CRIMINAL LAW — SENTENCING — SIXTH CIRCUIT HOLDS THAT FEDERAL JUDGES MAY NOT CONSIDER § 3553(A) FACTORS IN RULE 35(B) HEARINGS. — *United States v. Grant*, No. 07-3831, 2011 WL 71475 (6th Cir. Jan. 11, 2011) (en banc).

Mandatory minimum sentences imposed by statute are intended to achieve consistency in sentencing[1] at the expense of individual consideration of the contextual sentencing factors enumerated in 18 U.S.C. § 3553(a) — factors such as the defendant's role in the crime and the defendant's criminal history. However, this vision of mandatory minimum sentences is complicated by the possibility of downward departures for defendants who render substantial assistance to the government.[2] For a defendant facing a mandatory minimum sentence, the government may move pursuant to 18 U.S.C. § 3553(e) (at the original sentencing) or pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure (after the original sentencing) to empower the court to impose a sentence below the mandatory minimum in light of a defendant's "substantial assistance in the investigation or prosecution of another person."[3] Thus, the question arises whether a court may still consider the contextual factors outlined in § 3553(a) when deciding how to depart from the mandatory minimum upon a Rule 35(b) motion by the government.

While the circuits purportedly agree that the nature of a defendant's substantial assistance to the government is the only factor that can be used as a basis for downward departure on either a § 3553(e) motion or a Rule 35(b) motion,[4] this superficial consensus masks a contested jurisprudence regarding the role of contextual factors in assessing the appropriate sentence reduction for substantial assistance. Recently, in *United States v. Grant*,[5] the Sixth Circuit, sitting en banc, held that a federal judge may not consider § 3553(a) contextual factors in assessing the proper sentence reduction for a defendant who has rendered substantial assistance.[6] However, the court simultaneously

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[1] *See* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 10–11 (2010).

[2] *Id.* at 66 ("[T]here remains only one guaranteed way for the defense to avoid a mandatory sentence: a government motion that the defendant provided substantial assistance . . . ."). For an early history of the importance of substantial assistance departures, see generally Bruce M. Selya & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combatting Ultra-Uniformity*, 35 B.C. L. REV. 799 (1994).

[3] 18 U.S.C. § 3553(e) (2006); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2010).

[4] *See, e.g.*, United States v. Jackson, 577 F.3d 1032, 1036 (9th Cir. 2009); United States v. Hood, 556 F.3d 226, 234 n.2 (4th Cir. 2009); United States v. Williams, 551 F.3d 182, 186–87 (2d Cir. 2009); United States v. Mangaroo, 504 F.3d 1350, 1356 (11th Cir. 2007).

[5] No. 07-3831, 2011 WL 71475 (6th Cir. Jan. 11, 2011) (en banc).

[6] *Id.* at *8–9.

affirmed the "ample discretion" vested in the sentencing judge to consider other contextual factors in calculating the value of the assistance provided.[7] In applying this rule, the majority surprisingly affirmed the district court's conclusion that testimony relating to the context of the defendant's offense was procedurally barred from the resentencing hearing. The *Grant* court's excessively formalistic opinion is in direct tension with the court's own disposition of the case, thus guaranteeing future procedural inconsistency at an important juncture in the sentencing process.

In 2005, Kevin Grant pled guilty to three drug-related crimes.[8] The presentence report calculated that Grant's offenses corresponded to a U.S. Sentencing Guidelines (U.S.S.G.) range of thirty-two years to thirty-eight years and nine months.[9] The mandatory minimum sentence for these offenses was twenty-five years.[10] In recognition of Grant's cooperation, the government requested, pursuant to U.S.S.G. section 5K1.1, that the judge impose the statutory minimum term of imprisonment.[11] The prosecution also indicated that, if Grant continued to assist in its ongoing investigations, it would later file a Rule 35(b) motion to lower his sentence to sixteen years.[12]

Less than two years later, as promised, the government filed a Rule 35(b) motion recommending that Grant be resentenced to sixteen years.[13] Grant requested a further reduction due to several mitigating factors, including his testimony in a homicide case, the relatively minor role that he had played in the criminal enterprise, and the recent death of the mother of two of his children.[14] At the resentencing hearing, the district court judge stated that he lacked the power to hear Grant's testimony on any of these issues except for the nature of his assistance.[15] The district court granted the government's motion and re-

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[7] *Id.* at *10.

