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Defendant Cooperation and Electronic Surveillance as Substitutes in Criminal Prosecutions

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Abstract

A long-standing practice in the criminal justice system is that defendants trade information about criminal confederates in exchange for leniency at sentencing. In federal courts, these trades were often the primary means through which defendants received sentencing reductions under the mandatory sentencing guidelines. Federal prosecutors' exclusive control over the decision to grant this leniency and the wide variation across districts in the frequency with which defendants received it provoked criticism and calls for reform. This criticism fails to consider that a defendant's disclosures are only one possible source of information about large conspiracies. Electronic surveillance is an alternative source of evidence in prosecuting conspiracies. The paper tests this prediction using a repeated cross-section of 90 judicial districts over ten years. The results show that the use of wiretaps correlates negatively with sentencing reductions for cooperation. The estimates suggest that reforms which ameliorate this sentencing disparity may encourage substitution to electronic surveillance.

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1. Introduction

A central purpose of the Federal Sentencing Guidelines was the elimination of unwarranted disparities in sentencing (Stith and Cabranes 1998). A large body of evidence shows that large sentencing disparities remain under the Guidelines. One of the most prominent of the post-Guidelines disparities is the variation across districts in the use of downward departures for substantial assistance under § 5K1.1 (Maxfield and Kramer 1998). The extension of leniency to defendants who provide information on their criminal co-conspirators was an ancient practice well before the establishment of the Guidelines (Hughes 1992, Richman 1995). But the wide disparities across districts in substantial assistance departures have led to criticisms of how the Guidelines distribute this leniency.

The criticisms are numerous. The pattern of different sentences for defendants who are identical except for their geographic location suggests that arbitrary criteria influence sentencing decisions. When the only route to a sentencing reduction is to testify against another offender, defendants are tempted to commit perjury. Cooperating defendants may be targets of retribution from implicated offenders. The practice exacerbates the "cooperation paradox" in which a kingpin with extensive knowledge about his criminal organization receives a more lenient sentence than less well informed foot soldiers. An excessive reliance on substantial assistance, particularly in drug cases, has a corrosive effect on the communities most affected by drug trafficking and contributes to an unwillingness to cooperate with police and even to calls to "stop snitching."

Critics of § 5K1.1 departures often propose reforming the manner in which courts allocate this leniency. Most commonly, they call for giving judges more control in deciding when a defendant's cooperation is sufficient to warrant leniency. While the diagnosis of the ills of substantial assistance departures is undoubtedly correct, critics often fail to consider important side effects of their proposed cures. Defendants who "flip" or cooperate with the government by giving testimony against co-conspirators are one of several sources of information about large criminal enterprises. Prosecutors may alternatively gather this information by conducting electronic surveillance of suspected participants in a criminal organization.

[Briefly discuss: (1) how testimony of co-conspirator differs from information gathered from surveillance; (2) how the processes of gathering the information differ and hence how the cost to prosecutors differs; (3) discuss role of confidential informants, especially in establishing probable cause to conduct wiretap and as least expensive in terms of prosecutorial time, and that C-I's are not measured here; and (4) yet, flipped co-conspirators and wiretaps are the two main sources of evidence used to prosecute large, "multiple-defendant conspiracies" (as prosecutors call them, although this terminology is redundant).]

The paper tests this prediction by examining data from 90 judicial districts over ten years. The results show that when the data are pooled, wiretaps and substantial assistance do not correlate. This pattern is consistent with federal prosecutors prioritizing different offenses for prosecution and using a variety of resources in pursuing these priorities. But when the district fixed effects are included – that is, when the patterns *within* each district are examined – a negative correlation between the use of wiretaps and the frequency of departures for substantial assistance emerges. This result is consistent

with the hypothesis that electronic surveillance and defendant cooperation are substitutes. When prosecutors obtain substantial assistance from defendants and thus request the court grant more downward departures, they are less likely to conduct wiretap surveillance. The correlation is robust to controlling for a variety of other influences.

