



U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

February 7, 1992

To: Holders of United States Attorneys' Manual Title 9

From: Office of the Deputy Attorney General

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Acting Deputy Attorney General 

Re: Indictment and Plea Procedures Under Guideline Sentencing

Affects: 9-27.451

Purpose: This bluesheet sets out procedures to be followed in making charging decisions, drafting indictments, and negotiating plea agreements in cases which come under the Sentencing Guidelines.

The following is a new section:

On March 13, 1989, United States Attorney General Dick Thornburgh issued a Memorandum to all Federal prosecutors, entitled "Plea Bargaining Under The Sentencing Reform Act." On June 16, 1989, he issued a second Memorandum entitled "Plea Bargaining in Cases Involving Firearms." This bluesheet is a clarification of the procedures outlined in those memoranda, which remain in full force. Copies of these two memoranda, known as Thornburgh I and Thornburgh II, are attached.

1. General Plea Procedures

The following procedures shall be adopted as to all pleas of guilty:

A. All negotiated plea agreements to felonies or misdemeanors negotiated from felonies shall be in writing and filed with the court. Thus any time a defendant enters into a negotiated plea, that fact and the conditions thereof will be memorialized and a copy of the plea agreement maintained in the office case file or elsewhere.

B. There shall be within each office a formal system for approval of negotiated pleas. The approval authority shall be vested in at least a supervisory criminal Assistant United States Attorney, or a supervisory attorney of a litigating division in the Department of Justice, who will have the responsibility of assessing the appropriateness of the plea agreement under the policies of the Department of Justice pertaining to pleas, including those set forth in the Thornburgh Memos. Where certain predictable fact situations arise with great frequency and are given identical treatment, the approval requirement may be met by a written instruction from the appropriate supervisor which describes with particularity the standard plea procedure to be followed, so long as that procedure is otherwise within Departmental guidelines. An example would be a border district which routinely deals with a high volume of illegal alien cases daily.

C. The plea approval process will be part of the office evaluation procedure.

D. The United States Attorney in each district, or a supervisory representative, should, if feasible, meet regularly with a representative of the district's Probation Office for the purpose of discussing guideline cases.

2. Substantial Assistance Pleadings

A. Authority to File. Section 5K1.1 of the Sentencing Guidelines allows the United States to file a pleading with the sentencing court which permits the court to depart below the indicated guideline, on the basis that the defendant provided substantial assistance in the investigation or prosecution of another. Authority to approve such pleadings is limited to the United States Attorney, the Chief Assistant United States Attorney, and supervisory criminal Assistant United States Attorneys, or a committee including at least one of these individuals. Similarly, for Department of Justice attorneys, approval authority should be vested in a Section Chief or Office Director, or such official's deputy, or in a committee which includes at least one of these individuals.

B. Recordkeeping. Every United States Attorney or Department of Justice Section Chief or Office Director shall maintain documentation of the facts behind and justification for each substantial assistance pleading. The repository or repositories of this documentation need not be the case file itself. Freedom Of Information Act considerations may suggest that a separate form showing the final decision be maintained.

C. Rule 35(b) Motions. The procedures described above shall also apply to Motions filed pursuant to Rule 35(b), Federal Rules of Criminal Procedure, where the sentence of a cooperating defendant is reduced after sentencing on Motion of the United States. Such a filing is deemed for sentencing purposes to be the equivalent of a substantial assistance pleading.

3. Enhancements of Drug Penalties Based on Prior Convictions

Current drug laws provide for increased maximum, and in some cases minimum, penalties for many offenses on the basis of a defendant's prior criminal convictions. See, e.g., 21 U.S.C. §§ 841 (b)(1)(A), (B), and (C), 848 (a), 960 (b)(1), (2), and (3), and 962. However, a court may not impose such an increased penalty unless the United States Attorney has filed an information with the court, before trial or before entry of a plea of guilty, setting forth the previous convictions to be relied upon. 21 U.S.C. §851.

For the purposes of applying the rules of the Thornburgh memoranda, every prosecutor should regard the filing of an information under 21 U.S.C. §851 concerning prior convictions as equivalent to the filing of charges. Just as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. §851 regarding prior convictions that are readily provable and that are known to the prosecutor prior to the beginning of trial or entry of plea. The only exceptions to this requirement are those found in Thornburgh I. Such exceptions to the requirements that enhancement pleadings be filed are where: (1) the failure to file or the dismissal of such pleadings would not affect the applicable guideline range from which a sentence may be imposed; or (2) in the context of a negotiated plea, the United States Attorney, the Chief Assistant United States Attorney, the senior supervisory Criminal Assistant United States Attorney, or, within the Department of Justice, a Section Chief or Office Director has approved the negotiated agreement. The reasons for such an agreement must be set forth in writing as required by paragraph 2B, above. Consistent with Thornburgh I, such a reason might include, for example, that the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. The permissible agreements within this context include: (1) not filing an enhancement, (2) filing an enhancement which does not allege all relevant prior convictions, thereby only partially enhancing a defendant's potential sentence, and (3) dismissing a previously filed enhancement.

A negotiated plea which uses any of the options described in this section must be made known to the sentencing court. In addition, the sentence which can be imposed through the negotiated plea must adequately reflect the seriousness of the offense.

4. Firearm charges pursuant to Title 18 United States Code §924(c).

Prosecutors are reminded that when a defendant commits an armed bank robbery or other crime of violence or drug trafficking crime, appropriate charges include Title 18, United States Code §924(c).