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Lisa Egitto

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# SUBSTANTIAL ASSISTANCE DEPARTURES: THREAT TO SENTENCING GOALS OR NECESSARY EVIL?

LISA EGITTO\*

The United States Sentencing Guidelines (Guidelines) were promulgated by the United States Sentencing Commission (Commission), which was created by Congress<sup>1</sup> for the purpose of establishing a uniform federal sentencing system.<sup>2</sup> The goals of this new federal sentencing system were to eliminate disparity in sentencing,<sup>3</sup> to increase honesty in sentencing<sup>4</sup> and to create

\* Candidate for Juris Doctorate 2003, St. John's University, B.S. Criminal Justice, St. John's University 2000.

<sup>1</sup> See U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, app. § 2 (2001) (stating that the Sentencing Reform Act of 1984 provides for development of the Guidelines and delegates broad authority to the Commission); see also Bryan S. Gowdy, *Leniency Bribes: Justifying the Federal Practice of Offering Leniency for Testimony*, 60 LA. L. REV. 447, 458 (2000) (noting that United States Sentencing Commission was created by Comprehensive Crime Control Act of 1984); Maria Limbert, *Problems Associated with Prosecutorial Control Over Filing Substantial Assistance Motions and a Proposal for a Substantial Assistance Pre-Sentence Hearing*, 27 J. LEGIS. 251, 252-53 (2001) (discussing how Commission was created by Sentencing Reform Act of 1984); Hon. Bruce M. Selya & John C. Massaro, *The Illustrative Role Of Substantial Assistance Departures in Combating Ultra – Uniformity*, 35 B.C. L. REV. 799, 801 (1994) (stating Sentencing Reform Act of 1984 created the United States Sentencing Commission).

<sup>2</sup> See Gowdy, *supra* note 1, at 458 (stating that goal of United States Sentencing Commission was to establish uniform sentencing standards); see also Philip T. Masterson, *Eliminating the Government Motion Requirement of Section 5K1.1 of the Federal Sentencing Guidelines—a Substantial Response to Substantial Assistance: United States v. Gutierrez*, 24 CREIGHTON L. REV. 929, 952 (1991) (proposing that “one of the main purposes behind the implementation of the Federal Sentencing Guidelines was greater uniformity in sentencing”); Daniel W. Stiller, *Section 5K1.1 Requires the Commission's Substantial Assistance*, 12 FED. SENT. REP. 107, 108 (Sept./Oct. 1999) (noting that Guidelines were intended to promote uniformity).

<sup>3</sup> See *Oversight of the U.S. Sentencing Commission: Hearing of the Senate Judiciary Comm., Subcomm. On Criminal Justice Oversight* (2000) [hereinafter *Hearings*] (testimony of Sen. Thurmond) (stating that elimination of sentence disparity between similarly situated defendants was primary purpose of Guidelines); see also Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U.L. REV. 1471, 1475-76 (2000) (discussing Congress's primary goal of eliminating sentencing disparity); Selya & Massaro, *supra* note 1, at 801 (noting that Congress sought reasonable uniformity in sentencing).

<sup>4</sup> See U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, app. § 3 (2001) (discussing how Congress sought to ensure that sentences reflect actual time served); see also Froyd,

sentences that were proportionate to the crimes committed.<sup>5</sup> The Guidelines established a system of sentencing, whereby a number of factors are evaluated to determine the appropriate guideline range.<sup>6</sup> These factors, the offense level and the defendant's criminal history, are girded against one another to determine the guideline range, which is expressed in a period of months.<sup>7</sup> In calculating the guideline range, upward or downward adjustments may be made for a variety of reasons.<sup>8</sup> Once the guideline range has been determined, the defendant is sentenced within that range<sup>9</sup> unless a basis for departure exists.<sup>10</sup> There are several different bases for departures under

*supra* note 3, at 1476 (noting Congress sought to achieve honesty and certainty in sentencing, whereby defendants would serve the amount of time they were sentenced); Limbert, *supra* note 1, at 252 (discussing that one goal of Guidelines was to ensure the sentence was similar to the actual time served).

<sup>5</sup> See U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, app. § 3 (2001) (stating that Commission took culpability into account in creating Guidelines); see also Froyd, *supra* note 3, at 1476-77 (acknowledging Congress sought to make sentences reflect culpability); Selya & Massaro, *supra* note 1, at 801 (discussing proportionality as a goal of the Guidelines).

<sup>6</sup> Guideline ranges are determined by considerations of a defendant's criminal history and the type of offense committed. The offense level is calculated in accordance with Chapter Two of the Guidelines and the defendant's criminal history is determined by Chapter Four of the Guidelines. See Froyd, *supra* note 3 at 1480; see also Gowdy, *supra* note 1, at 458; Selya & Massaro, *supra* note 1, at 801-04.

<sup>7</sup> See Adriano Hrvatin, Comment, *Unconstitutional Exploitation of Delegated Authority: How to Deter Prosecutors from Using "Substantial Assistance" to Defeat the Intent of Federal Sentencing Laws*, 32 GOLDEN GATE U.L. REV. 117, 133-34 (2002) (explaining how the Guidelines determine a range of sentences expressed in a period of months); Eva E. Subotnik, Note, *Past Violence, Future Danger? Rethinking Diminished Capacity Departures under Federal Sentencing Guidelines Section 5K2.13*, 102 COLUM. L. REV. 1340, 1340 (2002) (illustrating the process of determining the sentencing range); see also Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1869 n.17 (2000) (describing factors that are used at arriving at a guideline range).

<sup>8</sup> Adjustments are available for a variety of non-offense specific reasons, such as whether the defendant was a minor or major participant, whether there was a hate crime motivation, or whether a special skill was involved in the commission of the crime. See U.S. SENTENCING GUIDELINES MANUAL §§ 3A1.1, 3B1.1-3. The most well known adjustment is the obstruction of justice enhancement. For a further discussion of enhancements for obstruction of justice, see U.S. SENTENCING GUIDELINES MANUAL § 3C1.1. See generally Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 6-7 (1988) (explaining how the adjustment process works).

<sup>9</sup> See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, app. § 2 (2001) (instructing that once guideline range has been determined, defendant should be sentenced within that range); see also *Hearings*, *supra* note 3, at 1 (testimony of Sen. Thurmond) (noting that Guidelines provide for range of possible sentences); Froyd, *supra* note 3, at 1481 (stating a defendant must be sentenced within appropriate Guideline range).

<sup>10</sup> See U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, app. § 4(b) (2001). Departures from the guideline range may be upward, thus increasing the sentence, or downward, thus decreasing the sentence. See Froyd, *supra* note 3, at 1481. See generally Limbert, *supra* note 1, at 253 (discussing availability of departures under Guidelines).

the Guidelines.<sup>11</sup>

This note will focus on the substantial assistance departure, which provides for a sentence below the guideline range if the defendant provides substantial assistance to the government.<sup>12</sup> Part I of this note will discuss the requirements and operation of substantial assistance departures. Part II will examine whether the use of substantial assistance departures are inconsistent with traditional sentencing goals and the objectives of the Guidelines. Part III will discuss the benefits to the use of substantial assistance departures. Part IV will examine whether the benefits to the use of substantial assistance departures outweigh the threats these departures have on traditional sentencing goals and the intended objectives of the Guidelines. Part V will discuss possible measures that may be taken to reduce the negative effects of substantial assistance departures.

### OPERATION OF SECTION 5K1.1

Section 5K1.1 of the Guidelines allows the court to depart from the guideline range if the government makes a motion showing that the defendant provided substantial assistance in the investigation or prosecution of another person who has committed an offense.<sup>13</sup> Courts have generally interpreted the government motion requirement strictly, requiring federal

<sup>11</sup> Upward departures may be granted where the victim suffered death or some type of injury. See U. S. SENTENCING GUIDELINES MANUAL § 5K2.1-2.3 (2001). Downward departures are available on the grounds of coercion, diminished capacity, or voluntary disclosure, but the criteria necessary to invoke these provisions is nearly impossible to establish. See, e.g. U. S. SENTENCING GUIDELINES MANUAL §§ 5K2.12, 5K2.13, 5K2.16 (2001) (discussing circumstances that warrant departure). See generally Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 FED. R. DECS. 459, 460-69 (1988) (reviewing possible bases for departures).

<sup>12</sup> See U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1 (2001) (defining substantial assistance departures); see also Froyd, *supra* note 3, at 1483 (discussing definition of substantial assistance departures); Jason C. Moreau, *Leniency for Testimony: Hypocrisy or Judicial Necessity*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 169, 170-71 (2000) (stating that section 5K1.1 allows for departures based on substantial assistance).

<sup>13</sup> See U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1 (2001) (noting requirements for substantial assistance departure, specifically the government motion requirement and the requirement that defendant provide substantial assistance in prosecution or investigation of another); Andrew M. Levine, *The Confounding Boundaries of "Apprendi-Land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 430-31 (2002) (stating that § 5K1.1 provides that once the government motion stated 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"); Hrvatin, *supra* note 7, at 144 (discussing the requirement of the government's motion before court may depart from the sentencing range).

prosecutors to make a motion under Section 5K1.1 before granting a substantial assistance departure.<sup>14</sup> District courts may review a prosecutor's decision not to file a motion for a substantial assistance departure,<sup>15</sup> however these instances are limited,<sup>16</sup> and courts generally require some threshold showing before holding a hearing on the matter.<sup>17</sup> Commentators have criticized the motion requirement for granting prosecutors too much discretion in deciding whether a substantial assistance departure is warranted in a specific instance.<sup>18</sup> Some commentators believe giving federal prosecutors the discretion to decide whether a substantial assistance departure is warranted is a mistake because the prosecutors' decisions will not be subject to appellate review, and the prosecutor is less equipped to make

<sup>14</sup> See e.g., *United States v. Cruz-Guerrero*, 194 F.3d 1029, 1031-32 (9th Cir. 1999) (holding that *United States v. Koon* did not eliminate government motion requirement for substantial assistance departures); *United States v. Shrewsbury*, 980 F.2d 1296, 1297 (9th Cir. 1992) (holding defendants are not entitled to substantial assistance departures absent a government motion); *United States v. Lewis*, 896 F.2d 246, 247 (2d Cir. 1990) (holding that sentencing courts cannot depart under § 5K1.1 unless a government motion is filed).

<sup>15</sup> See *Selya & Massaro*, *supra* note 1, at 813 (discussing courts' ability to review prosecutorial decision not to file motion for substantial assistance departure); see also Elkan Abramowitz, *Prosecutorial Input On Downward Departures For Assistance*, N.Y. L. J., Jan. 5, 1999, p. 3, col. 1 (listing procedures to review prosecutor's decision not to file in Second Circuit); *Limbirt*, *supra* note 1, at 260-61 (stating prosecutor's decision not to file substantial assistance motion may be reviewed if refusal to file had unconstitutional motive).

<sup>16</sup> See *United States v. Wade*, 504 U.S. 181, 185 (1992) (holding federal district courts may only review a prosecutor's refusal to file a substantial assistance motion if they find refusal to be based on unconstitutional motive); *United States v. Bagnoli*, 7 F.3d 90, 92 (6th Cir. 1993) (stating defendant's right to a hearing based on a substantial assistance motion is conditioned on a showing of an unconstitutional motive); *Selya & Massaro*, *supra* note 1, at 814 (noting court may review prosecutor's decision not to file motion only when there is constitutionally impermissible motive).

<sup>17</sup> See *Wade*, 504 U.S. at 185 (stating defendant must make a threshold showing of prosecutor's improper motive before district court may inquire into reasons behind prosecutor's failure to file motion); see also *United States v. Johnson*, 973 F.2d 611 (8th Cir. 1992) (holding district court was not required to inquire into reasons for prosecutor's refusal to file motion for downward departure when defendant made no threshold showing of government's improper motive); *Limbirt*, *supra* note 1, at 261 (noting *Wade* Court found a threshold showing was required before a review of prosecutor's refusal to file could be made); *Selya & Massaro*, *supra* note 1, at 814 (finding courts require a threshold showing before concluding discovery or an evidentiary hearing is appropriate).

<sup>18</sup> See *Abramowitz*, *supra* note 15, at p. 3, col. 1 (noting prosecutors in the Southern and Eastern Districts of New York specify in their cooperation agreements that the decision to file a 5K1.1 motion is entirely in their discretion); see also *Marcia Chambers*, *Prosecutors Take Charge of Sentences; Feds Hold Sway Over Disparity*, NAT'L L. J., Nov. 26, 1990, p.13, col. 1 (stating prosecutors have sole discretion in deciding whether substantial assistance departures are warranted); *Ian Weinstein*, *Regulating the Market for Snitches*, 47 BUFFALO L. REV. 563, 598 (1999) (arguing "substantial assistance departures have emerged as one of the favorite ways to exercise prosecutorial power").

the determination than a federal judge would be.<sup>19</sup>

Section 5K1.1 also requires the defendant to provide substantial assistance to the government.<sup>20</sup> Section 5K1.1 provides little guidance in defining substantial assistance and determining the extent of the departure to be granted by listing several factors for the court to consider in evaluating the assistance provided by the defendant.<sup>21</sup> More specifically these factors include: the significance and usefulness of the assistance provided;<sup>22</sup> the government's evaluation of the assistance;<sup>23</sup> the truthfulness, completeness and reliability of any information or testimony provided;<sup>24</sup> the nature and extent of the assistance;<sup>25</sup> any injury suffered, or any risk of injury to the defendant or his family as a result of the assistance;<sup>26</sup> and the timeliness of the

<sup>19</sup> See Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 943 (2001) (criticizing Guidelines for taking discretion away from judges and placing it in prosecutor's hands); see also Chambers, *supra* note 18, at 13, col. 1 (stating defense attorneys have criticized Guidelines for transferring discretion from judges, whose qualifications have been approved by the United States Senate, to federal prosecutors); Limbert, *supra* note 1, at 257-58 (describing prosecutors as biased advocates).

<sup>20</sup> See U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1 (2001) (stating requirement that defendant provided substantial assistance in the investigation of another); see also Limbert, *supra* note 1, at 255 (finding substantial assistance must be provided in investigation of another to qualify for substantial assistance departure); Moreau, *supra* note 12, at 170-71 (noting section 5K1.1 allows for a departure when information useful to prosecution or investigation of another is obtained from defendant).

<sup>21</sup> See U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1 (a)(1)-(5) (2001) (listing factors); see also Melendez v. U.S., 518 U.S. 120, 129 (1996) (stating district courts must consider factors in Section 5K1.1 (a)(1)-(5) in determining extent of departure below statutory minimum); United States v. Alegria, 192 F.3d. 179, 183 (1st Cir. 1999) (noting Section 5K1.1 (a)(1)-(5) suggests five non-exclusive factors that courts should consider).

