

The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement

CYNTHIA K.Y. LEE*

I. INTRODUCTION

Whether a sentencing court can depart downward from the applicable sentencing guidelines in recognition of a defendant's substantial assistance without a government motion requesting such a downward departure is a hotly disputed issue. Section 5K1.1 of the federal sentencing guidelines and 18 U.S.C. § 3553(e) specify that "upon motion of the government," the court may depart from the guidelines or statutory minimum to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Section 5K2.0 of the sentencing guidelines and 18 U.S.C. § 3553(b) suggest that the sentencing court has the discretion to depart from the guidelines without such a government motion.¹

The courts have not reached a consensus on whether a government motion is absolutely necessary before a sentencing court can depart downward for substantial assistance, although two circuit courts have suggested that a court may, in exceptional circumstances, depart without such a government motion.² This judicial reluctance to do away with the requirement of a government motion may stem from a fear that eliminating the requirement may cause a reversion to the pre-guidelines days when judges had extremely broad discretion in sentencing. It may also reflect the belief of the appellate courts that strict adherence to the rules reflected in the sentencing guidelines is necessary to avoid the widespread sentencing disparity which was prevalent in those pre-guidelines days.

This Article examines the tension between discretion and rules, and proposes that the requirement of a government motion before a sentencing court can depart downward in recognition of a defendant's substantial assistance can be eliminated without jeopardizing the goals of the sen-

* A.B. with distinction from Stanford University 1983; J.D. Boalt Hall School of Law 1989; current law clerk to Chief Judge Harold M. Fong, United States District Court for the District of Hawaii.

1. See *infra* notes 24-25 and accompanying text.

2. See *infra* note 45.

tencing guidelines. Part one of the Article explores the historical background leading to the creation of the sentencing guidelines. Part two describes the relevant guidelines provisions and statutory sections, and provides a summary of different judicial interpretations of these sections. Part three proposes that section 5K1.1 be amended to eliminate the requirement of a government motion, and discusses the implications of such an amendment.

II. HISTORICAL BACKGROUND

A. *Pre-Guidelines: Era of Discretion*

The tension between discretion and rules has been a powerful force motivating the creation of the sentencing guidelines. Before the guidelines were implemented, judges had extremely broad discretion in sentencing. A sentencing judge could impose any sentence he or she felt was appropriate as long as the sentence imposed did not exceed the statutory maximum.³ The judge was not required to articulate the reasons for his sentencing decision, and the length of the sentence was not subject to appellate review.⁴

In *Williams v. New York*,⁵ the United States Supreme Court applauded the American tradition of giving courts wide discretion in sentencing.⁶ The Court explained that such discretion was necessary in order to individualize the sentencing process, to ensure that the appropriate sentence was imposed.⁷ The tone set by the Supreme Court in *Williams* remained the prevailing view until the early 1970s when critics began to question whether such broad discretion produced the fairest sentences.

The biggest problem with the pre-guidelines system of broad discretion in sentencing was that it led to disparate treatment for similarly situated individuals.⁸ Sentencing disparity, or "the imposition of unequal

3. Under the old indeterminate sentencing system, the sentencing judge had complete control over the sentencing process. The judge could impose any sentence he or she deemed appropriate as long as the sentence imposed did not exceed the statutory maximum. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89 (1988).

4. *Id.* Requiring judges to provide some justification for their imposed sentences helps to assure that judges do not abuse their discretion in sentencing. *Id.* See also Note, *Pennsylvania Supreme Court Review, 1988, Judicial Discretion in Sentencing-Commonwealth v. Devers*, 519 Pa. 88, 546 A.2d 12 (1988), 62 TEMP. L. REV. 729, 731-32 (1989).

5. 337 U.S. 241 (1949).

6. *Id.* at 246.

7. *Id.* at 247-48.

8. This conclusion has been supported by a number of sentencing studies. In one study conducted in 1974, fifty judges given facts from identical cases were asked to indicate

sentences on defendants similarly situated with respect to their offenses of conviction and prior criminal record,"⁹ could be caused by personality factors peculiar to the sentencing judge.¹⁰ It could also be caused by differing philosophies as to the purpose of sentencing.¹¹ One judge might impose a long prison sentence, believing that incapacitation or deterrence is the primary goal of sentencing, while another judge, facing similar facts, might decide that probation is the more appropriate sentence if he believes the primary goal of sentencing is rehabilitation.¹²

In the early 1970s, Judge Marvin Frankel criticized "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences."¹³ Frankel pointed out that federal judges come to the bench with very little training on how to sentence.¹⁴ Many judges have very little prior contact with criminal sentencing proceedings during their years of practice.¹⁵ Those with exposure to criminal law generally have worked as prosecutors before being appointed to the bench.¹⁶ Frankel noted that the system of sentencing then in effect did not require the sentencing judge to articulate the reasons for his sentence even though "the giving of reasons helps the decision-maker himself in the effort to be fair and rational."¹⁷

the sentences they would impose. The responses ranged from twenty years imprisonment and a \$65,000 fine to three years imprisonment and no fine. Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1944 n.38 (1988) (citing S. REP. NO. 225, 98th Cong., 2d Sess. 37, 41, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3220, 3221).

9. Comment, *Sentencing Guidelines: Issues Confronting Appellate Courts*, 67 OR. L. REV. 871, 871 (1988). But compare Lowe, *Modern Sentencing Reform: A Preliminary Analysis of the Proposed Federal Sentencing Guidelines*, 25 AM. CRIM. L. REV. 1, 9 (1987) (asserting that "there is no single definition of disparity in sentencing").

