

“A Picture is Worth a Thousand Words”: The Effect of Spectators’ Display of Victim Photographs During a Criminal Jury Trial on a Criminal Defendant’s Fair Trial Rights

by ELIZABETH LYON*

The victim was a person—someone you can picture.

*Jack Collins, Former New Jersey Assembly Speaker*¹

I think they’re probably a problem.

*Stephen Breyer, United States Supreme Court Justice,
discussing the photograph buttons at issue in Carey v. Musladin*²

Introduction

Spectators at criminal jury trials have been known to display photographs of a deceased victim inside the courtroom either on buttons, T-shirts, collages, or through other means.³ Courts have recognized that these photographs function as no more than an ordinary “expression of the grief occasioned by the loss of the victim.”⁴ As such, courts have allowed them

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1. New Jersey Crime Victims’ Law Center Website, <http://www.njcvlc.org/reference/quotes/>.

2. Transcript of Oral Argument 28, *Carey v. Musladin*, 549 U.S. 70 (2006) (No. 05-785).

3. This issue often arises in cases where the defendant is on trial for the murder of the victim, and family or friends of the victim attend the criminal jury trial in support of the deceased victim.

4. *See, e.g., Musladin v. Lamarque*, 427 F.3d 653, 658 (9th Cir. 2005) (“The California Court of Appeal justified its rejection of Musladin’s claim as follows: . . . ‘the message to be conveyed by the [victim’s] family wearing buttons is less than clear. The simple photograph of [the victim] was unlikely to have been taken as a sign of anything other than the normal grief

inside the courtroom just as many other emotional expressions of spectators are allowed and even expected.⁵

This Note argues that victim photographs in the courtroom go beyond an ordinary showing of emotion. In addition, they serve to elicit sympathy from jurors, and they call the jurors to vindicate the victim's loss. For these reasons, such photographs violate a criminal defendant's constitutional right to a fair trial.⁶ Yet, state courts have routinely allowed spectators to display photographs of the victim during a criminal defendant's jury trial, even over the defense's objection.⁷ These courts underestimate the effect such photographs can have on a jury and, in the process, have infringed on the right of the defendant to obtain a fair trial by an impartial jury, as required by the Sixth and Fourteenth Amendments.

Recently, in *Carey v. Musladin*, the Supreme Court of the United States held that the "effect on a defendant's fair-trial rights of [spectators bringing photographs of the victim into the courtroom] is an open question in our jurisprudence."⁸ In the absence of Supreme Court precedent, state courts continue to allow in such photographs. Further, federal courts are prohibited from granting relief under Antiterrorism and Effective Death Penalty Act ("AEDPA") where a criminal defendant's rights have been violated in state court on such grounds.⁹ Thus, the Supreme Court should

occasioned by the loss of a family member.'" (quoting *People v. Musladin*, No. H015159, slip op. at 21–22 (Cal. Ct. App. Dec. 9, 1997)).

5. *Compare, e.g., Burns v. State*, 609 So. 2d 600, 604–05 (Fla. 1992) (finding that widow crying three times in courtroom insufficient to prejudice jury), with *Buckner v. State*, 714 So. 2d 384, 389 (Fla. 1998) (stating that "where prejudicial exhibition [of emotion] 'extreme,' new trial warranted" (citing *Woods v. Dugger*, 923 F.2d 1454 (11th Cir. 1991))).

6. See U.S. CONST. amend. VI.

7. See *infra* notes 84–108 and accompanying text.

8. *Carey v. Musladin*, 549 U.S. 70, 76 (2006). Because of the procedural stance of this case, the Supreme Court did not reach this issue. *Id.* at 77.

