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Doug Passon is a criminal defense attorney of over twenty years *and* an award-winning filmmaker, writer and musician. Passon has been creating and using moving pictures in his own cases and teaching lawyers, paralegals and investigators around the country how to do the same for over a decade. He is recognized by the Wall Street Journal as a pioneer in the use of video in sentencing mitigation.

In litigation, our story is everything; and how we tell it means the difference between victory and defeat.

Passon specializes in helping lawyers incorporate powerful and persuasive moving pictures into the litigation process.

Production and consulting services:

- CRIMINAL SENTENCING MITIGATION VIDEOS;
- CRIMINAL “VIDEO SENTENCING LETTERS”
- DEATH PENALTY/CLEMENCY VIDEOS;
- CIVIL DAMAGE (“DAY IN THE LIFE”) VIDEOS;
- STORY CONSULTING;
- IN-HOUSE VIDEO TRAINING;
- ENTERTAINING AND INFORMATIVE CLE PRESENTATIONS.

ATTACHMENTS

-PASSON’S RESUME

-MOVING PICTURES ARTICLE FROM “THE CHAMPION”, JUNE 2014

-THEORIES & THEME/STORYTELLING ARTICLE FROM “THE CHAMPION”, MARCH 2017

-ARTICLE FROM WALL STREET JOURNAL, MAY 2014

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Education

WASHINGTON UNIVERSITY SCHOOL OF LAW St. Louis, MO
J.D. 1996

- *Washington University Law Quarterly*, Associate Editor
- Kent Koerner Memorial Scholarship (For ranking in the top 10% of first year class.)
- Judge Amandus Brackman Moot Court Prize (For high score on moot court brief.)
- Wiley Rutledge Moot Court Society (For winning moot court competition.)
- National Moot Court Competition, Washington D.C.
- Carter-Tedrow Memorial Award (Awarded by graduating class for professionalism.)
- Pro Bono Law Association Public Interest Service Award

INDIANA UNIVERSITY Bloomington, IN
B.A., Criminal Justice and Speech Communications, 1992

Professional Experience

Law Offices of Doug Passon, P.C.
D Major Films, L.L.C. 2008 – present Scottsdale, AZ
President and Creative Director

Nationally recognized pioneer in the field of visual storytelling in litigation. Produce documentary films for use in and out of court, including criminal sentencing, death penalty, clemency, civil damages cases, and settlement negotiations. Provide training and consulting nationwide to legal professionals on the use of visual storytelling.

Office Of The Federal Public Defender 2002 – 2014 Phoenix, AZ
Assistant Federal Public Defender, Trial Unit

Represent indigent defendants in all stages of federal felony prosecutions, including complex and high profile cases. Conduct jury trials. Train attorneys, investigators and paralegals nationally in trial & sentencing advocacy and challenging government attempts to force-medicate incompetent clients.

Quarles & Brady/Streich Lang 2000 – 2002 Phoenix, AZ
Associate, White Collar Crime and Special Matters Litigation Unit

Orchestrated defense of criminal cases in all stages of state and federal prosecutions, from complex corporate criminal investigations to street crimes.

Maricopa County Public Defender 1996 – 2000 Phoenix, AZ
Deputy Public Defender, Trial Unit

Carried a continuous caseload of thirty to forty serious state felonies. Conducted numerous first and second chair jury and bench trials, preliminary hearings, and miscellaneous evidentiary hearings.

Publications

Attempted Burglary As a “Violent Felony” Under the Armed Career Criminal Act: Avoiding a “Serious Potential Risk” of Confusion in the Wake of Taylor v. United States, 495 U.S. 575 (1990), 73 WASH U. L.Q. 1649 (1995).

High Times and Misdemeanors: Warrantless Arrests for Misdemeanors Not Committed in the Presence of an Officer, FOR THE DEFENSE, Vol. 7, Issue 3 (1997).

The Drug Court Experience, FOR THE DEFENSE, Vol. 7, Issue 7 (1997).

Overcoming the Insanity Concerning Proposition 200 and Prior Violent Crimes, FOR THE DEFENSE, Vol. 10, Issue 4 (2000).

If the Grand Jury Will Indict a Ham Sandwich, Something is Not Kosher About A.R.S. § 13-901.01(B), FOR THE DEFENSE, Vol. 10, Issue 4 (2000)(co-authored).

Mitigation and the Movies: Using Moving Pictures To Put Your Client In The Best Light At Sentencing, THE DEFENDER, Spring 2007, reprinted in THE LIBERTY LEGEND, Vol. III, Issue 5, Summer 2007.

Forced Medication After United States v. Sell: Fighting a Client’s ‘War on Drugs’ – Part One, THE CHAMPION, May/June 2008 (co-authored).

Forced Medication After United States v. Sell: Fighting a Client’s ‘War on Drugs’ – Part Two, THE CHAMPION, October 2008 (co-authored).

Using Mitigation Videos To Build The Bridge of Empathy At Sentencing, Cultural Issues in Criminal Defense (3rd ed.)(Linda Friedman Ramirez ed., 2010).

Using Mitigation Videos To Build The Bridge of Empathy At Sentencing (Revised & Updated), THE CHAMPION, June 2014.

Winning at Sentencing With Theories, Themes, & the Creative Demonstration of Truth, THE CHAMPION, March 2017.

Story For Lawyers (Blog) January 2017 – present. (www.dougpassonlaw.com)

Teaching Experience

Legal Research and Writing Teacher’s Assistant, 1995-96

Maricopa County Public Defender Training College, 1998-2002

Federal Defender Seminar, “Federal Practice Pointers”, Phoenix, 2004

Advanced Federal Defender Training, “Mitigation and the Movies: Using Moving Pictures To Put Your Client In The Best Light at Sentencing”, Miami, 2007

Arizona Attorneys For Criminal Justice, Winter Seminar, “Cross-Examining Expert Witnesses”, Prescott, 2007

Arizona Public Defender Assn., “Mitigation and the Movies”, Tempe, 2007

National Assn. of Criminal Defense Lawyers, “Litigating Forced Medication Cases”, San Francisco, 2007

National Defender Investigator Assn., “Mitigation and the Movies”,
Las Vegas, 2007

Arizona Bar CLE By The Sea, “Mitigation and the Movies”, San Diego, 2008

Western All-Star Conference, “Mitigation and the Movies”, Boise, 2008

National Sentencing Advocacy Seminar, “Persuasive Sentencing Hearings”, Chicago,
2008

Arizona Public Defender Assn., “Mitigation and the Movies”, and “Litigating
Forced Medication Cases”, Tempe, 2008

Federal Defender Training, “Mitigation and the Movies”, Nashville, 2008

Federal Defender Training, “Mitigation and the Movies”, Syracuse, 2008

Federal Defender Training, “Mitigation and the Movies”, Honolulu, 2008

Federal Defender Training, “Fifth Amendment Challenges To Polygraphs In
Sex Offender Treatment”, Phoenix, 2009

Washington University School of Law, Access To Justice Symposium, St.
Louis, 2009

National Sentencing Advocacy Seminar, “Persuasive Sentencing Hearings”, Santa Fe,
2009

National Defender Investigator Assn., “Mitigation and the Movies”,
Daytona, 2009

Arizona Public Defender Assn., “Mitigation and the Movies”, and “Fifth
Amendment Challenges To Polygraphs In Sex Offender Treatment”, Tempe, 2009

Advanced Federal Defender Training, “First Annual Federal Public Defender
Sentencing Film Festival” and “Fifth Amendment Challenges To Polygraphs In Sex
Offender Treatment”, Minneapolis, 2009

Arizona Bar CLE By The Sea, “*The Staircase: Lessons Learned In a Hard
Fought Case*”, San Diego, 2009

Federal Defender Training, “Mitigation and the Movies”, Des Moines, 2009

Arizona Bar Professionalism Course, Phoenix , 2009

National Association of Criminal Defense Attorneys, “*Junk Science: A Case
Study*”, Las Vegas, 2010

Arizona State Bar, “*The Staircase: Lessons Learned In a Hard
Fought Case*”, Phoenix, 2010

National Defender Investigator Assn., “Producing Powerful & Persuasive
Sentencing Documentaries”, Las Vegas, 2010

Advanced Federal Defender Training, “Second Annual Federal Public Defender
Sentencing Film Festival, Seattle, 2010

Federal Defender Training, Litigating Forced Medication Cases after *Sell v. United States*, Oxford (MS), 2010

Arizona Public Defender Assn., “Mitigation and the Movies”, Tempe, 2010

Federal Defender Training., “Producing Powerful & Persuasive Sentencing Documentaries”, Ft. Myers, Jacksonville, & Tampa, 2010

