

# **SUBSTANTIAL ASSISTANCE:**

*An Empirical Yardstick Gauging Equity  
in Current Federal Policy and Practice*

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# **SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE**

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Since the beginning of the twentieth century, the federal government has incrementally recognized the need to standardize criminal statutes and sentencing provisions, fueled in great measure by a dissatisfaction with unrestrained judicial discretion and indeterminate sentences. It was this sentiment that underlay the passage of the Sentencing Reform Act (SRA)<sup>1</sup> of 1984 and its three sentencing goals:<sup>2</sup>

- **honesty:** to provide for sentences that represent close approximations of the actual time that defendants would serve in prison;
- **uniformity:** to promote consistency between the sentences imposed for "similar criminal offenses committed by similar offenders"; and
- **proportionality:** to foster sentence lengths that correlate with the severity of the offense committed.

Legislative history indicates that the primary congressional focus driving the SRA was the desire to control unwarranted sentencing disparity inherent in an indeterminate sentencing system and

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<sup>1</sup>Public Law No. 98-473.

<sup>2</sup>USSG §1A3; *see also* Senator Edward Kennedy's "Preface" in Michael J. Churgin *et al.*, Toward a Just and Effective Sentencing System (Praeger, 1977).

the individualized sentencing model<sup>3</sup> — a structure believed to result often in dissimilar sentences for similar offenders and similar sentences for dissimilar offenders. This concern is reflected in the text of the SRA, which mandates that the federal sentencing commission established under the law produce “certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . .”<sup>4</sup>

The Commission responded to congressional concern by nationally standardizing the factors and weights that determine individual punishments for defendants convicted of similar offenses. The resulting federal sentencing guideline system computes numeric offense seriousness levels based upon defendant behavior, the scope of the offense, offense-specific aggravating and mitigating factors, and general culpability adjustment criteria. Guideline sentence ranges are then determined from a matrix using the numeric offense levels and criminal history seriousness measures that capture the length, seriousness, and recency of the defendant’s criminal past.

### **The Undefined Substance of Substantial Assistance**

Following on the heels of the SRA was the 1986 Anti-Drug Abuse Act.<sup>5</sup> In this legislation, Congress directed the Commission to create sentence reduction incentives that would decrease sentences below the guideline range for offenders who assist in the investigation or prosecution of another person committing a criminal offense. The Sentencing Commission’s response to this congressional mandate took the form of guideline policy statement 5K1.1—Substantial Assistance to Authorities:

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.<sup>6</sup>

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<sup>3</sup>U.S. Sentencing Commission, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining, Volume II (December 1991), p. 14.

<sup>4</sup>28 U.S.C. § 991(b)(1)(B).

<sup>5</sup>Public Law No. 99-570.

<sup>6</sup>USSG §5K1.1. Note that substantial assistance sentencing departures can supplant more than just the guideline range. Under 18 U.S.C. § 3553(e), the court is granted the authority to impose a sentence below a statutory minimum sentence as appropriate in response to the government’s motion for a substantial assistance sentence reduction. However, whether the resulting §5K1.1 sentence is lower than a guideline range minimum, or a mandatory minimum statutory requirement, its application must signify the defendant’s provision of substantial assistance to authorities.

There is scant instruction clarifying the terms and policies contained in this genesis substantial assistance statement. Even further, the Guidelines Manual recognizes that this silence is by design:

A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based on variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section.<sup>7</sup>

Issues raised in the substantial assistance policy statement, but left unanswered elsewhere in the Guidelines Manual, the statute, and prosecutorial directives such as the U.S. Department of Justice's (DOJ's) U.S. Attorneys Manual, include four that are cited below.

First, the factors to be used by the prosecutor prior to sentencing to determine whether the cooperation of a given defendant is "substantial" — and therefore warrants a substantial assistance departure motion — are unaddressed. Defining some type of cooperation as "substantial" implies that there is another type of cooperation that is "non-substantial." Consequently, under this dichotomy, only a subset of defendant cooperation is expected to qualify for a substantial assistance departure. What objective and equitable parameters distinguish between "substantial" assistance and "non-substantial" assistance?

Second, the authority to move for a §5K1.1 departure is limited to the prosecution. This exclusivity has resulted in spirited debate in the criminal justice community. Government prosecutors defend the appropriateness of their substantial assistance monopoly by citing the government's unique capability to judge accurately the benefit obtained from the type and extent of assistance provided. The critical response is that predicating a substantial assistance departure on a government motion is a potential source of disparity because the unilateral government decision whether to make the substantial assistance motion is not subject to challenge by the defense and is not reviewable by the court (unless constitutional grounds are cited).

Third, substantial assistance is linked to cooperation concerning the investigation or prosecution of another person. This principle contends that the prosecution cannot move for, neither can the court grant, a §5K1.1 departure based solely upon information that the defendant provides about him/herself.<sup>8</sup>

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<sup>7</sup>USSG §5K1.1, comment. (backg'd.)

<sup>8</sup>Two sections of the sentencing guidelines permit limited consideration of self-incriminating information provided by the defendant. First, §1B1.8(b)(5) establishes that it is appropriate for the court to use self-incriminating information provided by the defendant to consider "whether, and to what extent, a downward departure is warranted," but only in response to a prosecutorial substantial assistance motion based on cooperation

Finally, apparently not all substantial assistance is equal. The policy statement places no conditions on the magnitude of the sentence reduction to be given. Consequently, extensive cooperation theoretically would deserve a larger sentence reduction than less extensive (but still substantial) cooperation. What is the link between assessing the value of a defendant's substantial assistance and deciding on the magnitude of the sentence reduction? While §5K1.1 addresses factors that should be considered in determining the "appropriate reduction,"<sup>9</sup> it does not specify a functional relationship. The statute itself is even less illuminating, only mentioning that it is appropriate to provide a cooperating defendant with "a lower sentence than would otherwise be imposed."<sup>10</sup>

## The Research Premises

The SRA holds the U.S. Sentencing Commission responsible for assuring that the purposes of sentencing are being met. This includes, under expectations of judicial equity, that the "certainty and fairness" principle applies as well to substantial assistance departures under the guidelines. Achieving equity in the substantial assistance process has major ramifications for the overall equity of the guidelines system; 19 percent of federal criminal convictions — roughly 7,500 cases per year — were granted downward departures under §5K1.1 over the past three fiscal years (fiscal years 1994 through 1996).

The yardstick against which equity will be measured is the presence of policy, application practices, and outcomes that support the goal of treating similar offenders similarly with respect to the guideline's substantial assistance provisions. The areas in which equity will be explored include the following:

- **Policy** consistency that supports §5K1.1 administration and definitions both among and within the federal districts, assuring equitable designation of behavior meeting the "substantial assistance" threshold;
- **Process** consistency that supports procedures for investigating and prosecuting defendants who provide cooperation, assuring fair determinations of the stipulations and facts that the guidelines use to determine offense severity; and

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"concerning unlawful activities of others." Second, §5K2.16 permits a downward departure (not a substantial assistance departure) for information that the defendant voluntarily discloses concerning the existence of an unrelated offense that is "unlikely to have been discovered otherwise" and is not connected with the investigation or prosecution of related conduct by the defendant.

<sup>9</sup>USSG §5K1.1(a).

<sup>10</sup>28 U.S.C. § 994(n).

- **Sentencing** departure consistency such that similar departures are awarded for similar assistance.

### Assessing the Operation of §5K1.1<sup>11</sup>

Per congressional mandate for an ongoing assessment of whether its guidelines are meeting the purposes of the SRA, in December 1991 the Commission initially evaluated the disparity-reducing operations and impacts of the newly established sentencing guidelines. With respect to §5K1.1 sentencing practices, the Commission’s report concluded that:

The evaluation suggested some unevenness and unwarranted use among U.S. attorney offices and individual prosecutors of prosecutorial motions to depart below the guidelines range based on a defendant’s substantial assistance in the investigation or prosecution of other persons. Quantitative and qualitative evidence from the evaluation points to a need for the Commission and the Department of Justice to monitor this issue to ensure that substantial assistance departures are not inappropriately used to undermine the guidelines, and to ensure that warranted substantial assistance departures do not result in unwarranted disparity.<sup>12</sup>

By 1994, data analysis and comments — generated as part of the Commission’s ongoing legislative prescription to “periodically . . . review and revise” the guidelines<sup>13</sup> — indicated that the previously observed trends and variations in §5K1.1 departures continued. For example, substantial assistance rates: (1) increased steadily since implementation of the federal sentencing guidelines; (2) varied greatly by judicial circuit and district; (3) varied within categories for several defendant demographic characteristics, most notably race and citizenship status; and (4) varied by offense of conviction and length of imposed sentence.<sup>14</sup>

These data suggested potential inconsistencies in how substantial assistance departures were being applied nationally. Proceeding from the recommendation in the earlier evaluation report, the

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<sup>11</sup>The paper uses the terms “substantial assistance motion” and “substantial assistance departure” interchangeably. While the court does not have to grant a §5K1.1 motion filed by the prosecution, information obtained by the Commission indicates that the vast majority of motions are granted as a matter of course. Additionally, the paper does not consider another source of substantial assistance departures: Rule 35(b) of the Federal Rules of Criminal Procedure. Rule 35(b) analysis could not be performed because court data on Rule 35(b) sentence adjustments were not consistently submitted to the Commission. Based on extensive consultation with the Bureau of Prisons, the Commission estimates that approximately 500 Rule 35(b) reductions occur each fiscal year, compared to approximately 7,500 §5K1.1 departures each fiscal year.

