murder, Puckett's testimony may be admitted without further ado. If such evidence is not already in the record, the judge may permit Puckett to testify ''on the condition'' of connection. The prosecution still must introduce evidence that connects the new charges against Hammer with Cox's alleged motive to kill. If the prosecution fails to do so, the judge will instruct the jury to disregard Puckett's testimony about the bail reduction hearing.

The advisory committee's explanation of this mechanism is hardly a model of clarity. To make matters worse, there is a small but significant error in the committee's note to Rule 104(b). Here are the note's concluding sentences:

> If after all the evidence on the issue is in [i.e., all evidence about whether Cox had heard of the new charges] . . . , the jury could reasonably conclude that fulfillment of the condition is **not** established, the issue [i.e., the import of Puckett's testimony about the new charges] is for them [the jury]. If the evidence is not such as to allow a finding [that Cox had heard of those charges], the judge withdraws the matter from their consideration.

(RB 15.) That boldfaced ''not'' is a mistake. These two sentences make (somewhat) more sense without it.

C. PROBATIVENESS VERSUS THE RISK OF UNFAIR PREJUDICE

Focus on FRE 403

RULE 403, PHRASE BY PHRASE

Rule 403 is short, but its simplicity is deceptive. Almost every phrase of the rule deserves scrutiny:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

It is worth taking a moment to master the mechanics of Rule 403. Virtually every piece of evidence admitted at trial must survive this rule's probativeness-versus-risk-of-unfair-prejudice weighing test. Some evidence must survive a stricter screening. But only the narrow class of

evidence defined by Rule 609(a)(2), which we take up in Chapter 4, is altogether exempt from Rule 403 scrutiny.

*''**The court may exclude** . . .''*: The operative word here is ''may.'' Decisions whether to exclude evidence under Rule 403 are committed to the trial judge's discretion and are reviewable on appeal only for abuse of discretion. Although abuse-of-discretion review acts as ''a virtual shield from reversal,'' ROGER PARK ET AL., EVIDENCE LAW § 12.01, at 540–41 & n.6 (1998), reversals are not unheard of. One example is *Old Chief v. United States*, 519 U.S. 172 (1997), excerpted below at page 82.

*''. . . **relevant evidence** . . .''*: The rule writers anticipated that Rule 403 often would result in exclusion of relevant evidence.

*''. . . **if its probative value is substantially outweighed by** . . .''*: Note that Rule 403 is a *liberal* evidence rule in the sense that it is friendly toward admission of evidence. If the evils of a particular piece of evidence (say, its potential to confuse the jury) exactly offset the probative value of the evidence, Rule 403 grants the trial judge no discretion to exclude. Even if such evils actually outweigh probative value, though only slightly, the rule still grants no permission to exclude. Only if these evils ''substantially outweigh[]'' the probative value of the evidence does Rule 403 give the judge discretion to exclude the evidence.

*''. . . **a danger of** . . . **unfair prejudice** . . .''*: Here the operative word is ''unfair.'' ''Relevant evidence is inherently prejudicial; but it is only *unfair* prejudice, *substantially* outweighing probative value, which permits exclusion of relevant matter under Rule 403.'' *United States v. McRae*, 593 F.2d 700, 707 (5th Cir.), *cert. denied*, 444 U.S. 862 (1979). The next several cases—*Bocharski*, *Serge*, *James*, *Myers*, and *Collins*—explore different sorts of potential *unfair* prejudice. These cases hardly exhaust the imaginable varieties.

*''. . . **a danger of** . . . **confusing the issues, misleading the jury** . . .''*: Distracting the jury from the task at hand also may supply grounds for excluding evidence under Rule 403.

*''. . . **a danger of** . . . **[1] undue delay, [2] wasting time, or [3] needlessly presenting cumulative evidence.**''*: Even sheer time waste may justify exclusion—''a concession,'' as Holmes said, ''to the shortness of life.'' *Reeve v. Dennett*, 145 Mass. 23, 28, 11 N.E. 938 (1887). Conceding

nothing on this score, the rule writers spelled out the problem of time waste three times.

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1. PHOTOS AND OTHER INFLAMMATORY EVIDENCE

STATE v. BOCHARSKI

Supreme Court of Arizona.
22 P.3d 43 (Ariz. 2001).

■ ZLAKET, CHIEF JUSTICE. Defendant Phillip Alan Bocharski moved from Michigan to Arizona with Frank Sukis in November 1994. The two settled just outside the small town of Congress. The defendant initially stayed with Sukis, but in December moved to a well-populated campsite on Ghost Town Road. Around Christmas, Sukis gave the defendant a Kabar knife, slightly smaller than one he kept for himself. This knife was described by Bocharski as his ''pride and joy,'' and he was frequently seen with it.

