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The Difference Between Truth and Truthfulness: Objective Versus Subjective Standards in Applying Rule 5C1.2

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I. INTRODUCTION

The drafters of the Violent Crime Control and Law Enforcement Act of 1994[1] sought to mitigate the effects of harsh mandatory minimum sentences for defendants who play minor roles in

1. Later codified in the U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2002) [hereinafter 2002 SENTENCING GUIDELINES] (setting "forth the provisions of 18 U.S.C. § 3553(f) as added by section 80001(a) of the Violent Crime Control and Law Enforcement Act of 1994").

nonviolent drug crimes by creating a "safety valve" provision.[2] This provision offers first-time offenders a way out of mandatory minimum sentences based on their minor participation in drug-related federal crimes.[3] Typically, these first-time offenders are "mules," people asked or hired by drug dealers to transport drugs.[4] According to the provision, defendants are eligible for relief if, among other requirements,[5] they "truthfully provid[e] to the government all information and evidence the defendant has concerning the offense."[6]

As an illustration of how the safety valve provision works, consider a hypothetical case. Bob is approached by Marty, who gives Bob a bag and asks Bob to deliver it to a third party. The police stop Bob and find five kilos of cocaine in the bag. At trial, Bob pleads guilty and is convicted of possession with intent to distribute.[7] This amount of cocaine carries a mandatory minimum sentence of ten years. Before

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2. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796 (1994) (amending 18 U.S.C. § 3553). Sections 80001, 3553(f), and 5C1.2 are known collectively as the "safety valve provision."

3. *See* 18 U.S.C. § 3553(f) (2000).

4. United States v. Ajugwo, 82 F.3d 925, 926 (9tb Cir. 1996); *see also* United States v. Sbrestha, 86 F.3d 935, 938 (9th Cir. 1996) (noting that "lower-level offenders, such as drug couriers or 'mules,' . . . typically have less [criminal] knowledge").

5. § 3553(f) provides:

> Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. [§§] 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. [§§] 960, 963), tbe court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the government bas been afforded the opportunity to make a recommendation, that—
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> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
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> (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
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> (3) the offense did not result in death or serious bodily injury to any person;
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> (4) the defendant was not an organizer, leader, manager, or supervisor of otbers in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act, and
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> (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the government all information and evidence the defendant has concerning the offense or offenses tbat were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the government is already aware of the information shall not preclude a determination by the court that the defendant has not complied with this requirement.

18 U.S.C. § 3553(f) (emphasis added).

6. 2002 SENTENCING GUIDELINES, *supra* note 1, § 5C1.2(a)(5).

7. 21 U.S.C. § 841 (2000) (prohibiting possession with intent to distribute).

the sentencing hearing, Bob meets with the prosecutor, who asks Bob the name of the person who gave him the bag. Bob suffers from extreme short-term memory loss and is unable to provide Marty's name to the prosecution. At the sentencing hearing, Bob can obtain relief from the mandatory minimum sentence if he can show that he meets the five requirements of the safety valve provision.[8] To qualify for relief, Bob must show (1) that he is a first-time offender according to the Federal Sentencing Guidelines ("the Guidelines"), (2) that he did not use violence in the commission of the crime, (3) that no one was hurt by Bob's actions, (4) that Bob was a mere participant in the criminal activity, rather than an organizer, and (5) that Bob has truthfully provided the government with all of the information that he has regarding the offense.[9] To prove the fifth requirement, Bob's attorney pays a psychiatrist to testify at the sentencing hearing regarding Bob's condition. To grant Bob safety valve relief, the judge will have to evaluate the psychiatrist's testimony and decide whether he believes that Bob has met the fifth requirement of truthfulness by providing all the information he has.[10]

The safety valve provision was enacted ten years after the enactment of the Sentencing Reform Act, which created mandatory minimum sentences for many drug and firearm offenses in addition to establishing the Federal Sentencing Commission to ensure uniformity in federal sentencing.[11] The purpose of the safety valve was to ensure that first-time, nonviolent offenders were not unduly punished by mandatory minimum sentences that were meant to apply to more culpable defendants with extensive criminal histories.[12]

After the defendant presents his case, and the prosecution raises any objections, the court has discretion to determine whether or not the defendant has provided all the information he has, based on the evidence presented at sentencing (or trial) and any additional evidence presented to the court.[13] Since the enactment of the safety

8. 18 U.S.C. § 3553(f).

9. *See* § 3553(f). The defendant has the burden of satisfying these requirements by a preponderance of the evidence. *See* United States v. Ajugwo, 82 F.3d 925, 929 (9th Cir. 1996).

10. Although application of the safety valve is apparently mandatory if a defendant meets the five stated criteria, there is room for substantial judicial discretion in determining whether the criteria have been met. *See, e.g.*, United States v. Espinosa, 172 F.3d 795, 797 (11th Cir. 1999) (holding that the court bears the responsibility of determining the truthfulness of the information the defendant provides to the government); United States v. Gama-Bastidas, 142 F.3d 1233, 1242 (10th Cir. 1998) (holding that the court must determine the quality and completeness of all information the defendant provided to the government to satisfy the fifth subsection).

11. *See infra* text accompanying notes 25-27.

12. *See infra* text accompanying notes 69-70.

13. *See* § 3553(f).

valve provision, codified in the Federal Sentencing Guidelines as Rule 5C1.2, most of the related litigation has focused on the fifth requirement, that a defendant "truthfully provide . . . all information . . . [he] has" in order to qualify for safety valve relief.[14] The defendant carries the burden of proof as to the five criteria.[15]

An issue at the heart of the safety valve's purpose is whether or not the information a defendant provides to the government must be objectively truthful, or whether the truthfulness requirement is satisfied when a defendant provides all the information that he subjectively believes to be truthful, even though that information may be contrary to facts offered by the government. The federal circuits are divided as to the standard of truthfulness required for safety valve relief.[16] The Sixth and Seventh Circuits and, prior to *United States v. Reynoso*, the Second Circuit, termed the safety valve a "good faith" test and used a flexible approach to determine truthfulness, based on whether a defendant has "provided . . . all information . . . [she] has."[17] Specifically, the Seventh Circuit determined that a defendant may qualify for safety valve relief based on psychological testimony at the sentencing hearing, if the information a defendant provides is true "within the range of her ability."[18] However, a recent Second Circuit decision declined to follow this standard, holding that the information a defendant provides must be objectively truthful for a defendant to qualify for safety valve relief.[19] In *United States v. Reynoso*, the Second Circuit held that even when a defendant had provided all of

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14. 2002 SENTENCING GUIDELINES, *supra* note 1, § 5C1.2(a)(5) and accompanying text. Because the first four requirements are clearly defined and based on concrete facts, it is relatively easy to determine whether or not a defendant meets them. The fifth requirement, however, requires a specific and unique determination by the presiding judge and is therefore the subject of most of the litigation surrounding the safety valve. *See id.*

15. *See supra* note 5.

16. *Compare* United States v. Thompson, 76 F.3d 166, 171 (7th Cir. 1996) (allowing safety valve relief based on expert testimony offered by the defendant at the sentencing hearing tending to show limitations on Thompson's perceptual and analytical abilities and concluding that Thompson had been forthright within the range of her abilities), *with* United States v. Reynoso, 239 F.3d 143, 145-46, 150 (2d Cir. 2000) (denying safety valve relief based on similar facts when both the government and court accepted arguendo that the defendant had given all of the information she had, within the range of her abilities).

17. 18 U.S.C. § 3553(f)(5) (2000); *see* United States v. Schreiber, 191 F.3d 103, 106 (2d Cir. 1999) (emphasizing that the statute requires a defendant to act in "good faith") (citation omitted); United States v. Ryals, Nos. 95-6202/95-6203, 1997 U.S. App. LEXIS 13127, at *11 (6th Cir. June 2, 1997) (finding that § 3553(f) provides that statutorily mandatory minimum sentences should not apply to drug offenders who have "made a good-faith effort to cooperate with the government"); United States v. Gambino, 106 F.3d 1105, 1110 (2d Cir. 1997) (indicating that a defendant must make a "good faith attempt to cooperate with the authorities" (quoting United States v. Arrington, 73 F.3d 144, 148 (7th Cir. 1996))); *Thompson*, 76 F.3d at 171.

18. *See Thompson*, 76 F.3d at 171.

19. *See Reynoso*, 239 F.3d at 146.

the information that she believed to be true, she did not qualify for safety valve relief because the information that she provided was not objectively truthful as determined by the court.[20]

This Note argues that the additional requirement of objective truthfulness transforms the safety valve into a modified version of the "substantial assistance" departure,[21] which allows more culpable defendants to obtain lesser sentences based on the quality and quantity of the information they provide to the government.[22] As such, the Second Circuit's interpretation is contrary to congressional intent regarding the enactment of the safety valve: the safety valve was specifically enacted to aid less culpable defendants who have little or no new information to trade. This Note seeks to demonstrate that the Seventh Circuit's approach is correct and that the standard of truthfulness used to determine whether or not a defendant qualifies for safety valve relief should be based on the information that a defendant is able to provide in accordance with the language and purpose of the Act. The Second Circuit decision in *Reynoso* reinterprets the language of the safety valve by requiring that a defendant not only "truthfully provide" all information he has, but also prove that the information provided is objectively true.[23]

As a result of varying circuit court interpretations of the truthfulness requirement, different courts have granted and denied safety valve relief to defendants with similar minor roles in drug crimes based on the reviewing courts' interpretation of the type of information that the defendant is required to provide.[24] This Note therefore further argues that the *Reynoso* decision decreases the uniformity in the application of the safety valve and increases the already considerable discretion allowed sentencing judges in determining whether or not similarly situated offenders qualify for relief.[25] Under this interpretation, the safety valve can be understood functionally as another tool for judges to use in their increasingly discretionary roles as sentencers, despite Congress's efforts to standardize sentences by creating the Federal Sentencing Guidelines

20. *See id.* at 150.

21. *See* 2002 SENTENCING GUIDELINES, *supra* note 1, § 5K1.1.

22. *Id.* The substantial assistance departure provides that "[u]pon motion of the government stating that the defendant has provided substantial assistance in tbe investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." *Id.*

23. *See Reynoso*, 239 F.3d at 150.

24. *See infra* Part IV.

25. *See infra* Part V.

and by legislating mandatory minimum sentences for federal drug crimes.

Part II of this Note provides the legal background of the safety valve provision and related federal legislation. Part III addresses the split in interpretation between federal circuits regarding the standard of truthfulness required to obtain safety valve relief. Part IV describes how the *Reynoso* court's interpretation of the safety valve transforms the provision into a modified version of the substantial assistance provision and the acceptance of responsibility provision. Part V analyzes the effects of this new interpretation on judicial discretion in sentencing, and Part VI provides concluding remarks about the potential impact of the new interpretation.