<sup>12</sup>U.S. Sentencing Commission, page 422.

<sup>13</sup>28 U.S.C. § 994(o).

<sup>14</sup>Documentation for the cited relationships is found in Maxfield *et al.*, pages 109-128.

Commission formed a Substantial Assistance Staff Working Group to study in greater detail substantial assistance sentencing practices under the guidelines.

### **Research Questions and Data Sources Addressing the Premises**

The working group organized its mission around the premises cited above and developed a list of research questions examining §5K1.1 departures. Exhibit 1 associates each of the premises with these research questions.

Any investigation of the substantial assistance process requires data on prosecutorial decisions: the type of assistance offered and provided by the defendant, the timing of that assistance, the accuracy of the information, and the benefit to the government of the assistance received. The DOJ, as outlined in its “Principles of Federal Prosecution,”<sup>15</sup> requires that each U.S. attorney office “shall maintain documentation of the facts behind and justification for each substantial assistance pleading.”

However, there are no standards given to the individual U.S. attorney offices defining how the information is to be maintained, nor are the data required to be compiled or reported to the central DOJ offices in Washington, D.C. Consequently, the working group’s request for such data could not be honored by the DOJ. In assessing the feasibility of collecting the raw data itself, the working group contacted several individual U.S. attorney offices. These contacts revealed that the data from individual U.S. attorney offices was not available in the aggregate and consistent form needed for assessment.

Without data collected and compiled by the DOJ, the Commission's working group developed a multi-faceted array of methodologies to collect the necessary empirical assessment data from policy and process perspectives. These empirical data strategies involved:<sup>16</sup> (1) a mail survey of §5K1.1 policies at each of the U.S. attorney offices; (2) site visits to eight districts to interview key individuals involved with §5K1.1 motions and departures (the court, prosecution, probation office, and defense); (3) a telephone survey to collect detailed §5K1.1 information from U.S. attorneys whose districts had prosecuted cases appearing in a random sample of departures; and (4) a data collection effort to compile culpability and cooperation data for each participant in a randomly selected sample of conspiracies with §5K1.1 departures.

The working group approach opted for a broad-based study of a wide array of factors. This decision represented its desire to overview the general operation of §5K1.1, rather than to focus on limited topics in greater depth. Consequently, the working group data involved small sample sizes, and confidence intervals are not reported. The results, therefore, are suggestive observations based

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<sup>15</sup>“Principles of Federal Prosecution,” Chapter 27 in United States Attorneys Manual 9-27.410, Criminal Division Title 9, U.S. Department of Justice, January 14, 1993.

<sup>16</sup>Prior to permitting the working group to contact its U.S. attorney offices, the DOJ required a review and modification of the project instruments. The courts, defense bar, and probation offices did not request prior review.

on a detailed, but exploratory, study. The consistency of the findings across these diverse methodologies, however, supports an appearance of robust findings that should motivate further confirmatory study both by the Commission and the DOJ. The methodologies used by the staff working group are summarized in Attachment A. The survey instruments and research methodologies are described fully in the previously mentioned staff working group document.

## **Measuring Evidence in Support of the Premises**

Having established the premises to be used in evaluating equity issues in substantial assistance departures, the remainder of this paper examines each premise in turn. The data collected from the staff working group efforts were analyzed to assess whether there were similar policies and processes across districts leading to equity in §5K1.1 motions and magnitudes of departure.

### **Measuring Up: Policy**

Frequently cited reasons to explain empirical differences in substantial assistance rates include differential policies of the U.S. attorney offices. Each U.S. attorney office is permitted to establish its own internal §5K1.1 processes consistent with legislative and DOJ guidance.

#### Within-District Policy

Using results from the staff working group's U.S. Attorney Office Mail Policy Survey,<sup>17</sup> Exhibit 2 indicates that as of 1995 when the survey was completed, four out of five (20.2%) U.S. attorney offices maintained a written substantial assistance policy. Each responding office (100.0%) reported the existence of at least one review or approval procedure; of these, 82.0 percent reported at least two different procedures. Clearly, the U.S. attorney offices generally had an infrastructure to review §5K1.1 applications.<sup>18</sup>

A further examination of U.S. attorney office policy and practice compared two independent measures — one of stated policy and one of actually applied policy. Exhibit 3 displays the rate at

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<sup>17</sup>As part of the staff working group, a policy survey questionnaire, along with an authorization memorandum from the Director of the Executive Office for U.S. Attorneys, was mailed to each of the 94 U.S. attorney offices. A total of 89 completed questionnaires were returned, for a response rate of 94.7%. Five districts elected not to participate in the survey: Alaska, Eastern California, New Hampshire, Oregon, and Eastern Wisconsin.

<sup>18</sup>The single most frequently used procedure (in 77.5% of districts) involved a supervisory assistant (typically a criminal division chief or a division chief), although the vast majority (87.0%) of these supervisory-review districts also had established at least one other review procedure. Approximately one-quarter (23.6%) of the districts reported a substantial assistance review committee. Committee members frequently included criminal division chiefs; assistant U.S. attorneys (AUSAs) with responsibility for an office division (such as the Criminal Division or the Economic Crimes Division); unit leaders; and the U.S. attorney.



which sampled individual cases were processed in compliance with the stated district policy.<sup>19</sup>

As an example, Exhibit 3 presents districts responding to the mail survey and reporting that substantial assistance motions must be approved by the U.S. attorney. For this review policy, there were 36 districts that also had individual cases sampled for review by the working group. The analysis of cases processed in those districts indicated that 44.4 percent of the districts operated in complete consistency with their policy, while 33.3 percent demonstrated no consistency with their policy. Complete consistency with review policy ranged from 41.2 percent for review committee policies to 63.2 percent for assistant U.S. attorney review policies.

This analysis suggests that districts frequently diverged from their stated policy. In fact, the analysis suggests that, at a minimum, 15.8 percent (the lowest proportion in the “No” column of Exhibit 3) may have completely disregarded their review policies. The study estimates that the policy review or approval criteria were followed consistently only in approximately half to two-thirds (between 41.2% and 63.2% in the “Yes” column) of the districts. These data suggest that U.S. attorney offices were often lax in following their internally-developed §5K1.1 policies.<sup>20</sup>

#### Definition of Substantial Assistance

If policies for application of the §5K1.1 motion vary from district to district, this would be a source of potential inequity. The working group used the U.S. Attorney Office Mail Policy Survey to examine this issue.

Exhibit 4 indicates that, as reported by the U.S. attorneys, the policies as to who should be awarded §5K1.1 motions were generally consistent. There was almost a total consensus that offenders who testify (100%), participate in the investigation of another offender (98.9%), or provide information for the prosecution of others (98.9%) should receive a substantial assistance departure.

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<sup>19</sup>Data from two of the working group’s efforts — the U.S. Attorney Office Mail Policy Survey and the U.S. Attorney Office Case Telephone Interviews — were combined to examine how the stated policies of the U.S. attorney offices were applied. Data collected by telephone on randomly selected §5K1.1 cases in a given district were matched to the information from the mailed policy survey for that district and compared. Note that while 89 districts responded to the survey, the random sample of individual cases involved only 65 of those 89 districts. The “Method of District Review” column indicates the number of districts among the 65 specifying the given review or approval policy.

<sup>20</sup>The analysis credited information that might otherwise mistakenly appear as policy inconsistency. For example, consider a district whose mail policy survey reported that review was required by the criminal division head, but a case from that district sampled for the telephone interview did not report that such a review occurred. On the surface, it would appear that this telephone interview case was not handled in accordance with district policy. However, in cases of apparent policy violation, the analysis searched the supplemental text information to determine if the cited review or approval policy was otherwise recorded in those data. In this example, if the required criminal division head review was recorded in the data as a supervisory review or a review committee membership, the case was coded as consistent with district policy.

Further, providing information on the criminal activity of others was supported by nearly as many (92.0%) of the U.S. attorneys responding to the mail survey.

The consensus cited above dissolved, however, when substantial assistance motions for information that a defendant provides about his/her own criminal behavior were examined. The U.S. attorneys split almost evenly over whether this type of assistance would be considered in making a §5K1.1 motion; just under half of the districts (48.9%) used self-incriminating information in considering substantial assistance. This difference suggests that, depending upon the sentencing jurisdiction, one defendant may receive a sentence reduction for such behavior, while a similarly situated defendant in another district would not. Further, as self-incriminating assistance by itself does not appear to meet the criteria of either 18 U.S.C. 3553(e) or §5K1.1, motions based solely on such cooperation may be illegal.

