

John C. Coughenour
Western District of Washington

*[I] sent a copy of your letter to a friend of mine who is a United States Senator, with whom I've had a lot of discussions about mandatory sentences I'm going to have a discussion with him about what he would do in this case and then tell him what I had to do as a result of the statutes that members of Congress have imposed upon the courts. Maybe some small amount of good will come out of your story.*¹

[P]lease forgive me if I lapse into a consideration of what might be just in this situation as opposed to how the guidelines tell me I should sentence, and bear with me if this is an exercise that we've become unfamiliar with under the guidelines, but I would like to talk about what justice requires.²

Appointed by: President Ronald Reagan, 1981.

Law School: University of Iowa, J.D., 1966.

Prior Legal Experience: Bogle & Gates, 1966-70, 1971-81.

Background and Reputation in the Legal Community

Prior to his judgeship, Coughenour practiced at Bogle & Gates law firm in Seattle where he specialized in litigation. Lawyers praise Judge Coughenour's judicial talent and his understanding of evidence and procedure. His courtroom is considered fast-paced and efficient, and he is known for not putting up "with nonsense" from lawyers. Criminal defense lawyers say that the judge is fair in trial, although some wish he "was more skeptical of the police." Other anonymous comments include that he is "pro-prosecution, but otherwise he's basically very good." "He puts the fear of God in defendants. He'll give them a decent break though. He's not liberal, but he's fair." On sentencing, defense lawyers say that Judge Coughenour is reasonable but usually follows the Guidelines. Two others noted, "If there is some compelling reason that the defendant should get a lighter sentence, he'll be receptive to it." "He believes in trying to maintain discretion in spite of the guidelines."

Several pre-Guidelines cases are illustrative of Judge Coughenour's sentencing philosophy. In 1983, he presided over a criminal antitrust case involving corporate executives charged with conspiracy to rig bids on contracts for nuclear power plants for the Washington Public Power Supply System ("WPSS"). At that time, WPSS's problems caused the largest municipal bond default in U.S. history. The judge fined the corporation the maximum of one million dollars million and sent one of its officers to jail for five months. In 1993, he rejected a death row inmate's claim that execution by hanging was cruel and unusual punishment under the Eighth Amendment. In contrast, that same year, he allowed a 23-year old man convicted of sale and manufacture of steroids to avoid prison by attending college, maintaining a certain grade point average, and doing community service work during his five

1

Sentencing Transcript at 5, United States v. Charles O. Niebuhr, Cr. 94-00739C-001 (W. D. Wash. May 16, 1995) (Sent. Tr. I).

2

Sentencing Transcript at 9, United States v. Wayne D. Fletcher, Cr. 99-250 (W.D. Wash. Oct. 1, 1999) (Sent. Tr. II).

year probationary period. “I think the judge really wanted to help this kid and gave him a damn good incentive to get educated,” said the man’s defense attorney.

Charles O. Niebuhr

Charge: Felon in Possession of a Firearm.
Sentence: 15 Years Mandatory Minimum.
Release Date: October 4, 2005.

At first glance, Charles Niebuhr’s fifteen-year sentence for possession of a gun by an ex-felon appears to a reasonable example of “just desserts.” Charles had already been convicted of grand larceny, robbery, armed robbery, attempting to obtain a controlled substance by fraud, forgery, and escape (twice),³ before he committed the armed bank robbery that gave rise to this federal prosecution.⁴ But to Judge Coughenour, Charles’ life was more complex than the paper record disclosed.



Charles was the oldest of four children and his father was physically abusive to his children and wife. After an incident in which his father beat his mother into unconsciousness, she took the children and left the home. When his father failed to provide any financial support, his family had to move to the “bad side of town” where they lived on welfare and other forms of government assistance. Charles moved out at age fifteen or sixteen, but he frequently returned to visit his siblings. Guilty over their lack of food and clothing, Charles dropped out of school and began stealing to help provide for them. He was caught and sent to a juvenile facility. At seventeen, he joined the Army as a way out. In 1970, he was introduced to heroin and became an addict for ten years, during which he spent much of his time in prison for drug related crimes. He eventually kicked heroin but then became an alcoholic and committed further crimes.

In 1978, he met his current wife. She visited him when he went to prison again and married him while he was still incarcerated. Upon his release, with her support, he went to school and got his semi-truck driving license. He quit drinking, worked hard, and helped his wife raise her two young daughters. By 1991, he owned two trucks, leasing one while continuing to drive his own. He had credit, a home, and regular vacations. He truly felt that he had left his old life behind. Unfortunately, this success went to his head. He over-extended himself financially and started drinking after work with his friends, despite his wife’s best efforts to d i s s u a d e h i m .

