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Prosecutorial Discretion and Substantial Assistance: The Power and Authority of Judicial Review - United States v. Wade

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NOTES

PROSECUTORIAL DISCRETION AND SUBSTANTIAL ASSISTANCE: THE POWER AND AUTHORITY OF JUDICIAL REVIEW — *United States v. Wade*

INTRODUCTION

> Good and evil, reward and punishment, are the only motives to a rational creature: these are the spur and reins whereby all mankind are set on work, and guided.[1]

The American criminal justice system has long been a system of rewards and punishments. After being arrested for criminal behavior, defendants may give substantial assistance to authorities in hopes that those authorities will offer reciprocal assistance during sentencing.[2] Yet, not all prosecutors reward defendants who make good faith efforts to assist the government in convicting co-conspirators.[3] When this happens in United States District Court, the United States Sentencing Guidelines (Guidelines) control.[4] When a defendant substantially assists the government, only the government may move for a reduced sentence under the guidelines.[5]

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1. John Locke, *Some Thoughts Concerning Education* I:54 (1693).
2. United States v. Wade, 112 S. Ct. 1840, 1842 (1992).
3. *Id.*
4. United States Sentencing Commission, GUIDELINES MANUAL (Nov. 1, 1991) [hereinafter *Guidelines Manual*].
5. *Id.* at § 5K1.1. This reduction of sentence is called a departure. § 5K1.1 provides:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines. (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evalua-

Prior to *United States v. Wade*,[6] a case originating in the Middle District of North Carolina, neither defendants nor the district courts could inquire into prosecutor's reasons for refusing to move for departure, no matter how unjust the decision appeared.[7] The Fourth Circuit held that this area of prosecutorial discretion was beyond the scope of the district court's review.[8] Reversing the Fourth Circuit, the Supreme Court held that prosecutorial determinations of substantial assistance, like other prosecutorial discretionary powers, may be reviewable if the determination was made on an unconstitutional basis.[9]

This Note analyzes the *Wade* case and argues that the Supreme Court correctly found that a district court can review any prosecutorial decision when it is based on an unconstitutional basis. First, the Note addresses the case history and background behind "substantial assistance" and the Guidelines. Second, it analyzes the reasoning of the Court: whether the ruling furthers the purpose of the Guidelines; whether protections under the Due Process Clause apply; whether the ruling is consistant with other holdings concerning analogous prosecutorial powers; and whether a threshold showing of unconstitutional bias is a necessary prerequisite before review. Third, it discusses the impact of *Wade* on future cases and the proposed changes to Guidelines.

THE CASE

When police searched the house of Harold Ray Wade, Jr. of Gibsonville, North Carolina on October 30, 1989, they found 978 grams of cocaine, two handguns and more than $22,000 in cash.[10] After the search and his arrest, Wade, in absence of a plea agreement, cooperated with authorities and "provid[ed] valuable assistance to the government in other prosecutions, leading to the con-

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tion of the assistance rendered; (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant's assistance.

6. United States v. Wade, 936 F.2d 169 (4th Cir. 1991).

7. *Id.* at 170.

8. *Id.* at 173.

9. United States v. Wade, 112 S. Ct. 1840, 1843-44 (1992).

10. *Id.* at 1842.

viction of co-conspirators."[11] Wade pleaded guilty to: (1) distribution of cocaine; (2) possession of cocaine with intent to distribute it, in violation of 21 U.S.C. § 841(a)(1); (3) conspiracy, in violation of 21 U.S.C. § 846; and (4) for using or carrying a firearm during and in relation to a drug crime, in violation of 18 U.S.C. § 924(c)(1).[12]

Under the Guidelines, Wade faced a sentencing range of 97-121 months, but he was also "subject to a 10-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(B), narrowing the actual range to 120-121 months."[13] At sentencing the government refused to move for a downward departure for substantial assistance and to comment on his cooperation.[14] Wade's lawyer, Mr. Matthew Martin, urged the court to sentence Wade "below the 10-year minimum for the drug counts to reward Wade for his assistance to the government."[15] Moreover, the court denied Wade's attempt to ascertain why the government refused to so move.[16] Because the government did not move for departure for substantial assistance under 18 U.S.C. § 3553(e)[17], U.S. District Court Judge N. Carlton

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11. *Wade*, 936 F.2d at 170.
12. *Wade*, 112 S. Ct. at 1842.
13. *Id.*
14. *Wade*, 936 F.2d at 170.
15. *Wade*, 112 S. Ct. at 1842.
16. *Wade*, 936 F.2d at 171.
17. 18 U.S.C. § 3553(e) (1988). § 3553(e) provides:

> Limited authority to impose a sentence below a statutory minimum. — Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 944 of title 28, United States Code.

Id. Section 994(n) of 28 U.S.C. provides:

> The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or presecution of another person who has committed an offense. 28 U.S.C. § 944(n) (1988).

The significant difference between GUIDELINES MANUAL § 5K1.1 and 18 U.S.C. § 3553(e) is that under § 3553(e), a sentencing judge may depart *below* the mandatory minimum, while § 5K1.1 only allows departure to the mandatory minimum.

Tilley ruled that he had "no power to go beneath the minimum."[18] Because he also pleaded guilty to a firearms charge which carried a mandatory 60-month consecutive sentence, Wade received 180 months.[19]

On appeal, Wade argued that inquiry into the government's reason for not moving for downward departure was relevant to determine whether the prosecutor acted "arbitrarily or in bad faith."[20] The Fourth Circuit Court of Appeals held that, according to the plain statutory language of 18 U.S.C. § 3553(e), the government must first move for downward departure before a court can consider such a departure.[21] Wade also argued that the sufficiency of the defendant's assistance as well as the prosecutor's reasons and motives were within the court's purview.[22] Wade argued that failure to review the prosecution's good faith frustrates the expressed Congressional policy behind substantial assistance departure.[23] Based on the holding that judicial review of a substantial assistance departure can only begin with a government sponsored motion, the court held that, absent such a motion, the defendant may not inquire into the government's reasons and motives.[24] The court held "to conclude otherwise would result in undue intrusion by the courts into the prosecutional discretion granted by the statute to the government."[25] Thus, the Fourth Circuit affirmed the judgment of the district court.[26]

Upon the grant of writ of certiorari, Wade again argued that district courts can enforce constitutional limitations on a prosecutor's discretion concerning a motion of substantial assistance.[27] The Supreme Court agreed, declining to distinguish a prosecutor's refusal to file a substantial assistance motion from other prosecutorial decisions.[28] The Supreme Court held that "federal district courts have authority to review a prosecutor's refusal to file

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18. *Wade*, 112 S. Ct. at 1842.

19. *Id.* Wade also pleaded guilty to violation of 18 U.S.C. 924(c), a firearms statute, which carries a 60-month minimum consecutive term.

20. *Wade*, 936 F.2d at 171.

21. *Id.*

22. *Id.*

23. *Id.*; *see* 28 U.S.C. § 994(n) and 18 U.S.C. §§ 3141-3150 (1988).

24. *Wade*, 936 F.2d at 172.

25. *Id.*

26. *Id.* at 173.

27. United States v. Wade, 112 S. Ct. 1840, 1843 (1992).

28. *Id.*

a substantial assistance motion and to grant a remedy if they find the refusal was based on an unconstitutional motive" such as a defendant's race or religion.[29] Although the Court agreed with Wade's argument, the Court did not remand the case for determination of unconstitutional motive, stating that Wade had failed to make a "substantial threshold showing" of improper motive.[30] Wade asserted that his attempt to make allegations of the government's improper motive was thwarted by the district court's belief that it had no power to inquire into the reason or motive of the prosecutor.[31] The Court stated, however, that "the District Court expressly invited Wade's lawyer to state for the record what evidence he would introduce to support his position if the court were to conduct a hearing on the issue."[32] Wade responded with a proffer of the extent of Wade's cooperation with the government.[33] The Court held that mere assistance alone is insufficient for relief by the court.[34] Therefore, Wade failed to make the requisite threshold showing.[35]

BACKGROUND

Due to the public pressure on Congress to address the increasing problems of drug abuse and distribution, violent crime, and repeat offenders, Congress enacted major federal criminal law reforms, including the Sentencing Reform Act of 1984 (Act).[36] The Act also sought to achieve "honesty in sentencing"[37] and to restrict "unjustifiably wide" disparity in sentences imposed on offenders with similar crimes and similar criminal histories.[38] To further the goals of the Act, Congress created the United States Sentencing

29. *Id.* at 1843-44.
30. *Id.* at 1844 (quoting Brief for Petitioner 26).
31. *Id.*
32. United States v. Wade, 112 S. Ct. 1840, 1844 (1992).
33. *Id.*
34. *Id.*
35. *Id.*
36. Pub. L. No. 98-473, 98 Stat. 1837, 1976 (codified at 18 U.S.C. §§ 3141-3150 (1988)).
37. S. REP. No. 225, 98th Cong., 2nd Sess. 38, 56 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3239 (Concerned that offenders were not serving the sentences imposed by judges due to actions by the Parole Commission, Congress abolished parole.). *See also* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 212(a), 98 Stat. 1837, 1987, 2008-09 (codified as amended at 18 U.S.C. § 3624 (1988)).
38. *See* S. REP. No. 225 at 65.

