CLE Handout |Investigating and Litigating Mitigation and Exceptional Sentences Down| 12.4.18

WHAT IS MITIGATION? Anything can be mitigation. There are no limits. It can be any fact or any legal argument that helps your client. **It is the story of why:** Why did this tragedy happen? It is the story that tells who our client is, and why he is the way he is—outside the moment in time that brought him to criminal court.

Mitigation should answer two important questions**:**

1. Why did this happen?

2. Why is it not going to happen again?

The answers should distinguish your case from others like it

When can you use mitigation?

You can use mitigation throughout the course of a case.

- At **bail or release** hearings;
- To **negotiate**: use it to convince the prosecutor to offer a favorable plea bargain.
- To get a lower sentence: use it to persuade the prosecutor to recommend, or the court to impose, the **low-end** of a standard-range sentence.
- To support an **alternative sentence**: such as DOSA, SSOSA, POSA, or a deferred prosecution in a misdemeanor—to persuade the prosecutor or the court.
- To support a **defense at trial**: use it to prove a mental or other defense at trial, such as duress, self-defense, entrapment or justifiable homicide.
- To argue for a **concurrent sentence**: use it to persuade the court to run a second sentence concurrent to an existing sentence—the trial court in the last sentencing hearing has discretion.
- To seek an **exceptional sentence below the standard range** in felony cases.

- To **counter a prosecutor's argument** for an exceptional sentence above the standard range.

- To threaten (where cajoling with persuasion has failed): Take a page from the prosecutors' playbook: "If we go to trial, first, I'm probably going to win based on self-defense/duress/minimal involvement, etc., but even if I lose, I'm going to ask for an exception sentence down, based on the statutory [or other] mitigating factors that are clearly present."

- To go up the prosecutors' chain of command: use it to persuade supervisors to give you want you want.

    - Line prosecutors often don't have the discretion to give you what you want, even when they want to, but their supervisors often do have discretion.

    - When a prosecutor tells you that she feels sympathy for your client's situation, but can't do what you want due to "office policy," ask her if she would mind if you speak to her supervisor about an exception to the policy. Working your way up the chain of command can yield great results for your client. But when you get there, you'll need something to show the higher ups, which is where your mitigation evidence will come in handy.

- To show that what you want is consistent with stated policy goals.

    - Become familiar with and advocate for smart justice and smart sentencing policy goals.

When should you introduce mitigation?

Don't wait! Bring up mitigation every chance you get: at first appearances, bail hearings, every meeting with the prosecutor, work it into the trial whenever you can, and argue it at sentencing. Post sentencing reviews or show cause revocation hearings are also appropriate times to raise mitigating circumstances as they relate to sentence conditions or lack of compliance.

WHAT TYPE OF MITIGATING FACTORS ALLOW EXCEPTIONAL SENTENCES BELOW THE STANDARD RANGE?

There are 11 statutory mitigating factors:[1]

(a) To a significant degree, the **victim was an initiator, willing participant, aggressor, or provoker** of the incident.

(b) **Before detection, the defendant compensated**, or made a good faith effort to compensate, **the victim** of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under **duress, coercion, threat, or compulsion** insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with **no apparent predisposition** to do so, was **induced by others** to participate in the crime.

(e) The defendant's **capacity to appreciate the wrongfulness** of his or her conduct, or to **conform his or her conduct to the requirements of the law**, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense **was principally accomplished by another person** and the defendant **manifested extreme caution or sincere concern for the safety or well-being** of the victim.

(g) The operation of the **multiple offense policy** of RCW 9.94A.589 results in a presumptive sentence that is **clearly excessive** in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a **continuing pattern of physical or sexual abuse by the victim** of the offense and the offense is a response to that abuse.

(i) The defendant was making a **good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose**.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the **defendant suffered a continuing pattern of coercion, control, or abuse by the victim** of the offense and the offense is a response to that coercion, control, or abuse.

(k) The defendant was convicted of vehicular homicide, by the operation of a vehicle in a reckless manner and has committed no other previous serious traffic offenses as defined in

[1] RCW 9.94A.535(1).

RCW **9.94A.030**, and the sentence is clearly excessive in light of the purpose of this chapter, as expressed in RCW **9.94A.010**.

