

**SIX STEPS TO SUCCESS
IN SENTENCING POST-*BOOKER*:
Getting the Sentence You Want
and Defending It on Appeal**

**Defending a Federal Criminal Case
CJA Panel Training Sponsored by the
Federal Public Defender for the Western District of Missouri
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I. SURVEYING THE LEGAL LANDSCAPE.

- A. As we all know, on January 12, 2005, in Booker v. United States, 543 U.S. 220 (2005), a five-Member majority of the United States Supreme Court, in an opinion authored by Justice Stevens held that a defendant’s Sixth Amendment right to trial by jury was violated when a judge made findings that enhanced the Guidelines range under the then-mandatory Federal Sentencing Guidelines. See id. at 226-27 & 243-44. A separate five-Member majority, in an opinion authored by Justice Breyer, remedied this constitutional problem not by requiring jury findings for the Guidelines-enhancing facts, but rather by stripping the Guidelines of their mandatory nature and rendering them purely advisory:

We answer the question of remedy by finding the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C.A. § 3553(b)(1) (Supp. 2004), incompatible with today’s constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, § 3742(e) (main ed. and Supp. 2004), which depends on the Guidelines’ mandatory nature. So modified, the Federal Sentencing Act, see Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 et seq., 28 U.S.C. § 991 et seq., makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp. 2004).

Id. at 245-46. The Court also inferred an appellate standard of review of “reasonableness” to replace the stricken standards of review for sentences. See id. at 260-62.¹

¹ The Eighth Circuit has since held that Booker’s reasonableness review applies with equal force to sentences imposed upon revocation of probation or supervised release. See, e.g., United States v. Larison, 432 F.3d 921, 922 (8th Cir. 2006) (supervised release revocation); United States v. Griggs, 431 F.3d 1110, 1115 (8th Cir. 2005) (probation revocation). What follows respecting reasonableness review of sentences should therefore be understood as applying equally to supervised

- B. After Booker, courts are still required to *consider* the applicable Guidelines range, but that range is only one of a number of factors listed in 18 U.S.C. § 3553(a) that are supposed to inform the sentencing decision. In theory, a district court is no longer under any compulsion to sentence within the Guidelines range.
- C. In practice, however, the Guidelines continue to have close to the same primacy that they had before Booker.
1. For purposes of post-Booker appellate review of sentences for reasonableness, the Eighth Circuit has held that a sentence within the properly calculated Guideline range is presumptively reasonable, although that presumption may be rebutted. See United States v. Lincoln, 413 F.3d 716, 717-18 (8th Cir. 2005). The Eighth Circuit has explained that this rebuttable presumption of reasonableness is warranted because “[t]he Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study.” United States v. Claiborne, 439 F.3d 479, 481 (8th Cir. 2006).
 2. This appellate presumption of reasonableness has led many district judges to believe that the Guidelines continue to be a “safe harbor” within which to sentence. Some courts have formalized this belief by holding that the Guidelines should be given “great weight” or “substantial weight” in the district court. See, e.g., United States v. Jiménez-Beltre, 440 F.3d 514, 516-19 (1st Cir. 2006) (*en banc*); United States v. Wilson, 350 F. Supp. 2d 910 (D. Utah 2005), on denial of motion to reconsider, 355 F. Supp. 2d 1269 (D. Utah Feb.2, 2005)
 3. To the extent that this deference to the Guidelines is based upon the idea that the Guidelines fully account for all of the § 3553(a) factors, it is based on a house of cards. Sentencing Resource Counsel Amy Baron-Evans has written an excellent article explaining in detail why the Guidelines do not fully account for

release or probation revocation sentences.

all the § 3553(a) factors. See Amy Baron-Evans, “The Continuing Struggle for Just, Effective and Constitutional Sentencing After United States v. Booker” (Aug. 2, 2006), available at [http://www.fd.org/pdf lib/struggle.pdf](http://www.fd.org/pdf_lib/struggle.pdf).

