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Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard

Julie Gyurci

A substantial assistance motion by the government permits a departure from the Federal Sentencing Guidelines ("Guidelines") for a defendant who provides substantial assistance in the prosecution or investigation of another person.1 The substantial assistance departure constitutes the most important exception to mandatory minimum sentences;2 fifteen percent of all defendants sentenced under the Guidelines receive substantial assistance departures.3 Yet, no clear standards exist governing the use of substantial assistance motions by prosecutors.4 In Wade v. United States,5 the Supreme Court recently held that sentencing courts may make a substantial assistance departure only on a motion by the government and that courts may review the government's refusal to bring a substantial assistance motion only if the government based the refusal on a constitution-


2. Substantial assistance departures comprised over 71% of all downward departures in fiscal 1992. U.S. SENTENCING COMMISSION, 1992 ANNUAL REPORT 125 (1993) (hereinafter 1992 ANNUAL REPORT). Courts lack discretion in sentencing under both statutory mandatory minimum sentences and the Sentencing Guidelines. Substantial assistance motions can offset both statutory mandatory minimum sentences and Guideline range sentences. See infra note 35 and accompanying text (noting that a motion under § 5K1.1 in all but one circuit allows courts to depart from statutory mandatory minimum sentence). Accordingly, this Note uses the term "mandatory minimum sentences" loosely to refer both to sentences required by the Sentencing Guidelines and statutes.

3. 1992 ANNUAL REPORT, supra note 2, at 127. In addition, over 25% of all defendants in federal drug trafficking cases receive substantial assistance departures. Drug trafficking offenses currently comprise over 41% of all Guidelines cases. Id. at 45.

4. See infra notes 44-49 and accompanying text (discussing inconsistency regarding use of substantial assistance motions).

ally impermissible motive.\(^6\) The Supreme Court specifically noted, however, that the defendant in *Wade* did not assist the government pursuant to a plea agreement.\(^7\) The federal circuits subsequently split over whether the holding applies to cases involving plea agreements in which the government reserves discretion to determine whether a defendant's cooperation merits a substantial assistance motion.\(^8\)

Mandatory minimum sentences generate an enormous amount of commentary and controversy.\(^9\) No commentators,

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\(^6\) *Id.* at 1843-44. For example, courts could review a prosecutor's refusal to request a substantial assistance departure if the prosecutor based the refusal on the defendant's race or religion. *Id.* at 1844. A court also can grant relief to the defendant if the government's refusal to move for a downward departure is "not rationally related to any legitimate government objective." *Id.*

7. The defendant in *Wade* did not rely on "any agreement on the Government's behalf to file a substantial assistance motion." *Id.* at 1843.

8. In a plea agreement, the government typically reserves discretion to make a substantial assistance motion in the following manner:

> At or before the time of sentencing, the United States will advise the Court of any "substantial assistance" provided by [the defendant] in the . . . investigation . . . or in the prosecution of another person who has committed a criminal offense. The United States may, but shall not be required to, make a motion requesting the court to depart from the sentencing range called for by the Guidelines. This decision shall be in the sole discretion of the United States Attorney.

United States v. Romsey, 975 F.2d 556, 557 (8th Cir. 1992) (quoting plea agreement).


9. For example, Chief Justice William Rehnquist stated recently that mandatory minimums are "perhaps a good example of the law of unintended consequences." *The Problems With Mandatory Minimum Sentences*, 77 *Judicature* 124, 124 (1993). One editorial calls mandatory minimums a "meat-ax approach to a task that demands fairness and precision." *Id.* at 125. Critics attack in particular the high sentences for first-time, low-level, non-violent drug offenders. Bill Rankin, *Prison Sentences Set in Stone: A Deterrent or an Injustice?*, ATLANTA J. AND CONST., Oct. 17, 1993, at A1. For example, one twenty-year-old woman was sentenced to ten years in prison for telling a government informant where to find her boyfriend to consummate an LSD sale. *Id.* Yet in light of growing public concerns about crime, legislators hesitate to make changes, "lest opponents tag them as soft on crime." *The Problems With Mandatory Minimum Sentences*, *supra*, at 124.
however, have examined the confusion remaining after *Wade* in cases involving substantial assistance motions pursuant to plea agreements. Criminal defendants surrender constitutional rights in entering a guilty plea and frequently incur substantial risks in fulfilling a cooperation agreement. Disturbingly, a growing number of federal circuits disregard the fundamental rights of defendants in the interpretation of plea agreements and refuse to investigate allegations of prosecutorial bad faith.

This Note describes the inconsistency in the approaches that the federal circuits use and asserts that the application of an objective good faith standard to plea agreements will protect the rights of defendants and produce greater uniformity. Part I outlines the goals of the Federal Sentencing Guidelines, illustrates the purposes of substantial assistance motions, and describes plea bargaining under the Guidelines. Part I also explains how courts use contract principles to interpret plea agreements and discusses the prevailing standards of review of prosecutorial discretion retained in plea agreements. Part II analyzes the shortcomings of the existing approaches and proposes a standard that would safeguard the constitutional and contractual rights of defendants and would restore balance to the sentencing process. This Note concludes that courts should apply an objective good faith standard to a prosecutor's refusal to file a substantial assistance motion pursuant to a plea agreement.

10. After *Wade*, no defense attorney would likely advise a client to cooperate with the government without the benefit of a plea agreement. David Fisher, *Fifth Amendment—Prosecutorial Discretion Not Absolute: Constitutional Limits On Decision Not To File Substantial Assistance Motions*, 83 J. CRIM. L. & CRIMINOLOGY 744, 771 (1993). Consequently, *Wade* offers little precedential value to lower courts in cases involving plea agreements, which "leaves lower courts in a quagmire." *Id.* at 770. Fisher also maintains that the Supreme Court did not effect positive change in *Wade* due to the Court's failure to address significant issues and due to the "lack of clarity and specificity" in the standards created. *Id.* at 758.

11. *See infra* notes 74-75 and accompanying text.


13. *See supra* note 8; *infra* notes 90-100 and accompanying text.
I. DEPARTURES FROM THE GUIDELINES

A. THE FEDERAL SENTENCING GUIDELINES

In 1987, the United States Sentencing Commission14 ("Sentencing Commission") addressed the perceived problems of indeterminate sentencing15 by implementing the Federal Sentencing Guidelines.16 Congress hoped to create a fair and efficient sentencing process that would curb unwarranted disparity in federal sentencing.17 Accordingly, the Sentencing Reform Act identifies three primary goals in restructuring the federal sentencing process: uniformity,18 proportionality,19 and honesty in sentencing.20

The Sentencing Guidelines apply to the most frequently occurring federal offenses.21 The Guidelines attach a base offense


15. Under indeterminate sentencing, federal judges had broad discretion to fashion sentences with little or no review, resulting in disparate sentences for similarly situated individuals. Parole commissions often diluted the sentence and "resentenced the defendant according to [their] own set of rules." U.S. SENTENCING COMMISSION, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 16 (1991) [hereinafter MANDATORY MINIMUM PENALTIES].


18. Congress sought to narrow disparity by ensuring uniform sentences for similarly situated criminals, those with similar records convicted of similar criminal conduct. MANDATORY MINIMUM PENALTIES, supra note 15, at 17.


20. Congress sought to avoid "the confusion and implicit deception" of indeterminate sentencing. U.S.S.G., supra note 1, at ch. 1, pt. A(3) cmt.

21. The Sentencing Guidelines apply to over ninety percent of all federal felony and Class A misdemeanor cases. Id. at ch. 1, pt. A(5) cmt. The federal
level to each offense and rank offense categories according to severity. Sentencing courts may adjust the offense level for aggravating or mitigating factors. After ascertaining the defendant's criminal history, the sentencing court determines the appropriate sentencing range from the sentencing table, which contains a grid comprised of forty-three offense levels and six criminal history categories. The court has discretion to choose the sentence from any point within the range.

code also imposes mandatory minimum sentences on more than 100 offenses. See Stephen Schulhofer, Rethinking Mandatory Minimums, 28 Wake Forest L. Rev. 199, 201 (1993). Four types of offenses account for more than 90% of all mandatory minimum convictions: manufacturing or distributing controlled substances, possessing a mixture containing a cocaine base, importing or exporting controlled substances, and the sentence enhancement for using or carrying a firearm during certain drug or violent crimes. Henry R. Wray, U.S. Gen. Accounting Office, Mandatory Minimum Sentences: Are They Being Imposed and Who is Receiving Them? Testimony Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary 3-4 (1993) (hereinafter Wray Testimony) (summary statement by Mr. Wray, Director, Administration of Justice Issues, GAO). Courts sentence offenders under the Guidelines unless the Guideline sentence is lower than the statutorily required minimum sentence. See U.S.S.G., supra note 1, § 5G1.1. A recent General Accounting Office report found that sentencing courts impose the Guidelines sentencing range in approximately 70% of drug cases, most of them involving drug trafficking offenses. Wray Testimony, supra, at 14-15, app. at 21.