Practice Tip:	***The list of mitigating circumstances in RCW 9.94A535(1) is not exclusive. Mitigation that justifies an exceptional sentence down can be anything that relates to the circumstances of the crime or the defendant's culpability for the crime.***

An exceptional sentence must be based on facts not considered by the legislature in establishing the standard range.[2] Circumstances of the crime must be "be sufficiently substantial and compelling to distinguish the crime in question from others in the same category."[3]

A mitigating factor is basically anything that persuades the court or the prosecutor to impose or agree to a sentence below the standard range, especially where the prosecutor agrees not to appeal. In some cases, it is easier to sell mitigation if there is also a legal issue—this can give the court or prosecutor some necessary CYA coverage.

Factors that will <u>not</u> justify a departure:

- Facts necessarily considered by the legislature in establishing the standard range cannot be a basis for a departure below the range.
- Facts that establish the elements of the crime.
- Lack of criminal history, except when a lack of history combined with no predisposition *and* inducement by others to commit the crime.[4]
- Personal circumstances unique to the defendant but unrelated to the crime cannot be a basis to depart downward.[5]
- A sentence that satisfies the purposes of the SRA, standing alone, does not justify a departure.[6]

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[2] *St v. Nordby,* 106 Wn.2d 514, 518, 723 P.2d 1117, 1119 (1986)
[3] RCW 9.94A.535
[4] RCW 9.94A.535, *State v. Nelson*, 108 Wn.2d 491, 740 P.2d 835, 841 (1987) (complete lack of police contacts or criminal history coupled with evidence the co-defendant was instigator of crime supported finding of lack of predisposition to commit the crime.)
[5] *State v. Law,* 154 Wn.2d 85, 89, 110 P.3d 717 (2005).
[6] *State v. Pascal*, 108 Wn.2d 125, 736 P.2d 1065 (1985) (the presumptive range reflects the legislative judgment as to how these interests shall best be accommodated.)

- An individual's low risk to re-offend does not support a departure.[7]

- Past history of concern for others does not support a departure below the range.[8]

Real Facts–*JUST SAY NO*! (Unless it benefits your client)

Facts that establish more serious or additional crimes may not be used to go outside the standard range. The **real facts doctrine** requires the sentencing court to rely on no more information than is admitted or proved at trial or sentencing. This prohibition might better be called the "uncharged crime doctrine." Do not agree to "real facts" unless this works to your client's benefit (i.e., a reduction from a class A to a B or B to a C, reducing the possible length of sentence or ISRB term).

What types of sentences are subject to exceptional downward sentences?

- A standard range sentence—the court can go as low as ZERO confinement on the underlying crime unless there is a mandatory minimum term and even that can be departed from with youth/developmental maturity as a basis to depart.[9]

- Generally, the court cannot reduce MANDATORY enhancements: deadly weapon, firearm, sexual motivation, prior felony DUI in vehicular homicide/assault, child under age 16 in car with vehicular homicide/assault or felony DUI, and robbery of a pharmacy are the only enhancements that are mandatory. *There is an exception when the court finds youth/developmental maturity as a basis to depart.*[10]

- However, non-mandatory enhancements may be reduced—this may come as a surprise as some people think all enhancements are mandatory, but the legislature has only used the word "mandatory" in some of the enhancement statutes.[11]

    - Examples include: drug offenses in public places, attempting to elude/ endangering one or more persons, solicitation of minor into gang related felony, assault on police officer with what appears to be a firearm, drug

[7] *State v. Fowler,* 145 Wn.2d 400 , 38 P.3d 335 (2002) (public safety already considered by the legislature in setting the standard range)

[8] *State v. Freitag*, 127 Wn.2d 141, 905 P.2d 355 (1995).

