was incarcerated under that sentence in 2004, when the grand jury returned the indictment in this case. Fitch completed his federal custody in the 2000 case on February 20, 2007. PSR 04-262, Release Status.

Fitch was not in custody in this case until, at the earliest, his transfer to the District of Nevada pursuant to a Writ of Habeas Corpus ad Prosequendum on July 9, 2004 – *after* the period which he alleges to have constituted improper delay. *See Id.* In *Arnold v. McCarthy*, 566 F.2d 1377, 1382 (9th Cir. 1978), this Court found that the filing of a felony complaint in California court did not trigger the Sixth Amendment right to a speedy trial even though the defendant was in custody at the time:

On January 18, 1968, the crime took place and the original complaint against Arnold was filed. However, he was not “accused” in Sixth

Amendment terms until about one year later, on January 2, 1969, when he was arrested and arraigned. Even though he was in custody on [an] unrelated . . . offense during much of this time, the period prior to arrest or formal indictment is expressly not protected by the speedy trial provisions.

Id. 566 F.2d at 1382.

The Sixth Amendment right to a speedy trial attempts to minimize the delay between arrest, indictment, and trial in order to protect against unreasonable impairments of liberty caused by unresolved charges. Speedy trial protection does not attach to any period before a defendant is “indicted, arrested, or otherwise officially accused.” *United States v. MacDonald*, 456 U.S. 1, 6 (1982). And the protection is limited only to those charges for which a defendant has been formally accused. “[T]he Sixth Amendment right of the accused has no application beyond the confines of a formal criminal prosecution.” *Doggett v. United States*, 505 U.S. 647, 655 (1992).

Pre-accusation delay does not implicate the speedy trial guarantee, *United States v. Kail*, 612 F.2d 443, 446 (9th Cir. 1980), nor does the guarantee require the government to discover, investigate and accuse an individual within any particular period of time. *United States v. Marion*, 404 U.S. 307, 313 (1971). So limited, the constitutional speedy trial clock does not run during the period in which a defendant merely fears that certain charges will be brought against him, regardless

of whether law enforcement has been investigating those potential charges.

4. There Was No Speedy Trial Violation Under *Barker v. Wingo*

In *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the Supreme Court set forth a balancing test of four factors to evaluate the merits of a claimed violation of the Sixth Amendment right: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) the prejudice to the defendant. *United States v. Gregory*, 322 F.3d at 1161 (quoting *Barker v. Wingo*, 407 U.S. at 530).

The first Barker factor, the length of the delay, is a threshold issue. See *United States v. Beamon*, 992 F.2d 1009, 1012 (9th Cir.1993). [Defendant] “must show that the period between indictment and trial passes a threshold point of ‘presumptively prejudicial’ delay,” and if he does the Court proceeds to the other *Barker* factors. *Id.* Although there is no bright-line rule, courts generally have found that delays approaching one year are presumptively prejudicial. *Doggett v. United States*, 505 U.S. 647, 652 n. 1, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). Under the Sixth Amendment, delay is measured from “the time of the indictment to the time of trial.” *United States v. Sears, Roebuck & Co.*, 877 F.2d 734, 739 (9th Cir.1989).

United States v. Gregory, *supra*, 322 F.3d at 1161-1162.

The 2004 indictment first accused Fitch with the offenses in this case and, as the district court correctly found, was the event that triggered Fitch's Sixth

Amendment right to a speedy trial on the charges therein. Fitch does not allege any improper delay thereafter. He fails to make even a threshold showing of delay to warrant a speedy trial analysis under *Barker*. Accordingly, and is there is no relevant delay upon which to base the remainder of the analysis, this Court need not address the remaining *Barker* factors.

