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Downward Departures for Substantial Assistance: A Proposal for Reducing Sentencing Disparities among Codefendants

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DOWNWARD DEPARTURES FOR SUBSTANTIAL ASSISTANCE: A PROPOSAL FOR REDUCING SENTENCING DISPARITIES AMONG CODEFENDANTS

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I. INTRODUCTION

Under the Sentencing Guidelines promulgated by the United States Sentencing Commission pursuant to the Sentencing Reform Act of 1984, a defendant who cooperates with the government may receive a sentence significantly less than a codefendant whose role in the offense was minor. In many cases, the minor offender does not possess the information the government seeks to conduct other investigations or prosecutions. By virtue of his lesser culpability, the minor offender is deprived of the opportunity to obtain a downward departure based on assistance rendered to the government. Thus, a major offender may receive a more lenient sentence than a codefendant whose role in the offense was minor.[1] To illustrate, the kingpin of a drug conspiracy who cooperates with the government could receive a sentence below the statutory minimum, while a codefendant who acted solely as a drug courier could receive a heavier sentence because his limited knowledge of the conspiracy is less valuable to the government.

One of the aims of the Sentencing Guidelines is to narrow disparities in sentencing.[2] However, when one defendant cooperates with the government and receives a lenient sentence, there is no specific mechanism by which the sentencing court can reduce the sentences of his codefendants so that the sentences are fair in relation to each other. Conversely, there is no provision limiting the sentence received by the cooperating defendant to insure fairness in the sentencing of codefendants.

Defendants who cooperate with the government should be rewarded. However, they should not be rewarded to the extent that they are given sentences lower than less culpable codefendants who

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1. As the Ninth Circuit recently acknowledged, "the Guidelines could yield the anomalous result of a defendant with a serious criminal history receiving a lower sentence than a first time offender . . . ." United States v. Lira-Barraza, 941 F.2d 745, 750 (9th Cir. 1991) (en banc).

2. "Disparity was said to be one of the most important evils the guidelines were intended to cure." United States v. Ray, 930 F.2d 1368, 1373 (9th Cir. 1990).

were unable to provide information to the government.[3] The Guidelines should include specific provisions which allow sentencing courts the discretion to alleviate such sentencing disparities.

The Discussion section of this article reviews the Sentencing Guidelines in general and departures in particular, notes the various grounds for departure, and examines the constitutionality of the government motion requirement of section 5K1.1. The Discussion section also addresses disparities in sentencing, with specific emphasis on disparities generated by the substantial assistance provisions.[4] The Commentary sets forth proposals for providing courts with the discretion to eliminate sentencing disparities when a major offender cooperates with the government and receives a lesser sentence than a minor offender who was unable to cooperate.

II. DISCUSSION

A. The Sentencing Guidelines in General

The Sentencing Reform Act ("Act") took effect on November 1, 1987, as part of the Comprehensive Crime Control Act of 1984.[5] The Act created the United States Sentencing Commission ("USSC") as an independent body within the judicial branch and gave it the authority to promulgate sentencing guidelines and policy statements.[6] The USSC in turn promulgated the United States Sentencing Guidelines ("Guidelines"). All defendants who commit federal offenses after November 1, 1987, are sentenced under the Guidelines.[7]

According to the drafters of the Guidelines, Congress had three objectives in enacting the Sentencing Reform Act of 1984. First, Congress sought to "enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing

3. United States v. Nelson, 918 F.2d 1268 (6th Cir. 1990). A different scenario would be presented if the lesser offender was given the opportunity to assist the government and refused. As the Sixth Circuit noted in United States v. Nelson, "[r]ewarding one who has [been given the opportunity and] not cooperated with authorities to essentially the same degree as those who have cooperated strains the incentives inherent in reward and punishment." *Id.* at 1275.

4. "Substantial assistance provisions" refers to Guideline § 5K1.1 as well as 18 U.S.C. § 3553(e) and Federal Rule of Criminal Procedure 35(b). *See infra* notes 22 and 23.

5. 98 Stat. 1987 (1984).

6. *See* 28 U.S.C. §§ 991-998 (1991).