The drinking led to an arrest for DWI, which in turn cost him his driving license, his trucks, and his credit cards, all in the course of about three months. Then, on October 11, 1991, while continuing to drink with his friends bemoaning his bad luck, one of the men suggested

3 His escape convictions were for walking away from a work release and from an honor farm.

4 As explained in the text, Charles was prosecuted by the State of Washington for the bank robbery and only faced federal charges for the possession of the gun.

that he rob a bank to wipe out his debts and also lent him a gun for that purpose. Charles continued his drinking that day until he eventually got the nerve to enter the Seafirst Bank in Bellevue, Washington where he pointed the gun at the tellers, demanded money, and threatened to shoot anyone who looked at him. Charles fled with some money but the tellers tripped the alarm and he was arrested a short time later.

Prosecuted by state authorities for the bank robbery, Charles pled guilty and was sentenced to 101 months in state prison. The U.S. Attorney then filed subsequent federal charges for possession of firearm by an ex-felon. For a defendant with Charles' record, this charge carried a statutory mandatory fifteen year sentence under the Armed Career Criminal Act.⁵

Before sentencing, Charles sent Judge Coughenour a long, typed letter laying out the facts of his life. He also expressed how sorry he felt towards the victims of his crimes, writing that, "I have seen on TV where people like me have been able to actually meet their victims and tell them in person that they are sorry. I dream sometimes about being able to do that. If it would help them and make them feel better and help them heal, it would mean a lot to me."⁶ He also dwelled on the costs of his failure to his wife and her children. He assured the judge that "whenever I do get to go back home, I will return to being a good, normal citizen. I will never commit another crime again of any kind. I own it to my wife and family, I owe it to myself and I owe it to society for allowing me to return and be a part of it. . . . My wife, my family, my church, and all the lessons I have learned over time will be my strengths. I am only sad that it has taken me so much pain and sorrow to reach the state of mind I now maintain. I am not so sad for myself, but for the victims, including my family, that I have caused to suffer pain and sorrow."⁷

At sentencing, Judge Coughenour imposed the required fifteen year term. He addressed Charles directly and told him that, "not only did I read your letter – I've been in the business for about 14 years. I have never taken one of those letters home to my family before. I took yours home and told my sons they should read it. I'm not easily moved, but I was moved by your letter. It's not only a tragic story, but it was particularly well-written. Its' obvious to me you have a lot of talents and that there are good reasons why people are sticking by you. I wish that I had more discretion than I have here today, but, you know, you're still relatively young and you'll be able to get even this behind you at some point."⁸

Judge Coughenour concluded the proceedings by telling Charles that he had "sent a copy of your letter to a friend of mine who is a United States Senator, with whom I've had a lot of discussions about mandatory sentences and the like, and I didn't tell him what . . . I had to

5

Where a state sentence arises out of the same conduct as the federal charge, the Guideline's usually call for the federal sentence to run concurrent with the state sentence. The government and Judge Coughenour agreed that was the appropriate result in this case. Thus, Charles will serve fifteen years total, with his state sentence expiring before his federal sentence is complete.

6

Undated letter from Charles Niebuhr to Judge Coughenour at 7 (on file with author).

7

Id. at 8.

8

Sent. Tr. I at 4.

impose in the way of a sentence here, but I'm going to have a discussion with him about what he would do in this case and then tell him what I had to do as a result of the statutes that members of Congress have imposed upon the courts. Maybe some small amount of good will come out of your story.”⁹

Wayne D. Fletcher

Charge: **Armed Bank Robbery; Bank Robbery.**
Sentence: **120 months.**
Projected Release Date: **January 14, 2008.**

At age forty two, with no previous criminal history, Wayne Fletcher committed two armed bank robberies in six days.¹⁰ In an effort to understand how Wayne's life arrived at this desperate and destructive place, defense counsel and the probation officer conducted a searching inquiry into his life.

Wayne, the oldest of four children, was raised by his parents in Everett, Washington. He left high school early (although he later obtained a GED) and worked as a plumber's apprentice. He then joined the Marine Corp and served for three years. After an honorable discharge, he returned to Washington and married in 1984. He, his wife, and their three children lived on Whidbey Island for many years where their lives revolved around work, family and their church. Sometime in the late 1990s, Wayne and his wife began to have marital problems that centered first on financial difficulties. This situation was exacerbated by a car accident in 1997 that left Wayne with severe pain and also limited his employment opportunities. He turned to gambling in an effort to find a "quick financial fix," and when that failed, to drinking. In that period, he and his wife separated and he became distraught over his wife's infidelity.

