CREATING A PERSUASIVE THEORY OF THE CASE

2017 Wisconsin Public Defender

Trial Skills Academy

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You Are Warriors

Aaron Hernandez, My Clients and Me

People v. Jonathon D.

THERE IS NO ANALOGY

- Why?
  - It is not necessarily the truth
  - Sometimes it can’t include the truth
  - Client confidentiality
  - It evolves
  - It must to be responsive to the Prosecution’s evidence
  - It should be responsive to the story that plays out in the courtroom

DEFINITION

- An short articulation in story form of why the jury should do what you tell them to do that is consistent with your legal defense, the facts, and the dominant emotion of your case.

PURPOSE

- Necessary for client
- Necessary for case
- Necessary for you

STEPS TO DEVELOP THE THEORY

I. Preparation

II. Legal Defenses

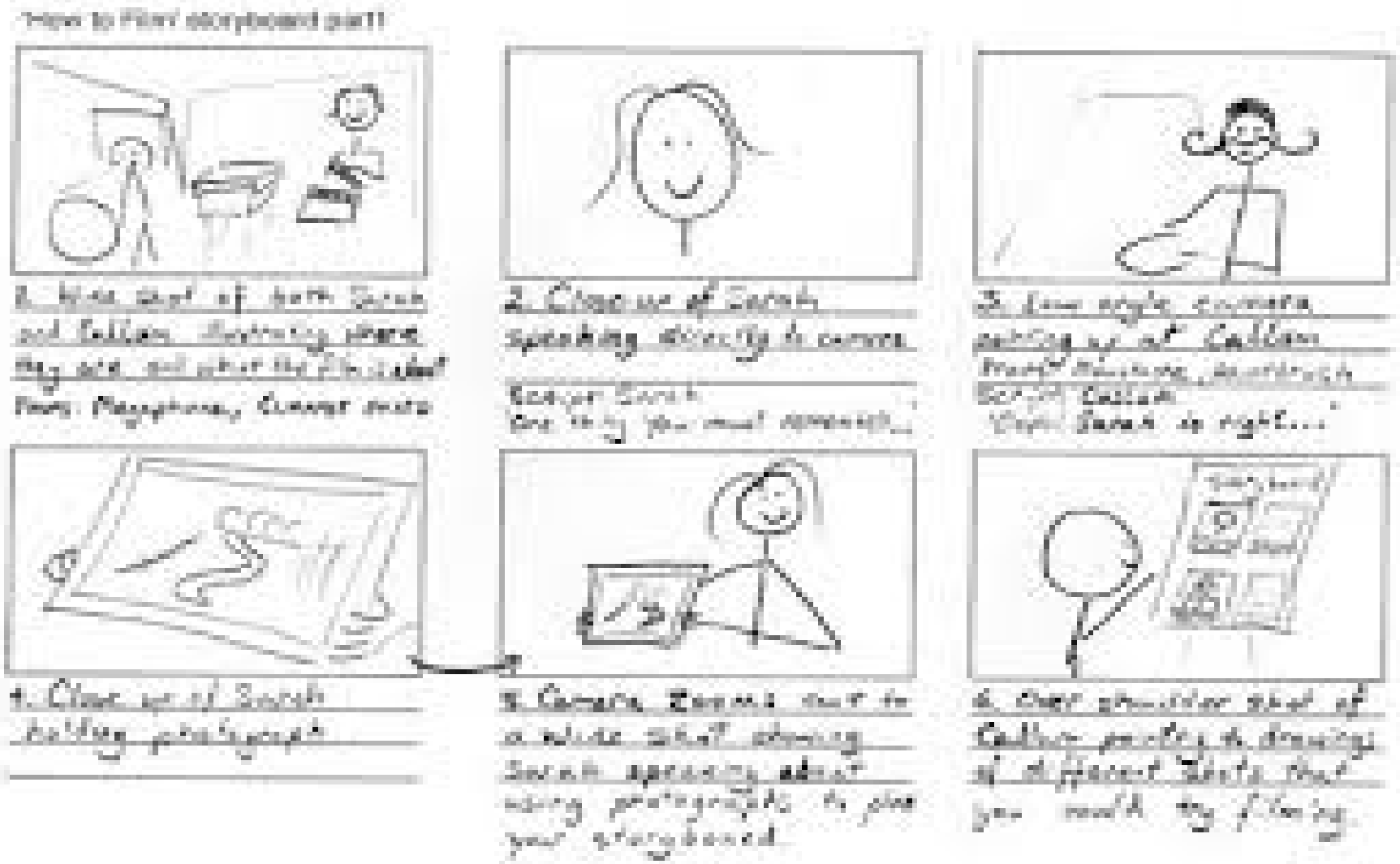
- It never happened (mistake/set-up)
- It happened but it wasn't me (mis-ID/alibi/set-up)
- It happened but it wasn't a crime (justification/accident)
- It happened but it wasn't this crime (lesser)
- It happened, I did it, it was the crime charged, but I am not responsible (insanity)
- It happened, but so what (nullification)

