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# North Carolina's Test for Excess: The Prejudicial Use of Photographic Evidence in Criminal Prosecutions after State v. Hennis

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# North Carolina's "Test For Excess": The Prejudicial Use of Photographic Evidence in Criminal Prosecutions After *State v. Hennis*

A photograph stands as a "silent witness"[1] to the past. When the State offers a photograph in a criminal prosecution, the reality conveyed can be powerful—sometimes too powerful. The "vital, mirror-like appearance of a photograph makes it capable of inciting passions and prejudices of a jury, whereas a lifeless map or drawing of the same subject would not have this effect."[2] North Carolina cases long have recognized the potential that photographic evidence holds for unfair prejudice,[3] but, like most jurisdictions, these cases have taken a permissive attitude toward prosecutors using evidence to illustrate witness testimony.[4]

In *State v. Hennis*[5] the North Carolina Supreme Court held that the prejudicial use of victims' photographs in a homicide prosecution went beyond both the trial court's discretion to balance relevance against prejudicial effect[6] and the harmless error rule.[7] The court thus ordered a new trial.[8] In the process, the court framed a new "test for excess" to be used in scrutinizing photographic evidence, focusing on: 1) whether a photograph unduly reiterates evidence properly presented; 2) whether irrelevant portions of a photograph obscure the relevant portions; and 3) whether the "totality of circumstances composing [the] presentation" of such evidence requires its exclusion.[9]

This Note examines North Carolina case law before and after *Hennis* concerning the illustrative use of victims' photographs in criminal prosecutions. The Note argues that the *Hennis* test for excess provides courts with a sound and flexible standard for judging whether photographic evidence was used merely to inflame jury sentiment. The Note concludes that the *Hennis* holding does not greatly diminish the legitimate use of such evidence, but nonetheless

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1. 3 J. WIGMORE, EVIDENCE § 790 (Chadbourn rev. 1970).

2. C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1001 (2d ed. 1969).

3. Any evidence introduced that is adverse to a party is by definition prejudicial. Only that evidence which is "unfair[ly]" prejudicial is to be excluded. N.C. R. EVID. 403.

4. For a discussion of the North Carolina case law on the prosecution's use of photographs of victims, see *infra* notes 42-115 and accompanying text.

5. 323 N.C. 279, 372 S.E.2d 523 (1988).

6. *Id.* at 285-86, 372 S.E.2d at 526-27. For a discussion of the trial court's discretionary balancing powers, see *infra* note 49 and accompanying text.

7. The harmless error rule in the evidentiary context provides that when defendant has been prejudiced at trial by admission of improper evidence, a new trial will be granted only when there is a reasonable possibility that a different verdict would have been reached had the evidence been excluded. *See* N.C. GEN. STAT. § 15A-1443 (1988). For a discussion of the harmless error rule, see *infra* notes 107-15 and accompanying text.

8. The remand for a new trial in *Hennis* was the first such ruling by the North Carolina Supreme Court to be made solely on the ground of prejudicial use of victims' photographs. *See infra* note 180 and accompanying text. On April 19, 1989, the jury in Timothy Hennis' second trial acquitted him on all charges, the first acquittal in a new trial of a capital crime in North Carolina since the state reinstated the death penalty. Bolch & Ruffin, *Reasonable Doubt (A Three-Part Series)*, Raleigh News and Observer, May 7-9, 1989, at 1, col. 1.

9. *Hennis*, 323 N.C. at 285-86, 372 S.E.2d at 527.

indicates that the harmless error rule, coupled with traditional deference shown by appellate courts to the trial court's discretion, will no longer routinely cure any excessive use of photographs in which the prosecution indulges.

In *State v. Hennis* defendant was convicted of three counts of murder in the first degree and one count of rape in the first degree.[10] The victims were Kathryn Eastburn and her two daughters, three-year-old Erin and five-year-old Kara.[11] The victims were murdered in their home.[12] Autopsies revealed that the causes of death for all three victims were stab wounds and large cuts in their necks.[13] According to the North Carolina Supreme Court's majority opinion, the evidence against defendant was "chiefly circumstantial."[14]

The State took ninety-nine photographs of the crime scene and of the bodies at the autopsy.[15] Defendant made a pretrial motion requesting that the use of the photographs be prohibited or, in the alternative, that only one photograph per victim be admitted.[16] Defendant requested that the court review the State's use of the photographs "with an eye to possible excess."[17] The trial court reviewed the photographs and allowed a total of thirty-five crime scene and autopsy photographs to be offered at trial.[18]

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10. *Id.* at 280, 372 S.E.2d at 523-24.

11. *Id.* at 281, 372 S.E.2d at 525. In the sentencing phase of the trial, the jury found that the defendant's sparing the life of a third child, an infant girl, did not constitute a mitigating factor in the death penalty analysis. Record at 165, *Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988) (No. 499A86).

12. *Hennis*, 323 N.C. at 281, 372 S.E.2d at 525.

13. *Id.*

14. *Id.* The majority's finding that evidence against defendant was "chiefly circumstantial" was supported by fingerprints, pubic hair, bloodstains, and sperm found at the crime scene that could not be matched to defendant. *Id.* The testimony of one witness that he saw defendant leave the Eastburn home at 3:30 a.m. on Friday, May 10, 1985, was "revised" and tenuous. *Id.* at 282, 372 S.E.2d at 525. A second witness gave an "extremely tentative" identification. *Id.* The second witness told investigators in June 1985 that she " 'had not seen anyone' " at a bank when she made a withdrawal from an automated teller only minutes before Kathryn Eastburn's missing bank card was used to make a withdrawal. *Id.* Yet this witness picked defendant's photograph out of a lineup in April 1986, at which time she admitted to uncertainty as to whether she was identifying defendant from newspaper photographs or from seeing defendant outside the bank in May 1985. *Id.*

The dissenting opinion, written by Justice Mitchell and joined by Justice Meyer, argued that the trial court's "careful decision" to allow the use of photographs was not an abuse of discretion. *Id.* at 292, 372 S.E.2d at 531 (Mitchell, J., dissenting). Finding no error in the trial court's conduct, the dissent saw no need to undertake a harmless error analysis. Nonetheless, the dissent made its own sweep of the evidence against defendant and did not find the State's evidence "nearly so weak nor the eyewitness identification testimony nearly so 'tenuous' as d[id] the majority." *Id.* at 287-88, 372 S.E.2d at 528 (Mitchell, J., dissenting). In addition to the identifications, the dissent noted that witnesses had seen a white Chevrolet Chevette parked near the home of the victim the day before the murders and that defendant had such a vehicle. Witnesses also testified that defendant had been "systematically burning something in a barrel in his backyard . . . all during [the] day" of Saturday, May 11, 1985. *Id.* at 290, 372 S.E.2d at 530 (Mitchell, J., dissenting). Burned debris in the barrel was examined, but the fragments of terry cloth and paper could not be linked to the bath towels, bed linens, or papers discovered missing from the Eastburn home. *See id.* (Mitchell, J., dissenting). The dissent finally mentioned an "abundance of [additional] evidence." *Id.* (Mitchell, J., dissenting).

Justice Mitchell did not state explicitly that the evidence against defendant was so overwhelming that he would have found the admission of the photographic evidence to be harmless error, but his sympathetic survey of the State's evidence suggests as much.

