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Frank O. Bowman III

*University of Missouri School of Law*, [bowmanf@missouri.edu](mailto:bowmanf@missouri.edu)

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# Defending Substantial Assistance: An Old Prosecutor's Meditation On Singleton, Sealed Case, and the Maxfield–Kramer Report

In recent issues, FSR published several federal appellate opinions that, depending on one's point of view, either promised or threatened radical changes in the practice of rewarding with reduced punishment defendants who cooperate with the government. In July 1998, a panel of the D.C. Circuit decided *In re Sealed Case* (Sentencing Guidelines "Substantial Assistance"),<sup>1</sup> and ruled that sentencing judges have discretion to reduce the sentences of cooperating witnesses without a government "substantial assistance" motion requesting the reduction. In the same month, in *United States v. Singleton*,<sup>2</sup> a panel of the Tenth Circuit struck an even more fundamental blow at current practice by holding that the venerable custom of awarding cooperating criminal defendants sentence reductions for truthful testimony against others constitutes felony bribery. Despite the hosannas from the defense bar and some observers in the academy that greeted these two opinions, there was never much chance that either would long survive.

This essay begins with a brief analysis of the panel and en banc opinions in *Sealed Case* and *Singleton*, and then turns to the more arresting question of whether the panel decisions were transitory aberrations or something more. Particularly if one considers *Singleton* and *Sealed Case* together with the Sentencing Commission's staff report on substantial assistance practice (the "Maxfield–Kramer Report"), it is difficult to escape the conclusion that unease with the current substantial assistance regime is growing. Unlike many observers, I view §5K1.1 as a very good thing, an invaluable prosecutorial tool against group criminality, but a tool that federal prosecutors are in danger of losing or having blunted in part due to their own indiscipline in employing the discretion the law now bestows on them. This essay argues that "attention must be paid" to substantial assistance by those in authority at the Justice Department, and that if the Department fails to monitor its own practices and practice self-restraint, others are likely to impose restraints that will prove far less palatable.

## **In re Sealed Case**

The *Sealed Case* panel tortured the plain language of §5K1.1, which stipulates that a court "may depart" from the otherwise applicable guideline sentence "[u]pon motion of the government."<sup>3</sup> The panel reached the remarkable conclusion that a district court could grant a substantial 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*.<sup>4</sup> The judges reasoned that substantial assistance departures in response to a government motion are specifically sanctioned by §5K1.1, but departures for substantial assistance in the absence of such a motion are not prohibited in so many words and should therefore be considered "unmentioned" and permissible. The obvious weakness in this reasoning is the language of §5K1.1 itself, which grants judges the power to award substantial assistance departures "upon motion of the government." 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. 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 plainly "considered" all cases of cooperation, but made a "considered" distinction between cases in which the government makes a motion and cases in which it does not.<sup>5</sup>

In July 1999, 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*.<sup>6</sup> 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."<sup>7</sup> 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.<sup>8</sup>

## **U.S. v. Singleton**

The Tenth Circuit's *Singleton* decision at least rested on a plausible textual foundation. Title 18, U.S.C., Section 201(c)(2) says that "whoever" offers or promises "anything of value to any person, for or because of the testimony" of such person commits the crime of bribery. The *Singleton* panel simply declared that "whoever" means "whoever," and that a prosecutor who promises to consider requesting a sentence reduction for a cooperating witness violates the statute. The flaw in the *Singleton* panel opinion was not in its literal reading of the statutory text, but in its failure to credit the overwhelming extrinsic evidence that Section 201(c)(2) was never



## **FRANK O. BOWMAN, III**

Associate Professor of Law, Indiana University School of Law, Indianapolis. Formerly Special Counsel, U.S. Sentencing Commission (1995–96); Assistant U.S. Attorney, Southern District of Florida; Trial Attorney, Criminal Division, U.S. Department of Justice; and sometime criminal defense attorney.

intended to cover bargained-for testimony by witnesses cooperating with the government.