4. Additionally, the presumption of reasonableness and the notion that the Guidelines should be given substantial or heavy weight come uncomfortably close to recreating the sort of effectively mandatory Guidelines system condemned as violative of the Sixth Amendment in Booker.

a. In his dissent from the remedy opinion in Booker, Justice Scalia foresaw that this might be a problem. See Booker, 543 U.S. at 311 (“As I have suggested earlier, any system which held it per se unreasonable (and hence reversible) for a sentencing judge to reject the Guidelines is indistinguishable from the mandatory Guidelines system that the Court today holds unconstitutional.”) (Scalia, J., dissenting) & id. at 313 (querying whether “appellate review for ‘unreasonableness’ [will] preserve de facto mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges”) (Scalia, J., dissenting); see also, e.g., United States v. Huerta-Rodriguez, 355 F. Supp. 2d 1019, 1025 (D. Neb. 2005), aff’d, 158 Fed. Appx. 754 (8th Cir. Dec. 16, 2005). For an excellent discussion of the constitutional issues raised by the presumption of reasonableness, see

i. Amy Baron-Evans, “Antidote to the Kool-Aid: Giving the Guidelines Substantial or Presumptive Weight Is Constitutionally, Textually and Factually Unsound” (April 10, 2006), available at [http://www.fd.org/pdf lib/antidote%20for%20the%20kool%20aid.pdf](http://www.fd.org/pdf_lib/antidote%20for%20the%20kool%20aid.pdf).

ii. Steve Sady, “Guidelines Appeals: The Presumption

of Reasonableness and Reasonable Doubt” (Feb. 22, 2006), available at <http://circuit9.blogspot.com/2006/02/guidelines-ap-peals-presumption-of.html>.

- b. Based on these and other concerns, some circuits have rejected the presumption of reasonableness adopted by the Eighth Circuit and other courts. See, e.g., United States v. Fernandez, 443 F.3d 19, 27-28 (2d Cir. 2006); United States v. Cooper, 437 F.3d 324, 331-32 (3d Cir. 2006).
- c. Additionally, a state case now pending before the United States Supreme Court may shed some light on the question of whether a system of “presumptively reasonable” Guidelines may still violate the Sixth Amendment under the rule of Blakely v. Washington, 542 U.S. 296 (2004) – the precursor to Booker. That case is Cunningham v. California, cert. granted, 126 S. Ct. 1329 (Feb. 21, 2006) (No. 05-6551), which was argued on October 11, 2006.
- d. Even if Cunningham does not speak to the validity of the presumption of reasonableness, given the split of authority, it seems likely that the Supreme Court will, at some point, enter into the debate. You should therefore preserve an objection to the Eighth Circuit’s presumption of reasonableness.
- e. Additionally, a number of courts have rejected the proposition that the Guidelines should be given “great weight” or “substantial weight,” and have held instead that they are merely one of several co-equal factors in § 3553 that are entitled to no more weight than any other factor. See, e.g., United States v. Zavala, 443 F.3d 1165, 1169-71 (9th Cir. 2006), reh’g *en banc* granted, 462 F.3d 1066 (9th Cir. Aug. 23, 2006) (*en banc*); United States v. Ranum, 353 F. Supp. 2d 984 (E.D. Wis. 2005); United States v. Myers, 353 F. Supp. 2d 1026 (S.D. Iowa 2005). If your district

court gives any indication that it is according the Guideline great or heavy weight at sentencing, or is treating them as the presumptive sentence absent some compelling reason to deviate from the Guidelines, you should object that the district court is effectively treating the Guidelines as mandatory in violation of Booker.

