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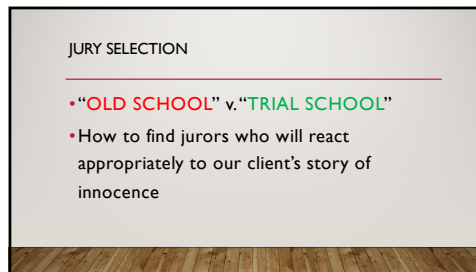
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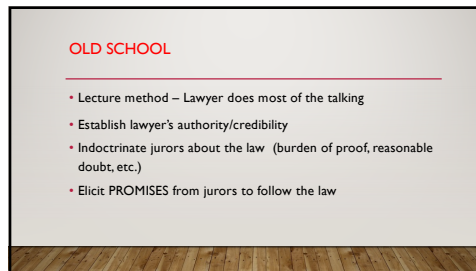
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OLD SCHOOL

PROBLEMS

--- Tells us almost **NOTHING** about the jurors

--- We end up falling back on **STEREOTYPES** and gut feelings

--- Banking on jurors **ASPIRATIONAL** promises

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OLD SCHOOL

STEREOTYPES

LOVE

Women

Blacks

Young

Poor

Teachers/Social Workers

HATE

Men

Caucasians

Old

Wealthy

Bankers/Cops

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OLD SCHOOL

“It is **arrogant** and **stupid** to choose jurors based on stereotypes of gender, race, age, ethnicity or class.”

- Ira Mickenberg

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## OLD SCHOOL

### ASPIRATIONAL PROMISES

Studies show:

- Jurors decide cases based on prejudices, preconceived notions, and feelings, regardless of the LAW or what any judge /lawyer tells them, even if they honestly believe otherwise.
- Asking about future behavior results in aspirational answers.

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## TRIAL SCHOOL

- LISTENING – Jurors do most of the talking
- Establish jurors' authority – empower them to act to do right
- Indoctrinate jurors about story of innocence
- Elicit opinions/feelings that help us predict how jurors will emotionally react

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## TRIAL SCHOOL

Studies show:

- The best predictor of what a person will do in the future is not what they say they will do, but what they have done in the past in analogous situations.
- Attitudes and feelings (emotions) are based on personal experiences

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TRIAL SCHOOL

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COMMAND

SUPERLATIVE

ANALOGY

10

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TRIAL SCHOOL

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COMMAND

-- TELL us about...

-- DESCRIBE for us...

-- SHARE with us...

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TRIAL SCHOOL

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SUPERLATIVE

-- The BEST...

-- The WORST...

-- The MOST SERIOUS...

-- The MOST RECENT...

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## TRIAL SCHOOL

### ANALOGY

- Life Experience
- Personal
- Dealing with a topic central to client's story of innocence

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## TRIAL SCHOOL

### EXAMPLES OF CSA "QUESTIONS"

(Self Defense) -- **TELL** us about the **MOST** force you ever had to use to defend yourself  
(Alcohol) -- **SHARE** with us about the person who showed the **BIGGEST** change in behavior after drinking alcohol  
(Police) -- **DESCRIBE** for us the **WORST** encounter you or someone close to you have had with police

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## TRIAL SCHOOL

What if my judge won't let me do this?!

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## TRIAL SCHOOL

### If judge tries to stop this:

- Prophylactic setup
- Remind judge the Government did this
- Cite case law
- In order to provide effective assistance of counsel need to judge potential jurors' fairness
- Offer to be done sooner

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## TRIAL SCHOOL

### If judge tries to stop it and all else fails...

#### Go in through the back door!

- Can you be fair?
- What makes you say that?
- Based upon how you feel about \_\_\_\_\_?
- How did you come to your opinion or feelings about \_\_\_\_\_?
- What had the biggest influence on your opinion or feelings about \_\_\_\_\_?

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## TRIAL SCHOOL

### MAL DAVIS CASE

- What are our emotional pitches?
- What facts/characters might jurors have emotional reactions to after hearing our story?
- What analogous life experiences might we want to have them share with us?