The practice of bargaining for testimony is of immense antiquity,<sup>9</sup> yet the legislative history of 201(c)(2) contains no indication of an intention to change so established a feature of the criminal court landscape. More importantly, in numerous other statutes, Congress has repeatedly, and expressly, sanctioned and regulated the exchange of leniency for testimony. The federal witness immunity statutes passed in 1970 require courts, upon motion of the government, to confer immunity on witnesses who testify for the government.<sup>10</sup> The Witness Relocation and Protection Act,<sup>11</sup> passed in 1974, allows the government to make monetary payments to and create whole new identities for cooperating witnesses. Most critically, 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, including Section 5K1.1 on substantial assistance departures, and Congress accepted them.

In addition, in Section 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 to the same extent that such reductions would be available at the time of sentencing under the Guidelines.<sup>12</sup> Thus, Congress itself adopted by reference the standards for sentence reduction in § 5K1.1, including the requirement of truthful, complete, and reliable testimony. The premise on which the *Singleton* panel opinion rested — that Congress intended to criminalize under Section 201(c)(2) the very same conduct it expressly authorized elsewhere — was never tenable.

On January 8, 1999, the en banc Tenth Circuit reversed *Singleton*, holding that § 201(c)(2) does not extend to prosecutors who bargain for testimony.<sup>13</sup> The majority opinion took a narrowly semantic approach, reasoning that the word “whoever” in § 201 refers only to natural persons and thus cannot cover a prosecutor negotiating a substantial assistance agreement because, when doing so, she is the “alter ego” of the government itself. The court also noted the irreconcilable conflict between the panel’s reading of § 201(c)(2) and the many statutes expressly sanctioning bargaining for testimony.

#### **Unanswered Questions and Portents of Trouble to Come**

There may be some in the federal prosecutorial community who, hearing of the en banc reversals of *Sealed Case* and *Singleton*, will heave a sigh of relief that the

status quo has been restored and will think no more of the matter. On the defense side, some observers may despair of ever reforming a system they believe confers unfair advantages on prosecutors and distorts principles of sentencing equity. Both complacency and despair are, I think, unwarranted. *Singleton* and *Sealed Case*, poorly reasoned though they may have been, were not localized squalls of judicial irrationality, but storm warnings of a gathering discontent with a number of aspects of federal practice regarding bargaining for testimony. Both those who would defend the present arrangements and those who would alter them should be thinking carefully about the battles to come.

#### **Singleton: The Fear of Too Many Snitches**

The *Singleton* decision raises the most fundamental questions about the substantial assistance regime. The judges who found bargaining for testimony to be a felony were plainly motivated by more than a sudden infatuation with textual literalism. The panel opinion repeatedly expressed the concern that the practice of rewarding felons for testimony perverts justice and creates a risk of “fraud upon the federal courts in the form of inherently unreliable testimony.”<sup>14</sup> Even in the face of frankly overwhelming evidence of Congressional intent to sanction such bargains, the panel professed itself unconvinced by the conventional law enforcement justification that bargaining for testimony is necessary to the successful prosecution of certain classes of crime.<sup>15</sup>

Although the original panel was plainly wrong in stubbornly refusing to accept the unmistakable legislative mandate for “buying” testimony, its opinion nonetheless forces us to confront realities of the substantial assistance regime that a decade of habituation have tended to obscure. Substantial assistance motions have become so entrenched a feature of federal practice — such a valued tool of prosecutors and such a cherished escape hatch for defendants facing long sentences — that one easily forgets the true nature of the transactions these motions reflect. Properly considered, bargaining for testimony with convicted felons is, at best, a necessary evil. It is an evil because it endangers, even if it need not subvert, two bedrock principles of criminal justice, the imperative that the innocent not be convicted and the aspiration that those who are equally culpable should be equally punished. Witnesses who hope for leniency in compensation for testimony against others are at least powerfully tempted to lie, and the judicial system’s mechanisms for detecting lies motivated by such hopes are not foolproof. Likewise, the inescapable fact about sentence reductions for cooperation is that the beneficiaries of such reductions will often receive punishments less than what society has said they deserve for their conduct and less than what similarly situated non-cooperators are compelled to endure.

The justification for sanctioning such a potentially corrosive practice is purely utilitarian. Bargaining for testimony is said to be necessary to detect and successfully prosecute certain crimes. As a former prosecutor, I accept without question the necessity of using and rewarding cooperating witnesses ... sometimes.<sup>16</sup> However, the argument from necessity does not transform a necessary evil into a positive good. Every time the criminal justice system bargains with felons it pays a price, the price of some increased risk of an unjust conviction of the accused and the price of an undeserved reduction in punishment for the guilty witness. Both common sense and devotion to principle suggest that the system should strive to pay this price as seldom as possible. Underlying the *Singleton* panel's rebellious stand is, I think, a rising sense of unease among the federal judiciary that substantial assistance motions are no longer necessary rarities, but are instead the common coin of federal criminal practice.

