Office of the Attorney General
Washington, D. C. 20530

March 13, 1989

MEMORANDUM

TO: Federal Prosecutors

FROM: Dick Thornburgh
Attorney General

SUBJECT: Plea Bargaining Under The Sentencing Reform Act

In January, the Supreme Court decided Mistretta v. United States and upheld the sentencing guidelines promulgated by the Sentencing Commission pursuant to the Sentencing Reform Act of 1984. The Act was strongly supported by the Department of Justice, and the Department has defended the guidelines since they took effect on November 1, 1987. Under these guidelines, it is now possible for federal prosecutors to respond to three problems that plagued sentencing prior to their adoption: 1) sentencing disparity; 2) misleading sentences which were shorter than they appeared as a result of parole and unduly generous "good time" allowances; and 3) inadequate sentences in critical areas, such as crimes of violence, white collar crime, drug trafficking and environmental offenses. It is vitally important that federal prosecutors understand these guidelines and make them work. Prosecutors who do not understand the guidelines or who seek to circumvent them will undermine their deterrent and punitive force and will recreate the very problems that the guidelines are expected to solve.

This memorandum cannot convey all that federal prosecutors need or should want to know about how to use the guidelines, and it is not intended to invalidate more specific policies which are consistent with this statement of principles and may have been adopted by some litigating divisions to govern particular offenses. This memorandum does, however, set forth basic departmental policies to which all of you will be expected to adhere. The Department consistently articulated these policies during the drafting of the guidelines and the period in which their constitutionality was tested. Compliance with these policies is essential if federal criminal law is to be an effective deterrent and those who violate the law are to be justly punished.

Plea Bargaining

Charge Bargaining

Charge bargaining takes place in two settings, before and after indictment. Consistent with the Principles of Federal Prosecution in Chapter 27 of Title 9 of the United States Attorneys' Manual, a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct

Whether bargaining takes place before or after indictment, the Department policy is the same: any departure from the guidelines should be openly identified rather than hidden between the lines of a plea agreement. It is inevitable that in some cases it will be difficult for anyone other than the prosecutor and the defendant to know whether, prior to indictment, the prosecutor bargained in conformity with the Department's policy. The Department will monitor, together with the Sentencing Commission, plea bargaining, and the Department will expect plea bargains to support, not undermine, the guidelines.

Once prosecutors have indicted, they should find themselves bargaining about charges which they have determined are readily provable and reflect the seriousness of the defendant's conduct. Should a prosecutor determine in good faith after indictment that, as a result of a change in the evidence or for another reason (e.g., a need has arisen to protect the identity of a particular witness until he testifies against a more significant defendant), a charge is not readily provable or that an indictment exaggerates the seriousness of an offense or offenses, a plea bargain may reflect the prosecutor's reassessment. There should be a record, however, in a case in which charges originally brought are dropped.

Sentence Bargaining

There are only two types of sentence bargains. Both are permissible, but one is more complicated than the other. First, prosecutors may bargain for a sentence that is within the specified guideline range. This means that when a guideline range is 18-24 months, you have discretion to agree to recommend a sentence of 18 or 20 months rather than to argue for a sentence at the top of the range. Similarly, you may agree to recommend a downward adjustment of two levels for acceptance of responsibility if you conclude in good faith that the defendant is entitled to the adjustment.

Second, you may seek to depart from the guidelines. This type of sentence bargain always involves a departure and is more complicated than a bargain involving a sentence within a guideline range. Departures are discussed more generally below.

Department policy requires honesty in sentencing; federal prosecutors are expected to identify for U.S. District Courts departures when they agree to support them. For example, it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure.

In sum, plea bargaining, both charge bargaining and sentence bargaining, is legitimate. But, such bargaining must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions.

Readily Provable Charges

The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons. It would serve no purpose here to seek to further define "readily provable." The policy is to bring cases that the government should win if there were a trial. There are, however, two exceptions.

