A Picture Is Worth a Thousand Words: The Use of Graphic Photographs as Evidence in Massachusetts Murder Trials

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THE USE OF GRAPHIC PHOTOGRAPHS AS
EVIDENCE IN MASSACHUSETTS MURDER TRIALS

I. INTRODUCTION

Since the late 1800’s, prosecutors have used photographs as evidence in murder trials. An advocate’s goal in using of photographs is to give the jury firsthand knowledge of the crime scene and an indication of how the victim suffered. Moreover, photographs might also afford the jury an opportunity to view the victim’s body following the autopsy. The jury could possibly view photographs showing the effects of decomposition and the victim’s internal organs, which may prove to be vital to the prosecution’s case. To prevent the possibility of the jury punishing the defendant based on the pictures, rather than on the facts presented, judges must be extremely careful in admitting graphic photographs.

This note analyzes the common practice of subjecting the jury to graphic and gruesome photographs in murder trials. Part II of this note

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1 See Blair v. Pelham, 118 Mass. 420, 421 (1875) (admitting photographic evidence).
6 See DeSouza, 428 Mass. at 670, 704 N.E.2d at 193 (noting reviewing court almost
explores some of the standards of review courts use in admitting photographs, as well as the discretion given to trial judges when deciding these issues. Part III addresses the use of graphic photographs in murder trials in Massachusetts by examining the historical use of photographs in Massachusetts murder trials. Next, Part III examines the various uses of photographs as evidence such as explaining injuries, showing extreme atrocity and cruelty, supporting testimony, and problems with admitting photographs of altered bodies. Part IV explores the effects of admitting color photographs versus black and white photographs. Part V discusses the potential problems with the practice of admitting photographs in Massachusetts. Part VI concludes with a summation of possible steps for the future to improve the current system.

II. REVIEWING GRAPHIC PHOTOGRAPHS

A. Standards of Review for Admitting Graphic Photographs

The United States Constitution guarantees that every person has the right to a fair trial. The Federal Rules of Evidence allow the admission of relevant evidence not unfairly prejudicial to the defendant. Defendants accused of murder often claim that the admission of graphic photographs is unfairly prejudicial because of the photographs’ tendency to inflame the jury and incite their need to punish. Most courts, however,
have held that graphic photographs are admissible so long as they present some evidentiary value. In fact, courts have found that the admission of graphic photographs alone generally fails to violate the defendant's right to a fair trial. In addition, when graphic photographs were relevant during trial, prosecutors can use them in the sentencing stage.

Although some states admit graphic photographs so long as they are not unfairly prejudicial, some states have developed certain tests for the admission of photographs. In New York, the judge may exclude photographs if their sole function is to inflame the jury. In North Carolina, photographs must pass a three-part test before admission that includes weighing such factors as the size of the image, the amount of detail and whether the photograph is in color. In Virginia, courts allow the admission of photographs to prove such things as motive, intent, malice, premeditation, method, and degree of atrociousness. Regardless of the applicable test, the final decision regarding the admissibility of photographs

15 See McGarty, 323 Mass. at 438, 82 N.E.2d at 606 (noting objection to admission of photos never sustained where they had evidential value).


17 See Brogdon v. Butler, 824 F.2d 338, 342 (5th Cir. 1987) (clarifying if relevant at trial then relevant in sentencing).


19 See Fagan, supra note 18, at 149 (explaining exclusion of photographs in New York trials). Photographs in New York criminal trials do not even need to meet the burden of having a probative value that is not outweighed by the prejudicial effect. Id. at 148. The standard is merely that the photograph is admitted so long as the sole purpose was not to inflame the jury. Id. at 149.

20 See Askins, supra note 18, at 157-58 (detailing test for admission in North Carolina). The test in North Carolina involves three factors, "(1) whether a picture unduly reiterates evidence already presented, (2) whether irrelevant portions of a photograph obscured the more relevant portions, and (3) whether the totality of the circumstances composing the presentation requires exclusion." Id. at 157. In addition, the judge must weigh factors such as "choice of medium, size of image, amount of detail shown and whether the image is in color or black and white." Id. at 157-58.

