

2019 WL 13075299 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)

Circuit Court of Florida,
Fifteenth Judicial Circuit,
Palm Beach County

STATE OF FLORIDA,

v.

Christopher VASATA, Defendant.

No. 17CF002808AMB.
May 28, 2019.

Motion to Exclude Gruesome and Inflammatory Photographs

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CRIMINAL DIVISION “X”

COMES NOW, the defendant, CHRISTOPHER VASATA, by and through undersigned counsel, and respectfully moves in limine pursuant to [Florida Statute §§ 90.105](#) and [90.403](#) for a pretrial ruling from this Court excluding gruesome photographs and as grounds in support states as follows:

Mr. Vasata is charged with three counts of first degree murder and other offenses. All of the charges in this case stem from an incident that occurred in Jupiter, Florida on February 5, 2017, during which three individuals--Kelli Doherty, Brandi El-Salhy, and Sean Henry--were shot and killed.

A forensic pathologist performed an autopsy of each of the decedents. Dr. Karen MacDougall performed the autopsies of Ms. Doherty and Ms. El-Salhy; Dr. Gertrude Juste did the autopsy of Mr. Henry. It was determined that the “manner of death” for each decedent was “homicide” and that the “cause of death” for each was “multiple [gunshot wounds](#).”

During the autopsy of Ms. Doherty it was discovered that she had been shot four times. It was determined that Ms. El-Salhy was shot five times. Dr. Juste had a tougher time determining the exact number of times that Mr. Henry was shot, but stated in a March 1, 2018, deposition that she believes he was shot “at least twelve” times. Because some of the [gunshot wounds](#) suffered by each decedent were from 7.62 × 39mm rifle rounds, the wounds did not merely result in death, they also resulted in what could fairly be described as disfigurement.

During the three autopsies that were performed, the decedents' injuries were documented in great detail by Drs. Juste and MacDougall and their assistants through photography as well as through the use of diagrams and illustrations. Prior to the autopsy, investigators with the Jupiter Police Department and the Office of the Medical Examiner also documented the decedents and their various injuries by taking numerous photographs of the decedents as they were found at the scene where they were shot and killed.

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Although unnecessary to prove any of the elements of the offenses in the December 14, 2017, indictment or any of the aggravators alleged in the state's May 12, 2017, death penalty notice, it is anticipated that the state will seek to admit some number of the photographs of the decedents' dead bodies and of their gruesome injuries.

In order to ensure that the jurors' decision-making in this case is based on reasoned evaluation and deliberation rather than unfair prejudice resulting from improper visceral reactions to inflammatory and emotionally-evocative evidence, the defendant requests that the Court apply [Florida Statute 90.403](#) to exclude or limit the state's introduction of gruesome photographs of the decedent's or their injuries.

MEMORANDUM OF LAW AND ARGUMENT

I. Florida's Traditional View of Admissibility of Gruesome Photographs



“Autopsy photographs that are relevant to show the manner of death, location of wounds, and the identity of the victim or to assist the medical examiner in explaining the victim's injuries are generally admissible evidence.” [Patrick v. State](#), 104 So. 3d 1046 (Fla. 2012); [Mansfield v. State](#), 758 So. 2d 636, 648 (Fla.2000); [Gudinas v. State](#), 693 So. 2d 953, 963 (Fla. 1997). Such photographs are, of course, still subject to the [section 90.403, Florida Statutes](#) balancing test. Pursuant to [section 90.403](#), “Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.” § 90.403, Fla. Stat. (2015).

In [Czubak v. State](#), 570 So. 2d 925 (Fla. 1990), the Florida Supreme Court discussed the admissibility of gruesome photographs:

This Court has long followed the rule that photographs are admissible if they are relevant and not so shocking in nature as to defeat the value of their relevance. Where photographs are relevant, then the trial judge in the first [instance] and this Court on appeal must determine whether the gruesomeness of the portrayal is so inflammatory as to create an undue prejudice in the minds of the jury and [distract] them from a fair and unimpassioned consideration of the evidence. We have consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence.


