

David Sam

District of Utah

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Appointed by: President Ronald Reagan, 1985.

Law School: University of Utah, J.D. 1960.

Military Service: U.S.A.F., Capt., 1961-63.

Prior Legal Experience: Dushene-Rosevelt, 1963-71; Sam & Mangan, Duschene-Rosevelt; 1971-73; Duchesne County Attorney, 1966-72; Duchesne County Commissioner 1972-74; Sam, Brown & Park, Duschene, 1973-76.

Prior Judicial Experience: District Judge, 4th Judicial District of Utah 1976-85.

Background and Reputation in the Legal Community

After law school, Judge Sam served in the Air Force for three years and then practiced law in Utah for thirteen years. During this period, he also held positions as Duchesne County Attorney and Duchesne County Commissioner. He served as an Institute Director for the Mormon Church in Colorado and Oregon and he taught as an adjunct faculty member at Brigham Young University. Judge Sam became a state court judge in 1976 and he was elevated to the federal bench in 1985. His community service activities have included serving on the boards of the Utah National Parks Council, the Boy Scouts of America, and a local university, college, and hospital.

Judge Sam is respected and liked by Utah lawyers. He has been described as a solid and capable judge with an admirable judicial temperament. He is known for running a relaxed court room and brings no pre-formed opinions or "discernible bias" to his docket. Thus, while plaintiff's attorneys consider Judge Sam conservative, they also note that he is fair. Criminal defense lawyers concur. As one stated, although "most of the judges here are pretty conservative in criminal matters, and Judge Sam is no different." "He really attempts to be fair to both sides." Similarly, in regard to sentencing, "He is not especially inclined to depart downward in sentencing, but he doesn't take great delight in putting people away."

Nationally, Judge Sam received significant press for twice dismissing bribery charges against the two bid chiefs for the 2002 Winter Olympics held in Utah. The second time around, Judge Sam stated that the charges could not stand because "there was no criminal intent or evil purpose," and he told the defendants that the case "offends my sense of justice."²

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¹ November 39, 2000 letter from Senior Judge David Sam to President William J. Clinton at 3 ("Judge Sam letter") (copy on file with author).

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²John Powers, *It Was a Case of Not Having One*, Boston Globe, December 21, 2003 at C.18, available at 2003 WL 66483868.

Gerard A. Greenfield

Charge: Possession with Intent to Distribute PCP.
Sentence: 192 months (sentence later commuted by President Clinton).
Release Date: January 20, 2001.

At age twenty-eight, Gerard Greenfield still had a promising, if somewhat undefined future ahead of him. Raised in a strong Christian home in Washington, D.C., he attended Catholic school where he was an altar boy. He graduated high school in 1982 and completed two years of college. In 1983, he enlisted in the Marine Corp Reserve where he was trained in supply administration. He served for four years before receiving an honorable discharge. Gerard maintained a steady employment history beginning in 1983 with a series of jobs that included sheet metal apprentice, mail clerk, telephone operator, and laborer. One prior employer told his probation officer that she considered him an excellent employee who could be trusted with money and to work without supervision.

In 1992, however, he was having trouble finding work and had just become engaged to his girlfriend of eight years.³ Perhaps because he became concerned about finances due to his impending marriage, or simply from bad judgment, Gerard made a fateful decision in that summer. In the course of purchasing marijuana for himself, a drug dealer he knew offered to pay him to make a single trip across the country to transport drugs back to the District of Columbia.⁴ The dealer arranged for him to be accompanied by Judy Boone and the two traveled to California where they picked up five single gallon bottles of liquid PCP and some marijuana from a wholesaler named "Dip."⁵

They then commenced their cross country trip but made it only as far as Utah where their car was stopped for going six miles over the speed limit.⁶ The officer issued only a warning, but he also ran a check on Boone, who had been driving. That check revealed that Boone had an outstanding warrant for a forgery charge in Maryland but that extradition was only authorized from an adjoining state so he could not arrest her.⁷

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³His fiancé at the time told the probation officer that Gerard was an honest person whom she knew to work hard and that he avoided drugs and criminal activity.

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⁴While not a drug addict, Gerard had been a frequent, often daily user of alcohol since age thirteen. He also smoked marijuana regularly since age fifteen and it was this habit that brought him into contact with the dealer that arranged for his trip to California. His commutation petition suggests that his abuse of alcohol and marijuana may have contributed to his lack of judgement.

