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ARTICLES

DEPARTING IS SUCH SWEET SORROW: A YEAR OF JUDICIAL REVOLT ON "SUBSTANTIAL ASSISTANCE" DEPARTURES FOLLOWS A DECADE OF PROSECUTORIAL INDISCIPLINE*

Frank O. Bowman, III**

*There's something happening here.
What it is ain't exactly clear
It's time we stop, hey, what's that sound?
Everybody look what's goin' down.*

Stephen Stills¹

I. INTRODUCTION

1998 was a fascinating year in federal sentencing law. In a series of sentencing cases, United States Courts of Appeals across the country handed the Department of Justice a small parade of stinging (if perhaps transitory) defeats. The best known of these cases, *United States v. Singleton (Singleton I)*,² reached even the popular media.³ In *Singleton I*, before being reversed *en banc*, a panel of the Tenth Circuit held that the ancient practice of award-

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1. STEPHEN STILLS, *For What It's Worth, on BUFFALO SPRINGFIELD: BEST OF . . . RETROSPECTIVE* (WEA/Atlantic 1989).

2. 144 F.3d 1343 (10th Cir.) [hereinafter *Singleton I*], *vacated*, 144 F.3d 1361 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999) [hereinafter *Singleton II*], *cert. denied*, No. 98-8758, 1999 WL 185874 (U.S. June 21, 1999).

3. See Joan Biskupic, *Justice Dept. to Appeal Court Ban on "Deals" with Witnesses*, WASH. POST, July 10, 1998, at A3; Richard A. Serrano, *Ruling Against Testimony Deals Hits Prosecutors*, L.A. TIMES, July 10, 1998, at A1.

ing cooperating criminal defendants sentence reductions for truthful testimony against others constitutes felony bribery.⁴ Less well-known, but only marginally less striking to the experienced federal criminal lawyer, was *In re Sealed Case* (*Sentencing Guidelines's* "Substantial Assistance"),⁵ in which the D.C. Circuit defied plain statutory language to rule that sentencing judges have discretion to reduce the sentences of cooperating witnesses without a government "substantial assistance" motion requesting the reduction.⁶

In my view, each of these cases was wrongly decided, sometimes shockingly so, and the first section of this essay is devoted to demonstrating the courts' errors.⁷ Nonetheless, considered together, these opinions are perhaps an understandable reflection of judicial unease with an important component of the federal sentencing system — the longstanding, but increasingly common, practice of making deals with criminal defendants to reduce their sentences in return for testimony against their accomplices. This Article's second section will consider the most common criticisms of the system of bargaining for testimony under the United States Sentencing Guidelines (the Guidelines)⁸ to determine whether *Singleton* and *Sealed Case* may be good policy even if they are bad law.⁹ Although I conclude that the results in these cases are undesirable as well as incorrect, I also believe that a good deal of the impetus for these cases has been provided by a continuing failure on the part of the Department of Justice to properly and discretely manage the im-

4. See *Singleton I*, 144 F.3d at 1358.

5. 149 F.3d 1198 (D.C. Cir.), *reh'g granted*, 159 F.3d 1362 (D.C. Cir. 1998).

6. See *id.* at 1204. For a time the Fifth Circuit aligned itself with the D.C. Circuit on this issue. See *infra* notes 119–27 and accompanying text. In *United States v. Solis*, 161 F.3d 281 (5th Cir. 1998) [hereinafter *Solis I*], a panel of the Fifth Circuit adopted the reasoning of *Sealed Case* and held that no government motion is required for a substantial assistance sentence reduction. See *id.* at 285. The government moved for reconsideration, and the panel vacated its original opinion, issuing instead an opinion arriving at exactly the opposite conclusion. See *United States v. Solis*, 169 F.3d 224, 227 (5th Cir. 1999) [hereinafter *Solis II*].

Two other interesting punishment cases were decided against the government in 1998. See *United States v. Sanchez-Rodriguez*, 161 F.3d 556 (9th Cir. 1998) (en banc) (ignoring a plain directive of the Federal Sentencing Guidelines to permit a sentencing departure based on the sentencing court's perception of the severity of a prior "aggravating felony"); *United States v. Jones*, 160 F.3d 641 (10th Cir. 1998) (discovering a constitutional right to a pretrial adversary hearing to reexamine a grand jury's probable cause finding that assets seized for forfeiture were traceable to a defendant's criminal conduct).

7. See *infra* Part II.

8. U.S. SENTENCING GUIDELINES MANUAL (1998).

9. See *infra* Part III.

mense power conferred by the Guidelines to induce witness cooperation. Not only has this failure stimulated judicial backlash in the form of decisions like the two under scrutiny here, but there is considerable risk that unless the Department exercises greater self-discipline, Congress, the Sentencing Commission, and the courts may adopt measures which will inflict long-term damage on legitimate law enforcement interests.

II. THE FEDERAL SENTENCING GUIDELINES AND "SUBSTANTIAL ASSISTANCE": A PRIMER

A. The Birth of the Federal Sentencing Guidelines

The characteristic feature of criminal sentencing in federal court before November 1987, when the Guidelines went into effect, was the virtually absolute discretion enjoyed by sentencing judges.¹⁰ In essence, the district court could sentence a convicted defendant anywhere within the range created by the statutory maximum and minimum penalties for the offense or offenses of conviction.¹¹ So long as the judge kept within the statutory range, there were virtually no rules about how he or she made the choice of sentence,¹² and the sentence was effectively unreviewable by a court of appeals.¹³ All this changed with the adoption of the Guide-

10. For a general discussion of pre-Guidelines federal sentencing, see Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680-89.

11. See David Fisher, *Fifth Amendment — Prosecutorial Discretion Not Absolute: Constitutional Limits on Decision Not to File Substantial Assistance Motions*, 83 J. CRIM. L. & CRIMINOLOGY 744, 745 (1993) ("Prior to the passage of the Sentencing Reform Act, federal judges enjoyed extremely broad discretion in sentencing. A judge could impose any sentence she thought was proper as long as it did not exceed the statutory maximum."); Steven S. Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669, 677 (1980) (referring to pre-Guidelines sentencing practices and noting that "the court's [sentencing] discretion nonetheless remains quite broad under most modern statutes"); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89 (1988) (characterizing the pre-Guidelines system as one of "indeterminate sentencing").

12. For example, before the enactment of the Sentencing Reform Act of 1984, federal law permitted courts to suspend the sentence term for "any offense not punishable by death or life imprisonment," and place the defendant on probation if the judge was "satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby." 18 U.S.C. § 3651 (repealed 1984).

13. See *Koon v. United States*, 516 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal."); *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) ("We begin with the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at

lines.¹⁴

The Guidelines are, in a sense, simply a set of instructions for one chart — the Sentencing Table.¹⁵ The goal of guidelines calculations is to arrive at numbers that represent positions on the vertical (*offense level*) and horizontal (*criminal history category*) axes of the Sentencing Table grid. These numbers in turn generate an intersection in the body of the grid. Each such intersection designates a *sentencing range* expressed in months. For example, a defendant whose offense level is 26, and whose criminal history category is I, is subject to a sentencing range of 63–78 months.¹⁶

The *criminal history category* reflected on the Sentencing

an end.”); *see also* *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983) (“[I]t is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.”). Although the appellate courts lacked the power to review the substance or length of sentences imposed by district courts, they retained some ability to review the *process* through which sentences were determined. The outer limits of the district court’s discretion were set by due process concepts. *See, e.g., United States v. Tucker*, 404 U.S. 443, 449 (1972) (affirming the appellate court’s remand for resentencing when the original sentence relied on prior convictions obtained without right to counsel); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (holding that a sentence based on erroneous factual information violated due process); *United States v. Clements*, 634 F.2d 183, 186 (5th Cir. 1981) (finding that the court would “not review the severity of a sentence imposed within statutory limits, but will carefully scrutinize the judicial process by which the punishment was imposed”); *Herron v. United States*, 551 F.2d 62, 64 (5th Cir. 1977) (“The severity of a sentence imposed within statutory limits will not be reviewed.”); *United States v. Cavazos*, 530 F.2d 4, 5 (5th Cir. 1976); *United States v. Espinoza*, 481 F.2d 553 (5th Cir. 1973). The *Espinoza* court reasoned that

[the] discretion [of sentencing judges] is not, and has never been absolute, and while the appellate courts have little if any power to review substantively the length of sentences, it is our duty to insure that rudimentary notions of fairness are observed in the process at which the sentence is determined.

Id. at 558 (citations omitted); *see also* *Fisher*, *supra* note 11, at 745 (noting that before the SRA there was no appellate review of sentencing decisions); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 226 (1993) (“For over two hundred years, there was virtually no appellate review of the trial judge’s exercise of sentencing discretion.”).

14. For a detailed explanation of all aspects of the Federal Sentencing Guidelines, *see* ROGER W. HAINES, JR., JENNIFER C. WOLL & FRANK O. BOWMAN, III, *FEDERAL SENTENCING GUIDELINES HANDBOOK* (1998) [hereinafter HAINES, WOLL & BOWMAN]. For a more succinct summary of the operation of the Guidelines, *see* Bowman, *supra* note 10, at 692–704.

15. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A.

16. *See id.* By statute, the top end of the range can be no more than 25% higher than the bottom end. *See* 28 U.S.C. § 994(b)(2) (1994); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A. For further discussion of the “25% rule,” *see* Bowman, *supra* note 10, at 691 n.49, 712–13.

Table's horizontal axis is a rough effort to determine the defendant's disposition to criminality, as reflected in the number and nature of his prior contacts with the criminal law.¹⁷ The *offense level* reflected on the Sentencing Table's vertical axis measures the seriousness of the present crime. The offense level customarily has three components: (1) A "base offense level," (2) a set of "specific offense characteristics," and (3) additional adjustments under Chapter Three of the Guidelines.¹⁸ The base offense level is a seriousness ranking based purely on the fact of conviction of a particular statutory violation.¹⁹ For example, all fraud convictions carry a base offense level of 6.²⁰ The "specific offense characteristics" are an effort to categorize and account for commonly occurring factors that cause us to think of one crime as worse than another. They "customize" the crime. For instance, the Guidelines differentiate between a mail fraud in which the victim loses \$1000 and a fraud with a loss of \$1,000,000.²¹ A loss of \$1000 would produce no increase in the base offense level for fraud of 6, while a loss of \$1,000,000 would add eleven levels and thus increase the offense level from 6 to 17.²²

Chapter Three of the Guidelines provides for additional adjustments to the offense level. These include increases in the offense level based on factors such as the defendant's role in the offense,²³ whether the defendant engaged in obstruction of justice,²⁴ commission of an offense against a government official²⁵ or particularly

17. See U.S. SENTENCING GUIDELINES MANUAL ch. 4, for the rules regarding calculation of criminal history category. The basic unit of measurement in this calculation is prior sentences imposed for misdemeanors and felonies. *See id.*

18. *See id.* at ch. 3.

19. *See id.*

20. *See id.* § 2F1.1(a).

21. *See id.* § 2B1.1(b)(1) (reflecting an increase in offense level of 2 for a theft of \$1000 and an increase of thirteen for a theft of \$1,000,000).

22. The amount of the "loss" is not the only specific offense characteristic for fraud offenses. Section 2F1.1 also provides adjustments for the specific offense characteristics of "more than minimal planning," the use of "sophisticated means" to commit the fraud, jeopardizing the soundness of a financial institution and other factors. *See id.* § 2F1.1(b)(2), (5)–(6)(A).

23. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1. The defendant's offense level can be enhanced by either two, three, or four levels depending on the degree of control he exercised over the criminal enterprise and on the size of that enterprise. *See id.*

24. *See id.* § 3C1.1. Obstruction of justice includes conduct such as threatening witnesses, suborning perjury, producing false exculpatory documents, destroying evidence, and failing to appear as ordered for trial. *See id.* cmt. 3(a)–(c), (e).

25. *See id.* § 3A1.2.

vulnerable victim,²⁶ and the existence of multiple counts of conviction.²⁷ There are also possible reductions in offense level based on a defendant's "mitigating role" in the offense²⁸ or on so-called "acceptance of responsibility."²⁹

Just as the characteristic feature of pre-Guidelines sentencing was the nearly unfettered sentencing authority of the judge, the defining characteristic of the Guidelines regime is its systematic restraint of judicial sentencing discretion. Once a district court has determined the final offense level on the vertical axis and the criminal history category on the horizontal axis, the Sentencing Table designates the sentencing range. The judge retains effectively unfettered discretion to sentence *within that range*.³⁰ However, by design, the Sentencing Reform Act and the Sentencing Guidelines make it very difficult to "depart," that is, to impose a sentence above or below the designated sentencing range. To depart, the judge must justify the departure on the record either by referring to factors specified in the Guidelines as appropriate grounds for departure,³¹ or by finding "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."³² Moreover, except in unusual circumstances, the Guidelines specifically *exclude*, for purposes of departing outside the guideline range, most of those factors, such as age, employment

26. See *id.* § 3A1.1 (creating an enhancement where a victim was selected based on "race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation" and in the case of a victim "unusually vulnerable due to age, physical or mental condition").

27. See *id.* ch. 3, pt. D.

28. See *id.* § 3B1.2 (allowing decreases in an offense level of two or four levels if defendant found to be a "minor participant" or "minimal participant" in the criminal activity).

29. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (permitting reduction of two offense levels where defendant "clearly demonstrates acceptance of responsibility," and three offense levels if otherwise applicable offense level is at least 16 and defendant has "assisted authorities in the investigation or prosecution of his own misconduct" by taking certain steps). Despite the euphemism "acceptance of responsibility," § 3E1.1 is nothing more nor less than an institutionalized incentive to gain guilty pleas.

30. See *id.* § 5C1.1(a) ("A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range.").

31. See *id.* § 5K2.0 (detailing the approved grounds for upward or downward departure).

32. This language appears in the Guidelines's enabling legislation, 18 U.S.C. § 3553(b), and is repeated in § 5K2.0 of the Guidelines.

record, or family ties, that judges formerly used to “individualize” sentences.³³

B. “Substantial Assistance”

By far the most common ground for departures from the otherwise applicable sentencing range is cooperation with the government in the prosecution of others, or “substantial assistance.”³⁴ The American judicial system has always rewarded criminal defendants who testify against their fellows, customarily by reducing the cooperating defendant’s sentence.³⁵ Prosecutors historically have entered into agreements with cooperators to drop or not file certain charges, or to recommend a lower sentence than might otherwise appear appropriate. However, prior to the passage of the Sentencing Reform Act of 1984 (SRA) and the ensuing adoption of the Federal Sentencing Guidelines, cooperation agreements were certainly a less prominent feature of the federal legal landscape than they are today.

The SRA and the Guidelines made three changes that, in combination, dramatically affected the process of bargaining for testimony in federal court. First, in the SRA, Congress imposed stringent minimum mandatory sentences for a number of commonly prosecuted federal crimes, most notably drug offenses.³⁶ For example,

33. Chapter 5, Part H of the Guidelines lists factors the Commission determined to be “not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range.” These include age, § 5H1.1; educational and vocational skills, § 5H1.2; mental and emotional conditions, § 5H1.3; physical condition, § 5H1.4; history of substance abuse, § 5H1.4; employment record, § 5H1.5; family or community ties, § 5H1.6; socio-economic status, § 5H1.10; military record, § 5H1.11; history of charitable good works, § 5H1.11; and “lack of guidance as a youth,” § 5H1.12. In theory, most of these factors nonetheless can justify a departure, but such a departure is permissible only where the excluded factor is present to a degree so unusual that the Commission would not have anticipated its impact and thus did not “adequately [take it] into consideration,” when formulating the Guidelines. 18 U.S.C. § 3553(b).

34. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (authorizing downward sentencing departures on motion of the government for “substantial assistance in the investigation or prosecution of another person”). In 1993, for example, the reason cited in 72% of the downward departures granted was substantial assistance. See Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 152 (1995).

35. See Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 7–8 (1992) (describing the long historical roots in England and the United States of granting sentencing concessions, including complete immunity to informants and cooperating co-defendants).

36. See Russell W. Gray, *Wilson v. Seiter: Defining the Components of and Propos-*

a first offense of possession with intent to distribute 500 grams of powder cocaine now carries a minimum mandatory sentence of five years imprisonment;³⁷ for five kilograms of cocaine, the minimum mandatory sentence is ten years.³⁸ For a second drug offense, the minimum mandatory sentence doubles.³⁹ Second, the Guidelines raised the sentencing ranges for the two most commonly prosecuted categories of federal crime — drugs and fraud⁴⁰ — significantly above historical norms.⁴¹ As a result, drug defendants now commonly face Guidelines or statutory minimum mandatory sentences of five, ten, fifteen years, or more, and white collar defendants who would in pre-Guidelines days have confidently expected probation and a fine now confront imprisonment for a period of years in a real penitentiary.⁴² Third, and pivotally, for most defendants virtually the only ground on which a departure from these stiff sentences might plausibly be based is “substantial assistance” to the govern-

ing a Direction for Eighth Amendment Prison Condition Law, 41 AM. U. L. REV. 1337, 1389 n.8 (1992).

