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## Evidence: Is Oklahoma Balancing the Scales of Justice by Tying the Hands of Trial Judges?: The 2002 Amendment to Section 2403 of the Oklahoma Evidence Code Mandating Admission of In-Life Victim Photographs in Homicide Cases

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# EVIDENCE: IS OKLAHOMA BALANCING THE SCALES OF JUSTICE BY TYING THE HANDS OF TRIAL JUDGES?: THE 2002 AMENDMENT TO SECTION 2403 OF THE OKLAHOMA EVIDENCE CODE MANDATING ADMISSION OF IN-LIFE VICTIM PHOTOGRAPHS IN HOMICIDE CASES

LIESA L. RICHTER\*

## *I. Introduction*

The Oklahoma legislature amended the Oklahoma Evidence Code in many respects in 2002. The legislature made many stylistic changes, such as converting masculine pronouns and terms within the Code to gender-neutral counterparts.<sup>1</sup> Other changes were substantive amendments to the rules, designed to clarify the existing practice of Oklahoma courts.<sup>2</sup> A few of the amendments announced new rules regarding Oklahoma evidence on issues that the state courts had yet to confront or decide.<sup>3</sup>

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1. See, e.g., 12 OKLA. STAT. ANN. § 2505 (West Supp. 2003) (amending the rule that provides privilege for communications between a “clergyman” and a person consulting “him” to use the terms “cleric” and “person”); *id.* § 2506 (changing “newspaper” to “journalist”); *id.* § 2606 (substituting term “juror” for masculine pronouns used to describe jurors in rule covering testimony by jurors).

2. For example, the legislature amended section 2609(B) to specify that the date of a witness’s testimony constitutes the ending date for determining whether impeaching convictions are more than ten years old. *Id.* § 2609(B). Under former section 2609(B), some litigants argued that the date on which a prosecutor filed charges or a plaintiff filed a complaint constituted the ending date for determining whether a ten-year period had elapsed; others argued that the date that a trial actually began or that the witness actually testified should control. See *Three M. Inv., Inc. v. Ahrend Co.*, 1992 OK 33, ¶ 6, 827 P.2d 1324, 1326. Because impeaching convictions are offered solely to impugn the credibility of a testifying witness, the Oklahoma Supreme Court recognized that the time of that testimony was a more logical ending date for judging stale convictions than the time of the filing of a charge or lawsuit. *Id.* ¶ 8, 827 P.2d at 1326 (“The time at which a witness’s credibility would need to be questioned is when that witness is testifying, not when the lawsuit is filed.”). Thus, the Court rejected the filing date as the proper ending date under former section 2609(B). *Id.* Nevertheless, the Oklahoma Supreme Court declined to resolve whether the date that the trial commenced or the date of the witness’s testimony would control when the facts of the case before them did not require them to decide. *Id.* ¶ 12, 827 P.2d at 1327. The 2002 amendment to section 2609(B) clarifies this issue for future litigants by expressly selecting the date of testimony as the proper date.

3. For example, the Oklahoma legislature amended title 12, section 2804(b)(3) of the

The recent amendment to section 2403 of the Oklahoma Evidence Code fits into none of these categories, however, and is noteworthy because it directly reverses the long-standing precedent of the Oklahoma Court of Criminal Appeals with respect to the admissibility of photographic evidence in homicide prosecutions. For decades, the Oklahoma Court of Criminal Appeals declared a trial court's admission of in-life victim photographs to be error in homicide trials, absent some direct dispute about the identity of the victim or the perpetrator that a particular in-life photograph of the victim could resolve.<sup>4</sup> Under this precedent, prosecutors had little hope of contrasting for the jury the often gruesome, postmortem photographs of a homicide victim with an image depicting the victim as she had appeared in life.<sup>5</sup> On the other hand, homicide defendants had little fear of the jury being exposed to such evidence absent unique factual circumstances.

On November 1, 2002, the Oklahoma legislature amended section 2403 of the Oklahoma Evidence Code to mandate the admission of in-life photographs of victims in homicide cases when the prosecution offers them "to show the general appearance and condition of the victim while alive."<sup>6</sup> The amendment

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Code. This amendment provides that a statement or confession, offered against an accused in a criminal case and made by a codefendant or other individual implicating both the codefendant or other individual and the accused, is inadmissible as a declaration against interest under section 2804(b)(3). 12 OKLA. STAT. ANN. § 2804(b)(3) (West Supp. 2003). While this issue has been a subject of hot debate nationally, no reported Oklahoma case had addressed the matter prior to the 2002 amendment. The legislature also made changes to title 12, section 2803(6). This amendment provides that a public record that is inadmissible under the hearsay exception for public records in section 2803(8) of the Oklahoma Evidence Code is inadmissible under the business records exception embodied in section 2803(6). *Id.* § 2803(6). While this issue also had generated conflict nationally, Oklahoma courts had not decided the question under the Code. See 2 LEO H. WHINERY, OKLAHOMA EVIDENCE, COMMENTARY ON THE LAW OF EVIDENCE § 30.31, at 758 (2d ed. 2000) [hereinafter WHINERY, OKLAHOMA EVIDENCE] ("An issue yet to arise in Oklahoma is whether public records and reports which are inadmissible under Subdivisions (a) through (d) may nevertheless be admitted under one of the other exceptions to the hearsay rule if they meet the foundational requirements for admissibility, such as the business records exception of Section 2803(6)."). The 2002 amendment conclusively resolves this issue in Oklahoma.

4. See *infra* notes 54-55 and accompanying text.

5. See *infra* notes 54-55 and accompanying text.

6. The Oklahoma legislature first amended section 2403 to require admission of in-life victim photographs in April 2002. This amendment took effect on November 1, 2002. Act of Apr. 23, 2002, ch. 128, 2002 Okla. Sess. Laws 438 (to be codified as amended at 12 OKLA. STAT. § 2403). The legislature amended section 2403 again on March 19, 2003 to correct technical deficiencies in the 2002 amendment. Act of Mar. 19, 2003, ch. 3, § 15, 2003 Okla. Sess. Law Serv. 17, 30-31 (West) (to be codified at 12 OKLA. STAT. § 2403). The 2003 amendment to section 2403 is substantively identical to the 2002 amendment with respect to in-life victim photographs.

reverses the status quo in Oklahoma homicide cases, allowing prosecutors to admit in-life photographs of victims routinely, while apparently leaving little room for a successful objection by defense counsel.

This Article explores the amendment to section 2403 and its effect on Oklahoma evidence law in five parts. Part II examines section 2403 of the Oklahoma Code of Evidence prior to its recent amendment, detailing the Oklahoma Court of Criminal Appeals' consistent disapproval of the admission of in-life victim photographs in homicide cases. Part II concludes that the courts' historical treatment of in-life victim photographs was inconsistent with: (1) the evidentiary standards governing the admissibility of such evidence in Oklahoma and in federal court; (2) the treatment of similar items of evidence in Oklahoma courts; and (3) the treatment of in-life victim photographs in the majority of states. Part III describes the amendment to section 2403 and the concerns that prompted the legislative reversal of the Oklahoma courts. Part IV examines the amendment's impact on Oklahoma's evidentiary rules and on Oklahoma trials after the 2002 amendment. Part IV concludes that the Oklahoma legislature may have acted to correct a true anomaly in the application of the Oklahoma Evidence Code, but that its remedy may set a dangerous precedent that undermines the historical discretion of the trial judge under section 2403. Part IV further opines that the recent amendment of section 2403 has far from ended the courtroom battle over the admission of in-life victim photographs. Not only will defense counsel in homicide cases craft new arguments for the exclusion of such photographs that Oklahoma courts will have to address, counsel in other criminal and civil cases are likely to use the amendment to argue for the admission or exclusion of victim photographs by analogy. Part V concludes.

## *II. Section 2403 of the Oklahoma Evidence Code and In-Life Victim Photographs*

### *A. Section 2403 Prior to the Amendment*

Section 2403 of the Oklahoma Evidence Code permits the trial judge in a criminal or civil action to exclude otherwise relevant evidence if the probative value of that evidence is substantially outweighed by concerns of unfairness or inefficiency.<sup>7</sup> It is impossible, therefore, to discuss the exclusion of evidence under section 2403 without some discussion of what constitutes relevant evidence and what gives evidence probative value.

Like its counterpart in the Federal Rules of Evidence (FRE), section 2401 of the Oklahoma Evidence Code provides a broad definition of "relevant

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7. 12 OKLA. STAT. § 2403 (amended 2003).

evidence.” Both define relevant evidence as evidence having “any tendency” to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would otherwise be.<sup>8</sup> Under this standard, a piece of evidence need not be independently *conclusive* or *sufficient* with respect to a fact of consequence in order to be relevant.<sup>9</sup> Indeed, as commentators long have noted, a brick is not a wall; evidence need only alter the existing probabilities with respect to a fact of consequence in some slight degree to be relevant.<sup>10</sup> Furthermore, a party need not direct evidence to a disputed fact or issue to satisfy this minimum threshold of relevance.<sup>11</sup> Evidence that is merely illustrative or background in nature may nonetheless be relevant under section 2401.<sup>12</sup>

Section 2402 of the Oklahoma Evidence Code permits a trial judge to admit any evidence meeting this minimum threshold of relevance unless another section of the Code, a statute, or the federal or state constitutions require its exclusion.<sup>13</sup> Many exclusionary rules in the Oklahoma Evidence Code withhold *specific* categories or types of otherwise relevant evidence from the

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8. 12 OKLA. STAT. § 2401 (2001); FED. R. EVID. 401.

9. See 2 WHINERY, OKLAHOMA EVIDENCE, *supra* note 3, §§ 14.02, 14.03, at 291-302 (noting that: (1) the definition of relevant evidence provided by section 2401 of the Oklahoma Evidence Code replicates the definition appearing in FRE 401; (2) that the section 2401 standard “simply requires an altering of the probabilities;” and (3) that “[t]he trial judge may conclude that evidence is *relevant* and admit the evidence even though, standing alone, it would not be *sufficient* to support a finding of the existence of the fact for which it is offered.”)

10. See *Malicoat v. State*, 2000 OK CR 1, ¶ 39, 992 P.2d 383, 403 (noting that “[r]elevant evidence tends to make the existence of any fact that is of consequence to the determination of the case more or less probable” and citing title 12, section 2401 of the Oklahoma Statutes).

11. See FED. R. EVID. 401 advisory committee’s note (“The fact to which the evidence is directed need not be in dispute.”); *Old Chief v. United States*, 519 U.S. 172, 179 (1997) (“Nor was its evidentiary relevance under Rule 401 affected by the availability of alternative proofs of the element to which it went, such as an admission by Old Chief [as to the element] . . .”); 2 WHINERY, OKLAHOMA EVIDENCE, *supra* note 3, § 14.03, at 297 (“Finally, it is not necessary that the fact to which the evidence is directed be in dispute.”).

12. See FED. R. EVID. 401 advisory committee’s note (“Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items fall in this category.”); *Foster v. State*, 1986 OK CR 19, ¶ 6, 714 P.2d 1031, 1036 (finding that the trial court properly admitted a baseball bat similar to the one undisputedly used in the attack of the murder victim over appellant’s objection because the bat was “relevant . . . in allowing the jury to visualize one of the weapons used in the attack”); 2 WHINERY, OKLAHOMA EVIDENCE, *supra* note 3, § 14.03, at 297 (“This position permits the use of background evidence, such as charts, photographs, and views, which does not involve disputed matters, but is nevertheless an aid to understanding the fact that is of consequence in the action.”).

