



Nonstatutory Mitigating Factors

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After my [earlier post about nonstatutory aggravating factors](#), a reader took me up on my offer to write about nonstatutory mitigating factors.

In addition to the twenty mitigating factors spelled out in G.S. 15A-1340.16(e), the law allows for "any other mitigating factor reasonably related to the purposes of sentences." Procedurally, nonstatutory mitigating factors are a little simpler than aggravating factors. There are no notice or pleading requirements on the defendant with respect to nonstatutory mitigating factors, and *Blakely* has no application to mitigating factors - the defendant just needs to prove them to the court by a preponderance of the evidence. The court is required to *consider* evidence of any nonstatutory mitigating factor presented, but it is required to make written findings only when it departs from the presumptive range. G.S. 15A-1340.16(a) & (c).

As you might imagine, there is less case law on nonstatutory mitigating factors than there is on nonstatutory aggravating factors - the mitigators are rarely appealed. Defendants will sometimes argue that a court erred by failing to find a nonstatutory mitigating factor, but the appellate courts review such arguments for abuse of discretion. *State v. Lovett*, 119 N.C. App. 689 (1995). Nevertheless, some discussion of approved nonstatutory mitigating factors appears in the cases, and the list below might help a defendant think of factors applicable to his or her case.

Defendant had no prior criminal record. *State v. Pender*, 176 N.C. App. 688 (2006).

Defendant identified a codefendant at an early stage in the proceedings. *State v. Easterling*, 119 N.C. App. 22 (1995) (note the difference between this factor and statutory mitigating factor (7), that the defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution).

Defendant's continued exposure to stress and conflict created by his mother's alcoholism contributed to and mitigated the commission of the offense. *State v. Lundin*, 116 N.C. App. 715 (1994).

Defendant was abused as a child. *State v. Church*, 99 N.C. App. 647 (1990) (factor discussed but not found in this case on account of a lack of credible evidence or relevance to the crime).

Defendant expressed genuine remorse to the victim at a voluntary meeting with the victim, where he explained the circumstances of the crime. *State v. Smith*, 92 N.C. App. 500 (1988).

Defendant had an extenuating relationship with the victim. *State v. Canty*, 321 N.C. 520 (1988) (factor not found when the victim had stabbed the defendant two days prior to the defendant shooting him).

Defendant behaved well in prison (considered at resentencing). *State v. Swimm*, 316 N.C. 24 (1986) (factor not found, but court noted the general propriety of considering the factor under *North Carolina v. Pearce*, 395 U.S. 711 (1969)).

Victim's loss was insubstantial. *State v. Litchford*, 78 N.C. App. 722 (1986) (factor not found when only police intervention mitigated the victim's loss).

Defendant aided in the possible prevention of a jailbreak while held in pretrial confinement. *State v. Cameron*, 314 N.C. 516 (1985) (factor not found, although issue not properly preserved on appeal).

Defendant rendered aid to the victim. *State v. Spears*, 314 N.C. 319 (1985) (factor not found in this case, but its "mitigating value" approved of in general terms).

Surely there are others - please post a comment with any you have used (or opposed). Another document that might be useful is the list of "Easy Mitigating Factors" compiled by Oregon attorney Michael R. Levine. He sells the most recent version, which is up to 171 factors, [here](#). A prior version, with a mere 128 factors, can be found [here](#). It's geared toward federal law, but it might give you some good ideas.