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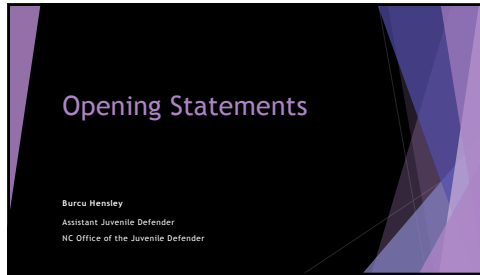
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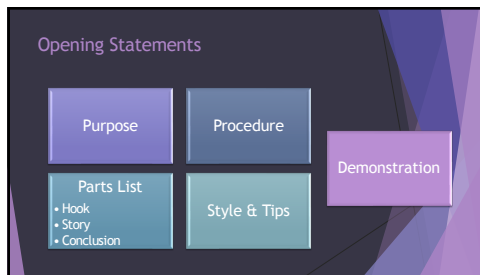
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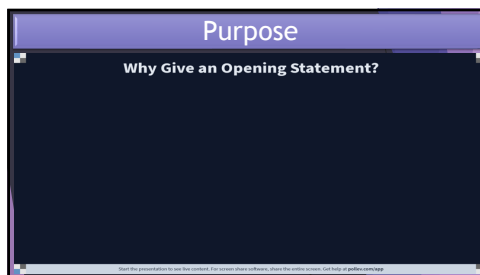
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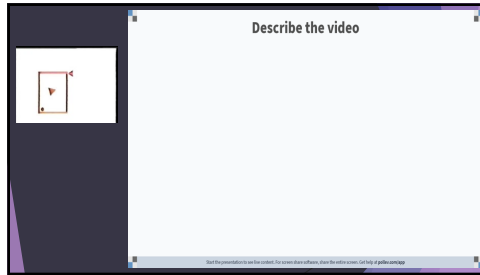
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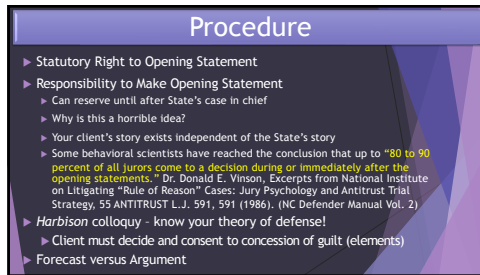
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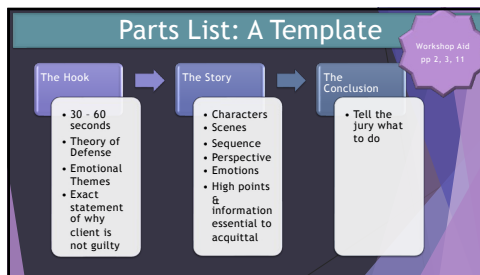
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## Parts List: A Template

The Hook

- Makes the jury feel your story is right and should be accepted
- Mal Davis is not guilty of murder. He was at the mercy of a cop that was drunk, corrupt, and a top-notch bully. Mills ordered Mal to take him to Jelly's house, Mills threatened Mal to cooperate, and Mills forced Mal to call Jelly. Mills made the deal with Jelly while Mal covered several feet away. Mal is not guilty of murder because he had nothing to do with this drunk and corrupt bully's agenda.

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@ When poll is active, respond at [polllev.com/mcojd200](https://polllev.com/mcojd200)  
 or Text **NCOJD200** to **22333** once to join

### What is the theory of Defense?

The criminal incident never happened.

The criminal incident happened, but Mal didn't do it.

The incident happened, Mal did it, but it wasn't a crime.

The criminal incident happened, Mal did it, it was a crime, but not the crime charged.

The criminal incident happened, Mal did it, it was the crime charged, but Mal's not responsible.

The criminal incident happened, Mal did it, it was the crime charged, Mal's responsible, but who cares?

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### What are some other possible themes?

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### Parts List: A Template

The Story

- 3 Main Characters: Mills, White, Mal
- 3 Main Scenes: Bar, Parking Lot, Porch
- Sequence: Chronological, starting at the bar
- From whose perspective will you tell the story? 3<sup>rd</sup> person omniscient / following Mills

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### Parts List: A Template

The Conclusion

- Tell the jury what you want them to do
- Then sit down
- No thank you's or legal talk
- Keep their attention on the theory of the case

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### Parts List: A Template

The Conclusion

- Mal Davis is not guilty of murder. ~~After hearing all the evidence, you will find that~~ Mills was a drunk, corrupt bully who forced Mal to cooperate with his agenda. ~~You will find that~~ it was Mills that set up the drug sale, not Mal. ~~You will find that~~ Mills called all the shots. ~~And you will find that~~ the right verdict for Mal Davis is not guilty.

