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1 IN THE UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF ARKANSAS
3 WESTERN DIVISION

3 UNITED STATES OF AMERICA,
4 Plaintiff,

5 vs. No. LR-CR-93-147(1)

6 DAVID HALE, Monday, March 25, 1996
7 Defendant. Little Rock, Arkansas
8 9:30 a.m.

9 TRANSCRIPT OF SENTENCING PROCEEDINGS
10 BEFORE THE HONORABLE STEPHEN M. REASONER
11 UNITED STATES DISTRICT JUDGE

11 APPEARANCES:

12 On Behalf of the Plaintiff:
13 MR. KENNETH W. STARR, Independent Counsel
14 MR. HICKMAN EWING, Associate Independent Counsel
15 Office of Independent Counsel
16 Two Financial Center Parkway, Suite 134
17 Little Rock, Arkansas 72211

18 On Behalf of the Defendant:
19 MR. RANDY COLEMAN, Attorney at Law; and
20 MR. GEORGE J. BEQUETTE, Attorney at Law
21 Skokos, Bequette & Smith
22 425 West Capitol Avenue, Suite 3200
23 Little Rock, Arkansas 72201

24 Also Present:

25 Mr. Robert B. Fiske, Jr.
Mr. Rusty Hardin
26 Mr. Dennis J. McInerney
Mr. W. Ray Jahn
27 Mr. Timothy Mayopoulos
Ms. Amy J. St. Eve

28 Proceedings reported by machine stenography; transcript
29 prepared by computer-aided transcription.

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1 THE COURT: Good morning.

2 MR. STARR: Good morning.

3 THE COURT: The matter scheduled for this date and
4 time is the sentencing in the case of United States v. David L.
5 Hale. The sentencing is subject to the Sentencing Guidelines.

6 Mr. Hale was originally charged in a four-count indictment
7 on September 23, 1993. In February, 1994, the Office of
8 Independent Counsel filed a four-count Superceding Indictment
9 against Mr. Hale, and subsequently on March 22, 1994, the
10 Office of Independent Counsel charged Mr. Hale in a two-count
11 Superceding Information. The two-count Superceding Information
12 charged Mr. Hale with, one, conspiracy to defraud the United
13 States, in violation of 18, United States Code, Section 371,
14 and one count of mail fraud, in violation of 18, United States
15 Code, Section 1341 and 1342.

16 Mr. Hale appeared here in this court with Randy Coleman,
17 his attorney, on March 22, 1993, and entered a plea of guilty
18 to both counts of the Superceding Information.

19 Mr. Ewing, have you read the Presentence Report and
20 addendum?

21 MR. EWING: Yes, we have, Your Honor, and we have no
22 objections to it.

23 THE COURT: Very well. Mr. Coleman, have you read
24 the Presentence Report and addendum?

25 MR. COLEMAN: Yes, I have, Your Honor.

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1 THE COURT: Mr. Hale, have you read the Presentence
2 Report and addendum and discussed them with Mr. Coleman?

3 MR. HALE: Yes, I have, Your Honor.

4 THE COURT: Do you understand today I will resolve
5 your objections, make factual findings, and impose your
6 sentence?

7 MR. HALE: Yes, sir, I do.

8 THE COURT: Thank you very much. The Court then is
9 given to understand the Presentence Report was prepared and
10 submitted to both the defendant and his counsel and to the
11 Office of Independent Counsel, both sides have had time to
12 review the Presentence Report, objections have been filed by
13 the defendant going to paragraphs 13 and 25.

14 Therefore, Mr. Coleman, we will hear you on your
15 objections at this time.

16 MR. COLEMAN: Your Honor --

17 THE COURT: Yes, sir.

18 MR. COLEMAN: -- if it please the Court, I think our
19 objections are more in the nature of a clarification as it
20 relates to paragraph 13 of the Presentence Report in relation
21 to the initial 1.5 million dollars of original capitalization
22 put into Capital Management. We merely wish to point out to
23 the Court that that \$500,000.00 of that money, against which
24 monies were leveraged and obtained from the SBA, were done so
25 as a product of Mr. Hale's own funds. Those were not

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1 ill-gotten --

2 THE COURT: Which \$500,000.00 are you talking about?
3 Are you talking about the Dean Paul loan?

4 MR. COLEMAN: No, sir.

5 THE COURT: Oh, okay.

6 MR. COLEMAN: That's not --

7 THE COURT: I'm not following it.

8 MR. COLEMAN: That's not it. If that's it, there's a
9 mistake in the Presentence Report which I did not catch.

10 There are references in the Presentence Report to the --
11 and maybe Mr. Klingbeil can help me with this. But there are
12 references in the Presentence Report to the original 1.5
13 million dollars that the defendant obtained in the course of
14 capitalizing Capital Management from the federal government.
15 It was merely our intent to point out to the Court that those
16 monies that originally went to the capitalization of Capital
17 Management Services, Inc. were Mr. Hale's funds, and not funds
18 from some other source that are the product of any of the
19 alleged criminal conduct in this case.

20 THE COURT: All right. But the Presentence Report is
21 correct, is it not, that \$500,000.00 was obtained in relation
22 to the Dean Paul loan, which generated 1.5 million dollars of
23 funding from SBA?

24 MR. COLEMAN: 500,000 was obtained, and I think
25 that's more appropriately addressed, if I'm following the

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1 scenario correctly, in paragraph 25, and that is true, Your
2 Honor. That is where that came from. But, again, we merely
3 wanted to point out to the Court that Mr. Hale and his wife
4 did, indeed, own the property that was utilized to
5 collateralize the loan from Madison Guaranty Savings & Loan,
6 that it had a value. We recognized that that value was
7 inflated at the time of the transaction, but, still, some of
8 those monies represented monies of Mr. Hale.

9 THE COURT: Well, I understand that, and I think the
10 Presentence Report spells that out. I understood that was
11 their property. It was just in this scheme it was greatly
12 inflated as to the value, and then the rest followed from
13 that.

14 MR. COLEMAN: That's correct, Your Honor.

15 THE COURT: All right. Okay. But I don't think
16 there's an error in the Presentence Report in that regard,
17 Mr. Coleman.

18 MR. COLEMAN: Well, in any respect, Your Honor, what
19 we wanted to point out to the Court is that that property had a
20 value, it was involved in the scheme to inflate the value.
21 That money was placed into Capital Management and subsequently
22 loaned out, and all of those funds were lost to Mr. Hale and
23 Capital Management Services because they were not repaid. And
24 those are the factors that we wanted to point out to the Court
25 in the course of making our clarification.

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1 THE COURT: All right. Now, does that take care of
2 both of the objections?

3 MR. COLEMAN: Yes, Your Honor.

4 THE COURT: All right. Well, the record will reflect
5 what Mr. Coleman has just stated, but I don't think any of that
6 in any way affects or vitiates the accuracy of the Presentence
7 Report.

8 Therefore, to the extent those are objections going to the
9 accuracy of the Presentence Report, they will be overruled, and
10 the Court adopts the facts set out in the Presentence Report
11 and adopts the Presentence Report in its entirety.

12 Any further objections?

13 MR. COLEMAN: No, Your Honor.

14 MR. EWING: No, Your Honor.

15 THE COURT: All right. According to the Sentencing
16 Guidelines passed by Congress, then, in Mr. Hale's case we have
17 a total offense level of 23; criminal history category of Roman
18 Numeral I; imprisonment range of 46 to 57 months; supervised
19 release of not less than two, no more than three years; fine
20 range of 10,000 to \$100,000.00. Restitution would be
21 applicable, the victim being the Small Business Administration,
22 and a 50- dollar assessment on each felony count would also be
23 required, for a total of \$100.00.

24 All right. With those guideline ranges in mind,
25 Mr. Ewing, let me turn to you and ask about the recommendation

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1 on behalf of Independent Counsel.

2 MR. EWING: Your Honor, we have filed a motion for a
3 downward departure under Section 5K1.1 of the Sentencing
4 Guidelines. I will address a couple of general remarks, and
5 then I will call on Mr. Bob Fiske, who was the original
6 Independent Counsel, to address this, and then to Mr. Starr.

7 Your Honor, we have put in our written motion that the
8 government does recommend a downward departure. When Mr. Hale
9 pled guilty, that was an agreement that Mr. Fiske will speak
10 to. But I point out, Your Honor, that under the Sentencing
11 Guidelines, Your Honor has stated what is in the Presentence
12 Report, but the Sentencing Guidelines does recognize this
13 matter of substantial assistance to the authorities, and it
14 states upon motion for the government, of the government,
15 stating the defendant has provided substantial assistance in
16 the investigation or prosecution of another person, the Court
17 may depart from the guidelines.

18 The appropriate reduction, of course, Your Honor, is up to
19 you. But the Guidelines themselves state that there should be
20 certain considerations, one of which is "... the court's
21 evaluation of the significance and usefulness of the
22 defendant's assistance, taking into consideration the
23 government's evaluation of the assistance rendered". The
24 commentary states: "Substantial weight should be given to the
25 government's evaluation of the extent of the defendant's

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1 assistance, particularly where the extent and value of this
2 assistance are difficult to ascertain".

3 Further, the Court is to consider "... the truthfulness,
4 completeness, and reliability of any information or testimony
5 provided by the defendant, the nature and extent of the
6 defendant's assistance, any injuries suffered, or any danger or
7 risk of injury to the defendant or his family, and the
8 timeliness".

9 Your Honor, so with those remarks, I would like to call on
10 Mr. Fiske and Mr. Starr to present the government's evaluation
11 of Mr. Hale's assistance.

12 THE COURT: Okay. Good to see you again.

13 MR. FISKE: Good to be back in Little Rock.

14 As Your Honor knows, I was appointed by Attorney General
15 Janet Reno as the Independent Counsel in January of 1994. On
16 August 5 of that year I was replaced by Kenneth Starr pursuant
17 to a decision issued by the Special Division of the United
18 States Court of Appeals for the District of Columbia following
19 the re-enactment of the independent counsel statute. I, of
20 course, will be speaking today only about Mr. Hale's actions in
21 cooperation during the period of time that I held the position
22 of Independent Counsel, up to August 5, 1994.

23 At the time that I was appointed, Mr. Hale was then under
24 an indictment obtained by the United States Attorney's Office
25 in this district, charging Mr. Hale with conspiracy to defraud

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1 the SBA of \$900,000.00. He, along with his two co-defendants,
2 Charles Matthews and Eugene Fitzhugh, were scheduled to go to
3 trial on March 28, 1994. As Your Honor noted earlier, in
4 February we obtained a Superceding Indictment and said that we
5 would be ready for trial on the March 28 date already
6 scheduled. At that time Your Honor severed the trial of
7 Mr. Matthews and Mr. Fitzhugh, which eventually occurred in
8 June, and confirmed that Mr. Hale's trial would go forward as
9 scheduled on March 28.

10 In early March, several weeks before the trial was to
11 begin, Mr. Coleman entered into plea discussions with our
12 office and expressed Mr. Hale's willingness to cooperate in the
13 ongoing investigation.

14 As part of the discussions leading up to the acceptance of
15 the plea by our office, Mr. Hale agreed to meet with attorneys
16 from our office and agents from the FBI to answer any and all
17 questions we had on any matters, including both the case that
18 was about to go to trial under the then-pending indictment and
19 any other criminal conduct that Mr. Hale had engaged in or was
20 aware of.