[9] *State v. Houston Sconiers*, 188 Wn.2d 1, 392 P.3d 401 (2017)

[10] *Id.*

[11] Enhancements added under 9.94A.533 *add time* to the existing standard range to create an increased range; enhancements are not separate sentencing provisions. *Guitterez v. DOC*, 146 Wn.App. 151 (2008)(enhanced range is still a standard range sentence).*See also*, Read, share, but DON'T CITE *UNREPORTED*, *State v. Pickens*, 160 Wn.App 1012 (Div. I) (2011) (alternative sentencing an option even when an enhancement applies—first offender waiver applies to felony eluding w/enhancement for reckless endangerment). Mandatory sentencing enhancements cannot be departed from. *State v. Brown*, 139 Wn.2d 20 (1999)(no departure for mandatory deadly weapon enhancement because of mandatory language in enhancement statute)

offense in county jail or DOC. **Check the language on the enhancement statute.**

- Concurrent sentencing—can be ordered to be consecutive as an exceptional sentence—if this helps your client.[12] This is often helpful when seeking an immigration safe resolution. For example, a client facing a prison range on robbery might plead to consecutive terms for felony assault and theft. Work an arrangement that gives the prosecutor the confinement he wants, but saves the client from having any one crime sentenced to more than 12 months, thus preventing an aggravated felony for immigration purposes.

- Multiple serious violent offenses are presumptively consecutive sentences. Pursuant to 9.94A.589, but they can run concurrently with a basis for an exceptional sentence below the range. [13]

- Length of community custody can be increased, but the total of community custody and confinement cannot exceed the statutory maximum.[14]

- Affirmative conditions can be part of an exceptional sentence if directly related underlying criminal behavior.[15]

Be creative with possible plea agreements

- Agreed exceptional upward: Consider agreeing to an exceptional upward sentence where the prosecutor agrees to reduce the charge to one with a lower sentencing range than the original charge. See RCW 9.94A.535(2)(a) and *In re Breedlove*.[16]

- Exceptional sentence with treatment conditions and supervision, where otherwise not allowed, or increased term of supervision, with less confinement, or lesser degree or less serious crime.

[12] RCW 9.94A.589 (1)(a)
[13] *In re Mullholland,* 161 Wn.2d 322, 166 P.3d 677 (2007). *State v. McFarland* 189 Wn.2d 47 (2017). There is no departure for mandatory enhancements. *State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999)(*c.f. St. v Houston-Sconiers,* 188 Wn.2d 1 (2017) (courts have discretion to depart from mandatory sentencing of youth).
[14] *In re Smith*, 139 Wn. App 600, 161 P.3d 483 (2007); *State v. Hudnall,* 116 Wn.App. 190, 64 P.3d 687 (2003).
[15] *State v. Schmeck*, 98 Wn. App. 647, 990 P.2d 472 (1999).
[16] *In re Breedlove*,138 Wn.2d 298, 979 P.2d 417 (1999).

HOW TO INVESTIGATE AND PRESENT MITIGATION

- **Fact gathering**

  Is it about the client? Start with the client's background—social history, family interviews, records (mental health, school, employment, military, financial, etc.). Use a social worker or mitigation specialist to collect and organize useful mitigation information.

  Is it derived from the facts of the case such as a failed defense or factual issue recognized as a mitigating factor? Use your investigator to really flush out the good facts and possible defenses, even if they are weak. A failed defense at trial can be a statutory basis for an exceptional sentence.[17]

- **Theme**

  Try to find something the prosecutor can't contradict, unless the mitigation is your defense to the charge

- **Experts**

  Effective assistance may require use of experts, proceed with caution and be aware of your discovery obligations (*Hamlet* and *Pawlyk* may require disclosure of the information if the prosecutor asks for it in discovery).

- **Internet**

  Can you find credible sites that provide information about a medical or mental health condition to persuade the court to your sentence recommendation? NAMI[18], the CDC[19] and NIMH[20] all provide useful information on mental health and physical conditions and often treatment recommendations.

- **"Studies Show"**

  Use of studies or research as mitigation: find and cite to resources that support your potential arguments, including:

  - harsher punishment does not stop child porn on the internet;
  - sex offenders don't have a greater chance of re-offending;

[17] *State v. Jeannotte,* 133 Wn.2d 847, 947 P.2d 1192 (1997).
[18] http://www.nami.org/
[19] Centers for Disease Control and Prevention - Diseases and Conditions
[20] https://www.nimh.nih.gov/index.shtml

- repeat drug offenders can be successful in treatment even after previous failed attempts;[21]
- prison terms counterproductive to rehabilitation because they break prosocial bonds;
- Excuses are not always bad! "Studies show" that people who provide an excuse for child molestation may be less likely to reoffend than those who do not;

- **Strategy and Procedure**

  - **Treat sentencing hearings like trials.**

    Approximately 95% of criminal cases are resolved by plea bargaining. Sentencing is your opportunity to litigate the important mitigating factors.