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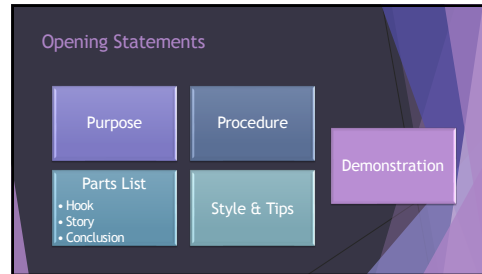
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Style & Tips

- ▶ Principals of primacy and recency:
  - ▶ Front load the strong stuff
  - ▶ Start on a high note, end on a high note
- ▶ Drop the legalese. Drop the big words, too. Tell the story to an 8-year-old on a playground
- ▶ Don't write it out. Just tell the story. The jury won't believe your client's story if you don't believe your client's story.
- ▶ Approach the trial as if you are a screenwriter creating a movie script. Your opening is the full-length trailer (no cliffhangers!)
  - ▶ Hero? Villain? Plot?
- ▶ Do not overpromise.
- ▶ Use graphic, colorful, descriptive language.
  - ▶ Visit the scene
- ▶ Your body language can help tell the story.
  - ▶ Everyone please stand up

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Style & Tips

- ▶ Your body language can help tell the story.
  - ▶ Everyone please stand up

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graph TD; Angry[Angry]; Outraged[Outraged]; Fear[Fear]; Confused[Confused]; Surprised[Surprised]; Relieved[Relieved]; Emotions((Emotions));
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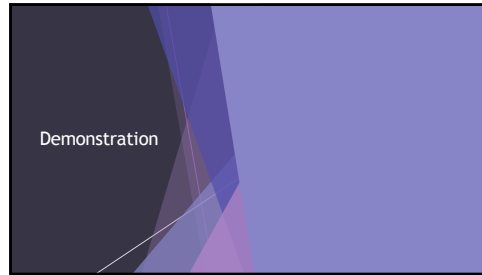
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Officer White:

- Don't call for backup "until we make the score."
- "I know where else we can make a buy."

Helen Cruz:

- Mills got angry and loudly said "some very hateful things" to the informant.
- Mills had "a hot temper when it came to work and was really angry that the drug dealer did not show up."
- White got into a big argument w/ informant and urinated on the hood of informant's car.

Bob Hale (manager @ Chili's):

- Mills had a reputation as a "pretty nasty boy. You wanted to stay out of his way."
- Other officer was "kind of young and seemed to look up to Mills."
- 7:15 pm - 11:00 pm

Autopsy report BAC .11

"Now you go to jail sucker"

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### Parts List: A Template

#### The Hook

- Mal Davis is not guilty of murder. He was at the mercy of a cop that was drunk, corrupt, and a top-notch bully. Mills ordered Mal to take him to Jelly's house. Mills threatened Mal to cooperate, and Mills forced Mal to call Jelly. Mills made the deal with Jelly while Mal covered several feet away. Mal is not guilty of murder because he had nothing to do with this drunk and corrupt bully's agenda.

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Chili's	
3/15/2001	
Server 2000	
Wgt Item	10.00
2.00 Steak	
4.00 Pasta	20.00
3.00 Chutney	17.00
Tax	1.00
Total	58.00

**Officer White:**

- Don't call for backup "until we make the score."
- "I know where else we can make a buy."



**Helen Cruz:**

- Mills got angry and loudly said "some very hateful things" to the informant.
- Mills had "a hot temper when it came to work and was really angry that the drug dealer did not show up."
- White got into a big argument w/ informant and urinated on the hood of informant's car.

**Bob Hale (manager @ Chili's):**

- Mills had a reputation as a "pretty nasty guy. You wanted to stay out of his way."
- Other officer was "kind of young and seemed to look up to Mills."
- 7:15 pm - 11:00 pm

**Autopsy report BAC .11**

"Now you go to jail sucker"

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# Cross Examination

Johnna Herron  
Assistant Public Defender, Guilford County

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## What is the point of cross examination?

