

Mitigation Arc

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In this article, we offer insight with the hopes of helping people regardless of what stage of the Arc they're in. It's never too early and never too late to prepare for a better outcome. For this reason, we urge all justice-impacted people to think about the mitigation arc—daily decisions open opportunities for higher levels of liberty at an earlier time.

Author's note:

- » I'm Michael Santos. The information I offer through this article comes from lessons I learned while going through more than 26 years in federal prison, from my research, and from interviews with more than 1,000 justice-impacted people. Those include defendants and people who concluded sentences in federal or state prison. The daily research consists of the study of policy statements and interviews with US Attorneys, Federal Judges, a retired director of the BOP, a former administrator of the BOP Halfway House program, and a retired Chief of US Probation. Visit our Subject-Matter Expert page at Prison Professors for more.
- » Although I use the pronoun "him" throughout the article, the information applies to men and women.

Five Early Stages of the Mitigation Arc:

- » First stage: The Charge
- » Second stage: The Plea / Verdict
- » Third stage: The PSR
- » Fourth stage: The Sentencing
- » Fifth stage: Post sentencing

First Stage of the Mitigation Arc: The Charge

In earlier writings, I've paraphrased a question I heard in a speech. The speaker asked his audience the best time to plant a seed for an oak tree. People didn't know how to respond.

They guessed.

After the speaker's dramatic pause, he told the audience that the best time to plant a seed for an oak tree was 20 years ago.

The second-best time would be today.

The analogy conveys the importance of early preparations. If we had made different decisions 20 years ago, we'd all be in a different position today. With that in mind, it's clear that decisions made today have an influence on opportunities that open for us in the weeks, months, and years ahead.

Regardless of the stage—at the start of a journey, during a prison term, or after transitioning to Supervised Release—we can learn by reflecting. Self-advocacy training requires us to open our eyes and seize or create opportunities to advance our prospects for success.

We'll follow Jim's story to understand the mitigation landscape at the first stage of the mitigation arc. Note that Jim isn't a real character, just a name I chose to help readers understand one person's progress through each stage of the arc.

Had Jim understood the system early, he could have architected the best strategy for his circumstances. While going through the criminal justice system, Jim could have made the right decisions at the right time.

In this context, I'm defining the "right decisions" as the type that would not have exposed Jim to interest from either civil or criminal law enforcement agencies. The more Jim knew, the more capable he would have been at protecting his liberty.

The day Jim learned that law enforcement officers considered him a potential witness, subject, or target of a criminal investigation, Jim should have begun architecting a mitigation strategy.

At this first stage, Jim would need to research defense attorneys. What type of defense attorney would suit him best?

The cost of hiring a competent criminal defense attorney may surprise some people. Becoming a skilled criminal defense attorney requires an investment of thousands of hours in training and practice—the defense attorney “practices” his profession. After graduating from law school, he may work in a series of relatively low-paying jobs to gather more experience. He may work as a clerk, a civil servant, or an associate for several years while managing student loan debt.

Once a defense attorney sets up a practice, he may try to recover his investment. A top criminal defense attorney with specialized skills may charge more than \$5,000 per hour. A moderately-priced criminal defense attorney would bill more than \$400 per hour.

Jim should consider the costs when going into the mitigation arc’s first stage. It’s as if Jim is going into war. He will need to choose which battles to fight. He will need to consider whether he has the resources to go the distance. Jim can work with a public defender if he doesn’t have the financial resources. But Jim should think about how he can help the public defender advance his prospects for success. Nothing will change the past, but Jim’s decisions in the first stage of the mitigation arc will open opportunities for leniency or expose him to gradually increasing sanctions.

Some of the best possible outcomes at the first stage of the mitigation arc would be for a defense attorney to accomplish one or more of the following goals:

- » Persuade prosecutors that Jim didn’t violate the law and didn’t have any knowledge of anyone else who broke the law.
- » Persuade prosecutors that Jim should qualify for a non-prosecution agreement.
- » Persuade prosecutors that Jim should qualify for a deferred-prosecution agreement.
- » Persuade prosecutors to offer Jim a pre-indictment charge with a lower statutory cap.
- » Persuade prosecutors to recommend a sentence that would not include incarceration, with a pre-indictment charge that may consist of a financial sanction, probation, or home confinement.
- » Persuade prosecutors to offer a pre-indictment charge with a recommendation for leniency at sentencing.
- » Persuade prosecutors not to publicize Jim’s involvement in the criminal justice system.

Succeeding at the first stage of the mitigation arc requires advanced planning. Some factors may be beyond Jim’s control. In some cases, powerful political factions influence how prosecutors bring charges.

Either way, Jim bears the onus of preparing. If Jim missed an opportunity to get a great outcome during this first stage of the mitigation arc, he would advance into the second stage.

