NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. D.P., Defendant-Appellant.	No. 15-50201 D.C. No. 3:14-cr-02641-LAB-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Argued and Submission Deferred April 4, 2017
Submitted April 14, 2017
Pasadena, California

Before: WARDLAW and CALLAHAN, Circuit Judges, and KENDALL,** District Judge.

D.P. appeals his judgment and sentence for one count of importation of a controlled substance in violation of 21 U.S.C. §§ 952 & 960. We have jurisdiction

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Virginia M. Kendall, United States District Judge for the Northern District of Illinois, sitting by designation.

pursuant to 28 U.S.C. § 1291, and we reverse and remand.

1. The district court erred in concluding that the government's disclosure of information derived from D.P.'s proffer statements did not breach the parties' proffer agreement. The government promised pursuant to the agreement not to offer "in connection with any sentencing proceeding for the purpose of determining an appropriate sentence" "any statement made by [D.P.] during the proffer." Yet when the district court asked the prosecution whether D.P. had revealed during his debrief sessions the number of times he had previously imported drugs, the government told the court that based on the proffer statements the number of prior crossings was "likely . . . more than 20 given the information provided." This violated the plain language of the parties' agreement. *See* Cal. Civ. Code § 1638; *see also United States v. Chiu*, 109 F.3d 624, 625–26 (9th Cir. 1997).

The government's argument that U.S.S.G. § 1B1.8(b)(5) provides an implied exception to its nondisclosure promise is not supported by that provision. Section 1B1.8 describes the extent to which protected information may be used by a court, not the scope of protections that can be afforded by the government as a matter of contract principles. *See* U.S.S.G. § 1B1.8. Indeed, subsection (a) acknowledges that individual proffer agreements will govern the use of protected information and

does not indicate that the provision trumps those agreements. *See id.* § 1B1.8(a). Moreover, subsection (b)(5) does not apply to these circumstances. Though a district court may consider protected information in assessing whether a *downward departure* in the applicable Guidelines range is warranted pursuant to a § 5K1.1 motion, subsection (b)(5) does not permit the court to consider protected information in determining where within that range the defendant's sentence should fall, as the court did here. *See id.* § 1B1.8(b)(5); *see also id.* § 1B1.8 cmt. 5.

The government's contention that D.P. was not entitled to nondisclosure because the substance of his debriefs was not confidential lacks merit, as the proffer agreement did not require confidentiality but rather specifically precluded the government from using D.P.'s proffered statements against him at trial or sentencing. Finally, the district court's conclusion that the parties could not contract to keep relevant information from it at sentencing was wrong as a matter of law. *See, e.g.*, *United States v. Whitney*, 673 F.3d 965 (9th Cir. 2012).

Proffers are relied on by the government in order to investigate further criminal activity and are based on the premise that the government does not have the ability to prosecute a particular defendant due to lack of knowledge or evidence of the crime. Proffers protect the constitutional right of the criminal defendant from incriminating himself in a crime of which the government is unaware.

Therefore, strict adherence to the language of the agreement is necessary to both aid the government in its investigation while protecting the rights of the defendant. Without such strict adherence to the language that prohibits its use at sentencing, it has no value to the defendant and therefore any trained defense attorney would not permit her client to enter into such an agreement.

That the government disclosed the incriminating statements in response to questioning from the district judge rather than offering the statements into evidence itself is not relevant to the outcome. The proffer agreement prohibited the government from "offer[ing] in evidence in its case-in-chief, or in connection with any sentencing proceeding for the purpose of determining an appropriate sentence, any statements made by [D.P.] during the proffer . . . ." By giving information to the district judge, the government breached the agreement, doing exactly what it said it would not do—give the district court statements made during the proffer session "in connection with any sentencing proceeding for the purpose of determining an appropriate sentence." Although the district judge's questioning placed the government in an awkward position, the only permissible course of conduct was to inform the district judge that the information was not within the government's control but for the proffer agreement, and the government was not permitted to divulge it.

2. The remedy for the government's breach is resentencing consistent with the terms of the proffer agreement before a different district court judge. Where the district court judge "has seen or heard the offending words that denied the defendant the benefit of his bargain" such that "further proceedings before him would necessarily be tainted by the government's breach," *United States v. Heredia*, 768 F.3d 1220, 1236 (9th Cir. 2014), resentencing by a different district court judge is required. *See, e.g.*, *United States v. Camper*, 66 F.3d 229, 233 (9th Cir. 1995) (citing *Santobello v. New York*, 404 U.S. 257, 262–63 (1971)).

