

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

3
4 United States of America,

5 Plaintiff,

NO. CR10-27RSM

6 v.

SENTENCING HEARING

7 Trung Dinh Phan,

SEATTLE, WASHINGTON

March 3, 2011

8 Defendant.

9
10 VERBATIM REPORT OF PROCEEDINGS
11 BEFORE THE HONORABLE RICARDO S. MARTINEZ
12 UNITED STATES DISTRICT JUDGE

13
14 APPEARANCES:

15 For the Plaintiff:

Susan Roe

16 For the Defendant:

Kyana Stephens

Jay Rorty

17 Scott Michelman

18
19 For U.S. Probation:

Todd Sanders

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24 Proceedings recorded by mechanical stenography, transcript
25 produced by Reporter on computer.

1 THE CLERK: This is the sentencing hearing in United
2 States vs. Trung Dinh Phan, Cause Number CR10-27, assigned to
3 this court. Will counsel please rise and make your appearances
4 for the record.

5 MS. ROE: Good morning, Your Honor, Susan Roe on behalf
6 of the United States.

7 THE COURT: Ms. Roe.

8 MS. STEPHENS: Good morning, Your Honor, Kyana Stephens
9 on behalf of Mr. Phan. I'm here with co-counsel. I'll let them
10 introduce themselves.

11 MR. RORTY: Good morning, Your Honor, Jay Rorty with
12 the American Civil Liberties Union admitted pro hac vice in this
13 district in this case for Mr. Phan.

14 MR. MICHELMAN: Good morning, Your Honor, Scott
15 Michelman admitted pro hac vice, American Civil Liberties Union
16 for Mr. Phan.

17 THE COURT: Counsel, thank you. Counsel, we're here
18 for sentencing on this particular case for a single count of
19 conspiracy to distribute MDMA, methylenedioxymethamphetamine. I
20 typically in a standard sentencing will bring out all my
21 sentencing materials and put them on the counter, on the bench up
22 here. If I did that in this case, you wouldn't be able to see
23 me. But I want to tell you I've had a chance to review all of
24 that material.

25 First of all, I want to thank the attorneys for the ACLU.

1 Some fascinating material has been presented to the court. And
2 let me just make some comments about that before we get started,
3 and I'm sorry if I accidentally mislead you as to whether or not
4 we would have an evidentiary hearing today. I should have
5 probably gotten back to you earlier on that. The court took into
6 consideration all of the material you provided, read
7 everything -- well, skimmed some of the scientific papers, put it
8 that way, read everything else, including the transcript of the
9 Southern District of New York, the McCarthy case. Am I still
10 correct that we are still awaiting a ruling on that one?

11 MR. RORTY: Yes, Your Honor. The sentencing hearing is
12 scheduled for March 11, the end of next week.

13 THE COURT: Okay. The defense in this case urges the
14 court to vary from the guidelines because, as he argues in all of
15 these documents that have been presented, that the guideline for
16 MDMA is empirically flawed, that development of the sentencing
17 guidelines commission almost a decade ago, the amendments that
18 came in almost a decade ago, 2001.

19 The defendant puts forth hundreds of pages of argument,
20 scientific papers, other information in an attempt to prove to
21 this court that the MDMA guideline is empirically flawed and,
22 therefore, the court should not defer to the findings of the
23 commission, but instead make its own determination as to the
24 appropriate offense level and sentence.

25 That's the exact process that was followed by the district

1 court in the Southern District of New York in U.S. vs. McCarthy,
2 and I believe that that took at least a couple of days to do an
3 evidentiary hearing, and as just indicated, that had some of the
4 leading experts in the field as to this exact issue that we are
5 awaiting a current ruling. I read that transcript with great
6 interest, and I even anticipate the ruling of my fellow district
7 judge with greater interest.

8 But based on the central argument that is presented here,
9 and that all of this information covers, is that MDMA is
10 basically less harmful than other drugs that was previously
11 thought, and the defense urges this court to adopt a different
12 sentencing ratio than is currently used under the applicable
13 guideline.

14 The defense suggests that the court consider using a
15 comparison to either marijuana or to another drug, ketamine, two
16 drugs that appear already in the drug sentencing -- drug
17 equivalency tables that we use.

18 If this court were to treat MDMA as equivalent to marijuana
19 on a ratio of one-to-one, then the resulting level in this case
20 would start at 20. With the appropriate adjustments as set out
21 in the presentence report that's prepared by probation, the end
22 result would be a level 22. This defendant falls in a criminal
23 history category one. His resulting range would then be 41 to 51
24 months.