21 See Payne, 257 Va. at 222, 509 S.E.2d at 297 (noting different methods of admitting photographs in Virginia).
most often lies within the discretion of the trial judge.\textsuperscript{22}

\textbf{B. The Discretion of the Trial Judge}

The trial judge is the gatekeeper in deciding which evidence goes to the jury.\textsuperscript{23} In cases involving the prosecution of murder, the judge’s role is extremely important because the defendant’s freedom, and perhaps life, is at stake.\textsuperscript{24} Therefore, when admitting graphic photographs, the judge must be careful not to admit evidence that will incite the jury.\textsuperscript{25} The bench, however, must not lose sight of the fact that the prosecution must have ample opportunity to prove its case beyond a reasonable doubt.\textsuperscript{26}

A proper and timely instruction to the jury is one of the main techniques that the judges use in attempting to eliminate the unfairly prejudicial effects of graphic photographs.\textsuperscript{27} By using jury instructions, the judge tries to clarify to the jury that the photographs may not be used to incite or arouse passion, rather, the jury should view the photographs as one piece of evidence that the prosecution is using to sustain its burden of proof.\textsuperscript{28} Although judges should give jury instructions to clarify the use of the evidence, failure to give limiting instructions does not render the admission a reversible error.\textsuperscript{29}

\textsuperscript{22} See id. (claiming judge’s discretion not disturbed unless clear abuse); Commonwealth v. Bys, 370 Mass. 350, 358, 348 N.E.2d 431, 437 (1976) (recognizing heavy burden for defendant challenging judge’s discretion).

\textsuperscript{23} See Fed. R. Evid. 104 (placing preliminary evidential questions with judge).


\textsuperscript{25} See Commonwealth v. Simmons, 419 Mass. 426, 432, 646 N.E.2d 97, 101 (1995) (noting judge’s duty to ensure impartial jury); see also Fagan, supra note 18, at 154 (recognizing photo of corpse likely to arouse passions and resentment from jury).

\textsuperscript{26} See United States v. Hall, 152 F.3d 381, 401 (5th Cir. 1998) (stating government must have chance to present case clearly).


\textsuperscript{28} See DeSouza, 428 Mass. at 670, 704 N.E.2d at 193 (instructing jury photographs admitted for analytical purposes); Commonwealth v. Haas, 398 Mass. 806, 816, 501 N.E.2d 1154, 1160 (1986) (instructing jury on probative worth); Gray, 314 Mass. at 98, 49 N.E.2d at 604 (instructing evidence not admitted to arouse passion or prejudice).

In addition to jury instructions, judges may advise potential jurors that the prosecution may introduce graphic photographs at trial during the jury selection process. Commonwealth v. Vizcarrondo illustrates one judge taking precautionary measures regarding photographic evidence, in an attempt to try to maintain fairness. The judge in Vizcarrondo notified prospective jurors about the graphic photographs, and asked whether viewing the graphic photographs would affect their impartiality. After the prosecution introduced the photographs into evidence, the judge reminded the jury of their assurance of impartiality and asked that they not let emotions sway them.

As stated above, the final decision on whether to admit a photograph lies within the judge’s discretion. This is a great deal of power for the judge to hold because of the risks involved in admitting potentially inflammatory photographs. Moreover, a defendant who challenges the trial judge’s decision carries a heavy burden that is very difficult to meet because reviewing courts will rarely overturn the trial judge’s decision. Indeed the reviewing court will only overrule the trial judge’s decision to admit the photographs where the judge clearly abused his discretion.

The case notes that the failure to give an instruction is just one of many factors to be evaluated to determine whether the admission is an error. Id.  


31 See id. at 363, 727 N.E.2d at 823 (finding allowance of photographs within judge’s discretion because judge took precautionary measure).

32 See id. at 363 n.2, 727 N.E.2d at 823 n.2.

33 See id.


35 See Miller & Mauet, supra note 5 at 563 (claiming jurors shown autopsy photographs more often find guilty verdict).


III. USING GRAPHIC PHOTOGRAPHS IN MASSACHUSETTS MURDER TRIALS

A. History

Courts in Massachusetts have addressed the issue of admitting photographs since the late 19th century. In 1875, the Supreme Judicial Court (SJC) held in *Blair v. Pelham* that as long as a photograph is verified, it is admissible as a tool for the jury to use in evaluating a case. Twelve years later, the SJC justified the admission of photographs by acknowledging the prosecution's right to use all evidence available to sustain its burden of proof.