Thus, there was, at least in some instances, a lack of coordinated policies and benchmarks in the U.S. attorney offices to guide decision making as to when a defendant qualifies for a substantial assistance departure motion. The question that emerges for study is: in spite of the evidence that policies were inconsistent, did defendants who provided similar assistance receive similar treatment under §5K1.1 motions?

### **Measuring Up: Process**

According to the guidelines, the substantial assistance process must involve a defendant informing or behaving in a cooperating manner to assist with the investigation or prosecution of another individual. The defendant's actions, if consistent with the prosecutor's definition of substantial assistance behavior, permit the defendant to receive a §5K1.1 motion from the prosecutor to the judge for a reduction in the otherwise applicable guideline sentence. Consequently, although a cooperating defendant is a necessary condition to prompt a §5K1.1 departure, it is not a sufficient condition.

#### Assistance: Substantial or Not

According to the data from the working group's Conspiracy Case Joint Coding Review, it is clear that assistance to authorities was a common occurrence, independent of whether a substantial assistance departure was actually received. Approximately two-thirds (67.5% or 158 of the 234 cases with available data) of all defendants<sup>21</sup> provided some form of assistance to the government during prosecution. However, only 38.6 percent of all defendants providing assistance received a substantial

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<sup>21</sup>Not all of the Commission's case folders contained adequate data to code the assistance provided. The Conspiracy Case Joint Coding Review statistics and analysis assume that all §5K1.1 defendants provided some kind of assistance. Consequently, 30 of the 91 §5K1.1 cases without assistance information were excluded from analysis as missing data. On the other hand, assistance was assumed for non-§5K1.1 defendants only if the case record actually documented assistance; thus, 97 of the 173 non-§5K1.1 cases were assumed to have provided assistance. Note that, under these assumptions, the analysis provides a conservative lower bound estimate of the proportion of non-§5K1.1 defendants who assist authorities.

assistance departure. This suggests that prosecutors, in fact, distinguished between providing information and providing substantially assisting information. Further, with nearly six out of every ten defendants who provided assistance not receiving §5K1.1 motions, the data suggest that the threshold for receiving a §5K1.1 motion is relatively high.

Does the type of information provided explain why more than six out of every ten (61.4%) cooperating defendants did not receive a sentence reduction motion? Exhibit 5 provides data on the type of assistance given, comparing types by those defendants who did and did not receive a departure. Focusing on drug trafficking conspiracies,<sup>22</sup> the exhibit presents the probability of receiving a substantial assistance departure given specified types of assistance.

Individuals who participated in undercover investigations (100%), who testified in court (85.7%), and who provided tangible evidence such as documents (66.7%) were more likely than not to receive substantial assistance departures. Nonetheless, the data also point out that 14.3 percent of those who testified in court and 33.3 percent of those who provided tangible evidence did not receive a §5K1.1 departure; participation in some of these potentially risky assistance behaviors did not guarantee a substantial assistance departure.

For the less expansive forms of assistance, receipt of the §5K1.1 departure was uncertain; agreeing to testify in court and providing verbal information<sup>23</sup> resulted in a §5K1.1 departure for roughly one-third of the defendants (27.9% to 31.3%).

These exploratory findings suggest that as of 1995 there was a lack of uniformly applied criteria as to what merits a substantial assistance departure. With only one-third of the defendants receiving substantial assistance for agreeing to testify and for providing verbal information, the discrepancy in §5K1.1 receipt rates suggests either that U.S. attorneys have diverse policies regarding such offenders or that the categorization in Exhibit 5 groups together relatively diverse offenders — some of whom were providing truthful and effective “substantial” assistance and others who were not. This is an issue that future research should address.

Continuing to measure documentation for the research premises, this paper now considers additional factors which explain receipt and degree of §5K1.1 departures. The search examines possible influences on how the government determines whether a defendant’s assistance is “substantial,” and how the link is made between the assistance provided by a defendant and the magnitude of sentence reduction awarded.

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<sup>22</sup>For the staff working group, a set of randomly selected set of conspiracies was identified. The internal case folders were searched for data on assistance given to the prosecution (as reported in the probation officer’s Pre-Sentence Report, the plea agreement, and/or other sentencing documents) and receipt of a §5K1.1 departure.

<sup>23</sup>The fact that the “verbal information only” category shows a rate of 47.6 percent may be an artifact of the data; a small number of “other unspecified” types of assistance were combined in this category. Because some of these “other” assistance types may involve more defendant-risky behaviors, it is expected that the higher probability of departure receipt for this category is artificially high.

### Type of Assistance Provided

One explanation for differential rates of substantial assistance could be specialization: defendants performing certain roles in the conspiracy might be better at providing, or more willing to provide, information that conforms to the prosecutorial definition of substantial assistance. Exhibit 6 examines this hypothesis with a sample of §5K1.1 defendants. The exhibit compares the type of assistance provided by three drug trafficking ranks: higher-position traffickers, street-level dealers, and lower-position drug conspiracy members.<sup>24</sup>

The hypothesis that function is associated with differential §5K1.1 rates was not strongly supported by the data in the exhibit. For most conduct categories, there was comparable participation regardless of function category. There was a trend for higher-position and street-dealer defendants to perform undercover assignments, while lower-position defendants were more likely to provide information on codefendants otherwise unknown to the prosecutor. Small sample sizes, however, make tests of these hypotheses impossible.

With the general similarities between assistance provided by higher-position and lower-position conspiracy members, one conclusion is that departure levels should be comparable regardless of culpability. However, because it is often argued that those higher in the crime conspiracy possess more valuable information to exchange for substantial assistance sentence reductions, the next section examines the cooperation benefit provided relative to the defendant's position in the conspiracy structure.

### Benefits and Results of Assistance Provided

Prosecutors argue that the sharing of information is a necessary, but not sufficient, condition for a substantial assistance departure. The information must be "substantial" in order for the government to move for a sentence reduction.

In Exhibit 7, data from the case telephone interviews compare the prosecutorial benefits or results received from cooperation by higher-position street-dealing, and lower-position drug conspiracy members. Consistent with the findings of Exhibit 6, perhaps Exhibit 7's most striking relationship is the similarity of benefits provided by the different function groupings.

Three prosecutorial benefits were most commonly cited during the interviews: (1) codefendant guilty pleas, (2) new prosecutions, and (3) new convictions. Regardless of function category, defendants were generally equally as likely to have provided one of these benefits.

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<sup>24</sup>During analysis and discussion in the paper, the various functions in a drug conspiracy frequently are grouped into relative culpability categories. These groups of defendant traffickers are used as culpability surrogates to generalize trends. The "higher-position" category includes the following drug trafficking functions: high-level organizers, growers, manufacturers, importers, and middle-level dealers. Street-level dealers comprise a separate function category. The "lower-position" category includes passive and low-level participants: off-loaders, "go-fers", couriers, mules, renters/storers, passive enablers, and users.

The other prosecutorial benefits were less frequently occurring, and the smaller sample sizes make generalization precarious. A larger sample is needed to determine whether the differences are significant for “recovery of assets” among higher-position defendants and for “additional arrests” among lower-position defendants.

In summary, Exhibits 6 and 7 suggest that perceptions that higher-position offenders receive more §5K1.1 departures due to their superior access to codefendant information are not supported. As aggregated in this exploratory study, higher-position drug conspiracy members (with the possible exception of their greater tendency to perform undercover work) appeared neither to have a monopoly on the type of assistance they provided, nor to be more likely to better effect prosecutions or investigations from their cooperation.

### Defendant Function and Access to Knowledge

Numerous respondents during the staff site visits, echoing criticisms in the general criminal justice community, cited the defendant’s role as one factor affecting the equity of §5K1.1. Practitioners stated that in criminal conspiracies the prosecution targets leaders and organizers for information under the assumption that those “at the top” possess more valuable intelligence.

Of course, defining “at the top” for a drug conspiracy sometimes is not straightforward, because many drug trafficking “organizations” prosecuted in the federal courts are loosely structured. Drug traffickers often do not specialize exclusively in one offense activity, as illustrated in the Conspiracy Case Joint Coding Review data; more than one-fourth (27.1%) of the defendants were identified with multiple function behaviors.<sup>25</sup> Regardless of whether the most common or the most serious function is considered, however, Exhibit 8 indicates that the defendant’s relative position in the drug trafficking conspiracy hierarchy was not proportionally related to his/her probability of receiving a substantial assistance departure. These data from the Conspiracy Case Joint Coding Review indicated no decreasing trend in §5K1.1 departures by decreasing function culpability. In fact, only about two or three of every ten highest-level functionaries<sup>26</sup> — the high-level organizer, manufacturer, or importer — were likely to receive a substantial assistance departure.

