

**ELIMINATING THE GOVERNMENT MOTION
REQUIREMENT OF SECTION 5K1.1 OF THE FEDERAL
SENTENCING GUIDELINES—A SUBSTANTIAL
RESPONSE TO SUBSTANTIAL
ASSISTANCE: UNITED STATES
V. GUTIERREZ**

INTRODUCTION

The Federal Sentencing Guidelines¹ are new phenomena in federal criminal law proceedings.² Although the guidelines as a whole have withstood constitutional attack,³ specific provisions within the guidelines have generated heated debate among the federal courts.⁴ One such provision is section 5K1.1 of the Federal Sentencing Guidelines.⁵

Section 5K1.1 specifies that "upon motion of the government," the sentencing court may depart downward from the applicable sentencing guideline range in recognition of a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.⁶ Despite the apparent requirement of a government motion, the issue of whether a court, *without* a government motion, may depart downward from the sentencing guidelines to reflect a defendant's substantial assistance is hotly debated.⁷

In *United States v. Gutierrez*,⁸ the United States Court of Appeals for the Eighth Circuit affirmed, by an equally divided court, the United States District Court for the Northern District of Iowa's departure from the guidelines for substantial assistance without a gov-

1. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1990) [hereinafter SENTENCING GUIDELINES].

2. 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, 181 (1988). The federal sentencing guidelines became effective on November 1, 1987. 18 U.S.C. § 3551(1988). For greater detail concerning the guidelines see *infra* notes 94-99 and accompanying text.

3. *Mistretta v. United States*, 488 U.S. 361 (1989) (rejecting arguments that Congress violated the nondelegation doctrine by delegating excessive legislative authority to the United States Sentencing Commission and that the Sentencing Reform Act was unconstitutional).

4. See *infra* notes 129-85 and accompanying text.

5. SENTENCING GUIDELINES, *supra* note 1, § 5K1.1. Section 5K1.1 provides in relevant part, "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." *Id.*

6. *Id.*

7. See *infra* notes 129-85 and accompanying text.

8. 917 F.2d 379 (8th Cir. 1990) (en banc).

ernment motion.⁹ The split of opinion in the Eighth Circuit evidences the controversy surrounding the section 5K1.1 government motion requirement and the general disagreement among federal courts over this issue.¹⁰ Indeed, the federal courts have yet to reach a consensus on whether a government motion is required before a sentencing court may depart downward from the applicable sentencing guideline range.¹¹

The purpose of this Comment is, first, to describe the issue faced by the Eighth Circuit in *Gutierrez* and explain the court's holding.¹² Second, this Comment explores the historical background preceding the creation of the federal sentencing guidelines and explains the purposes behind their adoption.¹³ Third, this Comment sets forth the relevant guideline provisions and statutory sections and provides a summary of various judicial opinions interpreting these provisions.¹⁴ Finally, this Comment concludes that the government motion requirement should be eliminated because it violates the defendant's right to due process and strains traditional separation of powers principles.¹⁵

FACTS AND HOLDING

MAJORITY

In *United States v. Gutierrez*,¹⁶ the United States Court of Appeals for the Eighth Circuit had to determine whether the United States District Court for the Northern District of Iowa could, without a government motion, depart downward from the applicable sentencing guideline range in recognition of a defendant's substantial assistance to the prosecution.¹⁷ In a panel decision, the Eighth Circuit held that a district court could not depart downward, under section

9. *Id.* The Eighth Circuit had originally, in a panel decision, *United States v. Gutierrez*, 908 F.2d 349 (8th Cir. 1990), vacated the sentence imposed upon the defendant by the district court and remanded the case for resentencing without a departure for substantial assistance. *Id.* at 352. The panel decision itself was then vacated on grant of petition for rehearing en banc. *Id.* at 355. Eventually, the Eighth Circuit affirmed the judgment of the district court by an equally divided court. *United States v. Gutierrez*, 917 F.2d 379, 379 (8th Cir. 1990) (en banc). This Comment's discussion of the *Gutierrez* case focuses on the Eighth Circuit's panel decision. See *infra* notes 16-76 and accompanying text.

10. See *infra* notes 129-85 and accompanying text.

11. See *infra* notes 129-85 and accompanying text.

12. See *infra* notes 16-76 and accompanying text.

13. See *infra* notes 77-93 and accompanying text.

14. See *infra* notes 94-191 and accompanying text.

15. See *infra* notes 192-280 and accompanying text.

16. 908 F.2d 349 (8th Cir.), vacated, No. 89-1950NI (8th Cir. Sept. 26, 1990), *reh'g en banc*, 917 F.2d 379 (8th Cir. 1990).

17. *Id.* at 349-50.

5K1.1, without a government motion.¹⁸ The panel rejected the argument that the government motion requirement was a nonbinding statement of public policy.¹⁹

The defendant, David Victor Gutierrez, was indicted on four counts of federal drug offenses.²⁰ Gutierrez was charged with possession of marijuana with the intent to distribute, two counts of using a telephone to facilitate the commission of a felony, and conspiracy to distribute and possess with the intent to distribute cocaine and marijuana.²¹ Gutierrez pled guilty to the conspiracy count.²² After entering his guilty plea, Gutierrez identified his supplier and his buyers during a debriefing by a federal agent.²³ Then, before the same district court judge that heard his case, Gutierrez testified at another defendant's trial on drug charges.²⁴

At the time of Gutierrez' sentencing, section 5K1.1 of the Federal Sentencing Guidelines provided that:

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 guidelines.²⁵

Gutierrez asked the district court to depart from the sentencing guidelines in recognition of his cooperation notwithstanding the refusal by the government to move for departure.²⁶

In recognition of Gutierrez' substantial assistance to the government, the district court departed downward from the range provided by the sentencing guidelines despite the fact that the government had not moved for departure.²⁷ The district court departed downward six months from the applicable range and sentenced Gutierrez to fifty-one months imprisonment.²⁸ The government then appealed

18. *Id.* at 352.

19. *See id.*

20. Brief for Appellant at vii, *United States v. Gutierrez*, 908 F.2d 349 (8th Cir.) (No. 89-1950), *vacated*, No. 89-1950NI (8th Cr. Sept. 26, 1990), *reh'g en banc*, 917 F.2d 379 (8th Cir. 1990).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*; *Gutierrez*, 908 F.2d at 349.

25. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL § 5K1.1 (1990) [hereinafter SENTENCING GUIDELINES] (emphasis added). Subsequent to Gutierrez' sentencing, 5K1.1 was amended effective November 1, 1989, by substituting "provided" for "made a good faith effort to provide." *Id.* at Appendix C at C.133.

26. *Gutierrez*, 908 F.2d at 350.

27. *Id.* at 350, 355.

28. *Id.* at 350.

the sentence imposed upon the defendant by the district court.²⁹

On appeal, the Eighth Circuit panel first noted that in prior cases it had upheld refusals to depart downward in sentencing under section 5K1.1 absent a government motion requesting downward departure.³⁰ The court stated that it had previously held that the absence of a 5K1.1 motion by the government precluded the trial court from departing unless the case raised questions of prosecutorial bad faith or arbitrariness.³¹ In addition, the court emphasized that other circuits had similarly concluded that district courts may not depart under section 5K1.1 absent a government motion.³² The court noted the United States Court of Appeals for the Fourth Circuit's statement that the language of section 5K1.1 clearly and unequivocally predicates consideration of a departure on the presence of a government motion.³³

The Eighth Circuit observed that the United States District Court for the Northern District of Iowa in *United States v. Gutierrez*³⁴ had concluded that "because section 5K1.1 is labeled as a policy statement, it does not have the same force of law as a guideline and therefore is not binding on the court."³⁵ The Eighth Circuit, however, noted that section 3553(e) of the Sentencing Reform Act of 1984 also required a government motion for a substantial assistance departure.³⁶ Section 3553(e) of the Sentencing Reform Act provides that:

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.³⁷

The Eighth Circuit then stated that it had "recently held that a motion by the government is a prerequisite to a district court's power to impose a sentence below the statutory minimum under section

29. *Id.* at 349.

30. *Id.* at 350. However, the court acknowledged that "by way of dicta [it had asserted] that 'in an appropriate case a 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.'" *Id.* (quoting *United States v. Justice*, 877 F.2d 664, 668-69 (8th Cir.), *cert. denied*, 110 S. Ct. 375 (1989)).

31. *Gutierrez*, 908 F.2d at 350.

32. *Id.* (citing, e.g., *United States v. Huerta*, 878 F.2d 89 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 845 (1990); *United States v. Ayarza*, 874 F.2d 647 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 847 (1990)).

33. *Id.* The Fourth Circuit case referred to is *United States v. Francois*, 889 F.2d 1341 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 1822 (1990).

34. *United States v. Gutierrez*, No. CR 88-0045 (N.D. Iowa 1989).

35. *Gutierrez*, 908 F.2d at 350-51.

36. *Id.*; 18 U.S.C. § 3553(e) (1988).

37. 18 U.S.C. § 3553(e) (1988).

3553(e)."³⁸ Thus, the court concluded that although section 5K1.1 concerns a departure from the guidelines as opposed to a statutory minimum, section 3553(e) demonstrates that the government motion requirement originated with Congress not the Sentencing Commission.³⁹

Moreover, the court asserted that section 5K1.1 implements the Congressional directive of 28 U.S.C. § 994(n), which provides:

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, taking into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.⁴⁰

The court stated that because Congress had not limited the conditions under which the substantial assistance exception may be available under section 994(n), Congress had not precluded the possibility of the government motion requirement.⁴¹ Consequently, the court argued that the government motion requirement of section 5K1.1 is presumptively valid in the guidelines because Congress had itself introduced the requirement in 18 U.S.C. § 3553(e).⁴²

Besides asserting the validity of the government motion requirement, the court acknowledged policy reasons for giving the government the discretion to initiate departure.⁴³ The court noted that the United States Court of Appeals for the Fifth Circuit has reasoned that the government is best able to provide the court with an accurate report of the degree and effectiveness of a defendant's assistance.⁴⁴ The court stated that the interest of the government in

38. *Gutierrez*, 908 F.2d at 351 (citing *United States v. Coleman*, 895 F.2d 501 (8th Cir. 1990)).

39. *Gutierrez*, 908 F.2d at 351. Quoting *Buckley v. Valeo*, 424 U.S. 1, 132 (1976), the court noted that "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction so long as the exercise of that authority does not offend some other constitutional restriction." *Id.* (citations omitted). As a result, the court asserted that Congress has the authority to limit judicial sentencing discretion. *Gutierrez*, 908 F.2d at 351.

40. *Id.*; 28 U.S.C. § 994(n) (1988). Section 994 of Title 28 of the United States Code is entitled "Duties of the Commission," referring to the United States Sentencing Commission. 28 U.S.C. § 994 (1988).

41. *Gutierrez*, 908 F.2d at 351.

