ITINERARY FOR THE JANUARY 18, 2012 MEETING OF THE GEORGE MASON AMERICAN INN OF COURT

Program Title: "Storytelling & the Art of Advocacy"

STUDENT PRESENTERS:
Melissa Alfano
Grace Kim
Erin Heenan
Leslee Soudrette

BARRISTERS OF THE INN:
John Kassabian, Esq.
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Rebecca W. Thacher, Esq.
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GUESTS OF INN:
Hon. Paul B. Ebert
Commonwealth's Attorney
Prince William County

Hon. Robert F. Horan (Ret.)
Commonwealth's Attorney
Fairfax County

I. Introduction
(7:30 pm - 7:35 pm)

II. Storytelling & the Art of Advocacy
(7:35 pm – 8:15)

A. The Use of Storytelling to Connect With Your Jury

B. *Commonwealth v. Muhammed*: Paul B. Ebert

C. *Commonwealth v. Hughes*: Robert F. Horan

III. Discussion & Questions
(8:15 pm – 8:30 pm)

PRINCE WILLIAM COUNTY

Paul B. Ebert

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Office Information: 21 Full-Time Assistants
10 Full-Time Support Staff
8 Full-Time Victim-Witness Program Staff

Education: Virginia Polytechnic Institute (Bachelor of Science/Business Administration-1959)
George Washington University School of Law (Bachelor of Law-1963)

Election History: Served continuously since 1968

Current Seniority: 1st

Political Affiliation: Democrat

Organizations: Virginia State Bar, Criminal Law Section, Prince William County Bar Association, VACA, National District Attorneys Association, Association of Government Attorneys in Capital Litigation, Prince William County Crime Solvers, Manasseh Lodge, Kena Temple, Northern Virginia Community College Police Science Advisory Committee

VACA/CASTC: Founder/First Chairman CASTC

State Boards: Commission on Family Violence, Legislative Task Force for Juvenile Justice Reform

Biographic Sketch: Born in Roanoke, Virginia, Former Justice of the Peace for Falls Church, Virginia, Former Assistant Commonwealth's Attorney for Prince William County, Private General Law Practice 1963-80, Received Recognition by National Center for Missing and Exploited Children, Widowed father of three children: Jeanene, Paul T. and Kathy

Judicial Circuit: 31st

Congressional District: 10th

PAUL B. EBERT
Commonwealth's Attorney
Prince William County
9311 Lee Avenue
Manassas, Virginia 20110

Education: Virginia Polytechnic Institute; George Washington School of Law

Former Justice of the Peace for the City of Falls Church, Virginia

Former Assistant Commonwealth's Attorney for Prince William County

Engaged in the general private practice of law 1963-80

Prince William County Commonwealth's Attorney, 1968-Present

Past President, Virginia Commonwealth's Attorneys Association

Past President, Prince William County Bar Association

Founder and First Chairman, Commonwealth's Attorneys Services Council

Former Member, Advisory Committee/Rules of Virginia Supreme Court

Lecturer at Training Seminars for Attorneys and Law Enforcement Personnel

Former Chairman, State Bar Criminal Law Section Board of Governors

Founding Member, Board of Directors, Prince William County Crimesolvers

Appointed Special Prosecutor in various Virginia Jurisdictions

Member, Manasseh Lodge, Kena Temple, Lions Club

Member of various civic associations and recipient of numerous civic awards

Member, No. Va. Community College Police Science Advisory Committee

Member, Governor's Task Force for Effective Prosecution of Domestic Violence

Member, Legislative Task Force for Juvenile Justice Reform

Received National Recognition by National Center for Missing and Exploited Children (1987)

Recipient of Robert F. Horan Award 1997 and 2004, Outstanding Virginia Prosecutor

Recipient of the Trial Advocacy Excellence Award from the Association of Government Attorneys in Capital Litigation for 1997-1998 and 2003-2004

Recipient of Arthur W. Sinclair 2004 Professionalism Award from the Prince William County Bar Association

Recipient of Harry L. Carrico Professionalism Award, from the Criminal Law Section of the Virginia State Bar, February 2006

Recipient of Homicide Investigator of the Year Award, from Virginia Homicide Investigator's Association, 1999; and Lifetime Achievement Award, 2003

Recognized by the American College of Trial Lawyers for Outstanding Leadership as Chair, October, 2, 2005

Recipient of Outstanding Service Award from the Virginia Association of Chief's of Police, August 13, 2002

Recipient of Greater Manassas Area Good Scouter Award, 2002

Recipient of Northern Virginia Victim Assistance Coalition Champion Award, 2004

Inducted into the America's Prosecutor's Home Run Hitters Club, 5/16/2004

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Recipient of "Leaders in the Law Award" from Virginia Lawyer's Weekly, October 2010

Speaking to the Jury: Case Law to Remember

- **Do not mention or refer to sentencing ranges in non-capital cases.**
  - "In a non-capital case, , reference to statutory punishment ranges is not relevant to the proper seating of a jury or to any matters at issue in the guilt or innocence stage of a felony proceeding in Virginia. *Thomas v. Commonwealth,* 279 Va. 131, 165, 688 S.E.2d 220, ___ (2010)(expanding the holding of *Commonwealth v. Hill*, 264 Va. 315, 320, 568 S.E.2d 673, 676 (2002) to include opening statements, as well as voir dire.)

- **Don't even mention sentencing minimums.**
  - *Walls v. Commonwealth*, 38 Va. App. 273, 563 S.E.2d 384 (2002)(holding that argument during guilt/innocence regarding mandatory minimums "could serve only to encourage inappropriate use of this information")

- **Do not mention that the defendant's spouse did not testify.**
  - Va. Code Section 19.2-271.2
  - *Jones v. Commonwealth*, 218 Va. 732 (1978)(holding that argument insinuating defendant's wife didn't testify because her testimony would be harmful was exactly what Va. Code § 8-288 (now 19.2-271.2) sought to prevent)

- **Do not make personal comments about opposing counsel.**
  - *Warmouth v. Commonwealth*, 29 Va. App. 476, 514 S.E.2d 418 (1999)(holding that comments that opposing counsel did a masterful job of distracting the jury from its focus was improper)

- **Do not misstate the law.**
  - This goes without saying.

- **Do not tell the jury that if they make a mistake, the judge can correct it.**
  - *Lyons v. Commonwealth*, 204 Va. 375, 131 S.E.2d 407 (1963)(holding that it was incorrect and improper to tell a jury that a judge could correct their mistakes, and suggested to the jury that they need not proceed with care in reaching their verdict)

- **Do not interject your personal opinion on the evidence or credibility of witnesses.**
  - *Jones v. Commonwealth*, 218 Va. 732 (1978)(holding that a prosecutor expressed his personal views when he told the jury "...in all my years as a Commonwealth's Attorney I have never seen a more perfect witness.")

- **Use charts, slideshows and pictures to tell your story.**
  - Props can be used, even if not introduced in evidence. *Curtis v. Commonwealth*, 3 Va. App. 636, 352 S.E.2d 536 (1987)
  - In-life photographs can be used in opening, in the discretion of the court, unless clearly prejudicial. *Lily v. Commonwealth,* 255 Va. 558 (1998)(the court stated that there was no inherent prejudice in the use of life photographs, especially in cases where the jury will also view crime scene photographs showing the victim)

- **Argue reasonable inferences.**
  - Counsel has a right to respond to the other's argument by referring to the evidence and the fair inferences to be drawn from it. *Martinez v. Commonwealth,* 10 Va. App. 636, 395 S.E.2d 467 (1990)

- **Opening statements may not contain:**
  - Argument on questions of law
    - *Lam v. Lam*, 212 Va. 758 (1972)
  - Inadmissible evidence
    - *Burnette v. Commonwealth*, 203 Va. 455 (1962)
  - Matters meant solely to inflame the passions of the jury.
  - Statements that impugn the presumption of innocence.
    - *Hazel v. Commonwealth*, 31 Va. App. 403 (2000)
  - Comments from the prosecutor on whether the defendant will testify.
    - *Ford v. Commonwealth*, 48 Va. App. 262 (2000)
  - Argument on punishment.
    - *Spencer v. Commonwealth*, 238 Va. 295 (1989)

- **Closing statements may not contain:**
  - Statements of fact not introduced into evidence.
    - *Bateman v. Commonwealth*, 183 Va. 253 (1944)
  - Statements that attempt to inflame the passions of the jury.
    - *Hutchins v. Commonwealth*, 220 Va. 17 (1979)
  - Comments from the prosecutor on the demeanor of the defendant, if he does not take the stand.
    - *Winston v. Commonwealth*, 12 Va. App. 363 (1991)

OPENING STATEMENT

in Criminal Cases

THE CURTAIN RAISER

CCJA HOME	MOTIONS	EXHIBITS	CCJA BOOKS
MANAGEMENT	DEMEANOR	EXPERTS	BIBLIOGRAPHY
PRETRIAL	JURY SELECTION	OBJECTIONS	CONTACT US
CLIENT INTERVIEW	DIRECT	ARGUMENT	VIDEOS & TRANSCRIPTS
WITNESS INTERVIEW	CROSS	LINKS	VOICE
TECHNOLOGY	EYEWITNESS ID	PALADIN	OPENING AND CLOSING COURSE

SAMPLE OPENING - MURDER PROS. & DEFENSE MISIDENTIFICATION

SAMPLE OPENING - MURDER DEFENSE ACCIDENT/SELF-DEFENSE

Raconteur: One who excels in storytelling.

Well begun is half done.

Classic opening statements including the infamous stammering greeting!

"Mr. Smith emphatically says the he is "not guilty!"

Be a persuader during your opening statement, not a lawyer. "

The banalities of life are juxtaposed against wildly alive scenarios that play in our minds.

Opening Statement: A contest for the imagination of the jury. Get into their world.

The opening statement is the single best engine for telling the jurors what your case is about. Your goal as a lawyer - to find the story and tell the story. Don't let yours be the "greatest story never told!"

Begin with the end in mind.

The best way to test your theory of the case is to prepare an opening statement.

"Your Honor, I'm only stating what i expect the evidence to prove."

The opening statement may be quite brief. Consider this opening statement which was given by the prosecution at the outset of the murder trial of the famous Captain William Kidd. The place - Old Bailey Courthouse, London, England; the date - May 8, 1701:

"My Lord, and you gentlemen of the jury, this is an indictment of murder. The indictment sets forth: 'That William Kidd, on the 30th of October, on the high sea, on the coast of Malabar, did assault one William Moore on board a ship called the Adventure, whereof William Kidd was captain, struck him with wooden bucket, hooped with iron, on the side of the head near the right ear, and that of this bruise William Moore died the next day, and so that William Kidd has murdered the same person.' To this indictment the defendant pleaded not guilty; if we prove him guilty, you must find him so. We will prove this as particular as can be, that William Kidd was captain of the ship, and that William Moore was under him in the ship, and that without any provocation the accused gave him the blow whereof he died. It will appear to be a most barbarous fact, to murder

Sample Prosecution Opening by Famed Prosecutor Vincent Bugliosi (1)

was shot to death by this defendant (pointing), Oscar Eastwood. This defendant was the 28 year old ex-boyfriend of Glenda Williams. Ms. Williams was cooking breakfast for Bill, when this man (pointing at the defendant), Oscar Eastwood, crashed through the front door of Ms. Williams' apartment and fired three bullets from this .38 snub-nosed revolver (displaying the weapon) into Bill's back."

"For most of us, convenience stores are a place to stop and shop. But for David North (looking at the defendant) a convenience store is a place to stop and rob."

"When the prosecutor read the indictment, I saw the looks of horror on all of your faces. This is a despicable crime. What could be more terrible than shaking a helpless 6-month-old baby to death? I just want you to know that this woman, Mary Riley, (putting her hand on the accused's shoulder) did not commit this crime. Mary Riley is not guilty. And that brings us to what Judge Smith has given us twenty minutes to talk about -- getting blamed for something you didn't do."

Sample Prosecution Hook - Enron Case

"The government will take you inside the doors of what was once the seventh largest corporation in this country, Enron. In the year before Enron declared bankruptcy, two men at the helm of the company told lie after lie about the true financial condition of Enron, lies that propped up the value of their own stock holdings and lies that deprived the common investors of information that they needed to make fully informed decisions about their own Enron stock. You will see that the Defendants Lay and Skilling knew key facts about the true condition of Enron, facts that the investing public did not know. With that information, Defendants Lay and Skilling sold tens of millions of dollars of their own Enron stock. The victims in this case, the investing public, their employees, those who did not have that information, those who were not able to sell their stock before Enron entered bankruptcy were not as fortunate as these two men. These men are Defendants Ken Lay and Jeffrey Skilling. This is a simple case. It is not about accounting. It is about lies and choices. This case will show you that these Defendants worked to lie and to mislead. They violated the duty of trust placed in them. They violated it by telling lie after lie about the true financial condition of Enron."

(The preceding was the prosecution "hook" in opening statement (1) at the 2006 Enron fraud trial of Jeffrey Skilling & Kenneth Lay. On 5-25-06, Skilling was convicted on some eighteen counts (1); Lay was convicted on all counts. Lay died some weeks thereafter at a ski resort.)

They say a bad beginning makes a bad ending. Get off to a good start, when the jurors' retention curve is at one of its two highest points, by developing a good hook.

PREADMITTING VISUAL EVIDENCE FOR USE IN OPENING

Most of us know that standards of professional conduct prevent us from displaying tangible evidence to the jury in a manner that would tend to prejudice fair consideration of such evidence. Normally, we have to wait to display our evidence until such time as we make a good faith tender of it. Suppose, however, that you would like to utilize a "tell and show" opening statement in which you use one or more items of demonstrative, documentary and/or real evidence, e.g., photos, letters, weapons, clothing, maps, diagrams, contraband, etc., in the case to enhance your oral telling of your case story. In other words, you support the content of your opening statement with a manual or electronic, e.g., PowerPoint, display of visuals. Can you do this without violating the law of evidence and/or ethical rules of conduct? Top me the answer should be affirmative, but you will need to make a pretrial showing to the trial judge regarding the relevance and admissibility of the items that you want to display during your opening. The way to get the ball formally rolling is to file a *Motion to Preadmit* in which you inform the court of your desire to use certain items of tangible evidence during your opening statement and attach an affidavit containing a lawyer or witness offer of proof of foundational facts that render the item admissible. Informally, you may wish to speak to the other side and inform them of the evidence you wish to display, together with available predicating information concerning the the particular item(s) of evidence. Many times you can reach mutual agreement with the opposition that allows each side to display certain items of evidence during the opening statement without objection. If your request is contested, you may be required to present a live witness proffer (tender) of testimony demonstrating the admissibility of the item of evidence.