37. See 21 U.S.C. § 841(b)(1)(B)(ii)(II) (1994).

38. See *id.* § 841(b)(1)(A)(ii)(II).

39. See *id.*

40. Together, narcotics and white collar crime account for roughly two-thirds of all federal cases. See Bowman, *supra* note 10, at 733 n.190.

41. From 1984 to 1990, the average federal sentence of incarceration (a figure which excludes those cases in which probation was ordered) rose from 24 to 46 months. See U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 60 (1991). Including probationary sentences (counted as zero months), the average sentence rose from 13 months in 1984 to 30 months in 1990. See *id.* By 1994, the average federal sentence (again excluding probation cases) had risen to 65.9 months. See U.S. SENTENCING COMM'N, 1994 ANNUAL REPORT, at 54–55, tbl. 21. The percentage of federal offenders sentenced to prison rather than probation of other non-incarcerative sanction has also increased under the Guidelines. In 1987, the year before the Guidelines went into effect, 53% of convicted federal defendants were sentenced to a term of imprisonment. See U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1993, at 494, tbl. 5.22 (Kathleen Maguire & Ann L. Pastore eds., 1994). By 1994, 77.8% of convicted federal offenders were imprisoned. See *id.* For a discussion of the increase in drug sentences under the Guidelines, see Bowman, *supra* note 10, at 740–45. For a discussion of the increase in white collar sentences under the Guidelines, see Frank O. Bowman, III, *Coping With “Loss”: A Re-Examination of Sentencing Federal Economic Crimes Under the Guidelines*, 51 VAND. L. REV. 461, 483–85 (1998).

42. As Justice Breyer, one of the original members of the U.S. Sentencing Commission, said of white collar offenders, “A pre-Guidelines sentence imposed on these criminals would likely take the form of straight probationary sentences.” Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 50 n.49 (1988).

ment.⁴³ Indeed, substantial assistance is one of only two authorized vehicles for departing below a statutory minimum mandatory sentence.⁴⁴

Taken together, these three changes in the law radically altered the plea bargaining environment and created powerful, indeed often almost irresistible, incentives for defendants to cooperate with the government. There is evidence suggesting that the adoption of statutory and guideline substantial assistance provisions changed the way federal prosecutors bargain and, perhaps, the way criminal defendants think about cooperating. For example, although no statistics exist on how often federal defendants received sentence reductions for cooperation before the Guidelines, statistics do exist on motions for sentence reduction under § 5K1.1 of the U.S. Sentencing Guidelines after the adoption of the Guidelines. The number of § 5K1.1 motions filed by federal prosecutors increased steadily in the years following 1987, and by 1994, the government made substantial assistance motions in nearly 20% of all federal prosecutions.⁴⁵ During my service as an Assistant United States Attorney (AUSA) in the Southern District of Florida in the early 1990s, I vividly recall one cooperating defendant who had been in federal prison before the Guidelines era telling me, "Before, nobody wanted a snitch jacket. Now, everybody rats, man."

Not surprisingly, the change has proven controversial. There have been two major criticisms, one general and one procedural. The overarching concern of many critics is that in the Guidelines era the incentives to cooperate are now so powerful that they dramatically increase the risk of perjury that always exists whenever the government rewards witnesses for testimony. For many critics, this general concern about excessive government leverage is exacer-

43. See FED. R. CRIM. P. 35(b).

44. See 18 U.S.C. § 3553(e) (permitting departure below minimum mandatory sentence "[u]pon motion of the government" for substantial assistance). The only other escape from a minimum mandatory sentence is the so-called "safety-valve" provision of 18 U.S.C. § 3553(f) and § 5C1.1 of the Sentencing Guidelines, which permit downward departures for defendants who fulfill five statutorily-mandated conditions. This includes truthful disclosure to the government of all information in the defendant's possession concerning the offense(s) of conviction and any others who are part of the same common scheme or plan.

45. See SUBSTANTIAL ASSISTANCE WORKING GROUP, U.S. SENTENCING COMM'N, FEDERAL COURT PRACTICES: SENTENCE REDUCTIONS BASED ON DEFENDANT'S SUBSTANTIAL ASSISTANCE TO THE GOVERNMENT (1997) [hereinafter FEDERAL COURT PRACTICES] (reporting that the national substantial assistance departure rate increased from 3.5% in fiscal year 1989 to 19.5% in fiscal year 1994).

bated by a pivotal procedural component of the substantial assistance mechanism — the requirement of a government motion as a prerequisite for a substantial assistance sentence reduction. The government motion requirement is the subject of the D.C. Circuit's opinion in *In re Sealed Case*.⁴⁶ The broader question of whether the government should be bargaining for testimony with felons is the issue at the root of the Tenth Circuit's original panel decision in *United States v. Singleton*.⁴⁷ I will address the government motion requirement first,⁴⁸ and then consider the bigger question presented in *Singleton*.⁴⁹

III. SEALED CASE AND SINGLETON: A DISSECTION

A. *In re Sealed Case*: Judicial Rejection of the Government Motion as Prerequisite for a Substantial Assistance Reduction

1. *Statutory and Supreme Court Authority on the Government Motion Requirement*

The Sentencing Reform of 1984 directed the Sentencing Commission to ensure

that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account *a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense*.⁵⁰

Before the Guidelines went into effect, Congress enacted the Anti-Drug Abuse Act of 1986,⁵¹ which added subsection (e) to 18 U.S.C. § 3553. Section 3553(e) authorizes departures below statutory minimum sentences in narrowly circumscribed situations. “*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*

46. See *Sealed Case*, 149 F.3d at 1198.

47. See *Singleton I*, 144 F.3d at 1343.

48. See *infra* Part III.A.

49. See *infra* Part III.C.

50. 28 U.S.C. § 994(n) (emphasis added).

51. Anti-Drug Abuse Act of 1986, § 1007(b), Pub. L. No. 99-570, 100 Stat. 3207 (codified at 18 U.S.C. § 3553).

*in the investigation or prosecution of another person who has committed an offense.*⁵²

The Sentencing Guidelines, promulgated by the Sentencing Commission and approved by Congress in 1987, contained § 5K1.1, which tracked § 3553(e) in permitting downward departures from the otherwise applicable Guidelines sentence based on cooperation and conditioned on a motion by the government. Section 5K1.1 states: “*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.*”⁵³

In 1992, the Supreme Court decided *Wade v. United States*.⁵⁴ Defendant Wade pled guilty to narcotics offenses that carried a minimum mandatory sentence of ten years and a Guidelines sentencing range of 97–121 months.⁵⁵ During the investigation that led to his prosecution, Wade provided information to the government that led to the arrest of another drug dealer; however, the government refused to make a motion to reduce his sentence for substantial assistance, and he was sentenced to fifteen years (180 months) in prison.⁵⁶ The district court held that it had no power to depart in the absence of a government motion.⁵⁷ In a unanimous opinion, the Supreme Court made several findings critical to the present discussion.

First, the Court noted that Wade’s situation involved both a minimum mandatory sentence and a sentence within the applicable Guidelines sentencing range, and therefore, his request for a sentence reduction implicated both § 3553(e) and Guidelines § 5K1.1.⁵⁸ Second, Wade conceded “as a matter of statutory inter-

52. 18 U.S.C. § 3553(e) (emphasis added).

53. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998) (emphasis added). Section 5K1.1 originally read: “Upon motion of the government stating that the defendant has made a good faith effort to provide substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the [G]uidelines.” *Id.* § 5K1.1 (1987) (emphasis added). In 1989, the Commission amended section 5K1.1 to delete the reference to “good faith effort.” *Id.* app. C, amend. 290 (Nov. 1, 1989).

54. 504 U.S. 181 (1992).

55. *See id.* at 183.

56. *See id.* Wade received the mandatory 10-year minimum sentence on the narcotics counts plus five years for a gun count. *See id.*

57. *See id.* at 181.

58. *See id.* at 184 (“Because Wade violated federal criminal statutes that carry mandatory minimum sentences, this case implicates both 18 U.S.C. § 3553(e) and USSG

pretation, that § 3553(e) imposes the condition of a Government motion upon the district court's authority to depart," and did "not argue otherwise with respect to § 5K1.1."⁵⁹ The Court said, "Wade's position is consistent with the view, *which we think is clearly correct*, that in both § 3553(e) and § 5K1.1 the condition limiting the court's authority gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted."⁶⁰ In short, the Court held that under both the statute and the guideline governing substantial assistance departures, the district court's power to depart is conditional on a government motion.⁶¹ No motion, no departure. Moreover, the government has no obligation to file a motion for a departure *even if* the defendant has provided substantial assistance.⁶²

Finally, the *Wade* Court held that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive."⁶³ The Court continued, "It follows that a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing."⁶⁴ Note the form of this holding. It does not grant the district court any independent authority to evaluate the nature or quality of a defendant's cooperation, or to grant a departure if the court believes the assistance was substantial.⁶⁵ The district court's only power is to make a narrowly circumscribed inquiry into the government's motives for declining to make a motion, which is a legal prerequisite for such a departure.

If any doubt remained after *Wade* that a government motion is a prerequisite for a substantial assistance departure, that doubt

§ 5K1.1.").

59. *Id.* at 185.

60. *Wade*, 504 U.S. at 185 (emphasis added).

61. *See id.*

62. *See id.* at 187.

63. *Id.* at 185-86.

64. *Id.*

65. The Court declined to remand the case for further proceedings because Wade had not alleged any unconstitutional basis for the government's refusal to make the motion. *See id.* at 186-87. In response to the district court's invitation to proffer the evidence that the defense would produce at a hearing on the failure to make a substantial assistance motion, Wade's counsel "merely explained the extent of Wade's assistance to the Government." *Id.* at 187. The Court stated, "This, of course, was not enough, for although a showing of assistance is a necessary condition for relief, it is not a sufficient one." *Id.* at 186.

should have been laid firmly to rest by the Supreme Court's 1996 decision in *Melendez v. United States*.⁶⁶ In *Melendez*, the government concluded that the defendant had provided substantial assistance. However, the government's motion requested only that the district court depart below the minimum of the otherwise applicable Guidelines sentencing range of 135–168 months, and did not request that the court depart below the statutory minimum sentence of ten years (120 months).⁶⁷ The district court sentenced the defendant to 120 months and held that it lacked the power to depart below the statutory minimum absent a government motion specifically requesting that it do so.⁶⁸ The Supreme Court agreed.⁶⁹

The Court considered the injunction of 18 U.S.C. § 3553(e) that no substantial assistance departure be granted except “upon motion of the government,” and held that a government motion is a “requirement for a departure below the statutory minimum [sentence].”⁷⁰ The Court repeatedly observed that without such a motion the sentencing court was not “authorized” to grant a substantial assistance departure below a statutory minimum,⁷¹ and that only the prosecutor can bestow such authority.⁷² As Justice Stevens said in concurrence, “[Congress] intended to confer the authority to dispense with the statutory minima *on the prosecutor rather*

66. 518 U.S. 120 (1996).

67. *See id.* at 122–23.

68. *See id.*

69. *See id.* at 131.

70. *Id.* at 130.

71. *See id.* at 122 (noting that the plea agreement in the case “did not require the Government to *authorize* the District Court to impose a sentence below the statutory minimum” (emphasis added)). The Court further stated that a motion requesting only a departure below the Guidelines range does not *authorize* a departure below a lower statutory minimum. *See id.* at 125–26. “We believe that § 3553(e) requires a Government motion requesting or *authorizing* the district court to ‘impose a sentence below a level established by statute as a minimum sentence’ before the court may impose such a sentence.” *Id.* (emphasis added).

72. *See Melendez*, 518 U.S. at 126. The Court stated:

[W]e agree with the Government that nothing in § 3553(e) suggests that a district court has *power* to impose a sentence below the statutory minimum to reflect a defendant's cooperation *when the Government has not authorized such a sentence*, but has instead moved for a departure only from the applicable Guidelines range. Nor does anything in § 3553(e) or [18 U.S.C.] § 994(n) suggest that the Commission itself may dispense with § 3553(e)'s motion requirement

Id. at 127 (emphasis added). “One of the circumstances set forth in § 3553(e) is . . . that *the Government has authorized the court* to impose a sentence below the statutory minimum.” *Id.* (emphasis added).

than the Commission.”⁷³ The Court read the phrase “upon motion of the government stating that the defendant has provided substantial assistance” to mean not only that the government must file a pleading in which it assesses the defendant’s cooperation as “substantial,” but also that the government must specifically request relief in the form of a sentence below the statutory minimum.⁷⁴

Melendez took the same view of the language in § 5K1.1 authorizing a departure below the Guidelines range “upon motion of the government.”⁷⁵ The Court said, “[W]e read [§ 5K1.1] as permitting the district court to depart below the Guidelines range when the *Government* states that the defendant has provided substantial assistance and *requests or authorizes the district court* to depart below the Guidelines range.”⁷⁶ In dissent, Justice Breyer contended that a single government motion should suffice to authorize a departure below both statutory and Guidelines minima, but he was even more explicit than the majority that a government motion is required for a substantial assistance departure from the Guidelines range. Justice Breyer wrote, “The Guidelines govern departures from these Guideline sentences, and they permit judges to depart downward for ‘substantial assistance’ *only if* the Government makes a ‘motion . . . stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.’”⁷⁷

Despite the clarity of both § 3553 and § 5K1.1, in the years immediately following the adoption of the Guidelines, creative lower courts tried various means of circumventing the government motion requirement.⁷⁸ For example, in one early case, the Second Circuit upheld a departure absent a government motion where defendant’s

73. *Id.* at 132 (Stevens, J., concurring) (emphasis added).

74. *See id.* at 126 (“Papers simply ‘acknowledging’ substantial assistance are not sufficient if they do not indicate desire for, or consent to, a sentence below the statutory minimum.”).

75. *Id.* at 130.

76. *Id.* at 131 (emphasis added).

77. *Id.* at 133 (Breyer, J., concurring and dissenting) (emphasis added) (quoting the language of § 5K1.1). Later in his opinion, Justice Breyer said: “[T]he [Substantial Assistance] Guideline authorizes a sentencing judge to depart downward from a Guideline sentence for substantial assistance *only if* the Government files the same kind of motion that the Government would file to obtain a departure from a statutory minimum sentence, were such a sentence at issue.” *Id.* at 134 (emphasis added).

78. *See, e.g.,* *United States v. Garcia*, 926 F.2d 125 (2d Cir. 1991) (concluding that a downward departure, under Sentencing Guidelines, was proper without government motion based upon assistance to the judicial branch).

cooperation broke the “log jam in a multi-defendant case” in an over-clogged judicial system, and facilitated the proper administration of justice.⁷⁹ However, the emphatic rulings of the Supreme Court in *Wade* and *Melendez* seemed, until quite recently, to have placed the government motion requirement beyond the possibility of serious dispute.⁸⁰

2. In re Sealed Case — *The D.C. Circuit Breaks Out*

In July 1998, a panel of the United States Court of Appeals for the District of Columbia Circuit issued its opinion in *In re Sealed Case*.⁸¹ The panel held that a district court could grant a substan-

79. *See id.* at 127. Subsequently, those courts that have considered the question have rejected sentence reductions based on assistance to the judicial branch. *See* *United States v. Dorsey*, 61 F.3d 260, 261–62 (4th Cir. 1995) (holding that assistance to the judiciary is an improper departure ground under § 5K2.0 of the Guidelines); *United States v. Shrewsberry*, 980 F.2d 1296, 1297–98 (9th Cir. 1992); *United States v. Lockyer*, 966 F.2d 1390, 1391–92 (11th Cir. 1992).