Overall, the results establish a connection between two aspects of the criminal justice system that are not typically seen as related. Wiretaps are usually thought of as an investigative tool employed prior to prosecution and implicating the Fourth Amendment. Substantial assistance is commonly considered a sentencing matter that arises after a plea and involving the Sixth Amendment. But when viewed from the perspective of the market for information about large criminal conspiracies, electronic surveillance and defendant cooperation are plausibly substitutes. Both are inputs into the prosecutor's production function.

The results speak to several literatures. First, the results provide further empirical confirmation of the wide discretion that federal prosecutors exercise. The wide variation across districts in the use of electronic surveillance and substantial assistance is consistent with prosecutors having discretion to choose both the types of offenses they will pursue and the inputs they use in pursuing them. Also, the substitution of wiretaps and substantial assistance is consistent with latitude to choose the inputs used in prosecuting large conspiracies.

Second, the results suggest that reforms of § 5K1.1 which restore to judges the authority to determine when cooperation merits leniency may influence how prosecutors investigate large conspiracies. When prosecutors cannot withhold leniency, their leverage in extracting cooperation is reduced. Defendants may provide partial cooperation and hope that the sentencing judge finds it warrants leniency. If the partial disclosures are less effective in obtaining convictions or if they must be supplemented with additional evidence, prosecutors may rely more heavily on electronic surveillance. The additional intrusions into privacy are a potential consequence that should be weighed in considering how § 5K1.1 should be reformed.

Third and more broadly, the evidence suggests a tension may exist in the constitutional protections of criminal procedure. The estimates detect no impact of *Booker* in the use of either substantial assistance or wiretaps. But the length of the post-*Booker* period studied is relatively short, and courts have not yet resolved the full implications of *Booker* for § 5K1.1 departures. The results raise the possibility that prosecutors and police respond to procedural protections by seeking less regulated avenues of obtaining the same end. If the courts provide greater Sixth Amendment protections, the response of prosecutors and police may place pressure on Fourth Amendment rights, and vice versa.

2. Legal and Institutional Background

A. Government-sponsored Departures for Substantial Assistance

[Discuss § 5K1.1 departures: (1) the criteria for them; (2) that they must be made on a motion for the government, and absent that motion, the judge cannot depart downward to reward the defendant's cooperation; (3) geographic variation in their use; (4) post-*Booker* issues including the unresolved question whether a judge may make a downward "variance" for cooperation in absence of the government's motion for substantial assistance.]

B. The Process Governing Applications for Electronic Surveillance

[The authorization process in the DOJ is stringent. After this vetting, the probability that a judge rejects a wiretap application for lacking probable cause or necessity is essentially zero.

The process of applying for a wiretap and conducting electronic surveillance is costly. Arguably, it requires some specialized skills. Wiretaps are also costly to operate. Elaborate.]

C. Predictions

The central prediction is that where downward departures for assistance are used more often wiretaps should be used less often.

[Add discussion of: (1) how confidential informants are used to establish probable cause; (2) how the quality of the evidence from cooperators and wiretaps differs, and hence, they are imperfect substitutes.]

3. Data

The source of the data on wiretaps is the Administrative Office (AO) of the United States Courts (various years). Information on sentencing and departures for substantial assistance is from the U.S. Sentencing Commission (various years). [More; years are the Commission's fiscal years.]

Table 1 presents the means and standard deviations of the data. The most striking feature of the data is that prosecutors use wiretaps far less frequently than downward departures for cooperation. The use of wiretaps is measured as the number of wiretaps approved in a year as a ratio of the number of defendants prosecuted in the district in that year, multiplied by 100. The use of substantial assistance departures as measured as the percentage of the defendants sentenced in a district and year. By these measures, wiretaps arise in less than one percent of sentencings.[1] In contrast, nearly twenty percent of sentenced defendants received government-sponsored downward departures for substantial assistance.

[Discuss also in Table 1:

(A) Wiretap characteristics:
   a. Predominantly narcotics cases;
   b. Average duration;
   c. Average wiretap outcomes.

(B) Sentencing outcomes:
   a. High rate of pleas;
   b. High rate of incarceration;
   c. Longer average sentences and higher rate of incarceration for drug offenders.]

