

**James C. Fox**  
**Eastern District of North Carolina**

*As you know, the United States Attorney decides the sentence for criminal defendants these days by the selection of the charge. The Court is substantially powerless to exercise any judicial function, except within the very limited range permitted by the Guidelines. . . .*

*I have gone to the lower end of the range primarily because of his youth. And I perceive him to be articulate . . . and capable of both getting an education and learning a way to make a living. And I hope he'll do that while he's incarcerated. And I want to say that I, left to my own devices and without the application of the Guidelines, I probably wouldn't have imposed that heavy a sentence. But as you know, my hands are tied in that regard.<sup>1</sup>*

**Appointed by:** President Ronald Reagan, 1982.

**Law School:** University of North Carolina, J.D. 1957.

**Military Service:** Cpl., Enlisted Reserve, U.S. Army 1951-59.

**Prior Legal Experience:** Law clerk, Hon. Don Gilliam, U.S. District Court, E.D. N.C. 1957-58; Carter & Murchison, 1958-59; Murchison, Fox & Newton, 1960-82.

**Prior Government Service:** County Attorney, New Hanover County, 1997-1981.

**Background and Reputation in the Legal Community**

After law school, Judge Fox clerked for a federal judge in the same district in which he eventually became a judge. He practiced law as an associate and then as a partner with a North Carolina law firm. He also served as a County Attorney. Before being appointed to the bench, Judge Fox did substantial community service. He was on the board or an officer of groups such as Opportunities, Inc. of Hanover County, North Carolina Children's Home, the Cornelia Davis Nursing Home, New Hanover School for Mentally Retarded Children, and the St. John's Art Gallery. He ran for the North Carolina Senate in 1966.

Lawyers who appear in front of Judge Fox consider him very competent. He is known to be a stickler for his procedural rules but otherwise allows lawyers to do their job. On civil matters he is considered conservative but fair. Criminal lawyers say that Judge Fox "takes a tough stance on crime, but he makes sure that defendants receive a fair shake." On sentencing, lawyers say that defendants can expect a long sentence if they're convicted. Comments included, "He's one of the toughest judges on sentencing." "He can be a tough sentencer. It doesn't matter what kind of case is involved – drugs, violence, whatever."

**Judge Fox on Sentencing Policy**

In several cases, Judge Fox departed downward to address disparities between co-defendants, including a case in which federal prosecutors brought charges against one defendant while

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Sentencing Transcript at 16, 12, *United States v. Anthony Theodore Fonville*, No. 92-7-01-CR-7F (E.D. NC July 13, 1992).

leaving the other to face only state prosecution. In *United State v. Piche*,<sup>2</sup> two brothers committed a racially motivated assault against some Vietnamese men and one of the victims died as a result. Both defendants were first prosecuted in state court. Lloyd Piche received a 37 year state sentence while the other brother, Robert Piche, received just six months (of which he served one and half months).

The federal prosecutor in North Carolina then brought federal criminal civil rights charges against Robert. After conviction, Judge Fox calculated that although Lloyd received a 37 year state sentence, he would actually only serve about 4 years. As a result, Judge Fox departed downward to give Robert a 48 month sentence to equalize the sentences the two brothers would serve for this crime. He stated that this departure was necessary “to provide the government with an incentive to prosecute all co-conspirators in federal court, rather than selecting some for federal prosecution and allowing others to be sentenced only in state court.”<sup>3</sup> He added that the departure was also necessary to eliminate the “grossly disparate and unfair sentencing of similarly situated defendants guilty of the *same* federal offense.”<sup>4</sup> The Fourth Circuit reversed, holding that federal prosecutors have the discretion to chose to bring charges against only some co-defendants in federal court. The appellate opinion adds that the Guidelines were designed to ensure uniform sentencing of federal defendants only. To try to take into account the vagaries of each state’s sentencing laws would risk chaos and ultimately increase federal disparity.

Judge Fox was reversed for a similar departure in a drug case in which prosecutors made deals with the ring leader but then refused to bargain with the “smaller fish”.<sup>5</sup> Judge Fox departed downward for one defendant and asked permission from the appeals court to revisit the sentences of two others who he had already sentence to longer terms than the kingpin. Once again, the Fourth Circuit held that this was an illegal departure and reversed, holding that just because a co-defendant is not punished severely enough is insufficient reason to sentence co-defendants below the nationally applicable guidelines for their offenses.<sup>6</sup>

More generally, Judge Fox writes that “As I have previously stated many times in court, I applaud the disciplined approach that Guidelines sentencing brings to the evaluation of an appropriate sentence. On the other hand, I object to the strictures that it imposes upon the judge. Sentencing is always fact specific, and it an art, not a science.”<sup>7</sup>

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*See United States v. Piche*, 981 F.2d 706, 719 (4<sup>th</sup> Cir. 1992).

