

C.A. NO. 07-10607

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff – Appellee,	)	D.C. No. 2:04-cr-262-JCM
	)	(District of Nevada, Las Vegas)
v.	)	
	)	
DAVID KENT FITCH,	)	
	)	
Defendant – Appellant.	)	
_____	)	

**APPELLANT'S REPLY BRIEF**

Appeal from the United States District Court  
for the District of Nevada, Las Vegas

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I.

ARGUMENT

**A. Despite the Government’s arguments, Mr. Fitch is still due relief under the speedy trial provision.**

In its response to Mr. Fitch’s brief, the Government argues that Mr. Fitch’s speedy trial right has not even been implicated, let alone violated, by the Government’s pursuit of the charges in this case. *Gov’t Brief* at 17. At its core, the Government’s position is founded on the contention that the 2004 indictment, and not the 2000 arrest, triggered the speedy trial protections relevant to this case. But while the Government advances its position vigorously, its argument is ultimately lacking. And when everything else is considered under the *Barker v. Wingo* paradigm, it is clear that Mr. Fitch is entitled to relief for the constitutional violation.

1. The Government offers no viable legal support for its position.

Mr. Fitch argues that his 2000 arrest triggers his speedy trial protection for the charges in this case. The Government argues that everything prior to the 2004 indictment is irrelevant. Yet the support the Government offers for its position is either ambiguous or irrelevant.

The Government places the weight of its argument on a quotation from *Dillingham v. United States*. *Dillingham* states that speedy trial protections engage with a formal indictment or with “the actual restraints imposed by arrest and holding to answer to a criminal charge.” 423 U.S. 64, 65 (1975) (quoting *United States v. Marion*, 404 U.S. 307, 320 (1971)). Relying on this quotation, the Government argues that Mr. Fitch was neither restrained nor held to answer to a

criminal charge in relation to this case. But beyond its *ipse dixit*, the Government offers no authority for this interpretation. Its declaration is submitted as the only support for the idea that the criminal charge for which it arrested Mr. Fitch was limited to those it first indicted. This question is exceptionally pressing given that Mr. Fitch was arrested for (as the Government described it) one “elaborate and lengthy” scheme.

The Government attempts to evade this problem of interpretation by invoking one of this Court’s decisions. Relying on *United States v. Gregory*, the Government argues that there is “no constitutional prohibition against filing a new indictment that arises out of the same course of conduct charged in a prior indictment.” *Gov’t Brief* at 19. But the Government’s reliance on *Gregory* is problematic on several fronts. To begin with, when the *Gregory* court itself stated that there is no constitutional problem with filing a new indictment charging a crime arising out of the same course of conduct as a previous indictment, it was not referring to the Sixth Amendment’s speedy trial provision. 322 F.3d 1157, 1161 (9th Cir. 2003). As the citations in the decision (but omitted from the Government’s brief) make clear, the *Gregory* court was referring to the problems of Double Jeopardy and unreasonable preindictment delay. *Id.* (citing *United States v. Dixon*, 509 U.S. 688, 705 (1993) and *United States v. Lovasco*, 431 U.S. 781, 791–92 (1977)). This portion of *Gregory* was not concerned with speedy trial protections.

The Government also emphasizes the *Gregory* court’s statement that a new indictment, as opposed to a superseding indictment, “would have presented no constitutional speedy trial problems.” *Gov’t Brief* at 20 (quoting *Gregory*, 322 F.3d

at 1161). This statement has its problems, too. First, as the subjunctive tense of this sentence and the content of the immediate next sentence indicate, this Court was not deciding the question, and so this conclusion is merely dicta. *Gregory*, 322 F.3d at 1161. Second, the cited authority for this sentence (again omitted by the Government) suggests the *Gregory* court was considering only a limited aspect of the speedy trial question - the time delay. *Id.* (citing *United States v. Turner*, 926 F.2d 883, 889 (9th Cir.1991) (four-month delay) and *United States v. Valentine*, 783 F.2d 1413, 1417 (9th Cir. 1986) (six-month delay)). And third, if the *Gregory* court truly intended what the Government argues - a new indictment would present no problem where an equivalent superseding indictment might violate the speedy trial provision - it would create an untenable constitutional rule. Prosecutors could sidestep the Sixth Amendment by merely dismissing one indictment and bringing a new one. The Government's rule would exalt form over substance. *Cf. United States v. Alvarez-Perez*, No. 09-50334, 2010 WL 5175011, at \*4 (9th Cir. Dec. 22, 2010).<sup>1</sup>