21 Virtually every day for the next two weeks Mr. Hale met
22 with attorneys from my office, as well as agents from the FBI.
23 During those meetings he fully admitted to participating in the
24 criminal conduct from which he was already under indictment.
25 In addition, he fully admitted to participating in criminal

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1 conduct that went far beyond the crimes for which he was then
2 under indictment. He also told us about the conduct of others
3 in the crimes in which he had personally participated, and,
4 finally, he told us about possible criminal conduct of others
5 in situations in which he was not personally involved, but that
6 he had either known about or had heard of.

7 During those meetings he produced voluminous records that
8 corroborated many of his statements, and he suggested various
9 additional ways in which we would be able to obtain further
10 evidence to corroborate his information. For example, he
11 identified other potential witnesses as well as locations where
12 relevant records could be found. Although we had already been
13 in the process of investigating many of the matters that he
14 told us about, there were several entirely new matters that he
15 brought to our attention that we had no prior knowledge of.
16 One example of such a new and unknown matter was information
17 that he provided to us relating to an alleged tax fraud that he
18 told us Governor Tucker and others had participated in. The
19 investigation that followed Mr. Hale's providing us with that
20 information ultimately led to an indictment of Governor Tucker
21 as well as William Marks and John Haley for tax and loan fraud,
22 and, of course, that case is currently pending in this
23 district.

24 Following this detailed proffer to us over those two
25 weeks, Mr. Hale agreed to plead guilty both to the conduct that

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1 was the subject of the then-pending indictment as well as the
2 conduct that he was not under indictment for, including conduct
3 that he had brought to our attention and of which we had been
4 unaware. He also agreed to enter into a cooperation agreement
5 with our office, pursuant to which he agreed to cooperate fully
6 with the Independent Counsel's Office in connection with its
7 investigation and prosecutions of others.

8 The plea agreement that we entered into provided that if
9 Mr. Hale did that, the full nature and extent of his
10 cooperation with the Independent Counsel's Office and the date
11 when such cooperation commenced would be brought by our office
12 to the attention of the Probation Office and to Your Honor at
13 the time of sentence. And I am here today, Your Honor,
14 pursuant to that plea agreement and to the commitment we made
15 to Mr. Hale at that time.

16 On March 22, Mr. Hale pled guilty to the already charged
17 conspiracy to defraud the SBA, as a result of his activities at
18 CMS from late 1988 through early 1989. And he also pled guilty
19 to the additional criminal conduct that he told us that he had
20 engaged in over the years. Specifically, he pled guilty to
21 having engaged in a course of conduct over a seven-year period
22 in which he caused his company, CMS, to make loans to various
23 individuals and entities in order to improperly benefit himself
24 and various other people. As Your Honor is aware, Count One of
25 the information to which Mr. Hale has pled guilty relates to

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1 the charges on the then-pending indictment. Count Two relates
2 to the new information that he provided to us with respect to
3 the seven-year course of conduct.

4 After his guilty plea in March, through early August of
5 1994 when I left, I could tell Your Honor that Mr. Hale fully
6 lived up to the terms of his cooperation agreement. Over the
7 course of the next several months, he was consistently
8 responsive to our requests for interviews and documents. He
9 was interviewed extensively on dozens of occasions by lawyers
10 working in my office at the time, specifically Rusty Hardin and
11 Dennis McInerney, both of whom are here today, and also by the
12 FBI. In those meetings Mr. Hale continued to provide our
13 office with detailed information regarding many of the matters
14 already under investigation, as well as other matters that the
15 office as a result of his information subsequently
16 investigated. He greatly assisted us, both in our overall
17 understanding of many of the core aspects of our investigation,
18 and also in our specific understanding of particular
19 transactions and events that are often very complex and quite
20 old.

21 His assistance was extremely beneficial in bringing about
22 cases that resulted in pleas of guilty, as well as in providing
23 information with respect to cases that have since been indicted
24 and are currently pending. For example, it helped greatly to
25 our office in refining our understanding of the criminal

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1 conduct of his two co-defendants, Charles Matthews and Eugene
2 Fitzhugh, and, therefore, in our ability to try that case. As
3 Your Honor knows, they both ended up pleading guilty during the
4 middle of that trial.

5 Mr. Hale's assistance was also extremely valuable in
6 connection with our investigation of numerous other matters.
7 Our office was still in the process of attempting to
8 corroborate Mr. Hale's extensive information in investigating
9 the many leads that Mr. Hale has provided us relating to these
10 matters when Mr. Starr took over the investigation.

11 As Your Honor notes from the Government's motion pursuant
12 to Section 5K1, several of the individuals who were the
13 subjects of the investigation of those other matters have since
14 pled guilty to criminal charges, with most of them also
15 agreeing to cooperate with the Office of the Independent
16 Counsel in connection with its various cases and
17 investigations.

18 Specifically, between March and August of 1994, Mr. Hale
19 provided substantial information to our office in connection
20 with investigations that subsequently led to guilty pleas by
21 the following individuals: Robert Palmer, who pled guilty to
22 conspiracy to make false entries in the records of Madison
23 Guaranty Savings & Loan Association; Chris Wade, who pleaded
24 guilty to bankruptcy fraud and making a false statement to a
25 financial institution; Stephen Smith, who pleaded guilty to

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1 conspiracy to misapply the funds of CMS; and Larry Kuca, who
2 also pleaded guilty to conspiracy to misapply the funds of
3 CMS.

4 Finally, Mr. Hale had also provided a great deal of
5 information to my office in connection with that part of the
6 investigation that relates to the case that is currently being
7 tried before Judge Howard. My office was intensively
8 investigating that information at the time Mr. Starr took
9 over.

10 In conclusion, Your Honor, for all those reasons, we
11 believe that Your Honor should grant the government's motion
12 pursuant to Section 5K1 and consider all of these facts as well
13 as obviously all the additional facts that Mr. Starr will bring
14 to your attention for the period since August, 1994 in
15 determining the appropriate sentence in this matter.

16 Thank you very much.

17 THE COURT: Thank you. Mr. Starr.

18 MR. STARR: May it please the Court.

19 In addition to the points made, and made well, by my
20 distinguished predecessor Mr. Fiske, I would note the
21 following: That Mr. Hale has committed crimes, and the
22 punishment that he receives from this Court should reflect the
23 full extent of his criminal activities. We have, however,
24 moved, as Mr. Fiske has indicated, and Mr. Ewing has likewise
25 indicated, and with the Court's permission, Mr. Ewing will

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1 elaborate further, we have moved for a downward departure. We
2 have declined to make a specific sentencing recommendation
3 because we do believe that that determination is best left
4 entrusted to this Court's sound discretion. Discretion
5 informed by taking into account all of the relevant factors.
6 And among those relevant factors are two in particular that I
7 want to lift up and to emphasize to the Court today.

8 First, in my judgment, Your Honor, Mr. Hale has accepted
9 full personal responsibility for his actions. He has accepted
10 accountability. He has, Your Honor, openly admitted his guilt,
11 and he has accepted with humility the fact that he will be
12 punished. He might have elected to exercise his right to put
13 the United States to the expensive and the very time-consuming
14 test of proving his guilt beyond a reasonable doubt. It was
15 his right as a citizen to do that. But instead, to his great
16 credit, he admitted his wrongdoing, and he acknowledged before
17 Your Honor in open court that he had committed serious crimes.

18 In my own dealings with Judge Hale, I have seen, I have
19 witnessed his contrition. I believe, Your Honor, that he is
20 genuinely remorseful of his criminal past. I have been
21 impressed with his humble spirit.

22 Also significant I believe today to the Court's decision
23 is Judge Hale's decision to cooperate with Mr. Fiske and
24 Mr. Fiske's able colleagues, including Mr. Hardin and
25 Mr. McInerney, as they began their efforts in this complex

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1 investigation, a highly complex investigation, to determine
2 whether others had also committed federal crimes. Mr. Fiske
3 has spoken about Mr. Hale's fulfillment fully of his agreement
4 during Mr. Fiske's distinguished tenure. Likewise, during my
5 tenure, Judge Hale has fully complied, and he continues to
6 comply to this very day and beyond with all of the terms of his
7 agreement.

8 I would also note for the Court's consideration that Judge
9 Hale's decision in March of 1994 to cooperate with the United
10 States Government, represented by Robert Fiske, came at
11 significant personal sacrifice. A man of considerable stature,
12 including holding judicial office, including having been
13 President of the National Jaycees, Judge Hale's decision to
14 cooperate with the United States in the conduct of its duties
15 to investigate and possibly to prosecute, has cost him. It has
16 cost him, Your Honor, the support and the friendship of many in
17 this community. His cooperation, Your Honor, has subjected him
18 and his family to risks and to hardships, including living in
19 seclusion away from his home. Mr. Hale has shown, I believe,
20 considerable courage and fortitude throughout these two
21 extraordinarily difficult years.

22 If I may conclude, his assistance, Your Honor, has been
23 not only useful, it has been highly useful. It has been
24 significant. It has not only been significant, it has been
25 highly significant to this investigation, begun first by

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1 Mr. Fiske, who in turn was building upon the work of the United
2 States Department of Justice, which had begun this
3 investigation. And on that solid foundation, we have been
4 laboring.

5 In short, Judge Hale has provided, Your Honor, substantial
6 assistance with respect to the overall investigation of the
7 Office of the Independent Counsel, including substantial
8 assistance in a number of matters which have resulted in public
9 criminal charges, which we have detailed in our written motion
10 for a downward departure. We so move, and I thank the Court
11 for its consideration.

12 THE COURT: Okay.

13 MR. EWING: Your Honor, I know this sometimes is
14 difficult for a court when you are asked to make decisions and
15 in your discretion determine what is substantial assistance. I
16 want to talk a little more. You've heard from Mr. Fiske and
17 you've heard from Mr. Starr concerning their opinions as the
18 Independent Counsel as to their evaluation of the extent of
19 Mr. Hale's assistance, especially when the value and extent are
20 difficult to ascertain.

21 Your Honor, I want to say some practical things here.
22 Really, four things, that would be my outline.

23 First, Mr. Hale agreed to cooperate fully, and he did it.
24 That's very important, Your Honor, because many people say they
25 will cooperate, but it ends up being their cooperation is

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1 limited to what you can already prove on them. A lot of people
2 when they get caught will say, "Yes, you caught me, I admit
3 what you can already prove, and that's it". Mr. Hale said, "I
4 will tell you about what you can prove on me, and I'm going to
5 tell you about everything". Some people say they'll cooperate
6 and they hold back information as to certain acts or other
7 people; people they've been friends with, they've been
8 political allies with. The mentality that says, "I will tell
9 them this, but I'm not going to tell them about Mr. X because
10 he's been my friend", or "I don't want to tell them about Mr. X
11 and Mr. Y because they're still in power, and I've got to come
12 back after I serve my sentence to this community, and if I tell
13 on them, I know I've had it with the peers in my community."
14 That's the way a lot of people allegedly cooperate with the
15 government, which turns out to be very minimal. David Hale
16 agreed to cooperate fully, and he did it.

