

COMMENT

SUBSTANTIAL REFORM FOR SUBSTANTIAL ASSISTANCE MOTIONS

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I. INTRODUCTION

Tackling the issue of how substantial assistance or a criminal defendant's cooperation with the government is to be handled is a daunting task. Cooperation by the accused has always been a critical element in law enforcement strategies. In the federal system, following the passage of the Sentencing Reform Act of 1984¹ and the subsequent birth of the sentencing guidelines shortly thereafter, the cooperating defendant has become even more important to law enforcement.

In responding to the reform proposal recently set forth in the *Journal of Legislation*,² four questions warrant further examination: (1) Who is to judge the value of a defendant's cooperation? (2) How is that cooperation to be rated or evaluated? (3) How much discretion are we going to give the person or institution ultimately deciding on the value of the cooperation? (4) When should this process occur? Let us begin exploration through three scenarios.³ By way of these three scenarios, it is my purpose to show some of the difficulties embodied in the issues surrounding substantial assistance, and hopefully to begin answering the four questions posed.

A. Scenario 1

A young man by the name of José Martin is arrested with a friend while sitting in a car parked outside of a drug store. Mr. Martin is a passenger in the car and his friend is seated in the driver's compartment at the time of the arrest. Unbeknownst to Mr. Martin, his involvement with a drug

1. Sentencing Reform Act of 1984, P.L. No. 98-473, §§ 211-12, 98 Stat. 1987-2017 (1984) (codified as amended in scattered sections of 18 U.S.C.).

2. Maria Limbert, *Problems Associated with Prosecutorial Control over Filing Substantial Assistance Motions and a Proposal for a Substantial Assistance Pre-sentence Hearing*, 27 J. LEGIS. 251 (2001).

3. All of the scenarios presented in this article are based on actual factual scenarios or portions of scenarios that the author has encountered in some fashion, but have been modified where needed to protect attorney-client privilege and client identity. All defendant names are fictitious, and any similarities with the names of actual individuals are purely coincidental.

transaction that just took place was videotaped and audio taped. The person to whom the crack cocaine was sold was an undercover police officer. As he is being taken down to the station, Mr. Martin opens up his mouth and starts arguing with the arresting officer that he sold no dope. The officer continues the conversation by saying that he knows all about Martin and has been watching him for some time. Mr. Martin then responds with the obligatory incriminating language as is so often the plight of defendants winding up in federal court: "Alright. I might have been involved with the sale, but it wasn't my dope."

At his arraignment, Mr. Martin explains the entire situation to his lawyer. One of the case agents approaches the lawyer, and informs her that law enforcement would be interested in having Mr. Martin proffer (cooperate) with law enforcement.⁴ The agent promises the lawyer that cooperation points would be in order if Mr. Martin agreed to such a proffer. No specific number of points is discussed.

Mr. Martin ultimately proffers, and provides law enforcement with very valuable information. In fact, the information is so valuable that it allows law enforcement to arrest and indict another drug supplier on the streets. The information also allows law enforcement to confirm many of their hunches regarding drug dealers in Mr. Martin's neighborhood. The lawyer is not present for the proffer.

Mr. Martin decides to change his plea in the case, and the lawyers for both parties then engage in plea negotiations. Unfortunately for Mr. Martin, he has his sentence enhanced to a mandatory minimum period of imprisonment because of prior convictions for drug trafficking.⁵ The government tells the defense lawyer not to worry though, because the enhancement will be essentially nullified by a motion the government is prepared to file on Mr. Martin's behalf. In its motion, the government will suggest to the court that a downward departure of two offense level points is appropriate. Despite their best efforts, Mr. Martin and his defense lawyer are unable to persuade the government that the enhancement is out of line, and that the two-point reduction for substantial assistance is insufficient.

4. Although beyond the scope of this particular article, the entire notion of what exactly a "proffer" is needs to be brought into the discussion of substantial assistance. At its most fundamental point, a proffer means to divulge information to law enforcement officials, typically in a room with at least a case agent involved. But proffers can develop into many different shapes and sizes. Proffers can lead to further discussions with law enforcement personnel out of the area or from another agency; review of video tapes, mug shots, or line-ups previously made by law enforcement; identification of voices on an audio tape; conducting monitored telephone conversations; leading law enforcement through high crime areas to identify various landmarks or structures relevant to ongoing criminal investigations; and controlled drug transactions.

5. See 21 U.S.C. §§ 841(b), 851 (2000).

B. Scenario 2

As soon as Thomas Smith stepped off the train, he was arrested for trafficking in heroin. He had been through this before. After all, he had served as a mule for a drug lord in New York City for a considerable period of time, and had already served a five-year sentence awhile back. He was well familiar with the system, and was well familiar with the street life that he was living over the past ten years. So when it came to meeting his lawyer, his request to participate in a proffer with the government was an easy decision for him to make.

The prosecutor willingly took the proffer of Mr. Smith. This time the defense lawyer was present, as well as the prosecutor and three law enforcement agents. All the individuals on the side of the government were interested in hearing what Mr. Smith had to say, particularly as it related to the drug lord in New York City. Mr. Smith had a lot to say, and what he had to say he expressed in an intelligent and articulate way.