Some questions to guide people at this first stage of the mitigation arc:

1. In what ways have I prepared myself to hire the right criminal defense attorney?
2. In what ways have I prepared myself to qualify for a non-prosecution agreement?
3. What steps am I taking to learn how the criminal justice system operates?

Second Stage of the Mitigation Arc: The Plea / Verdict

Prosecutors may choose to bring Jim into the system in one of two ways:

- » They may offer Jim an opportunity to plead guilty to a lower charge through a “criminal information” or a “criminal complaint.”
- » They may convene a grand jury and ask the grand jury to indict Jim for a crime or a multi-count indictment.

At each stage, prosecutors become more vested in getting the outcome they want. Once they decide to bring a charge, they want to win. In theory, they’re after justice. But for many prosecutors, winning means getting a conviction, not necessarily justice.

As I’ve written previously, anyone going into the system should learn from the wisdom that two philosophers offer:

- » Socrates: Know thyself
- » Sun Tzu: Know thy enemy

The inexperienced defendant may delude himself into believing that the prosecutor will view him as a “good person.” In reality, that’s a sign of ignorance of the system. The prosecutor and every other stakeholder in the system strive for an outcome. The more time passes, the more likely prosecutors—and other stakeholders—will want a conviction with a severe sanction. They define success by convictions and sanctions, not by seeing defendants as good people.

For this reason, everyone in the second stage of the mitigation arc should begin thinking about the challenges ahead. When Jim moved into this stage of the arc, he missed the opportunity to mitigate at the earlier stage. Decisions Jim makes in the second stage will influence what happens at later stages.

Making a good decision in the second stage requires Jim to use the same strategy and tactics that lead to good decisions in other areas of life:

- » A person must define success as the best possible outcome,
- » A person must create a plan and set priorities,
- » A person must develop tools, tactics, and resources that will advance the goal,
- » A person must execute the plan.

If Jim pleads not guilty to the charge, the prosecutor will attempt to prove the case through a trial. If Jim agrees to plead guilty, the prosecutor may agree to offer favorable terms in a plea agreement.

Jim should understand the costs of proceeding through a trial. In federal court, a defense attorney will want to invest considerable resources to prepare before a jury trial. That could mean reviewing every email, interviewing witnesses, and going through all the evidence they've built against Jim. The time commitment could mean thousands of hours. For this reason, a person should consider the financial costs of proceeding through trial, which could easily exceed \$300,000 for a jury trial in federal court.

If Jim qualified to proceed with a federal defender, he should question how much time the federal defender would have to prepare for a trial.

In addition to financial costs, Jim should think about the risk. If members of a jury acquit Jim, he may move on, or he may adjust. If a jury returns a verdict of guilty, on the other hand, Jim will face complications at sentencing. Typically, judges impose harsher sentences when juries return guilty verdicts.

A mitigation strategy after a jury verdict would differ from a strategy for a person that entered a plea agreement.

The prudent person would consider all options during this second phase of the mitigation arc, considering the earlier decisions. Some questions to guide decisions at this stage follow:

1. What financial resources do I have to defend myself against the charges?
2. What human resources can I draw upon to support me through this challenge?
3. How much time have I invested to learn the landscape of this process?

Third Stage of the Mitigation Arc: The PSR

If a jury acquits, the person may or may not succeed in putting the first two stages of the arc behind him. In other cases, collateral consequences follow that derail a person's prospects for success. Consider the OJ Simpson trial. He prevailed with an acquittal, but his life never returned to normal after the accusations against him, even though a jury acquitted him. Criminal charges can change a person's life.

If Jim pleads guilty or members of a jury vote to convict him, he advances into the next stage of the mitigation arc. From the system's perspective, he changes from being "presumed innocent" to a convicted felon. After the finding of guilt, Jim must prepare for the presentence investigation.

A federal probation officer will begin the presentence investigation long before meeting with Jim. The probation officer responsible for conducting the investigation will start with all the preconceived notions from a career in law enforcement.

The sooner Jim begins thinking about the probation officer, the more skillful Jim becomes in building tools, tactics, and resources to assist him at this stage of the mitigation arc.

Every day, probation officers work with justice-impacted people. Those interactions, over time, influence whether probation officers will trust the people they're interviewing. What does the probation officer already know? Probation officers will understand what prosecutors say. They will know that, at least from a legal perspective, the prosecutor established a finding of guilt.

Since probation officers and prosecutors have ongoing, collaborative relationships, Jim should consider whether it's plausible that the prosecutor influenced the probation officer's thinking. We interviewed Chris Maloney, who retired as a chief probation officer. In our interview, I asked Chris about the presentence investigation process. When I asked him about his process in gathering information that would lead to the presentence investigation report, he spoke about the long hours that went into preparing the report before the probation officer ever met with the subject of the interview.

