To Cooperate or Not: The Myths and Illusions of USSG §5K1

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Obviously, a defendant faced with the possibility of a substantial downward departure if they opt to "cooperate" faces a seemingly complex dilemma. On one hand they will be branded a "rat" or a "snitch" and possibility face the adverse consequences, real and imagined, in the event that a prison sentence results nonetheless. On the other hand, it is often likely (if not a guarantee) that others involved in the same crime or indictment will be discussing the possibility of cooperation resulting in "a race" to be the first. Failure to act in time may result in the inability to cooperate at all and avail oneself of the substantial benefits of a downward departure. This dilemma is present and most poignant in drug related cases as most if not all drug crimes usually involve more than one person and often involve many who are indicted as part and parcel of a drug conspiracy. Complicating matters is the fact that an individual with a "minor" part in the conspiracy is criminally liable for the total amount of drugs involved in the entire conspiracy. As a result, an individual may find themselves faced with the potential of scores if not hundreds of months in prison for what they thought was purchasing or distributing a relatively small amount of drugs.

Often, it is heard that a criminal defendant in such a matter is facing 20 years or more for "selling a gram or two." Needless to say, and not coincidentally, these type of defendants are "ripe for the picking" and often immediately begin to cooperate and tell the law enforcement personnel and the prosecution everything and anything they want to know in the hopes that the police will just let them go home. This will not happen as

there are no free passes in the criminal justice system and the federal, state and local police have procedure, policy and guidelines to follow in permitting a defendant to cooperate. Moreover, there are many pitfalls in cooperation, all of which need to be discussed with skilled counsel and negotiated with the prosecutors' office. Before we discuss more in this regard, let us make several prefatory comments.

First, *as a general rule*, we make no moral or ethical judgment regarding those who seek to avail themselves of the benefits of cooperation. There is much negativity associated with "rats and snitches" in prison and in society in general and often they are in fact abused in prison once it becomes known that they cooperated. Interestingly, there a few, if any, rats in prison-----or that is what "they" would like you to believe. According to the vocal and uniform chorus of the general population in just about any prison in America, they were all 'stand up" guys who refused to "rat" and took the hit for the others; they hate rats and never under any circumstance would they drop a dime on anyone. Their superior moral fiber prevents them under any circumstances from cooperation with the cops. They are tough, strong, "stand up" family men that should be placed on a pedestal for implementing their noble purpose of keeping their mouth shut and taking the bid "like a man." Well, if you believe this then your gullibility is only be surpassed by your naiveté.

Approximately 35% of all federal criminal defendants receive a downward departure for providing substantial assistance and over 26% of those involved in drug trafficking offenses receive a downward departure for providing substantial assistance. Many more try to cut a deal, but the information they offered was either useless or already known to the government. Considering the fact that the average departure for

substantial assistance in drug cases is 36 months from the applicable guideline range it is safe to assume that most drug trafficking defendants who received a §5K1 departure still ended up with a substantial prison sentence. In other words, they are in prison and these individuals are usually the most vociferous in extolling the self serving virtues of "taking it like a man" and not being a rat. Simply put, there are many in prison that are in fact "rats and snitches" themselves and the negative moniker associated with cooperation should not in and of itself, compel one not explore the possibility. You are not alone and will not be alone.

Second, each person must make an individualized personal, moral and legal decision based on the circumstances of their case, their personal, family and employment situation and the legal counsel provided. Since we cannot conceive of all the reasons that would compel one to cooperate, we can not and will not draw an ethical judgment on their decision to cooperate or not to cooperate. We will suggest however, that each individual should truly and honestly examine their own conduct, the strength of the governments' case, the sentencing ranges, the possibility of other departures, the co-defendants' known and assumed positions, their family situation, their financial situation and legal advice and then and only then make an informed decision. Unfortunately the "window of opportunity" for truly 'substantial" cooperation is often closed quickly and these decisions must be made rather quickly.

Let us dispel a few myths about cooperation.

First, the police or federal law enforcement personnel can not give you immunity regardless of what they say. Only the prosecutors office can elect not to prosecute or can provide immunity. Often times, police and federal agents tell an arrested defendant that

they will be given immunity or sent home immediately if the cooperate, wear a wire and/or give up other criminals. This will not happen and should not be relied upon. ONLY the AUSA (after following procedure) in the federal system and the District Attorney's in the state systems can provide that guarantee against non-prosecution. It is imperative that you immediately obtain the advice of skilled and competent legal counsel before jumping in and agreeing to provide substantial assistance.

