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“Not Just a Common Criminal”: The Case for Sentencing Mitigation Videos

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I. Introduction: Visual Legal Advocacy for the Defense?

On May 31, 2004, Juan Jose Chavez (hereinafter referred to as “Juan” which was pronounced as “John” and also known as “Lil Gangster”) was an 18-year-old gangbanger wannabe who shot and killed two young people in a warehouse in Montebello, Los Angeles County, California.¹ A week later he murdered Risa Bejarano in an alley in South Gate. Risa was a potential witness in the case of the earlier homicides.² Juan ordered Risa to lie on her stomach. While she begged for her life, he shot her in the face at close range. When the first bullet did not kill her, he shot her 12 more times. In a trial over which Judge Lance Ito of O.J. Simpson fame presided, the jury easily found Juan guilty of three counts of first degree murder with special circumstances including murder of a witness, multiple murders and murder to prevent lawful arrest.

In making its case for the death penalty, the prosecution put on victim impact testimony. In the case of Risa Bejarano, it was able to offer extensive visual or video evidence about her because the year before her death she had been one of the subjects of a PBS documentary entitled “Aging Out” which focused on the difficulties young people encounter in transitioning out of the foster care system.³ Not content simply to present the footage of Risa describing her life and her hopes and dreams, the prosecutor decided to include as part of his closing argument clips of Risa overlaid with audio of Juan bragging to a cellmate in street slang that he faced the death penalty for his crimes.

¹ A rival gang member “disrespected” Juan’s gang by calling out the rival’s name as he left Juan’s neighborhood. Juan and a fellow gang member went to the warehouse seeking revenge. Before Juan located the offending rival, he opened fire. Lynda McGeisey and Abdon Sandoval were killed, two others were wounded, and several other survivors were able to identify Juan at his trial. In addition to the three murder convictions, Juan was found guilty of two counts of attempted murder.

² Risa had taken Juan to the warehouse where the first murders occurred just days before the shootings.

³ AGING OUT (Public Policy Productions 2004) (Roger Weisberg & Vanessa Roth, directors).

If the prosecution took full advantage of the footage in the documentary, the jury would have seen and heard Risa recounting that she was the youngest of possibly 12 children (Risa was not sure of the exact number) of an immigrant mother whose life was marked by prostitution and drugs. According to Risa and her nearest sister in age, their mother turned a deaf ear to their pleas that she protect them from the sexual assaults of their stepfather. The girls wound up in the foster care system after they called the police.

Risa was more bookish than her siblings and she excelled in school. At 16, she was placed in the home of an especially supportive and caring foster mother, Delores Ruiz. Risa paid her own way to the senior prom; her date was the class president. She became the first member of her family to graduate from high school. She won eight scholarships that enabled her to attend UC Santa Barbara, but she had to work two jobs to afford to go. She tutored younger students right after school and worked the midnight-to-8 am shift at a fast food restaurant. Her schedule was difficult to maintain and she used drugs including crystal methamphetamine (hereinafter “meth”) to keep up the pace. She also experimented with drugs when she was free for the summer after graduation. Risa’s inability to abstain from the use of drugs, coupled with her failure to leave her biological family totally behind, constituted weaknesses that figured in her premature death.

Making the adjustment to college left Risa confused. She felt lost and turned to drugs which were readily available. She wound up on academic probation after her first semester. She worried about where she should go during breaks. She did not want to go to her former foster mother’s home because she considered that moving backwards. She went to stay instead with her sister.

Something traumatic apparently happened when Risa spent Mother’s Day with her mother and her family. Back at school, she lost touch with reality and wound up spending three weeks in a psychiatric ward on campus after experiencing a psychotic breakdown. Her former foster mother collected her from college and helped her to achieve some stability. When shooting of “Aging

Out” concluded, she was working at a supermarket, attending a local college, and preparing to move into an apartment obtained with the help of an independent living program. She had stopped taking her antidepressants because they were too expensive. According to the directors, Risa moved between her foster mother’s home, her sister’s home, and the independent living facility. She was murdered on June 5, 2004, before the documentary was broadcast.

The jury deadlocked on a penalty for the homicides of the two warehouse shooting victims, but sentenced Juan to death for killing Risa. The response of the jury to the footage from “Aging Out” was mixed. Some of the jurors, who were interviewed later, indicated that the video played a crucial role in their votes. According to one, the video took Risa’s killing to “another level.” A female juror concluded, “Personally, the film made a huge impact for me. I mean it didn’t change the facts as we knew them, but to hear her words and see her reactions and her emotions and her struggle so clearly, it made his crime so much more . . . sensational.” The video made a third juror see Risa as a person. She was not just another meth addict who got murdered. She had a life and was trying to go somewhere. The foreman, on the other hand, was offended because the footage interfered with the jurors’ duty to arrive at a decision “with the least amount of emotion.”

The information about the jurors’ responses and other events surrounding the trial of Juan Jose Chavez for Risa Bejarano’s murder comes from “No Tomorrow,” a sequel to “Aging Out” made by the same directors.⁴ Before Juan’s murder trial, the directors had been contacted by both the prosecution and the defense. They were disturbed that their footage of Risa would be used to support a death sentence for Juan. One of the directors, Vanessa Roth, said that

[t]he more she learned about Juan, the more she felt that he was yet another victim, another child whom society failed to protect. She was troubled that her film had been used to send him to death row. She didn’t think that Risa would have wanted that, knowing the

⁴ No TOMORROW (Public Policy Productions 2009) (Roger Weisberg & Vanessa Roth, directors).

compassion the girl had for the world that she had grown up in, and where her siblings still lived.⁵

“No Tomorrow” was intended to show “how Juan’s and Risa’s lives had become intertwined.” In addition to “questioning . . . the prosecutor’s decision to use the footage from ‘Aging Out’ in the trial,’ the subsequent documentary “would humanize Juan and show him for more than the crime he was sentenced for.”⁶

Indeed, Juan’s early life was much like Risa’s. His mother was an alcoholic who was physically and emotionally abusive. He was abandoned by his father and possibly molested by his mother’s boyfriend. Juan was a meth user like Risa. One commentator in “No Tomorrow” concluded that, with children like Juan, “every single system [--schools, family, juvenile justice, mental health, religious institutions--] had failed them.” He was a sweet kid; “had something happened to prevent the inevitable, he would have turned out differently,” but nothing happened. Despite the differences between them, Risa and Juan pretty much wound up in the same place: she dead in an alley and he, having shot her there, facing the death penalty.

Juan’s horrible upbringing standing alone might have generated some sympathy from the jury, but the mitigating impact of his story was likely undermined by comparison with Risa’s. Risa struggled mightily to make a better life for herself. She stayed in school and worked hard to be able to afford her dreams. When she was forced to drop out of college, she felt both shame because she let others down and a loss of self-respect because she could not live up to her own aspirations. She was attracted to Juan and he took advantage of her vulnerability to lure her into an alley and kill her. Risa made bad choices but she was capable of understanding that. Juan, on the other hand, made bad choices and exhibited no regret and no critical self-awareness of the import of his actions. He dropped out of school and sold drugs. He ran with a gang. He refused to show remorse when it might have softened the jury’s resolve against him. The jury

⁵ Victoria Kim, *Splicing Together Two Lives at Odds*, L.A. TIMES, Dec. 1, 2009, at A1.

⁶ *Id.*

needed to be convinced that that he was not a monster, but a tragic victim of circumstances beyond his control. His defense failed to persuade them of that.

The merits of introducing video footage of Risa as victim impact evidence are discussed by legal commentators in “No Tomorrow” and mentioned by those involved in the Chavez trial itself. One juror concluded it was fair to introduce the video because Risa was not there to speak on her own behalf while Juan’s cousin said that it was unfair because he did not have a video to make the case for mitigation of his sentence. When defense counsel argued for a reduction of the sentence because of the introduction of the video, Judge Ito rejected the claim and noted that the producers had not shot or edited it with a criminal trial in mind. In other words, the video had a patina of objectivity that legitimated its use.

Though the directors set out to humanize Juan in “No Tomorrow,” they did not actually make a mitigation video on his behalf. His lawyer ultimately pasted photos of Juan growing up on a poster board that he showed the jury. His lawyer asked,

What if we had a video of a three-year-old Juan Chavez getting punched out by his mother, of Juan Chavez being told by his mother that she’d wished she had aborted him, but she couldn’t because she didn’t have the money? What if we had a video of Juan Chavez sitting on the curb out in front of his apartment, when he got kicked out of the house, crying?

It is unlikely that anyone’s sentencing mitigation video would have footage of such specific, graphic instances of abuse. There was certainly nothing like that in the video of Risa, yet hers was effective in making her persona as a unique, though flawed, yet sympathetic individual felt by some of the jurors.

The question left unanswered by “No Tomorrow” is what would a sentencing mitigation video in support of a life sentence for Juan have looked like. That is a question that this Article attempts to answer. Along the way, it considers the legal and ethical issues related to producing videos to support

reductions in sentences based on pertinent legal and extralegal information about defendants, particularly their family histories, the environments that shaped their lives, their physical and mental health, their characters, and their criminal records. Mitigation evidence is intended to raise the moral and normative issues that should be weighed against aggravating factors so that the punishment the defendant receives fits her/his crime. The inquiry is essentially one of determining how much blame for a defendant's crimes should be attributed to factors beyond her or his control.

Video is an excellent medium for telling mitigation stories because it employs sight and sound to efficiently convey the history of an individual's real life encounters with crime, as told by people and images situated beyond the courtroom. Nonetheless, it must be acknowledged that this form of visual legal advocacy, like victim impact videos, is subject to disparagement and suspicion. The sincerity and credibility of even the most honest witnesses may be doubted because of their ties to the defendant and the typically one-sided nature of visual presentations. Video advocacy in general is claimed to unfairly manipulate emotions and to leave the party on the opposing side unable to effectively challenge the video's message on the basis of truth and rationality.

After considering the benefits and limitations of mitigation videos, this Article argues in favor of their use and admission in connection with sentencing decisions. They should be admissible as long as courts exercise vigilance in making evidentiary rulings based on critical assessments of the visual material in light of all the evidence available to the parties and counsels' arguments. This conclusion follows from an examination of some of the more contentious and seemingly problematic aspects of mitigation videos, aspects that particularly relate to the applicability of the hearsay rules and notions of image ethics.

II. The Elements of a Sentencing Mitigation Video

Plug “sentencing video” into YouTube or Google and up will pop hundreds of videos of celebrities and other noteworthy defendants being sentenced. That is not what the discussion that follows is about. A professional producer of the kind of videos under scrutiny here refers to them as sentencing documentaries. An alternative term might be “sentencing mitigation videos.” This article will use both “sentencing mitigation videos” and “mitigation videos.”