  - **Sentencing Memos**: **Show, Don't Tell**!

    Use video, embedded photos, graphics; use principles of primacy and recency to highlight what is important. Put information that is less important in the middle of your presentation or brief (such as criminal history).

  - **Allocution: Prepare your client.**

    - Ask him to write what he wants to say from the heart without worrying about making it perfect.
    - This helps you identify emotionally powerful things he has to say ("Every night, before I go to sleep, I go over the top ten things I want to change about myself. The last thing I do is say I'm sorry."), as well as areas to avoid ("None of this would have happened if she hadn't cheated on me.").
    - If his statement needs more depth, give him a few topics to write about. (What I would do differently if I could. Things I would change if I could. Lessons I have learned from this experience. Changes I want to make in my life. My short term and long term goals. What I will do so I don't get into trouble again.)
    - Make an outline of the good stuff for the client, and have him practice, again using his own words, and speaking from the heart.

- **Written findings and conclusions**

  Court must set forth the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535.

[21] See National Institute on Drug Abuse

CASE EXAMPLES OF MITIGATING FACTORS APPROVED BY THE COURTS

- **Secondary or minimal involvement/minor role**

  In order for a lesser degree of participation to be considered a mitigating factor, the defendant's participation must be "significantly out of the ordinary for the crime in question." *State v. Nelson,* 108 Wn.2d 491, 501 (1987) (holding bag in two armed robberies was not minimal involvement), *State v. Moore*, 73 Wn. App. 789 (1994) (defendant's lesser role in a marijuana-stolen property operation justified a departure below the standard range).

- **Failed defenses**

  "The SRA provides certain 'failed defenses' may constitute mitigating factors supporting an exceptional sentence below the standard range … These failed defenses mitigating circumstances include self-defense, duress, mental conditions not amounting to insanity and entrapment." *State v. Jeannotte,* 133 Wn.2d 847, 947 P.2d 1192 (1997).

  - **Failed entrapment defense**

    May constitute a mitigating factor supporting an exceptional sentence down. *State v. Hutsell,* 120 Wn.2d 913, 921 (1993) (defendant's compulsion based on drug dependence was not an appropriate mitigating factor). *State v. Jeannotte,* 133 Wn.2d 847, 851, 947 P.2d 1192 (1997) (entrapment by CI in drug sale was an appropriate mitigating factor)

  - **Failed lawful use of force/victim provoker**

    Failed self-defense is a mitigating factor. *State v. Jeannotte,* 133 Wn.2d 847, 851, 947 P.2d 1192 (1997); Assault victim's verbal provocation is a mitigating factor where victim provokes assault to a significant degree. *State v. Whitfield,* 99 Wn.App. 331, 994 P.2d 222 (1999).

  - **Failed duress defense**

    A failed duress defense may constitute a mitigating factor. Duress resulting from emotional and psychological stress does not justify an exceptional sentence unless the defendant acted under the influence of an outside force. *State v. Hutsell*, 120 Wn.2d 913, 845 P.2d 1325 (1993), *State v. Rogers*, 112 Wn.2d 180, 770 P.2d 180 (1989) (psychologist's report indicating defendant

under severe psychological and emotional stress at the time of an armed robbery insufficient to show his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired).

- **Failed mental defense**

  "While mental conditions not amounting to insanity or diminished capacity may constitute mitigating factors supporting an exceptional sentence below the standard range, the record must establish not only the existence of the mental condition, but also the requisite connection between the condition and significant impairment of the defendant's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of the law." *State v. Schloredt,* 97 Wn. App. 789, 987 P.2d 647 (1999) (citing *State v. Rogers,* 112 Wn.2d 180,770 P.2d 180 (1989)) (an exceptional sentence was properly considered but denied based on mental impairment where trial court did not find the mental condition impaired the defendant's ability to appreciate the wrongfulness of his conduct or to control his actions).

- **Drugs: small quantity/low level of involvement**

  Delivery of an extraordinarily small amount of a controlled substance and defendant's low level of involvement or sophistication in executing the crime are mitigating factors. *State v. Alexander,* 125 Wn.2d 717, 727, 888 P.2d 1169 (1995)(delivery of 0.03 g cocaine, defendant's involvement in transaction as middle man was minor, supported exceptional sentence below the standard range).

