

The Sentencing Issue

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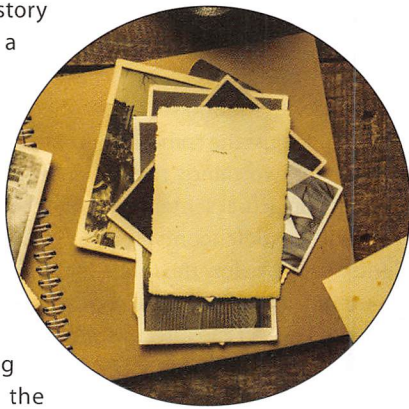
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By Doug Passon

An effective sentencing story can make a court see a case and a client in a new light. Defense lawyers tell only three types of sentencing stories. These stories involve Revelation, Relativity, and Redemption. At least one type is part of every case. Understanding the "3 Rs" of sentencing storytelling will help the defense identify, investigate, and craft the strongest mitigation arguments and achieve better results for clients.



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By Kimberly D. Richman

During parole board hearings, sometimes a client will use language indicating that he deserved a severe sentence for his crime: "Society didn't put me here. I put myself in here." Clients learn this language while attending prison programs that subtly teach them to say what the parole board wants to hear. The client may use this language ("program speak") even though he committed no crime. In doing this, however, the client may foreclose any future possibility of clearing his name. How can a defense lawyer mitigate such statements?



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The '3 Rs' of Sentencing Storytelling

I. Introduction

Sentencing is usually the most important day of a client's life. How does a criminal defense lawyer get ready to wow the judge and tell a fresh, compelling, and credible story that will actually move the needle in court?

What is the secret sauce of sentencing storytelling? There are only three types of sentencing stories defense lawyers will ever tell. They are the "3 Rs": Revelation, Relativity, and Redemption. In every case, the defense can and must uncover at least one "R." With a little bit of luck and a lot of elbow grease, counsel may find all three. Understanding these three categories and how they intersect will help forge a new and mighty set of tools to identify, investigate, and craft the strongest sentencing mitigation arguments and guarantee better results for the client when that big day arrives.

II. The '3 Rs'

A. **Revelation:**

These stories reveal deeper, often hidden truths of the client's life story that help decision-makers better understand and contextualize the choices the client made.

Typically, the government retains control over the client's story throughout the entire prosecution. The story is always the same: government good, defendant

bad. Revelation stories are designed to flip that script, giving the judge (or jury) a whole new perspective on the case and the client.

When offering these kinds of life history stories, the client is really saying, "Yes, your honor, I did it. I accept full responsibility. In order to help you make the right decision in this case, it is important for you to understand circumstances in my life that set the stage for my bad choices. Once you *take that journey with me*, you will have a better understanding of who I really am, why I did what I did, and why I am not going to do it again."

Done right, revelation stories are not about making excuses. They do not minimize the client's genuine remorse for having committed a crime. Rather, these stories put the client and the offense *in the proper context*. They help the judge understand the *human being* behind the police report, charging documents, and every other one-sided piece of paper in the court file.

Some defense attorneys are reluctant to offer any explanation for the client's conduct. They worry that if the client does not fully self-immolate, the judge will make him pay dearly for his lack of remorse and failure to fully accept responsibility. Those same folks seek to play it safe by leaving the government's story largely untouched. They pin their hopes on the client being able to pull off a heartfelt apology. They think this, and a stack of dull sentencing letters, will win the day.

Real sentencing story success requires much more. It includes a thorough mitigation investigation, use of experts when needed, and the cultivation of trusted relationships with the client and the people that know him best. Only then are those crucial life

BY DOUG PASSON

secrets revealed that bring powerful and persuasive sentencing stories into deep focus.¹

Myriad examples of revelation stories exist, and defense counsel must not shy away from telling them:

- ❖ The client knowingly perpetrates fraud while under the control of an abusive, manipulative spouse.
- ❖ The client transports drugs across the border because someone was threatening him or his family.
- ❖ The client robs a bank to pay for emergency medical care for a loved one.
- ❖ The client commits a violent act but suffers from a traumatic brain injury that compromises decision-making and impulse control.
- ❖ The client possesses child pornography but suffers from a cognitive-neurological impairment that impairs his ability to fully comprehend the social and emotional implications undergirding the production, viewing, or sharing of such horrible images.²
- ❖ Addiction issues underlying the offense are rooted in early life trauma or mental health issues.³
- ❖ The client reoffends after experiencing conditions of confinement that impeded his ability to effectively reintegrate into society.⁴

The defense must back up the client's story through means including witness interviews, records review, and use of experts. As long as the defense team has done this hard work, there is nothing stopping counsel from using these powerful, often never-before-disclosed revelations to put the client's actions in the proper context.

