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

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A PICTURE IS WORTH A THOUSAND WORDS – 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.¹ 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.² Moreover, photographs might also afford the jury an opportunity to view the victim's body following the autopsy.³ 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.⁴ 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.⁵

This note analyzes the common practice of subjecting the jury to graphic and gruesome photographs in murder trials.⁶ Part II of this note

¹ See *Blair v. Pelham*, 118 Mass. 420, 421 (1875) (admitting photographic evidence).

² See *Payne v. Commonwealth*, 257 Va. 216, 222, 509 S.E.2d 293, 297 (1999) (allowing photographs depicting crime scene and victim); *Commonwealth v. DeSouza*, 428 Mass. 667, 670, 704 N.E.2d 190, 193 (1999) (finding photographs showing place of injuries on body admissible).

³ See *Commonwealth v. Bastarache*, 382 Mass. 86, 106, 414 N.E.2d 984, 997 (1980) (allowing photograph of skull after removal of brain).

⁴ See *Commonwealth v. Carlino*, 429 Mass. 692, 696, 710 N.E.2d 967, 971 (1999) (addressing admission of photographs of internal organs); *Commonwealth v. Talbot*, 35 Mass. App. Ct. 766, 778, 625 N.E.2d 1374, 1382 (1994) (claiming photographs displaying effects of decomposition admissible).

⁵ See Michael Owen Miller & Thomas A. Mauet, *The Psychology of Jury Persuasion*, 22 AM. J. TRIAL ADVOC. 549, 563 (1999) (commenting on likelihood of jury to find guilty verdict based on graphic photographs).

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.⁷ Part III addresses the use of graphic photographs in murder trials in Massachusetts by examining the historical use of photographs in Massachusetts murder trials.⁸ 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.⁹ Part IV explores the effects of admitting color photographs versus black and white photographs.¹⁰ Part V discusses the potential problems with the practice of admitting photographs in Massachusetts.¹¹ 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.¹² The Federal Rules of Evidence allow the admission of relevant evidence not unfairly prejudicial to the defendant.¹³ 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.¹⁴ Most courts, however,

never finds error in admission).

⁷ See cases cited *infra* notes 12 through 38.

⁸ See cases cited *infra* notes 39 through 46.

⁹ See cases cited *infra* notes 47 through 69.

¹⁰ See cases cited *infra* notes 70 through 75.

¹¹ See cases cited *infra* notes 76 through 112.

¹² See U.S. CONST. amend. VI (giving all accused in criminal prosecutions "right to a speedy and public trial, by an impartial jury"); see also U.S. CONST. amend. V (guaranteeing no person shall "be deprived of life, liberty, or property, without due process of law").

¹³ See FED. R. EVID. 403 (excluding evidence when probative value substantially outweighs dangers of unfair prejudice).

¹⁴ See *Commonwealth v. Bys*, 370 Mass. 350, 358, 348 N.E.2d 431, 437 (1976) (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) (noting court's fear of photograph inducing loathing of crime and hatred of accused); *Commonwealth v. McGarty*, 323 Mass. 435, 438, 82 N.E.2d 603, 606 (1948) (objecting to admission of pictures because they inflame jury against defendant).

have held that graphic photographs are admissible so long as they present some evidentiary value.¹⁵ In fact, courts have found that the admission of graphic photographs alone generally fails to violate the defendant's right to a fair trial.¹⁶ In addition, when graphic photographs were relevant during trial, prosecutors can use them in the sentencing stage.¹⁷

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.¹⁸ In New York, the judge may exclude photographs if their sole function is to inflame the jury.¹⁹ 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.²⁰ In Virginia, courts allow the admission of photographs to prove such things as motive, intent, malice, premeditation, method, and degree of atrociousness.²¹ 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).

¹⁶ See *Jacobs v. Singletary*, 952 F.2d 1282, 1296 (11th Cir. 1992) (claiming introduction of graphic photograph rarely renders trial unfair); *Gonzalez v. DeTella*, 918 F. Supp. 1214, 1221 (N.D. Ill. 1996) (stating evidence shocking conscience with nothing more fails to violate due process).