There is considerable empirical support for such discomfort. The number of § 5K1.1 motions filed by federal prosecutors increased from 3.5% of all cases in 1989 to 19.5% of all cases by 1994.<sup>17</sup> The number has held steady at just under 20% ever since.<sup>18</sup> In some districts, the § 5K1.1 departure rate has been as high as 47.5%.<sup>19</sup> Moreover, Sentencing Commission statistics unquestionably *under-report* the frequency with which sentence reductions for cooperation are actually conferred because the Commission does not collect statistics on post-sentencing cooperation departures pursuant to Fed. R. Crim. P. 35(b).<sup>20</sup> Thus, nationwide at least one in every five, and perhaps closer to one in four, federal defendants receives a sentence reduction for cooperation. When one considers the number of defendants *against whom* the cooperators cooperate, it is fair to estimate that, at a minimum, between one-third and one-half of all federal convictions either produce a cooperating defendant, or are in part produced by evidence from the mouth of such a defendant.

#### **Sealed Case and the Maxfield-Kramer Report: The Fear That Snitches Will Not Get Their Just Reward**

The original *Sealed Case* opinion is a curious counterpoint to *Singleton*. While the *Singleton* panel may well have been disconcerted by the corrosive effect of too many government substantial assistance motions, the concern of *Sealed Case* is that prosecutors may behave inconsistently, and therefore inequitably, by not making enough. Had *Sealed Case* withstood en banc review, the practical effect would have been to make sentence reductions for cooperation more common rather than less. The claim that inconsistent government substantial assistance practice promotes unjustifiable sentencing disparities has been a consistent theme of the defense bar for years. The Sentencing Commission staff made its first contribution to debate on the point

in January 1998 by issuing a report authored by Linda Maxfield and John Kramer titled "*Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice.*"<sup>21</sup>

As it happens, the conclusions of Maxfield-Kramer are something of a wash for the disputants in the debate over whether substantial assistance generates unfair sentencing disparity. On the one hand, the report gives little support to exponents of the so-called "cooperation paradox," the claim that substantial assistance motions routinely provide large sentencing breaks for "drug kingpins" and other knowledgeable higher-ups, while they are rarely offered to assertedly ignorant lower-ranking criminals, thus producing low sentences for bosses and higher sentences for mopes.<sup>22</sup> The report concludes that, "The oft-cited 'truth' that drug conspiracy members at the top of the organization are more likely to secure reduced sentences due to substantial assistance than those lower in the criminal organization is not supported by these exploratory data."<sup>23</sup> On the other hand, Maxfield-Kramer concludes that there are wide regional and inter-district disparities in substantial assistance departure rates and practices,<sup>24</sup> as well as statistically significant disparities between the substantial assistance rates for Latinos and whites, and between the rates for men and women.<sup>25</sup>

A detailed dissection of the findings and methods of the Maxfield-Kramer report is beyond the scope of this essay. The point on which I want to focus attention here is not the report's findings, but its focus. The project that ultimately became the Maxfield-Kramer report began in 1994 as a broad-gauged, multi-faceted study of substantial assistance practice. In its original 1995 draft form it was titled simply "Substantial Assistance Departures in the United States Courts." (I was Special Counsel to the Sentencing Commission in 1995-96 and was involved in critiquing this draft.) The final 1997 staff report, of which Maxfield-Kramer is actually only an interpretive summary, bore the equally neutral title, "Federal Court Practices: Sentence Reductions Based on Defendant's Substantial Assistance to the Government." Only in the hands of Ms. Maxfield and Mr. Kramer did a report born of a general examination of substantial assistance practice finally metamorphose into a study about sentencing equity.