B. *Relativity:* Relativity stories compare 'this to that.'

Relativity stories typically compare the client, his culpability, or potential punishment to other relevant individuals or groups. Put another way, in the words of story expert Robert McKee, "A thing is what it is by comparing it to what it is not."⁵ In other words, relativity stories often focus on how the client is *different* from, and consequentially worthy of more favorable treatment than, a rele-

Figure 1	
2	B. §3553 Factors.
3	1. <i>Nature & Circumstances of Offense.</i>
4	As stated above, the amount in question here is relatively small
5	compared to the typical federal drug trafficking case. The typical case in this
6	district involves multiple kilograms, not grams. The government argues that the
7	conduct of Ms. Doe is more insidious, as it involves hand-to-hand sales. This logic
8	is hard to follow, especially when the government admits, it has no idea who is
9	bringing the drugs into the community and giving them to low-level sellers like the
10	defendants in this case to distribute the product.
11	In drug distribution, everyone involved is culpable to varying degrees.
12	The real crime is that those at the top of this food chain are rarely brought to justice.
13	The ones manufacturing the drugs, distributing mass quantities, enforcing their turf
14	through brutal acts of violence, and using others as pawns to do their bidding who
15	guarantee that those individuals assume nearly all the risk and reap almost none of
16	the reward. In counsel's experience, the person conducting the hand-to-hand sales
17	are not the ones profiting in any substantial way from the drug trade. They are
18	typically addicts (like all three defendants) who get involved in selling drugs
19	because they themselves need to feed their habit and are consequently walking
20	through life with limited options and impaired decision making skills. In short,
21	they are sitting ducks for law enforcement. The value of arresting and imposing
22	long prison sentences upon these young and impaired people is dubious.
23	

vant comparison set of sentenced offenders. In some cases, the lawyer shows how the client is worthy of more favorable treatment by comparing him to a relevant group who received the same lenient sentence the lawyer is seeking.⁶

This is a good place to point out that there can be overlap among the 3 Rs. For example, one can see how a "revelation" story can also be told as a "relativity" story. In other words, by highlighting the special circumstances behind the client's commission of the crime, counsel automatically sets him apart from every other similarly charged defendant the judge sentenced to X number of years last week, last month, and last year. Counsel's "revelation" story sends a very clear signal to the judge: "Pay attention; *this case is different*, so the sentence must be different."

1. *Relative Culpability:* compare one person to another.

A client's comparative role in the offense is always fair game, especially when there are co-defendants.⁷ Defense counsel need not simply look at others who have been charged in the case. Counsel can also compare the client's conduct with those who are *not* charged — those called "unindicted co-conspirators."

For example, many attorneys have represented clients accused of low-level drug trafficking offenses involving hand-to-hand-sales. The system often tends to cast a wide net and catch "little fish." Unfortunately, the guppies still typically face draconian punishments. An effective relativity argument shines a light on other players in the drug trafficking hierarchy, whether or not they are ever specifically identified, let alone arrested and charged.

To illustrate this point, see Figure 1. It is a passage from a sentencing memorandum in just such a case. The client was arrested for a series of small hand-to-hand sales of methamphetamine on an Indian Reservation.

2. *Sentencing Statistics:* compare the sentencing range the client faces to other similarly situated defendants.

