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United States v. Martin: Game Theory and Cooperation in White-Collar Criminal Sentencing

F. Elbert Isenhour

NOTE

UNITED STATES v. MARTIN: GAME THEORY AND COOPERATION IN WHITE-COLLAR CRIMINAL SENTENCING

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I. INTRODUCTION

Since the Enron scandal, Americans are more closely scrutinizing the prosecution and sentencing of white-collar criminals. Commentators have described Enron's impact on criminal sentencing as a "ratcheting effect," with sentence length increasing in lockstep with defendant notoriety.[1] In the midst of this trend, courts have found themselves in an unusual position. While tending an alert ear to the cry of the masses for strict punishment for notorious offenders, courts are still mindful of the role that a defendant's cooperation with the authorities must play in the sentencing. The United States Court of Appeals for the Eleventh Circuit recently balanced these concerns in *United States v. Martin*,[2] the second of two appeals concerning the leniency of a defendant's sentence.[3] As a result, *Martin* poses an interesting question – What happens to a Chief Financial Officer ("CFO") who has pled guilty when a Chief Executive Officer ("CEO") is acquitted? The short answer is "nothing." The question addressed in this Note is whether "nothing" is a proper result. This Note proposes that the holding in *Martin* provides a unique precedent for a "Prisoner's Dilemma"[4] gone awry, which could deter cooperation with authorities in future cases.

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1. Stephanos Bibas, *White-Collar Plea Bargaining And Sentencing After* Booker, 47 WM. & MARY L. REV. 721 (2005).

2. United States v. Martin (*Martin II*), 455 F.3d 1227 (11th Cir. 2006). The court revisited many of the same issues, with many of the same players, in *United States v. Livesay*, 484 F.3d 1324 (11th Cir. 2007). Much of the *Livesay* case is just reiterating the reasoning in *Martin*. Therefore, this Note will focus on *Martin* rather than *Livesay*, as *Martin* is the primary opinion on the issue.

3. The first appeal was United States v. Martin (*Martin I*), 135 F. App'x 411 (11th Cir. 2005).

4. *See generally* WILLIAM POUNDSTONE, PRISONER'S DILEMMA (First Anchor Books 1993) (1992).

Part II of this Note summarizes *Martin*. Part III describes how *Martin* relates to similar cases. Part IV focuses on how game theory analysis can help fashion appropriate sentencing considerations. Finally, Part V proposes a judicial role that is more likely to "make men good,"[5] and produce results tailored to deterring crime without discouraging cooperation.

II. THE LONG AND WINDING ROAD

Michael Martin, the defendant in *Martin*, was HealthSouth's CFO from 1997 to 2000.[6] During Martin's tenure HealthSouth's officers systematically overstated HealthSouth's financial position to maintain public confidence in a company that consistently failed to meet earnings-per-share projections.[7] Michael Martin assumed the CFO position after the fraud had begun, but did nothing to rectify past overstatements, nor to stop any future overstatements.[8] Although Martin did raise objections,[9] he was nevertheless complicit in the fraud.[10] Martin's actions and the actions of his co-conspirators caused investors to lose approximately $1.4 billion.[11]

A. Trial Level

On April 8, 2003, federal prosecutors charged Martin for his role in the fraud.[12] Martin pleaded guilty to all counts, promising to testify against co-conspirators in exchange for leniency.[13] At sentencing, the government moved for a section 5K1.1[14] downward departure based on substantial assistance to authorities.[15]

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5. ST. THOMAS AQUINAS, SUMMA THEOLOGICA, pt. I-II. q. 92 art. 1 (Benziger Bros. ed., 1947) (1274) *available at* http://www.ccel.org/a/aquinas/summa/FP.html.

6. *Martin I*, 135 F. App'x at 412.

7. *Id.*

8. *Id.*

9. *Martin II*, 455 F.3d 1227, 1231 (11th Cir. 2006) (In the words of the court, "Martin repeatedly discussed with Scrushy the fact that the income statements provided to the Securities and Exchange Commission ("SEC") and the investors were inaccurate, and he tried to dissuade Scrushy from perpetrating further fraud.") *Id.*

10. *Id.* at 1230-31.

11. *Martin I*, 135 F. App'x at 412.

12. Martin was charged with: "(1) one count of conspiracy to commit securities fraud and mail fraud and falsify books and records, in violation of 18 U.S.C. § 371 (Count One); and (2) one count of falsifying books, records, and accounts, in violation of 15 U.S.C. § 78m(b)(2)(A), 78m(b)(5), and 78ff, 17 C.F.R. § 240.13b2-1, and 18 U.S.C. § 2 (Count Two); and also a forfeiture count (Count Three)." *Id.* at 412.

13. *Id.*

14. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2006). ("Section 5K1.1 ... allows the

During sentencing, both the prosecution and defense presented evidence relevant to sentencing departure. Counsel for Martin argued that Martin's cooperation with the prosecution and with HealthSouth's civil plaintiffs warranted significant departure.[16] The government's countermotion stressed that Martin's cooperation had allowed them to expeditiously and effectively prosecute and investigate co-conspirators.[17] The government also noted Martin's attempt to stop the conspiracy, and subsequent resignation.[18] The court agreed that Martin's cooperation warranted departure, noting that "Martin had been truthful and cooperated 'without hesitation,' had been available 'on a continuous and regular basis,' and had 'provided valuable assistance in helping the United States . . . .'"[19]

Pursuant to the section 5K1.1 motion, the government recommended that Martin receive a sentence of 62 months' imprisonment, down from the 108 and 135 months recommended by the sentencing guidelines.[20] The district court however, announced it would depart downward even further, sentencing Martin to 60 months probation with no actual imprisonment.[21] The court also imposed

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court to depart from the guideline range if the government makes a motion showing that the defendant provided substantial assistance in the investigation or prosecution of another person who has committed an offense." Lisa Egitto, *Substantial Assistance Departures: Threat to Sentencing Goals or Necessary Evil?*, 17 ST. JOHN'S J. LEGAL COMMENT. 585, 587 (2003)). For a discussion on downward departures, see also Michael A. Simons, *Retribution For Rats: Cooperation, Punishment, And Atonement*, 56 VAND. L. REV. 1, 23 (2003). For a discussion of the history of 5K1.1 *see* Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 569-78 (1999). For a discussion of downward departures in general, see 21A AM. JUR. 2D *Criminal Law* § 882 (2006).

15. *Martin I*, 135 F. App'x at 412.

16. *Id.* at 413.

17. *Id.*

18. *Id.*

19. *Id.* (Internal quotations to the government's § 5K1.1 motion).

20. *Martin I*, 135 F. App'x at 413. For information on the structure of the Federal Sentencing Guidelines see generally LYNN S. BRANHAM, THE LAW AND POLICY OF SENTENCING AND CORRECTIONS IN A NUTSHELL 14-44 (7th ed. 2005); ARTHUR W. CAMPBELL, LAW OF SENTENCING (3d ed. 2004); ELLEN S. PODGOR & JEROLD H. ISRAEL, WHITE COLLAR CRIME IN A NUTSHELL 403-11 (3d ed. 2004); Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After* Booker, 47 WM. & MARY L. REV. 721 (2005); Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker: *More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 ARIZ. ST. L.J. 425 (2006); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471 (1993). *See also* United States v. Booker, 543 U.S. 220, 226-27 (2005) (holding the sentencing guidelines were unconstitutional when applied in a mandatory fashion). The effect of the *Booker* decision was to make the guidelines advisory. Bibas, *supra* note 1, at 730.

21. *Martin I*, 135 F. App'x at 412.

a fine of $50,000 and Martin agreed to forfeit $2.375 million of his ill-gotten wealth.[22] The government appealed Martin's sentence, claiming that the extent of the departure below their recommendation was unreasonable.[23]

B. *The First Appeal*

On appeal, the court ruled that "the record in this case [wa]s incapable of meaningful appellate review" because the trial court failed to adequately state its reasoning for the departure.[24] Without further documentation of the 5K1.1 reasons for departure, the appellate court could not presume that the extent of the departure was reasonable.[25] After consideration, the appellate court vacated the sentence, and remanded for resentencing.[26]

While the case was on remand, Martin testified at the trial of former HealthSouth Chief Executive Officer (CEO) and alleged co-conspirator Richard Scrushy.[27] Surprisingly, Scrushy's jury verdict acquitted him of all charges.[28]

C. *Re-Sentencing*

After remand, the trial court held a re-sentencing hearing.[29] The government again moved for a downward departure based on substantial assistance.[30] In considering the motion, the district court took pains to provide an adequate record for further appellate review. The court considered Martin's "unhesitating assistance to the FBI, the SEC, and HealthSouth's auditors and

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22. *Martin II*, 455 F.3d 1227, 1232 (11th Cir. 2006).

23. *Id.*

24. *Martin I*, 135 F. App'x at 415-16. The court stated, "It is unclear from the record (1) whether the district court relied upon permissible factors and (2) if so, whether the extent of the departure was reasonable." *Id.* at 415. (internal footnotes omitted).

25. *Id.* at 416.

26. *Id.* at 415-16. The trial court in Martin "checked the box stating that the downward departure was 'based on 5K1.1 motion of the government based on the defendant's substantial assistance . . . .'" *Id.* at 414. No other mention of the court's reasoning for the departure was found in the sentencing documents.

27. *Id.* at 412-13.

28. Krysten Crawford, *Ex-HealthSouth CEO Scrushy Walks*, CNNMONEY, June 28, 2005, http://money.cnn.com/2005/06/28/news/newsmakers/scrushy_outcome/index.htm. (The article describes the surprising result of Scrushy's trial. Jacob Frenkel, a former federal prosecutor said, "If you look at the evidence and the firepower that the government lined up for this case, the outcome is astounding." *Id.* "Alice Martin, the lead prosecutor and the U.S. Attorney for the Northern District of Alabama, told reporters that she was 'shocked' and 'disappointed' by the verdict . . . ." *Id.*

29. *Martin II*, 455 F.3d 1227, 1233 (11th Cir. 2006).

