

**PETITION FOR A REHEARING
AND SUGGESTION FOR REHEARING
EN BANC**

Appellant-petitioner, LANCELOTTE KAYE, petitions this Court for a rehearing of a decision by a three judge panel of this Court in United States of America v. Lancelotte Kaye, ____ F.3d ____, No. 889 (2d Cir., Sept. 5, 1995), attached, which affirmed by split decision, the sentence imposed by United States District Court for the Eastern District of New York (Jacob A. Mishler, Judge). The defendant, upon his plea of guilty, was sentenced to one (1) year of imprisonment, three (3) years supervised release and a \$50.00 special assessment. Execution of the sentence was stayed during the pendency of this appeal.

Prior to sentence, appellant made a motion for downward departure under USSG 5K2.0 based upon his substantial assistance to state and local law enforcement agencies which led to the arrest and conviction of two individuals for the sale of three pounds of marijuana to an undercover officer. Appellant had introduced the undercover to said individuals, participated in the "buy" while wearing a wire at the officer's request, all at considerable risk to himself. Defendant's successful cooperation was documented by the Office of the District Attorney of Nassau County, and later confirmed by the AUSA. Additionally, appellant's request for downward departure,

set forth his unblemished prior record at age 43; a long history of stable employment as a structural draftsman, prior to the downturn in the U.S. economy which resulted in the loss of his job, soaring financial problems, which led to the eviction of himself, his wife and daughter which rendered them virtually homeless; appellant's ill health, he suffers from diabetes, asthma and hypertension.

The appeal particularly focused on the appellant's successful cooperation with state and local law enforcement, and the District Court's refusal to grant a downward departure under USSG 5K2.0, in the belief it did not have the power to do so, without a 5K1.1 motion being made by the Government.

Prior to sentence the AUSA had provided a letter to the sentencing court acknowledging:

"that Kaye had cooperated in Nassau County... and that Kaye also attempted to cooperate federally. Unfortunately, the fact remains that the effort was ultimately unsuccessful. As such, the government cannot certify in connection with the federal prosecution that, 'the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense ...'".

The majority opinion written by Circuit Judge Ralph K. Winter, and concurred in by Circuit Judge Ellsworth A. Van Graafeiland held the view that

"the effect of cooperation with local authorities is governed by (USSG) Section 5K1.1."

Section 5K1.1 provides the court may grant a downward

departure from the Guidelines "upon motion of the government stating that the defendant has provided substantial assistance in an investigation or prosecution of another person who has committed an offense."

The majority held:

"The plain language of the section encompasses all law enforcement authorities whatever governmental unit they represent, and nothing in the Commentary even remotely suggests that the all inclusive language was not deliberate. Therefore, a motion by the government under Section 5K1.1 is necessary before a Court may depart from the guidelines based on assistance to state or local, as well as federal authorities."

A perfect Catch 22. The government would not provide a 5K1.1 letter despite its acknowledgment that appellant-petitioner provided substantial assistance to local authorities, because the AUSA could not "certify in connection with the federal prosecution that the defendant provided substantial assistance ..." In effect, the government guided by the Guidelines, agreed that substantial assistance to state and local authorities was not within their purview. On the other hand, the majority assumes the U.S. Attorney's Office had the power but not the obligation to provide a 5K1.1 letter.

The minority opinion written by Lewis A Kaplan, U.S. District Judge, sitting by designation, holds the view that the language of Section 5K1.1

"is extremely broad and most assuredly could embrace assistance to state and local authorities. Yet both the

provenance of the language and the different considerations relevant to departures based on assistance to federal and to State and local authorities respectively, suggest the breadth of language is misleading and that the (Sentencing) Commission did not adequately consider the matter.

"To begin with, the broad language on which the majority relies was appropriated in haec verba in all material respects from 18 U.S.C. Sec. 3553(e), which gives the courts authority, upon motion of the government, to impose a sentence below a statutorily prescribed minimum when a defendant provides 'substantial assistance in the investigation or prosecution of another person who has committed an offense.' Not only was the language simply adopted, without any evidence of independent consideration by the Commission of this matter, but there is nothing in the legislative history to suggest that Congress had considered or resolved the question as it relates to departures from mandatory minima. Hence, it is doubtful that the Commission properly may be regarded as having adopted a Congressional judgment on the issue."