- D. Until these issues shake out on further review, however, we are still very much living in a Guidelines-centered sentencing system.
1. Very soon after Booker, the Eighth Circuit made clear that the Guidelines should still be a large part of the district court's sentencing process:

Thus, the sentencing court must first determine the appropriate guidelines sentencing range, since that range does remain an important factor to be considered in the imposition of a sentence Once the applicable range is determined, the court should then decide if a traditional departure is available under Part K [of Chapter 5] and/or § 4A1.3 of the Federal Sentencing Guidelines. Those considerations will result in a "guidelines sentence." Once the guidelines sentence is determined, the court shall then consider all other factors set forth in [18 U.S.C.] § 3553(a) to determine whether to impose the sentence under the guidelines or a non-guidelines sentence.

United States v. Haack, 403 F.3d 997, 1002-03 (8th Cir. 2005).

- a. Moreover, "[w]hen a district court wishes to impose a sentence outside th[e Guideline] range, it must justify the variance on the basis of the matters listed in 18 U.S.C. § 3553(a). As the size of the variance grows, so too must the reasons that warrant it. And if a court imposes a sentence dramatically lower or higher than what the guidelines

recommend, it must show exceptional facts that make the proposed sentence a reasonable one.” United States v. Medearis, 451 F.3d 918, 920 (8th Cir. 2006).

b. In other words, “the farther the district court varies from the presumptively reasonable guidelines range, the more compelling the justification based on the § 3553(a) factors must be.” United States v. McMannus, 436 F.3d 871, 874 (8th Cir. 2006) (citations omitted).

2. From a procedural standpoint, sentencings will proceed exactly as they did before Booker:

a. “[T]he sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence.” Haack, 403 F.3d at 1003 (quoting United States v. Crosby, 397 F.3d 103, 112 (2d Cir. 2005); internal quotation marks omitted).

b. These facts need not be charged in the indictment and, in most cases, may be proved by only a preponderance of the evidence. See United States v. Okai, 454 F.3d 848, 851-52 (8th Cir. 2006). In fact, the Eighth Circuit has held that “in most cases . . . U.S.S.G. § 6A1.3 *requires* sentencing courts to apply Guidelines enhancements that are proven by a preponderance of the evidence, and the district court’s failure to do so . . . result[s] in an incorrect advisory Guidelines calculation.” Okai, 454 F.3d at 852 (emphasis added); see also, e.g., United States v. Thorpe, 447 F.3d 565, 568-69 (8th Cir. 2006) (reversing, on government’s appeal, sentence based only on Guideline enhancements that had been proved beyond a reasonable doubt; holding, at 569, that “[j]udicial fact-finding based upon a preponderance of the evidence is permitted in sentencing provided that the guidelines are applied in an advisory manner”) (citations omitted).

- i. Note, however, that the Eighth Circuit has left open the possibility (first adverted to in its opinion in United States v. Townley, 929 F.2d 365, 369 (8th Cir. 1991)) that facts with an extreme effect on the sentence may need to be found by a higher standard of proof than a preponderance of the evidence. See Okai, 454 F.3d at 852; cf. Almendarez-Torres v. United States, 523 U.S. 224, 248 (1998) (expressly reserving the question “whether some heightened standard of proof might apply to sentencing determinations which bear significantly on the severity of sentence”).
3. Appellate review of sentences:
 - a. Guideline calculations will continue to be reviewed as they were before Booker: the Eighth Circuit “continue[s] to examine de novo whether the district court correctly interpreted and applied the guidelines,” United States v. Mashek, 406 F.3d 1012, 1017 (8th Cir. 2005) (footnote omitted), and “continue[s] to review findings of fact for clear error.” Id. (citation omitted).
 - b. The Eighth Circuit still “review[s] a district court’s decision to depart from the appropriate guidelines range for abuse of discretion.” Id. (citations omitted).
 - c. “If the sentence was imposed as the result of an incorrect application of the guidelines, [the Eighth Circuit] will remand for resentencing as required by 18 U.S.C. § 3742(f)(1) without reaching the reasonableness of the resulting sentence in light of [18 U.S.C.] § 3553(a).” Mashek, 406 F.3d at 1017; see also, e.g., United States v. Morris, 458 F.3d 757, 760 (8th Cir. 2006) (“Therefore, an incorrect application of the guidelines ‘can require remand regardless of whether the resulting sentence was otherwise reasonable.’”) (citation omitted). Of course, if a Guideline

error was harmless, it does not require remand. See Mashek, 406 F.3d at 1017.