13. 12 OKLA. STAT. § 2402 (2001).

trier of fact based upon the intrinsic policy of promoting the fair and efficient search for truth in the judicial process or extrinsic policies designed to influence behavior outside the courtroom.<sup>14</sup> In contrast, section 2403 of the Oklahoma Evidence Code, like its federal counterpart, has served as a basis for the exclusion of otherwise relevant and admissible evidence that courts may apply *generally* to any type of evidence offered in a criminal or civil action.<sup>15</sup>

Section 2403 allows trial courts to exclude otherwise relevant and admissible evidence at the discretion of the judge based on concerns such as unfair prejudice, delay, and surprise. Prior to its amendment, section 2403 of the Oklahoma Evidence Code specifically provided: "Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise."<sup>16</sup> The language of this provision is substantially identical to FRE 403, upon which it was based.<sup>17</sup> This general rule of exclusion reflects the

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14. See GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 2.4, at 35 (3d ed. 1996) ("These various exclusionary provisions rest upon diverse grounds but each rule of exclusion is thought to be supported by a reason or policy that justifies withholding from the trier probative testimony or documents."); see also, e.g., 12 OKLA. STAT. § 2404 (2001) (forbidding the use of "character evidence" to prove conduct consistent with that character on a given occasion due to low probative value and danger of convictions for bad character); *id.* § 2407 (forbidding evidence of subsequent remedial measures to prove negligence, in part, to promote safety by the unbridled adoption of such measures following an accident).

15. In keeping with the general applicability of section 2403, the legislature has rarely exempted specific types of evidence from potential exclusion under the section 2403 standard. *But see* 12 OKLA. STAT. § 2609(A)(2) (Supp. 2002) (providing that "[e]vidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement"). Oklahoma courts and scholars have interpreted this rule as exempting admission of dishonesty crimes to impeach from section 2403 scrutiny. See *Banks v. State*, 1991 OK CR 51, 810 P.2d 1286; LEO H. WHINERY, COURTROOM GUIDE TO THE OKLAHOMA EVIDENCE CODE § 2609, at 480 (2002-2003) [hereinafter WHINERY, COURTROOM GUIDE] ("Crimes of dishonesty or false statement . . . are admissible under Section 2609(A)(2) without regard to balancing probative value against unfair prejudice.").

16. 12 OKLA. STAT. § 2403 (2001).

17. The language of former section 2403 differed from the language of FRE 403 in only two significant respects. First, former section 2403 omitted one basis for the exclusion of otherwise relevant evidence that the federal rule included. FRE 403 includes "waste of time" as an additional basis for exclusion. FED. R. EVID. 403. Section 2403 apparently omitted this basis for exclusion because it repeats the existing grounds for exclusion for "undue delay" and "needless presentation of cumulative evidence." Because "undue delay" and "needless presentation of cumulative evidence" are bases for exclusion under section 2403, otherwise relevant evidence that serves merely to waste time is surely subject to exclusion in Oklahoma under § 2403. See WHINERY, COURTROOM GUIDE, *supra* note 15, § 2403, at 282 ("[I]t would be untenable to argue that 'waste of time' would not be an appropriate ground for the exclusion

notion that, although relevant under the minimal standard set by section 2401, certain items of evidence that legislators are unable to identify and categorically exclude in advance will have insufficient probative value to overcome the potential dangers that they present to the factfinding process.<sup>18</sup> The FRE Advisory Committee noted that the dangers justifying the exclusion of evidence under FRE 403 “entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme.”<sup>19</sup> While no settled definition exists as to what constitutes “unfair prejudice” to the opponent of relevant evidence, the Advisory Committee Notes to FRE 403 suggest that unfair prejudice “means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”<sup>20</sup> Therefore, any evidence that may cause the jury to base its decision on something other than the facts of consequence in a case may fall within the ambit of unfair prejudice under section 2403.<sup>21</sup> The additional bases for

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of relevant evidence under Section 2403.”).

Second, former section 2403 included a basis for exclusion of evidence that the federal drafters purposely omitted. Section 2403 allows a trial judge to exclude otherwise relevant evidence if its probative value is substantially outweighed by the danger of unfair and harmful surprise. 12 OKLA. STAT. § 2403 (2001) (amended 2003). The Advisory Committee to the FRE specifically noted that the danger of unfair surprise continues to exist at trial despite “requirements of notice and instrumentalities of discovery.” FED. R. EVID. 403 advisory committee’s note. Nevertheless, the Committee eliminated surprise as a basis for withholding relevant evidence from the trier of fact, concluding that a continuance to eliminate the effects of such surprise is a more appropriate remedy than exclusion. *Id.* Disagreeing with the Advisory Committee on this point, section 2403 of the Oklahoma Evidence Code includes “unfair and harmful surprise” as a basis for exclusion “where it is an overriding, deliberate type of surprise.” OKLA. R. EVID. 2403 evidence subcommittee’s note; *see also* 2 WHINERY, OKLAHOMA EVIDENCE, *supra* note 3, § 14.09, at 314. The recent amendment to section 2403 maintains these two distinctions between section 2403 and FRE 403. Act of Mar. 19, 2003, ch. 3, § 15, 2003 Okla. Sess. Law Serv. 17, 30-31 (West) (to be codified at 12 OKLA. STAT. § 2403).

18. *See* LILLY, *supra* note 14, § 2.5, at 36 (discussing FRE 403 and explaining that the rule justifies the exclusion of evidence “in instances where the practical burdens of admission substantially outweigh the probative benefit of the evidence”); 2 WHINERY, OKLAHOMA EVIDENCE, *supra* note 3, § 14.09, at 315 (“Section 2403 is simply a reflection of the fact that there are instances which call for the exclusion of evidence because of the harm likely to result from its admission even though it is of unquestioned relevance.”).

19. FED. R. EVID. 403 advisory committee’s notes.

20. *Id.*; *see also* Cannon v. State, 1998 OK CR 28, 961 P.2d 838 (holding that evidence is unfairly prejudicial when it “tends to elicit an emotional rather than rational judgment by the jury.”).

21. FED. R. EVID. 403 advisory committee’s notes; *see also* 2 WHINERY, OKLAHOMA EVIDENCE, *supra* note 3, § 14.12, at 324 (“Accordingly, evidence that appeals to the jury’s sympathies, antagonism, punitive instincts, or horror . . . is included within the term ‘unfair

exclusion such as confusion of the issues, waste of time, and unfair and harmful surprise may also justify exclusion under section 2403.<sup>22</sup>

To assist the trial judge in determining whether a challenged piece of evidence has sufficient probative value to overcome the potential dangers it presents, section 2403 provides a balancing test.<sup>23</sup> Like its federal counterpart, the balancing test in section 2403 is drafted in favor of the *admissibility* of the challenged evidence: the trial judge may exclude otherwise relevant and admissible evidence under section 2403 only if its probative value in the case is *substantially outweighed* by the potential dangers of the evidence.<sup>24</sup> As indicated by the statutory language stating that the trial judge *may* exclude evidence pursuant to the rule, exclusion under section 2403 and FRE 403 has been highly discretionary with the judge who presides over the presentation of evidence at trial; therefore, appellate courts review these rulings for abuse of that discretion only.<sup>25</sup>

Courts and commentators have discussed the factors that will assist trial judges in evaluating the probative value of challenged evidence under FRE 403 and section 2403 of the Oklahoma Evidence Code. For example, in *Old*

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prejudice' . . .").

22. *See, e.g.*, *Cooper v. State*, 1983 OK CR 154, 671 P.2d 1168 (excluding evidence of the State's charging of a third party with the crime alleged against the defendant and subsequent dismissal of those charges against the third party under section 2403, where the admission of the evidence would open "a can of worms" that would confuse the jury issues to be tried in the case).

23. Act of Mar. 19, 2003, ch. 3, § 15, 2003 Okla. Sess. Law Serv. 17, 30-31 (West) (to be codified at 12 OKLA. STAT. § 2403).

24. *Id.* (emphasis added); *see also* FED. R. EVID. 403. Commentators have proposed various methods of viewing the evidence and its potential dangers in applying this balancing test. *See* 2 WHINERY, OKLAHOMA EVIDENCE, *supra* note 3, § 14.10, at 316. The Advisory Committee Notes to FRE 403 call for the balancing of the "probative value of and need for the evidence against the harm *likely* to result from its admission." FED. R. EVID. 403 advisory committee's notes (emphasis added). The Oklahoma courts appear to have adopted a slightly different approach to the balancing process that is even more favorable to the admissibility of relevant evidence challenged under section 2403. This test requires the Oklahoma trial courts to weigh the "maximum reasonable probative force" of the evidence against its "minimum reasonable prejudicial value." 2 WHINERY, OKLAHOMA EVIDENCE, *supra* note 3, § 14.10, at 320; *see also* *Mayes v. State*, 1994 OK CR 44, 887 P.2d 1288.

25. *See* LILLY, *supra* note 14, § 2.5, at 36 (discussing FRE 403 and commenting that "[a]ppellate courts wisely have reposed in the trial court considerable discretion in applying this balancing test and "unless there is a clear abuse of this discretion, no error will be recognized on appeal"); 2 WHINERY, OKLAHOMA EVIDENCE, *supra* note 3, § 14.10, at 318, 320 (noting that "by employing the word 'may,' instead of must, the rule authorizes, but does not require, the trial court to exclude evidence which would otherwise be admissible" and that "[t]rial judges will rarely be reversed on these [2403] decisions").



*Chief v. United States*,<sup>26</sup> the U.S. Supreme Court examined the factors that a judge should use to assess probative value when applying the balancing test of FRE 403.<sup>27</sup> The Court concluded that the trial judge should examine the probative value of a challenged piece of evidence in the context of any alternative or substitute evidence available to prove the same point with fewer, if any, attendant risks of prejudice or confusion.<sup>28</sup> The availability of less risky alternative evidence addressing the same point serves to “apply some discount to the probative value of an item of evidence” under FRE 403.<sup>29</sup> As a corollary to this review of available alternative evidence, the Court noted that the absence of any dispute as to a particular fact of consequence may also serve to lower the probative value of an item of evidence offered to prove that fact.<sup>30</sup> Although evidence may be relevant without a dispute as to the fact it tends to prove, the absence of such a dispute may lower the probative value of the challenged item of evidence for purposes of section 2403.<sup>31</sup>

Nevertheless, the Court emphasized that the existence of alternative proof does not necessarily justify the exclusion of relevant evidence that carries some risk of prejudice under FRE 403:

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26. 519 U.S. 172 (1997).

27. *Id.* at 184. The facts of *Old Chief* are as follows: “[A]fter a fracas involving at least one gunshot,” the government charged Old Chief with: (1) assault with a dangerous weapon, (2) using a firearm in relation to a crime of violence, and (3) possession of a firearm by a convicted felon. *Id.* at 174. The prior conviction supporting the third charge was for “assault causing serious bodily injury.” *Id.* at 175. Concerned that the jury would find that he had committed the instant crimes based upon his prior conviction for a violent assault, Old Chief sought to stipulate to the prior conviction, which qualified him as a felon and thus, forbade him from possessing firearms under the federal statute. *Id.* He argued that the offer to stipulate to the prior conviction rendered evidence of the *name* of the prior conviction inadmissible under FRE 403, and thus, that the trial judge had erred in admitting the name and nature of the prior conviction. *Id.*

28. *Id.* at 184 (“[W]hat counts as the Rule 403 ‘probative value’ of an item of evidence, as distinct from its Rule 401 ‘relevance,’ may be calculated by comparing evidentiary alternatives.”).