22. U.S.S.G., supra note 1, at ch. 2.

23. See id. at ch. 3. Sentencing courts adjust the base offense level for Victim-Related Adjustments, id. at ch. 3, pt. A; Role in the Offense, id. at ch. 3, pt. B; Obstruction, id. at ch. 3, pt. C; Multiple Counts, id. at ch. 3, pt. D; and Acceptance of Responsibility, id. at ch. 3, pt. E. Under § 3E1.1 of the Guidelines, the sentencing court decreases the offense level by two levels if the defendant clearly demonstrates acceptance of responsibility for the offense. Id. § 3E1.1(a). The court also may decrease the offense level by one additional level if the defendant assists in the investigation or prosecution of his own misconduct. Id. § 3E1.1(b). The Sentencing Commission specifically differentiates between acceptance of responsibility deductions and departures outside the Guidelines for substantial assistance. Id. § 5K1.1 cmt. n.2.

24. The sentencing court consults U.S.S.G., supra note 1, at ch. 4, to determine the Criminal History Category.

25. U.S.S.G., supra note 1, at ch. 5, pt. A. The intersection of the vertical axis, the Offense Level, and the horizontal axis, the Criminal History Category, provides the Guideline range in months of imprisonment. Id. at ch. 5, pt. A n.l. For step-by-step instructions in determining the appropriate sentence under the Guidelines, see id. § 1B1.1.

26. Id. § 5G1.1(c). Generally, as a matter of federal law, the maximum sentencing range for imprisonment may not exceed the minimum of the range by more than 25%. 28 U.S.C. § 994(b)(2) (1988).
B. SUBSTANTIAL ASSISTANCE DEPARTURES

The Sentencing Guidelines also contain provisions by which a sentencing court may depart from the Guidelines. The Sentencing Commission believes that the proper use of a court's departure authority is critical to the successful implementation of the Guidelines. Substantial assistance motions, the most important exception to Guideline sentencing, permit sentencing courts to depart from the Guidelines when a defendant cooperates with the government in other cases. Substantial assistance departures account for over two-thirds of all departures.

27. See U.S.S.G., supra note 1, at ch. 5, pt. K.
29. Courts cited substantial assistance as a reason in 71.6% of all downward departures in 1992. 1992 ANNUAL REPORT, supra note 2, at 122. In addition to the substantial assistance departure, U.S.S.G. § 5K1.1, courts may base a sentencing departure on aggravating or mitigating circumstances that the Sentencing Commission has not considered adequately. 18 U.S.C. § 3553(b) (1988); U.S.S.G., supra note 1, § 5K2.0. Courts also have discretion to depart upward, although they did so in only 1.5% of all cases in 1992. 1992 ANNUAL REPORT, supra note 2, at 127; see U.S.S.G., supra note 1, § 5K2.
30. This provision ensures that mandatory sentences will not impede defendants' cooperation and creates powerful incentives for defendants to assist the government. Commentators criticize the § 5K1.1 departure, however, on fairness grounds because the imposed sentence bears little relationship to culpability. See, e.g., John D.B. Lewis, Cooperation Under The Guidelines, N.Y. L.J., Apr. 30, 1993, at 2 (arguing that reducing "the dispensing of justice to a crass exchange of information for sentencing clemency" creates enormous suffering and produces no countervailing benefits). In fact, a defendant who plays a major role in a crime, with a high level of knowledge and responsibility, can negotiate a departure more easily than minor participants. See Schulhofer, supra note 21, at 211-13. Substantial assistance departures also create "serious inherent incentives to perjury." Rankin, supra note 9, at A1 (quoting U.S. District Judge Vincent Broderick).

At the same time, minor participants in multi-defendant drug and fraud conspiracy cases are subject to the same sentence as the most culpable co-defendants. L. Felipe Restrepo, To Be or Not To Be a Cooperating Defendant, CRIM. JUST., Winter 1993, at 22, 25.

There are few federal judges who have not had the disheartening experience of seeing major players in crimes immunize themselves from harsh mandatory minimum sentences by blowing the whistle on their minions, while the low-level offenders find themselves sentenced to the tough terms that the kingpin so skillfully avoided.

Barefoot Sanders & Vincent Broderick, Mandatory Sentences Are Unfair, DALLAS MORNING NEWS, Oct. 18, 1993, at 15A.
from the Guidelines, and their use has more than quadrupled from 1989 to 1992.

Section 5K1.1 of the United States Sentencing Guidelines provides that “[u]pon 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.” Similarly, 18 U.S.C. § 3553(e) permits courts to depart from the applicable statutory mandatory minimum sentence based on substantial assistance. All but one circuit have concluded that these two

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31. See 1992 Annual Report, supra note 2, at 120-21. In fiscal year 1992, trial courts sentenced outside of the Guidelines in 22.6% of all cases. See id. at 120. Departure rates vary markedly by offense type. Id. at 130. Offenses with high substantial assistance departure rates include bribery (31.1%), gambling and lottery (30.9%), drug trafficking (25.6%), money laundering (22.2%), and racketeering and extortion (20.1%). Id. at 130-31.

One judge, however, claims that no reliable statistics are available on departures due to the Sentencing Commission’s method of counting substantial assistance departures. Stanley Marcus, Substantial Assistance Motions: What Is Really Happening?, 6 Fed. Sentencing Rep. 6, 6 (1993). The Commission counts substantial assistance motions only if the government files the motion before sentencing; usually, however, prosecutors file substantial assistance motions long after the court imposes the sentence. Id. Judge Marcus concludes that “better than half—and probably a much higher percentage—of all downward departures are being made for reasons that are often wholly unclear, not stated in the open record, and altogether uncaptured by statistics.” Id. at 7.

Other courts, however, recognize and award § 5K1.1 departures only if the government files its motion prior to sentencing. These courts conclude that § 5K1.1 does not apply to a defendant’s assistance rendered subsequent to sentencing. United States v. Drown, 942 F.2d 55, 59 (1st Cir. 1991); United States v. Howard, 902 F.2d 894, 897 (11th Cir. 1990); United States v. Francois, 889 F.2d 1341, 1345 (4th Cir. 1989), cert. denied, 494 U.S. 1085 (1990). These courts recognize and reward cooperation subsequent to sentencing pursuant to a Federal Rule 35(b) motion only. Rule 35(b) provides the following: “The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant’s subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense . . . .” Fed. R. Crim. P. 35(b).


33. U.S.S.G., supra note 1, § 5K1.1. Before 1989, the standard for a § 5K1.1 motion was a “good faith effort” to provide assistance. In 1989, the Commission deleted the “good faith effort” clause, suggesting that a departure requires something more than just the willingness of the defendant to provide substantial assistance. Id. app. C, amend. 290.

34. 18 U.S.C. § 3553(e) (1988). The section provides the following:
provisions perform the same function and do not constitute separate and distinct methods of departure. 35

The prosecutor alone has the power to move for a substantial assistance departure; a sentencing court cannot depart on its own authority. 36 The court, however, determines the appropriate sentencing reduction and has full authority to deny a substantial assistance motion. 37 The trial court determines

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

Id. 28 U.S.C. § 994(n) (1988) similarly provides the following:
The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Id.

35. U.S.S.G. § 5K1.1 provides for departures below the Guidelines; 18 U.S.C. § 3553(e) provides for departures below the statutory mandatory minimum. Only the Eighth Circuit differentiates between the two departure motions. Compare United States v. Beckett, 996 F.2d 70, 74 (5th Cir. 1993) (concluding that a direct statutory relationship exists between § 5K1.1 and § 3553(e) that makes § 5K1.1 the appropriate method by which courts may implement § 3553(e)); United States v. Cheng Ah-Kai, 951 F.2d 490, 493-94 (2d Cir. 1991); United States v. Keene, 933 F.2d 711, 714 (9th Cir. 1991) with United States v. Rodriguez-Morales, 958 F.2d 1441, 1443 (8th Cir.) (requiring § 3553(e) motion rather than § 5K1.1 motion for departure below a statutory minimum), cert. denied, 113 S. Ct. 375 (1992). The United States Supreme Court acknowledged the circuit split in Wade v. United States, 112 S. Ct. 1840, 1843 (1992), but did not resolve the issue because the facts in Wade implicated both § 3553(e) and § 5K1.1. Id. at 1843. The Supreme Court previously suggested that it will look to the Sentencing Commission to resolve circuit splits before granting certiorari on a disputed issue. Braxton v. United States, 111 S. Ct. 1854, 1858 (1991).

