


Fall 1990

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Recommended Citation

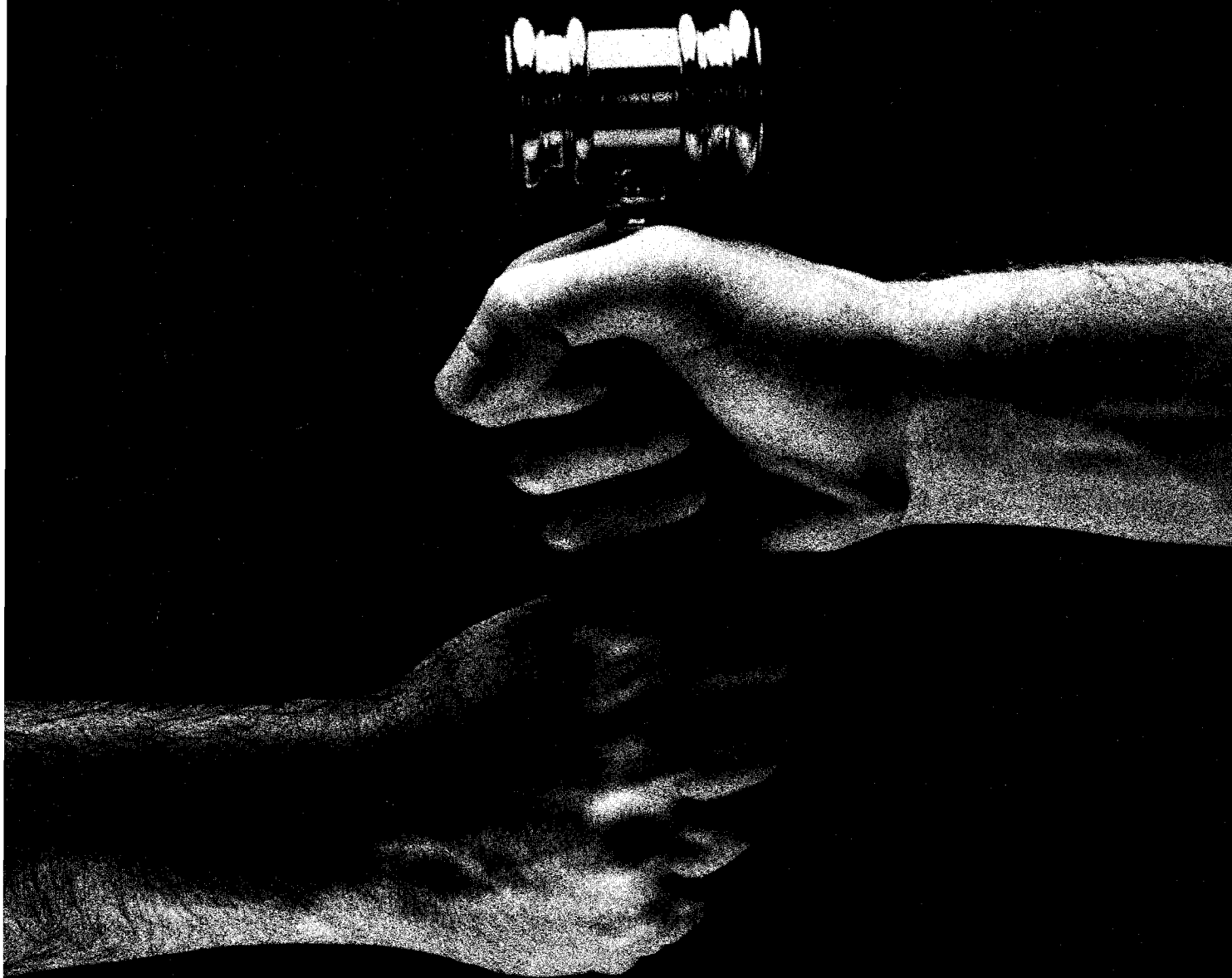
Bennett L. Gershman, The Most Fundamental Change in the Criminal Justice System: The Role of the Prosecutor in Sentence Reduction, *Crim. Just.*, Fall 1990 at 2, <http://digitalcommons.pace.edu/lawfaculty/412/>.