7. *See* United States v. Woolford, 896 F.2d 99, 101 (5th Cir. 1990); United States v. Thomas, 895 F.2d 51, 58 (1st Cir. 1990); United States v. Rosa, 891 F.2d 1063, 1069 (3d Cir. 1989); United States v. Story, 891 F.2d 988, 995 (2d Cir. 1989); United States v. Johnson, 889 F.2d 1032, 1036 (11th Cir. 1989); United States v. Newman, 889 F.2d 88, 94 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2566 (1990); United States v. Walker, 885 F.2d 1353, 1354 (8th Cir. 1989).

system."[8] Second, Congress aimed to provide reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.[9] Third, "Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."[10]

Under the Guidelines, a defendant's sentence is calculated through a combination of total offense level and criminal history category. The total offense level is determined by beginning with the base offense level for the particular offense and then adjusting that base level upward or downward based on such factors as acceptance of responsibility, role in the offense, obstruction of justice, etc.[11] The criminal history category is determined by assigning "points" to each of the defendant's past offenses.[12] If a defendant is considered a "career offender," he receives the highest criminal history category.[13]

The combination of a defendant's total offense level and criminal history category results in a "guideline range." A sentence within the guideline range is not appealable absent a showing that the guidelines were incorrectly applied or that the sentence was in violation of law.[14] If a judge chooses to depart from the guideline range, however, the standard of review is more stringent.[15] Discre-

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8. United States Sentencing Commission, *Guidelines Manual* (hereinafter U.S.S.G.), Part A-Introduction, at 1.2.

9. *Id.*; *see also* 18 U.S.C. § 3553(a)(6) (1988) (courts directed to impose sentences considering need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct); United States v. Pearson, 911 F.2d 186, 190 (9th Cir. 1990); United States v. Williams, 894 F.2d 208, 213 (6th Cir. 1990); United States v. Aguilar-Pena, 887 F.2d 347, 352 (1st Cir. 1989); United States v. White, 869 F.2d 822, 825 (5th Cir. 1989), *cert. denied*, 490 U.S. 1112 (1989), *and cert. denied sub nom.* Chambless v. United States, 110 S. Ct. 560 (1989).

10. U.S.S.G., Part A-Introduction, at 1.2.

11. *See id.* §§ 3A1.1-3E1.1.

12. *See id.* §§ 4A1.1-.3.

13. *See id.* §§ 4B1.1-.4.

14. 18 U.S.C.A. § 3742(e) (West Supp. 1991); United States v. Molinar-Apodaca, 889 F.2d 1417, 1424-25 (5th Cir. 1989); United States v. Soliman, 889 F.2d 441, 443 (2d Cir. 1989).

15. Several circuits employ a three-prong test in which the appellate court (1) evaluates whether the circumstances relied upon by the district court in departing are sufficiently "unusual" to warrant departure; (2) applies a clearly erroneous standard to determine whether the circumstances relied upon by the sentencing judge actually existed; and (3) assesses whether the degree of departure was reasonable. United States v. Martinez-Duran, 927 F.2d 453, 455-56 (9th Cir. 1991); United States v. Benskin, 926 F.2d 562, 564-65 (6th Cir. 1991); United States v. Simmons, 924 F.2d 187, 191 (11th Cir. 1991); United States v. Williams, 922 F.2d 578, 581 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1637 (1991); United States v. Dall, 918 F.2d 52, 54 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 981 (1991); United States v. Colon, 884 F.2d 1550, 1554 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 553 (1989);

tionary refusals to depart are not appealable.[16] Nor can a defendant appeal the degree of a downward departure.[17] If a sentencing court intends to depart from the guidelines, the defendant must be given notice and an opportunity to be heard.[18]

The constitutionality of the Sentencing Reform Act was upheld by the United States Supreme Court in *Mistretta v. United States*.[19] In that case, the Court held that Congress did not violate the separation of powers doctrine by delegating to the USSC the authority to promulgate sentencing guidelines. The Court reasoned:

> [C]onsistent with the separation of powers, 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.[20]

The Guidelines have been challenged on various constitutional grounds and upheld in every Circuit.[21]

United States v. Diaz-Villafane, 874 F.2d 43, 49 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 177 (1989); *see also Lira-Barraza*, 941 F.2d 745, (9th Cir. 1991) (en banc), *petition for cert. filed*, 60 U.S.L.W. 2112 (U.S. July 22, 1991) (No. 88-5161) (five-step test previously utilized by Ninth Circuit may be combined into three steps). When a departure is extreme, it must be supported by clear and convincing evidence. United States v. Kikumura, 918 F.2d 1084, 1102 (3d Cir. 1990).

16. *See, e.g.*, United States v. Brown, 921 F.2d 785, 791 (8th Cir. 1990); United States v. Harotunian, 920 F.2d 1040, 1044 (1st Cir. 1990); United States v. Soto, 918 F.2d 882, 884 (10th Cir. 1990); Schetz v. United States, 901 F.2d 85, 87 (7th Cir. 1990); United States v. Morales, 898 F.2d 99, 101 (9th Cir. 1990); United States v. Bayerle, 898 F.2d 28, 30-31 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 65 (1990); United States v. Wickstrom, 893 F.2d 30, 33 (3d Cir. 1989); United States v. Davis, 878 F.2d 1299, 1301 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 341 (1989). *Cf.* United States v. Deigert, 916 F.2d 916, 918-19 (4th Cir. 1990); (all holding that refusal to depart is reviewable only if district court believed it was without authority to depart).