- d. Assuming no misapplication of the Guidelines, the resulting sentence – whether within the properly calculated range or the product of a Guidelines-sanctioned departure – is a “guidelines sentence.” Haack, 403 F.3d at 1003. And, as discussed above, a sentence within a properly calculated Guideline range (and probably a sentence that is a proper Guideline departure) enjoys a presumption of reasonableness on appellate review.
- e. Any other sentence is a “non-guidelines sentence” that does not enjoy a presumption of reasonableness. See, e.g., United States v. McMannus, 436 F.3d 871, 874 (8th Cir. 2006) (“A sentence outside the guidelines range is not presumed to be reasonable.”) (citation omitted). Such a sentence

may be unreasonable if [the] sentencing court fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.

Haack, 403 F.3d at 1004.

- f. If the Eighth Circuit cannot discern from the record before it whether a non-Guideline sentence is reasonable, the court will remand for the district court to explain more fully its § 3553(a) justifications for that sentence. See, e.g., United States v. Myers, 439 F.3d 415, 418-19 (8th Cir. 2006); United States v. Feemster, 435 F.3d 881, 884 (8th

Cir. 2006).

II. CALCULATING THE APPLICABLE GUIDELINES RANGE.

- A. As all of the above discussion indicates, getting the Guidelines calculation right is just as important now as it was before Booker.
- B. As noted above, a Guideline calculation error, if not harmless, will require remand irrespective of whether the resulting sentence is otherwise reasonable. See, e.g., United States v. Morris, 458 F.3d 757, 760 (8th Cir. 2006); United States v. Mashek, 406 F.3d 1012, 1017 (8th Cir. 2005).
- C. Of course, for defendants who are before judges who tend to stay within the advisory Guideline range, getting that range as low as possible is key to minimizing the sentence.
- D. However, getting the advisory Guideline range as low as possible is also beneficial in cases where the district court is inclined to vary – either upward or downward – because the reasonableness of the variance is gauged in large part by how much the variance deviates from the advisory Guideline range. See, e.g., United States v. Kendall, 446 F.3d 782, 785 (8th Cir. 2006) (finding that upward variance that was “an increase of 155% . . . from the maximum [of the] guidelines range” was unreasonable); United States v. Claiborne, 439 F.3d 479, 481 (8th Cir. 2006) (finding that “a sixty percent downward variance” from the bottom of the advisory Guideline range was unreasonable); United States v. McMannus, 436 F.3d 871, 875 (8th Cir. 2006) (finding that downward variances of 54% and 58% “below the low end of the presumptively reasonable guidelines range[s]” were unreasonable). Additionally, the farther a sentence varies from the Guideline range, the more compelling the justifications for that sentence must be. See, e.g., United States v. Medearis, 451 F.3d 918, 920 (8th Cir. 2006); McMannus, 436 F.3d at 874.
- E. Remember, under the Criminal Justice Act, a defendant has the right, in

some circumstances, to expert assistance in addressing Guideline sentencing issues. See 18 U.S.C. § 3006A(e); see also, e.g., United States v. Hardin, 437 F.3d 463 (5th Cir. 2006) (district court reversibly erred in rejecting, without a hearing, court-appointed counsel’s request, under the Criminal Justice Act, for appointment of an expert (a forensic chemist) to testify as to the nature of “bones” (a by-product of the methamphetamine production process) and particularly whether “bones” could be considered a mixture or substance containing methamphetamine so that its weight could be counted in assessing drug quantity under the Guidelines). Indeed, an indigent defendant’s right to expert assistance may sometimes be of constitutional magnitude. See Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

- i. This right to expert assistance may be equally useful in the context of seeking a downward departure or downward variance from the Guidelines.