[Note: There is no uniform statutory, case, or rule-based law concerning the visual display of evidence in opening. If the concept is considered novel in your locale, your trial judge may take some gentle nudging to agree to it. Indeed, there is some judicial reluctance to allow prosecutors to identify and use specific documentary or real evidence in opening statement because these items may not come in as evidence. See *Commonwealth v. Parker*, 882 A.2d 488 (Pa. Super 2005) where, in a bizarre opinion authored by Judge Bender, the Pennsylvania court held that the trial court's decision to permit the prosecutor to display of a handgun in the Commonwealth's opening statement of an attempted murder, aggravated assault, possession of an instrument of crime, and violation of the Uniform Firearms Act case, was unreasonable "especially in light of the fact that defense counsel acknowledged that the gun would later be used during the trial, shown to the jury and admitted in evidence"; the majority opinion held that the display served no legitimate purpose but constituted harmless error; the more logical concurring opinion by Judge Olszewski queried why the prosecutor should not be allowed to visually display evidence that she could properly talk about. Eventually the Pa. appellate court got it right, overruling Judge Bender in *Commonwealth v. Parker*, 919 A.2d 943 (Pa. 2007) and holding that displaying tangible evidence during opening statement is proper so long as counsel intends to introduce the item and there is no question as to its admissibility. See also *State v. Hawn* , 2003 WL 22470962 (Ohio App. 2003); *Guerrero v. Smith*, 864 S.W.2d 797 (Tex. App. - Houston [14 Dist.] 1993); *People v. Williams*, 456 N.Y.S. 2d 1008 (1982); *Wimberli v. State*, 536 P.2d 945 (Okla. Crim. 1975). See also *Prosecutors reference in opening statement to matters not provable or which he does not attempt to prove as ground for relief*, 16 ALR4th 810; *Reference to Matters Not Proved*, 75A Am. Jur. 2nd Trials,

Section 527. Some courts allow counsel to verbally refer to exhibits in opening statement, but won't allow the exhibits themselves to be shown at that juncture. See *Smith v. Kansas City Southern Ry. Co.*, 846 So.2d 980 (La. App. 2003). Other courts may limit the practice to exhibits that have been exchanged by the parties and approved by the court well prior to trial. See *Young v. City of Providence*, 301 F. Supp.2d 187 (D. Ct. R. I. 2004) where a well-known and widely lauded defense attorney/law professor was publicly censured for filing a false pleading in connection with use of a diagram in opening statement. When trial courts refuse to allow evidence to be displayed in opening, the error, if any, may be deemed harmless on appeal. See *Ray v. State*, 527 So.2d 166 (Ala. Crim. App. 1987). Often, the matter is viewed as one of trial court discretion. See *Beavers v. State*, 217 N.W.2d 307 (Wis. 1974). Here are a few starter sources that you can consult if you want to gather some favorable authority concerning the technique of using visuals in opening statement: *State v. Smith*, 130 P.3d 554 (Hi. 2006);*State v. Sucharew*, 66 P.3d 59 (Ariz. App. 2003); *State v. Caenen*, 19 P.3d 142 (Kan. 2001); *West v. Martin*, 713 P.2d 957 (Kan. App. 1986); *Pickren v. State*, 500 S.E. 2d 566 (Ga. 1998); *James v. Heintz*, 478 N.W.2d 31 (Wis. App. 1991); *People v. Green*, 302 P.2d 307 (Cal. 1956): *State v. Sibert*, 169 S.E. 410 (W. Va. 1933). See also, Zwier & Galligan, *Technology and Opening Statements: A Guide to the Virtual Trial of the Twenty-First Century*, 67 Tenn. L. Rev. 523 (2000). One of you best arguments in support of being able to display evidence in opening is "If I can talk about it in opening, I should be allowed to show it "]

TO OPEN OR NOT TO OPEN

If you are trying a case, you must have some prosecutorial or defensive theory. If you have a case theory, the rule is : MAKE AN OPENING STATEMENT. If you're a prosecutor and don't have a case, dismiss the accusation. If you're a defender with no defensive theory, plead. There's a reason they call it the "opening" bell. It's your chance to talk to the group of red-blooded, air breathing, bipeds who will decide your case. They want and need some guidance about what this case is all about. Opening statement is your opportunity to give them that guidance. You can't afford to squander that opportunity.

PREPARING YOUR OPENING STATEMENT

[Much of the advice, particularly the EIGHT-STEP PROGRAM technique, that I would offer regarding preparation of an opening statement is similar to that contained in the advice for preparing a jury argument. Rather than repeat that advice here, I refer the reader to that preparation page of the jury argument web site.]

As a courtroom lawyer, you are both writer and performer. If you read the Eight-Step Program on the jury argument web site, you will know that I believe you must do a "write-out" of your opening statement as part of the prepare-produce-practice-present process. Remember, you must write for the ear, not the eye. You'll be speaking these words; the jurors won't be reading your opening. Preparation of opening statement requires editing. If you are a beginning lawyer, your main job in editing your first write -out will be taking out things that are not part of the story of your case. Most of those things that are not part of your story are argument.

After you have written your opening and edited it, you must practice your delivery. Rehearse by using a mirror or video camera. (Note: The video is better practice. The danger with the mirror is that, like Narcissus, you become too interested in watching yourself during delivery and go off message.) Rehearse at least three times. Watch and listen to your presentation. Time yourself, so you can end just a wee bit before the judge says, "Your time has expired, counsel." Don't try to memorize your entire opening, but have the beginning and ending paragraphs down pat. At trial, you will deliver your opening in a manner that will appear to the jurors as more extemporaneous than memorized. If you have done a write-out, reduced your write-out to key words and rehearsed, the words you deliver at trial will string themselves out in the right way.

You will *never, never, never read your opening statement* verbatim to the jury. Don't be a slave to your notes. It's okay to refer to notes during opening, but you will lose a bit of persuasive momentum every time you consult them. Don't hold your notes in your hand, even if they are on a 3X5. Put them on the corner of the ledge in front of the witness box or the counsel table. (Note: One of my prosecutor friends likes to put her notes on the corner of the defense counsel table.) Prepare your opening statement notes in the manner suggested on the Eight-Step Program for jury argument. (Note: I limit the quantity of notes my students are allowed to a 3x5 card containing only key words from the write-out. By the end of the opening statement course, they are weaned from any notes) If you believe in your story, you will know it. The idea is - let your case speak through you!.(Note: If you doubt yourself, on the evening before you are set to deliver your opening statement, go into a dark room, turn off the lights and deliver the entire opening in the dark).

Law schools teach us to speak in abstractions and generalizations. Since 1871, law students have been taught by the appellate case analysis method. We all spent a lot of time reading casebooks. Most of our law professors fancied questions more than answers. The cases that we studied in law school involved facts that have already been determined at the trial court level. There were few, if any, law school courses in the psychology of persuasion or communication theory. Instead, we were taught to "think like a lawyer." That translates into being boring, emotionless, analytical, calculating, and coldly logical. If we appear before a jury "thinking like a lawyer," there is a good chance the jurors may view us as phony and disingenuous. When jurors sizes a lawyer up as a "cold fish", they can easily think that lawyer doesn't care about his/her case. Opening statement is the time to shed the "lawyer" image and elevate your performance. It's your opportunity to show the jury that you are a good storyteller with a passionate belief in your case. The earthly truth is that a substantial part of your effectiveness in opening statement is in the presentation and not in the substance. Substance is important but, as a trial lawyer, you must

be concerned with presentation issues such as tempo, timing, location, voice, gesture, word choice, neurolinguistic word order, etc. [These are discussed on the delivery page of the jury argument web site. For more information, take a look.]

WHAT'S YOUR STORY?

When you stand up in court to deliver your opening statement, you'll be providing the jurors with factual information that is intended and designed to create an embedded memory. As the case unfolds this embedded memory will cause each juror to perceive the evidence in accord with your theory of the case, i.e., the fact- based reason why you are entitled to the jury's verdict. In opening you will try to convey a view and feelings to your listening audience. Your view will be slanted toward building a story of the case that will evoke the ultimate response you seek - a favorable verdict.

You are in charge of developing your opening. When you sit down and begin to prepare, look for the story of your case. Easily said, but how do you find the story of your case? Like Michelangelo's statutes that waited in marble for his chisel to set them free, there is a story inside every case waiting to be released by you. In truth, there is a whole universe of potential stories in every case. Your job it to find the right one and set it free in front of the jury. When you start constructing your story, you'll need to visualize it, just as the juror will. Visualization may be easier if you try the cartoon method of construction - basically trying to tell your story in five simple boxes, frame-by-frame.

Stories are based on facts, not abstractions. Keep in mind that your opening is when the jurors will begin to form their first mental pictures of your case. You want the mental images to be vivid, but they also have to be factual. They must make logical sense. The story must be simple in the sense that the jurors must be able to fully grasp it. If it is a complex case, you must make it simple with visuals, e.g. relationship charts, timelines, etc. Stories generally have a beginning, a middle, and an end. The content of a good opening statement depends on your ability to organize. There must be continuity and uninterrupted flow of action. Too much detail and it bogs, too little, and it has no legs. The best approach in planning may be to do a write-out that is too detailed. As you polish it, prune it of unnecessary detail and modifiers, e.g., adjectives and adverbs.

Where your story begins will depend on the story you want to tell. The prosecutor's story will typically begin with the criminal conduct. The defense story may begin at a different time. For example, in a self-defense case, the defense might begin its story with earlier violent relationships between the accused and the complainant to show why the accused thought she was in danger of deadly attack; in a duress case, the defense might begin with a story of prior threats to injure the accused's child if the accused didn't act as dope courier; in an entrapment case, the accused's story might begin with the acts of a government informant that seek to induce the accused into committing a crime. The defense story may center on events that transpired after the offense, e.g., shoddy police investigation, threats and violence by police at the station house that coerce the accused to confess, the faulty, unreliable, and overly suggestive lineup. The defense story might even be about the accused's good character.

Can you sum up your case with a distinctive theme? Try to find that theme. It might help you to find a theme if you try to complete the following sentence: "Ladies and gentlemen, this is a case about (*describe the case with a succinct thematic one-liner*)."

Look for the drama of your case. Elements of the crime and the burden of proof are important in law school, but they are not very dramatic subjects. Yet, many prosecutors spend inordinate time in their opening detailing the elements of the crime. Meanwhile, defenders harp on the requirement that guilt has to be "proven beyond a reasonable doubt," i.e., My client may be guilty, but they can't prove it. There a is certain amount of drama in every criminal case. So, how do you find the drama in your case, decipher it, and reveal it to the jury in your opening? You must know the entire case. Know your case and know the opposition's. Where is the conflict. Where is the agreement? What are the facts that are beyond dispute, the one's that won't be seriously contested? The dramatic part is the part that isn't dull. It has action, and its about human relationships.

You may want to build some suspense into your story. The goal with suspense is to engender a sort of pleasant excitement in the jurors as they put together the evidence and arrive at a decision, rather than having everything spelled out. With suspense, you don't leave a trail of irrelevant bread crumbs. Instead, leave a path of bright colored stones that clearly guides the jurors to the desired conclusion. [For more detailed discussion of case story, see Pretrial Preparation]

TIPS for OPENING STATEMENT

- Look and sound good from the start. Put your best foot forward. You won't get a chance to make another first impression. Dress to impress your message. Develop your speaking voice. Learn to use your body as a communicative tool. Learn to use the right words at the right time. The jurors have preconceived notions about how a lawyer is supposed to look and sound. They expect you to be their trusted guide, information provider, entertainer, and persuader. You have to garner their attention and hold it. You have to tell the factual story of your case in a way the creates a response and memory that slants the case your way. These are some of the same skills you utilize at jury argument, where you are less restricted in your analysis, inferences, and exhortations. To hone your storytelling skills, read some short stories out loud.

- When you have planned and prepared your opening, ask yourself, "Are there important background facts that I have erroneously left out?"

- Be prepared that the trial judge may diminish the weight of your opening statement by issuing a prefatory instruction somewhat as follows: "*What you will hear in the next few moments are the opening statements of the lawyers. What the lawyers say is not evidence. The purpose of the opening statement is to foreshadow or predict for you what the evidence will actually be. It will be up to you after hearing all of the evidence whether either side has proved or correctly predicted what the evidence will be. I caution you that what you hear in opening statement is not evidence. The evidence will begin when the first witness begins to testify.*"

- Opening statement is simultaneously a visual, auditory, and kinesthetic experience. Don't miss the opportunity to "tell and show." As a rule of thumb, try using at least one and no more than three prepared visuals in your opening statement. Be sure to obtain the court's advance approval by a motion to preadmit and, if necessary, a pretrial hearing. Premark the preadmitted visual before you begin your opening.

- If you are allowed freedom of movement, give advance thought to your positioning in the courtroom, i.e., where you will start, end, and move in between. Get rid of physical barriers between yourself and the jury. Avoid the lectern if possible. If you have to use a lectern, don't hide behind it. Turn the lectern so it faces your left side if you are right-handed and vice versa and you face the jury without obstruction. If the court has a "wingspan" rule requiring you to stand within arms length of the lectern and won't allow you to turn it sideways, come out an arms length. If you are allowed to move freely about the courtroom during opening, stand directly in front of the jury, but don't get stuck in one spot. Move as you speak to keep the juror's attention. Choreograph your movement from spot to spot to coincide with topic changes, as though each movement were a new chapter in your case story. Movement about the courtroom reflects your confidence, but it does more than that. It allows your body to stay in rhythm with your story. Stay within an informal conversational distance, i.e., 5-10 feet, from the jurors. Use distance as a tool. Close the distance when the point is of key importance. But never crowd the jury. Move in and out, not side to side. Don't pace, and don't turn your back on the jurors while speaking. .

- Show 'em your eyes and your hands! When you show your hands, get them away from your sides, and let them move naturally. Remember the old joke that says that about the only time you see a male lawyer's hands in his own pockets is when he is addressing a jury. Maintaining proper eye contact may be easier if you visualize the jurors, their faces, hands, and clothes, when you rehearse. Gestures, head nods, etc., are discussed more fully in the argument site.

- Be enthusiastic about your message.

- In planning your opening statement, use the "cartoon method" of telling your story described on the jury argument web site. This method requires you to visualize the story of your case as though it were a four-panel cartoon. Think of the four most vivid visual images of your story with voice bubbles (balloons) above each of the actors. Make sure your your verbal and visual story paints those mental pictures for your jurors.

- Start your opening with a strong attention-getting "hook" that grabs the jurors' attention and floats your case theme before the jurors.

- Remember the principle of *primacy* that tells us that, all other things being equal, jurors are more attentive and receptive to information at the beginning of the opening statement. The principle of *recency* tells us that jurors remember best that which comes last. This means that the beginning and ending of your opening are crucial parts of the speech. Normally, the Eight Step Preparation Program teaches advocacy students to memorize thoughts not words. But you your should know the words of the beginning and concluding portions of your opening statement cold, i.e., these are the only portions that you should be able to deliver upon command or at the drop of a hat.

