

Sentencing Chart: Pleading Guilty and/or Providing Information

| | Acceptance of Responsibility (USSG §3E1.1) | Safety Valve (18 U.S.C. § 3553(f), USSG §5C1.2) | Substantial Assistance (18 U.S.C. § 3553(e), USSG §5K1.1, p.s., FED. R. CRIM. P. 35(b)) |
|---|--|--|--|
| Is this benefit available in all types of cases? | Yes | No—drug cases only | Yes |
| How much of a reduction can I get? | 2 or 3 offense levels | 2 offense levels, with a minimum offense level of 17 in statutory minimum cases ¹ | No fixed limit ² |
| Will this benefit allow me to be sentenced below a statutory minimum? | No | Yes | Yes, if the government specifically requests ³ |
| Do I have to plead guilty to benefit? | Usually for 2 levels, ⁴ yes for 3 levels ⁵ | No | No ⁶ |
| Do I have to admit more than the charged offense(s)? | No ⁷ | Yes ⁸ | Usually ⁹ |
| Do I have to provide information about others? | No | Sometimes ¹⁰ | Yes |
| When do I have to provide information? | “Timely” ¹¹ | Not later than the time of the sentencing hearing ¹² | Up to one year after sentencing, ¹³ and sometimes even later ¹⁴ |
| To whom do I have to provide the information? | The court (and probation) | The government (not probation) ¹⁵ | The government |
| Can I get sentencing protection for the information I provide? | No | No (absent a cooperation agreement) ¹⁶ | Yes, with limitations ¹⁷ |
| Does the Government have to file a motion for me to get this benefit? | Yes, for a 3-level reduction ¹⁸ | No | Yes ¹⁹ |
| Does it matter if I possessed a firearm? | No | Yes ²⁰ | No |
| Does it matter if I obstructed justice? | Yes ²¹ | No | No |
| Does it matter if I had an aggravated role? | No | Yes ²² | No |
| Is eligibility affected by my criminal history score? | No | Yes ²³ | No |
| Does my information have to help the Government? | Yes, for a 3-level reduction ²⁴ | No | Yes |
| Can the Court consider a similar reduction under <i>Booker</i> and § 3553(a)? | Yes ²⁵ | Yes ²⁶ | Yes ²⁷ |

1. See USSG §5C1.2(b), §2D1.1(b)(11).
2. See USSG §5K1.1, p.s. The court is required to give substantial weight to the reduction recommended by the government, but it is not bound by the government's recommendation. *Id.*, comment. (n.3). In determining the extent of the reduction, the court can consider only factors related to the defendant's substantial assistance. *United States v. Desselle*, 450 F.3d 179, 182 (5th Cir. 2006); but see *United States v. Alvarez*, 51 F.3d 36, 39–40 (5th Cir. 1995) (affirming consideration of non-cooperation factor in determining extent of reduction).

In addition to a sentencing reduction, substantial assistance can be a basis for declining, or agreeing to dismiss, charges against the defendant. See U.S. ATTYS' MANUAL, § 9-27.230(B)(6), § 9-27.420(B)(1), § 9-27.430(B), § 9-27.600(B)(1)(b).

3. *Melendez v. United States*, 518 U.S. 120 (1996).
4. USSG §3E1.1, comment. (n.2).
5. USSG § 3E1.1(b).
6. See §5K1.1, p.s., comment. (n.2).
7. USSG §3E1.1, comment. (n.1(A)). But falsely denying or frivolously contesting relevant conduct can lead to denial of acceptance. *Id.*
8. Defendant must truthfully provide the government with all information and evidence he has concerning the offense and offenses that were part of the same course of conduct or common scheme or plan. USSG §5C1.2(a)(5); cf. USSG §1B1.3(a)(2) (relevant conduct).
9. See USSG §5K1.1(a)(2), p.s. (court must evaluate "completeness" of information provided by defendant).
10. See USSG §5C1.2(a)(5) (defendant must provide "all information and evidence"); 18 U.S.C. § 3553(f)(5) (same).
11. See USSG §3E1.1, comment. (n.1(H)) (timeliness to be considered in determining whether defendant has accepted responsibility); USSG §3E1.1(b) & comment. (n.6) (to be eligible for third-level reduction, defendant "must have notified authorities of his intention to plead guilty at a sufficiently early point in the process so that the government may avoid preparing for trial, and the court may schedule its calendar efficiently").
12. USSG §5C1.2(a)(5); 18 U.S.C. § 3553(f)(5).
13. See FED. R. CRIM. P. 35(b)(1).
14. See FED. R. CRIM. P. 35(b)(2) (motion for reduction of sentence may be made later than one year after sentencing, if information, or its usefulness, becomes known after a year has passed).
15. USSG §5C1.2(a)(5); 18 U.S.C. § 3553(f)(5). See *United States v. Rodriguez*, 60 F.3d 193 (5th Cir. 1995) (statement to probation officer does not meet requirement

that all information be "provided to the Government").

16. USSG §5C1.2, comment. (n.7).
17. See USSG §1B1.8(a) (government can agree that information provided during cooperation not be used to determine guideline range). The limitation does not apply to information (1) known to the government before a cooperation agreement was entered, (2) concerning criminal history, (3) used for perjury or false statement prosecution, or (4) in the case of a breach of the agreement. The information should not be used for purposes of setting the guideline range or for departing upward, but may be used in determining the extent of a downward departure under policy statement §5K1.1. USSG §1B1.8(b)(5) & comment. (n.1). Information provided to the government and repeated to the probation office is covered, *id.*, comment. (n.5), but information provided to agents without an agreement in place is not, *United States v. Ordonez*, 334 Fed. Appx. 619, 622–23 (5th Cir. 2009).
18. USSG §3E1.1(b).
19. USSG §5K1.1, p.s.; 18 U.S.C. § 3553(e); *Wade v. United States*, 504 U.S. 181, 185 (1992).
20. USSG §5C1.2(a)(2); 18 U.S.C. § 3553(f)(2).
21. USSG §3E1.1, comment. (n.4) (barring acceptance reduction when obstruction adjustment applies, except in "extraordinary cases").
22. USSG §5C1.2(a)(4); 18 U.S.C. § 3553(f)(4).
23. See USSG §5C1.2(a)(1) (defendant cannot have more than one criminal history point); 18 U.S.C. § 3553(f)(1) (same). See *United States v. Jasso*, 634 F.3d 305 (5th Cir. 2011) (court cannot depart to one criminal history point to make safety-valve applicable).
24. See USSG §3E1.1 (defendant must assist authorities in the investigation or prosecution of his own misconduct by making a timely plea, thereby permitting the government to avoid preparing for trial and to allocate resources efficiently).
25. Cf. *United States v. Newson*, 515 F.3d 374, 378 (5th Cir. 2008) (affirming decision not to vary outside the guideline range when no motion filed for third level of acceptance; "[t]he judge recognized that he could impose an outside-the-guidelines sentence").
26. Cf. *United States v. Sandoval-Sianuqui*, 632 F.3d 438, 444 (8th Cir. 2011) (district court considered downward variance based on disparity with codefendants who received safety-valve adjustment).
27. See *United States v. Blue*, 557 F.3d 682, 686 (6th Cir. 2009) ("[P]ost-Booker, the government's failure to file a Section 5K1.1 departure [motion] does not necessarily preclude a sentencing court from taking into account substantial assistance when considering the appropriate sentence in light of the Section 3553(a) factors."); cf. *United States v. Jackson*, 296 Fed. Appx. 408, 409 (5th Cir. 2008) (district court considered defendant's cooperation with the Government, despite the absence of §5K1.1 motion).