<sup>22</sup> See U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1 (a)(1) (2001); see also Alegria, 192 F.3d. at 183 (noting Section 5K1.1 (a)(1) discusses "the significance and utility of the information provided"); United States v. Chotas, 968 F.3d. 1193, 1195 (11th Cir. 1992) (finding Section 5K1.1(a)(1) measures "the 'significance' and 'value' of the defendant's assistance").

<sup>23</sup> See U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1 (a)(1) (2001); see also United States v. Senn, 102 F.3d. 327, 329 (7th Cir. 1996) (finding under Section 5K1.1(a)(1) courts may "take into consideration the government's evaluation of the assistance rendered"); United States v. Winters, 117 F.3d. 346, 349 (7th Cir. 1997) (noting same).

<sup>24</sup> See U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1 (a)(2) (2001); see also Alegria, 192 F.3d. at 183 (finding "full, complete and truthful cooperation" corresponds to Section 5K1.1(a)(2)); United States v. Ramsey, 165 F.3d. 980, 989 (D.C. Cir. 1999) (noting Section 5K1.1(a)(2) provides "the truthfulness, completeness, and reliability of any information or testimony provided by the defendant" be considered when determining the extent of the departure).

<sup>25</sup> See U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1 (a)(3) (2001); see also Alegria, 192 F.3d. at 183 (citing Section 5K1.1 (a)(3) examining "the nature and extent of the defendant's assistance"); United States v. Chotas, 968 F.3d. 1193, 1195 (11th Cir. 1992) (noting Section 5K1.1 (a)(3) contemplates "nature and extent of the defendants assistance").

<sup>26</sup> See U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1 (a)(4) (2001); see also United

assistance.<sup>27</sup> Additionally a defendant's assistance must have been rendered in a "prosecution or investigation of another."<sup>28</sup> There are no other uniform considerations in place to aid judges and federal prosecutors in the determination of whether a defendant's assistance is substantial enough to warrant a departure from the Guideline range or the determination of the extent of the departure warranted.

Once the government makes a motion for a substantial assistance departure, the sentencing judge must evaluate the assistance provided in order to determine if such a departure is warranted.<sup>29</sup> If it is decided that the defendant is entitled to a substantial assistance departure, the sentencing judge is granted broad discretion in determining the degree of the departure.<sup>30</sup> There has been some disagreement among the circuit courts as to how to determine the extent of a departure,<sup>31</sup> and whether

States v. Watson, 57 F.3d 1093, 1096 (D.C. Cir. 1995) (citing Section 5K1.1(a)(4)); United States v. White, 71 F.3d 920, 928 (D.C. Cir. 1995) (noting commission specifically included "any danger or risk of injury to the defendant or his family resulting from his assistance" as a consideration by district court in determining the appropriate departure).

<sup>27</sup> See U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1 (a)(5) (2001); see also *Alegria*, 192 F.3d at 183 (noting Section 5K1.1 (a)(5) contemplates "the timeliness of the proffer"); *Senn*, 102 F.3d at 329 (writing under Section 5K1.1(a)(1) courts may take into consideration "the timeliness of the defendant's assistance").

<sup>28</sup> See U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1 (2001); see also United States v. Berger, 251 F.3d 894, 907 (10th Cir. 2001) (commenting Section 5K1.1 provides in part that "upon motion of the government stating that the defendant has provided substantial assistance in investigation or prosecution of another who has committed an offense"); United States v. Quach, 302 F.3d 1096, 1102 (9th Cir. 2002) (noting that district court may depart downward "upon motion of the government stating that the defendant has provided substantial assistance in investigation or prosecution of another").

<sup>29</sup> See Moreau, *supra* note 12, at 170-71 (noting assistance provided is evaluated by judge, who then decides if it is substantial enough to warrant a departure); see also Limbert, *supra* note 1, at 255 (stating theoretically sentencing judge has final say in determining if substantial assistance departure is warranted); Selya & Massaro, *supra* note 1, at 803 (discussing how sentencing judge makes final determination as to whether substantial assistance departure is warranted).

<sup>30</sup> See Selya & Massaro, *supra* note 1, at 825 (noting sentencing judge determines degree of departure); see also Cynthia Lee & Brian Derdowski, Jr., *The Future Of Substantial Assistance: Recommendations For Reform*, 11 FED. SENT. R. 78, 1998 WL 1038954, \*7 (Vera Inst. Just.) (discussing judge's discretion in final determination to depart and extent of departure); Daniel C. Richman, *Cooperating Defendants: The Costs And Benefits Of Purchasing Information From Scoundrels*, 8 FED. SENT. R. 292, 1996 WL 671560, \*2 n.8 (Vera Inst. Just.) (acknowledging judge's discretion once government motion has been made).

<sup>31</sup> See United States v. Ferra, 900 F.2d 1057, 1061-62 (9th Cir. 1990) (explaining the departure must be reasonable, but is permissible because no statute could encompass all possibilities); United States v. Kim, 896 F.2d 678, 684-85 (2d Cir. 1990) (noting the calculation method used in the Second Circuit due to the limited guidance given by the Guidelines); see also Selya & Massaro, *supra* note 1, at 825-30 (discussing various possible methods of determining degree of departure).

mandatory minimum sentences set limits on the extent of the departure.<sup>32</sup> However, in *Melendez v. United States*,<sup>33</sup> the United States Supreme Court held that in order to depart below the mandatory minimum sentence, the government must make a separate motion under 18 U.S.C. § 3553(e).<sup>34</sup> 18 U.S.C. § 3553(e)<sup>35</sup> allows the government to make a motion requesting the defendant be sentenced below the mandatory minimum sentence, in order to reflect the defendant's substantial assistance.<sup>36</sup> It should be noted that Section 5K1.1 of the Guidelines and 18 U.S.C. § 3553(e) are both substantively and procedurally similar, however in order for a judge to reduce a sentence below the mandatory minimum range, the government must make an additional motion under 18 U.S.C. § 3553(e).<sup>37</sup>

<sup>32</sup> See *United States v. Beckett*, 996 F.2d 70, 74-75 (5th Cir. 1993) (explaining that as long as the government makes the appropriate 5K1.1 motion, the judge may depart downward without restrictions on any sentencing minimums); *United States v. Ah-Kai*, 951 F.2d 490, 492 (2d Cir. 1991) (noting that recent cases in other circuits have all held that a 5K1.1 motion by the government allows the judge to depart downward without any adherence to the sentencing guidelines or minimums); see also Selya & Massaro, *supra* note 1, at 830-32 (discussing conflicting views among circuits concerning whether sentencing judges may depart below mandatory minimum sentences without separate motion under 18 U.S.C. § 3553(e)).

<sup>33</sup> 518 U.S. 120 (1996).

<sup>34</sup> *Melendez*, 518 U.S. at 125-26 (stating that Section 3553(e) "requires a [g]overnment motion requesting or authorizing the district court to 'impose a sentence below a level established by statute as minimum sentence' before the court may impose such a sentence."). See Frank O. Bowman, III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 19 (1999) (explaining the facts leading up to the *Melendez* holding); see also Weinstein, *supra* note 18, at 573 (noting the amendment to the Anti-Drug Abuse Act gave the judge the ability to sentence below the statutory minimum if the government made a motion to that effect and the defendant provided cooperation).

<sup>35</sup> 18 U.S.C. § 3553(3) provides:

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

<sup>36</sup> See 18 U.S.C. § 3553(e) (stating the necessity of the government to make a motion for a sentence imposed below the minimum); see also Selya & Massaro, *supra* note 1, at 830 (discussing 18 U.S.C. § 3553(e)); Abramowitz, *supra* note 15, at p. 3, col. 1 (noting that 18 U.S.C. § 3553(e) requires a motion by the government before a court can depart below the mandatory minimum).

<sup>37</sup> See *United States v. Wade*, 504 U.S. 181, 184-85 (1992) (noting that 18 U.S.C. § 3553(e) and Section 5K1.1 are both procedurally similar); see also Limbert, *supra* note 1, at 254-55 (highlighting that both 18 U.S.C. § 3553(e) and Section 5K1.1 have the same procedural requirements of a motion by the government for a judge to depart downward from sentence minimum); Hrvatin, *supra* note 7, at 143 (describing the similarities between 18 U.S.C. § 3553(e) and Section 5K1.1 and further noting that in order to depart



Case law may illustrate the way in which substantial assistance departures are utilized, although such opinions are scarce. One illustrative case is *United States v. Rosado*,<sup>38</sup> in which Rosado plead guilty to conspiring with others to distribute and possession with the intent to distribute heroin.<sup>39</sup> The Government recommended a downward departure based on Rosado's substantial assistance, namely his willingness to testify at the trial of the head of the narcotics organization he was involved with and the information he provided to the Government about the narcotics operation's scope and structure.<sup>40</sup> Rosado's Guideline range was 87-108 months, as determined by the Presentence Report prepared by the U.S. Probation Office.<sup>41</sup> Despite the applicable guideline range, Rosado was sentenced to 10 months of imprisonment followed by four years of supervised release because of his substantial assistance.<sup>42</sup> Another illustrative case is *United States v.*

below the Guideline range a motion under Section 5K1.1 must be made and in order to depart below the mandatory minimum a separate motion under 18 U.S.C. § 3553(e) must be made).

<sup>38</sup> *United States v. Rosado*, No. 98 CR 1316-05 RWS, 2001 U.S. Dist. LEXIS 17968 (S.D.N.Y. Nov. 6, 2001).

<sup>39</sup> See *Rosado*, 2001 U.S. Dist. LEXIS 17968, at \*1 (announcing Rosado's guilty plea to "conspiring with other[s] to distribute and possess with intent to distribute one kilogram and more of mixtures and substances containing . . . heroin"); *Court Suggests Downward Departure Because Of Defendant's Cooperation With Government; United States v. Hector Rosado*, N.Y. L. J., Nov. 23, 2001, 17 (stating Rosado plead guilty to conspiring with others to possess and distribute heroin).

<sup>40</sup> See *Rosado*, 2001 U.S. Dist. LEXIS 17968, at \*4 (explaining the cooperation Rosado gave the government in exchange for a reduced sentence); *Court Suggests Downward Departure Because Of Defendant's Cooperation With Government: United States v. Hector Rosado*, *supra* note 39, at 17 (discussing rationale for the downward departure). See generally *Wade*, 504 U.S. at 182-84 (suggesting a relationship between defendants crime and the assistance given to the government, including Wade's drug offense convictions and the information he supplied to the government regarding another drug dealer).

<sup>41</sup> See *Rosado*, 2001 U.S. Dist. LEXIS 17968, at \*3 (discussing the Sentencing Guidelines which place Rosado's conduct at a base offense level of 34); *Court Suggests Downward Departure Because Of Defendant's Cooperation With Government; United States v. Hector Rosado*, *supra* note 39, at 17 (noting Rosado's Guideline range as determined by the United States Probation Office).

<sup>42</sup> See *Rosado*, 2001 U.S. Dist. LEXIS 17968, at \*5 (clarifying that due to the assistance Rosado supplied to the Government, he received a sentence of 10 months imprisonment, followed by probation); *Court Suggests Downward Departure Because Of Defendant's Cooperation With Government; United States v. Hector Rosado*, *supra* note 39, at 17 (stating Rosado received a ten month sentence due to his cooperation with the government). See generally *United States v. Ah-Kai*, 951 F.2d 490, 493-94 (2d Cir. 1991) (explaining that necessity of the government to make a motion for downward departure based on the defendant's "substantial assistance," but once made, the extent of departure is at the judge's discretion).

*Featherstone*,<sup>43</sup> in which Featherstone admitted to various acts of murder, counterfeiting, distribution of drugs and racketeering. Featherstone began cooperating when he was convicted on a murder charge. After serving five years on the murder charge, the imposition of the sentence was suspended and Featherstone was placed on probation for five years.<sup>44</sup> The suspension of the sentence was partially based on Featherstone's cooperation with the government that included critical testimony, recruiting additional cooperators, and the conviction of at least seven individuals.<sup>45</sup>

### COSTS OF SUBSTANTIAL ASSISTANCE DEPARTURES

Substantial assistance departures are criticized as being detrimental to the criminal justice system for a variety of reasons including: creating a coercion to inform;<sup>46</sup> placing too much discretion in the hands of prosecutors;<sup>47</sup> and establishing a system whereby the most culpable defendants reap the most rewards.<sup>48</sup> This section will explore how the practice of rewarding defendants who cooperate does not serve the traditional goals of

<sup>43</sup> No. 86 Cr. 861 RWS, 1988 U.S. Dist. LEXIS 14732.

<sup>44</sup> See *Featherstone*, 1988 U.S. Dist. LEXIS, at \*8-9 (stating Featherstone would receive five years probation); see also Timothy Clifford, *Gang Enforcer to Testify Against Gotti*, NEWSDAY, Jan. 26, 1990 at 8 (mentioning Featherstone received probation for his crimes); Paul Moses, *Informers a Necessary Evil*, NEWSDAY, Jun. 29, 1989 at 3 (noting this occurred after Featherstone was sentenced to five years probation).

<sup>45</sup> See *Featherstone*, 1988 U.S. Dist. LEXIS, at \*5 (discussing extent of Featherstone's cooperation); see also Marcia Chambers, *It Is Not Uncommon For The Government To Keep Informers Satisfied*, NAT'L L. J., Apr. 6, 1992, p.13, col. 1 (discussing Featherstone's cooperation); Richard Esposito, *'I'm Outta Here' Gotti Says; But Prosecutors Confident of Convicting Reputed Crime Boss*, NEWSDAY, Jan. 25, 1989 at 3 (observing Featherstone's cooperation with authorities began in 1986).

<sup>46</sup> See Chambers, *supra* note 18, at 13, col. 1 (arguing cooperation is only way for many defendants to avoid mandatory minimum sentences therefore coercion to cooperate exists); see also Stanley S. Arkin, *Moral Issues And The Cooperating Witness*, N.Y. L. J., June 9, 1994 (noting Guidelines induce defendants to cooperate with the government); Weinstein, *supra* note 18, at 563-64 (1999) (stating Guidelines have created incentive for defendants to cooperate).

<sup>47</sup> See Chambers, *supra* note 18, at 13, col. 1 (stating discretion to make Section 5K1.1 motion rests with prosecutor); see also Abramowitz, *supra* note 15, at p. 3, col. 1 (arguing that prosecutors have broad discretion in deciding whether to file a substantial assistance motion); Limbert, *supra* note 1, at 260-61 (discussing broad discretion that rests with prosecutors).

