Selected Appellate Case Law on §5C1.2 (Safety Valve)

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A. Eligibility

1. Applicable Offenses

Notwithstanding any other provision of law, in the case of an offense under . . . 21 U.S.C. §§ 841, 844, 846, 960, or 963, *the court shall impose a sentence pursuant to the guidelines . . . without regard to any statutory minimum sentence . . .*

a. In United States v. McQuilkin, 78 F.3d 105 (3d Cir.) *cert. denied*, 117 S. Ct. 89 (1996), the Third Circuit held that the safety valve does not apply to convictions under 21 U.S.C. § 860, the "schoolyard" statute. Only defendants convicted under one of the drug statutes specifically enumerated in 18 U.S.C. § 3553(f) may qualify for safety valve relief. *See* United States v. Anderson, 200 F.3d 1344 (11th Cir. 2000)(same); United States v. Kakatin, 214 F.3d 1049 (9th Cir. 2000)(same).

b. In United States v. Osei, 107 F.3d 101 (2d Cir. 1997), the Second Circuit held that the district court erred in concluding that §2D1.1(b)(4) is only available if the defendant is subject to a statutory minimum. As long as the defendant meets the requirements of §5C1.2, the reduction in §2D1.1(b)(4) applies to a defendant with offense level 26 or higher, even if he is not subject to a statutory minimum. *See also* United States v. Leonard, 157 F.3d 343 (5th Cir. 1998); United States v. Mertilus, 111 F.3d 870 (11th Cir. 1997).

2. Effective Date

In enacting 18 U.S.C. § 3553(f), Congress specified that the provision "shall apply to all sentences imposed on or after" September 13, 1994. (See H-Retroactive Application, page 12)

3. After Trial

In United States v. Sherpa, 110 F.3d 656 (9th Cir. 1997), the Ninth Circuit held that the district court did not clearly err in applying the safety valve after the defendant was convicted by a jury. The government argued that the jury verdict precluded a finding of truthfulness under §5C1.2(5). The Ninth Circuit concluded that the safety valve could still apply even if the defendant professed his innocence throughout the proceedings. Upon arrest, the defendant had cooperated with custom agents by providing names and details of his contacts, but maintained that he was not aware that he was carrying drugs. The district court believed the defendant, despite the jury's verdict. "[W]e hold that the safety valve requires a separate judicial determination of compliance which need not be consistent with a jury's findings." *Id.* at 662.

4. Impact of Plea Agreement

In United States v. Ortiz-Santiago, 211 F.3d 146 (1st Cir. 2000), the First Circuit held that the district court erred in finding that a provision in the plea agreement barred the court from considering whether the defendant qualified for a safety valve reduction. The provision read, "no further adjustments to the defendant's total offense level shall be made." The "safety valve" provision, included in Chapter Five, is not a Chapter Three "adjustment;" it is a congressional directive and "sui generis." The court must apply the safety valve if the defendant meets the criteria. "In a non-binding plea agreement, the government cannot contract around the safety valve." The case was remanded for resentencing.

B. Statutory Criteria

1. One Criminal History Point -- 18 U.S.C. § 3553(f)(1); §5C1.2(1)

the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines

a. In United States v. Resto, 74 F.3d 22 (2d Cir. 1996), the Second Circuit held that the defendant's four criminal history points disqualified him from receiving the safety valve, even though the district court departed downward to Criminal History Category I. The safety valve applies only if the defendant does not have more than one criminal history point "as determined under §4A1.1." §5C1.2, comment. (n.1).

b. In United States v. Valencia-Andrade, 72 F.3d 770 (9th Cir. 1995), the Ninth Circuit held that the district court correctly interpreted § 3553(f) as precluding the court from applying the safety valve, even though the court found that the defendant's two criminal history points based on two convictions for driving with a suspended license overrepresented the seriousness of the defendant's criminal history. *See also* United States v. Robinson, 158 F.3d 1291 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct 1155 (1999); United States v. Orozco, 121 F.3d 628 (11th Cir. 1997).