17 Second, David Hale provided substantial assistance within
18 the meaning of the Guidelines. Your Honor, we have had, Mr.
19 Fiske's office and Mr. Starr's office, veteran, seasoned
20 federal prosecutors, and state prosecutors, who are very
21 experienced in evaluating the cooperation and information
22 provided by people. Some would say, "Oh, well, he said that
23 and you all just took it and ran with it." No, it's just like
24 anybody else. Mr. Hale was a criminal, he violated the law.
25 You don't just take what they say at face value. You start

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1 digging, you start looking at records, you start finding out.
2 For example, if David Hale said, "You know, this Steve Smith
3 loan, I later found out there's something wrong with that".
4 Well, do you just take his word? No, you go in there and dig
5 and dig, and ultimately, guess what? "Mr. Smith said you're
6 right, that was a crime".

7 Your Honor, Mr. Fiske had on his staff Rusty Hardin, who
8 is a very experienced state prosecutor from Houston. He had
9 Dennis McInerney, who is a very experienced federal prosecutor
10 from New York, and others. Mr. Starr had Mr. Lerman, who was
11 an Assistant U.S. Attorney from Chicago with many years of
12 experience, who worked very closely with Mr. Hale. He had
13 Mr. Steve Learned, who has been a federal prosecutor over 20
14 years who is now an A.U.S.A. in the Eastern District of
15 Virginia. He had people from the Department of Justice,
16 experienced Assistant U.S. Attorneys from San Antonio. I was a
17 U.S. Attorney in Memphis 19 years. Your Honor, Republicans,
18 Democrats, Independents, career prosecutors, all came to the
19 same conclusion that David Hale has provided substantial
20 assistance, that he has been truthful, he has been complete,
21 and he has been reliable. The nature and extent of his
22 assistance has been massive. It's taken a long time. Not only
23 is it massive, but it's ongoing. It's ongoing as we stand here
24 today. He has got testimony to give in the future, he has
25 testified before the grand jury twice, he is expected to be

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1 called upon, not only in the pending trial, but on other
2 occasions to give information and testimony in the future.

3 Third, Your Honor, David Hale's value I can tell you is
4 very important because David Hale was an insider.
5 Conspiracies, Your Honor, and other joint criminal conduct,
6 especially in the white collar crime and corruption area is
7 very, very difficult. Why? Because we're dealing with people
8 who otherwise have good reputations in the community, the
9 conspirators are often close friends, they are intelligent,
10 they know how to cover transactions with paperwork, whether
11 it's falsifying, backdating, misrepresenting. To the naked eye
12 they are transactions that appear kosher or proper, if you just
13 look at them with the naked eye. And unless you have an
14 insider, you can't figure out what really happened. And as
15 long as everybody in the conspiracy or the illegal venture
16 keeps quiet, then everybody will be fine. But once somebody
17 comes forward and the conspiracy starts to unravel and the
18 illegal acts get exposed, then the government can make
19 progress. Your Honor, there was no progress being made, except
20 in Mr. Hale's case, until Mr. Hale came forward.

21 Your Honor, I can tell you after years of experience, when
22 one person departs from the inner circle, they are going to
23 suffer the wrath of everybody still in it. That's what's
24 happening to Mr. Hale. He has been attacked ferociously. He
25 has been attacked not only by those still on the inside, but

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1 those that would defend the ones on the inside, who presume
2 that Mr. Hale is making stuff up. People are spinning things
3 on him, he has lost friends, and he's lost many in the
4 community because he had the courage to come forward. It
5 becomes a war, Your Honor, for the minds and hearts of people
6 who will tell the truth and who won't.

7 Now, Mr. Hale was the first one to come forward. On March
8 22, 1994, David Hale was it. As time has gone along, because
9 of Mr. Hale coming forward, now there are others who admitted
10 their wrongdoing, and now who are cooperating with the
11 government. He was an insider. He knew how the system worked,
12 he knew about deals, some of them were merely patronage, some
13 were merely unethical, but some are crimes. It's very
14 important to have somebody on the inside, otherwise this
15 investigation would have been very much diminished.

16 And lastly, Your Honor, David Hale's value to this
17 investigation was because he was an insider and he cooperated
18 and he was available. David Hale would be criticized by some
19 because he's been elusive, he's been hidden out. Your Honor,
20 David Hale had reason to be concerned about his privacy. David
21 Hale gave information about himself, not only what's in the
22 Presentence Report, not only what's in our 5K1, but he's been
23 available to talk about a variety of things. When you come in
24 and investigate different people and different allegations, it
25 is very crucial to have somebody who is available with the

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1 right mind-set that has said "I will cooperate", and will do
2 so. I'm going to give you one example of something that was
3 very helpful that's not in our 5K1 motion. This is an
4 anecdote, Your Honor, but it shows the value of Mr. Hale.

5 Your Honor, we were in the process of investigating
6 Mr. Hubbell. In November of 1994, Mr. Hubbell, the proof
7 showed, had taken approximately \$500,000.00 from his law firm,
8 from clients, from government agencies by false billing. There
9 were many that thought this was terrible that we were
10 investigating Mr. Hubbell. There was an effort made to have us
11 back off of Mr. Hubbell. "This should be a civil dispute."
12 His lawyer said, "You ought to charge him with a misdemeanor.
13 You shouldn't do anything to make Mr. Hubbell lose his law
14 license, so just let him plead to a misdemeanor."

15 Your Honor, Mr. Hale gave us a name. He gave us a name of
16 a lawyer who was prosecuted in federal court in Little Rock in
17 1984 for padding his expense accounts named Wayne Lee. He was
18 an assistant city prosecutor. I think the amount of his padded
19 bills was \$9,000.00, which compared to Mr. Hubbell's was like
20 one, whatever, one-fiftieth, one-one hundredth of what
21 Mr. Hubbell had. Based on getting this information from
22 Mr. Hale, I went down to the Supreme Court of Arkansas to the
23 files. Mr. Lee pled guilty, Judge Eisele gave him 20 months
24 for mail fraud, for padding his bills of \$9,000.00. In 1990
25 Mr. Lee had served his sentence, had petitioned the Arkansas

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1 Supreme Court to get his law license back, and a panel
2 appointed by the Supreme Court, an ethics panel ruled on
3 whether Mr. Lee should get his law license back. Chairman of
4 that commission, Webster Hubbell. Mr. Hubbell wrote an opinion
5 in late 1990, which ironically was right in the middle of his
6 four-year fraudulent scheme, wherein he ruled that no, Mr. Lee
7 can't have his license back. Any lawyer that pads bills and
8 takes money should never have his law license back again.

9 Your Honor, I can tell you when we saw that, we had a lot
10 of ammunition to deal with Mr. Hubbell's lawyer. It's just an
11 example, though, Your Honor, an anecdote of Mr. Hale being
12 available to give us information that helped us in the overall
13 investigation that Mr. Fiske and then Mr. Starr was assigned to
14 do.

15 The Independent Counsel was given a mandate by Ms. Reno
16 and by the Special Division. Mr. Fiske and Mr. Starr and the
17 office down here is going about our business. We cannot do so
18 in a vacuum, unless people cooperate who have been a part of
19 the system and gave knowledge about activities that have gone
20 on. We couldn't go anywhere. David Hale has provided
21 substantial assistance. Yes, David Hale didn't always stay on
22 the straight and narrow. He admitted that. He took the
23 crooked way. Some could say he's a crook, some could say he's
24 corrupt, but, Your Honor, he wasn't the only one in Arkansas
25 like that. And the fact that he has chosen now to enlighten us

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1 and give us this information, hopefully the truth about whoever
2 will come out and this investigation will go forward.

3 Your Honor, in summary, we believe that the Court should
4 depart down because of Mr. Hale's substantial assistance, and
5 we will leave it to the Court to determine the amount.

6 Thank you, Your Honor.

7 THE COURT: Thank you. Mr. Coleman?

8 MR. COLEMAN: Your Honor, if the Court would bear
9 with me today, I may appear to struggle a little bit at times,
10 and that's because I quit practicing law a little over a year
11 ago. Before that, it had been some months since I've made a
12 formal presentation in court, and you can probably find a lot
13 of people that would say I wasn't that good to start with.
14 It's -- I'm not quite as nervous, Your Honor, as I would be if
15 I had to try the case to the people we have in the box over
16 here today (indicating). But I have always over the course of
17 time that I practiced law found these proceedings to be the
18 most difficult of anything you did in the practice of law. You
19 live with somebody for so long, and it gets to the point that
20 you almost live their life with them. You sit beside them, as
21 I did with Mr. Hale two years ago in this very courtroom, and
22 you see a man take an act and make a public confession that
23 strips away from him everything, materially, that he's ever
24 had. Strips away from him all of the personal achievements
25 that he's ever had and worked for all of his life. And it's

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1 hard to put into words what somebody feels like. I can't -- I
2 can't possibly do it. I can sense it when I sit beside someone
3 in that position.

4 So it's always difficult for me, at least, at a time like
5 this to search for words that can reach out and touch the heart
6 and soul of one human who has the unenviable task of passing
7 judgment on another. It is a very difficult circumstance, and
8 has always been for me. I feel like that in some respects I'm
9 privileged to represent David Hale. If I am to believe all
10 that I read and hear, I must represent one of the most
11 powerfully influential human beings to have ever come down the
12 pike in this state; if I'm to believe all that I read and hear,
13 David Hale has singularly possessed the ability to lead astray
14 some of the most highly sophisticated, intelligent,
15 well-educated people this community has ever produced. He has
16 been demonized in some circles, locally, over the last two
17 years. Some of that continues on today. In the trial that's
18 going on down the hall, Mr. Hale is presented in that fashion,
19 and I understand that. Some of the best friends I have,
20 personally and in the legal community, are participating in
21 that trial, and I understand what they have to do for their
22 clients. It's one of the best accepted trial techniques in the
23 world; to defend your client, you put somebody else, or
24 something else at issue. And I note some of that is what's
25 happening.

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1 I read with some degree of amusement that I was even given
2 some credit for having manipulated Janet Reno and the Justice
3 Department into the appointment of Mr. Fiske as an independent
4 counsel to come down here and investigate. As I told the Court
5 earlier, I've sort of retired from the practice of law, but
6 I'll be damned, if I'm that good, I may come back. I don't
7 believe that any more than I believe all the bad things that
8 are being said about David in those proceedings.

9 I also noticed that one of the attorneys in that other
10 case in his opening statement compared David Hale to Jacob in
11 the Bible by stating that he would allow you to feel the arms
12 of Esau to cover the voice of Jacob. I don't mean to turn this
13 into a Sunday school lesson, but there's more to the story
14 between Esau and Jacob than that one event. Esau and Jacob
15 were both sons of Isaac, Esau being the oldest. Esau being the
16 oldest carried with it a very valuable spiritual commodity
17 called the birthright of the first born. In the sibling
18 rivalry, Jacob made a deal with Esau whereby Esau sacrificed
19 that birthright to Jacob and all that went with it, which we're
20 led to believe in the Old Testament were considerable rights in
21 those days, Esau being the first born in the line of Abraham.
22 But Esau for a momentary gratification of his own greed and to
23 satisfy his own needs, sacrificed that in a deal with Jacob. A
24 lot of that's happened in this case, Your Honor.

25 First of all, I think to utilize the Bible to try to

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1 condemn David Hale, or an example from the Bible is
2 inappropriate, because the story of that book is human fault,
3 shortcoming, confession, forgiveness, mercy.

4 In the second place, those folks who are making the
5 complaints now are those folks who were like Esau, who at that
6 critical moment allowed their greed to replace their good
7 judgment, to walk into Dave Hale's bank and say, "David, I'm in
8 trouble, I need help, I need financial help, I have problems",
9 and with David and them all knowing that what David would have
10 to do to satisfy that request was wrong, and in many instances
11 against the law.