15. *Id.* at 282, 372 S.E.2d at 525.

16. *Id.*

17. *Id.*

18. *Id.*

The State's presentation of its photographic evidence took a rather unorthodox form. The State made duplicate slides of the color and black and white photographs.[19] A screen of considerable proportions[20] was erected on the courtroom wall opposite the jury, enabling the jury to view two side-by-side images just above defendant's head.[21] Nine crime scene photographs of the victims' bodies were introduced and projected on the screen to illustrate the testimony of a deputy sheriff and a paramedic.[22] The remaining twenty-six autopsy slides of the victims' bodies were introduced to "illustrate [the] testimony [of the forensic pathologists] as to the nature and extent of the wounds."[23] Finally, the same thirty-five photographs were distributed to the jury one at a time in the form of eight- by ten-inch glossies.[24] The glossies were presented to the jury "unaccompanied by further testimony" in a process taking an hour.[25] Both the crime scene and autopsy photographs graphically displayed the head, chest, and neck wounds of the victims, but the autopsy photographs were "made all the more gruesome by the visible protrusion of organs, caused by process of decomposition."[26] The trial court, in its charge to the jury, included an admonition that the photographs were to be considered only " 'for the purpose of illustrating and explaining the testimony of the various witnesses . . . [and that they were not to] be considered . . . for any other purpose.' "[27]

Defendant was found guilty of murder in the first degree on each count and guilty of the first-degree rape of Kathryn Eastburn.[28] The jury sentenced defendant to death for the murder convictions and to life imprisonment for the rape conviction.[29]

Defendant appealed to the North Carolina Supreme Court.[30] One of defendant's numerous assignments of error was that the probative value of the photographic evidence was far outweighed by the prejudice arising from its use, so that defendant was deprived of a fair trial and due process on the issue of guilt.[31] The North Carolina Supreme Court held that "under the facts of this case, permitting the photographs with redundant content to be admitted into evidence and to be twice published to the jury was error."[32] The court held that because the "circumstantial" evidence against the defendant was not "over-

19. *Id.*

20. The screen measured seven feet, eight inches by five feet, six inches. *See id.*

21. *Id.* Defendant's brief alleged that the trial judge's order authorizing construction of the oversized screen violated a "standing order" issued by the senior resident superior court judge in Cumberland County. Defendant's Brief at 55 n.28, *Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988) (No. 499A86).

22. *Hennis*, 323 N.C. at 282-83, 372 S.E.2d at 525-26.

23. *Id.* at 283, 372 S.E.2d at 526.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* (quoting trial court's instruction to jury).

28. *Id.* at 280, 372 S.E.2d at 523-24.

29. *Id.*

30. "The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina . . . ." N.C. GEN. STAT. § 15A-2000(d)(1) (1988).

31. Defendant's Brief at 53.

32. *Hennis*, 323 N.C. at 286-87, 372 S.E.2d at 528.

whelming,"[33] the error was prejudicial and the case was remanded for a new trial.[34]

The court provided a detailed outline of the analysis to be used henceforth by trial courts in determining whether the State's presentation of photographs is more unfairly prejudicial than probative.[35] The *Hennis* test for excess is not a bright line formula, but rather a "totality of circumstances" analysis that scrutinizes both the content and the manner of use of the proffered photographs.[36] In determining the illustrative value, if any, of the photographs and weighing that value against the tendency of the evidence to prejudice the jury, a court must assess factors such as "[w]hat a photograph depicts, its level of detail and scale, whether it is color or black and white, a slide or a print, where and how it is projected or presented, [and] the scope and clarity of the testimony it accompanies."[37] A trial court must also "probe the relevance of the scene depicted and conclude that its irrelevant portions do not obscure those elements that are pertinent to the proffered testimony."[38] Finally, a trial court must determine that a photograph "does not unduly reiterate illustrative evidence already presented."[39] When a proffered photograph " 'add[s] nothing to the State's case,' "[40] that photograph has no probative value, and hence "nothing remains but its tendency to prejudice."[41]

Photographs can be offered as substantive evidence to prove the truth of that which is depicted.[42] Photographs also are admissible as demonstrative evidence, used to help the factfinder by illustrating the testimony of witnesses.[43]

In addition to the authentication requirement,[44] photographic evidence is

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33. *Id.* at 287, 372 S.E.2d at 528. For a discussion of the varying reactions of the majority and the dissent to the body of evidence against defendant, see *supra* note 14.

34. *Hennis*, 323 N.C. at 287, 372 S.E.2d at 528.

35. *Id.* at 285-86, 372 S.E.2d at 527.

36. *Id.* at 285, 372 S.E.2d at 527.

37. *Id.* The court borrowed factors set out in State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978) ("accuracy and clarity" of photographs, "inadequacy of testimonial evidence in relating the facts to the jury," and other factors are considered in determining if illustrative value is outweighed by inflammatory effect). Previously, North Carolina law had focused on the objection of "excessive cumulation" when attacking gruesome photographic evidence and had not considered fully that other presentation decisions might raise the prejudicial impact of the evidence to an impermissible level. For a discussion of prior North Carolina law dealing with the cumulative use of photographs of victims, see *infra* text accompanying notes 82-106.

38. *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. The court cited State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979), and State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969). For a discussion of *Johnson*, see *infra* text accompanying notes 108-15. For a discussion of *Mercer*, see *infra* text accompanying notes 89-98.

39. *Hennis*, 323 N.C. at 286, 372 S.E.2d at 527.

40. *Id.* (quoting State v. Temple, 302 N.C. 1, 14, 273 S.E.2d 273, 281 (1981)).

41. *Id.*

42. By statute, North Carolina law provides that "[a]ny party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements." N.C. GEN. STAT. § 8-97 (1981).

43. *Id.* (statute "does not prohibit" use of a photograph "solely for the purpose of illustrating the testimony of a witness").

44. *See* State v. Gardner, 228 N.C. 567, 573, 46 S.E.2d 824, 828 (1948) ("accuracy of a photograph must be shown by extrinsic evidence that the photograph is a true representation" of that which it purports to portray).

subject to the requirements of the North Carolina Rules of Evidence.[45] The evidence must meet the rule 401 requirement of relevance.[46] Evidence that satisfies rule 401 nevertheless may be excluded under rule 403 if its probative value is outweighed by danger of unfair prejudice, or by reason of needless cumulation.[47] In addition to the language of the rule, courts also are guided by the advisory committee's note, which counsels that in reaching a decision on whether evidence should be excluded due to unfair prejudice, the trial judge should consider "the availability of other means of proof."[48]

Under the North Carolina Rules of Evidence, admission of evidence is a matter within the discretion of a trial judge, reviewable only for abuse of that discretion.[49] The trial court's discretionary power frequently has been invoked as a curative of decisions admitting quantities of victims' photographs that arguably reached "excessive" levels. In *State v. Dollar*,[50] a decision that preceded adoption of the North Carolina Rules of Evidence,[51] defendant was convicted of armed robbery and the first-degree murders of a Wilkes County couple.[52] In addition to seven autopsy photographs, the State offered twelve photographs of the crime scene, three of which included the victims.[53] The court found "no merit" in defendant's assignment of error that the number of such photographs was excessive.[54] The court recognized that under North Carolina law an excessive number of gruesome photographs may not be admitted.[55] The court held

45. *Hennis*, 323 N.C. at 283, 372 S.E.2d at 526.

46. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. R. EVID. 401.

47. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. R. EVID. 403.

48. N.C. R. EVID. 403 advisory committee's note.

49. *See* State v. Mason, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). In *Mason* defendant objected to introduction of testimony about shoes worn by defendant that had been compared to a shoe print taken at the crime scene. *Id.* Defendant claimed that the testimony led to prejudicial references regarding his prior incarceration, during which incarceration it was alleged that defendant had obtained the shoes. *Id.* at 730-31, 340 S.E.2d at 435. The *Mason* court took note of a decision by the United States Court of Appeals for the Fourth Circuit holding that, under Federal Rule of Evidence 403, the decision to exclude evidence is a matter within the "sound discretion of the trial judge." *Id.* (citing State v. MacDonald, 688 F.2d 224, 227 (4th Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983)). The North Carolina court noted that federal rule 403 is identical to North Carolina rule 403 and adopted the *MacDonald* "discretion" rule for North Carolina. *Id.*; *cf.* C. MCCORMICK, EVIDENCE 385-86 (1954) (when demonstrative evidence is "circumstantial or inferential in its bearing," and the balance of probative value against undue prejudice wavers, the court "should lean toward admission").

50. 292 N.C. 344, 233 S.E.2d 521 (1977).

51. The North Carolina Rules of Evidence became effective in 1984. Act of July 7, 1983, ch. 701, § 3, 1983 N.C. Sess. Laws 684 (codified as amended at N.C. GEN STAT. § 8C-1 (1988).

52. *Dollar*, 292 N.C. at 346-47, 233 S.E.2d at 522.

53. Record at 89-99 & 107, *Dollar*, 292 N.C. 344, 233 S.E.2d 521 (1977) (No. 22).

54. *Dollar*, 292 N.C. at 354, 233 S.E.2d at 527.

55. *Id.* at 355, 233 S.E.2d at 527; *see also* State v. Mercer, 275 N.C. 108, 120, 165 S.E.2d 328, 337 (1969) ("an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial"); State v. Foust, 258 N.C. 453, 460, 128 S.E.2d 889, 894 (1963) (use of 10 photographs was "excessive" in light of defendant's stipulation to fact being illustrated). For a discussion of *Mercer* and *Foust*, see *infra* text accompanying notes 82-98.

that "[w]hat constitutes an excessive number of photographs must be left largely to the discretion of the trial court in the light of their respective illustrative values."[56] Here, the court found that the use of an unspecified "total number" of victims' photographs[57] was not an abuse of discretion, apparently because they portrayed "somewhat different scenes."[58] Because each photograph was "useful to illustrate a portion of the testimony . . . not illustrated by other photographs," the group of photographs was not repetitious.[59]

The degree of relevance required of photographic evidence in homicide prosecutions by North Carolina rule 401 has assumed a number of forms. Photographs can be used to illustrate anything that a witness may describe in words.[60] Photographs of victims have been admitted for the purpose of illustrating the testimony of doctors and forensic pathologists.[61] In *State v. Horton*[62] black and white photographs of the victim depicted facial wounds and fatal chest wounds sustained by gunshot.[63] "Both photographs were introduced into evidence to illustrate the testimony of [a doctor] in describing the wounds and giving his opinion as to the cause of death of the deceased."[64] This illustrative use was held to be valid, especially because the trial judge gave the "proper limiting instruction that the photographs were being admitted for the sole purpose of illustrating the testimony" of the doctor and not as substantive evidence.[65]

Photographs of victims have been introduced to illustrate testimony concerning the location of the body when found.[66] In *State v. Atkinson*[67] defendant was convicted and sentenced to death for the first-degree murder of his four-year-old stepdaughter.[68] Defendant's assignments of error included the introduction of photographs used to illustrate the "location and appearance of the place where the child's body was found buried and the condition of the body."[69]

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56. *Dollar*, 292 N.C. at 355, 233 S.E.2d at 527.

57. *Id.* The trial transcript reveals that the "total number" cryptically alluded to in the opinion was actually ten—seven autopsy photographs and three crime scene photographs. *See supra* text accompanying note 53. Under *Hennis*, this quantity might constitute undue reiteration. *See Hennis*, 323 N.C. at 286, 372 S.E.2d at 527.

58. *Dollar*, 292 N.C. at 355, 233 S.E.2d at 527.

59. *Id.* at 354, 233 S.E.2d at 527.

60. *See* State v. Holden, 321 N.C. 125, 140, 362 S.E.2d 513, 524 (1987) (witness can use photographs to illustrate competent testimony), *cert. denied*, 108 S. Ct. 2835 (1988).

61. *E.g.*, State v. Williams, 308 N.C. 47, 61-62, 301 S.E.2d 335, 344-45 (pathologist used photographs to illustrate testimony as to cause of death), *cert. denied*, 464 U.S. 865 (1983).

62. 299 N.C. 690, 263 S.E.2d 745 (1980).

63. *Id.* at 693, 263 S.E.2d at 748.

64. *Id.*

65. *Id.* The pattern instruction reads, "A photograph was introduced into evidence in this case for the purpose of illustrating and explaining the testimony of a witness. This photograph may not be considered by you for any other purpose." NORTH CAROLINA PATTERN JURY INSTRUCTIONS, Crim. § 104.50 (1986).

66. *See, e.g.*, State v. Elkerson, 304 N.C. 658, 665, 285 S.E.2d 784, 789 (1982) (five photographs illustrated location of body when found); State v. Gardner, 228 N.C. 567, 573, 46 S.E.2d 824, 828 (1948) (three photographs showed condition of house after homicide and location of body when found).

67. 275 N.C. 288, 167 S.E.2d 241 (1969), *rev'd on other grounds*, 403 U.S. 948 (1971).

68. *Id.* at 295-96, 167 S.E.2d at 244-46.

69. *Id.* at 310, 167 S.E.2d at 254.

The court cited numerous North Carolina authorities suggesting that

> [t]he fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence, when properly authenticated as a correct portrayal of conditions observed by and related by the witness who uses the photograph to illustrate his testimony.[70]

A witness can use photographs to illustrate " 'anything it is competent for him to describe in words.' "[71] Therefore, a witness in a homicide prosecution can use photographs "showing the condition of the body when found, the location where found and the surrounding conditions at the time the body was found" if those photographs "accurately portray" the "gruesome spectacle and horrifying events" about which the witness testifies.[72]

Photographs of victims have been held to be relevant when used to prove elements of the crime, as when the State seeks to establish *corpus delicti*[73] or the premeditation required in first-degree murder prosecutions.[74] In *State v. Patterson*[75] defendant was convicted of the first-degree murder of his daughter, who had recently prosecuted an action against him.[76] Defendant's signed confession stated that he gave the victim fifteen minutes to leave the house and when the fifteen minutes were up, she was still arguing, so he killed her with a meat cleaver.[77] Defendant stipulated to the cause of death—"massive blood loss from deep lacerations of the face, neck, and head caused by a sharp, heavy instrument"—but argued that there was insufficient evidence to carry the issue of premeditation and deliberation to the jury.[78] Defendant also contended that the admission of two photographs of the victim, in light of the stipulation as to cause of death, served only to inflame the jury and unfairly prejudice the defendant.[79] The court held that "in a first degree murder case premeditation and deliberation may be proved circumstantially by showing the use of grossly excessive force or by proof of the brutal manner of killing."[80] A stipulation as to cause of death will not preclude "testimony describing in detail the manner of killing,

70. *Id.* at 311, 167 S.E.2d at 255; *see* State v. Porth, 269 N.C. 329, 337, 153 S.E.2d 10, 16 (1967); State v. Rogers, 233 N.C. 390, 395, 64 S.E.2d 572, 576 (1951); State v. Gardner, 228 N.C. 567, 572, 46 S.E.2d 824, 827-28 (1948).