30. *Id.*

shareholders."[31]   The district court described Martin's assistance as "outstanding," "invaluable," "complete," "completely reliable," and "immediate."[32]   In summing up its discussion of the 5K1.1 factors, the court said, "this is the only time in its 25-year history as a Judge when this kind of cooperation has been forthcoming from a defendant."[33]

After setting forth the reasoning for its departure under section 5K1.1, the court discussed factors relevant to sentencing mitigation in 18 U.S.C. 3553(a)(1).[34] The court found that (1) Martin's conduct was "an aberration" for an otherwise "outstanding citizen;"[35] (2) Martin had "sacrificed his own personal fortune in favor of the victims of the fraud;"[36] (3) that the conspiracy predated Martin's participation;[37] and (4) that Martin had tried to convince CEO Richard Scrushy to abandon the fraud.[38]

The court also considered the sentence of Aaron Beam, another one of the "core defendants" in the HealthSouth prosecutions.[39] Beam never attempted to dissuade Scrushy from further fraud, nor had he withdrawn from the conspiracy as had Martin, yet he only received a three-month sentence.[40] Finally, the court considered Scrushy's acquittal, reasoning a stricter sentence would be inappropriate since, "from the point of view of the government, the man most singularly responsible for this criminal conduct [Richard Scrushy] has been found not guilty and will serve no time at all."[41] While acknowledging "some

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31. *Id.* (Internal footnotes omitted). The Court adopted the government's description of Martin's assistance as follows:

> That this defendant's assistance enabled the government to swiftly prosecute Richard Scrushy and several other major participants in the fraud; it allowed the government to provide a timely assurance to the financial markets that the illegal conduct had ended and that corrective action was being taken; and it allowed HealthSouth to reconstruct its books and records and to begin its recovery.

Id. at 1233-34.

32. *Id.* at 1234.

33. *Id.*

34. Text of 18 U.S.C.A. § 3553(a) (continuing from (a) to (1)) "The court, in determining the particular sentence to be imposed, shall consider—(1) the nature and circumstances of the offense and the history and characteristics of the defendant . . . ."

35. *Martin II*, 455 F.3d at 1234.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* The court did so pursuant to 18 U.S.C.A. § 3553(a)(6), which allows courts to consider in sentencing "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . . ."

40. *Id.* at 1234 n.6.

41. *Martin II*, 455 F.3d at 1234.

period of incarceration is necessary to reflect the seriousness of the crime,"[42] the court reasoned that a lengthier sentence would "not serve as just punishment,"[43] and "would, in the court's judgment, promote disrespect for the law."[44]

The court recognized that allowing a CFO who cooperated with authorities to be singled out by his circumstances would "deter not only Martin but others similarly situated from engaging in similar conduct [cooperating with the authorities]."[45] The court found that "[a] longer period of incarceration would be greater than necessary to achieve the deterrence objectives, and would be unjust."[46]

Despite these arguments, the government contended that Martin was still culpable, and that a substantial period of incarceration was appropriate.[47] The government petitioned the trial court for a 42-month sentence, 20 months lower than the sentence requested at the first sentencing, and 66 months lower than Martin's recommended sentence of 108-135 months.[48]

Upon hearing from counsel, the court sentenced Martin to seven days imprisonment and two years supervised release, an increase from the first sentence, which included no actual jail time at all.[49] The district court re-imposed the fines that Martin had paid.[50] The government again appealed.[51]

D. The Second Appeal

On appeal, the appellate court dismissed the argument that imposing a stiffer sentence would be unjust in light of the circumstances surrounding the sentencing and acquittal of co-conspirators.[52] In the words of the court, "regardless of the government's original theory of the overall fraud scheme in this case, section 3553(a)(6) does not permit the district court to compare Martin's sentence with the 'sentence' of a man whom a jury acquitted of criminal conduct, however groundless that acquittal may seem in light of the

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Martin II*, 455 F.3d at 1233.
48. *Id.* This request was based upon a downward departure of 9 levels from offense level 31 to 22.
49. *Id.*
50. *Id.*
51. *Id.* at 1235.
52. *Id.* at 1241.

evidence in this record."[53] Holding that the sentence was unreasonable, the court vacated and remanded for sentencing; however, this time the court requested a different judge.[54]

III. MARTIN AND PALS

Michael Martin's case represents an emerging trend in the post-Enron world. Traditionally, courts have punished white-collar crime relatively lightly,[55] with sentences much shorter than those given to "common criminals."[56] In short,

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53. *Martin II*, 455 F.3d at 1241.

54. *Id.* at 1242.

55. Bibas, *supra* note 1, at 723.

Traditionally, penalties for white-collar crimes such as fraud, embezzlement, and insider trading were significantly lower than penalties for violent, drug, or even physical property crimes. White-collar offenders were much more likely to receive probation than thieves who stole equivalent amounts, and when white-collar offenders did go to prison their sentences were substantially shorter. For example, before the Sentencing Guidelines, an average of 59% of fraud defendants received straight probation sentences, and the average prison time served was seven months. For tax defendants, the figures were comparable: 57% received straight probation, and the average prison time served was five and a half months.

Id.

56. "One cannot help but be struck by US Sentencing Commission statistics indicating that, during 2001, the average sentence for white collar crimes was just over 20 months, while the average sentence for drug and violent crimes was 71.7 and 89.5 months respectively." STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 27 (2006) (citing to U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS at 32, Fig. E (2001)).

Offense	Percent Receiving Imprisonment Sanctions	Mean Prison Sentence (Months)	Standard Deviation	Median Prison Sentence (Months)	Longest Prison Sentence Imposed
Antitrust	19.2%	1.8	0.4	2	2
Securities Fraud	67.2%	19.6	25.1	12	144
Bribery	36.6%	24.7	46.2	6	180
False Claims	40.1%	18.8	22.3	6	84
Mail Fraud	55.1%	48.2	119.4	18	976
Credit Fraud	47.1%	13.5	12.9	6	60
Tax Fraud	58.9%	9.3	13.0	5	84
Bank Embezzlement	30.8%	13.0	16.5	6	60
All White Collar Crimes	46.4%	21.3	58.7	6	976
Common Crimes	49.7%	25.1	22.7	24	120

DAVID WEISBURD ET AL., CRIMES OF THE MIDDLE CLASSES: WHITE-COLLAR OFFENDERS IN

"[t]here was a time in the not-too-distant past when white-collar criminal prosecutions were delicate affairs, where prosecutors worked hard not to treat wealthy and powerful defendants as anything as distasteful as, well, criminals."[57]

A. *The Times They Are a-Changin'*

The recent swath of highly publicized corporate fraud has caused a dramatic shift in white-collar crime prosecution.[58] The impression that white-collar crimes are "victimless"[59] or "an exception to the rule" has become a relic of the past.[60] As a result, sentences for white-collar criminals are steadily increasing,[61] and appellate courts are reversing light sentences with increasing frequency.[62]

THE FEDERAL COURTS 131 (1991). (Statistics drawn from a representative class drawn from the Federal Districts of Southern New York, Maryland, Northern Georgia, Northern Texas, Northern Illinois, Central California, and Western Washington, and made up of a representative sample of 1094 white collar cases and 210 "common criminal" cases (30 common criminal cases per district and a maximum of 30 of each category of white-collar criminal cases per district). *Id.* at 196.

57. Kurt Eichenwald & Alexei Barrionuevo, *The Enron Verdict: The Overview; Tough Justice for Executives in Enron Era*, N.Y. TIMES, May 27, 2006, at A. "The tactics and strategies used in the successful prosecution of the former Enron chief executives, Jeffrey K. Skilling and Kenneth L. Lay, highlight the transformation that has occurred in recent years in the investigation and prosecution of white-collar crime . . . ." *Id.*

58. "What is also interesting about these scandals [Enron, Arthur Anderson, and WorldCom] is the outpouring of political condemnation and the rapid introduction of new legislation these cases generated." JAMES GOBERT & MAURICE PUNCH, RETHINKING CORPORATE CRIME 7 (2003).

59. "These . . . developments have served not only to demolish the 'victimless crime' image of corporate and white-collar crime, but have also revealed the extent of physical and financial damage that can be perpetuated by companies which encourage, tolerate, or engage in illegality." GOBERT & PUNCH, *supra* note 58, at 8 (citing J. KATZ, THE SEDUCTIONS OF CRIME (1988)).

60. "The involvement of well-respected corporations, as opposed to 'cowboy' outfits, suggested that no companies were above suspicion and that financial reports issued by even the most highly regarded accounting firms were not to be trusted." GOBERT & PUNCH, *supra* note 58, at 8. (quoting K. Calvita & H.N. Pontell, *Heads I Win, Tails You Lose: Deregulation, Crime and Crisis in the Savings and Loan Industry*, 36 CRIME & DELINQUENCY 321 (1990)).