36. Wade, 112 S. Ct. at 1843.

37. United States v. Mariano, 983 F.2d 1150, 1155-56 (1st Cir. 1993). The Guidelines state, however, that "[s]ubstantial weight should be given to the government’s evaluation of the extent of the defendant’s assistance, particularly where the extent and the value of the assistance are difficult to ascertain." U.S.S.G., supra note 1, § 5K1.1 cmt. n.3.

Sections 3553(e) and 5K1.1 have withstood preliminary constitutional challenges. For example, courts have rejected the argument that these sections violate the constitutionally required separation of powers. See, e.g., United States v. Huerta, 878 F.2d 89, 91-92 (2d Cir. 1989), cert. denied, 493 U.S. 1046 (1990). In addition, courts uniformly have held that because the government motion requirement does not invalidly circumscribe judicial sentencing discretion in individualized sentencing, the requirement does not violate due process requirements. See, e.g., United States v. La Guardia, 902 F.2d 1010, 1014 (1st
whether a defendant's assistance deserves a departure based on the following factors:

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;
5) the timeliness of the defendant's assistance.38

A sentencing court has wide discretion concerning both the decision to depart and the extent of the departure.39 In general, once the trial court establishes the basis for a downward departure, no limits exist as to the extent of the departure, except for express statutory prohibitions.40 A defendant cannot appeal either the trial court's refusal to depart41 or the extent of the departure.42 In practice, however, courts rarely deny the prosecutor's substantial assistance motion.43

Prosecutors dispense substantial assistance motions unevenly, largely because United States Attorney's Offices inconsistently define "substantial assistance."44 Consequently, the

38. U.S.S.G., supra note 1, § 5K1.1. The sentencing court may consider factors other than those enumerated. See id. § 5K1.1(a). At least one court has held that a trial court may recognize mitigating concerns only to the extent they relate to a defendant's substantial assistance. United States v. Mariano, 983 F.2d 1150, 1156 (1st Cir. 1993).
41. United States v. Romolo, 937 F.2d 20, 22 (1st Cir. 1991) (collecting cases). Parties may appeal the decision, however, when the trial court misapplied the rules governing departure. E.g., Mariano, 983 F.2d at 1153.42. See, e.g., United States v. Parker, 902 F.2d 221, 222 (3d Cir. 1990); United States v. Left Hand Bull, 901 F.2d 647, 650 (8th Cir. 1990).
43. Restrepo, supra note 30, at 25. A General Accounting Office report found that in seven out of eight judicial districts reviewed, sentencing courts granted a substantial assistance departure to "most or all defendants who received a substantial assistance motion." Wray Testimony, supra note 21, at 6, app. at 18.
use of substantial assistance motions varies greatly district by
district. In one district, the definition of substantial assistance varies "according to the extent to which the AUSA [Assistant United States Attorney] considers the defendant sympathetic." Id. at 522-23. In the United States Attorney's office in another district, a contradictory policy directive states that cooperation must result in additional charges or convictions and that the prosecutor should make the substantial assistance motion "once the defendant does everything he is called up to do." Id. at 531. This district had twice the national average of substantial assistance motions. Prosecutors there circumvented the Guidelines to deliver the sentences they thought individual defendants deserved. Id. In another district, the AUSAs "seldom used" the substantial assistance motion because prosecutors preferred charge reduction to lock in sentence exposure, and defense attorneys were "aggrieved by some AUSAs refusal to submit section 5K1.1 motions after cooperation was allegedly rendered." Id. at 541.

Further, the circuits do not agree on a definition of "substantial assistance." For example, one court has stated that a defendant's readiness to perform may be enough to constitute substantial assistance. United States v. Melton, 930 F.2d 1096, 1098-99 (5th Cir. 1991) (holding that the government must move for downward departure if defendant, in reliance on plea, did his part or stood ready to perform but was unable to do so because the government had no further need or opted not to use him). Another court reasoned that when defendants do all that the agreement requires, the government should move for a substantial assistance departure. United States v. Knights, 968 F.2d 1483, 1488-89 (2d Cir. 1992) (suggesting that if defendant did all that the plea agreement asks of him, he has kept his half of the agreement, and the government could not in good faith refuse to keep its half). Another court concluded that substantial assistance means actual assistance in the prosecution of another defendant; good faith cooperation is not enough. United States v. Donatiu, 922 F.2d 1331, 1335 (7th Cir. 1991) (stating that the government's decision not to move for departure was reasonable when defendant's information was not new or helpful).

Consequently, one court suggested that the government should clarify what it means by substantial assistance in the plea agreement. United States v. Fairchild, 940 F.2d 261, 266 (7th Cir. 1991) (ruling against defendant's interpretation of "substantial assistance," but nevertheless concluding that "[t]he government should not take advantage of a defendant's ignorance of the caselaw on substantial assistance to mislead him into believing it will make the motion if he cooperates"). One judge, searching case law for a consistent meaning for substantial assistance, reported finding "little that explicated the meaning of 'substantial assistance' under 5K1.1, even after five years of Sentencing Guidelines and substantial assistance motions." Marcus, supra note 31, at 6.

At least one circuit court has held that substantial assistance departures are appropriate when the defendant provides assistance to the judicial system as well as to the government. United States v. Garcia, 926 F.2d 125, 127-28 (2d Cir. 1991) (holding that departure without motion possible for assistance to the judiciary although not for assistance to the prosecutor). Most other circuits reject the holding in Garcia. E.g., United States v. Goroza, 941 F.2d 905, 908 (9th Cir. 1991) (holding that a government motion is required); United States v. Romolo, 937 F.2d 20, 24-25 (1st Cir. 1991) (same); United States v. Chotas, 913 F.2d 897, 900 (11th Cir. 1990) (same), cert. denied, 499 U.S. 950 (1991); United States v. Bruno, 897 F.2d 691, 695 (3d Cir. 1990) (same).
district. Moreover, racial and gender disparities exist. Inconsistencies also result when prosecutors make substantial assistance motions for motives other than the quality of assistance, for example, to induce guilty pleas, to benefit sympathetic defendants, or to mitigate sentences prosecutors perceive as too harsh. As a result, prosecutors increasingly have used substantial assistance motions for cases that should not qualify.

45. WRAY TESTIMONY, supra note 21, at 6. In some districts "the requirements were stringent, in others liberal." Id. at 16. For example, in 1992, the D.C. Circuit had an aggregate departure rate of 12.1%, while the Third Circuit had an aggregate departure rate of 38.2%. 1992 ANNUAL REPORT, supra note 2, at 127. In the Eastern District of Pennsylvania, which is in the Third Circuit, 48.8% of all defendants sentenced under the Guidelines received a substantial assistance departure. Id. Other districts with overall departure rates above 40% include Arizona and the Western District of North Carolina. Id. at 126. In stark contrast, Eastern Virginia, Western Arkansas, and Eastern Oklahoma had departure rates below 7%. Id. One commentator concludes that "[t]he inference of pervasive discretion, with sharp disparities in its application, is strong." Schulhofer, supra note 21, at 220.


47. In United States v. Redondo-Lemos, 817 F. Supp. 812 (D. Ariz. 1993), the court held that the United States Attorney's Office discriminated on the basis of gender in forming plea agreements. Id. at 819. For example, over one-third of females received straight probation for drug-related offense, while only eleven percent of males received probation. Id. at 815. In Redondo-Lemos, the United States Attorney's Office failed to meet its burden in rebutting the prima facie showing of discriminatory impact. As a result, the court gave the male defendants the benefit of the plea bargain they would have received but for the discrimination. Id. at 819.

48. Nagel & Schulhofer, supra note 44, at 550-51. Furthermore, such circumvention goes "largely unchecked by judges" who oppose the Guidelines or the Guideline range. OPERATION REPORT, supra note 16, at 17; see also WRAY TESTIMONY, supra note 21, at 8-9 (reporting that judges in the eastern district of New York "generally disliked" sentencing low-level offenders to mandatory minimums).