A moment's reflection will reveal that the study's final metamorphosis is really quite odd. Section 5K1.1 differs in a crucial respect from virtually every other guideline. It was designed, not to ensure that criminals are punished for what they truly did or to achieve sentencing equity among similarly situated offenders, but as a tool to fight crime. As noted above, its consciously utilitarian justification is that society is willing to pay the price of giving sentence reductions to morally undeserving cooperators in exchange for the benefit of an increased likelihood of apprehending and convicting

criminals who might not otherwise be caught. The problem with the Maxfield–Kramer report is that it focuses almost exclusively on one side of society’s bargain. It asks only whether the rewards society is willing to confer for cooperation are being distributed equitably among the criminal classes. It does not even attempt to answer the question of what society is getting in return.<sup>26</sup>

Why did the Maxfield–Kramer report turn out as it did? Several factors at least seem clear. The first is the lamppost factor. Commission staff focused on sentencing equity for the same reason that the man who lost his keys on a dark night looked for them under the lamppost where the light was brightest—they had data on the equitable effects of substantial assistance motions, but had no useful data on the other side of the equation, the value of the cooperation obtained.

In an article several months ago in FSR, Dan Richman argued that the gap in the Maxfield–Kramer data is both understandable and inevitable.<sup>27</sup> Under the best of circumstances, in any individual case, quantifying the amount and quality of assistance is inescapably subjective. As Professor Richman argues very persuasively, the only person with a real ability to make such judgments is the individual prosecutor who handled the case, and even the most candid of such judgments is always subject to dispute. What, after all, does it mean to say that a witness was “essential” to a case? Or that the witness’s testimony “substantially” assisted the government? Must the witness have been the sole source of proof for a statutory element of the crime? Or the sole means of disproving an affirmative defense? Or did the witness’s testimony merely increase the odds of a successful prosecution?

Thus, any effort to quantify the benefits of substantial assistance is bound to produce imperfect results. The peculiar slant of the Maxfield–Kramer report, however, is the product of more than the intrinsic difficulty of measuring the benefits of substantial assistance. The second factor at work was an institutional bias at the Sentencing Commission in favor of sentencing equity. The prime directive of the Commission is to stamp out disparity; effective law enforcement is not part of its mission. The Commission staff’s predisposition to focus on disparity issues is evident throughout the design and execution of the study.

Nonetheless, whatever the perspective of the study’s designers, the final barrier to the creation of a report balancing the costs of substantial assistance agreements against their benefits was an undoubted, if perhaps understandable, reluctance of the Department of Justice to assist the Sentencing Commission in assessing the real benefits of § 5K1.1. And here we come to the crux of the matter. Read together, the *Singleton* and *Sealed Case* panel opinions signal concern that the Justice Department is using cooperation agreements too often and too inconsistently, and that steps ought to

be taken to restrict this form of prosecutorial power. If the Department of Justice is to preserve the substantial assistance regime in substantially its present form, with all the advantages that regime confers on dedicated prosecutors, it must begin to respond on three fronts.

#### **Some Sympathetic Suggestions to the Justice Department**

First, the Department should strive to reduce the incidence of substantial assistance motions. Sentence bargaining for testimony with felons is an evil. No credible case can be made that this evil must be endured in 20–25% of all federal cases in order to achieve acceptable levels of prosecutorial success. If, as I think, the present rate of substantial assistance departures cannot be justified on the ground of necessity, then the excess over the rate necessary to secure convictions can only be explained by postulating that federal prosecutors are using cooperation departures for other purposes. The two most likely such purposes are: (1) using the substantial assistance motion as a caseload management tool, an incentive offered to achieve a plea regardless of whether the cooperation is either “substantial” or required; (2) using the substantial assistance motion as a means of selectively mitigating mandatory or Guideline sentences, usually drug sentences, that government lawyers privately believe are too harsh, either generally or in particular cases.

Although I think both of these alternative purposes for § 5K1.1 motions are at work daily, neither is legitimate. When prosecutors use the substantial assistance motion as a plea bargaining incentive with no genuine relation to government evidentiary needs or the substance of the defendant’s cooperation, the government disregards the law and cheats on the implicit contract supporting the Guidelines themselves.