- Recognize that your opening statement differs from your jury argument. In opening statement, you tell the jurors *what the evidence is*. In jury argument, you tell the jurors what the evidence means. In opening, stick to the facts or absence of facts. Don't argue. Over the objection of opposing counsel, you will typically not be allowed in your opening statement to *argue* the merits of your case. This means that you *won't* be permitted to spend much time in opening telling the jurors what the evidence *means*. In opening, you won't be allowed to urge inferences or exhort the jurors to action (the so-called "call to action or duty" or the prosecution's "plea for effective law enforcement"); in many courts, you won't be permitted to focus on impugning motives, attacking credibility, justifying conduct, displaying inconsistencies of testimony, stressing matters of common knowledge, or drawing analogies These things come at the end of the case in argument. Yet, the story you tell in opening statement, when properly crafted and delivered, can be a mini-argument in itself. You accomplish this when the structure of your opening invites the jurors to use their power of inductive reasoning to draw their own common sense conclusions and inferences from what you say, without any express urging or exhortation from you. [Note: If you insist on overtly arguing during opening statement, do it very briefly at the beginning when the opposition is least likely to interrupt you with an objection. There is typically what one might call a "grace period" of less than a minute at the outset of opening statement when advocates are loathe to object to the opponent's words. It's not necessarily out of courtesy. I think it is more because lawyers don't want to appear to jurors as too aggressively trigger-happy in interrupting opposing counsel with an objection at the very start of the opening. Here's a brief example of what seems to border on defense argument at the very outset of opening statement in a recent case where a criminal lawyer was charged with aiding terrorism: "Thank you very much, Your Honor. I do have something to say: Members of the

jury, for forty years in this town Laura Norder (the defendant), right here in this court house, has been building for justice and not terror. And when the end of this case comes and I stand before you, I submit that the evidence will show that anybody who says different, claims different, argues different, either sees these things very differently, is relying on faulty intelligence, or is acting from outright desire to mislead you." The other spot when you might make a mini-argument is at the very end of your opening statement when it is clear that you are concluding.]

- As mentioned, you probably won't be allowed to spend much time in opening statement explaining what the evidence means; this is typically reserved for jury argument at the end of the case. However, in opening statement you may want to use the forensic technique of *foreshadowing*, that is, indicating your future argument beforehand by creating an expectation in the jurors' minds. You do this in opening statement when you come to a key part of the story by making a parenthetical statement, an aside, to the effect that "This is an extremely important part of what happened, and *later in the case* we are going to talk about it and have you understand why it's so important."

- Weave a common theme that begins in your opening, winds its way through your direct and cross and then cinches up your case in argument. You can begin in opening to embed your case theme by using key words and phrases that reflect the theme. The first step, your opening, prefigures your last step, the jury argument.

- Be *succinct* and *substantive* in your opening. Your story of the case has to have legs. Standing alone and juxtaposed against the opposition's opening, your case story should support the verdict you seek. That said, pare it down to its lean and mean form. Cut out the foamy, frothy, fuzzy, fizzy, fluffy filler. Strive for eloquence that fits your linguistic comfort zone. Catch phrases are great, as long as they are substantively relevant. You don't want to appear too rehearsed. The idea is to be authentic and spontaneous in manner while speaking extemporaneously, i.e., preparing and practicing your opening in advance but not memorizing its exact words.

- Prosecutors are at a storytelling disadvantage in opening that sometimes leaves them open to objection. The rules require the prosecution to open first. In opening statement, due to the burden of proof and the presumption of innocence, prosecutors are typically not allowed to anticipate defense testimony. They can't talk about what the defense evidence will be. Defense lawyers should consider objecting to prosecutors telling the jury what evidence the defense is going to present. The ground for such a defense objection is, "We have no burden to prove anything, and we object to the prosecutor placing such a burden on us by speculating on what evidence s/he anticipates we will introduce. The rules restrict the prosecutor to telling the jury what the prosecution expects to prove, not what the defense may or may not do."

- Defenders should utilize the advantage of going second and getting the last word. Unlike jury argument, prosecutors normally have no right to rebuttal at the opening statement phase of the criminal trial. Defenders have three advantages at opening, i.e., (1) hearing the prosecutor describe the prosecution's evidence before having to indicate what the defense evidence will be, (2) being able to refer to what the prosecutor has said in opening in explaining the defense evidence, and (3) being in a position where the prosecutor has no opportunity to make a rebuttal opening and is,therefore, limited to objection. Defenders should listen closely to the prosecutor's opening and incorporate, dispute, or spin useful facts from it into the defense opening. For example, the defense may want to discuss its iron-clad evidence that will prove the opposition's claims fallacious.

- Don't overstate your case. Don't make promises in opening that you won't be able to keep. Having the last word in opening may encourage you to gild the lily. Don't do it. An able prosecutor will make notes of your promises in opening statement and remind the jury in final argument of a litany of *unkept promises* the defender made in opening statement.

- Be careful in opening statement not to expand the admissibility of otherwise excludable evidence, i.e., *don't open the door*! For example, in a recent wife-murder case the defense claimed in its opening that the deceased and defendant had an idyllic marriage and were "soul mates." This overstatement opened the door to devastating proof by the prosecution that the defendant had an ongoing relationship with a male prostitute.

- Be cautious in what you concede to the opposition.

- Your words are magic. They have the power to make mental images appear and disappear. They need to be the right words spoken at the right time. Borrow from others who have said it well. Read or listen to the opening statements of other lawyers. Written transcripts are available. Court TV broadcasts some fascinating trials conducted by terrific lawyer talkers. Record them and watch. [One of the best transcripts of opening statements that I have encountered came from the prosecutor and defense lawyer (Florida's Roy Black) in the *Marv Albert* case. Each side told a great, though different, story. It's included in the Opening Statements in Criminal Cases portion of the practice material DVD. Read the entire transcript out loud to get the true flavor and feel of a good prosecution and defense opening statement. Of course, you will never, never, never read your opening statement to your jury. Opening statement is when you *tell* the story, not read it.] You may find a few useful tips about the role of the opening statement in trials on a site sponsored by a non-lawyer jury consultant. Note that, at the bottom of this page, I have added several Internet resources that reproduce opening statements from various noteworthy cases. Paladin members will also find a link to a whole page of transcripts of openings.

- Shape the story you tell in opening to appeal to the values, e.g., sense of justice and fairness, righting a wrong, preventing a wrong, etc., of your audience - the jury. This means you have to know your audience. Who are you pitching to? Read this article on how Generation X and Generation Y view the world differently from each other and from their elders. See Jury Selection.

- Tell the heart of your story in the present tense, concentrating the jurors' attention on the relevant event(s) and not on what each witness will testify to in court. Eschew the " Witness X will testify to blah-blah-blah. Then Y will testify to blah-blah-blah. Then Z will testify to blah-blah-blah." method. You'll get the jurors on your side of the case during your opening by helping them mentally visualizing *what happened in real life, not what is going to occur in the courtroom.*

- Never read your opening statement to the jury. It's always more persuasive to work without notes. I eschew notes because they detract from sincerity. Of course, when faced with a temporary brain vacuum, it's comforting to be able to reach for a sip of water and glance at key word notes that will stimulate the cortex. If you think you need notes as a reminder or security blanket, make yourself a key word outline from your opening statement write-out. Make the key word outline on one 3 X 5 index card by going through your write-out, highlighting the key words, and writing them on the 3 X 5 card. You can place the card in a convenient place, e.g., counsel table, the lectern, your hand, etc., where you can refer to it if necessary. Here's an old trick - If your note card is out of sight, e.g., on the lectern, you can disguise your reference to it by placing a glass of water nearby. As you reach for the water to wet your whistle, you can glance down at the key words and refresh your recollection.

- Keep in mind that, when you are arguing your case at the end of the evidence, you want to be able to say, "Remember in opening statement I told you that I would stand here in at the end of this case and tell you (*state the crucial facts from your opening statement*)." The opening connects to the final argument through the evidence. As they say, "The beginning is in the end, and the end depends upon the beginning."

- Quit when you're ahead. Keep your story short and pithy. As they say, true eloquence consists in saying all that should be said, and that only. Respect the jury's time and attention.

- On occasion, your client's case will be joined with other co-defendants for trial. Each counsel will be entitled to give an opening. When your case is joined, try to go first in delivering your opening statement. Being first allows you to take advantage of the so-called principle of primacy, i.e., the jury's attention and receptivity level is highest at the outset of the openings. If you can't go first, go last to gain the benefit of principle of recency, i.e., the jury remembers best what it hears last.

OBJECTIONS DURING OPENING STATEMENT

Here are some of the objections that may be lodged during the opposition's opening. statement. See also the CCJA List of Trial Objections and the List of Trial Objections to Jury Argument. You'll need to check out the statutes and ruling case law in your jurisdiction to determine exact ground rules for opening statement. For example, do the statutes and/or case law of your state permit the defense in its opening statement to refer to evidence promised by the prosecution in its opening? Does your state allow the defense opening statement to mention facts that the defender anticipates eliciting on cross-examination of witnesses the prosecution mentioned in its opening statement? What if the defender thinks the prosecution is going to call an impeachable witness that the prosecution didn't mention by name in its opening. Can the defense talk about the impeaching evidence it plans to extract from such potential but unnamed witness?

This list of objections will be useful when you plan, prepare and write your own opening statement and when you listen to the opposition's opening statement and try to sort out the impermissible from the permissible. Consult your jurisdiction's Rules of Professional Conduct, Advisory Ethics Opinions on the Ethics page (1) as well as the ABA Standards - Prosecution Function - Opening Statement - Standard 3-5.5 and ABA Standards - Defense Function - Opening Statement - Standard 4-7.4 See also Model Rules of Professional Conduct, e.g., Rules 3.4, 8.4.

Argumentative: "Objection. Counsel is trying to argue the case in opening. The purpose of opening is for the prosecution to state the nature of the accusation and the facts which are expected to be proved by the government in support of the accusation (or the defense to state the nature of the defense(s) and the facts to be proved in support thereof)." "Counsel is arguing inferences rather than stating his version of facts." Tip: If a witness could say it in testimony, you can say it in opening statement. If a witness couldn't say it in testimony, it probably qualifies as argument. For example, argument would include drawing inferences and stating conclusions from the facts. Argument would also include evaluating the merits of the evidence. Tip: It's really not necessary to argue in opening. Let the facts argue for you. You can be very persuasive by picking a good descriptive or ethical theme (1), telling a good story (1), looking and sounding good (1), and presenting your client in the most favorable light consistent with the facts.

Anticipates a Defense: "Objection. That assertion is contrary to and infringes the presumption of innocence and the prosecution's burden of proving each element of the offense by suggesting that the defense has a burden to put on proof. The prosecutor is anticipating what evidence the defense will produce, despite the fact the s/he knows that the offense has no duty to produce any evidence or even cross-examine any witness." The prosecution opening statement should tread lightly in anticipating the evidence that the defense will or won't present. [Note: We all know that the rebuttable presumption of

innocence is the foundation of the adjudicatory American trial; we also know that the prosecution has the constitutional due process burden of proving its case beyond a reasonable doubt, see *In re Kinship*, 397 U.S. 358 (1970). Check your state Constitution's Bill of Rights (1) and your state statutes for similar protections; for example, Art. 38.03 CCP in my home state, Texas, provides, "All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt." When you object to the prosecution's statement, include separate grounds with appropriate references to your state Constitution and state statutes and/or rules.]

Asserts an Unprovable Fact: "Objection. That is an assertion that will not be proven by any evidence."

Injects an Inadmissible Matter: "Objection. That statement injects an inadmissible matter." One should not refer in opening statement to potentially inadmissible facts, e.g., a defendant's confession the allegedly coerced nature of which has yet to be determined by the trial judge.

Injects an Irrelevant Issue: "Objection. That assertion injects an irrelevant issue."

Instructs the jury on the law: "Objection. Counsel is instructing the jurors on the law." It is the customary role of the judge, not the lawyers, to provide the jurors with the applicable law of the case. Sometimes judges will instruct the venire on crucial issues of law as an incident of voir dire during jury selection. In states that allow lawyer participation during jury selection, the trial judge may allow the lawyers to discuss the law of the case as it pertains to the ability of a potential juror to serve. At any rate, discussion of the law in opening statement must be spare. It will typically be limited to a short statement of the principal legal rule that governs the case. For example, the prosecutor might say, "This is a murder case. If I'm right, at the end of this case, Judge Suggs is going to instruct you that in this state it is a crime for one person to kill another person without justification or excuse. When such a killing is done intentionally or purposely, the crime is murder." **Tip:** If you are going to mention the law of the case in opening statement and don't want to sound like you are encroaching upon the trial judge's prerogative to inform the jury of the applicable law, say "*If I'm right*, Judge (*insert the judge's name*) is going to instruct you at the end of this case that (*insert the crucial point of law*)."

Misstatement of Law: "Objection. That was a misstatement of the law."

Assertion of Personal Belief or Opinion: "Objection. That is an improper expression of counsel's personal belief (or knowledge) and injection of self into the opening. statement." [Note: You can typically avoid this objection by eschewing use of the personal pronoun "I" combined with the words "think" or "believe." You can still include personal references to yourself without indicating your personal opinion or belief about evidence or a witness.] One example of improper expression of opinion in opening statement occurs when counsel expresses opinion about the credibility of a witness, often a witness for the opposing party.

Unfairly Prejudicial Remark that Seeks to Poison the Jury's Mind Against the Defendant: "Objection. That is an inflammatory and overzealous remark unfairly seeking to poison the jury's mind against the defendant. It's a finger to the eye that departs from the proper purpose of the government's opening statement which is simply to outline its case so the jury can better understand it."

Confusing and Misleading Statement: "Objection. That statement is confusing and misleading."

A NOVEL SUGGESTION: OPENING BEFORE JURY SELECTION

In most jurisdictions, opening statements come *after* the voir dire jury selection process pursuant to statutes or rules governing the order of trial. See Art. 36.01 Tex. C.C.P. In at least one state, Idaho, provision is made for having opening statements *before* the jury voir dire. In Idaho the parties may, with the trial court's consent, present brief opening statements to the entire jury panel *prior* to voir dire; on its own motion the trial court may require counsel to do so. If you have no set-in-stone rules governing the order of trial, you might consider asking the trial court for permission to make an opening statement prior to voir dire. Obviously, you wouldn't make such a request if you thought it would not benefit your chances of selecting a favorable jury.

ANOTHER NOVEL SUGGESTION: MOVING FOR A DIRECTED VERDICT IMMEDIATELY AFTER THE PROSECUTION'S OPENING

If the prosecution's opening statement contains a concession that necessarily prevents a conviction, the defense might make a motion for directed verdict. If the trial court is amenable to this approach, before granting this motion it will probably give the prosecutor an opportunity to correct any error or omission.

SAMPLE OPENING STATEMENTS ON THE INTERNET

- I have edited an analyzed two opening statements delivered in two murder cases by truly gifted trial advocates. These two edited openings and my comments on them may be found at the top of this page in the red and green buttons at the tail end of the table of contents. The cases are labeled as "The Wig Shop Murder and "The Durst Case."

- Here's the 25-page opening statement of the prosecution by government prosecutor Robert Spencer and the 30-page opening statement of the defense by defender Edward MacMahon in the highly publicized trial of Zacarias Moussaoui (*U.S. v. Moussaoui*) on multiple conspiracy counts centered on the 9/11 attack. (1 - Wiki)

- These links take you to the opening statements for the prosecution and defense in the 1997 "Oklahoma City Bombing" trial of *Tim McVeigh*.

- This is the defense and prosecution opening statements at the second double-murder parricide (parent killing) trial of *Lyle Menendez* (one of the two infamous Menendez brothers - Eric being the other) in *People of California v. Menendez.*

- Here's a **Video** excerpt from defense opening statement of attorney David Rudolph and a **Video** excerpt from the prosecution opening statement in the case of *North Carolina v. Petersen*, a fascinating uxorcide (wife-murder) case that every student of criminal law should watch in the French-made documentary entitled "The Staircase."

