

FEDERAL COURT PRACTICES:
SENTENCE REDUCTIONS BASED ON
DEFENDANTS' SUBSTANTIAL ASSISTANCE
TO THE GOVERNMENT

Report Submitted to the
U.S. Sentencing Commission

by

The Substantial Assistance Staff Working Group

May 1997
Washington, D.C.



*Substantial Assistance
Staff Working Group:*

Susan Katzenelson
Pamela G. Montgomery
Co-Chairs

Cameron Counters
Shari Greenstein
Sharon Henegan
Linda Maxfield
Richard McNeil
Kelly Shackelford
John Steer
Vince Ventimiglia
Susan Winarsky
Members

Patricia Valentino
Editor

The Working Group would also like to acknowledge the help provided by other US. Sentencing Commission Staff and visiting assistant U. S. attorneys and public defenders in all phases of this multi-year effort.

TABLE OF CONTENTS

SUBSTANTIAL ASSISTANCE DEPARTURES

CHAPTER

1.	Introduction	1
2.	Legal Issues	7
3.	U.S. Attorneys' Policies	28
4.	Site Visits	41
5.	A Study of Individual Cases	60
6.	A Study of Conspiracies	73
7.	Aggregate Analysis of Sentencing Commission Data	109
8.	Summary and Recommendations	185

APPENDIX

A.	Bibliography
B.	District Policy Questionnaire
C.	Site Visit Questions
D.	The Interview Process
E.	Case Review Instruments and Case Review Manuals
F.	Tables F1-14

CHAPTER ONE

SUBSTANTIAL ASSISTANCE DEPARTURES: INTRODUCTION

In promulgating the Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984), Congress established the United States Sentencing Commission and delegated to it authority to develop sentencing guidelines for the federal courts. After a period of empirical study of past sentencing practices and intensive guideline development, the Commission issued initial guidelines that took effect on November 1, 1987.

As part of the Anti-Drug Abuse Act of 1986, Congress directed the 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."¹ Congress, in codifying a pre-existing practice, has determined that substantial assistance to the government is a circumstance meriting a lower sentence.² This public policy decision addresses the broader societal concern of giving incentives for cooperating with law enforcement authorities, in order that more law violators will be apprehended and punished.

Pursuant to the congressional mandate, the Commission issued policy statement 5K1.1—Substantial Assistance to Authorities. This policy statement provides in pertinent part:

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.

The policy statement also directs the courts, in recognition of the defendant's assistance "as a mitigating sentencing factor," to consider a number of reasons in determining the appropriate sentence reduction, including the significance and usefulness of the assistance rendered; the truthfulness and completeness of the information; the nature and extent of the assistance; any resultant risk or actual injury to the defendant or his/her family; and the timeliness of the assistance.³

¹28 U.S.C. § 994(n) (1988). Other statutory provisions authorize district courts to depart below statutory minimums for substantial assistance (18 U.S.C. § 3553(e)), and to depart for substantial assistance rendered after sentencing (Fed. R. Crim. P. 35(b)).

²28 U.S.C. § 994(n).

³USSG §5K1.1(a).

Policy statement 5K1.1 also makes a distinction between rewarding a defendant's "affirmative recognition of responsibility" (specified in § 3E1.1 as a two- or three-level reduction in the offense level) and granting a departure below the applicable guideline range pursuant to the defendant's substantial assistance in investigating the criminal activities of other persons.

Policy statement 5K1.1 recognizes the government's plea negotiation strategy of offering a lower sentence to a defendant in exchange for information about other offenders' offenses. Further, before the defendant can receive a sentencing reduction, the policy statement requires that the government make a motion to the court. Two separate references in §5K1.1 reiterate the attention the court should pay to prosecutorial input in the matter of substantial assistance. First, §5K1.1(a)(1) directs the court, in evaluating the assistance, to take "into consideration the government's evaluation of the assistance rendered." Second, Application Note 3 of the Commentary states: "Substantial weight should be given to the government's evaluation of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain."

Much of the litigation and scholarly debate over §5K1.1 has involved the government motion prerequisite. For the most part, however, this requirement has withstood all attacks. In this regard, The United States Supreme Court has held that the "government has the power, not a duty, to file a motion when a defendant has substantially assisted."⁴ Once the government exercises its discretion in making the motion, the court must use its discretion to determine whether to lower the sentence, and if so, how much of a sentence reduction to grant the defendant.

Since the issuance of policy statement 5K1.1 as part of the initial guidelines, the Commission has amended it once in 1989. That amendment deleted the phrase "made a good faith effort to provide," thereby "clarify[ing] the Commission's intent that departures under this policy statement be based upon the [actual] provision of substantial assistance," not merely the willingness to provide such assistance.⁵

In the broader context of plea practices, the government's use of its discretionary authority in determining charges and entering into plea agreements has been the subject of much scholarly debate and litigation. The Commission recognizes the significance of plea bargaining practices in determining the sentences that defendants ultimately receive. The introductory Commentary to Chapter Six, Part B - Plea Agreements, reflects both the Commission's and Congress's expectation of judges "to examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." More specifically, the Commission envisions judges ensuring that the plea bargaining process serves the statutory purposes of sentencing and does not introduce unwarranted disparity. The policy statements of

⁴*Wade v. U.S.*, 501 U.S. 181 (1992).

⁵*Id.*

this chapter leave open the option for the Commission to "ultimately develop standards for judges to use in determining whether to accept plea agreements."

The Act mandates that the Commission "periodically . . . review and revise . . . the guidelines promulgated. . . ." [28 U.S.C. § 994(o)] and gives the Commission authority to "collect systematically and disseminate information concerning sentences actually imposed . . ." [28 U.S.C. § 995(15)].

Pursuant to its mandate to study sentencing practices under the guidelines⁶, the Commission decided to conduct a detailed study of the policies, practices, and general observations emerging from the years of accumulated experience with the application of §5K1.1. Three specific preliminary findings contributed to interest in a comprehensive analysis:

1. a steady and significant increase over the years in the national rate of departures for substantial assistance, from a low of 5.8 percent in 1989 to a high of 19.5 percent in 1994;
2. considerable variation in the rate of substantial assistance departures among districts, with a 45 percent difference between the districts with the lowest (3.9%) and highest (49.3%) rates in 1994; and
3. important differences in the kinds of assistance given by defendants that result in substantial assistance motions, and in the extent of the departure granted by the courts.

Initial research questions focused on issues such as the district-based relationship among substantial assistance, caseload composition and trial rates; the characteristics of defendants who cooperate with authorities and the type of assistance offered; the interaction among §5K1.1 motions, offense category, and mandatory minimum penalties; a comparative analysis of substantial assistance departures and sentences for co-defendants involved in the same offense conduct; and the prosecutorial and judicial roles in filing and granting a 5K1.1 motions and determining sentences.

The Commission worked cooperatively with the Department of Justice, defense attorneys, federal judges, and federal probation officers to collect extensive data and conduct a multi-stage study.

Methodology

The basic mandate of this project was to collect and present reliable information on substantial assistance. To accomplish this overall purpose, the Commission examined a variety of evidence: the legal framework (statute, guideline, and appellate case law); the local context of district policies and practices (court, prosecution, and defense); a comparative view of

⁶See generally 28 U.S.C. § 995(a)(12), (13), (14), (15) and (16).

conspiracies in which some co-defendants provide substantial assistance; the mechanics of individual substantial assistance cases; and an aggregate statistical depiction of all federal defendants sentenced in fiscal year 1994.

The fact-finding process, accordingly, proceeded in a number of directions. The following is a short description of the seven main data collection efforts:⁷

- Case law and literature review—A summary analysis of relevant appellate court cases dealing with the most salient legal questions, challenges, and circuit conflicts pertaining to substantial assistance.
- United States attorney surveys—A mail survey addressed to all 94 United States attorneys, examining in detail their substantial assistance policies and practices. The survey instrument (*see* Appendix 4) was developed by the Commission in consultation with the Department of Justice. Complete responses and supporting documentation were received from 89 United States attorneys' offices.
- Site visits—Eight federal judicial districts were selected to represent variations in drug caseload, substantial assistance rates, and geographic region. Commission staff visited each site and conducted in-person interviews with judges, probation officers, prosecutors, public defenders, and members of the defense bar. The interview instrument (*see* Appendix 5), developed by the Commission in consultation with the Department of Justice, focused on the details of local substantial assistance practices at the district level, as seen by the various criminal justice professionals participating in the process.
- Individual case studies—A random sample of defendants receiving substantial assistance departures was selected, and details on the type and degree of their cooperation were collected in telephone interviews with respective United States and assistant United States attorneys (*see* Appendix 6 for the interview schedule).
- Conspiracy case studies—Extensive case review and analysis was conducted on a random sample of conspiracies in which at least one co-defendant received a substantial assistance departure (*see* Appendix 7 for the coded elements captured for each case and each conspiracy). Defining the conspiracy as the basic unit of analysis allowed the construction of profiles of the organization's structure and scope of criminal activity. This analysis also allowed for the study of the comparative role, culpability, departure status, and final sentence of each co-conspirator.

⁷A detailed description of each method is provided in the chapter presenting the corresponding analysis.

- Aggregate statistical analysis—Utilizing the Commission's own extensive sentence monitoring database, all guideline cases sentenced in fiscal year 1994 were studied to provide a comparative profile of defendants receiving and not receiving substantial assistance departures. Multivariate statistical analyses were performed to identify the relationship between the existence and degree of substantial assistance departures for legally relevant factors in a case, systemic and process variables, and legally irrelevant demographic characteristics.

Each approach was pursued for the unique insights and information it could add to the overall understanding of substantial assistance. At the end, it is hoped this report will present most of the major components depicting substantial assistance policies, practices, and outcomes in the federal criminal justice system.⁸

Report Layout

In addition to this Introduction (Chapter One), the report is comprised of six information and data chapters and a summary chapter of findings and conclusions.

Chapter Two summarizes the case law and discusses the more important appellate court rulings on substantial assistance issues. Chapter Three describes the baseline for district-based substantial assistance policies as reported to the Commission in a mail survey of all United States attorneys. Chapter Four provides a local context perspective based on information derived from site visits to eight districts and interviews with criminal justice professionals regarding substantial assistance practices in the court subculture of their respective districts.

Chapter Five captures in more detail the mechanics and array of individual variants of §5K1.1 motions in a sample of randomly selected cases receiving a substantial assistance departure in fiscal year 1994. The information was provided in phone interviews with United States attorneys and line prosecutors involved with the sample cases.

Chapter Six describes conspiracies in which one or more co-defendant received a substantial assistance motion. This analysis addresses the relationship between the various roles, culpability levels, and cooperation provided by co-defendant, the filing of substantial assistance motions, and comparative sentences within the same conspiracy.

Chapter Seven provides an aggregate data analysis of all defendants sentenced in a given fiscal year (1994), comparing those who received a substantial assistance departure with those who did not. The statistical analysis tries to assess the roles legally relevant factors, systemic variations, and legally irrelevant defendant characteristics play in a defendant receiving a

⁸The Commission's monitoring database includes only §5K1.1 cases; information on post-sentencing departures under Rule 35(b) are not submitted consistently to the Commission.

substantial assistance departure, and, when granted, the degree of sentence departure from the applicable guideline range.

Finally, Chapter Eight summarizes the most important findings of the previous chapters and offers some general conclusions on the state of prosecutorial practices, discretion, and substantial assistance under the guidelines.

CHAPTER TWO

SUBSTANTIAL ASSISTANCE DEPARTURES: LEGAL ISSUES

I. INTRODUCTION

The United States Congress implemented the federal sentencing guidelines on November 1, 1987 for the purpose of providing just punishment, eliminating sentence disparity, and "to reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process."⁹ The Sentencing Commission and the guidelines have successfully withstood scholarly attacks and constitutional challenges. One issue, however, the policy of authorizing sentence reductions for offenders who assist the government in the prosecution or investigation of another individual, continues to evoke considerable controversy.

Much of the controversy over the substantial assistance policies, codified at USSG §5K1.1, Title 18 §3553(e), and Rule 35(b), surrounds the issue of the government motion requirement. Scholars have written several articles discussing the government motion requirement and the myriad legal issues posed by substantial assistance departures.¹⁰ The scholarly debate and legal challenges have primarily centered around three issues: (1) the transfer of discretion from the court to the government; (2) the authoritative weight of USSG §5K1.1; and (3) the fairness of the policies to those "less serious" offenders with little useful information to give the government.

Legal commentators have noted the numerous occasions that "cooperative defendants have attacked the substantial assistance provisions because they give the prosecutor the sole power to decide whether to ask the court to depart from the sentencing range."¹¹ Prosecutors, however, are not concerned solely with winning the case, but also with ensuring that "justice be done," thereby making the abuse of such power less likely in comparison to granting that power to defendants.¹² From the government's perspective, a cooperation agreement may be worth a certain amount of trade-off in terms of sentence reductions, in order to proceed successfully against more culpable and/or dangerous offenders.¹³

⁹28 U.S.C. § 941(s).

¹⁰The report includes as Appendix A a bibliography of articles discussing substantial assistance departures.

¹¹Melissa M. McGrath, *Federal Sentencing Law: Prosecutorial Discretion in Determining Departures Based on Defendant's Cooperation Violates Due Process*, 15 S. Ill. U. L.J. 321, 330 (1991).

¹²Neil Eisenstadt, *Let's Make a Deal: A Look at United States v. Dailey and Prosecutorial Witness Cooperation Agreements*, 67 B.U. L. Rev. 749, 762 (1987).

¹³Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1, 12 (1992).

15
The literature, nevertheless, refers to the issue of prosecutorial discretion as one that merits vigilance. One issue of particular concern is that the prosecutor's interest in maintaining a "steady flow of guilty pleas" (and the defendant's interest in receiving as low a sentence as possible) carries with it the danger that agreements will result in defendants receiving unduly lenient sentences in relation to the seriousness of their offenses.¹⁴

Another potential source of prosecutorial abuse is arbitrariness with respect to fulfilling promises. One critic cautions that because prosecutors work alone, they are particularly subject to pressure and the temptation to "pick people they think they should get, rather than pick cases that need to be, prosecuted."¹⁵ This commentator calls for reviews of prosecutors' decisions by high-ranking assistant United States attorneys within their own offices, the court, or a standing commission that would include lay persons not engaged in prosecution who would examine and report upon the agreements at regular intervals.¹⁶

Many of the inherent ethical dilemmas of substantial assistance policies existed prior to the Sentencing Reform Act and the sentencing guidelines. As early as the 19th century, an informal practice began in which a defendant could obtain a pardon by revealing accomplices after confessing to the crime. The Supreme Court discussed the idea of cooperation agreements in *United States v. Ford*,¹⁷ and noted their important role in the apprehension of other criminals.¹⁸ Due to the lack of an organized police force during this time period, the investigation of crimes and the identification of criminals were aided greatly by those willing to turn in their guilty cohorts. Additionally, cash rewards and promises of pardons often were advertised as incentives for guilty associates to testify against the principal offender.

Considering the long history of sentence reductions for defendants willing to cooperate with authorities, it is remarkable that the "official" acceptance and written procedures for this practice have developed only recently. In 1980, the American Bar Association endorsed the granting of charge and sentencing concessions to defendants who plead guilty "only when the defendant's cooperation has resulted or may result in the successful prosecution of one or more other offenders engaged in equally serious or more serious criminal conduct."¹⁹

¹⁴Arnold Enker, *Perspectives on Plea Bargaining*, in U.S. President's Commission on Law Enforcement and Administration of Justice Task Force Report: The Courts 108 (1967).

¹⁵Hughes, *supra* note 13, at 16.

¹⁶*Id.*

¹⁷99 U.S. 594 (1878).

¹⁸Hughes, *supra* note 13, at 8.

¹⁹A.B.A., *Pleas of Guilty*, in 3 Standards for Criminal Justice §14-1.8(a)(iv)(1980).

As indicated in the preceding paragraphs, the recent codifications at Title 18, the guidelines, and the Federal Rules of Procedure formalized long accepted policies and plea negotiation strategies of the criminal justice system. With this background in mind, this section of the report gives a contextual framework for substantial assistance policies and practices by addressing some of the most common issues and their resolutions.

II. THE GOVERNMENT MOTION REQUIREMENT

A. Introduction

In what may have been unintentional foreshadowing of a future circuit conflict, the Supreme Court recognized "the importance of prosecutorial discretion in deciding when immunization is necessary [to facilitate justice]." ²⁰ In *The Whiskey Cases*, the Court noted that "of all the others, the prosecutor is the best qualified to determine [whom is worthy of pardon in exchange for testimony], as he alone is supposed to know what other evidence can be adduced to prove the criminal charge." ²¹ Likewise, in the area of substantial assistance, policy makers have entrusted the prosecutor with broad discretion because of the presumption of greater familiarity with the quality and effectiveness of the defendant's assistance.

One commentator, however, has criticized the transfer of such discretion to a "biased" party because "merely looking to the good faith of an opposing party is not the same as having a neutral judge objectively decid[ing] the issue." ²² The concern with prosecutors' ability to be objective in this process has been noted by others as well; "by giving this authority to the prosecutor, sentencing discretion is vested in a party who is an adversary against that defendant, and who, by the very role assumed in the process, cannot be objective." ²³ In addition, the government motion requirement has been characterized as giving the prosecutor the unilateral authority to block a downward departure for substantial assistance. ²⁴

²⁰Hughes, *supra* note 13, at 8.

²¹99 U.S. 594, 599 (1878).

²²Kimberly S. Kelley, *Substantial Assistance Under the Guidelines: How Smitheran Transfers Sentencing Discretion From Judges to Prosecutors*, 76 Iowa L. Rev. 187, 198 (1990).

²³Karen Bjorkman, *Who's the Judge? The Eighth Circuit's Struggle With Sentencing Guidelines and the Section 5K1.1 Departure*, 18 Wm. Mitchell L. Rev. 731, 755 (1992).

²⁴Cynthia K. Y. Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. Rev. 105, 111 (1994).

The government motion requirement also has been criticized as generating unfairness because of the uneven distribution of useful information among codefendants.²⁵ Minor participants and defendants with relatively lower culpability are often without sufficient knowledge to be of substantial assistance to the government and therefore are unable to benefit from the departure. For example, "upper level" individuals tend to be more useful sources of information in comparison to lower level defendants. As a result, "upper level" defendants may receive lighter sentences than "lower level" defendants who have little knowledge of the operations of complex criminal undertakings. This situation, often referred to as the "cooperation paradox,"²⁶ is argued to be a potential source of disparity—something the guidelines were intended to reduce.

The guidelines' "premium placed on cooperation" has been criticized as "unfair" because it places certain defendants, who cannot or will not cooperate, at a disadvantage.²⁷ According to one commentator, an equitable sentencing system would not place this premium on cooperation and would account for "legitimate reasons for failure to cooperate."²⁸ Other commentators, however, emphasize that the above-mentioned argument does not point to an inequality: "[t]he fact that some defendants cannot provide the kind of assistance necessary to invoke the departure is not different than the situation for any other departure: it applies to some defendants but not to others."²⁹

B. Constitutional Issues

Sections 3553(e) of Title 18 and USSG §5K1.1 require a government motion to permit a district court to sentence a defendant below the applicable statutory mandatory minimum or guideline range. The government motion requirement does not violate the due process, equal protection, or separation of powers clauses of the Constitution. Nor does the government motion requirement in §5K1.1 violate Congress's statutory grant of authority to the Sentencing Commission.

Due Process

Due process challenges to the §5K1.1 government motion requirement generally assert that: (1) due process requires that a defendant receive an individualized sentence based upon the

²⁵Antoinette M. Tease, *Downward Departures for Substantial Assistance: A Proposal for Reducing Sentencing Disparities Among Codefendants*, 53 Mont. L. Rev. 75 (1992).

²⁶Lee, *supra* note 16, at 138.

²⁷Avern Cohn, *The Unfairness of 'Substantial Assistance'*, 78 Judicature 186 (1995).

²⁸*Id.*

²⁹Thomas E. Zeno, *A Prosecutor's View of the Sentencing Guidelines*, 55 Fed. Probation 31, 36 (1991).

consideration of all relevant factors, and (2) due process requires that the government's discretion not deprive a defendant of an individualized sentence that rewards his substantial assistance. Thus, in many instances, defendants have argued that they are entitled to make the motion. Courts have rejected this argument unless the defendant shows that the prosecutor's failure to make the motion was based on an unconstitutional motive or violated the terms of a plea agreement.³⁰

Separation of Powers

Separation of powers challenges to the §5K1.1 government motion requirement generally assert that: (1) sentencing discretion rests solely within the judicial branch, and (2) the government motion requirement gives the executive branch an undue and unconstitutional influence in the sentencing process. Courts have rejected uniformly these challenges.³¹

Equal Protection

Similarly, courts have rejected uniformly equal protection challenges asserting that treating cooperating defendants differently from defendants unable to cooperate has no rational basis.³²

C. Statutory Mandate

In responding to assertions that the government motion requirement in §5K1.1 exceeds the scope of the Commission's statutory mandate, courts have held that the Commission has complied with the instructions of 28 U.S.C. § 994(n), directing that "the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed . . . to take into account a defendant's substantial assistance in the investigation or prosecution of

³⁰*See, e.g.,* United States v. Spears, 965 F.2d 262 (7th Cir.), *cert. denied*, 113 S. Ct. 502 (1992); United States v. Doe, 934 F.2d 353, 357-58 (D.C. Cir.), *cert. denied*, 502 U.S. 896 (1991); United States v. Santos, 932 F.2d 244, 255-56 (3d Cir.), *cert. denied*, 502 U.S. 985 (1991); United States v. Corley, 967 F.2d 101 (5th Cir. 1991), *vacated on other grounds*, 504 U.S. 968 (1992); United States v. Horn, 946 F.2d 738 (10th Cir. 1991); United States v. La Guardia, 902 F.2d 1010, 1015 (1st Cir. 1990); United States v. Rexach, 896 F.2d 710, 712 (2d Cir.), *cert. denied*, 498 U.S. 969 (1990); United States v. Francois, 889 F.2d 1341, 1345 (4th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990); United States v. Grant, 886 F.2d 1513, 1514 (8th Cir. 1989).

³¹*See, e.g.,* United States v. Smith, 953 F.2d 1060, 1063 (7th Cir. 1992); United States v. La Guardia, 902 F.2d 1010, 1015 (1st Cir. 1990); United States v. Rexach, 896 F.2d 710, 713-14 (2d Cir.), *cert. denied*, 498 U.S. 969 (1990); United States v. Spees, 911 F.2d 126, 127-28 (8th Cir. 1990); United States v. Kuntz, 908 F.2d 655, 657 (10th Cir. 1990); United States v. Huerta, 878 F.2d 89, 94 (2d Cir. 1989), *cert. denied*, 493 U.S. 1046 (1990).

³²*United States v. Horn*, 946 F.2d 738, 746 (10th Cir. 1991). *See also* United States v. Martinez, 968 F.2d 415 (5th Cir.) (same), *cert. denied*, 113 S. Ct. 828 (1992); United States v. Broxton, 926 F.2d 1180 (D.C. Cir. 1991) (same) *cert. denied*, 499 U.S. 911 (1989); United States v. Musser, 856 F.2d 1484 (11th Cir. 1988) (section 3553(e) does not deny equal protection to minor participants in drug offenses), *cert. denied*, 489 U.S. 1022 (1989).

another person who has committed an offense.”³³ These courts have reasoned that, in the absence of a government motion, cooperation still may be considered when selecting the sentence within the applicable guideline range. Moreover, the §5K1.1 government motion requirement parallels the provisions in both section 3553(e) and Rule 35(b).

III. REVIEW OF THE GOVERNMENT’S REFUSAL TO MAKE MOTION

A. Supreme Court Decision

In the initial years of guideline application, the appellate courts split on the issue of whether prosecutorial decisions to withhold substantial assistance motions were reviewable for arbitrariness or bad faith.³⁴ In 1992, the United States Supreme Court addressed this issue. In *United States v. Wade*³⁵ the Court held that the district court is permitted to review the prosecution’s decision to refuse to make a motion only if it were “based on an unconstitutional motive,” or in the situation where the refusal to move bears no rational relation to any “legitimate government end.”³⁶ The Court also made clear that the defendant bears the burden of making a “substantial threshold showing” that an unconstitutional motive was at work when the prosecutor withheld a §5K1.1 motion. Merely showing the extent to which the defendant assisted the government does not satisfy this requirement.³⁷

The defendant, in alleging that the government’s refusal to move for a §5K1.1 departure was decided arbitrarily or in bad faith, claimed that the government was “refusing to move because of factors that are not rationally related to any legitimate state objective.”³⁸ The opinion, citing the government’s brief, stated “[a]s the Government concedes . . . Wade would be entitled

³³See, e.g., *United States v. Lewis*, 896 F.2d 246, 247 (7th Cir. 1990) (section 5K1.1 reflects a reasonable interpretation of section 994(n)’s mandate); *United States v. White*, 869 F.2d 822, 828 (5th Cir.) (same), *cert. denied*, 490 U.S. 1112 (1989).

³⁴Several circuits had held that arbitrary or bad-faith government refusal was reviewable. Some of these cases required “extreme” or “egregious” bad faith before judicial review of the prosecutor’s decision would be allowed. For example, in *United States v. Mena*, 925 F.2d 354 (9th Cir. 1991), the Ninth Circuit noted the possibility of “extreme situations in which the defendant’s reliance on the government’s inducements may permit a downward departure in the absence of a government motion.” *Id.* at 356. Similarly, the Tenth Circuit, in *United States v. Kuntz*, 908 F.2d 655 (10th Cir. 1990), while rejecting the argument that “due process requires judicial review of a prosecutor’s decision not to file a section 5K1.1 motion,” nevertheless held that it did not “preclude the possibility that ‘[p]erhaps in an egregious case—a case where the prosecution stubbornly refuses to file a motion despite overwhelming evidence that the accused’s assistance has been so substantial as to cry out for meaningful relief—the court would be justified in taking some corrective action.’” *Id.* at 657, *citing* *United States v. La Guardia*, 902 F.2d 1010, 1017 (1st Cir. 1990).

³⁵504 U.S. 181 (1992).

³⁶*Id.* at 185.

³⁷*Id.* at 186.

³⁸*Id.*

to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end."³⁹ An examination of the government's brief further clarifies this. The government conceded that beyond the obvious constitutionally suspect classifications such as race or religion, "other arbitrary classifications" would only apply to the "the highly unlikely case in which the prosecutor classifies defendants according to factors that are not rationally related to whether they rendered substantial assistance."⁴⁰ Therefore, prosecutorial refusal to file substantial assistance motions normally is not subject to review for bad faith or arbitrariness without a showing of an unconstitutional motive.⁴¹

Subsequent to *Wade*, the Third Circuit has affirmed the district court's departure for substantial assistance when the government's sole motive for withholding a §5K1.1 motion was to penalize the defendant for exercising his/her right to trial.⁴² Similarly, the Ninth Circuit has held that the government may not refuse to make a §5K1.1 motion to penalize the defendant for going to trial. In *United States v. Khoury*,⁴³ after remand from the court of appeals, the government offered a §5K1.1 departure if the defendant would again plead guilty, but no reduction if the defendant withdrew his plea. The Ninth Circuit held that this amounted to penalizing a defendant for exercising his right to a jury trial, and therefore was an "unconstitutional motive" under *Wade*. The Ninth Circuit pointed out that the government had already made a §5K1.1 motion once in the case and had signed an agreement stating that the defendant aided in arresting a fugitive.

B. Breach of Plea Agreement

In general, the courts have held that if, as part of a plea agreement, the government explicitly promised to make a substantial assistance motion in exchange for the defendant's guilty plea, a government breach of that promise requires either specific performance by the government or the defendant to withdraw the guilty plea.⁴⁴ On the contrary, if a defendant

³⁹*Id.*

⁴⁰Brief for United States at 26, *Wade v. United States*, 504 U.S. 181 (1992).

⁴¹*See United States v. Urbani*, 967 F.2d 106 (5th Cir. 1992), which follows this interpretation of *Wade* and expressly rejects an interpretation that the "rationally related" language in the Supreme Court's opinion subjects the government's decision to review for cases in which no unconstitutional motive has been shown.

⁴²*United States v. Paramo*, 998 F.2d 1212 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1076 (1994).

⁴³62 F.3d 1138 (9th Cir. 1995).

⁴⁴*See, e.g., United States v. Garcia*, 954 F.2d 12, 17 (1st Cir. 1992); *United States v. Alexander*, 869 F.2d 91 (2d Cir. 1989), *aff'd*, 901 F.2d 272 (1990); *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir. 1985).

breaches the agreement by failing to provide substantial assistance, the defendant is not allowed to withdraw his/her guilty plea.⁴⁵

Plea agreements, predicated on a government commitment to make a substantial assistance motion on behalf of a defendant at a later time, present special problems of judicial review primarily in two contexts: (1) when a defendant's guilty plea is conditioned expressly on the government's promise of a forthcoming substantial assistance motion, and (2) when the plea agreement contains reciprocal conditional promises that the government will move for a downward departure in exchange for a defendant's substantial assistance. In both contexts, the issue is the availability of a remedy in the event of a breach of the plea agreement.

Defendant's Breach of Plea Agreement

Not surprisingly, courts have held that defendants who breach their plea agreement by failing to provide substantial assistance as promised may not withdraw their guilty pleas. At the same time, courts have relieved the government of any promise to make a substantial assistance motion when the defendant fails to fulfill his end of the bargain.⁴⁶

Government's Breach of Plea Agreement

The United States Supreme Court has ruled that the usual remedy for a prosecutor's breach of a plea agreement is specific performance.⁴⁷ In *Santobello*, the prosecutor's promise to make no sentence recommendation in return for the defendant's guilty plea was revoked inadvertently when the prosecutor handling the case was replaced by another prosecutor who was unaware of the promise.⁴⁸ The Court held that if a defendant has "bargained" for such an agreement, in the event of breach, the relief available to the defendant is either specific performance or withdrawal of the defendant's guilty plea.⁴⁹

⁴⁵See *United States v. Rexach*, 896 F.2d 710 (2d Cir.), *cert. denied*, 498 U.S. 969 (1990).

⁴⁶See *United States v. Conner*, 930 F.2d 1073 (4th Cir.) (defendant had burden of proof to show government breached plea agreement), *cert. denied*, 502 U.S. 958 (1991); *United States v. Head*, 927 F.2d 1361, 1376 (6th Cir. 1991) (government did not breach promise to move for reduction of offense level based on substantial assistance when promise was based on defendant's truthful and complete testimony, which the defendant did not provide), *cert. denied*, 502 U.S. 846 (1991).

⁴⁷*Santobello v. New York*, 404 U.S. 257, 262-63 (1971).

⁴⁸*Id.* at 259.

⁴⁹*Id.* at 262-63. At least one court has construed strictly the bargain analysis, holding that the agreement of two United States attorneys to "make every effort to persuade" the United States Attorney for the Northern District of Illinois to file a Rule 35(b) motion did not bind the latter to file a motion. See *United States v. Doe*, 940 F.2d 199 (7th Cir.), *cert. denied*, 502 U.S. 869 (1991).

Although the Court did not use the term "contract," most of the circuits subsequently have interpreted *Santobello*'s use of contract terms (specific performance, rescission of contract) to mean that plea agreements should be treated according to the principles of contract law.⁵⁰ Thus, if a prosecutor promises, as part of a plea or cooperation agreement, to move for a substantial assistance departure in exchange for a defendant's guilty plea, and thereafter breaches that promise, the courts will analyze the issue in light of contract law principles, notwithstanding the otherwise applicable requirements of §5K1.1 and/or section 3553(e).⁵¹ A number of circuits explicitly hold that when a prosecutor has promised to make a substantial assistance motion, and the defendant has relied on that promise in entering a guilty plea, the government's breach entitles the defendant (who has kept his end of the bargain) to specific performance.⁵²

The intersection of plea agreement violations and §5K1.1 departures also has arisen recently in the context of the government's use of otherwise protected information. In *United States v. Fontana*,⁵³ the government filed a motion for a four-level downward departure for defendant's substantial assistance. The government also recommended a three-level enhancement for the defendant's managerial role under USSG §3B1.1(b). The defendant challenged the enhancement as a violation of USSG §1B1.8.⁵⁴ According to the defendant, the sole source of information used to support the upward adjustment was derived from a §1B1.8 protected proffer provided to the government in the course of the defendant's cooperation. The First Circuit disagreed with the defendant's interpretation of his plea agreement, but could not determine from the record below what the court based its decision on and therefore a remand was necessary for the court to make clear its findings.

⁵⁰See, e.g., *United States v. Garcia*, 954 F.2d 12, 17 (1st Cir. 1992); *United States v. Alexander*, 869 F.2d 91 (1989), *aff'd*, 901 F.2d 272 (2d Cir. 1990); *United States v. McGovern*, 822 F.2d 739, 743 (8th Cir.), *cert. denied*, 484 U.S. 956 (1987); *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir. 1985); *United States v. Krasn*, 614 F.2d 1229 (9th Cir. 1980).

⁵¹*United States v. Smith*, 953 F.2d 1060, 1066 (7th Cir. 1992).

⁵²See, e.g., *United States v. Dixon*, 998 F.2d 228 (4th Cir. 1993); *United States v. Watson*, 988 F.2d 544 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 698 (1994); *United States v. Smith*, 953 F.2d 1060 (7th Cir. 1992); *United States v. Lewis*, 896 F.2d 246, 249 (7th Cir. 1990); *United States v. Easterling*, 921 F.2d 1073, 1080 (10th Cir. 1990) (government was obligated to file a timely memorandum indicating extent of defendant's cooperation prior to agreement in which it was part of language of agreement), *cert. denied*, 500 U.S. 937 (1991).

⁵³50 F.3d 86 (1st Cir.1995).

⁵⁴USSG §1B1.8 prohibits certain "self-incriminating information" provided by the defendant after entering a cooperation agreement from being used to enhance the defendant's offense level.

IV. RELATIONSHIP BETWEEN 18 U.S.C. § 3553(e) and §5K1.1

The Supreme Court in *Melendez v. Wade*⁵⁵ rejected the argument that the Sentencing Commission created a “unitary” motion system. According to the Court, a motion attesting to the defendant’s substantial assistance and requesting that the district court depart below the minimum of the applicable guideline range does not authorize a departure below a lower statutory minimum.

The Court also ruled that there was nothing in 18 U.S.C. § 3553 nor 28 U.S.C. § 994(n) that suggests “that the Commission itself may dispense with 18 U.S.C. § 3553(e)’s motion requirement, or alternatively ‘deem’ a motion requesting or authorizing different action—such as a departure below the guideline minimum—to be a motion authorizing the district court to depart below the statutory minimum.” The Court did not view policy statement §5K1.1 as an attempt by the Commission to “exercise this nonexistent authority.” The majority of the Court characterized §5K1.1 as serving two purposes. The first paragraph of §5K1.1 authorizes departures below the minimum guideline range, and the next section provides the district court guidance, after the government has moved for a departure below the statutory minimum, in determining the appropriate extent of the departure below the statutory minimum. According to the Court, “Congress did not charge the Commission with ‘implementing’ §3553(e)’s Government motion requirement, beyond adopting provisions constraining the district court’s discretion regarding the particular sentence selected.”

Justice Souter in a concurring opinion disagreed with the majority’s suggestion that the two parts of §5K1.1 should be treated separately. According to Justice Souter, “I would simply say that Application Notes indicate that §5K1.1 applies to motions under §3553(e), and leave it at that.”

Justice Stevens in a separate opinion concurring in the judgment of the Court, believed that the Commission “intended §5K1.1 to create a unitary motion system under which any request for a departure below the guideline range based on substantial assistance would also authorize a departure below the statutory minimum.” According to Justice Stevens, however, (1) Congress did not intend to authorize such a unitary system, and (2) Congress conferred the authority to dispense with the statutory minimum penalties on the prosecutor rather than the Commission.

Justice Breyer, in a separate opinion concurring in part and dissenting in part, was of the view that the Commission had in fact exercised its power to create a unitary motion system, thereby recognizing one kind of substantial assistance, not two. Justice O’Connor joined in the opinion.

⁵⁵116 S. Ct. 2057 (1996).

V. RELATIONSHIP BETWEEN §5K1.1 AND RULE 35(B)

Some courts have made significant distinctions between §5K1.1 and Fed. R. Crim. P. 35(b) in analyzing substantial assistance departure issues. The First and Eleventh Circuits have held that the sentencing court must rule on a §5K1.1 substantial assistance motion before sentencing the defendant.

In *United States v. Drown*,⁵⁶ the First Circuit held that the government may not defer a determination as to the quality of a defendant's assistance on the ground that such a judgment would be premature. At the time of sentencing, the government must decide whether to file a §5K1.1 motion and that decision must be based on a good faith evaluation of the assistance rendered to that date. The court based its decision primarily on the distinction between §5K1.1 motions and Rule 35(b) motions.

Eleventh Circuit

The Eleventh Circuit in *United States v. Howard*,⁵⁷ held that the sentencing court may not delay its ruling on a §5K1.1 motion in order to see if the defendant would keep his promise and provide the assistance he agreed to provide. The court in *Howard* distinguished between the §5K1.1 provision designed to assess cooperation provided before sentencing and Rule 35(b) that operates after the sentence has been imposed. The court observed that this structure permits the defendant two "bites" at the sentencing reduction "apple." The court noted that the sentencing court's deferral of a decision on the §5K1.1 motion denies one of these "bites."⁵⁸ The court also notes that such deferral conflicts with the Sentencing Reform Act that greatly limited the court's discretion to re-sentence.⁵⁹

VI. EXTENT OF DEPARTURE

A. Statutory Limits

Several appellate courts have examined whether certain provisions of Title 18 limit the degree of the sentencing reduction for substantial assistance.

⁵⁶942 F.2d 55 (1st Cir. 1991).

⁵⁷902 F.2d 894, 897 (11th Cir. 1990).

⁵⁸*Id.* at 896.

⁵⁹*Id.* at 897. Accord *United States v. Mitchell*, 964 F.2d 454 (5th Cir. 1992); *United States v. Robinson*, 948 F.2d 697, 698 (11th Cir. 1991) (court must rule specifically on the §5K1.1 motion, even if the sentence imposed is a downward departure) See also *Francois*, 889 F.2d at 1345 (recognizing the temporal distinction between §5K1.1 and Rule 35(b)), *cert. denied*, 494 U.S. 1085 (1990).

In *United States v. Daiagi*,⁶⁰ the court addressed whether 18 U.S.C. § 3561 limits the broad discretion of 18 U.S.C. § 3553(e) to impose sentence “below a level established by statute as minimum sentence.” Observing that there appeared to be no distinction between a mandatory minimum statutory term of imprisonment and a prohibition against probation, the Fourth Circuit held that section 3561(a)(1) does not limit the extent of departure permitted under section 3553(e).

The Seventh Circuit examined whether 18 U.S.C. § 3742, which requires that a sentence outside the guideline range be reasonable, limits downward departure discretion.⁶¹ The appellate court held that any departure “must be linked to the structure of the guidelines . . . employing the rationale and methodology of the guidelines. . . .” Moreover, the court stated that “[t]he government’s recommendation should be the starting point for the district court’s analysis.” Finally, the court noted that the USSG §§ 3C1.1 and 3E1.1 suggest that “departures based on a defendant’s cooperation with authorities may warrant something on the order of a two-level adjustment for each factor found by the court to bear similarly on its evaluation of the defendant’s cooperation. They provide but imperfect guidance, however, since weighing the impact of any given factor on the quality of the defendant’s cooperation is an imprecise art, at best. . . . We will simply renew our caution that ‘departures of more than two levels should be explained with a care commensurate with their exceptional quality.’”⁶²

In addition to Title 18 U.S.C. §§ 3553 and 3742, at least one court has examined a specific criminal statute to determine whether it would limit downward departure discretion. In *United States v. Thomas*,⁶³ the Seventh Circuit interpreted the language of 21 U.S.C. § 841(b)(1)(A)⁶⁴ to mean that “notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph” to require an imprisonment sentence rather than probation, and thus limit a court’s downward departure discretion pursuant to section 3553(e).

⁶⁰892 F.2d 31 (4th Cir. 1989).

⁶¹Section 3742 provides, “[t]he Government, (*sic*) may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence . . . is less than the sentence specified in the applicable guideline range.” 18 U.S.C. § 3742(b)(3). Section 3742 also provides “[u]pon review of the record, the court of appeals shall determine whether the sentence . . . is outside of the applicable guideline range, and is unreasonable. . . .” 18 U.S.C. § 3742(e)(3).

⁶²*United States v. Thomas*, 930 F.2d 526, 531 (7th Cir.) (citing *United States v. Ferra*, 900 F.2d 1057, 1064 (7th Cir. 1990), *cert. denied*, 504 U.S. 910 (1992)), *cert. denied*, 502 U.S. 857 (1991).

⁶³930 F.2d 526, 528 (7th Cir.), *cert. denied*, 502 U.S. 857 (1991).

⁶⁴This section specifies a ten-year mandatory minimum term of imprisonment.

B. Appellate Review

The appellate courts tend to agree that the extent of a substantial assistance departure, like that of other departures, generally is not subject to appellate review.⁶⁵ Likewise the denial of a motion pursuant to §5K1.1 is not reviewable.⁶⁶

VII. SECTION 5K2.0 AS AN ALTERNATIVE TO USSG §5K1.1 AND 18 U.S.C. § 3553(e)

Several circuits have addressed the issue of whether USSG §5K2.0⁶⁷ provides an alternative basis for a substantial assistance departure. The Second Circuit has upheld such departures, in contrast to the First, Eighth, Ninth, and D.C. circuits' apparent unwillingness to do so. None of the circuit courts, however, have ruled out any possibility of substituting a §5K2.0 motion for one pursuant to §5K1.1 in an exceptional case.

In rejecting a §5K2.0 departure based on the defendant's cooperation, the First Circuit observed that a departure pursuant to §5K2.0 was limited to situations in which there exists something atypical about the offender or the crime.⁶⁸

The Second Circuit noted in *United States v. Khan*⁶⁹ that a departure based on the defendant's cooperation pursuant to §5K2.0 would be "theoretically possible," though not permissible in the instant case. Such a §5K2.0 departure may be possible in the narrow case "where the defendant offers information regarding actions he took, which could not be used by

⁶⁵See *United States v. Shaffer*, 993 F.2d 625 (7th Cir. 1993) (extent of departure not reviewable); *United States v. Stowe*, 989 F.2d 261 (7th Cir. 1993); *United States v. Spiropoulos*, 976 F.2d 155 (3d Cir. 1992) (court may determine extent of departure on basis of value of defendant's substantial assistance); *United States v. Sharp*, 931 F.2d 1310, 1311 (8th Cir. 1991) (extent of substantial assistance departure not reviewable, as is the decision not to make the departure); *United States v. Dean*, 908 F.2d 215, 217 (7th Cir. 1990), *cert. denied*, 501 U.S. 1206 (1991); *United States v. Erves*, 880 F.2d 376, 382 (11th Cir.) (substantial assistance departure not appealable under 18 U.S.C. § 3742(a) on grounds that court should have imposed probation instead of 18 months), *cert. denied*, 493 U.S. 968 (1989). The limited exceptions involve cases in which the court bases its departure discretion on impermissible factors or the court fails to utilize its full discretion.

⁶⁶*United States v. Dellinger*, 986 F.2d 1042 (6th Cir. 1993).

⁶⁷Section 5K2.0 authorizes departure when "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."

⁶⁸*United States v. Mariano*, 983 F.2d 1150 (1st Cir. 1993).

⁶⁹920 F.2d 1100 (2d Cir. 1990), *cert. denied*, 499 U.S. 969 (1991). The defendant's assistance, saving the life of a D.E.A. informant who had been kidnapped, was not considered by the Second Circuit because it was not presented to the district court prior to the imposition of the sentence.

the government to prosecute other individuals (rendering §5K1.1 inapplicable), but which could be construed as a 'mitigating circumstance' for purposes of §5K2.0."⁷⁰

In another case,⁷¹ the Second Circuit held that a departure pursuant to §5K2.0 was permitted because the assistance was not to the government but to the judicial system. Here, the court found the defendant "facilitat[ed] the proper administration of justice in the District Courts" and "[broke] the log jam in a multi-defendant case that's pending in the seriously overcrowded dockets of the District Courts of the United States."⁷² In the Second Circuit's opinion, such assistance was not found to be contemplated by the guidelines, and is consistent with the notion of "sensible flexibility to depart in circumstances where departure from the Sentencing Guidelines has a reasonable basis."⁷³

The Eighth Circuit in *United States v. Polanco-Campagna*,⁷⁴ reversed a downward departure below a mandatory minimum without a government motion. The district court sentenced the defendant to the same period of imprisonment as his cooperating codefendant, a major drug trafficker. In reversing the downward departure, the Eighth Circuit held first, that the government must make a motion pursuant to section 3553(e) to sentence below a statutory minimum. Secondly, the appellate court held that, "[t]he sentencing court's desire to proportionalize sentences between codefendants is not, and by itself cannot be, an aggravating or mitigating circumstance justifying a section 5K2.0 departure." Third, a departure pursuant to §5K2.0 does not permit a sentence below the statutory minimum.

The Ninth Circuit, in *United States v. Sanchez*,⁷⁵ determined that the district court had exercised properly its discretion when it refused to depart downward pursuant to §5K2.0 on the basis of the defendant's having provided assistance in a civil forfeiture proceeding. The court did not address whether such a departure is *per se* impermissible on other facts, thus leaving the question unresolved.

⁷⁰*Id.* at 1107.

⁷¹*United States v. Garcia*, 926 F.2d 125 (2d Cir. 1991).

⁷²*Id.* at 127-128.

⁷³The notion of "sensible flexibility" was explained in *United States v. Correa-Vargas*, 860 F.2d 35 (2d Cir. 1988), when the Second Circuit stated that "only by allowing the district courts sensible flexibility can we promote the equally important purposes of just punishment, respect for the law and adequate deterrence set forth in the Sentencing Reform Act." *Correa-Vargas*, 860 F.2d at 40. To deny such flexibility, according to the court, would endow prosecutors with discretion at the expense of district judges, a result not intended by Congress. *Id.*

⁷⁴53 F.3d 893 (8th Cir. 1995), *petition for cert. filed*, (Jun. 29, 1995) (No. 95-5022).

⁷⁵927 F.2d 1092 (9th Cir. 1991).

In a later case, however, *United States v. Goroza*,⁷⁶ the Ninth Circuit held that a departure pursuant to §5K2.0 based on the defendant's cooperation with the government was inappropriate because "section 5K1.1 demonstrates that the Sentencing Commission specifically considered whether assistance to the government should be taken into account in sentencing."⁷⁷ To permit such a departure would make the government motion requirement of §5K1.1 meaningless.

The District of Columbia Circuit held similarly in *United States v. Watson*, 57 F.3d 1093 (D.C. Cir. 1995), rejecting the contention that §5K2.0 was the appropriate mechanism for a departure based on the defendant's assistance to the government.

While the district court may be unable to make a downward departure in the absence of the government motion, appellate courts that have considered the issue agree that the district court may consider the defendant's cooperation in determining the appropriate sentence within the applicable guideline range.⁷⁸

What happens, however, if the court denies the defendant any benefit because it refuses to allow the defendant to cooperate? The Fourth Circuit in addressing this question held that the district court made a fundamental error of law in forbidding a defendant to cooperate with the government. The district court based its prohibition on the erroneous conclusion that a defendant released on bond pending sentencing who agreed to participate in a government controlled drug operation would be committing a crime. According to the appellate court the prohibition was inconsistent with Rule 35(b) and §5K1.1 because it prevented the cooperation necessary to obtain a substantial assistance motion.⁷⁹

VIII. PROMULGATION OF §5K2.0 AS A POLICY STATEMENT AND NOT AS A GUIDELINE

Defendants have challenged the Commission's promulgation of §5K1.1 as a policy statement rather than as a guideline. In one case, the Eighth Circuit rejected the argument that district courts could ignore the government motion requirement of §5K1.1 because it was a policy statement.⁸⁰ Defendants also have asserted that the Commission violated the congressional mandate imposed in 28 U.S.C. § 994(n) by promulgating 5K1.1 as a policy

⁷⁶941 F.2d 905 (9th Cir. 1991).

⁷⁷*Id.* at 909.

⁷⁸See *United States v. Alanin*, 895 F.2d 1335, 1338 (11th Cir.), *cert. denied*, 498 U.S. 873 (1990); *see also* *United States v. Bruno*, 897 F.2d 691 (3d Cir. 1990); *United States v. Brick*, 905 F.2d 1092 (7th Cir. 1990).

⁷⁹*United States v. French*, 900 F.2d 1300, 1302 (8th Cir. 1990).

⁸⁰*United States v. Kelley*, 956 F.2d 748 (8th Cir. 1992).

statement. In one case,⁸¹ the defendant argued that the Commission exceeded its authority in promulgating USSG §5K1.1 as a policy statement rather than as a guideline. The Fifth Circuit rejected the argument holding that, rather than mandating the promulgation of a specific guideline for downward departure based on substantial assistance, Congress in section 994(n) instructed the Commission to ensure that the guidelines as a whole "reflect" the appropriateness of such a departure. The court then found that the Commission responded properly to the congressional mandate. Moreover, the court said, even if a specific guideline were required by section 994(n), the Commission promulgated such a guideline in § 1B1.1. That guideline sets forth step-by-step application principles that concern, among other things, departures from the guideline range, and § 1B1.1 specifically refers to Chapter 5, Part K of the sentencing guidelines.⁸²

IX. ROLE OF THE DISTRICT COURT

Prior to the implementation of the guidelines, there were few constraints on judicial discretion in sentencing. Judges were not required to justify sentences through a statement of reasons requirement nor were sentences subject to significant oversight by the courts of appeal.⁸³ The guidelines have been criticized for shifting much of the discretion previously vested in the courts to prosecutors.⁸⁴ For example, with respect to cooperation agreements, a sentencing judge retains the discretion to reject a motion for a substantial assistance departure, largely, and to determine the extent of any such departure, but may not review the government's failure to file a substantial assistance motion except in a limited set of circumstances.⁸⁵ The government motion requirement has been criticized for giving prosecutors the ultimate authority to decide whether the defendant will receive a downward departure despite the fact that the sentencing judge has the "last word" on the defendant's actual sentence.⁸⁶

⁸¹*United States v. Underwood*, 61 F.3d 306 (5th Cir. 1995).

⁸²*See also United States v. Dawson*, 990 F.2d 1314 (D.C. Cir. 1993) (Court rejects defendant's assertion that promulgation of §5K1.1 as policy statement and not as guideline violates congressional mandate).

⁸³Bruce M. Selya & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combatting Ultra-Uniformity*, 35 B.C. L. Rev. 799, 800 (1994).

⁸⁴Daniel J. Sears, *Practices Under the Federal Sentencing Guidelines: Bargaining for Freedom*, 22 Colo. Law. 485 (1993).

⁸⁵Review of the government's failure to file a substantial assistance motion occurs when there is a constitutionally impermissible motive attributable to the government, when the government motive for failing to file the motion is unrelated to the furtherance of any legitimate end, and when the government breaks a contractual promise to file the motion. *See Selya & Massaro, supra* note 83, at 804-05.

⁸⁶*Lee, supra* note 16, at 109.

In determining an appropriate reduction in a defendant's sentence, USSG §5K1.1 instructs the court to consider the significance and utility of the defendant's assistance; the truthfulness, completeness, and reliability of that information or testimony; the nature and extent of the assistance; any injury or threat of injury to the defendant or the defendant's family resulting from providing assistance; the timeliness of the assistance; and the government's evaluation of the assistance. Previously, no such advisory standards existed. Rather, the sentence imposed was at the complete discretion of the court, subject only to statutory minimum or maximum penalties.

It should be noted, however, that although the sentencing guidelines have diminished significantly the previous "unfettered discretion" enjoyed by district judges in sentencing, the actual application of the guidelines is not mechanical; "as a defendant's base offense level for specific offense characteristics and other factors is dependent on what the court determines to be relevant to the offense at issue."⁸⁷ Despite the government motion requirement, judges retain the exclusive power to accept or reject plea bargains, to find facts upon which the sentence will be based, and to decide the precise sentence within the applicable guideline range.⁸⁸ The sentencing court's discretion regarding whether to grant a departure was characterized aptly in *United States v. Mariano*:

Put bluntly, while a government motion is a necessary precondition to a downward departure based on substantial assistance, the docketing of such a motion does not bind a sentencing court to abdicate its responsibility, stifle its independent judgment or comply blindly with a prosecutor's wishes.⁸⁹

Another commentator, however, has criticized the prosecutor's choice of charges and facts as severely limiting the sentencing judge's discretion.⁹⁰ According to this commentator, although the guidelines do not explicitly confer new power on the prosecutor or actually transfer power from the judge to the prosecutor, "to the extent that the guideline parameters diminish the power of the judge, they correspondingly enhance the power of the prosecutor."⁹¹

⁸⁷Selya & Massaro, *supra* note 83, at 803.

⁸⁸Thomas E. Zeno, *A Prosecutor's View of the Sentencing Guidelines*, 55 Fed. Probation 31, 32 (1991).

⁸⁹983 F.2d 1150, 1155 (1st Cir. 1993).

⁹⁰Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. Rev. 1681, 1697 (1992).

⁹¹*Id.*

A review of the cases discussing the discretion afforded courts in making departures based on substantial assistance indicates that the court should make full use of its discretion and is not permitted to guide that discretion by considering otherwise impermissible factors. The Third Circuit in *United States v. King*,⁹² remanded the case because the district judge did not use the whole panoply of discretion bestowed under §5K1.1. At sentencing, the district court stated, "my practice, when I grant a §5K1.1 motion, is to go down three levels, three additional levels, on the theory if Acceptance of Responsibility is worth three levels, Substantial Cooperation should be worth the same." The defendant asserted that the court erred as a matter of law in determining the degree of the departure by using a mechanical rule instead of exercising its discretion. The appellate court agreed. According to the Third Circuit, §5K1.1 directs a sentencing court to gauge the extent and quality of the defendant's cooperation in deciding how much of a departure to make. In reversing and remanding, the appellate court held that a proper exercise of discretion requires the district court to conduct an individualized qualitative examination of the defendant's cooperation. Accordingly, the use of a general sentencing practice was inappropriate.

Likewise, the Sixth Circuit in *United States v. Bureau*,⁹³ reversed the district court for not exercising its full discretion in making a substantial assistance departure. The district court made a small departure based on its belief that the defendant's continued cooperation would merit a further reduction pursuant to Rule 35(b) after sentencing. According to the Sixth Circuit the court's practice merged §5K1.1 and Rule 35(b). The appellate court emphasized that "the sentencing judge has an obligation to respond to a §5K1.1 motion and to then state the grounds for sentencing without regard to future events." The appellate court was unable to determine from the record whether the district court used its full discretion in evaluating the defendant's substantial assistance. By postponing action on the government's motion pursuant to §5K1.1, the district court used Rule 35(b) to shift discretion back to the prosecutor. In so doing, the court contravened the requirement to rule on the §5K1.1 motion before imposing the sentence. According to the Sixth Circuit "[t]o do otherwise would be manifestly unfair to the defendant and would in effect be an incomplete exercise of discretion. . . . A disregard of §5K1.1's temporal mandate touches upon a criminal defendant's due process rights."⁹⁴

X. STATISTICAL ANALYSIS

A review of the 4,044 cases in the appeals database for fiscal year 1994 reveals that the Commission received information on 171 cases in which defendants raised an issue related to section 5K1.1. Thus, substantial assistance was an issue in only 4.2 percent of the appellate cases of which we have records. The vast majority of those appeals were by defendants who

⁹²53 F.3d 589 (3d Cir. 1995).

⁹³52 F.3d 584 (6th Cir. 1995).

⁹⁴*Id.*

argued that they were entitled to departures when the government failed to make a motion (*see* Table 1). The next most frequently appealed issue was the government's bad faith refusal to make a §5K1.1 motion. On both of those issues the affirmance rate was above 80 percent. Other issues that arose less frequently were challenges based on alleged violations of plea agreements and challenges based on the district court's mistaken belief that it lacked authority to depart. Issues involving violations of plea agreements had an affirmance rate of just over 50 percent. On issues involving the district court's discretion, the affirmance rate, however, was 75 percent. The issue involving the highest reversal rate (50%) was the applicability of statutory mandatory minimums. As indicated by Table 1, Due Process, Sixth Amendment, Separation of Powers, and other issues arising in the §5K1.1 context were appealed infrequently.

A regional analysis indicated that the Ninth Circuit, with 29 cases, had the largest number of §5K1.1 cases appealed in 1994. The Fifth, Fourth, and Third Circuits followed with 26, 21, and 18 substantial assistance cases appealed respectively (*see* Table 2). The Fifth Circuit had the highest rate of reversals at almost 20 percent. The Third Circuit had the highest rate of cases dismissed at just over 22 percent.

XI. CONCLUSION

The Supreme Court and the circuit courts of appeal have developed clear standards governing substantial assistance departures. The Supreme Court in *Wade, supra*, made clear that the government's failure to make a substantial assistance motion cannot be reviewed by the district court absent an unconstitutional motive. In *Melendez, supra*, the Supreme Court also made clear the distinction between a motion for a departure below the guidelines and a departure below the mandatory minimum. According to the Court, the prosecutor determines which type of sentence reduction the court can make.

The appellate courts have emphasized the necessarily broad discretion retained by district courts in determining whether to grant the government's motion. Generally the appellate courts will not disturb a district court's substantial assistance departure, absent the consideration of impermissible factors.

While the law may be clear on the parameters of substantial assistance departures, ethical issues surrounding the policy of rewarding defendants with sentence reductions based on their cooperation with the government have and will continue to elicit criticism and legal challenges. This policy continues to attract considerable criticism and discussion because of the conflicting emotions, philosophies, and practices that surround its implementation.

Table 1

SPECIFIC SENTENCING ISSUES APPEALED BY DEFENDANT UNDER §5K1.1¹
(October 1, 1993 through September 30, 1994)

ISSUE	Number	Percent	Affirmance Rate
SUBSTANTIAL ASSISTANCE (5K1.1)	171	100.0	73.7
Defendant claims to be entitled to departure; no government motion	61	35.7	86.9
Challenge to the extent of the departure	24	14.0	29.2
Challenge to government's refusal to make motion; bad faith	19	11.1	89.5
Challenge to the court's denial of reduction after government motion	11	6.4	81.8
Challenge to plea agreement/Rule 11 issues	11	6.4	54.6
District Court mistakenly believed it had no authority to depart	8	4.7	75.0
Rule 35 issues (correction or reduction of sentence)	4	2.3	100.0
Mandatory minimum statute applicable	4	2.3	50.0
Fifth Amendment: due process	3	1.8	100.0
Rule 32 issues	2	1.2	100.0
Fifth Amendment: equal protection	1	0.6	100.0
Separation of Powers	1	0.6	0.0
Sixth Amendment: right of confrontation	1	0.6	100.0
Violation of Ex-Post Facto Clause	1	0.6	100.0
Specifics unknown ²	1	0.6	100.0
Government failed to make motion based on unconstitutional grounds	1	0.6	0.0
Other issues appealed	18	10.5	77.8

SPECIFIC SENTENCING ISSUES APPEALED BY THE GOVERNMENT UNDER §5K1.1¹
(October 1, 1993 through September 30, 1994)

ISSUE	Number	Percent	Affirmance Rate
SUBSTANTIAL ASSISTANCE (5K1.1)	4	100.0	75.0
Challenge to government's refusal to make motion; bad faith	1	25.0	100.0
Challenge to plea agreement/Rule 11 issues	1	25.0	0.0
District Court mistakenly believed it had no authority to depart	1	25.0	100.0
Rule 35 issues (correction or reduction of sentence)	1	25.0	100.0

¹Based on 4,044 appeals defendants with sentencing as at least one of the reasons for appeal. Information on issues was unavailable in 319 cases. Because often more than one issue was appealed, the number of issues is more than the number of defendants. A description of guidelines used in this table can be found in the Guidelines Manual.

²"Specifics unknown" indicates: a) a challenge to a specific guideline when the court's order does not articulate the particular issue raised by the defendant or b) a general challenge to the application of the guidelines when the court's order does not indicate which guideline is being challenged.

SOURCE: U.S. Sentencing Commission, 1994 Appeals Datafile, APPFY94.

Table 2

SENTENCING APPEALS CASE DISPOSITION BY CIRCUIT AND DISTRICT¹
(Cases with §5K1.1 as a guideline appealed)
(October 1, 1993 through September 30, 1994)

CIRCUIT	TOTAL	AFFIRMED		REVERSED		AFFIRMED AND REVERSED		DISMISSED	
		n	%	n	%	n	%	n	%
TOTAL	160	137	85.6	9 (9)²	5.6	6 (6)²	3.8	8	5.0
D.C. CIRCUIT	1	1	100.0	0 (0)	0.0	0 (0)	0.0	0	0.0
FIRST CIRCUIT	2	2	100.0	0 (0)	0.0	0 (0)	0.0	0	0.0
SECOND CIRCUIT	4	4	100.0	0 (0)	0.0	0 (0)	0.0	0	0.0
THIRD CIRCUIT	18	13	72.2	1 (1)	5.6	0 (0)	0.0	4	22.2
FOURTH CIRCUIT	21	19	90.5	1 (1)	4.8	0 (0)	0.0	1	4.8
FIFTH CIRCUIT	26	19	73.1	5 (5)	19.2	2 (2)	7.7	0	0.0
SIXTH CIRCUIT	14	14	100.0	0 (0)	0.0	0 (0)	0.0	0	0.0
SEVENTH CIRCUIT	11	9	81.8	0 (0)	0.0	0 (0)	0.0	2	18.2
EIGHTH CIRCUIT	13	13	100.0	0 (0)	0.0	0 (0)	0.0	0	0.0
NINTH CIRCUIT	29	27	93.1	1 (1)	3.4	1 (1)	3.4	0	0.0
TENTH CIRCUIT	7	4	57.1	0 (0)	0.0	2 (2)	28.6	1	14.3
ELEVENTH CIRCUIT	14	12	85.7	2 (2)	14.3	0 (0)	0.0	0	0.0

¹Of the 6,745 appeals cases, 2,701 were excluded because the type of appeal was "conviction only." Of the 4,044 remaining cases, 121 were excluded due to one or both of the following reasons: missing district information (57) or missing type of appeal information (102). Descriptions of variables used in this table are provided in Appendix A.

²This category (in parentheses) includes cases that were remanded for sentencing purposes.

SOURCE: U.S. Sentencing Commission, 1994 Appeals Datafile, APPFY94.

CHAPTER THREE

SUBSTANTIAL ASSISTANCE DEPARTURES: UNITED STATES ATTORNEYS' POLICIES

As part of the Commission's effort to study comprehensively the operation of substantial assistance policies, a questionnaire was sent to each United States attorney. This questionnaire,⁹⁵ developed in consultation with the Department of Justice, inquired about general office policies and practices in each district regarding the filing of substantial assistance motions pursuant to USSG §5K1.1 and Rule 35(b) of the Federal Rules of Criminal Procedure. The Commission reviewed 89 Substantial Assistance District Policy Questionnaires submitted by the U.S. attorney's offices. Five districts did not respond to the survey.⁹⁶ This chapter summarizes those policies and practices employed in the 89 districts that responded.

I. EXAMINATION OF SUBSTANTIAL ASSISTANCE MOTIONS

The Substantial Assistance District Policy Questionnaire contained several questions relevant to the review/approval process for substantial assistance motions within each district, the types of assistance resulting in the filing of substantial assistance motions, the timing of the assistance, sentence recommendations, and Rule 35(b) motions.

A. The Review/Approval Process

Questions concerning the review/approval process included three major areas: written policies, levels of review/approval, and changes in policy.

Written Policy

Attorneys for the government⁹⁷ were asked whether their offices had policies for review/approval of substantial assistance motions and whether those policies were written. Eighty-one percent of the districts (n=72) responded that they have written policies for procedures to be followed prior to the filing of substantial assistance motions. Nineteen percent of the districts (n=17) did not have written policies, but had oral policies regarding substantial assistance motions. Every district had some policy in place, whether written or oral.

⁹⁵See Appendix B for the survey instrument.

⁹⁶This represents a completion rate of 95 percent.

⁹⁷The questionnaires generally were completed by either the U.S. attorney in the district, the first assistant U.S. attorney, or the chief of the criminal division.

Levels of Review/Approval

Questions concerning the levels of review/approval required for substantial assistance motions were included in the questionnaire. Attorneys for the government were presented with a chart providing possible levels of review/approval of substantial assistance motions, including whether the motion was reviewed/approved by the assistant United States attorney prosecuting the case, a supervisory assistant, a substantial assistance review committee, and/or the U.S. attorney in each district.⁹⁸

The assistant U. S. attorney prosecuting the case reviews the substantial assistance motion in all districts responding to the questionnaire.⁹⁹ Ninety-eight percent of the districts (n=87) require review/approval of a supervisory assistant, either a unit supervisor or criminal chief, before substantial assistance motions are filed. Two percent of the districts (n=2) allow the assistant U. S. attorney to review and approve substantial assistance motions on his/her own.¹⁰⁰

Eighty-three percent of the districts (n=74) require review/approval from more than one supervisor before substantial assistance motions are filed. Twenty percent of the districts (n=18) require review/approval from a designated review committee consisting of three or more supervisory assistants or assistant U.S. attorneys. Fifty-seven percent of the districts (n=51) require review/approval from the U.S. attorney before substantial assistance motions are filed (*see* Table 3).

Table 3
APPROVAL OF SUBSTANTIAL ASSISTANCE MOTIONS

Level of Approval	Number	Percent
Approval required	87	98.0
More than one supervisor	74	83.0
Review committee	18	20.0
U.S. attorney	51	57.0

⁹⁸The questionnaire asked about distinctions between review and approval of substantial assistance motions. In the majority of districts, the assistant U. S. attorney reviewed the motions and the supervisor, review committee, U. S. attorney, and/or first assistant U. S. attorney approved the motions.

⁹⁹Twenty-one percent of the districts (n=19) have standard forms that must be submitted for approval before the assistant U. S. Attorney prosecuting the case may file a substantial assistance motion. Other districts require justification in writing to be submitted for approval before filing substantial assistance motions, but do not use standard forms for this purpose.

¹⁰⁰Note that in this and tables to follow percentages do not add up to 100 percent because the questions represent various steps in a process and are not mutually exclusive.

Changes in Policy

Attorneys for the government were asked if their policies regarding substantial assistance motions, whether written or oral, had changed since the current U. S. attorney took office. Fifty-seven percent of the districts (n=51) responded that there was no change in policy since the appointment of the new U. S. attorney. Seventeen percent of the districts (n=15) had changed their policy since the appointment of the new U. S. attorney to include more levels of approval before substantial assistance motions were filed. Seven percent of the districts (n=6) had changed their policy since the appointment of the new U. S. attorney to include fewer levels of approval before substantial assistance motions were filed.

Nineteen percent of the districts (n=17) had changed their policies in other ways since the appointment of the new U. S. Attorney. These included procedural changes, such as requiring approval of substantial assistance motions from different supervisors, increasing the scrutiny of the motions, requiring proposals for the motion to be submitted in writing for approval, requiring proposals for the motion to be more fact-specific, and converting previous oral policies to writing.

Other changes were substantive changes in policy including lowering the standard of what qualifies as substantial assistance and a greater willingness to credit information, each resulting in more substantial assistance motions being filed.

B. Types of Assistance

Questions regarding the types of assistance resulting in substantial assistance motions included inquiries about the types of assistance that may result in the filing of a motion and the types of conduct that may preclude the filing of a motion.

Conduct Resulting In Motion

In determining what types of assistance result in the filing of substantial assistance motions, attorneys for the government were provided with a list of factors and asked to check each factor that applies in determining whether a substantial assistance motion on behalf of the defendant is warranted. These factors included testimony under oath in the investigation or prosecution of another person, information likely to lead to prosecution of others, information regarding criminal activities of others, information about defendant's own activity, and active participation in the investigation of another person (e.g., undercover).

In 42 percent of the districts (n=37), all of the above-referenced types of assistance were reported as factors considered by the government in moving for substantial assistance. In 56 percent of the districts (n=50), all of the above-referenced types of assistance were reported as factors considered by the government except information about the defendant's own activity. In

12 percent of the districts (n=11), information relating to forfeiture/seizure was reported as an additional factor in determining whether a motion is warranted (*see* Table 4).

Other types of assistance mentioned by attorneys for the government that result in substantial assistance motions include the defendant's ability to obtain cooperation from co-defendants, substantial assistance of third parties on behalf of the defendant, and recruitment of others as government agents. Attorneys for the government also credit defendants who provide information about fugitives, expose themselves to danger and personal risks, and produce documents that corroborate testimony of the defendant or other witnesses in the case.

