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## Fifth Amendment--Prosecutorial Discretion Not Absolute: Constitutional Limits on Decision Not to File Substantial Assistance Motions

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# FIFTH AMENDMENT—PROSECUTORIAL DISCRETION NOT ABSOLUTE: CONSTITUTIONAL LIMITS ON DECISION NOT TO FILE SUBSTANTIAL ASSISTANCE MOTIONS

**Wade v. United States, 112 S. Ct. 1840 (1992)**

## INTRODUCTION

In *Wade v. United States*,<sup>1</sup> the United States Supreme Court held that a prosecutor's decision not to file a motion for a reduction of sentence based on a defendant's substantial assistance to the government is reviewable by district courts. While Justice Souter, writing for the majority, does potentially put a cap on prosecutorial discretion in this area, he fails to clear up much of the confusion that had been accumulating in the lower courts.

This Note examines the background of the Federal Sentencing Guidelines, specifically in relation to reduction of sentences below statutory or guideline minimums, in addition to the background of prosecutorial discretion. Next, this Note explains the lack of clear standards set forth by the *Wade* decision and the possible dangers that accompany this ambiguity. Finally, this Note predicts the impact *Wade* is likely to have both on future courts facing similar issues and on the role of prosecutors and defendants in the plea-bargaining arena.

## II. SENTENCING GUIDELINES AND MANDATORY MINIMUM SENTENCES

In response to increasing problems of drug use and distribution, violent crime, and repeat offenders, Congress passed the Comprehensive Crime Control Act.<sup>2</sup> One of the major reforms that this legislation initiated was in the area of sentencing. This reform was embodied in the Sentencing Reform Act, which Congress passed in

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<sup>1</sup> 112 S. Ct. 1840 (1992).

<sup>2</sup> Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. 2, 98 Stat. 1976 (1984).

1984.<sup>3</sup>

Prior to the passage of the Sentencing Reform Act, federal judges enjoyed extremely broad discretion in sentencing. A judge could impose any sentence she thought was proper as long as it did not exceed the statutory maximum. The judge was not formally required to explain her reasons for assigning a given sentence. Moreover, this determination was not subject to appellate review.<sup>4</sup>

Although the Supreme Court in *Williams v. New York*<sup>5</sup> praised the degree of latitude given to trial judges, the system was often criticized for engendering disparate treatment for similarly situated individuals. The cause of this disparity was charged to the "unfettered discretion" granted to judges in determining sentences.<sup>6</sup>

Congress' response to this sentiment was the Sentencing Reform Act of 1984, which established the Federal Sentencing Commission, a federal agency empowered to promulgate Federal Sentencing Guidelines.<sup>7</sup> Among the objectives Congress hoped to achieve in passing the Act were honesty in sentencing and the elimination of widely disparate sentences imposed upon offenders with similar records for similar offenses.<sup>8</sup> The guidelines' stated purpose was to:

provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized

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<sup>3</sup> The Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. 2, ch. 2, 98 Stat. 1987 (1984) (codified at 18 U.S.C. §§ 3551-86, 3621-25, 3742 (1988) and 28 U.S.C. §§ 991-98 (1988)).

<sup>4</sup> See Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89 (1988).

<sup>5</sup> 337 U.S. 241 (1949).

<sup>6</sup> S. REP. NO. 225, 98th Cong., 2d Sess. 38, 56 (1984), reprinted in 1984 U.S.C.A.N. 3182, 3239. For example, one study showed that the average sentence for bank robbery was eleven years in 1974 but that in the Northern District of Illinois it was only five and one-half years for that same year. *Id.* See also Melissa M. McGrath, Comment, *Federal Sentencing Law: Prosecutorial Discretion in Determining Departures Based on Defendant's Cooperation, Violates Due Process*, 15 S. ILL. U. L.J. 321, 324-26 (1990).

<sup>7</sup> 28 U.S.C. § 994 (1988). The constitutionality of both the Sentencing Reform Act and the Sentencing Guidelines was upheld in *Mistretta v. United States*, 488 U.S. 361 (1989). Therein, the Court held that the United States Sentencing Commission, established as an independent commission in the judicial branch, neither violated the separation of powers principle nor was an unlawful delegation of legislative power by Congress. *Id.* In short, "the scope of judicial discretion with respect to a sentence is subject to Congressional control." *Id.* at 650.

<sup>8</sup> See *United States v. Aguilar-Pena* 887 F.2d 347, 353 (1st Cir. 1989)(uniformity in sentencing was a primary goal of Congress and the Sentencing Commission); *United States v. LaGuardia*, 902 F.2d 1010, 1013 (1st Cir. 1990)(it is "apodictic that the sentencing guidelines effectively stunt the wide discretion which district judges formerly enjoyed").

sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices

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To meet its stated objectives, the Sentencing Commission was charged with establishing guidelines and policy statements for federal courts to use in criminal sentencing.<sup>10</sup> Consistency was sought by yielding only a narrow range of sentences from which a judge could choose when sentencing a defendant with a given set of characteristics.<sup>11</sup>

Under the guidelines, a judge can methodically proceed through the rules to arrive at the proper sentencing range.<sup>12</sup> The process begins with the "base offense level" for the crime of conviction. Then the judge "adjusts" this level either upward or downward for any "specific offense characteristics" that are present in the particular case in order to arrive at an "adjusted base offense level."<sup>13</sup> This number and a number corresponding to the offender's criminal history category<sup>14</sup> are then applied to a sentencing table which displays the appropriate guideline range in terms of months of imprisonment.<sup>15</sup> The judge must sentence the defendant within these guidelines unless he believes aggravating or mitigating circumstances are not adequately taken into consideration by the guidelines.<sup>16</sup> In such a case, the judge may depart by stating his

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<sup>9</sup> 28 U.S.C. § 991(b)(1)(B) (1988).

<sup>10</sup> 28 U.S.C. § 991(b) (1988). Judges are required to follow the guidelines provisions. However, policy statements are non-binding in that they are drafted to assist district judges if they decide to depart from the guidelines. 18 U.S.C. § 3553(a)(5). See also *United States v. White*, 869 F.2d 822, 828-29 (5th Cir. 1989), *cert. denied*, 490 U.S. 1001 (1989) (policy statements designed to assist federal judges if they decide to depart from guidelines).

<sup>11</sup> The possibility for disparity was further reduced by providing for extremely limited circumstances under which a judge could depart from the guidelines. See 18 U.S.C. § 3553(b) (1988).

<sup>12</sup> See Cynthia K.Y. 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), for an easy-to-follow, yet complete description of the process a judge would use in determining the appropriate sentencing range for a given offense.

<sup>13</sup> U.S.S.G. § 1B1.1.

<sup>14</sup> The guidelines contain a table which allows one to apply a number to an individual based on their criminal history. The longer and more severe the criminal history, the higher the number. See U.S.S.G. § 5A.

<sup>15</sup> This procedure is subject to any mandatory minimum sentences that may exist for a particular offense by statute. See U.S.S.G. § 5G1.1 (if a statute requires imposition of a sentence other than that required by the guidelines, the statute shall control).

<sup>16</sup> 18 U.S.C. § 3553(b). See also U.S.S.G. § 5K2.0 for the sentencing guidelines' interpretation of departure under § 3553(b).

On its face, this section would appear to give judges wide latitude in determining sentences in that it allows departure both for reasons not provided in the guidelines as

reasons in open court.<sup>17</sup>

However, it appears the judge's power to depart from the guideline range is much more limited than it would appear on the surface. For example, the Sentencing Commission has made it clear that, except in an atypical situation, a court should not depart from the guideline range with respect to an aggravating or mitigating factor that the Commission has already taken into consideration.<sup>18</sup> Additionally, the Eighth Circuit Court of Appeals, for example, held that a defendant's substantial assistance to the authorities was not a mitigating circumstance of the kind "not adequately taken into consideration by the sentencing commission in formulating the guidelines . . . , " since § 5K1.1 adequately provides for such relief.<sup>19</sup>

One other possibility for departure is for "substantial assistance" on the part of the defendant. Title 18, § 3553(e)<sup>20</sup> of the United States Code gives a district court limited authority upon motion of the government to impose a sentence below a statutory minimum<sup>21</sup> to reflect a defendant's "substantial assistance" to the government.<sup>22</sup> Likewise, U.S.G. § 5K1.1 provides that a sentencing court may depart from the guidelines upon motion of the government.<sup>23</sup> These two provisions differ in that the language of

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well as for reasons that are, but which the judge believes are inadequate because of special circumstances surrounding a given offender. § 5K2.0.

<sup>17</sup> 18 U.S.C. § 3553(c) (1988). This decision is subject to appellate review. 18 U.S.C. § 3742 (1988).

<sup>18</sup> See U.S.S.G. § 1A4(b); *United States v. Roberts*, 726 F. Supp. 1359, 1365 (D.D.C. 1989) ("Since the Commission has taken almost every conceivably relevant factor into consideration, the courts are in practice in most instances powerless to depart from the guidelines.").

<sup>19</sup> *United States v. Justice*, 877 F.2d 664 (8th Cir. 1989) *cert. denied*, 493 U.S. 958 (1989) (quoting 18 U.S.C. § 3553(b) (Supp. 1987)).

<sup>20</sup> The full text of § 3553(e) reads:

Limited authority to impose a sentence below a statutory minimum. — Upon motion of the Government, the court shall have authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. 18 U.S.C. § 3553(e) (1988).