Likewise, if § 5K1.1 is routinely, but selectively, used as a sub rosa method of mitigating the severity of sentences DOJ lawyers feel to be unjustly severe, then the Department is also failing in its duty. If the law consistently produces punishments that require mitigation through extra-legal means, the duty of the Justice Department is to forthrightly advocate changes in the law. If the Department does not do so, it acts the coward by failing to say officially what its lawyers believe privately. And it consents to injustice in those cases where defendants receive unduly long sentences but are not awarded substantial assistance reductions because their particular prosecutors refuse to bend the rules. If, on the other hand, the Justice Department truly believes that the sentences set by Congress and the Commission for most offenses, including drug offenses, are appropriate, then handing out § 5K1.1 motions to one-quarter of all defendants is cheating the public of justice every time a motion is made in a case where it is not required to obtain a conviction.

I hasten to add that I am deeply sympathetic to the impetus all prosecutors feel at one time or another to use grants of discretion such as that in §5K1.1 to shape sentencing outcomes in accordance with their personal sense of justice, even in cases where the defendant has provided no real help to the government. The difficulty is that this use of §5K1.1 is plainly extra-legal, and its persistent occurrence lends considerable credence to the critique that the government wants everyone else to be constrained by rules, while insisting that prosecutors should be free to pursue whatever results seem best to them. Neither Congress, nor the defense bar, nor the judiciary, nor the Sentencing Commission can be expected to tolerate so one-sided an arrangement.

Second, the Department must make some effort to even out the more marked regional and interdistrict disparities in substantial assistance motion rates. When some districts give §5K1.1 motions more than 40% of the time, and the rates of other districts are consistently in the single digits, this is not evidence of understandable regional variation, but is instead a clear sign of policy disarray. More importantly, the existence of such stark differences gives ammunition to critics which even modest efforts to rein in those districts at the extremes would do much to disarm.

Finally, the Justice Department must be more receptive to efforts to ascertain the true societal value of the substantial assistance mechanism. Again, sentence rewards for cooperating criminals are a necessary evil, a price we choose to pay for greater goods. If it was only the Justice Department that paid the price, then its judgment about how much to pay, and to whom, and how often would be its own private business. At present, the Department treats the issue very much in this proprietary way. However, the price of bargaining with felons is paid by all of us. Therefore, as the public's agent, the Department of Justice has a responsibility to justify its "cooperation expenditure" in the same way it and all other public agencies have a responsibility to justify the expenditure of public money. The question that the Justice Department has so far failed to answer — and I suspect has not even asked itself — is: What are we buying for all these sentence reductions? Are we getting more convictions? Better convictions? Faster convictions?

Statistics are often uncertain guides, and any inquiry in this area would have to be undertaken with the greatest caution against over-interpreting its results. Still, some questions can certainly be answered if pursued in the right way. If the Department of Justice is to arm itself for the growing policy debate over substantial assistance, a debate in which *Singleton* and *Sealed Case* were merely incidents, it should study its own practices and be open to studies of them by legitimately interested outside parties. At the end of the day, the Justice Department bears the burden of proving that in sub-

stantial assistance motions, as elsewhere, its practices are both just and in the public interest.