Appellant strenuously urges that Section 3553(e) and USSG Sec. 5K1.1 are not "all inclusive". To the contrary, if the Congress or the Sentencing Commission intended that result, they would have provided upon the government's "motion, a defendant's substantial assistance to (Federal, State or local authorities) in the investigation or prosecution of any other person, the court may depart from the guidelines." The fact is that the underlined phrase was omitted. Moreover, it is a phrase of common usage in congressional legislation.

As a matter of fact, in the Legislative History of the Criminal Technical Amendments Act of 1986, which contained the enactment adopting 18 U.S.C. Sec. 3553, there was also

enacted "Section 41(d) (which) amends 18 U.S.C. 4210(b)(2) which deals with jurisdiction of the Parole Commission over a parolee. The Parole Commission is authorized by 18 U.S.C. 4210(b)(2) to determine to what extent a term of parole runs concurrently with any time of imprisonment, for a 'Federal, State or local crime' committed while on parole." U.S. Code Congressional and Administrative News, Vol. 6, 99th Congress, 2nd Session, 1986, pages 6142, 6152.

The phrase "Federal, State or local" is language found repeatedly not only in Title 18 but in the USSG as well.

The following is a comprehensive survey of the Title 18 statutes and Sentencing Commission Guidelines that used the phrase "Federal, State or local" or words of similar import referring to amongst other things "fugitives", "agencies", "officials", "felony offenses", "offenses", "local offenses", "crime", "criminal activity", etc.

1. 18 USCS Sec. 112 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I., CRIMES, CHAPTER 7, ASSAULT, Sec. 112 (f). Protection of foreign officials, official guests, and internationally protected persons, United States Code Service.

2. 18 USCS Sec. 241 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 13. CIVIL RIGHTS, Sec. 241. Conspiracy against rights, United States Code Service.

3. 18 USCS Sec. 351 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 18. CONGRESSIONAL, CABINET, AND SUPREME COURT ASSASSINATION, KIDNAPPING, AND ASSAULT, Sec. 351 (f). Congressional, Cabinet, and Supreme Court assassination, kidnapping, and assault; penalties, United States Code Service.

4. 18 USCS Sec. 601 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 29. ELECTIONS

AND POLITICAL ACTIVITIES, Sec. 601 (a) (1), (b) (1) (3). Deprivation of employment or other benefit for political contribution, United States Code Service.

5. 18 USCS Sec. 921 (1995), TITLE 18. CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 44. FIREARMS, Sec. 921 (2). Definitions, United States Code Service.

6. 18 USCS Sec. 922 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 44. FIREARMS, Sec. 922 (2) (A), (3) (c) (1); (j). Unlawful acts, United States Code Service.

7. 18 USCS Sec. 923 (1995), TITLE 18. CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 44. FIREARMS, Sec. 923 (g) (1) (8) (4) (j). Licensing, United States Code Service.

8. 18 USCS Sec. 924 (1995), TITLE 18. CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 44. FIREARMS, Sec. 924 (e) (2) (ii). Penalties, United States Code Service.

9. 18 USCS Sec. 925 (1995), TITLE 18. CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 44. FIREARMS, Thus, had the Congress intended that the federal prosecutor would also determine whether a defendant had provided substantial assistance to State or local authorities, it would simply have added such language which is routinely a part of congressional legislation. Sec. 925 (a) (1). Exceptions: Relief from disabilities, United States Code Service.

10. 18 USCS Sec. 981 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 46. FORFEITURE, Sec. 981 (e) (2), (g). Civil forfeiture, United States Code Service.

11. 18 USCS Sec. 1028 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 47. FRAUD AND FALSE STATEMENTS, Sec. 1028 (d) (1) (4) (5). Fraud and related activity in connection with identification documents, United States Code Service.

12. 18 USCS Sec. 1084 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 51. TRANSMISSION OF WAGERING INFORMATION, Sec. 1084 (b) (c) (d) (e). United States Code Service.

