

Frederic N. Smalkin
District of Maryland

*[T]he judges in this system no longer actually impose sentences that have anything to do with what one might call traditional concepts of individualized justice, but have to deal with what Congress orders us to do . . . and I've got to follow the law. . . . I will simply say that if I had the sentencing discretion here for the offense of having a firearm in your possession under the circumstances that this involved, there is no way I would sentence you to 180 months. That is well beyond the pale, but that's what Congress wants. . . .*¹

Appointed by: President Ronald Reagan, 1986.

Military Service: U.S. Army, 1968-1976, Captain.

Law School: University of Maryland, J.D., 1971.

Prior Legal Experience: Law Clerk, Hon. Edward S. Northrop, District of Maryland, 1971-72; JAG Corps, 1972-74; Assistant to General Counsel, Dept. of Army, 1974-76; Solo Practitioner, 1976; Lecturer, University of Maryland Law School, 1978-present.

Prior Judicial Experience: U.S. Magistrate Judge, District of Maryland, 1976-86.

Background and Reputation in the Legal Community

Judge Smalkin served with distinction in the United States Army, leaving with the rank of captain and two Meritorious Service Medals. He clerked for a federal judge in Maryland before serving as a JAG officer and with the General Counsel's Office of the Department of the Army. He was a United States Magistrate for ten years before his appointment to the federal bench.

Judge Smalkin has taught in a variety of settings including at the University of Maryland Law School, for bar review programs, and at the University of Virginia Trial Advocacy Institute. Among his notable rulings, Judge Smalkin presided over a trial that awarded damages to seven black plaintiffs subject to discrimination at a health club. The judge ordered the club to post non-discrimination notices, train employees in civil rights compliance, and award rebates to black members who may have been overcharged. In 1997, Judge Smalkin ruled that license plates bearing the image of the Confederate flag are protected by the First Amendment.

Lawyers surveyed consider Smalkin a very bright and demanding judge. They said he can be rough on lawyers, especially those who are not prepared. Civil litigators view Smalkin as conservative and somewhat pro-defense. About half the criminal defense attorneys interviewed said Judge Smalkin is pro-government. Others argue that the judge is "good for the defendant" because he will "hold the government's feet to the fire." On sentencing, the same split seems to be present. Some believe he is a tough sentencer. Others wrote that, "You might get a departure but you will have to work for it." Another lawyer reported, "With the appropriate case, I think he's pretty good about granting departures."

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Sentencing Transcript at 17, *United States v. William G. Horne*, 00-4645 (D. Md. Aug. 30, 2000).

Judge Smalkin on Sentencing Policy

When interviewed, Judge Smalkin contended that the Sentencing Guidelines are theoretically flawed and that there were seriously problems with how they have been implemented. Although reducing disparity was allegedly the rationale for the Guidelines, he complained that there was a wide split among the federal circuit courts in approaches to departures. He noted that the Fourth Circuit has upheld virtually no departures and pointed to *United States v. Rybicki*, 96 F3d. 754 (4th Cir. 1996), as an example of the Fourth Circuit's stingy approach. He also argued that prior to the Guidelines, at least within his district, there was not much disparity, with almost all cases "falling within one standard deviation." He also said that he sometimes felt "like an apparichik in a totalitarian regime" when sentencing under the Guidelines. He believes many judges share his sentiments that there is "no humanity" in the Guidelines sentencing system, adding that it felt both "Kafka-esque" and "Orwellian." Among other aspects, he singled out the acquittal conduct rule as fundamentally wrong. He believes that most judges, like him, would prefer not to consider acquitted conduct at sentencing by the preponderance standard. Judge Smalkin believes that a system of presumptive guidelines with fewer factors to consider would make more sense. Under his ideal system, the Courts of Appeal would have plenary review, but if the sentence were within the correct range, the sentence would be unreviewable.

He also argued that one source of the crisis in the federal system is the collapse of state court systems, which have been unable to deal with the fallout from the drug culture. However, federalizing drug crimes has made the situation worse and just skewed the market for prosecuting drug crimes. He thinks the federal docket is crowded with too many criminal cases that don't belong there. In drug cases in particular, Judge Smalkin contends he has never seen "a kingpin." Rather, the federal cases he sees usually involve "a guy who controls a couple of blocks and who gets a 300 month sentence." In a couple a cases, he has seen the police catch a few suppliers from Miami and New York but even these defendants were not at the top of the chain.