Table 4
CONDUCT CONSIDERED IN MOTION

Type of Conduct	Number	Percent
Testimony under oath	89	100.0
Information leading to prosecution of others	89	100.0
Information regarding criminal activities of others	89	100.0
Information about defendant's own activity	39	44.0
Active participation in the investigation of another	89	100.0

Conduct Precluding Motion

Attorneys for the government were asked about factors that, if present, would cause them not to file a substantial assistance motion. They were provided with a list of factors and asked to check all the factors that apply. These factors included the defendant's relative culpability/role in the offense, the defendant charged under certain statutes, the defendant who engaged in violent acts, the defendant whose codefendants had already cooperated, the defendant with a criminal history, and the defendant who continued misconduct while cooperating.

In 40 percent of the districts (n=36), attorneys for the government responded that they would not file a substantial assistance motion if the defendant was more culpable than those about whom he/she offered information. In 18 percent of the districts (n=16), attorneys for the government responded that they would not file a substantial assistance motion if the defendant

was charged under certain statutes or engaged in certain violent acts.¹⁰¹ In 16 percent of the districts (n=14), attorneys for the government would not file a substantial assistance motion if the defendant had an extensive or violent criminal history.

In 25 percent of the districts (n=22), attorneys for the government responded that they would not file a substantial assistance motion if codefendants were already cooperating. In 61 percent of the districts (n=54), attorneys for the government would not file a substantial assistance motion if the defendant continued misconduct while cooperating (*see* Table 5).

Table 5
CONDUCT PRECLUDING MOTION

Type of Conduct	Number	Percent
Defendant's culpability/role in offense	36	40.0
Defendant charged under certain statutes	16	18.0
Defendant engaged in violent acts	16	18.0
Defendant whose codefendants had already cooperated	22	25.0
Defendant with an extensive or violent criminal history	14	16.0
Defendant continued misconduct while cooperating	54	61.0

C. Timing of Assistance

Attorneys for the government were asked how the timing of the defendant's substantial assistance affected the degree of the sentence reduction recommended or agreed upon. Forty-two percent of the districts (n=37) considered the timing of the defendant's assistance and cooperation to be an important factor in either the filing of the substantial assistance motion or the amount of the sentence reduction recommended. Thirty-nine percent of the districts (n=35) considered the timing of the defendant's assistance to be one factor among many considered in either the filing of the substantial assistance motion or the amount of the sentence reduction recommended. Nine percent of the districts (n=8) considered the timing of the defendant's assistance to impact only the filing of the substantial assistance motion, but not the amount of the sentence reduction recommended. Six percent of the districts (n=5) considered the timing of the

¹⁰¹Offenses included in response to this question were violent crimes such as murder, sexual criminal assault, or intimidating/threatening witnesses, judges, or other public officials.

defendant's assistance to be of no importance in either the filing of the substantial assistance motion or the amount of the sentence reduction recommended¹⁰² (see Table 6).

Table 6
TIMING OF ASSISTANCE

Timing Valued As:	Number	Percent
Important factor	37	42.0
One factor	35	39.0
No factor	5	6.0

D. Sentence Recommendations

Sentence recommendations may take one of many forms depending on the particular court practices or office policy in the district. Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure provides that the attorney for the government and the attorney for the defendant may make a binding agreement that a specific sentence or a specific sentencing range is the appropriate disposition of the case. This type of binding agreement allows the defendant to withdraw his/her plea of guilty if the court does not accept the stipulated sentence or range.

Rule 11(e)(1)(B) provides that the attorney for the government may agree to make a recommendation for a particular sentence or a sentence range with the understanding that this recommendation is not binding on the court. Because this is a non-binding recommendation, the defendant may not withdraw from the plea if the recommendation is not accepted by the court and, therefore, the defendant must accept the sentence imposed by the court. Other types of recommendations include non-binding recommendations for a maximum or fixed-percent reduction or a non-binding recommendation to subtract a particular number of offense levels from the final guideline level determined.

Types of Recommendations/Agreements Used

Attorneys for the government were asked about what kinds of sentencing recommendations and/or plea agreements generally are used in their districts when the decision to make a substantial assistance motion has been made. In determining what types of sentencing recommendations/plea agreements are used, attorneys for the government were provided with a list of factors and asked to check all recommendations or agreements that apply. The different types of recommendations/agreements included binding sentence agreements, binding sentence range agreements, recommended sentence agreements, recommended sentence range agreements,

¹⁰²Three percent of the districts (n=3) stated that the importance of timing could only be considered on a case-by-case basis.

maximum or fixed-percent reduction (specifying the percentage used), and subtraction of offense levels (specifying the amount of reduction).

Most districts responded that they use more than one of these sentencing recommendations/plea agreements, depending on the judge or the circumstances of the case. Nineteen percent of the districts (n=17) use binding sentence agreements, 16 percent of the districts (n=14) use binding sentence range agreements, 40 percent of the districts (n=36) use recommended sentence agreements, 39 percent of the districts (n=35) use recommended sentence range agreements, 22 percent of the districts (n=20) use maximum or fixed percent reduction, 40 percent of the districts (n=36) use subtraction of offense levels, and 31 percent of the districts (n=28) make no recommendation (*see* Table 7).

Table 7
SENTENCE RECOMMENDATIONS

Type of Sentence Recommendation	Number	Percent
Binding sentence agreement pursuant to Rule 11(e)(1)(C)	17	19.0
Binding sentencing range agreement pursuant to Rule 11(e)(1)(C)	14	16.0
Recommended sentence agreement pursuant to Rule 11(e)(1)(B)	36	40.0
Recommended sentence range agreement pursuant to Rule 11(e)(1)(B)	35	39.0
Maximum or fixed percent reduction	20	22.0
Subtraction of offense levels	36	40.0
No recommendation	28	31.0

Changes in Policy

Attorneys for the government were asked whether the policy regarding sentencing recommendations and plea agreements had changed since the new U. S. attorney took office. No substantive change in policy in this area was noted in any district.

E. Rule 35(b) Motions

Rule 35(b) of the Federal Rules of Criminal Procedure provides that within one year after the imposition of the sentence the government may make a motion to reduce the defendant's

sentence as a result of the defendant's substantial assistance in the investigation or prosecution of another person. Attorneys for the government were asked whether they had written policies in their districts regarding Rule 35(b) motions, what types of assistance resulted in Rule 35(b) motions, and whether Rule 35(b) motions are discouraged in their district.

Written Policy

Sixty-three percent of the districts (n=56) responded that they had written policies concerning review, approval, or filing of Rule 35(b) motions.

Types of Assistance

In determining what types of assistance generally result in the filing of Rule 35(b) motions, attorneys for the government were provided with a list of scenarios and asked to check which scenarios applied. These scenarios included the defendant completing substantial assistance before sentencing, the defendant assisting only after sentencing, defendant's assistance continuing after sentencing, and the defendant receiving a Rule 35(b) motion for security reasons.

Six percent of the districts (n=5) responded that they would file a substantial assistance motion under Rule 35(b) if the defendant completed substantial assistance before sentencing. Eighty-nine percent of the districts (n=79) would file a substantial assistance motion under Rule 35(b) if the defendant substantially assisted only after sentencing. Ninety percent of the districts (n=80) would file a substantial assistance motion under Rule 35(b) if the defendant's assistance continued after sentencing. Thirty-three percent of the districts (n=29) would file a substantial assistance motion under Rule 35(b) for security reasons (*see* Table 8).

Table 8
RULE 35(b) MOTIONS

Types of Conduct	Number	Percent
Defendant completed substantial assistance <i>before</i> sentencing	5	6.0
Defendant substantially assisted <i>only</i> after sentencing	79	89.0
Defendant's substantial assistance continued after sentencing	80	90.0
Defendant requested Rule 35(b) for security reasons	29	33.0

Rule 35(b) Motions Discouraged

Three percent of the districts (n=3) responded that the courts in their districts discourage the filing of Rule 35(b) motions.

II. EFFECT OF POLICY CHANGES ON DISTRICT PRACTICES

On March 13, 1989, then Attorney General Dick Thornburg issued a memorandum to all federal prosecutors concerning charging and plea bargaining practices under the Sentencing Reform Act. Attorney General Thornburg directed prosecutors to "charge the most serious, readily provable offense or offenses, consistent with the defendants conduct" and instructed prosecutors to plea-bargain down from the most serious counts only when they believed they could not sustain the charges in court. This policy remained in effect until Janet Reno became Attorney General in 1993. On October 12, 1993, Attorney General Reno issued a "clarification" to the Thornburg memorandum.¹⁰³ Attorney General Reno's directive allowed prosecutors to consider a range of subjective factors in deciding which charges to bring and when to plea bargain, including whether a sentence is "proportional to the seriousness of the defendant's conduct." She noted that prosecutors should charge cases and enter into plea agreements on the basis of "an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime."

Policy changes such as Attorney General Reno's clarification of the Thornburg Memorandum often directly or indirectly affect other areas of district practices. In that regard, attorneys for the government were asked in the questionnaire what impact, if any, Attorney General Reno's clarification had on substantial assistance practices in their districts.

Sixty-nine percent of the districts (n=61) responded that Attorney General Reno's clarification of the principles of federal prosecution had no impact on substantial assistance practices in their districts. Thirty-one percent of the districts (n=28) responded that the clarification had impacted substantial assistance practices in their districts in the following ways:

Some districts noted that as a result of the Reno clarification substantial assistance motions have been made more frequently than before the clarification. The districts in which the clarification increased the number of substantial assistance motions interpreted it as giving them more flexibility in making substantial assistance motions, just as it gave more flexibility in making charging decisions and negotiating pleas. Some of these districts also noted that the clarification gave them more flexibility in making sentence recommendations to the court that resulted in reduced sentences for some defendants, depending on an individual assessment of the case.

¹⁰³The clarification was in the form of a Memorandum to Holders of the United States Attorneys' Manual, issued pursuant to USAM 1-1.550, and affected 9-27.000. See Appendix D-2 for Thornburg and Reno Memoranda.

Some districts noted that, as a result of the clarification, substantial assistance motions have been made less frequently than before the clarification. The districts in which the new policy decreased the number of substantial assistance motions interpreted it as giving them more flexibility in making charging decisions and negotiating pleas and, therefore, reducing the need to benefit defendants by making substantial assistance motions. Some of these districts noted that because in more instances the defendant is given an "up-front benefit" of reduced or dismissed charges as a result of his/her cooperation, he/she is precluded "from getting a second benefit by way of a substantial assistance motion." One district noted that the clarification's direct impact on charging and plea bargaining practices has had "some collateral affect on some substantial assistance cases by decreasing the amount of sentence reductions due to concessions already given the defendant in charge or plea bargains."

One district stated that the number of substantial assistance motions made in the district have been reduced because the flexibility in charge bargaining provided by Reno's clarification has allowed the government the option of pleading defendants in state court who previously would have been charged in federal court.

Some districts noted that the clarification resulted in looser standards of review in the use of substantial assistance motions, noting that substantial assistance motions are now evaluated on a more case-by-case basis, giving more discretion to the prosecutor in determining whether a motion should be made.

III. INTERNAL/EXTERNAL FACTORS AFFECTING DISTRICT PRACTICES

Often internal or external factors peculiar to a particular district affect the numbers and types of cases that receive substantial assistance motions. In some districts, these internal or external factors have resulted in a more infrequent use of substantial assistance motions. In other districts, these factors have resulted in a more frequent use of the motion.

A. Infrequent Use of Motion

Four percent of the districts (n=4) responded that they interpret the criteria for substantial assistance motions set out in USSG §5K1.1 to be stringent and, as a result, substantial assistance motions are filed in these districts only if the defendant does assist in a truly significant way and the government receives concrete results from this assistance. Some districts noted that defendants should not be rewarded for minimal performance, such as truthful and complete debriefings which plea agreements may call for in any event.

Two percent of the districts (n=2) responded that they no longer make many substantial assistance motions because, once the motion is made by the attorney for the government, the courts in their districts go too far below mandatory minimums and give serious offenders light sentences or probation.

One district stated that few motions are made in the district because the court historically has been adverse to substantial assistance motions whether made pursuant to USSG §5K1.1 or Rule 35(b).

One district stated that the use of the safety valve provision¹⁰⁴ had decreased the frequency of substantial assistance motions sometimes used in the district to get lower-level defendants below mandatory minimums. Another district responded that the safety valve provision would reduce substantial assistance motions in the district but also would decrease the number of defendants who normally would be willing to provide information to the government.

B. Frequent Use of Motion

Several districts responded that substantial assistance motions are made frequently in their districts because of the number of multi-defendant narcotics cases prosecuted in the districts and the need to use substantial assistance motions to dismantle large drug organizations. These districts noted that their "ability to prosecute large narcotics cases is directly tied to our use of substantial assistance motion practice." Several districts noted that they have a high volume of drug conspiracy cases dependant on co-conspirator testimony. Others noted that the high sentencing guidelines and statutory mandatory minimums in narcotics cases, particularly drug conspiracy cases, resulted in frequent use of the substantial assistance motions.

Several districts responded that they have a district policy of no or very little charge bargaining and, therefore, the only way for a defendant to receive a benefit for his/her cooperation is for the government to file a substantial assistance motion. These districts note that they might make more substantial assistance motions than a district that allows more flexibility in charging decisions.

One district responded that the defense bar in their district discourages defendants from providing information; therefore, attorneys for the government in that district make motions whenever possible to encourage defendants to cooperate.

One district responded that it has many white collar crime cases and they frequently use substantial assistance motions in those cases.

One district responded that the frequent use of substantial assistance motions helps eliminate docket congestion and helps attorneys for the government target the worst offenders.

One district responded that the emphasis on fairer sentences has increased the use of substantial assistance motions in the district.

¹⁰⁴The safety valve provision at USSG §5C1.2 limits the applicability of statutory minimum sentences for cases in which the defendant meets certain criteria set forth in the guideline.

One district responded that because of a loss of resources, the district has had to file more substantial assistance motions in order to plead more cases.

One district responded that it often uses substantial assistance motions to divert certain types of defendants from lengthy prison sentences.

IV. CONCLUSIONS

The written survey was the first of many sources of data obtained by the Commission and was to serve as a baseline on which to interpret data from other sources. The Commission expected to find greater similarity and consistency on this written policy level than from other types of information, such as case-based information or site visit information.

As expected, there is great similarity among the substantial assistance policies of the 89 districts who responded to the survey. Most of the districts require approval by the U.S. attorney or his/her designee before substantial assistance motions can be filed. Most of the districts require review/approval from more than one supervisor before substantial assistance motions are filed. Most of the districts reported that there has been no change in policy since the appointment of the new U. S. attorney.

The districts unanimously agree that testifying under oath, providing information leading to the prosecution of others, providing information about criminal activities of others, and active participation in the investigation of another usually will result in a defendant receiving a substantial assistance motion. Most of the districts agree that they would not file a substantial assistance motion if the defendant continued misconduct while cooperating. Most of the districts agreed that they would file a Rule 35(b) motion if the defendant substantially assisted after sentencing or if the defendant's assistance continued after sentencing.

Although these similarities in policy are apparent, there do appear to be many policy-based application differences as reflected in Sections III and IV that may explain the tremendous variation in the rates of substantial assistance motions in the districts. While some districts have made no changes in policy since the Thornburg memorandum was issued in 1989, other districts acknowledged that Reno's 1993 clarification did have a direct or indirect impact on substantial assistance policy that either increased or decreased the number of substantial assistance motions filed depending on the district's interpretation and application of the policy.

The questionnaire showed that the decision to make a substantial assistance motion may be affected by internal or external considerations unique to each district. Some of these considerations, such as the actions of judges or the historical patterns in the district, result in an infrequent use of the substantial assistance motion. Other considerations, such as the particular types of cases prevalent in a particular district, result in a more frequent use of the substantial assistance motion.

Because substantial assistance motions are individual decisions made on a case-by-case basis, the number and types of substantial assistance motions filed in each district will always vary. It is interesting to note, however, that although the policies in the U. S. attorney's offices are similar, the application and interpretation of those policies are very different.

CHAPTER FOUR

SUBSTANTIAL ASSISTANCE DEPARTURES: SITE VISITS

This chapter examines information obtained from 123 interviews conducted by Commission staff in the Fall of 1994 with district court judges, prosecutors, defense attorneys, and probation officers in visits to eight judicial districts. These site visits were conducted to learn "first-hand" how substantial assistance departures actually work in the sentencing process. This experiential perspective provides further clarification and greater understanding of the information detailed in other chapters of this report (*e.g.*, review of case law, case files, and aggregate statistical analyses). While most of the observations provided here corroborate the statistical findings, important new findings are presented in this chapter. The site visits help to answer the overall questions of why there is such significant variation in the rate of substantial assistance departures among districts, and whether this variation can be explained by legal and procedural factors.

The information in this chapter is presented in two ways. First, a summary of each site is provided, with a description of the site (*e.g.*, workload, plea, and sentencing practices) and the experiences and comments of those interviewed. Second, the data are organized and analyzed according to the respondent's position in the criminal justice system, *i.e.*, judge, prosecutor, defense attorney, or probation officer.

The chapter concludes with some general findings and observations of the site visit experience.

I. METHODOLOGY

The eight sites visited were selected based on four characteristics: district size (based on overall criminal caseload); drug caseload within each district; substantial assistance rate; and geographic region within the United States. In order to select the eight sites, the 94 judicial districts were listed by their substantial assistance rate in descending order. This list was divided into quarters and two sites were selected from each quarter, based on the number of drug cases as a percent of the total caseload of the district and the geographic location of the district.

In the districts selected, drug cases ranged from 20 to 60 percent of the total caseload. Three of the eight sites were from among the ten largest judicial districts (based on the number of defendants sentenced) in the country. The remaining five sites were mid-sized, with between 300 and 500 cases sentenced within a year. Finally, the eight sites selected were geographically representative of the United States. They were chosen from the following areas: Northeast, Mid-Atlantic, Southern, Northern, Midwest, Western, Southwest, and West Coast.

Commission staff conducted the site visit interviews with federal district court judges, prosecutors, defense attorneys, and probation officers. Prosecutors interviewed in each district included the United States attorney, section chiefs (e.g., Chief of the Narcotics Division), and individual assistant United States attorneys. Defense attorneys interviewed in each district included the public defender, private panel attorneys, and private defense attorneys. At each site, the chief judge in the district was contacted first, and assisted in determining which judges should or might be interested in being interviewed. Both the chief judge and the United States attorney's office approved the interviews conducted at each site. In total, 31 judges, 29 prosecutors, 30 defense attorneys, and 31 federal probation officers were interviewed.

The Commission cooperated with the Department of Justice and the Sentencing Subcommittee of the Attorney General's Advisory Committee in order to develop the interview instrument. The Department of Justice required advanced approval of the questions before agreeing to allow staff to participate in the interviews. The instrument was pretested in one judicial district (excluded from the analysis) in order to evaluate the clarity of the questions and the length of time necessary to complete the interview.

The interview included questions on the following issues: what type of cooperation *should* prompt a substantial assistance motion; in actual practice, what does prompt a substantial assistance motion; what benefits and problems are associated with the substantial assistance process; what factors influence decisions regarding substantial assistance motions, as well as the degree of departure once the motion has been made; are the substantial assistance practices fair and uniform; are Rule 35(b) motions made in lieu of the §5K1.1 motions; are the substantial assistance motions denied by the court and, if so, why; is there systematic variation in a defendant's willingness to cooperate; and what changes would the respondent make to the overall substantial assistance process? All of the participants were asked these same questions with some variation based on the participant's position in the system. The instrument is included at Appendix C. The identity of each site and of the individual survey participants was guaranteed to be kept anonymous. The interviews were conducted from September 1994 through November 1994.

II. SITE SUMMARIES

A. Site A

Site A is a large district (approximately 1,000 criminal cases per year). In fiscal year 1993, the substantial assistance rate in Site A was more than ten percent below the national rate of 16.9 percent. The caseload in Site A was characterized by a large number of fraud, immigration, and robbery offenses. While drug trafficking offenses constituted the largest percentage of cases convicted and sentenced in this district, they were well below (by approximately 20%) the percentage of drug trafficking cases nationwide. The rate of guilty pleas was slightly higher in Site A than the national rate of 88 percent. The average length of

imprisonment defendants received in Site A was slightly lower than the national average of 66 months. Defendants who received a substantial assistance departure were granted a slightly smaller sentence reduction than their national counterparts. Fifty-two percent of those with substantial assistance departures in this district were drug traffickers, compared to 71 percent nationally. Site A sentenced approximately 90 percent of its cases within the applicable guideline range.

In Site A, 14 participants were interviewed. The participants included four judges, three prosecutors (including the chief of the Narcotics Section), three defense attorneys, and four probation officers. Generally, the participants agreed that defendants had to do more than merely provide information in order to receive a substantial assistance motion from the United States attorney's office. In order to receive a departure, defendants minimally were expected to provide *specific* information relating to the instant offense or to another case *and* agree to testify before the grand jury or at trial. Defendants also were encouraged to do undercover work as a means of providing cooperation. However, two participants stated that defendants do not receive credit for local cooperation (*i.e.*, information provided to local or state law enforcement). Participants characterized cooperation in Site A as very result-oriented—to receive the substantial assistance motion and departure, the defendant's cooperation had to lead to a tangible benefit for the government.

As with the §5K1.1 motions, Rule 35(b) motions were used infrequently in this site—subjects interviewed agreed that Rule 35(b) motions rarely were used. However, when a Rule 35(b) motion was made, the same requirements applied as for the substantial assistance motion.

Generally, the interviewees identified the following as benefits of the substantial assistance process: a reduction in the number of cases that go to trial; the development and investigation of new cases; and the allocation of resources elsewhere in the federal criminal justice system. Additionally, several participants suggested that substantial assistance provides the only avenue to relieve defendants, especially drug defendants, from harsh sentences under the sentencing guidelines and statutory mandatory minimums.

Several problems were identified by the interviewees regarding the substantial assistance practices in Site A. The judges interviewed believed that too much sentencing discretion was left in the hands of the prosecutor. One judge suggested that the substantial assistance process was administered in an "arbitrary and capricious manner" by both the United States attorney's office and law enforcement (including DEA, FBI, and Secret Service). Also, judges, defense attorneys, and probation officers asserted that the United States attorney's office should make more substantial assistance motions. In addition, some suggested that the substantial assistance process may influence or encourage some defendants to exaggerate, or falsify information given to the government in order to get the substantial assistance motion. Further, some voiced concern that the substantial assistance process may result in disparity and unfairness with regard to sentencing outcomes.

While there were no written substantial assistance policies in this district, there were procedures in place to review substantial assistance motions. The individual assistant U.S. attorney took responsibility for compiling and initially reviewing his or her recommendation and the section chief or criminal division chief approved the motion. Prior to the appointment of the current United States attorney in this site, a substantial assistance review committee (including supervisors and the criminal chief) approved all motions.

B. Site B

Site B is a mid-sized district (300 to 500 criminal cases per year). The substantial assistance rate in Site B was less than five percent above the national rate of 16.9 percent in 1993. Close to 60 percent of the caseload in this district was comprised of drug trafficking and fraud offenses. The rate of guilty pleas was slightly higher than the national average of 88 percent. Defendants in Site B were slightly more likely to receive a sentence of imprisonment than their national counterparts; however, the average length of imprisonment was about the same as the national average—66 months. Ninety percent of the defendants who received substantial assistance departures were sentenced for drug trafficking offenses, compared to 71 percent nationwide. Defendants in Site B who received a substantial assistance departure were granted approximately ten months greater reduction in their sentences than defendants nationwide.

In Site B, 16 participants were interviewed, including five judges, four prosecutors, three defense attorneys, and four probation officers. Generally, the participants agreed that cooperating defendants may do anything from providing information about codefendants to providing information that leads to the prosecution of others named outside of the instant indictment. Respondents also agreed that the actual type of cooperation varied from case-to-case. Defendants, however, must always be truthful about their involvement in the instant offense and the scope of the conspiracy. Defendants providing the most information (*e.g.*, wearing a wire or testifying) were the most likely to receive a substantial assistance departure. The information provided, at the very least, should further the investigation of the instant offense and normally should lead to the conviction or prosecution of another (not necessarily someone more culpable). One judge characterized the substantial assistance process in this district as "snitching on everyone from here to Guam."

Rule 35(b) motions were not used often in Site B. Often sentencing was delayed until the defendant had provided full cooperation, making Rule 35(b) departures unnecessary. The only circumstance cited for using a Rule 35(b) departure was when it was necessary to keep the defendant "on the hook" to further or complete an investigation.

The main benefits of the substantial assistance process cited by respondents included the following: cases moved through the system more quickly; cooperation rendered by defendants provided law enforcement with the ability to open new cases; and it aided current criminal investigations and law enforcement efforts. Additionally, some respondents suggested that the

substantial assistance process, including 18 U.S.C. § 3553(e), was a means of circumventing the sentencing guidelines and the statutory mandatory minimums, allowing the court to impose a more fair and lenient sentence.

There was considerable variation in the problems with the substantial assistance process identified by respondents, including that judges should have more discretion to inquire into the level of cooperation provided by defendants or should be allowed to make a substantial assistance departure on their own. Several participants suggested that the substantial assistance process was not uniform because the filing of the motion was decided by the individual assistant U. S. attorney, and the decision was not reviewable on appeal. Finally, some participants suggested that the guideline (§5K1.1) and the statute (18 U.S.C. § 3553(e)) do not provide sufficient instructions on how to deal with cases when more culpable defendants receive less harsh sentences than less culpable codefendants who do not have information to provide.

The United States attorney's office in Site B has a substantial assistance review board that includes the United States attorney and the chief of the criminal division. They jointly review and approve all substantial assistance motions made by the line prosecutors. The prosecutors provide the review board with a written form describing the case, the nature of the cooperation, and the reason for the motion. The review board must approve the motion (or, in the absence of its members, receive approval from two unit chiefs) before the prosecutor can file it.

Although problems were cited by the participants in Site B, most believed that the substantial assistance practices generally operated smoothly. Prosecutorial abuse was not perceived to be a problem by the varied participants. However, most of the probation officers expressed a desire to be more involved in the process. Generally, judges stated that they should have more discretion in the substantial assistance process and prosecutors should have less. The defense attorneys stated that the prosecutor's failure to make a substantial assistance motion should be appealable.

C. Site C

Site C is a large district (more than 1,000 criminal cases per year). The substantial assistance rate for the 1993 fiscal year in Site C was less than five percent below the national rate of 16.9 percent. The caseload was characterized by a large number of drug trafficking and immigration offenses. The guilty plea rate was identical to the national rate. The average length of imprisonment imposed was slightly lower (by six months) than the average for all federal defendants. However, defendants who received a substantial assistance departure in Site C received lower (six months less) sentence reductions than their national counterparts. Seventy-four percent of those with substantial assistance departures were convicted of drug trafficking offenses, compared to 71 percent nationally.

In Site C, staff interviewed 11 participants: three judges, one prosecutor, three defense attorneys, and four probation officers. The respondents agreed that a defendant had to do more than just provide information to get a substantial assistance departure. Most of the respondents reported that a motion would be filed if the defendant provided details that would lead to the identification of more culpable individuals (*e.g.*, drug kingpins) or the prosecution of co-defendants. The United States attorney suggested that defendants who provide information that aids another judicial district (*e.g.*, identifying hidden assets) also would receive a motion.

The benefits of the substantial assistance process cited by participants included the following: more efficient (*i.e.*, faster) case processing through the system; a reduction in sentences for defendants subject to a statutory mandatory minimum or a high guideline range; and the identification and prosecution of more culpable criminals (*i.e.*, "the big fish").

The participants identified two main problems with the substantial assistance practice: (1) the difficulty and practicality of getting the government and defense counsel to agree on the extent of departure appropriate for the cooperation rendered by a defendant and (2) the problem of less culpable defendants who have no information to provide receiving harsher sentences than more culpable defendants. However, one respondent suggested that perhaps the guideline safety-valve provision would alleviate this problem. Additionally, the United States attorney suggested that uniform application of the substantial assistance guideline and statute was difficult because the district was large geographically.

There were written procedures in place as to how substantial assistance motions should be administered and processed in Site C. According to the United States attorney, the assistant United States attorney must obtain the approval of the first assistant criminal attorney in order to make a substantial assistance motion. A summary of the case and recommendation for the motion by the assistant attorney and supporting documentation from the first assistant must be included in the case file.

In Site C, four of the nine participants suggested that the defense should have the right to raise the substantial assistance motion when the government refused. However, there was much concern about the practical implications of such a change. One participant suggested that a defense motion could result in disagreements between the government and the defense as to who was telling the truth regarding the assistance provided to the government. Additionally, some noted that the substantial assistance guideline should provide more guidance on the amount of departure. Overall, the participants stated that the current substantial assistance practices were working adequately in Site C.

D. Site D

Site D is a mid-sized district (300 to 500 criminal cases per year). The substantial assistance rate in Site D was less than five percent above the national rate of 16.9 percent in 1993. More than 50 percent of the offenses in this district involved either drug trafficking or

fraud. The rate of guilty pleas was slightly higher than the national rate of 88 percent. Defendants sentenced in Site D received slightly shorter terms of imprisonment than defendants nationwide. Defendants who received a substantial assistance departure had slightly greater sentence reductions than defendants nationally. Seventy-seven percent of those receiving substantial assistance departures were convicted of drug trafficking, compared to 71 percent nationally.

In Site D, staff interviewed 19 participants. They included five judges, four prosecutors, six defense attorneys, and four probation officers. The participants reported that the defendant must provide "real assistance" before the government would make a motion for a substantial assistance departure. "Real assistance" included pro-active assistance (*e.g.*, undercover work), information that at a minimum would lead to the arrest of another individual, or grand jury or trial testimony. Although undercover assistance was not favored, all participants were mindful of circuit case law precedent stating that defendants should not be prevented from doing undercover work if they wanted to do so.

Among the benefits of the substantial assistance process cited by participants were: it provided law enforcement with a tool to build new criminal cases; it aided police investigations; it moved cases through the system; and it lessened the impact of guideline sentences on defendants.

Conversely, respondents also identified several problems with the substantial assistance process. The predominant criticism was that too much prosecutorial discretion resulted and that some assistant attorneys had too little experience in the substantial assistance arena. Participants also expressed concern that in some instances federal agents (*e.g.*, DEA, FBI) were making the cooperation deal with the defendant, not the prosecutor assigned to the case. Despite these problems, participants stated that the prosecutor was in the best position to evaluate whether a defendant had cooperated within the meaning of the guideline and the statute.

The United States attorney's office reported that they have a review process in place for substantial assistance. All motions related to drug crimes were reviewed by the drug task force and all other §5K1.1 cases were reviewed by the chief of the criminal division. The drug task force and criminal division chief have authority to approve motions that recommend up to a 25 percent reduction in sentence. However, only the United States attorney can approve a departure greater than 25 percent. Some of the interviewees stated that this review process did not guarantee consistency in the substantial assistance process in this district.

In general, Site D participants suggested that the substantial assistance guideline should be amended to provide for judicial review when the government fails to file a motion, or allow the court to make a downward departure based on "observed substantial assistance." Finally, participants expressed concern that less culpable defendants cannot receive a substantial assistance departure because of their lack of information.

E. Site E

Site E is a large district (more than 1,000 criminal cases per year). The 1993 substantial assistance rate in Site E was considerably higher than the national rate of 16.9 percent. Drug trafficking and fraud offenses comprised more than 70 percent of the caseload in this district. The plea rate in Site E was slightly higher than the national average of 88 percent. The average length of prison sentences imposed in this district was more than 12 months longer than the average of 66 months imposed nationwide. Despite the large number of substantial assistance departures, the average sentence for substantial assistance defendants in Site E was greater than the national average. Drug traffickers comprised 65 percent of those who received substantial assistance departures, compared to the national average of 71 percent; fraud offenses constituted an additional 17 percent.

In Site E staff interviewed 22 participants: five judges; six prosecutors; six defense attorneys; and five probation officers. Participants stated that the process worked well in this district and was not in need of remedy. Most participants stated that the substantial assistance practice has engendered a great deal of cooperation, as defined by the statute. Those interviewed generally agreed that the behaviors resulting in a substantial assistance departure form a continuum. At one end of the continuum was the defendant who pleaded early, aided in making the government's case, and agreed to act as an informant or testified against others. The defendant who actively participated in this manner received a substantial assistance motion. On the other end of the continuum were defendants who refused to cooperate, went to trial, and provided false information. All agreed that these defendants did not receive a substantial assistance departure. In the middle of the continuum were those defendants who cooperated post-indictment, provided no new information to the government, but offered collaborative assistance and background information. These defendants often received the substantial assistance motion. Defendants in Site E need not have testified in order for the government to have made the motion. In addition, it was not unusual for all the defendants in a drug conspiracy to cooperate and receive a departure.

Respondents in this district stated that there was very little charge bargaining. In fact, the prevailing policy was to indict defendants on all possible charges. Respondents suggested that the substantial assistance rate may be lower in other judicial districts because participants use other means, such as charge bargaining, to reduce sentences. They suggested that the government's practice of charging defendants with the maximum offenses and penalties for which there was evidence encouraged defendants to cooperate. All prosecutors, some judges, and most defense attorneys asserted that substantial assistance, as envisioned by Congress, was working well in Site E. They viewed the high substantial assistance rate as evidence of a well-functioning system and not as a problem or manipulation of the intent of the guideline (§5K1.1) and statute (18 U.S.C. § 3553(e)).

Participants reported several benefits of the substantial assistance process including: saving time and resources (defendants were more likely to plead guilty and to plead early in the

process); bringing new criminal investigations and aiding law enforcement in obtaining information regarding more culpable defendants (especially in drug conspiracy cases); and providing more discretion to judges at the time of sentencing.

While the United States attorney's office was pleased with the substantial assistance practice in Site E, some other participants perceived problems. Defense counsel, for instance, were concerned that the substantial assistance motion gave the government too much discretion and power. Others expressed concern that defendants provided false information in order to receive a departure, and that the high substantial assistance rate sent the wrong message to offenders (*i.e.*, that crime does pay and has no consequences). At Site E probation officers were the most critical of the substantial assistance practices. They clearly wanted to be more involved and informed of the substantial assistance practices in their district.

Although the participants identified problems, most did not want to see any changes in the current policies and practices. However, there was a clear indication that more discretion should be given to the court and/or the defense to have the ability to make substantial assistance motions when the government declines to do so.

F. Site F

Site F is a mid-sized district (300 to 500 criminal cases per year). The substantial assistance rate in Site F was less than five percent above the national rate of 16.9 percent in 1993. Drug trafficking offenses made up close to 60 percent of the caseload in this district, with an additional 16 percent sentenced for larceny offenses. The plea rate in Site F was slightly higher than the national rate. Although defendants in this district received considerably longer prison sentences than the national average (by approximately 15 months), those with a substantial assistance departure were sentenced like their national counterparts—an average of 54 months. Eighty-three percent of substantial assistance departures in Site F were connected to drug trafficking, as compared to 71 percent nationally.

In Site F staff interviewed 16 participants: three judges; five prosecutors; three defense attorneys; and five probation officers. The respondents in this site agreed that only substantial assistance involve "100 percent cooperation" by the defendant received a §5K1.1 or Rule 35(b) motion. Most suggested that the following types of defendant cooperation prompted the prosecutor to file the substantial assistance motion: willingness to testify; providing information that leads to the indictment or arrest of others; wearing a wire; and willingness to tell the truth and plead guilty.

The most significant benefits of substantial assistance in this district were viewed differently depending upon the position (*e.g.*, defense attorney, judge) of the respondent interviewed. The United States attorney's office viewed substantial assistance as a means to get at profits derived from criminal activity. They noted that they required complete financial disclosure by cooperating defendants. In addition, prosecutors suggested that the substantial

assistance process was used by local police to unravel criminal conspiracies. For instance, the local police have turned over suspects to federal agents so that substantial assistance may be used as a means of inducing defendant cooperation. Defense attorneys suggested that substantial assistance provided an opportunity for defendants to get out from under a guideline sentence. They also noted that the substantial assistance process in this district worked well because all those involved were forthright; hence, there existed a high level of certainty in the outcome of the substantial assistance motions. All of those interviewed agreed that the act of cooperation had a secondary effect of cutting the ties of the defendant to future criminal activity, at least within the same criminal network. Generally, the benefits of the substantial assistance process in this district were seen as: the reduction in the amount of prison time imposed; the inducement of cooperation; the increase in the number of new cases generated; the reduction in the amount of time spent in court; and a means to reduce overly harsh sentences.

On the other hand, several problems with the substantial assistance process were identified. The district has a prosecutorial policy that the substantial assistance departure should not be for more than one-third of the guideline minimum. Interviewees had mixed feelings regarding this policy—some saw this as hindering the cooperation process while others saw it as a means of ensuring consistency in sentencing for substantial assistance defendants. In addition, the court of appeals for the circuit in which this district is located has ruled that substantial assistance departures should be rendered *only* for cooperation provided prior to sentencing. The United States attorney's office reported that the time between a plea of guilty and the sentencing hearing was not sufficient to get the full benefit of cooperation from defendants. As a result, this district relied on Rule 35(b) motions in addition to the §5K1.1 substantial assistance motions. (The percentage of cases that resulted in Rule 35(b) motions was not known.)

Most agreed that it was rare for the court to deny a substantial assistance motion. Several reported that the decision to grant the motion, as well as the degree of departure, hinged on the recommendation of the United States attorney's office. Because Rule 35(b) motions were used extensively, probation officers often did not have a role in the process. However, most respondents stated that the substantial assistance process operated consistently due to the government's policy of "no more than a third off" and the familiarity and close working relationship among the court, defense, prosecution, and probation officers in this district.

The only major change suggested by participants was that others should have the ability to make a substantial assistance motion and this authority should not reside solely with the United States attorney's office.

G. Site G

Site G is a mid-sized district (300 to 500 cases per year), with a 1993 substantial assistance rate less than five percent below the national average of 16.9 percent. The caseload in this district was comprised mainly of larceny, drug trafficking, and firearms offenses. The plea rate was somewhat higher in this district than the national rate. Defendants in Site G received

substantially higher sentences on average (by approximately 30 months) than defendants nationally. Harsher sentencing standards remained consistent for substantial assistance departures as well as non-departures. Defendants involved in drug trafficking were the most likely to receive a substantial assistance departure in this district, but only 57 percent of offenders who received substantial assistance were convicted for drug trafficking, compared to 71 percent nationally.

Nine participants were interviewed in Site G. They included two judges, three prosecutors, one private defense attorney, and three probation officers. Generally, the participants agreed that cooperation that leads to the prosecution of another should produce a substantial assistance departure. However, the majority reported that, in practice, a *willingness* to provide information could prompt the prosecution to make a substantial assistance motion. Two prosecutors disagreed and asserted that no difference existed between theory and practice—in order to receive a substantial assistance motion, the defendant had to provide information that led to the prosecution of another. The participants agreed that once the substantial assistance motion was made, judges almost always granted it.

Factors that seemed to influence the substantial assistance process in Site G included the recommendation of the United States attorney's office and the amount and type of cooperation provided. For instance, defendants who had put themselves or their families at risk were more likely to have received the reduction. At least three participants claimed that young Black males involved in drug trafficking were more likely to cooperate than other defendants; two participants contended that older defendants were more likely to cooperate than younger defendants.

Participants stated that the substantial assistance process is a useful tool in getting additional criminal convictions. When asked what problems result from substantial assistance practices in the district, respondents reported no problems or abuses. However, they also reported that they believed the policies of the United States attorney's office were not uniform. Interestingly, most believed that the substantial assistance guideline and statute provided enough instruction and guidance for the process to work properly; however, one respondent asserted that substantial assistance policies should be further restricted or have boundaries imposed on them.

H. Site H

Site H is a mid-sized district (300-500 cases per year), with a substantial assistance rate more than ten percent above the national average of 16.9 percent for 1993. The caseload in this site was comprised largely of drug trafficking and fraud offenses. The plea rate was slightly lower than the national average of 88 percent. Sentencing data for this site suggested that the lower rate of guilty pleas was primarily due to drug trafficking and fraud defendants exercising their right to trial. While defendants sentenced in this district received slightly lower terms of imprisonment than defendants nationally, defendants given a substantial assistance motion received a much larger sentence reduction than the national average. Only 47 percent of those

who received substantial assistance departures in the district were convicted of drug trafficking, compared to 71 percent nationwide.

Staff interviewed 16 participants in Site H. These included four judges, three prosecutors, five defense attorneys, and four probation officers. Respondents generally agreed that defendants who provide cooperation resulting in the apprehension or conviction of a co-defendant should be granted a substantial assistance departure. The respondents reported that, in reality, the government made substantial assistance motions for defendants who testified against others, provided information concerning more culpable codefendants, or acted in an undercover capacity. According to the participants, Rule 35(b) motions were rare in this district because the court delayed sentencing for cooperating defendants.

Most of the participants stated that the main benefit of substantial assistance departures was the incentive for defendants to cooperate with law enforcement. Others noted that substantial assistance departures gave judges more discretion in their sentencing decisions, helped defendants, and produced more cases.

Participants in Site H noted many problems associated with the substantial assistance process, including: too much reliance on the government's recommendation; less culpable defendants not receiving as large a sentencing reduction as more culpable defendants; and inappropriate use of cooperation (and the process of cooperation slowed down the system of swift justice).

While all participants agreed that the court has almost always granted the substantial assistance motion once it has been filed, the respondents did not agree about the guideline and statute providing sufficient instruction and guidance. Two of the participants in Site H suggested the elimination of the government motion requirement. Additionally, two respondents asserted that the prosecutor's discretion should be more structured. Interestingly, the United States attorney's office stated that their office had a substantial assistance review committee that reviews problematic cases, and contended that this review committee helped to keep the process structured and in check.

III. SUMMARIES BY POSITION

A. Judges

Thirty-one federal judges participated in the survey. The majority of judges interviewed reported that providing testimony leading to the arrest/conviction of others was the primary behavior to warrant a departure. A few stated that it was not their role to monitor substantial assistance.

Judges noted the following benefits of substantial assistance motions: supporting law enforcement efforts and producing other criminal investigations; allowing defendants to reduce

their sentences; enabling the court's docket to move faster; and allowing the court to regain total discretion in determining the sentence.

The most frequently cited problem, according to the judges interviewed, was that less culpable defendants were sentenced more severely than more culpable codefendants. Many judges reported that the process corrupted the truth because it encouraged defendants to exaggerate; it was entirely unregulated; and it was not used sufficiently by the government. A few judges reported that there were no problems with the existing substantial assistance process.

The judges stated that the most important factors in determining the degree of departure were the defendant's role in the offense, the extent of cooperation, and the recommendation from the United States attorney's office. Some reported that they were aided by information contained in the presentence report regarding the defendant's helpfulness.

Eight judges stated that no changes were necessary in the substantial assistance practice. Seven favored a system under which the court would be able to make a departure without a government motion. Several others commented on the need for more definition and structure to the substantial assistance process.

B. United States Attorneys

Twenty-nine prosecutors were interviewed during the site visits. Most stated that giving information leading to the arrest and prosecution of others was the only factor warranting a substantial assistance departure. Many cited that defendants who wore a wire, helped law enforcement officials, and testified against others warranted a departure as well. In a few districts, prosecutors stated that defendants willingness to testify, and their truthfulness about their offense conduct and the involvement of their codefendants, warranted a substantial assistance motion, even if this information was only corroborative in nature.

Most of the prosecutors noted that the necessary action required to prompt a substantial assistance motion was information leading to the arrest of codefendants or other unindicted participants. In line with this requirement, most of the prosecutors reported that the cooperation must have been results-oriented (*i.e.*, resulted in an arrest, indictment, or conviction). Actions by the defendant that consistently led to the government making a motion were circumstances in which the defendant wore a wire or testified before the grand jury or at trial. However, in at least two sites, the government was willing to make a motion when defendants only agreed to testify and were truthful about their own involvement in the offense of conviction.

The primary benefit of substantial assistance identified by prosecutors was the initiation of new criminal cases and investigations. In addition, substantial assistance practices were believed to cause more defendants to plead guilty and to relieve the pressure on office resources.

The majority of federal prosecutors reported no problems with current substantial assistance practices. Although individual prosecutors mentioned select problems, there was no consensus among the group.

Most prosecutors believed the most influential factor determining the extent of departure was their recommendation. Others said that the extent of departure was influenced by the defendant's criminal history, helpfulness, and degree of risk or personal harm.

Most prosecutors indicated that no changes were necessary to the current substantial assistance practices. A few stated that the authority to make substantial assistance motions should not be given to the judges, and one prosecutor mentioned that the Rule 35(b) motion time frame should be extended beyond one year.

C. Defense Attorneys

Of the 30 defense attorneys interviewed during the site visits (public defenders, panel defense attorneys, and private defense attorneys), most agreed that substantial assistance departures should be based on the defendant's willingness to testify against others and to provide information that leads to the arrest or prosecution of other offenders. However, their threshold of the kind or amount of information given by the defendant in order to obtain a motion seemed lower than that required by prosecutors. A few stated that a full confession was all that should be necessary to get a substantial assistance motion.

Among the benefits of substantial assistance practices reported by defense attorneys were: the introduction of increased flexibility and discretion; a reduction in the length of sentences; saving court time and resources through the inducement of guilty pleas; and the creation of new criminal cases.

Criticisms of the substantial assistance practices reported by defense attorneys included: prosecutors having all the control and not making as many motions as they should; the concern that "little guys don't get as big a break as the big guys"; the process of encouraging defendants to lie and exaggerate; and the process jeopardizing the safety of the defendant.

The majority of defense counsel stated that they or, at the very least, the sentencing judge should be able to make the substantial assistance motion when the government fails to do so. A few stated that no change was necessary.

D. Probation Officers

Of the 33 probation officers interviewed during the site visits, almost all stated that a substantial assistance departure should be prompted by a defendant giving information that leads to the arrest/conviction of others. A few stated that complete truthfulness about the offense and the conduct of others should be sufficient to receive the departure. written policies

Probation officers identified many benefits, including: providing a defendant with a way of reducing a long sentence; helping clear the court's calendar by producing more pleas; giving judges discretion in sentencing defendants; offering the defendant a clear conscience; and leading to new cases and to the arrest of more culpable defendants.

The most frequently cited criticism of the substantial assistance process identified by probation officers was the significant disparity in sentencing outcomes, often with the "little guys" receiving more time than the "big guys." Probation officers reported that problems existed because the process was entirely unregulated; the prosecutors had total control and applied different interpretations/standards concerning what constituted substantial assistance; and defendants abused the process by testifying (often falsely) to improve their own situation.

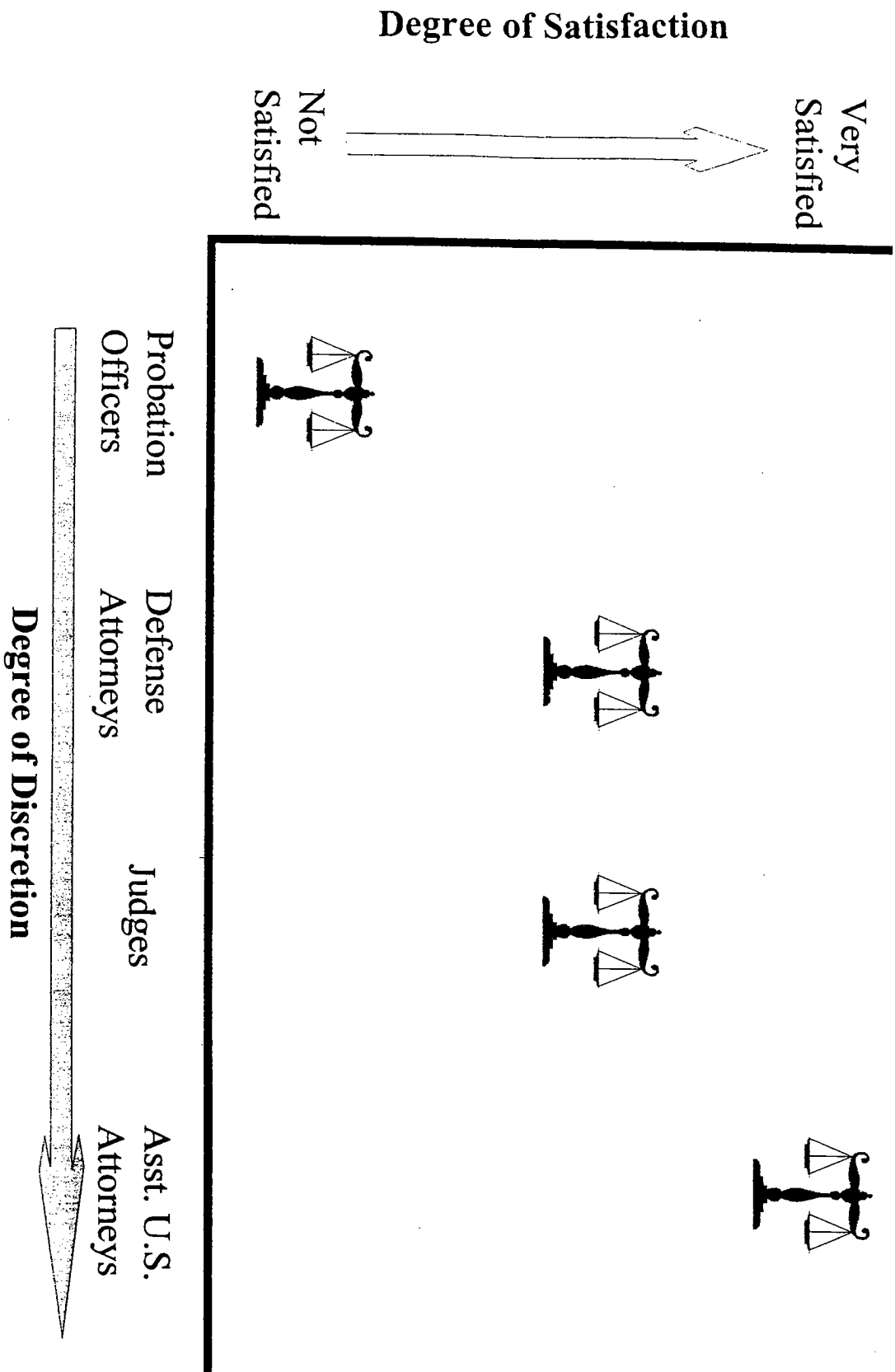
The most frequently suggested change in the substantial assistance process identified by probation officers was the need for national standardization, accountability, and regulation of the practices of prosecutors. Four probation officers noted the need for more precise guidelines defining what conduct by a defendant warrants a substantial assistance departure. A few probation officers stated that the substantial assistance process would be improved if defense attorneys and the court raised the issue when the prosecutor failed to make the motion for a departure.

Overall, respondent position in the federal criminal justice system seemed to be correlated with approval and acceptance of current substantial assistance practices. (See Figure 1.) Prosecutors were the most satisfied with substantial assistance practices; they also were the criminal justice practitioners with the ultimate influence, power, and discretion regarding when and how substantial assistance would be applied. On the other hand, probation officers were the most critical and dissatisfied with current practices; they had the least influence on and review of the utilization of the substantial assistance mechanism in the system. While defense attorneys were somewhat skeptical of misuse of the mechanism by prosecutors, they remained otherwise very supportive of the process because of the overwhelming benefit to their clients. Judges, who ultimately have the discretion and power to grant or reject a substantial assistance motion and determine the degree of departure, remained generally supportive of substantial assistance practice. It appeared that some judges did not want to interfere with or audit the substantial assistance process because they perceived the substantial assistance mechanism as an exclusively executive branch function as defined by the statute.

IV. CONCLUSIONS

Based on the eight site visits, there appeared to be some variation in substantial assistance practices across districts, but perhaps not enough to explain the difference in substantial assistance rates. The substantial assistance rate did not seem to track the percent of drug cases in the district's caseload. While the district with the lowest percentage of drug cases also had the lowest departure rate, the district with the highest percent of drug cases had a departure rate that was almost equal to the national average.

Figure 1
Satisfaction with the Substantial Assistance Process
by Position of Respondent



Similarly, district workload did not seem significant. Two of the three large districts were in the lowest quarter for substantial assistance departure rates, and the third district, although equal in size, had a high departure rate. The five mid-size districts had a difference of 13 percentage points in their substantial assistance rates, while the three large districts had striking differences in their departure rates.

Despite these considerable differences in the substantial assistance rates, almost all participants interviewed believed the practices in their districts were consistent with the statute and the guideline. However, their interpretation of the statute and guideline varied. There was consensus across districts that defendants who cooperated early, told all to the government, wore a wire or testified truthfully against others, and whose actions otherwise resulted in the conviction of another would get a substantial assistance departure. Most participants agreed that defendants who refused to cooperate with the government did not qualify for the departure. However, if cooperation is viewed along a continuum, and these two examples define the endpoints, there is considerable variation in practice as to what happens at other points along the continuum. (See Figure 2.) For example, defendants who cooperated and told the government all they knew (but none of it was new) received very different treatment across districts. In at least one district (with the highest substantial assistance rate of those visited), participants reported that this type of defendant consistently received a substantial assistance departure. In most other sites this was not the practice. However, in at least two other sites, participants reported that providing truthful information to the government (irrespective of the results) might generate a substantial assistance motion by the government.

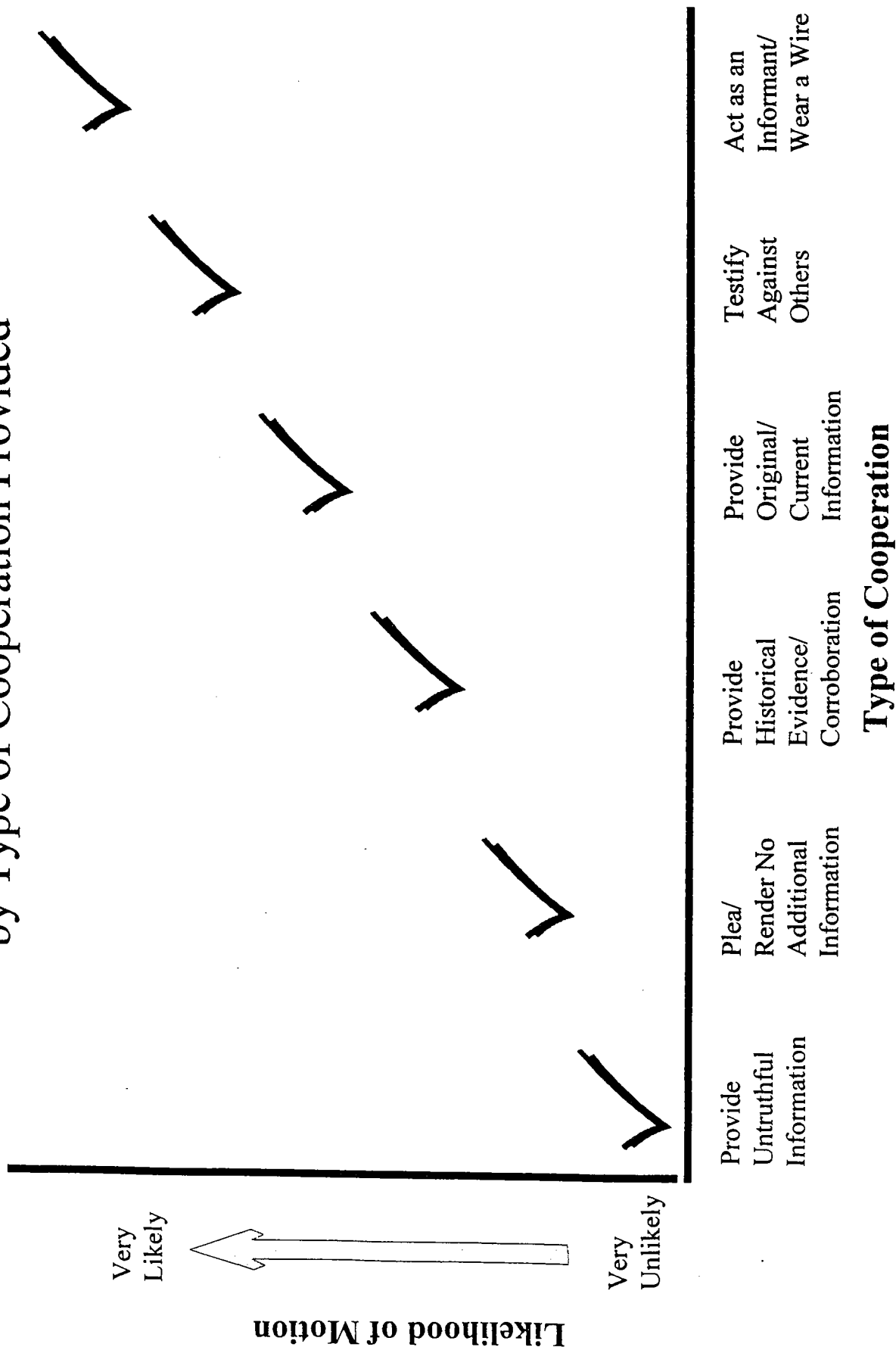
There was considerable agreement about both the benefits and the problems associated with substantial assistance. Substantial assistance across districts was thought to help the plea rate, save the court time and resources, and act as a boon to law enforcement efforts in the investigation and prosecution of crime. However, many expressed concern about the inequity created when the ringleaders or the most culpable defendants received the benefit of a lower sentence while less culpable defendants were unable to derive a reduced sentence because they were involved peripherally and had nothing of consequence to offer prosecutors.

While in the site with the lowest substantial assistance rate prosecutors were described as "stingy," it should be noted that in the site with the highest substantial assistance rate, the prosecutors were not seen as overly generous.

Although the charging practices of the districts were not investigated specifically, respondents from some districts mentioned their plea practices as a significant factor influencing substantial assistance rates. For example, in Site A (with the lowest substantial assistance rate of the districts visited) the government regularly engaged in charge bargaining that allowed defendants to plead to lesser charges or referred the case to state/local courts for prosecution. Conversely, in Site E (with the highest substantial assistance rate of the sites visited) prosecutors reported that they routinely indicted the defendant with all possible charges, including those with enhanced penalties that carry mandatory minimums. Participants in Site E stated that this

Figure 2

The Likelihood of Receiving a Motion for Substantial Assistance by Type of Cooperation Provided



charging practice had a causal relationship with the high rate of cooperation in their district, with cooperation offering the only relief from guideline and mandatory minimum sentences.

All those interviewed were asked if there was systematic variation in a defendant's willingness to cooperate based on offense type, age, race, or gender. The overwhelming majority reported no variation regarding demographic characteristics. However, almost all of the participants suggested that defendants involved in drug offenses, and to a lesser degree fraud offenses, were much more likely to be in a position to cooperate (*e.g.*, have information). The few who reported some variation other than by offense type did not agree on the impact of age or race. For instance, young Black males charged with drug trafficking were thought by a few to be more likely to cooperate, while others thought them less likely, especially if they were gang-affiliated.

The satisfaction with the substantial assistance process, and the perceived need for change depended upon the respondent's position. Predictably, prosecutors were the most satisfied with current practices and saw the least need for change. Probation officers, to the contrary, were the most critical of current practices and offered several recommendations for change. Defense attorneys were less critical than probation officers about the process, but clearly wanted the ability to make the substantial assistance motion. Judges were more diverse in their reaction to the need for change. Approximately one-third of the judges interviewed recommended no change. Another third believed the court or defense should have the ability to make the motion, while other judges asked for more structure and guidance to the substantial assistance process.

CHAPTER FIVE

SUBSTANTIAL ASSISTANCE DEPARTURES: A STUDY OF INDIVIDUAL CASES

Policy Statement 5K1.1 and its statutory counterpart, 18 U.S.C. § 3352(e), codify the public policy decision that allows defendants to assist the government in its law enforcement function in exchange for a sentence lower than that called for by the otherwise applicable statutory minimums and sentencing guidelines. This decision addresses the issue of giving incentives for cooperating with law enforcement authorities, in order to apprehend and punish more violators. Under §5K1.1 the defendant does not receive the sentence reduction unless the government makes a motion to the court requesting a departure from the guidelines. Once the government makes the motion, the court decides whether to reduce the defendant's sentence and how much of a reduction to make. As part of its statutory duty to periodically review the guidelines, the Commission has sought more information on this exercise of discretion by prosecutors and the courts.

This section of the study sought to answer the following key questions: (1) what types of assistance do defendants actually provide the government; (2) what benefits does the government receive from the cooperation; (3) how do the types of assistance relate to the sentence recommendation made by the government; and (4) how does the sentence recommendation relate to the sentence imposed by the court? To help answer these questions and to provide additional information on a large segment of federal criminal cases, the Commission conducted telephone interviews with prosecutors about randomly selected cases in which the defendant received a sentence reduction based on providing substantial assistance to the government.

Chapter Six presents information derived from the telephone interviews of prosecutors about substantial assistance cases in combination with data from the Commission's monitoring data files. The first part of the chapter is primarily descriptive of the types of assistance provided by defendants, the benefits to the government, and the factors that influenced the government's sentence recommendations. The second part of the chapter utilizes multivariate statistical analysis to study the relationship among case characteristics, the sentences recommended, and the sentences imposed.

I. METHODOLOGY

A. Data Collection Method

Based on several considerations, including the type of information sought, the Commission decided to conduct telephone interviews for this part of the study. First, because this component of the substantial assistance study moved beyond the expressed policy of the U.S. attorney's office, detailed information was solicited on the operation of office policy. The

individual case, rather than the district policy, was the relevant unit of analysis for describing policy in practice. Second, because the information was not available in court documents, the Commission needed to get details of the cooperation from people who had personal knowledge of each selected case. Third, because this was an exploratory data collection effort there was very little extant information on the factors that affect the §5K1.1 process. Without prior research to draw from, it was not feasible to construct finite response sets for many questions, making open-ended questions necessary. Finally, the decision was made to conduct telephone interviews because they tend to have higher response rates than mailed questionnaires, and permit clarification of respondent answers, if necessary.

The interviews consisted of questions from seven broad areas of inquiry, including: 1) the role of the defendant in the criminal activity; 2) matters concerning other related cases (*e.g.*, number of defendants, number of substantial assistance motions made); 3) the review and approval process for the substantial assistance motion; 4) the timing of the defendant's cooperation; 5) the type of assistance provided and the benefits to the government; 6) co-defendants' roles, substantial assistance motions for codefendants, and benefits to the government from assistance provided by codefendants; and 7) sentence recommendations. The interview protocol was developed in consultation with the Department of Justice.

B. The Sample

In 1994, the Commission received information for 39,917 defendants sentenced under the federal sentencing guidelines. Of these 39,917 cases, 7,524 received a §5K1.1 departure for providing substantial assistance. Two hundred fifty cases (or approximately 3%) were randomly selected for the interview sample, and 215 interviews were completed.¹⁰⁵ More detailed information on the methodology can be found in Appendix D-1 and the interview protocol in Appendix D-2.

II. ANALYSIS AND FINDINGS

A. Profile of Defendants and Cases

In 83 percent (n=178) of the 215 sample cases, defendants were male. Fifty percent of the defendants were White, 29 percent were Black, and 21 percent were Hispanic. This

¹⁰⁵Of the 250 cases originally selected for the sample, 15 were replaced for one of more of the following reasons: the U.S. attorney's office asserted that they had not made a §5K1.1 motion in that case; the file was not available to them for review; or the United States attorney preferred the prosecuting attorney to be present during the interview, but the prosecuting AUSA was not available. As a practical matter, replacement cases were selected randomly from all §5K1.1 cases within the same district, so that the total number of interviews for a district remained the same as originally sampled. This also helped U.S. attorneys to estimate the resources needed to respond to our request, as well as to expedite interview scheduling. Prosecutors in a few districts were unable to schedule interviews with us because of previous commitments in 35 cases.

compares to the overall FY 1994 5K1.1 population of 85.3 percent male, 14.7 percent female, 44.7 percent White, 31.5 percent Black, and 21.1 percent Hispanic.

Seventy-one percent (n=152) of the cases involved illegal drug activity. When prosecutors were asked to describe the defendant's role in the illegal drug activity, the most frequent response was street-level dealer (n=43), followed by mid-level dealer (n=41). Many defendants were couriers (n=29), brokers (n=26), or mules (n=25). Only eleven defendants were described as high-level dealers.

As the literature review indicates, one of the criticisms of §5K1.1 is that it unfairly penalizes low-level defendants. Because low-level defendants often have no valuable information to offer the government, they are unable to get a sentence reduction. The survey results offer evidence to refute that criticism. In addition to a preponderance of street-level dealers, mules, and couriers, prosecutors described a defendant's culpability with others involved in the same criminal activity, as low-level for 41 percent (n=88) of the defendants, 33 percent (n=70) as mid-level, and only 17 percent (n=37) as high-level. According to prosecutors, these low-level defendants provided valuable information to law enforcement authorities.

In 72 percent of the cases, the defendant had at least one codefendant. The number of codefendants in a case ranged from a low of one to a high of 34. In 56.5 percent of the cases in which there was at least one codefendant, the government filed a §5K1.1 motion for at least one other codefendant. Thus, the evidence suggested that a defendant's cooperation may have had a "snowball effect." A number of prosecutors noted that when one defendant began to "talk," the likelihood of other participants in the criminal activity pleading guilty and cooperating with the government increased. Many of the codefendants cooperated with the government and provided valuable information.

B. Types of Assistance

Policy Statement 5K1.1 provides: "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." Public policy as expressed in §5K1.1 indicates the desirability of reducing a defendant's sentence for assisting the government in its law enforcement effort of investigating and prosecuting other criminals. The defendant's aid to law enforcement can take many different forms from active participation in an undercover investigation to debriefing law enforcement authorities about the criminal activities of others.

According to the information received from the interviews, the types of assistance defendants provided or agreed to provide can be classified in five broad categories: testifying under oath in the investigation or prosecution of another person, providing information likely to lead to prosecution of others, providing information regarding criminal activities of others,

information about defendant's own activity, and actively participating in the investigation of another person (*e.g.*, undercover operation).¹⁰⁶

As shown in Table 9, the type of assistance most frequently provided to the government was information about the defendant's own activity in the same case (n=193), followed by information regarding the criminal activities of others in the same case (n=150). In none of the cases, however, was information about the defendant's activity the only type of assistance the defendant provided. Although the vast majority agreed to testify against someone else, defendants actually testified only 80 times. Among the trends that emerged from the study was the tendency of most prosecutors to require that defendants agree to testify against the other participants in the criminal activity. Some prosecutors stated that they refused to file a substantial assistance motion unless the defendant agreed to testify. During the interviews, prosecutors indicated that the testimony was not necessary in many of the cases because the other co-defendants pleaded guilty as a result of the early cooperation, or other codefendants testified on the same matters.

As shown in Table 10, most defendants provided more than one type of assistance. Typically, the defendant: 1) agreed to testify under oath about another person, 2) provided information likely to lead to the prosecution of others, 3) provided information regarding the criminal activities of others, and 4) provided information about his/her own criminal activity.

C. Benefits to the Government

Many of the prosecutors spoke enthusiastically about the law enforcement benefits of §5K1.1. Among the benefits from defendants' cooperation noted by the government were: sworn testimony, production of documentary and physical evidence, identification of other criminals, verification of government information, new information on criminal activity, and undercover investigative assistance. The defendants' assistance often led to other indictments and prosecutions, additional investigations, arrests, convictions, recovery of assets, more guilty pleas, and increased cooperation from other codefendants. In a few cases, prosecutors admitted that the government received no benefit from the defendant's assistance. For the most part, the prosecutors' responses support the suggestion that policy statement 5K1.1 is an effective tool in enhancing the government's ability to combat crime.

D. Review and Approval of the Government Motion

Typically the assistant U.S. attorney who prosecuted the case forwarded the recommendation for a §5K1.1 motion to supervisors. Most of the substantial assistance motions

¹⁰⁶Other than the five broad categories of cooperation noted above, there were only nine instances of other types of assistance. The other forms of assistance were: the surrender of firearms, stipulation to deportation, assistance in the seizure of assets, persuasion of codefendant to plead guilty, agreement to provide future assistance, and giving documents to the government.

Table 9

DEFENDANT ASSISTANCE BY TYPE OF ASSISTANCE¹

		Agreed To Provide But Did Not Provide		Provided		Did Not Agree To Provide Nor Provided	
		Number	Percent	Number	Percent	Number	Percent
Testimony Under Oath In Prosecution Of Another Person	Same Case	110	51.6	39	18.3	63	29.6
	Other Case	65	30.5	41	19.2	101	47.4
Information Likely To Lead To Prosecution Of Others	Same Case	5	2.3	141	66.2	67	31.5
	Other Case	3	1.4	115	54.0	89	41.8
Information Regarding Criminal Activities Of Others	Same Case	3	1.4	150	70.4	60	28.2
	Other Case	3	1.4	120	56.3	84	39.4
Information About Defendant's Own Activity	Same Case	2	0.9	193	90.6	18	8.5
	Other Case	0	0.0	77	36.2	130	61.0
Active Participation In Investigation Of Another Person (e.g., Undercover)	Same Case	4	1.9	28	13.1	180	84.5
	Other Case	4	1.9	33	15.5	170	79.8
Other Assistance	Same Case	2	0.9	7	3.3	204	95.8

RCE: USSC Substantial Assistance working group telephone interviews of prosecutors.

