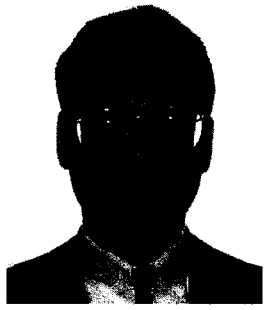

GRID & BEAR IT

Defense Strategies For Litigating Substantial Assistance Downward Departures

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Section 5K1.1 of the United States Sentencing Guidelines permits a sentencing court to depart downward from the otherwise applicable sentencing range upon a motion by the government "stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."[1] Title 18, U.S.C. section 3553(e) contains a similar provision with respect to sentencing below the otherwise applicable mandatory minimum punishments provided by statute. This column discusses three aspects of defense practice under these provisions: 1) strategies for defense advocacy when the government files a downward departure motion; 2) potential avenues of legal challenge to the government's refusal to file a motion where the parties have entered into a plea or other agreement that references cooperation; and 3) the circumstances in which the defense may compel the filing of a downward departure motion where there is no such agreement between the parties.

Defense Advocacy Where The Government Files A Substantial Assistance Motion

If the government files a downward departure motion, under either the guideline or the statute,[2] your efforts must be centered on the fact that it is for the court, not the government, to determine the extent of the departure warranted by the defendant's cooperation.[3]

The government, of course, will not likely remain silent on this issue, but will suggest to the court, whether in the motion or through allocution at sentencing, the quantum departure it feels is appropriate. In the Middle District of Florida, for example, the government purportedly follows a general policy of recommending a two-level downward departure where the defendant cooperates against co-defendants already under indictment, and a four-level departure where the defendant acts in an undercover capacity or is able to make a new case against individuals not already under indictment.[4] The government's recommendation, however, should be viewed as a starting, rather than an ending point in the analysis. In this regard, the literal language of section 5K1.1 can be a tremendous aid to the defense in getting past the government's attempts to limit the court's response. The guideline itself states the court should consider at least five matters in determining the extent of the departure:

1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
3) the nature and extent of the defendant's assistance;
4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and
5) the timeliness of the defendant's assistance.[5]

Moreover, these factors are not exclusive, with Background Commentary to the guideline noting:

> The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individualized basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above.

Given such language and instructions, it should be argued to the sentencing court that simply accepting the government's sug-

gested departure without further inquiry would be a serious abdication of judicial responsibility.

Next, assuming the court is ready to look past the government's recommendation to the other enumerated factors, what sort of presentation can defense counsel make here? While the defense is inherently handicapped by lack of information concerning precisely how the government conducted its investigation, which may well be ongoing, and how the client's information fits within that investigation, the following suggestions may be potentially useful.

First, if defense attorneys do not know what their clients told the government or did for its investigation, they will never be able to make a complete argument to the court at sentencing. Accordingly, it is essential for defense counsel to attend the client's debriefings and to take copious notes of everything the client says. Indeed, the better practice is to have two attorneys attend at least the initial sessions so that, while one lawyer is free to write down every word that is said, the other can assist in counseling the client and making sure the relationship gets off on and continues on the right foot. Careful note taking will allow you to make a sentencing presentation regarding your client's assistance with exacting detail; making sure the debriefings go smoothly will make it more likely that you will be able to state without contradiction that the client's cooperation has been "truthful, complete, and reliable" within the language of the guideline.

Second, what the client told the government is, of course, only one half of the picture. What the defense also needs to know is what the government learned from other sources. Obviously, this is more difficult because the information starts out in the hands of the opposition. But it doesn't have to always end up there. If there has been a trial, the government will have produced *Jencks* materials of any witnesses it used at that proceeding. If you obtain these materials, you can then compare what the government learned from those witnesses and when it learned it to what it secured from your client. Also, consider talking with defense counsel in the case who represent other cooperating witnesses — as best as you are permitted compare notes on whose client did what for the investigation and prosecution. When co-defendants are sentenced before your client, consider attending those sentencings or ordering the transcripts. Not only will you be able to tell what information others provided, you'll hear as well what departure the government recommended based on that information.