In most cases, counsel receives a sentencing recommendation or there is an applicable sentencing guideline or range. Anyone who has worked in the federal system knows that the guidelines reduce human beings and their offenses to a set of numbers.⁸ Those numbers are often not based on any empirical evidence or data, and they often yield results totally untethered to the goals of sentencing.⁹

Thankfully, many judges understand this and are beginning to impose below-guideline sentences. Thus, statistics can be an excellent tool to tell the story of how growing numbers of judges are rejecting the very unhelpful advice of the sentencing guidelines.¹⁰ An indispensable resource for sentencing statistical analyses is www.sentencingstats.com.¹¹

3. Sentencing Statistics: compare the potential sentencing range to punishments for more serious crimes.

Another way to highlight the deficiency of certain sentencing guidelines is to compare the client's offense to more serious offenses that allow for lower sentences. People are surprised to learn, especially under the federal guidelines, this is not uncommon. Clients involved in fraud or drug cases, for example, often face higher guidelines than those who have committed violent offenses such as robbery, sex crimes, and in some cases even murder.¹²

4. Compare the client's conditions of confinement to another.

Another point of comparison could be the *unique punitive effect of incarceration* on a client based on age, infirmity, or other special needs. These distinguishing characteristics will inevitably cause the client to serve "harder time" than those of sound mind and body who committed exactly the same offenses. Because the client's "punishment" will be more severe than the punishment of someone without any such issues, justice requires a lower sentence or no sentence at all. Some examples include the following:

- ❖ *Clients who are cooperators, diminutive, former law enforcement, or otherwise susceptible to exploitation or abuse by other inmates.* Compared to inmates without these challenges, those clients will serve a far more dangerous, restrictive, and isolated sentence.
- ❖ *Clients with mental health challenges.* For example, clients on the autism spectrum face significant custodial challenges, including cognitive differences that will hinder their ability to understand social interactions and norms. They tend to be rigid rule followers, which will put them at odds with other inmates. They often have extreme sensory issues that make the sounds and smells of a prison debilitating,

or they may have hypersensitivities to particular types of clothing, blankets, or other materials that will render them perpetually anxious and unsettled.¹³

- ❖ *Clients who have medical needs requiring consistent monitoring and treatment.* The Bureau of Prisons is simply not equipped to handle the medical monitoring and treatment most inmates require.¹⁴ This includes diabetes, high blood pressure, chronic pain, heart issues, and sleep apnea. In a case like this, consider hiring a consultant with firsthand experience in the BOP or the state's facilities.
- ❖ *Elderly clients.* Most institutions are not equipped to meet the needs of older inmates.¹⁵ Older inmates require more medical care, which is often lacking. They will encounter daily obstacles that make every moment of incarceration more difficult. This may include physical challenges such as scaling bunks or stairs and navigating an expansive prison campus. Many prisons have strict rules about how long an inmate can take moving from point A to point B. Add to that challenge, inmates will also find themselves having to carry heavy loads such as laundry or a bag of commissary items during that walk. Of course, elderly inmates are also easy targets for predators.

This list is not exhaustive. Like all of the 3Rs, a lawyer is limited only by what she or he has learned about the client's special circumstances and the work the lawyer does to develop these stories.

5. Compare the client's family hardships to another.

Many clients have children or other loved ones that depend on them. A judge, who has heard this story a million times, will likely think or even say aloud that the client should have thought about that *before* he committed the crime.¹⁶ Thus, lawyers must always tread lightly when it comes to incorporating kids into their sentencing mitigation stories.

However, there are exceptions to every rule. For this argument to be credible, counsel must dig deeper and demonstrate why the client's situation is *different* from other cases in which children are in the picture. Counsel must show that a truly innocent party

will suffer *extreme hardship* if deprived of the emotional, physical, or financial support the client has consistently provided. Some examples of this are:

- ❖ The client is sole custodian of a child with no other adult to assume custody.
- ❖ Dependent(s) have significant special needs of which the client is the best or even only person to care for.
- ❖ The commission of the crime was "family motivated." For example, the client stole money because a child needed medical treatment.
- ❖ The client is an *extraordinarily* involved parent or caregiver.

The story behind the story is that an *innocent* family member will be the true victim of a carceral outcome. If the client has actually been doing the hard work of caring for a dependent under extraordinary circumstances, counsel can and should tell this story.

