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Who's the Judge? The Eighth Circuit's Struggle with Sentencing Guidelines and the Section 5K1.1 Departure

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NOTES

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I. INTRODUCTION

In 1984, Congress created the United States Sentencing Commission\(^1\) to respond to the perceived inconsistencies and uncertainties of the indeterminant sentencing system.\(^2\) The


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Sentencing Commission is an independent body of the judicial branch that promulgates sentencing guidelines. The purpose of the Sentencing Commission is to develop a determinate sentencing system that achieves "retributive, educational, deterrent, and incapacitative goals." In order to help achieve these goals, the Commission developed the Sentencing Guidelines, which provide for variations in sentencing due to individual mitigating circumstances. The list of mitigating circumstances specifically provides for downward deviations from the prescribed sentence range for substantial assistance to the government in the investigation or prosecution of another.

The question of what constitutes substantial assistance to the government is placed, for the most part, in the hands of the prosecutor. Under the Sentencing Guidelines, only the prosecutor may move the sentencing court for downward deviations in sentences for substantial assistance in the prosecution of others. Since 1989, the Eighth Circuit has struggled with this grant of authority to the prosecutor and has recognized its constitutional implications. In recognizing the significant potential for abuse, the Eighth Circuit has determined that the district court judge may review the facts leading to the prosecutor's decision only in cases where prosecutorial bad faith or arbitrariness is alleged.

Other circuits have similarly struggled with the constitu-

uncertainty of the length of a prison term due to parole board discretion under indeterminant sentencing. Id.

tional implications arising from this grant of authority to the prosecutor.\textsuperscript{10} The Supreme Court recently held that the sentencing court may review the prosecutor's decision if constitutional rights are implicated.\textsuperscript{11} This Note argues that allowing downward deviations only upon a prosecutor's motion deprives defendants of their constitutional rights.

II. Background

A. Historical Sentencing Systems

Since the formation of the Union, criminal sentencing in the United States has been subject to constant change. Prior to the Revolutionary War, the prevailing sentencing theory was based on a retribution model.\textsuperscript{12} This theory was designed to advance punishment, deterrence, and incapacitation.\textsuperscript{13} At that time, incarceration was not a sentencing option; capital punishment for felonies, and public beatings or hard labor for lesser crimes, were common.\textsuperscript{14}

The first currents of reform came with the Revolutionary War.\textsuperscript{15} At that time, two new theories of sentencing theory

\begin{itemize}
  \item 11. Wade v. United States, 60 U.S.L.W. 4389 (U.S. May 18, 1992), \textit{aff'd}, 936 F.2d 169 (4th Cir. 1991). In \textit{Wade}, the government refused to make either a § 5K1.1 motion or a § 3553(e) motion to depart from the set guideline range or the prescribed statutory minimum sentence. In holding that the sentencing court has a right to review the government's refusal to make the motions, the Court limited this review to cases where the court considered unconstitutional factors, such as race or religion. The Court held that the defendant must make a "substantial threshold showing" of improper motive in order to trigger an evidentiary hearing on the matter. A claim of substantial assistance or general allegations of an improper motive are insufficient. \textit{Id.} at 4390. The Court did not decide whether the § 5K1.1 departure motion and the § 3553(e) motion are identical requirements.
  \item 14. \textit{See Scroggins}, 880 F.2d at 1206. In the eighteenth century, torture and capital punishment were the accepted methods of punishment. Non-capital sentences, including public floggings or brandings, simple fines, dismemberment and banishment, were common. \textit{See Campbell, supra} note 12, § 2, at 9. Prisons were originally old and abandoned ships. For example, San Quentin was built in its location simply because it was the site of the shipwreck of a floating prison. \textit{See American Friends Service Comm., Struggle for Justice: A Report on Crime in America} 34-35 (1971) [hereinafter \textit{Struggle for Justice}].
  \item 15. \textit{Campbell, supra} note 12, § 2, at 9.
\end{itemize}
were advanced. The first theory was premised on the idea that certainty of punishment was a more effective deterrent than overly severe punishment.\textsuperscript{16} The second theory advanced the belief that sentencing decisions should conform to principles of reformation and rehabilitation.\textsuperscript{17}

The belief in the rehabilitation potential of offenders led to the establishment of the first penitentiary and sentences of incarceration in Pennsylvania in 1786.\textsuperscript{18} Although incarceration was largely substituted for capital punishment and public humiliation sentences, the sentence was determined on the basis of the crime, not the criminal.\textsuperscript{19}

Criticism of this premise led to the adoption of the "medical" model of sentencing in 1869.\textsuperscript{20} Since then, all states have, at one time or another, implemented the medical model of sentencing.\textsuperscript{21} In a medical model of sentencing, also referred to as indeterminate sentencing, the offender is sentenced for an undetermined period of imprisonment, subject to a certain maximum.\textsuperscript{22} The actual period of imprisonment is based on the offender's rehabilitative progress, as determined by a parole board.\textsuperscript{23} The goal is the rehabilitation of the offender.\textsuperscript{24} Taking individual characteristics into account is an integral part of the process.\textsuperscript{25} Accordingly, indeterminate sentencing takes into consideration the offender's personality, social background, motivation for criminal conduct, and the potential for

\textsuperscript{16} Id. at 10-11.
\textsuperscript{17} Id. at 11.
\textsuperscript{18} Id. at 10 n.58. This represented the first step away from the torture that was regularly inflicted on felons.
\textsuperscript{19} Id. at 10.
\textsuperscript{20} In 1869, the state of Michigan adopted the first medical model of sentencing. See United States v. Scroggins, 880 F.2d 1204, 1207 n.6 (11th Cir. 1989), \textit{cert. denied}, 484 U.S. 1083 (1990). The medical model of sentencing refers to a method of incarceration which is designed to "cure" the offender of the ailment that causes him to commit crimes. This method is designed to prepare offenders, through rehabilitation, for re-entering public life as contributing members of society. Id. at 1206-07.
\textsuperscript{21} 17 SAGE CRIMINAL JUSTICE SYSTEM ANNUALS 16-17 (Martin L. Forst ed., 1982) [hereinafter SAGE ANNUALS].
\textsuperscript{22} Id. at 17.
\textsuperscript{23} Id. The philosophy behind the open-ended sentence is that it is impossible for the sentencing judge to determine the length of time needed for individual rehabilitation. The sensible alternative is to allow parole boards and corrections experts to judge when an offender can properly return to society. Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
effective correctional treatment.\textsuperscript{26} Judges are not constrained by the rules of evidence in determining which factors to consider in imposing a sentence.\textsuperscript{27} Predictably, indeterminant sentencing places broad discretion in the hands of the trial court.\textsuperscript{28}

