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REASONABLY PREDICTABLE: THE RELUCTANCE TO EMBRACE JUDICIAL DISCRETION FOR SUBSTANTIAL ASSISTANCE DEPARTURES

*India Geronimo**

INTRODUCTION

In *United States v. Booker*, the Supreme Court held that the Federal Sentencing Guidelines (“the Guidelines”) are no longer mandatory.¹ Even so, in its remedial opinion, the *Booker* Court instructed sentencing courts to continue to consult the Guidelines² and instructed appellate judges to consider the reasonableness of the lower court’s sentences.³ As a result of this recent decision, there has been a flurry of speculation within academia and the blogosphere about the extent of federal judicial discretion in determining sentences.⁴

Because *Booker* created an advisory sentencing regime,⁵ there is much guesswork regarding how much influence the Guidelines should retain.⁶ While judges must consult the Guidelines and use them as a basis for calculating sentences,⁷ it is unclear to what extent they should be able to diverge

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1. 543 U.S. 220, 259 (2005) (excising the provisions of the Federal Sentencing Guidelines that created a mandatory sentencing scheme).

2. *Id.*

3. *Id.* at 260-63.

4. *E.g.*, Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1 (2005); Posting of PG to de novo, http://www.blogdenovo.org/archives/2005_01.html (Jan. 12, 2005, 14:36 EST). *See generally* Sentencing Law and Policy, <http://sentencing.typepad.com> (last visited Sept. 26, 2006).

5. 543 U.S. at 259.

6. *See supra* note 4 and accompanying text.

7. *Booker*, 543 U.S. at 264; *see also* *United States v. Martin*, 135 F. App’x 411, 414-15 (11th Cir. 2005) (noting that judges must consult the Guidelines and state their reasons for imposing a sentence).

from the Guidelines and impose sentences that are lesser or higher than the Guidelines sentence.⁸

Within the realm of expanded judicial discretion are sentence reductions due to a defendant's cooperation with the government, namely, where there are no statutory mandatory minimums.⁹ Cooperation is one of several bases for sentencing departures. Prior to *Booker*, judges had discretion to depart from the Guidelines where the government made a section 5K1.1 motion after receiving substantial assistance, or cooperation, from a defendant.¹⁰ Post-*Booker* cooperation departures are particularly fascinating because they are a clear illustration of the manner in which *Booker* may expand a judge's power to "do what's right,"¹¹ while simultaneously limiting a prosecutor's discretion by allowing the judge to depart from the Guide-

8. *Booker* emphasizes the need for judges to make "individualized sentences," however, it is not very clear how much discretion judges have to achieve this goal. See *Booker*, 543 U.S. at 264-65 (citing 28 U.S.C. § 991(b)(1)(B) in stating that the Guidelines should encourage uniformity while allowing flexibility for individualized sentences where necessary). The extent of judicial "flexibility" is not very clear. Thus, post-*Booker* commentators have speculated about how *Booker* will continue to impact sentencings. See, e.g., *supra* note 4 and accompanying text.

9. It has been generally accepted that *Booker* does not apply where Congress has imposed a statutory mandatory minimum sentence; thus, the breadth of *Booker*'s impact is limited to the Guidelines and not to federal statutes that require mandatory minimums. *Harris v. United States*, 536 U.S. 545, 567-68 (2002); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (holding that the legislature may create statutory minimums without violating the Constitution).

10. The section 5K1.1 provision states:

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.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005).

11. See, e.g., Posting of TChris to TalkLeft: The Politics of Crime, http://talkleft.com/new_archives/009332.html (Jan. 15, 2005) (claiming that the "judge's discretion to impose the sentence the judge deems 'just' has expanded"). But see *United States v. Dalton*, 404 F.3d 1029, 1033-34 (8th Cir. 2005) (holding that the district court cannot exercise an "extraordinary reduction" in imposing a sentence absent "extraordinary circumstances").

lines without a motion from the government.¹² As this Comment illustrates, however, most appellate courts are reluctant to affirm sentences where the district court judge has exercised this discretion in the context of cooperation departures.¹³ The majority of courts have either failed to analyze how *Booker* impacts the mechanics of section 5K1.1 cooperation departures,¹⁴ or failed to address the question.¹⁵ Appellate courts have been particularly reluctant to affirm sentences where the sentence is lower than that which is recommended under the Guidelines.¹⁶ Nonetheless, several courts have

12. See Laurie P. Cohen & Gary Fields, *Balance of Power: High Court Declares Guidelines on Sentencing Violate Rights*, WALL ST. J., Jan. 13, 2005, at A1 (suggesting that creating an advisory system eliminates the prosecutor’s power to seduce the defendant into cooperating). Later, in comments posted to a sentencing policy blog, Professor Frank Bowman added the following:

Booker insofar as it apparently eliminates, moots, or at least renders less important the government monopoly on substantial assistance motions while at the same time giving judges a much broader degree of sentencing discretion generally. That represents a change disadvantageous to the gov’t in what working prosecutors have always regarded as one of the most important features of the guidelines.

See Sentencing Law and Policy, <http://sentencing.typepad.com> (Jan. 13, 2005, 13:34 EST).

13. See, e.g., *United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005) (holding that absent a government section 5K1.1 motion, the district court cannot grant a substantial assistance departure). The court supported its conclusion that there must be a government motion to depart by citing a pre-*Booker* case. *Id.* (citing *United States v. Forney*, 9 F.3d 1492, 1499 (11th Cir. 1993)). In *Crawford*, the court fails to explain why the advisory nature of the Guidelines does not impact the section 5K1.1 provision, nor does the court attempt to explain why a pre-*Booker* case would be relevant in the post-*Booker* advisory system. *Id.*

14. *Id.*

15. See *United States v. Doe*, 398 F.3d 1254, 1260 n.7 (10th Cir. 2005) (recognizing that pre-*Booker*, a government motion was necessary for the district court to grant a downward departure, but electing not to evaluate the “continued vitality” of this requirement in an advisory sentencing regime).