12 Now matters are presented, publicly, against David, that
13 it's almost a situation where he took these people in off the
14 streets, put a gun to their head and made them take the money.
15 But that doesn't ring true to anybody in this room, and it
16 shouldn't. It was a two-way street, just as it was with Esau
17 and Jacob. And I will remind everyone that Jacob, the
18 individual with whom Mr. Hale has been identified, went on to
19 become the nation of Israel and the tribes of Israel. So maybe
20 there is some reward down the line for somebody who initially
21 gets themselves in trouble because they honor and obey the
22 relationships that they had built for a number of years, both
23 personally and politically.

24 It is presented that Mr. Hale is the same man now that he
25 was earlier, years ago, and I don't doubt that. Mr. Hale is

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1 the same man that Governor Tucker trusted to manage his
2 campaign for Senate in 1978. David Hale is the same man that
3 everybody went to when they had money problems. Nothing bad
4 was said about David as long as he had the purse strings open
5 in 1983 and 1984 and 1985, and -6 and -7, when he was helping
6 everybody out. In the eyes of many, David did not become a
7 different man until he broke from the crowd and decided for the
8 first time in many years to do the right thing and come to face
9 with himself in 1993 when he went public in 1994 when he made
10 his confession to this Court. David was forced to take a good
11 look at himself. That's something that's hard for all of us to
12 do. It's something that's hard for us as a community sometimes
13 to do. For a lot of years all of us in this area have looked
14 at the same things through the same glasses, we probably
15 declined to take a look at ourselves and how we operate, and
16 now some of us are mad because someone from the outside has had
17 to come in here and do it, and David's partially blamed for
18 that, in the eyes of many. David did it so that he could
19 attempt to regain some measure of self-respect and dignity.
20 He's had to start from the ground up on that.

21 It's also been presented that because David is a
22 cooperating witness he has somehow had a one-way ticket to
23 paradise, that he has been in Canada fishing. I heard one
24 story that he has been on a cruise to the Bahamas. But none of
25 that is true. David in a statement to the Court has described

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1 what his life has been like for the last two years. Two years
2 ago last Friday David lost his freedom. There are prisons of
3 all shapes and descriptions, absent what this Court can order
4 Mr. Hale to, and Mr. Hale has been living in one of those for
5 two years. He's had deprivation of freedom, contact with other
6 people, and it's been like being in a prison for him. A little
7 more unusual than just himself, though, this one has had to be
8 shared by his family, his wife, Sue, who is here today, his
9 daughter, Amy, and his son, David, have had to share that
10 prison with him. For two years David has been paying his debt
11 to society, and, tragically, his family has been paying that
12 debt with him, also.

13 I would ask the Court to look at the entire landscape
14 before passing sentence on David, to take note of the fact that
15 many others involved in these transactions have received
16 immunity, some misdemeanors, some felonies with probationary
17 sentences. I think that's something that needs to be taken
18 into account.

19 Your Honor, this is not just an ordinary case. This is
20 not an ordinary defendant. It's a defendant who has tried to
21 do something for his community, and he's paying a price for
22 it. I do not think that this is a case which deserves the
23 application of the bureaucratic, rigid Sentencing Guidelines.
24 I think David Hale deserves something far less than that, and
25 in that application, on behalf of David, I am not ashamed to

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1 ask this Court to show its mercy to David in its sentencing.
2 Thank you.

3 THE COURT: Thank you. Mr. Hale, I've read your
4 sentencing memorandum and also letters that have been submitted
5 on your behalf. Do you have anything further to add to that,
6 or what Mr. Coleman has just said?

7 MR. COLEMAN: Your Honor, if I could just one moment,
8 Mr. Hardin is here from Houston, and he was one of the original
9 --

10 THE COURT: I remember, yes.

11 MR. COLEMAN: -- people that I came into contact with
12 on this, and I asked Mr. Hardin if he would come up here today
13 and make a brief statement for David, and we would like to
14 present that, if we could.

15 THE COURT: Very well.

16 MR. HARDIN: Good morning, Your Honor.

17 THE COURT: Welcome back to Arkansas.

18 MR. HARDIN: Thank you, sir.

19 Very briefly. Mr. McInerney and I spent over two weeks, I
20 guess, on a daily basis with Mr. Hale and his lawyer, back
21 after -- before the Court was approached about a plea. And I
22 don't feel like that I fell off a turnip truck as far as being
23 aware of the criminal justice system, and I don't know what the
24 New York equivalent to a turnip truck would be, but I'm
25 comfortable that Mr. McInerney did not. And I could represent

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1 to the Court and to the community, and the Court I think
2 properly has some consideration for it in assessing sentence,
3 that we believed the man then and we believe him now. And I
4 think for what that's worth I would like to say that to the
5 Court.

6 In over 15 years as a prosecutor, and I am very mindful of
7 how difficult your role is now, and now that I'm in private
8 practice, and none of us would presume to suggest that we know
9 best what you should do. But I saw firsthand the remorse, I
10 saw firsthand the things Mr. Ewing said 10 times better than I
11 could about the significance of David Hale and his testimony.
12 And I've watched from afar now that I've been gone a year and a
13 half as he has been assailed from every direction, both in the
14 media and by those who have their own special spin, as
15 Mr. Ewing has put it. And all I could say, as professional
16 prosecutors who had an obligation to see that justice was done,
17 we looked and listened and delved and considered greatly over a
18 long period of time before we were willing to put our
19 imprimatur on what he was saying, and for what it's worth in
20 the Court's consideration today, I believe this man told us 10
21 times more than we would have ever known about him.

22 Many of the things in the Presentence Report before the
23 Court are there solely because he told us. We would not have
24 known them. They were never things he could have been
25 prosecuted for because we would never have had a case. As

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1 Mr. Ewing has said very aptly, these things were not taken at
2 face value and moved forward. These things were looked into
3 and corroborated. And one of the things that perhaps is most
4 helpful to the Court to keep in mind, and for the world at
5 large as they consider David Hale when this is over, is that we
6 always looked for corroboration, and we did not on behalf of
7 Mr. Fiske, first, and now Mr. Starr, make recommendations or
8 suggestions without having been very personally comfortable
9 with the fact that we believed both what he was doing was very
10 substantial and what he was telling us was very truthful, and
11 as the Court considers is the first step toward admitting
12 everything, whether the other side knows it or not, and I'm
13 very satisfied that he did. We ask that the Court to keep that
14 in consideration.

15 Thank you for your time.

16 MR. COLEMAN: Mr. Hale would like to make just a
17 brief statement.

18 THE COURT: All right, Mr. Hale.

19 MR. HALE: Your Honor, I will keep my statement very
20 short, realizing that the investigation is continuing, in the
21 middle of a trial, and realize the potential of testifying in
22 future trials. But I would like to restate what I stated to
23 the Court when I entered my plea.

24 I want to apologize first to my family for the hurt and
25 suffering that they've had to go through because of what I've

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1 done. I'd like to apologize to my church family and to my
2 friends for their disappointment that I have shown for them --
3 that -- for what I've done, and to the people of Arkansas.
4 Truly sorry. And I want to also thank my church family and
5 friends who have steadfastly stood beside me, because it has
6 not been easy. Your Honor, for two years, it has been really
7 unbearable. And I thank the Court.

8 THE COURT: All right. Before I announce the
9 sentence of the Court and my reasons, I do feel compelled to
10 make one statement in response to Mr. Coleman's remarks. I
11 thought Mr. Coleman's statement was extremely eloquent, one of
12 the most eloquent that I've ever heard in my court, in any kind
13 of proceeding, sentencing hearing or otherwise. However,
14 Mr. Coleman, and I'm not quoting him exactly, I'm sure, but he
15 remarked of the anger of some people here in Arkansas because
16 some people that have come from out of state to shine a light
17 on -- and this is an exact quote -- "how we operate". I feel
18 compelled to say that I don't think the way that Capital
19 Management and Mr. Hale and this group of borrowers were
20 operating is the way most people, most businesspeople, most
21 professional people in Arkansas operate.

22 Mr. Hardin, I didn't fall off a turnip truck, either. I
23 spent 19 years practicing law. I represented a bank regularly,
24 I represented a lot of large financial institutions. I was
25 involved in all sorts of things, all the way from a

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1 15,000-dollar loan for a couple to buy their first home to four
2 and five million dollar bond issues and agricultural loans to
3 buy farms. I never dealt with one of those where it wasn't
4 understood from the very beginning that the borrowers were
5 either going to pay back every penny of that loan, with
6 interest, or they were going to literally lose the farm. And I
7 believe that what we saw here is an aberration of the character
8 of the professional and business community in Arkansas, and
9 I'll always believe that.

10 We have to deal with the fact that this was a
11 sophisticated scheme to illegally obtain money from the Small
12 Business Administration and to lend it out to certain
13 well-connected people. Mr. Hale allowed Capital Management to
14 be used as a veritable pool of money to which certain few
15 Arkansans could go dip out of; some of them apparently with no
16 obligation to even pay back the loans.

17 Mr. Hale, in your memorandum, at one point I felt that you
18 were almost saying that you were being used by the people that
19 were the borrowers. But the facts, I think, overwhelmingly
20 show that you willingly operated this service for these people,
21 and while you certainly may not be the only one at fault,
22 you're not a victim.

23 MR. HALE: Yes, sir, Your Honor.

24 THE COURT: You're anything but a victim.

25 However, the Independent Counsel's motion for downward

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1 departure in this case is well-founded. I don't know if I've
2 ever seen a case where the amount of help and the results
3 stemming from a single person's efforts has even approached
4 anything like this. Directly related to Mr. Hale's assistance,
5 we've had five guilty pleas and two multi-count felony
6 indictments. I also realize, Mr. Hale, that you have become a
7 pariah among certain of your old acquaintances and supposed
8 friends who shun you now. Worse, and more troubling to the
9 Court, I understand that you and your family have been
10 subjected to threats.

11 MR. HALE: Yes, sir.

12 THE COURT: That has caused you to have to live in
13 seclusion under FBI protection. I realize you have paid a much
14 higher price for your cooperation than most people do. And I
15 think that a downward departure in the range of 50 percent is
16 appropriate in your case. However, because of the nature of
17 this offense, I do think that that has to come off the top of
18 the range and not the bottom.

19 Therefore, it will be the judgment of this Court,
20 Mr. Hale, that you'll be committed to the custody of the Bureau
21 of Prisons for a period of 28 months. You'll serve three years
22 of supervised release. I will impose a minimum fine in your
23 case of \$10,000.00, because I am going to impose a restitution
24 figure of \$2,040,000.00. However, let me say in regard to
25 that, I am fully cognizant, Mr. Hale, at this time, or any time

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1 in the near future, you're not going to be able to pay anything
2 like that. And, therefore, I want the schedule for restitution
3 payments to be set up on a reasonable basis with the Probation
4 Office. It may be that that schedule, if you run it out and
5 you live to be 200 years old, you won't be able to pay it all
6 back. But, I do want to keep, if you want, the pressure on you
7 to help the SBA in recovering some of these loans. I have to
8 believe some of these loans could be recovered. I read the
9 Presentence Report, and I realize that some of them say that
10 there was a side agreement not to repay the loan, but I'm not
11 sure that's valid. So I want you, and as long as -- let me say
12 this. As long as you're making efforts to help the SBA in
13 recovering those loans and recovery of payments are being made,
14 then the payment schedule that you have that will be set by the
15 Probation Office may be deferred.