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The Most Fundamental Change in the Criminal Justice System

The role of the prosecutor in sentence reduction

By **BENNETT L. GERSHMAN**





As every lawyer knows, the prosecutor is the most powerful figure in the American criminal justice system.

The prosecutor decides whom to charge, what charges to bring, whether to permit a defendant to plead guilty, and whether to confer immunity. In carrying out this broad decision-making power, the prosecutor enjoys considerable independence. Indeed, one of the most elusive and vexing subjects in criminal justice has been to define the limits of the prosecutor's discretion.

This issue has recently emerged in a new context: the provisions in the Federal Sentencing Guidelines (the Guidelines) relating to sentence reductions based on the prosecutor's representation that a defendant has given law enforcement substantial cooperation. In *Mistretta v. United States*, 109 S Ct 647 (1989), the Supreme Court upheld the Guidelines against constitutional attacks based on separation of powers and delegation of authority. However, the Court was not asked to consider other constitutional challenges—in particular the claim that the Guidelines violate due process by de facto transferring much of the responsibility of sentencing from impartial judges to prosecutors, without providing standards to guide the prosecutors' discretion. Indeed, according to one federal court, the enhanced prosecutorial power under this new sentencing regime "may be the most fundamental change in the criminal justice system to have occurred within the past generation." (*United States v. Roberts*, 726 F Supp 1359, 1363 (DC DC 1989).)

The Guidelines were designed to effectively stunt the wide discretion that district judges formerly enjoyed in criminal sentencing. (*United States v. LaGuardia*, 902 F2d 1010, 1013 (1st Cir 1990).) Indeed, uniformity in the sentences imposed on similar offenders convicted of like crimes was a primary goal of Congress in enacting the Guidelines. (*United States v. Agui-*

lar-Pena, 887 F2d 347 (1st Cir 1989); *United States v. White*, 869 F2d 822, 825 (5th Cir 1989).) Although they remove sentencing discretion from judges, the Guidelines tacitly shift much of that discretion to prosecutors. Thus, the most important provisions that permit sentence reduction below a statutorily mandated minimum—18 U.S.C. § 3553(e) and Guideline 5K1.1—recognize as a mitigating factor the defendant's efforts to assist the government in the investigation and prosecution of criminal activities.

18 U.S.C. § 3553(e), entitled "Limited authority to impose a sentence below a statutory minimum," provides:

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

Section 5K1.1 of the Federal Sentencing Guidelines, entitled "Substantial Assistance to Authorities (Policy Statement)," provides:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the

assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and

(5) the timeliness of the defendant's assistance.

The interpretation and application of these provisions raise several fundamental questions. First, by removing the court's authority to reduce a sentence except upon the prosecutor's motion, do Section 3553(e) and Guideline 5K1.1 violate due process? Second, assuming the foregoing provisions are constitutional, does a defendant have any remedy when a prosecutor refuses to move for a sentence reduction based on the defendant's claim that he or she gave substantial cooperation? Third, assuming a court is willing to entertain the application, what standards should be applied to review a prosecutor's exercise of discretion in refusing to request a sentence reduction based on the defendant's purported cooperation?

Constitutionality of § 3553(e) and 5K1.1?

Under the Guidelines, the prosecutor has broad power to unilaterally control the amount of punishment a defendant receives. Under the strict language of the statute and Guidelines, unless the prosecutor initiates the process, neither the defendant nor the court can influence a sentence by showing that the defendant cooperated with the government. The prosecutor alone is empowered to cause a sentence to be adjusted below the mandated minimum, and the judge,

who historically has been the principal official entrusted with responsibility for sentencing, becomes virtually obsolete. To be sure, even absent a prosecution motion, the court is free to consider evidence of a defendant's substantial assistance in determining what sentence within the guideline range should be imposed. (*LaGuardia*, 902 F2d at 1013, n 4.) Nevertheless, the process, so the argument goes, tips so one-sidedly in the prosecutor's favor as to "disturb the due process balance essential to the fairness of criminal litigation." (*Roberts*, 726 F Supp at 1363.)