42. *Id.*

43. *Id.*

44. *Id.* (quoting *United States v. White*, 869 F.2d 822, 829 (5th Cir.), *cert. denied*, 490 U.S. 1112 (1989)). The court also asserted that it would only be the rarest instance in which the government will refuse to recognize a defendant's assistance. *Gutierrez*, 908 F.2d at 351. In addition, the court stressed that the government will reward a defendant for substantial assistance during the charging or plea bargaining process rather than moving for departure at sentencing. *Id.*

rewarding and encouraging assistance in government investigations limits the prosecution's discretion to some extent.⁴⁵ The court also asserted that reasonable use of substantial assistance motions for cooperative defendants will make future defendants more likely to cooperate.⁴⁶ Furthermore, the court stated that the prosecutorial promise to make a section 5K1.1 motion is analogous to a plea agreement.⁴⁷ As a result, the court averred that the remedies for breach of a plea agreement may also be available for breached substantial assistance motion promises.⁴⁸

Thus, the Eighth Circuit concluded that without an unequivocal statement from the Sentencing Commission to the contrary, the policy statement of section 5K1.1 should be treated as binding law.⁴⁹ The court emphasized that section 5K1.1 complied with the Congressional directive of 28 U.S.C. § 994(n) and coincided with the requirements of 18 U.S.C. § 3553(e).⁵⁰ The Eighth Circuit held that the district courts in its circuit are "bound to comply with the unambiguous language of section 5K1.1."⁵¹

DISSENT

Judge Heaney, the Senior Circuit Judge in the Eighth Circuit, filed a vigorous dissent to the panel's decision in *Gutierrez*.⁵² The dissent began by noting that Gutierrez had provided substantial assistance to the prosecutor's office.⁵³ The dissent described in detail Gutierrez' actions which the district court found to have substantially assisted the government.⁵⁴ In addition, Judge Heaney underscored the fact that "the government failed to reveal what, if any, standards its office used in deciding not to move for a downward departure."⁵⁵

45. *Id.*

46. *Id.* (quoting *United States v. Huerta*, 878 F.2d 89, 93 (2d Cir. 1989)).

47. *Gutierrez*, 908 F.2d at 351.

48. *Id.* The court emphasized that the facts of the case did not raise an issue of prosecutorial bad faith or arbitrariness for refusal to move for a § 5K1.1 departure. *Id.* at 351-52.

49. *Id.* at 352.

50. *Id.* See *supra* notes 37, 40 and accompanying text; see *infra* notes 124, 127 and accompanying text.

51. *Gutierrez*, 908 F.2d at 352.

52. *Gutierrez*, 908 F.2d at 352 (Heaney, J., dissenting).

53. *Id.*

54. *Id.* The district court found that Gutierrez substantially assisted authorities by identifying both his suppliers and customers and testifying at another defendant's trial. The dissent stressed that "[t]he district court was particularly well positioned to note the importance of [Gutierrez's] trial testimony in assisting the government" because the district court presided at that trial. *Id.*

55. *Id.* The dissent noted that not one United States Attorneys Office in the Eighth Circuit had "revealed the standards that it uses to determine whether a defendant's cooperation merits a motion for reduction of sentence." *Id.* at 352-53.

The dissent then argued that the guidelines did not require the conclusion reached by the majority.⁵⁶ The dissent asserted that because section 5K1.1 is a policy statement, the government motion requirement of section 5K1.1 is not binding on district courts.⁵⁷ The dissent noted that "Congress directed the Sentencing Commission to establish guidelines and policy statements."⁵⁸ The dissent asserted that although Congress was silent as to what force policy statements should have, Congress "must have envisioned a difference between guidelines and policy statements or it would not have made the distinction."⁵⁹ As a result, the dissent stated that the guidelines permitted district courts to consider assistance to the government in deciding whether to depart downward from the applicable sentencing range even if the government fails to move for such a departure.⁶⁰

The dissent further asserted that if section 5K1.1 is interpreted to predicate a departure upon the presence of a government motion, such a limitation would be "fundamentally unfair and a violation of due process."⁶¹ The dissent stated that the Eighth Circuit had previously pointed out the difficulties in "reconciling a motion requirement with due process."⁶² The dissent then explored three primary concerns with the government motion requirement.⁶³

First, the dissent declared that the government motion requirement transfers discretion from the trial court to the prosecutor.⁶⁴ The dissent argued that the discretion to consider substantial assistance to authorities has traditionally belonged to the court.⁶⁵ The dissent questioned whether our system of due process tolerates a situation where the pivotal sentencing responsibility is exercised by the prosecutor instead of a judge.⁶⁶ The dissent asserted that because of the role prosecutors fulfill, they favor the prosecution viewpoint in criminal litigation.⁶⁷

56. *Id.* at 353-54.

57. *Id.*

58. *Id.* at 353 (citing 28 U.S.C. § 994 which outlines the duties of the Sentencing Commission).

59. *Gutierrez*, 908 F.2d at 353 (Heaney, J., dissenting).

60. *Id.* at 353-54.

61. *Id.* at 354.

62. *Id.* (referring to *Justice*, 887 F.2d at 667).

63. *Gutierrez*, 908 F.2d at 354 (Heaney, J., dissenting).

64. *Id.* The dissent stated that "[t]his transfer . . . does nothing to ensure consistency of sentencing." *Id.*

65. *Id.*

66. *Id.* (quoting *United States v. Roberts*, 726 F. Supp. 1359 (D.D.C. 1989), *rev'd*, 1991 WL 12818 (D.C. Cir. 1991) (WESTLAW) (reversed on other grounds)).

67. *Gutierrez*, 908 F.2d at 354 (Heaney, J., dissenting). The dissent argued that, under § 5K1.1, prosecutors not only perform their traditional responsibilities of filing charges and advocating on behalf of the government, but they now effectively determine punishment for crimes. *Id.*

Second, the dissent emphasized that the prosecutor's decision not to file a motion for departure in recognition of a defendant's substantial assistance is not reviewable.⁶⁸ The dissent warned that the court's holding in *Gutierrez* "places a prosecutor's decision as to sentence beyond reach of the Constitution."⁶⁹ Moreover, the dissent asserted that even if the majority's opinion recognizes a bad faith exception to the nonreviewability of a prosecutor's decision not to file a departure motion, review of that decision is seriously curtailed.⁷⁰

Finally, the dissent pointed out that the substantial assistance issue is often a factual dispute.⁷¹ The dissent explained that under section 5K1.1, the absence of a government motion precludes the defendant from presenting evidence of assistance and the court from considering such evidence.⁷² Consequently, the dissent asserted that under such circumstances, the defendant is "effectively denied the opportunity to ensure that his sentence is based on true and accurate information, that he be allowed to rebut facts relied on, and that he be afforded the opportunity to present evidence."⁷³ The dissent thus concluded that section 5K1.1 of the Federal Sentencing Guidelines should not prevent a court from considering a defendant's assistance to the government and granting a downward departure from the applicable sentencing range in recognition of such assistance.⁷⁴

Subsequent to the Eighth Circuit's panel decision in *Gutierrez*, the defendant's petition for rehearing en banc was granted and the panel's opinion and judgment were vacated.⁷⁵ Upon rehearing, the Eighth Circuit, by an equally divided court, affirmed the district court's decision to depart downward without a government motion.⁷⁶

68. *Id.*

69. *Id.* Furthermore, the dissent quoted the United States District Court for the District of Columbia in *United States v. Roberts*, 726 F. Supp. 1359, 1375 (D.D.C. 1989), which stated that:

It is the government's invariable position that, regardless of the circumstances, no one — neither the defendant nor a court — may challenge the prosecutorial decision not to initiate the process, or may even attempt to ascertain on what basis that decision was made, and that this is so although the decision will have enormous consequences for the defendant, running in to many years of incarceration time. It is difficult to conceive of a parallel situation in the law where substantial liberty interests and consequences provided for by statute are beyond the power of inquiry by anyone.

Id.

70. *Gutierrez*, 908 F.2d at 354 (Heaney, J., dissenting).

71. *Id.* at 355.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* As a result, the opinion and judgment of the panel in *United States v. Gutierrez*, 908 F.2d 349 (8th Cir. 1989) were vacated. *Id.*

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

BACKGROUND

PRE-GUIDELINES ERA: BROAD JUDICIAL DISCRETION

Prior to the adoption of the Federal Sentencing Guidelines, judges had almost unfettered discretion in sentencing.⁷⁷ A federal judge could impose any sentence he or she determined appropriate, so long as the length of the sentence did not exceed the statutory maximum.⁷⁸ The sentencing judge was not required to state the reasons for his sentencing decision, nor was the length of the sentence imposed by a judge subject to appellate review.⁷⁹

In *Williams v. New York*,⁸⁰ the seminal case on judicial sentencing discretion,⁸¹ the United States Supreme Court discussed the tradition of broad judicial discretion in sentencing.⁸² The Supreme Court disapproved of mechanical, inflexible concepts in sentencing which needlessly restrict judicial discretion.⁸³

The view of judicial discretion espoused in *Williams* remained the predominant view until early in the 1970s when critics began to question the fairness of sentences imposed under a system of broad judicial discretion.⁸⁴ The most frequent criticism of the wide judicial discretion accorded to federal judges in sentencing was that it resulted in disparate treatment of similarly situated individuals.⁸⁵

77. 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, 682 (1990).

78. Weigel, *Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89 (1988).

79. *Id.*

80. 337 U.S. 241 (1949).

81. Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1941-42 (1988).

82. *Williams*, 337 U.S. at 246-49.

83. *Id.* at 248-49. See also Ogletree, 101 HARV. L. REV. at 1942. Professor Ogletree argued that a major impediment to the development of acceptable sentencing approaches is the historical disagreement over the principle purpose of punishment. Ogletree, 101 HARV. L. REV. at 1940. He noted that many early examples of sentencing law concentrated on retribution and restitution and asserted that in the modern era, the primary purpose of sentencing has changed radically. "[J]udges adopted the view that the punishment should fit the offender" rather than demanding that punishment fit the crime. *Id.* at 1940-41. Ogletree stated that during the 1950s, the predominant judicial philosophy in punishment focused on deterrence and rehabilitation as opposed to retribution and incapacitation. He declared that currently the tide has shifted in favor of retribution and incapacitation as both judges and penologists have expressed doubt about the merit of rehabilitation. *Id.* at 1941. Ogletree opined that judges historically have been granted excessive discretion to choose among the purposes of punishment while determining a sentence because "no single purpose of punishment has reigned supreme. . . ." *Id.*

84. Lee, 23 IND. L. REV. at 682.

85. Ogletree, 101 HARV. L. REV. at 1944. A number of sentencing studies support this conclusion. Lee, 23 IND. L. REV. at 682. In one study, 50 judges were given facts from identical cases and asked to indicate the sentences they would impose. Ogletree,

One of the most ardent and persistent critics of unbridled sentencing discretion and the resultant disparate treatment of similarly situated individuals is Marvin E. Frankel, a former United States District Judge for the Southern District of New York.⁸⁶ Judge Frankel criticized "the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences."⁸⁷ Frankel also acknowledged the tremendous difficulties federal judges face in attempting to treat similarly situated individuals fairly when imposing sentences.⁸⁸

Frankel noted that prior to appointment, federal judges usually have little exposure to sentencing either during law school or in practice.⁸⁹ In addition, Frankel stressed that prior federal sentencing practice offered little guidance because judges were not required to articulate their reasons for imposing sentences and, except in rare cases, judicial sentences were not reviewable.⁹⁰ For these reasons, unfettered judicial discretion led to unequal treatment of similarly situated individuals.⁹¹

In response to the problem of wide spread sentencing disparity and unfettered judicial discretion, Frankel made three proposals: (1) the establishment of a permanent national commission responsible for examining sentencing practices; (2) devising laws and rules for the implementation of sentences; and (3) ensuring the effective and objective enforcement of the laws and rules.⁹² Frankel's proposal and ideas in general were well received by state legislatures and considered by the United States Congress.⁹³

THE SENTENCING GUIDELINES: STRUCTURED DISCRETION

Purposes Behind the Federal Sentencing Guidelines

In response to the widespread criticism of the broad judicial discretion exercised by federal judges and the resultant sentencing disparities, Congress enacted the Sentencing Reform Act of 1984.⁹⁴ The

101 HARV. L. REV. at 1944 n.38. The hypothetical sentences in one extortion case noted by the study ranged from 20 years imprisonment and a \$65,000 fine to no fine and three years imprisonment. *Id.*

86. Ogletree, 101 HARV. L. REV. at 1942.

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

88. Frankel, *Lawlessness In Sentencing*, 41 U. CIN. L. REV. 1, 4-16 (1972).

89. *Id.* at 6-7.

