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EVIDENCE

STATUS OF THE *JONES* BRIGHT-LINE TEST FOR PEREMPTORY CHALLENGES AND THE ADMISSIBILITY OF GRAPHIC PHOTOS

In the death penalty appeal of Ellis Franklin, the South Carolina Supreme Court examined the procedures for using a *Batson*[1] peremptory challenge and the admissibility of graphic pictorial evidence. The court in *State v. Franklin*[2] held that the trial judge properly (1) disallowed defense counsel's peremptory strike of a member of the second jury panel who had previously been unconstitutionally stricken and (2) admitted graphic photographs into evidence because their probative value outweighed any possible prejudicial effect.[3] *Franklin* renders ineffective the bright-line test put forth in *State v. Jones*[4] by reinterpreting the proper procedure to be followed for a *Batson* challenge.[5] This leaves unscathed South Carolina's long-standing rule regarding the discretion afforded a trial judge in admitting evidence.[6]

Ellis Franklin was convicted of murdering Jennifer Martin and, upon the jury's finding of aggravating circumstances,[7] sentenced to death.[8] During jury selection, the defendant filed a *Batson* motion in response to the prosecution's striking of a black, female juror. In turn the prosecution made a similar motion in response to the defense's striking of three white males and a white female.[9] One of the white males was juror Cantley.[10] The trial court sustained both motions and quashed the jury panel to begin selection de novo in accordance with *Jones*.[11] The new venire included all those previously stricken.[12] Juror Cantley was called a second time, and again, defense counsel attempted to strike juror Cantley. The judge, however, disallowed the

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1. Batson v. Kentucky, 476 U.S. 79 (1986).

2. ___ S.C. ___, 456 S.E.2d 357 (1995).

3. *Id.* at ___, ___, 456 S.E.2d at 357, 361. *Franklin* has already been cited as support for the admission of such evidence. State v. Kelley, ___ S.C. ___, 460 S.E.2d 368, 371 (1995) (admitting charts, photographs, and video depicting excessive nature of killing).

4. 293 S.C. 54, 358 S.E.2d 701 (1987).

5. *Franklin*, ___ S.C. at ___, 456 S.E.2d at 364 (Finney, J., dissenting).

6. *E.g.*, State v. Kelley, ___ S.C. ___, ___, 460 S.E.2d 368, 370 (1995); State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991).

7. Aggravating circumstances include murder while in the commission of physical torture. S.C. CODE ANN. § 16-3-20(C)(a)(l)(h) (Law. Co-op. Supp. 1995).

8. *Franklin*, ___ S.C. at ___, 456 S.E.2d at 358.

9. *Id.* at ___, 456 S.E.2d at 359.

10. *Id.* at ___, 456 S.E.2d at 363 (Finney, J., dissenting).

11. *Id.* at ___, 456 S.E.2d at 360.

12. *Id.* at ___, 456 S.E.2d at 359.

strike and seated Cantley without allowing defense counsel to restate a race neutral explanation.[13] Franklin objected claiming error.[14]

In the sentencing phase of this bifurcated proceeding, the prosecution admitted into evidence seventeen photographs and ten slides to establish the aggravated circumstance of murder while in the commission of physical torture.[15] This evidence depicted the crime scene and Martin's tortured body at autopsy as well as the instruments of torture. Franklin claimed these photographs and slides, particularly State's exhibits 40 and 90,[16] were overly prejudicial.[17] A pathologist testified regarding these exhibits and the alleged torture.[18] On finding that the previously stricken juror had been properly seated and that the photographic evidence was not so prejudicial as to warrant inadmissibility, the South Carolina Supreme Court affirmed Franklin's conviction and sentence.[19]

I. *BATSON*, *JONES*, AND PEREMPTORY CHALLENGES IN SOUTH CAROLINA

The Supreme Court decided in *Batson v. Kentucky*[20] that the Equal Protection Clause[21] forbids the striking of potential jurors solely because of race.[22] In *Batson* a black man was convicted of second-degree burglary and receipt of stolen goods. The Court held that to make a prima facie case of discrimination, a defendant must show that he is a member of a distinct racial group, that the prosecution has used peremptory challenges to remove jurors of his race, and that the circumstances raise an inference that these removals were indeed on account of race.[23] The burden then shifts to the prosecution to provide a race-neutral explanation for the strike.[24] The Court, however,

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13. *Id.* at ___, 456 S.E.2d at 364 (Finney, J., dissenting).