61. For a summary of recent white-collar crime sentences see Andrew Ross Sorkin, *Ex-Tyco Officers Get 8 To 25 Years*, N.Y. TIMES, September 20, 2005, at A. Bernard J. Ebbers, WorldCom Chief Executive, SENTENCE: 25 YEARS; L. Dennis Kozlowski, Tyco Chief Executive, SENTENCE: 8.3-25 YEARS; Mark H. Swartz, Tyco Chief Financial Officer, SENTENCE: 8.3-25 YEARS; Jamie Olis, Dynegy Midlevel Executive, SENTENCE: 24 YEARS; Timothy J. Rigas, Adelphia Chief Financial Officer, SENTENCE: 20 YEARS; Martin R. Frankel, Financier, SENTENCE: 16.7 YEARS; John J. Rigas, Adelphia Founder and

Commentators have also called for stricter sentences, saying that the economic character and the "rational, cool, and calculated"[63] intent of the white-collar criminals make them prime candidates for general deterrence.[64]

Chairman, SENTENCE: 15 YEARS; Reed Slatkin, Money manager, SENTENCE: 14 YEARS; Alan B. Bond, Albriond CapitalMoney Manager, SENTENCE: 12.5 YEARS; Franklin C. Brown, Rite Aid Vice Chairman, SENTENCE: 10 YEARS; Andrew S. Fastow, Enron Chief Financial Officer, SENTENCE: 10 YEARS; E. Kirk Shelton, CUC International Vice Chairman, SENTENCE: 10 YEARS; Robert E. Brennan, First Jersey Securities Founder, SENTENCE: 9.2 YEARS; Martin L. Grass, Rite Aid Chief Executive, SENTENCE: 8 YEARS; John M. Rusnak, Allfirst Financial Currency trader, SENTENCE: 7.5 YEARS; Samuel D. Waksal, ImClone Systems Founder, chief executive, SENTENCE: 7 YEARS; Scott D. Sullivan, WorldCom Chief Financial Officer, SENTENCE: 5 YEARS; Ben F. Glisan Jr., Enron Treasurer, SENTENCE: 5 YEARS. *Id.*

62. *See, e.g.,* United States v. Smith, 445 F.3d 1, 5-6 (1st Cir. 2006) (reversing as unreasonable a sentence of 46 months when the advisory guidelines range was 100 to 125 months); United States v. Thurston, 456 F.3d 211, 212, 220 (1st Cir. 2006) (reversing as unreasonable a sentence of 3 months when the advisory guidelines called for 60 months and identifying 36 months as the minimum sentence that could withstand reasonableness); United States v. Davis, 458 F.3d 491, 493 (6th Cir. 2006) (reversing as unreasonable a sentence of 2 days with 1 day credit for times served); United States v. Eura, 440 F.3d 625, 630-34 (4th Cir. 2006) (reversing as unreasonable a sentence of 60 months when the advisory guidelines range was 78 to 97 months); United States v. Moreland, 437 F.3d 424, 434-37 (4th Cir. 2006) (reversing as unreasonable a sentence of 120 months when the advisory guidelines range was 360 months to life); United States v. Pyles, 482 F.3d 282, 292 (4th Cir. 2007) (reversing as unreasonable a sentence of 5 years' probation with 6 months' home confinement when the advisory guidelines called for 63-78 months' imprisonment); United States v. Lazenby, 439 F.3d 928, 932-33 (8th Cir. 2006) (reversing as unreasonable a sentence of 12 months when the advisory guidelines range was 70 to 87 months); United States v. Davis, 458 F.3d 491 (6th Cir. 2006) (reversing as unreasonable a sentence of 1 day when the advisory guidelines range was 33 to 41 months); United States v. Cage, 451 F.3d 585, 587 (10th Cir. 2006) (reversing as unreasonable a sentence of 6 days when the advisory guidelines range was 46 to 57 months); United States v. Crisp, 454 F.3d 1285, 1289 (11th Cir. 2006) (reversing as unreasonable a sentence of 5 hours' detention when the advisory guidelines range was 12 to 15 months); United States v. Livesay, 484 F.3d 1324 (11th Cir. 2007) (citing *Martin* for support in dismissing as unreasonable a 12 month sentence for HealthSouth Assistant Controller for the Accounting Department when the guideline was 78-97 months.) *See also* United States v. Zapete-Garcia, 447 F.3d 57, 60 (1st Cir. 2006) (reversing as unreasonable a sentence of 48 months when the advisory guidelines range was 0 to 6 months); United States v. Ebbers, 458 F.3d 110, 130 (2d Cir. 2006) (holding a sentence that was disproportionately longer than sentences of co-conspirators "harsh but reasonable"); United States v. Davenport, 445 F.3d 366, 372 (4th Cir. 2006) (reversing as unreasonable a sentence of 120 months when the advisory guidelines range was 30 to 37 months); United States v. Kendall, 446 F.3d 782, 784 (8th Cir.2006) (reversing as unreasonable a sentence of 84 months when the advisory guidelines range was 27 to 33 months). *But see* United States v. Martinez, 178 F. App'x 404, 404 (5th Cir. 2006) (holding that a departure from a guideline of 78-98 months to a sentence of 68 months was reasonable).

63. Bibas, *supra* note 1, at 724 (citing *Martin II*, 455 F.3d 1227, 1240 (11th Cir. 2006)).

64. "If one increased the expected cost of white-collar crime by raising the expected

Finally, most people just think that it makes sense to impose stricter sentences on white-collar criminals, if "we imprison the black teenager who steals a $25,000 car, equal treatment demands that we also imprison the middleaged white guy who steals $25,000."[65]

In fact, the trend in all areas of the law has been away from leniency in sentencing in all areas of the law. Even after the *Booker* decision made the guidelines advisory,[66] only 5.2% of sentences ever make it below the guideline range.[67] Most courts would rather presume the reasonableness of the guidelines, than risk venturing below the guidelines, only to be reversed.[68] In recent years, Congress has also acted to limit judicial discretion in downward departures.[69]

The times truly are a-changin' for executive America, and as a result, corporate actions that would have drawn little attention in the past are now being vigorously prosecuted . . . and strictly sentenced.[70]

B. *Fourteen Strikes and You're Still Not Out*

Richard Scrushy's trial provides an interesting aside to the emerging trend documented above. Before Scrushy's trial, most every analyst predicted a conviction.[71] However, the case of Richard Scrushy is a reminder that trials are not "played" on paper.

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penalty, white-collar crime would be unprofitable and would thus cease." Bibas, *supra* note 1, at 724 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 205 (3d ed. 1986)).

65. Bibas, *supra* note 1, at 723-24.

66. United States v. Booker, 543 U.S. 220, 226-27 (2005) (holding the sentencing guidelines were unconstitutional when applied in a mandatory fashion). The effect of the *Booker* decision was to make the guidelines advisory. *See, e.g.,* Bibas, *supra* note 1; Hofer, *supra* note 20, Standen, *supra* note 20.

67. Brian R. Gallini & Emily Q. Shults, *Herding Bullfrogs Towards a More Balanced Wheelbarrow: An Illustrative Recommendation for Federal Sentencing Post-Booker*, 33 J. LEGIS. 1, 29 n. 217 (2006) (citing U.S. SENTENCING COMMISSION, SPECIAL POST-BOOKER CODING PROJECT: CASES SENTENCED SUBSEQUENT TO UNITED STATES V. BOOKER 16 (2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf).

68. The Honorable Graham C. Mullen & J.P. Davis, *Mandatory Guidelines: The Oxymoronic State Of Sentencing After United States v. Booker*, 41 U. RICH. L. REV. 625, 636-37 (2007).

69. Feeney Amendment, Pub. L. No. 108-21, 117 Stat. 650 (2003). *See, e.g.,* Hofer, *supra* note 20, at 429-30.

70. Remarked of the Enron trial, "In the past, some of the charges, particularly those against Mr. Lay, might not have survived in a civil trial." Eichenwald & Barrionuevo, *supra* note 57.

71. "'There are few cases where the government has so much overwhelming evidence,' said Christopher J. Bebel, a former federal prosecutor . . . ." Reed Abelson & Milt Freudenheim, *Scrushy for the Defense?; Decision Nears on Testimony by the Ex-HealthSouth Chief*, N.Y.

At Scrushy's trial, the prosecutors brought forth evidence indicating that whenever the company's numbers would fall short of predictions, Scrushy directed his accountants "to 'fix it' by artificially inflating the company's earnings to match Wall Street expectations."[72] The prosecution also introduced evidence that Scrushy deliberately inflated HealthSouth's publicly reported earnings and falsified reports "so that [Scrushy and his co-conspirators] could reward themselves with bonuses, stock options, and other corporate perks."[73]

However, after fourteen co-conspirators cooperated with authorities and pleaded guilty,[74] after five of his inner circle testified in open court against him, and after prosecutors paraded exhibit after exhibit by the jury for more than five months,[75] a jury of his peers acquitted Scrushy.[76] The flamboyant CEO had

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TIMES, April 7, 2005, at C. "Legal specialists say the string of witnesses will make it difficult for Mr. Scrushy's lawyers to persuade jurors that he knew nothing about those crimes. With an acquittal seeming to be a long shot . . . Mr. Scrushy's strongest hope may [be] a hung jury." *Id.* "'The government has a strong case, substantially stronger than the case the government had in the case of Bernard Ebbers,' said Gregory J. Wallance, a defense lawyer with Kaye Scholer in New York." *Id.* (Ebbers received 24 years, *see supra* note 66.).

72. Scrushy v. Tucker, 955 So.2d 288, 292 (Ala. 2006).

73. *Id.* "Scrushy personally benefited from the scheme to artificially inflate earnings, having sold at least 7,782,130 shares of stock since 1999 at prices grossly inflated by the materially misstated financial statements. Scrushy 'earned' tens of millions of dollars . . . based on the inflated earnings." *Id.*

74. Hannibal Crumpler, another co-conspirator, went to trial as well. Unlike Scrushy, he received 8 years for his part in the fraud. *Today In Business*, N.Y. TIMES, June 16, 2006 at C; Weston L. Smith, a former chief financial officer testified that Crumpler's role in the Fraud was identifying "outpatient facilities where the fraud could be concealed." Kyle Whitmire, *Ex-HealthSouth Executive Convicted at Trial*, N.Y. TIMES, November 19, 2005 at C.

75. One of the more damning pieces of evidence was the testimony regarding a recorded dialogue between Scrushy and then CFO William T. Owens (who was wearing a wire at the behest of the government). "In one discussion, Mr. Scrushy appeared to be warning Mr. Owens of what would happen if he confessed. "If you want to go public with all of this, then you might as well get ready," Mr. Scrushy said, according to the tape. "Get fired, it's all gone, everybody goes down." Abelson & Freudenheim, *supra* note 71. (Owens was sentenced to 5 years despite his cooperation. *See*, Kyle Whitmire, *Executive Gets 5-Year Term In Fraud Case*, N.Y. TIMES, December 10, 2005, at C.) And the testimony of Scrushy's remarks to his cohorts; "When HealthSouth's earnings fell short of estimates, Scrushy directed HealthSouth's accounting personnel . . . to 'fix it' by artificially inflating the company's earnings to match Wall Street expectations." Scrushy v. Tucker, 955 So.2d 288, 292 (Ala. 2006).