[8] Grant pled guilty to knowing possession of a firearm in furtherance of a drug trafficking crime, conspiracy to commit money laundering, and operation of a continuing criminal enterprise. *Id.* at *1. The other charges were dismissed in a plea agreement. *Id.*

[9] *See id.* at *2.

[10] *Id.* at *1.

[11] *Id.* at *2. Notably, the government declined to request a departure under 18 U.S.C. § 3553(e); such a motion would have permitted the court to depart below the mandatory minimum. *Id.*

[12] *Id.* At the sentencing hearing, Grant objected to the calculation of his offense level, but the district court denied his objection and sentenced him to twenty-five years in prison. *Id.* Grant appealed, and a panel of the Sixth Circuit affirmed his sentence, finding any alleged error harmless due to the imposition of the mandatory minimum sentence. United States v. Grant, 214 F. App'x 518, 521 (6th Cir. 2007).

[13] *Grant*, 2011 WL 71475, at *2.

[14] *Id.* at *3.

[15] *See id.* At the hearing, the judge stated: "All I'm going to say is, I am not going to listen to any arguments, now or ever, with regard to sentences that have been agreed upon and which have

duced Grant's sentence to sixteen years.[16] Grant appealed, claiming that the court committed legal error by misunderstanding the factors it was permitted to consider.[17]

A divided panel of the Sixth Circuit reversed, holding that the district court was permitted to consider the § 3553(a) contextual factors at the Rule 35(b) hearing.[18] Writing for the majority, Judge Merritt noted that Grant had not yet received meaningful consideration of the § 3553(a) factors.[19] Judge Merritt opined that "[o]nce the grip of the mandatory minimum sentence is broken, the sentencing judge may consider § 3553(a)."[20] In dissent, Judge Gibbons complained that the majority's rule would "create[] new layers of pointless process" because a sentencing judge would now be required to review the § 3553(a) factors in setting the initial sentence and then again in hearing a Rule 35(b) motion.[21] This rule would also create unwarranted disparities between defendants whose assistance is completed prior to their original sentencing — who would fall under § 3553(e) motions and not receive consideration of the § 3553(a) factors — and defendants whose assistance continues past their sentencing, who could move pursuant to Rule 35(b) for consideration of factors beyond their assistance.[22]

The Sixth Circuit granted rehearing en banc and reversed the panel decision, affirming the district court's sentence. Writing for the court, Judge Gibbons[23] rejected Grant's argument that the language and legislative history of Rule 35(b) permit consideration of § 3553(a) factors.[24] The court read the title of Rule 35(b), "Reducing a Sentence for Substantial Assistance," to provide guidance that "courts are able to reduce a defendant's sentence *for* his substantial assistance."[25] The court also stated that Rule 35(b)(3) expressly permits courts to consider a defendant's presentence assistance in evaluating his later assistance, thus implying that other factors are impermissible.[26]

Grant had emphasized that Congress amended Rule 35(b) in 2002: the original language required that the sentence reduction "reflect a defendant's subsequent, substantial assistance," whereas the modified

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been imposed." *Id.* (quoting Transcript of Proceedings at 6–7, United States v. Grant, No. CR-2-04-161 (S.D. Ohio Apr. 27, 2007)).

16 *Id.* at *4.

17 *Id.*

18 United States v. Grant, 567 F.3d 776, 778 (6th Cir. 2009).

19 *Id.* Judge Merritt was joined by Judge Keith.

20 *Id.*

21 *Id.* at 786 (Gibbons, J., dissenting).

22 *Id.*

23 Judge Gibbons was joined by Chief Judge Batchelder and Judges Martin, Boggs, Gilman, Rogers, Sutton, Cook, McKeague, Griffin, and Kethledge.

24 *See Grant*, 2011 WL 71475, at *4–5.

25 *Id.* at *6.

