American College of Trial Lawyers

REPORT AND PROPOSAL ON SECTION 5K1.1 OF THE U. S. SENTENCING GUIDELINES

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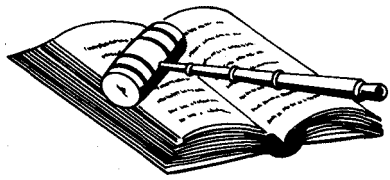

REPORT AND PROPOSAL ON SECTION 5K1.1
THE
U.S. SENTENCING GUIDELINES

Approved by the Board of Regents
March 10,1999

American College of Trial Lawyers

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The objective of the United States Sentencing Guidelines (the "guidelines") was the elimination of inequities in federal sentencing, widely perceived as the result of unchecked and unguided discretion in sentencing. A product of the Sentencing Reform Act of 1984, the guidelines expressly sought to bring uniformity, truthfulness and proportionality to sentencing by structuring the discretion exercised in that process.[1]

Tested against this mandate, Section 5K1.1 of the guidelines, which permits a departure from the otherwise applicable guidelines sentence for a defendant's substantial assistance to the government, can only be seen as a failure.[2] Over the ten years since its enactment, objective critics both inside and outside the sentencing process have increasingly observed that Section 5K1.1 generates unwarranted disparities, unpredictability and unfairness in sentencing. A common criticism is that the present requirement that there be a motion by the prosecutor before the court has the jurisdiction to consider a defendant's cooperation is an unnecessary and unwise transfer of power from the judiciary to a partisan. Empirical evidence published within the past five years substantiates these claims, and raises additional concerns with the manner in which Section 5K1.1 is being implemented.[3] Moreover, legal scholars have argued that the unpredictability in sentencing generated by Section 5K1.1 frustrates an additional purpose for which that particular Section was drafted: to encourage cooperation as a means of promoting effective law enforcement[4]

The inequities in sentencing resulting from Section 5K1.1 are of critical significance to the overall efficacy of the guidelines: the United States Sentencing Commission (the "Sentencing Commission") staff estimates that Section 5K1.1 departures are granted in nineteen percent of all federal criminal convictions, or 7500 sentences each year,[5] and that substantial assistance departures constitute roughly seventy percent of all departures from the guidelines[6] The number of

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[1]See U.S. Sentencing Guidelines Manual, ch. 1, pt. A, comment 3 (West 1998); The Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. II, 98 Stat. 1987 (1984) codified at 18 U.S.C. § § 3551-59; 28 U.S.C. §§ 991-98; see also Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines,* 42 U.C.L.A. L. Rev. 105, 107 (1994) ("The federal sentencing guidelines . were designed to promote certainty, uniformity, and proportionality in sentencing.").

[2]Section 5K1.1 as it is currently written is attached at Appendix B.

[3]*See* discussion *infra* at pages 11-27, and cites therein.

[4]*See* discussion *infra* at page 20, and cites therein.

[5]*See* Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice,* Report of the United States Sentencing Commission 4 (January 1998). These statistics are based on data for fiscal years 1994 through 1996. See *id.* These statistics do not account for Rule 35(b) substantial assistance reductions, which were excluded from the analysis. However, given the small number of Rule 35(b) reductions, see *id.* at 5 n.11 (estimating that approximately 500 Rule 35(b) reductions occur each year), Rule 35(b) departures are unlikely to have any appreciable impact on these statistics.

[6]*See* William J. Powell & Michael T. Cimino, *Prosecutorial Discretion Under the Federal Sentencing Guidelines: the Fox Guarding the Hen House?, 97* W. Va. L. Rev. 373, 392 (Winter 1995) *(citing* 1993 United States Sentencing Commission Annual Report 159 (1994)).

defendants seeking substantial assistance departures is even higher: less than half of all defendants who provided assistance in fiscal year 1992 received a Section 5K1.1departure.' As members of the Sentencing Commission recently acknowledged, given the frequency with which departures for substantial assistance are sought, inequitable application of Section 5K1.1 significantly impacts the success of the overall guideline system and its ability to fulfill its congressional mandate.[8]

Against a backdrop of widespread dissatisfaction with Section 5K1.1, this report documents the legal challenges and criticisms of that Section, and discusses how the proposed amendment of Section 5K1.1 is the best means of addressing those complaints. Part One briefly describes sentencing prior to the passage of the guidelines in 1987, and then discusses the different statutory and guideline provisions that provide for departures based upon substantial assistance to the government. Part Two traces the numerous, albeit failed, legal challenges to Section 5K1.1. Part Three examines the extensive criticisms of Section 5K1.1 and the empirical data recently published on substantial assistance departures that support those criticisms.

Finally, Part Four discusses the salient aspects of the Committee's proposed amendment to Section 5K1.1 (the "Proposed Amendment")[9] and the companion provisions, 18 U.S.C. § 3553(e)10 and Rule 35 of the Federal Rules of Criminal Procedure,[11] that realize the objectives of the guidelines while addressing the deficiencies of Section 5K1.1 as it is currently drafted. Briefly stated, we suggest that any party or the court be allowed to move for a departure based upon a defendants assistance, while acknowledging that the recommendation of the government be given deference because of its unique position to evaluate a defendant's cooperation. Second, we define substantial assistance to require, at a minimum, complete and truthful disclosure of the defendant's knowledge of the facts relating to the pertinent offense and, ordinarily, a willingness on the part of the defendant to testify or provide evidence. Third, we include provisions that address the existing criticism that Section 5K1.1 disproportionately benefits more culpable defendants. Finally, we delineate factors to guide the court's determination of the appropriate magnitude of departure.

I. BACKGROUND

Prior to the promulgation of the guidelines, judges exercised broad discretion in sentencing, and were authorized to impose indeterminate sentences of any length, provided they were within the statutory limits. Critics of this system blamed inequities in sentencing on the lack of any meaningful limits or structure to sentencing judges' discretion, as judges were not required to articulate the bases

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[7] *See* Maxfield & Kramer, *supra* note 5, at 10.

[8] *See id.* at 4.

[9] *See* Appendix A for the proposed amendment to Section 5K1.1, and Appendix B for Section 5K1.1 as it is currently drafted.

[10] *See* Appendix C for 18 U.S.C. 5 3553(e) as it is currently drafted.

[11] *See* Appendix D for Rule 35(b) of the Federal Rules of Criminal Procedure, as it is currently drafted.

for sentences, and sentences were rarely appealed.[12] Others complained of the sparse guidance available to judges, as few courts issued sentencing opinions.[13]

In response to widespread calls for reform,[14] Congress enacted the Sentencing Reform Act of 1984 (the "Sentencing Reform Act").[15] The Sentencing Reform Act created the Sentencing Commission, and charged it with drafting guidelines to structure judges' discretion in sentencing, while affording judges enough latitude to depart from that structure when warranted by aggravating or mitigating circumstances.[16] Two years later, in 28 U.S.C. § 994(n), Congress expressly created an additional basis for departures, requiring the Sentencing Commission to "assure that the [guidelines] reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another."[17]

Pursuant to this congressional directive, the Sentencing Commission promulgated Section 5K1.1, a guidelines policy statement, that provides: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." The purpose of Section 5K1.1

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[12] *See* Marvin Frankel, *Criminal Sentences: Law Without Order 5* (1973); see also Stephen Breyer, *Symposium: Equality Versus Discretion in Sentencing, 26* Am. Crim. L. Rev. 1813, 1822 (1989) (citing statistics of unwarranted disparities in sentencing prior to promulgation of the guidelines).

[13] *See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 41-50 (1983); see also Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers,* 101 Yale L.J. 1681, 1687 (June 1992) (describing the widespread dissatisfaction with the lack of guidance in pre-guidelines sentencing).

[14] Judge Marvin Frankel, one of the vocal advocates of reform, argued: "The evidence is conclusive that judges of widely varying attitudes in sentencing administering statutes that confer huge amounts of discretion, mete out widely divergent sentences where the divergences are explainable only by the variance among the judges, not by material differences in the defendants or the crimes." Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1, 21 (1972).

[15] Pub. L. No. 98-473, ch. II, 98 Stat. 1987 (1984), codified at 18 U.S.C. §§ 3551-59,28 U.S.C. §§ 991-98.

[16] 18 U.S.C. § 3553(b). The sentencing judges are instructed to make the decision whether to depart after considering the seriousness of the offense, deterrence, public protection, the indicated sentencing range under the Guidelines, the policy statements of the Sentencing Commission, and the goal of avoiding unwarranted disparities in sentencing. *Id*.

[17] 28 U.S.C. § 994(n) was enacted under the Anti-Drug Enforcement Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

[18] *See* Appendix B for the full text of the current Section 5K1.1.

is to enhance law enforcement efforts by rewarding defendants who cooperate in the investigation or prosecution of others who are committing offenses.[19]

Section 5K1.1 represents a dramatic shift in sentencing discretion from judges to prosecutors[20] The requirement that the government move before a court has the jurisdiction to consider the defendant's purported cooperation was not mentioned by the drafters of 28 U.S.C. § 994(n), but was unilaterally inserted by the Sentencing Commission. As noted by one scholar, prior to this government motion requirement, sentencing judges:

> regularly heard arguments by defendants that they had cooperated, and also heard arguments by prosecutors, sometimes urging a discount for cooperation and sometimes opposing one because the cooperation was either nonexistent or minimal. After hearing argument, the judge decided how much consideration should be shown for the defendant's cooperation. Although the court usually gave substantial weight to the prosecutor's recommendation, the prosecutor had no authority to prevent [a court from being lenient] based upon a defendant's assistance.[21]

In addition to investing in prosecutors the broad, unguided discretion to determine when the court could consider substantial assistance, the Sentencing Commission did not define "substantial assistance," leaving that determination to the government. Further, the Sentencing Commission made no provision in Section 5K1.1 for the review of a prosecutor's decision not to file a motion.

Parallel requirements were grafted onto other related provisions. Departures from statutory minimums based on a defendant's substantial assistance are governed by 18 U.S.C. § 3553(e), which mirrors Section 5K1.1 in that it also contains a government motion requirement: "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by

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[19] *See* The Anti-Drug Enforcement Act of 1986, H.R. Dot. No. 266, 99th Cong., 2d Sess. 109-10 (1986). *See also* Jonathan D. Lupkin, Note, 5K1.1 and *Substantial Assistance Departure: The Illusory Carrot of the Federal Sentencing Guidelines,* 91 Colum. L. Rev. 1519, 1524 (1991).

[20] *See* Michael *S.* Ross, *Cooperation with Federal Authorities: Operating on the Outer Limits,* 12 Crim. Justice 4,61 (Summer 1997) (Section 5Kl .I transferred this sentencing power to decide whether or not to issue a downward departure from the sentencing court to the prosecutor) (citing *United States v. Ming He, 94* F.3d 782 (2d Cir. 1996)); Kimberly *S.* Kelley, *Comment: Substantial Assistance Under the Guidelines: How Smitherman Transfers Sentencing Discretion from Judges to Prosecutors,* 76 Iowa L. Rev. 187, 189 (Oct. 1990). See *also* Freed, *supra* note 13 (describing the change affected by Section 5K1.1 as a decrease in the discretion of judges with a corresponding increase in the discretion of prosecutors).

[21] *See* Statement of Jon 0. Newman, Chief Judge of the United States Court of Appeals for the Second Circuit, before the Crime Subcommittee of the House Judiciary Committee, *available in 1995* WL 13415519 (Dec. 14, 1995).

statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense ...."[22]

A third basis for leniency in sentencing for a defendant's substantial assistance is found at Rule 35(b) of the Federal Rules of Criminal Procedure. Rule 35(b) permits a reduction of a defendant's sentence within one year after the defendant has been sentenced where a defendant provides substantial assistance to the government. Rule 35(b) also requires a government motion to trigger the court's consideration of the sentence reduction.[23]

Thus, if a defendant seeks to obtain sentencing leniency for his or her assistance, the defendant must, in all events, obtain the consent of and initiation by the government.

II. THE LEGAL CHALLENGES TO SECTION 5K1.1

Virtually from the guidelines' promulgation, Section 5K1.1 became the subject of legal challenges centering on the government motion requirement. Although largely unsuccessful, the number of challenges is indicative of the intense controversy surrounding the policy statement.

The government motion requirement was first challenged as an impermissible delegation of judicial responsibility to the executive branch on the basis that consideration of mitigating factors is a "constitutionally assigned judicial function."[24] However, courts rejected this argument on several grounds. Some courts concluded that the determination of the length of a defendant's sentence is not entirely a judicial function.[25] Others found that the government motion requirement does not permit the prosecutor to engage in "adjudication" because the power to

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[22]18 U.S.C. § 3553(e) was enacted in the same bill as 28 U.S.C. § 994(n). See Anti-Drug Enforcement Act of 1986, H.R. Dot. No. 266, 99th Cong., 2d Sess. 109-10 (1986). Although Congress expressly included a government motion requirement in 18 U.S.C. § 3553(e), it did not incorporate a similar provision in 28 U.S.C. § 994(n).

A separate government motion from that seeking a departure under the guidelines is required before the court may depart below the statutory minimum. *See Melendez v. United States,* 518 U.S. 120 (1996). Thus, a prosecutor's motion is a condition of a substantial assistance departure from either a sentencing guideline or a statutory minimum, although the Section 5K1.1 motion requirement was not imposed by Congress.