III. ASSESSING WHETHER GUIDELINE DEPARTURES ARE AVAILABLE.

- A. It is error for a district court to skip directly from the Guideline calculation to the analysis whether a variance is indicated, without first considering whether there are any traditional Guideline departures that apply. See, e.g., United States v. Zeigler, ___ F.3d ___, 2006 WL 2661121, at *2-*3 (8th Cir. Sept. 18, 2006) & id. at *3-*5 (Hansen, J., concurring in the judgment); United States v. Sitting Bear, 436 F.3d 929, 934-35 (8th Cir. 2006); United States v. Long Soldier, 431 F.3d 1120, 1122 (8th Cir. 2005).
- B. That being the case, you should, as part of your sentencing presentation, advocate any “traditional” Guideline departures that might be applicable to your client’s case:
 1. Departure grounds listed in Chapter 5 of the Guidelines.
 2. Unmentioned grounds that take your client’s case outside the

Guidelines' heartland. See USSG § 5K2.20.

3. Over-representation of criminal history. See USSG § 4A1.3.

C. In assessing whether the Guidelines overstate your client's culpability, there are a number of useful source materials from the Sentencing Commission itself that point out flaws in the Guidelines' scoring system. These publications are generally available at the Sentencing Commission's website at this link: <http://www.ussc.gov/research.htm>. Especially useful is the Commission's Fifteen Year Report, available at this link: http://www.ussc.gov/15_year/15year.htm. And, luckily, others have already gone through these massive reports for us and have extracted the most useful data from them in a highly digestible form:

1. Amy Baron-Evans, "The Continuing Struggle for Just, Effective and Constitutional Sentencing After United States v. Booker" (Aug. 2, 2006), available at http://www.fd.org/pdf_lib/struggle.pdf.

2. Amy Baron-Evans's Jan. 27, 2006 memorandum analyzing the various criminal history reports generated by the Sentencing Commission, available at http://www.fd.org/pdf_lib/3553_arguments.pdf.

3. Anne Blanchard and Kristen Gartman Rogers, "Presumptively Unreasonable: Using the Sentencing Commission's Words to Attack the Advisory Guidelines" (March 2005), available at http://www.fd.org/pdf_lib/presumptively%20unreasonable.pdf.

4. See also the bibliography of source materials collected in "Making the Government Eat Its Hat: Using Studies & Statistics to Redefine the Purposes of Sentencing," available at at this link:

http://www.fd.org/pdf_lib/Final%20Resource%20List%202.pdf

D. **CAUTION: Do NOT put all your eggs in the departure basket!** In other words, do not simply ask for a departure without also asking for

a variance. There are two reasons for this:

1. First, a district court has more latitude to impose a variance sentence than to make a downward departure under the Guidelines, both in terms of the grounds for variance and in terms of the “extraordinariness” of the variance factor at issue.
2. Second, if you only request a downward departure, and the district court denies your request, any appeal of the sentence will be a non-starter, because the Eighth Circuit continues to hold that it has no appellate jurisdiction to review a district court’s denial of a traditional downward departure. See, e.g., United States v. Kiertzner, 460 F.3d 988, 989 (8th Cir. 2006); United States v. Morell, 429 F.3d 1161, 1164 (8th Cir. 2005); United States v. Frokjer, 415 F.3d 865, 875 (8th Cir. 2005). In contrast, a district court’s refusal to vary from the advisory Guideline range may be reviewed pursuant to the Court of Appeals’ jurisdiction to review the reasonableness of even a within-Guidelines sentence. See United States v. Mickelson, 433 F.3d 1050, 1055 (8th Cir. 2006) (Court of appeals has jurisdiction to review the reasonableness of even a within-Guidelines sentence).