9. See, e.g., Joseph M. Brunner, *Negating Precedent and (Selectively) Suspending Stare Decisis: AEDPA and Problems for the Article III Hierarchy*, 75 U. CIN. L. REV. 307, 336 (2006) ("This [lower federal court] has determined that the New York Court of Appeals' decision was (plausibly) erroneous. Thus, [the defendant] had a constitutional right that was probably violated at his trial. Nevertheless, the AEDPA standard prevents a court from remedying that violation because the Supreme Court has not yet specifically recognized such a violation. If this [lower federal court] determines that [the defendant's] Sixth Amendment right was violated, then, that determination would be rendered ineffective and meaningless by the operation of the AEDPA standard. Once Congress has decided to establish lower Article III courts, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995),] and [*City of Boerne v. Flores*, 521 U.S. 507 (1997),] make clear that lower Article III courts' judgments must be given ordinary precedential and stare decisis effect. *Plaut* especially supports the proposition that any Article III court must have the ability to conclusively and authoritatively decide a case. Denying a court the ability to craft a remedy is an unconstitutional infringement on the judicial power an Article III court exercises.").

address this issue in order to ensure that criminal defendants are afforded their full constitutional rights.

Specifically, this Note will suggest that the Supreme Court should adopt a rule prohibiting spectators from displaying victim photographs in the courtroom during a criminal defendant's jury trial. First, it will look at the Court's decision in *Musladin* and other state court decisions dealing with victim photographs inside the courtroom, noting that many courts are allowing such photographs. Next, this Note will address the history and importance of the criminal defendant's fair trial rights under the Sixth Amendment, including the right to an impartial jury, and argue that displays of a victim's photograph in the courtroom infringe on these rights. Moreover, this Note will address counterarguments, including the First Amendment and the state's interest in allowing victims an outlet to express their emotions including grief and solidarity with the victim. Last, this Note suggests that, in light of the need to ensure all defendants are afforded their constitutional right to a fair trial under the Sixth and Fourteenth Amendments, the Supreme Court should adopt a rule prohibiting spectators from displaying photographs of the victim during a criminal jury trial.

I. Background Cases

A. *Carey v. Musladin*

In *Carey v. Musladin*, the defendant, Mathew Musladin, was charged in state court with the first-degree murder of the victim, Thomas Studer.¹⁰ At trial, there was no dispute as to whether Musladin was the individual who fatally shot Studer.¹¹ However, Musladin plead not guilty, arguing that he was acting in self-defense when he shot the victim.¹²

During at least some of the fourteen days of Musladin's trial, spectators sitting in plain view of the jury wore buttons depicting a photograph of the victim.¹³ Early on, Musladin's counsel moved to have the buttons removed from the courtroom, but the trial judge denied the motion.¹⁴ The jury convicted Musladin of first-degree murder.¹⁵ Musladin appealed his conviction.¹⁶ The California State Court of Appeals affirmed

10. *Musladin*, 549 U.S. at 72.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 72-73.

15. *Id.* at 72.

16. *Id.* at 73.

Musladin's conviction, and Musladin then appealed to the California Supreme Court, which denied his petition for review.¹⁷

After exhausting his state court appeals, Musladin filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California under AEDPA, arguing that the photograph buttons displayed by the spectators violated his constitutional fair trial rights.¹⁸ Under AEDPA, a federal court may overturn a state court conviction only where the state court decision was "contrary to, or involved an unreasonable application of, clearly established federal law."¹⁹ The federal district court denied the petition.²⁰

Musladin then appealed to the United States Court of Appeals for the Ninth Circuit.²¹ In his appeal, Musladin contended that under the Supreme Court's holdings in *Estelle v. Williams*²² and *Holbrook v. Flynn*,²³ the photograph buttons worn by spectators during his criminal jury trial created an "unacceptable risk of impermissible factors coming into play."²⁴ Musladin argued that the buttons were both a statement from the spectators regarding his guilt and a plea to the jury to convict him, thereby infringing on both his right to a fair trial by an impartial jury and a presumption of innocence.²⁵ Thus, he argued the buttons were inherently prejudicial because their presence violated his Sixth and Fourteenth Amendment rights.²⁶

The Ninth Circuit agreed with Musladin and reversed the district court's denial of Musladin's petition for writ of habeas corpus and remanded.²⁷ The Ninth Circuit found that the state appellate court correctly identified the "inherent prejudice" test of *Williams* and *Flynn* as the clearly established federal law to apply in this case.²⁸ Under the "inherent

17. *Id.*

18. *Id.*

19. 28 U.S.C. § 2254(d)(1) (2007).