II. LEGAL BACKGROUND

A. The Federal Sentencing Guidelines

The Federal Sentencing Guidelines are the result of the Sentencing Reform Act ("SRA"), part of the Comprehensive Crime Control Act of 1984.[26] Called a "sweeping"[27] overhaul of federal sentencing, the SRA "directed the promulgation of an essentially mandatory system of federal sentencing."[28] Among reasons for the enactment of the SRA, Congress indicated a desire to increase certainty in sentence lengths,[29] uniformity in sentencing among similarly situated defendants,[30] and proportionality in sentencing.[31]

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26. Pub. L. No. 98-473, 98 Stat. 1837, 1976 (1984) (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

27. S. REP. NO. 98-225, at 65 (1983).

28. H.R. REP. NO. 103-460, at 3 (1994).

29. *See* S. REP. NO. 98-225, at 56; *see also* 2002 SENTENCING GUIDELINES, *supra* note 1, ch. 1, pt. A3. An additional goal was to avoid offenders' receiving parole shortly after incarceration. *See* 2002 SENTENCING GUIDELINES, *supra* note 1, ch. 1, pt. A3.

30. *See* S. REP. NO. 98-225, at 52; *see also* 2002 SENTENCING GUIDELINES, *supra* note 1, at ch. 1, pt. A3; *see also* ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 1-3, 6 (1974) (detailing a study conducted prior to the passage of the Sentencing Reform Act in which fifty federal district court judges in the Second Circuit were given twenty identical case files and were asked to indicate what sentence they would impose on each defendant, with the results indicating a wide disparity in the sentences judges imposed). *Id.*

31. 28 U.S.C. § 991(b) (2000) provides:

> (b) the purposes of the United States Sentencing Commission are to—(1) establish sentencing policies and practices for the Federal criminal justice system that—(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal

Describing this last goal, the Senate Committee Report indicates that use of the Guidelines "is intended to assure that each sentence is fair compared to all other sentences."[32]

As part of the SRA, Congress estahlished the United States Sentencing Commission, which was given a mandate to create the Federal Sentencing Guidelines.[33] The Sentencing Guidelines standardized sentencing in federal jurisdictions[34] and were designed to further the goals enumerated in the SRA.[35] The Commission drafted the Sentencing Guidelines to focus on relevant "offense" characteristics.[36] This change represented a shift in emphasis from the background of the particular offender to an emphasis both on the offense itself and the particular offender's criminal history.[37] Accordingly, the Sentencing Guidelines determine an offender's sentence based on a grid system: an offender's criminal history is on one axis, and his offense level is on the other.[38] A federal judge determines an offender's sentencing range[39] by starting with a certain number of points for the offense itself, then by adding points based on certain relevant aspects of the crime.[40] The judge next adjusts the severity of the sentence within the range mandated by the Guidelines based on the offender's criminal history.[41] Although the judge is constrained by the limits of the sentencing range set by the

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conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

28 U.S.C. § 991(b) (2000).

32. S. REP. NO. 98-225, at 51; *see also* 2002 SENTENCING GUIDELINES, *supra* note 1, ch. 1, pt. A3.

33. *See* 28 U.S.C. § 994(a) (2000).

34. *See* 2002 SENTENCING GUIDELINES, *supra* note 1, ch.1, pt. A1 ("Introduction").

35. *See* 2002 SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 19 (1991) [hereinafter SPECIAL REPORT], *available at* http://www.ussc.gov./r_congress/MANMIN.PDF.

36. *See id.*

37. *See id.*

38. *See* 2002 SENTENCING GUIDELINES, *supra* note 1, § 1B1.1 ("Application Instructions") (describing the steps to take in applying the Guidelines); *see also* James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 277 (1999) (describing the operation of the sentencing Guidelines "grid").

39. The sentencing range is from the lowest possible to the highest possible sentence a defendant can receive.

40. *See* 2002 SENTENCING GUIDELINES, *supra* note 1, § 1B1.1(b)-(e) (terming the underlying offense the "base offense" and allowing for adjustments "as appropriate related to victim, role, and obstruction of justice," as well as "defendant's acceptance of responsibility").

41. *See* 2002 SENTENCING GUIDELINES, *supra* note 1, § 1B1.1(f) (instructing federal judges to "[d]etermine the defendant's criminal history category as specified in Part A of Chapter Four"); *see also* Anderson et al., *supra* note 38, at 278.

Guidelines, she has broad discretion to determine a defendant's sentence within the range.[42]

Judges may depart from the sentencing range as calculated under the Guidelines based on a series of aggravating and mitigating factors.[43] The third section of the Sentencing Guidelines allows for adjustments of an offender's sentence based on the following factors: victim-related aspects of the offense, the defendant's role in the offense, the defendant's level of cooperation with judicial proceedings, and the number of counts of a crime of which the defendant has been convicted.[44] These adjustments are called "downward departures" because they allow a judge to "depart" from the sentencing ranges proposed by the Guidelines.

B. Background Information on Mandatory Minimum Sentences

As part of the Sentencing Reform Act of 1984, Congress enacted a host of new mandatory minimum sentences for drug and firearm-related offenses.[45] Mandatory minimum penalties are enacted by Congress and require a federal judge to impose a sentence of at least a certain number of years when a defendant is convicted of a particular federal crime.[46] A judge has discretion in deciding how much higher the sentence should be but cannot go below the statutorily prescribed minimum.

The history of mandatory minimum sentence legislation during the last fifty years reveals conflicted and cyclical congressional attitudes toward mandatory minimum sentences as criminal justice policy.[47] In 1951, Congress established mandatory minimum sentences

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42. *See* 2002 SENTENCING GUIDELINES, *supra* note 1, § 5C1.1(a) ("A sentence conforms with the guidelines for imprisonment if it is within the minimum and maximum terms of the applicable guideline range."); *see also* Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1058 (2001) ("Once a district court has determined the final offense level on the vertical axis and the criminal history category on the horizontal axis, the Sentencing Table designates the sentencing range. The judge retains effectively unfettered discretion to sentence *within that range*.") (emphasis added).

43. See 2002 SENTENCING GUIDELINES, *supra* note 1, § 3A-D.

44. *Id.*

45. SPECIAL REPORT, *supra* note 35, at 9 nn.26-29; *see also* Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1877-78 (1995) (noting that "Congress passed the mandatory minimum statutes as a dramatic and popular way to combat some of the same perceived sentencing evils that inspired the SRA").

46. *See* Michael M. Baylson, *Mandatory Minimum Sentences: A Federal Prosecutor's Viewpoint*, 40 FED. B. NEWS & J. 167, 167 (1993).

47. *See* Marc Miller & Daniel J. Freed, *Editors' Observations, The Chasm Between the Judiciary and Congress over Mandatory Minimum Sentences*, 6 FED. SENTENCING REP. 59 (1993)

for drug-related crimes with the Boggs Act, an apparent response to increased drug use by young Americans.[48] Congress then stiffened minimum sentences for drug offenses in 1956.[49] However, Congress repealed most of these drug-related mandatory minimum penalties in 1970,[50] based on evidence from judges and prosecutors that mandatory sentences were both unduly harsh and ineffective at deterring drug crime.[51] In 1984, Congress passed the Comprehensive Crime Control Act, which included the Sentencing Reform Act, establishing the United States Sentencing Commission to promulgate judicial guidelines mandating uniformity in sentencing.[52] The Comprehensive Crime Control Act also contained new mandatory minimum sentences for drug and firearm offenses.[53] Congress cited renewed concern over inconsistency in criminal sentences, unchecked judicial discretion, and a desire for uniformity in sentencing among the reasons for its enactment.[54]

C. The Intersection of the Sentencing Guidelines and Mandatory Minimum Sentence Legislation

Congress presented similar reasons for the enactment of the Sentencing Reform Act and the enactment of additional mandatory minimum sentences in the Comprehensive Crime Control Act.[55] Prominent among these rationales is a desire to achieve uniformity in sentencing for similarly situated offenders.[56]

(noting that in 1984, 1986, 1988, and 1990, Congress passed laws requiring increasingly stiffer mandatory minimum penalties), *available at* www.lexis.com (last visited Apr. 24, 2003).

48. *See* Oliss, *supra* note 45, at 1851.

49. *Id.* at 1851 n.7 (citing the Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 651 (1956)).

50. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended in various sections of 21 U.S.C.). This Act repealed all mandatory minimum sentences for drug offenses, except for continuing criminal enterprise offenses. *See* 21 U.S.C. § 848 (2000).

51. SPECIAL REPORT, *supra* note 35, at 7-8 nn.14-19; *see also* Oliss, *supra* note 45, at 1851-52 (quoting then-Congressman George H.W. Bush describing the repeal as a move toward "better justice and more appropriate sentences" (116 CONG. REC. 33, 314 (1970), *reprinted in* 3 FED. SENTENCING REP. 108 (1990))).

52. *See supra* notes 26-28.

53. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 503(a), 1005(a), 98 Stat. 2069, 2138 (1984) (amending 21 U.S.C. § 860 (formerly § 845a) and 18 U.S.C. § 924(c)).

54. *See supra* notes 27-30.

55. *See generally* SPECIAL REPORT, *supra* note 35, 8-9; *see also* Jane L. Froyd, Comment, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1490 (2000) (noting that "both systems seek to provide appropriately severe and certain punishment for serious criminal conduct").

56. *See supra* note 30; *see also* SPECIAL REPORT, *supra* note 35, at 25 ("The sentencing guidelines and mandatory minimum sentences have in common important objectives. For

However, there is significant friction between the operation of the Sentencing Guidelines and mandatory minimum sentences.[57] For example, while the Guidelines tend to provide gradual increases in sentence severity based on additional offenses or prior criminal history, mandatory minimums result in markedly different sentences for similarly situated defendants when one defendant meets the requirements for the mandatory minimum sentence and another does not.[58] The result of this so-called cliff effect is that a difference in drug amount as small as five grams of cocaine can result in one defendant receiving a sentence that is twice as long.[59]

The substantial assistance provision, which provides an exception to mandatory minimum sentences, also results in enormous disparity in sentencing between similarly situated defendants based on a defendant's ability and willingness to provide the government with information about the underlying criminal activity.[60] The substantial assistance provision allows judges to depart "downward"

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example, both seek to provide appropriately severe and certain punishments for serious criminal conduct.").