[23]Fed. R. Crim. P. 35(b).

[24]*See, e.g., United States v. Huerta, 878* F.2d 89, 91 (2d Cir. 1989), *cert. denied, 493* U.S. *1046* (1990); *accord United States v. Spillman, 924* F.2d 721,724 (7th Cir. 1991).

[25]*See, e.g., Spillman,* 924 F.2d at 724-25 ("[W]e note that the challenge to the government motion requirement of § 5K1.1 and the assertion that the provision vests excessive power over the defendant's sentence with the United States Attorney is particularly unpersuasive in light of the traditional charging power exercised by the executive branch.").

pronounce the ultimate sentence still rests with the court.[26] Finally, courts upheld the provision's constitutionality on the ground that Congress possesses the power to restrict judicial discretion in sentencing.[27]

The government motion requirement was also challenged under the Due Process Clause.[28] Proponents of such claims argued that the provision impermissibly restricts the sentencing judge's discretion, denying the sentencing judge access to relevant information and allowing the prosecutor — who is an adversary in the proceeding — to control the defendant's fate. This argument won the support of several courts.[29]

However, the Supreme Court ultimately rejected this argument in *Wade v. United States*[30] when it concluded that the prosecutor retains full discretion in deciding whether to issue a Section 5K1.1 motion, and that no due process violation exists except in the rare case when a refusal is based on an unconstitutional motive.[31] Appellate courts also ruled that, outside of a capital case, a defendant does not have a constitutional right to an individualized sentence and, therefore, there is no harm in vesting the power to make such a motion solely within the discretion of the prosecutor.[32] Other courts concluded that because Congress has the power to

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[26] *See, e.g., Huerta,* 878 F.2d at 92; *United States v. Kuntz,* 908 F.2d 655, 657 (10th Cir. 1990).

[27] *See, e.g., Spillman,* 924 F.2d at 724; *United States v. Rexach,* 896 F.2d 710, 713-14 (2d Cir.), *cert. denied,* 498 U.S. 969 (1990).

[28] *See* Lee, *supra* note 1, at 131 (discussing due process challenges raised in courts).

[29] *See, e.g., United States v. Justice,* 877 F.2d 664, 667 (8th Cir.) (finding "several problems" with the Section 5K1.1 motion requirement, including the fact that it "places discretion that has historically been in the hands of a federal judge into the hands of the prosecutor," that the prosecutor's decision about whether to file a motion "appears to be unreviewable," and that the prosecutor essentially becomes "the trier of fact in resolving" the issue of a defendant's substantial assistance), *cert. denied,* 493 U.S. 958 (1989); *United States v. Roberts,* 726 F. Supp. 1359, 1368 (D.D.C. 1989) "[T]o substitute prosecutors for judges with respect to the sentencing responsibility is no more compatible with due process than would be the prosecutorial assumption of such other functions as the conduct of hearings on bail or on motions to suppress."), *rev'd on other grounds sub nom. United States v. Mills,* 964 F.2d 1186 (D.C. Cir. 1992), *cert. denied,* 506 U.S. 977 (1992), *United States v. Curran,* 724 F. Supp. 1239, 1245 (CD. III. 1989) (concluding that Section 5K1.1 "create[s] an imbalance in the rights of adverse parties in criminal cases ... [that] is prohibited by due process").

[30] 504 U.S. 181 (1992).

[31] *Wade,* 504 U.S. at 184-87; *see also* Lee, *supra* note 1, at n. 110.

[32] See, *e.g., United States v. Levy,* 904 F.2d 1026, 1035 (6th Cir. 1990) ("We note first that the Supreme Court has held that the Constitution does not require individualized sentencing in non-capital cases.") (citing *Lockett v. Ohio,* 438 U.S. 586, 602 (1978), *cert. denied,* 498 U.S. 1091 (1991)); *United States v. Lewis,* 896 F.2d 246, 248 (7th Cir. 1990) ("[A] defendant has no right to an individualized sentence set by a judge.") (citations omitted); *Huerta,* 878 F.2d at 94 ("[T]here is no right to individualized sentencing….").

eliminate judicial sentencing in its entirety, Congress may curtail judicial discretion in sentencing on a more limited basis.[33] Lastly, courts pointed out that prosecutors have always exercised some degree of control over determining a defendant's sentence, and that the Section 5K1.1 motion requirement should be seen as falling within this traditional zone of prosecutorial power.[34]

The third constitutional attack on Section 5K1.1 stemmed from the Equal Protection Clause. This thesis was articulated by Professor Stephen Schulhofer of the University of Chicago, who argued that substantial assistance under the Sentencing Guidelines creates a "cooperation paradox" that is undesirable:

> Defendants who are most in the know, and thus have the most 'substantial assistance' to offer, are often those who are most centrally involved in conspiratorial crimes. The highly culpable offender may be the best placed to negotiate a big sentencing break. Minor players, peripherally involved and with little knowledge or responsibility, have little to offer and thus can wind up with far more severe sentences than the boss.[35]

According to this argument, provisions such as Section 5K1.1 violate equal protection by providing special guarantees to more culpable defendants that less culpable defendants cannot enjoy.[36] Courts rejected this legal argument as well, how-ever, concluding that provisions such as Section 5K1.1 do not discriminate on the basis of any suspect classification and thus are only subject to rational basis review.[37]

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[33]*See United States v. LaGuardia,* 902 F.2d 1010, 1014 (1st Cir. 1990) ("Congress has the power to cabin judicial sentencing discretion, or even to eliminate discretion entirely, by fixing precise rather than indeterminate sentences."); *see also Mistretta v. United States,* 488 U.S. 361, 364 (1989) (upholding sentencing guidelines and finding that "the scope of judicial discretion with respect to a sentence is subject to congressional control [citation omitted]").

[34]*See e.g., LaGuardia,* 902 F.2d at 1015 ("The prosecutor has traditionally exercised a certain degree of control over a defendant's ultimate sentence by determining what charges to [bring] or, indeed, whether to bring charges at all."); *Huerta,* 878 F.2d at 92 (noting that the prosecutor has always possessed the right to determine whether or not to prosecute, and on what charges); *United States v. Grant,* 886 F.2d 1513, 1514 (8th Cir. 1989) (same).

[35]Stephen J. Schuihofer, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature, Rethinking Mandatory Minimums,* 28 Wake Forest L. Rev. 199, 212 (1993).

[36]*Cf. United States v. Musser,* 856 F.2d 1484, 1487 (11th Cir. 1 988) (describing, although ultimately rejecting, defendants' argument that 18 U.S.C. § 3553(e) violates equal protection "because minor participants and those of relatively low culpability are without sufficient knowledge to avail themselves of the provision"), *cert. denied,* 489 U.S. 1022 (1989).

[37]*See e.g., United States v. Horn,* 946 F.2d 738, 746 (10th Cir. 1991) ("[T]he sentencing disparity created by application of [18 U.S.C.] § 3553(e) and § 5K1.1 to some codefendants and not others does not offend equal protection because a rational connection exists between obtaining information concerning narcotics and providing an opportunity for a sentence reduction in exchange for such information."); *Musser,* 856 F.2d at 1487 (applying a similarly deferential standard of review).

Of the non-constitutional challenges lodged against the Section 5K1 .1 government motion requirement, the strongest argument was that of statutory interpretation. Litigants argued that Section 5K1.1's government motion requirement conflicts with the congressional directive that the Sentencing Commission "assure that the guidelines reflect the general appropriateness of imposing a lower sentence"[38] for defendants who provide substantial assistance to the prosecutor.[39] Because the government motion requirement makes the substantial assistance departure "not generally appropriate, but rather, appropriate only insofar as the prosecutor ... decides to file a motion,"[40] 28 U.S.C. § 994(n) is arguably left unsatisfied.[41] Yet courts disagreed, concluding that Section 5K1.1 fulfills the statutory directive.[42]

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[38]28 U.S.C. § 994(n).

[39]*See, e.g.,* Lee, *supra* note 1, at 1 40 ("By requiring the prosecutor to file a motion before the court can depart, Section 5K1.1's government motion requirement arguably contradicts the broad congressional intent manifested in Section 994(n).").

[40]*See* Lupkin, *supra* note 19, at 1535 (quoting 28 U.S.C. § 994(n)) (internal quotation marks omitted).

[41] *See, e.g.,* Lee, *supra* note 1, at 140.

[42]*See, e.g., United States v. White,* 869 F.2d 822, 828-29 (5th Cir.), *cert. denied,* 490 U.S. 1112 (1989).

In *In re Sealed Case,* 149 F.3d 1198, 1204 (D.C. Cir. 1998), a panel for the District of Columbia Court of Appeals attempted to restore some, albeit limited, discretion to a sentencing judge to depart based on a defendant's substantial assistance in the absence of a government motion, "where circumstances take the case out of the relevant guideline heartland." Applying the Supreme Court's analysis in *Koon V. United States,* 518 U.S. 81, 93 (1996), and relying on 18 U.S.C. §3553(b) (permitting departures for circumstances not adequately taken into account by the Commission), the D.C. Circuit concluded that a substantial assistance departure absent a government motion was "not encompassed by nor equivalent to any mentioned, encouraged, or discouraged factor" in the guidelines, policy statements or official commentary of the Sentencing Commission, and thus district courts are authorized to depart where circumstances take the case out of the relevant guideline heartland. *In re Sealed Case,* 149 F.3d at 1203-04.

The future of the panel's decision in *In re Sealed Case* is uncertain, at best. Although the Fifth Circuit adopted the decision, *United States v. Solis,* 161 F.3d 281, 283 (5th Cir. 1998), the Third Circuit has refused to adopt a similar holding, *United States v. Abuhouran,* 161 F.3d 206, 213-14 (3d Cir. 1998), and the D.C. Circuit subsequently granted a rehearing *en banc* and vacated the panel's decision. *In re Sealed Case,* 159 F.3d 1362 (D.C. Cir. 1998). In any event, given the Supreme Court's instruction in *Koon* that courts should bear in mind the Sentencing Commission's expectation that departures based on grounds not mentioned in the guidelines will be "highly infrequent," 518 U.S. at 96, it is likely that the exception to the government motion requirement proposed in *In re Sealed Case,* even if it survives further scrutiny, will be available to only a very few cooperating defendants.

Second, commentators argued that 28 U.S.C. § 994(n)'s silence on the issue of the government motion requirement coupled with 18 U.S.C. § 3553(e)'s express government motion language demonstrates congressional intent not to include such a requirement in the case of a substantial assistance departure from the guidelines.[43] The interpretive maxim *expressio unius est exclusio alterius* —"explicit direction for something in one provision, and its absence in a parallel pro-vision, implies an intent to negate it in the second context"[44] — indicates that Congress did not want the Sentencing Commission to require a government motion in Section 5K1.1.[45] Courts also rejected this argument, finding that the government motion requirement "does not contravene any express provision" and falls within the Sentencing Commission's broad authority to promulgate guidelines.[46]

Third, litigants argued that Section 5K1.1 should not be binding on courts because the Sentencing Commission labeled that Section a policy statement, not a guideline. This position was adopted by the Court of Appeals for the Eighth Circuit, sitting *en banc*, in *United States v. Gutierrez*,[47] and had support from other courts as well.[48] The Supreme Court implicitly rejected this argument, however,

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[43]*See* Lee, *supra* note 1, at 140-41 . Both sections 994(n) and 3553(e) were enacted pursuant to the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1007(a), 1008, 100 Stat. 3207.

[44]*See* Lupkin, *supra* note 19, at 1539 (quoting *Clinchfield Coal Co. v. Federal Mine Safety and Health Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990)). There is lit-tie legislative history on these provisions. They were initially introduced by President Ronald Reagan in a bill sent to Congress entitled "The Anti-Drug Enforcement Act of 1 986," *see* HR. Doc. No. 99-266, 99th Cong., 2d Sess. 109-10 (1986), during the final weeks of the 99th Congress. These provisions appeared nine days later in Senator Dole's bill, S. 2878. This bill was in turn incorporated in HR. 5484 the following day, which was then passed by Congress on October 1 7, 1 986, and signed by the President on October 27, 1 986. The only discussion of these provisions gives no useful insights into Congress' intent as to why it incorporated the government motion requirement. *See* HR. Doc. No. 99-266, 99th Cong., 2d Sess. 110 (1986).

[45]*See* Lee, supra note 1, at 141.

[46]*See United States v. Agu*, 949 F.2d 63, 65 (2d Cir. 1991), cert. den/ed, 504 U.S. 942 (1992).

[47]917 F.2d 379 (8th Cir. 1990) (*en banc*).