14. Record at 1378.

15. *Franklin*, ___ S.C. at ___, 456 S.E.2d at 361.

16. Exhibit 40 was a close-up shot of Martin's badly-beaten face with her eyes rolled back and her teeth turned backwards. Exhibit 90 depicted the body's genital area with part of a broomstick (that had allegedly been used to torture the victim) beneath the buttocks. *Id.* at ___, 456 S.E.2d at 361.

17. *Franklin*, ___ S.C. at ___, 456 S.E.2d at 361.

18. *Id.* at ___, 456 S.E.2d at 362.

19. *Id.* at ___, 456 S.E.2d at 361, 362.

20. 476 U.S. 79 (1986).

21. U.S. CONST. amend. XIV, § 1.

22. 476 U.S. 79 (1986).

23. *See id.* at 97.

24. *Id.* at 97-98. Deference is given to trial judges regarding the making out of such a prima facie case of discrimination. The defendant, however, must ultimately show that this race-neutral reason was pretextual and that the prosecution was purposely discriminating in the use of this jury strike.

left the question of how to implement *Batson* to the state and federal trial courts.[25] The principles proffered in *Batson* have since been widely expanded. The Supreme Court has further held that one cannot strike a juror solely on the basis of gender,[26] and a *Batson* challenge can now be made against the defense as well as the prosecution.[27] The principle has even been extended to include civil litigants as well as parties to a criminal action.[28]

The South Carolina Supreme Court has consistently looked to the procedure for *Batson* challenges outlined in *State v. Jones*.[29] The *Jones* court noted that although the United States Supreme Court gave state trial courts the discretion to fashion their own remedies in *Batson* situations, a better course of action would be to lay down a precise manner of inquiry into such accusations.[30] Thus, the court opted to dispense with *Batson's* case-by-case analysis and set forth a bright-line test by which, if the defendant is the member of a cognizable racial group and the prosecutor exercises strikes to remove jurors of that race, a hearing will be held at the request of defense counsel. If the solicitor fails to give a racially neutral explanation, "the process of selecting the jury shall start de novo."[31] In *State v. Franklin* the South Carolina Supreme Court attempted to follow the procedural guidelines outlined in *Jones*. The majority maintained, however, that the issue in *Franklin* was not squarely addressed in *Jones*.[32] In essence, the court treated this issue as a case of first impression for South Carolina. In *Franklin* the court sought the appropriate procedure to be used when a party attempts to strike from the second jury panel a person previously ruled unconstitutionally stricken under *Batson*. Citing decisions from such states as New York,[33] Mississippi,[34] Florida,[35] and Missouri,[36] the majority contended that most jurisdictions find no error in the seating of previously stricken jurors.[37] The court further

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25. *Id.* at 99. In South Carolina this procedure is established in State v. Jones, 293 S.C. 54, 358 S.E.2d 701 (1987).

26. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

27. Georgia v. McCollum, 505 U.S. 42 (1992).

28. Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

29. 293 S.C. at 58, 358 S.E.2d at 703-04.

30. *Id.* at 57, 358 S.E.2d at 703.

31. *Id.* at 58, 358 S.E.2d at 704.

32. *Franklin*, ___ S.C. at ___, 456 S.E.2d at 359 ("*Jones*, however, did not address the procedure when, as here, a party attempts to strike from the second venire a person previously ruled stricken in violation of *Batson*.").

33. People v. Moten, 603 N.Y.S.2d 940 (N.Y. Sup. Ct. 1993).

34. Griffin v. State, 610 So. 2d 354 (Miss. 1992).

35. State v. Aldret, 606 So. 2d 1156 (Fla. 1992); Jefferson v. State, 595 So. 2d 38 (Fla. 1992).

36. State v. Grim, 854 S.W.2d 403 (Mo. 1993).

37. *Franklin*, ___ S.C. at ___ & n.4, 456 S.E.2d at 360 & n.4. There is evidence of some split on the issue. For example, states such as North Carolina, State v. McCollum, 433 S.E.2d

stipulated that a contrary finding would inevitably reward a party for an improper, even discriminatory, strike with a different jury panel to choose from.[38] This being an unacceptable outcome, the court deemed the seating of Cantley proper.[39]

The majority further supported its position by adding that peremptory challenges have never been considered "constitutionally protected fundamental rights";[40] thus, a trial judge has the right to fashion an appropriate remedy under a particular fact pattern as long as the right to a fair trial and an impartial jury is not violated.[41]

Justice Toal, writing for the majority, insisted that no infringement of rights existed under the facts presented.[42] Justice Toal maintained that the jury selection process was started anew in accordance with *Jones* and that

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144 (N.C. 1993); California, People v. Wheeler, 583 P.2d 748 (Cal. 1978); and Indiana, Minnifield v. State, 539 N.E.2d 464 (Ind. 1989), favor striking the entire panel upon finding discriminatory peremptory strikes. States that do call for the seating of improperly removed jurors do not have a distinct procedure outlined by their relative state supreme courts as South Carolina does under *State v. Jones*, 293 S.C. 54, 358 S.E.2d 701 (1987).

