

399 F.3d 888

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United States Court of Appeals,
Eighth Circuit.
UNITED STATES of America, Appellee,
v.
Cinda Clare MULLINS, Appellant.
No. 04-2776.
Submitted: Dec. 13, 2004.
Filed: March 3, 2005.

Background: Defendant was convicted on unconditional guilty plea in the United States District Court for the Northern District of Iowa, O'Brien, J., of narcotics trafficking, and sentenced to statutory minimum of 10 years, which exceeded maximum applicable Sentencing Guidelines range. Defendant appealed her sentence.

Holding: The Court of Appeals, [Riley](#), Circuit Judge, held that defendant was not entitled to evidentiary hearing on her motion to compel substantial assistance motion, based only on assertions that she had supplied information and assistance and on her opinion of its value.

Affirmed.

West Headnotes

[\[1\] KeyCite Notes](#) 

- 🔗 [350H](#) Sentencing and Punishment
- 🔗 [350HIV](#) Sentencing Guidelines
- 🔗 [350HIV\(H\)](#) Proceedings
- 🔗 [350HIV\(H\)1](#) In General
- 🔗 [350Hk937](#) Pleadings and Motions
- 🔗 [350Hk939](#) k. Motion for Departure in General. [Most Cited Cases](#)

In federal prosecution government has power, but not duty, to make substantial assistance motion permitting court to depart below statutory mandatory minimum sentence. [18 U.S.C.A. § 3553\(e\)](#); [U.S.S.G. § 5K1.1](#), p.s., 18 U.S.C.A.

[\[2\] KeyCite Notes](#) 

- 🔗 [350H](#) Sentencing and Punishment
- 🔗 [350HIV](#) Sentencing Guidelines
- 🔗 [350HIV\(H\)](#) Proceedings
- 🔗 [350HIV\(H\)1](#) In General
- 🔗 [350Hk946](#) k. Refusal to Seek Downward Departure. [Most Cited Cases](#)

Federal district court may review government's refusal to make substantial assistance motion, if such refusal: (1) was prompted by unconstitutional motive, e.g. defendant's race or religion, or (2) was not rationally related to legitimate government interest. [18 U.S.C.A. § 3553\(e\)](#); [U.S.S.G. § 5K1.1](#), p.s., 18 U.S.C.A.

[\[3\] KeyCite Notes](#) 

- ↳ [350H](#) Sentencing and Punishment
 - ↳ [350HIV](#) Sentencing Guidelines
 - ↳ [350HIV\(H\)](#) Proceedings
 - ↳ [350HIV\(H\)1](#) In General
 - ↳ [350Hk946](#) k. Refusal to Seek Downward Departure. [Most Cited Cases](#)

To obtain evidentiary hearing on his challenge to government's refusal to make substantial assistance motion, federal defendant must make substantial threshold showing that government's refusal to make motion was premised on improper motive. [18 U.S.C.A. § 3553\(e\)](#); [U.S.S.G. § 5K1.1](#), p.s., 18 U.S.C.A.



[\[4\] KeyCite Notes](#)

- ↳ [350H](#) Sentencing and Punishment
 - ↳ [350HIV](#) Sentencing Guidelines
 - ↳ [350HIV\(H\)](#) Proceedings
 - ↳ [350HIV\(H\)1](#) In General
 - ↳ [350Hk946](#) k. Refusal to Seek Downward Departure. [Most Cited Cases](#)

Federal narcotics trafficking defendant was not entitled to evidentiary hearing on her motion to compel government to make substantial assistance motion, based only on showing that she had provided information concerning drug activities, was willing to provide continued assistance, and disagreed with government's assessment of extent to which her information assisted government; there was no showing that government had acted unconstitutionally or irrationally in refusing to make motion, and defendant was unable to name any person charged or held using her information. [18 U.S.C.A. § 3553\(e\)](#); [U.S.S.G. § 5K1.1](#), p.s., 18 U.S.C.A.; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, [21 U.S.C.A. §§ 841, 846](#).

*[889](#) Patrick T. Parry, Sioux City, IA, for appellant.
John H. Lammers, AUSA, Sioux City, IA, for appellee.

Before [MORRIS SHEPPARD ARNOLD](#), [BEAM](#), and [RILEY](#), Circuit Judges.

[RILEY](#), Circuit Judge.

Cinda Clare Mullins (Mullins) pled guilty, without a plea agreement, to conspiracy to manufacture and distribute 500 grams or more of methamphetamine within 1,000 feet of a protected location, in violation of [21 U.S.C. §§ 841\(a\)\(1\), 841\(b\)\(1\)\(A\)\(viii\), 846](#), and [860\(a\)](#). Applying the United States Sentencing Guidelines (Guidelines), the district court [\[FN1\]](#) determined Mullins's sentencing range was 78 to 97 months in prison, based on Mullins's criminal history category of III and a total offense level of 26. However, the district court sentenced Mullins to 120 months in prison, the statutory mandatory minimum sentence under [21 U.S.C. § 841\(b\)\(1\)\(A\)](#). Mullins appeals, arguing the district court abused its discretion by denying Mullins's motion for an evidentiary hearing on her motion to compel the government to make a substantial assistance departure motion. We affirm.

