

Uncharged Criminal Conduct

David Kent Fitch

The Crime

I have chosen to lead off with the Fitch case because it is a stark example of the extraordinary power of the sentencing judge—and, by contrast, the relatively minor role of the jury—and goes to the heart of necessarily understanding what sentencing is really all about.

David Kent Fitch had been indicted and convicted after a jury trial for several garden-variety, low-level crimes related to the fraudulent use of the credit card and bank account of his wife, who had mysteriously disappeared. The typical sentence for these types of crimes is a couple of years. Nevada federal district judge James Mahan sentenced Fitch to 262 months—just shy of twenty-two years—because he decided that Fitch must have killed his wife. The judge did this even though Fitch was neither convicted—nor even indicted and tried—for murdering her. And for all we know, she might even be alive.

The *Fitch* case is the only one in this book where I was not the sentencing judge. I was acting as a designated circuit court appellate

judge for the Ninth Circuit Court of Appeals. The country is divided into twelve federal circuits. The circuit courts' function is to review the decisions of the federal district courts. The Ninth Circuit is the largest circuit. It handles appeals from the district courts of California and eight other western states, including Nevada. Circuit courts sit in three-judge panels. One of the judges can be a district court judge; the other two must be circuit judges.

Because of the heavy case load of the Ninth Circuit, district court judges are frequently asked to help out. They need not come from a state within the circuit. Even though I am a district court judge from Brooklyn, I have been invited many times to sit as a designated Ninth Circuit Court of Appeals judge, and I had to decide—together with the two circuit court appellate judges—whether the law permitted Judge Mahan to sentence Fitch for a crime he was never charged with committing, let alone one for murder.



In 1997 and 1998, David Fitch spent considerable time in Bogotá, Colombia, where he became romantically involved with Patricia Molano Gutierrez, a Colombian citizen. Patricia moved to England in early 1998, and in mid-1998 Fitch traveled to England to visit her.

While in England, Fitch met Maria Bozi. Romanian by birth, Maria was a naturalized citizen of the United Kingdom and had lived and worked in England since 1991. Although still romantically involved with Patricia, Fitch married Maria in England on April 23, 1999.

A few weeks after their wedding, Fitch went to the United States while Maria remained in England and prepared to leave. She sublet her apartment and shipped, sold, or stored her personal property. She also opened a U.S. bank account in her name only, at Citibank. She transferred \$120,000 into the account in July 1999.

Maria stayed with a former boyfriend, Michael Novin, for a few weeks before she left England. She used Novin's mailing address for her bank and credit card statements. At the end of July, Novin drove Maria to the airport, where she took a flight to Nevada to meet her new husband.

Soon after arriving in Nevada, Maria purchased a 1994 Ford Thunderbird. She registered the car in her name only. She also purchased a \$14,000 mobile home and leased space for it at the Lakeshore Trailer Village in the Lake Mead National Recreation Area. Maria was the sole tenant on the lease and listed herself as the sole owner of the mobile home. She and her husband moved into the mobile home at the end of August 1999.

Maria would regularly telephone her mother in Romania and Novin in England, but the calls stopped a few days after she and David moved into the mobile home. Novin last spoke to Maria on September 4, when she told him that she and her husband were going on a “mini trip” for a week or two and that she would call him when she returned. Maria did not tell Novin where she and David were going.

Between September 7 and 17, 1999, David withdrew a total of \$8,000 from Maria’s Citibank account. On one occasion, he made the withdrawal while wearing a hat, sunglasses, and a fake mustache. On September 10, he purchased an \$8,000 cashier’s check payable to Patricia Molano.

The next day, a Citibank representative called Novin trying to reach Maria regarding, in Novin’s words, “some checks and some urgent matter.” Novin gave the caller Maria’s phone number in the United States.

On September 13, David Fitch deposited a \$40,000 check drawn on Maria’s Citibank account into his own account. Four days later, Citibank froze Maria’s account.

On September 18, Novin attempted to contact Maria to discuss Citibank’s phone call and left a message on her answering machine. David returned Novin’s call “half an hour later” and told Novin that Maria had “gone ahead to Vancouver because she had found a job there.” At roughly the same time, David told Grace Silvers, a neighbor, that Maria “went back to England.”