Consider now the §5K1.1 rates for a less culpable conspiracy member: the passive participant. These are individuals who serve as renters or storers of equipment, as passive enablers to more culpable defendants, or as drug users. Yet, passive participants were approximately twice as likely

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<sup>25</sup>In almost half of the cases with multiple functions (45.7%), the defendant predominately performed one function (usually, but not exclusively, a street-level dealer or a low-level participant) and infrequently additionally worked as a mid-level organizer. An additional 25.7 percent of multiple-function defendants were high-level organizers who at times performed lesser functions (usually mid-level organizing or brokering).

<sup>26</sup>For high-level defendants in Exhibit 8: 22.2 percent received a §5K1.1 departure when this was their most common function, with 32.4 percent receiving when this was their most serious function.

to receive §5K1.1 departures as were the highest-level defendants — approximately five or six out of every ten.<sup>27</sup>

The oft-cited “truth” that drug conspiracy members at the top of the organization are more likely to secure reduced sentences due to substantial assistance than those lower in the criminal organization is not supported by these exploratory data. The defendant’s function alone could explain differing rates of §5K1.1 departures.

Further, Exhibit 8 does not address why higher-level drug defendants — who by their high-level role are presumed to possess incriminating evidence about other defendants — either did not attempt to and/or did not succeed in negotiating an exchange of information for sentence reductions. Several possible explanations are explored in the next sections.

### Legally Irrelevant Factors in the Receipt of a §5K1.1 Motion

It is unacceptable for prosecutors or judges, purposely or unintentionally, to use the legally irrelevant factors of a person’s individual characteristics — such as gender, race, ethnicity, citizenship — in making sentencing decisions.<sup>28</sup>

In today’s society, the social scientist’s ability to measure compliance with this prohibition can be challenged. This is because these legally irrelevant variables can be highly associated with other variables that may independently affect sentencing outcomes. Disentangling the effects of two highly correlated characteristics is difficult.

In an attempt to examine this issue, a statistical analysis focused on factors related to receipt of a substantial assistance motion by the prosecution.<sup>29</sup> A multivariate model — so-named because it includes **multiple** variables to help explain a phenomenon — is a standard technique to analyze the independent impacts of highly associated factors. The model estimates the impact of one variable in the model, after accounting for all other impacts due to the other variables in the model.

The analysis here controlled for a long list of variables available to the Commission in its datafile.<sup>30</sup> Holding constant important variables such as offense type, guideline range, mitigating

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<sup>27</sup>For passive participant defendants in Exhibit 8: 62.1 percent received a §5K1.1 departure when this was their most common function, 55.0 percent received the §5K1.1 departure when this was their most serious function.

<sup>28</sup>§5H1.10; 28 U.S.C. § 994(d).

<sup>29</sup>Maxfield *et al.*, pages 143-165.

<sup>30</sup>An unpublished 1996 manuscript from the Bureau of Justice Statistics at the U.S. DOJ extended this Commission statistical model and included an additional explanatory variable. That report states that by adding the plea/trial disposition variable to the model, Black/Non-Minority racial disparity was reduced from 9.3 percent to 7.7 percent. However, the replication findings are still statistically significant for the personal characteristics

and/or aggravating factors, weapon involvement, and a host of other possible explanatory concepts, the study found that personal characteristics remained significant predictors of who received substantial assistance departures.

Exhibit 9 provides the model's estimates of the impact of personal characteristics on the probability of receiving a substantial assistance departure. There was a statistically significant impact for each of the five demographic characteristics listed in the exhibit, ranging from a high of a seven percentage point difference for Hispanics compared to the non-minority group, to a low of a two percentage point difference for two other comparisons (male versus female defendants, and older versus younger defendants). Or, more simply stated: compared to a non-minority defendant and controlling for all other personal, judicial, and guideline factors in the model, a Hispanic defendant was seven percentage points less likely than a non-Hispanic defendant to receive a substantial assistance departure.

It is important to qualify these findings, however, by recalling that several variables expected to have a great explanatory power were not available as input into the model. As discussed earlier, information concerning district charging practices, plea bargaining practices, and more detailed information on the type and usefulness of information to the prosecution is not contained on the Commission datafile. While this information is required to be collected by the U.S. attorney offices,<sup>31</sup> the data are not compiled by the DOJ and therefore could not have been used in our disparity modeling.

It is possible that inclusion of such information in the model would reduce or eliminate the effect of these legally irrelevant personal characteristics. However, the currently available data that control for the most important variables used in disparity analyses raise questions of racial, ethnic, nationality, and gender disparities in the awarding of §5K1.1 motions.

### Prosecutorial Discretion

Post-SRA prosecutorial discretion is perhaps the single most-cited topic mentioned with respect to the substantial assistance policy statement. In context, however, this concern is only one part of a much larger general concern of increased prosecutorial discretion under the guidelines. For instance, the Federal Judicial Center's (FJC) guidelines survey<sup>32</sup> reported that 86 percent of respondents agreed (of this, 57% said "strongly agree") that "sentencing guidelines give too much

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and carry the same requirement to investigate and resolve the possibility of disparity raised by statistically significant findings.

<sup>31</sup>"Principles of Federal Prosecution," Chapter 27 in United States Attorneys Manual 9-27.410, Criminal Division Title 9, U.S. Department of Justice, January 14, 1993.

<sup>32</sup>Molly Treadwell Johnson and Scott A. Gilbert, "The United States Sentencing Guidelines: Results of the Federal Judicial Center's Survey," Report to the Committee on Criminal Law of the Judicial Conference of the United States, Federal Judicial Center, December 5, 1996.

discretion to prosecutors.” Further, 74.9 percent of federal judges and 58.6 percent of chief probation officers thought that the prosecutor had “the greatest influence on the final guideline sentence.”

With respect to substantial assistance, the FJC survey also provided a suggestion of inequity. In total, 59 percent of judges and 55 percent of chief probation officers said that they personally had cases in which they believed that the defendant had provided “substantial assistance” but the prosecutor did not make a §5K1.1 motion.

The Commission’s substantial assistance working group data also provide information concerning prosecutorial discretion in guideline sentences under §5K1.1. The Conspiracy Case Joint Coding Review data were used to examine this issue.

To set the stage for this analysis, recall that accountability under the guidelines has different standards than criminal liability. With regard to drug trafficking, under the guidelines the defendant can be held accountable for more than the actual amount of drugs with which the defendant was personally involved. Instead, a member of a drug conspiracy can be held accountable for the entirety of drugs involved in the trafficking operation consistent with “relevant conduct,” defined as:

- all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
- in the case of jointly undertaken criminal activity . . . , all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.<sup>33</sup>

It follows logically that a trafficking conspiracy codefendant functionally higher in a conspiracy’s trafficking structure should have at least the same, or potentially a larger, relevant drug quantity as a conspiracy codefendant functionally lower in the trafficking structure.<sup>34</sup> This analysis, controlling for duration of involvement and seriousness of behavior, assumes that, holding other facts constant, a higher-position drug codefendant is expected to have a relevant conduct drug quantity either greater than or equal to the drug quantity of a less culpable co-conspirator.

The Conspiracy Case Joint Coding Review — and its 44 drug trafficking conspiracies — was used to compare codefendants involved in related drug trafficking offense behavior. Of the 44 drug trafficking conspiracies, 30 conspiracies contained the following: (a) at least one conspiracy member classified with a higher-position function (leader/organizer, grower/manufacturer, or street-level

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<sup>33</sup>USSG §1B1.3

<sup>34</sup>Factors such as the length of time involved in the conspiracy, or the scope of the criminal activity, could alter this relationship. For example, a high-level trafficker only recently involved could have a smaller relevant conduct drug quantity than a lower-level trafficker active in the conspiracy for a lengthy period of time. Or, a high-level trafficker may be able to exclude from his/her relevant conduct drug quantity computation any drug amount that an emulous, lower-level trafficker was independently dealing.



dealer) and (b) at least one conspiracy member classified with a lower-position function (low-level participant or passive participant). These 30 multi-position drug trafficking conspiracies can be divided into two categories.

First, consistent with the relevant conduct assumption, the majority (70.0% or 21 conspiracies) of these 30 conspiracies contained higher-position members, each of whom had relevant conduct drug quantities<sup>35</sup> equal to or greater than all lower-position members. Among these 21 conspiracies with the expected relevant conduct rankings, a large majority (61.9%) of all higher-position codefendants received a longer sentence term. However, this means that more than one-third (38.1%) of the conspiracies had more culpable defendants receiving sentences shorter than or equal to a least one less culpable defendant, usually (in six out of eight instances) because the more culpable defendants received §5K1.1 departures.