- Here's a brief **Video** excerpt from the defense opening statement from the case of *Florida v. Butler*. Take the time to watch the superb documentary film - Murder on a Sunday Morning - that takes you inside the defense preparation and presentation of a real murder case.

- If you would like see what an opening statement in a murder case looks like, take a look at the transcript of the opening statements for the prosecution and defense in the *Danielle van Dam* child kidnapping and murder case. This trial took place in San Diego, California, in 2002. The defendant David Westerfield was convicted and received a death sentence.

- You'll find the prosecution and defense opening statements from the *McMartin Preschool Abuse Trial* on this page.

- Here is a transcript of an opening statement in the case of *United States v. Petersen, et al* - a fraud prosecution.

- Here is the transcript of the defense opening statement in *U.S. v. Rosen*, a case involving the charge of making false reports to the Federal Election Commission (Case Background)(Judge's Analysis of Opening)

- This is the transcript of the opening statement for the prosecution (1), (2) in the so-called "Plague Case," *U.S. v. Thomas Campbell Butler, M.D.*

- Take a look at the prosecution's opening statement in the 1873 trial of *Susan B. Anthony* for illegal voting.

- The defense opening from the 1893 murder trial of sweet little *Lizzie Borden* in *Massachusetts v. Borden* for literally "whacking" (with an axe) her parents is also worth the read.

- Here's the transcript of the opening statements for the prosecution by Sir Edward Clarke and for the defense by Sir Edward Carson in the English case of *Wilde v. Queens*bury, a case in which Oscar Wilde prosecuted Lord Queensbury for criminal libel.

- The prosecution's opening statement in the 1889 English murder trial of *Florence Maybrick* is part of the inquiry into the "Jack the Ripper" murders. Florence stood trial for poisoning her hubby, who was a suspect in the Ripper murders.

- The prosecution (New Orleans' DA "Big" Jim Garrison) and defense (Irvin Dymond) opening statements in the 1969 trial of New Orleans' *Clay Shaw* (*Louisiana v. Shaw*) for conspiracy to assassinate President John Kennedy may be of interest to those who saw the the Kevin Costner movie "JFK." (1 - Costner's movie jury argument at Shaw's trial in "JFK) Shaw was acquitted.

- Here's a glimpse of counter-culture lawyer Tony Serra's opening statement in *California v. Bear Lincoln.*

- This page by civil defense lawyers about their preparation and delivery of a visual opening aided by technology is useful, plus, the fact that it contains their opening statement.in defense of an accusation of civil fraud. Here's another one, a plaintiff's opening in a very interesting and successful civil rights suit brought against the FBI and the Oakland, California police by an environmentalist.

- Convicted *"D.C. Sniper" John Muhammad* shows us how *not* to make an opening statement in this rambling lecture about "truth" where he tells his version of the story about the proverbial child's hand in the cookie jar (He makes it his child.), but manages never to mention the evidence or the facts he intends to prove.

- This transcript of opening statement delivered on November 21, 1945 by Justice Robert H. Jackson, Chief of Counsel for the United States at the 1945 War Crimes Tribunal, provides you with some splendid examples of persuasive oral advocacy.

The famous Al Pacino opening statement in the 1979 courtroom thriller And Justice for All. The movie is average, but this scene, where the criminal defense lawyer turns against his client, is classic

- Many students of forensic rhetoric have been impressed by the prosecution opening statements of Telford Taylor at the *1946 War Crimes Tribunal* trial of the German doctors for alleged atrocities in the name of medical science. See also The Medical Case - Transcript of General Telford Taylor's Opening Statement.

- You may get some ideas for your prosecution criminal opening statement by reading the prosecution's opening statement at the impeachment trial of *President William Jefferson Clinton*

- Here's are the openings at the other presidential impeachment trial in U.S. history - this one of President Andrew Johnson. This is the link for the transcript of the 1868 prosecution opening statement by Congressman Benjamin Butler (a former Union Major General who himself seemed to be crooked as the Snake River - his brother was a war profiteer in confiscated Southern cotton while General Butler ruled the nearby Port of New Orleans with a iron hand) and the defense opening statement by Benjamin Curtis (Attorney for Johnson)

- For comedic relief - From one of my top ten legal movies, to the right sidebar on YouTube, superstar Al Pacino, as defense counsel Arthur Kirkland, in *And Justice for All* delivers the classic opening statement that defenders from time-to-time only wish they could give (wiki). And how about Spencer Tracy in *Inherit the Wind*?

- More comedic relief is found in the transcript of plaintiff and defense opening statement in *Wile E. Coyote v. Acme*.

- YouTube Videos of opening statements : prosecution opening in *Ohio v. Miller*, an obstruction of justice case; prosecutor opening in a murder case; defender opening in a murder case; and others that you can easily find on YouTube.

- *What About Jury Arguments*: Opening statement and jury argument are joined at the hip. The theme you develop at the beginning of your case in opening winds its way through the evidence to your final argument at the end of the case. Consult the CCJA web site dedicated to Jury Argument in Criminal Cases for guidance in planning, preparing and delivering your jury argument. You'll also find references to some 40 other transcripts and videos of jury arguments posted on the web site of the "Opening and Closing" course. [Note: There are also transcripts of *jury argument* from 18 famous criminal cases in the 550-page *The Last Word*.]

turns against his client, is classic.

Consider the tension between being an honest, moral, straight-talking criminal defense lawyer and knowing that your client is 100% responsible for the criminal accusation you are defending him against. Is this why jurors don't trust defenders?

Has Al, as lawyer Arthur Kirkland, grossly breached the Disciplinary Rules of Professional Conduct for lawyers in disclosing to the jurors that his rapist-judge client has confessed guilt in confidence to Kirkland?

See Ethics.

A FEW EXAMPLES OF WHAT YOU MIGHT SAY, AS A DEFENSE LAWYER, IN OPENING STATEMENT

(*Introduction*) Ladies and gentlemen, my name is (*name of defense counsel*). Together with my colleagues over here at this table, I'm proud and privileged to represent this man (indicating the defendant). Today is one of the two times - the other is jury argument - that I get to talk to you directly about this case. This is an important time, and I am going to try my best to communicate what happened in this case.

(*Stating your theme*) This is a case of / This case is about (*state your theme, e.g., jealousy, greed, lust, etc.*)

(*Setting the scene for your story)* To begin to comprehend what happened here, we have to go roll back the clock to (*state time and place where your trial story begins*).

(*Let me walk you back*) Let me walk (take) you back to (*state the place and time*).

(*Boil the case down*) If we could boil this case down to everyday language, it would be this: (*without exaggeration, state the competing theories of the case in the form that best highlights the merits of your theory and deflates the merits of the opposition's*)

(*Client not guilty*) Members of the jury, (*name the defendant*) is not guilty, not guilty, not guilty.

(*Discounting opposition's theme and asserting yours*) This is not a case of (*state the prosecution's theme, e.g., see no evil, hear no evil*). This is a case of (*state the defensive theme, e.g., there was no evil*).

(*Purpose of opening statement*) The purpose of an opening statement is not to tell you what the evidence is. The witnesses and the exhibits will do that. Nor is the purpose of an opening statement for me to try to imprint on your minds every important fact. If we tried to do that, we would be here for an awfully long time. So what is an opening statement? An opening statement is sort of like getting someone ready for a trip that they have never taken before. You try to get them oriented to certain signs on the road and certain landmarks, so that, as they actually take the trip, they understand where they are going, where they are and where they have been. My purpose here today is to give you a preview of what the defense (or government) expects the evidence will show. During opening statements, we lawyers are not permitted to argue the case or to explain the meaning of the evidence. What we are allowed to do is to tell you what our defense is and to tell you what the evidence will and will not show. In jury argument at the end of the case, after all the evidence has been presented, we will come back to

discuss and explain the meaning of the evidence. [Note: It's popular today for the "trial advocacy" professors and young self-designated masters of "trial theater" to denigrate the metaphors that try to explain the purpose of the opening statement as a "road map," a "birds-eye view," a "summary," a "view through the port hole," etc. Instead, the modern teaching is that one should maximize the primacy affect by going directly into storytelling without the introduction. My suggestion is that you should do what you think is best from the jurors' perspective.]

(*Remember this*) If you don't remember anything else I'm going to say in the next few minutes, I ask you to remember this: (*state the essence of your defensive theory, e.g., the defendant never conspired or agreed with anyone, the defendant used a reasonable amount of force to protect himself from a deadly attack, etc.*)

(*Response to prosecutor's claims*) You've just heard somebody make a bunch of claims here about (*name the client*). as though those claims were gospel truth. What the prosecutor just said is nothing more than a claim of what s/he expects the evidence to prove. I intend no rudeness when I say, don't believe a word of it until you've heard all the evidence. You don't know what the facts are until you've heard the evidence. They (indicating the prosecutors) have the burden of proof beyond a reasonable doubt and nobody knows anything until they start to carry this burden.

(*Prosecutor's story analogized to a few pages in a book*) If we compare the true story of this case to a book, the government will only have a few pages. When our turn comes, we will try to present a bunch more, so you will have the whole book.

(*"Can you see my hand?" demonstration to show that one needs to be aware of both sides of the matter before coming to any conclusions*) (*Hold the palm of you hand to the jury.*) Can you see my hand? No, you can't see my hand. Not until I've turned it over and showed you both sides can you see my hand.

(*Charges/accusations not facts*) I want to talk about this (these) charge(s) (or accusation(s)). Charges or accusations) are not facts. They are simply a claim of what these prosecutors hope to prove beyond a reasonable doubt.

(*Multiple defendants - much evidence has nothing to do with the client*) In this opening, as in every other point in the trial, I am going to speak to you throughout this case for one person and one person only, (*name the client*). There is a lot of evidence in this case that will turn out not to involve (*name the client*) at all and that is not offered by the prosecution about (*name the client*). Sometimes, I may cross-examine a witness simply to show that the evidence that the witness offered doesn't have anything to do with (*name the client*). When you hear evidence, please ask yourself "which Defendant does that evidence apply to? Is that evidence connected to (*name the client*)?"

(*Prosecution goes first because it has burden of proof - defense will be putting on evidence and also cross-examining government witnesses*) In trials, somebody has to go first. In this case, as in every case where the government is claiming somebody did something wrong, they go first., the prosecutors. Maybe it's because they have the burden of trying to prove it beyond a reasonable doubt. So when it is our turn, we will present evidence to raise those reasonable doubts. But even before it is our turn, we will be cross-examining the witnesses that are presented here to bring out some of these reasonable doubts. Sometimes it will be just to flesh out the details, and sometimes to show that a government witness is biased or prejudiced or even being untruthful with you or relying on faulty or incomplete information.

(*Defender as being a part of law enforcement*) I consider myself as being in law enforcement. Yes, I do. As a lawyer, I enforce what are the most important laws, the Constitution and the Bill of Rights.

(*Defender as prosecution's adversary*) I am the prosecutor's adversary, their opponent, the thorn in their side. Like any good lawyer, I am my client's champion. I represent poor people, people of color, and, in many cases, I am appointed by the court to speak on behalf of those who can't afford to hire a lawyer.

(*Prosecution made its case sound like sleek, shiny sports car - but under the hood you find two mice on a treadmill - defense opening*)
You've just heard the prosecutor describe what on the surface sounds incriminating. It's going to be hard to keep an open mind. When you hear claims of the sort s/he just made, it's hard not to start making up your own mind, no matter how many times His/Her Honor urges you to keep and open mind until you've heard all the evidence. Listening to the prosecutor, I thought that his description of the government's case made it sound like it was some kind of beautiful sports car, sleek and shiny on the outside. But I will tell you that when we open the hood and look at what makes it run, you are going to find two mice on a treadmill.

(*Opening composed of several (five) parts*) This opening statement is composed of three parts. The good news is that I have just finished the first part - the introduction. Next, I'm going to tell you what the case is about. Then, I am going to walk you through some of the most relevant facts and events. After that, I'm going to spend a few minutes telling you how we are going to prove those facts and events to you. Finally, I am going to make a few concluding remarks.

(*What case is about*) What is this case about? Quite simply, this is a case about (*begin the explanation of the case*).

(*Explanation of proof*) How are we going to prove to you that (*state the element of the offense or the defense*)?

Harold Price Faringher, an outstanding trial lawyer of his era, on the subject of opening statement and argument. Mr. Faringher is also a very dapper dresser.

(*Mentioning the anticipated jury instructions on the law*) If I'm right (or correct) (or I predict that) the judge will give you an instruction (or a limiting instruction) telling you (*precisely state the contents of the anticipated instruction*).

(*Defender's promise as an introduction or closer to the discussion of the defense story of the case*) So this is (*name the client*) promise to you of what we confidently believe and expect that the evidence will show. This is our promise to you.

(*Lawyer's promise not like a politician's*) You may think a lawyer's promise is akin to a politician's promise, where you hear the promise and then you vote and then you wait to see if the person you elected keeps their promise. It's different in a courtroom. You won't vote until you hear the evidence, and you will see who keeps their promise and who does not before you write the ending of this story with your verdict.

(*Truth as a one step at a time journey*) Arriving at the truth is a journey that we will take one step at a time.

(*Defense witness will give sworn testimony entirely at odds with prosecutor's theory of case - defense opening*) You are going to hear from a witness who will present sworn testimony entirely at odds with what the prosecutor just told you, testimony that directly contradicts the prosecution's theory of the case

(*Defense will call witnesses the prosecution could have called but won't - defense opening*) We will call witnesses that the prosecution could have called. but won't, but for reasons that will become apparent.

(*You will demand more than the prosecutor can produce - defense opening*). When you have heard all the evidence in this case, you will recognize that you will honor truth and justice by telling the government that it hasn't solved this crime and that you won't rubber stamp it's theory of the case. You will demand more of the government.

(*Asking yourself if you are qualified to sit in judgment*)
You come in here and you wonder if you are equipped to be a juror. You have never had any experience with the law, the law books, and you wonder 'What makes me qualified to be a juror?' The simple answer is the truest. It's the common sense you have developed by living as long as you have and undergoing the life experiences you have faced. This makes you the most qualified people in this world to be sitting in judgment in this case. So please don't abandon that gift of common sense that you all have. Listen to the evidence, and you will do what's right.

(*Keep an open mind until all evidence in; important stuff may come near end*) I ask you, please keep an open mind until you have heard all the evidence. Sometimes the very last thing you hear about some situation is the thing that decides it for you. Sometimes it's what you hear near the end that is the solution to the whole problem.

(*Concluding portion of opening; defender refuses to carry burden of proof; defense will return at end of case to explain how the prosecution failed to carry its burden*) I have told you what we believe the evidence will be. I am not, by doing this, going to assume a burden of proof that we don't have. No, members of the jury, the prosecutors have that burden of proving their claims beyond a reasonable doubt, and when this case is all over and the evidence is in, I will stand before you again and point out the ways in which we believe they have not carried their burden of proof.

Two reasons why opening statement is of major importance in persuading your audience of jurors.