76. Several of the jurors were interviewed by the media after the trial. Juror Curtis Bender pointed out that he just did not believe that the prosecution had the evidence to convict. Kyle Whitmire, *Jurors Doubted Scrushy's Colleagues*, N.Y. TIMES, July 2, 2005, at C [hereinafter *Jurors Doubted*]. Christopher Cooper was not convinced by the testimony since "Each one of them had a reason to hide something." *Id.* Willis G. Vest was convinced that Scrushy was guilty, but developed a migraine during deliberations and was replaced by an alternate. *Id.* The

"beat the rap," he could go home in peace (relatively, he still has civil claims pending against him for millions of dollars).[77] He can now get back to his family, his friends, his music career,[78] his lavish vacations,[79] and his wealth[80] . . . for a time.[81]

Following this surprising acquittal, Michael Martin argued that the sentencing judge should consider Scrushy's acquittal in Martin's sentencing.[82] However, the Court of Appeals roundly rejected Martin's argument.[83] This Note proposes that the court's decision not to consider Scrushy's acquittal in sentencing Martin will make future white-collar defendants more reticent in plea bargaining negotiations. The next section will begin with a primer in game theory analysis, and then show how a game theory analysis can predict the effect that the Martin decision will have on future white-collar plea bargaining arrangements.

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alternate voted to acquit. *Id.*

77. "The Securities and Exchange Commission is still planning to proceed with a civil case against the former CEO that would include seeking $785 million in fines and restitution plus interest and having him barred from serving as an officer or director." Alix Nyberg Stuart, *CFOs talk, CEO walks,* CFO: MAGAZINE FOR SENIOR FINANCIAL EXECUTIVES, Aug. 2005, *available at* http://findarticles.com/p/articles/mi_m3870/is_11_21/ai_n15683513/print.

78. Former member of a relatively unknown garage rock band, failed country music singer, and promoter of a girl band "3rd Faze" (who often performed at company-sponsored events), Scrushy had devoted much of his life and energy to the music career that always escaped him. John Helyar, *The Insatiable King Richard He started as a nobody. He became a hotshot CEO. He tried to be a country star. Then it all came crashing down. The bizarre rise and fall of HealthSouth's Richard Scrushy,* CNNMONEY.COM July 7, 2003, http://money.cnn.com/magazines/fortune/fortune_archive/2003/07/07/345534/index.htm

79. After being convicted of an unrelated bribery charge and while on release prior to sentencing, Scrushy filed a petition asking the court to allow him to take 11 days out of the country for his annual family vacation . . . to the Bahamas. The petition was denied. United States v. Scrushy, Cr. No. 2:05cr119-MEF, 2006 WL 1990961 (M.D.Ala. July 14, 2006).

80. "Four mansions, the ten boats, the $135,000 bulletproof BMW, the $7.5 million Sikorsky helicopter, the G-5 jet he sometimes piloted himself." Helyar, *supra* note 78.

81. Both Scrushy and former Alabama Governor Don Siegelman were recently convicted of bribery, conspiracy and mail fraud on charges that Scrushy bought a seat on a state board with $500,000 in contributions to Siegelman's lottery campaign. Press Release, United States Department of Justice, Former Alabama Governor Don Siegelman, Former HealthSouth CEO Richard Scrushy Convicted of Bribery, Conspiracy and Fraud (June 29th, 2006), *available at* http://www.usdoj.gov/criminal/press_room/press_releases/2006_4667_06-29-06-Scrushy Convicted.pdf.

82. *See supra* notes 41-54 and accompanying text.

83. *Martin II*, 455 F.3d 1227, 1241 (11th Cir. 2006).

IV. GAMES GALORE (BUT NOT THE FUN KIND)

This Note uses game theory as a tool to analyze the interactions between law enforcement and defendants after *Martin*. Game theory is useful for analyzing a myriad of situations, even those that at first glance do not resemble a game.[84] According to William Poundstone, "Game theory is a study of conflict between thoughtful and potentially deceitful opponents."[85] A "game," according to game theory, is any situation where two or more parties find themselves competing over interests they cannot easily divide among themselves.[86] The "interests" discussed in this Note are the sentences of white-collar criminals. The prosecution is interested in higher sentences, while the defendants are interested in lower ones. The game theory analysis in this section will show that *Martin* will ultimately harm the prosecution of crimes by making defendants less willing to bargain.

An understanding of game theory principles is necessary to understand the analysis. This Note attempts to provide an overview of the sections of the theory necessary for understanding how game theory might predict future behavior among criminal defendants after *Martin*.

A. Game Time At Your Friendly Local Lockup Joint

Games, as defined by game theory, may be expressed in any number of ways. Consider a simple introductory game, the cake cutting game. Two children, both vying for the same piece of cake, must somehow split it between them.[87] Game theory calls this interaction a "zerosum" game. There is only one slice of cake and whether the first child cuts the cake at the 50% mark or at

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84. *See generally* WILLIAM POUNDSTONE, PRISONER'S DILEMMA (First Anchor Books edition 1993) (1992); M. Dresher, L.S. Shapely & A.W. Tucker, *Advances in Game Theory* (Annals of Mathematical Studies No. 52, Princeton University Press 1964); ROBERT AXLEROD, THE COMPLEXITY OF COOPERATION: AGENT BASED MODELS OF COMPETITION AND COLLABORATION 6 (1997); ROBERT AXLEROD, THE EVOLUTION OF COOPERATION 10 (1984); HERVE MOULIN, GAME THEORY FOR THE SOCIAL SCIENCES 88-137 (Andrew Schotter ed. 1981); David M. Chess, *Simulating the Evolution of Behavior: The Iterated Prisoner's Dilemma Problem*, 2 COMPLEX SYSTEMS 663 (1988); ROGER B. MYERSON, GAME THEORY: ANALYSIS OF CONFLICT (1997); JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1953); ANATOL RAPOPORT, N-PERSON GAME THEORY: CONCEPTS AND APPLICATIONS 46 (1970).

85. POUNDSTONE, *supra* note 4, at 6. *See generally* ROGER B. MYERSON, GAME THEORY: ANALYSIS OF CONFLICT (1997); M. Dresher, L.S. Shapely & A.W. Tucker, *Advances in Game Theory* (Annals of Mathematical Studies No. 52, Princeton University Press 1964).

86. POUNDSTONE, *supra* note 4, at 43.

87. Poundstone describes the "game" of children's cake cutting. Two children are offered cake by their parents. There is but one piece of cake to be divided among them. POUNDSTONE, *supra* note 4, at 43.

the 99% mark, the other player will get the remaining slice. In short, the kids split the sum between them.[88]

The traditional Solomonic parental solution is simple: let one child cut the cake and the other chose which slice he or she wants. If one cuts the cake *and* chooses unilaterally, we have good reason to believe he will carve the largest slice he can. Since dividing the cutting and choosing responsibilities does not allow *either of the two to* act unilaterally, the parties must cooperate, not out of altruism, but in their own best interest. The child cutting the cake will try to divide as equally as possible to prevent the other from having the larger slice. The rules of the game provide each child an incentive to operate in a mutually beneficial way.[89] The two children's interests are at "equilibrium,"[90] having exactly half a slice of cake is a result that neither child considers their personal maximum result,[91] but it is the best result that can be achieved given the situation. Game theory calls the point at which two players' interests balance a "saddle point,"[92] or a "Nash Equilibrium."[93]

However, "not all games have saddle points . . . [t]he trouble is you can invent a game with any rules you want."[94] Non-zerosum games for instance do not have saddle points.[95] While in zerosum games, players compete for a set amount of interests, in non-zerosum games there is not a set sum of interests. Since there is no set sum to divide, both players can *simultaneously* make gains

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88. It is called "zerosum" since the "scores" in game theory are generally represented in "points" of a given numerical value. In the example above, player 1, acting unilaterally, cutting the cake at the 60% mark would be considered giving player 1 a point value of 3, and player 2 a point value of -3, if the first player cut at the 80% mark then player 1 would have 4 and player 2-4. (The exact values given here are of little difference, all that need be understood is that points are represented in relation to another, if one gets something, the other gets the opposite.)

89. "No matter how carefully a parent divides it, one child (or both!) feels he has been slighted with the smaller piece. The solution is to let one child divide the cake and let the other chose which piece he wants. Greed ensures fair division." POUNDSTONE, *supra* note 4, at 43.

90. "The most important result in the theory of the [t]wo-person zerosum game states that in every game represented in normal form there exists a pair of strategies which are *in equilibrium* with each other. This means that if one player chooses such a strategy, then the other can do no better than to choose such a strategy also." RAPOPORT, *supra* note 86, at 63.

91. For absent the rule, either child could foreseeably obtain for themselves a 99% slice, leaving the other with the crumbs.

92. The result in the game that is like the "point in the middle of a saddle-shaped mountain pass—at once the maximum elevation reached by a traveler going through the pass and the minimum elevation encountered by a mountain goat traveling the crest of the range." POUNDSTONE, *supra* note 4, at 54.

93. Named after John Nash who originally theorized and expounded upon this point in games. POUNDSTONE, *supra* note 4, at 54.

94. POUNDSTONE, *supra* note 4, at 55.

95. RAPOPORT, *supra* note 84, at 93.

. . . or losses. In zerosum games, every choice is always better for one player at the expense of the other, but in non-zero sum games a particular *strategy* can be in itself better for *both* players.[96]

Though at first glance this might seem to simplify the analysis (since the results are not always so one-sided), closer examination reveals exactly how complicated non-zerosum games can be. The Prisoner's Dilemma is an example of the complication of non-zerosum games.

> Two men, charged with a joint violation of the law, are held separately by the police. Each is told that: (1) If one confesses and the other does not, the former will be given a reward . . . and the latter will be fined . . . (2) If both confess, each will be fined . . . (3) At the same time, each has good reason to believe that if neither confesses, both will go clear . . . ."[97]

The game is typically illustrated by a chart as follows:

FIGURE 1.1[98]

	B refuses deal	B turns state's evidence
A refuses deal	1 year, 1 year	3 years, 0 years
A turns state's evidence	0 years, 3 years	2 years, 2 years

We should now see the implications games of this sort have on the issue at hand. In this game, there are payouts and punishments roughly equivalent to the options available to the modern day criminal defendant. Criminal defendants, though not faced with the exact scenario described in the Prisoner's Dilemma, face a similar choice between less than desirable alternatives. However, in this scenario, they are competing not only with the other defendant, but also with the prosecutor, a dually interested party, interested both in the length of the defendant's sentence, and the depth of the defendant's information.