90. *Id.* at 9-10.

91. Lee, 23 IND. L. REV. at 682-83.

92. Frankel, 41 CIN. L. REV. at 51.

93. Ogletree, 101 HARV. L. REV. at 1943. In fact, when the United States Sentencing Commission began its work a variety of state sentencing guidelines were available for the Commission's examination. *Id.*

94. Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3673)

Sentencing Reform Act established the United States Sentencing Commission.⁹⁵ Under the directive of Congress in the Sentencing Reform Act, a primary purpose of the United States Sentencing Commission⁹⁶ was to draft sentencing guidelines designed to avoid sentencing disparities by limiting and channelling the exercise of judicial discretion.⁹⁷ Specifically, one of the purposes of the United States Sentencing Commission is to draft sentencing guidelines that will:

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.⁹⁸

(1988) and 28 U.S.C. §§ 991-998 (1988)). See also Ogletree, 101 HARV. L. REV. at 1944-45. According to Professor Ogletree, the Sentencing Reform Act of 1984 was one of many major federal criminal law reforms. *Id.* at 1945. For instance, public concern over increased drug use, violent crime, and recidivism lead to the enactment of the Comprehensive Crime Control Act, of which the Sentencing Reform Act was a part. *Id.* The Sentencing Reform Act of 1984 is scattered in sections 18 and 28 of the United States Code. *United States v. Chotas*, 913 F.2d 897, 898-99 (11th Cir. 1990).

95. 28 U.S.C. § 991 (1988). In *Mistretta v. United States*, 488 U.S. 361, 412 (1989), the United States Supreme Court upheld the constitutionality of the sentencing guidelines. The Court held that Congress, under the Sentencing Reform Act, neither (1) delegated excessive legislative authority to the Sentencing Commission nor (2) violated the separation of powers doctrine by placing the Commission in the judicial branch, by requiring federal judges to serve on the Commission and share their authority with nonjudicial individuals, or by empowering the President to appoint Commission members and remove them for cause. *Id.* The Court asserted that the doctrine of separation of powers does not prohibit Congress from delegating the intricate task of formulating sentencing guidelines to an expert body within the judicial branch. *Id.*

96. The United States Sentencing Commission was established "as an independent commission in the judicial branch. . ." 28 U.S.C. § 991(a) (1988). Three of the members must be federal judges, and no more than four may be members of the same political party. *Id.* For further details concerning composition of the sentencing commission, see 28 U.S.C. § 991(a) (1988).

97. See SEN. R. NO. 98-225, 98th Cong., 2d Sess. 52, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3235. See also Weinstein, *A Trial Judge's First Impression Of The Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 1 (1987). Another primary purpose of the Sentencing Reform Act is "honesty in sentencing" or truth-in-sentencing — that is, the sentence the judge gives is the sentence the offender will serve. Breyer, *The Federal Sentencing Guidelines And The Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988). To accomplish this objective, Congress abolished parole and replaced it with a new system of determinate sentencing. *Id.*

98. 28 U.S.C. § 991(b)(1)(B) (1988). Implementation of the guidelines marked "a move from judicial discretion that was largely unguided and unreviewable to a process of accountability, greater uniformity, and articulated reasons for punishment." Wilkins, *Plea Negotiations, Acceptance Of Responsibility, Role Of The Offender, And De-*

Thus, the Federal Sentencing Guidelines "are intended to enhance consistency, uniformity and fairness in the sentencing process."⁹⁹

APPLICATION OF THE SENTENCING GUIDELINES

By systematically applying the sentencing guidelines, a judge can arrive at the applicable sentencing range.¹⁰⁰ The sentencing range consists of a minimum and maximum term of imprisonment within which the judge can sentence a convicted criminal.¹⁰¹ The guidelines regime requires courts to consider two sets of factors — offense characteristics and offender characteristics — while selecting the specific guideline range.¹⁰² The guideline range is designed to account for offense characteristics such as the amount of property involved, the use of firearms, the degree of personal injury to the victim, and the characteristics of the offender relating to prior criminal history.¹⁰³ Sentencing disparity should therefore be reduced because all defendants who have common characteristics and are convicted of similar crimes are subject to the same guideline range within which the sentencing judge's discretion is confined.¹⁰⁴

To determine the applicable guideline range, the sentencing judge must first look to Chapter Two of the Sentencing Guidelines.¹⁰⁵ Chapter two classifies the most commonly used federal criminal statutes under nineteen different headings, such as "Offenses Involving Drugs" and "Offenses Against Person."¹⁰⁶ If more than one sentencing guideline section is referred to, then the sentencing judge must analyze the different sections and choose the most appropriate one.¹⁰⁷

After the judge selects the appropriate guideline section in Chapter Two, he or she must determine the "base offense level" that corresponds to the crime.¹⁰⁸ The judge must then apply any appropriate

partures: Policy Decisions In The Promulgation of Federal Sentencing Guidelines, 23 WAKE FOREST L. REV. 181, 181 (1988).

99. Weinstein, 52 ALB. L. REV. at 1 (citing 28 U.S.C. § 991(b)(1)(B) (1988)).

100. Lee, 23 IND. L. REV. at 684. See generally FEDERAL SENTENCING LAW & PRACTICE (1989) (providing annotations, commentary, and analysis of the federal sentencing guidelines).

101. SENTENCING GUIDELINES, *supra* note 25, at ch. 2.

102. Lindemann, *Opening The Federal Sentencing Guidelines To Alternatives*, 15 WM. MITCHELL L. REV. 555, 556 (1989).

103. Lee, 23 IND. L. REV. at 684-85. See also SENTENCING GUIDELINES, *supra* note 25, at ch. 2.

104. Lee, 23 IND. L. REV. at 684.

105. *Id.* See also SENTENCING GUIDELINES *supra* note 25, at 25, at § 1B1.1(a) (entitled "Application Instructions"). The Statutory Index (Appendix A) assists in this determination. *Id.*

106. SENTENCING GUIDELINES, *supra* note 25, at ch. 2.

107. Lee, 23 IND. L. REV. at 685.

108. *Id.*; SENTENCING GUIDELINES, *supra* note 25, at § 1B1.1(b).

"specific offense characteristics," such as threat of force or use of firearm to arrive at an "adjusted base offense level."¹⁰⁹

The sentencing judge must next determine whether any of the "adjustments" from Chapter Three of the sentencing guidelines apply.¹¹⁰ The adjustments from Chapter Three relate to the vulnerability of the victim, obstruction of justice, and the offender's acceptance of responsibility.¹¹¹ These adjustments are then either added to or subtracted from the adjusted base offense level to reach the "total adjusted offense level."¹¹²

Next, the judge determines the defendant's criminal history category under Chapter Four of the sentencing guidelines.¹¹³ The criminal history category focuses on the defendant's prior criminal history.¹¹⁴

Finally, to determine the appropriate guideline range, the judge consults a two-dimensional matrix with the total adjusted offense levels on the vertical axis and the criminal history categories on the horizontal axis.¹¹⁵ The intersection of the total adjusted offense level and the criminal history category yields the appropriate guideline range consisting of months of imprisonment.¹¹⁶ The sentencing judge then has the discretion to sentence the offender within the applicable guideline range.¹¹⁷

DEPARTURES GENERALLY

The sentencing guidelines are not rigid, however.¹¹⁸ The Sentencing Commission endeavored not only to eliminate unwarranted sentencing disparities but also to provide sufficient flexibility in order to promote individual justice.¹¹⁹ For instance, section 5K2.0 of the sentencing guidelines provides:

Under 18 U.S.C. § 3553(b) the sentencing court may impose a

109. Lee, 23 IND. L. REV. at 685; SENTENCING GUIDELINES, *supra* note 25, at § 1B1.1(b).

110. Lee, 23 IND. L. REV. at 685; SENTENCING GUIDELINES, *supra* note 25, at § 1B1.1(c).

111. Lee, 23 IND. L. REV. at 685; SENTENCING GUIDELINES, *supra* note 25, at § 1B1.1(c).

112. *Id.* Lee, 23 IND. L. REV. at 685.

113. *Id.*; SENTENCING GUIDELINES, *supra* note 25, at § 1B1.1(f).

114. SENTENCING GUIDELINES, *supra* note 25, at ch. 4. Lee, 23 IND. L. REV. at 685.

115. *Id.*; SENTENCING GUIDELINES, *supra* note 25, at § 1B1.1(g).

116. Lee, 23 IND. L. REV. at 685; SENTENCING GUIDELINES, *supra* note 25, at ch. 5, at 5.2.

117. Lee, 23 IND. L. REV. at 685.

118. Weinstein, 52 ALB. L. REV. at 2.

119. *Id.* at 1-2. *See also* Woodson v. North Carolina, 428 U.S. 280 (1986) (plurality) (stating that when deprivation of life is at stake, discretion to individualize sentence is required).

sentence outside the range established by the applicable guideline, 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. . . ."¹²⁰

Thus, although Congress directed the Sentencing Commission "to promulgate guidelines which structured discretion and reduced sentencing disparity," Congress intended a system flexible enough to take into account the atypical case.¹²¹

DOWNWARD DEPARTURE FOR SUBSTANTIAL ASSISTANCE

Relevant Statutory and Sentencing Guideline Provisions

During public hearings held by the Sentencing Commission, both prosecutors and defense attorneys articulated concerns about the sentence imposed upon a defendant who had agreed to assist the government in the investigation or prosecution of another offender.¹²² These individuals persuasively argued that without special consideration for cooperating defendants, few would be inclined to cooperate.¹²³ Moreover, Congress directed the Sentencing Commission to:

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 ac-

120. SENTENCING GUIDELINES, *supra* note 25, at § 5K2.0 (emphasis added). Section 5K2.0 further provides:

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 courts. . . . [T]he court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (*e.g.*, as a specific offense characteristic or other adjustment), if the court determines that, in light unusual circumstances, the guideline level attached to that factor is inadequate.

Id. Section 3553(b), meanwhile, provides:

(b) Application of Guidelines in Imposing a Sentence. — The court shall impose a sentence of the kind, and within the range . . . 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.

18 U.S.C. § 3553(b) (1988).

121. Wilkins, 23 WAKE FOREST L. REV. at 195. Judge Wilkins asserts that "the Commission focused its efforts on drafting guidelines for the typical case, and adopted a policy of limited departures to address cases which present unusual circumstances."

Id.

122. *Id.* at 196.