The better course is to do as Mr. Fitch's opening brief asks - to take the Supreme Court at its word. As it stated in *Dillingham*, speedy trial protection "need not await indictment, information, or other formal charge." 423 U.S. at 65. For Mr. Fitch, the speedy trial provision attached when he was arrested, and the fact that the Government chose to pursue the charges in two different indictments does not change that fact.

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<sup>1</sup> Confusingly, the Government also quotes a belated concession by Mr. Fitch's trial counsel that a subsequent prosecution might be permitted as authority for its argument. *Gov't Brief* at 20. But because this Court reviews the *district court's* determination *de novo*, *Gregory*, 322 F.3d at 1160, obviously the views of trial counsel bear virtually no weight on the matter.

2. Incarceration does not eliminate Mr. Fitch's speedy trial rights.

The Government further attempts to diminish the relevancy of Mr. Fitch's 2000 arrest to this case by pointing out that he was properly detained and held in custody for the crimes prosecuted under the 2000 indictment. The Government implies that Mr. Fitch's speedy trial rights could not attach during this custody. Key to its argument is this Court's decision in *Arnold v. McCarthy*. *Gov't Brief* at 23–24.

To begin, the Government's reliance on *Arnold* is misplaced. *Arnold* held that although the defendant was in custody on an unrelated charge, and a complaint had been filed against him, his speedy trial protections did not attach until a year later when he was arrested and arraigned. 566 F.2d 1377, 1382 (9th Cir. 1978). The situation in *Arnold* differs markedly from the one existing in this case. Unlike the defendant in *Arnold*, Mr. Fitch was arrested on related charges, part of an “elaborate and lengthy” scheme. Mr. Fitch's arrest marked the relevant start-point of his speedy trial protections. In contrast, it appears the *Arnold* court did not consider the filing of a complaint to be the equivalent of arrest or formal indictment under California law. *See id.*

If the complaint in *Arnold* was the equivalent of a formal indictment, Supreme Court precedent makes it unmistakable that the speedy trial protections would attach at its filing, despite confinement on other charges. Such is the teaching of *Smith v. Hooey*. In *Smith*, the defendant was indicted in Texas while he was serving a prison term at the federal penitentiary in Leavenworth, Kansas. 393 U.S. 374, 375 (1969). Over the next seven years, the state of Texas did nothing to prosecute the charges despite the defendant's repeated requests. *Id.* at 375–76.

The Supreme Court of Texas denied the defendant's request for mandamus, relying on an earlier decision in which it held that the state owes no duty to prosecute those held in another jurisdiction. *Id.* at 375–77. But the U.S. Supreme Court held that view as wrong. “The Sixth Amendment right to a speedy trial may not be dispensed with so lightly either. Upon the petitioner’s demand, Texas had a constitutional duty to make a diligent, good-faith effort to bring him before the . . . court for trial.” *Id.* at 383. Indeed, the Supreme Court noted several reasons why a person already in prison would need speedy trial protections as much as any other person. A delay in trial may lose a prisoner the possibility of a partially concurrent sentence. Or the pendency of another charge may increase his current sentence or worsen the conditions under which he serves it. *Id.* at 378. The pendency of an unresolved charge may also disrupt rehabilitative efforts. *Id.* at 379. And maybe more than a free person, “a man isolated in prison is powerless to exert his own investigative efforts to mitigate the[] erosive effects of the passage of time.” *Id.* at 380.