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96. POUNDSTONE, *supra* note 4, at 55.

97. *Id.* at 117-18. Merrill Flood developed the game, dubbing it the "Non-cooperative pair." *Id.* at 103. His colleague Albert W. Tucker proposed this hypothetical scenario to illustrate the game, wherefrom it received the name "Prisoner's Dilemma." *Id.*

98. *Id.* at 118.

However, the problem with the Prisoner's Dilemma game is that it is truly a dilemma.[99] "The best outcome all around is the upper left cell—the result when both comply with the bargain. However, the best outcome for any individual is to be the lone cheater. The *worst* outcome is to be a sucker who sticks to the agreement while the other person cheats."[100] The deck is stacked against the chooser, the best one can hope for (when acting in one's own self interest) is to limit the exposure to adverse results. So naturally, one should *defect,* which is game theory's technical term for being a "rat." If both players employ the same reasoning, however, both would do worse than if they had remained silent.[101] The best strategy overall is to *cooperate* with one another in silence, cooperation being game theory's term for remaining silent.[102] This provides a better result for both parties. However, this only works if both players make the choice to cooperate. A player who chooses to remain silent opens the door for a much worse result if the other person defects.[103] So—what should a rational person in this situation do—is there a rational course of action for every situation?[104]

To attempt to provide some sense of rationality to game theory, John Nash[105] developed a theory of "equilibriums" to judge the game's outcome.[106] One simply employs a "Monday Morning Quarterback" analysis.[107] In conducting a

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99. Webster's defines dilemma as "A predicament that apparently defies a satisfactory solution." WEBSTER'S II NEW COLLEGE DICTIONARY 324 (3d ed. 2005). In dilemmas neither option available to the chooser is seen as "good," there is no "saddle point," where the chooser can make a choice that is equally satisfactory.

100. POUNDSTONE, *supra* note 4, at 105.

101. "Thus two egoists playing the game once will both chose their dominant choice, defection, and each will get less than they both would have gotten if they had cooperated." ROBERT AXELROD, THE EVOLUTION OF COOPERATION 17-18 (1984) [hereinafter EVOLUTION OF COOPERATION].

102. The terms are admittedly confusing. Most people associate "cooperation" with the plea bargaining party, as in "the defendant *cooperated* with the authorities." However, in game theory, cooperation is actually a term of art denoting cooperation between the defendants, or remaining silent. I will do my best to make sure the reader understands the distinction whenever I use these terms in their technical senses.

103. POUNDSTONE, *supra* note 4, at 107.

104. "Dilemmas in real life are created . . . by the sundry ways that our individual interests clash with those of others and society . . . . The inner questions raised by dilemmas is simple and troubling: Is there a rational course of action for every situation?" POUNDSTONE, *supra* note 4, at 3.

105. For those who are wondering, this is the same John Nash portayed by Russell Crowe in the movie *A Beautiful Mind.* A BEAUTIFUL MIND (Universal Pictures 2001).

106. John F. Nash Jr., *Equilibrium Points in N-Person Games,* 36 PROC. NAT. ACAD. SCI. U. S. A. 48 (1950).

107. POUNDSTONE, *supra* note 4, at 98.

post-game survey, you would hypothetically ask both players if they were satisfied with the result based on what the other player did.[108] In this analysis you cannot suppose to "change the *other* team's strategy. If you're talking about what [you] should have done, you can't also presume to change the way [your] opponents played."[109] If the outcome at hand satisfies both parties, then the result is a Nash Equilibrium.[110]

The Prisoner's Dilemma presents an interesting application of the Nash Equilibrium. If both players cooperate, then they both will wish they had been the lone defector. If one defected while the other cooperated, the party defected against will wish they had also defected. However, if both defect, they will have achieved the Nash Equilibrium – although each will certainly wish they both had cooperated, neither could do any better acting unilaterally.[111] The Nash theory proves that in a short term, one-iteration game,[112] neither can do better than to defect. Nevertheless, the failure to recognize the mutually beneficial outcome that cooperation provides still leaves us with the odd feeling that something is rotten in the state of game theory.

B. Of Mice and Men

Researchers in the field, not being content to let the Nash Equilibrium's odd prediction lie, decided to give further study to the game.[113] Researchers hoped that games with many iterations, where the players would be allowed to develop behavioral patterns, could help solve the dilemma.[114]

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108. *Id.*

109. *Id.*

110. *Id. See generally* MOULIN, *supra* note 84, at 88-137.

111. POUNDSTONE, *supra* note 4, at 107.

112. "One iteration" simply means that the adverse players only play the game against one another one time, more complicated results stem from multiple iteration games.

113. Prisoner's Dilemma provides an interesting opportunity to study behavior. "What the Prisoner's Dilemma captures so well is the tension between the advantages of selfishness in the short run versus the need to elicit cooperation from the other player in the longer run. The very simplicity of the Prisoner's Dilemma is highly valuable in helping us to discover and appreciate the deep consequences of the fundamental processes in dealing with this tension." ROBERT AXELROD, THE COMPLEXITY OF COOPERATION: AGENT BASED MODELS OF COMPETITION AND COLLABORATION 6 (1997) [hereinafter COMPLEXITY OF COOPERATION].

114. "The problem is that while an individual can benefit from mutual cooperation, each one can also do better by exploiting the cooperative efforts of others. Over a period of time, the same individuals may interact again, allowing for complex patterns of strategic interactions." EVOLUTION OF COOPERATION, *supra* note 101, at 92. The hope was that the researchers would find that although "the player has a short-run incentive to defect, [they could] do better in the long run by developing a pattern of mutual cooperation with the other." EVOLUTION OF COOPERATION, *supra* note 101, at 109.

1. Computer Simulations

Academics from various fields have performed studies to observe behavior of "players" in Prisoner's Dilemmas.[115] Some of the most interesting results have come from the computer tournaments and simulations conducted by Robert Axelrod and colleagues.[116] Axelrod set up a computer simulation with a limited set of rules.[117] He then assigned each outcome a point value instead of a number of years imprisonment,[118] and solicited contributions of strategies, called "rules," from professionals and academics.[119] Axelrod then matched these rules against one another to determine what rules would gain the highest scores.[120]

Some submitted rules that favored cooperation, while other submitted rules that favored defection. The researchers found that the most successful strategies were the ones that worked to elicit cooperation from the other player.[121] Strategies tilted towards defection garnered less points.[122] The lesson taken from these tournaments is that players who are allowed to develop patterns of behavior cooperate more often. The short-term rationality of defection decreases as players stand to earn more from establishing mutually beneficial relationships of cooperation.[123]

Axelrod and colleagues took these findings to yet another set of tournaments, where they attempted to study rules in an "evolutionary" context.[124] Axelrod wanted to see how rules would stack up against each other when given a chance to react in long-term iterations. Axelrod set up a tournament, submitted certain rules to the computer, and ran the rules through several "generations" of study. The winning rules moved to the next round, while the losing rules did not. Axelrod found that cooperation became *necessary* for survival; mutual cooperation fared much better than mutual defection.[125] The study showed that

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115. *See generally* EVOLUTION OF COOPERATION, *supra* note 101, at 28-30.

116. *Id.*

117. *Id.* at 28.

118. *Id.* at 30. The payoffs are the same regardless of how they are expressed, mutual cooperation is the best overall outcome, mutual defection is the worst overall, being the lone cooperator is the worst individually, and being the lone defector is the best individually.

119. *Id.* For an example, one rule might be "defect every other turn." Another may be "cooperate until defected against, then defect every turn." These examples are just illustrative, players submitted a multitude of different rules, many far more advanced than these. *Id.*

120. *Id.* at 28-30.

121. EVOLUTION OF COOPERATION, *supra* note 101, at 28-30.

122. *Id.*

123. *Id.* at 28-30.

124. *Id.* at 48-69.

125. *Id.*

"[a]t first, poor programs and good programs are represented in equal proportions. But as time passes, the poorer ones begin to drop out and the good ones thrive."[126] What Axelrod has shown is that although defection is almost universal in the short term, long term strategies of cooperation often develop when players react to each other in repeated iterations.

2. People are Strange . . .

While researchers have found computer simulations incredibly helpful in evaluating the strategies between perfectly rational players, simulations carried out with humans have fared differently. Computers are a logical opponent, with a perfect memory of the past moves, a perfect understanding of the rules, and all possible ramifications of any actions.[127] People are not. People act at random;[128] act altruistically;[129] act competitively;[130] act collusively;[131] act

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126. EVOLUTION OF COOPERATION, *supra* note 101, at 52. The study showed that Tit for Tat, the winner of the simulated submitted rules tournament, was also the winner in the evolutionary rules tournament. *Id.* at 53. *See also,* David M. Chess, *supra* note 24.

127. POUNDSTONE, *supra* note 4, at 44.

128. "Players of games . . . have long appreciated the desirability of acting randomly" (in games which have a relatively low tolerance for strategy) POUNDSTONE, *supra* note 4, at 44.

129. "Consider the recent startling results of two psychologists who found that prisoners' dilemma players induced to feel empathy for the other party cooperate almost fifty percent of the time even when they know that the other party has already defected." Neal Kumar Katyal, *Conspiracy Theory,* 112 YALE L.J. 1307, 1322 (citing C. Daniel Batson & Nadia Ahmad, *Empathy-Induced Altruism in a Prisoner's Dilemma II: What if the Target of Empathy Has Defected?,* 31 EUR. J. SOC. PSYCHOL. 25 (2001)). The participants were all told that the other party had defected, and a random assortment received a note from the other party stating that she had just broken up with her boyfriend and hoped something good would happen to her to cheer her up. Without that inducement of empathy, only five percent cooperated. *Id.* at 28-30.