<sup>21</sup> The Sentencing Reform Act established minimum sentences by statute for many crimes, especially serious drug offenses.

<sup>22</sup> 18 U.S.C. § 3553(e) (1991). A reduction of sentence for defendants who provide substantial assistance is necessary because defendants would be unlikely to cooperate with prosecutors if, despite their efforts, they were subject to mandatory minimum sentences.

<sup>23</sup> U.S.S.G. § 5K1.1. The relevant portion of § 5K1.1 is: "Substantial Assistance to Authorities (Policy Statement). Upon motion to 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."

See also 28 U.S.C. § 994(n) which states that the commission "shall assure that the

§ 3553(e) refers to a departure below a statutory minimum, whereas the language of § 5K1.1 refers to a departure below the range specified by the sentencing guidelines.<sup>24</sup> There is virtually unanimous acceptance for the proposition that under either of these provisions, a district court may not depart absent a government motion thereto.<sup>25</sup> However, once a substantial assistance motion is filed, a court has discretion to determine the amount of sentence reduction, if any.<sup>26</sup>

In *Wade*, the defendant faced a minimum sentence of ten years under both the applicable statute and the guidelines.<sup>27</sup> Additionally, even though there was apparently some assistance given to the prosecution by the defendant, no motion for downward departure was filed. Therefore, the case squarely confronts the above issues concerning departure from both the sentencing guideline and the mandatory minimum sentence.

### III. PROSECUTORIAL DISCRETION

As discussed above, one of the Sentencing Reform Act's primary goals was to abate judicial discretion in the sentencing arena. The Act appears to have been successful in this respect.<sup>28</sup> However, while judicial discretion may have been drastically reduced, the dis-

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guidelines reflect the general appropriateness of imposing a lower sentence . . . to take into account a defendant's substantial assistance." § 5K1.1 is the Sentencing Commission answer to this mandate.

<sup>24</sup> However, the majority of circuits have held that a motion under either of the provisions implements the other. *See, e.g.*, *United States v. Cheng Ah-Kai*, 951 F.2d 490 (2d Cir. 1991); *United States v. Keene*, 933 F.2d 711 (9th Cir. 1991); *cf.* *United States v. Rodriguez-Morales*, 958 F.2d 1441, 1444 (8th Cir. 1992) *cert. denied*, 113 S. Ct. 375 (1992) (a motion under § 5K1.1 does not "equate" to a motion under § 3553(e)).

<sup>25</sup> *See* *United States v. Long*, 936 F.2d 482, 483 (10th Cir.), *cert. denied*, 112 S. Ct. 662 (1991); *United States v. Alamin*, 895 F.2d 1335, 1337 (11th Cir.), *cert. denied*, 111 S. Ct. 196 (1990); *United States v. Coleman*, 895 F.2d 501, 504-05 (8th Cir. 1990); *United States v. Francois*, 889 F.2d 1341, 1345 (4th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990); *United States v. Huerta*, 878 F.2d 89, 92 (2d Cir. 1989), *cert. denied*, 493 U.S. 1046 (1990); *United States v. Ayarza*, 874 F.2d 647, 653 (9th Cir. 1989), *cert. denied*, 493 U.S. 1047 (1990).

<sup>26</sup> *Keene*, 933 F.2d at 714.

<sup>27</sup> *Wade v. United States*, 112 S. Ct. 1840, 1842 (1992). A statutory minimum automatically becomes the minimum guideline sentence if the minimum guideline sentence would otherwise be below the statutory minimum sentence. *See* U.S.S.G. § 5G1.1(b).

<sup>28</sup> A compliance study conducted by the Sentencing Commission found that 81.1% of all sentences imposed nationwide during a nine month period fell within the guideline range. Of the other 19.9%, in 5.7% of the cases the court departed downward based on a motion for substantial assistance, in 9.7% the court departed downward for other reasons, and in 3.4% of the cases the court departed upward. This leaves only 1.1% of the cases which did not follow the guidelines provisions. *Lee, supra* note 12, at 703 n.32.

cretion did not vanish, as Congress may have hoped.<sup>29</sup> To the contrary, a tangible amount of discretion has shifted to prosecutors. The shift of discretion was examined in *United States v. Roberts*,<sup>30</sup> where the Circuit Court of Appeals for the District of Columbia concluded that "while the remedy adopted by Congress has reduced the opportunity for sentencing disparities caused by judges, it has not solved the overall disparity problem but has merely shifted responsibility therefore to other officials."

This Note will argue, *inter alia*, that the decision in *Wade* may further the shift of discretion from the judges to prosecutors by narrowly defining the opportunities a defendant has to challenge a prosecutor's decision to file a motion for substantial assistance. To understand the issues raised by *Wade*, it is important to understand the types of discretion typically granted to prosecutors and the limits put on these grants of discretion.

Prosecutors are granted broad discretion in many areas. These include, but are not limited to, the decision whether to investigate, grant immunity, or plea bargain, what recommendation to make under the Sentencing Guidelines, and the determination as to whether, what, when, and where charges should be brought.<sup>31</sup> However, the most typical exercise of discretion, i.e. the most litigated, and therefore the focus of this section, is the decision whether to initiate and conduct criminal prosecutions.<sup>32</sup>

The central issue of prosecutorial discretion can usually be stated as a question of the degree of latitude prosecutors should

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<sup>29</sup> In enacting the Sentencing Reform Act, it does appear that Congress' goal was to drastically reduce discretion. This is apparent when one recalls that Congress' primary goal in enacting the guidelines was to eliminate disparate sentences. See S. REP. NO. 225, *supra* note 6, at 74-75. There would seem to be little sense in attempting to eliminate disparate treatment by merely shifting the same discretion from one group to another.

<sup>30</sup> 726 F. Supp. 1359, 1363 (D.C. Cir. 1989). The overwhelming judicial opinion has been that the guidelines are unduly rigid and harsh, and give too much discretion to prosecutors. They have also been criticized for creating a new form of disparity: "instead of treating like defendants differently as the previous sentencing regime did, the guidelines treat offenders with dissimilar offenses and backgrounds similarly." Judge Edward Becker, *Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053, 2054 (1992). Also, there has been a wide disparity among the federal districts in how often motions for substantial assistance are made (from a low of 0%, for example, in the District of New Hampshire to a high of 24.1% in the Northern District of Oklahoma). Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

<sup>31</sup> *Preliminary Proceedings, Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1990-1991*, 80 GEOG. L.J. 1113, 1113-15 (1992) [hereinafter *Criminal Procedure*].

<sup>32</sup> The decision to focus on this aspect of prosecutorial discretion becomes more evident upon noting that all of the discretion cases Justice Souter cites in his opinion fall into this category. See *Wade v. United States*, 112 S. Ct. 1840, 1844 (1992).

have, or rather, how deferential the courts should be. The conflict between prosecutors and the courts is primarily governed by an unusual combination of the doctrines of separation of powers and equal protection.<sup>33</sup>

As a rule of thumb, judges will defer to a prosecutor's broad discretion to initiate and conduct criminal prosecutions.<sup>34</sup> The basis for deferring to prosecutors is that courts have widely acknowledged that these decisions are ill-suited for judicial review.<sup>35</sup> Therefore, a rebuttable presumption has arisen that prosecutions are undertaken in good faith and in a nondiscriminatory manner.<sup>36</sup> However, while prosecutorial discretion is broad, it is not "unfettered."<sup>37</sup> "Selectivity in the enforcement of criminal laws . . . is subject to constitutional constraints."<sup>38</sup> Decisions to prosecute may generally come under attack in two ways. As discussed below, the first constitutional attack is vindictive prosecution, which violates a defendant's due process rights.<sup>39</sup> The second attack is selective or discriminatory prosecution, which denies a defendant equal protection of the laws.<sup>40</sup>

#### A. VINDICTIVE PROSECUTION

A defendant is entitled to exercise all of his constitutional and statutory rights "without apprehension that the state will retaliate by substituting a more serious charge for the original one."<sup>41</sup> If a prosecutor does penalize a defendant for exercising his rights (for in-

<sup>33</sup> WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* §§ 13.4, 13.5 (1984).

<sup>34</sup> See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

<sup>35</sup> See *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review"). Underlying the belief that these decisions are ill-suited for judicial review is the belief that the factors which need to be considered in deciding whether to prosecute are not readily susceptible to the kind of analysis courts are competent to undertake, and that the systematic costs of that these examinations would likely cause are too high. *Id.*

<sup>36</sup> See, e.g., *United States v. Bassford*, 812 F.2d 16, 19 (1st Cir. 1987) ("courts should presume that the prosecution was pursued in good faith execution of the law"), *cert. denied*, 481 U.S. 1022 (1987).

<sup>37</sup> *United States v. Batchelder*, 442 U.S. 114, 125 (1979) (footnote omitted).

<sup>38</sup> *Id.*

<sup>39</sup> See *Blackledge v. Perry*, 417 U.S. 21 (1974).