[48]*See e.g., White*, 869 F.2d at 829 ("This policy statement obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such substantial assistance."); *see also United States v. Bayles*, 923 F.2d 70 (7th Cir. 1991) (noting with surprise that the defendant, who had been denied a substantial assistance motion by the prosecutor, had not challenged Section 5K1.1 as a non-binding policy statement rather than a guideline).

when it held that Section 5K1.1 's government motion requirement is binding on the court except in extraordinary circumstances.[49]

In addition to challenging the legality of the government motion requirement, several courts have relied on contract principles in an effort to limit prosecutorial discretion where the government enters into a cooperation agreement that pro-vides for a government motion should certain conditions be met. In *United States V. Harpaul,*[50] the court relied on the principle of specific performance to award a Section 5K1.1 departure in the absence of a government motion. The U.S. Attorney's Office refused to move, despite the views of the line assistants that the defendants' cooperation merited Section 5K1.1 letters, on the basis that the cooperation had not resulted in any arrests. Finding that one of the line prosecutors had told defense counsel that a government motion would not be dependent on an arrest, the court concluded that that promise limited the government's discretion in determining what constituted substantial assistance.[51]

However, prosecutors have successfully eluded such review by specifying in their cooperation agreements that the decision to move for a substantial assistance departure is left entirely to the discretion of the U.S. Attorney's Office. Thus, cooperation agreements in the Southern and Eastern District of New York, for example, typically provide that the government's sole assessment of the value, truthfulness, completeness and accuracy of the cooperation shall be binding upon the defendant.[52] The Second Circuit has interpreted this language to permit a prosecutor to withhold a Section 5K1.1 motion where he or she is "honestly, even though unreasonably, dissatisfied."[53]

In sum, the legality of Section 5K1.1 and the government motion requirement have been heavily contested. Although these legal challenges have succeeded very rarely, they underscore the broad dissatisfaction with the provision and its operation. The policy statement continues to generate considerable controversy and it appears clear to this Committee that if this controversy is to be resolved, amendment of the provision is required.

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[49] *See Wade,* 504 U.S. at 185.

Additionally, a rather unusual legal challenge to the practice of providing leniency for cooperation achieved fleeting success in the Tenth Circuit. A panel of the Tenth Circuit ruled that a prosecutor violated 18 U.S.C. § 201(c)(2), a federal anti-gratuity statute, when he offered leniency to a defendant in exchange for truthful testimony. *See United States v. Singleton,* 144 F.3d 1 343 (10th Cir. 1998). However, the Tenth Circuit sitting *en banc* vacated the panel's decision, and concluded that the statute was not violated. *See United States v. Singleton,* No. 97-3178, 1999 WL 6469 (10th Cir. Jan. 8, 1999). Other courts have also been quick to reject the panel's decision. *See, e.g., United States v. Ware,* 161 F.3d 414, 424 (6th Cir 1998).

[50] *United States v. Harpaul,* No. 97-303 (E.D.N.Y. Sept. 5, 1998).

[51] *See id.*

[52] *See* Elkan Abramowitz, *Prosecutorial Input on Downward Departures for Assistance,* 221 N.Y.L.J. 3 (1999).

[53] *United States v. Rexach,* 896 F.2d 710, 713 (2d Cir.), *cert. denied,* 498 U.S. 969 (1 990) (citation omitted); *see also, e.g., United States v. Fernandez,* 127 F.2d 277 (2d Cir. 1997) (upholding the district court's refusal to compel a Section 5K1.1 motion where the cooperator's assistance resulted in the arrest and indictment of 29 members of an auto theft ring, but where the cooperator lied about contacting another defendant).

III.CRITICISMS OF SECTION 5K1.1 IN PRACTICE

In the ten years since the promulgation of Section 5K1.1, a broad spectrum of critics, including judges, practitioners, probation officers, legal scholars and other observers, have voiced their discontent with the policy statement. Prominent among the concerns expressed by these critics is that, contrary to the goals of the guidelines, the policy statement generates widespread inequities in sentencing, and fails to promote the law enforcement goals for which Section 5K1.1 was designed. Empirical evidence recently published by the Sentencing Commission substantiates these criticisms and points to additional concerns with the manner in which Section 5K1 .1 is being implemented.

This section discusses the major criticisms of Section 5K1.1. First, this section examines problems directly associated with the government motion requirement. The report then discusses the lack of guidance given to judges in determining whether to depart, and the disparities in substantial assistance departure rates across different judicial districts. Next, the report examines critics' claims that Section 5K1.1 awards more culpable defendants with shorter sentences than less culpable defendants. Finally, this section considers the unwarranted disparities in the magnitude of substantial assistance departures.

A. The Government Motion Requirement

A focal point of the controversy surrounding Section 5K1.1 is the government motion requirement.[54] Objections to the "gate-keeper" role of prosecutors generally fall into three categories: (1) prosecutors are not consistently defining "substantial assistance," which generates unwarranted disparities in sentencing; (2) the motion requirement is an unwise and unnecessary transfer of discretion from the judiciary to the prosecutor, a partisan in sentencing proceedings; and (3) affording prosecutors the power to determine whether a defendant receives a substantial assistance departure undermines the law enforcement goals of Section 5K1.1.

1 . Substantial Assistance is Inconsistently Defined Among U.S. Attorneys

First, the gate-keeping requirement is problematic because prosecutors do not consistently define substantial assistance. Consequently, there is no certainty among defendants who provide assistance that they will receive Section 5K1.1 motions, and defendants who provide substantially identical assistance are treated dissimilarly at sentencing.

Professor Cynthia Kwei Yung Lee, a scholar who has written extensively on Section 5K1.1, has provided specific case studies demonstrating the inconsistent application of the government motion requirement. Comparing two cases in the Northern District of Illinois, for example, Professor Lee noted that two defendants

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[54] *See, e.g.,* Lee, *supra* note 1, at 112; Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines,* 117 F.R.D. 459 (1988) (sentencing discretion should be in the hands of judges, not prosecutors); Kelley, *supra* note 20, at 189 ("Section 5K1.1 places too much discretion with the prosecutors . . . it has not solved the overall disparity problem but has merely shifted responsibility therefor to other officials [citation and internal quotation marks omitted]."); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines,* 66 S. Cal. L. Rev. 501, 541 (1992); Powell & Cimino, *supra* note 6, at 391-92.

provided almost equivalent forms of cooperation.[55] In the first case, the defendant offered the name of his source, offered to try to implicate the source in a telephone conversation, and offered to testify against the source. In the second case, the defendant gave the government the names of her suppliers and offered to testify against the suppliers. The first defendant agreed to cooperate immediately, while the second defendant did not cooperate until approximately one year after her arrest. Neither defendant ultimately testified because the government was unable to charge and prosecute the named drug suppliers.[56]

In the first case, the prosecutor refused to file a substantial assistance motion, citing the government's inability to ultimately prosecute the source. However, the prosecutor in the second case filed a Section 5K1.1 motion, despite the fact that the government could not prosecute the named suppliers. Criticizing the resulting disparity, Professor Lee concluded that "[d]espite an internal policy in that .S. Attorney's] office n what constitutes substantial assistance], neither defendant was treated similarly by the same U.S. Attorney's Office, and neither defendant was able to predict with any certainty whether they would receive a favorable sentencing recommendation from the prosecutor."[57] Other scholars have observed similar inconsistencies.[58]

The disparities created by the inconsistent use of the government motion among individual prosecutors are magnified by the absence of any national standard defining substantial assistance, and the divergent Section 5K1.1 policies among individual U.S. Attorney's Offices.[59] Neither the text of Section 5K1.1, nor Section 5K1.1's enabling provision, 28 U.S.C. § 994(n), defines substantial assistance, and the legislative history of 28 U.S.C. § 994(n) gives no indication of what Congress intended when it used the term.[60] Moreover, the Department of Justice has not articulated any meaningful standards to guide prosecutors making this decision.[61]

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[55]*See* Lee, *supra* note 1, at 123-24.

[56]*See id.*

[57]*See* Lee, *supra* note 1, at 124.

[58]*See, e.g.,* Nagel & Schulhofer, *supra* note 54, at 522-23, 541.

[59]*See* Freed, *supra* note 13, at 1711-12; *see also Ming He,* 94 F.3d at 788 (criticizing the lack of guidance given to prosecutors in Section 5K1.1).

[60]*See supra* note 44. The lack of any guidance in the statute may be a result of the rushed pace with which the enabling legislation was drafted. In a news piece on Section 5K1.1, Eric Sterling, an attorney who worked for the House Crime Subcommittee at the time that Congress was drafting the legislation that led to Section 5K1.1, said that the Subcommittee staff was "racing to get done." Linnet Myers, The Dallas Morning News, March 26, 1 995, at 12A, *reprinted in* 1995 WL 7478163.

[61]Although the Department of Justice issued a Prosecutors' Handbook on Federal Sentencing Guidelines, otherwise known as "The Red Book," see Criminal Division, U.S. Dept of Justice, *The Prosecutors' Handbook on Federal Sentencing Guidelines and other Provisions of the Sentencing Reform Act of 1984* (1987), the handbook focuses on federal prosecutors' plea bargaining tactics and leaves unaddressed the issue of substantial assistance. *Id.; see also* Paul M. Secunda, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct,* 34 Am. Crim. L. Rev. 1267, 1283 (1997) (describing the lack of guidance given to prosecutors).

In the absence of any nationwide policy defining substantial assistance, the task was left to the U.S. Attorney's Office in each district to establish internal guidance. As Professor Lee noted, the different substantial assistance policies in the different districts "virtually guarantee" that substantial assistance motions will be defined differently from office to office.[62]

Empirical data on the Section 5K1.1 policies across different U.S. Attorneys' Offices substantiate this criticism. One analysis of the departure practices in two districts found that prosecutors in the District of Connecticut generally file a motion for substantial assistance only if the information given by the defendant results in the prosecution of someone of equal or greater value "in the criminal food chain."[63] By contrast, prosecutors in the District of Massachusetts file substantial assistance motions provided that the defendant is truthful, regardless of the relative culpability of the cooperating defendant and the defendant being investigated or prosecuted as a result of that cooperation.[64]

Another study likewise reported that, in the Northern District of Illinois, an Assistant U.S. Attorney will not make a substantial assistance motion unless the defendant actually assists in the prosecution of another suspect, such as testifying at the suspect's trial. Testifying is not considered substantial assistance in the U.S. Attorney's Office for the Central District of Illinois, however; prosecutors in that district will only file a Section 5K1.1 motion if the defendant goes undercover and wears a "wire" to help law enforcement authorities apprehend other suspects.[65] Finally, in the United States Attorney's Office in another district, the government will move only when cooperation results in additional charges or convictions.[66]

These reports suggest that whether a defendant receives a substantial assistance motion depends on the district in which that defendant is prosecuted and the individual prosecutor who is bringing the case. Inevitably, these inconsistencies

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[62] *See* Lee, *supra* note 1, at 125.

[63] *See* Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A THe of Two Districts,* 30 Conn. L. Rev. 569, 586 (Winter 1988).

[64] *See* Farabee, *supra* note 63, at 599. There are also a number of regional influences that contribute to the disparities between the districts. For example, Massachusetts has many large-scale, inner-city drug prosecution cases which often involve co-defendants, making cooperation from at least one defendant likely. *See id.*

[65] *See* Lee, *supra* note 1 , at 124-25.

[66] *See* Nagel & Schuihofer, *supra* note 54, at 531 . The Sentencing Commission staff has also reported that even where prosecutors' offices have similar substantial assistance policies, those policies are frequently ignored. A report released this year by the Sentencing Commission's Acting Director of the Office of Policy Analysis, Linda Drazga Maxfield, and Staff Director, John H. Kramer, indicated that only 44.4 percent of the U.S. Attorneys' Offices operate in complete consistency with their policy, while 33.3 percent demonstrated no con-sistency with their policy. *See* Maxfield & Kramer, *supra* note 5, at 8. Therefore, the existence of an internal policy does not ensure that Assistant U.S. Attorneys will consistently define substantial assistance in practice.

lead to unwarranted disparities in the sentences of defendants who provide similar assistance.[67]

Finally, there is no indication that prosecutors are developing consistent substantial assistance practices although that policy statement has been in use for over ten years.[68] In 1991, the Sentencing Commission found "some unevenness and unwarranted use among U.S. Attorneys' Offices and individual prosecutors of prosecutorial motions to depart below the guidelines range based on a defendant's substantial assistance in the investigation or prosecution of other persons."[69] Again in 1993, the Sentencing Commission reported wide variations in the kinds of assistance that resulted in Section 5K1.1 departures.[70] Continuing in this same trend, a study released in 1997 by the United States Sentencing Commission Substantial Assistance Working Group (the "Substantial Assistance Working Group") concluded that there are "important differences in the kinds of assistance given by defendants that result in substantial assistance motions."[71] These studies give the Committee no reason to believe that government control of the process through its motion requirement will generate fewer unwarranted sentencing disparities in the future.

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[67] *See* Lee, *supra* note 1 at 123-24, Nagel & Schulhofer, *supra* note 54, at 522-23, 541 (concluding that the Section 5K1.1 government motion requirement has the potential to create sentencing disparities which the guidelines were intend-ed to eliminate); John S. Austin, Note: *Prosecutor/al Discretion and Substantial Assistance: The Power and Authority of Judicial Review - United States v. Wade,* 15 Campbell L. Rev. 263, 273 (Summer 1993) ("The standards used to determine whether a defendant's cooperation merits a motion for a reduction of sentence vary widely from one United States Attorney's Office to another. Substantial assistance warranting a departure in one district may not be sufficient to warrant departure in other districts; thus nonconformity [is] inherently prevalent with such prosecutorial discretion.").