In an extraordinary case where the gap between the government's recommendation and what you think is fair is particularly large, consider making a carefully framed *Brady* motion for information relevant to your client's cooperation, addressing where it fits in the government's investigation. While we usually think of *Brady* as a basis for obtaining disclosure of evidence which is exculpatory on the issue of guilt or innocence, remember that it also applies to the government's obligation to disclose all information which might serve as mitigating at sentencing. Indeed, *Brady* itself was a sentencing case.[6]

In that regard, try to frame your requests to root out all possible uses by the government of your client's assistance. If you think they used it to get a search warrant, ask for the affidavit in support of the warrant. If you can proffer with some detail a basis to believe the client's assistance was used to indict other persons, request the grand jury transcripts supporting the indictments. Try to be as creative and as specific as possible. Even if the requests are denied in part by the court, you may well learn something from the government's response to the motion, you will certainly focus the court's attention more clearly on the areas of your client's assistance, and if all else fails, you may also find yourself with a decent appellate issue or two at the end of the day.

On the issue of danger or risk of injury to the defendant or his family, consider having family members testify at the sentencing. Let the court hear from them in person how they changed their residences, telephone numbers, continue to live in fear, or whatever facts you have to work with. These are aspects of your client's cooperation the government is likely to be unaware of and therefore could not have taken into consideration when it formulated its recommended departure. If the client has cooperated against others in federal custody, consider attending or obtaining transcripts of the initial appearances of these persons. If the government moved for detention or otherwise argued the defendant posed a danger to the community at that time, surely it must now agree at the client's sentencing that the defendant poses a danger to the client who cooperated with the prosecution against them.

Defense counsel get few opportunities for advocacy under the guidelines which compare with that presented by the government's filing of a substantial assistance motion. You are no longer talking about technical legal issues or begging for a sentence at the low end of a range that is too high to begin with. Instead, so long as the extent of the departure is "reasonable,"[7] the court is free from the shackles of the guidelines altogether, and may impose whatever sentence you can persuade it to.[8] Take full advantage of the opportunity whenever it arises.

Litigating The Government's Refusal To File Where A Plea Or Other Agreement Addresses The Issue

The time will come, if it hasn't already, when the government simply refuses to file the motion where you believe the client has earned one. What can you do about this? In the words of one late basketball coach: "Don't give up — don't ever give up."

The first place to look for help here is the plea agreement. These agreements typically include language such as:

> The defendant agrees to cooperate fully with the government's investigation and to do everything the government asks, truthfully and completely, whenever the government asks him to do it. In return, the government agrees to consider whether such cooperation qualifies as "substantial assistance." The defendant agrees that the determination as to whether he has provided substantial assistance rests solely with the government, and this decision shall not be challenged by the defendant whether by appeal, collateral attack or otherwise.

Other plea agreements may go further to provide the government "will" or "may" file a downward departure motion "if" the defendant provides substantial assistance.

While the case law is still emerging, the argument to be made is that these plea agreements, like any other contract, are subject to an implied condition of good faith.[9] Under the first type of agreement, of course, the government does not actually promise to file a motion — it agrees only to "consider" whether the defendant has provided substantial assistance. For this reason, the latter language is more favorable. But, even if the government has

agreed only to consider your client's assistance, it at least has to do that, and it must perform that consideration in good faith.[10]

Regardless of the terms of a written agreement that addresses the matter of substantial assistance, however, defense counsel should also explore whether there existed an oral agreement between the parties made prior to the client's actual cooperation: did the Assistant United States Attorney (AUSA) clearly state that if the assistance provided is substantial, then the government will file a downward departure motion? The law is clear that a written agreement is not necessary, and that an oral agreement is of equal legal effect.[11] Remember, *Santobello* involved the breach of an oral agreement.[12] Indeed from the defense perspective, it should be implicit in every case that the government is agreeing to file the motion if the assistance is substantial — your client is not agreeing to cooperate for nothing.

Given that, how do you go about proving an oral agreement? The best approach is to request an evidentiary hearing on this issue in advance of sentencing. Depending on the facts of each case, consider whether you can support your request for a hearing with an affidavit from either your client, you, or both. If you get a hearing, then consider issuing a subpoena to the prosecutor.[13] Try asking the prosecutor questions like:

Q: Was it your intention before the defendant began cooperating not to file a substantial assistance motion even if the defendant provided substantial assistance?