26 *Id.*

rule omitted the "to reflect" language.[27] However, the court put little stock in the 2002 changes because the notes that accompanied the amendment stated that the changes were "stylistic."[28] Furthermore, the court stressed the importance of maintaining consistency between Rule 35(b) and § 3553(e).[29] The court observed that § 3553(e) contains the "to reflect" language[30] and has a strong body of case law supporting the interpretation that downward departures "must be based *solely* upon the 'substantial assistance' rendered by the defendant."[31]

The court also rejected Grant's other arguments: that *United States v. Booker*[32] requires that judges consider § 3553(a) factors during sentence reductions, and that Grant had been denied consideration of the § 3553(a) factors at his initial sentencing because of the application of a mandatory minimum sentence.[33] Relying on *Dillon v. United States*[34] and Sixth Circuit precedent,[35] the court held that *Booker* did not mandate consideration of § 3553(a) factors at resentencing.[36] Finally, the court concluded that application of § 3553(a) factors was not constitutionally required and that defendants sentenced to mandatory minimum sentences were routinely denied such consideration.[37] The court firmly rejected the view that judges are allowed to consider § 3553(a) factors in Rule 35(b) hearings: "[M]ingling the terminology of § 3553(a) with the concept of valuation of assistance evokes a *Booker*-type proceeding, which does not reflect the purpose of Rule 35(b) or the ways that district courts have traditionally evaluated a defendant's substantial assistance."[38]

However, in dicta, the court insisted that a district judge who decides that a defendant has rendered substantial assistance has "ample discretion."[39] Indeed, the court fleshed out its view of appropriate judicial discretion by noting that the district court could recognize

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[27] *Id.* at *6–8.

[28] *See id.* at *8 (quoting FED. R. CRIM. P. 35 advisory committee notes on rules — 2002 amend.) (internal quotation marks omitted).

[29] *Id.* at *8–9.

[30] *See id.* at *7–8.

[31] *Id.* at *8 (quoting United States v. Bullard, 390 F.3d 413, 416 (6th Cir. 2004)) (internal quotation marks omitted).

[32] 543 U.S. 220 (2005).

[33] *Grant*, 2011 WL 71475, at *9–10.

[34] 130 S. Ct. 2683, 2693 (2010) (holding that *Booker*'s requirement that federal judges consider sentencing factors other than the U.S.S.G. range does not apply to sentence reductions made under 18 U.S.C. § 3582(c)(2)).

[35] *See* United States v. Johnson, 356 F. App'x 785, 790–92 (6th Cir. 2009) (holding that the protections associated with original sentencing are not required in other contexts); United States v. Washington, 584 F.3d 693, 700–01 (6th Cir. 2009) (same).

[36] *Grant*, 2011 WL 71475, at *9.

[37] *Id.* at *10.

[38] *Id.* at *11.

[39] *Id.* at *10.

"contextual considerations" in determining the extent of a Rule 35(b) sentence reduction.[40] The court described such permissible considerations as including "the context surrounding the initial sentence," whether "the defendant was among the least culpable in a multi-defendant case," "a defendant's capacity for abiding by the law" as judged by his criminal history, and whether the crime was particularly "heinous."[41] The court noted that "[o]ne district judge might decline to consider the contextual factors we mention; another might deem them useful. The choice is that of the district court."[42]

Judge Merritt concurred, emphasizing that the majority's rule empowers judges to weigh "contextual considerations"[43] and thus allows judges to retain "wide discretion . . . to do justice in the case."[44] Judge White concurred in part and dissented in part. She agreed with the majority that the district court can consider a wide range of factors at a Rule 35(b) hearing — including those in § 3553(a) — but only to the extent that such factors bear on the issue of the defendant's substantial assistance.[45] Since the district court had refused to consider all relevant contextual factors on procedural grounds, Judge White would have remanded the case for resentencing.[46]

Judge Clay dissented,[47] protesting that the majority's opinion would lead to "unnecessary confusion" over whether substantial assistance should be the only factor considered at the Rule 35(b) stage or whether instead the district court may "consider myriad factors in this regard — so long as the court does not acknowledge that the factors emanate from § 3553(a)."[48] Highlighting the majority's potentially contradictory holding and dicta, the dissent wondered whether "the majority would hold that the district court properly exercised its discretion in not considering § 3553(a), or whether the majority would hold that the district court lacked discretion to do so in any event."[49] Emphasizing the majority's position that "a district court *may*, in its discretion, consider additional factors to value a defendant's substantial assistance,"[50] the dissent disagreed with the majority's decision to affirm the procedural fairness of Grant's sentence reduction hearing given that the district court had believed itself barred from considering