Federal Defender Training., “Producing Powerful & Persuasive Sentencing Documentaries”, Tucson, 2010

National Sentencing Advocacy Workshop: Thinking Outside The Guideline Box, San Francisco, 2010

National Sentencing Workshop For Federal Defenders, Chicago, 2010

National Sentencing Advocacy Workshop: Using ‘Moving Pictures’ To Persuade, Puerto Rico, 2010

National Sentencing Advocacy Workshop: Using ‘Moving Pictures’ To Persuade, Atlanta, 2011

Federal Defender Training, Using ‘Moving Pictures’ To Persuade, Virginia, 2011

National Criminal Habeas Conference, Creating Powerful & Persuasive Videos For Use In Habeas & Clemency Proceedings, Austin, 2011

Advanced Federal Defender Training, “Third Annual Federal Public Defender Sentencing Film Festival, Baltimore, 2011

Arizona Public Defender Assn., “Persuasive Use of Video”, Tempe, 2011

Federal Defender Training., “Producing Powerful & Persuasive Sentencing Documentaries”, Corpus Christie, 2011

National Sentencing Advocacy Workshop: Using ‘Moving Pictures’ To Persuade, Redondo Beach, 2012

Advanced Federal Defender Training, “Fourth Annual Federal Public Defender Sentencing Film Festival, Atlanta, 2012

Arizona Public Defender Assn., “Persuasive Use of Video”, Tempe, 2013

Federal Defender Training., “Persuasive Use of Video”, Phoenix, 2013

Arizona Public Defender Assn., “Using ‘Moving Pictures’ To Persuade”, “Video Production For Legal Professionals”, & “Everything I Need To Know About Defending I Learned at the Movies”, Tempe, 2014

Center for American & International Law, “Transforming the Data Into a Persuasive Narrative”, Plano, TX, 2014

The Fight For Life Death Penalty Conference, “Death Penalty Mitigation Videos”, Phoenix, 2014

National Sentencing Advocacy Workshop: Using ‘Moving Pictures’ To Persuade,

New Orleans, 2015

National Sentencing Advocacy Workshop: Using ‘Moving Pictures’ To Persuade, University of Toledo School of Law, 2015

Arizona Public Defender Assn., “Everything I Need To Know About Defending I Learned at the Movies” (Updated), Tempe, 2015

Federal Capital Habeas Project, Faculty (Clemency Video Panel), Philadelphia 2015

Sentencing Video Consult Program, Federal Defender Office, M.D. Florida, 2015

Sentencing Video Consult Program, Federal Defender Office, S.D. Ohio, 2015

National Defender Investigator Assn., “Producing Powerful & Persuasive Sentencing Documentaries”, San Diego, 2015

National Sentencing Advocacy Workshop, Using ‘Moving Pictures’ To Persuade, La Jolla, 2016

National Defender Investigator Assn., “Anatomy of a Sentencing Video”, Chicago, 2016

Advanced Federal Defender Training, “Theories, Themes & the Creative Demonstration of Truth” & “Using Moving Pictures to Persuade”, Pittsburgh, 2016

National Sentencing Advocacy Workshop, Using ‘Moving Pictures’ To Persuade, Hartford, 2016

Metropolitan Public Defender Services, Full-day mitigation video training workshop, Portland, 2016

American Bar Association Annual Meeting, “The Art & Science of Visual Advocacy”, San Francisco, 2016

Federal Public Defender, Full-day mitigation video training workshop, St. Louis, 2016

Federal Public Defender, Full-day mitigation video training workshop, Dallas, 2016

Federal Death Penalty Resource Counsel, 2016 Strategy Session, “Using Moving Pictures & Video To Convince Decision-Makers, Denver, 2016.

National Sentencing Advocacy Workshop, Using ‘Moving Pictures’ To Persuade, Albuquerque, 2017

National Sentencing Advocacy Workshop, Using ‘Moving Pictures’ To Persuade, Theories & Themes, Storytelling, Baltimore, 2017

Advanced Federal Defender Training, Holding Out For A Hero: Using the “Hero’s Journey” Story Model to Win at Sentencing; 5th Federal Defender Sentencing Film Festival, New Orleans, 2017

Federal Criminal Practice Seminar, Using ‘Moving Pictures’ To Persuade, Cleveland, 2017

Federal Public Defender, Full-day mitigation video training workshop, Cleveland, 2017

Film Production Credits; Screenwriting Credits; Awards & Recognitions

- *Road to Eden*, Feature Length Documentary (2013). Passon wrote, directed, and assisted with filming & editing. *Eden* has played in over forty film festivals and other venues across North America. It is currently available on DVD and Digital download (www.roadtoedenfilm.com).
- *Letter of Thanks*, Short Documentary (2008). Passon wrote, directed, filmed and edited. The movie has garnered awards for “Best Arizona Short Film” at the Phoenix Film Festival, “Best Sound Design”, “Best Documentary”, “Best Editing”, and “Best in Show” at the SCC Film and Videofest, profiled in Arizona Republic and “Arizona Storytellers”.
- *Showbiz Arizona*, TV Series (2007). Passon served as head-writer for locally produced half-hour television show on the Arizona entertainment scene.
- *Romey & Jules*, Short (2006)(Co-Writer). Passon co-wrote award-winning script.
- *Creative Arts Competition* (2014). Passon won best original songwriting category in competition sponsored by the Arizona State Bar.
- *Wall Street Journal* (May 2014), Passon was recognized as a “pioneer” in the area of sentencing mitigation videos.

T H E National Association of Criminal Defense Lawyers

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June 2014

CHARLOTTE, NC — SEE PAGE 3
October 23-25, 2014 / NACDL's
16th Annual Making the
Case for Life Seminar

WASHINGTON, DC — SEE BROCHURE
November 5-8, 2014 / 10th Annual
Defending the White
Collar Case Conference

LAS VEGAS, NV — SEE PAGE 33
November 20-21, 2014 / 5th Annual
Defending Sex Crimes Conference

ASPEN, CO — SEE PAGE 44
January 11-16, 2015 / NACDL's
35th Annual Advanced
Criminal Law Seminar



**THE ART OF
SENTENCING ADVOCACY**

**Three Perspectives
On Effective
Sentencing Advocacy**



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Using Moving Pictures To Build the Bridge of Empathy at Sentencing

I. Introduction

During an address to the defense bar in 2008, the Honorable John Kane of the U.S. District Court for the District of Colorado boldly asserted that in the post-*Booker* world of discretionary sentencing, a criminal defender's primary responsibility and greatest challenge is to "[m]ake the judge suffer."¹ He explained that, for so long, many judges have become accustomed to employing cookie-cutter calculations instead of careful, individualized assessments of the facts and circumstances of each case and client. However, sentencing should rarely be an easy decision for the judge. Defenders must constantly seek out the most powerful ways to make the judge understand their clients and the mitigating circumstances behind the clients' conduct.

Not only should judges agonize over the proper sentence in each case, but they must truly feel the client's pain as they do so. Clients suffer. They suffer through traumatic and abbreviated childhoods. They suffer from mental illness or addiction.



They suffer through extreme poverty, abuse, or exploitation. They suffer the pains of being separated from loved ones. More often than not, that suffering is at the core of their criminal conduct. It is incumbent upon defenders, therefore, to create an *emotional connection* between judge and client by compelling the judge to walk a mile in each client's shoes. Put simply, in order to rise to Judge Kane's challenge, *a defender must make empathy the centerpiece of any effective sentencing presentation*. One of the most effective ways to meet that challenge is through the use of visual storytelling, specifically, the production of short documentary video presentations about the client.

The first section of this article will explain why the "moving picture" format is an especially useful tool for sentencing advocacy. The next section is designed to help the reader understand which cases are best suited for using this method of persuasion. The technique must be used sparingly, and only when the mitigation story is compelling, has empathetic characters to tell it, and most important, can be told in a visual, emotionally charged way.² The article concludes with a case study that elucidates the concepts presented.

II. Making the Case for Movies³

A. Persuasion Through Story

Just as every good writer knows that *story* is the primary vehicle for conveying fundamental truths about life,⁴ every good lawyer knows that story is the most effective tool of courtroom persuasion.⁵ The best lawyers consistently use story as a means to illuminate the truth of their cases. With the increasing prevalence of technology in the courtroom and the accessibility of inexpensive and user-

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friendly recording and editing equipment, the use of digital media to tell those stories became inevitable.⁶

A well-crafted “moving picture” has the power to move an audience — not just to laugh or cry, but to *act*. Movies connect viewers to, and reshape their views about, people, places, and issues. Although the term “moving pictures” is used to describe the technical essence of visual storytelling — images speeding across a viewer’s field of vision — it means much more than that. The goal of this process is not just to create pictures that have motion, but ones that are packed with *emotion*. In so doing, the defender brings the client’s story to life like nothing else can.