IV. ASSESSING WHETHER THERE ARE REASONS FOR A VARIANCE FROM THE GUIDELINES.

- A. Even more than with departures, creative thinking is key when it comes to variances.
- B. The touchstone of variances is 18 U.S.C. § 3553(a).
 1. Under § 3553(a), the district court “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of sentencing] set forth in [§ 3553(a)(2)],” namely, “the need for the sentence imposed –”
 - a. “to reflect the seriousness of the offense, to promote

respect for the law, and to provide just punishment for the offense,” 18 U.S.C. § 3553(a)(2)(A);

- b. “to afford adequate deterrence to criminal conduct,” 18 U.S.C. § 3553(a)(2)(B);
- c. “to protect the public from further crimes of the defendant,” 18 U.S.C. § 3553(a)(2)(C); and
- d. “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 18 U.S.C. § 3553(a)(2)(D).

2. And, “[t]he court, in determining the particular sentence to be imposed, shall consider –”

- a. “the nature and circumstances of the offense and the history and characteristics of the defendant,” 18 U.S.C. § 3553(a)(1);
- b. the purposes of sentencing set out in Section IV.B.1.a.-d. above, see 18 U.S.C. § 3553(a)(2);
- c. “the kinds of sentences available,” 18 U.S.C. § 3553(a)(3);
- d. “the kinds of sentence and the sentencing range established” by the Sentencing Guidelines (including the policy statements applicable to probation and supervised release revocations), 18 U.S.C. § 3553(a)(4);
- e. “any pertinent policy statement” in the Guidelines Manual, 18 U.S.C. § 3553(a)(5);
- f. “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” 18 U.S.C. § 3553(a)(6); and

- g. “the need to provide restitution to any victims of the offense.” 18 U.S.C. § 3553(a)(7).

C. The scope of possible grounds for downward variance is virtually endless.

1. All those personal characteristics and accomplishments that the Guidelines marginalize or place out of bounds may be fodder for a downward variance. For example, if your client completes an ESL program or gets his GED while on pretrial release or while incarcerated pretrial, that is indicative of his potential for rehabilitation and may, under 18 U.S.C. § 3553(a)(1), support a downward variance. See, e.g., United States v. McMannus, 436 F.3d 871, 875 (8th Cir. 2006) (indicating that fact that defendant put himself through community college while on pretrial release was a factor that, under § 3553(a)(1), might warrant a minor variance from the Guideline range). We therefore need to make a concerted effort to learn even more about our clients than we have heretofore.
2. A variance may be a means to achieve creative sentencing options that are not possible under the more restrictive Guideline departure rubric. Imagine, for example, the following scenario:
 - a. A defendant convicted of fraud is looking at Guidelines of 12 to 18 months’ imprisonment.
 - b. If the defendant receives no jail time, however, he can keep a job that pays fairly well.
 - c. The victims would rather start getting restitution now, rather than in a year to a year and a half from now. They agree that they will support a probation sentence provided that (1) as a condition of probation, defendant will pay them \$X a month in restitution, and (2) as a further condition of probation, defendant will provide Y hours of community service to a charity of their choosing.

- d. You ask the judge for a sentence of probation, with these conditions.
 - e. This type of arrangement clearly would not fly as a departure. However, it can be justified as a variance from the Guidelines on several bases:
 - i. Because the probation sentence includes not just a supervision component, but also restitution and community service components, probation is not simply a slap on the wrist, but rather meets the objectives of sentencing in § 3553(a)(2). Furthermore, the victims' acquiescence in the arrangement is further evidence that it "provide[s] just punishment for the offense." 18 U.S.C. § 3553(a)(2)(A).
 - ii. It considers "the kinds of sentences available," 18 U.S.C. § 3553(a)(3) – e.g., probation and alternative sanctions like community service.
 - iii. Most importantly, perhaps, the sentence takes very much into account "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(7).
3. Another terrific use of the post-Booker variance is in those instances where clients have cooperated with the government, but, for whatever reason, the government has refused to move for a substantial assistance departure under USSG § 5K1.1.
- a. Before Booker, the district court was categorically prohibited from going below the Guidelines without a § 5K1.1 motion.
 - b. Now, however, a defendant's cooperation, even if it does not result in a § 5K1.1 motion, may warrant a variance from the Guideline range. As the Second Circuit has

explained:

[I]n formulating a reasonable sentence a sentencing judge must consider “the history and characteristics of the defendant” within the meaning of 18 U.S.C. § 3553(a)(1), as well as the other factors enumerated in § 3553(a), and should take under advisement any related arguments, including the contention that a defendant made efforts to cooperate, even if those efforts did not yield a Government motion for a downward departure pursuant to U.S.S.G. § 5K1.1 (“non-5K cooperation”). Section 3553(a)(1), in particular, is worded broadly, and it contains no express limitations as to what “history and characteristics of the defendant” are relevant. This sweeping provision presumably includes the history of a defendant’s cooperation and characteristics evidenced by cooperation, such as remorse or rehabilitation.

United States v. Fernandez, 443 F.3d 19, 33 (2d Cir. 2006).

- c. The Eighth Circuit also appears to have recognized that Booker has changed the rules in this respect. In United States v. Lazenby, 439 F.3d 928, 933-34 (8th Cir. 2006), the court noted that “[p]rior to Booker, [without a § 5K1.1 motion], the court was then virtually precluded from considering [a defendant’s cooperation with the government]. Under Booker, the prosecution’s evaluation of the cooperation factor remains critical but is less controlling.”

D. Are there any grounds that will *not* support a variance?

1. From the case law, it appears that whether a factor will support a variance is generally a matter of degree, not kind. In other words, most mitigating factors can support a variance of some sort. The question is usually whether the particular factor at issue is extraordinary enough to support the *degree* of the variance in the case at hand.
 - i. Cf., e.g., United States v. McDonald, 461 F.3d 948, 954 (8th Cir. 2006) (“We have cautioned against substantial variances predicted upon characteristics of the individual defendant for which the guidelines calculation already accounts.”); and
 - ii. Id. at 956 (“We do not rule out the possibility that some extraordinary work history or individual characteristic related to age or the likelihood of recidivism could justify a variance in other cases. However, in this case, McDonald’s work history and the district court’s estimation of his likelihood of recidivism – whether considered separately or together – do not constitute the type of compelling justifications necessary to justify a variance of the magnitude awarded here.”) (footnote omitted).
2. That being said, there at least some areas that, it appears, categorically will not support variances in the Eighth Circuit:
 - a. First, the Eighth Circuit has condemned variance justifications that run counter to explicit congressional or Sentencing Commission policies:
 - i. A prime example of this is the 100-to-1 crack-to-cocaine-powder ratio in the drug statutes and the Guidelines. The Eighth Circuit has indicated that a district court’s categorical disagreement, as a policy matter, with the 100-to-1 ratio does not supply a reason for a variance. See United States v. Brown,

453 F.3d 1024, 1027 (8th Cir. 2006) (suggesting agreement with the proposition that “a district court may not reasonably impose a sentence outside the advisory range based solely on a rejection of the disparate treatment of crack and powder cocaine under the guidelines”) (citation omitted). Compare and contrast United States v. Gunter, ___ F.3d ___, 2006 WL 2589149 (3d Cir. Sept. 11, 2006) (“Post-Booker a sentencing court errs when it believes that it has no discretion to consider the crack/powder cocaine differential incorporated in the Guidelines . . . as simply advisory . . .”).

ii. See also, e.g., United States v. Robinson, 454 F.3d 839, 843 (8th Cir. 2006) (district court erred in basing downward variance in felon-in-possession case in part on fact that defendant was using firearm for hunting, when Sentencing Commission limited the “lawful sporting purposes” reduction to persons with less serious criminal records than defendant); cf. United States v. Beal, ___ F.3d ___, 2006 WL 2714922, at *3 (8th Cir. Sept. 25, 2006) (“[W]e are concerned that the variance in this case is so great that it does not give appropriate deference to the congressional policy on career offenders.”).