4. Estimates

A. Baseline Estimates.

[1] [Re-run results weighting wiretaps by average number of convictions that result. Then the gap between incidence of wiretaps and substantial assistance is smaller; this wiretaps measure is about 12.]

The frequency with which prosecutors use wiretaps is modeled as a function of the frequency of substantial assistance departures in the judicial district and the characteristics of the district. The ordinary least squares regression takes the form

$$Y_{it} = Z_{it}\delta + X_{it}\beta + \alpha_i + \alpha_t + \epsilon_{it}, \quad (1)$$

where Y_{it} is the number of wiretap applications in district i approves in year t as fraction of the number of defendants sentenced in that year (multiplied by 100). The term Z_{it} is percentage of defendants sentenced in the district in each year who receive a downward departures for substantial assistance. The vector X_{it} contains other characteristics that vary by district and time, such as the racial composition of defendants. The variable α_i is a fixed effect for district court i, and the data include 90 district courts. A federal statute, 28 U.S.C. §§ 81-144, defines 89 district courts in the fifty states plus the District of Columbia.[2] The inclusion of district fixed effects implies that the regression effectively looks at patterns of wiretaps *within* districts. This is akin to de-meaning the data at the district level, and looking at deviations from the district means. The term α_t is a fixed effect for year t. Finally, ϵ_{it} is an error term, and standard errors are clustered at the level of judicial districts.

Table 2 presents estimates from this equation. The estimates in Table 2 show that the fraction of defendants in a district receiving departures for substantial assistance correlate negatively and significantly with the use of wiretaps in the district. The magnitudes of the estimates are also socially meaningful. For example, the estimate of -.017 in the regression reported in column (3) implies that a one standard deviation increase in the frequency of substantial assistance corresponds to a reduction of .16 wiretaps per sentenced defendant. Relative to the sample mean use of wiretaps, this is a nearly 19% reduction.

The remaining columns examine the robustness of the estimated correlation between wiretaps and substantial assistance departures. Column (4) shows that although the length of the post-*Booker* period is limited, no changes in the relationship between wiretaps and substantial assistance are detectable. Perhaps the reason for this is that the key issue which would help flipped defendants has not been decided. So far, there are no decisions on whether judges may make a downward "variance" for a defendant's assistance in the absence of the government's motion for substantial assistance. Several commentators have noted that this is likely to be litigated in the near future. The data do not reveal any immediate change in the terms of trade in the market for flipped defendants.

Column (4) controls for rate at which defendants plead guilty. Almost all defendants plead guilty, and this rate has only a weak relationship to the use of wiretaps. Its presence does not much alter the correlation between substantial assistance and wiretaps. Columns (6) and (7) re-estimate the prior two specifications with the sample limited to the observations in which there is a positive use of wiretaps. This reduces the size of the data set by about a third; that is, about a third of districts rarely use any wiretaps. The results are similar. Thus, the estimates are not an artifact of the many zeroes in the data.

Overall, the initial results are consistent with wiretaps and substantial assistance being imperfect substitutes.

[2] District courts in Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands are excluded.

B. Controlling for Characteristics of Prosecutors, Judges, and the District.

Table 3 reports specifications that test whether the identity of particular actors in the criminal justice system influences the use of wiretaps. Column (1) reproduces the baseline estimate reported in column (5) of Table 2. Column (2) of Table 3 controls for the race and ideology of the United States Attorney. Additional specifications not reported here controlled for the tenure of the USA. Column (3) controls for the racial and ideological composition of the district court. Additional specifications not reported here controlled for other aspects of judicial background such as prior service as a prosecutor. Column (4) includes controls for both the USA and the local bench. None of these characteristics matter, and none have much effect on the correlation between wiretaps and substantial assistance.

The remaining three columns of Table 3 include controls for the crime rates. None of the crime rates bear a statistically significant relationship to the use of wiretaps. The correlation between wiretaps and substantial assistance is robust to their inclusion.

The estimates show that the use of wiretaps is not responsive to the identity of the lead prosecutor or, importantly, to the identity of the judges presiding in the district. Nor is it responsive to variation in street crime. This is consistent with prosecutors using wiretaps to combat large conspiracies and criminal organizations rather than isolated offenses.]

