



# Yes, You Can Have a Theory of Defense in District Court (and still get to your other cases)

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## 2005 New Misdemeanor Defender Program

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# What Is Not a Theory of Defense

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- The state can't prove my client is guilty beyond a reasonable doubt
- Buzzwords
  - Self-Defense! Alibi!
- Alternate Realities
  - I wasn't there, but if I was, I was entrapped
- Play for the fumbles



# What Is a Theory of Defense

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- One central theory that summarizes the factual, emotional, and legal reasons why the judge or jury should return a favorable verdict. It tells your client's story of innocence, reduced culpability, or unfairness; provides a roadmap for you for all phases of trial; and resolves problems or questions the judge or jury may have about returning the verdict you want.



# Sample Theory: S v. Jones

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When called into the gas station, Gary Jones was shocked to discover his friend, Adam Rogers, had stabbed the gas station attendant and was pointing a large knife at him. Terrified and confused, and fearing for his life, Gary obeyed Adam's commands to take the money and give it to Adam. Under these circumstances, Gary is NOT GUILTY of any crime because he was coerced, under threat of bodily harm, into participating in the robbery.



# Keys to Effective Theory

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# Constructing a Theory

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- Pick your genre
- Pick your three best facts and three worst ones (optional)
- Come up with a headline
- Write a theory paragraph
- Develop recurring themes



# Criminal Defense Genres

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1. It never happened (mistake, setup)
2. It happened, but I didn't do it (mistaken id, alibi, setup, etc.)
3. It happened, I did it, but it wasn't a crime (self-defense, accident, elements lacking)
4. It happened, I did it, it was a crime, but it wasn't this crime (lesser offense)
5. It happened, I did it, it was the crime charged, but I'm not responsible (insanity)
6. It happened, I did it, it was the crime charged, I'm responsible, so what? (jury nullification)



# Best and Worst of Our Case

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- Best Facts

- Worst Facts



# Come Up with a Headline

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- Imagine you are an editor of a sleazy tabloid newspaper. Come up with a phrase or sentence that captures the dominant emotion, image, or reality of your theory of the case
  - Also called the “barstool” method—that is, if asked by the person next to you why your client should win, be able to give a short and sweet explanation.



# Sample Headlines for Jones Case

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- Innocent man victimized twice, first by robber, then by state
- Man stares death in the face, makes only possible choice
- Man avoids further bloodshed, defuses volatile situation



# Headlines for Our Case

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# More Headlines

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# Our Theory Paragraph: #1

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# Our Theory: #2

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# Themes

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- Also known as
  - catch phrases
  - memorable lines
  - verbal melodies
- Use them again and again as shorthand way to evoke your overall theory
- For ex., for Jones, themes might include
  - “only possible choice”
  - “staring death in the face”



# Themes for Our Case

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# More Resources

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- Stephen P. Lindsay, *If You Build It, They Will Come: Creating and Utilizing a Meaningful Theory of Defense*, in TRIAL BRIEFS (North Carolina Academy of Trial Lawyers, April 2005)
- Cathy R. Kelley, *Trial by Design*, in THE CHAMPION (National Association of Criminal Defense Lawyers, Nov. 2002)