In 1949, the United States Supreme Court endorsed the medical model of sentencing. In Williams v. New York, the Court stated, “Retribution is no longer the dominant objective of criminal sentencing. Reformation and rehabilitation of offenders have become the important goals of criminal jurisprudence.”\textsuperscript{29}

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.\textsuperscript{30} This awareness led to the return of the retributive model of sentencing, which focused on the crime rather than the individual when determining the proper sentence.\textsuperscript{31}

\textsuperscript{26} Id. at 15-16.

\textsuperscript{27} Williams v. New York, 337 U.S. 241, 247 (1949). There, the Supreme Court stated:

\begin{quote}
Highly relevant—if not essential—to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics . . . . [A] sentencing judge [should] not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to the restrictive rules of evidence . . . .
\end{quote}

\textsuperscript{28} SAGE ANNUALS, supra note 21, at 17; see also Mistretta v. United States, 488 U.S. 361, 363 (1988).

\textsuperscript{29} Williams, 337 U.S. at 248. Although the medical model had been implemented in most jurisdictions, this was the first case in which the Supreme Court recognized this shift in ideology.

\textsuperscript{30} STRUGGLE FOR JUSTICE, supra note 14, at 8-10. There was recognition that indeterminant sentencing was not as effective in reformation and rehabilitation as was originally predicted. Additionally, experts acknowledged that the penal system was an absolute failure in the rehabilitation of offenders. According to experts, the system resulted in huge disparities in sentencing between similar cases, and created biases in race, religion and social class. The rehabilitation methods were also thought to be arbitrary and ineffective at lowering the recidivism rate. Id.; see also United States v. Scroggins, 880 F.2d 1204, 1207 (11th Cir. 1989), cert. denied, 484 U.S. 1083 (1990); SAGE ANNUALS, supra note 21, at 18-19.

B. Sentencing Reform

As the crime rate in the United States rose and as disparities in sentencing went unchecked in the federal courts, Congress, following state legislative reforms, enacted the Sentencing Reform Act of 1984.\footnote{18 U.S.C. §§ 3551-3587 (1988); 28 U.S.C. §§ 991-998 (1988); see also VON HIRSCH ET AL., supra note 31, at 127 (providing a summary of state reforms).} Under the Act, the medical model of sentencing was finally abandoned.\footnote{VON HIRSCH ET AL., supra note 31, at 127. Prior to the passage of the Act, "many federal judges [had] abandoned any attempt at fashioning sentences with regard to an offender's rehabilitative potential, and [were] consider[ing] other goals such as retribution and general deterrence." Scroggins, 880 F.2d at 1207 n.8.} The Act authorized the creation of the United States Sentencing Commission, whose function is to promulgate sentencing guidelines designed to eliminate the inequities of indeterminant sentencing.\footnote{28 U.S.C. §§ 991, 994, 995(a)(1) (1988).}

The United States Sentencing Commission was established as a permanent, independent, administrative agency within the judicial branch of the federal government.\footnote{28 U.S.C. §§ 991(a), 992(a), 992(b) (1988). The Commission is made up of seven voting members, appointed by the President with the advice and consent of the Senate. Three of these members are currently sitting federal judges. No more than four members may be of the same political party. The terms, except for the initial staggering, are for six years each, and each member is limited to two terms. The United States Attorney General is a non-voting member. Id.} To assist the Commission in the task of promulgating its sentencing guidelines, Congress identified three basic objectives for the new sentencing system. Above all else, the system was to be honest, uniform and proportional for varying degrees of criminal conduct.\footnote{U.S.S.G., supra note 5, § 1A3. This section states in relevant part: [To achieve honesty in sentencing, Congress] sought to avoid the confusion and implicit deception that arose out of the preguidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison . . . . Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity. Id.} The result was the Federal Sentencing Guidelines, which took effect on November 1, 1987.\footnote{28 U.S.C. § 991-998 (1988).}

In drafting the Guidelines, the Commission sought to minimize deviations from the guideline sentencing range due to
unique characteristics of a particular case.\textsuperscript{38} To accomplish this, the Commission developed an empirical formula which accounts for certain extenuating circumstances. After factoring in the extenuating circumstances, the formula provides an "offense level" which determines the range from which a judge can select a sentence.\textsuperscript{39} Congress provided guidance to the Commission for the creation of this formula by listing mitigating factors which were to be incorporated into the Guidelines.\textsuperscript{40} Judicial discretion is reserved within the sentence

\textsuperscript{38} 28 U.S.C. § 994(b) (1988). Congress directed the Commission to develop a sentencing range "for each category of offense involving each category of defendant." \textit{Id.}\textsuperscript{39} See United States v. Ruis-Villanueva, 680 F. Supp. 1411, 1415 (S.D. Cal. 1984), where the format of the Guidelines is described:

Offenses [are] grouped into 43 base levels, according to relative severity. Recommended sentences for each base level [are] figured, after a review of past sentencing practices. Consideration of certain aggravating and mitigating circumstances was allowed in order to take into account the gravity of a specific crime. The Commission also categorized offenders into six groups and on the basis of their criminal history. The Commission then plotted the coordinates for offenses and offenders and produced a grid which sets out sentencing ranges.

\textit{Id.}\textsuperscript{40} 28 U.S.C. § 994(c), (d) (1988). The Act provides for consideration of offense characteristics including:

1) the grade of the offense;
2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
3) the nature and degree of harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
4) the community view of the gravity of the offense;
5) the public concern generated by the offense;
6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
7) the current incidence of the offense in the community and in the Nation as a whole.