13. 18 USCS Sec. 1116 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 51. HOMICIDE, Sec. 1116 (d). Murder or manslaughter of foreign

officials, official guests, or internationally protected persons, United States Code Service.

14. 18 USCS Sec. 1201 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 55. KIDNAPPING, Sec. 1201 (f). Kidnapping, United States Code Service.

15. 18 USCS Sec. 1751 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 84. PRESIDENTIAL AND PRESIDENTIAL STAFF ASSASSINATION, KIDNAPPING, AND ASSAULT, Sec. 1751 (g). Presidential and Presidential staff assassination, kidnapping, and assault; penalties, United States Code Service.

16. 18 USCS Sec. 1761 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 85. PRISON-MADE GOODS, Sec. 1761 (1) (A), (2). Transportation or importation, United States Code Service.

17. 18 USCS Sec. 1955 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 95. RACKETEERING, Sec. 1955 (b) (1) (i), (3). Prohibition of illegal gambling businesses, United States Code Service.

18. 18 USCS Sec. 2254 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 110. SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN, Sec. 2254 (e) (3). Civil forfeiture, United States Code Service.

19. 18 USCS Sec. 2721 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART I. CRIMES, CHAPTER 123. PROHIBITION ON RELEASE AND USE OF CERTAIN PERSONAL INFORMATION FROM STATE MOTOR VEHICLE RECORDS, Sec. 2721 (a) (b) (1). Prohibition on release and use of certain personal information from State motor vehicle records, United States Code Service.

20. 18 USCS Sec. 3059 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART II. CRIMINAL PROCEDURE, CHAPTER 203. ARREST AND COMMITMENT, Sec. 3059 (2) (A). Rewards and appropriations therefor, United States Code Service.

21. 18 USCS 3142 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART II. CRIMINAL PROCEDURE, CHAPTER 207. RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS, Sec. 3142 (b), (c) (1) (A). Release or detention of a defendant pending trial, United States Code Service.

22. 28 USCS Sec. 3148 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART II. CRIMINAL PROCEDURE, CHAPTER 207. RELEASE AND DETENTION PENDING JUDICIAL PROCEEDINGS,

Sec. 3148 (b). Sanctions for violation of a release condition, United States Code Service.

23. 18 USCS Sec. 3563 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART II. CRIMINAL PROCEDURE, CHAPTER 227. SENTENCES, SUBCHAPTER B, PROBATION, Sec. 3563 (a) (1). Conditions of probation, United States Code Service.

24. 18 USCS Sec. 3564 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART II. CRIMINAL PROCEDURE, CHAPTER 227. SENTENCES, SUBCHAPTER B, PROBATION, Sec. 3564 (b). Running of a term of probation, United States Code Service.

25. 18 USCS Sec. 3583 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART II. CRIMINAL PROCEDURE, CHAPTER 227. SENTENCES, SUBCHAPTER D. IMPRISONMENT, Sec. 3583 (d). Inclusion of a term of supervised release after imprisonment, United States Code Service.

26. 18 USCS Sec. 3624 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART II. CRIMINAL PROCEDURE, CHAPTER 229. POSTSENTENCE ADMINISTRATION, SUBCHAPTER C. IMPRISONMENT, Sec. 3624 (e). Release of a prisoner, United States Code Service.

27. 18 USCS Sec. 3626 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART II. CRIMINAL PROCEDURE, CHAPTER 229. POSTSENTENCE ADMINISTRATION, SUBCHAPTER C. IMPRISONMENT, Sec. 3626 (b) (1). Appropriate remedies with respect to prison crowding, United States Code Service.

28. 18 USCS Sec. 4013 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART III. PRISONS AND PRISONERS, CHAPTER 301. GENERAL PROVISIONS, Sec. 4013 (a) (3) (4), (b) (1) (B). Support of United States prisoners in non-Federal institutions, United States Code Service.

29. 18 USCS Sec. 4204 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART III. PRISONS AND PRISONERS, CHAPTER 311. PAROLE (REPEALED), Sec. 4204 (b) (7). Powers and duties of the Chairman (Repealed), but see other provisions note for continuational, United States Code Service.