Commission (Commission), a body which would be charged with promulgating sentencing policies and practices for the federal criminal justice system.[39] The Commission had the power to draft sentencing guidelines that would

> provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.[40]

In November, 1987 the Guidelines developed by the Commission were not only the law, but they withstood constitutional challenge.[41] In *Mistretta v. United States*[42], the Supreme Court held that the delegation of the power to create sentencing guidelines did not violate the separation of powers clause.[43] A key criticism, however, is that the guidelines take too much discretion away from the judge while placing much more discretion in the hands of the prosecutor.[44] The discretion given to the prosecutor "tips so one-sidely in the prosecutor's favor as to 'disturb the due process balance essential to the fairness of criminal litigation.' "[45]

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39. 28 U.S.C. § 991(b)(1) (1988).

40. 28 U.S.C. § 991(b)(1)(B) (Supp. V. 1987).

41. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1837, 2017-34 (codified as amended at 28 U.S.C. §§ 991-998 (1988)). Congress ordered the Commission to complete the Sentencing Guidelines by April, 1987. The Guidelines then would automatically take effect six months later unless Congress passed a law to the contrary.

42. 488 U.S. 361 (1989).

43. *Id.* The Court rejected arguments that Congress violated the nondelegation doctrine by delegating excessive legislative authority to the Commission and that the Act was unconstitutional. *Id.* at 371.

44. Kimberly S. Kelley, Comment, *Substantial Assistance Under the Guidelines: How* Smitherman *Transfers Sentencing Discretion from Judges to Prosecutors*, 76 IOWA L. REV. 187 (1990); Cynthia K.Y. Lee, *The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement*, 23 IND. L. Rev. 681 (1990).

45. Bennett L. Gershman, *The Most Fundamental Change in the Criminal Justice System: The Role of the Prosecutor in Sentence Reduction*, 5 CRIM. JUST. 2, 2 (1990) (quoting United States v. Roberts, 726 F. Supp. 1359, 1363 (D.D.C. 1989)). This new sentencing regime has resulted from two factors. First, in its charging function, the prosecution can select the precise charges to bring against a defendant from a broad arsenal of often overlapping criminal statutes and aggra-

To understand the concept of departure under Section 5K1.1 of the Guidelines, one must first understand the process of establishing the guideline range.[46] To calculate the appropriate guideline range, the district judge begins by finding the statute of conviction in the statutory index (Appendix A)[47]. The index then refers the judge to the proper section of Chapter 2 of the Guidelines.[48] The Guidelines organize federal criminal statutes under nineteen headings.[49] If the statutory index refers to more than one

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vating factors enumerated in the Guideline provisions. For example, if a person is arrested in possession of two ounces of crack, the prosecutor may have a discretionary choice among the following thirteen statutory options: simple possession of crack, 21 U.S.C. § 844 (1988) (statutory punishment of one year); possession with intent to distribute crack, 21 U.S.C. § 841(a) (1988) (twenty-year maximum); possession with intent to distribute 5 grams or more of crack, 21 U.S.C. § 841(b)(1)(B)(iii) (1988) (five-year mandatory minimum, which can be doubled at prosecutor's option if defendant is charged with distribution to person under age of twenty-one, or within 1,000 feet of a school); possession with intent to distribute 50 grams or more of crack, 21 U.S.C. § 841(b)(1)(A)(iii) (1988) (ten-year mandatory minimum to life); conspiracy, 18 U.S.C. § 371 (1988) (five-year maximum); drug conspiracy involving the distribution of 5 grams or more of crack, 21 U.S.C. § 841(b)(1)(B)(iii) (1988) (five-year mandatory minimum); drug conspiracy involving the distribution of 50 grams or more of crack, 21 U.S.C. §§ 841(b)(1)(A)(iii) and § 846 (1988) (ten-year mandatory minimum to life); engaging in a pattern of racketeering, 18 U.S.C. §§ 1962(a), 1963 (1988) (twenty-year maximum); conspiracy to engage in a pattern of racketeering, 18 U.S.C. §§ 1962(d), 1963 (1988) (twenty-year maximum); engaging in a continuing criminal enterprise, 21 U.S.C. § 848 (1988) (ten-year mandatory minimum to life); use of firearm in aid of drug trafficing, 18 U.S.C. § 924(c) (1988) (five-year mandatory minimum; ten years if the weapon is a machine gun); use of juveniles, 21 U.S.C. § 845(b) (1988) (one-year minimum); drug trafficking by one previously convicted of a similar drug offense, 21 U.S.C. §§ 841(b)(1)(A) and (B)(iii) (1988) (ten-year mandatory minimum to life if 5 grams or more; twenty years to life if 50 grams or more). Second, the mandatory sentencing laws and Guidelines have purposely produced relative inflexibility with respect to the sentence. Thus, once the prosecutor has decided on the charges, the judicial contribution, in many cases can be almost ministerial. Since the prosecutor is able to make a very precise selection of the ultimate sentence, the judge's role is simply to ratify the choice of sentence detemined by the prosecutor.

46. *See* GUIDELINES MANUAL.

47. *Id.*

48. *Id.*

49. *Id.* Headings include: "Offenses Against the Person" (Part A); "Offenses Involving Property" (Part B); "Offenses Involving Public Officials" (Part C); "Offenses Involving Drugs" (Part D); "Offenses Involving Criminal Enterprises and Rackeetering" (Part E); "Offenses Involving Fraud and Deceit" (Part F); "Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obsenity" (Part G); "Offenses Involving Individual Rights" (Part H); "Offenses Involving Public

heading, then the judge must determine which heading is most appropriate to the case at hand.[50] Once the judge determines the appropriate section in Chapter 2, he must find the base offense level.[51] Levels may be added to the base level for "specific offense characteristics" such as use or threat of force,[52] use of firearms;[53] also, levels may be subtracted from the base level for other characteristics.[54] Next, the judge must determine if any adjustments from Chapter 3 apply which increase or decrease the base level. Adjustments may be made for acceptance of responsibility and obstruction of justice, for instance.[55] Next, the judge determines the offender's criminal history category using Chapter 4 of the Guidelines Manual.[56] The judge calculates the criminal history

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Safety" (Part K); "Offenses Involving the Administration of Justice" (Part J); "Offenses Involving Immigration, Naturalization, and Passports" (Part L); "Offenses Involving National Defense" (Part M); "Offenses Involving Food, Drugs, Agricultural Products and Odometer Laws" (Part N); "Offenses Involving Prisons and Correctional Facilities" (Part P); "Offenses Involving the Environment" (Part Q); "Antitrust Offenses" (Part R); "Money Laundering and Monetary Transaction Reporting" (Part S); "Offenses Involving Taxation" (Part T); and "Other Offenses" (Part X). *Id.*

50. *Id.* If more than one guideline section is referenced for the particular statute, use the guideline most appropriate for the nature of the offense conduct charged in the count of which the defendant was convicted.

51. *Id.* Immediately after the heading, judges find the Base Offense Level. For example, first degree murder carries a base offense level of 43. *See* GUIDELINE MANUAL § 2A.1.1.

52. GUIDELINE MANUAL § 2B3.1(b)(2)(F). Use or expression of a threat increases the base offense level by two levels under the "Robbery" heading. *Id.*

53. *See, e.g.,* GUIDELINE MANUAL § 2B3.1(b)(2)(A). Discharging a firearm during the commission of a robbery increases the base offense level by seven levels. In sentencing for aggravated assault under § 2A2.2, if the assault involved more than minimal planning, the sentence is increased two levels; in sentencing for sexual assault under § 2A3.1, use or display of a dangerous weapon during the offense increases the base offense four levels.

