

Trial Visuals



Chapter Eight



This drawing is from the Article 32 hearing in *United States v. Bales*, a 16-victim homicide case that arose in Afghanistan. The proceedings took place at Joint Base Lewis-McChord. Several of the witnesses needed for the hearing were located in Afghanistan and testified via video teleconference from Camp Nathan Smith, Kandahar City. Prosecution and defense teams were split between JBLM and Afghanistan. The hearing was held in the middle of the night in Washington to accommodate the Afghani witnesses, who testified during the daytime in Afghanistan. (Drawing by Lois Silver)

Master Sergeant James Baldassarre, a survivor of the Bataan Death March, was a key prosecution witness in the trial by military commission of General Masaharu Homma in Manila in 1946. In this photograph, taken on 10 January 1946, Baldassarre traces the route of the march, taken by 75,000 Filipino and American troops shortly after the surrender of the Philippines in March 1942. The men were forced to march over 65 miles in intense heat to prison camps; thousands did not survive the ordeal. General Homma was convicted and executed by firing squad on April 3, 1946.

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I. THE IMPORTANCE OF VISUAL DISPLAYS:

- A. **Communication:** The goal of every trial attorney is to communicate effectively with the fact finder. If the panel members do not understand and remember your theory of the case, you will never persuade them to vote in your favor when they deliberate. As discussed in the chapters on opening statement and closing argument, using simple, everyday language and telling your story in a linear and logical fashion help panel members understand what you are trying to say. Visual aids also help deliver your message in a memorable way.
- B. **Adult Learning:** The old adage that we remember 10% of what we hear, 20% of what we see, and 30% of what we hear and see reflects a basic truth about adult learning: the more engaged we are in mentally processing information, the more of it we are likely to retain. So simply sitting and listening to someone speak involves a minimal and passive engagement on the part of the listener. Listening to someone speak while simultaneously seeing a visual depiction of the message—either a picture or text—strengthens the message and increases the likelihood that the listener will retain the information. Listening to a message, seeing a visual depiction of it, *and* using the information—such as to solve a problem—ensures that the listener will *understand* the information. As Confucius said, “*Tell me and I will forget. Show me and I may remember. Involve me and I will understand.*”
- C. **The Military Audience:** In the United States military, leaders are trained throughout their careers on specific methods of identifying issues and making critical decisions. In the Army, this process is referred to as the Military Decision Making Process. This training becomes a way of thinking. Understanding how your audience—the military judge or panel—thinks will help you in formulating the best way to offer evidence to them. Because military leaders are trained to view the overall missions and specific objectives in a picture, visuals should be a key component in how you build your case.
- D. **Creativity:** Visual displays help to engage the listener and reinforce your message. Effective trial attorneys use every opportunity to depict the evidence in visual form so that the recipients will remember and understand their cases. Finding creative ways to use visual aids to send your message will make you a better trial attorney because it will make you a better communicator. There are countless ways to use visual aids; you are limited only by the evidence in your case and the military judge in your courtroom.

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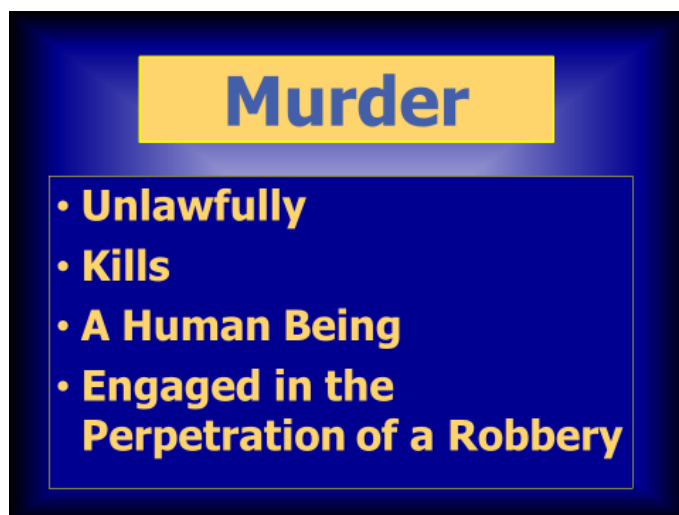
What you are able to do will, of course, vary from courtroom to courtroom. Some military judges are still resistant even to the use of flip charts in court, while others preside over courtrooms that are equipped with the latest technology: data projectors, white boards, digital display screens, and Wi-Fi internet. But whether you are in an old-fashioned or a high-tech courtroom, you should get comfortable using visual aids whenever possible to communicate with military judges and panels.