Nevertheless, as to the reason for the time that elapsed before the indictment was returned in this case, there was an ongoing investigation. Fitch was well aware of that when he entered his guilty plea in the first case:

At hearings before the court prior to the [2000] guilty plea, at which Fitch was present, the prosecutor repeatedly emphasized the continuing investigation and the government's belief that Fitch had committed other crimes. Also, the Revised Presentence Investigation Report, submitted to the court and to Fitch prior to his guilty plea stated [that there was an ongoing investigation].

United States v. Fitch, No. 06-17217, memorandum decision, 2010 WL 2788563 (9th Cir. July 14, 2010). As set forth above, interviews and investigation continued well after the conclusion of the first case. *See also* RT Sent. 16-17, ER 243-244. (Fitch's knowledge of continuing investigation, complexity of the crimes, difficulty in obtaining foreign records, and impact of intervening events of September 11, 2001); *see also* CR 46 pp. 8-12, SER 8-12; CR 59 pp. 1-3, SER 13-15 (magistrate judge and district court findings in denying pretrial motions to

dismiss for pre-indictment delay and speedy trial violation).

Fitch's claim to have asserted his right to speedy trial is based on a date in July 2005, (Br. at 17, citing motion filed 7/11/05) after the period of challenged delay.

Fitch claims prejudice based on the legally and factually untenable assertion that he was in pretrial custody on this case for seven and a half years. Opening Brief at 18. But that stretch of time includes the period before inception of this case, when he was held in pretrial detention and custodial sentence on the first indictment. He also argues that he suffered prejudice in the loss of his father's testimony. However, as the district court found in denying a pre-trial motion to dismiss for pre-indictment delay, Fitch's father, Burl Fitch, denied any knowledge of Maria Bozi during a police interview in 2003, and it is not apparent that the proffered testimony of Burl Fitch's alleged receipt of a call from Bozi would bear significantly on the charges in this case. CR 59, SER 14; CR 29 pp.5-6, 17-18(Ex.B), SER 79-80, 91-92(Ex.B).

In short, Fitch fails to establish a constitutional violation based on the Sixth Amendment right to a speedy trial.

B. THE SENTENCE, INCLUDING A FIFTEEN-LEVEL UPWARD DEPARTURE, WAS PROCEDURALLY SOUND AND SUBSTANTIVELY REASONABLE.

1. Standards of Review

This Court reviews the reasonableness of a sentence for abuse of discretion. *United States v. Carty*, 520 F.3d 984, 993 (9th Cir.2008) (en banc); *United States v. Ressem*, 593 F.3d 1095, 1115 (9th Cir. 2010) (“abuse-of-discretion standard of review applies to all sentencing decisions -whether inside or outside the Guidelines range”) (quoting *United States v. Gall*, 552 U.S. 38, 49 (2007)). “This review requires deference to the district court’s decision, and should not resemble a de novo review.” *United States v. Orlando*, 553 F.3d 1235, 1238 (9th Cir. 2009) (quoting *United States v. Cherer*, 512 F.3d 1150, 1151-60 (9th Cir. 2008).

This Court reviews the district court’s factual determination for clear error, when not limited to plain error review. *United States v. Santiago*, 466 F.3d 801, 803 n. 3 (9th Cir. 2006). However, because Fitch made no specific objection in the district court, this Court reviews for plain error; i.e., error that is plain, affects substantial rights, and seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 803.

2. Sentencing Proceedings

On July 16, 2007, the government filed a sentencing memorandum requesting an upward departure. CR 208, SER 16.

On September 28, 2007, Fitch filed objections to the presentence investigation report. CR 216, ER 209-211. On October 18, 2007, Fitch filed a sentencing memorandum and opposition to government's motion for upward departure. CR 218-221.

