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Unconstitutional Exploitation Of Delegated Authority: How To Deter Prosecutors From Using "Substantial Assistance" To Defeat The Intent Of Federal Sentencing Laws

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COMMENT

UNCONSTITUTIONAL EXPLOITATION OF DELEGATED AUTHORITY: HOW TO DETER PROSECUTORS FROM USING "SUBSTANTIAL ASSISTANCE" TO DEFEAT THE INTENT OF FEDERAL SENTENCING LAWS

INTRODUCTION

This Comment addresses whether the intent of the federal sentencing system is defeated when prosecutors reward high-level drug offenders with lenient sentences in exchange for testimony against less culpable co-conspirators.

In the mid-1980s, Congress completely overhauled federal sentencing policies pertaining to drug-related offenses. In the Sentencing Reform Act of 1984[1] and the Anti-Drug Abuse Act of 1986,[2] Congress enacted sentencing guidelines and mandatory-minimum penalty statutes to constrain judicial sentencing discretion and curb the inherent disparity that plagued indeterminate sentencing.[3] In the years since its

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[1] The Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

[2] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., and 31 U.S.C.).

[3] *See* Melissa M. McGrath, Comment, *Federal Sentencing Law: Prosecutorial Discretion in Determining Departures Based on Defendant's Cooperation Violates Due Process*, 15 S. ILL. U. L.J. 321, 324 & n.24 (1990) ("[E]very day [f]ederal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. . . . These disparities . . . can be traced directly to the unfettered discretion the law confers on . . . judges and parole authorities responsible for imposing and implementing . . . sentence[s].") (quoting S. Rep. No. 225, 98th Cong., 2d Sess. 38 (1984)). In a well-

implementation, determinate sentencing has limited the sentencing discretion of the judiciary but enhanced the role of prosecutors in sentencing without resolving the underlying disparities.[4]

The sentence reforms of the mid-1980s included sentence-reduction incentives for defendants who provide "substantial assistance" by cooperating with law enforcement in the investigation or prosecution of a person accused of a criminal offense.[5] Congress thus delegated to the prosecutor, who traditionally has held broad discretion over charging decisions,[6]

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known study conducted prior to the passage of the Sentencing Reform Act, fifty federal district court judges in the Second Circuit were given twenty identical case files and were asked to indicate what sentence they would impose on each defendant. *See* ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974). The variations in the judges' sentences revealed the scope of sentencing disparity. In a bank robbery case, the sanctions ranged from a sentence of eighteen years in prison and a $5,000 fine to imprisonment of five years and no fine. *Id.* at 6. In an extortion case, one judge sentenced a defendant to twenty years in prison and a $65,000 fine, while another imposed a sentence of three years and no fine. *Id.* at 1-3.

[4] *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM iii-iv (1991) [hereinafter SPECIAL REPORT] ("To the extent that prosecutorial discretion is exercised with preference to some and not to others, and to the extent that some are convicted of conduct carrying a mandatory minimum penalty while others who engage in the same or similar conduct are not so convicted, disparity is reintroduced.").

[5] *See* 18 U.S.C. § 3553(e) (2000); U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 5K1.1 (2001) [hereinafter U.S. SENTENCING GUIDELINES MANUAL]. Both provisions for substantial assistance allow the district court, upon request of the prosecutor, to impose a sentence below the determined penalty range in recognition of a defendant's assistance in the investigation or prosecution of another person who has committed an offense. *See* 18 U.S.C. § 3553(e); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1. Section 3553(e) allows for a downward departure from the applicable mandatory-minimum statute. *See* 18 U.S.C. § 3553(e). Section 5K1.1 allows for a downward departure from the applicable sentencing range under the Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1. See *infra* notes 187-188 and accompanying text for the exact wording of the two substantial-assistance provisions.

[6] The United States Supreme Court has held on many occasions that charging decisions are within the special province of the executive branch. *See* Heckler v. Chaney, 470 U.S. 821, 832 (1985). The Attorney General and the United States Attorneys retain "broad discretion" to enforce the nation's criminal laws. Wayte v. United States, 470 U.S. 598, 607 (1985) (quoting United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982)). They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3; 28 U.S.C. §§ 501, 540 (1994). As a result, "the presumption of regularity supports" their prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926). In the ordinary case, therefore, "so long as the prosecutor has probable cause to believe that the accused committed an

the exclusive authority to reward defendants who provide substantial assistance with favorable departures from otherwise applicable mandatory penalties.[7]

The substantial-assistance departure has become a significant way to avoid the most severe sentences under the current federal sentencing scheme.[8] In theory, the benefits of substantial assistance are available to all defendants.[9] In practice, however, only high-level offenders, those most knowledgeable of the drug operation, can take full advantage of the departure.[10] The combination of harsh mandatory penalties for low-level offenders and the substantial-assistance departure for high-level offenders has led to a new form of disparity in sentencing between offenders with varying levels of culpability.[11]

The real potential for disparity is evident in cases like *United States v. Chisholm*.[12] In that case, Clarence Aaron was

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offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rest entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

[7] As a condition precedent to departures for substantial assistance, the prosecutor must file a motion requesting such a departure. *See* 18 U.S.C. § 3553(e); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1. The court has no authority to *sua sponte* reward a defendant for his substantial assistance with a downward departure from the Guidelines and/or the applicable mandatory-minimum statute. *See* Melendez v. United States, 518 U.S. 120, 126 (1996).

[8] Substantial-assistance departures were granted in 24% of all drug cases in 1992; 27.2% in 1993; 31.7% in 1994; 31.9% in 1995; 30.6% in 1996 and 1997; 30.1% in 1998; and 28.5% in 1999. *See* Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1111 (2001) (citations omitted). In drug-trafficking cases, which do not include drug-possession cases and convictions obtained for use of a communications facility to commit a narcotics crime, 29.3% of all drug traffickers nationwide received sentence reductions for substantial assistance to the government in 1999. *See id.* at 1117 (citing U.S. SENTENCING COMM'N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 56, tbl. 27 (2000)).

[9] *See* 18 U.S.C. § 3553(e); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

[10] To be sure, not all assistance is considered to be substantial and, therefore, worthy of a downward departure. The value of the assistance is evaluated pursuant to: (1) the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation 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; and (5) the timeliness of the defendant's assistance. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1. Section 3553(e) looks to the same factors to determine the quality of a defendant's assistance. *See* 18 U.S.C. § 3553(e).

[11] *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 211-13 (1993).

[12] United States v. Chisholm, 73 F.3d 304 (11th Cir. 1996).

convicted for allegedly trafficking nine kilograms of cocaine in Mobile, Alabama.[13] Mr. Aaron, who had no prior criminal record,[14] maintained that he did nothing more than introduce two parties he knew to be drug dealers.[15] At trial, however, he was portrayed as a drug kingpin by the testimony of his co-conspirators.[16] Each co-conspirator had prior criminal records, and the charges of this conspiracy exposed them to life in prison.[17] They all entered into plea agreements with the prosecutor to testify against Mr. Aaron.[18] In return for their substantial assistance, the co-conspirators received significant leniency in sentencing notwithstanding their relatively greater culpability.[19] Mr. Aaron, on the other hand, had no information to offer the prosecution because of his limited involvement in the drug conspiracy.[20] Mr. Aaron was sentenced to three life sentences.[21] On remand after appeal, Mr. Aaron's sentence was reduced to one life sentence.[22] Mr. Aaron's case is an example of how prosecutors can abuse the

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[13] *Id.* at 305.

[14] *See Frontline: Snitch* (PBS television broadcast, Jan. 12, 1999), transcript of interview with Clarence Aaron, ("I had to strive my whole life to stay out of trouble. I ain't even had a traffic ticket before."), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/snitch/cases/aaron.html [hereinafter *Aaron interview*].

[15] *Id.* ("Yeah, I am guilty of something. I am guilty of hooking up the two parties, and I knew that both parties was in some type of drug activities, yes, but about selling drugs . . . I ain't had nothing to do with that.").

[16] *Id.* ("They had to find somebody [to be] the scapegoat. They had to find somebody to . . . point the finger at . . . to get [their] time reduced, and I was that person . . . They made me seem like I was the kingpin or something, [that] everything that went on, it was because of me. Which was not true.").

[17] *See Frontline: Snitch* (PBS television broadcast, Jan. 12, 1999), transcript of documentary *available at* http://www.pbs.org/wgbh/pages/frontline/shows/snitch/etc/script.html [hereinafter *Snitch*].

[18] Id.

[19] *Id.* The real organizer and kingpin of the conspiracy, as a result of his cooperation with the prosecutor, received a term of imprisonment between twelve and fourteen years. Another co-conspirator who testified against Mr. Aaron received a term of imprisonment between five and seven years. One co-conspirator did not serve a single day and received probation. *See id.*

[20] *Id.* ("[W]ho was I to testify against? I was the last one to be arrested. When I got arrested, all the guys that was involved in our conspiracy was already cooperating. So what do you want me to tell, what they already told? Ain't nothing else I could tell. Only people I could have testified against, the guy that was already cooperating at that particular time already.").

[21] *See Snitch, supra* note 17.

[22] *See Aaron interview, supra* note 14.

discretion granted to them to administer substantial assistance.

This Comment argues that prosecutors violate separation-of-powers principles[23] when they move for downward departures on behalf of kingpins who provide substantial assistance in a case against less culpable co-defendants because Congress did not authorize such an exercise of prosecutorial discretion.[24] In such instances where the intent of Congress is defeated, the prosecutor is essentially making law and thereby encroaching upon the law-making function of Congress.[25] To cure this constitutional abuse of prosecutorial discretion, the trial court should suppress the testimony of high-level conspirators pursuant to the exclusionary rule.[26]

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[23] The separation-of-powers doctrine reflects the central judgment of the Framers of the Constitution that, within our political scheme, liberty is best preserved through the separation of governmental powers into three coordinate branches, the executive, legislative, and judiciary. *See* Bowsher v. Synar, 478 U.S. 714, 725 (1986). The United States Supreme Court has recognized that while the Constitution mandates that "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others," Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935), the Framers rejected the notion that the three branches must be entirely separate and distinct. *See* Nixon v. Adm'r of General Services, 433 U.S. 425, 443 (1977) (rejecting as archaic complete division of authority among the three branches). Accordingly, our constitutional system imposes upon the branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which "would preclude the establishment of a Nation capable of governing itself effectively." Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam). This flexible approach of checks and balances protects against the encroachment or aggrandizement of one branch at the expense of another. *See* INS v. Chadha, 462 U.S. 919, 951 (1983). This Comment argues that separation-of-powers principles are implicated because the prosecutor essentially makes law when he acts contrary to Congress' intent and extends the benefits of substantial assistance to kingpin drug dealers at the expense of more minor participants.

[24] *See* SPECIAL REPORT, at 27 ("[T]he legislative history associated with enactment of the drug mandatory minimums suggests that Congress did not set the mandatory minimum sentences with the least severe case in mind. All available information suggests that the ten- and five-year mandatory minimums were aimed at the high- and mid-level managers, respectively."); Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1486-87 & n.144 (2000) ("[T]he House Committee on the Judiciary stated that it 'strongly believes that the federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs.'") (quoting 132 Cong. Rec. 27, 193 (1986)).

[25] *See supra* note 23 and accompanying text.

[26] *See* United States v. Leon, 468 U.S. 897, 906 (1984) (noting that the exclusionary rule is not a personal constitutional right, but rather a judicially-created remedy to deter government violations of the Constitution); Elkins v. United States, 364 U.S. 206, 217 (1960) ("The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only

This Comment begins by describing the trial and sentencing of Clarence Aaron in Part I. Part II provides a brief overview of the history and use of informant testimony. Part III discusses the federal sentencing framework and includes an analysis of the substantial-assistance motion, the primary mechanism through which prosecutors obtain reductions in the sentences of defendants who cooperate with law enforcement. Part IV focuses on the separation-of-powers challenges made to the substantial-assistance motion and why those challenges have thus far been fruitless in the federal appellate courts. Part IV reveals that the California Supreme Court has reached a different result when presented with separation-of-powers attacks to similar government-motion requirements under California law. Part V argues that Congress intended the most severe sentencing laws to apply to kingpin and mid-level drug traffickers. When prosecutors use substantial-assistance motions to recommend downward departures for kingpin drug traffickers at the expense of low-level co-conspirators, Part V contends that the prosecution has exceeded its authority to enforce the federal sentencing laws, defeated Congress' intent and encroached upon Congress' law-making function. To remedy the constitutional violation, Part VI proposes that courts apply the exclusionary rule and suppress the testimony of kingpins introduced against their low-level counterparts.

I. THE CLARENCE AARON STORY

In the summer of 1992, Clarence Aaron was twenty-three-years old, and a promising student athlete at Southern University in Baton Rouge, Louisiana.[27] Mr. Aaron was the first in his family to attend college.[28] At the time, he envisioned graduating from college and then pursuing a career in professional football.[29] Later, he wanted to work in corporate America, and eventually own his own business.[30] Those plans, unfortunately, would never materialize.

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effectively available way—by removing the incentive to disregard it.").

[27] *See Snitch, supra* note 17.

[28] *Id.*

[29] *Aaron interview, supra* note 14.

[30] *Id.*

Marion Watts was a crack-cocaine dealer in Mobile, Alabama.[31] He purchased powder cocaine by the kilogram, converted it into crack cocaine, and then sold it.[32] Sometime in 1992, Watts lost his source of powder cocaine.[33] Robert Hines, an associate of Watts and one of Mr. Aaron's closest childhood friends, called Mr. Aaron and asked him to introduce Watts to someone in Baton Rouge who might supply Watts with powder cocaine.[34]

Although Mr. Aaron had previously made efforts to avoid trouble,[35] he decided to help his friend.[36] Mr. Aaron drove Watts and Hines from Mobile to Baton Rouge and introduced them to Elwyn Chisholm.[37] Mr. Aaron accepted $1,500 for introducing the parties.[38] According to Mr. Aaron, he contributed nothing else to the conspiracy.[39]

Chisholm, through his source in Houston, Texas, provided Watts with a significant amount of powder cocaine.[40] Watts converted the powder cocaine into crack cocaine, and with Hines' help, sold it.[41] Shortly after their introduction, Watts, Chisholm, and Hines became the subjects of a federal investigation for conspiracy to distribute crack cocaine.[42] Mr. Aaron's cousin in Mobile was also implicated.[43] All had prior criminal records, and the potential charges of this conspiracy exposed them to life in prison.[44]

The United States Attorney's Office in the Southern District of Alabama offered prosecutorial leniency to Watts and his co-conspirators in exchange for their full cooperation and their testimony as to the details of the conspiracy.[45] Their cooperation with the prosecution led the authorities to Mr.