<sup>40</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

These equal protection claims come under the Fifth Amendment. Although the Fifth Amendment does not contain an equal protection clause, it has been held to contain an equal protection component. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>41</sup> *Blackledge*, 417 U.S. at 28.

stance, by charging a defendant with a more serious crime), there may be a due process violation. In *Blackledge v. Perry*,<sup>42</sup> the Court established a presumption of vindictiveness because it believed that even an appearance of vindictiveness could deter a defendant from exercising her rights. However, the situations in which this presumption will exist have been repeatedly narrowed by the courts.<sup>43</sup>

#### B. SELECTIVE PROSECUTION

A selective prosecution claim arises when a prosecutor improperly selects an individual for prosecution. While defendants often claim that a prosecutor's decision to prosecute has been selective and violative of equal protection, these claims rarely succeed. The underlying reason for this is that defendants must overcome the presumption that criminal prosecutions are undertaken in good faith.<sup>44</sup> However, it is not at all clear what a defendant is required to show to overcome this presumption. The reasons for this uncertainty are two-fold. First, the necessary elements for a successful claim of selective prosecution have been enunciated inconsistently. Second, courts have not clearly established the means for a defendant to prove these elements.<sup>45</sup>

The elements of a claim of selective prosecution have been enunciated in a myriad of ways. In *Wayte v. United States*,<sup>46</sup> the Supreme Court held that a petitioner seeking to prove selective prosecution must show that the decision to prosecute "had a discriminatory effect and that it was motivated by a discriminatory purpose."<sup>47</sup> Under this standard, discriminatory treatment arises if other violators similarly situated are not prosecuted, whereas discriminatory purpose occurs if selection "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."<sup>48</sup>

However, the dissent in *Wayte* argued a different standard was applicable. In applying the standard used in *Castaneda v. Partida*<sup>49</sup> to selective prosecution, Justice Marshall argued that in order to survive a motion for summary judgment, a defendant must make a non-

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<sup>42</sup> *Id.*

<sup>43</sup> See generally *Criminal Procedure*, *supra* note 31, at 1118.

<sup>44</sup> LAFAVE & ISRAEL, *supra* note 33, at § 13.4(b).

<sup>45</sup> *Id.*

<sup>46</sup> 470 U.S. 598, 608 (1985).

<sup>47</sup> *Id.* at 608 (citing *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256 (1979)).

<sup>48</sup> *Criminal Procedure*, *supra* note 31 at 1116-17.

<sup>49</sup> *Castaneda v. Partida*, 430 U.S. 482 (1977) (selectivity in the context of bringing an individual before a grand jury).

frivolous showing of the three elements of a *prima facie* case of selective prosecution. Justice Marshall explained that to make out a *prima facie* case of selective prosecution, an offender must show that (1) he is a member of a "recognizable" and "distinct" class; (2) a disproportionate number of this class was selected for investigation and possible prosecution; and (3) the selection procedure "was subject to abuse or was otherwise not neutral."<sup>50</sup>

A third standard for selective prosecution has been articulated, which encompasses a different set of three essential elements.<sup>51</sup> These three elements are: (1) that other similarly situated offenders have not been prosecuted;<sup>52</sup> (2) the selection of this particular offender was intentional or purposeful;<sup>53</sup> and (3) the selection was pursuant to an arbitrary classification.<sup>54</sup>

Whichever standard is used, the defendant bears the initial burden of demonstrating selective enforcement because courts assume criminal prosecutions are undertaken in good faith. But, the courts have varied in their determinations of what this burden entails.<sup>55</sup> More important for the defendant, however, is that he at least make a sufficient threshold showing<sup>56</sup> to be entitled to an evidentiary

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<sup>50</sup> *Wayte*, 470 U.S. at 625-26 (Marshall, J. dissenting). See also *Castaneda*, 430 U.S. at 497.

<sup>51</sup> *LAFAVE & ISRAEL*, *supra* note 33, § 13.4(a) (1984).

<sup>52</sup> An offender must show that "prosecutions are not normally instituted for the offenses with which he was charged." *United States v. Bourque*, 541 F.2d 290, 293 (1st Cir. 1986).

<sup>53</sup> In *Oyler v. Boyles*, the Supreme Court said that in order for there to be an equal protection violation the selection must have been "*deliberately* based upon an unjustifiable standard." 368 U.S. 448, 506 (1962). While it is clear that intent is necessary, what level of culpability the courts will actually require has not been precisely defined. See *LAFAVE & ISRAEL*, *supra* note 33, at § 13.4(d).

<sup>54</sup> In *Oyler*, 368 U.S. at 506, the Supreme Court stated that an "arbitrary classification" entails more than "the conscious exercise of some selectivity in enforcement." To determine what an arbitrary classification is, it is generally appropriate to determine whether there is a rational relationship between the classification and the stated objectives (a few classes are usually subject to stricter tests). See generally JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* ch. 14 (4th ed. 1991).

<sup>55</sup> *LAFAVE & ISRAEL*, *supra* note 33, at § 13.4(b).

<sup>56</sup> Some cases establish a single burden which must be met in order to obtain either discovery or an evidentiary hearing. See *United States v. Bassford*, 812 F.2d 16 (1st Cir.) *cert. denied*, 481 U.S. 1022 (1987); *United States v. Hintzman*, 806 F.2d 840 (8th Cir. 1986). However, others establish somewhat easier burdens to obtain discovery than is need to obtain an evidentiary hearing. Compare *United States v. Heidecke*, 900 F.2d 1155, 1159 (7th Cir. 1990) (defendant entitled to discovery if he can show "colorable basis") and *United States v. Richardson*, 856 F.2d 644, 647 (4th Cir. 1988) (defendant must establish a non-frivolous showing of a *prima facie* case of selective prosecution to be entitled to an evidentiary hearing).

hearing.<sup>57</sup> The allegations a defendant must make in order to constitute a threshold showing have been described in a variety of ways, including: (1) facts sufficient to raise a reasonable doubt about a prosecutor's purpose, (2) a non-frivolous showing of the essential elements of the claim, (3) sufficient facts to establish a "colorable basis" for his claim, or (4) establishment of a *prima facie* case.<sup>58</sup> If a defendant is denied an evidentiary hearing because he is unable to meet this burden, he will find it extremely difficult to make the specific allegations that are required to prove selective prosecution.

As will be discussed below, the decision in *Wade* has the potential to further shift discretion from judges to prosecutors. The reason for this, as will be described, is that the focus of Justice Souter's decision is the application of a selective prosecution case to the previously uncharted area of a prosecutor's discretion in sentencing. In determining whether this application actually increases the prosecutor's discretion, this Note will examine whether the areas of selective prosecution and sentencing are similar enough to warrant the analogy that Justice Souter makes.

#### IV. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Harold Ray Wade, Jr. was arrested in October 1989 after police officers searched his home and found 978 grams of cocaine, two handguns, and more than \$22,000 in cash.<sup>59</sup> Following his arrest Wade began to cooperate with the authorities, presumably in anticipation of leniency from the government.<sup>60</sup> Both the level and usefulness of this cooperation is disputed.<sup>61</sup>

Wade subsequently pled guilty to conspiring to distribute cocaine and to possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (1988); and to using a firearm during a

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<sup>57</sup> An evidentiary hearing is crucial to a defendant because it allows him to obtain discovery.

<sup>58</sup> *LAFAVE & ISRAEL*, *supra* note 33, at § 13.4.

<sup>59</sup> *Wade v. United States*, 112 S. Ct. 1840 (1992).

<sup>60</sup> See Brief for Petitioner at 6, *Wade v. United States*, 112 S. Ct. 1840 (1992) (No. 91-5771) [hereinafter Brief for Petitioner].

<sup>61</sup> Compare Brief for Petitioner, *supra* note 60, at 6 ("petitioner's assistance proved valuable to the government resulting in the identification and conviction of several other individuals") with Brief for United States at 6, *Wade v. United States*, 112 S. Ct. 1840 (1992) (No. 91-5771) [hereinafter Brief for United States] (disputing the extent of Wade's cooperation).

However, the extent and usefulness of Wade's cooperation is not central to this case. The issue before the Court is whether a district court has the legal authority to inquire into the prosecutor's reasons for the refusal. The actual validity of those reasons is a question for the district court on remand. Brief for Petitioner, *supra* note 60, at 6.

drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) (1991).<sup>62</sup> The Presentence Report indicated that under the Federal Sentencing Guidelines, the sentencing range for the drug offenses was 97-121 months imprisonment.<sup>63</sup> However, 21 U.S.C. § 841(b)(1)(B) set a mandatory minimum sentence of ten years imprisonment for these crimes. As a result the range for Wade's sentence was narrowed to 120-21 months.<sup>64</sup>

Wade's counsel did not object to the calculation of this guideline range in the Presentence Report.<sup>65</sup> However, counsel did raise the issue of petitioner's cooperation. Essentially, he attempted to question why the prosecutor chose not to make a motion for downward departure from the sentencing guidelines for petitioner's "substantial assistance" pursuant to 18 U.S.C. § 3553(e) (1991) or U.S.S.G. § 5K1.1.<sup>66</sup> The district court responded that without such a motion from the government, it had no power to impose a sentence beneath the statutory minimum.<sup>67</sup>

The Court of Appeals for the Fourth Circuit affirmed, holding that while it appeared that the defendant had cooperated and provided valuable assistance to the government, absent a motion from the government, courts lacked the authority under the "unambigu-

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<sup>62</sup> *Wade*, 112 S. Ct. at 1842. Wade entered his guilty plea without the benefit of a plea agreement. *Id.* at 1843.

Section 841(a)(1) reads: "It shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

Section 924(c)(1), in relevant part, reads:

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

<sup>63</sup> *Id.* at 1842.