This new sentencing regime has resulted from two factors. First, in its charging function, the prosecution can select the precise charges to bring against a defendant from a broad arsenal of often overlapping criminal statutes and aggravating factors enumerated in the Guideline provisions. For example, if a person is arrested in possession of two ounces of crack, the prosecutor may have a discretionary choice among the following thirteen statutory options: simple possession of crack (21 USC § 844: statutory punishment one year); possession with intent to distribute crack (21 USC § 841(a): twenty-year maximum); possession with intent to distribute 5 grams or more of crack (21 USC § 841(b)(1)(B)(iii): five-year mandatory minimum, which can be doubled at prosecutor's option if defendant is charged with distribution to persons under the age of twenty-one, or within 1,000 feet of a school); possession with intent to distribute 50 grams or more of crack (21 USC § 841(b)(1)(A)(iii): ten-year mandatory minimum to life); conspiracy (18 USC § 371: five-year maximum); drug conspiracy involving the distribution of 5 grams or more of crack (21 USC § 841(b)(1)(B)(iii): five-year manda-

tory minimum); drug conspiracy involving the distribution of 50 grams or more of crack (21 USC §§ 841(b)(1)(A)(iii) and 846: ten-year mandatory minimum to life); engaging in a pattern of racketeering (18 USC §§ 1962(a), 1963: twenty-year maximum); conspiracy to engage in a pattern of racketeering (18 USC §§ 1962(d), 1963: twenty-year maximum); engaging in a continuing criminal enterprise (21 USC § 848: ten-year mandatory minimum to life); use of a firearm in aid of drug trafficking (18 USC § 924(c): five-year mandatory minimum; ten years if the weapon is a machine gun); use of juveniles (21 USC § 845(b): one-year minimum); drug trafficking by one previously convicted of a similar drug offense (21 USC §§ 841(b)(1)(A) and (B), (iii): ten-year mandatory minimum to life if 5 grams or more; twenty years to life if 50 grams or more).

Second, the mandatory sentencing laws and Guidelines have purposely produced relative inflexibility with respect to the sentence. Thus, once the prosecutor has decided on the charges, the judicial contribution, in many cases, can be almost ministerial. Since the prosecutor is able to make a very precise selection of the ultimate sentence, the judge's role is simply to ratify the choice of sentence determined by the prosecutor.

Under this system the potential for sentencing disparities—purportedly the vice that the Guidelines sought to eliminate—has merely been shifted from the province of the judge to that of the prosecutor. Indeed, by charging and bargaining in disparate ways with similarly situated defendants, the prosecutor is able to introduce as much sentencing disparity into the system as he or she chooses. Furthermore, although judge-made disparities are open to public scrutiny, prosecutor-made disparities are decided in secret, without any public oversight.

On the other hand, the Supreme Court observed in *Mistretta* that "the sentencing function long has been a peculiarly shared responsi-

bility among the Branches of government and has never been thought of as the exclusive constitutional province of any one Branch." (109 S Ct at 664.) Moreover, Congress may, if it chooses, eliminate all discretion from sentencing and make every sentence mandatory. (Id at 650-51.) If Congress can remove all discretion, can it not guide that discretion through the Guidelines? (*White*, 869 F2d at 825.) Furthermore, since there is no constitutional right to individualized sentencing (*Lockett v. Ohio*, 438 US 586, 602 (1978)), a defendant has no right to present mitigating evidence to the sentencing authority (*United States v. Huerta*, 878 F2d 89 (2d Cir 1989); *United States v. Musser*, 856 F2d 1484 (11th Cir 1988); *United States v. White*, supra). Therefore, a defendant cannot complain if that evidence is regulated in the form provided by the Guidelines. Finally, according to some courts, the prosecutor's power is not really as formidable as the due process claim suggests. Said one court: "The only authority 'delegated' by the rule is the authority to move the district court for a reduction of sentence in cases in which the defendant has rendered substantial assistance. The authority to actually reduce a sentence remains vested in the district court." (*Musser*, 856 F2d at 1487.)

