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Cunningham's day of reckoning

Sentencing judge's 'extremely high standards of conduct' cited

The deal Randy "Duke" Cunningham struck last fall in pleading guilty to conspiracy and tax evasion for accepting more than \$2.4 million in bribes guarantees he won't be sentenced to more than 10 years in prison.

Whether the former congressman will get less than that today will be up to one man: a federal judge who was formerly a top-notch prosecutor experienced at handling high-profile cases.

U.S. District Judge Larry Alan Burns will be very analytical in making his decision, defense lawyer Robert Grimes said.

"He was the best trial lawyer in the U.S. Attorney's Office when he was in that office," said Grimes, who faced off against Burns in court.

Before becoming a federal prosecutor in 1985, Burns worked in the San Diego County District Attorney's Office for six years.

During his career, he prosecuted a minister who orchestrated the bombing of an abortion clinic; a woman who hired six Marines to kill her husband, a sergeant; and a car dealer who killed a salesman who sued him.

"He has extremely high standards of conduct for people," said Mario Conte, former head of San Diego Federal Defenders Inc., who also sometimes knocked heads with Burns.

"Although he was a career prosecutor, I don't get the sense that he, as a judge, has favored one side or another," Conte said. "He also is willing to make tough calls."

Burns, 51, declined to be interviewed for this article.

At a hearing scheduled to begin at 1 p.m. today, Burns will decide whether to punish Cunningham with the 10-year maximum term, the six-year sentence defense lawyers are seeking or something in between.

In preparation, he has read hundreds of pages of letters, reports, legal arguments, grand jury transcripts and evidence.

They document how Cunningham, in the words of prosecutors, "bullied and hectored" government officials to steer lucrative contracts to defense contractors.

Burns will have read Cunningham's handwritten list that sets a scale for the bribes in proportion to the amount of the contracts.

He also will have considered letters of support from the former congressman's 91-year-old mother and from some of Cunningham's former Navy comrades, including some who flew with him during the Vietnam War.

There's a report from a Beverly Hills psychiatrist theorizing how the mental toughness and agility that made Cunningham a fighter ace might have instilled a false sense of entitlement and invulnerability that betrayed him in the end.

Also among the papers is a plea from Cunningham's lawyers for mercy for a broken, 64-year-old man who has battled cancer and other ailments. They say he may only live seven more years and shouldn't be sentenced to die behind bars. There's also a letter from Cunningham saying he is "ashamed and deeply sorry."

Burns also will consider a report written by a probation officer that recommends the maximum sentence.

Burns will consider a complicated formula, part of federal sentencing guidelines, that balances factors such as the seriousness of the crime, the amount of the loss and a defendant's criminal history.

After taking it all in and hearing from prosecutors and defense lawyers, Burns will ask Cunningham what he has to say for himself.

The former congressman – who has said he was taken in by people he considered friends and genuinely believed in the programs he backed in exchange for cash – may have a tough time swaying the judge, experts said.

“He has a sense of justice,” defense lawyer Marc Carlos said. “He thinks cases merit punishment versus a slap on the hand.”

For Burns to sentence Cunningham to less than the maximum term, he probably would have to find reasons to adjust the math within the sentencing guidelines, legal experts said.

Defense lawyers argue that Cunningham’s “unique offender characteristics” – his military record, his charitable works, his work in Congress and his bad health – merit such an adjustment.

“The defense is free to argue for lesser time,” Carlos said. “But they’re not necessarily going to get it.”

Burns is a graduate of Point Loma College – before it became Point Loma Nazarene University – and the University of San Diego School of Law.

He was selected as a federal magistrate judge in 1997, and President Bush nominated him as a U.S. District judge in 2003.

He has ruled in favor of rent freezes, bans on adult businesses and limits on campaign contributions. He also ruled against the Internal Revenue Service when it wanted to freeze a company’s assets.

He has ruled in numerous criminal cases, sometimes good-naturedly sparring with defendants.

“I could have gotten a Joe DiMaggio baseball from you, even though he’s been deceased for some time,” he told a New Jersey man who admitted selling bogus sports memorabilia in 2004.

When deciding a sentence, some judges focus on the person before them and others on what they did, former San Diego District Attorney Paul Pfingst said.

“I would predict him to be someone who is more focused on the crime,” Pfingst said.

The best chance Cunningham has for mercy is by highlighting his health problems rather than his public service, which he compromised by accepting bribes, Pfingst said.

Burns also will decide whether Cunningham will be imprisoned immediately.

Many judges allow defendants such as Cunningham, who is free without bail, to turn themselves in a few weeks after sentencing once the federal Bureau of Prisons has determined where they will serve their sentences.

Other judges don’t believe it’s necessary to wait.

Cunningham may want to begin his imprisonment today because the sooner he goes in, the faster he will get out.

Whatever sentence he gets, Cunningham will have a chance to shorten it.

He has agreed to cooperate with the continuing investigation of bribery and improper contracts, and prosecutors have said that he has helped. If they find his assistance particularly useful in the future, they may return to Burns later and ask for a lesser sentence.

About the case

Cunningham’s corruption came to light after a Copley News Service story was published June 12 in The San Diego Union-Tribune. The piece focused on the purchase of his Del Mar-area house by a defense contractor. The contractor bought the house for \$1.675 million in November 2003 and sold it eight months later at a \$700,000 loss.

He was elected to Congress in 1990. A special election will be held April 11 to fill out the remainder of his term, which ends Jan. 3.

Cunningham achieved fame as a Navy pilot during the Vietnam War when he shot down five MIGs.