<sup>48</sup> See Richman, *supra* note 30, at \*1 (criticizing substantial assistance departures because most culpable defendants are rewarded); see also Froyd, *supra* note 3, at 493 (arguing substantial assistance departures only benefit most culpable defendants); Mascharka, *supra* note 19, at 943 (noting that high-level, culpable defendants are the ones receiving substantial assistance departures).

punishment or the goals of the Guidelines.

Traditional notions of punishment can be divided up into two schools of thought: utilitarian and retributive.<sup>49</sup> Utilitarian goals of punishment include deterrence, which focuses on the ability to deter both specific defendants and the general community.<sup>50</sup> Deterrence theories aimed at deterring future criminal conduct of individual defendants are referred to as specific deterrence theories. General deterrence theories focus on making criminal activity undesirable to society. Deterrence theories claim that by inflicting punishments severe enough to make criminal conduct less desirable, individuals will choose not to commit crimes.<sup>51</sup> Deterrence theories advocate punishments that are only severe enough to convince individuals criminal conduct is not beneficial, and thereby inducing individuals not to engage in such conduct.<sup>52</sup> Alternatively, retributive theories of punishment focus on a particular defendant's culpability. Retributive theories consider the type of offense committed and advocate punishments that are proportional to these offenses.<sup>53</sup> Retributive theories do not

<sup>49</sup> See Michael A. Cokley, *Whatever Happened to That Old Saying "Thou Shall Not Kill?": A Plea for the Abolition of the Death Penalty*, 2 LOY. J. PUB. INT. L. 67, 74 (2001) (describing both utilitarian and retributivist ideals); Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000) (distinguishing utilitarian purposes of punishment with those of the retributive school of thought); Deirdre Golash and James P. Lynch, *Public Opinion, Crime Seriousness, and Sentencing Policy*, 22 AM. J. CRIM. L. 703, 708-13 (1995) (revealing differences between retributivism and utilitarianism).

<sup>50</sup> See Cotton, *supra* note 49, at 1316 (describing deterrence theories of punishment); see also Joseph S. Hall, *Guided to Injustice?: The Effect of the Sentencing Guidelines on Indigent Defendants and Public Defense*, 36 AM. CRIM. L. REV. 1331, 1339 (1999) (arguing utilitarian philosophy tends to focus on deterrence of crime); John T. Parry, *Culpability, Mistake, and Official Interpretations of Law*, 25 AM. J. CRIM. L. 1, 31 (1997) (mentioning utilitarian philosophy tends to focus on deterrence of potential criminal behavior).

<sup>51</sup> See Cotton, *supra* note 49, at 1316 (stating deterrence theorists conclude that by making punishment for certain conduct severe enough to scare people from engaging in that conduct, people will be deterred from engaging in that conduct); see also U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, app. § 3 (2001) (discussing punishment theories that urge sentences should be scaled to most effectively lessen likelihood of future crimes); Michael Edmund O'Neil, *Abraham's Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. REV. 291, 298 (2001) (explaining utilitarianism concentrates on discouraging future illegal acts).

<sup>52</sup> See Cokley, *supra* note 49, at 74 (observing theory that punishment is linked to deterrence); Cotton, *supra* note 49, at 1316 (noting utilitarian theories suggest using punishment as a means to an end rather than an end itself); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 316 (1984) (outlining utilitarian principle that punishment should be based on prevention and societal needs).

<sup>53</sup> See Cotton, *supra* note 49, at 1315-16 (discussing retributive theories of punishment); see also U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, app. § 3 (2001) (noting "just deserts" theories of punishment focus on offender's culpability and resulting

attempt to deter future criminal conduct; rather the emphasis is on punishing the past criminal behavior of the defendant.

The intended goals of the Guidelines embody some of the goals of traditional punishment theories. Similar to retributive theories, the Guidelines were intended to establish a system of sentencing, where the sentences were proportionate to the offense committed.<sup>54</sup> Additionally, the Guidelines sought to eliminate disparities in sentencing practices across the districts and establish a uniform system of federal sentencing.<sup>55</sup> It is asserted that Section 5K1.1 does not advance any of these goals, but rather hinders them.

### *Proportionality Goals*

As noted above, proportionate sentencing is a goal of both retributive theories of punishment and the Guidelines.<sup>56</sup> Substantial assistance departures thwart this goal by reducing sentences for individuals who cooperate with the government without regard to the culpability of the individual.<sup>57</sup> The Guidelines establish a system of sentencing where an individual's culpability is taken into account in determining the guideline range.<sup>58</sup> Specifically, the Guidelines require judges to

harms); Rebecca Dresser, *Personal Identity and Punishment*, 70 B.U.L. REV. 395, 420 (1990) (arguing retributivists believe the public is permitted to impose punishment equal to the suffering caused).

<sup>54</sup> See U.S. SENTENCING GUIDELINES MANUAL, ch.1, pt. A, app. § 3 (2001) (noting one goal of Guidelines was to create sentences proportionate to offenses committed); see also Froyd, *supra* note 3, at 1476 (stating proportionality of sentences was a key objective of Commission in creating Guidelines); Selya & Massaro, *supra* note 1, at 801 (discussing proportionality as goal of Guidelines).

<sup>55</sup> See U.S. SENTENCING GUIDELINES MANUAL, ch.1, pt. A, app. § 3 (2001) (noting elimination of disparity as goal of Guidelines); see also Froyd, *supra* note 3, at 1475-76 (discussing elimination of sentencing disparity as primary goal of Guidelines); Limbert, *supra* note 1, at 252-53 (discussing goals of Guidelines).

<sup>56</sup> See U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A, app. § 3 (noting Commission adopted traditional goals of proportionality as one objective of Guidelines); Cotton, *supra* note 49, at 1315 (discussing retributive goals); Joseph L. Hoffman, *Apprendi v. New Jersey: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 267 (2001) (stating Guidelines contain traditional retributive principles).

<sup>57</sup> See *Sentencing Report Airs Equity Problems With "Substantial Assistance" Departures*, 66 U.S.L.W. 2503, Feb. 24, 1998 (stating substantial assistance departures are inconsistent with goals of 1984 Sentencing Reform Act); see also Mascharka, *supra* note 19, at 943 (noting reducing sentences in exchange for cooperation results in inequities); Richman, *supra* note 30, at \*1 (discussing challenges raised by substantial assistance departures to goals of proportionate sentencing).

<sup>58</sup> See U.S. SENTENCING GUIDELINES MANUAL, ch. 4, pt. A, cmt. (2001) (stating that Commission believed repeat offenders to be more culpable than first time offenders therefore criminal history must be accounted for); see also Froyd, *supra* note 3, at 1481

look at factors such as the offense level and the defendant's criminal history.<sup>59</sup> Despite these considerations, when a defendant is granted a substantial assistance departure he or she receives a sentence below the guideline range based solely on the assistance provided.<sup>60</sup> There are no uniform considerations in place that require a sentencing judge to consider the defendant's culpability when determining whether a departure is warranted or the degree of such a departure.<sup>61</sup>

The inconsistency between the goal of proportionality and the effect of substantial assistance departures is intensified by the existence of the "cooperation paradox."<sup>62</sup> Many commentators suggest that only the most culpable defendants benefit from cooperating with the government because they are the individuals with the most valuable information to sell.<sup>63</sup> This

(discussing reasons Commission believed it was important to include criminal history as a factor in determining guideline range); Linda Drazga Maxfield, *Prior Dangerous Criminal Behavior and Sentencing Under the Federal Sentencing Guidelines*, 87 IOWA L. REV. 669, 670 (2002) (emphasizing criminal history's importance in determining culpability for sentencing purposes).

<sup>59</sup> See Froyd, *supra* note 3, at 1480-82 (discussing the use of criminal history and criminal offense in determining guideline range); see also Gowdy, *supra* note 1, at 458-59 (noting criminal history and offense level as two most important factors in determining guideline range). See generally Selya & Massaro, *supra* note 1, at 801-03 (evaluating steps taken in determination of guideline range).

<sup>60</sup> See generally U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. K, appx. § 5K1.1(a)(1)-(5) (2001) (listing several factors judge should consider in determining whether departure is warranted, but culpability of defendant is not included); Daniel J. Freed & Stephen L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT. R. 119, available at 2001 WL 1750545, \*6 (2000-01) (indicating departures may lead to sentences below minimum levels); Selya & Massaro, *supra* note 1, at 826-30 (discussing methods and considerations judges use in determining extent of departure for substantial assistance).

<sup>61</sup> See generally *Sentencing Report Airs Equity Problems With "Substantial Assistance" Departures*, 66 U.S.L.W. 2503, Feb. 24, 1998 (noting Commission did not set any rules regarding extent of departure); see also Selya & Massaro, *supra* note 1, at 825 (acknowledging principles for determining extent of departure are relatively undeveloped). But see Gowdy, *supra* note 1, at 475 (stating cooperators should receive lesser sentences because they should be considered less culpable than non-cooperating defendants).

<sup>62</sup> See Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, And The Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 138 (1994) (discussing problems associated with cooperation paradox); see also Limbert, *supra* note 1, at 258-59 (illustrating how low-level offenders rarely possess type of information that constitutes substantial assistance); Froyd, *supra* note 3, at 1493-94 (discussing how cooperation paradox benefits high-level offenders who possess information desired by federal prosecutors, while low-level offenders rarely possess such information).

<sup>63</sup> See Froyd, *supra* note 3, at 1493-94 (noting only high-level offenders have enough relevant information to receive substantial assistance departures); see also Lee, *supra* note 62, at 138 (stating substantial assistance departures result in less culpable defendants receiving longer sentences than more culpable defendants because the minor players have less information to offer government); Limbert *supra* note 1, at 258-59

phenomenon has been referred to as the “cooperation paradox.” Critics of the “cooperation paradox” claim that only the most culpable defendants possess the type of information that amounts to substantial assistance, and therefore, are the only ones to benefit from the departures.<sup>64</sup> Evaluating the existence of the “cooperation paradox” poses a unique problem because it is often difficult to determine the reasons why a departure is not granted.<sup>65</sup> Additionally, commentators note the lack of appellate court decisions dealing with the issue of defining what types and amounts of information qualify as substantial assistance.<sup>66</sup> Despite the lack of case law on this subject, anecdotal evidence seems to support the existence of a “cooperation paradox.”<sup>67</sup> For example, one commentator compared the treatment of a mob underboss turned informant, who received a five year sentence for decades of violent criminal activity in return for his cooperation with the government, and a first time, non-violent offender, for whom prosecutors refused to recommend a sentence

(discussing how high-level offenders possess information that constitutes substantial assistance while low-level offenders do not); Richman, *supra* note 30, at \*1 (stating high level defendants are rewarded by schemes rewarding cooperation).

<sup>64</sup> See *United States v. Griffin*, 17 F.3d 269, 274 (8th Cir. 1994) (Bright, J., dissenting):

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

This demonstrates that small time dealers usually have little to nothing to offer to the government, while big time dealers are in a position to testify in exchange for a departure. Limbert, *supra* note 1, at 258-59. See generally Froyd, *supra*, note 3, at 1493-94.

<sup>65</sup> See Weinstein, *supra* note 18, at 589-90 (1999) (noting it is difficult to determine when the government refuses to make a substantial assistance motion because the information provided by the defendant did not rise to the level of substantial). See generally Richman, *supra* note 30, at \*1 (concluding most literature about substantial assistance is based on anecdotal evidence because hard data is difficult to find); Daniel C. Richman, *The Challenges Of Investigation Section 5K1.1 In Practice*, 11 FED. SENT. R. 75 available at 1998 WL 1038953, \*2-3 (acknowledging difficulties in investigating application of substantial assistance departures in practice).

<sup>66</sup> See generally Richman, *supra* note 65, at \*2-3 (concluding anecdotal evidence seems to underlie most theories about substantial assistance departures because of the lack of hard data); Selya & Massaro, *supra* note 1, at 804-08 (discussing lack of appellate court decisions on substantive issues regarding substantial assistance departures); *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1503, 1514 (2001) (decrying lack of standard in determining whether a defendant has rendered “substantial assistance”).

<sup>67</sup> See John D.B. Lewis, *Cooperation Under the Guidelines*, N.Y. L. J., Apr. 30, 1993, p. 2 (highlighting cases that demonstrate the cooperation paradox); see also Froyd, *supra* note 3, at 1493-94 (illustrating how cooperation paradox works). But see Weinstein, *supra* note 18, at 611-15 (suggesting cooperation paradox does not exist).

under five years, to illustrate the disparate treatment of low-level and high-level offenders.<sup>68</sup> In comparing the disparate treatment between low-level and high-level offenders, several questions were posed by the author to illustrate the seemingly unjust consequences of the government practice of rewarding cooperation.<sup>69</sup>

Several commentators argue that the cooperation paradox does not exist.<sup>70</sup> Many of these commentators base their arguments on a report made by the Commission, which noted, "only two to three out of every ten high level co-conspirators receive substantial assistance departures."<sup>71</sup> According to the Commission's research, high-level co-conspirators are less likely to receive substantial assistance departures than low-level co-conspirators, despite the numerous theories to the contrary.<sup>72</sup> Perhaps as news of the Commission's findings circulate, the "cooperation paradox" may fall out of favor, but in the meantime the "cooperation paradox" remains a criticism of the use of

<sup>68</sup> See Lewis, *supra* note 67, at 2 (comparing cases of *Gravano* and *Sanchez* to illustrate how cooperation paradox works). See generally *Garofalo v. Gravano*, 23 F.Supp.2d 279, 280-81 (E.D.N.Y. 1998) (discussing sentencing considerations for Gravano, including his involvement in nineteen murders and people who were arrested or convicted resulting from his testimony); *United States v. Gotti*, 771 F.Supp. 552, 554 (E.D.N.Y. 1991) (listing acts constituting the racketeering charge, implicating Salvatore Gravano in ten violent criminal acts).

<sup>69</sup> Lewis argued:

Does it make sense that our criminal laws, not to mention the prosecutors' responsible for enforcing them, let cold-blooded killers walk away even as they require a promising young man to be locked up for years on a single instance of poor judgment? Would the policies that lead to such grotesque results be supported by an informed public? Do the apprehension and conviction of criminals really require consequences so at odds with the interests of the larger society?

Lewis, *supra* note 67, at 2. See Virginia G. Villa, *Retooling Mandatory Minimum Sentencing: Fixing the Federal "Statutory Safety Valve" To Act As an Effective Mechanism for Clemency in Appropriate Cases*, 21 HAMLIN L. REV. 109, 124 (1997). But see Bowman, *supra* note 34, at 48-53 (1999).