80. *See, e.g.*, *United States v. Lezine*, 166 F.3d 895 (7th Cir. 1999) (stipulating that a court may consider departure for substantial assistance only in limited circumstances without government motion); *United States v. Licon-Lopez*, 163 F.3d 1040, 1042 (8th Cir. 1998) (holding that the court cannot depart in absence of a government motion); *United States v. Difeaux*, 163 F.3d 725, 728 (2d Cir. 1998) (holding that a deputy marshal is not the “government” for purposes of motion); *United States v. Santoyo*, 146 F.3d 519, 523–24 (7th Cir. 1998) (relying on a “long and unbroken line of cases” to recognize that a § 5K1.1 motion is a prerequisite for substantial assistance departures); *United States v. Gonsalves*, 121 F.3d 1416, 1420 (11th Cir. 1997) (holding “bare allegation” of bad faith by government in not making motion insufficient to permit a § 5K1.1 departure); *United States v. Amaya*, 111 F.3d 386, 388 (5th Cir. 1997) (stating that a court cannot address substantial assistance without government motion); *United States v. Dorsey*, 61 F.3d 260, 262 (4th Cir. 1995) (recognizing the government motion requirement and holding that assistance to the judicial system is not a proper ground for departure); *United States v. Kelley*, 956 F.2d 748, 751 (8th Cir. 1992) (en banc) (upholding government motion requirement even though § 5K1.1 is only a “policy statement”); *United States v. Gonzales*, 927 F.2d 139, 145 (3d Cir. 1991) (neglecting to review whether government’s refusal to move for departure was in good faith); *United States v. Sklar*, 920 F.2d 107, 115–16 (1st Cir. 1990) (holding defendant’s good faith efforts to offer cooperation not sufficient, absent a government motion, to permit downward departure); *United States v. Dumas*, 921 F.2d 650, 652–54 (6th Cir.), *modified*, 934 F.2d 1387, 1389 (6th Cir. 1990) (holding that a government motion is always required); *United States v. Levy*, 904 F.2d 1026, 1035 (6th Cir. 1990) (agreeing with the findings in *Dumas*); *United States v. Sorensen*, 915 F.2d 599, 603 (10th Cir. 1990) (acknowledging the government motion requirement and holding that the due process review of refusal to make a motion available only in “egregious” cases). Of course, not all courts understood the message, and in *United States v. Kaye*, 140 F.3d 86 (2d Cir. 1998), the Second Circuit upheld a substantial assistance departure without a government motion because the cooperation was with local rather than federal authorities. *See id.* at 87.

81. *See Sealed Case*, 149 F.3d at 1198.

tial assistance departure without a government motion, because such a departure was “unmentioned” in the Guidelines and was thus a permissible exercise of sentencing discretion under the standards announced by the Supreme Court in *Koon v. United States*.⁸² To arrive at this conclusion, the panel blithely ignored binding Supreme Court precedent, the plain language of both federal statutes and the Sentencing Guidelines, and ordinary principles of logic and English usage.

The opinion begins with the astounding statement that in *Wade* and *Melendez* the Supreme Court “never decided whether departure might be appropriate when the government has not filed a motion under section 5K1.1.”⁸³ This assertion is belied by the Supreme Court’s repeated statements in both *Wade* and *Melendez* that a necessary precondition of both § 3553 and § 5K1.1 departures is a government motion. As noted above, in *Wade*, the Court held that in a case where the government declines to file a motion, “a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing.”⁸⁴ Again, in *Melendez*, the Court emphasized over and over that without a government motion, the district court was without “authority” to grant a substantial assistance departure.⁸⁵

Having dealt with Supreme Court precedent by the simple expedient of ignoring it, the *Sealed Case* panel turned to its main argument — that the Supreme Court’s decision in *Koon* granted lower federal courts the power to ignore the plain language of the

82. See *id.* at 1204 (relying on *Koon v. United States*, 518 U.S. 81 (1996)).

83. *Id.* at 1202.

84. *Supra* note 64 and accompanying text.

85. See *supra* note 72 and accompanying text. The panel in *Sealed Case* could have tried to distinguish *Melendez* on the ground that it primarily concerned departures below the statutory minimum pursuant to 18 U.S.C. § 3553(e), and not departures below the Guideline range pursuant to § 5K1.1. However, the panel did not even attempt this distinction, which is unavailing in any case given the *Melendez* majority’s declaration that, “[W]e read [§ 5K1.1] as permitting the district court to depart below the Guidelines range when the Government states that the defendant has provided substantial assistance and requests or authorizes the district court to depart below the Guidelines range.” *Id.* at 131 (emphasis added). See Justice Breyer’s even more explicit statement in dissent that the Guidelines permit a § 5K1.1 departure “only if” the Government makes a motion. *Id.* at 133 (Breyer, J., dissenting). Justice Breyer’s views on the Guidelines are entitled to special attention because, before joining the Supreme Court, he was a member of the original Sentencing Commission which drafted the Federal Sentencing Guidelines. See U.S. SENTENCING GUIDELINES MANUAL title page (1987).

Sentencing Guidelines.⁸⁶ In *Koon*, the Court considered the sentencing appeal of Stacey Koon, one of the Los Angeles police officers convicted of civil rights violations for his part in the infamous beating of Rodney King.⁸⁷ Following Koon's conviction, the district court departed downward from the Guidelines sentencing range of 70–87 and instead imposed a sentence of thirty months.⁸⁸ The judge gave five reasons for the departure,⁸⁹ only one of which (that the victim's "wrongful conduct contributed significantly to provoking the offense behavior") was a reason specifically sanctioned by the Guidelines. The Ninth Circuit held that none of the district court's five reasons for departure was proper in this case, but the Supreme Court reversed.⁹⁰ The Court held that the standard of appellate review for departures outside the otherwise applicable guideline range is "abuse of discretion,"⁹¹ and that the district court did not abuse its discretion in relying on victim provocation and two of the four grounds for departure unmentioned in the Guidelines.⁹²

More importantly for present purposes, the *Koon* Court created a multi-tiered analytical structure for evaluating departure factors:

If the special [departure] factor is a *forbidden* factor, the sentencing court cannot use it as a basis for departure. If the special factor is an *encouraged* factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a *discouraged* factor, or an *encouraged* factor al-

86. See *Sealed Case*, 149 F.3d at 1202.

87. See *Koon*, 518 U.S. at 86–88.

88. See *id.* at 89–90.

89. The five reasons were: (1) "the victim's wrongful conduct contributed significantly to provoking the offense behavior," § 5K2.10"; (2) because of the "widespread publicity and emotional outrage which have surrounded this case," [Koon and his co-defendant Powell] were 'particularly likely to be targets of abuse' in prison"; (3) Koon would lose his job as a police officer and suffer "anguish and disgrace"; (4) Koon "had been 'significantly burden[ed]' by having been subjected to successive state and federal prosecutions"; and (5) "[Koon was] not 'violent [!], dangerous, or likely to engage in future criminal conduct' so there was no reason to impose a sentence . . . to protect the public from [his future criminality]." *Id.* (quoting the district court decision, *United States v. Koon*, 833 F. Supp. 769, 787–90 (C.D. Cal. 1993)).

90. See *id.* at 114.

91. *Id.* at 99.

92. The Supreme Court found that neither petitioners' career loss nor the low likelihood of recidivism was an appropriate departure factor. See *id.* at 110–11. However, the Court sustained the district court's holding based on the unusual susceptibility of Koon and Powell to abuse in prison, and because the petitioners were subjected to successive prosecutions in state and federal court. See *id.* at 112.

ready taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. If a factor is *unmentioned* in the Guidelines, the court must, after considering the “structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,” decide whether it is sufficient to take the case out of the Guideline’s heartland. The court must bear in mind the Commission’s expectation that departures based on grounds not mentioned in the Guidelines will be “highly infrequent.”⁹³

The *Koon* decision is subject to a number of criticisms.⁹⁴ Not least among these is that the division of permitted departure factors into “discouraged,” “encouraged,” and “unmentioned” categories proves singularly unhelpful in practice because the Court never explained how the exercise of a sentencing court’s discretion differs between the categories.⁹⁵ Read carefully, the Court’s opinion says nothing more than what the Guidelines themselves say — departure is permitted if the judge finds that a factor, any factor, whether discouraged, encouraged, or unmentioned, is of a type or degree that takes the case outside the “heartland” of cases considered by the Commission in creating the Guidelines.⁹⁶

Whatever its deficiencies, *Koon* is clear on two points germane to the present discussion. First, if the Commission forbade departure based on a particular factor, then a district court may not depart on that ground.⁹⁷ “If the special factor is a *forbidden* factor, the sentencing court cannot use it as a basis for departure.”⁹⁸ Sec-

93. *Koon*, 518 U.S. at 95–96 (emphasis added and citations omitted).

94. See, e.g., Frank O. Bowman, III, *Places in the Heartland: Departure Jurisprudence after Koon*, 9 FED. SENTENCING REP. 19 (1996) (arguing that *Koon* rests on an unsupportable reading of the Sentencing Reform Act and misunderstood factual data regarding the relative institutional competence of appellate and district court judges to evaluate guideline sentencing departures); Barry L. Johnson, *Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of Koon v. United States*, 58 OHIO ST. L.J. 1697, 1713–45 (1998) (arguing, *inter alia*, that the Court’s “abuse of discretion” standard of departure review was unjustified); Kate Stith, *The Hegemony of the Sentencing Commission*, 9 FED. SENTENCING REP. 14 (1996) (calling the *Koon* opinion “puzzling” and contending that it does not permit a “meaningful exercise of discretion by district courts”).

95. See *Koon*, 518 U.S. at 95–96.

96. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (describing grounds for departure generally).

97. See *Koon*, 518 U.S. at 93.

98. *Id.* at 95–96.

ond, if a factor is “discouraged” by the Guidelines, a sentencing court may depart only if the factor “is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present.”⁹⁹ In *Sealed Case*, the D.C. Circuit applied the *Koon* taxonomy for reviewing departures and arrived at the remarkable, nay mind-boggling, conclusion that a downward substantial assistance departure without a government motion is not forbidden by the Guidelines, indeed is not even discouraged, but is instead a situation “unmentioned” by the Guidelines.¹⁰⁰ Declared the court: “[A] substantial assistance departure without a government motion is neither encompassed by nor equivalent to any mentioned, encouraged, or discouraged factor, and was thus not adequately considered by the Commission. . . . In fact, where the government files no motion, section 5K1.1 does not even apply.”¹⁰¹

This is, of course, transparent poppycock. Nonetheless, some dissection of the court’s reasoning is in order. Faced with the inconvenient language of § 5K1.1 that plainly conditions a substantial assistance departure “upon motion of the government” and would thus appear to forbid such departures without a motion, the court simply announced: “Applying *Koon* to this case, *we begin with the obvious: The circumstance under which appellant seeks departure is not prohibited.* Nowhere do the Guidelines state that courts cannot depart based on substantial assistance in the absence of a government motion.”¹⁰²

In ordinary English usage, when I say, “Upon the occurrence of X, you may do Y,” the listener understands without further explanation that if X does not occur, then permission to do Y is not granted. This is the negative implication of a grant of authority with a condition precedent. Section 5K1.1 says, “Upon motion of the government . . . the court may depart”¹⁰³ If the court is at liberty to depart whether the government makes a motion or not, then the phrase “upon motion of the government” is meaningless surplusage.¹⁰⁴

99. *Id.* at 96.

100. *See Sealed Case*, 149 F.3d at 1202–03.

101. *Id.* at 1203–04.

102. *Id.* at 1202 (emphasis added).

103. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

104. *See Solis I*, 161 F.3d at 285 (Smith, J., dissenting) (arguing that the majority’s reading of § 5K1.1 “renders the words ‘[u]pon motion of the government’ redundant”).

The method of creating a condition precedent employed by the Sentencing Commission in § 5K1.1 is hardly unique to the Guidelines. As noted above, the language of § 5K1.1 is drawn directly from the statutory language of § 3553.¹⁰⁵ Exactly the same formulation is used by the Federal Rules of Criminal Procedure in governing substantial assistance departures based on cooperation after sentencing.¹⁰⁶ Rule 35(b) states: “The court, *upon motion of the Government made within one year after the imposition of sentence,*” may reduce a sentence for post-sentencing substantial assistance.¹⁰⁷ The same device appears in the discovery rules where the government’s obligation to produce discovery materials is triggered “[u]pon request of a defendant,”¹⁰⁸ and the defendant’s reciprocal discovery obligations arise only “on request of the government.”¹⁰⁹

The panel in *Sealed Case* made no effort to explain what function the phrase “upon motion of the government” serves if its purpose is not to create a condition precedent to the grant of a substantial assistance departure.¹¹⁰ Moreover, any attempt at such an explanation simply cannot account for the Supreme Court’s holdings in *Wade* and *Melendez* that the phrase “upon motion of the government” does indeed create a condition precedent to a substantial assistance departure.

Perhaps even more astounding than the declaration in *Sealed Case* — that a “motion-less” 5K1.1 departure is not prohibited — is the conclusion that such a departure is not even “discouraged” by the Guidelines, and is instead completely unmentioned.¹¹¹ The court’s reasoning on this point has to be read in full to be appreciated, but the essence is contained in the assertion: “Substantial assistance without a government motion is certainly not a ‘semantic

105. See *supra* text accompanying notes 52–53.

106. See FED. R. CRIM. P. 35(b).

107. *Id.* (emphasis added).

108. FED. R. CRIM. P. 16(a)(1)(A) (governing discovery of a defendant’s statement). The same verbal device appears four more times in Rule 16(a) on government discovery. See *id.* at 16(a)(1)(B)–(D).

109. *Id.* at 16(b)(1)(A). “If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, *upon request of the government,* shall permit [discovery].” *Id.* (emphasis added).

110. See *Sealed Case*, 149 F.3d at 1202.

111. See *id.* at 1203. “[T]he Guidelines nowhere expressly discourage departures based on ‘substantial assistance without a government motion,’ even though the Commission could easily have done so.” *Id.* at 1202.

or practical equivalent' of a substantial assistance with a motion [They] stand as polar opposites."¹¹² Thus, reasons the court, in § 5K1.1, the Commission encouraged substantial assistance departures when a government motion is made, but the Commission did not expressly mention, and thus, did not "adequately consider," those cases excluded from the encouraged category in which the government declines to make a motion.¹¹³ Therefore, a district court is free to depart without a government motion.¹¹⁴

The court is playing word games. Whether a departure factor properly falls into *Koon's* "unmentioned" category depends on whether the Commission "adequately considered" it, not on whether the Commission wrote into the text of the Guidelines the fact that consideration was given. The subject of § 5K1.1 is the departure factor of substantial assistance to the government. In drafting § 5K1.1, the Commission evidently "considered" all cases of cooperation, but made a "considered" distinction between cases in which the government moves for a sentence reduction and cases in which it does not.

It is as if my eight-year-old son were to bring me a bowl containing a mixture of fruit and candy bars and ask, "Dad, may I have a snack?" When I reply, "Yes, if you wash your hands, you may have a piece of fruit," I do not mean, "Sure have a banana, and a Milky Way bar, too, if you like, and I leave the decision about washing your hands to the exercise of your sound discretion." If my son, having immediately unwrapped the Milky Way and thrust it into his mouth with his unwashed fingers, were to argue, "But Dad, your response to my question did not specifically mention candy, nor did it specifically prohibit me from eating candy without washing, and therefore I assumed you had not 'adequately considered' that possibility," his banishment to his room would be swift, prolonged, and accompanied by stern remarks from the bench. In a perfect world, *Sealed Case* would earn for its authors the judicial equivalent of the same punishment. In what may be a foreshadowing of just that outcome, the D.C. Circuit granted the government's petition for rehearing en banc and vacated the portion of the panel's opinion concerning substantial assistance departures without government motions.¹¹⁵

112. *Id.* at 1203 (quoting *Koon*, 518 U.S. at 110).

113. *Id.* at 1202-03.

114. *See id.* at 1204.

115. *See Sealed Case*, 159 F.3d 1362 (D.C. Cir. 1998). Oral arguments on the re-

3. Reaction to Sealed Case

Several other courts have considered the opinion in *Sealed Case*. The Third Circuit and a district court in Pennsylvania both rejected the reasoning of the D.C. Circuit.¹¹⁶ The Third Circuit held that *Sealed Case* misconstrued § 5K1.1 and that a motion by the government is a precondition for relief under § 5K1.1.¹¹⁷ Absent such a motion, a substantial assistance departure is available under only three “extraordinary” circumstances — (1) the government refuses to file a motion based on unconstitutional considerations such as race, religion, gender, or the like; (2) the government acts in bad faith with regard to a plea agreement; and (3) “possibly [in a case] in which the assistance is not of a sort covered by § 5K1.1.”¹¹⁸

B. *United States v. Solis*: The Fifth Circuit Does the Two-Step

For about four months, it appeared that the Fifth Circuit would be dancing cheek-to-cheek with the D.C. Circuit panel in *Sealed Case*; however, after an intriguing flirtation, the Fifth Circuit twirled 180 degrees and left the *Sealed Case* opinion alone on the floor. In November 1998, a panel of the Fifth Circuit decided *Solis I*,¹¹⁹ holding by a 2-1 margin that a substantial assistance departure need not be preceded by a government motion, and unequivocally endorsing the result and reasoning of *Sealed Case*.¹²⁰ The government moved for reconsideration, and in March 1999, the *Solis* panel reversed itself, vacated the November 1998 opinion, and issued a new opinion (*Solis II*) holding unanimously that a substan-

hearing were held on January 27, 1999. The D.C. Circuit issued an opinion as this Article went to publication. See Part VII *infra* page 67.

116. See *United States v. Abuhouran*, 161 F.3d 206, 210 (3d Cir. 1998) (finding that *Sealed Case* “misapplied *Koon*” because substantial assistance to the government is taken into account in § 5K1.1 of the Guidelines); *United States v. Gibson*, 29 F. Supp. 2d 257, 258 (E.D. Pa. 1998); see also *United States v. Licon-Lopez*, 163 F.3d 1040, 1044 n.3 (8th Cir. 1998) (declining to follow *Sealed Case* and noting that the portion of that decision relating to the government motion requirement was vacated pending rehearing en banc).