OTHER OPENING STATEMENT RESOURCES

+ For Civil Lawyers: There's a potentially helpful web site treating the subject of opening statements in civil cases; the first sample follows the traditional structure of a plaintiff's personal injury opening . i.e., Introduction - What Are the Rules - What Did the Defendant Do - What Were the Immediate Harms - Who Are We Suing and Why - What Is Wrong With the Defense - The Long Term Harm Regarding the Injuries Inflicted on Plaintiff - Conclusion; when I looked at this site, the other samples were a mess - one of the sample opening transcripts was upside down and the other "sample openings" were transcripts of testimony not openings; if this law firm cleans up its site, this one might someday be an A-lister. Moving on, here's an 8-page paper on preparation and effective delivery of a plaintiff's opening statement in a civil tort case is also available on-line. (1 - opening in a products liability trial), (2), (3 - opening for the plaintiff in a asbestos terminal mesothelioma case). This is a sample plaintiff's opening statement in a civil wrongful death survivor's case. A civil lawyer also chimes in with a discussion of plaintiff's opening statement in a civil premises liability case. A mid-western law professor offers a lengthy discussion of opening statements and a lawyer makes suggests on how to effectively hook jurors in facially boring commercial cases. This BNA article has the usual suggestions re civil openings. This 19-page article discusses influence of the organizational strategy in opening statement and jury argument on juror verdict and damage awards. This is bare bones summary of opening from a college communication class. If you are interested in openings in civil cases, read what the heavyweights (1 & 2 - plaintiff - government lawyers) (3 - defendant -Microsoft lawyer) said on the Harvard cyberlaw web site in the the government's anti-trust case against Microsoft. See also (1). This paper appears to be written by a graduate communications student; it has no page breaks or headlines/captions but does quote how-to-do-it suggestions from various of credible lawyer sources. Here are opening statements (1 - 79 pages for the plaintiff, 2 - 55 pages for the defendant) in a tobacco case. Here are a couple of sample opening statements from civil cases (1 - 29 pages), (2- eviction case).

+ The Milosevic Marathon: It turned out to be wasted breath, but here is the prosecution's opening statement (1 - 1st part , 2 - 2nd part) from 12 February 2002 in the marathon trial of the late Slobodan Milosevic, before the International Criminal Tribunal for the Former Yugoslavia. Mr. Milosevic acted as

Milosevic before the International Criminal Tribunal for the Former Yugoslavia. Mr. Milosevic acted as his own counsel and made his own opening statement (not included). He died in custody on March 12, 2006, of an alleged heart attack. Some days before his death, Milosevic had reportedly asked for medical attention, complaining that his captors were poisoning him. The seemingly interminable trial was still grinding on at the time of his demise.

+ **Surfing the Web for Openings and Articles:** You can find some opening statements on the Internet (1 - prosecution opening statement in a multiple victim Utah homicide/euthanasia case), (2 - mock opening statement in the Michael Jackson child molestation case). How Stuff Works has a short VIDEO of openings for the prosecution and defense in a recreated trial that follows the actual transcript of a murder case; unfortunately, the substantive quality of openings is mediocre, e.g., the "I believe" and "We believe" phrases. You will find an occasional blurb on the web from an opening statement in a case de jour. Here's one from the Scott Peterson case (1). Activists may also post transcripts of openings; here's one from a misdemeanor trespass case (1). This lawyer has a five page article (1) on opening and claims he will send you a copy of one of his openings if you email (1) him. This one (1) confuses opening statement (where you are not permitted to argue) with jury argument (where you must argue) but does offer a few useful tips on opening statement, accompanied by some rather fanciful claims, i.e., your opponent may drop books and cough loudly during opening or argument to keep the jury from hearing you. This 9-page pdf article Opening Statement as Storytelling is worth a read. This blurb on the Free Library also stresses the opening as story. Here's a thesis paper by a communications researcher on lawyer storytelling during opening and a 7-page 1987 article by a law professor on What Your Opening Statement Should and Shouldn't Do. This video (1) reproduces a prosecution opening from the transcript of an actual murder trial. This video (1), from the theater chap, the *soi-disant* expert who apparently hasn't read the chapter teaching that Zen detests cloying self-glorification, borrows from the literature to summarize various aspects of opening. Among several articles, a trial consultant offers some helpful suggestions on opening statements. BNA also has an article describing opening statement. This Missouri practitioner's article gives you ten points (tips) re opening, i.e., start strong, have a theme, don't give the jury unconnected facts, tell a story, use tools of persuasion, primacy, recency, avoid overstating and reveal weakness, avoid legal talk, and, lastly, end strong. A law professor posts the 32-page "opening statement" portion (1) of a book; this one will read better if you print it. A criminal lawyer publishes a paper (1) written by a trial consultant. More helpful tips - (1), (2 -DUI/DWI - ten sample themes), (3), (4) on opening statement from practicing lawyers can be found on-line, (5 - 3 pages ALI-ABA), (6 - 5 pages), (7 - 14 pages), (8 - 15 pages), (9 - blurb from a PI lawyer), (10 - 19 pages re themes), (11 - 35 pages for prosecutors). This brief blurb on opening is from a psychologist. Movie buffs may find a few video clips of interest on YouTube, e.g., (1 - *My Cousin Vinny*). Do an "opening statement" search on YouTube and you'll also find some real life samples of courtroom openings, e.g., (1), (2), (3), (4). Watch TruTV (a shadow of its former live action CourtTV self) on cable in the early part of the day for real openings from real cases.

+ Do lawyers abuse the right to make opening statements? This law professor's article says "yes."

+ Supreme Court Cases on Opening Statement: *Arizona v. Washington*, 434 U.S. 497 (1978); *United States v. Dinitz*, 424 U.S. 600 (1976); *Frazier v. Cupp, Warden*, 394 U.S. 731 (1969); *Best, Administrator v. District of Columbia*, 291 U.S. 411 (1934). Note that the Federal Rules of Criminal Procedure say absolutely nothing about opening statement and do not indicate whether the government (prosecution) must give an opening statement. Case law suggests that the government may be permitted to waive opening statement. See *United States v. Welch*, 97 F.2d 142 (6th Cir. 1996).

+ See the CCJA Bibliography for numerous additional articles written about the subject of opening statement in civil and criminal trials. There's also a Bibliography of Jury Argument devoted exclusively to listing written articles about how to prepare and deliver jury arguments.

Bullfight critics row on row,
Crowd the vast arena full.
But only one man's there who knows,
And he's the man who fights the bull.
(A good thought for the man or woman who stands to deliver the opening)

BACK TO HOME
TOP

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Transcript: Opening Statements of Attorney James A. Willett

Tuesday, October 21, 2003; 12:00 AM

The following is the transcript of the opening statement by Assistant Commonwealth's Attorney James A. Willett. This is from a preliminary transcript of court proceedings compiled by court reporters Ronald Graham and Associates.

MR. WILLETT: Ladies and gentlemen, I would ask you to come back in time with me to a day almost a year ago. It is October 24, 2002. It is a day that would prove to see the arrest of the snipers, a day that would be their last day at large, a day that we'd finally see an end to their killing and their terrorism.

From this day forward, the shroud of fear that enveloped so many of us would begin to lift. From this day forward, schools would reopen, football games would be played. From this day forward, ordinary people going about ordinary tasks like pumping gas or walking across the street to a grocery store would be able to do so without being in fear for their very lives.

Come with me to the arrest scene. It's shortly after 3:30 in the morning on the 24th of October at a rest stop off an interstate in rural Maryland. It's like any of a hundred rest stops you've been in before. There's a ramp that leads from the interstate to the rest stop; and at the other end of rest stop, there is a ramp that leads from the rest stop to the interstate. At this time of the morning it's dark. There's a mist in the air. The lights overhead are halogen lights, and you can see the cones of light that throw down upon an almost completely empty parking lot.

Besides the parking lot, there's a small circular building which houses restrooms and maintenance closets and things like that and behind the rest area itself the building is a line of woods vegetation that you can't see through.

Looking around the parking lot in the distance the far end of it are some tractor trailers parked. Their running lights are on. Their engines run all night. The drivers are probably asleep in the cabs. You can smell the exhaust from the diesel engine. That's about the only sound that you can hear except for the occasional whine of tires from a lone automobile traveling up the interstate.

Looking around the parking lot facing the restrooms backed into a parking space right near there is an old boxy Chevrolet Caprice. Dirty paint job, banged up a little bit. You can see the grill work. You can see the headlamps, which are not on.

You're looking through the windshield, but you can't see inside the car because it's too dark. If you were to walk around to the side of the vehicle and attempt to look in the side windows, you would fail because they have been tinted.

It is the snipers' vehicle. It looks like an old cop car because that's exactly what it is. It is the place from which they took their killing shots, the thing that concealed them, and the

thing that allowed them to escape. We can see the car, but we can't see the snipers. Where are they? Are they in the car asleep? Are they in the car awake looking at us? Or are they out of the car? Are they in the woodline across the parking lot somewhere where we can't see with a high -powered rifle ready to take the next kill shot? As we stand there, we have no way of knowing.

But the snipers are not the only people there that we can't see. If we were to look past the car, past the restrooms to the woodline, we would see no movement; but movement is there. There are men there dressed in dark clothing highly armed, highly trained. They are the members of the FBI elite hostage rescue team. They have the mission to take the snipers. They have been alerted by a citizen who recognized the car after a police bulletin went out to everybody in the public with their names and their license plate and the car description. He happened to see the car parked there in this lonely space at the rest stop, and he called the police, and the police brought in the FBI.

But their problem is the same problem we have. They don't know where the snipers are. They know an awful lot about the snipers. They know they're clever and that they plan things well. They know that they'll kill without provocation, but they don't know where they are.

Unlike someone standing in a parking lot looking at this scene, the members of the hostage rescue team have a responsibility and a mission; and so rather than wait for the car to drive off or wait for some citizen to wonder by even at that time in the morning, they decide to take action. They rush the vehicle, two to the rear of the vehicle, two to the side of the vehicle, two to the other side of the vehicle. They smash out the windows.

In the front seat is an asleep Lee Boyd Malvo. He's taken out of the car and put on the ground. In the rear seat is an awake but dazed John Muhammad staring, sitting up. He's taken out of the vehicle, put on the ground, secured. It's over just that fast. In the understated language of the FBI report of the incident, the team leader said: two subjects arrested and secured without incident.

Ladies and gentlemen, as Judge Millette has told you, my name is Jim Willett. I'm an assistant commonwealth's attorney in Prince William County.

I'm here with Mr. [Richard A.] Conway, assistant commonwealth's attorney, and the commonwealth's attorney of Prince William County, Mr. [Paul B.] Ebert. We are here because we had a killing in our community like many communities did in our area, and Judge [LeRoy F.] Millette in his wisdom thought that it would be fair for the defendant if we came to an area where people weren't as directly affected by his crimes as the people where we're from, and that's why you were asked so many questions about did this personally affect you? Do you have friends or relatives in the Washington metropolitan area? And many of you said, "Well, I was concerned about it; but it was far away." Many of you said, "Well, I had relatives in the area; but I personally wasn't concerned;" so it was a good decision to bring the case to the people of Virginia Beach.

When I was growing up, we had one rule in our house that was more important than any other rule because this was the one rule that the boys better not break. That was if we were guests in somebody else's home, there better not be a report of bad behavior or inappropriate conduct coming back as a result of that.

Ladies and gentlemen, we will be and are guests in your home; and we'll be on our best behavior. That is not to say that there won't be moments in this trial that are emotional. That isn't to say that there won't be moments in this trial where there is a hardfought battle because this will be a hardfought battle.

On that point I want to address something that just happened today. As Judge Millette has told you, Mr. Muhammad has decided to represent himself.

It is an unusual but not unheard of thing for someone in his position to do. The Constitution states clearly that he has the right to do that if he meets certain qualifications in terms of his abilities to do that, and we had a very long meeting with him this morning at the bench for the court to make that determination, and the court felt that he did have the basic ability to at least begin to represent himself with the assistance of standby counsel, and it's a decision that the judge can change if he finds that Mr. Muhammad is not adequately representing himself, but for now that's his status, that's his right. Please understand that he has no knowledge of the rules of evidence or procedure of which we are aware, and he was advised of this gap in his ability his courtroom knowledge by the court and by his lawyers and has chosen voluntarily to ignore it.

We will make him play by the rules. We represent hundreds of thousands of people. We are not going to lay down simply because he's made this decision; so if he asks a question that's objectionable, we are going to object. If he tries to introduce a piece of evidence that's inadmissible, we are going to prevent him from doing that. We have a duty to do, and I hope and I ask that none of you hold his decision to represent himself against us in any way.

I want to talk to you a little bit if I can, folks, about something that I call just my word sniper craft. Because in order to be a sniper, you have to have a certain set of skills. You have to have certain abilities, and you have to have certain equipment, and together it really does form a craft or a trade or a profession however you want to think about it. The leading principle of sniper craft -- the guiding commandment if you will -- is that snipers never act alone if they can help it.

They always want to deploy in teams of two or more.

If you stop and think about what a sniper does, this becomes apparent. A sniper has two goals. First, he has to go into enemy territory, take out a target, and leave without being detected.

Second, he has to terrorize and demoralize the other side. In this case the other side were the people of the Washington metropolitan area.

Two men. One is the shooter. His responsibility is to take a weapon like this with a sight or a scope, select a target area, and focus all of his attention on that area. His concentration is fully there to the exclusion of everything around him, and that's where the second man comes into play.

He has more duties even than the shooter. He is the spotter. He has to provide a 360 - degree security for the man who is focused on the one thing that is his objective his target. So for example, if a sniper sets up in an urban environment near a Home Depot or a WalMart or a Sunoco or a Ponderosa where there's people all over the place coming in and out of restaurants, getting in and out of cars, the spotter has to make sure that no one is around to see when the shot is taken or they're caught.

Likewise, ladies and gentlemen, in addition to providing security for the shooter, the spotter has to know a way out and pick the time to escape; and, most importantly, in sniper terminology the spotter has to trigger the target for the shooter; and by that I mean he has to tell the shooter when the target is coming, where the target is, and when the target is in position to be shot. That's how they operate to achieve the twofold goals. Kill without being detected, terrorize and demoralize the enemy.

Obviously, they have to have some pretty significant equipment to do that; and in this case one of the pieces of equipment they had is a Bushmaster 223 high-powered rifle. A sniper wants to select a weapon with which he is familiar with.

Folks, this is the civilian equivalent of the military's M16 -- a weapon that that man fully qualified for during his days in the Army, a weapon that he is quite familiar with. The difference is that this is not fully automatic. It will only fire one round at a time with every pull of the trigger.

One round was all he needed. It has a muzzle velocity of 3,000 feet per second. That means that when the projectile leaves the end of the muzzle, it is traveling 10 football fields like that. It's a small projectile. A .223 is not a big bullet. It doesn't have to be. With that kind of energy when it is delivered to a target, it destroys that target if the target is a human being. It liquefies that part of the body that it strikes, and it is almost always fatal.

It is a weapon that is best fired from the prone position, that is laying down, because the ground can support the weight of the weapon; so if you're on the ground or if you're on a surface, like in the trunk of a car, and you couple that stability with this bypod up front here, this weapon becomes extremely stable and extremely accurate; and the shooter can remain in that concealed position for a very long time because it is comfortable to be prone. He is not standing holding the weapon up for his arms to get tired. He is on the surface with it, and he can stay there indefinitely.

The Caprice. I've told you the role that it played. It was their hide, their concealment place.

The Caprice was common and ordinary in an urban environment. You wouldn't think twice about it if you saw it backed into a parking space of a WalMart or a Mobil. It hid them. It allowed them to wait, pick their time, and provided them a means of escape.