38. *Franklin*, ___ S.C. at ___, 456 S.E.2d at 360 (quoting People v. Moten, 603 N.Y.S.2d 940, 947 N.Y. Sup. Ct. 1993)).

39. *Id.* at ___, 456 S.E.2d at 361.

40. *Id.* at ___, 456 S.E.2d at 360 (quoting Georgia v. McCollum, 505 U.S. 42, 57 (1992)). Yet, it has long been noted that "[t]he right of challenge, as allowed, is regarded sacred." State v. Briggs, 27 S.C. 80, 86, 2 S.E. 854, 857 (1887). Moreover, the United States Supreme Court has even called these peremptory strikes "one of the most important of the rights secured to the accused." Batson v. Kentucky, 476 U.S. 79, 107 (1986) (quoting Pointer v. United States, 151 U.S. 396, 408 (1894)). Our justice systems affords great weight to the proposition that all parties deserve a fair trial and an impartial jury under the United States Constitution. The Due Process Clause of the Fourteenth Amendment ensures "essential demands of fairness." Ham v. South Carolina, 409 U.S. 524, 526 (1973) (quoting Aldridge v. United States, 283 U.S. 308, 310 (1931)). In fact, long before the Sixth Amendment guarantee of a fair trial was made applicable to the states, courts had often noted that this right to an impartial jury was a basic facet of our justice system. *Id.* at 531 (Marshall, J., concurring in part & dissenting in part) (citing Duncan v. Louisiana, 391 U.S. 145 (1968)). The use of peremptory challenges, though not to be abused with discriminatory practices, is one of the few means of ensuring this impartiality and fairness. Thus, in protecting jurors from discriminatory removal from jury participation, parties must have the means to assure the fairest treatment afforded under the law. For this reason, jury strikes should be handled with the utmost care. As the South Carolina Supreme Court stated in *State v. Briggs*, 27 S.C. 80, 2 S.E. 854 (1887) (new trial ordered in murder case from reversible error in jury selection):

> The law casts its protection over all persons alike. Hence, before any person can be made to suffer for a crime . . . he must be proceeded against step by step according to the rules of practice which the law has ordained. It is no avail to proceed against him according to other and better rules. The law's rules must be pursued, or the law's penalty cannot be imposed upon him for his crime.

Id. at 84-85, 2 S.E. at 856.

41. *Franklin*, ___ S.C. at ___, 456 S.E.2d at 360.

42. *Id.* at ___, 456 S.E.2d at 360.

there was no indication in the record of any new race-neutral reason for the strike.[43] In fact, she added that defense counsel "conceded" to this lack of new facts.[44] Justice Finney, however, disagreed; in his dissent, he contended such a concession was not clear from the record.[45] The majority apparently made this assertion based upon statements made not by the attorney at trial, but by appellate counsel during oral argument. Even from these statements at appeal, however, such a concession is not apparent.[46] The majority may well have concluded that it was simply unnecessary to allow defense counsel to reargue his jury challenge.[47]

Although *State v. Jones* did not directly address the dominant *Batson* issue involved in *Franklin*;[48] as the Finney dissent contended, the majority may have misapplied the reasoning of *Jones*.[49] The purpose of the *Jones* doctrine was to develop a bright-line test rather than to allow the trial courts to fashion

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43. *Id.* at ___, 456 S.E.2d at 360.

44. *Id.* at ___, 456 S.E.2d at 361.

45. *Id.* at ___, 456 S.E.2d at 364 (Finney, J., dissenting); *see also* Record at 1359-60, 1377-78.