Concerned that he had not heard from Maria in several days, Novin contacted the U.S. Park Service. Prompted by Novin’s phone call, park ranger Gary Sebade visited David Fitch on September 29. Fitch told Sebade that Maria had returned to Romania. Earlier that same day, Fitch—calling himself “Mario Bozi”—had used Maria’s health insurance card and account number to schedule hernia surgery for October 5.

On October 1, park rangers saw Fitch loading his truck at the trailer park. They followed him to a dumpster, where they saw him discard several items. Searching the dumpster, the rangers found a receipt, dated July 7, 1999, reflecting the purchase of chloroform by a “Dr. David.”

Now suspecting foul play, the rangers sealed Maria’s mobile home with police tape. Fitch did not return to the trailer park, but instead checked into a motel in Las Vegas. On October 9, Maria’s Thunderbird was stolen and the police-tape barrier was broken.

At some point in October, Fitch attempted to sell Lorinda Brodoski “a women’s clothing and shoes and just personal items for a woman [her] size.” Brodoski testified at trial that Fitch had told her “he was selling these things because his wife left him.” Later that month, Fitch attempted to use Maria’s credit card to purchase \$5,000 in synthetic emeralds over the Internet; the card was declined.

While in Las Vegas, Fitch met a man named David Lee Krause. Fitch convinced Krause to give him his personal information, which Fitch then used to obtain duplicates of Krause’s Social Security card and birth certificate. Using those documents, Fitch obtained a Utah’s driver’s license and U.S. passport; both bore Fitch’s photograph but Krause’s name.

Fitch used the Krause passport to travel to London on November 25. There, he married Patricia Molano using his assumed identity.

Fitch reentered the United States on February 7, 2000, again using the Krause passport. The following day, officers with the Henderson (Nevada) Police Department stopped Fitch for speeding. He was driving the 1994 Thunderbird and presented the Krause driver’s license as identification. A routine license plate search revealed the connection to Maria, prompting the officers to contact the FBI. The FBI asked them to detain Fitch until federal agents could get to the scene. Since the license plate search had also revealed outstanding warrants against Fitch, the officers placed him under arrest.

Fitch’s arrest triggered a full FBI investigation. Between February 8 and 25, 2000, agents seized from Fitch, inter alia, a shotgun, three rifles, a revolver, a box of shotgun shells, numerous books, a passport in the name of Maria Bozi, and a “briefcase with miscellaneous docu-

ments” in her name. They also recovered the Krause birth certificate, passport, and driver’s license.

In addition, the FBI sought information from potential witnesses living in Romania and the United Kingdom through Mutual Legal Assistance Treaty (MLAT) requests. As a result of those MLAT requests, the FBI received witness statements from Michael Novin, Patricia Molano, and others. None of the potential witnesses had any knowledge of Maria’s whereabouts.

In March 2003, the FBI interviewed Fitch’s father. He stated that his son had married a woman in England but could not recall her name. When asked about Maria Bozi, he stated that he had “no knowledge” of her.

To date, Maria’s whereabouts remain unknown.

The Punishment

How could Judge Mahan have sentenced Fitch to jail for just about a quarter century for killing his wife if he was never charged with murdering her and the jury only convicted him for the relatively minor crimes stemming from the fraudulent use of Maria Bozi’s credit card and bank account? You have probably scratched your head and asked, “What is going on here?” To unravel this seeming paradox, we need to understand key aspects of the history of sentencing in our country and the fundamental differences between the role of the jury and the role of the sentencing judge. But it is not my purpose to write extensively on the evolution of sentencing laws and theories of penology that have been bandied about and implemented at various times throughout the years since the birth of our country. There are many scholarly books that do this. Here I try to simply focus on the real world of sentencing that I live with every day.