In this case, there is no other sovereign involved. The Government had the opportunity to pursue the charges as it liked, without seeking Mr. Fitch’s release from one of the state governments. Except, of course, for the limits imposed by the constitution, Mr. Fitch’s speedy trial right was triggered by his arrest. And as *Smith v. Hooy* teaches, his incarceration on other charges in no way diminishes his right to a speedy trial.

3. Mr. Fitch is still due relief under the *Barker* paradigm.

The Government argues that Mr. Fitch is not entitled to relief under the *Barker v. Wingo* paradigm, 407 U.S. 514, 530 (1972), claiming that he has not

shown relief is proper under any of the four factors. *Gov't Brief* at 25–27. But again the Government overstates its position. After all of the Government's objections are considered, Mr. Fitch is still due relief for the violation of his right to a speedy trial.

First, the Government argues that Mr. Fitch has failed to show any delay because the 2004 indictment marks the attachment of the speedy trial provision. *Gov't Brief* at 25–26. This claim is dealt with above. Mr. Fitch's 2000 arrest marks the attachment of his speedy trial protections, and the Government has failed to show otherwise. And as was argued in the opening brief, the four-year delay is presumptively prejudicial. Indeed, “no showing of prejudice is required when the delay is great and attributable to the government.” *Opening Brief* at 17 (quoting *United States v. Shell*, 974 F.2d 1035, 1036 (9th Cir. 1992)).

Second, the Government argues that even if there was a delay, delay was permissible because the investigation was ongoing, and Mr. Fitch was aware of that fact. *Gov't Brief* at 26–27; *see also Gov't Brief* at 22–23 (also explaining reason for delay). The Government does not explain how Mr. Fitch's awareness of the investigation affects this consideration because there is none. It is “the prosecution that bears the burden of explaining pretrial delays,” not Mr. Fitch. *McNeely v. Blanas*, 336 F.3d 822, 827 (9th Cir. 2003). If the Government purposefully delayed the proceedings to seek an advantage, it would weigh heavily against it. But even its “more neutral reason” - a continuing investigation and the impact of September 11, 2001 - weighs against the Government, “since the ultimate responsibility for such circumstances must rest with the government rather than the defendant.” *Id.* (quoting *Barker*, 407 U.S. at 531). Moreover, as the

Government's own brief indicates, it appears that no investigation occurred between the 2000 arrest and sometime in 2003. *See Gov't Brief* at 22. Indeed, the need for a four-year delay to investigate is highly dubious in light of the fact that Mr. Fitch apparently admitted his guilt to the crimes charged in this case during an interview with FBI agents. 2 ER 32–33, ¶¶ 10–12.<sup>2</sup>

Third, the Government condemns Mr. Fitch for waiting until after the 2004 indictment to assert his speedy trial right. *Gov't Brief* at 27. But this delay cannot count against him. Although speed trial protections had attached, and Mr. Fitch might have been aware that the Government was still investigating him, he certainly could not seek dismissal of charges yet filed. *Cf. United States v. Shell*, 961 F.2d 138, 144 (9th Cir. 1992) (failure to assert speedy trial right does not count against a defendant unaware of indictment).

Finally, the Government argues that Mr. Fitch suffered no prejudice because there was no delay and his father's testimony would not bear on this case. Its argument is again based on the contention that the 2004 indictment marks the attachment of Mr. Fitch's speedy trial rights. *Gov't Brief* at 27. Yet as was already discussed, the 2000 arrest is the relevant date, and thus prejudice is presumed. Also, because the Government has alleged the murder of Maria Bozi to greatly increase Mr. Fitch's sentence, evidence that she is still living provided by a phone call to Mr. Fitch's father would be greatly relevant.

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<sup>2</sup> The Government also makes a separate argument that it was not obligated to bring charges as soon as evidence was available. *Gov't Brief* at 21–23. In general, Mr. Fitch does not contend with the argument as it applies before the speedy trial protections have attached. However, contrary to the Government's implication, once the speedy trial protections have attached the reason for delay is properly considered under the second factor of the *Barker* paradigm.