29. *Id.* at 183. This examination of available alternative evidence also relates to another ground for the exclusion of relevant evidence under FRE 403 and section 2403: the needless presentation of cumulative evidence. While the needless presentation of cumulative evidence that the statute condemns suggests a backward-looking approach at evidence already presented to the trier of fact, the U.S. Supreme Court’s discussion of alternative evidence proposes a review of available alternative evidence, regardless of whether it has been presented to the trier of fact at the time that a 403 objection is raised.

30. *Id.* at 186 (noting that a defendant’s offer to admit an element of the prosecution’s case constitutes alternative, relevant evidence of that element).

31. *Id.*; see also WHINERY, COURTROOM GUIDE, *supra* note 15, § 2401, at 267 (noting that evidence that is essentially background in nature and not disputed nonetheless may aid the jury in deciding disputed issues of fact and is relevant under section 2401).

[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. . . . [A] defendant's Rule 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense.<sup>32</sup>

The Court also described the importance of descriptive richness as an aspect of probative value, particularly in a criminal case, where the prosecution bears the burden of proof beyond a reasonable doubt:

When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment. Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault.<sup>33</sup>

Oklahoma courts and commentators have used similar factors in weighing the probative value of challenged evidence under section 2403 of the Oklahoma Evidence Code. While acknowledging the importance of available alternative evidence and the absence of a dispute with respect to a given fact in assessing probative value under section 2403, Oklahoma courts likewise have recognized the importance of narrative richness in the presentation of evidence and the traditional autonomy of a party in choosing otherwise relevant evidence to present to the trier of fact as a factor affecting probative

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32. *Old Chief*, 519 U.S. at 183 (emphasis added).

33. *Id.* at 187-88. In a very narrow holding relating only to proof of felony-convict status in 18 U.S.C. § 922(g)(1) prosecutions, the Court found that the trial court had abused its discretion in allowing the prosecution to present the record of Old Chief's prior conviction to the jury describing the nature of his previous assault offense in light of Old Chief's willingness to stipulate to his felony convict status. *Id.* at 191. Because the prior conviction had no relationship to the set of facts involved in the instant charges, the Court found that the admission of the prior record of conviction failed to serve the goal of narrative richness. *Id.* In so holding, however, the Court continued to emphasize the general rule forbidding the criminal defendant from stipulating away the prosecution's proof under FRE 403. *Id.* at 192.

value.<sup>34</sup> For example, in *Guy v. State*,<sup>35</sup> the defendant argued that his offer to stipulate to the nature, location, and cause of the victim's wounds eliminated the cause and manner of death as issues in the case.<sup>36</sup> Accordingly, the defendant argued that a photograph depicting the victim's wounds was unrelated to a fact of consequence and that the risk of unfair prejudice substantially outweighed any probative value.<sup>37</sup> The Oklahoma Court of Criminal Appeals rejected the argument, finding that the defendant "could not have deprived the photo of its probative value by his offer to stipulate to the facts which the photo was offered to prove," and that the photo retained its probative value as to the cause, nature, and location of the victim's wounds despite the offer to stipulate.<sup>38</sup> Also, in *Baker v. State*,<sup>39</sup> the defendant, charged with second degree felony murder arising out of a drunken-driving incident, relied upon *Old Chief* to argue that the trial court erred in allowing the jury to hear evidence of a prior DUI conviction in light of this stipulation to the prior conviction as an element of the State's case.<sup>40</sup> In upholding the trial court's admission of the conviction, the Oklahoma Court of Criminal Appeals emphasized the importance of narrative richness and the autonomy of a litigant in presenting relevant evidence to support his case, stating that "[i]t is well established in this jurisdiction [that] '[t]he right of the state, or the

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34. See *Fairchild v. State*, 1999 OK CR 49, 998 P.2d 611 (looking to the absence of alternative evidence to support the state's theory on a contested matter in performing 2403 balancing test); WHINERY, COURTROOM GUIDE, *supra* note 15, § 2401, at 267 ("Section 2403 can be invoked in appropriate cases to prevent abuse where evidence is offered directed to facts not in dispute and it has marginal value in determining facts in dispute."); see also *Foster v. State*, 1986 OK CR 19, ¶ 6, 714 P.2d 1031, 1036 (finding that trial court properly admitted baseball bat similar to the one undisputedly used in the attack of the murder victim over appellant's objection because bat was relevant in allowing the jury "to visualize one of the weapons used in the attack").

35. 1989 OK CR 25, 778 P.2d 470.

36. *Id.* ¶ 9, 778 P.2d at 473.

37. *Id.*

38. *Id.* To the extent that *Guy v. State* suggests that a defendant's offer to stipulate can never deprive alternative evidence of its probative value, it is inconsistent with the holding of *Old Chief* and the discretionary balancing approach set forth in section 2403. See 2 WHINERY, OKLAHOMA EVIDENCE, *supra* note 3, § 14.17, at 338 ("The per se rule of the *Guy* case seems misplaced. An offer to stipulate should be given weight in the Section 2403 balancing process."). To the extent that the case holds that the defendant in that particular homicide prosecution could not deprive postmortem photographs of the victim of their probative value by stipulating to cause of death, however, it is entirely consistent with the general rule in criminal cases reiterated in *Old Chief* that "a defendant's Rule 403 objection offering to concede a point generally cannot prevail over the Government's choice to offer evidence showing guilt and all the circumstances surrounding the offense." *Old Chief*, 519 U.S. at 183.

39. 1998 OK CR 46, 966 P.2d 797.

40. *Id.* ¶ 4, 966 P.2d at 798.

accused, to present material evidence in support of an issue, cannot be taken away or the force of the evidence weakened by an admission or stipulation of the facts sought to be proven.”<sup>41</sup> Thus, the court should give weight to a party’s right to present his story to the trier of fact in a colorful and coherent manner when the court performs section 2403 balancing.

Because of the general applicability of section 2403 and the broad grounds for exclusion the statute provides, it is difficult to generalize about categories of evidence challenged and excluded under its authority.<sup>42</sup> Nevertheless, both prosecutors and defendants alike have traditionally attacked certain categories of evidence under section 2403 in Oklahoma and in other jurisdictions. One of the most common types of evidence a defendant challenges under section 2403 as raising unfair prejudice is photographic evidence.<sup>43</sup> Because of its illustrative nature, photographic evidence often depicts circumstances already described at trial through testimony or other demonstrative evidence.<sup>44</sup> Despite its arguably cumulative nature, however, photographic evidence generally satisfies the section 2401 broad definition of relevance because it serves to illustrate or bring to life facts of consequence to the action — it has some tendency to make those facts of consequence more or less probable.<sup>45</sup>

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41. *Id.* ¶ 5, 966 P.2d at 798 (quoting *Shepherd v. State*, 1931 OK CR, 300 P. 421, 424 (alteration in original)).

42. See WHINERY, COURTROOM GUIDE, *supra* note 15, § 2403, at 284 (“The types of evidence in which the exclusion of evidence is sought on grounds of unfair prejudice or one of the other risks specified in Section 2403 are varied as exemplified by the illustrative cases in Annotated Cases.”).

43. See 2 WHINERY, OKLAHOMA EVIDENCE, *supra* note 3, § 14.12, at 325 (“Evidence invoking claims of unfair prejudice on appeal has most often involved various forms of photographic evidence, including black and white and color photographs and video tapes.”) (citations omitted).

44. See generally 2 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 214, at 14 (John Strong ed., 5th ed. 1999) (noting that a photograph may be “viewed merely as a graphic portrayal of oral testimony, and becomes admissible only when a witness has testified that it is a correct and accurate representation of relevant facts personally observed by the witness”).

45. See, e.g., *Flores v. State*, 1999 OK CR 52, ¶ 23, 994 P.2d 782, 787 (stating that photographs of murder victims are relevant to illustrate their injuries for the jury, and finding that the admission of two photographs of damage to the victim’s anal opening was not unduly prejudicial or cumulative because they depicted different perspectives of the injuries); *Thornburg v. State*, 1999 OK CR 32, ¶ 21, 985 P.2d 1234, 1244 (noting that photographs of homicide victims have probative value in depicting the crime scene and in corroborating the testimony of the medical examiner); *Newbury v. State*, 1985 OK CR 1, ¶ 12, 695 P.2d 531, 534 (approving the admission of fourteen photographs of the corpse in a homicide trial and noting that “[p]ictures of the murder victim are always useful in establishing the corpus delicti of the crime”), *overruled on other grounds by* *McCalip v. State*, 1989 OK CR 46, 778 P.2d 488; *Wadkins v. State*, 1977 OK CR 339, ¶ 7, 572 P.2d 998, 999 (finding that pictures of deceased

Oklahoma courts consistently have recognized that the admissibility of relevant photographs illustrating persons, places, and things is subject to review by the trial judge under the section 2403 balancing test.<sup>46</sup>

Homicide defendants in Oklahoma have met with mixed success in challenging the admission of photographs of their victims under section 2403. On one hand, Oklahoma defendants have been largely unsuccessful in excluding pictures of their alleged victims' injuries under section 2403, despite arguments that their probative value pales in comparison to the gruesome and graphic nature of such photographs, which is likely to unduly inflame the sympathies of the jury.<sup>47</sup> In contrast, Oklahoma defendants have

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victim were probative despite the defendant's admission that he killed the victim in the manner alleged and despite the fact that his entire defense was based on insanity, only where the "[s]tate still had the burden to prove the offense charged was committed by the defendant") (decided prior to the effective date of the Oklahoma Evidence Code); *Hudman v. State*, 1949 OK CR, 205 P.2d 1175, 1181 (stating that "photographs and pictures are admissible where they illustrate or clarify some issue of the case and whenever it is relevant to describe a person, place or thing, pictures shown to be a faithful reproduction of whatever it purports to reproduce, are admissible for the purpose of assisting the court or jury in understanding the situation").

46. See *Thornburg*, ¶ 20, 985 P.2d at 1244 (stating that the test for admissibility of photographs is "whether their probative value is substantially outweighed by the danger of unfair prejudice," and that the decision to introduce photographs is "largely within the trial court's discretion") (citing 12 OKLA. STAT. § 2403 (1991)); *Ochoa v. State*, 1998 OK CR 41, ¶ 41, 963 P.2d 583, 598 (articulating the same standard for admissibility of photographic evidence and finding that admission of eighteen photographs of victims' bodies was within trial court's discretion); *Rawlings v. State*, 1987 OK CR 135, ¶ 59, 740 P.2d 153, 161 ("The rule is that admissibility of demonstrative evidence such as photographs is a question of legal relevance for the trial court. When the probative value is not outweighed by the danger of prejudice to the defendant, the photographs are admissible.").

47. See, e.g., *Malicoat v. State*, 2000 OK CR 1, ¶ 46, 992 P.2d 383, 405 (holding that the admission of photographs of deceased infant at emergency room were "more probative than prejudicial" where they showed the nature and location of the victim's wounds and "aided the jury in determining whether to believe Malicoat's claim that he did not realize he was inflicting serious and potentially deadly injuries"); *Flores v. State*, 1999 OK CR 52, ¶ 23, 994 P.2d 782, 787 (holding that postmortem pictures of the murder victim were probative of damage done to the victim and defendant's malice aforethought, and that the probative value of the photographs was not substantially outweighed by their gruesome nature); *Bernay v. State*, 1999 OK CR 37, ¶¶ 18-19, 989 P.2d 998, 1007; *Thornburg*, ¶ 21, 985 P.2d at 1244 (finding that the trial court did not abuse its discretion in admitting seven photographs of the charred remains of murder victims where photographs were probative insofar as they corroborated the medical examiner's testimony, depicted the crime scene, and established the corpus delicti); *Wilson v. State*, 1998 OK CR 73, ¶ 27, 983 P.2d 448, 458; *Ochoa*, ¶ 42, 963 P.2d at 598-99 (finding that the trial court did not abuse its discretion in admitting photographs of the deceased victims that were probative of the nature and extent of the wounds and depicted the crime scene); *Fritz v. State*, 1991 OK CR 62, ¶ 26, 811 P.2d 1353, 1360 (same); *Moore v. State*, 1990 OK CR 5, ¶ 54, 788 P.2d 387, 400 (same); *Brewer v. State*, 1982 OK CR 128, ¶ 17-18, 650 P.2d 54, 59 (same); *Seth v. State*, 1982 OK CR 97, ¶¶ 11-13, 647 P.2d 452, 454-55 (same).

enjoyed consistent success in excluding photographs of their alleged victims that depict the victims in life before the commission of the crime.<sup>48</sup> It is the admissibility of these in-life photographs that is the subject of the recent amendment to section 2403 of the Oklahoma Evidence Code.