20. *Musladin*, 549 U.S. at 73.

21. *Id.*

22. *Estelle v. Williams*, 425 U.S. 501 (1976).

23. *Holbrook v. Flynn*, 475 U.S. 560 (1986).

24. *Musladin v. Lamarque*, 427 F.3d 653, 654, 656–57 (9th Cir. 2005). See *infra* notes 49–80 and accompanying text for a more detailed discussion of *Williams* and *Flynn*.

25. Opening Brief of Petitioner-Appellant at 31–32, *Musladin*, No. 03-16653 (9th Cir. Nov. 4, 2004).

26. *Musladin*, 427 F.3d at 654, 656–57.

27. *Id.* at 654.

28. *Id.* at 656–58. Musladin's petition for habeas corpus was based on the grounds that the state appellate court unreasonably applied *Williams* and *Flynn*. Thus, the Ninth Circuit had to

prejudice” test, a courtroom practice that creates an “unacceptable risk of impermissible factors coming into play” violates a defendant’s constitution right to a fair trial.²⁹ The state appellate court concluded that the buttons worn by the victim’s family members during Musladin’s jury trial were an “impermissible factor coming into play.”³⁰ The Ninth Circuit held that this finding satisfied the “inherent prejudice” test and, therefore, Musladin’s constitutional rights were violated.³¹

However, after finding the buttons to be an impermissible factor coming into play, the state court went on to require Musladin to show that the presence of the photograph buttons “branded [him] with an unmistakable mark of guilt.”³² The Ninth Circuit found that this additional requirement was both contrary to, and an objectively unreasonable application of, clearly established federal law.³³ Therefore, the Ninth Circuit overturned the district court’s denial of Musladin’s petition for writ of habeas corpus and remanded the case for issuance of the writ.³⁴

The United States Supreme Court overturned the Ninth Circuit’s decision.³⁵ In doing so, the Supreme Court found that the Ninth Circuit abused its discretion in granting Musladin’s petition for habeas relief.³⁶ The Supreme Court held that its previous decisions in *Williams* and *Flynn* only concerned the effect of state-sponsored courtroom practices on a criminal defendant’s fair trial rights and did not address the effect of spectator conduct.³⁷ Thus, the Supreme Court held that, absent clearly established federal law on point with Musladin’s case, the Ninth Circuit’s action was an improper exercise of authority.³⁸

The three concurrences in *Musladin* raise several important issues.³⁹ First, Justice Kennedy recognized the need to establish a new rule dealing

look at the state appellate court decision to determine if it applied the correct federal law (clearly established federal law) and if the application was reasonable.

29. *Id.* at 656.

30. *Id.* at 658 (citing *People v. Musladin*, No. H015159, slip op. at 21–22 (Cal. Ct. App. Dec. 9, 1997)).

31. *Id.*

32. *Id.* at 658 (citing *Musladin*, No. H015159, slip op. at 21–22).

33. *Id.* at 661.

34. *Id.*

35. *Carey v. Musladin*, 549 U.S. 70, 77 (2006).

36. *Id.*

37. *Id.* at 75–76.

38. *Id.* at 77.

39. See *United States v. Sampson*, 486 F.3d 13, 47 n.17 (1st Cir. 2007) (“[Defendant] cites the statements contained [in *Musladin*] as indicia of the Supreme Court’s concerns over the potential for improper influence represented by the conduct of spectators. However, these