6. Compare the client's life experience to those with seemingly shared experiences who did not make similar choices.

This relativity story is typically employed to counter a common prosecutorial narrative, particularly in capital cases. For example, maybe a thorough mitigation workup reveals that the client suffered unimaginable abuse at the hands of horrible foster parents. The defense attorney has woven this into the fabric of a well-told revelation story, giving powerful context to the crime the client committed. At that moment, the state issues its own simplistic "relativity" retort, comparing the client to others who may have suffered similar negative life experiences but never ended up doing the horrible thing your client did.

If the defense lawyer has others who appear to have walked the same dreadful mile as the client, it is incumbent on the lawyer to understand and tell *their* stories as well. Everyone responds to trauma differently. To the extent those other individuals have their own serious issues such as mental health problems, addiction, a cycle of abusive relationships or lengthy criminal history, counsel should embrace those facts as proof that the damage inflicted by those whose job it was to care for and protect those children uniquely corroded and compromised their own options and choices in life.

If their paths are seemingly more successful, the defense compares “this to that” in order to help explain how their upbringing may have been significantly different than the client’s. Maybe they

taken and passed on supervision? If the majority of tests are clean, is this a significant accomplishment given his long history of addiction? Is he actively participating in treatment? Maybe in the

their statements. Done right, lawyers can differentiate clients’ remorse and acceptance not just by word choice but by the delivery of the statement, any actions taken to back up those words, or other evidence like letters and other forms of community support. When such extraordinary displays of remorse occur, it not only sets the client apart, but it also has the added benefit of overlapping with and undergirding the last, and perhaps most persuasive category — *redemption*.

Revelation stories give the judge a new perspective on the case and the client.

Relativity stories compare the client, his culpability, or potential punishment to other individuals.

Redemption stories focus on why the client will not make the same choices again.

had a special mentor or savior that the client did not. Maybe the client was the only male child and, as such, suffered the brunt of the abuse. Maybe the client heroically acted as a lightning rod to absorb the worst of the abuse and protect his smaller, younger siblings. Perhaps those siblings were offered life-changing opportunities of which the client was deprived.

Relativity requires counsel to take a 360-degree view, with the understanding that the stories of other people in and around the client’s orbit inevitably impact how the life story of the client unfolds.

7. Compare the client’s current conduct to his past actions.

This kind of relativity analysis comes up when the client has a long history of failing to conform his conduct to the law or the rules set by the court, including recidivism or probation violations. In those cases, a lawyer must look closely at the client’s conduct, past and present, in order to determine if she can make a credible case that even though the client is far from perfect, he is making genuine efforts to improve his life. In this instance, the lawyer uses relativity stories to arrive at a larger redemption story arc. (See section II.C of this article.)

For example, in a probation violation involving a drug relapse, did the client show up for his drug test knowing that he would be positive? Did he warn his probation officer that he expected to test positive? Did he ask for help? How many other tests has he

past the client, knowing he would test dirty, would simply abscond. The “new” client, unlike the “old,” is here to face the music, and that is progress.

If the client is a repeat offender, is his conduct becoming more dangerous or less dangerous? Maybe he has not had a crime of violence on his record in many years. Maybe he stayed crime-free this go-around for longer than he ever had before. What is the story of the “in between” periods that allowed him to remain law-abiding? What is the story of how he relapsed and reoffended? By comparing the client’s own relative successes and failures, counsel can push back on the state’s often simplistic narrative that this person has neither the desire nor the ability to do the right thing.

In the grand scheme, even if his accomplishments are not worthy of the proverbial ticker-tape parade when compared to his past monumental obstacles and failures, his current successes, however small, will amplify. This can be an effective way to make lemonade out of lemons, particularly with the added layers of a good revelation or redemption story.

8. Compare the client’s remorse or rehabilitation with the ‘typical’ offender.

Defense lawyering 101 requires lawyers to prepare their clients to demonstrate remorse and acceptance of responsibility at sentencing. However, decision-makers may doubt clients’ sincerity, particularly when the record is devoid of any meaningful action or other support for

C. *Redemption:* These stories reveal the client’s true character.

Unlike revelation stories, which give context and mitigate a client’s poor choices, redemption stories tend to focus on *why he will not make those choices again*. The big idea here comes from heroes like Bryan Stevenson and Sister Helen Prejean, who remind us that each of us is more than the worst thing we have ever done, and clients must not be judged simply by their worst mistake but by the totality of their life’s deeds.¹⁷

The goal, therefore, is to tell the story of past redemptive acts that show the client’s core goodness, present efforts to right the wrongs at issue, or a genuine motivation *and plan* to make meaningful change in the future.