[68] Indeed despite the publication over the past ten years of studies indicating the wide disparities in Section 5K1.1 practices and departure rates across districts, the Department of Justice has failed to issue any policy guidelines to minimize such disparities.

[69] United States Sentencing Commission, 1991 Annual Report (1992).

[70] *See* United States Sentencing Commission, 1993 Annual Report 11, 161-62 (1994).

[71] The United States Sentencing Commission Substantial Assistance Working Group, *Federal Court Practices: Sentence Reductions Based on Defendants' Substantial Ass/stance to the Government* 3 (May 1997). An explanation of the methodologies used by the Substantial Assistance Working Group in obtaining the empirical data in support of its report can be found at pages 143-46 of the Substantial Assistance Working Group report.

2. The Motion Requirement is an Unwise Shift in Discretion from Judges Prosecutors

In addition to the inconsistency with which prosecutors are defining substantial assistance, the government motion requirement effects an unnecessary and imprudent shift of power from the judiciary to an adversary in the criminal sentencing process. Judge Edwards, sitting on the United States Court of Appeals for the District of Columbia, wrote a separate concurrence in *United States v. Harrington,* in which he enumerated his concerns with prosecutorial discretion under the guidelines:

> I address the gamesmanship of the Guidelines and the problematic roles of U.S. Attorneys . . . only to emphasize that the guidelines have . . . merely transferred [discretion] from district judges — who, whatever their perceived failings, are at least impartial arbiters who make their decisions on the record and subject to public scrutiny and appellate review — to less neutral parties who rarely are called to account for the discretion they wield. Thus, the discretion and disparity game continues, it is only the players who have changed. [72]

In noting his particular concern with prosecutorial discretion in the Section 5K1.1 context, Judge Edwards further commented, "One wonders whether the Guidelines, in transferring discretion from the district judge to the prosecutor, have not left the fox guarding the chicken coop of sentencing uniformity."[73]

The Substantial Assistance Working Group polled U.S. Attorneys in each district on their definition of substantial assistance. Of the eighty-nine U.S. Attorneys asked what would preclude a substantial assistance motion, sixty-one percent said they would not file a motion if the defendant continued misconduct while cooperating, while thirty-nine percent of the U.S. Attorneys felt that this would not be determinative. The U.S. Attorneys were almost evenly divided on whether they would file a substantial assistance motion if the defendant were more culpable than those about whom he or she offered information. Twenty-five percent of the U.S. Attorneys also reported that they would not file a motion if the defendant were already cooperating in an unrelated investigation or prosecution. Another eighteen percent disagreed with the majority of the respondents, and said they would not file a Section 5K1.1 motion if a defendant violated specific statutes or engaged in violent acts. Finally, a significant minority, sixteen percent, of the U.S. Attorneys reported that they would not file a substantial assistance motion if the defendant had an extensive or violent criminal history. *Id.*

[72]*See, e.g., United States v. Harrington, 947* F.2d 956, 966-67 (D.C. Cir. 1991) (Edwards, J. , concurring).

[73]*Harrington,* 947 F.2d at 965 n.5.

Likewise, in *United States v. Roberts,*[74] *a* district court was confronted with a situation where *a* prosecutor promised to move for *a* Section 5K1.1 departure, and the defendant in fact provided assistance, but where the government ultimately refused to move for the departure. In support of his position, the prosecutor cited a decision by *a* review committee in the prosecutor's office which had, for unspecified reasons, refused to authorize the motion. Finding the government motion requirement unconstitutional, the district judge stated:

> [T]o substitute prosecutors for judges with respect to the sentencing responsibility is no more compatible with due process than would be the prosecutorial assumption of such other functions as the conduct of hearings on bail or on motions to suppress. . . . It is difficult to conceive of *a* parallel situation in the law where substantial liberty interests and consequences provided for by statute are beyond the power of inquiry ….[75]

This shift in discretion also led the Second Circuit to create *a* right to counsel at cooperation debriefings as *a* procedural protection against prosecutorial abuse in the cooperation context. Judge Cardamone, writing for the majority, justified the need for this procedural device by stating:

> When the power to authorize the sentencing court to make *a* downward departure . . . was vested in the prosecutor, *a* change occurred in the dynamics of sentencing. Formerly this power was lodged in *a* neutral judge, but now it resides initially in the hands of the prosecutor, an interested party in *a* criminal proceeding. Such *a* change in authority has the potential to tilt this aspect of *a* criminal prosecution unfairly in favor of the government. This potential for unfair treatment is troubling. . . . To create in the interest of fairness *a* more level playing field . . . we think when *a* cooperating witness is debriefed he is entitled to the assistance of counsel.[77]

Legal scholars have echoed similar concerns, arguing that prosecutorial discretion is less desirable than judicial discretion because it leaves too much control in the hands of an interested party.[78] This is particularly vexing where a defendant has exercised his right to *a* trial: "The prosecutor spends *a* significant amount of time compiling evidence and working zealously to convict defendants on trial.... [T]his role makes it difficult for the prosecutor to be objective regarding the imposition of sentencing after conviction."[79] Other commentators have cautioned that

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[74]*See Roberts,* 726 F. Supp. at 1368.

[75]*Roberts,* 726 F. Supp. at 1368, 1375.

[76]*United States v. Ming He,* 94 F.3d 782 (2d Cir. 1996).

[77]*Ming He,* 94 F.3d at 785.

[78]*See* Lee, *supra* note 1, at 171; Lupkin, *supra* note 19, at 1544-45; Patricia A. Seddon, Note, *Pennsylvania Supreme Court Review,* 1988, *Recent Decisions, Mandatory Minimum Sentencing Act — Commonwealth v. Wooten,* 62 Temp. L. Rev. 737, 744 (1989); Kelley, *supra* note 20, at 198 ("Merely looking to the good faith of an opposing party is not the same as having *a* neutral judge objectively deciding] the issue."); Karen Bjorkman, *Who's the Judge? The Eighth Circuit's Struggle with Sentencing Guidelines and the Section 5K1.1 Departure,* 18 Wm. Mitchell L. Rev. 731, 755-56 (1992) ("[B]y giving this authority to the prosecutor, sentencing discretion is vested in *a* party who is an adversary against that defendant, and who, by the very role assumed in the process, cannot be objective.").

[79]Lee, *supra* note 1, at 171 (citation and internal quotation marks omitted).

prosecutors are subject to a wider range of pressures than judges, from adversarial to professional to political.[80] Consequently, defendants with similar records who provide similar assistance may receive radically different sentences simply because of each prosecutor's biases.[81]

The discretion afforded prosecutors in Section 5K1.1 is particularly problematic in light of the fact that "the sentencing guidelines already lodge enormous discretion in the prosecutor."[82] As one commentator noted:

> Prosecutors can now determine what the sentence will be or what they want it to be prior to indictment: prosecutors know what specific facts will increase sentences and which ones will decrease sentences; they know that they can criminally charge the best or most minimal portion of their case and nonetheless gain the benefit of the weak or biggest part of their case through sentencing proceedings . . . and they know that constitutional obligations imposed upon them are not nearly as strong at sentencing as they are in prior phases of the process.[83]

Accordingly, scholars have argued that to add to these discretionary functions the power to block a sentencing court's consideration of cooperation tilts the balance too heavily in favor of the prosecutor.[84]

a. *Empirical Evidence Establishes that Prosecutors Are Making Substantial Assistance Determinations for Reasons Unrelated to Whether the Defendant's Assistance is Substantial*

Empirical evidence establishes that prosecutors are using the gate-keeping requirement for their own agendas, unrelated to whether the defendant's assistance is substantial. First, prosecutors are using the gate-keeping requirement in response to local pressures and concerns that have no bearing on the defendant's assistance. Of the U.S. Attorneys polled by the Substantial Assistance Working

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[80] *See* Steve Y. Koh, *Reestablishing the Federal Judge's Role in Sentencing,* 101 Yale L.J. 1109, 1124 (1992).

Describing as "ominous" the implications of placing the discretion to depart in the hands of the prosecutor, one legal scholar summarized:

> [I]t is not unusual for prosecutors to award concessions to compliant defendants without exacting the quality and extent of cooperation contemplated by the plea agreement, or to mete out concessions on an irrational basis. Often, substantial assistance is a fiction. On the other hand, many federal judges feel that they do not have the time, energy, and resources to monitor the government's exercise of this discretion and, when they do, federal prosecutors have challenged judicial review as an encroachment into the executive province. Because prosecutors have the fallback position of handing out these rewards, some tend to overcharge a case or hide the infirmities in their evidence until the threat of trial is imminent.

Daniel J. Sears, *Federal Sentencing Guidelines — The Good, the Bad and the Ugly,* 26 Feb. Cob. Law. 3, 5 (1997).

[81] *See* Koh, *supra* note 80, at 1163.

[82] Cynthia KY. Lee, *The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement,* 23 Ind. L. Rev. 681, 698-99 (1990).

[83] *See* Powell & Cimino, *supra* note 6, at 383.

[84] *See id.*

Group, two percent reported that they no longer make substantial assistance motions because they feel that once they do, the courts depart too far below mandatory statutory minimums.[85] In contrast, several U.S. Attorneys' Offices responded that they make Section 5K1.1 motions frequently because of the number of multi-defendant narcotics cases and the need to use such motions to dismantle large drug organizations. Another U.S. Attorney said Section 5K1.1 motions were frequently made to help eliminate docket congestion. Finally, a U.S. Attorney from another district reported that because of the loss of resources, more motions had to be filed in order to plead more cases.[86]

Second, prosecutors use the government motion requirement as a means of pressuring defendants to plead guilty, rather than exercising their right to a trial. Section 5K1.1 motions are often made in the plea bargaining context, and there-fore defendants must concede guilt before receiving a substantial assistance departure.[87] As most aspects of plea bargains, including charging decisions, are left to the discretion of prosecutors, Section 5K1.1 gives prosecutors tremendous power to determine the defendant's ultimate sentence.

This is particularly true of those offenses that carry mandatory minimum sentences, because courts may not depart from statutory minimums absent a government motion.[88] In such contexts, substantial assistance departures provide one of the few avenues of escape open to defendants facing mandatory minimum sentences.[89] Accordingly, critics assert that because of the pressure upon defendants to avoid the mandatory minimums, prosecutors have used substantial assistance departures to obtain guilty pleas even where the evidence in the prosecution's case against the defendant is weak or where there is some other defect in their case,[90]

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[85] *See* Substantial Assistance Working Group, *supra* note 71, at 37.

[86] *See* Substantial Assistance Working Group, *supra* note 71, at 38-39.

[87] *See* Deborah F. Dezelan, Case Comment, *Departures from the Federal Sentencing Guidelines,* 72 Notre Dame L. Rev. 1679, 1721 n.40 (July 1997).

[88] 18 U.S.C. § 3553(e). *See also Melendez v. United States,* 51 8 U.S. 120 (1996) (requiring separate government motion from that required to depart from the guideline sentence).

Although not the focus of this report, the Committee notes that mandatory minimums have themselves been the subject of considerable controversy and criticism. Indeed, the Sentencing Commission itself has reported on the undesirable consequences of mandatory minimums, including the inequities they generate in sentencing. *See* U.S. Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 5-26 (Aug. 1991). The Committee agrees with the findings of the Sentencing Commission, and urges that mandatory minimums be reconsidered.

[89] The legislative history of 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) indicates that Congress intended substantial assistance departures to provide an escape from mandatory minimums. Congress recognized that in the absence of departures from the mandatory minimums, there would be little incentive to cooperate. *See* Anti-Drug Enforcement Act of 1986, HR. Doc. No. 99-266, 99th Cong., 2d Sess. at 109-10 (1986).

[90] *See* Vincent L. Broderick, Flexible Sentencing and the Violent Crime Control Act of 1994, 7 Fed. Sent. R. 128, 128-29 (Nov/Dec. 1994); Sears, *supra* note 80, at 5.

or as a significant bargaining chip in the plea context[91]

Third, prosecutors choose not to make Section 5K1.1 motions even where defendants provide substantial assistance, in order to retain control over the defendant's ultimate sentence.[92] For example, a prosecutor may intentionally refrain from making a Section 5K1.1 motion in a case where a cooperating drug dealer is permitted to plead to a superseding count carrying a significantly smaller sentence under the guidelines than if he had been charged for the drug dealingoffense.[93] Because utilizing the Section 5K1.1 motion would have left the defendant's ultimate sentence to the discretion of the judge, the prosecutor and defense counsel can better assure a defendant's sentence by circumventing the Section 5K1.1 route.[94] Contrary to the intent of the guidelines, these practices deprive the judge from serving as any kind of arbiter of the final sentence of a cooperating defendant.

One study has indicated that in approximately twenty to thirty-five percent of cases, prosecutors circumvent the guidelines, and specifically Section 5K1.1, by failing to file a government motion.[95] Additionally, one judge, expressing his frustration with this process, has noted that "Assistant U.S. Attorneys . . . have been heard to say, with open candor, that there are many 'games to be played,' both in charging defendants and in plea bargaining, to circumvent the Guidelines. Because of this reality, sentences under the Guidelines often bear no relationship to what the Sentencing Commission may have envisioned as appropriate."[96]

Finally, empirical studies recently released by the Sentencing Commission staff indicate that personal characteristics, such as the gender and race of the defendant, play a role in the frequency with which prosecutors make Section 5K1.1 motions. Although the Sentencing Commission staff noted that its statistics

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[91] *See* Julie Gyurci, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement; Enforcing a Good Faith Standard,* 78 Minn. L. Rev. 1253, 1265 (May 1994) ("[P]rosecutors circumvent the Guidelines through plea agreements in twenty to thirty-five percent of all cases involving pleas. Prosecutors typically misuse their power to benefit defendants by surreptitiously making unwarranted substantial assistance motions…"), citing Henry H. Wray, U.S. Gen. Accounting Office, *Mandatory Minimum Sentences: Are They Being Imposed and Who is Receiving Them?,* Testimony before the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary 3-4 (1993).

