



The Use of Federal Rule of Criminal Procedure 35(b)

UNITED STATES SENTENCING COMMISSION



UNITED STATES SENTENCING COMMISSION

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January 2016

INTRODUCTION

Offenders who cooperate with the government in its efforts to prosecute others can receive credit for their “substantial assistance” in at least two ways. The most common and most analyzed method is through a substantial assistance motion that is filed pursuant to §5K1.1 of the Sentencing Guidelines at the time the offender is sentenced. If granted, the court may impose a sentence below the advisory guideline range and, if accompanied by a motion pursuant to 18 U.S.C. § 3553(e), below an otherwise applicable mandatory minimum penalty.¹

Offenders may also receive credit for substantial assistance *after* they have been sentenced. Federal Rule of Criminal Procedure 35(b) permits a court, upon the government’s motion, to impose a new, reduced sentence that takes into account post-sentencing substantial assistance, and that new sentence may go below the recommended guideline range and any statutory mandatory minimum penalty. These Rule 35(b) reductions are, in most respects, identical to §5K1.1 departures, as both require substantial assistance and both require a government motion. The only significant difference between the two types of motions is timing: Rule 35(b) motions are made *after* the original sentencing and so require a resentencing if granted, and §5K1.1 motions are made *before* sentencing and are granted at the time of the original sentencing.

Notwithstanding their substantive similarity, these two types of motions are used quite differently in practice. This report comprehensively analyzes for the first time² information on Rule 35(b) reductions obtained by the Commission from fiscal years 2009 through 2014 and, when possible, compares these reductions to §5K1.1 departures over the same time period. Among other

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conclusions, this analysis confirms that fewer offenders receive Rule 35(b) sentencing reductions than §5K1.1 departures and that the number of Rule 35(b) sentencing reductions has generally decreased. That being said, there are a small number of districts where Rule 35(b) sentencing reductions are used as often or more often than §5K1.1 substantial assistance departures. Regardless of the jurisdiction and the frequency with which such motions are used, Rule 35(b) motions generally result in a smaller reduction in the sentence imposed—whether in terms of months or percentage—than do §5K1.1 departures.

THE LEGAL FRAMEWORK

Rule 35(b) has been included in the Rules of Criminal Procedure since they were made effective in 1946. The substantial revisions to the Rule, especially in the last thirty years, have reflected broad changes in federal sentencing policy.

Before the enactment of the Sentencing Reform Act of 1984, Rule 35(b) contained a strict time limitation but included no substantive restrictions on the bases by which a court could reduce or modify a sentence.³ Indeed, the concept of “substantial assistance” was not mentioned in the Rule.⁴ As one court explained, a motion pursuant to Rule 35(b) was “essentially a ‘plea for leniency’ which offer[ed] the sentencing court an opportunity to temper its original sentence when presented with considerations appealing to its compassion.”⁵

The Sentencing Reform Act modified the Rule’s language so that courts could only “lower a sentence to reflect a defendant’s subsequent, substantial assistance in the investigation or prosecution of another person . . . in accordance with the guidelines and policy statements issued by the United States Sentencing Commission pursuant to section 994 to title 28, United States Code.”⁶ Such reductions could be granted only upon the government’s motion.⁷ And, just as the Rule’s language had changed, courts acknowledged that its purpose had similarly changed—instead of presenting a general opportunity for leniency, Rule 35(b) conferred an “entitlement on the government” that allowed it to obtain “valuable assistance” and then ask a sentencing court to reduce the defendant’s sentence as “compensation” for that assistance.⁸

Rather than issuing specific guidelines or policy statements directed towards post-sentencing substantial assistance, the original Commission promulgated a guideline provision and policy statement addressing substantial assistance more generally.⁹ For the most part, courts treated this guidance as applicable to sentencings and subsequent Rule 35(b) resentencings alike in recognition of the fact that the primary distinction between a §5K1.1 and Rule 35(b) motion is temporal.¹⁰

Today, Rule 35(b)(1) provides that, “[u]pon the government’s motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.”¹¹ Pursuant to Rule 35(b)(2), motions may be made later than one year after the original sentence if the “defendant’s substantial assistance involved”: (1) “information not known to the defendant until one year or more after sentencing,” (2) information provided within one year that “did not become useful to the government until more than one year after sentencing,” or (3) if the defendant could not have “reasonably . . . anticipated” that the information in question would be useful until more than a year after sentencing.¹² In evaluating whether the substantial assistance is, in fact, sufficient to warrant a reduction under Rule 35(b), “the court may consider the defendant’s presentence assistance.”¹³

Just like §5K1.1 substantial assistance motions, Rule 35(b) sentencing reductions can be applied in a wide range of circumstances. Rule 35(b) expressly applies to sentences that would otherwise be subject to a mandatory minimum penalty,¹⁴ and courts have sometimes reduced previously imposed life sentences to a term of years pursuant to a Rule 35(b) motion.¹⁵ Moreover, courts may grant a Rule 35(b) reduction *after* a §5K1.1 departure so long as there is no “double benefit” for the same assistance.¹⁶

Revisions to the Rule since the enactment of the Sentencing Reform Act have resolved many of the legal questions that previously occupied the courts.¹⁷ And, as to various other issues, the courts are generally in agreement. For example, courts that have considered the issue post-*Booker*¹⁸ have held that substantial assistance is a prerequisite to Rule 35(b) relief and that a court may not treat a Rule 35(b) resentencing as a chance to sentence the defendant “de novo.”¹⁹ Similarly, courts have consistently held that, in most circumstances,

the government has discretion as to whether to file a motion and that district courts have great discretion in determining whether to grant those motions.²⁰

Courts have taken various approaches, however, with respect to the “proper role played by non-assistance factors in determining the extent of a sentence reduction once a defendant has satisfied the substantial assistance criterion of Rule 35(b).”²¹ The First Circuit has stated that Rule 35(b) sentence reductions should “reflect only the assistance provided” but so held in the specific context of adjustments that go below the statutory mandatory minimum penalty.²² Several courts have held that non-assistance factors may be considered to *decrease* the extent of the reduction, not to increase it.²³ In contrast, the Ninth Circuit has held that courts may consider non-assistance factors more generally in determining the extent of a substantial assistance reduction regardless of whether those factors increase or decrease the reduction.²⁴

DATA AND ANALYSIS

The information below summarizes the results of the Commission’s analysis of Rule 35(b) sentencing reductions for fiscal years 2009 through 2014. This discussion focuses particularly on the numbers of such reductions and the jurisdictions where they are granted; the effects of Rule 35(b) reductions on sentences; and the demographic characteristics of offenders who receive such reductions. To the extent possible, this report compares the circumstances of offenders receiving Rule 35(b) reductions with those who received §5K1.1 departures. In addition, the report comments specifically on the sub-group of offenders who received both §5K1.1 departures and Rule 35(b) reductions.

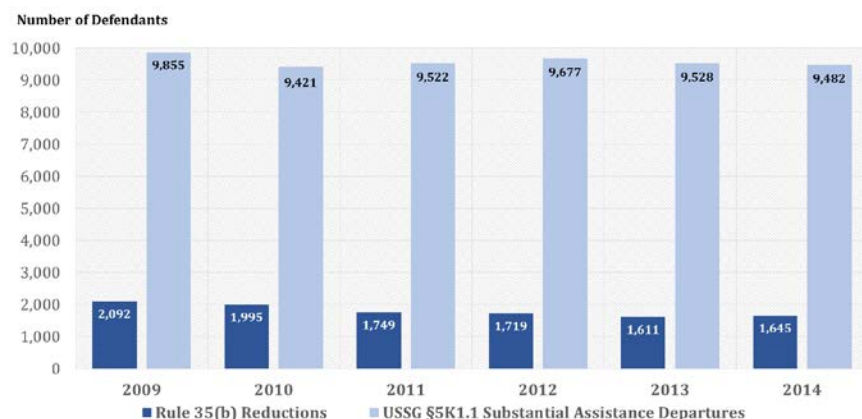
How Often Are Rule 35(b) Sentencing Reductions Granted?

As a general matter, Rule 35(b) sentencing reductions are not widely granted when compared with §5K1.1 departures. Moreover, Rule 35(b) reductions tend to be concentrated in particular jurisdictions, both in number and as a percentage of all cases in which substantial assistance is rewarded—whether by a §5K1.1 or Rule 35(b) motion—with a reduced sentence.

How Many Rule 35(b) Sentence Reductions Are Granted?

From fiscal years 2009 through 2014, the Commission received information on 10,811 Rule 35(b) reductions.²⁵ By contrast, there were 57,485 §5K1.1 substantial assistance departures over the same time period. Eighteen percent (1,947) of offenders who eventually received a Rule 35(b) reduction also received a §5K1.1 substantial assistance departure at the time of the original sentence.

Figure 1.
Rule 35(b) Reductions and §5K1.1 Substantial Assistance Departures



The number of Rule 35(b) sentencing reductions steadily decreased over the last six fiscal years, from a high of 2,092 in fiscal year 2009 to a low of 1,611 in fiscal year 2013 (a 23.0% decrease). In 2014, there was a modest increase from the preceding year to 1,645 sentencing reductions. Section 5K1.1 departures, however, decreased only slightly during the same time period, from a high of 9,855 in fiscal year 2009 to a low of 9,482 in fiscal year 2014 (a 3.8% decrease). The overall sentencing caseload has also decreased, but by a much lesser extent than have Rule 35(b) reductions. In particular, the overall caseload fell from 81,372 offenders in fiscal year 2008 to 75,836 offenders in fiscal year 2014 (a 6.8% decrease).