16. See, e.g., *United States v. Desselle*, 450 F.3d 179, 183 (5th Cir. 2006) (vacating a substantial assistance departure that was greater than the sentence that was recommended by the prosecution); *United States v. Fairclough*, 439 F.3d 76, 80-81 (2d Cir. 2006) (affirming a sentence where the district court diverged from the Sentencing Guidelines by imposing a high sentence on the defendant); *United States v. Goody*, 442 F.3d 1132, 1134 (8th Cir. 2006) (vacating a sentence where the district court gave a sentence that was lower than the Guidelines sentence, finding that there were no extraordinary circumstances to warrant the divergence). Professor Berman notes the trend to reverse sentencing variances that decrease a defendant’s sentences, and to affirm sentences that increase the defendant’s sentences. Sentencing Law and Policy, <http://sentencing.typepad.com/> (June 18, 2006, 00:09 EST). When listing recent published circuit court cases that deal with sentencing, Professor Berman noted that as of March 31, 2006, there were seventeen cases reversed for unreasonableness when the district court diverged from the Guidelines to grant a lower sentence. Sentencing Law and Policy, <http://sentencing.typepad.com/> (Mar. 31, 2006, 15:22 EST). Only one sentence was reversed, however, where the district court granted a sentence that was higher than the Guidelines sentence. *Id.* Even more disturbing are the eleven higher (above-guideline) sentences that were affirmed in comparison to the two below-guideline sentences that were affirmed. *Id.* Although Professor Berman’s study does not list all re-

used 18 U.S.C. § 3553(a), the statute describing offender characteristics that judges should consider at sentencing, as a mechanism for granting sentences below the Guidelines to account for an offender's cooperation.¹⁷

This Comment focuses on the nuances of post-*Booker* cooperation departures and sentence variances. Section 5K1.1 of the Guidelines governs the provision of cooperation, or substantial assistance, departures.¹⁸ This provision was the primary method for defendants to receive cooperation departures prior to *Booker*.¹⁹ The section 5K1.1 provision allowed substantial assistance departures where the prosecution actually benefited from the defendant's cooperation.²⁰ This Comment discusses how this aspect of the substantial assistance provision has been implicated by expanded judicial discretion.

First, Part I.A of this Comment will provide an overview of the original goals of the Sentencing Commission and the section 5K1.1 substantial assistance provision. Part I.B of the Comment summarizes *United States v. Booker* and its impact on cooperation departures. Finally, post-*Booker* application of section 5K1.1 and 18 U.S.C. § 3553(a) to substantial assistance is explored in Part II and is followed by a recommendation in Part III. This Comment argues that judges should not only consider a defendant's cooperation with the government at sentencing, but they should also consider those efforts where the cooperation does not amount to substantial assistance.

cent cases, it does illustrate a general trend to treat upward variances and downward variances differently. *Id.* As noted by the Second Circuit, reasonableness is a flexible standard. *See United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005) (“‘[R]easonableness’ is inherently a concept of flexible meaning, generally lacking precise boundaries . . .”). That does not mean, however, that it should be applied inconsistently based on whether the divergence is upward or downward.

17. *E.g.*, *United States v. Beamon*, 373 F. Supp. 2d 878, 884-86 (E.D. Wis. 2005); *United States v. Condon*, Nos. C3-05-04, C3-05-05, 2005 WL 1114841 (D.N.D. Apr. 22, 2005); *see also* AMY BARON-EVANS, FED. PUB. & CMTY. DEFENDERS, SENTENCING POST-*BOOKER* 15 (2005), available at http://www.fd.org/pdf_lib/sentencing%20postbooker101205.pdf. *See infra* note 70 for the text of § 3553(a).

18. *See supra* note 10 and accompanying text. Within the Guidelines, the section 5K1.1 provision had a monopoly over substantial assistance departures. Although defendants could receive a sentence reduction for “accepting responsibility” for their actions, this departure is generally lesser than the departure for substantial assistance. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005). Furthermore, offenders who provide or make a good faith effort to provide substantial assistance to the government do more than accept responsibility for their actions. *See infra* Part III.A.

19. *See supra* note 10 and accompanying text.

20. *See supra* note 10 and accompanying text.

PART I: FEDERAL SENTENCING AND BOOKER**A. The Sentencing Guidelines and Section 5K1.1**

The Guidelines came into effect in 1989 and provided mandatory sentencing guidelines for federal offenders.²¹ The Sentencing Commission Report of 1991, which described the goals of the Guidelines, identified six objectives for mandatory sentences: “assuring ‘just’ [] punishment, more effective deterrence, more effective incapacitation of the serious offender, elimination of sentence disparities, stronger inducements for knowledgeable offenders to cooperate in the investigation of others, and judicial economies resulting from increased pressure on defendants to plead guilty.”²²

Section 5K1.1 of the Guidelines provided for a departure from the mandatory sentence where the defendant provided substantial assistance to the prosecution.²³ Defendants had to *actually* provide substantial assistance to the government in order to benefit from this departure.²⁴ In other words, the cooperation was required to result in increased prosecution and further the prosecutorial enterprise before the defendant would receive the benefit of a reduced sentence. The provision of a sentencing departure is initiated by a government motion requesting a sentence reduction due to the defendant’s cooperation with the prosecution.²⁵ In some courts, the government provides the judge with a suggested sentencing range based on the extent of the defendant’s cooperation, timeliness of cooperation, and other related factors.²⁶ The sentence reduction for substantial assistance can provide a multiple-level departure from the Guidelines.²⁷ As a result, the section

21. *Mistretta v. United States*, 488 U.S. 361, 376-69 (1989).

22. Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 201-02 (1993) (citing to U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL & CRIMINAL JUSTICE SYSTEM: A SPECIAL REPORT TO CONGRESS 13-15 (1991)).

23. *See supra* note 10 and accompanying text.

24. *See supra* note 10 and accompanying text.

25. *See supra* note 10 and accompanying text.

26. *See, e.g., United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005). The practice of the government suggesting what sentence the judge should provide is not common to all jurisdictions. Some courts may place more weight on the probation office’s suggestion, and still, in other courts, the prosecutor makes no suggestion about sentences. For practical reasons, this Comment focuses on the courts where the government’s suggestion is usually given great weight. In other jurisdictions, the government is not likely to appeal the sentencing decision of the judge. Thus, there is limited case law discussing the reasonableness of the trial court’s decisions. Although prosecutors have greater control over the sentencing in these circuits, the appellate decisions on reasonableness still offer insight for other jurisdictions.

27. *See supra* note 16 and accompanying text.

5K1.1 provision can significantly reduce the defendant's sentence.²⁸ Many critics of the section 5K1.1 provision argue that it provides the prosecutor with too much discretion.²⁹ The judge, however, has the discretion to grant or deny the government's section 5K1.1 motion.³⁰ Thus, the section 5K1.1 departure requires agreement between the prosecutor and the judge.³¹

The original version of the section 5K1.1 provision granted substantial assistance departures where defendants made a good faith effort to cooperate with the prosecution.³² In 1989, however, the Sentencing Commission amended the section 5K1.1 provision, requiring that substantial assistance be actually provided.³³ The Sentencing Commission claimed that this amendment was a clarification of the original provision.³⁴

This change is significant because it required actual provision of substantial assistance and did not consider a good faith effort to provide substantial assistance for a sentencing departure.³⁵ The Sentencing Commission stated that the original language suggested that the *attempt* to cooperate with the government would warrant a departure.³⁶ The original language, however, required a "good faith effort" to provide substantial assistance, not a mere desire to do so.³⁷ Thus, this "clarification" between a good faith effort to provide and actual provision of substantial assistance, in reality, seems to have been a substantial change to the Guidelines, and not a mere "clarification." Furthermore, as a result of this change, prosecutors focused on the actual fruits of the information that defendants pro-

28. See *supra* note 16 and accompanying text; see also Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, 11 FED. SENT'G REP. 6, 13 (1998) ("The court's role in the substantial assistance process is to decide whether to accept the prosecution's § 5K1.1 motion and, if so, to determine the magnitude of departure as a function of the degree and nature of the cooperation.").