\textit{Id.} § 994(c). The Act also provides consideration of characteristics of the offender, as follows:

1) age;
2) education;
3) vocational skills;
4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
5) physical condition, including drug dependence;
6) previous employment record;
7) family ties and responsibilities;
8) community ties;
9) role in the offense;
10) criminal history; and
11) degree of dependence upon criminal activity for a livelihood.

\textit{Id.} § 994(d).
range provided for each offense level. 41

Departures from the Guideline's sentencing range are con-
trolled by section K of the Guidelines. 42 Section K allows for
deviations beyond a prescribed range in extraordinary circum-
stances. 43 Some courts interpret section K as legally binding, 44
while other courts interpret section K as simply a policy state-
ment that allows for judicial sentencing discretion beyond the
set guideline ranges. 45

Immediately after they took effect, the Sentencing Guide-
lines were challenged on constitutional grounds. Several
courts invalidated the Guidelines on separation of powers
principles, holding that the Sentencing Commission, by em-
ploying federal judges, usurped the powers reserved for the
legislative branch. 46 The Supreme Court settled these chal-
lenges during the 1988 Term in Mistretta v. United States. 47
The Mistretta Court upheld the constitutionality of the Guidelines,
finding that separation of powers principles were not vio-
lated. 48 The Court advanced the view that, while sentencing
is not exclusively a judicial function, there was a "'strong feel-
ing' that sentencing has been and should remain primarily a
judicial function." 49 Since Mistretta, most attacks on the Guide-

41. See U.S.S.G., supra note 5, § 1B1.1, which provides instructions for applying
the Guidelines in sentencing determinations.
42. See U.S.S.G., supra note 5, § 5K.
43. Id.
44. See infra note 50.
1988); see also U.S.S.G., supra note 5, § 1A4.b. In that section, the Commission stated
that it intends the sentencing courts to treat each guideline as carving out a "heart-
land," a set of typical cases embodying the conduct that each guideline de-
scribes. When a court finds an atypical case, one to which a guideline
linguistically applies but where conduct significantly differs from the norm,
the court may consider whether a departure is warranted.
1988); United States v. Brittman, 687 F. Supp. 1329, 1331 (E.D. Ark.), aff'd, 871 F.2d
1093 (8th Cir. 1988); United States v. Elliott, 684 F. Supp. 1535, 1542 (D. Colo.
48. Id. at 384. The Court stated, "Congress may delegate to the Judicial Branch
nonadjudicatory functions that do not trench upon the prerogatives of another
Branch and that are appropriate to the central mission of the Judiciary." Id. at 388.
lines have been due process challenges.\(^{50}\)

**C. Due Process Rights in Sentencing**

The Fifth Amendment of the Constitution provides that no person shall "be deprived of life, liberty, or property without due process of law."\(^{51}\) Sentencing an offender to prison obviously deprives that person of his or her liberty. Consequently, due process rights in sentencing have constantly been challenged and redefined.

1. **Due Process Challenges Prior to the Sentencing Reform Act**

The Supreme Court has recognized that the full due process rights afforded the defendant at trial should also be provided at sentencing.\(^{52}\) Prior to the Federal Sentencing Reform Act, the Court held that the minimum requirements for due process include written notice, disclosure of evidence to be considered, the opportunity to be heard, the right to refute evidence considered, a neutral and detached hearing body, and a written statement by the factfinder as to the evidence relied upon in the decisionmaking process.\(^{53}\) Because the trial judge was not constrained by the rules of evidence in determining which factors to consider in arriving at a sentence,\(^{54}\) the Court held that a judge "is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime."\(^{55}\) The Court has recognized that a defendant's ability to refute offered evidence is essential for a judge to determine a fair sentence.\(^{56}\)


\(^{51}\) U.S. Const. amend. V.

\(^{52}\) See Morrissey v. Brewer, 408 U.S. 471 (1972); Specht v. Patterson, 386 U.S. 605 (1967).

\(^{53}\) Morrissey, 408 U.S. at 489.


\(^{55}\) Woosley v. United States, 478 F.2d 139, 143-44 (8th Cir. 1973) (quoting Williams v. Oklahoma, 358 U.S. 576, 585 (1959)).

\(^{56}\) United States v. Satterfield, 743 F.2d 827, 840 (11th Cir. 1984), cert. denied,
Most of the cases where there was a due process challenge to the indeterminant sentencing system involved cases where a judge relied upon a presentencing report, prepared by the parole board for the prosecutor, to aid in the sentencing decision. The contents of the report were kept confidential from the defendant and his attorney. In one decision, the Supreme Court held that this failure to disclose information violated a defendant's due process rights. Thus, the Court recognized a defendant's constitutional right to know what factors were used in formulating a sentence.

2. Due Process Challenges to the Sentencing Guidelines

Most of the due process challenges to the Sentencing Guidelines were based on the theory that due process provides a right to an individualized sentence. The federal appellate courts have uniformly rejected this contention. Prior decisions had recognized that Congress has the authority to eliminate judicial discretion in sentencing. Under the indeterminant sentencing system, judicial discretion was broad. However, the parole board played the primary role in determining the actual length of time served. While sentencing is generally recognized as a province of the judiciary, Congress may properly insist that the sentence be based solely on the crime. Where a sentence is mandatory, any rights of indi-

471 U.S. 1117 (1985); see also United States v. Tucker, 404 U.S. 443, 448 (1972) (finding a sentence based on illegally obtained prior convictions invalid); Townsend v. Burke, 334 U.S. 736, 741 (1948) (reversing a sentence based on untrue allegations). 57 See, e.g., Gardner v. Florida, 430 U.S. 349, 353 (1977); Shelton v. United States, 497 F.2d 156, 157 (5th Cir. 1974). 58 See Gardner, 430 U.S. at 353; Shelton, 497 F.2d at 158. 59 Gardner, 430 U.S. at 358. "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." Id. 60 Id. at 362. 61 See supra note 50. 62 Id. The public policy argument has also been rejected on the grounds that it is Congress' responsibility to set public policy in this area. Id. 63 See, e.g., Geraghty v. United States Parole Comm'n, 719 F.2d 1199, 1212 (3d Cir. 1983) (stating that Congress may limit the authority to impose certain punishments and set maximum and minimum terms without constitutional infringement), cert. denied, 465 U.S. 1103 (1984). 64 United States v. Scroggins, 880 F.2d 1204, 1207 (11th Cir. 1989), cert. denied, 484 U.S. 1083 (1990). 65 United States v. White, 869 F.2d 822, 825 (5th Cir.), cert. denied, 490 U.S. 1112 (1989). There, the court stated, "Congress has the power to completely divest
individualization will result from a Congressional reservation of discretion to the judiciary. Congress has provided such discretion by giving sentencing ranges within the Guidelines. Any sentence imposed within the limits established by the Sentencing Guidelines is reviewed under the clearly erroneous standard.