2. Possession of a Firearm -- 18 U.S.C. § 3553(f)(2); §5C1.2(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

a. In United States v. Wilson, 105 F.3d 219 (5th Cir.), *cert. denied*, 118 S. Ct. 133 (1997), the Fifth Circuit held that in determining a defendant's eligibility for the safety valve, §5C1.2(2) allows for consideration of only the defendant's conduct, not the conduct of his co-conspirators. The defendant was therefore still eligible for relief under the safety valve even though a co-conspirator

possessed a gun. USSG §5C1.2(2) provides: "[c]onsistent with §1B1.3, the term 'defendant,' as used in subdivision (2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused." This language mirrors §1B1.3(a)(1)(A), but omits the text of §1B1.3(a)(1)(B)–the subsection that includes as "relevant conduct" acts and omissions undertaken in a "jointly undertaken criminal activity." *See In Re Sealed Case*, 105 F.3d 1460 (D.C. Cir. 1997) (co-conspirator liability cannot establish possession under the safety valve). *See also* United States v. Clavijo, 165 F.3d 1341 (11th Cir. 1999); United States v. Wilson, 114 F.3d 429 (4th Cir. 1997).

b. In United States v. Burke, 91 F.3d 1052 (8th Cir. 1996), the Eighth Circuit held that the government is not required to show that a firearm was actually used to facilitate the offense to prove that the defendant possessed a firearm "in connection with" the offense and thus preclude the defendant from receiving the "safety valve." The Eighth Circuit relied on its previous interpretation of the meaning of the phrase "in connection with," used in §2K2.1(b)(5), that provides an enhancement if the defendant used or possessed a firearm "in connection with" another felony offense.

c. In United States v. Wilson, 106 F.3d 1140 (3d Cir. 1997), the Third Circuit held that to be denied safety valve relief, the defendant need not actually possess a firearm at the time of arrest, as long as his firearm possession was part of the "same course of conduct" as the offense of conviction. The defendant argued that his possession of a firearm during drug dealing a year prior to the current offense of conviction was not part of the same course of conduct. The Third Circuit agreed with the district court that that the earlier drug dealing activities, during which the defendant possessed a weapon, were sufficiently similar to the instant offense of conviction and thus fell within the definition of "same course of conduct." The district court correctly concluded that the defendant failed to meet the requirement of §5C1.2(2). *See also,* United States v. Wright, 113 F.3d 133 (8th Cir. 1997)("merely because the firearms in question were not found on the defendant at the time of his arrest, does not mean he did not possess them in connection with his offense.").

d. In United States v. Smith, 175 F.3d 1147 (9th Cir. 1999), the Ninth Circuit held that conduct warranting a two-level increase under §2D1.1(b)(1) necessarily defeats application of the safety valve. *See also* United States v. Vasquez, 161 F.3d 909 (5th Cir. 1998)(equating safety the safety valve with the enhancement); United States v. Hallum, 103 F.3d 87 (10th Cir. 1996)(affirming the district court's use of the commentary to §2D1.1 to interpret §5C1.2).

e. In United States v. DeJesus, No. 99-1499, 219 F.2d 117 (2d Cir. 2000), the Second Circuit held that the "in connection with the offense" language in §5C1.2 is equivalent to the "in relation to" language of 18 U.S.C. § 924(c). The government must show that the firearm "served some purpose with respect to the

offense," and that the weapon "at least must facilitate, or have the potential of facilitating, the drug trafficking offense."

3. Death or Serious Bodily Injury – 18 U.S.C. § 3553(f)(3); §5C1.2(3)

the offense did not result in death or serious bodily injury to any person

4. Leadership Role – 18 U.S.C. § 3553(f)(4); §5C1.2(4)

the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848

In United States v. Bazel, 80 F.3d 1140 (6th Cir.), *cert. denied*, 519 U.S. 882 (1996), the Sixth Circuit rejected a claim that use of the conjunctive term "and" rather than the disjunctive term "or" in §5C1.2(4) requires disqualification from the safety valve based on role only if the defendant was both an organizer, leader, manager, or supervisor "and" engaged in a continuing enterprise. "Bazel's argument would be correct if § 3553(f) or §5C1.2 were phrased in terms of what the government would have to prove was true of the defendant, but unfortunately for Bazel, the statute is phrased in terms of what the defendant must show was not true of him." The defendant is not eligible for the safety valve if he meets either condition.

