

COPY

DEPARTMENT OF JUSTICE  
EXECUTIVE SECRETARIAT CONTROL DATA SHEET

From: WHITE, MARY JO, CHAIR, AG's ADVISORY COMTE OF USAs  
To: AG. ODD: 07-19-94  
Date Received: 07-14-94 Date Due: 07-19-94 Control #: X94071419606  
Subject & Date

07-13-94 MEMO ATTACHING A COPY OF HER MEMO TO CRM IN  
RESPONSE TO CRM's REQUEST FOR A DRAFT DISCUSSION PAPER WHICH  
WAS PREPARED JOINTLY WITH CRM ON THE ISSUE OF SUBSTANTIAL  
ASSISTANCE. IF THE AG WOULD LIKE THE ADVISORY COMMITTEE TO  
REVISIT THIS ISSUE, SHE WILL PLACE IT ON THEIR JULY ADVISORY  
COMMITTEE AGENDA FOR FURTHER DISCUSSION, W/ATTACHMENT;  
THRU DAG.

	Referred To:	Date:		Referred To:	Date:	
(1)	DAG;GORELICK	07-14-94	(5)			W/IN:
(2)			(6)			
(3)			(7)			PRTY:
(4)			(8)			1
	INTERIM BY:			DATE:		OPR:
	Sig. For: DAG			Date Released:		EHZ

Remarks

(1) FOR INTIALING ON THE "THRU" LINE. RETURN TO EXEC. SEC.  
FOR FORWARDING TO THE AG.

Other Remarks:

FILE:

REMOVE THIS CONTROL SHEET PRIOR TO FILING AND DISPOSE OF APPROPRIATELY  
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Recd  
DAG  
7/14/94



U.S. Department of Justice

Executive Office for United States Attorneys

RECEIVED  
DEPARTMENT OF JUSTICE

Attorney General's Advisory Committee  
of United States Attorneys

Room 1619  
10th & Constitution Avenue, N.W.  
Washington, D.C. 20530

'94 JUL 14 18:49

EXECUTIVE SECRET

July 13, 1994

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL

FROM: *MJW  
by gbb* Mary Jo White  
United States Attorney  
Southern District of New York  
Chair, Attorney General's Advisory Committee  
of United States Attorneys

SUBJECT: Substantial Assistance

PURPOSE: To provide a copy of a memorandum sent to the  
Criminal Division on substantial assistance.

TIMETABLE: Request input before July 26-27, 1994 Advisory  
Committee meeting.

SYNOPSIS: Criminal Division has requested a copy of a working  
paper prepared on substantial assistance.

DISCUSSION:

For your information, I am providing a copy of a memorandum sent to the Criminal Division responding to their request for a draft discussion paper (Tab A) which was prepared jointly with the Criminal Division on the issue of substantial assistance. Neither the Criminal Division nor the Advisory Committee favored either the approach or the document. We agreed that nothing was broken. What the Committee did agree to and propose is attached at Tab B. It is the Advisory Committee's recommendation to amend 28 U.S.C. Section 994(n) as regards substantial assistance. I understand that this language was ultimately recommended by the Criminal Division and is now before the Crime Bill Conference Committee.

RECOMMENDATION:

If you would like the Advisory Committee to revisit this issue, please call me at 212-791-0056, and I will place it on our July Advisory Committee agenda for further discussion.

Attachment



U.S. Department of Justice

Executive Office for United States Attorneys

Attorney General's Advisory Committee  
of United States Attorneys

Room 1619  
10th & Constitution Avenue, N.W.  
Washington, D.C. 20530

July 13, 1994

MEMORANDUM TO: Mary Harkenrider  
Counsel to the Assistant Attorney General  
Criminal Division

FROM: *msw* Mary Jo White  
*by gfb* United States Attorney  
Southern District of New York  
Chair  
Attorney General's Advisory Committee

SUBJECT: Substantial Assistance

I understand that the Attorney General was inquiring about the attached draft discussion paper (Tab A) which was prepared jointly with the Criminal Division in February 1994 on the issue of substantial assistance. Neither the Criminal Division nor the Advisory Committee favored either the approach or the document. We agreed that nothing was broken.