Congress has the power to fix the sentence for a federal crime. Early on, it chose to abandon fixed-sentence rigidity, except for mandatory

life sentences for certain murder-related crimes—which is still the case today—and put in place a system of ranges within which the sentencing judge could determine the precise punishment. But the outer ranges were invariably—and still are—very high. And for most crimes there were either no or relatively low mandatory minimums. Thus, the judge could fix the sentence within any point in this huge range. As the Supreme Court has recognized: “Congress delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the customarily wide range so selected.” This broad discretion was further enhanced by the power of the judge to grant probation and to even suspend the sentence. Moreover, there was virtually no appellate review. As long as the judge did not exceed the broad maximums fixed by Congress or did not fail to adhere to a mandatory minimum, the sentence could not be reversed.

Federal parole boards decided whether the prisoner should be returned to the general population before the expiration of the sentence, but this could not happen until the criminal had served a substantial period of time. Parole board members presumably were skilled to assess when, if at all, a prisoner was rehabilitated. The membership of each parole board for each federal institution, when parole was first implemented for federal prisoners at the turn of the twentieth century, consisted of the warden and physician of the institution and the superintendent of prisons of the Department of Justice.

Things were—and are—different on the state levels. There is great variety among the states. Some have fixed determinative sentencing, where each crime carries a specific sentence. Some have indeterminate sentencing systems. Some have a mixture of both based upon the particular crime. But even where there are indeterminate sentencing regimes, the ranges fixed by the states’ legislatures significantly cabin in the judge’s discretion. For example, to this day, bank fraud in New York State carries a range of one to four years, but on the federal level, it is zero to thirty years.

The unfettered sentencing discretion that federal judges had did not sit well with a rising tide of public sentiment that took root in the later part of the twentieth century, calling for some semblance of uniformity and consistency in federal sentencing. As Judge Marvin E. Fran-

kel, often referred to as the “father of [federal] sentencing reform,” wrote: “[T]he almost wholly unchecked and sweeping powers we give to [federal] judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”

Congress responded. In 1984 it passed the Sentencing Reform Act, creating the United States Sentencing Commission. Its purpose was to prepare sentencing guidelines—subject to Congress’s approval—in an effort to create sentencing uniformity so that similarly situated defendants throughout the country would be given similar sentences. The new sentencing regime abolished parole and created a determinate sentencing system. Now, if you did the crime, you truly had to do the time, except you could get 15 percent off if you behaved yourself while in jail.

Under this new regime, each crime created by Congress carried a base level number of points. For example, the most serious crime—premeditated murder—carried 43 points. The least serious crime got 4 points. To this base level you might have to add additional points. Thus, if the defendant was a leader or organizer in the criminal activity, he might qualify for up to 3 more points. There were a host of other possibilities for stacking up points. And there were some possibilities for lowering them; for example, if the defendant had pleaded guilty—sparing the government of a trial—he could get 2 or 3 points deducted for acceptance of responsibility.

Once you arrived at the total points associated with the crime, you would then have to determine what criminal history category the defendant fell into. If the defendant had no prior criminal brushes with the law, he would be in category I. If he had prior convictions, he would get criminal history points. A serious prior felony would carry 3 points; a less serious crime might only require 1 point. The criminal history categories ranged from I through VI—correlated to the total number of points. For example, if the defendant had more than 12 points, he would get the top prize—category VI, which is reflective of a really bad apple.

After you calculated the correct number of points associated with the crime and the appropriate criminal history category, a grid would tell you what the range of punishment should be. For example, 17 points and a criminal history of III would carry a sentencing range of

thirty to thirty-seven months; 43 points—regardless of the criminal history category—would be life. The judge could sentence the defendant to any point within the range. In doing so, although the seriousness of the crime had to be considered, the judge could also take into account the defendant's individual characteristics. Thus, the judge was entitled to consider the defendant's age, education, physical or mental problems, military service, prior good deeds, employment history, family or community ties, lack of youthful guidance, and socioeconomic status.

But those factors—barring exceptional circumstances—could not be the basis for departing below the sentencing guidelines' range. Upward departures, however, were authorized for a number of particularly onerous reasons, such as crimes that entailed extreme physical or psychological injury or loss of life.