Mitigation videos have been employed in cases involving a wide range of crimes, including murder, drug dealing, the illegal purchase and possession of firearms, health care fraud, embezzlement, unlicensed money transfers, and illegal re-entry into the country. In addition, the videos have been employed at different stages in the sentencing process. They are used before trial to give the state some idea of the strength of the defense’s mitigation evidence and to shape the sentencing goals of the prosecution. Videos may be submitted right before sentencing where the defendant has pled guilty and is seeking a downward departure from sentencing guidelines. Videos are also introduced during the sentencing phase of a trial. The evidentiary hurdles to such use will be discussed shortly. Some, but not all, judges are receptive to viewing videos in connection with sentencing because they increase judicial efficiency by condensing the testimony of mitigation witnesses to the essentials and eliminating the need for the court to hear them testify on the stand in real time.

For defendants sentenced to death or life without the possibility of parole, the sentencing process may end only after a decision is rendered on their petitions for a pardon or executive clemency. There are many examples of videos produced in connection with the commutation or pardon process; they do not have to comply with the rules of evidence and may be directed at both nonjudicial decisionmakers and potential political supporters of the defendant. Clemency videos, of which there are many, indicate the range of audio and visual material that mitigation videos in general include.⁷

⁷ For a listing of the constituent elements of clemency videos compiled by the Penn Program on Documentaries & the Law, see

Only a few sentencing mitigation videos have found their way into the public domain via distributed documentaries⁸ or YouTube and other video-sharing sites.⁹ Most of the videos I have seen were shared with me by the lawyers, mitigation specialists, and video makers who produced or directed them.¹⁰ Because there is almost nothing written about sentencing mitigation videos as well,¹¹ much of the information I discuss here about the practice and problems of

<https://www.law.upenn.edu/institutes/documentaries/clemencyproject/elements-outline.php>
(lasted visited June 27, 2113).

⁸ Footage from the sentencing video of Anthony Johnson, a young black man from Yonkers, New York who was charged with drug conspiracy in Vermont, can be found in a feature-length documentary. See *THE HOUSE I LIVE IN* (Charlotte Street Films, 2012) (Eugene Jarecki, director). Investigator Susan Randall was working on the sentencing phase of Johnson's case. She enlisted Jarecki's assistance in producing and editing a video on Johnson's behalf; in return Jarecki received the right to include the material in his film. Barbara Dundon, *Journalist Turned Private Eye to Speak at Film Screening of "The House I Live In,"* CHESTNUT HILL LOCAL, Apr. 3, 2013 (former NPR reporter describes how she came to be a mitigation investigator who produces videos).

⁹ There is online a sentencing documentary about Don Ayala, a private security contractor who pled guilty to the murder of an Afghan national who poured fuel over an American female anthropologist working for the U.S. military and set her on fire. See http://videos.nola.com/times-picayune/2009/05/don_ayala_sentencing_documenta.html (last viewed July 20, 2013). It was commissioned by the Times Picayune newspaper and produced by Reel Life Films LLC. Ayala pled guilty to involuntary manslaughter and was sentenced to five years of probation, a \$12,500 fine and a ban on holding security jobs. Bruce Alpert, *N.O. Man Finds Mercy in Court*, TIMES-PICAYUNE (New Orleans), May 9, 2009, at 1.

¹⁰ I am grateful for the insights and information provided by the following experts: Denise Arellano, Investigator, Federal Defender Services of Idaho, Boise, Idaho; Susan Randall, former Investigator, Federal Public Defender, District of Vermont, Burlington, Vermont and a private investigator and litigation support strategist with VTPrivateEye, LLC; Doug Passon, Esq., Assistant Federal Public Defender, District of Arizona, Phoenix, Arizona and president and creative director, D Major Films; Catherine Henry, Esq., Senior Litigator, Federal Community Defender Office for the Eastern District of Pennsylvania, Philadelphia, Pennsylvania; Melissa Powers, Esq., criminal defense attorney, Walsh & Larranaga, Seattle, Washington; and Jackie Walsh, producer/director, In-House Productions, Portland, Oregon.

¹¹ See Doug Passon, *Using Mitigation Videos to Bridge the Cultural Gap in Sentencing in* CULTURAL ISSUES IN CRIMINAL DEFENSE 979 (Linda Friedman Ramirez ed., 3rd ed. 2010). An electronic version of Passon's chapter lists 98 federal cases in which mitigation videos have been submitted. The cases arose in 30 states and Puerto Rico.

making and presenting sentencing mitigation videos comes from the makers themselves.

Sentencing mitigation videos are essentially character studies, i.e., five to eight-minute depictions of the life of a defendant and the family members and friends who will be impacted by her or his pending sentencing. The videos typically explain why the defendant is a better person than she or he appears to be on paper and should therefore be given a chance to serve a lesser sentence.

Like any other video, a strong narrative or story is the starting point of a good sentencing mitigation video. The elements of that story are typically a bleak start, a detour or momentary aberration that leads to crime, followed by self-discovery, introspection, or remorse that in turn produces an exercise of agency and a shift in thinking and acting that ultimately points the defendant in the direction of growth and stability. Evidence of resistance or push back against the hand the defendant was dealt is an important element of the claim for a sentence reduction. The defendant should not be portrayed as merely a pathetic individual who helplessly reflects negative stereotypes. That means that she or he must be *more than* the none too uncommon victim of the failures of our helping institutions (hospitals, schools, welfare agencies, etc.), the hapless progeny of a dysfunctional family, an unlucky loser in the genetic lottery, or the last in line at the well of psychological stability. Even if the subject's life is a string of pathologies, those pathologies should provide insight into the individual she or he is or might have become. Indications of introspection or reflexivity are essential. Consider the adage: "Life's challenges are not supposed to paralyze you; they're supposed to help you discover who you are."¹²

Visual storytelling with regard to sentencing mitigation is not just about emotions and pathos; it is a means of conveying concrete factual information about dynamic human processes like the destruction of the human spirit, its resistance to annihilation, or its difficult rehabilitation and restoration. That is

¹² The quote is attributed to American singer, composer, scholar and social activist Bernice Johnson Reagon.

why, in the view of one mitigation specialist, the most compelling stories involve defendants who have turned their lives around or defendants who are struggling to regain a plateau they occupied before engaging in criminal behavior which was out of character or aberrant (as where a sober person with traditional values and no criminal history experiences a traumatic event that leads to a crime).¹³ Of course, some people become totally overwhelmed by adversity. A sentencing mitigation video provides an opportunity for them to show who they might have become had they not been inundated by misfortune or otherwise lost their way. A video can show what a unique and complex human being the subject is. It can convey why the person is worth caring about and is not beyond redemption. It is regard, not sympathy, which makes it harder for a decisionmaker to deny a video subject's request for legal relief.

The method by which lawyers and investigators produce sentencing mitigation videos mirrors to some extent the ethnographic or experiential processes visual anthropologists and sociologists employ in learning about and visually documenting cultures. Lawyers and investigators are involved in mapping kinship and social ties, conducting open-ended interviews, getting subjects to tell life histories, and collecting the tangible artifacts (photos, home movies, videos, diplomas, birth certificates, school and medical records) with which to tell the story of a life that may have veered into the unexpected and the deviant.¹⁴

As visual social scientists have argued, video may be a particularly appropriate tool if there is a need to convey information that "is inaccessible through written or verbal media."¹⁵ Visual media are considered effective in

¹³ Diane Arellano, Investigator, Federal Defender Services of Idaho, Presentation at the Visual Legal Advocacy Roundtable: "VLA Step-by-Step?", sponsored by the Penn Program on Documentaries & the Law (Nov. 4, 2011).

¹⁴ Matthew Durlington, *The Hunters Redux: Participatory and Applied Visual Anthropology with the Botswana San*, in VISUAL INTERVENTIONS: APPLIED VISUAL ANTHROPOLOGY 191, 200 (Sarah Pink ed., 2009) [hereinafter VISUAL INTERVENTIONS].

¹⁵ Sarah Pink, *Applied Visual Anthropology: Social Intervention and Visual Methodologies*, in VISUAL INTERVENTIONS, *supra* note 14, at 20. Like visual social scientists, a legal scholar researching visual legal advocacy has to wrestle with the best method for analyzing visual data where there may be no way to provide readers with access to images if they are not already

allowing the use of metaphors and empathetic communication of knowledge and experience that cannot be expressed by words alone. But more than that, visual media are adept at illustrating the complex subjectivity of individuals, their knowledge, feelings, values, tastes and opinions; demonstrating the outward manifestations of social inclusion and exclusion; and capturing performances, especially rituals, cultural expressions, interpersonal interaction, social events, and spontaneous reactions. Compact video technology is excellent at capturing the everyday realities of a defendant and her or his family with a minimum of physical disruption. Video opens a window on the defendant's lifestyle and social connections and relations as well. Video is good at showing people naturally interacting with or relating to one another. Finally, video is especially useful in providing portraits of children who need to be protected from the full details of their family member's crimes and the cloud of jeopardy hovering over them all.

A sentencing video is not just the sum of its parts. The video offers a glimpse of the material world in which a defendant lives/lived with others who may or may not testify. Video is especially effective at showing the physical context, *i.e.*, the natural and built up environment in which a defendant lived, worked or played. Witnesses' descriptions of the physical, social, and cultural environment are not likely to be as vivid or informative as those provided by visual images. The exterior landscape of a defendant's life (the housing, schools, churches, playgrounds, and businesses) may also provide unspoken clues as to the institutional actors that have impacted the defendant's situation and psychological development.

To enhance effectiveness, sentencing mitigation videos are made using the full-range of documentary styles. Some are expository first-person documentary essays or visual sentencing letters. In these, the defendant personally narrates a text which is illustrated with stills and moving images. As narrator, the defendant has the opportunity to be introspective or reflexive with regard to the context of

disseminated or cannot be lawfully replicated. Law reviews do not typically include visual images.

her or his crimes, the core values that were ingrained in her or him during childhood but from which she or he strayed, and the importance of accepting responsibility for one's behavior. Occasionally, a video will employ a professional narrator such as one would find in a settlement brochure or documentary done for a personal injury action. The narrator conveys the defendant's story and keeps the video's momentum going by providing a bridge between distinct sections of the video and between interviews and other images. A narrator allows the videomaker to include information that has not come out in the interviews. Because time (the court's in particular) is generally at a premium with regard to mitigation videos, a narrator may be the best tool for efficiently and expeditiously delivering information to the viewer.

More often, though, mitigation videos employ an interactive style. Interviewees are shot in formally staged settings with backdrops, three-point lighting, lavalier microphones, and a stationary camera. They are shown responding to the unheard questions of an unseen questioner. Supplemental photographs, video footage, and other relevant images are used to illustrate the answers. Occasionally a more participatory approach is employed in that the questioner will be heard and even seen. In either case, there is no narrator guiding the interpretation of the video's images or its overall reception. That is considered a plus in that it frees the viewer to arrive at her or his own assessment of the information presented in the video. Lawyers trained as litigators are used to eliciting stories through a series of questions and answers during direct and cross-examination of witnesses. The interactive and participatory styles of videomaking are most compatible with standard trial practice.