130. "According to researchers, the subjects [who were playing an iterated Prisoner's Dilemma game] were more concerned with *beating* their opponent's scores than in maximizing their own scores. The researchers speculated that 'a kind of culturally imposed norm' leads people who are strangers to each other to act guardedly." POUNDSTONE, *supra* note 4, at 174-75 (emphasis in original).

Consider this game which the researchers tried on their subjects:

	Black	Red
Black	$4, $4	$1, $3
Red	$3, $1	$0, $0

Now this isn't even an interesting game. There's no reason to defect at all. No matter what, you're penalized for pushing the red button. But the subjects *did* push the red button, 47 percent of the time. Here defection must arise from a competitive impulse. Players who always cooperate rack up the maximum scores

according to notions of chivalry,[132] act according to premonition and superstition; [133] act according to prejudice;[134] and act in all sorts of ways that could never be imagined by a "rational" computer.

    This "nonrationality" adds an entirely new dimension to real life Prisoner's Dilemma. Two completely rational players will always come to the same result. When playing against a person, however, there is no assurance the other party will act rationally. Therefore, even one acting rationally cannot be assured of any particular result. Axelrod called this uncertainty and randomness in action "noise."[135]

    Understanding the effect of iteration on the rationality of cooperation, as well as the nonrationality of "noise" is foundational to the application of game theory in concrete situations. With the understanding gained by the previous sections, this Note shifts analysis to the complex arena of white-collar criminal pleading from a game perspective.

C. *Advanced Application*

    As the above section has shown, in a one-iteration game the Prisoner's Dilemma forces a rational player to "defect" against their opponent, even though the defection is in neither party's best interest. Imagine that the Prisoner's Dilemma, as described above, as only a point on a spectrum, with games that encourage cooperation on one side and games that encourage defection on another.[136] As Axelrod explained, slightly adjusting the payouts

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possible – but the game is a "tie." By defecting with a cooperating partner, a
player wins less but increases his score *relative* to his opponent.
Id. (emphasis in original).

    131. RAPOPORT, *supra* note 84, at 68-92.

    132. "[M]en become protective, and are more inclined to cooperate when they know their partner is a woman." POUNDSTONE, *supra* note 4, at 177.

    133. Axelrod called these "norms," actions based upon principles external to the game, which people applied within the game. COMPLEXITY OF COOPERATION, *supra* note 111, at 48-66. Axelrod also discussed "Metanorms," in which players will defect against a player who had broke a "norm" in order to enforce the norms. *Id.* at 52-54. "[O]ne way to enforce a norm: punish those who do not support it. In other words, be vengeful, not only against the violators of the norm, but also against anyone who refuses to punish the defectors." *Id.* at 52.

    134. "People often relate to each other in ways that are influenced by observable features such as sex, age, skin color, and style of dress . . . these characteristics can allow a player to know something useful about the other player's strategy even before the interaction begins." EVOLUTION OF COOPERATION, *supra* note 101, at 146-47.

    135. COMPLEXITY OF COOPERATION, *supra* note 111, at 30-39.

    136. Zerosum games do not have the same capability to encourage cooperation because the "winner take all" nature of the game lends itself more to adverse competition.

will transform the game, making the desired result, either cooperation or defection, more attainable.[137]

This is where the game theory becomes useful. Game theorists have noted that "getting out of the Prisoner's Dilemma is one of the primary functions of government: to make sure that when individuals do not have the private incentives to cooperate, they will be required to do the socially useful thing anyway . . . [w]hat governments do is change the effective payoffs."[138] This is why game theory is relevant to the law from a public policy standpoint. Knowledge of the rules that are likely to promote beneficial choices in difficult situations allows the government to structure laws accordingly.

Game theory can help the government predict which laws will foster cooperation among parties, and which laws will disincentivize cooperation.[139] If the payouts and structure of the game create an incentive to perform the government's desired action, then the policy is sound; conversely, if the game deters desired conduct, the policy is faulty. Determining whether a particular policy will encourage this desired result, however, can be difficult.

The average criminal defendant's decisional matrix is quite complex.[140] The problem for our participants is that the prosecutor is often the one who determines the payoffs for the "game."[141] Jeffery Standen portrays how a prosecutor can manipulate the overlap of sentences under the guidelines to expand or reduce the sentence at will.[142] Under the sentencing guidelines, any

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137. "Even a relatively small transformation of the payoffs might help to make cooperation based on reciprocity stable, despite the fact that the interaction is still a Prisoner's Dilemma." EVOLUTION OF COOPERATION, *supra* note 101, at 134.

138. *Id.* at 133.

139. "The trick [for attaining beneficial cooperation by governmental influence] is to set the stringency of the standard high enough to get most of the social benefits of regulation, and not so high as to prevent the evolution of a stable pattern of voluntary compliance from most all of the companies." *Id.* at 156.

140. Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 89 (1995).

141. For an illustrative history of this process, see Simons, *supra* note 14.

   Although our current cooperation system has a distinctly modern feel, the practice has existed in one form or another for centuries. Cooperation has its roots in the ancient common law doctrine of approvement, whereby a defendant who confessed, testified against his accomplices, and secured their convictions would receive a pardon. Eventually, the power to decide which witnesses should be permitted to testify for the state shifted to the prosecutor, and by the nineteenth century the practice of prosecutors negotiating with defendants for testimony had become commonplace. Since then, cooperation has remained a mainstay of our criminal justice system.

Simons, *supra* note 14, at 6.

142. Standen, *supra* note 20, at 1506-08.

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number of charges may cover the defendant's criminal actions, and the prosecutor can then charge bargain with the defendant. The notable trend towards disallowing downward departures in white-collar sentencing gives the prosecutor even more leverage since defendants now know that "what *they* charge is what *you* get."[143]

Commentators have defined prosecutors as "monopsonists," the sole purchasers of information that criminal defendants offer for "sale."[144] In a monopsonist market, the sole buyer sets the price and is free to discriminate on factors totally unrelated to the desire and ability to sell, and the information's relative value.[145] Prosecutors actually have an interest in discriminating against those who are willing to sell in order to keep "prices" low.[146] According to Standen, "[t]he legislative rules that structure sales of convictions do not appear to serve as a bulwark against the monopsony but rather tend to encourage prosecutors to capitalize on their superior bargaining position."[147] This puts defendants in a spot. "Selling" information is a defendant's sole prospect for leniency, yet at the same time one also knows that the "price" paid will depend solely on the prosecutor.

However, there are countervailing factors that help stabilize the monopsonist market. In the realm of criminal litigation, each prosecution is an independent game played between two individual adversaries. Game theory predicts that in these exchanges, the government will always "win," since despite offering low "prices," both players will likely defect.[148] But there is another game at work here, a "macrogame" between the government and the defense bar. In the area of white-collar crime, defense attorneys play an especially large role, disproportionate to their roles in the trials of "common criminals."[149] The

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143. *See supra* note 62 and accompanying text, detailing the trend towards reversal of downward deviations. The reader should note that although the guidelines are only advisory after *Booker*, most jurisdictions have determined that the guidelines are presumptively reasonable. *See* Graham & Davis, *supra* note 68. As such, a prosecutor who knows that a court will not stray from the guidelines, can be almost certain from the start exactly what sentence a defendant will get, even in the current advisory scheme. *Id.*

144. Standen, *supra* note 20, at 1472-73.

145. *Id.* at 1472-74.

146. *Id.* at 1478-87.

147. *Id.* at 1497-98.

148. "Defendants can do little to shift risk back to the government because each supplier (defendant) is a one shot player, who cannot engage in group action and can only sell his or her commodity to a single buyer (prosecutor), who enjoys . . . a superior negotiating position." Weinstein, *supra* note 14, at 584.

149. David Weisburd's CRIMES OF THE MIDDLE CLASSES reported that white-collar criminals among their survey group, were represented by privately retained counsel 56.7% of the time,

disproportionate presence of private defense counsel transforms the game from a "one shot" bargain to an iterated Prisoner's Dilemma.[150] As game theory would predict, the disproportionate presence of private counsel can turn the game in favor of the defense bar. Defection (turning "state's evidence") among well-represented white-collar criminals is lower than in cases involving common criminals without privately retained counsel.[151]

Defense attorneys have reason to push cooperation, since defection (cooperation with the authorities) hurts the interest of their client base on the macro level.[152] Defense attorneys are, and ought to be, wary of the "Golden Rule."[153] If you do not want other defendants testifying against your present and future clients, you should not advise your clients to testify against other defendants.[154]

Fighting an uphill battle against the player/arbiter of the game, the defense bar provides a formidable adversary. "A zealous defense attorney cannot give the defendant contemplating cooperation the certainty of a simple plea bargain, but she can vastly reduce the risk."[155] Taken alone, this countervailing factor may help stabilize prices, but is often not enough to tip the scales in favor of cooperation among defendants. The *Martin* decision, however, changes the rules of the game.

D. What's Going On?

If you recall from above, *Martin* held that the acquittal of a co-conspirator is not a valid sentencing concern. This section will now use our newly gained knowledge of game theory to begin to analyze *Martin*. Now that we have successfully outlined the parameters of the game, which *Martin* "played," we can now consider the effects that will likely follow. In the future, any CFO, or any other subordinate officer charged with a crime, must consider the holding

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while among "common criminals," polled from the same jurisdiction only 15.7% had privately retained counsel. WEISBURD, *supra* note 56, at 101.

150. As William Stuntz and others have noted, "Defense attorneys are repeat players with whom the government must deal often." Richman, *supra* note 138, at 93. (quoting William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 832-33 (1989)).

151. Weisburd also reported that white-collar criminals (who are disproportionately well-represented) had a cooperation rate of 7.7%, compared with a rate of 11.9% for "common criminals." WEISBURD, *supra* note 56, at 104.

152. Richman indicates that "there are considerable pressures on a broad range of attorneys to deter their clients from cooperating and that there is reason to believe that these pressures affect the advice that many defendants receive." Richman, *supra* note 138, at 76.

153. *Matthew* 7:12, *Luke* 6:31.

154. *See generally*, Richman, *supra* note 138, at 69.