In April 1995, Sukis moved to a location near the defendant. Shortly thereafter, an eighty-four year old woman named Freeda Brown established a campsite between Bocharski and Sukis. . . .

On May 10, Sukis picked up Bocharski at the latter's tent. The two of them saw Brown polishing her truck. . . . Sukis later testified that . . . the defendant suggested ''maybe he should offer [*sic*] or get rid of [Brown], on account of her arthritis, 'cause she was complaining all the time, she was praying God he'd take her out of her misery.'' . . .

On May 13, Duane Staley noticed that Freeda Brown's dog had no water and its leash was wrapped around a tree. He had not seen Brown in a while and grew concerned. He knocked on her trailer door and tried to open it. He then obtained help from Sukis, who got inside and found Brown's body on the bed, covered by a blanket. . . .

The officer who arrived at the trailer observed that the woman's body had already begun to decompose. He concluded that her death was due to natural causes. . . . [But a] subsequent autopsy disclosed that Brown had perished as a result of at least sixteen stab wounds to the head. . . .

. . . [O]fficers searched around a mine and a nearby cemetery in hopes of finding Bocharski's Kabar knife, which was last seen by any witness three months before the killing. The knife was never located. In fact, no murder weapon was ever found. . . . Two of [Bocharski's] finger-

prints were found on the door of the deceased's trailer, but could not be dated.

The defendant . . . was convicted of first-degree felony murder and first-degree burglary. . . . Bocharski was sentenced to twenty-one years' imprisonment on the burglary charge and to death for the murder. We review this case on direct, automatic appeal. . . .

TRIAL ISSUES

A. Gruesome Photographs

The trial court allowed six photographs into evidence over defense counsel's objection that they were gruesome, highly inflammatory, and unduly prejudicial:

Exhibit 42:	the victim's clothed body, showing gross marbling of the skin, discoloration of the face, and fluid coming from both the nose and mouth;
Exhibit 43:	a closeup of the victim's face in profile before it was cleaned
Exhibit 44:	the victim's torso and face after the body had been washed and her head had been shaved to make the wounds more visible;
Exhibit 45:	a closeup of the victim's hand and finger; and
Exhibits 46, 47:	views of the victim's skull, the top and its contents having been removed, with a metal rod going through an opening to the inside.

Relevant photographs may be received in evidence even though they ''also have a tendency to prejudice the jury against the person who committed the offense.'' State v. Chapple, 135 Ariz. 281, 287–88 (1983). This does not mean, however, that every relevant photograph should automatically be admitted. If a photograph ''is of a nature to incite passion or inflame the jury,'' *id.*, the court must determine whether the danger of unfair prejudice substantially outweighs the exhibit's probative value. ARIZ. R. EVID. 403. A trial court's decision in this regard will generally not be disturbed unless we find a clear abuse of discretion.

Bocharski concedes that the photographs of the victim's body were relevant. We agree. [Unrestyled] Rule 401 declares that evidence which has ''*any tendency* to make the existence of any *fact that is of consequence* to the determination of the action more probable or less probable than it would be without the evidence'' is relevant. ARIZ. R. EVID. 401 (emphasis added). We have previously recognized that the state has the burden of proving every element of first-degree murder. We have also suggested

that photographs of a homicide victim's body are generally admissible because ''the fact and cause of death are always relevant in a murder case.'' State v. Harding, 141 Ariz. 492, 499 (1984).

However, if a defendant does not contest the ''fact that is of consequence,'' ARIZ. R. EVID. 401, then a relevant exhibit's probative value may be minimal. Under such circumstances, gruesome photographs may ''have little use or purpose except to inflame,'' *Chapple*, 135 Ariz. at 288, and their prejudicial effect can be significant. In the present case, the photographs introduced by the state went to largely uncontested issues. The defense did not challenge the fact of the victim's death, the extent of her injuries, or the manner of her demise.

Exhibits 42 and 43 depict both the state of the body's decomposition and facial wounds. There was some question about how long the victim had been dead before she was found. This was discussed by the medical examiner and a forensic pathologist who performed the autopsy. The witnesses could not ascertain an exact time of death, only coming within a few days in their estimates. Moreover, while diagrams were available to depict the size and location of the deceased's most profound injuries, the state introduced Exhibit 44 to show superficial head wounds, and Exhibit 45 to show a cut on the victim's finger. Testimony indicated that the latter was not a defensive wound, making its significance marginal at best.

Nevertheless, we do not conclude that the trial court abused its discretion by admitting Exhibits 42–45. The state ''cannot be compelled to try its case in a sterile setting.'' *Chapple*, 135 Ariz. at 289–90. We are, however, concerned about the admission of Exhibits 46 and 47. Their admission was unnecessary and quite risky. The state contends that these photos were required to show the angles and depths of the penetrating wounds. According to the state, this information was important because a juror asked the medical examiner about it. The defense argues that the photographs had no probative value; the manner of the victim's death was not in issue and the photographs failed to show that the defendant's missing knife caused the wounds.