C. Controlling for District's Sentencing Environment.

Table 4 displays the results from various specifications controlling for the sentencing environment within the district. Column (1) reproduces the baseline estimate reported in column (5) of Table 2. Column (2) of Table 4 shows that prosecutors use wiretaps less often when the (log of the) median sentence within a district is higher. But the rate at which defendants receive sentences of incarceration rather than probation does not correlate with wiretaps.

Over 80% of wiretaps involve narcotics investigations. For that reason, the regression in column (3) replaces the average sentencing outcomes for all cases within the district with averages for drug offenses. Here, the sign of the coefficient on the length of the median sentence switches sign, and indicates that prosecutors in districts with longer sentences use wiretaps slightly more often.

The remaining specifications show that these patterns persist after controlling for the fraction of sentences meted out within the district are for drug offenses and when the measure of wiretaps is limited to those involving narcotics investigations.]

5. Discussion and conclusion

[Conclusions to be reached]

Table 1. Summary Statistics

Variable:	Mean [Standard Deviation]:	Variable:	Mean [Standard Deviation]:
Wiretaps per Defendant Sentenced	.888 [1.154]	% of Sentences Receiving Gov't Sponsored Downward Departures	19.428 [9.506]
% of Sentences Are Pleas	97.774 [12.695]	% of All Sentences Are to Prison	82.900 [8.332]
Narcotics Wiretaps per Defendant Sentenced	.757 [1.01]	(Log) Mean Sentence Length (of All Convictions Prison Sentences)	3.720 [.348]
Average Authorized Length of Wiretaps (Days)	47.367 [22.462]	% of Sentences Involve Drug Offenses	36.922 [11.590]
Average No. of Extensions per Wiretap	.070 [.283]	% of Drug Offense Sentences Are to Prison	95.358 [5.198]
Average Days a Wiretap was in Operation	40.227 [16.885]	(Log) Mean Sentence Length (of Drug Convictions Receiving Prison Sentences)	4.188 [.404]
Average Intercepts per Wiretap	641.890 [1,239.716]	United States Attorney is Democratic Appointee	.410 [.492]
Average Incriminating Intercepts per Wiretap	3.654 [48.017]	United States Attorney is African-American	.079 [.270]
Average Arrests per Wiretap	0.942 [3.279]	% of Judges in District are Democratic Appointees	44.865 [18.142]
Average Persons Convictions per Wiretap	0.193 [.8023]	% of Judges in District are African-American	7.265 [8.454]
% of Sentenced Defendants Who Are African-American	31.002 [18.957]	(Log) Murder Rate	1.593 [.580]
% of Sentences Are Pleas	97.774 [12.695]	(Log) Violent Crime Rate	6.045 [.479]
		(Log) Property Crime Rate	8.167 [.250]

Note: The total number of observations is 900, except for crime rates. Crime data for 2007 is not yet available, and the number of observations for the crime variables is 810.

Table 2. Incidence of Wiretaps and Sentencing Patterns

Explanatory Variable:	(1)	(2)	(3)	(4)	(5)	(6)	(7)
% of Sentences Receiving Gov't Sponsored Downward Departures	-.015** (.006)	-.013** (.006)	-.017** (.006)	-.018** (.007)	-.015** (.006)	-.019** (.009)	-.020** (.009)
% of Sentenced Defendants Who Are African-American			.018** (.007)	.018** (.007)	.023** (.007)	.018* (.011)	.018* (.001)
% of Sentenced Defendants Who Are Hispanic			.001 (.008)	.002 (.008)	.004 (.007)	.008 (.011)	.008 (.011)
(% of Sentences Receiving Gov't Sponsored Downward Departures) x (Post-*Booker*)				.007 (.012)			.003 (.010)
% of Sentences Are Pleas					-.006* (.003)	.016 (.029)	
Fixed Effects:							
Year	Y	Y	Y	Y	Y	Y	Y
District	Y	Y	Y	Y	Y	Y	Y
Year * District		Y	Y	Y	Y	Y	Y
R-square	.5421	.6140	.6184	.6186	.6198	.6229	.6229
Limited to Districts with Positive No. of Wiretaps?						Y	Y
N	900	900	900	900	900	607	607

Note –The dependent variable in each OLS regression is the total number of wiretaps per defendant sentenced. An asterisk * denotes coefficients statistically significant at the 10% level, and double asterisks ** denote coefficients statistically significant at the 5% level.