- Get helpful information out of the witness
- Discredit hurtful information from the witness
- Discredit the witness

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## What is the point of cross examination?

- This is not the time to make your closing argument
- Get the facts you need to make your closing argument later

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Topics to Address

- Facts that support your theory
- Facts that discredit the State's theory
- Facts that attack the witness's credibility

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Cross Examination Basics

- Ask leading questions
- Ask one fact per question
- Keep questions simple and short
- Never ask the "burrito question"

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Leading Questions

- Do NOT start with "who," "what," "when," "where," "why," or "how"
- Are NOT simply questions that require a "yes" or "no"
- Are sentences that can (but need not) end with, "right?" or, "correct?"
  - Drop the "tag" at the end and use your tone to ask the question

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Leading Questions

Q: Why didn't you check the gun for fingerprints?

A: Well, guns typically have rough surfaces, and fingerprints don't stick very well to them, so we don't usually find fingerprints on guns anyway.

Q: Did you check the gun for fingerprints?

A: No, it's usually not helpful to do that.

Q: You didn't check the gun for fingerprints?

A: No.

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Just the Facts

One fact per question

If you find yourself with multiple facts per question, break it up into multiple questions

Don't be afraid to break down complex or unfamiliar concepts into simple questions

Stick to facts – not characterizations

Never ask a question if you don't know the answer

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One Fact Per Question

Q: You found heroin and cocaine?

A: No.

Q: You found heroin?

A: Yes.

Q: You found cocaine?

A: No.

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Characterizations

- Q: The car was going too fast?
  - A: Well, I wouldn't say that. Everyone drives that speed on that part of the road.
- Q: That was irresponsible, wasn't it?
  - A: I think it would have been more irresponsible to drive significantly slower than all the other cars on the road.

- Q: When the silver car hit the green car, it pushed it all the way up onto the curb?
  - A: Yes.
- Q: And the debris landed as far as 50 feet away?
  - A: Yes.

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Simple and Short Questions

- Q: Officer, on the date in question, did you have the occasion to come upon a white powdery substance that you suspected was (and ultimately confirmed to be) cocaine hydrochloride?
- Q: You found cocaine?

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The "Burrito Question"

- Never ask the "burrito" question
- This gives the witness a chance to explain

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The "Burrito Question"

Q: You had rice?

A: Yes.

Q: You had black beans?

A: Yes.

Q: You had chicken?

A: Yes.

Q: You had cheese?

A: Yes.

Q: You had salsa?

A: Yes.

Q: You had guacamole?

A: Yes.

Q: You had sour cream?

A: Yes.

Q: And you put all that in a tortilla?

A: Yes.

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The "Burrito Question"

Q: So you had a burrito?

A: No, I had a taco.

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The "Burrito Question"

Ask about all the facts you need leading up to that question, but stop before you start a question with "So..."

Wait until closing argument to argue your point with the facts you've gathered

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### The "Burrito Question"

- What should you do if you accidentally ask the "burrito question"?
- Pivot!
- Ask questions that differentiate the witness's explanation from your conclusion (if you can)

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### The "Burrito Question"

- Q: So you had a burrito?
  - A: No, I had a taco.
- Q: But the tortilla was twelve inches in diameter, right?
  - A: Yes.
- Q: When you wrapped it up, you tucked in both ends of that tortilla?
  - A: Yes.
- Q: You only ate one of them as your meal?
  - A: Yes.

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### Organization

- Use the "chapter" method
- Use signposts
- Remember primacy and recency
- Be flexible – listen to the witness and adapt as needed

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### The "Chapter" Method

- Write down all the facts you need to get from the witness for your closing argument as bullet points
  - It helps to do this in a Word document so you can rearrange them
- Sort each fact into a broader topic you want to address (your "chapters")
- Organize your chapters so that they will have the most impact
- Signposting: when you change topics, let everyone know

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### The "Chapter" Method

- Listen to the direct examination and note anything you want to add to a chapter
- Have each chapter on a separate page so they can be rearranged on the fly
- It's okay to deviate from your written points if the witness gives you an unexpected answer you need to explore
  - The written points will then help you get back on track when you're done!