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31 United States v. Chisholm, 73 F.3d 304, 305 (11th Cir. 1996).
32 *Id.*
33 *Id.*
34 *See Snitch*, *supra* note 17.
35 *See supra* note 14 and accompanying text.
36 *See Snitch*, *supra* note 17.
37 *See Aaron interview*, *supra* note 14.
38 *See Snitch*, *supra* note 17.
39 *See supra* note 15 and accompanying text.
40 *Chisholm*, 73 F.3d at 305.
41 *Id.* at 305-06.
42 *See Snitch*, *supra* note 17.
43 *See id.*
44 *Id.*
45 *See id.*

Aaron.[46] Agents from the Federal Bureau of Investigation traveled to Baton Rouge and arrested Mr. Aaron.[47]

Mr. Aaron was formally charged along with Chisholm in a four-count indictment.[48] Upon his arrest, authorities attempted to persuade Mr. Aaron to disclose additional information about the conspiracy.[49] As authorities had arrested him last, however, and as he had been the least involved in the conspiracy, Mr. Aaron had no information to provide that had not already been provided by the other co-conspirators.[50] The prosecution considered Mr. Aaron unwilling, rather than unable, to cooperate.[51] Mr. Aaron's case was set for jury trial.[52]

At trial, Watts, the prosecution's key witness, provided the details of the conspiracy.[53] The testimony of Watts and his co-conspirators was the only direct evidence linking Mr. Aaron to the conspiracy.[54] Contrary to Mr. Aaron's assertion that all he had done was introduce his friends in Mobile to Chisholm in Louisiana, their testimony portrayed Mr. Aaron as a drug kingpin.[55] Watts described two separate drug transactions involving Mr. Aaron.[56]

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[46] *Id.*

[47] *See Snitch*, *supra* note 17 (noting that Mr. Aaron told his attorney that FBI agents went to his college classroom and pulled him out of the classroom and arrested him for possession with intent to distribute cocaine).

[48] *See Chisholm*, 73 F.3d at 305. Count I charged conspiracy to possess a controlled substance with the intent to distribute, in violation of 21 U.S.C. § 846. *Id.* at 306. In count II, Mr. Aaron and Chisholm were charged with possession with the intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1). *Id.* Count III charged a second violation of 21 U.S.C. § 846, for attempt to possess a controlled substance with the intent to distribute. *Id.* The final count charged criminal forfeiture under 21 U.S.C. § 853. *Id.*

[49] *See Frontline: Snitch* (PBS television broadcast, Jan. 12, 1999), transcript of interview with J. Don Foster, Assistant United States Attorney for the Southern District of Alabama, ("[We] did try to work with Aaron. He would not cooperate. . . . And he was given every opportunity to help himself early on and didn't want to do it. He thought he was going to go in there and snow the jury."), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/snitch/cases/foster.html.

[50] *See supra* note 20 and accompanying text.

[51] *See supra* note 49 and accompanying text.

[52] *See Chisholm*, 73 F.3d at 305.

[53] *Id.* (stating that Watts pleaded guilty to a lesser charge in exchange for testimony against Mr. Aaron at trial).

[54] *See Snitch*, *supra* note 17 (noting that the case against Mr. Aaron was based solely upon the testimony of cooperating individuals).

[55] *See supra* note 16 and accompanying text.

[56] *See Chisholm*, 73 F.3d at 305-06 (discussing two separate drug transactions in which Mr. Aaron was allegedly extensively involved).

The government introduced no cocaine into evidence.[57] Nevertheless, the jury found Mr. Aaron guilty of conspiring to distribute crack cocaine.[58] Under the federal sentencing laws, Mr. Aaron was sentenced to three concurrent life sentences without the possibility of parole.[59] The judge sentenced Chisholm to life without parole.[60] Watts, notwithstanding his role as the conspiracy's organizer and kingpin, in accordance with the terms of his plea agreement, received a term of imprisonment between twelve and fourteen years.[61] Hines received a term of imprisonment between five and seven years.[62] Mr. Aaron's cousin received probation.[63]

Following their convictions, Mr. Aaron and Chisholm appealed to the United States Court of Appeals for the Eleventh Circuit.[64] The court affirmed their convictions but vacated their sentences.[65] On remand, the district court

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[57] *See Snitch*, *supra* note 17. It is true that to obtain a conviction the prosecutor need only prove at trial that "a person knowingly or intentionally manufacture[d], distribute[d], or dispense[d], or possess[ed] with the intent to manufacture, distribute, or dispense, a controlled substance; or create[d], distribute[d], or dispense[d], or possess[ed] with intent to distribute or dispense, a controlled substance." 21 U.S.C. § 841(a)(1)–(2) (2000). In this regard, merely a detectable amount of drugs is sufficient to establish a violation of the substantive drug law. Significantly, however, proof as to the amount of drugs relates directly to the extent of punishment under the mandatory-minimum statutes and the Sentencing Guidelines, both of which use the quantity of drugs to establish the level of punishment. *See id.* § 841(b); U.S. SENTENCING GUIDELINES MANUAL § 2D1.1.

[58] *See Chisholm*, 73 F.3d at 306.

[59] *See Snitch*, *supra* note 17. Although the *Snitch* documentary reported that Mr. Aaron originally received three life sentences, the opinion for the Eleventh Circuit Court of Appeals stated that Mr. Aaron, pursuant to the Sentencing Guidelines, was sentenced to life without parole. *See Chisholm*, 73 F.3d at 306. The discrepancy is noted for the sake of accuracy.

[60] *Chisholm*, 73 F.3d at 306.

[61] *Aaron interview*, *supra* note 14 (noting that "I think Tino got between 12 and 14 years . . .").

[62] *Id.* (stating that "Robert got five to seven years . . .").

[63] *Id.* (noting that "my cousin, he got no time. Probation. Nothing. He just walked straight out of the courtroom.").

[64] *Chisholm*, 73 F.3d at 305.

[65] *Id.* at 309. On appeal, both Mr. Aaron and Chisholm raised a number of issues. *See id.* at 306. The court rejected all but two arguments. The court first concluded that the district court erred by assuming that powder cocaine converts to crack cocaine at a one-to-one ratio in determining the quantity of drugs involved in the conspiracy for which Mr. Aaron was to be held responsible at sentencing. *Id.* at 307-08. Second, the court held that the district court erred in sentencing Chisholm according to the schedule for crack cocaine because the conversion of the powder cocaine into crack cocaine was unforeseeable and outside the scope of the criminal activity in which he agreed to participate. *Id.* at 308-09.

reduced Mr. Aaron's sentence to life imprisonment.[66] The court reduced Chisholm's sentence to twenty years.[67] When one of the jurors in Mr. Aaron's case was asked what sentence he thought Mr. Aaron deserved, he said a short prison sentence would have been appropriate; three to five years at the most.[68]

II. AN OVERVIEW OF THE HISTORY OF PLEA BARGAINING

Prosecutorial leniency for defendants who assist law enforcement has deep roots in Anglo-American law.[69] Common-law courts have authorized plea-bargaining practices for centuries.[70] At early common law, accomplices were considered competent accusers in felony cases, and the English courts either pardoned the accomplice upon the defendant's conviction or executed the accomplice upon the defendant's acquittal.[71] This practice, known as approvement, was discontinued in the 1500s because the likelihood of perjury by the accomplice outweighed the probative value of his testimony.[72]

Shortly thereafter, however, the practice of granting pardons for "turning king's evidence" developed,[73] whereby an accomplice became eligible for a pardon by testifying fully and

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[66] *See Aaron interview, supra* note 14.

[67] *Id.* To summarize, Mr. Aaron received life imprisonment. Elwyn Chisholm was sentenced to serve twenty years in prison. Marion Watts received between twelve and fourteen years in prison. Robert Hines was sentenced to serve between five and seven years in prison. Mr. Aaron's cousin was given probation. *See Snitch, supra* note 17.

[68] *See Frontline: Snitch* (PBS television broadcast, Jan. 12, 1999), transcript of interview with Willie Jordan who sat on the jury that convicted Mr. Aaron, ("I wouldn't have thought of a large number of years, no. Just probably a short sentence. . . . [T]hree to five years, maybe something like that."), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/snitch/cases/jordan.html.

[69] Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 8 (1992).

[70] Yvette A. Beeman, Note, *Accomplice Testimony Under Contingent Plea Agreements*, 72 CORNELL L. REV. 800, 800 (1987).

[71] *Id.* (citing 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN *235).

[72] Note, *Accomplice Testimony Under Conditional Promise of Immunity*, 52 COLUM. L. REV. 138, 139 (1952) (stating that practice of approvement fell into disuse around 1500 because conditioning accomplice's pardon upon defendant's conviction was considered too conducive to perjury).

[73] *See* Beeman, *supra* note 70, at 801 (citing 2 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN *304, and other authorities). In the United States, "turning king's evidence" became known as "turning State's evidence." James W. Haldin, Note, *Toward a Level Playing Field: Challenges to Accomplice Testimony in the Wake of* United States v. Singleton, 57 WASH. & LEE L. REV. 515, 522 (2000) (citing Crawford v. United States, 212 U.S. 183, 203 (1909)).

fairly, without regard to whether a conviction was subsequently obtained.[74] In the treason trials of the seventeenth century, the English courts contested this practice.[75] Notwithstanding its diminished credibility, accomplice testimony given in exchange for a pardon was still valued as competent evidence.[76]

This view prevailed in the eighteenth and nineteenth centuries as acknowledged by the major treatises on criminal law, evidence, and procedure.[77] The courts in the United States also adopted the rule of the English treason trials but expanded the English tradition by allowing plea bargains for sentence leniency as well as total immunity from prosecution.[78]

Negotiated agreements between prosecutors and cooperators continue to be commonplace.[79] While the traditional rewards of clemency and immunity still exist, other incentives for cooperation have developed including dropped or reduced charges, monetary payments, or a commitment to recommend a lenient sentence.[80]

The presumptive unreliability of accomplice testimony has never been disputed.[81] Although recognizing that plea agreements may encourage perjury,[82] courts in the United

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[74] *See* Haldin, *supra* note 73, at 522 (citing Note, *supra* note 72, at 139).

[75] *See id.*

[76] *See id.* at 522-23.

[77] *See id.* at 523.

[78] *See* Beeman, *supra* note 70, at 801.

[79] *See id.* (making reference to statistics indicating that ninety percent of all criminal defendants plead guilty); Hughes, *supra* note 69, at 2 (stating that in both state and federal criminal prosecutions closely negotiated agreements for immunity and lenient plea bargaining in return for cooperation have assumed considerable importance); Haldin, *supra* note 73, at 523 (citing statistics showing that prosecutors routinely offer agreements for immunity or leniency to accomplices in exchange for testimony).

[80] *See* Haldin, *supra* note 73, at 523-24 (discussing the various ways in which law enforcement can encourage criminal defendants to cooperate).

[81] *See* Beeman, *supra* note 70, at 802 ("Accomplice plea agreements tend to produce unreliable testimony because they create an incentive for the accomplice to shift blame to the defendant or other co-conspirators. Further, an accomplice may wish to please the prosecutor to ensure lenient prosecution (or sentencing) in his own case.").

[82] The United States Supreme Court has stated that accomplice testimony is suspect and unreliable. *See, e.g.*, Bruton v. United States, 391 U.S. 123, 136 (1968); On Lee v. United States, 343 U.S. 747, 757 (1952); Caminetti v. United States, 242 U.S. 470, 495 (1917). *See also* Washington v. Texas, 388 U.S. 14, 22-23 (1967) ("Common sense would suggest that [a cooperating defendant] often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think [otherwise would] . . . clothe the criminal class with more nobility than one might expect . . .").

States have still found that the value of the information obtained through such agreements outweighs the danger of unreliability.[83]

Furthermore, plea-bargaining agreements are highly desirable for practical reasons.[84] They facilitate prompt and final dispositions of most criminal cases.[85] Many criminal prosecutions are disposed of without a trial because both the prosecutor and the defendant consider the benefits of a plea bargain to outweigh the risks and burdens of going to trial.[86] On one hand, plea-bargaining enhances a criminal defendant's chances of receiving a lesser sentence.[87] On the other, the plea saves the resources of the legal system and allows the prosecutor to secure a conviction without expending the time and energy required for trial.[88] Due to the overwhelming number of defendants and lack of processing resources, plea bargaining has necessarily assumed an indispensable role in the administration of criminal justice.[89] Still, despite its practicalities, the "rule of law is invariably sacrificed to the rule of convenience" in plea bargaining.[90]

Notwithstanding this consequence, the implementation of a harsh federal sentencing system in the mid-1980s spawned a

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[83] *See* Jack Finklea, *Leniency in Exchange for Testimony: Bribery or Effective Prosecution?*, 33 IND. L. REV. 957, 960 (2000) (showing that approval of agreements for testimony between prosecutors and defendants is further evidenced by the growth and scope of the Witness Protection Program, which gives a defendant liberty, money, and property in exchange for "truthful" testimony); Haldin, *supra* note 73, at 523 ("Prosecutors enjoy wide latitude in the type of promises they can make, presumably in order to overcome the obstacles that otherwise prevent evidence from reaching the fact finder.").

[84] In *Santobello v. New York*, 404 U.S. 257 (1971), the United States Supreme Court stated that "[t]he disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged." *Id.* at 260. Otherwise, "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Id.*

[85] *Id.* at 261.

[86] Justin H. Dion, Note, *Criminal Law – Prosecutorial Discretion or Contract Theory Restrictions? – The Implication of Allowing Judicial Review of Prosecutorial Discretion Founded on Underlying Contract Principles*, 22 W. NEW. ENG. L. REV. 149, 161 (2000) (citing Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1915 (1992)).

[87] *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 5K1.1).

[88] *Id.* (citing Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 53-56 (1968)).

[89] *Id.* (citing Alschuler, *supra* note 88, at 54-55).