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⁵Boone played the role of tester during the purchase, using some of the drug to ascertain its potency.

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⁶Gerard's commutation petition received support from a variety of sources including the Mayor of Salt Lake City, Ross C. Anderson. Mayor Anderson contended in his letter that the stop of Gerard and Judy Boone was clearly a pretextual racial stop, noting that both these individuals were black and that they were driving barely above the speed limit in an area where motorists routinely exceed the speed limit by an average of ten to fifteen miles per hour. Letter from Mayor Ross C. Anderson to President William J. Clinton (attached to commutation petition, copy on file with author).

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Nevertheless, the officer's interest was further piqued and while awaiting backup, he ordered the two out of the car and began to search the car. He found a package under the backseat that appeared to be marijuana just as another deputy arrived. At this point, Gerard and Boone panicked, got back into the car, and attempted to flee against the instructions of the officers. As Gerard drove, Boone threw the bottles of PCP from the car.⁸ A dangerous chase ensued until the officers shot out the rear tire of their car. The entire episode was captured on video from a camera in the police cruiser. After their arrests, both Gerard and Boone gave statements which admitted their guilt to being drug couriers.⁹

Gerard's situation did not improve once he obtained counsel. His first attorney died, allegedly of a drug overdose, and his case was taken over by a lawyer from the same shared office space. Although Gerard wanted to plead guilty, the new attorney refused to negotiate. On his own, Gerard attempted to meet with law enforcement officials to discuss cooperating against the supplier, but when the new attorney found out, he cut off this avenue and insisted that the case be tried. At trial, this attorney's behavior was, according to Judge Sam, offensive, and the judge had to admonish him several times during the proceedings.¹⁰ According to Gerard, his attorney did not tell him he planned to call him to testify until five minutes beforehand and did not explain the sentencing ramifications of testifying untruthfully.¹¹ Not surprisingly, given the overwhelming evidence of guilt, Gerard was convicted by the jury.

Soon after the trial, Gerard's attorney was disbarred and Judge Sam appointed a new attorney for the sentencing hearing. At this point, however, most of the damage had already been done. The five gallons of PCP and the marijuana that had been in the car yielded a Base Offense Level of 38. The probation officer also recommended a two point increase for obstruction of justice for his false testimony and his flight during the offense. With no prior criminal history, the sentencing range in the PSI was 235 to 292 months. At sentencing, however, Judge Sam ruled that Gerard could receive a reduction for acceptance of

⁷Gerard claimed the car belonged to his cousin and the car had not been reported stolen. *See United States v. Boone*, 62 F.3d 323 (10th Cir. 1995).

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⁹Although the bottles shattered in the road, sufficient samples were recovered to establish their contents.

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¹⁰In yet another twist to this case, because the deputy had illegally searched the car when it was first stopped, the five pounds of marijuana that were eventually seized from the vehicle were suppressed. However, the Court of Appeals held that the PCP Boone threw from the car during the chase was admissible because their flight was voluntary as was the decision to throw the PCP out the window. Thus, the seizure of the PCP was not "tainted" by the first illegal search and was not in Fourth Amendment lingo, "the fruit of the poisonous tree." In simple terms, that means that if Gerard and Boone had not fled, it is likely the PCP would also have been suppressed as a fruit of the illegal search and the government would have had to dismiss the entire case because it would have had no physical evidence.. *See United States v. Boone*, 62 F.3d 323, 325-26 (10th Cir. 1995).

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¹¹He was also apparently late to court on more than one occasion.

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¹²At trial, Gerard contended that he was unaware there was PCP in the car until Boone informed him after they had been stopped by the police. He insisted that she had made all the arrangements to pick up that substance. He did admit the marijuana in the car was his. This testimony contradicted his statement to the police after his arrest and the jury rejected it.

responsibility despite his earlier obstruction and false testimony. The judge held this situation was exceptional because his attorney essentially abandoned him after verdict when a defendant ordinarily has the opportunity to meet with the probation officer and admit guilt.¹² That decision reduced the sentencing range to 188 to 235 months. Judge Sam then selected 192 months as Gerard's sentence.