The procedural due process rights afforded under the indeterminant sentencing system apply to the Sentencing Guidelines. Although judicial discretion is greatly limited in the choice of the sentence, the rights of full disclosure and active participation in the sentencing process remain intact.

D. Departures from the Prescribed Sentence Range

The Sentencing Commission was aware that there may be some extenuating circumstances which cannot be accounted for in the formulation of the offense level. Section K of the Guidelines allows for the consideration of such extraordinary circumstances. Section K is a policy statement that outlines the situations in which a sentencing judge may find it necessary to impose a longer or a shorter sentence.

1. General Departures

Under section 5K2.0, a sentencing judge may depart from the offense level sentencing range when "the court finds that there exists an aggravating or mitigating circumstance of a

the courts of their sentencing discretion and to establish an exact, mandatory sentence for all offenses." Id. at 825 (quoting Lockett v. Ohio, 438 U.S. 586, 602 (1978)).

66. Id.
67. See 18 U.S.C. § 3742(e) (1988); see also United States v. Lawrence, 915 F.2d 402, 405-06 (8th Cir. 1990); United States v. Johnson, 879 F.2d 331, 335 (8th Cir. 1989).

The Guidelines do not foreclose individual due process challenges to the way in which the Guidelines are applied to specific cases. Where the application of the Guidelines to the facts is incorrect, the appellate courts may remand for proper sentencing within the Guidelines. United States v. Brittman, 872 F.2d 827, 828-29 (8th Cir.), cert. denied, 493 U.S. 1005 (1989).

68. United States v. Thomas, 884 F.2d 540, 543 (10th Cir. 1989); United States v. Pinto, 875 F.2d 143, 144 (7th Cir. 1989).
69. Specht v. Patterson, 386 U.S. 605, 610 (1967); United States v. Romano, 825 F.2d 725, 728 (2d Cir. 1987); Shelton v. United States, 497 F.2d 156, 159 (5th Cir. 1974).

70. Shelton, 497 F.2d at 159-60.

71. See U.S.S.G., supra note 5, § 1A4(b).
kind, or to a degree, not adequately taken into consideration in formulating the guidelines. 73 The policy statement continues by listing numerous circumstances which may warrant either a longer or shorter sentence. 74

2. Departures for Substantial Assistance Under Section 5K1.1

The enabling legislation and the Sentencing Guidelines explicitly provide for downward departures as a result of substantial assistance to the authorities. 75 Both allow for downward departures for substantial assistance “upon motion of the government.” 76 In order to sentence outside the Guideline’s range for a particular offense level, the policy statement of section 5K1.1 of the Guidelines states:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or

73. See U.S.S.G., supra note 5, § 5K2.0; see also 18 U.S.C. §§ 3553(a)(5), 3553(b) (1988).

74. U.S.S.G., supra note 5, §§ 5K2.1 to 5K2.14. The Guidelines are based on a charge offense system, rather than a real offense system. This means that the sentence is based on the charge brought by the prosecutor, not the actual offense committed by the individual. See U.S.S.G. § 1A4(a).

The original goal of the Commission was to develop a real offense system, but practical complications mandated the charge offense system finally drafted. As a result, effectual departures are often made from the Sentencing Guidelines since the offense level of a given crime is a major consideration in plea bargain situations. Plea bargains generally reflect a virtual agreement of a sentence, corresponding to the offense for which the plea is offered. Because of this, the sentence often bears little resemblance to the offense or offenses actually committed. For a harsh commentary on the final draft of the Sentencing Guidelines, see Paul H. Robinson, A Sentencing System for the 21st Century?, 66 Tex. L. Rev. 1 (1987).


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.

76. 18 U.S.C. § 3553(c) (1988); U.S.S.G., supra note 5, § 5K1.1, p.s. Although these sections are often equated with each other, it should be noted that U.S.S.G. § 5K1.1 is a policy statement and is intended to govern departures from the sentence range allowed for a particular offense level. Courts are required only to consider policy statements when setting a particular sentence. 18 U.S.C. § 3553(a)(5) (1988). The enabling legislation, 18 U.S.C. § 3553(c) (1988), however, is intended to govern only the departures below the statutory minimum sentence of a given offense.

In Wade v. United States, 60 U.S.L.W. 4389 (U.S. May 18, 1992), the Court declined to distinguish between the two requirements. In Wade, the statutory minimum was near the top of the Guidelines range, which rendered the distinction irrelevant.
prosecution of another person who has committed an offense, the court may depart from the guidelines.
(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's 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.\footnote{77}

A reduced sentence is ultimately determined by the sentencing judge, who may consider the opinion of the prosecutor and other mitigating circumstances offered by the parties.\footnote{78} At the same time, the court may consider other factors for general departures.\footnote{79}

The majority of federal circuits have held that a prosecutor must make a section 5K1.1 motion before the court may make a downward departure from the Sentencing Guidelines based on substantial assistance.\footnote{80} Some courts have recognized that this restraint on the sentencing court's discretion has constitutional implications.\footnote{81} The Fifth Circuit, for example, has noted that the "policy statement . . . does not preclude a district

