

Honorable Robert E. Jones
District of Oregon

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Appointed by: President George H.W. Bush, 1999.

Law School: Northwestern College of Law, LL.B. 1953.

Military Service: U.S. Naval Reserve, 1945-47; 1949-87; Retired Captain, U.S. Navy, JAG Corp.

Prior Legal Experience: Windsor, Jones & Briggs, 1953-56; Solo practitioner, 1956-58; Anderson, Franklin, Jones, Olsen & Bennett, 1959-63.

Prior Government Service: Oregon State Representative, 1963.

Prior Judicial Service: Oregon 4th Circuit Judge, 1963-82; Associate Justice, Oregon Supreme Court, 1983-1990.

Background and Reputation in the Legal Community

Judge Jones served in the United States Navy, the Naval Reserve, and in the Navy's JAG Corp. After graduating from law school from Northwestern College of Law, he practiced law for ten years with two firms, and briefly as a solo practitioner. After a year as an Oregon state representative, he was appointed as an Oregon Circuit Judge. He served as a state trial judge for nineteen years before being promoted to the Oregon Supreme Court, where he stayed until his appointment to the federal bench.

Judge Jones also has substantial experience in legal education, as an adjunct professor at Lewis & Clark Law School, Willamette University School of Law, the National Judicial College, and the American Academy of Judicial Education. He also served on the Board of Overseers of the Lewis & Clark Law School, as a master with the American Inns of Court, and as President of the Oregon Trial Lawyer's Association. Judge Jones has received many awards from university and bar groups for his service and accomplishments in his long career. With regard to criminal justice issues, Judge Jones served as Chairman of the Oregon Commission on Prison Terms and Parole Standards and the Oregon Criminal Justice Council.

Judge Jones' abilities are considered excellent. Lawyers interviewed said that he challenges lawyers and demands preparation. He is considered an expert on evidence law and otherwise deemed a scholarly judge. Although he is considered conservative and pro-business, civil attorneys consider him fair and a "straight arrow."

In the civil arena, Judge Jones is well known for his ruling in a breast implant case in which he held that there was insufficient evidence that these devices caused systemic diseases in women, holding that expert testimony had to show that the implants probably caused disease, not just that they possibly could. Judge Jones wrote that he recognized that his opinion, "goes farther in evaluating and eliminating plaintiffs' claims than any other opinion in breast

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Sentencing Transcript at 8, *United States v. Michael David Powell*, Cr. No. 89-60105 (May 22, 1991 D. Or.).

implant litigation pending in the country.”² Newspapers also report his comments in an anti-abortion protester case where he rebuked a witness by saying, “Truthful means truthful . . . This is not a Clinton deposition.”³

Criminal defense attorneys say Judge Jones is fair to defendants. One lawyer is quoted as saying that the judge “laments about the guidelines and the mandatory minimums.”

Judge Jones on Sentencing Policy

Judge Jones writes that

Over the last 40 years I have observed the evils of having no guidelines, with some very lenient judges imposing entirely inappropriate light sentences. On the other hand, I have observed the injustice of mandatory minimums and the injustice of too limited discretion under national guidelines. I do believe there is a compromise where we have guidelines but leave discretion to the sentencing judges to depart upward or downward. Sentencing never gets any easier and certainly is one of the most challenging duties of a judge.⁴

After he took senior status in 2000, Judge Jones no longer took routine criminal cases but he continued to handle complex criminal matters and states that he feels completely comfortable imposing substantial and severe sentences in those matters when appropriate. For example, he sentenced Packward Kaleilani Toulupe to forty years as the leader of a methamphetamine conspiracy and he gave a twenty year sentence to sixty one year old Walter J. Hoyt III, in a white collar case involving the sale of limited partnerships in a cattle venture. In regard to Hoyt, Judge Jones noted that the sentence was “justly deserved” despite the defendant’s ill health.⁵

James S. Flack

Offense: Conspiracy to Possess with Intent to Distribute Methamphetamine.
Sentence: 240 months.
Release Date: July 14, 2006.

James Flack was a cook for a fairly sophisticated methamphetamine ring in Rogue River, Oregon. When police raided the laboratory, they found a TV surveillance system, a large amount of cash, a gun and over 30 pounds of high quality methamphetamine. James was present when the lab was raided and he was immediately arrested.⁶ Ultimately, he was

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Oregonian, December 18, 1996.

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National Law Journal, Feb. 1, 1999.

4
November 6, 2003 letter from Judge Robert E. Jones to author at 2 (on file with author).

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Id. at 1.