Id. at 928 (citations omitted). In fact, the Florida Supreme Court has “consistently upheld the admission of allegedly gruesome photographs where they were independently relevant or corroborative of other evidence.” *Id.* at 929; *see, e.g., Gudinas* at 963 (slides showing stick protruding from victim's vagina and of victim's body in the morgue relevant to medical examiner's explanation of injuries and to heinous, atrocious, or cruel aggravating circumstances); *Mansfield* at 648 (photographs depicting mutilation of victim's genitalia and autopsy photograph of victim's brain relevant to medical examiner's determination of manner of death and probative toward heinous, atrocious, or cruel and sexual battery aggravators); *Patrick* at 1060-61 (autopsy photographs showing skin of victim's head pulled back to reveal skull and the entire torso opened to reveal victim's upper chest admissible to assist medical examiner in explaining the victim's injuries); [Jackson v. State](#), 545 So. 2d 260 (Fla. 1989) (photographs of victims' charred remains admissible where relevant to prove identity and circumstances surrounding murder and to corroborate medical examiner's testimony); [Bush v. State](#), 461 So. 2d 936, 939 (Fla. 1984) (photographs of blowup of bloody gunshot wound to victim's face admissible where relevant to assist the medical examiner in explaining his examination);

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 *Wilson v. State*, 436 So. 2d 908 (Fla. 1983) (autopsy photographs admissible where relevant to prove identity, nature and extent of victims' injuries, manner of death, nature and force of the violence, and to show premeditation);  *Straight v. State*, 397 So. 2d 903, 908 (Fla. 1981) (photograph of victim's decomposed body admissible where relevant to corroborate testimony as to how death was inflicted); *Foster v. State*, 369 So. 2d 928 (Fla. 1979) (gruesome photographs admissible in guilt phase to establish identity and cause of death), cert. denied, 444 U.S. 885 (1979).¹

The logic of these decisions is unpersuasive, grossly underestimates the impact of gruesome images on jurors, and is demonstrative of the arbitrariness of the traditional approach to determining the admissibility of gruesome photographs. This arbitrary approach is well-illustrated by the routine failure of courts to give any explanation or justification as to why they found certain photographs not to be unduly prejudicial.² The fact that there exists no uniform, court-dictated, other-than-gut-instinct metric for determining admissibility of gruesome photographs appears to be grounded in part on the flawed judicial assumption that exposure to gruesome images in a courtroom in the context of trial will not be upsetting because jurors see such images elsewhere in life. This presumes that what some jurors see is actually watched by all and that all are hardened to the emotional impact exposure brings. Neither conclusion, however, is supported by actual experience or supported by hard data.

II. The Impact of *Old Chief* on Florida Jurisprudence

This liberal view of the admissibility of gruesome photographs--though deeply ingrained in the jurisprudence of Florida and other jurisdictions--seems to ignore the jurisprudential dictates of the Supreme Court of the United States. In  *Old Chief v. U.S.*, 519 U.S. 172 (1997), the Supreme Court offered a principled means of determining admissibility using the section 403 balancing test:

On objection, the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.[...] [T]he judge would have to make these calculations with an appreciation of the offering party's need for evidentiary richness and narrative integrity in presenting a case, and the mere fact that two pieces of evidence might go to the same point would not, of course, necessarily mean that only one of them might come in. It would only mean that a judge applying Rule 403 could reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative proof going to the same point.

Id. at 182-183.³

The aforementioned cases in which gruesome photographs have been routinely admitted are bereft of any discussion to suggest possible evidentiary alternatives were considered or that the necessity of the gruesome evidence was weighed; rather, it appears as if the Florida Supreme Court has ignored the dictates of *Old Chief* as well as the wisdom of respected commentators such as Professor Charles W. Ehrhardt.⁴ Although the Florida Supreme Court has stated again and again that “[t]he test for admissibility of photographic evidence is relevancy rather than necessity”, *Mansfield, supra*, at 648, it is not entirely clear where that rule of

law comes from.⁵ More problematically, such a rule fails to comport with the analytical framework established by *Old Chief* and its progeny.

III. Science and the Psychological Impact of Gruesome Photographs

Most importantly, perhaps, the decisions of Florida courts do not appear to have been informed by the latest advances in psychology and neuroscience. As is often the case, the law has lagged well behind developments in these fields. In recent years, psychological research has illuminated how gruesome and graphic images and content actually affect jurors and their decision-making processes. Research now shows that the law's tendency to liberally admit gruesome photographs unnecessarily creates a severe risk that jurors will make decisions on an improper emotional basis. *See*, Jules Epstein & Suzanne Mannes, *Using Science to Challenge Gruesome Evidence*, April 2016, at 22.