57. *See* SPECIAL REPORT, *supra* note 35, at 25 (providing that "[i]n numerous other respects, however, mandatory minimums are both structurally and functionally at odds with sentencing guidelines and the goals the sentencing guidelines seek to achieve"). Mandatory minimum penalties operate to override the sentencing guidelines. *See* Celesta A. Albonetti, *The Effects of the "Safety Valve" Amendment on Length of Imprisonment for Cocaine Trafficking/Manufacturing Offenders: Mitigating the Effects of Mandatory Minimum Penalties and Offender's Ethnicity*, 87 IOWA L. REV. 401, 405 (2002) (commenting that "[m]andatory minimum penalties trump the sentencing guidelines"); *see also* Froyd, *supra* note 55, at 1484 (same).

58. *See* SPECIAL REPORT, *supra* note 35, at 25 ("Whereas the guidelines provide graduated, proportional increases in sentence severity for additional misconduct or prior convictions, mandatory minimums tend to result in sharp differentials or cliffs in sentences based upon small differences in offense conduct or criminal record.").

59. *Compare* 21 U.S.C. § 841(b)(1)(B) (1970) (providing a minimum five-year penalty for the manufacture or possession with intent to sell of one hundred grams or more of a substance containing heroin), *with* § 841(b)(1)(A) (providing for a minimum ten-year penalty for one kilogram or more of a substance containing heroin); *see also* Stephen J. Schulhofer, *Rethinking the Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 209 (1993) (arguing that the result of the cliff effect is that "small drug quantities have enormous importance, while all other factors bearing on culpability and dangerousness have no importance at all").

60. *See* Schulhofer, *supra* note 59, at 212 n.69 (quoting Judge Easterfield's opinion from *United States v. Brigham*, 977 F.2d 317, 318 (7th Cir. 1992) ("Mandatory minimum penalties, combined with a power to grant exemptions, create a prospect of inverted sentencing. The more serious the defendant's crimes, the lower the sentence—because the greater his wrongs, the more information and assistance he has to offer to a prosecutor.")); *see also* Adriano Hrvatin, Comment, *Unconstitutional Exploitation of Delegated Authority: How to Deter Prosecutors from Using "Substantial Assistance" to Defeat the Intent of the Federal Senteneing Laws*, 32 GOLDEN GATE U. L. REV. 117, 121 (2002) (arguing that "prosecutors violate separation-of-powers principles when they move for downward departures on behalf of kingpins who provide substantial assistance in a case against less culpable co-defendants because Congress did not authorize such an exercise of prosecutorial discretion").

from the mandatory minimum sentence.[61] Substantial assistance is the primary reason for downward departures.[62] For a defendant to receive such a substantial assistance departure, she must provide the government with information that is helpful to the investigation or prosecution of others.[63] Moreover, the government must make a motion to the court on behalf of the defendant, based on the useful information that the defendant provided to the prosecution.[64]

Obviously, the substantial assistance provision benefits those persons most involved in the criminal activity who are able to provide useful information to the government, such as names of contacts or suppliers or information about the operation of the conspiracy.[65] The useful information requirement deprives low-level offenders of any way to reduce their mandatory minimum sentences. Even if they cooperate with the government, they are often unable to provide sufficient information to qualify for substantial assistance. This "cooperation paradox"[66] is particularly acute in drug conspiracy cases in which one or a few conspirators act as behind-the-scenes organizers of the crime, employing others (usually drug addicts) to do the actual drug handling and transacting. When the conspiracy is revealed, only the organizers of the crime will be in a position to provide useful information to the government, while the low-level participants receive equally severe sentences based on the quantity of drugs involved in the transaction. This cooperation paradox also has a disparately harsh impact on women, who often serve as mules or couriers in drug conspiracies.[67]

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61. *See* 18 U.S.C. § 3553(e) (2000).

62. In 2000, substantial assistance departures accounted for approximately three-quarters of all departures that federal courts granted to crack and powder cocaine users. *See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 61 (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm; U.S. SENTENCING COMM'N, ANNUAL REPORT 38 (1997) (finding that in 1997, substantial assistance departures accounted for approximately two-thirds of all departures that courts granted to drug offenders), *available at* http://www.ussc.gov/ANNRPT/1997/97TOC.HTM; Bowman & Heise, *supra* note 42, at 1110-11 (noting that "since 1994, roughly one in every three federal drug defendants has received a substantial assistance departure").

63. *See* § 3553(e) ("Upon motion of the government, the court shall have the authority to impose a sentence below a level estahlished 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.") (emphasis added).

64. § 3553(e).

65. *See* Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 198-99 (1991).

66. *See* Schulhofer, *supra* note 59, at 211-13.

67. *See* Paula C. Johnson, *At the Intersection of Injustice: Experiences of African-American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 37 (1995); *see also* U.S. SENTENCING COMM'N, ANNUAL REPORT tbl.5 (1997) (finding that women are convicted for drug offenses more

D. Enactment of the Safety Valve Provision

Congress responded to the new drug-related mandatory minimum sentences that were part of the SRA in 1984 in the same way they had responded in 1970, after evidence showed that the mandatory minimums were not achieving the intended goals of just punishment, certainty, and fairness.[68] In 1994, ten years after the enactment of the SRA, Congress passed the Violent Crime Control and Law Enforcement Act, softening the effect of the SRA and the new mandatory minimum sentences.[69]

The safety valve provision is actually derived from two separate acts. In 1994, Congress amended 18 U.S.C. § 3553 by creating the safety valve provision to address concerns that low-level, nonviolent drug offenders were being unfairly punished by mandatory minimum sentences when they shared only a small part in the commission of the crime.[70] The Sentencing Commission enacted its own safety valve in 1995, providing that a defendant who has an offense level of twenty-six or greater and meets the other requirements of the statute gains a two-level decrease in offense level according to the Guidelines.[71] The Commission's safety valve applied to all drug offenses, not merely the ones listed in 18 U.S.C. 3553(f),[72] and became effective for all defendants sentenced on or after November 1, 1995.[73]

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frequently than any other type of offense), *available at* http://www.ussc.gov/ANNRPT/1997/TABLE5.PDF.

68. *Compare* 28 U.S.C. § 991(b) (2000), *with* 18 U.S.C. § 3553(f); *see also* Albonetti, *supra* note 57, at 407 (noting that "[l]egal scholars, social scientists, judges, and probation officers view the safety valve amendment as a legislative attempt to mitigate the negative legal and sociolegal ramifications of the harsh drug mandatory minimum sentences that went into effect in the mid-1980s").

69. Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985 (1994) (amending 18 U.S.C. § 3553).

70. *See supra* Part II.D.

71. 2002 SENTENCING GUIDELINES, *supra* note 1, § 2D1(b)(4) (1995) [hereinafter 1995 SENTENCING GUIDELINES]. This section has been rearranged so that § 2D1(b)(4) is now subsection (b)(6). 2002 SENTENCING GUIDELINES, *supra* note 1, § 2D1.1(b)(6).

72. The original five offenses are as follows: 21 U.S.C. § 841 (1994) (prohibiting manufacturing, distribution, or dispensation of real or counterfeit controlled substances); § 844 (prohibiting unlawful possession of controlled substances); § 846 (proscribing conspiracy to commit drug-related offenses); § 960 (criminalizing importation or exportation of controlled substances); § 963 (outlawing conspiracy to import or export controlled substances). *See* 1995 SENTENCING GUIDELINES, *supra* note 1, § 5C1.2 (1995) (referring to these five code provisions).

73. 1995 SENTENCING GUIDELINES, *supra* note 70, §§ 5C1.2, 2D1.1(a)(4); *see also* United States v. Osei, 107 F.3d 101, 104 (2d Cir. 1997) (holding that by locating the reduction in § 2D1.1, Congress conveyed its intention that the reduction should apply to all sentences, not just to the mandatory minimum sentences enumerated in § 5C1.2).

Until Congress enacted the safety valve provision in 1994, defendants convicted of certain drug crimes could only receive less than the mandatory minimum sentence based on substantial assistance to the prosecutor.[74] In enacting the safety valve, Congress specifically noted that the substantial assistance provision had the result of rewarding more culpable defendants based on the amount of useful information they could provide the prosecutor, while less culpable defendants received the full mandatory minimum.[75] Additionally, commentators such as Philip Oliss noted that the safety valve, unlike the substantial assistance provision, limited prosecutorial authority by allowing a judge, rather than a prosecutor, to determine whether relief was warranted.[76] The safety valve's legislative history demonstrates that Congress enacted the safety valve to rectify these inequalities in the system:

> Ironically, for the various offenders who most warrant proportionally lower sentences—offenders that by guideline definitions are the least culpable—mandatory minimums generally operate to block the sentence from reflecting mitigating factors.[77]

The safety valve provides low-level offenders relief from mandatory minimum sentences for drug crimes if they meet specific criteria.[78] The defendant must not have more than one criminal history point,[79] must not have used violence, threats of violence, or a weapon during the offense, the offense must not have resulted in death or serious bodily injury to another, and the defendant must not be an organizer or leader in the offense.[80] Finally, no later than the time of sentencing, the defendant must have "truthfully provided to

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74. 18 U.S.C. § 3553(e) (2000); 2002 SENTENCING GUIDELINES, *supra* note 1, § 5K1.1.

75. H.R. Rep. No. 103-460 (1994), 1994 WL 107571; *see also* Schulhofer, *supra* note 59, at 211-13.

76. Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1885-86 (1995):

> Another aspect of the safety valve provision is that, while it does not eliminate prosecutors' control over substantial assistance motions, it allows judges to determine independently whether an offender has provided as much assistance as he or she is capable of providing. If an offender has met the other criteria, and the judge is satisfied that he or she has truthfully disclosed everything that he or she knows about the offense, section 80001(a) instructs the judge to impose a sentence pursuant to the guidelines. The fact that a defendant's knowledge may not be relevant or useful to the prosecution is immaterial to the judge's determination. This provision does not affect the prosecution's discretion regarding substantial assistance motions, but it appears to limit the influence that prosecutorial discretion has in determining a first-time, nonviolent offender's sentence.

Id.

77. H.R. REP. NO. 103-460.

78. *See* § 3553(f).

79. *See* 2002 SENTENCING GUIDELINES, *supra* note 1, § 5C1.2(a)(1).

80. 18 U.S.C. § 3553(f)(1)-(5) (2000).

the government all information and evidence that the defendant has concerning the offense."[81]

The purpose of the safety valve ostensibly is served by the provision as enacted. The safety valve provision addresses the unjust result of the substantial assistance provision whereby only the most culpable defendants could obtain relief from mandatory minimum sentences because they had the most information to offer the government.[82] Further, it makes a specific exception for first-time, nonviolent offenders who fit certain criteria. In addition, relief is no longer based on a prosecutorial motion.[83] However, the text and legislative history of the Act do not directly address the type of truthfulness required by the safety valve provision. Does "truthfully" providing "all the information that a defendant has"[84] require that the information provided be objectively truthful, or does the provision provide relief for a defendant who truthfully *believes* that the information she provides is true, when facts presented by the government indicate that this believed information is not true?