The next day, October 19, 2007, the government filed a response to Fitch's memorandum. CR 222, ER 221-227. Also that day, the district court conducted a sentencing hearing and imposed sentence. CR 230, ER 19 (judgment); RT Sentencing, ER 228-314. The district court heard from the parties regarding the guideline calculations, determined the guideline range, then considered arguments of counsel and Fitch's statement regarding the sentence. The district court made findings; determined that the Guidelines Range sentence was 41 to 51 months (based on an offense level of 20 and Criminal History Category III); concluded that the circumstances brought this case "outside the heartland" of other fraud, forgery and false statement cases; found that a 15-level upward departure was appropriate under Guidelines Section 5K2.1 (resulting in a sentencing range of 210 to 262 months' imprisonment); and imposed a 262-month sentence. ER 305-06.

3. The Sentence is Procedurally Sound

Fitch argues procedural error at sentencing, theorizing that the district court relied on erroneous facts, failed to explain the sentence, treated the guidelines as mandatory, and failed to consider the 18 U.S.C. § 3553(a) sentencing factors. Br. at 19. Fitch failed to raise these issues at sentencing. Thus, this Court reviews only for plain error. *Santiago*, 466 F.3d at 803.

a. The District Court Did Not Commit Plain Error, or Clear Error, in its Reliance on Facts at Sentencing

Fitch argues the district court relied on clearly erroneous facts to conclude he caused Ms. Bozi's death in order to commit the crimes of conviction.

After listing facts discussed by the district court, Fitch asserts that "most" of them are clearly erroneous. Br. at 21. He further argues or suggests the district court drew an erroneous conclusion from the facts (*See* Br.at 23) notwithstanding even defense counsel agreeing at sentencing that the facts compel the conclusion that Fitch was responsible for the disappearance and demise of Ms. Bozi. RT Sent. 28, 31, 39, ER 255, 258, 266.

Fitch's factual challenges do not square with the information that the district court properly relied upon at sentencing. The district court may consider a wide variety of information at sentencing that could not otherwise be considered at trial.

18 U.S.C. § 3661 (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”); Fed.R.Evid. 1101(d)(3) (Federal rules of evidence inapplicable at sentencing).

“[A] sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited as to the kind of information he may consider, or the source from which it may come.” *United States v. Vanderwerfhorst*, 576 F.3d 929, 935 (9th Cir. 2009) and citations therein. “[H]earsay evidence of unproved criminal activity not passed on by a court, for example, may be considered in sentencing.” *Id.* Further, the district court may rely on an uncontroverted PSR to establish the factual basis for a sentencing enhancement. *United States v. Romero-Rendon*, 220 F.3d 1159, 1163 (9th Cir. 2000), *cited in*, *Vanderwerfhorst* at 935.

The general rule is that the burden rests with the defendant to show that information relied on in sentencing was false; mere contentions of falsity don’t sustain that burden. *United States v. Von Sultzer*, 532 F.Supp. 584, 587 (D. NV 1982); *Vanderwerfhorst* at 935, 936.

Fitch’s factual challenges arise from a series of facts the district court found persuasive in concluding Fitch caused Ms. Bozi’s death:

[O]ne, Mr. Fitch failed to report his wife's disappearance to the police. If you have a loved one who disappears, I think your first reaction is you report the disappearance to the police. Mr. Fitch didn't do that here. Two, he 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.

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

Five, he 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. And, six, he 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 two weeks while wearing disguises. And those of you who sat through trial will recall that evidence I'm sure.

RT sent. 77-78, ER 304-305.

Fitch argues first that no evidence was presented to the jury about whether he reported his wife's disappearance or filed for divorce. Br. at 22. He falls short of stating that the evidence was false. As discussed above, the district court was free to consider information other than that presented to the jury. The presentence report states Fitch did not attempt to obtain a divorce. PSR 04-262 ¶¶ 34, 111. Further, Fitch's various inconsistent stories about the whereabouts of Ms. Bozi,

including to the national park ranger, and the cumulative evidence clearly demonstrate he did not report her disappearance.