When jurors are presented with evidence that is particularly gruesome, they are likely to experience a visceral emotionally charged feeling that leads them to be inappropriately punitive. Although there have been differences of opinions regarding whether one precedes the other or they occur simultaneously, it is indisputable that emotions and their physiological correlates are closely connected. According to the Schachter-Singer theory, emotions are the result of two components: an individual's physiological responses and an individual's cognitions, or thoughts. Stanley Schachter & Jerome E. Singer, *Cognitive, Social, and Physiological Determinants of Emotional State*, 69 *Psychol. Rev.* 379-399 (1962).

Physiological studies have used [functional magnetic resonance imaging \(fMRI\)](#)⁶ to investigate the way in which gruesome evidence affects the perceiver's brain. In one such study, participants read accounts of crimes which were manipulated to evoke either weak or strong disgust. Not only did those who received the strong disgust materials dole out significantly more punishment, but they also showed a decrease in activity in the regions of the brain that are usually active during logical reasoning and moral judgment. Beatrice H. Capestany & Lasana T. Harris, *Disgust and Biological Descriptions Bias Logical Reasoning During Legal Decision-Making*, 9 *Social Neuroscience* 265-277 (2014). Another study found similar evidence regarding the response of the brain to evocative material by evaluating the role that emotional distracters would have on a working memory task involving face recognition. Florin Dolcos & Gregory McCarthy, *Brain Systems Mediating Cognitive Interference by Emotional Distraction*, 26 *J. Neuroscience* 2072-2079 (2006). In addition to finding that those who were shown pictures designed to be emotional distracters (e.g., pictures of a mutilation) were less accurate in their identifications than those shown non-emotional pictures (e.g., a person washing dishes), the study also found that the emotional pictures were associated with increased activity in "hot" brain regions responsible for emotions (e.g., the amygdala) and reduced activity in the cold brain regions responsible for goal-oriented and decision-making behaviors (e.g., the prefrontal cortex). The authors of the study believe their findings suggest that the basis on which people make decisions is directly influenced by the nature of the material to which they have been exposed. Other neurological studies have found that during decisions surrounding moral judgments, the emotional rather than the cognitive areas of the brain are more active. Jessica M. Salerno & Bette L. Bottoms, *Emotional Evidence and Jurors' Judgments: The Promise of Neuroscience for Informing Psychology and Law*, 27 *Behav. Sci. & L.* 273-296 (2009).

Not only does the gruesomeness of evidence produce different patterns of brain activity, but it also translates into differences in punitiveness. At least two studies have found that individuals who experience gruesome photographic evidence were more likely to convict than those who did not view such photographs, even when both sets of individuals were presented with the same factual information regarding the crimes in question. Kevin S. Douglas, David R. Lyon & James R.P. Ogloff, *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder trial: Probative or Prejudicial?* 21 *Law & Hum. Behav.* 485-501 (1997); David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 *Law & Hum. Behav.* 183-202 (2006); Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 *Ariz. St. L.J.* 1003, 1021 (2014);

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Jennifer S. Lerner & Larissa Z. Tiedens, *Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition*, 19 Behav. Decision Making 115, 122 (2006).

Research has also shown that these problems cannot be fixed by proper judicial instructions telling jurors to ignore emotional content or graphic or gruesome evidence. Such research has shown that instructions to ignore certain types of information are ineffective at best, and at worst, may make the information more salient due to an ironic process or rebound effect.⁷ See, Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 Psychol. Pub. Pol'y & L. 677 (2000); Geoffrey P. Kramer, Norbert L. Kerr & John S. Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 Law 6 Hum. Behav. 409-438 (1990); David A. Sklansky, *Evidentiary Instructions and Jury as Other*, 54 Stan. L. Rev. 407 (2013);⁸ Michelle Cox & Sarah Tanford, *Effects of Evidence and Instructions in Civil Trials: An Experimental Investigation of Rules of Admissibility*, 4 Soc. Behav. 31-55 (1989); Emily R. Edwards & Karen E. Mottarella, *Preserving the Right to a Fair Trial: An Examination of Prejudicial Value of Visual and Auditory Evidence*, 16 N. Am. J. Psychol. & L. 397-414 (2014); Saul M. Kassin & David A. Garfield, *Blood and Guts: General and Trial-Specific Effects of Videotaped Crime Scenes on Mock Juror Verdicts*, 21 J. Applied Soc. Psychol. 1877-1887 (1991); Rachel K. Cush & Jane Goodman-Delahunty, *The Influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence*, 13 Psychiatry Psychol. & L. 110-123 (2006); Carleen M. Thompson & Susan Dennison, *Graphic Evidence of Violence: The Impact on Juror Decision-Making, the Influence of Judicial Instructions and the Effect of Juror Biases*, 11 Psychiatry Psychol. & L. 323-337 (2004).