5. Disclosure Requirement – 18 U.S.C. § 3553(f)(5); §5C1.2(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 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 has complied with this requirement

a. To the "Government"

i. In United States v. Rodriguez, 60 F.3d 193 (5th Cir.), *cert. denied*, 516 U.S. 1000 (1995), the Fifth Circuit held that for purposes of §5C1.2(5), statements to a probation officer did not constitute statements to "the Government." *See also* United States v. Martinez, 83 F.3d 488 (1st Cir. 1996); United States v. Contreras, 136 F.3d 1245 (9th Cir. 1998).

ii. In United States v. Real-Hernandez, 90 F.3d 356 (9th Cir. 1996), the Ninth Circuit held that the disclosure requirement of the "safety valve" does not require the defendant to give information to a specific government agent. The Circuit rejected the government's argument that the defendant failed to provide information to the government because he did not discuss his involvements in a prior incident with the current prosecutor. "The prosecutor's office is an entity, and knowledge attributed to one prosecutor is attributable to others as well." *See* White v. United States, 858 F.2d 416, 421 (8th Cir. 1988), *cert. denied*, 489 U.S. 1029 (1989).

b. "All Information and Evidence"

i. In United States v. Maduka, 104 F.3d 891 (6th Cir. 1997), the Sixth Circuit held that the requirement that the defendant provide information about other participants is not dependent on whether the defendant was convicted of conspiracy. Even if not convicted of conspiracy, a defendant must provide information concerning "the immediate chain of distribution." *See* United States v. Scharon, 187 F.3d 17 (1st Cir.1999)(safety valve denied because the defendant should have disclosed the identity of the person on whose behalf he was acting); United States v. Thompson, 81 F.3d 877 (9th Cir. 1996)(defendant denied safety valve relief for refusing to reveal source of drugs), *cert. denied*, 117 S. Ct. 214 (1996); United States v. Woods, 210 F.3d 70 (1st Cir. 2000)(defendant's refusal to provide information about other players in the offense justified denial of safety valve relief).

ii. In United States v. Myers, 106 F.3d 936 (10th Cir.), *cert. denied*, 520 U.S. 1270 (1997), the Tenth Circuit held that §5C1.2(5) requires disclosure of everything the defendant knows about his own actions and those who participated in the crime with him. The defendant argued that his disclosure of his own actions was sufficient. The Tenth Circuit disagreed and found that the defendant refused to provide other information such as who were his buyers or the names of others connected to his operation. Because he failed to show that he disclosed

all information known to him, regardless of whether or not it was relevant or useful to the government's investigation, the defendant failed to meet his burden of proving he qualified under § 3553(f).

c. Method of Disclosure

i. In United States v. Ivester, 75 F.3d 182 (4th Cir.) *cert. denied*, 518 U.S. 1011 (1996), the Fourth Circuit affirmed the district court's denial of the defendant's request for a "downward departure" under §3553(f). The Government did not seek information from the defendant, and the defendant did not volunteer any information. "[D]efendants seeking to avail themselves of downward departures under 18 U.S.C. § 3553(f) bear the burden of affirmatively acting, no later than sentencing, to ensure that the Government is truthfully provided with all information and evidence the defendants have concerning the relevant crimes." *See* United States v. Flanagan, 80 F.3d 143 (5th Cir. 1996).

ii. In United States v. Montanez, 82 F.3d 520 (1st Cir. 1996), the First Circuit upheld the district court's denial of safety valve relief, but held that a defendant is not required to offer himself for debriefing to satisfy § 3553(f) disclosure requirement. Here the defendant's written disclosure was drawn almost verbatim from a government affidavit, and the government pointed out suspicious omissions from which the district court correctly decided that the defendant did not provide full disclosure. The First Circuit noted that nothing in 18 U.S.C. § 3553(f) specifies the form, place, or the manner of the disclosure. Nevertheless, because it is up to the defendant to persuade the district court that he has "truthfully provided" the required information and evidence to the government, a defendant who declines to offer himself for a debriefing takes a very dangerous course.