117. See *Abuhouran*, 161 F.3d at 213. (“The requirement of a government motion under § 5K1.1 is a condition limiting a court’s authority to grant a defendant a substantial assistance departure.”).

118. *Id.* at 214. An example of the third circumstance would be assistance in the prosecution of a civil forfeiture case.

119. See *supra* note 6 and accompanying text.

120. The vote of the panel was 2-1, with Judge Jerry E. Smith dissenting. See *Solis I*, 161 F.3d at 285.

tial assistance departure is not available under either § 5K1.1 or § 5K2.0 of the Guidelines without a government motion.¹²¹ These gyrations merit some brief scrutiny.

The *Solis I* opinion was, if anything, more distressing than *Sealed Case* itself. In *Solis I*, the district court granted a five-level downward departure under the “safety valve” provision of § 5C1.2 of the Guidelines. On appeal, the Fifth Circuit found that this departure was improper. However, the court declared the error harmless because its own (apparently *sua sponte*) examination of the trial record disclosed that the true basis for the trial court’s decision to depart was the defendant’s cooperation with the government.¹²² Thus, said the Fifth Circuit, the trial court could have granted a substantial assistance departure without a government motion.¹²³

The opinion of the *Solis I* majority made no effort to analyze § 5K1.1 or to distinguish the Supreme Court’s decisions in *Wade* and *Melendez*. It simply declared that, “We are persuaded by the D.C. Circuit’s reasoning in *In re Sealed Case* and, therefore, adopt it.”¹²⁴ In fact, however, in at least two respects *Solis I* went much farther even than *Sealed Case*. First, *Solis I* abandoned not only the requirement of a *government* motion for a substantial assistance sentence reduction, but also any requirement that the *defendant* request such relief. According to *Solis I*, a court could award a downward departure for substantial assistance without request or input from anybody. Second, *Solis I* abandoned any pretense of requiring that the cooperation be of “substantial assistance” to the government. The record in *Solis* showed nothing more than that the defendant talked to government agents four times about “topics that were relevant to the investigation.”¹²⁵ There was no indication that the government learned anything it did not already know, much less that any information gleaned was of “substantial assistance in the investigation or prosecution of another person.”¹²⁶ In

121. See *Solis II*, 169 F.3d at 227.

122. See *Solis I*, 161 F.3d at 283.

123. See *id.* at 284–85.

124. *Id.* at 284. In a footnote, the court quoted portions of the opinion in *Sealed Case* and then wrote: “[W]e read § 5K1.1 to mean only that the Commission encourages courts to depart from the Guidelines when the government makes a motion. We do not read it, however, to preclude courts from departing under § 5K2.0 without a government motion.” *Id.* at 284 n.2.

125. *Id.* at 284.

126. *Supra* note 50 and accompanying text.

Solis I, the Fifth Circuit made no pretense of showing, as even the reasoning of *Sealed Case* would require, that the defendant's assistance was so extraordinary that it fell outside the heartland of other cases involving cooperation and thus merited a departure.

Then, in a reconsidered opinion quite as remarkable in its way as the opinion it replaced, the Fifth Circuit changed its mind. Not only does *Solis II* reach a result exactly opposite to *Solis I*, but it does so with no explanation whatever of the change. In *Solis I*, the panel found the reasoning of *Sealed Case* irrefutable; in *Solis II*, the panel never mentions *Sealed Case* at all, except to observe in a footnote that the *Sealed Case* opinion had been vacated pending en banc rehearing.¹²⁷ The court does not explain why the reasoning of *Sealed Case* was compelling in November, but did not even merit discussion in March. Although the second *Solis* opinion is certainly correct, even critics of the original result are left with some disappointment that the two judges who changed their votes provided no explanation for their conversion.

One suspects that the en banc D.C. Circuit will finally arrive at the same conclusion about *Sealed Case* as did the panel in *Solis*. If not, however, the Supreme Court may be obliged to repeat for a third time its ruling that a government motion is a legal prerequisite for a substantial assistance departure.

C. *United States v. Singleton*: Substantial Assistance as Felony Bribery

If *United States v. Singleton* (*Singleton I*) teaches no other lesson, the case will stand as a constant reminder to lawyers never to omit even the most implausible argument — there is always the chance, however remote, that it will fall on the ears of a group of judges who will buy it. In 1992, Wichita police detectives began investigating a scheme by Wichita drug dealers to use Western Union wire transfers to send money to California to pay for supplies of cocaine being shipped from California to Kansas.¹²⁸ Sonya Evette Singleton “was the common-law wife of Eric Johnson, who regularly bought, packaged, and sold drugs.”¹²⁹ Western Union documents listed Ms. Singleton as either the sender or recipient of eight wire transfers alleged to be involved in the drug conspiracy,

127. See *Solis I*, 161 F.3d at 225 n.1.

128. See *Singleton I*, 144 F.3d at 1343.

129. *Id.* at 1344.

and handwriting experts identified her handwriting on Western Union paperwork associated with all eight wire transfers.¹³⁰ At Ms. Singleton's trial for money laundering and conspiracy to distribute cocaine, the government also introduced the testimony of Napoleon Douglas, a co-conspirator cooperating with the government.¹³¹ Singleton was convicted of conspiracy and seven counts of money laundering.¹³²

The Tenth Circuit's opinion gives none of the specifics of Mr. Douglas's testimony, and indeed does not even disclose its general nature other than to say that he "testified against Ms. Singleton."¹³³ We do know, however, that before testifying, Douglas entered into a plea agreement pursuant to which he pled guilty to some crime and promised to cooperate with the government by giving information and testimony about the crimes of others.¹³⁴ In return, the government promised Douglas four things: (1) if, in the government's opinion, Douglas's cooperation amounted to "substantial assistance," the government would file a motion pursuant to either 18 U.S.C. § 3553(e) or § 5K1.1 of the Federal Sentencing Guidelines for a downward sentencing departure; (2) Douglas would not be prosecuted for offenses arising out of the transactions for which he was arrested other than the crime (or crimes) to which he pleaded guilty (excepting perjury or related offenses if he were untruthful); (3) the government would inform the federal district court sentencing Mr. Douglas on his present conviction of the nature and extent of his cooperation with the authorities; and (4) the government would inform Mississippi parole authorities of the nature and extent of Douglas's cooperation with the federal government.¹³⁵

Before trial, Singleton moved to suppress Douglas's testimony on the ground that the government had impermissibly promised Douglas something of value in return for his testimony, in violation of the federal witness bribery statute, 18 U.S.C. § 201(c)(2).¹³⁶ The district court denied the motion, and after the trial, in which Douglas testified, defendant Singleton was convicted on all charges.¹³⁷

130. *See id.*

131. *See id.*

132. *See id.* at 1343.

133. *Id.* at 1344.

134. *See Singleton I*, 144 F.3d at 1344.

135. *See id.*

136. *See id.*

137. *See id.* at 1343.

Singleton renewed her bribery argument in the Tenth Circuit, and in an opinion that sent shock waves through the national criminal justice community,¹³⁸ the three-judge panel held unanimously that the AUSA violated § 201(c)(2) by promising leniency to Douglas conditioned on his testimony.¹³⁹ The court went on to find that by violating the federal criminal statute, the AUSA also violated *Kansas Model Rules of Professional Conduct* Rule 3.4(b), and therefore, suppression of Douglas's testimony was required.¹⁴⁰

The federal bribery statute reads as follows:

Whoever . . . directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . authorized by the laws of the United States to hear evidence or take testimony . . . shall be fined under this title or imprisoned for not more than two years, or both.¹⁴¹

The panel's opinion rests on two premises. First, the language of § 201(c)(2) "could not be more clear," and on its face prohibits prosecutors from bargaining for testimony.¹⁴² "Whoever" means

138. See, e.g., Mark Hansen, *Shot Down in Mid-Theory*, A.B.A. J., May 1999, at 46 (discussing the *Singleton* case); David R. Rovella, *10th Circuit: Plea Deals Aren't Bribery*, NAT'L L.J., Jan. 25, 1999, at A8; *Plea Bargaining Ban Puts on Full-Court Press*, N.J. LAW., Nov. 9, 1998, at 2; Biskupic, *supra* note 3; Serrano, *supra* note 3.

139. See *Singleton I*, 144 F.3d at 1351.

140. See *id.* at 1358. The court's finding of a state ethical violation by a federal prosecutor, and its use of that supposed violation as an excuse for the suppression of evidence is deeply problematic, though it raises issues beyond the scope of this Article. Among the more notable difficulties with this aspect of the panel's opinion is its statement that "the federal courts have unanimously rejected the notion that federal prosecutors are exempt from these [state] ethical rules." *Id.* at 1354. This is flatly untrue. See, e.g., *Baylson v. Disciplinary Bd.*, 975 F.2d 102, 112-13 (3d Cir. 1992) (holding that enforcement of a state rule regarding attorney subpoenas violated the Supremacy Clause). Moreover, the *Singleton* opinion ignores another opinion of the Tenth Circuit itself, *United States v. Colorado Supreme Court*, 87 F.3d 1161 (10th Cir. 1996), which strongly intimates exactly the contrary result. See *id.* at 1165. For a more complete treatment of other authority, pro and con, see Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665 (1996). After gliding without analysis over the troublesome question of whether a federal prosecutor *can* be held to state ethical rules, the *Singleton* panel leaps with no analysis or citation to the conclusion that such a violation is a ground for evidentiary suppression, as opposed to personal professional sanctions. See *Singleton I*, 144 F.3d at 1354.

141. 18 U.S.C. § 201(c)(2) (1986).

142. *Singleton I*, 144 F.3d at 1345.

whoever. Second, offering leniency for testimony is pernicious and should be prohibited.¹⁴³

The judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money. Because prosecutors bear a weighty responsibility to do justice and observe the law in the course of a prosecution, it is particularly appropriate to apply the strictures of § 201(c)(2) to their activities.¹⁴⁴

Despite its ringing rhetoric and voluminous citations,¹⁴⁵ the opinion fails as a work of statutory interpretation.

The court is, of course, correct that the language of 18 U.S.C. § 201(c)(2), read on its face, seems to apply to everyone, including the government. Equally plain is the fact that absolutely no one, most particularly including Congress, intended the law to apply to plea bargaining with cooperators. This lack of intention is discernible from events both before and after the passage of § 201(c)(2) in 1962.¹⁴⁶ First, bargaining with defendants for testimony was a well-established and judicially condoned practice for centuries prior to the adoption of § 201(c)(2).¹⁴⁷ The United States Supreme Court recognized the practice as early as 1878 in *The Whiskey Cases*.¹⁴⁸ In 1966, four years after the enactment of § 201(c)(2), the Supreme Court responded to an attack on the use of informant testimony as contrary to Anglo-American legal tradition with these words:

143. *See id.* at 1346.

144. *Id.* at 1347. The panel also wrote:

If justice is perverted when a criminal defendant seeks to buy testimony from a witness, it is no less perverted when the government does so. Because § 201(c)(2) addresses what Congress perceived to be a wrong, and operates to prevent fraud upon the federal courts in the form of inherently unreliable testimony, the proscription of 201(c)(2) must apply to the government.

Id. at 1346.

145. At one point the panel cites the Bible, the Magna Carta, a seventeenth-century treatise by Samuel Rutherford, and Justice Brandeis all in a single paragraph. *See id.* at 1346–47.

146. *See* Pub. L. No. 87-849, 76 Stat. 1119 (1962).

147. *See* Hughes, *supra* note 35, at 7–8.

148. 99 U.S. 594 (1878). The Court wrote:

Prosecutors . . . should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfills those conditions he is equitably entitled to a pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation.

Id. at 604.

Insofar as the general attack upon the use of informers is based upon historic "notions" of "English-speaking peoples," it is without historical foundation. In the words of Judge Learned Hand, "Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly."

....

The petitioner is quite correct in the contention that [the informant who testified in this case], perhaps even more than most informers, may have had motives to lie. But it does not follow that his testimony was untrue, nor does it follow that his testimony was constitutionally inadmissible. The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.¹⁴⁹

As the Fifth Circuit opined in 1987, "No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence."¹⁵⁰ The *Singleton I* panel made no effort to address the universal judicial acceptance of bargained-for testimony before and after the enactment of § 201(c)(2), other than to mention rather weakly that the historical record "give[s] us pause."¹⁵¹

Of course, the fact that a practice is deeply ingrained in the legal culture does not prohibit Congress from changing it. Nonetheless, when a litigant urges upon a court a construction of a statute that would prohibit, indeed criminalize, a practice settled for centuries, the court has an obligation to inquire as to whether Congress really intended so revolutionary a result.¹⁵² In the case of

149. *United States v. Hoffa*, 385 U.S. 293, 311 (1966) (quoting *United States v. Dennis*, 183 F.2d 201, 224 (2d Cir. 1950)).

150. *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987); see also *United States v. Reid*, 19 F. Supp. 2d 534, 538 (E.D. Va. 1998) ("In short, the right on the part of the prosecutor to make promises of leniency in exchange for testimony is as old as the institution of the criminal trial.")

151. *Singleton I*, 144 F.3d at 1352. ("Although the government's apparent practice of giving inducements for testimony, as opposed to other forms of cooperation, and the judiciary's seeming approval of such practice give us pause, they do not alter the words of a clear statute.")

152. As the Supreme Court said in *Astoria Federal Savings & Loan Ass'n v.*

§ 201(c)(2), not a word in the legislative history signals an intention to criminalize government bargaining for testimony.¹⁵³ The response of the *Singleton I* panel was to say, “We find no clearly expressed legislative intention contradicting the statute’s language.”¹⁵⁴ Of course, this retort misses the point entirely. Congressional silence only reinforces the conclusion that no one in Congress ever considered the possibility that § 201(c)(2) would be invoked against the government itself to prohibit bargaining for testimony.

More important to the interpretive question than to settled practice, however longstanding, is the fact that Congress has repeatedly, and expressly, sanctioned and regulated the exchange of leniency for testimony. The federal witness immunity statutes, passed as part of the Organized Crime Control Act of 1970, require courts, upon motion of the government, to confer immunity on witnesses who testify for the government.¹⁵⁵ The statute dealing with witness relocation and protection, passed as part of the Comprehensive Crime Control Act of 1984, allows the government to make monetary payments to and create whole new identities for cooperating witnesses.¹⁵⁶ Most importantly, as noted above, the Sentencing Reform Act of 1984, particularly 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), authorized judges to reduce sentences below statutory minimums for cooperators and mandated that the Sentencing Commission create sentencing rules that take substantial assistance to the government into account. In response, the Sentencing Commission drafted guidelines and policy statements, which included § 5K1.1 on substantial assistance departures, and Congress accepted them.¹⁵⁷ Section 5K1.1(a)(2) states that, “The appropriate re-

Solimino, 501 U.S. 104 (1991):

Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except “when a statutory purpose to the contrary is evident.”

Id. at 108 (citations omitted) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

153. See H.R. REP. NO. 87-748 (1961).

154. *Singleton I*, 144 F.3d at 1352.

155. See 18 U.S.C. §§ 6001–6005 (1994).

156. See *id.* § 3521.

157. The Sentencing Reform Act of 1984 consigned to the Sentencing Commission the responsibility of drafting, promulgating, and periodically amending sentencing guidelines. The guidelines and amendments are submitted to Congress for its review and go

duction [for substantial assistance] shall be determined by the court for reasons stated that may include . . . the truthfulness, completeness, and reliability of any information or *testimony provided by the defendant.*¹⁵⁸

In addition, in § 215(b) of the Comprehensive Crime Control Act of 1984, *Congress itself* directly amended Rule 35(b) of the Federal Rules of Criminal Procedure to permit reductions in sentence for cooperation within a year after the original sentencing date.¹⁵⁹ The statutorily amended rule read:

(b) CORRECTION OF SENTENCE FOR CHANGED CIRCUMSTANCES. — The court, on motion of the Government, 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 another person who has committed an offense, *to the extent that such assistance is a factor in applicable guidelines or policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a).*¹⁶⁰

In 1987, Congress, by statute, made the provisions of Rule 35(b) applicable to pre-Guidelines sentences.¹⁶¹ Thus, Congress itself has twice adopted by reference the standards for sentence reduction in § 5K1.1, including the requirement of truthful, complete, and reliable testimony.

In short, the interpretation of § 201(c)(2) urged by Ms. Singleton conflicts squarely with a bushel of congressionally enacted or approved statutes, guidelines, and procedural rules that endorse and regulate sentence bargaining for testimony. The *Singleton* panel recognized the canon of statutory construction directing that apparently conflicting statutes should, if possible, be interpreted to give effect to each.¹⁶² But rather than taking the obvious tack of

into effect on November 1 of the year in which they are promulgated unless "modified or disapproved by Act of Congress." 28 U.S.C. § 994(n).

158. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1(a)(2) (emphasis added).

159. See Pub. L. No. 98-473, § 215(b), 99 Stat. 1837, 2016 (1984).

160. *Id.* (emphasis added).

161. See Pub. L. No. 100-182, § 22, 101 Stat. 1266, 1271 (1987).

162. See *Singleton I*, 144 F.3d at 1348 (noting "our duty to harmonize apparently conflicting statutes whenever possible"). This canon has been stated in various ways. See *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 739 (1989) (Scalia, J., concurring) ("[W]here text permits, statutes dealing with similar subjects should be interpreted harmoniously."); Rev. Robert John Araujo, *Method in Interpretation: Practical Wisdom and the Search for Meaning in Public Legal Texts*, 68 MISS. L.J. 225, 319 (1998)

concluding that § 201(c)(2) does not apply to bargained-for testimony, the panel distorted the statutes that authorize the practice. The panel contended that the federal immunity statutes do not conflict with § 201(c)(2) because the government does not grant immunity itself, but can only petition the court to do so.¹⁶³ Of course, the same is true of virtually all bargains involving sentencing leniency in return for testimony (with the exception of a promise to dismiss or not file charges). Neither before nor after the advent of the Sentencing Guidelines could a prosecutor lower the sentence unilaterally.¹⁶⁴ All the government can promise or deliver is a recommendation to the judge that the court exercise its discretion to reduce the penalty. If, as the panel would have it, § 201(c)(2) prohibits the government as well as private parties from rewarding testimony, it is of no consequence that the government actor who bestows the reward works for the judicial rather than the executive branch.

The *Singleton I* panel then “harmonized” § 201(c)(2) with 18 U.S.C. § 3553(e), § 5K1.1 of the Guidelines, and Federal Rule of Criminal Procedure Rule 35(b) by declaring that “‘substantial assistance’ does not include testimony.”¹⁶⁵ Rather sentence reductions are permitted for “all forms of substantial assistance other than testimony.”¹⁶⁶ This is almost painfully silly. It distorts the plain meaning and indisputable purpose of the Sentencing Reform Act, the Sentencing Guidelines, and the Federal Rules of Criminal Procedure. Those laws were enacted not to facilitate general law enforcement intelligence gathering, but to provide the leverage necessary to secure the testimony of criminals against their associates and accomplices.

Moreover, the panel’s tortured reading of the Act, the Guidelines, and the Rules fails to accomplish the panel’s policy goal — preventing the government from “perverting justice” by “buying testimony.”¹⁶⁷ In truth, in a legal world governed by the *Singleton I* opinion, all the actors would behave almost identically to the way they do now — they would enter cooperation agreements, give and receive information, testify at trial, and seek and award sentence

(“[L]egal texts *in pari materia* are to be read together.”); Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 458 (1989) (asserting that “statutes regulating the same subject should be construed harmoniously”).

163. See *Singleton I*, 144 F.3d at 1348.

164. See *id.* at 1355.

165. *Id.*

166. *Id.*

167. See *supra* note 144 and accompanying text.

reductions thereafter. Everyone would understand that full and satisfactory “substantial assistance” is incomplete without truthful testimony. The only difference would be that everyone would avoid writing or speaking the taboo words “in consideration of your testimony.” Indeed, the panel tacitly conceded as much, saying: “Nor will our holding drastically alter the government’s present practices. The government may still make deals with accomplices for their assistance other than testimony, and it may still put accomplices on the stand; it simply may not attach any promise, offer, or gift to their testimony.”¹⁶⁸ Thus, the *Singleton I* panel argues at one time that the practice of rewarding testimony with sentence reductions so corrupts the integrity of the judicial process that exclusion of the tainted evidence is required to deter the “unlawful conduct,”¹⁶⁹ and at another time, that the court’s interpretation of § 201(c)(2) is permissible because it really would not change all that much.

Perhaps unsurprisingly, the panel opinion in *Singleton I* did not long survive. The Tenth Circuit took the unusual step of vacating the panel opinion and ordering rehearing en banc on its own motion.¹⁷⁰ On January 8, 1999, the full court issued a new opinion (*Singleton II*) holding that § 201(c)(2) does not extend to prosecutors who bargain with defendants for testimony.¹⁷¹ All members of the court concurred in the result except for the three judges on the original panel.¹⁷² The majority opinion took a narrowly semantic approach. Judge Porfilio, writing for the majority, reasoned that the word “whoever,” in the statutory phrase “whoever . . . gives, offers, or promises anything of value to any person” for testimony, refers only to natural persons and thus cannot cover an AUSA negotiating a substantial assistance agreement because, when doing so, she is the “alter ego” of the government itself.¹⁷³ Prosecuting the govern-

168. *Singleton I*, 144 F.3d at 1355.

169. *Id.* at 1359.

170. *See id.* at 1361.

171. *See Singleton II*, 165 F.3d at 1298. In the interval between the panel decision in July 1998, and the en banc opinion in January 1999, the panel’s conclusions also received rough treatment at the hands of judges from other circuits. *See, e.g.*, *United States v. Malszewski*, 161 F.3d 992, 1015 (6th Cir. 1998); *United States v. Jones*, 160 F.3d 473, 482 n.7 (8th Cir. 1998); *United States v. Reid*, 19 F. Supp. 2d 534, 535 (E.D. Va. 1998).

172. *See Singleton II*, 165 F.3d at 1308. Judges Henry and Lucero each filed a separate concurrence. *See id.* at 1302–03. Judges Kelley, Seymour, and Ebel dissented. *See id.* at 1308.

173. *Id.* at 1300.

ment itself for violating § 201(c)(2) would be an “absurdity,” so a construction of § 201(c)(2) that embraces such an absurdity is necessarily incorrect.¹⁷⁴ In addition, the en banc majority noted the irreconcilable conflict between the panel’s reading of § 201(c)(2) and statutes such as the Sentencing Reform Act,¹⁷⁵ and it cited numerous cases that had considered and rejected the panel’s view of § 201(c)(2).¹⁷⁶

One peculiarity of all the *Singleton II* opinions is that they consistently speak of § 201(c)(2) as if it were a sort of exclusionary rule, applicable, if at all, solely to the conduct of the prosecutor. No judge faces up squarely to the fact that § 201(c)(2) is a penal statute. The penalty for violating the provision is not witness preclusion, but a two-year stretch in the penitentiary.¹⁷⁷ Moreover, if § 201(c)(2) applies to a prosecutor who offers to seek a sentence reduction in return for substantial assistance, then under ordinary principles of criminal liability, the statute applies equally to the defense lawyer who conveys the offer and later joins the prosecutor in urging the court to reduce the client’s sentence.¹⁷⁸ Most tellingly, since the power to award a sentence reduction for cooperation rests in the sole discretion of the court,¹⁷⁹ the true malefactor under § 201(c)(2) is neither the prosecutor nor the defense attorney, but the judge who actually “gives” the thing of value. In the end, the real reason why the *Singleton I* panel’s interpretation of § 201(c)(2) is untenable is that it requires one to declare with a straight face that Congress intended to send federal prosecutors, defense lawyers, and judges to prison for colluding to reduce the sentences of cooperating witnesses.

174. *See id.* at 1301.

175. *See id.*

176. *See id.*

177. *See* 18 U.S.C. § 201(c) (specifying that the penalty is a fine or imprisonment of not more than two years, or both).

178. The defense lawyer would be liable either as a conspirator under 18 U.S.C. § 371 (1994), or as an aider and abettor under 18 U.S.C. § 2 (1994).

179. *See* 18 U.S.C. § 3553(e); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

IV. EXPLAINING THE UNEXPLAINABLE: WHY THESE BAD OPINIONS ISSUED FROM GOOD JUDGES

A. "Hey, What's That Sound?"

So what's happening here? Are *Sealed Case*, *Solis I*, and *Singleton I* inconsequential aberrations, the irrational outbursts of three isolated panels fortuitously loaded with liberal ideologues? Or, as I am disposed to think, do these cases, ephemeral though their particular holdings may prove, represent signs of a deeper and more sustained current of judicial thought? In the first place, these three cases cannot be casually dismissed as manifestations of ideological bias. Of the nine circuit judges who decided *Sealed Case*, *Solis I*, and *Singleton I*, six were appointed by Presidents Reagan or Bush, and three were appointed by Presidents Carter and Clinton.¹⁸⁰ Of the eight judges who voted with the majority in these cases, five were Republican appointees.¹⁸¹ Of course, the party affiliation of the President who appointed a judge is hardly an infallible indicator of the ideological disposition of the appointee, but such affiliation is a decent rough proxy. It thus seems fair to conclude that the three cases considered here were not the product of secret cells of the ACLU.

Indeed, taken as a group, the nine judges who sat on these three panels represent a fair cross-section of the federal judiciary — intelligent, thoughtful, moderate-to-conservative in disposition and politics. Moreover, these judges were hardly giddy newcomers to the federal bench. Eight of the nine had been on the appellate bench for at least six years, and the *Sealed Case* and *Singleton I* panels each boasted the Chief Judge of the circuit.¹⁸² How, then, could this distinguished group go so palpably astray?

The results in *Sealed Case* and *Solis I* may be attributable in part to an ongoing struggle between the judges, the Justice Department, and Congress over control of criminal sentencing. Since the

180. The D.C. Circuit judges who decided *Sealed Case* were Edwards (Carter), Tatel (Clinton), and Buckley (Reagan). In the Fifth Circuit, the *Solis* court consisted of Duhe (Reagan), Wiener (Bush), and the dissenter Smith (Reagan). The *Singleton* panel from the Tenth Circuit was composed of Seymour, C.J. (Carter), Ebel (Reagan), and Kelly (Bush). See THE AMERICAN BENCH: JUDGES OF THE NATION (Ruth A. Kennedy et al. eds., 9th ed. 1997).

181. See *id.*

182. Of the nine judges, only one, Judge Tatel of the D.C. Circuit, was recently appointed by President Clinton. See *id.* at 88. Chief Judge Edwards sat on the *Sealed Case* panel, and Chief Judge Seymour was on the *Singleton* panel. See *id.* at 67, 83.

advent of the Guidelines, elements of the federal judiciary have bemoaned the loss of the courts' former absolute discretion over the imposition of criminal punishment.¹⁸³ In the wake of *Koon*, some lower federal courts have begun testing just how far that opinion will permit judges to reassert a greater discretionary authority at sentencing.¹⁸⁴ This process is not limited to cases of substantial assistance departures, but can be seen in decisions such as *United States v. Sanchez-Rodriguez*,¹⁸⁵ where the *en banc* Ninth Circuit ignored a plain directive of the Federal Sentencing Guidelines in order to permit a sentencing departure based on the sentencing court's perception of the severity of a prior "aggravating felony."¹⁸⁶

Although *Sealed Case* and *Solis I* may be ascribable, at least in significant part, to the broader post-*Koon* struggle over sentencing discretion, those two decisions considered together with *Singleton I* also suggest a more narrowly focused judicial unease over the federal government's use of informant witnesses. At least three basic concerns arise in most debates about substantial assistance departures:

- 1) "Buying" testimony is wrong because testimony "purchased" with promises of sentencing leniency present too great a risk of perjury, and thus of wrongful convictions.
- 2) Even if bargained-for accomplice testimony is sometimes necessary, federal prosecutors have come to rely on it too much.
- 3) The substantial assistance regime, as now applied, generates a variety of unfair results and, in general, subverts

183. See Bowman, *supra* note 10, at 707-14, 724-32 (discussing judicial critiques of the allocation of sentencing discretion under the Guidelines); KATE STYTH & JOSE A. CABRANES, FEAR OF JUDGING (1998) (criticizing the limitation of judicial sentencing discretion through minimum mandatory sentences and the Guidelines).

184. See generally Paul J. Hofer et al., *Departure Rates and Reasons After Koon v. U.S.*, 9 FED. SENTENCING REP. 284 (1997); Johnson, *supra* note 94.

185. 161 F.3d 556 (9th Cir. 1998) (*en banc*).

186. In his persuasive dissent, Judge Trott wrote:

Many sentencing judges will recognize the majority's opinion as welcome relief from the strictures of the Guidelines and as a restoration to them of much of the discretion they lost almost fifteen years ago. This case, however, is the equivalent of a Boston Tea Party, but without the constitutional right or authority to throw it. The majority's holding is contrary to the holding of *Koon*, and we trespass on turf that according to the Constitution belongs to Congress when we make decisions that involve fundamental sentencing policy. As we fell short in our opinion in *Koon*, we now go overboard in this one, capsizing the Guidelines in the process.

Id. at 568-69 (footnote omitted).

the goal of the Sentencing Guidelines to eliminate unwarranted sentencing disparity. In particular:

- a) Substantial assistance departures create the risk that “kingpins” will receive lower sentences than their underlings because the “kingpins” have more information to exchange for a substantial assistance recommendation.
- b) The government motion requirement should be abandoned because prosecutors often unfairly refuse to make substantial assistance motions for defendants who have indeed assisted the government.
- c) There is a wide and unjustifiable disparity between the practices of U.S. Attorneys in different districts regarding motions for substantial assistance.
- d) In many districts, government motions for substantial assistance departures subvert the aims of the Federal Sentencing Guidelines by having become merely another plea bargaining tool, often awarded for reasons unrelated to real assistance to the government.

B. Addressing the Standard Critiques of Substantial Assistance Departures

1. General Concern #1: “Buying” testimony encourages perjury and risks wrongful convictions

The fundamental concern of the *Singleton I* panel was that inducements for testimony offered by either party to a criminal case encourage perjury and create the risk of a wrongful conviction.¹⁸⁷ In general, the law prohibits purchasing the testimony of fact witnesses with either rewards or threats.¹⁸⁸ It does so because of the obvious risk that the party who pays the piper will call the tune, and so corrupt the fact-finding process. The risk of such corruption seems far greater when the inducement for testimony is not mere

187. See *supra* note 144 and accompanying text; see also *Singleton II*, 165 F.3d at 1309 (Kelly, Seymour & Ebel, JJ., dissenting) (characterizing the original panel opinion as “center[ing] on maintaining the integrity, fairness, and credibility of our system of criminal justice”).

188. See 18 U.S.C. § 201(c)(2). Of course, the law permits parties to pay “expert” witnesses to give opinion testimony. Whether this difference results from a principled distinction between the inherent corruptibility of opinion and fact witnesses or simply a surrender to commercial realities is another question.

money, but the sorts of incentives only the state, acting through prosecutors and judges, can offer — the threat of prison for silence, combined with the promise of freedom (or at least less prison time) for testimony. Nonetheless, as discussed above, the practice of rewarding with reduced punishment those who testify for the government has an ancient pedigree in the law,¹⁸⁹ and as the en banc Tenth Circuit reiterated in *Singleton II*, the practice is firmly entrenched in modern statutes and judicial opinions.¹⁹⁰ Antiquity alone, however, is a threadbare justification for any legal rule.¹⁹¹ Some further exploration of the matter is required.

The true justification for exchanging leniency for cooperation is a utilitarian argument from necessity — without accomplice information and testimony, many serious crimes, particularly complex crimes involving groups, could not be solved or punished; absent the prospect of leniency, most, if not all, accomplices would refuse to cooperate.¹⁹² In *Singleton I*, for example, the government asserted that without the testimony of witnesses who cooperate in return for lower sentences, it “could not enforce the drug laws, could not prosecute organized crime figures under RICO, and could not prosecute many other cases ‘of such a character that the only persons capable of giving useful testimony are those implicated in the crime.’”¹⁹³ As David Sklansky has pointed out, although there is no empirical proof of the argument from necessity, nonetheless, the claim that certain kinds of cases cannot be prosecuted without accomplice testimony has been “conventional wisdom for generations.”¹⁹⁴ Common sense, my own personal experience as a federal

189. See *supra* notes 146–50 and accompanying text.

190. *Singleton II*, 165 F.3d at 1301–02.

191. “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 1001 (1997) (reprinting the publication of an address delivered on January 8, 1897, which originally appeared in 10 HARV. L. REV. 457 (1897)).

192. The assertion that courts reward cooperators because cooperation indicates contrition and a disposition to ameliorate the harm one has done by assisting law enforcement in apprehending others is true enough so far as it goes, but as a justification for substantial assistance sentence reductions it is at best incomplete and at worst disingenuous.

193. Supplemental Brief of the United States at 15–16, *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998) (No. 97-3178) (quoting *Kastigar v. United States*, 406 U.S. 441, 446 (1972)).

194. David A. Sklansky, *Starr, Singleton, and the Prosecutor’s Role*, 26 FORDHAM URB. L.J. 509, 526 (1999).

and state prosecutor, and the experience of prosecutorial colleagues whom I respect¹⁹⁵ dispose me to agree with the conventional wisdom, at least to this extent — without accomplice testimony secured through substantial assistance agreements, several important categories of serious federal crime would be far more difficult to prosecute, and many individual cases within those categories could not be prosecuted at all.