Later, *Commonwealth v. Retkovitz* extended the admission of graphic photographs as evidence by clarifying that material evidence cannot be excluded merely because it may have an effect that extends further than the purpose for its admission. Finally, in 1956, the SJC clarified that there was no difference between black and white and color photographs for purposes of evaluating their admissibility into evidence. In light of the Massachusetts courts well-documented liberal approach regarding the admission of graphic photographs into evidence, reviewing courts routinely uphold trial judges' decisions to admit photographs into evidence.
B. Using Photographs to Explain the Injuries

Orally describing that a victim was stabbed, strangled, or shot may not adequately illustrate what the victim experienced.\(^{46}\) As vivid or harsh as the photographs may be, photographs have the potential to more accurately depict the victim’s experience.\(^{47}\) Courts tend to find evidential value in graphic photographs of the body or crime scene because they tend to show not only the condition of the premises at the time of the crime, but also the nature and extent of the wounds.\(^{48}\) The fact that someone may give oral testimony about a victim’s injuries does not justify the exclusion of photographs at trial.\(^{49}\) In addition, the defendant’s admission that he or she committed the murder does not negate the need to admit the photographs into evidence since the photographs may also prove extreme atrocity or cruelty.\(^{50}\)


\(^{49}\) See Ramos, 406 Mass. at 407, 548 N.E.2d at 862 (denying argument claiming photographs cumulative because medical examiner testified); Campbell, 375 Mass. at 313, 376 N.E.2d at 876 (involving defendant claiming photographs unnecessary to prove case because of verbal testimony about nature of wound).

\(^{50}\) See Simmons, 419 Mass. at 431, 646 N.E.2d at 100 (refusing to exclude photograph because defendant admitted to killing); Knowlton, 265 Mass. at 386, 163 N.E. at 253 (finding photograph showing force indicates extreme cruelty).
C. Using Photographs to Prove Extreme Atrocity and Cruelty

Massachusetts General Laws ch. 265, § 1 defines murder in the first degree as the killing of another that is "committed with deliberately premeditated malice aforethought or with extreme atrocity or cruelty." Accordingly, if the prosecutor fails to introduce photographs during trial and the defendant confesses to committing the crime charged, the jury will never have the opportunity to see the actual method used to commit the crime. One of the most common reasons for admitting photographs into evidence is to prove extreme atrocity and cruelty. Photographs, rather than words, can show extent of the wound, the level of force, and perhaps accurately depict the state of mind of the defendant; allowing the jury to better understand the methods the alleged killer used, and circumstances involved in the killing.

D. Using Photographs to Support Testimony

In addition to using photographs to illustrate circumstances surrounding the injuries, judges can admit graphic photographs to support the witness's testimony at trial. Photographs of the victim can help to corroborate the testimony of pathologists and medical examiners who generally testify about the injuries suffered and the probable cause of death. In


55 See Meinholz, 420 Mass. at 636, 651 N.E.2d at 386-87 (allowing photograph demonstrating medical examiner's testimony of which discolorations caused by injury rather than decomposition); Commonwealth v. Haas, 398 Mass. 806, 816, 501 N.E.2d 1154, 1160 (1986) (finding relevance because photograph assists evaluation of pathologist testimony);
addition, photographs of the crime scene might also serve to support testimony about the circumstances surrounding the crime. Finally, photographs might support the testimony of police officers who describe inconsistencies in the defendant’s claims or statements.

E. Limitations on Admission When the Body Was Altered

A central issue for debate surrounding the admission of photographs is whether to admit photographs when there are alterations to the victim’s body. The SJC, however, appears to use this theory sparingly for the exclusion of photographs. For example, Massachusetts courts included photographs depicting the effects of decomposition. In essence, the courts justify the admission of such photographs because the photographs may show the injuries suffered while the victim was alive and the manner in which the victim was buried. Furthermore, photographs that

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See Desouza, 428 Mass. at 670, 704 N.E.2d at 193 (allowing photographs showing inconsistencies in statement to police).


See id; see also Commonwealth v. Meinholz, 420 Mass. 633, 636, 651 N.E.2d
include the effects of medical treatment, such as incisions, or medical instruments have not rendered the photograph inadmissible. In fact, the only cases excluding photographs because of alteration involve a body damaged by search dogs and a picture of internal organs. In Commonwealth v. Bastarache, the SJC, after allowing a photograph of the skull after the removal of the brain, developed a standard to determine the admissibility of photographs depicting an altered body. The SJC held that in such cases, the judge should admit the photographs only if they are relevant to a contested issue in the case. This standard required that trial judges more carefully scrutinize photographs that depict post-death alterations. The Bastarache rule, however, has limited applicability since photographs are still admissible if they are relevant to a contested fact.