➔ *This should apply in small quantity/residue cases*

- **Multiple offense policy results in clearly excessive sentence**

  - A departure is justified when the combined effects of multiple offenses are non-existent, trivial, or trifling. *State v. Sanchez,* 69 Wn.App. 255, 848 P.2d 208 (1993)

  - Multiple deliveries: *State v. Sanchez,* 69 Wn. App 255, 848 P.2d 208 (1993) (departure justified in multiple deliveries of small quantities of drugs to police who controlled the number of deliveries), *State v. Fitch,* 78 Wn.App. 546, 897 P.2d 424 (1995) (exceptional sentence justified for three counts of delivery of a controlled substance for multiple drug sales over several days to same undercover police officer and CI).

- Multiple forgeries: several forgeries over several days that results in a clearly excessive sentence range authorizes exceptional sentence down. *State v. Calvert*, 79 Wn. App 569, 903 P.2d 1003 (1995) (minimum cumulative effect of multiple forgeries).

- One shot fired, three victims: *State v. Smith*, 124 Wn.App. 417, 102 P.3d 158 (2004) (one shot, fired at car containing three persons and supporting three assault convictions, resulted in a presumptive sentence that was clearly excessive, and in light of fact the court was required to impose consecutive firearms enhancements).

- **Nature of the offending conduct at low end of range**

  The conduct is the least serious or falls at the low end of the range of contemplated conduct covered by statute. *State v. Alexander,* 125 Wn.2d 717, 727, 888 P.2d 1169 (1995) (defendant connected buyer to seller and crime involved small quantity of drugs), (*But see State v. Fisher*, 108 Wn.2d 419, 739 P.2d 683 (1983) (young age of victim not taken into account in setting standard range and basis for departure up).

  ➔ *This factor is ripe for litigating exceptional sentences downward for chippy crimes charged as felonies.*

- **Victim initiator, willing participant, aggressor, or provoker**

  - In ROC 3, willing participation of 14 year-old victim is a valid mitigating factor when affirmative evidence defendant did not initiate sexual contact. *State v. Clemens,* 78 Wn. App 458, 898 P.2d 324 (1995).

  - In VHOM, where deceased provided minor with alcohol and permitted him to drive car then victim was willing participant if on remand trial court finds causal connection between defendant' reckless driving and victim's conduct. *State v. Hinds,* 85 Wn.App 474, 936 P.2d 1135 (1997).

  - In prosecution of felony VNCO, court had discretion to consider victim's willingness as a basis to depart downward. *State v. Bunker*, 144 Wn. App 407, (2008).

  - *State v. Whitfield*, 99 Wn. App 331, 994 P.2d 222 (1999) (victim provoked by insistent behavior).

  - *State v. Pascal,* 108 Wn.2d 125, 736 P.2d 1065 (1987) (battered woman killed her abuser, victim initiated or provoked incident). But see *State v. McKee,* 141 Wn.App 22, 167 P.3d 575 (2007) (In multiple rapes of prostitutes, fact that

victims were willing to have sex for money does not mean they were willing participants.)

- **Turning self in:**

  - Can be a basis for exceptional down in escape charge. *State v. Akin,* 77 Wn.App. 575, 892 P.2d 774 (1995).
    - *How about quick response to FTA/warrant that forms basis for bail jump.*

- **Assistance and cooperation with the prosecution**

  - Can be a basis to support an exceptional down. *State v. Nelson*, 108 Wn.2d 491, 740 P.2d 835 (1987) (defendant plead guilty and testified against co-defendant in robbery prosecution)

- **Defendant, before detection, makes a good faith effort to compensate the victim**. 9.94A.535 (1)(b).[22]

- **Confession** is a mitigating factor that a court can consider. *State v. Armstrong*, 106 Wn.2d 547,551, 723 P.2d 1111 (1986) (court imposed exceptional sentence above the standard range, but recognized confession is a mitigating factor.)

- **Seeking help for victim** is a mitigating factor. *State v. Elsberry*, 69 Wn.App 793, 850 P.2d 590 (1993) (court imposed exceptional sentence above the standard range, but recognized seeking help for the victim is a mitigating factor.)