The trial judge originally allowed Exhibits 46 and 47 to be admitted for the purpose of showing the angles of the wounds. However, the prosecutor did not elicit testimony concerning these angles or their significance. Indeed, there was no testimony at trial rendering Exhibits 46 and 47 particularly meaningful. The photographs do not reveal what type of knife was used, nor did the prosecutor refer to them when examining witnesses regarding a possible murder weapon. Although the pictures met the bare minimum standard of relevance . . . they had little tendency to establish any disputed issue in the case. Accordingly, we are left to conclude that they were introduced primarily to inflame the jury.

Let us again make clear that not every relevant photograph is admissible. Trial courts have broad discretion in admitting photographs. However, judges also have an obligation to weigh the prejudice caused

by a gruesome picture against its probative value. ARIZ. R. EVID. 403. In the present case, the record reflects that the trial judge conducted a Rule 403 weighing. In our view, however, he reached the wrong conclusion with regard to Exhibits 46 and 47. These two photos should not have been admitted . . . .

[Having concluded that the trial court erred, the court then considered whether the error affected the jury's verdict:]

Here, the photographs of the corpse were startling, as evidenced by the jurors' visible reactions to them. In particular, two jurors showed physical signs of distress upon seeing Exhibits 42, 43, and 44, with one of them apparently trying to prevent herself from hyperventilating. The judge noted on the record that after seeing these reactions to the first group of photographs, he ''watched [the jurors] closely as they passed around Forty-six and Forty-seven.'' His observation that ''they seemed to take them in stride'' is uncontroverted. Bocharski has not shown that Exhibits 46 and 47 had a particularly adverse effect on this jury . . . .

. . . Nothing before us suggests that the jurors' thoughtful consideration of the evidence was hampered by the objectionable photographs. Their verdict reflects careful attention to detail. Indeed, they chose felony murder instead of premeditated murder—a distinction that might easily have been overlooked if the verdict had been attributable to outrage or emotion generated by the gruesome pictures . . . . Accordingly, we find . . . that the error in admitting Exhibits 46 and 47 did not contribute to or affect the jury's verdict . . . .

DISPOSITION

We affirm the defendant's convictions . . . .

■ MARTONE, JUSTICE, concurring in the judgment. I join the court in affirming the convictions . . . . I write separately to express my disapproval of parts of the opinion.

I. PHOTOGRAPHS

Bocharski conceded the relevance of all the admitted photographs. The question then is simply whether the trial court abused its discretion in weighing probative value against prejudicial effect under Rule 403, Ariz. R. Evid. As evidenced by the majority's sua sponte speculation here, appellate courts are not in a very good position to second guess such judgments . . . . Murder is a grisly business and is likely to involve grisly photographs. Absent egregious error, we should not disturb Rule 403 weighing by the trial judge. There was no appeal to emotion, sympathy, or horror here.

One's view on the exclusion of otherwise relevant evidence is influenced by one's view of the jury system. I do not believe that jurors

need to be protected from themselves. In my experience, jurors quite properly separate the wheat from the chaff. . . . I do not believe that we should be paternalistic with our jurors. The trial court did not err in admitting any of the photographs. . . .

■ MCGREGOR, JUSTICE, specially concurring. . . .

Problem 1.8
Photo of Guns

Consider these facts from *United States v. Hitt*, 981 F.2d 422 (9th Cir. 1992):

> Dale Lee Hitt was convicted of possessing an unregistered machine gun in violation of 26 U.S.C. § 5861(d). The government alleged he had altered a semiautomatic rifle so it would discharge more than one shot per trigger pull—the defining characteristic of a machine gun. . . .
>
> The key question . . . was whether the rifle would in fact rapid-fire. The government and Hitt each had their own experts test-fire it: In the government's test, the rifle did fire more than one shot per trigger pull, but when Hitt's expert (witnessed by two police officers) tested it, it didn't. Hitt's expert suggested the gun may have fired automatically in the government's test because of a malfunction, perhaps because the internal parts were dirty, worn or defective. In response, the government introduced a photograph of the rifle which, it argued, showed the rifle was neither dirty, worn nor defective.
>
> Unfortunately, the photograph showed nothing of the gun's interior. All the jury could see was the outside, and not very well at that, as the gun occupied only a small part of the 4″ × 6″ photograph. The rest was taken up by about a dozen other weapons—nine other guns, including three that looked like assault rifles, and several knives—all belonging to Hitt's housemate.

Was the photograph relevant? Should the trial court have admitted it over Hitt's objection?