Second, returning to the 30 drug trafficking conspiracies in which there was at least one higher-position and one lower-position member, the remaining 30.0 percent (9 of these 30 conspiracies) had at least one higher-position member with a relevant conduct drug amount lower in absolute quantity than at least one lower-position member.<sup>36</sup> In just under half (44.4%) of these nine conspiracies, this higher-position member also received a §5K1.1 sentence reduction.<sup>37</sup>

Many guideline critics claim that under §5K1.1, highly-culpable drug traffickers can provide substantial assistance and thus receive a sentence equal to or less than co-conspirators with significantly less culpable roles in the offense. In fact, five of the eight districts constituting the staff working group site visits reported this criticism of the substantial assistance process.

This analysis suggests that there are incidents in which higher-position drug traffickers can receive smaller sentences than less culpable defendants. This exploratory analysis was not able to examine possible qualifying explanations. However, it suggests that lower sentences for high-position traffickers could be an outcome of either a beneficial relevant conduct drug amount stipulation or determination, and/or receipt of a substantial assistance departure. Determining the relative impact of each of these factors remains for subsequent research.

## Measuring Up: Sentencing

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<sup>35</sup>Drug quantity was measured using the defendant's base offense level. See USSG §2D1.1.

<sup>36</sup>Of these nine conspiracies, seven involved a mid-level or high-level conspiracy member receiving a lower relevant conduct drug amount than at least one lower-position codefendant (a courier, "go-fer", off-loader, or renter/storer). The remaining two conspiracies involved a street-level dealer and either a storer/money runner or a courier. In all cases, the higher-position defendant was involved in the conspiracy as least as long, if not longer, than the lower-position defendant.

<sup>37</sup>Two of these higher-position defendants were mid-level organizers and two were street-level dealers.

The court's role in the substantial assistance process is to decide whether to accept the prosecution's §5K1.1 motion and, if so, to determine the magnitude of departure as a function of the degree and nature of the cooperation.

In promulgating the guidelines, the Commission clearly intended that the judge use discretion in reducing a sentence due to defendant cooperation. The guidelines policy statement in §5K1.1 provides guidance for the judge in deciding upon the sentence departure; the judge is to consider the assistance's significance, usefulness, truthfulness, completeness, reliability, nature, extent, risk, and timeliness. The equity questions focus on how the court uses this guidance to meet the SRA goals of "certainty and fairness."

#### Magnitude of Departure: Type of Assistance

Exhibit 10 uses data from the Conspiracy Case Joint Coding Review to examine the magnitude of departure associated with different types of substantial assistance. The exhibit reports that the actual number of months that sentences were reduced varied greatly, even controlling for the type of assistance given. For example, while half of the §5K1.1 defendants who participated in an undercover investigation each had more than a 48-month reduction in their guideline sentence, one quarter of the undercover defendants had fewer than a 24-month reduction in their guideline sentence.

Similar statistics apply for §5K1.1 defendants who both agreed to testify and gave verbal information: half (50.0%) had their sentences reduced by more than 48 months, while roughly another third (37.5%) had their sentences reduced by fewer than 24 months. These exploratory data suggest that the extent of the defendant's departure, measured in terms of the number of months the sentence is reduced, varied considerably within each type of assistance.

#### Magnitude of Departure: Offense Type

A credible hypothesis is that differences in substantial assistance rates are related to offense type. Because some offenses are more prone to conspiracy ("multi-defendant") behaviors, defendants charged with these offenses should have greater opportunities to provide details about a co-participant in those behaviors. Supporting this hypothesis, the staff working group report shows high §5K1.1 departure rates for offense types expected to generate conspiracy behaviors: drug trafficking (33.4%), money laundering (28.6%), and racketeering (24.2%).<sup>38</sup>

Consider the research premises regarding the sentencing phase of the §5K1.1 process. Does offense type equitably predict the magnitude of the departure that a cooperating defendant receives? Using data from the Commission's national datafile, Exhibit 11 examines the average number of months that a cooperating defendant's sentence was reduced as a function of the type of offense and

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<sup>38</sup>Maxfield *et al.*, Figure 17, page 122.

the length of the predeparture guideline range.<sup>39</sup>

The third data column (“Mean Decrease in Months”) of Exhibit 11 shows that there was a wide range of average months of departure that varied by offense type: from a mean of 63.9 months of departure for drug trafficking offenses to a mean of 9.6 months of departure for larceny offenses. However, upon further examination and comparison with the second data column of the exhibit (“Mean §5K1.1 Sentence in Months”), the average sentence for the offense type appears to be directly related to the average decrease in months. All offense types listed in Exhibit 11 show the same general pattern: the greater the average predeparture guideline term, the greater the number of months that the judge will likely depart.

The last three data columns in Exhibit 11 confirm this observation. These columns divide the predeparture sentences into three categories: (1) sentences less than five years, (2) five-to-ten year sentences, and (3) sentences more than ten years. There was considerable similarity of departure magnitudes in each of the separate columns of the three sentence length categories: (1) decreases between 11.7 and 23.5 months for the shortest sentence category column, (2) decreases between 27.3 and 48.0 months for the middle sentence category column, and (3) decreases between 86.6 and 142.3 months for the longest sentence category column.

In summary, the differences in the range of average departure months within offense type were between 9.6 months for all larceny §5K1.1 defendants and 63.9 months for all drug trafficking §5K1.1 defendants. However, these differences were substantially mitigated when the predeparture guideline range was considered. These data suggest that sentence length was a better predictor of magnitude of departure, as measured here, than was offense type.

Emanating from equity concerns in this paper, this finding could be explained if defendants facing longer guideline sentences were more likely both to cooperate with prosecutors and to provide assistance that meets the prosecutor’s “substantial” definition. Given the linkages in criminal justice and sentencing theory between the risk of a longer sentence and higher culpability, findings from previous data in this paper raise reservations with this possible explanation of greater assistance from more culpable defendants. Consequently, if the presence of cooperation and the value of the assistance were not the determining factors, future research must focus on identifying those factors that are the determinants.

#### Legally Irrelevant Factors in the Magnitude of Sentence Departure

A previous section of this paper reported evidence of potential disparity with respect to the prosecutor’s motion for a §5K1.1 departure. These results were qualified in that they were obtained without the availability of prosecutorial variables such as the type and value of assistance provided. Further, without these variables, all modeling efforts will likely continue to produce results that

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<sup>39</sup>The measure of departure magnitude uses the bottom of the predeparture guideline range as the point of comparison to the §5K1.1 downward departure sentence.

suggest racial, ethnic, and gender disparity in the awarding of §5K1.1 motions.

Exhibit 12 provides data from another multivariate model<sup>40</sup> that estimates the factors that impact upon the degree of departure that a §5K1.1 defendant receives. The degree of departure is measured as a percentage reduction received from the bottom of the predeparture guideline sentence range. For example, if a defendant's predeparture guideline range was 30 to 37 months, and if the judge departed pursuant to a §5K1.1 motion to 20 months, then the defendant's degree of departure would be 33 percent. Or, in other words, the defendant's sentence was reduced by one-third.

Exhibit 12 indicates that legally irrelevant factors also appeared to have played an influential role in the degree of a §5K1.1 departure. Holding constant all other available legal, guideline, and process factors, there was statistically significant evidence of disparity based on all personal defendant characteristics included in the exhibit. The differential in the percent of reduction received was highest when comparing gender: female defendants received departures that were nine percentage points higher than did similar male defendants. Smaller, but still significant, differences were measured for ethnicity and citizenship (five percentage points), age (four percentage points), and race and education (two percentage points).<sup>41</sup>

## Summary and Implications

While this paper's exploration into the use of substantial assistance may raise more questions than it answers, the questions that it raises could set a significant policy agenda for the U.S. Sentencing Commission and the Department of Justice. In 1984, Congress determined that the American people deserved a fair, equitable, and honest sentencing system. In setting this course, Congress created the U.S. Sentencing Commission and mandated that it write sentencing guidelines to structure the decision-making of the federal judiciary. Two years after passage of the Sentencing Reform Act of 1984, Congress passed the Anti-Drug Abuse Act of 1986 and 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.<sup>42</sup>

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<sup>40</sup>Maxfield *et al.*, pages 165-181.

<sup>41</sup>An interpretative example of these statistically significant findings is detailed here for clarity among non-statisticians. For ethnicity, when receiving a §5K1.1 departure and when all other factors were identical, a non-Hispanic defendant, on average, received a sentence reduction that was five percentage points greater than a Hispanic defendant.

<sup>42</sup>28 U.S.C. § 994(n).

This directive to the Commission to reward offenders for cooperating in the investigation or prosecution of other offenders must be viewed within the overall goal of establishing fair and honest sentencing. Thus, one of the goals of this project is to examine whether substantial assistance motions are consistent with the overall tenor of the Sentencing Reform Act.

Research questions focused on the policies and procedures developed in the districts to see whether they were consistent with each other and whether they resulted in similar defendants receiving similar sentence reductions for providing similar assistance. Consistent with the development of explicit and consistent sentencing guidelines in the judiciary, this report presumes that the U.S. Sentencing Commission and the Department of Justice should require similar procedures and policies in order for similar assistance to receive similar sentence reductions.