63 See Carlino, 429 Mass. at 696, 710 N.E.2d at 971 (excluding photographs of heart and liver due to risk of prejudice); Richmond, 371 Mass. at 564, 358 N.E.2d at 1000 (excluding photograph of mutilated head when damage done post mortem not by killer).


65 See id. The rule is stated as follows:

In this case on retrial, and in future cases involving photographs showing the body as altered in the course of an autopsy, the judge should assess the photographs. If they are apt to be inflammatory or otherwise prejudicial, he should admit them, in his discretion, only if they are important to the resolution of any contested fact in the case. Id.


IV. ADMITTING CONTROVERSIAL PHOTOGRAPHS – COLOR VERSUS BLACK AND WHITE

In an effort to nullify the potential unfairly prejudicial effect of the photographs on a jury, defendants have tried to exclude color photographs under the theory that they are more inflammatory than black and white photographs. As early as 1956, various state courts have found no distinction between color and black and white photographs. Arizona courts have found the same principle of relevance should be applied to a photograph, regardless of whether the photograph is color or black and white. In addition, a district court in Pennsylvania found that the mere fact that a photograph is in color will not transform it into a gruesome and unsightly exhibit. Moreover, an Indiana court allowed the admission of a color photograph, concluding that color photographs are more accurate and true in representation. In California, although a court acknowledged a possible difference between color and black and white photographs, it found the difference insignificant for purposes of admissibility. Similarly, Massachusetts courts have found no difference between black and white and color photographs at trial.

V. EVALUATING MASSACHUSETTS PROCEDURE FOR ADMITTING GRAPHIC PHOTOGRAPHS

Massachusetts has a liberal approach to admitting photographs as evidence in murder trials. This raises the question of whether Massachus-
sets courts are properly granting murder defendants their constitutional right to due process and a fair trial. By holding the bar for admissibility as low as the mere relevance of the photographs, Massachusetts courts allow juries to make decisions based on passion and emotion rather than facts and evidence.

Photographic evidence plays a vital role in murder trials by allowing juries to see what happened to the victim as if the jury witnessed the event firsthand. Nevertheless, by admitting all photographs that meet the test of mere relevance, courts are unfairly leaning the scales of justice in favor of the prosecution. Juries are comprised of ordinary people who are likely to be dramatically affected by viewing graphic or gruesome photographs. Once the jury has the opportunity to view photographs of the crime, it may convict based on either their desire to punish or their hatred towards the defendant for the crime committed. In some cases, jurors believe they are impartially viewing the photographs when in fact viewing these graphic pictures subconsciously leans them towards a guilty

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76 See U.S. CONST. amend. V and VI.

77 See Miller and Mauet, supra note 5 at 563 (claiming jury more likely to find guilty when faced with graphic photographs); Fagan, supra note 18 at 154 (finding photograph of corpse arouses passion and resentment in jury).


79 See Miller and Mauet, supra note 5 at 563 (finding photographs give prosecution more credibility). The article claims that jurors tend to find the defendant guilty regardless of whether photographs were entered into evidence to prove issue of murder. See Miller and Mauet, supra note 5 at 563. In fact, by giving weight to the prosecution's case, jurors tend to validate additional evidence offered by the prosecution to prove defendant's guilt. See Miller and Mauet, supra note 5 at 563. More disturbing, jurors did not believe that the photographs influenced their verdict. See Miller and Mauet, supra note 5 at 563.

80 See Miller and Mauet, supra note 5 at 563; see also James E. Kelley, Addressing Juror Stress: A Trial Judge's Perspective, 43 DRAKE L. REV. 97 (1994) (noting juror suffered nightmares, eating problems and physical illness after viewing graphic photographs).

81 See Miller and Mauet, supra note 5 at 563 (recognizing bias of jurors after viewing graphic photographs); see also Commonwealth v. Bys, 370 Mass. 350, 358, 348 N.E.2d 431, 437 (1976) (having defendant arguing photograph could only cause jury to arrive at unwarranted sense of rebellion); Commonwealth v. Osman, 284 Mass. 421, 423, 188 N.E.2d 226, 227 (1933) (claiming photograph induces loathing of crime and hatred of accused by jury).
verdict. In any case, admitting evidence that unfairly prejudices the jury destroys the notion that a person is innocent until proven guilty.