III. Brainstorming

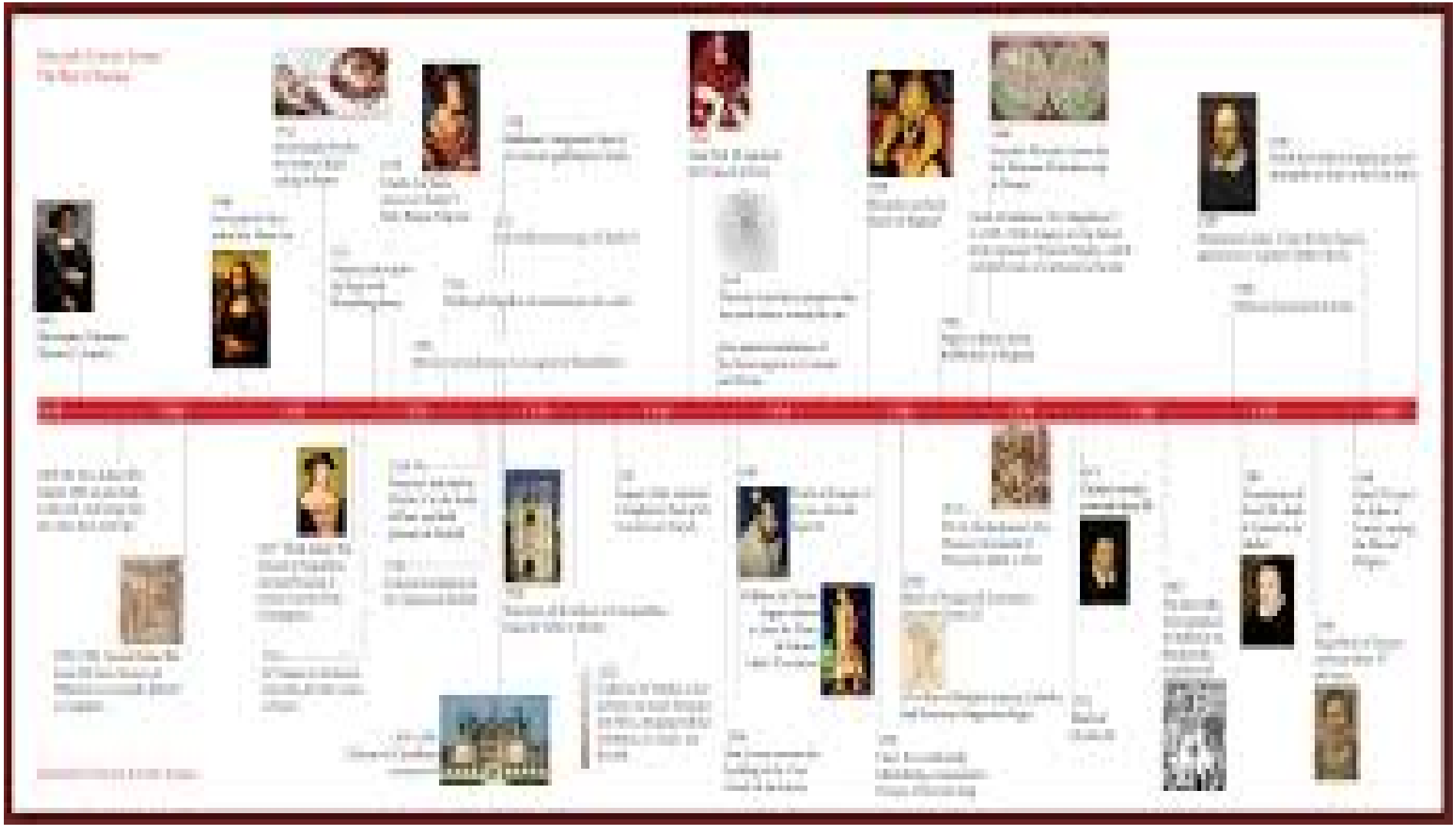
Uncritically Gather the Facts

IDEAS

Storyboarding



Timeline



Who is the Witness

IV. Identify Your Facts Beyond Change

- Definition: A fact that the jury will believe to be true no matter what we (us, the state, the judge) do or say
  - The theory must accommodate these facts
  - These facts can create, limit, and/or and extinguish a potential theory of the case

V. The Dominant Emotion

VI. Develop a Vocabulary

- Good words
- Bad words
- Repetition/Incorporation
- Create labels

VII. The BIG Jury Question(s)

VIII. Themes

- Words, phrases or images that capture and highlight the theory
  - Should be memorable
  - Should allow the listener to conjure images