30. 18 USCS Sec. 4206 (1995), TITLE 18 CRIMES AND CRIMINAL PROCEDURE, PART III. PRISONS AND PRISONERS, CHAPTER 311. PAROLE (REPEALED), Sec. 4206 (d). Parole determination criteria (Repealed, but see other provisions note for continuation), United States Code Service.

31. 18 USCS Sec. 4209 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART III. PRISONS AND PRISONERS,

CHAPTER 311. PAROLE (REPEALED), Sec. 4209 (a), Conditions of parole (Repealed, but see other provisions note for continuation), United States Code Service.

32. 18 USCS Sec. 4210 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART III. PRISONS AND PRISONERS, CHAPTER 311. PAROLE (REPEALED), Sec. 4210 (b) (2), (d). Jurisdiction of Commission (Repealed, but see other provisions note for continuation), United States Code Service.

33. 18 USCS Sec. 4214 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART III. PRISONS AND PRISONERS, CHAPTER 311. PAROLE (REPEALED), Sec. 4214 (b) (1), (d) (5). Revocation of parole (Repealed, but see other provisions note for continuation), United States Code Service.

34. 18 USCS Sec. 4351 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART III. PRISONS AND PRISONERS, CHAPTER 319. NATIONAL INSTITUTE OF CORRECTIONS, (Sec. 4351 (c) (1). Establishment; Advisory Board; appointment of members; compensation; officers; committees; delegation of powers; Director, appointment and powers), United States Code Service.

35. 18 USCS Sec. 4352 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, PART III. PRISONS AND PRISONERS, CHAPTER 319. NATIONAL INSTITUTE OF CORRECTIONS, (Sec. 4352 (a) (1) (3) (4) (6) (8) (12). Authority of Institute; time; records of recipients; access; scope of section), United States Code Service.

36. 18 USCS Appx Sec. 2A4.1 (1996), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER TWO. OFFENSE CONDUCT, PART A. OFFENSES AGAINST THE PERSON, 4. KIDNAPPING, ABDUCTION, OR UNLAWFUL RESTRAINT, Sec. 2A4.1. Kidnapping, Abduction, Unlawful Restraint, United States Code Service.

37. 18 USCS Appx Sec. 2B4.1 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER TWO. OFFENSE CONDUCT, PART B. OFFENSES INVOLVING PROPERTY. 4. COMMERCIAL BRIBERY AND KICKBACKS, Sec. 2B4.1. Bribery in Procurement of Bank Loan and Other Commercial Bribery, United States Code Service.

38. 18 USCS Appx Sec. 2C1.7 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER TWO.

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39. 18 USCS Appx Sec. 2F1.1 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER TWO. OFFENSE CONDUCT, PART F. OFFENSES INVOLVING FRAUD OR DECEIT, Sec. 2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States, United States Code Service.

40. 18 USCS Appx Sec. 2H1.1 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER TWO. OFFENSE CONDUCT, PART H. OFFENSES INVOLVING INDIVIDUAL RIGHTS, 1. CIVIL RIGHTS, Sec. 2H1.1. Conspiracy to Interfere with Civil Rights; Going in Disguise to Deprive of Rights, United States Code Service.

41. 18 USCS appx Sec. 2J1.6 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER TWO. OFFENSE CONDUCT, PART J. OFFENSES INVOLVING THE ADMINISTRATION OF JUSTICE, Sec. 2J1.6. Failure to Appear by Defendant, United States Code Service.

42. 18 USCS Appx Sec. 2K1.3 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER TWO. OFFENSE CONDUCT, PART K. OFFENSES INVOLVING PUBLIC SAFETY, 1. EXPLOSIVES AND ARSON, Sec. 2K1.3. Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials, United States Code Service.

43. 18 USCS Appx Sec. 2K2.1 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER TWO. OFFENSE CONDUCT, PART K. OFFENSES INVOLVING PUBLIC SAFETY, 2. FIREARMS, Sec. 2K2.1. Unlawful Receipt Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition, United States Code Service.