<sup>70</sup> See Bowman, *supra* note 34, at 48-53 (citing, amongst many other reasons, lack of empirical evidence to support these claims); Lee & Derdowski, *supra* note 30, at \*2 (refuting existence of cooperation paradox, despite theories of legal scholars). See generally Weinstein, *supra* note 18, at 611-14 (commenting on cooperation paradox).

<sup>71</sup> Lee & Derdowski, *supra* note 30, at \*2; see also Weinstein, *supra* note 18, at 611-14 (discussing Commission's study of cooperation paradox). But see Froyd, *supra* note 3, at 1494 (stating in drug trade, least culpable co-conspirators, such as couriers and mules, often receive more stringent sentences than kingpins).

<sup>72</sup> See Lee & Derdowski, *supra* note 30, at \*2 (discussing the Commission's research); see also Weinstein, *supra* note 18, at 611-14 (suggesting Commission's research proves cooperation paradox does not exist). But see Thomas N. Whiteside, Symposium: *The Federal Sentencing Guidelines: Ten Years Later: The Reality of Federal Sentencing: Beyond the Criticism*, 91 NW. U.L. REV. 1574, 1594 (1997) (stating Fifth Circuit has held courts may limit substantial assistance departures to avoid disparity in sentences when compared with less culpable co-conspirators).

substantial assistance departures.<sup>73</sup>

### *Deterrence Goals*

The utilitarian theories of punishment focus on specific deterrence of individual offenders, and general deterrence of criminal conduct.<sup>74</sup> The effects of substantial assistance departures are inconsistent with deterrence objectives in two ways. First, substantial assistance departures result in sentences that are too lenient to effectively deter offenders from future criminal conduct.<sup>75</sup> While there are many difficulties in studying the recidivism rates for those defendants who receive substantial assistance departures, anecdotal evidence may be used to illustrate this point.<sup>76</sup> One illustrative example is the ex-mob underboss, Salvatore Gravano, who received a five - year sentence for a laundry list of violent crimes after cooperating

<sup>73</sup> See Limbert, *supra* note 1, at 258-59 (illustrating how small time dealers are unable to benefit from substantial assistance departures, while larger dealers have information they can offer to the government in return for lenient sentences); see also Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 210 (explaining cooperation paradox is often at play in drug conspiracy cases, as the least culpable conspirators have little information to share with the government, and thus have less bargaining power and end up with harsher sentences than their more culpable counterparts); Mascharka, *supra* note 19, at 943 (discussing phenomenon known as cooperation paradox).

<sup>74</sup> See Cotton, *supra* note 49, at 1316 (distinguishing between general and specific deterrence); see also Michael O'Neill, *supra* note 51, at 298 (stating utilitarianism is concerned with punishment in its broader social context and therefore concentrates on the need for both general and specific deterrence); Parry, *supra* note 50, at 31-32 (explaining utilitarian theorists consider both specific and general deterrence as means for maximizing social welfare).

<sup>75</sup> See Richman, *supra* note 30, at n.14 (discussing cooperation and its lack of effectiveness as a deterrent); see also Justin H. Dion, *Criminal Law – Prosecutorial Discretion or Contract Theory Restrictions? The Implications of Allowing Judicial Review of Prosecutorial Discretion Founded on Underlying Contract Principles*, 22 W. NEW ENG. L. REV. 149, 200 (2000) (explaining that as courts are unwilling to review sentencing departures, prosecutors have the liberty to be lenient without having to defend their decisions to the public). See generally *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, *supra* note 66, at 1532 (noting recidivism is a factor considered in making sentencing departure decisions).

<sup>76</sup> See Richman, *supra* note 30, at n.14 (stating anecdotal evidence supports the contention that rewarding cooperation is an ineffective deterrent). See generally MODERN DICT. FOR THE LEGAL PROF. (2001) (defining recidivism as “tendency of an individual to return to a former mode of behavior such as a criminal who, after being released from prison, commits another crime”). But see Elizabeth Williams, Annotation, *Construction and Application of United States Sentencing Guideline § 2G2.1 et seq., Pertaining to Child Pornography*, 145 A.L.R. FED. 481, 18 (2002) (noting courts have departed from sentencing guidelines when evidence presented an increased likelihood of recidivism).



with the government.<sup>77</sup> Recently, Gravano plead guilty to drug charges, illustrating the prior sentence was not an effective deterrent.<sup>78</sup> Secondly, many commentators argue substantial assistance departures send the wrong message to society. For instance, one commentator stated that government- rewarded cooperation sends the public the message "the more you know the better the deal."<sup>79</sup> While it is difficult to test whether rewarding cooperation with lenient sentences and government witness protection is an effective deterrent to the public,<sup>80</sup> it seems that such a practice would not deter individuals from criminal activity.

### *Elimination of Disparity*

Prior to the promulgation of the Guidelines there were great disparities between sentences for similar crimes.<sup>81</sup> One of the goals of the Guidelines was to eliminate this disparity.<sup>82</sup> It is

<sup>77</sup> See Joseph P. Fried, *Ex-Mob Underboss Given Lenient Term For Help As Witness*, N. Y. TIMES, Sept. 27, 1994, Sec. A, p. 1, col. 1 (noting Gravano was sentenced to a five-year prison term for committing nineteen murders in exchange for his cooperation with government); see also Pete Bowles, *Gravano Guilty In Ecstasy Case*, NEWSDAY, Jun. 30, 2001, p. A04 (discussing lenient sentence Gravano received in exchange for cooperation); *The Return Of Sammy The Bull*, N. Y. TIMES, Jun. 26, 2001, Sec. A, p. 18, col. 1 (discussing Gravano's five year prison sentence).

<sup>78</sup> See Christopher Francesciani, *Strong As A "Bull": How Sammy Flexed His Muscles*, N.Y. POST, Aug. 17, 2001 (discussing Gravano's plea to drug charges); see also Bowles, *supra* note 77, at p. A04 (acknowledging Gravano plead guilty to drug charges and now faces 23 years in prison); Mike Claffey, *Two Wiseguys Cracking Wise*, DAILY NEWS, Jul. 1, 2001, p. 15 (discussing charges against Gravano).

<sup>79</sup> Chambers, *supra* note 45, at p. 13, col. 1; see Hrvatin, *supra* note 7, at 119 (stating high-level offenders with the most knowledge about drug operations can take the most advantage of substantial assistance departures); Lee, *supra* note 73, at 209 (questioning wisdom of giving lighter sentences to defendants who "snitch" on other persons).

<sup>80</sup> See generally Chambers, *supra* note 45, at p.13, col. 1 (noting that rewarding cooperation and placing criminals under witness protection may not be in the best interests of society); Judge Rudolph J. Gerber, Essay, *On Dispensing Injustice*, 43 ARIZ. L. REV. 135, 136 (2001) (opining Arizona's judicial leniency resulting from mandatory sentencing leads to fallacies regarding deterrence).

<sup>81</sup> See Froyd, *supra* note 3, at 1473-75 (discussing methods used to determine sentences prior to the Guidelines); Todd E. Witten, Comment, *Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697, 697 (1996) (stating prior to Guidelines, public wanted to end disparity in sentencing); *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 AM. CRIM. L. REV. 1463, 1463 (2001) (stating that "[t]he perception developed that the 'unfettered discretion' of judges and parole authorities in imposing and implementing sentences resulted in unwarranted disparity among offenders with similar criminal backgrounds convicted of similar crimes committed under similar circumstances, as well as concomitant problems of unfairness, uncertainty, and dishonesty in sentencing.").

<sup>82</sup> See Froyd, *supra* note 3, at 1476 (noting one of the goals of the Guidelines was to

suggested that the use of substantial assistance departures increases sentencing disparity.<sup>83</sup> When a substantial assistance departure is granted, the judge is permitted to sentence that defendant to a lesser sentence than that prescribed by the Guidelines, therefore the cooperating defendant receives a lighter sentence than a similarly situated defendant who has committed the same crime and does not cooperate.<sup>84</sup> This problem is intensified by the lack of formal considerations in place for determining the degree of the departure.<sup>85</sup> The degree of the departure is left in the hands of a sentencing judge, possibly guided by the recommendation of a prosecutor.<sup>86</sup> This situation creates vast disparities in the sentences received by cooperating defendants.<sup>87</sup>

eliminate sentencing disparity); Joan Tagliareni, *Actual Contamination in the Federal Sentencing Guidelines: To Prove or Not to Prove?*, 22 B.C. ENVTL. AFF. L. REV. 413, 413 (1995) (explaining that Guidelines were enacted to remedy problems with earlier sentencing methods and create cohesion in sentencing law); *The American College of Trial Lawyers Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, *supra* note 81, at 1463 (stating that as a result of disparity in sentencing, Congress established United States Sentencing Commission with the direction to establish sentencing guidelines).

<sup>83</sup> See Gowdy, *supra* note 1, at 476 (stating costs of exchanging leniency for testimony include great sentencing disparities among similarly situated defendants); see also Chambers, *supra* note 18, at 13, col. 1 (discussing San Diego federal judge who resigned because of the increase in sentencing disparity caused by the Guidelines); Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U.L. REV. 23, 39-40 (stating a U.S. General Accounting Office report revealed disparities in sentencing between blacks and whites for the same offense since the Guidelines were enacted).

<sup>84</sup> See Hrvatin, *supra* note 7, at 152-53 (stating cooperating defendants often engage in more serious criminal behavior, but end up with lighter sentences than less culpable defenders due to their ability to cooperate with prosecutors); Lee, *supra* note 73, at 209 (stating the cooperating defendant who is more culpable than his counterpart receives a lighter sentence in reward for his willingness to turn state's evidence); Richman, *supra* note 65, at \*1 (noting substantial assistance departures threaten the goal of horizontal equity in sentencing).

<sup>85</sup> See Gowdy, *supra* note 1, at 468 (noting Guidelines say nothing about how much a judge may reduce a sentence when making a downward departure); see also Richman, *supra* note 65, at \*1 (stating equity problems are worsened by the lack of guidance in how cooperators should be treated); Lee & Derdowski, *supra* note 30, at, at \*3-7 (discussing the lack of guidelines governing extent of departure when a judge decides to depart).

<sup>86</sup> See Stiller, *supra* note 2, at 108 (noting that federal judges defer to federal prosecutors' recommendations on the magnitude of the departure). See generally 874 F. 2d 43, 49 (1st Cir. 1989) (stating that a three step process is utilized by the federal courts used when determining a departure); Robert H. Smith, *Departure Under the Federal Sentencing Guidelines: Should a Mitigating or Aggravating Circumstance Be Deemed "Adequately Considered" Through "Negative Implication?"* 36 ARIZ. L. REV. 265, 286 (1994) (postulating that the degree of departure be measured by a standard of reasonableness).

<sup>87</sup> See Lee & Derdowski, *supra* note 30, at \*1-7 (noting lack of guidelines for determining extent of departure leads to inconsistency); Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current*

In addition to the problems created by the lack of formal guidance for determining the degree of the departure, 5K1.1 practices differ through out the districts. There are no uniform definitions as to what constitutes substantial assistance across the districts.<sup>88</sup> Federal prosecutors are left unguided in determining whether the assistance provided by a defendant amounts to substantial assistance.<sup>89</sup> While federal prosecutors may have to conform to written guidelines that apply to their district, there are no similar guidelines that apply across the districts.<sup>90</sup> The inconsistency in the definition of substantial assistance ultimately results in sentencing disparity.<sup>91</sup> The Commission, realizing the potential disparity problems, conducted research as to how Section 5K1.1 worked in practice.<sup>92</sup> The initial report from the Commission revealed that Section 5K1.1 practices greatly varied across the districts.<sup>93</sup> The report

*Federal Policy and Practice*, 11 FED. SENT. R. 6 available at 1998 WL 911926, at \*6 (Vera Inst. Just.) (stating the current structure results in dissimilar sentences for similar offenders).

<sup>88</sup> See *Sentencing Report Airs Equity Problems With 'Substantial Assistance' Departures*, U.S. L. WEEK, Feb. 24, 1998 at 2503 (discussing difference in federal standards dictating what constitutes substantial assistance); see also Chambers, *supra* note 18, at 13, col. 1 (quoting Thomas W. Hiller II, "In all judicial districts, the U.S. attorneys look at cooperation subjectively and may reward it, or may not. . ."); Lee, *supra* note 62, at 125-27 (noting different prosecutors' offices have different substantial assistance policies); Limbert, *supra* note 1, at 259 (discussing how policies regulating cooperation practices vary widely from district to district).

<sup>89</sup> See Stiller, *supra* note 2, at 109 (arguing application of Section 5K1.1 is left in the hands of federal prosecutors); see also Abramowitz, *supra* note 15, at p. 3, col. 1 (stating that in the Southern and Eastern Districts of New York the decision to file a 5K1.1 motion is left entirely in the discretion of the prosecutor); Lee, *supra* note 62, at 127-28 (noting in districts with no formal substantial assistance policy each Assistant United States Attorney has discretion to decide whether or when to file substantial assistance motion).

<sup>90</sup> See Gowdy, *supra* note 1, at 466 (noting many U.S. Attorney's Offices ignore local 5K1 procedures and many more offices have no written procedure); Maxfield & Kramer, *supra* note 87, at \*6 (stating as of 1995 20.2% of U.S. Attorney's Offices maintained written policies providing guidance for substantial assistance departures); see also Lee, *supra* note 62, at 125-27 (illustrating differences in substantial assistance policies by comparing policies in Central District of Illinois and District of Columbia).

<sup>91</sup> See Maxfield & Kramer, *supra* note 87, at 1-5 (explaining that the sentencing commission discovered unevenness and unwarranted use among U.S. Attorney offices). See generally, 28 U.S.C. § 991(b) (stating the purpose of the Sentencing Commission is to establish policies and practices that provide certainty and fairness).

<sup>92</sup> See Maxfield & Kramer, *supra* note 87, at 1-5 (discussing the efforts of the Sentencing Commission to research and evaluate problems of the disparities in sentencing stemming from 5K1.1 practices); see also Richman, *supra* note 65, at \*1 (discussing difficulties in evaluating effectiveness of 5K1.1).

<sup>93</sup> See Maxfield & Kramer, *supra* note 87, at 1-5 (discussing the researching efforts of the Sentencing Commission of the sentencing disparities from 5K1.1 practices); see also Lee, *supra* note 62, at 125-27 (comparing differences in 5K1.1 practice between Central District of Illinois and District of Columbia); Richman, *supra* note 65, at \*1 (discussing

found variations in Section 5K1.1 practices are partially attributable to the fact that substantial assistance is considered differently throughout the districts.<sup>94</sup> The differences in these practices create sentencing disparity across the districts, which is essentially what the Guidelines were created to eliminate.