b. The Eighth Circuit has also held that “the [sentencing] court’s [] concern about the credibility of witnesses is not an appropriate justification for varying from an advisory guideline range that was established based on an implicit finding that the witnesses were credible.” United States v. Brown, 453 F.3d 1024, 1026 (8th Cir. 2006); see also United States v. Portillo, 458 F.3d 828, 830 (8th Cir. 2006) (following Brown).

i. Note that other courts have left this question open. See United States v. Harper, 448 F.3d 732, 736 n.3

(5th Cir. 2006); *cf.* United States v. Dazey, 403 F.3d 1147, 1178 (10th Cir. 2005) (“The strength of the evidence supporting Guidelines enhancements was not relevant to the mandatory results under the pre-Booker regime (provided the evidence satisfied the preponderance standard); now, in the discretion of the district court, it may be.”) (citation omitted).

- c. The Eighth Circuit has also held that a district court is not “permitted under [18 U.S.C.] § 3553(a)(6) to consider a potential federal/state sentencing disparity in imposing [a defendant’s] sentence,” United States v. Jeremiah, 446 F.3d 805, 808 (8th Cir. 2006), because “[u]nwarranted sentencing disparities among federal defendants remains the only consideration under § 3553(a)(6) – both before and after Booker.” Id. (footnote and citation omitted).

- E. MORAL: Variance justifications should be case-specific and tailored to the particular defendant before the court, and should not simply represent policy disagreements with sentencing choices made by the Sentencing Guidelines.

V. MAKING YOUR CASE FOR A BELOW-GUIDELINES SENTENCE.

- A. The first step toward a below-Guidelines sentence (whether by way of traditional departure or variance) is a complete investigation not just of the offense, but also of your client. The sentencing regime ushered in by Booker requires defense attorneys to get to know their clients in a way that has not been relevant since before the Sentencing Guidelines were introduced. There is virtually no facet of the client’s life that may not give rise to some variance factor. Consider enlisting family members to help round up these materials. Call family members, work associates, former teachers, etc. to see what they can tell you about your client.

B. Once you have settled on your sentencing arguments, it is important to present these in a digestible and well-documented way to the district court.

1. A sentencing memorandum laying out the facts and tying them to the § 3553(a) factors is essential, along with cross-references to supporting evidence (letters, witness affidavits, psychological evaluations, military or school records, etc.)
2. Remember, the CJA does provide court-appointed attorney with the mechanism to ask for funds for expert assistance in sentencing matters. See Section II.E., supra.
3. Some district judges may appreciate a videotape that shows your client at home and at work, and that has live interviews with people who know your client well.

C. Sentencing:

1. Although many judges do not like for sentencings to be “mini-trials,” it may be necessary to put on some witnesses at sentencing, particularly if the government contests some of your sentencing arguments.
2. If you have given the judge your materials sufficiently in advance, it will be a simple matter to briefly synopsise your arguments for the court.
3. **IMPORTANT:** If the judge is seriously considering a variance, she will most likely want to hear from your client before she does so. It is therefore very important to discuss the client’s sentencing allocution in detail and well in advance of the sentencing hearing, to make sure that the client does not shoot himself in the foot.

VI. PROTECTING YOUR BELOW-GUIDELINES SENTENCE ON APPEAL.

- A. So you got your client a below-Guidelines sentence – congratulations! Now, how can you make sure that that sentence withstands a government appeal?
- B. Your best insurance against having a favorable sentence flipped on appeal is to lay your groundwork carefully in the district court, as described above, by steering the district court to permissible variance grounds, documenting those grounds well, and helping the district court tie the extent of the variance to the variance grounds relied upon.
- C. Your district judge may also appreciate it if you draft a proposed Statement of Reasons for Sentence for her, setting out in detail the rationale for the variance sentence. Send the judge a disk with an electronic copy of your sentencing materials and your proposed Statement of Reasons so that she can simply cut and paste these into the judgment if she is so inclined.

GOOD LUCK!!!