III. THE SPLIT IN INTERPRETATION: THE STANDARD OF TRUTHFULNESS REQUIRED TO QUALIFY FOR SAFETY VALVE RELIEF

In full, § 3553(f)(5) specifies that in order to qualify for safety valve relief, the defendant must, by the time of sentencing, have

> truthfully provided to the government all information and evidence that the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the government is already aware of the information shall not preclude a determination by the court that the defendant bas complied with the requirement.[85]

The language of the safety valve provision is inherently ambiguous regarding the standard of truthfulness required to qualify for relief. The Act uses the word "truth" in its adverbial form, "truthfully."[86] The instant split of authority concerns whether the use of the adverb form indicates that only a subjective standard of truthfulness is sufficient (by focusing on the *way* in which the

81. § 3553(f)(5).

82. *See supra* notes 74-75.

83. *See id.*; *see also* Violent Crime Control and Law Enforcemant Act; Pub. L. No. 103-332, § 80001(a), 108 Stat. 1796 (1994) (amending 18 U.S.C. § 3553); Revisions to the Sentencing Guidelines for tbe United States Courts, 59 Fed. Reg. 52,210 (Oct. 14, 1994) commentary application notes 1-7.

84. § 3553(f)(5).

85. *Id.*

86. *Id.*

defendant provides the information), or whether, by using the word "truthfully,"[87] Congress intended that the defendant demonstrate that the information he presents is objectively true. Closely related to the issue of objective versus subjective truthfulness is the requirement that a defendant provide "all information and evidence [he] has."[88] Thus, truthfulness is measured by the court's perceptions of the extent of the defendant's efforts to offer information within his possession.

A. The Background for the Reynoso *Decision*

As noted above, "truthfully provided" is a phrase with multiple meanings. Since the enactment of the safety valve provision, federal courts have taken different approaches to determining what conduct by defendants will qualify for safety valve relief under the "truthfully provided" language.[89]

The U.S. Court of Appeals for the Seventh Circuit addressed the specific issue of objective versus subjective truthfulness under the safety valve provision in *United States v. Thompson*.[90] In *Thompson*, the Seventh Circuit upheld a district court determination that the defendant qualified for safety valve relief because she provided information to the government "within the range of her ability."[91]

A jury convicted Thompson of conspiracy to possess cocaine with intent to distribute and of knowingly distributing cocaine,[92] based on a series of conversations and her delivery of the drugs to an undercover officer.[93] Thompson admitted to counting sums of money and delivering boxes and packages but challenged the jury's finding that she was a knowing participant in the conspiracy, claiming that although she was aware of the actions she was performing, she was

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87. *Id.*

88. *Id.*

89. *See, e.g.*, Jeffrey J. Shebesta, Note, *The "Safety Valve" Provision: Should the Government Get an Automatic Shut-Off Valve?*, 2002 U. ILL. L. REV. 529, 531 (2002) (identifying three main issues federal courts have encountered when interpreting the requirements of the "truthfully provided" language in section 5C1.2):

> First, should a defendant who initially lies to the government automatically be disqualified from a safety valve reduction even if the defendant ultimately makes a complete and truthful statement? Second, what is the statutory deadline for making a complete and truthful statement to the government? Finally, how and to whom should the safety valve statement be made?

90. 76 F.3d 166 (7th Cir. 1996).

91. *Id.* at 171.

92. *Id.* at 167-68. Thompson was convicted of conspiracy to possess with intent to distribute cocaine pursuant to 21 U.S.C. § 846 and of knowingly distributing approximately five kilograms of cocaine under 841(a). *Id.*

93. *Id.* at 166-68.

not aware of their implications or of their criminality.[94] In her defense, Thompson relied on a psychological profile that found that she suffered from a diminished capacity to understand complex situations.[95] Although the Seventh Circuit upheld the defendant's conviction for knowing participation in the conspiracy, they also upheld the application of the safety valve.[96] Because the district court relied on expert testimony to hold that the defendant had provided assistance to the government to the best of her abilities,[97] the Seventh Circuit deferred to the district court's determination under the clearly erroneous standard.[98]

Upholding the district court finding that the defendant had provided all the information that she had "to the best of her ability," the Seventh Circuit upheld the application of safety valve relief.[99] By doing so, the Seventh Circuit accepted that safety valve relief applies to defendants who provide information to the best of their abilities, even if the information may not be objectively truthful.[100] Although the Seventh Circuit acknowledged that the district court had evidence indicating that Thompson was aware of the criminality of her actions, the court held that Thompson's lack of ability to understand the implications of those criminal actions did not preclude relief under the safety valve.[101]

Other circuits have indicated agreement with the *Thompson* approach by reducing the emphasis on objective truthfulness in

94. *Id.* at 169. Thompson asserted that the "evidence introduced against her at trial command[ed] nothing other than the innocent interpretation that these were the actions of a secretary unwittingly performing the duties normally associated with that position, including answering the phone, taking messages, and transferring items to customers as required by her employer." *Id.*

95. *Id.* at 168.

96. *Id.* at 171.

97. *Id.*

98. *Id.* at 168-69. At sentencing, the district court, according to the Sentencing Guidelines, recommended a decrease in her offense level based on her minimal role in the actual cocaine distribution and gave her a two-level reduction for acceptance of responsibility based on the psychological evaluation and the fact that Thompson gave information to the government "as she knew and understood it." *Id.* at 168.

99. *Id.*

100. *See id.* It could be argued that, in making their decision, the Seventh Circuit was simply deferring to the judgment of the district court under the clear error standard. However, the Seventh Circuit specifically held that the defendant qualified for safety valve relief because she was "forthright within the range of her ability." *Id.* at 171. Although this determination is reliant on the district court finding, the Seventh Circuit was also interpreting the meaning of the language of the safety valve requirement.

101. *Id.*

awarding safety valve relief to defendants under the provision.[102] For example, the U.S. Court of Appeals for the Ninth Circuit held that a jury's guilty verdict does not preclude a defendant from obtaining safety valve relief.[103] In *United States v. Sherpa*, the government challenged the district court's finding on subsection (5) only—the "truthfully provided" subsection of the safety valve provision.[104] A jury had convicted Sherpa of possession of heroin with intent to distribute and importation of heroin, notwithstanding his claim that he did not know that the substance in his suitcase was heroin.[105] At sentencing, the district court judge reduced Sherpa's sentence pursuant to the safety valve.[106] On appeal, the government contended that Sherpa's conviction for intent to distribute precluded the possibility that Sherpa truthfully provided "all information" that he had concerning the offense, arguing that "the jury's guilty verdict legally forecloses any possibility that Sherpa's consistent profession of ignorance (regarding the presence of drugs in the suitcase) was based in truth."[107] The court disagreed, finding that "subsection (5) has been termed a 'tell all you can tell' requirement" mandating only that Sherpa provide all the information "at his disposal."[108]

In so holding, the Ninth Circuit placed special emphasis on the role of the judge over that of the jury in determining safety valve relief under § 3553(f).[109] Because the judge is privy to far more information than the jury in making a determination about sentencing relief,[110] she is in a better position to determine whether or not a particular defendant has "truthfully provided" all the information that he has.[111] The *Sherpa* court also based its position on the Supreme Court's

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102. *See, e.g.*, United States v. Schreiber, 191 F.3d 103, 106-07 (2d Cir. 1999); United States v. Sherpa, 110 F.3d 656, 663 (9th Cir. 1996); United States v. Shrestha, 86 F.3d 935, 939 (9th Cir. 1996).

103. *Sherpa*, 110 F.3d at 663.

104. *Id.* at 660.

105. *Id.* at 658-59.

106. *Id.* at 659.

107. *Id.* at 660.

108. *Id.* (quoting United States v. Shrestha, 86 F.3d 935, 939 (9th Cir. 1996)). A narrower interpretation of this holding, that the holding was hased solely on the reviewing court's ability to sentence a defendant regardless of the findings of a jury, is discussed *infra* Part IV.

109. *Id.*

110. *Id.* at 660-61. As examples of the type of information a judge hears that a jury does not, the *Sherpa* court provided: (1) statements made by a defendant who testified only at the sentencing hearing, (2) evidence and witnesses not shown to the jury, and (3) an increased opportunity to observe the defendant over a period of months. *Id.* at 660; *see also* United States v. Fernandez-Vidana, 857 F.2d 673, 675 (9th Cir. 1988) (explaining that hearsay may he considered at sentencing); FED. R. EVID. 1101(d)(3) (stating that rules of evidence do not apply at sentencing).

111. *Sherpa*, 110 F.3d at 660-61.

holding in *United States v. Koon*, stating that courts may not identify facts relevant to sentencing beyond those delineated in the Sentencing Guidelines.[112] According to *Koon*, "a federal court's examination of whether a factor can ever be an appropriate basis for departure is limited to determining whether the [Sentencing] Commission has proscribed, as a categorical matter, consideration of the factor."[113] In light of the *Koon* decision, the Ninth Circuit held that a district court may reconsider the facts necessary to the jury verdict in determining whether or not a defendant should receive safety valve relief.[114] Therefore, if a defendant maintains his innocence to the judge at sentencing after the jury has already decided his guilt as a matter of fact, the sentencing judge has the discretion to award safety valve relief based on elements of the crime, notwithstanding the difference between the defendant's claim and the jury's finding.[115] Obviously, this holding grants judges increased discretion in determining whether a defendant has been sufficiently truthful to qualify for safety valve relief. The *Sherpa* holding demonstrates a general willingness to allow defendants relief based on flexible standards of truthfulness as determined by the reviewing court. The *Sherpa* court embraced this flexible standard to the point of allowing the defendant to maintain a position at sentencing in direct opposition to a fact established by the jury.[116]

A decision of the U.S. Court of Appeals for the Second Circuit prior to *Reynoso* further demonstrates a flexible interpretation of the truthfulness requirement of the safety valve provision. In *United States v. Schreiber*, the Second Circuit held that a defendant who at first lies and even misleads the government may still obtain safety valve relief under § 3553(f), as long as the defendant eventually provides information that complies with the safety valve requirements at some time prior to his actual sentencing.[117] Defendant Schreiber

112. *Id.* at 661-62 (citing Koon v. United States, 518 U.S. 81 (1996)).

113. *Koon*, 518 U.S. at 109.

114. *Sherpa*, 110 F.3d at 662.

115. *Id.*

116. Although the *Sherpa* decision can be understood as merely increasing deference to federal judges in sentencing, the *Sherpa* court simultaneously affirmed the defendant's right to maintain a position in opposition to the prosecution at sentencing regarding the elements of the safety valve requirement. Regarding judicial discretion and the safety valve, see discussion *infra* Part V.