Being wise to the ways of the streets, Mr. Smith was able to give the agents, who were attentively listening, more than they had bargained for. He told them not only about the drug lord in New York City, but also discussed with law enforcement at the multiple proffer sessions numerous details regarding supply networks that extended beyond U.S. borders. After one of the proffers, the anxious prosecutor asked the defense lawyer if one more proffer session would be possible. This time, the prosecutor wanted to bring in an agent from another neighboring district, so that law enforcement could extend its sweep based on the information that Mr. Smith had given them.

At that subsequent proffer session, the newly added agent, for one reason or another, chose not to believe Mr. Smith's statements. In fact, he claims he is certain that Mr. Smith is lying. Unsure as to whether to believe the agent or Mr. Smith, the prosecutor nevertheless offers Mr. Smith a two-level departure for his substantial assistance (or for his troubles, depending on one's perspective).

The defense lawyer later confirms after Mr. Smith is sentenced that the new agent who had been brought in to the last session just did not like Mr. Smith, and that all the other agents were able to confirm the veracity of the salient points of Mr. Smith's statement. No law enforcement action is ever taken against the New York drug lord. For all intents and purposes the information obtained in the proffer sessions is not used. The two-level downward departure that the government recommends to the court, and which the court grants, turns out to be far less than the actual value of Mr. Smith's extensive information.

C. Scenario 3

Monique Johnson always wanted to be a millionaire. When she was arrested for engaging in securities fraud, wire fraud, and mail fraud, she felt grave remorse. She felt remorse for herself because her business plan had failed miserably, but also remorse for the customers she let down. She told her lawyer that under no circumstances did she want to go to trial, and that she wanted to cooperate in every way possible with the government.

Her lawyer quickly discovered that one of the reasons Ms. Johnson's business efforts failed was because of her lack of organization. When he made a simple request of her to outline in detail the companies she had formed, she responded with a 40-page letter, complete with diagrams and narrative. The prosecutor agreed to the proffer session but with great hesitation. When the session began, Ms. Johnson could not stop talking. She rambled on for almost an hour in a fashion that even her lawyer had to admit was nonsensical. She tried in vain to explain her 40-page chart, but it only made the prosecutor more impatient.

That is not to say, however, that the prosecutor was entirely tuned out. When Ms. Johnson successfully identified three individuals of a conspiracy that the government had been investigating for the past several years, and added a couple of new names to that group, the prosecutor took interest in what she had to say. He agreed to a subsequent proffer.

The lawyers on the case eventually negotiate a plea agreement that leaves room for a motion by the government for cooperation. It also leaves room for possible sentencing departure under Federal Rule of Criminal Procedure 35(b). Unfortunately for Ms. Johnson, she was never able to get her act together, or her facts concisely presented to the prosecutor. Despite her best efforts, the government was never sufficiently impressed with Ms. Johnson's presentation to believe that substantial assistance was warranted, and thus, never filed its motion for substantial assistance. As a consequence, Ms. Johnson never received a sentence reduction despite the fact that she had valuable information among her clutter.

II. WHO IS TO JUDGE?

In all three scenarios, the prosecution is effectively the decision-maker as to how many points the cooperation is to receive. In all three scenarios, almost complete discretion rests with the prosecution. It appears that, while people may agree on little in the area of substantial assistance, one exception is concern over large and growing prosecutorial discretion. "Post-SRA prosecutorial discretion is perhaps the single most-cited topic mentioned with respect to the substantial assistance policy statement. In context,

however, this concern is only one part of a much larger general concern of increased prosecutorial discretion under the guidelines.”⁶ A survey by the Federal Judicial Center reported that eighty-six percent of survey respondents, which included individuals working in the federal criminal justice system, believed that “sentencing guidelines give too much discretion to prosecutors.”⁷ Perhaps more interesting is that 74.9 percent of federal judges and 58.6 percent of chief probation officers agreed that prosecutors had “the greatest influence on the final guideline sentence.”⁸

Leaving the decision-making with the prosecution creates inherent discrepancies as to who receives what and how much. There are no rules that would dictate how much certain cooperation is worth. This lack of uniformity is a significant force running contrary to the goals of the Sentencing Guidelines. The Guidelines, after all, are to bring some sense of uniformity to the sentencing process in the federal system. That is entirely undercut, if the prosecutor gives, for example, a two-point offense level reduction to one defendant for bringing a new criminal case to their attention, but four points to another defendant who might be able to bring only valuable information to an already ongoing law enforcement effort. And, as the above scenarios illustrate, personalities and experience in the field could come into play in the prosecutor’s decision.

The problem is plainly aggravated when the decision to file a sentencing enhancement under 21 U.S.C. § 851 rests with the prosecution as well. As the first scenario illustrates, what one hand giveth, the other hand can quickly taketh away. That scenario not only runs contrary to the uniformity objective in the Guidelines, but would also seem to run contrary to one of the ultimate goals of the Sentencing Guidelines themselves, which is to encourage cooperation among defendants. What defendant in his or her right mind would cooperate only to know that the government is still going to file a sentencing enhancement under 21 U.S.C. § 851?

Therefore, there can be no real quibble as to the need to place the decision of doling out offense level reductions for substantial assistance in the hands of a neutral party, as Limbert proposes.⁹ But one may legitimately

6. LINDA D. MAXFIELD & JOHN H. KRAMER, U.S. SENTENCING COMMISSION, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 14 (Jan. 1998), available at <http://www.ussc.gov/research.htm>. The authors of this study were at the time Acting Director and Staff Director, respectively, of the Office of Policy Analysis of the U.S. Sentencing Commission. The paper presented an analysis of data gathered by the Commission’s Substantial Assistance Staff Working Group.