17. *See* United States v. Ybabez, 919 F.2d 508, 510 (8th Cir. 1990); United States v. Dean, 908 F.2d 215, 217 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2801 (1991); United States v. Martinez, 905 F.2d 251, 254 (9th Cir. 1990); United States v. Vizcarra-Angulo, 904 F.2d 22, 23 (9th Cir. 1990); United States v. Gant, 902 F.2d 570, 573 (7th Cir. 1990); United States v. Pighetti, 898 F.2d 3, 4 (1st Cir. 1990); United States v. Wright, 895 F.2d 718, 722 (11th Cir. 1990).

18. United States v. Fortenbury, 917 F.2d 477, 480 (10th Cir. 1990); United States v. Rafferty, 911 F.2d 227, 230 (9th Cir. 1990); United States v. Sands, 908 F.2d 304, 307 (8th Cir. 1990); United States v. Cota-Guerrero, 907 F.2d 87, 90 (9th Cir. 1990); United States v. Landry, 903 F.2d 334, 340 (5th Cir. 1990); United States v. Hedberg, 902 F.2d 1427, 1429 (9th Cir. 1990); United States v. Hernandez, 896 F.2d 642, 644 (1st Cir. 1990); United States v. Ramirez Acosta, 895 F.2d 597, 600-01 (9th Cir. 1990); United States v. Nuno-Para, 877 F.2d 1409, 1415 (9th Cir. 1989).

19. 488 U.S. 361 (1989).

20. *Id.* at 388.

21. *See, e.g.*, United States v. Wilson, 900 F.2d 1350 (9th Cir. 1990) (due process); United States v. Rivera, 898 F.2d 442 (5th Cir. 1990) (effective assistance of counsel); United States v. Rutter, 897 F.2d 1558 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 88 (1990)

B. Departures

1. Grounds for Departure

The Guidelines set forth several specific grounds for both upward and downward departures. In particular, a judge may grant downward departure based on a defendant's substantial assistance to the government. Section 5K1.1 of the Guidelines provides:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
> (a)The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
> (1)the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's 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.[22]

The Application Notes to section 5K1.1 provide that substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence under the circumstances set

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(due process); United States v. Belgard, 894 F.2d 1092 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 164 (1990) (separation of powers and due process); United States v. Barnerd, 887 F.2d 841 (8th Cir. 1989) (due process and presentment clause); United States v. Baker, 883 F.2d 13 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 517 (1989) (equal protection); United States v. Erves, 880 F.2d 376 (11th Cir. 1989), *cert. denied sub nom.* Villarreal v. United States, 110 S. Ct. 416 (1989) *and cert. denied sub nom.* Richardson v. United States, 880 F.2d 376 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 416 (1989) (due process); United States v. Fernandez, 877 F.2d 1138 (2d Cir. 1989) (due process); United States v. Jacobs, 877 F.2d 460 (6th Cir. 1989) (due process); United States v. Bolding, 876 F.2d 21 (4th Cir. 1989) (due process); United States v. Pinto, 875 F.2d 143 (7th Cir. 1989) (due process); United States v. Seluk, 873 F.2d 15 (1st Cir. 1989) (separation of powers and due process); United States v. Frank, 864 F.2d 992 (3d Cir. 1988), *cert. denied*, 490 U.S. 1095, 109 S. Ct. 2442 (1989) (separation of powers).

22. U.S.S.G. § 5K1.1. While § 5K1.1 addresses downward departures at the time of sentencing, Federal Rule of Criminal Procedure 35(b) authorizes a court to reduce a sentence based on substantial assistance after sentencing. Rule 35(b) provides in part: "The court, on motion of the Government, may within one year after the imposition of a sentence, lower a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code." FED. R. CRIM. P. 35(b).

forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n).[23] A motion for downward departure based on substantial assistance must be brought by the government.[24]

Other than substantial assistance to the government, the Guidelines set forth four additional instances which warrant downward departure. Specifically, the Guidelines authorize downward departure if the victim's wrongful conduct contributed significantly to provoking the offensive behavior.[25] Downward departure is also authorized if the defendant committed a crime in order to avoid a perceived greater harm, for example, a mercy killing.[26] Similarly, if the defendant committed a crime under coercion, blackmail, or duress, none of which constituted a complete defense, downward departure is authorized.[27] Finally, the Guidelines provide that if the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a sentence below the guideline range may be appropriate.[28] A government motion is not a prerequisite for downward departure based on any of these grounds.