So wait a second. Wait a second. If this thing was so essential to the sniper operations, are you telling me that somebody can just take any old car and become a sniper? No. I'm not saying that, and you are right. Certain modifications had to be made to this vehicle.

Let me show you a picture of it, if I can.

This was taken after the arrest. You can see the broken glass, things that were removed from the vehicle. You can also see that it's a very large trunk. Notice if you would, please, that the upper lid of the trunk is white except on that edge, that last foot where it's been spray painted blue. That's one of the modifications that the snipers made to the car because the trunk lid has to come up a little bit in order for them to take the kill shot, and they didn't want to a change or flash of white color, so they changed that.

Another thing they did was they took the supports of the back seat and removed them so that the back seat could raise up in two portions. One portion was a place to conceal the weapon. What you are looking at here is the back seat of the Caprice with one part of the back seat removed. The weapon was hidden there. If you were to take this piece and raise it up on a hinge, you would see that the back supporting struts have been cut away by the defendant so that he can crawl into the trunk from the rear seat and stretch out in a prone position to fire.

He also . . . went around to the back of the car and cut a hole in the rear deck, as you see here, to allow the barrel, the muzzle of the gun to protrude while he took the shot; and it's very interesting the way this cut was made, ladies and gentlemen, because when you see different pictures of it, from the top you will see that the cut is not made straight across like this. He beveled it. That gives him a much wider field of vision and a much narrower exposure. A very, very clever premeditated device.

The Caprice allowed them with impunity to travel where they wanted, park where they wanted, and kill who they wanted; and the more they killed the more their territory in which they killed became enemy territory. Because after these killings started to rage, everybody in our area was looking for the sniper. People were pumping gas looking for the sniper, buying groceries looking for the sniper.

So at each increasing shot, his risk of capture elevated; and yet this car and his planning escape routes and so forth allowed him to continue to kill with impunity.

The sniper has other tools. In this particular situation, you would need ear protection firing from a trunk and we found ear plugs in the car. You would need a means for the spotter and the shooter to communicate. We found functioning walkie talkies. We found a computer with maps of the areas where the kill shots were made and escape routes

plotted on them, and we found a global positioning unit and a digital voice recorder that was used by them to rehearse their extortion demands.

Folks, I want to talk to you a little bit about how the evidence of the shootings themselves is going to come in; but before I do that, I would like very much to introduce you to a man by the name of Dean Harold Meyers. On October 9, 2002, Mr. Meyers works for a company in Manassas. He lives in Maryland. He is in his early fifties. He is by all accounts a good and gentle soul upon this earth. He is a hard worker. He is a man of generosity. He is a friend to many. He is a man of modesty. He is at work at his place of business, an engineering concern, in the city of Manassas; and as is his habit, he's working late. He comes in early. He leaves late.

As the evening began to wear on, however, he decided it was time to go home. He stands up, he says goodbye to his coworkers. He says something to the effect, "Well, I think I've had all the fun I can take for one day," or words to that effect. He gets his coat, walks out the door, walks down the steps.

He walks to his car. You can see him opening the door, stepping inside the driver's side and turning on the ignition. Dean wants to go home. He wants to have a meal. He wants to relax. He fully intends the do that except that Dean needs to put gas in his car.

He drives up the road. You'll see a picture of it. It's a congested area just like all the other shootings. By now the sniper fear has been raging.

There have been any number of killings, but that's not a concern to him. This man survived a bullet in Vietnam. He wasn't about to let some sniper hiding somewhere alter his behavior. He drives to the Sunoco. He pulls to the pump. You can see him getting out of the car. He takes the gas cap off the tank and sets it up on the gas pump, goes to remove his wallet to use his credit card to pay for the gas when the sniper's rifle crack is heard and he falls to the pavement to death.

The shot came from across the street Bob Evans parking lot here. Dean was gunned down here – a distance of about 80 yards. You can see how important a spotter would be in this situation. This parking lot is always crowded as you see it pictured here today. There are always people coming in and out of the restaurant, and that's where they were.

How do we know that? Did anybody see them?

No. There will be no eyewitness testimony to any of these shootings, ladies and gentlemen. That's how clever he is. But we know that that's where the shot is fired from because of the trajectory of the bullet and because we found right there, right in that parking area, an ADC map booklet that was stolen from a library in Baltimore, and we seized that and we examined it for fingerprints, and lo and behold it had both Mr. Muhammad's and Mr. [Lee Boyd] Malvo's fingerprints on it. And we took the bullet fragments from Dean Meyers' body and compared them forensically with known bullets shot from the gun that was found in their car the night of their arrest, and it matched.

No question whatsoever. It matched to the exclusion of any other weapon in existence.

That's basically how the evidence is going to come before you, and I give you that as an example because in this situation we have selected 16 of the sniper shootings to present to you, 10 of which were fatal. What I'd like to do now is go back to the beginning on Sept. 5 to the first shooting and take you through it case by case because, folks, let me tell you right now. This evidence is not difficult to understand. It is straight forward and clear. The problem is that there is so much of it.

Most juries are asked to decide one or two crimes, one or two shootings. You . . . are being asked to decide 16 shootings. The only way I can get a handle on it is to take it one case at a time and then move on to the next one, and that's what we're going to do in the presentation of evidence in this case. We have a chart that I think might help.

The evidence is also going to come in a pattern that I hope will be recognizable and help you predict what's going to happen. Now, each of these shootings was different; so the pattern doesn't hold true and exact for each shooting; but generally speaking, I would anticipate that for each shooting where there is a fatality, you will hear from a family member who will identify a picture of the victim in life. You will hear from crime scene folks who surveyed and photographed the area over all, from above, and that sort of thing to give you a general layout of what the area looked like where the shooting took place. You will hear from people who were there at the time. Although none of them actually saw a shot fired, they will tell you different ones will tell you they heard a shot or they saw somebody fall, their reactions was that they called 911, what they did in that regard. You will hear from the first official people who got on the scene, whether it's a rescue person or a police officer and what took place from that point on; and then you will hear from the crime scene analysts.

Perhaps some of you have seen the TV program CSI and you see the magic that they work. Let me tell you, our guys are better; and they will present to you the forensic evidence that was meticulously gathered at each one of these scenes. DNA evidence, fingerprint evidence, and ballistic evidence that links the rifle that was found in the car to all but two of the shootings and all of the murders.

It began on Sept. 5th. It ended, as I have told you on, Oct. 24th. Back in a previous December, December of 2001, an incident of little importance occurred. And I am going to tell you about it, and I'm going to ask you to take it and set it aside knowing that it's on the shelf over here. Remember that we're going to take it off the shelf when it becomes important later. The defendant and Mr. Malvo are in Bellingham in the state of Washington. Mr. Malvo's mother, Ruda James, is there too. She and Mr. Malvo are in the country illegally, and there is an argument and a domestic dispute, and the police are called to the dispute and discover two things. First, Mr. Malvo is in the presence of Mr. Muhammad. Second, Mr. Malvo is illegally in this country; and so he is arrested; and he is fingerprinted in the presence of the defendant on December 19, 2001. Put it up on the shelf for now.

September 5th. September 5th saw the beginning of the financing -- the raising of funds by the defendant -- to finance his campaign of terror.

Paul LaRuffa, a survivor, he's 55 years of age. He runs a restaurant in Prince George's County called Margellina's. It's a nice little place, homestyle kind of food, little bar. He does a nice little business for himself. It's closing time. He and two of his friends lock up the business. He has two bank bags with about $3,500 in them. He says goodbye to his buddies, who go to different locations in the parking lot where their vehicles are located; and he goes to his car, opens it, shuts the door preparing to leave. When all of a sudden, one person appears at his window.

He can't tell you who it was. He didn't see the face because that person . . . Lee Boyd Malvo . . . began shooting. He was in possession of a .22 caliber revolver. Five shot capacity. All five shots emptied into Mr. LaRuffa.

The shooter reaches in through the shattered glass. Mr. Lauffa is bleeding profusely at this point. You will hear a doctor describe his bleeding as arterial spurt, and you will see pictures of it along the side of his car. It looks as if someone . . . took a great big water gun and filled it with blood colored liquid and squirted it up and down the side of the car. The shooter reaches into the car, takes the bank bags with the money and the name that says Margellina's on it and takes a computer belonging to Mr. Lauffa. This computer is the very same computer that would be found in the car at the time of the arrest with all the snipers' plans and maps on it. Mr. LaRuffa's friends see what happened. They call 911; and in one of the calls, you can actually hear Mr. LaRuffa say, I don't want to die in this parking lot. He would not die. He would survive, and he will be here to tell you about that horrific experience.

Some days later at a law office some distance away from Margellina's restaurant, the bank bags are found empty and a shirt is found.

Ironically, the shirt says something along the lines of on the front, I only have the ability to be nice to one person today; and on the back it says, today's not your day. That shirt was collected. It was microscopically examined, and there were hairs found in that shirt that DNA analysis proved belong to Mr. Malvo.

As we go through these different scenes, ask yourself, Who's out front? Who's taking the risks?

Whose DNA? Whose fingerprints? Who's being exposed to being caught? I think you'll find the answer to that question is that it was the 16-year-old Lee Boyd Malvo while this man stayed safely in a place of concealment.

Let me give you another example of just that. On the 15th of September Muhammad Rashid was at his business, a business called Three Road Liquor also in Prince George's County not too far from Mr. LaRuffa's pizza restaurant. Same method of operation folks.

You've heard the term MO, modus operandi. Same thing. Mr. Rashid is in the process of locking up his business. If I didn't tell you excuse me I should have. The snipers realized $3,500 in profits from their attack on Mr. LaRuffa; and that is important because when they come to attack Mr. Rashid, they have an acquired something new. They have acquired the Caprice. They went up to New Jersey to a place called Bordentown and purchased it there from a used car dealer who will tell you that when he sold the car to him, the trunk wasn't spray painted, there wasn't a hole cut in the back, and the back seat support struts were all in shape, which means that he made all those modifications.

Mr. Rashid comes out of his business early that evening, and he sees a car that looks like that Caprice parked out back; and, you know, he doesn't really think a whole lot of it because it's a car.

You know, there's cars everywhere; but he's never seen it before; and he makes some notation of it. At the end of the evening, he comes outside. He's in the process of locking the door to the front of his business when he feels something go by him, and he hears a crack, and he doesn't know what it is, and something goes by him again a second crack.

What's happening is he's being fired at by a high powered rifle. The rounds miss him. They lodge inside the store itself. They go through the door and lodge inside a shelf. They were so destroyed that no ballistic match could be made; but, nevertheless, we could tell that it was a high -powered rifle as opposed to a handgun; and, again, as soon as those shots were fired and missed, a young man was up on Mr. Rashid and with this gun fired one time in the abdomen; and Mr. Rashid fell to the pavement and was robbed.

Mr. Rashid played dead. It was a difficult thing for him to do being shot in the abdomen. He wanted to cough. He suppressed his cough as he laid there, and his plan worked. He wasn't shot again and again and again like Mr. LaRuffa was. He was only shot one time. The robber flees. Mr. Rashid calls 911 himself, and you will hear that tape, and he survives.

The financing of this operation then went to Montgomery, Ala., where an important lesson was learned by the snipers. Same MO. Two women at a liquor store closing up for the night. Key in the door, engaging the lock, Ms. Kellie Adams shot in the face by a high -powered rifle. She goes down. Her friend Claudine Parker is horrified. She begins to back up away from this horrible thing. At one moment it was her friend. At the next moment, she's down; and Ms. Parker takes the second shot to the back.

This shot kills her. As soon as the shots from the high-powered rifle were fired, Mr. Malvo is right up on the scene again and starts rifling through their property in an attempt to rob them; but this is where they learned a lesson because not only was Mr. Malvo right up on the victims, but the police were right up on them too because they were in the area and heard the shots.

Where is the spotter? And Mr. Malvo has to run for it, and run he does. On the way he drops an Armor Light catalog. It's a weapons catalog. You know whose fingerprints are

on it. Mr. Malvo's. On the way he stashes the .22 caliber rifle, which is found by a citizen in her backyard a couple weeks later. When that gun is recovered, it is matched to the bullets that are taken from Mr. Rashid and matched to the bullets that were taken from Mr. LaRuffa to prove that this was the gun to the exclusion of all others that shot those two men.

The police went to the scene. They found a paper bag, a liquor store bag, with a receipt attached to it. Mr. Malvo's fingerprints are on that as well. But the lesson was learned. You better have somebody giving you that 360 -degree security.

The next killing was also in the deep south in Baton Rouge, La. . This time the business was not a liquor store but a beauty shop called Beauty Depot. Ms. Ballenger closing the store will be the next victim of the sniper. She was shot. She was killed almost instantly; and, again, as soon as the shot was fired, Mr. Malvo was right up on the scene right there. Shots fired, he appears to take her purse. He is seen by a witness or at least a young man is seen by a witness grabbing the purse and running to the Caprice. He gets in, the Caprice drives off. Ms. Ballenger was not shot with the handgun because the handgun is now in police custody. She is shot with a high-powered Bushmaster .223 rifle, the very rifle that was found in the back seat of the Caprice on October 24th when they were arrested. Perfect match.

There were also two receipts found in the Caprice at the time of the arrest which were significant because both of those receipts were from businesses in the vicinity of Ms. Ballenger's shop.

One was from a business called the Piggly Wiggly, which is a grocery store down there; and it was dated Sept. 23rd, the very date of the killing. The other was from a Savalot store dated four days later on Sept. 27th proving that they were in the Baton Rouge area when the killing took place.

At this point we see a change in the strategy and tactics on the part of the snipers.

Robbery is no longer their sole goal. They now wish to terrorize, and so they go from a single isolated shooting on a single isolated day to a series of killings all on one day to create a zone of terror in and around Montgomery County.

The first victim was a gentleman by the name of Premkumar Walekar. He was a cab driver. He pulls into a Mobil station a little after eight o'clock in the morning in Montgomery County, [Maryland]. He goes to the back of his car, and it's one of those older style gas tanks that's behind the license plate where you pull the plate down. There was a woman, a physician in fact, who was at the pump next door along with her children inside her van who had never seen that type of gas tank located there. I guess she is much younger than me, and so she's watching in fascination as he goes around to the back of the car and pulls this thing down and inserts the pump, and her attention is focused on him because of that. It is at that precise moment that he is gunned down from across the street. He gets hit. He staggers. To her horror, he staggers towards her van where she and

her child are, and he falls up against the van and slides down to the pavement leaving a smear of blood all the way down the side. She's scared to death, but she's a doctor. She gets out of her car leaving her child there, not even thinking about her child at that point.

At the same time, a police officer is arriving. They try to give Mr. Walekar CPR, mouth to mouth resuscitation. It's a wasted effort. He would die sometime later from a shot from the .223 Bushmaster. He was a random victim who came into a preselected killing zone and died for no better reason.

Twenty-five minutes later Sarah Ramos, 34 years of age, is reading a book seated on a bench outside a restaurant near a home for the elderly called Leisure World. She's sitting in a normal position with her head like this slightly down reading the book. The defendants are parked at the other end of the parking lot, again about 70 or 80 yards away, pulled into a parking space so that the deadly end of the Caprice is facing Sarah. An elderly gentleman from Leisure World is walking by her, notices her, walks past her, hears the crack of the rifle, turns around and sees that she is splayed out on the bench and there's blood everywhere. He thinks it's a suicide.