Fitch argues it is a mistake to conclude he murdered his wife because he possessed “some of [her] personal information (credit cards, checkbook, etc.)” or else the same conclusion could be drawn as to Mr. Novin. Br. at 22-23. Fitch minimizes the facts. Fitch had all of Ms. Bozi’s personal information of the type she would be expected to possess. This factor was obviously not the only basis of the district court’s conclusion. Further, Mr. Novin did report his friend’s disappearance and was not the object of the types of evidence that incriminated Fitch.

Fitch argues that the court clearly erred by inferring from Fitch’s inconsistent accounts (concerning Ms. Bozi’s whereabouts) that he murdered his wife. But he merely challenges the credibility of a witness—without regard to the deference this Court affords to the trial judge, who observed the testimony—and argues that it might actually be true that Ms. Bozi went to Vancouver. Br. at 23-25. The district court reasonably found the inconsistency of the various stories to be damning. If Ms. Bozi had gone to Vancouver, one would expect Fitch to consistently provide that explanation. The district court did not plainly err in relying on its perception of the witnesses and uncontroverted evidence.

Fitch also attempts to assign error to the factual finding that he tried to sell Ms. Bozi's personal effects and car. Br. at 26. He suggests that he owned the car, at least jointly with Ms. Bozi because it was purchased after they were married, was insured in both their names, and the government dismissed the counts relating to a stolen motor vehicle. *Id.* Although the car was purchased after the marriage and both Ms. Bozi and Fitch were insured, the evidence was that Ms. Bozi bought the car with her money and titled it solely in her name. The dismissal of counts, without any information concerning the reason(s) why the Government exercised its discretion, adds no support to Fitch's suggestion.

Fitch further speculates that Ms. Bozi could have left her things to him or that the personal items he offered for sale did not belong to her. Br. at 26. No evidence supports his speculation, nor did Fitch challenge these facts or inferences at sentencing. Thus, the district court did not plainly err in relying on its perception of this uncontroverted evidence together with all of the rest of the evidence.

b. The District Court Adequately Explained the Upward Departure and Sentence

Fitch argues the district court failed to adequately explain why it did not order a different sentence – for instance one resulting from a lesser departure (of

“six or eight or even ten” levels), or at a different point in the guideline range (such as “low-end of the range or some other sentence within that range.”). Br. at 27-28. Lacking those explanations, he argues that meaningful review becomes difficult, if not impossible. *Id.* Fitch failed to make this objection in the district court, thus review is for plain error. *United States v. Miqbel*, 444 F.3d 1173, 1176 (9th Cir. 2006).

The district court did not err, let alone plainly err, in explaining the sentence. The court conducted a thorough sentencing hearing and, due to the length of the hearing, took a short recess before imposing sentence. ER 300-301. Thereafter, the district court made a finding that an upward departure was necessary to achieve a sufficient sentence under the principles of 18 U.S.C. § 3553(a) (ER 302); explained the bases of its finding that Fitch caused death to effectuate his fraud scheme (ER 303-305); and found that the facts brought the case sufficiently outside the heartland of fraud, forgery, and false statement offenses to warrant a departure. ER 305. The district court found, pursuant to 5K2.1, that “Ms. Bozi’s death was intended and that was the means that [Fitch] used and intended to use to effectuate his scheme.” ER 306. In determining the extent of the departure, the district court made note of *United States v. Mayle*, 334 F.3d 552 (6th Cir. 2003), in which the Sixth Circuit upheld a 23-month upward departure and sentence of 30

years imprisonment in a fraud, forgery, and false statement case, based on murder of a victim whose body had not been found. Here, however, the district court found a 15-level departure and 262-month sentence of imprisonment to be appropriate. ER 306.