On April 7, 1999, Wayne robbed the Frontier Bank in Lake Stevens Washington. He wore a mask and pointed a black handgun at the teller. He pulled the dye packs from the money the tellers gave him and fled with just over \$8,000. On April 13, 1999, he robbed the City Bank in North Creek, Washington. Although he did not brandish a gun at the teller during that robbery, a witness in the bank saw him pull a gun from his bag while the teller was giving him the money. Wayne was followed from the bank and he was stopped by the police without incident. He freely admitted his guilt for the robbery that day and the other one six days earlier. Both the money from the second robbery and the gun were recovered in the pickup he was driving.

Wayne waived indictment and pled guilty to one count of bank robbery, one count of armed bank robbery, and one count of using a firearm during the commission of a crime of violence.¹¹ Based on these charges, and with a reduction for acceptance of responsibility,

9

Sent. Tr. I at 5.

10

The government alleged that Fletcher was suspected of up to six other bank robberies but never charged him with these offenses and the Court did not take them into consideration at sentencing.

11

Wayne was looking at a guideline range of 57-71 months and a consecutive seven year sentence for the gun count. However, at sentencing Wayne's attorney, supported by a psychiatric report, requested a downward departure for diminished capacity. The psychiatrist concluded that at the time of these offenses, Wayne was suffering from major depression which impaired his judgment, reasoning ability, and capacity to manage his life. The psychiatrist stated that Wayne's behavior in this period, including the bank robberies, was essentially "fatalistic and suicidal."¹²

At sentencing, the judge first addressed the prosecutor and said, ". . . please forgive me if I lapse into a consideration of what might be just in this situation as opposed to how the guidelines tell me I should sentence, and bear with me if this is an exercise that we've become unfamiliar with under the guidelines, but I would like to talk about what justice requires."¹³ He noted (and the prosecutor agreed) that the required sentence would have been considered quite heavy in the pre-Guidelines era. On one hand, the judge recognized that Wayne's "conduct first of all is extremely serious" and that but for very good law enforcement work, "somebody might have gotten hurt before it was brought to an end."¹⁴

On the other hand, Judge Coughenour was

also very persuaded that there was nothing in the background of this man that I see ordinarily in crime like this. I have seldom seen such a collection of strong support from family and friends, impressing upon me that this man lived a very responsible life up to a point in time. And I guess the real problem I have is where does justice lie in this situation. . . . I am persuaded that the explanation for this conduct is not the ordinary explanation that we see in criminal cases. There is something else at work here, and I'm satisfied that it is a mental condition and that it is aberrant behavior and that it does justify a downward departure.¹⁵

On these grounds, he departed downward five levels, resulting in a 36 month sentence on the bank robbery counts. With the 84 months required by the consecutive mandatory minimum on the gun count, his total sentence became 120 months.

As part of the plea and because Wayne did not display or refer to the gun during the second robbery, that crime was charged as simple bank robbery. However, his mere possession of the gun during the offense was sufficient for a second, consecutive mandatory minimum gun count under § 924(c).

12

May 5, 1999 letter from Dr. Wayne Berberich to Brian Tsuchida, Federal Public Defender at 5 (on file with author). The psychiatrist was sufficiently concerned about his mental health that he suggested Wayne be placed in a psychiatric unit, at least for an initial period upon his incarceration. In a one page letter to the judge before sentencing, Wayne stated, "I don't know why I committed these robberies and I'm having a hard time dealing with what I did. I'm sorry to everyone that has been hurt by my actions." July 2, 1999 written statement by Charles Niebuhr (Letter on file with author).

13

Sent. Tr. II at 9.

14

Sent. Tr. II at 11.

15

Sent. Tr. II at 11.

While Wayne was fortunate that the judge granted a significant downward departure that reduced his Guideline sentence by 21 months, the impact of the judge's downward departure on the final sentence was dwarfed by the prosecutor's decision to forgo an indictment and allow an early plea. If he had been indicted, Wayne would have faced an additional, consecutive twenty five year mandatory minimum for a second count of carrying a firearm during a crime of violence.¹⁶ Thus, instead of ten years, Wayne would be serving a minimum thirty five year sentence. The judge recognized this at sentencing -- "I recognize that in the way this was charged and the way the case was negotiated between counsel has at least eliminated the potential for an obscene sentence under the statutes that have been enacted by Congress and could have seen Mr. Fletcher spend the rest of his natural life in prison."¹⁷

Wayne understands that he received favorable treatment from the U.S. Attorney's Office, and thus "my sentence is not what would be considered extremely high, [but] ten years does in fact take a long time to pass."¹⁸

16

In 1998, Congress increased the penalty for a second §924(c) conviction from twenty to twenty five years. *See* 112 Stat. 3469 (1998).

17

Sent. Tr. II at 10. The judge added that, "in fact, I had a very similar case to Mr. Fletcher's a few years ago where, if you added up all the mandatory consecutive sentences as a result of the use of a weapon in a series of bank robberies, the man would have gone away for 125 years because of the way the case was charged." *Id.*

18

Undated letter to the author at 1 (on file with author).