iii. In United States v. Brack, 188 F.3d 748 (7th Cir. 1999), the Seventh Circuit held that the defendant's truthful written statement combined with his request for a proffer session constituted compliance with safety valve, where the government "rebuffed" defendant's request. The government "could not complain of incompleteness when it refused to allow him to finish telling his story."

iv. In United States v. Wrenn, 66 F.3d 1 (1st Cir. 1995), the First Circuit held that the defendant did not "provide" information as required under §5C1.2(5) when the sole manner of disclosure was the defendant's unwittingly taped conversation in furtherance of his criminal conduct,

recorded as part of the government's investigation. The court stated that § 3553(f)(5) "contemplates an affirmative act of cooperation with the government."

d. Refusal to Testify

In United States v. Carpenter, 142 F.3d 333 (6th Cir. 1998), the Sixth Circuit held that a defendant's refusal to testify at a criminal proceeding involving co-conspirators does not preclude him from receiving the benefit of the safety valve. The defendant provided all the information he had concerning the offenses, but refused to testify at trial. The government argued that the defendant was required to provide testimony to grand and petit juries. The district court held that as a matter of law it was precluded from applying the safety valve. The Sixth Circuit reversed, holding that a defendant is required to provide information and evidence to the government, not the court and that "evidence [as required under § 3553(f)] is limited to those things in the possession of the defendant prior to his sentencing, excluding testimony, that are of potential evidentiary use to the government."

e. Lying

i. In United States v. Long, 77 F.3d 1060 (8th Cir.), *cert. denied*, 519 U.S. 859 (1996), the Eighth Circuit held that the defendant may not lie to the government in an interview and then satisfy §3553(f) by admitting the truth during cross-examination at the sentencing hearing.

ii. In United States v. Marin, 144 F.3d 1085 (7th Cir.), *cert. denied*, 119 S. Ct. 265 (1998), the Seventh Circuit held that to satisfy § 5C1.2(5) a defendant who provides the government with untruthful pre-sentencing disclosures must provide complete and truthful disclosure by the time of the commencement of the sentencing hearing. The defendant cannot deliberately mislead the government and wait until the middle of the sentencing hearing to cure his prior misstatements. Here, the defendant changed his testimony during the sentencing hearing, and thus, the district court was correct to deny the safety valve to the defendant.

iii. In United States v. Tournier, 171 F.3d 645 (8th Cir. 1999), the Eighth Circuit held that the defendant was eligible for the safety valve because she provided full and truthful cooperation, though "grudging and fitful," by the time of the sentencing hearing. The defendant provided false denials or withheld information on relevant subjects of her knowledge

of the conspiracy to the government at four interviews. Just before the sentencing hearing, she filed an affidavit containing complete and truthful information concerning the offense. The Eighth Circuit rejected the government's argument that §3553(f)(5) should be construed to prohibit application of the safety valve to defendants who wait until the last minute to cooperate fully. The statute only requires that the information be provided by the time of the sentencing hearing. *See* United States v. Schreiber, 191 F.3d 103 (2d Cir. 1999)(lies and omissions do not disqualify a defendant from safety valve relief so long as the defendant makes a complete and truthful proffer not later than the commencement of the sentencing hearing).

iv. In United States v. Miller, 179 F.3d 961 (5th Cir. 1999), the Fifth Circuit held that a defendant cannot be denied safety valve relief for lying about prior drug offenses that were not part of the same course of conduct or of a common scheme or plan as the offense of conviction. The district court refused to grant safety valve relief to the defendant, concluding that the defendant lied about his role in a prior drug transaction. The defendant argued that neither a four-year old marijuana arrest nor a two-year old cocaine transaction bore any relationship to the present offense of conviction. The appellate court agreed with the defendant, holding irrelevant the defendant's lies about his prior activities that were not substantially connected nor sufficiently similar to the offense of conviction. Because the defendant had provided all information about his current offense of conviction, he was entitled to safety valve relief.