The impact that the presentation of gruesome evidence has on the jurors should also be considered, not only from a decision-making standpoint but from a physiological and psychological perspective. Beginning in 1990, data for the Capital Jury Project were collected. This data derived from in-depth interviews with jurors from across the country who had actually served on capital trials. The data showed that more than 60 percent of jurors described the experience as emotionally upsetting and a third reported trouble eating or sleeping. William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early findings*, 70 Indiana L. J. 1043 (1995). Others had relationship problems, smoked and drank more than they should, and reported nightmares. *Id.* These qualitative results are consistent with quantitative, laboratory-based results showing that mock jurors exposed to graphic evidence of violence experience significantly more stress than those who are not exposed. Reason exists, therefore, to limit the introduction of gruesome and graphic evidence during trial not just to ensure the fairness of the trial but also to safeguard the well-being of jurors.

IV. *Old Chief* and the Application of Science

When considered in light of this body of research, the liberal view of admissibility of gruesome photographs heretofore promulgated by Florida courts seems dubious, if not downright contrary to the principles of fairness on which our criminal justice system is built. Applying the relevant science in the analytical framework of *Old Chief* should produce a different, but fundamentally more fair decision-making process regarding the admissibility of gruesome photographs. In practice this approach would look like the following:

When a forensic pathologist needs to describe the point of entry of a bullet that struck a victim's head, she may do so with a black and white drawing of a head, with a Styrofoam model of a head, or a photo from the autopsy. All three can show, equally, where on the head the bullet entered, so their probative value is equal; but the emotional (read “unfairly prejudicial” or “misleading” impact of the photo is far greater. *Old Chief's* reasoning [...] would command that the court then “discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by the unfairly prejudicial risk.” In this formulation, because of the science on how inflammatory evidence distorts judgment, the autopsy photo has a discounted probative value and a high risk of unfair prejudice or misleading the jury. Thus the proof would have to be made by the drawing or the Styrofoam model. Each could tell the story quite well, but neither risks the same emotional response as the autopsy photo.

Epstein & Mannes, *supra*.

Other courts across the country are finally starting to take heed of the scientific research and are recognizing the need to reign in the liberal view of admissibility. In 2015, Pennsylvania's chief justice wrote a dissent in which he surveyed some of the scientific research on the subject and called for greater judicial scrutiny, writing that “appellate courts should impose some constraints on the introduction of graphic photographs into the courtroom. [...]” *Commonwealth v. Woodard*, 129 A.3d 480, 510 (Pa. 2015) (Saylor, C.J., dissenting). Chief Justice Saylor explained

Many jurisdictions [...] have maintained a very liberal approach to the admission of photographs of murder victims, affording trial courts wide discretion and latitude. To my knowledge, however, there are no rational metrics available for the assessment; rather, the analysis generally proceeds in the form of a series of rather abstract and conclusory pronouncements. Such dispositions are vulnerable to the reasonable criticism that they are grounded more upon “instinct and folk knowledge” than upon the psychological impact of graphic photographs upon lay jurors. They also reflect another downside of according largely unbridled discretion to the trial courts, in that decisions material to the outcomes of individual cases can be made on a widely disparate basis.

I also note that emerging evidence, derived from psychological studies, suggests that disturbing photographs of murder victims have a substantial effect on jurors in terms of fostering anger, shallower mental processing, greater reliance on shortcuts and stereotypes, and enhanced certainty even in the absence of any material probative contribution of the photographic evidence in question. Critically, there also is evidence that the emotional influence probably operates outside of jurors' conscious awareness, thus raising questions about the ameliorative effect of limiting instructions issued by trial judges. The studies suggest a significant possibility that conventional judicial attitudes concerning the degree of impact of graphic depictions of death upon decision-making by lay jurors may be misplaced.

Id. at 510-11 (citations omitted).