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*Piche*, 981 F2d at 719.

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*Id.* (quoting Judge Fox’s memorandum opinion).

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*See United States v. Ellis*, 975 F.2d 1061 (4<sup>th</sup> Cir. 1992). As a result of his cooperation, the ringleader was exposed to a maximum sentence of 120 month range, down from 360 months to life, and he received 108 months as the result of his cooperation. The prosecutors claimed that the case against the ringleader had problems and therefore allowing him to cooperate against his underlings was the best strategy for them.

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*Id.*

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July 29, 2004 letter from Judge Fox to author at 1 (on file with author).

## Anthony Theodore Fonville

**Offense:** Bank Robbery.  
**Sentence:** 210 months.  
**Projected Release Date:** April 14, 2007.

Anthony and Paul Fonville,<sup>8</sup> were teenagers together in Onslow County, North Carolina. Beginning in 1987, when Anthony was just sixteen years old, the two engaged in a crime spree that encompassed a significant number of break-ins and at least one robbery.<sup>9</sup> By the time they were arrested on suspicion of a October 14, 1988 breaking and entering, Anthony had turned seventeen. During their arrests, the police learned that the two boys had also committed a robbery of a convenience store on October 6, 1988. Despite Anthony's youth, the state charged him and Paul as adults for these two crimes and for five other burglaries.



The state elected to proceed on the Oct. 6<sup>th</sup> robbery first, but the Fonvilles' trials were severed. Anthony went to trial first and was found guilty.<sup>10</sup> The day after Anthony was convicted of the Oct. 6<sup>th</sup> robbery, Paul pled guilty to four counts of felonious B&E in their second joint indictment. For reasons unknown, the state prosecutor also agreed to dismiss the indictment on the Oct. 6<sup>th</sup> robbery charge against Paul for which Anthony had just been convicted.<sup>11</sup> A month later, Anthony pled guilty to five counts in the second indictment. Thus, despite the fact the Fonvilles had committed all their crimes together, the decision by the state prosecutor to give Paul a better deal meant that Anthony now had two convictions for "crimes of violence" as defined by the Sentencing Guidelines, whereas Paul had only one.<sup>12</sup>

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The two are cousins.

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Anthony's criminal behavior actually began even earlier. He was sent to a state training school for a year for a breaking and entering charge when he was twelve years old.

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Anthony was charged with armed robbery and the jury returned a verdict of guilty on the lesser included offense of simple robbery.

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A close reading of the documents suggests two possible reasons for the state prosecutor's decision to treat the two boys differently. In the October 6<sup>th</sup> robbery, Anthony was the one who entered the store while Paul remained outside. Thus, s/he may have considered Paul less culpable. It may also be that having just tried Anthony and only gotten a robbery conviction, the prosecutor decided that a second trial on the same facts against Paul was not worth the resources and therefore was willing to use the robbery charge as an incentive for Paul to plead to counts in the second indictment.

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In most circumstances, offenses that are consolidated for trial or sentencing are considered one offense for purposes of the career offender guideline. Thus, because Paul was sentenced to multiple counts in the second indictment in one proceeding, those distinct breaking and entering events were counted as a single crime of violence for purposes of §4B1.1. On the other hand, because Anthony went to trial and was sentenced separately for the Oct. 6 robbery, the Guidelines viewed him as having committed two crimes of violence. In actuality, both Paul and Anthony had committed and been convicted of multiple felony breaking and entering charges. Recognizing the artificiality of the

None of this would have mattered if the Fonvilles had tread the straight and narrow when paroled from state prison in 1991. However, on December 23, 1991, the two robbed the First Citizen's Bank and Trust Company in Beulaville, North Carolina. Anthony entered the bank and drew what appeared to be a handgun from a bag and demanded that the teller fill it with money (later Anthony claimed that the object was a toy gun).<sup>13</sup> He then fled to a waiting car driven by Paul. A surveillance photo of the robbery was published and came to the attention of Anthony's state parole officer. After a positive lineup confirmed Anthony's identity, he confessed, and implicated Paul. Both were charged with bank robbery and both pled guilty.