10. Studies have found that judges with working class backgrounds tend to impose harsher sentences although young, well educated judges tend to be more lenient. Lowe, *supra* note 9, at 11 n.54.

11. Weigel, *supra* note 3, at 98-99. Section 3553 of the Sentencing Reform Act of 1984 sets out the four underlying purposes of sentencing:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with the needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2) (1988). Depending on their particular philosophy regarding the predominant purpose(s) of sentencing, different judges may sentence differently even when faced with identical facts.

12. Weigel, *supra* note 3, at 98-99.

13. M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973).

14. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 6 (1972).

15. *Id.*

16. *Id.*

17. *Id.* at 9.

As a means of remedying the problem of widespread sentencing disparity and checking the uncontrolled discretion of sentencing judges, Frankel proposed implementing a system of sentencing guidelines.¹⁸ Frankel's criticism of the old system of discretion started the movement for reform of the sentencing process, and was a catalyst for the creation of the Sentencing Commission and the system of sentencing guidelines which we have today.¹⁹

B. The Sentencing Guidelines: Era of Rules

In response to the growing public concern over sentencing disparity, Congress enacted the Sentencing Reform Act of 1984.²⁰ The Act established the United States Sentencing Commission. The purpose was to draft sentencing guidelines that would:

provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.²¹

Under the sentencing guidelines, a judge can systematically apply the guideline rules to come up with a guideline range. The guideline range is a predetermined minimum and maximum term of imprisonment within which the sentencing judge can sentence an offender. The guideline range is designed to take into account the crime of conviction, particular characteristics of the crime and the offender, as well as the offender's past convictions. Because all persons convicted of similar crimes who exhibit similar characteristics become subject to the same guideline range, the sentencing guidelines, if followed, reduce disparity in sentencing by confining the judge's discretion to the guideline range.

To calculate the appropriate guideline range, the sentencing judge must start by looking up the statute of conviction in the statutory index (Appendix A). The index will lead the judge to a section in chapter 2 of the sentencing guidelines. Chapter 2 organizes the most commonly

18. *Id.* at 51.

19. See Ogletree, *supra* note 8, at 1942.

20. The Sentencing Reform Act of 1984 was enacted on Oct. 12, 1984 as Chapter II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473. The Act is codified in 18 U.S.C. §§ 3551-86, 3621-25, 3742 (1988) and 28 U.S.C. §§ 991-98 (Supp. V 1987).

21. 28 U.S.C. § 991(b)(1)(B) (Supp. V 1987).

used federal criminal statutes under nineteen headings, such as "Offenses Against the Person," and "Offenses Involving Drugs." Occasionally, there will be more than one referenced sentencing guidelines section. In such cases, the sentencing judge must review the different sections and determine which one is most appropriate.

Once the judge locates the appropriate guideline section in chapter 2, he must find the "base offense level" for the crime of conviction. If any "specific offense characteristics," such as use or threat of force, or use of a firearm, exist, the judge must add points to (or in some cases subtract points from) the base offense level to come up with an "adjusted base offense level."

Next, the sentencing judge must determine if any "adjustments" from chapter 3 of the guidelines apply. These include adjustments either upwards or downwards for special circumstances such as a vulnerable victim, obstruction of justice, and acceptance of responsibility. These adjustments are added to or subtracted from the adjusted base offense level to come up with the total adjusted offense level.

Next, the judge determines the offender's criminal history category by looking in chapter 4 of the sentencing guidelines. The criminal history category is calculated based on the offender's past conviction record.

Finally, the judge can determine the appropriate guidelines range by consulting the sentencing table on page 5.2 of the guidelines. The vertical axis of the sentencing table consists of offense levels. The horizontal axis of the sentencing table consists of various criminal history categories. The intersection of the offense level and the criminal history category displays the appropriate guideline range in months of imprisonment. The sentencing judge can then sentence the offender within the guideline range with little fear of being reversed. Only if the judge departs from the guidelines, sentencing the offender to a prison sentence greater than the maximum or less than the minimum terms specified in the calculated guideline range, may the sentence of the court be subject to appeal by either the government or the defendant.²²

C. Sentencing Discretion Under the Guidelines: The Authority of the Court to Depart

The drafters of the sentencing guidelines sought not only to eliminate unwarranted sentencing disparities, but also "to maintain sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of

22. 18 U.S.C. § 3742 allows either the government or the defendant to appeal any imposed sentence that departs from the applicable guideline range.

general sentencing practices.”²³ As section 5K2.0 of the sentencing guidelines provides:

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guidelines, if the court finds “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.” Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the court at the time of sentencing. . . . [T]he court may depart from the guidelines, even though the reason for departure is listed elsewhere in the guidelines, (e.g., as an adjustment or specific offense characteristic), if the court determines that, in light of unusual circumstances, the guidelines level attached to that factor is inadequate.²⁴

Similarly, 18 U.S.C. § 3553(b) allows a court to depart from the applicable sentencing guidelines if the court finds 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. Section 3553(b) provides:

(b) *Application of Guidelines in Imposing a Sentence.*—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds 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. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.²⁵

Some critics have said that section 5K2.0 of the sentencing guidelines opens the door to letting judges sentence offenders in whatever way they choose just as they did in the pre-guidelines days.²⁶ A creative judge

23. 28 U.S.C. § 991(b)(1)(B).

24. UNITED STATES SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL § 5K2.0 (West 1990) [hereinafter GUIDELINES].

25. 18 U.S.C. § 3553(b) (1988).