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indicted along with five others. The government asserted that Michael Zivich and Steven Bates were the partners and financiers of the operation, James was a cook, as was another co-defendant, Gary Foster, who also knew how to upgrade the quality of the drug into “ice,” a higher grade of meth. The retailers of the organization were unclear, although Zivich admitted that the product was distributed through “biker groups” in the Southern California and Nevada areas.⁷

James and Bates pled guilty in exchange for the dismissal of some charges and an agreed cap on their sentences of twenty years.⁸ This turned out to be a smart move. Under the Guidelines, pure methamphetamine, known as “ice,” is treated more severely than other forms of the drug or its byproducts. Thus, the 30 pounds of pure meth translated to an Offense Level of 40. Two points were added for a gun and two deducted for his plea. With no prior criminal record, James’ Guideline range without the plea agreement would otherwise have been 292-365 months.

At sentencing, James told the judge that he understood what he did was wrong and that he was truly sorry.⁹ He candidly admitted that he “. . . didn’t realize . . . while committing the crime that the penalties were so severe. Had I known that, I don’t think I would have remained involved in it. . . . I didn’t think I was risking 20 years of my life. And I’m sorry I did that.¹⁰ Judge Jones asked him if he had given any consideration to the damage caused by his production of methamphetamine. Again, James was quite honest. He told the judge that in retrospect certainly, but at the time, he had not really thought about it, saying “when I was in the process of . . . making the meth, I never realized that. Maybe I was blinded to the fact that there was – you know, there was a large demand. . . . if so many people wanted it, can it be bad?”¹¹

After this exchange, Judge Jones spoke to James further before he imposed the required twenty year sentence. He stated that

I suppose that federal judges have spent a lot their time imposing sentences complaining about the Congressional acts that have restricted our discretion. And that

A search warrant of James’ home in Romoland, California yielded an additional 4.3 pounds of meth and two fully automatic machine guns. Charges arising from that search were dismissed as part of the plea deal in this case.

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One co-defendant cooperated and received 48 months. Two went to trial and were convicted; Zivich received life without parole and Foster was sentenced to 360 months.

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July 23, 1998 letter from James Flack to Tracy Bergmann, Families Against Mandatory Minimums, at 1 (copy on file with author).

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James said, “I wanted to tell the Court that I realize what I did was wrong. I realize the seriousness of the crime that I committed. And I am truly sorry for committing the crime.” Sentencing Transcript at 59, *United States v. James Sanford Flack*, Cr. No. 90-60055-2 (D. Or. June 25, 1991).

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Sent. Tr. at 59-60.

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Sent. Tr. at 60.

the amount of time that are imposed by the Congress for these offenses is disproportionate to not only state sentences but other federal crimes.”¹²

He went on to note that earlier that morning the Sentencing Guidelines had dictated only a twelve month sentence for a white supremacist convicted of a dynamite charge. Judge Jones said he perceived that defendant to be “far more dangerous” than James. He said, “the inequities here are just terrible . . . 12 months for possession of dynamite by an unrepentant person; versus looking at [Mr. Flack] as a non-sociopathic individual with no record, no signs of violence, and who went into this situation strictly to make a fast buck.”¹³

Lastly, Judge Jones told James that as a “cook” for the operation, he couldn’t give him a reduction for minor role nor eliminate the enhancement for the gun found in the house when he was arrested.

The judge commented that he was

. . . very sympathetic. If I could, as a matter of working with my heart versus my head, I would very much like to get your sentence down to a range of 188 to 235, but I would have to compromise the facts to get there. I think that is where you belong. [] I’ve even considered departing to get there, but I don’t see that I can. . . .

No matter how I cut it, I can’t get below the 20 years. I would like to, very frankly. I would like to do the things your lawyer has suggested, and I just can’t intellectually do that without cheating on the facts. And I don’t think we’re supposed to play games with these guidelines.¹⁴

Judge Jones then imposed the twenty year sentence, telling James, “Again, I sentence you, Mr. Flack, with a heavy heart. I’m sure that doesn’t help you any. But I just can’t mess around with the facts or the guidelines.”¹⁵

Prior to this case, James had no criminal record. He graduated from high school in 1975 and had held a variety of manual labor jobs for a few years. He then was employed by a drilling company for five years and before turning to construction work. In the late 1980s, James developed a serious addiction to methamphetamine. He tried drug rehabilitation at the Betty Ford Center in January 1990, but his treatment was unsuccessful and his addiction eventually led him into this offense.¹⁶

Ten years later, James wrote to Judge Jones and detailed the steps he has taken to educate and rehabilitate himself. He earned an Associates Degree with a 3.85 GPA and was working

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Sent. Tr. at 63.