25 If the court were instead to use the ratio of 35-to-one,

1 because that was my understanding of the pre-2001 -- the ratio
2 that was used prior to the 2001 amendments to the current MDMA
3 guidelines, then the resulting guideline range for this
4 defendant, Mr. Phan, would be level 34 and call for a range of
5 151 to 188 months.

6 Because of this defendant's individual circumstances,
7 neither the government nor probation are actually recommending a
8 sentence greater than 36 months, and based on everything I've
9 seen, this court would not consider imposing anything greater
10 than that particular sentence.

11 So based on all that, does the defense argument -- does that
12 fact that the government and probation and the court is not
13 considering imposing anything greater than 36 months moot the
14 argument made by the defense in this case? That's the question.
15 Yes, counsel.

16 MR. RORTY: Thank you, Your Honor. The simple answer
17 is, no, it does not. The argument is not mooted by independent
18 considerations which lead to either departure or variances under
19 our guideline analysis.

20 As Mr. Phan has raised this categorical variance, an
21 entirely independent argument from any of the others presented in
22 this case, it would be Mr. Phan's position that this court must
23 take that argument separately, consider it, rule on that. And in
24 the event that the court agrees with the defense position that
25 the harms of MDMA are overstated and a variance is appropriate,

1 then vary downwards from the otherwise applicable guideline range
2 level, which is now fixed at 36 months in this case.

3 THE COURT: Thank you. Ms. Roe, any comment?

4 MS. ROE: Only as to the last point, Your Honor. That
5 is, that a guideline range would not be fixed at 36 months.
6 Rather, that's the end recommendation from the government and
7 probation.

8 THE COURT: But you don't disagree with the first part
9 of his --

10 MS. ROE: Your Honor, I think you're going to be
11 appealed no matter what the finding is regarding the guidelines,
12 and I'd just ask that your findings be very clear and thorough.

13 THE COURT: All right. Well, I think the defense is
14 right in part. I think under *Kimbrough v. United States*, the
15 court has discretion to vary from the guidelines based on a
16 policy disagreement.

17 I think the fact that the Ninth Circuit has explained that
18 district judges are at liberty to reject any guidelines on policy
19 grounds, and the Ninth Circuit has also held that it would be
20 error to attach a presumption of reasonableness to the guideline
21 range, in view of all that, the court is not required to embrace
22 any particular alternative ratio, and this court will not do so
23 in this situation for a variety of reasons.

24 One, I will not do it because it's not necessary in this
25 case in order for the court to impose a sentence that is

1 sufficient, but not more than necessary to accomplish the
2 reasonable objectives of sentencing. But I do it for another
3 reason that's even more important. The court agrees that there
4 may very well be problems with the MDMA guidelines as currently
5 constructed. As we learn more about the effects of certain drugs
6 on humans, especially after years of experience with those drugs
7 and especially as more designer drugs come into play, it
8 obviously makes logical sense to go back and re-evaluate all the
9 guideline ranges.

10 As I indicated earlier, I eagerly await the ruling by my
11 fellow district judge in the McCarthy case, because we trial
12 judges, we who are given the incredible responsibility and the
13 ultimate responsibility of imposing an actual sentence on a real
14 person should have the benefit of the guidance of the latest
15 relevant information before we impose those sentences that
16 forever change people's lives.

17 However, the Sentencing Guideline Commission also bears the
18 ultimate responsibility. In fact, that commission is mandated to
19 continuously refine guidelines to respond to advances in
20 scientific knowledge.

21 The question before this court I think is a simple one and
22 it was asked actually in the defendant's sentencing memo. Since
23 the government and probation have both recommended a sentence of
24 36 months, is any further reduction potentially warranted on the
25 basis of either Mr. Phan's personal circumstances and/or problems

1 with the MDMA guideline? But the exact question of whether or
2 not this court believes that there is a problem with the current
3 MDMA guideline I think is before this court, and I believe the
4 answer is, yes, there is.

5 Based on everything that I have seen that was presented
6 here, based on the arguments that were made in the Southern
7 District of New York, I think it's imperative that the Sentencing
8 Guideline Commission address this issue, just like they did with
9 the disparity between crack and powder cocaine. This court,
10 however, as indicated previously, will not reach and make an
11 alternative ratio in this case because I don't think it is
12 necessary to do that, but it will be taken into account in terms
13 of imposing the ultimate sentence.