26. Lowe, *supra* note 9, at 36 (asserting that “[j]udges will deviate from the presumptive outcome whenever they feel compelled to do so under the circumstances”).

can theoretically devise valid reasons to depart by thinking up circumstances which were not adequately taken into account by the Sentencing Commission.²⁷

The more prevailing view, however, seems to be that the sentencing guidelines provide sufficient checks to limit the discretion of the sentencing judge.²⁸ United States District Court Judge Jack B. Weinstein believes that, in general, federal judges will comply with the sentencing guidelines for two reasons. First, the sentencing guidelines provide a uniform national front which serves to deter unlawful conduct by publicizing the sentences that will be imposed for certain crimes.²⁹ Second, adherence to the guidelines reduces internal stress on judges. Not only can a judge almost assuredly avoid reversal by sentencing within the guidelines, but he or she can rule "under the illusion that he or she is no longer personally responsible for a sentencing decision."³⁰

More concrete checks on the discretion of the sentencing court are provided by statute. Title 18, section 3553(c) of the United States Code requires the court to provide a statement of reasons to support any sentence departing from the guidelines. Furthermore, section 3742 of title 18 of the United States Code allows either the government or the defendant to appeal any departure sentence. Overall, these incentives to the sentencing court to sentence within the guidelines may impede the willingness of the sentencing court to depart, even when departure might produce the fairest result.

These new statutory restrictions coupled with the enormous emotional burden that is lifted from a sentencing judge's shoulders when she or he sentences within the guideline range encourage judges to exercise their sentencing authority within the structured limits of the sentencing guidelines. A judge concerned with reversal by an appellate court is unlikely to depart given these restrictions. Indeed, a compliance study conducted by the Sentencing Commission after the United States Supreme Court

27. The guidelines do not appear to have adequately taken into account several factors. For example, a court might depart under section 5K2.0 based upon the good that a defendant has done in his lifetime, the fact that the defendant's job will be lost and he is unlikely to obtain another, making rehabilitation after release difficult, extreme illness of a dependent requiring the presence of the defendant at home, health problems of the defendant that make imprisonment particularly inappropriate, the fact that the defendant is very elderly, the defendant's leadership role in the community, the significance of defendant's business in the community, or the immaturity of a particular defendant. Weinstein, *A Trial Judge's First Impression of the Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 16 (1987).

28. See, e.g., Lindemann, *Opening the Federal Sentencing Guidelines to Alternatives*, 15 WM. MITCHELL L. REV. 555, 600-01 (1989); Weinstein, *supra* note 27, at 10.

29. Weinstein, *supra* note 27, at 10.

30. *Id.*

upheld the constitutionality of the sentencing guidelines in *United States v. Mistretta*³¹ found that 81.1% of all sentences imposed nationwide in a nine month period fell within the guideline range.³²

Given these low incentives for a sentencing court to depart, the Sentencing Commission's goals of reducing unwarranted sentencing disparity and providing certainty in sentencing³³ are likely to be accomplished. The Sentencing Commission's additional goals of providing fairness in sentencing and maintaining sufficient flexibility to permit individualized sentences,³⁴ however, may be undercut if judges decline to depart out of fear of being reversed, even when they believe departure is warranted.

While unchecked discretion and a return to the pre-guidelines days of unstructured discretion in sentencing is certainly not desired, the exercise of limited discretion is necessary even under the new sentencing guidelines. The Sentencing Commission recognized this need for sentencing judges to depart occasionally when it drafted the goals of the sentencing guidelines.³⁵ Accordingly, the Commission drafted several departure sections authorizing the sentencing court to depart from the guidelines.³⁶ Even with these departure sections, however, sentencing courts, by and large, have declined to depart.³⁷

III. DOWNWARD DEPARTURES FOR SUBSTANTIAL ASSISTANCE

Title 18, section 3553(e) of the United States Code gives a district court limited authority to impose a sentence below the statutory minimum to reflect a defendant's substantial assistance to the government. It

31. 109 S. Ct. 647 (1989).

32. Report on Compliance and Departures Through End of Fiscal Year 1989 (Jan. 19, 1989 - Sept. 30, 1989) [unpublished report]. The report was based on a study of a 25% random sample of cases sentenced pursuant to the Sentencing Reform Act during the period from Jan. 19, 1989 through Sept. 30, 1989. Out of a sample of 3,260 cases, 2,806 (or 81.1%) courts sentenced within the applicable guideline range. In 5.7% of the cases, the sentencing court departed downward based on a motion by the government for a reduced sentence based on the defendant's substantial assistance to authorities. In 3.4% of the cases, the court departed upward, giving a sentence above the guideline range. In 9.7% of the cases, the court departed downward for other reasons.

33. See *supra* note 21 and accompanying text.

34. *Id.*

35. *Id.* (goals of fairness and individual consideration in sentencing).

36. See GUIDELINES, *supra* note 24, § 5K2.0 (authorizing departure if sentencing court finds aggravating or mitigating circumstances of a kind not adequately taken into consideration by the Sentencing Commission in fashioning the guidelines); GUIDELINES, *supra* note 24, § 5K1.1 (authorizing departure for a defendant's substantial assistance to authorities upon government motion).

37. See *supra* note 32.

includes an express requirement that the government make a motion requesting a departure before the sentencing court may depart downward:

(e) Limited Authority to Impose a Sentence Below a Statutory Minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.³⁸

The sentencing guidelines contain a similar provision. Section 5K1.1 of the guidelines provides that a sentencing court may depart from the guidelines *upon motion of the government*. It reads:

Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.³⁹

The Sentencing Commission has suggested informally that courts may depart downward even without a government motion and have pointed to sentencing guidelines section 5K2.0 and 28 U.S.C. § 994(n) as provisions supporting such departures. These sections, however, are inadequate bases to support section 5K1.1 departures without a government motion.