29. See, e.g., Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 662-63 (2004).

30. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005).

31. See *id.*

32. The original provision stated, "Upon motion of the government stating that the defendant has made a *good faith effort to provide substantial assistance* in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,103 (May 13, 1987) (emphasis added).

33. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (amended 1989).

34. See U.S. SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS MANUAL 115-16 (Apr. 13, 1987) (incorporating technical, clarifying, or conforming amendments submitted to Congress May 1, 1987), available at <http://www.ussc.gov/2001guid/Appc-5.pdf>.

35. *Id.*

36. *Id.*

37. See *supra* note 32 and accompanying text.

vided, rather than the offender characteristics that substantial assistance demonstrates.³⁸

B. Summary of *United States v. Booker*

In *United States v. Booker*, the Supreme Court held that the Guidelines were only advisory.³⁹ The Court issued both a doctrinal opinion, written by Justice Stevens, and a remedial opinion, written by Justice Breyer.⁴⁰ In its remedial opinion, the Supreme Court required that judges consult the Guidelines, even though they are not bound by them.⁴¹ The *Booker* Court struck down § 3553(b) of the federal sentencing statute, which required courts to impose sentences within the Guidelines.⁴²

The facts of the case follow. Based on the results of the jury trial, Respondent Booker received a sentence between 210 and 262 months in prison under the Guidelines.⁴³ Despite this, the district court judge held a post-sentencing hearing and determined, by a preponderance of the evidence, that Booker could be held accountable for an additional 566 grams of cocaine for sentencing purposes.⁴⁴ This finding increased Booker’s sentence to one between 360 months and life imprisonment.⁴⁵

In addition, Respondent Fanfan, the second defendant to the case, was convicted of a crime that placed his sentence at seventy-eight months under the Guidelines.⁴⁶ During a sentencing hearing following the trial, the judge found additional facts that raised Fanfan’s sentence to a sentence between 188 and 235 months.⁴⁷

In its doctrinal opinion, the *Booker* Court addressed the constitutionality of the Guidelines.⁴⁸ Under the Sixth Amendment, defendants have a right

38. See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005) (instructing the judge to evaluate the actual provision of substantial assistance). The distinction between actually reaping the benefits from the defendant’s cooperation versus considering the good faith efforts to cooperate quickly, and with as much information as possible, is critical. The former only evaluates whether prosecutors were able to prosecute using the defendant’s information. Thus, where two defendants provide the same information, only one has provided substantial assistance to the prosecution because the prosecution has not “actually” benefited from the second individual’s information.

39. 543 U.S. 220, 259 (2005).

40. *Id.* at 226, 244.

41. *Id.* at 259.

42. *Id.* at 245. Section 3553(b) is codified at 18 U.S.C.A. § 3553(b)(1) (West Supp. 2004).

43. *Booker*, 543 U.S. at 227.

44. *Id.*

45. *Id.*

46. *Id.* at 228.

47. *Id.*

48. *Id.* at 226.

to a fair jury trial.⁴⁹ The common law incorporates the right to be proven guilty beyond a reasonable doubt into the nexus of Sixth Amendment rights.⁵⁰ Under the mandatory system, both Booker's and Fanfan's Sixth Amendment rights were violated because the Guidelines allowed judicial fact-finding under a "preponderance of the evidence" standard.⁵¹ The *Booker* Court noted that if the Guidelines were advisory, this problem would not exist.⁵² Under an advisory sentencing system, the judge can assess the factors she finds most relevant without a finding from the jury, distinguishing it from the mandatory fact-finding under the mandatory sentencing scheme.⁵³ The Court noted the previous legislative scheme allowed judges to make certain factual findings and grant sentence enhancements as an aggravating factor interfering with the offenders' Sixth Amendment rights.⁵⁴ As a result of this practice, the judge, not the jury, became the main fact-finder whose decision impacted the defendant.⁵⁵

The doctrinal opinion concluded that under a mandatory sentencing regime, fact-finding that increased the sentence of the defendant must be brought before the jury.⁵⁶ The *Booker* Court held that despite the efficiency issues that may arise, any judicial fact-finding that enhanced the defendant's sentence, based on her plea of guilty or a jury verdict, must be submitted to the jury in order to preserve the defendant's Sixth Amendment rights.⁵⁷ The Court reasoned that the rights embodied by the Sixth Amendment outweigh the interests of efficiency and held that the Guidelines, as they stood, were unconstitutional.⁵⁸

In the remedial opinion written by Justice Breyer, the Court discussed the construction of the Guidelines after the doctrinal holding that the Guidelines were unconstitutional.⁵⁹ The Court corrected the constitutional infirmities of the Guidelines by severing two provisions.⁶⁰ The Court struck down § 3553(b)(1), which created the mandatory nature of the

49. U.S. CONST. amend. VI.

50. *Booker*, 543 U.S. at 230.

51. *Id.* at 232.

52. *Id.* at 233.

53. *Id.* ("For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.")

54. *Id.* at 236 ("As the enhancements became greater, the jury's finding of the underlying crime became less significant.")

55. *Id.*

56. *Id.* at 244.

57. *Id.*

58. *Id.* at 243-44.

59. *Id.* at 244.

60. *Id.* at 259.

Guidelines, as well as § 3742(e), which set the standard of appellate review for sentences.⁶¹ The Court held that severing these provisions preserved the constitutionality of the remaining provisions of the Guidelines.⁶² The Court also held that this action effectively rendered the Guidelines advisory.⁶³ The Court then instructed judges to continue to consult the Guidelines when sentencing,⁶⁴ but it also permitted judges to tailor the sentences to satisfy statutory concerns, citing § 3553(a).⁶⁵

Several policy considerations affected the Court’s remedial decision. The Court noted the importance of the Sentencing Commission’s goals of uniformity and stated that the ability to match real conduct with the sentence achieved this goal.⁶⁶ The Court reasoned that a system overly dependant on plea-bargaining gave the prosecutor too much control.⁶⁷ The Court stated that such prosecutorial discretion does not satisfy the Sentencing Commission goals of increasing uniformity.⁶⁸ It also stated that the need to provide individualized sentences while maintaining consistency for similar conduct was critical to its decision.⁶⁹

Additionally, the *Booker* Court emphasized the importance of § 3553(a) in sentencing decisions and the judge’s ability to tailor sentencing decisions based on factors listed within that statute.⁷⁰ The decision explicitly stated

61. *Id.* The text of § 3553(b)(1) reads in part:

Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C.A. § 3553(b)(1) (West Supp. 2006) (emphasis added).