The district court “adequately explain[ed] the *chosen sentence* to allow for meaningful review and [to] promote the perception of fair sentencing.” *Gall v. United States*, 128 S.Ct. 586, 597 (2007) (emphasis added). Fitch cites no authority holding the district court must justify its decision not to impose other potential sentences. Fitch’s disagreement with the district court’s determination does render the court’s explanation inadequate. *See United States v. Vanderwerfhorst*, 576 F. 3d 929, 938 (9th Cir. 2009). The record contains sufficient factual findings to support the departure and sentence and provides no basis for a finding of plain error warranting reversal.

c. The District Court did not Treat the Guidelines as Mandatory

Fitch argues that the District Court gave the guidelines more weight than other factors and therefore, effectively treated them as mandatory. Br. at 28-29. Again, there was no objection below and the plain error standard thus applies.

The district court clearly knew the guidelines were advisory and to be afforded equal weight with other factors and expressly so 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.

* * *

The Court, of course, under 3553 exercises its discretion in imposing any sentence that the Court considers to be reasonable. Section 3553(a) sets out the factors to be considered in imposing a sentence, and considering all of those factors and trying to give equal weight to all but not to impose a sentence – I’m sorry – to impose a sentence that is sufficient but not greater than necessary to comport with those factors.

ER 301-302.

The record does not support a finding of plain error or any error in the district court’s treatment of the guidelines in determining the sentence.

d. The District Court Considered the Statutory Sentencing Factors

Fitch argues the district court failed to consider the 18 U.S.C. § 3553(a) sentencing factors. He supports his argument by reasoning that the district court did not discuss the factors (Br. at 30), which renders this argument a mere restatement of his ill-founded argument that the district court’s findings were insufficient. Br. at 30-31

Before imposing sentence, the district court stated:

All right, having heard statements of counsel for the government, counsel for the defendant, and the defendant’s remarks, having read the presentence report submitted by the Probation

Department and considering its contents, and there being no plea agreement in the case and, of course *most importantly, considering the factors set forth in 18 USC 3553*, I have to agree with the government that this is a case that calls for an upward departure.

RT Sent. 74 (emphasis added), ER 301.

The district court additionally stated that Section 3553(a) sets out the factors to be considered in imposing a sentence, that it was considering all of those factors, and trying to impose a sentence sufficient, but not greater than necessary to comport with those factors. ER 302. Then, the district court again stated that an upward departure was necessary “to achieve a sentence which is sufficient under the principles embodied in 18 USC, Section 3553 (a). *Id.* at 75, ER 302.

The district court’s repeated affirmation that it considered the statutory sentencing factors was sufficient to find that it did so. This Court assumes that district judges know the law and understand their obligation to consider statutory sentencing factors. *Ressem*, 593 F.3d at 1119. The district court need not articulate in a vacuum how each § 3553(a) factor influenced its determination of an appropriate sentence, and the district court “need not tick off the sentencing factors to demonstrate it has considered them.” *Id.*; *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (en banc) . Further, an adequate sentencing explanation may be inferred from the record as a whole. *Carty* at 993.

“An estimation of the outer bounds of what is ‘reasonable’ under a given set of circumstances may not always be beyond debate, but the [generally-applied] abuse-of-discretion standard by which that estimation must be judged limits the debate and gives district courts broad latitude in sentencing.” *Ressem* at 1121-1122. The record here demonstrates the district court followed the appropriate sentencing procedures.

4. The Sentence is Substantively Reasonable

“A substantively reasonable sentence is one that is sufficient, but not greater than necessary to accomplish the sentencing goals of 18 U.S.C. § 3553(a)(2).” *Ressem* at 1120 (quoting *United States v. Crowe*, 563 F.3d 969, 977 n.16 (9th Cir. 2009) and 18 U.S.C. § 3553(a)).

“The touchstone of ‘reasonableness’ is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a).” *United States v. Tomko*, 562 F.3d 558, 568 (3d Cir. 2009) (quoting *United States v. Grier*, 475 F.3d 556, 571 (3d Cir. 2007) (en banc); see also *United States v. Williams*, 425 F.3d 478, 481 (7th Cir. 2005) (“[W]hat we must decide is whether the district judge imposed the sentence he or she did for reasons that are logical and consistent with the factors set forth in section 3553(a).”).