Section 5K2.0 of the sentencing guidelines, like 18 U.S.C. § 3553(b), allows the sentencing court to depart only if the aggravating or mitigating circumstance supporting the departure is "not adequately taken into consideration by the Sentencing Commission" in formulating the guidelines.⁴⁰ The Eighth Circuit Court of Appeals, in a recent opinion entitled *United States v. Justice*,⁴¹ held that a defendant's substantial assistance to authorities was not a mitigating circumstance of a kind "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines" within the meaning of 18 U.S.C. § 3553(b) since section 5K1.1 of the sentencing guidelines already deals with a defendant's

38. 18 U.S.C. § 3553(e) (1988).

39. GUIDELINES, *supra* note 24, § 5K1.1.

40. *See supra* notes 23-25 and accompanying text.

41. 877 F.2d 664 (8th Cir. 1989).

substantial assistance.⁴² The holding of the court in *Justice* suggests that section 5K2.0, which parallels 18 U.S.C. § 3553(b), does not give the court discretion to depart downwards for substantial assistance without a government motion.⁴³

Section 994(n) of title 28 of the United States Code,⁴⁴ the second suggested basis to support a downward departure for a defendant's substantial assistance without a government motion, provides that the guidelines may go below a statutory minimum to take into account a defendant's substantial assistance. Section 994(n), however, does not address the dilemma of the sentencing court of whether it has the authority to depart from the guidelines without a government motion.

Given the lack of statutory authority allowing a sentencing court to depart in recognition of a defendant's substantial assistance without a government motion, district courts have had to rely on judicial interpretation to define the boundaries of permissible behavior. To date, no federal court of appeals has held that a federal district court may depart downward from the applicable guideline range to reflect a defendant's substantial assistance without a government motion. Some circuit courts have suggested the opposite - that the sentencing court *cannot* depart downward for substantial assistance *unless* the government makes a motion - by affirming district court refusals to depart without a government motion.⁴⁵ Other courts have suggested that a sentencing court can, in limited circumstances, depart downward without a government

42. *Id.* at 666.

43. What the Eighth Circuit failed to note is that section 5K2.0 explicitly states that "[t]he court may depart from the guidelines, *even though the reason for departure is listed elsewhere in the guidelines.*" Ironically, the *Justice* opinion is one of the leading cases criticizing the section 5K1.1 requirement of a government motion, and does suggest that in exceptional circumstances, the sentencing court may depart in recognition of a defendant's substantial assistance without a government motion. *Id.* at 668-69.

44. Section 994(n) provides:

(n) The Commission shall assure 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.

28 U.S.C. § 994(n).

45. *See, e.g.,* *United States v. Huerta*, 878 F.2d 89 (2d Cir. 1989) (affirming district court's refusal to depart downward for substantial assistance without a government motion); *United States v. Ayarza*, 874 F.2d 647 (9th Cir. 1989) (affirming district court's imposition of a sentence within the applicable guideline range over defendant's constitutional challenges to the sentencing guidelines); *United States v. Musser*, 856 F.2d 1484 (11th Cir. 1988) (rejecting appellants' constitutional challenges to 18 U.S.C. § 3553(e) and FED. R. CRIM. P. 35(b) on equal protection, due process and separation of powers grounds).

motion,⁴⁶ but no appellate court has found the appropriate case to actually rule on this issue.

A. Circuit Court Opinions

1. *Second Circuit*—United States v. Huerta.—In *United States v. Huerta*,⁴⁷ the Second Circuit Court of Appeals affirmed the refusal of the district court to depart downward from the applicable guideline range without a government motion on the ground that 18 U.S.C. § 3553(e) and Sentencing Guidelines § 5K1.1 “unambiguously limit the discretion of a judge to impose a sentence below the statutory minimum on grounds of the defendant’s cooperation to cases in which the government makes a motion requesting such a departure.”⁴⁸

The *Huerta* court rejected all of the appellant’s constitutional challenges to the provisions requiring a government motion. First, the appellant argued that the requirement of a government motion violated the separation of powers doctrine since it delegated to the prosecutorial arm of the Executive Branch the authority to control when the judiciary could consider a defendant’s cooperation with the government as a mitigating factor. The *Huerta* court, however, held that the requirement of a government motion did not violate the separation of powers doctrine because sentencing is not an inherently or exclusively judicial function. The court explained that since Congress has the power to eliminate all judicial discretion in sentencing by establishing mandatory sentences, Congress can also limit the discretion of the sentencing court by requiring a government motion.⁴⁹

The court then rejected the appellant’s due process challenge to section 3553(e). Appellant argued that section 3553(e) violated due process by allowing prosecutors unlimited and unreviewable discretion in deciding whether to make substantial assistance motions and by curtailing a judge’s ability to consider evidence of cooperation. The *Huerta* court held that there was no due process violation, reasoning that “there is no right to individualized sentencing, and Congress may constitutionally prescribe

46. See, e.g., *United States v. White*, 869 F.2d 822, 829 (5th Cir. 1989) (section 5K1.1 “does not preclude district court from entertaining a defendant’s showing that the government is refusing to recognize [the defendant’s] substantial assistance”); *United States v. Justice*, 877 F.2d 664, 669 (8th Cir. 1989) (“in an appropriate case the district court may be empowered to grant a departure notwithstanding the government’s refusal to motion the sentencing court if the defendant can establish the fact of his substantial assistance to authorities”).

47. 878 F.2d 89 (2d Cir. 1989).

48. *Id.* at 91.