B. Control

The video process affords attorneys a significant degree of control over their sentencing presentation. No matter how much preparation a lawyer undertakes before putting a witness on the stand or having a client address the judge, things can, and often do, go awry. Even if witnesses do not say anything detrimental to the case, they often convey information that is of no particular relevance to the judge. The video editing process allows the lawyer to trim away the fat from traditional sentencing presentations, allowing for ultimate control over content, pace, and emotional tone. Not only does this result in more powerful sentencing advocacy, it can also shorten the length of sentencing hearings — something judges will undoubtedly appreciate.⁷

C. Relaxed Evidentiary Standards at Sentencing

Sentencing is the perfect place to employ moving pictures because most jurisdictions have liberal rules governing a lawyer’s ability to introduce mitigation materials.⁸ If a prosecutor or judge finds this perfectly acceptable form of mitigation objectionable, federal and state practitioners have many weapons at their disposal to fight and win this battle.

Under the federal rules, before imposing sentence, the court “must” allow the defendant to “speak or present *any information* to mitigate the sentence.”⁹ The federal sentencing statute goes even further, stating, “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”¹⁰ Given the expansive language contained in these provisions, it is hard to imagine a situation in which a judge could reasonably preclude the

defense from presenting such information as mitigation at sentencing.¹¹

The fact that sentencing videos contain a significant amount of hearsay should not be an impediment. Not only is hearsay already prevalent in the sentencing process (pre-sentence reports, sentencing memoranda, character letters, and so forth), but the Federal Rules of Evidence clearly state that the rules of evidence do *not* apply at sentencing.¹² If a prosecutor complains she has no opportunity to cross-examine witnesses who appear in the video, a defender can point to many post-*Crawford* citations stating that the right to confront is not generally applicable at sentencing hearings.¹³

The information a party presents at (federal) sentencing need only bear “minimal indicia of reliability” and the prosecution must have an “opportunity to refute.”¹⁴ A properly produced sentencing video will only contain reliable and relevant evidence. Moreover, pre-sentence disclosure of the video should preemptively obviate opposing counsel’s claim of lack of opportunity to refute. If the prosecution is so inclined, it has its own resources available to locate and interview witnesses who appear in the video, or present other testimony or evidence to counter the information.

In the end, a defender should be able to break through a wall of objections with little difficulty. However, although the rules should ensure admissibility, only a compelling, well-crafted finished product will ensure success.

III. Creating a Powerful And Persuasive Sentencing Video

A. Use Sentencing Videos Sparingly

Although every case is important, a lawyer must carefully consider whether her client is best served by video mitigation. Using this form of persuasion too often or under the wrong circumstances may lessen its impact and fuel resistance to this type of advocacy. In short, sentencing videos are *not* for every case.

As a threshold matter, a moving picture may be appropriate when the lawyer determines that a client’s sentencing story is far better *shown* to the judge, rather than simply told. If so, the lawyer must then determine whether she has access to the three essential ingredients of any successful sentencing documentary: *a solid story, connective characters, and emotionally evocative images*. If a lawyer cannot muster all three elements,

she must strongly consider saving this technique for another case.

B. The Three Elements of a Sentencing Documentary

1. Solid Story

A solid story is moving. Movies build the bridge of empathy, first and foremost, with story elements that make the judge *feel* something. Thus, it is essential that sentencing stories evoke emotion. However, this is an area where the lawyer must strike a delicate balance. Arguably, any attempt at persuasion involves a modicum of manipulation, but audiences have stink-detectors. If a scene contains too much raw emotion, the audience will feel manipulated. They know when they are being “played” (made a fool of or taken advantage of), and they will not tolerate it for long. Consequently, effective persuaders must be *subtle* in their methods. Some sentencing video “no-no’s” include the use of dramatic voice-over narrations, flashy editing tricks,¹⁵ overbearing or melodramatic music,¹⁶ gratuitous scenes of crying loved ones, pointless inclusion of children, ham-handed re-enactments, and so forth. This kind of overblown content distracts from the message of the movie and destroys credibility.

A solid story is unique. Not surprisingly, a good sentencing movie shares many of the same elements of a well-crafted commercial film, either feature or documentary. When a person pays 10 dollars to enter a dark theater and give over two hours of his life, he expects a good story. He expects to hear things he has never heard, see things he has never seen, and go places he has never been. Put simply, “a good story means something worth telling that the world wants to hear.”¹⁷ In the world of visual storytelling, there is perhaps no greater sin than boring an audience. Therefore, mitigation movies must not be used for “ordinary” sentencing stories.¹⁸

A solid story is lean and “integrated.” A common complaint of modern moviegoers is that films are longer than they need to be. Films that run too long tend to bore, annoy, and distract. The last thing a lawyer (or her client) wants is for the judge to tune out. There is no right answer to the question of how long a sentencing movie should be, as some stories are more complex than others. As a general parameter, however, the video should be between five and 15 minutes long.

Good movies, like good trial presentations, reveal a process of “integration.”¹⁹ In courtroom persuasion, this process requires that every aspect of a

lawyer's presentation advance the theory and themes of the case. In trial, a lawyer may leave a particularly brutal or entertaining piece of cross-examination on the cutting-room floor if she knows the questions, fun as they would have been to ask, would not further the theory of the defense. Likewise, in movies, every scene, line of dialogue, image, and sound must serve the story, move it forward, and illuminate a central theme.²⁰ That is not to say a sentencing video cannot have multiple story lines. In fact, many great stories have "subplots." However, even with subplots, the concept of integration still applies, as each subplot must still directly relate to the main theme of the story.²¹

The sentencing video should be between five and 15 minutes long.

A solid story employs small stories to tell the big story. Lawyers must resist the urge to rely on dry data to tell the story, and instead they must seek out emotionally charged smaller stories that move the main story forward. In one example, a defendant was caught smuggling drugs across the border. It was a one-time event, done out of desperation to pay off a large gambling debt. The story the lawyer sought to tell was the intensity of the gambling addiction that fueled the crime. The defendant and other witness could have droned on about the dull details of how often he gambled, which casinos he frequented, which games he played, and how much money he lost. That data was better suited for the sentencing memo or the pre-sentence report.

For the mitigation movie, the lawyer chose instead to convey the reality of the defendant's disease by telling the (literally) gut-wrenching story behind the story: The client recalled a time he was on bed rest, having just undergone serious stomach surgery. He was staying at his mother's house, as she was helping him recover. In the middle of the night, the sights and sounds of the casino began to echo in his dreams. The lure of gambling was so powerful that he dragged himself out of bed, struggled to get dressed, took his mother's car and, while barely able to exert the effort to steer, drove himself to the casino and played the slot machines into the early morning. This short, vivid story moved

the judge to greater understanding by enabling him to suffer through the power and pain of the client's addiction.

2. Connective Characters

Character is connection. A discussion of character reveals again how the process of forging bonds of empathy comprises the core of every effective sentencing presentation. Without someone with whom the audience can identify, care about, and root for, a movie falls flat on its face. In sentencing documentaries, the main character is usually, although not always, the client.²² The client is often best suited to tell his own story. In some cases, this may not be possible. The lawyer must then find other characters to fill that role.²³

A lawyer must include characters in her movie that the judge can relate to in some meaningful way. Ideally, the "characters" will be attractive, articulate, and likeable. In reality, most criminal defendants are the polar opposite of the bankable Hollywood movie star. However, a lawyer need not be discouraged by this fact. Indeed, this "disconnect" is often the reason a lawyer chooses this medium of persuasion in the first place — because although the client's bad deeds may create an impediment to *sympathy*, they need not impede the goal of character *empathy*.

In describing the important distinction between sympathy and empathy, creative writing instructor Robert McKee unwittingly underscores the critical importance of building character connection at sentencing:

The protagonist must be empathetic; he may or may not be sympathetic. Sympathetic means likable. Tom Hanks and Meg Ryan, for example, or Spencer Tracy and Katharine Hepburn in their typical roles: The moment they step onscreen, we like them. We'd want them as friends, family members, or lovers. They have an innate likability and evoke sympathy. Empathy, however, is a more profound response. Empathetic means, "like me." Deep within the protagonist the audience recognizes a certain shared humanity. ... There's

something about the character that strikes a chord.²⁴

A client may do bad things, but if the lawyer emphasizes connective character traits, the audience will instinctively bond with the client and want good things for him.²⁵

Consider some of the great "bad guys" in film and television with whom audiences consistently connect with and root for, notwithstanding their evil deeds. Dr. Hannibal Lecter in *The Silence of the Lambs* is a wonderful example of empathy at work. Lecter is a serial killer who eats his victims. It is hard to imagine a more disturbing, unlikable character. Yet the audience is drawn to him. In fact, many who see this movie are actually quite satisfied at the end when (spoiler alert) Lecter escapes and announces his intention to devour Dr. Chilton, the sadistic psychiatrist who tortured him for years in the dungeon of the prison insane asylum.