To avoid these potential prejudices, Massachusetts courts should reexamine their liberal approach on the subject, and limit the use of graphic and gruesome photographs as evidence in murder trials. By establishing the bar for admissibility at mere relevance, most photographs will be admissible. For instance, a photograph of the victim in a murder case will almost always be relevant to show the extent of the injuries, since the premise of murder is inflicting deadly injuries upon another. Even if the photographs do not clearly depict the injuries, the court may still admit the photographs to support testimony of a pathologist or medical examiner. Furthermore, in first degree murder trials, the prosecution has an additional theory under which to admit the photographs by claiming that the photograph establishes extreme atrocity or cruelty.

82 See Miller and Mauet, supra note 5 at 563 (claiming jurors more likely to find guilty verdict when faced with graphic photographs).

83 See Miller & Mauet, supra note 5 at 563 (noting juror tendency to convict after viewing graphic photographs); see also U.S. CONST. amend. VI (granting all accused right to fair trial); MASS. GEN. LAWS ch. 234, § 28 (describing criteria for selecting jurors). Jurors must understand "that a defendant is presumed innocent until proven guilty, that the commonwealth has the burden of proving guilt beyond a reasonable doubt, and that the defendant need not present evidence in his behalf." Id. 84 See Commonwealth v. McGarty, 323 Mass. 435, 438, 82 N.E.2d 603, 606 (1948) (claiming evidence admitted as long as evidential value); see also Bys, 370 Mass. at 358, 348 N.E.2d at 437 (finding defendant challenging discretion must meet heavy burden).


Massachusetts courts took a step in the right direction by developing a test for admitting photographs of altered bodies. In cases involving altered bodies, judges must determine if the photograph is inflammatory or prejudicial and, if so, admit them only to prove a contested fact. Although this rule may be limited because there will likely be some contested fact, it requires judges to make an additional inquiry before admitting the photographs. The courts should take a further step and raise the bar for admitting all photographs at least to the level applied in cases with altered bodies. Although courts only apply the harsher in cases involving altered bodies, it is unlikely that viewing a body altered as a result of an autopsy is more inflammatory than photographs of a sexually mutilated child, photographs of a victim shot at close range, or photographs of a body beginning to show signs of decomposition. By raising the bar to the level used for altered bodies, courts can still admit the photographs, but if they are inflammatory, properly limit their admissibility to contested facts. This rule would be prosecutor friendly because it will not give the defendant the opportunity to stipulate the evidence away since there will likely be at least some contested fact. For example, a defendant may admit to murder, however, they may contest that they acted with extreme atrocity or

90 See Bastarache, 382 Mass. at 106, 414 N.E.2d at 997.
91 See Vazquez, 419 Mass. at 354, 644 N.E.2d at 981-82 (recognizing judge's voir dire regarding photographs as following Bastarache).
cruelty. The court could still admit the photographs to prove that contested fact. Further, while a photograph of a murder victim may have an emotional effect, the facts and circumstances that the prosecution is trying to convey may be adequately presented through verbal testimony.

Although Massachusetts has taken steps in the right direction, the courts could do more to ensure a fair trial to all defendants accused of murder. One solution would be for the court to develop a stricter test of admissibility that will apply in all cases, rather than just in certain scenarios. The examination required in cases involving altered bodies is harsher than the general Massachusetts practice of admitting photographic evidence depicting non-altered bodies, but it is not as strict as the Federal Rules of Evidence requiring the exclusion of all evidence that is unfairly prejudicial. Perhaps Massachusetts should look to other states as a guideline for developing a stricter test. For example, Massachusetts courts could take an approach like the one taken in North Carolina, which requires the weighing of several factors such as choice of medium, size of image, amount of detail shown and whether the image is in color or in black and white. These are all significant factors, which may cause

96 See MASS. GEN. LAWS ch. 265 § 1 (raising murder charge to first degree when committed with extreme atrocity or cruelty); Meinholz, 420 Mass. at 636, 651 N.E.2d at 386-87 (admitting photograph on issue of extreme atrocity or cruelty); Simmons, 419 Mass. at 431, 646 N.E.2d at 100 (allowing photograph when relevant to issue of extreme atrocity or cruelty); Commonwealth v. Osman, 284 Mass. 421, 423, 188 N.E.2d 226, 227 (1933) (justifying admission on issue of extreme atrocity or cruelty).