16 Let me ask the people in the audience, we're going to be
17 finished in just a couple of minutes, so please keep your
18 seats. Mr. Marshal, will you enforce that, please?

19 DEPUTY MARSHAL: Yes, sir.

20 THE COURT: I'm going to be finished here in just a
21 minute. I'm almost through. I will have to impose a special
22 mandatory penalty assessment of \$100.00; \$50.00 for each felony
23 count. I am going to allow you to remain on the same bond.
24 I'm going to set a reporting time and date of Monday, April the
25 8th, at 2:00 p.m.. However, I am cognizant of the fact that

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1 you may not be through with your obligations under your
2 agreement in testifying in the trial that's going on in Judge
3 Howard's court at this time. And if I am advised by the Office
4 of Independent Counsel that that date needs to be extended, I
5 will extend that date.

6 Any further findings that the Court needs to make in this
7 matter? Thank you. Court will be in recess.

8 (Whereupon the hearing concluded at 10:40 a.m.)

9 C E R T I F I C A T E

10 I, Eugenie M. Power, Official Court Reporter, do
11 hereby certify that the foregoing is a true and correct
12 transcript of proceedings in the above-entitled case.

13

14

Eugenie M. Power, Official Reporter

15

Date: _____

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Eugenie M. Power
United States Court Reporter

M E M O R A N D U M

TO: Jackie Bennett
FROM: Kimberly Nelson Brown 
DATE: March 10, 1997
RE: Rule 35 Motion

I. Rule 35 Generally

Rule 35 of the Federal Rules of Criminal Procedure provides in pertinent part for a reduction of a defendant's sentence because of "changed circumstances." Fed. R. Crim. P. 35(b). Specifically, the court "may reduce [the] sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense," in accordance with the Federal Sentencing Guidelines. The government must file the motion within one year after the imposition of the sentence. Where the defendant's "substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of the sentence," however, the court may consider such a motion one year or more after sentencing. *Id.*¹ The advisory committee notes to the 1991 amendments indicate that "[i]n deciding whether to consider an untimely motion, the court may, for example, consider whether the assistance was provided as early as possible."

II. Timing of a District Court's Ruling on a 35(b) Motion

The advisory committee notes further indicate that, under the 1987 amendment, district courts had been required to rule on the government's motion within one year after imposition of sentence. The notes explain why this requirement was changed in 1991:

. . . This caused problems . . . in situations where the defendant's assistance could not be fully assessed in time to make its motion to reduce the sentence before one year had elapsed. The amendment requires the government to make its motion to reduce the

¹ The Rule further provides that "[t]he court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence." Fed. R. Crim. P. 35(b).

sentence before one year has elapsed but does not require the court to rule on the motion within the one year limit. This change should benefit both the government and the defendant and will permit completion of the defendant's anticipated cooperation with the government. Although no specific time limit is set on the court's ruling on the motion to reduce sentence, the burden nonetheless rests on the government to request and justify a delay in the court's ruling.

In my brief search, I did not find any case precisely addressing a district court's delay in ruling on a timely 35(b) motion. In United States v. Snipes, 19 F.3d 13, No. 92-5370, 1994 WL 62252 (4th Cir. 1994) (unpublished disposition), however, the defendant argued that the government improperly failed to advise the court at sentencing of his cooperation. The Fourth Circuit disagreed, observing that the defendant would suffer no prejudice as a result of the government's decision to delay assessing the value of his assistance and to file instead a Rule 35(b) motion at a later date. The court explained: "it is implausible for [defendant] to argue that a departure would result in a sentence of less than the time he will have to serve prior to the Rule 35(b) motion being made and ruled upon." Id. at *3. Perhaps similar reasoning would bear upon a judge's decision to rule upon a timely 35(b) motion.

III. Case Law

A. Courts (including the Eighth Circuit) are reluctant to grant 35(b) motions where defendants already received downward departures pursuant to 5K1.1 of the Sentencing Guidelines

The Eighth Circuit has affirmed a lower court's denial of a 35(b) motion where the government made 5K1.1 motions for downward departure at the sentencing hearings, and the defendants received sentences "significantly below the guideline range and below the statutory ten-year minimum." United States v. Griffin, 17 F.3d 269, 270 (8th Cir. 1994). The district court had "concluded that the 5K1.1 departures contemplated the cooperation that the government now raises as grounds for further reductions in sentence." Id. at 270 n.3. See also Goff v. United States, 965 F.2d 604, 605 (8th Cir. 1992) (affirming District Judge Reasoner's denial of 35(b) motion on same grounds).

B. The factors a court should consider in ruling on a Rule 35(b) motion correspond to those set forth in the Sentencing Guidelines for 5K1.1 departures

The primary difference between Rule 35(B) and section 5K1.1

of the Sentencing Guidelines is temporal: while the guideline provision was intended to recognize assistance prior to sentencing, Rule 35(b) was designed to reward subsequent cooperation. United States v. Drown, 942 F.2d 55, 59 (1st Cir. 1991); see also United States v. Speed, 53 F.3d 643, 645 (4th Cir. 1995) (downward departure granted pursuant to Rule 35(b) can only apply to substantial assistance that takes place after sentencing). However, courts have "require[d] the extent of a downward departure [pursuant to Rule 35(b)] to be linked to the structure of the Guidelines." United States v. Hayes, 5 F.3d 292, 295 (7th Cir. 1993). Indeed, the Sixth Circuit has stated that "the government makes these motions under identical criteria." United States v. Mullins, Nos. 95-6554, 95-6555, 1997 WL 63149, at *4 (6th Cir. Feb 12, 1997) (unpublished disposition). The court quoted the United States Attorney's Manual on this subject as follows:²

"Every United States Attorney . . . shall maintain documentation of the facts behind and justification for each substantial assistance pleading [under § 5K1.1]. . . .

The procedures described above shall also apply to Motions filed pursuant to Rule 35(b), Federal Rules of Criminal Procedure, where the sentence of a cooperating defendant is reduced after sentencing on motion of the United States. Such a filing is deemed for sentencing purposes to be the equivalent of a substantial assistance pleading."

Id. at *5 (quoting United States Dep't of Justice, U.S. Attorney's Manual § 9-27.410 (1993)).

The Sentencing Guidelines, in turn, provide that

[t]he 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

² I quoted this version because it is more current than the copy kept in the OIC-DC office.

provided by the defendant;

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

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

U.S.S.G. § 5K1.1.

United States v. Shampine, 978 F.2d 1264, No. 92-1763, 1992 WL 311894 (8th Cir. Oct. 30, 1992) (unpublished disposition) sheds some light on the Eighth Circuit's interpretation of "substantial assistance" under 35(b).³ In that case, the Eighth Circuit affirmed the district court's denial of the defendant's motion to compel the government to file a Rule 35(b) motion. The government had asserted that the defendant "'had not lived up to his end of the agreement,'" that is, "[h]e had not been particularly forthcoming" during the trial of a co-defendant, and the government did not credit his claim that he knew nothing about a third individual allegedly involved in the crime. Id. at *1.

³ While I performed a relatively broad search of Eighth Circuit law on the subject, it was not exhaustive; Shampine contains a more substantive discussion of the factors considered than other Eighth Circuit cases I found.



Little Rock, Arkansas

March 19, 1994

Randy Coleman, Esq.
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Suite 3200
425 West Capital
Little Rock, Arkansas 72201-3439

U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
FILED
IN OPEN COURT
JAMES W. MCCORMACK, CLERK

Re: David L. Hale

BY: AAB
DEPUTY CLERK 3-22-94

Dear Mr. Coleman:

On the understandings specified below, the Office of the Independent Counsel ("this Office") will accept a guilty plea from David L. Hale to a criminal information charging him with violations of (1) Title 18, United States Code, Section 371, and (2) Title 18, United States Code, Sections 1341 and 2. These charges each carry a maximum sentence of five years' imprisonment, a maximum term of three years' supervised release, a maximum fine of the greatest of \$250,000, twice the gross gain, or twice the gross loss, and a mandatory \$100 special assessment. The total maximum sentence of incarceration on both counts is 10 years' imprisonment.

If David L. Hale fully complies with the understandings specified in this Agreement, he will not be further prosecuted for any crimes related to his participation in the conduct of the affairs of Capital Management Services, Inc., Diversified Capital, Inc., and Madison Guaranty Savings and Loan, and any other crimes, to the extent David L. Hale has disclosed such criminal activity to this Office as of the date of this Agreement.

The understandings are that David L. Hale shall truthfully disclose all information with respect to the activities of himself and others concerning all matters about which this Office inquires of him, shall cooperate fully with this Office, the Federal Bureau of Investigation and any other law enforcement agency so designated by this Office, shall attend all meetings at which his presence is requested with respect to the matters about which this Office inquires of him, and further, shall truthfully testify before the grand jury and/or at any trial or other court proceeding with respect to any matters about

GOVERNMENT EXHIBIT 2 74

which this Office may request his testimony. Any assistance David L. Hale may provide to federal criminal investigators shall be pursuant to the specific instructions and control of this Office and those investigators. This obligation of truthful disclosure includes an obligation upon David L. Hale to provide to this Office, upon request, any document, record or other tangible evidence relating to matters about which this Office or any designated law enforcement agency inquires of him.

It is further understood that the sentence to be imposed upon David L. Hale is within the sole discretion of the sentencing judge. This Office cannot and does not make any promise or representation as to what sentence David L. Hale will receive. However, this Office will inform the sentencing judge and the Probation Department of (1) this Agreement; (2) the nature and extent of David L. Hale's activities with respect to this case; (3) the nature and extent of any and all other activities of David L. Hale which this Office deems relevant to sentencing; and (4) the full nature and extent of David L. Hale's cooperation with this Office and the date when such cooperation commenced. In so doing, this Office will use any and all information it deems relevant, including information and statements provided by David L. Hale both prior to and subsequent to the signing of this Agreement. In addition, if it is determined by this Office that David L. Hale has provided substantial assistance in an investigation or prosecution, and if David L. Hale has otherwise complied with the terms of this Agreement, this Office will file a motion, pursuant to Section 5K1.1 of the Sentencing Guidelines, advising the sentencing judge of all relevant facts pertaining to that determination and requesting the Court to sentence David L. Hale in light of the factors set forth in Section 5K1.1(a)(1)-(5).

It is understood that, even if such a motion is filed, the sentence to be imposed on David L. Hale remains within the sole discretion of the sentencing judge. Furthermore, this Office retains the right to present to the sentencing judge and Probation Department, either orally or in writing, any and all facts and arguments relevant to sentencing. It is further understood that this Agreement in no way affects or limits this Office's right to respond to and take positions on post-sentencing motions or requests for information which relate to reduction or modification of sentence.

It is further understood that David L. Hale must at all times give complete, truthful, and accurate information and testimony and must not commit any further crimes whatsoever. Should David L. Hale commit any further crimes or should it be determined that he has given false, incomplete, or misleading testimony or information, or should he otherwise violate any provisions of this Agreement, David L. Hale shall thereafter be

subject to prosecution for any federal criminal violation of which this Office has knowledge, including, but not limited to, perjury and obstruction of justice. Any such prosecutions may be premised upon any information and statements provided by David L. Hale both prior to and subsequent to the signing of this agreement. Moreover, any such prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against David L. Hale in accordance with this Agreement, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of any such prosecutions. It is the intent of this Agreement to waive any and all defenses based on the statute of limitations with respect to any prosecutions which are not time-barred on the date this Agreement is signed.