¹Of the 215 completed interviews, two were excluded due to missing information on type of assistance.

Table 10

**NUMBER OF ASSISTANCE TYPES AGREED TO OR PROVIDED BY
SUBSTANTIAL ASSISTANCE DEFENDANTS**

Defendants agreed to or provided	Number	Percent
No Assistance	2	0.9
One Type of Assistance	2	0.9
Two Types of Assistance	9	4.2
Three Types of Assistance	22	10.2
Four Types of Assistance	130	60.5
Five Types of Assistance	49	22.8
Six Types of Assistance	1	0.5
Total	215	100.0

SOURCE: USSC Substantial Assistance working group telephone interviews of prosecutors.

in the cases surveyed were reviewed by a higher-level supervisor or committee. In 13 cases there was no higher-level supervisory review, although almost every district had a review and approval procedure for substantial assistance motions, the kind of review varied from district to district. In some districts a supervisory assistant United States attorney reviewed the motion and in others a substantial assistance review committee was involved in the process. The United States attorney reviewed and approved the motion in only 22 percent of the cases (n=47). In 77% of the cases (n=36), prior to the review by the U.S. attorney, either a supervisory assistant U.S. attorney or a substantial assistance committee had been involved in the process.

E. The Government's Sentence Recommendation

The government's sentence recommendation can take one of several forms depending on the particular practices of the U.S. attorney's office and the district court. Under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, the parties can agree that the government will make a sentence recommendation specifying a sentence or sentencing range appropriate to the disposition of the case. This binding agreement allows the defendant to withdraw his/her plea of guilty if the court does not accept the stipulated sentence or range. In the sample of cases in the survey, only 6.5 percent (n=14) of the cases involved a binding Rule 11(e)(1)(C) agreement.

Most of the government recommendations were pursuant to Rule 11(e)(1)(B). This agreement allows the government to make a non-binding recommendation for a particular sentence or sentence range. With a non-binding recommendation, the defendant cannot withdraw from the plea if the recommendation is not accepted by the court. The sample cases suggest that often these non-binding recommendations specified: (1) a maximum percent reduction, (2) a fixed-percent reduction from the guideline range, or (3) offense level reductions from the otherwise applicable guideline range.

The government made a sentence recommendation to the court in 53 percent (n=114) of the cases. Most of the sentence recommendations were to subtract between two and four offense levels from the otherwise applicable guideline range. Ninety-six of the 114 sentence recommendations were approved by a supervisor. Many of the prosecutors said that after supervisory approval of the §5K1.1 motion, they could use their own discretion in making a sentence recommendation.

For those cases in which the government made a sentencing recommendation to the court, prosecutors were asked to list the factors that influenced the length of the recommendation. There was no uniform list of factors used by the U.S. attorneys' offices. Prosecutors noted the unique features of each case to explain the lack of any standardized procedure in determining the length of the departure recommendation.

Factors cited by prosecutors in determining the length of the sentencing recommendation included: the degree and timeliness of the assistance, prosecutions and investigations that

resulted from the assistance, the defendant's criminal history, completeness of assistance, the defendant's truthfulness, the defendant's culpability, the defendant's attitude, risk to defendant, age or physical condition of the defendant, and severity of offense.

The degree of cooperation and results from the cooperation, however, were factors considered most frequently by the government in making a sentence recommendation. As can be expected, the more useful the information, the greater the departure recommendation.

The timing of the defendant's assistance was also an important factor. The earlier the defendant cooperated, the stronger the possibility that the defendant would get a greater sentence reduction than a similarly-situated defendant who cooperated at a later date. According to prosecutors, the first defendant in a conspiracy to cooperate tended to get a better sentence recommendation than any later cooperating defendants.

In 53 percent (n=114) of the cases, a mandatory minimum term of imprisonment would have been applicable to the defendant. However, most prosecutors stated that the mandatory minimum sentence did not affect the government's sentence recommendation. Prosecutors in only twenty-two of the cases stated that the mandatory minimum sentence affected the government's recommendation. When there was an applicable mandatory minimum penalty, a majority of the prosecutors used the mandatory minimum as a guidepost for their sentence recommendation.

F. Relationships Among Case Characteristics, Sentence Recommendations, and Sentences Imposed

Government Sentence Recommendation

We expanded the usefulness of the information on government sentence recommendations by combining it with data collected by the Commission as part of its ongoing monitoring activities. The most important combination was the sentence recommended by the government as compared to the sentence actually imposed by the court. The following sections detail the results of this comparative statistical analysis.

The first question tested was whether a government sentence recommendation influenced the sentence imposed. If the recommendation did not have an influence, the difference between the sentences imposed in cases with recommendations and sentences imposed in cases without government recommendations would not be statistically significant. The average government recommendation was a 45.8 percent reduction. Our analysis, however, showed that for cases in which the government made a recommendation, defendants received an average sentence reduction of 52.4 percent. For cases in which a recommendation was not made, defendants received, on average, a 66.0 percent reduction in their sentence.

This finding remained the same even when controlling for the seriousness of the offense. For defendants with the same offense level prior to departure, those for whom the government made a sentence recommendation, received departures 11.1 percent smaller than departures for defendants sentenced without a government recommendation.

District courts that preferred to receive government sentence recommendations tended to make smaller departures than courts that preferred the government not make sentence recommendations. When the court preferred a recommendation, defendants received departures averaging 53.7 percent off the minimum adjusted guideline sentence. For districts in which the court did not prefer a recommendation, defendants received sentence reductions averaging 63.2 percent from the minimum adjusted guideline range.

After determining that the sentence recommendation was associated with the sentence imposed, we looked to the factors associated with the degree of departure recommended by the government. Because of the limited number ($n = 114$) of valid cases available for analysis of government sentence recommendations, we were unable to control for all competing explanations or confounding factors. Therefore, these multivariate analyses should be considered exploratory.

(1) Defendant Characteristics

An analysis of defendant's citizenship status and criminal record data revealed that these factors are not correlated to the government's sentence recommendation. A defendant's race, however, was correlated with larger departure recommendations. Prosecutors recommended larger percent departures for White defendants than for Hispanic or Black defendants. The average sentence recommendation is 51 percent below the guideline minimum. The average sentence recommendations for Hispanics, however, were 39.6 percent below the guideline; for Blacks they were 41.0 percent below the guideline.

(2) Offense Characteristics

Under the sentencing guidelines, the offense level for a drug trafficking offense is determined largely by the weight and type of drug involved. The study group questioned whether the type of drug involved in the offense factored into the departure recommended by the government. The findings suggest that there was no relationship between the drug type and the recommended degree of departure.

Often defendants convicted of drug trafficking offenses are subject to a statutory minimum sentence. As the site visit analysis revealed, the applicability of a mandatory minimum penalty was often a strong motivator for defendants to cooperate with the government. A substantial assistance motion by the government gives the court discretion to sentence below the mandatory minimum. The data analysis examined whether the applicability of a mandatory minimum sentence affected the degree of departure recommended by the government. The

results did not reveal a statistically significant relationship between the presence of a drug mandatory minimum sentence and the degree of departure recommended by the government.¹⁰⁷

(3) Types of Assistance and Benefits to the Government

Previous analysis described the different types of assistance defendants provided and the frequency of occurrence. This section examines the relationship between the types of assistance provided by the defendant, the type of benefits received by the government, and the degree of departure recommended by the government.

Defendants who testified or agreed to testify received larger departure recommendations than defendants who did not agree to provide testimony. On average, those who testified or agreed to testify received sentence recommendations 45.9 percent below the guideline range while those not willing to testify received recommendations 30.9 percent below the guideline range. The data did not reveal a statistically significant correlation for any of the other types of assistance. However, controlling for each type of benefit attributed to the defendant's assistance, there was no significant relationship between the type of benefit and the amount of departure recommended.

Information from the telephone interviews with prosecutors did not support the idea that the level of commitment or risks faced by the defendant resulted in a larger percent departure recommendation by the government. In fact, there was no statistically significant correlation between providing undercover assistance or pro-active assistance and the degree of recommended departures.¹⁰⁸ Similarly, we were unable to find a statistically significant relationship between personal risk to the defendant and percent of departure recommended.¹⁰⁹ On average, those defendants who risk personal health, go undercover, or provide pro-active assistance, do not appear to receive larger departure recommendations.

Factors Affecting the Sentence Imposed

(1) Defendant Characteristics

¹⁰⁷A similar analysis conducted for gun mandatory minimums also did not reveal a statistically significant relationship.

¹⁰⁸One possible explanation for failing to find statistical significance could be attributed to the small number of defendants who actually were identified as having provided pro-active or undercover assistance. Fewer than 40 defendants were identified as having provided pro-active assistance and only 26 defendants provided undercover assistance.

¹⁰⁹When asked what factors affected the sentence recommendation, interviewees cited risk to the defendant seven times. For the purposes of the analyses, we considered defendants who faced substantial risk to be these seven defendants and all the defendants who provided undercover assistance. Taken together, this still represents a small number of defendants and could explain the failure to find statistical significance.

An analysis of defendant's citizenship status revealed that this factor is not correlated with the sentence imposed. There was a statistically significant difference between the departure sentences by race. The courts imposed sentences that averaged 64.3 percent below the guideline range for white¹¹⁰ defendants compared to sentences that averaged 49.3 percent below the guidelines for Hispanics and 55 percent for Black defendants.

The data also showed that defendant's criminal history was correlated negatively with the degree of departure imposed. For each criminal history point, the court reduced the size of the departure by 1.2 percent.

(2) Offense Characteristics

The findings suggest that while drug type was not associated with the percent of departure imposed, three other offense characteristics were, including applicability of a mandatory minimum, seriousness of the offense, and prior criminal record. Defendants with an otherwise applicable drug or gun mandatory minimum received smaller departures than other defendants. The departures were 20.1 percent smaller for defendants with gun mandatory minimums and 10.2 percent smaller for defendants with drug mandatory minimums.¹¹¹

Defendants who committed more serious crimes as evidenced by their higher offense levels received smaller departures than those who committed less serious crimes. For each additional offense level, the courts departed an average of one percentage point less. For each additional criminal history point, controlling for the offense level, courts imposed departure sentences approximately one percentage point smaller.

(3) Types of Assistance and Benefits to the Government

Results from the telephone interviews uncovered no evidence of a statistically significant relationship between the size of the departure given by the court and the type of assistance provided by the defendant or the benefit received by the government.

¹¹⁰In total, 41.6% of federal defendants were reported in the White racial category in fiscal year 1994. For the model's Non-Minority category, White defendants were combined with the category of "Other" race (including Asian, American Indians, and Pacific Islanders). Only 3.5 percent of federal defendants fall into the "other" minority category. Empirical investigation indicated that the Other category was more similar to the White category than to either the Black or Hispanic categories.

¹¹¹Defendants facing a drug mandatory minimum received average sentences 55.2 percent below the guideline range. Defendants facing a gun mandatory minimum sentence received average sentences 45.2 percent below the guideline range.

The Relationship Between the Government Recommended Sentence and the Sentence Imposed by the Courts

Analysis of the data showed that judges tended to follow the government's recommendation in 43.9 percent (n=50) of the cases. Judges imposed longer sentences than recommended in 14.9 percent (n=17) of the cases and shorter sentences than recommended in 41.2 percent (n=47) of the cases.

The findings indicate that when the sentence was higher than the recommendation, the sentence imposed was 26 percent above the recommended sentence. When the sentence was lower than the recommendation, the average difference between the two was 41.5 percent of the recommended sentence.

III. CONCLUSIONS

In studying the operation of substantial assistance policies in particular cases, the Commission gained greater insight into the myriad of considerations that contribute to the substantial assistance process. Prosecutors reported a variety of factors such as the degree of the defendant's assistance, the defendant's criminal history, the defendant's willingness to testify, and beneficial results to the government as significant considerations. Because the substantial assistance motions were so heavily dependent on the discretion of the individual prosecutor, the application of USSG §5K1.1 varied from district to district. For example, while almost every district had a policy in which substantial assistance motions are reviewed by a higher-level supervisor or committee, the kind and degree of review differed in each district. Some districts used a committee to approve motions, whereas other districts had the U.S. attorney approve the motion.

While there may be some differences in interpreting the substantial assistance policy statement, there were certain areas of similarity. For example, the earlier the defendant began to cooperate, the stronger the possibility that the defendant would get a greater departure than a similarly-situated defendant who cooperated at a later time. In addition, if two defendants had the same offense level, the defendant with less criminal history points was more likely to receive a greater departure recommendation and a greater reduction in his/her sentence.

The data also revealed that the population of defendants who receive substantial assistance motions contains large numbers of low-level defendants. Forty-one percent of the defendants in the cases surveyed were described as low-level defendants by prosecutors. According to prosecutors, these low-level defendants provided valuable information about the criminal activities of others. We do not know, however, whether the 41 percent of low-level defendants who receive substantial assistance departures is a large or small proportion of the overall population of all low-level defendants.

The interviews revealed that the types of assistance provided by defendants can be organized in five broad categories: testimony under oath, information likely to lead to the prosecution of others, information regarding the criminal activities of others, information about the defendant's own criminal activity, and assistance in an undercover investigation. While most defendants agreed to provide sworn testimony, most did not. According to prosecutors, often the defendant's agreement to testify caused codefendants to plead guilty, making testimony unnecessary. Most defendants provided more than one type of assistance.

Prosecutors found policy statement 5K1.1 to be an effective law enforcement tool. The defendants' assistance often led to additional prosecutions, arrests, guilty pleas, and increased cooperation from other codefendants. In most cases the government motions were reviewed and approved by higher-level supervisors. If sentence recommendations were provided, the recommendation most frequently given was non-binding, and suggested a two to four offense level decrease from the guideline minimum. The degree of cooperation and the benefits from the cooperation were the most frequently reported factors that prosecutors considered in making a sentence recommendation.

A statistical analysis of the data indicated a relationship between the government's recommendation and the sentence imposed, with the court following the government's recommendation 42-percent of the time. In cases in which the government made a recommendation, defendants received an average sentence reduction of 52.4 percent, compared to a sentence reduction of 66 percent in cases in which there were no recommendations.

Interestingly, we found that one additional variable was correlated to the government recommendation, but not with the final sentence. We found that defendants who agreed to provide testimony received a 15.5 percent increase in the size of the departure recommendation.

Race was found to be associated with both the sentence recommended and the sentence imposed. Hispanics received smaller government recommendations (40.4% below the guidelines) and smaller departures (49.3 %) than either White or Black defendants.

By combining information from the telephone interviews with the Commission's monitoring data, the study group was able to begin to describe the relationship between the offender and offense characteristics of the case, the recommendation of the government, and the actual sentence imposed by the court. This information provided the Commission further insight about the exercise of discretion by prosecutors and judges in the substantial assistance process. Analysis presented in this chapter is based on a relatively small sample of §5K1.1 cases sentenced in fiscal year 1994. The data collected from the telephone interviews are rich in detail and provide a comprehensive description of the §5K1.1 process for each of the cases in the sample. As such, statistical analysis was limited to simple models of relationships between offense and offender characteristics and the sentence recommendations and the sentence imposed. The results of these analyses do not imply a causal relationship, but indicate correlations that may be influenced by factors not analyzed.

CHAPTER SIX

SUBSTANTIAL ASSISTANCE DEPARTURES: A STUDY OF CONSPIRACIES

In contrast to previous chapters in this report that have focused on individual cases or districts as the unit of analysis, this chapter focuses on the criminal conspiracy as a unit of analysis. This focus allows examination of all codefendants in the conspiracy and assessment of factors influencing whether or not a defendant received a substantial assistance departure. There are several advantages to focusing on the conspiracy as the unit of analysis.

First, an analysis of the entire conspiracy and not just an individual case file often allows for a more complete understanding of substantial assistance. Cooperation with authorities by definition most commonly involves the provision of information about another person—typically, but not exclusively, one in the same conspiracy as the cooperator. Thus, by reviewing case files for all defendants in a conspiracy, the reviewer is given additional insight into the cases of all defendants and particularly the cooperation, conduct, and sentencing of other defendants.

For example, the case file of Defendant A may indicate that Defendant A provided information to authorities and a substantial assistance reduction was given. A second case file for the same conspiracy, however, may indicate that Defendant B refused to cooperate, went to trial, and was convicted on the basis of a codefendant's testimony. In such a case, more is learned about the extent of Defendant A's cooperation than might have been known without Defendant B's case file.

Second, the review of the conspiracy extends the time frame for knowledge of the activities and cooperation of the defendants in the conspiracy. For example, it may become clear that the reason all five defendants in an early indictment received a substantial assistance reduction was that they all provided information on a second round of defendants previously unknown or unindicted by authorities.

Third, the review of the conspiracy may clarify the relative merits of each defendant's cooperation. For example, it may help explain why one defendant who provided extensive cooperation did not receive a substantial assistance reduction by clarifying that the defendant testified significantly later than another defendant, that the defendant merely repeated what was already known from other sources, or that the defendant provided only verbal information when another defendant exposed him/herself to violence or conducted monitored purchases in person.

Finally, the review of the conspiracy permits an examination of the relative importance of various statutory, guideline, or offense conduct considerations (*e.g.*, whether defendants were rewarded for cooperation not with a substantial assistance reduction but by a reduction in exposure to a mandatory minimum) that might not be apparent in a review of only one case file.

There are, of course, limitations to this approach, as noted throughout this chapter. Nevertheless, the use of the conspiracy as the unit of analysis, discussed in theory above and demonstrated in practice below, provides important information and data supplementary to that provided by other units of analysis.

I. OBJECTIVES

Using the conspiracy as the unit of analysis allows examination of three critical questions:

- Why does one defendant in a conspiracy receive a substantial assistance reduction (*i.e.*, a reduction, not just a motion, pursuant to either USSG §5K1.1, or 18 U.S.C. § 3553(e), or both) and another in the conspiracy does not?
- Why does one defendant in a conspiracy receive a greater substantial assistance reduction than another defendant in the conspiracy who also received a substantial assistance reduction?
- How does the sentence of a defendant who receives a substantial assistance reduction compare with the sentences of those in the conspiracy who do not receive a substantial assistance reduction?

Presumably, a number of factors come into play to address these questions. For purposes of the first and second questions, however, it was initially assumed that the most direct and logical factors, namely those related to each defendant's cooperation, are responsible for whether a substantial assistance reduction is made and the extent of that reduction. The following factors related to cooperation were examined:

1. The fact of cooperation (or assistance—the terms are used interchangeably) (*i.e.*, whether the defendant provided any information, regardless of its value, about another person to a person in authority);
2. The type of cooperation (*e.g.*, providing verbal information, performing undercover work);
3. The extent or fullness of cooperation (*i.e.*, whether the defendant provided all the information or assistance possible);
4. The timing of the cooperation (*i.e.*, whether the defendant cooperated before, after, or at the same time as his/her co-defendants); and
5. The truthfulness of the cooperation (*i.e.*, whether the defendant gave false information).

However, if this primary theory alone does not explain adequately why one defendant receives a substantial assistance reduction and another does not, additional factors may prove relevant to the questions posed. These may include factors related to relevant offense conduct, such as:

1. Whether the defendant possessed or directed another to possess a firearm;
2. Whether the defendant threatened or inflicted injury or death on another person; and
3. Whether the defendant had a particularly low-level function (*e.g.*, a passive participant or periodic worker) or high-level function (*e.g.*, head of a significant drug-importing organization) in the offense.

Various factors related to statutory and guideline considerations also may help address the questions raised:

1. Whether the defendant was convicted of a mandatory minimum statute (*e.g.*, 21 U.S.C. § 841(a)(1)(A) (drug trafficking), 18 U.S.C. § 924(c) (use of a firearm in connection with another offense));
2. Whether the defendant was not convicted of a mandatory minimum statute although such a statute could have applied;
3. Whether the defendant was convicted of an offense with a significantly lower statutory maximum (*e.g.*, 18 U.S.C. § 4 (Misprision of a Felony)) than could have applied; and
4. Whether the defendant received another downward departure instead of a reduction for substantial assistance.

Finally, factors related to personal characteristics of the defendant may bear on the questions: (1) race; (2) gender; (3) criminal history category; and (4) other characteristics (*e.g.*, health, number or nature of dependents, presence of an abusive or coercive relationship).

II. METHODOLOGY

As noted above, this chapter focuses on a sample of conspiracies—not individual defendants. Accordingly, a systematic random sample of conspiracies was selected. The sampling frame was composed of multiple-defendant conspiracies, with at least one defendant receiving a substantial assistance departure and at least one defendant sentenced in fiscal year 1992. (The last requirement minimizes the probability of selecting conspiracies with information on defendants sentenced too recently for case files to be available.)

Individual case files were analyzed by staff using a review sheet to record specific aspects of each file as well as textual summaries of the offense conduct, cooperation, and sentencing of each case. (See Appendix E-1 for the case review instrument and instruction manual.)

Full information was available on 64 conspiracies involving 323 defendants. A more complete profile of the conspiracies and defendants, and an analysis of the findings, follows this section. (For more detailed information on methodology, see Appendix E-2.)

Note that the initial sample of conspiracies used for this project was not intended to be sufficiently large to draw statistically significant conclusions. Instead, this chapter relies more on conclusions derived from a qualitative review of individual conspiracies.

III. ANALYSIS AND FINDINGS

A. Profile of Conspiracies and Defendants

All Conspiracies

This review involved 64 conspiracies comprising 323 defendants sentenced in more than 39 districts. Most districts were represented by just one or two conspiracies, except Southern California (five conspiracies), Southern New York (four conspiracies), Eastern Pennsylvania (four conspiracies), and three conspiracies each from Northern Illinois, New Jersey, Eastern New York, Western North Carolina, and Southern Texas—districts with high rates of substantial assistance departures and/or high rates of drug cases.

Of the 323 defendants, 122 (37.8%) received a substantial assistance reduction, compared to 19.5 percent for all fiscal year 1994 defendants. Note, however, that the rate is expected to be higher as a result of the selection criterion that every conspiracy chosen have at least one defendant who receives a substantial assistance reduction.

Defendants in Zone D of the guideline's sentencing table (*i.e.*, the zone for which no alternatives to imprisonment are available) were overwhelmingly more likely to receive a substantial assistance reduction than were defendants in Zones A, B, or C. Eighty-nine percent of substantial assistance reductions were granted to defendants in Zone D. This appeared to be so regardless of the size of the conspiracy or the type of conspiracy offense.

The conspiracies were dominated by drug offenses. Of the 64 conspiracies, 44 (with 264 defendants or 81.7% of the total 323 defendants reviewed) involved drug trafficking offenses and 20 (with 59 defendants) involved other offenses (most commonly, six fraud conspiracies with 15 defendants, four burglary conspiracies with 17 defendants, and three bank robbery conspiracies with seven defendants). By comparison, 42 percent of all fiscal year 1994 defendants were involved in drug trafficking offenses. The proportion of drug defendants to non-drug defendants

in this sample is higher due to the conspiracy unit of analysis, because drug trafficking offenses more typically involve conspiracies than other offense types.

The conspiracies tended to be relatively small. Of the 64 conspiracies, 23 had only two defendants; 29 had between three and five defendants; and 11 had six or more defendants. The largest conspiracy involved 60 defendants. (Each of the 64 conspiracies reviewed is briefly summarized in Appendix E-3.)

Non-Drug Conspiracies and Drug Conspiracies

As mentioned above, the 64 conspiracies reviewed for this project included 44 that involved drug trafficking offenses and 20 that involved other offenses (e.g., fraud, firearms, robbery). The non-drug conspiracies reviewed tended to be smaller than the drug conspiracies; of the 20 non-drug conspiracies only one involved more than five defendants.

The drug conspiracies involved primarily powder cocaine (17 conspiracies with 78 defendants), crack cocaine (eight conspiracies with 33 defendants), marijuana (eight conspiracies with 48 defendants), methamphetamine (five conspiracies with 16 defendants), and heroin (three conspiracies with 23 defendants), as well as three other controlled substances (with 66 defendants).

Rates of substantial assistance departures were relatively high for non-drug defendants involved in bank robbery (60.0%), larceny (62.5%), money laundering (66.7%), and racketeering (57.1%). Drug defendants received substantial assistance reductions at a slightly lower rate than all defendants (34.5% compared to 37.8%) and significantly lower than for all non-drug defendants (49.2%).¹¹²

Size of Conspiracy

The project determined the size of a conspiracy by counting all defendants named in the indictment. In addition, any "related defendant" or "codefendant" listed in the presentence report of any initial defendant was reviewed if the subsequent defendant appeared directly involved in an offense committed by the initial defendants. However, only those in a conspiracy for whom a case file was reviewed were counted. In some conspiracies, case files for a particular defendant could not be reviewed, either because the files were not available, or because the defendant was not indicted federally. In such a conspiracy, the size may appear smaller than it actually was and information about the conspiracy may be more restricted.

¹¹² Although drug defendants typically receive substantial assistance reductions at greater rates than non-drug defendants, in this sample the rates are reversed. The selection criterion requires that at least one defendant in the conspiracy receive a substantial assistance reduction, and drug conspiracies, as noted above, tend to be larger than non-drug conspiracies.

As noted above, this sample involved primarily conspiracies with five or fewer defendants (53 of the 64 conspiracies). The larger conspiracies (involving seven or more defendants) comprised 159 defendants or almost half of the defendants reviewed; the mid-size conspiracies (involving three to six defendants) contained 118 defendants; and the small conspiracies (involving only two defendants) held 46 defendants.

Rates of departure among the larger conspiracies, understandably, were lower than for the small and mid-size conspiracies. In part, this is due to the fact that some conspiracies defined as "small" in fact involved additional defendants whose files could not be found or whose members were not indicted. In fact, in eight of the two-person conspiracies, both defendants received substantial assistance reductions, apparently providing assistance against other members of the conspiracy who were indicted separately and whose files were not available.

Conspiracy Structure

Four general conspiracy structures could be identified among the sample conspiracies: (1) horizontal (most defendants share approximately the same function in the conspiracy); (2) hierarchical (relatively few defendants with higher-level functions in the conspiracy and relatively more defendants with lower-level functions); (3) inverted hierarchical (relatively more defendants with higher-level functions in the conspiracy and relatively few defendants with lower-level functions); and (4) diffuse (defendants with functions at various levels not corresponding generally to the first three structures).

However, determining the structure of the conspiracies proved to be sufficiently inexact that no conclusive associations could be drawn. As an initial matter, fully 23 of the 64 conspiracies involved only two defendants. By virtue of their limited size, these conspiracies could be considered to have a generally horizontal structure but by definition could not have any of the other structures. Consequently, these conspiracies would not have been useful case studies with respect to structure.

With respect to the other structures, examples of each structure were readily identifiable, but it was often difficult to label each conspiracy with a single structure, particularly when information was missing from the case file. Accordingly, we leave to another study any effort to determine whether conspiracy structure is associated with the way substantial assistance reductions are applied.

As a final point, it should be noted that many of the court cases prosecuted under one docket comprise only a fraction of the complete net of criminal participants and conspiratorial activities. This fact renders the chapter's presentation of both conspiracy size and structure incomplete, and to a degree an artifact of the criminal justice system.

B. Cooperation Factors Associated with Substantial Assistance Reduction

A review of the case files shows that the following factors appear to be associated with whether a defendant receives a substantial assistance reduction.

Fact of Assistance

The fact of cooperation or assistance by the defendant (*i.e.*, whether the defendant provided any information, regardless of value, about another person to a government authority) was associated with whether the defendant received a substantial assistance reduction.

Note that the project assumed a low threshold for determining whether a defendant has provided assistance. We have defined "assistance" to include the defendant's providing *any* information about any other criminally responsible person to the government. That threshold is necessarily different from the "substantial assistance" determination made by individual prosecutors and their supervisors, which involves some judgment as to the value of the assistance to the government in light of the circumstances of the case.

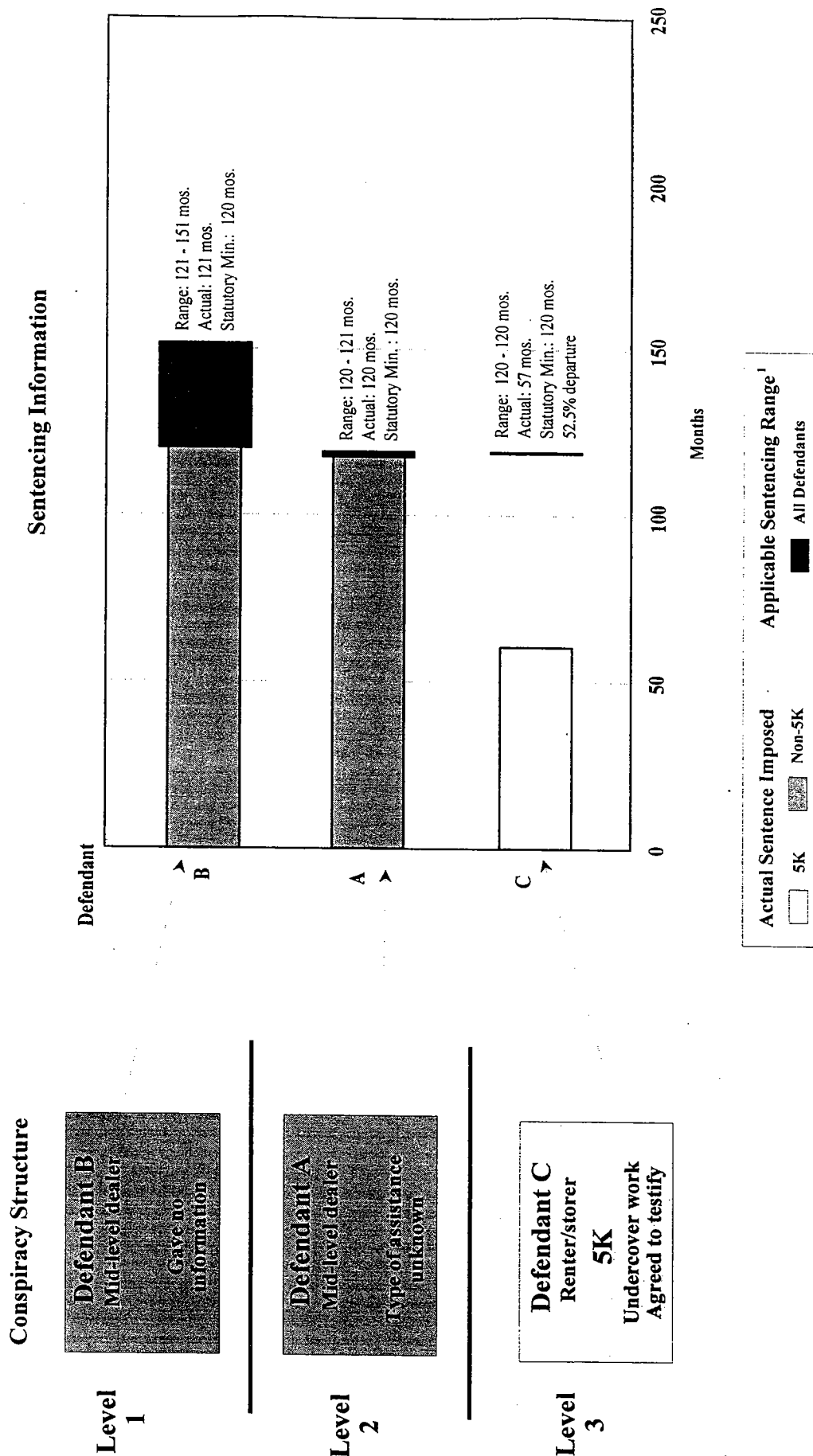
Of the 70 defendants who were known to have refused or failed to provide assistance, none received a substantial assistance reduction. However, not all defendants who cooperated received a substantial assistance reduction. In fact, the project's broad definition of "assistance" ensured this result: with no independent determination as to whether the assistance was "substantial," there were undoubtedly defendants who provided a threshold level of assistance ultimately not considered by the government as sufficient to merit a substantial assistance motion.

In at least 19 conspiracies, the project's "logical" assumption with respect to which defendants in a conspiracy would receive a substantial assistance reduction was played out. In those conspiracies, it could be determined that the defendant who provided assistance received a substantial assistance reduction while the defendant who was not known to have provided assistance did not.

For example, in conspiracy number 48 (Figure 3), there was no evidence that two participants of a mid-level methamphetamine trafficking organization, Defendants A and B, both mid-level dealers, provided any assistance to authorities. They did not receive a substantial assistance reduction, even though the judge believed the mandatory minimum 120-month sentence to be heavy "by any measure." However, Defendant C, also an occasional mid-level dealer but predominantly a renter/storer, cooperated and received a substantial assistance reduction.

Note that in a handful of these conspiracies, all of the defendants in the indictment before the court received substantial assistance reductions because they cooperated against defendants convicted under a separate indictment. In some of these conspiracies, the cooperating co-

Figure 3
Fact of Assistance



Conspiracy No. 48
Pennsylvania, Eastern
Drugs: Methamphetamine

¹Includes statutory mandatory minimum trumps if applicable.

defendant testified at the trial of another defendant and was sentenced at a later date. In conspiracy number 58, for example, a defendant's sentencing was postponed repeatedly until after the trials of codefendants; and all defendants in the conspiracy who received substantial assistance reductions were sentenced after other defendants.

Type of Assistance

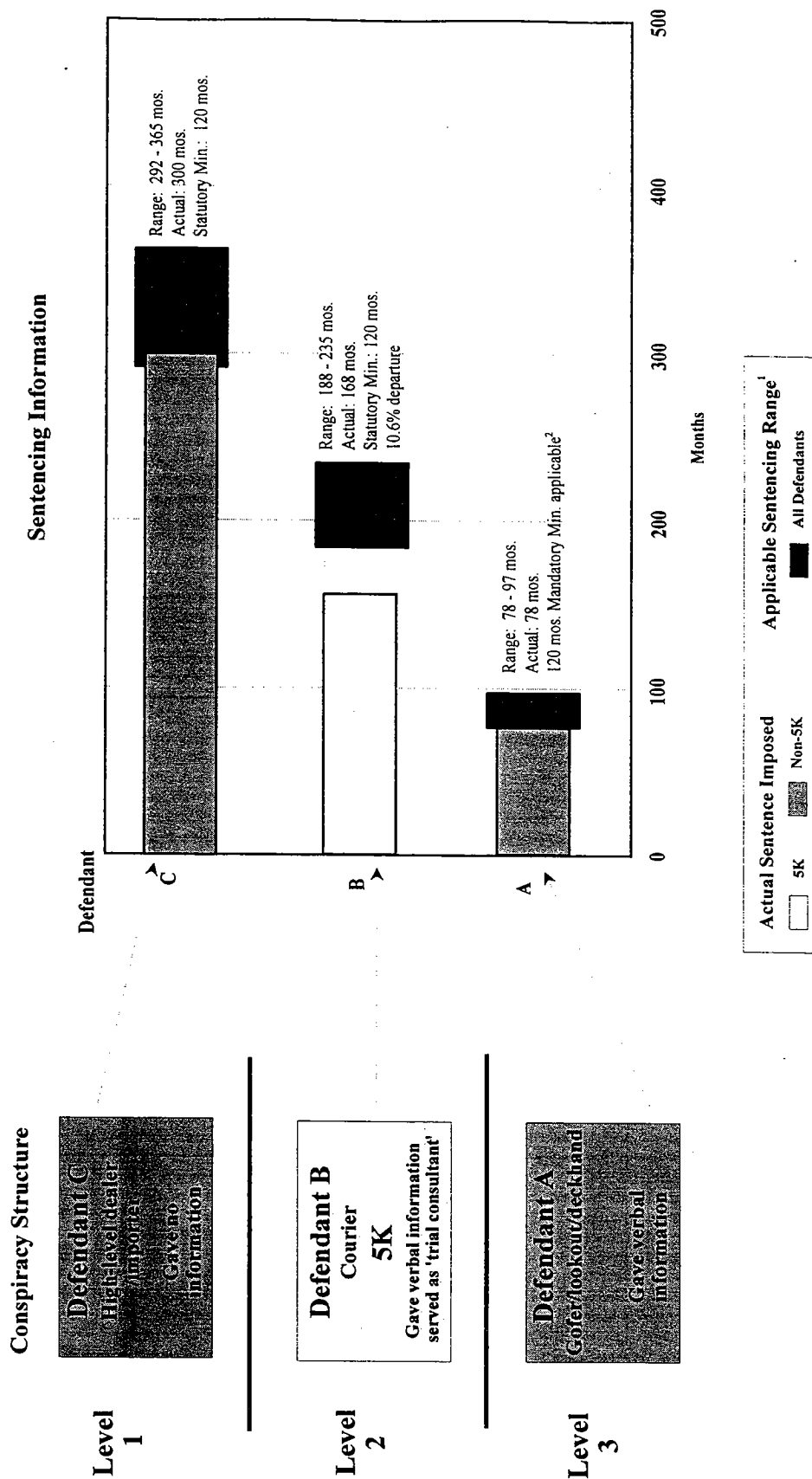
As noted in the preceding discussion, the mere fact of assistance was not always associated with whether a cooperating defendant would receive a substantial assistance reduction. In at least five conspiracies, whether a substantial assistance reduction was made depended on the type of assistance provided relative to other defendants in the conspiracy. For example, a defendant who was known from the case file to have performed undercover work was significantly more likely to receive a substantial assistance reduction than a defendant who was known to have provided only verbal information.

Conspiracy number 2 (Figure 4) provides an example. Defendant A, a gofer, provided verbal information to authorities. Defendant B provided both verbal information and served as a "trial consultant" at the trial of Defendant C, a high-level dealer, who apparently did not cooperate. Only Defendant B received a substantial assistance reduction due, the court noted, "to the exceptional cooperation working as 'trial consultant' to government during co-defendant's trial." Defendant A, despite his cooperation, received no substantial assistance reduction. (Although he did plead in a superseding indictment to a money laundering count that released him from a 10-year mandatory minimum and may be related to his low-level function in the conspiracy.)

Consistent with this, in every conspiracy reviewed, a defendant that: (1) conducted an undercover purchase or sale, (2) engaged in a monitored transaction (typically a phone call), or (3) testified truthfully at trial received a substantial assistance reduction. Further, while many defendants who merely provided verbal information or agreed to testify (as opposed to actually testifying) received a substantial assistance reduction, at least half did not.

Similarly, when a defendant was known to have cooperated against a person about whom the government had no prior information, the defendant was significantly more likely to receive a substantial assistance reduction. Specifically, over 70 percent of the 26 defendants known to have provided such information received substantial assistance reductions, compared with less than 40 percent of the 61 defendants known not to have provided such information. These figures were consistent regardless of the type or size of conspiracy.

Figure 4
Defendant Provided 'Extra' Assistance



Conspiracy No. 2
California, Central
Drugs: Powder Cocaine

¹ Includes statutory mandatory minimum trumps if applicable.

² Facts of the case appeared to warrant a mandatory minimum, which was not applied at sentencing.

SOURCE: U.S. Sentencing Commission, 1995 Codefendant Datafile, SUBCON95.

Lack of Truthfulness or Incomplete Cooperation

Defendants whose cooperation lacked truthfulness (*i.e.*, the defendant gave false information) typically did not receive substantial assistance departures even though they provided some truthful assistance.

Thus, in the four conspiracies in which a defendant was known to have provided false information, even after cooperating truthfully with the government, the defendant did not receive a substantial assistance reduction, while truthful codefendants providing comparable or less assistance did.

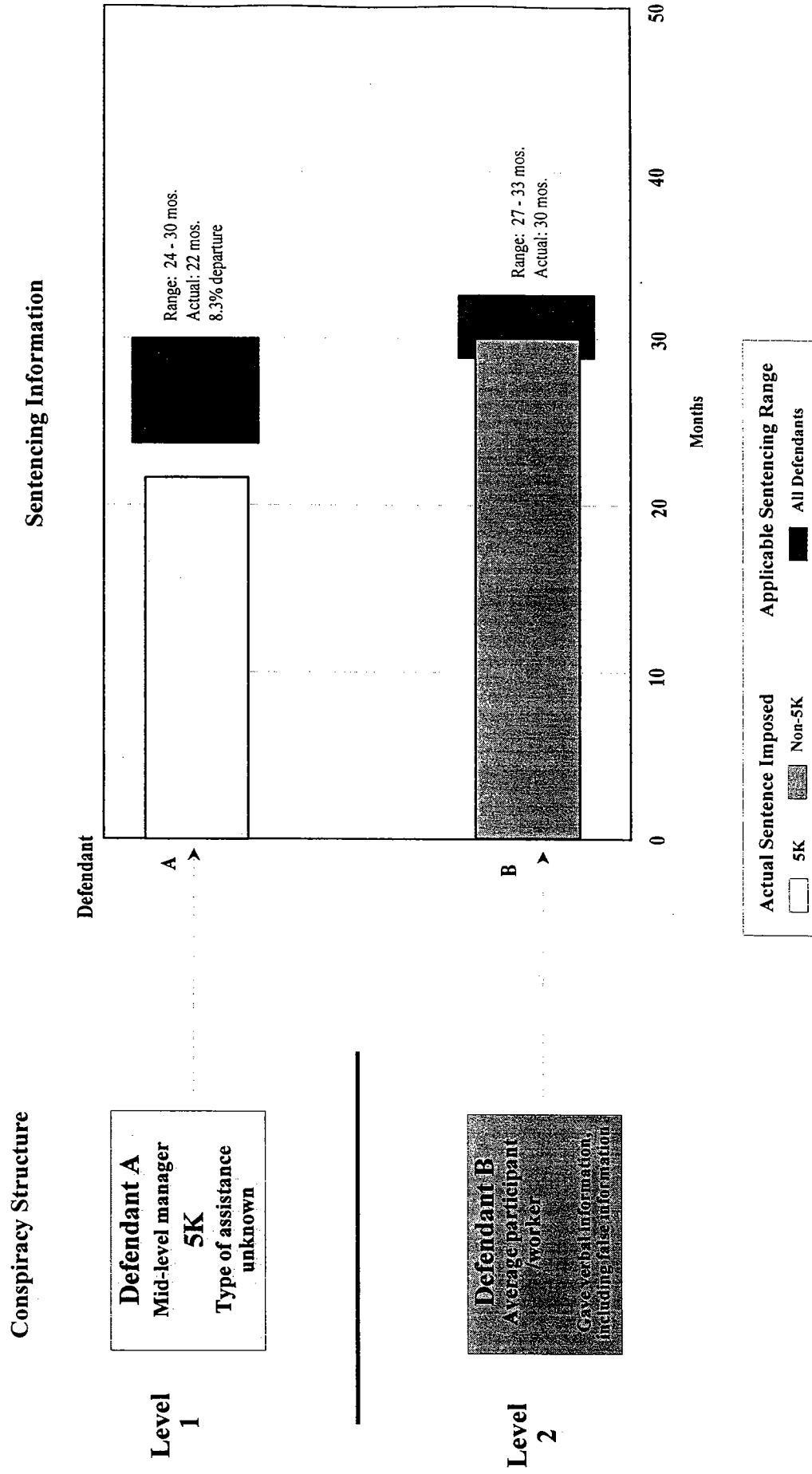
For example, in conspiracy number 12 (Figure 5), Defendant B initially cooperated with investigators and entered into a plea agreement regarding a possible substantial assistance motion. However, the government later filed a motion to vacate the plea agreement because it believed that the defendant withheld and provided false information. At the same time, Defendant A, whose cooperation was not known because the plea agreement was sealed, did receive a substantial assistance reduction.

A corollary situation exists when the defendant provides incomplete cooperation. It was difficult for the project to determine with certainty whether the extent or fullness of a defendant's cooperation (*i.e.*, whether the defendant provided all the information or assistance available to that defendant) was associated with the receipt or extent of a substantial assistance reduction; in only the rare case was information regarding the extent or fullness of assistance specified in the case file. However, when the case file did provide information regarding incomplete testimony, such incompleteness apparently led the government to refuse to make a substantial assistance motion.

For example, in conspiracy number 15 (Figure 6), Defendant C made proffers to the government regarding his involvement in an arson offense. The FBI later asked the defendant to accept responsibility for his involvement in an unrelated state murder case. The defendant did not do so, and the government moved for an upward departure (which was not granted by the court) based on under-representative criminal history.

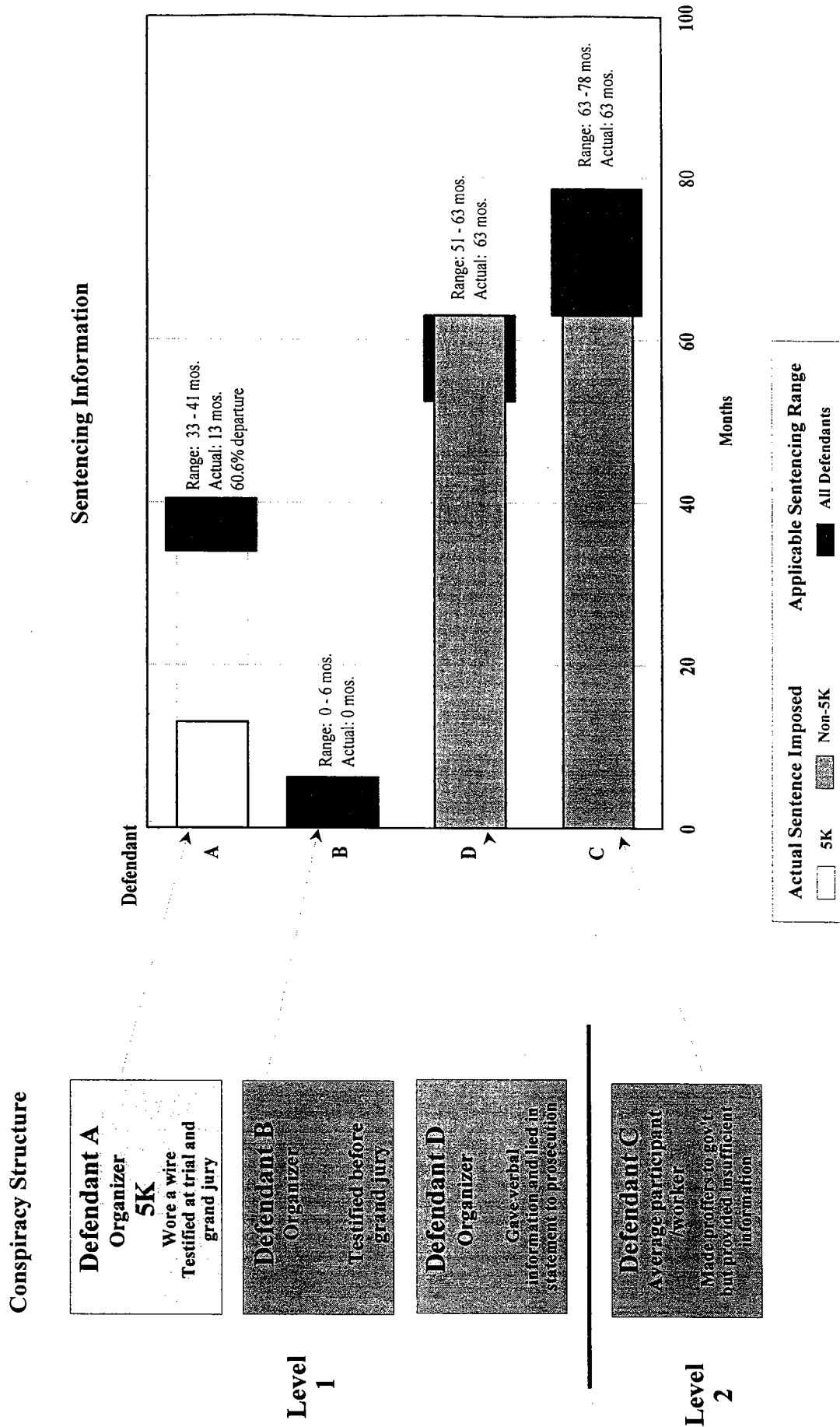
Although this chapter did not examine the effect of a defendant going to trial on whether the defendant received a substantial assistance reduction, aggregate statistics for FY 1994 show that only 1.9 percent of defendants convicted at trial received a \$5K1.1 reduction, compared to 21.3 percent of defendants convicted following a guilty plea, a difference statistically significant at the 0.001 level.

Figure 5
Lack of Truthfulness



Conspiracy No. 12
Georgia, Middle
Embezzlement

Figure 6
Defendant Provided 'Insufficient' Information



Conspiracy No. 15
Illinois, Northern
Arson

C. Other Factors Associated with Substantial Assistance Reduction

We have noted that other factors may influence whether a defendant receives a substantial assistance reduction. The following is a discussion of other factors associated with the reduction.

Defendant's Function in the Conspiracy

Whether a defendant had a particularly low-level function (*e.g.*, as a passive participant or periodic worker) or high-level function (*e.g.*, head of a significant drug-importing or other criminal organization) in the conspiracy appeared to some degree to influence whether a defendant received a substantial assistance reduction.

Each defendant in the sample was reviewed to determine that defendant's most predominant function. In drug conspiracies, each defendant was identified as having one of 16 functions (*e.g.*, high-level dealer, street-level dealer, courier, low-level employee). In non-drug conspiracies, each defendant was identified as having one of four functions (*i.e.*, organizer/leader, mid-level manager, average participant/worker, low-level participant/gofer). (See Appendix E-1 for the case review instrument and the instruction manual, which describe the functions in greater detail.) Table 11 displays §5K1.1 departure rates by function for drug and non-drug conspiracies.

(1) Drug Conspiracies

Among defendants in drug conspiracies, participants whose predominant function was passive (*e.g.*, enabler or renter/storer) received substantial assistance reductions at significantly higher rates than other participants. Broker-intermediaries and mid-level dealers (selling to dealers) received substantial assistance reductions at rates greater than the 34.5 percent average for all defendants in the drug conspiracies. On the other hand, high-level dealers or leaders of significant drug organizations and street-level dealers (selling to users) were the least likely to receive the reduction.

In several of the conspiracies reviewed, these trends were confirmed when low-level players who did not provide cooperation comparable to that of codefendants, nevertheless, would receive a substantial assistance reduction, apparently on the basis of a limited function in the offense. This factor, however, was not always reliably determined, as it may overlap with other factors, including statutory and guideline considerations and, more typically, other personal characteristics that may elicit sympathy from the government or the court.

For example, in conspiracy number 9 (Figure 7), all nine defendants received a substantial assistance reduction. However, assistance apparently was provided only by the higher-level defendants in the conspiracy, Defendants A, D, and E (all mid-level dealers), and presumably by an offloader in the offense, Defendant F, who was subjected to threats as a result of his otherwise unspecified cooperation.

TABLE 11

**SUBSTANTIAL ASSISTANCE DEPARTURE RATE BY
FUNCTION IN CONSPIRACY
Drug Conspiracies¹**

<u>FUNCTION</u>	<u>Total</u>	Substantial Assistance Departures	
		<u>Number</u>	<u>Percent</u>
TOTAL	250	88	36.0
High-Level	18	4	22.2
Mid-Level	71	29	40.8
Street-Level	64	14	21.9
Broker	14	6	42.9
Low-Level	54	17	31.5
Passive	29	18	62.1

¹Of the 264 defendants involved in drug conspiracies, 14 were excluded due to either missing function (9) or missing departure information (5).

SOURCE: U.S. Sentencing Commission, 1995 Conspiracy Data File.

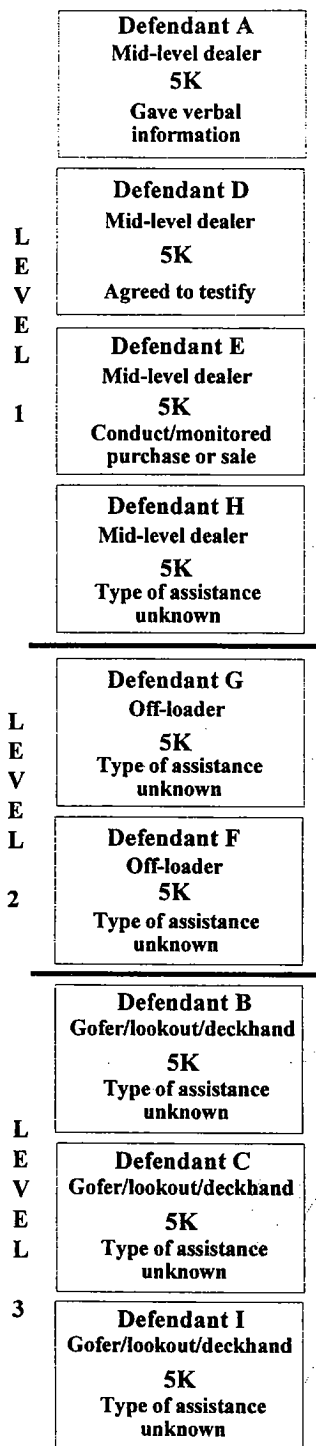
**SUBSTANTIAL ASSISTANCE DEPARTURE RATE BY
FUNCTION IN CONSPIRACY
Non-Drug Conspiracies¹**

<u>FUNCTION</u>	<u>Total</u>	Substantial Assistance Departures	
		<u>Number</u>	<u>Percent</u>
TOTAL	59	31	52.5
Organizer/Leader	16	8	50.0
Mid-Level Manager	8	5	62.5
Average Participant/Worker	31	16	51.6
Low-Level Participant/Gofer	4	2	50.0

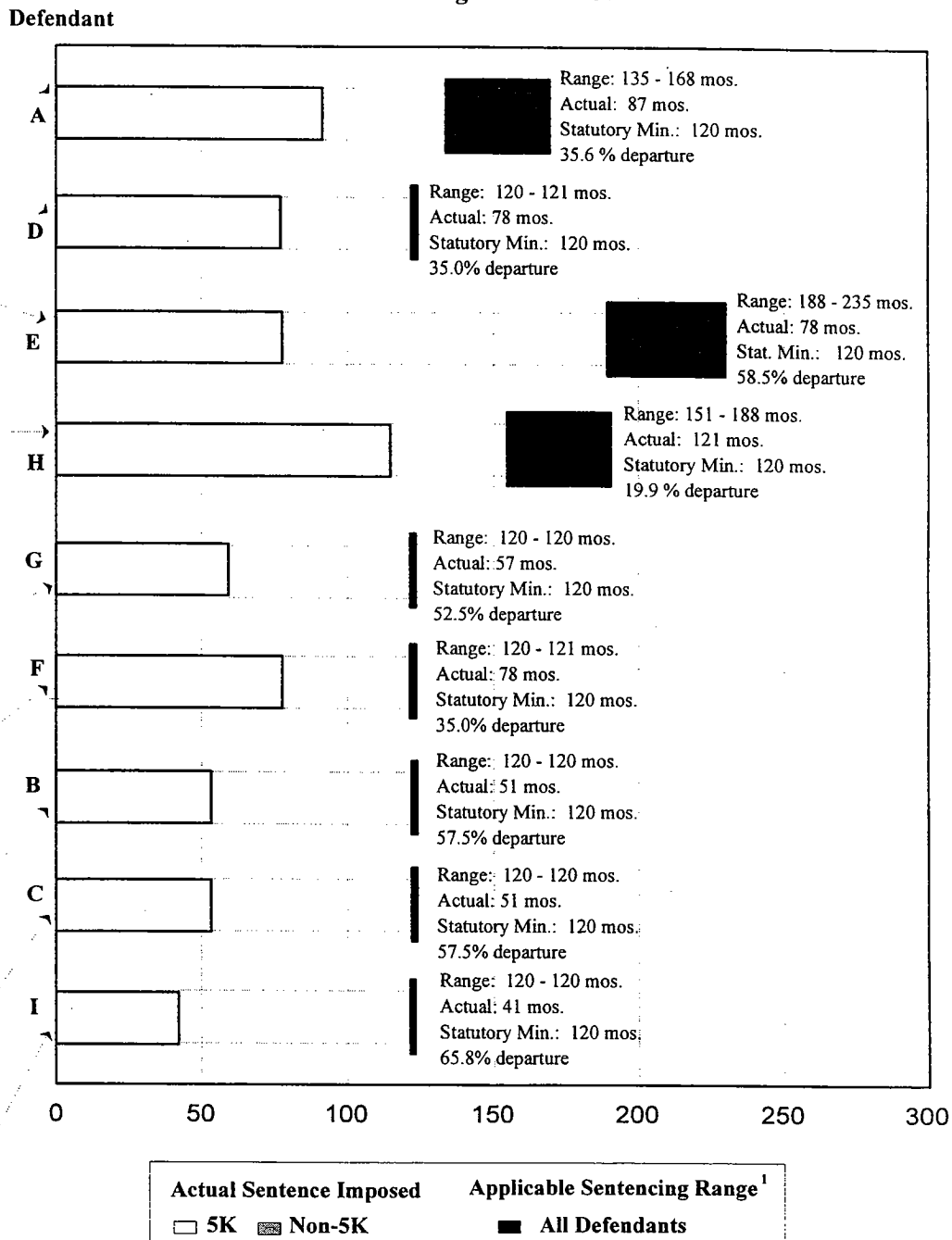
¹SOURCE: U.S. Sentencing Commission, 1995 Conspiracy Data File.

Figure 7
Low-Level Function

Conspiracy Structure



Sentencing Information



Conspiracy No. 9
Florida, Middle
Drugs: Powder Cocaine

¹ Includes statutory mandatory minimum trumps if applicable.

The other defendants, who apparently did not cooperate but who were low-level gofers or offloaders, nevertheless received substantial assistance reductions. Indeed, three of the four lower-level defendants received significantly lower sentences (41 or 51 months) than the more culpable defendants who cooperated (78, 87, and 121 months).

It is less clear whether, in an additional limited number of conspiracies, a defendant who provided cooperation comparable to or greater than that of codefendants, nevertheless, did not receive a substantial assistance reduction, apparently on the basis of the heightened function of the defendant in the offense.

(2) Non-drug Conspiracies

In non-drug offenses, 52.5 percent of all defendants received substantial assistance reductions. When considering their predominant function, mid-level defendants were the only group to receive the reduction more frequently than other groups.

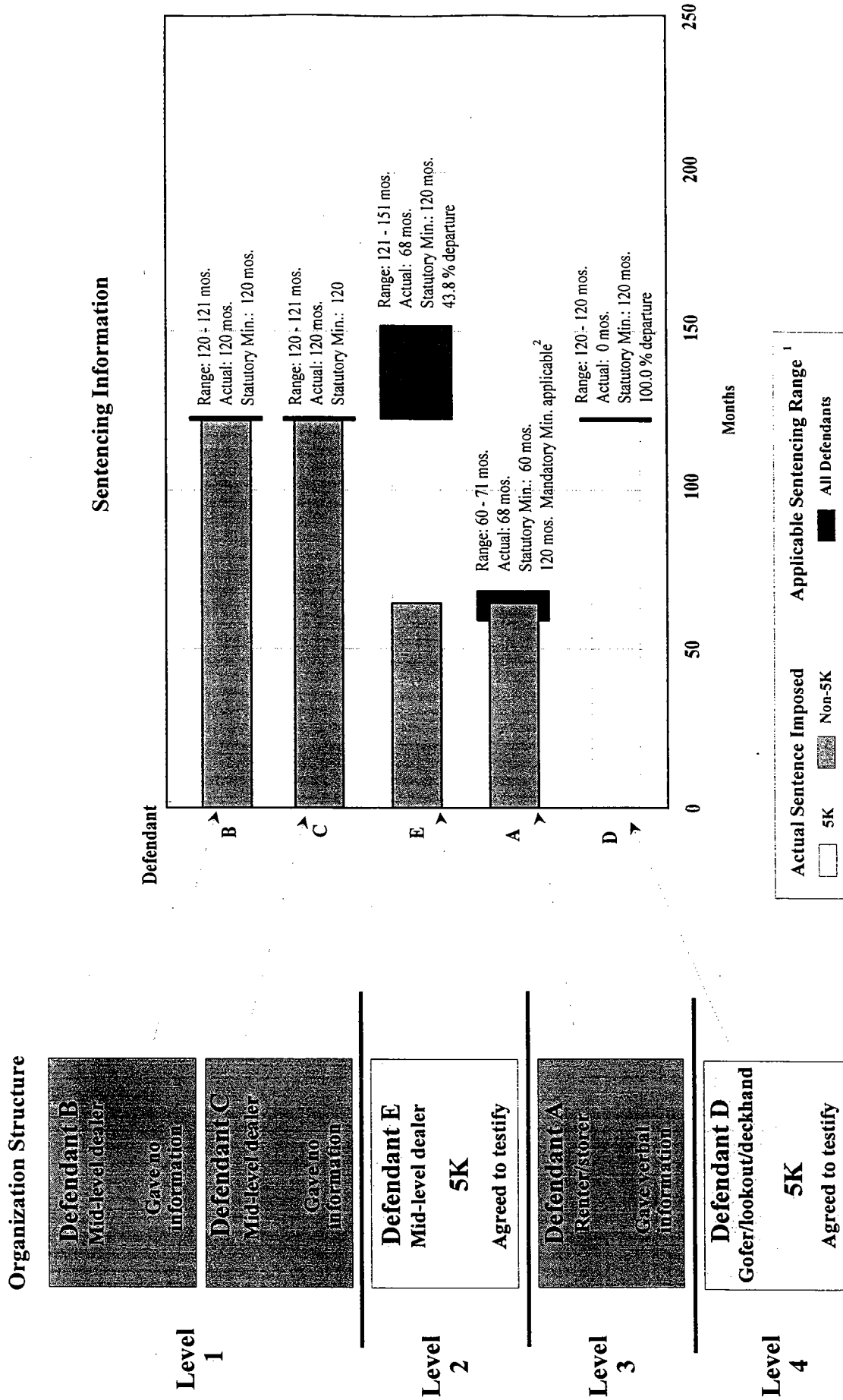
Defendant Not Convicted of Mandatory Minimum

In several conspiracies, a defendant who provided substantial assistance comparable to or greater than that provided by codefendants did not receive a substantial assistance reduction. However, that defendant was convicted of an offense that either carried no mandatory minimum or carried a significantly lower mandatory minimum than could have applied to the defendant. In such conspiracies, codefendants who received a substantial assistance reduction generally did not receive the same benefit of a reduced mandatory minimum.

Defendants in these conspiracies either were sentenced pursuant to a lower section 841 mandatory minimum than might have applied (e.g., 21 U.S.C. § 841(b)(1)(B)) or were convicted of a firearm or drug offense that carried no mandatory minimum (e.g., 21 U.S.C. § 856 (making available a drug establishment)). As a consequence, the defendant's statutory and guideline exposure may have been limited. This plea situation might have obviated the need for a substantial assistance motion by the government.

For example, in conspiracy number 25 (Figure 8), Defendant A provided verbal assistance to investigators regarding the activities of two mid-level dealers. Defendant A, although originally charged with a count carrying a 120-month mandatory minimum, had this count dropped and pleaded instead to a count with a 60-month minimum and received a sentence of 68 months but no substantial assistance reduction. At the same time, Defendants D and E provided verbal assistance (perhaps even to a lesser degree), but remained subject to a 120-month mandatory minimum. They received substantial assistance reductions to probation (for the lower-level Defendant D) and 68 months (for the mid-level dealer Defendant E).

Figure 8
Defendant Not Convicted of Mandatory Minimum



Conspiracy No. 25
New Jersey
Drugs: Powder Cocaine

¹ Includes statutory mandatory minimum trumps if applicable.
² Facts of the case appeared to warrant a mandatory minimum, which was not applied at sentencing.
 SOURCE: U.S. Sentencing Commission, 1995 Codefendant Datafile, SUBCON95.

Note that in a situation such as that facing Defendant A, the threat of a mandatory minimum and the offering of assistance may interact in at least two ways. For example, the promise of a substantial assistance reduction following the charging of a mandatory minimum count may induce cooperation. Conversely, cooperation, particularly timely cooperation, may result in a mandatory minimum count not being charged.

Defendant Convicted of Offense With Lower Statutory Maximum

In several conspiracies, a defendant who provided substantial assistance comparable to or greater than that provided by codefendants did not receive a substantial assistance reduction. These defendants, however, pleaded guilty to an offense with a significantly lower statutory maximum than that with which they were or could have been charged. As a consequence, the defendant's statutory (both maximum and minimum) exposure was limited and, of equal importance, the defendant's guideline exposure also might have been limited. This plea situation theoretically might have obviated the need for a substantial assistance motion by the government. (See the discussion in the preceding section.)

For example, in conspiracy number 21 (Figure 9), Defendants A and B, who assisted in laundering a conspiracy leader's drug proceeds, provided extensive verbal information regarding the drug activities of two mid-level participants in the offense but did not receive a substantial assistance reduction. However, Defendants A and B were not convicted of drug trafficking offenses as were their codefendants. Instead, both defendants were convicted of conspiring to defraud the United States in violation of the tax code, under 18 U.S.C. § 371 (statutory maximum of 60 months), and were sentenced under the tax guidelines to two months' imprisonment.

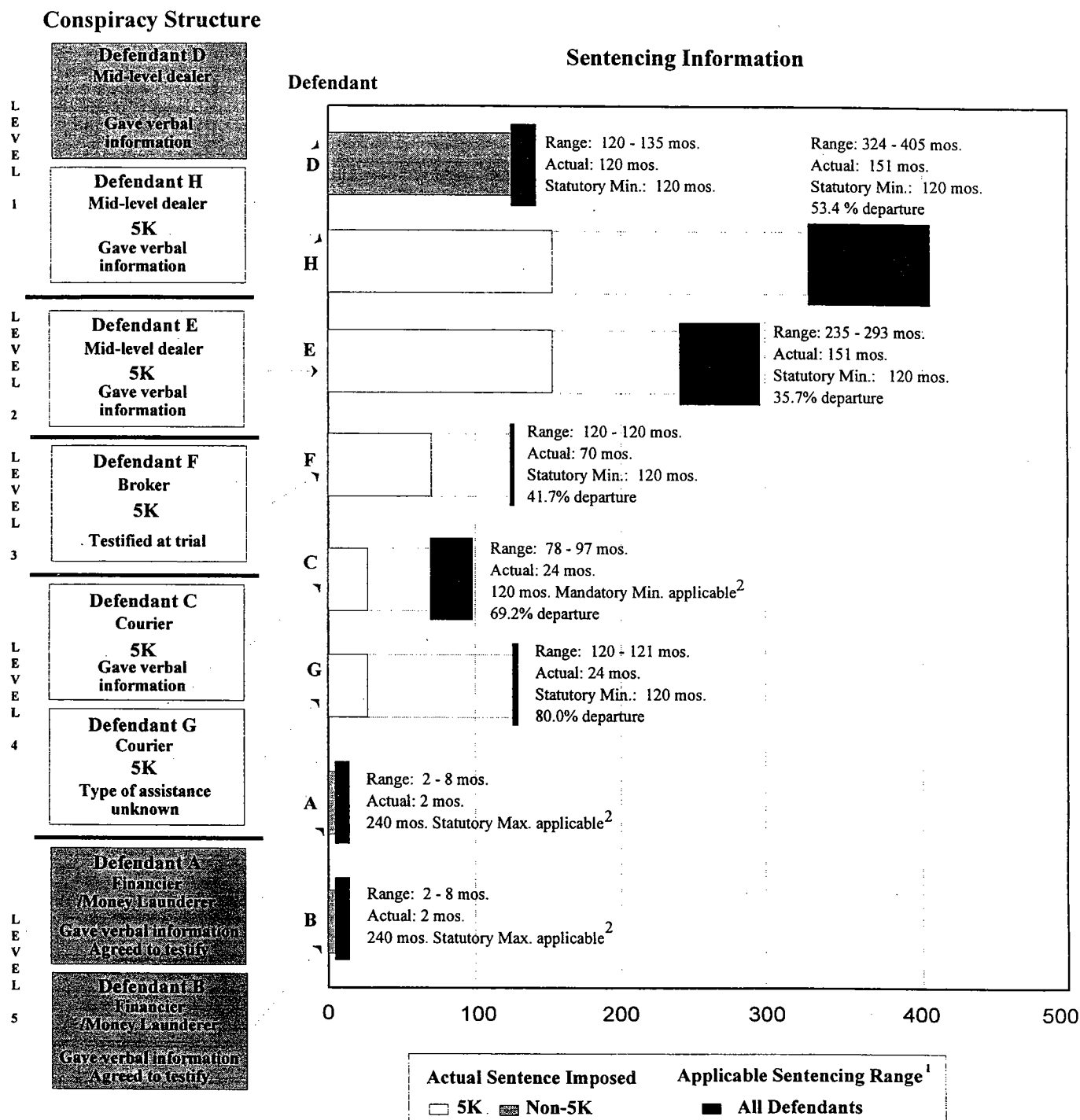
This association between defendants who receive lower statutory maximums and, despite their cooperation, do not receive substantial assistance reductions, is supported also in the aggregate. Of the approximately 60 defendants who received a lower statutory maximum, only 32.8 percent received a substantial assistance reduction, compared to 39.2 percent of those who did not receive the lower maximum.