123. *Id.*

count a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.¹²⁴

Consequently, "Congress expressly intended that substantial assistance to the government should be a mitigating factor."¹²⁵

There is general agreement that departure from the guidelines is the only effective and practical approach to sentencing a defendant who provided substantial assistance to the government.¹²⁶ Just as courts may depart from statutory mandatory minimum sentences in recognition of a defendant's substantial assistance,¹²⁷ a court may depart from the applicable sentencing guideline range to reflect a defendant's substantial assistance.¹²⁸

CASE LAW REGARDING THE GOVERNMENT MOTION REQUIREMENT

Case Law Supporting the Validity of the Government Motion Requirement

The express requirement that the government make a motion requesting a departure before the sentencing court may depart downward has generated considerable disagreement among the federal courts. For example, in *United States v. Huerta*,¹²⁹ the United States Court of Appeals for the Second Circuit affirmed the United States District Court for the Eastern District of New York's refusal to depart downward from a mandatory minimum sentence in recognition of substantial assistance without a government motion.¹³⁰ The Second Circuit asserted that 18 U.S.C. section 3553(e) and section 5K1.1 of the sentencing guidelines unambiguously limit a judge's discretion to depart for substantial assistance to cases in which the government makes a motion requesting such a departure.¹³¹ The Second Circuit

124. *Id.* at 196-97. See 28 U.S.C. § 994(n) (1988).

125. Wilkins, 23 WAKE FOREST L. REV. at 197.

126. *Id.*

127. 18 U.S.C. § 3553(e) of the United States Code gives the district court limited authority to impose a sentence below the statutory minimum to reflect a defendant's substantial assistance to the government. It 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 The 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.

18 U.S.C. § 3553(e) (1988).

128. Wilkins, 23 WAKE FOREST L. REV. at 197-98.

129. 878 F.2d 89 (2d Cir. 1989).

130. *Id.* at 90-91.

131. *Id.* at 91. The defendant in *Huerta* pleaded guilty to an offense which included a five-year mandatory minimum sentence. *Id.* Thus, *Huerta* sought a depar-

rejected the defendant's challenge to the government motion requirement on separation of powers and due process grounds.¹³²

The defendant first argued that the requirement of a government motion under 18 U.S.C. § 3553(e)¹³³ violated the separation of powers doctrine.¹³⁴ The defendant stated that the government motion requirement violated separation of powers principles because it transferred sentencing discretion from the judiciary to the prosecutorial arm of the executive branch.¹³⁵ The Second Circuit, however, emphasized that sentencing is not inherently or exclusively a function of the judiciary.¹³⁶ The court asserted that Congress has the power to eliminate all judicial sentencing discretion by establishing mandatory sentences.¹³⁷ As a result, the Second Circuit concluded that Congress has the authority to limit a sentencing judge's discretion to depart by requiring a government motion.¹³⁸

The defendant also argued that the requirement of a government motion violated due process by giving prosecutors unlimited and unreviewable discretion in determining whether to make a substantial assistance motion and by limiting a judge's authority to consider evidence of cooperation.¹³⁹ The Second Circuit stated that the requirement of the government motion did not violate due process principles because Congress may prescribe mandatory sentences and, thus, there is no right to individualized sentencing.¹⁴⁰ Consequently, in *Huerta*, the Second Circuit held that predicating the authority of the court to consider a defendant's substantial assistance during sentencing on a motion by the government does not violate either separation

ture under 18 U.S.C. § 3553(e) which provides for a downward departure in recognition of a defendant's substantial assistance. *Id.* Because § 3553(e) predicated the court's authority to depart upon a motion by the government requesting such a departure, the district court concluded that without a government motion it lacked the authority to depart. *Id.*

132. *Id.* at 90.

133. *See supra* notes 37 & 127.

134. *Huerta*, 878 F.2d at 91. Although *Huerta* involved the government motion requirement of 18 U.S.C. § 3553(e), the court's holding and rationale apply equally to challenges against the government motion requirement of section 5K1.1 of the federal sentencing guidelines. *See supra* notes 36-39 and accompanying text and *infra* note 141.

135. *Huerta*, 878 F.2d at 91. *Huerta* asserted that such a delegation interfered with or usurped a "constitutionally assigned judicial function." *Id.*

136. *Id.* at 93. The court also stressed that the prosecution is in the best position to evaluate the effectiveness and degree of a defendant's substantial assistance. The *Huerta* court concluded that the "relative expertise of the branches involved" is relevant when determining whether separation of powers principles have been violated. *Id.* at 92-93.

137. *Id.* at 93.

138. *Id.*

139. *Id.*

140. *Id.* at 94.

of powers principles or a defendant's due process rights.¹⁴¹

In *United States v. Ayarza*,¹⁴² the United States Court of Appeals for the Ninth Circuit faced similar constitutional challenges to the government motion requirement of section 5K1.1 of the Federal Sentencing Guidelines.¹⁴³ Ayarza also challenged the government motion requirement on separation of powers and due process grounds.¹⁴⁴

The Ninth Circuit stated that the requirement of a government motion does not violate the doctrine of separation of powers because "the sentencing process is not inherently judicial and that, even if it were, the government's authority to recommend a reduced sentence [is] not impermissibly obtrusive."¹⁴⁵ The court further stated that because there is no constitutional right to the availability of a substantial assistance provision, there are no grounds upon which to challenge the Congressional provision of it.¹⁴⁶

The court next resolved the due process issue.¹⁴⁷ The court in *Ayarza* asserted that 18 U.S.C. § 3553(e) and section 5K1.1 of the sen-

141. *Id.* at 90, 94. In *United States v. Kuntz*, 908 F.2d 655, 657 (10th Cir. 1990), the United States Court of Appeals for the Tenth Circuit applied the reasoning in *Huerta* to reject a constitutional challenge to the government motion requirement in § 5K1.1 of the Federal Sentencing Guidelines. *Id.* Citing *Huerta*, the United States Court of Appeals for the Seventh Circuit in *United States v. Lewis*, 896 F.2d 246, 249 (7th Cir. 1990), also rejected a due process challenge to the validity of the government motion requirement in § 5K1.1. *Id.* In addition, the Seventh Circuit in *Lewis* asserted that the government motion requirement in section 5K1.1 of the Federal Sentencing Guidelines was a reasonable interpretation of 28 U.S.C. § 994(n) which directed the Sentencing Commission to take into account a defendant's substantial assistance. *Lewis*, 896 F.2d at 247-48.

142. 874 F.2d 647 (9th Cir. 1989). The defendant filed a motion for a downward departure from the applicable sentencing range in recognition of his assistance to the authorities. *Id.* at 649. The district court ruled that a downward departure could not be considered without a motion by the government. *Id.*

143. *Id.* at 653.

144. *Id.*

145. *Id.* (citing *United States v. Severich*, 676 F. Supp. 1209, 1212-13 (S.D. Fla. 1988), *aff'd*, 872 F.2d 434 (11th Cir. 1989)).

146. *Ayarza*, 874 F.2d at 653, (quoting *United States v. Musser*, 856 F.2d 1484, 1487 (11th Cir. 1988), *cert. denied*, 489 U.S. 1022, (1989), which rejected separation of powers and due process challenges to 18 U.S.C. § 3553(e) and Rule 35(b) of the Federal Rules of Criminal Procedure)). 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.

FED. R. CRIM. P. 35(b). The court in *Musser* noted that the only authority delegated to the prosecutor under section 5K1.1 is the authority to "move" the district court for a departure. *Musser*, 856 F.2d at 1487. Thus, the court stated that the "authority to actually reduce a sentence remains vested in the district court. . . ." *Id.*

147. *Ayarza*, 874 F.2d at 653.

tencing guidelines did not violate a defendant's right to due process because it is logical for Congress to vest some sentencing discretion in the prosecutor, the only individual who can evaluate the helpfulness of a defendant's cooperation.¹⁴⁸ Thus, the Ninth Circuit held that section 3553(e) and section 5K1.1 are not unconstitutional simply because they permit only the prosecutor to seek a departure in recognition of a defendant's substantial assistance.¹⁴⁹

The United States Court of Appeals for the Fifth Circuit, in *United States v. White*,¹⁵⁰ also faced a challenge to the section 5K1.1 government motion requirement.¹⁵¹ The defendants in *White* argued that by requiring a motion by the government, section 5K1.1 failed to implement the Congressional directive of 28 U.S.C. § 994(n).¹⁵² Section 5K1.1 requires that a government motion be filed before the sentencing court may depart downward.¹⁵³ Meanwhile, 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."¹⁵⁴ The Fifth Circuit rejected the defendants' argument and held that section 5K1.1 accords with the statutory directive of section 994(n).¹⁵⁵ The court explained that the requirement of a government motion in section 5K1.1 is premised on the reasonable assumption that the government is best able to evaluate the extent and effectiveness of a defendant's assistance.¹⁵⁶ The court also maintained that it would be a rare case in which the

148. *Id.* See also *United States v. Francois*, 889 F.2d 1341, 1345 (4th Cir. 1989) (holding that the government motion requirement of § 5K1.1 does not violate the defendant's constitutional right because the availability of a substantial assistance provision is not a constitutional right).

149. *Ayarza*, 874 F.2d at 653.

150. 869 F.2d 822 (5th Cir. 1989).

151. *Id.* at 828-29.

152. *Id.* at 828-29. The cases in *White* were consolidated for argument and appeal. *Id.* at 825. The appellants/defendants challenged the application of the sentencing guidelines promulgated by the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984. The appellants/defendants argued that the guidelines are illegal because the Commission violated the statutory mandate of the Sentencing Reform Act by creating guidelines which allow the government to control the reward granted for cooperation with the government. Specifically, they argue that section 5K1.1's government motion requirement fails to implement Congress' direction to create a substantial assistance provision. *Id.* at 828-29. See also *supra* note 40 and accompanying text.

153. SENTENCING GUIDELINES, *supra* note 25, at § 5K1.1.

154. 28 U.S.C. § 994(n) (1988).

155. *White*, 869 F.2d at 829. See also *Lewis*, 896 F.2d at 247 (holding that § 5K1.1 reflects a reasonable interpretation of the mandate of § 994(n)).

156. *White*, 869 F.2d at 829.

government would refuse to recognize substantial assistance.¹⁵⁷

Case Law Either Questioning or Rejecting the Validity of the Government Motion Requirement

In *United States v. Justice*,¹⁵⁸ the United States Court of Appeals for the Eighth Circuit affirmed the district court's refusal to grant a section 5K1.1 departure without a government motion even though it concluded that the government's refusal to file the substantial assistance motion was unreasonable.¹⁵⁹ Despite affirming the district court's decision, the Eighth Circuit criticized the requirement of a government motion before a sentencing court may depart downward under section 5K1.1 of the Federal Sentencing Guidelines.¹⁶⁰

After acknowledging that both section 5K1.1 and 18 U.S.C. § 3553(e) require a government motion before a court may depart from the guidelines for substantial assistance, the Eighth Circuit noted several problems with the government motion requirement.¹⁶¹ First, the court stated that the government motion requirement transfers discretionary authority from the judiciary, where sentencing discretion has traditionally lied, to the prosecution.¹⁶² Second, the Eighth Circuit warned that a prosecutor's refusal to file a motion for substantial assistance appears to be unreviewable even if the prosecutor has abused his discretion.¹⁶³ Third, the court asserted that because the issue of a defendant's substantial assistance may be a disputed factual issue, section 5K1.1 essentially gives a prosecutor the role of the trier of fact with respect to the issue of substantial assistance.¹⁶⁴

157. *Id.*

158. 877 F.2d 664 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 375 (1989).

159. *Id.* at 668, 670. The court stated that "the government's refusal to motion the court for departure under § 5K1.1 in this case seems . . . unreasonable in light of its stipulation." *Id.* at 668. The government stipulated to many of the steps the defendant had taken to aid the authorities. *Id.* at 667-68. Because the Eighth Circuit affirmed the district court's refusal to grant a departure without a government motion, its persuasive criticisms in *Justice* are simply dicta. Lee, 23 IND. L. REV. at 693.

