

PHOTOGRAPHS AND EVIDENCE WITH EMOTIONAL IMPACT

I. Photographs

The (Commonwealth) (defendant) [intends to introduce / has introduced] (a photograph) (photographs) into evidence.

The photograph(s) may be graphic and unpleasant. I instruct you that your verdict must not in any way be influenced by the fact that these photographs may be graphic or unpleasant. The defendant is entitled to a verdict based solely on the evidence and not one based on pity or sympathy.

Consider a photograph only as it may show a medical condition, the nature of the (injury) (injuries), or the details of the incident itself.

II. Testimony or Evidence that May Evoke an Emotional Response

Sometimes evidence is presented that may produce an emotional response. For example, it's natural and understandable to feel sympathy and empathy when you see or hear about a person who was allegedly injured in a serious way, or who suffered in some way. I instruct you that you must separate any emotional response from

the value and weight of the evidence. You must find the facts in this case based only on the evidence and not on your emotional response to the evidence. You must not base your decision on sympathy, anger, passion or prejudice or pity. Rather, your verdict must be based solely on the evidence in this case and my instructions on the law.

NOTES:

1. **Admissibility.** The fact that a photograph is gruesome or may have an inflammatory effect on the jury does not preclude its admission. See *Commonwealth v. Walters*, 485 Mass. 271, 282 (2020), citing *Commonwealth v. Keohane*, 444 Mass. 563, 572-573 (2005). “The question whether the inflammatory quality of a photograph outweighs its probative value and precludes its admission is determined in the sound discretion of the trial judge.” *Commonwealth v. Amran*, 471 Mass. 354, 358 (2015) (citations omitted). See also *Commonwealth v. Nadworny*, 396 Mass. 342, 366 (1985).

The trial judge should take steps to mitigate the potentially prejudicial nature of a photograph: the judge may instruct the jury that the photograph is offered for its clinical or medical value and not to evoke emotion or sympathy, by altering the jury to the admission of potentially gruesome photographs during empanelment and by limiting the number and size of photographs shown. See *Commonwealth v. Amran*, 471 Mass. at 358; *Commonwealth v. Vizcarrondo*, 431 Mass. 360, 363 and n. 2 (2000). See also *Commonwealth v. Walters*, 485 Mass. at 282-283 (finding that, although judge failed to appropriately weigh the probative value against the prejudicial effect of admitting gruesome autopsy photo of victim’s face, the condition of which was not relevant to an issue in dispute at trial, error did not require reversal where judge limited number and size of photos shown and “repeatedly cautioned the jurors that, despite the gruesome nature of the photographs, they were to render a verdict based on the evidence, rather than on sympathy, anger, or passion.”)

2. **Timing of instruction.** This instruction should be given both at the time of the admission of the photographs and their publication to the jury as well as in the final instructions. See *Commonwealth v. Cardarelli*, 433 Mass. 427, 432 (2001).