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### Controlling the Witness

- Interrupting the witness mid-answer usually won't work
- Try asking easy questions first to get in the flow of short answers
- Do your best to get a "yes" or "no"
  - If the witness doesn't answer the first time, ask again
  - If you ask 3 times with no answer, move on

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### Impeachment

- Refer to NC Rules of Evidence 607 through 613
- Common topics of impeachment
  - Prior inconsistent statements
  - Prior convictions
  - Bias or interest

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### Prior Inconsistent Statements

- You can ask a witness if they said something different at another time
  - Remember, the prior statement is not evidence itself!
- If the witness denies the prior statement, you may use other evidence to prove it
  - Transcript of prior testimony, video or audio recording, testimony of another witness, etc.
- State is entitled to a copy of the impeaching evidence upon request
- Note: be careful of "putting on evidence" if you do not intend to do so
- Refer to NC Rule of Evidence 613

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### Procedure for Prior Inconsistent Statements

- Have the witness reaffirm the statement you are impeaching
- Establish the prior statement occurred
- Build up the veracity of the prior statement
- Confront witness with prior statement
- Resist the urge to keep going!
  - You will only allow the witness to explain away the inconsistency

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### Prior Convictions

- "What, if anything, have you been convicted of in the last ten years that carries a maximum punishment of sixty days or more?"
- If witness doesn't name all convictions, follow up!
- Decide whether the witness's record is bad enough that it's worth asking
- Refer to NC Rule of Evidence 609

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### Bias or Interest

- If the witness has a reason to lie (or err on the side against your client when they don't know), you may ask about it
- Common biases
  - Witness doesn't like client or likes alleged victim
  - Witness (or loved one) could face consequences from admitting the truth
  - Witness has a financial or other interest in outcome of case

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### Other Forms of Impeachment

- You may ask about facts that contradict the witness's testimony
- You may cross examine on prior dishonest acts, but cannot prove it by extrinsic evidence
  - Refer to NC Rule of Evidence 608(b)
- You may ask experts about treatises that contradict their methods or opinions

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Some Style Points

- Use theory and theme language
- Watch out for verbal "tics"
- Don't be a bully
- Make eye contact with jurors during important points

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Mal Davis Case

- What are some facts we would want to get out of Officer White?
- What are some chapters we would include in our cross examination of Officer White?

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Demonstration

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## Direction Examination – Session Summary

Timothy Heinle, UNC School of Government

Direct exam allows you to deliver your message to your audience. Tell your story. Control your narrative.

### *Choose witnesses*

- Driven by your case theory. Each witness should advance your theory in at least one way.
- Identify a witness' strengths and weaknesses. Cut anticipated attacks off in advance.

### *Tell your story*

- Use the chapter method to prepare your direct. Chapters can be
  - a place or moment in time (e.g., Harris Teeter the night of June 10), or
  - facts or themes (e.g., childhood bullying, desperation, or lack of sleep).
- Decide the order of your chapters and questions.
  - Chronologically may be appropriate but can also be boring/mimic the State's case.
  - Maybe start with a topic (e.g., fear of police) rather than an event.
  - Or move through events non-chronologically (e.g., testifying about the shock of being tackled by store security before describing his day in general, including shopping).

➔ Tip! Write facts you want brought out in different chapters on separate sheets of paper. Rearrange them to find the most effective sequence. Then create your transition statements and questions.

### *Question styles*

Move beyond "leading questions on cross, open questions on direct." There are degrees to open-ended questions. Ask open but controlled, purposeful questions.

1. Wide open: "Tell us about your family." "Did anything happen that night?"
  - a. Risky (witness could give a harmful or boring response).
2. Less open: "Describe the air quality." "How far from the kitchen were you?"
  - a. Still open, but it allows you to exercise some control over the direction of the response.
3. Close-ended but non-leading: "Did you smell smoke?" "Could you clearly see her?"
  - a. Some will incorrectly say this is a leading question. Retreat to slightly more open, less-directed style questions, then fluctuate. Find the line and walk it.

Your style may vary by witness. For example, you may give a forensic expert more wide-open questions, allowing them to testify freely. Whereas for your client, you may prefer to use more controlled questioning, while still allowing the client's voice to shine through.