with whether “buttons proclaiming a message relevant to the case ought to be prohibited as a matter of course.”⁴⁰ Second, Justice Stevens made the argument that “there is no merit whatsoever to the suggestion that the First Amendment may provide some measure of protection to spectators in a courtroom who engage in actual or symbolic speech to express any point of view about an ongoing proceeding.”⁴¹ Most relevant, however, is Justice Souter’s concurrence, with which Justice Stevens essentially agreed.⁴² Justice Souter stated that, with regard to a defendant’s fair trial rights, “the trial judge has an affirmative obligation to control the courtroom and keep it free of improper influence,” whether such influence results from state-sponsored or private spectator conduct.⁴³ Souter went on to express serious concerns about the effect of the photograph buttons on the fair trial rights of the defendant,⁴⁴ contending that

one could not seriously deny that allowing spectators at a criminal trial to wear visible buttons with the victim’s photo can raise a risk of improper considerations. The display is no part of the evidence

concurrences focus on the impact that affirmative demonstrations by spectators (there, the wearing of buttons by spectators that featured an image of the victim) may have during the guilt phase of a trial.” (citing *Musladin*, 549 U.S. at 78–83) (alteration in original)).

40. *Musladin*, 549 U.S. at 80–81 (Kennedy, J., concurring) (citing *Frank v. Mangum*, 237 U.S. 309 (1915) (courtroom disorder and mob violence), *Moore v. Dempsey*, 261 U.S. 86 (1923), *Sheppard v. Maxwell*, 384 U.S. 333, 355 (1966) (the disruptive presence of the press in the courtroom), and *Estes v. Texas*, 381 U.S. 532, 550 (1965) (the presence of cameras in the courtroom)). Justice Kennedy recognizes that it is an already well-settled rule that a court must “order a new trial when a defendant shows his conviction has been obtained in a trial tainted by an atmosphere of coercion or intimidation” caused by spectator or other courtroom conduct. However, Kennedy distinguishes the potential impact of the photograph buttons from the “coercion or intimidation” caused by courtroom conduct in previous Supreme Court cases. He suggests that “the case as presented to us here does call for a new rule, perhaps justified as much as a preventative measure as by the urgent needs of the situation. That rule should be explored in the court system, and then established in this Court before it can be grounds for relief in [a habeas corpus proceeding].” *Id.*

41. *Id.* at 79 (Stevens, J., concurring).

42. *Id.* at 81–83 (Souter, J., concurring). In his concurrence, Justice Souter argues that the standard established in *Williams* and *Flynn*, that a criminal defendant’s fair trial rights are infringed when a courtroom “practice or condition presents ‘an unacceptable risk . . . of impermissible factors coming into play’ in the jury’s consideration of the case,” reaches spectator conduct. Souter contends that while the photograph buttons present a risk of impermissible factors being considered by the jury, there is insufficient evidence to conclude that such a risk was unreasonable. He suggests that while it is unlikely that a First Amendment interest exists in the photograph buttons, it would be preferable that the argument be fully developed before deciding “whether protection of speech could require acceptance of some risk raised by spectators’ buttons.” *Id.*

43. *Id.* at 82 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966)).

44. *Id.* at 82–83.

going to guilt or innocence, and the buttons are at once an appeal for sympathy for the victim (and perhaps for those who wear the buttons) and a call for some response from those who see them. On the jurors' part, that expected response could well seem to be a verdict of guilty, and a sympathetic urge to assuage the grief or rage of survivors with a conviction would be the paradigm of improper consideration.⁴⁵

B. United States Supreme Court's "Inherent Prejudice" Test

In *Musladin*, the Supreme Court held that it was improper for the Ninth Circuit to grant Musladin's petition for writ of habeas corpus under AEDPA because of the lack of any Supreme Court precedent on point with the issue raised by the case.⁴⁶ The Court distinguished the precedent established in *Williams* and *Flynn* on the ground that these cases deal with the effect of state-sponsored courtroom activity, not spectator conduct, on the defendant's fair trial rights.⁴⁷ While at least one state court has done so, the Supreme Court has not yet extended the holdings in *Williams* and *Flynn* to cover the effect of spectator conduct.⁴⁸

1. *Estelle v. Williams*

In *Estelle v. Williams*, the defendant, Harry Williams, was charged with assault.⁴⁹ Throughout his state court jury trial, Williams appeared in court wearing prison attire.⁵⁰ Neither Williams nor his counsel raised an objection to the clothing.⁵¹ Williams appealed after he was convicted, and the Texas Court of Criminal Appeals affirmed.⁵² Williams then sought habeas relief in the United States district court.⁵³ The district court held that although the forced wearing of prison garb was inherently unfair, it amounted to a harmless error.⁵⁴ Williams appealed to the Fifth Circuit

45. *Id.*

46. *Id.* at 77 (majority opinion).