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

¹⁸ See *Payne*, 257 Va. at 222, 509 S.E.2d at 297 (explaining Virginia standard); An-sley Brooks Askins, Note, *Status of the Jones Bright-Line Test for Preemptory Challenges and the Admissibility of Graphic Photos*, 48 S.C. L. REV. 149, 157-58 (1996) (noting North Carolina evaluation procedure); James F. Fagan, Jr., Note, *Smile: How Prejudicial Can the Candid Camera Be? The Admission of Photographs in a Criminal Trial*, 9 ST. JOHN'S J. LEGAL COMMENT. 145, 149 (1993) (explaining test for evaluation used in New York criminal trials).

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.²²

B. The Discretion of the Trial Judge

The trial judge is the gatekeeper in deciding which evidence goes to the jury.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.²⁴ Therefore, when admitting graphic photographs, the judge must be careful not to admit evidence that will incite the jury.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.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.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.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.²⁹

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).

²³ See FED. R. EVID. 104 (placing preliminary evidential questions with judge).

²⁴ See MASS. GEN. LAWS ch. 265, § 2 (1999) (stating punishments for committing murder in Massachusetts). A 1986 amendment to the statute repealed the death penalty making life imprisonment the punishment for capital murder. *Id.*

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).

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

²⁷ See *Commonwealth v. DeSouza*, 428 Mass. 667, 670, 704 N.E.2d 190, 193 (1999) (instructing jury to use photographs to analyze not to elicit sympathy); *Commonwealth v. Gray*, 314 Mass. 96, 98, 49 N.E.2d 603, 604 (1943) (noting judge's instruction that evidence not introduced to arouse passion or prejudice).

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).

²⁹ See *Commonwealth v. Jackson*, 428 Mass. 455, 465, 702 N.E.2d 1158, 1165 (1998) (explaining absence of limiting instruction will not alone make admission an error).

In addition to jury instructions, judges may advise potential jurors that the prosecution may introduce graphic photographs at trial during the jury selection process.³⁰ *Commonwealth v. Vizcarrondo* illustrates one judge taking precautionary measures regarding photographic evidence, in an attempt to try to maintain fairness.³¹ The judge in *Vizcarrondo* notified prospective jurors about the graphic photographs, and asked whether viewing the graphic photographs would affect their impartiality.³² 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.³³

As stated above, the final decision on whether to admit a photograph lies within the judge's discretion.³⁴ This is a great deal of power for the judge to hold because of the risks involved in admitting potentially inflammatory photographs.³⁵ 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.³⁶ Indeed the reviewing court will only overrule the trial judge's decision to admit the photographs where the judge clearly abused his discretion.³⁷

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.*

³⁰ See *Commonwealth v. Vizcarrondo*, 431 Mass. 360, 363 n.2, 727 N.E.2d 821, 823 n.2 (2000) (noting judge's pre-trial notification to potential jurors regarding graphic photographs).

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.*

³⁴ See *Commonwealth v. Haas*, 398 Mass. 806, 816, 501 N.E.2d 1154, 1160 (1986) (noting discretion given even though gruesome and inflammatory photographs); *Commonwealth v. Murphy*, 356 Mass. 604, 609, 254 N.E.2d 895, 899 (1970) (failing to find judge abused discretion).

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

³⁶ See *Commonwealth v. Bys*, 370 Mass. at 358, 348 N.E.2d at 437 (noting defendant's heavy burden when challenging judge's discretion); *Commonwealth v. McGarty*, 323 Mass. 435, 438, 82 N.E.2d 603, 606 (1948) (noting objection claiming pictures inflame jury never sustained if evidential value exists); see also *Payne v. Commonwealth*, 257 Va. 216, 222, 509 S.E.2d 293, 297 (1999) (noting judge's discretion not disturbed unless clear abuse).

³⁷ See *Commonwealth v. Zagranski*, 408 Mass. 278, 289, 558 N.E.2d 933, 940 (1990) (commenting even if only marginally relevant no abuse of discretion).