\footnote{77. U.S.S.G., supra note 5, § 5K1.1. Prior to 1990, the wording of this section was slightly different. At that time, the section read: "Upon motion of the government stating that the defendant has made a good faith effort to provide substantial assistance . . . ." U.S.S.G., supra note 5, § app. C.133 (1987) (emphasis added).
78. See United States v. Musser, 856 F.2d 1484, 1487 (11th Cir. 1988) (stating that the only delegation to the prosecutor is the ability to move for the departure; the actual authority to depart remains in the sentencing judge), cert. denied, 489 U.S. 1022 (1989); see also United States v. Huerta, 878 F.2d 89, 93 (2d Cir. 1989) (stating that without a § 5K1.1 motion from the prosecutor, the assistance may be considered in exercising discretion within the guidelines), cert. denied, 493 U.S. 1046 (1990).
79. See, e.g., U.S.S.G., supra note 5, §§ 5K2.0 to 5K2.14. At least one judge on the Eighth Circuit contends that section 5K2.0, an alternative section in the Guidelines, may be used to depart downward for substantial assistance in the event that the prosecution does not make a § 5K1.1 motion. See United States v. Kelley, 956 F.2d 748, 757 (8th Cir. 1992) (Beam, J., concurring in part and dissenting in part).
80. See supra note 50.
court from entertaining a defendant’s showing that the government is refusing to recognize [his] substantial assistance.’”

Further, the sentencing judge has always had a right to review all available relevant information at sentencing. A defendant has due process rights in the sentencing stages, including the right to participate in a hearing and refute the evidence offered by the prosecution. These rights have not evaporated with the demise of the medical model and a return to the retributive theory of sentencing.

III. EIGHTH CIRCUIT DECISIONS

A. Early Cases

The Eighth Circuit has confronted the section 5K1.1 motion issue several times. In United States v. Justice, the Eighth Circuit recognized the difficulty in the prosecutorial motion requirement:

While we recognize that § 5K1.1 allows the district court,


84. See Morrissey v. Brewer, 408 U.S. 471, 489 (1972); United States v. Romano, 825 F.2d 725, 728 (2d Cir. 1987); Shelton v. United States, 497 F.2d 156, 160 (5th Cir. 1974).

85. See United States v. Kelley, 956 F.2d 748 (8th Cir. 1992) (en banc); United States v. Laird, 948 F.2d 444, 447 (8th Cir. 1991); United States v. Drake, 942 F.2d 517, 519 (8th Cir. 1991); United States v. Hubers, 938 F.2d 827, 829 (8th Cir.), cert. denied, 112 S. Ct. 427 (1991); United States v. Gutierrez, 908 F.2d 349, 350 (8th Cir.), vacated, 917 F.2d 579 (8th Cir. 1990); United States v. Oransky, 908 F.2d 307, 309 (8th Cir. 1990); United States v. Smitherman, 889 F.2d 189, 191 (8th Cir. 1989), cert. denied, 110 S. Ct. 1493 (1990); United States v. Grant, 886 F.2d 1513, 1514 (8th Cir. 1989).

upon motion of the government, to depart below the guidelines to reward a defendant’s cooperation, we are not positive that this provision, in the absence of a motion by the government, would divest a sentencing court of the authority to depart below the guidelines in recognition of a defendant’s clearly established and recognized substantial assistance to authorities. We believe that in an appropriate case the district court may be empowered to grant a departure notwithstanding the government’s refusal to motion the sentencing court if the defendant can establish the fact of his substantial assistance . . . .

In Justice, the defendant alleged that he had provided substantial assistance to the government. The government did not deny the allegations but nevertheless declined to make the section 5K1.1 motion. The Justice court criticized section 5K1.1’s motion requirement. First, the court found that the motion gave the prosecutor discretion that has historically belonged to the sentencing judge. Second, the prosecutor’s decision was unreviewable. Finally, section 5K1.1 usurped the province of the trier of fact in resolving the factual issue of substantial assistance. Despite the Justice court’s criticism of the section 5K1.1 motion requirement, the court did not find the defendant’s rights were violated under the particular facts.

Subsequent Eighth Circuit cases addressing the section 5K1.1 similarly declined to invalidate the prosecutorial motion requirement. In United States v. Grant, the Eighth Circuit reserved judgment on the “question of whether a prosecutor’s arbitrary or bad faith refusal to move for a Section 5K1.1 departure violates due process.” This reservation continued in

87. Id. at 668-69.
88. Id. at 665.
89. Id.
90. Id. at 667.
91. Id.
92. Id.
93. Id.
94. Id. The constitutional issue was avoided by a finding that it was not properly presented on appeal. The court stated that there was no apparent abuse of discretion on the part of the district court in refusing the defendant’s request for downward departures. In dicta, however, it reserved the right to review the evidence leading up to the prosecutor’s decision. Id. at 669-70.
95. 886 F.2d 1513, 1514 (8th Cir. 1989).
subsequent decisions by the Eighth Circuit.\textsuperscript{96}

\textbf{B. United States v. Gutierrez}

In \textit{United States v. Gutierrez},\textsuperscript{97} decided almost at the same time as \textit{United States v. Oransky},\textsuperscript{98} a three-judge panel of the Eighth Circuit reversed a section 5K1.1 downward departure without a government motion. In \textit{Gutierrez}, the prosecution agreed to dismiss charges in exchange for the defendant’s cooperation with the government in other drug-related investigations.\textsuperscript{99} The defendant agreed to identify his supplier and customers. As part of his assistance, the defendant also testified against another person.\textsuperscript{100}

The prosecution asked the court to take the defendant’s cooperation into consideration within the Guideline’s applicable range, but it refused to make a section 5K1.1 motion.\textsuperscript{101} The defendant then requested a downward departure from the Guidelines based on his assistance to the authorities.\textsuperscript{102} The sentencing judge deviated from the Guidelines by six months based on the defendant’s motion and the judge’s own knowledge of the defendant’s assistance.\textsuperscript{103}

The government appealed the sentencing decision, and a three-judge panel of the Eighth Circuit reversed, finding that a government motion was necessary before a downward deviation for substantial assistance was available.\textsuperscript{104} The panel decision identified two issues: first, whether a prosecutorial motion

\begin{footnotesize}

In \textit{Oransky}, Judge Heaney stated in his concurrence that a sua sponte downward departure for substantial assistance should be allowed “if a question of prosecutorial bad faith or arbitrariness is present.” \textit{Oransky}, 908 F.2d at 309-10 (Heaney, J., concurring) (citing United States v. Gutierrez, 908 F.2d 349, 352-55 (8th Cir. 1990) (Heaney, J., dissenting)).