49. The discretionary features of mandatory minimum sentences result in evasion of the mandatory minimum in 30 to 50% of cases in which mandatory minimum sentences apply. Schulhofer, supra note 21, at 220.
Despite the potential for prosecutorial abuse, in *Wade v. United States*,\(^5\) the Supreme Court recently held that sentencing courts may make a substantial assistance departure only on motion by the government.\(^5\) The Court also held that courts cannot review the government's refusal to file a substantial assistance motion unless the refusal is based on a constitutionally impermissible motive or is not rationally related to any legitimate government end.\(^5\) The Court reasoned that the decision to bring a substantial assistance motion resembles any other discretionary decision of the prosecutor.\(^5\) The Supreme Court specifically noted, however, that *Wade* did not involve a plea agreement.\(^5\) Consequently, federal courts disagree about whether *Wade* controls in cases in which defendants bargain for and rely on the government's promise in a plea agreement to make a substantial assistance motion if warranted by the assistance rendered.\(^5\)

C. Plea Agreements Under the Guidelines

 Defendants enter guilty pleas in almost ninety percent of Guidelines cases,\(^5\) and many pleas involve some form of agreement with the government.\(^5\) Even though the Sentencing Commission did not intend to institute major changes in plea agreement practices,\(^5\) in reality prosecutors have gained significant power in plea bargaining under the Guidelines.\(^5\) Prosecu-

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51. *Id.* at 1843. In 1993, the Sentencing Commission considered and rejected an amendment that would allow courts to depart on their own without a motion by the government. Deborah Pines, *Amendments Approved to Sentencing Guidelines*, N.Y. L.J., Apr. 20, 1993, at 1. One circuit has held, however, that when the government refuses to make a substantial assistance motion, breaching a plea agreement, the district court may sentence the defendant below the mandatory minimum without a motion by the government. United States v. De La Fuente, 8 F.3d 1333, 1340-41 (9th Cir. 1993).
52. *Wade*, 112 S.Ct at 1843-44. The court concluded that a defendant must make a "substantial threshold showing" of impermissible motive to advance a right of discovery or an evidentiary hearing. *Id.* at 1844. A defendant cannot satisfy the requirement with a mere generalized allegation. *Id.*
53. *Id.* at 1843.
54. *Id.*
55. *See supra* note 8.
58. *Id.*
59. *See Nagel & Schulhofer, supra* note 44, at 504-05, 561. The Sentencing Guidelines granted prosecutors new authority and power, but imposed no corresponding accountability. United States v. Jones, 983 F.2d 1425, 1433 n.12 (7th Cir. 1993). Both Congress and the Sentencing Commission considered plea bar-
tors have substantial discretion in negotiating plea agreements,\textsuperscript{60} which creates a significant danger for abuse of prosecutorial power.\textsuperscript{61} In practice, prosecutors circumvent the Guidelines\textsuperscript{62} through plea agreements in twenty to thirty-five percent of all cases involving pleas.\textsuperscript{63} Prosecutors typically misuse their power to benefit defendants by surreptitiously making unwarranted substantial assistance motions.\textsuperscript{64}
Although prosecutors have higher ethical obligations than other lawyers, prosecutors find themselves “increasingly immune to ethical restraints” and “virtually immune from judicial review.” One court justifies the minimal scrutiny of prosecutors’ conduct in plea bargaining by reasoning that built-in institutional safeguards protect defendants, who will refuse to cooperate with prosecutors who act unfairly. Yet prosecutors and defendants possess unequal bargaining power. Because of the harshness of many Guideline sentences, a defense attorney in a multi-defendant case feels compelled to explore every possibility for a departure and “may feel compelled to beat his or her colleagues to the prosecutor’s door to cut a deal.”

65. Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. Rev. 393, 405 n.41 (1992). Public prosecutors play a dual role in the judicial process. They represent the adversarial element in a proceeding against a particular defendant. Unlike most criminal defense attorneys, however, prosecutors also represent the government, thereby committing themselves to the pursuit of “impartial justice” and the fairest, though not necessarily most severe, sentence. United States v. Jones, 983 F.2d 1425, 1433 n.13 (7th Cir. 1993) (citing Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1218 (1958)); see also United States v. De La Fuente, 8 F.3d 1333, 1340 (9th Cir. 1993) (holding government to a high standard of fair dealing in view of its duty to “serve truth and justice first” (quoting United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993))); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1992) (concluding that a “prosecutor has the responsibility of a minister of justice and not simply that of an advocate”).

66. Gershman, supra note 65, at 393; see id. at 443-48 (discussing prosecutors’ exemption from ethical restraints).

67. Id. at 406. At the same time, the Supreme Court demands higher ethical standards for defense counsel but imposes lower standards for their competence and loyalty. Id. at 404 n.72.

68. United States v. Rexach, 896 F.2d 710, 714 (2d Cir.), cert. denied, 498 U.S. 969 (1990). The court notes that the government has a substantial interest in encouraging cooperation through plea agreements. If the government “fails to exercise its discretion fairly and even-handedly, valuable information and assistance will be lost, because defendants may come to regard its prosecutors as untrustworthy and simply refuse to cooperate with them.” Id.


70. For example, Carol A. Brook, Deputy Director of the Federal Defender Program in Chicago, asserts the following: “You can’t take a Guidelines case without thinking how you’re going to argue for a [downward] departure. The stakes are too high.” John Flynn Rooney, Federal Sentencing Guides Susceptible to Reason, Creativity, CHI. DAILY L. BULL., Dec. 10, 1993, at 1.

D. Consequences of a Plea Agreement

Defendants incur risks and surrender rights when entering into a cooperation agreement with the government. For example, a cooperating defendant "assumes potentially onerous and protracted obligations" to the government. Potential hazards of cooperating include the following: betraying friends and family by testifying against them, risking retribution, and endangering family members. Moreover, a defendant gives up constitutional rights by entering a guilty plea. Accordingly, the Constitution requires that defendants waive constitutional rights voluntarily, knowingly, and intelligently. Prosecutors to a guilty plea frequently represents the only alternative a defendant has to a long prison sentence. Restrepo, supra note 30, at 51. In addition, a defendant, on the other hand, sometimes can get the same or similar information from other defendants in a multi-defendant case. Defendants must decide whether to cooperate very early in the proceedings, usually before discovery. Id. at 24. The Sentencing Commission clearly intended mandatory minimums to encourage offenders to provide cooperation "because cooperation . . . is the only statutorily-recognized way to permit the court to impose a sentence" below the mandatory minimum. MANDATORY MINIMUM PENALTIES, supra note 15, at 14 (citation omitted). Conversely, courts may not consider a defendant's refusal to cooperate as an aggravating sentencing factor. U.S.S.G., supra note 1, § 5K1.2.

72. Hughes, supra note 12, at 3. Obligations will "at least include interviews and debriefings and may involve undercover action or observation and reporting back." Id.

73. Lewis, supra note 30, at 2; Restrepo, supra note 30, at 24-25. In addition, the New York Times reports a "trend" among drug gangs in Manhattan to kill witnesses to their crimes who cooperate with prosecutors. Witnesses Being Put at Risk by Gangs, Prosecutors Say, N.Y. TIMES, Nov. 22, 1993, at A12.

74. For example, a defendant admits all elements of the charged crime and relinquishes the right to go to trial. John J. Farley, Guilty Pleas, 81 GEO. L.J. 1184, 1193-95 (1993). In addition, a defendant waives nonjurisdictional constitutional rights and might waive the right to challenge prosecutorial defects. Id. See generally Santobello v. New York, 404 U.S. 257, 264 (1971) (Douglas, J., concurring) (listing fundamental rights waived by guilty plea); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.6(a) (2d ed. 1992) (same).

75. See Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."). The government's breach of a plea agreement raises the question of whether the plea was "knowingly and voluntarily made." Blackledge v. Allison, 431 U.S. 63, 75 n.8 (1977). Similarly, when a prosecutor does not inform defendants of the probable consequences of the plea bargain, the plea is not intelligently made. Peter Westen & David Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 CAL. L. Rev. 471, 504 (1978). Either the prosecutor or the defendant may opt out of the plea at any time before the defendant performs. An exception to this general rule exists when the defendant acts to his substantial detriment in reliance on the prosecutor's promise. See Mabry v. Johnson, 467 U.S. 504, 506 (1984).
have a duty to make the circumstances and consequences of a plea bargain known\textsuperscript{76} so that defendants can make an informed choice about whether to plead guilty and cooperate with government.\textsuperscript{77}

E. Application of Contract Principles to Plea Bargains

The Supreme Court has analogized plea agreements to contracts. In \textit{Santobello v. New York},\textsuperscript{78} the Court held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."\textsuperscript{79} Consequently, every federal circuit uses principles of contract law to interpret plea agreements.\textsuperscript{80} Federal circuits also consistently use contract principles to review government refusals to file substantial assistance motions pursuant to plea agreements.\textsuperscript{81}