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.³⁸ In 1875, the Supreme Judicial Court (SJC) held in *Blair v. Pelham*³⁹ that as long as a photograph is verified, it is admissible as a tool for the jury to use in evaluating a case.⁴⁰ 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.⁴¹

Later, *Commonwealth v. Retkovitz*⁴² 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.⁴³ 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.⁴⁴ 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.⁴⁵

³⁸ See *Commonwealth v. Robertson*, 162 Mass. 90, 97, 38 N.E. 25, 27 (1894) (admitting photograph of murder victim).

³⁹ 118 Mass. 420 (1875).

⁴⁰ See *id.* at 421 (admitting photograph as long as true representation to aid jury's understanding).

⁴¹ See *Robertson*, 162 Mass. at 97, 38 N.E. at 27.

⁴² 222 Mass. 245, 110 N.E. 293 (1915).

⁴³ See *id.* at 249, 110 N.E. at 294 (finding natural abhorrence of crime inevitable incident of trial).

⁴⁴ See *Commonwealth v. Makarewicz*, 333 Mass. 575, 584, 132 N.E.2d 294, 299 (1956) (finding no distinction between color and black and white photographs).

⁴⁵ See *Commonwealth v. DeSouza*, 428 Mass. 667, 670, 704 N.E.2d 190, 193 (1999) (noting courts almost never rule an error to admit); *Commonwealth v. McGarty*, 323 Mass. at 438, 82 N.E.2d at 606 (claiming objection never sustained when some evidential value exists).

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

⁴⁶ See *DeSouza*, 428 Mass. at 670, 704 N.E.2d at 193 (addressing appeal of conviction of shooting victim); *Commonwealth v. Simmons*, 419 Mass. 426, 431, 646 N.E.2d 97, 100 (1995) (evaluating case where victim suffered eleven stab wounds); *Commonwealth v. Vazquez*, 419 Mass. 350, 354, 644 N.E.2d 978, 981-82 (1995) (addressing case where victim died from strangulation); *Commonwealth v. Ramos*, 406 Mass. 397, 407, 548 N.E.2d 856, 862 (1990) (finding verbal testimony not enough).

⁴⁷ See *Commonwealth v. Osman*, 284 Mass. 421, 423, 188 N.E.2d 226, 227 (1933) (claiming photographs describe condition more accurately and vividly).

⁴⁸ See *DeSouza*, 428 Mass. at 670, 704 N.E.2d at 193 (admitting photographs showing location of wound); *Ramos*, 406 Mass. at 407, 548 N.E.2d at 862 (allowing photograph depicting condition of crime scene); *Commonwealth v. Florentino*, 381 Mass. 193, 196, 408 N.E.2d 847, 850 (1980) (finding photographs aid jury's understanding about nature of wound); *Commonwealth v. Campbell*, 375 Mass. 308, 313, 376 N.E.2d 872, 876 (1978) (admitting photographs depicting nature of wound); *Commonwealth v. Robertson*, 162 Mass. 90, 97, 38 N.E. 25, 27 (1894) (allowing photographs showing condition of premises at time of crime discovery); see also *Commonwealth v. Meinholz*, 420 Mass. 633, 636, 651 N.E.2d 385, 387 (1995) (justifying admission because photograph shows burial and injuries); *Vazquez*, 419 Mass. at 354, 644 N.E.2d at 981-82 (finding photograph helpful in assessing issue of strangulation); *Commonwealth v. Haas*, 398 Mass. at 816, 501 N.E.2d at 1160 (admitting photograph of petechial hemorrhage to prove asphyxiation); *Commonwealth v. Knowlton*, 265 Mass. 382, 386, 163 N.E. 251, 253 (1928) (using photographs to show nature and extent of wound).

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."⁵¹ 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.⁵² One of the most common reasons for admitting photographs into evidence is to prove extreme atrocity and cruelty.⁵³ 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.⁵⁴ 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.⁵⁵ In

⁵¹ MASS. GEN. LAWS ch. 265, § 1.

⁵² See *Commonwealth v. Bys*, 370 Mass. 350, 358, 348 N.E.2d 431, 437 (1976) (allowing photograph indicating force on issue of extreme atrocity and cruelty); *Knowlton*, 265 Mass. at 386, 163 N.E. at 253 (admitting photograph showing force relevant to extreme cruelty).