7. Molly Treadway Johnson & Scott A. Gilbert, *The United States Sentencing Guidelines: Results of the Federal Judicial Center’s Survey*, contained in REPORT TO THE COMMITTEE ON CRIMINAL LAW OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Dec. 5, 1996).

8. *Id.*

9. *Id.* at 7.

ask: isn't this already done? After all, U.S.S.G. § 5K1.1, which is the main sentencing guideline governing substantial assistance motions, states that "[u]pon motion of the government . . . *the court* may depart from the guidelines." (emphasis added.) Similar language is found at 18 U.S.C. § 3553(e), which provides that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Nothing in this language requires the court to grant the government's motion.

The Congress authorized the United States Sentencing Commission to:

assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.¹⁰

It did just that by placing the responsibility for filing the motion with the government, and the authority to decide the motion with the court.

The proposal espoused by Limbert would shift the responsibility for decision-making to a federal magistrate judge. This may not have that significant of an impact, however, if the goal is to try to reduce the discretion the prosecution has over substantial assistance credits. If the prosecution, for one reason or another, believes that substantial assistance should not be granted or, at most, for only one level even when the defendant pleads for more because he or she truly has provided substantial assistance, nothing will change in the prosecution's discretionary power by shifting the decision-making to a federal magistrate judge.

But the question is nevertheless a nagging one. If the power of who makes the motion rests solely with the prosecution, then the ultimate decision-making authority often rests with it as well. If, as the Sentencing Commission has decided, it takes a motion by the government before the court can grant any substantial assistance benefit at all, the government deprives the court of the power of that decision by simply not filing the motion.

As the scenarios point out, the power tug-of-war is considerably more complicated than it might first appear. In all three scenarios, the gov-

10. 28 U.S.C. § 994(n) (2000).

ernment listens to the defendant during proffer sessions. In all three, the information's value does not translate into a benefit for the defendant equivalent to its true worth.

In scenario 3, the confusing and disorganized manner in which the defendant presented the information hindered the government's evaluation of the information, and, for the less patient prosecutor, also gave the government an excuse for not filing a substantial assistance motion. One can imagine the following exchange between the prosecutor and Ms. Johnson's lawyer following the proffer session. "We know your client tried her best, but frankly, we simply couldn't make heads or tails out of what she was trying to tell us."

In scenario 2, personalities—and egos—come into play.¹¹ Some law enforcement have their way of dealing with the world in which they work, and so do defendants. When a defendant comes along who, because of his "inside track" and his own touch of arrogance, can inadvertently rub a case agent the wrong way by pointing out errors in the agent's view of the world of crime (or at least one of the neighborhoods), the backlash can have serious repercussions for the defendant. What would have happened if Mr. Smith in scenario 2 had unbeknownst to him fallen upon false information, but the bulk of what he had to say at the proffer was valuable and correct? Should he in effect be punished (either by the government's refusal to file a substantial assistance motion or one for only a point or two) because one agent happens to discount all of what Mr. Smith says merely because he was honestly incorrect on one portion of the information he proffered? What goes on in the proffer room, even when things like egos and personalities are at play there, ends up having an enormous impact on the court's sentencing power. What if the agent in scenario 2 who, for one reason or another, did not believe any of Mr. Smith's information (even though it was correct) was supervising agent and had veto power over all substantial assistance motions in the case? In that instance, despite Mr. Smith's having given the government substantial assistance, the court never has a chance to take that information into consideration at sentencing, because the supervising agent refused to permit a substantial assistance motion to be filed.

11. It is, of course, impossible to avoid entirely these elements in the evaluation of a defendant's substantial assistance. The goal is to limit their impact, since they undercut uniformity and equity in the evaluation of and reward for substantial assistance. And for any prosecutor or defense lawyer who has participated in numerous proffer sessions, the impact of these elements is undeniably strong. Examples include the overbearing agent, the taciturn defendant who fails to speak up even though it is in his or her interest to do so, the skeptical prosecutor who simply refuses to believe what the defendant is telling him or her, and the supervisor who simply wishes to send a message to all defendants in a particular conspiracy that the government is going to play "hard ball" and give no one more than a two-point reduction. The talk around the proffer table often becomes that of the "generous" prosecutor or the "stingy" one.

Scenario 1 is perhaps the most troubling because it appears to reflect an unresolved conflict between the governing statute and the Guidelines. Section 3553(e) of Title 28 draws the line between responsibilities: the government files the substantial assistance motion, and the court is thereby authorized to depart, even if to do so means to sentence the defendant below a mandatory minimum sentence.

In drug trafficking cases where mandatory minimum sentences come into play,¹² the government may seek to increase mandatory minimum sentences. In one instance, a mandatory minimum sentence can be increased from ten years to twenty years, and once again from twenty years to life.¹³ In another instance, a mandatory minimum sentence can be increased from five years to ten years.¹⁴ The enhancement automatically takes place with a mere one-page filing by the government setting forth the defendant's prior drug offense.