[90] *Id.* (quoting Alschuler, *supra* note 88, at 85).

greater incentive to plea bargain and has led to a steady increase in cooperation between criminal defendants and prosecutors.[91] In order to minimize the severity of the current federal sentencing laws and have some chance of receiving a reduction in sentence,[92] defendants have little choice but to provide the prosecution with "substantial assistance in the investigation or prosecution of another person."[93]

III. THE FEDERAL SENTENCING FRAMEWORK

A. THE FEDERAL SENTENCING GUIDELINES

The use of informant testimony by the government changed dramatically when Congress passed the Sentencing Reform Act of 1984.[94] Congress intended the Sentencing Reform Act, included as part of the Comprehensive Crime Control Act,[95] to address the problem of crime in society.[96] Public discontent and Congress' dissatisfaction with unrestrained judicial discretion and indeterminate sentences specifically fueled the passage of the Sentencing Reform Act.[97]

Before 1987, federal judges had virtually unlimited discretion to impose any sentence they considered

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[91] *See* Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 563-64 (1990) ("While prosecutors may have always welcomed the assistance of snitches, tougher federal sentencing laws have led to a significant increase in cooperation as more defendants try to provide 'substantial assistance in the investigation or prosecution of another person,' to have some chance of receiving a significant sentence reduction."). To support his argument, Professor Weinstein points to data of cooperation rates collected and analyzed by the Sentencing Commission. *See id.* at 563 n.2. "In 1989 . . . only 3.5% of the cases involved substantial assistance departures. In 1990 the number climbed to 7.5%, and . . . move[d] up to 11.9% in 1991, 15.1% in 1992 and 16.9% in 1993. In 1994 the figure reached 19.5% . . . , 19.7% in 1995 and 19.2% in 1996." *See id.* (citing U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 39, fig. G (1996)).

[92] *Id.* at 564.

[93] *Id.*

[94] The Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

[95] *See* Pub. L. No. 98-473, 98 Stat. 1837, 1976 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

[96] SPECIAL REPORT, at ii.

[97] *See* Karen Bjorkman, Note, *Who's the Judge? The Eighth Circuit's Struggle with Sentencing Guidelines and the Section 5K1.1 Departure*, 18 WM. MITCHELL L. REV. 731, 735 (1992) ("In the early 1960s the increasing crime rate spurred growing concern and criticism of indeterminant sentencing. Individualized sentencing was criticized as the public became aware of discrimination and due process violations.").

appropriate.[98] This indeterminate sentencing system[99] reflected Congress' desire to rehabilitate defendants, rather than punish them.[100] Indeed, few constraints determined what judges could or should consider when sentencing, except the maximum sentence imposed by law.[101] Judges could utilize any factors they deemed relevant to sentencing a defendant.[102] In addition to their great discretion in sentencing, judges had statutory authority to suspend almost all sentences.[103] Finally, the availability of parole prior to the Sentencing Reform Act created even greater uncertainty in sentencing, for the actual time served by a defendant was likely to be far less than the sentence imposed.[104]

Broad discretion led to non-uniform sentencing throughout the federal system.[105] This disparity was perceived as being

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[98] *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, 9 (1999) ("The characteristic feature of criminal sentencing in federal court before November 1987, when the Guidelines went into effect, was the virtually absolute discretion enjoyed by sentencing judges.").

[99] In *Williams v. New York*, 337 U.S. 241 (1949), Justice Hugo Black said that indeterminate sentencing is "[a] prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. . . . The belief no longer prevails that every offense in a like legal category calls for identical punishment without regard to the past life and habits of a particular offender." *Id.* at 247.

[100] *See* Mistretta v. United States, 488 U.S. 361, 363 (1989) ("[I]ndeterminate sentencing [was] based on [the] concept[] of the offender's possible, indeed probable, rehabilitation, a view that it was realistic to attempt to rehabilitate the inmate and thereby to minimize the risk that he would resume criminal activity upon his return to society."); Dion, *supra* 86, at 163-64 ("Th[e] indeterminate sentencing system exemplified Congress' desire to rehabilitate defendants, rather than punish them. Congress referred to this system of sentencing as the 'rehabilitation model.'") (footnotes omitted).

[101] *See* David Fisher, *Fifth Amendment – Prosecutorial Discretion Not Absolute: Constitutional Limits on Decision Not to File Substantial Assistance Motions*, 83 J. CRIM L. & CRIMINOLOGY 744, 745 (1993) ("Prior to the passage of the Sentencing Reform Act, federal judges enjoyed extremely broad discretion in sentencing. A judge could impose any sentence she thought was proper as long as it did not exceed the statutory maximum.").

[102] Factors included the offender's personality, social background, motivation for criminal conduct, and the potential for effective correctional treatment. *See* Bjorkman, *supra* note 97, at 734-35.

[103] *See* Weinstein, *supra* note 91, at 572 n.30.

[104] *See* SPECIAL REPORT, at 15 ("[W]hile judges wielded tremendous sentencing discretion, the potency of their sanction was often severely diluted by a parole commission that later resentenced the defendant according to its own set of rules.").

[105] *See* Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1689 (1992) ("In a system without acknowledged starting points, measuring rods, stated reasons, or principled review, unwarranted (or at least unexplained) disparity and

unfair and in conflict with the notion that similarly situated defendants should be treated equally.[106] To combat the disparity, many legal scholars and lawyers concluded that a uniform system of sentencing guidelines was needed.[107] The climate was right for sweeping federal sentencing reform.[108]

The Sentencing Reform Act was formulated with the overarching purpose to enhance the ability of the criminal justice system to combat crime through an effective and fair sentencing scheme.[109] To accomplish this goal, Congress identified three objectives.[110]

Congress first sought certainty and honesty in sentencing.[111] By abolishing parole and the indeterminate-sentencing structure, the Sentencing Reform Act eliminated the need for federal judges, when rendering sentence, to contemplate the future actions of the Parole Commission.[112] Determinate sentencing would allow judges to impose an appropriate sanction without concern that the sentence would be reduced significantly at a later date through parole release.[113] In this way, the public would also feel that the judge's sentence would represent the sentence that the offender would serve.[114]

Second, Congress sought uniformity in sentencing such that similar defendants convicted of similar offenses would receive similar sentences.[115] Congress significantly reduced the ability of judges to impose very different sentences by enacting guidelines that limited the range of possible imprisonment

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disproportionality seemed to flourish.").

106 Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. Rev. 105, 114 (1994) [hereinafter Lee I].

107 Michael S. Gelacek, et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 307 (1996).

108 *See* William W. Wilkins, Jr., et al., *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 309-10 (1993) (noting that Congress began to express broad concern about unwarranted disparity in sentencing in the mid-1970s, and that after several failed attempts to completely revise the federal criminal code, the long-sought Sentencing Reform Act, included in the Comprehensive Crime Control Act of 1984, was signed into law by President Ronald Reagan).

109 *Id.*

110 *Id.*

111 SPECIAL REPORT, at 16.

112 *Id.*

113 Wilkins et al., *supra* note 108, at 310.

114 *Id.*

115 SPECIAL REPORT, at 16.

sentences to a maximum variance of six months or twenty-five percent for similarly situated defendants.[116]

Congress finally sought proportionality or just punishment in sentencing by creating a system that recognized the differences in defendants and their offenses and that provided appropriate sentences with those differences in mind.[117]

To achieve these three objectives, the Sentencing Reform Act provided for the formation of the United States Sentencing Commission as an independent, permanent agency in the judicial branch.[118] The overriding mandate to the Sentencing Commission was to determine the appropriate types and lengths of sentences for more than 2,000 offenses by establishing a uniform and comprehensive set of sentencing guidelines for all federal courts.[119]

Subsequently, the Sentencing Commission created the Sentencing Guidelines and submitted to Congress for review its first set of guidelines on April 13, 1987.[120] On November 1, 1987, after six months of review, the first edition of the Sentencing Guidelines became law.[121] Full nationwide implementation of the Sentencing Guidelines did not begin, however, until late January 1989.[122]

Between 1987 and 1989, more than 300 constitutional challenges to the Guidelines and the Sentencing Commission itself precluded full nationwide implementation.[123] In January 1989, the United States Supreme Court upheld the constitutionality of the Sentencing Commission and its

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116 *Id.*

117 *Id.*

118 *Id.* The Sentencing Commission consists of seven voting members (one of whom is the Chairman) appointed by the President and confirmed by the Senate. *See* 28 U.S.C. § 991(a) (1998). The President also appoints one non-voting member, and the Attorney General or his/her designee sits as a non-voting, ex officio member. *See id.* No more than four members can be of the same political party and at least three members must be federal judges. *See id.* The other members can include judges and non-judges who have demonstrated expertise in the criminal justice area. *See id.* The Chairman and other members of the Commission are subject to removal by the President "only for neglect of duty or malfeasance in office or for other good cause shown." *Id.* Each voting member serves for six years and may not serve more than two full terms. *See* 28 U.S.C. § 992(a).

119 SPECIAL REPORT, at ii.

120 *Id.* at 17.

121 *Id.*

122 *Id.* at ii.

123 SPECIAL REPORT, at ii.

Guidelines by finding that Congress validly delegated its legislative power to the Sentencing Commission and did not violate the separation-of-powers doctrine.[124]

The Sentencing Guidelines instituted a detailed system for calculating a convicted defendant's sentence on a chart known as the Sentencing Table, in which the severity of the crime committed is graphed on one axis and is then juxtaposed against the offender's criminal history on another axis.[125] The sentencing range for a particular defendant is the intersection of the two axes.[126] The vertical axis that determines the severity of the offense is comprised of forty-three levels.[127] The horizontal axis is comprised of six criminal-history categories.[128] Movement along the criminal-history axis is determined by prior convictions,[129] while movement on the offense-level axis is determined by the nature of the crime as well as any aggravating or mitigating factors.[130] Accordingly, the Guidelines take into account both the seriousness of the offense, including relevant offense characteristics, and important information about the offender, such as the offender's role in the offense and prior record.[131]

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[124] *See* Mistretta v. United States, 488 U.S. 361, 390 (1989).

[125] *See* U.S. SENTENCING GUIDELINES MANUAL § 5A (2001).

[126] *See id.* (expressing respective sentencing ranges in terms of months).

[127] *See id.*

[128] *See id.*

[129] *See id.* (noting that the criminal history portion of the Sentencing Table has six categories, each covering a range of two to three criminal-history points).

[130] *See* U.S. SENTENCING GUIDELINES MANUAL § 5A. In drug-trafficking cases, a defendant's base-offense level is determined according to the type and quantity of drug at issue as provided in the Drug Quantity Table. *See id.* at § 2D1.1(c). The base-offense level can then be adjusted to more specifically reflect the nature of the criminal conduct. *See id.* at § 3A1.1–E1.1. For example, if the court finds that the offense committed was a hate crime, the defendant's offense level is increased by three levels. *See id.* at § 3A1.1(a). A crime committed upon a vulnerable victim warrants an increase of two levels. *See id.* at § 3A1.1(b)(1)–(2). The defendant's aggravating role in the offense justifies an increase in the base offense of two to four levels. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(a)–(c). Downward adjustments are similarly available. Where the defendant played a mitigating role in the offense, a downward adjustment of two to four levels is possible. *See id.* at § 3B1.2(a)–(b). If the defendant accepts personal responsibility for the offense, his offense level can be further adjusted downward by two levels. *See id.* at § 3E1.1(a)–(b). It is important to note that adjustments to a sentence are not the same as departures from a sentence. Adjustments are made in the determination of the offense level, while departures are made after the defendant's appropriate guideline range is calculated. *See id.* at § 1B1.1.

[131] SPECIAL REPORT, at 19.

Once the intersection of the offense level and the criminal history is determined, the court is presented with a narrow range of months within which to sentence the defendant.[132] If the judge sentences the defendant within this range, the sentence is not subject to appellate review unless the judge makes a mistake in calculation or the sentence is imposed in violation of law.[133]

The court can depart from the applicable sentencing range only when it finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described."[134] If a judge departs from the applicable guideline range and imposes a sentence that is higher or lower than the range, the judge must

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[132] *Id.* at 23.

[133] *See* 18 U.S.C. § 3742(a) (2000).

[134] U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (quoting 18 U.S.C. § 3553(b)). Before an upward or downward departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases under the Sentencing Guidelines. *See* Koon v. United States, 518 U.S. 81, 98 (1996) (setting forth the framework a sentencing court should consider in deciding the appropriateness of a departure). To assist courts, the Sentencing Commission did identify some of the factors that were not adequately considered when formulating the Guidelines, and which, in effect, can take a case out of the "heartland" of the sentencing range. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (stating that only courts can determine whether unique circumstances warrant departure because the Guidelines cannot list or analyze all possible scenarios). Interestingly, the Sentencing Guidelines "place essentially no limit on the number of potential factors that may warrant a departure." Burns v. United States, 501 U.S. 129, 137 (1991). A court, for instance, may increase the sentence if the offense resulted in death, significant physical injury, or if the victim suffered serious psychological injury. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.1–2.3. A downward departure may be appropriate if the victim's wrongful conduct contributed significantly to provoking the offense. *See id.* at § 5K2.10. If the crime was committed to avoid a perceived greater harm, or because of serious coercion, blackmail, or duress, even if not amounting to a complete defense, a downward departure may be appropriate. *See id.* at § 5K2.11–2.12. A court may depart downward if the defendant committed the offense while suffering from a significantly reduced mental capacity. *See id.* at § 5K2.13. Once a court has decided to depart, there is generally no formula governing the extent of the departure. *See* Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1042 (1997). The extent of the departure need only be reasonable. *See* 18 U.S.C. § 3742(a). There are certain factors, however, that never can be the bases for departure, including age; educational and vocational skills; mental and emotional conditions; physical condition; employment record; family or community ties; race, sex, national origin, creed, religion, and socio-economic status; military record; or lack of guidance as a youth. *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.1–1.6, 1.10–1.12.

demonstrate that the departure has a permissible basis.[135] Hence, the Guidelines constrain the sentencing discretion of federal judges by requiring them to impose sentences within calculated and limited guideline ranges.[136]

The Guidelines, in effect, replaced a discretionary system of judicial sentencing with a system of mandatory sentencing that is determined in large part by the prosecutors.[137] Although prosecutors have always played a significant role in sentencing, the Guidelines substantially enhanced their role and discretion in four ways.[138]

First, the Guidelines embody a "charge-offense based" approach to sentencing, and since prosecutors control what to charge, they essentially control the ultimate sentence.[139] Second, the control over what to charge gives the prosecutor a greater advantage in plea-bargaining, from which sentence determinations are regularly made to the general exclusion of the sentencing judge.[140] Third, during the sentencing phase of trial, the prosecutor may introduce relevant conduct to enhance a defendant's sentence, which need only be proved by a preponderance of the evidence.[141] Finally, if a defendant provides substantial assistance, only the prosecutor can file a

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[135] *See* 18 U.S.C. § 3553(b). If a judge chooses to depart from an applicable guideline range, the standard of review is a stringent one. Discretionary refusals to depart are not subject to appeal. Nor can a defendant appeal the degree of a downward departure. *See* Antoinette Marie Tease, *Downward Departures for Substantial Assistance: A Proposal for Reducing Sentencing Disparities Among Codefendants*, 53 MONT. L. REV. 75, 77-78 (1992).