Q: So you fully expected to act in good faith at all times, and as part of that good faith, you would file the motion if the assistance provided was in fact substantial?

Q: And you never told the defendant that you intended to act in bad faith and refuse to file the motion even if the assistance provided was substantial?

Q: So both you and the defendant went into this relationship of cooperation with the understanding that if the assistance proved to be substantial, you would in fact file the departure motion?

Unless the prosecutor is willing to testify that he or she thought from the beginning they might act arbitrarily, or that the defendant should have known that they might do so, in most cases at least an implicit meeting of the minds is likely to emerge from the evidence.

Assuming you can establish an agreement, the question then becomes how to prove the government's refusal to file the motion is in bad faith. Here the government's line of defense is likely to be the blanket assertion that the assistance simply was not substantial. To rebut this, the defense may wish to try some of the tactics suggested above for learning about the extent and quality of the defendant's assistance:

- Review the *Jencks* material from any trials;
- File a *Brady* motion;
- Review the transcripts of the sentencing proceedings of co-defendants who did receive a downward departure motion and compare their cooperation to that of your client;
- Subpoena the case agent who conducted the investigation and extract from him all the ways in which your

client's assistance was used;[14]

- Subpoena or issue writs of *habeas corpus ad testificandum* to any persons who were on the receiving end of your client's cooperation — these people may be happy to discuss the various ways in which your client has made their lives miserable.

The bottom line here is to be creative: scour the earth for information from whatever source you can. The defense will not win these cases very often, but making the best record possible may pressure the government to change its mind, leave you with good appellate issues, or influence the sentencing judge to rule favorably on other guidelines issues or impose a sentence at the low end of the guideline range. And, of course, in unusual cases the defense just might win.

Litigating The Government's Refusal To File Where There Is No Plea Agreement Between The Parties

In the absence of a written or oral agreement between the parties, a defendant's ability to compel the government to file a departure motion is governed by the recent decision of the Supreme Court in *Wade v. United States*.[15] In *Wade*, the Court ruled that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive," or "if the prosecutor's refusal to move was not rationally related to any legitimate government end."[16] As examples of unconstitutional motives, the Court suggested racial or religious discrimination. *Id.* Because Wade made no allegations of any improper motive, but simply claimed his assistance was substantial, the Court denied him relief without any further elaboration of what other circumstances might justify an order compelling the government to file the motion. The door is therefore open for defense attorneys to craft new arguments of "unconstitutional motive" or "irrationality" to fit particular cases.

In this regard, post-*Wade* cases in both the Third and Tenth Circuits have held that the government may not refuse to file a downward departure motion simply because the defendant chooses to exercise the constitutional right to a jury trial.[17] For example, defendants sometimes cooperate with the government during the pretrial phase of a case with a loose understanding that a favorable plea agreement will be reached between the parties. At some point in the plea negotiations, the government often offers to file a substantial assistance motion as part of the inducement to plead guilty, assuming the client's cooperation has at least been minimally helpful. Where you cannot reach a final agreement with the government and end up going to trial even after your client has cooperated, however, you may find that the government's enthusiasm about filing a substantial assistance motion has waned.

While this scenario may not present itself often, it raises the following question: Why shouldn't the client receive the same benefit for cooperating that he or she would have received had there been a guilty plea? This is particularly true if the assistance relates to cases other than the one which was tried so that the decision to proceed to trial did not render the client unavailable to the government as a witness to follow through with cooperation. In this situation, you should file a motion to compel the filing of a downward departure motion, and allege the government's refusal to so file is premised on the unconstitutional motive of punishing the client for the exercise of his right to a trial.

Another likely impermissible motive under *Wade* would be punishing a defendant for the exercise of his right to appeal. The government should not be permitted to take the position that it will withhold a Rule 35 substantial assistance motion unless the defendant does not prosecute or dismisses an appeal. Defense counsel may also be able to make use of the somewhat broader language in *Wade* providing for relief if the government's refusal to file is not rationally related to any legitimate government end. Counsel should be on the lookout for opportunities to make creative arguments under this language in appropriate cases.