\textsuperscript{76} Brady, 397 U.S. at 748 n.6.
\textsuperscript{77} Westen & Westin, supra note 75, at 504.
\textsuperscript{78} 404 U.S. 257 (1971).
\textsuperscript{79} Id. at 262.
\textsuperscript{80} United States v. Pollard, 959 F.2d 1011, 1022 (D.C. Cir.) (concluding that a plea agreement is a form of contract), \textit{cert. denied}, 113 S. Ct. 322 (1992); United States v. Badaracco, 954 F.2d 928, 939 (3d Cir. 1992) (analyzing plea agreements under contract law standards attended by safeguards to ensure rights of defendant); United States v. Robison, 924 F.2d 612, 613-14 (6th Cir. 1991) (interpreting and enforcing plea agreements pursuant to traditional contract law principles); United States v. Khan, 920 F.2d 1100, 1105 (2d Cir. 1990) (interpreting plea agreements with principles borrowed from contract law, but recognizing that criminal sentencing proceedings differ from civil contract disputes), \textit{cert. denied}, 111 S. Ct. 1606 (1991); United States v. Oleson, 920 F.2d 538, 542 (8th Cir. 1990) (analogizing plea agreements to contracts, but concluding that due process concerns require deviation from normal commercial contract law principles); United States v. Mesa-Rincon, 911 F.2d 1433, 1446 (10th Cir. 1990) (using contract principles to govern interpretation of plea agreements); United States v. Jeffries, 908 F.2d 1520, 1523 (11th Cir. 1990) (likening interpretation of plea agreements to interpretation of contracts, while protecting rights of defendant); United States v. Sophie, 900 F.2d 1064, 1071 (7th Cir.) (applying ordinary contract principles to decide existence or meaning of agreement), \textit{cert. denied}, 498 U.S. 843 (1990); United States v. Sutton, 794 F.2d 1415, 1423 (9th Cir. 1986) (measuring plea agreement by contract law standards); United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986) (applying contract law tempered by constitutional concerns and perceived fairness in administration of justice); United States v. Baldacchino, 762 F.2d 170, 179 (1st Cir. 1985) (applying contract law to plea bargains as long as application will ensure defendants what is reasonably due in the circumstances); United States v. Ocanas, 628 F.2d 353, 358 (5th Cir. 1980) (recognizing that principles of contract law provide a useful analytical framework for interpreting a plea bargain, but noting critical role of trial court in process), \textit{cert. denied}, 451 U.S. 984 (1981).

\textsuperscript{81} \textit{E.g.}, United States v. Forney, 9 F.3d 1492, 1499 n.2 (11th Cir. 1993) (discussing general application of contract principles in other circuits to govern-
Courts finding that the government breached a plea agreement may grant specific performance or permit withdrawal of the guilty plea by the defendant.\textsuperscript{82} Although courts uniformly apply principles of contract law to plea agreements, most courts recognize that principles of contract law "cannot be blindly incorporated into the criminal law."\textsuperscript{83} Because the contractual rights of criminal defendants in a plea agreement are fundamental and constitutionally-based,\textsuperscript{84} courts usually temper contract principles with "safeguards to insure the defendant [receives] what is reasonably due in the circumstances."\textsuperscript{85} For example, courts do not employ a "rigidly literal construction of the language" of a plea agreement.\textsuperscript{86} Many courts hold the government to a higher standard and greater degree of responsibility in interpreting unclear lan-

\textsuperscript{82} Santobello, 404 U.S. at 267 (Douglas, J., concurring). Courts "ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State." Id.; see also LaFave & Israel, supra note 74, § 21.6(d).


83. United States v. Ocanas, 628 F.2d 353, 358 (5th Cir. 1980).

84. E.g., United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986) (recognizing the constitutional basis of the defendant's underlying contract right); see Mabry v. Johnson, 467 U.S. 504, 509 (1984) (concluding that a breached plea agreement impairs voluntariness and intelligence of plea).


86. United States v. Hand, 913 F.2d 854, 856 (10th Cir. 1990). Courts generally avoid "a hyper-technical" approach, United States v. Jefferies, 908 F.2d 1520, 1523 (11th Cir. 1990), particularly when a narrow interpretation would violate the spirit of the agreement. United States v. Giorgi, 840 F.2d 1022, 1026 (1st Cir. 1988).
guage. Courts also consider what the defendant reasonably understood when entering into the plea agreement.

F. EXISTING STANDARDS OF REVIEW OF PROSECUTORIAL DISCRETION TO BRING A SUBSTANTIAL ASSISTANCE MOTION PURSUANT TO A PLEA AGREEMENT

In a plea agreement, to ensure full compliance and cooperation from the defendant, the government may reserve discretion to bring a substantial assistance motion. Federal circuits disagree, however, on the appropriate standard of review for a prosecutor's refusal to bring a substantial assistance motion pursuant to a plea agreement. A growing number of circuits permit review for constitutionally impermissible motivation only, while other circuits also allow review for allegations of prosecutorial bad faith.

Six circuits permit review only when the government bases its refusal to make a substantial assistance motion on an unconstitutional motive, such as race or religion. These courts reason that when the prosecutor retains sole discretion in the plea agreement over the decision to file a substantial assistance motion, the government makes no explicit promise and therefore incurs no contractual obligation to the defendant.

Consequently, these courts hold that no corresponding duty of good

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87. Several circuits resolve ambiguities or disputed terms against the government. E.g., United States v. Massey, 997 F.2d 823, 824 (10th Cir. 1993); United States v. Jefferies, 908 F.2d 1520, 1523 (11th Cir. 1990); United States v. Moscahlaidis, 868 F.2d 1367, 1361-63 (3rd Cir. 1989). Contra United States v. Goroza, 941 F.2d 905, 909 (9th Cir. 1991); United States v. Laetival-Gonzalez, 939 F.2d 1455, 1463 (11th Cir. 1991) (applying objective standards to determine meaning of ambiguous or disputed terms), cert. denied, 112 S. Ct. 1280 (1992); United States v. Fields, 766 F.2d 1161, 1168 (7th Cir. 1985). Cf United States v. Hernandez, 996 F.2d 62, 66 (5th Cir. 1993) (finding remand necessary to determine the intentions of the parties concerning the use of "may" in the plea agreement).

88. United States v. Ringling, 988 F.2d 504, 506 (4th Cir. 1993); United States v. Olesen, 920 F.2d 538, 541 n.1 (8th Cir. 1990); United States v. Hand, 913 F.2d 854, 856 (10th Cir. 1990). Other courts, however, apply an objective standard and look to the reasonable expectations of the parties. United States v. Sophie, 900 F.2d 1064, 1071 (7th Cir. 1990); United States v. Read, 778 F.2d 1437, 1441 (9th Cir. 1985), cert. denied, 479 U.S. 835 (1986).

89. See supra note 8 and accompanying text (noting split among federal circuits).

90. See supra note 8 (citing cases).

91. "[T]here can be no ambiguity in the absence of an express government promise in the plea agreements to file a [substantial assistance] motion. . . . The lack of such a promise is clear evidence that such a promise was not made." United States v. Coleman, 895 F.2d 501, 506 (8th Cir. 1990) (italics omitted).
faith exists. Generally, these courts take a restrictive view toward implying sentencing promises into plea agreements, asserting that a substantial assistance departure provides extraordinary relief and that courts should preserve the government’s discretion unless the prosecutor clearly bargains it away. According to these circuits, the Supreme Court’s decision in Wade controls, and courts may review only those decisions in which the defendant makes a threshold showing of constitutionally impermissible motivation.

Courts that review for both constitutionally impermissible motivation and prosecutorial bad faith reason that by bargaining with the defendant and inducing the plea, the government limits its discretion and incurs a valid contractual obligation. These courts analogize agreements in which the government reserves discretion to contractual promises conditional on satisfaction. Although the government retains discretion under the

92. See United States v. Forney, 9 F.3d 1492, 1500 n.2 (11th Cir. 1993). This reasoning led to an absurd result in United States v. Favara, 987 F.2d 538 (8th Cir. 1993). In Favara, the defendant offered to provide information about illegal drug activities in exchange for a substantial assistance motion. Id. at 539. The government told the defendant's attorney that it could not make a sentencing decision before evaluating the quality of the assistance rendered, but promised to “deal with [the defendant] in good faith.” Id. The defendant subsequently provided information that led to the recovery of two kilograms of cocaine, but the government refused to make a substantial assistance motion. Id. Because it did not make an express promise to move for a departure, the court held that the government did not restrict its discretion. Id. Consequently, the court refused to review whether the government fulfilled its express promise to deal with the defendant in good faith. Id. at 540.


94. E.g., United States v. Romsey, 975 F.2d 556, 557-58 (8th Cir. 1992).


96. “Once the government uses its § 5K1.1 discretion as a bargaining chip in the plea negotiation process, that discretion is circumscribed by the terms of the agreement.” United States v. Conner, 930 F.2d 1073, 1075 (4th Cir.), cert. denied, 112 S. Ct. 420 (1991). Yet a mere promise by the government to inform the court of the extent and value of the defendant's cooperation does not restrict the government's discretion in bringing a substantial assistance motion. See, e.g., United States v. Raynor, 939 F.2d 191, 195 (4th Cir. 1991).

plea agreement, these courts assert that the prosecutor must exercise this discretion in good faith because of the implicit covenant of good faith in every contract. A court can review, either subjectively or objectively, whether the prosecutor has fulfilled his or her obligation. Applying a subjective good faith standard, a court will uphold the government's refusal if the prosecutor is honestly, though unreasonably, dissatisfied with the defendant's cooperation. Generally, however, in ordinary contract disputes, courts prefer an objective standard: whether a reasonable person in the position of the obligor would be satisfied.