V. Application to Mr. Vasata's case

Applying the framework of *Old Chief* and the relevant science to the present case, this Court should exclude the gruesome photographs from the crime scene and from the autopsy from being presented as evidence at trial. In weighing the probative value of the photographs against the unfair prejudice that would almost certainly result, the court should consider the need for the evidence; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction, as well as alternative methods of proof.⁹

The photographic evidence is unnecessary in Mr. Vasata's case, especially in light of the fact that the gruesome nature of the evidence demonstrates its tendency to suggest an improper and emotional basis for resolving the matters in dispute. As an alternative method of proof, Drs. Juste and MacDougall can adequately explain the nature and location of the decedents' injuries with a combination of testimony and the diagrams and drawings that are part of the medical examiner's file. If the point that the state is trying to prove, for example, is that a bullet entered the back of the decedents and exited out of the front of her torso after perforating various organs in her body, the doctor's testimony to that effect, combined with a diagram showing the location of the injury, proves that point just as effectively as a gruesome photograph yet without the unnecessary risk of inflaming the emotions of the jurors by showing them gruesome and disturbing photographs of the decedents' corpses. If the non-inflammatory method of proof can be used to establish the same point, there is simply no principled reason to allow the jurors to be exposed to gruesome photographs that could potentially cause them to base their decisions on an improper, emotional basis. This same

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logic--the very logic of *Old Chief*--would apply to all of the decedents' relevant injuries, and should result in exclusion of the gruesome photographs.

Because of the heightened risk of prejudice associated with the gruesome photographs, the minimal need for the evidence, and the availability of evidentiary alternatives, the court should find that the photographs are less probative than they are prejudicial and exclude them pursuant to [section 90.403](#).

WHEREFORE, Mr. Vasata respectfully requests that this Court grant this motion and the relief requested herein.

Respectfully submitted,

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Footnotes

- 1 Many other jurisdictions across the United States have unwisely adopted a similar view. See generally Barbara E. Bergman, Nancy Hollander & Theresa M. Duncan, 3 WHARTON'S CRIMINAL EVIDENCE § 16.7 (15th ed. 2014).
- 2 See, e.g., Kenneth W. Graham, Jr., 22A Fed. Prac. & Proc. Evid. § 5215 (2d ed.2015) (alluding to the phenomenon of “ipse dixit cases--those where the judges tell us that evidence is or is not ‘prejudicial’ and expect us to accept it on nothing more than the court's say-so”)
- 3 The reasoning of *Old Chief* was approved and adopted by the Florida Supreme Court in  *Brown v. State*, 719 So. 2d 882 (Fla. 1998).
- 4 “In weighing the probative value against the unfair prejudice, it is proper for the court to consider *the need for the evidence*; the tendency of the evidence to suggest an improper basis to the jury for resolving the matter, e.g., an emotional

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basis; the chain of inference necessary to establish the material fact; and the effectiveness of a limiting instruction, as well as *alternative methods of proof*.” Charles W. Ehrhardt, *Florida Evidence*, § 403.1 (2016 ed.)(emphasis added).

- 5 *Mansfield* cites to  *Gudinas v. State*, 693 So. 2d 953, 963 (Fla. 1997), which cites to  *Pope v. State*, 679 So. 2d 710, 713 (Fla. 1996), which cites to   *Nixon v. State*, 572 So. 2d 1336, 1342 (Fla. 1990), which cites to  *Gore v. State*, 475 So. 2d 1205, 1208 (Fla.1985), cert. denied, 475 U.S. 1031 (1986). *Gore*--which was decided twelve (12) years before *Old Chief*--appears to have invented the rule out of whole cloth.
- 6 Functional magnetic resonance imaging is a neuro-imaging technique that, by measuring differences in blood flow to different brain regions, allows researchers to identify which parts of the brain are engaged during various activities.
- 7 Daniel M. Wagner, *Ironic Processes of Mental Control*, 101 *Psychol. Rev.* 34 (1994)
- 8 Although David Sklansky posits that jury instructions need not be perfect and may have some positive effect, in many of the studies that he reviewed, the instructions given either were ineffective in getting jurors to disregard or compartmentalize the evidence or they backfired and made some evidence more salient.
- 9 One possible and less prejudicial alternative would be for any photographs of the decedents' dead bodies or the decedents' injuries be admitted in a black and white version. Research shows that black and white images reduce disgust reactions from jurors. See Salerno, Jessica M., *Seeing Red: Disgust Reactions to Gruesome Photographs in Color (but not in Black and White) Increase Convictions*, 23(3) *Psychol. Pub. Pol'y & L.* 336 (2017).

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