160. *Justice*, 877 F.2d at 667, 670.

161. *Id.* at 667. Judge Heaney, in his dissent in *Gutierrez*, referred to these criticisms. *Gutierrez*, 908 F.2d at 352-55 (Heaney, J., dissenting).

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

163. *Id.* This problem is exacerbated by the fact that the prosecutor does not have to state his reasons for refusing to make a substantial assistance departure motion. *United States v. Boshell*, 728 F. Supp. 632 (E.D. Wash. 1990). Judges, on the other hand, are required to state their reasons for departing from the guidelines. 18 U.S.C. § 3553(e) (1988). In addition, either the defendant or the prosecutor may appeal any departure. 18 U.S.C. § 3742 (1988).

164. *Id.* The problems outlined by the Eighth Circuit in *Justice* were present in the facts of that case and the court was inclined to hold that the district court could depart without a government motion. *Id.* 667-69. However, the court determined that the defendant received the benefit of his cooperation with authorities during the

In *United States v. Curran*,¹⁶⁵ the United States District Court for the Central District of Illinois declared both 18 U.S.C. § 3553(e) and section 5K1.1 of the sentencing guidelines unconstitutional.¹⁶⁶ The court held that requirement of a government motion found in both of these provisions violates a defendant's substantive and procedural due process rights.¹⁶⁷

The court in *Curran* held that the requirement of a government motion unconstitutionally limits a defendant's substantive due process rights.¹⁶⁸ The court asserted that a "scheme of ordered liberty is diminished when one party's participation in a fair, adversarial process is limited, as the defendant is limited by . . . section 5K1.1."¹⁶⁹ The court stated that the government motion requirement of section 5K1.1 prevents a defendant from presenting evidence intimately related to the proper length of sentence.¹⁷⁰ As a result, the court in *Curran* determined that either party must be able to raise the issue of a downward departure for substantial assistance.¹⁷¹

The court also asserted that section 5K1.1 of the Federal Sentencing Guidelines violates a defendant's procedural due process rights.¹⁷² The court first noted that a defendant has due process

charging phase of the case. *Id.* at 669. Thus, the court did not determine the issue of whether a district court may depart notwithstanding the government's refusal to motion for departure in recognition of substantial assistance. *Id.* at 668-69.

165. 724 F. Supp. 1239 (C.D. Ill. 1989).

166. *Id.* at 1241, 1245.

167. *Id.* The fifth amendment of the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

168. *Id.* at 1241-42, 1245. The court stated, "The right to substantive due process means that the Government cannot take actions which on the whole runs counter to 'some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 1241 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

169. *Curran*, 724 F. Supp. at 1242.

170. *Id.*

171. *Id.*

172. *See id.* at 1242, 1245. The court emphasized that a longer sentence deprives a defendant of a significant liberty interest — noting that without the departure the guidelines would have required a sentence nine to twelve months longer. *Id.* at 1242. Indeed, the sentencing process impacts a defendant's liberty interest as much as the determination of guilt or innocence; consequently, courts have "recognized that due process protections must be extended to sentencing to provide appropriate safeguards and to ensure fairness." Note, *Hard Time Lightly Given: The Standard Of Persuasion At Sentencing United States v. Lee, a/k/a "Monkey"*, 54 BROOKLYN L. REV. 465, 465 (1988). Moreover, because the majority of convictions are the result of guilty pleas, "the procedure that determines the defendant's sentence has greater practical impact on his liberty than the procedure that determines guilt or innocence." *Id.* at 487.

In addition, the court in *Curran*, while discussing the defendant's procedural due process rights at sentencing, stated that the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), has determined that the following general factors must be evaluated to decide "what process is due at sentencing: (1) the nature of the

rights during the sentencing phase.¹⁷³ The court then stated that section 5K1.1 creates an imbalance in the adversarial process of a criminal proceeding in violation of due process concepts.¹⁷⁴ The court

individual interest; (2) the risk of error inherent in present methods; (3) the value of additional safeguards; and (4) the Government's interest, including fiscal burdens, of any additional safeguards." *Curran*, 724 F. Supp. at 1242.

Although *Mathews* does not directly apply to criminal sentencing cases (the case itself concerned the deprivation of social security benefits), circuit courts have applied these factors in the criminal sentencing context. See *Mathews*, 424 U.S. at 323. See e.g., *United States v. Barnerd*, 887 F.2d 841, 842 (8th Cir. 1989); *United States v. Lee*, 818 F.2d 1052, 1056 (2d Cir. 1987), cert. denied, 484 U.S. 956 (1987). See also Note, *The Federal Sentencing Guidelines: Adopting Clear & Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387, 1405 n.88 (1990). Moreover, "while the Supreme Court has not explicitly adopted the *Mathews* test in this setting, no language in *Mathews* appears to limit the test to the administrative hearing context." Note, 57 U. CHI. L. REV. at 1405 n.8. In fact, the factors enunciated in the *Mathews* balancing test are the "pre-cise issues that must arise in any due process analysis." *Id.* See Note, *Procedural Due Process At Sentencing For Felony*, 81 HARV. L. REV. 821, 842 (1968) (asserting that defendants have due process rights at sentencing); Note, *Fifth Amendment - Due Process Rights At Sentencing* *McMillan v. Pennsylvania*, 77 J. CRIM. L. & CRIMINOLOGY 646 (1986) (examining judicial and academic constructions of due process at sentencing).

173. *Curran*, 724 F. Supp. 1242. The court did, however, acknowledge that due process rights at sentencing are somewhat more diminished than during the trial. *Id.* See also *United States v. Pugliese*, 805 F.2d 1117, 1123 (2d Cir. 1986) (reinforcing the premise that at sentencing the defendant does not enjoy due process requirements identical to that at trial but also stating that convicted person may not be sentenced on misinformation or materially untrue assumptions). The court also stated that in general, sentencing proceedings comport with due process requirements unless fundamentally unfair. *Curran*, 724 F.2d at 1242. The court determined that the government motion requirement of section 5K1.1 is fundamentally unfair. *Id.* at 1245.

174. *Id.* The United States Supreme Court faced analogous due process challenges in *Arnett v. Kennedy*, 416 U.S. 134 (1974) (plurality). In *Arnett*, a federal employee was fired after accusing his superior of illegal conduct. *Id.* at 137. The employee filed suit and sought a pretermination evidentiary hearing under the due process clause. *Id.* The relevant statute, provided that employees in Kennedy's job category could be dismissed only for cause. *Id.* at 140. As a result, the United States Supreme Court determined that Kennedy had a protected property interest. *Id.* at 151, 155. However, the statute provided that this interest or right would be protected through a written protest instead of a trial-type of hearing. *Id.* at 137.

A plurality of the court, led by Justice Rehnquist, concluded that the legislatively created right not to be terminated except for cause could not be considered apart from the procedural mechanism that Congress had designed for its implementation. *Id.* at 152-55. Justice Rehnquist asserted that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of [plaintiff] must take the bitter with the sweet." *Id.* at 153-55. The other six Justices rejected Justice Rehnquist's theory that procedures provided by the statute could define a civil service employee's due process rights. *Id.* at 167, 177, 203, 211. Nonetheless, Kennedy lost his suit because the Court's swing voters thought that due process did not require an evidentiary hearing. *Id.* at 164, 202.

Later, the Supreme Court directly rejected the *Arnett* plurality's "bitter with the sweet" theory in the case of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 540-41 (1985). The Court insisted upon due process safeguards for a city security guard who, under Ohio statutes, could only have been fired for cause. *Id.* at 535. The Court asserted that substance and procedure are distinct in due process analysis. *Id.* at 541. The Court emphasized that once a state creates entitlements through substantive laws,

asserted that by freeing the hands of a prosecutor while binding the hands of a defendant and a court, section 5K1.1 unconstitutionally skews the sentencing process in favor of the prosecutor.¹⁷⁵ The court in *Curran* argued that the government motion requirement of section 5K1.1 deprives a defendant of the opportunity to contest the facts upon which the government relied when deciding not to move for a departure.¹⁷⁶ Thus, the court concluded that defendants in criminal cases must also be allowed to move for downward departure in recognition of substantial assistance to authorities.¹⁷⁷

The United States District Court for the District of Columbia, in *United States v. Roberts*,¹⁷⁸ also held that section 5K1.1 of the sentencing guidelines violates a defendant's due process rights.¹⁷⁹ The court noted that other courts have reasoned that unless section 5K1.1 is interpreted to allow a defendant as well as a prosecutor to move for a substantial assistance departure, section 5K1.1 is unconstitutional.¹⁸⁰

The court began its analysis by noting that "[i]t is well established . . . that [a defendant] has a right to due process during the sentencing stage."¹⁸¹ The court in *Roberts* emphasized that a fair sentencing procedure requires that a sentence be based on true and accurate information.¹⁸² Additionally, the court stated that a fair sentencing procedure includes the requirement that a defendant have the opportunity to question the procedures resulting in the imposi-

the adequacy of procedures used to deprive individuals of those entitlements depends on federal constitutional law, and state laws or regulations cannot foreclose due process inquiries. *Id.*

175. *Curran*, 724 F.Supp. at 1244.

176. *Id.* at 1245 (citing *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality); *Townsend v. Burke*, 334 U.S. 736, 741 (1948)).

177. *Curran*, 724 F. Supp. at 1242, 1245.

178. 726 F. Supp. 1359 (D.D.C. 1989), *rev'd*, 1991 WL 12818 (D.C. Cir. 1991) (WESTLAW) (reversed on other grounds).

179. *See id.* at 1373-75. The district court, Harold H. Greene, J., held 18 U.S.C. § 3553(e) unconstitutional as well. *Id.* Furthermore, the court asserted that the sentencing guidelines themselves and the statute creating the Sentencing Commission (the Sentencing Reform Act) violate due process requirements because they transfer discretionary authority in sentencing from judge to prosecutor. *Id.* at 1360-68. The court held this despite acknowledging the Supreme Court's decision in *Mistretta*. *Id.* at 1360.

180. *Id.* at 1373. The court began its analysis by citing *White*, 869 F.2d at 829, and *Justice*, 877 F.2d at 668-69, which both recognized that in the proper case, a defendant might have the right to request, or the district court have the authority *sua sponte*, to consider a departure despite the government's refusal to motion the court. *Roberts*, 726 F. Supp. at 1373-74.

181. *Id.* at 1374.

182. *Id.* *See* *United States v. Tucker*, 404 U.S. 443, 446-49 (1972) (emphasizing the need to ensure that information used at sentencing is accurate and fair).

tion of sentence.¹⁸³ The court then asserted that both the defense and the prosecutor should have an effective opportunity to contest allegations likely to affect the sentence.¹⁸⁴ The court concluded that the government motion requirement of section 5K1.1 violates these tenets of fair sentencing and, thus, violates a defendant's due process rights.¹⁸⁵

In *State v. LeCompte*,¹⁸⁶ the Supreme Court of Louisiana determined that a substantial assistance provision similar to section 5K1.1 would violate the doctrine of separation of powers unless interpreted so as to permit a defendant to move for a substantial assistance departure or the court to consider such a departure sua sponte.¹⁸⁷ *LeCompte* involved a statute which allowed a sentencing court, upon motion of a prosecutor, to reduce the sentence of a convicted defendant who provided substantial assistance in the identification, arrest, or conviction of other parties.¹⁸⁸ The Supreme Court of Louisiana began by noting that the Louisiana constitution divides the governmental powers of the state into three distinct branches: legislative, judicial, and executive.¹⁸⁹ The court then stated that if the trial court's decision whether to reduce a sentence is predicated upon the prosecuting attorney's arbitrary discretion, the departure in recognition of substantial assistance is actually a function of the prosecutor's discretion not the discretionary choice of the court.¹⁹⁰ The court held

183. *Roberts*, 726 F. Supp. at 1374. See *Gardner*, 430 U.S. 349 (noting that the defendant must have an opportunity to challenge the evidence considered at sentencing).