49. *Id.* at 93.

mandatory sentences or otherwise constrain the exercise of judicial discretion.”⁵⁰

The *Huerta* court suggested that the discretion of a sentencing court is not completely circumscribed by the requirement of a government motion pursuant to section 3553(e) because the court can always consider a defendant's cooperation in determining a defendant's sentence, with or without a government motion, as long as it applies a sentence within the applicable guideline range. The court stated: “[W]e note that section 3553(e) does not foreclose a sentencing court from considering a defendant's cooperation as a mitigating factor in deciding what sentence *within the applicable range designated by the Guidelines* is appropriate, whether or not the government agrees.”⁵¹ This acknowledgement, however, does not provide much comfort to district courts faced with the situation in which they wish to depart downward from the applicable guideline range without a government motion because it only gives courts “discretion” to sentence within the guideline range.

2. *Fifth Circuit*—*United States v. White*.—In *United States v. White*,⁵² the Fifth Circuit Court of Appeals affirmed orders of several district courts imposing sentences under the sentencing guidelines. Even though the Fifth Circuit affirmed the lower court orders, the *White* opinion is significant because the appellate court in this case came close to ruling that section 5K1.1 does not preclude a district court from departing downward without a government motion.

The appellants in *White* argued that by providing for a motion by the government, section 5K1.1 failed to implement the congressional directive of 28 U.S.C. § 994(n). Section 5K1.1 requires that the government file a motion before the court departs downward. Section 994(n) directs the Sentencing Commission to “assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.”⁵³

The *White* court rejected the appellants' argument, holding that the section 5K1.1 provision was in accord with the statutory directive of section 994(n).⁵⁴ The court reached this conclusion by explaining that the policy statements contained in the sentencing guidelines are not rigid, mechanical requirements.⁵⁵ Rather they are “designed to assist the court

50. *Id.* at 94.

51. *Id.* at 93 (emphasis added).

52. 869 F.2d 822 (5th Cir. 1989).

53. 28 U.S.C. § 994(n).

54. 869 F.2d at 829.

55. *Id.*

in imposing an appropriate sentence.”⁵⁶ While section 5K1.1 is based on the “reasonable assumption that the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant’s assistance, . . . [it] obviously does not preclude a district court from entertaining a defendant’s showing that the government is refusing to recognize such substantial assistance.”⁵⁷ The implication drawn from the language of the court is that a sentencing court may depart downward based on a defendant’s substantial assistance even if the government refuses to recognize such assistance by filing a motion.

3. *Eighth Circuit*—*United States v. Justice*.—In a case entitled *United States v. Justice*,⁵⁸ the Eighth Circuit Court of Appeals criticized the requirement, found in 18 U.S.C. § 3553(e) and Sentencing Guideline § 5K1.1, of a government motion before a sentencing court can depart downward. Even though the *Justice* court thought the refusal by the government to file a motion in recognition of the defendant’s substantial assistance was unreasonable,⁵⁹ it affirmed the refusal of the district court to grant a downward departure.⁶⁰ Therefore, the court’s strong words of criticism are merely dicta.

The Eighth Circuit Court of Appeals acknowledged that section 5K1.1 and 18 U.S.C. § 3553(b) require a government motion before a court can depart for substantial assistance.⁶¹ The court, however, noted several problems with this requirement of a government motion. “First, this arrangement places discretion that has historically been in the hands of a federal judge into the hands of the prosecutor”⁶² since under these provisions the prosecutor has the discretion whether to file a motion. If the prosecutor decides not to file a motion, the court cannot depart, even if it believes the defendant has rendered substantial assistance to the government.⁶³ “Second, whether the prosecutor has abused his discretion in refusing to file a motion is a question that appears to be unreviewable.”⁶⁴ Under the guidelines, there is no right of review or remedy if the prosecutor refuses to file a motion. Third, resolution of

56. *Id.*

57. *Id.* (emphasis added).

58. 877 F.2d 664 (8th Cir. 1989).

59. *Id.* at 668 (“the government’s refusal to motion the court for departure under § 5K1.1 in this case seems to be unreasonable in light of its stipulation”).

60. *Id.* at 670.

61. *Id.* at 667.

62. *Id.*

63. Although the judge possesses the technical authority to depart from the guidelines, this authority is so rigidly regulated by the guidelines that for all practical purposes, departure is not really an option. See *United States v. Roberts*, 726 F. Supp. 1359, 1365 n.39 (D.D.C. 1989).

64. *Justice*, 877 F.2d at 667.

the issue whether a defendant has provided substantial assistance to authorities is left to the prosecutor.⁶⁵

In perhaps the strongest language from a federal appellate court supporting the notion that a sentencing court may depart under section 5K1.1 without a government motion, the Eighth Circuit stated, "We believe that *in an appropriate case the district court may be empowered to grant a departure notwithstanding the government's refusal to motion the sentencing court* if the defendant can establish the fact of his substantial assistance to authorities as outlined above."⁶⁶ The court concluded, "Nevertheless, we are not prepared to decide this issue based on the record currently before us."⁶⁷ Since the *Justice* court did not feel the case it had before it was an appropriate case to hold that the sentencing court should have departed downward without a government motion, it affirmed the refusal of the lower court to depart downward without such a government motion.