54. GUIDELINE MANUAL § 2A4.1(b)(4)(C). If kidnapping victim is released before 24 hours has elapsed since seizing the victim, the base offense level is decreased one level. *Id.*

55. GUIDELINE MANUAL, Chapter 3 (Adjustments). Adjustments include: "Victim Related Adjustments" (Part A); "Role in Offense" (Part B); "Obstruction of Justice" (Part C); "Multiple Counts" (Part D); and "Acceptance of Responsibility" (Part E). *Id.*

56. GUIDELINE MANUAL. Chapter 4 ("Criminal History" and "Criminal Livelihood"). This section furthers four policies of the sentencing guidelines. First, it holds the the defendant with a prior record more culpable. Second, general deterence dictates that the sentencing guidelines send a clear message that repeated criminal behavior warrants aggravated punishment. Third, it protects the public

based on offender's past conviction record.[57] Finally, by using the appropriate offense level and the appropriate criminal history category, the judge consults the sentencing table of the guidelines, and the intersection of the two reveals the appropriate sentencing range in months.[58] Parties can appeal the sentence only if the judge departs from the sentencing range and orders an increased or decreased sentence.[59]

The district judge must impose a sentence within the sentencing range determined in the process above unless "the court finds that there exists an aggravating or mitigating circumstance of a kind, or degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ."[60] Under 18 U.S.C. § 3553(E), a court can only depart from an otherwise mandatory minimum sentence because of a defendant's assistance to authorities:

> Upon motion of the government the court shall have the authority to impose a sentence below a level established by statute as minimum setence 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.[61]

Before *Wade* reached the Supreme Court, the courts of appeals varied their approach to resolving judicial review of prosecutorial discretion in moving for substantial assistance. One circuit allowed a review that appeared to be completely openended.[62] Five circuits allow a limited review for "bad faith or arbitrariness" sufficient to constitute a substantive due process vi-

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from those criminals with high recidivism rates and likely to commit future criminal conduct. Fourth, repeated offenses is an indicator of the limited likelihood of successful rehabilitation.

57. GUIDELINE MANUAL § 4A1.1 ("Criminal History Category").

58. GUIDELINE MANUAL (table located on inside back cover).

59. 18 U.S.C. § 3742 allows either the government or the defendant to appeal any imposed sentence that departs from the applicable guideline range.

60. 18 U.S.C. § 3553(B) (1988).

61. 18 U.S.C. § 3553(E) (1988).

62. *See* United States v. Paden, 908 F.2d 1229, 1234 (5th Cir. 1990) (construing GUIDELINE MANUAL § 5K1.1) ("The absence of a government motion . . . 'does not preclude the district court from entertaining a defendant's showing that the government is refusing to recognize [his] substantial assistance' ").

olation.[63] All the cases addressed prosecutorial discretion as it related to § 5K1.1, not 18 U.S.C. § 3553(e); however, the same holding would in all probability result had the departure occurred under § 3553(e).

Two cases in two different circuits, *United States v. Doe* and *United States v. Bayles*, permitted a similarly limited review "under the same standards currently employed by district courts to review other matters committed to prosecutorial discretion": to ensure that the prosecutor's decision is not based "upon an unjustifiable standard such as race, religion, or other arbitrary classification"[64] or intended "to penalize a defendant for exercising his legally protected rights."[65] Another circuit had suggested *in dicta* that it would follow *Doe* and *Bayles*.[66] The Sixth Circuit had expressly reserved the question "whether a prosecutor's arbitrary or bad faith refusal" to file for departure under § 3553(e) may be reviewable as a due process violation.[67] The Third and Fourth Circuits apparently agreed that a district court has no power whatsoever to review a prosecutor's refusal to file a substantial assistance motion.[68]

ANALYSIS

A. *Purpose of the Statute*

Section 3553(e) of Title 18 grants the court "authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed

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63. *See* United States v. Agu, 949 F.2d 63 (2d Cir. 1991); United States v. Hubers, 938 F2d 827, 829 (8th Cir.), *cert. denied*, 112 S.Ct. 427 (1991); United States v. Mena, 925 F.2d 354, 355-56 (9th Cir. 1991); United States v. Vargas, 925 F.2d 1260, 1267 (10th Cir. 1991); United States v. Villarino, 930 F.2d 1527, 1530 (11th Cir. 1991).

64. United States v. Doe, 934 F.2d 353, 361 (D.C. Cir. 1991) (construing GUIDELINE MANUAL § 5K1.1), *cert. denied*, 112 S.Ct. 268 (1991) (quoting Bordenkircher v. Hayes, 434 U.S. 357 (1978)); *see also* United States v. Bayles, 923 F.2d 70, 72 (7th Cir. 1991) (construing GUIDELINE MANUAL § 5K1.1).

65. *Doe*, 934 F.2d at 361; *Bayles*, 923 F.2d at 72.

66. United States v. Romolo, 937 F.2d 20, 24 (1st Cir. 1991) (construing GUIDELINE MANUAL § 5K1.1).

67. United States v. Gardner, 931 F.2d 1097, 1099 (6th Cir. 1991).

68. *See* United States v. Gonzales, 927 F.2d 139, 145-46 (3d Cir. 1991) (construing GUIDELINE MANUAL § 5K1.1); *Wade*, 936 F.2d at 172 (construing 18 U.S.C. § 3553(e) and GUIDELINE MANUAL § 5K1.1).

an offense."[69] The statute that expressed the legislative purpose of the Sentencing Guideline Commission mandates that the guidelines "provide certainty and fairness," avoiding "unwarranted sentencing disparities" and "maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[70] Allowing judges a limited review of prosecutor's decisions furthers the statute's central purpose: the elimination of " 'unwarranted sentencing disparities among defendants with similar records.' "[71]

The standards used to determine whether a defendant's cooperation merits a motion for reduction of sentence vary widely from one United States Attorney's Office to another.[72] Substantial assistance warranting departure in one district may not be sufficient to warrant departure in other districts; thus, nonconformity in inherently prevalent with such prosecutorial discretion. In the policy statement of the Guidelines, the courts cannot review the prosecutor's "unfettered, unchecked, and possibly arbitrary discretion," which results in "less consistency in the sentencing process than when the sentencing judges evaluated 'substantial assistance' in all cases.[73] Consequently, inability of the courts to correct arbitrary differences will frustrate the congressional goal of eliminating sentence disparity.[74]

In addition to disparity between United States Attorneys from

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69. 18 U.S.C. § 3553(e) (1988).

70. 28 U.S.C. § 991(b)(1)(B) (Supp. V. 1987).

71. 28 U.S.C. § 991(b)(1).

72. *See, e.g.*, United States v. Donatiu, 922 F.2d 1331, 1335 (7th Cir. 1991) (defendant must "actually help" in the prosecution of another defendant); United States v. Chotas, 913 F.2d 897, 902 (11th Cir. 1990) (Clark, J., concurring in part and dissenting in part) (defendant must "accept responsibility for his participation in the crime"), *cert. denied*, 111 S. Ct. 1421 (1991); United States v. Curran, 724 F. Supp. 1239, 1241 (C.D. Ill. 1989) (defendant must participate in covert operations, among other things); United States v. Coleman, 707 F. Supp. 1101, 1105-06 (W.D. Mo. 1989) (local United States Attorney has flat "policy" of not filing any substantial assistance motions), *rev'd on other grounds*, 895 F.2d 501 (8th Cir. 1990).

73. Donald P. Lay, *Rethinking the Guidelines: A Call for Cooperation*, 101 YALE L.J. 1755, 1762 (1992).

74. *See* United States v. Keene, 933 F.2d 711, 715 (9th Cir. 1991) (absence of judicial review of prosecutor's decision "could well frustrate Congress' goal of eliminating sentence disparity"); *Chotas*, 913 F.2d at 905 (Clark, J., concurring in part and dissenting in part) (making prosecutor's decision unreviewable would be "grossly inconsistent with the statutory goal of reducing sentencing disparity").

different districts, substantial assistance can result in sentencing disparity among co-defendants. Where substantial assistance is applied in a case involving a drug courier (or "mule") and a substantial drug dealer, drug dealers benefit from substantial assistance due to the information they can convey to the government while drug couriers, who have little knowledge of the operation, must carry the full weight of their sentence.[75] Thus, substantial assistance, if applied inequitably, "results in serious imbalances by producing unduly severe sentences for 'mules' who know little about the drug syndicates for which they work and unduly lenient sentences for substantial drug dealers who tell all after their arrest."[76]

1. Reward those who cooperate

The Act provides that the Sentencing Commission "shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."[77] To implement its statutory mandate, the Commission has promulgated a Policy Statement governing all downward departures from guideline sentencing for substantial assistance.[78]

Because the charges brought in *Wade* carried statutorily-mandated minimum sentences, the district court's power to depart downward for substantial assistance was governed both by § 3553(e), which specifically authorizes departures below a statutory minimum, and by the more general Policy Statement, § 5K1.1,

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75. *See* Catherine M. Goodwin, *Sentencing Narcotics Cases Where Drug Amount is a Poor Indication of Relative Culpability*, 4 FED. SENTENCING REP. 226 (1992). *But see* United States v. Valdez-Gonzalez, 957 F.2d 643 (9th Cir. 1992) (sustaining a downward departure to probation for two Mexican drug "mules" on the ground that the relative harmlessness of "mules" was not adequately taken into account by the guidelines).

76. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1705 (1992).

77. 28 U.S.C. § 994(n) (1988).

78. *See* GUIDELINE MANUAL § 5K1.1. The Policy Statement states the court may "depart from the guidelines upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense".

which applies to all departures below the applicable guideline range.[79] Where federal criminal statutes mandate minimum sentences, both § 3553(e) and § 5K1.1 are implicated.[80] If "the minimum under the Guidelines is the same as the statutory minimum and the Government has refused to file any motion at all, the two provisions pose identical and equally burdensome obstacles."[81]

The Court found that Wade had cooperated with authorities and provided them with substantial assistance; however, this finding alone will not entitle a defendant to discovery or an evidentiary hearing.[82] In essence, if a court is to depart for reasons of substantial assistance, the assistance must be *very* substantial. While the Court recognizes the purpose of the statute to reward those defendants who provide valuable information, the Court has not let the purpose of the statute control the case, unless such purpose is compromised by reasons which are not rationally related to legitimate government interests.[83] Instead, it defers to prosecutors' discretion unless in using that discretion the prosecutors frustrate the goal to reward those defendants who cooperate with the government and their actions are also so patently unconstitutional as to warrant judicial review.

2. *Judicial Review Not Forbidden by Statute*

Statutes giving prosecutors sole discretion to initiate prosecutions and select charges typically contain no language expressly authorizing judicial review of those discretionary decisions.[84] The Supreme Court has never construed such legislative silence as precluding the limited judicial review required to ensure that the prosecutor does not exercise his statutory discretion in an unconstitutional manner.[85] Reading § 3553(e)'s language to preclude

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79. *See Keene*, 933 F.2d at 713-714 (explaining overlap between § 3553(e) and § 5K1.1).

80. *Wade*, 112 S. Ct. at 1843.

81. *Id.* Both Wade and the government apparently assumed this assertion. The Supreme Court thus did not decide whether § 5K1.1 "implements" and thereby supersedes § 3553(e) or whether the two provisions pose two separate obstacles. *See* United States v. Cheng Ah-Kai, 951 F.2d 490, 493-494 (2d Cir. 1991); *Keene*, 933 F.2d at 713-14; *also see* United States v. Rodriguez-Morales, 958 F.2d 1441, 1443 (8th Cir. 1992).

82. *Wade*, 112 S. Ct. at 1844.

83. *Id.*

84. *See, e.g.*, 28 U.S.C. § 547 (1988) (powers of United States Attorneys).

85. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 608-14 (1985); United

even limited judicial review of the prosecutor's decision not to seek a downward departure would be "completely opposite to the meaning that [the Supreme Court] has attached to silence in a variety of analogous settings."[86]

The Supreme Court has refused to hold that congressional silence on another aspect of the guidelines was intended affirmatively to deny defendants procedural protections traditionally accorded to them in analogous situations.[87] As the Court in *Burns* explained, congresssional intent to "rule out" a particular procedure cannot be inferred from its failure expressly to provide for that procedure, where such an interpretation would be "inconsistent with [the statute's] purpose."[88]

A federal statute "must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[89] As several courts have recognized, construing the government motion requirement to forbid all judicial review of the prosecutor's decision not to file a substantial assistance motion would raise a serious constitutional problem: Whether the Due Process Clause of the Fifth Amendment permits Congress to commit a decision with such a significant impact on a defendant's sentence to the utterly unreviewable authority of his adversary, the prosecutor.[90]

States v. Godwin, 457 U.S. 368, 384-85 (1982).

86. Burns v. United States, 111 S.Ct. 2182, 2187 (1991).

87. *Id.* at 2186-88 (Congress' failure expressly to require notice to the parties before an upward departure from guideline range did not signify an intent to deny them such notice).

88. *Id.*

89. United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916); *see also* International Assoc. of Machinists v. Street, 367 U.S. 740, 749 (1961) ("federal statutes are to be so construed as to avoid serious doubt of their constitutionality").

90. *See, e.g., Doe*, 934 F.2d at 362-63 (D.H. Ginsburg, J., concurring) (construing GUIDELINE MANUAL § 5K1.1) (characterizing this constitutional question as one whose resolution is "far from clear," "difficult," and worthy of the Court's attention); United States v. Justice, 877 F.2d 664, 667-69 (8th Cir.) (construing GUIDELINE MANUAL § 5K1.1), *cert. denied*, 493 U.S. 958 (1989); United States v. Gutierrez, 908 F.2d 349, 352, 354-55 (8th Cir.) (Heaney, J., dissenting) (5K1.1), *vacated en banc mem.*, 917 F.2d 379 (8th Cir. 1990) (affirming by an equally divided vote, without opinion, the decision of the District Court); United States v. Roberts, 726 F. Supp. 1359, 1374-75 (D.D.C. 1989) (construing both 18 U.S.C. § 3553(e) and GUIDELINE MANUAL § 5K1.1) ("It is difficult to conceive of a parallel situation in the law where substantial liberty interests and consequences provided for by statute are beyond the power of inquiry by anyone."), *rev'd on other grounds sub nom.*, United States v. Doe, 934 F.2d 353 (D.C. Cir. 1991).

In *Wade*, the Court allows limited judicial review to prevent such infringments upon due process and his constitutional rights.[91] However, by applying the standard used in *Wayte*, courts may review possible constitutional infringments by the prosecutor only where the defendant has shown, beyond mere allegations, bad faith or arbitrariness on the part of the prosecution.[92] Although this constitutional review does provide some protection to the cooperating defendant, it certainly poses an almost insurmountable obstacle to surpass.

The argument that Congressional silence does not proscribe judicial review of prosecutorial discretion also applies to the Guidelines. "Failure of the Commission to establish rules governing the filing of motions for departure ought to authorize the courts themselves to formulate and implement" rules for downward departure for substantial assistance where the government has refused to file a motion.[93] Therefore, the courts should have sufficient leeway under the Guidelines to depart absent a government motion or at least review the government's decision for failure to so move.

B. Power of the Judicial Branch to Supervise Attorneys Before the Court

The Supreme Court stated in *Wade* that "a prosecutor's discretion when exercising that power [to file a motion for substantial assistance] is subject to constitutional limitations which the district court can enforce."[94] Although the court expressly decided this issue based on the constitutional claim resolved in *Wayte*, Wade also made arguments concerning the inherent right of the courts to supervise the prosecutors and attorneys before it.[95]

1. Power to supervise prosecutors

Wade argued that the Fourth Circuit's ruling ignores a long line of decisions from the Supreme Court, which unequivocally establishes that even decisions committed to the sole discretion of

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91. *See Wade*, 112 S. Ct. at 1844.

92. *Id.*

93. Jeff Staniels, *Opportunities for Courts and Advocates under the 1992 Amendments*, 4 FED. SENTENCING REP. 314 (1992).

94. *Id.*, 112 S. Ct. at 1843.

95. *See generally*, Brief for Petitioner, United States v. Wade, 112 S. Ct. 1840, 1842 (1992)..

the prosecutor — e.g., the decisions whether to prosecute and how to charge — remain subject to the limited judicial review necessary to ensure that the prosecutor is not exercising his discretion in an unconstitutional manner.[96] The Supreme Court has long recognized its power necessarily extends to policing the conduct of prosecutors in federal criminal proceedings.[97]

As in the review of the prosecutor's charging decisions, judicial inquiry must be guided and confirmed by a proper respect for the autonomy of a co-equal branch of the government.[98] However, where the prosecutor has refused to file a motion for substantial assistance because of the defendant's race or religion, then the courts have no choice than to supervise, monitor and admonish such prosecutorial indiscretion.[99]

2. Power to supervise any attorney before the court

It is well settled that the federal trial courts also have the inherent power to supervise the conduct of proceedings before them.[100] This "supervisory" power is derived not from "rule or statute but [from] the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[101]

The Supreme Court has often recognized a federal court's inherent power that gives it the right to supervise the conduct of prosecutors in federal criminal proceedings before it.[102] The court

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96. *See, e.g., Wayte*, 470 U.S. 598 (reviewing prosecutor's charging decisions for alleged equal protection and first amendment violations).

97. United States v. Hasting, 461 U.S. 499, 505 (1983); United States v. Hale, 422 U.S. 171, 180 (1975).

98. *Wayte*, 470 U.S. at 608.

99. *Wade*, 112 S. Ct. at 1844.

