

FEB 22 2008

*United States v. Nguyen*  
No. 05-10399

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

B. FLETCHER, Circuit Judge, dissenting.

I respectfully dissent.

The admission of detective Wirth's testimony was error and it was not harmless. No eye witness or physical evidence tied Nguyen to the crime or the crime scene. The only reliable evidence from which inferences could be drawn were the cell phone records that only proved that the known robber-shooter and Nguyen communicated frequently before the robbery and after the robbery but not during the robbery. Wirth's testimony suggested that no one other than Nguyen could have committed the robbery, which could have tipped the scale in the jury's mind. Without it, it is probable that the jury would not have convicted.