By considering data on Rule 35(b) offenders, the Commission can provide a more complete analysis of the ultimate number of offenders sentenced in a fiscal year who gave substantial assistance to the government. For example, 9,433 offenders (11.5%) who were first sentenced in fiscal year 2010 received a substantial assistance departure at their original sentencing. Of those 9,433 offenders, 320 later received a Rule 35(b) sentencing reduction. An additional 1,206 offenders who were originally sentenced in 2010 but who did *not* receive a 5K1.1 departure later received a Rule 35(b) reduction. That is, rather than 9,433 offenders (or 11.5% of sentenced offenders), a total of 10,639 offenders (or 13.0% of sentenced offenders) who were originally sentenced in fiscal year 2010 actually received a sentence reduction for providing substantial assistance to the government in

the prosecution of others. Even now, several years later, that number could continue to increase slightly, as offenders have received Rule 35(b) sentencing reductions up to 21 years after their original sentencing.

How Do Different Jurisdictions Vary In Their Use Of Rule 35(b) Sentencing Reductions?

The use of Rule 35(b) reductions varies greatly by district and circuit,²⁶ and Commission data show that such reductions are concentrated in only a small number of districts.

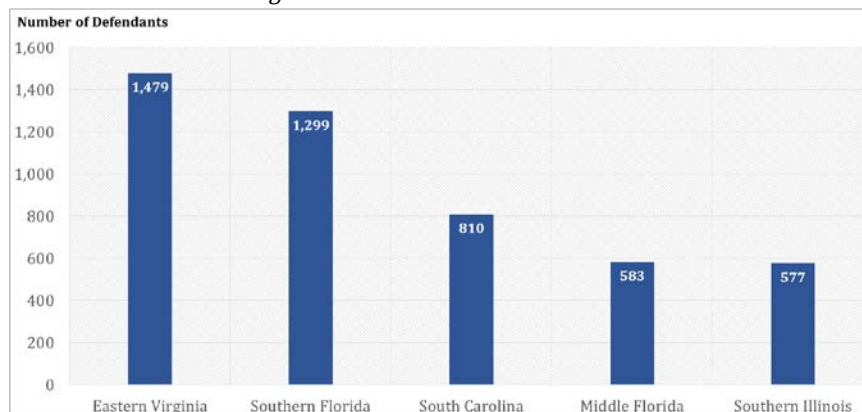
District courts within the Fourth and Eleventh Circuits had the highest percentage of Rule 35(b) sentencing reductions. District courts within these two jurisdictions accounted for 49.3 percent of all the Rule 35(b) reductions, with the district courts within the Fourth Circuit granting 27.4 percent of all Rule 35(b) reductions and district courts within the Eleventh Circuit granting 21.9 percent.²⁷ By comparison, these two circuits combined had only 18.9% of the overall district court caseload in fiscal years 2009 through 2014. At the other end of the spectrum, district courts within the District of Columbia, First, and Second Circuits combined accounted for only 2.5 percent of all Rule 35(b) sentencing reductions during this time period,²⁸ even though 8.6% of the overall district court caseload was from these circuits. There was no circuit in which Rule 35(b) reductions were used in more than 40 percent of cases in which substantial assistance was rewarded by a sentencing reduction. In fact, the district courts within only three circuits granted Rule 35(b) sentencing reductions in more than 25 percent of cases—the Fourth (36.2%), Seventh (29.9%), and Eleventh (28.9%) Circuits.

In absolute terms, there were relatively few Rule 35(b) reductions in many districts. Indeed, 17 of the 94 districts had fewer than ten Rule 35(b) reductions during the six-year period. Certain districts, however, granted Rule 35(b) motions quite frequently. The Eastern District of Virginia had the most Rule 35(b) reductions with 1,479 (13.7% of all Rule 35(b) motions granted), followed by the Southern District of Florida with 1,299 (12.0% of all Rule 35(b) motions granted). Four other jurisdictions also had more than 500 Rule 35(b) reductions during the relevant period.

Figure 2.

Top Five Districts Granting Rule 35(b) Reductions

Fiscal Years 2009 through 2014



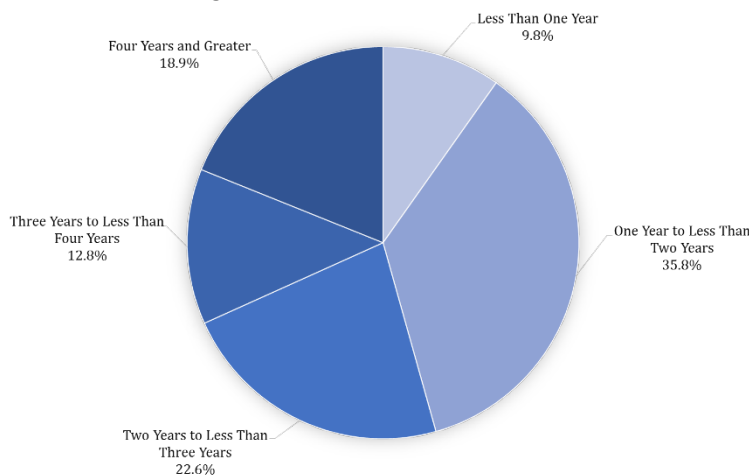
All but five of the 94 districts had at least one offender who received a Rule 35(b) sentencing reduction after receiving a §5K1.1 departure at the time of the original sentence. Three districts had more than 100 such cases: the District of South Carolina (237 offenders or 12.2% of the Rule 35(b) and §5K1.1 substantial assistance offenders), the Middle District of Florida (182 or 9.4%), and the Eastern District of North Carolina (110 or 5.6%).

Considering percentages rather than numbers leads to the same general conclusions. In most districts, Rule 35(b) is used infrequently to account for an offender's substantial assistance to the government. However, in a few districts, courts use this procedure as the primary means to reward substantial assistance. In particular, courts in six of the 94 districts used Rule 35(b) reductions in more than 50 percent of the cases in which substantial assistance was rewarded by a sentencing reduction.²⁹ Courts in four districts—the Southern District of Illinois, the District of South Dakota, the District of Nebraska, and the Eastern District of Virginia—granted Rule 35(b) sentencing reductions in more than 75 percent of the cases in which an offender provided substantial assistance to the government.

How Much Time Typically Elapses Between The Original Sentence And A Rule 35(b) Reduction?

Rule 35(b) motions ordinarily must be made within one year after the original sentencing.³⁰ Commission data demonstrates, however, that the majority of such motions are not *granted* within this period. In fact, the largest percentage of offenders received Rule 35(b) reductions between one and two years after the original sentence was imposed (35.8%).

Figure 3.
Time Between Original Sentence and Rule 35(b) Reduction
Fiscal Years 2009 through 2014



The average time between the original sentence and the granting of a Rule 35(b) reduction was 2.3 years; for offenders who also received a §5K1.1 substantial assistance reduction, that time was slightly longer, at 2.6 years.³¹ Only 9.8 percent of offenders received a Rule 35(b) sentencing reduction within one year after the original sentencing. The district courts within the District of Columbia (3.0 years) and the Second (2.9 years) Circuits had the longest average time periods between events, and the district courts within the Tenth Circuit had the shortest average time (1.4 years).

The number of Rule 35(b) reductions in a given district appears to have no effect on the time that elapses between the original sentence and granting the Rule 35(b) motion, as the average time

elapsed was similar for the two districts with the most Rule 35(b) sentencing reductions and those with the fewest. The two districts with the most Rule 35(b) reductions had an average elapsed time of 2.2 years (the Eastern District of Virginia) and 2.0 years (the Southern District of Florida). The 17 districts with fewer than ten Rule 35(b) reductions had an average elapsed time of 2.3 years.

Offenders who were *not* convicted of an offense carrying a mandatory minimum penalty had significantly less time between the original sentencing and the Rule 35(b) reduction. These offenders had an average of only 1.6 years between events, but offenders who *were* subject to a mandatory minimum penalty had an average of 2.5 years between events.³²

What Types Of Offenses Are Involved In Cases In Which Offenders Later Receive Rule 35(b) Reductions?

Offenders receiving Rule 35(b) reductions are similar to those receiving §5K1.1 substantial assistance departures in one respect: both groups were more likely to have been convicted of drug offenses than were offenders overall.

From fiscal years 2009 through 2014, 31.3 percent of offenders overall were convicted of drug trafficking crimes. From fiscal year 2009 through fiscal year 2014, the vast majority of those who received Rule 35(b) sentencing reductions were drug trafficking offenders (73.3%),³³ followed by firearm offenders (10.6%). The percentage of drug offenders was even higher for those who received both a §5K1.1 departure and a Rule 35(b) sentencing reduction—among this group, 78.1 percent were drug offenders. Similarly, a majority of those who received §5K1.1 substantial assistance departures at the time of their original sentence were drug offenders (60.7%), followed by fraud offenders (13.5%).

How Often Was The Offender’s Original Sentence Affected By A Statutory Mandatory Minimum Penalty?

Offenders who received a Rule 35(b) sentencing reduction were more likely to have been convicted of an offense that carries a mandatory minimum penalty than were offenders who received a substantial assistance departure at the time of the original sentencing.