46. JUSTICE 2: Was there any indication of an opportunity being afforded to articulate any basis that the second strike as to why juror Cantley would not be an acceptable juror to the defense? ATTORNEY: The trial court wouldn't allow anything. He just said . . .
JUSTICE 2: What did the trial court say?
ATTORNEY: He just said, "I'm not going to allow you to do it for any reason."
JUSTICE 2: "I have previously ruled."
. . .
And, when it comes up the second time, if something had developed, was counsel afforded an opportunity to give that reason? Say this juror had been observed talking to a police officer or any number of things that happen in the trial of cases, was he given an opportunity to give a reason?
ATTORNEY: No. And I think he had a right to give that reason.
JUSTICE 1: You yourself, however, concede that the reason the juror was struck is because he struck him before. You don't know of any other reason or anything in this record to suggest that defense counsel was prevented if he knew of some extraneous reason that cropped up between first selection and a half an hour later, the second selection, you don't know of any other reason that developed for that strike? Do you, Attorney?
ATTORNEY: No, your Honor, I don't.

Franklin, ___ S.C. at ___, 456 S.E.2d at 365 (Appendix (quoting audio recording of oral arguments)).

47. *Id.* at ___, 456 S.E.2d at 360 (citing Steele v. Charlotte, Columbia & Augusta R.R., 14 S.C. 324 (1880) (a motion formerly heard and ruled upon would only be reviewed if a new set of facts were to arise)).

48. *Supra* note 32 and accompanying text.

49. *See Franklin*, ___ S.C. at ___, 456 S.E.2d at 364 (Finney, J., dissenting).

case-by-case results.[50] By allowing a trial court to develop its own remedy, the usefulness of the bright-line test utterly disappears.[51]

The procedure outlined in *Jones* was binding on the *Franklin* court absent a dramatic decision to overturn *Jones*. *Jones* requires that the jury selection process start de novo.[52] Thus, the process should have been treated just as if it was being done for the first time. The *Franklin* majority contended that it followed the mechanics of *Jones*;[53] however, in not allowing defense counsel the right to express a race-neutral explanation of his attempted jury strike,[54] the court was using beliefs and information from the original jury selection process rather than starting this process completely de novo as outlined in *Jones*. When defense counsel struck juror Cantley, the judge interjected, "I've already ruled." The juror was seated, and the judge stated that the defense did not have the right to reiterate a race-neutral explanation.[55] The trial judge added to the record: "My idea was that if he did not have a reason then he couldn't have a reason now."[56] Thus, the "rules of practice which the law has ordained"[57] in South Carolina were not followed to the letter. The bright-line *Jones* remedy, if not completely overturned as Justice Finney asserted,[58] is certainly tainted by the court's decision.

II. THE ADMISSIBILITY OF GRAPHIC EVIDENCE IN SOUTH CAROLINA

Franklin contested the admission of certain graphic photographs and slides, claiming they were unduly prejudicial and without probative value because his attorney, in declining cross-examination, left the pathologist's testimony uncontroverted.[59] Justice Toal and the majority of the South Carolina Supreme Court disagreed,[60] finding that such evidence, despite its graphic depiction, has continually been held relevant in the establishment of

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50. State v. Jones, 293 S.C. 54, 57, 358 S.E.2d 701, 703 (1987).

51. *Franklin*, ___ S.C. at ___, 456 S.E.2d at 364 (Finney, J., dissenting) ("The majority overrules *Jones'* bright line remedy and substitutes for it the vague rule . . . .").

52. "[A]new; afresh; second time." BLACK'S LAW DICTIONARY 435 (6th ed. 1990).

53. *Franklin*, ___ S.C. at ___, 456 S.E.2d at 360 ("Our decision today does not impact *Jones*.").

54. *Supra* notes 45-46 and accompanying text; *see* Record at 1377-78 (Judge stating: "I ruled at the side bar that he did not have the right to again give me some race neutral reason.").

55. Record at 1359.

56. *Id.* at 1378.

57. State v. Briggs, 27 S.C. 80, 85, 2 S.E.2d 854, 856 (1887).

58. *Franklin*, ___ S.C. at ___, 456 S.E.2d at 364 (Finney, J., dissenting).

59. *Id.* at ___, 456 S.E.2d at 361-62.