Various other sections of the Guidelines provide for upward departures. Specifically, courts are authorized to depart upward from the guideline range if death resulted;[29] if significant physical

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23. Title 18 U.S.C. § 3553(e) provides in part:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

18 U.S.C.A. § 3553(e) (Supp. 1991). Title 28 U.S.C. § 994(n) provides:

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

28 U.S.C.A. § 994(n) (Supp. 1991).

24. United States v. Dumas, 934 F.2d 1387 (6th Cir. 1991); United States v. Chotas, 913 F.2d 897, 901 (11th Cir. 1990), *reh'g denied*, 922 F.2d 849 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1421 (1991); United States v. Oransky, 908 F.2d 307, 309 (8th Cir. 1990); United States v. Bruno, 897 F.2d 691, 696 (3d Cir. 1990); United States v. Alamin, 895 F.2d 1335, 1337 (11th Cir. 1990), *reh'g denied*, 914 F.2d 251 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 710 (1991); United States v. Coleman, 895 F.2d 501, 505 (8th Cir. 1990). For a proposal that defense counsel should be allowed to move for downward departure based on substantial assistance, *see* Lee, *The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement*, 23 IND. L. REV. 681 (1990).

25. U.S.S.G. § 5K2.10.

26. *Id.* § 5K2.11.

27. *Id.* § 5K2.12.

28. *Id.* § 5K2.13.

29. *Id.* § 5K2.1.

injury resulted;[30] if the victim suffered extreme psychological injury;[31] if a person was abducted, taken hostage, or unlawfully restrained to facilitate commission of the offense or to facilitate the escape from the scene of the crime;[32] if the offense caused property damage or loss not taken into account within the guidelines;[33] if a weapon or dangerous instrumentality was used or possessed in the commission of the offense;[34] if the defendant's conduct resulted in a significant disruption of a governmental function;[35] if the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim;[36] if the defendant committed the offense in order to facilitate or conceal the commission of another offense;[37] if national security, public health, or safety was significantly endangered;[38] or if the defendant committed the offense in furtherance of a terrorist action.[39] A defendant's refusal to cooperate with authorities may not be grounds for upward departure.[40] A government motion is not required for upward departure.

Section 5K2.0 acts as a catch-all provision for departures from the guideline range.[41] That section acknowledges that under 18 U.S.C. § 3553(b) the sentencing court may depart from the guideline range if it finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[42] Where the applicable offense guideline and adjustments have already taken into consideration a particular factor, that factor may not be a basis for departure unless it "is present to a degree substantially in excess of that which ordinarily is involved in

30. *Id.* § 5K2.2.
31. *Id.* § 5K2.3.
32. *Id.* § 5K2.4.
33. *Id.* § 5K2.5.
34. *Id.* § 5K2.6.
35. *Id.* § 5K2.7.
36. *Id.* § 5K2.8.
37. *Id.* § 5K2.9.
38. *Id.* § 5K2.14.
39. *Id.* § 5K2.15.
40. *Id.* § 5K1.2.
41. The Commission intended to provide for two kinds of departure. The first "involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions." U.S.S.G. § 1A4(b), p.s., at 1.6. The second type of departure is "unguided." *Id.* Such departures "may rest upon grounds referred to in Chapter Five, Part K (Departures), or on grounds not mentioned in the guidelines." *Id.*
42. *Id.* § 5K2.0 (quoting 18 U.S.C. § 3553(b)).

the offense."[43]

The court may also depart from the guideline range if it finds that the defendant's criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that he will commit future crimes.[44] Pursuant to this section, a court may depart upward or downward.[45]

2. Constitutionality of Section 5K1.1—Government Motion Requirement

The constitutionality of the government motion requirement of § 5K1.1 of the Guidelines, which provides for downward departures based on substantial assistance to the government, has been challenged in several circuits. In *United States v. Musser*, the court rejected the defendant's argument that the government motion requirement unconstitutionally delegated "to prosecutors unbridled discretion to decide who is entitled to a sentence reduction."[46] The court noted that the only authority delegated to prosecutors was the authority to move for a reduction of sentence; authority to actually reduce a sentence remained with the court.[47] The court further held that because the defendant did not have a "constitutional right to the availability of a substantial assistance provision," he had no grounds upon which to challenge Congress' manner of enacting it.[48]

The Ninth Circuit, in *United States v. Ayarza*, expressly adopted the *Musser* holding.[49] In *Ayarza*, the court rejected separation of powers and due process challenges to section 5K1.1.[50] The court noted that "it is rational for Congress to lodge some sentencing discretion in the prosecutor, the only individual who knows whether a defendant's cooperation has been helpful."[51]

Similarly, in *United States v. Huerta*, the Second Circuit held that the requirement of a government motion did not constitute

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43. *Id.*

44. *Id.* § 4A1.3.