II. PRACTICE POINTERS ON TRIAL VISUALS:

A. Rule #1—Visuals Should Be Visible:

1. **Flip Charts:** If you are using a paper flip chart, write legibly in large letters using a dark magic marker. Do not clutter the page. If your handwriting is illegible, have someone else write it or attach preprinted signs.
2. **Diagrams** should be displayed enlarged on a screen or on an easel, labeled clearly, and positioned so that every panel member can see them from the panel box. Printed diagrams should also be applied to foam core or stiff cardboard backing so they look professional and do not bend or flop off the easel.
3. **Time lines or flow charts** should not be crowded with an amount of information that cannot be digested within a few moments. Declutter them; consider breaking one diagram into two or several.
4. **PowerPoint Slides:**
 - a. Use a large and plain font, 24 points or greater; do not use comic sans or other font that might convey a lack of seriousness;
 - b. Avoid overusing italics;
 - c. Use soothing and contrasting colors for maximum legibility;
 - d. Minimize the number of words on a slide.

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Use non-annoying contrasting colors and a simple font, minimizing the number of words on a slide. This slide is written in Tahoma bold.

- B. **The Inevitable Objections:** Ours is a profession that is often resistant to change. So the creative use of displays will sometimes draw objections. Knowing that you are going to be using a chart, diagram, or PowerPoint slideshow, opposing counsel might object on the ground that your display is inaccurate, inflammatory, or overly prejudicial. Anticipate these objections. Make sure your visual displays are fair and accurate.
1. **Common Objections to Digital Display:** Digital displays are common in trial practice, and military judges and panels are accustomed to the use of PowerPoint. Yet it is not uncommon to hear opposing counsel complain that the digital display is inflammatory or prejudicial. What most of these objections boil down to is that demonstrative evidence is powerful and convincing.
 2. **Counterarguments:** In response to an objection, be prepared to make several arguments to the military judge:
 - a. If it is permissible to write something down on a paper flip chart with a marker and display it in front of the panel, why would it not be permissible to digitally project that same text onto a screen, where it will be far more legible?
 - b. Think of the PowerPoint display as just a high quality chart with colorful markers.

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- c. The electronic display does not change the evidence; it simply makes it more visible, and therefore, more understandable.
- d. The digital display is a timesaver: we can switch from picture to picture or from document to document at the click of a mouse, rather than walking over to a pile of papers and flipping through them.
- e. And the display has the added advantage that all panel members will be looking at the same evidence at the same time while the witness explains what they are seeing. No longer must we waste precious court time while panel members pass an exhibit to each other, trying to remember what they saw while the witness testifies.

III. VISUALS DURING OPENING STATEMENT:

- A. **The Potential Objection:** Another possible objection to be ready for is to the use of PowerPoint during opening statement. Opposing counsel sometimes objects on the basis that no evidence should be displayed to the panel before an official ruling on admissibility. This is sometimes a persuasive argument, because military judges may be squeamish about allowing the panel to see photographs or documents that may never be admitted into evidence.
- B. **The Counterargument:** The counterargument is that *showing* the evidence to the jury during opening statement is no different than *talking about* the evidence. Presumably, this is the whole purpose of opening statement: to describe what the lawyer *expects the evidence will be*. This necessarily comes with the risk that some of what is referred to during opening statement will never be admitted. Each attorney bears the risk of infecting the record with statements about evidence that the panel may never hear or see. In this sense, displaying a document or photograph during opening is no different than referring to a defendant's confession to the police during opening: the confession might never come into evidence, and it is up to the lawyer to balance the risk of a potential mistrial against the benefit of telling a complete and coherent story during opening statement.
- C. **Good Faith Basis:** The best way to prevail in the face of such an objection is to make sure that anything displayed during the opening statement is *virtually certain* to come into evidence. If there is any legitimate question about admissibility of a particular item, simply do not mention it or show it during opening. You might also consider asking the military judge for a pretrial hearing to determine the admissibility of a display.