4. *Ninth Circuit*—United States v. Ayarza.—In *United States v. Ayarza*,⁶⁸ the Ninth Circuit Court of Appeals affirmed a district court's imposition of a sentence within the sentencing guidelines. The defendant appealed, challenging the constitutionality of the sentencing guidelines on separation of powers and due process grounds. The court of appeals rejected the defendant's constitutional challenges, in somewhat summary fashion, holding (1) that the district court did not err in rejecting defendant's motion for a downward adjustment in his sentence based on his substantial assistance under section 5K1.1 of the sentencing guidelines and 18 U.S.C. § 3553(e) because both of these provisions condition such a downward departure upon motion of the government - a prerequisite that was not met in this case; (2) that the requirement of a government motion does not violate the doctrine of separation of powers because the sentencing process is not an inherently judicial function, and that, even if it were, the government's authority to recommend a reduced sentence is not impermissibly obtrusive; and (3) that 18 U.S.C. § 3553(e) and section 5K1.1 do not violate defendant's constitutional right to due process because "it is rational for Congress to lodge some sentencing discretion in the prosecutor, the only individual who knows whether a defendant's cooperation has been helpful."⁶⁹

5. *Eleventh Circuit*—United States v. Musser.—In *United States v. Musser*,⁷⁰ the Eleventh Circuit Court of Appeals rejected constitutional

65. *Id.*

66. *Id.* at 668 (emphasis added).

67. *Id.* at 669.

68. 874 F.2d 647 (9th Cir. 1989).

69. *Id.* at 653.

70. 856 F.2d 1484 (11th Cir. 1988).

challenges to 18 U.S.C. § 3553(e) and Rule 35(b) of the Federal Rules of Criminal Procedure based on equal protection, due process, and separation of powers grounds. Rule 35(b) allows a sentencing court to lower its previously imposed sentence to reflect a defendant's substantial assistance to the government. Like section 5K1.1 and 18 U.S.C. § 3553(e), it requires a government motion. Rule 35(b) provides:

The court, on motion of the Government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court's authority to lower a sentence under this subdivision includes the authority to lower such sentence to a level below that established by statute as a minimum sentence.⁷¹

Appellants first challenged the government motion requirement on equal protection grounds, arguing that "minor participants and those of relatively low culpability are without sufficient knowledge to avail themselves of the [departure for substantial assistance] provision."⁷² The *Musser* court found that since the statute did not discriminate on the basis of race or a suspect class, the rational relation standard was the applicable standard. Because "Congress' desire to ferret out drug kingpins is obviously served by encouraging those with information as to the identity of kingpins to disclose such information," the court found a rational relationship between the statute and Congress' purpose and held that appellants' equal protection challenge to the "substantial assistance" provision was without merit.⁷³

Appellants also challenged the "substantial assistance" provision on due process grounds, arguing that the requirement of a government motion delegated to prosecutors unbridled discretion to decide who is entitled to a sentence reduction. The appellate court rejected appellants' due process challenge as well, reasoning that the only authority delegated to prosecutors by the rule is the authority to *move* the district court for a reduction of sentence. The authority to actually reduce a sentence remains vested in the district court.⁷⁴ Finally, the appellants' argument that the provision violates the separation of powers doctrine was rejected summarily as without merit.⁷⁵

71. FED. R. CRIM. P. 35(b).

72. *Musser*, 856 F.2d at 1487.

73. *Id.*

74. *Id.*

75. *Id.*

B. *Tried Alternatives*

Despite the lack of firm appellate authority to depart downward without a government motion, some district courts have dared to depart, devising ways to avoid the guidelines and statutory requirement of a government motion. Two of these methods are examined in this Article. These methods of accomplishing the downward departure without a government motion, however, are inadequate to protect a defendant's interest in a fair sentence if district courts utilizing these methods risk reversal by appellate courts unconvinced that the government motion requirement is unconstitutional. What is needed is an amendment to the guidelines that would apply universally to all sentencing courts, allowing these courts to depart downward in recognition of a defendant's substantial assistance without a government motion.

1. *Treating Letters Regarding the Defendant's Cooperation From the Government to the Court as the Functional Equivalence of a Government Motion.*—In *United States v. Coleman*,⁷⁶ several defendants filed a motion with the district court requesting it to order the government to file a motion to permit the district court to consider a departure, or, in the alternative, to consider a departure notwithstanding the failure of the government to file a motion.

The government had entered into a plea agreement with defendants that provided that the government would advise the sentencing court of the nature, extent, and importance of the assistance the defendants provided to law enforcement authorities.⁷⁷ The agreement, however, did not specify *how* the government would advise the sentencing court of the defendants' assistance.

The government refused to file a motion requesting departure. In a lengthy twenty-one page opinion, the district court examined 28 U.S.C. § 994(n), 18 U.S.C. § 3553(e), and section 5K1.1 of the sentencing guidelines and concluded that these provisions “*clearly contemplate that the sentencing court may be authorized to make a lower departure from the Guidelines and consider a sentence below a mandatory minimum sentence.*”⁷⁸ Interestingly, the court did not go further and insert the words “*even without a government motion.*” The court then treated letters from the government to the court that detailed the defendants' cooperation as the functional equivalent of a motion, thereby allowing the imposition of a sentence below the applicable guideline range.⁷⁹

The solution reached by the court in *Coleman* to the problem of a prosecutor who reneges on a promise to file a motion for downward

76. 707 F. Supp. 1101 (W.D. Mo. 1989).

77. *Id.* at 1118-19.

78. *Id.* at 1115 (emphasis added).

79. *Id.* at 1119-20.

departure in recognition of the defendant's substantial assistance after the defendant has provided assistance to the government pursuant to a plea agreement is not a method that most courts can follow. In *Coleman*, the prosecutor had rejected defense counsel's request that the government commit itself to filing a motion for downward departure if the defendants' cooperation proved to be substantial.⁸⁰ Instead, as part of the plea agreement, the prosecutor agreed to submit a letter to the court describing the defendants' cooperation.⁸¹ Few, if any, plea agreements will include such a provision, especially not if prosecutors realize that district courts may treat such letters as the functional equivalent of a motion for downward departure.