100. *See*, e.g., Chambers v. NASCO, Inc., 111 S.Ct. 2123, 2132-33 (1991) (citing United States v. Hudson, 11 U.S. (7 Cranch) 34, 34 (1912)); Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980); Link v. Wabash R. Co., 370 U.S. 626, 630-31 (1962); *see also* Bank of Nova Scotia v. United States, 487 U.S. 250, 264 (1988) (Scalia, J. concurring) ("every United States court has an inherent supervisory authority over the proceedings conducted before it").

101. *Link*, 370 U.S. at 630-631; *see Hudson*, 11 U.S. (7 Cranch) at 34 ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution," because "they are necessary to the exercise of all others").

102. *See, e.g., Hasting*, 461 U.S. at 505; *Hale*, 422 U.S. at 180; *see also Bank of Nova Scotia*, 487 U.S. at 264 (Scalia, J., concurring) (federal district court's "inherent supervisory authority" extends to monitoring prosecutors' "perform-

may use this power to demand that federal prosecutors adhere not only to the standards of conduct actually required by the Constitution, but also to those the court deems necessary to preserve the integrity of federal criminal proceedings.[103]

"Nothing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability."[104] Judicial inquiry into the reasons why the prosecution refuses to file a substantial assistance motion is necessary to deter future illegal or improper conduct by prosecutors, whose decisions should not remain forever shuttered from the watchful eye of the court.[105]

While the Court in *Wade* did not address a court's general power to supervise any attorney before it, it did state that it saw "no reason why courts should treat a prosecutor's refusal to file a substantial assistance motion differently from a prosecutor's other decisions."[106] Thus, it can be inferred that the Court concurred with Wade's assertion that the court can supervise those attorneys before it.

C. *Other Discretionary Powers Subject to Review*

1. *Analogous Powers*

The American criminal justice system has traditionally committed certain key decisions to the discretion of the prosecutor; the

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ance in the court").

103. *See* McNabb v. United States, 318 U.S. 332, 340 (1943) ("Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure [which] are not satisfied merely by observance of those minimal historic safeguards . . . summarized as 'due process of law' "); *Hastings*, 461 U.S. at 505 (court may use its supervisory power to remedy violation of a defendant's "recognized rights," to "preserve [the] integrity of federal criminal proceedings before it, and to "deter illegal conduct" by government agents). *See also* United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979) (federal district court may use its "inherent supervisory powers" to "protect the integrity of the judicial process . . . from unfair or improper prosecutorial conduct"); United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1974) (Hufstadler, J., concurring) ("An important function of [the federal courts'] supervisory power is to guarantee that federal prosecutors act with due regard for the integrity of the administration of justice").

104. United States v. Berrios, 501 F.2d 1207, 1209 (2d Cir. 1974).

105. *Hastings*, 461 U.S. at 505.

106. *Wade*, 112 S. Ct. at 1843.

most prominent is the decision whether to prosecute.[107] The prosecutor also has the power to decide which charges to press.[108]

All of the following prosecutorial functions are subject ot varying degrees of judicial review: the decision to obtain a wiretap[109]; the decision to obtain a search warrant[110] or an arrest warrant[111]; the choice of witnesses to be presented to the grand jury[112]; the decision to seek joint trials of persons or offenses[113]; and even how to interview witnesses.[114] Once charges have been filed, the decision whether to plea bargain is also committed to the discretion of the prosecutor.[115]

Like any other power conferred upon the Executive Branch, however, prosecutorial discretion " 'is not unfettered,' " but re-

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107. *See* United States v. Nixon, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). *See also* Gershman, *supra* note 45, at 2. Gershman writes:

> As every lawyer knows, the prosecutor is the most powerful figure in the American criminal justice system. The prosecutor decides whom the charge, what charges to bring, whether to permit a defendant to plead guilty, and whether to confer immunity. In carrying out this broad decision-making power, the prosecutor enjoys considerable independence. Indeed, one of the most elusive and vexing subjects in criminal justice has been to define the limits of the prosecutor's discretion.

Id.

108. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (deciding "what charge to file or bring before a grand jury . . . generally rests entirely in [the prosecutor's] discretion").

109. 18 U.S.C. § 2518(1) (1988) ("judge of competent jurisdiction" must approve application).

110. FED. R. CRIM. P. 41 (federal magistrate or state court judge must approve request).

111. FED. R. CRIM. P. 4, 9 (court or other authorized officer must approve request).

112. *In re* Grand Jury 89-2, 728 F. Supp. 1269, 1272 (E.D. Va. 1990) (collecting cases).

113. FED. R. CRIM. P. 8, 14.

114. Gregory v. United States, 369 F.2d 185, 187-89 (D.C. Cir. 1966), *cert. denied*, 396 U.S. 865 (1969) (prosecutor may not advise witness not to speak with anyone unless prosecutor is present).

115. *See* Weatherford v. Bursey, 429 U.S. 545, 561 (1977) ("[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."); Newman v. United States, 382 F.2d 479, 480, 482 (D.C. Cir. 1967) (treating the decision whether to plea bargain as an aspect of the prosecutor's discretion to decide "when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought" and holding that "it is not the function of the judiciary to review the exercise of executive discretion.")

mains " 'subject to constitutional contraints.' "[116] As the Supreme Court has repeatedly recognized, these "constitutional limits" include the guarantees of fair and equal treatment contained in the the Due Process Clause of the Fifth Amendment.[117]

Although the prosecutor is permitted "the conscious exercise of some selectivity" in his enforcement of the criminal laws,[118] equal protection principles forbid him to "deliberately base" those discretionary decisions "upon an unjustifiable standard such as race, religion, or other arbitrary classification."[119] To safeguard these constitutional guarantees, the Supreme Court has long held that the federal courts may review even those decisions committed to the sole discretion of the prosecutor for the limited purpose of ensuring that the prosecutor is not exercising his discretion in an unconstitutional manner.[120]

Like the decision whether and how to prosecute, the decision to seek a downward departure for substantial assistance is committed by statute to the discretion of the prosecutor.[121] But like other matters committed to prosecutorial discretion, it must remain subject to the limited judicial review necessary to ensure that consti-

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116. *Wayte*, 470 U.S. at 608 (quoting United States v. Batchelder, 442 U.S. 114, 124-25 (1979)); *see also Bordenkircher*, 434 U.S. at 365 ("broad though [presecutorial] discretion may be, there are undoubtedly constitutional limits upon its exercise").

117. U.S. CONST. amend. V.

118. Oyler v. Boles, 368 U.S. 448, 456 (1962).

119. *Id.* (citing Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886)); *see also Batchelder*, 442 U.S. at 125.

120. *Wayte*, 470 U.S. at 608-14 (reviewing United States Attorney's charging decision may be reviewed for vindictive motivation that violates due process).

121. *Compare, e.g.*, 28 U.S.C. § 547 (1988) (giving United States Attorney power to "prosecute for all offenses against the United States") *with* 18 U.S.C. § 3553(e) (1988) (giving prosecutor power to initiate consideration of defendant's cooperation at sentencing). The legislative history of 18 U.S.C. § 3553(e) underscores the close parallel between the prosecutor's charging decision and the decision to file a "substantial assistance" motion. The provision that became § 3553(e) was proposed to Congress by the President as § 504 of the Drug Free America Act of 1986, H.R. Doc. No. 266, 99th Cong., 2d Sess. (1986). The explanation that accompanied the provision stated that with the creation of mandatory minimum sentences, there is a need to provide an exception for defendants who cooperate to a substantial extent in the investigation or prosecution of others. It further states that by providing authority for the sentencing court to sentence the defendant below the statutory minimum, this amendment allows for a defendant's record to reflect accurately his or her involvement in the crime charged, rather than a less serious offense charged by the prosecutor to avoid mandatory minimum sentences.

tutional rights of due process are protected.[122]

2. Due Process Considerations

It has long been "clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."[123] The Supreme Court has consistently and carefully applied the principles of due process where the sentencing proceeding presents "a distinct issue" that could affect the punishment imposed.[124]

Wade argued that the attendant possibility of a different sentence depending on the resolution of the defendant's substantial assistance creates a discrete liberty interest and mandates due process protections.[125] Moreover, once Congress confers a protected interest, Congress " 'may not constitutionally authorize [its] deprivation . . . without appropriate procedural safeguards.' "[126] When the government refuses to make the § 3553(e) motion, the defendant faces potential "grievous loss," and the obligations of due process must be satisfied.[127]

In *Wade*, the Court held that the statute, § 3553(e), and the

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122. *Wayte*, 470 U.S. at 608.