v. In United States v. Morones, 181 F.3d 888 (8th Cir. 1999), the Eighth Circuit upheld the district court's denial of the safety valve to a defendant who originally told the government the truth, but later recanted. If the sentencing court finds that the initial recanted story was truthful, or that in recanting the defendant has been untruthful, the court's finding that the defendant has not "truthfully provided to the Government all information and evidence concerning the offense" is not clearly erroneous. Here, because the district court found the initial recanted story truthful, the defendant is precluded from safety valve relief. The Eighth Circuit did note that "[s]afety valve relief is not precluded simply because a tardy disclosure is less helpful to the government."

vi. In United States v. Figueroa, 199 F.3d 1281 (11th Cir. 2000), the Eleventh Circuit held that a defendant must give complete and truthful disclosure, even if withheld or misrepresented information would not have aided further investigation or prosecution. The district court

granted safety valve relief, after finding that some of the defendant's disclosures were incomplete and untruthful. The district court determined that the withheld information would not be of much use to the government. The Eleventh Circuit reversed, holding that §5C1.2(5) does not empower the sentencing court to apply the safety valve simply because it concludes that withheld or misrepresented information would not aid further investigation or prosecution.

vii. In United States v. Brownlee, 204 F.3d 1302 (11th Cir. 2000), the Eleventh Circuit found that "[n]othing in [18 U.S.C. § 3553(f)] suggests that a defendant who previously lied or withheld information from the government is automatically disqualified from safety-valve relief." When the defendant was arrested, he provided the DEA with a proffer in which he failed to disclose the source of his cocaine. On the morning of the sentencing hearing, the defendant provided the prosecutor and an agent with the name of his supplier. The district court denied the defendant's request for safety valve relief based on the government's position that the defendant's failure to disclose his supplier earlier did not constitute "disclosing information in good faith." The Eleventh Circuit found that § 3553(f) and §5C1.2 require only that the defendant provide information "not later than the time of sentencing hearing." Because the defendant met the deadline, the district court erred in not determining whether the defendant was truthful before denying him safety valve relief.

f. Constitutionality

i. In United States v. Washman, 128 F.3d 1305, 1307 (9th Cir. 1997), the Ninth Circuit held that § 3553(f)(5) does not raise constitutional concerns because it does not mete out additional punishment if a defendant decides not to disclose information.

ii. In United States v. Arrington, 73 F.3d 144 (7th Cir. 1996), the Seventh Circuit held that the disclosure requirement does not implicate the Fifth Amendment right against self incrimination. As the Circuit reasoned in cases addressing the constitutionality of §3E1.1, denying relief is not "penalizing the defendant but denying him a benefit." *citing* Ebole v. United States, 8 F.3d 530, 536-37 (7th Cir. 1993)(requirements for reduction under §3E1.1 do not implicate Fifth Amendment).

iii. In United States v. Cruz, 156 F.3d 366 (2d Cir. 1998), the Second Circuit held that the requirement in §5C1.2 that a defendant admit to

relevant conduct beyond that included in the offense of conviction in order to gain a reduction in his sentence does not violate the right against self-incrimination. The court noted that the choice presented to a defendant under §5C1.2 between relief from the mandatory minimum sentence and a waiver of his right against self-incrimination is analogous to the choice confronting defendants in plea bargain cases, and gives rise to no more compulsion than is present in that situation. *See infra,* United States v. Stewart, 93 F.3d 189 (5th Cir. 1996).

g. Fear of Retaliation

i. In United State v. Tang, 214 F.3d 365 (2d Cir. 2000), the Second Circuit held that the defendant's fear for the safety of his fiancee and family members did not excuse him from providing information about a co-defendant, as required under §5C1.2(5). The statute does not provide an exception, and in other contexts (substantial assistance, testimony under grant of immunity) the law does not authorize withholding required information. "We see no basis for creating a fear-of-consequences exception" to the safety valve disclosure requirement.