Table 3. Incidence of Wiretaps and Sentencing Patterns

Explanatory Variable:	(1)	(2)	(3)	(4)	(5)	(6)	(7)
% of Sentences Receiving Gov't Sponsored Downward Departures	-.017** (.006)	-.017** (.006)	-.017** (.006)	-.017** (.006)	-.014** (.006)	-.014** (.006)	-.014** (.006)
% of Sentenced Defendants Who Are African-American	.018** (.007)	.018** (.007)	.018** (.007)	.018** (.007)	.014** (.007)	.013** (.007)	.014** (.007)
% of Sentenced Defendants Who Are Hispanic	.001 (.008)	.001 (.008)	.001 (.008)	.0004 (.0078)	.002 (.008)	.002 (.008)	.002 (.008)
United States Attorney is Democratic Appointee		-.161 (.302)		-.150 (.306)			
United States Attorney is African-American		-.022 (.254)		-.016 (.267)			
% of Judges in District are Democratic Appointees			.008 (.010)	.008 (.010)			
% of Judges in District are African-American			-.023 (.043)	-.021 (.043)			
(Log) Murder Rate					-.019 (.279)		
(Log) Violent Crime Rate						.258 (.628)	.327 (.615)
(Log) Property Crime Rate							-.312 (1.362)
R-square	.6184	.6189	.6192	.6197	.6470	.6471	.6472
N	900	900	900	900	810	810	810

Note – The dependent variable in each OLS regression is the total number of wiretaps per defendant sentenced. All regressions also include fixed effects for years and districts and district-year interactions. An asterisk * denotes coefficients statistically significant at the 10% level, and double asterisks ** denote coefficients statistically significant at the 5% level.

Table 4. Incidence of Wiretaps and Sentencing Patterns

Explanatory Variable:	(1)	(2)	(3)	(4)	(5)	(6)	(7)
% of Sentences Receiving Gov't Sponsored Downward Departures	-.017** (.006)	-.015** (.006)	-.015** (.006)	-.014** (.006)	-.014** (.006)	-.013** (.006)	-.014** (.006)
% of Sentenced Defendants Who Are African-American	.018** (.007)	.024** (.008)	.023** (.007)	.017** (.007)	.024** (.008)	.023** (.008)	.017** (.007)
% of Sentenced Defendants Who Are Hispanic	.001 (.008)	.003 (.007)	.003 (.007)	.002 (.007)	.002 (.007)	.003 (.008)	.002 (.007)
% of Sentences Are Pleas		-.006** (.003)	-.006** (.003)	-.004 (.003)	-.006** (.003)	-.006** (.003)	-.004 (.003)
% of All Sentences Are to Prison		.004 (.009)			.004 (.009)		
(Log) Mean Sentence Length (of All Convictions Prison Sentences)		-.156** (.075)			-.150** (.073)		
% of Sentences Involve Drug Offenses					-.006 (.006)	-.005 (.005)	-.006 (.005)
% of Drug Offense Sentences Are to Prison			-.089 (.128)	-.125 (.112)		-.089 (.128)	-.125 (.112)
(Log) Mean Sentence Length (of Drug Convictions Receiving Prison Sentences)			.012** (.003)	.011** (.003)		.012** (.003)	.011** (.003)
R-square	.6184	.6214	.6263	.5896	.6218	.6263	.5903
Dependent Variable: Type of Wiretaps	All	All	All	Narcotics	All	All	Narcotics
N	900	900	900	900	900	900	900

Note – The dependent variable in each OLS regression is the total number of wiretaps per defendant sentenced. All regressions also include fixed effects for years and districts and district-year interactions. An asterisk * denotes coefficients statistically significant at the 10% level, and double asterisks ** denote coefficients statistically significant at the 5% level.