Furthermore, it is agreed that in the event that it is determined that David L. Hale has violated any provision of this Agreement, (i) all statements made by David L. Hale to this Office or other designated law enforcement agents, or any other testimony given by David L. Hale before a grand jury or other tribunal, whether prior to or subsequent to this Agreement, or any leads from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings hereafter brought against David L. Hale and (ii) David L. Hale shall assert no claim under the United States Constitution, any statute, Rule 11(e)(6) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that statements made by him prior to or subsequent to this Agreement, or any leads therefrom, should be suppressed. It is the intent of this Agreement to waive any and all rights in the foregoing respects.

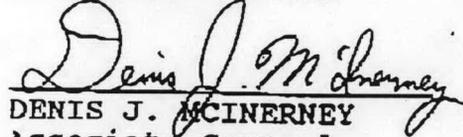
It is further understood that this Office agrees to take steps that the Office determines to be appropriate to assist David L. Hale in maintaining his privacy interests.

With respect to this matter, this Agreement supersedes all prior, if any, understandings, promises and/or conditions between this Office and David L. Hale. No additional promises, agreements, and conditions have been entered into other than those set forth in this letter and none will be entered into unless in writing and signed by all parties.

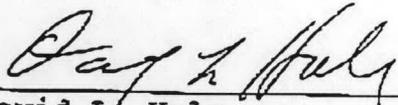
Very truly yours,

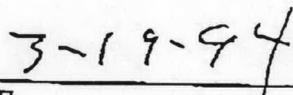

ROBERT B. FISKE, JR.
Independent Counsel


RUSTY HARDIN
Associate Counsel

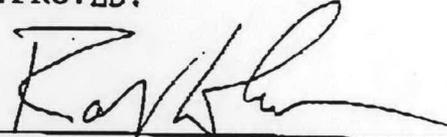

DENIS J. MCINERNEY
Associate Counsel

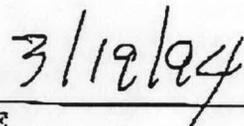
AGREED AND CONSENTED TO:


David L. Hale


DATE

APPROVED:


Randy Coleman, Esq.
Attorney for David L. Hale


DATE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

MAR 25 1996

JAMES W. MCCORMACK, CLERK
By: _____
DEP CLERK

UNITED STATES OF AMERICA)
)
 v.)
)
 DAVID L. HALE)

No. LR-CR-93-147(1)

MOTION OF THE UNITED STATES
FOR DOWNWARD DEPARTURE PURSUANT TO U.S.S.G. § 5K1.1

The United States of America, by Kenneth W. Starr, Independent Counsel, pursuant to U.S.S.G. § 5K1.1, hereby moves this Court to depart downward from the applicable Sentencing Guidelines in imposing sentence on Defendant David L. Hale.

There is no doubt that David Hale has committed serious federal crimes. The nature and scope of Mr. Hale's criminal conduct is reflected by the offense level calculated by the Probation and Pretrial Services Office under the Sentencing Guidelines. The sentence the Court imposes on Mr. Hale should take full account of Mr. Hale's criminal conduct.

The United States requests that the Court also take full account of a number of other factors, including Mr. Hale's acceptance of responsibility for his crimes and his cooperation with the United States. Mr. Hale has provided substantial assistance in the investigation and prosecution of a significant number of other persons who, like Mr. Hale, have committed serious federal offenses. The government expects that Mr. Hale will continue to provide substantial assistance to the United States in ongoing investigations and prosecutions. Mr. Hale's

decision in March 1994 to cooperate with the United States involved significant personal sacrifice. He has lost the support and friendship of many. He has subjected his family to risks and hardships, living in seclusion away from home.

In entering into his plea agreement with the United States, Mr. Hale committed himself to full cooperation. Among other things, the plea agreement required Mr. Hale to:

- truthfully disclose all information with respect to the activities of himself and others concerning all matters about which this Office inquires of him;
- cooperate fully with this Office, the Federal Bureau of Investigation, and any other law enforcement agencies designated by this Office;
- attend all meetings at which his presence was requested; and
- testify truthfully before the Grand Jury and at any trial or other court proceeding with respect to any matters about which this Office may request his testimony.

Mr. Hale has fully complied, and continues to comply, with all of the terms of the plea agreement. Mr. Hale's assistance has been useful and significant to the Independent Counsel's investigative and prosecutorial efforts, as detailed below. See U.S.S.G. § 5K1.1(a)(1).

Mr. Hale has provided truthful, complete and reliable information to the United States. See U.S.S.G. § 5K1.1(a)(2).

Mr. Hale's assistance has been timely, permitting the United States to investigate and prosecute crimes within applicable statutes of limitation. See U.S.S.G. § 5K1.1(a)(5). Mr. Hale has made himself available whenever attorneys and law enforcement agents working with this Office have requested it. He has spent many hours reviewing documents relevant to the Independent Counsel's investigation. Mr. Hale has given sworn testimony before the Grand Jury, and he is expected to testify in two cases currently under indictment. See U.S.S.G. § 5K1.1(a)(3).

Mr. Hale has provided substantial assistance with respect to the overall investigation of the Office of the Independent Counsel, including substantial assistance in matters which have resulted in the following criminal informations and indictments:

United States v. Charles Matthews, No. LR-CR-93-147(2):

On June 23, 1994, following Mr. Hale's guilty plea and agreement to cooperate with the United States, Charles Matthews pleaded guilty to two misdemeanor counts of violating 18 U.S.C. § 215, bribing a small business investment company official, namely Mr. Hale.

United States v. Eugene Fitzhugh, No. LR-CR-93-147(3):

On June 23, 1994, following Mr. Hale's guilty plea and agreement to cooperate with the United States, Eugene Fitzhugh pleaded guilty to one misdemeanor count of violating 18 U.S.C. § 215, bribing a small business investment company official, namely Mr. Hale.

United States v. Robert W. Palmer, No. LR-CR-94-240:

On December 5, 1994, Robert Palmer pleaded guilty to one count of conspiring to make false entries in the books and records of Madison Guaranty Savings and Loan Association ("MGS&L"), in violation of 18 U.S.C. §§ 371 and 1006.

Mr. Palmer has agreed to cooperate with the United States, and the United States expects to call Mr. Palmer to testify at

the trial in United States v. James B. McDougal, et al., discussed below.

United States v. Christopher V. Wade, No. LR-CR-95-48:

On March 21, 1995, Christopher Wade pleaded guilty to one count of bankruptcy fraud in violation of 18 U.S.C. § 152 and one count of making a false statement to a financial institution in violation of 18 U.S.C. § 1014.

United States v. Jim Guy Tucker, William J. Marks, Sr. & John H. Haley, No. LR-CR-95-117:

On June 7, 1995, the Grand Jury returned a three-count indictment against Jim Guy Tucker, William J. Marks, and John H. Haley, alleging that (1) Messrs. Tucker and Marks conspired to make false statements to Mr. Hale's small business investment company, Capital Management Services, Inc. ("CMS"), for the purpose of influencing CMS, in violation of 18 U.S.C. §§ 371 and 1014; (2) Messrs. Tucker and Marks made a false statement for the purpose of influencing the actions of CMS in violation of 18 U.S.C. § 1014; and (3) Messrs. Tucker, Marks and Haley conspired to defraud the United States for the purpose of impeding the Internal Revenue Service in the collection of income taxes, in violation of 18 U.S.C. § 371.

On September 5, 1995, the indictment was dismissed. On March 15, 1996, the Court of Appeals reversed and remanded the case for trial. The government expects to call Mr. Hale to testify at the trial.

United States v. Stephen A. Smith, No. LR-CR-95-118:

On June 8, 1995, Stephen Smith pleaded guilty to one misdemeanor count of conspiring to misapply funds of Mr. Hale's small business investment company, CMS, in violation of 18 U.S.C. §§ 371 and 657.

Mr. Smith has agreed to cooperate with the United States, and the United States expects to call Mr. Smith to testify at the trial in United States v. James B. McDougal, et al., discussed below.

United States v. Larry E. Kuca, No. LR-CR-95-150:

On July 13, 1995, Larry Kuca pleaded guilty to one misdemeanor count of conspiring to misapply funds of Mr. Hale's small business investment company, CMS, in violation of 18 U.S.C. §§ 371 and 657.

Mr. Kuca has agreed to cooperate with the United States, and the United States expects to call Mr. Kuca to testify at the

trial in United States v. James B. McDougal, et al., discussed below.

United States v. James B. McDougal, Jim Guy Tucker & Susan H. McDougal, No. LR-CR-95-173:

On August 17, 1995, the Grand Jury returned a 21-count indictment against James B. McDougal, Jim Guy Tucker and Susan H. McDougal. The indictment charges conspiracy to misapply funds of MGS&L, to make false entries in the books and records of MGS&L, to defraud MGS&L, to misapply the funds of CMS, to make false entries in the books and records of CMS, and to make false statements to CMS, as well as wire fraud, bank fraud, mail fraud, false statements to a small business investment company, misapplication of bank funds, and making false entries in bank records, in violation of 18 U.S.C. §§ 371, 2, 1343, 1344, 1341, 1014, 657, and 1006.

Trial of the case is currently proceeding before the Honorable George Howard, Jr. The United States expects to call Mr. Hale to testify at the trial.

CONCLUSION

For all of the foregoing reasons, the United States requests, pursuant to U.S.S.G. § 5K1.1, that the Court depart downward from the applicable Sentencing Guidelines in imposing sentence on Defendant David L. Hale.

Dated: March 22, 1996

Respectfully submitted,

Kenneth W. Starr by Norman Lewis J.
KENNETH W. STARR
Independent Counsel *Deputy Independent Counsel*

Office of the Independent Counsel
10825 Financial Centre Parkway
Suite 134
Little Rock, Arkansas 72211
Tel.: (501) 221-8700

CERTIFICATE OF SERVICE

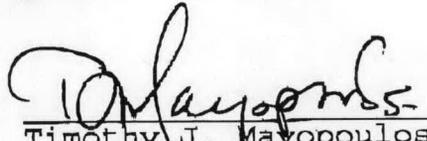
I certify that on March 22, 1996, I caused copy of the foregoing document to be served as indicated below:

Randy Coleman, Esq. (by fax and first class mail)
Ten Shackelford Plaza
Little Rock, Arkansas 72221

Joe Klingbeil (by fax and by hand)
Supervising U.S. Probation Officer
600 W. Capitol Avenue
Little Rock, Arkansas 72201

Kenneth W. Starr
Independent Counsel

By:


Timothy J. Mayopoulos
Associate Counsel

Ferlin GOFF, Appellant,
v.
UNITED STATES of America, Appellee.

No. 92-1301.

United States Court of Appeals,
Eighth Circuit.

Submitted May 11, 1992.

Decided May 26, 1992.

A defendant who previously pleaded guilty to a drug charge and firearm charge appealed from an order of the United States District Court for the Eastern District of Arkansas, Stephen M. Reasoner, Chief Judge, denying government's motion for further reduction of sentence. The Court of Appeals held that denial of further reduction for substantial governmental assistance was not an abuse of discretion.

Affirmed.