117. 191 F.3d 103, 108 (2d Cir. 1999); *see also* Shebesta, *supra* note 89, at 537-42 (describing the *Schreiber*, *Shrestha*, and *United States v. Tournier*, 171 F.3d 645 (8th Cir. 1999), decisions as evidence of a "plain language interpretation" of the requirements of section 5C1.2(5) and arguing that the statute does not distinguish between defendants who provide all information, or all truthful information, in initial meetings and defendants who initially lie or mislead the government but eventually provide adequate information before the sentencing hearing).

repeatedly lied and obstructed the government's case prior to offering two allegedly truthful[118] statements to the government before his sentencing hearing.[119] The district court denied the defendant's request for safety valve relief, asserting that the defendant had missed his chance to qualify by continually misleading the government in earlier proffer sessions.[120] Based on a plain language interpretation of § 3553(f) that a defendant must "truthfully provide[ ]" the information "not later than the time of the sentencing hearing,"[121] the Second Circuit held that the defendant had satisfied the basic requirements of the statute.[122]

In *Schreiber*, the Second Circuit also drew an important distinction between a defendant's "cooperation" with the government and the defendant's qualifications for safety valve relief.[123] The court remarked that "[t]o the extent that we have previously suggested that the statute requires a defendant to 'cooperate' with the government . . . a defendant may meet the requirements by volunteering to the government complete and truthful information no later than the time of sentencing."[124] In so holding, the Second Circuit rejected the government's policy argument that a determination of whether or not the defendant has acted in good faith should rest on his "conduct as a whole," from the start of the criminal proceeding.[125] The Second Circuit described this government argument as an attempt "to justify engrafting onto the statute the requirement that a defendant must cooperate with the government in good faith even beyond the textual mandate."[126] According to the Second Circuit, evidence regarding the defendant's conduct is relevant to the court's determination of the defendant's credibility when he later claims eligibility for safety valve relief, but prior lack of good faith in dealing with the government does not automatically disqualify a defendant from relief.[127] The *Schreiber* court's holding is particularly interesting in light of the subsequent *Reynoso* court's holding, because in *Schreiber*, the Second Circuit demonstrated a general reluctance to

118. The court did not rule on the issue of truthfulness. The Second Circuit assumed that defendant's final proffers were "complete and truthful." *Schreiber*, 191 F.3d at 106.

119. *Id.* at 103-05.

120. *Id.* at 106 (quoting the district court opinion declining to give defendant a "fourth bite at the apple").

121. 18 U.S.C. § 3553(f)(5) (2000).

122. *Schreiber*, 191 F.3d at 106.

123. *Id.*

124. *Id.* (citations omitted).

125. *Id.* at 106-07.

126. *Id.* at 106.

127. *Id.* at 107-08.

correct problems inherent in the design of the safety valve.[128] Noting that the *Schreiber* interpretation of the safety valve may actually encourage defendants to play games with the government, the Second Circuit remarked that "[t]o the extent that this problem exists, however, the remedy lies in Congress, not in a judicial rewrite of plain text."[129]

However, the language that the Second Circuit used to describe the safety valve in *Schreiber* laid the foundation for its future decision in *Reynoso*. The court noted that to obtain safety valve relief, a defendant must "volunteer[ ] to the government complete and truthful information no later than the time of sentencing."[130] By ignoring the statutory adverbial term "truthfully" in favor of the adjectival phrase "truthful information," the Second Circuit laid the groundwork for displacing a test of good-faith compliance with one of objectively truthful information.[131] However, as previously discussed, the *Reynoso* court's decision demonstrates that the two forms of the word are used interchangeably in the application of the safety valve.

B. The Reynoso *Court's Rationale*

In *Reynoso*, the Second Circuit broke from traditional interpretations of the safety valve—both from the "good-faith" interpretation accepted by other circuits[132] and from the Second Circuit's own plain language interpretation in *Schreiber*. The facts of *Reynoso* are fairly straightforward. Defendant Reynoso approached a confidential informant and handed him a brown bag that contained forty-four grams of crack cocaine.[133] Reynoso told the confidential informant that there was crack cocaine in the bag.[134] Reynoso was arrested five months later and charged with conspiracy to distribute

128. *Id.* at 106.

129. *Id.* at 107.

130. *Id.* at 106.

131. *See infra* note 155 and accompanying text. Many courts of appeals use the terms "truthful" and "truthfully" interchangeably when applying the safety valve. *Id.*

132. United States v. Reynoso, 239 F.3d 143 (2d Cir. 2000). Cases requiring the defendant to make a "good-faith" effort include *United States v. Wrenn*, 66 F.3d 1, 3 (1st Cir. 1995) (requiring that the defendant affirmatively cooperate with the government to receive safety valve relief), *United States v. Arrington*, 73 F.3d 144, 148 (7th Cir. 1996) (requiring that the defendant initiate contact and make attempts with the government to obtain safety valve relief), and *United States v. Ramunno*, 133 F.3d 476, 482 (7th Cir. 1998) (finding that a defendant who lies but later admits some truth when confronted has not made a good-faith attempt and does not qualify for safety valve relief); *see also* Shebesta, *supra* note 89, at 542-46 (describing the holdings in these cases and the court's reasoning in each).

133. *Reynoso*, 239 F.3d at 144.

134. *Id.* at 144-45.

and possession with intent to distribute more than fifty grams of crack cocaine[135] as well as with distribution and possession with intent to distribute more than five grams of crack cocaine.[136] Reynoso met with prosecutors for a safety valve proffer and informed the government that she had been addicted to crack cocaine at the time of the drug transfer.[137] Although Reynoso admitted that she had distributed the crack cocaine on that occasion, she denied ever acting as a courier or deliverer of drugs for a drug dealer and maintained that she had stolen the crack and approached the confidential informant to sell it on her own.[138] Her defense counsel admitted that the "objective facts known to the parties did not support Ms. Reynoso's story . . . . [T]he only logical inference [from the known facts] is that Ms. Reynoso was working for a drug dealer as a courier, not that she had stolen the crack and sold it herself."[139]

Reynoso's counsel retained a forensic psychiatrist who found that her "history of intoxication, impaired memory and neglect" accounted for her behavior, even though she had no psychiatric illness.[140] The psychiatrist indicated that although Reynoso was ready to accept responsibility for her criminal behavior, she was unconsciously elaborating a story that would explain her behavior based on the limited memory she had of the event.[141] The doctor indicated that Reynoso's story was untrue, but she did not appreciate that it was untrue because of her "organic memory impairment, secondary to cocaine intoxication."[142]

Reynoso pled guilty, and defense counsel moved for safety valve relief, conceding that Reynoso had not been "objectively" truthful at her safety valve proffer, but arguing that because she "did not appreciate the fact that her information was untrue [as a result] of organic memory impairment," she nevertheless satisfied the truthfulness requirement.[143]

Before embarking on its analysis, the majority, following the government's lead, accepted the findings of the psychiatrist who interviewed the defendant and assumed that Reynoso subjectively

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135. *Id.* at 145; *see* 21 U.S.C. § 846 (2000).

136. *Reynoso*, 239 F.3d at 145; *see* §§ 812, 841(a)(1) & (b)(1)(B).

137. *Reynoso*, 239 F.3d at 145.

138. *Id.*

139. *Id.* (citing Appellant's Br. at 6).

140. *Id.*

141. *Id.*

142. *Id.* The doctor also indicated that " 'such a pattern of confabulation is common in those with significant memory impairment.' " *Id.*

143. *Id.*

believed all the information that she provided to the government in her safety valve proffer.[144] The court then addressed both the government's argument that Reynoso's information must be objectively true to qualify and the defendant's argument that the information need only be subjectively believed by the defendant.[145] The court concluded that both parties were partially correct, and that both forms of truthfulness were required from the defendant.[146] The Second Circuit indicated that "first and foremost"[147] the plain language of § 3553(f)(5) supported this result.[148]

The Court's textual arguments were twofold. First, the court argued that the word "truthful" includes both a subjective and an objective meaning.[149] The court cited three dictionaries for the proposition that the word "truthful" encompasses both "telling or disposed to tell the truth"[150] (subjective truth) and "accurate and sincere in describing reality" (objective truth).[151] Based on these definitions, the court reasoned that Congress intended for the word "truthful" to require a defendant to offer information that is truthful in both an objective and a subjective sense.[152]

The court next addressed the defendant's argument that the statute's phrasing and the use of the adverbial form, "truthfully provided,"[153] indicates that the "emphasis of the statute is on the defendant's state of mind."[154] Disregarding the emphasis on the adverbial form, the court cited a long list of its own safety valve opinions in which it employed the words "truthful" and "truthfully" interchangeably, demonstrating that no special import was intended by the use of the adverbial form.[155]

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144. *Id.* at 145 n.2.

145. *Id.* at 146.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 147.

150. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2457 (1976)).

151. *Id.*

152. *Id.*

153. 18 U.S.C. § 3553(f)(5) (2000).

154. *Reynoso*, 239 F.3d at 147.

155. *Id.* at 147-48 (citing, inter alia, United States v. Schreiber, 191 F.3d 103, 106 (2d Cir. 1999) (holding that § 3553(f)(5) requires that a defendant provide "to the government complete and truthful information no later than the time of sentencing"); United States v. Conde, 178 F.3d 616, 620 (2d Cir. 1999) (stating that § 3553(f)(5) requires "truthful and complete disclosure to the government"); United States v. Smith, 174 F.3d 52, 55 (2d Cir. 1999) (stating that safety valve relief is contingent on disclosure of "complete and truthful information"); United States v. Cruz,

The court also offered legislative history to support its opinion.[156] The court reviewed Congress's purpose in enacting the safety valve: to rectify an inequity in the system whereby low-level offenders who wanted to cooperate with the government were denied relief from mandatory minimum sentences because they had no new information to offer.[157] The court interpreted this congressional language to mean that the safety valve extends only to defendants who would have qualified under the substantial assistance provision *but for* the requirement that they provide new and/or useful information to the government.[158] Therefore, to qualify for safety valve relief, a low-level, first-time offender must have the same state of mind as a more culpable defendant who is attempting to qualify for a substantial assistance downward departure.[159] The court continued this line of analysis to read the statute as providing that "the government is entitled under § 3553(f)(5) *not* to be provided with objectively false information, which may be harmful to the government."[160] The court concluded its analysis of the legislative history by expressing confidence that "Congress did not intend to reward the defendant who, for whatever reason, tries 'to trade' on objectively false information."[161]

The Second Circuit next addressed the two arguments raised by Reynoso in her appeal.[162] Reynoso first argued that the safety valve has been interpreted by other courts of appeals as a "good-faith" provision requiring a defendant only to make a showing of a "good-faith" effort to cooperate with the government.[163] The court acknowledged the good-faith interpretation of the safety valve, but stated that "we have never suggested that whether a defendant satisfies the statutory requirement . . . turns solely on the defendant's state of mind."[164]

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156 F.3d 366, 371 (2d Cir. 1998) (stating that § 3553(f)(5) requires "that a defendant provide truthful information regarding the 'offense of conviction and all relevant conduct' ")).