Examples of such situations, often involving lesser guideline exposure as well, include conspiracies in which a defendant was convicted of 18 U.S.C. § 4 (Misprision of a Felony with 36-month maximum); 21 U.S.C. § 856 (Renting a Drug Establishment with 240-month maximum), and 18 U.S.C. § 924(c) (Carrying a Firearm in Connection with Another Offense with 60-month mandatory consecutive sentence).

Defendant Received Other Downward Departure

In some conspiracies, a defendant who provided substantial assistance comparable to or greater than that provided by codefendants did not receive a substantial assistance reduction but

Figure 9
Defendant Convicted of Offense with a
Substantially Lower Statutory Maximum



Conspiracy No. 21
Minnesota
Drugs: Powder Cocaine

¹ Includes statutory mandatory minimum trumps if applicable.

² Facts of the case appeared to warrant a mandatory minimum or statutory maximum, which was not applied at sentencing.

received instead a downward departure based on other grounds. These defendants typically possessed some personal or familial characteristic that served as the basis of a downward departure.

For example in conspiracy number 27 (Figure 10), Defendant C provided assistance almost identical to that provided by Defendant B. Defendant B received a substantial assistance reduction. Defendant C did not, but received a downward departure on the basis of her need to care for a young child who recently had been burned.

Other conspiracies involved downward departures on the basis of lack of prior criminal history and battered women's syndrome. However, in only one conspiracy did the court expressly depart downward on both the basis of substantial assistance and the status of the defendant.

This departure situation theoretically might have obviated the need for a substantial assistance motion by the government, at least when the defendant was not subject to a statutory mandatory minimum sentence. There is, of course, information missing with regard to the timing of a decision not to move for a substantial assistance reduction and the decision to make another downward departure.

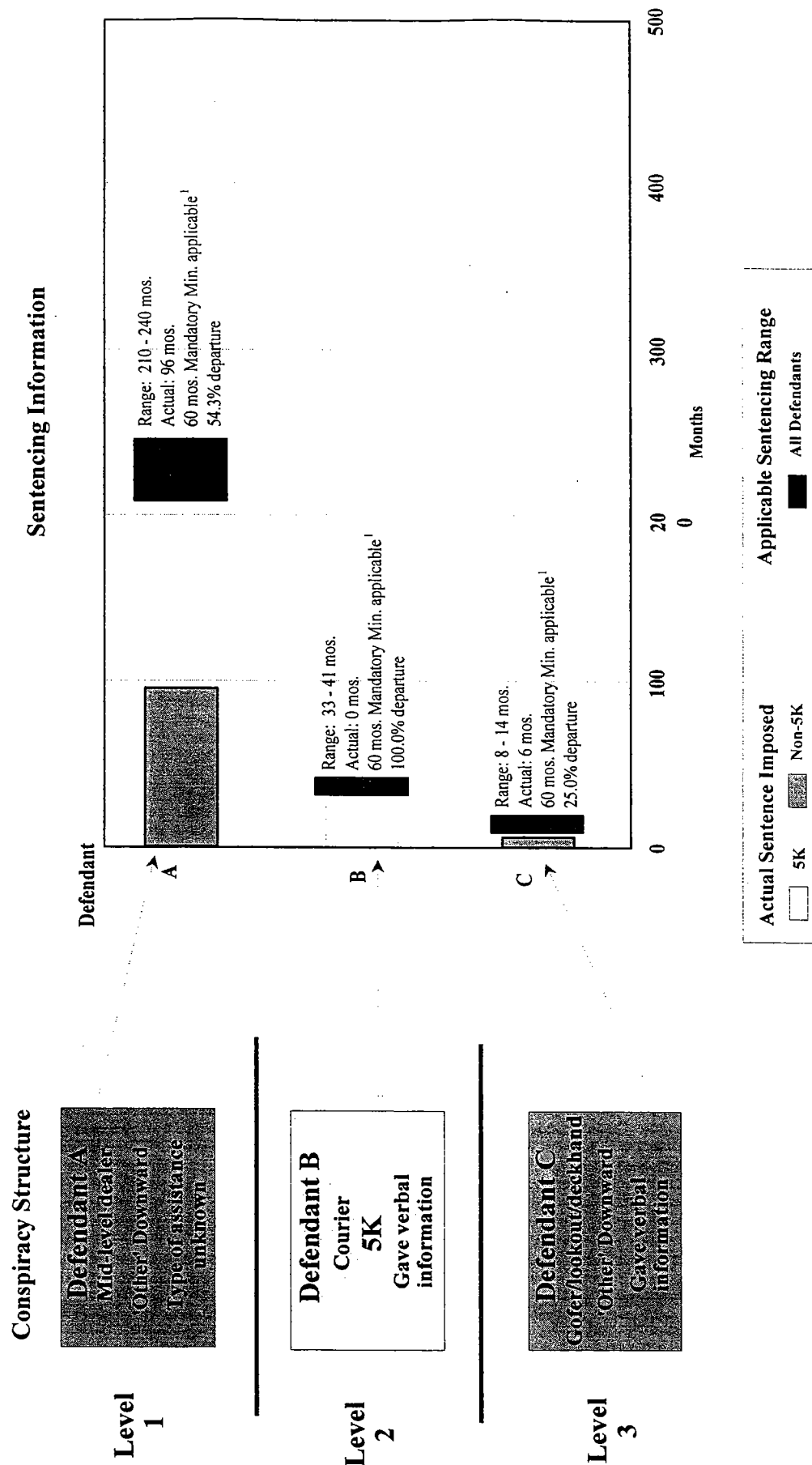
Defendant Convicted of Mandatory Minimum

In several conspiracies, a defendant who provided less assistance than a codefendant but also was convicted of a mandatory minimum statute (e.g., 21 U.S.C. § 841(a)(1)(A) (drug trafficking), 18 U.S.C. § 924(c) (carrying a firearm in connection with another offense)) nevertheless received a substantial assistance reduction. However, in most of these cases, the defendant also had a low-level function in the offense (see the discussion above).

For example, in conspiracy number 25 (Figure 8 presented above), Defendant D was a low-level worker subject to a 120-month mandatory minimum who agreed to testify against his codefendants and provided some verbal information, but generally lacked knowledge as to the scope and structure of the conspiracy. Nevertheless, he received a substantial assistance reduction of 120 months, resulting in a sentence of probation. Defendant E was a mid-level dealer subject to the same 120-month mandatory minimum. He had more information regarding the conspiracy and provided more extensive verbal information and received a substantial assistance reduction of 53 months to a sentence of 68 months. Defendant A, a renter/storer who brokered some deals for the conspiracy, was subject to a lesser, 60-month mandatory minimum and provided verbal information, but did not receive a substantial assistance reduction and also received a 68-month sentence.

Figure 10

Defendant Received 'Other' Downward Departure



Conspiracy No. 27
New Mexico
Drugs: Powder Cocaine

¹ Facts of the case appeared to warrant a mandatory minimum, which was not applied at sentencing.
SOURCE: U.S. Sentencing Commission, 1995 Codefendant Datafile, SUBCON95.

On the aggregate, conspiracy defendants convicted of 21 U.S.C. § 841(a)(1)(A) (120-month mandatory minimum for drug trafficking) received substantial assistance reductions somewhat more frequently (42.1%) than all defendants (37.5%). However, defendants convicted of 18 U.S.C. § 924(c) (60-month mandatory consecutive) received the reduction significantly less frequently (25.0%). Defendants convicted of 21 U.S.C. § 841(a)(1)(B) (60-month mandatory minimum for drug trafficking) received reductions at approximately the same rate (40.0%) as all defendants.

D. Factors Not Associated with Substantial Assistance Reductions

The following factors, for reasons provided below, did not appear to be associated with receiving a substantial assistance reduction.

Defendant's Possession of a Firearm

Whether the defendant carried or directed another person to carry a firearm in connection with an offense did not appear to influence whether a defendant received a reduction for substantial assistance. Specifically, among defendants who carried a firearm or directed another person to carry a firearm, 37.7 percent received a substantial assistance reduction, compared to 37.9 percent of those who did not carry a firearm. This finding held, regardless of the size of the conspiracy or the type of offense (drug or non-drug) in which the conspiracy was involved.

Within individual conspiracies, similar results were found. In most of the conspiracies in which one or more defendants carried a firearm and one or more did not, substantial assistance reductions generally were given to either type of defendant. In only one or two conspiracies did defendants, who carried a firearm and who cooperated at levels comparable with or greater than their codefendants, appear to have been denied a substantial assistance reduction on the basis of their firearm involvement.

Race

The racial background of a defendant (Black, White, Hispanic, or Other, including Native Americans and Asians) did not appear to influence whether a defendant in one of the 21 mixed-race conspiracies received a substantial assistance departure.

Specifically, in only seven of these conspiracies did all members of one race (whether Black, White, or Hispanic) receive a substantial assistance reduction but all, or virtually all, (in a large conspiracy) of the members of the other race did not. However, in these cases there was an apparent legal justification for this result (*e.g.*, all the members of the one race provided cooperation and the members of the other did not).

In only three of the 21 mixed-race conspiracies were substantial assistance reductions given to all members of one race but not to members of the other race in the conspiracy (or, in

one large conspiracy, to only one of eleven members of the other race) with no apparent legal justification for this result. (Note that although no legal justification was apparent, this may result merely from a lack of information in the file.)

Nevertheless, data collected under this review of conspiracies indicated that Blacks received substantial assistance reductions at somewhat greater rates (48.2%) than Whites (36.9%) and Hispanics (33.3%). This was particularly so in drug conspiracies and in mid- and large-size conspiracies, but less in non-drug conspiracies. (For an aggregate analysis of the relationship between race and substantial assistance, *see* Chapter 8.)

Criminal History Category, Gender, and Other Characteristics

The review did not identify with certainty any conspiracy in which it appeared that one or more defendants received a substantial assistance reduction based on their criminal history category, gender, or other personal characteristics (*e.g.*, health, number of dependents, presence of an abusive or coercive relationship) in contrast with other defendants who lacked the same characteristic.

Aggregate data generally support this conclusion. For example, although the rate of substantial assistance departures for women was higher (50.0%) than for men (36.2%), this appeared only to be the case in larger conspiracies and those involving drugs. Similarly, the data regarding criminal history showed no significant variation in the rate of substantial assistance reductions on the basis of criminal history category, and the case review uncovered no examples.

The fact that such characteristics were not identified or identifiable may not be surprising. First, the court generally is barred from taking into account gender (categorically barred by statute) or criminal history (barred from consideration except in the extraordinary situation by case law) when departing downward. Second, even if a court were to rely on either factor in making a downward departure, it is not likely that the case file (including the presentence report, statement of reasons, or sentencing transcript) would disclose such reliance. Moreover, with respect to other personal characteristics, appellate courts and district practices generally accept departures on these grounds and a departure based on substantial assistance would not be necessary. Even if the court enters a substantial assistance departure due to such characteristics being present in order, for example, to sentence below a mandatory minimum statutory sentence, it is likely that the court would state plausible grounds that were primarily or exclusively related to permissible factors.

E. Factors for Which There is Insufficient Information

The working group initially identified several factors that experience, case law, or interviews suggested might be associated with whether a substantial assistance reduction is given. For the various reasons discussed below, the review could not confirm or refute whether the following factors influenced substantial assistance reductions.

Timing of Cooperation

The project could not determine whether the timing of a defendant's cooperation (*i.e.*, whether defendant provided assistance before, after, or at about the same time as codefendants) was associated with the receipt or extent of a substantial assistance reduction.

Information regarding this factor commonly was not provided in the case files—it was known for only 69 of the 323 defendants. When the information was provided, it typically was in connection with other factors already associated with substantial assistance departures (*e.g.*, the fact or type of cooperation). But for cases in which this information was known, defendants who provided information before or at the same time as codefendants appeared more likely to receive a substantial assistance reduction (approximately 70% of the cases) than a defendant who provided information later than codefendants (approximately 20%). This trend prevailed regardless of the size of the conspiracy or the nature of the offense (drug or non-drug).

However, for those cases in which there appeared to be some association between the timing of the cooperation and the reduction, a defendant who cooperated early often did so by going undercover. It is not clear whether the substantial assistance reduction in these instances was given as a reward for the timing of the cooperation or for the risk incurred in performing undercover work. Similarly, the case review shows that some defendants who cooperate after other defendants do not receive substantial assistance reductions.

For example, in conspiracy number 30 (Figure 11), Defendant A cooperated at the time of his arrest and implicated Defendant B who also cooperated upon his arrest. However, only Defendant A received a substantial assistance reduction (and also had the mandatory consecutive 60-month sentence count dropped).

Defendant Inflicted Injury or Death

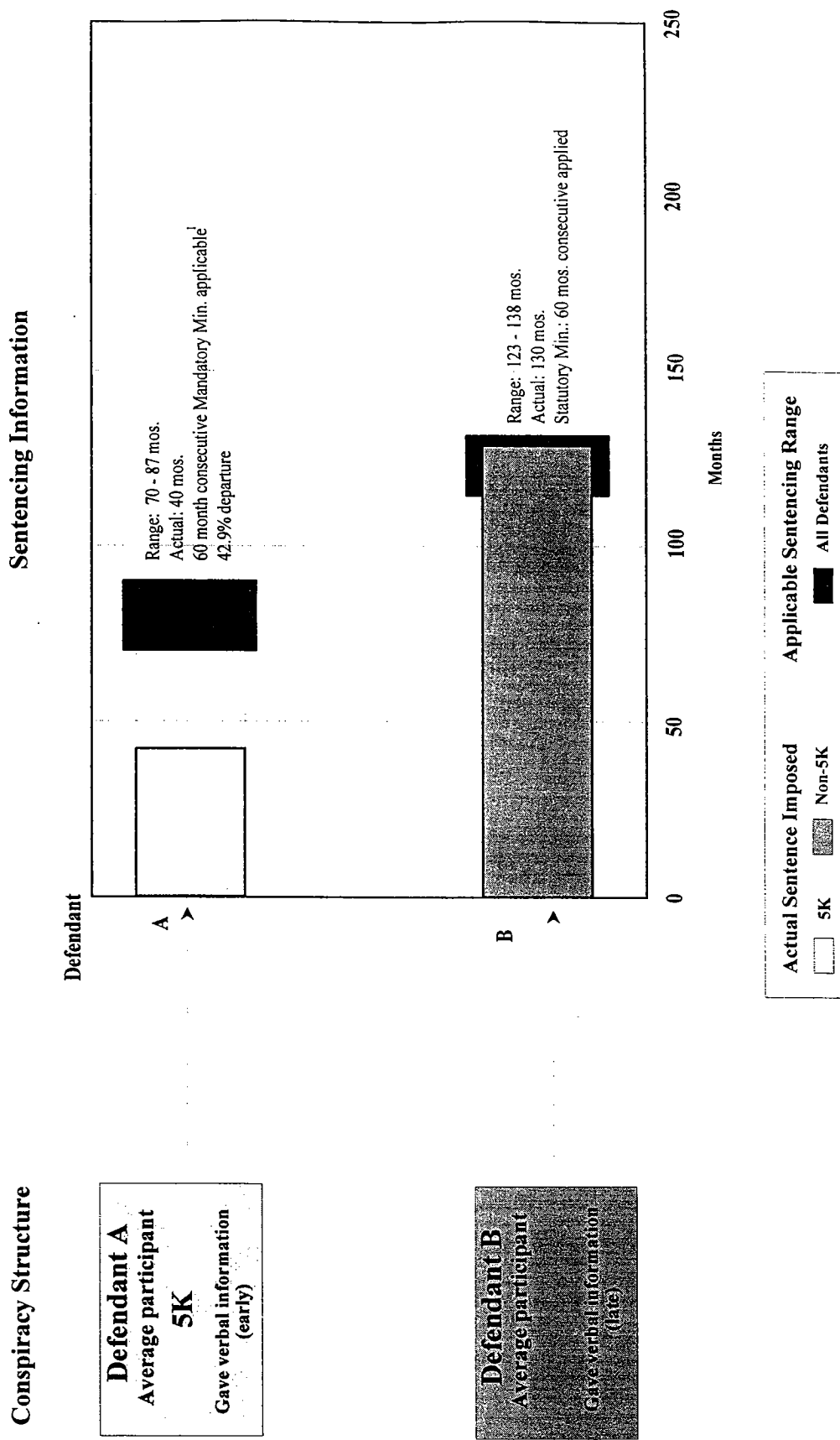
It could not be determined whether the defendant's inflicting death or injury on a victim was associated with the receipt or extent of a substantial assistance reduction because so few cases were available for review.

Very few defendants (only five of the 323, with three of them members of the same conspiracy) were responsible for inflicting injury or death on another person in the offense, including law enforcement or innocent parties. This small percentage was consistent with the findings of other Commission studies that indicate drug offenses rarely involve injury or death to another person in the offense.

F. Factors Associated with the Extent of Substantial Assistance Reduction

In addition to determining the initial question (why certain defendants in a conspiracy receive a substantial assistance reduction and others do not), the project sought to answer a

Figure 11
Defendant Provided 'Early' Cooperation



Conspiracy No. 30
New York, Eastern
Bank Robbery

¹ Facts of the case appeared to warrant a mandatory minimum, which was not applied at sentencing.
 SOURCE: U.S. Sentencing Commission, 1995 Codefendant Datafile, SUBCON95.

second question: Why do some defendants in a conspiracy receive a greater substantial assistance reduction in their sentence than other defendants who also received a substantial assistance reduction?

To determine the extent of the departure (the reduction from the minimum of the final guideline range to the final sentence imposed), the project reviewed the 27 conspiracies in which more than one defendant received a substantial assistance reduction. In 18 of these conspiracies, only two defendants received a substantial assistance reduction; in three conspiracies, three defendants received the reduction; and in the remaining six conspiracies, between five and nine defendants received the reduction. Almost one-third of the conspiracies were not involved with drug offenses.

In 25 of the conspiracies, there was sufficient information in the case files to examine whether a defendant's cooperation, offense conduct, or other guideline or statutory consideration influenced the extent of the reduction. However, an express justification rarely was provided in the district court's statement of reasons. For those few cases in which it was, the unusual extent of cooperation most frequently was cited as influencing the extent of the reduction. For example, in conspiracy number 21 (*see* Figure 9), although all eight defendants provided verbal assistance, the court gave substantial assistance reductions to those who provided unusual assistance. Defendants E and G were noted for having provided information without which the conspiracy could not have been reconstructed.

A review of the case files suggests that, as hypothesized, the defendant's cooperation does influence the extent of the reduction. For example, in four conspiracies, the defendant who provided a greater degree of cooperation (*e.g.*, participated in an undercover buy as opposed to providing verbal information) received a lower sentence than the codefendant. In one conspiracy, the defendant provided extensive verbal information very early in an investigation that ultimately led to the federal convictions of at least 50 additional defendants. This defendant, although of approximately the same or greater culpability than other defendants, received a 75 percent reduction in sentence, as opposed to the 25 percent reduction applied to the other five cooperating defendants.

In at least four additional conspiracies, a defendant who provided a level of cooperation comparable to that of a codefendant (*e.g.*, both agreed to testify or both engaged in undercover transactions) received either a final sentence comparable to that of a codefendant or comparable reductions from their respective adjusted guideline ranges. For example, in one conspiracy, although one defendant was significantly more culpable than the other and had a greater adjusted guideline range, both defendants received similar 50 percent reductions in their sentences after both provided verbal information.

Although the level of cooperation may influence the extent of the departure, the degree of culpability of the defendant (*i.e.*, the defendant's function and overall role in the offense whether as a leader or a follower) appeared to influence more frequently the extent of the departure. In 15

conspiracies, the less culpable defendant (*e.g.*, typically a low-level worker or a passive participant) received a lower absolute sentence or a greater reduction in sentence than a more culpable defendant.

For example, in conspiracy number 25 (Figure 8 presented above), two defendants were subject to the same mandatory minimum 120-month sentence and to comparable adjusted guideline range minimums. Both agreed to testify and to make themselves and information at their disposal available to investigators. The first, a low-level worker involved in a single cocaine transaction and with limited knowledge of the operation of a cocaine conspiracy, received a 100-percent reduction in sentence to probation. The second, however, one of two mid-level dealers in the conspiracy and the right-hand man to the conspiracy organizer, received only a 44-percent reduction in sentence to 68 months.

In an additional four conspiracies, defendants equally culpable as their codefendants received a sentence comparable to those of the codefendants. For example, in one of the conspiracies, three mules carrying marijuana across the Mexican border each provided verbal information regarding other codefendants and each received identical 14-month reductions in sentence to a final sentence of 13 months.

In several of the conspiracies discussed above, including the latter, both the defendant's level of cooperation and culpability may have influenced the reduction in sentence. Finally, in relatively few conspiracies, neither the culpability nor the defendant's level of cooperation appeared to influence the extent of the departure.

G. Sentence Proportionality and Substantial Assistance Departures

Approach

The final question considered in this review was: Do substantial assistance reductions alter the relative proportionality between culpability and punishment for all defendants sentenced in the same conspiracy? Does the receipt of a substantial assistance reduction result in a defendant receiving a lower sentence than a codefendant when the defendant's culpability or function in the conspiracy might otherwise have resulted in a higher sentence than that of the codefendant? If so, regardless of whether the substantial assistance reduction is merited or not, in some conspiracies it will result in non-cooperating defendants receiving higher sentences than a more culpable or higher-function cooperating defendant in the conspiracy (and vice versa).

It is obvious that the absolute length of sentences in a conspiracy will be changed for defendants receiving a substantial assistance reduction. What is not clear is whether receipt of a substantial assistance reduction also will alter the relative order or position of sentences for all the defendants in the conspiracy. For example, members of the same conspiracy, Defendants A and B, receive guideline range minimums of 63 months and 27 months respectively, reflecting

their relative culpability. Defendant A cooperates and receives a substantial assistance reduction to 50 months, while Defendant B, who does not cooperate, is sentenced to the 27-month minimum of his applicable guideline range. In view of Defendant A's substantial assistance reduction, his absolute sentence has changed, but the relative order of penalties between him and Defendant B did not: Defendant A's 50-month sentence is still higher than Defendant B's 27-month sentence. However, if Defendant A were to receive a 13-month sentence following a departure, compared to Defendant B's 27-month sentence, the relative order of their sentences also would change in relation to their culpability.

To examine this question, the study compared (1) the order of final sentences imposed for each defendant in a conspiracy with (2) the order of each defendant's respective guideline range minimum (a proxy for culpability). If the relative position did not change (*i.e.*, Defendant A's guideline minimum range was higher than Defendant B's, as was Defendant A's final sentence despite Defendant A's receipt of a substantial assistance reduction), the fact that Defendant A received a substantial assistance reduction did not result in a more culpable defendant receiving a lower sentence than a less culpable defendant.¹¹³

Note that the determination of a proxy for culpability was, in some conspiracies, complicated because some defendants had two minimums that were used for comparison: the minimum of the final guideline range as determined before and after application of any relevant statutory mandatory minimum. These minimums represented the guideline and statutory approximation of the defendant's culpability in the offense, including the defendant's offense conduct, role in the offense, and criminal history. In such cases, we examined both minimums as proxies. Finally, note that these minimums are only rough proxies for culpability as they may vary according to the offense of conviction (*see*, for example, conspiracy number 41 below).

Results

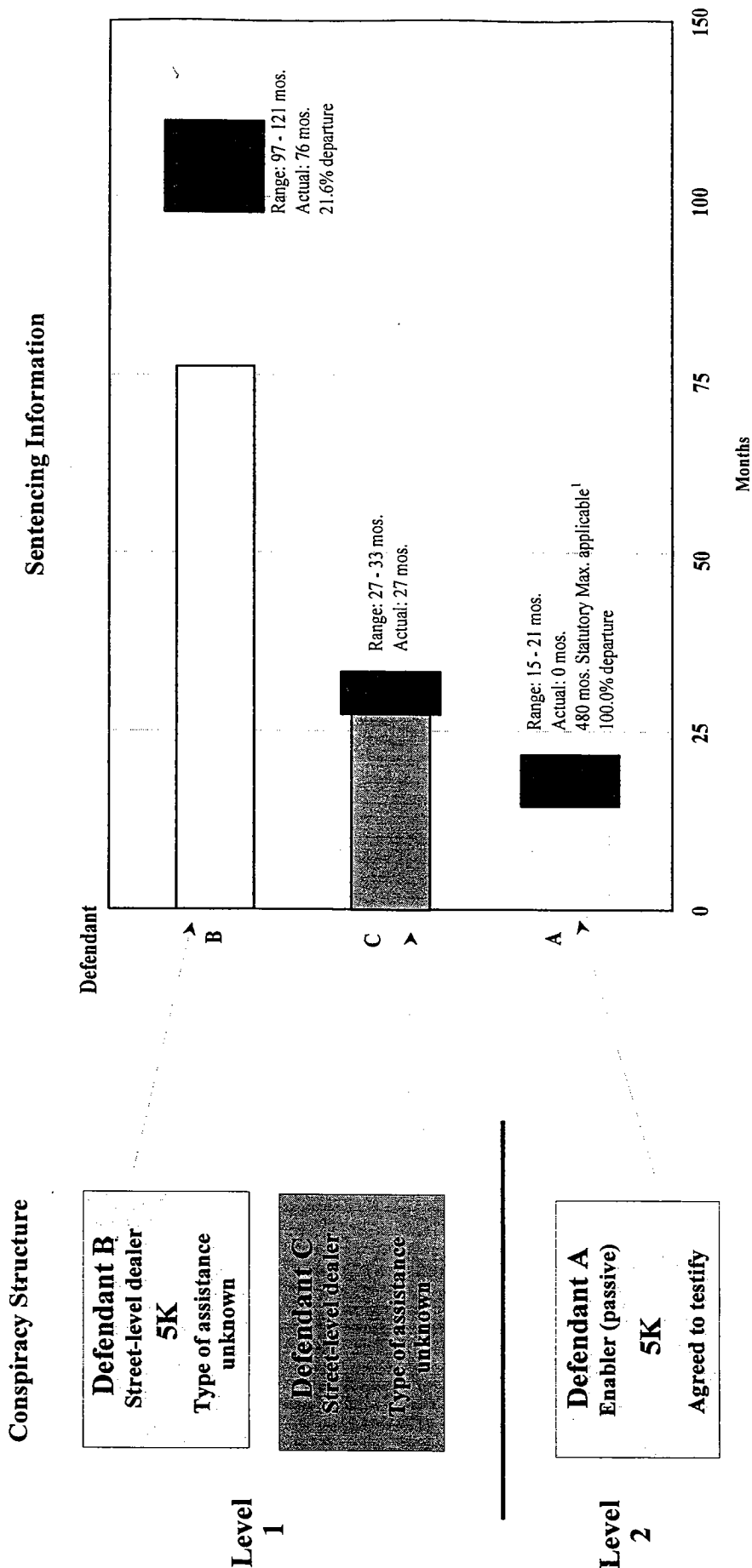
In 21 conspiracies (almost one-third of the conspiracies), the relative positions of the final sentences were identical to those of the guideline minimums. Consequently, the receipt by one or more defendants of a substantial assistance reduction did not alter the relative positions of sentences imposed on the defendants. Thus, in these conspiracies, regardless of the fact or type of assistance provided by defendants and the resultant substantial assistance reductions, no defendant who was more culpable received a lower sentence than less culpable codefendants. (However, note that in five of these conspiracies, all defendants received a substantial assistance reduction, suggesting that the role of culpability in changing the relative positions of final sentences may have been reduced.)

For example, in conspiracy number 41 (Figure 12), Defendant A was a crack addict who allowed Defendants B and C, both street-level dealers, to distribute a total of 38 grams of crack from her apartment. Defendant A's guideline minimum

¹¹³In three conspiracies, there was insufficient information to make any comparisons.

Figure 12

Substantial Assistance Reduction Has No Impact on Position of Sentences



Conspiracy No. 41
Ohio, Southern
Drugs: Heroin

¹ Facts of the case appeared to warrant a statutory maximum, which was not applied at sentencing.
SOURCE: U.S. Sentencing Commission, 1995 Codefendant Datafile, SUBCON95.

range was 15 months, but after providing information about her co-defendants' drug-related activities, she received a reduction to a three-month sentence. Defendant B's guideline range minimum was 97 months, which was reduced to 76 months following a substantial assistance reduction. Defendant C's guideline minimum range and sentence were 27 months. Thus, despite the substantial assistance reductions, the more culpable defendants (as identified by the relative guideline range minimums) received higher sentences than the less culpable defendants.

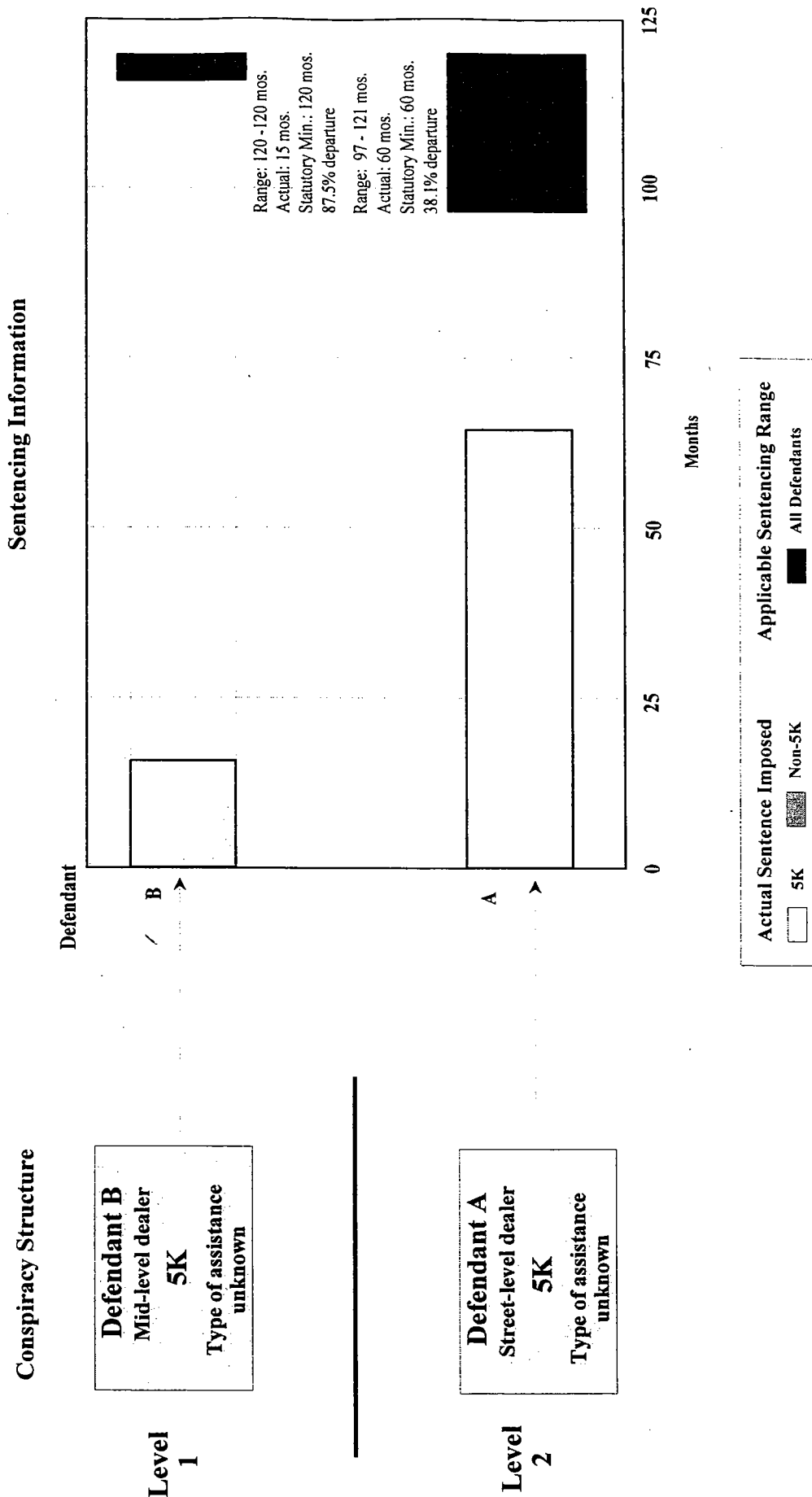
In an additional seven conspiracies, the relative positions of the final sentences differed from the relative positions of the minimums as determined by mandatory statutory minimums, but did not differ from the relative minimums as determined by the final guideline range before it was "trumped" by the statutory minimum. In these cases, receipt by one or more defendants of a substantial assistance reduction altered the relative positions of the sentences imposed to reflect the relative culpability as determined by the guidelines but not by the statute.

For example, in conspiracy number 39 (Figure 13), Defendant A, a mid-level dealer, was less culpable than Defendant B, also a mid-level dealer, who served as Defendant A's source of supply. Defendant A, moreover, cooperated with authorities upon his arrest, placed a call to his supplier (previously unknown to authorities), and met with the supplier in a monitored transaction. Defendant A, however, was subject to a 120-month statutory mandatory minimum and a 57-month guideline range minimum, while Defendant B was subject only to a 97-month guideline range minimum. Following substantial assistance reductions given both defendants, however, Defendant A received a final sentence of 15 months and Defendant B one of 60 months.

In 19 conspiracies, the relative final sentences differed from the relative minimums as determined by the guideline and statutory minimums. In each of these conspiracies, the provision of assistance by one or more defendants who received a substantial assistance reduction apparently was responsible for altering the relative order of sentences imposed on the defendants.

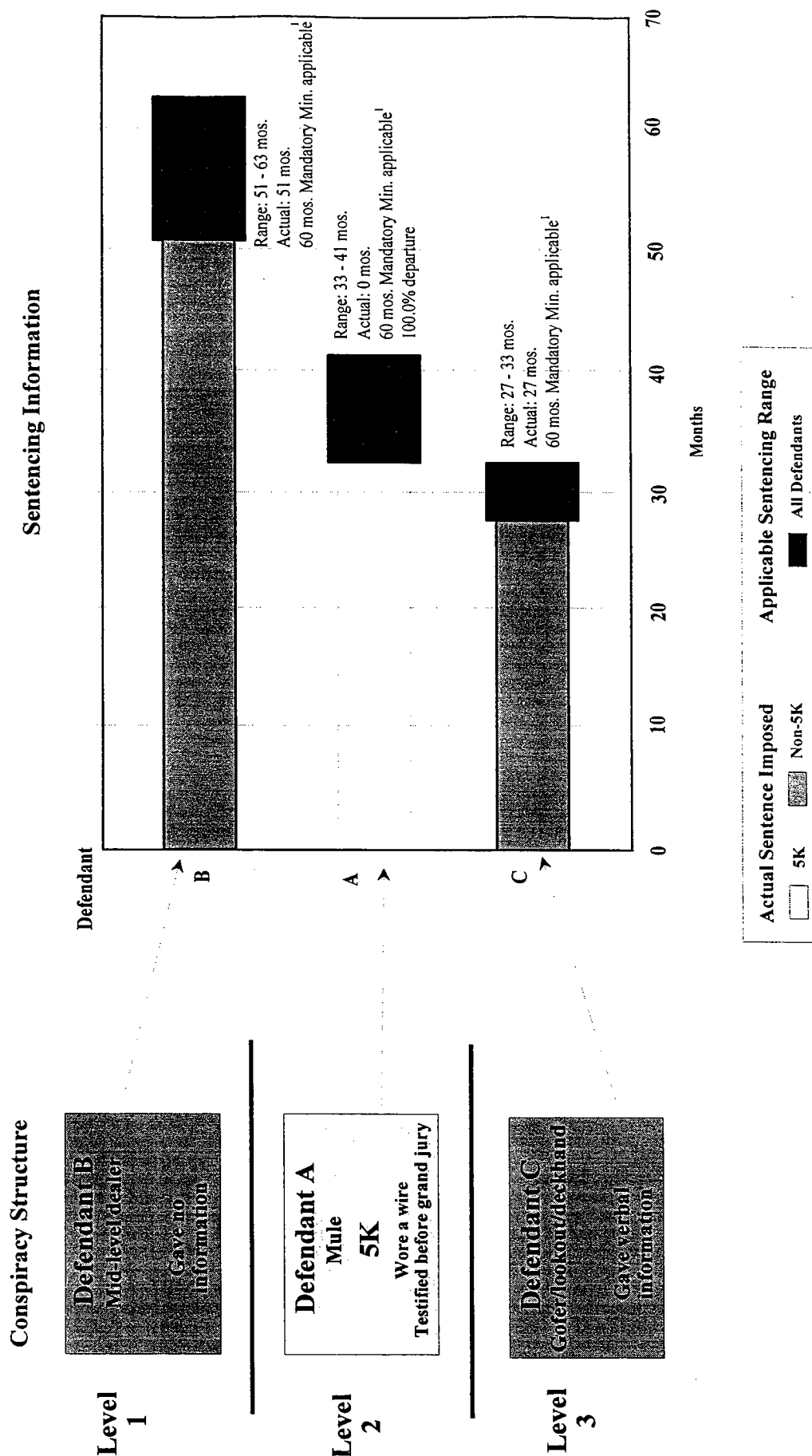
For example, in conspiracy number 51 (Figure 14), Defendant B was responsible for obtaining cocaine to be transported by courier and later distributed. He managed the conduct of Defendant A, who carried the cocaine from Venezuela to Defendant B. Defendant C, a minimal participant, drove Defendant B when he picked up the delivery from the courier. The guideline range minimums for Defendants A through C were 33 months, 51 months, and 27 months, respectively. However, following a substantial assistance reduction for Defendant A, who conducted a controlled delivery of cocaine to Defendant B, the final sentences were probation, 51 months, and 27 months, respectively.

Figure 13
Substantial Assistance Reduction Has Mixed Impact
on Position of Sentences



Conspiracy No. 39
North Carolina, Western
Drugs: LSD

Figure 14
Substantial Assistance Reduction Has Impact
on Position of Sentences



Conspiracy No. 51
Puerto Rico
Drugs: Powder Cocaine

¹ Facts of the case appeared to warrant a mandatory minimum, which was not applied at sentencing.
 SOURCE: U.S. Sentencing Commission, 1995 Codefendant Datafile, SUBCON95.

Note that in an additional six conspiracies, the provision of assistance appeared to have a partial but not full responsibility for altering the relative sentences. In these conspiracies, the receipt of a substantial assistance reduction was responsible for changing partially the relative order of sentences for some defendants. In eight other conspiracies, neither the function of the defendant nor the provision of assistance appeared to influence the relative final sentences of the defendants.

IV. CONCLUSIONS

In contrast with previous chapters in this report that have focused on individual cases or districts as the unit of analysis, this chapter focuses on the criminal conspiracy as the unit of analysis. This focus, fundamentally, allows the reviewer to examine all co-defendants in that conspiracy to examine three critical questions and possible answers:

1. Why do some defendants in a conspiracy receive a substantial assistance reduction and others in the conspiracy do not?

Several factors related to the fact and type of cooperation appear to influence whether a substantial assistance reduction was given. The fact of cooperation or assistance by the defendant (*i.e.*, whether the defendant provided any information, regardless of value, about another person to a government authority) is associated with whether the defendant received a substantial assistance reduction.

In addition, whether a substantial assistance reduction is made depends more on the type of cooperation provided relative to other defendants in the conspiracy. However, defendants whose cooperation lacked truthfulness (*i.e.*, the defendant gave false information) or whose assistance was incomplete often did not receive substantial assistance departures despite having provided other assistance.

Other factors influenced whether a substantial assistance reduction was given. A defendant who had a particularly low-level function (*e.g.*, as a passive participant or periodic worker) in some conspiracies received a substantial assistance reduction even though the defendant did not provide assistance comparable to or greater than that provided by co-defendants. In a few conspiracies, on the other hand, a defendant with a high-level function (*e.g.*, head of a significant drug-importing or other criminal organization) in the conspiracy did not receive a substantial assistance reduction even after providing assistance comparable to or greater than that of co-defendants.

In several conspiracies, a defendant who provided assistance comparable to or greater than that provided by codefendants nevertheless did not receive a substantial assistance reduction but instead was convicted of an offense that either carried no mandatory minimum, carried a significantly lower mandatory minimum, or carried a significantly lower statutory maximum than could have applied to the defendant. In such conspiracies, codefendants who received a

substantial assistance reduction generally did not receive the same benefit of a reduced mandatory minimum.

In other conspiracies, a defendant who provided less assistance than a codefendant but also was convicted of a mandatory minimum statute (*e.g.* 21 U.S.C. § 841(a)(1)(A) (drug trafficking), 18 U.S.C. § 924(c) (carrying a firearm in connection with a drug offense)), nevertheless received a substantial assistance reduction. However, in many of these cases, the defendant also had a low-level function in the offense.

In some conspiracies, a defendant who provided substantial assistance comparable to or greater than that provided by codefendants nevertheless did not receive a substantial assistance reduction but received instead a downward departure for other reasons.

The following factors did not appear to be associated with receiving a substantial assistance reduction: (1) whether defendant carried a firearm; (2) defendant's race; and (3) defendant's gender, criminal history, or other personal characteristics.

2. Why do some defendants in a conspiracy receive a greater substantial assistance reduction in their sentence than other defendants in the conspiracy who also received a substantial assistance reduction?

Two primary factors appeared to be associated with the extent of a substantial assistance reduction. The level of cooperation provided by the defendant relative to that of codefendants appeared to influence the extent of the departure. In general, the review showed that the greater the level of cooperation, the greater the extent of the departure. However, the degree of culpability of the defendant (*i.e.*, the defendant's function in the offense and the defendant's overall role in the offense, whether as a leader or a follower) appeared more frequently to influence the extent of the departure. For example, a defendant with a higher-level function in the conspiracy generally received a lesser reduction in sentence and a more severe final sentence than a defendant with a lower-level function who also received a substantial assistance reduction.

3. How do the sentences of defendants in a conspiracy who receive a substantial assistance reduction compare with the sentences of those in the conspiracy who do not receive a substantial assistance reduction?

Receipt of a substantial assistance reduction frequently (*i.e.*, in at least 32 of the 64 conspiracies) altered the relative positions of the final sentences of codefendants in a conspiracy when compared with the positions of the guideline range minimums for those defendants. In 19 of these conspiracies, the relative final sentences differed from the relative minimums as determined by the guideline and statutory minimums, and the provision of assistance by one or more defendants who received a substantial assistance reduction apparently was responsible for altering the relative sentences imposed on the defendants. In an additional seven of these conspiracies, the relative positions of the final sentences differed from the relative positions of

the minimums as determined by mandatory statutory minimums, but did not differ from the relative minimums as determined by the final guideline range before it was "trumped" by the statutory minimum. The receipt of a substantial assistance reduction was responsible for changing the relative sentences of some, but not all defendants, in an additional six of these conspiracies.

However, in at least 21 other conspiracies (almost one-third of the conspiracies), the relative positions of the final sentences were identical to those of the guideline minimums. Consequently, the receipt by one or more defendants of a substantial assistance reduction did not alter the relative positions of sentences imposed on the defendants. Thus, in these conspiracies, regardless of the fact or type of assistance provided by defendants in that conspiracy and regardless of the receipt of a substantial assistance reduction, no defendant who was more culpable than a codefendant received a lower sentence than that codefendant.

CHAPTER SEVEN

SUBSTANTIAL ASSISTANCE DEPARTURES: AGGREGATE ANALYSIS OF SENTENCING COMMISSION DATA

The major factors prompting this study of substantial assistance departures in the federal judicial system emanated from three trends previously observed in the Sentencing Commission's fiscal year data files:

- **Substantial assistance rates have increased steadily since implementation of the federal sentencing guidelines.**

Figure 15 indicates that the national substantial assistance departure rate increased from 3.5 percent in fiscal year 1989 to 19.5 percent in fiscal year 1994.

- **Substantial assistance rates vary greatly by judicial circuit and district.**

There are several different trend patterns for circuit substantial assistance rates from fiscal years 1991 to 1994. Figure 16 indicates that a few circuits, such as the Tenth Circuit, had a relatively stable substantial assistance rate; some circuits, such as the First Circuit, experienced a dramatic increase in their substantial assistance rate; and others, such as the Seventh Circuit, fluctuated from year to year. For judicial circuits, the highest substantial assistance departure rate (32.2%) in 1994 was in the Third Circuit, with the lowest (12.5%) in the Tenth Circuit.

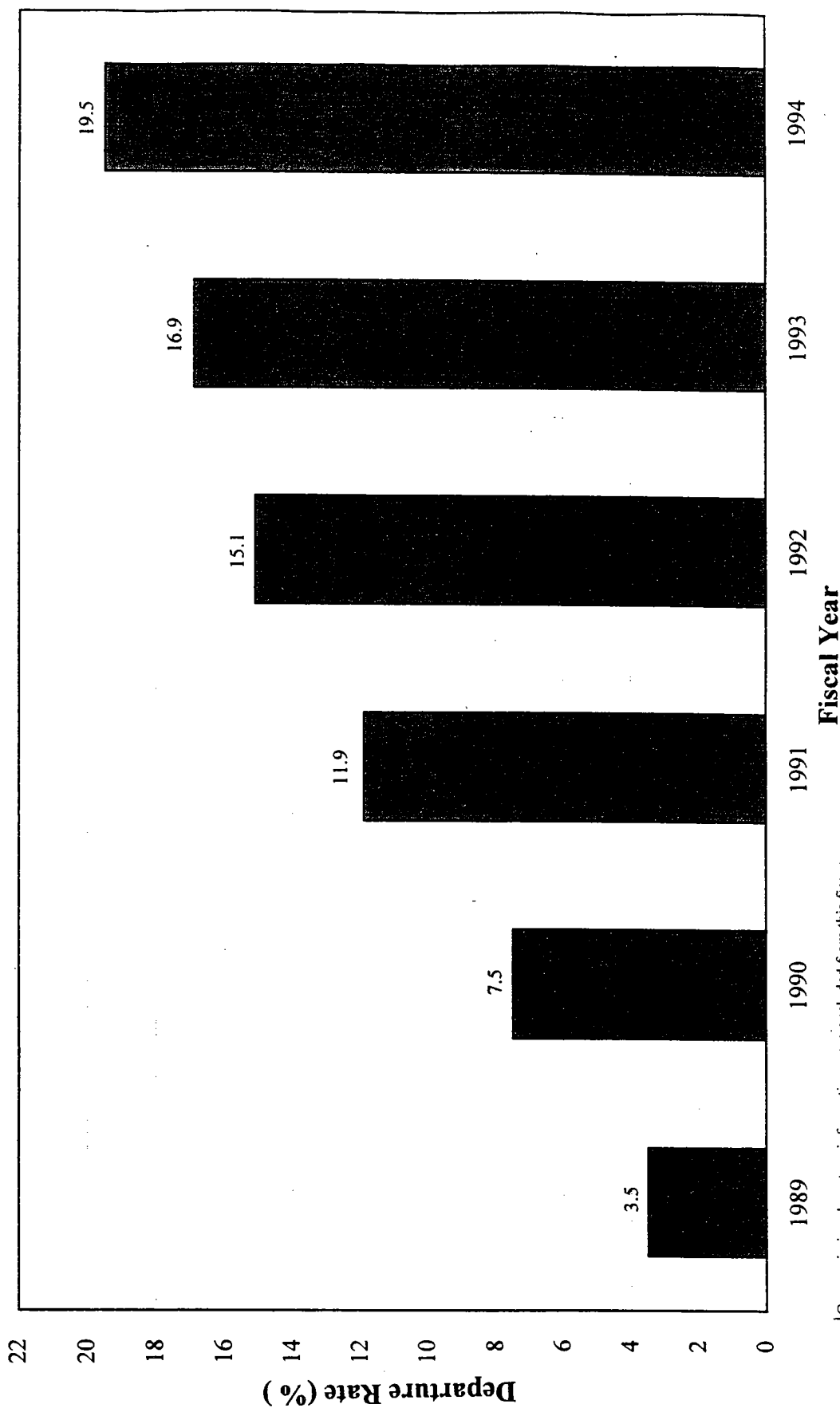
Table 12 illustrates the wide variation in substantial assistance rates among districts. In fiscal year 1991, the substantial assistance rate varied from 0.0 percent in Rhode Island and Eastern Oklahoma to 40.9 percent in Eastern Pennsylvania. An even greater variation in substantial assistance rates¹¹⁴ existed in fiscal year 1994, from 3.9 percent in Eastern Virginia to 49.3 percent in Eastern Pennsylvania.

- **The degree of the departure granted by the court varies by judicial circuit and district.**

Once a substantial assistance motion is granted, the judge decides on the appropriate sentence unrestricted by guideline ranges. Data presented in a

¹¹⁴The Northern Mariana Islands District, with eight federal convictions and no substantial assistance departures in fiscal year 1994, is excluded from this comparison.

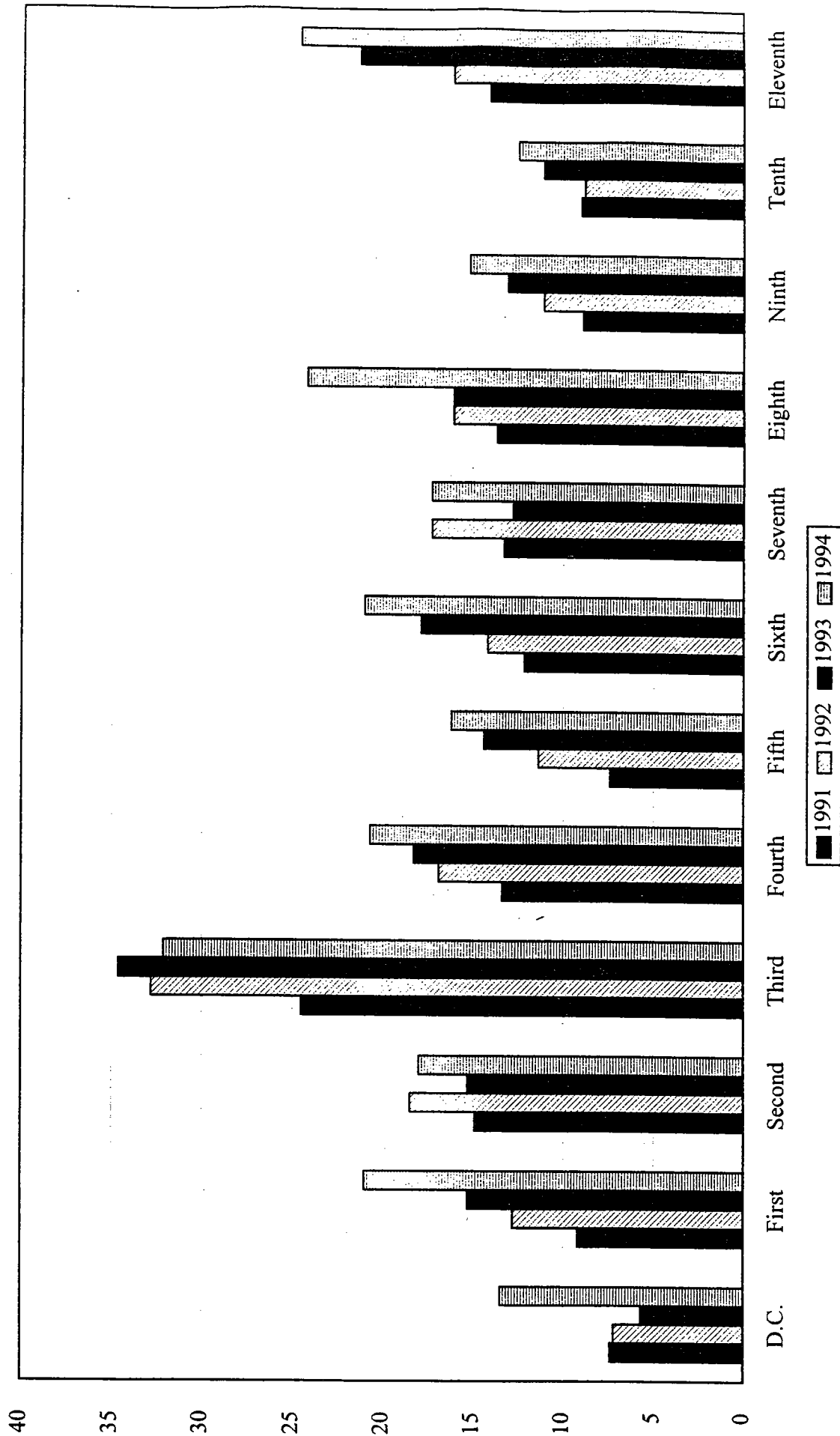
Figure 15
SUBSTANTIAL ASSISTANCE DEPARTURE RATES BY SENTENCING YEAR¹
 (October 1, 1988 through September 30, 1994)



¹Cases missing departure information were excluded from this figure.

SOURCE: U.S. Sentencing Commission, Monitoring Datafiles, MONFY89-MONFY94.

Figure 16
PERCENT OF SUBSTANTIAL ASSISTANCE CASES BY CIRCUIT¹
 (October 1, 1990 through September 30, 1994)



¹ Of the 153,755 cases, 6,819 were excluded from this table due to missing departure information.

Table 12

**SUBSTANTIAL ASSISTANCE RATES BY CIRCUIT AND DISTRICT
FOR FISCAL YEAR 1991 THROUGH FISCAL YEAR 1994¹
(October 1, 1990 through September 30, 1994)**

CIRCUIT District	Number of Cases	FY 1991		FY 1992		FY 1993		FY 1994	
		n	% 5K	n	% 5K	n	% 5K	n	% 5K
TOTAL	146,936	31,767	11.9	36,229	15.1	40,442	16.9	38,498	19.5
D.C. CIRCUIT	1,910	511	7.4	512	7.2	421	5.7	466	13.5
District of Columbia	1,910	511	7.4	512	7.2	421	5.7	466	13.5
FIRST CIRCUIT	4,211	899	9.2	1,046	12.8	1,077	15.3	1,189	21.0
Maine	549	133	2.3	135	5.2	139	5.8	142	20.4
Massachusetts	1,378	346	15.9	319	21.3	348	27.3	365	26.6
New Hampshire	357	73	12.3	88	20.5	106	20.8	90	34.4
Puerto Rico	1,386	243	6.6	321	11.5	353	9.9	469	17.5
Rhode Island	541	104	0.0	183	2.2	131	3.8	123	8.9
SECOND CIRCUIT	12,623	2,585	14.9	2,955	18.5	3,634	15.3	3,449	18.0
Connecticut	973	228	9.7	240	8.8	259	6.6	246	8.5
New York									
Eastern	4,846	977	16.7	1,225	17.0	1,444	17.0	1,200	19.5
Northern	1,314	288	11.8	292	13.7	356	23.9	378	18.5
Southern	3,868	749	16.2	869	28.1	1,100	13.5	1,150	17.0
Western	1,146	237	13.5	194	11.3	339	13.0	376	21.0
Vermont	476	106	11.3	135	8.2	136	11.0	99	22.2
THIRD CIRCUIT	8,359	1,594	24.5	2,193	32.8	2,478	34.6	2,094	32.1
Delaware	398	114	8.8	112	15.2	83	9.6	89	14.6
New Jersey	2,159	470	22.3	639	27.2	542	27.3	508	27.4
Pennsylvania									
Eastern	3,277	496	40.9	855	48.8	1,094	50.8	832	49.3
Middle	1,039	230	24.4	246	28.1	280	23.2	283	25.1
Western	1,076	209	6.7	251	13.2	322	21.4	294	11.9
Virgin Islands	410	75	4.0	90	10.0	157	7.0	88	5.7
FOURTH CIRCUIT	16,355	3,525	13.4	4,034	16.9	4,493	18.3	4,301	20.7
Maryland	1,433	377	14.3	361	20.5	324	16.7	371	23.2
North Carolina									
Eastern	1,630	308	17.2	386	18.9	438	22.2	498	20.3
Middle	1,269	310	15.8	313	19.8	349	23.8	297	24.2
Western	2,173	333	37.2	509	45.4	587	47.7	744	43.4
South Carolina	2,490	454	16.5	508	16.7	866	17.6	662	19.9
Virginia									
Eastern	3,840	913	3.1	1,009	2.7	1,024	4.2	894	3.9
Western	1,399	319	13.5	393	18.8	302	19.5	385	25.7
West Virginia									
Northern	673	144	13.9	182	13.7	210	11.4	137	14.6
Southern	1,448	367	7.1	373	8.6	395	7.3	313	6.7

Table 12 (cont.)

CIRCUIT		FY 1991		FY 1992		FY 1993		FY 1994	
District	Number of Cases	n	% 5K	n	% 5K	n	% 5K	n	% 5K
FIFTH CIRCUIT	20,984	5,197	7.4	5,235	11.4	5,318	14.4	5,234	16.2
Louisiana									
Eastern	1,687	369	9.5	476	6.7	462	7.8	380	7.6
Middle	206	49	8.2	38	15.8	74	14.9	45	8.9
Western	964	183	9.3	226	11.1	269	16.7	286	16.1
Mississippi									
Northern	647	183	9.3	129	10.9	150	14.0	185	13.0
Southern	896	202	8.4	197	6.1	277	14.1	220	13.6
Texas									
Eastern	1,337	260	7.7	278	9.7	410	5.1	389	10.0
Northern	3,165	565	6.7	813	10.1	937	18.5	850	19.2
Southern	6,278	1,870	7.5	1,584	14.0	1,358	17.1	1,466	18.1
Western	5,804	1,516	6.3	1,494	11.7	1,381	13.5	1,413	17.6
SIXTH CIRCUIT	14,315	3,080	12.2	3,590	14.2	4,005	17.9	3,640	21.0
Kentucky									
Eastern	1,144	193	16.6	305	12.5	321	17.5	325	24.9
Western	1,409	305	2.3	384	5.5	429	9.1	291	7.9
Michigan									
Eastern	3,266	761	14.2	773	15.5	915	17.1	817	20.8
Western	781	117	2.6	169	4.1	209	4.8	286	23.1
Ohio									
Northern	2,039	410	9.3	453	7.7	625	14.6	551	19.2
Southern	1,888	431	19.3	534	26.6	518	33.6	405	28.6
Tennessee									
Eastern	1,426	370	16.5	342	16.7	376	21.5	338	23.1
Middle	771	165	5.5	209	8.6	177	14.7	220	13.2
Western	1,591	328	11.0	421	16.6	435	18.9	407	23.3
SEVENTH CIRCUIT	7,567	1,520	13.3	2,010	17.3	2,238	12.8	1,799	17.3
Illinois									
Central	967	198	14.1	282	18.1	250	20.4	237	25.7
Northern	2,647	537	15.1	753	22.4	764	10.3	593	14.0
Southern	881	135	17.8	194	16.5	317	17.0	235	24.7
Indiana									
Northern	726	128	9.4	176	4.0	243	3.7	179	6.2
Southern	767	150	14.0	205	17.6	200	20.0	212	26.4
Wisconsin									
Eastern	1,129	273	9.9	299	15.1	318	13.2	239	14.2
Western	450	99	9.1	101	7.9	146	8.2	104	8.7
EIGHTH CIRCUIT	8,608	1,910	13.7	2,020	16.1	2,355	16.1	2,323	24.2
Arkansas									
Eastern	965	217	14.8	264	19.3	237	12.7	247	13.4
Western	475	81	1.2	103	1.0	166	0.6	125	4.0
Iowa									
Northern	484	76	7.9	114	20.2	136	17.7	158	22.2
Southern	520	129	3.1	139	7.9	115	7.0	137	34.3
Minnesota	1,388	302	18.2	344	23.3	357	19.6	385	23.1
Missouri									
Eastern	1,191	229	7.0	241	12.5	333	14.4	388	27.8
Western	1,520	376	21.0	318	29.9	448	28.1	378	39.2
Nebraska	847	184	25.5	174	13.2	256	18.4	233	33.5
North Dakota	487	132	6.1	127	3.9	129	12.4	99	11.1
South Dakota	731	184	6.5	196	3.6	178	4.5	173	4.6

Table 12 (cont.)

CIRCUIT		FY 1991		FY 1992		FY 1993		FY 1994	
District	Number of Cases	n	% 5K	n	% 5K	n	% 5K	n	% 5K
NINTH CIRCUIT	25,373	5,323	8.9	6,190	11.1	6,970	13.1	6,890	15.2
Alaska	437	72	4.2	141	8.5	122	9.0	102	9.8
Arizona	4,231	851	10.9	1,063	10.4	1,210	13.1	1,107	14.8
California									
Central	3,512	827	3.4	827	4.8	930	5.1	928	6.7
Eastern	2,089	425	5.2	550	10.7	561	9.5	553	9.6
Northern	1,194	313	8.3	221	13.1	236	14.0	424	15.8
Southern	5,942	1,140	11.3	1,282	15.9	1,768	20.6	1,752	22.6
Guam	223	0	0.0	67	23.9	90	7.8	66	12.1
Hawaii	834	209	23.9	206	21.8	226	29.7	193	28.0
Idaho	288	74	4.1	66	4.6	60	6.7	88	9.1
Montana	752	203	3.0	206	12.6	172	7.0	171	14.0
Nevada	1,428	235	6.4	367	6.0	426	5.4	400	10.8
Northern Mariana Islands	8	0	0.0	1	0.0	7	42.9	0	0.0
Oregon	1,941	408	7.6	568	5.8	476	6.3	489	9.4
Washington									
Eastern	995	240	6.7	263	5.7	258	7.0	234	7.3
Western	1,499	326	15.0	362	19.1	428	19.6	383	24.3
TENTH CIRCUIT	7,849	1,686	9.0	1,879	8.8	2,203	11.1	2,081	12.5
Colorado	1,395	292	23.6	343	16.6	399	21.8	361	20.5
Kansas	1,053	231	7.8	226	5.3	298	7.4	298	14.8
New Mexico	2,221	507	3.0	552	5.6	578	6.2	584	6.3
Oklahoma									
Eastern	210	62	0.0	59	0.0	43	4.7	46	4.4
Northern	604	111	9.9	163	7.4	167	8.4	163	16.0
Western	974	204	3.4	208	8.2	300	7.0	262	11.1
Utah	990	192	10.4	250	12.4	276	11.6	272	8.5
Wyoming	402	87	13.8	78	7.7	142	21.1	95	26.3
ELEVENTH CIRCUIT	18,782	3,937	14.1	4,565	16.1	5,248	21.3	5,032	24.6
Alabama									
Middle	908	150	9.3	300	12.7	228	19.3	230	19.1
Northern	1,216	218	6.9	308	14.0	290	24.5	400	19.5
Southern	1,330	296	17.9	305	19.0	433	26.3	296	28.4
Florida									
Middle	4,291	913	20.4	1,010	24.0	1,209	27.5	1,159	33.7
Northern	1,361	251	36.3	311	27.7	402	34.8	397	40.8
Southern	5,424	1,285	8.2	1,352	10.8	1,483	13.8	1,304	15.1
Georgia									
Middle	1,216	230	10.9	302	11.3	312	14.1	372	17.7
Northern	2,118	425	10.9	423	10.4	656	15.7	614	21.2
Southern	918	169	10.7	254	16.5	235	26.4	260	32.3

¹Of the 153,755 cases, 6,819 were excluded due to missing departure information.

SOURCE: U.S. Sentencing Commission, 1991-1994 Monitoring Datafiles, MONFY91-MONFY94.

later section of this chapter¹¹⁵ show that in fiscal year 1994, judges reduced sentences by an average of 60.9 percent for defendants receiving a substantial assistance departure. However, this sentence reduction varied among circuits from a high of 81.9 percent for the D.C. Circuit to a low of 50.1 percent for the Seventh Circuit. Among districts, the sentence reductions ranged from highs of 93.1 percent and 92.1 percent in Guam and Vermont, respectively, to lows of 30.1 percent and 30.0 percent for Western Wisconsin and Middle Louisiana, respectively.

This chapter of the report examines in detail the trends and relationships between case characteristics and federal sentencing departures for substantial assistance. The data sources are the fiscal year sentencing data files created and maintained by the U.S. Sentencing Commission. The chapter has two major sections.

The first section examines aggregate data from the Commission data files and provides descriptive statistics comparing substantial assistance and non-substantial assistance cases.

The second section focuses on multivariate analyses of two sequential elements of the substantial assistance process:

- the probability that the prosecutor successfully enters a substantial assistance motion,¹¹⁶ and
- the degree to which the court departs downward from the guideline range pursuant to a substantial assistance motion.

Both of these multivariate analyses examine the factors associated with the substantial assistance process. The advantage of this approach is that the analysis estimates the independent effect of each predictor variable, holding constant the effect of all other predictor variables.

I. METHODOLOGY AND LIMITATIONS

The Sentencing Commission's data files are compiled from hard copy court documents submitted to the Commission as required by law. Information on departure status is found in the Statement of Reasons (SOR) accompanying the Judgment and Conviction Order: the SOR contains the judge's reasoning for granting the departure. A substantial assistance departure is defined as a sentencing event in which the judge indicated in the SOR that a sentence reduction

¹¹⁵Reference Table 18

¹¹⁶While the court does not have to grant a §5K1.1 motion filed by the prosecutor, information obtained by the Commission through other stages of this project indicates that most motions are granted as a matter of course. Note that the hard copy court documents submitted to the Commission include information only on granted §5K1.1 motions; they contain no direct information identifying defendants for whom a motion was made, but denied.

was based on a substantial assistance motion (§5K1.1 of the Guidelines Manual) made by the prosecution.

A principal limitation of the analysis is that the relationships among explanatory variables and substantial assistance may be influenced by explanatory variables not included in the multivariate model. For example, the Commission does not have access to possible confounding variables such as the quantity or quality of information given to prosecutors, or the charge and plea bargaining practices of individual districts. While the analyses can show relationships among variables, it can neither attribute causality nor evaluate impacts of unavailable data.

A second limitation of the analysis is the fact that sentencing departures based upon a defendant's cooperation with authorities can be granted at either of two points in the sentencing process. The first of these occurs at sentencing when the judge grants a prosecutor's substantial assistance motion. The Sentencing Commission data can identify §5K1.1 departures from the SOR; receipt of §5K1.1 motions are coded into the database and available for analysis.

The second time that a substantial assistance departure can be granted is subsequent to, but within one year of, sentencing: the prosecutor can make a motion to the court pursuant to Federal Rule of Criminal Procedure 35(b) asking for a sentencing reduction based upon the defendant's cooperation following sentencing. As this event happens after sentencing and the courts have not been previously required or asked to submit these re-sentencing documents to the Sentencing Commission, the analysis of Commission data cannot address completely substantial assistance departures based on Rule 35(b) motions.¹¹⁷

However, even with this limitation, the Commission believes that the following analysis is representative of substantial assistance practices in the U.S. Courts based upon evidence collected during this project. Two facts are highlighted. First, information collected during other project phases—the U.S. Attorney policy questionnaire, the site visits, and the telephone case-specific phone interviews—indicate that overall Rule 35(b) departures are used infrequently in most districts. Second, when Rule 35(b) motions are used, they are clustered in a few districts that use Rule 35(b) motions rather than §5K1.1 departures as a matter of prosecutorial policy. Based on these facts, Rule 35(b) motions appear to be, on average, a small portion of all substantial assistance departures.

For the aggregate analysis of substantial assistance, fiscal year 1994 Commission data were chosen. These are cases sentenced in the federal courts between October 1, 1993 and

¹¹⁷The Commission consulted extensively with the Bureau of Prisons (BOP) to identify Rule 35(b) post-sentencing substantial assistance sentence reductions appearing on BOP's SENTRY datafile. Preliminary evidence suggests that an additional 1 to 1.5 percent of all defendants (roughly 400 cases and 540 cases in fiscal years 1993 and 1994, respectively) received a Rule 35(b) departure. A few defendants (approximately one-half of one percent, or roughly 200 cases per fiscal year) also received a Rule 35(b) reduction in addition to a §5K1.1 departure. Consultation with BOP continues and the Commission plans to include the Rule 35(b) departure process explicitly in later analyses.

September 30, 1994. In tables that use trend data over time, consistent definitions for the analytic variables were applied to previous fiscal year datafiles. The analysis divided the cases into two categories: those receiving a substantial assistance §5K1.1 departure and all other cases.

II. DESCRIPTION OF SUBSTANTIAL ASSISTANCE CORRELATES

This section of the report examines frequencies, trends, and correlational relationships between cases with substantial assistance departures and all other cases (including non-departures, upward departures, and other downward departures).¹¹⁸

A. Demographic Data

Table 13 presents information on the distribution of fiscal year 1994 cases by the demographic categories named below.