CRIMINAL LAW ⇨ 996(1.1)

110k996(1.1)

Denial of the government's request for further reduction of sentence based on defendant's postsentencing grand jury testimony was not an abuse of discretion; sentencing court stated that it anticipated defendant's continued cooperation and rewarded him accordingly when it granted a downward departure in imposing original sentence. 18 U.S.C.A. § 924(c)(1); Fed.Rules Cr.Proc.Rule 35(b), 18 U.S.C.A.; U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

*605 Appellant appeared pro se in this appeal.

Terry L. Derden, Little Rock, Ark. (Charles A. Banks and Terry L. Derden, on the brief), for appellee.

Before JOHN R. GIBSON, FAGG, and HANSEN, Circuit Judges.

PER CURIAM.

Ferlin Goff appeals from an order of the district court [FN1] denying a motion filed by the government under Federal Rule of Criminal Procedure 35(b) to reduce Goff's sentence. We

affirm.

FN1. The Honorable Stephen M. Reasoner, Chief Judge, United States District Court for the Eastern District of Arkansas.

Goff previously pleaded guilty to a drug charge and a firearm charge. The court calculated a Guideline sentencing range on the drug offense of 70 to 87 months; the firearm offense carried a mandatory consecutive five-year sentence. See 18 U.S.C. § 924(c)(1). At sentencing in March 1991, the government moved for a downward departure based on Goff's substantial assistance, which the district court granted, sentencing Goff to fifty-seven months imprisonment on the drug offense and four years imprisonment on the firearm offense. Goff did not appeal his sentence. In January 1992, the government moved for a further reduction of Goff's sentence under Rule 35(b), because after sentencing, Goff had appeared before the grand jury to testify in another investigation. The government also reminded the court of a detailed statement Goff had given which was useful. The district court denied the government's motion, stating that when it granted the downward departure in March 1991, it anticipated Goff would continue to cooperate and had rewarded him accordingly.

Rule 35(b) states in part:

The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense....

Fed.R.Crim.P. 35(b) (emphasis added). It lies within the discretion of the district court to decide whether it will grant or deny such a motion. See, e.g., *United States v. Richardson*, 939 F.2d 135, 140 (4th Cir.1991), cert. denied, 502 U.S. 987, 112 S.Ct. 599, 116 L.Ed.2d 623 (1991), 502 U.S. 1061, 112 S.Ct. 942, 117 L.Ed.2d 112 (1992); *United States v. Emanuel*, 734 F.Supp. 877, 878 (S.D.Iowa). We have reviewed the record and find no abuse of discretion here.

Goff also argues the district court and the government breached the plea agreement at sentencing. Those matters are not properly before us.

965 F.2d 604
(Cite as: 965 F.2d 604, *605)

Page 2

Accordingly, we affirm.

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UNITED STATES of America, Appellee,
v.
Terrance GRIFFIN, Appellant,
UNITED STATES of America, Appellee,
v.
Joseph H. DONNELL, Appellant,
UNITED STATES of America, Appellee,
v.
Kevin COKES, Appellant.

Nos. 93-2852, 93-3068 and 93-3069.

United States Court of Appeals,
Eighth Circuit.

Submitted Dec. 14, 1993.

Decided Feb. 28, 1994.

Rehearing Denied in Nos. 93-3068, 93-3069
April 8, 1994.

Defendants entered guilty pleas in the United States District Court for the Western District of Missouri, Dean Whipple, J., to drug conspiracy charges, and they appealed from sentencing. The Court of Appeals, Beam, Circuit Judge, held that district court was not required to grant prosecutor's motions for downward departure for providing substantial assistance and did not abuse its discretion in following magistrate's recommendation that motions be denied absent support for defendant's claim that magistrate judge's report revealed bias against them.

Affirmed.

Bright, Senior Circuit Judge, filed dissenting opinion.

CRIMINAL LAW ⇨ 996(1.1)

110k996(1.1)

District court was not required to grant prosecutor's motions under plea agreement for downward departure for providing substantial assistance and did not abuse its discretion in following magistrate judge's recommendation that motions be denied, absent support for defendants' claim that magistrate judge's report revealed bias against them. Fed.Rules Cr.Proc.Rule 35(b), 18 U.S.C.A.

*270 Counsel who represented the appellant in 2852 was John R. Cullom of Kansas City, MO; in 3068 and 3069, Glenn E. Bradford of Kansas City, MO.

Counsel who represented the appellee was Peter Ossorio of Kansas City, MO.

Before MAGILL, Circuit Judge, BRIGHT, Senior Circuit Judge, and BEAM, Circuit Judge.

BEAM, Circuit Judge.

Terrance Griffin, Kevin Cokes and Joseph Donnell were arrested for conspiracy to distribute cocaine base. All three entered pleas of guilty and cooperated with the FBI and other drug enforcement authorities in investigations of the drug conspiracy. In exchange for this cooperation, the government made 5K1.1 motions for downward departure at the sentencing hearings in all three cases. As a result, Griffin, Cokes and Donnell received sentences significantly below the guideline range and below the statutory ten-year mandatory minimum. The government later filed a motion for correction of sentence pursuant to Rule 35(b) [FN1] and requested a further reduction in the sentences for subsequent, substantial assistance.

FN1. Rule 35(b) states in part:

The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense....

Fed.R.Crim.P. 35(b) (emphasis added).

The same district judge [FN2] who initially sentenced the appellants directed a magistrate judge to conduct hearings and to recommend a disposition for the Rule 35(b) motions. The magistrate judge issued findings of fact and conclusions of law recommending that the Rule 35(b) motions be denied as inappropriate. After an independent review of the record, the district court adopted the magistrate judge's report and denied the motions. Griffin, Cokes, and Donnell appeal contending that the Rule 35(b) motions were an integral part of their plea agreements and that the district court abused its discretion by denying the motions. We affirm.

FN2. The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

The government filed the Rule 35(b) motions, thereby fulfilling any obligations it may have had under the plea agreement. The appellants concede

that the district court was not bound to grant the Rule 35(b) motions. After a hearing, the magistrate judge concluded that the appellants had not provided subsequent, substantial assistance that would warrant further reductions in their sentences. The district court adopted this conclusion. The decision to grant or deny a Rule 35(b) motion is entirely within the discretion of the district court. *Goff v. United States*, 965 F.2d 604 (8th Cir.1992) (per curiam). Absent an abuse of that discretion, [FN3] the appellate courts cannot interfere. We find no evidence that the district court *271 abused its discretion in this case. Accordingly, the decision of the district court is affirmed.

FN3. The appellants allege that the magistrate judge's report revealed bias against them. We read the magistrate judge's report differently. The magistrate judge chastised the government for bringing Rule 35(b) motions without adequate grounds. He rejected the government's contention that the willingness of the appellants to testify against co-conspirators constituted subsequent, substantial assistance. Instead, the magistrate judge concluded that this cooperation was part of the assistance contemplated by the 5K1.1 reduction granted by the district court. He also noted that the Rule 35(b) motion with regard to Griffin was time-barred. We cannot conclude that these findings constitute an abuse of discretion.

While chastising the government, the magistrate judge discussed in detail how he would have managed the plea agreements had he been the Assistant United States Attorney in charge of the case. We are troubled by this digression and by the weight that the magistrate judge seemed to place on an internal Justice Department memo issued by former Attorney General Thornburgh. However, we cannot agree with the appellants' contention that these comments amount to an abuse of discretion. Nothing in the record indicates any bias against these particular defendants, or, indeed, against any defendants. Furthermore, after an independent review of the record, the district court concluded that the 5K1.1 departures contemplated the cooperation that the government now raises as grounds for further reductions in sentence. The district judge who had responsibility for the initial sentencing is clearly in the best position to determine what kinds of cooperation the 5K1.1 departures encompassed.

BRIGHT, Senior Circuit Judge, dissenting.

I dissent.

The facts are undisputed. [FN1]

FN1. The appellee does not contest the facts or the prosecutor's right to move for the reduction in sentence. Appellee's claim of nonappealability fails. *United States v. Evidente*, 894 F.2d 1000, 1003-04 (8th Cir.1990) (determination that judge lacks power to reduce sentence is appealable pursuant to 18 U.S.C. § 3742). See also *Wade v. United States*, 504 U.S. 181, ----, 112 S.Ct. 1840, 1843-44, 118 L.Ed.2d 524 (1992) (constitutional due process issue raised by appellant makes case appealable).

1. The federal prosecutor promised the defendants-appellants that he would make the appropriate motions to reduce the heavy drug sentence each faced if defendants assisted in the prosecution of other members of the drug conspiracy. Immediately, the defendants cooperated; the prosecutor made the necessary motions [FN2] to reduce defendants' sentences and the district court recognized and enforced the prosecutor's promises. [FN3]

FN2. These motions were brought under both U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e).

U.S.S.G. § 5K1.1 provides as follows:

Substantial Assistance to Authorities (Policy Statement)

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

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

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

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

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

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

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

18 U.S.C. § 3553 provides in pertinent part:

(e) Limited authority to impose a sentence below a statutory minimum.--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.

FN3. Below are listed the applicable guideline range and the terms of imprisonment the defendants were actually sentenced:

| | Guideline Range | Sentence Received |
|---------|---|------------------------------|
| Griffin | 135-168 months (11 yrs, 3 mos-14 yrs) | 90 months (7 yrs, 6 mos) |
| Cokes | 235-293 months (19 yrs, 7 mos-24 yrs, 5 mos) | 100 months (8 yrs, 4 mos) |
| Donnell | 151-181 months (12 yrs, 7 mos-15 yrs, 1 mo) | 70 months (5 yrs, 10 mos) |

In each case, the convictions called for a mandatory minimum sentence of no less than ten years imprisonment. The harshness of the sentences under the guidelines rested in principal part on the weight of the crack attributed to each defendant in the conspiracy.

2. The prosecutor further promised the defendants that if each provided further assistance in pending drug investigations, he would move for a second reduction in their sentences. The defendants gave additional assistance for other pending prosecutions. The prosecutor made the appropriate motions but the magistrate judge hearing the case determined, as a matter of fact and law, that the court could not honor the prosecutor's promises. The district court adopted the magistrate judge's findings and conclusions and denied further sentence reductions. This appeal followed.

assistance from these defendants gave the government important new information which benefitted the government in its additional prosecutions.

In my view, the magistrate judge erred and the district court continued the error. I would therefore reverse and remand for reconsideration of the motions.

FN4. The prosecutor relied on a provision of Fed.R.Crim.P. 35(b), reading in pertinent part:

The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. The court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

I.

The prosecutor represented to the magistrate judge that defendants Terrance Griffin *272 and Kevin Cokes provided additional and new assistance more than one year after the defendants had been initially sentenced. [FN4] The prosecutor also represented that under the arrangement made with Joseph Donnell, who assisted in getting Cokes to cooperate, Donnell would benefit from Cokes' further cooperation. Additional assistance from these defendants and others led to the preparation of cases against other drug defendants, who then pleaded guilty. Nevertheless, the prosecutor represented that

The magistrate judge rejected the defendants' claims for a second reduction, asserting that the additional assistance counted for nothing as a matter of law or fact. The magistrate judge's rationale appeared to rest solely on his own personal experience as an Assistant U.S. Attorney, who in that role, had made all deals "up front." In part, the magistrate judge said:

I would suggest, though, that in the future, Mr. Ossorio [Assistant United States Attorney presenting the motion], you might alert your fellow assistant United States attorneys that as was my practice and I know you love to hear this, when I was in that office, I always gave everybody the benefit on the front end, so that it was clear that I

anticipated they would testify and they got the benefit for that testimony at the time the [§ 5K1.1] motion was filed, even though it hadn't been accomplished.