44. 18 USCS appx Sec. 2P1.1 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER TWO. OFFENSE CONDUCT, PART P. OFFENSES INVOLVING PRISONS AND

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45. 18 USCS appx Sec. 2T1.1 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER TWO. OFFENSE CONDUCT, PART T. OFFENSES INVOLVING TAXATION, 1. INCOME TAXES, EMPLOYMENT TAXES, ESTATE TAXES, GIFT TAXES, AND EXCISE TAXES (OTHER THAN ALCOHOL, TOBACCO, AND CUSTOMS TAXES), Sec. 2T1.1. Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents, United States Code Service.

46. 18 USCS Appx Sec. 4A1.2 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER FOUR. CRIMINAL HISTORY AND CRIMINAL LIVELIHOOD. PART A. CRIMINAL HISTORY, Sec. 4A1.2. Definitions and Instructions for Computing Criminal History, United States Code Service.

47. 18 USCS Appx Sec. 5B1.3 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER FIVE. DETERMINING THE SENTENCE, PART B. PROBATION, Sec. 5B1.3. conditions of Probation, United States Code Service.

48. 18 USCS Appx Sec. 5D1.3 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER FIVE. DETERMINING THE SENTENCE, PART D. SUPERVISED RELEASE, Sec. 5D1.3. Conditions of Supervised Release, United States Code Service.

49. 18 USCS Appx Sec. 7B1.1 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER SEVEN. VIOLATIONS OF PROBATION AND SUPERVISED RELEASE, PART B. PROBATION AND SUPERVISED RELEASE VIOLATIONS, Sec. 7B1.1. Classification of Violations (Policy Statement), United States Code Service.

50. 18 USCS Appx Sec. 8D1.3 (1995), TITLE 18, CRIMES AND CRIMINAL PROCEDURE, SENTENCING GUIDELINES FOR THE UNITED STATES COURTS. 18 USCS APPENDIX, CHAPTER EIGHT. SENTENCING OF ORGANIZATIONS, PART D. ORGANIZATIONAL PROBATION, Sec. 8D1.3 Conditions of Probation - Organizations, United States Code Service.

In addition to these specific pieces of legislation adopted by the Congress, the writer is reliably informed

that there are 988 enactments found in the United States Code, that use the phrase "Federal, State or local", to define the extent and scope of the particular legislation.

Thus, had the Congress intended that the federal prosecutor would also determine whether a defendant had provided substantial assistance to State or local authorities, it would simply have added such language to Sec. 3553(e) and 5K1.1 which is routinely a part of congressional legislation.

Appellant submits the minority view is in fact the correct holding. Firstly, the issue at hand is a matter of statutory construction affecting appellant's rights in a criminal proceeding. Thus, appellant is entitled to have a criminal statute strictly interpreted in his favor where substantial rights are involved. Smith v. Alabama, 360 U.S.1, 1959; U.S. v. Resnick, 299 U.S. 207, 1936; U.S. v. Berger, 338 F2d 485 (2nd Cir., 1964).

18 U.S.C. Sec. 3553(e) and USSG 5K.1 have virtually identical language:

"Upon motion of the government stating 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."

No where in the statute or the guidelines is there any reference to assistance to "State or local" authorities. appellant contends that the omission of any reference to assistance to State or local authorities is significant and

meaningful, and the absence of such language supports appellant's contention that USSG Sec. 5K2.0 is applicable to appellant's case, as his cooperation with State or local authorities was a "mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."

Judge Kaplan's view that there seems to be little rational basis for assuming the federal prosecutor to be in a better position to assess whether a defendant has rendered substantial assistance to State and local authorities, rather than the sentencing court, is compelling, and supports the inference that neither Congress or the Sentencing Commission intended that a federal prosecutor be the one to assess the value and worth of a defendant's cooperation with State and local authorities.

In the instant case, the government virtually conceded such jurisdiction to the court at the sentencing hearing only to retreat from that position on appeal. However, reliance by both sides on USSG 5K2.0 for a downward departure, based on the unusual facts of the case, make it evident that the language of 5K1.1 is not as all-encompassing as supposed.

The lack of the all-inclusive "Federal, State or local" language in either 18 U.S.C. Sec. 3553(e) or USSG

5K1.1 and the division within the three judge panel, comports with a need for a rehearing; and a suggestion for a rehearing en banc.

Dated: October 18, 1995

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