47. *Id.* at 75–76.

48. *Id.* at 76 (“[A]lthough the Court articulated the test for inherent prejudice that applies to state conduct in [*Estelle v.*] Williams[, 425 U.S. 501 (1976),] and [*Holbrook v.*] Flynn[, 475 U.S. 560, 568 (1986)], we have never applied that test to spectators’ conduct. Indeed, part of the legal test of *Williams* and *Flynn*—asking whether the practices furthered an essential *state* interest—suggests that those cases apply *only to state-sponsored practices*.” (emphasis added)); *see infra* section VII.B.

49. *Williams*, 425 U.S. at 502.

50. *Id.*

51. *Id.*

52. *Id.* at 503.

53. *Id.*

54. *Id.*

Court of Appeals, which reversed the conviction on the ground that the error was not harmless.⁵⁵

In 1976, the United States Supreme Court overturned the Fifth Circuit's decision, holding that, while the forced wearing of prison garb is inherently prejudicial, and thus violates a defendant's constitutional right to a fair trial, such conduct did not amount to an infringement of the defendant's fair trial rights in the present case because neither Williams nor his counsel ever objected to the forced wearing of the clothing.⁵⁶ Courts have consistently required that the defendant object to being tried in prison garments before a constitutional violation will be found.⁵⁷ The Court held that, based on the lack of an objection by the defendant in this case, there was insufficient evidence to prove that Williams was forced to wear the prison clothing.⁵⁸

In its analysis, the *Williams* Court held that a courtroom practice is "inherently prejudicial," and thus violates a defendant's fair trial rights, when "an unacceptable risk is presented of impermissible factors coming into play" and the practice "furthers no essential state policy."⁵⁹ The Court found that compelling a defendant to stand trial in prison attire would serve as a constant reminder of the defendant's status as an accused needing to be held in custody, and such conduct would function as a continuous and improper influence on the jury throughout the trial.⁶⁰ In addition, such a practice serves no compelling state interest, such as ensuring the safety of others.⁶¹ Thus, the forced wearing of prison garb during trial is "inherently prejudicial" and violates the defendant's fair trial rights.⁶²

2. *Holbrook v. Flynn*

In *Holbrook v. Flynn*, the Court reaffirmed its holding in *Williams* in determining whether the presence of uniformed officers violated the defendants' right to a fair trial.⁶³ The defendant, Charles Flynn, and five co-defendants were charged with armed robbery.⁶⁴ On the first day of

55. *Id.*

56. *Id.* at 512-13.

57. *Id.* at 508 ("Courts have therefore required an accused to object to being tried in jail garments, just as he must invoke or abandon other rights.")

58. *Id.* at 512-13.

59. *Id.* at 504-05 (citing *Turner v. Louisiana*, 379 U.S. 466, 473 (1965)).

60. *Id.* at 503-05.

61. *Id.* at 505.

62. *Id.* at 512-13.

63. *Holbrook v. Flynn*, 475 U.S. 560, 568-70 (1986).

64. *Id.* at 562.