ii. United States v. Stewart, 93 F.3d 189 (5th Cir.1996), the Fifth Circuit held that the disclosure requirement of §5C1.2(5) is constitutional and does not impose cruel and unusual punishment. The defendant argued that the disclosure requirement of §5C1.2(5) was unconstitutional because it subjected the defendant and her family to violent retaliation. In rejecting the defendant's argument, the Fifth Circuit noted that it had resolved similar challenges to §3E1.1. *See* United States v. Mourning, 914 F.2d 699, 707 (5th Cir. 1990)("[t]o the extent the defendant wishes to avail himself of this provision, any dilemma he faces in assessing his criminal conduct is one of his own making."). A defendant can refuse to cooperate and be sentenced under the regular sentencing scheme.

h. Distinction between §§5C1.2(5) and 5K1.1 (Substantial Assistance)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines. §5K1.1, p.s.; *see also*, 18 U.S.C. § 3553(e); 28 U.S.C. § 994(n).

Courts that have examined the similarity between the disclosure requirements for a substantial assistance departure and for relief under the safety valve have

found that the § 3553(f) requirement that a defendant disclose "all information," including the identities of co-conspirators, does not make §5K1.1 redundant. Acosta-Olivas, 71 F.3d 375, 379 (10th Cir. 1995); Ivester, 75 F.3d 182 (4th Cir.)("§5K1.1 requires a motion from the government and the government's evaluation of the extent of the defendant's assistance is given `substantial weight.' Under § 3553(f), by contrast, the court determines whether a defendant has complied with its provisions, including subsection 5"), *cert. denied*, 518 U.S. 1011(1996) Furthermore, § 3553 specifically states that the defendant may still enjoy the benefits of the section even if the information he provides is not "relevant or useful" to the government.) *See* United States v. Maduka, 104 F.3d 891 (6th Cir. 1997).

i. Distinction between §§5C1.2 and 3E1.1 (Acceptance of Responsibility)

To qualify for an adjustment for acceptance of responsibility, a defendant must "truthfully admit the conduct comprising the offense(s) of conviction." USSG §3E1.1, comment. (n.1(a)).

i. In United States v. Arrington, 73 F.3d 144 (7th Cir. 1996), the defendant received a three-level reduction for acceptance of responsibility under §3E1.1, but the district court determined that the defendant had not truthfully provided all the information concerning the offense as required under §3553(f)(5). The Seventh Circuit agreed with the lower court and concluded that the admission of responsibility to obtain a reduction under §3E1.1(a) is not necessarily sufficient to satisfy §3553(f)(5). Under §3553(f)(5), the defendant must provide "all information" concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan," whereas, §3E1.1(a) requires the defendant to admit only the conduct comprising the elements of the offense(s) of conviction. *See* United States v. Yate, 176 F.3d 1309 (11th Cir. 1999); United States v. Sabir, 117 F.3d 750 (3d Cir. 1997); United States v. Adu, 82 F.3d 119 (6th Cir. 1996).

ii. In United States v. Conde, 178 F.3d 616 (2d Cir. 1999), the Second Circuit held that, unlike §3E1.1, the disclosure obligation imposed by §5C1.2(5) requires more than accepting responsibility for one's own acts. Under §5C1.2, the defendant must also disclose the involvement of any co-conspirators.

iii. In United States v. Shrestha, 86 F.3d 935 (9th Cir. 1996), the Ninth Circuit held that a defendant who does not qualify for an adjustment for acceptance of responsibility under §3E1.1 is not necessarily precluded from relief under the safety valve. In Shrestha, the defendant confessed

to knowledge of the contraband and provided names of his contacts to customs agents before trial. At trial and at sentencing, the defendant insisted that he did not know he was carrying drugs. The government argued that the "defendant's recantation of his guilty knowledge" cast doubt on his original confession, and that perjury at trial should automatically defeat a claim for sentence reduction under section (5) of the safety valve provision. The Ninth Circuit rejected the government's argument stating that: "[t]he safety valve is not concerned with sparing the government the trouble of preparing for and proceeding with trial, as is USSG §3E1.1." *Id*. at 938. The Ninth Circuit added that the safety valve authorizes courts to grant relief to defendants who provide the government with complete information by the time of the sentencing hearing, and that the defendant's recantation did not diminish the information he had earlier provided. *Id*. at 940.