### *B. Treatment of In-Life Victim Photographs Under the Former Section 2403*

In addition to offering postmortem pictures of victims in homicide cases, Oklahoma prosecutors have frequently offered victim photographs taken prior to the crime at issue as evidence.<sup>49</sup> Criminal defendants have objected to the admission of such in-life photographs as irrelevant and unduly prejudicial.<sup>50</sup> Although sections 2401, 2402, and 2403 of the Oklahoma Evidence Code govern the admissibility of such photographic evidence, Oklahoma courts have analyzed the admission of in-life photographs against a more exacting standard and have almost uniformly held that their admission constitutes error.<sup>51</sup>

#### *1. A Higher Standard of Relevance for In-Life Victim Photographs*

First, the Oklahoma Court of Criminal Appeals has applied a more stringent standard of “relevance” to in-life photographs of victims than the liberal standard of relevance under section 2401.<sup>52</sup> The court has frequently stated that photographs of homicide victims taken while alive are inadmissible unless

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Occasionally, courts have excluded photographs of deceased victims under section 2403's balancing test where the court found the photographs unnecessarily gruesome or cumulative. *See, e.g.,* *Livingston v. State*, 1995 OK CR 68, 907 P.2d 1088; *Mann v. State*, 1988 OK CR 7, 749 P.2d 1151. In addition, Oklahoma courts have upheld challenges to photographs of deceased victims as misleading to the jury where the photographs reflect the work of decomposition or the autopsy surgeon in addition to that of the criminal. *See Ritchie v. State*, 1981 OK CR 91, 632 P.2d 1244.

48. *See infra* note 54 and accompanying text.

49. *Boutwell v. State*, 1983 OK CR 17, ¶ 18, 659 P.2d 322, 326 (“With increasing frequency prosecutors in this state have been introducing . . . photographs of the victims taken when they were alive.”), *abrogated on other grounds*, *Stouffer v. State*, 1987 OK CR 166, ¶ 7, 742 P.2d 562, 564.

50. *See infra* note 54.

51. *See infra* note 54 and accompanying text. While the Oklahoma Court of Criminal Appeals has almost uniformly found the admission of in-life photographs to be error, the Court has routinely held that such error alone does not justify reversal of a homicide conviction. *See, e.g., Malicoat*, ¶ 44, 992 P.2d at 404; *Thornburg*, ¶ 23, 985 P.2d at 1244; *Tilley v. State*, 1998 OK CR 43, ¶ 34, 963 P.2d 607, 615. *But see Ritchie*, ¶ 8, 632 P.2d at 1246 (noting that “[i]n a close case, on appeal, such a[n] [in-life] photograph may well tip the scales in appellant's favor”).

52. *See supra* Part II.A.

relevant to some material issue.<sup>53</sup> In applying this standard, the court has found that in-life photographs are irrelevant whenever the identity of the crime victim or victims is not in dispute.<sup>54</sup> Thus, the court has held that photographs depicting the deceased victim during life are irrelevant and inadmissible whenever they are not *needed* to prove the identity of the victim or the defendant.<sup>55</sup>

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53. See, e.g., *Thornburg*, ¶ 23, 985 P.2d at 1244; *Tilley*, ¶ 34, 963 P.2d at 615; *Valdez v. State*, 1995 OK CR 18, ¶ 64, 900 P.2d 363, 381.

54. See, e.g., *Thornburg*, ¶ 23, 985 P.2d at 1244 (“In the present case, the identity of the victims was not a material issue and accordingly, these pre-mortem photographs should not have been admitted into evidence.”); *Tilley*, ¶ 34, 963 P.2d at 615 (“[T]he victim’s [in-life] photograph . . . was not relevant to any issue in the case against Tilley. While Kimberly James’ body was badly decomposed, her identity was not an issue as defense counsel stipulated that the body recovered in the Washita River was Kimberly James.”); *Valdez*, ¶ 64, 900 P.2d at 381. (holding that the victim’s in-life photograph was not relevant to a material issue in a first degree murder prosecution, even though victim’s remains had been burned beyond recognition where “no one questioned whether he was in fact Valdez’s homicide victim”); *Staggs v. State*, 1991 OK CR 4, ¶ 7, 804 P.2d 456, 458 (finding no relevant purpose for introduction of an in-life photograph of the victim where State conceded that the victim was positively identified through fingerprints); *Cargle v. State*, 1985 OK CR 77, ¶ 82, 909 P.2d 806, 830 (“This Court has held such [in-life] photographs are generally inadmissible . . . based on their relevancy to the issues presented at trial.”); *Boutwell*, ¶ 18, 659 P.2d at 326 (concluding that photos of the victim while alive were not relevant because the victim’s identity was not in question); *Ritchie*, ¶ 8, 632 P.2d at 1246 (“The jury should not have been concerned with what the child looked like prior to the offense committed against her, but instead it should have been concerned only with what had been done to the child, how it was done, when it was done and who did it.”).

55. See *supra* note 54. The Oklahoma Court of Criminal Appeals has found in-life photographs “relevant” and admissible when they are directed to a disputed issue at trial, such as the identity of the perpetrator of the crime. For example, in *Rawlings v. State*, 1987 OK CR 135, 740 P.2d 153, the State offered a photograph of the missing victim with her small child prior to the victim’s disappearance in the trial of the victim’s ex-husband for first degree murder. *Id.* ¶ 58, 740 P.2d at 161. The defendant claimed that the photograph had no probative value and ought to be excluded. *Id.* Although the court recognized the general inadmissibility of such photographs in murder prosecutions, it found this photograph relevant. *Id.* ¶ 61, 740 P.2d at 161. Where the evidence demonstrated that the victim kept the treasured photograph on her person at all times and that the same photograph was found among defendant’s possessions after the victim’s disappearance, the court found the photograph relevant on the issue of defendant’s culpability in connection with the victim’s disappearance. *Id.*; see also *Flores v. State*, 1999 OK CR 52, ¶ 23, 994 P.2d 782, 787 (finding an in-life photograph of the victim relevant to a material issue where witnesses who did not know victim were able to identify her from the photograph as the person with the defendant shortly before her murder and where defendant had told police that he had found the victim’s body after her death but that he had not killed her); *Shelton v. State*, 1990 OK CR 34, ¶ 6, 793 P.2d 866, 870 (upholding the admission of in-life photographs of the victim recovered from the scene of the crime where the presence of photographs at the scene connected the defendant to the murder).

The requirement that a “dispute” as to the identity of a homicide victim exist before an in-life victim photograph becomes “relevant” contradicts the liberal definition of relevance contained in section 2401 of the Oklahoma Evidence Code. Certainly, a photograph of a victim in life has *some* “tendency” to show that the victim was an alive and healthy person, whose life the defendant extinguished.<sup>56</sup> Indeed, such evidence tends to corroborate the verbal testimony of the state’s witnesses who describe the victim in life. Although such a photograph is clearly background in nature, and merely illustrates the information that may be available through other relevant evidence, such background information is commonly regarded as falling within the broad standard of relevance that section 2401 and FRE 401 require.<sup>57</sup>

Arguably, the Oklahoma courts have loosely and erroneously used the term “irrelevant” when discussing in-life victim photographs as a shorthand manner of stating that such photographs have *no* probative value under section 2403 in the absence of a dispute regarding the identity of the victim. However, any conclusion reached by the Oklahoma courts that an in-life victim photograph possesses *no* probative value in the absence of a dispute contains serious flaws. While the absence of a dispute regarding a particular matter will undoubtedly lower the probative value of evidence, it will not necessarily *eliminate* it all together under Oklahoma law or the U.S. Supreme Court’s interpretation of FRE 403.<sup>58</sup> When a defendant pleads not guilty in a homicide prosecution, the law requires the government to prove every element of its case beyond a reasonable doubt.<sup>59</sup> The general rule prohibits a criminal

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56. See *Fugate v. State*, 431 S.E.2d 104, 109 (Ga. 1993) (finding that photograph of victim while alive was relevant to prove that the defendant took the life of another human being); *Spencer v. State*, 398 S.E.2d 179, 185 (Ga. 1990) (finding an in-life photograph of the victim relevant where “the state has to prove beyond a reasonable doubt that the defendant ‘cause[d] the death of another human being’”) (quoting GA. CODE ANN. § 16-5-1 (1998)) (alteration in original); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah’s Victims’ Rights Amendment*, 1994 UTAH L. REV. 1373, 1409 (1994) (noting that issues of proof, such as the fact that victim was a human being and the identity of the victim, “are always present in homicide cases,” and that “a photograph always helps to prove them”).

57. See *United States v. Grandison*, 780 F.2d 425, 429 (4th Cir. 1985) (upholding the admission of in-life photographs of victims over relevance objections, stating, “As for the relevance contention, we perceive no strength in the argument because [the victims] were central figures in the crimes that had been charged. They had to be identified.”), *vacated on other grounds* by 479 U.S. 1076 (1987); *State v. Broberg*, 677 A.2d 602, 606 (Md. 1996) (“[P]hotographs do not lack probative value merely because they illustrate a point that is uncontested.”); *supra* note 12.

58. See *supra* notes 30-41 and accompanying text.

59. See *Old Chief v. United States*, 519 U.S. 172, 199 (1997) (O’Connor, J., dissenting); *Phillips v. State*, 1999 OK CR 38, ¶ 74, 989 P.2d 1017, 1038.



defendant from undermining the government's proof by concession and requires courts to consider narrative and descriptive richness in weighing probative value under section 2403.<sup>60</sup> A photograph of the victim while alive certainly gives descriptive richness to a prosecution's case and helps the prosecution tell the jury the victim's story, even where the victim's identity is not in dispute.<sup>61</sup>

## 2. A More Stringent Balancing Test for In-Life Photographs

In addition to employing a higher standard of relevance to in-life victim photographs, Oklahoma courts have required that such photographs meet a more stringent balancing test than the applicable test articulated under section 2403. Even when such photographs are probative of a disputed and material issue, courts have not admitted them unless their probative value *outweighed* the danger of prejudice to the defendant.<sup>62</sup> By requiring that the probative value of the offered photographs tip the scales, courts have created a test that favors the *exclusion* of relevant evidence that directly contravenes the plain language and intent of section 2403.<sup>63</sup>

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60. See *supra* notes 32-41 and accompanying text.

61. See *infra* note 83 and accompanying text. The dissent in *Old Chief* posed a hypothetical with respect to clearly admissible evidence in a murder case that helps illustrate the "probative value" of an in-life photograph of a homicide victim. Justice O'Connor posed the following: "[C]onsider a murder case. Surely the Government can submit proof establishing the victim's identity, even though, strictly speaking, the jury has no 'need' to know the victim's name, and even though the victim might be a particularly well loved public figure." *Old Chief*, 519 U.S. at 195 (O'Connor, J., dissenting). Similarly, a photograph of the murder victim in life may tell part of the story of the defendant's guilt even though the jury has no "need" to see it, and it may carry some attendant risk of unfair prejudice to the defendant.