14 That being said, let me indicate that no one actually
15 disagrees with the current calculation of the guideline range as
16 set out by probation, other than the policy arguments that we
17 have addressed, but Mr. Phan falls in category one, level 38. It
18 calls for an advisory range of 235 to 240 months, 240 simply
19 because that's the statutory maximum.

20 The court has reviewed the plea agreement of the parties,
21 the government's sentencing memo, their 5K motion, the
22 defendant's sentencing memo, the defendant's other authority,
23 scientific studies, news, and the government papers and hearings,
24 the defendant's supplemental sentencing memo addressing the
25 appropriate guideline, the defendant's supplemental sentencing

1 reply memo, the release status report prepared by probation,
2 pretrial services unit, and finally, the presentence report
3 prepared by Lisa Combs, U.S. Probation officer, and Supervisor
4 Todd Sanders is present on her behalf in court this morning.

5 MS. ROE: Your Honor, the government also filed
6 something in camera regarding this --

7 THE COURT: I have reviewed that as well, had a chance
8 to look at that as well.

9 So based on all that, Ms. Roe, what is the government's
10 recommendation for sentencing?

11 MS. ROE: Thank you, Your Honor. Well, Your Honor,
12 it's interesting because I wrote out a few things and the court
13 has nearly said all of them. It's odd that we're discussing the
14 guidelines here in a case where the guidelines are really
15 insignificant. The issue that has been put, you know, at the
16 center regarding the guidelines is irrelevant to this defendant.

17 Of course, as the court may anticipate, the U.S. Attorney's
18 Office asserts that the guidelines are adequate and appropriate,
19 and the range that you found. And, of course, the court has
20 discretion under Booker and under Kimbrough, and a myriad of
21 cases to vary or depart from the guideline range.

22 The important issue really today is Mr. Phan, who he is and
23 what his sentence should be. Mr. Phan is a long-time drug
24 dealer. In 2003 he was dealing marijuana, but by 2009 he was
25 dealing in tens of thousands of MDMA pills. He had firearms both

1 in 2003 and again in January of 2010, firearms, at least one of
2 which were loaded, and at both times he had a couple in his
3 place.

4 He was pretty highly placed in his organization. He was
5 here as a connection with the Canadian supplier, really a
6 conduit, so a mid-level person in an international organization.
7 He developed his own group of workers here in Washington. He
8 had, as is pretty clear from pre-sentence and his own admissions,
9 he hired other people to do work for him. He didn't do the dirty
10 work. He didn't actually accept the deliveries, but rather, sent
11 his minions in, and they were paid either in pills or in money.
12 He was their leader and organizer and manager, and that is
13 undisputed. It's in the presentence report and it's admitted by
14 the defense.

15 It appears that he was making all of his money with drug
16 dealing, and this is for the last couple of years. We know this
17 from several facts. He lived pretty well. They had three cars,
18 a house, the normal accouterments of day-to-day. He had no
19 reported legitimate income for several years, hadn't filed tax
20 returns, said he worked for a sister. There is no record of that
21 with any institutions or anything legitimate.

22 Since his arrest in 2010, he and his girlfriend have fallen
23 behind quite badly in their bills, so we know that he was
24 contributing to paying those. And her reported legitimate net
25 income of 2200 a month that's in the presentence report, which

1 apparently was their only legitimate income for four or five
2 years, was the only legitimate income since he decided to stay
3 home with the older child. So we've gotten the story that he
4 hadn't worked because he was home with the child. Her 2200 a
5 month would never even have covered their mortgage payment of
6 \$2853 a month, and it's amazing they could get that mortgage.
7 And indeed, it wouldn't have covered any of the other day-to-day
8 or routine payments, the car payments, the loan for a car that he
9 was a co-signer, and all of their other bills.

10 We also know that clearly he was paying for that house and
11 all the other bills with drug money, because since his arrest in
12 January of 2010, his mortgage has been unpaid. The last payment
13 was made in January of 2010. It's unpaid for the past year,
14 since February of 2010.