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- D. ***Brown v. State***:¹ In an unpublished opinion of the Nevada Supreme Court, the defendant, Brown, complained that the state displayed pictures to the jury during its opening statement. The defendant claimed that he was prejudiced because these photographs had not yet been introduced into evidence. The Court found nothing improper in using the photographs during opening statement. “Although it is the duty of counsel when making an opening statement to avoid overstating facts, there is not misconduct unless the prosecutor makes statements in bad faith. Here, it appears the prosecutor had a good faith belief that the photographs would be admissible.” (*Internal citations omitted.*)
- E. **Pre-mark by Agreement**: You can also avoid this objection by pre-marking exhibits by agreement of both counsel, since much of the evidence will be admitted without objection once the proper foundation is laid. Once a diagram or photograph is pre-marked as an exhibit, opposing counsel can hardly object to its being displayed during opening statement.
- F. **Coordinate with Opposing Counsel**: Any visual aid beyond a basic photograph or diagram should be disclosed in advance to avoid creating a problem in front of the panel. Print out a copy of your PowerPoint slides and show them to opposing counsel and the military judge. Deal with objections before the panel enters the courtroom. If you are reluctant to disclose your slides to opposing counsel, then you may ask the military judge to allow you an *ex parte* showing to avoid having an opening, closing, or examination interrupted by lengthy objection and argument. The military judge will appreciate your candor in tipping him or her off.

IV. SPECIFIC KINDS OF DISPLAYS:

- A. **Photographs**: Photographs will be part of the evidence in nearly every case. Because a picture is worth a thousand words, using photos professionally and effectively during court-martial greatly enhances your ability to communicate with the fact finder. Make sure photographs are large enough to be seen, whether hard copy or digital. Do not improperly stretch or distort digital photos when resizing them. Here are some tips to make photos more useful:
1. **Draw a Circle**: Highlight something important in the photograph by placing a highly visible circle or square around it.
 2. **Enlarge**: After highlighting something within the photo, make a second copy of the same photo, crop the second copy down to show just the highlighted

¹ 2013 Nev. Unpub. LEXIS 1470; 2013 WL 5477164

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element, then enlarge the cropped portion to full size by grabbing the corner handles and resizing so it fills the slide field. Now you have exploded the element of the photo that you want the panel to focus on.

3. **Label Something:** Add text boxes, arrows, callouts, or balloons to call attention to any element of any photograph.
4. **Animate Something:** Add animation to any slide, allowing elements of the slide to appear one at a time.



Draw a Circle



Enlarge

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Label

B. **Charts:** In some courtrooms, you will be limited to the use of physical visuals or charts. If this is the case, make their use as professional as possible:

1. **Prepare in Advance:** Write any text in advance so that the panel members do not have to watch you write;
2. **Keep It Legible:** Make sure your letters are large, bold, and clear. Use a large and dark marker;
3. **Cover:** Keep pre-written text covered up until the moment you need to display it.
4. **Having a Witness Draw in Court:** If you are going to have a witness draw a diagram in court, practice with the witness before trial. Make sure the witness follows all the above rules in drawing the diagram or making the list. Don't be afraid to correct the witness during the examination. *“Ma’am, would you please draw that larger, using the whole sheet.” “Sir, would you please use larger letters.” Or, “Could you press down harder with the marker so that the letters are darker so that we can all see what you are writing.”*

C. **Models:** A model can be an effective way of presenting physical evidence.

1. **Types:** Plastic models of body parts—such as those used in medical school—are available from medical supply companies. These tend to be expensive. Life-sized models of humans are available as well, also pricey. Model cars are available in a variety of sizes. All of the above can be helpful to the panel in understanding the way

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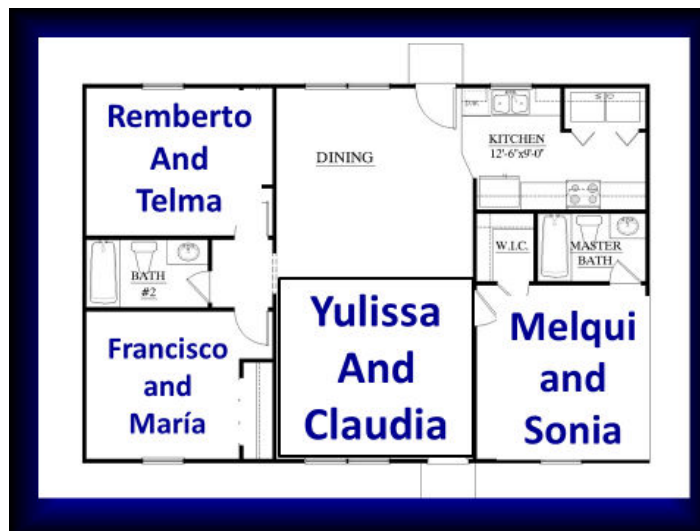
an injury occurred, the trajectory of a bullet through the body, or the way two vehicles came together and separated during a crash.