45. *See id.*

46. 856 F.2d 1484, 1487 (11th Cir. 1988), *cert. denied*, 489 U.S. 1022, 109 S. Ct. 1145 (1989).

47. *Id.*; *see also* United States v. La Guardia, 902 F.2d 1010, 1016 (1st Cir. 1990).

48. *Musser*, 856 F.2d at 1487; *see also* United States v. Harrison, 918 F.2d 30, 33 (5th Cir. 1990); United States v. Valencia, 913 F.2d 378, 386 (7th Cir. 1990); United States v. Kuntz, 908 F.2d 655, 657 (10th Cir. 1990); *La Guardia*, 902 F.2d at 1015; United States v. Lewis, 896 F.2d 246, 249 (7th Cir. 1990); United States v. Francois, 889 F.2d 1341, 1345 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 1822 (1990).

49. 874 F.2d 647, 653 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 847 (1990).

50. *Id.*

51. *Id.*; *see also La Guardia*, 902 F.2d at 1015.

interference with or usurpation of a constitutionally assigned judicial function in violation of the separation of powers doctrine.[52] The court likewise held that the government motion requirement did not violate due process, even though it circumscribed judicial sentencing discretion.[53] The court reasoned: "Like his separation of powers argument, Huerta's due process claim rests on the faulty premise that judicial sentencing discretion cannot be validly circumscribed."[54] The court further explained that: "[T]here is no right to individualized sentencing, and Congress may constitutionally prescribe mandatory sentences or otherwise constrain the exercise of judicial discretion, . . . so long as such constraints have a rational basis."[55]

The Eighth Circuit reached a similar conclusion in *United States v. Grant*,[56] holding that "[d]ue process is not offended by a guideline that narrows the discretion of a sentencing court."[57] The court noted that: "[T]he motion requirement 'is predicated on the reasonable assumption that the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance.' "[58]

The Seventh Circuit also rejected due process challenges to the government motion requirement in *United States v. Lewis*.[59] In that case, the defendant argued that the government motion requirement (1) improperly restricted the sentencing judge's traditional discretion,[60] (2) deprived him of his "right to present accurate and reliable information to the trial court concerning his substantial assistance,"[61] and (3) placed undue discretion with the prosecutor.[62]

C. *Disparities in Sentencing*

1. *Disparities Among Codefendants in General*

Disparities in sentences alone do not violate the Sentencing Reform Act.[63] Equalization of codefendants' sentences is not re-

52. 878 F.2d 89, 92 (2d Cir. 1989).
53. *Id.* at 93-94.
54. *Id.* at 94.
55. *Id.*
56. 886 F.2d 1513 (8th Cir. 1989).
57. *Id.* at 1514.
58. *Id.* (quoting *White*, 869 F.2d at 829).
59. 896 F.2d 246, 249 (7th Cir. 1990).
60. *Id.* at 248.
61. *Id.*
62. *Id.*
63. United States v. Sanchez Solis, 882 F.2d 693, 699 (2d Cir. 1989).

quired under the Sentencing Guidelines.[64] The mere fact that a co-defendant has received a lighter sentence does not indicate an abuse of discretion on the part of the sentencing judge.[65] The argument that a defendant has received a harsher sentence than a co-defendant is not a ground for relief on appeal.[66] In other words, "a defendant cannot base a challenge to his sentence 'solely on the lesser sentence given by the district court to his co-defendant.' "[67]

The mere fact that a sentencing judge perceives it as unjust for a defendant to receive a lesser sentence than his codefendant is not, by itself, a valid ground for upward departure.[68] Conversely, the sole fact that co-conspirators have received lighter sentences does not justify a downward departure.[69] In general, a district court may not depart downward from the guideline range for the sole purpose of harmonizing the defendant's sentence with that received by his codefendant.[70] However, as discussed more thoroughly below, one court has held that where codefendants received lighter sentences due to substantial assistance departures, a defendant may be entitled to a downward departure in order to conform his sentence to those of his co-conspirators.[71]

2. *Disparities Generated by Substantial Assistance Provisions*

The Sixth Circuit, in *United States v. Nelson*, held as a matter of law that a district court was not precluded from departing downward in order to conform the defendant's sentence to those received by his co-conspirators who had cooperated and received substantial assistance departures.[72] In *Nelson*, the defendant's

64. United States v. Carpenter, 914 F.2d 1131, 1136 (9th Cir. 1990).

65. United States v. Smith, 897 F.2d 909, 911 (7th Cir. 1990); United States v. Castro, 887 F.2d 988, 1001 (9th Cir. 1989); United States v. Boyd, 885 F.2d 246, 248 (5th Cir. 1989).