First, if the applicable guideline range from which a sentence may be imposed would be unaffected, readily provable charges may be dismissed or dropped as part of a plea bargain. It is important for you to know whether dropping a charge may affect a sentence. For example, the multiple offense rules in Part D of Chapter 3 of the guidelines and recent changes to the relevant conduct standard set forth in 1B1.3(a)(2) will mean that certain dropped charges will be counted for purposes of determining the sentence, subject to the statutory maximum for the offense or offenses of conviction. It is vital that federal prosecutors understand when conduct that is not charged in an indictment or conduct that is alleged in counts that are to be dismissed pursuant to a bargain may be counted for sentencing purposes and when it may not be. For example, in the case of a defendant who could be charged with five bank robberies, a decision to charge only one or to dismiss four counts pursuant to a bargain precludes any consideration of the four uncharged or dismissed robberies in determining a guideline range, unless the plea agreement included a stipulation as to the other robberies. In contrast, in the case of a defendant who could be charged with five counts of

fraud, the total amount of money involved in a fraudulent scheme will be considered in determining a guideline range even if the defendant pleads guilty to a single count and there is no stipulation as to the other counts.

Second, federal prosecutors may drop readily provable charges with the specific approval of the United States Attorney or designated supervisory level official for reasons set forth in the file of the case. This exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring other, critical aspects of the federal criminal justice system. For example, approval to drop charges in a particular case might be given because the United States Attorney's office is particularly over-burdened, 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.

To make guidelines work, it is likely that the Department and the Sentencing Commission will monitor cases in which charges are dropped. It is important, therefore, that federal prosecutors keep records justifying their decisions not to go forward with readily provable offenses.

Departures Generally

In Chapter 5, Part K of the guidelines, the Commission has listed departures that may be considered by a court in imposing a sentence. Some depart upwards and others downwards. Moreover, 5K2.0 recognizes that a sentencing court may consider a departure that has not been adequately considered by the Commission. A departure requires approval by the court. It violates the spirit of the guidelines and Department policy for prosecutors to enter into a plea bargain which is based upon the prosecutor's and the defendant's agreement that a departure is warranted, but that does not reveal to the court the departure and afford an opportunity for the court to reject it.

The Commission has recognized those bases for departure that are commonly justified. Accordingly, before the government may seek a departure based on a factor other than one set forth in Chapter 5, Part K, approval of United States Attorneys or designated supervisory officials is required, after consultation with the concerned litigating Division. This approval is required whether or not a case is resolved through a negotiated plea.

Substantial Assistance

The most important departure is for substantial assistance by a defendant in the investigation or prosecution of another person. Section 5K1.1 provides that, upon motion by the government, a court may depart from the guidelines and may impose a non-guideline sentence. This

departure provides federal prosecutors with an enormous range of options in the course of plea negotiations. Although this departure, like all others, requires court approval, prosecutors who bargain in good faith and who state reasons for recommending a departure should find that judges are receptive to their recommendations.

Stipulations of Fact

The Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue. Stipulations to untrue facts are unethical. If a prosecutor has insufficient facts to contest a defendant's effort to seek a downward departure or to claim an adjustment, the prosecutor can say so. If the presentence report states facts that are inconsistent with a stipulation in which a prosecutor has joined, it is desirable for the prosecutor to object to the report or to add a statement explaining the prosecutor's understanding of the facts or the reason for the stipulation.

Recounting the true nature of the defendant's involvement in a case will not always lead to a higher sentence. Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others and the government agrees that self-incriminating information so provided will not be used against the defendant, section 1B1.8 provides that the information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement. The existence of an agreement not to use information should be clearly reflected in the case file, the applicability of section 1B1.8 should be documented, and the incriminating information must be disclosed to the court or the probation officer, even though it may not be used in determining a guideline sentence.

Written Plea Agreements

In most felony cases, plea agreements should be in writing. If they are not in writing, they always should be formally stated on the record. Written agreements will facilitate efforts by the Department and the Sentencing Commission to monitor compliance by federal prosecutors with Department policies and the guidelines. Such agreements also avoid misunderstandings as to the terms that the parties have accepted in particular cases.