  - Should trigger an emotional response
  - Refer to universal truths
    - *"If the story is not about the hearer he will not listen." - John Steinbeck*

Applying Themes to our Cases

- Develop themes that speak to the emotion, universal truths, and visual images of your case
- Use them in voir dire, opening, cross, closing
- Repetition is powerful
- Vocabulary is the key

Write Your Theory

- Identify the best and worst fact(s) in your case
- Start with a headline – it can help you begin
- Draft a few short persuasive sentences in story form
- Don’t forget the emotion
- Deploy your vocabulary

People v. Jonathon D.

- Preparation

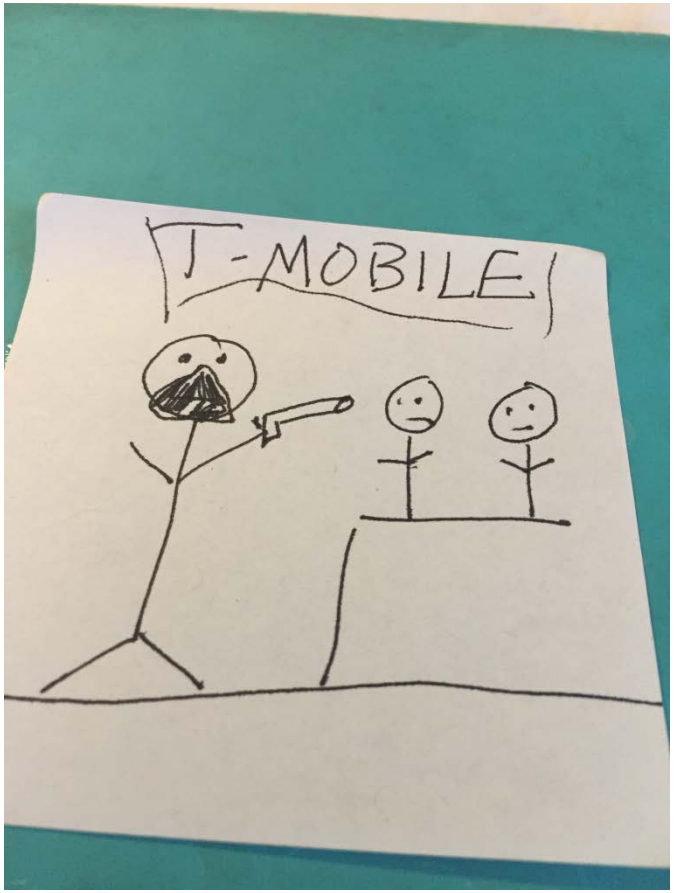
- Legal Defenses
  - Mis-identification
  - Any others?