“In determining substantive reasonableness, we are to consider the totality of the circumstances, including the degree of variance for a sentence imposed outside the Guidelines range.” *Carty*, 520 F.3d at 993.

Ressem at 1120. "[This Court] may not reverse just because we think a different sentence is appropriate." *Carty*, 520 F.3d at 993 (citation omitted).

Fitch argues briefly that his sentence is substantively unreasonable based on a list of allegations. He submits that the sentence is harsh; that there was insufficient evidence to prove he killed Ms. Bozi; that it appears as if the government intentionally staggered the charges to achieve a higher sentence; and that the district court did not give Fitch credit or sufficient consideration of the time served on the initial prison sentence.

The district court, cognizant of its responsibility, explicitly weighed the plethora of facts before it and the Section 3553(a) factors to fashion a sentence sufficient, but not greater than necessary to accomplish the sentencing goals of 18 U.S.C. § 3553(a)(2). RT Sent. 75, ER 302. While the upward departure was significant, it was not unwarranted in light of the facts.

This case and Fitch's relevant conduct significantly differs from the heartland of typical cases involving financial frauds and money laundering falling cases assessed under § 2F1.1 (and the current § 2B1.1). Murder is seldom a prerequisite for such "white-collar" crimes, and the Sentencing Guidelines prescribed for financial fraud and money laundering offenses do not contemplate murder.

Both Congress and the Sentencing Commission anticipated that such exceptional cases would occasionally arise. Section 5K2.0 of the 1998 edition of the Sentencing Guidelines expressly allowed that: "[u]nder 18 U.S.C. § 3553(b), the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" USSG § 5K2.0.

"The United States Sentencing Guidelines explicitly encourages upward departure where death or serious injury occurs." *United States v. Vernier*, 335 F.Supp.2d 1374, 1378 (S.D.Fla. 2004), *aff'd in part and vacated in part*, 152 Fed.Appx. 827 (11th Cir. 2005). More particularly, the Policy Statement set forth in § 5K2.1 of the Sentencing Guidelines instructs:

If death resulted, the court may increase the sentence above the authorized guideline range.

Loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind and the degree of planning or preparation. Other appropriate factors are whether multiple deaths resulted, and the means by which life was taken. The extent of the increase should depend on the

dangerousness of the defendant's conduct, the extent to which death or serious injury was intended or knowingly risked, and the extent to which the offense level for the offense of conviction, as determined by the other Chapter Two guidelines, already reflects the risk of personal injury. For example, a substantial increase may be appropriate if the death was intended or knowingly risked or if the underlying offense was one for which base offense levels do not reflect an allowance for the risk of personal injury, such as fraud.

USSG § 5K2.1 (emphasis added). "[A]n upward departure under section 5K2.1 may be based on harm resulting from relevant conduct as opposed to conduct comprising the offense of conviction." *United States v. Purchess*, 107 F.3d 1261, 1271 (7th Cir.1997); *see also, Williams v. New York*, 337 U.S. 241, 250-51 (1949) ("A sentencing judge...is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined"); *Harris v. United States*, 536 U.S. 545, 558 (2002) ("The Court has recognized that this process is constitutional and that the facts taken into consideration need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt"). By its terms, in cases involving death, § 5K2.1 "authorize[s] courts to 'increase the sentence above the authorized guideline range' up to the statutory maximum for the offense of conviction." *United States v. Howard*, 454 F.3d 700, 703 (7th Cir.2006).

While the ordinary standard of proof for factual findings underlying sentencing enhancements is preponderance of the evidence, *See United States v. Riley*, 335 F.3d 919, 925 (9th Cir.2003), the district court emphasized it found the relevant facts by the higher standard of proof, of clear and convincing evidence, appropriate where an enhancement would have " 'an extremely disproportionate effect' " on the sentence. *See United States v. Hopper*, 177 F.3d 824, 832-33 (9th Cir.1999) (quoting *United States v. Restrepo*, 946 F.2d 654, 659 (9th Cir.1991) (*en banc*)); *see also Riley*, 335 F.3d at 925. The district court stated:

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

RT Sent. 76, ER 303.