Age. There was little difference in the distribution of §5K1.1 departures across age groupings. Those aged 26 to 30 years were the group most likely to receive a substantial assistance departure (21.6%), followed closely by those aged 31 to 35 (20.4%). Defendants under age 21 had the lowest rate (16.3%), followed closely by those more than age 50 (16.6%).¹¹⁹

Gender. There was little overall difference in the substantial assistance rate between males (19.7%) and females (18.7%). There was, however, a significant difference between men's and women's §5K1.1 rates within offense types. Women received substantial assistance departures almost twice as often as men for robbery, communication facility, firearms, and racketeering offenses. Men were more likely than women to receive substantial assistance departures for gambling and arson offenses.¹²⁰

Race. There were small differences in the substantial assistance rates across racial categories. White defendants were most likely to receive §5K1.1 departures (21.1%), followed by Blacks (20.3%). Lower rates were found for both Hispanic¹²¹ defendants (16.9%) and defendants in the "Other"¹²² racial category (14.9%).

¹¹⁸At times the text refers to data relationships among primary offense types; detailed tables of demographic data disaggregated by primary offense category appear in Appendix F, Table 1 through Table 6.

¹¹⁹See Appendix F, Table 2.

¹²⁰See Appendix F, Table 2.

¹²¹Defendants whose ethnic background was designated as Hispanic were classified as Hispanic regardless of racial background (see Appendix F, Table 3).

¹²²The "Other" racial category includes Native Americans, Alaskan Natives, and Asian or Pacific Islanders.

Table 13

SELECT DEFENDANT CHARACTERISTICS BY DEPARTURE STATUS¹
(October 1, 1993 through September 30, 1994)

	TOTAL	PERCENT	SUBSTANTIAL ASSISTANCE CASES		NON-SUBSTANTIAL ASSISTANCE CASES ²	
			Number	Percent	Number	Percent
TOTAL	38,498	100.0	7,524	19.5	30,974	80.5
AGE						
Under 21	1,798	4.7	293	16.3	1,505	83.7
21-25	6,717	17.6	1,325	19.7	5,392	80.3
26-30	7,184	18.8	1,553	21.6	5,631	78.4
31-35	6,632	17.3	1,353	20.4	5,279	79.6
36-40	5,319	13.9	1,003	18.9	4,316	81.1
41-50	6,905	18.1	1,353	19.6	5,552	80.4
Over 50	3,682	9.6	612	16.6	3,070	83.4
GENDER						
Male	32,557	84.6	6,415	19.7	26,142	80.3
Female	5,937	15.4	1,109	18.7	4,828	81.3
RACE						
White	15,914	41.6	3,361	21.1	12,553	78.9
Black	11,626	30.4	2,363	20.3	9,263	79.7
Hispanic	9,391	24.6	1,590	16.9	7,801	83.1
Other	1,319	1.8	196	14.9	1,123	85.1
CITIZENSHIP						
U.S. Citizen	29,452	77.9	6,138	20.8	23,314	79.2
Non-U.S. Citizen	8,347	22.1	1,334	16.0	7,013	84.0
EDUCATION						
Less than High School	14,642	39.1	2,770	18.9	11,872	81.1
High School	12,539	33.5	2,603	20.8	9,936	79.2
Some College	7,326	19.6	1,520	20.7	5,806	79.3
College Graduate	2,912	7.8	575	19.7	2,337	80.3

¹Of the 39,971 cases, 1,473 cases were excluded due to missing departure information. Additionally, cases missing information on age, gender, race, citizenship, or education were excluded from that section of the table.

²Non-substantial assistance cases include cases receiving no departures, upward departures, or downward departures.

SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

Citizenship.¹²³ In total, 20.8 percent of U.S. citizens received a substantial assistance departure, compared to 16.0 percent of all Non-U.S. citizens (including both legal and illegal aliens). In contrast, further analysis revealed that only 9.7 percent of illegal aliens received a substantial assistance departure.¹²⁴ Drug trafficking offenses accounted for the highest rates of substantial assistance for both U.S. citizens (36.1%) and illegal aliens (24.5%). Among defendants for whom citizenship status was known, illegal aliens received the lowest substantial assistance rates for offense types.

Education. There was little difference in overall substantial assistance rates across education levels, varying between 20.8 percent for those with a high school diploma and 18.9 percent for those who had not graduated from high school.

The relationships between each educational category and the primary offense type receiving the highest percentage of §5K1.1 departures were: defendants with less than a high school education and arson offenses (31.0%); high school graduates and money laundering offenses (27.7%); defendants who had some college education and drug trafficking offenses (37.9%); and college graduates and drug trafficking offenses (40.2%).¹²⁵

Combined Effect of Race and Citizenship Status. Table 14 displays the relationship between §5K1.1 departures and citizenship status by race:

- Among U.S. citizens, each of the three major racial categories had approximately equal §5K1.1 rates (ranging between 20.5% and 22.2%).
- Among legal aliens, §5K1.1 rates stayed relatively constant within one or two percentage points for Whites and Blacks, but dropped four percentage points (to 18.6%) for Hispanics.
- Among illegal aliens, §5K1.1 rates dropped by another five to six percentage points for Whites and Blacks, and dropped an additional ten percentage points (to 8.6%) for Hispanics.

Variables measuring race, citizenship status, and substantial assistance rates appear to have a distinct relationship. Hispanics comprised the largest number of illegal aliens, and also received a significantly lower substantial assistance rate than illegal aliens of any other racial category. Hispanics were split almost equally among the three citizenship categories (U.S.

¹²³Information concerning legal alien status is contained in the Appendix F, Table 4.

¹²⁴See Appendix F, Table 4.

¹²⁵See Appendix F, Table 5. This comparison considers only primary offense categories with an ample number of defendants.

Table 14

SUBSTANTIAL ASSISTANCE RATES BY DEFENDANT RACE AND CITIZENSHIP¹
(October 1, 1993 through September 30, 1994)

CITIZENSHIP	TOTAL	WHITE		BLACK		HISPANIC		OTHER	
		n	% 5K	n	% 5K	n	% 5K	n	% 5K
TOTAL	37,744	15,681	21.3	11,479	20.5	9,297	17.0	1,287	15.2
U.S. Citizen	29,444	15,045	21.3	10,468	20.5	3,066	22.2	865	12.0
Legal Alien	4,333	371	20.8	584	22.6	3,106	18.6	272	19.9
Illegal Alien	2,800	101	15.8	231	16.9	2,404	8.6	64	23.4
Status Unknown	1,167	164	18.9	196	21.9	721	16.8	86	25.6

¹Of the 39,971 cases, 2,227 cases were excluded due to one or more of the following reasons: missing information on race (307), missing information on citizenship (862), or missing departure information (1,473).

SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

citizen, legal alien, and illegal alien), whereas the other three race categories had U.S. citizens as their most significant portion of defendants.

B. Offense of Conviction

In addition to the overall increase in substantial assistance rates since 1991, the variation in rates by offense type also grew. Figure 17 displays the ten offense types with the highest substantial assistance rates in fiscal year 1994 and compares the 1994 rates with those in 1991: all high-rate 1994 offense types showed an increase since 1991.

Year-to-year trends indicate varying patterns of change in substantial assistance rates across all offense types.¹²⁶ Some offense types, such as sexual abuse and immigration, had a steady and low substantial assistance rate (roughly one to two percent of cases); others, such as bribery, had a steady and high (19% to 20%) substantial assistance rate. There were significant increases in substantial assistance rates in some offenses, such as drug trafficking and use of a communication facility in drug trafficking. Although some offense types (such as antitrust) appear to have considerable substantial assistance rates, it is important to note the small number of cases overall for these offense types (in 1994: antitrust had 6 cases, arson had 90 cases, and kidnapping had 46 cases).

Figure 18 depicts the frequencies and rates of substantial assistance by select offense types, and illustrates that by far the largest number of §5K1.1 cases occurred in drug trafficking—approximately one-third of the nearly 15,000 drug trafficking cases. Since a substantial assistance departure motion can recommend that the judge depart below a mandatory minimum sentence, it is not surprising that a large percentage of the substantial assistance departures are drug cases which include mandatory minimum sentences. The figure also shows the preponderance of drug trafficking cases in the federal system. Other offense types with both large numbers of convictions and notable substantial assistance rates included fraud, firearms, larceny, robbery, money laundering, and extortion/racketeering.

Throughout the remainder of this chapter, analyses focusing on select primary offense types will be limited to the seven high frequency §5K1.1 offenses cited in the previous paragraph. Figure 19 targets these seven select offense types, illustrating the distribution of substantial assistance departures among these offenses of conviction.

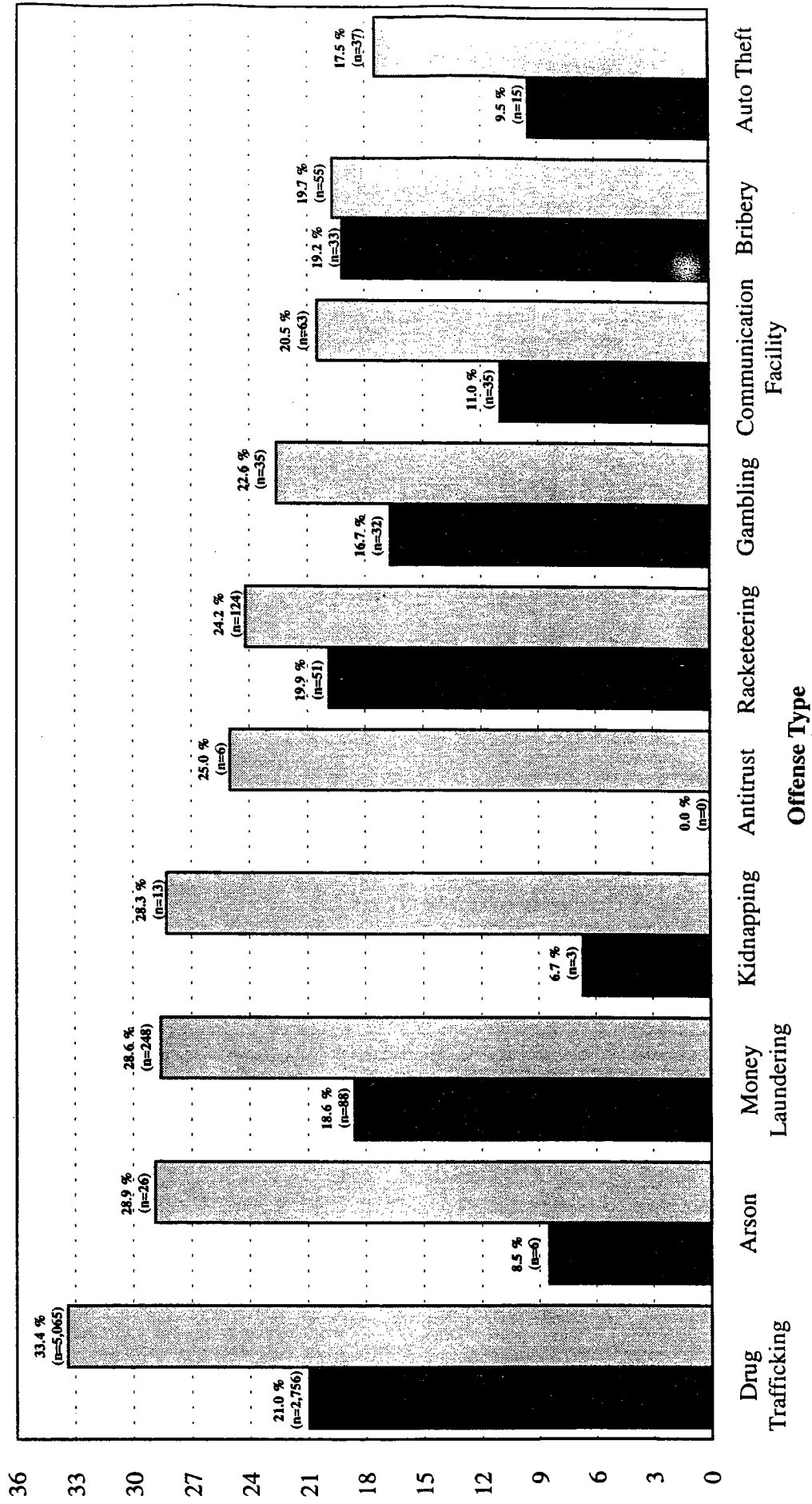
C. Criminal History Category

Table 15 illustrates the distribution of substantial assistance cases by offense type and criminal history category. Criminal history category was divided into three classifications: Criminal History Category I (CHC I); Criminal History Categories II through VI (CHC II-VI) excluding career offenders and armed career criminals; and career offenders/armed career criminals.

¹²⁶See Appendix F, Table 6.

Figure 17

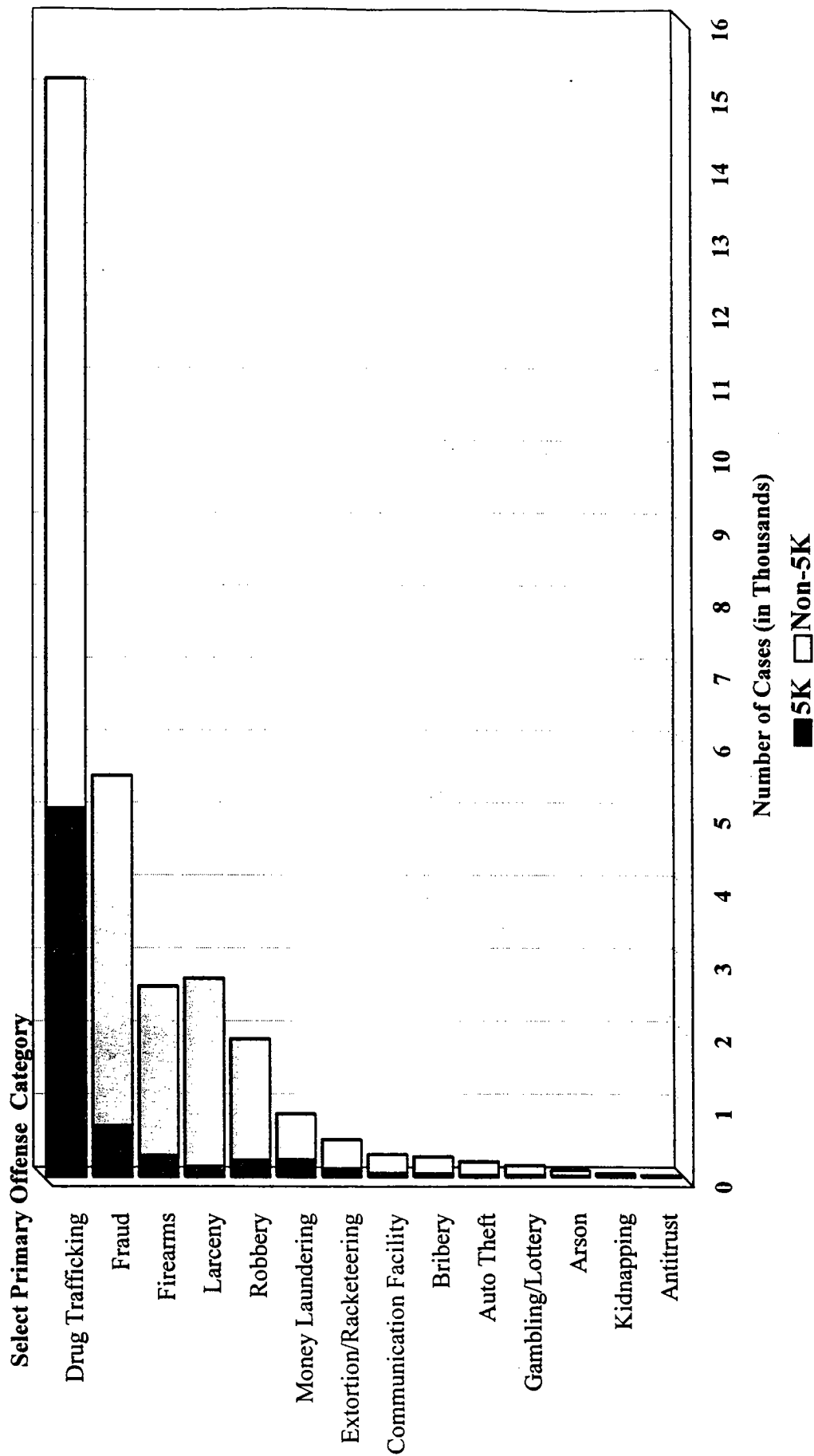
SELECT OFFENSE TYPES BY SUBSTANTIAL ASSISTANCE RATE ¹
(October 1, 1990 through September 30, 1994)



¹ Cases missing either offense type or departure information were excluded from this figure.

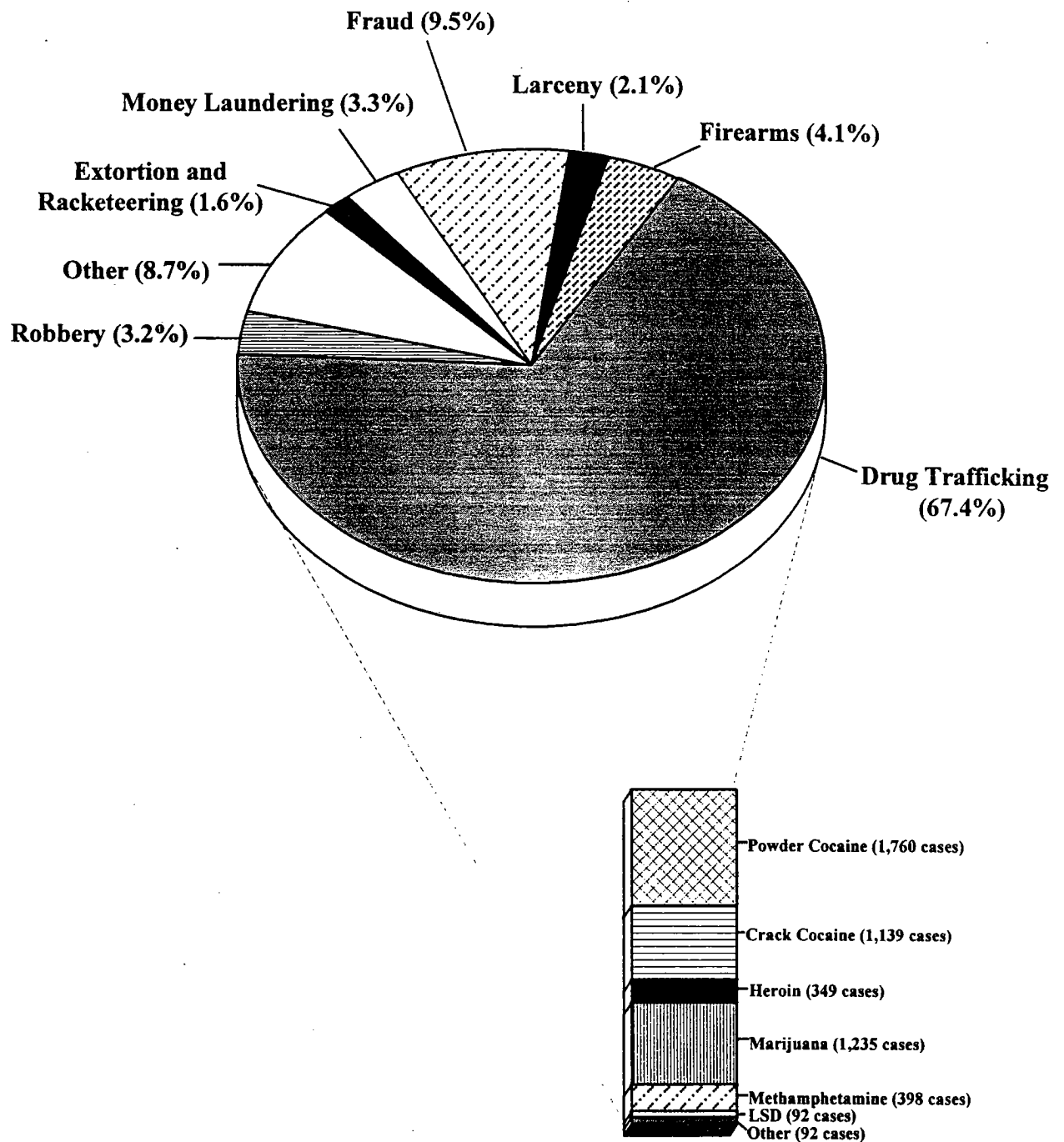
Figure 18

**PROPORTION OF CASES RECEIVING A SUBSTANTIAL ASSISTANCE
DEPARTURE BY SELECT PRIMARY OFFENSE CATEGORY¹
(October 1, 1993 through September 30, 1994)**



¹ Non-substantial assistance cases include cases with no departure, upward departures, or downward departures.

Figure 19
SUBSTANTIAL ASSISTANCE DEFENDANTS BY
SELECT PRIMARY OFFENSE CATEGORY AND DRUG TYPE¹
 (October 1, 1993 through September 30, 1994)



¹ Of the 7,524 cases that received a substantial assistance departure, six cases with missing primary offense category were excluded.

SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

SUBSTANTIAL ASSISTANCE RATES BY SELECT PRIMARY OFFENSE AND CRIMINAL HISTORY CATEGORIES!
(October 1, 1993 through September 30, 1994)

SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

In general, Table 15 shows no consistent relationship between receipt of a §5K1.1 departure and criminal history category. A primary comparison was between defendants in Criminal History Category I (the CHC I column) and defendants in higher criminal history categories (the CHC II-VI column). Table 15's first five offense types—robbery, drug trafficking, firearms, larceny, and fraud—included three-quarters of the cases of the entire table and showed one pattern: a defendant with the lowest criminal history ranking was slightly more likely to receive a §5K1.1 departure than a defendant with a longer criminal history. The other trend—evident for money laundering or racketeering/extortion offenses—had the reverse relationship: a defendant with a longer criminal history was slightly more likely to receive a §5K1.1 departure.

For career offenders and armed career criminals, no general relationship was observed between §5K1.1 status and criminal history ranking. With only 1,259 defendants in this category in 1994, the number of defendants in four offense types was too small for analysis.

D. Sentence Length

Two facets of substantial assistance sentence length were examined—differences in sentences by: (a) offense type and (b) circuit and district. In aggregate, the analysis of the Commission datafiles indicated a very small difference between the percentage of substantial assistance cases and non-substantial assistance cases receiving a prison sentence (78.8% and 78.0%, respectively).¹²⁷

Sentence Length by Offense of Conviction. Table 16 shows that overall substantial assistance departure sentences were seven months shorter on average than all other sentences.

The table highlights the wide variation in sentence lengths between §5K1.1 and non-§ 5K1.1 cases in certain offense types. Substantial assistance departures gave defendants markedly lower average sentences for kidnapping (96.2 months less) and drug trafficking (40.2 months less). Lower average sentences by approximately two or three years were given to substantial assistance defendants convicted of: firearms (36.9 months less), robbery (33.8 months less), racketeering/extortion (30.6 months less), pornography/prostitution (30.6 months less), and drug-communication facility (27.4 months less).

In some cases, defendants with substantial assistance departures were given longer sentences on average than other defendants: murder (27.4 months more) and drugs—simple possession (14.3 months more). This may be due to the seriousness of the instant offenses committed by the substantial assistance defendants. However, note the small number of cases in the substantial assistance groups (nine cases of murder and eight cases of drugs—simple possession).

¹²⁷Information concerning type of sentence imposed is contained in Appendix F, Table 7.

Table 16

**AVERAGE SENTENCE LENGTH BY DEPARTURE STATUS
AND PRIMARY OFFENSE CATEGORY¹**
(October 1, 1993 through September 30, 1994)

PRIMARY OFFENSE	TOTAL	SUBSTANTIAL ASSISTANCE CASES		NON-SUBSTANTIAL ASSISTANCE CASES ²	
		Number	Mean Months	Number	Mean Months
TOTAL	38,076	7,511	41.2	30,565	48.2
Murder	48	9	166.6	39	139.2
Manslaughter	41	0	—	41	31.2
Kidnapping/Hostage-Taking	43	13	66.2	30	162.4
Sexual Abuse	150	2	42.0	148	61.6
Assault	367	5	33.8	362	37.3
Robbery	1,863	240	70.2	1,623	104.0
Arson	87	26	37.5	61	65.0
Drugs - Trafficking	14,866	5,057	51.6	9,809	91.8
Drugs - Communication Facility	308	63	16.0	245	43.4
Drugs - Simple Possession	824	8	19.8	816	5.5
Firearms	2,593	304	29.6	2,289	66.5
Burglary/B&E	42	1	23.0	41	25.5
Auto Theft	210	37	10.2	173	19.0
Larceny	2,719	154	5.3	2,565	5.2
Fraud	5,497	715	5.2	4,782	10.9
Embezzlement	877	38	2.8	839	3.7
Forgery/Counterfeiting	928	86	8.3	842	8.4
Bribery	276	55	2.9	221	13.5
Tax	841	72	2.7	769	4.7
Money Laundering	863	248	17.7	615	36.2
Racketeering/Extortion	491	124	40.5	367	71.1
Gambling/Lottery	155	35	1.3	120	4.8
Civil Rights	107	15	1.6	92	23.6
Immigration	2,226	24	11.3	2,202	18.4
Pornography/Prostitution	80	9	8.6	71	39.2
Prison Offenses	264	17	16.4	247	21.7
Administration of Justice Offenses	564	86	4.2	478	15.0
Environmental/Wildlife	105	5	6.8	100	3.3
National Defense	25	3	7.3	22	14.8
Antitrust	24	6	1.0	18	1.4
Food & Drug	72	10	10.4	62	3.3
Other Miscellaneous Offenses	482	38	12.4	444	8.4

¹Of the 39,971 cases, 1,895 were excluded due to one or more of the following reasons: missing primary offense category (52), missing departure information (1,465), life sentence ranges (386), or missing sentence information (122). Sentences of probation (*i.e.*, sentence lengths of zero months) were included in the sentence average computations.

²Non-substantial assistance cases include cases with no departures, upward departures, or downward departures.

SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

Sentence Length by Circuit and District. Table 17 highlights the large variation in sentence lengths between §5K1.1 and non-§5K1.1 cases by circuit and district. Among the individual circuits, defendants who received substantial assistance departure cases in the District of Columbia were sentenced to 25.7 months less than defendants who did not receive a substantial assistance departure; contrast this with the Sixth Circuit within which substantial assistance defendants were sentenced to an average of five months more.

There was even greater variation among districts, with §5K1.1 defendants (compared to non-§5K1.1 defendants) receiving 47.4 months on average less in Southern Illinois and 24.5 months more in Northern Mississippi. These variations may be due to the offense types prevalent in a particular district or circuit, prosecutorial policies on substantial assistance motions, or the exercise of judicial discretion.

E. Degree of Departure from the Guideline Minimum

The “degree of departure” concept measures the variation of the defendant’s departure sentence from the minimum of the final applicable guideline range¹²⁸ and is reported as a percentage decrease from the minimum of this range. For example, consider a defendant with a guideline range of 30 to 37 months. If this defendant were granted a substantial assistance departure, the judge can depart below the guideline minimum of 30 months and impose a sentence anywhere between zero months (*i.e.*, a sentence of probation only) and 29 months. If the judge sentences the defendant to 20 months in prison, the defendant receives a 33 percent degree of departure: the sentence is lower by 10 (*i.e.*, 30 minus 20) months, or 33 percent lower than the applicable guideline minimum of 30 months. Similarly, if the judge sentences the defendant to zero months in prison, the defendant receives a 100 percent departure (the sentence is 100 percent lower than the applicable guideline minimum of 30 months).

Focusing on both §5K1.1 and other downward departure cases, Table 18 compares the differences in degree of departure from the guideline minimum by circuit and district. The table shows an average degree of departure of 60.9 percent for substantial assistance cases and 55.9 percent for other downward departure cases. However, this reasonably comparable degree of departure translates into dissimilar months of departure: substantial assistance sentences were on average 50.8 months shorter than their guideline minimums while other downward departure sentences averaged 23.2 months shorter.

Degree of Departure by Circuit. When comparing below-guideline departure levels among circuits, individual circuits showed a wide variation in the average degree of departure in sentence length. The range of departures was larger for substantial assistance cases (31.8

¹²⁸In this analysis the final applicable guideline range incorporates any applicable mandatory minimum sentence. For example, consider a defendant who has a computed guideline range of 51 to 63 months for an offense with a mandatory minimum sentence of 60 months. The mandatory minimum sentence “trumps” the lower computed guideline endpoint, producing the final applicable guideline range of 60 to 63 months.

Table 17

**AVERAGE SENTENCE LENGTH BY DEPARTURE STATUS
AND FEDERAL JUDICIAL CIRCUIT AND DISTRICT¹
(October 1, 1993 through September 30, 1994)**

CIRCUIT District	TOTAL	SUBSTANTIAL ASSISTANCE CASES ²		NON-SUBSTANTIAL ASSISTANCE CASES ²	
		n	Mean Months	n	Mean Months
TOTAL	38,076	7,511	41.0	30,565	48.2
D.C. CIRCUIT	837	63	21.4	387	47.1
District of Columbia	837	63	21.4	387	47.1
FIRST CIRCUIT	2,095	247	34.7	924	51.6
Maine	253	29	47.4	112	38.1
Massachusetts	625	97	30.2	264	46.3
New Hampshire	149	31	49.5	59	30.9
Puerto Rico	833	79	30.5	377	65.2
Rhode Island	235	11	30.4	112	42.5
SECOND CIRCUIT	5,284	618	20.2	2,802	32.3
Connecticut	467	21	30.9	223	38.9
New York					
Eastern	2,158	234	18.7	962	34.2
Northern	686	70	35.8	308	18.4
Southern	1,131	193	15.3	938	36.0
Western	668	78	23.5	295	21.7
Vermont	174	22	6.7	76	39.9
THIRD CIRCUIT	3,465	671	35.5	1,397	44.9
Delaware	165	13	63.8	76	47.6
New Jersey	869	139	27.8	365	34.1
Pennsylvania					
Eastern	1,218	408	37.2	405	57.6
Middle	491	71	39.8	210	39.2
Western	551	35	27.9	258	50.3
Virgin Islands	171	5	32.0	83	26.1
FOURTH CIRCUIT	7,529	887	46.7	3,321	57.4
Maryland	644	86	54.8	279	46.7
North Carolina					
Eastern	861	101	50.0	380	75.0
Middle	518	72	51.1	223	94.9
Western	1,133	321	57.5	406	61.8
South Carolina	1,182	132	23.1	525	41.8
Virginia					
Eastern	1,677	35	49.3	821	57.2
Western	659	99	39.3	280	61.5
West Virginia					
Northern	250	20	26.9	115	43.5
Southern	605	21	17.9	292	40.6

Table 17 (cont.)

CIRCUIT District	TOTAL	SUBSTANTIAL ASSISTANCE CASES		NON-SUBSTANTIAL ASSISTANCE CASES ²	
		n	Mean Months	n	Mean Months
FIFTH CIRCUIT	9,484	848	39.7	4,318	51.4
Louisiana					
Eastern	717	29	43.3	344	39.0
Middle	86	4	45.0	41	34.5
Western	522	46	16.3	238	42.0
Mississippi					
Northern	336	24	66.2	156	41.7
Southern	408	30	59.2	189	45.3
Texas					
Eastern	727	39	46.1	344	63.3
Northern	1,486	162	41.7	662	65.4
Southern	2,650	266	40.3	1,192	52.4
Western	2,552	248	35.7	1,152	47.4
SIXTH CIRCUIT	6,459	763	43.8	2,848	38.8
Kentucky					
Eastern	569	81	26.0	244	34.3
Western	555	23	28.0	266	18.7
Michigan					
Eastern	1,452	170	37.0	641	37.9
Western	504	66	55.3	219	44.4
Ohio					
Northern	987	105	60.7	441	37.9
Southern	688	116	54.4	286	33.3
Tennessee					
Eastern	588	78	39.5	255	47.8
Middle	411	29	36.8	191	37.8
Western	705	95	40.9	305	57.5
SEVENTH CIRCUIT	3,252	312	47.7	1,470	51.7
Illinois					
Central	411	61	55.8	175	48.1
Northern	1,089	83	35.9	503	47.0
Southern	400	58	52.7	171	100.1
Indiana					
Northern	345	11	41.5	167	39.1
Southern	368	56	44.2	156	50.3
Wisconsin					
Eastern	440	34	56.2	203	41.1
Western	199	9	65.8	95	43.7
EIGHTH CIRCUIT	4,844	562	35.5	1,741	51.2
Arkansas					
Eastern	461	33	27.6	214	54.0
Western	245	5	25.4	120	33.9
Iowa					
Northern	277	35	56.9	121	60.3
Southern	225	47	56.0	89	83.7
Minnesota	677	89	35.2	294	44.4
Missouri					
Eastern	662	108	37.3	277	66.5
Western	596	148	24.6	224	58.4
Nebraska	382	78	40.9	152	42.5
North Dakota	187	11	13.9	88	29.2
South Dakota	332	8	18.4	162	32.0

Table 17 (cont.)

CIRCUIT District	TOTAL	SUBSTANTIAL ASSISTANCE CASES		NON-SUBSTANTIAL ASSISTANCE CASES ¹	
		n	Mean Months	n	Mean Months
NINTH CIRCUIT	12,686	1,044	36.0	5,821	39.9
Alaska	190	10	55.6	90	33.7
Arizona	2,038	164	24.1	937	30.2
California					
Central	1,784	62	46.1	861	58.3
Eastern	1,050	52	54.6	499	50.5
Northern	779	67	32.4	356	43.8
Southern	3,104	396	39.3	1,354	25.4
Guam	124	8	5.8	58	32.1
Hawaii	330	54	47.2	138	38.4
Idaho	168	8	16.5	80	48.1
Montana	316	24	19.8	146	49.1
Nevada	751	43	27.2	354	47.5
Northern Mariana Islands	0	0	—	0	—
Oregon	932	46	35.4	443	53.0
Washington					
Eastern	451	17	18.0	217	26.1
Western	669	93	35.8	288	40.9
TENTH CIRCUIT	3,884	260	30.1	1,812	39.4
Colorado	644	74	33.2	285	37.5
Kansas	548	44	39.2	252	53.9
New Mexico	1,129	37	17.3	546	24.6
Oklahoma					
Eastern	88	2	6.0	43	44.0
Northern	298	26	19.8	136	40.7
Western	491	29	50.6	231	62.1
Utah	521	23	21.6	249	34.8
Wyoming	165	25	20.6	70	46.3
ELEVENTH CIRCUIT	8,684	1,236	60.2	3,724	70.5
Alabama					
Middle	410	44	63.5	183	43.9
Northern	714	78	22.3	318	46.7
Southern	490	84	63.0	203	57.7
Florida					
Middle	1,897	391	60.2	753	77.9
Northern	614	162	77.9	226	101.0
Southern	2,379	197	56.1	1,091	80.7
Georgia					
Middle	666	66	57.5	300	51.1
Northern	1,084	130	59.0	477	66.4
Southern	430	84	70.6	173	65.9

¹Of the 39,971 cases, 1,895 were excluded from this table due to one or more of the following reasons: missing departure information (1,465), life sentence ranges (386), or missing sentencing information (122). Sentences of probation (*i.e.*, sentence lengths of zero months) were included in the sentence average computations.

²Non-substantial assistance cases include cases with no departures, upward departures, or downward departures.

SOURCE: U.S. Sentencing Commission, 1994 Monitoring Datafile, MONFY94.

Table 18

**DEGREE OF DEPARTURE BY GUIDELINE RANGE AND
FEDERAL JUDICIAL CIRCUIT AND DISTRICT¹
(October 1, 1993 through September 30, 1994)**

CIRCUIT		DEGREE OF DECREASE FOR SUBSTANTIAL ASSISTANCE			DEGREE OF DECREASE FOR OTHER DOWNWARD DEPARTURES		
District	TOTAL ²	n	Mean Decrease in Months	% Decrease in Months	n	Mean Decrease in Months	% Decrease in Months
TOTAL	9,792	7,012	50.8	60.9	2,780	23.2	55.9
D.C. CIRCUIT	100	63	70.8	81.9	37	31.0	61.4
District of Columbia	100	63	70.8	81.9	37	31.0	61.4
FIRST CIRCUIT	309	227	51.9	65.2	82	17.9	54.1
Maine	30	29	47.2	48.9	1	3.0	20.0
Massachusetts	131	89	54.8	73.5	42	16.6	67.4
New Hampshire	33	26	37.2	56.7	7	15.8	55.0
Puerto Rico	99	74	57.0	63.3	25	21.2	32.5
Rhode Island	16	9	40.3	74.6	7	17.7	55.0
SECOND CIRCUIT	964	534	54.0	78.1	430	21.1	59.0
Connecticut	107	20	62.6	73.3	87	21.6	68.4
New York							
Eastern	344	181	62.5	79.2	163	22.1	50.6
Northern	97	67	33.7	56.6	30	16.4	48.7
Southern	263	169	66.2	88.1	94	24.1	66.5
Western	121	76	24.0	69.4	45	15.9	60.7
Vermont	32	21	47.0	92.1	11	10.1	68.0
THIRD CIRCUIT	718	617	59.3	68.4	101	19.2	68.4
Delaware	14	13	68.5	59.4	1	6.0	100.0
New Jersey	150	130	37.7	69.6	20	14.6	71.7
Pennsylvania							
Eastern	401	371	73.0	71.5	30	21.1	67.0
Middle	90	66	31.7	50.9	24	21.5	66.5
Western	58	32	45.7	70.6	26	19.0	68.2
Virgin Islands	5	5	39.0	50.4	0	--	--
FOURTH CIRCUIT	1,000	834	57.0	60.3	166	22.4	53.6
Maryland	117	76	33.4	43.9	41	22.8	44.9
North Carolina							
Eastern	114	98	64.3	62.7	16	19.2	56.2
Middle	78	68	53.9	56.1	10	10.8	55.8
Western	310	294	72.2	59.1	16	20.8	56.0
South Carolina	145	128	27.3	61.6	17	27.6	70.6
Virginia							
Eastern	59	35	92.7	66.1	24	30.4	56.6
Western	113	94	62.7	70.5	19	23.4	51.9
West Virginia							
Northern	26	20	33.3	70.5	6	9.8	57.4
Southern	38	21	21.9	66.5	17	19.8	47.4

Table 18 (cont.)

CIRCUIT	TOTAL ¹	DEGREE OF DECREASE FOR SUBSTANTIAL ASSISTANCE			DEGREE OF DECREASE FOR OTHER DOWNWARD DEPARTURES		
		n	Mean Decrease in Months	% Decrease in Months	n	Mean Decrease in Months	% Decrease in Months
FIFTH CIRCUIT	1,041	801	38.8	53.8	240	29.9	57.1
Louisiana							
Eastern	49	29	28.5	50.8	20	12.6	56.8
Middle	5	4	14.8	30.0	1	38.0	92.7
Western	53	45	25.0	79.0	8	37.5	56.7
Mississippi							
Northern	47	23	110.6	57.7	24	74.8	62.7
Southern	39	30	49.6	44.4	9	29.9	54.4
Texas							
Eastern	59	38	47.1	57.7	21	25.2	66.4
Northern	180	146	40.4	57.2	34	22.8	76.6
Southern	317	250	44.7	54.9	67	21.5	57.7
Western	292	236	26.2	46.7	56	31.9	38.7
SIXTH CIRCUIT	889	731	38.9	54.0	158	15.6	56.5
Kentucky							
Eastern	85	74	32.1	60.2	11	8.6	45.3
Western	32	21	21.5	52.8	11	17.3	44.4
Michigan							
Eastern	201	167	47.8	59.4	34	15.5	47.0
Western	71	64	33.5	43.0	7	8.9	60.7
Ohio							
Northern	140	101	41.1	50.4	39	14.1	59.8
Southern	133	109	39.3	47.7	24	16.0	72.9
Tennessee							
Eastern	87	76	32.5	54.0	11	14.7	70.7
Middle	33	26	25.0	46.9	7	6.3	54.5
Western	107	93	42.4	60.6	14	32.6	48.2
SEVENTH CIRCUIT	344	290	34.5	50.1	54	18.1	63.8
Illinois							
Central	61	58	32.2	44.9	3	7.7	95.6
Northern	97	73	36.8	63.2	24	14.3	66.5
Southern	65	58	48.5	54.4	7	16.3	58.0
Indiana							
Northern	19	9	49.6	66.0	10	25.0	48.7
Southern	55	51	21.2	41.8	4	41.5	88.5
Wisconsin							
Eastern	36	32	26.7	35.9	4	18.8	58.1
Western	11	9	29.1	30.1	2	5.0	41.7
EIGHTH CIRCUIT	688	549	47.8	64.5	139	19.4	58.6
Arkansas							
Eastern	44	33	53.9	67.4	11	24.3	80.5
Western	7	5	23.0	78.1	2	8.0	64.3
Iowa							
Northern	46	35	56.6	50.6	11	14.1	58.8
Southern	50	46	34.6	44.2	4	10.8	41.3
Minnesota	123	88	43.2	61.5	35	19.1	49.4
Missouri							
Eastern	122	105	40.9	62.9	17	23.6	63.8
Western	163	145	61.7	77.0	18	17.2	56.3
Nebraska	91	74	46.1	65.0	17	29.4	62.3
North Dakota	25	11	23.5	65.4	14	12.1	65.8
South Dakota	17	7	12.9	43.8	10	16.7	51.6

Table 18 (cont.)

CIRCUIT	TOTAL ²	DEGREE OF DECREASE FOR SUBSTANTIAL ASSISTANCE			DEGREE OF DECREASE FOR OTHER DOWNWARD DEPARTURES		
		n	Mean Decrease in Months	% Decrease in Months	n	Mean Decrease in Months	% Decrease in Months
NINTH CIRCUIT	1,893	950	50.9	63.8	943	24.8	51.7
Alaska	23	10	52.9	47.2	13	29.7	54.4
Arizona	553	159	55.9	73.1	394	22.2	53.5
California							
Central	94	52	37.7	47.9	42	27.8	49.4
Eastern	104	49	50.5	49.4	55	25.1	36.7
Northern	95	63	37.7	72.1	32	30.9	57.5
Southern	550	344	57.2	60.5	206	28.8	49.0
Guam	9	7	19.4	93.1	2	15.0	13.0
Hawaii	66	52	44.3	60.7	14	21.0	67.9
Idaho	13	8	54.5	74.1	5	8.6	84.9
Montana	47	23	29.7	69.8	24	13.8	74.4
Nevada	77	42	42.0	69.2	35	45.3	62.4
Northern Mariana Islands	0	0	--	--	0	--	--
Oregon	115	45	26.8	54.1	70	22.2	42.0
Washington							
Eastern	29	15	41.3	70.7	14	16.2	47.9
Western	118	81	64.9	71.8	37	17.9	53.6
TENTH CIRCUIT	476	244	35.8	61.2	232	20.8	60.4
Colorado	112	74	28.2	53.6	38	23.9	54.4
Kansas	48	31	40.7	55.1	17	13.8	68.5
New Mexico	130	37	35.5	74.3	93	21.1	53.9
Oklahoma							
Eastern	2	2	19.5	75.0	0	--	--
Northern	35	25	42.5	77.0	10	13.5	80.8
Western	45	28	56.6	52.6	17	17.2	68.2
Utah	70	22	33.6	66.6	48	23.2	67.3
Wyoming	34	25	26.2	59.7	9	20.0	64.2
ELEVENTH CIRCUIT	1,370	1,172	63.1	55.2	198	29.0	52.6
Alabama							
Middle	47	41	34.8	39.2	6	16.5	60.2
Northern	80	73	45.6	72.4	7	4.9	66.9
Southern	91	79	86.9	67.0	12	44.0	54.6
Florida							
Middle	420	369	58.0	52.8	51	29.2	53.6
Northern	153	150	96.4	59.5	3	42.3	54.5
Southern	258	193	64.2	55.4	65	37.3	49.2
Georgia							
Middle	72	63	35.6	50.6	9	11.3	80.1
Northern	151	120	62.2	56.0	31	13.9	37.8
Southern	98	84	52.5	41.4	14	35.7	67.8

¹Of 39,971 cases, the Commission received complete guideline application information for 34,644.

²Of the 34,644 cases received with complete guideline application information, 10,006 were recorded as either a substantial assistance departure or an other downward departure. Of these, 214 were excluded from this table due to one or more of the following reasons: missing sentence length information (6), missing guideline minimum value (50), guideline minimum of life imprisonment (79), or logical criteria other than missing information (129).

SOURCE: U.S. Sentencing Commission, 1994 Monitoring Datafile, MONFY94.

percentage points¹²⁹) than downward departure cases (16.7 percentage points¹³⁰). Similarly, the average number of months of departure was larger for substantial assistance cases: 36.3 months¹³¹ compared to 14.4 months¹³² for other downward departure cases.

Comparing data within districts, the analysis selected only on those districts with adequate numbers of downward departures to make comparisons valid.¹³³ The trend in two-thirds (68%)¹³⁴ of these select districts revealed consistently larger decreases for §5K1.1 cases:

- The degree of departure for substantial assistance cases was on average 26 percent¹³⁵ higher than for downward departure cases.
- At the same time the number of months reflected in that departure was on average more than 100 percent higher.¹³⁶

Consider the dramatic example of the District of Connecticut, in which similar degrees of departures (68.4% and 73.3%—a 7% difference—between downward departure cases and substantial assistance cases, respectively) resulted in sentenced month reductions of 21.6 months and 62.6 months, respectively—a 290 percent difference.

One implication results from combining the finding of higher §5K1.1 reductions (Table 18) and the finding of shorter §5K1.1 sentences (Table 17). Substantial assistance cases likely have higher computed guideline range minimums compared to non-substantial assistance

¹²⁹For substantial assistance cases the percentage decreases ranged from the District of Columbia Circuit (81.9%) to the Seventh Circuit (50.1%).

¹³⁰For downward departure cases the percentage decreases ranged from the Third Circuit (68.4%) to the Ninth Circuit (51.7%).

¹³¹For substantial assistance cases the average months of departure ranged from the District of Columbia Circuit (70.8 months) to the Seventh Circuit (34.5 months).

¹³²For downward departure cases the average months of departure ranged from the District of Columbia (31.0 months) to the Sixth Circuit (15.6 months).

¹³³Only districts with at least 30 downward departures were examined.

¹³⁴For the remaining one-third of these select districts, all but two had §5K1.1 (compared to downward departure) cases with **smaller** average degrees of departure (averaging 0.07% smaller) and larger average sentence months reduction (averaging 81% larger). The remaining two districts had §5K1.1 cases with a higher average degree of departure (averaging 12% larger) with **smaller** average sentence months reduction (averaging 12% smaller).

¹³⁵The range was roughly 6 percent to 60 percent.

¹³⁶The range was roughly 120 percent to 500 percent.

departures. Consequently, §5K1.1 cases' higher degrees of departure and greater months of reduction serve to make substantial assistance sentences imposed more comparable to those of downward departure sentences imposed. In relation to offense types, this hypothesis is examined in a later section.

Degree of Departure by Offense of Conviction. Table 19 compares, by select offense type, the degree of departure for substantial assistance cases and other downward departure cases.

The dominant trend of both larger percent and months reduction was evident also in Table 19 and held for all select offense types except larceny. The highest degrees of departure were for drug trafficking: 63.9 percent for §5K1.1 cases and 35.3 percent for downward departure cases.

Table 19 also presents average sentence lengths by select offense types. These sentence length data¹³⁷ can be used in tandem with average months of decrease data¹³⁸ to approximate offense type guideline range minimums. For example, consider downward departure robbery cases. The average sentence imposed for other downward departure cases was 61.3 months (Column "C") and the departure reduced the guideline sentence by 26.6 months (Column "D"). An estimate of the lower endpoint of the guideline range is found by summing the robbery values in Columns "C" and "D": 87.9 months (61.3 + 26.6). For each select offense type, an estimate of the guideline lower endpoint is computed by summing Columns "A" and "B" for §5K1.1 cases and Columns "C" and "D" for other downward departure cases.

For each of the select offense types in Table 19, the estimated guideline minimum was higher for §5K1.1 cases than for downward departure cases. The conclusions are that substantial assistance defendants on average had:

- higher offense severities;
- higher guideline ranges;
- larger degrees of departure; and
- larger month reductions in sentence length.

¹³⁷Columns "A" and "C" of Table 19 present average sentence lengths for §5K1.1 and other downward departure cases, respectively.

¹³⁸Columns "B" and "D" of Table 19 present average months of departure for §5K1.1 and other downward departure cases, respectively.

Table 19

DEGREE OF DEPARTURE RELATIVE TO GUIDELINE RANGE BY SELECT PRIMARY OFFENSE CATEGORIES¹
(October 1, 1993 through September 30, 1994)

PRIMARY OFFENSE	TOTAL (ALL CASES)	TOTAL BELOW GUIDELINE RANGE ²			DEGREE OF DECREASE FOR SUBSTANTIAL ASSISTANCE				DEGREE OF DECREASE FOR OTHER DOWNWARD DEPARTURES			
		n	%		n	Mean Sentence in Months ³ (Column "A")	Mean Decrease in Months (Column "B")	% Decrease in Months	n	Mean Sentence in Months ³ (Column "C")	Mean Decrease in Months (Column "D")	% Decrease in Months
TOTAL (ALL OFFENSES)	34,644	9,792	28.3		7,012	41.2	50.8	60.9	2,780	33.8	23.2	55.9
SELECT OFFENSE TYPES												
Robbery	1,711	399	23.3		227	70.2	47.1	39.2	172	61.3	26.6	32.4
Drug Trafficking	14,281	5,864	41.1		4,791	51.6	63.9	57.0	1,073	56.4	35.3	44.7
Firearms	2,358	487	20.7		254	29.6	31.2	62.1	231	32.5	19.8	53.2
Larceny	2,310	252	10.9		141	5.3	9.6	79.5	111	4.8	8.7	82.0
Fraud	4,877	1,039	21.3		641	5.2	11.5	77.2	398	5.9	10.7	75.4
Money Laundering	775	305	39.4		236	17.7	28.3	73.1	69	17.8	18.0	57.9
Racketeering/Extortion	472	158	33.5		116	40.5	55.8	59.3	42	55.8	33.6	49.6

¹Of the 39,971 cases, the Commission received complete guideline application information for 34,644.

²Of the 34,644 cases received with complete guideline application information, 10,006 were recorded as either a substantial assistance departure or an other downward departure. Of these, 214 were excluded from this table due to one or more of the following reasons: missing sentence length information (6), missing guideline minimum value (50), guideline minimum of life imprisonment (79), or logical criteria other than missing information (129).

³Sentences of probation (i.e., sentence lengths of zero months) were included in the sentence average computations. Sentences of life imprisonment were included in the sentence average computations with an assigned value of 470 months (39.17 years), the life expectancy estimate of the average-aged federal defendant.

SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

F. Mandatory Minimums

Table 20 highlights the strong relationship between mandatory minimum sentences and substantial assistance departures. This table reports data for all defendants in fiscal year 1994. A defendant receiving a substantial assistance departure (compared to one without a §5K1.1 departure) was:

- more than twice as likely (53.9% compared to 22.0%, respectively) to have been convicted under a mandatory minimum statute (either drug and/or gun), and
- almost three times more likely (47.9% compared to 16.6%, respectively) to have been convicted under a drug mandatory minimum (exclusive of a gun mandatory minimum statute).

Table 20 also reports results from the perspective of defendants with a mandatory minimum sentence (the shaded columns in Table 20). Defendants convicted with:

- any mandatory minimum (either drug or gun) were almost three times more likely to have received a §5K1.1 departure than non-mandatory minimum defendants (37.3 % and 12.6%, respectively), and
- a drug mandatory minimum(s) alone was more than two times more likely to have received a §5K1.1 departure than defendants with gun mandatory minimum(s) alone (41.3% and 17.9%, respectively).

G. Drug Offenses

Drug offenses comprise a large proportion of both federal caseload and §5K1.1 departure cases. Figure 20 examines drug type, mandatory minimum convictions, and weapon involvement.

Drug Cases: Mandatory Minimums by Drug Type. Targeting drug defendants only and including the effects of drug type, Figure 20 examines the strong relationship between mandatory minimum drug sentences and the substantial assistance rate. As an example for interpreting the table, consider that of all drug defendants involved with marijuana and convicted under a mandatory minimum drug statute, 43.9 percent received a substantial assistance departure.

Strikingly and consistently across drug type, Figure 20 indicates that a drug defendant sentenced under a drug mandatory minimum was the most likely to receive a §5K1.1 departure than was any other drug defendant:

Table 20

DEPARTURE STATUS AND APPLICABLE MANDATORY MINIMUMS¹
(October 1, 1993 through September 30, 1994)

— All Defendants —

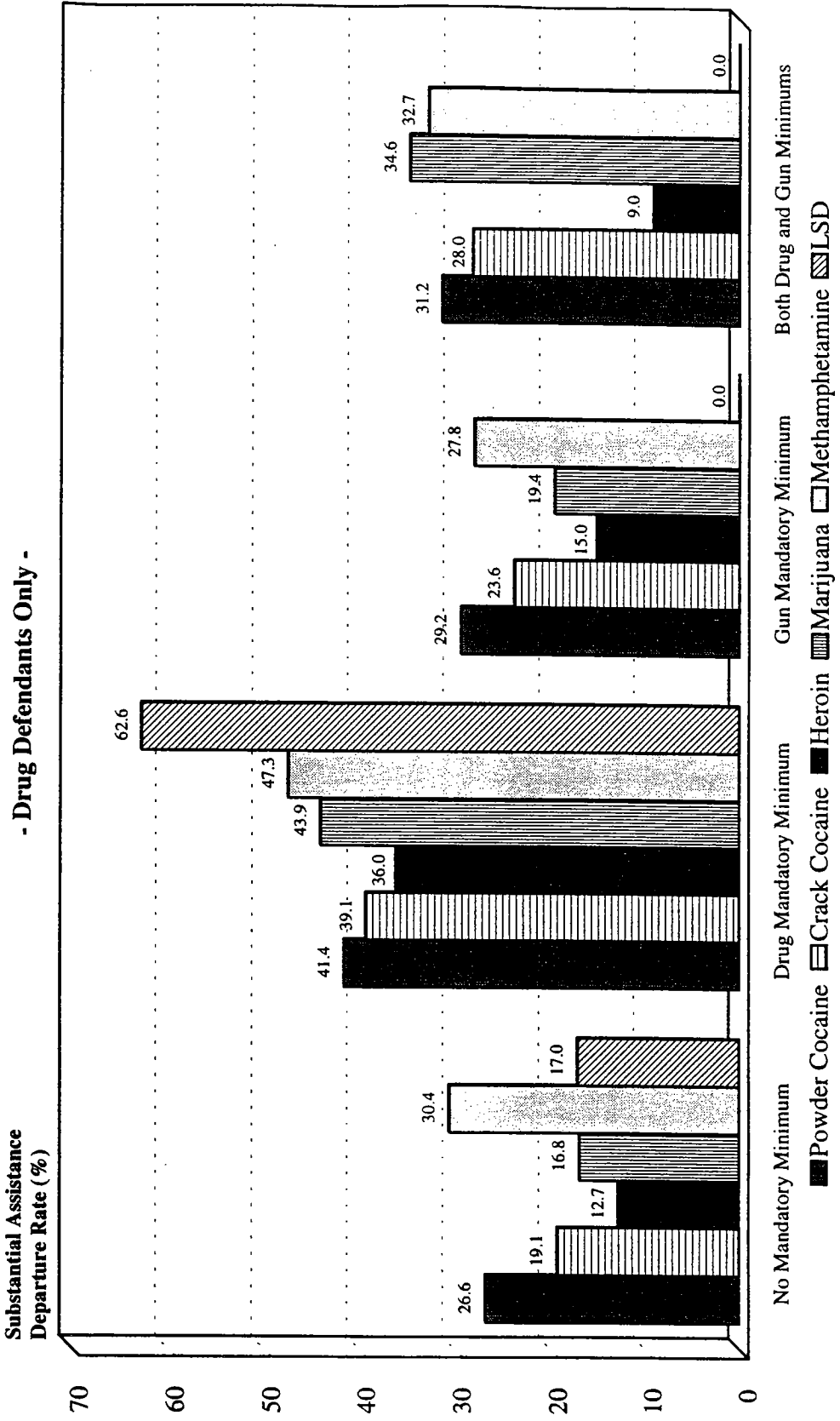
	TOTAL	PERCENT	SUBSTANTIAL ASSISTANCE CASES ²			NON-SUBSTANTIAL ASSISTANCE CASES ²		
			Number	Percent of 5K Cases	Percent of Mandatory Minimum Status	Number	Percent of Non-5K Cases	Percent of Mandatory Minimum Status
MANDATORY MINIMUM APPLIED								
TOTAL	38,363	100.0	7,504	19.6	—	30,859	80.4	—
NO MANDATORY MINIMUM	27,521	71.7	3,456	46.1	12.6	24,065	78.0	87.4
WITH MANDATORY MINIMUM	10,842	28.3	4,048	53.9	37.3	6,794	22.0	62.7
Drug	8,709	22.7	3,596	47.9	41.3	5,113	16.6	58.7
Gun	1,457	3.8	261	3.5	17.9	1,196	3.9	82.1
Both Drug and Gun	676	1.8	191	2.5	28.3	485	1.6	71.7

¹Of the 39,971 cases, 1,608 were excluded due to one or both of the following reasons: missing information on mandatory minimums (209) or missing departure information (1,473).

²Non-substantial assistance cases include cases with no departures, upward departures, or downward departures.

SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

Figure 20
SUBSTANTIAL ASSISTANCE DEPARTURE RATES
BY MANDATORY MINIMUM STATUS AND PRIMARY DRUG TYPE¹
(October 1, 1993, through September 30, 1994)



¹Of the 39,971 cases, 16,707 were sentenced under §§2D1.1, 2D1.2, 2D1.5, 2D1.6, 2D1.8, or 2D2.1. Of these, 16,327 were included in this table among the select drug types. An additional 365 cases were excluded due to one or more of the following reasons: missing drug type (3), missing information on mandatory minimums (6), or missing departure information (365).

- LSD defendants were the most likely (62.6%) to receive §5K1.1 departures, followed by methamphetamine (47.3%) defendants.
- Heroin defendants were the least likely (36.0%) to receive §5K1.1 departures, followed by crack cocaine (39.1%) defendants.

Figure 20 also shows that defendants with both drug and gun mandatory minimums were the second likeliest category to receive §5K1.1 departures: roughly one-third each of drug defendants involved with marijuana (34.6%), methamphetamine (32.7%), and powder cocaine (31.2%). (Note that LSD defendants rarely, if ever, used guns in conjunction with their drug involvement.)

Generally, drug defendants without convictions under any mandatory minimum statute were the least likely to receive §5K1.1 departures.

The relationship between mandatory minimums and substantial assistance departures may exist for several reasons. One hypothesis proposes that defendants who face stiff mandatory penalties¹³⁹ may be more willing to cooperate with prosecutors because a substantial assistance motion is the only way to receive a reduced sentence. Another postulates that drug trafficking convictions imply a greater likelihood of co-conspirators about whom defendants can provide cooperation information and receive subsequent §5K1.1 motions.

Drug Cases: Weapon Involvement by Drug Type. Table 21 shows the relationship between convicted weapon involvement, drug type, and substantial assistance rates in drug trafficking (§2D1.1) cases. In this table, convicted weapon involvement included either a guideline specific offense characteristic (SOC) for weapon involvement or use, or a separate 18 U.S.C. § 924(c) conviction. As an example for interpreting the table, among powder cocaine traffickers without weapon involvement, 39.2 percent received a substantial assistance departure.

The analysis identified three relationships between weapon involvement and substantial assistance departures depending on the drug type involved:

- **Powder cocaine, heroin, methamphetamine, or LSD:** Traffickers in these drug types were most likely (between 27.5% and 46.5%) to receive a substantial assistance departure when no weapon was involved.

¹³⁹Regarding the reported link between mandatory minimum statute convictions and substantial assistance departures, additional tabulations on the Commission's 1994 datafile MONFY94 indicated that longer mandatory minimum penalties were related to higher rates of substantial assistance departures. Defendants subject to the longer 120-month mandatory minimums were more likely to receive §5K1.1 departures than defendants facing 60-month mandatory minimums.

Table 21

WEAPON INVOLVEMENT AND SUBSTANTIAL ASSISTANCE RATES BY PRIMARY DRUG TYPE¹
(October 1, 1993 through September 30, 1994)

— Drug Trafficking Only —

DRUG TYPE	TOTAL	NO WEAPON INVOLVEMENT		GUIDELINE SOC ENHANCEMENT FOR WEAPON INVOLVEMENT		18 U.S.C. § 924(c) CONVICTION	
		n	% 5K	n	% 5K	n	% 5K
TOTAL	14,267	11,782	34.8	1,569	34.5	913	27.4
Powder Cocaine	4,570	3,835	39.2	476	29.9	259	32.4
Crack Cocaine	3,313	2,333	34.6	563	38.0	417	27.1
Heroin	1,287	1,144	27.5	101	21.8	42	11.9
Marijuana	4,029	3,619	29.8	297	33.3	113	23.0
Methamphetamine	865	658	46.5	127	33.9	80	27.5
LSD	200	193	45.6	5	20.0	2	0.0

¹Of the 39,971 cases, 15,743 were sentenced under §2D1.1 (Drug Trafficking). Of these, 14,578 received complete guideline application information. An additional 297 cases in the "OTHER" drug category were excluded. Of the remaining 14,281, 14 cases were excluded for one or both of the following reasons: missing information on drug type (3) or missing departure information (14).

SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

- **Crack cocaine or marijuana:** Traffickers in these drug types were most likely (38.0% and 33.3%, respectively) to receive substantial assistance departures when a guideline SOC enhancement for weapon involvement was applied.
- **All drug types except powder cocaine:** Substantial assistance departures were least likely among drug traffickers with an 18 U.S.C. § 924(c) conviction.¹⁴⁰

Commonly, drug trafficking mandatory minimum sentences “trump” the guideline range: when the mandatory minimum statute specifies a sentence higher than the computed guideline sentencing range, the statutory sentence mandate overrides the computed guideline range. Because of the large proportion of §5K1.1 departures involving drug trafficking mandatory minimums, it is interesting to note that in giving the §5K1.1 sentence for mandatory minimum drug traffickers, almost all judges (95.8%) departed to a sentence below both the statutory minimum and the pre-trumped guideline range.¹⁴¹

III. MULTIVARIATE ANALYSIS OF SUBSTANTIAL ASSISTANCE MOTIONS

The tables presented earlier in this chapter identify correlations between granting of substantial assistance motions and outcome variables involving: (a) defendant characteristics, (b) legally relevant factors, and (c) the criminal justice system. However, while informative, the tables do not provide information concerning the relative impact of these variables on the substantial assistance motion process.

To examine the distinct individual impact of each explanatory variable, a multivariate analysis was used. A multivariate model gets its name from the “multiple” number of explanatory variables included in the analysis. The model’s purpose is to measure—while *holding all other explanatory factors constant*—the impact of *each* explanatory variable on the variable of interest (*i.e.*, the outcome variable, for example, the probability of receiving a §5K1.1 departure). Using econometric techniques, an explicit impact (usually called the “coefficient” in a multivariate model) is estimated for each explanatory variable in the model; each coefficient

¹⁴⁰Other than drug trafficking, robbery is the other primary offense category with substantial levels of weapon involvement: 58.8 percent (n=1,006) of robbery cases in the Commission’s 1994 datafile MONFY94. For robbery cases, those with weapon involvement (*i.e.*, either a guideline weapon enhancement or at least one 18 U.S.C. § 924(c) conviction) were more likely (17.6%) to receive a §5K1.1 departure than cases without weapon involvement (8.1%). Additionally, focusing only on robberies involving guns, the presence of at least one mandatory minimum gun conviction (18 U.S.C. § 924(c)) is highly related to §5K1.1 departure receipt: 7.6 percent of cases compared to 10.9 percent without a gun mandatory. These results may be due to the large percentage of robbery cases involving guns, or to more cooperation by robbery defendants facing gun mandatory minimum sentences.

¹⁴¹U. S. Sentencing Commission, 1994 Datafile, MONFY94.

tells how much the outcome variable is expected to change when the associated explanatory variable takes on a different value and all other variables remain the same.

A hypothetical example illustrates the relationship. Consider as an outcome variable, the number of prison months imposed upon a defendant convicted of bank robbery. Assume that the analyst uses only two explanatory variables: (1) the defendant's gender,¹⁴² and (2) the defendant's number of previous robbery convictions. Further, assume that a multivariate regression model estimates the coefficients as follows: -9.25 for gender and +14.5 for prior robbery conviction. These *hypothetical* coefficients are interpreted to mean that:

- holding the defendant's gender constant (*i.e.*, comparing only men to men, or comparing only women to women), each additional prior robbery conviction would be expected to increase the hypothetical prison sentence by 14.5 months;
- holding the number of prior robbery convictions constant (*i.e.*, comparing only defendants with the same number of robbery convictions), a female defendant's sentence is expected to be smaller by a hypothetical 9.25 prison months.

The hypothetical findings of this model can be stated in another way: holding number of prior convictions constant, the expected difference between men and women in prison months imposed is captured by the coefficient of the gender variable: -9.25.¹⁴³

The analysis in the remainder of this chapter was structured around two decisions (*i.e.*, two outcome variables) in a substantial assistance case:

- What factors affect whether or not a substantial assistance motion is filed by the prosecutor?¹⁴⁴

¹⁴²Assume gender is coded 0=male and 1=female.

¹⁴³For a woman, one robbery conviction would increase the prison sentence by 14.5 months, while at the same time the effect of being a female would reduce the prison sentence by 9.25 months. Consequently, the woman with one prior robbery conviction would have a sentence increased by $14.5 - 9.25 = 5.25$ months. For a man with one prior robbery conviction, his sentence would increase by 14.5 months. The difference in prison sentence between a man and a woman each with one prior robbery conviction would be 9.25 months ($14.5 - 5.25 = 9.25$ months).

¹⁴⁴While the court does not have to grant a §5K1.1 motion filed by the prosecutor, information obtained by the Commission through other stages of this project indicates that most motions are granted as a matter of course. Note that the hard copy court documents submitted to the Commission include information only on granted §5K1.1 motions; they contain no direct information identifying defendants for whom a motion was made, but denied.

- What factors affect the amount of departure given by the judge following the granting of a substantial assistance motion?

Visualizing these two decisions as separate in time and involving possibly different factors,¹⁴⁵ the study was divided into two separate examinations. The first concerned a “Yes-No” process: did the prosecutor make a successful substantial assistance motion? This part of the multivariate analysis used a probit model appropriate for examination of the dichotomous decision.

The second part of the study concerned a quantitative decision: the amount the judge departed from the guideline minimum in imposing a substantial assistance sentence. This second analysis used a multivariate regression model for an outcome variable to measure the degree of departure.

The sections below detail these efforts. Both analyses used information from the Sentencing Commission’s fiscal year 1994 database. Preliminary investigation indicated that the relationships between the explanatory and outcome variables varied across drug trafficking and non-drug trafficking defendants. Consequently, to demonstrate these differences, the analysis was repeated on each of three specific groupings of defendants:

- all cases;
- all cases except those involving drug trafficking; and
- only drug trafficking (§2D1.1) cases.

The decision to analyze separately these three different groupings is supported by the large proportion of drug trafficking (§2D1.1) cases among federal defendants (38.8%¹⁴⁶) as well as the large proportion of drug trafficking cases among federal substantial assistance cases (67.4%). The division into different groupings assured that the preponderance of drug trafficking cases did not overwhelm and mask any differing §5K1.1 processes in other offense categories.

The text of this report focuses on only the drug trafficking and non-drug trafficking models; the different effects in these two models tend to cancel each other out when combined in the all cases model. However, the all cases model is presented in the data tables for those interested in the gross effect of explanatory variables on either the probability or degree of departure.

¹⁴⁵While many prosecutors recommend a departure level, adjustment, or sentence along with the substantial assistance motion, the judge is not bound by the recommendation and can decide independently on the degree of departure from the guideline minimum.

¹⁴⁶U.S. Sentencing Commission, 1994 Annual Report.

Finally, the explanatory variables were classified into three categories for ease of discussion:

- **Defendant characteristics**—such as race or gender—are legally irrelevant factors. Such factors are presumed to be unrelated either to sentencing or to the granting or degree of a substantial assistance departure.
- **Legally relevant characteristics**—such as weapon involvement or criminal record—are appropriate factors for consideration either in sentencing or in the granting or degree of a substantial assistance departure.
- **Criminal justice system characteristics**—such as a district's drug caseload or plea rate—are process variables related to existing regional, procedural, or systemic circumstances. It is presumed that these factors may contribute to variations either in sentencing or in the granting or degree of a substantial assistance departure.