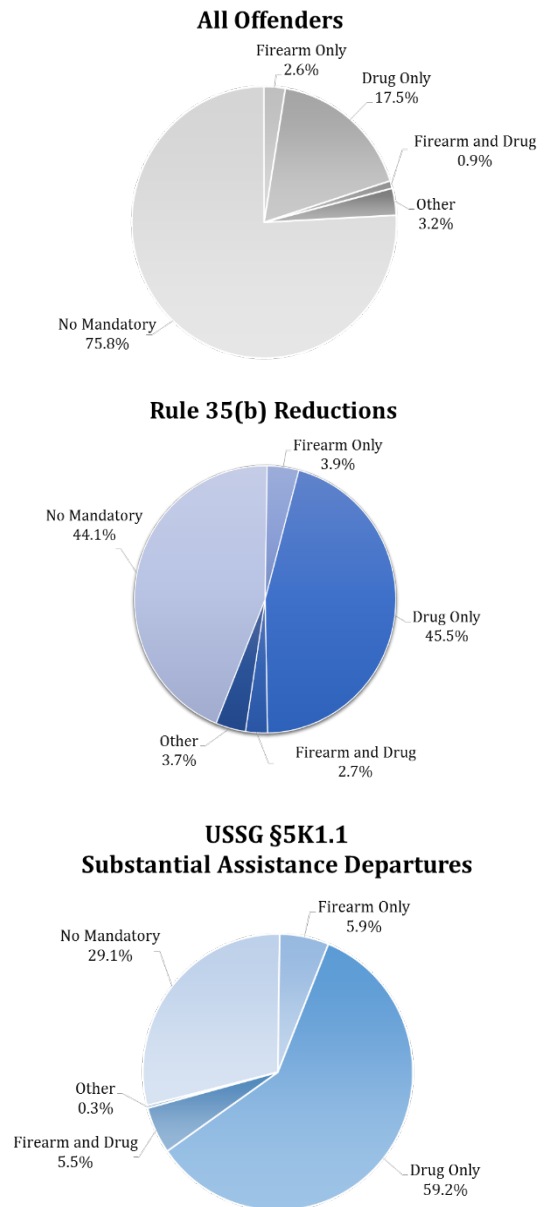
Of offenders who received a Rule 35(b) reduction, 70.9 percent had been convicted of an offense carrying a mandatory minimum penalty, compared to 54.8 percent of offenders who received a §5K1.1 substantial assistance departure.³⁴ Of Rule 35(b) offenders convicted of an offense carrying a mandatory minimum penalty, 59.2 were convicted of a drug crime. This group was followed by offenders convicted of a weapon offense (5.9%), offenders convicted of both a weapon and a drug offense (5.5%), and offenders convicted of an offense that was neither a drug nor a weapon offense (0.3%).

The majority of offenders convicted of an offense carrying a mandatory minimum penalty were sentenced below the applicable minimum penalty after they received the Rule 35(b) reduction. Of such offenders, 74.5 percent were sentenced below the minimum penalty, 22.6 percent were still sentenced above the minimum penalty, and 2.8 percent were sentenced at the minimum level.

What Was The Final Sentence In Cases In Which Offenders Received A Rule 35(b) Sentencing Reduction?

The Commission also examined the relationship between the ultimate sentence length and Rule 35(b) sentencing reductions, both in comparison to offenders overall and to those who received §5K1.1 substantial assistance departures at the time of their original sentencing.

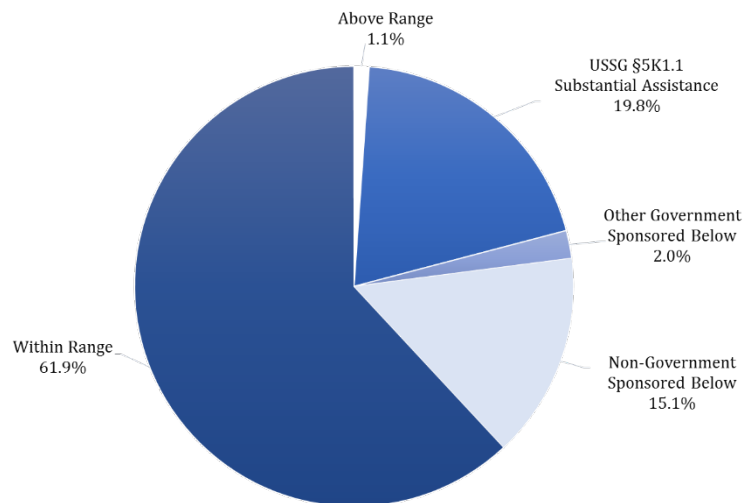
Figure 4.
Offenders Convicted of Offenses Carrying Mandatory Minimum Penalties
Fiscal Years 2009 through 2014



What Is The Relationship Between The Original Guideline Range And The Final Sentence For Offenders Receiving Rule 35(b) Sentencing Reductions?

Most offenders who received Rule 35(b) sentencing reductions were originally sentenced within the guideline range. For the six-year period under study, 61.9 percent of such offenders were sentenced within the guideline range, 1.1 percent were sentenced above the guideline range, and the remaining 37.0 percent were originally sentenced below the guideline range:

Figure 5.
Position of Original Sentence Relative to Guideline Range for Rule 35(b) Offenders
Fiscal Years 2009 through 2014



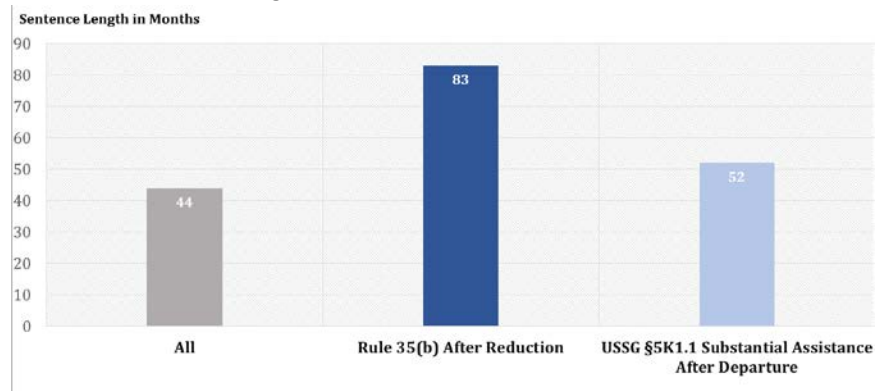
This differs from the overall population of federal offenders sentenced during the same period. Overall, 52.8 percent of offenders were sentenced within the guideline range, 1.8 percent were sentenced above the range, and 45.4 percent were sentenced below the guideline range.

What Is The Final Sentence Length For Offenders Receiving Rule 35(b) Sentencing Reductions?

What Is The Average Sentence Length?

The Commission also analyzed the length of sentences after Rule 35(b) motions were granted. Regardless of the comparison group, offenders receiving Rule 35(b) reductions tended to have longer sentences. When compared with all offenders' final sentences—that is, sentences taking into account §5K1.1 departures, other departures, Rule 35(b) sentencing reductions, and other reductions—the Rule 35(b) offenders had longer average sentences.

Figure 6.
Average Sentence Length for Rule 35(b) Offenders
Fiscal Years 2009 through 2014



The average sentence after a Rule 35(b) reduction was 83 months.³⁵ In contrast, offenders who received a §5K1.1 departure only had an average sentence of 52 months, and offenders overall received an average sentence of 44 months. Particularly when compared with offenders overall, though, offenders who received a Rule 35(b) reduction were more likely to have been convicted of drug trafficking and firearm offenses—offenses that tend to result in relatively long sentences. (The average sentence for drug trafficking and firearm offenders overall from 2009 to 2014 was 75 months.) The great majority of Rule 35(b) offenders—83.9 percent—were sentenced for drug trafficking and firearms offenses. By contrast, only 69.9 percent of offenders who received §5K1.1 substantial assistance

departures and 38.3 percent of all offenders were convicted of one or both of these two offenses.

Not all of the difference in sentence length, though, can be explained by differences in the offenses for which various offender groups were sentenced. Even after limiting the analysis to those convicted of similar offense types, offenders receiving Rule 35(b) reductions still tended to receive longer sentences than offenders who received §5K1.1 substantial assistance departures for almost all offense types.³⁶ In fact, there were 11 offense types for which the average sentence after a Rule 35(b) reduction was at least double the average sentence for offenders who received a §5K1.1 substantial assistance departure.³⁷ For example, robbery offenders with a Rule 35(b) reduction received an average sentence of 102 months, and offenders with a §5K1.1 reduction received an average sentence of 51 months.

Differences in sentence length are also seen when comparing whether the offender receiving a Rule 35(b) reduction was convicted of an offense carrying a mandatory minimum penalty. Offenders who were not convicted of an offense carrying a mandatory minimum penalty had the lowest average sentence after the Rule 35(b) motion was granted (56 months). Offenders convicted of a firearm offense carrying a mandatory minimum penalty had the highest average sentence (127 months). Offenders convicted of a drug offense carrying a mandatory minimum penalty received an average sentence of 88 months. Offenders convicted of both a firearm and a drug offense carrying a mandatory minimum penalty had an average sentence of 121 months. On the other hand, offenders convicted of an offense that carried a mandatory minimum penalty but that was not a drug or firearm statute had an average sentence of 57 months.