The sentencing power placed in the prosecution's hands is enormous. Let us assume, for example, that Mr. Martin in scenario 1 has one prior felony conviction for drug trafficking (scored at three criminal history points, placing Mr. Martin in criminal history category II).¹⁵ Assume further that the amount of crack cocaine he sells to the undercover officer is six grams. This quantity of crack cocaine results in a mandatory minimum five-year sentence.¹⁶ The Sentencing Guidelines place Mr. Martin at offense level 26 for a sentencing range of seventy to eighty-seven months.¹⁷ Let us further assume that Mr. Martin's cooperation is valued by the prosecutor as a two-level benefit. By filing a motion for substantial assistance, the government would authorize the district court to sentence Mr. Martin below the statutory minimum of five years.¹⁸ Under a strict guideline calculation, Mr. Martin's offense level could then potentially drop from 26 levels to 21 levels. This calculation results from a two-level reduction for Mr. Martin's substantial assistance (assuming the court's grants the government's motion) and an additional three-level reduction in the event Mr. Martin pleads guilty (again assuming the court grants Mr. Martin acceptance of responsibility points).¹⁹ At that offense level, Mr. Martin's sentencing range drops to forty-one to

12. *See, e.g.*, 21 U.S.C. § 841(b).

13. 21 U.S.C. § 841(b)(1)(A).

14. 21 U.S.C. § 841(b)(1)(B).

15. United States Sentencing Guidelines Manual Ch. 5, Pt. A (2001) [hereinafter U.S.S.G.] sets forth the sentencing chart in its entirety.

16. 21 U.S.C. § 841(b)(1)(B)(iii).

17. U.S.S.G. § 2D1.1(c)(7).

18. 18 U.S.C. § 3553(e) (2000).

19. U.S.S.G. § 3E1.1.

fifty-one months, which, even at the high end, is substantially below the five-year mandatory minimum sentence.

Mr. Martin's prior conviction could come back to haunt him, however, to erase any benefit of his cooperation—and in the process dramatically change the district court's sentencing power. The federal drug trafficking laws give the prosecution unbridled discretion to file an enhancement whereby Mr. Martin's mandatory minimum sentence is not five years but ten years.²⁰ The statute governing such enhancements does not require the United States attorney to provide any reason whatsoever for filing the enhancement. It also sets no standards or requirements for the filing of the sentencing enhancement.²¹

Therefore, if the government believes that enhancement is appropriate, a notification to the court of Mr. Martin's prior drug offense increases his mandatory minimum sentence to ten years. In this event, Mr. Martin's starting offense level is 29, which results in a sentencing range of 97 to 121 months. This is the first sentencing range in the appropriate criminal history category (II) where we can find the mandatory ten-year sentence.

The same five-level reduction (two levels for substantial assistance and three levels for acceptance of responsibility) now brings Mr. Martin down to offense level 24, resulting in a sentencing range of fifty-seven to seventy-one months. Thus, by sentencing Mr. Martin even at the low end of that guideline range (fifty-seven months), the district court is back to sentencing Mr. Martin roughly where he would have originally fallen without any cooperation and without any offense level reduction for foregoing trial in the case, namely, five years. The entire benefit to Mr. Martin's cooperation is nullified not by the court but by the prosecutor.

Limbert's proposal of placing on the defendant the burden of filing a substantial assistance motion dramatically levels the playing field. One might argue, though, that both parties should be able to file such motions. After all, there is no reason to deprive the government of its leverage in proffer discussions of filing such a motion, and, as Limbert correctly observes, the neutral decision-maker will likely rely heavily on the prosecutor's opinion.²² In other words, a prosecutor's motion is likely to be looked upon more favorable in most situations than a defendant's motion.²³

20. 21 U.S.C. § 841(b)(1)(B)(iii).

21. *See*, 21 U.S.C. § 851.

22. *See, supra* note 2, at 264.

23. The courts of appeals have not been receptive to arguments in support of allowing the defendant to file substantial assistance motions. *See, e.g., In re Sealed Case*, 181 F.3d 128, 142 (D.C. Cir. 1999) (en banc), *cert. denied sub nom. Sealed Petitioner v. United States*, 528 U.S. 989 (1999) ("in the absence of a government motion, a district court lacks authority under the Guidelines to depart from the applicable sentencing range on the basis of a defendant's substantial assistance."); *In re Sealed Case*, 292 F.3d 913, 917 (D.C. Cir. 2002). The

Moreover, although Limbert's proposal acknowledges that the defendant-informant has first-hand knowledge of the amount and extent of his or her cooperation that does not necessarily mean that the defendant's view of the worth of such assistance will be valued. Practically every defendant in every conspiracy thinks he or she has the inside information that is most beneficial to the government.

Furthermore, there may well be instances where the government does not wish to go through the full-blown hearing that Limbert's proposal calls for. In a sensitive investigation where the defendant has given valuable information, yet because of the ongoing nature of the investigation the government does not wish to bring forward the value of the defendant's information through a court hearing, the government should be able to file in its own right an unopposed motion for substantial assistance. Because of the unopposed nature of the motion, no court hearing would be needed to ensure that the defendant receives full value for the substantial assistance, and the secrecy of the ongoing investigation would be preserved.²⁴

III. HOW IS SUBSTANTIAL ASSISTANCE TO BE EVALUATED?

The handling by the courts and the government of substantial assistance motions under the Sentencing Guidelines suggests two points: no two districts appear to evaluate substantial assistance the same, and federal judges have no difficulty determining reasons for granting substantial assistance departures.