### *Bring scenes to life*

- Use transition statements (e.g., "I want to discuss your typical day").
- Incorporate demonstrative evidence (e.g., a map; photograph of room).
- Take your time. Do not just use conclusory questions and move on. Flesh out details.
- Use descriptive words to activate the listener's five senses (e.g., in a self-defense case, asking the defendant to describe the taste of blood in her mouth before she hit back).

### *Prepare*

Practice testimony with witnesses, out loud, whenever possible. Help each other be more effective. Explain their purpose. Simulate trial so they are not surprised by the feeling of pressure in court.





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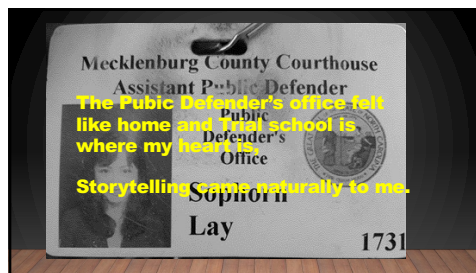
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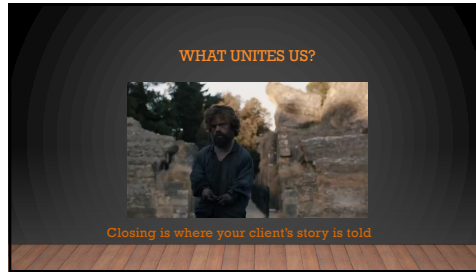
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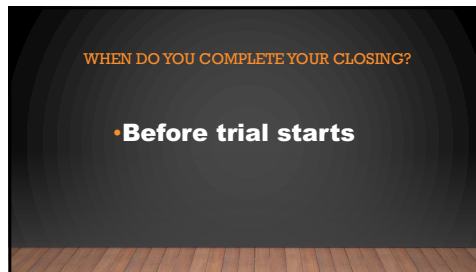
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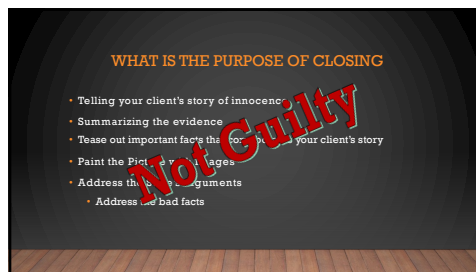
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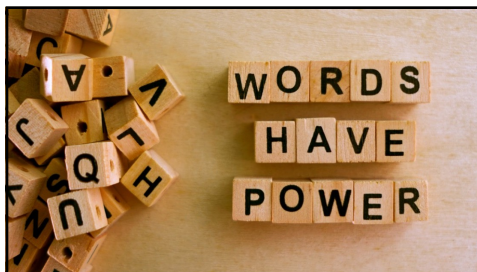
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- Set the Scenes
- My storytelling journey
  - 1. Refugee camps in Cambodia
  - 2. Educated in the South
  - 3. Being at home as a public defender
- **Mal Davis**
  - 1. Before Mills that Day
    - 1. Addicted since 18 years old
    - 2. 7 out of the last 9 years in prison
    - 3. Vulnerable and Afraid of Cops
  - 2. Met Mills
    - 1. Pulled away from fighting several Black men
    - 2. Forced to buy drugs
  - 3. After Mills
    - 1. Sitting in jail for just doing what an officer told him to do

### CHRONOLOGY

- **Officer Mills**
  - 1. Chilly
    - 1. Drunk
    - 2. Rowdy-itching for a bust
  - 2. Magnolia Terrace
    - 1. Aspen growing
    - 2. Starting fight
    - 3. Kidnapped Mills
  - 3. Jelly's House
    - 1. No backup
    - 2. Reckless arrest
    - 3. Got himself killed

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### RULE OF 3/TRILOGY

- In Photography

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### RULE OF 3

- In Photography
- In Décor
- Closing
  - Start with your hook
  - Remind them of your hook
  - Close with your hook

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### TRILOGY IN STORYTELLING

- Story telling came natural to me.

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### TRILOGY IN STORYTELLING

- Story telling came natural to me.