II. REVIEW OF PLEA AGREEMENTS IN WHICH THE GOVERNMENT RETAINS DISCRETION TO BRING A SUBSTANTIAL ASSISTANCE MOTION

A. A GOOD FAITH STANDARD CIRCUMSCRIBES PROSECUTORIAL DISCRETION

The Sentencing Guidelines grant federal prosecutors new authority and power, but impose no corresponding accountability. Prosecutors frequently make substantial assistance motions that benefit undeserving defendants, while they deny deserving defendants their expectation and reliance interests under a plea agreement. Moreover, courts rarely review the

§ 228 (1986); 3A Corbin, supra note 81, § 644; 5 Walter H.E. Jaeger, Williston on Contracts § 675A (3d ed. 1961). Courts regularly recognize and uphold agreements in which a contractor conditions her duty on satisfaction with the other party's performance. Jaeger, supra, § 675A, at 190.


99. Khan, 920 F.2d at 1106 (citing Restatement (Second) of Contracts § 228 cmt. a). The Second Circuit provided that once a defendant alleges that he believes the government acted in bad faith, the prosecutor briefly must explain its reasons for refusing to make a downward motion. Id. at 1106. The court reasoned that a defendant should not have the initial burden to make a showing of prosecutorial bad faith, because a defendant usually will not have knowledge of the prosecutor's motivation at that point. Id. The defendant then must make a threshold showing of bad faith, sufficient to trigger a hearing under the Guidelines. Id.

100. Rexach, 896 F.2d at 715 (Pierce, J., dissenting) (citing 1A Corbin, supra note 81, § 150, at 670). The Restatement (Second) of Contracts also explains that if the agreement does not clearly specify honest satisfaction, a court usually will not assume that the obligee has undertaken the risk of the obligor's unreasonable, even if honest, dissatisfaction. Restatement (Second) of Contracts § 228 cmt. a (1986).

101. United States v. Jones, 983 F.2d 1425, 1433 n.12 (7th Cir. 1993).

102. See supra notes 69-71 and accompanying text.
exercise of prosecutorial discretion. Consequently, prosecutors "are free to be lenient or harsh in particular cases, without publicly explaining, let alone defending, their decisions." This result undermines the Guidelines' goals of uniformity and fairness.

Courts that review a prosecutor's refusal to make a substantial assistance motion pursuant to a plea agreement only for a constitutionally impermissible motive fixate on the sanctity of "the zone of prosecutorial discretion" at the expense of the constitutional and contractual rights of defendants. Although prosecutorial discretion is broad, it is not "unfettered." In Santobello, the Supreme Court noted the benefits of plea bargaining, but added that "all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor." Because a defendant waives constitutional rights by signing a plea agreement, courts have a duty to ensure the integrity of the process.

If the plea "was induced by promises, the essence of those promises must in some way be made known." The government cannot evade the intelligence requirement by simply reserving authority to violate its promises. If the prosecutor's discretion remains completely unrestricted by the plea agreement, the defendant lacks an understanding of the likely consequences and thus cannot make an informed choice about

103. See supra notes 59-61, 67 and accompanying text.
105. Wilkins & Steer, supra note 17, at 64 (noting that uniformity and fairness were primary objectives of Congress).
106. See supra note 8 (citing cases).
107. See, e.g., United States v. Forney, 9 F.3d 1492, 1501 n.4 (11th Cir. 1993) ("The Supreme Court emphatically has upheld the sanctity and separate-ness of prosecutorial discretion for the proper functioning of our criminal justice system.")
108. See supra notes 74-77 and accompanying text (discussing constitutional implications of plea bargains).
109. See supra notes 78-88 (discussing application of contract principles to plea agreements).
112. See supra notes 74-77 and accompanying text (discussing constitutional rights foregone by entering plea agreement).
114. Id.
115. "[T]he state has an affirmative obligation to ascertain and disclose to the defendant with a reasonable degree of certainty the . . . consequences of a guilty plea." Westen & Westin, supra note 75, at 510.
whether to cooperate. Although the Supreme Court in *Wade* treated a prosecutor's refusal to file a substantial assistance motion as it would a prosecutor's other discretionary decisions,\(^{116}\) *Wade* did not involve a plea agreement.\(^{117}\) When the government uses its 5K1.1 discretion to induce cooperation from the defendant, the terms of the plea agreement circumscribe the prosecutor's discretion.\(^{118}\) Objective good faith review constitutes an essential safeguard that helps ensure defendants receive "what is reasonably due in the circumstances."\(^{119}\)

### B. Refusing to Apply a Good Faith Standard Disregards the Contractual Rights of Defendants

Traditional contract principles, which all circuits apply to plea agreements,\(^{120}\) also support imposing a good faith standard on prosecutorial discretion retained in plea agreements. When a defendant agrees to cooperate and places herself at risk by assisting the government pursuant to a plea agreement,\(^{121}\) her plea rests to a significant degree on the promise of the prosecutor to evaluate her assistance. Courts cannot reasonably conclude that the government offers nothing in exchange for the cooperation of the defendant, not even a good faith consideration of the defendant's assistance.\(^{122}\) The defendant bargains for the plea to secure a downward departure if her assistance proves to be "substantial" within the meaning of the Guidelines. The government's promise to evaluate the quality of the defendant's assistance constitutes consideration for the defendant's promise to cooperate.

The approach permitting review only for a constitutionally impermissible motive\(^{123}\) ignores contract principles and affords criminal defendants less protection than courts routinely give commercial contractors under similar agreements. Plea agreements in which the prosecutor reserves discretion to bring a substantial assistance motion are analogous to contractual

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117. *Id.*
120. See supra note 80 (citing cases).
121. See supra notes 72-73 and accompanying text (discussing risks that defendants frequently incur in cooperating with the government).
122. United States v. De La Fuente, 8 F.3d 1333, 1340 (9th Cir. 1993).
123. See supra note 8 (citing cases).
promises conditional on satisfaction. Promises conditional on satisfaction are "common" in contracts, and "such contracts have been almost universally upheld." Although these agreements may appear one-sided, courts recognize them as valid contracts due to the implicit covenant of good faith and fair dealing. Because the contractual rights of a criminal defendant under plea agreements are constitutionally based, sentencing courts have an obligation to ensure that the government has acted in good faith in refusing to file a substantial assistance motion.

By controlling the terms of a cooperation agreement, the prosecutor typically attempts to evade review by retaining "sole and unfettered discretion" to determine whether the defendant's cooperation merits a substantial assistance departure. One commentator contends that "[t]aken literally, [such an] agreement is surely unconscionable and a court would not uphold perverse judgments on these matters." Courts ordinarily reject such a literal and "hyper-technical reading" of plea agreements yet several circuits read these cooperation agreements literally and cite the prosecutor's "carefully-worded plea agreement" in refusing to impose a good faith standard.

Courts rejecting a good faith standard place too much emphasis on finding an explicit promise to file a substantial assistance motion in the plea agreement. The Eighth Circuit's

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124. United States v. Khan, 920 F.2d 1100, 1105 (2d Cir. 1990), cert. denied, 499 U.S. 969 (1991); see supra notes 98-99 and accompanying text (discussing the Second Circuit approach). Although the court, not the prosecutor, controls the ultimate outcome of the sentencing decision, the court has no authority to depart without a motion by the government. See supra note 51 and accompanying text (describing courts' impotence in light of the history of the Guidelines and subsequent judicial interpretation).

125. 5 JAEGGER, supra note 97, § 675A, at 189-90.

126. "Under any interpretation [of a promise conditional on personal satisfaction], the exercise of judgment must be in accordance with the duty of good faith and fair dealing, and for this reason, the agreement is not illusory." RESTATEMENT (SECOND) OF CONTRACTS § 228 cmt. a (1986) (cross-references omitted). See also supra note 98 and accompanying text (noting the Second Circuit's recognition of the covenant).