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Sent. Tr. at 63-64.

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Sent. Tr. at 64-65.

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Sent. Tr. at 67.

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The Betty Ford Center staff diagnosed him as having a history of poly-drug abuse including meth, amphetamines, alcohol, as well as a serious gambling problem. Nevertheless, he was released with staff approval after one month of treatment.

towards a Bachelors Degree through correspondence courses. He successfully completed 500 hours of a drug treatment course, learned to speak fluent Spanish, and took many hours of computer, clerical, building trades, and other self-help courses including certification as a personal trainer.

He was also able to repair some of his relationships with his family and he converted to Buddhism as part of his efforts to become a more spiritual person. He told the judge he hoped to “illustrate that a person can make life-long changes and find purpose and a measure of success while serving a long prison sentence.”¹⁷ James shared with the Judge that he had become engaged to a woman he met through a college course and hoped to work towards an M.B.A.

Judge Jones wrote back thanking James for his letter. He noted that over thirty-eight years as a judge before taking senior status, he had sentenced some 10,000 felons. “Unfortunately, rarely have any of them rehabilitated themselves to the extent you have. You are to be commended in the strongest terms for your attitude and your many achievements.”¹⁸

Judge Jones wrote recently that a ten year sentence would have been appropriate for James. He notes that “. . . Mr. Flack is just one of many methamphetamine manufacturers who received Draconian sentences with no apparent deterrent effect, as methamphetamine is still prevalent in Oregon and has polluted portions of the Hawaiian islands.”¹⁹

James was released on July 14, 2006 and his supervised release was transferred to the Central District of California to allow him to relocate there.

Compiled from Sentencing Transcript (excerpt), PSI, inmate letters, letters from Judge Jones, PACER docket sheet.

Michael David Powell

Offense: Felon-in-Possession of a Firearm.
Sentence: 15 year mandatory minimum.
Release Date: May 12, 2003.

During the summer of 1989, thirty-eight year old Michael Powell was with his family on a camping trip in a national forest in Oregon. At the time, he was involved in the music business in Los Angeles and running two organic farms in Ohio. When police officers in camouflage approached his camp, Michael wasn't sure at first who they were so he grabbed his son's rifle and fled into the woods. Eventually, having become separated from his family, he hiked towards town with the rifle and some other equipment tied together. He was arrested without incident on his walk back, pursuant to a warrant for him in Ohio on a matter

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June 13, 2001 letter from James S. Flack to Judge Jones at 2 (copy on file with author).

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June 27, 2001 letter from Judge Jones to James S. Flack at 1 (copy on file with author).

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March 27, 2003 letter to author, App. B at 1-2 (on file with author).

that was later determined to concern his son.²⁰ No Oregon state charges were filed against him for carrying the rifle and Michael returned to Ohio to resolve the warrant issue. That seemed to be the end of the matter until a year later, federal agents arrested Michael in Ohio for being a felon-in-possession of a firearm and the indictment charged him under the Armed Career Criminal Act (“ACCA”) because he had three prior convictions which qualified as “crimes of violence.”

Michael still disputes the facts that underlay his prior offenses, which are discussed in detail below. Suffice to say, that reading between the lines, his drug use and lifestyle, combined with some bad judgment in his youth, resulted in these convictions for serious offenses much earlier in his life.

His first conviction occurred in 1976. Michael was accused of participating in a series of armed robberies in which his estranged wife’s car was used. On May 5, 1976, he was sentenced on four counts of aggravated robbery committed over a three day period. On May 10, 1976, he was sentenced on two more counts of aiding and abetting robbery for offenses during the same period, but in a different county. He claims that he did not participate in these offenses but also refused on principle to help the police and identify the person he knew had committed these crimes.²¹ For these convictions, he received two years probation which was later shortened.

By 1978, Michael was a self proclaimed hippie, living in a commune and using peyote and marijuana. He decided to go on a camping trip with a few friends and ended up hitchhiking in New Mexico where they were picked up by a rancher. Michael claims the man became abusive and attacked him after threatening to sexually assault his friend’s fourteen year old companion. Michael states that he shot the man with a pistol his friend had given him when the rancher came at him with a pipe and knife.²² Midway through a contentious trial, Michael decided to plead guilty. Although he believed he was pleading to negligent homicide, the court records reflect a plea to second degree murder and he was sentenced to three and half years, rather than the six months he claims he was offered for pleading.²³

After these convictions, Michael’s life settled down somewhat and he became better noted for his creativity and entrepreneurship. He has been an artist and songwriter and music producer, including being a member of an early version of the rock group Devo. He operated two

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Drugs and guns had been found in a search of the defendant’s family home in Ohio in April 1989. Michael’s son later testified before a grand jury that these items belonged to him (although no charges had been filed against the son at the time of Michael’s federal sentencing two years afterwards). As a result, the charges against Michael in Ohio were dropped.