[92] *See* Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period,* 91 Nw. U. L. Rev. 1284, 1296-97 (1997). The unpredictability of sentencing not only affects the prosecutor and defendant, but also the public, which has an interest in being able to accurately predict the likely consequences of criminal action. *See* Lee, *supra* note 1, at 121.

[93] *See* Schulhofer & Nagel, *supra* note 92, at 1291.

[94] *See id.*

[95] *See* Schulhofer & Nagel, *supra* note 92, at 1285.

[96] *United States v. Harrington,* 947 F.2d 956, 964 (D.C. Cir. 1991) (Edwards, J., concurring).

on this were not conclusive,[97] it found that defendant characteristics have an "appreciable impact" on the outcome of a defendant's sentence, and that a defendant's race and gender had "as much of an impact as legally relevant characteristics on the probability of receiving a Section 5K1.1 departure"[98]

In sum, the empirical evidence supports the criticisms that prosecutors are using their gate-keeping role to further interests unrelated to whether the defendant's assistance is substantial. Consequently, the motion requirement is generating the very inequities that the guidelines were intended to eliminate.

b. Prosecutorial Discretion in the Government Motion Requirement Undermines the Goal of Section 5K1. 1 of Encouraging Cooperation

Additionally, the broad grant of discretion to prosecutors in Section 5K1.1 frustrates the law enforcement goals underlying the policy statement. Because prosecutors have such broad discretion in determining whether to make a Section 5K1.1 motion, a defendant providing assistance has no means of determining, outside of a specific government promise in a plea bargain, whether he will receive a government motion as a result of that cooperation. And a defendant who cannot gauge the likelihood that he will receive any benefit in exchange for his incurring the risks inherent in cooperation is less likely to provide assistance.[99] Indeed, because of the prosecutor's gate-keeper powers, a defendant who distrusts a prosecutor's good faith may withhold valuable cooperation because he fears he will suffer the costs of that cooperation without the benefits.[100]

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[97]The Substantial Assistance Working Group noted that it was missing some information on the district charging practices, plea bargaining practices, and other detailed information on the type and usefulness of information to the prosecutors, and that these could have been the bases for these statistics. However, the report noted that the currently available data that control for the most important variables used in disparity analyses raise questions of racial, ethnic, nationality, and gender disparities in the use of Section 5K1.1. *See* Substantial Assistance Working Group, *supra* note 71, at 147.

[98]Substantial Assistance Working Group, *supra* note 71, at 181; *see also* Maxfield & Kramer, *supra* note 5, at 13-14 ("Even more worrisome, legally irrelevant factors *(e.g.,* gender, race, ethnicity, citizenship) were found to be statistically significant in explaining § 5K1.1 departures.").

Maxfield and Kramer similarly reported that the personal characteristics of a defendant had a "significant impact" on the probability of receiving a substantial assistance departure, and that "legally irrelevant factors also appeared to have played an influential role in the degree of a § 5K1.1 departure." Maxfield & Kramer, *supra* note 5, at 14, 18.

[99]*See* Lee, *supra* note 1, at 118-21 (describing the deterrent effect that certainty provides for persons thinking of committing crimes).

[100]Moreover, the government motion requirement in the context of mandatory minimum sentences may encourage defendants to provide false information so as to avoid harsh sentences. *See* Broderick, *supra* note 90, at 128; Sears, *supra* note 80, at 5. This, in turn, prevents limited law enforcement resources from being used to investigate or prosecute other offenders who are in fact engaging in illegal conduct. Accordingly, while Section 5K1.1 has the potential to serve as a useful and important aid to law enforcement, the manner in which Section 5K1.1 is being implemented in practice may actually hinder the policy statement's rationale.

c. There is No Significant Check on Prosecutorial Discretion

Finally, the gate-keeper role given to prosecutors is particularly problematic given the absence of any significant checks on the prosecutor's decision not to file a motion. Courts may review a prosecutor's refusal to file a substantial assistance motion only in the limited circumstances of determining: (1) if the refusal was based on an unconstitutional motive; (2) if the government breached an agreement in a plea bargain; or (3) if the refusal to file a motion was not rationally related to any legitimate government end.[101] Moreover, even where a defendant can show that he has provided substantial assistance, he or she is not entitled to an evidentiary hearing or discovery.[102] Thus, for the great majority of defendants, the prosecutor's decision whether to file a Section 5K1.1 motion will be final:

> Unlike the many procedural safeguards that protect a defendant even after he is charged, such as the judicial determination of probable cause, the preliminary hearing, or indictment by a grand jury, there are few procedural safeguards protecting the defendant from an incorrect sentencing decision. . . . If the prosecutor's assessment of the defendant's assistance — as insubstantial and thus not deserving of a substantial

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[101] *Wade v. United States,* 504 U.S. 181, 185-86 (1992); *see also, e.g., United States v. Garcia,* 954 F.2d 12, 17-1 8 (1st Cir. 1 992) (reviewing failure to file Section 5K1.1 motion for breach of plea agreement). The Supreme Court has interpreted the last requirement very loosely, noting that the government may refrain from filing a substantial assistance motion, even where substantial assistance has been rendered, based on its rational assessment of the cost and benefit that would flow from making such a motion. *See id.* at 187. A few courts have also found that the government's discretion to make a substantial motion requirement is limited by due process, and its prohibition against vindictive prosecution. *See Blackledge v. Perry,* 417 U.S. 21, 27 (1974) (due process violated when prosecution brought in retaliation for defendant's exercise of their legal rights); *Willhauck v. Halpin,* 953 F.2d 689, 711 (1st Cir. 1991) (same); *United States v. Khan,* 787 F.2d 28, 31 (2d Cir. 1986) (same). However, vindictiveness is exceedingly difficult to prove and courts have failed to find vindictive prosecution where there was evidence that the government threatened to withhold a Section 5K1.1 motion if the defendant rejected its proposed plea. *See, e.g., United States v. Murphy,* 65 F.3d 758, 763 (9th Cir. 1 995) (no proof of actual vindictiveness when the government conditioned the filing of a Section 5K1.1 motion on the defendant's acceptance of a plea offer even though the government did not discuss the possibility of filing an actual Section 5K1.1 motion until it entered plea negotiations); *United States v. Williams, 47* F.3d 658, 662-63 (4th Cir. 1995) (no vindictiveness where the prosecutor threatened additional sanctions unless the defendant agreed to affirmatively cooperate). *But see United States v. Khoury,* 62 F.3d 1138, 1139-40 (9th Cir. 1 995) (finding vindictiveness where government initially took position at sentencing that defendant had offered substantial assistance and made the appropriate motion, but changed its position before the district court).

[102] *See Wade,* 504 U.S. at 186.

assistance motion — is incorrect, there are no procedural mechanisms to check the correctness of this decision.[103]

B. Judges Are Given Little Guidance as to What Constitutes Substantial Assistance

In addition to the problems associated with the government motion requirement, empirical data corroborate that there are wide disparities in the numbers of substantial assistance departures granted across different district courts. In fiscal year 1991, the Substantial Assistance Working Group found that the "substantial assistance departure rate," or the percentage of Section 5K1.1 departures granted as a percentage of all sentences, varied from 0.0 percent in the District of Rhode Island and the Eastern District of Oklahoma, to 40.9 percent in the Eastern District of Pennsylvania. This disparity increased in fiscal year 1994: the Eastern District of Virginia gave Section 5K1.1 departures in 3.9 percent of all of its cases that year, whereas the Eastern District of Pennsylvania gave substantial assistance departures in 49.3 percent of all of its cases that year.[104] Again, in 1996, the Eastern District of Pennsylvania reported a substantial assistance departure rate of 47.5 percent, while the Eastern District of Oklahoma had a substantial assistance departure rate of 4.4 percent.[105]

The following chart demonstrates the disparity in the substantial assistance departure rates across judicial districts.

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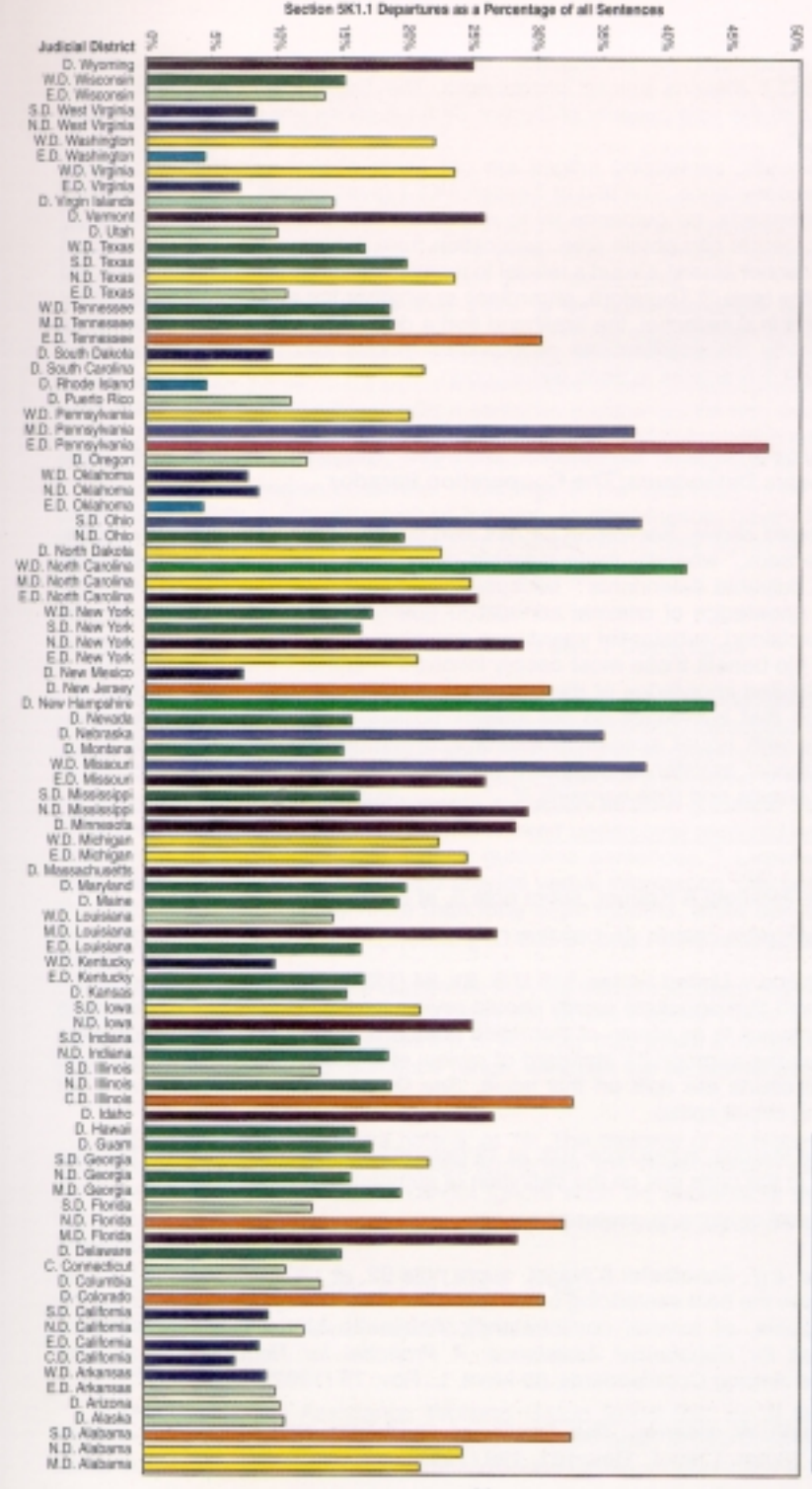
[103]Lee, *supra* note 1, at 173; *see also* Lupkin, *supra* note 19, at 1544-45 ("Since a prosecutor's decision not to file a 5K1.1 motion is, for the most part, beyond the scope of judicial review, this particular aspect of the sentencing process can potentially become more arbitrary than it was prior to the promulgation of the sentencing guidelines.").

This practice conflicts with one of the major goals of the guidelines: to create honesty and predictability in sentencing. *See* U.S. Sentencing Guidelines Manual, ch. 1, pt. A, comment 3 (West 1998); *see also* Stanley Marcus, *Substantial Assistance Motions: What is Really Happening?,* 10 Fed. Sent. Rep. 14 (July/Aug. 1997) ("The guideline system was ... designed to create truth in sentencing…."). Because prosecutors are not typically required to explain why they refused to move for a Section 5K1.1 departure, a defendant has little opportunity to understand why he has not been rewarded for his cooperation.

[104]*See* Substantial Assistance Working Group, *supra* note 71, at 109.