What the Advisory Committee did agree to and propose is attached at Tab B. It is our recommendation to amend 28 U.S.C. Section 994(n) as regards substantial assistance. I understand that this language was ultimately recommended by the Criminal Division and is now before the Crime Bill Conference Committee.

If the Attorney General would like us to revisit this issue, we will place it on our July Advisory Committee agenda for further discussion.

Attachments

cc: Janet Reno

**DRAFT BLUE SHEET**

**Purpose:** This bluesheet gives policy guidance to federal prosecutors respecting the filing motions for downward departure under 18 U.S.C. §3553(e) and/or U.S.S.G. §5K or for sentence reduction under Fed. R.Crim. P. 35(b) based upon a defendant's substantial assistance.

**I. Motions For Departure**

There are a number of statutes which provide for minimum mandatory terms of imprisonment, see e.g., 21 U.S.C. §841(b)(1)(A-B) (controlled substance distribution) and 18 U.S.C. §924(e) (Armed Career Criminal Act). Notwithstanding the mandatory language of these statutes, a court may sentence a defendant below a statutory minimum mandatory on government motion so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. 18 U.S.C. §3553(e). Furthermore, once a defendant has been sentenced, the government may file a motion to reduce the defendant's sentence for the same reasons. Fed. R.Crim. P. 35(b). Finally, in cases governed by the Sentencing Reform Act of 1984, as amended, 18 U.S.C. §3551, et seq., a court may depart downwards from the established range under the United States Sentencing Commission Sentencing Guidelines, see U.S.S.G. §5K, for similar reasons.

**II. Need for Coordinated Approach**

While the appropriate evaluation of a defendant's cooperation, the decision to seek a downward departure, whether by statute, rule or guideline, and the government's recommendation, if any, are matters which are uniquely within the competence of the federal prosecutor, there are certain factors which ought to be evaluated and considered in making a recommendation. While there can never be absolute comparisons between sentences imposed by different judges and in different districts, the government's recommendations ought to be based upon the same considerations and should, within reason, result in approximately the same departures for the same types of assistance in the same types of cases.

There are no mathematical formulae and defendants are not necessarily entitled to a downward departure because some or all of the factors are present nor are they necessarily to be denied a downward departure because of the absence of one or more factors.

### III. Factors

A federal prosecutor ought to consider the following factors:

A. The significance and usefulness of the defendant's assistance:

- Were other federal and/or local prosecutions (including affirmative civil and/or administrative actions) made possible solely through the defendant's assistance and what were the significance of these cases?
- Were other federal and/or local prosecutions (including affirmative civil and/or administrative actions) made possible in part through the defendant's assistance and what were the significance of these cases?
- Were federal and/or local investigative agencies assisted in significant anti-crime activities through information (intelligence) provided by the defendant and what is the significance of this information (intelligence)?

B. The truthfulness, completeness and reliability of any information or testimony provided by the defendant:

- Was the defendant's information and/or testimony fully truthful and reliable?
- Did the defendant disclose to the United States the existence of all assets subject to forfeiture as the result of the defendant's conduct?
- Did the defendant acquiesce in the forfeiture of all assets subject to forfeiture as the result of the defendant's conduct?
- Did the defendant assist agents and prosecutors in effecting the forfeiture of assets subject to forfeiture such as by voluntarily repatriating assets from offshore?

- Did the defendant engage in any conduct, including the use of controlled substances, violation of conditions of release or violation of law, after arrest which could or was used to impeach the defendant's reliability?
- Did the defendant engage in any conduct, including the use of controlled substances, violation of conditions of release or violation of law, after agreeing to cooperate which could or was used to impeach the defendant's reliability?
- Did the defendant withhold any information at any time whether in proffers and/or debriefings to agents and/or prosecutors, testimony before the grand jury at trial or any other official proceeding and if so, how material was the information withheld?