155. *Id.* at 73-74.

in *Martin*. Despite the strong hand held by the government in plea-bargaining, the decision in *Martin* has altered the rules of the game. This Note proposes that in the spectrum of games as described above,[156] *Martin* moves white-collar criminal pleading several degrees towards incentivizing cooperation among co-defendants.[157]

If we remember our Prisoner's Dilemma scenario from above:

FIGURE 1.2[158]

	B refuses deal	B turns state's evidence
A refuses deal	1 year, 1 year	3 years, 0 years
A turns state's evidence	0 years, 3 years	2 years, 2 years

As illustrated by the Nash equilibrium theory, the standard-rule Prisoner's Dilemma provides that the most "rational" decision is defection, since neither player can do better by switching strategies unilaterally.[159] The *Martin* decision throws off every quadrant of the dilemma.

1. The Sucker Payoff

The top right quadrant is the easiest to analyze. The main "stick" that the Prisoner's Dilemma has to counter the "carrot" of cooperation is this quadrant. In standard rule Prisoner's Dilemma play, the top right quadrant provides the worst possible payout for the chooser. If a player chooses to cooperate while their opponent defects, they would then be stuck with the enhanced sentence –

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156. *See supra* notes 134-35 and accompanying text.

157. I have not been the only one to realize the disparity in the *Martin* case, Alix Nyberg Stuart of CFO magazine accurately predicted the same result that I will now show that game theory predicts.

> If there is any lesson for CFOs to learn from the stunning acquittal of former HealthSouth Corp. CEO Richard Scrushy, it may be to keep mum a little longer. With all five former HealthSouth CFOs facing jail time as Scrushy walks, the case is likely to 'slow the rush to the prosecutor's office to be the first to rat on your colleagues,' says Charna Sherman, co-chair of the White Collar Practice at Squire, Sanders & Dempsey LLP.

Stuart, *supra* note 77.

158. POUNDSTONE, *supra* note 4, at 118.

159. *Id.* at 98.

the sucker payoff. Players who would prefer to cooperate cannot do so rationally because of the fear of this quadrant. However, *Martin* explicitly calls into question the validity of the "sucker payoff" in real life Prisoner's Dilemmas. The *Scrushy* acquittal shows that despite the best prosecutorial efforts, a large degree of "noise" remains in the legal system.[160]

The prosecution in *Scrushy* used the testimony of fourteen co-conspirators against Scrushy, and all to no avail.[161] Scrushy decided to fight the case, despite the grim prospect of facing the testimony of defecting co-conspirators at trial. On the other hand, Martin cooperated with the government, forgoing his opportunity to challenge the case at trial. Game theory and common sense would predict a stunning defeat for Scrushy; however, introducing well-heeled counsel and a sympathetic jury into the picture creates a large degree of "noise." The only way a defendant may capitalize on this "noise" is to cooperate, playing like Scrushy in hopes of getting a win. Keeping your mouth shut while the other defendant sings is no longer *necessarily* a bad choice.

It is important to note, however, that this factor alone does not make cooperation among defendants a necessary choice. Dynegy's Jamie Olis can testify as to the danger of this strategy as much as Scrushy can testify to its appeal.[162] *Scrushy* does not assure any future defendant a "get out of jail free card," it simply makes the offer of going to trial against co-conspirator testimony appear a bit less dangerous.

2. The Temptation Payoff

The next quadrant for consideration is the bottom left, the "temptation" payoff. Game theory studies have shown this to be the most preferable choice.[163] After *Martin*, this quadrant loses much of its luster. Game theory studies have shown the competitive nature of players in the real world.[164] The studies show that players have an innate desire to receive for themselves the most comparatively beneficial outcome, at the other player's expense.[165] In

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160. For a good discussion of noise in the white-collar crime arena, see Samuel W. Buell, *Reforming Punishment Of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1625-27 (2007).

161. *See supra* notes 71-81 and accompanying text.

162. "Olis's codefendants cooperated with authorities and negotiated 5 year caps on their sentence. Olis refused to cooperate and received a sentence of more than 24 years." Bibas, *supra* note 1, at 727-28 (citing Susan Warren, *Refusing to Talk, Dynegy's Olis Goes to Prison*, WALL ST. J., May 20, 2004, at B1).

163. EVOLUTION OF COOPERATION, *supra* note 101, at 10; POUNDSTONE, *supra* note 4, at 107.

164. *See supra* notes 125-32 and accompanying text.

165. *Id.*

simulations, this has caused a pattern of random defection in the midst of otherwise rational cooperative play, even when there was no incentive to defect.[166] In reality, the same results can show how beneficial defection may be turned into cooperation. In *Martin*, Martin chose the bottom left quadrant, fully expecting to "do better" than Scrushy. Martin did not do better than Scrushy, and the *Martin* decision creates a precedent to ignore this aberrant result.

Future players considering this will likely find themselves somewhat dumbstruck. When players who have an interest in "beating" the other player have no recourse, their natural competitive nature is denied effect. Future players will see that they have no comparative advantage in defection that they do not have in cooperation. As the possibility of acquittal rises, the benefits of being the lone defector decrease. A player now sees not only that defection might lead to a worse result for themselves, but also a chance that their actions will benefit the other player.[167] After the dust settled around Martin, he realized that the best possible choice resulted in the worst possible outcome, and future defendants should take notice.

Further, the fallout of Enron has also affected this quadrant. While in times past white-collar defendants reasonably expected light sentences and "country club" prisons, the public outcry over corporate fraud has changed the entire landscape.[168] As documented above, authorities are now paying more attention to investigating, convicting, and sentencing white-collar defendants.[169] This being the case, even if a defendant cuts a deal, there is no assurance that the prosecutor will uphold their end of the bargain.[170] Even given that the

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166. *Id.*

167. The New York Times' Kyle Whitmire reported that the plea bargains of Martin and the other co-conspirators actually help push the jurors towards acquittal in the Scrushy case:

> The jurors said the plea agreements, rather than strengthening the government's case, made the witnesses' testimony suspect. Before the trial, a federal judge had sentenced Michael Martin, another former chief financial officer, to six months of home detention. The defense characterized the sentence as excessively lenient, allowing Mr. Martin to sleep in his own bed, go to the store and even play golf.

Jurors Doubted, supra note 76, at A1.

168. *See supra* notes 55-65 and accompanying text.

169. *Id.*

170. *See* Richman, *supra* note 138, at 93. Richman describes quite well the excruciating uncertainty that faces the defendant:

> Perhaps the government's case is so weak that the defendant might take the case to trial, obtain an acquittal and face no punishment. Or the government is soliciting his cooperation only to make an overwhelming case even stronger (perhaps to avoid a trial); should both he and his co-defendant refuse to cooperate, both might face the harshest sentence. The government might refuse to set a precise payout for cooperation, conditioning unspecified leniency upon the extent to which the

prosecutor does, there is no assurance that the judge will allow the prosecutor to reward the defendant.[171]

Bottom left corner strategies are traditionally the "golden goose" of Prisoner's Dilemma game theory play.[172] Competitors in head-to-head competitions have an incredible propensity to defect *even against interest* to get the coveted payoff this quadrant provides.[173] However, in real life this strategy is beginning to show itself as more of a lame duck than a golden goose. This quadrant now comes with uncertainty disproportionate to its reward.

3. The Defection Equilibrium

As previously discussed, the interesting thing about the Prisoner's Dilemma is that it forces rational players to act against interest.[174] The carrot and stick of the bottom left and top right respectively, drove players from mutual benefit to mutual defection. With the stakes of these two quadrants changed, we must now consider the effect upon the formerly "rational" choice in the bottom right.

Prior to Scrushy's trial, more than a dozen dejected co-conspirators lined up at the prosecutor's door to make a detestable but rational choice – confess guilt and promise to do everything in their power to help convict their friends.[175] Now, every one of them is kicking themselves.

The beauty of the dilemma facing defendants (from the government's perspective) is that it forces defendants to do what they would not otherwise do – expose themselves to criminal liability at the mercy of the court and without a "fair and just adjudication."[176] The government knows that in most cases

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defendant gives "truthful" information. Or there might be a real risk that, having imposed such a condition - with or without a specified payout - the government will later act in bad faith to deprive the defendant of the promised leniency. Moreover, even were a defendant to know precisely what his sentence would be were he to cooperate, fear of the condemnation or retaliation often faced by snitches could introduce an element of uncertainty into the effective payout.
Richman, *supra* note 138, at 90-91.

171. *See supra* note 62 and accompanying text.

172. For many defendants, cooperation offers the only opportunity for significant sentence mitigation or escaping prison all together, regardless of the seriousness of the offense." Weinstein, *supra* note 14, at 577-78.

173. *See supra* note 128 and accompanying text. "Players who always cooperate rack up the maximum scores possible—but the game is a 'tie.' By defecting with a cooperating partner, a player wins less but increases his score relative to his opponent." POUNDSTONE, *supra* note 4, at 175.

174. *See supra* notes 99-104 and accompanying text.

175. *See supra* note 74 and accompanying text.

176. "The typical cooperator does not betray his associates out of an altruistic desire to fight crime. The typical cooperator is motivated primarily, if not entirely, by a desire to help himself."

defection is not the defendant's first choice. Most people question the idea of "ratting out" a former friend and coworker.[177] People have a natural inclination that loyalty is to be treasured and disloyalty despised.[178] People, especially in the United States, also have an inclination that there is something unjust about the power prosecutors have to force defendants into defection.[179]

The government allows, maybe even forces, prosecutors to coerce defendants to act against their natural inclinations because of the comparable social good gained through the defendant's testimony. Without the testimony of defectors, the wheels of justice would begin to grind more slowly, especially in areas like white-collar crime.

The rules of the game have changed; defection is no longer the shining beacon of rationality for defendants. Fighting the case at trial does not subject defendants to as much of a comparative disadvantage after Enron and *Martin*. Through the actions of the courts and legislatures, and in cases like *Martin*, the public outcry against white-collar defendants has caused the law to promote the results contrary to public interest.

4. Cooperation

Cooperation warrants little comment. For most defendants, it is still a poor choice, but many defendants taking note of *Martin* will likely weigh cooperation far more heavily than they might have in the past. The defense bar's iterative effect, 5K1.1's failure to provide a meaningful departure, and the prosecutorial system's deleterious success, all join the failings of *Martin* to create an incentive for cooperation, where once there stood a market for cheap and easy defection. This being the case, what, if anything, should courts do?

