

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

UNITED STATES OF AMERICA

*

v.

*

Criminal Case No. GLR 17-0631

NGHIA PHO

*

MEMORANDUM IN AID OF SENTENCING

The Defendant, by and through his attorney, Robert C. Bonsib, Esq. and the law office of MarcusBonsib, LLC, hereby submits this Memorandum in Aid of Sentencing and, in support thereof, states as follows:

I. PROCEDURAL BACKGROUND

On December 1, 2017, the Defendant appeared before the Court and entered a plea of guilty to a one-count criminal information charging him with the willful retention of national defense information in violation of 18 U.S.C. 793(e).

A Pre-Sentence Report (“PSR”) was ordered and sentencing is now set for September 25, 2018.

II. PRE-SENTENCE REPORT

The PSR contains the following Guidelines recommendations, which are consistent with the Guideline recommendations contained within the plea agreement agreed by the parties

Base Offense Level 2M3.3; 2M3.3(a)(1)	29
Role (3B1.3)	+2
Adjusted Offense Level	31
Acceptance of Responsibility	-3
Total Offense Level	28

Criminal History Category I.

Based upon these recommended Guidelines findings, the Defendant's Guidelines are 78-97 months.

The government will recommend a sentence of 96 months to be followed by three years of supervised release

The Defendant must pay a \$100 special assessment.

The Defendant has no objections or corrections with respect to the information contained within the PSR, except that the Defendant does not concur with the sentence recommended by the government and in the PSR. The Defendant's position with respect to appropriate sentence is more fully discussed herein.

III. SENTENCING EXHIBITS

Attached to this Sentencing Memorandum as Exhibits in support of the Defendant's position regarding sentencing are the following:

- #1. Letter from Nghia Pho
- #2 Letters in support of Nghia Pho
 - i. Michael Pho – son
 - ii. Minh Pho - daughter
 - iii. Lua Huynh – Buddhist monk at Mr. Pho's Temple
 - iv. Letter from Buddhist members of Mr. Pho's Temple
- #3 Family photographs
- #4 Certificate from NSA
- #5 General David Petraeus plea and sentencing documents
- #6 Article re pardon of CIA Director John Deutch

IV. 18 U.S.C. 3553(a) CONSIDERATIONS

(i) Personal and Family Characteristics

As the PSR indicates, and as is documented by the letters from Mr. Pho and his family and friends, Mr. Pho led an exemplary life up to the time of the incident that brings him before the Court.

Growing up in a family in Vietnam, immigrating to Germany and then to the United States, Mr. Pho has a remarkable educational and employment history.

His personal history also confirms his role and history as a dedicated father and provider.

It is clear that to Mr. Pho family is paramount and his life has been dedicated to providing for his family.

His success as a father is demonstrated by the success of his children in their professional and educational pursuits, the specifics of which are detailed both in the PSR and by the letters from his children attached to this sentencing memorandum.

Mr. Pho and his wife have worked hard to provide for their children and it was in, large measure, Mr. Pho's desire to continue to provide for his family that was the motivating factor that led him into making the errors in judgment regarding the handling of national security information that brings him before the Court.

Mr. Pho has no criminal record nor does he have any history of otherwise ever having been involved himself in any other criminal conduct.

(ii) Time Period of Conduct

The conduct that Mr. Pho has acknowledged committing and to which he pled guilty occurred approximately three years ago. Mr. Pho was not charged until approximately two years after the search warrant was executed at his residence and after NSA became aware of the presence of the classified materials in his home.

During the intervening two years and during the time since he entered his plea of guilty in this case, Mr. Pho has continued to demonstrate responsible behavior. He has performed on pre-trial release without any issues or violations. The government did not seek pre-trial detention in this matter (and Mr. Pho greatly appreciates the government's position with respect to that issue) nor onerous conditions of release. Mr. Pho's conduct since his arrest confirms the appropriateness of the trust that the government had in his promise to comply with all conditions of release.

It is respectfully submitted that Mr. Pho's performance while on pre-trial release is further evidence that his errors in judgment in removing classified information and retaining those materials in his home represent an aberrant course of conduct when considered in evaluating his entire life.

In describing Mr. Pho's conduct as abhorrent, it is not intended to suggest that he conduct was isolated in nature or limited in time but rather conduct that, when put in the context of his entire life, and when his conduct is understood in the context of the reasons why it occurred, is in fact abhorrent in the sense that it is not consistent with his personality or his character.