Section 3742(e) instructs appellate judges to apply de novo review to the sentencing court’s decision. See 18 U.S.C.A. § 3742(e) (West 2000 & Supp. 2006). This standard was changed by the Supreme Court’s decision to require appellate review under a “reasonableness” standard. *Booker*, 543 U.S. at 260-61.

62. *Booker*, 543 U.S. at 259.

63. *Id.*

64. *Id.*

65. *Id.* at 245-47.

66. *Id.* at 246.

67. *Id.* at 256-57.

68. *Id.*

69. *Id.* at 264.

70. *Id.* at 261. Section 3553(a) states:

Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

that district courts are not bound by the Guidelines, although they must consult them.⁷¹ The Court instructed judges to consider the § 3553(a) factors when sentencing, such as the nature and circumstances of the offense and the history and characteristics of the defendant.⁷² This provision of the Guidelines requires judges to consider the main objectives of the Sentencing Commission; namely, the nature and circumstances of the offense, the history and characteristics of the defendant, and the need for the sentence to protect the public from further crimes of the defendant.⁷³

Further, *Booker* grants appellate review under a reasonableness standard.⁷⁴ The Court reasoned that such a standard is consistent with Congress' intentions and instructed appellate courts to assess whether the sentence is unreasonable under the factors discussed in § 3553(a).⁷⁵ Although lower courts are afforded greater discretion, this discretion will be affected by how appellate courts interpret reasonableness.

PART II: JUDICIAL DISCRETION AND COOPERATION POST-*BOOKER*

A. *Booker's* Impact on Substantial Assistance Departures

Expanded judicial discretion has allowed judges to consider a greater number of factors when sentencing a defendant, including the defendant's cooperation with the prosecution. Judges may grant a sentence lower than the sentence suggested by the pre-sentence report, when reasonableness so requires.⁷⁶ Thus, a judge may diverge from the Guidelines based on coop-

-
- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

...

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C.A. § 3553(a) (West & Supp. 2004).

71. *Booker*, 543 U.S. at 245-46.

72. *Id.* at 249.

73. *Id.* at 268-69.

74. *Id.* at 261-62.

75. *Id.*

76. *Id.* at 260-62.

eration, even where the prosecutor has not filed a motion to grant the defendant a substantial assistance departure under section 5K1.1, which was previously impossible under the mandatory sentencing regime. This is mainly achieved by factoring either the defendant’s cooperation, or good faith effort to cooperate, into the § 3553(a) factors that the judge considers.

Despite the expanded discretion, the trial court must provide an explanation of how it reached its sentencing decision.⁷⁷ In *United States v. Martin*, the prosecution filed a section 5K1.1 substantial assistance motion, recommending that the defendant receive a sentence of sixty-two months imprisonment.⁷⁸ Instead of applying this sentence, the district court imposed a sentence of sixty months *probation*.⁷⁹ No explanation was provided to establish the validity of such a significant departure.⁸⁰ The appellate court vacated the sentence, reasoning that post-*Booker*, a sentencing court must provide some explanation for departing from the Guidelines.⁸¹ This explanation is necessary to assess whether the sentence is reasonable and to allow for meaningful appellate review of the sentence.⁸² Thus, although trial courts have broad sentencing discretion, this discretion is not unfettered.⁸³ The sentencing judge must provide a reasonable basis for departures that is individualized to the defendant.⁸⁴

Nonetheless, courts now have increased discretion to reduce a defendant’s sentence when reasonableness so requires. In *United States v. Pizano*, the prosecution submitted a section 5K1.1 motion suggesting that the court give Pizano a ten percent reduction in his sentence.⁸⁵ When the trial court sentenced Pizano to a term seventy-five percent below his Guidelines range,⁸⁶ the prosecution appealed and argued that the sentence was unreasonable.⁸⁷ The Eighth Circuit affirmed the trial court’s sentence, noting that the trial judge evaluated the § 3553(a) factors related to Pizano’s cooperation, such as the usefulness and significance of the assistance given, and stated his reasons for implementing a departure.⁸⁸ The appellate court also

77. *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005) (“This consultation requirement, at a minimum, obliges the district court to calculate *correctly* the sentencing range prescribed by the Guidelines . . .”).

78. 135 F. App’x 411, 412 (11th Cir. 2005).

79. *Id.* at 414.

80. *Id.*

81. *Id.* at 415-16.

82. *Id.*

83. *Id.* at 416.

84. *United States v. Booker*, 543 U.S. 220, 260-62 (2005).

85. 403 F.3d 991, 993 (8th Cir. 2005).

86. *Id.* at 994.

87. *Id.*

88. *Id.* at 996-97.

suggested that while serious consideration should be given to the prosecutor's sentencing recommendation, the sentencing judge is not controlled by it.⁸⁹

Post-*Booker* courts may consider a lower sentence for substantial assistance against the government's opposition.⁹⁰ In *United States v. Beamon*, the district court evaluated § 3553(a) in view of the nature of the offense, the character of the defendant, and the needs of the public when sentencing the defendant.⁹¹ In addition, the court considered the disparate impact of crack-cocaine sentences and powder-cocaine sentences.⁹² The court determined that in sentencing it could consider factors that relate to the defendant's substantial assistance, as well as factors that are not related.⁹³ Furthermore, in *United States v. Condon*, the district court upheld its own decision to give the defendant a sentencing departure that exceeded the government's recommendation.⁹⁴ The court noted that it had considered the factors under § 3553(a) and could elect to give a greater departure based on Condon's cooperation.⁹⁵

Even where there is no government motion to grant a substantial assistance departure, the judge may consider the offender's cooperation, or good faith effort to cooperate with the prosecution, in accordance with § 3553(a).⁹⁶ As previously discussed, § 3553(a) has increased importance in the post-*Booker* sentencing world.⁹⁷ *Booker* authorizes judges to use § 3553(a) as a vehicle to sentence consistently with the statutory provisions of the Guidelines.⁹⁸ The § 3553(a) provision is crucial because it considers important offender characteristics and traits, which are relevant to sentencing.⁹⁹

The § 3553(a) provision is increasingly important for cooperation because, despite *Booker*'s expansion of judicial discretion, courts have not incorporated this discretion under the section 5K1.1 provision of the Guidelines. Several cases have held that because section 5K1.1 requires a gov-

89. *Id.* at 996.