[105]*See* United States Sentencing Commission, 1996 Source Book of Federal Sentencing Statistics 41, Tab. 26 (1996). It is unclear whether these statistics incorporate substantial assistance departures after sentencing. However, because the number of substantial assistance departures after sentencing is small, *see* Substantial Assistance Working Group, *supra* note 71, at 116 (concluding that Rule 35(b) reductions are a small percentage of all sentencing departures or reductions for substantial assistance), it is unlikely that they would have any significant impact on these percentages.

Substantial Assistance Departure Rate Across Judicial Districts for October 1, 1995 to September 30, 1996



Source:
U.S. Sentencing Commission, 1996 Sourcebook of Federal Sentencing Statistics 41-43 (1996). Approximately 1500 cases were excluded from this analysis due to missing or unclear departure information. Additionally, the substantial assistance departure rate for the Northern Mariana Islands, calculated at 85.7%, was excluded from this graph.

One explanation for the disparate departure rate is the inconsistent use of Section 5K1.1 motions among prosecutors. The Sentencing Commission staff indicates that the vast majority of Section 5K1.1 motions are granted as a matter of course.[106]

Additionally, sentencing judges are not given enough direction in defining substantial assistance. The text of Section 5K1.1 gives judges, like their prosecutional counterparts, no guidance as to what constitutes substantial assistance.[107] Moreover, courts can obtain little clarification from the case law, as a defendant generally cannot appeal a court's refusal to depart,[108] and few courts have attempted to define the term.[109] Therefore, regardless of whether the assistance provided by a defendant is substantial, the likelihood that a defendant will receive a departure is affected by the predilections of individual judges and prosecutors, and the Section 5K1.1 practices in each district court.[110]

C. Disproportionate Sentences Between Relatively More and Less Culpable Defendants: The Cooperation Paradox

As stated above, Section 5K1.1 has also been criticized as creating a "cooperation paradox," whereby more culpable defendants receive shorter sentences than less culpable defendants[111] because less culpable defendants do not have sufficient knowledge of criminal conduct to qualify for such departures. As one scholar explained, substantial assistance departures:

> tend [t]o benefit those most deeply involved in crime. Minor participants with limited knowledge of the crimes of others often may have no information that authorities do not already possess.... Even among defendants with equal access to useful information, the availability of a substantial assistance departure may hinge primarily on the timing of their arrests and plea bargains.[112]

[106] *See* Maxfield & Kramer, *supra* note 5, at 5.

[107] *See* Section 5K1.1 and 18 U.S.C. § 3553(e).

[108] In *Koon v. United States,* 518 U.S. 81, 84 (1996), the Supreme Court unanimously held that appellate Courts should review sentencing judges' decisions to depart pursuant to an abuse of discretion standard, and not *de novo. Koon* does not resolve the appropriate standard of review of a court's refusal to depart, and the circuit courts are split on this issue. *See* Dezelan, *supra* note 87, at 1712 (describing circuit splits).

[109] *See* Marcus, *supra* note 103, at 13 (expressing his frustration with the little guidance in the case law on the definition of substantial assistance).

[110] *See* Farabee, *supra* note 63, at 58.

[111] *See, e.g.,* Schulhofer & Nagel, *supra* note 92, at 1306 (Section 5K1.1 "can in effect give the best sentencing break to the most knowledgeable, and hence the most culpable, of several conspirators"); Antoinette Marie Tease, *Downward Departures for Substantial Assistance: A Proposal for Reducing Sentencing Disparities Among Codefendants,* 53 Mont. L. Rev. 75 (1992).

[112] Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity,* 28 Am. Crim. L. Rev. 161, 199 (1991).

Recent empirical data published by the Sentencing Commission staff support this criticism. The Sentencing Commission members found that in approximately thirty-eight percent of drug trafficking conspiracies, defendants with positions of higher authority in the conspiracies received sentences shorter than or equal to at least one less culpable defendant. The Sentencing Commission staff attributed this to the fact that the more culpable defendants received departures for substantial assistance.[113] The staff further observed that five out of eight districts surveyed reported that more culpable defendants were receiving smaller sentences than less culpable defendants through Section 5K1.1 departures.[114]

The Committee recognizes that there is an understandable tendency to obtain the cooperation of "higher ups" in any criminal organization because they are more likely to have encyclopedic knowledge of the operations of that organization. At the same time, there exists a reasonable concern that this affords those most culpable an opportunity to avoid a sentence commensurate with their criminal activity. Additionally, it appears that neither the present rule nor practice encourages prosecutors to find alternative sources for this information, It may well be preferable to obtain the cooperation of several underlings in the operation, none of whom alone can provide a complete picture but who, in combination, have information coextensive with their chief. A revision of Section 5K1.1 may afford an incentive for such an effort.

D. Disparities in the Magnitude of Section 5K1.1 Departures

Finally, empirical evidence establishes that there are unwarranted disparities in the magnitude of departures given to defendants who provide substantial assistance. The Sentencing Commission staff reported that approximately half of the Section 5K1.1 defendants surveyed who participated in undercover investigations received more than a forty-eight month reduction in their guideline sentences, while one quarter of the defendants who worked undercover received less than a twenty-four month reduction from their guideline sentences.[115] Likewise, of the defendants who agreed to testify and provide verbal information, fifty percent had their sentences reduced by more than forty-eight months, while approximately thirty-eight percent had their sentences reduced by fewer than twenty-four months.[116]

One explanation for these disparities may be that prosecutors make different departure recommendations. Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure provides that an Assistant U.S. Attorney may make a recommendation for a particular sentence or sentence range, although the recommendation is not

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[113]Maxfield & Kramer, *supra* note 5, at 16. The majority of all higher-position codefendants received longer sentence terms than the lower-position defendants (61.9 percent). *Id.* However, we cannot ignore such an appreciable minority of highly culpable defendants receiving sentences less than or equal to less culpable off end era.

[114]*See* Maxfield & Kramer, *supra* note 5, at 16-17.

[115]*See* Maxfield & Kramer, *supra* note 5, at 17.

[116]*See id.*

[117]The Substantial Assistance Working Group found that as of fiscal year 1994, the government made a sentence recommendation in fifty-three percent of cases surveyed. Substantial Assistance Working Group, *supra* note 71, at 66.

binding on the court[117] The Honorable Stanley Marcus, United States District Judge for the Southern District of Florida, describes how different prosecutors recommend departures of varying magnitudes:

> I have had the experience of witnessing the prosecutor on Monday morning walk in and say, 'Judge, the defendant worked proactively, he testified, he was complete and truthful, he went to the bat for us and we made great cases based upon it, and what we want you to do is cut the sentence of twenty years in half.' I've looked at him and said, 'O.K. I agree that substantial assistance is evident, tell me how you arrive at cutting the sentence in half, from twenty years to ten. Why not cut it by a third or by two-thirds?' And indeed the defense attorney would get up and say, 'Judge, we agree with everything the prosecutor has said except the recommendation; in that regard we think the work was so extraordinary that you ought to cut it by two-thirds or even reduce the sentence to time served.' On Tuesday, a prosecutor would come in and the experience would be the same, same cooperation, although a different defendant, indeed, a different prosecutor. And we would come down to a recommendation and the prosecutor would say, 'Cut the sentence by a third, Judge....' On Wednesday, the prosecutor has come in and said in another similar case, 'Cut the sentence by two-thirds.' And by the end of the week, the prosecutor might be heard to recommend that the sentence should be reduced to time served.[118]

Disparities in the magnitude of Section 5K1.1 departures may also be attributed to the scant guidance given to judges on the extent to which they should depart based upon a defendant's substantial assistance. Section 5K1.1 sets forth five general factors that a court may consider when determining the extent to which it should depart; however, it does not describe the importance to be placed on each of those factors.[119]

Complaining about the lack of case law on Section 5K1.1 departures, Judge Marcus has also criticized that judges are unable to determine how similarly-situated defendants are being treated by other courts.[120] Another legal scholar similarly objected that:

> [I]n exercising this discretion, judges use different sentencing philosophies and thus arrive at disparate sentences. Those judges disposed to rigidity defer to the Guidelines' ranges, while those who prefer leniency search

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[118]Marcus, *supra* note 103, at 14.

[119]*See* U.S.S.G. § 5K1.1.

[120]*See* Marcus, *supra* note 103, at 14.

for loopholes.... As a result, what sentence a defendant receives can still depend largely upon which judge presides at sentencing....[121]

E. The General Dissatisfaction with Section 5K1.1

Given Section 5K1.1's record over the past ten years, it is not surprising that legal scholars and observers of the sentencing process have repeatedly criticized the policy statement and the manner in which it is being implemented. Evidence also indicates widespread dissatisfaction among those directly involved in the sentencing process. A 1996 survey conducted by the Federal Judicial Center of chief probation officers and judges in both the district and circuit courts indicates that of the 591 district judges who responded, reform of departures under the guidelines was ranked as that guideline area most in need of substantive change.[122] The survey found that:

> Respondents repeatedly expressed support for providing judges [with] greater opportunit[ies] to depart from prescribed guideline ranges.... A number of findings show that respondents believe that much of the discretion that resided with judges before the guidelines has been shifted to prosecutors, and that prosecutors now have an inappropriate degree of influence in the sentencing process.[123]

Over eighty-six percent of the respondents also agreed with the statement that '[t]he sentencing guidelines give too much discretion to prosecutors," and fifty-nine percent strongly agreed with this statement.[124] The majority of responding district judges and chief probation officers further reported that they had been involved in cases in which they believed a defendant substantially assisted, but where the government did not make a substantial assistance motion. Additionally,

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[121]Koh *supra* note 80, at 1124; *see also* Bruce M. Selya and John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combatting Ultra-Uniformity* 35 B.C.L. Rev. 799, 827 (1994). Moreover, judges may be considering inappropriate factors such as the length of a defendant's pre-departure guidelines sentence in determining the extent to depart based upon a defendant's assistance. Maxfield & Kramer, *supra* note 5, at 21. The Sentencing Commission staff reported that the magnitude of the Section 5K1.1 departure often is a function of the length of the pre-departure guidelines sentence: the greater the average predeparture guideline term, the greater the number of months the judge departed. However, members of the Sentencing Commission found no evidence that defendants facing higher sentences provide more assistance, and thus warrant a relatively greater departure. Furthermore, data collected by members of the Sentencing Commission suggest that judges may be considering a defendant's personal characteristics, such as race and gender, in determining the degree of a Section 5K1.1 departure. Maxfield & Kramer, *supra* note 5, at 19.

[122]Scott A. Gilbert & Molly Treadway Johnson, *The Federal Judicial Center's 1996 Survey of Guideline Experience,* 9 Fed. Sent. R. 87, 89 (Sept./Oct. 1996).

[123]*Id* at 89-90.

[124] *Id.*at 90.

the report indicated that most respondents believed that the judge, *sua sponte* or by motion of the defense, should be permitted to depart downward for a defendant's substantial assistance in the absence of a government motion.[125] Likewise, the Substantial Assistance Working Group reported that of eight districts interviewed in the fall of 1994, judges, probation officers and defense counsel in seven out of the eight districts responded either that Section 5K1.1 vests too much discretion in the hands of the prosecutor, or that Section 5K1.1 should be amended to permit judges to make a substantial assistance departure in the absence of a government motion.[126]

In sum, the Committee is compelled by the clear evidence on Section 5K1.1 departures over the last five years to conclude that the policy statement is generating numerous inequities in sentencing. Prosecutors are inconsistently defining substantial assistance, and are improperly using the government motion requirement to achieve objectives unrelated to the underlying goals of Section 5K1.1 or the guidelines. Likewise, district courts are receiving insufficient guidance on what constitutes substantial assistance, or the extent to which they should depart from a guideline sentence for a defendant's substantial assistance. Finally, the evidence suggests that there is broad support for reform of Section 5K1.1 from both participants and observers of the sentencing process.

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IV. **THE PROPOSAL**

Initially, the Proposed Amendment attempts to strike the proper balance between prosecutors and sentencing judges in determining whether substantial assistance was provided and whether a departure is appropriate: it emphasizes the importance of the government's evaluation of the defendant's assistance in determining whether that cooperation is substantial, while vesting the sentencing court with the discretion to make that ultimate determination. For several reasons, this change is critical to achieving equity in Section 5K1.1 departures.

First, eliminating the prosecutor's Section 5K1.1 gate-keeping role returns the discretion in substantial assistance departures to those who are accustomed to acting as neutral arbiters in the sentencing process. It also recognizes that the inherently factual question of whether a defendant's assistance is substantial should be left to judges, who are experienced in weighing evidence and making factual determinations.[127]

Second, eliminating the government motion requirement remedies many of the current objections to Section 5K1.1. In particular, it precludes U.S. Attorneys from using Section 5K1.1 departures for purposes other than to reward a defendant's assistance, prevents prosecutors from circumventing the guidelines by failing to file Section 5K1.1 motions where they would otherwise be appropriate, and levels the playing field between prosecutors and defendants in the mandatory minimum context.

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[125] *Id.* at 91.

[126] Substantial Assistance Working Group, *supra* note 71, at 47-55.

[127] The Committee recognizes that there will often be factual disputes as to whether or not a defendant's cooperation is substantial. The proposed Section 5K1.1 is not intended to limit the judge's discretion to ensure the safety of other cooperating persons or the viability of an ongoing investigation.