C. Burden of Proof

The defendant has the burden of proving, by a preponderance of the evidence, the applicability of the safety valve. *See* United States v. Wrenn, 66 F.3d 1 (1st Cir. 1995); United States v. Gambino, 106 F.3d 1105 (2d Cir. 1997); United States v. Ivester, 75 F.3d 182 (4th Cir. 1996), *cert. denied*, 116 S. Ct. 2537 (1996); United States v. Flanagan, 80 F.3d 143 (5th Cir. 1996); United States v. Arrington, 73 F.3d 144 (7th Cir. 1996); United States v. Ajugwo, 82 F.3d 925 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 742 (1997); United States v. Verners, 103 F.3d 108 (10th Cir. 1996).

D. Judicial Findings

1. Evidentiary Hearing

In United States v. Real-Hernandez, 90 F.3d 356 (9th Cir. 1996), the Ninth Circuit held that the defendant did not have a right to an evidentiary hearing to determine truthfulness for purposes of applying the safety valve provision. There is no general right to an evidentiary hearing at sentencing, and the district court has discretion to determine whether to hold such a hearing.

2. Necessity of Findings

In United States v. Myers, 106 F.3d 936 (10th Cir.), *cert. denied*, 117 S. Ct. 2446 (1997), the Tenth Circuit held that district courts must make a determination as to whether or not defendants meet the requirements under § 3553(f). The district court

declined to address whether the defendant met the five criteria listed in § 3553(f) and held that whether the safety valve provision should apply is a matter within its discretion. The Tenth Circuit disagreed, stating that the plain language of the statute mandates that the court disregard the statutory minimum if the defendant meets the five criteria. *See* United States v. Espinos, 172 F.3d 795 (11th Cir. 1999)(the court bears the responsibility for determining the truthfulness of the information the defendant provides the Government); United States v. Gama-Bastidas, 142 F.3d 1233 (10th Cir. 1998)(court must determine quality and completeness of all information the defendant provided the government to satisfy subsection 5).

E. Supervised Release

A defendant who meets the criteria under this section is exempt from any otherwise applicable statutory minimum sentence of imprisonment and statutory minimum term of supervised release. §5C1.2, comment. (n.9); *see also* §5D1.2, comment. (n.1).

In United States v. Hendricks, 171 F.3d 1184 (8th Cir. 1999), the Eighth Circuit held that a defendant who qualifies for the safety valve must be sentenced to a term of supervised release without regard to the minimum statutory penalty. The district court believed it was bound by the ten-year term of supervised release contained in the mandatory minimum statute. The Eighth Circuit reversed, concluding that once a defendant qualifies for the safety valve, the court has no authority to look to the statute in determining the sentence. The Eighth Circuit stated that since the defendant was convicted of a Class A felony, the applicable term of supervised release under the guidelines is three to five years.

F. Departures

1. In United States v. Pratt, 87 F.3d 811 (6th Cir. 1996), the Sixth Circuit held that neither 18 U.S.C. § 3553(f) nor §5C1.2 authorizes a downward departure from the guideline sentencing range without an independent basis for the departure. The defendant argued that the court had statutory authority to sentence her to as little as 24 months. The court concluded that the phrase "lowest term of imprisonment is at least 24 months" establishes a floor below which the Sentencing Commission cannot lower the sentencing range, and is not an independent basis for departure. *Id*. at 813.

2. In United States v. Solis, 169 F.3d 224 (5th Cir.), *cert. denied,* 120 S.Ct. 112 (1999), the Fifth Circuit held that the district court misapplied the guidelines by granting the defendant a five-level departure pursuant to §5C1.2, based on the defendant's assistance to the government. A court may depart based on substantial assistance only if the government files a motion under §5K1.1. Here, the defendant was only entitled to a two-level reduction under §2D1.1(b)(6).