⁵³ See *Commonwealth v. Maldonado*, 429 Mass. 502, 507, 709 N.E.2d 809, 813 (1999) (allowing photograph to prove premeditation); *Meinholz*, 420 Mass. at 636, 651 N.E.2d at 386-87 (admitting photograph in cases where murder committed with extreme atrocity or cruelty); *Commonwealth v. Simmons*, 419 Mass. 426, 431, 646 N.E.2d 97, 100 (1995) (finding relevance when murder committed with extreme atrocity or cruelty); *Commonwealth v. Clifford*, 374 Mass. 293, 306, 372 N.E.2d 1267, 1276 (1978) (noting photograph allowed when proving first degree murder); *Osman*, 284 Mass. at 423, 188 N.E.2d at 227 (finding relevance as to extreme atrocity or cruelty).

⁵⁴ See *Maldonado*, 429 Mass. at 507, 709 N.E.2d at 813 (admitting photographs corroborating testimony that victims shot at close range); *Commonwealth v. DeSouza*, 428 Mass. 667, 670, 704 N.E.2d 190, 193 (1999) (finding photographs confirm surviving victims testimony).

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.⁵⁶ Finally, photographs might support the testimony of police officers who describe inconsistencies in the defendant's claims or statements.⁵⁷

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.⁵⁸ The SJC, however, appears to use this theory sparingly for the exclusion of photographs.⁵⁹ For example, Massachusetts courts included photographs depicting the effects of decomposition.⁶⁰ 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.⁶¹ Furthermore, photographs that

Commonwealth v. Lee, 324 Mass. 714, 718-19, 88 N.E.2d 713, 716-17 (1949) (allowing photographs to assist understanding of medical examiner); *Commonwealth v. Makarewicz*, 333 Mass. 575, 584, 132 N.E.2d 294, 299 (1956) (justifying admission of enlargements as fair representation of what pathologist found in autopsy); *see also* *United States v. Hall*, 152 F.3d 381, 400 (5th Cir. 1998) (admitting photographs cumulative of detailed testimony of medical examiner).

⁵⁶ *See Ramos*, 406 Mass. at 407, 548 N.E.2d at 861 (allowing photograph of automobile to aid understanding of crime scene); *see also* *North Carolina v. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (1999) (allowing photographs into evidence because they support witness statements); *Gonzalez v. DeTella*, 918 F. Supp. 1214, 1220 (N.D. Ill. 1996) (admitting evidence to corroborate testimony).

⁵⁷ *See DeSouza*, 428 Mass. at 670, 704 N.E.2d at 193 (allowing photographs showing inconsistencies in statement to police).

⁵⁸ *See Commonwealth v. Bastarache*, 382 Mass. 86, 106, 414 N.E.2d 984, 997 (1980) (noting stronger test needed for photographs altered during autopsy); *see also* *Askins*, *supra* note 18 at 157 (claiming photographs of altered body unfairly prejudicial if admitted on uncontested issue).

⁵⁹ *Compare Commonwealth v. Richmond*, 371 Mass. 563, 564, 358 N.E.2d 999, 1000 (1976) (excluding graphic photograph only because injuries occurred post-mortem), and *Commonwealth v. Carlino*, 429 Mass. 692, 696, 710 N.E.2d 967, 971 (1999) (excluding photographs of internal organs), with *Commonwealth v. Vazquez*, 419 Mass. 350, 354, 644 N.E.2d 978, 981-82 (1995) (allowing photograph of bone removed from body), and *Bastarache*, 382 Mass. at 106, 414 N.E.2d at 997 (admitting photograph where brain removed from skull). *Commonwealth v. Richmond* and *Commonwealth v. Carlino* represent the only time the court has excluded photographs. *See Richmond*, 371 Mass. at 564, 358, N.E.2d at 1000; *Carlino*, 429 Mass. at 696, 710 N.E.2d at 971.

⁶⁰ *See Commonwealth v. Talbot*, 35 Mass. App. Ct. 766, 778, 625 N.E.2d 1374, 1382 (1994) (allowing photographs of body covered with maggots).