The final sentences of offenders who received a Rule 35(b) reduction also varied based on whether they received a departure or variance. Those who received non-government sponsored departures or variances at the time of their original sentencing had the lowest average sentence after a Rule 35(b) reduction (69 months). This was followed by (1) offenders who received a government-sponsored below-range sentence at their original sentence but who did not receive a §5K1.1 substantial assistance departure (79 months) and (2) offenders who originally received a §5K1.1 substantial assistance departure and later received a Rule 35(b) reduction (85

months).³⁸ The highest average sentence was received by offenders who were originally sentenced above the guideline range (96 months).

Finally, a small group of offenders (153, or 1.4%) who originally received a sentence of life imprisonment or a *de facto*³⁹ sentence of life imprisonment later received a Rule 35(b) reduction. Most of these offenders were convicted of a drug trafficking offense (99 or 64.7%). Drug offenses were followed in frequency by firearms offenses (26 or 17.0 %) and murder (12 or 7.8%). Five of these offenders had their sentences reduced but still received a *de facto* sentence of life imprisonment.⁴⁰ Excluding these five offenders, the average new sentence for offenders who were originally sentenced to life imprisonment was 256 months.⁴¹ The lowest sentence was 34 months,⁴² and the highest was 420 months.

How Does Final Sentence Length Vary By Jurisdiction?

There are, again, notable variations throughout districts in the length of sentences for offenders who receive a Rule 35(b) reduction.

In 20 districts, offenders receiving Rule 35(b) sentencing reductions had average sentences of over 100 months. The districts with the highest average sentences were the Southern District of Indiana (118 months) and the Western District of Louisiana (117 months). Only six districts had average sentences less than 50 months. The lowest average sentence for offenders who received a Rule 35(b) sentencing reduction was in the District of Idaho, where the average sentence was 26 months. Looking at circuit-wide data, offenders receiving a Rule 35(b) sentencing reduction in the district court for the District of Columbia had the highest average sentence (101 months), followed by offenders in district courts within the Seventh and Fourth Circuits (94 and 92 months, respectively). Offenders sentenced in district courts within the Ninth Circuit received the lowest average sentence (65 months), followed by offenders sentenced in district courts within the First and Eighth Circuits (68 and 70 months, respectively).

As with analysis of Rule 35(b) offenders' sentences overall, the district variations in sentence lengths appear to be closely connected to the types of offenses at issue. For example, in the jurisdictions with the longest average sentences, 57.9 percent of offenders receiving a

Rule 35(b) reduction in the Southern District of Indiana were convicted of an offense carrying a mandatory minimum penalty, and 85.2 percent of those in the Western District of Louisiana were convicted of such an offense. By contrast, in the District of Idaho, which had the shortest average sentence after a Rule 35(b) motion was granted, 33.3 of offenders receiving a Rule 35(b) reduction were convicted of offenses with a mandatory minimum penalty.

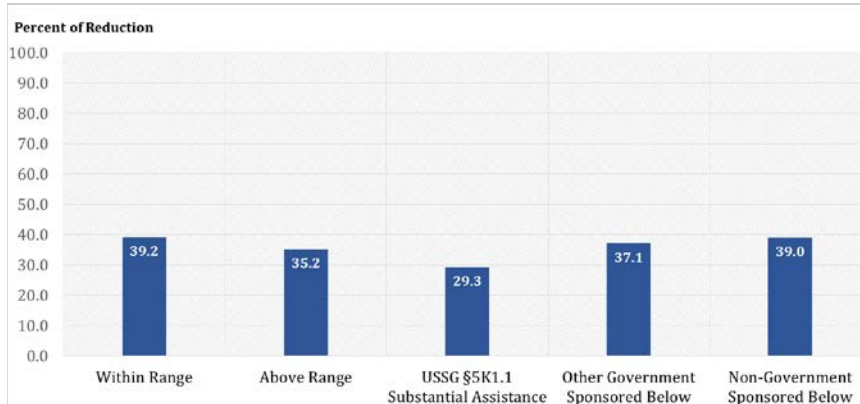
What Is The Extent Of The Average Rule 35(b) Sentencing Reduction When Compared With §5K1.1 Substantial Assistance Departures?

Overall, offenders receive a smaller sentence reduction for Rule 35(b) motions than for §5K1.1 substantial assistance motions. Rule 35(b) sentencing reductions resulted in an average decrease of 37.1 percent from the original sentence, compared with a decrease of 52.6 percent from the bottom of the original guideline range for §5K1.1 departures.⁴³

The relatively lower benefit from a Rule 35(b) motion holds true regardless of where the offender's first sentence fell in the recommended guideline range and whether the offender received a departure of any sort. Offenders who received a §5K1.1 departure during their original sentencing and subsequently received a Rule 35(b) reduction had an average Rule 35(b) reduction of 29.3 percent from the original sentence. This suggests that courts take into account the earlier §5K1.1 substantial assistance reduction when giving a subsequent Rule 35(b) reduction. Among all offenders who eventually received a Rule 35(b) reduction but who did not receive a §5K1.1 substantial assistance departure, offenders who were originally sentenced within the guideline range had an average extent of reduction of 39.2 percent from the original sentence; offenders who were originally sentenced above the guideline range had an average extent of reduction of 35.2 percent from the original sentence; those who were given a government-sponsored below-range sentence that was *not* a §5K1.1 substantial assistance departure had an average extent of reduction of 37.1 percent from the original sentence; and those who were otherwise sentenced below the guideline range had

an average extent of reduction of 39.0 percent from the original sentence.

Figure 6.
Extent of Rule 35(b) Reduction by Place in Guideline Range
Fiscal Years 2009 through 2014



The type of offense at issue appeared to have some effect on the extent of reduction pursuant to Rule 35(b) motions. Considering the most common offenses, the average extent of Rule 35(b) reductions from the original sentence was 37.3 percent for drug trafficking offenders and 36.0 percent for firearm offenders. Gambling offenders received the largest reduction from the original sentence (66.0% for five offenders).⁴⁴ Of offenses with more than 50 cases, automobile theft offenders had the highest reduction from the original sentence (44.4%). The smallest average reduction from the original sentence was given for offenders sentenced for crimes involving using a communication facility in a drug trafficking offense (25.2% for 14 offenders).

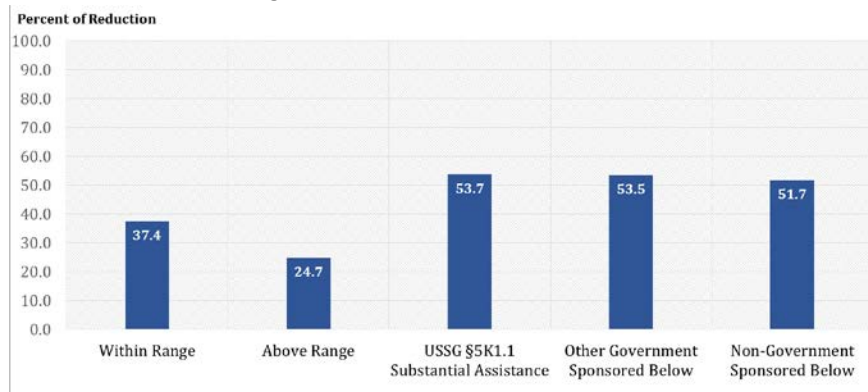
The presence of a mandatory minimum penalty also had some effect on the average extent of the Rule 35(b) reduction. The largest average reduction from the original sentence—39.3 percent—was for offenders who were originally convicted of both firearm and drug offenses that carried mandatory minimum penalties. The smallest average reduction from the original sentence—31 percent—was for offenders convicted of an offense carrying a mandatory minimum penalty that did not involve drugs or firearms. Offenders convicted pursuant to a firearm statute carrying a mandatory minimum penalty had an average reduction from the original sentence of 35.9 percent,

while those convicted of a drug offense carrying a mandatory minimum penalty had an average reduction of 37.4 percent. Finally, those who were not convicted of an offense carrying a mandatory minimum penalty had an average reduction from the original sentence of 36.4 percent.

Figure 7.

Extent of Rule 35(b) Reduction from Original Guideline Minimum by Place in Guideline Range

Fiscal Years 2009 through 2014



Considering the extent of departure from the original guideline *minimum* rather than the original *sentence* results in a relatively greater value to Rule 35(b) reductions, although §5K1.1 motions still lead to a greater average decrease in sentence. Measuring Rule 35(b) sentencing decreases from the original guideline minimum results in an average reduction of 42.6 percent⁴⁵ rather than the 37.1 percent reduction measured from the original sentence. Moreover, although Rule 35(b) offenders who originally received a §5K1.1 substantial assistance departure have the lowest extent of departure from the original sentence to the Rule 35(b) reduction, offenders who received both forms of substantial assistance reductions have the largest reduction if that reduction is measured from the *original* guideline minimum. Rule 35(b) offenders who originally received a §5K1.1 substantial assistance departure at sentencing have a 53.7 percent reduction in their sentence from the original guideline minimum. Rule 35(b) offenders with a government-sponsored (other than §5K1.1 substantial assistance departure) have a slightly lower reduction (53.5%).

In the end, this data suggests two conclusions. First, when considering the benefit of a Rule 35(b) sentencing reduction,

offenders who receive *both* a §5K1.1 departure and a Rule 35(b) sentencing reduction have the most significant decrease either from the original sentence or from the original guideline minimum. That is, the Rule 35(b) sentencing reduction generally provides an additional benefit to the offender beyond the original §5K1.1 departure. Second, offenders who receive *only* a Rule 35(b) reduction fare less well than do defendants who receive a §5K1.1 substantial assistance departure. Accordingly, all other factors being equal, offenders in jurisdictions that rely primarily on Rule 35(b) sentencing reductions rather than §5K1.1 departures or a combination of the two will tend to receive less of a benefit for the substantial assistance that they provide.