[136] *See* Cynthia Kwei Yung Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 201 (1997) [hereinafter Lee II] (stating that the Guidelines constrain the sentencing discretion of federal district-court judges by requiring them to calculate an applicable guideline range before imposing sentence).

[137] *See* Paul M. Secunda, Note, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267, 1268 (1997) (stating that the creation of the Guidelines to rein in the discretion of the federal judges has resulted in the vast accretion of prosecutorial discretion).

[138] *See id.* at 1273-78 (discussing four ways in which the Sentencing Guidelines dramatically expanded the prosecutor's role in sentencing).

[139] *Id.* at 1273-74 (citing Jeffrey Standen, *Plea Bargaining in the Shadows of the Guidelines*, 81 CAL. L. REV. 1471, 1502 (1993)). The prosecutor's decision as to what facts to charge determines a defendant's base-offense level under the Guidelines, and, hence, the likely extent of punishment. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)–(c).

[140] Secunda, *supra* note 137, at 1274.

[141] *Id.*

motion for downward departure.[142] Hence, a significant portion of the constitutionally mandated sentencing authority traditionally held by judges was transferred to prosecutors.[143]

B. MANDATORY-MINIMUM PENALTIES AND HOW THEY INTERACT WITH THE SENTENCING GUIDELINES

Simultaneous to the passage of the Sentencing Reform Act and the development and implementation of the Sentencing Guidelines, Congress passed the Anti-Drug Abuse Act of 1986.[144] The Act included criminal statutes that imposed mandatory-minimum sentences for drug crimes and crimes of violence involving firearms.[145] In particular, the Anti-Drug Abuse Act established a system of mandatory-minimum sentences for drug-trafficking offenses in which the minimum penalty was tied to the amount of drugs involved in the offense.[146] The Act's focus on the quantity of drugs was a new one, for prior drug legislation "did not distinguish drug traffickers by the quantities of drugs they were responsible for selling or smuggling."[147] Congress, however, believed that the amount of drugs involved in any particular offense was an indicator of both the harm to society as well as the offender's culpability.[148]

Mandatory-minimum statutes were passed as a dramatic and popular way to address some of the same perceived sentencing evils that served as the motivation for the

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[142] *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 5K1.1).

[143] *See* Bennett Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 418-19 (1992) (stating that the Guidelines have restricted the sentencing discretion of judges and produced a corresponding enhancement in the prosecutor's discretion to make charging decisions and to force persons to cooperate); Lee II, *supra* note 136, at 234-35 (arguing that recent cases make clear that the prosecutor has the ability to determine whether a court will be able to exercise discretion and depart from the prescribed sentencing range).

[144] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended is scattered sections of 18 U.S.C., 21 U.S.C., and 31 U.S.C.).

[145] *See* SPECIAL REPORT, at 6-11 (tracing the development of mandatory-minimum sentencing back to as early as 1790, when Congress established such penalties for capital offenses).

[146] *Id.* at 10.

[147] Froyd, *supra* note 24, at 1486 & n.143 (quoting H.R. Rep. No. 845, 99th Cong., 2d Sess. 10-11 (1986)).

[148] *Id.* at 1486 (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 4 (1997)).

Sentencing Reform Act.[149] The public's heightened concern over the devastating effects of drug addiction and the alarming rate at which drugs were flowing into the United States raised congressional awareness, urging a legislative response.[150] Congress took aim at the judiciary and what it believed to be the unduly lenient sentencing practices of federal judges.[151] Too often, major drug traffickers reappeared quickly on the streets after prosecution and conviction.[152] In an effort to stop this "revolving door," Congress turned to statutorily mandated sentencing provisions for drug offenses.[153] By enacting these penalty provisions, Congress sought to expose serious drug offenders to lengthy and mandatory terms of imprisonment.[154] The message to the federal judiciary as well as the public was that society would no longer tolerate the proliferation of illegal drugs.[155] These statutes, however, were enacted without serious debate and without considering their compatibility with the Guidelines.[156] In a very real way, the Anti-Drug Abuse Act was the product of public hysteria and a responsive political whirlwind.[157]

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149 Phillip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1877-78 (1995).

150 Wilkins et al., *supra* note 108, at 315.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 Wilkins et al., *supra* note 108, at 315.

156 Oliss, *supra* note 149, at 1878.

157 Eric Sterling, now president of the Criminal Justice Foundation, was counsel to the chairman of the House Subcommittee on Crime and took an active part in formulating the mandatory-minimum statutes. *See Snitch*, *supra* note 17. Mr. Sterling's view on how the Anti-Drug Abuse Act came about is revealing.

> The work that I was involved in, in enacting these mandatory sentences, is probably the greatest tragedy of my professional life. These laws came about in an incredible conjunction between politics and hysteria. It was 1986. Tip O'Neill comes back from the July 4th district recess, and everybody's talking about the death of the Boston Celtics pick, Len Bias. That's all his constituents are talking to him about. And he has the insight, "Drugs. It's drugs. I can take this issue into the election." He calls the Democratic leadership together in the House of Representatives and says, "I want a drug bill. I want it in four weeks." And it set off kind of a stampede. I mean, everybody started trying to get out front on the drug issue. . . . [E]very committee, Merchant Marine and Fisheries, Interior and Insular Affairs . . . not just the Judiciary Committee, Foreign Affairs, Ways and Means, Agriculture. . . . Everybody's got a piece of this out there . . . fighting to sort of get their . . . face on television talking about the drug problem. . . . [T]hese mandatories came in the last couple days before the [c]ongressional recess, before they were all going to race out of town and, you know, tell the

As applied, statutory mandatory minimums require judges to impose no less than the specified sentence upon conviction.[158] Specifically, the Anti-Drug Abuse Act reintroduced five-, ten-, and twenty-year mandatory-minimum sentences for persons convicted of trafficking in, importing, or possessing specified amounts of controlled substances.[159] The Act subjects large-scale drug dealers or "kingpins" to a ten-year mandatory-minimum sentence for a first offense and a twenty-year sentence for a second conviction of the same offense.[160] Mid-level dealers in the drug-distribution chain receive a mandatory-minimum penalty of five years for a first offense and a ten-year minimum sentence for a second conviction of the same offense.[161] Nothing in the Act's legislative history suggests that Congress intended these harsh mandatory-minimum sentences to apply inversely to low-level participants in drug crimes.[162]

> voters about what they're doing to fight the war on drugs. No hearings, no consideration by the federal judges, no input from the Bureau of Prisons. I mean, even DEA didn't testify. . . . [T]he whole thing was kind of cobbled together with sort of chewing gum and baling wire. Numbers are picked out of air. And we see what these consequences are of that kind of legislating.

Id.

158 *See* Weinstein, *supra* note 91, at 573. The principal statute declares that "it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance." 21 U.S.C. § 841(a) (2000). The penalty provisions are set forth in section 841(b) according to the type and quantity of the controlled substance involved in the offense. *See id.* § 841(b). Section 841(b) is entitled "Penalties" and states that "any person who violates [section 841(a)] shall be sentenced [as section 841(b) prescribes.]" *Id.*

159 Weinstein, *supra* note 91, at 572.

160 *See* SPECIAL REPORT, at 10. "The Act's legislative history suggests that Congress expected that those typically subject to the ten-year mandatory minimum would be large-scale drug dealers (called 'major traffickers')." Wilkins et al., *supra* note 108, at 316 & n.66 (citing H.R. Rep. No. 845, 99th Cong., 2d Sess. 11-12, 16-17 (1986)).

161 "The [Act's] legislative history suggests that the five-year mandatory minimum would apply to mid-level drug dealers (called 'serious traffickers')." Wilkins et al., *supra* note 108, at 316 & n.67 (citing H.R. Rep. No. 845, 99th Cong., 2d Sess. 12, 17-18 (1986)).

162 *See supra* note 24 and accompanying text. *But see* Edward J. Tafe, Comment, *Sentencing Drug Offenders in Federal Courts: Disparity and Disharmony*, 28 U.S.F. L. Rev. 369, 379 (1994) ("[T]his sentencing scheme also targeted those operating at lower retail levels of the distribution chain. Street-level traffickers were considered appropriate targets of the [mandatory-minimum] statute[s] 'because they keep the street markets going.'" (quoting H.R. Rep. No. 845, 99th Cong., 2d Sess. 12 (1986)). No one disputes that all individuals, even those operating on the lower retail levels of the distribution chain, trafficking in large quantities of drugs should come within the purview of the most severe mandatory-minimum statutes. As the United States

The Act's approach of corresponding specific sentences to relative drug quantities was also incorporated into the Sentencing Guidelines.[163] Although the Sentencing Reform Act was enacted before the Anti-Drug Abuse Act, the Guidelines were not promulgated until 1987.[164] The Sentencing Commission referred to the penalty structure of the 1986 Act to establish the penalty ranges for drug offenses under the Guidelines.[165] In essence, mandatory-minimum sentences serve as the floor for sentencing ranges under the Guidelines, either equaling or exceeding the minimum sentences specified in section 841(b).[166]

Mandatory-minimum sentences, however, still "trump the guideline ranges."[167] Mandatory provisions force courts to impose specific penalties for certain drug crimes.[168] Even if the Guidelines place the low end of the sentencing range below the mandatory minimum, the court cannot venture below the mandatory-minimum sentence unless the prosecutor files a

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Supreme Court explained in *Chapman v. United States*, 500 U.S. 453 (1991):

> Congress adopted a "market-oriented" approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence. To implement that principle, Congress set mandatory minimum sentences corresponding to the weight of a "mixture or substance containing a detectable amount of" the various controlled substances, . . . It intended the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found – cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level. Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going.

Id. at 461 (citations omitted). Some minor participants, however, are indeed less culpable and exposing these lower-level co-conspirators to penalties intended for kingpin drug traffickers defeats congressional intent. The result, as seen in Clarence Aaron's case, is inherently unjust.

163 Wilkins et al., *supra* note 108, at 319-20 ("[T]he drug guidelines were based principally upon the mandatory penalty structures provided by the 1986 Act.").

164 SPECIAL REPORT, at 17.

165 Tafe, *supra* note 162, at 379. Section 2D1.1 of the Sentencing Guidelines sets a range of sentences for violations of section 841. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1. "The drug quantity tables in [section] 2D1.1 list[] the sentencing ranges for offenses involving specified amounts of various proscribed substances and follow[] a strictly proportional pattern interpolated from the mandatory minimum sentences of [section] 841(b)." Tafe, *supra* note 162, at 379 (citing Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 872 (1992)).

166 Tafe, *supra* note 162, at 379-80.

167 Saris, *supra* note 134, at 1035.

168 Froyd, *supra* note 24, at 1484.

motion for a departure based on substantial assistance.[169] Hence, while a defendant's sentence may have reflected certain downward adjustments for mitigating circumstances under the Guidelines,[170] mandatory minimums nullify these adjustments.[171]

In this way, mandatory-minimum penalties do not fit neatly into the Sentencing Commission's sentencing scheme.[172] The Sentencing Guidelines are structured so that a small change in a particular factor relevant to sentencing, like the seriousness of the offense or important information about the offender, results in only an incremental change in the applicable sentence range under the Guidelines.[173] Mandatory minimums, on the other hand, operate contrary to the Guidelines by creating sharp differences in sentences among defendants who fall just below the threshold of a mandatory minimum and those whose criminal conduct subjects them to the mandatory penalty.[174]

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[169] *Id.* *See also* Melendez v. United States, 518 U.S. 120, 122 (1996) (holding that departure below the minimum of the applicable sentencing range under the Guidelines does not also permit departure below statutory minimum sentence).

[170] *See supra* note 134 and accompanying text.

[171] Froyd, *supra* note 24, at 1484.

[172] *Id.*; Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194 (1993) ("While the Commission has consistently sought to incorporate mandatory minimums into the guidelines system in an effective and reasonable manner, in certain fundamental respects, the general approaches of the two systems are inconsistent.") (citations omitted).

[173] Froyd, *supra* note 24, at 1484.

[174] *Id.* Although not the focus of this comment, mandatory-minimum statutes have come under additional attack since the United States Supreme Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any fact, other than a prior conviction, that increases the prescribed statutory maximum penalty to which a defendant is exposed must be submitted to a jury and proven beyond a reasonable doubt. *See id.* at 490. Nearly all of the circuit courts have found that the fact of drug quantity is the kind of fact that must be submitted to the jury and proven beyond a reasonable doubt when the amount of drugs exposes a defendant to an increased penalty beyond the statutory maximum allowable under the facts as found by the jury. *See, e.g.*, United States v. Thomas, 274 F.3d 655, 663-64 (2d Cir. 2001) (en banc); United States v. Vasquez, 271 F.3d 93, 98 (3d Cir. 2001) (en banc); United States v. Promise, 255 F.3d 150, 157 (4th Cir. 2001) (en banc), *petition for cert. filed*, No. 01-6398 (U.S. Sept. 20, 2001); United States v. Doggett, 230 F.3d 160, 164-65 (5th Cir. 2000), *cert. denied*, 531 U.S. 1177 (2001); United States v. Page, 232 F.3d 536, 542-43 (6th Cir. 2000), *cert. denied*, 532 U.S. 1056 (2001); United States v. Nance, 236 F.3d 820, 824-25 (7th Cir.), *cert. denied*, 122 S.Ct. 79 (2001); United States v. Aguayo-Delgado, 220 F.3d 926, 933-34 (8th Cir.), *cert. denied*, 531 U.S. 1026 (2000); United States v. Nordby, 225 F.3d 1053, 1056 (9th Cir. 2000), *overruled by* United States v. Buckland, 277 F.3d 1173, 1182 (9th Cir. 2002)

In addition to the statutory mandatory-minimum provisions, the Anti-Drug Abuse Act of 1986 included two amendments that received little comment at the time the Act was passed, but have contributed significantly to the lure of informant testimony.[175] The first amendment authorized judges to reduce a defendant's sentence below the mandatory minimum to reflect the defendant's cooperation, but only on motion of the government.[176] The second amendment revised the statutory directive of the Sentencing Reform Act and authorized the Sentencing Commission to create sentence-reduction incentives that allow prosecutors to move for reductions in a sentence below the guideline range for offenders who assist in the investigation or prosecution of another person committing a criminal offense.[177] By holding out the potential for sentence mitigation, these amendments solidified the already strong incentives for criminal defendants to make cooperation agreements with the government.[178]

With the passage of the Omnibus Anti-Drug Abuse Act in 1988,[179] Congress continued to target drug crimes by modifying the mandatory penalties for those defendants involved in drug-trafficking conspiracies.[180] As a result, the mandatory-

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(en banc); United States v. Jones, 235 F.3d 1231, 1236 (10th Cir. 2000); United States v. Rogers, 228 F.3d 1318, 1327 (11th Cir. 2000), *abrogated on other grounds by* United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001) (en banc); United States v. Fields, 251 F.3d 1041, 1043-44 (D.C. Cir. 2001). Defendants have since taken *Apprendi* and argued that sections 841(b)(1)(A) & (B), the two principle and most severe mandatory penalty provisions, are facially unconstitutional. The circuit courts have thus far rejected the argument. *See, e.g.*, United States v. Kelly, 272 F.3d 622, 623 (3rd Cir. 2001) (per curiam); United States v. McAllister, 272 F.3d 228, 232-33 (4th Cir. 2001); United States v. Slaughter, 238 F.3d 580, 581 (5th Cir. 2000), *cert. denied*, 532 U.S. 1045 (2001); United States v. Martinez, 253 F.3d 251, 256 n.6 (6th Cir. 2001); United States v. Brough, 243 F.3d 1078, 1080 (7th Cir.), *cert. denied*, 122 S.Ct. 203 (2001); United States v. Woods, 270 F.3d 728, 729 (8th Cir. 2001); Buckland, 277 F.3d at 1177; United States v. Cernobyl, 255 F.3d 1215, 1216 (10th Cir. 2001); United States v. Candelario, 240 F.3d 1300, 1311 n.16 (11th Cir.), *cert. denied*, 121 S.Ct. 2535 (2001).