2. **Visibility:** If you choose to go this route, choose carefully. Make sure the model is big enough to be seen by the jury. (See Rule #1 above). Prepare a place in the courtroom, such as a table or platform, for using the model.
 3. **Preparation:** Make sure the witness is familiar with the model and can manipulate it so that it is visible to the panel. (See Rule #1). Do not have your witness and your model meeting for the first time during trial testimony.
 4. **Clearance:** As usual, make sure the military judge will allow the display. If you have any question about this, get clearance.
- D. **Diagrams:** Diagrams can be effective in explaining crime scenes, time lines, series of events, or casts of characters.
1. **Two Distinct Uses:**
 - a. **Scene Diagram:** A basic schematic or scene diagram is used to simplify or explain the evidence during trial, while a witness is on the witness stand. This kind of diagram should be kept simple and clean, with lots of white space, large letters, and clear, bold lines.
 - b. **Evidence Summary:** Sometimes, a diagram can be used to summarize evidence elicited during trial so that the panel can have and use the diagram during deliberations when they are trying to understand the evidence in detail. A timeline is a good example of this kind of diagram. This kind of diagram is less a visual aid than a compilation of data, is generally more complicated, as its purpose is to summarize complicated testimony; it is intended more as an aid for the panel during deliberations. All information contained in the diagram must be based on the evidence. Also, military judges will vary in allowing admission of evidence summaries.
 2. **Hard Copy:** If using a hard copy of the diagram, use foam core backing and display the diagram on an easel in front of the panel where all members can see it. Have the witness come right off the stand to point out things on the diagram.
 3. **Digital Display:** if displaying the image digitally, have the witness come right up to the screen to point things out. Also, some laser pointers do not show up very well on digital screens, so be prepared to use an old-fashioned pointer for visibility.

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Display a photograph of a house.



Then use a diagram depicting where the family members slept.

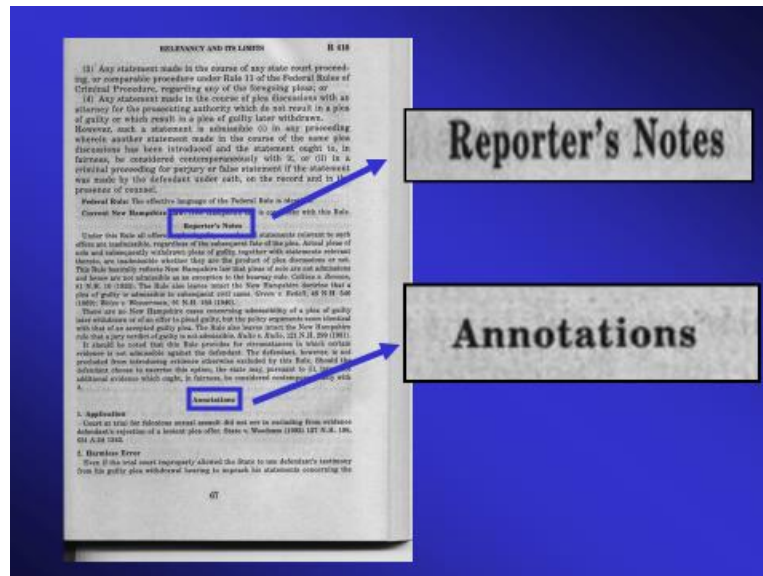
- E. **Documents:** Many cases require documentary evidence, and any document can be scanned to a PDF and placed in a PowerPoint slide.
1. **Why Display a Document?** Most documents will not be legible to the panel when scanned and put into a slide. The writing will be too small. But the reason to display the document after it has been admitted is to electronically explode the writing within