What Are The Demographic Characteristics Of Offenders Receiving Rule 35(b) Reductions?

Offenders who received a Rule 35(b) reduction were more likely to be Black (44.8%) than any other racial group, and offenders who received both a §5K1.1 departure and a Rule 35(b) reduction were slightly more likely to be Black (50.7%) than was the overall Rule 35(b) population. White offenders constituted 29.9 percent of the population receiving a Rule 35(b) sentencing reduction; Hispanic offenders were 22.6 percent; and Other race offenders were 2.7 percent.⁴⁶ This demographic breakdown differs quite significantly from those who received §5K1.1 substantial assistance departures. White offenders were more likely to have received a §5K1.1 substantial assistance departure (37.3%) than any other group, followed by Black offenders (29.2%), Hispanic offenders (28.7%), and Other offenders (4.7%).

Overall, Other race offenders received the largest extent of Rule 35(b) reductions (40.6% decrease from the original sentencing range), followed by Hispanic offenders (37.2%), Black offenders (37.0%), and White offenders (36.8%). Similarly, Other race offenders had the largest extent of departure for §5K1.1 substantial assistance departures (58.8%). White offenders had the second highest (55.4%), followed by Black (50.0%) and Hispanic offenders (49.6%).

The majority of Rule 35(b) offenders were United States citizens (85.3%), which was slightly higher than the percentage of United States citizens receiving a §5K1.1 substantial assistance departure (82.2%). There was relatively little difference in the extent of departure between these two groups, as United States citizens received an average Rule 35(b) reduction of 37.2 percent as compared to 36.7 percent for non-citizens.

The majority of Rule 35(b) offenders were male (88.1%), which was higher than the percentage of male offenders who received a §5K1.1 substantial assistance departure (81.0%). Female offenders received a slightly larger extent of Rule 35(b) reductions (38.9%) than did male offenders (36.9%).

CONCLUSION

Offenders who cooperate with the government in its efforts to prosecute others can receive credit for their “substantial assistance” in at least two ways—the §5K1.1 substantial assistance departure and the post-sentencing Rule 35(b) reduction. Even though Rule 35(b) sentencing reductions have accounted for up to 18 percent of all substantial assistance sentencing reductions for offenders sentenced in a given year, they have received relatively little study, at least in comparison to §5K1.1 departures.

Major Findings

A review of the 10,811 cases in which Rule 35(b) reductions were granted over the past six years suggests the following conclusions:

- ❖ Rule 35(b) sentencing reductions are used relatively rarely, but a few districts make frequent use of Rule 35(b) sentencing reductions. There is no clear data-based explanation for these differences, as these districts vary substantially from one another in overall case load, offense mix, and demographic composition.
- ❖ Most offenders receiving a Rule 35(b) reduction were originally sentenced within the guideline range. This suggests that courts are rarely departing or varying for reasons other than substantial assistance with this group of offenders.

- ❖ Most offenders receiving a Rule 35(b) reduction were convicted of a drug trafficking offense that carries a mandatory minimum penalty.
- ❖ Rule 35(b) sentencing reductions generally provide less benefit than do §5K1.1 substantial assistance departures. This general statement holds true whether the Rule 35(b) sentencing reduction is compared to the §5K1.1 substantial assistance departure in terms of the ultimate sentence length or by the extent of the reduction from the original sentence. The relatively high number of Rule 35(b) offenders who are convicted of drug and firearms offenses, though, as well as the relatively high number of those subject to mandatory minimum penalties, suggests that these offenders may receive a lower reduction because they are more serious offenders.
- ❖ Although Rule 35(b) sentencing reductions are usually less beneficial to offenders than are §5K1.1 substantial assistance departures, offenders who receive both a §5K1.1 departure and a Rule 35(b) sentencing reduction receive the largest overall reduction in their sentences, regardless of how that reduction is measured.
- ❖ Offenders sentenced in jurisdictions that primarily use Rule 35(b) sentencing reductions overall receive less of a benefit for their substantial assistance than do offenders in jurisdictions that rely primarily on §5K1.1 departures or a combination of Rule 35(b) reductions and §5K1.1 departures.

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¹ 18 U.S.C. § 3553(e); U.S. SENT’G COMM’N, GUIDELINES MANUAL [hereinafter “USSG”] §5K1.1 (2015); *see also* 28 U.S.C. § 994(n) (directing Commission to create guidelines that “reflect the general appropriateness” of sentencing ranges below statutory mandatory minimums to account for a “defendant’s substantial assistance”).

² The Commission began collecting information on resentencings, including Rule 35(b) resentencings, in 2006 and first published statistical information on this subject in 2009. *See* U.S. SENT’G COMM’N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at iii, 151-54” (2009). The Commission has historically released information and analysis regarding §5K1.1 departures in various reports as well as in its annual sourcebooks and related materials. *See, e.g.*, U.S. SENT’G COMM’N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 39 (1997); U.S. SENT’G COMM’N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS [hereinafter “2014 SOURCEBOOK”], at S-87 (2015).

³ FED. R. CRIM. P. 35, Rule Applicable to Offenses Committed Prior to Nov. 1, 1987 (providing that a “motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked” and that the court “shall determine the motion within a reasonable time”).

⁴ *Id.*

⁵ *United States v. Distasio*, 820 F.2d 20, 24 (1st Cir. 1987) (citations omitted); *see also, e.g.*, *United States v. Smith*, 650 F.2d 206, 208 (9th Cir. 1981) (“The function of Rule 35(b) is simply to allow the district court to decide if, on further reflection, the original sentence now seems unduly harsh.” (citation, internal punctuation omitted)).

⁶ Pub. L. 98-473, § 215, 98 Stat. 1837 (1984), as amended by Pub. L. 99-570, § 1009, 100 Stat. 3207 (1986); *see also* 18 U.S.C. § 3582(c)(1)(B) (permitting courts to “modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35(b) of the Federal Rules of Criminal Procedure”).

⁷ Pub. L. 98-473, § 215, 98 Stat. 1837 (1984), as amended by Pub. L. 99-570, § 1009, 100 Stat. 3207 (1986).

⁸ *United States v. Shelby*, 584 F.3d 743, 745 (7th Cir. 2009).

⁹ USSG §5K1.1 and commentary thereto.

¹⁰ *See, e.g.*, *United States v. Poland*, 562 F.3d 35, 38 (1st Cir. 2009); *United States v. Mulero-Algarin*, 535 F.3d 34, 38 (1st Cir. 2008); *United States v. Mitchell*, 964 F.2d 454, 461 (5th Cir. 1992); *but see United States v. Poland*, 533 F. Supp. 2d 199, 204 & n.14 (D. Me. 2008), *aff’d on narrower grounds*, 562 F.3d 35 (1st Cir. 2009) (commenting that, “[t]extually,” it is clear that §5K1.1 is “not a policy statement for Rule 35(b) motions” but acknowledging the small numbers of Rule 35(b) motions and the “general guidance” provided by the §5K1.1 factors).

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¹¹ FED. R. CRIM. P. 35(b). This language has been in place during the entire time period of this report, but some revisions have been made since the enactment of the Sentencing Reform Act. In 2002, Rule 35(b) was revised to eliminate the phrase “to reflect a defendant’s substantial assistance.” The Rule retained only the language stating that a court could reduce a sentence in accordance with the Sentencing Commission’s guidelines and policy statements. *See, e.g., Poland*, 533 F. Supp. 2d at 205 (describing revisions to Rule); *see also* FED. R. CRIM. P. 35 advisory committee’s notes, 2002 Amendments (including these revisions among other “stylistic” changes). Second, Rule 35(b) was revised in 2007 to eliminate reference to the Sentencing Commission’s “guidelines and policy statements.” FED. R. CRIM. P. 35 advisory committee’s notes, 2007 Amendments. “The amendment conforms Rule 35(b)(1) to the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005). . . . Subdivision (b)(1)(B) has been deleted because it treats the guidelines as mandatory.” *Id.*

¹² FED. R. CRIM. P. 35(b)(2). This language has changed substantially over time. From 1991 to 2002, the Rule permitted a motion after one year only if the defendant learned the information in question more than one year after sentencing. In 2002, the Rule was amended to incorporate the current, broader language. FED. R. CRIM. P. 35 advisory committee’s notes, 2002 Amendments. The Advisory Committee explained that, because the “one-year restriction” is important for purposes of finality and timeliness, the amendment did not “eliminate the one-year requirement as a generally operative element.” However, “where the usefulness of the information is not reasonably apparent until a year or more after sentencing, no sound purpose is served by the current rule’s removal of any incentive to provide that information to the government one year or more after the sentence (or if previously provided, for the government to seek to reward the defendant) when its substantiality become evident.” *Id.*

¹³ FED. R. CRIM. P. 35(b)(3). Before this language was added in 1998, some pre-sentencing assistance was not substantial enough to warrant a §5K1.1 motion; however, because of Rule 35’s language, this assistance could not then be considered on a Rule 35(b) motion. *See, e.g., United States v. Speed*, 53 F.3d 643, 645 (4th Cir. 1995); *United States v. Bureau*, 52 F.3d 584, 595 (6th Cir. 1995). The revised provision was “intended to fill a gap.” FED. R. CRIM. P. 35(b)(4) advisory committee’s notes, 1998 Amendments.