156. *Reynoso*, 239 F.3d at 148.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 149 (citing Appellant's Br. at 22 (citing United States v. Shrestha, 86 F.3d 935, 938 (9th Cir. 1996))); *see supra* note 132 (regarding the good-faith interpretation of the "truthfully provided" requirement).

164. *Id.*

The defendant then attempted to draw a parallel between her case and the *Sherpa* and *Thompson* courts' holdings.[165] The *Reynoso* court found *Sherpa* inapplicable to the instant case, concluding that *Sherpa* only addressed the issue of whether a sentencing court could consider all of the facts relevant to the jury's decision in determining sentencing.[166] The court then distinguished *Thompson* on the grounds that the defendant provided statements regarding her objective conduct.[167] The court found that to the extent that the U.S. Court of Appeals for the Seventh Circuit evaluated Thompson's psychological testimony, they did so only to determine whether Thompson had provided *all* of the information that she had, not to determine whether the information she had provided was objectively truthful.[168]

In dissent Judge Calabresi offered a different interpretation of the safety valve based on the language of the provision, case law interpreting the safety valve, and the relevant legislative history.[169] Judge Calabresi stated that by using the adverbial form of truthful, "truthfully," Congress intended specific emphasis on the manner that the defendant provided information rather than on the substance of the information provided.[170] He argued that the determination of whether a defendant "truthfully" provided information should be based on the defendant's state of mind[171] and cited Second Circuit language terming the safety valve a "good faith attempt to cooperate with the authorities" as support for this interpretation.[172] Further, Judge Calabresi noted that the plain language of the statute only requires that a defendant provide all of the information that she "has."[173] If the *Reynoso* court already found that defendant Reynoso did not "have" the information because of a psychological impairment, there is no way that she could have provided that information to the government.[174]

Judge Calabresi further indicated that the Second Circuit's past interchangeable use of the words "truthful" and "truthfully" did not indicate that the two have interchangeable meanings.[175] Instead,

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165. *Id.*

166. *Id.*

167. *Id.* (citing United States v. Thompson, 76 F.3d 166, 171 (7th Cir. 1996)).

168. *Id.* (citing *Thompson*, 76 F.3d at 171).

169. *Id.* at 150 (Calabresi, J., dissenting).

170. *Id.* (Calabresi, J., dissenting).

171. *Id.* at 150-51 (Calabresi, J., dissenting).

172. *Id.* at 150 (Calabresi, J., dissenting) (quoting United States v. Gambino, 106 F.3d 1105, 1110 (2d Cir. 1997)).

173. *Id.* at 150-51 (Calabresi, J., dissenting).

174. *Id.* (Calabresi, J., dissenting) (quoting 18 U.S.C. § 3553(f)(5) (2000)).

175. *Id.* at 151 (Calabresi, J., dissenting).

he argued the language cited by the majority is irrelevant, because when the court used "truthful" and "truthfully" interchangeably, it was never addressing the specific standard of truthfulness necessary to gain safety valve relief.[176]

Addressing the majority's analysis of the legislative history, Judge Calabresi found the history largely inconclusive, but remarked that, "if anything, it cuts against the majority view."[177] Because the safety valve was enacted to benefit defendants even if they had no new or useful information to trade with the government, it follows that the defendant may be eligible for safety valve relief "regardless of whether they have useful knowledge, useless knowledge, wrong knowledge, or no knowledge at all."[178]

Finally, Judge Calabresi addressed the fear that he believes underlies the majority's opinion: that defendants will gain relief by "trading on" false information.[179] According to Judge Calabresi, the majority was afraid that allowing the defendant to offer information that is only subjectively truthful would lead to a battle of the experts, making it more difficult for courts to determine the facts.[180] Judge Calabresi observed that courts already engage in credibility determinations when they weigh evidence to determine whether to grant safety valve relief.[181] In addition, he opined that the majority's holding would encourage defendants to provide less information to the government than they otherwise might, because if they were unable to prove that the information was objectively truthful or if the government had contradictory information, the contested additional information they provide would potentially cast doubt on the quality of the original information provided.[182] Thus, the majority's holding creates a "perverse incentive to deny knowledge of uncomfortable facts."[183]

Judge Calabresi's dissent proposes a new way to address standards of truthfulness in applying the safety valve.[184] Judge

176. *Id.* (Calabresi, J., dissenting).

177. *Id.* at 153 (Calabresi, J., dissenting).

178. *Id.* (Calabresi, J., dissenting).

179. *Id.* at 154 (Calabresi, J., dissenting).

180. *Id.* (Calabresi, J., dissenting).

181. *Id.* (Calabresi, J., dissenting) (citing United States v. Schreiber, 191 F.3d 103 (2d Cir. 1999), and United States v. Gambino, 106 F.3d 1105, 1110 (2d Cir. 1997)) (describing how the district court based its denial of safety valve relief on the "detailed representations in the government's letter, which the court credited over [defendant's] implausible arguments in rebuttal").

182. *Id.* at 154 (Calabresi, J., dissenting).

183. *Id.* (Calabresi, J., dissenting).

184. *Id.* (Calabresi, J., dissenting).

Calabresi suggests that courts employ an "overwhelmingly strong presumption" that the defendant is not providing subjectively truthful information when the information given is not objectively truthful.[185] Such a presumption would make it much harder to "trade on" false information and would restrict relief for the defendant to the rare cases in which the government accepts that the defendant subjectively believes the information she is able to provide.[186] Judge Calabresi observed that operating under a strong presumption that what is subjectively believed is objectively truthful is not unusual in criminal law.[187] Judge Calabresi declined to suggest that the information Reynoso proffered was sufficient to carry her burden of proof, but nevertheless dissented from the majority opinion because the government "conceded that Reynoso believed she was telling the truth."[188]

Indeed, the most curious aspect of the *Reynoso* court's decision is the fact that both the court majority and the government accepted that the defendant provided all the information that she had,[189] but concluded that the information provided was insufficient.[190] The majority seemed to overlook the language directly following the word "truthfully" in the statute—that the defendant must provide "all the information" that she "has."[191] Taking these two phrases together, it is natural to assume that "truthfully" governs the way in which the defendant must provide the information, while "all the information" the defendant "has" governs the type and amount of information that the defendant must provide. However, this inference does not mean that "truthfully" cannot also modify the type of information that the defendant provides.

While interchangeable use by courts of appeals of the adjective "truthful" and the adverb "truthfully" indicates that courts often do

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185. *Id.* (Calabresi, J., dissenting).

186. *Id.* at 154-55. (Calabresi, J., dissenting).

187. *Id.* at 155. (Calabresi, J., dissenting). Judge Calabresi included a colorful example to illustrate this point:

> A defendant who truly believes that that which she held to the head of her victim was a banana and not a gun has a defense, based on an absence of mens rea, to a charge of murder or criminal assault. Nevertheless, it is almost impossible . . . for a defendant to demonstrate the truth of that assertion because we assume . . . that everybody knows the difference between a gun and a banana.

Id. (Calabresi, J., dissenting).

188. *Id.* (Calabresi, J., dissenting).

189. *Id.* at 146 n.2 (noting that "for purposes of this appeal we assume, as did the district court, that Reynoso subjectively believed that she has truthfully provided all the information she had").

190. *Id.* at 150.

191. 18 U.S.C. § 3553(f)(5) (2000).

not meaningfully distinguish between the two forms of the word, it also points to the wide variety of types and forms of truth present in any judicial proceeding. To the defendant who subjectively holds a belief, there is no discernable difference between objective and subjective truthfulness. There is only one "truth" that he knows. Therefore, the defense's closest approximation to objectively truthful information is to present the testimony of a psychiatrist who will explain differences between what appears to be the objective truth (i.e., corroborated testimony by the prosecution) and the truth offered by the defendant. By doing so, the defense seeks to show that although the defendant is not providing objective truth, she is making a good-faith attempt to provide what she can. The prosecution is in the same position of providing their necessarily subjective allegations about what occurred and offering testimony of witnesses to bolster these allegations. Because the judge will determine how objectively truthful each side has been by evaluating all the evidence they have presented, the prosecution only will offer such evidence that it can prove so as not to call attention to loose ends or conflicting details. However, when the defendant uses a psychiatrist to demonstrate that his version of the truth is bona fide, she calls the whole of his testimony into question. If a defendant has some information to give the government but is unable to prove that other portions of his testimony are objectively true, he may be unable to qualify for the safety valve under the *Reynoso* standard.

The standard of truthfulness required for a defendant to qualify for safety valve relief at a sentencing hearing is extremely important when viewed in the broader context of criminal procedure. The sentencing hearing is typically the only hearing that a defendant receives pursuant to a plea agreement.[192] Because truthfulness is determined by the court based on a variety of factors not included in the text of the opinion, including the defendant's demeanor, attitude, and other background information to which only the court has access, it often will be difficult on appeal to determine which aspects of the defendant's testimony were most central to the court's decision to award or deny relief. The safety valve already provides judges considerable discretion based largely on the language of the truthfulness requirement.[193] In a broader sense, the safety valve

192. Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 170 (1991) (finding that, of four selected districts in the year of 1989, seventy-nine percent of all defendants pled guilty to drug crimes).

193. *See, e.g.*, Albonetti, *supra* note 57, at 419 (noting that "three of the five conditions required to qualify for the safety valve provision are salient defendant characteristics used in the

represents a departure from the stated purposes of the Guidelines because it requires courts to examine the particular characteristics of the offender, as opposed to focusing solely on the offense.[194] Understood in this light, the *Reynoso* court's decision can be interpreted as an effort to rein in judicial discretion in determining whether or not a defendant qualifies for safety valve relief.

IV. ASSISTANCE TO THE GOVERNMENT: THE SAFETY VALVE AND THE ACCEPTANCE OF RESPONSIBILITY AND SUBSTANTIAL ASSISTANCE DOWNWARD DEPARTURES

The Second Circuit in *Reynoso* grafted an additional requirement onto the safety valve provision by requiring that a defendant prove that the information he provides is both subjectively and objectively truthful. This additional truthfulness requirement draws heavily from the requirements for downward departures,[195] including the departure for "acceptance of responsibility"[196] and the departure for "substantial assistance" to the government.[197] As such, the *Reynoso* court's decision represents an expansion in the interpretation of the safety valve provision.

Following the enactment of the safety valve legislation, federal courts confronted a wide range of procedural issues concerning how a defendant must deliver any information he has to qualify for safety valve relief.[198] These initial cases analyzing safety valve qualifications also demonstrate the difficulty that federal courts face in distinguishing the operation of the safety valve provision from the acceptance of responsibility and substantial assistance provisions.