127. See supra note 84 and accompanying text.


129. Hughes, supra note 12, at 43 n.163.

130. E.g., In re Arnett, 804 F.2d 1200, 1203 (11th Cir. 1986).


132. See supra notes 91-93 and accompanying text (noting that for these courts the existence of an express promise is determinative in finding a contractual obligation). Courts rejecting contractual obligations purport to require an express promise due to the significance of the sentencing reward. See supra note 93 and accompanying text (citing cases). Indeed, a departure constitutes extraordinary relief, but the sentencing court has full authority to deny the gov-
application of this reasoning led to absurd results, refusing to review for good faith a prosecutor's oral promise to deal with the defendant "in good faith," absent an express sentencing promise.133 The government might not make an explicit promise to make a substantial assistance motion, but a cooperation agreement typically contains an explicit promise to evaluate the quality of the defendant's assistance.134 Because the government incurs a valid contractual obligation, a corresponding duty of good faith applies to its determination.135

C. A Subjective Good Faith Standard Leads to Inconsistency and Confusion

Courts that apply a good faith standard to the exercise of prosecutorial discretion pursuant to a plea agreement employ a subjective standard.136 For example, in United States v. Khan, the court concluded that the government had no duty to file a substantial assistance motion if it was honestly, though unreasonably, dissatisfied with the defendant's cooperation.137 The subjective good faith standard, however, as currently applied to cooperation agreements, results in inconsistency and provides little guidance to sentencing courts.138 When prosecutors subjectively evaluate the quality of the defendant's assistance, according to the prosecutors' own individual standards, the government's motion if the judge believes that the defendant's cooperation does not merit a departure. See supra notes 38-42 and accompanying text (noting courts' broad discretionary power to award sentencing reduction).

133. United States v. Favara, 987 F.2d 538 (8th Cir. 1993); see supra note 92 (discussing facts of case).

134. Even a court that found no contractual obligation in a plea bargain held that such a bargain "unequivocally required the government 'to consider' . . . a 5K1.1 motion." United States v. Forney, 9 F.3d 1492, 1500 n.2 (11th Cir. 1993). The court found that the government must "consider" the defendant's assistance, but did not require it to execute this contractual provision in good faith. Id.


137. Id. at 1105.

138. Assessing the honesty of a federal prosecutor's determination places sentencing courts in an awkward position. Moreover, courts cannot easily apply the standard. One district court, struggling with the subjective standard, resorted to a heightened reasonableness standard. United States v. Disla-Montano, 1993 WL 541701, at *6 (E.D. Pa. Jan. 3, 1994) (finding that because government's position was "not merely unreasonable, but lacked all rational basis," it was not sincere).
meaning of substantial assistance varies from prosecutor to prosecutor and a sentencing court cannot meaningfully review the prosecutor's determination.

Consequently, courts attempt to add consistency by inching closer to an objective good faith standard. For example, the Second Circuit purports to employ a subjective good faith standard, but imposes enough additional restrictions to transform it into more of an objective standard. In *United States v. Khan*, the court concluded that the government could not disregard a defendant's cooperation "simply because the defendant is supplying information that the government does not want to hear."139 Similarly, in *United States v. Knights*, the court suggested that once a defendant cooperates fully under a plea agreement, the government cannot in good faith refuse to move for a downward departure.140 These courts thereby rejected the government's dissatisfaction as unreasonable, while making no evaluation of the sincerity of the government's dissatisfaction, the only relevant inquiry under a subjective good faith standard.141 Thus, some courts feel compelled by the need for consistency in sentencing to depart from their own articulated standard.

D. COURTS SHOULD APPLY AN OBJECTIVE GOOD FAITH STANDARD

An explicit objective good faith standard would allow federal courts the opportunity to impose uniformity in departures despite disparities in requests for departures by prosecutors. If the prosecutor promised to consider whether the defendant's cooperation constituted substantial assistance, a sentencing court would review a defendant's allegations of bad faith to determine whether a reasonable prosecutor would have considered the cooperation sufficiently substantial to make a substantial assistance motion.

Courts prefer when practicable to apply an objective good faith standard to conditional promises in contracts.142 Courts generally use a subjective good faith standard only in contracts involving such matters as aesthetics or personal fancy, for which courts cannot easily assess the reasonableness of dissatisfac-

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139. *Khan*, 920 F.2d at 1105.
141. See id.
142. See supra note 100 and accompanying text (noting that courts apply an objective standard unless parties contract for a subjective standard).
As one court observed, "Although instances like the allocation of cultural subsidies between ballet and opera may suggest an almost total absence of articulable rationality, the decision whether to move for a downward departure is not a matter of taste."144 Section 5K1.1 articulates clear standards that govern substantial assistance departures,145 and the Sentencing Commission accordingly directs sentencing courts to review the government's evaluation of the quality of the defendant's assistance in deciding whether to grant the prosecutor's substantial assistance motion.146

Moreover, when interpreting contracts, courts generally apply a "reasonable person" objective standard unless the contract clearly specifies a subjective standard.147 The Second Circuit in its interpretation of a cooperation agreement turned this rule on its head, stating that it would apply a subjective standard unless the cooperation agreement expressly specifies reasonable satisfaction or an objective standard.148 Nevertheless, a subjective good faith standard denies criminal defendants protection that commercial contractors routinely receive under analogous agreements.

Because criminal defendants have liberty interests that implicate constitutional concerns, defendants deserve more protection, not less, than ordinary contractors in a civil dispute.149 Concerns for the honor and integrity of the government and for public confidence in the fairness of the process require holding the government to a higher standard.150 This higher standard

143. 3A CORBIN, supra note 81, § 646, at 93.
145. See supra text accompanying footnote 38 (enumerating factors).
146. U.S.S.G., supra note 1, § 5K1.1; see also United States v. Rexach, 896 F.2d 710, 715 (2d Cir.) (Pierce, J., dissenting) (arguing that plea agreement provides objective standard, namely, whether defendant substantially assisted in the prosecution or investigation of another person), cert. denied, 498 U.S. 969 (1990).
147. RESTATEMENT (SECOND) OF CONTRACTS § 228 cmt. a, illus. 2(b) (1986); 3A CORBIN, supra note 81, § 644; 5 JAEGER, supra note 97, § 675 A.
149. E.g., United States v. Ringling, 988 F.2d 504, 506 (4th Cir. 1993) (concluding that courts should analyze a plea agreement "at a more stringent level than in a commercial contract because the rights involved are generally fundamental and constitutionally based"); United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986) (noting that a defendant's rights reflect "concerns that differ fundamentally from and run wider than those of commercial contract law").
150. United States v. Garcia, 966 F.2d 41, 43-44 (4th Cir. 1992). Holding the government to a higher standard also would involve considering what the
“requires the sovereign to perform its contractual duties with a sharpened sense of good faith and fair dealing.” Holding the government to a greater degree of responsibility than the defendant also helps to redress the disparity in bargaining power and expertise between the parties.

E. APPLICATION OF THE OBJECTIVE GOOD FAITH STANDARD

The government should make a substantial assistance motion whenever required by a plea agreement, as governed by principles of contract interpretation, whether or not the prosecutor actually believes the defendant’s cooperation constitutes “substantial assistance.” If the sentencing court determines that the assistance was not “substantial,” the court need not grant the motion. Using an objective good faith standard therefore does not contravene the policy behind substantial assistance departures. In addition, the prosecutor remains free to inform the court of the extent and usefulness of the defendant’s cooperation. The government also retains discretion over the extent of the departure it recommends, although again, the prosecutor’s recommendation does not bind the sentencing court.

The court should determine whether the defendant’s assistance justifies a departure, taking into account the factors defendant reasonably understood when entering into the agreement and interpreting any unclear or vague language against the government. See supra notes 83-88 and accompanying text (explaining that courts ordinarily employ safeguards to protect the fundamental rights of defendants).

151. United States v. Forney, 9 F.3d 1492, 1509 (11th Cir. 1993) (Clark, J., dissenting).
152. See supra notes 69-71 and accompanying text (explaining that prosecutors have greater bargaining power than defendants in negotiating plea agreements).
153. See supra notes 81-88 and accompanying text (discussing contract principles including applying an objective good faith standard and holding the government to a higher standard in the interpretation of unclear or vague language).
154. In appropriate circumstances, the government should request a substantial assistance departure if the defendant stands ready to perform, but is unable to provide assistance because the government chooses not to use him. United States v. Melton, 930 F.2d 1096, 1098-99 (5th Cir. 1991). For example, the government should bring this motion when the defendant has relied to his substantial detriment on the plea agreement.
155. See supra notes 37, 39-42 and accompanying text (explaining that the sentencing court has broad authority concerning whether to depart and in determining the extent of departure).
156. See U.S.S.G., supra note 1, § 5K1.1 cmt. n.3.
157. See supra notes 38-42 and accompanying text (noting broad discretion of the trial court); see also Farley, supra note 74, at 1185 (noting that prosecutor does not have to endorse recommendation enthusiastically).
enumerate in section 5K1.1. The court should give the recommendation of the government considerable weight, but it should not delegate its sentencing authority to the prosecutor.