Understanding the Options

A commitment to guideline sentencing in the context of plea bargaining may have the temporary effect of increasing the proportion of cases that go to trial, until defense counsel and defendants understand that the Department is committed to the statutory sentencing goals and procedures. Prosecutors should understand, and defense counsel will soon learn, that there is sufficient flexibility in the guidelines to permit effective plea bargaining which does not undermine the statutory scheme.

For example, when a prosecutor recommends a two level downward adjustment for acceptance of responsibility (e.g., from level 20 to level 18), judicial acceptance of this adjustment will reduce a sentence by approximately 25%. If a comparison is made between the top of one level (e.g., level 20) and the bottom of the relevant level following the reduction (e.g., level 18). it would show a difference of approximately 35%. At low levels, the reduction is greater. In short, a two level reduction does not mean two months. Moreover, the adjustment for acceptance of responsibility is substantial, and should be attractive to defendants against whom the government has strong cases. The prosecutor may also cooperate with the defendant by recommending a sentence at the low end of a guideline range, which will further reduce the sentence.

It is important for prosecutors to recognize while bargaining that they must be careful to make all appropriate Chapter Three adjustments -- e.g., victim related adjustments and adjustments for role in the offense.

Conclusion

With all available options in mind, and with full knowledge of the availability of a substantial assistance departure, federal prosecutors have the tools necessary to handle their caseloads and to arrive at appropriate dispositions in the process. Honest application of the guidelines will make sentences under the Sentencing Reform Act fair, honest, and appropriate.

Office of the Attorney General
Washington, D. C. 20530

June 16, 1989

MEMORANDUM

TO: Federal Prosecutors

FROM: Dick Thornburgh
Attorney General

SUBJECT: Plea Bargaining in Cases Involving Firearms

On May 15, 1989, the President outlined a comprehensive program to combat violent crime. In it he noted that to ensure the objective that those who commit violent crimes are held fully accountable, plea bargaining procedures must be uniformly and strictly applied. Accordingly, he has directed me to issue and fully implement guidelines for federal prosecutors under the Sentencing Reform Act to ensure that federal charges always reflect both the seriousness of the defendant's conduct and the Department's commitment to statutory sentencing goals and procedures. This means that, in all but exceptional cases such as those in which the defendant has provided substantial assistance to the government in the investigation or prosecution of crimes by others, federal prosecutors will seek conviction for any offense involving the unlawful use of a firearm which is readily provable. This will implement the congressional mandate that mandatory minimum penalties be imposed by the courts upon violent and dangerous felons.

As you recall, in my March 13, 1989 memorandum to all federal prosecutors on the subject of plea bargaining, I stated (at pp. 2-3):

> *** The Department will monitor, together with the Sentencing Commission, plea bargaining, and the Department will expect plea bargains to support, not undermine, the guidelines.
>
> Once prosecutors have indicted, they should find themselves bargaining about charges which they have determined are readily provable and reflect the seriousness of the defendant's conduct. Should a prosecutor determine in good faith after indictment that, as a result of a change in the evidence or for another reason (e.g., a need has arisen to protect

the identity of a particular witness until he testifies against a more significant defendant), a charge is not readily provable or that an indictment exaggerates the seriousness of an offense or offenses, a plea bargain may reflect the prosecutor's reassessment. There should be a record, however, in a case in which charges originally brought are dropped.

* * * *

Department policy requires honesty in sentencing; federal prosecutors are expected to identify for U.S. District Courts departures when they agree to support them. For example, it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure.

In sum, plea bargaining, both charge bargaining and sentence bargaining, is legitimate. But, such bargaining must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions. (Emphasis added.)

On the subject of minimum mandatory penalties for violent firearms offenses, the Department's November 1, 1987 Prosecutors Handbook on Sentencing Guidelines provides (at p. 50):

> ... in no event is a ... 18 U.S.C. 924(c) [minimum mandatory firearms] charge not to be pursued unless it cannot be readily proven or unless absolutely necessary to enable imposition of an appropriate sentence on someone who has rendered substantial assistance to the government, and then only with the consent of ... the United States Attorney as to 18 U.S.C. 924(c) charges.

The specific affirmation of these policies by the President requires that you be especially vigilant about their full implementation in your district. Any questions about these matters will continue to be handled by the appropriate Assistant Attorney General.