(iii) Respect within the Community

Mr. Pho is an extremely religious man and is dedicated to the principles that are the foundation of his Buddhist religion. He is well respected within the Buddhist religious

community as is evidenced by the letters submitted in support of him. He is a constant presence at the Temple.

Mr. Pho's dedication to his religious is just one further and additional factor supporting the conclusion that he does not represent a danger to the community and that, should the Court impose the recommended sentence in this matter, he would act as a responsible member of the community.

(iv) Why Did Mr. Pho Engage in this Conduct?

In viewing the entirety of Mr. Pho's personal life, his family life, his hard work ethic, his devotion to his religion, one can only wonder why he engages in the conduct that brings him before the Court.

It is clear from the available evidence, that there is no suggestion that Mr. Pho intended to put the national security of the United States at risk. To the contrary, he was a skilled technician who worked hard to successfully complete the very important and sensitive assignments assigned to him within the NSA. He was involved and essential to the success of significant and sensitive projects within the NSA.

Unlike many other instances where unlawful removal or retention of national defense information or classified information may have occurred, Mr. Pho sought no financial gain, had no purpose to advance of personal political objectives and had no intent to embarrass the NSA nor to the prejudice the national security. He had no contact with foreign nationals and did not seek to disclose or make available the information that he had to the news media, advocacy groups or anyone else.

Mr. Pho accepts responsibility for his errors in judgment. He knows, and knew at the time that he engaged in the conduct that resulted in this prosecution, that it was not proper for

him to remove and retain classified information at his residence. Since his arrest in this matter and the subsequent investigation, the full nature and scope of his misconduct and attendant consequences has become much more apparent to Mr. Pho. Since the execution of the search warrant, Mr. Pho has cooperated with investigators by acknowledging his actions. He has never denied his conduct nor sought to minimize his conduct. It is clear, however, that he did not have a full appreciation of the potential consequences to him personally and did not clearly consider the potential consequences to the national security.

Mr. Pho's focus, and his sole focus, in removing classified materials to his personal residence was to have those materials conveniently available to him at his home so that he could prepare a well-supported personnel evaluation with the hope and expectation that he would be able to convince his supervisors as to the value and significance of his work within the NSA.

As Mr. Pho indicates in his letter, and as he has maintained on other occasions, the motive for his conduct was strictly and solely limited to his desire to be able to persuasively document reasons as to why he should be entitled to favorable employment consideration within the NSA.

As Mr. Pho indicates in his letter, because of his language issues and because of his limited social skills in interacting with others in the workplace, he found it difficult to blend in and to become an active participant in the work teams at the NSA. This translated into his becoming more withdrawn. He was of the belief that because of his difficulty with language and with social interaction that in order to advance within the agency he had to make an extraordinary demonstration of his technical skills and value and, therefore, removed materials from the agency so that he could work on them at home. It was in an effort to demonstrate to his

supervisors his value to the agency that he engaged in the conduct that ended up having the absolute opposite effect.

The reasons for Mr. Pho's conduct in this case present a very unique set of facts and ones that does not fall within the "typical" case was this sort.

(v) Other Cases of Retention of Classified Materials

Other individuals in the news media have taken classified information out of their respective agencies and used them to advance political purposes, to leak to the media to embarrass an agency, to assist a romantic partner in their professional pursuits and for a number of other more nefarious reasons. Some of these individuals held high position in government or other positions of public exposure or importance.

In some of those instances, courts have imposed jail sentences. In other instances, jail sentences have not been imposed. Perhaps one of the most well-known instances of the improper handling of classified information relates to General David Petraeus who was accused of removing, maintaining and mishandling classified information related to his romantic relationship with his biographer.

General David Petraeus pled guilty to an offense related to the mishandling of classified information and received a non-incarceration sentence. In reviewing the plea documents, judgment and statement of reasons in his case it is difficult to differentiate the "potential" harm to the national security of the United States from the "potential" harm to the United States in the instant case, although an argument can be made that General Petraeus' conduct was more egregious because it risk the lives of those involved in protecting the national security of the United States, while Mr. Pho's conduct jeopardized intelligence gathering capabilities of the United States. (See Exhibit No. 5 – Petraeus plea documents)

Another person more fortunate than Mr. Pho and even more fortunate than Director Deutch avoided prosecution altogether even though their conduct was at least as serious as that of Mr. Pho. (see Exhibit 6 – Article re pardon of CIA Director John Deutch).