62. See *Thornburg v. State*, 1999 OK CR 32, ¶ 23, 985 P.2d 1234, 1244 ("This Court has held that photographs of homicide victims taken while alive are inadmissible unless they are relevant to some material issue and their relevancy outweighs the danger of prejudice to the defendant."); *Tilley v. State*, 1998 OK CR 43, ¶ 32, 963 P.2d 607, 615 (requiring relevance to "outweigh[] the danger of prejudice to the defendant"); *Valdez v. State*, 1995 OK CR 18, ¶ 64, 900 P.2d 363, 381 (same); *Staggs v. State*, 1991 OK CR 4, ¶ 7, 804 P.2d 456, 458 (same); *Franks v. State*, 1981 OK CR 138, ¶ 18, 636 P.2d 361, 366 (same), *overruled on other grounds* by *Brown v. State*, 1987 OK CR 181, 743 P.2d 133. Although Oklahoma courts have consistently applied this more stringent balancing test to in-life victim photographs, they occasionally have used the section 2403 balancing test in examining the admissibility of such photographs. See, e.g., *Flores v. State*, 1999 OK CR 52, ¶ 25, 994 P.2d 782, 787 ("Generally, photographs of homicide victims taken while alive are inadmissible unless they are relevant to some material issue and their probative value is not substantially outweighed by the danger of unfair prejudice.").

63. See *Ritchie v. State*, 1981 OK CR 91, ¶ 6, 632 P.2d 1244, 1245 ("[W]here the evidence is both probative and prejudicial, the former must yield the greater value."). This formulation of the balancing test not only contradicts the plain language of section 2403, it is particularly

In applying this test, Oklahoma courts have consistently found that in-life photographs of victims pose a serious threat of prejudice to criminal defendants because they so easily invoke the jury's sympathy.<sup>64</sup> Indeed, the courts have found that the "emotional effect of such pictures may be the same as gruesome death photographs."<sup>65</sup> In *Smith v. State*, for example, the Oklahoma Court of Criminal Appeals stated that the trial court erroneously admitted an in-life photograph of two murdered little girls because "[t]he photograph of the cherubic little girls served only to highlight the unfortunate fact that untimely death and injury had been visited upon them."<sup>66</sup> Unless a photograph of the victim before death establishes a contested issue, such as the identity of the perpetrator, Oklahoma courts have held that the probative value of such photographs fails to outweigh the prejudicial impact under the more stringent balancing test favoring the exclusion of in-life photographic evidence.<sup>67</sup>

### *3. The Historical Treatment of In-Life Victim Photographs Was Inconsistent with the Treatment of Other Photographic and Demonstrative Evidence*

The Oklahoma courts' analysis of in-life victim photographs has not only contradicted the general language and interpretation of sections 2401 and

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inconsistent with the test adopted by Oklahoma courts to analyze a section 2403 objection affording the evidence its maximum reasonable probative value and its minimum prejudicial impact. This interpretation of the balancing test is even more weighted in favor of admissibility than the federal standard, which affords the evidence its *reasonable* probative value and its *likely* prejudicial effect. See *supra* note 24.

64. See, e.g., *Tilley*, ¶32, 963 P.2d at 614; *Staggs*, ¶ 7, 804 P.2d at 458; *Shelton v. State*, 1990 OK CR 34, ¶ 7, 793 P.2d 866, 870 (identifying prejudice from in-life victim photographs as the danger that the jury "would substitute emotion for reason" in a homicide case).

65. *Newbury v. State*, 1985 OK CR 1, ¶ 13, 695 P.2d 531, 535, *overruled on other grounds by McCalip v. State*, 1989 OK CR 46, 778 P.2d 488; see also *Franks*, ¶ 18, 636 P.2d at 366 ("The horror of the homicide can be equally evoked with a photo of a victim who is a beautiful baby as it can be with gruesome death pictures."), *overruled on other grounds by Brown v. State*, 1987 OK CR 181, 743 P.2d 133.

66. *Smith v. State*, 1982 OK CR 143, ¶ 34, 650 P.2d 904, 910. The prejudice necessary to exclude otherwise relevant evidence under section 2403 must be "unfair" prejudice, tempting the jury to reach a decision on an improper basis. Act of Mar. 19, 2003, ch. 3, § 15, 2003 Okla. Sess. Law Serv. 17, 30-31 (West) (to be codified at 12 OKLA. STAT. § 2403); see also *supra* note 20 and accompanying text. Evidence that damages the defense because it helps to prove the State's case may be very "prejudicial" to the defendant, but not "unfair." Arguably, the proper role of the State in a homicide prosecution is to "highlight" for the jury the untimely death and injury that have been visited upon the victims. Evidence that accomplishes this may indeed prejudice the defendant, but it will not necessarily do so *unfairly*.

67. See *supra* notes 54-55, 61-62 and accompanying text.

2403, but has also been contrary to their treatment of other photographic and demonstrative evidence in criminal cases. As mentioned previously, the Oklahoma Court of Criminal Appeals has routinely upheld the admission of multiple postmortem photographs of victims under section 2403, even in cases where the defendant has conceded the cause of death of the victim. For example, in *Guy v. State*,<sup>68</sup> the court upheld the admission of postmortem photographs despite the defendant's stipulation as to the cause of death, noting that the defendant "could not have deprived the photo of its probative value by his offer to stipulate to the facts which the photo was offered to prove" and that the photo retained its probative value as to the cause, nature and location of the victim's wounds despite the offer to stipulate.<sup>69</sup> In *Wadkins v. State*,<sup>70</sup> a pre-Code decision, the Oklahoma Court of Criminal Appeals found that the fact and manner of the victim's death were "at issue" and that photographs of the dead victim possessed probative value despite the fact that the defendant confessed to the crime and defended solely on the basis of insanity.<sup>71</sup> The court explained that "[w]hile it may be true that the defendant's sole defense was insanity, the State still had the burden to prove the offense charged was committed by the defendant. As such, the pictures in question clearly had probative value."<sup>72</sup> In a more recent decision, *Cargle v. State*,<sup>73</sup> the Oklahoma Court of Criminal Appeals found that multiple postmortem photographs of the victims at the crime scene were relevant to accurately depict the positions of the victims' bodies as they were found.<sup>74</sup> The photographs were relevant, the court held, to corroborate and illustrate eyewitness testimony, even though the defendant "never disputed the identity of the victims or the cause of death."<sup>75</sup>

Oklahoma courts have handled demonstrative evidence concerning undisputed issues similarly. In *Foster v. State*,<sup>76</sup> the defendant was accused

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68. 1989 OK CR 35, 778 P.2d 470.

69. *Id.* ¶ 9, 778 P.2d at 473.

70. 1977 OK CR 339, 572 P.2d 998.

71. *Id.* ¶ 7, 572 P.2d at 999.

72. *Id.*; see also *Newbury v. State*, 1985 OK CR 1, ¶ 12, 695 P.2d 531, 534, *overruled on other grounds* by *McCalip v. State*, 1989 OK CR 46, 778 P.2d 488. In *Newbury*, the court rejected the defendant's argument that *fourteen* photographs of the victim's corpse were inadmissible where the only defense was alibi and the only contested issue was the perpetrator's identity. The court stated that "[i]n every criminal prosecution, it devolves upon the State to prove, first, the corpus delicti, and, second, that the crime was committed by the accused." *Id.* ¶ 12, 695 P.2d at 534. Further, "[p]ictures of the murder victim are always useful in establishing the corpus delicti of the crime." *Id.*

73. 1995 OK CR 77, 909 P.2d 806.

74. *Id.* ¶ 36, 909 P.2d at 819.

75. *Id.*

76. 1986 OK CR 19, 714 P.2d 1031.

of beating an elderly delivery man to death with a baseball bat. The State offered a new baseball bat, similar to the one allegedly used against the victim, into evidence at trial over the defendant's objection.<sup>77</sup> The defendant's sole defense at trial was that he had an alibi. He claimed he was away from home at the time of the incident and knew nothing about the crime until was over.<sup>78</sup> Although no dispute existed as to the cause of death or type of injuries the victim suffered, the Oklahoma Court of Criminal Appeals found that the bat was "relevant to the case in allowing the jury to visualize one of the weapons used in the attack."<sup>79</sup> Thus, Oklahoma courts have allowed prosecutors to introduce other photographic and demonstrative evidence to paint a full picture of the case for the jury, even where the matters illustrated were not in dispute.

Further, the Oklahoma Court of Criminal Appeals has routinely found the unfair prejudicial impact of multiple, grisly, postmortem photographs insufficient to substantially outweigh their probative value in a section 2403 challenge.<sup>80</sup> Although Oklahoma courts have analogized the prejudice caused by in-life photographs to the prejudice generated by gruesome postmortem pictures, the emotional appeal and shock value of grisly postmortem scenes, foreign to the experience of an average juror, may be more likely to create an unfairly prejudicial emotional response from the jury than a single photograph of the victim alive.<sup>81</sup> Even assuming that in-life photographs create risks of

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77. *Id.* ¶ 5, 714 P.2d at 1036.

78. *Id.* ¶ 4, 714 P.2d at 1035.

79. *Id.* ¶ 6, 714 P.2d at 1036. The court also found that the prejudicial impact of the new bat failed to substantially outweigh its probative value under section 2403, where the prosecutor and the trial judge carefully instructed the jury that the bat was not the actual weapon used in the attack. *Id.* ¶ 7, 714 P.2d at 1036.

80. *See supra* note 45.

81. *See State v. Broberg*, 677 A.2d 602, 610 (Md. 1996) (noting that neither of the in-life victim photographs were "more prejudicial than autopsy photographs that are routinely admitted in homicide cases"); *People v. Sullivan*, 296 N.W.2d 81, 83 (Mich. Ct. App. 1980) ("Furthermore, we again emphasize that the photograph depicted the victim's appearance prior to the crime. It was in no way inflammatory or gruesome."); *State v. Goode*, 461 S.E.2d 631, 647 (N.C. 1995) ("In light of our prior holdings with regard to the admissibility and lack of prejudicial effect of [postmortem] photographic evidence of the victims of brutal crimes, the admission of one photograph depicting [the victims] when they were alive does not rise to the level of prejudice required for a reversal. *In fact, we are not persuaded that this photograph had any prejudicial effect at all.*") (emphasis added); *State v. Nefstad*, 789 P.2d 1326, 1349 (Or. 1990) (quoting trial judge ruling on objection to in-life photograph as follows: "It seems to me there can't be anything prejudicial to the Defendants in a picture of a decedent in a murder case. It doesn't prejudice them. It doesn't change the light in which the Defendant is in. It simply shows the jury that the person who is dead is a person and not just a name and not just a body shown in an autopsy or a crime scene photograph."); *State v. Brett*, 892 P.2d 29, 41 (Wash. 1995) (upholding admission of an eight by nine inch head and shoulders image of murder victim

unfair prejudice *similar* to those presented by postmortem pictures, it is difficult to reconcile the almost per se exclusion of in-life photographs under section 2403 with the routine admission of gory postmortem photographs under the same rule. Yet, the Oklahoma courts have allowed the admission of cumulative postmortem photographs depicting uncontested injuries in the face of a section 2403 challenge because “[g]ruesome crimes result in gruesome pictures.”<sup>82</sup> In comparing the analysis with respect to these closely related evidentiary objections, it is clear that the higher standard of relevance and more stringent balancing test applied to in-life photographs has led to a higher rate of exclusion for in-life photographs than for postmortem photographs. Indeed, prior to the recent amendment, an almost per se rule of inadmissibility for in-life victim photographs was Oklahoma law.