Finally, directors of mitigation videos have also used the direct or observational style. This mode of nonfiction filmmaking is sometimes described as "vérité" or "fly on the wall" which suggests that the camera is capturing real life as it is occurring, seemingly without the intervention or staging of the director or cameraperson.¹⁶ Mitigation videos using the observational style have been

¹⁶ The term "cinéma vérité" is also (erroneously) applied to this mode of filming. Strictly speaking, cinéma vérité is a style pioneered by French anthropologist Jean Rouch and

shot out-of-doors, with handheld cameras and natural light and without formal staging of interviews. (Video makers also shot supplemental footage using this style.) An investigator who uses this approach frequently described it as follows: “Plop yourself down in a community and the story will get you even if you don’t get it.”¹⁷ The observational format tends to open up the video to encompass the defendant’s material and physical world and draws the decisionmaker into it. For example, the video may capture life on busy streets, in public places like restaurants and playgrounds, or in private homes--locales that constitute the milieu of defendants, but which may be unfamiliar to judges and juries. Surroundings (the housing, furnishings, and neighborhood) may be a far better indicator of a person’s economic circumstances and social standing than her or his countenance or apparel.¹⁸ The ambient sounds picked up during vérité filming capture the vibe of the setting and the informal and imperfect speech patterns and natural activities of the inhabitants. The result is a more spontaneous, authentic, and intimate portrait of a defendant’s life. If sentence mitigation is a matter of bridging cultural differences between the defendant and the sentencer(s), the direct or observational approach may be the best mode of production.

Videos shot “fly on the wall” or observational style might be expected to have music captured as part of the ambient background sound. It should be legitimate to incorporate into a mitigation video music that organically relates to the defendant’s story. That would be true if the defendant was a musician whose

sociologist Edgar Morin in the 1960 documentary “Chronique d’un Eté” (“Chronicle of a Summer”) which involved the filmmakers in “questioning and probing those interviewed, provoking the subjects to expose themselves in a spontaneous and truthful way.” IRA KONIGSBERG, *THE COMPLETE FILM DICTIONARY* 57-58 (2nd ed. 1997).

¹⁷ The impact of this technique can be found in the footage from the sentencing video by Susan Randall of Anthony Johnson that is included in the documentary “The House I Live In.” See note 8, *supra*.

¹⁸ Sometimes the surroundings are integral to the crime. Kamathene Cooper killed his landlord because the latter refused to fix up the “dilapidated” rental property without a rent hike. At Cooper’s initial trial, the judge admitted only a 6 of the 21 photos of the exterior and interior of the home offered into evidence during the penalty phase of the case. This ruling was reversed on appeal. *State v. Cooper*, 353 S.E.2d 441 (S.C. 1986).

musical tastes cast doubt or suspicion on his character. If the defendant's family runs a business or household where music is constantly playing or if music floats through the air in the park where defendant's friends are being interviewed, there should be no reason why what is essentially "the soundtrack of the defendant's life" should not be included in the video.¹⁹

The out-of-pocket cost of producing a mitigation video and the production values of the finished product vary with the professional credentials of the cinematographer and editor. Some federal defender offices and mitigation specialists do the production work themselves without the involvement of a trained videomaker. In capital cases, counsel can request approval of expenses from the court. The videos can be expensive if they require traveling far distances (out of the country, for example), interviewing a large number of interviewees, and using translators.

Ideally, in deciding whether to produce a mitigation video, the visual legal advocate should compare the expense of production with the magnitude and likelihood of the benefit that can be expected. It is too early to reach definitive conclusions, based on quantitative data, about the effectiveness of mitigation videos. Some practitioners who have employed them warn that overuse will undercut the medium's effectiveness, which may depend on video's novelty and concerted efforts to keep purely emotional appeals in check. However, the ethical obligation to fully explicate a client's background in connection with a sentencing decision should keep advocates from worrying about the next case as opposed to the one at hand. That a video would be counterproductive in a particular defendant's case, though, would be a good reason not to submit one. The inexperienced visual legal advocate should seriously consider whether the

¹⁹ Inclusion of copyrighted music captured as part of the soundtrack during a vérité or observational shoot may be justified as fair use. DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE 5 (2005).

client's mitigation story is one that will exploit video's potential or be diminished by a video presentation.²⁰

Moreover, the benefits of this form of visual legal advocacy are not limited to advancement of the interests of defendants. For example, appearing in court may represent a threat to witnesses who are undocumented immigrants and to the defendants on whose behalf they are called to testify. The witness risks deportation and intimidation by the state to prevent cooperation with the defense, while the defense risks having the focus of attention diverted to "the highly controversial and irrelevant issue of illegal immigration."²¹ In such situations, allowing video testimony of the witness limited to matters that are probative to sentencing would be both efficient and just.

In essence, then, the essentials of good nonfiction or documentary visual storytelling apply to sentencing mitigation videos. Of course, the content has to be tailored to address the factors that are legally pertinent to defendants' claims for sentence reduction. Mitigation videos represent a hybrid of traditional legal advocacy and the effective use of audiovisual technology for the dissemination of evidence and for legal persuasion. Because the technology is being put to the service of the law and the pursuit of justice, it is the legal standards for admitting and weighing evidence and for proper argument that must shape the content of mitigation videos, as the next section explores in depth.

III. Deriving General Production Standards from the Requirements for Admission

²⁰ See generally Passon, *supra* note 11, at 985 (suggesting that lawyers save mitigation videos for cases where, in the author's view, the essential elements—"a solid story, credible and compelling characters, and emotionally evocative images"—are present).

²¹ See *People v. Godinez-Flores*, No. A129389, 2011 WL 5118777, at *9 (Cal. Ct. App. Oct. 27, 2011) (ruling that the defense could not impeach an undocumented shooting victim with bogus Social Security cards found on his person at the hospital). See also Caleb Mason, *The Use of Immigration Status in Cross-Examination of Witnesses: Scope, Limit, Objections*, 33 AM. J. TRIAL ADVOC. 549 (2010).

As previously indicated, mitigation videos have been used at nearly every stage of the sentencing process, from charging to clemency, not just as evidence at a formal sentencing hearing. However, a visual legal advocate would do well to consider the standards her or his video would have to satisfy for admission in a formal proceeding regardless of the use contemplated. There is a relationship between those evidentiary standards and the elements of an effective visual “brief.”

The first hurdle a defendant faces in introducing a mitigation video about her or his family background, character, or other factors relevant to sentencing in a formal proceeding are the legal technicalities of the rules of evidence. Mitigation videos typically contain hearsay and are themselves hearsay. Statements that were not made under oath or subject to cross-examination are an essential element of them. Moreover, the statements’ makers may not be available to submit to cross-examination. Supreme Court precedent supports the proposition that exclusion of mitigating evidence in capital cases based on the hearsay rules is unconstitutional,²² but the magnitude of the departure from normal practice that the constitution warrants is unclear. Issues regarding admission of hearsay, of course, persist in regard to noncapital cases.

A video can cover a wide swath of the defendant’s life, with breath being measured in terms of time, geography and/or experiences. The story may begin before the defendant was born and extend right up to his or her appearances in court for the crime for which she or he is being sentenced. It is unreasonable to expect that the defendant will be able to cover such a span without relying on hearsay or witnesses who will not be available for cross-examination. That is an inherent aspect of the mitigation inquiry.

Because there is stigma involved in being associated with a defendant charged with a crime, particularly a heinous one, witnesses may be reluctant to undertake the physical and psychological burden of coming to court and testifying on a

²² Green v. Georgia, 442 U.S. 95 (1979) (admitting statement, though hearsay, because it was against the maker’s interest, highly relevant, highly reliable, and corroborated).

defendant's behalf. In addition, witnesses may be reluctant to reveal their own shared victimization with the defendant or their role in victimizing her or him. Without some allowance being made in the application of the rules of evidence, defendants and potential witnesses who are themselves victims may be victimized again by and during the sentencing process.

The issue of admissibility in the face of a hearsay objection was squarely presented in *Washington v. Cecil Emile Davis*.²³ Davis was found guilty of the 1997 rape, robbery, and murder of a 65-year-old woman who lived across the street from his mother. The circumstances of the murder were bizarre and cruel. He was tried and convicted in 1998, but his death sentence was overturned in 2004 based on a personal restraint petition granted by the Supreme Court of Washington.²⁴ A new sentencing hearing was held in 2006 and Davis was once again given the death penalty.

On appeal of the second sentence to the Supreme Court, Davis argued that the lower court abused its discretion by excluding the videotaped statements of two of his elderly paternal aunts who lived out of state in Kansas City, Missouri. The statements were procured by a sentencing mitigation specialist. Though not under oath at the time, the women "later signed declarations summarizing the information covered in the interviews."²⁵ Though they indicated in their written statements that they were unable to attend the sentencing hearing in person, the trial court "concluded that there was insufficient basis to establish they were unavailable."²⁶

The defense and the prosecution offered up two different views of the contents of the videos. (Without seeing the videos, it is impossible to determine which description is more accurate. Obtaining copies of the DVDs from the court or the parties has thus far proven impossible.) According to the defense, "Davis' aunts discuss his troubled youth, family history, mental problems suffered by his

²³ State v. Davis, 290 P.3d 43 (Wash. 2012).

²⁴ In re Davis, 101 P.3d 1 (Wash. 2004).

²⁵ State v. Davis, 290 P.3d at 55.

²⁶ *Id.* at 57, n.14.

paternal grandmother, his abnormality, his mother and father's neglect, and the poverty he suffered as a child."²⁷ The videos carried significant import for the defendant's case according to his brief.

Had the jury considered this evidence, even one juror could have believed that because Davis' parents neglected him during his formative years, his mental health issues were present since birth, and learning and mental health issues run in his family, in fairness and mercy his life should be spared. Moreover, that there were family members other than his sister and mother who stood behind him and cared about his fate could also have led a juror to show mercy.²⁸

The prosecution, on the other hand, maintained that persons providing mitigation evidence must testify on the witness stand, under oath and subject to cross-examination. As for the videos, it argued that "[t]he defendant's aunts spoke for fifteen to twenty minutes each, with virtually all of it relating to themselves and their immediate family, mother and father, brothers and the circumstances of their own upbringing."²⁹

The Supreme Court of Washington upheld the lower court's rejection of the videos. Granting that the rules of evidence are constitutionally relaxed with regard to mitigation in capital cases, the Supreme Court stated that the trial court nonetheless retains the right to exclude evidence as irrelevant because it has no "bearing on the defendant's character, prior record, or the circumstances of his offense."³⁰ Thus, evidence of Davis's grandmother's schizophrenia was irrelevant because it was not connected to his upbringing or mental health and therefore had "no bearing" on the factors germane to his sentence.³¹ Similarly, "the trial court maintains its traditional ability to control the reliability of

²⁷ Reply Brief of Appellant at 19, *State v. Davis*, 290 P.3d 43 (No. 80209-2), 2010 WL 30804567.