66. United States v. Cox, 921 F.2d 772, 775 (8th Cir. 1990); United States v. Harrison, 918 F.2d 469, 475 (5th Cir. 1990); United States v. Pierce, 893 F.2d 669, 678 (5th Cir. 1990), *reh'g denied*, 897 F.2d 528 (5th Cir. 1990); *but cf. Williams*, 894 F.2d at 213 (district court reversed for inconsistent application of guidelines among codefendants).

67. *Pierce*, 893 F.2d at 678 (quoting *Boyd*, 885 F.2d at 249).

68. United States v. McKenley, 895 F.2d 184, 187-88 (4th Cir. 1990); *cf.* United States v. Sardin, 921 F.2d 1064, 1067 (10th Cir. 1990) (where court departed upward for each of three codefendants, degree of upward departure in each case should have been equivalent).

69. United States v. Restrepo, 936 F.2d 661, 670-71 (2d Cir. 1991); United States v. Carr, 932 F.2d 67, 73 (1st Cir. 1991); United States v. Richardson, 901 F.2d 867, 869 (10th Cir. 1990); *but cf.* United States v. Ray, 930 F.2d 1368, 1372-73 (9th Cir. 1990) (Ninth Circuit upheld a downward departure in order to conform the defendant's sentence to those of his codefendants who were sentenced during a temporary suspension of the Guidelines in the Ninth Circuit).

70. United States v. Parker, 912 F.2d 156, 158 (6th Cir. 1990).

71. United States v. Nelson, 918 F.2d 1268, 1273 (6th Cir. 1990).

72. *Id.* This holding has since been overruled. *See* United States v. Gessa, 944 F.2d

guideline range called for a term of imprisonment of twelve and one-half years to fifteen and one-half years.[73] His co-conspirators, on the other hand, had cooperated with the government and received sentences of sixty, forty-eight, and thirty months based on substantial assistance departures.[74] The court held that as a matter of law district courts "are not precluded . . . from departing from the guidelines in order to generally conform one conspirator's sentence to the sentences imposed on his co-conspirators."[75] In reaching its ruling, the court noted:

> Of all the purposes that induced Congress to enact the Sentencing Reform Act, . . . none was more compelling than Congress' desire to achieve greater uniformity in sentencing or, stated otherwise, to eliminate unreasonable disparity in sentencing.[76]

Quoting section 5K2.0 as authority, the court reasoned that a significant disparity between the guideline range of the defendant and the sentences actually received by his co-conspirators was a mitigating factor not adequately taken into consideration by the guidelines.[77]

Applying the three-prong test for review of sentencing departures,[78] the Sixth Circuit held that the circumstances relied upon by the trial court in departing were sufficiently "unusual" to justify departure.[79] Next, the court determined that the district court did not clearly err "in finding that the unusual circumstance relied upon for the departure actually existed."[80] However, applying the third prong of the test, the appellate court concluded that the degree of departure was unreasonable.[81] The court's ruling turned on "substantial factual differences between Nelson's case and his confederates."[82] Significantly, the court noted that Nelson had been afforded the opportunity to cooperate with the government and refused.[83]

The Second Circuit recognized the *Nelson* holding in *United*

265, 270 (6th Cir. 1991) ("departure solely for the sake of conformity among co-defendants is not authorized under the guidelines").

73. *Nelson*, 918 F. 2d at 1273.
74. *Id.*
75. *Id.*
76. *Id.* at 1271.
77. *Id.* at 1272-73.
78. *See supra* note 15.
79. *Nelson*, 918 F.2d at 1271-73.
80. *Id.* at 1273.
81. *Id.* at 1273-75.
82. *Id.* at 1275.
83. *Id.*

States v. Joyner.[84] The court noted:

> Recently, the Sixth Circuit upheld a sentencing judge's authority to depart downward to *lessen* differences among sentences of co-defendants, but restricted the significance of its ruling by holding that the circumstance justifying leniency for the co-defendants—cooperation—did not apply to the defendant whose departure was challenged by the Government.[85]