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40 *Id.*
41 *Id.*
42 *Id.* at *11.
43 *Id.* at *12 (Merritt, J., concurring) (quoting majority opinion).
44 *Id.*
45 *Id.* at *14 (White, J., concurring in part and dissenting in part).
46 *Id.*
47 Judge Clay was joined by Judges Keith, Moore, and Cole.
48 *Grant*, 2011 WL 71475, at *16 (Clay, J., dissenting).
49 *Id.* (citation omitted).
50 *Id.*

Grant's testimony on § 3553(a) factors.[51] The dissent cited the congressional purpose of "the imposition of a just sentence" as a particularly compelling factor in favor of a more inclusive review of Rule 35(b) motions, especially in cases like Grant's, in which the imposition of a mandatory minimum sentence essentially foreclosed any possibility of meaningful § 3553(a) review at the initial sentencing.[52]

The *Grant* court engaged in a formalistic analysis of whether judges can consider § 3553(a) factors at Rule 35(b) resentencing hearings. Yet this analysis failed to provide a clear answer to the case's central question: when, if ever, can a sentencing judge consider contextual factors when resentencing defendants who have cooperated with the government and who are seeking relief from mandatory minimum sentences? The dissent correctly claimed that the majority's holding — especially when considered in light of its decision to affirm Grant's sentence — would lead to "confusion."[53] Such confusion may have a significant impact on sentencing law and policy by increasing interjudge disparities in sentencing outcomes.

The error in the *Grant* opinion is the court's excessively rigid consideration of § 3553(a). The coherence of the *Grant* holding relies on the assumption that there is a meaningful difference between those statutory factors — which may not be considered at a Rule 35(b) resentencing — and the kinds of considerations that the court finds to be acceptable under "the traditionally broad discretion that district courts exercise in valuing . . . assistance."[54] The § 3553(a) factors include the "nature and circumstances of the offense," the "history and characteristics of the defendant," the "need for the sentence imposed," the "kinds of sentences available," the "need to avoid unwarranted sentence disparities," and the "need to provide restitution to any victims of the offense."[55] After explicitly ruling that a judge does not have discretion to consider these factors, the *Grant* court noted in dicta that a sentencing judge may appropriately take into consideration factors that address the same issues as § 3553(a), including the context of the original sentence, the defendant's role, and the nature of the offense.[56] By relying on the formal distinction between "traditional" contextual factors and contextual factors explicitly rooted in § 3553(a), the *Grant* court

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[51] *Id.* The dissent ultimately concluded that "[s]ince the district court erroneously found that it *could not* — rather than *would not* — consider these arguments, the decision should be vacated and the case remanded to the district court for reconsideration." *Id.* at *20. The dissent also disagreed with the majority's interpretation of Rule 35(b), based on legislative history and on advisory committee notes accompanying post-2002 amendments. *See id.* at *17–19.

[52] *Id.* at *17.

[53] *Id.* at *16.

[54] *Id.* at *10 (majority opinion).

[55] 18 U.S.C. § 3553(a) (2006).

[56] *Grant*, 2011 WL 71475, at *10.

refused to resolve the question of when judges should be procedurally prohibited from considering contextual factors that they deem relevant in valuing the defendant's assistance.[57]

The *Grant* decision reimagines the appropriate scope of judicial sentencing discretion in a quiet but important way. *Grant* upheld a district court's conclusion that it was procedurally bound to exclude testimony about the context of a defendant's offense while simultaneously affirming the discretion of judges to hear such testimony, as long as that testimony is relevant to valuing the defendant's assistance and is not explicitly linked to § 3553(a). Following the muddled *Grant* rule, district courts now have discretion not only in exercising substantive sentencing judgment, but also in determining whether they are permitted to hear testimony bearing on the context of a defendant's offense. The *Grant* decision thus demands that judges exercise "procedural discretion" — that is, discretion in their interpretation of the boundaries of the testimony that they can use to inform their substantive judgments. Central to the history of sentencing reform is a view of substantive judicial discretion that stands in contrast to the model of discretion invited by the *Grant* court. In the pre-Guidelines era, judges retained substantial — and perhaps excessive[58] — discretion in sentencing, but they exercised this discretion in making substantive judgments about a defendant's blameworthiness and capacity for reformation.[59] By refusing to announce a clear holding on which factors a district court may consider when ruling on a Rule 35(b) motion, the *Grant* court failed to acknowledge that it was introducing a new layer of discretion into the sentencing procedure. This kind of additional — and unacknowledged — discretion is in tension with a central goal of American sentencing: the reduction of unwarranted disparities.[60]