2. *Imposing a Duty to Act in Good Faith on the Government.*— In *United States v. Galan*,⁸² an unpublished district court opinion, the Southern District Court of New York ordered the government to make an *ex parte, in camera* disclosure to the court on the subject of the defendant's cooperation to allow the court to evaluate whether the government's refusal to make a motion for a downward departure was in good faith.

In *Galan*, the defendant and the government had entered into a plea agreement. The *Galan* plea agreement provided that the government would make a motion for a downward departure if the defendant cooperated with the investigation by the government. The government then refused to file such a motion because it felt the defendant had breached the plea agreement.

The *Galan* court held that under these circumstances, it could require the government to provide to the court a detailed statement of any assistance actually rendered by the defendant.⁸³ The court held that it could then evaluate the government's statement to determine whether the government's refusal to make a motion for downward departure was in bad faith, suggesting that either a downward departure would then be appropriate even without a government motion or that if the government refusal to make such a motion was in bad faith, the court could compel the government to file a motion.⁸⁴

C. Policy Rationale Behind Requirement of a Government Motion

The obvious reason for requiring a government motion before a sentencing court can depart downward in recognition of a defendant's

80. *Id.* at 1105.

81. *Id.*

82. *United States v. Galan*, No. 89 Cr. 198, 1989 WL 63110 (S.D.N.Y. June 8, 1989).

83. *Id.*

84. *Id.*

substantial assistance was aptly stated by the Ninth Circuit Court of Appeals: "[I]t is rational for Congress to lodge some sentencing discretion in the prosecutor, the only individual who knows whether a defendant's cooperation has been helpful."⁸⁵ It is this belief, that the government is in the best position to know whether the defendant has rendered substantial assistance to the government, that prevents courts from simply ignoring the requirement or writing it out of the statute by judicial fiat.

There are several problems with this belief. First, the prosecutor is not the sole player with primary knowledge with respect to whether and to what extent the defendant has cooperated. The defendant also has firsthand knowledge of the amount and extent of his cooperation. Second, and more importantly, the sentencing guidelines already lodge enormous discretion in the prosecutor. The prosecutor determines to a large extent what sentence the offender ultimately receives because of its charging power.⁸⁶ For example, if an individual is arrested in possession of two ounces (fifty-six grams) of cocaine base (crack),⁸⁷ the prosecutor can charge the individual with simple possession of crack which carries a one-year maximum statutory punishment,⁸⁸ possession with intent to distribute crack which carries a twenty-year maximum statutory punishment,⁸⁹ possession with intent to distribute five grams or more of crack which has a five-year mandatory minimum,⁹⁰ possession with intent to distribute fifty grams or more of crack which has a twenty-year mandatory minimum,⁹¹ conspiracy which carries a five-year maximum,⁹² drug conspiracy involving the distribution of five grams or more of crack which carries a five-year mandatory minimum,⁹³ drug conspiracy involving the distribution of fifty grams or more of crack which carries a ten-year mandatory minimum and a maximum punishment of life imprisonment,⁹⁴ engaging in a pattern of racketeering which carries a twenty-year maximum,⁹⁵ conspiracy to engage in a pattern of racketeering with a twenty-year statutory maximum,⁹⁶ and/or engaging in a continuing criminal enterprise which carries a ten-year mandatory minimum and a statutory

85. *United States v. Ayarza*, 874 F.2d 647, 653 (9th Cir. 1989).

86. Weinstein, *supra* note 27, at 5.

87. *See United States v. Roberts*, 726 F. Supp. 1359, 1363 nn.15-30 (D.D.C. 1989).

88. 21 U.S.C. § 844 (1988).

89. *Id.* § 841(a), (b).

90. *Id.* § 841(b)(1)(B)(iii).

91. *Id.* § 841(b)(1)(A)(iii).

92. 18 U.S.C. § 371 (1988).

93. 21 U.S.C. §§ 846, 841(b)(1)(B)(iii) (1988).

94. *Id.* §§ 846, 841(b)(1)(A)(iii).

95. 18 U.S.C. §§ 1962(a), 1963 (1988).

96. *Id.* §§ 1962(d), 1963.

maximum of life imprisonment.⁹⁷ The prosecutor has the additional power of determining which sentencing factors the sentencing court considers by its construction of the plea agreement.⁹⁸ To add to these discretionary functions the power to control whether a sentencing court may consider a defendant's substantial assistance vests too much discretion in the hands of the prosecution, a biased player in the criminal proceeding.⁹⁹

A second, less obvious, reason for judicial reluctance to do away with the government motion requirement may be the fear that eliminating the requirement will open the door to sentencing as it was before the guidelines took effect - largely uncontrolled sentencing discretion leading to disparate treatment of similarly situated offenders. Under the current rules, the government motion requirement provides a tangible check on the ability of the sentencing court to depart for substantial assistance. If this requirement is removed, appellate courts may fear that sentencing courts will depart downward whenever and to whatever extent they feel is appropriate using the substantial assistance provision as their justification.

These concerns are reflective of the general concerns which led to the creation of the sentencing guidelines. The tension between rules and discretion, between uniformity and proportionality, is brought into sharp focus when considering the section 5K1.1 requirement of a government motion. On the one hand, the appellate courts are legitimately worried that the good of the sentencing guidelines - eliminating unwarranted disparity and increasing certainty and uniformity in sentencing - will be unraveled if the checks on judicial discretion are too liberally removed. On the other hand, the goal of individualized sentences, proportionate to the individual offender's particular characteristics, calls for some adjustment in the current structure.¹⁰⁰ Both concerns can be met even if the government motion requirement is eliminated.