The probation officer's first draft of the PSI set Anthony's Offense Level at 23 and his criminal history category at V, yielding a sentencing range of 84-105 months.<sup>14</sup> However, this PSI was incorrect and had to be redone. With two prior convictions for crimes of violence, Guideline §4B1.1 required that he be classified as a Career Criminal. The Career Criminal Guideline required that his Offense Level be raised to 34 and his Criminal History Category to Level VI.<sup>15</sup> The combined effect of these changes was a new sentencing range of 210-262 months.

In contrast, because of the state prosecutor's 1988 decision to dismiss the Oct. 6<sup>th</sup> robbery charge against Paul, Paul was not classified as a career offender. As a result, his sentencing range was much lower and he received a sentence of 71 months from Judge Fox. Thus, despite committing the same crime and having virtually identical criminal histories, Paul was released from prison in March 1997, while Anthony received a sentence three times as long.<sup>16</sup>

At Anthony's sentencing, Judge Fox recognized that a substantial sentence was required as punishment and to protect the public. He ruled against the defense on several motions concerning Anthony's career offender status,<sup>17</sup> including a request for a downward

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counting method, the Guidelines permit a judge to depart upward if the criminal history category does not adequately capture the seriousness of a defendant's past criminal conduct.

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No gun was recovered and Anthony, thus they were not charged with carrying a firearm during a crime of violence which would have carried an additional 60 month consecutive sentence.

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In the first draft of the PSI, the probation officer only gave Anthony two points off for acceptance of responsibility when he was probably entitled to three points. Thus, he would have faced a slightly lesser sentencing range had he been sentenced under this version of the PSI.

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The career criminal Guideline was written in response to a Congressional directive that federal defendants with two prior crimes of violence be sentenced at or near the statutory maximum of their federal offense. §4B1.1 sets out a short table which sets the offense level for different statutory maximums and requires that all career offenders be sentenced in Criminal History Category VI, the highest level.

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Paul was doubly lucky to have avoided career offender status. At the time of sentencing, Anthony and Paul had pending charges in state court for another robbery. Not having been reduced to a conviction, this event was not counted in the criminal history calculus at all.

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Anthony's attorney unsuccessfully tried to argue that the Oct. 6 and Oct. 14, 1988 incidents were part of one continuing criminal act (and hence should have been treated as a single offense) and that his treatment as an adult by North Carolina at seventeen, when like offenders in other states often

departure, stating that, “I don’t think his status as a career offender overstates the seriousness of his record.”<sup>18</sup> He also declined to depart downwards based on Anthony’s youth and difficult upbringing saying, “this man has some violent propensities, and he’s demonstrated them, and under those circumstances it’s probably wise that he be removed from – as a threat to the public, generally, and that he be incarcerated.”<sup>19</sup>

When the judge asked for the government’s opinion, the prosecutor first concurred that the defendant’s record and the current offense were serious. However, he noted that the government appreciated the defendant’s early plea and his ready admission of guilt. Furthermore, the prosecutor stated that he agreed with the defense attorney that Anthony was “mighty young and he’s looking at a lot of time, no matter how we look at it.”<sup>20</sup> Thus, while opposing any downward departures, the government took the position that it had no preference on sentence other than it be within the calculated Guideline range.

Lastly, Anthony’s defense attorney attempted to make issue of the sentencing disparity between Anthony and his co-defendant. Judge Fox stated that he had no choice but to deny the motion and told him that, “As you know, the United States Attorney decides the sentence for criminal defendants these days by the selection of the charge. The Court is substantially powerless to exercise any judicial function, except within the very limited range permitted by the Guidelines.”<sup>21</sup>

Before Judge Fox pronounced the sentence, Anthony addressed the judge. He mentioned his impoverished upbringing, the absence of his father, and his mother’s drug and alcohol problem. He noted that two of his brothers were also already in prison. Still, he tried to take responsibility for his behavior, telling the judge

I know that what I did was wrong, and I’m sorry. I didn’t mean to hurt anyone; I didn’t hurt nobody in the crimes I did. . . . There’s a good side of me and I want to prove to my lawyer and to you and to my family that I can make it in life. I don’t want to spend the rest of my life in prison. I want to have to have the chance to get out there, and you know, get married and have a family and kids and everything.<sup>22</sup>

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received juvenile adjudications (which are not counted toward career offender status), violated the Constitution.

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Sent. Tr. at 8. He also denied a motion to strike the enhancement for possession of a weapon, holding that whether it was a toy gun or not “doesn’t really impact the seriousness of the offense.”