This brand-new sentencing regime took effect November 1, 1987, and was the law I was bound to apply when I took office exactly seven years later. During the next ten years, I was significantly hemmed in by the mandatory nature of the sentencing guidelines.

In 2005, the Supreme Court rendered its opinion in *United States v. Booker*. In this landmark decision, the majority of the justices ruled that it was unconstitutional for Congress to have required that the sentencing guidelines be mandatory. It recognized Congress's laudatory desire in 1984—when it put in place its mandatory sentencing regime—to eliminate sentencing disparity, but reasoned that it could not constitutionally preclude the judges from exercising their discretion within any statutorily created maximum and minimum term.

The Supreme Court, therefore, made the guidelines advisory. The judges were now permitted, and indeed required, to consider the previously proscribed individual characteristics of the defendant—in addition to the nature of the crime—as a basis for imposing a sentence outside the guidelines' range. The circuit courts of appeal could only disagree with the sentencing judge's out-of-guidelines sentence if it was procedurally defective, such as below a mandatory minimum, or basically substantively off the wall.



But what about the jurors' role? They have nothing to do with sentencing except in very few situations. Once they decide that a defendant is guilty, it is the judge who has the sole power to determine the facts and circumstances that will drive the sentence. The Fitch case is a stark example of just how powerful that power is.

In sentencing Fitch to about twenty-two years—even though the sentencing range for the crimes for which he was convicted was forty-one to fifty-one months—Judge Mahan believed that an upward departure was warranted because he determined that “the death of Maria Bozi was the means that Mr. Fitch used to effectuate the offenses of which he was found guilty.” That issue was never before the jury. But once the jury found him guilty of bank fraud, Judge Mahan had the power to decide that Fitch killed his wife and to sentence him accordingly. This is because the Supreme Court ruled a number of years ago that the sentencing judge can consider facts that a jury cannot—and the judge can even find those facts by a lesser standard than proof beyond a reasonable doubt.

Thus, the judge can increase the defendant's sentence based—as in Fitch's case—on uncharged conduct and even for acquitted conduct. In coming to this seemingly counterintuitive conclusion, the high court reasoned that such increases “do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction.” In respect to acquittals, double jeopardy is not implicated because, as the Supreme Court has explained, “an acquittal is not a finding of any fact.” Thus, it “does not prove that the defendant is innocent,” and “it is impossible to know exactly why a jury found a defendant not guilty on a certain charge.”

Except where Congress has established mandatory minimum punishments, the sentencing-judge's power is still the case today. The only constitutional limitation on this enormous power is that Judge Mahan, for example, could not sentence Fitch beyond the maximums that Congress had established for the crimes for which he was convicted. They included, in addition to the bank fraud, a variety of other relatively minor crimes, such as the fraudulent use of an access device and money laundering. Collectively, these other crimes also carried

high maximums. When stacked together, which the sentencing judge could do, the total maximum range came to an astonishing 360 years. This was the outer limit of Judge Mahan's sentencing authority. The practical upshot of it all was that Fitch's fate—once convicted of the minor crimes—was totally in the hands of the judge.

Of course, there had to be a factual basis for the judge's determination that Fitch had indeed murdered his wife in order to carry out his bank fraud and credit card crimes. And in fixing the precise sentence, the judge had to consider—under the applicable post-*Booker* advisory guidelines regime—the individual characteristics of the defendant. But even there, Judge Mahan had boundless discretion. He could obtain information upon which to make his findings and fix the term of imprisonment from any reliable source, such as presentence reports prepared by probation officers, which draw on information concerning every aspect of a defendant's life.

Justice Hugo Black explained the rationale for all this when he wrote the majority opinion for the Supreme Court back in 1949 in *Williams v. People of the State of New York*:

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. And modern concepts of individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

The *Williams* case stands as a stark example of the power of a sentencing judge to even override a jury's determination. A New York State jury found the defendant guilty of murder in the first degree—which qualified back then for the imposition of the death penalty—but unanimously recommended a life sentence. Relying on the additional information that the trial judge obtained through the court's probation department, the judge sentenced Williams to death. The high court approved by a seven to two vote, thereby setting a precedent