²⁸ Appellant's Opening Brief at 58, *State v. Davis*, 290 P.3d 43 (No. 80209-2), 2009 WL 7358100.

²⁹ Brief of Respondent at 45, *State v. Davis*, 290 P.3d 43 (No. 80209-2), 2010 WL 3918858.

³⁰ *State v. Davis*, 290 P.3d 56.

³¹ *Id.* at 56.

mitigating evidence.”³² The aunts’ statements were excluded because they were not based on first-hand knowledge, but on gossip, what they were told by the mitigation specialist, and what they had read in the newspaper. “Furthermore, the defense obtained and presented the evidence in a manner that gave the State almost no opportunity to explore these potential problems, even though a video deposition or in-person testimony appears to have been possible.”³³

Despite their nexus to hearsay, videos should be considered an appropriate medium for building a case for mitigation. Mitigation videos are the equivalent of presentence reports which are subject to limited challenge based on hearsay and other rules of evidence. The substance of a mitigation video is part fact, part opinion, and part plea for mercy. The speakers’ biases and motives for appearing are generally transparent. That transparency speaks to the limited probity of the video’s content. The video format may make it harder for speakers to be limited to what is strictly relevant than it would be when the person is testifying in court with a prosecutor ready to object and a judge ready to rule on those objections. Yet, video can be edited. The defense in the *Davis* case offered a redacted version of the interviews which purportedly eliminated material of questionable relevancy.

To counter hearsay objections, it is important that the visual legal advocate produce a video whose content is connected to the defendant and factors pertinent to her or his sentencing. The defendant must always be in the picture, so to speak. Likewise, the defense and the court should take into account that the prosecution’s effort to impeach mitigation witnesses can sidetrack the proceeding and place the focus on the witness rather than on the defendant whose future is on the line. Due regard for the sensibilities of a victim or a victim’s loved ones can hamstring a defendant’s ability to challenge victim impact evidence, whatever the medium. No such constraint applies to sentencing

³² *Id.* at 57.

³³ *Id.* Although the court upheld the death sentence, it may never be carried out. In February of 2014, Governor Jay Inslee announced a moratorium on executions in the state. Andrew Garber, *Inslee Bans Executions While He’s Governor*, SEATTLE TIMES, Feb. 12, 2014, at A1, available at 2014 WLNR 3977635.

mitigation witnesses. Still, not every mitigation witness has evidence to offer that is crucial enough to warrant a deposition or an in court appearance and point-by-point cross examination. The cumulative impact of the testimony of such limited witnesses may support the overall impression that the defendant has people on her or his side who care about the sentence she or he receives. Although the defense in *Davis* conceded that video depositions could be taken, one might doubt that it would have been worthwhile for the prosecution to incur the cost of participating in such discovery. The wisest course is to give the prosecution a copy of any mitigation video in advance, along with all unedited footage and the names and contact information for the witnesses appearing therein, as early as possible. This will give the state the chance to interview the witnesses if they wish. The witnesses might also be present at the sentencing hearing, available to be questioned by the state or the judge.

Admission of a sentencing video seems particularly justified where mitigation witnesses are not available to testify in person.³⁴ However, the question of availability should be resolved in light of the challenges inherent in building a case for mitigation. For example, the defendant in *Coddington v. Oklahoma* claimed by way of mitigation a history of childhood abuse.³⁵ His father was an alcoholic; his mother and siblings were drug addicts. Defendant himself had been in and out of jail. Defendant's mother had been convicted of conspiracy to distribute meth and was at the time of his trial confined out of state, in a federal medical facility in Texas, because of serious heart problems that made her death imminent.³⁶ Defense counsel moved to preserve the mother's testimony. The parties agreed that each side would draft interrogatories and that the answers would be obtained from the mother in person and recorded via videotape and

³⁴ U.S. v. Ortiz, 315 F.3d 873, 903-94 (8th Cir. 2002) (where defendant's family members could not obtain visas to travel from Columbia, videotaped mitigation evidence from them did not prejudice the defense; in fact, tapes were an advantage in that they could be edited and "showed visually the poverty of the defendant's village and family background").

³⁵ *Coddington v. State*, 142 P.3d 437 (Okla. Crim. App. 2006).

³⁶ *Id.* at 456.

transcription.³⁷ The defendant's mother was administered the oath by the judge over the phone. The defendant's lawyer asked his interrogatories. The prosecution did not submit written questions; rather, a state's attorney cross-examined the witness in person. At trial, the prosecution belatedly but successfully demanded that the testimony be read into the record, and that the videotape of the session not be played.³⁸ The state relied on a statute enacted in 1910 which it contended allowed only for the reading of the testimony into the record.

The ruling was reversed on appeal as a violation of due process. The statute did not provide that reading the testimony into the record was the only method available. The court reasoned that "[t]he exclusion of the videotaped examination was not based upon unreliability, but upon the strict application of an outdated statute dealing with reliable preserved testimony."³⁹ Furthermore, "[t]he humanizing effect of live testimony in the form of a mother testifying for her son as mitigation evidence in a capital murder trial cannot seriously be disregarded as irrelevant."⁴⁰ "Personal observation of a significant mitigation witness would allow the jury to judge the witness's demeanor and aid in determining that witness's credibility and value as a mitigation witness."⁴¹ Concluded the court, "Prohibiting the jury from receiving evidence in the form likely to invoke sympathy and achieve the purpose of this mitigation witness was improper."⁴²

Conversely, Roosevelt Smith, Jr., who claimed to be a Katrina evacuee, was tried for the murder of an elderly church food pantry volunteer in Pasadena, Texas.⁴³ He offered "a 41-minute videotaped interview of his mother, Ms. Ester Mae Smith, addressing various aspects of his childhood, schooling, and

³⁷ *Id.* at 457.

³⁸ *Id.*

³⁹ *Id.* at 458.

⁴⁰ *Id.* at 459.

⁴¹ *Id.* at 460.

⁴² *Id.*

⁴³ *Smith v. Texas*, No. AP-75793, 2010 WL 3787576 (Tex. Crim. App. Sept. 29, 2010).

hospitalization” in a state hospital. Ms. Smith did not attend the trial because of “health issues” and a reluctance to “reveal family secrets.” The prosecution objected to the video on hearsay grounds and the trial court agreed. The information covered in the mother’s video was entered on the record by an investigator and a deputy testified about the defendant’s suicide attempt in jail. The trial court concluded that “a vast amount of the same evidence came in through other witnesses and in different form.” Of course, the implication of this conclusion is that the prosecution had the ability to challenge the content of the video by means other than through the cross-examination the defendant’s mother. Unlike the court in *Coddington*, the *Smith* court did not consider the mother’s video better evidence than the alternatives. It may have considered the mother’s failure to appear a voluntary attempt to evade cross-examination. In the context of mitigation, however, such an intent on the part of a witness may be less problematic than it appears.

As the ruling in the *Smith* case suggests, sentencing mitigation videos raise unique “image ethics” issues for the visual legal advocate. Image ethics involve informed consent, protection of the norms of privacy and confidentiality that prevail in the community from which subjects come, verification of the accuracy of content, avoidance of exploitation and failure to take into account harm stemming from audience reception, and fair exchange or “giving something back” to the subjects in exchange for the value of the images received.⁴⁴

Divulging family secrets to support a mitigation claim can be embarrassing to the defendant and her or his relatives. There is a stigma attached to being the family member of a convicted and incarcerated person.⁴⁵ Children might be especially affected; prioritizing the interests of the defendant and other interested adults over those of children with regard to stigma would create a problem of image ethics. Moreover, some witnesses likely participate in mitigation videos on the assumption that the statements will be used only in

⁴⁴ SARAH PINK, *DOING VISUAL ETHNOGRAPHY* 49 (2d ed., 2007).

⁴⁵ Regina Austin, “The Shame of It All”: *Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173 (2004).

connection with the defendants' mitigation claims and will otherwise be private. However, mitigation videos admitted in a formal sentencing proceeding should be included in public court records. Privacy concerns might warrant limiting production of videos if access to them by the public cannot be restricted.⁴⁶ A general written consent form signed by every interviewee would eliminate doubt as to the use that can be made of her or his recorded statement. That is not in accord with customary practice. Shared or collaborative decision making with the family members of a defendant who appear as subjects in the video might also discharge some of the videomaker's ethical obligations. There are presently no requirements beyond the common law or codes of best practices for the production of mitigation videos. The only guarantee that image ethics will be respected is the visual legal advocate's commitment to reflexive self-critical video making.

In sum, then, extrapolating from the requirements of the rules of evidence, it seems reasonable to conclude that mitigation videos in general should contain content that is relevant and probative to the defendant's sentencing, exhibits indicia of reliability, and avoids unnecessary redundancy. In addition, ethical issues should be addressed during the production process and in the videos themselves if their persuasive power will otherwise be compromised. In the section that follows, this Article will apply these considerations to a number of facets of mitigation videos such as the use of images of an adult defendant's happy childhood; the wisdom of shaping the disclosure of family secrets in a way that humanizes the defendant and dehumanizes her or his parents and other relatives; alternative ways of presenting the testimony of the children of a defendant who wants to establish the quality of his or her parenting through them; and finally the admissibility of documentaries made for a general audience as evidence of the institutional and social context of a defendant's life and crimes.

⁴⁶ When ethnographers "use [images] to make academic points they should also consider the personal, social, and political implications of the publication of those images for their subjects." PINK, *supra* note 44, at 166. The same is true for visual legal advocates.

IV. Special Issues Related to Sentencing Mitigation Videos

A. The Adult Defendant as a Child

Defendants have attempted to introduce visual evidence of their happy childhoods in connection with their claims of mitigation. The courts have generally rejected such evidence on the ground that it is not relevant to an adult defendant's moral culpability or blameworthiness with regard to the crimes charged.⁴⁷ There are strong arguments that support admission, however.

The relevance of childhood photos and footage of a defendant to a sentencing determination depends on the story being told in the particular case. By their very nature, photos taken of a child surrounded by family and friends or at school or during organized youth activities typically show no indication of a difficult, abusive upbringing. As one expert on historical images of children has noted, "Smiles and laughter make appropriate family pictures. As emotions shade off to express greater degrees of distress, their representation in personal photographs becomes less acceptable."⁴⁸ Medical and school records, social worker's or therapist's notes, photographs of bumps and bruises, and x-rays and CAT scans of internal injuries are likely far better visual proof of abuse than family photos.