The fact that without bargained-for accomplice testimony the government would not be as successful as it now is in pursuing some important kinds of cases is a powerful, but not necessarily dispositive, argument in favor of allowing such testimony. If, as the *Singleton I* panel apparently feared, bargained-for testimony from government witnesses creates an unacceptably high risk of perjury and thus of wrongful convictions, then the practice should be banned outright. The most basic difficulty in performing such a utilitarian calculus is that no one, on either side of the debate, has any idea how frequently cooperating government witnesses lie, or what is more to the point, whether they lie *more often* than any other type of witness. It is at this point that history reenters the argument. Although we do not (and probably cannot) know how often snitches lie, the centuries-long acceptance of rewarding government witnesses rests on a societal consensus, renewed in each legal generation, that bargaining with thieves and thugs is a necessary, if unsavory, cost of law enforcement. Implicit in the historical verdict and the plethora of modern law on rewarding cooperators has been the judgment that the undoubted risk of perjured testimony is ameliorated to an acceptable degree by the traditional mechanisms of requiring full disclosure of government agreements with witnesses,¹⁹⁶ and encouraging vigorous adversarial testing of the cooperating witness's testimony through cross-examination.

One can argue, however, that the traditional judicial acceptance of bargained-for testimony reflected in the Supreme Court's opinion in *United States v. Hoffa*¹⁹⁷ and the congressional codification of the same practice in statutes such as the Sentencing Reform

195. For an extraordinarily persuasive explanation by two Assistant United States Attorneys of the necessity for and power of the substantial assistance motion as a tool in combatting violent organized crime, see Ronald S. Safer & Matthew C. Crowl, *Substantial Assistance Departures: Valuable Tool or Dangerous Weapon*, 12 FED. SENTENCING REP. (forthcoming 1999).

196. See, e.g., *Giglio v. United States*, 405 U.S. 150, 153-54 (1972) (requiring government to disclose promises of leniency made to witnesses).

197. 385 U.S. 293 (1966).

Act, came before the effects of the Guidelines sentencing regime began to emerge. In this view, the leverage afforded the government through greatly enhanced statutory minimum and Guidelines sentences, combined with the government monopoly on substantial assistance motions, creates hitherto unheard-of pressures to cooperate and temptations to lie. Because the post-Guidelines bargaining power of the prosecutor is undeniably stronger than it was before, this position has some undoubted force. However, its persuasiveness rests on a conflation of two related, but nonetheless quite distinct, assertions.

First, the incentives to cooperate with the government are now much stronger and thus more defendants testify, and second, the enhanced prosecutorial leverage also leads to marked increases in *false* testimony. The trouble is that the first consequence — more accomplice testimony — is a good thing, so long as the testimony is truthful. Only untruthful accomplice testimony is bad, and there is no way of knowing that the incidence of such testimony has increased except by assuming that some percentage of cooperating witnesses will lie and thus, as the percentage of cooperators rises, the number of cooperating liars will rise as well.

Moreover, the real evil is not false testimony, per se, but the risk that false “purchased” testimony will produce erroneous convictions. It would be foolish and naive to dismiss the very real possibility that lying informants will sometimes convict the innocent, or still more commonly, make small fries appear more culpable than they are. The prisons produce some very plausible liars. On the other hand, much of the criticism of witness cooperation agreements seems to proceed from the even more naive assumption that juries consist of credulous bumpkins who automatically convict on the uncorroborated testimony of a defendant’s “flipped” accomplice. On the contrary, juries are instinctively skeptical of bargained-for testimony. Even moderately competent cross-examination of such witnesses makes them more so. As a rule, such testimony helps the government only where it is woven into a fabric of corroborating detail from untainted sources, and as I can attest from painful personal experience, a “dirty” witness can actually harm an otherwise strong case. In short, although accomplice testimony presents undeniable risks, there is reason for faith in the law’s conventional mechanisms for testing its veracity.

And yet, even if one finds the need for rewarding some government witnesses compelling, and even if one views the panel opinion in *Singleton I* as downright eccentric, the source of the panel’s

unease cannot be entirely ignored or expunged. Faced with the choice of prison or freedom, witnesses will lie to save themselves, and sometimes those lies will not be detected by the prosecutor, exposed by the defense lawyer, or ignored by the jury. No matter what procedural safeguards are devised for cooperator testimony, the risk of perjury convicting the innocent can only be minimized; it cannot be eliminated. This ineradicable fact does not require the abolition or criminalization of witness cooperation agreements. It does, however, strongly suggest a principle of parsimony in wielding this uniquely powerful prosecutorial tool. That is, the Department of Justice should employ cooperation agreements whenever necessary, *but not more than necessary*, to apprehend and convict serious violators of federal criminal law. I will suggest some practical manifestations of this principle of parsimony later in the Article.

2. General Concern #2: Federal Prosecutors Overuse Informants and Cooperating Witnesses

Even if one accepts the necessity of sometimes using unsavory methods in pursuit of laudable ends, it does not necessarily follow that the law should encourage such methods as common practice. A number of commentators have decried the post-Guidelines emergence of a “snitch culture” in the federal courts, that is, an ethos in which the normal means of proving criminal charges is reliance on bargained-for testimony.¹⁹⁸ One difficulty in addressing this critique is that there are no pre-Guidelines statistics on how often cooperating witnesses had their sentences reduced to compare with post-Guidelines practice. However, as noted at the outset of this Article, the number of § 5K1.1 motions filed by federal prosecutors increased from 3.5% of all cases in 1989 to 19.5% of all federal prosecutions by 1994.¹⁹⁹ Between 1994 and 1996, the percentage of substantial assistance departures remained constant at approxi-

198. The phrase “snitch culture” or an equivalent is often heard in conversations among practitioners and academics. The same point is made in more elevated terms in published articles. See, e.g., Mark Curriden, *Making Crime Pay*, A.B.A. J., June 1991, at 42, 43 (commenting on the rise in the use of confidential informants); Thomas A. Mauet, *Informant Disclosure and Production: A Second Look at Paid Informants*, 37 ARIZ. L. REV. 563, 563–64 (1995) (arguing in the context of search warrants and arrests that the use of informants has increased and citing *The Police Informant*, ANGOLITE, Dec. 1980, at 25, which argued that informants have become pervasive in the American culture and the trend is toward their increased use).

199. See *supra* note 45 and accompanying text.

mately 19% of all defendants sentenced.²⁰⁰

What we do not know is the number of cases in which accomplice testimony, or the threat of it, resulted in a conviction. One cannot simply double the 19% of substantial assistance motions to conclude that 38% of all defendants are either cooperators or the target of cooperators. Sometimes a defendant will receive a substantial assistance motion without giving information leading to a successful prosecution. Sometimes a single cooperating defendant will testify against many other defendants. Sometimes a number of co-defendants in a single case will become, successively, the targets of cooperating witnesses and then cooperating witnesses themselves.²⁰¹ Still, it is probably fair to estimate that somewhere between thirty and forty percent of all federal criminal defendants either cooperate with the government or are prosecuted based at least in part on information provided by cooperators. Whether the actual number, whatever it is, is too high, depends largely on one's beliefs about the incidence of wrongful convictions based on informant testimony, as well as on the answers to other questions, such as whether the commonplace use of informant testimony produces more or "better quality" convictions than would a system in which such testimony was rare, and whether the government is using substantial assistance motions to subvert other objectives of the guidelines regime. Whatever else may be said, the presence of § 5K1.1 as a factor in so many cases demonstrates that the Department of Justice has so far been little concerned with parsimony in the use of accomplice testimony.

3. *General Concern #3: Substantial Assistance Motions Produce Various Inequities*

Since the adoption of the Guidelines, commentators have raised a number of complaints about substantial assistance sentence re-

200. See Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, 11 FED. SENTENCING REP. 6 (1998). This is a reanalysis of an earlier report prepared by the staff of the U.S. Sentencing Commission. Its authors were, at the time of its publication, Acting Director of the Office of Policy Analysis and the Staff Director of the Commission, respectively. See *id.* The conclusions presented in the report are based largely on data from the much more voluminous unpublished staff report cited *supra* note 45.

201. I recall one case I prosecuted in the Southern District of Florida in which, by the time of trial of the principal defendant, seven of the target's co-defendants had pled guilty and agreed to testify under substantial assistance agreements. See *United States v. Cosgrove*, 73 F.3d 297 (11th Cir. 1996).

ductions which, at bottom, amount to the argument that the substantial assistance regime, as now arranged, produces inequitable results.²⁰² I will consider the most common arguments, some of which are ill-founded and others of which are not.

a. Debunking the “Cooperation Paradox”

One of the most persistent (and most misconceived) criticisms of substantial assistance departures is the claim that, because so-called “kingpins” — those higher on the criminal organization chart — know more facts than their underlings, they will have more information to give prosecutors and thus will be the beneficiaries of larger and more frequent sentence reductions.²⁰³ Critics have expressed particular concern for the plight of the lowest level offenders who know so little that they have no information to bargain with.²⁰⁴ This phenomenon, so goes the critique, plays havoc with the fundamental principle of criminal punishment that penalties should be proportionate to culpability.²⁰⁵ More particularly, it is said to undermine one of the Guidelines’s key objectives, that of reducing unwarranted sentencing disparity.²⁰⁶

Brief elaboration will make the point clearer. The phenomenon of which the critics complain arises when co-conspirator *A*, who is more knowledgeable about and more culpable for the acts of a criminal group than co-conspirator *B*, cooperates with the authorities and *B* does not. Critics find it anomalous that *A* may receive a lower sentence than *B* after the government makes a motion for

202. See, e.g., Hon. Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge’s Perspective*, 30 SUFFOLK U. L. REV. 1027, 1062 (1997) (noting disparity issues with substantial assistance); Christopher M. Alexander, Note, *Indeterminate Sentencing: An Analysis of Sentencing in America*, 70 S. CAL. L. REV. 1717, 1729 (1997).

203. See, e.g., *United States v. Griffin*, 17 F.3d 269 (8th Cir. 1994) (Bright, J., dissenting). Judge Bright observed:

What kind of a criminal justice system rewards the drug kingpin or near-kingpin who informs on all the criminal colleagues he or she has recruited, but sends to prison for years and years the least knowledgeable or culpable conspirator, one who knows very little about the conspiracy and is without information for the prosecutors?

Id. at 274.

204. See 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, 210 (1997).

205. See *id.*

206. See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 212–13 (1993).

reduction of A's sentence below the otherwise applicable guideline or statutory minimum under 18 U.S.C. § 3553(b) and/or § 5K1.1 of the Guidelines. The perceived anomaly has been christened the "cooperation paradox."²⁰⁷

Despite this argument's superficial appeal, it fails at both a theoretical and a practical level. From the perspective of a sentencing theory, any time a criminal receives leniency for informing on his comrades, there is some compromise of the principle of meting out punishment among the population of offenders in direct proportion to blameworthiness. The inevitable effect of giving sentencing credit for assistance to the authorities is to impose lower sentences on cooperators than on similarly situated non-cooperators. Even if the sentence given the informer is not lower than that of less culpable co-defendants in his own case, it will certainly be lower than that imposed on equally or less culpable non-cooperating defendants in other cases.²⁰⁸ After all, *this is the point of the program*. If a cooperating defendant were not offered the prospect of a lower sentence than he and other similarly situated defendants otherwise deserved, he would not cooperate. The value of the § 5K1.1 motion in investigations of group criminality is to break group solidarity by offering preferential sentencing treatment to those who turn on their colleagues. In passing 18 U.S.C. § 3553(b), Congress made the policy choice that the social utility of achieving convictions through bargained-for testimony outweighed the costs of

207. *Id.* at 211–12; see also Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1858 (1995) (referring to this phenomenon as "inverted sentencing").

208. Professor Gerald Uelmen has argued that proportionality among defendants in the same case is more important than equality of treatment among similarly situated defendants in different cases:

My experience [as a prosecutor] suggested that a bank robber in Los Angeles was less concerned about his sentence being greater than the sentence imposed on a bank robber in Dallas, than he was about his sentence being greater than the co-defendant in the same case, who talked him into participating in the robbery. Disparity is dissipated by distance. Proportionality is most essential when it is coterminous. The task of apportioning justice based on the relative culpability of co-defendants in the same case is where the rubber hits the road in sentencing. That task was generally managed quite well by judges under the "old system." The Federal Sentencing Guidelines, quite simply, take that task away from judges and turn it over to prosecutors.

Gerald F. Uelmen, *Federal Sentencing Guidelines: A Cure Worse Than the Disease*, 29 AM. CRIM. L. REV. 899, 900 (1992). Although the views of co-defendants in the same case may not be irrelevant, Professor Uelmen does not answer the question of why society's sentencing choices are necessarily constrained by the opinions of the criminals being punished.

deviations from a strictly proportional sentencing system.

The particular outrage expressed by critics over situations in which the sentence of a "more culpable" cooperator is lower than that of a "less culpable" non-cooperator is a red herring. The principle of sentencing in proportion to culpability is no less compromised when cooperating defendant *A* receives a lower sentence than *equally* culpable, non-cooperating co-defendant *B*, than it is if *A*'s sentence is lower than non-cooperating co-defendant *C*, whose culpability is 10% (or 1%) less than *A*'s and *B*'s. Moreover, in order to preserve strict proportionality of sentencing among co-defendants, the maximum sentencing concession available to any cooperator would have to be limited by the purely arbitrary factor of the sentence of the next-most-culpable co-defendant. For example, a cooperating defendant could receive a ten-month reduction in sentence if the next-most-culpable defendant in his case received a sentence ten months lower than the cooperator's guideline range. A cooperator in a different case who was identically situated, *except that* there happened to be no less culpable co-defendants in the case, would have no downward limit on the sentence reduction a judge might award. A cooperation system structured in this way would be both practically ineffective (because it would frequently preclude offering meaningful incentives to those with valuable information to impart) and facially unjust (because sentence reductions for cooperation would be subject to arbitrary limitations having no relationship to the value of the cooperation provided).

In short, in most cases the "cooperation paradox" is no paradox at all, merely a pejorative catchphrase for the way any system of rewarding accomplice testimony always works — criminals who inform on their compatriots sometimes get lower sentences than equally guilty or less guilty criminals who do not. But what about the extreme cases? What about those "kingpins" who skate for ratting on their underlings, or the poor ignorant couriers and other schmoes doing long sentences while the big guys betray them and go free? In situations like that, hasn't the sentencing system abandoned its most basic premises? Well, yes, if there were any evidence that such miscarriages of justice happened with any frequency, it would certainly be a powerful argument in the arsenal of the critics of substantial assistance departures. However, there is no such evidence. The originator of the phrase "cooperation paradox," Professor Stephen Schulhofer, was careful to state that the Guidelines have the *potential* to penalize underlings far more harshly than kingpins, without actually asserting that this penalizing actually

often occurs.²⁰⁹ Most commentators, on the other hand, have not been so circumspect. They assert as a fact that leaders often receive much lower sentences than followers, but they never cite evidence to support the claim.²¹⁰

209. Professor Schulhofer wrote:

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. . . . Instead of a pyramid of liability with long sentences for leaders at the top of the organizational ladder, the mandatory system *can* become an inverted pyramid with stiff sentences for minor players and modest punishments for knowledgeable insiders who *can* cut favorable deals.

Schulhofer, *supra* note 206, at 212–13 (emphasis added and footnotes omitted).

210. See, e.g., Judy Clarke, *The Sentencing Guidelines: What a Mess*, FED. PROBATION 45 (1991); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Thomas W. Hillier, II, *The Sentencing Commission and Its Critics*, 2 FED. SENTENCING REP. 224 (1990); Lee, *supra* note 204; William W. Schwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENTENCING REP. 339 (1991) (claiming, without evidence, that “the [drug] dealer is often able to negotiate with the prosecutor for a sentence below the minimum in return for cooperation which the small fry is unable to offer”).

In her article, Ms. Clarke states, “Disparity increases substantially in drug cases where often the ‘heavy’ is able to offer cooperation and the lesser involved defendants are not able to assist.” Clarke, *supra*, at 46. Ms. Clarke, however, offers no evidence either that (a) more culpable defendants “often” cooperate when less culpable ones do not, or (b) the less culpable defendant often receives a greater sentence than the “heavy.”

Professor Freed states:

The application of the “substantial assistance” adjustment in drug courier cases, for example, results in serious imbalances by producing unduly severe sentences for “mules” who know little about the drug syndicates for which they work and unduly lenient sentences for substantial drug dealers who tell all after their arrest by DEA agents.