71. *Atkinson*, 275 N.C. at 311, 167 S.E.2d at 255 (quoting *Gardner*, 228 N.C. at 572, 46 S.E.2d at 828).

72. *Id.*

73. *See, e.g.*, State v. Taylor, 294 N.C. 347, 350, 240 S.E.2d 784, 785-86 (1978) (single photograph relevant for showing *corpus delicti*). The term *corpus delicti* refers to "[t]he body of a crime. The body (material substance) upon which a crime has been committed, *e.g.*, the corpse of a murdered man, the charred remains of a house burned down." BLACK'S LAW DICTIONARY 310 (5th ed. 1979).

74. *See, e.g.*, State v. Lester, 294 N.C. 220, 228, 240 S.E.2d 391, 398 (1978) (photograph admissible to establish premeditation element of first-degree murder).

75. 288 N.C. 553, 220 S.E.2d 600, *modified*, 428 U.S. 904 (1971).

76. *Id.* at 555-58, 220 S.E.2d at 603-05.

77. *Id.* at 558, 220 S.E.2d at 605.

78. *Id.*

79. *Id.* at 570, 220 S.E.2d at 613.

80. *Id.* at 570-71, 220 S.E.2d at 613 (citation omitted).

and photographs, properly authenticated, may be offered to illustrate this testimony."[81]

Despite the general rule that relevant photographs are admissible even if grotesque, a line of North Carolina cases lays out an exception to the rule when the number of photographs presented by the State is excessive. In *State v. Foust*[82] defendant was convicted of murder in the second degree.[83] Defendant stipulated that the cause of death was a gunshot wound caused by the gun held in the State's possession.[84] The State offered into evidence "ten gory photographs in color of the dead body of [the victim], and had the coroner explain his testimony as to the death wound in her chin in respect to each photograph in detail."[85] While reiterating the general rule that gruesomeness alone will not render inadmissible an otherwise authenticated photograph,[86] the court held, with no elaboration, that "under the circumstances here it seems there was an excessive use of these ten photographs by the State."[87] Presumably the use of ten photographs to illustrate one wound constituted duplicative, and perhaps also unfairly prejudicial, use of photographic evidence. Defendant's case was remanded for a new trial for this error as well as for the prejudicial error of submitting the question of second-degree murder to the jury where there was no evidence of malice in the killing.[88]

North Carolina extended the *Foust* "excessiveness" exception in *State v. Mercer*.[89] The *Mercer* court took note of defendant's assignment of error relating to the use of photographic evidence, although this assignment of error was not the basis of the court's reversal.[90] The court cited the parsimonious *Foust* opinion[91] for the proposition that where a "prejudicial photograph is relevant, competent and therefore admissible, the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors."[92]

The *Mercer* court then applied the *Foust* rule to the exhibits offered at trial. Three photographs representing the front door, lock, and interior of the house where the crimes occurred were properly admitted.[93] Three photographs of an adult victim clothed and lying on a bed, and one photograph of a bloodstain on

81. *Id.* at 571, 220 S.E.2d at 613; *see also* State v. Elkerson, 304 N.C. 658, 665, 285 S.E.2d 784, 789 (1982) (stipulation does not affect state's burden to prove its entire case).

82. 258 N.C. 453, 128 S.E.2d 889 (1963).

83. *Id.* at 454, 128 S.E.2d at 890.

84. *Id.* at 460, 128 S.E.2d at 894.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 458, 128 S.E.2d at 893.

89. 275 N.C. 108, 165 S.E.2d 328 (1969).

90. *Id.* at 120, 165 S.E.2d at 337.

91. *See supra* text accompanying notes 82-88.

92. *Mercer*, 275 N.C. at 120, 165 S.E.2d at 337.

93. *Id.*

the bed where the five-year-old victim was found were admitted.[94] The court held that these four photographs "were competent to illustrate the testimony," and that whether all or only a few of them should have been admitted was a decision within the trial judge's discretion.[95] The court then scrutinized three photographs of the child victim taken at the funeral that showed entry and exit bullet wounds.[96] The court held that "[t]hese photographs, depicting scenes which are poignant and inflammatory, ha[d] no probative value in respect of any issue for determination by the jury," especially since the evidence as to cause of death was uncontradicted and tended to show the boy was lying on the bed when shot.[97] Finally, a single photograph of the second adult victim taken at the funeral home was mentioned in this advisory opinion directed to the trial court upon remand. The appellate court refrained from any explicit ruling, but noted that "it would seem the observations with reference to the photographs depicting the dead body of [the child] would be applicable to this photograph depicting the dead body of [the adult]."[98]

The court likewise expressed its disfavor of the excessive use of victims' photographs in *State v. Sledge*.[99] In *Sledge* defendant had been convicted of two second-degree murders and given two consecutive life sentences.[100] Defendant excepted to the State's introduction of nine photographic slides, four of one victim and five of the other.[101] The court noted that the photographs in question were taken after the bodies had been exhumed for a second autopsy, more than two months after the date of death.[102] Not surprisingly, the photos were "somewhat more gory and gruesome" than ordinary, owing to decomposition.[103] Noting the highly "gory" nature of the murder scene itself, the court held that "[n]ormal human revulsion could be accented but little by viewing the photographs."[104] The State "likely could have illustrated the medical testimony fully as well with fewer pictures," and "[e]xcessive use of photographs is not favored."[105] Nonetheless, the court held that the use of the photographs did not rise to the level of excess prohibited in *Mercer* and *Foust* and that the trial court had not abused its discretion in admitting them.[106]

A new trial will be granted to a defendant against whom unduly prejudicial

94. *Id.*
95. *Id.*
96. *Id.* at 121, 165 S.E.2d at 337.
97. *Id.*
98. *Id.*
99. 297 N.C. 227, 254 S.E.2d 579 (1979).
100. *Id.* at 228, 254 S.E.2d at 580.
101. *Id.* at 230-31, 254 S.E.2d at 582.
102. *Id.* at 231, 254 S.E.2d at 582.
103. *Id.*
104. *Id.*
105. *Id.* at 231-32, 254 S.E.2d at 583. Courts in other jurisdictions likewise have faced the questions whether and how to limit the ability of the prosecution to introduce gruesome photographic evidence by scrutinizing the presentation with an eye toward excess and unfair prejudice. An encyclopedic survey of the cases is provided in Annotation, *Admissibility of Photograph of Corpse in Prosecution for Homicide or Civil Action for Causing Death*, 73 A.L.R.2D 769 (1960).
106. *Sledge*, 297 N.C. at 231, 254 S.E.2d at 582.