#### 4. Other Jurisdictions’ Approaches to In-Life Victim Photographs

Oklahoma’s long-standing history of almost per se exclusion of in-life photographs of homicide victims also differed from the approach taken by a majority of states with respect to such evidence.<sup>83</sup> Other states, in applying

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while alive, stating that “[i]n-life photographs are not inherently prejudicial, especially when the jury also sees “after-death” pictures of the victim’s body.”).

82. *Cargle v. State*, 1995 OK CR 77, ¶ 38, 909 P.2d 806, 819 (quoting *McCormick v. State*, 1993 OK CR 6, ¶ 12, 845 P.2d 896, 898) (alteration in original).

83. *E.g., Broberg*, 677 A.2d at 607-08 (affirming the admission of in-life photographs of a little boy killed by a drunk driver against an objection arising under Maryland’s version of FRE 403, and noting that “[t]he majority of appellate courts that have considered the admissibility of ‘in-life’ photographs have also upheld their admission”). The *Broberg* court noted that Oklahoma was among the “minority of jurisdictions [that] have taken the position that ‘in life’ photographs are irrelevant and prejudicial, and therefore have concluded that the use of ‘in life’ photographs is disfavored.” *Id.* at 608; *see also Williams v. State*, 451 So. 2d 411, 421 (Ala. Crim. App. 1984) (“There was nothing inflammatory or improper about the State’s introduction of the photograph of the victim [standing next to a Christmas tree.]”); *Palmer v. State*, 451 So. 2d 500, 502 (Fla. Dist. Ct. App. 1984) (finding no reversible error with respect to admission of posed in-life photograph of victim with his girlfriend, even though the victim’s identity was uncontested, because the court determined that the in-life photograph would not reasonably inflame the passions of the jury); *Fugate v. State*, 431 S.E.2d 104, 109 (Ga. 1993) (concluding that photograph of victim while alive was relevant to prove that the defendant took the life of another human being) (quoting GA. CODE ANN. § 16-5-1 (1998) (alteration in original)); *Spencer v. State*, 398 S.E.2d 179, 185 (Ga. 1990) (finding in-life photograph of victim relevant where “the state has to prove beyond a reasonable doubt that the defendant ‘cause[d] the death of another human being.’”); *People v. Morgan*, 568 N.E.2d 755, 774 (Ill. 1991) (finding in-life photographs of victim relevant and admissible to corroborate testimony of “life and death witness,” despite defendant’s offer to stipulate to victim’s correct identity, because “the defendant pleaded not guilty and the State had the right to prove every element of the crime charged and was not obligated to rely on the defendant’s stipulation”) (quoting *People v. Speck*, 242 N.E.2d 208, 221 (Ill. 1968)), *rev’d on other grounds*, 504 U.S.

the balancing test of section 2403 contained in their state evidence codes, have allowed prosecutors to admit in-life photographs, even when probative of undisputed matters only.<sup>84</sup> These courts have found the in-life photographs of murder victims probative of the identity and existence of the person whose life the defendant allegedly took, as well as part of the story of the murder prosecution.<sup>85</sup> Courts of many states recognize the probative value of such photographs even when witnesses have testified to or the defendant has conceded the identity of the victim.<sup>86</sup> The majority of courts that have considered the issue have found that the prejudicial effect caused by in-life

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719 (1992); *People v. Toth*, 435 N.E.2d 748, 754 (Ill. App. Ct. 1982) (explaining that the rules of evidence permit the state to call life and death witnesses to establish that the murder victim was alive prior to the events at issue, and that a photograph properly illustrates such testimony); *State v. Aswegan*, 331 N.W.2d 93, 97 (Iowa 1983) (finding that the admission of the victim's in-life photograph fell within the discretion of the trial judge); *State v. White*, 544 So. 2d 620, 626 (La. Ct. App. 1989) (finding no error in the prosecutor's use of a properly admitted in-life photograph during closing argument); *Commonwealth v. Nadworny*, 486 N.E.2d 675, 690 (Mass. 1985) (upholding admission of in-life photograph of murder victim over defendant's objection that "contrast between the decedent's 'youthful and smiling face' and the 'gruesome' visage in the postmortem photographs was inflammatory and prejudicial," and finding that the picture was relevant as to the identity and health of the victim, despite the defendant's offer to stipulate); *Bullock v. State*, 391 So. 2d 601, 609 (Miss. 1980) (finding no abuse of discretion in the admission of a high school portrait of the victim); *State v. Mergenthaler*, 868 P.2d 560, 564 (Mont. 1994) (finding no abuse of discretion in the admission of a single photograph of infant-victim, taken a few weeks before her death, in a negligent homicide case, which the prosecutor "introduced to the jury to show who the victim was and what she looked like"); *State v. Seymour*, 673 A.2d 786, 793 (N.H. 1996) (holding that the trial court did not abuse its discretion in admitting an in-life photograph of the victims, where the State argued that they were admissible to allow the jury to identify the people who were the subjects of the murder prosecution); *State v. Goode*, 461 S.E.2d 631, 646-47 (N.C. 1995) (upholding the admission of an in-life photograph of the murder victims where it was relevant to illustrate the testimony of a nephew identifying and describing his aunt and uncle while alive, and where the prejudicial effect of the photograph was minimal, if it existed at all); *State v. Ash*, 526 N.W.2d 473, 477 (N.D. 1995) (upholding the admission of an in-life photograph of a murder victim with his wife under 403 standard, in part because the picture "served to identify the victim for the jury by replacing an intangible, formless decedent with a face and personality"); *State v. Bertram*, 591 A.2d 14, 23 (R.I. 1991) (holding that a victim's in-life photograph was relevant to prove identity); *State v. Brett*, 892 P.2d 29, 41 (Wash. 1995) (upholding the admission of an in-life photograph of the murder victim despite defense offer to stipulate to the identity of the victim because it allowed the jury to see what the victim looked like in life, and was not unduly prejudicial). A few states have excluded in-life photographs applying reasoning similar to that of the Oklahoma courts. See, e.g., *Parker v. Arkansas*, 731 S.W.2d 756, 763 (Ark. 1987); *Commonwealth v. Rivers*, 644 A.2d 710, 716 (Pa. 1994).

84. See *supra* note 83.

85. See *supra* note 83.

86. See *supra* note 83.

photographs does not *substantially* outweigh their probative value.<sup>87</sup> This approach appears consistent with the plain language and interpretation of sections 2401 and 2403 discussed above.<sup>88</sup>

### III. The Amendment to Section 2403

Consistent with this view, the Oklahoma legislature lifted the long-standing judicial ban on the admission of in-life photographs of victims in homicide prosecutions.<sup>89</sup> The legislature statutorily reversed the Oklahoma Court of Appeals' precedent concerning the admission of in-life photographs through an amendment to section 2403 itself. In stark contrast to the former, almost per se judicial rule excluding in-life victim photographs, the legislature amended section 2403 to create a per se rule of admissibility for such photographs in homicide cases. Section 2403 now reads: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise."<sup>90</sup> By providing that appropriate in-life photographs of homicide victims "shall be admissible" to show the general appearance and condition of the victim while alive, the amendment declares such photographs relevant pursuant to section 2401 and removes such photographs from the balancing test set forth in section 2403.<sup>91</sup> Thus, the amendment reverses the status quo in Oklahoma: prosecutors who have long been unable to show the jury a photograph that depicts a homicide victim as he appeared in life will be able to admit such pictures routinely. On the other hand, defendants no longer

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87. See *supra* note 83.

88. See *supra* Part II.A.

89. See *supra* note 6.

90. Act of Mar. 19, 2003, ch. 3, § 15, 2003 Okla. Sess. Law Serv. 17, 30-31 (West) (to be codified at 12 OKLA. STAT. § 2403) (emphasizing language added to section 2403 by the 2002 and 2003 amendments). However, in a prosecution for any criminal homicide, an appropriate photograph of the victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive.

91. See *State v. Williams*, 828 P.2d 1006, 1013 (Or. 1992). In *Williams*, the Oregon Supreme Court analyzed the impact of statutory language providing that in-life photographs of victims "shall be admissible" in homicide cases. *Id.* at 1012-13. Because Oregon's Evidence Code mirrored Federal Rules 401 and 402 with respect to relevance and Rule 403 relating to the exclusion of otherwise relevant evidence for undue prejudice, the Oregon Supreme Court found that "[t]he statute, in effect, declares the photographs to be relevant and not subject to balancing under [Oregon Evidence Code] 403." *Id.* at 1013. The Oklahoma amendment to section 2403 also provides that victim photographs "shall be admissible" and appears to have a similar effect. § 15, 2003 Okla. Sess. Law Serv. 17, 30-31 (West) (to be codified at 12 OKLA. STAT. § 2403)

will be able to successfully exclude such photographs on the basis of their irrelevance or tendency to cause unfair prejudice.

In its reversal, the Oklahoma legislature did not specifically focus on the *evidentiary* arguments that support the admission of victim photographs in some cases. Instead, the legislature amended section 2403 out of concern for victims' rights in the criminal justice process.<sup>92</sup> Popularly called the "Kristie LaGrange Act," the amendment was named after a twenty-six-year-old family therapist who was beaten to death with a brick by one of her clients during a counseling session on July 17, 2000.<sup>93</sup> Oklahoma House of Representatives republican leader Fred Morgan sponsored the bill that led to the amendment.<sup>94</sup> He noted concerns about the rights of crime victims resulting from the prior treatment of in-life victim photographs by Oklahoma courts:

"Crime victims are guaranteed representation at every other criminal court proceeding . . . . But in the case of murder trials, the victim currently has no representation. In fact, a jury's verdict can be thrown out for the simple display of the murder victim's photograph." Such photos are generally not allowed in court because there is a fear that a conviction could be overturned on the basis that photos colored the jury's judgment . . . .<sup>95</sup>

In support of the amendment to section 2403, some Oklahoma citizens and participants in the Oklahoma criminal justice system opined that the introduction of in-life victim photographs at homicide trials would level the playing field between the extensive rights afforded the criminal defendant and those available to victims and their families.<sup>96</sup> Indeed, the Oklahoma

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92. In connection with the amendment to section 2403 of the Oklahoma Evidence Code, Judy Busch of the Oklahoma Survivors' Association stated: "I think it is time we put a face on the victim." Brian Ford, *Bill Expands Murder Trial Photo Use*, TULSA WORLD, Feb. 1, 2002, at News 11.

93. Kristie LaGrange's parents helped develop and promote the measure sponsored by then-house minority leader Fred Morgan. *Day in Court; Victims' Rights Score a Win*, TULSA WORLD, Apr. 25, 2002, at Opinion 16. Interestingly, the amendment will not affect the prosecution of Kristie LaGrange's murderer. Jack Chance, LaGrange's seventeen-year-old patient at the time, pled guilty to the crime and agreed to serve a life sentence without the possibility of parole rather than face the death penalty at trial. Jack Money, *House OKs Bill to Allow Court Photos*, DAILY OKLAHOMAN, Apr. 19, 2002, at 4A.

94. H.R. 2216, 48th Leg., 2d Sess. (Okla. 2002).

95. Ford, *supra* note 92, at News 11. Despite Representative Morgan's apparent concerns over the reversal of convictions based on the admission of in-life photographs, a review of the Oklahoma case law demonstrates that the erroneous admission of such photographs is usually deemed harmless error on appeal. See *supra* note 51 and accompanying text.