Freed, *supra*, at 1705. For many years, Professor Freed has been one of America’s most knowledgeable and astute observers of the Guidelines, but here he links one debatable assumption with a factual premise unsupported by evidence. First, he assumes drug couriers “know little” about the organizations for which they work, when in fact they often know a great deal, and would not be employed unless they enjoyed the confidence of the “substantial drug dealers” for whom they work. Second, the claim that substantial drug dealers often receive lower sentences than couriers is unsupported by evidence. He cites *United States v. Rodriguez*, 724 F. Supp. 1118, 1122 (S.D.N.Y. 1989), in which the court constructs a *hypothetical* case of disproportionate sentencing that does not even involved substantial assistance departures. And he cites two articles, Catherine M. Goodwin, *Sentencing Narcotics Cases Where Drug Amount Is a Poor Indication of Relative Culpability*, 4 FED. SENTENCING REP. 226 (1992), and Deborah Young, *Rethinking the Commission’s Drug Guidelines: Courier Cases Where Quantity Overstates Culpability*, 3 FED. SENTENCING REP. 93 (1990), neither of which provides either data nor anecdote to prove that “substantial drug dealers” get lower sentences than the couriers who work for them. See Freed, *supra*, at 1754 nn.132–33.

The lack of published evidence demonstrating that severe cases of “cooperation paradox” are common is hardly surprising, because there is every reason to doubt that the phenomenon in any very extreme form happens much at all. The critics’ conviction that it happens all the time ignores the internal logic of complex investigations, particularly narcotics investigations — catch the small fish first, precisely because they are the ones handling the drugs in the transactions with undercover agents, and then use cooperation agreements to turn them against the people they work for. One cannot simply start at the top and work down, because one needs the people at the bottom to get to the top.

The critics’ faith in the ubiquity of the “cooperation paradox” also flies in the face of normal expectations of rational prosecutorial and judicial behavior. The critics’ position necessarily assumes that prosecutors routinely choose to convict minnows by giving away the sentencing store to the whales, that the dream of every prosecutor’s life is to make a sweetheart deal with Al Capone so Al can testify against his bookkeeper and the corner distiller of bathtub gin. It also assumes sentencing judges are so obtuse that they cannot recognize a case in which a large sentence reduction to one cooperating defendant badly skews the proportionality of punishment between all the defendants, as well as being so incompetent that, having recognized the potential disparity, they are powerless to prevent it. Despite the fact that prosecutors have a monopoly on

Mr. Hillier asserts that “dozens of high level drug dealers are receiving more lenient sentences (at least comparatively) than their less culpable confederates because they have more to offer the government by way of information.” Hillier, *supra*, at 224. Mr. Hillier offers no proof that even “dozens” of “high level drug dealers” are getting disproportionately low sentences, and he provides no explanation of his interesting parenthetical qualification — “at least comparatively.”

Professor Lee asserts:

The cooperation paradox is particularly acute in drug conspiracy cases where co-conspirators at the bottom of the hierarchy have little or no information to share with the government and the ones at the top have information and thus are able to receive the benefit of a substantial assistance departure. In such cases, *the least culpable co-conspirators often end up with harsher sentences than the more culpable co-conspirators.*

Lee, *supra* note 204, at 210 (emphasis added and footnote omitted). Professor Lee’s authorities for this factual claim are the dissenting opinion in *United States v. Griffin*, 17 F.3d 269, 274 (8th Cir. 1994) (Bright, J., dissenting), which itself cites no data, and a law review article, Antoinette Marie Tease, *Downward Departures for Substantial Assistance: A Proposal for Reducing Sentencing Disparities Among Codefendants*, 53 MONT. L. REV. 75, 75 (1992), which also makes the same claim without data. See Lee, *supra* note 204, at 251 n.50.

the power to request substantial assistance reductions (except, at least for the moment, in the D.C. Circuit), judges retain absolute discretion to grant or deny such motions and equally absolute discretion concerning the amount of any resulting departure. Only a remarkably inept jurist cannot maintain rough proportionality within a single case if he or she considers it important to do so.

Such statistical evidence as exists lends support to the impression that the “cooperation paradox” is not much of a real world problem. As part of a study of substantial assistance departures published in 1997, the staff of the Sentencing Commission analyzed sixty-four conspiracies in which at least one defendant received a substantial assistance motion.²¹¹ In the drug conspiracies, “participants whose predominant function was passive (e.g., enabler or renter/storer) received substantial assistance reductions at significantly higher rates than other participants,” while “high-level dealers or leaders of significant drug organizations and street-level dealers (selling to users) were the least likely to receive the reduction.”²¹² The Commission staff also saw indications that the government in effect reduced the threshold standard of “substantial assistance” in order to allow “low-level players” the benefit of a substantial assistance motion.²¹³ In non-drug conspiracies, “mid-level” defendants received substantial assistance departures at a higher rate than other groups.²¹⁴ The study suggests that in all types of conspiracies, low-level offenders benefitted from a variety of factors in addition to, or in place of, substantial assistance motions which kept their sentences lower relative to other more-culpable co-defendants.²¹⁵

b. In Defense of the Government Motion Requirement

The requirement of a government motion as a prerequisite for a substantial assistance departure may have been the subject of more academic abuse than any other procedural feature of the Sentenc-

211. See FEDERAL COURT PRACTICES, *supra* note 45, at 75.

212. *Id.* at 86.

213. *Id.* at 86, 89.

214. See *id.* at 89.

215. These considerations included having lower minimum mandatory sentences than other members of the conspiracy or no mandatory minimum sentence at all; being convicted of an offense with a lower statutory maximum sentence than other members of the conspiracy and receiving a downward departure for some reason other than substantial assistance. See *id.* at 89–93.

ing Guidelines.²¹⁶ Calls for its abolition have been raining down for more than a decade, but Congress, the Commission (and the Supreme Court) have stuck to their guns, and the rule remains. It should. Congress and the Commission got it right in the first place. The critics are wrong.

The primary criticisms of the government motion requirement are that it gives the government too much power, that it deprives sentencing courts of authority properly theirs, and that it risks unfairness because prosecutors may refuse to make the motion for defendants whose assistance really has been substantial. One of the principle flaws in the critics' position flows from a miscategorization of the substantial assistance mechanism as merely another of the myriad Guidelines rules whose function is to control unwarranted sentencing disparity.²¹⁷ Section 3553(e) of Title 18 and § 5K1.1 of the Guidelines are not rules about sentencing equity. They are grants of power to prosecutors to perform a difficult and sometimes unappetizing task – coercing criminals to do a doubly unpleasant thing: admit their own guilt, and then violate a basic human taboo by informing on their friends, associates, or even blood relatives. “Turning” accomplices into witnesses is rough business. Fair arguments can be made that as a society we ought not do it at all. However, if we are to do it, then the rules governing the process must ensure that society gets the benefit of its bargain in the form of full, complete, truthful information and testimony.

Cooperating witnesses do not like either to give incriminating information about or to testify against their friends. Overcoming their initial resistance to helping the government at all takes immense leverage. The Guidelines and statutory minimum mandatory

216. See, e.g., Avern Cohn, *The Unfairness of 'Substantial Assistance,'* 78 JUDICATURE 186 (1995); 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,* 23 IND. L. REV. 681 (1990); Lee, *supra* note 204; Tease, *supra* note 210; Julie Gyurci, Note, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing A Good Faith Standard,* 78 MINN. L. REV. 1253, 1272-75 (1994); Kimberly S. Kelley, Comment, *Substantial Assistance Under the Guidelines: How Smitherman Transfers Sentencing Discretion from Judges to Prosecutors,* 76 IOWA L. REV. 187 (1990); Philip T. Masterson, Comment, *Eliminating the Government Motion Requirement of Section 5K1.1 of the Federal Sentencing Guidelines — A Substantial Response to Substantial Assistance: United States v. Gutierrez,* 24 CREIGHTON L. REV. 929 (1991).

217. This misapprehension is evident even among the staff of the Sentencing Commission itself as the introductory passages of the Maxfield and Kramer substantial assistance report reveal. See Maxfield & Kramer, *supra* note 200, at 1-5.

sentences provide the initial leverage by creating a level of certainty about the unpleasant consequences of conviction that never existed in the pre-Guidelines indeterminate sentencing system. It is one thing to be facing a sentence that *could* range anywhere from probation to forty years depending on the whim of the judge. It is another thing altogether to have your lawyer sit you down in front of a chart that says you *will* be sentenced to 121–151 months unless a ground for departure can be found. Before the Guidelines, it was psychologically easy to gamble on the sentencing judge's generosity. Now defendants reach much faster for the only escape hatch, an agreement to cooperate with the government.

Nevertheless, even after defendants cross the first hurdle of agreeing to cooperate, they would still prefer, naturally enough, to give as little information as possible, to conceal facts that show themselves in a discreditable light, and to do as little damage to their former friends as they can. The severity and certainty of Guidelines sentences provide the initial impetus for witness cooperation, but it is the government monopoly on the substantial assistance motion that ensures candor, completeness, and continued cooperation until the job is done. In a system where the sentencing judge can act at the defendant's request and over the objection of the government, even partial, grudging cooperation stands a fair chance of earning at least some sentence reduction. Judges since Solomon and before have always been baby splitters — they instinctively want to give each party, if not half, then at least some portion of the object of contention. Moreover, for a judge with a crowded docket, splitting the baby is far more economical than investing the time and mental energy that would be necessary to fully understand the government's case, the allegedly cooperative defendant's place in it, and the inevitably intricate arguments about why the defendant was or was not truthful or completely forthcoming in some particular respect.

Finally, given that sentencing levels under the Guidelines are indeed quite substantial, judges have plenty of leeway to grant some sentence reduction for disputed or half-hearted cooperation without completely foregoing punishment. By contrast, under the current system, unless the prosecutor, who knows the case better than anyone and has both the knowledge and incentive to detect lies, half-truths, and incomplete disclosure, is satisfied that defendant is truthful and completely forthcoming, no motion will be filed and no reduction is possible. Thus, under a substantial assistance system in which the prosecutor is stripped of the doorkeeper func-

tion, the incentive to cooperate some would remain, but the imperative of complete and candid cooperation would be dramatically diminished.

The Fifth Circuit's original opinion in *Solis* illustrates the point nicely. Defendant *Solis* spoke with government agents four times, but never testified, never worked in an undercover capacity, and never provided any information of practical consequence.²¹⁸ Nonetheless, the court of appeals, without any factual inquiry whatever, declared, in effect, "Aw, that's good enough," and granted a sentence reduction.²¹⁹ Without the government motion requirement, there is reason to fear that such judicial behavior would become common.

The complaint that the government motion requirement improperly deprives judges of sentencing authority is also misconceived. It tends to glide over the fact that, once the government makes its motion, the district court has essentially unlimited discretion either to grant or deny it,²²⁰ and unlimited discretion as to the amount of any resulting departure.²²¹ The critics would certainly respond that the motion requirement deprives the court of power to redress the injustice that results when the government refuses to seek a substantial assistance departure for a defendant whose efforts on the government's behalf entitle him to a reduction.

There are two answers to this critique. First, as discussed above, judges are ill-suited for making the determination of whether a defendant provided genuine, and substantial, assistance to the government. The best judge of whether a defendant has been of substantial assistance to the government is the government itself. Second, and more importantly, common sense (buttressed by some statistical evidence²²²) demonstrate that the risk of prosecutors frequently refusing to seek sentence reductions for those who genu-

218. See *Solis I*, 161 F.3d at 283.

219. See *id.* at 285.

220. See *United States v. Franks*, 46 F.3d 402, 406 (5th Cir. 1995) (finding that a district court need not depart simply due to government motion); *United States v. Eibler*, 991 F.2d 1350, 1355 (7th Cir. 1993) (holding that appellate court has no jurisdiction to review district court's refusal to depart "when the refusal reflects an exercise of the judge's discretion"); *United States v. Graham*, 946 F.2d 19, 22 (4th Cir. 1991) (recognizing when a district court exercises discretion not to depart downward, the decision is unreviewable). See generally HAINES, WOLL & BOWMAN, *supra* note 14, at 783.

221. See *United States v. Khalil*, 132 F.3d 897, 898 (3d Cir. 1997) (holding that the court of appeals lacks jurisdiction to review extent of substantial assistance departure). See generally HAINES, WOLL & BOWMAN, *supra* note 14, at 784.

222. See *infra* notes 225-26 and accompanying text.

inely cooperate is vanishingly small.

In the first place, the claim that prosecutors would behave this way ignores the powerful systemic incentives that favor reliably rewarding witness cooperation. Understanding this reality requires an appreciation of some of the subtleties of substantial assistance negotiations. The relationship between witness and prosecutor does not begin with an exchange of unconditional promises. At her first meeting with a potential cooperator, the AUSA does not say, "If you talk to me today, I promise to move to reduce your sentence." Instead, the prosecutor says, "Start talking today. Today, and all the other times we will meet, tell me everything you know. Testify truthfully at trial. Once you have done all those things, I will evaluate your performance, and *if*, in my sole discretion, I conclude that you have provided substantial assistance, *then* I will move to reduce your sentence. Trust me."²²³ From the government's perspective, this one-sided arrangement is absolutely necessary to ensure complete cooperation until the end of the case. From the defendant's perspective, it makes no sense to accept such a lopsided deal *unless your lawyer tells you that you can trust the prosecutor to do the right thing*.

If a prosecutor uses a cooperating defendant in any significant way, and then refuses without powerful justification to make a substantial assistance motion, she risks lasting damage to her credibility that will markedly impair her capacity to turn other defendants in future cases. The federal criminal bar, even in very large cities, is a limited and insular fraternity. Word gets around. All experienced federal criminal lawyers understand this reality.²²⁴

In addition, when evaluating the claim that prosecutors commonly withhold "deserved" substantial assistance motions, one must remember one fact of prosecutorial life that has remained constant before and after the advent of the Sentencing Guidelines — the ever-present need to manage caseloads by securing guilty pleas in the vast majority of indicted cases.²²⁵ The substantial as-

223. In essence, this was the agreement the government made with the defendant in *Singleton*. See *Singleton I*, 144 F.3d at 1344.

224. After reviewing a draft of this Article, Professor Steven Clymer, who is also an experienced federal prosecutor, wrote the Author,

When I was [an Assistant U.S. Attorney in Los Angeles], I would give defense attorneys "references" — the names of other attorneys whose clients had cooperated and for whom I had made 5K motions, so that they could determine for themselves whether I would treat their clients fairly if they chose to cooperate.

E-mail from Steven Clymer to Frank Bowman (May 9, 1999) (on file with Author).

225. More than 90% of all federal criminal cases are disposed of by guilty plea. See,

sistance motion is not only a useful tool for its intended purpose of obtaining necessary testimony from reluctant accomplices, it is also a marvelous method of securing a guilty plea from the cooperator himself. Thus, the persistent temptation for prosecutors is not to withhold § 5K1.1 motions from the deserving, but to distribute them liberally in order to facilitate easy guilty pleas.²²⁶

Finally, the sheer plenitude of substantial assistance departures is a powerful refutation of contention that AUSAs are unfairly parsimonious in rewarding cooperators. As noted above, roughly one-fifth of all federal defendants nationwide are the beneficiaries of substantial assistance motions.²²⁷ If the national average were not high enough, statistics gathered by the Sentencing Commission show that some U.S. Attorneys' Offices dispense substantial assistance motions at startlingly high rates. The most striking example is the Eastern District of Pennsylvania where, during fiscal year 1996, substantial assistance motions were made by the government on behalf of 47.5% of the defendants sentenced.²²⁸ When the statistical evidence suggests that substantial assistance departures are, if anything, over-recommended by federal prosecutors, the solution is hardly to abandon the government motion requirement and give carte blanche to courts to hand out even more such departures.

e.g., U.S. SENTENCING COMM'N, 1995 ANNUAL REPORT, at 56 tbl.17 (showing that 91.9% of all federal convictions during fiscal year 1995 were obtained by guilty plea).

226. The impetus to use § 5K1.1 to secure pleas from cooperators also stems from what I perceive to be a common psychological truth about prosecutors. In my experience, prosecutors tend to measure their success by convictions, not by the length of sentences obtained. For example, I know almost exactly how many trials I won and how many trials I lost in 14 years as a prosecutor. In my complex federal investigations, I remember distinctly the defendants who pleaded guilty and those who went to trial. However, I have virtually no memory of the sentences imposed in any of my cases. For me, and I think for many of my colleagues, a "win" was a conviction followed by some prison time, a "loss" was an acquittal. It was not that the length of sentence did not matter, it was simply that the fact of conviction was of more importance than the particulars of the sentence. With this mindset, prosecutors can find it very easy to rationalize exchanging a sentencing concession, even a concession not permitted by the letter of the Guidelines, for the certainty of a guilty plea.