Third, permitting the court to depart based upon its own determination or the motion of either the defendant or the government furthers the guidelines' objectives of honesty and predictability in sentencing. Unlike the current Section 5K1.1, under which a prosecutor typically does not have to state the reasons for refusing to move, the proposed amendment would require the judge to state on the record the bases for either departing or refusing to depart. Thus, defendants will have a better understanding of the reasons behind a decision granting or denying a substantial assistance departure. Likewise, case law developing as a result of this practice will provide guidance to other judges, prosecutors, and defendants and encourage uniformity in the substantial assistance context.

Although the proposed Section 5K1.1 eliminates the government motion requirement, the proposal stresses the importance of the prosecutor's evaluation of the defendant's assistance to the judge's decision to depart. Recognizing that prosecutors are often the participants at sentencing who have the greatest insight into the usefulness and importance of the defendant's assistance in the governments prosecution or investigation, the proposal requires the court to give particular weight to the government's evaluation of the defendant's assistance in determining whether to depart, and the extent of the departure. Indeed, the Committee expects that, as a practical matter, significant departures will rarely be granted without the support of the government.

Moreover, while the government will not be the gate-keeper of the court's jurisdiction, the amendment in no way affects the government's traditional role as gate-keeper to those who wish to act as cooperators. The government will continue to make unilateral determinations of the reliability, credibility and usefulness of prospective cooperators — using such devices as proffers and use immunity agreements of limited duration. However, once the decision has been made to use such an individual, the final determination of whether this cooperation has been "substantial" will be within the court's purview.

Next, the proposed amendment defines substantial assistance to require, at a minimum, the complete and truthful disclosure of a defendant's knowledge of the facts relating to the pertinent offense. A court may further consider whether a defendant has disclosed all other known facts relating to any other criminal activities under inquiry.[128] Additionally, the proposed amendment requires a demonstrated willingness by the defendant to testify or to provide other reliable evidence in support of the defendant's disclosures.

Defining substantial assistance limits the discretion of a sentencing judge to grant a Section 5K1.1 departure, and therefore should mitigate concerns that eliminating the prosecutorial gate-keeping function will permit judges to use Section

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[128]A defendant's disclosures relating solely to his own culpability do not ordinarily merit a substantial assistance departure, and it is expected that courts will rarely depart on the basis of such disclosures alone. Indeed, disclosures relating solely to a defendant's own culpability that would ordinarily result in a reduction under Section 3E1.1 of the U.S. Sentencing Guidelines — such as those described in Application Note 1(a) through (h) in that Section — do not, by themselves, constitute substantial assistance.

However, a court may grant a substantial assistance departure, or reduce a sentence under Rule 35(b) of the Federal Rules of Criminal Procedure, where such disclosures further a significant, additional law enforcement purpose. By way of example only, a court might find that a substantial assistance departure is warranted where a computer hacker — who has broken into a sophisticated computer system — uses his unique knowledge and expertise to inform law enforcement about how he penetrated the system and how future breaches could be prevented.

5K1.1 whenever they seek to avoid application of the guidelines, regardless of the assistance provided by the defendant. Additionally, clarifying what, at a minimum, constitutes substantial assistance will provide more predictability to defendants, prosecutors and judges in determining the type of assistance that merits a Section 5K1.1 departure, and thus will engender more consistency in substantial assistance departures. Finally, this change reflects our recognition that truthful and complete disclosures are essential to the underlying law enforcement rationale of Section 5K1.1.

Third, the proposal addresses the criticism that substantial assistance departures typically benefit those defendants who are relatively more culpable than those defendants whose role in criminal activity is minimal. The proposed Section 5K1.1 permits a court to aggregate the assistance of several defendants involved in the same or a related offense in determining whether any one defendant's assistance is substantial. Additionally, the proposed Section 5K1.1 directs the court to consider the relative culpability of the defendant and the person or organization being investigated or prosecuted as a result of the defendant's assistance in determining the extent of any departure. Therefore, the proposed amendment permits a sentencing court to take measures to ameliorate the "cooperation paradox" associated with substantial assistance departures.

Fourth, the proposed Section 5K1.1 provides additional guidance to assist courts in determining the magnitude of a departure based on a defendant's assistance. By detailing specific factors that the court may consider in determining the extent to which it should depart, the unwarranted disparities in the magnitude of substantial assistance departures should be reduced significantly. Additionally, the proposed amendment provides application notes that give sentencing courts assistance in determining the appropriate extent to depart. The proposed Section 5K1.1 stresses the importance of considering the government's recommendation in determining the magnitude of the departure, thereby ameliorating some prosecutors' current criticisms that judges depart too far from the guideline sentence for a defendant's substantial assistance.

Finally, the proposed amendment eliminates the government motion requirement in 18 U.S.C. § 3553(e) and Rule 35 of the Federal Rules of Criminal Procedure. These changes ensure uniform application of the different substantial assistance provisions. This recommendation also addresses the existing criticism that prosecutors are using the Section 5K1.1 government motion requirement in the mandatory minimum context for improper reasons, such as to coerce defendants to plead guilty.

In conclusion, this proposal addresses many of the existing criticisms of substantial assistance departures. The proposal returns to judges the discretion they formerly possessed to determine whether defendants should receive leniency in sentencing for their cooperation with the government. Consistent with the objectives of the guidelines, however, this discretion is limited, both by the definition of substantial assistance, the specific guidance given to judges in determining the magnitude to depart, and by the emphasis placed on the government's recommendations at sentencing. Additionally, the proposal advances the law enforcement interests of Section 5K1.1 by providing increased certainty to defendants who cooperate. Thus, by structuring the discretion in the substantial assistance context, the proposed amendment furthers the guidelines' goals of consistency, predictability and proportionality in sentencing.

APPENDIX A

PROPOSED AMENDMENT
SECTION 5K1.1 SUBSTANTIAL ASSISTANCE TO AUTHORITIES

If a defendant provides substantial assistance in the investigation or prosecution of a person or organization that has committed an offense, the court may depart from the guidelines. The departure may be made on a motion of the defendant or of the government setting forth specific facts in support of the motion, or, in the absence of a motion by either party, on the court's own findings.

(a) "Substantial assistance" must include complete and truthful disclosure of the defendant's knowledge of the facts relating to the pertinent offense and ordinarily includes disclosure of all other known facts relating to any other criminal activities under inquiry. Such disclosures will generally include testimony relating to these matters or a demonstrated willingness to testify or to provide otherwise reliable evidence.

(b) The court shall set forth the reasons for its decision to grant or to deny a motion to depart, or for its *sua sponte* decision to depart.

(c) The appropriate downward departure for substantial assistance shall be determined by the court, for reasons stated, that may include, but are not limited to, consideration of the following factors:

(1) the recommendation of the government;

(2) the recommendation of other law enforcement authorities;

(3) the timeliness of the defendant's assistance;

(4) whether the defendant's assistance results in the prosecution or conviction of a person or organization;

(5) whether the defendant assisted in the investigation or prosecution of a person or organization more culpable than the defendant;

(6) the assistance of other persons obtained as a result of the defendant's assistance;

(7) whether the defendant's assistance resulted in any danger or risk of injury to the defendant or to the defendant's family;

(8) whether the defendant's assistance resulted in substantial, incremental economic, employment or personal costs to the defendant;

(9) whether the defendant's assistance decreases the probability of the defendant's recidivism;

(10) the likelihood that others will be deterred from committing offenses by the fact that the defendant provided assistance.

Application Notes :

1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of a person or organization who has committed an offense may justify a sentence below a statutorily required minimum sentence.

2. "Investigation" or "Prosecution" as used in this section includes investigations or prosecutions already pending at the time of the defendant's assistance or initiated after the defendant's assistance. Such "investigations" or "prosecutions" may include activities by federal, state or local law enforcement or regulatory officials having jurisdiction over such mailers.

3. Subsection (a) establishes that, to constitute "substantial assistance," the court must conclude that the defendant truthfully disclosed to the appropriate authorities all information known concerning the offense under investigation. The court should ordinarily consider whether the defendant has provided complete disclosure of all other facts known to him concerning any other criminal activity. This subsection recognizes that a defendant's assistance may be "substantial" even though the defendant cannot or is not requested to testify. Examples of such assistance may include, in appropriate circumstances, working as a government informant in aid of a government investigation. A defendant's disclosures relating solely to his own culpability do not form a basis for a departure for substantial assistance, unless such disclosures further a significant, additional law enforcement purpose.

4. "Government" as used in this section refers to federal law enforcement or regulatory officials. However, Subsection (c) (2) specifically recognizes that recommendations of state and local law enforcement or regulatory officials may also be considered in determining the appropriate sentence. This subsection recognizes that defendants may have information relating to misconduct or criminality which is most appropriately addressed by non-federal authorities and that the defendant should receive full credit for his assistance to these authorities.

5. Subsections (c) (1) and (c) (2) recognize that substantial weight ordinarily should be given to the prosecution's evaluation of the extent to which a defendant's assistance is substantial and furthers a prosecution or investigation. The prosecutor is ordinarily in a singular position to evaluate the importance of that assistance to the government case or investigation and his or her recommendation should be given deference by the sentencing court. When the prosecutor does not move for a departure, the court may consider whether the reasons given by the prosecutor for not seeking a departure are unrelated to the truthfulness and completeness of the disclosures by the defendant.

6. In assessing the appropriate reduction in light of the timeliness of a defendant's assistance under Subsection (c) (3), the court should take into consideration: (i) whether the defendant provided assistance prior to an imminent threat of disclosure or government investigation; or (ii) whether the defendant provided assistance after the disclosure or government investigation but prior to the indictment; or (iii) whether the defendant provided assistance after the charges but before trial; or (iv) whether the defendant provided assistance only after conviction. In the ordinary case, the earlier the defendant demonstrates a willingness to provide assistance, the greater should be the downward departure.

7. In considering whether a defendant's assistance results in the prosecution or conviction of a person or organization under Subsection (c) (4), a court is not limited to those situations in which the prosecution or conviction of

a person or organization would not have occurred but for the defendant's assistance. It is sufficient that the defendant's assistance is a substantial factor in a prosecution instituted independently of the defendant's assistance.

8. Substantial assistance in the investigation of another person or organization need not, in all cases, result in the arrest, indictment or prosecution of that person or organization.

9. Subsection (c) (5) recognizes that a court may make a greater departure when the person or organization being investigated or prosecuted is more culpable than the cooperating defendant. This subsection encourages the court to weigh whether the defendant is providing information about underlings or information about targets at or above his level of responsibility in a criminal hierarchy. In determining the relative culpability of either the defendant or the person or organization being investigated or prosecuted with the aid of the defendant's assistance, the court may utilize the relevant offense level and culpability score under the individual and organizational guidelines.

10. Subsection (c) (6) recognizes that a defendant's assistance may not be considered "substantial" due to his lack of knowledge or minimal involvement in criminal activity. In such instances, the court may aggregate the assistance provided by all defendants involving the same or a related offense in determining whether any one defendant's assistance is "substantial." For example, in a drug operation which imports, processes and distributes narcotics, it may be preferable to seek the assistance of minor participants in these three areas rather than the assistance of a higher up who has knowledge of all three. While the knowledge of each minor participant may not by itself have been viewed as "substantial," the assistance of the three may be combined for that determination.

11. Subsection (c) (7) recognizes that the court may consider whether the assistance provided by the defendant creates personal risks to the defendant or his family. The sentencing court may also consider whether such assistance and the resulting danger make defendant's conditions for incarceration unduly burdensome to the government or disproportionately restrictive to the defendant. Under this subsection, the court may also consider the number and age of dependents, and the extent to which the family depends economically on the defendant and other factors in weighing the vulnerability of the defendant's family.

12. Subsection (C) (8) permits a court to consider whether the assistance provided by the defendant results in an economic loss, professional or employment disqualification, or social or personal opprobrium substantially in excess of that which he would have suffered had the defendant not cooperated under this section. For example, a greater departure may be warranted where the defendant discloses additional, previously undetected criminal activity and suffers a significant, incremental fine or the forfeiture of otherwise protected assets. Alternatively, for example, the court may consider whether the defendant's disclosure of previously undetected criminal conduct results in the defendant's preclusion from engaging in a legitimate career or professional activity which would have been unaffected by the original charges.

13. Subsection (c) (9) permits a court to consider whether the fact of the defendant's assistance to the government and any public notice thereof significantly reduces that defendant's opportunity to participate in further crimes. For example, the court may find that the publicity attendant to the defendant's cooperation against members of his immediate community or against a pervasive network of organized crime makes the defendant's re-entry into criminal activities unlikely.

14. Subsection (c) (10) allows the sentencing court to consider whether the defendant has revealed a criminal activity previously undetected, and thereby allows the government to take prophylactic steps to prevent or to detect such activity. The revelation of such criminal conduct and the government's response may be seen as deterring others from such activities.

15. The sentence reduction for substantial assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. A defendant's disclosures or conduct relating solely to that defendant's own culpability that would ordinarily result in a reduction under Section 3E1.1 of the U.S. Sentencing Guidelines — such as those described in Application Notes 1(a) through (h) of that Section — do not, by themselves, constitute substantial assistance.