¹⁴ FED. R. CRIM. P. 35(b)(4). In contrast, §5K1.1 does not explicitly authorize courts to sentence below a mandatory minimum penalty but instead includes a reference to 18 U.S.C. § 3553(e). USSG §5K1.1 comment. (n.1). Section 3553(e) provides that “[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the sentencing Commission pursuant to section 994 of title 28, United States Code.” That is, even if the government files a §5K1.1 motion, a court may not impose a sentence below a statutory mandatory minimum penalty unless the government also files a motion pursuant to 18 U.S.C. § 3553(e).

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¹⁵ See, e.g., *United States v. Conway*, 560 F. App'x 622 (8th Cir. 2014) (rejecting for lack of jurisdiction argument that district court should have further reduced life sentence).

¹⁶ FED. R. CRIM. P. 35(b) advisory committee's notes, 1998 Amendments.

¹⁷ For example, numerous pre-amendment decisions addressed the timing of motions and the point at which an offender must have learned of or provided the information at issue. See, e.g., *United States v. McDowell*, 117 F.3d 974, 978-80 (7th Cir. 1997) (remanding case for factual determination of timing of awareness); *Speed*, 53 F.3d at 645-46 (rejecting claim that trial court erred by refusing to continue sentencing because government stated that substantial assistance would primarily be post-sentencing and thus appropriate for Rule 35(b) motion; agreeing, though, that it would be improper to allow post-sentencing credit for pre-sentencing assistance via a Rule 35(b) motion).

¹⁸ *United States v. Booker*, 543 U.S. 220 (2005).

¹⁹ See, e.g., *United States v. Tadio*, 663 F.3d 1042, 1046, 1055 (9th Cir. 2011).

²⁰ See, e.g., *Tadio*, 663 F.3d at 1052; *Mulero-Algarin*, 535 F.3d at 38-40; *United States v. Glasgow*, 72 F. App'x 667, 668-69 (9th Cir. 2003).

²¹ *Tadio*, 663 F.3d at 1047.

²² *Poland*, 562 F.3d at 41; see also *United States v. Malone*, __ F.3d __, 2015 WL 8991190, at *7 & n.41 (5th Cir. Dec. 11, 2015) (rejecting argument that non-assistance factors could be considered to decrease extent of §5K1.1 departure; rejecting also case law from other jurisdictions permitting consideration of such factors in considering Rule 35(b) motions and stating that “this Court has held that ‘Rule 35(b) incorporates the standards set out in § 5K1.1’” (quoting *United States v. Grant*, 493 F.3d 464, 467 n.1 (5th Cir. 2007))).

²³ See, e.g., *United States v. Hardman*, 602 F. App'x 744, 748 (11th Cir. 2015); *United States v. Webster*, 666 F.3d 1023, 1026 (7th Cir. 2012); *United States v. Rublee*, 655 F.3d 835, 839 (8th Cir. 2011); *Shelby*, 584 F.3d at 750.

²⁴ *Tadio*, 663 F.3d at 1047; but see *id.* at 1055 (emphasizing that resentencing was not “the equivalent of a de novo sentence”); cf. *United States v. Spinks*, 770 F.3d 285, 289 n.2 (4th Cir. 2014) (addressing motion under 18 U.S.C. § 3553(e); commenting, in addressing defendant's argument, that non-assistance factors can be used to *decrease* extent of reduction but declining to resolve whether non-assistance factors can be used to “*increase* the extent of a reduction” under Rule 35(b)).

²⁵ The Commission collects sentencing information on all offenders convicted of felony and Class A misdemeanors who are sentenced in district courts and produces an annual data file that contains sentencing, guideline application, and selected demographic information. Since fiscal year 1993, the Commission has also collected information from federal appellate courts on convictions and sentences as well as information from all federal

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courts on sentencings of organizations. Finally, since fiscal year 2006, the Commission has collected information on eight types of resentencings and other modifications of sentences, all of which is made public through the Commission's annual *Sourcebook of Federal Sentencing Statistics*. See, e.g., 2014 SOURCEBOOK at Appendix A, S-168-69 (describing data sources, including resentencing information); see also *supra* note 2.

²⁶ Information in this subsection is also set forth in the Commission's annual *Sourcebook of Federal Sentencing Statistics*, Appendix A, Table A-1.

²⁷ District courts within these circuits granted, respectively, 2,968 and 2,370 Rule 35(b) motions.

²⁸ District courts within these circuits granted, respectively, 25, 106, and 140 Rule 35(b) motions.

²⁹ The districts include: Southern District of Illinois (79.8%), South Dakota (79.5%), Nebraska (79.2%), Eastern District of Virginia (78.1%), District of Wyoming (64.4%), and Southern District of Florida (52.0%).

³⁰ See *supra* notes 11-12 and accompanying text.

³¹ Offenders in four cases had a gap of 20 years or more between the original sentence and the Rule 35(b) reduction.

³² For additional discussion of the effect of such mandatory minimum penalties on Rule 35(b) sentencing reductions, see *infra* Data and Analysis section.

³³ Information in this subsection is also set forth in the Commission's annual *Sourcebook of Federal Sentencing Statistics*, Appendix A, Table A-2.

³⁴ During the six-year time period under study, 24.2 percent of offenders overall were convicted of an offense carrying a mandatory minimum penalty.

³⁵ 2014 SOURCEBOOK at Appendix A, Table A-1.

³⁶ *Id.* at Table A-2. The exceptions were offenders sentenced for Assault (4 offenders who received Rule 35(b) reductions), Arson (6), Child Pornography (24), and Prostitution (11). *Id.* The sentences were similar for offenders who received §5K1.1 substantial assistance reductions and those who received Rule 35(b) reductions.

³⁷ The other ten offenses included: Drugs-Communication Facility (34 months for offenders who received a Rule 35(b) reduction compared to 16 months for those who received a §5K1.1 departure); Drugs-Simple Possession (43 months compared to 10 months); Automobile Theft (132 months compared to 34 months); Fraud (35 months compared to 17 months); Forgery/Counterfeiting (25 months compared to 12 months); Tax (20 months compared to 8 months), Gambling/Lottery (4 months compared to 2 months); Administration of Justice (42 months compared to 8 months); Food and Drug (19 months compared to 6 months); and Other Miscellaneous Offenses (29 months compared to 14 months).

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³⁸ Offenders who received a Rule 35(b) reduction after receiving a §5K1.1 substantial assistance departure had an average sentence of 120 months before the Rule 35(b) reduction.

³⁹ The Sentencing Commission has historically treated a sentence of 470 months or more as a *de facto* life sentence. *See, e.g.*, 2014 SOURCEBOOK at S-170 (explaining that this sentence length is consistent with the average life expectancy of federal criminal offenders).

⁴⁰ These five offenders received sentences of 480 months (one offender), 486 months (one offender), 540 months (two offenders), and 871 months (one offender) after receiving the Rule 35(b) reduction. Three of these offenders were convicted of firearm offenses, and two were convicted of extortion or racketeering offenses.

⁴¹ An additional seven offenders were not included in this total as they were resentenced to “time served.” These offenders had 1-, 7-, 10-, 12-, 13-, 16- and 17-year sentence reductions.

⁴² Six offenders received sentences of ten years or less after the Rule 35(b) reduction.

⁴³ 2014 SOURCEBOOK at Appendix A, Table A-1. The relatively lower benefit received from a Rule 35(b) motion as compared to a §5K1.1 substantial assistance reduction applies *regardless* of the number of Rule 35(b) motions granted in a jurisdiction. All districts with more than 50 Rule 35(b) reductions had an average extent of reduction of at least 20 percent. However, of the 11 districts with more than 50 Rule 35(b) reductions, only the Western District of Pennsylvania had an average extent of reduction of more than 50 percent (53.4%). District courts within the Third Circuit had the largest average extent of Rule 35(b) reductions (43.6%), and those within the Sixth Circuit had the smallest (30.7%).

⁴⁴ *Id.* at Table A-2.

⁴⁵ *Id.* Offenders whose original guideline minimum was “Life” are not included in this analysis. There were 183 offenders whose original guideline minimum was life. These offenders received an average sentence of 221 months after a Rule 35(b) reduction. Offenders with a §5K1.1 substantial assistance departure (75 of the 183 offenders or 41.0%) at the time of their original sentence had the lowest average sentence after reduction (177 months), followed by “Non-government sponsored below” (11 offenders, 207 months), “Government-Sponsored (five offenders, 252 months) and “Within Range” (89 offenders, 256 months).

⁴⁶ *Id.* at Table A-3.