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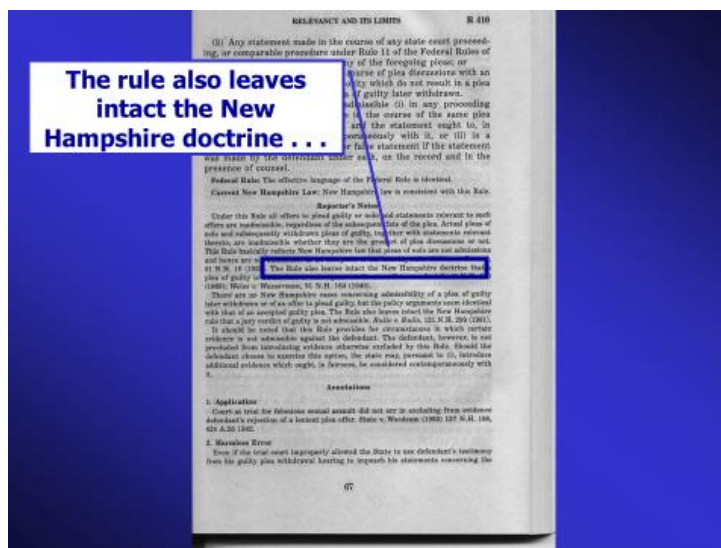
the document that you want the military judge or panel to focus on, such as a key phrase or a signature.

2. **How to Enlarge the Key Part:** As explained above in the discussion about photographs, to focus the panel's attention on one part of the document:
 - a. Put a box around the element of the document you want to highlight;
 - b. Make a second copy of the document on the same slide;
 - c. On the second copy of the document, crop the document on all sides to leave only the area covered by the box you drew remaining;
 - d. Enlarge the cropped portion so that it is legible to the panel;
 - e. Draw a border around this enlarged portion; and
 - f. Link it to the original smaller portion with an arrow or line.
3. **Rekeying for Legibility:** If there is a portion of a document that is not legible even when enlarged due to bad handwriting or poor condition of the document, you can do the following:
 - a. Put a box around the element of the photo you want to highlight;
 - b. Insert a text box into the slide containing the document;
 - c. Type the text into the text box;
 - d. Choose a font color and background that make the text box legible.

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Enlarged Text



Rekeyed Text

- V. **UNDERSTANDING LEFT AND RIGHT LIMITS:** While digital displays can help make the evidence come to life, be careful not to take things too far. Take the following three cases as cautionary tales about the power of visual displays.

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- A. **Overuse of Gruesome Photos--*State (of North Carolina) v. Hennis***:² During the trial of this 1985 triple homicide, the prosecution was permitted to introduce 26 autopsy photos and 9 crime scene photographs.

The North Carolina Supreme Court reversed the conviction based, not on admission of the photos into evidence, but on the manner in which they were used by the prosecution during the trial. The prosecutors were permitted to display the photos on a screen placed directly behind the defendant, so that the jury had to look at the defendant as it viewed each image. And the prosecutors displayed the photos repeatedly while examining witnesses, even where the witnesses had no additional evidence to offer about the photographs. Finally, just before resting its case, the prosecution slowly and silently displayed each of the 35 already-published photographs to the jury without comment. The Court commented as follows:

[T]he prejudicial effect of photographs used repetitiously in this case was compounded by the manner in which the photographs were presented. The erection of an unusually large screen on a wall directly over the defendant's head such that the jury would continuously have him in its vision as it viewed the slides was a manner of presentation that in itself quite probably enhanced the prejudicial impact of the slides themselves. Finally, thirty-five duplicative photographs published to the jury one at a time just before the state rested its cases were excessive both in their redundancy and in the slow, silent manner of their presentation. We hold that under the facts of this case, permitting the photographs with redundant content to be admitted into evidence and to be twice published to the jury was error.³

- B. **Booking Photo in Jail Outfit—*State (of Missouri) v. Walter***:⁴ During closing argument, the prosecutor displayed the following slide, based a booking photo of the defendant which had been previously entered into evidence as part of a packet of booking information, but which had never before been displayed to the jury:

² 323 N.C. 279, 372 S.E.2d 523 (1988).

³ *Hennis, Id.* at 286-87, 372 S.E.2d at 528. As a result of this reversal, Hennis, an active duty Master Sergeant with the United States Army at the time of the crime, was granted a new trial, at which he was acquitted of the murders of a woman and two small children. See *United States v. Hennis*, 75 M.J. 796, 802 (A. Ct. Crim. App. 2016). In 2006, when advances in DNA technology allowed law enforcement agents to link Hennis to the murders, he was returned to active duty by the Army and court-martialed. *Id.* This prosecution resulted in a conviction. Hennis was sentenced to death by a military panel and, as of the date of the publication of this manual, is awaiting execution. *Id.*

⁴ 479 S.W.3d 118 (2016).