In sum, despite the Government's protestations, Mr. Fitch has suffered a violation of his speedy trial right, and under *Barker*, he is due relief.

**B. The Government ignores the heightened scrutiny that Mr. Fitch's sentence should receive.**

In its brief, the Government goes to great ends to defend Mr. Fitch's sentence as procedurally and substantively sound. Yet despite its many assurances, at no time does the Government address the greater scrutiny Mr. Fitch's sentence must face because it is so far outside of the guidelines. Under this greater scrutiny, the procedural and substantive flaws with the sentence are evidence.

1. Mr. Fitch's sentence is still based on erroneous facts.

"In this circuit, when a sentencing factor has an extremely disproportionate effect on the sentence relative to the conviction, the government must prove such a factor by clear and convincing evidence." *United States v. Lynch*, 437 F.3d 902, 916 (9th Cir. 2006) (citing *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999)); accord. *United States v. Staten*, 466 F.3d 708, 717 (9th Cir. 2006). At least on its face, the district court used the correct standard. *See* 1 ER 7. But in application, the district court appears to have stumbled, and thus the claim of error.

First, there is the problem with what the district court based its findings on. The Government takes issue with Mr. Fitch's claim that there was nothing in the trial record to support many factual findings. In response, the Government correctly states that the district court may rely on evidence beyond what was presented in the guilt phase of the trial. *Gov't Brief* at 30–31. But what the Government either misses or ignores is the district court's specific statement:

[A]ll of these findings . . . 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."

1 ER 7. Or, in other words, the district court relied on the jury's perception of the facts to justify its own findings. It did not rely on other evidence that was admitted only during sentencing. But this reliance on the jury's verdict is misplaced, and these findings are clearly erroneous under the clear and convincing standard of proof if the jury did not receive evidence supporting the findings.

Second, there is a problem with the district courts ultimate finding: "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." 1 ER 7. Again, this finding must meet the clear-and-convincing standard, and supposedly was. *See id.; Lynch*, 437 F.3d at 916.

But for a finding to meet the clear and convincing standard, the proponent party must "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (citation and quotation marks omitted). Or, as another court put it, the "evidence must be of extraordinary persuasiveness." *United States v. Kaluna*, 192 F.3d 1188, 1204 (9th Cir. 1999) (Thomas, C.J., dissenting) (citation and quotation marks omitted).

With this much higher evidentiary standard, the "general rule" quoted by the Government does not fit. The Government states that Mr. Fitch must "show that the information relied upon in sentencing was false." *Gov't Brief* at 31. In fact, neither case that the Government cites for this rule employs the clear-and-

convincing standard. See *United States v. Vanderwerfhorst*, 576 F.3d 929, 935–37 (9th Cir. 2009); *United States v. Von Sultzer*, 532 F.Supp. 584, 587 (D. Nev. 1982). Instead, it is proper to merely point out how the available evidence does not permit the finding with sufficient certainty. It cannot be error to require the district court to meet the evidentiary standards set by this Court.

And so in the opening brief, Mr. Fitch attacked the various sub-findings, and attacked the ultimate finding reached by the district court. In response, the Government props up the various sub-findings, complaining that Mr. Fitch is speculating about alternative possibilities. *Gov't Brief* at 32–34. But this misses the point. With the clear-and-convincing standard of proof, there should be none of the other credible alternatives. The district court's finding cannot simply be more likely than not. There should be an abiding conviction that it is highly probable Mr. Fitch caused the death of Maria Bozi; the evidence must be extraordinarily persuasive. *Colorado*, 467 U.S. at 316; *Kaluna*, 192 F.3d at 1204. It was not so here. The district court clearly erred. And because of this error, Mr. Fitch must be resentenced.