If given more discretion, Judge Smalkin believed that the typical street level dealer should receive about three to five years and be given educational and vocational counseling if there is some potential for rehabilitation. Similarly, the bank robbers he usually sees are heroin addicts who should get 40 to 60 months and comprehensive drug treatment. Finally, Judge Smalkin thinks the current system has no accountability mechanism for prosecutors. It has become "sentence first, trial later." While he believes Maryland has a good United States Attorney, the system gives the prosecutor too much power over sentences.

William David Horne

Offense: Felon in Possession of a Firearm.
Sentence: 15 year mandatory minimum.
Projected Release Date: February 3, 2013.

There is no real dispute about the facts in this case. In 1999, William Horne walked past a Blockbuster Video carrying a rifle. A housing authority officer saw him and ordered him to stop. Although drunk, William complied immediately. When asked what he was doing with the gun, William replied that he was taking it to a nearby pawn shop.



The gun was unloaded although William had ammunition on his person.

William was originally charged in state court. He was offered a plea bargain which would have resulted in a 15 month sentence. He decided to opt for a trial, but before the state case could proceed, the federal prosecutor for Maryland decided to charge him as a felon-in-possession under the Armed Career Criminal Act (“ACCA”). William’s federal public defender filed a motion to suppress but when that was denied, he really had no defense and therefore pled guilty. Without the ACCA, his Guidelines adjusted range would have been 77 - 96 months.² However, under this statute, he was subject to a mandatory 15 year term.

William does have a long criminal record. In addition to a variety of petty offenses, he had been convicted of two burglaries, theft, battery, and two storehouse breaking and entering charges.³ He was also on probation at the time of this crime. Because of the burglary and breaking and entering convictions, he had three prior convictions that qualified as “crimes of violence” under the ACCA, even though he had not used a weapon or harmed anyone during these prior crimes.

William believes that his criminal conduct resulted from his problems with alcohol. He left high school in the 11th grade to work with his father, an electroplater. He lost that job and his first marriage due to his drinking. In between his short prison stays, he was able to maintain other employment for some periods, including a two year stint in a shipping and receiving position in Baltimore. That position ended when he was convicted of burglarizing the premises at night. He had been in treatment twice before this case but was unable to remain sober.

At sentencing, Judge Smalkin stated he saw “no reason that I wouldn’t sentence him other than at the low end of the guidelines range, obviously, since this sentence is draconian enough.”⁴ While William did not speak at sentencing, Judge Smalkin went on to say

Well, the judges in this system no longer actually impose sentences that have anything to do with what one might call traditional concepts of individualized justice, but have to deal with what Congress orders us to do, and Congress has the power to write the checks and Congress has the power to tell us what to do and they have told us what to do and I’ve got to follow the law.⁵

As the Judge signed the papers, he added

I will simply say that if I had the sentencing discretion here for the offense of having a firearm in your possession under the circumstances that this involved, there is no way

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His Base Offense Level was 24 but he received a 3 point reduction for his plea. Given all his convictions, his Criminal History Category was VI, yielding the range noted above.

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William had a total of seventeen convictions before his federal case, but many were for minor offenses such as disorderly conduct and disturbing the peace as well as misdemeanor destruction of property.

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Sent. Tr. at 17.

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Sent. Tr. at 17.

I would sentence you to 180 months. That is well beyond the pale, but that's what Congress wants.⁶

When interviewed for this study, Judge Smalkin elaborated, stating that there was no criminal intent in this case. He felt that some punishment was in order because William was drunk and carrying a gun but that if allowed, he probably would have given him a year and a day.

In prison, William earned his G.E.D. and holds a UNICOR job which he says is one of the "few things around here that gives you a feeling of normalcy."⁷ William is still angry about his long sentence. He thinks the law he was convicted under was for violent criminals, not people like himself. He writes that will be he will be 55 when he gets out of prison and worries about coming out of prison to find that he will be unemployable after spending most of his productive years in prison. His parents are quite elderly now and miss his help around the house. He has an adult daughter and he became a grandfather while incarcerated.

Compiled from Sentencing Transcript (partial), PSI, inmate letter, interview with Judge Smalkin, PACER docket sheet.

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Sent. Tr. at 17.

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November 2, 2003 letter to author at 3 (on file with author).