<sup>64</sup> For the firearm count, the Presentence Report noted that the five-year mandatory minimum sentence required by 18 U.S.C. § 924(c)(1) was the same as the Federal Sentencing Guidelines sentence under § 2K2.4(a). This was to be served consecutively. Brief for the United States, *supra* note 61, at 7.

<sup>65</sup> *Id.*

<sup>66</sup> Brief for Petitioner, *supra* note 60, at 6.

<sup>67</sup> *Wade*, 112 S. Ct. at 1842. However, the district court did expressly ask petitioner's counsel to state for the record what evidence he would introduce in support of his contention. In response, petitioner's counsel detailed the assistance he believed Wade provided. See Brief for United States, *supra* note 61, at 7.

ous language" of § 3553(e) to downward depart from mandatory minimum sentences in consideration of the substantial assistance of a defendant.<sup>68</sup> Additionally, the court of appeals said that since the government has "sole discretion in deciding whether to file a motion for downward departure for substantial assistance,"<sup>69</sup> it follows that the defendant may not inquire into the government's reasons and motives if the government does not make such a motion."<sup>70</sup>

The United States Supreme Court granted certiorari to determine whether a district court has the power to review a prosecutor's decision not to file a motion for departure below a mandatory minimum sentence based on the defendant's substantial assistance.<sup>71</sup>

## V. SUPREME COURT OPINION

Writing for a unanimous Court, Justice Souter held that contrary to the position taken by the court of appeals, district courts do indeed have the authority to review a prosecutor's refusal to file a motion for a reduction of sentence below a statutory minimum based on a defendant's substantial assistance to the government.<sup>72</sup> The Court held, however, that this authority is limited to the instances where the prosecutor's refusal was based on an unconstitutional motive.<sup>73</sup> Thus, the Court affirmed the result reached in the Fourth Circuit<sup>74</sup> because the defendant had not made the requisite allegations of unconstitutional motive necessary to entitle him to further review.<sup>75</sup>

Justice Souter began his sparse opinion with a discussion of the two applicable statutes under which the government is empowered to file a motion for reduction based on a defendant's substantial

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<sup>68</sup> *United States v. Wade*, 936 F.2d 169, 171 (4th Cir. 1991).

<sup>69</sup> This assumes that no plea agreement existed between the defendant and the government whereby the defendant could assure himself of the benefits of § 3553(e) or § 5K1.1 by agreeing to provide substantial assistance in return for the government's commitment to file a motion for downward departure at sentencing.

<sup>70</sup> *Wade*, 936 F.2d at 172. Curiously, however, in responding to *Wade's* assertion that he should be permitted to question the good faith of the government in refusing to make a motion, the court of appeals suggested that a motion may not be necessary if there was prosecutorial bad faith or arbitrariness that could present a due process violation. *Id.* Nevertheless, the court's refusal to examine such a possibility in the present case, in addition to its later statement that a "defendant may not inquire into the government's reasons and motives," indicate that the court did not give much effect to its earlier statement; instead it came to the conclusion that the prosecutor's decision could not be challenged for any reason. *Id.*

<sup>71</sup> *Wade v. United States*, 112 S. Ct. 635 (1991).

<sup>72</sup> *Wade v. United States*, 112 S. Ct. 1840, 1843-44 (1992).

<sup>73</sup> *Id.* at 1844.

<sup>74</sup> *United States v. Wade*, 936 F.2d 169 (4th Cir. 1991).

<sup>75</sup> *Wade*, 112 S. Ct. at 1841.

assistance, namely 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1.<sup>76</sup> The petitioner conceded, and therefore Justice Souter did not address, that as a matter of statutory interpretation the two provisions require the government to file a motion in order for the district court to have the authority to depart from a minimum sentence.<sup>77</sup> Furthermore, petitioner did not claim that the government motion requirement itself was unconstitutional;<sup>78</sup> nor did he claim that the motion requirement was superseded by a plea agreement whereby the government agreed to file such a motion.<sup>79</sup> The result was that Justice Souter held that both § 3553(e) and § 5K1.1 give the government the power, but not the duty, to file a motion when a defendant has substantially assisted the government.<sup>80</sup>

Justice Souter next examined whether a prosecutor's discretion in exercising this power is subject to constitutional limitations. He concluded that a prosecutor's decision whether to file a substantial assistance motion should be treated similarly to other decisions made by a prosecutor.<sup>81</sup> To illustrate the proper limits on prosecutorial discretion, Justice Souter looked to *Wayte v. United*

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<sup>76</sup> The full text of § 3553(e) reads:

Limited authority to impose a sentence below a statutory minimum. — Upon motion of the Government, the court shall have authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. 18 U.S.C. § 3553(e) (1988).

The relevant portion of § 5K1.1 is: "Substantial Assistance to Authorities (Policy Statement) Upon motion to 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." U.S.S.G. § 5K1.1.

Although at first glance these two passages may appear to serve the same function, there is one important difference. Section 3553(e) provides for a reduction below a mandatory minimum sentence, while § 5K1.1 provides for a reduction below the sentencing guidelines. A situation could quite conceivably arise where, because of aggravating factors, the guidelines provided for a sentence higher than the statutory minimum. *See, e.g., United States v. Cheng Ah-Kai*, 951 F.2d 490 (2d Cir. 1991). Here the parties assumed, and the Court agreed, that where the minimum under the guidelines is the same as the statutory minimum, the "two provisions pose two identical and equally burdensome obstacles." *Wade*, 112 S. Ct. at 1843.

<sup>77</sup> *Wade*, 112 S. Ct. at 1843. *See also* Brief for Petitioner, *supra* note 60, at 9 n.2.

<sup>78</sup> Note, however, that the National Association of Criminal Defense Lawyers, as Amicus Curiae in support of Petitioner, alleged such a constitutional violation. *See* Brief of Amicus Curiae at 3-11, *Wade v. United States*, 112 S. Ct. 1840 (1992) (No. 91-5771). *See also supra* note 96 for a list of cases upholding the constitutionality of the two germane statutes.

<sup>79</sup> *See, e.g., Santobello v. New York*, 404 U.S. 257, 262-63 (1971) (state must keep agreement regarding a sentence recommendation or a guilty plea); *United States v. Conner*, 930 F.2d 1073, 1075-77 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 420 (1991).

<sup>80</sup> *Wade*, 112 S. Ct. at 1843.

<sup>81</sup> *Id.*

*States*.<sup>82</sup> *Wayte* dealt with the government's selective prosecution of those who failed to register with the Selective Service System.<sup>83</sup> Justice Powell, writing for the majority, held that "although prosecutorial discretion is broad, it is not 'unfettered.'" <sup>84</sup>

Without detailing the framework that *Wayte* established for the constitutionality of prosecutorial conduct, Justice Souter held that district courts have the authority to review a prosecutor's decision not to file a substantial assistance motion and provide the defendant a remedy, if the court finds that the decision was based on an unconstitutional motive.<sup>85</sup> Justice Souter cited a refusal to file because of a defendant's race or religion as an instance when a defendant would be entitled to relief.<sup>86</sup>

Justice Souter next held that Wade was not entitled to relief, apparently because Wade had neither alleged nor claimed to have evidence of a constitutional violation by the government.<sup>87</sup> Although Justice Souter never stated explicitly what Wade needed to show in order to obtain relief, Justice Souter did speak to what would not be sufficient. According to Justice Souter, since a government motion was required by statute, a claim that a defendant provided substantial assistance, by itself, would not entitle a defendant to a remedy.<sup>88</sup> Moreover, he stated that such a claim standing alone would not even entitle a defendant to discovery or an evidentiary hearing.<sup>89</sup>

Justice Souter, however, did not state affirmatively what claims entitled Wade to relief. To the contrary, his only discussion of the sufficiency of claims was through negative inference. He stated that generalized allegations of improper motive would not suffice.<sup>90</sup>

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<sup>82</sup> 470 U.S. 598 (1985).

<sup>83</sup> *Id.* The government practiced a passive enforcement policy, under which only those individuals who reported themselves as having knowingly and willingly failed to register, or who were reported by others, were prosecuted.

<sup>84</sup> *Id.* at 608 (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).

<sup>85</sup> *Wade*, 112 S. Ct. at 1843-44.

<sup>86</sup> *Id.* at 1844.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* (citing *United States v. Redondo-Lemos*, 955 F.2d 1296, 1302-03 (9th Cir. 1992)) (in inquiring into whether prosecutor abused her discretion in plea bargaining, it is not enough that a prosecutor's decisions had a discriminatory effect; the court must also find that the prosecutor was motivated by a discriminatory purpose); *United States v. Jacob*, 781 F.2d 643, 646-47 (8th Cir. 1986) (defendant must make a threshold showing of the essential elements of selective prosecution to obtain discovery or a hearing); *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1169 (9th Cir. 1982) (in a case alleging vindictive prosecution, there must be a threshold showing of vindictiveness before the court can inquire into the prosecutor's motives); *United States v. Berrios*, 501 F.2d

Also, he noted that Wade conceded that a "substantial threshold showing" was necessary to have a right to discovery or an evidentiary hearing.<sup>91</sup> From this discussion, Justice Souter ascertained that Wade never claimed to have evidence showing that the government acted for "suspect reasons such as his race or religion."<sup>92</sup>

Justice Souter concluded by indicating that Wade would be entitled to relief if the "prosecutor's refusal to move was not rationally related to any legitimate government end."<sup>93</sup> However, once again, Justice Souter held that Wade did not allege such a claim.<sup>94</sup> Therefore, he affirmed the Fourth Circuit's judgment.