123. Gardner v. Florida, 430 U.S. 349, 358 (1977).

124. *See* Specht v. Patterson, 386 U.S. 605, 610 (1967) (quoting Graham v. West Virginia, 224 U.S. 616, 625 (1911) and holding that the post-conviction application of a state "Sex Offenders Act" that could result in enhanced punishment must be accomplished in accordance to with due process, which included the right to counsel and a full hearing); *see also* Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (state may not ignore requirements of due process in penalty phase of capital case); *Oyler*, 368 U.S. at 452 (due process requires that convicted defendant "must receive reasonable notice and an opportunity to be heard" if state plans to ask for punishment under recidivist statute); Chandler v. Fretag, 348 U.S. 3, 8 (1954).

125. *Witherspoon*, 391 U.S. at 522 (1968); *see Specht*, 386 U.S. at 610; *Oyler*, 368 U.S. at 452; *Chandler*, 348 U.S. at 8; *but see* United States v. Doe, 934 F.2d 353, 361 (D.C. Cir. 1991).

126. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985); *see also* Wolff v. McDonnell, 418 U.S. 539, 557 (1974) (holding that the prisoner's interest in a state created good time credit policy is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause); *Doe*, 934 F.2d at 361 (D.H. Ginsburg, J., concurring) (rejecting majority's conclusion that Congress' ability to make assistance irrelevant to sentencing rendered Due Process Clause irrelevant when Congress did make assistance a factor in sentencing).

127. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Policy Statement, § 5K1.1, "gives the government a power, not a duty, to file a motion when a defendant has substantially assisted."[128] This holding reflects a number of holdings in the courts of appeals: 18 U.S.C. § 3553(e) does not create a protected liberty interest.[129] Merely providing substantial performance will not entitle a defendant to a remedy or even discovery.[130] Therefore, while the Court may view the power of substantial performance as impacting the liberty of the defendant, it proscribes judicial review of that determination unless the defendant's rights were demonstrably abused.[131]

Wade follows a line of Supreme Court cases which holds that although "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation,"[132] the Equal Protection Clause (and the "equal protection component" of the Fifth Amendment Due Process Clause[133]) forbids selective enforcement that is "deliberatively based upon an unjustifiable standard such as race, religion, or other arbitrary classification."[134] The Supreme Court has held that a prosecutor's exercise of discretion "may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' "[135]

A prosecutorial decision that is intended to punish a defendant for "exercising a protected statutory or constitutional right" violates the Due Process Clause.[136] The Due Process Clause forbids the prosecutor to use his discretion to punish a defendant for "exercising a protected statutory or constitutional right."[137]

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128. *Wade*, 112 S. Ct. at 1843.

129. *See Doe*, 934 F.2d at 360; *see generally* Kentucky Dep't. of Corrections v. Thompson, 490 U.S. 454, 462-463 (1989) (statute creates a protected liberty interest by establishing "substantive predicates" that limit the discretion of officials).

130. *Wade*, 112 S. Ct. at 1844.

131. *Id.* The Court held refusal based on race or religion rises to the level which warrants judicial review. It also held that review was warranted where there is rationally related interest to any government end.

132. *Oyler*, 368 U.S. at 456.

133. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

134. *Bordenkircher*, 434 U.S. at 364; *see also Batchelder*, 442 U.S. at 125 (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

135. *Wayte*, 470 U.S. at 608.

136. *Goodwin*, 457 U.S. at 372.

137. *Id.* (citing *Bordenkircher*, 434 U.S. at 363 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort")); *see also* Blackledge v. Perry, 417 U.S. 21, 27 (1974).

Wade also argued that due process requires that a disinterested person, not the prosecutor, act as "an independant decisionmaker to examine the initial decision" by the prosecutor.[138] While the Court did not rule expressly on this issue, it may have followed the Sixth and the Eleventh Courts of Appeals holdings that the prosecutor's authority under the substantial assistance provisions is only to request a lower sentence; the ultimate determination of the defendant's sentence is made by the district court, which is a "neutral decisionmaker."[139]

3. *Undue Burden On Prosecutors*

Another unarticulated reason for the Court's determination that a very narrow and limited judicial review of prosecutorial discretion lies in a court's inability to weigh properly the factors considered by the prosecutor.[140] Factors such as "the strength of the case, the prosecution's general deterrence value, the government's enforcement priorities, and the case's relationship to the government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake."[141]

Because the prosecutor is "uniquely competent" to decide whether to file a substantial assistance motion, and because that decision turns on questions of law enforcement policy that are not well suited to judicial review, "[d]eciding whether to make a § 5K1.1 motion is fundamentally like deciding to prosecute on lesser charges persons who provide more assistance."[142] Moreover, because "[d]efendants often estimate the value of their assistance, and the risks they have taken to provide it, more highly than does the prosecutor,"[143] the prosecutor's decision not to file a substan-

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138. *Morrissey*, 408 U.S. at 486; *see also* Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (holding an impartial decisionmaker essential).

139. *See* United States v. Levy, 904 F.2d 1026, 1035 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 974 (1991); United States v. Musser, 856 F.2d 1484, 1487 (11th Cir. 1988), *cert. denied*, 489 U.S. 1022 (1989).

140. *Wayte*, 470 U.S. at 607.

141. *Id.*

142. United States v. Smith, 953 F.2d 1060 (7th Cir. 1992). *See* United States v. Grant, 886 F.2d 1513, 1514 (8th Cir. 1989) (government motion requirement "is predicated on the reasonable assumption that the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance") (quoting United States v. White, 869 F.2d 822, 829 (5th Cir.), *cert. denied*, 490 U.S. 1112 (1989)); United States v. Ayarza, 874 F.2d 647, 653 (9th Cir. 1989).

143. *Smith*, 953 F.2d at 1062.

tial assistance motion would become an issue in a large number of cases in which the defendant cooperated with the government in some way. In such hearings the prosecutor would often be required to disclose details of the investigation of defendant's case, as well as other cases, to show that the defendant has not received less favorable treatment than other similarly situated defendants.[144]

In addition to the intrusion into the prosecutorial decision-making process, permitting the district court to second guess the prosecutor's determination "would confer on the judiciary discretionary power to disregard the considered limits of the law it is charged with enforcing."[145] Analogous to prosecutorial discretion, judicial review of agency action is foreclosed under the Administrative Procedure Act (APA)[146] if the statute in question indicates that a particular matter is "committed to agency discretion by law."[147] The discretion accorded to the prosecutor by Congress and the Sentencing Commission in § 3553(e) and § 5K1.1 is analogous to the "exclusive authority and absolute discretion" enjoyed by the government in determining whether to prosecute[148] and what charges to bring.[149]

Furthermore, the Court may be concerned that overly extensive judicial review would negatively impact the effectiveness of the prosecutor's office.[150] Examining the basis of a prosecution de-

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144. *See* GUIDELINES MANUAL § 5K1.1, Background (although district court must state reasons for reducing defendant's sentence under § 5K1.1, court may elect to provide reasons to defendant *in camera* or in writing under seal "for the safety of the defendant or to avoid disclosure of an ongoing investigation").

145. United States v. Payner, 447 U.S. 727, 737 (1980); *see also* Commissioner v. Asphalt Products, Inc., 482 U.S. 117, 121 (1987); Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1516 (1984) (courts may not use supervisory power to "limit the constitutionally permissible exercise of prosecutorial discretion").

146. 5 U.S.C. § 701.

147. 5 U.S.C. § 701(a)(2) (1988). *See* Webster v. Doe, 486 U.S. 592, 599-601 (1988); Heckler v. Chaney, 470 U.S. 821, 830 (1985) (A matter is committed to agency discretion by law if the statute in question is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.).

148. United States v. Nixon, 418 U.S. 683, 693 (1974); *see also* Wayne A. Logan, Comment, *A Proposed Check on the Charging Discretion of Wisconin Prosecutors*, 1990 WIS. L. REV. 1695 (1990) (suggesting judicial review for prosecutorial inaction).

149. *See* Ball v. United States, 470 U.S. 856, 859 (1985).

150. *Wade*, 112 S. Ct. at 1844. By establishing a "threshold showing" stan-

lays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.[151]

D. Threshold Showing of Unconstitutionality

1. Presumption of Good Faith

Although the prosecutor may dismiss an indictment only with leave of court under Rule 48(a) of the Federal Rules of Criminal Procedure,[152] the courts have emphasized that leave of court should be granted except in the most unusual circumstances. Thus, in applying Rule 48(a), the courts have recognized a presumption that the prosecutor acted in good faith and that his decision should be followed.[153] The Supreme Court has held that "[i]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties."[154]

Where there is a "stong presumption that prosecutorial action is taken in good faith," a defendant must make "a substantial threshold showing in order to obtain discovery or an evidentiary hearing on allegations or prosecutorial misconduct."[155] In *Wade*, the Court adopted this threshold showing requirement for judicial review of a prosecutor's decision not to move for departure under §

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dard for judicial review of prosecutorial discretion under *Wayte*, the Court shields the office of the prosecutor from all but the most heinous abuses of discretion.