Remedies for prosecutor's refusal to move for reduction

The language of 18 U.S.C. § 3553(e) and Guideline 5K1.1 requires a motion by the prosecutor before a court may reduce the defendant's sentence based on the defendant's cooperation. Most courts have construed this requirement strictly: Without the triggering motion by the prosecutor, a court may not consider the defendant's cooperation. (*United States v. Rexach*, 896 F2d 710 (2d Cir 1990); *United States v. Francois*, 889 F2d 1341 (4th Cir 1989); *United States v. Weidner*, 703 F Supp 1350 (ND Ind 1988).) Some courts have

construed this requirement more broadly to include a prosecutor's oral recommendation at the time of sentence (*United States v. Campbell*, 704 F Supp 661, 663 (ED Va 1989)), or letters to the court detailing the defendant's cooperation (*United States v. Coleman*, 707 F Supp 1101 (WD Mo 1989)). Absent a downward departure motion by the prosecutor or its functional equivalent, what remedy is available to a defendant who seeks a sentence reduction based on substantial assistance?

As noted above, some courts squarely hold that absent a motion, no remedy is available regardless of the unreasonableness of the prosecutor's refusal. (See *Rexach, Francois, and Weidner*, supra.) Considerable judicial deference is—and should be—accorded to prosecutorial discretion, particularly in view of the prosecutor's expertise. However, a total withdrawal of the judicial function is potentially dangerous. Occasions may arise when prosecutorial discretion should be reviewable. For example, what if a defendant makes a colorable showing that the prosecutor's refusal to make a downward-departure motion was based on racial or vindictive grounds? Surely judicial intervention in such a case would not only be appropriate, but would even be mandated.

Some courts, while suggesting that prosecutorial discretion may be reviewable, refuse to consider claims of abuse by pointing out that the prosecutor already has exercised discretion through beneficial charging or plea bargaining decisions. For example, the prosecutor already may have selected a lesser charge from a wide variety of possible charges with varying mandatory minimums, or may have permitted a plea to an even further-reduced charge. A court therefore could conclude that the defendant already received the benefit of his or her cooperation during the charging and plea-bargaining phase of the case and is not entitled to any further prosecutorial lenity. (*United States v. La-*

Guardia, supra; *United States v. Justice*, 877 F2d 664 (8th Cir 1989); *United States v. Taylor*, 868 F2d 125 (5th Cir 1989); *United States v. Nelson*, 717 F Supp 682 (DC Minn 1989).)

Finally, some courts have held, for differing reasons, that in appropriate cases a prosecutor's motion is not a necessary precondition for a sentence reduction based on the defendant's cooperation. (*Justice, White, and Roberts*, supra.) In these instances, the courts provide a remedy either by finding the statute and Guidelines unconstitutional (*United States v. Curran*, 724 F Supp 1239 (CD Ill 1989); *Roberts*, supra); by reading into the cooperation agreement a downward-departure condition (*Coleman*, supra); by applying 18 U.S.C. § 3553(b), which allows for "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission," to find as an aggravating circumstance prosecutorial bad faith (*United States v. Bruno*, 897 F2d 691, 695 (3d Cir 1990); or by simply announcing that the provisions in the statute and Guidelines do not mean what they say (*Justice and White*, supra).