60. *Id* at ___, 456 S.E.2d at 362; *cf. id.* at ___, 456 S.E.2d at 364-65 (Finney, J., dissenting) (calling for at least a resentencing).

aggravating circumstances under section 16-3-20 of the South Carolina Code.[61]

South Carolina has adopted the language of Rule 403 of the Federal Rules of Evidence, which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ."[62] Unfair prejudice has been interpreted by the South Carolina Supreme Court as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[63]

Furthermore, South Carolina has long adhered to the principle that "[t]he trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion."[64] The Fourth Circuit maintains that a probative versus prejudicial determination of the trial court "will not be overturned except under the most 'extraordinary' of circumstances."[65] Thus, the court in *Franklin* was obliged to follow the trial court's ruling on the admission of this evidence, namely exhibits 40 and 90, unless it could be shown that the judge had blatantly abused his discretion. Rule 403's presumption of admissibility paired with the trial judge's justifications based on statutory provisions regarding the aggravating circumstance of physical torture made abuse of discretion an unlikely result.[66]

Section 16-3-20 allows the admission of "additional evidence in extenuation, mitigation, or aggravation of the punishment" in the sentencing phase of a bifurcated trial.[67] Thus, although photographs that tend to arouse the sympathies of a jury should be largely excluded in the guilt phase of a capital trial,[68] such evidence can often be admitted in the sentencing phase to establish aggravating circumstances. For example, in *State v. Kornahrens*,[69] another capital murder case, the supreme court held that the admission into evidence of photographs and slides of the gravesite and bodies would most

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61. S.C. CODE ANN. § 16-3-20 (Law. Co-op. Supp. 1995); *see* State v. Green, 301 S.C. 347, 358, 392 S.E.2d 157, 162 (1990) (admission of evidence of prior crimes allowed in sentencing phase to prove "extenuation, mitigation or aggravation of the punishment").

62. S.C. R. EVID. 403.

63. State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (quoting FED. R. EVID. 403 advisory committee's note).

64. *Id.* at 380, 401 S.E.2d at 148 (citing State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 (1983)); *see, e.g.*, State v. Kelley, ___ S.C. ___, ___, 460 S.E.2d 368, 370 (1995) (citing State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986), *cert. denied*, 480 U.S. 940 (1987)).

65. United States v. Heyward, 729 F.2d 297, 301 n.2 (4th Cir. 1984); United States v. Whitfield, 715 F.2d 145, 147 (4th Cir. 1983).

66. *Franklin*, ___ S.C. at ___, 456 S.E.2d at 361-62.

67. S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. Supp. 1995).

68. State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986); State v. Waitus, 224 S.C. 12, 27-28, 77 S.E.2d 256, 263 (1953).

69. 290 S.C. 281, 350 S.E.2d 180 (1986), *cert. denied*, 480 U.S. 940 (1987).

likely have been inadmissable in the guilt phase, but they were properly admitted in the sentencing phase.[70] In *Kornahrens* the pictures showed the bodies in substantially the same condition as the defendant had left them, and thus, were relevant in the sentencing phase to establish the circumstances of the crime and the defendant's character. The court added that although a trial judge must always weigh the probative value of evidence against its prejudicial effect, the probative value in the sentencing phase of a capital trial is much broader than that in the guilt phase.[71]

Given this broad interpretation of probative value in the sentencing phase of a bifurcated trial, how graphic can photographs be before they constitute undue prejudice under South Carolina evidentiary rule 403?[72] South Carolina apparently leaves the relevancy of particular factors largely to a case-by-case determination affording much discretion to the trial judge. Certain factors do, however, seem to have some special weight in this determination of prejudice. For example, color photographs showing "a considerable amount of blood" were deemed inadmissable absent a need to show some material fact yet to be established.[73] Photographs in which the bodies are shown in the same condition as the defendant left them are seen as not unduly prejudicial. The court in *Kornahrens* stated that "[w]hile not pleasant to look at, they show what the defendant himself did to the bodies and nothing more."[74] By comparison, pictures depicting a victim after the body had been altered somehow have been found to be unduly prejudicial when they contained no disputed information. In *State v. Middleton*[75] the supreme court found that the prejudicial value of a picture depicting the scalp pulled away from the victim's skull and another showing her surgically opened vaginal cavity outweighed any probative value they added to the prosecution's case.

Another important factor for South Carolina courts in weighing prejudicial effect and probative value is whether the information depicted in the graphic pictures is in any way contested. Defense counsel in *Franklin* argued that exhibits 40 and 90 had little probative value because the trial attorney did not cross examine the pathologist whose testimony established the same information as was contained in these photographs and slides.[76] Defense counsel claimed that this lack of a cross examination left the pathologist's testimony uncontroverted and, therefore, the photographs were essentially unnecessary. The South Carolina Supreme Court disagreed, contending that the jury could

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70. *Id.* at 288, 350 S.E.2d at 185.

71. *Id.*

72. S.C. R. EVID. 403.

73. State v. Patrick, 289 S.C. 301, 308-09, 345 S.E.2d 481, 485 (1986) (per curiam), *overruled on other grounds by* Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991).