REVERSED and REMANDED.[1]

[1] The government's motion (Docket Entry No. 34) to supplement the record, dated June 28, 2016, is GRANTED with respect to the proffer agreement and DENIED with respect to the extradition affidavit. The parties' joint motion (Docket Entry No. 70) to submit the case for judicial resolution, dated April 14, 2017, is GRANTED. The government's motion (Docket Entry No. 72) to file a supplemental brief, dated April 14, 2017, is DENIED. D.P.'s motion (Docket Entry No. 74) to file an opposition to the government's supplemental brief, dated April 18, 2017, is DENIED as moot.

Callahan, J., dissenting:

I respectfully dissent.[1] The majority discerns a breach of a proffer agreement where none exists and reads the sentencing guidelines to preclude disclosures that they clearly allow.

The government entered into a proffer agreement with D.P. whereby it agreed not to "offer in evidence in its case-in-chief, or in connection with any sentencing proceeding … any statements made by [D.P.] during the proffer." The majority criticizes the government for disclosing to the district court that the number of border crossings D.P. made to transport illicit drugs was "likely … more than 20 given the information provided." But the government did not "offer" D.P.'s statements and therefore did not breach the agreement. The commonly understood meaning of the term "offer" is to "propose" something, "present for acceptance or rejection," or to "make available." *Offer*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/offer (last accessed May 11, 2017). Here, the government did not affirmatively "present" or volunteer the self-incriminating information to the court; it only divulged it after repeated demands by the district judge.

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[1] I concur in the majority's footnote 1.

Even if the government had "offer[ed]" the information to the court, it was within its authority to do so. U.S.S.G. § 1B1.8(a) prevents the government from using "self-incriminating information provided pursuant to [a cooperation] agreement … against the defendant." That includes the "government's presentation of information." *Id.* cmt. 5. However, that limitation "shall not be applied to restrict the use of information … in determining whether, or to what extent, a downward departure from the guidelines is warranted pursuant to a government motion under § 5K1.1 (Substantial Assistance to Authorities)." U.S.S.G. § 1B1.8(b)(5).

Here, the government filed a § 5K1.1 motion. Thus, under subsection (b)(5), the limitation against the use of self-incriminating information—including its "presentation"—does not apply. Comment 1 to the guidelines makes this point plain: Not only may the government not "withhold [self-incriminating] information from the court," but the court may also use that information for purposes of "determining whether, and to what extent, a downward departure" from the guidelines is warranted pursuant to a § 5K1.1 motion. *Id.* cmt. 1.

The majority insists that subsection (b)(5) is inapplicable because it allows the district court to consider protected information only in assessing whether a downward departure "in the applicable Guidelines range is warranted pursuant to a § 5K1.1 motion." The subsection does not, the majority contends, allow the court

to consider such "information in determining where within that range the defendant's sentence should fall," as the court did here.

The plain text of subsection (b)(5) is to the contrary. The court may use self-incriminating information to determine whether "a downward departure from the guidelines is warranted," § 1B1.8(b)(5)—i.e., to settle on a sentence *after* the guideline range is established. That is precisely what the district court did here: it applied a § 5K1.1 5-point reduction, which resulted in a particular guideline range. It then used the incriminating information to decide whether to depart downward from that range as D.P. requested.

Our case law does not compel a different outcome. The majority's reliance on *United States v. Whitney*, 673 F.3d 965 (9th Cir. 2012), is misplaced for two reasons. First, *Whitney* did not involve a § 5K1.1 motion, meaning the exception to § 1B1.8's general prohibition on the use of self-incriminating information did not apply. *See id.* at 968–70. Second, the government in *Whitney* volunteered information to the court supporting a sentencing enhancement in violation of the plea agreement. *Id.* at 969. Here, as discussed, the government only admitted to the number of border crossings (and a rough approximation at that) *after* the court demanded the information.

In short, the government did not breach its proffer agreement with D.P. by divulging information pursuant to a § 5K1.1 motion at the district court's request. I respectfully dissent.