Once you have a theory on which to proceed under *Wade*, the next obstacle is trying to get a hearing on the claim so that you can make your record. Simply claiming that your client's assistance was substantial, while a necessary part of your position, is not going to be enough. According to *Wade*, neither will "additional but generalized allegations of improper motive."[18] Unfortunately, the defendant in *Wade* conceded that he had no right to discovery or a hearing unless he made a "substantial threshold showing." *Id.* Given this concession, the Court had no occasion to consider whether relief might be available upon a lesser showing. In any event, *Wade* is now routinely cited for the proposition that the defense must make a "substantial threshold showing" in order to get discovery or a hearing.[19]

To satisfy this requirement, defense counsel should file a lengthy and detailed proffer, supported by affidavits if possible, setting forth not only the client's cooperation, but also the circumstances demonstrating the government's impermissible motive. Attach whatever supporting documents you have available because, if a hearing is denied, this proffer and whatever is attached may be your only appellate record on the issue.

If a hearing is permitted, follow the same approach to proving your client's assistance as suggested above. As for demonstrating the government's impermissible motives, you must persuade the court that such matters will never be susceptible to direct proof, but rather may be established by inference. And the two issues have considerable overlap. The clearer it is that the defendant's assistance was in fact substantial, the more likely the court will be to conclude that the government is up to no good by refusing to recognize the cooperation as substantial.

Conclusion.

Both the statute and guideline provide that a substantial assistance downward departure is available "upon motion of the government." Accordingly, in the vast majority of the cases, if the government does not file the motion then the defendant will simply be out of luck. But defense counsel should bear in mind that this window is not entirely shut — or at least not locked shut — and in some cases relief may be available even if the government will not file the motion voluntarily. And even if the government is not forced to file the motion, litigation of the issue may help in other ways by educating the sentencing court about your client and his assistance. Moreover, if the defense bar can start putting together some pretty good records on this issue, perhaps the pressure will build so that one day the government motion requirement itself will be revisited, and the authority to consider this powerfully mitigating factor returned to the sentencing courts where it belongs. ■

Our readers are our best source for ideas. We would like very much to hear from you. Anyone having ideas for a column or wishing to write one, please contact:

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Notes

1. U.S.S.G. Section 5K1.1.

2. Most courts agree that a motion referencing only the guideline and not the statute nevertheless provides the court with authority to depart below both the applicable guideline range and any statutory minimum sentence. United States v. Beckett, 996 F.2d 70, 74 (5th Cir. 1993); United States v. Ah-Kai, 951 F.2d 490, 493-94 (2d Cir. 1991); United States v. Keene, 933 F.2d 711, 713-14 (9th Cir. 1991). But see United States v. Hawley, 984 F.2d 252, 253-54 (8th Cir. 1993); United States v. Rodriguez-Morales, 958 F.2d 1441, 1445-46 (8th Cir.), *cert. denied*, 113 S.Ct. 375, 121 L.Ed.2d 287 (1992); United States v. Dumas, 921 F.2d 650 (6th Cir. 1990). *See also* Wade v. United States, 112 S.Ct.1840, 118 L.Ed.2d 524 (1992) (noting but not addressing issue); United States v. Chevarria-Herrara, 15 F.3d 1033, 1036 n.6 (11th Cir. 1994) (same). In view of this potential issue, however, defense counsel should clarify, where the government is agreeable, that the departure motion is made pursuant to both the guideline and the statute.

3. United States v. Spiropoulos, 976 F.2d 2282 (3d Cir. 1992); United States v. Udo, 963 F.2d 1318 (9th Cir. 1992), United States v. Damer, 910 F.2d 1239 (5th Cir. 1990); United States v. Pippin, 903 F.2d 1478, 1485 (11th Cir. 1990); United States v. Wilson, 896 F.2d 856 (4th Cir. 1990). See also United States v. Foster, 988 F.2d 206 (D.C. Cir.), *cert. denied*, 113 S. Ct. 2431 (1993).

4. Where circumstances dictate, however, the government has been willing to deviate from this policy, and in unusual cases may seek a downward departure of up to 10 or 11 levels.