[175] Weinstein, *supra* note 91, at 573 & n.34 ("The statutes which fostered widespread cooperation . . . were passed as a pair of amendments buried deep in the Anti-Drug Abuse Act of 1986. There was no debate in either chamber and no mention of the change appears in any of the reports or other legislative history of that act . . .").

[176] *Id.* at 573 & n.35 (citing 18 U.S.C. § 3553(e) (1994)).

[177] *Id.* at 573 & n.36 (citing 28 U.S.C. § 994(n) (1994 & West Supp. 1998)).

[178] *Id.*

[179] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(a), 102 Stat. 4377 (codified as amended at 21 U.S.C. §§ 846, 963 (1994)).

[180] SPECIAL REPORT, at 10; Hatch, *supra* note 172, at 193 ("In 1988, Congress cast an even larger net over drug offenses at different levels of the drug distribution chain by applying mandatory minimum penalties to conspiracies to commit certain offenses . .

minimum penalties previously applicable to drug-trafficking offenses became applicable to conspiracies to commit these substantive offenses.[181] Although the range of culpability varies among co-conspirators, this change increased the likelihood that the applicable mandatory penalties could apply equally to the kingpin drug dealer and the mid- or low-level co-conspirators.[182] Under the laws of conspiracy, low-level dealers, middlemen and higher-up organizers could all be held responsible for the same quantity of drugs flowing through the conspiracy.[183]

The changes in sentencing of the mid-1980s had a serious impact on the choices available to federal criminal defendants.[184] Congress, however, did not completely close the door on defendants charged with drug crimes. By providing law enforcement with substantial assistance in the investigation or prosecution of another person, a defendant can receive significant leniency from otherwise applicable guideline ranges and mandatory-minimum penalties.[185] Accordingly, this benefit provides defendants with a self-serving incentive to testify falsely against others.[186]

.") (footnote omitted).

[181] SPECIAL REPORT, at 10. The pertinent amendment was codified at 21 U.S.C. § 846 and provides that: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846 (2000).

[182] SPECIAL REPORT, at 10.

[183] *See* Schulhofer, *supra* note 11, at 212-13.

[184] Weinstein, *supra* note 91, at 578.

[185] *See* 18 U.S.C. § 3553(e); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

[186] *See* Lee II, *supra* note 136, at 207 ("[T]he incentive to lie is exacerbated . . . because cooperation is the primary door through which defendants can receive sentencing leniency."). In a lecture to federal prosecutors, Stephen S. Trott, the chief of the Criminal Division of the Justice Department during the Reagan Administration and now a judge on the United States Court of Appeals for the Ninth Circuit, had the following to say about informant testimony:

> Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law. This willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies and double-crossing anyone with whom they come into contact, including—and especially—the prosecutor.

Mark Curriden, *The Informant Trap: Secret Threat to Justice* (pt. 1) NAT'L L.J., Feb. 20, 1995, at A1.

C. DOWNWARD DEPARTURE THROUGH SUBSTANTIAL ASSISTANCE

The Sentencing Reform Act of 1984 and the Anti-Drug Abuse Act of 1986 expressly included sentence-reduction incentives for defendants who provide substantial assistance in the investigation or prosecution of another person committing a criminal offense. For its part, the Sentencing Commission promulgated section 5K1.1.[187] Congress, through the Anti-Drug Abuse Act, added subsection (e) to 18 U.S.C. § 3553.[188] The provisions mirror one another, both in substance and procedure.

Substantively, these provisions authorize the district court to depart downward from applicable penalty ranges in recognition of a defendant's substantial assistance to the government.[189] Section 5K1.1 allows for a downward departure from the otherwise applicable sentencing range under the Guidelines based on a defendant's cooperation.[190] Similarly, section 3553(e) empowers the district court to impose a sentence below the mandatory minimum to reflect a

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[187] *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1. Section 5K1.1 provides:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who 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 . . . (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation 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; and (5) the timeliness of the defendant's assistance.

Id.

[188] *See* 18 U.S.C. § 3553(e). Section 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 994 of title 28, United States Code.

Id.

[189] Lee II, *supra* note 136, at 204.

[190] *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.[191]

From a procedural perspective, both section 5K1.1 and section 3553(e) require, as a condition precedent to departure, a government motion.[192] The federal court cannot depart below the applicable sentencing range because of a defendant's substantial assistance without a motion from the prosecutor requesting departure.[193] If the prosecutor does not file a departure motion, the court may not question the prosecutor's decision unless the defendant makes a substantial threshold showing that the government's decision is based on an unconstitutional motive such as race or the exercise of a constitutional right, or not rationally related to a legitimate governmental objective.[194]

Moreover, the extent to which a court can independently sentence a defendant by departing from the Guidelines and statutory minimums is constrained by the departure recommended by the prosecutor in his substantial-assistance motion.[195] A prosecutor's request that the court depart from the sentencing range under the Guidelines does not allow for a similar departure from the applicable mandatory-minimum

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191 *See* 18 U.S.C. § 3553(e).

192 *See id.*; U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

193 *See* 18 U.S.C. § 3553(e); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1. *See also* Melendez v. United States, 518 U.S. 120, 122 (1996) (holding that two substantial-assistance motions, one under section 5K1.1 and another under section 3553(e), are needed if defendant wants departures below both the applicable guideline range and mandatory-minimum sentence).

194 *See* Wade v. United States, 504 U.S. 181, 185-86 (1992). In *Wade*, the United States Supreme Court considered "whether district courts may subject the Government's refusal to file . . . a [substantial-assistance] motion to review for constitutional violations." *Id.* at 183. As a preliminary matter, the Court noted that both section 5K1.1 and section 3553(e) limit judicial authority and grant the prosecutor the power, but not the duty, to file a motion requesting a downward departure in exchange for a defendant's substantial assistance. *See id.* at 185. The Court then held, however, that the prosecutor's discretion to file a substantial-assistance motion is subject to constitutional limitations enforceable by the district courts. *See id.* Specifically, a defendant would be entitled to judicial review of the prosecutor's decision if he could show that the prosecutor acted pursuant to an unconstitutional motive, such as race or religion. *See id.* at 185-86. A defendant would also be entitled to judicial review if he could show that the prosecutor's decision was not rationally related to a legitimate government interest. *See* Wade, 504 U.S. at 186. Since the defendant in *Wade* failed to allege an unconstitutional motive, but rather merely insisted that his assistance to the prosecution was substantial and warranted a departure, his sentence was affirmed. *See id.* at 186-87.

195 *See Melendez*, 518 U.S. at 126.

statute unless the prosecutor makes such a request.[196] Hence, the substantial-assistance structure has further constrained the judiciary while enhancing the power of the prosecutor.[197]

In *Melendez v. United States*,[198] the United States Supreme Court held that a district court may not depart below a statutory minimum sentence where the prosecutor's substantial-assistance motion requested only a departure below the applicable sentencing range under the Sentencing Guidelines.[199] To the Court, the language found in both section 5K1.1 and section 3553(e) was unambiguous. Section 5K1.1 authorizes departures below the Guidelines range while a substantial-assistance motion under section 3553(e) authorizes departures below the mandatory-minimum sentence.[200] Where the prosecutor, therefore, had moved solely under section 5K1.1, the district court could depart below the applicable

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196 *See id.*

197 *See id.* ("[N]othing in [section] 3553(e) suggests that a district court has power to impose a sentence below the statutory minimum to reflect a defendant's cooperation when the Government has not authorized such a sentence, but has instead moved for a departure only from the applicable Guidelines range."); *Wade*, 504 U.S. at 185 ("[I]n both [sections] 3553(e) and [] 5K1.1 the condition limiting the court's authority [to move for substantial assistance] gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted.").

198 Melendez v. United States, 518 U.S. 120 (1996).

199 *See id.* at 124. The *Melendez* Court addressed a question that had been left unresolved in *Wade* – whether a prosecutor must file two substantial-assistance motions, one under section 5K1.1 and a second under section 3553(e), to depart below both the sentencing range under the Guidelines and the statutory mandatory-minimum sentence that falls below the applicable Guidelines range. *See Wade*, 504 U.S. at 185 ("We are not . . . called upon to decide whether . . . the two provisions pose two separate obstacles."). In *Melendez*, the defendant pleaded guilty to conspiracy to distribute and to possess more than five kilograms of cocaine under 21 U.S.C. § 846, an offense carrying a mandatory-minimum sentence of ten years. *See Melendez*, 518 U.S. at 122. The defendant agreed to cooperate with the prosecution in exchange for a motion under section 5K1.1 requesting a departure from the applicable sentencing range under the Guidelines. *See id.* The parties' agreement did not require that the prosecution move for a departure below the statutory minimum sentence. *See id.* Under the Guidelines, the defendant was exposed to imprisonment between 135 and 168 months. *See id.* As he had promised, the prosecutor filed a substantial-assistance motion under section 5K1.1, asking that the court impose a sentence below the Guideline range. *See id.* at 122-23. The district court granted the departure motion, but imposed a sentence of 120 months on the ground that it could not also depart below the ten-year mandatory sentence without a separate motion under section 3553(e). *See Melendez*, 518 U.S. at 123. The defendant's primary contention on appeal was "that [section] 5K1.1 create[d] a 'unitary' motion system, in which a motion attesting to the substantial assistance of the defendant and requesting a departure below the Guidelines range also permits a district court to depart below the statutory minimum." *Id.* at 125.

200 *See id.* at 130-31.

Guidelines range, but only to the extent that such a departure did not venture below the mandatory-minimum sentence.[201] To accomplish a further departure below the mandatory-minimum sentence, a second substantial-assistance motion, this one under section 3553(e), was required.[202]

The significance of *Melendez* is undisputed. The decision makes clear that the prosecutor not only controls whether a departure can be granted, but also, through its power to withhold a second substantial-assistance motion, the extent of the departure.[203] Hence, the Supreme Court's interpretation of the substantial-assistance provisions within the greater framework of federal sentencing acknowledges the enhancement of sentencing discretion in the executive at the expense of the judicial branch.[204]

Admittedly, prosecutors have always had the discretion to decide what, when, and where to charge.[205] Prosecutors also have the discretion to decide what cases to bring, when to grant immunity, when to plea bargain, and what sentencing recommendations to make.[206] The current sentencing system, however, bestows upon the prosecutor an additional power that directly affects the sentencing of the defendant.[207] As mentioned, only the prosecutor may file a substantial-assistance motion so that the judge may depart from the sentencing range under the Guidelines or an applicable mandatory-minimum statute.[208] Thus, the prosecutor acts as both the prosecutor and the sentencing judge.[209] Although the sentencing reforms of the 1980s were designed to limit the sentencing discretion of federal judges, the discretion has simply shifted from the judiciary to the prosecutor.[210]

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201 *See id.* at 125-26.

202 *See id.* at 125-26, 131.

203 Lee II, *supra* note 136, at 234.

204 *Id.* ("*Melendez* . . . signals an expansion of the prosecutor's formerly limited role as gatekeeper to that of a concierge. Prosecutors now not only have the power to decide which defendants will be permitted to enter the substantial assistance gate, they also control which rooms . . . cooperating defendants may enter.").

205 Dion, *supra* note 86, at 175.

206 *Id. See also supra* note 6 and accompanying text.

207 *See* Dion, *supra* note 86, at 175 (citing Lee I, *supra* note 106, at 108).

208 *See supra* note 197 and accompanying text.

209 Dion, *supra* note 86, at 175.

210 *Id.* (citing Fisher, *supra* note 101, at 749).

The Sentence Reform Act and the Anti-Drug Abuse Act dramatically affected the process of plea bargaining for testimony in federal court.[211] With the adoption of harsher mandatory-minimum penalties, prosecutorial control over plea-bargain negotiations has increased.[212] Prosecutors can use the strict and mandatory sentences as "bargaining chips" to induce defendants to plead guilty to lesser charges and thereby avoid severe prison sentences.[213] Prosecutors have another bargaining chip in substantial assistance, over which they maintain nearly unfettered discretion.[214] Substantial assistance is virtually the only way defendants can depart from stiff sentences.[215]

All told, criminal defendants have a powerful incentive to shift the blame to other defendants.[216] It is not surprising, therefore, that the most common ground for departure[217] from the otherwise applicable sentencing range is cooperation with the government in the prosecution of others, or "substantial assistance."[218]

IV. THE JUDICIAL REJECTION OF SEPARATION-OF-POWERS CHALLENGES TO THE GOVERNMENT-MOTION REQUIREMENT OF SUBSTANTIAL ASSISTANCE

A. THE RESPONSE OF FEDERAL APPELLATE COURTS

A common constitutional challenge to the government-motion requirement is that the requirement violates the separation-of-powers doctrine because the authority to decide whether a defendant should receive leniency for substantial assistance is taken away from the judiciary and delegated to the executive branch.[219] This argument assumes that

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[211] Bowman, *supra* note 98, at 13.

[212] *See* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 73 (1993).

[213] Schulhofer, *supra* note 11, at 202.

[214] *See supra* note 197 and accompanying text.

[215] Bowman, *supra* note 98, at 14-15.