Unlike the Sixth Circuit in *Nelson*, however, the district court in *Joyner* departed downward from the defendant's guideline range in order to increase the difference between the sentence imposed on Joyner, whom the district court found to be a minor offender, and those received by his codefendants.[86] In this context, the appellate court held that the district court erred in relying on "disparity" as a basis for departure.[87]

Nelson was also cited in *United States v. Rutana* for the proposition that "departure in order to achieve conformity among co-defendants is not appropriate where there is a basis for disparity."[88] In *Rutana*, the court reversed the sentencing court's downward departure.[89] Although the district court did not state that it departed downward in order to conform Rutana's sentence to those of his codefendants, Rutana made the argument on appeal that his sentence should be affirmed because it was similar to the sentences imposed on his codefendants.[90] Finding that disparity was warranted in this case, the appellate court remanded the case for resentencing.[91]

3. Constitutionality of Section 5K1.1—Unavailability to Minor Offenders

In the following two cases, defendants challenged the constitutionality of the substantial assistance provisions on the ground

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84. 924 F.2d 454, 460 (2d Cir. 1991).

85. *Id.* (emphasis in original).

86. Joyner's codefendants each had been sentenced to 90 months, and Joyner's guideline range was 63-78 months. *Id.* at 457.

87. *Id.* at 462. *Joyner* has subsequently been cited for the proposition that a court may not depart downward in order to decrease disparity. *See, e.g., Restrepo*, 936 F.2d at 671; *Carr*, 932 F.2d at 73.

88. 932 F.2d 1155, 1159 (6th Cir. 1991), citing *Nelson*, 918 F.2d at 1273.

89. *Id.* at 1158.

90. *Id.* at 1159.

91. *Id.* In particular, the court noted that Rutana pled guilty to a knowing violation of the Clean Water Act, whereas his codefendants pled guilty to a negligent violation of the statute. *Id.* In addition, Rutana's offense level was increased by two for his leadership role, while both his codefendants received four-level decreases for their minor roles. *Id.*

that they were unavailable to minor offenders who did not possess sufficient knowledge to aid the government in other investigations or prosecutions. In both cases, the courts rejected the argument that this fact alone renders the substantial assistance provisions unconstitutional.

In *United States v. Musser*,[92] the defendant argued that the substantial assistance provisions violated equal protection because those of low culpability were without sufficient knowledge to avail themselves of the benefits of these provisions.[93] Concluding that Congress had a rational basis for enacting the relevant statutes, the court rejected the defendant's argument.[94] The court noted that there was no disparate treatment because all minor participants were treated similarly.[95]

The defendant in *United States v. Severich*[96] argued that the substantial assistance provisions violated her substantive due process rights because she was unable to avail herself of their benefits due to her minor role in the offense.[97] Applying a rational relationship standard, the court rejected her arguments and upheld the substantial assistance provisions as constitutional. The court held:

> On balance, the liberty interests of defendant here must give way to the anti-drug abuse strategies advanced by Congress. There exists a rational relationship between the goal of enhanced prosecution of drug traffickers and incentives offered those who cooperate in their prosecution. This relationship is no less valid because defendant, due to her low level of participation, was unable to implicate a drug kingpin through her cooperation which, arguably through no fault [of] hers, proved unfruitful.[98]

Although the courts in both *Musser* and *Severich* held that the substantial assistance provisions passed constitutional muster, these cases illustrate the fact that the substantial assistance provisions are available only to those who possess sufficient knowledge to cooperate with the government. Often, minor offenders are perfectly willing to cooperate but are unable to do so because they lack sufficient knowledge.

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92. 856 F.2d 1484 (11th Cir. 1988).
93. *Id.* at 1486-87.
94. *Id.*
95. *Id.*
96. 676 F. Supp. 1209, (S.D. Fla. 1988), *aff'd*, 872 F.2d 434 (11th Cir. 1989).
97. *Id.* at 1213-14. Defendant argued that "the imposition of a minimum sentence in her case is irrational and overly severe in view of her inability to render substantial assistance, a position owing to her minor role in the trafficking scheme and not to any lack of her effort to cooperate." *Id.*
98. *Id.* at 1214.

III. COMMENTARY

As noted by the Second Circuit in *United States v. Reina*,[99] it is "troubling" that minimally culpable offenders often do not have the quantity or quality of information which the government seeks in conducting other investigations or prosecutions.[100] Often, their more culpable codefendants will receive lighter sentences based on cooperation with the government, while the minor offender is not afforded the opportunity to cooperate because he or she does not possess the knowledge sought. It seems, on the whole, that more culpable offenders are ultimately rewarded for their more extensive knowledge, while in comparison, minor offenders are penalized for their lack of knowledge. Such results are fundamentally unfair.[101]

The problem is particularly pronounced in light of the statutory minimum sentences for certain drug offenses. Thus, as noted previously, the kingpin of a drug conspiracy who cooperates with the government may receive a lighter sentence than one who served as a mere drug courier and whose knowledge of the conspiracy was limited. Although cooperation with the government should be encouraged, it should not effectively reward major criminal offenders for the extent of their criminal involvement.