Standard for evaluating prosecutorial discretion

Assume that a prosecutor has made a decision not to move for a downward departure based on the defendant's cooperation. What standard should a court employ to determine whether the prosecutor acted in good faith? The only court to squarely address this important question has been the Second Circuit in *United States v. Rexach*, 896 F2d 710 (2d Cir 1990). In *Rexach*, the defendant was indicted for selling three vials of cocaine to an undercover officer within 1,000 feet of a public elementary school, and for possessing with intent to distribute cocaine. (21 USC §§ 812, 841, and 845.) *Rexach* participated in a proffer session with an Assis-

tant United States Attorney.

A proffer session ordinarily occurs before any cooperation agreement is reached. At the proffer session, a representative of the United States Attorney's Office, defense counsel, and the client meet to discuss the kinds of assistance that the client might be able to render. An agreement is executed containing the understanding that no statements made at the proffer session may be used by the government against the client in any future prosecution, except in a prosecution for false statements, obstruction of justice, or perjury. Furthermore, the government may use information derived directly or indirectly from the meeting to obtain evidence against the client and may also use statements made by the client for the purpose of cross-examination, should the client testify.

At the proffer session, *Rexach* provided detailed information that led to the arrests of three individuals. However, he provided no further information until one week before his trial, when he claimed that he could offer additional information about large-scale narcotics dealers and distributors. Based on these representations, the government entered into a cooperation agreement with *Rexach* which provided that *Rexach* would cooperate fully, attend meetings, and testify for the government. The agreement further provided:

*If it is determined by this Office that Domingo Rexach has made a good faith effort to provide substantial assistance in the investigation or prosecution of another person who has committed an offense, this Office will file a motion *** pursuant to Title 18, United States Code, Section 3553(e) so that the sentencing judge shall have the authority to impose a sentence below a level established by statute as a minimum sentence, and *** pursuant to Section 5K1.1 of the Sentencing Guidelines. (Rexach, 896 F2d at 712.)*

Pursuant to this agreement, *Rexach* pleaded guilty to distributing

cocaine. Before sentencing, the government informed Rexach that it would not move for a downward departure because it did not find that he had made a good-faith effort to provide substantial assistance. Rexach's information, according to the government, was "unreliable and worthless." He offered no assistance in investigating the information, failed to stay in contact with the authorities, and dropped out of sight for significant periods of time. Claiming that the government had breached the agreement, Rexach moved for an order directing specific performance. (Rexach also claimed that section 5K1.1 violated due process and the separation of powers doctrine because it conditioned a downward departure on a prosecutor's discretionary determination of substantial cooperation. The Second Circuit rejected those arguments in a subsequent decision, *United States v. Huerta*, supra.)

The district judge denied the motion for specific performance, finding that the prosecutor had made a good-faith determination that Rexach had not provided substantial assistance. (*United States v. Rexach*, 713 F Supp 126 (SD NY 1989).) The district judge imposed a sentence of fourteen months' imprisonment, midway in the guideline range of twelve to sixteen months; a six-year period of supervised release; and a special assessment of \$50. A panel of the Second Circuit affirmed, with one judge dissenting. Recognizing that its recent decision in *United States v. Huerta* (supra) contained broad language suggesting that a prosecutor's discretion in making downward-departure motions might be unlimited and unreviewable, the court sought to clarify the appropriate standards governing a prosecutor's refusal to make such a motion. Specifically, should the test be whether the prosecutor subjectively believed that the defendant failed to provide substantial assistance, or should the prosecutor's subjective belief also be objectively reasonable?

Initially, absent any cooperation agreement, the decision by a prosecutor to forgo a downward-departure motion "is not subject to judicial review at all." (*Rexach*, 896 F2d at 713.) Thus, no matter how unreasonable or in bad faith the prosecutor's decision may be, absent any cooperation agreement, there is no judicially enforceable obligation to move for a downward departure, just as there is no judicially enforceable obligation on the prosecutor to engage in plea bargaining. However, when a cooperation agreement is entered into, a court will review that agreement and the parties' obligations under it, pursuant to established principles of contract law. (*Santobello v. New York*, 404 US 257 (1971); *United States v. Carbone*, 739 F2d 45 (2d Cir 1984).) Thus, where the agreement is conditioned on the satisfaction of the obligor—the prosecutor, in this case—the condition is not met if the obligor is honestly, even though unreasonably, dissatisfied.