15 So he was making significant money that he and his
16 girlfriend were living on, and they've been doing it for years.

17 Where did the money come from? We have a pretty good sense
18 of how big it was and where it came from. He handled at least
19 three loads of hundreds of thousands of MDMA pills smuggled in
20 from Canada for distribution here. And the sense of the value of
21 these pills is that it's admitted and the court knows that the
22 truck driver, who is just one small piece of this, was getting
23 ten thousand cash per truckload. He was not the buyer. He was
24 not the western district receiver and distributor that Mr. Phan
25 was. He was not the person who was fronting the pills or moving

1 the pills. He was just one piece. So there was thousands of
2 dollars going from these pills.

3 Mr. Phan made thousands of dollars on these smuggles and
4 also paid out both pills and money to others who worked for him.

5 Before that, in at least 2003, we know that he and others at
6 his Seattle home, because he was the renter of that home, moved
7 hundreds of pounds of marijuana out of that home. And D.C. Bud
8 yields tens of thousands of dollars for profit, and we know that.
9 We have a sense of how large the movement was in 2003 because he
10 was trying to collect on a \$51,000 debt in 2003, and that's part
11 of that investigation. He and his girlfriend were involved in
12 that collection.

13 More recently, the court has a sense of what sort of sums of
14 money he's been moving for his Canadian people and that those
15 sums were done under the supervision of ICE, but those sums were
16 determined by Mr. Phan and his cohorts, not by ICE. So it's
17 pretty clear he was involved in hundreds of thousands of dollars
18 of drugs over the years.

19 So Mr. Phan is a well-placed and successful drug dealer of
20 several years duration, but today he comes to us as a cooperator,
21 and because of his good placement in this organization, he has
22 been a highly successful cooperator. More details have been set
23 out under seal at the in-camera hearing. The government makes
24 the recommendation today not based on the guidelines and not
25 based on the legal arguments that have been put forward regarding

1 guidelines, but based on who Mr. Phan is, his history, and then
2 comparing it with his cooperation.

3 We are asking the court to sentence him to 36 months. That
4 is designed to be both a recognition of who he is and to be
5 commensurate with his cooperation. It is compared not just with
6 his co-defendants, but with other people similarly situated, that
7 is, highly successful cooperators who have been involved in the
8 drug business for years. They are deserving of benefits, but
9 they must also -- but the court must also take into account the
10 nature and the history and the duration of their criminal
11 activity.

12 I imagine that normally the 36-month recommendation from the
13 government in this case would be highly acceptable to the
14 defense, and when the court -- I mean when the government makes
15 the 36-month recommendation, it's not saying that's where the
16 guidelines should start. That's -- regardless of what the
17 guidelines, that's the appropriate recommendation in the
18 government's mind. We're satisfied that it's a fair and
19 appropriate term, that Mr. Phan has benefited greatly by that
20 recommendation, and that he deserves to do so.

21 So regardless of what the court finds as the guidelines --
22 or we're asking the court to impose that sentence regardless of
23 whatever guidelines the court might find would be appropriate.
24 We're also asking for the supervised release, the terms and
25 conditions recommended by probation.

1 THE COURT: Thank you, Ms. Roe. Ms. Stephens.

2 MS. STEPHENS: Thank you, Your Honor. I am going to
3 have Mr. Rorty address the court first, and then I'll follow up.

4 THE COURT: All right. Mr. Rorty.

5 MR. RORTY: Thank you, Your Honor. I'll keep your
6 initial comments very much in mind and as a result be quite
7 brief. My understanding from the court's initial comments is
8 that the court agrees with the defense that the MDMA guideline is
9 flawed and that it is imperative that the United States
10 Sentencing Commission take action to change that guideline. But
11 based on the court's initial statement that the court will take
12 into account the flaws in that guideline and craft an appropriate
13 sentence in this case, and that the court's initial inclination
14 is that a 36-month sentence is appropriate, as a result, I
15 won't -- unless the court has specific questions with respect to
16 our analysis or the science, it sounds like the court is not at
17 the present inviting further argument on that issue.

18 THE COURT: Correct.

19 MR. RORTY: So the one component of the court's initial
20 remarks that I would like to address is while I appreciate the
21 court's message to the commission and recognition that it's
22 important that the guideline be changed, I think that
23 procedurally and also in the relationship between the Supreme
24 Court, district courts and the commission, there is another step
25 that this court can take. The lesson of Rita, one of the

1 significant Supreme Court cases which helps to clarify the
2 analysis in the context of the crack cocaine and powder cocaine
3 disparity helps district courts understand their role in dealing
4 with a flawed guideline. And one of the things Rita stresses is
5 that district courts play a vital role in communicating to the
6 commission.