2. Mr. Fitch's sentence must be adequately explained.

In his opening brief, Mr. Fitch protests the manner in which his sentence was selected. After correctly calculating the applicable Guideline range, the district court decided on a 15 level departure, and then selected the high end of that range, all without explanation why any other level was not appropriate. Arriving at that level, the district court acknowledged the § 3553(a) factors, but otherwise did not declare how they applied, or how they affected the specific sentence chosen by the

court. It seemed that the Guidelines were the only thing that mattered. *Opening Brief* at 27–31. In other words, the specific choice of sentence appeared arbitrary.

To this the Government replies, no, the district court has done enough. The district court said that it considered the § 3553(a) factors and it said it did not consider the Sentencing Guidelines as mandatory. The district court made a departure from the Guidelines because it found that Mr. Fitch had caused Maria Bozi’s death to accomplish the crimes, and it did not need to explain why this specific sentence, and not a lesser one, was justified. *Gov’t Brief* at 34–39. In other words, the district court had done the minimum, and that was sufficient to fulfill sentencing procedural requirements.

But, of course, what would suffice in a run-of-the-mill case does not come close when the district court imposes a 15 level departure under the Guidelines. When the district court makes a significant departure from the Sentencing Guidelines, the reason for departure is subject to a more demanding scrutiny.

It is also clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.

. . .

If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance. We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one. After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.

*Gall v. United States*, 552 U.S. 38, 46, 50 (2007); accord. *United States v. Carty*, 520 F.3d 984, 991–92 (9th Cir. 2008).

What the district court did here was far from what the Supreme Court requires. Appellate review would be rendered meaningless for non-Guideline sentences if once a departure is justified, the district court need not offer any more reason for its choices. Yes, it is assumed the district court knows the law and follows it, and it need not tick off each § 3553(a) factor. *Gov't Brief* at 38. But here the departure was supposedly based on § 3553(a) factors raised by the Government, and so “the judge should normally explain why he accepts or rejects the party’s position.” *Carty*, 520 F.3d at 993. Without a proper explanation, it will appear as though the district court ignored § 3553(a), or as if it treated the Sentencing Guidelines as mandatory. Without a proper explanation, the selected sentence appears arbitrary. Consequently, this case must be remanded so that Mr. Fitch might be resentenced. And if another sentence that departs from the Sentencing Guidelines is imposed, the district court must then explain its decision in such detail that this Court can exercise meaningful appellate review.

Finally, the Government argues that these claims should be subject to plain error review because no objection was entered below. *Gov't Brief* at 35–36. But this argument misunderstands the substance of these claims. As the Government in essence argued, the district court complied with the minimum requirements of sentencing. This is not a case where the district court completely failed to fulfill its duty. See *United States v. Vences*, 169 F.3d 611, 613(9th Cir. 1999). Because the court made a significant departure from the Guidelines, a more detailed explanation was required. Yet it would be a Herculean task for an attorney to

weigh and consider the court's explanation and decide whether it was sufficient to provide meaningful review, unless the failure was particular glaring. Indeed, it might only be reasonable for an attorney to catch those errors that would not survive plain review. In any case, Rule 51(b) of the Federal Rules of Criminal Procedure provides that there is no prejudice to a party in such a situation. *Cf. United States v. Autery*, 555 F.3d 864, 871 (9th Cir. 2009). Therefore plain error review is not warranted.

3. This Court must consider the totality of the circumstances to determine whether Mr. Fitch's sentence is substantively reasonable, not merely procedurally permissible.

Mr. Fitch has argued that his sentence is not substantively reasonable because the district court considered factors it should not have (the alleged murder of Maria Bozi) and failed to give any weight or consideration to other factors that should reasonably be considered when imposing a sentence. *Opening Brief* at 31–34.

In turn, the Government argues that Mr. Fitch's sentence is substantively reasonable. Its argument can be characterized as containing three more-or-less distinct parts. First, the Government argues that an individualized sentence should be imposed, and in exceptional cases, that may warrant an extreme departure from the Sentencing Guidelines. Second, the district court fulfilled its procedural requirements under § 3553(a) in relation to concerns raised by Mr. Fitch. Finally, Mr. Fitch's sentence is justified, especially as compared to *United States v. Mayle*. *Gov't Brief* at 39–48.