Flynn's jury trial, four uniformed troopers sat in the front row of the spectators' section, immediately behind Flynn and his co-defendants.⁶⁵ This was an "extraordinary" measure, not traditionally employed at criminal proceedings.⁶⁶ Flynn's counsel immediately objected to the presence of the officers, arguing that "the presence of uniformed officers would suggest to the jury that defendants were of 'bad character,'" in violation of their fair trial rights.⁶⁷ The trial court justice ruled that "in view of the need for adequate security," the uniformed troopers could remain.⁶⁸ The trial proceeded with the uniformed officers present, and Flynn was convicted.⁶⁹

Flynn appealed his conviction to the Rhode Island Supreme Court, where the conviction was upheld.⁷⁰ Flynn then sought habeas relief in the federal district court, which also upheld the conviction.⁷¹ The First Circuit Court of Appeals, however, reversed Flynn's conviction, finding that the trial court failed to show why the particular circumstances surrounding Flynn's trial called for such an "extraordinary" measure as the presence of the uniformed troopers.⁷²

In 1986, the United States Supreme Court reversed the First Circuit, holding that, under the Court's precedent in *Williams*, the presence of the officers was not "inherently prejudicial," and, thus, the practice did not violate the defendant's fair trial rights.⁷³ The Court distinguished *Flynn* from *Williams* in that the message sent by the security officers, unlike that sent by the compelled wearing of prison garb, was far from clear.⁷⁴ The presence of the uniformed guards was just as likely to be construed as a measure to protect against outside disruptions or eruptions of violence in the courtroom as a sign that Flynn is particularly dangerous or guilty.⁷⁵ Also, in contrast to the prison clothing in *Williams*, the officers served an important state interest, mainly to maintain the custody of the defendants and to insure there was adequate security in the courtroom.⁷⁶ Thus, Flynn's

65. *Id.*

66. *Id.* at 565.

67. *Id.* at 562–63.

68. *Id.* at 563.

69. *Id.* at 565.

70. *Id.*

71. *Id.* at 566.

72. *Id.*

73. *Id.* at 572.

74. *Id.* at 569.

75. *Id.*

76. *Id.* at 571–72.

fair trial rights were not violated by the presence of the uniformed officers.⁷⁷

Therefore, under *Williams* and *Flynn*, courtroom conduct infringes a criminal defendant's constitutional fair trial rights if that particular category of conduct has been held "inherently prejudicial" or if the defendant is able to prove that the conduct has caused or will cause actual prejudice in the case at bar.⁷⁸ State-sponsored courtroom conduct has been held to be "inherently prejudicial" where it creates an "unacceptable risk of impermissible factors coming into play."⁷⁹ However, the Supreme Court has never extended the "inherent prejudice" test of *Williams* and *Flynn* to determine if spectator courtroom conduct, including spectators bringing photographs of the victim into the courtroom, violates a defendant's fair trial rights.⁸⁰

C. State Court Decisions Addressing the Display of Victim Photos

Unlike the Supreme Court, a number of state courts have addressed the issue of whether or not spectators' display of victim photographs infringes on a defendant's constitutional fair trial rights. Some courts have explicitly extended the "inherent prejudice" test established in *Williams* and *Flynn* to analyze this issue, finding that such photographs do not violate the defendant's fair trial rights.⁸¹ Other courts have reached the same conclusion by finding no actual proof that the jurors were affected by such photographs and, thus, no actual prejudice.⁸² Only a small number of trial courts have excluded such photographs from the courtroom.⁸³

1. Decisions Applying *Williams* and *Flynn* to Spectator Conduct

Most recently, in *State v. Lord*, the Supreme Court of Washington found that, under the "inherent prejudice" test of *Williams* and *Flynn*, spectators wearing photograph buttons of the victim during the defendant's criminal jury trial did not violate the defendant's fair trial rights.⁸⁴ The Court held that under the United States Supreme Court's ruling in *Musladin*, state appellate courts are expressly allowed to determine and

77. *Id.* at 572.

78. A defendant's fair trial rights may be impaired by either a showing of actual or inherent prejudice. See *Estelle v. Williams*, 425 U.S. 501, 505 (1976); see also *Flynn*, 475 U.S. at 570.

79. *Williams*, 425 U.S. at 505; *Flynn*, 475 U.S. at 570.

80. *Carey v. Musladin*, 549 U.S. 70, 76 (2006).