227. See *supra* note 45 and accompanying text.

228. See U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B.

c. The Department of Justice Has Failed to Regulate the Use of Substantial Assistance Motions by Government Lawyers

Sentencing Commission statistics establish two undeniable facts. First, there are quite astonishing differences among U.S. Attorney's Offices in the rates at which they make substantial assistance motions. In contrast to the 47.5% rate in the Eastern District of Pennsylvania, federal prosecutors in the Eastern District of Virginia and the Central District of California make such motions in only 7.2 and 6.9 percent of their cases respectively.²²⁹ Although not quite as stark as the inter-district disparities, there are also marked regional differences in substantial assistance departure rates among federal circuits. In FY 1998, the rate varied from a low of 11.3% in the Ninth Circuit to a high of 31.5% in the Third Circuit (home of the Eastern District of Pennsylvania).²³⁰ Second, the very high substantial assistance departure rates in districts like the Eastern District of Pennsylvania are plainly inconsistent with both the text and spirit of § 5K1.1, and cannot be explained by reference to the conventional justification for the substantial assistance device. It simply strains credulity to suggest that half the federal defendants in Philadelphia provide genuinely "substantial" help to the government, or that Philadelphia prosecutors need to offer substantial assistance departures to half the people indicted in the district in order to secure an acceptable rate of convictions. When cooperation departures are dispensed in nearly half of all cases, the substantial assistance motion has ceased to be a closely guarded method of obtaining needed evidence, and has degenerated into a convenient caseload reduction tool. Both wide variations in § 5K1.1 motion rates between judicial districts and high absolute numbers of § 5K1.1 motions in particular districts are bad in themselves, and foolish for the Department of Justice.

i. Inter-District Disparities

Persistent inter-district disparities in departure motion rates give powerful ammunition to critics of the government monopoly on

229. *See id.*

230. U.S. SENTENCING COMM'N, 1998 Data File, USSCFY98. The substantial assistance departure figures for the other circuits were: D.C. Circuit: 17.9%; First Circuit: 21.5%; Second Circuit: 23.9%; Fourth Circuit: 21.3%; Fifth Circuit: 16.9%; Sixth Circuit: 27.1%; Seventh Circuit: 20.6%; Eighth Circuit: 22.9%; Tenth Circuit: 14.4%; Eleventh Circuit: 22.0%. *Id.*

the substantial assistance motion. As demonstrated above, the government motion requirement is essential to securing full, truthful, and sustained cooperation from the witnesses who prosecutors really need to prove their cases.²³¹ But inter-district disparities of the magnitude which now exist allow critics to argue that prosecutors in districts with relatively high rates are behaving "fairly," while those in districts with low rates are being unjust. Alternatively, such disparities permit critics to argue (without characterizing either high or low departure rates as correct) that the government is being unfair because it is applying different standards to similarly situated defendants based purely on the fortuity of geographical location. In either case, say the critics, judicial intervention is required to ensure equity.²³² The government is poorly situated to meet such arguments because it cannot admit the truth — prosecutors in districts which routinely use § 5K1.1 motions as case management tools are recommending § 5K1.1 sentence reductions for a multitude of defendants who do not deserve them, often in cases in which accomplice testimony is not necessary to secure convictions.²³³

The government might defend its heterogenous § 5K1.1 practices by pointing to a surprising recent finding by Professor Ian Weinstein. His analysis of Sentencing Commission data revealed that, remarkably, there appears to be no statistically significant correlation between the rate of substantial assistance departures and the average length of sentences imposed in a district.²³⁴ At first blush, this result seems to belie the claim that inter-district disparities in substantial assistance motion rates produce disparate sentencing patterns for similarly situated defendants in different districts. However, on close examination, Professor Weinstein's conclusions provide little solace to the Justice Department.

In the first place, Professor Weinstein's analysis does not show that the rate of substantial assistance departures in a district has no effect on overall sentence lengths in that district. Nor does he dispute the commonsense proposition that the difference in overall

231. See *supra* Part IV.B.3.b.

232. See, e.g., Alan J. Chaset, *Koon Opens Another Door: District of Columbia Circuit Permits § 5K1.1 Departure Without Government Motion*, 22 CHAMPION, Dec. 1998, at 26, 28.

233. With, one might add, the active collusion of the judges in their districts.

234. Ian Weinstein, *Substantial Assistance and Sentence Severity: Is There a Correlation?*, 11 FED. SENTENCING REP. 83 (1998).

sentence lengths between two judicial districts may sometimes be attributable to differences between the districts in rate of substantial assistance departures.²³⁵ Defendants in District A may very well receive different sentences than identically situated defendants in District B because of differing local substantial assistance practices. Considered carefully, Professor Weinstein's study shows only that, when all ninety-three judicial districts are considered in the aggregate, the effect of substantial assistance departure rates on average sentence length is unpredictable.

Professor Weinstein's explanation for his counterintuitive findings is that the § 5K1.1 departure is only one of a variety of means available to prosecutors and judges to manipulate sentence lengths, and that different districts have evolved different patterns of employing the available tools. For example, both Weinstein and Professor Lisa Farabee have found an inverse relationship between the number of substantial assistance departures and the number of non-5K1.1 judicial departures in a district or region; the more substantial assistance departures, the fewer judicial departures, and vice versa.²³⁶ Other prosecutorial means of massaging sentencing outcomes include charging decisions and sentence factor manipulation.²³⁷

If Weinstein's explanation of his results is correct (and based on my own experience and conversations with federal prosecutors around the country, I am disposed to think he is), then his survey does not disprove the charge that differing substantial assistance motion rates produce disparity. Instead, it may lend credence to an even more profound criticism of prosecutorial sentencing behavior, namely that prosecutors are not merely inconsistent in exercising the discretion concededly given them by the Guidelines to make or not make substantial assistance motions, but they are seizing control of the entire sentencing process by sub rosa manipulations of a variety of other sentencing mechanisms. This interpretation of Weinstein's data would oversimplify a complex picture. The local

235. See, e.g., Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569 (1998) (describing a statistical comparison of departure rates in the Districts of Massachusetts and Connecticut that shows some correlation between a higher substantial assistance rate and lower average sentences in Massachusetts).

236. Farabee, *supra* note 235, at 629; Weinstein, *supra* note 234, at 84.

237. For discussion of sentence factor manipulation, see Frank O. Bowman, III, *To Tell the Truth: The Problem of Prosecutorial "Manipulation" of Sentencing Facts*, 8 FED. SENTENCING REP. 324 (1996).

sentencing equilibria Weinstein describes are plainly the result of interactions between all the institutional actors in the sentencing system — judges, defense attorneys, probation officers, and prosecutors. Nonetheless, if Weinstein's survey does not prove the common claim that prosecutors dominate federal sentencing, it certainly suggests that prosecutors are exercising discretion in a number of ways that circumvent the design of the Sentencing Guidelines.

ii. Excessive Overall Departure Rates

Even if large inter-district disparities in substantial assistance motion rates did not exist, *excessive* substantial assistance departure rates, such as those in Philadelphia, which are far higher than can possibly be justified by any genuine need to obtain accomplice testimony, would lend force to the allegation that the government is routinely manipulating the Guidelines to achieve the sentencing outcomes it desires rather than those that would be produced by neutral application of Guidelines rules. When the Government acts this way, it cheats on the implicit contract that supports the entire Guidelines structure. The Guidelines were designed to reduce sentencing disparity by constraining judicial discretion. The Guidelines are supposed to prevent *judges* from imposing their personally or regionally idiosyncratic visions of justice in place of nationally determined norms. In the course of constraining judicial discretion, the authors of the Guidelines undeniably increased the influence of prosecutors over sentencing by making the Guidelines fact-driven. Under the Guidelines, facts like drug quantities, fraud loss amounts, the use of a weapon, and the like have necessary sentencing consequences; in such a system, prosecutors have great influence because they are in command of the facts. However, one of the most critical, if unstated, premises of the Guidelines system is that, if it is to work, prosecutors must act as honest stewards — prosecuting cases vigorously, presenting all relevant facts to the sentencing judge, and letting the sentencing chips fall where they may.

The Guidelines cannot survive in anything like their present form if the government insists that judges be restrained, but refuses to accept limitations on its own power to set sentencing outcomes. If the government systematically evades the Guidelines's limitations on prosecutorial sentencing authority, then the Guidelines really do become merely an excuse for raising sentences across the board with no pretension of reducing sentencing disparity. If that becomes either the truth or the widespread perception of the

Guidelines, then Congress will in time give the judges back much of their old unfettered discretion. Or, as evidenced by cases like *Sealed Case* and *Solis I*, the judges will take it back, and Congress and the Sentencing Commission will be so disillusioned that they will lack the incentive to pass corrective laws or guidelines to repeal the judicial incursions.

The Guidelines's many critics in the defense community would, of course, applaud their collapse. But for the Department of Justice to contribute to such an outcome would be unbelievably shortsighted. The Guidelines *are* good for the government. They ensure that those who commit serious federal crimes do serious federal time. Neutrally applied, they promote fair outcomes. And they give the government a uniquely powerful tool — the substantial assistance motion — for combating group criminality. It would be a sad irony if the government's overuse of § 5K1.1 contributed to the loss of both the tool and the Guidelines system itself.

V. SOME PRESCRIPTIONS FOR ACTION

If the Department of Justice is to forestall the imposition of disadvantageous and substantively undesirable changes to the present substantial assistance regime, and perhaps to the Guideline system as a whole, it must act promptly and decisively.

First, policy makers in the Justice Department must focus their attention on the Sentencing Guidelines in general and substantial assistance in particular. In my view, federal prosecutors across the country too often exhibit a distressing complacency about the Guidelines. It is as if this system, so profoundly helpful to the enterprise of criminal law enforcement, were an immutable feature of the natural environment, impervious to time and tide. Nothing could be further from the truth. The advantages conferred upon prosecutors by the Guidelines have been under attack since their inception. The cases discussed in this Article, *Singleton* and *Sealed Case*, as well as the Supreme Court's decision in *Koon* increasing judicial departure authority, are but a few among an increasing number of signs that the tide may be turning, that there is an emerging consensus among influential elements of the bench, the bar, and Congress in favor of restraining federal prosecutorial power.²³⁸ One of the forms such restraint might take in the sen-

238. Another example is the recent passage of the McDade bill, which was enacted as a provision in the Citizens Protection Act of 1998, Pub. L. No. 105-277, § 801, 112

tencing arena would be externally-imposed limitations on prosecutors' ability to bargain for and reward witness cooperation.²³⁹

Second, the Justice Department must insist that federal prosecutors abide by both the letter and spirit of the Guidelines. In particular, the Department must insist that prosecutors file substantial assistance motions only when the recipient really did provide substantial assistance in the investigation or prosecution of another person. It should impose this discipline, not merely because continued indiscipline invites intrusions on prosecutorial prerogatives, but for a far more important reason as well. The mission of the Department is to do justice. Whatever else doing justice may mean, it requires that those who enforce the law abide by the law. If the law is wrong, the role of the Justice Department is not to ignore it, evade it, or exploit it, but to expose the problem and advocate corrections. The evidence is quite clear that federal prosecutors in a great many places are misusing substantial assistance departures to manipulate sentencing outcomes in contravention of both the letter and spirit of the Guidelines. That is wrong and the Department of Justice should not condone it.

I hasten to add that I do not ascribe malign motives to individual prosecutors who use substantial assistance motions for purposes other than obtaining badly needed evidence against an accomplice. Such prosecutors would undoubtedly respond, in utter good faith, that their objective is precisely to attain what they perceive to be justice in the particular case. The point is that the Federal Sentencing Guidelines embody a societal judgment that justice in sentencing is not a product of the personal standard of any one decision-maker, but of the application of uniform, nationwide standards to all similarly situated defendants. The job of the Department of Justice is to implement that societal judgment. If the Federal Sentencing Guidelines are wholly unjust, the Department should urge their repeal. If portions of the Guidelines are intolerably harsh or impose too many restraints on prosecutorial discretion, the Department should propose corrective amendments. What the Department may not properly do is insist that everyone else abide by the Guidelines while condoning Guidelines evasion by its own

Stat. 2681 (1998) (codified as 28 U.S.C.A. § 530B (West Supp. 1999)).

239. As but one example, the 1998 Sentencing Commission staff report on substantial assistance concludes that the Commission should "provide guidance" regarding the magnitude of substantial assistance departures. Maxfield & Kramer, *supra* note 200, at 15.

people.

Third, the Department should act to reduce as far as possible the dramatic existing disparities between the substantial assistance practices of different U.S. Attorneys' Offices. Absolute uniformity among all ninety-three districts is neither possible or desirable. Different districts have different demographics, different caseloads, different personalities, and different problems. There must be room in any Department policy to accommodate variations in local conditions and methods. Therefore, I do not suggest that Main Justice set district quotas or numerical targets for substantial assistance motions. However, the Department should adopt, after careful consideration and with extensive participation by U.S. Attorneys and line prosecutors from around the country, a set of non-binding internal guidelines regarding substantial assistance motions. The *United States Attorney's Manual* presently requires that substantial assistance motions be approved by a supervisory attorney and that "documentation of the facts" behind each motion be maintained, but no national standards exist on what constitutes substantial assistance.²⁴⁰ The Sentencing Commission's staff report found that four out of five U.S. Attorneys' offices have a written substantial assistance policy,²⁴¹ and 100% of the offices surveyed had some review or approval procedure for substantial assistance motions.²⁴² Nonetheless, the report also concluded that a significant disparity existed between U.S. Attorneys' offices regarding the factors relevant to the decision about whether substantial assistance actually occurred.²⁴³ This result is consistent with the phenomenon already noted of widely differing substantial assistance rates between districts.²⁴⁴

The process of drafting internal guidelines should be preceded by a careful internal study of current practice with a view to identifying the factors that should be determinative of whether a motion should be made. Once internal guidelines are in place, the Attorney General should require that no substantial assistance motion be made without prior approval by a standing committee within each U.S. Attorney's Office or Criminal Division Section which would

240. U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL ch. 9, § 27.400 (1997).

241. See Maxfield & Kramer, *supra* note 200, at 9.

242. See *id.*

243. See *id.* at 7, 9.

244. See *supra* notes 229-30 and accompanying text.

review the case in light of the internal guidelines. Finally, the Assistant Attorney General for the Criminal Division, or his designate (possibly the person tasked to serve as the Justice Department's Ex Officio member of the Sentencing Commission), should set up a system for monitoring U.S. Attorney compliance with the substantial assistance review process.

No conceivable set of non-binding guidelines could achieve absolute national uniformity, and the political forces within the Department would no doubt ensure that any internal guidelines were general in character with a fair degree of wiggle room. Thus, outside critics might consider the effort a toothless charade. I am confident, however, that well-crafted internal guidelines combined with local review and Main Justice monitoring would markedly regularize substantial assistance practice across the country, without at the same time eliminating room for healthy regional variation and the sound exercise of the individual prosecutor's discretion.

Fourth, when drafting its substantial assistance guidelines and when considering other policies (such as grants of immunity) relating to bargained-for testimony, the Department should adopt a general principle of parsimony. By "principle of parsimony" I do not mean merely a fancy name for a rule that prosecutors should seek substantial assistance departures only for those who truly assisted the government. Rather, the Department should view all reductions of punishment for cooperation in their proper light, that is, as necessary, but undesirable, deviations from the general principle that the punishment should fit the crime, which, moreover, pose especially high risks of perjury and conviction of the innocent. Consequently, the Department of Justice should encourage its prosecutors to employ cooperation agreements whenever necessary, *but not more than necessary*, to apprehend and convict serious violators of federal criminal law.

VI. CONCLUSION

The substantial assistance motion is the most powerful prosecutorial tool in modern federal criminal law. Unlike many academic observers, I think much of the criticism of the substantial assistance mechanism is misplaced. However, like all instruments of power, the substantial assistance motion can be abused and there is evidence that federal prosecutors are misusing substantial assistance. If the Department of Justice is to maintain substantial assistance in its present form, it must put its house in order by institut-

ing measures which eliminate the use of substantial assistance departures as a plea bargaining incentive for the undeserving, and limit the dramatic disparities in substantial assistance practices between U.S. Attorneys' Offices. I hope this Article will serve as a small stimulus toward that desirable end.

VII. AFTERWORD

As this Article went to press, the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, unanimously reversed the decision of the panel in *In re Sealed Case*.²⁴⁵ The full court held that "it is clear that by authorizing [substantial assistance] departures with government motions, the Commission did intend to preclude departures without motions."²⁴⁶ The Supreme Court's decision in *Koon* liberalizing the general standard for departures under the Guidelines, did not, in the view of the en banc court, alter the plain meaning of the language of § 5K1.1.²⁴⁷

245. See *In re Sealed Case* (Sentencing Guidelines's "Substantial Assistance"), No. 97-3112 1999 WL 462422 (D.C. Cir. July 9, 1999) (en banc) (to be reported at 181 F.3d 128).

246. *Id.* at *2. The court relied particularly on the fact that the Sentencing Commission borrowed the phrasing of § 5K1.1 from 18 U.S.C. § 3553(e) and Rule 35(b) of the Federal Rules of Criminal Procedure, "whose preclusive meaning is well-established." *Id.* at **2-3.

247. *Id.* at **6-10.