184. *Roberts*, 726 F. Supp. at 1374. Citing *Townsend*, 334 U.S. at 741 (stating that careless consideration of misinformation at sentencing violated due process), the court stressed that a defendant has the right to challenge the facts relied upon or presented to the court to support the criminal penalty. *Roberts*, 726 F. Supp. at 1374.

185. *Id.* at 1373-75. The court held that 18 U.S.C. § 3553(e) also violates these tenets. *Id.*

186. 406 So. 2d 1300 (La. 1981).

187. See *id.* at 1312. See also, *State v. Olson*, 325 N.W.2d 13, 14, 18-19 (Minn. 1982) (holding that predicating a departure from the statutory minimum sentence [similar to that provided for by 18 U.S.C. § 3553(e)] upon discretionary authority of prosecutor would violate separation of powers doctrine) (the court in *Olson* employed a saving construction similar to that in *LeCompte* to uphold Minnesota's substantial assistance provision)).

188. *LeCompte*, 406 So. 2d at 1302. See LA. REV. STAT. ANN. 40:967(G)(2) (West Supp. 1991) which provides:

The district attorney may move the sentencing court to reduce . . . the sentence of any person . . . who provides substantial assistance in the identification, arrest or conviction of other parties The arresting agency shall be given an opportunity to be heard in reference to any such motion. The court may reduce . . . the sentence if it finds that the defendant rendered such substantial assistance.

Id.

189. *LeCompte*, 406 So.2d at 1311.

190. *Id.* In reaching its conclusion, the Supreme Court of Louisiana relied upon California cases which had held that the limitation of a prosecutor's exercise of judicial functions is inherent in the separation of powers doctrine. *Id.* at 1310-11. For example,

that "[u]nder Louisiana's constitutional separation of powers, the [prosecuting] attorney, a member of the executive branch, should have no role in sentencing, an obvious judicial function."¹⁹¹

ANALYSIS

SENTENCING GENERALLY

One of the main purposes behind the implementation of the Federal Sentencing Guidelines was greater uniformity in sentencing.¹⁹² Congress sought reasonable uniformity in sentencing by reducing the disparity in sentences imposed for similar criminal offenses committed by similar offenders.¹⁹³ The sentencing guidelines were designed to reduced disparate sentencing of similarly situated individuals by limiting and channelling judicial discretion.¹⁹⁴

Although Congress desired guidelines which structured discretion and reduced sentencing disparity, it also directed the Sentencing Commission to promulgate guidelines flexible enough to accommodate the atypical case.¹⁹⁵ Thus, the Commission concentrated its efforts on "developing initial guidelines . . . which significantly reduced discretion but maintained sufficient flexibility to avoid unjust . . . results."¹⁹⁶

in *Esteybar v. Municipal Court*, 5 Cal. 3d 119, 123, 127-28, 95 Cal. Rptr. 524, 526, 529, 485 P.2d 1140, 1142, 1145 (1971), the defendant had been charged with possession of marijuana, an offense which in the absence of any prior felony convictions may be treated as either a felony or a misdemeanor. The statute in question, however, dictated that the court could proceed with the offense as a misdemeanor only after obtaining the consent of the prosecutor. *Id.* The California Supreme Court found that this statute violated the separation of powers doctrine, stating, "Under our system of separation of powers, we cannot tolerate permitting such an advocate [the prosecuting attorney] to possess the power to prevent the exercise of judicial discretion as a bargaining tool to obtain guilty pleas." *Id.* at 126, 45 P.2d at 1144, 95 Cal. Rptr. at 528.

191. *LeCompte*, 406 So. 2d at 1311.

192. UNITED STATE SENTENCING COMMISSION, SENTENCING GUIDELINES § 1.2 (1990) [hereinafter SENTENCING GUIDELINES].

193. *Id.*

194. Weinstein, *A Trial Judge's First Impression Of The Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 1 (1987). See *supra* notes 94-98 and accompanying text.

195. Wilkins, *Plea Negotiations, Acceptance Of Responsibility, Role Of The Offender, And Departure: Policy Decisions In The Promulgation Of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 195 (1988). See *supra* notes 118-121 and accompanying text.

196. *Id.* at 195-96. To counterbalance the need for determinate sentencing, the Sentencing Reform Act provides for a system with "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentence practices." *Id.* at 196 (quoting 28 U.S.C. § 991(b)(1)(B)). This standard provides a basis for departure in § 5K2.0 of the sentencing guidelines which states in relevant part:

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not

For example, in an effort to avoid "unjust results," the Sentencing Commission drafted the section 5K1.1 substantial assistance departure provision under Congressional direction.¹⁹⁷ Under 28 U.S.C. § 994(n), Congress directs the Commission to:

assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentencing that is lower than that es-

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 courts. . . .* [T]he court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines . . . if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

SENTENCING GUIDELINES, *supra* note 192, at § 5K2.0 (emphasis added). Similarly, 18 U.S.C. § 3553(b) provides:

The court shall impose a sentence . . . within the range . . . 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.

18 U.S.C. § 3553(b) (1988). Section 5K2.0 and 18 U.S.C. § 3553(b) intimate that the sentencing court has the authority to depart from the guidelines without a government motion as required by section 5K1.1 of the guidelines. *Lee, 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, 681 (1990). In fact, Judge William W. Wilkins, Jr., Circuit Judge for the United States Court of Appeals for the Fourth Circuit and Chairman of the United States Sentencing Commission, asserted that "Congress expressly intended that substantial assistance to the government should be a mitigating factor." Wilkins, 23 WAKE FOREST L. REV. at 197.

However, the Sentencing Commission has proposed an amendment to § 5K1.1 in an attempt to clarify its position with respect to the government motion requirement of section 5K1.1. Amendment 35 of § 5K1.1, 56 Fed. Reg. 44-45 (1991) (proposed Jan. 17, 1991). The Commission contrasted the Eighth Circuit's affirmance of the United States District Court for the Northern District of Iowa's departure without a government motion in *United States v. Gutierrez*, 917 F.2d 379 (8th Cir. 1990) (en banc), with the Eleventh Circuit's reversal of the United States District Court for the Northern District of Georgia's substantial assistance departure absent a government motion in *United States v. Chotas*, 913 F.2d 897 (11th Cir. 1990). The Commission stated that the proposed amendment is designed to reinforce the Eleventh Circuit's view that the Commission adequately considered substantial assistance as a mitigating factor and that a government motion is a prerequisite to a downward departure under section 5K1.1. Amendment 35 of § 5K1.1, 56 Fed. Reg. at 45.

This proposed amendment, nonetheless, does not address or resolve the due process issues raised in cases such as *Gutierrez*. See *infra* notes 219-80 and accompanying text. The amendment simply forecloses use of § 5K2.0 of the sentencing guidelines as a substantial assistance departure mechanism. Proposed Amendment 56 Fed. Reg. at 45. See, e.g., *Chotas*, 913 F.2d at 901-905 (Clark, J., dissenting) (asserting that § 5K1.1 is just another guideline provision and, therefore, controlled by the departure provisions of § 5K2.0).

197. Wilkins, 23 WAKE FOREST L. REV. at 196-98. See *supra* notes 118-21 and accompanying text.

established by statute as minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.¹⁹⁸

However, section 5K1.1 of the sentencing guidelines predicates consideration of a defendant's substantial assistance on a motion by the government.¹⁹⁹ Federal courts, meanwhile, have yet to reach a consensus on the issue of whether requiring a government motion before a court may grant a substantial assistance departure violates a defendant's due process rights.²⁰⁰ It is this issue which split the United States Court of Appeals for the Eighth Circuit in *United States v. Gutierrez*.²⁰¹

Before pursuing further analysis, it must be emphasized that the United States Supreme Court did not resolve this issue in *Mistretta v. United States*.²⁰² In *Mistretta*, the Supreme Court upheld the sentencing guidelines generally.²⁰³ Specifically, the Court rejected the argument that Congress had violated the nondelegation doctrine by delegating excessive legislative authority to the Sentencing Commission.²⁰⁴ The Court concluded that Congress did not violate the nondelegation doctrine by delegating the power to promulgate sentencing guidelines for federal criminal offenses to the Sentencing Commission.²⁰⁵

The Supreme Court further rejected the argument that the Sentencing Reform Act violates separation of powers principles.²⁰⁶ The Court stated that the presence of federal judges on the Sentencing Commission did not violate separation of powers.²⁰⁷ The Court in *Mistretta* asserted that the doctrine of separation of powers does not "prohibit Congress from calling upon the accumulated wisdom and experience of the Judicial Branch in creating policy on a matter uniquely within the ken of judges."²⁰⁸ Notwithstanding these determinations, the *Mistretta* decision did not resolve due process issues

198. 28 U.S.C. § 994(n) (1988).

199. *Sentencing Guidelines*, *supra* note 192, at § 5K1.1. Section 5K1.1 provides: "Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who committed an offense, the court may depart from the guidelines." *Id.* (emphasis added).

200. See *supra* notes 129-85 and accompanying text.

201. See *supra* notes 16-76 and accompanying text.

202. 488 U.S. 361, 361 (1989); See *United States v. Roberts*, 726 F. Supp. 1359, 1360 (D.D.C. 1989). See also notes 3, 95 and accompanying text.

203. *Mistretta*, 488 U.S. at 412. See *supra* notes 3, 95 and accompanying text; see *infra* notes 204-209 and accompanying text.

204. *Mistretta*, 488 U.S. at 371-79.

205. *Id.* at 412.

206. *Id.* at 380-84.

207. *Id.* at 397-408.

208. *Id.* at 412.

involving specific guideline sections such as section 5K1.1.²⁰⁹

SECTION 5K1.1 LABELED A POLICY STATEMENT NOT BINDING ON COURTS

In *United States v. Gutierrez*,²¹⁰ the United States Court of Appeals for the Eighth Circuit, in its panel decision, treated the policy statement of section 5K1.1 as binding law.²¹¹ The Eighth Circuit panel concluded that district courts must comply with the unambiguous language of section 5K1.1.²¹² The dissent, however, asserted that because Congress had directed the Sentencing Commission to establish guidelines and policy statements, Congress must have intended a difference between the two, otherwise it would not have made the distinction.²¹³ Therefore, the dissent concluded that the district court should have considered evidence of substantial assistance notwithstanding the requirement of a government motion in section 5K1.1.²¹⁴

Commentary on this issue supports the dissent's assertion that section 5K1.1, labeled a policy statement, does not have the binding force of law.²¹⁵ For example, Judge William W. Wilkins, Jr., Chairman of the United States Sentencing Commission, has noted the substantial difference between policy statements and guidelines.²¹⁶ Judge Wilkins stated that under the statutory scheme provided for by Congress, guidelines "are intended to be specific in nature and mandatory in application."²¹⁷ On the other hand, Judge Wilkins stated that Congress intended policy statements to provide generalized guidance during the sentencing process.²¹⁸

209. *Roberts*, 726 F. Supp. at 1360. See *supra* notes 3 & 95 and accompanying text.