Districts have authority to establish their own policies for reviewing substantial assistance motions. The United States Attorneys' Manual ("USAM") requires prior internal approval before such a motion can be filed. The USAM provides as follows:

Section 5K1.1 of the Sentencing Guidelines allows the United States to file a pleading with the sentencing court which permits the court to depart

courts have recognized, however, some limited relief from this prohibition. District courts have the authority to grant relief "if they find that the refusal [by the government to file a substantial assistance motion] was based on an unconstitutional motive," or "if the prosecutor's refusal to move was not rationally related to any legitimate Government end." *Wade v. United States*, 504 U.S. 181, 185-86 (1992). Relief may also be forthcoming if the defendant provided cooperation pursuant to a plea agreement, and can demonstrate that the government's refusal to file the substantial assistance motion is attributable to bad faith or breach of the plea agreement. See *Santobello v. New York*, 404 U.S. 257, 268 (1971); *United States v. Jones*, 58 F.3d 688, 692 (D.C. Cir. 1995); *United States v. Lukse*, 286 F.3d 906, 912-13 (6th Cir. 2002).

24. Concerns over protecting the integrity of an ongoing investigation and the confidential nature of information often arise in the context of substantial assistance being offered by someone. When those concerns arise in the context of a hearing on a substantial assistance motion, the court can easily address those concerns by placing the hearing under seal. This is not a new problem. It arises from time to time at sentencing where a defendant's cooperation may be discussed in detail by the court. Again, the easy solution is placing the hearing under seal, which is typically in both parties' interests at that point.

below the indicated guideline, on the basis that the defendant provided substantial assistance in the investigation or prosecution of another. Authority to approve such pleadings is limited to the United States Attorney, the Chief Assistant United States Attorney, and supervisory criminal Assistant United States Attorneys, or a committee including at least one of these individuals. Similarly, for Department of Justice attorneys, approval authority should be vested in a Section Chief or Office Director, or such official's deputy, or in a committee which includes at least one of these individuals.

Every United States Attorney or Department of Justice Section Chief or Office Director shall maintain documentation of the facts behind and justification for each substantial assistance pleading. The repository or repositories of this documentation need not be the case file itself. Freedom of Information Act considerations may suggest that a separate form showing the final decision be maintained.

The procedures described above shall also apply to Motions filed pursuant to Rule 35(b), Federal Rules of Criminal Procedure, where the sentence of a cooperating defendant is reduced after sentencing on motion of the United States. Such a filing is deemed for sentencing purposes to be the equivalent of a substantial assistance pleading.²⁵

Most districts have a written policy on the topic, and virtually all districts have some type of approval procedure in place.²⁶ Typically, the approval process involves supervisory personnel and/or a committee.²⁷ But even with procedures in place, policies are not internally or consistently followed. Internal procedures and policies are consistently followed in about half to two-thirds of the districts.²⁸ In other words, even with a policy in place, nothing prevents a district from acting inconsistently. Indeed, upon closer analysis, there would seem to be no particular incentive to any district to act consistently according to its internal policies on substantial assistance. Acting inconsistently with a particular written policy translates into increased flexibility in dealing with informant-defendants.

The USAM also instructs United States attorneys to consider the defendant's cooperation in deciding whether to enter into a plea agreement:

Defendant's Cooperation. The defendant's willingness to provide timely and useful cooperation as part of his/her plea agreement should be given serious consideration. The weight it deserves will vary, of course, depending on the nature and value of the cooperation offered and whether the same benefit can be obtained without

25. United States Attorneys' Manual ("USAM"), § 9-27.400 (B) (Plea Agreements Generally).

26. MAXFIELD & KRAMER, *supra* note 6, at 7.

27. *Id.*

28. *Id.*

having to make the charge or sentence concession that would be involved in a plea agreement. In many situations, for example, all necessary cooperation in the form of testimony can be obtained through a compulsion order under 18 U.S.C. §§ 6001-6003. In such cases, that approach should be attempted unless, under the circumstances, it would seriously interfere with securing the person's conviction. If the defendant's cooperation is sufficiently substantial to justify the filing of a 5K1.1 Motion for a downward departure, the procedures set out in USAM 9-27.400 (B) shall be followed.²⁹

The policy does not define how the "nature and value of the cooperation offered" is to be determined.

The USAM provides slightly more guidance when deciding not to prosecute a person in exchange for his or her cooperation. In this instance, considerations of the public interest are primarily weighed.³⁰

(A) In determining whether a person's cooperation may be necessary to the public interest, the attorney for the government, and those whose approval is necessary, should weigh all relevant considerations, including:

- (1) The importance of the investigation or prosecution to an effective program of law enforcement;
- (2) The value of the person's cooperation to the investigation or prosecution; and
- (3) The person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his/her history with respect to criminal activity.

(B) Comment. This paragraph is intended to assist Federal prosecutors, and those whose approval they must secure, in deciding whether a person's cooperation appears to be necessary to the public interest. *The considerations listed here are not intended to be all-inclusive or to require a particular decision in a particular case.* Rather they are meant to focus the decision-maker's attention on factors that probably will be controlling in the majority of cases.³¹ (emphasis added).