90. *See, e.g.*, *United States v. Beamon*, 373 F. Supp. 2d 878, 885-86 (E.D. Wis. 2005); *United States v. Condon*, Nos. C3-05-04, C3-05-05, 2005 WL 1114841, at *1 (D.N.D. Apr. 22, 2005).

91. *Beamon*, 373 F. Supp. 2d at 885-86.

92. *Id.* at 886.

93. *Id.* at 884.

94. *Condon*, 2005 WL 1114841, at *1. The government recommended a sentence of forty-eight months and the court imposed a sentence of forty-two months. *Id.*

95. *Id.*

96. *See* discussion *infra* Part III.A.

97. *See supra* text accompanying notes 76-95.

98. *United States v. Booker*, 543 U.S. 220, 245-46 (2005).

99. *See supra* note 70, providing the relevant text of § 3553(a).

ernment motion to depart, it is per se unreasonable for a court to depart in the absence of such a motion.¹⁰⁰ Despite this limitation, judges may consider a defendant’s cooperation or good faith effort to cooperate through the lens of § 3553(a).¹⁰¹ A defendant who has surrendered all available information in a timely manner may present a decreased likelihood of recidivism.¹⁰² Where a defendant has eliminated ties to a criminal organization, her ability to return is necessarily impaired.¹⁰³ This is especially so where she has revealed all available information to the prosecution.¹⁰⁴ This type of behavior is at the heart of the offender characteristics described in § 3553(a).¹⁰⁵ Thus, so long as the court evaluates cooperation through § 3553(a) to impose a reasonable and individualized sentence, appellate courts should uphold the trial court’s sentencing decision.

**B. Compliance With the Guidelines As a Measure of Reasonableness:
The Reluctance to Require Courts to Diverge From the Guidelines**

Booker does not require courts to reduce a sentence based on a defendant’s substantial assistance. Although judges have greater discretion to consider various factors post-*Booker*, sentences must comport with a reasonableness standard.¹⁰⁶ Many courts have interpreted reasonableness by measuring the sentencing court’s compliance with the Guidelines. For instance, where there is no section 5K1.1 substantial assistance motion by the prosecution, some courts have held that judges are not permitted to consider the offender’s substantial assistance as a basis for reducing a sentence.¹⁰⁷

When considering a defendant’s substantial assistance, courts are restricted to giving sentences that are “reasonable.”¹⁰⁸ In *United States v. Bermúdez*, the defendant appealed the trial court’s failure to compel the government to file a section 5K1.1 motion on his behalf.¹⁰⁹ The trial court found that Bermúdez did not provide truthful information to the prosecu-

100. See, e.g., *United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005).

101. See *BARON-EVANS*, *supra* note 17, at 17.

102. *Id.*

103. *Id.*

104. *Id.*

105. Section 3553(a) states that “the nature and circumstances of the offense and the history and characteristics of the defendant” are primary factors to be weighed when imposing a sentence. 18 U.S.C.A. § 3553(a) (West & Supp. 2004). The characteristics of the defendant are clearly implicated in cooperation or a good faith effort to cooperate with the government.

106. *United States v. Booker*, 543 U.S. 220, 246 (2005) (holding that sentencing decisions should be evaluated for their reasonableness).

107. See, e.g., *United States v. Bermúdez*, 407 F.3d 536, 538 (1st Cir. 2005).

108. See *supra* note 11 and accompanying text.

109. *Bermúdez*, 407 F.3d at 538.

tion.¹¹⁰ The appellate court reasoned that in light of this finding, the trial court was not required to grant a substantial assistance departure.¹¹¹ The sentence must comport with reasonableness; refusing to depart from the Guidelines due to the defendant's false testimony comports with reasonableness.¹¹²

When sentences diverge from the Guidelines, appellate courts have required trial courts to provide an explanation for the divergence. In *United States v. Dalton*, the Eighth Circuit reversed the trial court's sentence, stating that it was unreasonable.¹¹³ The prosecutor made a section 5K1.1 substantial assistance motion and suggested that Dalton receive a ten percent departure from the Guidelines.¹¹⁴ Instead, the trial court judge imposed a seventy-five percent departure and expressed his disdain toward the Guidelines.¹¹⁵ The appellate court reversed the sentence because the judge failed to state reasons why he placed greater weight on Dalton's substantial assistance than the prosecutor.¹¹⁶ Furthermore, the court found "[a]n extraordinary reduction must be supported by extraordinary circumstances."¹¹⁷

Moreover, defendants cannot compel the sentencing court to diverge from the Guidelines. In *United States v. Daniels*, the defendant appealed the trial court's sentencing decision, claiming that the court failed to compel the government to file a substantial assistance motion.¹¹⁸ The appellate court affirmed the trial court's sentence, noting that the trial court cannot compel the government to make a section 5K1.1 motion where failure to do so is not unconstitutionally motivated.¹¹⁹ Furthermore, the appellate court noted that the trial court considered Daniels's cooperation with the government in its sentencing decision.¹²⁰ Because the trial court considered the extent of Daniels's cooperation in its decision, the sentence could not be unreasonable.¹²¹

Furthermore, a sentencing court does not have the authority to force the prosecution to make a section 5K1.1 substantial assistance motion on a de-

110. *Id.*

111. *Id.* at 541.

112. *Id.*

113. 404 F.3d 1029, 1033-34 (8th Cir. 2005).

114. *Id.* at 1029-30.

115. *Id.* at 1031-32.

116. *Id.* at 1033-34.

117. *Id.* at 1033.

118. 147 F. App'x 869, 870 (11th Cir. 2005), *cert. denied*, 2006 U.S. LEXIS 502 (2006) (unpublished opinion).

119. *Id.* at 871.

120. *Id.* at 870.

121. *Id.*

defendant’s behalf.¹²² In *United States v. Mullins*, Mullins argued that the sentencing court abused its discretion when it did not compel the government to make a section 5K1.1 substantial assistance motion.¹²³ The appellate court affirmed the trial court’s sentence, reasoning that the government owes no duty to move for a section 5K1.1 sentencing departure,¹²⁴ nor can the sentencing court compel the government to do so where the government’s refusal is not unconstitutionally based.¹²⁵ Similarly, in *United States v. Moore*, the court reasoned that section 5K1.1 fell within the sole discretion of the prosecutor,¹²⁶ and although the prosecutor had the right to make a section 5K1.1 motion, she had no duty to do so.¹²⁷

In sum, trial courts are not compelled to diverge from the Guidelines where there is no motion from the prosecution. These cases illustrate that in fact, many appellate courts have interpreted reasonableness in relation to compliance with the Guidelines. Under section 5K1.1, the Guidelines require that the prosecution make a motion for substantial assistance before a judge departs. Thus, these courts have rejected the possibility that district judges may grant a section 5K1.1 departure in the absence of such a motion. Measuring reasonableness in such a manner does not appear warranted under the *Booker* decision, which states that sentences should be viewed in light of the factors described in § 3553(a), not in terms of how the sentence conforms with the Guidelines.