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Sent. Tr. at 8. The defense attorney got the judge to agree that Anthony was quite young to be facing such a long sentence and that he had never actually injured another person. Still, Judge Fox was concerned that it was “just be a matter of time” before that happened. Sent. Tr. at 10. Anthony’s mother was a single parent on public assistance. She also had drug and alcohol problems and she provided little supervision for her four children. The home was often without heat or food and one parole officer noted that confinement was an improvement over the family residence. Anthony dropped out of school in the 9<sup>th</sup> grade and he was tested to have an IQ of only 83.

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Sent. Tr. at 11.

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Sent. Tr. at 12.

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Sent. Tr. at 13-14.

After Anthony's statement, the judge pronounced the sentence of 210 months, telling the parties

I have gone to the lower end of the range primarily because of his youth. And I perceive him to be articulate . . . and capable of both getting an education and learning a way to make a living. And I hope he'll do that while he's incarcerated. And I want to say that [] left to my own devices and without the application of the Guidelines, I probably wouldn't have imposed that heavy a sentence. But as you know, my hands are tied in that regard.<sup>23</sup>

Anthony appealed his sentence to the Fourth Circuit, reiterating his claims at sentencing, including the co-defendant disparity issue. Although the Fourth Circuit assumed that the difference in their sentencing ranges was due solely to the North Carolina prosecutor's decision to dismiss Paul's Oct. 6, 1988 robbery charge, the panel nevertheless concluded no relief was permitted by the Guidelines.<sup>24</sup> The court held, as it had in previous cases, that absent prosecutorial misconduct, disparity of sentences among co-defendants is not a proper basis for departure.

In a rather convoluted section of the opinion, the court notes that Judge Fox had possessed the authority to depart upward in Paul's case if he believed that Paul's criminal history category did not adequately capture his past criminal conduct that did not result in convictions. Thus, the panel reasoned that "It would be an anomaly if the same factor (unconvicted conduct) that the Sentencing Guidelines use to justify an upward departure for one defendant would be allowed to justify a downward departure for a co-defendant, should the upward departure not be given."<sup>25</sup>

While perhaps a correct interpretation of the Guidelines, the opinion glosses over the predicament that Judge Fox faced in this case. He apparently felt that the Guideline sentence of 71 months for Paul was sufficient to satisfy all the purposes of criminal punishment, and therefore, an upward departure was unnecessary. In other words, he likely felt that both justice and the Guidelines were served by Paul's Guideline range. For Anthony, however, he clearly indicated that he believed that Anthony's guideline range was higher than necessary, but he did not think that the law permitted him to impose a more just sentence. His fidelity to

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Sent. Tr. at 16.

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*See United States v. Fonville*, 5 F.3d 781, 783 (4<sup>th</sup> Cir. 1993). This assumption may not have been accurate. Anthony's PSI references an earlier arrest for another series of B&Es that Anthony committed when he was sixteen (he had broken into several elementary schools and a store over a three month period and stolen a variety of items). In that case, he appears to have been charged as an adult but was treated as a Youthful Offender by the North Carolina penal system. Without access to Paul's PSI, it is unclear whether he was a party to these 1987 incidents. Nevertheless, even if this 1987 adjudication would have constituted as a third qualifying conviction for career offender status, the point is that both Judge Fox and the Court of Appeals believed that the Guidelines provide no remedy for radically disparate sentences for identical co-defendants created by state plea bargaining decisions.

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*Fonville*, 195 F.3d at 784.

the law, however, did not allow him to bend the Guidelines, for example by granting a criminal history downward departure, to get to a result he felt was fairer.<sup>26</sup>

Anthony writes now that he has been in prison a long time and that he has never been in trouble or received any incident reports. More importantly, he says that “I am not the same young man I was before I came to be here. God comes first in my life, that how I’m able to be strong so that one day, I will be able to get back to my family . . . so I can live a happy and meaningful life.”<sup>27</sup> He also expressed an eagerness to have his story told, but he also made clear that this was not necessarily in the expectation that it would benefit him. Rather he wrote that there are other good men in prison who deserve a chance to get out earlier than their current sentences and he hopes the laws can be changed for their sakes as well.

*Compiled from PSI, Sentencing Transcript, inmate letter, letter from judge, and appellate opinion.*

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In other words, while he had the power to depart downward if he found Anthony’s Category VI overstated his criminal record, he believed that Anthony’s record was comparable to other Category VI defendants. Thus, fidelity to law and the Guidelines resulted in a sentence the judge personally believed was too severe.

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