He calls 911, tells them, we've got a suicide.

You'll hear his testimony, and you'll hear his tape.

But when the police get there right away, one police officer is pretty on the ball; and she says, It can't be a suicide. There's no gun. She couldn't have shot herself.

As the police continue with their investigation, they find a witness who sometime just a few minutes before the shooting saw the Caprice parked in the space where the shot was taken from; and again, Sarah Ramos was murdered by the Bushmaster .223 that was found in his car when he was arrested.

An hour and a half later still in Montgomery County, LoriAnn Lewis Rivera is at a Shell station not far-- these places are all close to each other, folks. She's a young mother. Fortunately, she does not have her children with her; but she does have her children's car seats, and she wants to vacuum out her van, so she pulls up to the vacuum at the Shell station and removes the children's car seats when it's her turn to be executed. Children without a mom as a result. The car was seen by a police officer in the vicinity just before the shooting took place, and Ms. Lewis Rivera was killed by the very same gun.

The last killing on Oct. 3rd took place technically in the city of Washington, but it is just over the border of Montgomery County so that you can throw a stone from where this gentleman was executed, and it would land in Montgomery County. It is right there. Paschal Charlot, an elderly gentleman, 72 years of age, is walking in his neighborhood where he grew up and lived his entire life. He is stopped at a street corner waiting for a traffic light. The defendants are in their Caprice parked across the intersection, again, with the killing end of that vehicle facing Mr. Charlot. He raises his hand as the shot is fired. It tears his hand apart, lands in his chest, and kills him.

Two witnesses who run a restaurant there called the Tropicana happened to be out back near where the vehicle was parked when the shot is fired, and their attention turns towards it, and they see the Caprice pull slowly up the street and away at night with no headlights. At Mr. Charlot's autopsy, fragments were removed from his body and found to be an exact match. Four people from eight o'clock in the morning to 20 minutes after nine o'clock.

The tactics of the terrorists have changed, and they will change yet again. Now we are going to see a geographic expansion of the killings into Virginia.

Caroline Seawell was 43 years of age. She is a survivor, ladies and gentlemen; and you will get to meet her. She is a wonderful person. It will come through to you immediately on the witness stand. You will be so glad that she was one of the lucky ones because of the type of person she is.

She is at the Michael's craft store in Spotsylvania County where you buy art supplies and cardboard paper and crayons and crafts and things like that. She's there for the purpose of buying those types of things. She comes out to her van.

Loading things into her van, she is shot in the side of the back. Fortunately for her the bullet passes through her and lodges in her vehicle. She's rushed to the hospital. She's saved. Again, people see the Caprice in the area just before he shooting; and, again, when the bullet fragments are removed not this time from her body but from the side of her car where they struck they matched his gun.

Three days later the authorities in Prince William, excuse me Montgomery County, Md., have a press conference at 6:30 in the morning. It is a press conference that will prove to be tragically ironic. The press conference was to announce that the authorities have stationed state police throughout the schools of Montgomery County, Md., to effectuate the safety of the students.

An hour an half later, a fine young man, a neat kid, 13 years of age named Iran Brown is being driven by his Aunt Tonya to Tasker Middle School. She is a registered nurse. He gets out of the car with his book bag and begins to walk toward the entrance of the school, which is covered with a canopy. His aunt begins to pull away when she hears the crack of the snipers' rifle. She stops and she turns and she sees her nephew; and he says, "I've been shot," and he falls. She brings the car right back to that place, takes matters into her own hands. As I say, she's a nurse. She puts Iran in the car with her, and off they go to the nearest medical facility. She's calling 911, and you will hear her anguish on that tape as she tries to let the police know the desperate circumstances of her plight and at the same time keep her nephew from going into shock, keep him from getting scared, keep him calm to save his life; and save his life she does.

She gets him to the Prince George's County medical facility, and they drop him in a helicopter, and they medevac him to DC like that--where expert physicians and surgeons

who're trained for just this type of thing take over and save Iran's life; and I am happy to report to you that except for a spleen, which he no longer has, Iran is okay. He doesn't like the notoriety that this case has brought him.

It is unwelcomed. He is the object of attention. He just wants to be a normal kid. Now in his freshman year in high school, he will tell you how he feels about that.

The vehicle, the defendants' Caprice, was seen in an area the night before Iran was shot and in that same neighborhood the morning of. In fact, one witness will tell you that he was stopped at a traffic light right outside Tasker Middle School an hour before Iran was gunned down and made eye contact with him in the Caprice. As far from him as I am from you right now, they locked eyes. He was smiling. He also saw Mr. Malvo in the front seat and saw Mr. Malvo climb over the front seat into the back seat before he drove off.

When the bullet fragments were removed from Iran's body, they were an exact match to his .223.

The police realized, folks, that this shot was probably not taken from the Caprice but taken from a woodline to one side of the school; and so they organized a step-by-step search -- people in a line walking in a grid search fashion -- and they found some interesting things. They found a cartridge casing from a .223 round that ballistics analysis showed was fired from the .223, so we have a double ballistics match here the round from Iran's surgery and the shell casing at the scene both from his gun. They find a pen barrel -- an empty pen barrel, you know, like a Bic nothing inside -- with a DNA sample consistent with the defendant's DNA. The odds of it being somebody else's DNA are approximately 510 to 1. If you take that statistic and you combine it with the undisputed match of the rifle casing, we know who was holding that pen out there. And they found a tarot card. Not surprisingly, the snipers chose the tarot card of death; and this was the first time that they had communicated with anybody.

"Call me God," they write on one side. "For you, Mr. Police, call me God. Do not release to the press."

It's all said in some enigmatic code. What does it mean? Mr. Malvo's DNA was found on that card, so we have ballistic match, DNA from both defendants.

After they tried to kill Iran Brown, the snipers went to the city of Baltimore and had an encounter with the police. That's how we know that they were up there, which really isn't significant in and of itself until we get to the day of the arrest on the 24th of October when inside the Caprice they find a piece of paper with a list of schools in the Baltimore area where they were the very next day from the school shooting.

The snipers wanted to add still more jurisdictions to their list, and it was at this time that we had the shooting in Prince William County, and I've talked to you about that. You

know how it was executed. One interesting point about it is an hour before the shooting, the defendant and the Caprice were sighted by a woman who works in a bank.

They were in the parking lot, and they encountered one another, and she will tell you that they had a brief conversation. She was a little bit startled but was immediately reassured by his calmness and his polite demeanor an hour before he gunned down Dean Meyers.

After the shooting he is in the Caprice up in the Bob Evans parking lot; and as luck or ill-luck would have it, there happened to be a Prince William County police officer, Officer Bailey, in his patrol car right in that area; and as soon as the shot was fired, Officer Bailey was instructed to block off the Bob Evans parking lot and take the names of everybody that was there. There was only one entrance to the Bob Evans parking lot, and he pulled his cruiser right across it blocking him in.

Mr. Muhammad is one of the first cars in line. They've just killed Dean Meyers. He rolls down the window.

"Sir, can you tell me your name?"

"I am John Muhammad."

"What are you doing here?"

"I was directed off the Interstate here."

Officer Bailey will tell you the same thing that the lady from the bank will tell you, calm, polite, talking to him like he had an ordinary conversation just after an execution.

The snipers decide to go back to Spotsylvania after this. They go to an Exxon station. Ken Bridges is 53 years old when he is shot in the back and dies. The Exxon station is just like all the other scenes, folks. It's a classic sniper-picked scene, picked because it's crowded, picked because the Caprice can blend in, and picked because it's near an Interstate for easy escape. The fragment is removed from the body of Mr. Bridges and again matched to the .223.

He wants to add more jurisdictions at this point, expand the terror, expand the jurisdictions that might contribute to the pool of ransom money that he's about to ask for; so he goes to Fairfax County; and he goes to a business there called the Home Depot where Ted and Linda Franklin are there with their vehicle loading their purchases into the car when Mrs. Franklin is taken by a head shot that blows her brains apart. I mean that in a very literal sense of the term. They aren't there anymore. Right in front of her husband, Ted. He stands there and sees his wife's head explode.

Explode. He calls 911. He is hysterical. He is so shocked and damaged by what happened that his voice is involuntarily raised to the point where you will think when you hear this tape what the dispatcher thought when she took the call that she was talking to a woman

until it becomes clear that he is describing the execution of his wife. Ladies and gentlemen, we are going to play that tape. We are not going to play it in the presence of Mr. Franklin. That would be an unnecessarily cruel thing to do. We will play the tape and then bring Mr. Franklin in to tell you what happened. The crime scene specialists, analysts from Fairfax County find the rounds at the scene in the vehicle; and it was the defendant's sniper rifle which took Linda in her 47 year.

The snipers then decided they want further expansion. They go down to Hanover County; and it's a scene just like any others, folks. It's right off the Interstate. You take the Ashland exit on your way to Richmond; and you come to an area that's got all kinds of restaurants like Ponderosa and, you know, Applebee's and places like that.

Jeff Hopper and his wife don't even live in Virginia. They are from Florida. They are on a trip along 95 and have the bad luck to pull off at this particular Ponderosa to get something to eat, and they park in the back. There is a woodline in the back, and they finish dinner. They're coming out to the parking lot walking to their car. They're joking with one another. They're playing, you know, around with one another. They're having a good time. They just had a nice meal when Jeff is shot. He survives, and the bullets are matched to the rifle, but some very interesting things happen just before Jeff Hopper was gunned down.

The snipers began to expand their efforts to communicate. They called a hotline in Rockville, Md., they called a police line in the Montgomery Police Department, and they called a priest, a Catholic priest in Ashland, in the very town, they called the priest the day before they tried to kill Jeff Hopper, and the priest will not be able to tell you that he recognized their voices or that they identified who they are, but remember the things that I told you about that were found in the Caprice -- there was a global positioning system, a computer, and a personal data device. In some of those items are notations of exactly who they called and when, including the priest; and they tell the priest, "We know who's doing the sniper killings; and if you want to find out, there was a robbery and a murder in Montgomery, Ala. , at a liquor store that is unsolved."

At this point nobody knows what this means, but the priest calls the information in, and the authorities look into it, and sure enough there's a woman gunned down with a high - powered rifle and another one shot with a high -powered rifle that is the same caliber of the rifle being used in the sniper shootings, and so Jeff Hopper is one of the lucky ones. He survives.

The police go into the woodline again doing that gridline search like they did at the Tasker Middle School and they find some very interesting things. They find a casing, another shell casing, that matches the sniper rifle, so there's another double match from Jeff's body and from the scene.

They find a Cinarasin bag, this thing just crumbled up and thrown on the ground by the trees, with Mr. Malvo's DNA on it, and they find a Halloween bag. It's a plastic bag. Kids might use them at Halloween. It's got pumpkins and witches and stuff. Otherwise, it's a

regular Ziploc plastic bag; and inside that plastic bag is a note which reads in part, "For you, Mr. Police, call me God. Do not release to the press. We have tried to contact you to start negotiation, but the incompetence of your forces in Montgomery County, in Rockville, and a priest in Ashland these people took calls for a hoax or a joke, so your failure to respond has cost you five lives. If stopping the killing is more important than catching us now, then you will accept our demand which are nonnegotiable. You will place $10 million in a Bank of America account." It gives the account number in the name of Jill Lynn Farrell Ms. Farrell will be here. She will tell you that she was a bus driver out west where the defendants were one time and that her credit card with this number was stolen from her.

"We will have unlimited withdrawal at any ATM in the world. You will activate the bank account, credit card, and PIN number. We will contact you at the Ponderosa telephone at this number Sunday morning. You have until 9 a.m. Monday morning to complete the transaction. Try to catch us withdrawing, at least you will have less body bags; but if trying to catch us is now more important, then prepare your body bags. If we give you our word, that is what takes place. Word is bond. PS, your children are not safe anywhere at any time."

So they've opened up the communication process. After the killing they call the FBI hotline and try to do some further negotiations to no avail.

The police don't know what to do at this point.

The final killing before their arrest was on Oct. 22nd back in Montgomery County. The defendant was seen the night before in an Outback restaurant. In fact, we have a videotape of him in the restaurant. You will see that. You will see that he is in possession of Mr. LaRuffa's computer, and the next morning, early morning, Conrad Johnson, a longtime employee of the Montgomery County Transportation System, he is a bus driver. He's standing in the steps of his bus with the door open waiting for the day to begin, waiting for his passengers to arrive. From his vantage point, he looks out across a small play area with basketball courts and some grassy areas to a woodline.

Concealed in that woodline is one or both of the snipers. We don't know. Nobody saw them. But as Mr. Johnson stood there minding his own business waiting to begin his day, the shot was taken. He's thrown back into the bus. He is conscious. The bullet hits him center mass, and help is brought right away, and he is taken to a hospital, but the internal damage is worse than they first thought, and he bleeds to death on the operating table.

The bullet that killed Mr. Johnson was likewise inclusively matched to the defendant's gun, and the police began once again to do their gridline search in that wood area. They find a duffel bag that you will hear some evidence about that contained many, many things unusual items that were also in the Caprice. Things like black pepper. Things like onion skins. Different debris, different trace evidence with the exact same types of things found in the Caprice. They found a glove to one hand. Its mate was in the Caprice, and they found yet another note. The pattern to us by now should be familiar.

"For you, Mr. Police, call me God. Do not release to the press. PS, your children are not safe. Can you hear us now? Do not play these childish games with us. You know our demands. Next person your choice. You did not respond to the message and departed from what we told you to say, and you departed from the time. Your incompetence has cost you another life. You have until 9 a.m. to deliver the money and 8 a.m. to deliver this response, 'We have caught the sniper like a duck in a noose,' to let us know that you have our demands."

You will hear evidence, ladies and gentlemen, that terrorists groups often communicate with the entities that they're terrorizing with codes like this. The purpose is so that the people that are being terrorized know that the actions were taken by the genuine folks. The IRA puts it out all the time a list of code words.

You will say this. We have caught the sniper like a duck in a noose. So that when we hear that go out over the news, we know that you got our note; and you know that we're the real article.

Sixteen shootings, 10 homicides, all of which came from a Bushmaster .223.

Ladies and gentlemen, we have a long and difficult journey ahead of us. Long because there were just so many crimes, there is so much blood on his hands, and we have to examine each one of those one at a time. Difficult not because the evidence is difficult to understand but because of the type of evidence it is that you all have to listen to, the way these people died and the impact that it's had on their loved ones. You will hear from family members who will tell you about that as further victims in this case, but let me assure you they are not the only victims. There are countless others. Other family members, friends of the murdered and hundreds and hundreds upon thousands of people who were stung by his terrorism all looking to us. They will be nameless and faceless in this trial, but they are there nonetheless. He committed capital murder after capital murder.

At the close of the evidence, we'll ask you to convict him of that very crime. Thank you very much for your time and attention.

John Allen Muhammad's opening statement

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(CNN) -- Washington-area sniper suspect John Allen Muhammad won the right to defend himself Monday in his trial on murder, terrorism, conspiracy and firearms charges. Muhammad faces the death penalty if convicted of the murder or terrorism charge.

Acting as his own attorney, sniper suspect John Allen Muhammad addresses the jury as he delivers his opening argument on Monday.