photographic evidence has been used only when there is a reasonable chance that a different verdict would have been reached had the evidence not been admitted.[107] In *State v. Johnson*[108] defendant was convicted of first-degree murder of a ten-year-old boy.[109] The State introduced five photographs of the victim's body, one of which was among fourteen photographs ordered suppressed pursuant to a pretrial motion.[110] Four photographs "show[ed] portions of the victim's body, apparently dismembered by wild animals, found some two months after the killing."[111] A fifth photograph portrayed nylon cord around the victim's neck, which corroborated defendant's confession as to the cause of death.[112] Since no evidence existed that defendant had mutilated the victim, the four "repetitive" photographs were not relevant to the determination of any material fact at issue.[113] The court held that the introduction of this evidence was prejudicial error only in the sentencing phase of the trial.[114] A new trial was granted for sentencing, but "in view of the overwhelming evidence of guilt," the introduction of the photographs was harmless error with respect to the determination of guilt.[115]

Against this background of law, the *Hennis* court formulated its test for excess.[116] The court then applied its test to the facts of *Hennis*. Finding that the trial court had appropriately determined that many of the ninety-nine photographs initially proffered were repetitious and inadmissible, the court neverthe-

107. *See* N.C. GEN. STAT. § 15A-1443(a) (1988).

108. 298 N.C. 355, 259 S.E.2d 752 (1979).

109. *Id.* at 358, 259 S.E.2d at 755.

110. *Id.* at 376, 259 S.E.2d at 765.

111. *Id.*

112. *Id.* at 377, 259 S.E.2d at 766.

113. *Id.*

114. *Id.* at 377-78, 259 S.E.2d at 766; *but see* State v. Kornahrens, 290 S.C. 281, 289, 350 S.E.2d 180, 186 (1986) (photographs of victims that "most likely would have been inadmissible in the guilt phase . . . were relevant in the sentencing phase to show the circumstances of the crime and the character of the defendant"), *cert. denied*, 107 S. Ct. 1592 (1987).

In Thompson v. Oklahoma, 108 S. Ct. 2687 (1988), the United States Supreme Court was presented with the issue whether improper photographic evidence that a state court determined was harmless error at the guilt phase violated a capital defendant's constitutional right to a fair trial if it also was considered at the sentencing phase. The Court disposed of the case on the basis of another issue and therefore declined to address the photographic evidence question. *Id.* at 2700. Justice Scalia, dissenting, did reach the issue, however, and stated that the photographs, "showing gunshot wounds . . . and knife slashes," were probative of the heinous nature of the crime. *Id.* at 2722 (Scalia, J., dissenting). Justice Scalia noted that the Court has "never before held that the excessively inflammatory character of concededly relevant evidence can form the basis for a constitutional attack," and the Justice declined to take that step in *Thompson*. *Id.* (Scalia, J., dissenting). "If there is a point at which inflammatoriness so plainly exceeds evidentiary worth as to violate the federal Constitution, it has not been reached here." *Id.* (Scalia, J., dissenting). The Supreme Court, he stated, does not sit to review state evidentiary matters such as the balancing of relevance and prejudice. *Id.* (Scalia, J., dissenting).

115. *Johnson*, 298 N.C. at 376, 259 S.E.2d at 766. The court reached a similar conclusion regarding irrelevant photographs in State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981). In *Temple* the court held that the State's introduction of several photographs, "particularly those taken of the body lying in the casket, add[ed] nothing to the State's case and would have been better left unpresented." *Id.* at 14, 273 S.E.2d at 281. The assignment of error, however, was overruled. *Id.* Evidence of defendant's guilt was overwhelming and the use of the photographs was "harmless error beyond a reasonable doubt." *Id.*

116. For a discussion of the elements of the *Hennis* test for excess, see *supra* text accompanying notes 9 & 35-41.

less concluded that "many other photographs with repetitive content" had been admitted erroneously.[117] A slide depicting a child's neck wound was used to illustrate the testimony of one of the pathologists, who was unable to make use of the photograph in any manner other than by making a pro forma "identification"[118] of the content, and who then revealingly said, "This looks like the one we saw before."[119] Several color slides of the same victim's neck wound taken at the autopsy also were used by the witness to illustrate testimony about "different facts."[120] While this would appear to satisfy formal requirements,[121] the court undertook its undue reiteration analysis and held that these autopsy slides "cannot be said to have added anything in the way of probative value" to the crime scene slides showing the same wound.[122] The long-established use of autopsy photographs[123] was expressly approved by the court, but under these facts the "majority of the twenty-six [autopsy] photographs . . . added nothing to the state's case" as already presented by crime scene testimony and the accompanying slides.[124] The majority of autopsy photographs lacked "additional probative value" and, therefore, the photographs, which were "grotesque and macabre in and of themselves," held only the potential for inflaming the jurors.[125]

Apparently, the court was satisfied that the rule 401 relevance of the photographs was established[126] and that "irrelevant portions" did not obscure the illustrative elements of testimony.[127] The court found that under the "totality of circumstances composing [the] presentation"[128]—the first consideration in the *Hennis* test for excess—the prejudicial effect of the repetitive usage of photography was "compounded."[129] The court held that the prejudicial impact of the slides was "quite probably enhanced" by their projection onto an "unusually large screen on a wall directly over defendant's head such that the jury would

117. *Hennis*, 323 N.C. at 286, 372 S.E.2d at 527.

118. *Id.* The *Hennis* court disapproved of photographs that could not be used to illuminate testimony, but only to display a violent image to the jury. The type of pro forma identification made by the pathologist in *Hennis*, however, should not be confused with the type of identification that is required for authentication of photograph. *See* State v. Rogers, 233 N.C. 390, 395, 64 S.E.2d 572, 576 (1951) (photographs admissible only after witness identified them and "stated that they were correct and true representations of the body of the deceased, and of the place where it was found"); State v. Gardner, 228 N.C. 567, 573, 46 S.E.2d 824, 828 (1948) (for authentication purposes, "correctness of [photographic] representation may be established by any witness who is familiar with the scene, object, or person portrayed, or is competent to speak from personal observation").

119. *Hennis*, 323 N.C. at 286, 372 S.E.2d at 527.

120. *Id.* at 286, 372 S.E.2d at 528.

121. "Ordinarily photographs are competent to be used by a witness to explain or to illustrate anything it is competent for him to describe in words." *Gardner*, 228 N.C. at 572, 46 S.E.2d at 828.

122. *Hennis*, 323 N.C. at 286, 372 S.E.2d at 527-28.

123. *See, e.g.*, State v. Williams, 308 N.C. 47, 61, 301 S.E.2d 335, 345 (illustrative use by pathologist is proper to help describe size, number and location of wounds and marks observed during autopsy), *cert. denied*, 464 U.S. 865 (1983).

124. *Hennis*, 323 N.C. at 286, 372 S.E.2d at 528.

125. *Id.*; *cf.* State v. Murphy, 321 N.C. 738, 741, 365 S.E.2d 615, 617 (1988) (each autopsy photograph "showed something different" and was admissible).