V. APPLICABLE AQUINAS ANALYSIS

We have come to a point of decision. Game theory analysis predicts the general trends started by Enron and culminating in the *Martin* decision will likely sway the future white-collar criminal defendant towards fighting the case

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Simons, *supra* note 14, at 28.

177. Simons, *supra* note 14, at 26-27.

178. "[D]isdain for cooperators is deeply embedded in our culture. In the playground, our children learn that no one likes a tattletale. In school, they learn that Benedict Arnold was despised for his treason. In church, they learn that Judas' treachery led to Jesus' death." *Id.*

179. One "of the principal objections that [has] been leveled against plea bargaining [is] that the 'rewarding' of those who plead guilty in effect penalizes those who exercise their right to go to trial." BRANHAM, *supra* note 20, at 15. "Because disloyalty is at the heart of cooperation, snitching engenders almost universal moral ambivalence and we should question whether the government should encourage so much of it." Weinstein, *supra* note 14, at 565.

at trial rather than "risk" cooperating with the prosecution. This Note proposes that this result is neither fair to the individual defendants, nor in the best interest of the "common good" as defined by Thomas Aquinas.[180]

A. *Individual defendants*

Individual defendants all over the nation have been subjected to a "game" of gigantic and dynamic proportions. The difficulties illustrated by this Note are conclusions based upon study of the overarching legal trends after the fact. White-collar criminal defendants, however, are caught in the *middle* of tumultuous changes in white-collar prosecution and sentencing. Courts must settle this area of the criminal law, if for no other reason than to allow the players to have a good look at the rules before they step up to play. Cases like *Martin* are shaping the law, giving future players an idea of the stakes at hand. However, before courts clarify the "rules," many more players will choose based on partial information and speculation. As described above, randomness of the rules, or "noise," is a significant contributing factor likely to lead to greater cooperation among defendants.[181]

It is clear the rules need to be settled, but in whose favor do we settle them? Should the defense-oriented trend of mutual cooperation continue, or should we rather seek to fashion rules to aid the prosecution of crimes?

B. *The Common Good*

In many ways, the answer to the question at hand is simple. "Law should be framed," said Aquinas, "not for any private benefit, but for the common good of all the citizens."[182] The end result should be a rule providing the proper relationship to universal happiness,[183] in accordance with the natural law.[184]

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180. AQUINAS, *supra* note 5, at pt. I-II, q. 96, art. 1, a.

181. *See supra* notes 158-60 and accompanying text.

182. AQUINAS, *supra* note 5, at pt. I-II, q. 96, art. 1, a. "Hence human laws should be proportionate to the common good. Now the common good comprises many things. Wherefore law should take account of many things, as to persons, as to matters, and as to times." *Id.*

183. "Consequently the law must needs regard principally the relationship to happiness. Moreover, since every part is ordained to the whole, as imperfect to perfect; and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness." AQUINAS, *supra* note 5, at pt. I-II, q. 90, art. 2, a. Aquinas here is echoing Socrates, who famously argued, first with Glaucon, then with the much more willing Adeimantus, that it is the common good that must guide the model society. Socrates summed up the argument to Adeimantus, "our aim in founding the State was not the disproportionate happiness of any one class, but the greatest happiness of the whole; [as] we thought that in a State which is ordered with a view to the good of the whole we should be most likely to find

In the philosophy of St. Thomas Aquinas, this common good is not simply the "greatest good for the greatest number," but is a group of people, "united together by consent to the law and by community of welfare,"[185] to make laws that "make those to whom it is given, good, either simply or in some particular respect."[186]

In our dilemma, what are the rules that will contribute most to the common good, and what rules are most likely to make individual citizens good? The answer to both questions is the same. Despite the moral ambivalence (or worse) most people have for defectors, the greatest social utility is provided by the set of rules that encourages cooperation with authorities through voluntary action.[187]

Corporate misconduct has blighted the moralistic face of our society; greed run rampant has ruined the public trust. For many years, the rules of the game tilted heavily towards defection, but a defection with leniency.[188] In recent years, the government has gone too far to the other extreme.[189] In shaping a policy that discourages leniency, the government has inadvertently changed the rules to favor cooperation among defendants.[190] Left unchecked, this will deprive the government of witnesses they need to prosecute crimes.[191] A greater number of criminal defendants proceeding to trial increases not only the amount of public expenditure, but also the likelihood that aberrant results like the ones witnessed in Scrushy's trial will multiply.[192]

Justice." PLATO, THE REPUBLIC 129 (Benjamin Jowett trans., 1986) (at bk. IV, ln. 420b9-11).

184. "Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law." AQUINAS, *supra* note 5, at pt. I-II, q. 95, art. 2, a.

185. AQUINAS, *supra* note 5, at pt. I-II, q. 105, art. 2, a.

186. AQUINAS, *supra* note 5, pt. I-II, q. 92, art. 1, a.

187. According to R.P. George,

> [L]aws that effectively uphold public morality may contribute significantly to the common good of any community by helping to preserve the moral ecology which will help to shape, for better or worse, the morally self constituting choices by which people form their character, and in turn affect the milieu in which they and others will in future have to make such choices.

ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 47 (Clarendon House 2002) (1993).

188. *See supra* notes 55-70 and accompanying text, detailing the historical treatment of white-collar crime, and the subsequent shift towards sentencing strictness.

189. *See supra* notes 61-70 and accompanying text.

190. *See supra* notes 155-78 and accompanying text.

191. *Id.*

192. This will in itself provide for a domino effect. The more defendants who take the case to trial and win, the more who will be willing to try. The converse may also be true, as Katyal

The common good requires the government take action to provide the community with free and fair markets, and information held by criminal defendants is a necessary tool for this provision. The government must take steps to enforce the interest of the common good. "Changing the effective payoffs"[193] in Prisoner's Dilemma games is an essential part of the government's role in shaping policy. Dramatic changes are not required.[194] All that is required is that the government "set the stringency of the standard high enough to get most of the social benefits of regulation, and not so high as to prevent the evolution of a stable pattern of voluntary compliance."[195]

C. A Few Small Requests

Martin pleaded guilty because he reasoned, according to the principles of the Prisoner's Dilemma, that defection was his best option. From a Monday Morning Quarterback perspective, it was actually the worst choice he could have made, and his reliance on changing "rules" was highly detrimental. If courts will not consider sentencing incongruity in cases like *Martin*, the effects on cooperation in game play will likely be unfavorable to both the government and the people.

A proper judicial role in future cases should encompass at least some consideration of co-conspirator sentencing. Encouraging case law development tempering the strict rule from *Martin* would be a welcome development, but the simplest and most effective strategy would be amending section 5K1.1 to allow judicial consideration of the sentences or acquittals of co-conspirators. Congress should amend 5K1.1 to read: "The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following . . . (6) The amount of time to be served, and relative culpability of co-conspirators, co-felons, and other unindicted or acquitted individuals."[196]

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has noted: "criminal law should encourage renunciation and withdrawal, not only because a person's renunciation or withdrawal removes that person from the organization, but because it may also *increase* the defection of other members of the group." Katyal, *supra* note 127, at 1332 (emphasis added).

193. "Getting out of the Prisoner's Dilemma is one of the primary functions of government: to make sure that when individuals do not have the private incentives to cooperate, they will be required to do the socially useful thing anyway . . . [w]hat governments do is change the effective payoffs." EVOLUTION OF COOPERATION, *supra* note 101, at 133.

194. "Even a relatively small transformation of the payoffs might help to make cooperation based on reciprocity stable, despite the fact that the interaction is still a Prisoner's Dilemma." *Id.* at 134.

195. *Id.* at 156.

196. The current text of § 5K1.1 is as follows:

This proposal should be considered as separate and distinct from 18 U.S.C.A. section 3553(a)(6), which reads, "The court, in determining the particular sentence to be imposed, shall consider . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[197] The text in section 3553 is concerned with parity among comparable criminal sentences, while the proposed amendment limits itself to the parties involved in the same criminal acts as the defendant being sentenced. The importance of this distinction is evident in the *Martin* case,[198] on its face section 3553(a)(6) allows judges to consider only the sentences of similarly situated individuals. Acquitted individuals have no sentence to compare. The proposed amendment does not affect the language or scope of section 3553, since the underlying policy proposed in this Note is concerned only with the effect of co-conspirator considerations and their affect on cooperation within section 5K1.1.

This proposal does not change the substantive criminal law; rather, it simply allows the judge to consider another policy factor in mitigation upon receiving a 5K1.1 motion. Since the text of 5K1.1 allows, but does not require, courts to consider the factors listed, courts would presumably only consider co-conspirator liability in future situations like Martin's, where sentencing disparity could lead to negative results on the common good.

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.

197. 18 U.S.C.A. § 3553(a)(6).

198. The court in *Martin* refused to read § 3553(a)(6) to encompass a consideration of Scrushy's acquittal. *Martin II*, 455 F.3d 1227, 1241 (11th Cir. 2006); *see supra* note 56-69 and accompanying text.

VI. CONCLUSION

This Note has summarized *United States v. Martin*, and analyzed the result under the Game theory analysis. This Note has attempted to show that *Martin's* rationale was improper from a policy perspective as it could likely lead to a decline in cooperation with the authorities by future white-collar defendants. This result is contrary to a proper governmental policy concerned with the common good, and should be rectified to allow prosecutors greater access to the information that plea bargaining can offer.

To summarize, the beauty of the Prisoner's Dilemma, is that it remains a dilemma. There are no "right choices" or "wrong choices" per se; in most situations, neither choice is preferable to the player when compared to not playing at all. Nevertheless, defendants must play, and they must have rules— rules that favor a proper result. No set of rules ensures that defendants will voluntarily cooperate with authorities. The best our justice system can hope for is a set of rules that makes it more likely than not that the government will derive the benefits held by white-collar defendants. The rule in *Martin* should be tempered to allow consideration of co-conspirator acquittal when sentencing testifying co-conspirators.