IV. ELIMINATION OF THE GOVERNMENT MOTION REQUIREMENT - TWO PROPOSALS TO CONSIDER

A. Proposal for a Two Level Discount

One way to deal with the concern that eliminating the government motion requirement may open the door to a reversion back to the days

97. 21 U.S.C. § 848 (1988).

98. Sears, *Sentencing Guidelines: Shifting Discretion from the Judge to the Prosecutor?*, 17 COLO. LAW. 1, 7 (1988).

99. Note, *Pennsylvania Supreme Court Review, 1988 - Mandatory Minimum Sentencing Act, Commonwealth v. Wooten*, 519 Pa. 45, 545 A.2d 876 (1988), 62 TEMP. L. REV. 737, 744 (1989).

100. Lindemann, *supra* note 28, at 605; Weinstein, *supra* note 27, at 30.

of unchecked judicial discretion in sentencing is to allow the court to give the offender a two level discount if the court finds the offender substantially assisted the government. Such an amendment to the sentencing guidelines would parallel the current two level discount given to an offender for acceptance of responsibility.¹⁰¹ Such a discount would not be automatic; the offender would bear the burden of proving (1) that he provided assistance to the government, (2) that his assistance was substantial, and (3) that his substantial assistance warrants granting him a two level discount.

The two level discount proposal appears to be a meeting ground for both types of critics, those concerned with sentencing courts having too much discretion and those concerned with courts adhering too strictly to the rules of the sentencing guidelines. On the one hand, a two level discount proposal would limit the amount of discretion a sentencing judge could exercise since the judge could only "credit" an offender with, at most, a two level adjustment. On the other hand, while the reduction of two levels would be fixed, since the two level discount would not automatically apply in every instance, whether to grant it would be a matter solely within the discretion of the sentencing judge.¹⁰²

Actually, a proposal for a two level discount would not constitute a departure from the guidelines. The sentencing court would still be sentencing the offender within the applicable guideline range even if it applied the two level discount proposal in recognition of the defendant's substantial assistance. This two level discount proposal for substantial assistance should, therefore, be rejected because rather than solving the problem of limited judicial discretion in sentencing, it further restricts the sentencing court by limiting any possible reduction in sentence to only two levels. More than a two level discount may be warranted in particular cases, but under this proposal, the sentencing court would not be able to depart further under section 5K2.0 of the sentencing guidelines because the offender's substantial assistance would have been a circumstance already taken into account by the Sentencing Commission in fashioning the sentencing guidelines.

B. Eliminating the Government Motion Requirement

A better idea would be to merely eliminate the requirement of a government motion, thereby allowing the decision to depart downward

101. Under Sentencing Guidelines § 3E1.1, if the sentencing court believes that a defendant has accepted responsibility for his conduct, it may subtract two points from the adjusted offense level.

102. *But see* Wilkins, *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 190-92 (1988) (discussing the two level discount for acceptance of responsibility).

for substantial assistance to rest squarely with the sentencing court. Eliminating the government motion requirement is necessary to achieve the goal of fair and just sentencing. The prosecution is not and cannot be an unbiased player in the sentencing process. "The prosecutor spends a significant amount of time compiling evidence and working zealously to convict defendants on trial. . . . [T]his role makes it difficult for the prosecutor to be objective regarding the imposition of sentencing after conviction."¹⁰³ Additionally, the prosecutor already has enormous discretion under the current sentencing guidelines.¹⁰⁴

In answer to the concern that the prosecutor is in the best position to know whether the defendant rendered assistance which was substantial, under this proposal the prosecutor does not lose all input into the decision whether the court will depart for substantial assistance. The prosecutor can present its reasons for opposing departure to the sentencing court. The sentencing court can then weigh the government's assessment of the defendant's assistance against the evidence presented by the defendant. The prosecutor's input is thus given adequate weight, but the ultimate decision whether a departure downward is warranted rests with the judge.

Eliminating the government motion requirement would not *add* any authority to the sentencing court which it does not already have under the current sentencing guidelines. The sentencing court currently has the authority to depart downward in an unqualified amount in recognition of a defendant's substantial assistance once the government moves for such departure. This proposal merely takes away the requirement that the government file a motion for downward departure before the court can exercise its authority.

Additionally, eliminating the government motion requirement would not lead to unbridled discretion similar to that exercised by sentencing judges prior to implementation of the sentencing guidelines. Sentencing judges would still have great incentive to sentence within the guideline range given the articulation requirement and the risk of reversal.¹⁰⁵ Under the proposal, the sentencing court could not depart whenever it felt like departing from the guidelines; it would have to find that a defendant rendered substantial assistance to the government in order to exercise its discretion to depart.

103. Note, *supra* note 99, at 744.

104. See *supra* notes 85-99 and accompanying text.

105. 18 U.S.C. § 3553(c) (1988) (requiring court to articulate reasons justifying departure); *id.* § 3742(a)(2) (allowing defendant and government to appeal a departure sentence).

V. CONCLUSION

Both prosecutors and defense attorneys agree that without some mechanism giving defendants who cooperate with the government special consideration in sentencing, few defendants will be willing to render such assistance.¹⁰⁶ Defendants who cooperate risk discovery as an informant and put their lives on the line when they give away the names of others involved in criminal activity. The provision allowing a sentencing court to depart in recognition of a defendant's substantial assistance to the government is an important provision. Its significance should not be diminished by placing the discretion whether to apply the provision in the hands of the prosecution.

106. Both prosecutors and defense attorneys recognize the need to give defendants who render assistance to government authorities special consideration in sentencing. Without some recognition in the form of a reward for such assistance, few defendants would be willing to cooperate. Wilkins, *supra* note 102, at 196.