When defendants contend that they have provided "substantial assistance" pursuant to a cooperation agreement or allege bad faith by the government in fulfilling the plea agreement, the government should disclose its reasons for refusing to make the motion. Although the party asserting the breach carries the burden of proof, a defendant ordinarily has no way of discerning the prosecutor's motivation in not moving for a departure. Courts' failure to require the government to disclose the basis for its decision should not result in the government escaping liability for what might amount to bad faith. For example, in one case, the government conceded that the defendant had cooperated, but argued that the court nevertheless lacked the authority to review its refusal to make a substantial assistance motion. Further, judicial decisions in other contexts

158. See supra text accompanying note 38 (listing factors that § 5K1.1 directs sentencing courts to consider in making departure decisions).

159. The Guidelines thus provide "the court with the authority to grant a reduction, with the prosecutor as something of a 'fact finder.'" United States v. Smith, 953 F.2d 1060, 1069 (7th Cir. 1992) (Cudahy, J., concurring).

160. The Supreme Court found a defendant's mere contention of substantial assistance insufficient to trigger a hearing in Wade. Because in plea agreements the government incurs contractual obligations and the defendant develops reliance interests, the decision in Wade, which specifically excepted plea agreements, see supra note 7 and accompanying text, is inapplicable to such agreements.

161. The Second Circuit originally articulated this approach. See United States v. Khan, 920 F.2d 1100, 1106 (2d Cir. 1990), cert. denied, 499 U.S. 969 (1991); supra note 98 and accompanying text (describing approach). The defendant also has a right to discovery. The government has an "obligation to produce documents that [the defendant] needs to meet his burden." United States v. Rueben, 1994 WL 22572, at *2 (S.D. Tex. Jan. 21, 1994).


163. Khan, 920 F.2d at 1106. To make the requisite threshold showing of a constitutionally impermissible motive, defendants have a difficult, if not impossible task, in gathering evidence of the prosecutor's subjective motivation. For example, in United States v. Murry, 1992 WL 336462 (8th Cir. Nov. 18, 1992), a black defendant asserted that his case was "one of the few in which the 'all-white prosecutors have refused to file a 5K1.1 motion.'" Id. at *2 (quoting defendant's brief). The court held that such "generalized allegations of improper motive" do not merit review. Id. (quoting Wade v. United States, 112 S. Ct. 1820, 1844 (1992)). As a result, most defendants receive no review at all for a prosecutor's refusal to make a substantial assistance motion.

164. United States v. Sims, 1992 WL 190909, *2 (4th Cir. Aug. 11, 1992) (per curiam). The appellate court agreed, stating that the grounds that the de-
recognize that a rejection of performance for unstated reasons violates good faith.\textsuperscript{165}

Only after the government discloses its reasons for not making a substantial assistance motion should the court require the defendant to make a threshold showing of bad faith, sufficient to trigger a hearing.\textsuperscript{166} When a reasonable dispute exists as to whether the defendant did in fact provide substantial assistance, the government cannot determine this issue alone; the defendant must have an opportunity to refute the government's view. Because the defendant bargains for and relies on the plea agreement, the defendant deserves an explanation of the government's refusal to make the motion.\textsuperscript{167} In a civil contract dispute, a court likely would examine the facts of the case before permitting one contractor to reject unilaterally the other party's performance. Sentencing courts similarly should evaluate the facts presented by both sides and review the prosecutor's determination for good faith.\textsuperscript{168}

F. A GOOD FAITH REVIEW IS A PROPER ROLE FOR COURTS

Courts justify limited review of a prosecutor's discretion by reasoning that prosecutors have institutional incentives to uphold their commitments and encourage cooperation agreements. Courts reason that defendants will refuse to cooperate with prosecutors who treat defendants unfairly.\textsuperscript{169} This analysis, however, ignores the disparity in bargaining power between the government and the defendant.\textsuperscript{170} Due to the severity of mandatory minimum sentences, prosecutors, through their power to bring substantial assistance motions, wield enormous control over sentencing decisions. For a defendant who chooses not to go to trial, bargaining with the prosecutor normally represents the only possibility for a sentence below the Guidelines range.\textsuperscript{171}

\textsuperscript{165} See supra notes 121-122 and accompanying text (noting that defendants place themselves at risk in bargaining for a plea agreement).

\textsuperscript{166} See supra part H.D (proposing an objective good faith standard).

\textsuperscript{167} See supra notes 69-71 and accompanying text.

\textsuperscript{168} See supra note 68 and accompanying text (discussing perceived existence of inherent safeguards against prosecutorial abuses).

\textsuperscript{169} Id. at *3.

\textsuperscript{170} See supra notes 69-71 and accompanying text.

\textsuperscript{171} See supra note 71 (explaining that the Sentencing Commission intended this result to facilitate cooperation).
One court implied that reviewing government discretion to file a substantial assistance motion is "not readily susceptible to the kind of analysis the courts are competent to undertake."\textsuperscript{172} Section 5K1.1 itself, however, provides clear standards. Courts readily can assess the defendant's performance by an objective standard: whether the defendant's cooperation substantially assisted the government "in the investigation or prosecution of another person."\textsuperscript{173} In addition, the Sentencing Guidelines direct courts to undertake this same analysis in determining whether to grant the government's motion,\textsuperscript{174} intending that sentencing courts, not prosecutors, make sentencing reductions.\textsuperscript{175} The Sentencing Commission expressly stated that "sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge."\textsuperscript{176}

Critics charge that prosecutors, in spite of the clear language of the Guidelines,\textsuperscript{177} "have become de facto sentencing judges."\textsuperscript{178} Under current practice in many districts, prosecutors decide whether a defendant's assistance deserves a departure and often determine the extent of the departure; the sentencing court usually grants the government's request.\textsuperscript{179} This process contributes to tremendous disparity in departure awards and undermines uniformity. Some districts award substantial assistance departures routinely, while other districts grant them only in exceptional cases.\textsuperscript{180} Although broad prosecutorial discretion actually benefits many defendants, subjective charging decisions disadvantage defendants who do not

\textsuperscript{172} United States v. Forney, 9 F.3d 1492, 1501 n.4 (11th Cir. 1993) (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)).  
\textsuperscript{173} See United States v. Rexach, 896 F.2d 710, 715 (2d Cir.) (Pierce, J., dissenting), cert. denied, 498 U.S. 969 (1990); U.S.S.G., supra note 1, § 5K1.1. The Sentencing Guidelines further provide a list of factors to consider in the determination. See supra text accompanying note 38 (enumerating factors).  
\textsuperscript{174} See U.S.S.G., supra note 1, § 5K1.1.  
\textsuperscript{175} For example, the Sentencing Commission Chairperson argues that critics who charge that sentencing policies transfer sentencing authority from judges to prosecutors "fail to take into account the multiple features built into the guideline system to keep the judge in control of sentencing." Testimony of Judge William W. Wilkins, Jr., Chairman, United States Sentencing Commission, 6 Fed. Sentencing Report 67, 68 (1993).  
\textsuperscript{176} U.S.S.G., supra note 1, ch. 6, pt. B cmt.  
\textsuperscript{177} Id. § 5K1.1.  
\textsuperscript{178} Testimony of the President of the Federal Judges Association, Honorable John M. Walker, Jr., supra note 104, at 72.  
\textsuperscript{179} See supra note 43 and accompanying text (noting that in practice courts rarely deny prosecutor's motion).  
\textsuperscript{180} See supra notes 44-49 and accompanying text (discussing inconsistency).
appear sympathetic to prosecutors, leading to racial and other disparities.181 By limiting review and simply following prosecutors' recommendations, courts neglect their duty to make sentencing decisions:182 "The judiciary's unwillingness to set meaningful limits on the prosecutor's... discretion is the principal reason for the prosecutor's dominance over the criminal justice system."183 Sentencing courts have an obligation to review the refusal of prosecutors to make substantial assistance motions pursuant to plea agreements.

CONCLUSION

Misuse of prosecutorial power constitutes a substantial obstacle to the effectiveness of the Federal Sentencing Guidelines. Defendants receive downward departures when the Guidelines do not warrant them, while the government denies departures to defendants who do in fact provide substantial assistance. A discretionary and sometimes discriminatory system treats similarly situated defendants differently, thus undermining the goals of the Sentencing Guidelines. This Note proposes that courts should use principles of contract law to interpret conditional promises by plea agreements. Accordingly, courts would review a prosecutor's refusal to file a substantial assistance motion pursuant to a plea agreement under an objective good faith standard, rejecting the prosecutor's refusal to make a substantial assistance motion if a reasonable prosecutor would have been satisfied by the defendant's cooperation. This would lend fairness and predictability to the process and safeguard the fundamental rights of defendants. Although courts would accord the recommendations of prosecutors due deference, judges, not prosecutors, would make the ultimate determination in accordance with Guidelines policy whether to grant a substantial assistance departure.

181. See supra note 46 (discussing evidence that prosecutors are more likely to grant sentencing concessions to white defendants).
182. See supra note 43 and accompanying text (noting that courts rarely deny prosecutor's motion).
183. Gershman, supra note 65, at 441.