Further guidance is given in a following section of the USAM. While this guidance is directed at a decision whether to prosecute in return

29. USAM, § 9-27.420(B)(1) (Plea Agreements—Considerations to be Weighed).

30. USAM, § 9-27.600(B)(3) (Entering into Non-prosecution Agreements in Return for Cooperation—Generally).

31. USAM, § 9-27.620 (Entering into Non-prosecution Agreements in Return for Cooperation—Considerations to be Weighed).

for a person's cooperation, the same factors make similar sense when considering substantial assistance motions.

In order to be in a position to adequately assess the potential value of a person's cooperation, the prosecutor should insist on an "offer of proof" or its equivalent from the person or his/her attorney. The prosecutor can then weigh the offer in terms of the investigation or prosecution in connection with which cooperation is sought. In doing so, he/she should consider such questions as whether the cooperation will in fact be forthcoming, whether the testimony or other information provided will be credible, whether it can be corroborated by other evidence, whether it will materially assist the investigation or prosecution, and whether substantially the same benefit can be obtained from someone else without an agreement not to prosecute. After assessing all of these factors, together with any others that may be relevant, the prosecutor can judge the strength of his/her case with and without the person's cooperation, and determine whether it may be in the public interest to agree to forego prosecution under the circumstances.³²

What seems to be sought for evaluating substantial assistance—whether examining these factors or the list of objective and subjective factors proposed by Limbert—is a "totality of the circumstances" standard. In other words, the more factors the court considers, the more likely the evaluation is to be fair.³³

While this method may not foster predictability, it does carry benefits for both the government and the defendant. On the one hand, the government's flexibility is increased by allowing it to consider a wide range of factors when determining the value of a defendant's assistance. This appears to match current practice. For the defendant, a "totality of the circumstances" standard would allow more grounds to argue that the assistance provided was in fact valuable to the government.

At the end of the day, we can turn to the list of factors contained in the Sentencing Guidelines for considerable guidance in this area. The list, while not exhaustive, is an acceptable starting point.

32. USAM, § 9-27.620(B)(2) (Entering into Non-prosecution Agreements in Return for Cooperation—Considerations to be Weighed).

33. Although Limbert in her proposal also calls for a "totality of the circumstances" standard, this author does not believe it is practicable to divide sharply between objective and subjective factors. While the decision-maker—whether a federal district judge or a federal magistrate judge—will always try to focus on objective factors, subjective considerations inevitably come into play, and should. For example, what may be a risk taken for one defendant is a normal state of affairs for another. Substantial assistance is, after all, a rather subjective issue. A "totality of the circumstances" standard ensures that both objective and subjective factors are considered.

(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.³⁴

Two steps would eliminate significantly the unnecessary hodgepodge of considerations that now seems to be in effect. First, the Sentencing Commission and the United States Department of Justice should consider joining forces to adopt a single set of factors for evaluating substantial assistance.³⁵ Having a single set of factors would benefit all parties concerned. It would provide an inclusive roadmap for the courts; it would provide clearer and more unified guidance for all United States Attorney Offices across the country; and it would allow defense lawyers to more effectively counsel their clients who may desire to cooperate with the government.

Second, a single policy on substantial assistance motions governing all United States Attorney Offices should be adopted. If the nation's federal criminal justice system can operate on a single set of Sentencing Guidelines, there is no reason why the executive branch cannot operate on a single policy for substantial assistance motions. The fact that there are multiple policies throughout the country (which apparently are often ignored) only undermines the uniformity sought in the Sentencing Guidelines. Moreover, the fact that there are multiple policies produces the unseemly result of cooperation being valued more (or less) depending on the jurisdiction in which the defendant happens to be arrested. Evaluating substantial assistance will

34. U.S.S.G. § 5K1.1.

35. It is assumed that defense interests would be represented through the Sentencing Commission's various committee structures. To the extent the outcome is a "totality of the circumstances" standard, the defense will benefit, as noted in the text. It is important, however, that the list of factors reflect defense input, since defense lawyers will likely be the first ones to explain to defendants what they can expect through cooperation. In other words, defense lawyers may often be the first ones to evaluate possible assistance so as to be able to advise their clients of the chances of a substantial assistance motion.

always be a rather subjective exercise. That does not mean, however, that we should abandon all efforts to make the exercise a more objective one.

IV. HOW MUCH DISCRETION TO THE DECISION-MAKER?

Having a “totality of the circumstances” test for evaluating substantial assistance may rightly lead one to conclude that we now need to limit the court’s discretion in deciding such motions. If such limitations are not imposed, it is argued that sentencing disparities may creep back into the system. This rationale underlies Limbert’s proposal to limit downward departure motions for substantial assistance to two to five levels.³⁶

The short answer to this argument lies in the Sentencing Guidelines themselves. In Section 5K2.0, the Sentencing Commission makes clear in one of its many policy statements³⁷ that “[t]he decision as to whether *and to what extent departure is warranted* rests with the sentencing court on a case-specific basis.”³⁸ (emphasis added). This policy statement mirrors the statutory instruction to federal courts regarding sentencing.

The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) [referring to sentencing guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.³⁹

Nowhere does either the statute or the Sentencing Guidelines limit the extent of an otherwise authorized departure—regardless of whether the departure is upwards or downwards.