APPENDIX

I. Table A-1.

Rule 35(b) Reductions and Substantial Assistance Departures by Circuit and District
Fiscal Years 2009-2014

II. Table A-2.

Sentence Length for Rule 35(b) Reductions and Substantial Assistance Defendants in Each Primary Offense Category
Fiscal Years 2009-2014

III. Table A-3.

Offense and Offender Characteristics in Rule 35(b) and Substantial Assistance Cases
Fiscal Years 2009-2014

Table A-1

**RULE 35(b) REDUCTIONS AND SUBSTANTIAL ASSISTANCE DEPARTURES
BY CIRCUIT AND DISTRICT¹
Fiscal Years 2009-2014**

CIRCUIT District	Rule 35(b)							Substantial Assistance (\$5K1.1)				
	Total		Number		Average Resentence	Extent of Reduction - Sentence ² (%)	Extent of Reduction - Guideline Range ³ (%)	Number		Average Sentence	Extent of Departure ⁴ (%)	
	N	%	N	%				N	%			
TOTAL	68,296	100.0	10,811	15.8	83	37.1	42.6	57,485	84.2	52	52.6	
D.C. CIRCUIT	597	0.9	25	4.2	101	43.0	49.6	572	95.8	26	77.3	
District of Columbia	597	0.9	25	4.2	101	43.0	49.6	572	95.8	26	77.3	
FIRST CIRCUIT	1,538	2.3	106	6.9	68	34.8	49.8	1,432	93.1	35	60.6	
Maine	357	0.5	25	7.0	65	26.3	48.6	332	93.0	45	45.8	
Massachusetts	368	0.5	25	6.8	85	38.9	50.8	343	93.2	33	66.5	
New Hampshire	235	0.3	13	5.5	78	21.3	44.4	222	94.5	32	56.3	
Puerto Rico	500	0.7	38	7.6	54	50.6	54.0	462	92.4	31	68.4	
Rhode Island	78	0.1	5	6.4	56	27.9	—	73	93.6	32	65.2	
SECOND CIRCUIT	5,348	7.8	140	2.6	79	38.2	51.1	5,208	97.4	29	73.5	
Connecticut	407	0.6	4	1.0	55	50.0	66.0	403	99.0	29	70.2	
New York												
Eastern	1,418	2.1	30	2.1	68	56.6	69.0	1,388	97.9	23	81.6	
Northern	710	1.0	21	3.0	66	30.2	51.4	689	97.0	43	55.9	
Southern	1,535	2.2	56	3.6	98	42.6	49.2	1,479	96.4	25	85.5	
Western	1,039	1.5	21	2.0	94	22.9	39.2	1,018	98.0	38	56.4	
Vermont	239	0.4	8	3.3	42	38.0	53.0	231	96.7	16	83.1	
THIRD CIRCUIT	4,688	6.9	291	6.2	75	43.6	51.4	4,397	93.8	40	62.6	
Delaware	101	0.1	3	3.0	105	25.5	—	98	97.0	36	69.0	
New Jersey	1,393	2.0	45	3.2	62	48.7	61.4	1,348	96.8	28	63.4	
Pennsylvania												
Eastern	1,803	2.6	67	3.7	97	39.9	52.7	1,736	96.3	50	66.3	
Middle	745	1.1	55	7.4	65	29.3	37.5	690	92.6	46	45.7	
Western	587	0.9	121	20.6	72	53.4	56.1	466	79.4	28	70.4	
Virgin Islands	59	0.1	0	0.0	NA	NA	NA	59	100.0	31	64.9	
FOURTH CIRCUIT	9,099	13.3	2,968	32.6	92	39.2	43.6	6,131	67.4	68	46.7	
Maryland	1,343	2.0	62	4.6	94	31.9	43.6	1,281	95.4	52	50.8	
North Carolina												
Eastern	1,558	2.3	194	12.5	107	33.7	46.5	1,364	87.5	96	39.7	
Middle	392	0.6	56	14.3	111	31.3	42.5	336	85.7	82	36.1	
Western	885	1.3	97	11.0	81	36.1	48.4	788	89.0	67	42.4	
South Carolina	1,824	2.7	810	44.4	109	36.3	44.1	1,014	55.6	81	48.9	
Virginia												
Eastern	1,893	2.8	1,479	78.1	85	42.4	42.8	414	21.9	31	58.5	
Western	740	1.1	175	23.6	92	37.1	43.5	565	76.4	57	51.9	
West Virginia												
Northern	234	0.3	22	9.4	38	34.3	38.6	212	90.6	35	46.7	
Southern	230	0.3	73	31.7	56	40.1	45.2	157	68.3	36	54.2	

Table A-1 (cont.)

CIRCUIT District	Rule 35(b)							Substantial Assistance (§5K1.1)				
	Total		Number		Average Resentence	Extent of Reduction - Sentence (%)	Extent of Reduction - Guideline Range (%)	Number		Average Sentence	Extent of Departure (%)	
	N	%	N	%				N	%			
FIFTH CIRCUIT	9,342	13.7	950	10.2	84	35.9	41.4	8,392	89.8	56	45.0	
Louisiana												
Eastern	267	0.4	13	4.9	68	30.1	33.8	254	95.1	67	41.4	
Middle	220	0.3	17	7.7	70	34.8	60.5	203	92.3	55	45.5	
Western	243	0.4	56	23.0	117	42.6	41.7	187	77.0	64	51.7	
Mississippi												
Northern	261	0.4	23	8.8	72	32.9	43.5	238	91.2	55	44.4	
Southern	185	0.3	15	8.1	78	18.0	27.6	170	91.9	57	34.0	
Texas												
Eastern	882	1.3	380	43.1	82	38.5	39.8	502	56.9	58	46.3	
Northern	1,043	1.5	37	3.5	110	26.2	44.2	1,006	96.5	76	40.2	
Southern	2,955	4.3	258	8.7	81	33.5	41.9	2,697	91.3	49	46.3	
Western	3,286	4.8	151	4.6	80	35.8	43.7	3,135	95.4	53	45.8	
SIXTH CIRCUIT	8,130	11.9	701	8.6	86	30.7	42.9	7,429	91.4	54	47.7	
Kentucky												
Eastern	1,095	1.6	46	4.2	73	36.1	48.4	1,049	95.8	51	47.1	
Western	496	0.7	20	4.0	106	25.6	45.3	476	96.0	46	51.8	
Michigan												
Eastern	1,076	1.6	126	11.7	72	35.7	43.9	950	88.3	47	57.6	
Western	498	0.7	122	24.5	97	23.8	35.3	376	75.5	74	35.6	
Ohio												
Northern	1,224	1.8	28	2.3	79	20.4	40.3	1,196	97.7	46	46.5	
Southern	1,233	1.8	157	12.7	73	32.6	47.9	1,076	87.3	45	53.1	
Tennessee												
Eastern	1,388	2.0	113	8.1	111	25.6	36.7	1,275	91.9	74	36.0	
Middle	331	0.5	10	3.0	114	31.6	46.3	321	97.0	53	56.1	
Western	789	1.2	79	10.0	74	41.2	50.0	710	90.0	57	50.5	
SEVENTH CIRCUIT	3,927	5.8	1,174	29.9	94	34.5	38.2	2,753	70.1	64	47.5	
Illinois												
Central	700	1.0	280	40.0	110	33.0	37.5	420	60.0	91	43.0	
Northern	755	1.1	30	4.0	86	26.1	43.1	725	96.0	62	49.8	
Southern	723	1.1	577	79.8	90	36.0	36.6	146	20.2	46	52.8	
Indiana												
Northern	526	0.8	21	4.0	57	26.7	39.9	505	96.0	54	41.6	
Southern	314	0.5	19	6.1	118	24.4	40.1	295	93.9	78	40.7	
Wisconsin												
Eastern	754	1.1	173	22.9	91	37.4	45.9	581	77.1	56	55.3	
Western	155	0.2	74	47.7	80	29.1	35.3	81	52.3	55	47.0	
EIGHTH CIRCUIT	5,679	8.3	1,379	24.3	70	40.4	45.3	4,300	75.7	63	52.7	
Arkansas												
Eastern	471	0.7	225	47.8	73	32.8	33.2	246	52.2	36	53.2	
Western	275	0.4	13	4.7	100	29.3	45.0	262	95.3	75	31.4	
Iowa												
Northern	657	1.0	149	22.7	105	29.4	43.7	508	77.3	100	34.9	
Southern	560	0.8	78	13.9	105	27.4	47.9	482	86.1	97	43.0	
Minnesota	647	0.9	34	5.3	64	38.0	51.3	613	94.7	48	59.3	
Missouri												
Eastern	727	1.1	32	4.4	59	36.6	46.5	695	95.6	42	61.4	
Western	884	1.3	29	3.3	100	36.8	54.7	855	96.7	50	62.2	
Nebraska	688	1.0	545	79.2	62	46.4	47.9	143	20.8	41	63.6	
North Dakota	428	0.6	2	0.5	NA	NA	NA	426	99.5	86	49.9	
South Dakota	342	0.5	272	79.5	50	47.4	49.0	70	20.5	24	60.3	

Table A-1 (cont.)