⁶¹ *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.⁶² In fact, the only cases excluding photographs because of alteration involve a body damaged by search dogs and a picture of internal organs.⁶³ 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.⁶⁴ 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.⁶⁵ This standard required that trial judges more carefully scrutinize photographs that depict post-death alterations.⁶⁶ The *Bastarache* rule, however, has limited applicability since photographs are still admissible if they are relevant to a contested fact.⁶⁷

385, 387 (1995) (allowing photographs portraying burial and injuries victim sustained while alive); *Commonwealth v. Simmons*, 419 Mass. 426, 431, 646 N.E.2d 97, 100 (1995) (allowing photograph showing eleven wounds inflicted when alive).

⁶² See *Commonwealth v. Jackson*, 428 Mass. 455, 465, 702 N.E.2d 1158, 1165 (1998) (allowing photographs of victim's shaved head because it included no decay or other injuries); *Commonwealth v. Campbell*, 375 Mass. 308, 313, 376 N.E.2d 872, 876 (1978) (finding incision held together with black stitches not inflammatory); *Commonwealth v. Pike*, 324 Mass. 335, 338, 86 N.E.2d 519, 520-21 (1949) (determining extraneous objects in photograph added nothing gruesome).

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).

⁶⁴ See *Commonwealth v. Bastarache*, 382 Mass. 86, 106, 414 N.E.2d 984, 997 (1980) (developing rule for admitting altered photographs).

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.*

⁶⁶ See *Commonwealth v. Vazquez*, 419 Mass. 350, 354, 644 N.E.2d 978, 981-82 (1995) (finding photograph of extracted bone helpful on issue of strangulation). The court upheld the judge's decision because he held a voir dire to determine the admissibility as required by *Commonwealth v. Bastarache*. *Id.*; see also *Bastarache*, 382 Mass. at 106, 414 N.E.2d at 997.

⁶⁷ See *Vazquez*, 419 Mass. at 354, 644 N.E.2d at 981-82 (allowing photograph when strangulation contested issue of fact); *Commonwealth v. Carlino*, 429 Mass. 692, 696 n.2, 710 N.E.2d 967, 971 n.2 (1999) (recognizing discretion to admit photograph if relevant to contested issue).

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.⁶⁸ As early as 1956, various state courts have found no distinction between color and black and white photographs.⁶⁹ 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.⁷⁰ 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.⁷¹ Moreover, an Indiana court allowed the admission of a color photograph, concluding that color photographs are more accurate and true in representation.⁷² 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.⁷³ Similarly, Massachusetts courts have found no difference between black and white and color photographs at trial.⁷⁴

V. EVALUATING MASSACHUSETTS PROCEDURE FOR ADMITTING GRAPHIC PHOTOGRAPHS

Massachusetts has a liberal approach to admitting photographs as evidence in murder trials.⁷⁵ This raises the question of whether Massachu-

⁶⁸ See *Commonwealth v. Haas*, 398 Mass. 806, 816, 501 N.E.2d 1154, 1160 (1986) (finding argument regarding color photographs meritless); *Commonwealth v. Makarewicz*, 333 Mass. 575, 584, 132 N.E.2d 294, 299 (1956) (dismissing defendant's claim of difference between color and black and white photographs).

⁶⁹ See *Makarewicz*, 333 Mass. at 584, 132 N.E.2d at 299 (claiming no distinction between using black and white or color photographs); see also *People v. Holt*, 7 Ill. App. 3d 646, 653-54, 288 N.E.2d 245, 251 (1972) (drawing no distinction between black and white and color photographs).

⁷⁰ See *Arizona v. Brady*, 105 Ariz. 190, 196, 461 P.2d 488, 494 (1969) (applying same principle whether photograph color or black and white).

⁷¹ See *United States v. Odom*, 348 F. Supp. 889, 894 (M.D. Pa. 1972).

⁷² See *Sotelo v. Indiana*, 264 Ind. 298, 308, 342 N.E.2d 844, 850 (1976).

⁷³ See *People v. Mathis*, 63 Cal.2d 416, 423, 406 P.2d 65, 70 (1965).

⁷⁴ See *Makarewicz*, 333 Mass. at 584, 132 N.E.2d at 299 (noting no distinction between black and white and color photographs).

