



## Ninth Circuit Upholds Dramatic Upward Departure in Fraud Case

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Last month, the U.S. Court of Appeals for the Ninth Circuit upheld a very large upward departure by a U.S. District Judge in Nevada of more than 17 years above the recommended range under the Sentencing Guidelines, [based on conduct that the defendant was never convicted of or even charged with.](#)

In this highly unusual case, David Kent Fitch was convicted by a jury of nine counts of bank fraud, two counts of fraudulent use of an access device, two counts of attempted fraudulent use of an access device, two counts of laundering monetary instruments, and one count of money laundering. The guidelines range for the offenses was 41 to 51 months. The sentencing judge sentenced Fitch to 262 months. The statutory maximum for the nonviolent crimes that Fitch was convicted of is 360 months.

The sentencing judge relied on a finding that there was clear and convincing evidence that Fitch had murdered his wife and that her death was the means that he used to commit his crimes — by gaining access to her accounts and taking her credit cards and personal information. The judge viewed the alleged murder as a serious aggravating factor. However, Fitch was never even charged with the murder after being investigated as a suspect.

As the dissent pointed out, to increase a sentence by 17 years under U.S.S.G. § 5K2.1 based on a finding of premeditated murder, there needs to be clear and convincing evidence. The majority stated that there was clear and convincing evidence to support the upward departure.

The Sixth Amendment guarantees that a conviction must rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged. Once there is a conviction, judges have enormous power to find the facts that will drive the sentence up or down. The sentencing judge has the power to sentence a defendant based upon facts not found by a jury up to the statutory maximum and a defendant has no right to a jury determination of the facts that the judge deems relevant.

The Ninth Circuit sustained the sentence, stating that there was no procedural error and that the sentence was not substantively unreasonable. The court did not find the sentence to be substantively unreasonable even though it was five times the recommended range under the guidelines. Under current Supreme Court precedent, a sentencing judge can consider sentences based on the “real crime” that occurred. This



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determination is made by a judge alone at sentencing and is to be based upon “clear and convincing evidence,” which the judge found here even though the government never charged Fitch with the murder.

This enormous upward departure cannot be justified. The government investigated Fitch for the conduct that the judge used to give him an additional 17 years in prison for, but did not even find enough evidence to charge him. Yet, the Ninth Circuit was able to find that the sentence should be sustained largely because it did not exceed the very high statutory maximum sentence of 30 years. This case could present the Supreme Court with the opportunity to define the meaning of substantive unreasonableness in sentencing.

*Crime in the Suites is authored by the [Ifrah Law Firm](#), a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.*

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