[216] *Id.* at 15.

[217] For other departures under the Guidelines, see *supra* note 134 and accompanying text.

[218] *See supra* note 8 and accompanying text.

[219] Lee I, *supra* note 106, at 134. For cases that thoroughly discuss separation-of-powers challenges to substantial assistance, see *United States v. Huerta*, 878 F.2d 89,

sentencing is primarily a judicial function, which is compromised if the prosecutor has the authority to control when a judge may reward a defendant for substantial assistance.[220]

The federal appellate courts, however, have rejected the separation-of-powers argument for a number of reasons. Sentencing, to start, has never been within the exclusive arsenal of the judiciary.[221] Congress has always had the power to limit the discretion of judges by enacting statutes with minimum and maximum sentences.[222] Similarly, the prosecutor, through his charging function, has always had some influence over a defendant's ultimate sentence.[223] Accordingly, appellate courts have concluded that giving the prosecutor some sentencing authority does not unconstitutionally intrude upon the sentencing authority of the judiciary.[224]

Moreover, since Congress has the power to limit the factors that a court can consider in sentencing a defendant, federal appellate courts have acknowledged that Congress could have totally precluded judges from even considering a defendant's substantial assistance.[225] As a defendant has no right to substantial assistance, he cannot challenge the manner in which it was enacted by Congress.[226]

Finally, courts have rejected the argument that the government-motion requirement violates separation of powers because the discretion granted the prosecutor is limited to the authority to file a motion for downward departure, while the

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91-93 (2d Cir. 1989), *cert. denied*, 493 U.S. 1046 (1990); *United States v. Francois*, 889 F.2d 1341, 1344 (4th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990); *United States v Spillman*, 924 F.2d 721, 724-25 (7th Cir. 1991); *United States v. Ayarza*, 874 F.2d 647, 653 (9th Cir. 1989), *cert. denied*, 493 U.S. 1047 (1990); *United States v. Severich*, 676 F.Supp. 1209, 1212-13 (S.D. Fla. 1988), *aff'd*, 872 F.2d 434 (11th Cir. 1988).

220 Lee I, *supra* note 106, at 134.

221 *Id.*

222 *Id.*; Hatch, *supra* note 172, at 186-87 (listing the ways in which Congress has maintained some influence over sentencing including the enactment of mandatory-minimum sentences); Mistretta v. United States, 488 U.S. 361, 364 (1989) (noting that Congress has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control).

223 Lee I, *supra* note 106, at 134-35.

224 *Id.* at 135.

225 *Id.*

226 *Id.*

court is still left with the ultimate decision as to whether to depart, and if so, to what extent.[227]

B. THE CALIFORNIA SUPREME COURT HAS RESPONDED DIFFERENTLY TO SEPARATION-OF-POWERS CHALLENGES TO STATUTES ANALOGOUS TO SECTION 3553(E) AND SECTION 5K1.1

The California Supreme Court initially applied similar reasoning to uphold former California Health and Safety Code section 11718,[228] which prohibited a judge from striking a prior conviction from a complaint or information without the prosecutor's prior approval.[229] In *People v. Sidener*,[230] the court rejected a separation-of-powers challenge to section 11718, finding that the decision to strike a prior conviction was simply part of the prosecutor's charging discretion.[231]

Eight years later, however, in *People v. Tenorio*,[232] the California Supreme Court overruled its holding in *People v. Sidener* and struck down section 11718 on separation-of-powers grounds.[233] Section 11718, like section 3553(e) and section 5K1.1, vested the court with the ultimate power to dismiss, but conditioned the exercise of that power upon prior approval of the prosecutor.[234] On this occasion, the court explained that a judge's sentencing role is compromised when he believes that a prosecutor's approval is necessary before a charge can be dismissed in the interests of justice.[235]

The court also rejected the argument that because the California Legislature has the authority to completely remove the power to strike prior convictions from the courts without

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227 *Id.*

228 Former Health and Safety Code section 11718 provided that:

> [N]o allegation of fact which, if admitted or found to be true, would change the penalty for the offense charged from what the penalty would be if such fact were not alleged and admitted or proved to be true may be dismissed by the court or stricken from the accusatory pleading except upon motion of the district attorney.

Cal. Health & Safety Code § 11718 (West 1961) (repealed 1972).

229 Lee I, *supra* note 106, at 136.

230 People v. Sidener, 58 Cal. 2d 645 (1962), *rev'd sub. nom.* People v. Tenorio, 3 Cal. 3d 89 (1970).

231 Lee I, *supra* note 106, at 136.

232 People v. Tenorio, 3 Cal. 3d 89 (1970).

233 *See id.* at 95.

234 *See supra* note 228 and accompanying text.

235 *See Tenorio*, 3 Cal. 3d at 94.

constitutional consequence, the Legislature could permissibly divide discretion between the prosecutor and the judge.[236] Once authority was given to the courts to dismiss prior convictions, the Legislature could not condition the exercise of that authority upon a prosecutor's motion without violating the Constitution.[237]

In *People v. Superior Court (Romero)*,[238] the California Supreme Court followed the logic of *People v. Tenorio* to declare that an interpretation of the State's "Three Strikes" law that would deprive a trial judge of the power to dismiss a prior-felony-conviction allegation absent the prosecutor's consent violated separation of powers.[239]

Under California Penal Code section 667(f)(2), a prosecutor has the discretion to dismiss or strike a prior felony conviction either in the interests of justice or where there is insufficient evidence to prove the prior conviction.[240] It was argued that

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[236] Lee I, *supra* note 106, at 137. The *Tenorio* court said:

> [E]ven if the Legislature could constitutionally remove the power to strike priors from the courts, it has not done so, but rather has purported to vest in the prosecutor the power to foreclose the exercise of an admittedly judicial power by an appropriate judicial officer. It is no answer to suggest that this is but a lesser included portion of the prosecutor's discretion to forego prosecution, as the decision to forego prosecution does not itself deprive persons of liberty.

Tenorio, 3 Cal. 3d at 94.

[237] Lee I, *supra* note 106, at 137.

[238] People v. Superior Court (Romero), 13 Cal. 4th 497 (1996).

[239] *See id.* at 513. The defendant in *Romero* was charged with drug possession in violation of California Health and Safety Code section 11350(a). *See id.* at 506. He also had suffered four prior convictions for second-degree burglary, attempted burglary, first-degree burglary of an inhabited dwelling, and drug possession. *See id.* As a result of his convictions for second-degree burglary and first-degree burglary of an inhabited dwelling, the defendant was a candidate for life imprisonment under California's "Three Strikes" sentencing law. *See id.* The defendant pleaded not guilty to the underlying charge of drug possession. *See Romero*, 13 Cal. 4th at 507. The trial court, under the authority of Penal Code section 1385(a), offered to strike allegations of the defendant's prior felony convictions if he changed his plea to guilty. *See id.* The prosecutor objected, arguing that under Penal Code section 667(f)(2), the court had no power to dismiss the prior felony allegations in a Three Strikes case unless the prosecutor asked the court to do so. *See id.* The trial court disagreed, finding that such an interpretation of the Three Strikes law would violate the constitutional doctrine of separation of powers. *See id.*

[240] Section 667(f)(2) provides:

> The prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice pursuant to [Penal Code] Section 1385, or if there is insufficient evidence to prove the prior conviction. If upon the satisfaction of the court that there is insufficient evidence to prove the prior felony conviction, the court may dismiss or strike the allegation.

Cal. Penal Code § 667(f)(2) (West 1999).

under the statute the court could not on its own motion and in furtherance of justice strike a prior conviction that exposed a defendant to an enhanced sentence without the prosecutor's prior approval.[241] Trial courts, however, regularly exercised such authority pursuant to Penal Code section 1385(a).[242] The issue was whether the Legislature intended the Three Strikes law to give prosecutors the power to veto judicial decisions to dismiss prior-felony-conviction allegations in furtherance of justice under section 1385(a).[243]

Recognizing that the Legislature could have completely eliminated a trial court's power to strike prior felony allegations without constitutional consequence, the Supreme Court rejected the contention that the Legislature, having given courts the power to dismiss, could then condition that power on the prior approval of the prosecutor.[244] Rather, since dismissal was a judicial rather than an executive function, a law that subjected the court's discretion to dispose of criminal charges to prosecutorial approval violated separation of powers.[245] Accordingly, the Three Strikes law did not obviate a court's ability to strike prior-felony-conviction allegations on its own motion in the furtherance of justice.[246]

The California approach, as taken in both *People v. Tenorio* and *Romero*, stands in clear contrast with the federal appellate courts' rejection of separation-of-powers challenges to similar government-motion requirements.[247]

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241 *See Romero*, 13 Cal. 4th at 513.

242 *See id.* at 508. Penal Code section 1385(a) provides:

> The judge or magistrate may, either of his or her own motion or upon application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. . . . This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.

Cal. Penal Code § 1385(a) (West 1999).

243 *Romero*, 13 Cal. 4th at 507, 517-18.

244 *See id.* at 516, 518, 528.

245 *See id.* at 515-16.

246 *See id.* at 518, 529-30.

247 Lee I, *supra* note 106, at 137.

V. THE SEPARATION-OF-POWERS DOCTRINE IS VIOLATED WHEN DRUG KINGPINS RECEIVE DOWNWARD DEPARTURES BECAUSE CONGRESS NEVER INTENDED KINGPINS TO RECEIVE SENTENCE LENIENCY AT THE EXPENSE OF LOWER-LEVEL CONSPIRATORS

> What kind of a criminal justice system rewards the drug 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? [248]

Allowing a downward departure for defendants who cooperate rewards culpable offenders who "snitch" on others.[249] In certain instances, this is unwise and irrational. Often, the cooperating defendant has engaged in serious criminal

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[248] United States v. Griffin, 17 F.3d 269, 274 (8th Cir. 1994) (Bright, J., dissenting). Judge Myron H. Bright of the Eighth Circuit Court of Appeals is an outspoken and consistent critic of the federal sentencing system as it applies to drug offenses. *See, e.g.*, United States v. Jones, 145 F.3d 959, 966 (8th Cir. 1998) (Bright, J., concurring in part and dissenting in part) ("In this case, the lowest person on the totem pole, a mere street-level seller with an I.Q. of fifty-three received a heavier sentence than the mastermind of the conspiracy and the conspiracy's primary drug supplier. What kind of system could produce such a result?"); United States v. Romero, 118 F.3d 576, 582 (8th Cir. 1997) (Bright, J., dissenting) ("This case provides a typical, yet disturbing glimpse into the underbelly of prosecuting non-violent, first time drug offenders under mandatory minimum sentences."); United States v. Kalb, 105 F.3d 426, 430 (8th Cir. 1997) (Bright, J., dissenting) ("These sentencing schemes essentially take the discretionary power to determine the length of a defendant's sentence away from Article III judges and place it in the hands of prosecutors who control the charges brought against a defendant."); United States v. Knapp, 955 F.2d 566, 570-71 (8th Cir. 1997) (Bright, J., concurring separately) (arguing that a latecomer or minor participant to the drug-trafficking conspiracy should not automatically be held responsible for the same amount of drugs as other conspirators); Montanye v. United States, 77 F.3d 226, 233 (8th Cir. 1996) (Bright, J., dissenting) (finding a thirty-year sentence "draconian, unnecessarily harsh and unreasonable," where defendant furnished glassware to the conspiracy, a conspiracy which incidentally never delivered one gram of drugs to any consumer); United States v. Hiveley, 61 F.3d 1358, 1365-66 (8th Cir. 1995) (Bright, J., concurring) ("I have seen draconian sentences meted out in drug cases where an offender has had no contact with any drugs but may be only a minor functionary in a drug conspiracy where heavy amounts of drugs could be involved."); United States v. Goebel, 898 F.2d 675, 678 (8th Cir. 1990) (Bright, J., concurring) (observing that the Sentencing Guidelines produce unjust sentences among similar offenders); United States v. O'Meara, 895 F.2d 1216, 1221 (8th Cir. 1990) (Bright, J., concurring in part and dissenting in part) ("This case opens the window on the sometimes bizarre and topsy-turvy world of sentencing under the Guidelines.").

[249] Lee II, *supra* note 136, at 209.

behavior.[250] The cooperating defendant, however, ends up with a lighter sentence than less culpable offenders because he is able to cooperate with the prosecutor.[251] Still, under such circumstances, judges have been virtually powerless to interfere.[252]

A "cooperation paradox" results when the "big fish" ends up with a lighter sentence than the "little fish."[253] The "cooperation paradox" reveals itself most prominently in drug-conspiracy cases where co-conspirators operating at the lower levels of the conspiracy have little or no information to provide the prosecution while those participants at the higher levels are more knowledgeable and thus in the best position to take advantage of substantial assistance.[254]

The "cooperation paradox," together with the judges' inability to depart from the determined sentencing range without a prosecutorial substantial-assistance motion, results in "inverted sentencing."[255] Inverted sentencing allows knowledgeable, and, therefore, highly culpable offenders to

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[250] *Id.*

[251] *Id.*

[252] *See, e.g.*, United States v. Brigham, 977 F.2d 317, 318 (7th Cir. 1992) (where the least culpable offender in a drug conspiracy received the longest term of imprisonment, the court noted that such a sentencing inversion "is neither illegal nor unconstitutional, because offenders have no right to be sentenced in proportion to their wrongs . . . [even though] meting out the harshest penalties to those least culpable is troubling, because it accords with no one's theory of appropriate punishments") (citation omitted). For a discussion of *Brigham*, which "clearly illustrates both the judges' impotence under the mandatory minimum statutory regime, [and] also the inequitable results associated with . . . substantial assistance," see Oliss, *supra* note 149, at 1857-58.

[253] Lee II, *supra* note 136, at 210 (citing Schulhofer, *supra* note 11, at 211-13). More specifically, Professor Schulhofer says that:

> [T]he escape hatch for cooperation creates a paradox. Defendants who are most in the know, and thus have the most "substantial assistance" to offer, are often those who are most centrally involved in conspiratorial crimes. The highly culpable offender may be the best placed to negotiate a big sentencing break. Minor players, peripherally involved and with little knowledge or responsibility, have little to offer and thus can wind up with far more severe sentences than the boss.

Schulhofer, *supra* note 11, at 212.

[254] Lee II, *supra* note 136, at 210 & n.52. *See also* Tease, *supra* note 135, at 75 ("[T]he minor offender does not possess the information the government seeks . . . By virtue of his lesser culpability, . . . [he] is deprived of the opportunity to obtain a downward departure . . . [for substantial] assistance . . . Thus, a major offender may receive a more lenient sentence than a codefendant whose role . . . was minor.").