### BENEFITS OF THE SUBSTANTIAL ASSISTANCE DEPARTURE

As discussed above substantial assistance departures are criticized because they result in sentences that are disproportionate to the crimes committed,<sup>95</sup> create sentencing disparity,<sup>96</sup> and are not effective deterrents.<sup>97</sup> Despite the problems with the use of substantial assistance departures the federal government has chosen to codify this age old practice<sup>98</sup> of rewarding cooperation in Section 5K1.1.<sup>99</sup> Some commentators

the difference between the 5K1.1 practices in the Eastern District of Virginia and the Eastern District of Pennsylvania).

<sup>94</sup> See Richman, *supra* note 65, at \*1 (noting that differences as to what constitutes substantial assistance attributes to the equity problem); see also Maxfield & Kramer, *supra* note 87, at 1-5 (discussing the efforts of the Sentencing Commission to research and evaluate problems of the disparities in sentencing stemming from 5K1.1 practices); Lee, *supra* note 62, at 123-29 (comparing 5K1.1 practices of different prosecutors and in different districts to illustrate how lack of guidelines defining substantial assistance creates disparity).

<sup>95</sup> See Richman, *supra* note 30, at \*1-2 (noting discounts in sentences given to cooperators challenge goals of proportionality). See generally Theresa Karle and Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: Empirical and Case Law Analysis*, 40 EMORY, L.J. 393, (stating that the Guidelines were devised to reduce disproportionate sentencing).

<sup>96</sup> See Lee, *supra* note 62, at 123-129 (illustrating how current 5K1.1 practices threaten equity goals of Guidelines); Richman, *supra* note 65, at \*1 (noting equity problems in sentencing caused by substantial assistance departures). See generally 28 U.S.C. § 991(b) (stating the purpose of the Sentencing Commission is to establish policies and practices that avoid unwarranted sentencing disparities).

<sup>97</sup> See Chambers, *supra* note 18, at p.13, col. 1 (stating government-rewarded cooperation sends the wrong messages to criminal); Richman, *supra* note 30, at \*2 (discussing negative effects on deterrence caused by government-rewarded cooperation); Smith, *supra* note 86, at 286 n.225 (noting loose guidelines would seriously compromise the deterrent effect of the system).

<sup>98</sup> See Richman, *supra* note 30, at \*1 (noting practices rewarding cooperation are long standing tradition); see also Gowdy, *supra* note 1, at 455 (discussing *The Whiskey Cases* and how leniency in exchange for testimony is a long standing tradition in American jurisprudence). See generally 18 U.S.C. § 3553 (a) (providing the purposes of sentencing).

<sup>99</sup> See Selya & Massaro, *supra* note 1, at 803-04 (discussing Congressional direction that cooperation be rewarded in the Guidelines). See generally Rosemary Cakmis and James Skuthan, *Survey Article: Federal Sentencing Guidelines*, 50 MERCER L. REV. 1035, 1059 (1999) (stating that Section 5K1.1 addresses cooperation before sentencing and works in tandem with Rule 35(b) to give the Government two opportunities to reward a defendant's substantial assistance in the investigation or prosecution of other); Ross Galin, Note, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245, 1245 (2000) (stating

defend the practice of granting substantial assistance departures to cooperators.<sup>100</sup> In this section, the benefits of substantial assistance departures will be discussed and evaluated in an effort to determine if the benefits of substantial assistance departures really outweigh the costs the use of such departures inflict on the goals of sentencing.

### *Benefits to Law Enforcement*

The main justification for the use of substantial assistance departures is the benefit received by law enforcement.<sup>101</sup> It is argued that without the information and testimony received by cooperators, many upper-level criminals would not be arrested and prosecuted.<sup>102</sup> Commentators argue that cooperators would not come forward without some benefit to themselves, and it is therefore necessary to reward their cooperation with a lighter sentence.<sup>103</sup> Additionally, some cooperators place themselves in great danger by providing law enforcement with information about other defendants.<sup>104</sup> It is asserted that the risks the

that 5K1.1 motions are an important tool used by prosecutors to induce and reward both guilty pleas and cooperation).

<sup>100</sup> See *Sentence Reductions Based on Defendants' Substantial Assistance to the Government*, 11 FED. SENT. R. 18 available at 1998 WL 911927 (stating there is a general consensus that the benefits of substantial assistance departures include increasing the plea rate, saving judicial time and resources and creating new criminal cases); see also Arkin, *supra* note 46, at p. 3, col. 1 (recognizing no criminal justice system would function effectively without the use of cooperating witnesses); Galin, *supra* note 99, at 1245 (recognizing importance of 5K1.1 to reward cooperation and induce guilty pleas).

<sup>101</sup> See Gowdy, *supra* note 1, at 474 (noting primary benefit of substantial assistance departures is the assistance to law enforcement in the prosecution and conviction of defendants); see also *Prepared Testimony of John Roth Chief, Narcotic and Dangerous Drug Section Criminal Division*, Federal News Serv., May 11, 2000 (Statements of John Roth before the House Government Reform Committee Subcommittee on Criminal Justice) [hereinafter *Testimony*] (stating that substantial assistance departures are essential to combat drug trafficking crimes); James Dowden, Note, *United States v. Singleton: A Warning Shot Heard 'Round the Circuits?*, 40 B. C. L. REV. 897, 901 (1999) (stating that the Sentencing Commission has noted that a defendant's assistance in the resolution of other criminal investigations helps resolve criminal cases).

<sup>102</sup> See Richman, *supra* note 30, at \*3-4 (stating many upper-level criminals would not be convicted without the testimony of lower-level cooperating defendants); see also Chambers, *supra* note 45, at p. 13, col. 1 (discussing criticisms of government practice of rewarding low-level criminals to catch upper-level criminals). See generally *Testimony*, *supra* note 101 (stating that federal prosecutor's jobs in combating drug trafficking would be nearly impossible without substantial assistance departures).

<sup>103</sup> See Richman, *supra* note 30, at \*4 (noting it is necessary to pay criminals for information); see also Arkin, *supra* note 46, at p.3, col. 1 (noting informants need some encouragement to come forward and cooperate with the government); Chambers, *supra* note 45, at p.13, col. 1 (quoting federal prosecutor's statement that recognition must be paid to cooperating defendants in order for them to work with the government).

<sup>104</sup> See generally U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1(a)(4) (2001)(noting

cooperator takes deserve some recognition.<sup>105</sup> While the arrest, prosecution and conviction of upper-level criminals is a legitimate justification for the use of substantial assistance departures, some commentators have criticized this justification.<sup>106</sup> One criticism is that the cooperator's testimony is suspect due to credibility problems, and is not as valuable as it may appear at first glance.<sup>107</sup> Another criticism focuses on the effect of giving the cooperator a lighter sentence.<sup>108</sup> Some commentators argue the cooperator may continue a life of crime after he serves his reduced sentence.<sup>109</sup> Another argument is allowing low-level criminals to go free in order to convict upper-

injury, danger, or risk of injury to cooperating defendant or his family should be considered in determining whether the departure should be granted); Rob Drummond, *Recent Development: Florida v. J.L. Phone Calls, Guns, and Searches*, 27 AM. J. CRIM. L. 415, 419 (2000) (illustrating danger taken any time an individual cooperates with law enforcement regarding illegal activity); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L. J. 69, 69 (1995) (stating that danger to cooperators and their families can be significant).

<sup>105</sup> See generally U.S. SENTENCING GUIDELINES MANUAL, § 5K1.1(a)(4) (2001) (stating risks cooperator takes should be considered in determining whether departure should be granted). See generally, *Hearing of the Senate Judiciary Committee, Subcommittee on Criminal Justice Oversight*, Federal News Serv., Oct. 13, 2000 (statements of John Steer, Vice Chair, U.S. Sentencing Commission) (opining that substantial assistance is an important law enforcement tool); G. Adam Schweickert, III, Note, *Third Party Cooperation: A Welcome Addition to Substantial Assistance Departure Jurisprudence*, 30 CONN. L. REV. 1445, 1457 (1998) (listing criteria used to determine sentence reduction for substantial assistance, including potential danger to cooperator).

<sup>106</sup> See Gowdy, *supra*, note 1, at 475-477 (discussing various costs of government-rewarded cooperation); see also Chambers, *supra*, note 44 at, p. 13, col. 1 (criticizing use of substantial assistance departures to reward cooperation). See generally Tracey Tyler, *Man Jailed in Killing Seeks Bail*, TORONTO STAR, Sept. 9, 2002 at B07 (illustrating unreliability of jailhouse informants).

<sup>107</sup> See Gowdy, *supra*, note 1, at 476 (discussing risks that cooperators will fabricate testimony); see also Richman, *supra*, note 30, at \*2-3 (discussing problems of cooperators perjuring themselves). See generally Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569, 620 (1998) (stating that credibility of statements is generally requirement for granting substantial assistance).

<sup>108</sup> See Richman, *supra*, note 30, at n.14 (discussing how rewarding cooperation is an ineffective deterrent); see also Chambers, *supra* note 44, at p. 13, col. 1 (criticizing system of rewarding cooperation as being detrimental to society). *But see* Bowman, *supra* note 34, at 50 (1999) (arguing that use of substantial assistance departures is a sound policy).

<sup>109</sup> See Richman, *supra*, note 30, at n.14 (stating anecdotal evidence supports contentions that criminals escaping harsh sentences by cooperating are likely to engage in criminal behavior again); *Mafia Informer Jailed for Running Ecstasy Ring in U.S.*, SUNDAY TRIBUNE, September 9, 2002, at p.21 (showing example of informer that received reduced sentence for cooperation and recidivated). See generally Thomas R. Goots, Comment, *"A Thug in Prison Cannot Shoot Your Sister": Ohio Appears Ready to Resurrect the Habitual Criminal Statute—Will it Withstand an Eighth Amendment Challenge?*, 28 AKRON L. REV. 253, 275 n.141 (1995) (referring to 1983 Bureau of Justice statistics which found that 62.5% of prisoners released were rearrested within three years).

level criminals is not in the best interests of society.<sup>110</sup> Finally, it has been asserted that after a high-level criminal has been arrested and convicted, law enforcement officials may later have a need for information he possesses and may be successful in obtaining a release or shorter sentence for him as well.<sup>111</sup>

Despite these criticisms, it is maintained that cooperator testimony is necessary to law enforcement objectives, and therefore, is a necessary evil.<sup>112</sup> There is support for the necessity of cooperator testimony to law enforcement objectives.<sup>113</sup> The Commission conducted a study of 130 narcotics defendants who provided substantial assistance.<sup>114</sup> The study revealed that the assistance these defendants provided resulted in twenty-one trial

<sup>110</sup> See Chambers, *supra* note 44, at p. 13, col. 1 (discussing how use of witness protection and allowing criminals back into society is detrimental to society). See generally *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, *supra* note 66, at 1525 (stating that more culpable defendants often receive lighter sentences than less culpable defendants because of substantial assistance); Farabee, *supra* note 107, at 583 (arguing that more culpable defendants benefit most from substantial assistance departures).

<sup>111</sup> See Chambers, *supra* note 44, at p. 13, col. 1 (discussing federal prosecutor's request to allow a felon convicted for life without parole to go free after the felon provided the government with information that led to the conviction of a group of major narcotic dealers). See generally Henry Pierson Curtis, *Judges OK Drug Conviction; The Ruling On Appeal Cleared a Federal Prosecutor in the Handling of the Trial*, ORLANDO SENTINEL TRIBUNE, Nov. 22, 2002, at p. B3 (stating that convicted felons received reduced sentences in exchange for their testimony); Mitchel Maddux, *Informant Gets 18 Months For Stealing \$1M; Despite His Help In Probe, Judge Criticizes Man*, THE RECORD (BERGEN COUNTY, NJ), Jan. 15, 2002, at p. A3 (explaining how career informant was finally arrested for fraud and was given leniency because of substantial assistance).

<sup>112</sup> See Gowdy, *supra*, note 1, at 474-75 (evaluating evidence supporting the need for cooperator testimony in law enforcement); George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 3 (2000) (suggesting that compensating witnesses in form of leniency is necessary evil without which prosecution of most culpable defendants may be impossible). See generally Jack B. Weinstein, *A Trial Judge's Reflections on Departures From the Federal Sentencing Guidelines*, 5 FED. SENT. R. 6, available at 1992 WL 230671 at 1-2 (1992) (stating reasons of practicality that make downward departures a useful tool).

<sup>113</sup> See Gowdy, *supra* note 1, at 474 (discussing anecdotal support for contentions that cooperation is necessary to achieve law enforcement objectives); see also Steven M. Cohen, *Effective Screening for Truth Telling: Is It Possible? What Is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817, 827 (2002) (mentioning necessity of relying on informants and accomplices to obtain convictions); Ellen Yaroshesky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 921 (1999) (stating most federal criminal cases are resolved partly on testimony of cooperating defendants).

<sup>114</sup> See Gowdy, *supra* note 1, at 474 (discussing United States Sentencing Commission study). See generally Harris, *supra* note 112, at 18 (mentioning statistics kept by U.S. Sentencing Commission reveal one of every five defendants won mitigation through providing substantial assistance); Weinstein, *supra* note 18, at 564 (stating one of every five defendants sentenced in federal court in 1996 won mitigation by providing substantial assistance).

convictions and fifty-nine guilty pleas.<sup>115</sup> Additionally, cooperator testimony has helped to solve 250 gang-related murders, and helped to convict 300 persons in the Southern District of New York.<sup>116</sup> Although this evidence is mostly anecdotal, it lends strong support to the contention that the use of cooperators is necessary to the success of law enforcement's objectives.<sup>117</sup> Given the necessity of cooperator testimony to law enforcement objectives, it appears that the substantial assistance departure is beneficial, despite all its faults.<sup>118</sup>

### *Benefits to the Criminal Defendant*

Despite the criticisms of substantial assistance departures, they are, in some ways, beneficial to the criminal defendant. Specifically, substantial assistance departures provide criminal defendants with an escape from harsh mandatory minimum sentences.<sup>119</sup> As noted previously, although a motion under

<sup>115</sup> See Gowdy, *supra* note 1, at 474 (discussing United States Sentencing Commission study). See generally Jonathan D. Lupkin, 91 COLUM. L. REV. 1519, 1519 (1991) 5K1.1 and Substantial Assistance Departure: The Illusory Carrot of the Federal Sentencing Guidelines, (mentioning cooperator testimony results in conviction and incarceration of other criminals); Selya & Massaro, *supra* note 1, at 807 (mentioning substantial assistance departures occur with great frequency in instances involving convictions for drug trafficking).