Why is it that audiences rally behind this crazed killer? The writer, Ted Tally, masterfully infused this complicated character with traits that engender admiration and connection. Lecter was brilliant. He was persecuted by the government. He cooperated with law enforcement to help catch a far more disturbing serial killer. He had the capacity to care for other human beings, as demonstrated by his relationship with the protagonist, Clarice Starling (played by Jodie Foster). He was fearless and strong and in control. These are the kinds of qualities people see in themselves, either in truth or in desire. It is because of those connections that audiences root for Lecter, if even on a subconscious level.²⁶ If this technique can work to convince an audience to support a cannibalistic killer, it can work for virtually any defendant, no matter how "unlikable" the defendant may seem.

Another wonderful example of filmmakers bridging the gap between audience and character can be found in the National Geographic documentary *March of the Penguins*. Hardly the makings of Hollywood blockbuster, *March* began its life as a small French-produced nature film exploring penguin mating rituals in Antarctica. Are you still awake? That little penguin pic went on to gross over \$77 million and won the Academy Award for Best Documentary in 2005. The reason *March* was so successful is because the filmmakers built the bridge of empathy by infusing human elements into their subjects and their story. The movie, at its core, was about family and the struggles parents endure in order to provide for and protect their children.

They also replaced the French narration with the instantly relatable voice of actor Morgan Freeman. When asked about the key to making a compelling wildlife documentary, director Luc Jacquet said, “[e]motion. If you don’t feel something when you’re out in the wild, there’s no film. That’s the basis for everything.”²⁷

Character is action. Another storytelling axiom of particular relevance is that the truth of a person’s character is revealed by what the character *does*, not what he says.²⁸ Character and credibility are very much at issue during sentencing.²⁹ The challenge is to prevent the defendant’s crime from defining his character. In a typical sentencing presentation, the lawyer, the client, or the client’s people will *tell* the judge all about the client’s character (i.e., “he’s a hard worker,” “he’s a good dad”). Sentencing documentaries allow the judge to see *character in action*. As explained in greater detail below, it is a wasted opportunity to simply show characters talking. To the extent possible, a lawyer must show the character *doing*. For example, instead of a defendant talking about his job, try filming him in action at work. Showing the character engaged in the performance of some special skill enhances credibility, makes the movie more interesting to watch and, most important, forges those all-important bonds of empathy.

3. Emotionally Evocative Images

Movies are stories told with *pictures*.³⁰ In other words, “[f]ilm is a visual medium that dramatizes a basic story line; it deals in pictures, images, bits and pieces of film: a clock ticking, a window opening, someone watching, two people laughing, a car pulling away from the curb, a phone ringing.”³¹ Undeniably, “for all its complexity, a movie provides but two kinds of information: sight and sound.”³² Therefore, every moment of a sentencing video is an opportunity to create connections by using powerful images to tell the defendant’s story.

Beware the dreaded “talking head.” Documentaries almost universally include on-camera interviews. However, as stated above, if a sentencing video is merely a parade of “talking heads,” it will be boring and ineffective.³³ The judge will ultimately wonder why the lawyer did not just bring the speakers into court or have them write a letter. The lawyer’s goal is to strive for creative *visual* ways to convey the narrative in final form. This may be the most important and yet most overlooked aspect of the mitigation video production process.

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In sentencing documentaries, witness interviews are akin to the foundation of a building. Without a strong foundation, the building will not stand. However, the “moving pictures” are the walls, windows, roof, and all the rest. In this craft, emotionally evocative images are absolutely essential to add layers of emotion, excitement, and credibility over the story being

would speak a thousand words.

Finding b-roll material is perhaps the most challenging part of this process. B-roll can come from a number of sources. A lawyer may find useful b-roll in government discovery, such as excerpts from police reports, crime scene photos, surveillance videos, interrogations, diagrams, and booking photos. On occasion,

Instead of showing a defendant talking about his job, try filming him in action at work.

told. Without those images, the building is uninhabitable. With those images, the judge begins to suffer.

Images layered on top of witness interviews in the editing process are typically referred to as “cutaways” or “b-roll.” To draw from the previous example of the client at work (character in action), the defendant’s on-camera interview provides the narration, but the viewer sees mostly b-roll or cutaways to the client actually at work engaged in his specialized activity.³⁴ In another example, if a witness describes the hardship of growing up in extreme poverty, a cutaway to images of his childhood home

the client or his family will have pre-existing b-roll such as home movies or family photos. Documents make for decent b-roll as well. If a client talks about completing a drug program, the filmmaker can scan the graduation certificate and include that image in the video. A lawyer may also find useful photos, videos, and documents on the Internet.

The filmmaker must also be prepared to create her own b-roll. For example, if the story is about an elderly relative who relies on the defendant for daily care, the filmmaker can shoot “a day in the life” footage, showing the client driving the relative to the doctor, cleaning the home,

sorting medications, giving insulin injections, and paying bills. A lawyer may have to be especially creative in obtaining b-roll from places great distances away. Consider enlisting friends or family in faraway places to assist, even if it means sending them a recording device. A filmmaker need not cover up every second of their talking heads with b-roll. However, she should always be thinking “visually” and devising creative ways to infuse the final product with as many relevant emotionally evocative images as possible.

C. Test Screenings

When meticulous lawyers prepare cases, they enlist friends, family, or co-workers to proofread pleadings, weigh in on theories and themes, or serve as mock jurors. Likewise, filmmakers conduct their own “mock trials” in the form of test screenings. After the lawyer assembles the pieces of her sentencing video into a rough cut, she should conduct a test screening with a trusted audience to determine whether the movie achieves its goals. A test audience will suggest cuts, edits, or other changes to improve the quality of the final product. A lawyer must take care to finish a first draft far enough in advance of sentencing to allow ample time for screening, adjustments, and disclosure.

D. A Case Study: United States v. Sabourjian

Zal Sabourjian³⁵ was born and raised in Iran. He came to the United States in 1991 seeking asylum, having escaped intense religious persecution in his home country. Zal was an evangelical Christian which, in Iran, is a life-threatening endeavor. He made it to Mexico, crossed the border illegally, and obtained asylum. Eventually, he legally brought his two children to America and they began to live the American dream.

In 2005, as tensions between Iran and the United States were escalating, Zal was accused of conspiring to help an undetermined number of Iranians illegally cross the U.S.-Mexico border using counterfeit visas. With the help of a dubious informant, the government painted Zal as a professional alien smuggler and created unfounded fears of terroristic intent.

Because so much bad information had been disseminated about the client in discovery and in the media, his lawyer knew it was imperative to show the judge who Zal really was and why he did what he did. Zal’s intent was not to sneak a gang of terrorists across the border, as the government insinuated. Instead, he wanted to help persecuted members of his extended Iranian family find refuge in

America, just as he had done several years earlier. In addition, because Zal’s native language was Farsi, his lawyer knew it would be difficult for Zal to express himself in the courtroom. In short, the disputed facts were damning, the empathy gap was huge, and the case was ripe for a sentencing documentary.

The three ingredients for a successful sentencing documentary were at the lawyer’s disposal. Zal’s story was unique and moving. His account of being jailed and tortured by Iranian Mullahs for his religious beliefs, his harrowing journey to freedom, and the amazing life he built for himself and his children in America were cinematic gold. There were loads of great characters to tell the story, including the client, his children, and their pastor. Zal, speaking in the quiet comfort of his home instead of a sterile and stressful courtroom, came across clear and sincere.

The movie was loaded with dynamic visuals that left no doubt in the judge’s mind about the truth of the story. The lawyer shot b-roll showing, among other things, the client hard at work as a tailor in a high-end clothing store, playing keyboard at Bible study, and worshipping in church. He and his 11-year-old daughter, already an accomplished classically trained pianist, provided a moving musical soundtrack that was integrated into the story. A paralegal working on the project located an Internet photograph of the prison in Iran where Zal was jailed for his religious beliefs. His family in Iran, who were the intended beneficiaries of Zal’s offense, sent a videotape explaining their situation and asking the judge for leniency.