126. For the language of North Carolina rule 401 concerning relevance, see *supra* note 46.

127. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

128. *Id.*

129. *Id.* at 286, 372 S.E.2d at 528.

continually have him in its vision as it viewed the slides."[130] Additionally, the court found excessive another aspect of the State's presentation: Immediately prior to resting its case, the State distributed to each juror eight-by-ten glossies of the thirty-five approved images already shown in slide form.[131] The State thus presented twice a set of photographs that would have been repetitive and prejudicial had they been published only once, excess upon excess. Additionally, the distribution of the glossies was excessive in its "slow, silent manner of . . . presentation; it did not illustrate any new testimony, but served merely to highlight the close of the State's presentation of evidence."[132] Applying its newly formulated test for excess to the facts of *Hennis*, the court held that "permitting the photographs with redundant content to be admitted into evidence and to be twice published to the jury was error."[133]

What effects will *Hennis* have on the ways in which prosecutors use photographs of victims? *Hennis* is the most significant case to date under North Carolina law concerning evidentiary use of photographs of crime victims because it sets forth a more comprehensive and demanding standard for admissibility than had previously existed. Before *Hennis*, courts showed great deference to prosecutorial attempts to use photographic evidence that had a potentially inflammatory impact, limiting exclusion to excessively duplicative instances and using the harmless error rule to bail out errant prosecutors who had built otherwise strong cases against defendants. With *Hennis*, the court left in place the use of photographs in a prosecution, but placed limits on the use of gruesome photographs—limits which signal to trial courts that they now must take more seriously the power of photographs and the potential for their abuse. Implicit in the court's fashioning of a test for excess is the fact that a presentation of photographic evidence now carries with it a more exacting duty to make that presentation responsibly.

While gruesomeness alone still will not render a photograph inadmissible, courts are directed to scrutinize each gruesome photograph and determine whether, in light of a number of factors, the photograph's probative value outweighs any potential prejudicial effect.[134] Content is but one factor in this totality of circumstances analysis.[135] In addition to looking at what is depicted, courts weighing prejudice against probativeness now have been instructed to consider fully what film critics sometimes call "production values." Decisions about the medium (slide or photograph), size of the image, amount of detail shown, and whether the photograph is in color or black and white,[136] may con-

130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 286-87, 372 S.E.2d at 528.
134. *Id.* at 285, 372 S.E.2d at 527.
135. *Id.*
136. *But see* State v. Boyd, 287 N.C. 131, 141, 214 S.E.2d 14, 20 (1975) (use of color photograph when black and white photograph depicting essentially the same scene was available was not error). Aside from mentioning color as one of the factors to be considered in the presentation analysis, the *Hennis* court did not otherwise address the issue. *See Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. In his brief defendant argued that the trial court should have granted his pretrial motion to restrict the

tribute to a finding of prejudicial effect outweighing probative value.[137]

Projection of slides onto a courtroom screen was not held to be improper under *Hennis*, but the use of an "unusually large" screen, coupled with its placement in almost symbolic conjunction with the location of the accused, was such that the court held the already prejudicial effect of the slides to have been "quite probably enhanced."[138] The equivocal language used by the court indicates that a more neutral and balanced approach to the use of slides likely will pass muster, but the totality of circumstances approach now allows such factors as size and location of the screen to be considered.

Further, defendant's brief vigorously argued the impropriety of the prosecution's "*ex parte* application [to the trial judge] to construct a screen" in the courtroom.[139] Defendant argued that this "improper *ex parte* communication between the State and the trial judge . . . had the *de facto* effect of allowing the decision on a crucial evidentiary question to be made in the absence of the Defendant and his trial counsel, to the prejudice of the Defendant."[140] The *Hennis* court, either inadvertently or studiously, chose not to pass on the propriety of such an application made outside the presence of defendant's counsel.

Thus, *Hennis* requires that trial judges act as censors of insensitive and unfairly prejudicial "presentation" decisions made by the prosecution. In addition to watching for irrelevant and unduly reiterative photographic evidence,[141] they are charged with the task of making sure that the totality of circumstances does not cross the line from an adversarial proceeding founded on sober evidentiary principles to a dramatic and inflammatory show. Despite a long and colorful history,[142] recently there has been an increasing sense that the skillful use of demonstrative evidence is an essential part of advocacy in modern litigation.[143] Those qualities of demonstrative evidence that make for good advocacy also make it a sensitive area deserving close judicial scrutiny: its concreteness, its vividness, and its direct appeal to the senses.

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exhibits to black and white photographs instead of color, or in the alternative, color photographs instead of color slides. Brief for Defendant at 56. The court's silence on the issue of color does not illuminate further its inclusion of color among the presentation factors. The other errors committed were sufficient for reversal, so the court did not elaborate on the use of color.

137. *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

138. *Id.* at 286, 372 S.E.2d at 528.

139. Brief for Defendant at 74.

140. *Id.*

141. Presentation decisions made by the defense also must be scrutinized, of course. For obvious reasons the presentation of gruesome photographs is almost always a prosecutorial matter. *See* L. DODD, THE USE OF DEMONSTRATIVE EVIDENCE IN A CRIMINAL TRIAL: A PICTURE COULD BE WORTH A THOUSAND YEARS 6 (The North Carolina Academy of Trial Lawyers Seminar, "The Eight Hottest Issues in Criminal Law" 1987).

142. One of the oldest and most treasured cases of the commentators in this area remains a case described in 4 J. WIGMORE, EVIDENCE § 1157 (3d ed. 1940). The black dress worn by the victim of the murderous rage of a " 'disappointed lover' " was presented to the jury, " 'but no stain was observable, no excitement was produced.' " *Id.* (quoting D. BROWN, THE FORUM 448 (1834)). Then the State " 'produced some of the white undergarments—corsets, etc. all besmeared with human blood.' " *Id.* (quoting D. BROWN, THE FORUM 448 (1834)). From that point on, " 'the current of opinion continued to run against the defendant . . . until the close of the case, and finally bore him into eternity.' " *Id.* (quoting D. BROWN, THE FORUM 448 (1834)).

143. *See* L. DODD, *supra* note 141, at 1.

In addition to production values, content remains significant. Irrelevant portions of a photograph may obscure relevant elements.[144] The "scope and clarity" of the testimony is scrutinized to see how it relates to the photograph that purports to illustrate it.[145] A witness cannot be used merely as a vehicle to introduce a photograph when the witness, beyond identifying it, cannot make from it any other significant illustrative use.[146] A court can find that a given photograph, used properly by one witness, cannot be used by another witness who purports to use the photograph to illustrate "different facts."[147] One such additional usage, following *Hennis*, could constitute undue reiteration.[148]

The State's brief provides an example of an approach to the use of photographic evidence that *Hennis* implicitly disfavors.[149] In *State v. Dollar*[150] the proffered photographs provided depictions of "the bodies of [the victims] as they lay in the living room of the home and in the tool shed and of the areas surrounding them."[151] The *Dollar* court held that the fact that the photographs "portrayed somewhat different scenes" meant that the trial court had not abused its discretion.[152] In *Hennis* the State extended the *Dollar* argument and asserted that the photographs were not unduly reiterative because technically they illustrated discrete facts.[153] The State argued that the photographs depicted different scenes,[154] angles,[155] slides,[156] orientations,[157] perspectives,[158] positions,[159] and wounds.[160] All of these "different" photographs, the State argued, served different evidentiary purposes and hence were not repetitious.[161] In sharp contrast to the holding of *Dollar*, the *Hennis* court repudiated this detached, mechanical approach to the evidence. The *Hennis* court rejected an overly technical compliance with the rules and opted for a more flexible totality of circumstances approach,[162] along with a sensitivity to "undu[e] reiterati[on]."[163]

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144. *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

145. *Id.* at 285-86, 372 S.E.2d at 527-28.