In *Koon v. United States*,⁴⁰ the Supreme Court made clear that sentencing is the traditional exercise of discretion by the court. And, in the Supreme Court’s view in this post-guidelines era, sentencing necessarily en-

36. Limbert, *supra* note 3, at 263.

37. Policy statements of the Sentencing Commission, which are clearly identified as such in the Sentencing Guidelines, are distinct from guidelines which the Sentencing Commission also promulgates. According to the statute governing the Sentencing Commission’s functions, policy statements regard “application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code.” 28 U.S.C. § 994(a)(2). The initial guidelines needed to be submitted to Congress by a set deadline, but policy statements did not. Federal judges must only “consider” when determining a particular sentence “any pertinent policy statement issued by the Sentencing Commission . . . that is in effect on the date the defendant is sentenced.” 18 U.S.C. § 3553(a)(5). They are, however, required to sentence within the Guidelines unless a departure ground exists. 18 U.S.C. § 3553(b). In other words, policy statements do not set forth requirements for federal judges to follow as do the guidelines.

38. U.S.S.G. § 5K2.0.

39. 18 U.S.C. § 3553(b).

40. 518 U.S. 81 (1996).

compasses departures from the Sentencing Guidelines as well.⁴¹ For this reason, the Supreme Court in *Koon* instructed appellate courts to analyze a district court's departure under an abuse of discretion standard.⁴² Since *Koon*, the lower courts have interpreted departure jurisprudence essentially to allow specific departures so long as the Sentencing Guidelines do not prohibit them.⁴³ In short, departures are as much a fabric of the sentencing scheme presently in effect as are the guideline sentences that fall well within the "heartland" cases mapped out by the Sentencing Commission.

The absence in either the Sentencing Guidelines or the applicable statutes of any limitation on a court's departure discretion rests on sound policy for both law enforcement and the defense. Limbert's proposal of limiting from two to five offense levels any departures for substantial assistance is made for the salutary purpose of avoiding widespread sentencing disparity.⁴⁴ But the evidence suggests that federal courts across the nation generally sentence within the guideline range otherwise suggested by the "heartland" cases described by the Sentencing Commission in the Sentencing Guidelines.

For fiscal year 2000, for example, the Sentencing Commission reports that 64.5 percent of cases are sentenced within the guideline range. Substantial assistance departures occurred in 17.9 percent of cases, and downward departures for other reasons occurred in 17 percent of cases. For the same period of time, upward departures occurred in only 0.7 percent of cases.⁴⁵ Not surprising, the highest percentage of substantial assistance departures occurred in the area of drug trafficking (27.8 percent).⁴⁶ These data are similar to data for fiscal year 1995. At that time, 71 percent of cases were sentenced within the guideline range; 19.7 percent received downward departures for substantial assistance; 8.4 percent received departures for other reasons; and 0.9 percent of the cases received an upward departure.⁴⁷ Again, the area of highest substantial assistance departures was drug trafficking (33.6 percent).⁴⁸ This evidence comes from the period when no

41. *Id.* at 98.

42. *Id.*

43. *Koon* established a four-part analytical framework to guide appellate review of departure determinations, classifying departure factors as: "(1) forbidden, (2) encouraged, (3) discouraged, or (4) unmentioned." *Id.* at 95-96.

44. Limbert, *supra* note 3, at 263.

45. Sourcebook of Federal Sentencing Statistics, tbl. 5.32 (2000). This entire compilation of data is located through the United States Sentencing Commission's web site, available at (<http://www.ussc.gov>). The data are limited to six fiscal years beginning in 1995. The fiscal year used here is from October 1 to September 30.

46. United States Sentencing Commission, Office of Policy Analysis, 2000 Datafile, tbl. 9 at www.ussc.gov/JUDPACK/2000/1c00.pdf (9/19/02).

47. United States Sentencing Commission, Office of Policy Analysis, 1995 Datafile, tbl. 8 at www.ussc.gov/JUDPACK/1995/1c00.pdf (9/19/02).

ficking (33.6 percent).⁴⁸ This evidence comes from the period when no departure limitations were in place other than the Sentencing Guidelines themselves.

If sentencing disparity is the concern, then the proposed limitation would have to be made across the board in both an upward and downward fashion. A sentence that is increased, for instance, seven levels beyond the guideline range mandated by the Sentencing Guidelines is as much a problem when it comes to disparate sentencing as a sentence that is seven levels below. The problem is the same whether we are talking about departures based on substantial assistance or any of the many other (and essentially limitless) bases on which a departure can be constructed. In sum, the problem of disparity does not go away if we limit a court's departure discretion solely to substantial assistance motions.⁴⁹

As noted above, the proposed limitation has problems for both the prosecution and the defense. Returning to scenario 2 with our street-wise drug trafficker, Thomas Smith, we can imagine a set of facts where the agents and the defendant are truly of one mind, where the agents use Mr. Smith's testimony to nab a drug kingpin in New York, and want to use Mr. Smith as a testifying witness at the kingpin's trial. In this instance, the substantial assistance departure is probably a small price to pay for the considerable law enforcement assistance which Mr. Smith lends. Law enforcement may need to offer Mr. Smith more than five levels to make it worthwhile for him to put himself and his family at risk forever.