EXAMPLES OF MITIGATING FACTORS <u>NOT</u> APPROVED BY COURTS:

Factors serving as a justification for a downward exceptional sentence must relate to the crime, the defendant's culpability for the crime, or the past criminal record of the defendant.

- Lack of any criminal record, *State v. Pascal*, 108 Wn.2d 125, 736 P.2d 1065 (1987), *State v. Frietag*, 127 Wn.2d 141, 905 P.2d 355 (1995). Defendant's criminal history and seriousness of offense is already taken into account in setting presumptive sentences by SRA. *State v. Nordby,* 106 Wn.2d 514,518 n 4, 723 P.2d 1117 (1986). (Exception to this rule of lack of criminal record combined with factor that defendant lacked predisposition or was induced by others. *State v. Ha'mim,* 132 Wn.2d 834, 940 P.2d 633 (1997), *State v. Nelson*, 108 Wn.2d 491, 740 P.2d 835 (1987).

[22] Conversely, affirmative efforts by the defendant to conceal the crime can be an aggravating factor. *State v. Vaughn.* 83 Wn.App. 669, 679-80 (1996) *review denied* 131 Wn.2d 1018 (1997); *State v. Smith,* 82 Wn.App. 153, 165 (1996).

- Defendant's good character. *State v. Frietag*, 127 Wn.2d 141, 905 P.2d 355(1995).

- Defendant's good conduct after the crime. *State v. Roberts,* 77 Wn.App. 678, 894 P.2d 340 (1995).

- Defendant's extreme remorse following the crime, except when the defendant satisfies statutory mitigating factor by compensating or making a good faith effort to compensate a victim before detection. *State v. McClarney,* 107 Wn.App. 256, 26 P.3d 1013 (2001) *rev denied* 146 Wn.2d 1002 (2002).

- Factors personal to a particular defendant. *State v. Law*, 154 Wn.2d 85, 97, 110 717 (2005) (Defendant's family circumstance is an improper factor). Defendant's ability and willingness to improve herself. *State v. Pascal*, 108 Wn.2d 125 (1987) 736 P.2d 1065. Defendant's limited education. *State v. Sanchez,* 69 Wn.App. 255, 848 P.2d 208 (1993).

- Defendant's strong family support. *State v. Fowler,* 145 Wn.2d 400, 38 P.3d 335 (2002).

- Crime was aberrational behavior for defendant, *State v. Fowler,* 145 Wn.2d 400, 38 P.3d 335 (2002), lack of future dangerousness, *State v. Allert,* 117 Wn.2d 156, 815 P.2d 752, 815 P.2d 752 (1991), low risk of re-offense, *State v. Fowler*, 145 Wn.2d 400, 38 P.3d 335 (2002).

- Defendant posed no threat to the public, *State v. Hutsell*, 120 Wn.2d 913, 845 P.2d 1325 (1993); *State v. Allert*, 117 Wn.2d 156, 815 P.2d 752 (1991) *State v. Pascal,* 108 Wn.2d 125, 736 P.2d 1065 (1987).

Areas for Expansion in Exceptional Sentencing

- **Mental health with drugs/alcohol also present in case facts**: See the WDA Practice Advisory "Exceptional Sentence Down-Mental Impairment."[23] Tease out the details to show that the nexus between the mental health condition and the criminal conduct. Show that the substance use/abuse is secondary to the mental illness. Was the client self-medicating to treat symptoms of an untreated, undertreated or misdiagnosed mental illness? You will need an expert to do this.

- **Lack of criminal history and generally law abiding behavior**: Show the client was not pre-disposed by lack of history and/or lack of police contacts to establish that

[23] This and other WDA Advisories related to sentencing issues can be found here: http://www.defensenet.org/resources/practice-advisories/sentencing

the conduct was an **aberration** for this client brought on by unusual and difficult circumstances or external pressures. Lack of criminal history or police contacts alone is not enough. Show factors consistent with necessity, duress or coercion.

- **Sentencing entrapment**: i.e., did law enforcement have control over the scene/the number of charges/the severity of the charges (i.e., get a defendant to sell more drugs than intended, or increase criminal conduct by orchestrating multiple buys.)