210. 908 F.2d 349 (8th Cir.), *vacated*, No. 89-1950 NI (8th Cir. Sept. 26, 1990), *reh'g en banc*, 917 F.2d 379 (1990). Upon rehearing, the Eighth Circuit, by a divided court, affirmed the district court's decision to depart without a motion by the government as outlined in section 5K1.1. *Gutierrez*, 917 F.2d at 379.

211. *Gutierrez*, 908 F.2d at 352. The court stated that § 5K1.1 was binding "because it comports with the directive of section 994(n) and because its requirements coincide with the requirements of section 3553(e)." *Id.*

212. *Id.*

213. *Gutierrez*, 908 F.2d at 353. (Heaney, J., dissenting). The dissent asserted this despite acknowledging Congress' silence as to what force policy statements are to have. See *id.*

214. *Id.* at 353-54.

215. See, e.g., FEDERAL SENTENCING LAW & PRACTICE 46-48, 449 (1989) (stating that policy statements are not binding on courts). See *infra* note 218 and accompanying text. See also *Chotas*, 913 F.2d at 902-905 (Clark, J., dissenting) (noting that Congress adopted both 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n) as part of the same legislation and that the absence of a government motion requirement in § 994(n) implies that the government motion requirement of section 5K1.1 is not a binding prerequisite to departure for substantial assistance).

216. Wilkins, 23 WAKE FOREST L. REV. at 187.

217. *Id.*

218. *Id.* (Citing S. REP. NO. 98-225, 98th Cong., 1st Sess. 165-68 (1983), *reprinted in*

REQUIREMENT OF A GOVERNMENT MOTION VIOLATES DUE PROCESS PRINCIPLES

Significant Interest Deprived

Nonetheless, if the requirement of a government motion in section 5K1.1 is interpreted as a binding limitation on a court's authority to depart from the sentencing guidelines in recognition of substantial assistance, such a limitation would be fundamentally unfair and violate a defendant's due process rights.²¹⁹ Due process implies that the government cannot act in a manner which offends principles of justice so firmly established in the traditions and conscience of American society as to be considered fundamental.²²⁰

Imprisonment raises due process inquiries because the right to be free from bodily restraint is a fundamental interest.²²¹ The fifth amendment of the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law."²²² Imposition of a longer than justified sentence deprives a defendant of a significant liberty interest.²²³ As a result, when section 5K1.1 prevents a court from granting a justifiable departure, resulting in the imposition of a longer sentence, a defendant is deprived of a significant liberty interest.²²⁴

The facts of *United States v. Roberts*,²²⁵ illustrate this point.²²⁶ In *Roberts*, the defendant waived her right to a speedy trial several

1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3348-51). In fact, Judge Wilkins asserts that sentences inconsistent with the guidelines are subject to appellate review, while those only inconsistent with a policy statement are not. Wilkins, 23 WAKE FOREST L. REV. at 187; 1984 U.S. CODE CONG. & ADMIN. NEWS at 3350. In addition, the United States Court of Appeals for the Fifth Circuit stated that "[t]his policy statement [section 5K1.1] obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such substantial assistance." *United States v. White*, 869 F.2d 822, 829 (5th Cir. 1989), *cert. denied*, 109 S. Ct. 3172 (1989).

219. *Gutierrez*, 908 F.2d 354 (Heaney, J., dissenting). The government motion requirement of § 5K1.1 also strains traditional concepts of separation of powers. See *supra* notes 186-91 and accompanying text.

220. *United States v. Curran*, 724 F. Supp. 1239, 1241 (C.D. Ill. 1989) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

221. See *supra* notes 172, 174 and accompanying text. See also Note, *Fifth Amendment - Due Process Rights At Sentencing McMillan v. Pennsylvania*, 77 J. CRIM. L. & CRIMINOLOGY 646, 647 (1986) (stating that proceedings which deprive an individual of liberty must comply with certain procedures inherent in the phrase "due process of law").

222. U.S. CONST. amend. V.

223. *Curran*, 724 F. Supp. at 1242. See *supra* notes 172, 174 and accompanying text.

224. *Id.* See *supra* notes 170, 174 and accompanying text.

225. 726 F. Supp. 1359 (D.D.C. 1989).

226. *Id.* at 1360-61. The facts of *United States v. Gutierrez* illustrate this point as well. See *Gutierrez*, 908 F.2d at 352-53 (Heaney, J., dissenting). See *supra* notes 23-24, 54 and accompanying text; see *infra* notes 244-46 and accompanying text.

times in order to provide assistance to law enforcement authorities.²²⁷ While cooperating with the authorities, the defendant met and gave information to Federal Bureau of Investigation agents, a Drug Enforcement Administration agent, and several Assistant United States Attorneys.²²⁸ Moreover, the prosecuting attorney corroborated the defense's contention that the defendant had provided substantial assistance.²²⁹ The prosecution noted that motions for departure pursuant to 18 U.S.C. § 3553(e) and section 5K1.1 of the Federal Sentencing Guidelines were warranted.²³⁰ The prosecutor stated that "if it were up to me . . . I would file a departure request."²³¹ However, the United States Attorneys office for the district had a departure committee which evaluated all departure requests, and this committee refused to authorize a departure for Roberts.²³² In a case such as *Roberts*, strict adherence to the requirement of a government motion as found in section 5K1.1 prevents a substantial assistance departure and thus deprives the defendant of a significant liberty interest by imposing a longer sentence.²³³

DUE PROCESS STANDARDS NOT MET

When a significant liberty interest is deprived, as in the imposition of a sentence, the requirements of due process must be fulfilled.²³⁴ The concept of due process implies that minimum standards of fairness must be met.²³⁵ The requirement of a government motion under section 5K1.1 does not meet these standards.²³⁶

For instance, it is well settled that a defendant has a right to due process at the sentencing stage.²³⁷ It is also well established that a fair sentence includes the requirement that (1) a sentence be based on true and accurate information, (2) the defendant have an opportunity to question the procedures leading to the imposition of the sen-

227. *Roberts*, 726 F. Supp. at 1361. The defendant was indicted for distribution of "crack" cocaine and use of a firearm, thereafter, the parties engaged in extended plea negotiations. *Id.* at 1360-61.

228. *Id.* at 1361. Despite the defendant's significant assistance and understanding that substantial leniency would be awarded for her assistance, "the prosecution ultimately agreed only to permit [the] defendant to plead guilty to [a] drug distribution charge which carry[ed] a mandatory minimum" ten-year sentence. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* The court quoted a hearing transcript. *Id.*

232. *Id.* The court in *Roberts* held that 18 U.S.C. § 3553(e), section 5K1.1, and the departure procedure utilized in the district violated due process requirements. *Id.* at 1366-68, 1373-76.

233. See *supra* notes 178-85, 227-32 and accompanying text.

234. See *supra* notes 165-85, 219-33 and accompanying text.

235. See *supra* notes 165-85 and accompanying text.

236. See *supra* notes 158-191 and accompanying text.

237. *Roberts*, 726 F. Supp. at 1374. See *supra* notes 165-85 and accompanying text.

tence, and (3) the defendant be permitted to contest facts presented and relied upon by the prosecution.²³⁸

Section 5K1.1, however, violates these tenets of due process.²³⁹ For instance, when a defendant has provided substantial assistance to law enforcement authorities and the government refuses to file a departure motion, the sentence the court imposes under the guidelines will not be based on true and accurate information.²⁴⁰ Under section 5K1.1, the absence of a government motion precludes the defendant from presenting evidence of assistance and the court from considering that evidence.²⁴¹ Thus, evidence of substantial assistance which would justify a departure from the applicable sentencing range²⁴²

238. *Id.* See *supra* notes 172, 178-85 and accompanying text.

239. *Id.* See *supra* notes 172, 178-85 and accompanying text. Indeed, sentencing presents due process concerns which can be analyzed using the *Mathews v. Eldridge* balancing test. Note, *The Federal Sentencing Guidelines: Adopting Clear & Convincing Evidence as the Burden of Proof*, 57 U. CHI. L. REV. 1387, 1405 (1990). In *Mathews*, the Supreme Court held that four general factors must be considered while determining what process is due to ensure a fair adjudication: (1) the nature of the individual interest; (2) the risk of error inherent in the present process; (3) the value of any additional safeguards; and (4) the government's interests. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See *supra* note 172.

The individual interest involved at sentencing under the guidelines is the possibility of serving an unjustifiably long sentence. Note, 57 U. CHI. L. REV. at 1405. The defendant's "interest in his sentence could not be greater because his sentence determines in large measure his future liberty." *United States v. Lee*, 818 F.2d 1052, 1055 (2d Cir. 1987). This factor would strongly favor elimination of the government motion requirement of § 5K1.1. *Curran*, 724 F.Supp. at 1242-45.

The risk of error in the present method relates to the question of whether a longer than justified sentence will be imposed on a defendant by requiring a government motion. See *supra* notes 165-85 and accompanying text. The risk of erroneous deprivations under the government motion requirement of section 5K1.1 is great. See *supra* notes 158-85, 225-33 and accompanying text; see *infra* notes 237-80 and accompanying text. On the other hand, the value of additional safeguards embodied in an evidentiary hearing on substantial assistance would be tremendous. See *supra* notes 165-85, 219-33 and accompanying text; see *infra* notes 237-80 and accompanying text.

Lastly, the governmental interest in the economic and deterrence costs of the elimination of the government motion requirement are not significant. See *supra* note 218 and accompanying text; see *infra* notes 278-79 and accompanying text. Application of the *Mathews* balancing test, consequently, dictates elimination of the government motion requirement. See *Curran*, 724 F. Supp. at 1242-45.

240. *Id.*

241. *Gutierrez*, 908 F.2d at 355 (citing *Roberts*, 726 F. Supp. at 1374).

242. Under 28 U.S.C. § 994(n) Congress directed the Commission to:

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) (1988). Congress specifically intended substantial assistance to be a mitigating factor at sentencing. Wilkins, 23 WAKE FOREST L. REV. at 197. See Note, *Procedural Due Process At Judicial Sentencing For Felony*, 81 HARV. L. REV. 821, 842 (1968) (asserting that the right to present mitigating evidence at sentencing should be regarded as essential to due process).

will not be considered by the court and the court will have to sentence as if the defendant had not rendered any such assistance.²⁴³

For example, in *Gutierrez*, the sentencing judge presided over the trial of another defendant at which Gutierrez testified in cooperation with the government.²⁴⁴ The district court, as a result, was well positioned to evaluate the importance of Gutierrez' trial testimony in assisting the government in its prosecution of another defendant.²⁴⁵ Nonetheless, without a motion by the government as per section 5K1.1, the district court would be prevented from considering such evidence of assistance and, in fact, would have to ignore such evidence.²⁴⁶

In addition, the defendant is precluded from questioning either the procedures leading to the imposition of the sentence or the facts upon which the prosecution relied.²⁴⁷ Under section 5K1.1, the prosecution could arbitrarily or unconstitutionally (e.g., with racial or sexual prejudice) refuse to file a motion and the court would be powerless to intervene despite a defendant's substantial assistance.²⁴⁸ This danger is great because the prosecution does not have to state reasons for its refusal to motion the court whereas the court must articulate its reasons for departure.²⁴⁹

CONTRARY ARGUMENTS UNPERSUASIVE

In addition to the evident unfairness of an inadequate opportu-

243. *Roberts*, 726 F. Supp. at 1374-75.

244. *Gutierrez*, 908 F.2d at 349.

245. *Id.* at 352 (Heaney, J., dissenting).

