11.13. Photographs

(1) A photograph may be admitted in evidence upon a showing that it is relevant and properly identified and authenticated as a fair and accurate representation of what it purportedly depicts.

(2) An authenticated photograph of a deceased or of an injury is admissible in the discretion of the court if it tends to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove other evidence offered or to be offered, and if its probative value outweighs the danger of undue prejudice.

Note

Subdivision (1) is derived from *People v Byrnes* (33 NY2d 343, 347 [1974]) where the photographs were authenticated and admitted into evidence because the "complainant, a competent witness possessing knowledge of the matter, identified the subjects and verified that the photographs accurately represented the subject matter depicted." Further, in a proper case, a photograph may constitute "independent probative evidence of what it shows" (*Byrnes* at 348, citing as an example *People v Webster*, 139 NY 73, 83 [1893] [photograph admitted to show physique of deceased where defendant pleaded self-defense]).

While an appropriate witness's testimony normally will establish the foundation, where "no witnesses are available who have viewed the subject matter portrayed, valid alternative grounds may exist for authenticating the photograph and admitting it into evidence, such as testimony, especially that by an expert, tending to establish that the photograph truly and accurately represents what was before the camera." (*Byrnes* at 349; *see People v Price*, 29 NY3d 472, 477 [2017] [" 'since the ultimate object of the authentication requirement is to insure the accuracy of the photograph sought to be admitted into evidence, any person having the requisite knowledge of the facts may verify,' or an expert may testify that the photograph has not been altered" (citation omitted)].)

In *Price*, the People failed to authenticate a photograph "from an Internet profile page allegedly belonging to defendant" by any of the traditional methods, "as the victim was unable to identify the weapon as that which was used in the robbery, and no other witnesses testified that the photograph was a fair and accurate representation of the scene depicted or that it was unaltered" (*Price*, 29 NY3d at 474, 477-478 [citations omitted]). Instead, the People argued that the photograph's authenticity had been proved by evidence "that the printout of the

web page is an accurate depiction thereof, and that the web page is attributable to and controlled by . . . the defendant" (*id.* at 478). The Court, however, held that "[a]ssuming without deciding that a photograph may be authenticated through the method proposed" or "some variation thereof," the People failed in their proof "of defendant's connection to the website or the particular profile." (*Id.* at 478-480.)

Subdivision (2) is derived primarily from *People v Pobliner* (32 NY2d 356, 369-370 [1973]), and its progeny. In *Pobliner*, the Court held:

> "The general rule is that photographs of the deceased are admissible if they tend to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered or to be offered. Admission of photographs of homicide victims is generally within the discretion of the trial court. Where they are otherwise properly admitted as having a tendency to prove or disprove some material fact in issue, photographs of a corpse are admissible even though they portray a gruesome spectacle and may tend to arouse passion and resentment against the defendant in the minds of the jury. There are many cases in which photographs of a homicide victim have been held admissible to show, for example, the position of the victim's body, the wounds of the victim, or to illustrate expert testimony. Photographic evidence should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant." (*Id.* at 369-370 [internal quotation marks and citations omitted].)

In *Pobliner*, the defendant told a friend that his wife was asleep when he shot her. Four photographs were properly admitted to show that the deceased "was in her bed, in a sleeping position, when shot, thus tending to confirm" the defendant's friend's testimony; and two photographs taken at the morgue were properly admitted to "show the three clustered bullet holes near the left temple, indicating marksmanship and deliberateness in the killing." (*Pobliner* at 370; *see People v Bell*, 63 NY2d 796, 797 [1984] [photographs of a victim being attended in the hospital were admissible given that "(t)hey were not gory, the lacerations they show having either been cleaned up or bandaged, and while the knife remaining imbedded in the victim's back was startling in the sense of being unusual, the picture it presented of the knife was less unnerving than the oral testimony concerning it"]; *People v Stevens*, 76 NY2d 833, 836 [1990] ["The photographs of the victim's body showed the nature of the injury and therefore tended to prove that the assailant acted with intent to inflict serious injury, an essential element of the manslaughter count. The People were not bound to rely entirely on the testimony of the medical expert to prove this point and the photographs were admissible to elucidate and corroborate that testimony"]; *People v Wood*, 79 NY2d 958, 960 [1992] ["The nature and manner of the killing were material and relevant to prosecution of the murder indictment and the defendant could not

make it otherwise by admitting that he had killed the victim but contending that he had done so under the influence of an extreme emotional disturbance. The questioned exhibits illustrated the severity and calculated nature of the wounds and tended to disprove defendant's claim that he was totally out of control at the time of the killing"]; *Mazella v Beals*, 27 NY3d 694, 709 [2016] [in action for malpractice by a psychiatrist, a photograph of the deceased who committed suicide "was relevant to plaintiff's theory that the violent nature of the suicide—death by self-inflicted knife wounds—was a result of decedent's extreme mental and emotional condition, induced by the long-term use of prescription drugs," and its admission was not "unduly prejudicial" because there was testimony and the autopsy report describing the body's condition].)

A portrait or photograph of a deceased taken when the deceased was alive may "arouse the jury's emotions, particularly when they are presented in a before-and-after format, and thus should not be admitted unless relevant to a material fact to be proved at trial. In addition, the relevance of the portraits must be independently established; the fact that photographs of the victim after death have been found to be relevant does not necessarily establish the relevance, and hence admissibility, of portraits of the victim while alive." (*People v Stevens*, 76 NY2d 833, 835-836 [1990]; *Smith v Lehigh Val. R.R. Co.*, 177 NY 379, 384 [1904] [in an action to recover for pecuniary damages resulting from the decedent's death, the introduction in evidence of the photograph of the deceased as a handsome woman when she was alive was improper]; *compare People v Ramsaran*, 154 AD3d 1051, 1053-1054 [3d Dept 2017] [photographs of the deceased prior to her murder "were relevant to and probative of the People's central theory that defendant disapproved of the victim's appearance and was motivated to kill her, in part, by his desire to be with (another woman), whose appearance he perceived as more attractive"].)