While the district court did not engage in a discussion with Fitch following Fitch's chillingly unremorseful and lengthy assertions of what he considers to be *his* victimization (*Id.* at 48-71, ER 275-298), it did thoroughly consider all non-frivolous arguments raised by the defense. For example, the district court agreed with the defense on two objections (*Id.* at 75, ER 302), and explained why it

rejected Fitch's assertion that he had already been sentenced for the death of Ms. Bozi. RT Sent. 77, ER 304; RT Sent. 29-30, ER 256-257.

Based on the record of the prior case, the district court found that Judge Dawson did not rely on her death "in the slightest." RT Sent. 77, ER 304; RT Sent. 29-30, ER 256-257. Thus, there was no basis for "crediting" Fitch with the time served on the prior sentence. Beyond that, the district court explained that the Bureau of Prisons calculates credit for time served in this case and issues related to "overlapping" custody. *Id.* at 46-48, ER 273-275.

Finally, while the present case is extraordinary, it is not unparalleled. Federal courts confronting comparable crimes have recognized that a substantial upward departure is warranted where evident but uncharged murders were the catalyst for financial frauds. For example, in *United States v. Mayle*, 334 F.3d 552 (6th Cir. 2003), the defendant was convicted of mail fraud and forgery related to Supplemental Security Income ("SSI") checks totaling \$5,073.25 that were payable to Joseph Newman. In that case, the Sentencing Guidelines provisions related to fraud and forgery resulted in an Offense Level of 14 which (in Criminal History Category I) would have yielded a sentencing range of 15 to 21 months. However, in that case—as in the present case—the victim's disappearance was a predicate for the financial frauds. Although the victim's body had not been found, the district

court concluded that the defendant had murdered Joseph Newman, and that the murder constituted relevant conduct because it facilitated the fraudulent offenses of conviction. The district court accordingly increased the defendant's base offense level by 23 points to level 37 pursuant to U.S.S.G. § 5K2.1 and sentenced the defendant to a term of 30 years imprisonment. The Court of Appeals for the Sixth Circuit affirmed, explaining:

Defendant contends that because Newman's body has not been found, there is no evidence that he died, much less that he was murdered. The district court noted that Newman was living with defendant at the time of his disappearance; that Newman's disappearance coincided with the beginning of defendant's fraudulent endorsement of checks made payable to Newman; and that defendant retained Newman's personal effects. Finally, the district court noted that the completely unbelievable statement defendant gave to investigators about placing Newman's checks in the mailbox “strongly supports an evil understanding of what happened to Newman.”

On review, we are satisfied that the evidence was sufficient to enable the district court to find by a preponderance of the evidence that defendant killed . . . Newman

....

The district court found that defendant caused Newman's death in order to facilitate the fraud offense. According to the district court, defendant caused the death of Newman “in essence, so that the defendant could receive approximately \$300 a month.”

The district court's determination that the death of Newman was conduct that occurred during the commission of the fraud offense was not clearly erroneous. This finding is amply supported by the facts surrounding the disappearance of Newman and defendant's forgery of his SSI checks.

Having determined that causing Newman's death was relevant conduct, the district court found that the Sentencing Guidelines concerning the offense conduct do not accurately reflect this conduct. Under the 2000 Sentencing Guidelines Manual, the applicable manual at the time of defendant's sentencing, the offense level for all three offenses of conviction, mail fraud in violation of 18 U.S.C. § 1341, forgery in violation of 18 U.S.C. § 510, and making false statements in violation of 18 U.S.C. § 1001, was governed by § 2F1.1. Section 2F1.1 called for a base offense level of 6. The court increased the offense level by 4 points pursuant to § 2F1.1 for specific offense characteristics regarding the amount of the loss and the degree of planning involved. The court added an additional 2 points for vulnerable victim under § 3A1.1(b)(1) and 2 points for obstruction of justice pursuant to § 3C1.1.