[255] *See* Oliss, *supra* note 149, at 1858, 1863-64 (referring to the "cooperation paradox" as "inverted sentencing").

escape the mandatory sentences, while less culpable actors, who were not the target of stiff mandatory sentences, receive the harsh penalties.[256] This undermines the goals of just punishment as well as the incarceration of dangerous felons and contributes to a new form of disparity in sentencing.[257]

Congress was not unaware of this unjust result. The Sentencing Commission, directed by Congress to explore the tension between the Guidelines' system of graduated, proportional sentencing and mandatory minimums' "charge offense" approach, concluded that by limiting the effect of mitigating factors, mandatory minimums led to instances in which defendants convicted of offenses that differed in seriousness nonetheless received similarly severe sentences.[258]

Then, in July 1993, based upon information presented at a hearing before the Subcommittee on Crime and Criminal Justice, members of Congress determined that strict mandatory-minimum sentences coupled with downward departures for substantial assistance created sentencing disparity that substantially affected low-level drug offenders.[259] Indeed, judges were forced to impose severe mandatory sentences on low-level drug defendants who were not the focus

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[256] Schulhofer, *supra* note 11, at 213 ("Instead of a pyramid of liability with long sentences for leaders at the top of the organizational ladder, the mandatory system can become an inverted pyramid with stiff sentences for minor players and modest punishments for knowledgeable insiders who can cut favorable deals."). *But see* Bowman, *supra* note 98, at 48-53 (arguing that challenges based on the "cooperation paradox" have been made without specific evidence that high-level drug offenders benefit more from departures for substantial assistance than low-level co-conspirators and alleging that the statistical evidence that does exist lends support to the impression that the "cooperation paradox" is not much of a problem in the real world).

[257] Oliss, *supra* note 149, at 1864 (citing Schulhofer, *supra* note 11, at 211-13). *See also supra* note 4 and accompanying text. *But see* Bowman, *supra* note 98, at 50 ("The particular outrage expressed by critics over situations in which the sentence of a 'more culpable' cooperator is lower than that of a 'less culpable' non-cooperator is a red herring."). An apparent lack of statistical support, upon which Professor Bowman relies to discredit a "cooperation paradox" in federal sentencing, *see supra* note 256 and accompanying text, should not interfere with the courts' ability to remedy the obvious disparity that results in cases like that of Mr. Aaron, *see supra* Part I, or Mr. Brigham, *see supra* note 252 and accompanying text. Where a low-level conspirator suffers the brunt of the punishment while acknowledged kingpins receive sentence leniency for substantial assistance, judicial intervention is appropriate to correct the prosecutorial usurpation of delegated authority. Specific statistical data is perhaps necessary to urge a congressional response to the "cooperation paradox." In the meantime, however, some defendants need a measure of protection, which can be accomplished through the application of the exclusionary rule. *See* discussion *infra* Part VI.

[258] Froyd, *supra* note 24, at 1495 (citing SPECIAL REPORT, at 20-33).

[259] *Id.* at 1495-96 (citing H.R. Rep. No. 460, 103rd Cong., 2d Sess. 5 (1994)).

of Congress' intent when it enacted mandatory minimums.[260] Congress instead had designed mandatory-minimum sentences to apply to the more culpable drug-conspiracy kingpins and mid-level dealers.[261]

Congress realized that it could strengthen the integrity and effectiveness of mandatory-minimum sentencing by creating a limited exception from these penalties for the least culpable, low-level drug offenders.[262] Accordingly, in response to concerns about the harsh effects of mandatory minimums on low-level offenders, Congress passed section 80001 of the Violent Crime Control and Law Enforcement Act of 1994.[263]

The "safety valve" provision provides a narrow exemption from specific mandatory-minimum statutes to a certain first-time, non-violent, low-level drug offenders.[264] The safety valve is an exception to, and not a departure from, otherwise applicable mandatory-minimum sentences.[265] That is, if a defendant falls within the safety-valve exception, the mandatory-minimum statute simply does not apply.[266] The district court then proceeds as if sentencing a defendant who is not subject to a mandatory-minimum sentence by applying the Sentencing Guidelines to arrive at the appropriate sentence.[267] Under the Guidelines, a limited two-level downward departure is available if the defendant's base-offense level is twenty-six or higher.[268]

Unlike departures for substantial assistance, eligibility for the safety valve is not contingent upon the usefulness of the

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260 *Id.* at 1496.

261 *Id.*; SPECIAL REPORT, at 10.

262 Froyd, *supra* note 24, at 1496 & n.218.

263 Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985 (1994) (codified at 18 U.S.C. § 3553(f) (2000)). The Sentencing Commission added a similar provision to the Sentencing Guidelines, recognizing an exemption from the otherwise applicable mandatory penalty statutes. *See* U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2001). The provision under both section 3553(f) and section 5C1.2 are substantively identical, and will collectively be referred to as the "safety valve."

264 Froyd, *supra* note 24, at 1496.

265 *Id.* at 1497.

266 *See id.* at 1497-98.

267 *See id.* at 1498. *See* Jon M. Sands, *How Does the Safety Valve Work? Sentencing Issues Under 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2*, 20 DEC-CHAMPION 37, 41 (1996) ("The safety valve is not a departure. It merely removes the mandatory nature of certain sentences. It essentially clears the pipe of the mandatory minimum blockage. The defendant must still deal with the guidelines.").

268 *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(6).

defendant's information.[269] Neither does the safety valve require a motion by the prosecutor.[270] The judge, therefore, rather than the prosecutor, determines whether a defendant qualifies for relief under the safety valve.[271] The absence of a government-motion requirement is significant. It symbolizes a renewed faith in the district courts' ability to exercise sentencing discretion without prosecutorial oversight.[272]

Defendants who seek the benefit of the safety-valve exception bear the initial burden of demonstrating, by a preponderance of the evidence, that they are eligible.[273] A defendant cannot have more than one criminal-history point.[274] Second, the offense at issue must have been non-violent and committed without the use of a dangerous weapon.[275] If the offense resulted in the death or serious injury to any person, the defendant is not eligible.[276] A defendant is similarly ineligible if he was the leader in the offense or engaged in a continuing criminal enterprise.[277] Finally, the defendant must provide the prosecution with all information that he has relating to the offense.[278] The court, if it is satisfied that the

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269 Lee II, *supra* note 136, at 215.

270 *Id.*

271 *Id.*

272 *Id.* at 215-16.

273 *Id.* at 214.

274 *See* 18 U.S.C. § 3553(f)(1); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2(a)(1) (providing, as the first criteria, that the safety valve shall apply if the "the defendant does not have more than 1 criminal history point . . .").

275 *See* 18 U.S.C. § 3553(f)(2); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2(a)(2) (stating that a defendant is eligible for the safety valve if he "did not use violence or credible threats of violence or possess a firearm or other dangerous weapon . . . in connection with the offense . . .").

276 *See* 18 U.S.C. § 3553(f)(3); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2(a)(3) (noting that the safety valve is available so long as "the offense did not result in death or serious bodily injury to any person . . .").

277 *See* 18 U.S.C. § 3553(f)(4); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2(a)(4) (permitting the application of the safety valve if "the defendant was not an organizer, leader, manager, or supervisor of others . . . and was not engaged in a continuing criminal enterprise . . .").

278 *See* 18 U.S.C. § 3553(f)(5); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2(a)(5) (providing for the safety valve if "not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan . . ."). Distinguishable from substantial-assistance departures, "the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement." *See* 18 U.S.C. § 3553(f)(5); U.S. SENTENCING GUIDELINES MANUAL §

defendant has met his burden, can then impose a sentence in accordance with the Sentencing Guidelines without regard to any statutory minimum sentence.[279]

At the very least, the safety valve has the potential of reducing the grossly disproportionate sentences for less culpable offenders and militates against the "cooperation paradox" by providing a remedy for those offenders who cannot secure a substantial-assistance motion but still are willing to disclose what information they have.[280] Before the safety valve, defendants convicted of certain drug crimes could receive a sentence below the statutory minimum only on the prosecutor's motion to depart downward based on a defendant's substantial assistance.[281] The safety valve was enacted to rectify the inequity in this system, whereby a more culpable defendant who could provide the prosecutor with useful information about drug-related activities faired better under section 3553(e) or section 5K1.1 than lower-level offenders who typically had less knowledge.[282] Accordingly, the safety valve was an attempt by Congress to ensure that its mandatory-minimum penalties were applied to higher-level drug conspirators.[283]

The safety valve, however, falls short of Congress' goal of relieving the disparity in sentencing because it is too restrictive with respect to the class of defendants to which it applies.[284] The safety valve's five requirements are so narrow in scope that not all low-level offenders are eligible for the provision.[285]

5C1.2(a)(5).

279 *See* 18 U.S.C. § 3553(f); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (stating that the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence).

280 Oliss, *supra* note 149, at 1886.

281 Sands, *supra* note 267, at 37.

282 *See id.*

283 Lee II, *supra* note 136, at 215. *See also* Froyd, *supra* note 24, at 1498; Oliss, *supra* note 149, at 1888.

284 Froyd, *supra* note 24, at 1498 (citing 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 HAMLINE L. REV. 109, 125 (1997)). *See also* Sands, *supra* note 267, at 42 ("The safety valve is not a cure-all. It does not completely loosen the heavy-handed approach of mandatory minimums for many, if not most, drug defendants. Neither does it soften the choke hold of the federal sentencing guidelines.").

285 Froyd, *supra* note 24, at 1498 & n.234 (citing cases in which relief under the safety valve was denied because the defendant had more than one criminal-history point, possessed a firearm, or failed to give the government all the information he had pertaining to the offense). For purposes of illustration, suppose that as a result of a

Consequently, the safety valve fails to ensure that the more severe mandatory sentences apply only to high-level offenders.[286]

VI. TO REMEDY THE SEPARATION-OF-POWERS VIOLATION WHEN KINGPIN DRUG DEALERS ARE REWARDED WITH SUBSTANTIAL ASSISTANCE, THEIR TESTIMONY AGAINST LESS CULPABLE, LOW-LEVEL CO-DEFENDANTS SHOULD BE SUPPRESSED PURSUANT TO THE EXCLUSIONARY RULE

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine, this court should resolutely set its face.[287]

Under the authority of substantial assistance, the prosecutor, who is charged with enforcing the federal sentencing laws, is empowered to determine the punishment for violation of the laws. Congress never intended kingpin drug dealers to get the benefit of substantial-assistance motions at the expense of lower-level participants.[288] When the prosecutor exercises his delegated authority to recommend a downward

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drug sale gone awry, the seller is shot dead by the buyer. An associate of the seller was present at the scene and was in his car awaiting the completion of the drug transaction but was not a participant to the shooting. If the associate is later indicted for his participation in the larger drug-trafficking conspiracy, he – assuming that he meets the other criteria – may not be eligible for the safety valve because on of the offenses resulted in someone's death. *See* 18 U.S.C. § 3553(f)(3); U.S. SENTENCING GUIDELINES MANUAL § 5C1.2(a)(3).

[286] Froyd, *supra* note 24, at 1498.

[287] Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), *overruled in part by* Berger v. New York, 388 U.S. 41 (1967) and Katz v. United States, 389 U.S. 343 (1967).

[288] *See* Oliss, *supra* note 149, at 1888 (stating that the safety valve "is, ostensibly, a congressional acknowledgement of the failings of mandatory minimum sentencing and an attempt to prevent future inequitable consequences").

departure for an acknowledged drug kingpin, the prosecutor has exceeded his authority and violated separation-of-power principles because he is acting contrary to legislative intent. Under such circumstances, the executive is making law and thereby encroaching upon the law-making function of Congress.[289] The substantial-assistance motion is the vehicle through which the prosecutor legislates.

This form of separation-of-powers violation, in which the prosecutor uses substantial assistance to usurp Congress' role as legislator, is not foreclosed by the federal appellate courts' rejection of separation-of-powers challenges to the government-motion component of substantial assistance.[290] To be sure, the focus here is not on whether the executive is improperly exercising sentencing authority at the expense of the judiciary. Rather, at issue is the relationship between the executive and the legislative branches. Having delegated to the prosecutor the discretion to enforce the sentencing laws and administer substantial assistance does not permit an exercise of that discretion in violation of congressional intent.

Such abuse defeats the purpose of the sentence reforms of the 1980s.[291] The application of substantial assistance in drug-courier cases results in serious sentence disparity by producing unduly severe sentences for drug couriers and minor participants who know little about the drug-trafficking operation for which they work and unduly lenient sentences for high-level drug dealers who can tell all to save themselves from harsh sentences.

To cure the constitutional violation, the testimony of cooperating kingpins that benefit from substantial-assistance motions should be suppressed pursuant to the exclusionary rule.[292] The United States Supreme Court has approved the

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289 *See supra* note 23 and accompanying text.

290 *See* discussion *supra* Part IV.A.

291 *See* Freed, *supra* note 105, at 1712 (discussing the finding of the Sentencing Institute of the Second and Eighth Circuits that "vesting power over such departures in the unregulated discretion of an [Assistant United States Attorney], a nonneutral party, invited the very disparity that the [Sentencing Reform Act] had sought to eliminate.").

292 "The exclusionary rule is not a personal constitutional right, but rather a judicially-created remedy to deter government violations of the Constitution." John F. Deters, *The Exclusionary Rule*, 89 GEO. L.J. 1216, 1216 (2001) (citing United States v. Leon, 468 U.S. 897, 906 (1984)). Dismissing the indictment altogether would be too drastic a remedy in most cases. *See* United States v. Bleu, 384 U.S. 251, 255 (1966)

use of judicially-created exclusionary rules to remedy constitutional violations.[293]

The exclusionary rule is regularly used to suppress evidence obtained directly or indirectly through government violations of the Fourth,[294] Fifth,[295] or Sixth Amendments.[296] The reach of the exclusionary rule, however, is broad enough to protect against other constitutional violations as well.[297] As an exclusionary rule for evidence in criminal proceedings, the doctrine focuses on the link between the evidence procured and the initial illegality of a government tactic.[298] When evidence is admitted at trial in violation of the exclusionary rule, reversal is required unless the error was harmless.[299]

Originally, the exclusionary rule was created with the purpose of deterring police misconduct.[300] With that continued focus, the United States Supreme Court has since declined to extend the rule to errors made by judicial officers, such as

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("[P]recedent[] ordering the exclusion of . . . illegally obtained evidence assume[s] implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also . . . interfere[] with . . . having the guilty brought to book.").

293 *See* Finklea, *supra* note 83, at 982-83.