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March 27, 2003 letter to author at 1-2 (on file with author).

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Id. at 2.

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This version of his criminal record comes from the 9th Circuit opinion denying his direct appeal. *See United States v. Powell*, 967 F.2d 595, 1992 WL 127038 (9th Cir. (Or.)) Michael believes that his Federal Public Defender failed to bring information to the court’s attention that would have resulted in some of these convictions not being considered for ACCA purposes, in which case, his Guideline range would have been, according to him, only 4-11 months. *See* March 6, 2003 letter to author at 2 (on file with author).

independent music labels in California and in Ohio and a contracting company, where he also farmed and raised livestock. As he puts it, "I've done a lot of things and I've done them well. . . . Whatever I do, I put myself into 200%."24

Judge Jones agreed, in part, with this assessment. At the May 22, 1991 sentencing hearing, he remarked that

Well, there's no doubt, Mr. Powell, that you possess remarkable artistic talents. I don't understand all the symbolism attached to it. . . . I was also very impressed with the letter you received from Bernard Shaw. And obviously you have a lot of basic talent, which is what makes this situation all the more pathetic.25

The judge then explained that a mandatory fifteen year term applied under the ACCA. He told Michael that

I cannot change your past behavior. I cannot change your past convictions. The fact of the matter is that they are there, and you knew they were there. You had no business whatsoever having any weapons with you at the time that you were out in the forest, whether they were in your possession or your family's possession, particularly after this event in Ohio when you were in fugitive status. You knew about your son's involvement.

It all adds up to a very pathetic situation. I have no basis to depart. If I departed, I would be violating what Congress has dictated for the person who [did what you did]. Obviously, I can say this, that your situation did not impress me as an aggravated one.26

Judge Jones then articulated his belief that Michael and his family were attempting to live out in the woods "without the intent of committing any present or future crime. And that you just wanted to be left alone. And that it was incredibly bad judgment that you exercised in running away with a rifle. But we cannot live by hindsight."27 In conclusion, he told Michael that

This whole thing, as I say, is very sad for me. I have no choice but to impose the 180 month minimum. . . . And other than that, I can say to you that this sentence is imposed because the Congress has demanded it. It's imposed to protect the public and society. And other than that, I am very sorry.28

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March 27, 2003 letter to author, App. A at 2 (on file with author).

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Sent. Tr. at 7.

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Sent. Tr. at 7-8.

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Sent. Tr. at 8.

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Sent. Tr. at 8.

In 2001, Judge Jones also wrote a letter on behalf of Michael as part of his application for commutation or reduction of his sentence.²⁹ The judge wrote, “I was well aware of Mr. Powell’s extremely serious criminal background at the time of sentence. Nevertheless, at the time of this offense that required a 15 year sentence, Powell was not engaged in any criminal activity per se, other than becoming frightened at the campsite and possessing his son’s .22 caliber hunting rifle. There was no evidence that he had intentions to use this rifle in any criminal fashion.”³⁰ The petition was denied.

While in prison, Michael also converted to Buddhism and he participated in three separate ordination ceremonies, each time increasing his level of devotion and commitment. He has practiced and taught meditation for over thirteen years.

In May 2003, Michael was released. As communicated by letter, his plan was to stay with his mother and then spend some time with his Tibetan teachers and on retreat in the wilderness. After some time to re-acclimate, he wrote that he will decide how to best serve society. In his words, “There is no down time once a being truly enters the path of altruism. Every moment is a precious gift and a precious, unlimited opportunity to manifest the intent for the benefit of our fragile, living family.”³¹

In a recent letter, Judge Jones said he felt a sentence of seven to eight years would have been adequate for this case, noting that “The facts of his violation simply did not match with the written word of the guidelines.”³² He said about Michael, “I recognize his violent past and I am keeping my fingers crossed for his future.”³³

Compiled from Sentencing Transcript, inmate letters, appellate opinions, correspondence from judge, PACER docket sheet.

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Michael tried to obtain an early release due to his father’s serious illness but this request was denied.

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November 2, 2001 letter from Judge Jones to Whom It May Concern at 1 (copy on file with author).

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March 27, 2003 letter to author at 3 (on file with author).

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November 6, 2003 letter from Judge Jones to author at 1 (on file with author).

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Id.