146. *Id.* at 286, 372 S.E.2d at 527-28; *see supra* note 118.

147. *Hennis*, 323 N.C. at 286, 372 S.E.2d at 527-28.

148. *Id.* at 286, 372 S.E.2d at 527.

149. *See* Brief for State at 35-41, *Hennis* (No. 499A86).

150. 292 N.C. 344, 233 S.E.2d 521 (1977). For a discussion of *Dollar*, see *supra* text accompanying notes 50-59.

151. *Dollar*, 292 N.C. at 354, 233 S.E.2d at 527.

152. *Id.* at 355, 233 S.E.2d at 527; *see also* State v. Williams, 308 N.C. 47, 62, 301 S.E.2d 335, 345 ("each slide had distinct probative value"), *cert. denied*, 464 U.S. 865 (1983); State v. Bock, 288 N.C. 145, 156-57, 217 S.E.2d 513, 520 (1975) (five photographs of partially clad female victim "in different positions" at scene of crime admissible as showing her wounds and illustrating testimony of those that found her), *death sentence vacated*, 428 U.S. 903 (1976).

153. Brief for State at 35.

154. *Id.* at 35, 41.

155. *Id.* at 41.

156. *Id.* at 40.

157. *Id.* at 41.

158. *Id.* at 39.

159. *Id.*

160. *Id.* at 41.

161. *Id.* at 35.

162. *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

163. *Id.* at 286, 372 S.E.2d at 527.

An important consideration for the prosecution following *Hennis* is the individualized treatment each photograph must now receive. Each photograph is to be analyzed to determine whether its characteristics, combined with its presentation, rise to an impermissibly inflammatory level.[164] Likewise, individual photographs are to be analyzed to see that each one lacks irrelevant elements,[165] and that each photograph does not unduly reiterate a photograph previously offered.[166]

The *Hennis* court's treatment of autopsy slides duplicating crime scene slides is also important for prosecutors to consider. While autopsy photographs per se are not disapproved under *Hennis*, they must not depict or illustrate facts that crime scene photographs already have depicted.[167] Both types of photograph traditionally have been utilized, but the State cannot rely on the use of two different settings to make the same evidentiary point twice. The prosecution is forced to choose between a crime scene and an autopsy photograph in order to avoid a finding of duplication and cumulation.

The State argued in its brief that

> each photograph and slide was relevant to illustrate and prove a lack of provocation; the manner and means by which the killings were carried out, including the force used; the dealing of lethal blows as the victims were helpless; the nature and number of wounds; and the extreme brutality of all three killings.[168]

The State's brief characterized the defendant's position as maintaining that "the more vicious, the more brutal, and the more heinous the murder, the more limited the State should be in proving malice, a specific intent to kill, and premeditation and deliberation."[169] But the *Hennis* court, far from placing unduly severe limits on prosecutors who are trying especially heinous crimes, simply has recognized that heinousness and premeditation cannot be proven by testimony and photographs that seek, through subtle or not so subtle presentation decisions and unduly reiterative imagery, to go beyond proof of the elements and instead attempt to manipulate jurors into making their decision on a "purely emotional basis."[170]

The implications of *Hennis* for defense counsel follow naturally from those of the prosecution. When the State uses photographic evidence in discovery, any pretrial motion made by defense as to the admissibility of the evidence should

164. *Id.* at 285, 372 S.E.2d at 527.

165. *Id.*

166. *Id.* at 286, 372 S.E.2d at 527.

167. *Id.* at 286, 372 S.E.2d at 527-28.

168. Brief for State at 35. The State argued that, even considering defendant's stipulation as to cause of death, those aspects of premeditation and deliberation that are required to be shown in a first-degree murder case made the photographs relevant in assisting the witnesses. *Id.* The *Hennis* court reaffirmed the traditional rule, discussed *supra* note 81 and accompanying text, that a defendant's stipulation to a fact constituting a material element of the crime does not relieve the prosecution of its burden to prove all the elements of the crime. *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526. Nevertheless, the court made it clear that limits exist on the amount of gruesome photographic evidence that can be admitted. *Id.*

169. Brief for State at 42.

170. N.C. R. EVID. 403 advisory committee's note.

aggressively press for stringent limits on number and presentation and should insist that photographs be proffered only to illustrate that which it is competent to prove by testimony. When engaged in an out-of-court conference with the prosecution and trial judge, defense counsel faces the tricky task of preserving objections for appeal, forcefully arguing the law, and avoiding an obstructive appearance or otherwise alienating the trial judge. If the *Hennis* trial is any guide, what transpires in such a conference comes to resemble a negotiation, with the prosecution withdrawing some quantity of clearly irrelevant or repetitive photographs, while pushing aggressively for the admission of others.[171] Defense counsel raises objections to specific photographs, and to improper uses of photographs for illustrative purposes, as when "irrelevant portions" obscure the pertinent portions.[172]

Finally, defense counsel should be prepared to object to those aspects of the presentation which heighten prejudicial effect. Any attempt to manipulate the presentation media, such as unconventionally placed screens, excessive magnification, skillful accumulation, or other photographic impurities[173] are suspect under *Hennis*, and defense counsel should (as with all demonstrative evidence) be sensitive to such matters of presentation. Defense counsel should attempt, by objection, negotiation, and more subtle conversion,[174] to mitigate their effectiveness while preserving defendant's appeal.

The *Hennis* decision, with its framework for testing excessive use of other-

171. *See* Brief for State at app.

172. *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527; *see* State v. Temple, 302 N.C. 1, 14, 273 S.E.2d 273, 281 (1981) (photographs of body lying in casket add nothing to doctor's testimony); State v. Mercer, 275 N.C. 108, 121, 165 S.E.2d 329, 337 (1969) (photographs of victim at funeral home). For a few remarkable examples of such evidence from other jurisdictions, see Hrabak v. Madison Gas & Elec. Co., 240 F.2d 472, 479 (7th Cir. 1957) (in civil case, court excluded photographs of plaintiff that showed his face distorted with pain while being treated for his injuries); People v. Burns, 109 Cal. App. 2d 524, 533, 241 P.2d 308, 318-19 (1952) (photographed victim exhibited a shaved head, surgical cuts and punctures, and lips held "practically . . . inside out" with surgical instruments, making such a "grotesque and horrible [image] that it is doubtful if the average juror could be persuaded to look at the pictures while the witness pointed out the bruises and abrasions"). For abuses of demonstrative evidence generally, see Knowles v. Crampton, 55 Conn. 336, 338, 11 A. 593, 594 (1887) (in civil action, a section of a cadaver was offered to show that no ribs were located in a particular place in human body); Commonwealth v. Morgan, 358 Pa. 607, 611-13, 58 A.2d 330, 332-33 (1948) (prosecutrix of rape charge was ordered to get up on a table and demonstrate in open court the position she was in when her doctor, during examination, allegedly raped her; court strongly condemned the action, noting that the "goddess of Justice is not prurient"). The use (or abuse) of one famous crime film is reported in J. KIRKWOOD, AMERICAN GROTESQUE 316-19 (1968). Mr. Kirkwood reports that in the trial of Clay Shaw, who was acquitted of conspiracy to kill President John F. Kennedy, the trial judge allowed the famous "Zapruder film" to be shown to jury a total of five times in one day, including one "meticulous frame-by-frame stop action depiction." *Id.* at 318. The author comments that, observing the trial that day, he "could not help wonder if the [jury] would be swayed to extract a toll for that tragic and freakish shot from the only person ever brought to trial for the brutal technicolor murder which had been run off for them in such graphic detail." *Id.* at 319.