The prudent person would think about the tools, tactics, and resources he could build to influence this third stage of the mitigation arc.

1. What could Jim create before the mitigation arc to counter any preconceived notions that the probation officer may have?
2. In what ways would Jim's efforts to influence the presentence investigation report open opportunities for him to advocate for himself more effectively at different stages of the journey?
3. If Jim missed an opportunity to influence the PSR favorably, what steps could he take to influence the next stages?

Fourth Stage of the Mitigation Arc: The Sentencing

Once the probation officer completes the presentence investigation report (PSR), Jim will move into the fourth phase of the mitigation arc. It's time to prepare for sentencing.

Jim and his defense attorney may or may not agree with everything the probation officer wrote. Similarly, the prosecutor may or may not agree with the probation officer's writing. Before the sentencing hearing, the defense attorney and the prosecutor may work with the probation officer to amend the PSR so that neither party objects.

Suppose the prosecutor, the defense attorney, and the probation officer disagree on the accuracy of the PSR. In that case, the judge will begin the sentencing hearing by reviewing the report. The judge will listen to the prosecutor, the judge will listen to the defense attorney, and the judge may listen to the probation officer. The judge will decide with a ruling, and the ruling will become a "finding of fact."

After the judge resolves discrepancies in the PSR, the judge will respond to sentencing memorandums and listen to oral arguments from both the prosecutor and the defense attorney. The judge will offer Jim an opportunity to address the court.

At that point, Jim is speaking to an audience of one: the Judge.

Will Jim be ready for that sentencing hearing?

If Jim prepared effectively, he would have tools, tactics, and resources to assist him at this stage of the mitigation arc. He would ask himself these questions:

1. What resources have I built to differentiate myself from other people that appear before sentencing?
2. How did my preparations bolster my defense attorney's effort to craft a compelling sentencing memorandum?
3. How do the resources I created show the growth I've made since the time prosecutors brought me into the system?

Fifth Stage of the Mitigation Arc: Post Sentencing

Following the sentencing hearing, jurisdiction over Jim may change. If the judge sentenced Jim to probation, he would remain under the judicial branch of government. But if the judge sentenced Jim to “the custody of the Attorney General,” that means he will transition into an arm of the executive branch of government—the Bureau of Prisons.

The defense attorney may or may not stick around to assist Jim through appeals. However, navigating the complexities of the executive branch of government will require Jim to advocate for himself. The Bureau of Prisons does not respond well to defense attorneys. Many policies and procedures prohibit a person in prison from using a defense attorney until after the person has exhausted all administrative remedies.

Although the defense attorney may consider his job done after the sentencing hearing, Jim and his loved ones will begin working through the labyrinthine world of imprisonment. To succeed at this stage of the mitigation journey, Jim will need to develop a new set of tools, tactics, and resources.

In the First Step Act era, this strategy of building an “extraordinary and compelling” record is essential. No one should take our word for the importance of memorializing a journey that will advance prospects for success. Instead, the person should visit our subject-matter expert page from the resource tab of our nonprofit's website. They will find my interviews with people at the highest levels, including:

- » Video interviews with two federal judges,
- » Video interviews with a retired chief of US Probation,
- » Video interviews with a past director of the federal Bureau of Prisons,
- » Video interviews with the former administrator of the nation's halfway house system.

What will all those interviews have in common?

Each interview reveals a unified message, showing how the system operates. People who build careers in the criminal justice system want to see incremental progress. They want to build a record showing that the system helped the person advance to increasing levels of liberty. Those professionals will rely upon written records. The written records show that the system is working, and it gives validity to the work they're doing.

The more Jim understands the system that holds him, the more influential he becomes at engineering a mitigation strategy that will lead to the highest level of liberty at the soonest possible time.

Some questions to guide Jim's preparation for self-advocacy at this stage of the journey follow:

1. What tools, tactics, and resources am I creating to advance my candidacy for the earliest possible transition to liberty?
2. How will I learn from subject-matter experts or policy changes once imprisonment separates me from the Internet?
3. How am I preparing myself to respond to challenges I may encounter once I transition to an RRC or while I'm on Supervised Release?

Conclusion:

Every stage of the criminal justice frustrates us. While going through the various stages, we'll frequently see inequities. People like Jim will see administrators requiring him to abide by rules that they flagrantly violate. To get the best outcome, we need the best resources. We need examples. We need to know how to use the system's mechanisms to self-advocate. As a person that lived in that system for 9,500 days, I make a commitment to show others the strategies that I used to advance myself to higher levels of liberty, and to success upon release. It's my hope that members of our community will find value in this lesson.

Please share the message with others around you. I strive to be in the change that I want to see in the world. That change includes working to bring systemic reforms that you can use to get the highest level of liberty, at the soonest possible time. I believe in you.