Further, appellate courts have not applied this stringent interpretation of “reasonableness” across the board. Recent case law suggests that appellate courts are more likely to affirm a divergence from the Guidelines where the district court grants a higher sentence to the defendant than where the dis-

122. *Id.* A court can only compel the government motion if the government acted unconstitutionally, such as discriminating on the basis of race. *Id.*

123. 399 F.3d 888, 889 (8th Cir. 2005).

124. *Id.* at 890. Note that this case does not address whether a district court can grant a section 5K1.1 departure in the absence of a government motion. Although many cases state in dicta that the grant of a section 5K1.1 departure is solely at the discretion of the prosecutor, all of these cases cite pre-*Booker* case law outlining the procedure of section 5K1.1 motions. See *supra* note 13 and accompanying text. None of these cases, however, address how *Booker* implicates the section 5K1.1 departure provision in light of expanded judicial discretion. Furthermore, none of these cases offer any analysis or rationale for claiming that section 5K1.1 motions are granted at the sole discretion of the prosecutor, outside of the citation of pre-*Booker* case law. Arguably, much of the pre-*Booker* case law is partially irrelevant and courts should attempt to revisit this concept, or at the very least, provide a rationale for their assumption that sentencing courts cannot grant section 5K1.1 departures in the absence of a government motion.

125. *Mullins*, 399 F.3d at 890.

126. 136 F. App’x 284, 287 (11th Cir. 2005) (“Because substantial-assistance motions are within the government’s discretion, a defendant has no protected right which gives rise to a due process claim.”).

127. *Id.* at 286 (citing *Wade v. United States*, 504 U.S. 181, 184 (1992)).

strict court grants a lower sentence.¹²⁸ If appellate courts apply a standard of reasonableness with teeth for pro-defendant sentences, they should not apply a “reasonableness lite” standard for pro-prosecution sentences.

C. Procedural and Utilitarian Arguments to Restrict Judicial Discretion

Despite *Booker*'s expansion of judicial discretion, there are some arguments for limiting a court's ability to consider cooperation. One argument follows a utilitarian analysis.¹²⁹ According to this argument, cooperation plays a purely functional role in sentencing by furthering the prosecutorial enterprise.¹³⁰ This approach does not consider the culpability of the defendant or the defendant's offender characteristics.¹³¹ Another argument is a procedural argument.¹³² Under this argument, because section 5K1.1 requires prosecutors to move for a section 5K1.1 motion, judges may not grant a section 5K1.1 departure in the absence of a prosecutorial request to do so.¹³³ This is the more persuasive of the two arguments because it is based on the actual text of the section 5K1.1 provision.

Several scholars argue that the substantial assistance provision should not consider the culpability of the defendant.¹³⁴ According to this view, the purpose of the section 5K1.1 provision is strictly utilitarian, and the actual receipt of substantial assistance from the defendant should be the only consideration for departure.¹³⁵ Proponents of this view argue that the section 5K1.1 provision is most efficient when it provides departures to defendants who may actually provide usable information to the prosecution.¹³⁶

Utilitarians argue that section 5K1.1 departures are efficient because actually receiving substantial assistance is economically beneficial for prose-

128. See *supra* note 16.

129. See generally Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043 (2001); Aaron J. Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557 (2003).

130. See Bowman & Heise, *supra* note 129 at 1117. A utilitarian approach only considers the direct benefit to the prosecution, considering whether the prosecutor was able to prosecute other individuals based on the information that was provided by the defendant.

131. See, e.g., *id.* at 1117 (“Implicit in the idea of substantiality is . . . proof that the assistance materially advanced the prosecutorial enterprise.”).

131. See, e.g., *id.* at 1117 (“Implicit in the idea of substantiality is . . . proof that the assistance materially advanced the prosecutorial enterprise.”).

132. See, e.g., *United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005). *But see supra* note 16 and accompanying text.

133. See *Crawford*, 407 F.3d at 1182.

134. See generally sources cited *supra* note 129.

135. See Bowman & Heise, *supra* note 129, at 1117.

136. *Id.*

cutors in their investigations.¹³⁷ Accordingly, the substantial assistance departure is only a tool for law enforcement, designed to provide an incentive for defendants to cooperate; culpability is largely irrelevant.¹³⁸ Under this view, substantial assistance departures exist based on the “hardheaded utilitarian calculation that offering sentence reductions . . . for [cooperation] is sometimes necessary to successfully prosecute certain crimes.”¹³⁹ Substantial assistance departures are only efficient when given to defendants who actually provide substantial assistance to law enforcement.¹⁴⁰ Thus, a good faith effort to provide substantial assistance should be ignored because the prosecution did not actually profit from the information.¹⁴¹ According to this argument, prosecutors only benefit where the cooperation is “substantial,” by assisting in the apprehension of other criminals and obtaining more prosecutions.

Another position against granting section 5K1.1 departures in the absence of a government motion argues that the court is procedurally barred from doing so.¹⁴² According to this argument, the court is only allowed to grant a substantial assistance departure if the government makes a section 5K1.1 motion.¹⁴³

One of the most-cited cases to support the contention that the district court can only consider substantial assistance after the government has made a section 5K1.1 motion is *United States v. Wade*.¹⁴⁴ The *Wade* Court held that the section 5K1.1 provision gives the government power to file a substantial assistance motion, but it does not create a duty to do so.¹⁴⁵ The prosecutor’s discretion in filing a section 5K1.1 substantial assistance motion is subject only to constitutional limitations.¹⁴⁶ In *United States v. Alamin*, the court stated that a judge may not grant a section 5K1.1 departure without the government motion.¹⁴⁷

Both *Alamin* and *Wade* pre-date *Booker*, but relying on these cases, many post-*Booker* courts have simply concluded that judges may not grant

137. See generally Rappaport, *supra* note 129.

138. *Id.* at 574.

139. Bowman & Heise, *supra* note 129, at 1117.

140. See *id.*

141. See *id.*

142. See, e.g., *United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005).

143. *Id.*

144. 504 U.S. 181, 182-83 (1992).

