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TO: Assignment Judges **Directive #07-21**
Criminal Presiding Judges

FROM: Glenn A. Grant, J.A.D. 

SUBJECT: Guidance on the Use of Visual Aids During Closing Arguments (Criminal)

DATE: February 23, 2021

This Directive promulgates guidance for prosecutors and defense counsel on the use of visual aids during closing arguments in criminal trials in accordance with the Supreme Court’s decision in State v. Damon Williams, __ N.J. __ (2021), decided January 19, 2021. In Williams, the Supreme Court held that the prosecutor’s comments and use of a PowerPoint slide during closing arguments improperly invited a comparison between the conduct of the defendant and a violent movie character where the central issue was whether the defendant committed second-degree robbery (theft using force or the threat of force) or third degree theft (exercising unlawful control over another’s movable property). The prosecutor’s comments and the extra-evidentiary movie photograph made it more likely that the jury would reject the defense that only a theft occurred. Thus, the prosecutor’s conduct during summation was “clearly capable of having an unfair impact on the jury’s deliberations,” and on the defendant’s right to a fair trial, which constituted reversible error. Slip op. at 26.

In rejecting defendant’s suggestion to adopt a rule requiring prosecutors to provide opposing counsel with any planned PowerPoint presentations, the Court explained that “the State is under no duty to announce to the defense each inference it will ask the jury to reach during summation.” Id. at 27.

Notwithstanding that, however, the Court stated:

[W]e remind prosecutors that they have a ‘unique role and responsibility in the administration of criminal justice’... and therefore must ensure their strategy and commentary fall within ‘the boundaries of permissibly forceful advocacy’... Prosecutors must walk a fine line when making comparisons, whether implicit or explicit, between a defendant and an individual whom the jury associates with violence or guilt. The use of a sensational and

provocative image in service of such a comparison, even when purportedly metaphorical, heightens the risk of an improper prejudicial effect on the jury.
[ibid. (citations omitted).]

The Court further explained that:

[I]n closing, prosecutors are obliged to confine their comments to the evidence admitted at trial and reasonable inferences drawn therefrom. Failing to do so may imply that facts or circumstances exist beyond what has been presented to the jury and encroach upon a defendant's right to a fair trial.
[Id. at 22.]

Recognizing the role that visual aids can play during closing arguments for both prosecutors and defense counsel, the Court “encourage[d] counsel to disclose to each other and the court any visual aids intended to be used during closing arguments” to avoid objection or possible error, but did not require that practice. Id. at 26-27.

Therefore, in accordance with the principles set forth in Williams, I am issuing guidance for prosecutors and defense counsel on the use of visual aids during closing arguments in criminal trials as follows: (1) Visual aids such as PowerPoint presentations must adhere to the same standards as counsel's spoken words; (2) Slides may not be used to put forward impermissible evidence or make improper arguments before the jury; (3) a PowerPoint may not be used to make an argument visually that could not be made orally. Id. at 27.

Any questions or comments regarding this Directive may be directed to the Criminal Practice Division at (609) 815-2900 x55300.

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