5. U.S.S.G. Section 5K1.1(a).

6. *See* Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L .Ed. 2d 215 (1963).

7. *See* 18 U.S.C § 3742(e)(3); United States v. Snelling, 961 F.2d 93, 96-97 (6th Cir. 1991); Pippin, 903 F.2d at 1485; United States v. Wilson, 896 F.2d 856, 859 (4th Cir. 1990) (no lower limit on court's authority to depart downward once government has filed substantial assistance motion, provided sentence is not "unreasonable").

8. The Court's basis for its downward departure sentence must, however, be limited to the assistance provided by the defendant to the government's investigation rather than other considerations, unless these considerations supply an independent basis for a downward departure. United States v. Chevarria-Herrara, 15 F.3d 1033 (11th Cir. 1994); United States v. Campbell, 995 F.2d 173 (1st Cir. 1993); United States v. Valente, 961 F.2d 133 (9th Cir. 1992); United States v. Valle, 929 F.2d 629, 633 (11th Cir. 1991); United States v. Peralta, 741 F. Supp. 1197, 1199-1200 (D.Md. 1990).

9. United States v. Knights, 968 F.2d 1483, 1486 (2d Cir. 1992); United States v. Dixon, 998 F.2d 228, 231 (4th Cir 1993); United States v. Wilder, Case No. 92-4790 (5th Cir. Feb. 22, 1994); United States v. Watson, 988 F.2d 544, 553 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 698, 126 L. Ed. 2d 665 (1994); United States v. Hernandez, 996 F.2d 62, 65-66 (5th Cir. 1993); United States v. De La Fuente, 8 F.3d 1333 (9th Cir. 1993); United States v. Robinson, 978 F.2d 1554, 1569 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1855, 123 L. Ed. 2d 478 (1993); United States v. Disla-Montano, Case No. 92-00605 (E.D. Pa. Jan. 3, 1994); United States v. Ganz, 806 F.Supp. 1567 (S.D. Fla. 1992). *Cf.* United States v. Forney, 9 F.3d 1492, 1500 nn.2 & 3 (11th Cir. 1993) (declining to review government's good faith compliance with plea agreement requiring government to consider whether defendant's assistance was substantial because defendant failed to raise issue in district court); United States v. Bushert, 997 F.2d 1343, 1355 (11th Cir. 1993) (stating that circuits are split as to whether government's failure to file motion under plea agreement is subject to judicial review for bad faith but declining to address issue because defendant withdrew request for evidentiary hearing on bad faith allegation); United States v. Phong Le, Case No. 91-213 (M.D. Fla. Mar. 18, 1994) (following Forney in declining to review government's good faith compliance on Section 2255 petition where defendant did not object at original sentencing to government's failure to file a downward departure motion). But see United States v. Garcia-Bonilla, 11 F.3d 45 (5th Cir. 1993) (distinguishing Watson and Hernandez based on differences in language of plea agreement).

10. United States v. Forney, 9 F.3d 1492, 1500 n.2 (11th Cir. 1993) (noting requirement that government fulfill plea agreement in good faith, but not reaching issue because defendant failed to allege or prove government did not "consider" his assistance as required by plea agreement). *See also id.* at 1504-09 (dissenting opinion of Judge Clark, who argued case should be reversed and remanded to district court for inquiry into government's bad faith notwithstanding defendant's failure to make specific allegations).

11. United States v. Forney, 9 F.3d 1492, 1500 (11th Cir. 1993) (for *Santobello* purposes, whether promises "are memorialized in a written plea agreement is irrelevant.").

12. Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971).