If, insofar as defendant's home life is concerned, outward appearances were deceiving, childhood photos might be quite relevant. Pivotal changes in the

⁴⁷ *Berard v. State*, 486 So.2d 458 (Ala. Crim. App. 1984) (court rejects school records and photos of the defendant growing up where the prosecution objected on the ground that the evidence was intended to generate sympathy among the jury in a case where an 18-year-old defendant shot his 14-year-old and 15-year-old acquaintances for no explicable reason); *Mendoza v. State*, No. AP-75213, 2008 WL 4803471 (Tex. Crim. App. Nov. 5, 2008) (photo of defendant in diapers and posing happily with his family not relevant to showing that he posed no future danger or warranted a life sentence rather than the death penalty; photos showing defendant in school context admitted); *Rhodes v. State*, 934 S.W.2d 113, 125-26 (Tex. Crim. App. 1996) (11 photos of defendant as "a normal happy child" did not "diminish his moral culpability" for "a violent double murder").

⁴⁸ PATRICIA HOLLAND, PICTURING CHILDREN: THE MYTH OF THE CHILD IN POPULAR HISTORY 162 (2003).

life and circumstances of the defendant might have occurred during childhood. It would not be unexpected, therefore, if there were happy photos before the crucial event and nothing after. Of course, there are the exceptional cases where physical and emotional pain or psychological disturbance *is* evident in a child's appearance. Furthermore, there are no doubt some viewers who believe that they can see a future gangbanger in the appearance of a male child of color. In either case it must be left to the triers of fact to determine if the defendant's face foretold her or his future.

There are several reasons why an adult defendant would want to use pictures of her or himself as a child in a mitigation video. Such images break up the monotony of interviews and are likely to elicit a positive emotional response. Photographs of kids in general are a source of pleasure and joy. Childhood images of the defendant have symbolic or metaphorical significance. They invite the trier of fact to think of the defendant as an innocent child who needs a second chance and to see the defendant's detour into crime as a rupture in the course upon which she or he was embarked as a youngster. The viewer/sentencer has the power to put the lost child on the right path again. Quite naturally, this reading of the defendant's childhood photos may prompt a court to reject their admission on the grounds that they are manipulative.⁴⁹

The courts are not typically swayed by defense arguments that defendants should be able to humanize themselves through the introduction of childhood photos.⁵⁰ Defendants may be particularly eager to introduce their childhood

⁴⁹ In a somewhat related move, defendants have offered mitigating evidence from siblings. Like evidence of a happy childhood or from loving children, evidence from siblings tends to focus on good times and the support the defendant provided the witnesses. *Brown v. Luebbers*, 371 F.3d 458, 468 (8th Cir. 2004). Generally the sibling has not engaged in criminal conduct and is an upstanding citizen as exemplified, for instance, by military service. Courts reject the idea that the sibling's character is a reflection of the defendant's.

⁵⁰ *Rhodes*, 934 S.W.2d 113 (rejecting defendant's right to show his "human side" when the defendant claimed that the State had "attempted to dehumanize and turn him into some kind of a monster").

photos if similar images of the victim were admitted as victim impact evidence.⁵¹ Courts have rejected the introduction of comparable victim impact evidence as a justification for the admission of childhood photos of the defendant.⁵² Whereas the defendant can be present in court, the victim in a capital case cannot. Still photographs and film or video footage are all there is.⁵³ The introduction of victim impact evidence is not supposed to result in a comparison of the relative worth of the lives of the victim and the perpetrator.

Traditional happy photos should nonetheless be admissible to supplement a chronology of the relevant events in a defendant's life. Many people only have photos of themselves as young children; for them, the process of creating memories of good times and special occasions was never a part of their normal family lives. If something traumatic happened when the defendant was three years old, even a smiling photo of her or him at three would be a useful reminder of just how young that is and how the defendant missed out on the happy time childhood is supposed to be. Actual pictures should help the trier or triers of fact translate verbal testimony into the mental images that arise from genuine engagement with the people and issues involved in a criminal case.

B. Defendants' Parents and Family Secrets

Unhappy childhoods far outnumber happy ones as the subject of mitigation videos. The childrearing practices and behavior of the defendant's mother and father may be the most frequently examined topic in such videos. The parent's or parents' inability to provide for the basic needs of their child, their use of harsh

⁵¹ Defense counsel in *Rhodes* argued that "[t]he jury was not allowed to see evidence which tended to place the defendant in the context of his life, while it saw photographic examples of the lives of the victims of this offense." Appellant's Brief on Appeal at 58, *Rhodes*, 934 S.W.2d 113 (No. 71595), 1993 WL 13038071. I have argued elsewhere that childhood photos should be limited as visual victim impact evidence to cases where the victim is a child or close to childhood in age. Regina Austin, *Documentation, Documentary, and the Law: What Should Be Made of Victim Impact Videos?*, CARDOZO L. REV. 979, 1014 (2010).

⁵² *Mendoza*, 2008 WL 4803471 (concepts related to victim impact evidence "cannot necessarily be inverted for the benefit of the defendant").

⁵³ This argument was made by the state in the *Rhodes* case. State's Appellate Brief at 51, *Rhodes*, 934 S.W.2d 113, (No. 71595), 1994 WL 16057542.

discipline, the barrenness of the home environment they provided, and their own drug and alcohol addiction, developmental disability, and mental illness may be the heart of the defendant's case for mitigation. These circumstances make parents prime sources of mitigation information as well.

With a focus on pathology and dysfunction, though, mitigation often depends on the willingness of relatives to disclose family secrets and potentially embarrassing details about family life. Full exploration of the details requires cooperation between the visual legal advocate and defendants' loved ones who may insist upon controlling the nature of the story they tell and their own self-presentation. Videos especially provide subjects an opportunity to insert their voices and points of view into the judicial proceeding, as well as to shade the story in their favor.

There are several reasons why a video of a defendant's parent admitting that the defendant was abused or mistreated as a child by the parent or by others of whom the parent was aware might be unreliable and should be subject to challenge (though not necessarily by cross-examination). The parent or parents may be *too willing* to accept responsibility for the defendant-child's criminal behavior or *too unwilling* to be questioned about a private matter in a public context that might lead to their being condemned or stigmatized. The former is a problem for the prosecution while the latter is a problem for the defense.

It is commonly assumed that bad mothers are an important cause of their adult children's criminal behavior. Indeed, mothers whose children were recently incarcerated rate their parenting as poor.⁵⁴ If the judicial system is more lenient toward a child when the mother takes some of the blame for the child's law breaking, the mother may feel that she has no choice but to accept the indictment. That is what being there for a child means. That is what unconditional mother love requires. The amount of abuse admitted to might be exaggerated, both in how it is described by family members and in how the

⁵⁴ Kerry M. Green et al, *Impact of Adult Sons' Incarceration on African American Mothers' Psychological Distress*, 68 J. MARRIAGE & FAMILY 430, 436 (2006).

testimony is received by judges and jurors who find in it confirmation of stereotypes of bad mothers.

Conversely, a childhood characterized by abuse and mistreatment may be hidden from the outside world and become the substance of family secrets. Piercing the shroud of the family secret can be a challenge for defense counsel in general and the visual legal advocate in particular. Consider the case of *Demontrell Lamar Miller v. Texas*.

The defendant Miller was charged with capital murder in the battering death of his girlfriend's two-year-old son.⁵⁵ The case raised inconsequential (for our purposes) evidentiary issues related to autopsy photographs of the victim and an audio recording of a conversation between the defendant and a mitigation witness. More importantly, during the sentencing phase of his trial, his sister took the stand as a character witness. The sister testified that the defendant had been "his siblings' primary caregiver when he was still in middle school. She explained that their mother was not at home to take care of them because she was always at work. In fact, their mother was often not at home because she was in jail."⁵⁶ The court allowed the prosecution to question the sister about her mother's criminal record so as to correct the impression that her mother's absences were due to employment. The child had been four when her mother was arrested for possession of a controlled substance and six when her mother was arrested for theft. The sister's response to a litany of inquiries about her mother's criminal record was that she did not know about or remember her mother being in jail. "She explained, '[I]f my mom was arrested, they not going to tell us, they probably tell us something else. So I don't remember my mom being arrested.'"⁵⁷

The appellate court found no error in the state's questioning the sister about her mother's criminal record because it was relevant to the jury's assessment of the sister's credibility.⁵⁸ On the one hand, her lack of knowledge or memory

⁵⁵ *Miller v. State*, No. AP-76270, 2012 WL 1868406 (Tex. Crim. App. May 23, 2012).

⁵⁶ *Id.* at 16.

⁵⁷ *Id.* at 17.

⁵⁸ *Id.*

regarding her mother's incarcerations called into question "her ability to accurately observe and recall details about her home life and her immediate family members, including [the defendant]." On the other hand, if she knew that her mother was often in jail but chose not to admit this as an explanation for her mother's frequent absences from home, then the jury would have cause to question her honesty.

Miller's mother's criminal history could have been forthrightly addressed by the defense and made an element of the plea for mitigation. It might have worked to the defendant's advantage if it had been shown that the defendant was a responsible caretaker while his mother was in and out of prison. The burden of that responsibility and the lack of a good parent as a role model might have caused him to associate parenting with uncontrolled anger and physical abuse which might have played a role in his crime. Moreover, his mother's involvement with the criminal justice system may have socialized him in a culture of law breaking and violence. Instead the mother's record was brought out during cross-examination by a prosecutor who labeled defendant's character witnesses "'a parade of thugs.'"⁵⁹ The character of the defendant's witnesses was seriously undermined. The focus of the proceedings was shifted away from the defendant who was facing capital murder charges.

The opinion further suggests that the mother was involved in coordinating the family members and friends who attended the trial; she asked them to wear purple, the color of royalty, to show their support for the defendant.⁶⁰ It is not uncommon for mothers, wives, and partners to take on coordination responsibilities related to a defendant's defense.⁶¹ Miller's love for his mother and his dependence on her economic and emotional support may have resulted in a defense strategy aimed at preserving the family's secrets that ultimately weakened the case for mitigation.

⁵⁹ *Id.* 16.

⁶⁰ *Id.*

⁶¹ MEGAN COMFORT, *DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON* 186-88 (2008).

Courts should recognize that there may be personal preferences or cultural norms against sharing “family secrets” that limit witnesses’ availability to appear in person and be candid. In some cases, an advocate may be able to elicit sensitive information via indirect means, such as by asking about the family’s involvement with institutions like child protective services or school truancy offices instead of inquiring directly into the role that violence or deprivation played in the home.⁶² Otherwise, an advocate should be able to offer the testimony of reticent, traumatized or vulnerable family witnesses on video in circumstances where the prosecution’s opportunity to contest the testimony can be satisfied by means other than cross-examination. The particular reluctance of parents, who provided a poor nurturing environment for their child, to expose themselves to cross-examination should not deprive the defendant of the benefit of having the sentencer(s) make their acquaintance on video.

C. The Young Children of Adult Defendants

In *People v. Edwards*, the defendant sought to introduce a short video featuring his 11-year-old son and 8-year-old daughter.⁶³ The trial court concluded that a sufficient foundation for the video had not been laid and that it was unreliable. The children were not sworn to tell the truth, and the state had no opportunity to establish what the children had been told beforehand about their father’s situation or to cross-examine them. Although each child had been interviewed for an hour, the state had not been given the opportunity to view the outtakes or unedited footage that did not make it into the 20-minute video. The state offered to stipulate to the tapes’ impact on the defendant’s claim of mitigation but the defense understandably declined the offer. The Illinois Supreme Court concluded that the defendant was therefore not prejudiced by the lower court’s rejection of the video.