After pronouncing the sentence, Judge Sam told Gerard

I am certainly impressed with your family, their support of you, and it does appear to the Court that certainly they were not aware of any conduct of this nature because of your record in the past which does not appear to be one that in any way would indicate your involvement in this type of conduct. It is the view of the Court that you do have many positive strengths and I hope that you involve yourself in programs that will enhance those strengths and bring you back to society a law-abiding citizen that contributes to society's order. I want you to know of my interest in you. . . .¹³

After his direct appeal and post-conviction efforts were unsuccessful, Gerard obtained *pro bono* counsel who filed a commutation petition on his behalf. The attorney contacted Judge Sam who agreed to write a letter on his behalf to President Clinton. In his letter, Judge Sam cited several factors that he felt weighed in favor of commutation. First, Judge Sam noted that if Gerard had been sentenced a year later, he would have benefitted from the "safety-valve" which would have reduced his sentence by almost three years. Second, he noted that Gerard received less than adequate assistance of counsel, particularly because of his attorney's unwillingness to enter early negotiations for a plea that could have resulted in a cooperation agreement, or at least an additional reduction for early acceptance of responsibility. Judge Sam wrote in this regard that "It is noteworthy that Mr. Greenfield, on his own, had initiated contact and discussions with the government before being stopped by Mr. Porterfield, his disbarred attorney."¹⁴ More generally, Judge Sam noted that

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Judge Sam concluded his letter by noting that Gerard had been incarcerated for seven and a half years and was now thirty-six years old, "still young enough, if given the opportunity, to make a positive contribution to society and the community in which he lives."¹⁶

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¹³At sentencing, Gerard told the judge that "I did have five gallons of PCP to deliver to another person. . . And I know what I did was wrong. And actually, I tried to plead guilty before the trial but I was not allowed to." Sent. Tr. at 6.

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¹⁴Sent. Tr. at 10 -11.

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¹⁵Judge Sam letter at 3.

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¹⁶*Id.*

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¹⁷*Id.* at 4.

In his petition, Gerard's attorney noted some additional factors that weighed in favor of early release. To everyone that knew Gerard, his decision to get involved in this offense was completely out of character. At the time of sentencing, case law existed which allowed a defendant to argue for a downward departure if he or she could show his conduct was clearly aberrant behavior.¹⁷ However, because of the late substitution of counsel for sentencing, a motion on these grounds was never made.¹⁸ Gerard's petition also pointed out that Boone received a sentence of only 120 months, despite her at least co-equal role, and the fact that she was wanted for another offense while engaged in the instant crime.¹⁹

Gerard was one of seventeen non-violent drug offenders who was granted a commutation by President Clinton as he left office in 2001. While some of President Clinton's other clemency decisions were severely criticized, most notably his pardon of fugitive financier, Marc Rich, the commutation for Gerard and the others like him were widely praised.²⁰

When released, Gerard returned to the Washington, D.C. area to his father's home. With strong family support, he was able to re-adjust and eventually married and had a child. He works full-time as a bus driver and his family feels that he has fully left his past behind him.²¹

Compiled from Sentencing Transcript, PSI, appellate opinion, commutation petition, newspaper articles, telephone conversation with family member.

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¹⁸A single incident involving transporting illegal cargo could qualify if characterized by the type of spontaneity consistent with aberrant behavior. See *United States v. Fairless*, 975 F.2d 664, 667 (9th Cir. 1992).

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¹⁹The petition points out that his sentencing attorney also failed to ask for a downward adjustment for his minor role in the offense. While it is true that Gerard's role was minor compared to the wholesaler in California and the distributor in D.C., only Gerard and Boone were arrested in Utah and his role vis a vis his co-defendant was essentially co-equal. Thus, he was probably not entitled to a minor role adjustment under that Guidelines provision.

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²⁰Due to the age of the case, Gerard's commutation attorney was unable to learn how she obtained a lesser sentence, although one might suspect that she cooperated, given that the amount of drugs in the car generally would have required a higher sentence for someone with a criminal history.

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²¹See Randy Barnett & Morgan Reynolds, *Well-Deserved Commutation of Sentences*, The Record, Northern New Jersey, January 5, 2001 at L9, 2001 WL 5232289 (noting that authors rarely agreed with President Clinton and that one author was a former prosecutor); Brent Israelsen, *Pardon Panel is Misguided*, Salt Lake City Tribune, March 5, 2001 at A1.

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²²February 13, 2007 telephone conversation with Gerard's father (notes on file with author).