246. *Id.* at 355.

247. *Roberts*, 726 F. Supp. at 1375.

248. *Id.* See *supra* notes 163, 172-77 and accompanying text.

249. 18 U.S.C. § 3553(c) (1988). See *supra* notes 163, 172-77 and accompanying text. Under 18 U.S.C. § 3553(c), the court must state in open court its reasons for imposition of the particular sentence. In addition, in a recent Congressional oversight hearing, one witness emphasized the distinction between prosecutorial and judicial discretion and commented:

In the judicial arena every decision is subject to review. Every decision rendered must be grounded on articulated facts and legal theories stated on the open record. An error in either regard is subject to appeal and reversal. *When the decision is made by the prosecutor, there is no public proceeding, there are no enunciated facts, and legal theories become irrelevant. Whatever the decision, it is absolutely unreviewable. No matter how wrong, it cannot be corrected.*

Congressional Oversight, 2 Fed. Sent. R. 227 (1990) (summary of statements before the House Subcommittee on Criminal Justice) (statement of Thomas W. Hillier, Federal Public Defender, Mar. 7, 1990) (quoting *United States v. Boshell*, 728 F. Supp. 632 (E.D. Wa. 1990)) (emphasis added).

It is doubtful that the due process infirmities of § 5K1.1 could be cured by the publication or other dissemination of the prosecutions standards for determining when to file a departure motion.

nity to present and rebut evidence affecting the sentence and the potential for arbitrary prosecutorial discretion under section 5K1.1, the arguments in favor of the government motion requirement of section 5K1.1 are unpersuasive.²⁵⁰ For instance, in upholding the government motion requirement of section 5K1.1, courts have often emphasized that the defendant does not have a constitutional right to a substantial assistance provision.²⁵¹

Although this statement is generally true, there are numerous problems with this argument when relied upon as a basis for the constitutionality of the government motion requirement of section 5K1.1.²⁵² For example, once a procedure is adopted, that procedure must meet due process standards.²⁵³ Once a substantial assistance provision is made available to one party, due process requires that it be available to all parties in the proceeding.²⁵⁴ The United States Supreme Court's reasoning in *Cleveland Board of Education v. Loudermill*²⁵⁵ exposes the due process infirmities of a provision, like section 5K1.1, which creates a departure mechanism to reward substantial assistance but which unconstitutionally limits use of that mechanism by defendants.²⁵⁶ The Court, in *Loudermill*, asserted that once a state creates an entitlement through substantive laws, the adequacy of procedures used to deprive individuals of those entitlements depends on federal constitutional standards, and state laws or regulations cannot foreclose due process inquiries.²⁵⁷ The Court emphasized that substance and procedure are distinct in due process analysis.²⁵⁸

250. See *infra* notes 252-80 and accompanying text.

251. *United States v. Ayarza*, 874 F.2d 647, 653 (9th Cir. 1989). Many courts have also asserted that there is no right to an individualized sentence while upholding the government motion requirement of § 5K1.1. See, e.g., *United States v. Huerta*, 878 F.2d 89, 94 (2d Cir. 1989). However, the United States Supreme Court has stated that when deprivation of life is at stake, discretion to make an individualized determination is constitutionally mandated. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). While discussing *Woodson*, Judge Weinstein asserted that "[t]his philosophy requiring individualization . . . must govern sentencing in general." Weinstein, *A Trial Judge's First Impression Of The Federal Sentencing Guidelines*, 52 ALB. L. REV. 1, 11 (1987). Judge Weinstein noted that the "legislative history of the Sentencing Reform Act reveals that Congress expected judges to attempt to achieve such individualization." *Id.* The Act itself directs the Commission to promulgate guidelines in a manner that maintains "sufficient flexibility to permit individualized sentences" in appropriate cases. 28 U.S.C. § 991(b)(1)(B) (1988).

252. *Curran*, 724 F. Supp. at 1242-44.

253. *Curran*, 724 F. Supp. at 1243 n.2.

254. *Id.* at 1244.

255. 470 U.S. 532 (1985).

256. See *supra* note 174; *infra* notes 257-61 and accompanying text. See also *Curran*, 724 F. Supp. at 1244.

257. *Loudermill*, 470 U.S. at 541.

258. *Id.*

Although *Loudermill* involved a state-created right and section 5K1.1 involves a federally-created procedure for rewarding substantial assistance, the Supreme Court's rationale in *Loudermill* illustrates the due process issues raised by the government motion requirement of section 5K1.1.²⁵⁹ Congress directed the Sentencing Commission to provide for a substantial assistance departure²⁶⁰ and the Sentencing Commission cannot unconstitutionally limit use of that provision by requiring a government motion under section 5K1.1.²⁶¹

In fact, the dissent in *Gutierrez* raised such due process concerns before concluding that the government motion requirement of section 5K1.1 was not binding on a district court.²⁶² The dissent questioned whether our system of due process countenances a situation where the prosecutor exercises the pivotal sentencing responsibility, as under section 5K1.1.²⁶³ The dissent noted that the absence of a government motion under section 5K1.1 precludes the defendant from presenting evidence of substantial assistance and the court from considering such evidence.²⁶⁴ As a result, the dissent in *Gutierrez* asserted that strict adherence to the government motion requirement of section 5K1.1 prevents a defendant from ensuring that his sentence is based on true and accurate information.²⁶⁵

Both prosecutors and defense attorneys, meanwhile, agree that without some mechanism to reward defendants for providing substantial assistance, few would be willing to cooperate.²⁶⁶ In fact, Chairman Wilkins asserted that "[t]he only practical and workable approach to sentencing a defendant who provided substantial assistance is by a departure from the guidelines."²⁶⁷ Therefore, the Sentencing Commission cannot create a departure mechanism and then unconstitutionally limit use of that mechanism.²⁶⁸

Courts upholding the government motion requirement of section

259. See *supra* notes 122-28, 165-77 and accompanying text; see *infra* notes 260-65 and accompanying text.

260. 28 U.S.C. 5994(n) (1988).

261. See *Curran*, 724 F. Supp. at 1244. See also *supra* notes 165-77 and accompanying text.

262. See *supra* notes 52-76 and accompanying text.

263. See *supra* notes 64-67 and accompanying text. The dissent also cautioned that a prosecutor's decision not to file a substantial assistance departure motion is not reviewable. See *supra* notes 68-70 and accompanying text.

264. See *supra* notes 71-74 and accompanying text.

265. See *supra* note 73 and accompanying text.

266. Wilkins, 23 WAKE FOREST L. REV. at 196. It should be noted that defendants who cooperate with law enforcement authorities risk personal danger. Lee, 23 IND. L. REV. at 702.

267. Wilkins, 23 WAKE FOREST L. REV. at 197. Wilkins also notes that Congress expressly intended substantial assistance to be a mitigating factor at sentencing. *Id.*

268. See *Curran*, 724 F. Supp. at 1244. See also *supra* notes 165-77 and accompany-

5K1.1 have also emphasized that the government through its prosecution of the defendant is in the best position to evaluate the effectiveness of a defendant's assistance.²⁶⁹ There are several problems with relying on this argument to uphold the government motion requirement of section 5K1.1.²⁷⁰

First, the prosecutor is not the only party with first-hand knowledge of a defendant's cooperation.²⁷¹ The defendant also has information concerning the extent and amount of his cooperation.²⁷² And in cases like *Gutierrez*, the court may even be in a good position to evaluate a defendant's assistance.²⁷³ Second, the prosecutor already exercises enormous discretion under the guidelines.²⁷⁴ Because the prosecutor has the power to choose from a variety of charges, he largely determines the probable time served.²⁷⁵ The prosecutor also has the power to determine which sentencing factors the court considers via the plea agreement.²⁷⁶ Thus, giving the prosecutor the additional power to control the court's consideration of a defendant's substantial assistance, vests too much discretion in the prosecutor — a biased player in criminal proceedings.²⁷⁷

ing text. The United States Supreme Court rejected a similar "bitter with the sweet" situation in *Loudermill*. *Loudermill*, 470 U.S. at 540-41.

269. *Huerta*, 878 F.2d at 92-93. The courts have also often asserted that Congress has the authority to eliminate all judicial discretion in sentencing by establishing mandatory sentences. *Id.* at 93. While this statement is true, it does not resolve the due process problems with the requirement of a government motion under § 5K1.1. See *Curran*, 724 F. Supp. at 1243-44. There is a difference between eliminating judicial discretion and transferring judicial discretion. See *supra* notes 259-65 and accompanying text.

270. *Lee*, 23 IND. L. REV. at 698.

271. *Id.*

272. *Id.*

273. See *supra* notes 23-24, 54 and accompanying text and *supra* notes 244-46 and accompanying text.

274. See *Weinstein*, 52 ALB. L. REV. at 5. See also *Lee*, 23 IND. L. REV. 698.

275. See *Weinstein*, 52 ALB. L. REV. at 5. See also *Roberts*, 726 F. Supp. at 1363-64 nn.15-30. For example, if an individual is arrested in possession of two ounces (fifty-six grams) of cocaine base (crack), the prosecutor can charge the individual with illegal possession of crack which carries a one-year maximum statutory punishment; possession with intent to distribute crack, which carries a twenty-year maximum statutory punishment; possession with the intent to distribute five grams or more of crack which has a five-year mandatory minimum; possession with intent to distribute fifty grams or more of crack which has a twenty-year mandatory minimum; conspiracy which carries a five-year maximum; drug conspiracy involving the distribution of five grams or more of crack which carries a five-year mandatory minimum; drug conspiracy involving the distribution of fifty grams or more of crack which carries a ten-year mandatory minimum with a maximum punishment of life imprisonment; engaging in a pattern of racketeering which carries a twenty-year maximum; conspiracy to engage in a pattern of racketeering with a twenty-year statutory maximum; and/or engaging in a continuing criminal enterprise which carries a ten-year mandatory minimum and a statutory maximum of life imprisonment. *Id.*

276. *Lee*, 23 IND. L. REV. at 699.

277. *Id.* See also *supra* notes 163, 172-74, 249 and accompanying text.

CONCLUSION

Elimination of the government motion requirement will not cause a reversion to the pre-sentencing guidelines era of unbridled judicial discretion. Two innovations in the sentencing guidelines prevent such a result. First, 18 U.S.C. § 3553(c) requires the judge to state his reasons for departing from an applicable sentencing range.²⁷⁸ Second, 18 U.S.C. § 3742 allows either the defendant or the prosecution to appeal any departure.²⁷⁹ These statutory provisions provide incentive for the sentencing court to sentence within the applicable guideline range.²⁸⁰ More importantly, however, elimination of the section 5K1.1 government motion requirement is necessary to protect a defendant's due process rights at sentencing.

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278. 18 U.S.C. § 3553(c) (1988).

279. 18 U.S.C. § 3742(a)-(b) (1988). In addition, Judge Weinstein asserts that adherence to the guidelines reduces the internal stress suffered by judges. Weinstein, A Trial Judge's First Impression of the Federal Sentencing Guidelines, 52 ALB. L. REV. 1 10 (1987). By sentencing within the guidelines, the judge may avoid the risk of reversal and "rule under the illusion that he or she is no longer personally responsible for a sentencing decision." *Id.*

280. Lee, *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, 687 (1990). In fact, the Sentencing Commission conducted a compliance study after the Supreme Court's decision in *Mistretta* and found that 81.1% of all sentences imposed in a nine month period fell within the guideline range. Lee, 23 IND. L. REV. at 687-88.