7 My understanding is that this court is presently playing
8 that role by placing its comments on the record, but variances
9 and policy disagreements based on -- variances based on policy
10 disagreements are the mechanism that the Supreme Court has
11 recommended to district courts to communicate with the
12 commission. Of course, district courts are free to communicate
13 directly. Judges commonly testify to the commission, can write
14 letters specifically advising changes or making recommendations.
15 There is a constant dialogue in many, many forms between district
16 courts and the commission. But in terms of what the
17 commission -- the data that the commission pays attention to and
18 looks at when it considers modifying a long-established
19 guideline, variances are one of the most important components
20 because, of course, that's the most important decision judges
21 make in sentencing individual defendants.

22 So what I would ask this court to do, and perhaps this is
23 what you were already saying, is that if you impose a sentence of
24 36 months based on the government's recommendation, based on the
25 totality of evidence regarding Mr. Phan, that the court specify

1 that the analysis presented by the defense regarding the flaws in
2 the MDMA guideline is one of the factors which the court has used
3 to arrive at an appropriate sentence, whether that is 36 months
4 or something else.

5 THE COURT: And, Mr. Rorty, I think that's exactly what
6 we do in the statement of reasons that probation actually
7 prepares for us, but will be signed off probably within the next
8 four or five days from today, and that will be exactly what this
9 court will do, that that will be one of the factors that went
10 into the court fashioning its sentence in Mr. Phan's case.

11 MR. RORTY: Thank you. Are there any issues raised in
12 the defense pleadings and in connection with the MDMA guideline
13 that the court would like me to address?

14 THE COURT: No. Thank you.

15 MR. RORTY: Thank you.

16 MS. STEPHENS: Your Honor, I think you said it best
17 this morning already, which is that Mr. Phan is here before you
18 as an actual person and it's necessary that we consider a
19 sentence that is individualized for who he is.

20 I know the government has painted a picture that Mr. Phan is
21 a drug dealer. This is a young man. He's 27 years old. And who
22 he is is not limited to who he is as a drug dealer. This is also
23 a father, a husband, brother. Mr. Phan in supporting his family
24 has made no excuses that he has supported his family as a young
25 man making some poor decisions with drug money.

1 But I do want to make a few clarifications from the
2 government's argument, which is that Mr. Phan lives in a
3 community. Part of that community is here today behind me,
4 brothers and sisters, family, friends, his wife's family, and one
5 of the people who lived with Mr. Phan was Aaron Phung, who the
6 court has also got to know and also sentenced to 30 months in
7 this case. Mr. Phung was the owner of one of the weapons found
8 in the home. Mr. Phung was also a contributor to the household
9 that is now held singularly by Mr. Phan and his girlfriend,
10 Tracie. They live there with their two young children. I think
11 what the most important thing this court should consider about
12 Mr. Phan is who he is now.

13 Apart from the empirically scientifically flawed guidelines,
14 this court had to consider his substantial assistance, which is
15 covered. Mr. Phan did a very good job of documenting his
16 relationship and his communication with the officer who is here
17 in court today. One thing I want to highlight, because it speaks
18 to what sentence is necessary for Mr. Phan, is the way he
19 responded to that relationship. Mr. Phan early on had an
20 attachment to the officer, stronger than he had to his attorney.
21 He wanted to be of assistance to them. He wanted to communicate
22 with them. He was taking directions from them. And he learned a
23 lot from it. He came back writing notes about what he was able
24 to share and how he was learning how police operate. And it was
25 encouraging to him. It was a side that he had not seen, and it

1 made him think about his future goals, and that was an important
2 step post-plea what Mr. Phan has been doing and how he has
3 changed.

4 Mr. Phan also has taken on the primary role of caring for
5 his family. While he is not engaged in that other activity, he
6 has been the one who takes his daughter to and from school while
7 his girlfriend works at a bank. He's been the one who has been
8 taking care of the household.

9 And it's not a small thing over the year that he has been
10 involved with this court that he has had no issues on
11 supervision. He has not returned to using any marijuana. He has
12 not had any lapses using alcohol. He has followed every
13 direction of the court and shown himself responsible.

14 In many ways, this lends strong support that Mr. Phan is a
15 low risk for recidivism. There is no question in our minds that
16 Mr. Phan is through with criminal conduct. But more importantly,
17 he does not pose a threat to the public safety any longer.