A cynical person might suggest that the higher one is “on the food chain” the more forgiving those who make decisions in cases such as this one are of “errors of judgment.”

Mr. Pho has worked hard over the years. He has contributed to assisting the United States with respect to assisting with respect to national security matters. He was not, however, fortunate enough to have the title of “General” or “Director” when he was brought before the Court for mishandling classified information. Mr. Pho cannot produce a lot of letters from individuals with titles and otherwise impressive personal histories. Mr. Pho did his work in an office, out of sight but yet while performing important national security work for the United States.

(vi) Other 3553(a) Considerations

Mr. Pho is 70 years of age and suffers from a variety of medical ailments that, while not debilitating, do require regular medical attention. His medical conditions together with his age are important considerations in determining whether a sentence of confinement is appropriate in this matter.

Additionally, Mr. Pho has already suffered substantial personal consequences including the loss of his employment, the personal humiliation that he has brought upon himself and his family as a result of the publicity that was associated with his arrest in this matter, his inability to obtain meaningful employment in the future in his area of specialized expertise as well as a variety of other intangible factors.

This is not to say that Mr. Pho's conduct did not have serious potential consequences to the United States but rather to underscore that in asking for a sentence that does not involve incarceration, such a sentence can legitimately consider recognize the personal consequences suffered by Mr. Pho as a result of his conduct and not minimize the serious nature of the "potential" consequences of his conduct.

(vi) Reasons why a Non-Confinement Sentence is Appropriate

Not only because of his otherwise impeccable personal history, his age, his cooperation with the government after the execution of the search warrant, his medical condition and his conduct since the time of the execution of the search warrant, Mr. Pho does not represent a present danger to anyone. He does not represent a risk of flight and he has conformed to all of the requirement imposed on him by the Court.

In sentencing Mr. Pho, considering the unique nature of the reasons for his conduct in this case, the Court still will obviously look at the need for deterrence. Mr. Pho recognizes that the Court is always cognizant of the need to "send a message" to others who may be tempted to engage in similar conduct. To the extent that a message needs to be sent, such a message has been sent by the consequences already suffered by Mr. Pho. And, it is respectfully submitted that if a more severe "message" was appropriate under these facts, it should also have been sent in the matters involving General Petraeus and CIA Director John Deutch.

V. SENTENCING RECOMMENDATION

In determining whether a sentencing of confinement is necessary in this matter, it is respectfully submitted that based upon Mr. Pho's personal characteristics that there is no need for deterrence of Mr. Pho, no need for rehabilitation, nor any need to further impose punishment upon him. As part of the sentencing decision the Court must make in this matter, Mr. Pho

recognizes that the Court must also consider the issues of deterrence and must impose a sentence that respects the nature of the offense before the Court. It is because of the highly unusual, if not unique circumstances that surround the motivation for Mr. Pho's removal and retention of classified material at his home that distinguish his case from other unlawful retention case, that a variant sentence is justified. that might otherwise be viewed as a sentence that does not properly address issues of deterrence nor recognize the severity of the potential harm from his conduct.

It is respectfully submitted that a sentence of home confinement will serve all of the appropriate 3553(a) factors that the Court is mandated to consider in imposing a sentence in this matter.

VI. REQUEST FOR SPEAKERS AT SENTENCING

The Defendant respectfully requests that his wife, a friend and his son be permitted to address the Court at sentencing

It is anticipated that they will each speak for approximately five minutes and will address their opinions regarding the Defendant's personal characteristics

VII. CONCLUSION

For each and all of the foregoing reasons it is respectfully requested that this Honorable Court impose a variant sentence, substantially below the Guidelines range. Based upon the particular circumstances of the offense conduct, the Defendant's lack of any prior record, the reasons for which the Defendant possessed classified material, the Defendant's age and medical condition, and for the other reasons set forth herein, it is respectfully requested that the Court imposed of substantial period of home confinement with such terms and conditions as the Court deems appropriate.

Respectfully submitted,

MARCUSBONSIB, LLC

/s/ Robert C. Bonsib

Robert C. Bonsib
6411 Ivy Lane, Suite 116
Greenbelt, Maryland 20770
(301) 441-3000
robertbonsib@marcusbonsib.com
Trial Bar No. 00324

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served this 13th day of September, 2018 *via* CM/ECF to: Assistant United States Attorneys Thomas P Windom and Nicholas A. Mitchell.

/s/ Robert C. Bonsib

Robert C. Bonsib