UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 90-10080-WD

WILLIAM DAVID LINDHOLM,

DEFENDANT'S MEMORANDUM IN SUPPORT OF
GOVERNMENT'S MOTION FOR REDUCTION OF SENTENCE

The United States has moved for a reduction of William David Lindholm's sentence, pursuant to Fed. R. Crim. P. 35 (b), by filing its Motion in this honorable Court on July 19, 1994, along with an Affidavit by AUSA Paul V. Kelly, and a transcript of the trial testimony provided by Mr. Lindholm in the case of *United States v. Alfred Trenkler*, D. Mass. Criminal No. 92-10369-Z.

In its Motion, the Government states that it "believes that a sentence reduction of at least 24 months (from the defendant's original sentence of 97 months) would be appropriate in the circumstances."

The defendant respectfully submits that: (1) This Court is not bound to follow the specific recommendation of the United States, once the Government has moved to reduce sentence, and the Court has the power under Rule 35 (b) to reduce Mr. Lindholm's sentence more substantially; (2) U.S.S.G. § 5K1.1 (a) (1), which may be interpreted to require the Court to give deference to the Government's evaluation of the extent of reduction appropriate in a given case, is not binding upon the Court in the context of a Rule 35 (b) Motion; and (3) The specific reduction urged by the

United States for Mr. Lindholm fails to fairly reflect the value of his assistance to the United States, in light of the crucial nature of his testimony in the *Trenkler* case, and the kind and degree of departures or reductions urged by the Government in other cases, where other defendants have done as much or less than Mr. Lindholm, and been rewarded far more generously for their cooperation and assistance. The first two points are argued below in Section 1; the third point in Section 2.

1. THE COURT HAS THE POWER TO REDUCE MR. LINDHOLM'S SENTENCE MORE SUBSTANTIALLY THAN THE 24 MONTHS URGED BY THE GOVERNMENT.

The United States, upon filing a motion to reduce sentence under Fed. R. Crim. P. 35 (b), cannot limit the authority of the District Court to exercise its discretion and reduce the defendant's sentence to a greater degree than the specific reduction urged by the Government. It is well-established that the Court is empowered to see that justice is done in responding to the Government's motion, in that the Court may independently evaluate the facts surrounding the defendant's assistance and the value of that assistance to the prosecution, and arrive at its own conclusion as to what will constitute a just and fair reduction of sentence. That conclusion might well differ from that reached by the Government in forming its specific recommendation.

In *United States v. Emanuel*, 734 F.Supp. 877, 878 (S.D. Iowa 1990), the Court held:

> The power to move for a sentence reduction rests with the government, but once the government files a motion for reduction of sentence the sole power to reduce the sentence and to determine the extent of any reduction rests with the court.....The government cannot limit the court's discretion as to how much, if at all, to reduce the sentence.

In evaluating the extent to which Mr. Lindholm's sentence should be reduced, this Court should take particular note of the fact that the United States has moved for a reduction of "*at least* 24 months." On its face, the Motion of the Government contemplates that an additional reduction, greater than 24 months, may be appropriate after the Court has had an opportunity to carefully consider the facts relating to Mr. Lindholm's cooperation.

U.S.S.G. § 5K1.1 (Policy Statement) may be interpreted to mandate deference to the specific recommendation of the United States,[1] where (a) (1) states:

> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

However, § 5K1.1 deals with guidelines departures, and cannot control the court's discretion exercised pursuant to Rule 35 (b), which is clearly not a departure, since the proceedings occur well after sentence has been imposed on the defendant in accordance with the United States Sentencing Guidelines. Nothing in the language of Rule 35 (b) suggests that the Court must give any mandatory deference to the specific reduction suggested by the United States in a Rule 35 (b) context.

Also, the literal language of § 5K1.1 (a) (1) speaks of the Court "taking into consideration the government's evaluation of the assistance rendered," and says nothing which indicates that the Court must slavishly follow the Government's specific

[1] *Emanuel, supra,* at 877, supplies such an interpretation to § 5K1.1 (a) (1).

recommendation as to the amount of departure, even in a Guidelines departure situation.

Again, this case is not one where the Government has urged a reduction in language such as "no more than 24 months" or "no greater reduction than 24 months." The United States has, in exercising its own discretion, left the door open to any new sentence which provides "*at least* 24 months" reduction from Mr. Lindholm's original 97 month sentence, implying that a greater reduction may be appropriate in the discretion of this Court.

2. A REDUCTION OF AT LEAST 64 MONTHS SHOULD BE ALLOWED, IN ORDER TO FAIRLY AND JUSTLY REFLECT THE NATURE AND QUALITY OF MR. LINDHOLM'S ASSISTANCE TO THE UNITED STATES

Mr. Lindholm voluntarily, without any urging or promises, offered his assistance to the United States in its prosecution of Alfred Trenkler. He testified for the United States without having secured any oral or written promise from the Government that they would move to reduce his sentence in the future as a result of his cooperation, much less agreed upon the amount of such a reduction. (Kelly Aff., ¶5).