In this situation, a sentencing documentary was undoubtedly the most moving and persuasive way to tell the client’s story. The judge saw, as clearly as he could, that Zal was not a professional alien smuggler; he was a master tailor working two jobs. He was a single father raising two beautiful and brilliant children. He was not an extremist; he was a man of peace and deep religious faith. He made a bad choice for the right reasons. At sentencing, the judge carefully considered the video and expressed his appreciation for the defense lawyer’s advocacy. Even the prosecutor was impressed and made favorable comments. In the end, the client received probation.

IV. Conclusion

It is no secret that well-crafted movies have enormous power not just to entertain, but to inform and persuade. Adapting this medium for use in court proceedings is gaining momentum as it becomes easier and less expensive for attorneys to produce

their own professional-looking product. To be effective, the lawyer must tell a unique story using connective characters and powerful visuals. When done properly and in the right case, an emotionally charged sentencing documentary can be the most effective way to forge the bonds of empathy and truly make the sentencing judge suffer.

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Notes

1. See the Honorable John Kane, United States District Court, D. Colo., *Remarks for CJA Session*, October 3, 2008. Judge Kane’s charge for all criminal defense lawyers is as follows: “Your job in the sentencing process, as I see it, is to thwart the powerful convenience that encourages a laconic adherence to a thoughtless and passionless process.” *Id.* at 7.

2. Even in such cases, time or budget constraints may make the production of a sentencing video implausible. However, even simply including *still photos* in a sentencing memorandum can add layers of emotional depth to a sentencing story.

3. This article cites liberally to screenwriting and filmmaking sources, as well as examples from well-known movies. This is because lawyers are storytellers, and the elements of a persuasive sentencing documentary closely mirror those of well-made commercial documentary and feature films.

4. *E.g.*, ROBERT MCKEE, *STORY: SUBSTANCE, STRUCTURE, STYLE, AND THE PRINCIPLES OF SCREENWRITING* 25 (1997) (“[A]ll writers must come to understand the relationship of story to life: *Story is metaphor for life.*”).

5. *E.g.*, TERENCE F. MACCARTHY, *ON CROSS-EXAMINATION* 4-5 (2007) (in cross-examination, lawyers must “tell a story,” as it is the “most persuasive technique known”); LISA L. DECARO & LEONARD MATHEO, *THE LAWYER’S WINNING EDGE: EXCEPTIONAL COURTROOM PERFORMANCE* 75-77 (2004) (“A story transcends a basic fact pattern ... and lets the listener feel emotionally involved.”).

6. Lawyers are increasingly employing visual persuasion techniques in various stages of legal proceedings. For examples and other excellent resources, visit the New York Law School’s “Visual Persuasion Project” online at <http://www.visualpersuasionproject.com>.

7. This medium may also help control costs. In some cases, witnesses often reside far outside the jurisdiction of prosecution. While it may be costly or impractical to bring witnesses to court to address the judge at sentencing, it may be far more feasible for a lawyer, investigator, or paralegal to arrange for a witness’s statement to be videotaped.

8. This article focuses on the production of moving pictures for use at sentenc-

ing only, where wide-open rules for presenting mitigation materials make them a natural fit. That is not to say moving pictures have no place at other stages of the proceedings. A lawyer is limited only by his imagination, his good judgment, and the rules of evidence.

9. FED. R. CRIM. P. 32(i)(4) (emphasis added).

10. 18 U.S.C. § 3661 (emphasis added).

11. Many states have similar wide-open sentencing rules that mirror the federal system. For example, the Arizona Rules of Criminal Procedure require a court to conduct a sentencing hearing. ARIZ. R. CRIM. P. 26.7(a). The rule further allows "any party [to] introduce any reliable, relevant evidence, including hearsay, in order to show aggravating or mitigating circumstances, to show why sentence should not be imposed, or to correct or amplify the pre-sentence [or other] reports." ARIZ. R. CRIM. P. 26.7(b).

12. FED. R. EVID. 1101(d)(3). This may also be the case in many state courts. For example, in Arizona, judges are not required to follow any rules of evidence in mitigation and aggravation hearings. See, e.g., *State v. Donahoe*, 118 Ariz. 37, 574 P.2d 830 (Ariz. App. 1977).

13. E.g., *United States v. Littlesun*, 444 F.3d 1196 (9th Cir. 2006) (right to confront not generally applicable at sentencing hearing); *State v. McGill*, 213 Ariz. 147, 140 P.3d 930 (Ariz. 2006).

14. E.g., *United States v. Giltner*, 889 F.3d 1004 (11th Cir. 1989). Note, however, that these requirements are usually imposed as minimal due process protections for the defendant.

15. One must never use the editing process to portray statements out of context or to otherwise abuse the truth. Keep in mind, especially when filming the client, that a prosecutor could request and likely receive an order for disclosure of all raw footage.

16. This is not to say that music does not have an important place in the world of sentencing videos. Music can enhance the emotional content of the movie and help tell the client's story. The best scenario for music is when it is organic (i.e., "integrated") to the story. For example, if the client or a family member is a musician, it might serve the story to showcase that person's talents.

17. MCKEE, *supra* note 4, at 20.

18. Of course, there are exceptions to every rule. Sometimes, a moving picture can turn the ordinary into the extraordinary. In one example, a lawyer argued for mitigation based on the relatively common claim that the client was a single parent, and the children would suffer in her absence. To make matters worse, the client had those same kids in the car with her when she was caught transporting narcotics across the U.S.-Mexico border. The prosecution argued

that she was using the kids as cover. The client responded that given her status as single mom, she had no choice but to have her kids with her that day. Showing the client engaged in the process of being an amazing mom and seeing this family's daily circumstances brought a routine and very difficult mitigation argument to life.

19. RICHARD WALTER, STORY: SCREENWRITING: THE ART, CRAFT AND BUSINESS OF FILM AND TELEVISION WRITING 112-114 (1988) (coining the term "integration" to describe the fundamental process of synchronizing all elements of a film).

20. What lawyers refer to as "theory" and "theme," author and teacher Robert McKee calls the "controlling idea." He describes this as "the purest form of a story's meaning, the how and why of change, the vision of life the audience members carry away into their lives." MCKEE, *supra* note 4, at 114-17. For example, in the movie *Dirty Harry*, the controlling idea is "[j]ustice triumphs because the protagonist is more violent than the criminals." *Id.* at 116. In *Groundhog Day*, the controlling idea is "happiness fills our lives when we learn to love unconditionally." *Id.* at 117.

21. For example, the film *Rocky* is about a down-and-out fighter who is given a chance to finally make something of himself, but only by overcoming seemingly impossible obstacles. A major subplot involves Rocky's romance with Adrian, an introverted pet store worker living with her tyrannical brother Paulie. Here too, Rocky battles against overwhelming odds to win Adrian's heart. The fight against Apollo Creed and the fight to win the girl are therefore "integrated."

22. Movies have main characters and supporting characters. The main character is typically referred to as the protagonist. McKee defines the protagonist as a character with a conscious desire, who has the capacity to convincingly pursue the object of his desire, and who has a realistic chance of attaining that desire. MCKEE, *supra* note 4, at 138-39. Good stories have antagonists as well, which are "forces that oppose the character's will and desire." *Id.* at 317-318. Characters are not always necessarily people. Sometimes defendants battle "antagonistic forces" in the form of interpersonal conflicts including drug addiction, post-traumatic stress disorder, and abuse. The best stories involve the protagonist battling against and ultimately defeating these antagonist forces. An underdog client who overcomes a lifelong meth addiction, for example, is the most compelling character in his own life story.

23. In movies, "[a]ll other characters are in the story first and foremost because of the relationship they strike to the protagonist and the way each helps to delineate the

dimensions of the protagonist's complex nature." *Id.* at 379.

24. MCKEE, *supra* note 4, at 141.

25. See KARL IGLÉSÍAS, WRITING FOR EMOTIONAL IMPACT 61-76 (2005) (setting forth techniques for "instant character appeal and empathy").

26. Lest one think Dr. Lecter is an isolated example, consider the empathetic traits of these other troubled, yet lovable characters: Melvin Udall (Jack Nicholson) in *As Good as It Gets*, Tony Soprano (James Gandolfini) in *The Sopranos*, and Ratso Rizzo (Dustin Hoffman) in *Midnight Cowboy*, to name a few.

27. GENEVIEVE JOLLIFFE & ANDREW ZINNES, THE DOCUMENTARY FILMMAKERS HANDBOOK 497 (1st ed. 2006).

28. E.g., SYD FIELD, SCREENPLAY: THE FOUNDATIONS OF SCREENWRITING 41 (1994) ("ACTION IS CHARACTER — what a person does is what he is, not what he says."); WALTER, *supra* note 19, at 87. ("In movies, as in life, actions speak louder — and more eloquently, more articulately — than words.")