<sup>116</sup> See Gowdy, *supra* note 1, at 475 (quoting Steven M. Cohen, "Singleton" Turns the Tables Too Far, 21 Nat'l L.J. Nov. 16, 1998, at A27). See generally Ellen S. Podgor, *Perspectives on the Role of Cooperators and Informants: White-Collar Cooperators: The Government Employer- Employee Relationships*, 23 CARDOZO L. REV. 795, 800 (2002) (discussing how cooperators information and testimony are key ingredients to operating criminal systems efficiently); Michael A. Simons, *New Voices on the War on Drugs: Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921, 955-56 (2002) (implying cooperation increases chances of getting convictions).

<sup>117</sup> See Gowdy, *supra*, note 1, at 475 (stating despite reliance on anecdotal evidence it is generally accepted that government-rewarded cooperation benefits prosecutors and law enforcement in their crime fighting efforts); see also Cohen, *supra* note 113, at 827 (mentioning necessity of relying on informants and accomplices to obtain convictions); Podgor, *supra* note 116, at 800 (acknowledging cooperator testimony is a key ingredient to operating an efficient criminal system).

<sup>118</sup> See generally Arkin, *supra* note 46, at p.3, col. 1 (discussing substantial assistance departures as incentive for cooperation); Limbert, *supra* note 1, at 251 (stating use of informants is one of law enforcements most essential investigative tools); Podgor, *supra* note 116, at 801 (discussing flaws of cooperation agreements balanced against need for information related to crimes).

<sup>119</sup> See Simons, *supra* note 116, at 924 (stating "cooperation is one of the most viable ways for prosecutors to ameliorate the rigidity and severity of the mandated drug sentences."); see also Lee, *supra* note 73, at 204 (1997) (discussing section 5K1.1 of the Federal Sentencing Guidelines Manual and 18 U.S.C. § 3553 (e) and mentioning how these provisions authorize the court to depart downward from applicable guideline range or mandatory minimum sentence); Limbert, *supra* note 1, at 251 (discussing how substantial assistance departures can be an escape from harsh guideline sentences).



Section 5K1.1 does not permit a judge to depart from mandatory minimum sentences, a second motion under 18 U.S.C. 3553(e) may be made to depart below the mandatory minimum based on a defendant's substantial assistance. This creates a large incentive for the defendant to cooperate with the government because the mandatory minimum sentences instituted by the Sentencing Reform Act of 1984 are severe.<sup>120</sup> Many commentators criticize these mandatory minimum sentences as being unduly harsh, especially with respect to low-level drug offenders.<sup>121</sup> The prospect of receiving a sentence below the mandatory minimum is an obvious benefit. Many members of the defense bar support substantial assistance departures on the basis that they are the only way to protect their clients from the unduly harsh mandatory minimum sentences.<sup>122</sup> It has also been suggested that substantial assistance departures may be motivated, in some cases, by judges' frustrations with a sentencing system that they believe is unduly harsh, rather than law enforcement's need for information.<sup>123</sup>

<sup>120</sup> See Froyd, *supra* note 3, at 1471 (discussing harsh sentences imposed after Sentencing Reform Act of 1984); see also Fried, *supra* note 77, at p. 1, col. 1 (quoting Manhattan attorney describing sentences provided for by Guidelines as "draconian"); Mascharka, *supra* note 19, at 935 (noting current popularity of mandatory minimum sentences).

<sup>121</sup> See Floyd, *supra* note 3, at 1471 (focusing on mandatory minimum sentences for drug offenses); see also Lewis, *supra* note 67, at 2 (noting in vast majority of drug cases filed in Eastern and Southern District of New York cooperation is only way to avoid harsh mandatory minimum prison sentences); Simons, *supra* note 116, at 922-23 (stating "despite frequent criticism of these drug sentences, drug war policy-makers remain devoted to incarceration").

<sup>122</sup> See Arkin, *supra* note 46, at p. 3, col. 1 (acknowledging every defense attorney speaks with their client about benefits of cooperation); see also Lee, *supra* note 73, at 207 (mentioning cooperation is the primary way defendants can receive leniency in sentencing). *But see* Lee & Derdowski, *supra* note 30, at \*3 (noting while substantial assistance departures benefit criminal defendants who provide substantial assistance, many in defense community argue Section 5K1.1 fosters distrust among defendants and creates incentives to lie).

<sup>123</sup> See Richman, *supra* note 30, at \*4 (suggesting sentencing discounts for cooperation may be motivated not by law enforcements' need for information, but that sentences given to cooperators reflect judges frustrations with a sentencing regime they believe is too harsh); see also Plato Cacheris, *Responsibilities of the Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 33, 34 (1996) (discussing judges are practically powerless because mandatory sentencing guidelines have removed their discretion on sentencing). See generally Celesta A. Albonetti, *Legal Issues and Socio-legal Consequences of the Federal Sentencing Guidelines: The Effects of the "Safety Valve" Amendment on Length of Imprisonment for Cocaine Trafficking/ Manufacturing Offenders: Mitigating the Effects of Mandatory Minimum Penalties and Offender's Ethnicity*, 87 IOWA L. REV. 401, 402 (2002) (discussing when safety valves are used to avoid mandatory minimum sentences).

## SHOULD SUBSTANTIAL ASSISTANCE DEPARTURES BE ABOLISHED?

Some commentators advocate the abolishment of substantial assistance departures because of the injustices and inequities these departures create.<sup>124</sup> However it is asserted that despite the problems associated with substantial assistance departures, they are here to stay.

Congress expressly mandated that the Commission in some form should reward cooperation.<sup>125</sup> Obviously, Congress believed it was desirable to reward cooperators at the sentencing stage. In addition to the Congressional mandate that cooperation should be rewarded, substantial assistance departures do provide benefits to both law enforcement agencies,<sup>126</sup> and criminal defendants.<sup>127</sup>

Recently, the legality of substantial assistance departures was called into question by a Tenth Circuit case. In *United States v. Singleton*,<sup>128</sup> the defendant, Singleton was convicted based on testimony of a co-defendant.<sup>129</sup> The co-defendant's testimony was

<sup>124</sup> See Lewis, *supra* note 67, at 2 (arguing substantial assistance departures should be abolished because of costs they impose on society); see also Lee & Derdowski, *supra* note 30, at \* 2-3 (discussing arguments that substantial assistance departures should be abolished); *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, *supra* note 66, at 1513 (discussing criticism of 5K1.1 mentioning it "generates widespread inequities in sentencing and fails to promote the law enforcement goals").

<sup>125</sup> See Selya & Massaro, *supra* note 1, at 803-04 (noting Congress expressly provided Commission take cooperation into account in sentencing); see also Bowman, *supra* note 34, at 13-15 (1999) (discussing substantial assistance as a change made by the Sentencing Reform Act and the Guidelines which allows defendants to receive sentences below statutory minimum); Kimberly S. Kelley, *Substantial Assistance Under the Guidelines: How Smitherman Transfers Sentencing Discretion from Judges to Prosecutors*, 79 IOWA L. REV. 187, 202-03 (1990) (mentioning Congress "directs the Sentencing Commission to allow for a lower sentence when a defendant has provided substantial assistance").

<sup>126</sup> See *Hearings*, *supra* note 3 (testimony of Mr. Steer) (arguing substantial assistance is a critical law enforcement tool); see also Gowdy, *supra* note 1, at 474-75 (discussing numerous examples of how cooperator testimony aids law enforcement); Limbert, *supra* note 1, at 251 (stating use of informants is one of law enforcement's oldest and most essential investigative tools).

<sup>127</sup> See Lee, *supra* note 62, at 177 (discussing substantial assistance departures as way for defendant to avoid mandatory minimum sentences); see also Limbert, *supra* note 1, at 251 (discussing how substantial assistance departures can be an escape from harsh guideline sentences); Podgor, *supra* note 116, at 798 (stating "culpable individuals that can implicate others can receive the benefit of decreased punishment").

<sup>128</sup> *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *rehearing en banc granted, opinion vacated by* 144 F.3d 1361 (Jul. 10, 1998).

<sup>129</sup> See *Singleton*, 165 F.3d at 1298 (stating Singleton was convicted of money laundering and conspiracy to distribute cocaine); see also Lee & Derdowski, *supra* note 30, at \*3 (noting co-defendant testified at Singleton's trial). See generally A. Jack Finklea, *Leniency in Exchange for Testimony: Bribery or Effective Prosecution?*, 33 IND. L. REV. 957, 958 (2000) (explaining that Ms. Singleton's conviction was adduced primarily from

given in exchange for a promise by federal prosecutors to make a substantial assistance motion on behalf of the co-defendant.<sup>130</sup> Singleton appealed her conviction on the ground that the cooperation agreement between the cooperating defendant and the government violated 18 U.S.C. § 201(c)(2).<sup>131</sup> 18 U.S.C. § 201(c)(2) criminalizes offering or promising to give something of value to a person in exchange for testimony given in a court proceeding.<sup>132</sup> The Tenth Circuit held that the federal government was not exempt from 18 U.S.C. § 201(c)(2).<sup>133</sup> The court found that the government's promise to file a substantial assistance departure was something of value to the cooperating defendant and therefore violated 18 U.S.C. § 201(c)(2).<sup>134</sup> On rehearing *en banc*, however, the Court of Appeals for the Tenth Circuit reversed the decision, holding that the term "whoever" does not include the United States when it is acting in its sovereign capacity.<sup>135</sup> The Court found that Assistant United

testimony of co-defendant).

<sup>130</sup> See *Singleton*, 165 F.3d at 1298 (stating co-defendant's testimony was given in exchange for leniency); see also Lee & Derdowski, *supra* note 30, at \*3 (noting co-defendant was promised a substantial assistance motion in exchange for his testimony). See generally Jeffrey M. Schumm, *Courts Rush to Extinguish Singleton, But Are the Embers of the Panel's Decision Still Glowing?*, 27 FLA. ST. L. REV 325, 330 (1999) (indicating testimony by co-defendant came after prosecutor's promise of leniency).

<sup>131</sup> See *Singleton*, 165 F.3d at 1299 (discussing grounds for Singleton's appeal); see also Lee & Derdowski, *supra* note 30, at \*3 (noting Singleton argued that the cooperation agreement violated the federal bribery statute). See generally Schumm, *supra* note 130, at 330 (averring that issue on appeal was 18 U.S.C. § 201(C)(2) as applied to the government).

<sup>132</sup> 18 U.S.C. § 201(C)(2) provides whoever:

directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom; shall be fined under this title or imprisoned for not more than two years, or both.

See generally Dowden, *supra* note 101, at 913; Schumm, *supra* note 130, at 329.

<sup>133</sup> See *Singleton*, 165 F.3d at 1298 (noting holding of *Singleton I*); see also Lee & Derdowski, *supra* note 30, at \*3 (discussing holding of *Singleton I*). See generally Schumm, *supra* note 130, at 330 (explaining that federal prosecutors fall within the intended scope of 18 U.S.C. § 201(C)(2)).

<sup>134</sup> See *Singleton*, 165 F.3d at 1298 (noting holding of *Singleton I*); see also Lee & Derdowski, *supra* note 30, at \*3 (discussing reasoning behind court's holding in *Singleton I*). See generally Dowden, *supra* note 101, at 916 (discussing meaning and scope of "something of value" as applied to 18 U.S.C. § 201(C)(2)).

<sup>135</sup> See *Singleton*, 165 F.3d at 1299-1301 (discussing multiple rationales for excluding application of Section 201(C)(2) to government when acting in sovereign capacity); see also Moreau, *supra* note 12, at 171-72 (noting courts holding that term "whoever" does not apply to federal government acting in its sovereign capacity); Schumm, *supra* note 130, at 332-33 (indicating comprehensive review of use of term "whoever").

States Attorneys, acting as “alter egos” of the United States government, are not prohibited by 18 U.S.C. § 201(c)(2) from offering cooperating defendants a possible sentence reduction in exchange for their cooperation.<sup>136</sup> Since the decision of the Tenth Circuit, a majority of the circuit courts have adopted this interpretation of the federal bribery statute and rejected that the use of substantial assistance departures violates 18 U.S.C. § 201(c)(2).<sup>137</sup>

While there are many problems associated with substantial assistance departures, many of these concerns can be cured through reform to Section 5K1.1.<sup>138</sup> The following section suggests three possible steps that may be taken in an effort to reduce the threat substantial assistance departures pose to goals of uniform sentencing, proportionate sentencing, and deterrence of criminal activity.

#### PROPOSED REFORMS TO SUBSTANTIAL ASSISTANCE DEPARTURES

Substantial assistance departures are likely to remain a part of the federal sentencing scheme.<sup>139</sup> It cannot, however, be ignored that the use of substantial assistance departures is inconsistent

<sup>136</sup> See *Singleton*, 165 F.3d at 1299-1301 (describing federal prosecutors as alter egos of the United States government); see also Dowden, *supra* note 101, at 919-20 (explaining that agreements between defendant and U.S. Attorney were merely avenues for agreements with the United States). See generally Schumm, *supra* note 130, at 331 (indicating that when U.S. Attorneys act within defined parameters of their job, 18 U.S.C. § 201(C)(2) does not apply).

<sup>137</sup> See *United States v. Hunte*, 193 F.3d 173, 174 (3d Cir. 1999) (holding federal bribery statute does not apply to federal prosecutors and collecting cases adopting *Singleton II*); *United States v. James*, 195 F.3d 192, 197 (4th Cir. 1999) (noting circuit courts have unanimously held federal bribery statute is inapplicable to federal government). *But see* Finklea, *supra* note 129, at 988-89 (asserting that guidelines set out should apply with equal weight to both sides in an action).

<sup>138</sup> See generally, Lee & Derdowski, *supra* note 30, at \*2 (recommending measures of reform to Section 5K1.1); Limbert, *supra* note 1, at 251-52 (discussing possible means of reducing problems associated with substantial assistance departures); Stiller, *supra* note 2, at 109-10 (suggesting development of application principles will help to clarify Section 5K1.1); Weinstein, *supra* note 18, at 629-31 (advocating reducing number of substantial assistance departures in order to eliminate problems associated with Section 5K1.1).