Second, many people believe that providing substantial assistance will result in no prison time at all. In fact, law enforcement personnel do everything possible to lead you to believe that you will get off 'scott free" if you give up the ghost. Again, this is a myth and is not borne out by the statistics. Thus, even after receiving a downward departure for substantial assistance, it is likely that a term of incarceration will occur anyway.

Third, some people are under the misconception that if they cooperate and are ultimately sentenced to a term of imprisonment that they are incarcerated in a in a special facility with most of the privileges of a free person---including conjugal visits. Some also believe that if they cooperate that they will be treated better by the Bureau of Prisons staff and will be kept segregated from the general population even of they are designated to a "regular prison." Both are absolutely false. There is no "special facility" for cooperators that would allow an inmate to enjoy most of the benefits of freedom. There has been a rumor that we have been unable to confirm that the Bureau of Prisons operates a facility known as the "cheese factory" that has all the comforts and freedoms of home and is THE place to be imprisoned. Again, we suggest that no such facility exists. There are, however, stand alone and satellite prison camps (FPCs) attached to higher security

facilities which are certainly not as dangerous and threatening but a far cry from the historic and largely mythical "Club Fed."

As to being segregated from specific populations, the Bureau of Prisons has two programs: WITSEC and Central Inmate Monitoring System or CIMS monitoring. The WITSEC program like the Federal Witness Protection Program is voluntarily and CIM is programmatic not requiring acceptance or volition by the inmate. To quote from the BOP Policy Statement:

> Witness Security Cases. Individuals who agree to cooperate with law enforcement, judicial, or correctional authorities, frequently place their lives or safety in jeopardy by being a witness or intended witness against persons or groups involved in illegal activities. Accordingly, procedures have been developed to help ensure the safety of these individuals. There are two types of Witness Security cases: Department of Justice (authorized by the Attorney General under Title V of Public Law 91-452, 84 Stat. 933); and Bureau of Prisons Witness Security cases (authorized by the Assistant Director, Correctional Programs Division).
>
> PS 5180.04

CIMS is a program designed to ensure that a cooperating witness and the defendants against whom he testified against never end up at the same institution, unit, block or module. Usually CIMS monitoring is done behind the scenes and an inmate will rarely have any active involvement in the program as in this regard it is merely designed to ensure the safety of an inmate by keeping an inmate and other *specific and identifiable* inmates segregated by facility and or unit.

WITSEC involves long stays in Protective Custody meaning the SHU or Segregated Housing Unit, also known as the Hole. Being in PC is not a way to spend your time if it is at all possible. For the most part, you spend your time in the SHU and are treated as a high security risk with a disciplinary problem. You are locked down 23 hours a day and have very limited contact with anyone. In other words, regardless of the reason why you are in the SHU the corrections officers pretty much treat you all the same: As if you are a degenerate, violent criminal with a disciplinary problem. PC is no way to bid and in my experience "SHU time" was the toughest part of my sentence.

With that said, let's discuss Section 5K1 of the United States Sentencing Guidelines. Section 5K1 of the USSG provides:

> **SUBSTANTIAL ASSISTANCE TO AUTHORITIES**
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> **§5K1.1. <u>Substantial Assistance to Authorities</u> (Policy Statement)**
>
> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
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> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
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> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Commentary

Application Notes:

1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

2. The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.

3. Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Background: 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 upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

Thus, what is apparent but rarely discussed is the fact that once the court decides to grant the governments' motion, the court is not limited to the amount of the departure that it can give. We are aware of many lawyers that tell there clients that they will receive

a 2 or 3 level reduction for substantial assistance. Although this may be true, it is impossible to say with any reasonable degree of certitude. Regardless of the amount of time called for in the Sentencing Guidelines for a defendants' particular crime, criminal history, adjustments etc, the court is free to grant as much or as a little a departure as it chooses. By law, the court must consider the factors enumerated in USSG §5K1 but once it does so it is free to grant a departure significantly below the purported mandatory minimums or required under the applicable guideline level. "There is no lower limit placed on district court's authority, by statute or by Sentencing Guidelines, in departing downward from Guidelines on Government's motion to impose sentence reflecting defendant's substantial assistance in investigation or prosecution of others; limit of discretion is question of whether or not sentence imposed was reasonable." *U.S. v. Wilson,* 896 F.2d 856 (4th Cir 1990). This is not to say that the Court will in fact grant a departure so substantial that it will not result in a term of incarceration, but it is important to note that the court is free to grant as much or as little of a departure as the judge sees fit based upon a consideration of the factors enumerated in Section 5.k.1 The decision whether to grant government's motion for departure sentence, and extent of departure, are within sentencing court's sound discretion. *U.S. v. Wills*, 35 F.3d 1192 (7th Cir. 1994). Extent of downward departure granted by district court, on government's motion for defendant's substantial assistance lies wholly within district court's discretion. *U.S. v. Doe,* 996 F.2d 606 (2nd Cir 1993). Government's motion for downward departure under Sentencing Guidelines, based on substantial assistance of defendant, cannot limit extent of court's exercise of discretion when, pursuant to statute, court determines extent of departure that should be attributed to defendant's cooperation. *U.S. v. Dudek*, 867