Thus, a Commission working group was established to explore the policies and procedures across the judicial districts, and to study the factors associated with §5K1.1 sentence reductions and the magnitudes of the departures. To conduct this exploratory analysis, the working group developed a diversity of research methodologies including: (1) a review of substantial assistance social science and legal literature; (2) a review of §5K1.1 case law; (3) a mailed policy survey of U.S. attorneys; (4) site visits to eight federal judicial districts (which included interviews with judges, prosecutors, private defense attorneys, public defenders, and probation officers); (5) telephone interviews with designated U.S. attorney office staff concerning defendants who received a substantial assistance departure; (6) a case coding project for defendants involved in a sample of conspiracies in which at least one member received a §5K1.1 departure; and (7) descriptive and multivariate analyses of the Commission's extensive sentencing database.

The evidence compiled from these efforts indicated that a crucial link underlying the concept of substantial assistance could not be established. The data reported were not able to find direct correlations between type of cooperation provided, type of benefit or result received by the government, the making of a §5K1.1 motion, and the extent of the substantial assistance departure received. While limited data hamper significance testing, the consistency of the findings across methodologies reveals four facets of an equity problem requiring subsequent research.

First, this analysis uncovered that the definition of "substantial assistance" was not being consistently applied across the federal districts. Not only were some districts considering cooperation that was not being considered by other districts, but the components of a given behavior that classified it as "substantial" were unclear. These findings are in contradiction to the equity premises that assume "certainty and fairness."

Second, while the U.S. attorney offices are required to record the reason for making a substantial assistance motion, there is no provision that this information be made available for review. It is exactly such a lack of review, inherent in preguideline judicial discretion, that led to charges of unwarranted sentencing disparity and passage of the SRA. Under the SRA, the court is now compelled to report a reason for the sentence imposed and a reason for a departure — operationalized in the court's "Statement of Reasons." A comparable §5K1.1 "statement of reasons" appears

appropriate for a guideline process affecting nearly one in every five federal defendants. DOJ information on district charging practices, plea bargaining practices, degree and type of cooperation, and usefulness of information to the prosecution is crucial in an assessment of §5K1.1, whether that assessment is performed by the Commission or by any other government agency.

Third, the evidence consistently indicated that factors that were associated with either the making of a §5K1.1 motion and/or the magnitude of the departure were not consistent with principles of equity. Expected factors (*e.g.*, type of cooperation, benefit of cooperation, defendant culpability or function, relevant conduct, offense type) generally were found to be inadequate in explaining §5K1.1 departures. Even more worrisome, legally irrelevant factors (*e.g.*, gender, race, ethnicity, citizenship) were found to be statistically significant in explaining §5K1.1 departures. This discovery requires the Commission to proceed with further assessment to assure that the §5K1.1 policies, processes, and sentences conform to the expectations of fairness and justice.

Finally, the analysis raises the question of whether the Sentencing Commission needs to provide guidance about the magnitude of a decrease in a §5K1.1 departure. Data indicate that currently judges relate the magnitude of departure to the length of the predeparture sentence: higher predeparture guideline ranges bring more absolute months of departure. However, no evidence supports the conclusion that defendants facing higher sentences, in fact, provide absolutely more cooperation, or absolutely more beneficial cooperation, to warrant a larger relative departure. The issue is whether the magnitude of a substantial assistance departure should be an absolute amount (all defendants who cooperate at a given substantial assistance level receive a set and absolute number of months reduction in sentence) or a relative amount (all defendants who cooperate at a given substantial assistance level receive a proportional months reduction in sentence).<sup>43</sup> The philosophical debate that addresses the assumptions and ramifications of the absolute versus proportional approach is long overdue.

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<sup>43</sup>Under the proportional approach, cooperation is worth more “months off” for an individual facing a higher predeparture guideline sentence range. For example, assume that cooperating defendants providing an established level of substantial assistance were to receive a 20 percent reduction in the predeparture guideline sentence. For a defendant with a guideline range of 10 to 16 months, this is an approximate sentence reduction of between 2 to 3 months. For a defendant with a guideline range of 121 to 151 months, this is a substantially larger absolute sentence reduction: approximately 24 to 30 months reduction.

**Exhibit 1**  
**SUBSTANTIAL ASSISTANCE EQUITY PREMISES**  
**AND RESEARCH QUESTION DATA REQUIREMENTS**

<b>Equity Premise</b>	<b>Research Questions</b>	<b>Source Data<sup>1</sup></b>	<b>Evidence</b>
Policy	Written and oral district policies	U.S. Attorney Mail Policy Survey (C)	Exhibit 2
	Within-district consistency of review policy application	U.S. Attorney Mail Policy Survey (C) matched to U.S. Attorney Case Telephone Interviews (E)	Exhibit 3
	Substantial assistance definition	U.S. Attorney Mail Policy Survey (C)	Exhibit 4
	Information about defendant self	U.S. Attorney Mail Policy Survey (C)	Exhibit 4
Process	Type of cooperation and receipt of §5K1.1	Conspiracy Case Joint Coding Review (F)	Exhibit 5
	Culpability and type of cooperation	U.S. Attorney Case Telephone Interviews (E)	Exhibit 6
	Culpability and benefit or result of cooperation	U.S. Attorney Case Telephone Interviews (E)	Exhibit 7
	Culpability and receipt of §5K1.1	Conspiracy Case Joint Coding Review (F)	Exhibit 8
	Impact of legally irrelevant factors	Statistical Analysis of Commission Data (G)	Exhibit 9
	Prosecutorial discretion	Conspiracy Case Joint Coding Review (F)	In text
Sentencing	Magnitude of departure by type of cooperation	Conspiracy Case Joint Coding Review (F)	Exhibit 10
	Magnitude of departure by sentence length and offense type	Statistical Analysis of Commission Data (G)	Exhibit 11
	Impact of legally irrelevant factors	Statistical Analysis of Commission Data (G)	Exhibit 12

<sup>1</sup>Alphabetic references refer to data sources described in Attachment A.

SOURCE: U.S. Sentencing Commission, 1997.



**Exhibit 2**  
**FORM OF SUBSTANTIAL ASSISTANCE REVIEW POLICIES:**  
**U.S. ATTORNEY OFFICE MAIL POLICY SURVEY<sup>1</sup>**

	<b>Districts<sup>2</sup></b>	
	n	%
<b>Total</b>	89	100.0
Written Policy <sup>3</sup>	71	79.8
Oral Policy	18	20.2

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<sup>1</sup>While there are 94 judicial districts, there are only 93 U.S. attorneys; the districts of Guam and the Northern Mariana Islands are served by a single U.S. attorney. Totals presented in the tables reference the policy occurrences among the 94 districts.

<sup>2</sup>Five districts did not respond to the mail survey: Alaska, Eastern California, New Hampshire, Oregon, and Eastern Wisconsin.

<sup>3</sup>One district was missing information on whether the policy was written; data for this district are contained in the "Policy Written" category.

SOURCE: U.S. Sentencing Commission, U.S. Attorney Office Mail Policy Survey, 1995.

**Exhibit 3**  
**SUBSTANTIAL ASSISTANCE REVIEW POLICY CONSISTENCY<sup>1</sup>**

	<b>Total Districts<sup>2</sup></b>	<b>Method of District Review</b>		<b>Consistency With District Policy</b>					
				<b>Yes</b>		<b>Partial</b>		<b>No</b>	
				n	%	n	%	n	%
<b>District Policy Specifies Review or Approval by:</b>									
U.S. Attorney	65	36	100.0	16	44.4	8	22.2	12	33.3
Assistant U.S. Attorney	65	38	100.0	24	63.2	8	21.1	6	15.8
Supervisory Assistant	65	50	100.0	24	48.0	17	34.0	9	18.0
Review Committee <sup>3</sup>	65	17	100.0	7	41.2	3	17.6	7	41.2

<sup>1</sup>While there are 94 judicial districts, there are only 93 U.S. attorneys; the districts of Guam and the Northern Mariana Islands are served by a single U.S. attorney. Totals presented in the tables reference the policy occurrences among the 94 districts.

<sup>2</sup>Five districts did not respond to the mail survey: Alaska, Eastern California, New Hampshire, Oregon, and Eastern Wisconsin. Of the remaining 89 districts, a total of 65 were represented among the randomly selected §5K1.1 cases for which a telephone interview was conducted with a representative of the U.S. attorney's office.

<sup>3</sup>One district reported that a subgroup of specific, identified staff reviewed §5K1.1 cases on a revolving basis. Although not termed a "review committee," this arrangement appears under this category in the table.

SOURCE: U.S. Sentencing Commission, U.S. Attorney Office Mail Policy Survey and U.S. Attorney Office Case Telephone Interviews, 1995.