⁷⁵ See *Commonwealth v. Zagranski*, 408 Mass. 278, 289, 558 N.E.2d 933, 940 (1990) (noting judge's discretion allowed even if mere relevance); *Commonwealth v.*

sets courts are properly granting murder defendants their constitutional right to due process and a fair trial.⁷⁶ 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.⁷⁷

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.⁷⁸ 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.⁷⁹ Juries are comprised of ordinary people who are likely to be dramatically affected by viewing graphic or gruesome photographs.⁸⁰ 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.⁸¹ In some cases, jurors believe they are impartially viewing the photographs when in fact viewing these graphic pictures subconsciously leans them towards a guilty

McGarty, 323 Mass. 435, 438, 82 N.E.2d 603, 606 (1948) (claiming admission allowed when evidential value found).

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).

⁷⁸ See, e.g., Commonwealth v. DeSouza, 428 Mass. 667, 670, 704 N.E.2d 190, 193 (1999) (allowing photograph to show location of wound); Commonwealth v. Ramos, 406 Mass. 397, 407, 548 N.E.2d 856, 862 (1990) (admitting photographs of crime scene); Commonwealth v. Knowlton, 265 Mass. 382, 386, 163 N.E. 251, 253 (1928) (finding relevance where photographs show force).

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.⁸² In any case, admitting evidence that unfairly prejudices the jury destroys the notion that a person is innocent until proven guilty.⁸³

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.⁸⁴ By establishing the bar for admissibility at mere relevance, most photographs will be admissible.⁸⁵ 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.⁸⁶ 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.⁸⁷ 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.⁸⁸

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).

⁸⁵ See *Commonwealth v. Vizcarrondo*, 431 Mass. 360, 362, 727 N.E.2d 821, 823 (2000) (noting Supreme Judicial Court rarely finds error when photographs of crime scenes and homicide victims admitted); *Commonwealth v. Zagranski*, 408 Mass. 278, 289, 558 N.E.2d 933, 940 (1990) (claiming judge's decision upheld as long as mere relevance).

⁸⁶ See, e.g., *Commonwealth v. DeSouza*, 428 Mass. 667, 670, 704 N.E.2d 190, 193 (1999) (admitting photographs relevant to location of wound); *Commonwealth v. Vazquez*, 419 Mass. 350, 354, 644 N.E.2d 978, 981-82 (1995) (claiming relevance of photograph on issue of strangulation); *Commonwealth v. Meinholz*, 420 Mass. 633, 636, 651 N.E.2d 385, 387 (1995) (admitting photographs showing burial and injuries); see also MASS. GEN. LAWS ch. 265, § 1 (defining murder).

⁸⁷ See *Commonwealth v. Haas*, 398 Mass. 806, 816, 501 N.E.2d 1154, 1160 (1986) (allowing photograph to assist evaluation of pathologist testimony); *Commonwealth v. Makarewicz*, 333 Mass. 575, 584, 132 N.E.2d 294, 299 (1956) (admitting enlargements as fair representation of what pathologist found in autopsy).

⁸⁸ See, e.g., *Commonwealth v. Simmons*, 419 Mass. 426, 431, 646 N.E.2d 97, 100 (1995) (noting admissible when murder with extreme atrocity or cruelty); *Commonwealth v. Clifford*, 374 Mass. 293, 306, 372 N.E.2d 1267, 1276 (1978) (allowing photograph when proving first degree murder); *Commonwealth v. Osman*, 284 Mass. 421, 423, 188 N.E.2d 226, 227 (1933) (admitting based on relevance as to extreme atrocity or cruelty).

Massachusetts courts took a step in the right direction by developing a test for admitting photographs of altered bodies.⁸⁹ 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.⁹⁰ 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.⁹¹ 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.⁹² 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.⁹³ 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.⁹⁴ 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.⁹⁵ For example, a defendant may admit to murder, however, they may contest that they acted with extreme atrocity or

⁸⁹ See *Commonwealth v. Bastarache*, 382 Mass. 86, 106, 414 N.E.2d 984, 997 (1980) (stating test used for admission of photographs when altered body); see also *Vazquez*, 419 Mass. at 354, 644 N.E.2d at 981-82 (following *Bastarache* test).

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*).