A cautionary note is needed regarding the interpretation of the analysis. The multivariate models control only for the impact of the included explanatory variables (see Appendix F, Table 14). Variables that were not available for analysis likely have strong explanatory impacts on the substantial assistance process: the amount of cooperation provided by the defendant to the prosecution, the quality or usefulness of the information, the charging policies of law enforcement, and the plea bargaining practices of the prosecution.

A significance level (α) of .05 was used throughout the analysis discussion. Significance is reported in this study only when it is concluded, with 95 percent confidence, that the impact estimate is not due to random chance. Note, however, that statistical significance does not necessarily imply that a variable has a meaningfully significant effect either on the probability of receiving a substantial assistance departure or on the degree of departure received. Continuous variables such as age may be statistically significant, but only may affect the probability of receiving a substantial assistance departure by a minimal amount, meaning that a variable would have to increase considerably before the effect on the probability would be seen as important.

Because of the exploratory nature of this analysis and the differing significance level conventions used by academic disciplines, the tables identify three prob-levels, denoted as follows:

- | | |
|-----|--|
| * | significance at the .90 level ($\alpha=.10$) |
| ** | significance at the .95 level ($\alpha=.05$) |
| *** | significance at the .99 level ($\alpha=.01$) |

The text consistently uses the word "significance" to refer to an α value of .05 or smaller; individuals interested in the exact prob-values will find these, as well as coefficients and standard errors, listed in the appendix tables for this chapter.

IV. FACTORS AFFECTING A GOVERNMENT §5K1.1 MOTION

The prosecutorial motion analysis sought to identify the independent effects of explanatory variables upon the likelihood that a prosecutor would make a successful substantial assistance motion. The model was estimated on the three groupings of defendants using the probit statistical technique. Estimates from the probit results were converted to probabilities of receiving a substantial assistance motion.¹⁴⁷

A. Government Motion: Defendant Characteristics

The defendant characteristic variables included in the models were gender, race, citizenship status, education level, and age. The computed substantial assistance probabilities for the defendant characteristic variables are reported in Table 22. Numbers in this table refer to the probability of receiving a substantial assistance motion.¹⁴⁸

Gender. While a significant variable, gender varied in its impact upon probabilities across the defendant data groupings. Gender had a larger effect in the drug trafficking only grouping: males had a significantly lower chance of receiving a substantial assistance motion (.2389) than females (.3050), a change in probability of .0661, given that all other variables remain constant at the average. Gender was not a significant variable in the non-drug trafficking

¹⁴⁷The probit estimates were converted into probabilities by multiplying the estimate of each predictor variable by an observed value, computing the probit statistic, and referring to a cumulative normal distribution table to find the associated probability of receiving a substantial assistance motion for an individual with those specific observed values of the predictor variables. To compare different values of a given variable, average values were assigned to all other predictor variables. Consider, for example, a comparison of gender effects. To compare the probabilities of a substantial assistance motion for men and women, the probability was computed once for "Male" (GENDER=0) and again for "Female" (GENDER=1). For all predictor variables other than GENDER in the model, the average value of the variable was used. Consequently, using equivalent values for all other predictor variables, the difference in the probabilities for males and females is measured by the difference in the computed probabilities when GENDER=0 and GENDER=1. This method permits an examination of the effect of one variable (such as GENDER) on the probability of the defendant receiving a substantial assistance motion given that all other variables in the model are held constant. (For complete statistical results of the probit analyses, see Appendix F, Tables 8 through 10. Descriptions of variables used in these analyses can be found in Appendix F, Table 14.)

¹⁴⁸The Sentencing Commission data include information on whether the defendant received a substantial assistance departure. Both the interviews and field work of this study substantiate the fact that judges rarely deny a prosecutor's substantial assistance motion. Consequently, this section uses the term "receive a substantial assistance motion" to reference cases granted a substantial assistance departure by the judge. It is understood, however, that a few cases likely exist in which a substantial assistance motion is made by the prosecutor but denied by the judge.

Table 22

**DEPENDANT CHARACTERISTICS: EFFECT ON PROBABILITY
OF RECEIVING A SUBSTANTIAL ASSISTANCE DEPARTURE¹**

Defendant Characteristics	Probability of Receiving a Substantial Assistance Departure					
	All Cases		Non-Drug Trafficking Cases		Only Drug Trafficking Cases	
	Average ²	Change ³	Average	Change	Average	Change
GENDER						
Male	0.1635		0.1151		0.2389	
Female	0.1814	0.0179***	0.1151	0.0000	0.3050	0.0661***
RACE						
Non-Minority	0.2005		0.1379		0.3015	
Black	0.1562	-0.0443***	0.1151	-0.0228***	0.2119	-0.0896***
Hispanic	0.1251	-0.0754***	0.0778	-0.0601***	0.1949	-0.1066***
CITIZENSHIP STATUS						
U.S. Citizen	0.1762		0.1230		0.2578	
Non-U.S. Citizen	0.1357	-0.0405***	0.0901	-0.0329***	0.2148	-0.0430***
EDUCATION						
Less than H.S. Degree	0.1492		0.1038		0.2266	
H.S. Degree or more	0.1788	0.0296***	0.1210	0.0172***	0.2643	0.0377***
AGE						
0	0.1867		0.1190		0.2776	
18	0.1762	-0.0105**	0.1170	-0.0020	0.2643	-0.0133**
21	0.1736	-0.0131**	0.1170	-0.0020	0.2611	-0.0165**
25	0.1711	-0.0156**	0.1151	-0.0039	0.2578	-0.0198**
35	0.1660	-0.0207**	0.1151	-0.0039	0.2483	-0.0293**
45	0.1611	-0.0256**	0.1131	-0.0059	0.2389	-0.0387**
55	0.1562	-0.0305**	0.1112	-0.0078	0.2327	-0.0449**

¹This table demonstrates the probability of receiving a substantial assistance departure when all other variables are held constant except the variable of interest. These probabilities were obtained from a PROBIT analysis using all the variables listed in the models.

²The "Average" column in this table denotes the probability of receiving a substantial assistance motion for each variable given that all other variables are held constant using the mean or average value. The mean value for a variable does not necessarily represent an actual value maintained by that variable, but is used as a means of controlling for the effects of all variables except the variable of interest.

³The "Change" column in this table provides the change in probability of receiving a substantial assistance departure from the reference group (bolded value) to the other values of the same variable, provided that all other variables are held constant at their mean values. Values followed by one asterisk (*) are significant at the .10 level; values followed by two asterisks (**) are significant at the .05 level; and values followed by three asterisks (***) are significant at the .01 level.

SOURCE: U. S. Sentencing Commission, 1994 Monitoring Datafile, MONFY94.

grouping. Recall that males comprise the vast majority of federal defendants (84.6%).¹⁴⁹ The small number of women defendants may prompt prosecutors to be more lenient. Alternatively, women convicted of drug trafficking may both be more likely to be involved in a conspiracy and be characterized with less culpable or more non-violent behavior compared to women convicted of crimes such as fraud or embezzlement.

Race. Three racial categories were examined: Black, Hispanic,¹⁵⁰ and Non-Minority.¹⁵¹ The probit results in all three data groupings indicated significantly lower probabilities of receiving a substantial assistance departure for both Blacks and Hispanics compared to Non-Minorities. The racial differences in the probabilities of receiving a substantial assistance motion from the prosecutor are described below.

- The racial differences were more pronounced for the drug trafficking cases only grouping: Non-Minorities was the most likely racial group to receive a substantial assistance motion (.3015), followed by Blacks (.2119) and Hispanics (.1949).
 - The probability for Blacks was almost nine percentage points lower than that for Non-Minorities.
 - The probability for Hispanics was more than ten percentage points lower than that for Non-Minorities.
- Probabilities were notably higher for the drug trafficking only grouping compared to the non-drug trafficking grouping.
 - The Non-Minority drug trafficking grouping was more than twice (.3015) as likely to receive a substantial assistance motion than was the Non-Minority non-drug trafficking grouping (.1379), a difference of more than 16 percentage points.
 - The lowest probability (.0778) occurred for Hispanics convicted of non-drug trafficking offenses and was 2.5 times lower than the probability for Hispanics convicted of drug trafficking offenses (.1949).

¹⁴⁹U.S. Sentencing Commission, 1994 Annual Report.

¹⁵⁰The Hispanic category includes both White and Black Hispanics.

¹⁵¹In total, 41.6% of federal defendants were reported in the White racial category in fiscal year 1994. For the model's Non-Minority category, White defendants were combined with the category of "Other" race (including Asian, American Indians, and Pacific Islanders). Only 3.5 percent of federal defendants fall into the "Other" minority category. Empirical investigation indicated that the "Other" category was more similar to the White category than to either the Black or Hispanic categories.

The large effects of race in the drug trafficking only model are probably a combination of: (a) racial prevalence within certain drug types, (b) the desire to avoid mandatory minimum penalties, and (c) the organizational structure of drug conspiracies that fosters substantial assistance. Citizenship also is related to racial effects, because 74.9 percent of non-Citizens are Hispanic.¹⁵²

Citizenship. Citizenship status divided defendants into one of two categories: U.S. citizens and non-U.S. citizens (including legal and illegal aliens). Regardless of grouping, U. S. citizens were between three and four percentage points more likely than non-U.S. citizens to receive a §5K1.1 departure. Further, U.S. citizens in the drug trafficking only category were more than twice as likely as those uninvolved in non-drug trafficking cases to receive a §5K1.1 motion: a difference of more than 13 percentage points. Non-U.S. citizens may be less likely to receive §5K1.1 departures because of language or cultural barriers to providing assistance.

Education. The level of education received by each defendant was categorized into two categories: less than a high school diploma and at least a high school diploma (*i.e.*, 12 years or more of education). Education level was significant in both data groupings. Defendants who had finished high school had a higher probability of receiving a substantial assistance motion than comparable defendants who had not finished high school (an increase of almost two percentage points for the non-drug trafficking grouping and almost four percentage points for the drug trafficking only grouping). This might be related to the criminal behavior of educated defendants as leaders or managers in conspiracies; more motivated and able to provide substantial assistance in order to reduce their sentences.

Age. Age of defendant was significant in the drug trafficking only grouping: as a defendant's age increased, the probability of a substantial assistance motion decreased, ranging from one percentage point to more than four. However, while significant, the relative contribution of age to the change in probability was small. For example, comparing the probabilities for one defendant with an otherwise similar defendant aged ten years older, the probability of a substantial assistance motion decreased by a mere .009 percentage points for the older defendant. The most likely reason that age is significant only in the drug trafficking model is because these crimes tend to involve younger defendants.¹⁵³

B. Government Motion: Legally Relevant Characteristics

Legally relevant characteristics, specified by statutes and guidelines, define characteristics of the crime such as drug types and amounts, gun usage, or role in the offense, as well as criminal history. Under the federal guidelines, the characteristics reported in Table 23 are all appropriate for consideration in determining a sentence.

¹⁵²U. S. Sentencing Commission, 1994 Annual Report.

¹⁵³U. S. Sentencing Commission, 1994 Annual Report.

Offense of Conviction. The offense of conviction is one of the most important variables predicting the probability of receiving a substantial assistance motion. The following offense types are associated with high frequencies or large numbers of substantial assistance motions: drug trafficking (38.0%, n=5,065), robbery (14.3%, n=241), firearms (13.3%, n=305), larceny (6.8%, n=155), fraud (14.6%, n=715), money laundering (32.0%, n=248), and racketeering (31.2%, n=124).¹⁵⁴ Separate dichotomous variables were created to capture the impact of these offense types on the substantial assistance probability. As described earlier, the drug trafficking offense impacts are so potent that their analysis involved a separate data grouping. Consequently, the impacts of the remaining seven offense categories were estimated in the non-drug trafficking cases model.

Table 23 reports the results for the probability impacts of offense types. The non-drug trafficking grouping shows all offense types other than larceny had significant effects: money laundering defendants were the most likely to receive a substantial assistance motion (.3121) and robbery defendants were the least likely (.1271). Note that defendants convicted of money laundering have a higher probability of receiving a \$5K1.1 departure than drug traffickers. These two offense types are very often connected, however, as money launderers are often converting the proceeds from drug trafficking into "legal income." When compared with all other offense types, holding other variables constant at their means, offense type can change the probability of receiving a substantial assistance departure by as much as 21 percentage points.

Drug Involvement.¹⁵⁵ For non-drug trafficking offenses, Table 23 reports the impact of the presence of any drug type on the probability of a substantial assistance motion. Non-drug trafficking offenses that included large numbers of cases involving drugs are: drug communication facility (n=327), simple possession (n=878), firearms (n=226), money laundering (n=111), extortion/racketeering (n=186), and administration of justice (n=165).¹⁵⁶ This variable was significant in the non-drug trafficking grouping. In the non-drug trafficking cases model, defendants whose offenses involved drugs had a higher probability of receiving a substantial assistance motion (.1611) than other defendants not involved with drugs (.0853), an increase of almost eight percentage points. These results may be due to defendants providing substantial assistance in exchange for not having drug charges filed, or may be a simple relationship of drugs being present with more serious offenses in which the defendants were more able/willing to provide substantial assistance.

Drug Type. Table 23 examines the type of drug involved in drug trafficking offenses. Drug type variables included powder cocaine, crack cocaine, heroin, methamphetamine, and other drugs; marijuana was the omitted comparison category. Of these drug types, only heroin and powder cocaine were statistically significant: powder cocaine traffickers were more likely

¹⁵⁴U.S. Sentencing Commission, 1994 Annual Report.

¹⁵⁵Drug involvement was determined by any mention of drugs in the presentence report.

¹⁵⁶U.S. Sentencing Commission, 1994 Datafile, MONFY94.

Table 23

**LEGALLY RELEVANT CHARACTERISTICS: EFFECT ON PROBABILITY
OF RECEIVING A SUBSTANTIAL ASSISTANCE DEPARTURE ¹**

Legally Relevant Characteristics	Probability of Receiving a Substantial Assistance Departure					
	All Cases		Non-Drug Trafficking Cases		Only Drug Trafficking Cases	
	Average ²	Change ³	Average	Change	Average	Change
PRIMARY OFFENSE TYPE						
Robbery	0.1562	0.0524***	0.1271	0.0251**	N/A	N/A
Drug Trafficking	0.2420	0.1382***	N/A	N/A	N/A	N/A
Firearm	0.1357	0.0319***	0.1379	0.0359***	N/A	N/A
Larceny	0.0885	-0.0153*	0.0869	-0.0151*	N/A	N/A
Fraud	0.1492	0.0454***	0.1401	0.0381***	N/A	N/A
Money Laundering	0.3300	0.2262***	0.3121	0.2101***	N/A	N/A
Racketeering	0.2236	0.1198***	0.1922	0.0902***	N/A	N/A
All Other Offenses	0.1038		0.1020		N/A	N/A
DRUG INVOLVEMENT						
Drugs Not Involved	0.1314		0.0853		N/A	N/A
Drugs Involved	0.2206	0.0892***	0.1611	0.0758***	N/A	N/A
DRUG TYPE						
Heroin	N/A	N/A	N/A	N/A	0.1894	-0.0526***
Methamphetamine	N/A	N/A	N/A	N/A	0.2611	0.0191
Crack Cocaine	N/A	N/A	N/A	N/A	0.2578	0.0158
Powder Cocaine	N/A	N/A	N/A	N/A	0.2743	0.0323***
Marijuana	N/A	N/A	N/A	N/A	0.2420	
Other Drugs	N/A	N/A	N/A	N/A	0.2266	-0.0154
GUIDELINE MINIMUM						
0 Months	0.1446		0.1075		0.2296	
27 Months	0.1539	0.0093***	0.1093	0.0018**	0.2358	0.0062***
63 Months	0.1660	0.0214***	0.1151	0.0076**	0.2451	0.0155***
97 Months	0.1788	0.0342***	0.1190	0.0115**	0.2546	0.0250***

Table 23 (cont.)

Legally Relevant Characteristics	Probability of Receiving a Substantial Assistance Departure					
	All Cases		Non-Drug Trafficking Cases		Only Drug Trafficking Cases	
	Average ²	Change ³	Average	Change	Average	Change
WEAPON INVOLVEMENT						
No Presence of Weapon	0.1660		0.1075		0.2451	
Presence of Weapon	0.1733	0.0073	0.1736	0.0661***	0.2358	-0.0093
GUN MANDATORY MINIMUM						
Not Applied	0.1708		0.1151		0.2483	
Applied	0.1151	-0.0557***	0.0968	-0.0183	0.2061	-0.0422**
DRUG MANDATORY MINIMUM						
Not Applied	N/A		N/A		0.2090	
Applied	N/A	N/A	N/A	N/A	0.3707	0.1617***
CRIMINAL HISTORY						
Category I	0.1814		0.1271		0.2546	
Category II - VI	0.1495	-0.0319***	0.0968	-0.0303***	0.2327	-0.0219***
AGGRAVATING ROLE						
Adjustment Not Applied	0.1635		0.1093		0.2451	
Adjustment Applied	0.1922	0.0287***	0.1736	0.0643***	0.2358	-0.0093
MITIGATING ROLE						
Adjustment Not Applied	0.1635		0.1093		0.2420	
Adjustment Applied	0.2005	0.0370***	0.1611	0.0518***	0.2776	0.0356***
BODILY INJURY						
Enhancement Not Applied	0.1660		0.1151		0.2451	
Enhancement Applied	0.1423	-0.0237	0.0808	-0.0343**	0.1423	-0.1028
NUMBER OF COUNTS						
One Count of Conviction	0.1733		0.1170		0.2611	
Two Counts of Conviction	0.1635	-0.0206***	0.1131	-0.0099***	0.2389	-0.0454***

¹This table demonstrates the probability of receiving a substantial assistance departure when all other variables are held constant except the variable of interest. These probabilities were obtained from a PROBIT analysis using all the variables listed in the models.

²The "Average" column in this table denotes the probability of receiving a substantial assistance motion for each variable given that all other variables are held constant using the mean or average value. The mean value for a variable does not necessarily represent an actual value maintained by that variable, but is used as a means of controlling for the effects of all variables except the variable of interest.

³The "Change" column in this table provides the change in probability of receiving a substantial assistance departure from the reference group (bolded value) to the other values of the same variable, provided that all other variables are held constant at their mean values. Values followed by one asterisk (*) are significant at the .10 level; values followed by two asterisks (**) are significant at the .05 level; and values followed by three asterisks (***) are significant at the .01 level.

SOURCE: U. S. Sentencing Commission, 1994 Monitoring Datafile, MONFY94.

(.2743), and heroin cocaine traffickers were less likely (.1894), to receive a §5K1.1 departure compared to defendants convicted of marijuana trafficking (.2420).

Since public interest in all drug types has increased in recent years, further analysis scrutinized the relationship between race and drug type. Black defendants comprised 90.4 percent of all crack cocaine traffickers, with also large proportions of all heroin and powder cocaine traffickers (33.0% and 29.7%, respectively). Hispanic defendants accounted for more than half of all marijuana traffickers (51.1%), followed by slightly less than half of heroin and powder cocaine cases (48.9% and 42.8%, respectively).¹⁵⁷ The distribution of these drug types among racial groups may help explain the coefficients estimated by the model.

To investigate the interaction of race and drug type, each type of drug was examined in relation to defendant race. An "interaction" effect occurs when there is an impact from the joint presence of two (or more) variables that individually have separate effects of the outcome: the presence of variable "A" and variable "B" together have a distinct impact separate from either variable "A" or "B" on its own. For example, the interaction effect of Black and powder cocaine captures the impact on §5K1.1 departures of Black defendants who also were convicted of trafficking powder cocaine, separately from the individual effect either of being Black or trafficking in powder cocaine.

The interaction analysis presented several interesting findings. First, the variable for crack cocaine became significant in increasing the likelihood of a §5K1.1 departure; heroin and powder cocaine remained significant as previously. Second, the Black and Hispanic variables remained significantly likely to decrease the probability of a §5K1.1 departure. Finally, several race and drug type interaction effects significantly decreased the likelihood of receiving a § 5K1.1 departure for: Blacks trafficking in either crack cocaine or the "other drugs" category; and Hispanics trafficking in either crack cocaine or powder cocaine.¹⁵⁸

Guideline Minimum. Another legally relevant characteristic was offense seriousness, as measured by the minimum of the applicable guideline range. This variable was found to be significant in all models: the probability of receiving a substantial assistance motion increases as the guideline minimum of the computed sentence range increases. The statistics in Table 23 illustrate the comparative probabilities for guideline minimum sentences of 27 months, 63 months, and 97 months. As seen previously, the probabilities for the drug trafficking only grouping are more than twice as large as those for the non-drug trafficking grouping (for example, .2358 compared to .1093). However, although significant, the relative increase in the probability due to a month increase in the guideline minimum is fairly small: for the drug trafficking only grouping estimated at the mean, it takes roughly a 30-month increase in the

¹⁵⁷U.S. Sentencing Commission, 1994 Annual Report.

¹⁵⁸U.S. Sentencing Commission, 1994 Datafile, MONFY94.

guideline minimum to effect a one percentage point increase in the probability of a substantial assistance motion. One possible explanation for the increased probability of receiving §5K1.1 departures at higher guideline minimums might be that defendants with higher guideline minimums committed more serious crimes, faced longer sentences, and were more motivated to help prosecutors.

Weapon Involvement. Presence of a weapon¹⁵⁹ during the commission of a crime was found to be significant only in the non-drug trafficking case grouping: a defendant who had a weapon was 6.6 percentage points more likely to receive a §5K1.1 motion (.1736) than a comparable defendant who did not have a weapon (.1075).

Gun Mandatory Minimum. Another variable addressing the impact of weapons addresses whether or not the defendant was convicted under a mandatory minimum sentence for gun presence. This variable was found to be significant for the drug trafficking only grouping: the presence of a gun mandatory minimum decreased the §5K1.1 probability from .2483 to .2061, or slightly more than four percentage points.

At first glance, the results from the weapon involvement analysis seem to conflict with the results from the assessment of gun mandatory minimums. Note first, however, that weapon involvement includes either the presence of a gun or another dangerous weapon¹⁶⁰ other than a gun. However, further study revealed a distinct difference in the proportion of mandatory gun convictions between drug trafficking offenses and non-drug trafficking offenses that helps to explain these results.¹⁶¹

- For drug trafficking, weapons were involved approximately 17 percent of the time, divided between guideline weapon enhancements (11%) and 18 U.S.C. § 924(c) convictions (6%).
- For non-drug trafficking offenses, robbery and assault offenses accounted for the vast majority of weapon use.
 - Robbery offenses had weapon involvement in 59 percent of the cases,

¹⁵⁹Weapon presence was identified if the defendant either received a guideline specific offense characteristic (SOC) weapon enhancement or conviction under the statutory gun enhancement, 18 U.S.C. § 924(c). It did not include cases in which the defendant was convicted of unlawful firearms transportation or transaction crimes (18 U.S.C. § 924(e)) as this offense by definition involves guns and therefore is not considered an enhancement.

¹⁶⁰Guideline 1B1.1 Application Note 1(d) defines a dangerous weapon as "an instrument capable of inflicting death or serious bodily injury." An instrument appearing to be a dangerous weapon is treated in the guidelines as if it were a dangerous weapon.

¹⁶¹The statistics described below concerning weapon involvement and offense type are derived from the U.S. Sentencing Commission's 1994 Monitoring Datafile, MONFY94.

divided between guideline enhancements (34%) and 18 U.S.C. § 924(c) convictions (25%).

- Assault offenses had weapon involvement in 45 percent of the cases, divided between guideline enhancements (41%) and 18 U.S.C. § 924(c) convictions (4%).

These figures show that the non-drug trafficking offenses of robbery and assault were substantially more likely to have weapon involvement than drug trafficking offenses, and were generally less likely to involve a mandatory minimum gun conviction. One explanation might be that prosecutors are more willing to negotiate with non-drug traffickers who have guideline weapon enhancements (that may involve a non-gun weapon) in contrast to drug traffickers who also face gun mandatory minimum convictions.

Drug Mandatory Minimum. Defendants convicted of drug trafficking¹⁶² and subject to a drug mandatory minimum had a significantly higher probability (.3707) of receiving a substantial assistance motion than defendants to whom a drug mandatory minimum did not apply (.2090). The difference between these probabilities is 16 percentage points, making this one of the largest single increases in probability. Drug trafficking cases are often conspiracies and the presence of a drug mandatory minimum implies a relatively large quantity of drugs. Perhaps these defendants are more willing to provide information to prosecutors in return for their only chance for a sentence reduction below the statutory mandatory minimum.

Criminal History. For this study, the guidelines' six criminal history categories were divided into two groups: (1) Criminal History Category I (CHC I) offenders and (2) Criminal History Category II - VI (CHC II-VI) offenders.¹⁶³ In 1994, 50.7 percent of all federal defendants and 56.9 of drug defendants were in CHC I.¹⁶⁴ Criminal history was significant for both non-drug traffickers and drug traffickers: defendants in CHC I were more likely (by between two and three percentage points) to receive a §5K1.1 motion. Cases in the drug trafficking only grouping had a higher overall probability of receiving a substantial assistance motion: .2546 for those in CHC I and .2327 for comparable defendants in CHC II-VI. Likely reasons for the increased probability of §5K1.1 departures for defendants in CHC I are that first time offenders may be

¹⁶²Drug statutes with mandatory minimum sentences essentially are applied only in drug trafficking offenses. Other data groupings lack sufficient cases of drug mandatory minimums to permit model estimation.

¹⁶³CHC II-VI also includes defendants who received either career offender or armed career criminal status. Defendants who receive the career offender or the armed career criminal status must be in specific criminal history categories (see §4B1.1 and §4B1.4 of the USSG). After considering both guideline applications, the similarity of their substantial assistance rates (see Table 15) with other non-status defendants, and the small number of cases, career offenders and armed career criminals were grouped with the other defendants in CHC II-VI.

¹⁶⁴U.S. Sentencing Commission, 1994 Annual Report.

more willing to cooperate, or that prosecutors may be more willingly to intercede for offenders with minor criminal history records.

Aggravating Role. Under the sentencing guidelines, a defendant receives an aggravating role adjustment if the defendant was a leader, organizer, manager, or supervisor in a criminal activity involving five or more participants. Aggravating role was found to be significant in the non-drug trafficking grouping: defendants who received this adjustment were more likely to receive a substantial assistance motion by more than six percentage points. These defendants would know more about the operations of the conspiracy than other defendants and would, therefore, be more able to provide substantial assistance to law enforcement authorities.

Mitigating Role. A mitigating role adjustment applies to defendants in the lowest levels of an organization who are less culpable than other participants in the crime. All defendants who received a mitigating role adjustment—both non-drug traffickers and drug traffickers—were more likely to receive a substantial assistance motion than defendants who did not receive the adjustment: a difference of five percentage points for non-traffickers and more than three percentage points for traffickers.

Combining these results with those from the aggravating role adjustment, non-drug trafficking defendants at either the upper or lower ends of an organization were more likely to receive a substantial assistance departure than those in the middle. For drug traffickers only, those low in the organization were more likely to receive a §5K1.1 motion. Note, however, that the role adjustments were infrequently applied: out of 34,642 defendants, only 5,612 received a mitigating, and 2,571 received an aggravating, role adjustment.

Bodily Injury. Bodily injury denotes whether the victim(s) received any bodily injury during the commission of a crime. This variable was found to be significant in only non-drug trafficking cases: defendants who did not cause bodily injury were significantly more likely (.1151) to receive a §5K1.1 motion than their counterparts who did (.0808), an increase of more than three percentage points. In crimes other than drug trafficking, bodily injury is a significant marker of criminal violence. Prosecutors may be more willing to pursue substantial assistance motions with those who have not injured anyone in the course of their offenses.

Counts of Conviction. This variable examined the actual number of counts of conviction for the defendant. Table 23 shows the impact of having one versus two counts of conviction: defendants with two counts were significantly less likely to receive a §5K1.1 motion than defendants with one count, holding all other variables in the model constant at their average values. For the non-drug trafficking data grouping, the difference in probabilities was only 0.39 percentage points (.1170 versus .1131) compared to a difference of 2.2 percentage points (.2611 versus .2389) for the drug trafficking only grouping.

Initially these findings were thought to be linked to the district's plea rate being either low or high; however, only a weak correlation was found. Instead, these findings appear to be

by-products of whether or not a successful plea bargain was established. There is a moderate positive correlation ($r=.24$) between the number of counts of conviction and whether a person went to trial: defendants with higher counts of conviction were more likely to go to trial rather than to plead guilty. Therefore, defendants who would not or did not have a plea bargain with the prosecution tended to have more counts of conviction and to be less likely to receive a \$5K1.1 departure. In general, 76.6 percent of defendants who received a substantial assistance departure had one count of conviction; 75.8 percent of all defendants in 1994 had one count of conviction.¹⁶⁵

C. Government Motion: Criminal Justice System Characteristics

The third category of variables represents process variables in the criminal justice system. These variables refer to specific characteristics of the district, region, or court system.

Geographic Region. The first systemic variable in Table 24 is geographic region in the United States, based on the U.S. Census Bureau's four-region classification. The reference group for all the models was the Midwest. In the non-drug trafficking cases grouping, defendants in the Northeast, South, and West (.1660, .1075, and .1112 respectively) all had higher probabilities of receiving substantial assistance motions than equivalent defendants in the Midwest (.0901), resulting in increased probabilities of receiving substantial assistance motions of up to seven percentage points. In the drug trafficking cases only grouping, defendants in the Northeast and South (.3085 and .2177 respectively) were significantly more likely to receive substantial assistance motions than similar defendants in the Midwest (.2643), both by more than four percentage points. Defendants in the West were not significantly different from defendants in the Midwest.

These findings were particularly interesting because the regional classification did not follow circuit distinctions and, therefore, could not be explained by case law differences. There appears to be real differences in substantial assistance procedures based on the area of the country. This might be due to popular opinion or traditional attitudes of a region being carried into the criminal justice system or the overall case loads within particular regions.

Judge Appointment Year. Another variable in the systemic category is the appointment year of the judge, indicating whether the judge was appointed before or after the federal guideline system became operational. This variable divided judges into pre-guideline appointment and guideline appointment categories, with 1989's *Mistretta* decision used as the "operational" date. It was hypothesized that judges appointed prior to the guidelines might be more encouraging of substantial assistance motions to depart from the guidelines. However, because it was not significant in either the drug trafficking only or the non-drug trafficking cases models, no difference in substantial assistance departure probability was detected.

¹⁶⁵U.S. Sentencing Commission, 1994 Datafile, MONFY94.

Table 24

**SYSTEMIC CHARACTERISTICS: EFFECT ON PROBABILITY
OF RECEIVING A SUBSTANTIAL ASSISTANCE DEPARTURE¹**

Systemic Characteristics	Probability of Receiving a Substantial Assistance Departure					
	All Cases		Non-Drug Trafficking Cases		Only Drug Trafficking Cases	
	Average ²	Change ³	Average	Change	Average	Change
REGIONAL						
Midwest	0.1539		0.0901		0.2643	
Northeast	0.2148	0.0609***	0.1660	0.0759***	0.3085	0.0442***
South	0.1562	0.0023	0.1075	0.0174**	0.2177	-0.0466***
West	0.1685	0.0146*	0.1112	0.0211**	0.2483	-0.0160
JUDGE APPOINTMENT YEAR						
1989 or Later	0.1736		0.1210		0.2546	
Before 1989	0.1635	-0.0101*	0.1131	0.1131	0.2483	0.2483
DISTRICT CASELOAD						
0 Cases	0.1562		0.1151		0.2389	
350 Cases	0.1611	0.0049**	0.1151	0.0000	0.2420	0.0031
750 Cases	0.1660	0.0098**	0.1151	0.0000	0.2483	0.0094
1150 Cases	0.1711	0.0149**	0.1151	0.0000	0.2546	0.0157
PROSECUTOR CASELOAD RATIO						
Low	0.1492	-0.0095*	0.1151	-0.0079	0.2119	-0.0364***
Medium	0.1587		0.1230		0.2483	
High	0.1611	0.0024	0.1075	-0.0155**	0.2810	0.0327***
DISTRICT DRUG CASELOAD RATIO						
Low	0.1922	0.0287***	0.1230	0.0192***	0.2578	0.0189
Medium	0.1635		0.1038		0.2389	
High	0.1711	0.0076	0.1151	0.0113*	0.2420	0.0031
DISTRICT PLEA RATE						
Low	0.1660	-0.0051	0.1151	-0.0059	0.2358	-0.0125
Medium	0.1711		0.1210		0.2483	
High	0.1611	-0.0100**	0.1056	-0.0154**	0.2483	0.0000
DISTRICT \$5K1.1 RATE						
Low	0.0823	-0.0788***	0.0630	-0.0540***	0.1251	-0.1045***
Medium	0.1611		0.1170		0.2296	
High	0.2643	0.1032***	0.1635	0.0465***	0.3859	0.1563***

¹This table demonstrates the probability of receiving a substantial assistance departure when all other variables are held constant except the variable of interest. These probabilities were obtained from a PROBIT analysis using all the variables listed in the models.

²The "Average" column in this table denotes the probability of receiving a substantial assistance motion for each variable given that all other variables are held constant using the mean or average value. The mean value for a variable does not necessarily represent an actual value maintained by that variable, but is used as a means of controlling for the effects of all variables except the variable of interest.

³The "Change" column in this table provides the change in probability of receiving a substantial assistance departure from the reference group (bolded value) to the other values of the same variable, provided that all other variables are held constant at their mean values. Values followed by one asterisk (*) are significant at the .10 level; values followed by two asterisks (**) are significant at the .05 level; and values followed by three asterisks (***) are significant at the .01 level.

SOURCE: U. S. Sentencing Commission, 1994 Monitoring Datafile, MONFY94.

District Caseload. The number of criminal cases sentenced by district also was examined in the systemic category. The number of criminal cases was ranked by size and divided into three categories: high caseload districts, medium caseload districts, and low caseload districts.¹⁶⁶ To show the effect of district caseload, Table 24 illustrates three district caseloads that fell into each of the size categories: districts of 350 cases, 750 cases, and 1150 cases represent low, medium, and high district caseloads, respectively. Caseload was not found to be significant in either the drug trafficking only or the non-drug trafficking models: the size of the district has no significant effect on the probability of receiving a substantial assistance departure.

Prosecutor Caseload Ratio. In addition to the number of cases sentenced in a district, the caseload per prosecutor was included in the systemic category. Prosecutor caseload is the number of cases divided by the number of criminal prosecutors in each district. It was hypothesized that defendants in districts with higher prosecutor caseloads would have a higher probability of receiving substantial assistance motions due to time constraints. Caseload was divided into low, medium, and high categories, using the medium group as the reference.

Estimates for this variable were most definitive for the drug trafficking only grouping: defendants sentenced in a low prosecutor caseload district had a significantly lower probability of receiving a substantial assistance motion (.2119) and defendants sentenced in a high prosecutor caseload district had a significantly higher probability (.2810), consistent with the initial hypothesis. This difference accounted for a change of about three percent for both the low and high caseload groups from the medium group, controlling for all other variables. There also was one significant result for the non-drug trafficking cases grouping: defendants sentenced in a high prosecutor caseload district were less likely to receive a substantial assistance motion (.1075 compared to .1230 for medium prosecutor caseloads). The difference in probability between high and medium caseload districts was less than two percentage points. This last finding opposes earlier findings in the drug trafficking only model and might be explained by the fact that almost 40 percent of federal cases are drug trafficking cases. When prosecutors encounter non-drug trafficking cases, they may not need to spend as much time on their investigation because these crimes often do not involve conspiracies. Therefore, prosecuting a non-drug trafficking case would not take as much time or resources as a drug trafficking case.

District Drug Caseload Ratio. District drug caseload is computed by determining the proportion of a district's criminal caseload that consisted of drug offenses (drug trafficking, simple possession, and communication facility). The non-drug trafficking grouping had the only definitive finding: defendants sentenced in low drug caseload districts (.1230) were significantly

¹⁶⁶This method of ordering districts by size and dividing the ordered list into three categories was used for several systemic variables as part of the prosecutorial motion and judicial degree of departure analyses in this chapter. These variables are: district case size (high, medium, and low numbers of criminal cases); district prosecutor caseload (high, medium, and low numbers of criminal cases per prosecutor); district drug caseload (high, medium, and low drug cases as a proportion of all criminal cases); district plea rates (high, medium, and low proportions of cases that pleaded guilty); and district substantial assistance rates (high, medium, and low proportions of cases sentenced with a substantial assistance departure).

more likely to receive substantial assistance motions than those in medium drug caseload percentage districts (.1038); this was an increase of less than two percentage points. Districts that prosecute few drug cases might be more willing to offer substantial assistance deals to decrease sentences under drug mandatory minimums. Note that this variable was not significant in the drug trafficking only grouping.

District Plea Rate. The plea rates of all 94 districts were examined, and districts were divided into low, medium, and high plea rate districts, with medium districts serving as the reference group. Few of the results were significant, however, possibly due to the fact that districts in the low plea rate category still had plea rates above 80 percent. In the non-drug trafficking cases grouping, the probability of receiving a substantial assistance motion significantly decreased in high (compared to medium) plea rate districts: .1056 and .1210, respectively. High plea rate districts in the non-drug trafficking grouping had approximately one percentage point lower probability of receiving a substantial assistance motion when all other variables were held constant at their mean values. These results also may be due to a confounding effect: some plea bargain agreements likely include implicit or explicit substantial assistance assurances.

District Substantial Assistance Rate. The final judicial system variable is the district substantial assistance rate. Districts were placed into the low, medium, and high categories, using the medium group for reference. This variable was significant for both the low and high categories in both models, with smaller §5K1.1 probabilities in low §5K1.1 rate districts and higher probabilities in high §5K1.1 rate districts. In the non-drug trafficking cases model, the probabilities for low versus high rate districts were .0630 and .1635, respectively, for a difference of more than ten percentage points. In the drug trafficking only model, the probabilities were .1251 and .3859 for low and high §5K1.1 rate districts, respectively, resulting in a difference of more than 15 percentage points. These variables were among those with the largest impact on the probabilities of a defendant receiving a substantial assistance departure.

D. Multiple Variables: How Characteristics Interact

Drug Trafficking. Table 25 focuses on drug trafficking defendants only to highlight the more complex and realistic picture of how multiple variables interact. This table shows the result on §5K1.1 probabilities when comparing the presence or absence of four explanatory variables: drug mandatory minimums, gun mandatory minimums, drug types (powder cocaine, crack, and heroin), and race.

The effects of having a mandatory minimum sentence—either drug or gun—are clearly demonstrated in this table. In every category, a defendant subject to a drug mandatory minimum sentence had a higher probability of receiving a substantial assistance departure than a comparable defendant who was not. Conversely, a defendant subject to a gun mandatory minimum sentence had a smaller probability of receiving a substantial assistance departure.

Table 25

**SELECT CHARACTERISTICS: EFFECT ON PROBABILITY
OF SUBSTANTIAL ASSISTANCE DEPARTURE¹**

— Drug Trafficking —

Race and Drug Type	Mandatory Minimums			
	Drug Mandatory Minimum		No Drug Mandatory Minimum	
	Gun Mandatory Minimum	No Gun Mandatory Minimum	Gun Mandatory Minimum	No Gun Mandatory Minimum
Powder Cocaine				
Non-Minority	0.4207	0.4761	0.2483	0.2946
Black	0.3156	0.3669	0.1685	0.2061
Hispanic	0.2946	0.3446	0.1515	0.1867
Crack Cocaine				
Non-Minority	0.4013	0.4562	0.2327	0.2776
Black	0.2981	0.3483	0.1562	0.1922
Hispanic	0.2743	0.3085	0.1401	0.1736
Heroin				
Non-Minority	0.3156	0.3669	0.1685	0.2061
Black	0.2236	0.2676	0.1075	0.1357
Hispanic	0.2061	0.2483	0.0968	0.1230

¹This table demonstrates the probability of receiving a substantial assistance departure when all other variables are held constant except the variable of interest. These probabilities were obtained from a probit analysis using all the variables listed in the models.

SOURCE: U. S. Sentencing Commission, 1994 Monitoring Datafile, MONFY94.

Therefore, for drug trafficking cases, a defendant with a drug mandatory minimum and without a gun mandatory minimum had the greatest probability of receiving a §5K1.1 departure; a defendant with a gun mandatory minimum and no drug mandatory minimum had the lowest probability.

The effects of each drug type by race are demonstrated in this table. A defendant convicted of trafficking in a powder cocaine offense had a consistently greater probability of receiving a §5K1.1 departure than another defendant in a comparable racial group convicted of trafficking in either crack cocaine or heroin. Likewise, a crack cocaine trafficker had a larger probability of receiving a §5K1.1 departure than a heroin trafficker of the same race. This may be due to the perception that the mandatory minimum penalties for crack cocaine are too harsh.

The effect of race on substantial assistance departures also is clearly illustrated. Across trafficking of any drug type, a Non-Minority defendant had a greater probability of receiving a substantial assistance departure than a Black or Hispanic trafficking in the same drug. Similarly, across all drug type categories, a Black defendant was more likely to receive a substantial assistance departure than a Hispanic defendant.

Looking at the combined effects of all four characteristics, the table shows that Non-Minority defendants who trafficked in powder cocaine, were facing a drug mandatory minimum, and without a gun mandatory minimum had the greatest probability (.4761) of a §5K1.1 departure. Focusing on the four characteristics with the lowest probability of receiving a substantial assistance departure, note that Hispanic defendants who trafficked in heroin and were subject to a gun mandatory minimum (but not a drug mandatory minimum) had a low probability of a §5K1.1 departure (.0968). By varying only four characteristics, the probability of receiving a substantial assistance departure can change dramatically.

Select Primary Offense Categories. Table 26 looks at the combination of four different characteristics on the probability of receiving a substantial assistance departure for select primary offense categories other than drug trafficking: money laundering, robbery, and fraud. The other characteristics included in the table are criminal history category, role in the offense (aggravating, mitigating, or no adjustment), and gender.

Comparing defendants with the same values for role adjustment, gender, and criminal history category, those convicted of money laundering had the highest probabilities of receiving substantial assistance departures. Likewise, those convicted of robbery had higher probabilities than defendants convicted of fraud. Criminal history also had a consistent effect on the probability of receiving a substantial assistance departure: in comparable categories for role adjustment and gender, defendants in Criminal History Category I (CHC I) convicted of one offense type were more likely to receive a §5K1.1 than equivalent defendants who were in Criminal History Category II - VI (CHC II-VI) convicted of the same offense type.

Table 26

**SELECT CHARACTERISTICS: EFFECT ON PROBABILITY
OF SUBSTANTIAL ASSISTANCE DEPARTURE¹**

— Select Offenses —

Role in Offense and Gender	Select Primary Offense Category and Criminal History Category					
	Money Laundering		Robbery		Fraud	
	Criminal History Category I	Criminal History Category II-VI	Criminal History Category I	Criminal History Category II-VI	Criminal History Category I	Criminal History Category II-VI
Aggravating Role						
Male	0.3745	0.3264	0.1867	0.1539	0.1788	0.1469
Female	0.4052	0.3520	0.2061	0.1711	0.1977	0.1635
Mitigating Role						
Male	0.3897	0.3409	0.1977	0.1635	0.1894	0.1562
Female	0.4207	0.3669	0.2206	0.1814	0.2119	0.1736
No Role Adjustment						
Male	0.3372	0.2912	0.1611	0.1314	0.1539	0.1251
Female	0.3632	0.3156	0.1788	0.1469	0.1711	0.1401

¹This table demonstrates the probability of receiving a substantial assistance departure when all other variables are held constant except the variable(s) of interest. These probabilities were obtained from a probit analysis using all the variables listed in the models.

SOURCE: U. S. Sentencing Commission, 1994 Monitoring Datafile, MONFY94.

The role a defendant played in an offense also affected his/her probability of receiving a substantial assistance departure. Interestingly, if the defendant received either an aggravating or a mitigating role adjustment, the probability of receiving a substantial assistance departure was greater than if the judge did not make a role adjustment. Comparing the effects of receiving the aggravating and the mitigating role adjustments, defendants with a mitigating role adjustment were more likely to receive a §5K1.1 departure. This table also demonstrates the effect of gender and role on the probability of receiving a substantial assistance departure: compared to their comparable male counterparts, women had a higher probability of receiving a §5K1.1 departure.

A defendant with the following characteristics had the highest probability of receiving a substantial assistance departure: a female money launderer who received a mitigating role adjustment and was in Criminal History Category I (.4207). Compare this group with the defendant with the lowest probability of receiving a substantial assistance departure: a male who committed fraud, received no role adjustment, and was in Criminal History Category II - VI (.1251). By varying only those four characteristics, the chance of receiving a substantial assistance departure decreases by almost 30 percent.

V. FACTORS AFFECTING JUDICIAL DEGREE OF DEPARTURE

The second multivariate analysis examines those cases that received the prosecutor's substantial assistance motion and focuses specifically on judicial action: what factors help to explain a substantial assistance departure sentence given by the judge? In a substantial assistance departure the judge can sentence without the constraints of the applicable guideline range.

This portion of the study focuses on the length of the sentence in substantial assistance departure cases. The outcome variable used in the regression model is defined as the degree of departure from the minimum of the applicable guideline range¹⁶⁷ and is reported as a percentage decrease from the guideline range minimum sentence.¹⁶⁸ For example, consider a defendant with a guideline range of 30 to 37 months. If this defendant were granted a substantial assistance departure, the judge can depart below the guideline minimum of 30 months, anywhere between zero months (*i.e.*, a sentence of probation only) and 29 months. If the judge sentences the defendant to 20 months in prison, the defendant receives a 33 percent degree of departure: the sentence is lower by 10 months (*i.e.*, 30 minus 20), or 33 percent lower than the applicable guideline minimum of 30 months. Similarly, if the judge sentences the defendant to zero months in prison, the defendant receives a 100 percent departure (the sentence is 100 percent lower than the applicable guideline minimum of 30 months).

¹⁶⁷For this analysis the applicable guideline range incorporates any applicable statutory minimum sentence. For example, if a defendant has a computed guideline range of 41 to 51 months for an offense with a mandatory minimum sentence of 60 months, the mandatory minimum sentence "trumps" the guideline range, making the applicable guideline range equal to 60 months.

¹⁶⁸For complete statistical results of the regression analyses, *see* Appendix F, Tables 11 through 13. Descriptions of variables used in these analyses can be found in Appendix F, Table 14.

The multivariate analysis of degree of departure uses only those cases receiving a substantial assistance departure as represented in the U.S. Sentencing Commission's fiscal year 1994 database. As explained earlier, the study estimated degree of departure using models with each of three specific groupings of defendants based on the presence of a drug trafficking conviction:

- all cases;
- all cases except those involving drug trafficking; and
- only drug trafficking cases.

The discussion of the results is organized around the three categories of explanatory variables: defendant characteristics, legally relevant factors, and criminal justice system characteristics. As with the earlier discussion, only results from the drug trafficking model and the non-drug trafficking model are covered in the text. Results from both of these models, plus those of the all cases model, are shown in each table. This section continues the use of a significance level (α) of .05: "statistical significance" is reported in the text only when with 95 percent confidence it is judged that the impact estimate is not due to random chance. Recall that the tables use asterisks to identify three α levels for reference (*=.10; **=.05; ***=.01); the complete list of estimated coefficients, standard errors, and prob-values is contained in the appendix tables to this chapter.

A. Overall Explanatory Power

The regression model estimates include a measure of the power of the entire model resulting from its explanatory variables. This measure is called the R^2 statistic and reports the percent of variation in the outcome variable accounted for by the explanatory variables. The R^2 statistic for the all cases grouping was .27, meaning that the model explained 27 percent of the variation in the degree of departure for all cases. In the non-drug trafficking grouping, the R^2 statistic was much higher at .38. In the area of social science research, these R^2 statistics are very respectable.

The drug trafficking only grouping had a less impressive R^2 statistic with a value of .18. This suggests that the defendant, legally relevant, and judicial system characteristic variables included in the analysis did not explain as much of the variation as they did in either the groups of all cases and non-drug trafficking cases.

B. Judicial Degree of Departure: Defendant Characteristics

The same defendant characteristics studied in the government motion analysis were included in the degree of departure study.

Gender. Table 27 shows that women received significantly larger percentage point reductions in their sentences than men. For the non-drug trafficking grouping, women received 7.4 percentage point larger sentence reductions. Gender had its greatest impact in the drug trafficking grouping: women received roughly a 10.2 percentage point larger reduction in their sentences.

Race. In the drug trafficking grouping, Non-Minority defendants received significantly larger percentage point reductions in their sentences than either Black or Hispanic defendants. On average and holding all other variables constant, Non-Minority traffickers had greater reductions by 3.1 percentage points compared to Black traffickers and 5.4 percentage points compared to Hispanic traffickers.

In the non-drug trafficking grouping, only Hispanics had a significantly lower degree of departure (5.3 percentage points) than Non-Minority defendants. For the non-drug trafficking, the model reports that at the 95 significance level the sentence reductions for Black and Non-Minority defendants were the same.

The results from both the drug trafficking grouping and the non-drug trafficking grouping mirror earlier findings from the probit analysis. Not only do Blacks and Hispanics have a lower probability of receiving a substantial assistance departure, but when they do receive departures, they are of a smaller magnitude than Non-Minority defendants' departures.

Citizenship. United States citizens receive significantly larger substantial assistance reductions in their final sentences than non-U.S. citizens. United States citizens had, on average, reductions that were more than five percentage points greater than non-U.S. citizens. For drug trafficking cases, citizens' reductions averaged 5.2 percentage points greater than non-U.S. citizens. This difference might be due to a variety of reasons such as language barriers, non-U.S. citizens knowing fewer people in the conspiracy, and U.S. citizens being more motivated to greater cooperation because of better understanding of U.S. laws, especially concerning drug trafficking convictions.

Education. Defendants with at least a high school diploma received significantly larger percentage point reductions than defendants without a high school diploma. This finding holds true whether or not the crime was drug trafficking. For the non-drug trafficking grouping, defendants without a high school education received reductions 4.1 percentage points lower than high school graduates. For the drug trafficking grouping, defendants without a high school diploma received reductions 2.1 percentage points less than those with at least a high school diploma. More educated defendants might receive larger substantial assistance departures because they are able to give more complex technical or financial information about the conspiracy, or they may be perceived as less likely to recidivate due to the positive links among educational attainment, age (defendants with more education are likely older), and employment potential.

Table 27

**DEFENDANT CHARACTERISTICS: EFFECT ON DEGREE
OF SUBSTANTIAL ASSISTANCE DEPARTURE¹**

Defendant Characteristics	Degree of Departure (in Percent)					
	All Cases		Non-Drug Trafficking Cases		Only Drug Trafficking Cases	
	Average ²	Change ³	Average	Change	Average	Change
GENDER						
Male	57.4		57.7		55.8	
Female	66.6	9.2269***	65.1	7.4838***	66.0	10.1785***
RACE						
Non-Minority	60.4		60.1		59.4	
Black	58.4	-2.0031***	59.3	-0.7826	56.3	-3.0905***
Hispanic	55.4	-4.9858***	54.8	-5.2884**	54.0	-5.3857***
CITIZENSHIP STATUS						
U.S. Citizen	59.6		59.3		58.2	
Non-U.S. Citizen	54.3	-5.3376***	56.3	-2.9419	53.0	-5.2031***
EDUCATION						
Less than H.S. Degree	56.9		56.2		56.0	
H.S. Degree or More	59.7	2.8014***	60.3	4.1295***	58.1	2.1077***
AGE						
18 Years	56.4		54.5		56.3	
21 Years	56.8		55.3		56.5	
25 Years	57.4		56.3		56.7	
35 Years	58.8	0.1443***	58.9	0.2591***	57.3	0.0632*
45 Years	60.3		61.5		58.0	
55 Years	61.7		64.1		58.6	

¹This table demonstrates the percent of substantial assistance departure from the guideline minimum, when all other variables are held constant at their mean values except the variable of interest. These percentages were obtained from a regression analysis using all the variables listed in the models.

²The "Average" column in this table denotes the percent of substantial assistance departure for each variable, given that all other variables are held constant using the mean or average value. The mean value for a variable does not necessarily represent an actual value maintained by that variable, but is used as a means of controlling for the effects of all variables except the variable of interest.

³The "Change" column in this table provides the change in percent of substantial assistance departures from the reference group (bolded value) to the other values of the same variable, provided that all other variables are held constant at their mean values. Quotation marks (") are used in multi-value variable groups to denote the same increase/decrease in percent between all values of a continuous variable. Values followed by one asterisk (*) are significant at the .10 level; values followed by two asterisks (**) are significant at the .05 level; and values followed by three asterisks (***) are significant at the .01 level.

SOURCE: U. S. Sentencing Commission, 1994 Monitoring Datafile, MONFY94.

Age. Older defendants in the non-drug trafficking grouping received statistically significant larger reductions in their sentences. While the significant impact of each single year of age appeared relatively small (.2591 years, or approximately three months), this impact became meaningful when comparing the oldest versus the youngest defendants. For example, a non-drug trafficking defendant aged 55 years old on average received a substantial assistance sentence reduction of an additional 7.8 years (*i.e.*, 30 years times .2591 equals 7.8 years) more than did a comparable defendant aged 25 years old. Note that age was not significant at the .05 level for the drug trafficking grouping.

C. Judicial Degree of Departure: Legally Relevant Characteristics

The legally relevant characteristics in the model include the same list as those examined in the government motion analysis, such as role in the offense, criminal history, gun use, or drug type. It would be expected that given the nature of these variables, they could affect the degree of departure defendants receive.¹⁶⁹

Offense of Conviction. Offense types were predicted to be one of the most important factors affecting the degree of the substantial assistance departure. Several variables indicating type of offense were included in the non-drug trafficking grouping: robbery, firearms, larceny, fraud, money laundering, and racketeering. Each variable measures the impact of the associated offense type compared to other offense types not listed above.

Table 28 shows that in the non-drug trafficking grouping, two of the offense variables were significant: fraud and robbery. Fraud defendants were more likely to get larger degrees of departure (3.2 more percentage points). Robbery defendants received smaller degrees of departure (17.7 fewer percentage points). The larger departures for fraud defendants are likely due to their knowledge of extremely complex transactions that would be of more value to prosecutors than some other offenses. Robbery defendants might have received smaller departures because of the violent nature of these offenses.

The significant impacts in non-drug trafficking grouping can be ordered to illustrate how offense types are associated with §5K1.1 departures:

- robbery had the lowest estimated degree of departure—17.7 percentage points less than the other offense types; and

¹⁶⁹Refer to Table 28.

Table 28

**LEGALLY RELEVANT CHARACTERISTICS: EFFECT ON DEGREE
OF SUBSTANTIAL ASSISTANCE DEPARTURE¹**

Legally Relevant Characteristics	Degree of Departure (in Percent)					
	All Cases		Non-Drug Trafficking Cases		Only Drug Trafficking Cases	
	Average ²	Change ³	Average	Change	Average	Change
PRIMARY OFFENSE TYPE						
Robbery	43.0	-18.2081***	43.5	-17.7370***	N/A	N/A
Drug Trafficking	57.5	-3.7195**	N/A	N/A	N/A	N/A
Firearm	62.7	1.5254	63.9	2.6000	N/A	N/A
Larceny	64.6	3.4533	65.4	4.1802*	N/A	N/A
Fraud	65.0	3.7787***	64.5	3.2273**	N/A	N/A
Money Laundering	67.0	5.8260***	64.9	3.6371*	N/A	N/A
Racketeering	57.9	-3.2490	57.9	-3.3262	N/A	N/A
All Other Offenses	61.2		61.3		N/A	
DRUG INVOLVEMENT						
Drugs not Involved	59.1		61.8		N/A	
Drugs Involved	58.6	-0.4889	61.0	-0.8351	N/A	N/A
DRUG TYPES						
Heroin	N/A	N/A	N/A	N/A	56.7	-0.5498
Methamphetamine	N/A	N/A	N/A	N/A	55.0	-2.3011
Crack Cocaine	N/A	N/A	N/A	N/A	56.6	-0.7078
Powder Cocaine	N/A	N/A	N/A	N/A	57.4	0.1104
Marijuana	N/A		N/A		57.3	
Other Drugs	N/A	N/A	N/A	N/A	56.4	-0.8919
GUIDELINE MINIMUM						
12 Months or More	58.7		58.8		57.3	
Less Than 12 Months	81.8	23.1076***	79.5	20.7333***	83.8	26.5188***
WEAPON INVOLVEMENT						
No Presence of Weapon	58.7		61.0		57.4	
Presence of Weapon	58.7	-0.0736	62.5	1.4961	56.6	-0.8622

Table 28 (cont.)

Legally Relevant Characteristics	Degree of Departure (in Percent)					
	All Cases		Non-Drug Trafficking Cases		Only Drug Trafficking Cases	
	Average ²	Change ³	Average	Change	Average	Change
GUN MANDATORY						
Not Applied	58.9		61.5		57.3	
Applied	56.3	-2.5406*	56.9	-4.5877	56.6	-0.7155
DRUG MANDATORY						
Not Applied	58.2		N/A		56.5	
Applied	59.3	1.0814	N/A	N/A	58.1	1.5190*
CRIMINAL HISTORY						
Category I	62.2		63.9		60.1	
Category II - VI	53.4	-8.8370***	50.9	-12.9840***	53.0	-7.1484***
AGGRAVATING ROLE						
Adjustment Not Applied	59.2		59.7		57.6	
Adjustment Applied	54.4	-4.8089***	51.0	-8.6753***	54.4	-3.1823***
MITIGATING ROLE						
Adjustment Not Applied	58.0		60.3		56.5	
Adjustment Applied	62.9	4.9637***	66.6	6.3421***	61.4	4.8976***
BODILY INJURY						
Enhancement Not Applied	58.7		58.8		57.2	
Enhancement Applied	59.7	0.9924	59.5	0.7610	72.0	14.8531
NUMBER OF COUNTS						
One Count of Conviction	59.0		61.5		57.6	
Two Counts of Conviction	58.5	-0.5234***	61.0	-0.4863***	57.0	-0.5623***

¹This table demonstrates the percent of substantial assistance departure from the guideline minimum, when all other variables are held constant at their mean values except the variable of interest. These percentages were obtained from a regression analysis using all the variables listed in the models.

²The "Average" column in this table denotes the percent of substantial assistance departure for each variable, given that all other variables are held constant using the mean or average value. The mean value for a variable does not necessarily represent an actual value maintained by that variable, but is used as a means of controlling for the effects of all variables except the variable of interest.

³The "Change" column in this table provides the change in percent of substantial assistance departures from the reference group (bolded value) to the other values of the same variable, provided that all other variables are held constant at their mean values. Quotation marks (") are used in multi-value variable groups to denote the same increase/decrease in percent between all values of a continuous variable. Values followed by one asterisk (*) are significant at the .10 level; values followed by two asterisks (**) are significant at the .05 level; and values followed by three asterisks (***) are significant at the .01 level.

SOURCE: U. S. Sentencing Commission, 1994 Monitoring Datafile.

- fraud defendants received on average almost 21 greater percentage points of departure than robbery defendants.

Drug Involvement. A variable indicating whether drugs were involved in the offense was included for the non-drug trafficking model. The indicator for drug involvement in the non-drug trafficking cases grouping was not significant. This means that at the 95 percent level of significance, it cannot be stated that drug involvement is associated with either an increased or decreased degree of departure. This result probably is due to the seriousness of the underlying offenses, implying that the additional drug issues for non-trafficking cases had little impact on judges' sentencing.

Drug Type. For the drug trafficking only grouping, a set of variables was added to measure the impact of drug type on the degree of departure. These variables measured, compared to marijuana, whether the degree of departure varied if the defendant was trafficking in crack cocaine, powder cocaine, heroin, methamphetamine, or other drugs. None of the indicators for drug type was significant. This means that after the initial decision of whether or not a defendant is to receive a substantial assistance departure, the type of drug seems to have no significant impact on the degree of departure—either upward or downward. Other variables such as type and extent of assistance appear more important in determining the degree of departure.

Guideline Minimum. Empirical study of the patterns of degree of departure indicated that the percentage of departure has a strong relationship with guideline minimum, particularly at the lowest guideline ranges. Those defendants with a guideline minimum of less than approximately 12 months were the defendants most likely to receive departures of 80 percent or greater.

This relationship is at least in part an artifact. For a sentence of less than 12 months, every additional month of reduction is a significant percentage. For example, if a defendant with a guideline range of 63 to 78 months is given a substantial assistance departure reduction totaling six months, the degree of departure is only approximately ten percent. However, if a defendant with a guideline range of 8 to 14 months is given a six-month sentence reduction, the degree of departure is 75 percent. Consequently, defendants with low guideline minimum ranges are more likely to receive departures of 70 to 100 percent.

To account for the empirical relationship between low guideline minimums and high degrees of departure, this variable indicated whether the guideline range minimum was either less than 12 months, or 12 months and greater. Substantial assistance defendants with a guideline minimum below 12 months were significantly more likely to receive a larger degree of departure than defendants with higher guideline minimums. Low guideline range defendants with a §5K1.1 departure received departures more than 20 percentage points greater: 20.7 percentage points in the non-drug trafficking grouping and 26.5 percentage points in the drug trafficking only group.

Weapon Involvement. The indicator for weapon involvement (either as a guideline enhancement or statutory gun conviction) in the offense was not significant in any of the data groupings. This means that at the 95 percent level of significance, it cannot be stated that gun involvement was associated with either an increased or decreased degree of departure for substantial assistance cases.

Gun Mandatory Minimum. A related but separate variable is the presence of a gun mandatory minimum statute. This variable was not significant in either the non-drug trafficking or the drug trafficking only models and, therefore, like the presence of a gun, had no significant effect on the degree of departure. Because these two variables were each only significant in one model from the probit section, it is not surprising that the significance was too weak to affect the degree of departure also.

Drug Mandatory Minimum. Recall from the previous section's probit analysis that the presence of a drug mandatory minimum was significant in increasing the likelihood of a drug trafficking defendant receiving a §5K1.1 departure. In contrast, however, the presence of a drug mandatory minimum had no significant impact (at the .05 level) on the degree of the departure. It appears that once the substantial assistance option was available, judges used other criteria for determining the degree of sentence reduction given to the drug defendant.

Criminal History. The criminal history variable divided substantial assistance defendants into two categories: those in Criminal History Category I (CHC I) and those in Criminal History Category II - VI (CHC II-VI). Results from the data groupings indicated that defendants in CHC I—those with the lesser amounts of prior criminal history counted under the guidelines—received significantly larger percentage point departures than those with more substantial criminal histories, all other factors remaining equal.

The relative contribution of criminal history category to the estimates of degree of departure also was large. In the non-drug trafficking grouping, defendants with none or minimal levels of criminal history received departures 13.0 percentage points greater than those with more criminal history, while in the drug trafficking only grouping, those with none or minimal levels of criminal history received departures 7.1 percentage points greater. This result is consistent with the attitude of the general public that defendants who have been convicted of more offenses in the past should receive smaller departures than first time offenders.

Aggravating Role. The aggravating role variable indicates whether or not a defendant was a leader, organizer, or manager of a conspiracy involved in criminal activity. As Table 28 shows for both data groupings, those who had an aggravating role adjustment received significantly smaller departures than those who did not receive the adjustment. The effect was greatest for the non-drug trafficking grouping: those without the adjustment received a larger departure by 8.7 percentage points compared to those with the adjustment. For the drug trafficking grouping, those without the adjustment had departures 3.2 percentage points greater. Recall from the probit analysis that defendants who received an aggravating role adjustment were

significantly more likely to receive a substantial assistance departure. However, the regression analysis showed that these same defendants likely received smaller degrees of departure than defendants who had no role adjustment. Although the leaders, managers, and organizers knew more and provided valuable substantial assistance, perhaps they were also the most culpable defendants and therefore were not given large sentence decreases.

Mitigating Role. The mitigating role variable also measures a defendant's culpability: defendants at the lower levels of an organization are considered less culpable than others in the organization. Those with mitigating role adjustments received significantly larger percentage point departures for their cooperation than others: this result ranged from a 6.3 percentage point larger departure for the non-drug trafficking grouping to a 4.9 percentage point larger departure for the drug trafficking grouping. Because these defendants were the least culpable, they were not only more likely to receive a substantial assistance departure, but additionally were likely to receive a larger degree of departure.

Bodily Injury. The indicator for bodily injury during the commission of the crime(s) was not statistically significant in either of the data groupings. This means that at the 95 percent level of significance it cannot be stated that the presence of a bodily injury adjustment is associated with either an increased or decreased degree of departure for substantial assistance cases. This result is probably due to the relatively small number of cases involving bodily injury (n=414).¹⁷⁰

Counts of Conviction. Defendants with multiple counts of conviction receive smaller percentage point reductions in their sentences than those with one count. Regardless of data grouping, the results indicated that each additional count of conviction reduces a defendant's degree of departure between .4 and .5 percentage points. For example, Table 28 shows that a drug trafficking §5K1.1 defendant with two counts of conviction on average received a degree of departure 0.56 percentage points smaller than a drug trafficking §5K1.1 defendant with only one count of conviction. The regression results also estimate that a defendant with five counts of conviction received a degree of departure 2.2 percentage points lower.¹⁷¹ The relative contribution of this variable is small, and probably is explained by its relationship with mode of conviction discussed in the probit section of this chapter. This result also may be due to defendants with more counts of conviction being less willing to cooperate because they likely will be serving more prison time than defendants with only one count of conviction, even with a departure.

¹⁷⁰U.S. Sentencing Commission, 1994 Datafile, MONFY94.

¹⁷¹These two defendants have a difference of four (5 minus 1) counts of conviction. The difference in the expected degree of departure is found by multiplying the effect of one count of departure (0.56) by four: 4 times 0.56 equals 2.2 percentage points.

D. Judicial Degree of Departure: Criminal Justice System Characteristics

Variables that characterize the criminal justice system environment in which judges make substantial assistance decisions also were included in the model. These process variables capture impacts due to systemic factors.

Geographic Region. To examine variation in degree of departure across the nation, each substantial assistance case was associated with its related U.S. Census Bureau region: Northeast, South, West, and Midwest (the comparison category). There were significant differences in percentage departures across all regions for the drug trafficking only grouping and for two regions of the non-drug trafficking grouping.

Table 29 shows that defendants sentenced in the Northeast region received the largest degrees of departure; compared to the Midwest, the Northeast had departures 19.7 percentage points larger for the drug trafficking only grouping and 11.4 percentage points for the non-drug trafficking grouping. The West had the second most notable degree of departure: on average 11.7 more percentage points (than the Midwest) for the drug trafficking only grouping and 8.1 more percentage points (than the Midwest) for the non-drug trafficking grouping.

The results for the Southern region were mixed. There was a significant difference between the Midwest and the South for the drug trafficking only grouping (3.3 more percentage points for the South). However, the estimate for the Southern region in the non-drug trafficking grouping was not significant. These findings are basically consistent with findings from the probit analysis. Defendants sentenced in the Northeast were the most likely to receive a substantial assistance departure and also received the largest degrees of departure, whereas defendants in the Midwest were the least likely to receive a substantial assistance departure and also received the smallest departures.

Judge Year of Appointment. A judge's year of appointment—before or after the implementation of the sentencing guidelines—was hypothesized to affect departure degrees, with pre-guideline judges more likely to give larger departures. This variable was significant only in the non-drug trafficking grouping: judges who were appointed prior to the sentencing guidelines granted larger substantial assistance departures by 2.3 percentage points than those appointed after implementation of the guidelines. This might be related to the increase in penalties for offenses such as drugs or white collar crimes after the institution of the guidelines. Judges who had given more lenient pre-guideline sentences might be more generous with substantial assistance departures.