F.Supp. 766, (N.D.Ill.1994). Once the government makes motion for downward departure based on substantial assistance, determination of precise measure of departure is matter within court's discretion. *U.S. v. Calle*, 796 F.Supp. 853.(D MD 1992). It is imperative to keep in mind that most judges have either a standard policy or practice where it would be possible to get a more precise idea as to how much of a departure a particular judge "normally' grants once a §5K1 motion is granted. Please note however, that the strength of the governments' motion, the nature of the cooperation and the court's evaluation of the factors enumerated in Section 5K1 require an individualized and fact specific analysis not susceptible to accurate prediction. It is not likely that anyone would be able to definitively determine for a defendant in advance exactly how much of a departure will be granted.

The second most common cooepration myth is that the governments "required" to file the requisite §5K1 motion once a defendant cooperates.. Simply put, the government has absolutely no obligation to file a motion pursuant to Section 5K1 regardless of the type of cooperation provided. A corollary misconception is that a defendant or his lawyer can inform the court of all the cooperation you performed and the Court can then grant a downward departure based on Section 5K1 of the USSG. The plain language of §5K1 makes it apparent that the government and the government ONLY can file such a motion. The language of section 5K1 is clear: "Upon motion of the government, stating that the defendant has provided substantial assistance or cooperation in the investigation or prosecution of another person…." Thus, the government is the only entity involved that can file the motion. Further, the assistance and cooperation must involve the conduct of another and not the defendant's role in the

charged crime and the court can deny the motion outright as it is purely discretionary. "The federal district courts cannot depart downward on the basis that defendant has provided substantial assistance without motion from government." *U.S. v. Easter,* 1992, 981 F.2d 1549(10th Cir 1992), certiorari denied 113 S.Ct. 2448, 508 U.S. 953, 124 L.Ed.2d 665. "No downward departure was available for substantial assistance, under Sentencing Guidelines, where government had not made motion for departure." *U.S. v. Edgar*, 971 F.2d 89(8th Cir 1992). In fact, in the absence of a government motion for downward departure on the basis of substantial assistance provided by a defendant, the sentencing judge retains discretion to consider defendant's cooperation with the government *only* in selecting particular sentence within applicable guideline range. *U.S. v. Gonzalez,* 970 F.2d 1095 (2nd Cir 1992), A defendant's substantial assistance to the government by testifying in codefendant's trial, exposing of himself to "meaningful degree of danger" by that testimony, and his provision of a benefit to the government and society by offering testimony that assisted in codefendant's conviction, were grounds for departure adequately comprehended by provision authorizing downward departure for substantial assistance, and thus could not be used for downward departure absent a motion for downward departure by the government. *U.S. v. Chotas*, 968 F.2d 1193 (11th Cir. 1992). District court lacks power to depart downward because of a defendant's substantial assistance in absence of motion by government. *U.S. v. Higgins*, 967 F.2d 841 (3rd Cir. 1992), *rehearing denied*. Sentencing court could not depart from Sentencing Guidelines on basis of substantial assistance of defendant when government did not so request. *U.S. v. Amparo,* 961 F.2d 288 (1st Cir. 1992), *certiorari denied* 113 S.Ct. 224, 506 U.S. 878, 121 L.Ed.2d 161 The sentencing court has no power to grant defendant

downward departure from sentencing guideline range based on substantial assistance unless the Government moves court to depart. *U.S. v. Willis*, 956 F.2d 248. (11th Cir, 1992)

Thus, it is imperative that the lawyer define and obtain a specific agreement outlining exactly what steps are required by the defendant in order to induce the government to file the requisite motion BEFORE cooperation begins.