**Exhibit 4**  
**SUBSTANTIAL ASSISTANCE CONDUCT CONSIDERED IN MOTION:**  
**U.S. ATTORNEY OFFICE MAIL POLICY SURVEY<sup>1</sup>**

<b>Type of Conduct</b>	<b>Total</b>	<b>Conduct</b>	
	<b>Districts<sup>2</sup></b>	<b>Considered</b>	
	<u>n</u>	<u>n</u>	<u>%</u>
Testimony Under Oath	88	88	100.0
Participation: Investigation of Another	88	87	98.9
Information: Prosecution of Others	88	87	98.9
Information: Criminal Activity of Others	88	81	92.0
Information: Defendant's Own Activity	88	43	48.9

<sup>1</sup>While there are 94 judicial districts, there are only 93 U.S. attorneys; the districts of Guam and the Northern Mariana Islands are served by a single U.S. attorney. Totals presented in the tables reference the policy occurrences among the 94 districts.

<sup>2</sup>Five districts did not respond to the mail survey: Alaska, Eastern California, New Hampshire, Oregon, and Eastern Wisconsin. One additional district reported that consideration of conduct was at the sole discretion of the prosecuting attorney; data from this district are not reported in the table.

SOURCE: U.S. Sentencing Commission, U.S. Attorney Office Mail Policy Survey, 1995.

**Exhibit 5**  
**COMPARISON OF ASSISTANCE PROVIDED BY §5K1.1 STATUS:**  
**DRUG TRAFFICKING DEFENDANTS IN THE**  
**SUBSTANTIAL ASSISTANCE CONSPIRACY CASE JOINT CODING REVIEW**

	<b>Total</b>		<b>§5K1.1 Status</b>			
			<b>No Receipt</b>		<b>Receipt</b>	
	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>
<b>Total Drug Conspiracy Members<sup>1</sup></b>	264	100.0	173	65.5	91	34.5
<b>Members with Type of Assistance Data</b>	158	100.0	97	61.4	61	38.6
<b>Type of Assistance Provided<sup>2</sup></b>						
Undercover <sup>3</sup>	4	100.0	0	0.0	4	100.0
Testimony (Trial or Grand Jury)	7	100.0	1	14.3	6	85.7
Tangible Evidence	3	100.0	1	33.3	2	66.7
Verbal Information/Agreed to Testify	86	100.0	62	72.1	24	27.9
Agreed to Testify Only	16	100.0	11	68.8	5	31.3
Verbal Information Only	42	100.0	22	52.4	20	47.6

<sup>1</sup>A random sample of 64 conspiracies was selected with the criteria that at least one defendant received a substantial assistance departure and at least one defendant was sentenced in fiscal year 1992. Of these 64 conspiracies, 44 were drug trafficking conspiracies and contained a total of 264 defendants. Among the 91 defendants who received a §5K1.1 departure, information on the type of substantial information provided was available for 61 defendants. A total of 173 of these defendants did not receive a substantial assistance departure; case files provided information on assistance provided to prosecutors for a total of 97 of these cases.

<sup>2</sup>Type of assistance is ranked so that an item appearing higher in the list may include an item appearing later in the list. For example, “undercover” may also include “testify” or “verbal information.” However, “tangible evidence” never includes “undercover” or “testify.”

<sup>3</sup>Includes working with government officials by wearing a wire, introducing a government agent, or conducting or monitoring a drug purchase or sale.

SOURCE: U.S. Sentencing Commission, Conspiracy Case Joint Coding Review, 1995.

**Exhibit 6**  
**TYPE OF §5K1.1 ASSISTANCE PROVIDED BY**  
**DEFENDANT’S MOST SERIOUS DRUG TRAFFICKING FUNCTION**  
**IN THE U.S. ATTORNEY OFFICE CASE TELEPHONE INTERVIEWS**

	<b>Drug Trafficking Function</b>							
	<b>Total</b>		<b>Higher-Position<sup>1</sup></b>		<b>Street-Level Dealer</b>		<b>Lower-Position<sup>2</sup></b>	
	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>
<b>Total Drug Defendants<sup>3</sup> with Selected Functions</b>	130	—	59	—	37	—	34	—
<b>Type of Assistance Provided<sup>4</sup></b>								
Undercover	17	13.1	9	15.3	6	16.2	2	5.9
Testimony (Trial or Grand Jury)	29	22.3	14	23.7	9	24.3	6	17.6
Agreed to Testify	32	24.6	15	25.4	8	21.6	9	26.5
Information on New Codefendants	25	19.2	10	16.9	5	13.5	10	29.4
Information on Known Codefendants	78	60.0	36	61.0	21	56.8	21	61.8
Information on Own Criminal Conduct	7	5.4	3	5.1	1	2.7	3	8.8

<sup>1</sup>“Higher-position” roles are defined as drug traffickers operating as organizers, entrepreneurs, growers, manufacturers, importers, or mid-level dealers.

<sup>2</sup>“Lower-position” roles are defined as drug traffickers operating as off-loaders, “go-fers,” couriers, mules, renter/storers, passive enablers, or users.

<sup>3</sup>A random sample of 250 cases receiving a §5K1.1 departure was selected from the Commission’s fiscal year 1994 datafile. Information on the cases was collected through telephone interviews with the U.S. attorney or representative regarding the defendant’s and codefendant’s cooperation, assistance provided, and the benefit received from the assistance.

<sup>4</sup>A defendant may provide multiple types of assistance; sums will not necessarily total the number of defendants.

SOURCE: U.S. Sentencing Commission, United States Attorney Office Case Telephone Interviews, 1995.

**Exhibit 7**  
**BENEFIT OF §5K1.1 ASSISTANCE BY**  
**DEFENDANT'S MOST SERIOUS DRUG TRAFFICKING FUNCTION**  
**IN THE U.S. ATTORNEY OFFICE CASE TELEPHONE INTERVIEWS**

	<b>Drug Trafficking Function</b>							
	<b>Total</b>		<b>Higher-Position<sup>1</sup></b>		<b>Street-Level Dealer</b>		<b>Lower-Position<sup>2</sup></b>	
	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>	<b>n</b>	<b>%</b>
<b>Total Drug Defendants<sup>3</sup> with Selected Functions</b>	130	—	59	—	37	—	34	—
<b>§5K1.1 Benefit/Result Received<sup>4</sup></b>								
Guilty Pleas of Codefendants	58	44.6	25	42.4	17	45.9	16	47.1
Prosecution of New Defendants	31	23.8	14	23.7	10	27.0	7	20.6
Additional Convictions	21	16.2	9	15.3	7	18.9	5	14.7
Additional Arrests	12	9.2	5	8.5	2	5.4	5	14.7
Recovery of Assets	11	8.5	7	11.9	2	5.4	2	5.9
Additional Investigations	10	7.7	5	8.5	2	5.4	3	8.8
Warrants	5	3.8	2	3.4	1	2.7	2	5.9
Cooperation of Known Codefendants	5	3.8	2	3.4	0	0.0	3	8.8
Sentencing Enhancements	5	3.8	2	3.4	1	2.7	2	5.9
Cooperation of New Codefendants	4	3.1	2	3.4	1	2.7	1	2.9
Deportations	3	2.3	0	0.0	1	2.7	2	5.9

<sup>1</sup>“Higher-position” roles are defined as drug traffickers operating as organizers, entrepreneurs, growers, manufacturers, importers, or mid-level dealers.

<sup>2</sup>“Lower-position” roles are defined as drug traffickers operating as off-loaders, “go-fers,” couriers, mules, renters/storers, passive enablers, or users.

<sup>3</sup>A random sample of 250 cases receiving a §5K1.1 departure was selected from the Commission’s fiscal year 1994 datafile. Information on the cases was collected through telephone interviews with the U.S. attorney or representative regarding the defendant’s and codefendant’s cooperation, assistance provided, and the benefit received from the assistance.

<sup>4</sup>A defendant’s cooperation may have resulted in multiple prosecutorial benefits; sums will not necessarily total the number of defendants.

SOURCE: U.S. Sentencing Commission, United States Attorney Office Case Telephone Interviews, 1995.

**Exhibit 8**  
**§5K1.1 STATUS BY DRUG TRAFFICKING FUNCTION:**  
**SUBSTANTIAL ASSISTANCE CONSPIRACY CASE JOINT CODING REVIEW**

	<b>Receipt of §5K1.1</b>					
	<b>Defendant's Most Serious Function</b>			<b>Defendant's Most Common Function</b>		
	<b>Total</b>	<b>n</b>	<b>%</b>	<b>Total</b>	<b>n</b>	<b>%</b>
<b>Drug Conspiracy Members<sup>1</sup></b>	250	90	36.0	250	88	35.2
<b>Function</b>						
High-Level	34	11	32.4	18	4	22.2
Middle-Level	92	33	35.9	71	29	40.8
Street-Level	55	13	23.6	64	14	21.9
Broker	8	5	62.5	14	6	42.9
Low-Level	41	17	41.5	54	17	31.5
Passive Participant	20	11	55.0	29	18	62.1

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<sup>1</sup>A random sample of 64 conspiracies was selected in which at least one defendant received a substantial assistance departure and at least one defendant was sentenced in fiscal year 1992. Of these 64 conspiracies, 44 were drug trafficking conspiracies. These 44 drug trafficking conspiracies involved 264 defendants, 14 of whom were excluded due to missing function (9) or missing departure (5) information.