[FN1](#). The Honorable Donald E. O'Brien, United States District Judge


for the Northern District of Iowa.



I. BACKGROUND


At her sentencing hearing, Mullins testified she gave the government names; showed officers businesses, houses, and people associated with illegal narcotics; and "did everything I could possibly do." Mullins further testified she repeatedly telephoned officers, but they never returned her phone

calls. She believes officers used her information to apprehend some people and used her information in their cases. However, Mullins never testified before a grand jury, never testified in any contested sentencing hearings, and never purchased drugs for the government. Mullins is unable to name any person the government charged or held using her information. Mullins contends the government acted irrationally and in bad faith, because she took every affirmative step she could think of to assist the government. The government, relying on its discretion, maintains it was under no duty to move for a downward departure because Mullins did not provide substantial assistance.

II. DISCUSSION

[1]  Before a district court may depart below a statutory mandatory minimum sentence to reflect a defendant's substantial assistance, the government first must make a motion requesting the court impose a sentence below the mandatory minimum. *Melendez v. United States*, 518 U.S. 120, 125-26, 116 S.Ct. 2057, 135 L.Ed.2d 427 (1996) (citing 18 U.S.C. § 3553(e)). Both 18 U.S.C. § 3553(e) ("[u]pon motion of the government") and section 5K1.1 of the Guidelines (same) give the government the power, but not the duty, to make a substantial assistance motion. *Wade v. United States*, 504 U.S. 181, 185, 112 S.Ct. 1840, 118 L.Ed.2d 524 (1992). "[T]he government has no duty to make [a substantial assistance] motion unless it has entered into a plea agreement *890 with the defendant that creates such a duty." *United States v. Wolf*, 270 F.3d 1188, 1190 (8th Cir.2001). Here, Mullins pled guilty without a plea agreement, and the government never promised it would move for a downward departure. Therefore, the government retained its discretion to decline to make a substantial assistance motion.

[2]  [3]  The government's discretion to refuse to make a substantial assistance motion "is subject to constitutional limitations that district courts can enforce." *Wade*, 504 U.S. at 185, 112 S.Ct. 1840. A district court may review the government's refusal to make a substantial assistance motion under section 3553(e) or section 5K1.1, if such refusal (1) was prompted by an unconstitutional motive, such as the defendant's race or religion; or (2) was not rationally related to a legitimate government interest. *Id.* at 185-87, 112 S.Ct. 1840. To obtain an evidentiary hearing, a defendant must make a "substantial threshold showing" that the government's refusal to make a substantial assistance motion was premised on an improper motive. *Id.* at 186, 112 S.Ct. 1840. "In the absence of such a showing, a defendant is not entitled to any remedy or even an evidentiary hearing." *United States v. Hardy*, 325 F.3d 994, 996 (8th Cir.2003) (citations omitted).

[4]  Mullins's testimony at her sentencing hearing merely demonstrates (1) she provided information concerning drug activities; (2) she was willing to provide continued assistance; and (3) she disagrees with the government's assessment of the extent to which her information assisted the government. Even crediting her version of assistance, Mullins's assertions do not support any inference the government acted unconstitutionally or irrationally in refusing to move for a downward departure based on substantial assistance. A defendant's bare assertions of assistance do not constitute a "substantial threshold showing" of improper conduct by the government. See *Wade*, 504 U.S. at 186, 112 S.Ct. 1840 (holding neither "a claim that a defendant merely provided substantial assistance" nor "additional but generalized allegations of improper motive" is sufficient to merit an evidentiary hearing). Because Mullins failed to make a "substantial threshold showing," the district court correctly concluded it lacked authority to conduct an evidentiary hearing.

III. CONCLUSION

We affirm the district court's judgment. [FN2]

[FN2]. We note Mullins did not challenge her sentence based on the Supreme Court's recent decision in *United States v. Booker*, --- U.S. ----, ---- - ----, 125 S.Ct. 738, 756-57, --- L.Ed.2d ----, ---- - ---- (2005) (holding mandatory application of the Guidelines is unconstitutional, and the Guidelines are now "effectively advisory"). Therefore, Mullins has waived any Sixth Amendment argument on appeal. Even if Mullins had preserved a *Booker* challenge on appeal, the holdings in *Booker* are of no avail to Mullins, because the district court imposed Mullins's sentence based on a statutorily mandated minimum sentence, and not on sentencing enhancements. See *United States v. Vieth*, 397 F.3d 615, 619 (8th Cir.2005) (holding defendant was not entitled to resentencing because his

"sentence was not determined based upon an application of the federal sentencing guidelines, but rather based upon the mandatory minimum sentence set forth in the governing criminal statute").

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Briefs and Other Related Documents [\(Back to top\)](#)

- [04-2776](#) (Docket) (Jul. 21, 2004)
- [2004 WL 2758493](#) (Appellate Brief) Appellant's Brief (2004) [Original Image of this Document \(PDF\)](#)



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