Despite the obstacles suggested by *Edwards*, the children of defendants have appeared in a number of sentencing mitigation videos. Visual evidence that

⁶² Mary A. Connell, *A Psychobiological Approach to the Evaluation for Sentence Mitigation*, 31 J. PSYCHIATRY & THE LAW 319, 331 (2003).

⁶³ *People v. Edwards*, 579 N.E.2d 336, 364 (Ill. 1991).

a defendant is loved by her or his children and cares for them in turn has been ruled both admissible and inadmissible proof of the parent's good character.⁶⁴ In addition, showing that the defendant provides more than the customary level of parental love and support and has family responsibilities and duties that exceed the ordinary has resulted in significant reductions in a defendant's sentence.⁶⁵ Defendants who have primary childrearing responsibilities which defy gender stereotypes and defendants whose children suffer from chronic or life-threatening illnesses or struggle in school because of educational deficits have gotten lighter sentences. Videos enable defendants to show that they play an important role in the lives of their children and that an extended sentence will result in a substantial and specific hardship or loss to the youngsters in terms of their emotional and financial support and caretaking.

In addition, it has been argued that children of incarcerated parents have an independent interest in or right to maintain connections and contact with their mothers or fathers.⁶⁶ This interest or right theoretically exists separate and apart

⁶⁴ *Compare* *People v. Virgil*, 253 P.3d 553 (Cal. 2011) (upholding the admission of five of nine pictures of defendant's child and wife containing messages that were sent to him by his wife while he was incarcerated) *with* *U.S. v. Hager*, 721 F.3d 167 (4th Cir. 2013) (rejecting videotapes featuring capital defendant's 13-year-old daughters because their expressions of love for their father and their happiness about interacting with him were not conditioned on his being of good character). Courts have limited the admission of visual evidence in some cases. *Parrish v. Commonwealth*, 121 S.W.3d 198, 207 (Ky. 2003) (court bars introduction of children's cards, letters and photos as part of the defendant's effort to show that he was "no monster" and that his crime was an aberration; the children's love and regard was expressed in their grandmother's testimony and their presence in the courtroom); *Johnson v. State*, 660 So.2d 637, 645 (Fla. 1995) (photo of daughter who died by miscarriage rejected as "potentially disturbing" and "of little relevance" though jury was informed about the photo and its importance). *But see* *Meece v. Commonwealth*, 348 S.W.3d 627 (Ky. 2011) (ruling that letters exchanged between defendant and his children expressing love for each other should have been admitted under the state of mind exception to the hearsay rule).

⁶⁵ See Joseph A. Slobodzian, *Jurors to Begin Deciding Ali's Fate in Killing*, PHILA. INQUIRER, Feb. 24, 2010, at B4 (video featuring interviews with sons of defendant charged with armed robbery and murder of two armored car guards shows him as a "loving father"). A copy of the video is in the author's possession.

⁶⁶ See Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77 (2011).

from any claim the parents may have to preserve ties with them. (However, courts have held that the impact of a parent's execution on her or his children is irrelevant.)⁶⁷ There is evidence that children who have contact with their incarcerated parents are less likely to duplicate their parents' patterns of behavior. Given the children's need to maintain relationships with their incarcerated parents, the custodial parents and relatives of such children might be expected to allow them to bear witness to the defendants' love, support, and other substantial contributions to family life even though the truth may be otherwise. Of course, there may be cases in which a child is better off if all ties with a law breaking parent are severed. That may be especially true where the defendant's victims are the children or other family members.

The logistics of capturing on video the interaction between a defendant who is in custody and her or his children can be difficult. Firstly, some prisons prohibit video or audio recording of any kind or strictly control the availability of recording.⁶⁸ Pennsylvania Department of Corrections even bars attorneys from recording interviews with their clients.⁶⁹ If recording is banned, it will not be possible to capture an incarcerated defendant interacting with her or his children unless there are home movies from their past. Taping phone conversations between incarcerated parents and their children has been used as a substitute. The audio can be supplemented with family photos or home movies and videos that illustrate or make the audio text come alive. Typically, however, the defendant is not present in any way, the children are interviewed in a home setting, the state is not represented, and the atmosphere is not adversarial.

There are various ways to present the defendant's children to the sentencing decisionmaker or decisionmakers. The children can speak for themselves; they can address the importance of keeping their incarcerated parent

⁶⁷ See U.S. v. Hagar 721 F.3d at 194 (rejecting videos of daughters that contained "execution impact evidence" that did not reflect on the defendant's background, character or crimes).

⁶⁸ See Pitchford v. State, 45 So.3d 216, 249-50 (Miss. 2010) (attempt to produce a "day in the life" video of the defendant interacting with his son effectively thwarted by the policy of the jail where he was confined as there was no basis for the trial judge to compel production).

⁶⁹ Department of Corrections Code of Ethics para. 25.

in their lives as well as their understanding of the impact a longer sentence will have on that relationship. They can also beg for a reduced sentence and shed tears as they contemplate the impact of their parent serving a stiffer sentence. Children who do this are not ignorant of the purpose of the video or unaware of the significance of their participation. Decisionmakers may be wary of children directly addressing the issue of sentencing because the former may fear that both they and the children are being manipulated. Alternatively, the children may be seen but not heard. This protects their innocence. Adults, family members, friends, and professionals can describe the likely impact of the sentence on the defendant's children who are seen playing with one another, for example. Thirdly, the children may be interviewed in a way that reveals their close relationship with their incarcerated parent but also their innocence with regard to the importance of the video to their parent's sentencing. The ability of the children to understand the implications of the video and the questions they are being asked to answer varies with the age and maturity of the children.

Apart from soliciting expressions of the children's regard for a parent who has broken the law, a video shot in the home, in observational or fly-on-the-wall mode, may illustrate better than testimony the significance of the contribution of the defendant to the children's care and well-being. The visual evidence is especially important where it shows how the struggle to deal with the number of children, their special needs, or the limitations of the children's other or alternative care givers will be exacerbated by the defendant's absence.

There are certain ethical considerations about using children in sentencing mitigation or clemency videos that may affect the videos' probative value and good faith. Giving testimony on behalf of a parent facing death or significant prison time is likely to be an emotional experience for a child. It may seem as if the burden of protecting the parent's wellbeing has been laid on her or his shoulders. A video presentation could be counterproductive if it appears that the child is being exploited by a parent facing substantial prison time because (1) the relationship between the child and the parent is falsely portrayed in the video, (2) the child's appearance in the parent's video is unduly stigmatizing, or (3) the child

is put in physical or emotional jeopardy by her or his appearance in the video. If it is clear that the child has been manipulated or coached to elicit an emotional response from the decisionmaker, the decisionmaker may resent it and dismiss the child's contribution. A video is likely to be most effective if the child's participation is or appears unscripted and natural, comprehensible to the child, and relatively voluntary.

If the child is very young, the obligation to tell the truth and the child's promise to do so will have to be explained in language the child can understand. If the prosecution is entitled to be present and to cross-examine the children,⁷⁰ the interview might become adversarial which could subject the child to the pressures she or he would experience if put on the witness stand in the courtroom. The wisdom of a parent who would subject a child to such a process may call the probity of the resulting evidence into question as well.

Woodward v. Alabama is a case in which the court refused to accept either the live or video testimony of the defendant's children as bona fide evidence of the quality of the defendant's fatherhood.⁷¹ The defendant, who was on trial for killing a police officer, attempted to introduce a video of four of his children and two of his nephews being interviewed by a mitigation specialist.⁷² The defendant had five children by four women; three of the children and one of the mothers testified in person. The children in the video recalled fun experiences they had had with the defendant and explained that they missed him. The defense asserted that bringing the children to court would have been traumatic, coming as it would on the heels of defendant's being found guilty of two counts of capital murder and facing the possibility of a death sentence or life without the possibility of parole. The trial court's refusal to admit the video into evidence was

⁷⁰ See *U.S. v. Becton*, 461 F. Supp.2d 138, 139-40 (S.D.N.Y. 2006) (court agrees to fund the production of an interview of a capital defendant's children provided the government is permitted to "engage in 'appropriate, sensitively-conducted, cross-examination'").

⁷¹ *Woodward v. State*, CR-08-0145, 2011 WL 6278294 (Ala. Crim. App. Dec. 16, 2011).

⁷² *Id.* at *46-47.

affirmed on appeal on the grounds that the evidence was irrelevant and cumulative, and its rejection, not prejudicial.⁷³

The testimony of the children was not supported by objective evidence of defendant's material support of his children, an important indicator of good fatherhood in the view of the court. The idea that the children were being exploited by testifying on the defendant's behalf was invoked in the trial court's assessment of the defendant's relationship with his children as a mitigating factor:

[T]he court is underwhelmed by Defendant's family situation. Defendant's very young children like him; he bought them clothes, took them places, and was a positive influence on them. What young child does not adore a parent? As for being a provider, Defendant appeared to do a bare minimum for his brood. He did not provide a home for any of them or their mothers. He lived in an apartment with yet another woman. When his children visited, they met at Defendant's mother's house. Buying clothes for his children on occasion is hardly being a responsible parent. He did not pay child support; the weight of the evidence indicates that he lacked a legitimate occupation that would provide the means to support families.⁷⁴ (Italics in the original text)

In addition, the court argued that the evidence "casts a strong doubt on the portrayal of Defendant as a responsible father working to provide for his children. Defendant has never paid taxes or filled a tax return. There is no record with the

⁷³ The appellate court concluded that video was irrelevant in that it contained statements about the sentence the defendant should receive, which were not allowed under court cases or the sentencing law. Furthermore, the video was cumulative given that three of defendant's children had testified in person. Finally, refusal to admit the testimony was not prejudicial since, without it, the jury had recommended a sentence of life without the possibility of parole rather than the death penalty and the court had found the defendant's relationship with his children a non-statutory mitigating circumstance. *Id.*

⁷⁴ *Id.* at *41 (italics in the original).

State of his having ever held a legitimate job. How then does he provide for his children?"⁷⁵ The court suggests that the answer was "the narcotics trade."⁷⁶

The good visual legal advocate has to take audience reception into account in order to be persuasive. Defense counsel in *Woodward* were working in an area where there are powerful representations of poor male parenting throughout mass media. Their efforts to employ defendant's children to construct a counter-narrative with words or better yet with audiovisual images seemingly backfired. Of course, groups vary with regard to the significance they place on the financial aspects of male parenting. A father's mere presence in his children's lives counts a great deal in some communities, especially as the children get older and the parent too grows up and gets wiser about the ways of the world. Cultural norms do differ and mitigation is about increasing awareness of cultural diversity. A more metaphorical or figurative contextual approach to the defendant's relationships with his children might have been more successful.