\textsuperscript{97} 908 F.2d 349, \textit{vacated} 917 F.2d 379 (8th Cir. 1990).

\textsuperscript{98} 908 F.2d 307 (8th Cir. 1990).

\textsuperscript{99} Brief for Appellee at v, United States v. Gutierrez, 908 F.2d 349 (8th Cir.) (No. 89-1950), \textit{vacated}, 917 F.2d 379 (8th Cir. 1990).

\textsuperscript{100} \textit{Gutierrez}, 908 F.2d at 349.

\textsuperscript{101} Brief for Appellant at 8, United States v. Gutierrez, 908 F.2d 349 (8th Cir.) (No. 89-1950), \textit{vacated}, 917 F.2d 379 (8th Cir. 1990).

\textsuperscript{102} \textit{Gutierrez}, 908 F.2d at 350.

\textsuperscript{103} \textit{Id.} at 352. The trial judge was David R. Hansen of the U.S. District Court for the Northern District of Iowa. He had personal knowledge of the degree of assistance which was given by the defendant because he presided over the trial of another person whom the defendant testified against. \textit{Id}.

\textsuperscript{104} \textit{Id.} at 349.
\end{footnotesize}
is required for a downward deviation for substantial assistance; and second, whether this requirement constitutes a violation of due process because it is made at the sole discretion of the prosecutor, an adversarial party. The panel found that a strict reading of the Guidelines and the enabling legislation required a section 5K1.1 motion by the prosecutor for downward deviation from the Guidelines. The panel did not reach the second issue.

The decision was vacated, however, when a request for a rehearing en banc was granted. After rehearing, an equally divided court affirmed the district court.

C. Recent Cases

In subsequent cases, the court has relied on dicta in United...
States v. Justice" and reaffirmed the prosecutorial motion requirement in the absence of a showing of bad faith or arbitrariness. This retreat renders Gutierrez an anomaly. Recently, in United States v. Kelley, the court again addressed the section 5K1.1 motion issue. In an en banc decision, the Eighth Circuit affirmed the district court and found that a prosecutorial motion is necessary for downward departure for substantial assistance. However, the constitutional due process issues were not raised on appeal. Consequently, absent allegations of bad faith or arbitrariness, a prosecutor's motion is currently required before a court may grant a downward departure for substantial assistance in the Eighth Circuit.

IV. CONSTITUTIONAL ANALYSIS

The requirement of a prosecutor's motion to trigger a downward departure from the sentencing range for substantial assistance leads to compelling constitutional arguments. First, the section 5K1.1 motion requirement violates procedural due process because of the great risk of an erroneous deprivation of liberty. Second, in denying a sentenced offender the right to appeal, the prosecutor's decision not to move for a downward departure violates substantive due process. Third, the discretion vested in the prosecutor violates separation of powers principles.


112. Kelley, 956 F.2d at 748.

113. Id. at 757. The trial court judge in this case was Judge David R. Hansen of the U.S. District Court for the Northern District of Iowa. In holding that he was without power to deviate downward without a prosecutorial motion, the court reversed the position it had taken in United States v. Gutierrez, 908 F.2d 349 (8th Cir.), vacated, 917 F.2d 379 (8th Cir. 1990).

114. Kelley, 956 F.2d at 750 (stating "appellants forego constitutional arguments and simply urge that we are not bound to follow United States Sentencing Commission").

115. The Eighth Circuit now recognizes that § 5K1.1 and 18 U.S.C. § 3553(e) do not serve the same function. In United States v. Rodriguez-Morales, the court held that where the prosecutor has made a § 5K1.1 motion, the sentencing court still lacks the authority to make a § 3553(e) departure. United States v. Rodriguez-Morales, 958 F.2d 1441 (8th Cir. 1992).
A. Procedural Due Process

Due process of law is a right granted to all individuals before they may be deprived of a liberty interest.116 The Supreme Court, in Mathews v. Eldridge, stated that the right to be heard “at a meaningful time and in a meaningful manner” is a fundamental requirement of procedural due process.117 Mathews identified three factors that should be considered in determining whether procedural due process requirements have been met.118 The first factor is the extent to which an individual’s constitutional rights are affected by the government’s actions.119 In sentencing cases, the affected right is a crucial one—the defendant’s right to liberty.120

Second, a court must also consider “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.”121 The prosecutorial motion requirement of section 5K1.1 deprives defendants of the right to place mitigating circumstances of substantial assistance before the court for consideration of a smaller sentence. Because the prosecutor’s decision to make the motion is not appealable, any error or abuse will not be reviewed or corrected.122 This preclusion violates the spirit of the Sentencing Guidelines and the enabling legislation.123 The Guidelines specifically allow the court to consider downward departures where aggravating or mitigating circumstances exist which have not been “adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . .”124 Due process grants defendants the right to active participation in the sentencing hearing, including the right to have the court consider any and

116. U.S. CONST. amend. V.
118. Id. at 335.
119. Id.
120. See United States v. Johnson, 879 F.2d 331 (8th Cir. 1989) (holding that, under determinate sentencing, the right to liberty is significantly and finally affected because judicial discretion within the guideline range is broad and reversed only if clearly erroneous).
121. Mathews, 424 U.S. at 335.
123. See 28 U.S.C. § 994(n) (1988); U.S.S.G., supra note 5, §§ 1A4(b), 5K2.0; see also United States v. LaGuardia, 902 F.2d 1010, 1014 (1st Cir. 1990).
all relevant factors in sentencing. Consequently, by restricting a defendant's participation and right to appeal, section 5K1.1 increases the risk of an erroneous deprivation of liberty.