151. *Wayte*, 470 U.S. at 607.

152. Rule 48(a) of the FEDERAL RULES OF CRIMINAL PROCEDURE states: "The Attorney General of the United States attorney may *by leave of court* file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant." *Id.* (Emphasis added).

153. *See* United States v. Cowan, 524 F.2d 504, 514 (5th Cir. 1975); United States v. Ammidown, 497 F.2d 615, 621 (D.C. Cir. 1973).

154. United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926); *see also* United States v. Dotterweich, 320 U.S. 277, 285 (1943).

155. *See, e.g.*, United States v. Heidecke, 900 F.2d 1155, 1158-60 (7th Cir. 1990) (to obtain discovery, a defendant must show a "colorable basis" for a claim of vindictive prosecution; to obtain a hearing, the defendant must "offer sufficient evidence to raise a reasonable doubt that the government acted properly"); United States v. Hintzman, 806 F.2d 840, 846 (8th Cir. 1986) (to obtain discovery, a defendant must establish a "prima facie" case of selective prosecution); United States v. Greenwood, 796 F.2d 49, 52 (4th Cir. 1986) (to obtain discovery on selective prosecution charge, defendant's allegations must raise "a legitimate issue" of governmental misconduct).

3553(e) and § 5K1.1.[156]

Wade's attorney, Mr. Martin, spent a substantial part of his alloted argument attempting to convince the Supreme Court to remand the case to the district court.[157] In the arguments, Chief Justice Rehnquist expressed doubt that the defendant would be entitled to a remand if his proffer failed to raise the issue of unconstitutional government conduct.[158] Yet Mr. Martin argued that he was unable to reach that point because the district judge did not believe he had the authority to review the government's decision for any reason.[159] In response to why he did not press his case in district court, Mr. Martin said that because he felt his client was going to get the minimum term, he did not want to push the issue with the judge.[160] The Court found that Wade's counsel had not made a sufficient threshold showing of unconstitutional conduct to warrant remand.[161]

a. As Compared to Vindictive Prosecution

The courts of appeals agree that in order to obtain discovery or a hearing on a claim of selective or vindictive prosecution, the defendant bears the burden of producing evidence, not merely allegations, to support his claim that the prosecutor's motives were improper.[162] In limited circumstances in which action detrimental to the defendant has been taken after the exercise of a legal right, the Supreme Court has applied such a presumption of unconstitutionality.[163]

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156. *Wade*, 112 S. Ct. at 1844.

157. The Criminal Law Reporter: Arguments Heard 51:2 (4/1/92) at 3004.

158. *Id.*

159. *Id.* at 3005.

160. *Id.*

161. *Wade*, 112 S. Ct. at 1844.

162. *See, e.g., Heidecke*, 900 F.2d at 1158-60; United States v. Schoolcraft, 879 F.2d 64, 67-69 (3d Cir.), *cert. denied*, 493 U.S. 995 (1989); *Hintzman*, 806 F.2d at 842; United States v. Moon, 718 F.2d 1210, 1229-1230 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); United States v. Gallegos-Curiel, 681 F.2d 1164, 1167-71 (9th Cir. 1982); United States v. Torquato, 602 F.2d 564, 569 (3d Cir. 1979); *Berrios*, 501 F.2d at 1211. *Cf.* McCleskey v. Kemp, 481 U.S. 279, 297 (1987) ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.").

163. *See Blackledge*, 417 U.S. 21 (prosecutor's decision to file felony charges after defendant demands trial de novo on a misdemeanor charge); North Carolina v. Pearce, 395 U.S. 711 (1969) (trail court imposes a harsher sentence following a

The Supreme Court has recognized that the presumption of vindictiveness "may operate in the absence of any proof of improper motive and thus may block a legitimate response to criminal conduct"; for that reason, the Court has declined to apply the presumption unless there is a "reasonable likelihood" of vindictiveness in a particular class of cases.[164] Here, because the circumstances in this particular case do not lead a court to the reasonable likelihood of vindictiveness, the Court has placed the burden of coming foward on the defendant to show bad faith or arbitrariness.[165]

b. Effectiveness of the Prosecutor Impaired

To further bolster the presumption of good faith, the government argued that the prosecutor's failure to make a substantial assistance motion on behalf of those defendants who have provided significant assistance to the prosecution is likely to impair the effectiveness of the prosecutor's efforts to persuade other defendant's to cooperate.[166]

2. Determination of Arbitrariness and Bad Faith

While the Court in *Wade* has held that a prosecutorial discretion in filing motions for substantial assistance is reviewable if the decision was based arbitrarily or in bad faith, the Court has not given a clear definition to apply this standard.[167] Arbitrariness refers generally to "unjustified disparities in the treatment of similarily situated persons."[168] Bad faith, to the extend that it means something more than the prosecutor's consideration of a constitutionally forbidden characteristic such as race, appears to be nothing more than "an epiteth that is attached to conduct that is substantively arbitrary."[169]

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successful appeal).

164. *Goodwin*, 457 U.S. at 373; Alabama v. Smith, 490 U.S. 794, 799-802 (1989). For a discussion on prosecutorial vindictiveness, *see* Note, *Prosecutorial Vindictiveness in the Criminal Appellate Process: Due Process Protection after United States v. Goodwin*, 81 MICH. L. REV. 194 (1982).

165. *Wade*, 112 S. Ct. at 1844.

166. *See Doe*, 934 F.2d at 361; United States v. LaGuardia, 902 F.2d 1010, 1016 (1st Cir. 1990); United States v. Lewis, 896 F.2d 246 (7th Cir. 1990); United States v. Huerta, 878 F.2d 89 (2d Cir. 1989).

167. *Wade*, 112 S. Ct. at 1844.

168. *Smith*, 953 F.2d at 1062.

169. *Id.* at 8.

To the extent that the Supreme Court intended its reference to "other arbitrary classifications" to extend beyond constitutionally suspect classifications such as race and religion, the reference can apply only to the highly unlikely case in which the prosecutor classifies defendants according to factors that are not rationally related to whether they rendered substantial assistance.[170] In *Wade*, the Court repeats the language in *Dukes*, holding that a defendant is entitled to relief "if the prosecutor's refusal to move was not rationally related to any legitimate government end.[171]

It is yet to be seen when the federal courts determine that the prosecutor's conduct was arbitrary or in bad faith. Before *Wade*, the Ninth Circuit had recently held that the prosecutor's charging decisions are not subject to review for arbitrariness.[172] The Tenth Circuit adopted a restrictive standard of review: "[A] district court may be justified in taking some corrective action in egregious cases," which include "prosecutorial bad faith" and "where the prosecutor stubbornly refuses to file a motion despite overwhelming evidence that the accused's assistance has been so substantial as to cry out for meaningful relief."[173]

E. Aftermath of Wade

Although *Wade* is less than a year old, more than half of the courts of appeals have already ruled on some aspect of the holding.[174] The trend of these early decisions show the courts' hesitation to inquire into the motivation of the prosecutor unless the defendant makes more than allegations of bad faith or arbitrariness.[175]

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170. *See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

171. *Wade*, 112 S. Ct. at 1844 (citing Chapman v. United States, 111 S. Ct. 1919 (1991).

172. United States v. Redondo-Lemos, 955 F.2d 1296 (9th Cir. 1992).

173. *Vargas*, 925 F.2d at 1267 (interpreting § 3553(e) and § 5K1.1); United States v. Kuntz, 908 F.2d 655, 657 (10th Cir. 1990) (§ 5K1.1).

174. United States v. Knights, 968 F.2d 1483, 1486 (2d Cir. 1992); United States v. Higgins, 967 F.2d 841, 845 (3d Cir. 1992); United States v. Waites, 972 F.2d 344 (4th Cir. 1992); United States v. Urbani, 967 F.2d 106, 109 (5th Cir. 1992); United States v. Egan, 966 F.2d 328, 330 (7th Cir. 1992); United States v. Romsey, 975 F.2d 556 (8th Cir. 1992)).