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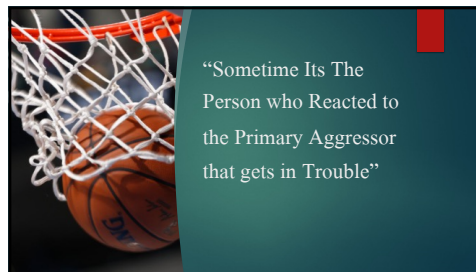
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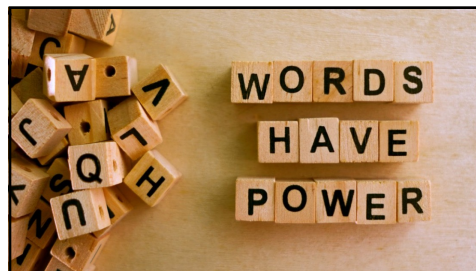
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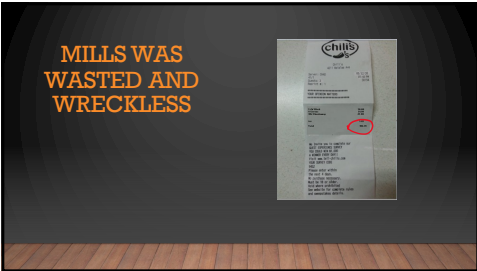
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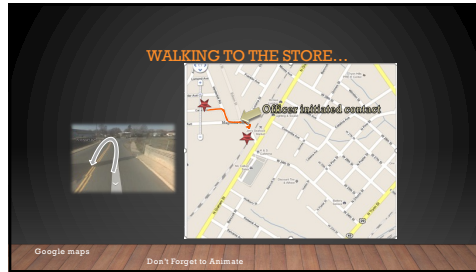
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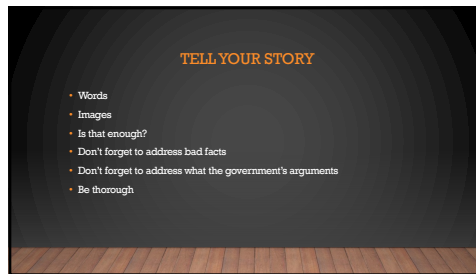
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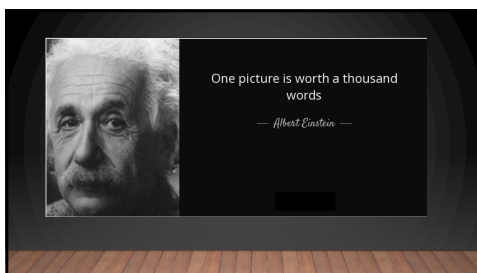
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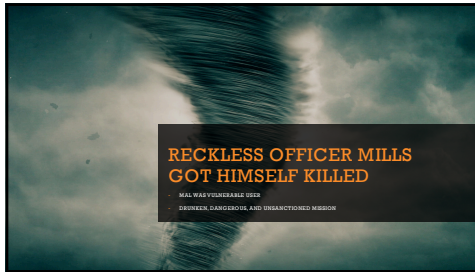
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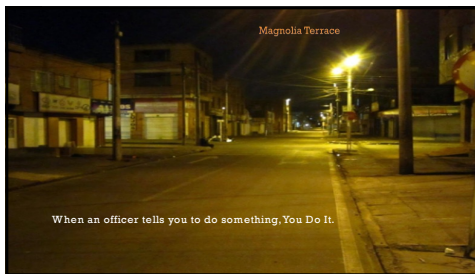
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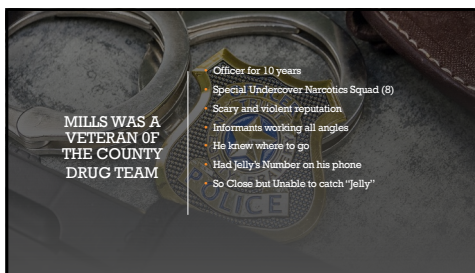
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<b>NARRATIVE</b>		<b>OFFICER RON WHITE'S STATEMENT</b>	
Type Confidential	Did the reporting officer take a statement from the subject? No		
Reporting Officer 088351	Entered Date/Time 05/26/20 1309		
Did the reporting officer have correspondence, memo, or email related to this incident? No			
Brief description of reporting officer role or involvement in the case: Reporting Officer			
Do you have officer generated audio and/or video reference this case (i.e. DMVR, Body Worn, interview room)? Yes			
List type of audio/video (i.e. DMVR, Body Worn, interview room) and vehicle number, if applicable:			
<p>I, Officer White, am 23 years old, and has been a patrol officer with the county police department for two years. On March 12, 2020, at 7:30 P.M. I was off duty and having dinner at Chili's with my friend, Officer Pete Mills. Officer Mills was 34 years old and had been in the Special Undercover Narcotics Squad for eight years and was also off duty. Officer Mills brought his girlfriend, 23 year old sister Cruz, with them to dinner.</p> <p>By 11:00 P.M. we were still at their table in Chili's. We had finished dinner and had "a drink, maybe two at most," when Mills was approached by a man who Mills later told us was a known and reliable drug informant. They had a private conversation in the bar, and Mills then went back to his table, where I and Ms. Cruz were waiting for him. He told us that we had to leave immediately because he was going to make a big undercover buy and arrest a notorious dealer named "Felix". Mills told us "not to tell for backup" or tell anyone else in the police department about this "until we make the scene."</p> <p>We drove in Mills's unmarked SUV to the corner of Huron Avenue and Elm Street, where the informant was supposed to meet us with the order. This did not happen and we did not see the informant or the order. We waited for about an hour and a half. The informant did not show up.</p>			