District Caseload. Does the total number of cases in the district affect the degrees of departure that defendants receive? The analysis found that the number of cases in the district did impact the size of departure defendants received, but it impacted drug trafficking cases differently than it did non-drug trafficking cases. In the drug trafficking cases only model, each

Table 29

**SYSTEMIC CHARACTERISTICS: EFFECT ON DEGREE
OF SUBSTANTIAL ASSISTANCE DEPARTURE¹**

Systemic Characteristics	Degree of Departure (in Percent)					
	All Cases		Non-Drug Trafficking Cases		Only Drug Trafficking Cases	
	Average ²	Change ³	Average	Change	Average	Change
REGIONAL						
Midwest	52.3		54.7		50.0	
Northeast	69.6	17.3369***	66.1	11.4207***	69.7	19.7194***
South	55.0	2.7679***	55.9	1.2071	53.3	3.2952***
West	62.8	10.5287***	62.8	8.0997***	61.7	11.6798***
JUDGE APPOINTMENT YEAR						
1989 or Later	58.5		57.3		50.0	
Before 1989	58.8	0.2298	59.6	2.2782**	49.4	-0.6041
DISTRICT CASELOAD						
350 Cases	59.2		58.2		58.2	
750 Cases	58.7	-0.0014*	58.8	0.0015	57.3	-0.0022**
1150 Cases	58.1		59.4		56.4	
PROSECUTOR CASELOAD RATIO						
Low	58.5	-0.3301	60.3	0.8126	56.3	-1.1256
Medium	58.8		59.5		57.4	
High	58.8	-0.0347	56.8	-2.6977*	58.0	0.5508
DISTRICT DRUG CASELOAD RATIO						
Low	53.9	-3.1246***	54.7	-0.1943	51.4	-5.3887***
Medium	57.0		54.9		56.8	
High	61.1	4.1174***	61.8	6.8756***	59.5	2.7457***
DISTRICT PLEA RATE						
Low	58.8	-1.1442	58.7	0.6484	57.5	-1.8308**
Medium	60.0		58.1		59.4	
High	57.4	-2.5875***	59.5	1.3935	55.0	-4.3812***
DISTRICT \$5K1.1 RATE						
Low	58.7	-0.9941	57.2	-3.4097*	58.7	1.0178
Medium	59.7		60.6		57.7	
High	57.9	-1.8219***	57.6	-3.0505**	56.7	-0.9210

¹This table demonstrates the percent of substantial assistance departure from the guideline minimum, when all other variables are held constant at their mean values except the variable of interest. These percentages were obtained from a regression analysis using all the variables listed in the models.

²The "Average" column in this table denotes the percent of substantial assistance departure for each variable, given that all other variables are held constant using the mean or average value. The mean value for a variable does not necessarily represent an actual value maintained by that variable, but is used as a means of controlling for the effects of all variables except the variable of interest.

³The "Change" column in this table provides the change in percent of substantial assistance departures from the reference group (bolded value) to the other values of the same variable, provided that all other variables are held constant at their mean values. Quotation marks (") are used in multi-value variable groups to denote the same increase/decrease in percent between all values of a continuous variable. Values followed by one asterisk (*) are significant at the .10 level; values followed by two asterisks (**) are significant at the .05 level; and values followed by three asterisks (***) are significant at the .01 level.

SOURCE: U. S. Sentencing Commission, 1994 Monitoring Datafile, MONFY94.

additional 100 cases in annual caseload tended to *decrease* the percent of departure defendants received (0.2 percentage points), while there was an *increase* in the non-drug trafficking cases model, although the increase was not significant.

Prosecutor Caseload Ratio. Each district was sorted into one of three categories: low, medium, or high numbers of criminal cases per prosecutor. None of the prosecutor caseload variables in either data grouping was significant at the .05 level. The lack of significance is not surprising because the judge, not the prosecutor, ultimately is responsible for the degree of departure.

District Drug Caseload Ratio. Defendants sentenced in districts with high drug caseloads (as a proportion of total caseload) received significantly larger degrees of departures than defendants in districts with medium caseloads for both data groupings: 6.9 percentage points and 2.7 percentage points for the non-drug trafficking and drug trafficking only groupings, respectively.

The variable indicating low district drug caseload was significant only in the drug trafficking only grouping: §5K1.1 defendants in these districts received smaller departures by 5.4 percentage points than similar defendants in medium drug caseload districts.

District Plea Rate. For the drug trafficking only grouping, both high and low plea rate districts received significantly smaller departures (by 4.4 and 1.8 percentage points, respectively) compared to medium plea rate districts. For the non-drug trafficking grouping, the plea rate was not significant. Recall from the probit section that there was a relatively strong correlation between mode of conviction and counts of conviction with little variation in district plea rates, results that might be related to the lack of significance in the non-drug trafficking grouping.

District Substantial Assistance Rate. The only significant finding at the .05 level was for the non-drug trafficking grouping: defendants sentenced in districts with a high rate of substantial assistance departures received smaller departures (by 3.0 percentage points) than defendants sentenced in medium rate districts.

For drug trafficking only cases, substantial assistance departure variables were not significant, signifying that at the 95 level of significance there was no variation in the degree of departure given to substantial assistance drug trafficking cases sentenced in low, medium, or high substantial assistance rate districts. The lack of significance is not surprising given that variables such as type of drug and drug mandatory minimums played little or no role in the degree of departure received.

E. Regression: Multiple Characteristics

Drug Trafficking. Table 30 is similar to Table 25 in that it looks at the effects of drug mandatory minimums, gun mandatory minimums, type of drugs (powder cocaine, crack cocaine,

Table 30

**SELECT CHARACTERISTICS: EFFECT ON DEGREE
OF SUBSTANTIAL ASSISTANCE DEPARTURE¹**

— Drug Trafficking —

Race and Drug Type	Degree of Departure (in percent)			
	Drug Mandatory Minimum		No Drug Mandatory Minimum	
	Gun Mandatory Minimum	No Gun Mandatory Minimum	Gun Mandatory Minimum	No Gun Mandatory Minimum
Powder Cocaine				
Non-Minority	59.6	60.3	58.1	58.8
Black	56.5	57.2	55.0	55.7
Hispanic	54.2	54.9	52.7	53.4
Crack Cocaine				
Non-Minority	58.8	59.5	57.3	58.0
Black	55.7	56.4	54.2	54.9
Hispanic	53.4	54.1	51.9	52.6
Heroin				
Non-Minority	58.9	59.7	57.4	58.1
Black	55.8	56.6	54.3	55.0
Hispanic	53.6	54.1	51.9	52.6

¹This table demonstrates the degree of substantial assistance departure (in percent) when all other variables are held constant except the variable of interest. These percentages were obtained from a regression analysis using all the variables listed in the models.

SOURCE: U. S. Sentencing Commission, 1994 Monitoring Datafile, MONFY94.

and heroin), and race for drug trafficking cases. However, this table focuses on the degree of departure rather than the probability of receiving a departure. Several of the findings in this section parallel findings in the probit section, meaning that not only did defendants with these characteristics have a greater likelihood of receiving a substantial assistance departure, but they also received larger departures than defendants without these characteristics.

Corresponding to earlier findings, defendants convicted of drug mandatory minimums received larger percentages of departure, and defendants convicted of gun mandatory minimums received smaller percentages of departure than equivalent defendants without mandatory minimum convictions. Also, this table shows that defendants convicted of trafficking in powder cocaine received larger departures than either crack cocaine or heroin defendants with similar characteristics. Heroin defendants received slightly larger departures than crack cocaine defendants; recall, however, that earlier findings reported that crack cocaine defendants were more likely to receive a substantial assistance departure. Lastly, race effects continued into degree of departure, with Non-Minority defendants receiving the largest departures, and Blacks receiving substantially larger departures than Hispanics.

Focusing on the effects of all four characteristics, the largest §5K1.1 degrees of departure were granted to Non-Minority defendants trafficking powder cocaine with drug mandatory minimum convictions, but without gun mandatory minimum convictions (60.3%). The lowest substantial assistance departures were granted to Hispanic defendants trafficking in crack cocaine or heroin with gun mandatory minimum convictions, but without drug mandatory minimum convictions (51.9%). By changing these four characteristics, a difference of more than eight percentage points can be seen in the degree of departure.

Select Primary Offense Categories. Table 31 parallels Table 26 discussed earlier in this chapter, centering around offense types (money laundering, robbery, and fraud), criminal history category, role in the offense (aggravating, mitigating, or no role adjustment), and gender. However, this table looks at the degree of departure rather than the probability of receiving a substantial assistance departure and includes all defendants in the select offense categories.

Comparable to results from the probit analysis, defendants involved in money laundering offenses not only had higher probabilities of receiving a substantial assistance departure, but also of receiving a larger degree of departure than similar defendants convicted of either robbery or fraud. However, defendants convicted of fraud offenses received larger departures than equivalent defendants convicted of robbery, while robbery defendants were more likely to receive a substantial assistance departure than fraud defendants. Defendants classified as Criminal History Category I were more likely to receive a substantial assistance departure and receive a larger departure across all characteristics.

Defendants who received a mitigating role adjustment had the highest probability of receiving a substantial assistance departure, and also received the largest degree of departures when compared to equivalent defendants with aggravating role adjustments or no role

Table 31

**SELECT CHARACTERISTICS: EFFECT ON DEGREE
OF SUBSTANTIAL ASSISTANCE DEPARTURE¹**

— Select Offenses —

Role in Offense and Gender	Degree of Departure (in percent)					
	Money Laundering		Robbery		Fraud	
	Criminal History Category I	Criminal History Category II-VI	Criminal History Category I	Criminal History Category II-VI	Criminal History Category I	Criminal History Category II-VI
Aggravating Role						
Male	64.1	55.2	40.0	31.2	62.0	53.2
Female	73.3	64.5	49.3	40.4	71.2	62.4
Mitigating Role						
Male	73.8	65.0	49.8	41.0	71.8	62.9
Female	83.1	74.2	59.0	50.2	81.0	72.2
No Role Adjustment						
Male	68.9	60.0	44.8	36.0	66.8	58.0
Female	78.1	69.3	54.1	45.2	76.0	67.2

¹This table demonstrates the degree of substantial assistance departure (in percent) when all other variables are held constant except the variable of interest. These percentages were obtained from a regression analysis using all the variables listed in the models.

SOURCE: U. S. Sentencing Commission, 1994 Monitoring Datafile, MONFY94.

adjustment. However, although defendants with aggravating role adjustments were more likely to receive a §5K1.1 departure than defendants with no role adjustment, they received smaller departures than comparable defendants who had no role adjustment. Lastly, female defendants had a greater probability of receiving a substantial assistance departure and received larger departures than similar males.

Overall, women in Criminal History Category I, convicted of money laundering and with mitigating role adjustments, received the largest degree of departures (83.1%), while men in Criminal History Category II - VI, convicted of robbery with aggravating role adjustments, received the lowest degree of departures (31.2%). Therefore, by varying these four characteristics, defendants can receive departures more than 50 percentage points less than equivalent defendants without these characteristics.

VI. SUMMARY OF RESULTS

Due to findings supporting the fact that drug trafficking substantial assistance motions involve different processes than motions for non-drug trafficking offense types, these two offense type groupings were the focus of the comparisons. The grouping of drug trafficking only cases was able to explain only about 18 percent of the variation in the degree of substantial assistance departures, whereas the non-drug trafficking cases model explained about 38 percent, suggesting that factors other than those captured in this study must be responsible for the remainder of the variation. Consequently, several variables that were not available for inclusion in this study may account for many of the results found in both the probit and regression sections. Such unavailable data include:

- district charge practices,
- plea bargaining practices,
- degree and type of cooperation, and
- usefulness of information to the prosecution.

Of the three groups of characteristics (defendant, legally relevant, and criminal justice system), defendant characteristics were most likely to have significant and homogeneous impacts on the outcome variables. Legally relevant characteristics often had high explanatory power, meaning that these variables were able to account for a large percentage of the variation. As a group, the criminal justice system variables showed the greatest variance in significance patterns among both the data groupings (drug trafficking vs. non-drug trafficking) and outcome measures (probability of §5K1.1 departure vs. degree of §5K1.1 departure).

Major findings ($\alpha \leq .05$) for *all defendants* included:

- **Women** were more likely to receive larger degrees of departure than men.
 - Most **race** results were significant both for the probability of receiving a substantial assistance departure and the degree of §5K1.1 departure received.
 - The probability of receiving a substantial assistance departure was highest for Non-Minority defendants, followed by Black defendants; the lowest rates were for Hispanic defendants.
 - Degrees of departure were highest for Non-Minority defendants and lower for Hispanic defendants.
- U.S. **citizens** were more likely to receive §5K1.1 departures were than non-citizens.
- Defendants with at least a high school **education** were more likely to receive §5K1.1 departures and to receive larger degrees of departure.
- Among select **primary offense categories**, defendants convicted of money laundering were the most likely to receive a substantial assistance departure, followed by drug trafficking and racketeering. Of these three offense types, money laundering had higher degrees of departure.
 - Among select offense types, defendants convicted of firearms were least likely to receive §5K1.1 departures; next least likely were fraud and robbery defendants.
- When there was **drug involvement** in a non-trafficking offense, the defendant was more likely to receive a §5K1.1 departure.
- Defendants in **Criminal History Category I** were more likely to receive a substantial assistance departure and to receive larger degrees of departure than defendants in higher criminal history categories.
- Defendants with only one **count of conviction** were more likely to receive substantial assistance departures and larger degrees of departure.
- Defendants sentenced in the Northeast **geographic region** were most likely to receive a substantial assistance departure; defendants in the Northeast and the West received larger degrees of departure than defendants in the Midwest and South.

- Defendants receiving **mitigating role adjustments** were granted more substantial assistance departures and received larger degrees of departure.
- Defendants receiving **aggravating role adjustments** received larger degrees of departure.
- A defendant in a district with a **high prosecutor caseload ratio** was more likely to receive a substantial assistance departure.

Major findings ($\alpha \leq .05$) for *drug trafficking defendants* included:

- **Female** traffickers were more likely to receive §5K1.1 departures and to receive larger degrees of departure than male traffickers.
- **Race** findings for both substantial assistance receipt rates and degree of departure rates were consistent for drug traffickers: the rates were highest for Non-Minority defendants, followed by Black defendants, with the lowest rates for Hispanic defendants.
- U.S. **citizen** traffickers both were both more likely to receive a substantial assistance departure and to receive a larger degree of departure than non-citizen traffickers.
- **Older** traffickers were more likely to receive substantial assistance departures.
- With respect to whether or not judges were **appointed prior to guideline implementation**, there was no significant difference in the trafficking defendant's probability or degree of substantial assistance departures.
- Compared to marijuana traffickers, **powder cocaine traffickers** were more likely and **heroin traffickers** were less likely to receive substantial assistance departures. No significant differences with respect to degree of departure were found for any drug type.
- Traffickers with **gun mandatory minimum** sentences had a lower probability of receiving a substantial assistance departure; however, there was no difference with respect to degree of departure.
- Traffickers facing **drug mandatory minimum** sentences had a higher probability of receiving substantial assistance departures; however, there was no difference with respect to degree of departure.

- As the district's **prosecutor caseload ratio** increased, on average, the §5K1.1 trafficker's probability of receiving a substantial assistance departure increased; however, there was no trend with respect to degree of departure.
- As the district's **drug caseload ratio** increased, on average the §5K1.1 trafficker's degree of departure increased; however, there was no trend with respect to the probability of receiving a §5K1.1 departure.

CHAPTER EIGHT

SUMMARY AND RECOMMENDATIONS

Congress and the United States Sentencing Commission, in enacting 18 U.S.C. § 3553(e) and Policy Statement §5K1.1, respectively, have recognized the importance and benefits to prosecutors, law enforcement, and the courts of defendants providing assistance in investigating and prosecuting other criminals. The Commission, particularly, is concerned about the developing substantial assistance practices and their impact on the sentences that defendants receive. One of Congress' key concerns in enacting the Sentencing Reform Act of 1984 that created the Commission, was unfettered judicial discretion creating unwarranted sentencing disparity. Indeed, by 1992 more than 15 percent of the sentences imposed by the courts were not those called for by either the otherwise applicable sentencing guideline range or, in many instances, by statutory minimum penalty provisions. In those 15 percent of cases, the district court, pursuant to a government motion to reduce the defendant's sentence, used its discretion in determining the appropriate sentence. Also, by 1992 the Commission had evidence showing the following: (1) widespread variation among the federal district courts in the percentage of defendants receiving sentence reductions based on substantial assistance to the government; (2) widespread variation in the length of sentence reductions for similarly-situated defendants; and (3) steadily increasing percentages of defendants receiving sentence reductions for substantial assistance during the first six years of a new sentencing guidelines system. The Commission could not discern from this initial evidence whether the variations and increases noted above were warranted or not. Consideration of these issues and the Commission's statutory directive to "periodically . . . review and revise" the guidelines,¹⁷² led to this study, *Federal Court Practices: Sentence Reductions Based on Defendants' Substantial Assistance to the Government*.

By 1994, the last year covered by the report, nearly one-fifth of all defendants sentenced in federal district courts received reduced sentences based on substantial assistance to the government. The Commission's study, presented in this report, goes beyond a statistical analysis. The study presents, *inter alia*, a picture of current substantial assistance practices, explanations for some of the developing trends, and the viewpoints of many of those involved in the federal sentencing system. The report concludes with recommendations for further action.

I. METHODOLOGY

To better understand the circumstances and context of judges making sentence reductions based on defendants' substantial assistance to the government, the Commission used a multiple-source data collection methodology. This methodology included a review of relevant appellate case law and literature; a survey of all United States attorneys' offices on the policies and

¹⁷²28 U.S.C. § 994(o).

practices used in deciding to make a motion to reduce a defendant's sentence based on substantial assistance; personal interviews with judges, prosecutors, defense attorneys and probation officers in eight districts; telephone interviews with prosecuting attorneys about a sample of cases in which the defendant received a substantial assistance departure; a comparative review of criminal conspiracies in which at least one co-conspirator received a substantial assistance departure; and aggregate statistical analysis of all 1994 guideline sentences.

If understanding the practices in federal court regarding sentence reductions based on substantial assistance can be likened to a puzzle, then major portions of this puzzle have been successfully solved by the study. However, two general caveats need to be kept in mind. First, some of the information pertinent to a better understanding of the context and circumstances that led to the sentence reductions was undocumented, unreviewable, or available only second hand—all contributing to missing pieces of the complete picture. Second, by the time a district court makes a sentence reduction based on a defendant's substantial assistance many other factors have influenced the disposition of the case. These factors are in large part discretionary decisions which involve law enforcement priorities, jurisdictional choices, prosecutorial declination and charging policies, and plea bargaining between prosecutors and defendants.

Providing substantial assistance to the government is one (although perhaps the most significant) of a series of post-offense behaviors by defendants that could possibly lead to sentence discounts. By focusing on the sentencing event, which this report does, the reasons for and the effect of decisions by prosecutors and judges on substantial assistance may become confounded with previous decisions made in the criminal justice process. Therefore, this report answers only some of the questions—and leaves other questions for further study by policy makers who focus on other parts of the criminal justice system.

II. SUMMARY OF MAJOR FINDINGS

A. Sentence reductions in exchange for defendants' assistance to prosecutorial and investigative authorities are not a new phenomenon and continue to pose dilemmas.

The practice of courts reducing a defendant's sentence because of the defendant's cooperation with investigative and prosecutorial officials has a long history in British and American jurisprudence. This practice was codified by Congress in 18 U.S.C. § 3553(e) and by the Sentencing Commission in policy statement §5K1.1. The personal interviews conducted during the site visits also confirmed the long-standing controversy—continued under the recent statutory and sentencing guidelines enactments—surrounding the law enforcement policies and ethical concerns engendered by the prosecutorial discretion inherent in plea and cooperation agreements in general, and in substantial assistance departures in particular.

The dilemma in the substantial assistance policy area is often posed as one between law enforcement's need for information and the resulting inequity in sentences. The benefits to the criminal justice system are many, such as: the investigation and prosecution of other criminals;

the defendants' guilty pleas allowing for a more efficient use of criminal justice time and resources; and the increase in prosecutorial and judicial flexibility by allowing for moderation of extreme punishment. In contrast, the problems posed to the criminal justice system are also myriad, such as: the tremendous pressure on defendants to falsify information or put themselves at risk of physical harm when faced with extremely long prison sentences; the tendency of more culpable defendants to receive shorter sentences than those less culpable because they more often have the type of information that law enforcement needs; and the disparity that is caused by the lack of standards to guide the discretion of prosecutors and judges. Much of the controversy surrounding substantial assistance, however, concerns not its utilitarian credentials but its unjust consequences. Criminal justice practitioners voice much concern about substantial assistance sentence reductions undermining the concept of proportionality in sentencing. For example:

- Proportionality between the severity of the offense and the punishment—punishment under the guidelines is tailored to a defendant's past criminality and current offense culpability and seriousness—providing substantial assistance mitigates this punishment (often considerably) based on post-offense behavior.
- Proportionality between the defendant and his/her codefendants—the cooperating defendant is not punished proportionately based on his/her conduct in relation to other codefendants.
- Proportionality between the defendant and other similarly-situated defendants—the cooperating defendant is not punished similarly to other defendants who commit a crime of a similar type and seriousness, and has a similar criminal record.

Sentence reductions for substantial assistance undermine the concept of justice and the proportionality in sentencing structured into the guidelines: the defendant's sentence is not commensurate with the degree of his or her offense severity and criminal history; it is not proportionate to the punishment of codefendants; and it is not equal to that of other similarly-situated defendants.

On the other hand, substantial assistance might be viewed as corrective justice in reducing, via cooperative behavior, the social harm caused by the original offense. Substantial assistance sentence reductions can also be viewed as corrective in some criminal cases in which the applicable statutory and guideline penalties are considered inordinately harsh and rigid in accounting for individual circumstances.

Prosecutors have expressed concern about limiting or prohibiting defendants from providing substantial assistance because of the information's effectiveness in detecting crimes and prosecuting additional criminals. These prosecutors, however, have offered no tangible evidence to support this position, only anecdotal circumstances. Commission efforts to substantiate such claims have been hampered because neither the Department of Justice nor the United States attorneys maintain records on this issue.

B. The decisions of the Supreme Court and the circuit courts of appeals interpreting the substantial assistance provisions have provided broad parameters in which prosecutors and the district courts can exercise their discretion.

Decisions by the Supreme Court and the circuit courts of appeal interpreting policy statement §5K1.1 and 18 U.S.C. § 3553(e) have provided broad parameters for the exercise of judicial discretion. For example, district courts have (1) full discretion to either accept or reject the government's motion and (2) full discretion to determine the extent of the departure. The appellate courts generally will not disturb the district court's exercise of discretion in this area as long as the district court fully considers the individual circumstances of the case in determining a sentence. At least one appellate court has held that using a sentencing pattern is not allowable.

The courts have also confirmed the prosecutor's broad discretion and power to make a motion for sentence reduction based on the defendant's substantial assistance to the government. In the absence of a breach of a plea agreement, the government's failure to file a substantial assistance motion is not reviewable by the court unless the reason for the failure to file the motion is based on an unconstitutional factor.

The recent decision by the Supreme Court in *Melendez v. United States*, 116 S. Ct. 2057 (1996), however, gives the prosecutor an even greater role in this process by allowing the prosecutor to decide whether the court should begin the sentence reduction from below the applicable guideline range or the mandatory minimum penalty. Prior to *Melendez*, the majority of circuit courts of appeals held that once the government made a motion requesting a sentence reduction based on substantial assistance, the district court decided the parameters of the sentencing reduction. Thus, in the past, the government motion allowed the court to sentence below the guidelines and any applicable mandatory minimum. Under *Melendez*, a government motion to reduce a sentence below the guidelines range does not allow the court to reduce the defendant's sentence below a lower mandatory minimum penalty. The Commission needs to continue monitoring substantial assistance sentence reductions to determine whether *Melendez* prompts any changes to substantial assistance departure policies or practices.

C. The substantial assistance policies and practices of the United States attorneys are not consistent nationwide.

Having established the historical and legal context of substantial assistance sentence reductions, we turn next to a specific look at the policies and practices of the United States attorney's offices. A survey of United States attorney's offices, telephone interviews, and personal interviews with judges, probation officers, prosecutors, and defense counsel provided information on the established policies and practices used in deciding whether to make a motion to reduce the defendant's sentence based on substantial assistance. Some of the findings are listed hereafter:

- Stated policies in most districts tend to be very similar: (1) the United States attorney or his/her designee must approve the motion prior to its filing; (2) often more than one supervisor must give prior approval; (3) infrequent use of post-sentencing substantial assistance reductions; and (4) no report of a policy change following the appointment of a new United States attorney.
- A statistical analysis indicated a strong relationship between the government's recommendation and the sentence imposed. In those districts where the United States attorney makes recommendations, they are generally expressed either as a percent reduction (usually between one-quarter to one-third below the guideline sentence) or as a specified offense level reduction.
- In the majority of cases in which the government makes a sentence recommendation, the judge's sentence reduction is equal to or greater than the government's recommendation. According to judges, their ultimate sentencing decision is based on the defendant's offense conduct and degree of cooperation, and the government's recommendation.
- The type of cooperation that the defendant is expected to provide is limited to a small range of behaviors. Most of the prosecutors surveyed agreed that the defendants for whom they make downward departure motions tend to: (1) agree to testify under oath, (2) provide information that leads to the prosecution or investigation of others' criminal activities, and (3) participate in the investigation of others.
- However, prosecutors do not make substantial assistance motions for all defendants who provided any or all of the types of cooperation listed. While the substantial assistance policy is result-oriented, individual prosecutors tend to interpret the policy on a case-by-case basis depending on the defendant's circumstances. Other factors are considered, such as the defendant's intent and the prosecutor's perception of the harshness of the otherwise applicable penalty.
- A motion would not be made for a defendant who commits a criminal offense while cooperating with the government or one who provides false or incomplete information.
- The earlier a defendant began to cooperate, the stronger the possibility that the defendant would get a greater reduction than a similarly-situated defendant who cooperated at a later time.
- While there is agreement on the type of cooperation that definitely will or definitely will not result in a substantial assistance reduction, the evaluation of behaviors between these extremes is the basis of great disagreement.

- The government's decision to file a motion may also be affected by external and internal considerations unique to the district, such as charging practices, sentencing patterns of the judges, and the types of criminal cases prevalent in the district court.
- Some districts implemented policy changes as a result of the 1989 Thornburg memorandum on charging decisions, while others did not. Some districts made changes after the 1993 Reno memorandum on charging decisions, again, others did not. These policy changes, based on the interpretations of the U.S. attorney, either increased or decreased the number of motions filed by that particular district.

Despite the similarity of United States attorney's policies, the implementation of the policies differs across the nation depending in large part on varying interpretations of Justice Department charging policy and local circumstances. It is noteworthy that, while federal prosecutors across the nation can make a motion to the court to reduce the defendant's sentence based on substantial assistance, the United States Department of Justice (DOJ) does not have a nationwide policy to guide the prosecutors in the use of their discretion. Such a policy would help to ensure consistent application of the substantial assistance guidelines and statute.

D. The defendant's relative culpability has a great influence on whether a defendant receives a substantial assistance departure and the extent of departure.

Contrary to the view of many in the criminal justice system, defendants with relatively minor roles and lesser culpability in an offense compared to others provide substantial assistance to the government and are often rewarded. The prevailing hypothesis that low-level defendants do not benefit from substantial assistance departures was not supported by the study. Telephone interviews with prosecutors revealed that the population of defendants who received substantial assistance sentence reductions contained large numbers of low-level defendants. The prosecutors interviewed described forty-one percent of the defendants as low-level participants. An analysis of 64 groups of codefendants (*i.e.*, conspiracies, including a total of 323 defendants) offered additional support for this position. Of course, this finding is consistent with the fact that the vast majority of defendants sentenced under the guidelines are low-level first-time offenders.

- The defendant's actual cooperation, the type of cooperation provided, and the truthfulness and completeness of the information were the factors most relevant to whether a particular defendant received a substantial assistance departure. Other factors influencing whether a defendant received a substantial assistance departure were: (1) the defendant's role in the offense and (2) the applicability of a mandatory minimum penalty. Low-level participants or those who had lesser culpability than others in the conspiracy tended to receive substantial assistance departures.
- Additionally, cooperating defendants who did not receive substantial assistance departures, nevertheless received other benefits such as: (1) conviction of offenses that did not subject them to mandatory minimum penalties; (2) conviction of offenses that

subjected them to lower mandatory minimum penalties than other codefendants; or (3) receipt of downward departures for reasons other than substantial assistance.

- Of the two factors found to be generally associated with the extent of the substantial assistance departure, the most important factor was the defendant's relative culpability in the offense. The lower the defendant's culpability, the greater the extent of the departure. The other factor associated with the extent of the substantial assistance departure was the level of the defendant's cooperation.
- In approximately two-thirds of the conspiracies, the substantial assistance departure sentence changed the hierarchical positions of the defendants relative to their offense seriousness.

The defendant's relative culpability was one of the most important factors in determining who received a substantial assistance departure and the size of the departure. This finding may be an indication that the sentence reductions were not necessarily rewards for cooperating with the government, but a means to ameliorate the perceived harshness of the guideline sentence or mandatory minimum penalty.

E. Criminal justice practitioners have varied views on whether the current policies/practices regarding substantial assistance sentence reductions should be changed.

- Prosecutors were the most satisfied with current practices and saw the least need for change. They emphasized the importance of the substantial assistance motion as a law enforcement tool, and stressed the need and use for it as a way to reward the positive results generated by defendants' cooperation. Prosecutors did concede, however, that sometimes defendants' intent and willingness were also considered as part of the equation.
- Probation officers, in contrast, were the most critical of current practices. They were especially concerned about what they viewed as too much unregulated government control over the process. Another major concern regards possible abuse by defendants who do not, in their view, provide any information of real value to the government, but yet are rewarded with a sentence reduction. Probation officers offered several recommendations for change, including greater government accountability and the establishment of nationwide standards to help guide the use of prosecutorial and judicial discretion.
- Defense attorneys were less critical about the current practice than probation officers. Their main concern was about those defendants who, in their view, provided substantial assistance to the government but were not rewarded with a sentence reduction. Defense attorneys' definition of "substantial assistance" was generally more inclusive than that of prosecutors. They clearly wanted the ability to make a

motion for substantial assistance or, as an alternative, for the judge to consider the issue and make the sentence reduction without having the prosecutor as a gatekeeper.

- Judges were the most diverse in their recommendations for change. Some judges saw no need for change, viewing substantial assistance departures as the return of sentencing discretion to the court. Other judges indicated that they would like to have the ability to make the sentence reduction without a government motion. Some judges suggested the need for more structure and guidance to the process. The Judicial Conference for the Ninth Circuit has offered a resolution to reform the system by eliminating all substantial assistance departures.

F. The aggregate data show that several defendant characteristics such as race and gender had a comparable impact on the probability of receiving a substantial assistance sentence reduction as do legally relevant characteristics.

Focusing on both the probability of receiving a substantial assistance departure and the degree of the departure from the guideline range, the analyses controlled for three sets of explanatory factors (independent variables): defendant characteristics; offense variables; and systemic criminal justice factors. Several variables that were not available for inclusion in the study and would likely affect the probit and regression analyses include:

- charging practices,
- plea bargaining practices,
- degree and type of defendant cooperation, and
- usefulness of defendant information to the prosecution.

Comparing the three groups of characteristics (defendant, legally relevant, and criminal justice system), defendant characteristics were most likely to have significant impacts on the outcome variables. Legally relevant characteristics often had high explanatory power, meaning that these variables were able to account for a large percentage of the variation. The caseload variables in the systemic grouping, except for the substantial assistance rate, had the least consistent and significant findings.

Major findings for *all defendants* included:

- **Women** were more likely to receive §5K1.1 departures and to receive larger degrees of departure than men.
- **Race** results were significant both for the probability of receiving a substantial assistance departure and the degree of §5K1.1 departure received. Rates were highest

for non-minority defendants, followed by Black defendants, with the lowest rates for Hispanic defendants.

- U.S. **citizens** were more likely to receive §5K1.1 departures and to receive larger degrees of departure than non-citizens.
- Among select **primary offense categories**, defendants convicted of money laundering were the most likely to receive a substantial assistance departure, followed by drug trafficking and racketeering. Of these three offense types, money laundering also had the highest degree of departure. Among select offense types, defendants convicted of larceny were least likely to receive §5K1.1 departures; the second and third least likely offense types were firearms and fraud.
- Defendants in **Criminal History Category I** were more likely to receive a substantial assistance departure and to receive larger degrees of departure than defendants in higher criminal history categories.
- Defendants sentenced in the Northeast and West **geographic regions** were most likely to receive a substantial assistance departure and to receive larger degrees of departure than defendants in the Midwest and South.
- Defendants receiving **mitigating role adjustments** were granted more substantial assistance departures and received larger degrees of departure.

Major findings for *drug trafficking defendants* included:

- U.S. **citizen** traffickers received larger degrees of departure than non-citizen traffickers.
- The **appointment date of the sentencing judge**, whether before or after guideline implementation, was not significant in predicating the defendant's probability of receiving a substantial assistance departure or the degree of departure made by the judge.
- Compared to marijuana traffickers, **powder cocaine traffickers** were more likely and **heroin traffickers** were less likely to receive substantial assistance departures. No significant differences with respect to degree of departure were found for any drug type.
- Defendants subject to **gun mandatory minimum** sentences had lower probabilities of receiving substantial assistance departures; however, there was no difference with respect to degree of departure.

- Defendants subject to **drug mandatory minimum** sentences were much more likely to receive both substantial assistance departures and larger degrees of departure.

III. CONCLUSIONS AND RECOMMENDATIONS

The philosophical underpinning of sentence reductions for substantial assistance can be traced to utilitarian theory. The substantial assistance sentence reduction benefits law enforcement by increasing the number of successful investigations, prosecutions, and convictions. In doing so, it also serves the crime control model. The sentence reduction also benefits the court and prosecution by (1) securing additional guilty pleas and (2) reducing the number of trials and subsequent sentence related appeals. Finally, the substantial assistance sentence reduction, especially under the constraints imposed by the Sentencing Reform Act, guidelines, and mandatory minimum penalties, offers the greatest and most certain "relief" for defendants.

Although sentence reductions for substantial assistance offer many benefits, the resulting problems of (1) lack of proportionality in sentencing, (2) increased possibility of false evidence and testimony in federal cases, and (3) disparate sentencing outcomes, all caution against a strong endorsement of the current practice.

The compelling and often-times conflicting concerns both for and against substantial assistance sentence reductions require the U.S. Sentencing Commission, Department of Justice, and other interested parties to continue to work together to insure that the inherent tensions in the criminal justice system are sufficiently balanced to reach a full and fair result for all concerned. To move towards a fuller understanding of the impact of substantial assistance sentence reductions on the criminal justice practice in federal courts, the following actions are recommended:

- (1) Establishment of a national policy on substantial assistance for prosecutors;
- (2) Continued monitoring and reporting on substantial assistance sentences;
- (3) Amendment of Policy Statement §5K1.1 to reflect *Melendez* holding;
- (4) Report from the Department of Justice on actual new leads, convictions, and other tangible benefits received from defendants who got substantial assistance departures.

APPENDIX A

REFERENCES

American Bar Association, *Pleas of Guilty*, in 3 Standards for Criminal Justice, §14-1.8 (a)(iv) (1980).

John S. Austin, *Prosecutorial Discretion and Substantial Assistance: The Power and Authority of Judicial Review—U.S. v. Wade*, 15 Campbell L. Rev. 263 (1993).

Karen Bjorkman, *Who's the Judge? The Eighth Circuit's Struggle With Sentencing Guidelines and the Section 5K1.1 Departure*, 18 Wm. Mitchell L. Rev. 731 (1992).

David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 Judicature 196 (1995).

Avern Cohn, *The Unfairness of "Substantial Assistance"*, 78 Judicature 186 (1995).

Robert O. Dawson, *Sentencing—The Decision as to Type, Length, and Conditions of Sentence* (1969).

Neil B. Eisenstadt, *Let's Make a Deal: A Look at United States v. Dailey and Prosecutor-Witness Cooperation Agreements*, 67 B.U. L. Rev. 749 (1987).

Arnold Enker, *Perspectives on Plea Bargaining*, in U.S. President's Commission on Law Enforcement and Administration of Justice Task Force Report: The Courts (1967).

David Fisher, *Fifth Amendment—Prosecutorial Discretion Not Absolute: Constitutional Limits On Decision Not to File Substantial Assistance Motions*, 83 J. Crim. L. & Criminology 744 (1993).

Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L. Rev. 1681 (1992).

Julie Gyurci, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard*, 78 Minn. L. Rev. 1253 (1994).

John Hagan and Ilene Nagel Bernstein, *The Sentence Bargaining of Upperworld and Underworld Crime in Ten Federal District Courts*, 13 L. & Soc'y 467 (1979).

William T. Harrington, *Federal Court May Never Depart from Sentencing Guidelines Pursuant to §5K1.1 Absent Government Motion—United States v. Romolo*, 26 Suffolk U. L. Rev. 891 (1992).

Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1 (1992).

Kimberly S. Kelley, *Substantial Assistance Under the Guidelines: How Smitherean Transfers Sentencing Discretion From Judges to Prosecutors*, 76 Iowa L. Rev. 187, 207 (1990).

Cynthia K.Y. Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. Rev. 105 (1994).

Cynthia K.Y. Lee, *The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement*, 23 Ind. L. Rev. 681 (1990).

Jonathan D. Lupkin, *5K1.1 and Substantial Assistance Departure: The Illusory Carrot of the Federal Sentencing Guidelines*, 91 Colum. L. Rev. 1519 (1991).

Philip T. Masterson, *Eliminating the Government Motion Requirement of Section 5K1.1 of the Federal Sentencing Guidelines—A Substantial Response to Substantial Assistance: United States v. Gutierrez*, 26 Creighton L. Rev. 929 (1991).

Melissa M. McGrath, *Federal Sentencing Law: Prosecutorial Discretion in Determining Departures Based on Defendant's Cooperation Violates Due Process*, 15 S. Ill. U. L. J. 32 (1991).

Steven S. Nemerson, *Coercive Sentencing*, 64 Minn. L. Rev. 669 (1980).

Donald A. Purdy, Jr. and Michael Goldsmith, *Better Do Your Homework—Plea Bargaining Under the New Federal Sentencing Guidelines*, Crim. Just. 2 (1988).

Donald A. Purdy, Jr. and Jeffrey Lawrence, *Plea Agreements Under the Federal Sentencing Guidelines*, 26 Crim. L. Bull. 483 (1990).

L. Felipe Restrepo, *To Be or Not To Be a Cooperating Defendant*, Crim. Just. 22 (1993).

Steven J. Schulhofer & Ilene H. Nagel, *A Tale of Three Cities: An Empirical Study of Charge Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501 (1992).

Daniel J. Sears, *Practice Under the Federal Sentencing Guidelines: Bargaining for Freedom*, 22 Colo. Law. 485 (1993).

Bruce A. Selya and John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combatting Ultra-Uniformity*, 35 B.C. L. Rev. 799 (1994).

John Seymour, Note, *Roberts v. United States: Sentencing the Defendant Who Refuses to Cooperate*, 18 Am. Crim. L. Rev. 565 (1981).

Donna J. Spindel, *Crime and Society in North Carolina, 1663-1776* (1989).

Jeffrey Standon, *Plea Bargaining in the Shadow of the Guidelines*, 81 Cal. L. Rev. 1471 (1993).

Antoinette M. Tease, *Downward Departures for Substantial Assistance: A Proposal for Reducing Sentencing Disparities Among Codefendants*, 53 Mont. L. Rev. 75 (1992).

United States Department of Justice, *Principles of Federal Prosecution* (1980).

United States Sentencing Commission, Annual Report (1994).

United States Sentencing Commission, Guidelines Manual (1994).

Dr. Ernest Van Den Haag, *Limiting Plea Bargaining and Prosecutorial Discretion*, 15 Cumb. L. Rev. 1 (1984).

William W. Wilkins, Jr., *The United States Sentencing Commission*, 55 Fed. Probation 26 (1991).

Thomas E. Zeno, *A Prosecutor's View of the Sentencing Guidelines*, 55 Fed. Probation 31 (1991).

APPENDIX B

UNITED STATES SENTENCING COMMISSION SUBSTANTIAL ASSISTANCE WORKING GROUP

SUBSTANTIAL ASSISTANCE DISTRICT POLICY QUESTIONNAIRE

SEPTEMBER 21, 1994

INTRODUCTION

The following questions are about your district's current policies regarding substantial assistance motions. If your district's policies have changed since you became U.S. Attorney, please mention both previous and current policies in response to the questions to which they apply. Your responses should reflect both written and unwritten policies, unless otherwise specified.

In this questionnaire, "substantial assistance motion" means a motion made by the government pursuant to section 3553(e) of Title 18, United States Code, or section 5K1.1 of the United States Sentencing Commission's Guidelines Manual. Where the context indicates a post-sentencing action, "substantial assistance motion" refers to a motion made by the government pursuant to Fed. R. Crim. Pro. 35(b).

Please attach a copy of any written policy your district uses for review and filing of substantial assistance motions. If you have any questions, please contact Pamela Montgomery, Deputy General Counsel, at (202) 273-4520.

Please provide the following information:

Your name: _____

Your title: _____

Your phone number: _____

1. DOES YOUR DISTRICT HAVE ANY WRITTEN POLICY CONCERNING REVIEW, APPROVAL, OR FILING OF SUBSTANTIAL ASSISTANCE (5K1.1) MOTIONS?

Written district policy	Check only one box
1. No	
2. Yes (Please attach copy.)	

1a. Has this policy changed since you became U.S. Attorney on _____ ? (date)	Check only one box
1. No	
2. Yes Please explain: _____ _____ _____	

2. ACCORDING TO YOUR DISTRICT'S POLICY (WRITTEN OR UNWRITTEN), WHO IS RESPONSIBLE FOR REVIEWING OR APPROVING RECOMMENDATIONS FOR SUBSTANTIAL ASSISTANCE MOTIONS?

Responsible for reviewing or approving	Check all that apply	
	Reviewing	Approving
1. AUSA prosecuting the case.		
2. Supervisory Assistant(s): a.(title) _____ b.(title) _____		
3. Substantial Assistance Review Committee (member titles): a. _____ b. _____ c. _____ d. _____		
4. U.S. Attorney		
5. Other (please specify): _____		

2a. Has this policy changed since you became U.S. Attorney?	Check only one
1. No	
2. Yes. Please explain: _____ _____ _____	

3. ACCORDING TO DISTRICT POLICY (WRITTEN OR UNWRITTEN), WHICH OF THE FOLLOWING TYPES OF ASSISTANCE ARE FACTORS CONSIDERED BY THE GOVERNMENT IN MOVING FOR SUBSTANTIAL ASSISTANCE?

Type of assistance	Check all that apply
1. Testimony under oath in the investigation or prosecution of another person.	
2. Information likely to lead to prosecution of others.	
3. Information regarding criminal activities of others.	
4. Information about defendant's own activity.	
5. Active participation in investigation of another person (e.g., undercover).	
6. Other (please specify): a. _____ b. _____	

3a. Has this policy changed since you became U.S. Attorney?	Check only one box
1. No	
2. Yes. Please explain: _____ _____ _____	

4. ARE THERE ANY FACTORS THAT WOULD CAUSE YOUR OFFICE NOT TO FILE A SUBSTANTIAL ASSISTANCE MOTION?

Factors	Check all that apply
1. Defendant's relative culpability/role. Please explain: _____ _____	
2. Defendant charged under certain statutes. Please specify statutes: a. _____ b. _____ c. _____	
3. Defendant engaged in certain violent acts. Please specify type of acts: a. _____ b. _____ c. _____	
4. Other codefendants already cooperating.	
5. Defendant criminal history. Please specify: a. _____ b. _____	
6. Defendant continued misconduct while cooperating.	
7. Other factors. Please specify: a. _____ b. _____ c. _____	

4a. Has this policy changed since you became U.S. Attorney?	Check only one box
1. No	
2. Yes. Please explain: _____ _____	

5. HOW DOES THE TIMING OF THE DEFENDANT'S SUBSTANTIAL ASSISTANCE AFFECT THE DEGREE OF THE SENTENCE REDUCTION RECOMMENDED OR AGREED UPON?

5a. Has this policy changed since you became U.S. Attorney?	Check only one box
1. No	
2. Yes. Please explain: _____ _____ _____	

6. WHAT KINDS OF SENTENCING RECOMMENDATIONS/PLEA AGREEMENTS ARE GENERALLY USED FOR SUBSTANTIAL ASSISTANCE MOTIONS? ARE THESE COURT OR U.S. ATTORNEY'S POLICIES?

Type of Sentence Recommendations/Plea Agreements	Check all that apply	
	Court Policy	Office Policy
1. Binding sentence agreement (Rule 11(e)(1)(C)).		
2. Binding sentence range agreement (Rule 11(e)(1)(C)).		
3. Recommended sentence agreement (Rule 11(e)(1)(B)).		
4. Recommended sentence range agreement (Rule 11(e)(1)(B)).		
5. Maximum or fixed percent reduction. (Please specify percent): _____		
6. Subtraction of offense levels. Please specify amount of reduction: _____		
7. Other (please specify): _____		

6a. Has this policy changed since you became U.S. Attorney?	Check only one box
1. No	
2. Yes. Please explain: _____ _____	

7. DOES YOUR DISTRICT HAVE ANY WRITTEN POLICY CONCERNING REVIEW, APPROVAL, OR FILING OF RULE 35(b) MOTIONS?

	Check only one box
1. No, there is no written district policy.	
2. Yes, there is a written district policy. (Please attach copy or brief description.)	

7a. Has this policy changed since you became U.S. Attorney?	Check only one box
1. No	
2. Yes. Please explain: _____ _____ _____	

8. IN YOUR DISTRICT, IS IT THE PRACTICE OF THE COURT TO DISCOURAGE FILING OF RULE 35(b) MOTIONS?

	Check only one box
1. No	
2. Yes, court discourages filing of Rule 35(b) motions.	

9. ACCORDING TO DISTRICT POLICY (WRITTEN OR UNWRITTEN), UNDER WHAT CIRCUMSTANCES DOES THE GOVERNMENT FILE A SUBSTANTIAL ASSISTANCE MOTION UNDER RULE 35(b) RATHER THAN 5K1.1?

Circumstances for filing Rule 35(b) motions	Check all that apply
1. Defendant completed substantial assistance before sentencing.	
2. Defendant substantially assisted only after sentencing.	
3. Defendant's substantial assistance continued after sentencing.	
4. Defendant requested Rule 35(b) for security reasons.	
5. Other (please specify): a. _____ b. _____	

9a. Has this policy changed since you became U.S. Attorney?	Check only one box
1. No	
2. Yes. Please explain: _____ _____ _____	

10. OFTEN POLICY CHANGES IN ONE AREA DIRECTLY OR INDIRECTLY AFFECT OTHER AREAS. WHAT IMPACT, IF ANY, HAS ATTORNEY GENERAL RENO'S CLARIFICATION OF THE PRINCIPLES OF FEDERAL PROSECUTION DATED OCTOBER 12, 1993 (USAM 9-27.000), HAD ON SUBSTANTIAL ASSISTANCE PRACTICES IN YOUR DISTRICT?

11. ARE THERE ANY OTHER POLICY CHANGES THAT HAVE HAD AN EFFECT ON SUBSTANTIAL ASSISTANCE PRACTICES IN YOUR DISTRICT?

12. PLEASE SET FORTH ANY REASONS, INTERNAL OR EXTERNAL TO YOUR OFFICE, THAT YOU BELIEVE ARE IMPORTANT TO UNDERSTANDING THE NUMBERS AND TYPES OF CASES THAT RECEIVE A SUBSTANTIAL ASSISTANCE MOTION IN YOUR DISTRICT.

(e.g., are there district policies on declination/charging or charge bargaining that, in your opinion, should be considered in conducting research on substantial assistance motions?)

Thank you for completing this questionnaire. Please return to the U.S. Sentencing Commission in the pre-addressed envelope:

- the completed questionnaire
- written policy documents
- other relevant documents

APPENDIX C

NAME: _____

TITLE: _____

DISTRICT ID#: _____

LENGTH OF TIME IN CURRENT POSITION: _____

5K1.1 SITE VISIT QUESTIONS

1. Based on your personal understanding of the substantial assistance statute (3553(e)) and guideline (5K1.1), describe the type of cooperation a defendant would offer that should prompt the prosecutor to file a 5K1.1 motion.
2. Do you think that the statute and guideline provide sufficient instruction and guidance to allow substantial assistance motions to work the way you suggested?
3. In actual practice, what type of cooperation prompts the prosecutor to make a substantial assistance motion in this district?
4. What, if any, benefits do you associate with the substantial assistance practice in this district?

What, if any, problems do you associate with the substantial assistance practice in this district?

JUDGE:

5. What factors influence your decision on whether to grant a substantial assistance motion or not?

ALL OTHERS:

5. What do you think influences the judge's decision in whether to grant a 5K1.1 motion or not?

PROMPTS (Factors such as):

- presence of firearms
- degree of cooperation
- other sentencing issues such as mandatory minimums, guidelines
- declination policies

What factors do you think influence the judge's decision as to the degree of the departures?

6. Do you think the substantial assistance practices of the U.S. Attorney's office in this district are sufficiently uniform and consistent to guarantee fair and proportionate sentences?

JUDGE:

7. What factors do you consider in determining the degree of departure (i.e., the sentence)?

PROSECUTOR:

7. What factors do you consider in recommending the degree of departure (i.e., the sentence)?

PROMPTS:

- presence of firearms
- other sentencing issues such as mandatory minimums, guidelines

DEFENSE:

7. In return for the defendant's cooperation, what can you bargain for?

PROMPTS:

- Prosecutor's agreement to file 5K1.1
- Prosecutor's sentence recommendation
- Prosecutor's specific sentence recommendation
- Binding plea agreement

PROBATION OFFICER #7 (ALL OTHERS #8):

7. Are there instances in which the court denies a 5K1.1 motion?

How frequently does that happen?

What are the factors that influence the court in denying the motion (i.e., presence of firearms)?

PROBATION OFFICERS #8 (ALL OTHERS #9):

8. Do you find any systematic variation in defendants' willingness to cooperate based on offense type or based on personal characteristics such as: age, gender, or race/ethnic identity?

PROBATION #9 (ALL OTHERS #10):

9. What changes, if any, would you make to the overall 5K1.1 process?

PROMPTS:

- Need for more structuring and specificity in the form of USSC guidelines, DOJ directives, USAO supervision.
- Possibility of motion to be filed by any of the sides (i.e., court, defense, government).

APPENDIX D-1

THE INTERVIEW PROCESS

Initial contact was made through a packet sent to all U.S. attorneys whose office was represented in the sample. The packet contained: an introductory letter from the USSC Chairman the Honorable Judge Richard Conaboy; a September 8, 1994 introductory memorandum from the Department of Justice, Executive Office for U.S. attorneys (DOJ/EOUSA); a list of the subject cases selected within their district; and a list of general interview topics. The letter from the USSC asked that someone in their office contact the USSC to schedule interviews. On May 26, 1995, DOJ/EOUSA issued a memo to U.S. attorneys expressing DOJ's desire to have supervisory personnel present during the interviews.¹

The number and titles of interview participants varied by district. The number of participants ranged from one to four for a specific case. Interview participants ranged from the U.S. attorney to AUSAs. Familiarity with the subject case ranged from having prosecuted the case to simply reviewing the file for the interview. To enhance interviewer and interviewee communication, the interviewers were selected from USSC legal staff.

Interviews began by confirming the subject case and recording respondent information such as name, title, and capacity of involvement in prosecuting the case. The interview consisted of questions from seven broad areas of inquiry. The interview progressed from one area of inquiry to the next in the following sequence: 1) the role of the defendant in the criminal activity; 2) other related cases (*e.g.*, number of defendants, number of substantial assistance motions made); 3) the review and approval process for the substantial assistance motion; 4) the point in the case when the defendant began to provide assistance; 5) type of assistance promised/provided, and the benefits to the government of the assistance; 6) codefendants' role, substantial assistance motions for codefendants, and benefits to the government from assistance provided by codefendants; 7) sentence recommendation (*e.g.*, whether a recommendation was made, what the recommendation was, factors that affected the sentence recommended). The interview information was then coded, entered into a database, and converted to a SAS dataset for analysis.

In interviews where there was more than one respondent, the code for respondent involvement in the case is the value for the respondent most familiar with the case. For the majority of interviews, the prosecuting AUSA was the respondent most familiar with the case.

¹In response to the May 26, 1995 DOJ/EOUSA memorandum, when making initial telephone contact with U.S. attorneys, interviewers expressed no preference about who should be interviewed. If the U.S. attorney asked what had been past practice or who we would like to interview, the USSC interviewers noted that, following DOJ preference, we will speak with the person designated by the U.S. attorney. At this point, depending upon the district, the U.S. attorneys would either arrange for interviews or instruct the USSC interviewers to contact the prosecuting AUSA directly.

When possible, interview questions were accompanied by a set of responses. These responses were derived from USSC staff familiarity with the §5K1.1 process and input from visiting practitioners. Numeric values were assigned to question responses.² For some questions a predetermined set of responses was not practical. For those, the interviewers were provided space to write in a response. In consultation with the interviewers, responses were grouped into categories and then assigned nominal numeric values.³

²If a range was provided by the respondent instead of a single value for questions 3, 8, or 12, the midpoint of the range was coded as the response value. If the midpoint of the range was not an integer, one of the integer values adjacent to the true mid-point of the range was randomly selected. If a range of time periods was provided as a response to question 5, the latest point in the case process was coded as the point at which the defendant began to provide assistance.

³Questions that required narrative responses were: description of the defendant's participation in "non-drug" cases (Q2); the benefit to the government from the defendant's assistance (Q7); the benefit to the government from codefendants' assistance (Q10); factors that affected the length of sentence recommended (Q14); how the mandatory minimum sentence affected the government's sentence recommendation (Q17); and how the career offender guideline affected the government's sentence recommendation (see Appendix D-2).

Each coded value represents a single element of the narrative text. To permit review of narrative coding decisions the text was highlighted for each element that was coded. Interviewers then reviewed the narrative coding to determine if the coding accurately captured the descriptive elements of the narrative. When the interviewer felt that the original written narrative lacked important information provided by the respondent, an addendum to the narrative was permitted. Coders categorized the narrative responses to questions 7 and 10 into two types of information: 1) the form of assistance provided and 2) the results or benefits of the assistance.

APPENDIX D-2

SUBSTANTIAL ASSISTANCE WORKING GROUP

SUBSTANTIAL ASSISTANCE AUSA CASE INTERVIEW
5-26-95

Interviewer_____

Date of Interview_____

District_____

TELEPHONE INTERVIEW PROTOCOL

Please confirm or correct the following information:

Your name_____

Your title_____

Your telephone number: (____) _____

The following questions pertain to the case of _____.

Docket no._____ The defendant was sentenced on_____, 199__.

Please limit your responses to this particular case.

In what capacity were you involved in the prosecution of this case?

1. Personally involved in the prosecution of the case.
2. Supervised the prosecution of the case.
3. No direct involvement in prosecution of the case.

Q1. IF THE CASE INVOLVED ILLEGAL DRUG ACTIVITY, WHICH OF THE FOLLOWING ROLES DESCRIBES THE DEFENDANT'S CRIMINAL ACTIVITY?

Interviewer note: 'Illegal drug activity' includes any drug trafficking involvement, whether manufacturing, distributing, marketing, money laundering, etc.

If this case does not involve illegal drug activity, skip to question #2.

Interviewer note: Tell respondents that you will be referring to the list of roles we sent to them.

Task performed by defendant in drug related criminal activity	Check all that apply
1. High-Level Dealer	
2. Mid-Level Dealer	
3. Street-Level Dealer	
4. Manufacturer	
5. Financier	
6. Bodyguard/Strongman/Debt Collector	
7. Broker/Steerer/Go-Between	
8. Courier (transports drug by vehicle or boat)	
9. Mule (transports drugs on person or in baggage)	
10. Renter/Storer	
11. Moneyrunner	
12. Off-loader/Loader	
13. Gopher/Lookout/Deckhand/Worker/Employee	
14. Enabler (passive)	
15. User	
16. Other (please specify): _____ _____	

Skip to question #3.

Q2. BRIEFLY DESCRIBE THE DEFENDANT'S PARTICIPATION IN THE CRIMINAL ACTIVITY?

Q3. WERE THERE ANY OTHER RELATED (i.e., same factual nexus) BUT SEPARATE (i.e., separate final charging instruments) CASES? IF SO, HOW MANY, IN WHAT DISTRICTS, HOW MANY DEFENDANTS IN EACH, AND HOW MANY OF THE DEFENDANTS RECEIVED SUBSTANTIAL ASSISTANCE DEPARTURES?

If there were no related cases, skip to question #4

Interviewer note: For each case, probe the respondent about the District, # of defendants, and # receiving SA.

Related, but separate, cases	District	Number of defendants	Number of defendants receiving substantial assistance (if known)	
			5K1.1	Rule 35(b)
1.				
2.				
3.				
4.				
5.				
6.				

Q4. IN THIS CASE, WHO REVIEWED AND/OR APPROVED THE SUBSTANTIAL ASSISTANCE MOTION?

Interviewer note: Probe whether the person/committee reviewed and approved the SA motion.

Reviewed or Approved motion	Check all that apply	
	Reviewed	Approved
1. AUSA prosecuting the case.		
2. Supervisory Assistant(s): a. (title) _____ b. (title) _____		
3. Substantial Assistance Review Committee (member titles): a. _____ b. _____ c. _____ d. _____		
4. U.S. Attorney		
5. Other (please specify): _____		

Q5. CONSIDERING ONLY THE DEFENDANT IN THIS SPECIFIC CASE, AT WHAT POINT IN THE PROSECUTION OF THIS CASE DID THE DEFENDANT START TO PROVIDE ASSISTANCE?

Assistance provided <u>at or prior to</u> :	Check most appropriate category
1. Contact by agent or AUSA	
2. Complaint/Target Letter	
3. Indictment/Information	
4. Resolution of significant pretrial motions	
5. Plea	
6. Trial	
7. Sentencing	
8. Post-sentencing/Appeal (Rule 35(b))	
9. Other (please specify): a. _____ b. _____	

Q6. DID THE DEFENDANT AGREE TO AND/OR PROVIDE ANY OF THE FOLLOWING TYPES OF ASSISTANCE?

Interviewer note: Solicit a response to each "type of assistance" before reciting the next type and probe whether the defendant agreed to provide and did provide the assistance.

Type of assistance		Check all that apply	
		Agreed to provide assistance	Provided assistance
1. Testimony under oath in prosecution of another person.	same case		
	other case		
2. Information likely to lead to prosecution of others.	same case		
	other case		
3. Information regarding criminal activities of others.	same case		
	other case		
4. Information about defendant's own activity.	same case		
	other case		
5. Active participation in investigation of another person (<u>e.g.</u> , undercover).	same case		
	other case		
6. Other (please specify):			
a. _____			
b. _____			

Q7. WHAT BENEFIT DID THE GOVERNMENT RECEIVE FROM THE DEFENDANT'S ASSISTANCE?

Interviewer note: Probe regarding the type of activity, numbers and types of investigations and prosecutions.

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are approximately 20 lines visible. The paper appears to be a standard notebook page.

Q8. INCLUDING ANY SUPERSEDING INDICTMENTS, HOW MANY CODEFENDANTS WERE THERE IN THIS CASE?

Number of codefendants	
------------------------	--

If there were 0 codefendants, skip to question #11.

Q9. HOW MANY OF THE CODEFENDANTS COUNTED IN QUESTION #8 RECEIVED A SUBSTANTIAL ASSISTANCE MOTION?

Interviewer note: If necessary, remind the respondent that we are asking about 5K1.1 and Rule 35(b) motions.

	Type of Motion Filed	
	5K1.1	Rule 35(b)
Number of codefendants who received a substantial assistance motion		

If no codefendants received substantial assistance motions, skip to question #11.

Q10. WHAT BENEFIT DID THE GOVERNMENT RECEIVE FROM THE CODEFENDANTS' ASSISTANCE?

Interviewer note: Probe regarding the type of activity, numbers and types of investigations and prosecutions.

Q11. AMONG THE CODEFENDANTS/PARTICIPANTS IN THE CRIMINAL ACTIVITY, WHICH OF THE FOLLOWING CATEGORIES BEST DESCRIBES THE DEFENDANT'S CULPABILITY IN THE CRIMINAL ACTIVITY?

Interviewer note: If necessary, remind the respondent that the question is not limited to codefendants.

Defendant's culpability	Check the most appropriate category
1. High-level (Please define) _____	
2. Mid-level (Please define) _____	
3. Low-level (Please define) _____	

Q12. WHAT SENTENCE WAS RECOMMENDED BY YOUR OFFICE?

Answer
all that
apply

Recommended sentence	Length in months, amount in dollars, or number of offense levels reduced	
1. No recommended sentence is made to Court (Stand silent), and no intra-office recommendation was made. <i>Skip to Question #15</i>	Incorrect	Correct
2. No recommended sentence is made to Court (Stand silent), and no intra-office recommendation was made.	Incorrect	Correct
3. Probation		
4. Community Confinement/Home Detention		
5. Prison		
6. Fine/Restitution	\$	
7. Reduction in guideline offense level		
8. Other (please specify): a. _____ b. _____		

DID THE RECOMMENDED SENTENCE REQUIRE SUPERVISORY APPROVAL?

No___ Yes ___ by_____

If item 2 choice is Correct in Question #12, then skip Question #13.

Q13. WHAT TYPE OF SENTENCE RECOMMENDATION DID YOUR OFFICE MAKE IN THIS CASE?

Type of Sentence Recommendation	Answer all that apply
1. Binding sentence (Rule 11(e)(1)(C)) agreement.	
2. Binding sentence range (Rule 11(e)(1)(C)) agreement.	
3. Recommended sentence (Rule 11(e)(1)(B)) agreement.	
4. Recommended sentence range (Rule 11(e)(1)(B)) agreement.	
5. Fixed percent reduction (please specify percent): _____	
6. Subtraction of offense levels (please specify amount of reduction): _____	
7. Other (please specify): _____	

Q14. STARTING WITH THE MOST IMPORTANT, WHAT FACTORS AFFECTED THE LENGTH OF THE SENTENCE RECOMMENDED?

Q15. IN THIS CASE, WAS IT KNOWN WHETHER THE COURT PREFERRED SUBSTANTIAL ASSISTANCE MOTIONS WITH OR WITHOUT SENTENCING RECOMMENDATIONS?

Court preference	Check appropriate category
1. Court preferred no sentence recommendation from government.	
2. Court preferred a sentence recommendation from government.	
3. Government did not know court's preference.	

Q16. WAS A MANDATORY MINIMUM SENTENCE APPLICABLE IN THIS CASE?

Mandatory minimum sentence	Check appropriate response
1. No	
2. Yes	

If a mandatory minimum sentence was not applicable, skip to question #18.

Q17. DID THE MANDATORY MINIMUM SENTENCE AFFECT THE GOVERNMENT'S SENTENCE RECOMMENDATION? IF SO, HOW?

Q18. IF THE CAREER OFFENDER GUIDELINE (4B1.1) WAS APPLICABLE, DID IT
AFFECT THE GOVERNMENT'S SENTENCE RECOMMENDATION? IF SO, HOW?

Thank you for completing this interview.

APPENDIX E-1

CASE REVIEW INSTRUMENTS AND CASE REVIEW MANUALS

(a)

INDIVIDUAL—§1B1.8 AGREEMENT Codefendant PROJECT CODING SHEET

Identifying Information

Coder	_____	Defendant's Name	_____
USSCID Number	_____	Defendant Number	_____
Docket Number	_____		

50 Defendant Entered §1B1.8 Agreement?
 YE—Yes NO—No [GO TO No-§ 1B1.8 Coding Sheet]

Offense Conduct Factors

- 100 Non-Drug Defendant's Function in Conspiracy [GO TO LINE 106 WHEN LINE 100 COMPLETE]
[circle defendant's most serious function; underline predominant function]
 OR -- Organizer/Leader LO -- Low-Level Participant/Gofer
 MI -- Mid-Level Manager UN -- Unknown
 AV -- Average Participant/Worker NA -- Not Applicable
- 101 Drug Defendant's Function in the Conspiracy
[circle defendant's most serious function; underline predominant function; check add'l functions]
 HI -- High-Level Dealer/Importer CO -- Courier (Drug By Vehicle)
 GR -- Grower/Manufacturer MU -- Mule (Drug On Person)
 MI -- Mid-Level Dealer (Sells to Dealers) MO -- Money-runner
 ST -- Street-Level Dealer (Sells to User) RE -- Renter/Storer
 FI -- Financier/Money Launderer OF -- Off-loader/Loader
 PI -- Aircraft Pilot or Ship Captain GO -- Gofer/Lookout/Deckhand
 BO -- Bodyguard/Strongman EN -- Enabler (Passive)
 BR -- Broker/Steerer/Go-Between US -- User Only
 UN -- Unknown
- 102 Primary Drug Type that Defendant Personally Possessed or Trafficked
 HE -- Heroin OT -- Other Schedule I or II
 CR -- Crack/Cocaine Base IV -- Schedule III, IV, or V
 CO -- Cocaine NO -- None [GO TO LINE 106]
 ME -- Methamphetamine UN -- Unknown
 MA -- Marijuana
- 103 Primary Drug Quantity
 CO -- As determined by court or P.O.: _____ kilos UN -- Unknown
 PE -- Personally possessed by defendant: _____ kilos UN -- Unknown
 PR -- Subject to §1B1.8 protection: _____ kilos UN -- Unknown
- 104 Secondary Drug Type that Defendant Personally Possessed or Trafficked
 HE -- Heroin OT -- Other Schedule I or II
 CR -- Crack/Cocaine Base IV -- Schedule III, IV, or V
 CO -- Cocaine NO -- None [GO TO LINE 106]
 ME -- Methamphetamine UN -- Unknown
 MA -- Marijuana

Secondary Drug Quantity

CO -- As determined by court or P.O.: _____

kilos

UN -- Unknown

PE -- Personally possessed by defendant: _____

kilos

UN -- Unknown

PR -- Subject to §1B1.8 protection: _____

kilos

UN -- Unknown

105 Date the Defendant Commenced the Conduct

DA (month/day/year): _____

UN -- Unknown

107 Date the Defendant Completed the Conduct

DA (month/day/year): _____

UN -- Unknown

108 Weapon Possessed by or at Direction of Defendant (Do not use §1B1.8 information)

YE -- Yes

NO -- No

109 Weapon Possessed by or at Direction of Defendant (§1B1.8 Information)

YE -- Yes

NO -- No

110 Injury or Death Inflicted by or at Direction of Defendant

YE -- Yes

NO -- No

111 Summarize the conduct of the defendant (see coding manual).

Cooperation Information

200 Did the defendant provide any information regarding the conduct of any other person who has committed an offense?

YE -- Yes

PR -- Presumably yes

UN -- Unknown

NO -- No [GO TO LINE 300]

201 Type of Assistance Defendant Provided *[circle up to the 4 most serious that apply]*

WI -- Wore wire

DO -- Gave documents/tangible evidence

UC -- Introduced undercover agent

IN -- Gave verbal information

TR -- Testified at trial

OT -- Other [EXPLAIN] _____

GJ -- Testified before a grand jury

AG -- Agreed to testify

NO -- None

MO -- Conducted monitored purchase/sale

UN -- Unknown

202a Person Against Whom Defendant Provided Assistance *[circle all that apply]*

PO -- Participant outside of conspiracy

PK -- Participant within conspiracy

DE -- Defendant only

UN -- Unknown

202b Whether Any Participant Was Not Previously Known by Law Enforcement

YE -- Yes (That is, at least one participant was NOT previously known)

NO -- No (That is, all participants WERE previously known)

UN -- Unknown

**INDIVIDUAL—NO §1B1.8 AGREEMENT
Codefendant PROJECT CODING SHEET**

Identifying Information

Coder _____
 USSCID Number _____
 Docket Number _____

Defendant's Name _____
 Defendant Number _____

- 50 Defendant Entered §1B1.8 Agreement?
 YE -- Yes [GO TO §1B1.8 Coding Sheet]
 NO -- No

Offense Conduct Factors

- 100 Non-Drug Defendant's Function in Conspiracy [GO TO LINE 106 WHEN LINE 100 COMPLETE]
[circle defendant's most serious function; underline predominant function]

OR -- Organizer/Leader	LO -- Low-Level Participant/Gofer
MI -- Mid-Level Manager	UN -- Unknown
AV -- Average Participant/Worker	NA -- Not Applicable

- 101 Drug Defendant's Function in the Conspiracy
[circle defendant's most serious function; underline predominant function; check add'l functions]

HI -- High-Level Dealer/Importer	CO -- Courier (Drug By Vehicle)
GR -- Grower/Manufacturer	MU -- Mule (Drug On Person)
MI -- Mid-Level Dealer (Sells to Dealers)	MO -- Money-runner
ST -- Street-Level Dealer (Sells to User)	RE -- Renter/Storer
FI -- Financier/Money Launderer	OF -- Off-loader/Loader
PI -- Aircraft Pilot or Ship Captain	GO -- Gofer/Lookout/Deckhand
BO -- Bodyguard/Strongman	EN -- Enabler (Passive)
BR -- Broker/Steerer/Go-Between	US -- User <u>Only</u>
	UN -- Unknown

- 102 Primary Drug Type that Defendant Personally Possessed or Trafficked

HE -- Heroin	OT -- Other Schedule I or II
CR -- Crack/Cocaine Base	IV -- Schedule III, IV, or V
CO -- Cocaine	NO -- None [GO TO LINE 106]
ME -- Methamphetamine	UN -- Unknown
MA -- Marijuana	

- 103 Primary Drug Quantity

CO -- As determined by court or P.O.:	_____ kilos	UN -- Unknown
PE -- Personally possessed by defendant:	_____ kilos	UN -- Unknown

- 104 Secondary Drug Type that Defendant Personally Possessed or Trafficked

HE -- Heroin	OT -- Other Schedule I or II
CR -- Crack/Cocaine Base	IV -- Schedule III, IV, or V
CO -- Cocaine	NO -- None [GO TO LINE 106]
ME -- Methamphetamine	UN -- Unknown
MA -- Marijuana	

- 105 Secondary Drug Quantity

CO -- As determined by court or P.O.:	_____ kilos	UN -- Unknown
PE -- Personally possessed by defendant:	_____ kilos	UN -- Unknown

- 106 Date the Defendant Commenced the Conduct
DA (month/day/year): _____
UN -- Unknown
- 107 Date the Defendant Completed the Conduct
DA (month/day/year): _____
UN -- Unknown
- 108 Weapon Possessed by or at Direction of Defendant
YE -- Yes
NO -- No
- 109 Do Not Answer This Question
- 110 Injury or Death Inflicted by or at Direction of Defendant
YE -- Yes
NO -- No
- 111 Summarize the conduct of the defendant (see coding manual).