96. According to one news article, Oklahoma County District Attorney Wes Lane remarked that the amendment would help create "an even playing field" between the defendant and the



legislature created the per se rule of admissibility for in-life victim photographs in homicide cases in response to these public policy concerns.<sup>97</sup>

Oklahoma legislators and citizens are not the only groups concerned about representing the rights of crime victims in the courtroom. Other states and victims' rights groups have become increasingly concerned with the voice of the victim in recent years.<sup>98</sup> Some groups have specifically criticized courts, such as the Oklahoma Court of Criminal Appeals, for stating that in-life victim photographs are irrelevant in homicide prosecutions:

For victims, such statements exemplify the view that the criminal justice system is out of balance. While questioning the value of victim photographs . . . court[s] d[o] not mention that defendants are, of course, alive and present in the courtroom to establish rapport with the jury. Indeed, in many cases a defendant's family sits in the front row of the courtroom. Yet while the defendant is free to personalize his side of the case, the victim's family is not even given the satisfaction of having the prosecution introduce a photograph of the victim to personalize the life taken.<sup>99</sup>

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victim in a setting where criminal defendants often appear in court looking like "cleaned-up and coiffured choirboys." Ford, *supra* note 92, at News 11. In addition, a representative of the Oklahoma Homicide Survivors' Association commented on the disparity between the admission of gruesome autopsy and crime scene photographs of victims and the complete exclusion of in-life victim photos. *Id.*

97. This is not the first time the legislature has amended the Oklahoma Evidence Code to accommodate the interests of crime victims in the courtroom. It amended section 2615 of the Code in 1988 to include crime victims or their representatives as persons exempted from the general rule excluding witnesses from the courtroom. Act of Apr. 4, 1988, ch. 109, § 1, 1988 Okla. Sess. Laws 374 (codified at 12 OKLA. STAT. § 2615(5) (2001)); *see also* 3 WHINERY, OKLAHOMA EVIDENCE, *supra* note 3, § 46.08, at 548.

98. *See* Jay M. Zitter, Annotation, *Validity, Construction, and Application of State Constitutional or Statutory Victims' Bill of Rights*, 91 A.L.R.5TH 343 (2001). The author notes that

[r]ight or wrong, there is a widespread perception that the criminal justice system is out of balance since it coddles defendants with numerous rights, while crime victims or relatives of the victims are at best left out in the cold, or at worst are repeatedly insulted and hurt by the same system.

*Id.* at 362-63.

99. Cassell, *supra* note 56, at 1408 (discussing the concerns that led to passage of the Utah Rights of Crime Victims Act). In reliance on Oklahoma precedent, the Utah Supreme Court began to disfavor the admission of in-life victim photographs prior to the amendment of the Utah Constitution and Utah statutes to require the admission of such photographs. *Id.*; *see also* State v. Rocco, 795 P.2d 1116, 1117 (Utah 1990) (noting that "several courts have recognized that the probative value of a photograph showing a homicide victim's appearance before the crime was committed is often weak") (citing *Ritchie v. State*, 1981 OK CR 91, ¶ 8, 632 P.2d 1244, 1246); State v. Lafferty, 749 P.2d 1239, 1258 (Utah 1988) (same).

In response to such criticisms, legislatures in other states have enacted statutes mandating the admissibility of in-life photographs of the victim in a homicide prosecution. For example, in 1987, the Oregon legislature passed a statute containing language substantially similar to the Oklahoma amendment.<sup>100</sup> Like Oklahoma's new statute, the Oregon law mandates the admission of in-life victim photographs, exempting them from a defense objection based upon relevance or unfair prejudice.<sup>101</sup> Similarly, the citizens of Utah approved the Utah Victims' Rights Amendment to the Utah Constitution in 1994, extending constitutional protection to crime victims in Utah by vesting them with specific rights throughout the criminal justice process.<sup>102</sup> The implementing statute for the Utah constitutional amendment defines the rights provided by the constitutional amendment, and creates additional rights for victims.<sup>103</sup> The

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100. § 8, 1987 Or. Laws ch. 2 (codified at OR. REV. STAT. § 41.415 (2001)). In fact, the language of the Oregon statute is identical to the amended section 2403 except in one respect: the Oklahoma statute requires admission of an "appropriate" photograph of the homicide victim, while the Oregon statute contains no express limitation on the type of photograph that courts must admit. Compare OR. REV. STAT. § 41.415 (2001) with OKLA. STAT. § 2403 (Supp. 2002). The requirement of an "appropriate" photograph in Oklahoma may preserve some amount of discretion in the trial judge and promises to be one of the new battlegrounds for Oklahoma defense attorneys seeking to exclude in-life photographs following the amendment to section 2403. See *infra* notes 117-18 and accompanying text.

101. *Oregon v. Williams*, 828 P.2d 1006, 1013 (Or. 1992) ("The statute, in effect, declares the photographs to be relevant and not subject to balancing under [Oregon Evidence Code] 403."). In contrast to the Oklahoma amendment to section 2403 of the Oklahoma Evidence Code, the Oregon statute providing for the admissibility of homicide victim photographs is a separate statutory provision outside the Oregon Evidence Code. See OR. REV. STAT. § 41.415 (2001).

102. UTAH CONST. art. I, § 28; see also Cassell, *supra* note 56, at 1375. In response to increasing concerns over the rights of victims in criminal prosecutions, most states have enacted constitutional or statutory provisions providing crime victims with a variety of rights throughout the prosecution of their offenders. See Zitter, *supra* note 98, at 364. Although an exhaustive analysis of these provisions falls outside the scope of this Article, they typically seek to increase victims' rights in the following ways: (1) providing for economic restitution; (2) developing administrative procedures that are sensitive to the plight of the victim; (3) respecting the privacy of the victim; (4) protecting the victim against intimidation; (5) not limiting victims' participation in prosecutions to appearing as a witness; and (6) decreasing the burdens on victims who assist the prosecution. *Id.* at 364. In 1996, Oklahoma passed a constitutional amendment vesting crime victims with specific rights similar to those found in other jurisdictions. OKLA. CONST. art. I, § 34. In addition, the Oklahoma legislature has enacted statutory provisions designed to further the rights of victims in criminal proceedings. See, e.g., 19 OKLA. STAT. § 215.33 (2001) (victims' and witnesses' rights generally); 22 OKLA. STAT. §§ 984, 984.1-.2 (2001) (presentation of victim impact statements in sentencing proceedings); 57 OKLA. STAT. § 332.2 (2001) (victims' rights with respect to parole proceedings).

103. UTAH CODE ANN. § 77-38-9 (1999); see also Cassell, *supra* note 56, at 1376.

Utah Statute specifically enumerates the right of the prosecution to introduce an in-life photograph of the victim “to establish that the victim was a human being, the identity of the victim, and for other relevant purposes,” in a homicide case.<sup>104</sup>

Although many jurisdictions have passed victims’ rights provisions, either by constitutional amendment or statute, Utah and Oregon are exceptional in expressly mandating the admission of in-life victim photographs in homicide cases as a guaranteed right.<sup>105</sup> At least one state has squarely addressed the question of whether a victims’ bill of rights that fails to include an express guarantee of such a right nonetheless gives rise to a per se rule of admissibility for such pictures. In *State v. Broberg*,<sup>106</sup> the Maryland Supreme Court upheld the admission of two in-life photographs of a victim in a vehicular homicide trial.<sup>107</sup> The court held, however, that the Maryland victims’ rights statute failed to create a per se rule of admissibility and that the trial judge’s discretion under Maryland’s 403 balancing test would continue to control the admission of in-life photographs.<sup>108</sup>

Despite the extensive and growing concern over victims’ rights throughout the country, therefore, very few jurisdictions have gone so far as to *require* that the jury see in-life victim photographs any time the prosecution offers them. Therefore, by amending section 2403, Oklahoma abandoned one minority position with respect to these photographs for another. Although the Oklahoma Court of Criminal Appeals’ almost per se exclusion of in-life victim photographs was a distinct minority position throughout the United States, the legislature’s rule of per se admissibility is also an anomaly.

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104. UTAH CODE ANN. § 77-38-9(7) (1999). Unlike Utah’s statutory victims’ rights provision, Oklahoma’s constitutional and statutory victims’ rights provisions made no mention of the admission of in-life photographs in homicide trials prior to the amendment of section 2403 of the Evidence Code. The Utah statute describes the purposes for the introduction of such in-life photographs differently than the Oklahoma amendment to section 2403. While amended section 2403 mandates the admission of in-life photographs to show the “general appearance and condition of the homicide victim while alive,” Act of Mar. 19, 2003, ch. 3, § 15, 2003 Okla. Sess. Law Serv. 17, 30-31 (West) (to be codified at 12 OKLA. STAT. § 2403), the Utah statute discusses using such photographs to show “that the victim was a human being,” UTAH CODE ANN. § 77-38-9(7) (1999). The distinction in language, however, appears to mean little in terms of the admissibility of in-life photographs.

105. See generally Zitter, *supra* note 98, at 367-68 (describing typical rights protected under state constitutional and statutory victims’ rights provisions).

106. 677 A.2d 602 (Md. 1996).

107. *Id.* at 612.

108. *Id.*

#### *IV. The New Section 2403 and the Future of In-life Victim Photographs in Oklahoma Trials*

It is not surprising that any per-se rule authorizing the admission of evidence based upon the balance between probative value and prejudicial impact is a minority rule. It is true that the legislature has often analyzed specific categories of evidence and balanced the probative value of a particular category against its corresponding prejudice to prescribe its admissibility in advance in Article Four of the Oklahoma Evidence Code.<sup>109</sup> While this legislative balancing is the process that arguably led to the amendment of section 2403 to allow in-life victim photographs, almost all of the rules in Article Four of the Evidence Code that are the product of similar legislative balancing mandate the *exclusion* of otherwise relevant evidence.<sup>110</sup> This reflects the legislature's conclusion that the probative value of such evidence is never sufficient to justify its admission due to its prejudicial impact on the trier of fact or on society in general.<sup>111</sup> Even where such rules permit the admission of evidence within the specified categories as exceptions to the legislative balancing process, that evidence remains subject to a discretionary section 2403 balancing by the trial judge.<sup>112</sup>

The reason many rules exclude rather than admit evidence after balancing probative value against prejudicial effect is simple: the rules of evidence are designed to filter the information that is provided to the trier of fact. While it may be easy to declare in advance entire categories of evidence that a jury should *not hear* based on the evidence's prejudicial impact, it is almost impossible to maintain an effective filter by declaring entire categories of evidence admissible without examining the unique factual scenarios that give rise to both criminal and civil cases.

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109. See 12 OKLA. STAT. §§ 2404-2412 (2001).

110. *Id.*

111. See, e.g., *id.* § 2404 (prohibiting the use of character evidence to show conduct by a person in conformity with that character on a particular occasion because of likely and improper influence on the trier of fact, except in specified exceptional circumstances); *id.* § 2407 (prohibiting evidence of subsequent remedial measures to prove negligence or culpable conduct because of its low probative value and the public policy of encouraging such subsequent corrections).

112. See, e.g., *id.* § 2404(B) (providing that trial court "may" admit evidence of other crimes, wrongs, or acts for purposes other than a prohibited propensity inference). Courts have interpreted this language as requiring a section 2403 balancing procedure even for other acts evidence within such a category. See also *id.* § 2406 (providing that evidence of habit and routine is "relevant" to prove conduct on a particular occasion, and maintaining the trial judge's ability to exclude such evidence if its prejudicial impact substantially outweighs its probative value under section 2403).