As for the Government's first argument, Mr. Fitch does not disagree. He agrees that the district court has the power to impose a non-Guideline sentence. Instead, Mr. Fitch argues that under the totality of the circumstances, the specific sentence he received is not reasonable, and "the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors." *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1055 (9th Cir. 2009).

This conclusion leads to the second part of the Government's argument - that the Government's fulfilled its procedural requirements. The Government argues that the district court "thoroughly consider[ed] all non-frivolous arguments." *Gov't Brief* at 43. But the question for this Court is not whether the district court thoroughly considered any specific argument. It is whether it committed an error of judgment in weighing the relevant factors. Substantive review would not hold much meaning if it were a mere reconsideration of procedural necessities.

It is from this prospective that Mr. Fitch registers his challenge to his sentence. For example, though Mr. Fitch has been continuously incarcerated since 2000, the district court did not appear to give that any weight beyond what the Bureau of Prisons was willing to credit. But even if a sentence of 262 months was justified, the district court should have considered how the previous seven years of incarceration should affect the sentence for the "elaborate and lengthy" scheme. And though the Government characterizes it as frivolous, things like Mr. Fitch's medical problems and his good behavior during his previous term in prison should not count for nothing. Viewing these things in the totality of the circumstances, they strongly suggest that Mr. Fitch's sentence should have been shorter than the 262-month term imposed.

Finally, the Government argues that Mr. Fitch's is substantively reasonable because it is consistent with the result reached in *United States v. Mayle*. But this comparison is not warranted on a couple levels. First, in *Mayle*, the Sixth Circuit specifically rejected the principle that "relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." 334 F.3d 552, 556 (6th Cir. 2003). In contrast, this Court has consistently held that due process imposes such a requirement. *See, e.g., United States v. Staten*, 466 F.3d 708, 720 (9th Cir. 2006); *United States v. Jordan*, 256 F.3d 922, 926 (9th Cir. 2001) (citing *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999)). In light of that fact that there is no clear and convincing evidence proving Maria Bozi's murder or showing it relevant to the charges in this case, the comparison to the result in *Mayle* is unwarranted.

Besides the difference in evidentiary standard, there is also the difference in circumstances. For example, in *Mayle*, it was proven by a preponderance of the evidence that the defendant had murdered at least three people to accomplish his crimes. *See* 344 F.3d at 556–563 & n.1. But while the Government points out that the defendant in *Mayle* received a 23 point increase in his offense level, and not the 16 point increase Mr. Fitch received, it still does not account for the numerous differences between the two cases. 18 U.S.C § 3553(a)(6) requires courts "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," but that is merely one factor among many for the court to consider. The goal for individualized sentencing would be in vain if a district court is allowed to base its sentencing choices on those reached in other

cases that bear a rough similarity. In short, a sentence is not substantively reasonable just because another court has done more or less the same thing.

Viewed in the totality of the circumstances, the district court failed to properly weigh all of the relevant factors in this case. Therefore, the district court imposed a sentence that is substantively unreasonable, and Mr. Fitch must be resentenced to remedy that error.

II.

CONCLUSION

The Government has failed to show that Mr. Fitch's right to a speedy trial was not violated. Therefore, the current charges should be dismissed with prejudice. Failing that, Mr. Fitch should be resentenced because the district court imposed a sentence that is procedurally erroneous and substantively unreasonable.

DATED: January 10, 2011.

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

III.

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32, the brief's line spacing is double spaced and proportionally spaced. The typeface is Times New Roman 14 point and the word count is 5,099.

DATED: January 10, 2011.

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

CERTIFICATE OF SERVICE

I hereby certify that, on January 10, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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

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/s/ Mario D. Valencia  
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