For example, in *United States v. Ivester*, the Fourth Circuit held that the defendant must initiate contact with the government to qualify for safety valve relief.[199] Addressing this specific issue for the

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causal attribution decisionmaking process that judges relied on prior to federal Guidelines reform and the era of mandatory minimum sentences") (citations omitted).

194. *See id.*

195. Downward departures provide an opportunity for a defendant to receive a lesser sentence under the Guidelines, while the safety valve provides defendants a way out of mandatory minimum sentences. *Id.*; *see also* 18 U.S.C. § 3553(f) (2000).

196. 2002 SENTENCING GUIDELINES, *supra* note 1, § 3E1.1. The "acceptance of responsibility" departure, found in section 3E1.1 of the Guidelines, allows a defendant to receive a reduction in his Guideline-determined sentence if he "truthfully admits the conduct comprising the offense(s) of conviction." *Id.*

197. 2002 SENTENCING GUIDELINES, *supra* note 1, § 5K1.1. The "substantial assistance" provision allows, upon government motion, a defendant to receive a departure below the statutory minimum if he provides "useful information" to the government. *Id.*

198. *See* Shebesta, *supra* note 89, at 531.

199. 75 F.3d 182, 185 (4th Cir. 1996).

first time, the court held that the language requiring a defendant to "truthfully provide to the government all information . . . concerning the offense"[200] is "plain and unambiguous" and that it requires a defendant to "demonstrate, through affirmative conduct, that they have supplied truthful information to the government."[201] This "affirmative act" requirement bears a strong resemblance to the conduct required by a defendant to qualify for substantial assistance, which basically requires defendants to "turn" on their codefendants and take sides with the government.[202] Indeed, defendant Ivester argued that this interpretation required defendants to act like government informants and, as such, was contrary to the statutory language, which specifically does not require any new or useful information from the defendant in order to qualify for relief.[203] In dissent, Judge Hall noted that the majority had construed the word "provide" (as in, the defendant must "truthfully provide"[204]) to require the defendant to do more than simply tell what he knows.[205] Although he acknowledged that the statute requires the defendant to perform an "affirmative act" to qualify for relief, he argued that a defendant may commit such an act simply by opening his mouth and should not also be required to arrange a meeting with the government.[206] Most courts of appeals have sided with the Fourth Circuit and require a defendant to seek out the government to qualify for relief under the safety valve.[207]

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200. 18 U.S.C. § 3553(f)(5) (2000).

201. *Ivester*, 75 F.3d at 185.

202. *See* 2002 SENTENCING GUIDELINES, *supra* note 1, § 5K1.1; *see also* Frank O. Bowman, III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 57 (1999) (describing the effect of the substantial assistance provision on defendants).

203. *Ivester*, 75 F.3d at 185.

204. § 3553(f)(5).

205. *Ivester*, 75 F.3d at 186-87 (Hall, J., dissenting).

206. *Id.* at 186 (Hall, J., dissenting).

207. *See* United States v. Flanagan, 80 F.3d 143, 147 (5th Cir. 1996) (finding that, in arguing for the application of the safety valve, a defendant may not claim that the government did not affirmatively seek information from the defendant); United States v. Arrington, 73 F.3d 144, 148 (7th Cir. 1996) (holding that the safety valve requirement was intended to benefit "only those defendants who truly cooperate" and that true cooperation requires a "good-faith attempt" to cooperate with the authorities). In addition, most federal courts have followed the Fourth and Seventh Circuits' approach by requiring the defendant to provide complete information regarding the names (or descriptions) of the person or people who gave him the drugs. *See, e.g.*, United States v. Camacho, 261 F.3d 1071, 1073 (11th Cir. 2001); United States v. Adu, 82 F.3d 119, 124-25 (6th Cir. 1996); United States v. Romo, 81 F.3d 84, 85 (8th Cir. 1996); United States v. Acosta-Olivas, 71 F.3d 375, 379 (10th Cir. 1995); United States v. Rodriguez, 69 F.3d 136, 143 (7th Cir. 1995); United States v. Wrenn, 66 F.3d 1, 3 (1st Cir. 1995). This requirement is intuitive because such low-level offenders often have little other information to offer. *See* United States v.

Once the defendant offers his information to the government, what is the government's role in determining its truthfulness? Section 5C1.2(5) provides that the defendant must "truthfully provide[ ] to the government all information and evidence," but then states that the court is not precluded from awarding safety valve relief when the defendant has not provided any new or useful information.[208] As a result, on the rule's face, it appears that the government is in the position to determine truthfulness, while the court is in the position of determining whether or not the information is new or useful. This provision reverses the roles: the government is in the better position to determine whether the information is new and useful (and also to argue as to its truthfulness), but the court is in the best position to make a ruling on the truthfulness of the defendant. Federal safety valve opinions reflect confusion regarding the degree of deference to be afforded government assessments of a defendant's credibility in applying the safety valve, especially given the precedent of granting significant deference to the government in determining whether or not to bring a motion for substantial assistance.[209] As noted above, the major difference between substantial assistance and the safety valve is that substantial assistance requires a motion from the government for the court to consider a substantial assistance departure, while the safety valve provision does not.[210] Courts have identified the differences between the provisions to emphasize the court's role in determining truthfulness: for example, in *United States v. Maduka*, the Sixth Circuit held that the safety valve only requires a defendant to *provide* the information that she possesses, regardless of its *helpfulness* to the government.[211] Refining the *Ivester* court's definition of the discretionary role a court plays in determining whether a defendant qualifies, the Sixth Circuit remarked that while a court reviewing a substantial assistance motion "must grant 'substantial weight' to the evaluation by the government of the assistance rendered by a defendant, . . . a court independently reviews the applicability of § 5C1.2."[212] Following suit, in *United States v. Espinoza*, the Eleventh Circuit vacated and remanded a district court opinion that relied only on the government's information and

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Shrestha, 86 F.3d 935, 938 (9th Cir. 1996) (noting that "lower-level offenders, such as drug couriers or 'mules,' . . . typically have less [criminal] knowledge").

208. § 3553(f)(5).

209. *See Ivester*, 75 F.3d at 185; United States v. Maduka, 104 F.3d 891, 894 (6th Cir. 1997); United States v. Thompson, 81 F.3d 877, 880-81 (9th Cir. 1996); *Acosta-Olivas*, 71 F.3d at 379.

210. *See supra* note 63; *see also Ivester*, 75 F.3d at 185.

211. 104 F.3d 891, 894-95 (6th Cir. 1997); *see also Thompson*, 81 F.3d at 881.

212. *Maduka*, 104 F.3d at 895.

disregarded the defendant's position because he had not testified at trial, holding the court responsible for determining the "truthfulness of the information the defendant provided to the government."[213]

Courts of appeals have also distinguished safety valve relief from downward departures for acceptance of responsibility based on the defendant's timing in cooperating with the government. In *United States v. Shrestha*, the court held that a defendant still qualified for safety valve relief even if she initially presented truthful information but then subsequently pled not guilty and denied what she had previously stated.[214] Drawing a sharp distinction between the acceptance of responsibility provision and the safety valve provision, the court held that the safety valve is "not concerned with sparing the government the trouble of preparing for and proceeding with trial. . . . [It] was designed to allow the sentencing court to disregard the statutory minimum in sentencing first-time nonviolent drug offenders who played a minor role in the offense and who 'have made a good-faith effort to cooperate with the government.' "[215] Similarly, in *Schreiber*, the Second Circuit held that a defendant who at first lied and misled the government and refused to attend a proffer session was not ineligible for safety valve relief under § 3553(f).[216] However, the Second Circuit declined to stretch the safety valve's "good-faith" requirement to extend to the defendant's entire conduct from the start of the criminal proceeding and held that inconsistencies in a defendant's story would weigh heavily against her credibility.[217] However, the Second Circuit held that the court should not place any additional requirements on the defendant beyond those mandated by the plain letter of the law.[218]

Legal commentators have noted federal courts' tendency to read and interpret the safety valve provision within the context of the purpose and rationale of substantial assistance and other Guidelines departures.[219] According to Jane Froyd, courts have difficulty applying the safety valve provision because it was modeled after the substantial assistance provision[220] but is based on a different rationale.[221] The

213. 172 F.3d 795, 796-97 (11th Cir. 1999).

214. 86 F.3d 935, 940 (9th Cir. 1996).

215. *Id.* (citation omitted).

216. United States v. Schreiber, 191 F.3d 103, 108 (2d Cir. 1999).

217. *Id.* at 107.

218. *Id.* at 108.

219. *See* Virginia G. Villa, *Retooling Mandatory Minimum Sentencing: Fixing the Federal "Statutory Safety Valve" to Act as an Effective Mechanism for Clemency in Appropriate Cases*, 21 HAMLINE L. REV. 109, 124 (1997); Froyd, *supra* note 55, at 1499 (noting that "Congress modeled [the truthfulness] requirement after the downward departure for substantial assistance").

220. *See* Froyd, *supra* note 55, at 1499; *see also* 18 U.S.C. § 3553(e) (2000).

safety valve provision is based on the "relative culpability or ranking of drug offenders,"[222] while the substantial assistance provision is based on a desire to obtain cooperation from defendants who have useful information to offer the government in exchange for a reduced sentence.[223] As such, the *Reynoso* court's focus on obtaining *objectively* truthful information places undue emphasis on the usefulness of that information to the government, rather than on the defendant's actions in making the statement.[224] Virginia Villa also notes that the safety valve provision "allows a low-level offender who has no valuable information to seek the same type of 'deal' available to upper-level offenders [under the substantial assistance provision]."[225] According to Villa, given courts' "previous practice [of applying the substantial assistance provision] and the language of the statute, it is not surprising that courts have construed the statutory safety valve as narrowly as the substantial assistance provision."[226]

Although the safety valve differs fundamentally from the downward departures in that it applies solely to first-time, low-level offenders,[227] federal courts have had difficulty distinguishing the nature of the safety valve's truthfulness requirement from the truthfulness required for the substantial assistance and acceptance of responsibility downward departures. The *Reynoso* court's decision is a substantive return to a requirement that a defendant provide the government with *useful* information to qualify for relief from mandatory minimum sentencing. By interpreting the statutory language to mean that the government is required to receive objectively true information under the safety valve requirement,[228] the

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221. Froyd, *supra* note 55, at 1499.

222. *Id.*

223. *Id.*; *see also* § 3553(e); 2002 SENTENCING GUIDELINES, *supra* note 1, § 5K1.1; *see also* Froyd, *supra* note 55, at 1499:

> The only role that culpability plays in [the substantial assistance] provision is that highly culpable offenders are usually better able to take advantage of this departure. But it is their knowledge of criminal activity, rather than their level of culpability, that actually allows them to take advantage of this departure.