III. Brainstorming

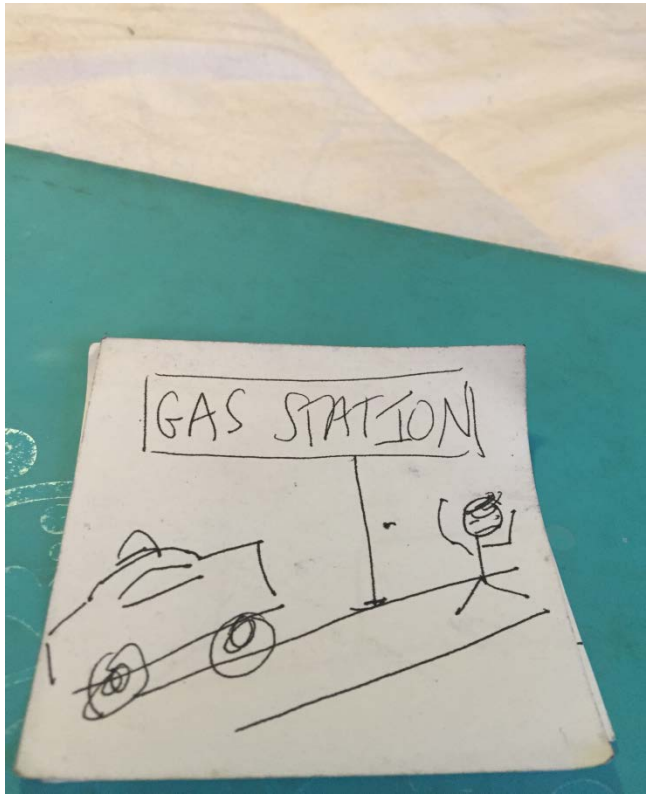
- Robbery with a 45 caliber firearm at a cell phone store
- Robber was described as Hispanic, 6 feet, wearing a mask
- He demanded money and a debit card from two men working in the store
- Took $2100 total - only $1600 vouchered
- Told them to put property in a A/X bag
- Said “Don’t follow me or I’ll shoot you”
- PO observed JD a few blocks away and followed him slowly
- PO observe A/X bag containing gun, money, property, other clothes, black ski mask**
- JD runs from police
- Arrested a block and a half away from where first observed.
- Went back and recover bag (Officer who does this is unavailable)**
- Gun has two special attachments – looks professional.
- One CW brought to scene – no ID**
- Du-rag and hat thrown in the A/X bag on scene.
- FST DNA reveals a 3 or more person mixture on the weapon
- **5.21 billion times** more probable that JD is in it than that he is not in the mixture
- Didn’t test anything else – money, mask, clothes, etc.