## VI. ANALYSIS

In *Wade v. United States*, Justice Souter explored the previously uncharted waters of a prosecutor's discretion in deciding whether to file a motion in consideration of a defendant's substantial assistance. However, instead of using this opportunity to clear up some of the murkiness created in this area by the circuit courts,<sup>95</sup> Justice Souter adds to it by failing to effect any positive change through this decision. This failure comes in two main areas: 1) relevant issues the Court chose not to address and 2) lack of clarity and specificity in the standards (or lack thereof) set out by the Court.

### A. ISSUES THE COURT CHOSE NOT TO ADDRESS

The Court's decision in *Wade v. United States* is based on the interpretation of two statutes: 18 U.S.C. § 3553(e) and U.S.S.G.

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1207, 1211 (2d Cir. 1974) (must elicit evidence of essential elements of selective prosecution to be entitled to discovery).

<sup>91</sup> *Wade*, 112 S. Ct. at 1844; Brief for Petitioner, *supra* note 60, at 18-19.

<sup>92</sup> *Wade*, 112 S. Ct. at 1844. Petitioner claimed that the district court prevented him from presenting such evidence because the court believed that it did not have any power to review a prosecutor's decision. Brief for Petitioner, *supra* note 60, at 19. Therefore, the petitioner was seeking a remand to develop a claim that the government violated his constitutional rights by refusing to file the motion "arbitrarily" or "in bad faith." *Id.* However, Justice Souter said the district court expressly invited Wade's attorney to do so, but his counsel took the opportunity to merely detail the extent of Wade's assistance. *Wade*, 112 S. Ct. at 1844.

<sup>93</sup> *Wade*, 112 S. Ct. at 1844 (citing *Chapman v. United States*, 111 S. Ct. 1919 (1991) (government cannot impose a penalty based on an arbitrary classification that would violate the due process clause of the Fifth Amendment)).

<sup>94</sup> *Id.*

<sup>95</sup> In the words of Judge Ginsburg:

The difficulty of the issue[s] the magnitude of the stakes, and the superficiality of the analysis underlying several of the circuits' decisions give reason to hope that the Supreme Court will at some point evaluate § 5K1.1 in the light of its prior teachings on the requirements of due process in the sentencing context.

*United States v. Doe*, 934 F.2d 353, 363 (D.C. Cir. 1991)(Ginsburg, J., concurring).

§ 5K1.1. Both impose a requirement that there be a government motion in order for a court to reduce a defendant's sentence below either a statutory minimum or a guideline minimum, respectively. This motion requirement has been determined to be constitutional by virtually all of the circuits.<sup>96</sup> However, although the statutes may not be violative of the Constitution, this fact alone does not insure that they serve their intended purpose.

Section 3553(e) is, on its face, satisfactorily unambiguous and, like all statutes, binding.<sup>97</sup> Section 5K1.1, enacted by the Sentencing Commission, is not as clear. The ambiguity in U.S.S.G. § 5K1.1 becomes apparent when it is compared to 28 U.S.C. § 994(n). The latter statute states that the guidelines should provide for substantial assistance.<sup>98</sup> The section, entitled "Duties of the Commission," says the guidelines should allow for sentences below statutory minimums where a defendant has provided substantial assistance to the government.<sup>99</sup> However, § 5K1.1 leaves this decision to the discretion of the prosecutor which does not "assure" a defendant of a reduction in sentence. Furthermore, ambiguity arises because § 5K1.1 is a policy statement, rather than a guideline, raising the

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<sup>96</sup> The constitutionality of 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 has been upheld in *United States v. LaGuardia*, 902 F.2d 1010 (1st Cir. 1990)(both); *United States v. Huerta*, 878 F.2d 89 (2d Cir. 1989)(both); *United States v. Francois*, 889 F.2d 1341 (4th Cir. 1989)(§ 5K1.1); *United States v. Harrison*, 918 F.2d 30 (5th Cir. 1990)(both); *United States v. Gardner* 931 F.2d 1097 (6th Cir. 1991)(§ 3553(e)); *United States v. Levy*, 904 F.2d 1026 (6th Cir. 1990)(§ 5K1.1); *United States v. Lewis*, 896 F.2d 246 (7th Cir. 1990)(§ 5K1.1); *United States v. Grant*, 886 F.2d 1513 (8th Cir. 1989)(§ 5K1.1); *United States v. Mason*, 902 F.2d 1314 (8th Cir. 1990)(§ 3553(e)); *United States v. Ayarza*, 874 F.2d 647 (9th Cir. 1989)(both); *United States v. Snell* 922 F.2d 588 (10th Cir. 1990)(§ 3553(e)); *United States v. Kuntz*, 908 F.2d 655 (10th Cir. 1990)(§ 5K1.1); *United States v. Musser*, 856 F.2d 1484 (11th Cir. 1988)(§ 3553(e)), *cert. denied*, 489 U.S. 1022 (1989); Three district courts found these provisions to be unconstitutional. *See United States v. Frederico*, 732 F. Supp. 1008 (N.D. Cal. 1988); *United States v. Curran*, 724 F. Supp. 1239 (C.D. Ill. 1989); *United States v. Roberts*, 726 F. Supp. 1359 (D.D.C. 1989). Subsequently, however, circuits in which those districts are located upheld the two provisions. *See United States v. Ayarza*, 874 F.2d 647 (9th Cir. 1990); *United States v. Ortez*, 902 F.2d 61 (D.C. Cir. 1990); *United States v. Lewis*, 896 F.2d 246 (7th Cir. 1990).

<sup>97</sup> *See supra* note 20.

<sup>98</sup> U.S.S.G. § 5K1.1.

<sup>99</sup> Section 994 of Title 28, created as part of the Sentencing Reform Act of 1984, contains a detailed list of the duties of the Sentencing Commission. Section 994(n) empowers the Sentencing Commission to provide for downward adjustments to account for a defendant's substantial assistance:

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 a 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. § 994(n)(1988) (emphasis added).

issue of whether the section is binding on judges. Some have suggested that policy statements are not binding on the courts but are merely suggestions that courts should follow.<sup>100</sup> If this were so, a court could depart without a government motion so long as it only departs below the guideline range,<sup>101</sup> and not below a minimum sentence imposed by statute.<sup>102</sup> As a result, it is not clear that the Commission, in passing § 5K1.1, did what § 994(n) mandates—i.e., “assure that the guidelines reflect the general appropriateness” of imposing a lower sentence for substantial assistance.<sup>103</sup> Nevertheless, most courts have rejected the argument that § 5K1.1 offers a defendant inadequate protection; rather, they have found that § 5K1.1 both reasonably effects the intent of § 994(n)<sup>104</sup> and has the binding force of a guideline.<sup>105</sup>

Justice Souter, however, did not discuss these contentions in his decision. He either refused to address these problems or framed the issues so that they were irrelevant.<sup>106</sup> Justice Souter could have

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<sup>100</sup> See *United States v. Amesquita-Padilla*, 691 F. Supp. 277 (W.D. Wash. 1988); Kimberly S. Kelley, Comment, *Substantial Assistance Under the Guidelines: How Smitherman Transfers Sentencing Discretion from Judges to Prosecutors*, 76 IOWA L. REV. 187 (1990).

<sup>101</sup> Under § 3553(b), a court can depart for reasons not adequately taken into consideration by the guidelines. Substantial assistance could be one of these reasons if § 5K1.1 were determined to be non-binding.

<sup>102</sup> In that situation, § 3553(e) would apply and would require a government motion.

<sup>103</sup> 28 U.S.C. § 994(n)(1988)(emphasis added).

<sup>104</sup> See, e.g., *United States v. Lewis*, 896 F.2d 246, 248 (“section 5K1.1 reflects a reasonable interpretation of § 994(n)’s mandate”); *United States v. Ayarza*, 874 F.2d 647, 653 (9th Cir. 1989) *cert. denied*, 493 U.S. 1047; *United States v. White*, 869 F.2d 882, 829 (5th Cir. 1989), *cert. denied*, 109 S. Ct. 3172.

The courts generally give two reasons for this interpretation. The first is that the language of § 5K1.1 is consistent with § 994(n). While the statute uses the word “assure,” this should not be taken to mean that the judge must take a defendant’s assistance into account in every case. *Lewis*, 896 F.2d at 248. This is because § 994(n) only requires that the guidelines recognize the “general appropriateness” of reducing a sentence for substantial assistance. *Id.* This 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 defendant’s assistance.” *White*, 869 F.2d at 248.

Secondly, § 994(n)’s parallel provision, § 3553(e), imposes a government motion requirement. Furthermore, § 3553(e) provides that the court shall impose a lower sentence “in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to § 994.” Because of the interrelation between the two sections, it is entirely appropriate for the same burden to be imposed under § 994(n) as is under § 3553(e). Since this is what § 5K1.1 does, courts have held that it appropriately effects the purpose of § 994(n).

<sup>105</sup> See *United States v. Gutierrez*, 908 F.2d 349 (8th Cir. 1990); *United States v. Donati*, 720 F. Supp. 619 (N.D. Ill. 1989). The reasoning behind these decision is that even though policy statements are generally non-binding, the interrelation between § 3553(3), § 995(n), and § 5K1.1 serve to make the section binding. But see Kelley, *supra* note 100 (arguing that the “shall ensure” language of 28 U.S.C. § 3553(a)(5) dictates that policy statements be non-binding).