18 Mr. Phan will address more specifically some of the things
19 that have moved him. He's prepared a statement for the court.
20 But I want this court to remember also that Mr. Phan is not just
21 a community member, has family and friends, but he was also part
22 of a community for this crime and the court did impose sentences
23 for the other three people involved. And while Mr. Phan had a
24 more senior role than the other three co-defendants, he certainly
25 wasn't at the top of this conspiracy. And I think Mr. Phan has

1 paid his debt through his cooperation to act as a role to assist
2 the law enforcement to capture the people above him.

3 In this case, this court has imposed sentences of 30 months
4 for two of the other co-conspirators and 24 months for
5 Mr. Douglas. And it's interesting that this court imposed 24
6 months for Mr. Douglas because when the court is considering the
7 intra-defense disparities, the recommendation by defense of 24
8 months and 120 days of electronic home monitoring and three years
9 of supervision is not a disparity. It is very consistent with
10 how this court has sentenced the others.

11 Mr. Douglas, who received 24 months, was the only other
12 defendant who even began to raise the empirical flaw in the MDMA
13 guidelines. And I remember, having been present, that the court
14 commented on that when considering the sentence. And Mr. Phan
15 has raised many other issues that weren't available to the other
16 co-defendants in this case, the cooperation mainly. And so he
17 finds himself, and this court should find him at a sentence that
18 looks a lot like all the others, but for very different reasons.

19 And it's also notable to this court that some of the other
20 co-defendants were at a category a lot higher than Mr. Phan, and
21 I spent quite a bit of time going through each co-defendant and
22 raising the arguments as to why these people were not similarly
23 situated. They raised different arguments, but they should
24 indeed find themselves at a sentence of 24 months.

25 Your Honor, Mr. Phan will say so himself, but this is not a

1 man that arguably needs any incarceration whatsoever. He has
2 shown himself to be able to, by this process, turn his life
3 around, but he also admits and has taken responsibility in his
4 letter to this court that what he did was serious. He is not
5 minimizing the seriousness of Ecstasy in our community, and for
6 that, and almost that alone, punishment, we are asking this court
7 to impose 24 months. This is a man who has barely done a day in
8 prison, and we expect that the 24 months that this court should
9 impose as his sentence will have a profound impact. Being
10 incarcerated is not a benign event in the life of a young man,
11 and so I ask this court to follow the defense recommendation
12 based on the empirical flaws of the guidelines, his cooperation,
13 the work that he has done, and how he is not similar to the other
14 co-defendants in this case. Thank you.

15 Would the court like to hear from Mr. Phan at this time?

16 THE COURT: Yes. Thank you, Ms. Stephens.

17 Mr. Phan, I read your letter. I read all the letters that
18 were submitted. I'm sure several of those people back there
19 probably were ones that authored some of those letters.

20 Ms. Stephens makes some very interesting and fascinating
21 comments. She talks about the fact that you're a low risk of
22 recidivism. That means the court should not be concerned about
23 you committing crimes in the future. My question to you is, the
24 drug dealer life-style seems very attractive to young men
25 especially. The money is easy. It's good. It's a good way to

1 pay your mortgage, have your nice cars, do everything else. You
2 don't know how to do anything legitimately. When you come out
3 after two years, three years, whatever is imposed here, what are
4 you going to do different that's going to make sure that her
5 words are correct and that you don't go back to that life-style?

6 THE DEFENDANT: Because I come to realize that family
7 is the most important thing to me, and it's just going to strive
8 me that much harder to work for them, and I am going to try to do
9 whatever I can to provide for them and not make the same mistake
10 that I did. I think I've grown up, you know, and I can guarantee
11 that I will not make the same mistake.

12 I love my kids, you know. I don't want any time taken away
13 from me and my kids, so that alone is going to make me not do
14 anything stupid to risk it and be back here in front of you.
15 There is just no way I am going to make the same mistake again.

16 THE COURT: That's a great goal. How you get there is
17 the difficult part. You're not going to make it there working at
18 a nail shop. You know that. What are you going to do in your
19 life to get the skills necessary to be able to take care of your
20 family without risking having to go back to prison?

21 THE DEFENDANT: I believe I have the skills necessary.
22 It's just my commitment towards it, and I believe that I will
23 commit myself to have a better life for my family. And it's not
24 like I'm looking at one income. Now it's me and my girlfriend,
25 so we have to learn to work together and provide two incomes and

1 make it that much easier for our family, and I believe that I can
2 do that.