However, it may be argued that in drug cases where intent is a key issue, knowledge of criminal activity is a proxy for culpability.

224. Indeed, the fact that the "truthfully provided" requirement is preceded by four requirements that are only concerned with the culpability of the defendant (his prior criminal history, whether or not the crime was violent, etc.) provides support for the understanding that the safety valve is concerned with the defendant's situation, not necessarily with the usefulness of the information he provides. *See* 2002 SENTENCING GUIDELINES, *supra* note 1, § 5C1.2.

225. Villa, *supra* note 219, at 124.

226. *Id.*

227. *See* § 3553(f).

228. United States v. Reynoso, 239 F.3d 143, 148 (2d Cir. 2000).

Reynoso court placed renewed emphasis on the value of the information to the government—and on whether or not the government will be able use the information. Fear that defendants would intentionally mislead the government by offering false information was a major rationale underlying Congress's decision to vest the power to bring motions for departures based on substantial assistance in the executive branch. However, the same rationale should not apply to defendants who typically have no new or useful information to provide.[229] The language of the safety valve specifically avoids emphasis upon benefit to the government.[230]

V. JUDICIAL DISCRETION: EFFECTS OF *REYNOSO* ON JUDICIAL SENTENCING UNDER THE FEDERAL GUIDELINES

As discussed above, the Sentencing Reform Act of 1984 and the subsequent Federal Sentencing Guidelines came about in response to concerns that the prior rehabilitative approach to sentencing, which focused on particular characteristics of the offender, was not working,[231] and that similarly situated defendants were receiving disparate sentences because of broad judicial discretion.[232]

Legal scholars have examined the effect of the Federal Sentencing Guidelines and mitigating statutes including the safety valve on actual federal drug crime sentencing.[233] For example, Professors Bowman and Heise found that the enactment of the initial congressional safety valve had little impact on drug sentences.[234] However, after the Sentencing Commission's two-level safety valve was made effective in November 1, 1995, there was a "significant reduction" in drug sentences:[235]

> In 1996, the percentage of drug cases receiving either a statutory or Guidelines safety valve reduction totaled 19.2%. And in 1996, [Administrative Office of the United States Courts] sentencing figures show a dramatic drop in average drug sentence (from 88.7 months in 1995 to 82.5 months in 1996) and the [United States Sentencing] Commission

229. *See* § 3553(f)(5).

230. *See* § 3553(f)(5).

231. *See* Bowman & Heise, *supra* note 42, at 1054-55 (explaining that in the 1970s and 1980s, the rehabilitative model of sentencing lost sway in state and federal courts for many reasons, including rising crime, evidence that prisoners were not being rehabilitated, and disparate sentences for similarly situated defendants).

232. *Id.* at 1055.

233. *See id.* at 1049, *supra* note 42 (concluding that at least some decrease in length of federal drug sentences is attributable to "non-discretionary" causes); *see also* Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 480-81 (2002).

234. Bowman & Heise, *supra* note 42, at 1071.

235. *Id.*

reported a two-month decrease from the preceding year (from 86.6 months in 1995 to 84.3 months in 1996).[236]

However, Bowman does not believe that the enactment of the safety valve is responsible for this decline in federal drug sentencing.[237] His research indicates a downward trend in sentence lengths starting in 1992, before the safety valve was enacted.[238] The safety valve was the only provision enacted after 1990 providing defendants with relief from mandatory drug sentences, but Bowman argues that it is likely not responsible for the decline in actual drug crime sentences during the 1990s.[239]

Bowman believes that increases in discretionary factors, such as judges' ability to sentence individuals within the sentencing range, are the real cause of the gradual decreases in sentence lengths.[240] Although the safety valve appears to be based on nondiscretionary factors, such as the defendant's criminal history, the nonviolent nature of the crime, and the requirement that the defendant not be leader of the criminal activity to qualify,[241] Bowman argues that the "five qualifying criteria clearly leave room for hidden or overt exercises of discretion."[242]

Although application of the safety valve is ostensibly mandatory if the defendant meets the five criteria, federal judges have considerable discretion in determining whether or not the criteria have been met. As the vaguest of the five requirements, the

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236. *Id.* at 1071-72 (citations omitted).

237. *Id.* at 1072.

238. *Id.*; *see also* Bowman & Heise, *supra* note 233, at 480-81:

> [T]he evidence we have reviewed shows the following: (1) at virtually every point in the Guidelines sentencing process where prosecutors and judges can exercise discretionary authority to reduce drug sentences, they have done so; and (2) where we can measure trends, the trend since roughly 1992 has always been toward exercising discretion in favor of leniency with increasing frequency.

Id.

239. Bowman & Heise, *supra* note 42, at 1072.

240. *Id.*

241. *See* 18 U.S.C. § 3553(f) (2000).

242. Bowman & Heise, *supra* note 42, at 1072; *see also* Bowman & Heise, *supra* note 233, at 490-91:

> [T]he true significance [of the statutory safety valve] is that for eligible first-time offenders it opens the door to an array of discretionary choices previously foreclosed to lawyers and judges by operation of the mandatory minimum sentence statutes . . . . [Such] . . . wholly or partly discretionary mitigating guidelines provisions . . . [include] . . . non-substantial assistance departures and reductions for mitigating role in the offense.

Id. (citations omitted).

truthfulness requirement offers a significant potential for the exercise of such discretion.[243]

In one respect, the *Reynoso* court's decision was an attempt to diminish judicial discretion in determining whether or not a defendant qualifies for safety valve relief. By injecting an objective standard of truthfulness into the test, the *Reynoso* decision partially standardizes the process by which courts determine a defendant's truthfulness. The Second Circuit no longer must consider a defendant's subjective beliefs if he cannot prove their objective truthfulness.

An unintended result of *Reynoso* may be that defendants are less likely to come forward with information that they cannot verify. As noted above, at the sentencing hearing, the defendant has the burden of proving that he qualifies for safety valve relief. The prosecution, in turn, may present evidence tending to show that the defendant should not receive safety valve relief. Because many safety valve cases involve drug conspiracies, the prosecution is likely to be in the process of indicting a series of defendants connected to the same criminal activity and also is likely to have considerably more information about the conspiracy as a whole than the defendant. At the sentencing hearing, the defendant will attempt to prove she has given all of the information that she knows by presenting evidence of her minimal involvement in the criminal activity. If the government has contrasting information from other members of the conspiracy, it will attempt to discredit the defendant's claim that she lacks such knowledge. It will be difficult for the defendant to overcome these attempts by the government, however, because the defendant typically has little or no information regarding the other criminal actors in the conspiracy, especially if she acted only as a "mule," or courier of drugs. In this situation, the judge has little "objective" basis on which to determine the defendant's truthfulness. Because of the defendant's minimal role in the criminal activity and the heavy burden of demonstrating his truthfulness, the defendant's fate will hinge on the judge's general impressions of the defendant's credibility.

An example of this scenario is *United States v. Hicks*, a decision in which the U.S. Court of Appeals for the Sixth Circuit adopted the *Reynoso* approach.[244] In *Hicks*, the Sixth Circuit employed *Reynoso* language that "a defendant seeking to qualify for relief under the safety valve provision must prove *both* that the information he or she

243. Bowman & Heise, *supra* note 42, at 1073 ("A determination of whether the defendant has provided truthful and complete disclosure rests largely on a necessarily imprecise and largely unverifiahle assessment by the prosecutor of the veracity and completeness of a defendant's post-plea-agreement dehriefing.").

244. Nos. 99-6457/99-6458, 2001 U.S. App. LEXIS 10758, at *7 (6th Cir. May 15, 2001).

provided to the government was objectively true and that he or she subjectively believed that such information was true."[245] The *Hicks* court upheld the district court finding that because there was a large discrepancy between the information that defendant Hicks admitted and the amount of information that was supported by the evidence, Hicks had not been "truthful with the court in describing the transactions which form[ed] the relevant conduct."[246] Faced with this typical scenario, judges will be more likely to deny safety valve relief based on "gaps" in a defendant's knowledge.

VI. CONCLUSION

The *Reynoso* court's decision represents a shift from a more flexible "good-faith" interpretation of the safety valve toward a stricter standard that defendants must meet to qualify for reduced sentences.

This shift is not supported by the plain language of the statute as enacted, which requires only that a defendant provide all of the information that she has.[247] To the extent that the information a defendant provides is discredited by the information the government provides, a judge has discretion to determine what she thinks is truthful. However, the decision in *Reynoso* goes beyond an increase in judicial discretion. Although the Second Circuit agreed that the defendant had provided all of the information that she could, it still denied her relief because her version of events did not match the objective facts. If the court had disregarded her testimony or if the government had successfully discredited it, the decision would be far less significant. However, because the court accepted the testimony, the court effectively denied safety valve relief to a defendant who had provided all the information she had regarding her crime. This result is in direct contrast to Congress's express purpose in enacting the provision.

Although many federal courts that have not adopted the *Reynoso* court's approach likely already consider objective truth in deciding whether or not to grant a defendant safety valve relief, the *Reynoso* court goes too far by refusing relief to a defendant who subjectively believes objectively untruthful information. Where the court, having weighed the evidence, agrees that a defendant believes the subjective information she presents, a defendant should not be denied relief because the information is ultimately unhelpful to the

245. *Id.* at *10-11.

246. *Id.*; *see also* United States v. Adu, 82 F.3d 119, 124 (6th Cir. 1996).

247. *See* 18 U.S.C. § 3553(f)(5) (2000); 2002 SENTENCING GUIDELINES, *supra* note 1, § 5C1.2.

government. By placing renewed emphasis on the importance of the government receiving truthful information,[248] the Second Circuit effectively denies relief to low-level defendants with a shaky grasp on reality, those who are most attractive to high-level offenders looking for vulnerable agents and who are therefore most in need of safety valve relief.[249]

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245. *See* United States v. Reynoso, 239 F.3d 143, 148 (2d Cir. 2000) (noting that "the government is entitled under § 3553(f)(5) *not* to be provided with objectively false information, which may well be harmful to the government") (emphasis in original).

249. Often, these first-time offenders are women, girlfriends, or drug addicts who are dependent upon the main offender. *See* Johnson, *supra* note 67, at 45. Thompson and Reynoso are both female. United States v. Reynoso, 239 F. 3d 143, 144 (2d Cir. 2000); United States v. Thompson, 76 F. 3d 166, 167 (7th Cir. 1996).

[*] I dedicate this Note to C.E. Smith. I thank my family and friends for their support. Special thanks goes to my aunt, Rebecca R. French, who encouraged me to attend law school in the first place. I also thank my editor, Tara Kilfoyle, and the senior board of the Vanderbilt Law Review for editorial support.

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