Even if these hurdles are overcome, there is no requirement that the court in fact grant such a motion. By definition, a motion is a request to the court to permit or prohibit something. The government is *asking and requesting* the court on the defendants behalf to grant a departure based on the conduct outlined in the governments §5K1 motion. The court does not have to grant the motion---and routinely doesn't. Many Courts have held that the federal district court did not abuse its discretion in deciding not to grant downward departure from sentencing guidelines, despite government's motion premised on defendant's substantial assistance and even though district court expressed its concern over defendant's "very serious psychological problems"; district court observed that it was "not at all convinced that the help that [defendant] gave would justify a downward departure." *U.S. v. Organek,* 65 F.3d 60 (6th Cir. 1995). The Sentencing Guidelines do not require a downward adjustment for cooperation, but cooperation may be considered by the court, in its discretion, as a mitigating sentencing factor. *U.S. v. Easterling*, 921 F.2d 1073 (10th Cir. 1990), *certiorari denied* 111 S.Ct. 2066, 500 U.S. 937, 114 L.Ed.2d 470. "It is within discretion of district court whether to sentence below Sentencing Guideline range in response to motion or recommendation of Government for downward

departure." *U.S. v. Damer*, 910 F.2d 1239, (5th Cir. 1990) *certiorari denied* 111 S.Ct. 535, 498 U.S. 991, 112 L.Ed.2d 545. In short, Sentencing Guidelines which allow reduction in sentence or downward departure for defendant who provides substantial assistance to law enforcement vest courts with substantial discretion regarding whether, and in what circumstances, to grant motion. *U.S. v. Doe*, 870 F.Supp. 702(ED Va 1994)

Once a defendant has decided to cooperate and provide substantial assistance, their lawyer will make what is known as a proffer. Simplistically, a proffer is a tender of intentionally vague information by the defendant's lawyer outlined the nature and type of cooperation that the client is willing or able to provide. In other words, the information and assistance by the defendant must be something that the government is interested in pursuing and often times the information in the proffer is of no value to the government. The information offered may be something that the government is already aware or already provided by another cooperating witness; it may be old or too vague to be of prosecutorial significance. If the proffer is accepted there will be a "debriefing" where the defendant provides more detail and if accepted by the government, then the agreement will be reduced to a cooperation agreement and/or plea agreement. In either event, the agreement, at a minimum will provide for the following:

1. That the Defendant be completely truthful in all aspects of his cooperation including but not limited to criminal history.
2. That the government will reserve its right in its sole and exclusive discretion as to whether it will file a §5K1 motion.

3. The defendant agrees that he cannot withdraw his plea in the event the government fails to file a §5K1 motion or if one is made and it is denied by the court.
4. If the defendant breaches the agreement, he will be prosecuted for the initial charge as well as for the basis for the breach, i.e. lying to the government.

Quite often---too often---- a defendant will cooperate and the then find out the government is not willing to file the requisite §5K1 motion. More often than not, the reason for such a refusal by the government is the fact that the defendant has not been "completely' truthful. Unfortunately, many defendants try to hide their criminal past (or think they can outsmart the government) and are not at all truthful when asked specific questions. This is the surest way to ensure that the government refuses to file a Section 5K1 motion and the defendant ends up with a substantially longer sentence than originally anticipated. Once an individual decides to cooperate, they must make a decision to cooperate and come completely clean. Once during plea negotiations and with my permission, an AUSA explained to my client as follows:

> "We believe that there is a line between right and wrong and illegal versus legal conduct. We believe that the line has been crossed. We also believe that the fact that you are here and express a willingness to cooperate tells us that you want to cross that line from the illegal side to the legal side. We will help you do so. You must recognize that you can no longer decide to look at that line, 'sometimes' be on our

> side of the line and sometimes be on the other side of the line. You are on the right side of the line all the time, 24/7, 365 days a year or we will have nothing to do with you. We will need to know every skeleton in your closet, everything you did wrong and with whom you did it with. You will not have the ability to tell some, but not all. You will not have the ability to tell us half-truths, sometimes truths, or even the truths you *think* we want to hear. If you are willing to abide by this---and all of this--- it is possible to avoid a very lengthy prison sentence. If not, we can go to trial and let a jury decide if you go to prison at all."

It is important that people understand that the case law is littered with situations were the court upheld the government's refusal to file a §5.k.1 motion because the defendant was not truthful in all aspects of his cooperation- even thought the cooperation was substantial. The prisons are equally filled with people that although they cooperated and may indeed have provided substantial assistance to the government never received the benefit of their bargain as they failed to be completely and wholly truthful.

As can be seen, agreeing to cooperate and provide substantial assistance is not a panacea and will not necessarily result in the desired outcome. First, the information you provide must be timely, accurate and result in something positive for the government, usually an arrest or conviction. Second, you must be absolutely truthful in ALL regards. Third, the government must file the requisite motion. Fourth, the court must grant that

motion. Fifth, the court must then decide that your cooperation should result in a substantial downward departure.