Redemption stories, particularly the “history of good deeds” stories, are often better when presented in tandem with a credible revelation story. In other words, if the defense spends considerable effort trying to convince the judge that the client has lived an otherwise exemplary life, the defense must also be prepared to tell a solid story about what went wrong in his life that caused him to be blown so far off his moral course. The takeaway must be that it is the good works along the way, not the isolated mistake, that truly defines the client’s character.

1. Using Past Redemptive Behavior to Reveal True Character

In *every* case, the defense attorney must take a deep dive into the past to identify and highlight the good works the client has undertaken in his life that reveal his *true character*. NACDL Past President Alan Ellis calls these “*the things your client did when no one was keeping score*.”¹⁸ For example:

- ❖ Is he the caregiver for his father with a serious or terminal illness?
- ❖ Has he given generously to charities (preferably with money that does not constitute ill-gotten gains)?

- ❖ Has he changed or even saved a life?
- ❖ Has he served in the military or in some other selfless capacity?
- ❖ If detained, has he helped other inmates better their circumstances?
- ❖ Has he devoted time or money to acquire some special skill or better himself or someone else?
- ❖ Has he overcome seemingly insurmountable challenges in life?
- ❖ Is he loved and respected by the people that know him best?

In general, these stories of prior good works carry greater weight when they are bolstered by someone *other than the client*. One of the most common ways to involve others in the client's sentencing stories are through "character letters." Although well-intentioned, these letters often miss the mark. Avoid having the authors of these letters simply rattle off vague descriptors such as "he's a good father," "he's a hard worker," or "he's generous." Instead, have them tell a detailed and heartfelt *story* that brings those qualities to life. Have them include a photograph or two in the letter to help tell that story. In some cases, a sentencing mitigation video will have far greater impact than letters.¹⁹ In a case involving financial loss, consider having the author include a check, for even a small amount, that is meant to contribute to restitution. Then, the person vouching for the client's character is literally "putting his money where his mouth is."²⁰

In telling these stories, defense attorneys help the judge see something more than just an unrepentant "criminal." Instead, they make the credible case that the client is a fundamentally decent human being who, although temporarily blown off his moral course, will assuredly return to his best and truest self.

2. Present Redemption — Taking Immediate and Substantial Steps to Make Amends for the Crime Committed

Often, the best redemption stories are the ones in which clients have made sincere and substantial efforts to right the wrongs of their criminal conduct.²¹ As stated in section B.8., these are the things that truly set clients apart by demonstrating an extraordinary acceptance of responsibility. For example:

- ❖ If drug addiction was the catalyst for the crime, has the client completed a rehabilitation program prior to sentencing? True, many arrive at the big day having achieved this goal. It is also true that the prosecutor may seek to minimize the accomplishment by casting it as an unheroic act of simply following the court's conditions of release. In that case, dig deeper. Did he simply go through the motions or did he truly take the teachings to heart? Have the client tell the judge what he learned and why it will help him to maintain sobriety. Does he now sponsor others in the program? Does he speak to young people about the dangers of drugs? Does he continue with treatment even without a court order compelling him to do so?
- ❖ Did the client complete some course of higher education (or even a GED)?
- ❖ Did the client land his dream job, or *any* job for that matter?
- ❖ Has the client achieved goals never before thought possible, such as homeownership?
- ❖ Has he moved away from the dangerous neighborhood that contributed to his criminal conduct?
- ❖ Has the client done an inordinate amount of community service?
- ❖ Has the client demonstrated extraordinary acceptance of responsibility by paying back restitution in whole or in part?
- ❖ Has the client undertaken therapy or found effective medication to address underlying mental health issues?
- ❖ Has the client written a heartfelt expression of remorse to the victims or the court, demonstrating deep understanding of the implications of his conduct?