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Slide presented during the state’s closing in *State v. Walter*

In a scathing rebuff of the prosecutor’s tactic, the Missouri Supreme Court reversed the conviction based on plain error:

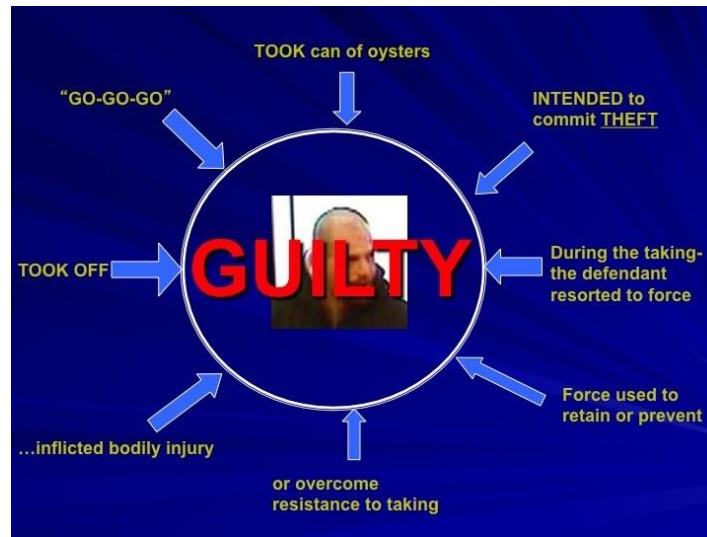
While Walter was not forced to appear physically in prison attire during his trial, the altered photograph the state presented during its closing argument compelled the same *de facto* influence upon the jury. . . . [T]he state’s use of the altered photograph of Walter impinged upon the presumption of innocence and the fairness of the fact-finding process by juxtaposing the photograph of Walter wearing prison attire and “GUILTY” stamped across his face with him sitting at the defendant’s table in plain clothes.⁵

- C. **Red “Guilty” Banner Across Defendant Photo—*In Re Pers. Restraint of McKague*:**⁶ The Court of Appeals for Washington State reversed the conviction of Jay Earl McKague in 2014 after the prosecutor displayed the following slide during closing argument:

⁵ *Id.* at 127.

⁶ 2014 Wash. App. LEXIS 1600, 2014 WL 2963441, decided June 30, 2014

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Slide presented during the state's closing in *McKague*

The prosecutor made the following comment while showing the slide: “[O]n the evidence, ladies and gentlemen, the defendant is guilty as charged.”

The court found that this was misconduct: “The prosecutor altered the photograph of McKague by cropping it and digitally placing the word ‘GUILTY’ across it. Moreover, the slide, coupled with the prosecutor’s comment that McKague ‘is guilty as charged,’ constituted an expression of the prosecutor’s personal opinion on McKague’s guilt.”

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DRILLS

GOAL OF THE DRILLS

The following 5 drills are designed to enhance facility with various kinds of visual aids during trial. We hope not only to assist counsel in choosing and creating the right kind of visual aids, but also in laying the evidentiary foundation for these aids and using them smoothly and seamlessly during trial.

Drill #1—Bedroom Diagram:

Materials: For this drill, you will use the bedroom diagram in *U.S. v. Mallick* in the Appendix to this manual. If your diagram is in digital format, then you will need a computer and some kind of display screen connected to the computer.

Preparation: You should come to the training session with the diagram in a form appropriate to present to a panel, such as in electronic format ready to be displayed on a large screen or a hard copy enlarged and mounted on a stiff backing to be presented to the panel on an easel or stand. The drill should be conducted in the courtroom or in a classroom set up as a courtroom.

Persons Needed: You will need four people: a prosecutor, a defense counsel, a military judge, and a witness.

Instruction: The supervisor or a delegate should conduct a 15-20 minute lesson on the proper use of diagrams in court and how to lay an evidentiary foundation for their admissibility.

Conduct the Drill: Have counsel direct Investigator Paul Bartholemew through his creation of the diagram, lay the foundation for its admissibility, and guide the witness through the crime scene using the diagram. Opposing counsel should make every valid objection and the supervisor should make rulings in accordance with the law. Critique will be based on counsel's ability to use the diagram effectively to explain the crime scene.