173. *See* Faught v. Washam, 329 S.W.2d 588, 600 (Mo. 1959) (court took judicial notice of the natural color of limbs and "perceive[d] the probable inflammatory impact of such photographs depicting sympathy-provoking injuries in 'high and unrealistic colors' ").

174. *See* L. DODD, *supra* note 141, at 11. Mr. Dodd recommends that defense counsel must "participate in and be a part of [the State's demonstrative evidence] . . . so as to lessen [its] impact . . . [and] associate himself and his credibility with that of the credibility of the State's evidence." *Id.* This can be done by assisting the State in setting up its exhibits or by positioning the exhibits for the jury's benefit. *Id.*

wise competent gruesome photographs, adds a layer of reasoning on the North Carolina case law that may or may not significantly affect the ways in which such evidence is used. Prosecutors who are wary of the potentially broad sweep of a totality of circumstances test affecting the way they conduct their cases may take comfort in the thought that the facts of *Hennis* that resulted in a new trial are arguably an extreme example of poor prosecutorial judgment and highly forgiving trial court discretion. *Hennis* approaches the outer boundary of behavior in this area, and prosecutorial decisions and trial discretion that fall well short of the distressing facts of *Hennis* are likely to avoid reversal, as discretion in this area, even under the new *Hennis* test for excess, remains broad. *Hennis* stuck close to North Carolina precedent,[175] preserving traditional usages of photographs but adding a flexible, discretion-oriented "circumstances" test designed to address flagrant abuse of the "presentation" process. By avoiding transparently abusive tactics of presentation, prosecutors can continue to use photographs of victims to illustrate competent testimony and thereby prove those elements of the case they must in order to obtain a guilty verdict. More radical measures contemplated by the holdings and dicta of other jurisdictions were avoided, such as the "Pennsylvania Rule" urged by defendant's brief, which requires that photographs be "of such essential evidentiary value that their need clearly outweighs the likelihood of inflaming the minds and passion of the jury."[176] The "Pennsylvania Rule" builds into photographic evidence an inherent level of prejudice that raises the requirement that evidence be relevant to a

175. The *Hennis* court did cite prominently one case from another jurisdiction: State v. Banks, 564 S.W.2d 947 (Tenn. 1978). In *Banks* defendant was convicted of second-degree murder and sentenced to 99 years' imprisonment. *Id.* at 948. The State introduced color slides and prints "depicting the victim's battered head and body." *Id.* Defendant objected that the photographs "were not relevant to any contested issue." *Id.* The court held that the photographs were relevant to the issue of deliberation, but adopted as "fair and just" the rule that even relevant evidence should not be admitted if its prejudicial effect exceeds its probative value. *Id.* at 951. The court stated that the "inherently prejudicial character of photographic depictions of a murder victim" requires scrutiny of factors that may enhance or mitigate that prejudicial character. *Id.* The court also stated that the pathologist's testimony about the victim's injuries "gave more information about them than the photographs do" and was "readily understandable without a pictorial portrayal." *Id.* at 952. Expressing skepticism about the mechanical use of photographs as illustrative evidence accompanying testimony, the court stated that "[a] case can be imagined in which a photograph could supplement the medical testimony to give a better understanding of the number of wounds inflicted and the manner in which the killing was carried out, but this was not one." *Id.* Finally, the Tennessee Supreme Court noted that the trial court's failure to include in the trial record the reasons for admitting the photographs was "an omission of some seriousness," as the appellate courts were then forced to second-guess the trial court in assessing possible abuse of discretion. *Id.* The *Banks* court held that while the prejudicial effect of the photographs "far outweighs their probative value," the error was harmless, since the "circumstances of this homicide, aside from the photographs, are so brutal and horrible that they fully explain and support the verdict of guilty and the severity of the sentence." *Id.* at 952-53.

The *Hennis* court, while adopting *Banks*' factors for its presentation analysis, declined to adopt some of *Banks*' more potent language, such as its description of the "inherently prejudicial character of photographic depictions of a murder victim," or its formulation that "[t]he more gruesome the photographs, the more difficult it is to establish that their probative value and relevance outweigh their prejudicial effect." *Id.* at 951 (citing Commonwealth v. Scaramuzzino, 455 Pa. 378, 381, 317 A.2d 225, 226 (1974) ("Never before have we been faced with the admission of so many slides, unquestionably repetitive, and viewed for so long a period of time," including slides showing human heart removed from deceased.)).

176. Brief for Defendant at 68 (emphasis omitted) (quoting Commonwealth v. Powell, 428 Pa. 275, 278-79, 241 A.2d 119, 121 (1968)).

requirement that the evidence be "essential," a more stringent rule than that adopted in *Hennis*.[177]

The *Hennis* court wisely has left the basic framework for use of illustrative photographic evidence in place, but has provided a new and needed standard to apply to particular types of abusive presentation tactics. That standard is tailored to the unique problems posed by photographic evidence. The *Hennis* test for excess contemplates the manipulative dangers of aesthetic choices as well as those of overpublication. The analysis set forth in *Hennis* fleshes out a body of common law that has concerned itself too exclusively with the problem of excessive cumulation. By granting a new trial in a high-profile, horrible multiple murder case, the court's message—that North Carolina will no longer tolerate any and all abuse of photographic evidence—is doubly reinforced for all concerned.[178]

The *Hennis* decision is also instructive in that the majority and dissent vigorously disagreed as to whether the evidence against defendant was strong enough to render the improper use of photographic evidence mere harmless error.[179] The wide discretion to assess direct and circumstantial evidence and then apply the harmless error rule, for both trial judges and appellate courts, may have led prosecutors before *Hennis* to buttress weak cases with an excessive display of gruesome photographic "illustration." Prosecutors boasting of strong cases might have taken comfort in the harmless error rule and likewise made excessive use of such evidence. The *Hennis* court, with its split over the harmless error analysis and its first impression grant of a new trial solely on grounds of unfairly prejudicial use of photographs of victims,[180] serves notice that decisions to orchestrate too powerful a production in reliance on the harmless error rule might get a costly "thumbs down" from the critics wearing robes.

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177. *Compare Powell*, 428 Pa. at 278-79, 241 A.2d at 121 ("Pennsylvania Rule") with *Hennis*, 323 N.C. at 285-86, 372 S.E.2d at 527 ("totality of circumstances" test).

178. For a journalistic account of the trial, conviction, appeal, and ultimate acquittal of Timothy Hennis, see Bolch & Ruffin, *supra* note 8.

179. For a discussion of harmless error, see *supra* notes 107-15 and accompanying text .

180. In both *Mercer* and *Foust*, new trials were granted on the basis of at least one other reversible error in addition to the improper admission of photographic evidence. For a discussion of *Mercer* and *Foust*, see *supra* text accompanying notes 82-98.