<sup>139</sup> See generally Gowdy, *supra* note 1, at 477; Hrvatin, *supra* note, at 7. *But see* Lewis, *supra* note 67, at 2:

When the law reduces the dispensing of justice to a crass exchange of information for sentencing clemency, it ill serves the society it was intended to protect. It also debases the legal system and demeans everyone involved in that system. As a policy choice, the guidelines' monolithic insistence on cooperation has proved a moral failure; as a purportedly pragmatic tool for law enforcement, it has produced enormous suffering with no countervailing benefits. It deserves to, and will be, scrapped. The sooner the better.

with the goals of proportionate sentencing, deterrence, and uniform sentencing.<sup>140</sup> It is asserted that there must be some reform made in order to conform the use of substantial assistance departures to the goals of punishment and the objectives of the Guidelines. The author, to ensure that the use of substantial assistance departures results in sentences that are more proportionate and uniform, and are more effective deterrents, suggests several methods. In order to achieve the goal of uniform sentencing, it is suggested that uniform guidelines be implemented throughout the districts setting forth what type of assistance rises to the level of substantial assistance and the degree of departure permitted for a certain amount of substantial assistance.<sup>141</sup> Guidelines pertaining to the degree of departure will also address proportionality concerns.<sup>142</sup> Finally, limiting the number of substantial assistance motions prosecutors are allowed to give will increase the effectiveness of federal sentencing as a deterrent because defendants will no longer expect to cooperate and receive a lesser sentence.<sup>143</sup>

<sup>140</sup> See Richman, *supra* note 30, at \*1 (concluding that any system allowing leniency in exchange for cooperation threatens sentencing regime based on proportionality; see also Stiller, *supra* note 2, at 108 (arguing lack of application principles in Section 5K1.1 threatens goals of Guidelines); Lewis, *supra* note 67, at 2 (criticizing substantial assistance departures); *Sentencing Report Airs Equity Problems With 'Substantial Assistance' Departures*, U.S. L. WEEK, Feb. 24, 1998, at 2503 (noting substantial assistance departures are inconsistent with Guideline goals).

<sup>141</sup> See Stiller, *supra* note 2, at 110 (suggesting method for determining departure); see also Lee & Derdowski, *supra* note 30, at \*2 (discussing suggestions by scholars advocating nationwide guidelines to determine whether substantial assistance departures are warranted). *But see* Patti B. Saris, *Below The Radar Screens: Have The Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1046 (1997) (indicating absence of and difficulties associated with creation of national departure guidelines).

<sup>142</sup> See generally Stiller, *supra* note 2, at 110 (suggesting method for determining extent of substantial assistance departure); John Council, *Benchmarks; More Downward Departures Granted; In Criminal Cases, Federal Judges Stray from Sentencing Guidelines*, TEX. LAW., Nov. 27, 2000, at 24 (discussing factors taken into consideration for substantial-assistance departures); David E. Rovella, *U.S. Judges' Sentences Dip Below Guidelines Agency Attributes Trend to Surge in Immigration Cases; Members of Congress Call it Abuse of the Rules*, N.J. L.J., Nov. 27, 2000 (noting factors determining departures).

<sup>143</sup> See Weinstein, *supra* note 18, at 629-31 (reasoning that limiting possible motions prosecutors can make will force prosecutors to use substantial assistance motions more sparingly and that when amount of cooperation decreases, so will expectation of cooperation agreements). See generally *Prepared Testimony of Kenneth W. Sukhia Before the House Judiciary Committee Before the Subcommittee on Crime*, FED. NEWS SERV., Mar. 11, 1999 (discussing federal sentencing as deterrent); Elliot Grossman, *Three-Year Investigation Ends in Drug Indictments; Officials Say They've Broken Up a Sophisticated Lehigh Valley Cocaine Distribution Ring*, THE MORNING CALL, Jul. 9, 1999, at B1 (noting that arrests should serve as deterrent to drug dealers, partly because of strict federal

### *Guidelines for Defining Substantial Assistance*

As indicated earlier, there are no uniform federal guidelines dictating what type of assistance constitutes substantial assistance.<sup>144</sup> The lack of formal guidelines makes it difficult for any uniform definition of substantial assistance to be used by prosecutors.<sup>145</sup> The result is that every prosecutor has his or her own idea about what type of assistance may rise to the level of substantial assistance, and deserve a Section 5K1.1 motion.<sup>146</sup> The prosecutor may have to follow guidelines devised in his or her particular district addressing what type of assistance constitutes substantial assistance; but not all districts have established such guidelines.<sup>147</sup> Furthermore, since there are no uniform federal standards, there is disparity and disagreement across the districts as to what constitutes substantial assistance.<sup>148</sup> It is asserted that the creation of uniform federal

sentencing guidelines).

<sup>144</sup> See *Hearings*, *supra* note 3 (testimony of Sen. Thurmond) (acknowledging vast disparities in how individual U.S. Attorney's apply Guidelines); Richman, *supra* note 30, at \*2 (stating that government standards for substantial assistance vary greatly); *Sentencing Report Airs Equity Problems With 'Substantial Assistance' Departures*, U.S. L. WEEK, Feb. 24, 1998, 2503 (discussing difference in federal standards regarding what constitutes substantial assistance); see also Richman, *supra* note 65, at \*2-3 (illustrating how 5K1.1 practices differ across districts by comparing Eastern District of Virginia and Eastern District of Pennsylvania).

<sup>145</sup> See Richman, *supra* note 65, at \*2-3 (discussing varying standards for determining whether substantial assistance has been provided); see also Stiller, *supra* note 2, at 109 (arguing granting unfettered discretion to prosecutors in application of Section 5K1.1 results in varying applications of Section 5K1.1 across districts); *Court Decisions*, N.Y. L.J., Oct. 21, 1998, at 32 (discussing *U.S. v. Harpaul* and standard for substantial assistance).

<sup>146</sup> See Stiller, *supra* note 2, at 109 (discussing how application of Section 5K1.1 is left in hands of U.S. Attorneys and Assistant U.S. Attorneys); see also Richman, *supra* note 30, at \*4 (suggesting that only attorney who is responsible for case can truly assess whether cooperator has truly cooperated); *Sentences Still Vary; U.S. Sentencing Commission*, NAT'L L.J., Feb. 16, 1998, at A12 (reporting inconsistent definition of substantial assistance).

<sup>147</sup> See Maxfield & Kramer, *supra* note 87, at \*6 (noting as of 1995, 20.2% of U.S. Attorney's Offices maintained written substantial assistance policy); see also Lee & Derdowski, *supra* note 30, at \*1 (discussing Commission's finding that 4 out of 5 U.S. Attorney's Offices maintain written substantial assistance policies); *Sentencing Report Airs Equity Problems With 'Substantial Assistance' Departures* U.S. L. W., Feb. 24, 1998, at 2503 (stating that although 80% of U.S. Attorney's Office have written policies and review procedures covering substantial assistance U.S. Attorney's Offices often diverge from these policies).

<sup>148</sup> See Richman, *supra* note 65, at \*1 (noting differing government standards for substantial assistance adds to disparity problem); see also Lee & Derdowski, *supra* note 30, at \*5 (stating disparity results from lack of uniform guidelines to aid prosecutors in determining whether substantial assistance motion is warranted); Stiller, *supra* note 2, at 109-10 (discussing how lack of application principles create arbitrariness in 5K1.1 practice); Weinstein, *supra* note 18, at 564 (acknowledging district to district disparities

standards would ensure that all prosecutors follow the same notion of what substantial assistance is and would help to eliminate sentencing disparity throughout the districts.

It is suggested that the guidelines should include a nonexclusive list of factors to evaluate substantial assistance, and a nonexclusive list of illustrative examples of substantial assistance.<sup>149</sup> Federal prosecutors should also be required to make a short summary of the type of information provided to them by cooperating defendants who received substantial assistance departures, and the summary should be made available as precedent.<sup>150</sup> It is asserted that these suggestions will effectively reduce the amount of confusion and disagreement over what types of information constitute substantial assistance. Arguably, by eliminating some of the disagreement surrounding the definition of substantial assistance and requiring all federal prosecutors to conform to one definition of substantial assistance, the federal sentencing scheme will be one step closer to achieving its goal of uniformity.

### *Guidelines for Determining the Degree of Departure*

As noted previously, commentators have noted there is a lack of guidance in determining the degree of the departure once a federal judge has decided that a substantial assistance departure is warranted.<sup>151</sup> The lack of guidelines regarding the degree of

in application of Section 5K1.1 threatens goals of uniformity and elimination of disparity).

<sup>149</sup> See Lee & Derdowski, *supra* note 30, at \* 5 (noting many scholars have suggested establishing nationwide guidelines to guide prosecutors in determining whether cooperating defendants have provided substantial assistance); see also Howard Mintz, *The Sentencing Game; Federal sentencing guidelines were supposed to bring consistency to punishment and curtail deal making in the justice system. In the Northern District, the reforms have just made the bargaining more complicated*, THE RECORDER, Jul. 7, 1992, at 1 (acknowledging need to clarify definition of substantial assistance); Stiller, *supra* note 2, at 109-110 (suggesting the Commission develop and implement application principles for Section 5K1.1).

<sup>150</sup> See generally *Sentencing Report Airs Equity Problems With 'Substantial Assistance' Departures*, U.S. L. WEEK, Feb. 24, 1998, 2503 (suggesting prosecutors be required to submit statement of reasons for making 5K1.1 motion); Lee, *supra* note 62, at 129 (noting that Terwillinger Memorandum, issued by Justice Department in 1992, requires prosecutors to make statement of reasons supporting all filed 5K1.1 motions); see also Abramowitz, *supra* note 15, at 3 (citing U.S. v. Harpaul).

<sup>151</sup> See Lee & Derdowski, *supra* note 30, at \*7 (stating there are no guidelines to aid judges in determining extent of departures); see also Stiller, *supra* note 2, at 108 (discussing lack of guidance exists for application of 5K1.1); Maro Robbins, *Drug Plot Ringleader Gets 8 Years; Contrition, Guilty Plea Draw Lighter Sentence for Former S.A. Policeman*, SAN ANTONIO EXPRESS-NEWS, Jun. 20, 2002, at 1B (discussing judge's leeway in deciding punishment).

departures increases the lack of uniformity and may result in more disproportionate sentences.<sup>152</sup> The degree of departure granted to a cooperating defendant is currently determined by an individual judge, with only the recommendation of the federal prosecutor as a guideline.<sup>153</sup> This method of determining the degree of departures leaves considerable room for judges to use their discretion and invariably leads to different levels of departures for defendants who committed similar crimes and provided similar assistance.<sup>154</sup> The existence of formal, uniform guidelines for determining the degree of departure that consider both the type of assistance provided and the crime the defendant is charged with will help to ensure that the degree of departures for similarly situated defendants is more uniform.<sup>155</sup> This will help to increase uniformity and further the goals of the Guidelines.<sup>156</sup> Additionally, the use of formal guidelines for determining the degree of the departure to be granted will help to ensure that sentences are proportionate to the crime

<sup>152</sup> See Mary Wisniewski Holden, *Questions remain after 10 years of sentencing guidelines*, CHI. LAWYER, Dec. 1997, at 8 (commenting on national disparities of substantial assistance departures); Stiller *supra* note 2, at 109 (illustrating how lack of uniformity increases disparity); see also *Hearing of the Crime Subcommittee of the House Judiciary Committee*, FED. NEWS SERV., Dec. 15, 1995 (discussing how discretion in substantial assistance departure is sometimes being employed inconsistently).

<sup>153</sup> See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. K, cmt 3 (2002) (providing sentencing judge should give substantial weight to prosecutor's evaluation of defendant's assistance when determining extent of departure); see also Stiller, *supra* note 2, at 108 (stating that while judges have sole discretion in determining extent of departure, the Commission provides substantial weight should be given to prosecutors' recommendations); Brad Zinn, *Waynesboro Man Could Get Life Term*, THE DAILY NEWS LEADER, Nov. 14, 2002, at 3A (noting judge's authority with substantial assistance departure).

<sup>154</sup> See Richman, *supra* note 65, at \*1 (stating that due to the lack of guidance in determining how cooperators should be treated, two similarly situated cooperators will be treated differently). See generally Selya & Massaro, *supra* note 1, at 825 (noting judges have discretion in determining degree of departure); *Prepared Statement of Carmen D. Hernandez on Behalf of the National Association of Criminal Defense Lawyers*, FED. NEWS SERV., Oct. 13, 2000 (finding that mandatory minimum penalties are being disproportionately applied).

<sup>155</sup> See Stiller, *supra* note 2, at 109 (suggesting Sentencing Commission should research and establish uniform sentence reduction for substantial assistance departure); see also Lee, *supra* note 62, at 178 (suggesting limit on extent of departure judge may grant); Lee & Derdowski, *supra* note 30, at \*1-3 (noting one suggested cause of inconsistency is lack of guidance for judges to determine degree of departure).

<sup>156</sup> See Lee & Derdowski, *supra* note 30, at \*7 (stating lack of guidance in determining amount of departure creates inconsistency); see also Richman, *supra* note 65, at \*1 (discussing how lack of guidelines as to how cooperators should be treated creates increased disparities); *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, *supra* note 66, at 1504 (noting that inequitable application of Section 5K1.1 compromises efficacy of the Sentence Guidelines as a whole).



committed while still taking into consideration the Congressional mandate that stated cooperation should be rewarded in the sentencing process.<sup>157</sup> The guidelines could limit the degree of departure permitted based on the seriousness of the crime committed and/or the defendant's criminal history. This scheme would be more consistent with the overall purposes of the Guidelines and traditional goals of punishment.<sup>158</sup>

It is suggested that the degree of the departure should be subject to the consideration of several factors that are uniform throughout the districts.<sup>159</sup> As noted above, these guidelines would help to ensure that the degrees of departures are uniform for similarly situated defendants throughout the districts.<sup>160</sup> These considerations should include the seriousness of the offense the cooperating defendant is charged with and the cooperating defendant's criminal history. If a cooperating defendant has committed a serious crime or is a repeat offender, the possible departure should be limited in some way.<sup>161</sup> This

<sup>157</sup> See Lee & Derdowski, *supra* note 30, at \*7 (suggesting judges should not depart to the same extent for defendants of varying culpabilities merely because defendants provided similar assistance); *cf.* Lee, *supra* note 62, at 128 (stating that sliding scale limits on departures would adequately address concerns about fairness to individual concerns). See generally *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, *supra* note 66, at 1524-35 (discussing proposed revision of Section 5K1.1 aimed in part at remedying the proportionality problems inhering in the present system).

<sup>158</sup> See Stiller, *supra* note 2, at 110 (stating uniform methods of determining extent of departures would cure problems associated with Section 5K1.1); *cf.* *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, *supra* note 66, at 1531 (describing proposal which, also in an effort to serve the overall objectives of the Guidelines, would seek to narrow the variance in granted departures by delineating specific factors to assist courts in making their determination); see also Lee & Derdowski, *supra* note 30, at \*9 (considering argument that binding plea agreements might reduce inconsistencies but concluding that some inconsistency may be warranted and that up-front plea agreements would not be a panacea).