It is even more persuasive to show that the client undertook these rehabilitative efforts *before* the whirlwind of the criminal justice system rocked his world. It goes a long way to refute the allegation of a "jailhouse conversion" if the client stopped the criminal activity and attempted to rectify the situation *before* he ever knew he would face legal consequences.

3. Tell the Story of the Hope for Future Redemption

Even if defense counsel cannot tell a past or present redemption story, with some work on counsel's part and genuine buy-in from the client, counsel can still show the judge that the client is beginning the long and arduous walk on the road to redemption. In some cases, counsel may need to step up and not only encourage these positive changes, but also help find the programs and other opportunities for a motivated client to undertake.

Future redemption is vital when it comes to the concept of "specific deterrence." In other words, judges factor into their sentencing decision the client's likelihood to reoffend. Thus, it is incumbent upon lawyers to work with the client and demonstrate that he is actually giving serious consideration to his future. Many clients need help with this. They want to change for the good of themselves and their loved ones, not just to achieve a favorable sentencing result. However, often they do not know how to achieve those meaningful changes in life. That is where going the extra mile to try and give clients information and tools for success can translate into a better sentencing result. For example:

- ❖ Can counsel research and arrange for the client to participate in exactly the right treatment program?²²
- ❖ Can counsel find the perfect prison placement that would allow the client the opportunity to learn that trade he has always dreamed of pursuing?²³
- ❖ Can counsel communicate the client's sincere desire to receive drug and alcohol treatment while incarcerated?
- ❖ Can counsel present a realistic plan (including employment opportunities) the client has formulated that will allow him to begin making regular and substantial restitution payments?

By showing the judge that the client has carefully considered his future *and has developed a concrete plan of action*, the lawyer demonstrates the client's genuine commitment to bettering himself. Not only that, but the lawyer challenges the judge (and even the prosecutor) to become players, or even heroes, in this redemption story. After all, they are the ones who ultimately have the power to

give him the chance to prove he is serious about turning his life around.

III. Conclusion

The development of sentencing mitigation should begin the moment the file hits the defense attorney's desk. That is not fatalism, but realism. Having the "3 Rs" in mind at the very inception of the case will illuminate the path forward through a thorough mitigation investigation and, more importantly, lead to a substantially better sentencing result for the client.

As much as lawyers will love to sink their teeth into a good revelation or relativity story, redemption may turn out to be their favorite "R" by far. Why? Because these are stories of *hope*, and defense advocates need as much hope as they can get in this system and in this lifetime. As the character Andy Dufresne in "Shawshank Redemption" says: "*Hope is a good thing, maybe the best of things, and no good thing ever dies.*" Defense lawyers should let that hope lift them up and guide them in and out of the legal arena.

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Notes

1. One effective resource for gaining deeper insight into a client, his history, and his special needs is called "Defense Map." This is a confidential, free mitigation tool for defendants designed by a former criminal defense attorney. For more information, go to www.defensemapp.com.

2. See, e.g., HANDBOOK OF AUTISM SPECTRUM DISORDER AND THE LAW (F.R. Volkmar et al. eds.) (1st ed. 2021).

3. See e.g., Jessica Bartlett & Kate Steber, *How to Implement Trauma-Informed Care to Build Resilience to Childhood Trauma* (May 9, 2019), <https://www.childtrends.org/publications/how-to-implement-trauma-informed-care-to-build-resilience-to-childhood-trauma> (Childhood trauma is strongly linked to mental and physical health problems over a child's life.); Vahid Farnia et al., *Prevalence of Childhood (ADHD) in Methamphetamine Dependence: A Descriptive Study*, 12 IRANIAN J. PSYCHIATRY BEHAV. SCI. (Dec. 2018); Jayne O'Donnell & Mabinty Quarshie, *The Startling Toll on Children Who Witness Domestic Violence Is Just Now Being Understood*, USA TODAY (Jan. 19, 2019), <https://www.usatoday.com/story/news/health/2019/01/29/domestic-violence-research-children-abuse-mental-health-learning-aces/2227218002/>.