D. Documentaries as Evidence of the Context of a Defendant's Life

Defense counsel have unsuccessfully attempted to rely on commercially produced nonfiction or documentary photographs, film, and video of a general nature to supply visual images of the context and background of the defendant's life and criminal behavior. Typically, the evidence has been excluded on the grounds that it bore no relationship to the defendant and did not fall within any recognized exception to the hearsay rule.

For example, David Joseph Carpenter (a/k/a the "Trailside Killer"), who was convicted of the serial killing of eight hikers, spent a year in a state hospital for the mentally ill prior to his crimes.⁷⁷ His attorney sought admission of a newspaper expose and 16 photos about the institution that pertained to the period of the defendant's hospitalization. The news article, along with 12 photos, was included in a book which surveyed conditions at ten mental institutions

⁷⁵ *Id.* at 43 (italics deleted).

⁷⁶ *Id.* (italics deleted).

⁷⁷ *People v. Carpenter*, 935 P.2d 708 (Cal. 1997).

across the country.⁷⁸ One review published at the time said that the book was “certainly not a sober approach to the subject. It is a startling exposé in every way, from the language used to the pictures.”⁷⁹ Another reviewer had visited five of the 12 facilities; she or he concluded that “in some instances the defects were somewhat exaggerated, the services minimized, and the limitations were not sufficiently appreciated by the other. In places, attempts were made to secure emotional appeal rather than to present neutral facts.”⁸⁰

The appellate court rejected the article and 14 of the photos. The defendant’s attorney made no attempt to situate the defendant in the context of the institutional life they depicted or to in essence put him in the pictures. Furthermore, as the trial court indicated, the excluded evidence was unreliable hearsay “written in a sensational fashion, the thrust of which is a grand jury investigation of an alleged beating.”⁸¹

Defendants have also sought the admission of all or part of a documentary film as evidence relevant to a sentencing hearing. The defendant in *Nicholas Jason Bryant v. Georgia* was found guilty of two counts of murder committed in the course of a robbery.⁸² The 23-year-old defendant and his two victims, a 68-year-old male drug seller and user and a female drug user who was along for the ride, were on a mission to buy drugs. The defendant maintained that at the time of the shooting his capacity was impaired by drugs and that the male who was driving was acting particularly aggressive and paranoid because he had taken to

⁷⁸ The author of the article was Albert Deutsch. Mr. Deutsch wrote a number of pieces about mental institutions around the country; some of them wound up in his book. ALBERT DEUTSCH, *THE SHAME OF THE STATES* (1948).

⁷⁹ Book Notices, *The Shame of the States*, 140 JAMA 993, 993 (July 16, 1949). The photographs (apart from the captions) in the book are not nearly as horrific as the scenes from Pennhurst State School in Pennsylvania and Willowbrook State School in New York that appeared in muckraking television broadcasts several decades later. See *Suffer the Little Children* (NBC 10 broadcast 1968) (Bill Baldini reporting) (full five-part report can be found online at <http://www.youtube.com/watch?v=YG33HvIKOgQ>); *Willowbrook: The Last Great Disgrace* (WABC-TV Eyewitness New Special Report Jan. 6, 1972) (Geraldo Rivera reporting).

⁸⁰ Book Reviews, *The Shame of the States*, 70 CALIF. MED. 310 (April 1949).

⁸¹ *Carpenter*, 935 P.2d at 726.

⁸² *Bryant v. State*, 708 S.E.2d 362 (Ga. 2011).

shooting meth. The defendant killed his fellow passengers with the man's gun and stole the \$2,200 he had in his possession.⁸³

In support of his claims for mitigation, the defendant sought to admit into evidence "Crystal Death," a 25-minute "public service" documentary produced by the Sheriff's Department of Douglas County, Georgia, the very agency that investigated his case.⁸⁴ Produced in 2005, the video features former meth users (including a serial killer, a middle-aged father of a college student, and a young mother whose own mother describes her efforts to help her child come to grips with addiction), police officers, and a physician who had experience with meth users. All of them describe the myriad powerful destructive effects of meth addiction. There are also staged scenes involving actors playing the role of meth addicts cooking the drug on the kitchen stove and interacting with toddlers. According to the defense's appellate brief, the video would have supplied "reliable evidence about the effects of methamphetamine and how it contributed to the events that took place on the day of the shooting."⁸⁵

The appellate court upheld the lower court's rejection of the video. It stated that "mitigation evidence that does not focus on the character, background, or offense of the particular defendant on trial is properly excluded."⁸⁶ "Crystal Death" did not refer to the defendant or his victims, and they did not contribute to its production.⁸⁷ The holding was in accord with the argument advanced by the prosecution which maintained that the video was "generic" and duplicated the testimony of the defense's medical expert who put

⁸³ *Id.* at 370.

⁸⁴ A copy of the video was obtained from the Sheriff's Office and is in the possession of the author. It was also available online at mms://mediam1.gpb.org/Ga-DouglasCo/DouglasCo_MethVideo_558kbps.wmv.

⁸⁵ Brief of Appellant at 11, *Bryant*, 708 S.E.2d 362 (No. S10P1689), 2010 WL 4091313.

⁸⁶ *Bryant*, 708 S.E.2d at 384.

⁸⁷ *Id.*

the information on the record through a method that did not contravene the hearsay rule.⁸⁸

Having found that the video was not relevant, the court did not have to reach the prosecution's second objection that the video constituted hearsay. The video presented substantive information going beyond the testimony of live witnesses. Furthermore, the information conveyed was "constructed" to reflect the filmmakers' points of view.⁸⁹ The defense argued that it came within the exception for admissions by an opposing party because it was made by a state agency, though not by the prosecutors involved in the defendant's case.

There are two other grounds the defense might have invoked to support the introduction of "Crystal Death" although both require connecting the video to the live testimony of a witness having knowledge of the contents. Video has been used to illustrate testimony, in which event the video is not admitted for the truth of the assertions it contains or in essence makes. The live witness is the source of any declarations and can be cross-examined about them.

Alternatively, the video might have been admitted under the learned treatise exception to the hearsay rule.⁹⁰ Courts have held that a video may qualify as a learned treatise, much like books and periodicals,⁹¹ that can be relied on by an expert during direct examination or brought to an expert's attention on cross-examination.⁹² The video must be "established as reliable by the expert's admission or testimony, by another expert's testimony, or by judicial notice." The reliability or authoritativeness of the video depends on the credentials and

⁸⁸ Brief of Appellee State of Georgia at 72-76, *Bryant*, 708 S.E.2d 362 (S10P1689), 2010 WL 5893653.

⁸⁹ MCCORMICK ON EVIDENCE 38 (7th ed. 2013) (Kenneth S. Broun gen. ed.).

⁹⁰ FED. R. EVID. 803 (18).

⁹¹ *Costantino v. Herzog*, 203 F.3d 164, 171 (2d Cir. 2000) (reasoning that a visual format is not a reason to keep trustworthy, authoritative information from the jury); *but see Simmons v. Yurchak*, 551 N.E.2d 539, 543 (Mass. App. Ct. 1990) (the legislature should determine if videotapes are accepted as authoritative in the scientific community and therefore learned treatises).

⁹² FED. R. EVID. 803 (18).

reputation of its producers and directors within their fields, their interest in the proceedings, the purpose and intended audience for which the video was made, the rigorousness of the process leading to production and distribution of the video, and the extent to which it has been subject to peer review, public scrutiny, or other forms of evaluation for accuracy.⁹³ Precedent suggests that video cannot stand on its own.⁹⁴ It is admissible only in connection with expert testimony and can be screened into evidence but not received as an exhibit which would be available to the jury during deliberations. These prerequisites are intended to prevent jurors from misunderstanding or misapplying the information the learned treatise contains. The decision to allow use of the video as such is bolstered if the trial court views it beforehand.⁹⁵

It is unclear whether defendant's lawyers' attempt to introduce "Crystal Death" was related to live witness testimony. The sheriff of Douglas County himself took the stand at the trial as did a medical expert for the defense who, according to the prosecution, testified about how meth works and "the chronic psychological effects that are observed in regular users, including loss of control." Either of them might have been in a position to vouch for the video's reliability and basis in evidence.

However, the characteristics of "Crystal Death" are somewhat equivocal with regard to whether it would qualify as a learned treatise. The videos that have been so defined in other cases have typically been made by professional associations and educational institutions for training purposes. The Office of the Sheriff of Douglas County, Georgia, however, probably had a good deal of familiarity with meth and the behavior of meth users. An internet search turned up little information about the independent filmmaker (David Zelski) and company (Dizzy Productions) that were involved in producing the video. "Crystal Death" was made for a lay audience by governmental entities seeking to educate citizens about, and to deter the use of, an illegal drug that also represents an

⁹³ Loven v. State, 831 S.W.2d 387, 396 (Tex. Crim. App. 1992).

⁹⁴ See Hill v. Hill, 634 N.W.2d 811, 816 (Neb. Ct. App. 2001).

⁹⁵ Costantino, 203 F.3d at 172; Loven, 831 S.W.2d at 397.

environmental hazard. Given the purpose of the video, it might be expected to exaggerate the dangers of meth. It appears to have been distributed broadly on the internet and on DVDs. It is not possible to tell from the video itself if it was vetted for inaccuracies by outside experts before it was distributed or if it attracted critical comments thereafter.

A documentary aired by the BBC (British Broadcasting Corporation) about street children in Guatemala might have had a better chance of being considered a learned treatise within the exception to the hearsay rule. Its admission was sought during the murder trial of Christian Antonio Monterroso, who was charged with killing two grocery store clerks in separate holdups.⁹⁶ Monterroso was born in Guatemala and came to this country at the age of 5.⁹⁷ When he was 16 years old, after he had dropped out of school and done a stint in rehab for substance abuse, he was sent back to Guatemala to live with his father. This was in the late 1980s. Because he did not get along with his stepmother, he wound up on the streets of Guatemala City for a time. He was back in the USA by the summer of 1989.

As part of the penalty phase of his case,⁹⁸ his attorney sought to introduce all or part of a 1991 BBC documentary entitled “They Shoot Children, Don’t They?” which focused on the abuse Guatemalan street children suffered at the hands of security forces and death squads.⁹⁹ At a hearing prior to the penalty stage, defense counsel termed the video an accurate depiction of the life of street

⁹⁶ People v. Monterroso, 101 P.3d 956, 966 (Cal. 2005).

⁹⁷ *Id.* at 966.

⁹⁸ *Id.* at 981.