16. In considering motions made pursuant to this Section, the court may take whatever steps it considers necessary, including *in camera* and sealed proceedings, to ensure the safety of the defendant or other cooperating individuals or to avoid frustration of an ongoing investigation or prosecution.

18 U.S.C. § 3553(e):

Where a defendant has provided substantial assistance in the investigation or prosecution of a person or organization that has committed an offense, the court shall have the authority to impose a sentence below a level established by statute as the minimum sentence so as to reflect the defendant's substantial assistance. 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.

Rule 35 of the Federal Rules of Criminal Procedure:

(b) Reduction of Sentence for Changed Circumstances. The court, on motion made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent substantial assistance in the investigation or prosecution of an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. The court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

APPENDIX B

PART K. DEPARTURES

1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

§ 5K1.1 Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(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;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Commentary

Application Notes:

1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

2. The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.

3. Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Background: A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant *in camera* and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

APPENDIX C

18 U.S.C. § 3553. Imposition of a sentence.

(e) Limited authority to impose a sentence below a 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 the investigation or 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.

APPENDIX D

Rule 35 of the Federal Rules of Criminal Procedure: Correction or Reduction of Sentence.

(b) Reduction of Sentence for Substantial Assistance. If the Government so moves within one year after the sentence is imposed, the court may reduce a sentence to reflect a defendant's subsequent substantial assistance in investigating or prosecuting another person, in accordance with the guidelines and policy statements issued by the Sentencing Commission under 28 U.S.C. § 994. The court may consider a government motion to reduce a sentence made one year or more after the sentence is imposed if the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after sentence is imposed. In evaluating whether substantial assistance has been rendered, the court may consider the defendant's pre-sentence assistance. In applying this subdivision, the court may reduce the sentence to a level below that established by statute as a minimum sentence.

APPENDIX E

Bibliography

Cases

Blackledge v. Perry, 417 U.S. 21(1974)

Clinch field Coal Co. v. Federal Mine Safety and Health Comm'n, 895 F.2d 773 (D.C. Cir. 1990)

In re Sealed Case, 149 F.3d 1198 (D.C. Cir. 1998), *rehearing en banc granted and opinion vacated,* 159 F.3d 1362 (D.C. Cir. 1998)

In re Sealed Case, 159 F.3d 1362 (D.C. Cir. 1998) *(en banc)*

Koon v. United States, 518 U.S. 81(1996)

Lockett v. Ohio, 438 U.S. 586 (1978)

Melendez v. United States, 518 U.S. 120 (1996)

Mistretta v. United States, 488 U.S. 361 (1989)

Neuman v. Bowen, 824 F.2d 1240 (D.C. Cir. 1987), *cert. denied,* 485 U.S. 940 (1988)

United States v. Abuhouran, 161 F.3d 206 (3d Cir. 1998)

United States v. Adonis, 744 F. Supp. 336 (D.D.C. 1990)

United States v. Agu, 949 F.2d 63 (2d Cir. 1991), *cert. denied,* 504 U.S. 942 (1992)

United States v. Bayles, 923 F.2d 70 (7th Cir. 1991)

United States v. Curran, 724 F. Supp. 1239 (C.D. Ill. 1989)

United States v. Fernandez, 127 F.2d 277 (2d Cir. 1997)

United States v. Garcia, 926 F.2d 125 (2d Cir. 1991)

United States v. Grant, 886 F.2d 1513 (8th Cir. 1989)

United States v. Gutierrez, 917 F.2d 379 (8th Cir. 1990) *(en banc)*

United States v. Harpaul, No. 97-303 (E.D.N.Y. Sept. 5, 1998)

United States v. Harrington, 947 F.2d 956 (D.C. Cir. 1991)

United States v. Horn, 946 F.2d 738 (10th Cir. 1991)

United States v. Huerta, 878 F.2d 89 (2d Cir. 1989), *cert. denied,* 493 U.S. 1046 (1990)

United States v. Justice, 877 F.2d 664 (8th Cir.), *cert. denied,* 493 U.S. 958 (1989)

United States v. Khan, 787 F.2d 28 (2d Cir. 1986)

United States v. Khoury, 62 F.3d 1138 (9th Cir. 1995)

United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990)

United States v. Knights, 968 F.2d 1483 (2d Cir. 1992)

United States v. Kuntz, 908 F.2d 655 (10th Cir. 1990)

United States v. LaGuardia, 902 F.2d 1010 (1st Cir. 1990)

United States v. Levy, 904 F.2d 1026 (6th Cir. 1990), *cert. denied,* 498 U.S. 1091 (1991)

United States v. Lewis, 896 F2d 246 (7th Cir. 1990)

United States v. Melton, 930 F.2d 1096 (5th Cir. 1991)

United States v. Meyer, 810 F.2d 1242 (D.C. Cir.), *vacated,* 816 F.2d 695 (D.C. Cir.), *reinstated sub nom. Bartlett v. Bowen,* 824 F.2d 1240 (D.C. Cir. 1987), *cert. denied,* 485 U.S. 940 (1988)

United States v. Ming He, 94 F.3d 782 (2d Cir. 1996)

United States v. Murphy, 65 F.3d 758 (9th Cir. 1995)

United States v. Musser, 856 F.2d 1484 (11th Cir. 1988)

United States v. Redondo-Lemos, 754 F. Supp. 1401 (D. Anz. 1990), *rev'd,* 955 F.2d 1296 (9th Cir. 1992)

United States v. Rexach, 896 F.2d 710 (2d Cir.), *cert denied,* 498 U.S. 969 (1990)

United States v. Roberts, 726 F. Supp. 1359 (D.D.C. 1989), *rev'd on other grounds sub nom. United States v. Mills,* 964 F.2d 1186 (D.C. Cir. 1992), *cert. denied,* 506 U.S. 977 (1992)

United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), *rehearing en banc granted and decision vacated,* No. 97-3178, 1999 WL 6469 (10th Cir. Jan. 8, 1999)

United States v. Singleton, No. 97-3178, 1999 WL 6469 (10th Cir. Jan. 8, 1999) *(en banc)*

United States v. Solis, 161 F.3d 281 (5th Cir. 1998)

United States v. Spillman, 924 F.2d 721 (7th Cir. 1990)

United States v. Stanley, 928 F.2d 575 (2d Cir.), *cert. denied,* 502 U.S. 845 (1991)

United States v. Ware, 161 F.3d 414 (6th Cir. 1998)

United Slates v. White, 869 F.2d 822 (5th Cir. 1989), *cert. denied,* 490 U.S. 1112 (1989)

United States v. Williams, 47 F.3d 658 (4th Cir. 1995)

Wade v. United States, 504 U.S. 181 (1992)

Willhauck v. Halpin, 953 F.2d 689 (1st Cir. 1991)

Statutes & Rules

Fed. R. Crim. P. 11 (e)(1)(B)

Fed. R. Crim P. 35(b)

18 U.S.C. § 201(c)(2)

18 U.S.C. §§ 3551-59

18 U.S.C. § 3553(b)

18 U.S.C. § 3553(e)

28 U.S.C. §§ 991-98

28 U.S.C. § 994(n)

1986 Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207 (1986)

Drug Free America Act of 1986, H.R. Doc. No. 99-266, 99th cong., 2d 5ess. (1986)

S. Rep. No. 98-225 (1983)

The Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. II, 98 Stat. 1987 (1984)

U.S.S.G. § 5K1.1

U.S.S.G § 3E1.1

Other Authorities

Elkan Abramowitz, *Prosecutorial Input on Downward Departures for Assistance,* 221 N.Y.L.J. 3(1999)

Albert W. Alschuler, *Departures and P/ea Agreements Under the Sentencing Guidelines,* 117 F.R.D. 459 (1988)

John S. Austin, *Note: Prosecutorial Discretion And Substantial Assistance: The Power And Authority Of Judicial Review — United States v. Wade,* is Campbell L. Rev. 263 (5ummer 1993)

Karen Bjorkman, *Who's the Judge? The Eighth Circuit's Struggle with Sentencing Guidelines and the Section 5K1.1 Departure,* 18 Wm. Mitchell L. Rev. 731 (Summer 1992)

Stephen Breyer, *Symposium, Equality Versus Discretion in Sentencing,* 26 Am. Crim. L. Rev. 1813 (1989)

Vincent L. Broderick, *Flexible Sentencing and the Violent Crime Control Act of 1994,* 7 Fed. Sent. R. 128 (Nov/Dec. 1994)

Deborah E. Dezelan, *Departures From The Federal Sentencing Guidelines After Koon v. United States: More Discretion, Less Direction,* 72 Notre Dame L. Rev. 1679 (July 1997)

Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts,* 30 Conn. L. Rev. 569 (Winter 1988)

Marvin Frankel, *Criminal Sentences: Law Without Order* 5 (1973)

Marvin E. Frankel, *Lawlessness in Sentencing,* 41 U. Cin. L. Rev. 1 (1972)

Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers,* 101 Yale L.J. 1681 (June 1992)

Scott A. Gilbert & Molly Treadway Johnson, *The Federal Judicial Center's 1996 Survey of Guideline Experience,* 9 Fed. Sent. R. 87 (Sept./Oct. 1996)

Julie Gyurci, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement; Enforcing a Good Faith Standard,* 78 Minn. L. Rev. 1253 (May 1994)

Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity,* 29 Am. Crim. L. Rev. 161, 199 (1991)

Kimberly S. Kelley, *Substantial Assistance Under the Guidelines: How Smitherman Transfers Sentencing Discretion From Judges to Prosecutors,* 76 Iowa L. Rev. 187 (Oct. 1990)

Steve Y. Koh, *Reestablishing the Federal Judge's Role in Sentencing,* 101 Yale L.J. 1109 (Mar. 1992)

Cynthia K. Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures,* 50 Rutgers L. Rev. 199 (Fall 1997)

Cynthia K. Y. Lee, *The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement,* 23nd. L. Rev. 681 (1990)

Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines,* 42 U.C.L.A. L. Rev. 105 (1994)

Jonathan D. Lupkin, *5K1.1 and Substantial Assistance Departure: The Illusory Carrot of the Federal Sentencing Guideline,* 91 Colum. L. Rev. 1519 (1991)

Stanley Marcus, *Substantial Assistance Motions: What is Really Happening?,* 10 Fed. Sent. R. 13 (July/Aug. 1997)

Linda Drazga Maxfield and John H. Kramer, *Substantial Assistance:An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice,* United States Sentencing Commission (Jan. 1998)

Linnet Myers, The Dallas Morning News, March 26, 1995, at 12A, *reprinted in* 1995 WL 7478163

Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: an Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines,* 66 S. Cal. L. Rev. 501 (1992)

Jon 0. Newman, Chief Judge of the United States Court of Appeals for the Second Circuit, Statement Before the Crime Subcommittee of the House Judiciary Committee, *available in* 1995 WL 1345519 (Dec. 14, 1995)

William J. Powell & Michael T. Cimino, *Prosecutorial Discretion Under The Federal Sentencing Guidelines: Is The Fox Guarding The Hen House?,* 97 W. Va. L. Rev. 373 (Winter 1995)

Janet Reno, United States Attorney General, *Principles of Federal Prosecution, reprinted in* 6 Fed. Sent. Rep. 352 (Vera Inst. of Justice) (May 1994)

Michael S. Ross, *Cooperation with Federal Authorities: Operating on the Outer Limits,* 12 Crim. Justice 4 (Summer 1997)

Stephen J. Schulhofer, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature, Rethinking Mandatory Minimums,* 28 Wake Forest L. Rev. 199 (1993)

Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period,* 91 Nw. U.L. Rev. 1284 (Summer 1997)

Daniel J. Sears, *Guidelines Sentencing —The Good, The Bad And The Ugly,* 26 Cob. Law 3 (Feb. 1997)

Paul M. Secunda, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct,* 34 Am. Crim. L. Rev. 1267 (Spring 1997)

Patricia A. Seddon, Note, *Pennsylvania Supreme Court Review, 1988, Recent Decisions, Mandatory Minimum Sentencing Act — Commonwealth v. Wooten,* 62 Temp. L. Rev. 737 (1989)

Bruce M. Selya & John C. Massaro, *The Illustrative Role of SubstantialAssistance Departures in Combating Ultra-Uniformity,* 35 B.C. L. Rev. 799 (July 1994)

Antoinette Marie Tease, *Downward Departures for Substantial Assistance: A Proposal for Reducing Sentencing Disparities Among Codefendents,* 53 Mont. L. Rev. 75 (Winter 1992)

United States Department of Justice, *The Prosecutors' Handbook on Federal Sentencing Guidelines and Other Provisions of the Sentencing Reform Act of 1984* (1987)

United States Sentencing Commission, *1991 Annual Report* (1992)

United States Sentencing Commission, *1993 Annual Report* (1994)

United States Sentencing Commission, *1996 Source Book of Federal Sentencing Statistics* (1996)

United States Sentencing Commission, *Special Report to the Congress:* Mandatory Minimum Penalties in the Federal Criminal Justice System (August 1991)

United States Sentencing Commission Substantial Assistance Working Group, *Federal Court Practices: Sentence Reductions Based on Defendant's Substantial Assistance to the Government* (May 1997)

United States Sentencing Guidelines Manual (West 1998)