<sup>106</sup> See *Wade v. United States*, 112 S. Ct. 1840, 1843 (1992).

used this opportunity to clear up some of the dissension among the lower courts.<sup>107</sup> This is especially true considering that dissension among the circuits was a likely motivation for the Court's granting certiorari.

Another potentially significant issue that Justice Souter failed to address is plea agreements. Courts have held that plea agreements requiring the government to file a motion for a reduction in sentence are enforceable;<sup>108</sup> Justice Souter acknowledged this in *Wade*. However, Wade never entered into a plea agreement with the prosecution. The failure to do so led to his eventual misfortune. Harold Wade pled guilty without the benefit of a plea agreement to federal drug and firearm charges, which carried a combined mandatory minimum sentence of fifteen years.<sup>109</sup> Nevertheless, he assisted the government, presumably in the hopes that his sentence would be reduced. For some unknown reason, Wade did not enter into a plea agreement, but instead spontaneously offered the prosecutor information.<sup>110</sup> The prosecutor accepted this information and used it to his advantage.<sup>111</sup> However, instead of inquiring into the possible

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<sup>107</sup> In Justice Souter's defense, this case invoked both statutes equally, so that even if the ambiguity surrounding § 5K1.1 was significant, thereby possibly allowing the judge to depart without a motion by the government, he could not depart below the mandatory minimum sentence imposed by statute. This minimum sentence posed a burden (motion requirement) and a sentence (ten-year prison term) equal to that of the sentencing guidelines. However, this does not necessarily preclude Justice Souter from resolving ambiguities in one of the statutes fundamental to the decision at hand, namely § 5K1.1.

<sup>108</sup> *United States v. Coleman*, 895 F.2d 501, 506 (8th Cir. 1990); *United States v. Conner*, 930 F.2d 1073, 1076-77 (4th Cir.), *cert. denied*, 112 S. Ct. 420 (1991).

<sup>109</sup> Brief for Petitioner, *supra* note 60, at 6.

<sup>110</sup> *Id.* The most likely reason was that the prosecutor, knowing that Wade had already pled guilty and was therefore basically out of options, refused to bind himself to an express agreement.

<sup>111</sup> Brief for United States, *supra* note 61, at 7. The United States never argued that Harold Wade did not assist the government. Additionally, the Fourth Circuit found that Wade had provided valuable assistance. *United States v. Wade*, 936 F.2d 169, 170 (4th Cir. 1991). The United States' argument relied on the fact that the prosecutor has sole discretion whether to file a motion regardless of whether substantial assistance was provided. Note, however, that respondents do mention in their brief that there was what they labeled a "wholly legitimate reason for the prosecutor's decision not to file a substantial assistance motion," namely alleged obstruction of justice on the part of Wade. Brief for United States, *supra* note 61, at 20.

In that the government used the information Wade provided, there seems to be little reason why the court should not find that an implied contract existed. Such a contract could be implied in two ways. The first would be to imply the contract in fact. The underlying premise is that by supplying information to the government, Wade made a unilateral offer, which the prosecutor accepted by using this information. Second, a contract could be implied in law on the basis that the prosecutor would be unjustly enriched if he used the information provided by the defendant without giving anything (consideration) in return. Wade's information does not appear to be gratuitous because

reasons for this inequitable result, Justice Souter simply mentioned that Wade conceded that there was no plea agreement.<sup>112</sup>

Finally, Justice Souter noted that the parties conceded that a government motion was necessary, that the motion requirement was constitutional, and that this condition was not superseded in this case by an agreement with the government.<sup>113</sup> By acquiescing to the parties' sentiments concerning these issues, Justice Souter was unable to reach a series of holdings which would have resolved conflicts among the circuits. While none of these may have been the primary issue of the case, the lack of consensus in this area seemed to warrant a more complete discussion.<sup>114</sup>

Justice Souter's failure to resolve the apparent ambiguities in § 5K1.1, his failure to address plea agreements, and his failure to reconcile the disagreement in the circuits demonstrate his unwillingness to make this case significant. Ironically, as this Note will discuss below, even when Justice Souter did address issues, the result was more confusion than a resolution of significant issues.

#### B. THE COURT'S FAILURE TO ENUNCIATE STANDARDS CLEARLY

Justice Souter's opinion failed to enunciate clear standards to govern future cases. First, the Court failed to define the standards to govern the amount of discretion a prosecutor should have in his decision to file a motion for a reduction in sentence based on a defendant's substantial assistance. Second, the Court failed to clarify or explain even those standards that are enunciated in the opinion.

In deciding *Wade*, the United States Court of Appeals for the Fourth Circuit laid down an exceptionally narrow view of the federal courts' inherent power to supervise proceedings before them.<sup>115</sup> Not only did the Fourth Circuit agree with most other courts, which had held that the government motion was necessary for a court to sentence a defendant to something less than the statutory minimum

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most drug dealers are not so altruistic as to freely give up such valuable information. In addition, the information does not appear to be officious because prosecutors are almost always seeking information of this sort. Once the contract is implied, it could be specifically enforced, which is a generally accepted remedy in plea bargain disputes. See *Santobello v. New York*, 404 U.S. 257 (1971). Specifically enforcing the contract would force the government to file a motion. This procedure seems like an effective course of action for an innovative (and possibly daring) judge who felt handcuffed by the motion requirement.

<sup>112</sup> *Wade v. United States*, 112 S. Ct. 1840, 1844 (1992).

<sup>113</sup> *Id.* at 1843. See also Brief for Petitioner, *supra* note 60, at 9.

<sup>114</sup> See *supra* note 95, for a discussion by Judge Ginsburg of the confusion in this area and a call for the Supreme Court to address these issues.

<sup>115</sup> *Wade*, 936 F.2d 169 (1991).

(stating that 3553(e) was unambiguous), but it went on to say that the prosecutor's decision whether to file the motion was unreviewable.<sup>116</sup> The extreme view taken by the Fourth Circuit was likely a motivating factor in the Supreme Court's decision to grant certiorari.

Justice Souter affirmed the Fourth Circuit's decision, although he set slightly different parameters with respect to the appropriate review of a prosecutor's decision not to file a motion for substantial assistance.<sup>117</sup> However, Justice Souter's ambiguous language makes these parameters difficult to ascertain.

Justice Souter's approach of accepting the parties' sentiments regarding certain issues and his apparent unwillingness to address others, as described above, left one issue in the case: whether a prosecutor's discretion, in deciding whether to file a motion in recognition of a defendant's substantial assistance, is subject to any limitations.<sup>118</sup> The petitioner argued that the prosecutor's discretion in filing a motion for substantial assistance must be subject to limited judicial review; otherwise, a central purpose of the sentence reforms—the elimination of unwarranted sentencing disparities among defendants with similar records—would be undermined.<sup>119</sup> Justice Souter agreed with the petitioner and held that the government motion requirement was reviewable.<sup>120</sup> Unlike the Fourth Circuit, Justice Souter apparently recognized the serious procedural due process concerns that would arise if he held otherwise.<sup>121</sup>

Typically, a discussion of prosecutorial discretion necessitates a discussion of two separate standards. The first is the standard that

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<sup>116</sup> *Id.* at 171-72. See *supra* note 69 and accompanying text.

<sup>117</sup> *Wade v. United States*, 112 S. Ct. 1840 (1992).

<sup>118</sup> See *id.* at 1842.

<sup>119</sup> Brief for Petitioner, *supra* note 60, at 12-13.

<sup>120</sup> *Wade*, 112 S. Ct. at 1842.

<sup>121</sup> These procedural due process concerns are analytically separate from the substantive due process concerns that have been mounted against the government motion requirement itself. The latter due process concerns have been uniformly rejected. See cases cited *supra* note 96.

The procedural due process concerns, on the other hand, are not challenging the constitutionality of the motion requirement, only that interpreting that requirement to forbid all judicial review of a prosecutor's decision to file a substantial assistance motion would make the statute unconstitutional. While the Constitution may not prevent Congress from making a defendant's cooperation totally irrelevant, once Congress decides to make it a factor, it must not set up procedures that contravene the procedural requirements of the Due Process Clause. See *United States v. Doe*, 934 F.2d 353, 362 (D.C. Cir. 1991) (Ginsburg, J., concurring). *But cf.*, *United States v. LaGuardia*, 902 F.2d 1010, 1015 (1st Cir. 1990) ("since defendants have no right to a departure from the guidelines based on their cooperation with the government, they 'have no grounds upon which to challenge Congress' manner of enacting [such a provision].'").

must be met in order for the petitioner to prevail on a claim that a prosecutor's decision was improper. The second standard is a degree of the first. It is what must be met in order for the petitioner to be entitled to discovery and an evidentiary hearing. However, in his attempt to apply the Court's existing prosecutorial discretion jurisprudence to this new area, Justice Souter was cryptic in his discussion of both standards.

Justice Souter never outlined what Wade must show to be entitled to relief. Instead he asserted that even if the standards which Wade proposed were accepted, Wade had not shown enough under those standards to be entitled to relief.<sup>122</sup> Justice Souter, however, did not say whether the standards proposed by Wade were the correct standards to be applied.<sup>123</sup> Justice Souter walked through each of Wade's claims and stated that even if true, Wade would not be entitled to relief because he had not met that claim as proposed. Justice Souter did not say, however, that either of the claims themselves (to require the government to file a motion or to be granted discovery and an evidentiary hearing) were inadequate.