The question of admitting photographs as evidence clearly illustrates this principle. Even when photographs of a certain type or within a particular class are at issue, the photographs within that type or class may be as varied as the facts that give rise to homicide prosecutions. For example, postmortem victim photographs may depict injuries for the jury during a graphic autopsy procedure, show the decomposing remains of the victim, or simply show a distant picture of the victim shortly after the murder, as discovered at the crime scene. Because of the great variation possible within any class of photographs, it is impossible to determine in advance whether photographs in the class as a whole would be appropriate for the jury to view. Furthermore, photographs are somewhat unique as evidence because they serve to illustrate matters proved by other evidence in a case.<sup>113</sup> It may be appropriate to exclude particularly gruesome postmortem photographs of a victim in a murder prosecution where a medical examiner or eyewitness can explain the injuries. On the other hand, courts should clearly admit even gory postmortem pictures to show the malicious nature of a killing when scant testimony is available regarding the cause of death or the defendant claims accident as a defense. For the above reasons, the question of admitting specific photographs is peculiarly inappropriate for advance determination by the legislature and has long rested within the discretion of the trial judge under the balancing test provided by FRE 403 and section 2403 of the Oklahoma Evidence Code. The judicial test is particularly suited to deal with specific pictures offered into evidence in cases with unique facts that have varying probative value and prejudicial impact.

In-life photographs of homicide victims are no different in this respect. Just as the prosecution must prove the cause of death in a murder case, the prosecution always bears the burden of proving the identity of the victim.<sup>114</sup> In most cases, however, in-life photographs depicting the person killed serve only to illustrate a matter already in evidence — namely, that the victim was alive and well prior to her death. Furthermore, the potential prejudicial impact on the defendant varies with the photograph offered. The sympathy invoked

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113. *See supra* note 44 and accompanying text. Because a witness must authenticate photographs through testimony that the photograph accurately depicts its subject, photographs almost always will be duplicative or illustrative of testimonial evidence already presented to the jury. *See generally* 2 MCCORMICK, *supra* note 44, § 214, at 14 (noting that a photograph may be “viewed merely as a graphic portrayal of oral testimony, and becomes admissible only when a witness has testified that it is a correct and accurate representation of relevant facts personally observed by the witness”).

114. *See, e.g.,* *Spencer v. State*, 398 S.E.2d 179, 185 (Ga. 1990) (finding an in-life photograph of the victim relevant where “the state has to prove beyond a reasonable doubt that the defendant ‘cause[d] the death of another human being’”) (quoting GA. CODE ANN. § 16-5-1 (1998)) (alteration in original).

by a picture of a smiling victim with her adoring husband in front of the Christmas tree, or a picture of a young child in his boy scout or athletic uniform may be much greater than the sympathy aroused by a simple head-and-shoulders portrait of the victim alone in plain clothes. Thus, allowing the trial judge to exercise section 2403 discretion would lead to the most equitable results within a statutory provision designed as a basis for excluding evidence. In this respect, the Oklahoma legislature disturbed the proper and discretionary standard of section 2403 by mandating the admissibility of in-life victim photographs in all homicide cases. It is for this reason that the Oklahoma amendment to section 2403 is such a minority position on the admission of in-life photographs.

Based on the historical treatment of these photographs by the Oklahoma Court of Criminal Appeals, however, the court arguably left the legislature with little choice. Despite the statutory framework that applied to in-life photographs, which allowed for judicial discretion, the Oklahoma Court of Criminal Appeals precedent forced lower courts to apply a more stringent rule of exclusion to in-life victim photographs, which essentially prohibited trial judges from exercising that discretion with respect to in-life victim photographs.<sup>115</sup> Reinstating the trial court's ability to admit in-life victim photographs in homicide cases in light of the existing Oklahoma precedent, therefore, may have been impossible without legislating a per se rule of admissibility.<sup>116</sup>

Although a purely discretionary balancing test under the former section 2403 for the admission of in-life victim photographs would be preferable to the recent amendment, the Oklahoma legislature improved on the law in Oregon and Utah by preserving at least *some* discretion for the trial judge with respect to in-life photographs. Unlike the Oregon and Utah statutes, which demand that an in-life victim photograph "shall be admissible" in all homicide cases, the Oklahoma amendment provides for the admission of only "an *appropriate* photograph."<sup>117</sup> Although the amendment greatly curtailed the discretion of the trial judge by conclusively determining that in-life victim photographs are relevant and sufficiently probative to warrant admission, some discretion remains in the hands of the trial judge. The requirement that the photograph be "appropriate" preserves the trial judge's discretion to

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115. See *supra* notes 52-61 and accompanying text.

116. The circumstances leading to the per se rule of admissibility in Utah appear somewhat similar. Decisions of the Utah Supreme Court signaled disfavored status for in-life victim photographs in homicide cases prior to the amendment of the Utah statutes that required their admission. See *supra* note 99.

117. Act of Mar. 19, 2003, ch. 3, § 15, 2003 Okla. Sess. Law Serv. 17, 30-31 (West) (to be codified at 12 OKLA. STAT. § 2403) (emphasis added).

exclude a specific in-life victim photograph that he finds “inappropriate.” Because the legislature offered no guidance as to what constitutes an “appropriate” photograph, the task of determining the propriety of a given photograph will necessarily fall within the discretion of the trial judge. Thus, the law continues to permit trial courts to distinguish between different types of in-life victim photographs within that broad category of pictures, albeit in the shadow of the legislature’s express approval for the admission of such photographs. Although maintaining discretion in the trial judge with respect to the admission of in-life victim photographs is consistent with the long-standing evidentiary principles governing photographic evidence, the legislature’s laudable effort to maintain this discretion through the use of the term “appropriate” has the potential to undermine its goal in amending section 2403. The Oklahoma courts could continue the disfavored status of such in-life pictures through an overly stringent application of the “appropriate” requirement.<sup>118</sup>

Thus, what constitutes an “appropriate” victim photograph will likely become the next battleground for counsel and courts involved in Oklahoma homicide trials. While defendants can no longer argue that an in-life picture of the victim is irrelevant or lacks probative value in a given case, defendants surely will challenge the specific photographs offered by the prosecution as inappropriate.<sup>119</sup> Questions abound: How recent must a victim photograph be

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118. The legislature’s choice of the term “appropriate” to define admissible in-life photographs may suggest that the legislature was mindful of this possibility. In using the modifier “appropriate,” the legislature was not likely concerned that prosecutors would seek to admit photographs of victims that painted those victims in a negative or “inappropriate” light. Nor could the legislature have been concerned that prosecutors would offer pictures inconsistent with the decorum of the courtroom in some respect. The inclusion of the modifier “appropriate” suggests that the legislature intended to provide some continuing protection for the interests of the *defendant* in the fair administration of justice. Therefore, an appropriate photograph must not unduly prejudice the defendant by inviting a guilty verdict on a purely emotional basis. Curiously, the Oklahoma legislature chose not to restrict the admissibility of such photographs based upon the well-understood term “prejudice.” Perhaps, the legislature was concerned that the use of the term “prejudice” would invite Oklahoma courts to continue their long-standing exclusion of in-life photographs in homicide cases, even under the amended section 2403 in a way that the term “appropriate” would not.

119. This is unlikely to be the only defense challenge to the admission of in-life victim photographs under amended section 2403. Evidentiary and other criminal procedure provisions which vest rights in the victim often create tension with the constitutional rights provided to the criminal defendant under state and federal law. *See Zitter, supra* note 98, at 364 (noting that “some . . . oppose victims’ rights provisions because they will compromise the critical balance of constitutional protections for criminal defendants”). Oklahoma homicide defendants may, therefore, seek to raise constitutional objections to the admissibility of in-life victim photographs under section 2403, as defendants in other states have already done. For example, in *State v. Nefstad*, 789 P.2d 1326, 1349-50 (Or. 1990), the defendant in a capital felony-murder

for a judge to consider it an “appropriate” reflection of the general appearance and condition of the victim while alive? Will a judge consider photographs of victims depicting them as participants in certain activities “appropriate,” or will a picture of the victim in her military uniform go too far in communicating to the jury that the victim was a good person and productive member of society for whose murder society ought to demand some recompense? Will a judge consider victim photographs that include other subjects, such as family members, friends, and pets “appropriate”? Will a judge admit multiple in-life victim photographs under any circumstances despite the language of amended section 2403, which allows the admission of “an appropriate photograph”?<sup>120</sup> Must a prosecutor offer any in-life photographs after the first for a purpose other than to show the victim’s “general appearance and condition”? Will the balancing test of section 2403 or the test announced by the Oklahoma Court of Criminal Appeals prior to the amendment of section 2403 govern the admission of multiple photographs? The tension between the clear intent of the legislature that courts permit the prosecution to introduce in-life photographs — and the long-standing disapproval of such photographs by the Oklahoma courts — may make it difficult for trial courts to draw a coherent line with respect to many of these issues.

Section 2403 may also muddy the waters regarding the use of in-life victim photographs in cases other than homicide trials. There will be other criminal cases in which prosecutors wish to offer a victim photograph into evidence. For example, the victim in a child-abuse prosecution may not testify before the jury or be present in the courtroom at trial, and the prosecutor may wish, therefore, to “identify” the victim and demonstrate his “general appearance and condition” through a smiling portrait. Under the precedent of the Oklahoma Court of Criminal Appeals, such a photograph would have little relevance unless the parties disputed the identity of the victim.<sup>121</sup> Under the

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case challenged the admission of an in-life victim photograph during the guilt-innocence phase of his prosecution under Oregon statute 41.415 as unconstitutional. The Oregon Supreme Court rejected the defendant’s argument that the in-life photograph constituted improper victim-impact evidence used by the jury during the penalty phase of his case. *Id.* at 1350. Oklahoma defendants in capital cases may attempt to raise similar constitutional challenges.

120. § 15, 2003 Okla. Sess. Law Serv. 17, 30-31 (West) (to be codified at 12 OKLA. STAT. § 2403) (emphasis added).

121. *See Ritchie v. State*, 1981 OK CR 91, ¶ 8, 632 P.2d 1244, 1246 (finding error in the admission of a photograph of an abused child in a child abuse case that ended in the child’s death). The court noted that “[t]he jury should not have been concerned with what the child looked like prior to the offense committed against her, but instead it should have been concerned only with what had been done to the child, how it was done, when it was done and who did it.” *Id.*



reasoning that gives rise to amended section 2403, however, such a photograph may be relevant and probative without any such dispute. Likewise, wrongful death cases and other civil matters may prompt questions concerning the admissibility of “victim” photographs that the amended section 2403 leaves unanswered. By limiting the scope of the amendment to “homicide” cases, the Oklahoma legislature failed to provide for such circumstances. How will Oklahoma courts handle objections to such victim photographs in light of the legislature’s relevance and probative value judgments inherent in the amendment and the prior contrary precedent of the Oklahoma Court of Criminal Appeals? Only the arguments and objections of Oklahoma trial lawyers on both sides of the aisle will provide the answers to these questions.

### *V. Conclusion*

In response to the Oklahoma courts’ consistent rejection of in-life victim photographs as evidence in homicide prosecutions, the Oklahoma legislature amended section 2403 of the Oklahoma Evidence Code to require the admission of “an appropriate” victim photograph in homicide cases. Although the amendment may have been necessary to alter the Oklahoma Court of Criminal Appeals’ long-standing exclusion of such evidence, replacing the discretionary balancing test embodied in section 2403 with a *per se* rule of admissibility is inconsistent with the historical purpose and application of the rule. Nevertheless, the legislature may have eliminated much of the danger inherent in such an approach by vesting the trial court with discretion to determine which in-life victim photographs are “appropriate” in a given case. However laudable, this remaining discretion promises to leave room for continuing debate over the admissibility of in-life victim photographs — a debate the Oklahoma legislature clearly sought to end through its recent amendment to section 2403.