98 See Bys, 370 Mass. at 385, 348 N.E.2d at 437 (denying claim that photograph could only cause jury to arrive at unwarranted sense of rebellion); McGarty, 323 Mass. 435, 438, 82 N.E.2d 603, 606 (1948) (failing to deny admission of pictures because inflame jury against defendant); see also Miller & Mauet, supra note 5 at 563 (noting dramatic effect of photographs on juries).

99 See U.S. CONST. amend. VI (ensuring right to fair and speedy trial); see also Commonwealth v. Bastarache, 382 Mass. 86, 106, 414 N.E.2d 984, 997 (1980)

100 See Bastarache, 382 Mass. at 106, 414 N.E.2d at 997.

101 See id. See also FED R. EVID. 403. Federal Rule of Evidence 403 states that "all evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..." Id.


103 See Askins, supra note 18 at 157-58 (describing criteria used for evaluating admissibility of photographs in North Carolina courts).
photographic evidence to become unfairly prejudicial.\textsuperscript{104} Although color versus black and white has not been an issue in Massachusetts, a photograph depicting blood and tissue in vivid color may be more inflammatory than one in black and white.\textsuperscript{105} This is not to say that using color photographs alone should render a photograph inadmissible, but it could be one of several factors used to determine admissibility.\textsuperscript{106} Another solution may be to create a list of issues for which a graphic photograph could be admitted such as motive and level of atrocity.\textsuperscript{107} This ensures that the prosecution has a reason to admit and display the photographs other than mere relevance.\textsuperscript{108}

Another improvement Massachusetts could make is to require that judges not only give a limiting instruction, but also notify jurors in advance that they will be viewing graphic photographs.\textsuperscript{109} This allows jurors who believe that viewing graphic photographs will compromise their impartiality to remove themselves from the case before it even starts.\textsuperscript{110} Once these jurors remove themselves, the defendant is less likely to face an inflamed jury seeking to punish.\textsuperscript{111} These are merely suggested steps to lead to a less prejudicial trial for those facing the possibility of life in


\textsuperscript{105} See Makarewicz, 333 Mass. at 584, 132 N.E.2d at 299 (rejecting claim of distinction between color and black and white photographs); see also United States v. Odom, 348 F. Supp. 889, 894 (M.D. Pa. 1972) (claiming color cannot transform photograph). But see People v. Mathis, 63 Cal.2d 416, 423, 406 P.2d 65, 70 (1965) (recognizing a potential difference between color and black and white photographs but noting insignificance of difference).

\textsuperscript{106} See Askins, supra note 18 at 157-58 (noting North Carolina procedure which includes using color as a factor).

\textsuperscript{107} See Payne v. Commonwealth, 257 Va. 216, 222, 509 S.E.2d 293, 297 (1999) (noting methods of admitting photographs in Virginia). The Virginia courts allow admission of photographs on a list of factors such as motive and degree of atrocity. \textit{Id.}

\textsuperscript{108} See Commonwealth v. Zagranski, 408 Mass. 278, 289, 558 N.E.2d 933, 940 (1990) (claiming marginal relevance allows upholding discretion); \textit{Payne}, 257 Va. at 222, 509 S.E.2d at 297 (explaining Virginia standard). In Virginia, the court allows photographs to prove such things as motive, intent, malice, premeditation, method, and degree of atrocity. \textit{Id.}


\textsuperscript{110} See \textit{id.} (noting jurors given opportunity to excuse themselves if unable to guarantee impartiality regarding graphic photographs).

\textsuperscript{111} See \textit{id.} (commenting on judge's reminder to jurors of guarantee of impartiality).
VI. CONCLUSION

On both the federal and state level, defendants are guaranteed the right to a fair trial. By allowing the jury to see graphic photographs, courts are encroaching on that constitutionally guaranteed right. The solution is simply to raise the bar for admitting graphic or gruesome photographs. This is not to say that all photographs should be inadmissible, rather they should meet a test requiring proof of something more than mere relevance. Failure to change the current methodology results in convictions based on emotion rather than proof, which risks the possibility of taking a person's liberty without due process of law.

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112 See U.S. CONST. amend. VI (guaranteeing right to fair trial); MASS. GEN. LAWS ch. 265, § 2 (setting forth punishment for murder in Massachusetts).