29. See, e.g., 18 U.S.C. § 3553(a)(1) (listing the "history and characteristics" of the accused as a sentencing factor).

30. FIELD, *supra* note 28, at 8.

31. *Id.*

32. WALTER, *supra* note 19, at 115.

33. *Id.* at 104 ("What drama is NOT is a bunch of characters sitting around talking, twiddling their thumbs, doing nothing.")

34. Computer software allows an editor to easily blend multiple sounds and images to accomplish seamless cutaways. Everyone with a computer has basic editing software included, either Windows Moviemaker or iMovie. Each program is simple to use, will work for basic sentencing videos, and will allow the user to develop skills that will carry forward to more advanced programs.

35. This example is based on a real case, but the defendant's name has been changed. ■

About the Author

Doug Passon has been practicing criminal defense for 18 years in Phoenix, Ariz. He is also an award-winning filmmaker and President of D Major Films, which specializes in the production of powerful and persuasive moving pictures for use in criminal and civil cases.



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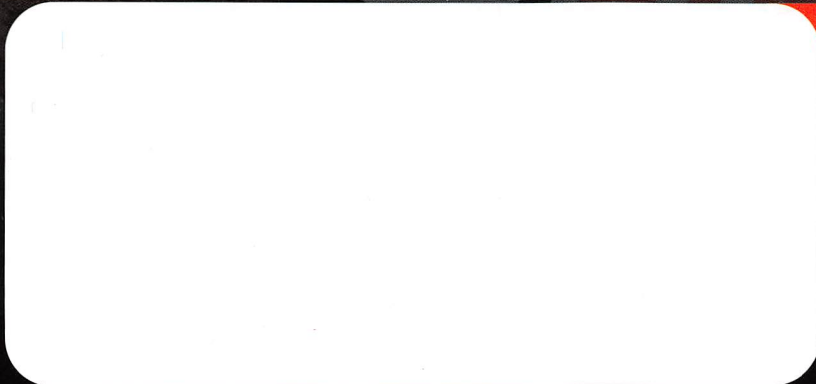
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Winning at Sentencing With Theories, Themes, and the Creative Demonstration of Truth

Effective advocates understand that emotion-based storytelling is the key to persuasion at every stage of a legal proceeding. Unfortunately, no matter how talented defense attorneys are, most clients are going to be sentenced for something. Usually, the person determining the client's fate is a judge who has seen and heard it all. In some jurisdictions, and in death penalty cases, the deciders are jurors who have just been exposed to a parade of "horribles" during trial. No matter the audience, the defense team's job is to craft a true and moving story and tell it well. This is the way the defense wins at sentencing.

This article makes the case that before forging ahead with any contested sentencing, lawyers must first articulate the *theory* of their sentencing argument. Only then will their sentencing stories and the tools they need to tell them begin to take shape. After laying this solid story foundation, lawyers must then do the hard creative work of fleshing out the dominant *themes* of their story that serve to illuminate the beating emotional heart of the theory, or what this article refers to as the *truth* of the case.

This process may feel a little awkward at first. By and large, lawyers do not take deep dives into story technique in law school. If lawyers have been exposed to the concepts of theory and theme, it has typically been in the context of trial advocacy, not sentencing advocacy.

What Is a Theory?

In the sentencing context, the theory is a short, written road map of the client's *story* of mitigation, rehabilitation, and/or reduced culpability.¹ A theory generally consists of a few sentences or a paragraph that sets forth the *factual, emotional, and legal reasons* the judge (or jury) should do what the defense is asking. Good theories also include a sentence or two that *confront and resolve any bad facts* that could tank counsel's argument.²

It is important to note that the theory the defense attorney constructs is mostly for the attorney's own use. It is the foundational blueprint for building a solid story grounded in facts, law, and most importantly, *emotional truth*. Lawyers may like what they have written enough to use it later in a sentencing memo or oral argument, but they certainly do not have to. This is about identifying the best, most persuasive sentencing arguments, beginning to look at those arguments in story form, and creating a master plan for building a powerful and persuasive sentencing presentation.

What Do We Mean by 'Emotional Reasons' or 'Emotional Truth'?

As legal professionals, lawyers are taught to build arguments around the facts and the law. While both are

BY DOUG PASSON

obviously important, well-crafted legal arguments fail when they are devoid of *emotion*. But what does this really mean?

Emotion does *not* mean playing on sympathies. People do not connect with those they simply feel sorry for. This is not about sympathy, it is about *empathy*. Empathy is connection. Without connection, people are not motivated into action. And the way people connect is through *shared experiences and shared values*. In that way, the story the defense lawyer tells must be a vessel for truth. The story must transcend factual truth and tap into the *deeper truths of universal human experience*. These are the things people know in their hearts to be true; things woven into the very fabric of their being. The very best stories subtly invoke these truths to build the bridge of empathy and create *absolute understanding*.

Because law schools do not teach story technique, attorneys have to find that wisdom from other sources. Attorneys should look outside the law for story guidance. They should read books, see movies, go to plays, and watch television. Study the craft! Defense lawyers should learn from those story professionals who have moved them in ways they never thought possible. The good news is defense attorneys can now count an afternoon at the movies as professional development! Before moving into a case study, let's explore the idea of theory in more depth by looking at some great classic movies.

Example of Theory and Emotional Truth in Movies

What lawyers refer to as “theory,” screenwriters and filmmakers may call “plot.” However, what distinguishes a good movie from a great movie is the deeper meaning behind the plot, something often referred to in cinema as the “controlling idea.”³ On the surface, Steven Spielberg’s first mega-hit, *Jaws*, is the story of three men who band together and put their lives on the line to hunt and kill the mammoth, merciless terror of Amity town beach. Those are the facts, which are no doubt crucial to the argument and must be included in the theory. But what is the real argument in *Jaws*? What *moves* viewers and elevates this story to something more than just a scary-as-hell thrill ride? The story brings a certain satisfaction when it confirms something everyone hopes to

be the truth of life: With cooperation, courage, and cleverness humans can triumph over extreme adversity. It is not an argument viewers consciously digest when they watch. Instead, people watching the movie feel it in their bones to be right, and it inspires them. That is why people cheer when the heroes, flawed as they may be, vanquish the beast and save the town.

In *Rocky*, a down and out fighter is given a chance to compete for the heavyweight championship of the world. No one, including Rocky himself, believed he could win. He was a two-bit palooka being set up for an epic pummeling. The movie is also a beautiful love story between Rocky and Adrian. One does not need to look hard to find truth in this movie. One truth is that with hard work and belief in oneself, a person can achieve things he or she never dreamed possible. Another truth is that love motivates you to be a better person. It is no accident that in the midst of the chaos at the end of the fight, Rocky is singularly focused on having Adrian by his side. Perhaps a third truth of *Rocky*, one that defense lawyers know all too well, is that “winning” doesn’t always mean coming in first. If lawyers give their all and leave every ounce of blood and sweat on the canvas, they will walk out of the ring with their heads held high.

In one final example, the movie *Tootsie* stars the incomparable Dustin Hoffman as Michael Dorsey, a struggling actor who disguises himself as a woman to get work. Sydney Pollack, the late great director of this film, turned the project down several times before finally coming on board. He thought the story, as it existed at the time, was nothing more than a one-trick gimmick. He understood that great stories are always about something bigger. This is the something called *truth*.⁴ Mr. Pollack would call it the ever-essential “spine” of the story.

Pollack explained that after spending an intensive week with Hoffman and the screenwriter Larry Gelbart, the truth of the movie revealed itself. He found his inspiration in this line of dialogue: “Michael, being a woman has made you weird.” Pollack said to the writer, “If that line was ‘Michael, being a woman has made a man out of you,’ then we have a movie!”⁵ The truth of *Tootsie* is an expression of the most fundamental life truth as it pertains to the work of lawyers: In order to truly understand the suffering of others, one must walk a mile in their shoes. Once lawyers can see “the other” as themselves, they can no longer

look away; they are transformed and ideally situated to do what is right. In other words, it is all about *empathy*.

Example of Theory in a Federal Fraud Case

Each of these movies most likely began as a handful of sentences describing the skeleton of the story, an abbreviated plot. In the film world, writers would call this a “synopsis” or possibly a “treatment.” Sound familiar? Lawyers use the same process when they sketch out their theory! Consider a real-life example of a well-crafted sentencing theory in a criminal case.