145. *Id.* at 185.

146. *Id.* at 185-87.

147. 895 F.2d 1335, 1337 (11th Cir. 1990) (stating that the Sentencing Guidelines make it clear that there can be no section 5K1.1 departure without a motion by the government).

147.895 F.2d 1335, 1337 (11th Cir. 1990) (stating that the Sentencing Guidelines make it clear that there can be no section 5K1.1 departure without a motion by the government).

a section 5K1.1 substantial assistance departure without a government motion.¹⁴⁸ Courts either summarily conclude that *Booker* has no impact on the judge's ability to grant section 5K1.1 departures,¹⁴⁹ or decide to address the issue.¹⁵⁰ Courts are reading the Sentencing Guidelines too restrictively and have failed to reconsider their views on this contention in light of *Booker*. These cases may be irrelevant given the courts' shift toward increased judicial discretion post-*Booker*. As such, these arguments do not properly address how *Booker* has impacted cooperation sentence variances.

PART III: RECOMMENDATION

A. Acknowledging Good Faith Efforts to Cooperate

Despite the utilitarian and procedural arguments, judges should factor an offender's good faith effort to cooperate into their sentencing decisions, even where no government motion exists. First, the utilitarian goals of the Guidelines can be satisfied by considering a defendant's good faith effort to cooperate with the government, because such consideration encourages cooperation. In addition, considering a defendant's cooperation in the absence of a section 5K1.1 motion allows the court to grant sentences that are reasonable and individualized to the defendant, a goal the Supreme Court realized as material in *Booker*.¹⁵¹ Appellate courts should grant great deference to the sentencing courts because sentencing courts are better able to assess the relevant § 3553(a) factors, which are fact-intensive inquiries about the offender. Appellate courts have been applying a standard of reasonableness that relies too heavily on the Guidelines without considering the importance of the factors discussed in § 3553(a).

Second, granting variances to those who make a good faith effort to cooperate is efficient because it may increase the number of offers of substantial assistance.¹⁵² This, in turn, will most likely increase the amount of

148. *See, e.g.*, United States v. Crawford, 407 F.3d 1174, 1181-83 (11th Cir. 2005).

149. *Id.*

150. *See, e.g.*, United States v. Doe, 398 F.3d 1254, 1260 n.7 (10th Cir. 2005). Some courts dodge attempts to reconcile the prosecutorial discretion in filing section 5K1.1 motions and the court's discretion to consider a defendant's cooperation. *Id.*

151. *See* United States v. Booker, 543 U.S. 220, 264 (2005) (discussing the importance of giving individualized sentences and its relationship to the Sentencing Commission's goals).

152. Increasing the number of offers of substantial assistance is critical because section 5K1.1 motions were intended to be used frequently. *See* Bruce M. Selya & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combating Ultra-Uniformity*, 35 B.C. L. REV. 799, 810 (1994) (noting that section 5K1.1 is an incentive program, and, "like other incentives, [it] was conceived out of a desire to maximize the occurrence of its operative condition (i.e., cooperation with law enforcement authorities) and, as a necessary corollary, to maximize the number of times the section would be invoked").

substantial assistance actually provided. The section 5K1.1 provision was intended to be invoked as frequently as possible and was created to increase the occurrence of cooperation for the government.¹⁵³ Allowing departures only where substantial assistance is actually provided may, however, have the opposite effect by discouraging lower-ranked members of an organization from cooperating when they have useful information, because they fear that the prosecutor will not deem their information “substantial.”

Moreover, refusing to consider the good faith effort to cooperate made by minor players creates “an inverted pyramid with stiff sentences for minor players and modest punishments for knowledgeable insiders who can cut favorable deals.”¹⁵⁴ A good faith effort to cooperate should be considered because to do otherwise would reward the defendants who are most culpable.¹⁵⁵

Furthermore, a good faith effort to cooperate reveals something about the character of the defendant. Making a good faith effort to cooperate may involve endangering oneself, being scrutinized by members of a criminal organization, severing all criminal ties, and goes beyond merely accepting responsibility for one’s action. It frequently involves placing oneself in harm’s way. Judges should consider it along with other offender characteristics.¹⁵⁶ A character-based analysis is most relevant to this issue. The Sentencing Reform Act of 1984, the Guidelines Manual, and recent Supreme Court case law support a character-based approach to criminal sentencing.¹⁵⁷ The character-based approach highlights the offender’s cha-

153. *See id.*

154. *See* Schulhofer, *supra* note 22, at 212-13 (arguing that the section 5K1.1 requirement for “actual” substantial assistance creates a cooperation paradox that rewards the most culpable offenders). *But see* 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, 53 (1999) (arguing that the claim of “reverse equity” is overstated).

155. *See* Schulhofer, *supra* note 22, at 212-13.

156. *See supra* note 17 and accompanying text. A good faith effort demonstrates the defendant’s willingness to cooperate with law enforcement and exemplifies a trait greater than mere acceptance of responsibility. The defendant not only accepts responsibility but also sacrifices any past relationship she had with her criminal connections. A good faith effort to cooperate is not a mere desire to do so but the actual actions taken in furtherance of providing cooperation to the government, including providing the limited information she may have.

157. *See generally*, Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 & 28 U.S.C.); U.S. SENTENCING GUIDELINES MANUAL (2005); *see, e.g.*, *Koon v. United States*, 518 U.S. 81, 113 (1996) (noting that “[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue”). Furthermore, *Koon* instructed sentencing courts to “make a refined assessment of the many facts that bear on the outcome, informed by its vantage point

racteristics, history, and likelihood of recidivism.¹⁵⁸

Congress instructed federal districts to closely examine “the nature and the circumstances of the offense and the history and characteristics of the defendant.”¹⁵⁹ According to the commission, the court may also consider, “without limitation, any information concerning the background, character and conduct of the defendant.”¹⁶⁰ A character-based approach encompasses all of the aforementioned objectives of the Sentencing Commission and would be the most appropriate method of analyzing cooperation.¹⁶¹ “[T]he character-based approach permits the sentencing judge to fully examine ‘the human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue.’”¹⁶² This allowance contributes to the holistic approach to sentencing as originally intended by Congress.¹⁶³

A character-based approach encourages judges to consider cooperation and how it relates to offender characteristics.¹⁶⁴ Applying this approach, a good faith effort to cooperate made by a lower member of an illicit organization should be one of the offender characteristics that judges consider when sentencing a defendant.¹⁶⁵ One’s good faith effort to provide substantial assistance “should be weighed against the criminal culpability, mitigating the offender’s punishment.”¹⁶⁶ It is greater than accepting responsibility because the defendant is now cutting off all ties from her past criminal activity. By attempting to cooperate and offer what information she may have, a defendant often places herself in danger and destroys ties with the illicit underground organization to which she once belonged.¹⁶⁷ This willingness is an offender characteristic that judges should consider when granting sentencing departures because it relates directly to the objec-

and day-to-day sentencing experience.” *Koon*, 518 U.S. at 82. Only a character-based approach reaches such breadth of analysis. See also Rachael A. Hill, Comment, *Character, Choice, and “Aberrant Behavior”: Aligning Criminal Sentencing with Concepts of Moral Blame*, 65 U. CHI. L. REV. 975 (1998); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 369 (1996) (recognizing “a long moral and legal tradition” that holds “that we owe it to the dignity and humanity of the defendant to let the entire history appear”).

158. NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 67 (Tim Crane & Jonathan Wolff eds., 1994). Character-based analysis serves as a “practical orientation of the criminal law as a form of social control [It upholds], perhaps symbolically, certain framework social values.” *Id.*

159. Hill, *supra* note 157, at 982 (quoting 18 U.S.C. § 3553(a)(1)).

160. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (1997)).

161. *Id.*

162. *Id.* at 983 (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)).

163. See *United States v. Booker*, 543 U.S. 220, 250 (2005).

164. See Rappaport, *supra* note 129, at 575.

165. *Id.*

166. *Id.*

167. See *supra* notes 99-105 and accompanying text.

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tives of § 3553(a).¹⁶⁸ Judges should use § 3553(a) as a basis for reducing the sentences of offenders who provide a good faith effort to cooperate, where reasonableness so requires.

B. Consideration of Cooperation Where There is No Government Motion

Judges should also be able to evaluate a defendant’s cooperation under section 5K1.1, even where there is no government motion. Analysis under section 5K1.1 is appropriate where the defendant has provided assistance to the prosecution, but for some reason, the government did not file a section 5K1.1 motion on behalf of the defendant. Although § 3553(a) provides an outlet for discussing this type of cooperation, section 5K1.1 is the traditional method of evaluating substantial assistance.¹⁶⁹ The absence of a government motion should not circumvent a judge’s ability to use the provision most appropriate for cooperation. *Booker* suggested that judges tailor defendant sentences.¹⁷⁰ Inability to analyze cooperation under the provision designated for cooperation hinders this goal. Furthermore, no courts have provided an adequate reason for why judges should not be able to use section 5K1.1 as a method of analyzing cooperation in the absence of a government motion.¹⁷¹

C. General Recommendations

Appellate courts should give great factual deference to the sentencing courts. Although appellate courts must review the sentencing court’s decision with a standard of reasonableness,¹⁷² they must also defer to the sentencing courts’s factual findings.¹⁷³ The trial court can better interpret the relevant factual considerations and individualize the defendant’s sentence.¹⁷⁴ They also have direct access to the facts and are better able to analyze the offender’s likelihood of recidivism. For this reason, several

168. *See supra* notes 98-104 and accompanying text.

169. *See supra* note 23 and accompanying text.

170. *See supra* note 65 and accompanying text.

171. *See supra* note 16 and accompanying text.

172. *See supra* Part I.B.

173. *United States v. Veteto*, 920 F.2d 823, 825 (11th Cir. 1991).

174. *Id.* at 825; *see also* 18 U.S.C.A. § 3742(e) (West 2003 & Supp. 2004). Although the § 3742(e) provision has been struck down by *Booker*, it offers valuable insight into the weight that the Sentencing Commission intended to place on the sentencing court’s findings. This provision states, “The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses . . . [and] shall give due deference to the district court’s application of the guidelines to the facts.” 18 U.S.C.A. § 3742(e).

appellate courts have deferred to the trial court's sentencing decision.¹⁷⁵

One case that highlights the desire to rely on the trial court's sentencing and factual findings is *United States v. Veteto*.¹⁷⁶ In this case, the trial court sentenced Veteto as a career offender.¹⁷⁷ Veteto argued that his two previous convictions were part of the same crime, and he was therefore not a career offender.¹⁷⁸ Because the inquiry into whether the crimes were separate or related was fact-intensive, however, the appellate court deferred to the trial court's initial findings and applied a "clearly erroneous" standard.¹⁷⁹ The appellate court held that it was within the trial court's discretion to sentence Veteto to a sentence higher than that laid out in the Sentencing Guidelines recommendation because great deference should be given to the sentencing court due to the case's highly fact-intensive inquiry.¹⁸⁰

The trend to reverse decisions where the judge issued a sentence lower than what was recommended in the Guidelines, even after considering the factors in § 3553(a), does not follow the precedent that the Supreme Court established with *Booker*. For instance, in *United States v. Desselle*,¹⁸¹ after granting a downward departure that was greater than the sentence recommended by the prosecution, the sentencing judge stated that in doing so he had considered the age of the defendant and the likelihood of recidivism, which are two characteristics that fit within the ambit of § 3553(a).¹⁸² Despite this, the Fifth Circuit reversed the sentence, claiming that the sentencing judge did not evaluate the factors within section 5K1.1.¹⁸³ This was the basis of reversal even though district court judges were instructed through *Booker* to consider the factors within § 3553(a) to fashion the appropriate sentence. The Fifth Circuit relied on the text of the Guidelines without discussing the effect of *Booker* on the computation of sentences.¹⁸⁴ The Supreme Court emphasized the importance of evaluating the factors under § 3553(a) for all sentences, yet the Fifth Circuit only emphasized the text of the 5K1.1 provision when reversing the sentence.¹⁸⁵ This is an example of an appellate court reaching too far to prevent a downward departure from

175. See, e.g., *Veteto*, 920 F.2d at 825.

176. *Id.* at 826.

177. *Id.* at 824.

178. *Id.*

179. *Id.* at 825.

180. *Id.*

181. 450 F.3d 179, 183 (5th Cir. 2006).

182. *Id.* at 181-82.

183. *Id.* at 183 (finding that the district court abused its discretion by considering non-assistance-related factors in determining the extent of section 5K1.1).

184. *Id.* at 182.

185. *Id.* at 182-83.

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the Guidelines.

Trial courts should be able to exercise their discretion to consider the offender’s cooperation, even where defendants make a good faith effort to cooperate but their cooperation has not yielded substantial assistance. Assuming that a court cannot grant a section 5K1.1 departure in the absence of a government motion, courts may still factor in cooperation when reviewing the § 3553(a) factors. *Booker* recognized the importance of individualized sentences that consider the defendant’s level of culpability and character traits. As such, cooperation and a good faith effort to cooperate reveal important characteristics, such as likelihood of recidivism, that courts should be able to consider in this era of expanded judicial sentencing discretion.