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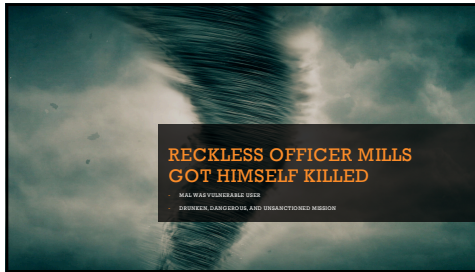
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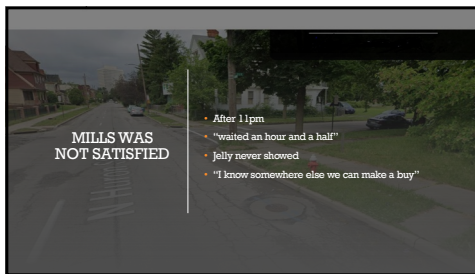
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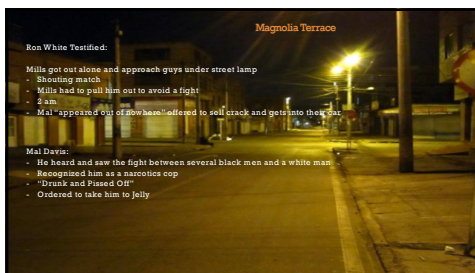
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WHAT MAKES MORE SENSE?

- Mal didn't recognize a narcotics cop
- - with 27 prior convictions,
- - spending 7 out of the past 9 years in prison.
- - Manager at Chili's recognized him, knew of his bad rep
- Mal saw the fight underneath a streetlamp then approached the white man?
- Mal couldn't tell the car was a cop's car?

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UNMARKED  
POLICE CAR

- It's still a cop car
- It has sirens
- It has radio, rifles, flank jackets and other paraphernalia
- Its standout at a place like Magnolia Terrace

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Ken White Testified:

Mills got out alone and approach guys under street lamp

- Shooting match
- Mills had to pull him out to avoid a fight
- 2 am
- Mal appeared out of nowhere offered to sell crack and got into that car.

Mal Davis:

- He heard and saw the fight between several black men and a white man
- Recognized him as a narcotics cop
- "Drunk and Passed Out"
- Ordered to take him to Jelly

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Mal Davis was NOT selling crack  
- no car  
- no phone  
- didn't have the number for Jelly

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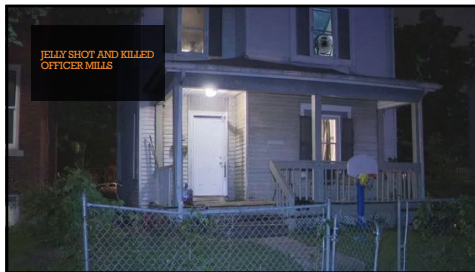
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JELLY SHOT AND KILLED  
OFFICER MILLS

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**Not Guilty**

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