#### Notes

- <sup>1</sup> 149 F.3d 1198 (D.C. Cir. 1998), vacated 159 F.3d 1362 (D.C. Cir.), *rev'd en banc*, 181 F.3d 128 (D.C. Cir. 1999). Panel opinion reprinted at 11 FED. SENT. R. 43 (July/Aug. 1998).
- <sup>2</sup> 144 F.3d 1343 (10th Cir. 1998), vacated 144 F.3d 1361 (10th Cir.), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999). Panel opinion reprinted at 11 FED. SENT. R. 104 (Sept./Oct. 1998).
- <sup>3</sup> U.S.S.G. § 5K1.1 (1998).
- <sup>4</sup> *Sealed Case*, 149 F.3d at 1204 (relying on *Koon v. United States*, 518 U.S. 81 (1996)).
- <sup>5</sup> For a more detailed critique of *Sealed Case* and *United States v. Singleton*, see Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. R. 7 (1999).
- <sup>6</sup> *In re Sealed Case No. 97-3112 (Sentencing Guidelines' "Substantial Assistance")*, 181 F.3d 128 (D.C. Cir. July 9, 1999).
- <sup>7</sup> *Id.* at 132. 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.*
- <sup>8</sup> *Id.* at 137-140.
- <sup>9</sup> See *United States v. Hoffa*, 385 U.S. 293, 311 (1966) (rejecting constitutional attack on informant testimony and reviewing history of use of such testimony).
- <sup>10</sup> 18 U.S.C. §§ 6001-6005.
- <sup>11</sup> 18 U.S.C. §§ 3521-3528.
- <sup>12</sup> Moreover, in 1987, Congress, by statute, made the provisions of Rule 35(b) applicable to pre-Guidelines sentences. Pub.L. 100-182, § 22, 101 Stat. 1266 (1987).
- <sup>13</sup> 165 F.3d 1297 (10th Cir. 1999).
- <sup>14</sup> 144 F.3d at 1346.
- <sup>15</sup> *Id.* at 1353.
- <sup>16</sup> For a powerful explanation of the value of the leverage created by substantial assistance motions in the prosecution of criminal groups, see Ronald S. Safer and Matthew C. Crowl, *Substantial Assistance Departures: Valuable Tool or Dangerous Weapon*, 12 FED. SENT. R. 41 (1999).
- <sup>17</sup> SUBSTANTIAL ASSISTANCE WORKING GROUP, U.S. SENTENCING COMM'N, FEDERAL COURT PRACTICES: SENTENCE REDUCTIONS BASED ON DEFENDANT'S SUBSTANTIAL ASSISTANCE TO THE GOVERNMENT (1997).
- <sup>18</sup> UNITED STATES SENTENCING COMM'N, 1998 ANNUAL REPORT 38 (1999).
- <sup>19</sup> UNITED STATES SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, App. B (1997). In 1998, the § 5K1.1 departure rate in the Eastern District of Pennsylvania was 42.7%. UNITED STATES SENTENCING COMM'N, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, App. B (1999).
- <sup>20</sup> See Linda Drazga Maxfield and John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, United States Sentencing Commission 5, n. 11 (January 1998) (noting that Rule 35(b) data is not collected, but estimating that Rule 35(b) motions occur in roughly 500 cases per year). See also, Stanley Marcus, *Substantial Assistance Motions: What Is Really Happening?* 6 FED. SENT. R. 6 (1993) (questioning accuracy of Sentencing Commission departure data because information about Rule 35(b) motions not collected).
- <sup>21</sup> *Id.*
- <sup>22</sup> For a more detailed critique of the "cooperation paradox," see Bowman, *supra* note 5, at 49-54.
- <sup>23</sup> Maxfield and Kramer, *supra* note 20, at 13.

<sup>24</sup> *Id.* at 20.

<sup>25</sup> Latinos are apparently less likely to receive a substantial assistance motion than whites, while women are more likely to receive such motions than men. *Id.* at 13–14.

<sup>26</sup> The only information collected by the Commission's §5K1.1 study on the benefits conferred by substantial assistance came from a phone survey of Assistant U.S. Attorneys which produced information about 130 drug defendants who received substantial assistance motions in FY 1994 (1.7% of the 7,524 defendants who received substantial assistance departures in FY 1994). *Id.* at 29. Unsurprisingly the Maxfield–Kramer report does not attempt to draw any general conclusions about the overall benefits of substantial assistance from so tiny and unrepresentative a sample. However, Maxfield and Kramer do imply that the skimpy benefits data bolsters their conclusions about sentencing equity. After concluding that the study reveals statistically significant evidence of inequities in substantial assistance practice based on legally impermissible factors like race,

they wrote: "Expected factors (e.g., type of cooperation, benefit of cooperation, defendant culpability or function, relevant conduct, offense type) generally were found inadequate in explaining §5K1.1 departures." *Id.*, at 21 (emphasis added). The plain implication of this sentence is that Commission staff gathered meaningful data on the benefits of substantial assistance and included that data as part of the regression analysis that produced results suggesting racial inequities. The problem is that the study's conclusions about race and gender are based on a multiple regression analysis of all 38,498 cases sentenced in FY 1994, including all 7,524 cases with substantial assistance departures. There is no method of which I am aware that would allow combining the results of a multiple regression analysis of 38,000 cases, or of 7,524 substantial assistance cases, with the results of a phone survey of an unrepresentative subset of 130 substantial assistance cases to produce any coherent conclusion.

<sup>27</sup> Daniel C. Richman, *The Challenges of Investigating §5K1.1 In Practice*, 11 FED. SENT. R. 75 (Sept.–Oct. 1998).