

State Clemency Project: Mitigation Overview¹

At the heart of a successful clemency petition (indeed, at the heart of any compelling sentencing submission to a court) is the client's story. In fact, in his reflections on his use of presidential clemency power, President Obama highlighted the stories of commutees, which, as he said, "touched me personally and not just because I could have been caught up in the system myself had I not gotten some breaks as a kid."² People like the middle-aged man "who at eighteen was a member of a gang and carried a gun but is now twenty or thirty years older," with "an unblemished prison record . . . has gone back to school, gotten his GED, has gone through drug treatments, has the support of the original judge that presided, the support of the U.S. attorney that charged him, support of the warden, has a family that loves him."³ In other words, when one looks behind each prison sentence, even a very severe one, and takes the full measure of the inmate in question, aggravating information can become less so – moderated by context or rehabilitation.

Mitigation in the clemency context is a two-pronged task. First, counsel will mitigate in the traditional sense – that is alleviate the severity of the client's particular offense, prior criminal record, prison history with specific rebuttals (client did not participate in or order any violent conduct; client was not the organizer or mastermind; client's conduct represented an impulsive and youthful crime spree; client was acting in self-defense in prison assault infraction, etc.). But next, and more importantly, counsel engages in a kind of holistic mitigation – stepping back and telling the client's life story, contextualizing their offense(s) in a narrative that emphasizes their essential humanity and their redemption. What is his/her background? What circumstances or characteristics led to their involvement in the offense of conviction? What have they done to prove their capacity to live a productive life outside prison walls?

Borrowing from Judge Jack Weinstein,⁴ we decided that the best way to distill decades of mitigation precedents and scholarship was into a checklist, formulated loosely under pre-offense, offense and post-offense categories. Not every topic will be relevant to your client, and some may overlap (drug addiction may feature in your client's past, in the impetus to the offense, and in their rehabilitative focus, for example). Under each topic, we list questions to drive further investigation, and under each list of questions, we list potential areas to explore for documentary or testimonial support. We also list resources for additional guidance, with a particular emphasis on established and emerging social science insights that inform smarter and more compassionate sentencing outcomes.

¹ Please email murrayj@umn.edu with any edits/suggestions for both this overview and the accompanying checklist.

² Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 Harv. L. Rev. 811 (2017).

³ See Presidential News Conference on Combatting ISIS, August 4, 2016, video and transcript available at <https://www.c-span.org/video/?413608-1/president-obama-holds-news-conference-isis>.

⁴ Eastern District of New York Judge Jack Weinstein uses a checklist at every sentencing. It is available at <http://fcpa.stanford.edu/fcpac/documents/4000/002509.pdf>.

We emphasize that this checklist is not exhaustive, but rather an effort to spearhead an individualized and nuanced exploration of your client's life, offense and prison record.

If our list may seem daunting, be assured that many of the topics will not apply in your individual case. Moreover, in many cases, areas where meaningful mitigation can be developed will be apparent from in depth interviews of your client and close family members. While it may not be possible for you to visit your client, we cannot emphasize enough the value of one-on-one conversations to prize out mitigating facts that may never have been considered before in your client's hurried encounters with professionals in the criminal justice system. So, if you cannot visit in person, we urge you to set up legal calls with him/her (by telephone or video conference) and to utilize the services of volunteer attorneys and law students in the vicinity of your client's prison for in-person meetings.

A final word: clemency advocacy is not like traditional litigation. It is not adversarial, and as such, the clemency petition is the client's only opportunity to present his or her case as effectively as possible. It is critical, therefore, that the petition address all potential red flags, pre-empt and defuse opposition arguments that might be raised by the reader, and give a thorough and transparent presentation of the factors that make the applicant deserving of a commutation or release.