175. United States v. Gonzalez, 970 F.2d 1095 (2d. Cir. 1992); *Egan*, 966 F.2d at 330.

1. The Fourth Circuit

In an appeal from the district court's ruling that it had no authority to review a prosecutor's decision not to move for substantial assistance, the Fourth Circuit Court of Appeals held that the district court erred in not allowing review into the prosecutorial discretion; however, the Fourth Circuit found that the defendant's proffered showing that he in fact substantially assisted was insufficient as a matter of law to require remand of the case.[176] In a similar case, the Fourth Circuit held that the district court has authority to inquire into the government's reasons for refusing to move for substantial assistance departure if the defendant makes a substantial showing that the government's refusal was a product of unconstitutional motives.[177] In *Sims*, the district court did inquire into the government's refusal to recommend departure and found that the reason not to move for departure because of independently obtained information[178] was based on legitimate grounds.[179]

2. Other Circuits

The Eighth Circuit Court of Appeals held that unless a defendant can make a "substantial threshold showing" of a constitutionally impermissible motive, he is not entitled to discovery or a hearing on why the prosecutor declined to make a downward departure motion.[180] A defendant's bare assertion that the United States Attorney "has an arbitrary policy against making motions for substantial assistance" failed to raise a genuine issue that the decision in his case was not rationally related to a legitimate government interest.[181]

The Second Circuit Court of Appeals held that limited review does exist and that federal district courts have authority to review a prosecutor's refusal to file a substantial assistance motion and to grant a remedy only if they find that the refusal was based on an unconstitutional motive.[182] The Third Ciruit Court of Appeals held

176. *Waites*, 972 F.2d 344.

177. United States v. Sims, 972 F.2d 344 (4th Cir. 1992).

178. Information gathered independently from the initial investigation revealed the defendant's continued use of drugs and lack of truthfulness concerning the drug use of others. *Sims*, 972 F.2d 344.

179. *Id.*

180. *Romsey*, 975 F.2d at 558.

181. *Id.*

182. *Knights*, 968 F.2d at 1486 (When defendant claims that government has

that the district court did not have authority to depart downward absent a government motion where the defendant " 'never alleged, much less claimed to have evidence tending to show, that the Government refused to file a motion for suspect reasons such as his race or religion.' "[183]

The Fifth Circuit Court of Appeals held that the defendant's failure to allege "an illicit motivation underlying the government's refusal to request a 5K1.1 departure" does not warrant an evidentiary hearing.[184] Absent a suggestion that the government's decision was based on a constitutionally suspect reason, "it is difficult to see how his claim indicates anything more than his disagreement with the government's decision and an invitation to the district court to similarly disagree which is exactly the judicial oversight that *Wade*, through its adoption of the *Wayte* standard, forbids as overly intrusive on the prosecution's broad discretion."[185] The Fifth Ciruit held that the defendant would only be "entitled to relief if the prosecutor's refusal was not rationally related to any legitimate government end."[186] Moreover, the court held that *Wade* precludes any inclination by the district courts "to give this statement [of the law] broader meaning" and found that "the district court's view of its authority was, if anything, too broad according to the subsequent pronouncements in *Wade*."[187]

The Seventh Circuit Court of Appeals affirmed with no comment on the appropriateness of judicial review of the prosecutor's decision not to move for departure under § 5K1.1 when the district

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acted in bad faith in refusing to move for downward departure, government may rebut this allegation, and defendant must then make a showing of bad faith to trigger some form of hearing.); *United States v. Gonzalez*, 970 F.2d 1095 (2d. Cir. 1992) (Where there has been no allegation of bad faith and in absence of a government motion, the sentencing judge retains discretion to consider a defendant's cooperation with the prosecution only in selecting a particular sentence within the applicable guideline range.); *see also* United States v. Arango, 966 F.2d 64 (2d Cir. 1992) (generalized allegations of improper motive insufficient to require district court to hold an evidentiary hearing on evidence produced at sentencing).

183. *Higgins*, 967 F.2d at 845 (quoting *Wade*, 112 S. Ct. at 1844).

184. *Urbani*, 967 F.2d at 109 (holding that mere substantial assistance alone is insufficient to establish bad faith or arbitrariness on the part of the prosecutor); *see also* United States v. Sellers, 975 F.2d 149 (5th Cir. 1992) (remanding the case to district court because of that court's error in holding that defendant was entitled to a downward departure merely because he provided the government with substantial assistance).

185. *Urbani*, 967 F.2d at 110.

186. *Id.*

187. *Id.*

court held an evidentiary hearing on the matter.[188] The district court held that it was the defendant's burden to demonstrate that a departure was justified.[189] The court concluded that "Mr. Egan 'has not shown that his testimony in the re-trials was not part of a promise of ongoing cooperation' and thus that Mr. Egan had failed to satisfy his burden of proving that the government's refusal to make a motion to depart was arbitrary."[190]

Although the trend of cases show some willingness, albeit with the greatest dose of caution, of the district court to inquire into the prosecutor's reasons for failing to file a motion for substantial assistance, no case as of yet has found for the defendant.[191] Moreover, such a finding in the district court would certainly be appealed where that court may take a more critical view of the district court's inquiry.[192]

3. *Proposed amendment to § 5K1.1*

The federal courts of appeals have consistently held that § 3553(e) conditions a District Court's authority to depart downward for a defendant's substantial assistance upon a government motion.[193] They have held that a motion by the government is a prerequisite to a sentence below the statutory minimum or a downward departure from the Guidelines sentencing range for substantial assistance.[194]

However, this motion prerequisite in cases involving only § 5K1.1 (not § 3553(e)) may be shortlived. A proposed amendment to § 5K1.1 would remove the government motion requirement except in cases also covered by § 3553(e).[195] The Commission has merely published the proposed amendment for comment; the pro-

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188. *Egan*, 966 F.2d at 330.

189. *Id.*

190. *Id.* at 331 (quoting United States v. Egan, 742 F. Supp. 1003, 1005 (N.D. Ill. 1990)).

191. *Sims*, 972 F.2d 344; *Urbani*, 967 F.2d at 109.

192. *Urbani*, 967 F.2d at 109.

193. *See, e.g., Kuntz*, 908 F.2d at 657; United States v. La Guardia, 902 F.2d 1010 (1st Cir. 1990); United States v. Coleman, 895 F.2d 501, 505 (8th Cir. 1990); *Huerta*, 878 F.2d at 91.

194. *See* United States v. Long, 936 F.2d 482, 483 (10th Cir.), *cert. denied*, 112 S. Ct. 662 (1991); United States v. Alamin, 895 F.2d 1335, 1337 (11th Cir.), *cert. denied*, 111 S. Ct. 196 (1990); *Coleman*, 895 F.2d at 504-05; United States v. Francois, 889 F.2d 1341, 1343 (4th Cir. 1989).

195. Notice of Proposed Amendment to § 5K1.1 of the United States Sentencing Comm'n Manual, 57 Fed. Reg. 90-01 (1992) (proposed Jan. 2, 1992).

posal has not been endorsed or adopted by the Commission.[196] On the issue of whether a motion by the government should be required, the Judiciary Commission concluded that requiring a motion would prevent courts from having to make difficult determinations of the extent of a defendant's cooperation.[197]

Articles, notes, and comments abound on the subject of eliminating the government motion requirement.[198] However, in a political season where talk on harsher penalties for criminals buys votes, prospects for sentencing reform which would benefit a convicted defendant are bleak.

CONCLUSION

In *Wade*, the Supreme Court correctly held that prosecutorial discretion is reviewable if the defendant can make a sufficient threshold showing of bad faith or arbitrariness.[199] The Court has chosen a ruling which allows defendants who have been unjustly denied downward departure a remedy under the law. However, the Court has not yet defined what is "rationally related to a legitimate government interest."[200] Furthermore, district courts and appellate courts may differ on the evidentiary issue of whether the proffer meets the threshold showing necessary for review.[201] While *Wade* has resolved an issue which has met with differing responses throughout the courts of appeals, questions remain on how *Wade* will be applied. In any event, some of those defendants who have

196. *See* 57 Fed. Reg. 90 (1992) ("Publication of an amendment for comment does not necessarily indicate the view of the Commission or any individual Commissioner on the merits of the proposed amendment.").

197. Commentary, *Opportunities for Courts and Advocates under the 1992 Amendments*, 4 FED. SENT. R. 314 (1992).

198. *See e.g.*, Philp T. Masterson, Comment, *Eliminating the Government Motion Requirement of Section 5K1.1 of the Federal Sentencing Guidelines — A Substantial Response to Substantial Assistance:* United States v. Gutierrez, 24 CREIGHTON L. REV. 929 (1991); Cynthia K.Y. Lee, *The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement*, 23 IND. L. REV. 681 (1990) ("Eliminating the government motion requirement is necessary to achieve the goal of fair and just sentencing.").

199. *Wade*, 112 S. Ct. at 1844.

200. *Id.*

201. *Urbani*, 967 F.2d at 109.

been "punished" for their substantial assistance may gain some reward.

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