81. See, e.g., *State v. Lord*, 165 P.3d 1251 (Wash. 2007) (en banc).

82. See, e.g., *Johnson v. Commonwealth*, 529 S.E.2d 769 (Va. 2000).

83. See *infra* notes 109–14 and accompanying text.

84. *Lord*, 165 P.3d at 1259.

follow their own constitutional precedent regarding spectator conduct.⁸⁵ However, previously in *In re Woods*, the Supreme Court of Washington applied the “inherent prejudice” test of *Williams* and *Flynn* to spectator conduct in the courtroom.⁸⁶ Thus, in *Lord*, the Washington Supreme Court analyzed the constitutionality of the presence of spectators wearing photograph buttons of the victim under the “inherent prejudice” test.⁸⁷

The majority in *Lord* emphasized that the photograph buttons were nothing more than “a silent showing of sympathy or affiliation in the courtroom.”⁸⁸ The court found that “[a] simple photograph button, a sign of support or sympathy that does not expressly advocate guilt or innocence, does not alone impermissibly bias a jury.”⁸⁹ However, as discussed later in this Note, photographs of the victim do present a great risk of biasing a jury against a defendant.

Justice Chambers, concurring in part and dissenting in part, argued that photograph buttons are a form of expression and communication, and allowing photograph buttons in the courtroom is “to allow courtroom

85. *Id.* at 1258.

86. *Id.* at 1258–59 (citing *In re Woods*, 114 P.3d 607 (Wash. 2005)). In *Woods*, the Supreme Court of Washington used the “inherent prejudice” test of *Williams* and *Flynn* to determine if spectator conduct, namely the wearing of orange and black ribbons, violated a defendant’s Sixth and Fourteenth Amendment rights. *In re Woods*, 114 P.3d at 616. The court held that the spectator’s ribbons did not create an unacceptable risk of impermissible factors coming into play because the ribbons did “not express any conclusion about Woods’s guilt or innocence.” *Id.* Thus, Woods’s right to a fair trial was not violated by the presence of the spectators’ ribbons in the courtroom. *Id.* at 617.

In *Woods*, the Supreme Court of Washington summarized several other state court decisions applying *Flynn* to spectator conduct. The *Woods* court noted the following:

Many courts have used the *Holbrook* [*Flynn*] standard and have found that no inherent prejudice exists so as to taint the defendant’s right to fair trial from the wearing of buttons or other displays. See, e.g., *Buckner v. State*, 714 So. 2d 384, 389 (Fla. 1998) (spectators holding up victim’s picture was not inherently prejudicial); *Pachl v. Zenon*, 929 P.2d 1088, 1093 (Or. 1996) (spectators wearing buttons with inscription “Crime Victims United” was not prejudicial and counsel was not ineffective for failing to challenge the issue); *State v. Braxton*, 477 S.E.2d 172, 177 (N.C. 1996) (spectators wearing badges with victim’s picture on them was not prejudicial). In most cases involving violent crime, there is at least one grieving family present at the trial and the presence of such persons should not come as any surprise to the jury members. See, e.g., *State v. Richey*, 298 S.E.2d 879, 889 (W. Va. 1982) (“We must assume that a jury has the fortitude to withstand this type of public scrutiny, and cannot presume irreparable harm to the defendant’s right to a fair jury trial by the presence of spectators who may have some type of associational identity with the victim of the crime.”).

Id.

87. *Lord*, 165 P.3d at 1255. On the third day of Lord’s jury trial, the court “expressed concern that the buttons might invoke undue sympathy from the jury,” and, on the fourth day, the court ordered the buttons removed. *Id.*

88. *Id.* at 1256.