The district court determined that this guideline calculation, which resulted in an offense level of 14, did not take into consideration the serious nature of defendant's conduct in causing the death of his fraud victim. The district court accordingly granted the government's request for an upward departure.

Section 2F1.1, the guideline governing the offenses of conviction, does not factor in the unique circumstances of this case. Causing death is sufficiently outside of the

heartland of the fraud, forgery, and false statement offenses to warrant a departure from the Sentencing Guidelines. The Guidelines specifically provide that if death resulted from the relevant offense conduct, the court may increase the sentence above the authorized guideline range. U.S.S.G. § 5K2.1. Thus, we find that the Guidelines encourage departure on this basis. *See also United States v. Jose-Gonzalez*, 291 F.3d 697, 702 (10th Cir.2002) (“The Guidelines encourage consideration of death and significant physical injury as grounds for departure.”).

••••

An increase of 23 levels is a significant departure. However, upon careful review we conclude that because defendant's relevant conduct involves the most serious crime of murder and because that conduct was not reflected in the offense level under the Guidelines, the sentencing court's decision to increase the offense level by 23 levels was not unreasonable and was not an abuse of discretion.

Mayle, 334 F.3d at 562-65; *see also Vernier*, 335 F.Supp. at 1379 and 1381

(upward departure where murder facilitated fraudulent credit card withdrawals).

The district court considered the above-cited cases, and imposed a less substantial departure than the 23-level departure upheld in *Mayle*.

Read as a whole, subsection 3553(a)(2) directs:

The court, in determining the particular sentence to be imposed, shall consider . . .

(2) the need for the sentence imposed—

- (A) *to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;*
- (B) to afford *adequate deterrence* to criminal conduct;
- (C) *to protect the public from further crimes of the defendant;* and
- (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; . . .

18 U.S.C. § 3553(a)(2) (emphasis added).

Under the facts and circumstances of this case discussed above, a substantial sentence was needed to reflect the seriousness of the defendant's offenses and to provide just punishment. Additionally, a substantial sentence was needed not only as a general deterrent against such egregious murder-for-profit schemes, but also to protect the public from the danger posed by this individual defendant. In addition to his substantial criminal record and coldly calculated crimes, Fitch has made several written threats against Ms. Molano. CR 208, pp. 18-19, SER 33-34, 58-60(Appx. F), 63-64(Appx. G); PSR 04-262 ¶ 40. The district judge imposed the sentence he did for reasons that are logical and consistent with the factors set forth in section 3553(a). The result was a reasonable sentence well within the district court's discretion.

VII.

CONCLUSION

Based on the foregoing, Fitch's conviction and sentence should be affirmed.

DATED this 17th day of November, 2010.

Respectfully submitted,

DANIEL G. BOGDEN
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Appellate Chief
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/s/ Camille W. Damm _____
CAMILLE W. DAMM
Assistant United States Attorney

VIII.

CERTIFICATE OF RELATED CASES

In accordance with the provisions of Rule 28-2.6 of the Rules of the Ninth Circuit Court of Appeals, the United States advises the Court that it knows of no prior or related cases.

Dated: November 17, 2010

Respectfully submitted,
DANIEL G. BOGDEN
United States Attorney

/s/ Camille W. Damm
CAMILLE W. DAMM
Assistant United States Attorney

IX.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(c) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 06-10290

I certify that: (check appropriate options(s))

1. Pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

X Proportionately spaced, has a typeface of 14 points or more and contains 11122 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

Date: November 17, 2010

/s/ Camille W. Damm

Camille W. Damm

Assistant United States Attorney