Sally Burrows⁶ was a 45-year-old woman who had never been in trouble a day in her life. She and her husband Damien Thorn were charged with multiple counts of fraud concerning an ongoing real estate scam. The bad facts that would certainly dominate the government’s argument were that Sally was a knowing participant, deeply involved in a scheme that resulted in losses of over \$600,000. It was not a faceless institution that was stuck holding the bag, but rather many unsuspecting investors, some of whom were financially devastated as a result.

The lawyer’s daunting task was to help the judge truly empathize with Sally by telling the true story of her fall from grace and subsequent redemption. Because the lawyer had already done the hard work of learning the fine details of his client’s life story, he was able to craft the following theory, which informed every aspect of his sentencing presentation, which included, in this case, a sentencing video:⁷

Theory: Once a concert cellist at the peak of her career, Sally Burrows came unhinged after years of intimidation, isolation, and manipulation at the hands of her husband Damien Thorn, a sociopath and master con artist. After Thorn squandered her entire inheritance, Sally eventually turned to fraud to satisfy the insatiable demands of the man she believed to be “the great love of her life.” She stayed in this abusive relationship for so many years because of her attachment to her de facto children Charlie and Matthew, the fear of what would happen if she left, and her hope and faith in “happily

ever after.” Her arrest has been a blessing, as it has allowed Ms. Burrows to free herself from Damien’s grip, reconnect with lost family and friends who truly love her, and rebuild her shattered self.

Here are four sentences that comprise a concise, but fully formed foundation of a story. Moreover, because everyone secretly craves a happy ending, the story also has a powerful true tale of remorse and redemption.

Notice that the theory also includes built-in responses to bad facts, i.e., those nasty little landmines that, if not disarmed, can discredit the truth of the story. Why was Ms. Burrows so deeply involved in the scheme? Because Thorn pressured and manipulated her. Why didn’t she just leave him instead of staying in this dysfunctional marriage for 15 years? She could not bear to abandon the children she loved, and he brainwashed her to believe she needed his protection. Moreover, even if she wanted to leave, after years of keeping her isolated from family and friends, she had nowhere to go. Finally, growing up in a family where marriage

meant “forever,” she desperately wanted to believe that everything would work out and she could have the perfect life of which she always dreamed.

Finally, the truth of the case starts to emerge. The defense has some good facts to seize upon and it has anticipated strong rebuttals to the bad ones. Now that the defense has taken great care to lay this solid foundation, it is time to begin building it out with powerful *themes*.

What Is a Theme?

Put simply, theme is the way the defense *creatively* demonstrates the emotional truth of the story. Themes are felt in the gut. They stick with people even after the words have been spoken. They play on an incessant loop in the listener’s head.

Finding the theme is about more than just identifying what the case or story is about. For example, simply saying the case is about “abuse” or “mental illness” or “addiction” does not mean the defense has come up with a theme. Those are not themes. Those are ideas. *The theme is what the defense lawyer is saying about those ideas.* For example, “love” is not a

theme. Instead, “money cannot buy love” and “she would have done anything for love” are themes.

The quintessential example of genius use of theme in the courtroom comes courtesy of the O.J. Simpson trial. Twenty years later, everyone still remembers Johnny Cochran’s brilliant turn of phrase.

Let’s take a closer look at the O.J. case to show how theory and theme interact. The nutshell *theory* of the defense was that O.J. was framed by lying, racist cops. Alan Dershowitz expressed the emotional truth of that theory, that “when you find a certain amount of lying and evidence planting on the other side, you can’t trust any of the evidence, so the mountain [of evidence] wasn’t enough to convict if a few of the hills and valleys were corrupted.”⁸

Dr. Henry Lee drove this point home during his testimony with this wonderfully icky, emotionally resonant theme: “If you find a cockroach in a bowl of spaghetti, you don’t look for another cockroach before you throw out the whole bowl.” After being handed the gift of the glove debacle, Cochran had a perfect theme that not only highlighted the bungled courtroom demonstration, but hammered the main point that something was rotten in LA. Love it or hate it, “If it doesn’t fit, you must acquit” is a home run theme that will echo through the ages.

Not everyone has Johnnie’s gift for words. However, one need look no further than some popular films for great examples of theme. Let’s go back to *Jaws*. What was the most memorable piece of dialogue in that film? One perfectly pithy line, “You’re gonna need a bigger boat,” encapsulates the entire movie. That’s not just great dialogue — it’s a theme.

Themes can be found at the movies without even going inside the theater. Just take a stroll next to the box office and read the taglines on the posters. Each one provides fodder for a theme. The movie *Platoon* tells the story of an idealistic young man from a privileged background who leaves college to enlist to fight in Vietnam. The movie poster rockets viewers to the heart of the story when it says, “The first casualty of war is innocence.” *Erin Brockovich* draws its audience in by the promise of a story of one woman who “brought a small town to its feet and a company to its knees.” One of the all-time-great taglines is found on the poster for the quirky jour-

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YOU NEVER STAND ALONE

ney of *The Royal Tenenbaums*, which communicates not only the plot, but the tone of the story — “Family isn’t a word. It’s a sentence.”

Creative Themes Go Beyond Clever Word Play

Contrary to what lawyers are programmed to believe in law school, words are not the be all and end all of advocacy. Remember, themes are the *creative* demonstration of truth. That means there is no limit to where theme can live. A theme can be a song, an object, or a symbol. A theme can be a painting, a poem, or a sound. Lawyers are in the business of “story,” and all great storytellers in every medium use theme in various ways to amplify their truth. Themes are the lifeblood of story! So let’s go back to the movies and learn from some of the masters.

The movie *Harold & Maude* is a great example of using music to express theme. This movie is about a young man obsessed with death who falls in love with a much older woman who lives her life to the fullest. The truth this movie tells is that happiness comes from embracing the highs and lows of life and letting go of fear. The entire soundtrack was brilliantly composed by Cat Stevens/Yusuf Islam. However, one song in particular made repeated appearances in furtherance of the truth of that tale: *If You Want to Sing Out, Sing Out*.¹⁰

Great stories, particularly movies, use *visual imagery* to express theme. Take, for example, the film *Forest Gump*. The most memorable line in this movie is uttered by Forest’s mother, played by Sally Field: “Life is like a box of chocolates. You never know what you’re gonna get.” Again, not just “sweet” dialogue, but theme. This movie is a meditation on the idea of destiny. It explores a universal life question, the truth of which remains elusive. Are the twists and turns of life preordained, or is it just a string of random events? A visual manifestation of this theme opens and closes the movie — the simple, elegant image of a feather floating on the breeze.

Example of Theme in a Federal Fraud Case

Let’s go back to client Sally Burrows. Using the reliable rhetorical devices of alliteration and triads, the defense team isolated the following ideas: faith, fear, and freedom. Remember, however, ideas are not themes. Themes convey the truth

underlying those ideas. What did the defense want to say about those three wonderful F-words?

What is the universal truth they tapped into when they invoked the word “faith”? In essence, the truth is that sometimes people *want* to believe something so badly, it becomes real to them. The defendant desperately wanted to believe that Damien was really her prince charming. She *needed* to be right — for herself and her family. She was raised to remain faithful to her wedding vows. Divorce was not an option. Faith very much kept her in this terrible situation. Therefore, the theme “blinded by faith” became the thematic expression of this truth.

How about “fear”? Damien was controlling and abusive. He manufactured fake external fears (such as being the target of a mafia hit man) to keep Sally isolated and to convince her that she needed to stay with him and that only he could protect her from harm. Can everyone agree that sometimes fear changes people or makes them do things they would otherwise never do? Or, put in a more “thematic” way, “fear is a thief in the night that robs you of your very soul.” Another truth about fear is that it can be debilitating. We know the right thing to do, but fear can keep us from doing it. Thus, “frozen with fear” became another easy theme with nice alliteration and a sonorous ring of truth.

Finally, the focus is on “freedom.” The truth? From extreme adversity springs the hope and promise of positive change. Hasn’t everyone been through tests and trials and come out the other side a better person? This is relevant to recidivism, especially in a fraud case where defendants are often viewed as unrepentant serial predators. In this case, even though Sally was staring down a prison sentence, she felt truly free for the first time in years. Free to live her life out from under the control of an abusive spouse. Free to reconnect with the good influences in her life that Damien worked so hard to strip away. Free to return to her authentic self. A simple, familiar theme works here: “What doesn’t kill us makes us stronger.”

Faith, fear and freedom are well and good, but in this case the defense team had an even better creative demonstration of truth at its disposal: *a cello*. Before meeting Thorn, Sally earned a master’s degree in cello performance, played for a prestigious symphony, and became a gifted teacher who worked with children.