SOURCE: U.S. Sentencing Commission, Conspiracy Case Joint Coding Review, 1995.

**Exhibit 9**  
**LEGALLY IRRELEVANT FACTORS:**  
**RELATIVE NUMBER OF DEFENDANTS RECEIVING A**  
**§5K1.1 DEPARTURE<sup>1</sup>**

<b>Defendant Characteristics</b>	<b>Expected Number Out of 100 (a)</b>	<b>Expected Number Out of 100 (b)</b>	<b>Difference (b) - (a)</b>
<b>Gender</b>			
(a) Male vs. (b) Female	16	18	2**
<b>Race</b>			
(a) Black vs. (b) Non-Minority	16	20	4**
<b>Ethnicity</b>			
(a) Hispanic vs. (b) Non-Minority	13	20	7**
<b>Citizenship</b>			
(a) Non-U.S. vs. (b) U.S.	14	18	4**
<b>Education</b>			
(a) Non-H.S. vs. (b) High School	15	18	3**
<b>Age</b>			
(a) Age 45 vs. (b) Age 18	16	18	2*

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<sup>1</sup>Table is derived from a PROBIT analysis for the probability of receiving a substantial assistance departure when all variables in the model are held constant except for the variable of interest. Values are estimated using the mean values of the explanatory variables. Values followed by one asterisk (\*) are significant at the .05 level; values followed by two asterisks (\*\*) are significant at the .01 level.

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



**Exhibit 10**  
**COMPARISON OF ASSISTANCE PROVIDED BY §5K1.1 STATUS:**  
**DRUG TRAFFICKING DEFENDANTS IN THE**  
**SUBSTANTIAL ASSISTANCE CONSPIRACY CASE JOINT CODING REVIEW**

	<b>Received §5K1.1</b>			
	<b>Frequency</b>		<b>Sentence Reduction</b>	
	<b>n</b>	<b>%</b>	<b>% Less Than 2 Years</b>	<b>% More Than 4 Years</b>
<b>Total Drug Conspiracy Members<sup>1</sup></b>	91	—		
<b>Members with Type of Assistance Data</b>	61	—		
<b>Type of Assistance Provided<sup>2</sup></b>				
Performed Undercover <sup>3</sup>	4	100.0	25.0	50.0
Testified (Trial or Grand Jury)	6	100.0	16.6	83.3
Provided Tangible Evidence	2	100.0	50.0	50.0
Verbal Information/Agreed to Testify	24	100.0	37.5	50.0
Agreed to Testify Only	5	100.0	40.0	20.0
Verbal Information Only	20	100.0	20.0	45.0

<sup>1</sup>A random sample of 64 conspiracies was selected with the criteria that at least one defendant received a substantial assistance departure and at least one defendant was sentenced in fiscal year 1992. Of these 64 conspiracies, 44 were drug trafficking conspiracies and contained a total of 264 defendants. Among the 91 defendants who received a §5K1.1 departure, information on the type of substantial information provided was available in the case folders for 61 defendants. A total of 173 of these defendants did not receive a substantial assistance departure; case files provided information on assistance provided to prosecutors for a total of 97 of these cases.

<sup>2</sup>Type of assistance is ranked so that an item appearing higher on the list may include an item appearing later in the list. For example, “undercover” may also include “testify” or “verbal information.” However, “tangible evidence” never includes “undercover” or “testify.”

<sup>3</sup>Includes working with government officials by wearing a wire, introducing a government agent, or conducting or monitoring a drug purchase or sale.

SOURCE: U.S. Sentencing Commission, Conspiracy Case Joint Coding Review, 1995.

**Exhibit 11**  
**MONTHS OF §5K1.1 SENTENCE DECREASE FROM GUIDELINE RANGE**  
**BY SELECTED PRIMARY OFFENSE CATEGORIES**  
**(October 1, 1993 through September 30, 1994)**

	§5K1.1 Count	Mean §5K1.1 Sentence in Months <sup>1</sup>	MONTHS OF SENTENCE DECREASE DUE TO §5K1.1. DEPARTURE			
			Mean Decrease in Months	Mean Sentence Decrease in Months		
				(Imprisonment-Only Sentences <sup>2</sup> )		
				Sentence < 60 months	Sentence 60-120 months	Sentence >120 months
<b>TOTAL (ALL OFFENSES)</b>	7,012	41.2	50.8			
<b>SELECTED OFFENSE TYPES<sup>3</sup></b>						
Robbery	227	70.2	47.1	20.1	33.1	86.6
Drug Trafficking	4,791	51.6	63.9	13.7	31.0	97.9
Firearms	254	29.6	31.2	17.4	36.7	97.4
Larceny	141	5.3	9.6	11.7	27.3	—
Fraud	641	5.2	11.5	13.8	29.3	—
Money Laundering	236	17.7	28.3	23.5	48.0	99.3
Racketeering/Extortion	116	40.5	55.8	21.8	39.7	142.3

<sup>1</sup>Sentences of life and sentences of probation (*i.e.*, sentence lengths of zero months) were included in the sentence average computations.

<sup>2</sup>Cases with predeparture guideline ranges in Zone D of the sentencing table.

<sup>3</sup>Of the 39,971 cases sentenced in fiscal year 1994, a total of 7,012 cases received a substantial assistance departure. Among the seven selected offense types in this table, 6,853 cases received a substantial assistance departure. Of these, 302 cases were missing complete guideline application information, and an additional 68 were excluded due to several logical criteria other than missing information (*e.g.*, the case was marked by the court as a departure, but the sentence is within the guideline range or vice-versa). Because of computational limitations, 72 cases with a guideline minimum of life imprisonment were excluded from “Mean Decrease in Months” columns in the table.

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

**Exhibit 12**  
**LEGALLY IRRELEVANT FACTORS:**  
**PERCENTAGE BY WHICH SENTENCE REDUCED**  
**FOR DEFENDANTS RECEIVING A §5K1.1 DEPARTURE<sup>1</sup>**

<b>Defendant Characteristics</b>	<b>Percentage Sentence Reduction (a)</b>	<b>Percentage Sentence Reduction (b)</b>	<b>Difference (b) - (a)</b>
<b>Gender</b>			
(a) Male vs. (b) Female	57	66	9**
<b>Race</b>			
(a) Black vs. (b) Non-Minority	58	60	2**
<b>Ethnicity</b>			
(a) Hispanic vs. (b) Non-Minority	55	60	5**
<b>Citizenship</b>			
(a) Non-U.S. vs. (b) U.S.	54	59	5**
<b>Education</b>			
(a) Non-H.S. vs. (b) High School	57	59	2**
<b>Age</b>			
(a) Age 45 vs. (b) Age 18	60	56	-4**

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<sup>1</sup>Table is derived from a multiple regression analysis for the percentage by which a §5K1.1 sentence is reduced below the otherwise applicable guideline minimum. Estimation was performed by holding all variables in the model constant except for the variable of interest. Values followed by two asterisks (\*\*) are significant at the .01 level.

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

**Attachment A**  
**METHODOLOGIES EMPLOYED BY THE U.S. SENTENCING COMMISSION**  
**SUBSTANTIAL ASSISTANCE STAFF WORKING GROUP**

A. Literature Review	Review and summary of pertinent legal and criminological literature dealing with cooperation in general, and substantial assistance in particular.
B. Case Law Review	Analysis of relevant appellate court cases dealing with the most salient legal questions, challenges, and circuit conflicts pertaining to substantial assistance.
C. United States Attorney Office Mail Policy Survey	Mail survey addressed to all 94 United States attorneys, examining in detail their substantial assistance policies and practices. The survey instrument 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.
D. District Site Visits	On-site interviews in eight federal judicial districts representing 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, 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.
E. United States Attorney Office Case Telephone Interviews	Telephone interviews with respective United States and assistant United States attorneys concerning a random sample of defendants receiving substantial assistance departures. Details on the type and degree of defendant cooperation were collected.
F. Conspiracy Case Joint Coding Review	Extensive case review and analysis on a random sample of conspiracies in which at least one codefendant received a substantial assistance departure. 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.
G. Aggregate Statistical Analysis of Commission Data	All guideline cases sentenced in fiscal year 1994 were studied using the Commission's own extensive sentencing database. These data provided a comparative profile of defendants receiving and not receiving substantial assistance departures. Multivariate statistical analyses identified 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.

SOURCE: U.S. Sentencing Commission.