Alternative Exercise: The supervisor may also tell counsel the week prior to the training to prepare an exhibit from a diagram in a pending case. If this option is chosen, counsel should prepare a colleague to play the role of the witness for the practical exercise.

Drill #2—Working with a Digital Photograph

Material: Counsel should choose a photograph from an existing case.

Persons Needed: For this drill, you will need two counsel (one to play the proponent of the evidence and the other to play opposing counsel) and the supervisor to play the role of the military judge during the practical exercise.

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Preparation: If the photo is in hard copy, it must be scanned to create a digital version as a pdf. The pdf should then be dropped into a PowerPoint slide and sized appropriately. (Remember to enlarge and shrink using only the corner handles so as not to distort the image.) Counsel should bring a computer to the training room with the PowerPoint slide and the digital image.

Instruction: The supervisor should conduct a 15-20 minute lesson on the proper use of digital photos in court. The supervisor should also demonstrate—on a large display screen if possible—how to do the following in PowerPoint:

1. Drop a digital image into a PowerPoint slide;
2. Size the image to fill the slide;
3. Highlight any element within the photo with a circle around it, a box around it, or an arrow pointing to it;
4. Enlarge the selected element within the image by
 - a. Creating a second copy of the image on a second PowerPoint slide;
 - b. Using the cropping tool on the second slide to crop out all parts of the image except the selected detail;
 - c. Enlarging the cropped detail to fit the entire slide, again using only corner handles;
5. Animate the slide by first showing the plain image and then bringing in the arrow, circle, or box as an animated object.

Conducting the Drill: Counsel should be given 15-20 minutes to work with their photographs both to create a slide and to display a highlighted detail. Critique should be based on ability to properly size, animate, and manipulate the image.

Drill #3—Using a Digital Photo in Court:

Preparation: Counsel should be given 30 minutes to work with a colleague who will play the witness to introduce the digital photograph in court.

Persons Needed: You will need four people: a prosecutor, a defense counsel, a military judge, and a witness.

Instruction: The supervisor should instruct counsel on the foundation required to display digital images and the limitations on what counsel may and may not do in adding text, labels, etc.

Conduct the Drill: One lawyer should present direct examination of the witness to explain the circumstances of the taking of the photo and lay the foundation for its admissibility. The

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proponent should also take the witness through the highlighting of the important detail and the foundation for admissibility of the enlarged detail. Opposing counsel should make every valid objection, and the supervisor should make legal rulings. Critique should be based on the effectiveness of counsel in laying the foundation for both the photo and the enlarged detail and on the effectiveness of the examination of the witness in communicating the contents of the photo.

Drill #4—PowerPoint Slides

Materials: For this drill, counsel will need a computer with PowerPoint installed and a display screen for the mock opening. Also, choose a case file from a pending case.

Preparation: Choose a specification charged in the case or choose a jury instruction on the planned defense that will be used.

Conduct the Drill:

1. Draft a short explanation of the specification or defense you have selected. Keep it under one half page typed. Your audience is a panel and the explanation should be in the style of an opening statement.
2. Create a brief PowerPoint presentation to go along with the written explanation. The presentation should be no more than 3 or 4 slides.
3. Using a display screen, explain the specification or defense to colleagues using the PowerPoint slides as if delivering an opening statement to a panel.
4. Critique should be based on clarity of the slides and the extent to which they supplement and clarify the explanation.

Drill #5—Time Line in PowerPoint

Preparation: Select a pending case involving a series of events at distinct and identifiable dates or times. Prepare a colleague as a witness to explain the series of events.

Persons Needed: For this drill, you will need two counsel (one to play the proponent of the evidence and the other to play opposing counsel) and the supervisor to play the role of the military judge.

Create a Slide: Create PowerPoint slides that set forth the series of dates or times in a time line.

Conduct the Drill:

1. Counsel should conduct a direct examination of the witness explaining the events depicted in the time line and connecting them with their times or dates.

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2. Counsel should then deliver part of a closing argument displaying the PowerPoint slide and using the timeline depicted. Opposing counsel should make every valid objection and the military judge should make legal rulings on those objections.
3. Critique should be based on the clarity of the explanation, the legibility of the slide, and the extent to which the oratory and the slide work together to form a persuasive argument.

View Video Vignette #11, Foundation for and Use of Diagram in *U.S. v. Mallick*, available on the digital version of *The 2018 Advocacy Trainer* or on JAGCNet.