Third, courts must consider "the Government's interest, including the function involved and the fiscal and administrative burdens" involved in instituting alternative procedures. One of the government's interests is the encouragement of a defendant's assistance in the prosecution of others. By requiring the government to prepare and submit to the court an evaluation of the extent of the defendant's assistance, the court could decide whether a downward departure was warranted. Court evaluation of the defendant's assistance is always appropriate for sentencing determinations within the range of the offense level. Therefore, the government's interest should be minimally affected. Furthermore, the administrative burden on the prosecutor is lessened where the decision whether to make a section 5K1.1 motion is answered by the court. Additionally, placing the decision to depart with the court would lead to a uniformity of decisions.

The Third Circuit applied the Mathews test in United States v. Frank, and held that no liberty interest was at stake in the section 5K1.1 motion because a defendant does not have an es-

127. See United States v. Roberts, 726 F. Supp. 1359, 1367 (D.D.C. 1989), modified sub nom., United States v. Holland, 729 F. Supp. 125 (D.D.C. 1990), rev'd sub nom. on other grounds, United States v. Mills, 925 F.2d 455 (D.C. Cir. 1991). In Roberts, the evidence presented to the court regarding the degree of assistance rendered was not disputed; the reason given for not making a § 5K1.1 motion was that "the enforcement agencies did not pursue [defendant's] information because 'something bigger ... came up.'" 726 F. Supp. at 1376.
128. Compare United States v. Donatiu, 720 F. Supp. 619 (N.D. Ill. 1989), aff'd, 922 F.2d 1331 (7th Cir. 1991), with United States v. Fiterman, 732 F. Supp. 878 (N.D. Ill. 1989). These cases exemplify the dangers of vesting this authority in the prosecutor. Both cases originated out of the same office at approximately the same time, yet in Donatiu, the defendant made immediate efforts to render substantial assistance. He was to make a drug delivery immediately after his arrest; the delivery was not completed because of extraneous circumstances beyond his control. The prosecutor did not make a § 5K1.1 motion, and the sentencing court refused to depart downward on the defendant's motion. Donatiu, 720 F. Supp. at 630.
In contrast, in Fiterman, the prosecutor made a § 5K1.1 motion in spite of the defendant's minimal assistance a full year after her arrest. The sentencing judge rejected the § 5K1.1 motion and imposed the maximum sentence under her offense level. 732 F. Supp. at 883-85.
tablished right to an individualized sentence. The Frank court, however, failed to recognize that Congress has retained elements of the individualized sentence by providing judicial discretion within the sentencing ranges and allowing deviation outside of the sentencing range where unusual circumstances exist.

Congress has an absolute right to eliminate judicial sentencing discretion. However, a defendant has a protected liberty interest in the downward departure provisions provided by section K. This view has been implicit in other decisions. Allowing only one adversarial party to present information of substantial assistance "skew[s] the sentencing process in a way that cannot withstand due process scrutiny." For example, in United States v. Curran, the prosecutor did not file a section 5K1.1 motion because the defendant did not meet the required "profile" for the motion. The court held that due process requires that the court, or either party, may make the 5K1.1 motion or may offer evidence of prosecutorial assistance.

B. Substantive Due Process

The right of review and appeal presents another problem in the application of section 5K1.1. The right of a defendant to

129. Frank, 864 F.2d 992, 1008-09 (3d Cir. 1988), cert. denied, 490 U.S. 1095 (1989). The Frank Court stated, "The recognition of a substantial liberty interest in individualized sentencing would . . . be inconsistent with the generally accepted notion that both retribution . . . and general deterrence . . . are appropriate . . . reasons for imposing sanction." Id. at 1009-10.

130. U.S.S.G., supra note 5, §§ 1A4(b), § 5K1.1. The Guidelines explicitly allow for departures beyond the ranges for extenuating circumstances, at the sentencing court's discretion. Id.

131. See supra Part II.C.2.


134. 724 F. Supp. at 1241.

135. Id. at 1244 (once the "provision is made available to one party to the litigation, due process requires that it be made available to all parties in the litigation").

In considering the question of procedural due process, the Curran court disagreed with the Eleventh Circuit in United States v. Musser, 856 F.2d 1484 (11th Cir. 1988), cert. denied, 489 U.S. 1022 (1989). There, the court stated, "the only authority delegated by the rule is the authority to move . . . for reduction of sentence. . . . The authority to actually reduce a sentence remains in the district court . . . ." Id. at 1487 (emphasis added).
appeal his or her sentence has been well established. In United States v. Federico, the court stated that sentencing is a quintessential judicial function. As a judicial decision, the sentence imposed will be subject to review on appeal. However, the decision of a prosecutor to forego a section 5K.1 motion is not a judicial decision and therefore is not appealable.

The right to appeal is basic to our system of government. Many circuits have held that, in the event of alleged prosecutorial bad faith or arbitrariness, the district court judge should properly exercise discretion and review the facts leading up to the decision of whether or not a section 5K.1 motion was made. In a recent case, the Supreme Court held that where the government’s motives are based on unconstitutional factors, the sentencing court may review the prosecutor’s decision.

In United States v. Roberts, the court found that section 5K.1 was essentially a transfer of judicial power to the prosecutor and was therefore unconstitutional. The prosecutor’s office in that district, in an attempt to avoid unwarranted section 5K.1 motions, instituted a “departure committee” within the office for the purpose of evaluating section 5K.1 departures. The mechanism by which downward deviation mo-

141. Wade v. United States, 60 U.S.L.W. 4389 (U.S. May 18, 1992); see supra notes 11, 76.
143. Id. at 1361.
tions were to be made was outside the individual prosecutor's control. Further, the procedures used and the factors considered by the committee were unknown. The decision whether to make the section 5K1.1 motion was completely unreviewable. The court found intolerable the placement of this sentencing authority in the prosecutor, stating, "It is difficult to conceive of a parallel situation in the law where substantial liberty interests and consequences provided for by statute are beyond the power of inquiry by anyone." 

