

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 94-50636  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

TERRELL ROBERT WASHINGTON

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
(SA-94-CR-108-1)

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(April 28, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:<sup>1</sup>

The sole issue presented on appeal is whether the government breached its plea agreement with Terrell Washington when it refused to move for a downward departure for substantial assistance under § 5K1.1 of the U.S. Sentencing Guidelines. The district court rejected Washington's claim that the government breached the plea agreement. We affirm.

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<sup>1</sup>Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Washington pleaded guilty to possession with the intent to distribute cocaine base and unlawfully carrying and using a firearm during a drug transaction. As part of Washington's plea agreement, the government agreed to consider filing a motion for a downward departure under § 5K1.1 if Washington provided substantial assistance to the government. The plea agreement expressly provided, however, that "it is within the sole discretion of the government as to whether to file such a motion."

During sentencing, Washington objected to the government's refusal to file a § 5K1.1 motion. Washington testified that he gave the government information concerning known drug traffickers. A DEA special agent assigned to Washington's case testified, however, that Washington's information was "stale" and unhelpful. The district court concluded that Washington's cooperation was not sufficiently substantial to require the government to file the 5K1.1 motion under the terms of the plea agreement.

II.

In **United States v. Wade**, \_\_\_U.S.\_\_\_, 112 S.Ct. 1840 (1992), the Court held that § 5K1.1 grants the government discretionary authority to move for a downward departure for substantial assistance as long as the government does not limit its discretion through the terms of a plea agreement. Where a plea agreement does not limit the government's discretion to move for a downward departure under § 5K1.1, the defendant cannot challenge the government's refusal to seek a downward departure unless "the

refusal was based on an unconstitutional motive' such as the defendant's race or religion." **United States v. Urbani**, 967 F.2d 106, 109 (5th Cir. 1992)(quoting **Wade**, 112 S.Ct. at 1844); **see also United States v. Garcia-Bonilla**, 11 F.3d 45, 47 (5th Cir. 1993).

Based on **Wade** and **Urbani**, Washington's claim must fail. Washington's plea agreement expressly acknowledged that the government had discretion in deciding whether to seek a downward departure. Although Washington challenges the government's assessment of the extent of his assistance, he fails to point to any evidence that the government's refusal to seek a downward departure was based on an unconstitutional motive. We therefore conclude that the district court did not err in overruling Washington's objection to the government's refusal to seek a downward departure under § 5K1.1.

AFFIRMED.