Two alternatives would provide solutions to this problem. First, the Guidelines could expressly provide that a basis for downward departure exists when a more culpable codefendant has cooperated with the government and received a sentence below that of the less culpable defendant. Such cases should be limited to instances where the minor defendant has not been afforded the opportunity to cooperate with the government.[102] Second, the Guidelines could limit departures based on substantial assistance to no less than the sentences received by less culpable defendants who were not in a position to cooperate with the government. Either approach would ensure that in cases of substantial assistance, the Guidelines were applied with fundamental fairness.[103]

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99. 905 F.2d 638 (2d Cir. 1990).

100. *Id.* at 640.

101. Where a less culpable defendant has been given the opportunity to cooperate with the government and has refused, no such fundamental unfairness exists. *See supra* notes 3 and 83 and accompanying text.

102. The fundamental unfairness arises when a minor offender, although willing to cooperate with the government, cannot because he does not possess the breadth of information that his more culpable codefendants do. In such situations, if the more culpable codefendants receive substantial assistance departures, the minor offender who would have cooperated with the government should have his sentence reduced so that it is proportional to those of his codefendants.

103. Both options should be available to the court because the order in which codefendants are sentenced varies. If the major offender is sentenced first, the first option should

Proponents of the Guidelines as written may argue that in enacting the substantial assistance provisions, Congress intended to encourage a race to the prosecutor's office among defendants who wish to provide information and receive lower sentences. What Congress may not have envisioned, however, is that certain defendants cannot participate in this race because they lack sufficient knowledge. It is not the mere fact that minor offenders cannot avail themselves of the substantial assistance provisions that renders them fundamentally unfair[104] but rather the sentencing disparities generated when their more culpable codefendants can.[105]

IV. CONCLUSION

Although section 5K2.0 has been interpreted as providing courts with the authority to depart downward to reduce sentencing disparities generated by the substantial assistance provisions, only one circuit has upheld this interpretation.[106] Other courts have held that, in general, sentencing disparities alone do not warrant departure.[107]

Because section 5K2.0 does not specifically refer to a court's authority to depart downward in order to reduce sentencing disparities, courts may be reluctant to rely on it. And unless a court indicates on the record that it believed it did not have the authority to depart downward, decisions not to depart are unreviewable.[108] Including specific provisions in the Guidelines which permit downward departure in order to conform the sentences of minor offenders to those of more culpable codefendants who received substantial assistance departures would indicate to sentencing courts that such situations present valid bases for departure.

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be available to the court. If the minor offender is sentenced first, the second option should be available. The second option should also be available in cases where a motion for downward departure is brought on behalf of the major offender after both he and the minor offender have been sentenced. *See supra* note 22.

104. *See, e.g., Musser*, 856 F.2d at 1487; United States v. Severich, 676 F. Supp. 1209, 1214 (S.D. Fla. 1988).

105. Section 3B1.2 of the Guidelines provides that a defendant's offense level may be decreased by 4 if he was a minimal participant, by 2 if he was a minor participant, or by 3 if his role fell in between the two. U.S.S.G. § 3B1.2. Thus, the Guidelines do take into account a defendant's minor role per se. What the Guidelines do not take specifically into account, however, are sentencing disparities generated among codefendants when minor offenders are not afforded the opportunity to obtain substantial assistance departures because they lack knowledge.

106. *See supra* notes 71-83 and accompanying text.

107. *See supra* notes 68-70, 87-88 and accompanying text.

108. *See supra* note 16 and accompanying text. Note also the Second Circuit's comment that the lawfulness of reliance on disparity as a ground for departure has rarely been litigated. *Joyner*, 924 F.2d at 459-60.

The fact that the substantial assistance provisions and the Guidelines in general have been upheld as constitutional under a rational relationship standard does not mean that they could not be further tailored to better achieve the goals sought by Congress. In enacting the substantial assistance provisions, Congress may have intended to tolerate sentencing disparities generated when some defendants are willing to cooperate and others refuse. However, there is no indication that Congress intended for minor offenders who are willing but unable to cooperate with the government to receive sentences which are harsh in comparison with those of their cooperating codefendants. Incorporation of the proposals outlined in this article would further Congress' goals of narrowing sentencing disparities and of seeking proportionality in sentencing.