Thorn forced her to leave that life behind. He even pawned her instrument for pennies on the dollar. It had been years since she played a note. All of the music and light had run out of her life. While on release awaiting sentencing, she rented a cello and began to play again. She had lost so much skill over the years, but she was determined to get it back. An entire universe of story lived in the wood and wires of her instrument. That cello became the embodiment of everything the defense team needed the judge to know about this case.

This was a case in which the defense lawyer decided a sentencing video would be the most powerful way to tell the story. However, even if no video had been made in this case, there is no doubt the defense lawyer would have found a way to incorporate the cello theme into his sentencing presentation. For example, he could have put a picture of Sally playing cello in his sentencing memo. He could have played a recording of one of her performances during his sentencing argument. He could have brought the cello into court for sentencing. Not only does it encapsulate the entire story arc, it gives the lawyer an opportunity to forge



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bonds of empathy by highlighting her work ethic, intellect, and resilience.¹¹

Remember, the defense attorney's goal is to *creatively* demonstrate the *truth* of the case. Use good judgment. Do not use gimmicks or melodrama. Defense attorneys should stretch themselves beyond their normal comfort levels. It works.

At What Point in the Process Does Counsel Formulate Theories and Themes?

Any good lawyer knows that mitigation work should begin at the beginning of the case. This is not defeatist; this is just the reality of the criminal justice system. Thus, the defense team should be thinking about sentencing theories and themes from the outset. More important, the defense team should be doing the hard work of learning the client's history, gathering relevant records, talking to witnesses, and finding every possible way in to a persuasive sentencing narrative. Every client has a story to tell. It is the defense lawyer's job to find it and tell it well.

That said, defense lawyers should not lock themselves in too early. As they get deeper into the story develop-

ment process, theory will come into clearer focus and more powerful themes will reveal themselves. Defense lawyers must allow for the possibility that the story may take unexpected turns as they continue working the case up for sentencing. The defense must be prepared to totally abandon certain theories and themes if they are just not working. In showbiz, they call this "killing your darlings," and it is vital to the creative process. Hopefully, defense counsel has a great team or at least some tolerant friends and family members who can serve as honest sounding boards and help uncover the emotional truth of the case.

Conclusion

The law and the facts will only take counsel so far. The defense attorney's job is to employ story to create emotional connections. Theory and theme are the heart and bones of this process. Sympathy-evoking buzzwords like "homelessness" or "abusive upbringing" do very little to advance the client's cause. Those concepts need to be expanded and shaped into rock-solid theories and illuminated by colorful and creative and emotionally res-

onant themes. By taking the audience on this story journey, the defense compels them to walk in the shoes of "the other" and feel the truth of their struggle. If done correctly, everyone in this process will connect with the client in ways defense counsel never believed possible, and justice will follow.

Notes

1. See Ira Mickenberg, *Developing a Sentencing Theory and a Persuasive Storyline for Sentencing Advocacy*, available at https://www.fd.org/pdf_lib/SAWII2010/SAWII2010_Persuasive_Theories.pdf.

2. *Id.*

3. See ROBERT MCKEE, *STORY: SUBSTANCE, STRUCTURE, STYLE, AND THE PRINCIPLES OF SCREENWRITING* 114-17 (1997).

4 This is yet another concept shamelessly appropriated from the screenwriting world. See *id.* at 25 ("[A]ll writers must come to understand the relationship of story to life: *Story is metaphor for life.*").

5. Austin Film Festival's "On Story" Podcast, July 29, 2014.

6. While the example is true, the names have been changed.

7. In special cases a short documentary film may be the best way to tell the client's story with the most impact. Doug Passon, *Using Mitigation Videos to Build the Bridge of Empathy at Sentencing*, *THE CHAMPION*, June 2014 at 14.

8. <http://www.pbs.org/wgbh/pages/frontline/oj/interviews/dershowitz.html>.

9. *Id.*

10. Here is one of several YouTube videos featuring the song and clips from the movie — <https://youtu.be/LWGxYIQudOA>.

11. See *A Recipe for Great Lawyering: Liver, Fava Beans, and a Nice Chianti*, *STORY FOR LAWYERS BLOG* (Jan. 24, 2017), <http://wp.me/p8fYhN-2y>. ■

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About the Author

Doug Passon is a criminal defense lawyer of 20 years and an award-winning documentary filmmaker. His practice focuses primarily on the production of sentencing mitigation videos for lawyers nationwide.



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U.S. NEWS

Leniency Videos Make a Showing at Criminal Sentencings

Some Lawyers Supplement Letters of Support With Mini-Documentaries; Effectiveness Is Debated

By JOE PALAZZOLO

May 29, 2014 4:32 p.m. ET

Randy Ray Rivera, formerly of Springfield, Mass., and now a resident of the Metropolitan Detention Center in Brooklyn, is the subject of a documentary film that was made for a very limited audience: the federal district judge who held Mr. Rivera's fate in his hands.

It tells the story of a young man who began dealing drugs as a teenager to support his siblings and his heroin-addict mother, who died of AIDS in 2004. The 26-minute video includes emotional interviews with Mr. Rivera's brothers and sisters, daughters and son, current and ex-girlfriends and a social worker, as well as with Mr. Rivera himself, in white-and-gray prison garb.

"You put yourself at risk, because what are you going to do? Starve? I'm not gonna let..." he says, his voice trailing off. And then: "Never."

Such films, while rare, have caught on in some federal public defenders' offices. Now, some private lawyers and investigators are attempting to unlock the potential of video in the sentencing phase of criminal cases, supplementing the memorandum and letters of support that are typically used to plead for leniency.

"The sentences are almost always better than they would otherwise be," said Doug Passon, a veteran assistant federal public defender in Arizona who is considered by his peers to be a pioneer of so-called sentencing-mitigation videos. For the past five years, he has held a sentencing film festival at an annual training conference for federal public defenders.

Mr. Rivera pleaded guilty last September to conspiring to distribute crack-cocaine. It was the latest of more than a dozen drug-related convictions on his record since 1998; federal prosecutors sought a sentence of 30 years to life in prison, the guideline range for an offender with Mr. Rivera's criminal history.

Launch DJ Hub | the federal district court in Vermont, gave Mr. Rivera 12 years in prison, after viewing the video Mr. Rivera's legal team put together. It captures the rundown buildings in Springfield that Mr. Rivera's family occupied, sometimes as squatters. At one point, Mr. Rivera's teenage daughter, through tears, calls him "one of the best dads ever."

Judge Sessions, speaking generally about sentencing videos, said, "When you have a video of either a defendant's life or a victim's life, it provides context for that life."

But he said videos weren't a substitute for a good legal argument in a sentencing memorandum. "They are supplementary," he said.

Tristram J. Coffin, the U.S. attorney in Vermont, said he believed the videos are of limited use to judges, offering only an "edited version of the defendant's life."

Prosecutors and victims have less of an ability to offer a counternarrative in video form, he said. In the case of a convicted drug dealer, for instance, "it's hard to represent the tremendous damage his illegal activities caused to many communities and individuals," Mr. Coffin said.

Proponents say the videos fall within the scope of a federal rule that allows people convicted of a crime to "speak or present any information to mitigate the sentence" to the courts. But some courts have rejected sentencing videos, after prosecutors protested they weren't given an opportunity to question the witnesses who appeared in the videos, investigators said.

While investigators and lawyers say such videos are used in a small fraction of the tens of thousands of federal cases that end in a criminal sentence each year, the word appears to be slowly spreading.

Susan Randall, a former documentary filmmaker who now works as a private investigator in Vermont, said she has created more than 20 sentencing videos for a range of white-collar and drug defendants, including Mr. Rivera.

Another of her subjects, Robert Rosploch, was sentenced last year to six years in prison after he pleaded guilty to conspiring to distribute cocaine in Vermont. Federal sentencing guidelines called for 14 to 17½ years in prison.

"There are definitely cases where a sentencing memo in black and white doesn't cut it," Ms. Randall said.

Katrina Daniel, a former television news reporter who covered crime, started her own production company in 2012 and has made about 10 sentencing videos, charging anywhere from \$5,000 to \$20,000.

Some are simply interviews with the defendants, while others draw on family, friends, co-workers and others. Ms. Daniel said she tries to convey the defendant's remorse and acceptance of responsibility.

Mr. Passon said he got the idea for sentencing videos from an attorney he clerked for in 1995, while he was law student at Washington University in St. Louis. They were representing a man charged with a drug crime whose wife was dying of lupus, and the defendant was her sole caretaker.

"We were trying to show how desperately he was needed at home," Mr. Passon said. They went to the client's home with a clunky, tape-fed video camera and recorded the man as he cared for his wife. "It was very, very powerful," said Mr. Passon.

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