- **Reduce Familial Separation**: A client's personal circumstances alone will not support an exceptional sentence down, but if you can draw a nexus between the crime the client's role as a parent that can be a basis.
- **Impact on individual/family:** immigration consequences, loss of job/career/professional licensing, loss of income, loss of housing, impact on parental rights, or impact on family. While personal circumstances may not be a basis to justify an exceptional sentence down, they can be relevant to a sentence within the standard range and you can argue this along with another recognized basis for the departure.

    - *Can you argue that St v. Law should be overturned - that trial courts should have discretion to consider these important individual circumstances and consequences. See J. Madsen dissents in Frietag, Fowler and Brown (mandatory minimum for enhancement) and J Sanders in Law (with J. Madsen concurring.*)

- **Bail Jump-** If absence from court is short. *State v. Akin,* 77 Wn. App 575, 892 P.2d 774 (1995)(turning self in on escape charge can be a basis for exceptional down). If absence is due to uncontrollable circumstances such as financial/logistical hurdles but not sufficient to satisfy the bail jump defense found at 9A.76.170. See *State v. Vanderyacht*, 130 Wn.App 1055 (2005)(*UNREPORTED-DO NOT CITE**)

- **Any failed defense**. "[c]ircumstances that led to the crime, even though falling short of establishing a legal defense, justify distinguishing the conduct from that involved where those circumstances were not present." *State v. Hutsell,* 120 Wn.2d 913, 921, 845 P.2d 1325 (1993) quoting with approval David Boerner, *Sentencing in Washington* 9–23 (1985) (footnote omitted).

- Get the court to take note of and adopt findings in social science research. This has recently been done in the US Supreme Court line of cases dealing with fair

sentencing of youth.[24] Can you use social science research/studies/data to support leniency.

- Deterrence (lack of): fact of punishment more deterrent than length of punishment.[25] Remind the court that the legislature modified the probation review/revocation process with DOC based on this research. [26]

- Possible legal argument? *Alleyne v. US*: if court MUST impose the standard range, and the mandatory minimum is not zero, then jury must find facts to support mandatory minimum – i.e., a lack of mitigation.

Appeal: Standard of Review

A defendant may appeal a denial of exceptional sentence below the standard range if either (1) the court refuses to exercise its discretion at all, or (2) relies on impermissible basis for refusing to impose an exceptional sentence. [27] If the court denied the exceptional sentence request, file the appeal. The appellate attorney can help the client determine if the appeal issue has merit.

A sentence outside the standard range can be appealed by the state or the defense. RCW 9.94A.585(4). Appellate courts may review an exceptional sentence to ensure that (1) substantial evidence supports the trial court's reasons for imposing the sentence; (2) the reasons, as a matter of law, justify a departure from the standard range; and (3) the trial court did not abuse its discretion in sentencing the defendant too excessively or too leniently.[28]

The length of exceptional sentence is reviewed on appeal subject to an abuse of discretion standard. The appellate court reviews whether the sentence was clearly too lenient or clearly excessive. Under the abuse of discretion standard, a sentence will be adjudged "clearly too lenient" only if the trial court's action was one that no reasonable person would have taken. [29]

Additional Resources:

WDA Practice Advisories – WDA has several felony sentencing related Practice Advisories, these can be found on WDA's website at http://www.defensenet.org/ under Resources.

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[24] See the WDA Practice Advisory "Exceptional Sentence Down – Youth as a Mitigating Factor"
[25] See the National Institute of Justice Report – 5 things about Deterrence, found at https://ncjrs.gov/pdffiles1/nij/247350.pdf (July 2014)
[26] See the WDA Practice Advisory "Community Supervision-DOC Violation Hearings and Sanctions 2012 Legislative Update- RCW 9.94A.737" and The Final Bill Reportfor 2ESSB 6204
[27] *See State v. Schloredt, 97 Wn. App. 789 (1999), State* v. *Khanteechit*, 101 Wn. App 137 (2000)
[28] *State v. Fowler*, 145 Wn.2d 400, 406-07 (2002); *State v. Ferguson*, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001) *State v. Sweet*, 138 Wn.2d 466 (1999); *see also*, *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997).
[29] *See State v. Armstrong,* 106 Wn.2d 547, 723 P.2d 1111 (1986) (applying this standard of review to sentences which are allegedly "clearly excessive").