Motion Tr. (11/10/92), at 31 (emphasis added). Further, the magistrate judge claimed that the prosecutor's arrangement violated an Attorney General policy.

We reject this reasoning, as Fed.R.Crim.P. 35(b) contains no limitation excluding an additional reduction of sentence when that defendant has already received a benefit for prior substantial assistance under § 5K1.1 or 18 U.S.C. § 3553(e).

Moreover, the asserted violation of the Attorney General's policy appears to be irrelevant and probably wrong. The policy violation of the prosecutor, as here asserted by the magistrate judge, may be a concern of the Department of Justice but is generally not binding on a judge who is limited to matters of fact and law in making sentencing decisions. Cf. *United States v. Lorenzo*, 995 F.2d 1448, 1453 (9th Cir.1993) (U.S. Attorney's Manual does not create any substantive or procedural right enforceable at law). Moreover, Attorney General Thornburgh's policy in part reads:

The most important departure is for substantial assistance by a defendant in the investigation or prosecution of another person. Section 5K1.1 provides that, upon motion by the government, a court may depart from the guidelines and may impose a non-guideline sentence. This departure provides federal prosecutors with an enormous range of options in the course of plea negotiations. Although this departure, like all others, requires court approval, prosecutors who bargain in good faith and who state reasons for recommending a departure should find that judges are receptive to their recommendations.

App. at 55-56.

Thus, the policy gives the prosecutor broad discretion in this area. Here, the prosecutor clearly acted in "good faith" and stated reasons for recommending departure. Thus, the alleged "policy" violation appears groundless.

The record indicates that the magistrate judge confused his function as a judge with his prior duties as a federal prosecutor. [FN5] This confusion led to his error in failing to *273 consider defendants'

additional assistance before rejecting their pending motions. The district court adopted the magistrate judge's views and persisted in the error, as indicated above.

FN5. The following colloquy at the hearing on the motions is illustrative:

THE COURT: ... If there was a contemplation that [sic] [defendants pleading guilty under an agreement] would testify, they should've gotten the benefit from that testimony on the front end. That's what they were getting, that's what this whole case was about. The 35(b) motion has to do with if somebody is sitting in jail and suddenly they decide, well, I'm going to tell you about General Noriega and all the stuff that was going on in Panama, and I'm going to tell you before the grand jury, suddenly, you know, that's new information. That's not what we have here, though. I mean, not substantially, we don't have it here. This is just--

MR. CULLOM [Griffin's attorney]: Well--

THE COURT: This is just a poor way of doing business. It just is.

MR. CULLOM: With all due respect, I disagree with you on that. I think they have provided substantially [sic] assistance subsequent to the sentence.

THE COURT: Well--

MR. CULLOM: Those two convictions are proof of it.

THE COURT: I think it's still--the jury is still out, though, whether that information was made before they had their first downward departure.

MR. CULLOM: But their testimony hadn't been--

THE COURT: That doesn't matter though. I mean, that doesn't matter. Suppose a trial judge is taking these 5(k) motions [referring to U.S.S.G. § 5K1.1] and reducing the sentence, he doesn't think--that trial judge isn't thinking, John, well, I'm just going to give them the benefit of this information and reduce it as much as they were reduced in this case. And then if they come in and testify, I'm going to give them a further--there's no record of that here.

....

THE COURT: Right. I think I get--I think I know what everybody was thinking here. The problem is I don't know that that's the appropriate tact to take, John. That's the whole issue. Does that rise to the level of subsequent substantial assistance? I don't think it does. And I haven't seen any case law that supports that. The fact that there--I mean, nobody gets in this business and debriefs people and gets them pled and gets them in front of a judge and sentenced and find--does a downward departure, and then says but, you know, but we're not contemplating they're going to testify about

anything. I mean, that's absurd. That's absurd. No one would ever do that, see. But clearly, that apparently was what the U.S. attorney was saying, I think. I think that's what he was saying, that if you guys come in and you puke and you tell us everything you know, and I'm going to file 5(k) motion. And then if you go and you continue and you come to trial and you testify at trial, I'm going to file another motion under 35(b).

That is wrong. I don't think that's what the law is. Motion Tr. at 32-33, 35.

Accordingly, I would reverse and remand for reconsideration of the motions for reduction of the sentences. I would suggest a referral, if any, by the district judge, be made to a different magistrate judge.

II.
THE MYTH OF CONSISTENCY IN

Griffin: 135 months less 45 months = 33.3%
(11 yrs, 3 mos. less 3 yrs, 9 mos.)
Cokes: 235 months less 135 months = 57.4%
(19 yrs, 7 mos. less 11 yrs, 3 mos.)
Donnell: 151 months less 81 months = 53.6%
(12 yrs, 7 mos. less 6 yrs, 9 mos.)

See also ante, note 3.

In this case these defendants and others had something to sell--information on their former cohorts. [FN7] For that each became entitled to a motion for sentence reduction and *274 initially received sentences well below the guidelines and the mandatory minimums. Further, as disclosed by the letter quoted in footnote 7, some of the conspiracy members had obtained additional sentence reductions.

FN7. We excerpt a portion of a letter written by the assistant prosecutor Peter Ossorio to the magistrate judge:

Dear [magistrate judge]:

The plea tendered by the last defendant, Ronald E. Whitley, in the case of United States of America v. Anthony S. Rashid, et al, No. 90-171-01-CR- W-5, permits bringing to a close a series of prosecutions in this district involving a number of defendants in other cases who agreed to provide substantial assistance in the Rashid investigation and trial. To assist the court in reaching appropriate decisions

SENTENCES.

I take this opportunity to comment on the obvious unfairness of mandatory minimums and guideline sentencing. First, this case graphically punctures a myth that mandatory minimums and guideline sentences in drug cases result in equal treatment for offenders. The promise under federal law that all drug dealers and other drug offenders shall serve long prison terms as a strong deterrent in the so-called war on drugs is also false. As already observed, the defendants received heavy slashes in the guideline mandatory sentences through motions made by the prosecutor, accepted by the sentencing judge. [FN6]

FN6. Compared to the applicable minimum guideline sentence, the defendants received the following downward departures, by percentage:

regarding the pending cases, the following updated information is provided:

.... [Listing eleven defendants prosecuted in the drug conspiracy, including appellants, who received very substantial reductions in sentences and several who obtained second reductions in sentences for continuing assistance.]

All defendants made statements to authorities about their knowledge of the drug trafficking of Anthony S. Rashid and later, Frank H. Fore and Ronald E. Whitley....

App. at 9-10.

The letter specifically commented on the assistance rendered by defendants as follows:

Griffin: "(Substantial witness regarding Whitley bringing 'crack' to Kevin Cokes; corroborates much of Cokes' information)." Id. at 11.

Cokes: "(One of four most important witnesses regarding Whitley. Second most important witness in establishing the scale of the multi-kilogram 'crack' traffic between Houston and Kansas City in 1990-91)." Id.

Donnell: "(Useful information linking Terrance Griffin, Kevin Cokes and Ronald Whitley tending to corroborate Griffin and Cokes)." Id.

I do not criticize this policy. Its rationales include "giving the prosecutor a powerful law enforcement tool, ... [and] providing a just reward for a cooperative defendant." *United States v. Kelley*, 956 F.2d 748, 755 (8th Cir.1992). I must observe, however, that prosecutors, not federal judges, possess this awesome power to initiate reductions of prison sentences below mandatory minimums and below guideline ranges.

Some of the defendants in this case may or may not be the most culpable in the conspiracy. I do suggest, however, that at least one defendant bears heavy responsibility for the previously flourishing crack conspiracy. Some sense of fairness, compassion and honesty in sentencing compels the conclusion that other drug offenders may be deserving of a break, particularly first-time offenders, those low on the totem pole of the drug hierarchy with little culpability, people who have no information to sell, and other minor players who are fit subjects for rehabilitation because they have learned the lesson of their wrongful ways. These are persons who can be saved from years and years of imprisonment which benefits neither society nor the offender.

| Offense | Time served |
|------------------------|-------------|
| Drugs | 60 months |
| Kidnapping | 57 months |
| Robbery | 51 months |
| Arson | 36 months |
| Racketeering/Extortion | 36 months |
| Sexual Abuse | 27 months |
| Assault | 24 months |
| Firearms | 15 months |
| Manslaughter | 12 months |

Dennis Cauchon, *Sentencing study treads cautiously*, U.S.A. Today, Feb. 7, 1994, at 4A.

2. Statistics available from the Sentencing Commission on drug offenses indicate that of the 16,684 offenders sentenced in fiscal year 1992, a great percentage (41.3%) and a total of 6,897 persons had zero criminal *275 history points, used no weapon, and played a non-aggravating role in the offense. [FN9]

FN9. United States Sentencing Commission,

What kind of a criminal justice system rewards the drug kingpin or near-kingpin who informs on all the criminal colleagues he or she has recruited, but sends to prison for years and years the least knowledgeable or culpable conspirator, one who knows very little about the conspiracy and is without information for the prosecutors?

Imposing heavy sentences on first offenders who play only a minor role in an offense and who do not use any weapon wastes lives. The statistics are striking:

1. Low level, non-violent drug offenders account for 21.2% of the federal prison population. These small-time drug offenders often serve longer prison sentences than robbers, rapists and kidnappers. [FN8]

FN8. A news story appearing in U.S.A. Today reported on the Justice Department's report on mandatory minimum sentences (relating to 16,316 prisoners). Data from a table accompanying this story is reproduced below.

Crime and punishment

Non-violent drug offenders account for 21.2% of the federal prison population. Punishments for first-time drug offenses, compared with other offenses:

Defendants Sentenced under the Federal Sentencing Guidelines for Drug Offenses--Fiscal Year 1992.

3. These same statistics show that of those sentenced under the guidelines subject to mandatory minimum statutes, 34.7% of those sentenced--3,198 persons--had no criminal history points, used no weapon and played no aggravating role in the crime. We know that such offenders received sentences no less than five years, or no less than ten years, or no less than fifteen years and some no less than twenty years imprisonment, as called for by whatever

mandatory minimum sentences applied in the case (based substantially on weight of drugs).

Our sentencing opinions have frequently recited the irrationality of the guidelines in drug sentences. New data demonstrate the frequency and regularity of lengthy sentences for non-violent crimes committed by first-time drug offenders.

These heavy sentences seem not to have served as a deterrent. [FN10] Again, this observer comments: the sentencing system is irrational; it "cries out for change.". See *United States v. Smith*, 997 F.2d 396, 399 (8th Cir.1993) (Bright, J., dissenting)

(citing and quoting Marc Miller & Daniel J. Freed, *Suggestions for the President and the 103rd Congress on the Guideline Sentencing System*, 5 *Fed.Sent.R.* 187 (Jan./Feb.1993)).

FN10. Recently, Philip B. Heymann, formerly a very high official in the Justice Department (second in command), as reported by the *New York Times*, "dismissed mandatory minimum prison sentences for many low-level drug offenders as almost useless in deterring crime." David Johnston, *Ex- Official Attacks Crime Bill Backed by Clinton*, *N.Y. Times*, Feb. 16, 1994, at A1.

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