This concern was echoed by the court in United States v. Curran. The Curran court criticized the appealability of the prosecutor's decision by stating, "In the absence of special circumstances (e.g., a claim of denial of equal protection based on some invidious classification, such as race), there is no mechanism to challenge a prosecutor's decision not to file a motion for reduction based on substantial cooperation." 

Under the Sentencing Guidelines, Congress reserved the right of limited discretion in sentencing to the judiciary. By giving any of this authority, no matter how slight, to the executive branch, the Sentencing Guidelines confuse the traditional adversarial role of the prosecutor and makes possible cries of collusion and unfairness in the sentencing process. In the Guidelines, Congress has reserved the rights of discretion and deviation within and without the sentencing range to the sentencing judges.

C. Separation of Powers

Most circuit courts, while finding that the section 5K1.1 motion is mandatory, have criticized the requirement because of

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144. Id. at 1376.
145. Id. at 1375-76.
146. Id. at 1375. The court further stated that to substitute prosecutors for judges with respect to the sentencing responsibility is no more compatible with due process than . . . prosecutorial assumption of the other [judicial] functions. . . . In the view of this court, none of these can be accommodated in the traditional due process framework that has existed in our law since the Magna Carta.

Id.

148. Id. at 1244.
149. U.S.S.G., supra note 5, §§ 1A4(b)-1A4(h).
the adversarial role of the prosecutor.\textsuperscript{151} A number of courts have invalidated statutes and procedures similar to section 5K1.1 on separation of powers principles. In \textit{Ford v. Wainwright}, the Supreme Court held that a state procedure that placed the final determination of capital punishment in the hands of the governor was unconstitutional.\textsuperscript{152} The Court held that the procedure was flawed because the decision was within the executive branch of government.\textsuperscript{158} The Court held that the governor, a law enforcement official, could not have the proper degree of impartiality.\textsuperscript{154}

Other courts also have recognized the need to separate prosecutorial and judicial functions. The Supreme Court, in \textit{Young v. United States ex rel. Vuitton}, found that the judiciary cannot be at the mercy of another branch of government in fulfilling its constitutional mandate.\textsuperscript{155} The necessity of this separation was discussed in \textit{United States v. Brennan}.\textsuperscript{156} There, the court stated that the many tools available to the prosecutor for inducing the cooperation of defendants do not extend to the sentencing process.\textsuperscript{157} The government may use plea bargaining or may point out the desirability of cooperation in the form of a reduced charge, but it should not have the ability to influence the sentencing formulation for its own ends.\textsuperscript{158} The primary purposes of sentencing—rehabilitation and retribution—should be unaffected by the government’s interests in coercing assistance. Sentencing discretion, beyond the mandates of congressional standards, should lie in the discretion of the judiciary.\textsuperscript{159}

Some state courts have found that vesting discretion in the prosecutor is impermissible where it ties the hands of the court in an area where judicial discretion is not restricted.\textsuperscript{160} In \textit{Peo-
ple v. Tenorio, the California Supreme Court held unconstitu-
tional a statute which allowed for dismissal only on motion of
the prosecutor.\textsuperscript{161} The court found that vesting the prosecutor
with such power did "'violence to our concept of constitu-
tional government.'"\textsuperscript{162}

In a similar case, the Arizona Supreme Court held that a
state statute that does not allow mitigating circumstances to be
considered in sentencing, except upon the initiative of the
prosecutor, violates separation of powers principles.\textsuperscript{163} The
court held that while the legislature has the power to deter-
mine what the law should be, the executive branch has the
power to determine which criminals to prosecute and which
charges to file.\textsuperscript{164} Thus, allowing the executive branch the au-
thority to decide whether a defendant should have the benefit
of circumstances which could reduce his or her sentence un-
constitutionally restricts the power of the judiciary.\textsuperscript{165} The law
allowed the executive branch to limit and review the discretion
of the judiciary.\textsuperscript{166} By doing so, the statute unconstitutionally
violated separation of powers principles.\textsuperscript{167}

The section 5K1.1 motion is similarly flawed. By vesting the
prosecutor with discretion to depart from the Guidelines, the
authority violates the role reserved to the judiciary by section
K. The separation of powers principle was applied to the sec-
tion 5K1.1 motion in \textit{United States v. Federico}.\textsuperscript{168} The Federico
court analyzed the traditional duty of the judiciary in the sen-
tencing process and noted that there is "'no justification for
'vesting in a partial advocate, the prosecutor, the power to pre-
vent the exercise of . . . judicial discretion.'"\textsuperscript{169} By giving this
authority to the prosecutor, sentencing discretion is vested in a
party who is an adversary against that defendant and who, by

\textsuperscript{161}. 473 P.2d at 996-97.
\textsuperscript{162}. \textit{Id.} at 995 (quoting People v. Sidener, 375 P.2d 641, 660 (Cal. 1962)).
\textsuperscript{163}. State v. Prentiss, 786 P.2d 932, 937 (Ariz. 1989). This finding was made
under the due process clause of the Arizona Constitution, which mirrors the Due
Process Clause of the United States Constitution. \textit{Id.}
\textsuperscript{164}. \textit{Id.} at 936.
\textsuperscript{165}. \textit{See id.}
\textsuperscript{166}. \textit{Id.}
\textsuperscript{167}. \textit{Id.}
\textsuperscript{168}. 732 F. Supp. 1008 (N.D. Cal. 1988).
\textsuperscript{169}. \textit{Id.} at 1012 (citing to People v. Tenorio, 473 P.2d 993 (Cal. 1970)).
the very role assumed in the process, cannot be objective.170

V. CONCLUSION

The section 5K1.1 prosecutorial motion requirement violates a defendant's constitutional rights. Depriving the defendant of an opportunity to provide evidence of mitigating circumstances is a violation of procedural due process. When the executive branch usurps the role of the judiciary, and where there is no appellate review of its decision, this transfer of power violates substantive due process rights and separation of powers principles.

While the Sentencing Guidelines have generally protected individual's constitutional rights and furthered public policy objectives,171 the section 5K1.1 motion requirement does not. Only by interpreting the section as a non-binding policy statement can the courts protect the individual's constitutional rights.

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