4. See Emily Widra, *No Escape: The Trauma of Witnessing Violence in Prison*, Prison Policy Initiative (Dec. 2020) (A study

of recently incarcerated people finds that witnessing violence is a frequent and traumatizing experience in prison.), <https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence>.

5. This Robert McKee quote comes from an online interview. However, anyone looking for a great read on story fundamentals should check out McKee's seminal work, *Story: Substance, Structure, Style and the Principles of Screenwriting*.

6. Relativity stories should ring familiar because we generally accept without question that a client with zero criminal history should be treated more leniently than a repeat offender, and vice versa. See, e.g., U.S.S.G. §§ 4A1.1 through 4B1.5.

7. Offense role is another example of a widely accepted relativity story, particularly under the federal guidelines. See, e.g., U.S.S.G. § 3B1.1 & 3B1.2 (allowing for adjustments for "aggravating" or "mitigating" roles in the offense).

8. See, e.g., U.S.S.G. § 5A (Sentencing Table).

9. See, e.g., Defender Services Offices Training Division, *Deconstructing the Guidelines*, <https://www.fd.org/sentencing-resources/deconstructing-the-guidelines>.

10. See Mark Allenbaugh, *Sentencing in Chaos: How Statistics Can Harmonize the "Discordant Symphony"*, 32(3) FED. SENT'G REP. (Feb. 2020).

11. For an example of how sentencing statistics are used, see "*Pardon Joe Furando*," <https://vimeo.com/377444354>, a pardon/clemency video using statistics to help bolster the case that the client's original sentence was unjust (statistics portion can be found at 6:20 through 7:58).

12. See *id.*

13. See, e.g., HANDBOOK OF AUTISM SPECTRUM DISORDER AND THE LAW (F.R. Volkmar et al. eds.) (1st ed. 2021).

14. See Review of the Federal Bureau of Prisons' Medical Staffing Challenges, OIG Report, e1602, March 2016 (<https://oig.justice.gov/reports/2016/e1602.pdf>).

15. See The Impact of an Aging Inmate Population on the Federal Bureau of Prisons, OIG Report, e1505, Feb. 2016 (<https://oig.justice.gov/reports/2015/e1505.pdf>).

16. In a federal sentencing transcript, the judge told the client: "The rest of their lives, [your daughters will] wonder, why did my father hate me so much that he would find a way to get himself locked up in federal prison?" *United States v. Mogler*, 2:15-cr-001118-SPL-1.

17. This fundamental tenant is underscored in the federal sentencing statute 18 U.S.C. § 3553, which requires a judge to consider, among other things, the "history and characteristics" of the client. 18 U.S.C. § 3553 (a)(1).

18. Mr. Ellis has interviewed over 30 federal judges on the dos and don'ts of effective sentencing advocacy. See <https://alanellis.com/wp-content/uploads/2018/12/law360-sentencing-representation-part-1-12.pdf>.

19. Sentencing mitigation videos are short documentary films (10-20 minutes) that include witness statements boiled down to their most salient topics combined with photographs or other powerful and persuasive visual elements. For examples, visit www.dougpassonlaw.com.

20. *Id.* at 5 (quoting U.S. District Judge Robert Scola Jr.: "I'd rather have 50 character witnesses pay \$100 each toward the defendant's restitution than to provide 50 character letters. Making reasonable efforts to pay restitution is one indication of sincere remorse.").

21. See, e.g., *United States v. Harris*, 2018 WL 5278701 (E.D.N.Y. Oct. 2018) (a powerful example of how a client's efforts at rehabilitation carried the day at sentencing).

22. The Department of Health and Human Services' Substance Abuse and Mental Health Services Administration (SAMHSA) announced the launch of FindTreatment.gov, a website to help assist those across the country seeking substance abuse treatment.

23. Of course, not all states have adequate programming. In federal cases, the definitive resource for researching prison programming is *The Federal Prison Guidebook* (<https://alanellis.com/federal-prison-guidebook/>). ■

About the Author

Doug Passon has been a criminal defense lawyer for 25 years. He has a national practice focusing on sentencing and post-conviction relief. As an award-winning filmmaker, he has been a pioneer in sentencing mitigation video production and is widely recognized as the leading expert in this field. He is also "of counsel" to the Law Offices of Alan Ellis.



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