3 THE COURT: What else do you want to say?

4 THE DEFENDANT: I'm just sorry for everything I've
5 done, you know, and I just really hope that I have a second
6 opportunity to do right for my family.

7 THE COURT: Thank you.

8 THE DEFENDANT: Thank you, Your Honor.

9 THE COURT: Counsel, let me check with our probation
10 officer, Mr. Sanders. Thank you for filling in for Ms. Combs.
11 Having heard everything that you've heard from counsel and
12 Mr. Phan, is there anything else you'd like to say this morning?

13 MR. SANDERS: I really have nothing to add, Your Honor,
14 unless there are specific questions about our recommendation.

15 THE COURT: Thank you. Counsel, as indicated, the
16 court has already pointed out what the calculations that the
17 guidelines currently bring us. The court has also indicated its
18 concern, and one of the factors the court considers in imposing a
19 sentence here, is the appropriateness of that guideline range,
20 especially in view of all the points raised by the defense in
21 terms of the potential flaws even when that guideline was reached
22 and originally set out.

23 The court also must consider the remaining 3553 factors that
24 are set out in that statute, the nature and circumstances of this
25 offense. It was a very, very serious offense. There is no

1 question Mr. Phan has been involved in dealing drugs for a
2 significant period of time.

3 The court needs to consider the history and characteristics
4 of the defendant, the background. He's still a young man. He's
5 absolutely taken almost every possible positive step that you can
6 since being apprehended to do the right thing, and that makes a
7 lot of difference in this court's opinion.

8 But the court also is mindful of the need for the sentence
9 to reflect the seriousness of the offense and promote respect for
10 the law and provide just punishment for the offense.

11 As I mentioned just moments ago in my comments directed at
12 the defendant, the drug dealer life-style is a very attractive
13 one, especially to young men. Easy money, fast money. Fast
14 life-style, if you will, guns, drugs, cars. They need to
15 understand, everyone out there, that the potential punishment for
16 it is not worth that kind of life-style.

17 As Mr. Phan just indicated here in his comments to the
18 court, and I hear it every time we have sentencings, very few
19 people understand that whenever they commit a criminal offense
20 and they come to sentencing, they are actually responsible for
21 sentencing all their family members. They don't think about that
22 until it happens.

23 The court is aware of the need for the sentence to afford
24 adequate deterrence to criminal conduct, not only to him, but to
25 others, to protect the public from the defendant.

1 The court is aware of the need to provide the defendant with
2 educational and vocational training, or any other correctional
3 treatment in the most effective manner. The court also has to
4 look at all the other types of sentences that are available.

5 Defense counsel, Ms. Stephens, argues in this case that the
6 court should look at the sentences imposed on the other
7 co-defendants in this case, and of course the court does that in
8 every situation. But there is no doubt that Mr. Phan is also the
9 one that was at the top of this little tiny pyramid. Yes, he's
10 not at the top of the bigger picture, if you will, but he was
11 more involved than the other three co-defendants that have
12 already been sentenced.

13 There is no need to provide any restitution in this case,
14 and the court has already mentioned the unwarranted sentence
15 disparity. So the question then really becomes what do we impose
16 on this particular person.

17 The court will impose the following sentence after
18 considering all of these factors. He will be placed on
19 supervised release for three years. There is no restitution.
20 The court finds he does not have the financial ability to pay a
21 fine. That will be waived. The court cannot waive the mandatory
22 special assessment that is set at \$100 by statute. That will be
23 the only monetary payment that will be imposed.

24 Ms. Combs, our probation officer in this case, recommends
25 seven specific conditions of supervised release, as well as the

1 standard conditions. The court has reviewed each of these seven,
2 finds that they are appropriate in light of the background and
3 characteristics of the defendant and the offense of conviction
4 here. So the court will impose them exactly as set out in the
5 presentence report prepared by probation. Let me briefly
6 summarize those.

7 The defendant shall cooperate in the collection of DNA.
8 During the entire period of supervised release, he is prohibited
9 from possessing any firearm or destructive device. Actually,
10 unless he has that right restored in the future, he will always
11 be prohibited from possessing any firearms or destructive
12 devices.

13 He will submit to one drug and alcohol test within 15 days
14 of placement on supervised release, at least two periodic tests
15 thereafter, never to exceed eight valid tests per month.