V. WHEN SHOULD THE PROCESS OF DETERMINING SUBSTANTIAL ASSISTANCE MOTIONS OCCUR?

Under Limbert's proposal, the decision as to how many levels a substantial assistance departure is worth, if any at all, would be made immediately prior to sentencing.⁵⁰ While she is correct that under current practice the government usually files its substantial assistance motion right before or

48. *Id.* at tbl. 9.

49. There seems to be no reason that justifies imposing a limit on a defense motion for a downward departure based on substantial assistance but not on a defense motion for a downward departure based on, for instance, the defendant's diminished capacity. *See, e.g.*, U.S.S.G. § 5K2.13. Similarly, there seems to be no reason for limiting the benefit a defendant could receive for his or her substantial assistance, but not limit how much the court might upward depart based on, for example, the defendant's extreme conduct. *See, e.g.*, U.S.S.G. § 5K2.8. Limbert's proposal, as stated, might run into equal protection challenges as well. But if the challenge were answered by imposing the limit also on how far a court might upward depart—in other words, imposing the limit on both defense and prosecution motions—the government would then lose an important sentencing tool that currently allows it to seek an upward-sentencing departure reflecting a particular defendant's heinous or brutal conduct that undisputably falls way beyond the "heartland" boundaries.

50. Limbert, *supra* note 3, at 264.

during the sentencing hearing, the decision to file such a motion is often made before the defendant pleads guilty or is convicted.

Reality dictates that a proffer session usually occurs when the prosecution wants it to occur. In scenarios 1 and 2, law enforcement may believe both Messrs. Martin and Smith can assist immediately with ongoing investigations. For that reason, the proffer session might occur shortly after the arrest. In scenario 3, the urgency of the proffer and assistance from the defendant may not be present, therefore, the proffer session may not take place until shortly before the change of plea conference or even afterwards. Indeed, because of Federal Rule of Criminal Procedure 35(b), the proffer session could even take place after sentencing.

In analyzing when a determination on substantial assistance is made, three events need to be separated out: when the proffer session occurs; when the motion for a substantial assistance departure is made; and when the court (whether magistrate or district judge) decides the motion. As noted above, when the proffer occurs will typically be dictated by events out of defendant's control—and more likely in the prosecution's control. When the proffer occurs will in turn control when the remaining two events occur. In our three scenarios, the prosecution discloses its decision regarding a substantial assistance motion prior to sentencing and possibly prior to plea negotiations, if any cooperation points are to be forthcoming at all.

Notwithstanding the necessary flexibility in timing, which is inherent in gathering substantial assistance from a defendant, the goal should be to have this process unfold to conclusion prior to the change of plea conference and ideally prior to the final negotiations of the plea agreement. In this way, both parties enter into the plea agreement with as clear an understanding of the final offense level as possible. For both parties, achievement of this goal would minimize (though obviously not eliminate) any undue surprises at sentencing.

After all, written plea agreements usually include the parties' recommendation to the court of a total adjusted offense level to be used at sentencing.⁵¹ It is difficult to recommend a particular sentence or sentencing range, as the federal rules contemplated,⁵² if the parties have not come to an agreement on the anticipated total adjusted offense level. Other offense level adjustments are usually set forth in the plea agreement. There is no reason why the offense level adjustment a defendant may receive for substantial assistance should be treated any differently (except when the proffer

51. FED. R. CRIM. P. 11(e)(1)(B) governs plea agreements containing sentencing recommendations that are not binding on the court.

52. *Id.*

session is delayed). Substantial assistance issues *must* be resolved prior to the change of the plea conference when the written plea agreement sets forth a specific sentence or sentencing range that is binding on the court once the agreement is accepted.⁵³

The precautions embodied in Federal Rule of Criminal Procedure 11 regarding the taking of pleas also justify adjudicating substantial assistance motions prior to the change of the plea conference as often as possible. The aim of the precautions and the plea colloquy between the judge and the defendant at the change of plea conference is to ensure that the defendant is entering into the plea knowingly and voluntarily.⁵⁴ That goal cannot be entirely achieved if the defendant admits his or her guilt before the court without knowing how much the proffered assistance is worth or what the adjusted total offense level will be. It is also difficult to accept that a defendant's plea is truly voluntary and knowing when the key factor that prompted the defendant to resolve his or her case through a plea agreement—the sentencing benefit to be received in exchange for cooperation—is still undetermined at the time the defendant pleads guilty.

VI. CONCLUSION

No one disputes that sentencing lies at the heart of judicial authority. By allowing only the government to file substantial assistance motions, judicial authority has been eroded. Reform is sorely needed in this area. Regardless of the specific approach we may choose, the aim should be to preserve judicial sentencing authority. By allowing defendants *and* the government to file substantial assistance motions, we move in that direction. And by so moving, we enhance fairness in sentencing by returning to judges sentencing discretion that is now unjustifiably in the hands of the prosecution. If this proposal is adopted, more equitable sentences and fewer sentencing disparities will result, and progress will be made in achieving desirable goals of the Sentencing Guidelines.

53. See FED. R. CRIM. P. 11(e)(1)(C).

54. "In federal courts . . . Rule 11 prescribes a procedure 'designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary . . . [and] to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination.'" *United States v. Dewalt*, 92 F.3d 1209, 1211-12 (D.C. Cir. 1996) (quoting *McCarthy v. United States*, 394 U.S. 459, 465 (1969)).