This possibility of similarly situated defendants' receiving divergent sentences based on a procedural ambiguity flies in the face of the

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[57] It should be noted that Judge Clay's dissent illuminates the majority's failure to ask the right question: not whether a judge should consider § 3553(a) factors or whether the defendant has a statutory right to such consideration, but whether a judge *may* take such testimony into account in ruling on the Rule 35(b) motion. *See id.* at *15–17 (Clay, J., dissenting). Other circuit courts have similarly avoided addressing this question head-on, focusing instead on their agreement that § 3553(a) factors are not to be considered in Rule 35(b) resentencings as grounds for separate sentence reductions. *See, e.g.*, United States v. Jackson, 577 F.3d 1032, 1036 (9th Cir. 2009); United States v. Desselle, 450 F.3d 179, 182 (5th Cir. 2006).

[58] *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 11–13 (1973); *id.* at 12–25 (discussing "individualized" sentencing and the resulting disparities as a product of judges' class biases, politics, views on leniency, and egos, among other factors).

[59] *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 22–23 (1998).

[60] S. REP. NO. 98-225, at 52 (1983) ("A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity.").

uniformity and fairness goals of the sentencing reform movement.[61] Judge Marvin Frankel wrote in 1973 of the need to "reject individual distinctions — discriminations, that is — unless they can be justified by relevant tests capable of formulation and application with sufficient objectivity to ensure that the results will be more than the idiosyncratic ukases of particular officials, judges or others."[62] Although sentencing policy has become more complicated since *Booker*, Frankel's plea for similar sentencing for similar defendants has not lost its resonance.[63] Even the *Booker* decision itself, although decided on Sixth Amendment grounds, emphasized that an advisory guidelines regime would help ensure fairness by "maintaining a strong connection between the sentence imposed and the offender's real conduct — a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve."[64]

Grant directly engages with the central tension in sentencing law and policy: how to balance the conflicting drives for uniformity and individualization. Meaningful procedural uniformity could begin to advance the criminal justice system toward both of these goals, while offering predictability to defendants. Sentencing experts have begun to look at *Booker* as an opportunity for courts to embrace a more robust set of procedural protections for defendants in the sentencing process.[65] This movement toward robust procedures in sentencing offers a potential remedy to the ambiguity and unpredictability now facing cooperating defendants in the wake of *Grant*. If our judicial system remains serious about seeking to achieve uniformity in sentencing, then it should announce a clear rule as to whether it is within the discretion of a trial judge to consider contextual factors while resentencing a cooperating defendant pursuant to a Rule 35(b) motion.

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[61] For background, see the Supreme Court's discussion in dicta of the purposes of sentencing reform in the 1970s and 1980s in *Mistretta v. United States*, 488 U.S. 361, 365–67 (1989).

[62] FRANKEL, *supra* note 58, at 10, 21 (arguing for reform of the status quo of the early 1970s in which "judges of widely varying attitudes on sentencing, administering statutes that confer huge measures of discretion, mete[d] out widely divergent sentences where the divergences [were] explainable only by the variations among the judges, not by material differences in the defendants or their crimes," *id.* at 21); *see also* Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 915–29 (1962).

[63] *See, e.g.*, Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 813 (2006) (describing the "strong rhetorical commitment to uniformity," notwithstanding current policy disagreements about how to achieve it). *But see* Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. REV. 649, 651 (2003) (arguing that the pursuit of uniform sentencing has diluted the emphasis on fairness in individual sentencing outcomes).

[64] United States v. Booker, 543 U.S. 220, 246 (2005).

[65] *See* Alan DuBois & Anne E. Blanchard, *Sentencing Due Process: How Courts Can Use Their Discretion to Make Sentencings More Accurate and Trustworthy*, 18 FED. SENT'G REP. 84, 86 (2005).