74. *Kornahrens*, 290 S.C. at 289, 350 S.E.2d at 186.

75. 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986).

76. *Franklin*, ___ S.C. at ___, 456 S.E.2d at 362.

not have understood the extent of the torture solely from the pathologist's statements.[77] When courts find that information could have or already has been established through other testimony or evidence, such photographs have at times been found overly prejudicial. In *Middleton*, the court reversed a murder conviction, finding that the testimony of a forensic pathologist had negated much of the probative value of the extremely graphic photographs and slides.[78] There, in contrast to *Franklin*, defense counsel did not merely refuse to cross examine the expert, but further offered to stipulate to any of the facts shown in the pictures.[79]

Other jurisdictions have taken additional factors into consideration in this balancing test. The necessity of the evidence is commonly an important consideration.[80] In fact, the advisory committee notes to Rule 403 of the Federal Rules of Evidence, from which the South Carolina rule is taken,[81] adds that "[t]he availability of other means of proof may also be an appropriate factor."[82] This consideration has been emphasized sparingly, however, in the establishment of aggravating circumstances.[83] Furthermore, graphic evidence merely corroborating a witness's testimony already proffered at trial has been allowed when the reliability of the witness may be questionable.[84]

In *State v. Hennis*[85] the North Carolina Supreme Court framed a "test for excess" to be used in the weighing of graphic photographic evidence. In this test, courts are to focus on the following 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.[86] *Hennis* further calls for the weighing of such factors as the choice of medium, size of the image, amount of detail shown, and whether the

77. *Id.* at ___, 456 S.E.2d at 362.

78. *Middleton*, 288 S.C. at 24, 339 S.E.2d at 693.

79. *Id.*; *see* State v. Waitus, 224 S.C. 12, 77 S.E.2d 256, 263 (1953) (admission of photographs of murder victim was reversible error when all information was fully established by uncontradicted medical and lay testimony).

80. Gross v. Black & Decker (U.S.), Inc., 695 F.2d 858, 863 (5th Cir. 1983); United States v. Grassi, 602 F.2d 1192, 1195 (5th Cir. 1979) (a "central consideration[]" in determining probative value under Rule 403 is proponent's need for the evidence).

81. WALTER A. REISER JR., A COMPARISON OF THE FEDERAL RULES OF EVIDENCE WITH SOUTH CAROLINA EVIDENCE LAW 16-17 (5th ed. 1993) (quoting State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991)).

82. FED. R. EVID. 403 advisory committee notes; *see, e.g.*, State v. Garcia, 663 P.2d 60 (Utah 1983).

83. *See* State v. Todd, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986) ("no abuse of discretion if the photograph serves to corroborate testimony").

84. People v. Gardner, 151 Cal. Rptr. 123, 127 (Cal. Ct. App. 1978).

85. 372 S.E.2d 523 (N.C. 1988).

86. *Id.* at 527.

image is in color or black and white.[87] North Carolina courts have further stated that "photographs showing the condition of the body when found, the location where found and the surrounding conditions at the time the body was found" are properly admissible.[88]

Although similar factors have been applied in South Carolina cases, no clear checklist can be ascertained. In most states, South Carolina included, the discretion of the trial judge dictates the Rule 403 balancing analysis. The above-mentioned factors, however, certainly should be noted, and defense counsel should be sure to file appropriate pretrial motions pushing aggressively for stringent limits on the number and presentation of graphic photographs or slides to ensure possibly prejudicial evidence is only admitted to illustrate material facts. Furthermore, defense counsel should be ready to object to any facets of the evidence that could serve only to heighten prejudicial effect. Any display manipulation such as "unconventionally placed screens, excessive magnification, [or] skillful accumulation" may be deemed suspect and unduly prejudicial, requiring exclusion.[89]

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87. *Id.*; *see also* State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978) ("accuracy and clarity" of pictures and "inadequacy of testimonial evidence in relating the facts to the jury" were factors considered to determine that the illustrative value outweighed the inflammatory effect of evidence).

88. State v. Atkinson, 167 S.E.2d 241, 255 (N.C.), *rev'd on other grounds*, 403 U.S. 948 (1971).

89. Michael T. Cawley, Note, *North Carolina's "Test For Excess": The Prejudicial Use of Photographic Evidence in Criminal Prosecutions After* State v. Hennis, 67 N.C. L. REV. 1367, 1382 (1989).