STORYBOARDING

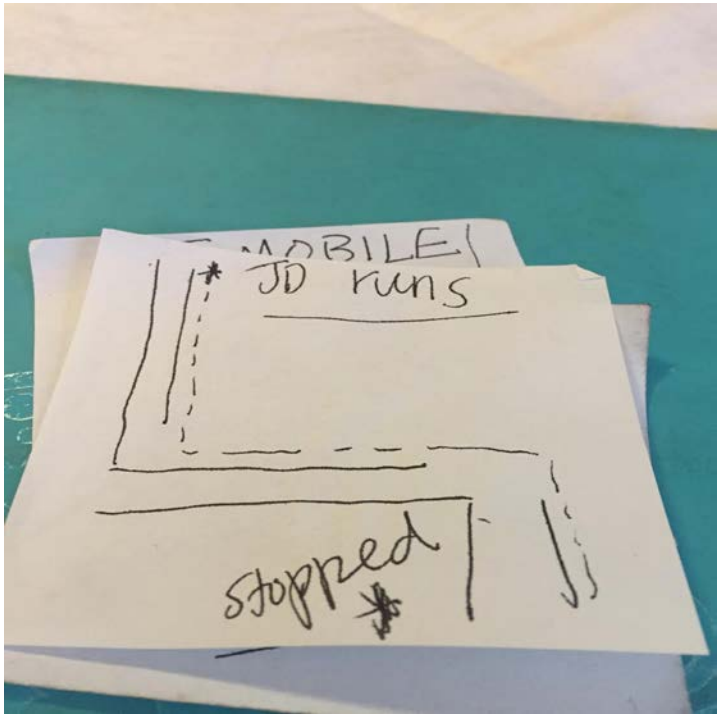
Scene 1 – Robbery by Masked Man



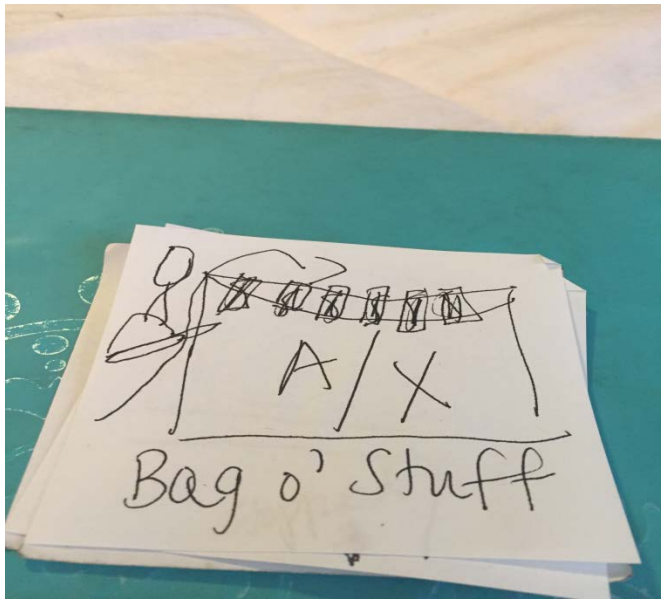
Scene 2 – JD is Followed by Police



Scene 3 – JD Runs a Block and a Half from Cops



Scene 4 – Cops Throw Hat and Du-Rag in A/X Bag



Who is the Witness

- Not from the Bronx
- Scared
- Able to give a description provided to cops (perp and gun)
- Couldn’t ID
- Lost money
- Mad at cops
- Robber came in right after owner came in
- Other disgruntled prior employees

IV. Facts Beyond Change

- Two complainants were robbed
- Some amount of money and debit card were stolen and put in A/X bag
- JD runs from cops
- A/X bag recovered in vicinity
- Gun has a mixture of DNA
- No other testing
- JD's hat and du-rag are tossed into the A/X bag after he was stopped
- JD is mixed race (light-skinned) with braids and 6'4" tall

V. Dominant Emotion

- “Stop and Frisk” environment
- Fear turned to disbelief
- Grasping at straws
- Wronged Victims
- The real perp is still out there

VI. Vocabulary

Good

- Real perpetrator
- Hispanic
- Tall
- Pseudo-science
- Numerical chance
- Professional weapon

Bad

- Mr. Daley
- Light-skinned
- DNA evidence
- Scientific evidence
- Deserted area

VII. The Big Jury Question(s)

- How could that man possibly be confused with the perpetrator?
- Why would the cops say he had the bag in his hands if he didn't?
- Why did he run if he wasn't guilty?
- Isn't all DNA testing the same?

Write It Out

- When he felt the marked blue and white creeping just feet behind him, the bile rose from his belly to his mouth and he acted on instinct - JD ran as fast he could. But when they caught up with him, he put his hands up and stopped. After all, he had done nothing wrong – he was just walking to the bus to meet up with his brother after checking out retail property in the area. The cuffs cut into his wrists as he waited, but when the stranger they brought over said, "I don't recognize that guy," he was sure they knew the truth – that he had done nothing wrong. But then they ripped off his orange du-rag and his Yankees hat and took him anyway. JD was mistakenly, tragically charged with a crime that he did not commit. All because his fear of them got the best of him.

THEMES

- Height had served him well until that night
- Junk science reveals desperation
- Fear of the police can lead to a mistaken prosecution
- Cops’ sloppiness leads to mis-ID
- Wrong place wrong time
- He had done nothing wrong

Theory Drives Strategy

- How you cross/direct
- Do you cross
- Defense case

JOHN LEWIS GET IN THE WAY

BUYERS