CIRCUIT District	Rule 35(b)							Substantial Assistance (§5K1.1)			
	Total		Number		Average Resentence	Extent of Reduction - Sentence (%)	Extent of Reduction - Guideline Range (%)	Number		Average Sentence	Extent of Departure
	N	%	N	%				N	%		
NINTH CIRCUIT	8,561	12.5	228	2.7	65	31.4	44.7	8,333	97.3	42	53.6
Alaska	167	0.2	2	1.2	NA	NA	NA	165	98.8	43	51.6
Arizona	1,192	1.7	5	0.4	63	31.2	43.2	1,187	99.6	29	62.0
California											
Central	1,346	2.0	8	0.6	62	21.5	35.8	1,338	99.4	37	56.8
Eastern	820	1.2	20	2.4	60	35.6	44.9	800	97.6	52	42.9
Northern	446	0.7	8	1.8	94	51.2	63.4	438	98.2	32	63.9
Southern	1,787	2.6	49	2.7	56	33.8	54.5	1,738	97.3	44	51.6
Guam	90	0.1	4	4.4	74	15.8	23.5	86	95.6	40	58.2
Hawaii	417	0.6	5	1.2	64	27.7	51.5	412	98.8	60	50.3
Idaho	470	0.7	7	1.5	26	29.9	54.7	463	98.5	55	43.7
Montana	358	0.5	67	18.7	82	26.0	32.0	291	81.3	60	39.0
Nevada	327	0.5	10	3.1	30	34.2	50.8	317	96.9	25	54.7
Northern Mariana Islands	9	0.0	0	0.0	NA	NA	NA	9	100.0	24	68.8
Oregon	594	0.9	27	4.5	58	33.7	47.0	567	95.5	42	54.1
Washington											
Eastern	183	0.3	3	1.6	39	36.7	—	180	98.4	54	52.5
Western	355	0.5	13	3.7	57	38.7	59.8	342	96.3	33	62.6
TENTH CIRCUIT	3,189	4.7	479	15.0	75	37.6	43.6	2,710	85.0	49	52.8
Colorado	705	1.0	15	2.1	61	22.6	54.7	690	97.9	49	49.6
Kansas	757	1.1	68	9.0	67	38.0	47.0	689	91.0	59	52.6
New Mexico	451	0.7	6	1.3	56	40.2	58.1	445	98.7	31	63.7
Oklahoma											
Eastern	120	0.2	20	16.7	79	39.0	51.3	100	83.3	70	39.0
Northern	240	0.4	19	7.9	107	35.5	42.9	221	92.1	48	47.9
Western	186	0.3	4	2.2	27	66.2	72.6	182	97.8	55	60.5
Utah	213	0.3	14	6.6	89	25.6	27.7	199	93.4	42	51.4
Wyoming	517	0.8	333	64.4	75	38.0	42.4	184	35.6	51	46.6
ELEVENTH CIRCUIT	8,198	12.0	2,370	28.9	76	36.2	40.8	5,828	71.1	61	45.4
Alabama											
Middle	367	0.5	18	4.9	78	28.2	44.1	349	95.1	61	41.4
Northern	574	0.8	19	3.3	103	37.9	56.1	555	96.7	61	49.2
Southern	491	0.7	48	9.8	87	41.4	50.4	443	90.2	56	54.5
Florida											
Middle	2,408	3.5	583	24.2	85	33.2	41.8	1,825	75.8	70	43.7
Northern	527	0.8	135	25.6	103	44.4	49.9	392	74.4	63	58.6
Southern	2,500	3.7	1,299	52.0	63	38.8	41.3	1,201	48.0	42	46.5
Georgia											
Middle	333	0.5	78	23.4	89	26.8	27.1	255	76.6	52	48.0
Northern	579	0.8	100	17.3	102	27.0	37.3	479	82.7	69	37.9
Southern	419	0.6	90	21.5	97	21.8	20.5	329	78.5	72	29.7

¹ Of the 10,811 Rule 35(b) cases, 958 were excluded from the “Extent of Reduction” calculation due to: the case was not able to be matched with its original case (15); offender received same prison sentence after resentencing (35); offender received a “de facto” life sentence before and after resentencing (5); offender received an undeterminable “time served” sentence after resentencing (894); or the sentence after resentencing was missing (9).

² “Extent of Reduction - Sentence” is the percentage decrease that the average resentence is from the average original sentence imposed.

³ “Extent of Reduction - Guideline Range” is the percentage decrease that the average resentence is from the average minimum of the guideline range that applied in the case.

⁴ “Extent of Departure” is the percentage decrease that the average sentence is from the average minimum of the guideline range that applied in the case.

Table A-2
SENTENCE LENGTH FOR RULE 35(b) AND SUBSTANTIAL ASSISTANCE DEFENDANTS
IN EACH PRIMARY OFFENSE CATEGORY
Fiscal Years 2009-2014

PRIMARY OFFENSE	RULE 35(b) ¹					SUBSTANTIAL ASSISTANCE (\$5K1.1)				
	N	%	Average Resentence	Extent of Reduction - Sentence (%)	Extent of Reduction - Guideline Range (%)	N	%	Average Sentence	Extent of Departure (%)	
TOTAL	9,858	100.0	83	37.1	42.6	57,485	100.0	52	52.6	
Murder	15	0.2	220	41.9	39.8	75	0.1	166	43.9	
Manslaughter	0	0.0	—	—	—	1	0.0	—	—	
Kidnaping/Hostage Taking	4	0.0	158	30.4	55.4	77	0.1	123	48.0	
Sexual Abuse	18	0.2	96	39.2	47.6	103	0.2	79	46.0	
Assault	4	0.0	27	39.9	33.0	53	0.1	32	47.9	
Robbery	87	0.9	102	32.1	26.5	577	1.0	51	40.7	
Arson	6	0.1	38	36.4	44.6	74	0.1	41	46.2	
Drugs - Trafficking	7,223	73.3	88	37.3	43.7	34,872	60.7	62	49.6	
Drugs - Communication Facility	14	0.1	34	25.2	31.6	356	0.6	16	60.9	
Drugs - Simple Possession	3	0.0	43	34.7	43.5	29	0.1	10	76.5	
Firearms	1,044	10.6	97	36.0	39.4	5,303	9.2	70	47.4	
Burglary/B&E	1	0.0	—	—	—	17	0.0	21	46.2	
Auto Theft	9	0.1	132	44.4	41.2	85	0.1	34	54.4	
Larceny	39	0.4	25	36.0	34.9	459	0.8	13	60.9	
Fraud	775	7.9	35	36.7	39.8	7,767	13.5	17	61.8	
Embezzlement	3	0.0	21	30.8	0.0	87	0.2	12	57.7	
Forgery/Counterfeiting	38	0.4	25	35.4	31.9	512	0.9	12	57.0	
Bribery	35	0.4	24	43.7	47.3	394	0.7	14	62.8	
Tax	27	0.3	20	40.6	46.2	506	0.9	8	69.4	
Money Laundering	147	1.5	42	42.2	48.2	1,223	2.1	22	64.4	
Racketeering/Extortion	126	1.3	95	35.4	41.4	925	1.6	57	53.0	
Gambling/Lottery	5	0.1	4	66.0	74.2	77	0.1	2	87.6	
Civil Rights	2	0.0	—	—	—	61	0.1	19	63.8	
Immigration	92	0.9	31	35.7	36.2	1,748	3.0	16	51.8	
Pornography/Prostitution ²	24	0.2	130	27.2	33.9	78	0.1	70	45.7	
Child Pornography ²	24	0.2	105	35.2	47.1	328	0.6	119	41.6	
Prison Offenses	8	0.1	12	38.6	15.1	65	0.1	11	56.3	
Administration of Justice Offenses	21	0.2	42	37.6	38.7	577	1.0	8	71.8	
Environmental/Wildlife	1	0.0	—	—	—	90	0.2	5	77.3	
National Defense	7	0.1	48	31.6	56.4	154	0.3	30	57.9	
Antitrust	0	0.0	—	—	—	68	0.1	12	64.6	
Food & Drug	3	0.0	19	33.0	48.2	37	0.1	6	81.7	
Other Miscellaneous Offenses	42	0.4	29	26.4	39.3	604	1.1	14	65.4	
Obscenity ²	0	0.0	—	—	—	2	0.0	—	—	
Prostitution ²	11	0.1	50	45.3	48.0	101	0.2	57	49.9	

¹ Of the 10,811 Rule 35(b) cases, 958 were excluded from the “Extent of Reduction” calculation due to: the case was not able to be matched with its original case (15); offender received same prison sentence after resentencing (35); offender received a “de facto” life sentence before and after resentencing (5); offender received an undeterminable “time served” sentence after resentencing (894); or the sentence after resentencing was missing (9).

² The Child Pornography, Obscenity and Prostitution offense categories were created in Fiscal Year 2010 and the Pornography/Prostitution category was discontinued. SOURCE: U.S. Sentencing Commission, 2009 - 2014 Resentencing Datafiles, and 2009 - 2014 Monitoring Datafiles (OPAFY09-OPAFY14).

Table A-3

**OFFENSE AND OFFENDER CHARACTERISTICS IN RULE 35(b) AND
SUBSTANTIAL ASSISTANCE CASES**

Fiscal Years 2009 through 2014

OFFENDER CHARACTERISTICS	RULE 35(b)					SUBSTANTIAL ASSISTANCE (§5K1.1)			
	N	%	Average Resentence	Extent of Reduction - Sentence (%)	Extent of Reduction - Guideline Range (%)	N	%	Average Sentence	Extent of Departure (%)
Race	9,831	100.0	83	37.1	42.6	57,209	100.0	52	52.6
White	2,937	29.9	72	36.8	42.8	21,343	37.3	42	55.4
Black	4,404	44.8	97	37.0	42.3	16,732	29.2	66	50.0
Hispanic	2,220	22.6	72	37.2	42.4	16,447	28.7	53	49.6
Other	270	2.7	59	40.6	46.9	2,687	4.7	37	58.8
Gender	9,855	100.0				57,464	100.0		
Male	8,680	88.1	87	36.9	42.4	46,537	81.0	57	50.5
Female	1,175	11.9	52	38.9	44.7	10,927	19.0	29	60.4
Citizenship	9,844	100.0				57,367	100.0		
U.S. Citizen	8,394	85.3	85	37.2	42.8	47,149	82.2	52	53.2
Non U.S. Citizen	1,450	14.7	72	36.7	41.5	10,218	17.8	50	48.5

SOURCE: U.S. Sentencing Commission, 2009 - 2014 Resentencing Datafiles, and 2009 - 2014 Monitoring Datafiles (OPAFY09-OPAFY14).