<sup>159</sup> See *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, *supra* note 156, at 1531 (arguing that unwarranted disparities in magnitude of departures would be significantly reduced if the court had specific factors to consider); *cf.* Lee, *supra* note 62, at 172 (discussing guidelines' provision that particular factors previously used by sentencing judge should not be used as a basis for departure); Stiller, *supra* note 2, at 110 (discussing method of determining extent of departures, whereby most defendants receiving substantial assistance departures would be granted a presumptive discount, referred to as "the heartland of substantial assistance").

<sup>160</sup> See Stiller, *supra* note 2, at 110 (suggesting a system of uniform departures would cure problems associated with Section 5K1.1); see also Lee & Derdowski, *supra* note 30, at \*7 (discussing need for some guidance as to how to determine extent of departures); *Proposal*, *supra* note 156, at 1523-24 (commenting that disparity of departure rates among district courts is attributable to lack of guidance given to judges).

<sup>161</sup> See generally, Lee & Derdowski, *supra* note 30, at \*7 (noting judges should not be forced to grant similar departures for defendants of different culpabilities); see also Lee,

provision will ensure that serious, repeat offenders do not receive minimal sentences.<sup>162</sup> Taking the defendant's culpability into account when determining the degree of the departure helps to achieve the goal of proportionate sentencing while remaining consistent with the Congressional mandate that cooperation should be rewarded.<sup>163</sup>

### *Limiting the Number of Substantial Assistance Motions Made*

Limiting the number of substantial assistance motions made by federal prosecutors will help to alleviate many perceived problems with substantial assistance departures, some not addressed in this note.<sup>164</sup> It is asserted limiting the amount of substantial assistance motions will help to increase the effectiveness of the Guidelines as a deterrent. As noted earlier, many commentators have argued that the use of substantial assistance departures sends criminals the wrong message and therefore does not act as an effective deterrent.<sup>165</sup> If the numbers of substantial assistance motions are limited, prosecutors will not

*supra* note 62, at 178-79 (suggesting extent of all departures should be limited according to sliding scale to address fairness concerns); *cf.* Galin, *supra* note 87, at 1251 (2000) (describing guidelines' sentencing mechanics which already contemplate these factors by using a graph system which measures along one axis the severity of the crime and along the other axis the offender's criminal history).

<sup>162</sup> See Lee & Derdowski, *supra* note 30, at \*7 (suggesting more culpable defendants should receive smaller departures); see also Lee, *supra* note 62, at 179 (noting extent of departures should vary slightly based on fairness to individual concerns); *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, *supra* note 66, at 1530 (discussing proposed revision of 5K1.1 which would direct a court to consider the relative culpability of defendant and party being prosecuted or investigated when contemplating degree of departure).

<sup>163</sup> See Lee & Derdowski, *supra* note 30, at \*7 (suggesting culpability be taken into account when determining extent of departures); see also Lee, *supra* note 62, at 179 (discussing reasons that warrant variation in extent of departure); *cf.* *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, *supra* note 66, at 1530 (offering remedy to "cooperation paradox" by proposing that courts be permitted to aggregate assistance of several defendants when measuring assistance of any single defendant).

<sup>164</sup> See Weinstein, *supra* note 18, at 630-32 (discussing benefits to limiting number of substantial assistance departure motions); see also Ellen Yaroshefsky, *supra* note 113, at 963 (recognizing Weinstein's proposal). *But see* George C. Harris, *supra* note 112, at 34 (commenting that Weinstein does not explain how this limit would be monitored or enforced).

<sup>165</sup> See Chambers, *supra* note 18, at 13, col. 1 (suggesting use of substantial assistance departures send criminals the wrong message); see also Fried, *supra* note 77, at sec. A, p. 1, col. 1 (quoting attorney Gerald B. Lefcourt, "[I]t creates the informer system, whereby if you please the Government, you go free"); Lee, *supra* note 62, at 172 (commenting that most defendants will continue to cooperate regardless of prosecutorial arbitrariness because it is one of the only ways defendants can receive a lower sentence).

be so willing to incite defendants to cooperate with the promise of a motion when the defendant's cooperation is not an utter necessity.<sup>166</sup> Prosecutors will use the motions sparingly for fear that they will need one later on to obtain vital information from a defendant and have already used up their allotted amount.<sup>167</sup> Defendants are less likely to assume they will be able to receive a lesser sentence in exchange for information if the number of substantial assistance motions are limited and used by prosecutors only as a last resort.<sup>168</sup> Since defendants are less likely to expect a lesser sentence in exchange for cooperation, and rather expect a harsh sentence, they are more likely to refrain from committing crimes.<sup>169</sup>

It is suggested that each federal prosecutor be limited to a certain number of substantial assistance motions for a period of time.<sup>170</sup> The number of motions permitted and the period of time should be determined by researching the current substantial

<sup>166</sup> See Weinstein, *supra* note 18, at 630 (stating limiting amount of substantial assistance departure motions would force prosecutors to make better use of their discretion in selecting cooperators); see also Lee, *supra* note 62, at 109 (commenting that the government motion requirement of section 5K1.1 gives prosecutors ultimate authority to decide if defendants will receive a departure); Galin, *supra* note 99, at 1277 (arguing that enticing a defendant to cooperate with a downward departure motion, only to deny such a motion by exploiting a subjective condition in the contract, compromises government's integrity).

<sup>167</sup> See Weinstein, *supra* note 18, at 630-31 (arguing prosecutors weigh decisions to use cooperation against other possible instances of cooperation). *But see*, Lee, *supra* note 62, at 108 (focusing critique not on the overuse of departures, but instead on problematic autonomy of prosecutors in opting not to offer a departure in any given case). See generally *The American College of Trial Lawyers Report and Proposal on Section 5K1.1 of the United States Sentencing Guidelines*, *supra* note 66, at 1528 (reporting survey results of those who believe Section 5K1.1 vests too much discretion in hands of prosecutor).

<sup>168</sup> See Weinstein, *supra* note 18, at 629-30 (stating that by reducing incentives to cooperate, cooperation would in fact decrease); cf. Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1506 n.111 (1993) ("Substantial assistance is part of the larger context of sales of information, and such sales have always been consensual"). See generally *U.S. v. Marino*, 983 F.2d 1150 (1st Cir. 1993) (stating that Section 5K1.1 provides defendants an incentive to cooperate in the administration of justice).

<sup>169</sup> See *U.S. v. Smith*, 909 F.2d 1164, 1168 (8th Cir. 1990) (stating there is a deterrence value in a longer sentence); see also *U.S. v. Turner*, 998 F.2d 534, 536 (7th Cir. 1993) (noting sentences should deter criminal conduct). See generally Cotton, *supra* note 49, at 1315 (stating deterrence theories focus on threat of punishment to prevent people from engaging in criminal conduct).

<sup>170</sup> Cf. Samuel A. Perroni & Mona J. McNutt, *Criminal Contingency Fee Agreements: How Fair Are They?*, 16 U. ARK. LITTLE ROCK L.J. 211, 231 (1994) (stating how "the prosecution could be allowed to offer any two concessions in exchange for cooperation and testimony, but no more"); Weinstein, *supra* note 18, at 630 (suggesting number of substantial assistance motions be limited by district). See generally Podgor, *supra* note 116, at 798-99 (criticizing the inconsistent application of assistance motions).

assistance practices within the district.<sup>171</sup> Additionally, some provisions should be made, by which, if there is a vital need for a prosecutor to grant a substantial assistance motion and he or she has already used all of his or her allotted motions, the prosecutor would be permitted to make the motion.<sup>172</sup> However, use of a provision such as the one described should only be used as a last resort in an extreme case.

## CONCLUSION

The substantial assistance departure provided for in Section 5K1.1 of the Guidelines has been the subject of much controversy.<sup>173</sup> The use of such departures impedes various goals of the Guidelines and traditional sentencing goals.<sup>174</sup> Substantial assistance departures increase disparity in sentencing, impede deterrence objectives, and create disproportionate sentences.<sup>175</sup> Despite the problems with the use of substantial assistance departures, they serve a greater need.<sup>176</sup> The use of substantial

<sup>171</sup> See Weinstein, *supra* note 18, at 630 (suggesting limit of substantial assistance departure should be 15% of cases); see also Perroni & McNutt, *supra* note 170 (proposing that in plea agreements the prosecution be allotted two concessions for cooperation and testimony). See generally Nora V. Demleitner, *Immigration Threats And Rewards: Effective Law Enforcement Tools In The "War" On Terrorism?*, 51 EMORY L.J. 1059, 1086-87 (2002) (comparing local diversity in Utah, where 0.5% of offenders had departures based on assistance motions, with 40.5% in the Central District of Illinois).

<sup>172</sup> See Ronald S. Safer & Matthew C. Crowl, *Substantial Assistance Departures: Valuable Tool or Dangerous Weapon?*, 12 FED. SENT. R. 41, available at 1999 WL 1458621, at \*6 (noting prosecutors need flexibility in making substantial assistance motions). See generally Gowdy, *supra* note 1, at 474-75 (emphasizing need for substantial assistance departures to aid law enforcement); Arkin, *supra* note 46, at p. 3, col. 1 (noting necessity of cooperation to law enforcement is well established).

<sup>173</sup> See e.g., Abramowitz, *supra* note 15, at p. 3, col. 1 (discussing problems with Section 5K1.1); Lewis, *supra* note 67, at 2 (criticizing use of substantial assistance departures); Stiller, *supra* note 2, at 107 (criticizing lack of application principles for 5K1.1 practice).

<sup>174</sup> See Stiller, *supra* note 2, at 107 (stating lack of application principles for substantial assistance departures circumvent goals of Guidelines); see also Richman, *supra* note 30, at \*4 (noting substantial assistance departures threaten sentencing goals). But see J. Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT. R. 180 available at 1999 WL 730985, \*1 (Vera Inst.Just.) (1999) (discussing how the guideline's objectives were reached).

<sup>175</sup> See Richman, *supra* note 30, at \*1-3 (discussing various problems with use of substantial assistance departures); see also Lewis, *supra* note 67, at 2 (noting problems with use of cooperation encouraged by Guidelines). But see J. Breyer, *supra* note 174 (arguing that although "the guideline system is far from perfect" it is not deserving of its current criticisms).

<sup>176</sup> See Lee & Derdowski, *supra* note 30, at \*4 (concluding that while substantial assistance departures have their drawbacks the benefits outweigh the costs); see also Richman, *supra* note 30, at \*1-3 (noting substantial assistance departures may be the only way in which to obtain critical information). But see Lewis, *supra* note 67, at 2

assistance departures creates incentives for defendants to work with the government by providing information and testimony.<sup>177</sup> The assistance cooperating defendants supply help to arrest and convict many serious offenders.<sup>178</sup> Arguably many of these offenders would not be arrested or convicted if not for the use of substantial assistance departures, because without the promise of a lesser sentence many defendants would choose to remain silent. Additionally, substantial assistance departures provide the possibility of a decreased sentence to defendants, who face severely harsh penalties under mandatory minimum sentencing laws.

Given the enormous benefits of substantial assistance departures, they appear to be here to stay, however, given the problems with such departures there is need for reform. There are many suggestions as to how Section 5K1.1 can be reformed thereby ensuring that the use of substantial assistance departures yield results consistent with the goals of sentencing and the goals of the Guidelines. Some of the various ways Section 5K1.1 can be reformed is limiting the number of substantial assistance motions made by federal prosecutors,<sup>179</sup> including a comprehensive, uniform definition of substantial assistance,<sup>180</sup> and creating guidelines to determine the degree of

(arguing substantial assistance departures are more costly than beneficial and therefore should be eliminated).

<sup>177</sup> See Richman, *supra* note 30, at \*4 (discussing need for inducements to obtain information from criminals); see also Arkin, *supra* note 46, at p.3, col. 1 (suggesting substantial assistance departures create incentives to cooperate); Chambers, *supra* note 18, at p.13, col. 1 (noting arguments made by former U.S. Attorney that without recognition criminals will not be induced into cooperating).

<sup>178</sup> See Gowdy, *supra* note 1, at 474-475 (discussing how information bought with leniency aids law enforcement); see also Limbert, *supra* note 1, at 251 (stating cooperation is essential to law enforcement); Richman, *supra* note 30, at \*4 (noting cooperator testimony is essential to prosecutions).

<sup>179</sup> See Weinstein, *supra* note 18, at 630 (suggesting placing limits on number of substantial assistance departures that are permitted will alleviate problems associated with use of these departures); see also Scott A. Gilbert & Molly T. Johnson, *The Federal Judicial Center's 1996 Survey Of Guideline Experience*, 9 FED. SENT. R. 87, available at 1996 WL 931748, at \*4 (reporting that 5% of district judge's and chief probation officer's polled with open-ended survey questions wanted, as their one change to the guidelines, to reduce prosecutor's discretion). See generally Michael Tonry, *GAO Report Confirms Failure Of U.S. Guidelines*, 5 FED. SENT. R. 144, available at 1992 WL 439717, at \*7-8 (questioning whether the Guidelines shifted too much power to prosecutors).

<sup>180</sup> John Scalia, *The Impact Of Changes In Federal Law And Policy On The Sentencing Of, And Time Served In Prison By, Drug Defendants Convicted In U.S. District Courts*, 14 FED. SENT. R. 152, available at 2002 WL 31308054, at \*4 (stating how "the U.S. Sentencing Commission reported that substantial assistance was not consistently defined across judicial districts"); see also Susan Katzenelson & Pamela

departure.<sup>181</sup>

Montgomery, *Report To The U.S. Sentencing Commission By Its Substantial Assistance Staff Working Group*, 11 FED. SENT. R. 18, available at 1998 WL 911927, at \*12 (identifying probation officer concerns that prosecutors apply varying standards as to what constitutes substantial assistance). See generally Lee & Derdowski, *supra* note 30, \*1-7 (discussing recommendations of establishing nationwide guidelines defining substantial assistance).

<sup>181</sup> See Stiller, *supra* note 2, at 107 (suggesting guidelines for determining degrees of departures); see also Lee & Derdowski, *supra* note 30, at \*4 (discussing methods of bringing consistency to the magnitude of substantial assistance departures). See generally Avern Cohn, *Advice To The Commission – A Sentencer’s View*, 8 FED. SENT. R. 14, available at 1995 WL 803971, at \*2 (giving three suggestions to alleviate guideline disparities).