For example, Justice Souter stated that a prosecutor's discretion in filing a motion for substantial assistance is subject to constitutional limitations because there is "no reason why courts should treat a prosecutor's refusal to file a substantial assistance motion differently from a prosecutor's other decisions."<sup>124</sup> In support of this assertion, Justice Souter cited *Wayte v. United States*,<sup>125</sup> a selective prosecution case.<sup>126</sup>

In *Wayte*, Justice Powell, writing for the majority, used a standard equal protection analysis in reaching the conclusion that the decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."<sup>127</sup> Justice Powell then discussed the necessary elements of

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<sup>122</sup> *Wade*, 112 S. Ct. at 1844.

<sup>123</sup> For example, Justice Souter could have been demonstrating that Wade could not even meet the standards he enunciated, implying that the "appropriate" standard would be more difficult to meet. Alternatively, he could have been acknowledging the standards enunciated by Wade as "correct" but simply saying that Wade had failed to meet them.

<sup>124</sup> *Wade*, 112 S. Ct. at 1843.

<sup>125</sup> 470 U.S. 598 (1985).

<sup>126</sup> The issue in *Wayte* was whether the government's selective prosecution of individuals who failed to register with the Selective Service System was constitutional. The government only prosecuted those individuals who reported themselves as having violated the law. *Wayte*, 470 U.S. at 600.

<sup>127</sup> *Wayte*, 470 U.S. at 608 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

a claim of selective prosecution.<sup>128</sup> The Court held that in order to succeed on such a claim, a defendant must show both that the policy had a "discriminatory effect" and that it was motivated by a "discriminatory purpose."<sup>129</sup>

The justices in *Wayte*, however, disagreed on the appropriate standard for evaluating selective prosecution claims. The dissent in *Wayte* argued that the standard used in the area of grand jury selection should be applied to decisions to prosecute.<sup>130</sup> To make out a prima facie case of selective prosecution under the dissent's standard, a defendant must show that 1)"he is a member of a recognizable, distinct class"; 2)"a disproportionate number of the class was selected for investigation and possible prosecution"; and 3)"this selection procedure was subject to abuse or was otherwise not neutral."<sup>131</sup>

Despite the confusing standards enunciated in *Wayte*, Justice Souter concluded that district courts have the authority to review a prosecutor's refusal to file a substantial assistance motion and to grant a remedy.<sup>132</sup> However, instead of untangling the standard set out in *Wayte* and then proceeding to describe to what extent it is applied to the area at issue in *Wade*, Justice Souter merely stated that relief may be granted if the prosecutor's refusal to file a motion for substantial assistance was based on an "unconstitutional motive."<sup>133</sup> What Justice Souter did, in effect, was take an unclear case in the already unclear area of selective prosecution<sup>134</sup> and attempt to use that case as a basis to establish the appropriate standards for prosecutorial discretion in filing substantial assistance motion, an unresolved area of the law. The effect of such actions will be to make the area of a prosecutor's discretion whether to file a motion for substantial assistance as unclear as selective prosecution, if not more so.

The problems that may arise from the *Wade* analysis are numerous. Confusion already exists as to the applicable standard in the area of selective prosecution, as demonstrated by the disagreement

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<sup>128</sup> See *supra* text accompanying note 45-48.

<sup>129</sup> *Wayte*, 470 U.S. at 608.

<sup>130</sup> *Id.* at 623-24 (Marshall, J., dissenting).

<sup>131</sup> *Id.* at 608 (Marshall, J., dissenting) (citing *Castaneda v. Partida*, 430 U.S. 482, 494 (1977)).

<sup>132</sup> *Wade v. United States*, 112 S. Ct. 1840, 1843-44 (1992).

<sup>133</sup> *Id.* Justice Souter specifies race and religion as examples of "unconstitutional motive." *Id.* at 1844. Presumably, however, other areas would be included since Justice Souter relied on *Wayte*, which used standard equal protection analysis. But, again, one cannot be sure because of the ambiguity in Justice Souter's opinion.

<sup>134</sup> See discussion of prosecutorial discretion, *supra* at part III.

between the majority and the dissenting opinions in *Wayte*. Justice Souter did nothing to clear up the confusion, and instead blindly cited the case that evidences this confusion.<sup>135</sup> Additionally, even if the selective prosecution standard was clear, there is no discussion as to whether it should apply to sentencing.

There is no reason to believe that the standards which have evolved in the area of selective prosecution apply, *a fortiori*, in the area of sentencing. The policy rationales and justifications supporting prosecutorial discretion in the area of sentencing are likely to be different than those in the area of selective prosecution. For example, a prosecutor's discretion at the charging phase would seem to have a greater effect on defendants than the exercise of discretion with respect to a substantial assistance motion. This is because the decision at the sentencing phase only concerns a possible reduction in sentence, while a decision at the charging phase concerns what charges, if any, a defendant may face. Moreover, rules established in the sentencing area arose from additional policies established by the guidelines, which should be taken into consideration. These Congressional policies should have been examined by Justice Souter and compared to those that exist in the area of selective prosecution. Additionally, the grand jury and the reasonable doubt standard, which serve to protect a defendant from a prosecutor's discretion in the area of prosecution, are not present as protection in the sentencing area.<sup>136</sup> Finally, because the factors used to determine whether to prosecute have been found to be "ill-suited to judicial review . . .," courts have been "hesitant to examine the decision whether to prosecute."<sup>137</sup> Whether the same degree of latitude is appropriate in evaluating the prosecutor's decision to file a substantial assistance motion is an important issue passed over by Justice Souter. For these reasons, it may be appropriate to have different standards even though equal protection analysis is appropriate in both areas.

If lower courts embrace these ambiguous standards enunciated in *Wade* and blindly apply them, grossly inequitable results could ensue. This is potentially the most damaging aspect of Justice Souter's lack of clarity. At least in cases that arose before *Wade*, when no clear standard was enunciated, lower courts could have considered the rationale of a chosen standard and its appropriateness to

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<sup>135</sup> *Wade*, 112 S. Ct. at 1843.

<sup>136</sup> However, it can be argued that once a defendant has already been convicted, he does not "deserve" as much protection.

<sup>137</sup> *Wayte v. United States*, 470 U.S. 598, 607-08 (1985).

the area before applying it. Now, these same courts are forced to apply the standards carelessly laid out in *Wade*.

Instead of remedying this carelessness, Justice Souter furthered the ambiguity created by *Wayte* in a brief discussion of what *Wade* would have to show to obtain discovery or an evidentiary hearing. Justice Souter undertook this discussion through a series of negative inferences which, once again, leave one mystified as to the boundaries of the claim. Justice Souter stated the obvious when he said that mere allegations of "substantial assistance will not entitle a defendant to a remedy."<sup>138</sup> Furthermore, he added that general allegations of improper motive are also not enough.<sup>139</sup> Justice Souter never explained if "general allegations of improper motives" are insufficient because they are general or because more is needed than improper motives. In either case, however, Justice Souter seems to have misunderstood the nature of the claim. Allegations should only have to be general because the defendant has yet to obtain discovery or an evidentiary hearing. This rationale is somewhat analogous to "notice pleading" in the area of civil procedure where a plaintiff is not required to describe his claim in great detail in order to state a cause of action.<sup>140</sup> Additionally, "improper motives" should be sufficient if improper motives are those that are not "rationally related to any legitimate state objective."<sup>141</sup> Justice Souter said that the "rationally related" standard is sufficient to entitle a defendant to relief;<sup>142</sup> however, as mentioned above, he said that improper motives are not.<sup>143</sup>

After perpetuating this confusion, Justice Souter proclaimed, "Wade concedes that a defendant has no right to discovery or an evidentiary hearing unless he makes a 'substantial threshold showing.'"<sup>144</sup> Even if one assumes that Justice Souter advocated this standard—which is troublesome since Justice Souter once again argued through negative inference—he did not adequately describe what must be shown in order to reach this threshold.

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<sup>138</sup> *Wade*, 112 S. Ct. at 1844. Justice Souter had just stated that an unconstitutional motive was necessary.

<sup>139</sup> *Id.* (citing *United States v. Redondo-Lemos*, 955 F.2d 1296, 1302-03 (9th Cir. 1992); *United States v. Jacob*, 781 F.2d 643, 646-47 (8th Cir. 1986); *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1169 (9th Cir. 1982); *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974) (selective and vindictive prosecution cases)).

<sup>140</sup> See FED. R. CIV. P. 8(a) (1992).

<sup>141</sup> See Petitioner's Reply Brief at 2, *Wade v. United States*, 112 S. Ct. 1840 (1992) (No. 91-5771) [hereinafter Petitioner's Reply Brief].

<sup>142</sup> *Wade*, 112 S. Ct. at 1844. See *infra* text accompanying notes 147-53.

<sup>143</sup> See *supra* text accompanying 139.

<sup>144</sup> *Id.*

The selective prosecution cases have used a multitude of different standards and shifting burdens to determine if there has been a threshold showing.<sup>145</sup> In spite of this, Justice Souter inexplicably states simply that Wade has never alleged that he had "*evidence tending to show*, that the Government refused to file a motion for suspect reasons such as race or religion."<sup>146</sup> It is difficult to tell whether Justice Souter advocated this standard to determine if there had been a substantial threshold showing. If so, he cited nothing in support of this standard. Instead, Justice Souter turned to a new discussion: whether Wade is entitled to a remand.