Here is Muhammad's opening statement to the jury:

MUHAMMAD: Good evening.

I would like to thank the judge for giving me the opportunity to speak. I want to talk to you briefly on some things that [prosecutors] talked about.

One of the things that we are here for today and the next couple days is to find out what everyone wants to know is what happened. Something happened. We have his side, and we have my side. If both of us -- one picture and come up with two different stories. Something is wrong. Somebody is not telling the truth. Somebody's lying. I got sworn in. I'm sure they got sworn in, and everyone that gets up on the stand gets sworn in. We are all going to get sworn in. We are going to ask to tell the truth, the whole truth, and nothing but the truth.

One of the things I like -- I like reading and learning about words. One of the things I was fascinated in coming into this strange world to me is three truths. The truth, the whole truth, and nothing but the truth. I always thought it was just the truth. Apparently I was wrong, so I did some checking to find out what is it about these three truths? Same thing but yet they are different.

Well, the whole truth. What is the whole truth? The whole truth, what I found out when I asked that is, Don't take anything away from the truth, which means when we take something away from it, it's not a whole anymore. If we do that, that's a lie. If we do that, we are deceiving. What's nothing but the truth? Well, that means you don't add nothing to the truth. If we do that, we [are] deceiving. We are telling a lie, so

this is why it's important that we tell the whole truth and nothing but the truth. But how do we jump from the truth to the whole truth to nothing but the truth when at one time all we had was the truth? Jesus said, "You shall know the truth." He didn't say you shall know the whole truth and nothing but the truth. The truth. For what happened between that time and this time to where we got to deal with three truths?

Well, I found out as man evolved with wisdom and understanding, we also evolved with deceitfulness in our lives. It seems we found out how to tell the truth with a lie, and upon upholding the standard of telling the truth, you could be prosecuted for lying. He was still telling the truth, so what he did as we evolved in understanding things, the scientists or the wise people at that time realized this person's lying. Yet they're telling the truth.

Now, how can that be so? Well, let me give you an example. It's kind of like this. If I say I don't like basketball, that's my opinion. I don't like basketball. But if someone else come along and says, I like basketball, then in actuality what he just said is what I said, but it's not the whole truth of what I said. He left something out. Therefore, it cannot be considered the truth. It's a lie.

So we continue to tell these stories and continue to tell these stories to where we have to come up with the three truths -- the whole truth and nothing but the truth; and now that's where we are right now, which means if a person gets up on that stand and don't respect all three truths, then they can be prosecuted for telling a lie; and upon the law they can get up on the stand and lie and still tell the truth and not be prosecuted. That's why they changed it. Just the facts that we need. The facts should help us to identify what's the truth and what's not the truth and what is a lie and what's not a lie. OK. In knowing what our wisdom and our understanding, as we evolve, we knew how to manipulate things. Put something here that shouldn't be there, put something here that shouldn't be there, and became more and more confusing, and now we have science and a whole lot of other more things into it to prove that is the truth or to disprove that is the truth, and it became more and more confusing.

I heard him talk about his family. Anytime I deal with anything, I always reflect back on my children, whom I love very much; and I remember an incident when I was in the Caribbean; and my favorite daughter, Taliba -- she loves chocolate. She loves chocolate cookies. As I was leaving, she said, "Daddy, can I have some chocolate cookies?" and I said, "Sure. I come back, we'll go to the store, and we'll get some chocolate cookies, but don't go in the cookie jar and get no chocolate cookies until I come back." She said, "I won't, Daddy. I won't."

So I leave. I come back about an hour later. I see my baby daughter out in the yard with cookies in her hands and eating chocolate cookies. I am upset now because from what I see, she disobeyed. I got the evidence in her hand. I got her eating cookies. I even got her sister saying she saw her going in the cookie jar; so I'm very upset now because my baby daughter have lied to me. That's what I am thinking, so I go up to here, and she starts hiding the cookies. That is more proof. She is being deceiving now, so I tell her I want to see her in the house. She come in the house; and whenever I have a dispute with my children, first thing I do is I pick them up and I put them up at least eye level or above me to where I look up to them, and that way I can remind myself don't be disrespectful to them, and I ask her. I say, "Didn't I tell you don't go in the cookie jar?" and she said, "Dad --" I said, "Don't say nothing. Don't say nothing. Didn't I tell you don't go in the cookie jar?" She say, "Yes, sir."

I said, "Didn't I tell you, Don't eat no more of these cookies out of the cookie jar until I get back?" She said, "Dad --" I say, "Shut up and answer my question."

She say, "Yes, sir."

I say, "Why did you disobey me?"

"Well, Dad, I didn't --"

I said, "Why did you disobey me?"

She said nothing. So I say, Go in the room, and I come in there and I deal with you later; so she go in the room crying. When she go in the room crying, she yelled for her big brother John, who always protects her; so she yelled for him. He come running in the room worrying about his sister. "Taliba, Taliba, what's wrong?"

She said, "Daddy going to spank me because I didn't listen to him."

So I come in the room, and my son said, "Daddy, what is wrong?"

I said, "Taliba disobeyed me. She went in the cookie jar, and I told her don't go in the cookie jar. She eating cookies, and I told her, 'Don't eat any cookies until we eat;' " and my son told me -- he said, "Daddy, you don't know what happened. You just guessing. You want to hear?"

I said, "So what you telling me? Don't believe my lying eyes?"

He said, "Dad, I'm not saying you lie. I'm saying that you don't know what happened. You wasn't here." He said, "I was here." He said, "Do you want to hear the truth?" I said, "Yes, tell me the truth."

He said, "Well, what happened, Dad, right after you left, Taliba came and asked me for some cookies; so I went to the store and I bought her some cookies, chocolate cookies; and when she got full, I told her to go put the rest of the cookies in the cookie jar."

That was the time that her sister saw her actually going in the cookie jar, but what her sister didn't know, she wasn't taking cookies out of the jar; she was actually putting cookies in the jar; and I didn't know. I thought Salina -- Taliba had disobeyed me, but she really hadn't disobeyed me. She actually got cookies from the store and not out of the cookie jar. I asked her not to take cookies out of the cookie jar, and she didn't, but I was basing that on what I saw. I was basing that on what I guessed at what happened, but I didn't know that's what happened, so John told me that.

So I asked Taliba. I lost my memory now. I asked Taliba, "Why didn't you tell me?" I done forgot all about telling her to be quiet -- like what these people told me. Be quiet. Go to jail, and you are not going to say nothing, and that's what I did. Taliba did exactly what I told her to do. She didn't say anything, so when I told her, "Why didn't you tell me?" she looked up -- looked down at me and said, "Daddy, you told me to be quiet;" and I told John -- I said, "John, so you want me to believe what you just told me?" and he said the same thing. He said, "Daddy, you don't know what happened. I was here. I know what happened."

And I say to these people. We know something happened. They wasn't there. I was. I know what happened, and I know what didn't happen. They are basing -- what they have done to me and what they are saying on a theory -- and I just want to speak on that for a minute. A theory. I was locked up based on a theory. I was denied bail based on a theory. As a matter of fact, there was two theories. The first theory was I was homeless, living in homeless shelter, and poor.

Well, if that was true, then why not -- why shouldn't the judge offer me bail? Because if I'm homeless, poor, and living in a homeless shelter, I'm not going to be able to make bail anyway. That's the first theory.

Then after that, he said, And, Your Honor, we don't know where this man lives. He goes in and out of the country anytime he wants to.

That's the second theory. The second theory is what they are worried about, because he knew if I was able -- if he gave me bail, I would be able to make the bail, and then I would not be locked up in a hole and I could come out here and represent myself to the people instead of all you are hearing is the negative side of my human being, so that way is the only time that I will be able to represent myself here in the court because out there in the street there is so much being said about this man to dehumanize me first, attack my family, attack me indirectly and directly, attack my children and everything else; and I'm still sitting there listening to all this stuff going on from people who don't know what happened.

Now, I'm not saying they don't know what happened. Those are not my words. They are saying they don't know what happened. They are saying that their entire case is based on a theory -- and I say a theory, one. They are saying theories. What's a theory? See, this is a new world. I mean this is a new world for me. I mean I'm learning language that I didn't even think exists; so I looked up the word "theory". It said many different things, but it ends up with a guess. A guess, an opinion. It's a guess. Assumption is a guess.

I'm locked up. I'm denied my constitutional right based on a guess. I mean what is it about a human life to where we have reduced it to where we can take it based on a guess? A guess. You can lock a man up and forget he's there and go out and say every negative thing in the world you can possibly say about him based on a guess; and ironically about all this, once all this is over, by the grace of the law that I am found guilty -- not guilty -- these men -- you know what they are going to do? They will say, "Next." No "I'm sorry." No apologies. Just, "Next. Who's the next victim? Who else can we get?" And the beat goes on and it goes on and goes on. A guess, people, is not enough to take a human being life. A guess is not enough to lock an individual up and deny him his constitutional right to bail so that he can defend himself. A guess is, Who's next? The truth. You got the positive side, the positive side, which is the truth. Then what's the negative side. It's a lie. No. Can a person tell a lie and not be a liar? Yeah, they can tell lies and not be a liar. It's because they don't know the truth. They are repeating what someone told them. They are lying, but they don't know they're lying.

What is a liar? A liar is when you know the truth and you willfully deceive someone in thinking what you are saying is the truth. Now, that is a lie, and that's a liar.

In the Caribbean we call -- there is two lies that we call. We say it's a wicked lie and an insane lie. It's a wicked liar and an insane liar. What's the difference between a liar who tells the lie and a wicked liar and an insane liar?

A wicked liar, when he lies, he starts gathering people around him that he can convince of his lie. They start telling the lie, and he starts gathering information to support his lie. He knows it's a lie; but if you get up enough information and you and people start believing that lie as the truth -- now he always knows it's a lie; but the other people always think it's the truth because they don't think he would lie to them. That's a wicked lie.

Now, what's an insane lie? That's the one I have a problem with. An insane lie. An insane lie is after you did all the lying to this person and to this person, moving this information and put it here and move that evidence and put it here and move this evidence and put it here, you start believing your own lie; and that is an insane lie, when you start believing your own lie. That's when someone really needs to lock you up in a rubber room, because you lost your mind; and that's what we're dealing with; and this is why it's important to know what the truth is based on the whole truth and nothing but the truth.

If something is added to it, it's not the whole. If something's taken away from it, it's not nothing but the truth. All we are dealing with is the truth. That's what we are looking for.

We need the evidence. Saying it, people, doesn't make it so. Saying it doesn't make it so.

Accusing a human being of a crime doesn't make it so. Man is accused of being humane and decent, but what they have done to me is not humane nor decent. To accuse me of a crime doesn't make it so. Accuse is far different between proving -- and that's what we are here today and for the next couple days -- to prove what was done and what was not done; but when you prove something, here we go again.

ASSISTANT PROSECUTOR JAMES WILLETT: If your honor please, at this point I hate to interrupt. The purpose of an opening statement is to tell the jury what he

thinks the facts will be. He has not done that up to this point.

JUDGE LEROY F. MILLETTE JR.: I think he is speaking in an allegorical manner, and that's why I allowed him to go on; but, Mr. Muhammad, he is correct. The purpose of opening statement is to tell the jury what you think the evidence is going to be.

MUHAMMAD: Yes, sir. The evidence, if we monitor step by step and be patient and listen to it carefully, it will show that I had nothing to do with these crimes. I had nothing to do with these crimes. They know this, and that's why they are trying to impose everything at one time; and what we ask you all to do is just pay attention. Please pay attention because right now my life and my son's life is on the line, and we need for people to understand that when you say something, it's important -- in this place it's important to prove it. You needs facts. You need evidence that it actually happened. Not evidence, I think it happened. Not evidence, I assume it happened. Not evidence, I hope it happened. But evidence that it happened, and that is what separates a guess from the truth. The truth is a fact. A guess is a theory. A theory is something that we can believe as much as we want to, but it doesn't make it a fact.

Regardless of how loud it may get, regardless of how much emphasis may be put on it, it doesn't change it. It's just a theory. It's an assumption. We're looking for facts. We are looking for evidence, and the evidence will show that I had nothing to do with these crimes, that I had nothing to do with these crimes directly or indirectly, that I know anything about these crimes, that I know any times of these crimes or anything pertaining to these crimes at all.

The evidence will show that, and this is why -- I know that a couple of you all came, you said that I base my decision on the facts, and that's good, and I also noticed when the judge asked you questions, the judge would ask you questions, and some of you said, I think I can. I believe I can. I hope I can; and the judge stopped and said, You know, it's really important because this case is so important. We need to know. We need to know you can. Can you separate what you've heard, what you may have seen, what someone may have told you, to specifically on the facts that we have in this courtroom? And if they could not answer that to where it would satisfy the judge or satisfy to us, the judge dismissed them because it's important that you know what happened. Know.

We got a right to think. We have a right to assume. We have a right to speculate. We have a right to do that; but when it's concerning a human being's life, that's what separates what we think, what we assume, and what we theorize happened from what we know happened; and when people get up on the stand and when they get up and speak, that's what I would like you all to pay attention to. Find out do they know what happened? Not at the beginning. Not in the middle. Not just at the end. All the way through -- because any part -- any part of what they're saying, it's not the truth, it's a lie. All that is deceiving because for a problem -- a mathematical problem to come out to a proper answer, if you make a mistake anywhere in that problem, then the answer is not going to be correct; so it's important to get all the steps properly. Half -- halfway. I used to have a teacher that would say, "John, half is not good enough;" and I say, "I got half the problem right."

She say, "That is not good enough. You need to get all the problem right to get the right answer;" and what we are looking for in the next couple days is we need the right answer. We need to know what happened, and the evidence that they bring as he stated already, that he would hold me to the same standards that if I was another one of his opponent lawyers. The same way for him. The standard should be the same. Not just to say it happened but to prove it happened all the way through -- all the way through. I know a lot of us have an issue much about Mr. Muhammad.

Mr. Muhammad this and Mr. Muhammad that. He took away a lot of people's rights. We actually thought we had a choice. Dirty glass number one or dirty glass number two and then we were forced -- out there I'm sure you all were forced to pick, thinking you really had a choice. Dirty glass number one, dirty glass number two.

That's not a choice. A real choice will be between dirty glass number one or a clean glass; and for the next couple days, the next couple of hours, it is my responsibility to set a clean glass of what really happened on those days alongside this dirty glass; and because it's the nature of a man to choose and to want to choose what is right, I don't have to tell anyone that the glass is clean. Just because you want to drink out of a clean glass, you pick it. The only reason you would drink out of a dirty glass is because you thought you had a choice between dirty glass number one and dirty glass number two. You really didn't have a choice.

That's what we want to do today and the next couple days with the evidence, that we can show everything that they said and everything that they have mentioned, how things would evolve into what really happened, because that's why we're here. That is why everybody is listening right now. There is no doubt in everyone's mind something happened. We're here today in court to find out what happened, and that's why I thank the judge for asking the jurors can you separate what you have heard out there and base your opinions solely on what you hear in court? Because a lot has been said out there, and they have brought a lot in court already what have been said out there. So I ask for from you the same thing the judge have asked of you. That you -- Will you please base your decision on what you -- what is said in the courtroom and not out there; and that way we can make sure that the truth is told, the whole truth, and nothing but the truth.

Thank you, judge.