In *Rexach* the cooperation agreement left acceptance of the defendant's performance subject to the prosecutor's judgment; therefore, the prosecutor was allowed to reject the defendant's performance, provided the prosecutor was honestly dissatisfied. Indeed, observed the court, the Guidelines themselves adopt a broad subjective standard for prosecutorial decision making. Under the Guidelines, the prosecutor decides whether to make a downward-departure motion, what constitutes "substantial assistance," and how the court should evaluate that assistance. "For these reasons, the decision to make or withhold a motion for downward departure must be given the same high level of deference as other prosecutor decisions." (*Rexach*, 896 F2d at 713.)

There are, the court noted, some limits on the prosecutor's exercise of discretion. First, there is an implied obligation of good faith in every contract (Restatement (Second) of Contracts § 205), as there is in other areas of prosecutorial

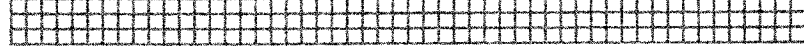
decision making. (*United States v. Wayte*, 470 US 598 (1985); *Blackledge v. Perry*, 417 US 21 (1974).) Although a prosecutor is presumed to act in good faith, this presumption can be rebutted by showing that the prosecutor acted invidiously, vindictively, or in bad faith. (Id.) Second, a defendant could negotiate a cooperation agreement that provided for a standard of satisfaction to be one of objective reasonableness. Finally, as a matter of policy, prosecutors would not be likely to misuse cooperation agreements and risk that as defendants came to distrust prosecutors, valuable information would not be forthcoming. (See also *United States v. Lewis*, 896 F2d 246, 249 (7th Cir 1990); *United States v. LaGuardia*, 902 F2d at 1016.)

Judge Pierce, in dissent, did not disagree that the absence of a cooperation agreement precludes judicial review, nor that agreements are reviewed under ordinary contract principles. He did disagree, however, with the application of those principles to this case—specifically, the failure of either the majority or the district judge to determine whether the parties contemplated that Rexach's earlier cooperation pursuant to the proffer agreement would be included in the "substantial assistance" calculation. Judge Pierce further noted that objective standards frequently are employed to interpret performance promises in contracts. (See A. Corbin, *Corbin on Contracts* § 150 at 670 (1963).) Thus, applying an objective standard, Rexach's assistance—providing information leading to three arrests—constituted "substantial assistance" within the meaning of the plea agreement. Judge Pierce would have remanded the case to the district court to determine whether the parties intended that Rexach's earlier assistance would be included within the "substantial assistance" calculus.

The Second Circuit's broad deference to prosecutorial discretion under the Sentencing Guidelines is not surprising. The judiciary histor-

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ically has shown remarkable restraint when reviewing prosecutorial decision making generally. (See Bennett Gershman, *Prosecutorial Misconduct* § 4.1 (Clark Boardman 1985).) Even so, as a practical matter, reviewing prosecutorial discretion under a subjective bad-faith test is meaningless. Cases that apply a bad-faith standard to prosecutorial behavior have rarely found against the prosecutor. (See B.

Gershman, *supra*; *United States v. Smitherman*, 889 F2d 189, 191 (8th Cir 1989): threatening to intervene if prosecutor arbitrarily and in bad faith refuses to file a 5K1.1 motion.)

Rexach is a prime example of arguably bad-faith conduct by the prosecutor. Although *Rexach* provided information leading to the drug arrests of three persons, the Second Circuit sustained the prosecutor's claim that the assistance

was not substantial enough. Finally, the Second Circuit's confidence that institutional incentives guarantee prosecutorial good faith may be fanciful. After *Rexach*, it is probably more likely that cooperating defendants will be reluctant to enter into cooperation agreements with prosecutors without much more meaningful assurances than simple reliance on the prosecutor's good faith. **CJ**