G. Appellate Jurisdiction

1. In United States v. Cruz, 106 F.3d 1553 (11th Cir. 1997), the Eleventh Circuit held that it had jurisdiction under 18 U.S.C. § 3742 to hear a defendant's claim addressing the denial of the safety valve. The government cited United States v. McFarlane, 81 F.3d 1013 (11th Cir. 1996) in its argument that a district court's decision not to grant a defendant safety valve relief is not reviewable on appeal. McFarlane held that a defendant is normally prohibited from appealing a district court's failure to grant a downward departure from the applicable guideline range unless the district court believed that it did not have discretion to grant such a departure. In Cruz, the Eleventh Circuit distinguished McFarlane by explaining that the safety valve is not a departure; instead it requires an eligible defendant to be sentenced within the guideline range without regard to a statutory minimum. Because § 3553(f) directs the court to apply the sentencing guidelines without regard to the statutory minimum if the five criteria are met, a sentence above the guideline range would be "a result of an incorrect application of the sentencing guidelines," and thus reviewable under § 3742(d).

2. In United States v. Ivester, 75 F.3d 182 (4th Cir.) *cert. denied*, 518 U.S. 1011 (1996), the defendant asserted that the district court erred in failing to grant him a downward departure from his five-year statutory minimum sentence because he had complied with the provisions for downward "departure" set forth by the "safety valve" statute at 18 U.S.C. § 3553(f), incorporated in §5C1.2. The appellate court agreed to hear the appeal because the claim was "essentially one for review of a sentence allegedly imposed in`violation of law.'" *See* 18 U.S.C. § 3742(a)(1).

H. Retroactive Application

1. In United States v. Thompson, 76 F.3d 442 (2d Cir. 1996), the Second Circuit held that Amendment 515 could not be applied retroactively because it was not specifically included under §1B1.10. Amendment 515 added a specific offense characteristic to §2D1.1 authorizing a two-level reduction of an offense level of 26 or higher if the defendant meets the criteria of the §5C1.2. *See* United States v. Sanchez, 81 F.3d 9 (1st Cir.), *cert. denied*, 117 S. Ct. 201 (1996).

2. In United States v. Clark, 110 F.3d 15 (6th Cir. 1997), the Sixth Circuit held that appellate courts may take the safety valve statute into account in pending sentencing cases and that district courts may consider the safety valve statute when a case is remanded under § 3742 or § 3582(c). The defendant received a mandatory minimum sentence of 121 months after the safety valve provision was enacted. The district court denied her motion to amend the sentence in accord with the safety valve provision, stating that it lacked discretion to issue a sentence below the statutory minimum. The appellate court found that § 3582 was intended to be applied broadly. Also, because

a case is not final when it is pending appeal, and a sentence has not been imposed until after review of the appellate court, the safety valve provision could be applied in cases on appeal. The court added that application of the safety valve statute when a sentence is modified would not result in ex post facto violation because the defendant would not be disadvantaged by its application.

3. In United States v. Mihm, 134 F.3d 1353 (8th Cir. 1998), the Eighth Circuit concluded that a court has authority to apply safety valve relief to a defendant who is resentenced pursuant to § 3582(c)(2), even if the original sentence occurred before the effective date of the safety valve (September 13, 1994). The Eighth Circuit held that a resentencing under § 3582(c)(2) requires the court to consider all relevant statutory factors. Because § 3553(f) is a general sentencing factor, the district court must take it into account. *See contra,* United States v. Stockdale, 129 F.3d 1066 (9th Cir. 1997).

4. In United States v. Stockdale, 129 F.3d 1066 (9th Cir. 1997), the Ninth Circuit concluded that a defendant who is eligible for relief under § 3582(c)(2) is not entitled to application of the safety valve upon resentencing, if the original sentencing occurred before the effective date of § 3553(f) (September 13, 1994). The fifth prong of § 3553(f), requiring the defendant to provide information "[n]ot later than the time of the sentencing,"supports a construction that the safety valve applies only if the findings were made at the original sentencing. The language in § 3582(c)(2) concerning modification of a sentence, "implies that the safety valve statute applies during sentencing, not in subsequent reduction proceedings." The guideline language in §1B1.10 instructs a court to apply the listed amendment upon resentencing but to leave "all other guideline application decisions unchanged." The Ninth Circuit also noted that though the "inferences from grammar might be a bit thin . . . they lead to the only result that makes sense."