### C. THE REMAND ISSUE

Wade claimed that he was entitled to a remand<sup>147</sup> to allow him to develop a claim that the government violated his constitutional rights by withholding a substantial assistance motion "arbitrarily" or in "bad faith."<sup>148</sup> Wade claimed the prosecutor acted in bad faith by refusing to move because of "factors that are not rationally related to any legitimate state interest."<sup>149</sup> Although the government conceded that their actions must be "rationally related," the Court denied the remand.<sup>150</sup> The Court held that Wade had failed to show that the district court frustrated his effort to adequately plead a claim, and further, that his claim, as presented, "failed to rise to the level warranting judicial inquiry."<sup>151</sup>

This holding has two significant flaws. First, Justice Souter again decided that Wade had not met a given standard without adequately describing exactly what that standard involved. It is not evident how Justice Souter used the "rationally related" standard. While Justice Souter said that "Wade would be entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end,"<sup>152</sup> he did not specify to what kind of relief Wade would be entitled.

In support of the applicability of the "rationally related" stan-

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<sup>145</sup> See, e.g., LAFAYE & ISRAEL, *supra* note 33, at § 13.4.

<sup>146</sup> *Wade*, 112 S. Ct. at 1844 (emphasis added).

<sup>147</sup> A remand to the trial court would have entitled Wade to discovery and an evidentiary hearing which are critical to establishing a claim that the prosecutor acted improperly. See *supra* note 57 and accompanying text.

<sup>148</sup> Petitioner's Reply Brief, *supra* note 141, at 3-4.

<sup>149</sup> *Wade*, 112 S. Ct. at 1844.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* This holding apparently means Wade's claim did not meet the nebulous "threshold."

<sup>152</sup> *Id.*

dard, Justice Souter cited *Chapman v. United States*,<sup>153</sup> a due process case dealing not with prosecutorial discretion, but with whether a given construction of a statute—concerning the method used to determine the weight of narcotics—was constitutional. In *Chapman*, the Court held that Congress had a rational basis in choosing to punish drug offenders based on the diluted weight of the drug as sold on the street as opposed to the weight of pure drug within the confiscated supply.<sup>154</sup> Justice Souter's decision to rely on this case, instead of relying on the selective prosecution cases that he cited earlier, is beyond comprehension. *Chapman* did involve an application of the Federal Sentencing Guidelines, but in an area so unrelated that an attempt at analogy without discussion seems fatuous.

The second flaw with Justice Souter's analysis in denying Wade a remand is that even under Justice Souter's ambiguous standards, it appears that Wade did, in fact, show enough to be entitled to a remand. The purpose of the remand is not to automatically entitle Wade to an evidentiary hearing or discovery, but to allow him the opportunity to allege the facts necessary to support a claim under the standard Justice Souter should have clearly announced. If after a remand Wade still failed to make a "substantial threshold showing," then the case could be dismissed. This is contrary to Justice Souter's opinion, which would seem to require Wade to make this showing before receiving any form of discovery through remand.

Justice Souter held that Wade was not entitled to a remand because he had neither alleged nor claimed to have evidence that would entitle him to relief.<sup>155</sup> Wade replied that he would have developed a claim in the district court but that the district court frustrated this effort because it erroneously believed that this decision was unreviewable.<sup>156</sup> Petitioner explained that while the district court allowed petitioner to "state for the record . . . what the evidence would be," it did not allow him to actually present evidence or explain the basis for his challenge of the prosecutor's decision.<sup>157</sup> Additionally, when petitioner complained about being interrupted before finishing his statement, the district court responded by saying that he could appeal his decision.<sup>158</sup> Nevertheless, Justice Souter held that the record showed no claim of frustration of

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<sup>153</sup> 111 S. Ct. 1919 (1991).

<sup>154</sup> *Id.*

<sup>155</sup> *Wade v. United States*, 112 S. Ct. 1840, 1844 (1992).

<sup>156</sup> Petitioner's Reply Brief, *supra* note 141, at 4.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

petitioner's attempt to plead an adequate claim.<sup>159</sup>

In addition to the fact that Wade's attempt to allege an unconstitutional motive was apparently frustrated, Wade should have been entitled to a remand. The district court was under the impression that no claim for review of the prosecutor's decision could stand. Therefore, there was no reason for either the district court or petitioner to know what should be expected from such a claim. Even if the district court had given him ample opportunity to state his claim for the record, Wade should still be entitled to a remand so he could state a claim under the appropriate standard established by the Supreme Court in this case.<sup>160</sup> Under the above scenario, there should be a presumption that a remand be given because the danger that a district court will not adequately consider a defendant's claim seems high when a court believes that no claim can be stated under any circumstances. In sum, Justice Souter's failure to remand this case demonstrates a failure by the Court to understand the purpose of a remand in a case involving a lower court's misapplication of the law.

#### D. FUTURE IMPACT OF *WADE*

It seems apparent that the *Wade* decision leaves lower courts in a quagmire.<sup>161</sup> It follows from the discussion above that after *Wade*,

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<sup>159</sup> *Wade*, 112 S. Ct. at 1844.

<sup>160</sup> As demonstrated above, this would be no easy task considering the extreme ambiguity of Souter's opinion.

<sup>161</sup> As of October 2, 1992, a WESTLAW search revealed seventeen cases citing *Wade*. Most of these cases cited the opinion only for the proposition that the government motion requirement is constitutional, that the prosecutor's refusal to file a motion for substantial assistance is reviewable or that more than substantial assistance is necessary to entitle a defendant to relief. *United States v. Rivera*, 971 F.2d 876 (2d Cir. 1992); *United States v. Higgins*, 967 F.2d 841 (3d Cir. 1992); *United States v. Vilchez*, 967 F.2d 1351 (9th Cir. 1992); *Page v. United States*, 968 F.2d 1221 (9th Cir. 1992)(unpublished, text available on WESTLAW).

However, some courts tried to apply the standards set forth in *Wade* and came to varying results. See, e.g., *United States v. Sims*, 1992 WL 190909 (4th Cir. Aug. 11, 1992)(per curiam) (unpublished, text available on WESTLAW)(court can inquire into the government's reason for refusing to move if a defendant makes a "substantial showing" that the refusal was the product of an unconstitutional motive"); *United States v. Mastorakos*, 966 F.2d 1457 (7th Cir. 1992)(unpublished, text available on WESTLAW) (Souter "shrugged [his] shoulders" to the question presented in the case); *United States v. Urbani*, 967 F.2d 106, 109 (5th Cir. 1992)(looked beyond *Wade* and held that the applicable standard was whether the discretion "was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification."); *United States v. Gonzales*, 970 F.2d 1095 (2d Cir. 1992)(allegations of bad faith or misconduct on the part of the prosecutor will state a claim under the "rationally related" standard); *United States v. Egan*, 966 F.2d 328 (7th Cir. 1992)(burden of proof is on defendant at all stages of this claim) *cert. denied*, 113 S. Ct. 1021 (1992).

Finally, a few courts applied *Wade* in other contexts. See, e.g., *New Jersey v. Jackson*,

lower courts can be sure only that a prosecutor's discretion is reviewable if it is based on an unconstitutional motive. In addition, it seems that the motive must be one not rationally related to a legitimate state objective. However, *Wade* gives courts virtually no additional guidance. Lower courts are therefore left with the unenviable task of determining the limits of this apparently limited judicial review. One important factor courts should consider in making this determination is the relationship between the justifications for prosecutorial discretion in sentencing and the justifications for prosecutorial discretion in the selective prosecution area. This factor was completely ignored by Justice Souter, which could lead to greater problems than a lack of clarity. If the justifications in the two areas are different enough, the use of the selective prosecution standards in the area of sentencing could lead to deleterious results. This could occur because if the rationales and policy justification underlying the two areas are different, as discussed above,<sup>162</sup> there would be no reason to believe that the standards designed to protect defendants in selective prosecution cases would adequately protect the rights of a defendant in the area of sentencing. Courts should also consider methods of promoting the reforms of the sentencing guidelines.

After *Wade*, no attorney is likely to advise his client to give a prosecutor information without an explicit plea agreement. However, defendants may still decide to divulge information because of the unequal bargaining power that exists between prosecutors and defendants at this point. By the time these sentencing issues are discussed, the defendant has generally either been found guilty or has pled guilty. Consequently, the defendant has nothing to lose by offering the prosecutor information in the hope that the prosecutor will later decide to file a motion in return. Prosecutors realize this, so they will have little incentive to offer anything up front. However, the government has a strong interest in encouraging defendants to cooperate, since this type of information is vital to prosecutors seeking convictions. Therefore, there is little incentive for prosecutors to misuse their power to file a substantial assistance motion.<sup>163</sup> How this dynamic plays out in police stations and court-

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607 A.2d 974, 979 (N.J. 1992) (sympathy and compassion are in appropriate consideration in sentencing deliberation because they are not factors which are "rationally related to any legitimate government end").

<sup>162</sup> See *supra* text accompanying notes.

<sup>163</sup> See *United States v. LaGuardia*, 902 F.2d 1010, 1016 (1st Cir. 1990).

houses throughout the country could likely be more important than this decision handed down by the Supreme Court.

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