13. In order to compel the testimony of any employee of the Department of Justice, defense counsel must accompany the subpoena with an affidavit or statement "setting forth a summary of the testimony sought." 28 C.F.R § 16.23(c). United States v. Bizzard, 674 F.2d 1382, 1387 (11th Cir.), *cert. denied*, 459 U.S. 973, 103 S.Ct. 305, 74 L. Ed. 2d 286 (1982); United States v. Marino, 658 F.2d 1120, 1125 (6th Cir. 1981); United States v. Allen, 554 F.2d 398, 406-07 (10th Cir.), *cert. denied*, 434 U.S. 836, 98 S. Ct. 124, 54 L. Ed. 2d 97 (1977). *See also* DEP'T OF JUSTICE MANUAL § 1-13.000. This provision is purely a housekeeping measure, however, and supplies no basis for a claim of privilege against disclosure by the government. United States *ex rel.* Touhy v. Ragen, 340 U.S. 462, 95 L.Ed. 417 (1951); Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788 (D.C. Cir. 1971); NLRB v. Capital Fish Co., 294 F.2d 868 (5th Cir. 1961); Smith v. C.R.C. Builders Co., Inc., 626 F. Supp. 12 (D. Colo. 1983). Counsel should be sure to provide the affidavit or statement sufficiently in advance of the hearing to preclude a claim by the government that the prosecutor has not had enough time to obtain permission to testify under the C.F.R. procedure.

The government may also oppose the defendant's subpoena to the prosecutor on the grounds that the defendant has no "compelling need" for the testimony. *See* United States v. Roberson, 897 F.2d 1092, 1098 (11th Cir. 1990); United States v. Dupuy, 760 F.2d 1492, 1498 (9th Cir. 1985); United States v. Wallach, 788 F. Supp. 739, 743-44 (S.D.N.Y. 1992). Because the prosecutor is likely to be the only witness to the possible substantial assistance agreement, however, a compelling need for the testimony exists. Roberson, 897 F.2d at 1098; United States v. Prantil, 764 F.2d 548, 551-52 (9th Cir. 1985).

14. Some of defense counsel's efforts to obtain information about the use of the client's information may be met with claims by the government that revealing such information may tend to jeopardize an ongoing investigation. Several responses to this should be considered. First, this claim in itself advances the defendant's argument — if his information was worthless, then surely revealing the ways in which it was used should reveal little or nothing in the way of an ongoing investigation. Second, even if disclosure could jeopardize an ongoing investigation, your client's due process right to information which is directly exculpatory as to his sentence must override the government's countervailing interest. Finally, consider methods to protect both interests, such as conducting the hearing in camera, or even allowing the government to submit certain materials to the court for review on an in camera and ex parte basis.

The government may also raise work product or "deliberative process" privileges, but these privileges are qualified, and must yield to the defendant's due process entitlement to exculpatory information where the defendant has no other access to the information, and where the government's deliberative process itself is the issue. *In re* Subpoena, 967 F.2d 630, 634 (D.C. Cir. 1992); KFC Nat'l Management Corp. v. NLRB, 497 F.2d 298, 305 (2d Cir. 1974), *cert. denied*, 423 U.S. 1087, 96 S. Ct. 879, 47 L. Ed. 2d 98 (1976); Singer Sewing Machine Co. v. NLRB, 329 F.2d 200, 208 (4th Cir. 1964); *In re* Franklin Nat'l Bank Securities Litigation, 478 F. Supp. 577, 582-87 (E.D.N.Y. 1979).

15. 3 112 S. Ct. 1840, 118 L. Ed. 2d 524 (1992). *Wade* expressly did not address any claim that the government motion requirement was "superseded" "by any agreement on the government's behalf to file a substantial assistance motion, *cf.* Santobello v. New York." 118 L. Ed. 2d at 530-31.

16. 118 L. Ed. 2d at 531.

17. United States v. Paramo, 998 F.2d 1212, 1219-20 (3rd Cir. 1993) ("unconstitutional motive" within meaning of Wade "includes penalizing a defendant for exercising his constitutional right to trial."), *cert. denied*, 114 S. Ct. 1076, 127 L. Ed. 2d 393 (1994); United States v. Easter, 981 F.2d 1549, 1555 (10th Cir. 1992) ("Defendant's exercise of his constitutional right to a jury trial would be an improper basis for the government to withhold a [substantial assistance] motion."), *cert. denied*, 113 S. Ct. 2448, 124 L. Ed. 2d 665 (1993).

18. 118 L. Ed. 2d at 531.

19. See, e.g., United States v. Mkhsian, 5 F.3d 1306, (9th Cir. 1993); United States v. Hammer, 3 F.3d 266 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1121, 127 L. Ed. 2d 430 (1994).