C. The nature and extent of the defendant's assistance:

- Did the defendant provide a complete and truthful proffer and/or debriefing?
- Did the defendant testify before a Grand Jury?
- Did the defendant testify at a trial or other official proceeding at which the defendant was confronted by an opposing party?
- If the defendant did not testify solely because the federal prosecutor reached a plea agreement avoiding indictment and/or trial, was the defendant ready, willing and able to testify?
- Did the defendant participate in "active" cooperation?
  - Did the active cooperation expose the defendant to significant physical danger?
  - As the result of the defendant's cooperation, were extraordinary protective measures necessary (moving defendant or witness security)?

- What was the extent of the defendant's cooperation (telephone calls, face-to-face meetings, electronic monitoring)?
  - What were the results of the defendant's active cooperation and to what extent are those results the product of the defendant's good or bad conduct?
- D. Any injury suffered, or any danger or risk of injury to the defendant or the defendant's family resulting from the defendant's assistance.
- Was there physical or emotional damage to the defendant, the defendant's family or friends as the result of cooperation?
  - Was there damage to property of the defendant, the defendant's family or friends as the result of cooperation?
  - Did the defendant and/or the defendant's family or friends require special security as the result of the defendant's cooperation and how onerous were those precautions?
  - Did the defendant place him/herself at substantial risk of injury through cooperation whether or not such injury, in fact, occurred?
- E. Timeliness of the defendant's assistance:
- Did the defendant seek out authorities prior to learning that s/he was the target or subject of an investigation?
  - Did the defendant seek out authorities upon learning that s/he was the target or subject of an investigation?
  - Did the defendant cooperate fully and promptly upon arrest?
  - How much time elapsed from the time the defendant learned that s/he was a target and/or subject until s/he cooperated?



- In a multiple defendant or coconspirator case, was the value of the defendant's cooperation compromised by the passage of time, including the decision by others to cooperate?
- Did the defendant put the government to the burden of a hearing and/or trial process, how much of a burden was the process and were other confidential sources disclosed as the result of the defendant's tactical decisions?
- Did the defendant cooperate after learning the facts of the government's case whether by formal or informal discovery and/or pretrial production?
- Was the timeliness of the defendant's cooperation a factor in the success of other investigations and/or the failure of others?

#### IV. MATTERS WHICH OUGHT NOT TO BE CONSIDERED

Above and beyond factors such as race, creed, color, sex, national origin, political persuasion, sexual orientation and other impermissible factors, federal prosecutors ought not to consider the following factors in determining whether to seek a downward departure and if so, how much of a recommendation to make:

- A. The defendant's otherwise good or bad character.
- B. Cooperation afforded by third parties. In other words, cooperation provided by one person ought not to accrue to the benefit of another.
- C. The defendant's personal, health and/or familial circumstances.
- D. Any other factor which Courts generally ought not to consider in sentencing and which would not likely result in an independent basis for downward departure absent a government motion.



V. PROCEDURE

1. Departures, whether under statute, rule or guideline are to be approved by the appropriate Assistant Attorney General or United States Attorney or appropriate supervisor designated by an Assistant Attorney General or United States Attorney.
2. A written memorandum reflecting the approval is to be maintained in the case file.
3. When a request is made by a defendant or his/her authorized representative that the government consider the filing of a motion, the request and government decision are to be memorialized in the case file.
4. Motions for departure are to be made in writing. They should set forth either in their body or in accompanying pleading, the basis for the government's motion, the facts which support the motion, and the government's recommendation if any. Prosecutors are encouraged to seek court orders sealing such documents.

ATTORNEY GENERAL'S ADVISORY COMMITTEE

Duties of the Commission

Title 28, United States Code, §994(n) shall be amended as follows:

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in an investigation of any offense or the prosecution of another person who has committed an offense.

Title 18, United States Code, § 3553(e) shall be amended as follows:

(e) Limited authority to impose a sentence below the statutory minimum. Upon motion of the Government, the Court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in an investigation of any offense or the prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to Section 994 of title 28, United States Code.