16 If so instructed by probation, he will participate in a
17 program approved by them for treatment of any addiction,
18 dependency or substance abuse issues, and obviously that will
19 include testing to determine if he's reverted to the use of drugs
20 or alcohol. As part of this supervised release, he will
21 completely abstain, that is, not use any alcohol or any other
22 intoxicants during this period.

23 He will submit his person, his residence, any offices,
24 safety deposit boxes, storage units, property, vehicles to
25 searches conducted by U.S. Probation or any other law enforcement

1 officer at a reasonable time in a reasonable manner based upon a
2 reasonable suspicion.

3 He will participate, if so directed by probation, in any
4 mental health program approved by them, and that may certainly
5 include the successful completion of what is known as the MRT or
6 the moral reonation therapy program.

7 And, finally, he will provide probation with access to any
8 and all requested financial information, including any
9 authorization necessary to conduct credit checks and obtain
10 copies of any of his income tax returns filed.

11 That only leaves the amount of custody time to impose.
12 After looking at all of these factors very, very carefully, the
13 court is impressed by several things. One, his conduct since his
14 arrest has been exemplary. Not only has he managed to stay clean
15 and sober according to all the pretrial services reports, but
16 he's done his best to be cooperative in so many different ways,
17 and I know that that can't be easy. And I know he's doing it for
18 many reasons to try to help himself and stay closer to his family
19 and not be gone or locked up for longer periods of time, but it
20 also shows this court that as a young man, he still has the
21 ability to turn that life around and not just embrace the life of
22 the drug dealer.

23 For all those reasons, the court feels that an appropriate
24 sentence in this case will be 30 months, 3-0, credit for all time
25 served. He will be allowed to voluntarily surrender.

1 Ms. Stephens, did you ask for placement in a particular facility?

2 MS. STEPHENS: Thank you, Your Honor. We did ask in
3 our memo for Lompoc, but we have changed that to Sheridan at
4 Mr. Phan's request.

5 THE COURT: All right. The court will make that
6 recommendation.

7 Mr. Phan, do you have any questions about the sentence just
8 imposed by this court?

9 THE DEFENDANT: No, Your Honor.

10 THE COURT: Do you understand that those conditions I
11 set that are part of the presentence report are mandatory? Once
12 you start supervised release, if you violate those in any way,
13 you'll end up right back here and they'll be asking me to put you
14 back in jail. Do you understand that?

15 THE DEFENDANT: I understand.

16 MS. ROE: I prepared the judgment, Your Honor, which
17 I'm handing to defense counsel to review.

18 MS. STEPHENS: Thank you, Your Honor. I have reviewed
19 the judgment and sentence, and I do believe it accurately
20 reflects the court's oral ruling.

21 MS. ROE: If I may approach?

22 THE COURT: You may. Counsel, two final things for our
23 record. One, as the proposed judgment form accurately reflects
24 the sentence just imposed, it's been dated and signed by this
25 court.

1 Two, the court will point out for the record and for the
2 defendant that his plea agreement did not waive any of his rights
3 to appeal the sentence just imposed.

4 Mr. Phan, what that means is you have the right to appeal
5 the sentence or any portion of the sentence this court has just
6 imposed. You can exercise that right simply by asking
7 Ms. Stephens to file a notice of appeal on your behalf to start
8 the process. You can actually do it yourself without her help.
9 Simply notify the clerk of our court that you wish to file that
10 notice of appeal. The critical issue is that if you do not file
11 the notice of appeal within ten days of today's date, and today I
12 believe is the third day of March, 2011, you may forever waive or
13 give up the right to appeal any portion of this sentence. Do you
14 understand?

15 THE DEFENDANT: Yes, I do.

16 THE COURT: Good luck to you and your family.

17 THE DEFENDANT: Thank you.

18 MS. ROE: Your Honor, there is a pending motion to
19 unseal that was filed yesterday regarding the defendant's
20 supplemental secondary reply brief.

21 THE COURT: Whatever that was.

22 MS. ROE: And defense counsel indicates there is no
23 objection to the motion.

24 THE COURT: It will be signed off, then, in chambers.
25 Thank you.

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MS. STEPHENS: Thank you, Your Honor.

CERTIFICATE

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I, Denae L. Hovland, Official Court Reporter, do hereby
certify that the foregoing transcript is true and correct.

/S/Denae L. Hovland

Denae L. Hovland