⁹⁹ THEY SHOOT CHILDREN, DON’T THEY? (BBC Everyman series 1991) (Judith Jackson, director). A copy of the video is in the possession of the author. The documentary follows Bruce Harris, an Englishman employed by Covenant House in Guatemala City, as he works with street children and attempts to document the abuse they suffered at the hands of the authorities, including the abduction and disappearance of 14 homeless boys. The life of these street children was hard. They survived through prostitution and stealing. They became addicted to glue to stave off cold and hunger. They were harassed, tortured, and murdered by security forces that were known to force the children to swallow the glue they were sniffing. Monterroso testified that he stopped stealing because he was afraid of the death squads. *Monterroso*, 101 P.3d at 966.

children, but did not offer witnesses “to authenticate the film or opine on its fidelity to the life of street children in Guatemala City,” nor did he offer to show that the time frame of the events depicted in the documentary coincided with the defendant’s time in Guatemala.¹⁰⁰ The judge indicated that there was a “strong possibility” that the documentary would be admitted if the defendant testified that he suffered abuse similar to that suffered by the children in the film.¹⁰¹

After both sides had presented their penalty phase evidence, the defense belatedly asked for a ruling on the admission of the documentary. The court rejected the request as untimely and further indicated that the film was “not relevant or connected up by any defense evidence.”¹⁰² On appeal, the Supreme Court of California found no error in the exclusion. It noted that the documentary was hearsay.¹⁰³ Furthermore, “[d]efendant never claimed any personal contact with the police ‘death squads.’”¹⁰⁴ “To the extent the video depicted the general level of poverty in Guatemala, it was cumulative of the testimony of defendant and other witnesses.”¹⁰⁵ Finally, the documentary “had no relevance to defendant’s character, prior record, or the circumstances of his offense.”

While Monterroso was not on the streets of Guatemala City during his formative years, there is nonetheless some support for the notion that the documentary was of relevance to his sentence. During his time there, he “befriended a number of children in the area and raised money for their sports programs.”¹⁰⁶ He apparently found some meaning in life beyond himself. The documentary focused on the brutalization of the children who became homeless because of systemic problems, not just family discord. A civil war drove families out of rural areas. Life in the city was difficult and parents were forced to abandon children to fend for themselves on the streets. The video would have

¹⁰⁰ *Id.* at 982.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 982.

¹⁰⁴ *Id.* at 982.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 966.

been highly relevant to understanding the character of a defendant whose upbringing mirrored that of the children depicted in the documentary. That was not Monterroso. However, the video might explain the contribution he made to some homeless children's lives when he focused on helping them to survive. It might have illustrated his own testimony or that of the director of the rehabilitation program in which he was enrolled shortly before he returned to the United States.

In addition, the video might have qualified as a learned treatise if it had been vouched for by an expert whose testimony it supplemented or contradicted. The documentary was broadcast on BBC One as part of the *Everyman* series which aired on Sunday evenings between 1977 and 2005. It was an independent production directed by Judy Jackson whose work generally focuses on social justice and human rights issues.¹⁰⁷ The BBC has a reputation for solid journalism and code of practice and editorial guidelines to which independent producers of documentary content must adhere. After being broadcast in 1991, "They Shoot Children, Don't They," according to Jackson's website, generated a letter-writing campaign against violence inflicted on Guatemalan street children as depicted in the video that ultimately led to the arrest of four police officers there.¹⁰⁸

If an expert is required to attest to the authoritativeness of a video, admission of the video itself may seem duplicative and therefore unnecessary. Yet, as the court stated in *Loven v. Texas*, "In most cases, a [learned] treatise will better communicate the bases of a particular subject to the jury than will and expert speaking contemporaneously."¹⁰⁹ A video that combines audio and visual images may be more effective than traditional testimony at making a case for mitigation where a defendant's claim revolves around her or his being from a different place, a different time and a different culture. This is likely to be increasingly so as more

¹⁰⁷ Judy Films, <http://www.judyfilms.com/home.html> (last visited June 27, 2013).

¹⁰⁸ Filmography, 1991, "They Shoot Children, Don't They," <http://www.judyfilms.com/films/theyshootchildren.htm> (last visited June 27, 2013).

¹⁰⁹ *Loven*, 831 SW2d at 395.

of us come to realize that, as a result of the digital revolution, we learn better from audio accompanied by images than from the spoken word alone.

Individuals do not exist in a vacuum and lawbreakers are impacted by the material and social world in which they live. Context is especially significant to mitigation. The courts in *Carpenter*, *Bryant* and *Monterroso* all suggest that nonfiction documentary work that offers a macro-level perspective (of systems and institutions) or a meso-level perspective (of group relationships and associations) on a defendant's life can be relevant mitigation evidence if the defense virtually puts the defendant in the picture. Capable in a way of defying time and place, documentary photos, films and videos can be highly effective ways of transporting the sentencer(s) to the place in which a defendant's humanity was nurtured or dashed and her or his choices were enlarged or circumscribed, if not preordained.

VI. Summary of Five Major Points that the Maker of a Sentencing Mitigation Video Should Consider

(1) A good sentencing mitigation video should tell a good story. If possible, it should attribute to the defendant one or more of the following elements: self-discovery, introspection and remorse; the exercise of agency and responsibility; or upward movement and growth in terms of skills, world view and social relations.

(2) Because they are composed of text, images and sound, sentencing mitigation videos are especially useful in showing

- (a) the physical environment the defendant inhabited,
- (b) the witnesses' intellectual and physical capacities,
- (c) the witnesses' individual subjectivity and vulnerability,
- (d) the witnesses' feelings and tastes,
- (f) the defendant's family rituals, performances, and interactions,
- (e) the cultural practices and expressions of the groups of which the defendant is a member, and

(g) the role of institutional actors and systemic forces played in producing the defendant's current situation.

(3) A sentencing mitigation video should contain content that is relevant, exhibits indicia of reliability, and avoids unnecessary redundancy. The relevance of evidence contained in a mitigation video depends on its bearing on the defendant's character, prior record, and the circumstances of the offense.

(4) Sentencing mitigation videos are hearsay and contain hearsay. The witnesses are typically not under oath. They may be unavailable to testify in court or to be subjected to cross-examination. The introduction of hearsay may be unavoidable given the span of time, geography and experiences a case for mitigation can potentially cover. The unavailability of witnesses should depend on the nature of the excuse, the importance of the witness to the defendant's claim of mitigation, and the availability of other means of challenging the testimony of the witness besides cross-examination. The evidentiary hurdles should be reduced by giving the prosecution access to the video well before it is introduced along with the names and contact info of the witnesses.

(5) Witnesses appearing in sentencing mitigation videos may be socially and psychologically vulnerable. It is therefore important that the visual legal advocate observe the obligations of legal and visual ethics by

- (a) obtaining informed consent from the witness or the witness's guardian,
- (b) protecting witnesses' privacy and need for confidentiality
- (c) avoiding exploitation;
- (d) taking into account harm stemming from audience reception such as stigma, and
- (d) verifying the accuracy of the content.

V. Conclusion

The visual portrait of Risa Bejarano presented to the jury in Juan Chavez's capital murder case succeeded in presenting her as a deeply contextualized,

socially connected, yet individually complex person. Her life was impacted by institutions that made it both better and worse. The foster care system got her through high school but was not there to support her through college the way good parents routinely do. Aging out of foster care put enormous pressure on Risa to be independent and to survive on her own; this pressure proved deadly. The university's services were inadequate to sustain a freshman lacking the family support that typical students enjoy. The same is true of the medical and mental health systems which did not deliver the treatment for her drug addiction, including the expensive psychotropic medicines, she needed to survive.

Risa had the strength of character to attempt to overcome the obstacles posed by the inadequacies and failures of these institutions, but they were ultimately insurmountable. Risa was a person who attracted friends among her peers in high school and her college dorm mates as well as adult supporters like her foster mother and social worker. She cared about them and what they thought of her. The footage from "Aging Out" does not tell us this. It shows us this. It comes through in the scenes of Risa and her foster mother shopping for school supplies and walking down the street laughing. It is obvious from the scenes of Risa and her friends before the prom and of Risa moving out of her dorm room.

Finally, Risa's character was marked by ambivalence. She wanted a better life for herself but was unsure that she was capable of achieving it on her own. She had great sympathy for her siblings and others who were trapped in the grip of the harsh material and emotional conditions that characterized her upbringing. The directors do not tell us this. We infer it from the images they provide. We infer it from what Risa says and does. The use of audiovisual images as opposed to exposition created a sense of positive movement and engagement with life by Risa and a connection by the audience with her. She did not passively accept her station in life; she worked against it. Even though she fell short in the end, the viewer cares about Risa because she tried so hard and is unprepared to write her off as just another drug addict.

Juan too had a story that could have been told by depicting his life in terms of an institutional context of supports and failures, positive and counterproductive social connections, and individual complexity. Juan was in many respects a creature of his circumstances, and his supporters contended that his criminal conduct and demeanor did not really reflect who he was. There were ways to visually position Juan in a time and place of limited opportunities and blocked escapes. More attention could have been paid to developing evidence of his potential for growth and redemption. As matters were addressed, however, the arc of a good story was absent. His best argument for a life sentence--that Risa would not have wanted him to get the death penalty—depended on the finer qualities of his victim, not himself.

A good mitigation video might have made a difference in Juan's sentence. The failure of the directors of "No Tomorrow" to produce one for Juan may have less to do with the material that investigation into Juan's life turned up and more to do with the lack of accessible examples of the genre and a broad discussion and analysis of sentencing mitigation videos and other forms of visual legal advocacy among practitioners and academics. Given the lack of access to existing mitigation videos and the nonexistence of a code of best practices for their production, the directors might have been tempted to pour their creativity into generating a video that ignored the reality of who Juan was and unabashedly tugged at the heart strings. Mitigation videos are not supposed to portray what is not there. They are not supposed to be works of fiction. That is why the state should be able to challenge them. Still, it should be acknowledged that mitigation evidence is generally a mixture of fact, opinion, and a plea for mercy that can span a wide frame of time, distance and relations. The state should not be able to demand the right to cross examine every witness who appears in a sentencing mitigation video or to insist that a video be rejected for admission simply because it is or contains hearsay.

Mitigation videos have the capacity to convey with efficiency a more complex and nuanced portrait of a defendant's background, character, and crime than ordinary oral testimony delivered by witnesses taking the stand. Beyond

that, greater use of mitigation videos may have a potentially transformative impact on the criminal justice process. One investigator likens the effect of such videos on defendants to that produced by an encounter with a truth and reconciliation commission.¹¹⁰ Having others bear witness to the events of their lives, while actually seeing those events situated in a larger systemic and social context, has a profound influence on some defendants. It impresses them and shakes them up. The videos give them an opportunity to talk about the lives they have lived. The combined impact of victim impact videos and sentencing mitigation videos allows defendants to confront their insensitivity toward their victims and their ignorance of the impact of their crimes on their own loved ones. For many defendants, this kind of awareness will develop over time, but time may be one thing some defendants do not have. If videos speed up the process of accountability and repair of human relationships, then so much the better.

¹¹⁰ Telephone Interview with Susan Randall, Sentencing Investigator, in Burlington, Vermont (Sept. 16, 2011).