⁹² See *Commonwealth v. Zagranski*, 408 Mass. 278, 289, 558 N.E.2d 933, 940 (1990) (finding mere relevance justifies upholding judge's decision); *Bastarache*, 382 Mass. at 106, 414 N.E.2d at 997 (raising bar for admission of photographs when body altered).

⁹³ Compare *Commonwealth v. Maldonado*, 429 Mass. 502, 507, 709 N.E.2d 809, 813 (1999) (showing photographs of victim shot at close range); *Commonwealth v. Meinholz*, 420 Mass. 633, 636, 651 N.E.2d 385, 387 (1995) (evaluating photographs of body with signs of decomposition), and *Commonwealth v. McGarty*, 323 Mass. 435, 438, 82 N.E.2d 603, 606 (1948) (dealing with photographs of sexually mutilated child), with *Commonwealth v. Jackson*, 428 Mass. 455, 465, 702 N.E.2d 1158, 1165 (1998) (allowing photographs of victim's shaved head), and *Commonwealth v. Campbell*, 375 Mass. 308, 313, 376 N.E.2d 872, 876 (1978) (admitting photograph of incision held together with black stitches because not inflammatory).

⁹⁴ See *Commonwealth v. Bastarache*, 382 Mass. 86, 106, 414 N.E.2d 984, 997 (1980) (limiting admissibility of photographs of altered body to contested issues); see also *Askins*, *supra* note 18 at 157 (claiming court should exclude photographs of altered body unless admitted on contested issue).

⁹⁵ See *Commonwealth v. Simmons*, 419 Mass. 426, 431, 646 N.E.2d 97, 100 (1995) (failing to exclude photograph because defendant stipulated to killing).

cruelty.⁹⁶ The court could still admit the photographs to prove that contested fact.⁹⁷ 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.⁹⁸

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.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ Perhaps Massachusetts should look to other states as a guideline for developing a stricter test.¹⁰² 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.¹⁰³ 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).

⁹⁷ See *Commonwealth v. Bys*, 370 Mass. 350, 358, 348 N.E.2d 431, 437 (1976) (admitting photograph because showing force relevant to issue of extreme atrocity or cruelty); *Commonwealth v. Knowlton*, 265 Mass. 382, 386, 163 N.E. 251, 253 (1928) (allowing admission on issue of extreme atrocity or cruelty when photograph shows force).

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.*

¹⁰² See *Payne v. Commonwealth*, 257 Va. 216, 222, 509 S.E.2d 293, 297 (1999) (explaining Virginia standard); *Askins*, *supra* note 18 at 157-58 (noting North Carolina evaluation procedure).

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.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.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.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.¹⁰⁷ This ensures that the prosecution has a reason to admit and display the photographs other than mere relevance.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.¹⁰⁹ This allows jurors who believe that viewing graphic photographs will compromise their impartiality to remove themselves from the case before it even starts.¹¹⁰ Once these jurors remove themselves, the defendant is less likely to face an inflamed jury seeking to punish.¹¹¹ These are merely suggested steps to lead to a less prejudicial trial for those facing the possibility of life in

¹⁰⁴ See *Commonwealth v. Makarewicz*, 333 Mass. 575, 584, 132 N.E.2d 294, 299 (1956) (arguing about admission of enlargements of photographs); *Commonwealth v. Haas*, 398 Mass. 806, 816, 501 N.E.2d 1154, 1160 (1986) (denying defendant argument concerning color photographs).

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).

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

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 atrociousness. *Id.*

¹⁰⁸ See *Commonwealth v. Zagranski*, 408 Mass. 278, 289, 558 N.E.2d 933, 940 (1990) (claiming marginal relevance allows upholding discretion); *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 atrociousness. *Id.*

¹⁰⁹ See *Commonwealth v. Vizcarrondo*, 431 Mass. 360, 363 n.2, 727 N.E.2d 821, 823 n.2 (2000) (allowing photographs where judge warned prospective jurors in advance of graphic photograph).

¹¹⁰ See *id.* (noting jurors given opportunity to excuse themselves if unable to guarantee impartiality regarding graphic photographs).

¹¹¹ See *id.* (commenting on judge's reminder to jurors of guarantee of impartiality).

prison.¹¹²

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).