294 The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ." U.S. CONST. amend. IV. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (exclusionary rule applies in federal court to evidence obtained in violation of the 4th Amendment).

295 The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. *See* Bram v. United States, 168 U.S. 532, 548 (1897) (exclusionary rule applies in federal court to evidence obtained in violation of the 5th Amendment).

296 The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. *See* United States v. Wade, 388 U.S. 218, 239-42 (1967) (witness identification excluded because post-indictment lineup violated 6th Amendment right to counsel); Massiah v. United States, 377 U.S. 201, 206-07 (1964) (statements excluded because deliberately elicited in violation of defendant's 6th Amendment right to counsel).

297 *See supra* note 26 and accompanying text.

298 *See* United States v. Ceccolini, 435 U.S. 268, 278 (1978).

299 *See* Chapman v. California, 386 U.S. 18, 23-24 (1967). Harmless error is error that does not affect a party's substantive rights or the case's outcome. *See* BLACK'S LAW DICTIONARY 563 (7th ed. 1999).

300 *See* United States v. Leon, 468 U.S. 897, 916 (1984).

judges or magistrates, when issuing warrants.[301] In so holding, the Court emphasized that judges and magistrates are not adjuncts to the law-enforcement team.[302] Rather, as neutral judicial officers, they fulfill their duties with no stake in the outcome of particular criminal prosecutions.[303] Thus, the threat of exclusion of evidence could not be expected to deter such individuals from issuing warrants in violation of the Constitution.[304]

The Supreme Court used similar reasoning to find the exclusionary rule inapplicable to the errors of legislators.[305] The Court again distinguished the role of legislators from that of the police. Legislators enact laws to establish and perpetuate the criminal justice system, a deliberative process that is significantly different from the hurried judgment of law-enforcement officers "engaged in the often competitive enterprise of ferreting out crime."[306] In this way, although legislators are not neutral judicial officers, like judges and magistrates, neither can they be classified as members of the law-enforcement team.[307] In light of the presumption that legislators perform their duties in accordance with the Constitution, the Court found no reason to believe that the exclusionary rule would deter lawlessness among legislators.[308]

The apparent narrowing of the exclusionary rule is not determinative here.[309] The focus of this separation-of-powers argument is on the actions of the prosecutor. To start, in contrast to judicial officers or legislators, prosecutors are not neutral participants in the criminal justice system. Instead,

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301 *See id.* In *Leon*, the Court held that the exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even though the warrant was ultimately found to be unsupported by probable cause and was, therefore, defective. *See id.* at 918-22. This exception to the exclusionary rule is known as the good-faith exception. *See id.* at 920-21.

302 *Id.* at 916-17.

303 *Leon*, 468 U.S. at 917.

304 *Id.*

305 *See* Illinois v. Krull, 480 U.S. 340, 350-52 (1987).

306 *Id.* at 351 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

307 *Id.* at 350-51 (citing *Leon*, 468 U.S. at 917).

308 *Id.* at 351 (citing *Leon*, 468 U.S. at 916).

309 *See id.* at 347-48 (in determining the application of the exclusionary rule, "the Court has examined whether the rule's deterrent effect will be achieved, and has weighed the likelihood of such deterrence against the costs of withholding reliable information from the truth-seeking process") (citations omitted).

they work hand-in-hand with the police "for the purpose of procuring evidence in particular criminal investigations."[310] The extension, therefore, of the exclusionary rule to prosecutors is a narrow and appropriate one.

More importantly, enforcing the exclusionary rule in this context would serve to deter and to compel respect for the Constitution by removing from the prosecutors the incentive to disregard it.[311] Deterring violations of constitutional rights is the core rationale for excluding illegally-obtained evidence.[312] Indeed, the rule is designed to prevent, rather than repair.[313]

Here, the violation of separation of powers urges suppression. When prosecutors use substantial-assistance motions to reward drug kingpins with sentence leniency, separation-of-powers principles are violated because prosecutors abuse the discretion granted to them by Congress to enforce the federal sentencing laws. Under such circumstances, the intent of federal sentencing is defeated. Exclusion is the most effective way to certify compliance with congressional intent, for the rule furthers the valuable public policy of deterring abuses of power by the executive.

The deterrent effect of the rule would serve to lessen, if not remove, the incentive prosecutors may have to abuse their sentencing discretion. When the potential consequence of such prosecutorial tactics is the suppression of testimony central to the prosecution's case, prosecutors might be more inclined to use caution in distributing substantial assistance. At bottom,

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[310] *Krull*, 480 U.S. at 352.

[311] United States v. Elkins, 364 U.S. 206, 217 (1960). *But see* Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 755 (1970) (explaining that there is "hardly any evidence" that the exclusionary rule exerts any deterrent effects on police behavior); Michael T. Kafka, Student Article, *The Exclusionary Rule: An Alternative Perspective*, 27 WM. MITCHELL L. REV. 1895, 1920-21 (2001) (arguing that there is a lack of data to support the proposition that the exclusionary rule works as a deterrent).

[312] *See* Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard for the charter of its own existence."). *But see* Kafka, *supra* note 311, at 1921 ("Given that there is a dearth of empirical evidence to support the effectiveness of the exclusionary rule as a deterrent, combined with the fact that 'this effect is not so inherently likely that we can assume it to exist in the absence of proof,' it is difficult to support its continued wholesale use.") (quoting Charles Alan Wright, *Must a Criminal Go Free if the Constable Blunders?*, 50 TEX. L. REV. 736, 741 (1972)).

[313] *Elkins*, 364 U.S. at 217.

the exclusionary rule would challenge the credibility of kingpins who testify to the details of the conspiracy, including its scope and purpose, and the culpability of various participants like their low-level counterparts.

At its inception, an additional purpose of the exclusionary rule was to preserve the imperative of judicial integrity.[314] As early as 1888, the Supreme Court noted that courts have the inherent power over their own process to prevent abuse, oppression, and injustice.[315] The exclusionary rule in this regard helped courts further the integrity of the judicial process, which otherwise was threatened if the courts condoned, implicitly if not explicitly, unconstitutional government tactics.[316] Certainly, the objective of the judiciary should be to prevent crime rather than promote it.[317] This rationale, however, has been abandoned by recent Supreme Court authority, leaving deterrence as the exclusionary rule's primary focus.[318] Still, recognizing that the judiciary must at the very least portray an image of impartiality, the exclusionary rule, if not applied to expressly further judicial integrity, can assure defendants and the public that courts will not allow the prosecutor to unfairly profit from his own unconstitutional behavior.[319]

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[314] *See id.* at 223.

[315] Finklea, *supra* note 83, at 983 (citing Gumbel v. Pitkin, 124 U.S. 131, 144 (1888)).

[316] *See* United States v. Bleu, 384 U.S. 251, 255 (1966) ("While the general common-law practice is to admit evidence despite its illegal origins, this Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under the Constitution, federal statutes, or federal rules of procedure."); *Elkins*, 364 U.S. at 223 ("'[A] conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.'") (quoting McNabb v. United States, 318 U.S. 332, 345 (1943)).

[317] *See* United States v. Russell, 411 U.S. 423, 449 (1973) (Stewart, J., dissenting) ("It is the Government's duty to prevent crime, not to promote it."). The Supreme Court has enumerated three purposes for using the Court's inherent supervisory powers: (1) to implement a remedy for violation of recognized rights; (2) to preserve judicial integrity; and (3) as a remedy designed to deter illegal conduct. *See* Finklea, *supra* note 83, at 986 (citing United States v. Hastings, 461 U.S. 499, 505 (1983)).

[318] *See* United States v. Leon, 468 U.S. 897, 921 n.22 (1984).

[319] *See* United States v. Calandra, 414 U.S. 338, 357 (1974) (reasoning that the Constitution's Framers fashioned the exclusionary rule to assure "all potential victims of unlawful government conduct – that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.").

Exclusion gives a defendant no more than that which the Constitution guarantees him, to the prosecutor no less than that to which honest law enforcement is entitled, and to the courts, that judicial integrity paramount in the true administration of justice.[320] In other words, the prosecution should not be put in a better position than it would have been in if no illegality had occurred.[321] But neither should the prosecution be put in a worse position simply because of some earlier error or misconduct by law enforcement.[322]

As with any remedial device, the exclusionary rule's application has been restricted to those instances where its remedial objectives are most effectively served.[323] Where the exclusionary rule does not promote deterrence, then its use is unwarranted.[324] Accordingly, the Supreme Court has identified several exceptions to the exclusionary rule. A defendant, for example, must have standing to challenge the admission of evidence against him.[325]

A court may also admit evidence that would not have been discovered but for official misconduct if the casual connection between the illegal conduct and the acquisition of the evidence is sufficiently attenuated.[326] Similarly, even if agents of the executive engage in illegal investigatory activity, evidence will be admissible if it is discovered through a source independent of the illegality.[327] Closely related to the independent-source exception, under the inevitable-discovery exception, a court

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320 Mapp v. Ohio, 367 U.S. 643, 660 (1961).

321 *See* Nix v. Williams, 467 U.S. 431, 443 (1984). *See also* Jerry E. Norton, *The Exclusionary Rule Reconsidered: Restoring the Status Quo Ante*, 33 WAKE FOREST L. REV. 261, 262 (1998) (arguing that the exclusionary rule is a just one because it restores the status quo ante by putting both the State and the accused in the positions they would have been in had the Constitution not been violated – neither better nor worse).

322 *See Nix*, 467 U.S. at 443; Akhil Reed Amar, Fourth *Amendment First Principles*, 107 HARV. L. REV. 757, 793 (1994) (indicating that those criminals who commit the abhorrent crimes that are often subject to application of the exclusionary rule should not gain a windfall over the people who both expect and deserve a prosecution from the production of evidence that is wholly reliable).

323 *Calandra*, 414 U.S. at 348.

324 United States v. Janis, 428 U.S. 433, 454 (1976).

325 *See* Deters, *supra* note 292, at 1216-18.

326 *See* Wong Sun v. United States, 371 U.S. 471, 491 (1963) (where defendant arrested without probable cause voluntarily returned to the police station and gave an unsigned confession, confession ruled admissible because the defendant's voluntary return rendered confession sufficiently attenuated from illegal arrest).

327 *See Nix*, 467 U.S. at 443.

may admit illegally obtained evidence if the evidence inevitably would have been discovered through independent, lawful means.[328]

Finally, even if no exception to the exclusionary rule applies, the government may use illegally obtained evidence in contexts outside of the prosecution's case-in-chief.[329] The prosecutor may introduce tainted evidence in federal civil tax proceedings, habeas proceedings, grand jury proceedings, civil deportation proceedings, parole revocation proceedings, and at a defendant's sentencing hearing.[330]

All of the exceptions to the exclusionary rule would apply with equal force in this context, for to hold otherwise "would reject logic, experience, and common sense."[331] However, logic, experience, and common sense would similarly be insulted if courts were to continue to allow prosecutors to subvert congressional intent by allowing kingpin drug dealers to avoid the more severe sentencing laws under the veil of substantial assistance.

CONCLUSION

Substantial assistance as promulgated by Congress is not the problem. The problem lies with the prosecutor's use of the sentencing authority granted to him. Permissible prosecutorial discretion does not extend to defying congressional intent by favoring more culpable drug-trafficking conspirators with substantial assistance.

Unlike civil or criminal defense counsel, the prosecutor does not represent an individual client.[332] Nor does the prosecutor represent the victim of the crime, the police, or any other person.[333] Instead, the federal prosecutor represents the vast interests of the federal government, which means he

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[328] *See* Murray v. United States, 487 U.S. 533, 539 (1988) (noting inevitable discovery is actually an extrapolation from the independent-source doctrine; since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered).

[329] Deters, *supra* note 292, at 1227.

[330] *Id.*

[331] *Nix*, 467 U.S. at 444.

[332] Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 537 (1986).

[333] *Id.*

represents the interests of society in general.[334] Notwithstanding the prosecutor's primary obligation to the public, he must remember that the criminal defendant is a citizen and entitled to total fairness during the prosecution.[335]

Viewed this way, the prosecutor has a duty not only to obtain a conviction, but also to seek justice.[336] When prosecutors abuse the discretion granted to them by Congress to enforce the federal sentencing laws by rewarding kingpin drug traffickers with substantial-assistance departures, they jeopardize a criminal defendant's right to due process and fair trial and act contrary to their role as enforcers of the law.[337]

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[334] *Id.*

[335] Berger v. United States, 295 U.S. 78, 88 (1935) (stating that as the representative of a sovereignty whose interest in a criminal prosecution is not to win, but to accomplish justice, the prosecutor "may prosecute with earnestness and vigor . . . [b]ut, while he may strike hard blows, he is not at liberty to strike foul ones"); Secunda, *supra* note 137, at 1267-68 ("[T]he . . . prosecutor strives to maintain an upright stance in the stained halls of criminal justice. . . . Virtue is the cherished ingredient in his role . . . Daily, the ethical fibre of the prosecutor is tested – and through him, in large measure, the rectitude of the system of justice.") (quoting H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1145 (1973)).

[336] For an articulation of the prosecutor's role in the criminal justice system, see R. Jackson, *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940:

> There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn't blind. One of the greatest difficulties is of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints. . . . What every prosecutor is practically required to do is select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain. If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than the case that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm – in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

(*quoted in* Morrison v. Olson, 487 U.S. 654, 727-28 (1988) (Scalia, dissenting).

[337] *See* Finklea, *supra* note 83, at 983 ("It is well settled that the government cannot

They venture beyond their role as enforcers of the law and legislate by acting contrary to the intent of the sentencing laws.

The separation-of-powers doctrine is adequate to deal with the abuse. When prosecutors use substantial assistance in contravention of congressional intent, separation-of-powers principles, as enforced through the exclusionary rule, have the greatest ability to correct the abuse and further the integrity of the federal sentencing system as Congress intended. Under such circumstances, exclusion provides a disincentive for prosecutors and preserves judicial integrity by removing potentially perjured testimony.

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deliberately user perjured testimony or encourage the use of perjured testimony, so the great incentive to lie in the face of an offer of leniency should cause the prosecutor to refrain from making such a deal lest he risk punishment for causing the perjury himself.") (quoting Napue v. United States, 360 U.S. 264, 269-70 (1959)).

* J.D. candidate, Golden Gate University School of Law, May 2002. I thank the Law Review for the opportunity to contribute, in a small way, to a dynamic discussion in which much has been proposed but very little accomplished. For Richard A. Canatella, whose passion as a student of the law I admire and in whom I find faith and inspiration. And for Nilo Seghetti, my grandfather, whose absence I feel with every beat of my heart, the heart in which his memory now lives.