Cooperation Information

- 200 Did the defendant provide any information regarding the conduct of any other person who has committed an offense?
YE -- Yes
PR -- Presumably yes
UN -- Unknown
NO -- No [GO TO LINE 300]
- 201 Type of Assistance Defendant Provided *[circle the 4 most serious that apply]*

WI -- Wore wire	DO -- Gave documents/tangible evidence
UC -- Introduced undercover agent	IN -- Gave verbal information
TR -- Testified at trial	OT -- Other [EXPLAIN] _____
GJ -- Testified before a grand jury	
AG -- Agreed to testify	NO -- None
MO -- Conducted monitored purchase/sale	UN -- Unknown
- 202a Person Against Whom Defendant Provided Assistance *[circle all that apply]*
 PO -- Participant outside of conspiracy
 PK -- Participant within conspiracy
 DE -- Defendant only
 UN -- Unknown
- 202b Whether Any Participant Was Not Previously Known by Law Enforcement
 YE -- Yes (That is, at least one participant was NOT previously known)
 NO -- No (That is, all participants WERE previously known)
 UN -- Unknown
- 203 When the Assistance was Provided
 BE -- Before any other participant provided assistance
 WI -- At approximately the same time other participants provided assistance
 AF -- After most other participants provided assistance
 UN -- Unknown

204 Summarize the cooperation provided by the defendant.

205 Do not answer this question.

Sentencing Information

300 Higher Mandatory Minimum of Which Defendant Could Have Been Convicted *[circle all that apply]*
EE -- 18:922(g)/924(e) (Career Criminal-15yr) JU -- 21:859/861 (Involves Juvenile-1yr)
CC -- 18:924(c) (Gun & Drug/Violent Crime-5yr) SS -- 21:860 (Drugs Near School-1yr)
AA -- 21:841(b)(1)(A)/960(b)(1) (Drugs-10yr) OD -- Other Drug
BB -- 21:841(b)(1)(B)/960(b)(2) (Drugs-5yr) OT -- Other Non-Drug
CR -- 21:844 (Simple Possession of Crack-5yr) NO -- None
UN -- Unknown

301 Could a higher statutory maximum have applied to defendant?

YE -- Yes [LIST STATUTE AND EXPLAIN] _____
NO -- No

302 Number of Superseding Informations or Superseding Indictments Filed Against Defendant: _____

303 Date of Defendant's Conviction

DA -- (month/day/year) _____
UN -- Unknown

304 Summarize any sentencing-related information (see the coding manual).

Miscellaneous Information

400 Record any information regarding participants for whom you do not have a separate PSR. (Record on the lines provided on question 507b of the conspiracy coding sheet.)

401 Summarize any criminal history, defendant background (e.g., abuse of alcohol or a controlled substance, extraordinary family circumstances), or other information that might have influenced whether the defendant received a motion based on cooperation.

402 Summarize any additional comments or observations you may have.

CONSPIRACY
Codefendant PROJECT CODING SHEET

Identifying Information

Coder _____
 Docket number(s) _____
 Number of Defendants _____

Offense Conduct Factors

500 Primary Offense Type for Conspiracy *[circle only one]*

MU -- Murder/Kidnapping/Rape/Assault

RO -- Robbery

DR -- Drugs

FI -- Firearms/Arson

BU -- Burglary/Theft/Larceny/Embezzlement

FR -- Fraud

IM -- Immigration

WC -- Other White Collar

MI -- Other Miscellaneous

UN -- Unknown

501 Primary Drug Type Distributed by Conspiracy

[circle the drug with the greatest quantity, underline any other drugs]

CO -- Cocaine

CR -- Crack/Cocaine Base

MA -- Marijuana

HE -- Heroin

OT -- Other Schedule I or II

IV -- Schedule III, IV, or V

NO -- None [GO TO LINE 506]

UN -- Unknown

502 Total Drug Quantity Distributed by Conspiracy: _____ kilograms

_____ Check here if quantity has been converted and combined for multiple types of drugs

503 Date the Conspiracy Commenced: _____

504 Date the Conspiracy was Completed: _____

505 Weapon Involved in Conspiracy

FD -- Firearm Discharged

WU -- Weapon Otherwise Used

WP -- Weapon Displayed/Possessed on Person

WR -- Weapon Readily Accessible

WO -- Weapon Not Readily Accessible

NO -- No Weapon

506 Injury or Death Inflicted in Conspiracy

DE -- Death

PE -- Permanent/Life-Threatening Injury

SE -- Serious Bodily Injury

BO -- Bodily Injury

SU -- Substantial Risk of Death or Serious
Bodily Injury

NO -- None

507a Briefly describe the structure of the conspiracy (see coding manual).

507b Names, docket numbers, and any demographic or court information for any participant who may be a member of the conspiracy but for whom you do not have a separate PSR. This information may be found on the cover sheet to any PSR (see "Related Cases" or "Codefendants").

Comments

508 Summarize any additional comments or observations you may have.

INDIVIDUAL DEFENDANT CODING MANUAL
1994 SUBSTANTIAL ASSISTANCE WORKING GROUP
Codefendant PROJECT

Identifying Information

"Coder"	Put your initials here.
"USSCID Number"	Fill in the USSC ID number on the cover of the file.
"Docket Number"	Fill in the docket number(s) for this defendant.
"Defendant's First Name"	Fill in <u>only</u> the first name for this defendant.
"Defendant Number"	Fill in the number for this defendant (provided as last digits of docket number on top of cover sheet).

- 50 Identify whether the defendant entered a §1B1.8 agreement. If **YE -- Yes**, use the §1B1.8 Coding Sheet and follow the instructions below as well as the §1B1.8 Coding Sheet Special Instructions. If **No -- No**, use the no-§ 1B1.8 agreement coding sheet.

Offense Conduct Factors

- 100 Identify the **function** of a defendant **not involved** in a drug offense. Circle the defendant's most serious function and underline the defendant's predominant function. Do not rely on whether a Chapter Three adjustment for role was actually given.

OR -- Organizer/Leader: leads, directs, or otherwise runs a significant organization.

MI -- Mid-Level Manager: takes instructions from an organizer or leader and conveys to subordinates; supervises at least one other participant.

AV -- Average Participant/Worker: average participant or worker in the offense; takes instructions from organizer, leader, or mid-level manager; extremely limited or no supervision of others.

LO -- Low-Level Participant/Gofer: no decision-making authority or supervision of others; limited benefit from offense.

UN -- Unknown

- 101 For a defendant involved in a **drug offense**, circle the most serious **specific function** or task performed by the defendant in the offense; underline the function that the defendant performed most frequently. Mark with a check up to two additional functions performed by the defendant. Do not rely on whether a Chapter Three adjustment for role was actually given. Use the definitions that follow:

High-Level Dealer/Importer: purchases or imports drugs near the top of the drug distribution chain, and distributes drugs to other high-level or mid-level dealers; or leads, directs, or otherwise runs a significant drug organization.

Grower/Manufacturer: grows, cultivates, or manufactures a controlled substance.

Mid-Level Dealer: distributes large quantities to other mid-level dealers or to street-level dealers.

Street-Level Dealer: distributes small quantities directly to the user.

Financier/Money Launderer: provides money for purchase, importation, manufacture, cultivation, transportation, or distribution of drugs; launders proceeds of drug sales or purchases.

Aircraft Pilot/Vessel Captain: pilots vessel or aircraft; requires special skill; does not include defendant who is the only participant directing a small boat (e.g., a go-fast boat) onto which drugs had been loaded from a "mother ship" (such person is a courier).

Bodyguard/Strongman/Debt Collector: provides physical and personal security for another participant in the offense; collects debts owed, or punishes recalcitrant persons.

Broker/Steerer/Go-Between: arranges for two parties to buy/sell drugs, or directs potential buyer to a potential seller.

Courier: transports or carries drugs with the assistance of a vehicle or other equipment. Includes situations where defendant, who is otherwise considered to be a crewmember, is the only participant directing a vessel (e.g., a go-fast boat) onto which drugs had been loaded from a "mother ship."

Mule: transports or carries drugs internally or on their person, often by airplane, or by walking across a border. Also includes a defendant who only transports or carries drugs in baggage, souvenirs, clothing, or otherwise.

Moneyrunner: transports/carries money from the purchase or sale of drugs in the offense.

Renter/Storer: provides, for profit/compensation, own residence, structures (barns, storage bins, buildings), land, or equipment for use to further the offense.

Off-loader/Loader: performs the physical labor required to put large quantities of drugs into storage, hiding, or onto some mode of transportation.

Gopher/Lookout/Deckhand/Worker/Employee: performs very limited, low-level function in the offense (whether or not ongoing); generally has no contact with drugs; includes running errands, answering the telephone, receiving packages, packaging the drugs, manual labor, acting as lookout to provide early warnings during meetings, exchanges, or off-loading, or acting as deckhand/crewmember on vessel or aircraft used to transport large quantities of drugs.

Enabler (Passive): plays no more than passive role in criminal activity, knowingly permitting certain unlawful criminal activity to take place without affirmatively acting in any way to further such activity; may be coerced or unduly influenced to play such a function (e.g., a parent or grandparent threatened with displacement from a home unless they permit the activity to take place), or may do so as "a favor" (without compensation); may include the rare case of a "passenger" or one of two "drivers" of a vehicle transporting drugs, where the defendant is unaware of the presence of drugs in the vehicle.

User Only: possessed small amount of drugs apparently for personal use only; no apparent function in any conspiratorial criminal activity.

- 102 Indicate the **primary drug** (the drug resulting in the greatest offense level) that defendant personally trafficked—look to acts that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused in connection with the offense of conviction and any common scheme or plan as the offense of conviction. Schedule information is in the Code of Federal Regulations (or see Vince Ventimiglia for a copy). If two drugs result in the same offense level, circle the drug that is highest on the chart.

§1B1.8 Coding Sheet Special Instructions: When determining which drug is primary, consider quantities or drugs otherwise protected under §1B1.8.

- 103 Indicate in kilograms the **quantity** of the **primary drug** that defendant possessed or trafficked.

CO -- As determined by court or P.O.: indicate the quantity of the primary drug as determined by the court (or the P.O. if no SOR is available). Use the court (or P.O.'s) determination of the base offense

level—do not second-guess their calculation. This figure should correspond roughly to the defendant's relevant conduct under §1B1.3.

PE -- Personally possessed by defendant: indicate the quantity of the primary drug associated with the acts that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused in connection with the offense of conviction and any common scheme or plan as the offense of conviction. Do not rely solely on the court (or P.O.) calculation.

§1B1.8 Coding Sheet Special Instructions: Do not include quantities protected under §1B1.8.

§1B1.8 Coding Sheet Special Instructions:

PR -- Subject to §1B1.8 protection: indicate the quantity of the primary drug for which defendant would have been responsible under §1B1.3 (Relevant Conduct) but for the fact the quantity was protected under §1B1.8. Include in this figure only quantities that are expressly protected by §1B1.8.

- 104 Indicate the **secondary drug** that defendant personally trafficked.
- 105 Indicate in kilograms the **quantity** of the **secondary drug** that defendant possessed or trafficked. (See instructions for line 103.)
- 106 Indicate the **date the defendant commenced the defendant's conduct**. Specify exact dates if known with certainty; otherwise, approximate the date (e.g., July 1987, early 1985, or mid-1990).
- 107 Indicate the **date the defendant completed the defendant's conduct**. The defendant may be considered to have completed his/her conduct even if the legal standard for affirmative withdrawal from the conspiracy has not been met. As above, specify exact dates.
- 108 Identify whether, solely on the basis of information not protected by §1B1.8, the **defendant possessed a weapon**, including a firearm, or **directed or commanded another participant to possess the weapon**.
- 109 Do not answer this question.

§1B1.8 Coding Sheet Special Instructions: Identify whether, solely on the basis of information protected by §1B1.8, the **defendant possessed a weapon**, including a firearm, or **directed or commanded another participant to possess the weapon**.

- 110 Identify whether the **defendant inflicted injury or death** to a victim or directed or commanded another participant to inflict the injury or death.
- 111 **Summarize the offense conduct** personally undertaken by the defendant (i.e., by the defendant and not another participant) with particular emphasis on the defendant's role in the offense and his culpability relative to codefendants in the conspiracy. The text of this summary will be provided to the Commission in the form of a summary of the offense, so ensure that the summary is objective and reflects proper use of grammar and spelling.

Always include information regarding (1) drug quantity and type, (2) the extent to which a weapon or injury to victim was involved, (3) the function of the defendant, and (4) sentence imposed.

As necessary, discuss the factors identified in lines 100 through 111, as well as aggravating or mitigating factors such as: • frequency of participation in the offense; • decisionmaking or supervisory authority; • ownership/sale of drugs; • amount of revenue or compensation; • any flight from law enforcement; • defendant's personal or familial relationship to another participant, particularly where the relationship involves undue emotional influence or some form of coercion of defendant.

Cooperation Information

- 200 Indicate whether the defendant provided any information or assistance regarding the conduct of any other person who has committed an offense.
- Indicate **YE -- Yes** when the defendant expressly provided information or assistance regarding the conduct of any other person who has committed any offense. For example, indicate **Yes** if the defendant states "I got cocaine from [name] and sold it on the street."
- Indicate **P -- Presumably Yes** when you do not know that the defendant has expressly provided any information or assistance about the conduct of another person who has committed any offense, but you can presume the defendant has provided such information or assistance. For example, the PSR contains details about the offense that the defendant could have known but law enforcement could not have known.
- Indicate **UN -- Unknown** when you do not have sufficient information to determine whether the defendant may or may not have provided assistance.
- Indicate **NO -- No** in any other case (e.g., when the court finds defendant provided no assistance, or the government or a probation officer so indicate in the absence of any information to the contrary.)
- 201 Indicate the **type of assistance** the defendant provided. Circle all that apply.
- WI -- Wore wire** applies when defendant engages in a monitored face-to-face transaction with another participant.
- UC -- Introduced undercover agent** applies when defendant introduces a law enforcement official or person operating on behalf of law enforcement to another participant.
- MO -- Conducted monitored purchase/sale** applies when defendant engages in a monitored transaction other than face-to-face with another participant.
- 202 Indicate the **person against whom the defendant provided assistance**. If the defendant only related additional details regarding defendant's own conduct, mark **DE -- Defendant only**.
- 203 Indicate **when the assistance was provided**.
- 204 **Describe the cooperation** provided by the defendant. Describe the degree and nature of the cooperation, the degree to which defendant's cooperation endangered the safety or welfare of the defendant or his immediate family or close friends, the person(s) against whom the defendant cooperated, the relative roles of those persons, and whether those persons were already indicted. Summarize other sources of information regarding the offense (agents, undercover sources, defendant admissions/cooperation, co-defendant admissions/cooperation). Draw inferences in non-undercover operations about who provided the information that is available in the PSI.
- §1B1.8 Coding Sheet Special Instructions:** Describe the cooperation not provided by the defendant pursuant to a §1B1.8 agreement. Indicate the existence of a written or oral cooperation agreement and whether the agreement was other than boilerplate.
- 205 Do not answer this question.
- §1B1.8 Coding Sheet Special Instructions:** Describe (in details noted above) the **cooperation** provided by the defendant pursuant to a §1B1.8 agreement.

Sentencing Information

- 300 Indicate under which **higher mandatory minimum** defendant could have been convicted but was not. Look to the full scope of defendant's criminal liability when determining whether the mandatory minimum

may apply. Do not rely on whether a mandatory minimum was actually charged. Of course, do not identify mandatory minimums to which defendant was not sentenced solely because a §5K1.1 motion was granted. Circle all that apply.

§1B1.8 Coding Sheet Special Instructions: Do not indicate a mandatory minimum that would apply only if information concerning a weapon or quantities protected under §1B1.8 is considered.

- 301 Indicate whether a **higher statutory maximum** could have applied to defendant's offense. Do not rely on whether a mandatory minimum was actually charged. One indication that a higher statutory maximum might have applied appears when a defendant is convicted of a statute with a particularly low statutory maximum. Examples of such statutes include:

18:3	(Accessory After the Fact)	(maximum of 1/2 term for underlying offense)
18:4	(Misprision of a Felony)	(maximum of 3 years)
18:371	(Conspiracy)	(maximum of 5 years)
21:856	(Operating a Drug Establishment)	(maximum of 20 years)
21:843(b)	(Communication Facility)	(maximum of 4 years)
21:844	(Simple Possession)	(maximum of 1 year)

Before marking **YE—YES**, ascertain that defendant in fact could have been convicted of the offense with the higher statutory maximum.

§1B1.8 Coding Sheet Special Instructions: Do not indicate a statutory maximum that would apply only if information concerning a weapon or quantities protected under §1B1.8 is considered.

- 302 Indicate the **number of superceding informations or superceding indictments** filed against defendant. Count as superceding any information or indictment filed against the defendant that follows a previous information or indictment against that defendant—do not rely solely on whether the information or indictment is labeled “superceding.” Count as superceding information that follows an indictment. If the PSR or other document labels information or an indictment as “superceding,” count it as “1” at least.
- 303 Indicate the **date of defendant's conviction, whether after a guilty plea or after trial**, for this conduct.
- 304 **Summarize any sentencing-related information** found in any document in the file. For example, indicate when the court suggests it is departing from the mandatory minimum sentence to the otherwise applicable guideline range or when the court otherwise justifies the extent of the departure. Summarize statements from court or P.O. justifying acceptance of motion or extent of departure or discussing the distinction between §5K1.1 motion and 18:3553(e) motion. Also indicate whether the plea agreement contains stipulations to facts or guidelines application that are not consistent with the PSR or whether the parties entered a binding Rule 11(e)(1)(C) agreement. **Do not duplicate statistical sentencing information already provided by Monitoring on the cover sheet.**

Miscellaneous Information

- 400 List the names, docket numbers, and any demographic or court information for any participant who may be a **member of the conspiracy** but for whom you do not have a separate PSR. This information may be found on the cover sheet to any PSR (see “Related Cases” or “Codefendants”).
- 401 **Summarize any criminal history, defendant background** (e.g., abuse of alcohol or a controlled substance, extraordinary family circumstances), or other information that might have influenced whether the defendant received a motion based on cooperation.
- 402 Summarize any **additional comments** or observations you may have.

CONSPIRACY CODING MANUAL
1994 SUBSTANTIAL ASSISTANCE WORKING GROUP
Codefendant PROJECT

Identifying Information

- "Coder" Put your initials here.
 "Docket Number(s)" Fill in the docket number(s) for defendants in this conspiracy.
 "Number of Defendants" Identify the number of defendants in this conspiracy.

Offense Conduct Factors

- 500 Indicate the **primary offense type** for the conspiracy. Do not merely refer to the guideline applied for this information. In cases involving use or possession of a firearm in connection with the offense (perhaps resulting in an 18:924(c) conviction or a guideline adjustment for firearm possession) but not trafficking in firearms, specify only the underlying offense.

MU -- Murder/Kidnapping/Rape/Assault: includes murder, manslaughter, kidnapping/hostage-taking, sexual abuse, assault offenses.

RO -- Robbery: includes robbery offenses.

DR -- Drugs: includes drug trafficking, communications facility, and simple possession offenses.

FI -- Firearms/Arson: includes arson and firearms offenses, including firearms trafficking offenses.

BU -- Burglary/Theft/Larceny/Embezzlement: includes burglary/breaking and entering, auto theft, larceny, embezzlement offenses.

FR -- Fraud: includes fraud, forgery, counterfeiting offenses.

IM -- Immigration: includes immigration offenses.

WC -- Other White Collar: includes bribery, tax, money laundering, extortion, racketeering, gambling, lottery, anti-trust, food and drug.

MI -- Other Miscellaneous: includes civil rights, pornography, prostitution, prison, administration of justice, environmental, national defense offenses.

UN -- Unknown

- 501 **Circle the primary drug** (the drug resulting in the greatest offense level) in which the conspiracy trafficked. **Underline** any other drugs in which the defendant trafficked.
- 502 Indicate the **total drug quantity** in which the conspiracy trafficked. Where multiple types of drugs are involved, convert each drug quantity into a single marijuana quantity and mark the relevant space.
- 503 Indicate the **date the conspiracy commenced**. Specify exact dates or, if necessary, approximate the date (e.g., July 1987, early 1985, or mid-1990).
- 504 Indicate the **date the conspiracy was completed**. As above, specify exact dates.

- 505 Indicate the extent to which a **weapon** was involved in connection with the conspiracy. "Weapon" includes any firearm, explosive, destructive device, bomb, knife, or other instrument (chair, car) used as a weapon, but does not include a fist.

FD -- Firearm Discharged: a participant discharged a firearm.

WU -- Weapon Otherwise Used: a participant otherwise used a firearm (e.g., pistol whipping) or otherwise used a weapon (e.g., drove a car at another person, stabbed a person).

WP -- Weapon Displayed/Brandished/Possessed On Person: a participant displayed, brandished, showed, or threatened a weapon, or possessed or carried a weapon on their person, or within immediate arm's reach. A weapon is threatened if the person did not actually have the weapon on his person, but claimed it was on his person.

WR -- Weapon Readily Accessible: a participant had a weapon within easy reach but not on their person and not within immediate arm's reach. For example, a gun might be in the same room or in the cabin of the car.

WO -- Weapon Not Readily Accessible: a participant (1) possessed a weapon which was somewhat removed from the participant and the drugs (e.g., was in another room or in the trunk of a car); or (2) the participant's weapon was with the drugs or drug proceeds (money) but the participant is not at that location.

NO -- No Weapon: (1) no participant possessed, threatened, or used any weapon in connection with the criminal activity; or (2) a participant possessed a weapon but its possession is so unconnected (temporally or spatially) with drugs and drug proceeds (money) and the criminal activity that an enhancement under the current § 2D1.1(b)(1) would not be likely; or (3) there is no statement in the PSI with regard to whether a weapon was used, threatened, or possessed.

- 506 Indicate the extent to which any victim of the conspiracy, including a participant, suffered **injury or death**. For definitions of options other than SU (below), see the commentary to §1B1.1.

SU -- Substantial Risk of Death/Serious Bodily Injury—No Weapon Used applies when a participant, including the defendant, created a substantial risk of death or serious bodily injury by a means other than use of a weapon (e.g., established a meth lab in a residential area).

- 507 Briefly describe the structure of the conspiracy, generally ranking codefendants according to culpability, and provide brief parenthetical describing the function or role of each in the offense. For a defendant for whom there is no separate PSR, explain why not (e.g., codefendant is fugitive, unindicted, referred to state for prosecution). (**Information on conspiracy structure needs to be provided only once.**)

Comments

- 508 Summarize any additional comments or observations you may have.

APPENDIX E-2

METHODOLOGY

As noted in the text, this project focuses on the conspiracy as the unit of analysis, not on the cases of individual defendants. Accordingly, a systematic random sample of conspiracies was selected. The sampling frame was composed of multiple-defendant conspiracies (defined to include defendants with the same docket number and sentenced in the same office of the same district before the same judge) with at least one defendant receiving a substantial assistance departure, and at least one defendant sentenced in fiscal year 1992. The district-office-judge requirement was selected because many districts number indictments sequentially for each judge while others number by office or district. The fiscal year 1992 requirement was included to minimize the probability of selecting conspiracies with information on defendants sentenced too recently for case files to be available.

This sampling methodology may overrepresent some districts and underrepresent others. As stated above, this project does not attempt to achieve statistical precision (which would require that a significantly greater number of conspiracies and even greater number of case files be reviewed), but attempts only to draw an accurate, general picture of the various possible approaches to the questions given above.

The project included, in any conspiracy, any defendant named in the indictment drawn in the sample. In addition, a conspiracy may have included the "related defendants" or "co-defendants" listed in the PSR of any of the initial defendants, if those subsequent defendants appeared to be directly involved in an offense connected with the initial defendants. However, only those defendants for which a case file was available and reviewed were ultimately counted as members of the conspiracy. In some conspiracies, case files for a particular defendant could not be reviewed, either because the files were not available or because the defendant was not indicted federally.

Individual case files were analyzed by staff drawn from every office in the Commission. These case file reviewers used a review sheet to record specific aspects of each file as well as textual summaries of the offense conduct, cooperation, and sentencing of each case. (See Appendix E-1 for the case review instrument and review manual.)

Full information was available on 64 conspiracies involving 323 defendants and these case files were reviewed. The initial sample of conspiracies used for this project was not intended to be sufficiently large to draw statistically significant conclusions. Instead, this chapter relies less on aggregate statistical analysis of the sample and focuses more on conclusions derived from a qualitative review of individual conspiracies.

The project assumes a low threshold for determining whether a defendant has provided "assistance." We have defined "assistance" to include the defendant's providing any information about any other criminally responsible person to the government. That threshold is necessarily different from the "substantial assistance" determination made by individual prosecutors and their supervisors, which involves some judgment as to the value of the assistance to the government in light of the circumstances of the case.

The project focuses on whether a substantial assistance **reduction** was given, not whether a substantial assistance **motion** was made. With the exception of one conspiracy, it was not apparent that any motions had been denied by a court. (This is consistent with the findings of the site visit study that determined that courts are reluctant to decline the offer of discretion that a substantial assistance motion provides.) Consequently, this project does not examine so much who receives a substantial assistance motion as it does who receives a substantial assistance reduction.

In addition, this project focuses on substantial assistance reductions made at sentencing pursuant to substantial assistance section 5K1.1 of the Sentencing Guidelines or section 3553(e) of the criminal code (18 U.S.C. §3553(e)). There is only the briefest mention of post-sentencing Rule 35(b)'s in the case files (as would be expected in case files containing presentencing information). Accordingly, this project does not address why certain defendants might or might not receive such post-sentencing reductions. Nevertheless, as noted in the text, in two of the three instances in which post-sentencing Rule 35 motions are discussed, the contexts suggest that a Rule 35 reduction for substantial assistance may have been anticipated in exchange for presentencing cooperation.

The project relied on information available in the case file for each defendant. This information varied by defendant but generally included a presentence report, a judgment and conviction order, and a statement of reasons. It also might have included a plea agreement or a sentencing transcript.

Further, it was not uncommon in cases involving cooperation agreements and motions for substantial assistance reduction, for the court to place certain documents or information under seal for the protection of the defendant. This was apparent in some conspiracies in this project in which sealed plea agreements and other documents were not provided to the Commission.

Either event (information not provided in file or information under seal) may be relevant to the fact that as many as 21 of these conspiracies lacked some useful information about cooperation, extent of departure, sentence, offense conduct, or relevant statutory or guideline information.

APPENDIX E-3

SUMMARY OF CONSPIRACIES¹

CONSPIRACY NUMBER	CONSPIRACY TYPE	NUMBER OF CASES REVIEWED	DEPARTURE PERCENT
Total		323	38.4%
1	Drugs	2	50.0%
2	Drugs	3	33.3%
3	Fraud	4	25.0%
4	Drugs	6	20.0%
5	Drugs	17	52.9%
6	Drugs	4	50.0%
7	Drugs	2	50.0%
8	Robbery	2	50.0%
9	Drugs	9	100.0%
10	Drugs	4	25.0%
11	Drugs	5	20.0%
12	Burglary/Embezzlement...	2	50.0%
14	Miscellaneous	2	50.0%
15	Firearms/Arson	4	25.0%
16	Other White Collar	2	50.0%
18	Drugs	60	10.2%
19	Drugs	7	42.9%
20	Fraud	3	66.7%
21	Drugs	8	62.5%
22	Fraud	2	100.0%
23	Drugs	2	100.0%
24	Drugs	4	50.0%
25	Drugs	5	40.0%
26	Burglary/Embezzlement...	5	20.0%
27	Drugs	3	33.3%
29	Drugs	3	33.3%
30	Robbery	2	50.0%
31	Robbery	3	33.3%
32	Drugs	4	50.0%
33	Drugs	3	33.3%
34	Burglary/Embezzlement...	8	75.0%

¹Of the 323 cases reviewed, five were excluded from the calculation of departure percentages due to missing departure information.

SUMMARY OF CONSPIRACIES (Continued)

CONSPIRACY NUMBER	CONSPIRACY TYPE	NUMBER OF CASES REVIEWED	DEPARTURE PERCENT
Total		323	38.4%
35	Fraud	3	33.3%
36	Drugs	5	100.0%
37	Unknown	2	100.0%
38	Drugs	2	50.0%
39	Drugs	2	100.0%
40	Fraud	2	100.0%
41	Drugs	3	66.7%
42	Drugs	2	50.0%
43	Drugs	13	7.7%
44	Drugs	2	50.0%
45	Drugs	2	50.0%
46	Burglary/Embezzlement...	2	100.0%
47	Drugs	3	66.7%
48	Drugs	3	33.3%
49	Drugs	12	8.3%
50	Drugs	5	20.0%
51	Drugs	3	33.3%
52	Drugs	4	25.0%
53	Drugs	5	50.0%
54	Other White Collar	2	50.0%
55	Drugs	2	100.0%
56	Drugs	3	33.3%
58	Drugs	13	23.1%
59	Drugs	4	25.0%
61	Drugs	3	100.0%
62	Fraud	3	33.3%
63	Drugs	4	50.0%
64	Drugs	12	16.7%
65	Drugs	2	50.0%
66	Drugs	2	50.0%
67	Drugs	2	100.0%
68	Immigration	4	25.0%
69	Other White Collar	2	100.0%

APPENDIX F

Table 1

SUBSTANTIAL ASSISTANCE RATES BY AGE AND SELECT PRIMARY OFFENSE CATEGORIES (October 1, 1993 through September 30, 1994)

PRIMARY OFFENSE	TOTAL	AGE															
		Under 21		21 - 25		26 - 30		31 - 35		36 - 40		41 - 50		Over 50			
TOTAL (A.I.L. OFFENSES) ¹	n	n	% 5K	n	% 5K	n	% 5K	n	% 5K	n	% 5K	n	% 5K	n	% 5K		
38,205		1,796	16.3	6,710	19.7	7,179	21.6	6,627	20.4	5,316	18.9	6,900	19.6	3,677	16.6		
SELECTED OFFENSE TYPES TOTAL ²																	
Kidnapping/Hostage-Taking	46	8	25.0	12	41.7	11	36.4	4	25.0	3	0.0	7	14.3	1	0.0		
Robbery	1,882	214	17.8	439	17.5	376	14.4	334	8.7	221	8.6	216	8.8	82	6.1		
Arson	90	9	11.1	21	38.1	15	33.3	8	37.5	11	18.2	12	33.3	14	21.4		
Drugs - Trafficking	15,099	731	28.7	3,018	32.4	3,147	35.9	2,792	34.6	2,148	31.9	2,400	34.1	863	29.0		
Drugs - Communication Facility	307	10	20.0	51	23.5	68	26.5	66	15.2	39	10.3	52	25.0	21	19.1		
Firearms	2,612	134	11.2	541	14.8	566	12.2	472	20.4	351	10.8	387	9.6	161	9.9		
Fraud	5,456	66	6.1	555	9.9	837	13.1	886	14.0	814	12.8	1,408	14.1	890	13.4		
Money Laundering	866	7	14.3	52	25.0	114	27.2	146	25.3	153	27.5	220	34.1	174	28.2		
Racketeering/Extortion	513	19	15.8	98	29.6	67	31.3	76	23.7	47	19.2	112	23.2	94	19.2		
Gambling/Lottery	155	0	--	0	--	8	25.0	15	13.3	20	20.0	44	15.9	68	29.4		
Anti-Trust	24	0	--	0	--	0	--	1	0.0	3	33.3	8	25.0	12	25.0		

¹Of the 39,971 cases, 1,766 cases were excluded due to one or more of the following reasons: missing offense type (28), missing departure information (1,473), or missing age information (321)

²Of the 28,021 cases included in this table based on select offense type, 971 cases were excluded due to one or both of the following reasons: missing age information (127) or missing departure information (858).

SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

APPENDIX F

Table 2

SUBSTANTIAL ASSISTANCE RATES BY GENDER AND SELECT PRIMARY OFFENSE CATEGORIES (October 1, 1993 through September 30, 1994)

PRIMARY OFFENSE	TOTAL		Male		Female	
	n	% 5K	n	% 5K	n	% 5K
TOTAL (ALL OFFENSES) ¹	38,456		32,527	19.7	5,929	18.7
SELECTED OFFENSE TYPES TOTAL ²	27,163					
Kidnapping/Hostage-Taking	46		43	27.9	3	33.3
Robbery	1,889		1,811	12.3	78	24.4
Arson	90		86	30.2	4	0.0
Drugs - Trafficking	15,153		13,472	32.6	1,681	39.9
Drugs - Communication Facility	308		241	15.8	67	37.3
Firearms	2,614		2,501	11.0	113	26.6
Fraud	5,305		4,170	13.5	1,335	11.4
Money Laundering	866		683	28.4	183	29.5
Racketeering/Extortion	513		468	22.4	45	42.2
Gambling/Lottery	155		140	23.6	15	13.3
Anti-Trust	24		24	25.0	0	--

¹Of the 39,971 cases, 1,515 cases were excluded due to one or more of the following reasons: missing offense type (52), missing departure information (1,473), or missing gender information (5).

²Of the 28,021 cases included in this table based on select offense type, 858 cases were excluded due to missing departure information.

SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

APPENDIX F

Table 3

SUBSTANTIAL ASSISTANCE RATES BY RACE AND SELECT PRIMARY OFFENSE CATEGORIES (October 1, 1993 through September 30, 1994)

PRIMARY OFFENSE	TOTAL		White		Black		Hispanic		Other	
	n	% 5K	n	% 5K	n	% 5K	n	% 5K	n	% 5K
TOTAL (ALL OFFENSES) ¹	38,215	21.1	15,896	20.3	11,618	16.9	9,384	14.9	1,317	14.9
SELECTED OFFENSE TYPES TOTAL ²										
Kidnapping/Hostage-Taking	46	29.0	31	33.3	12	0.0	3	0	--	--
Robbery	1,889	9.7	844	15.1	912	11.6	112	21	4.8	4.8
Arson	90	31.9	69	20.0	10	33.3	3	8	12.5	12.5
Drugs - Trafficking	15,123	41.5	4,564	32.9	5,156	26.4	5,135	268	39.9	39.9
Drugs - Communication Facility	308	31.4	86	22.0	91	11.0	127	4	50.0	50.0
Firearms	2,608	12.1	1,132	11.1	1,108	11.5	297	71	14.1	14.1
Fraud	5,457	15.5	3,367	9.1	1,444	8.6	433	213	10.8	10.8
Money Laundering	860	31.5	470	34.3	143	18.1	227	20	45.0	45.0
Racketeering/Extortion	513	21.0	253	35.9	145	19.1	84	31	9.7	9.7
Gambling/Lottery	155	27.5	109	13.0	23	--	0	23	8.7	8.7
Anti-Trust	24	25.0	24	--	0	--	0	0	--	--

¹Of the 39,971 cases, 1,756 cases were excluded for one or more of the following reasons: missing offense type (52), missing departure information (1,473), or missing information on race (307).

²Of the 28,021 cases included in this table based on select offense type, 948 cases were excluded due to one or both of the following reasons: missing departure information (858) or missing information on race (100).

SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

Table 4

SUBSTANTIAL ASSISTANCE RATES BY CITIZENSHIP STATUS AND SELECT PRIMARY OFFENSE CATEGORIES (October 1, 1993 through September 30, 1994)

¹Of the 39,971 cases, 2,204 cases were excluded due to one or more of the following reasons: missing offense type (52), missing departure information (1,473), or missing information on citizenship (862).

²Of the 28,021 cases included in this table based on select offense type, 1,150 cases were excluded for one or both of the following reasons: missing departure information (858) or missing information on citizenship (318).

SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

APPENDIX F

Table 5

SUBSTANTIAL ASSISTANCE RATES BY EDUCATION AND SELECT PRIMARY OFFENSE CATEGORIES (October 1, 1993 through September 30, 1994)

PRIMARY OFFENSE	EDUCATION									
	TOTAL		Less than High School		High School Graduate		Some College		College Graduate	
	n	% 5K	n	% 5K	n	% 5K	n	% 5K	n	% 5K
TOTAL (ALL OFFENSES) ¹	37,387	18.9	14,631	20.8	12,526	20.8	7,324	20.8	2,906	19.8
SELECTED OFFENSE TYPES TOTAL ²	26,725									
Kidnapping/Hostage-Taking	46	28.6	21	25.0	20	13.6	3	33.3	2	50.0
Robbery	1,875	13.5	742	12.6	796	13.6	301	13.6	36	0.0
Arson	87	31.0	29	20.6	34	36.8	19	36.8	5	40.0
Drugs - Trafficking	14,968	29.7	7,102	26.4	4,867	37.9	2,420	37.9	579	40.2
Drugs - Communication Facility	302	16.7	138	25.0	96	20.7	58	20.7	10	30.0
Firearms	2,577	11.1	1,173	12.5	1,012	12.7	338	12.7	54	7.4
Fraud	5,332	10.4	998	13.1	1,759	13.4	1,585	13.4	990	16.4
Money Laundering	854	23.2	190	27.7	249	32.2	239	32.2	176	31.3
Racketeering/Extortion	506	19.9	206	25.2	155	33.3	84	33.3	61	24.6
Gambling/Lottery	154	17.0	47	24.2	66	32.3	31	32.3	10	10.0
Anti-Trust	24	50.0	2	0.0	5	27.3	11	27.3	6	33.3

¹Of the 39,971 cases, 2,584 cases were excluded due to one or more of the following reasons: missing offense type (52), missing departure information (1,473), or missing information on education (1,234).

²Of the 28,021 cases included in this table based on select offense type, 1,296 cases were excluded for one or both of the following reasons: missing departure information (858) or missing information on education (477)

SOURCE U S Sentencing Commission, 1994 Datafile, MONFY94.

APPENDIX F

Table 6

SUBSTANTIAL ASSISTANCE RATES BY PRIMARY OFFENSE CATEGORY ¹ (October 1, 1990 through September 30, 1994)

PRIMARY OFFENSE	TOTAL	FY 1991		FY 1992		FY 1993		FY 1994	
		Total	SK Rate	Total	SK Rate	Total	SK Rate	Total	SK Rate
TOTAL	146,596	31,690	11.9	36,093	15.1	40,353	16.9	38,460	19.5
Murder	236	26	0.0	60	6.7	83	6.0	67	13.4
Manslaughter	198	59	0.0	51	2.0	45	4.4	43	0.0
Kidnapping/Hostage-Taking	189	45	6.7	53	5.7	45	8.9	46	28.3
Sexual Abuse	607	136	1.5	168	0.0	152	0.0	151	1.3
Assault	1,339	282	0.4	341	2.1	348	1.7	368	1.4
Robbery	6,329	1,288	6.4	1,555	8.7	1,597	10.4	1,889	12.8
Arson	330	71	8.5	78	16.7	91	13.2	90	28.9
Drugs - Trafficking	60,234	13,104	21.0	15,142	25.6	16,835	28.7	15,153	33.4
Drugs - Communication Facility	1,151	319	11.0	276	14.5	248	19.0	308	20.5
Drugs - Simple Possession	3,456	881	1.0	861	0.5	888	1.5	826	1.1
Firearms	10,452	2,269	4.2	2,738	6.3	2,831	9.3	2,614	11.7
Burglary/B&E	274	96	9.4	71	2.8	65	13.9	42	2.4
Auto Theft	893	158	9.5	220	11.4	304	7.6	211	17.5
Larceny	10,753	2,372	5.1	2,648	4.7	3,010	4.5	2,723	5.7
Fraud	18,566	3,390	5.3	4,262	9.9	5,409	11.2	5,505	13.0
Embezzlement	3,988	1,097	2.0	1,108	3.2	906	3.1	877	4.3
Forgery/Counterfeiting	3,505	798	9.0	915	9.1	864	8.5	928	9.3
Bribery	917	172	19.2	254	31.1	212	22.2	279	19.7
Tax	2,564	315	5.4	615	6.5	792	7.8	842	8.6
Money Laundering	2,895	474	18.6	632	22.2	923	22.0	866	28.6
Racketeering/Extortion	1,503	256	19.9	309	20.1	425	20.5	513	24.2
Gambling/Lottery	720	192	16.7	191	30.9	182	11.5	155	22.6
Civil Rights	458	114	12.3	121	5.8	116	10.3	107	14.0
Immigration	8,256	2,131	1.1	1,815	0.8	2,075	0.9	2,235	1.1
Pornography/Prostitution	457	157	3.8	136	5.9	84	2.4	80	11.3
Prison Offenses	984	254	1.6	215	1.9	251	7.2	264	6.4
Administration of Justice Offenses	2,338	531	9.6	546	8.8	694	9.7	567	15.3
Environmental/Wildlife	503	144	4.2	101	11.9	153	9.2	105	4.8
National Defense	153	27	18.5	41	17.1	59	23.7	26	11.5
Antitrust	100	17	0.0	20	5.0	39	10.3	24	25.0
Food & Drug	239	55	5.5	45	4.4	67	6.0	72	13.9
Other Miscellaneous Offenses	2,009	460	4.6	505	6.3	560	8.0	484	7.9

¹Of the 153,755 cases, 7,159 were excluded due to one or both of the following reasons: missing primary offense category (412) or missing departure information (6,819). For each year the number of missing cases were as follows: 1,729 cases in FY1991, 136 cases in FY1992, 89 cases in FY1993, and 38 cases in FY1994

SOURCE: U.S. Sentencing Commission, Monitoring Datafile, MONFY94.

APPENDIX F

Table 7

TYPE OF SENTENCE IMPOSED BY DEPARTURE STATUS¹ (October 1, 1993 through September 30, 1994)

DEPARTURE STATUS	RECEIVING IMPRISONMENT						RECEIVING PROBATION						
	TOTAL			Prison/ Community Split Sentence ²			TOTAL			Probation and Confinement			
				Prison									
	n	%		n	%		n	%		n	%		
TOTAL	38,312	29,929	78.1	28,161	73.5	1,768	4.6	8,383	21.9	3,003	7.8	5,380	14.0
Substantial Assistance Cases	7,511	5,917	78.8	5,653	75.3	264	3.5	1,594	21.2	586	7.8	1,008	13.4
Non-Substantial Assistance Cases ³	30,801	24,012	78.0	22,508	73.1	1,504	4.9	6,789	22.0	2,417	7.8	4,372	14.2

¹Of the 39,971 guideline cases, 1,659 were excluded due to one or both of the following reasons: missing departure information (1,473), missing sentencing information (84), or cases in which the defendant received no imprisonment or probation (188).

²Prison/community split includes all cases in which defendants received prison and conditions of confinement as defined in USSG §5C1.1.

³Non-substantial assistance cases include cases with no departures, upward departures, or downward departures.

SOURCE: U.S. Sentencing Commission, 1994 Datafile, MONFY94.

APPENDIX F

Table 8

PROBIT OUTPUT: ALL CASES MODEL

Dependent Variable 5KDEPART			Weighted Frequency Counts for the Ordered Response Categories	
Class Level Information			Level	Count
Class	Levels	Values	0	25891
5KDEPART	2	0 1	1	7109
Number of observations used = 33000			Observations with Missing Values = 6971	
Log Likelihood for NORMAL -14840.58695				

Variable	DF	Estimate	Std Err	ChiSquare	Pr>Chi
INTERCEPT	1	1.33780081	0.057091	549.0993	0.0001
AGE	1	0.00210093	0.000837	6.3048	0.0120
GENDER	1	-0.0736041	0.024394	9.1037	0.0026
EDUC	1	-0.1143532	0.018253	39.2510	0.0001
BLACK	1	0.17003601	0.021546	549.0993	0.0001
HISPANIC	1	0.31005725	0.028195	120.9276	0.0001
USCITIZEN	1	0.16922181	0.026856	39.7047	0.0001
NORTHEAST	1	-0.2282241	0.03216	50.3597	0.0001
SOUTH	1	-0.0081018	0.028391	0.0814	0.7754
WEST	1	-0.0613346	0.036346	2.8477	0.0915
JUDGEYR	1	0.03448925	0.01899	3.2983	0.0693
DISTCASELOAD	1	-0.0000524	0.000023	5.1306	0.0235
PROSCASELO	1	0.04400655	0.024236	3.2968	0.0694
PROSCASEHI	1	-0.0111814	0.021878	0.2612	0.6093
DRUGCASELO	1	-0.1093907	0.025895	17.8455	0.0001
DRUGCASEHI	1	-0.0277266	0.023872	1.3490	0.2454
PLEARATELO	1	0.01864564	0.023151	0.6486	0.4206
PLEARATEHI	1	0.04445204	0.021162	4.4123	0.0357
5KRATELO	1	0.40446566	0.028748	197.9433	0.0001
5KRATEHI	1	-0.362933	0.019524	345.5532	0.0001
AGGROLE	1	-0.100533	0.031461	10.2111	0.0014
MITROLE	1	-0.1430876	0.026112	30.0280	0.0001
BODILYINJURY	1	0.10024882	0.0868	1.3338	0.2481
CRIMIINALHIST	1	0.13297499	0.018483	51.7599	0.0001
DRUGINVOLV	1	-0.3559218	0.048709	53.3936	0.0001
GUNMANDMIN	1	0.24700472	0.04476	30.4526	0.0001
WEAPONINVOL	1	-0.0355644	0.031402	1.2826	0.2574
GDLINEIN	1	-0.0014836	0.00012	153.6570	0.0001
#COUNTS	1	0.03998464	0.003928	103.5980	0.0001
ROBBERY	1	-0.2454818	0.048806	25.2982	0.0001
DRUGTRAF	1	-0.5622896	0.048467	134.5950	0.0001
FIREARM	1	-0.1616935	0.043889	13.5731	0.0002
LARCENY	1	0.09238482	0.050447	3.3537	0.0671
FRAUD	1	-0.215441	0.033286	41.8934	0.0001
MONEYLAUNDER	1	-0.8181004	0.053707	232.0371	0.0001
RACKETEER	1	-0.4945969	0.070798	48.8049	0.0001

APPENDIX F

Table 9

PROBIT OUTPUT: NON-DRUG TRAFFICKING CASES MODEL

Dependent Variable 5KDEPART			Weighted Frequency Counts for the Ordered	
Class Level Information			Response Categories	
Class	Levels	Values	Level	Count
5KDEPART	2	0 1	0	16557
Number of observations used = 18843			1	2286
Log Likelihood for NORMAL -6398.555208			Observations with Missing Values =5637	

Variable	DF	Estimate	Std Err	ChiSquare	Pr>Chi
INTERCEPT	1	1.37695643	0.080179	294.9326	0.0001
AGE	1	0.00082998	0.00117	0.5028	0.4783
GENDER	1	-0.0026585	0.033913	0.0061	0.9375
EDUC	1	-0.0867494	0.02902	8.9358	0.0028
BLACK	1	0.10723	0.030973	11.9861	0.0005
HISPANIC	1	0.33389544	0.04957	45.3706	0.0001
USCITIZEN	1	0.17871645	0.0458	15.2264	0.0001
NORTHEAST	1	-0.3755432	0.045639	67.7082	0.0001
SOUTH	1	-0.105267	0.041182	6.5339	0.0106
WEST	1	-0.1215399	0.052131	5.4355	0.0197
JUDGEYR	1	0.04582416	0.028473	2.5901	0.1075
DISTCASELOAD	1	-0.0000481	0.000036	1.8250	0.1767
PROSCASELO	1	0.03449371	0.034833	0.9806	0.3220
PROSCASEHI	1	0.07998711	0.033246	5.7885	0.0161
DRUGCASELO	1	-0.1087772	0.035163	9.5700	0.0020
DRUGCASEHI	1	-0.0678237	0.035427	3.6651	0.0556
PLEARATELO	1	0.03215864	0.034325	0.8777	0.3488
PLEARATEHI	1	0.07846983	0.032052	5.9936	0.0144
SKRATELO	1	0.34620457	0.040883	71.7112	0.0001
SKRATEHI	1	-0.2062365	0.029457	49.0191	0.0001
AGGROLE	1	-0.2901522	0.046011	39.7675	0.0001
MITROLE	1	-0.2412951	0.048854	24.3947	0.0001
BODILYINJURY	1	0.19917324	0.094867	4.4078	0.0358
CRIMINALHIST	1	0.16177434	0.028528	32.1579	0.0001
DRUGINVOLV	1	-0.3754015	0.049272	58.0484	0.0001
GUNMANDMIN	1	0.10371375	0.072543	2.0439	0.1528
WEAPONINVOL	1	-0.3045269	0.062432	23.7922	0.0001
GDLINEMIN	1	-0.0005783	0.00025	5.3462	0.0208
#COUNTS	1	0.02434527	0.004274	32.4428	0.0001
ROBBERY	1	-0.1267477	0.058642	4.6715	0.0307
FIREARM	1	-0.1726535	0.046011	14.0809	0.0002
LARCENY	1	0.08967601	0.050818	3.1140	0.0776
FRAUD	1	-0.1901647	0.03388	31.5044	0.0001
MONEYLAUNDER	1	-0.7765235	0.054207	205.2093	0.0001
RACKETEER	1	-0.3928283	0.071988	29.7773	0.0001

APPENDIX F

Table 10

PROBIT OUTPUT: DRUG TRAFFICKING ONLY CASES MODEL

Dependent Variable 5KDEPART			Weighted Frequency Counts for the Ordered	
Class Level Information			Response Categories	
Class	Levels	Values	Level	Count
5KDEPART	2	0 1	0	9334
Number of observations used = 14157			1	4823
Likelihood for NORMAL -8116.664499			Observations with Missing Values =1334	

Variable	DF	Estimate	Std Err	ChiSquare	Pr>Chi
INTERCEPT	1	0.52687831	0.075926	48.1544	0.0001
AGE	1	0.0026337	0.001253	4.4191	0.0355
GENDER	1	-0.2015322	0.036513	30.4651	0.0001
EDUC	1	-0.1255629	0.023955	27.4737	0.0001
BLACK	1	0.27969629	0.038542	52.6628	0.0001
HISPANIC	1	0.34493666	0.03699	86.9583	0.0001
USCITIZEN	1	0.1433297	0.034353	17.4077	0.0001
NORTHEAST	1	-0.1298967	0.047786	7.3893	0.0066
SOUTH	1	0.15253966	0.040673	14.0655	0.0002
WEST	1	0.0500241	0.052691	0.9013	0.3424
JUDGEYR	1	0.02541938	0.025957	0.9589	0.3274
DISTCASELOAD	1	-0.0000466	0.000031	2.2017	0.1379
PROSCASELO	1	0.12611279	0.034737	13.1808	0.0003
PROSCASEHI	1	-0.0961593	0.029979	10.2881	0.0013
DRUGCASELO	1	-0.0590029	0.0394	2.2426	0.1343
DRUGCASEHI	1	-0.0169125	0.033018	0.2623	0.6085
PLEARATELO	1	0.03089999	0.03204	0.9301	0.3348
PLEARATEHI	1	-0.0075654	0.02919	0.0671	0.7955
5KRATELO	1	0.41243568	0.040719	102.5935	0.0001
5KRATEHI	1	-0.4484921	0.026906	277.8416	0.0001
AGGROLE	1	0.03280965	0.043401	0.5714	0.4497
MITROLE	1	-0.1065324	0.031838	11.1961	0.0008
BODILYINJURY	1	0.38504809	0.371337	1.0752	0.2998
CRIMINALHIST	1	0.07034422	0.025085	7.8637	0.0050
DRUGMANDMIN	1	-0.4822622	0.028654	283.2694	0.0001
GUNMANDMIN	1	0.14148491	0.059661	5.6239	0.0177
WEAPONINVOL	1	0.03735576	0.037802	0.9765	0.3231
GDLINEMIN	1	-0.0007323	0.00017	18.5364	0.0001
#COUNTS	1	0.07019192	0.007191	95.2678	0.0001
HEROIN	1	0.17606477	0.050849	11.9887	0.0005
OTHERDRUG	1	0.04376703	0.066066	0.4388	0.5077
METH	1	-0.061712	0.052297	1.3924	0.2380
CRACK	1	-0.0485717	0.047396	1.0502	0.3055
COCAINE	1	-0.101488	0.034098	8.8585	0.0029

APPENDIX F

Table 11

REGRESSION OUTPUT: ALL CASES MODEL

Dependent Variable PERCENT DEPART					
Analysis of Variance					
Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	36	1520339.6674	42231.657427	73.577	0.0001
Error	6979	4005785.9993	573.97707398		
C Total	7015	5526125.6667			
Root MSE	23.95782				
Dep Mean	60.71815				
C.V.	39.45743				
				R-square	0.2751
				Adj R-square	0.2714

Variable	DF	Parameter Estimate	Standard Error	T for H0 : Parameter=0	Prob > T
INTERCEP	1	54.825425	2.16241273	25.354	0.0001
AGE	1	0.1443	0.02994507	4.819	0.0001
GENDER	1	9.226917	0.84407681	10.931	0.0001
EDUC	1	2.801447	0.6262847	4.473	0.0001
BLACK	1	-2.003094	0.74533158	-2.688	0.0072
HISPANIC	1	-4.985784	0.95018181	-5.247	0.0001
USCITIZEN	1	-5.337583	0.9141501	-5.839	0.0001
NORTHEAST	1	17.336915	1.10461517	15.695	0.0001
SOUTH	1	2.767879	1.0044718	2.756	0.0059
WEST	1	10.528738	1.31136559	8.029	0.0001
JUDGEYR	1	0.229833	0.60044829	0.383	0.7019
DISTCASELOAD	1	-0.001447	0.00081401	-1.778	0.0755
PROSCASELO	1	-0.330094	0.8740658	-0.378	0.7057
PROSCASEHI	1	-0.034745	0.78109798	-0.044	0.9645
DRUGCASELO	1	-3.124575	0.93161471	-3.354	0.0008
DRUGCASEHI	1	4.117443	0.85286924	4.828	0.0001
PLEARATELO	1	-1.144238	0.8099976	-1.413	0.1578
PLEARATEHI	1	-2.587476	0.7460331	-3.468	0.0005
SKRATELO	1	-0.994095	1.14992066	-0.864	0.3873
SKRATEHI	1	-1.821911	0.66749775	-2.729	0.0064
AGGROLE	1	-4.808863	1.00168289	-4.801	0.0001
BODILYINJURY	1	0.992394	3.53418002	0.281	0.7789
CRIMINALHIST	1	-8.837043	0.6291134	-14.047	0.0001
DRUGMANDMIN	1	1.081385	0.81151691	1.333	0.1827
GUNMANDMIN	1	-2.540642	1.51750358	-1.674	0.0941
WEAPONINVOL	1	-0.073578	1.02757301	-0.072	0.9429
MITROLE	1	4.963717	0.8259021	6.01	0.0001
#COUNTS	1	-0.523426	0.12161192	-4.304	0.0001
DRUGINVOL	1	-0.48893	1.82881918	-0.267	0.7892
ROBBERY	1	-18.208081	2.08237158	-8.744	0.0001
DRUGTRAF	1	23.107648	1.87112459	1.988	0.0469
FIREARMS	1	1.525422	1.90960701	0.799	0.4244
LARCENY	1	3.453328	2.2734464	1.519	0.1288
FRAUD	1	3.77873	1.41119647	2.678	0.0074
MONEYLAUNDER	1	5.826002	1.87295215	3.111	0.0019
RACKETEER	1	-3.249008	2.5124263	-1.293	0.196
GLMINLO	1	23.107648	1.1583576	19.949	0.0001

APPENDIX F

Table 12

REGRESSION OUTPUT: NON-DRUG TRAFFICKING CASES MODEL

Dependent Variable PERCENT DEPART					
Analysis of Variance					
Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	34	810293.67119	23832.16680	36.136	0.0001
Error	2182	1439060.2785	659.51433477		
C Total	2216	249353.9496			
Root MSE	25.68101				
Dep Mean	68.90839			R-square	0.3602
C.V.	37.26834			Adj R-square	0.3503

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > T
INTERCEP	1	48.292713	3.72741964	12.956	0.0001
AGE	1	0.259059	0.05337284	4.854	0.0001
GENDER	1	7.483812	1.50427527	4.975	0.0001
EDUC	1	4.12947	1.30707448	3.159	0.0016
BLACK	1	-0.782596	1.43267057	-0.546	0.585
HISPANIC	1	-5.28837	2.19557799	-2.409	0.0161
USCITIZEN	1	-2.941945	1.97830732	-1.487	0.1371
NORTHST	1	11.420712	2.07750619	5.497	0.0001
SOUTH	1	1.207086	1.92100774	0.628	0.5298
WEST	1	8.099714	2.44872	3.308	0.001
JUDGEYR	1	2.278249	1.15341432	1.975	0.0484
DISTCASELOAD	1	0.001547	0.00163527	0.946	0.3441
PROSCASELO	1	0.812623	1.60457521	0.506	0.6126
PROSCASEHI	1	-2.697677	1.53781275	-1.754	0.0795
DRUGCASELO	1	-0.194333	1.59061887	-0.122	0.9028
DRUGCASEHI	1	6.875586	1.61291434	4.263	0.0001
PLEARATELO	1	0.648422	1.59284553	0.407	0.684
PLEARATEHI	1	1.393504	1.44209142	0.966	0.334
5KRATELO	1	-3.40966	2.01083522	-1.696	0.0901
5KRATEHI	1	-3.050502	1.3127599	-2.324	0.0202
AGGROLE	1	-8.675281	1.86304534	-4.657	0.0001
BODILYINJURY	1	0.76101	4.18825478	0.182	0.8558
CRIMINALHIST	1	-12.984747	1.26878249	-10.234	0.0001
GUNMANDMIN	1	-4.587691	2.85104735	-1.609	0.1077
WEAPONINVOL	1	1.49613	2.81044926	0.532	0.5945
MITROLE	1	6.342076	1.97275514	3.215	0.0013
#COUNTS	1	-0.486287	0.16332994	-2.977	0.0029
DRUGINVOL	1	-0.835081	2.01943203	-0.414	0.6793
ROBBERY	1	-17.736958	2.76726901	-6.41	0.0001
FIREARMS	1	2.600041	2.15588392	1.206	0.2279
LARCENY	1	4.180204	2.4513043	1.705	0.0883
FRAUD	1	3.227322	1.54256201	2.092	0.0365
MONEYLAUNDER	1	3.63708	2.0450695	1.778	0.0755
RACKETEER	1	-3.326209	2.76212468	-1.204	0.2286
GLMINLO	1	20.733265	1.43817047	14.416	0.0001

APPENDIX F

Table 13

REGRESSION OUTPUT: DRUG TRAFFICKING ONLY CASES MODEL

Dependent Variable PERCENT DEPART					
Analysis of Variance					
Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	33	558564.84572	16926.20745	32.251	0.0001
Error	4765	2500787.5812	524.82425629		
C Total	4798	3059352.4269			
Root MSE	22.90904				
Dep Mean	56.93449			R-square	0.1826
C.V.	40.23755			Adj R-square	0.1769

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > T
INTERCEP	1	54.861898	2.21071235	24.816	0.0001
AGE	1	0.063183	0.03713166	1.702	0.0889
GENDER	1	10.17846	1.02674154	9.913	0.0001
EDUC	1	2.107705	0.70267997	3.000	0.0027
BLACK	1	-3.090528	1.08780035	-2.841	0.0045
HISPANIC	1	-5.385699	1.07320121	-5.018	0.0001
USCITIZEN	1	-5.203101	1.03023342	-5.050	0.0001
NORTHEAST	1	19.719371	1.32441748	14.889	0.0001
SOUTH	1	3.295151	1.17754218	2.798	0.0052
WEST	1	11.679787	1.56583728	7.459	0.0001
JUDGEYR	1	-0.604113	0.69613951	-0.868	0.3855
DISTCASELOAD	1	-0.002216	0.00093662	-2.365	0.018
PROSCASELO	1	-1.125618	1.04542634	-1.077	0.2817
PROSCASEHI	1	0.550782	0.90319207	0.610	0.542
DRUGCASELO	1	-5.388725	1.16699684	-4.618	0.0001
DRUGCASEHI	1	2.745732	0.99953015	2.747	0.006
PLEARATELO	1	-1.830789	0.93333376	-1.962	0.0499
PLEARATEHI	1	-4.381163	0.87215847	-5.023	0.0001
5KRATELO	1	1.017848	1.40737303	0.723	0.4696
5KRATEHI	1	-0.921005	0.77529178	-1.188	0.2349
AGGROLE	1	-3.182256	1.17997886	-2.697	0.007
BODILYINJURY	1	14.853083	13.31183483	1.116	0.2646
CRIMINALHIST	1	-7.148412	0.71891822	-9.943	0.0001
DRUGMANDMIN	1	1.51896	0.83031136	1.829	0.0674
GUNMANDMIN	1	-0.715493	1.78784911	-0.400	0.689
WEAPONINVOL	1	-0.862245	1.09276775	-0.789	0.4301
MITROLE	1	4.897552	0.89127659	5.495	0.0001
#COUNTS	1	-0.562262	0.19489994	-2.885	0.0039
HEROIN	1	-0.549814	1.56245124	-0.352	0.7249
OTHERDRUG	1	-0.891856	1.94119026	-0.459	0.6459
METH	1	-2.301096	1.42287294	-1.617	0.1059
CRACK	1	-0.707777	1.33795322	-0.529	0.5968
COCAINE	1	0.110372	0.96536138	0.114	0.909
GLMINLO	1	26.518763	2.41399663	10.985	0.0001

APPENDIX F

Table 14

PROBIT AND REGRESSION VARIABLE DEFINITIONS AND CODES (ALPHABETICAL ORDER)

ANALYSIS VARIABLE	DEFINITION AND CODES
#COUNTS	Actual number of defendant's counts of conviction
5KDEPART	Presence of §5K1.1 departure 0 = Upward, downward, or no Departure 1 = §5K1.1 Departure • = Missing/Not Applicable
5KRATEHI	High district §5K1.1 rate 0 = Low or medium §5K1.1 rate 1 = High §5K1.1 rate • = Missing
5KRATELO	Low district §5K1.1 rate 0 = High or medium §5K1.1 rate 1 = Low §5K1.1 rate • = Missing
AGGROLE	Aggravating role adjustment 0 = Did not receive 1 = Received role adjustment • = Missing
BLACK	Defendant non-Hispanic Black classification 0 = White, Other, or Hispanic classification 1 = Non-Hispanic Black • = Missing
BODILYINJURY	Bodily Injury specific offense characteristic (SOC) adjustment 0 = Did not receive 1 = Received • = Missing
COCAINE	Primarily powder cocaine involvement in offense 0 = No powder cocaine (includes missing) 1 = Powder cocaine
CRACK	Primarily crack cocaine involvement in offense 0 = No crack cocaine (includes missing) 1 = Crack cocaine
CRIMINALHIS	Criminal History Category 0 = Category I 1 = Category II through Category VI and Career Offender • = Missing
DISTCASELOAD	Actual number of cases sentenced in district in FY1994

Table 14 (cont.)

ANALYSIS VARIABLE	DEFINITION AND CODES
DRUGCASEHI	High district drug caseload 0 = Low or medium drug caseload 1 = High drug caseload • = Missing
DRUGCASELO	Low district drug caseload 0 = High or medium drug caseload 1 = Low drug caseload • = Missing
DRUGMANDMIN	Presence of mandatory minimum drug statute 0 = Less than 60-month minimum (includes missing) 1 = 60 or more month minimum (includes life)
DRUGTRAF	Drug trafficking primary offense type 0 = All other offenses 1 = Drug trafficking • = Missing
EDUC	Education 0 = Less than high school diploma 1 = Some degree (high school diploma or greater) • = Missing
FIREARM	Firearms primary offense type 0 = All other offenses 1 = Firearms • = Missing
FRAUD	Fraud primary offense type 0 = All other offenses 1 = Fraud • = Missing
GDLINEMIN	Minimum of the guideline range for defendant (in months) 0 - 800 = Valid Range in months • = Missing, Multiple GL Ranges, N/A, 18§924(c) only, and Life Sentences
GDMINLO	Low category of minimum of guideline range for defendant 0 = 12 months or more 1 = Less than 12 months • = Missing
GENDER	Gender of defendant 0 = Male 1 = Female • = Missing

Table 14 (cont.)

ANALYSIS VARIABLE	DEFINITION AND CODES
GUNMANDMIN	Presence of mandatory minimum gun statute 0 = Less than 60-month minimum for 18§924(c)/Less than 120 months for 18§924(e) (includes missing) 1 = 60-month or more minimum for 18§924(c)/120 months or more for 18§924(e) • = Missing
HEROIN	Primarily heroin involvement in offense 0 = No Heroin (includes missing) 1 = Heroin
HISPANIC	Defendant Hispanic classification 0 = White non-Hispanic, Black non-Hispanic, or Other Non-Hispanic 1 = Hispanic ethnicity, regardless of racial classification • = Missing
JUDGEYEAR	Judge appointment pre-guideline 0 = Appointed 1989 or after 1 = Appointed pre-1989 • = Missing
LARCENY	Larceny primary offense type 0 = All other offenses 1 = Larceny • = Missing
MARIJ	Primarily marijuana involvement in offense 0 = No marijuana (includes missing) 1 = Marijuana
METH	Primarily methamphetamine involvement in offense 0 = No Methamphetamine (includes missing) 1 = Methamphetamine
MIDWEST	Midwestern U.S. Census Bureau geographical region 0 = All other regions 1 = Midwestern region • = Missing
MITROLE	Mitigating role adjustment 0 = Did not receive 1 = Received role adjustment • = Missing
MONEYLAUNDER	Money laundering primary offense type 0 = All other offenses 1 = Money laundering • = Missing

Table 14 (cont.)

ANALYSIS VARIABLE	DEFINITION AND CODES
NON-MINORITY	Defendant non-Hispanic, non-minority classification 0 = Black or Hispanic classification 1 = Non-Hispanic White or non-Hispanic other race (i.e. Asian, Native American, etc.) • = Missing
NORTHEAST	Northeastern U.S. Census Bureau geographical region 0 = All other Regions 1 = Northeastern Region • = Missing
OTHERDRUG	Primarily other drug involvement in offense 0 = Crack cocaine, powder cocaine, marijuana, methamphetamine, or heroin (includes missing) 1 = Any other drug than those listed above
PERCENTDEPART	§5K1.1 sentence degree of departure (in percent) from the defendant's guideline minimum (sentences of probation or alternative methods of confinement only defined as zero months of prison)
PLEARATEHI	High district plea rate 0 = Low or medium plea rate 1 = High plea rate • = Missing
PLEARATELO	Low district plea rate 0 = High or medium rate 1 = Low plea rate • = Missing
PROSCASEHI	High prosecutor criminal caseload 0 = Low or medium caseload 1 = High caseload • = Missing
PROSCASELO	Low prosecutor criminal caseload 0 = Medium or high caseload 1 = Low caseload • = Missing
RACKETEER	Extortion/racketeering primary offense type 0 = All other offenses 1 = Extortion/racketeering • = Missing
ROBBERY	Robbery primary offense type 0 = All other offenses 1 = Robbery • = Missing

Table 14 (cont.)

ANALYSIS VARIABLE	DEFINITION AND CODES
SOUTH	Southern U.S. Census Bureau geographical region 0 = All other regions 1 = Southern region • = Missing
USCITIZEN	U.S. Citizenship status 0 = U.S. citizen 1 = Non-U.S. citizen (legal and illegal aliens) • = Missing
WEAPONINVOL	Weapon involvement in offense 0 = No weapon (includes missing) 1 = Weapon specific offense characteristic (SOC) or 18 U.S.C. § 924(c)
WEST	Western U.S. Census Bureau geographical region 0 = All other regions 1 = Western region • = Missing