Many months later, the United States has moved to reduce Mr. Lindholm's sentence pursuant to Rule 35 (b), having already reaped the benefit of his assistance. Having eaten its dinner, the Government now wants to offer a small payment for its feast.[2]

The defendant is very much aware of many recent agreements between the

[2]The defendant fully realizes that the official position of the office of the United States Attorney as to sentencing departures or reductions is the result of decisions made in the Substantial Assistance Committee of that office, and is no longer controlled by individual AUSAs. These remarks are thus not directed personally toward Mr. Kelly, but the Committee.

Government and other defendants in unrelated cases, where significantly more credit was given in terms of sentencing departures for assistance of equal or lesser significance and quality. Just as an example, present counsel represented defendant Robert Sungy before Judge Mazzone.[3] Mr. Sungy faced two indictments for possession of cocaine with intent to distribute, and was facing a mandatory minimum sentence of ten years (the Guidelines would have actually mandated a much higher sentence, due to prior criminal record, the amount of cocaine involved, and other factors). Because Mr. Sungy cooperated fully with the United States, he received a sentence of 42 months upon the recommendation of the prosecution pursuant to U.S.S.G. § 5K1.1. Mr. Sungy never had to testify for the Government, because all defendants eventually entered pleas.

Present counsel also represented a defendant in the Daryl Whiting case, who had been a fugitive from justice recently captured.[4] That defendant, while a rather minor figure in the Whiting conspiracy, faced an astronomical Guidelines sentence because of the enormous amount of cocaine foreseeable to him in the sense of § 1B1.3. He cooperated, primarily by recounting knowledge of the Whiting conspiracy after his fellow conspirators had already been convicted; the result was a sentence of 18 months. This Court may take judicial notice of its own experience with how generously the United States has dealt with cooperating defendants in this District who have done far less than Mr. Lindholm.

[3] *United States v. Robert Sungy*, D. Mass. Crim. Nos. 92-10229, 92-10258.

[4] *United States v. Philip Catouse*, No. 90-10313-S.

Contrasting Mr. Lindholm's assistance with these examples is instructive. Mr. Lindholm came forward on his own, because of a personal conviction that defendant Trenkler had committed a truly loathsome offense which had resulted in death and showed no remorse for it. (Tr. 13-100). Mr. Lindholm demanded no deals or promises in advance. He came forward to cooperate because it was the right thing to do, and part of his personal quest to rehabilitate himself as a citizen and human being. (Tr. 13-100, 13-101).

The case against Trenkler was fairly thin, based entirely upon circumstantial evidence. (Kelly Aff., ¶2). Mr. Lindholm's testimony at the Trenkler trial in recounting the admissions of Trenkler was crucial to the prosecution of that case, and may have been the deciding factor in the jury's verdict of guilt.

The defendant has every confidence that the Government will admit, at a hearing on its Motion, that Mr. Lindholm's information and testimony was honest, detailed, accurate, and invaluable in the prosecution of Trenkler. He held back nothing in his effort at cooperation in the Trenkler matter.

Mr. Lindholm's offer of assistance was timely, in that it was provided efficiently in advance of the Trenkler trial to enable the United States to prepare its prosecution so as to make the fullest and best use of the testimony.

The cooperation rendered by Mr. Lindholm subjected him forever to the title "informer," or "rat," and inescapably made serving his sentence within the Bureau of Prisons unpleasant and potentially dangerous. News articles about his testimony appeared in the Boston Globe and Boston Herald, widely publicizing his cooperation

to former associates, inmates with whom he had to serve, and the community at large. Ordinarily, a defendant's cooperation becomes known only to his co-defendants; it is the unusual case where a cooperating individual such as Mr. Lindholm has the fact of his assistance trumpeted over the airwaves and delivered in newsprint to millions of doorsteps.

WAS IN MEDIA PRIOR TO TEST

In summary, Mr. Lindholm's cooperation with the prosecution was of immense value to the United States, and was of extremely high quality. His conduct in voluntarily approaching the Government and assisting them without demanding any deals or promises in advance is admirable, and the effect of his cooperation upon the quality of his life with the prison system (and without, in certain quarters) was inevitably destructive. In similar circumstances, the courts and the prosecution have routinely granted a reduction or departure of two-thirds or more of a cooperating defendant's sentence. In fairness, and with due regard for public policy which favors encouraging cooperating individuals to come forward, this honorable court should reduce the sentence of William David Lindholm from 97 months to no more than 33 months.

RULE 35B WRITTEN SO THAT THERE IS NO PAPERTRAI SEE ENTIRE TEXT OF RULE 35 B

The defendant respectfully requests a hearing in this matter.

Respectfully submitted,

William David Lindholm,

By His Attorney,

Roger A. Cox

Roger A. Cox BBO# 551514
89 Broad Street, 14th Floor
Boston, Massachusetts 02110
(617) 451-3445

DATED: July 28, 1994

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Memorandum has been served in hand upon AUSA Paul V. Kelly, 1003 McCormack P.O. & Courthouse, Boston, MA 02109, this 28th Day of July, 1994.

Roger A. Cox