89. *Id.* at 1253–54.

spectators to present a planned, organized effort to communicate with—and sway—the jury.”⁹⁰ Such participation in the trial on the part of spectators is “abhorrent to a fair and impartial trial.”⁹¹ Based on these findings, Chambers logically contended that, “[i]n my view, signs, logos, and buttons with pictures have no place in a courtroom during a trial.”⁹²

In *Lord*, the Washington Supreme Court, like the United States Supreme Court in *Musladin*, expressly recognized the “important distinction between the potential impact of a ‘state-sponsored’ message and a message from private citizens.”⁹³ The court found there should be more leniency in the analysis of private spectator courtroom conduct because, unlike state sponsored conduct, spectator conduct is more likely to be understood by the jury as a private expression.⁹⁴

2. *State Court Decisions Allowing Photographs Without Applying “Inherent Prejudice” Test of Williams and Flynn*

A number of other state courts have addressed the issue of the effect of victim photographs on a criminal defendant’s fair trial rights without explicitly applying the “inherent prejudice” test of *Williams* and *Flynn*.⁹⁵ Instead of looking to whether there was “an unacceptable risk of impermissible factors coming into play,” the courts in these cases have looked to whether or not there was actual proof that the jury had seen and been affected by the presence of the photographs.⁹⁶ Absent such a showing, the courts held that the defendant’s constitutional right to a fair trial had not been impaired by the presence of such photographs.

90. *Id.* at 1265 (Chambers, J., concurring in part and dissenting in part).

91. *Id.* at 1264 (“The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.” (quoting *Patterson v. Colorado*, 205 U.S. 454, 462 (1907))).

92. *Id.* at 1265.

93. *Id.* at 1254 (majority opinion).

94. *Id.*

95. *Estelle v. Williams*, 425 U.S. 501, 504 (1986); *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986).

96. See, e.g., *Flynn*, 475 U.S. at 570 (citing *Williams*, 425 U.S. at 505). In *Flynn*, the Court held that a violation of a defendant’s constitutional fair trial rights may be found upon a showing of either actual or inherent prejudice. *Id.* Absent a showing of actual prejudice, a defendant’s right to a fair trial may nonetheless be infringed by conduct that is inherently prejudicial. *Id.* “Whenever a courtroom arrangement is challenged as inherently prejudicial . . . the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether ‘an unacceptable risk is presented of impermissible factors coming into play.’” *Id.* However, in a number of state court decisions concerning the effect of courtroom spectators displaying the victim’s photograph during the defendant’s criminal jury trial, the courts focus primarily on whether or not a finding of actual prejudice can be shown. *Id.*

In *Johnson v. Commonwealth*, the Supreme Court of Virginia held that courtroom spectators wearing buttons displaying the victim's photograph did not violate the defendant's fair trial rights.⁹⁷ The court found that there was no actual evidence that any of the jurors saw the photographs, and thus there was no merit to the argument that the photographs improperly influenced the jury and impaired the defendant's ability to obtain a fair trial by an impartial jury.⁹⁸ Similarly, in *State v. Braxton*, the Supreme Court of North Carolina held that spectators wearing badges containing a photograph of the victim did not violate the defendant's fair trial rights, finding no evidence in the record showing that the jurors even noticed the photographs or knew that they were photographs of the victim.⁹⁹ In neither of these cases did the courts look to whether there was an "unacceptable risk" that the photographs may have come into play; rather, they looked to the absence of actual evidence showing that the photographs did influence the jury in any way.

In *State v. Bradford*, the Supreme Court of Kansas found that photographs of the victim did not violate a defendant's constitutional right to a fair trial.¹⁰⁰ In support, the court stressed that the defendant failed to provide evidence that any of the jurors saw or were influenced by the buttons.¹⁰¹ In *Buckner v. State*, the defendant argued that spectators displaying photographs of the victim during his criminal jury trial amounted to extrajudicial evidence that "created undue sympathy which warranted a mistrial."¹⁰² The record showed that two of the jurors did in fact see the photographs, but both jurors stated that the photographs would not influence their decision in any way.¹⁰³ The Supreme Court of Florida held that there was "no reasonable possibility that the jury's brief exposure to the pictures may have changed the outcome of the proceeding," and thus the pictures did not deprive the defendant of his fair trial rights.¹⁰⁴

97. *Johnson v. Commonwealth*, 529 S.E.2d 769, 781-82 (Va. 2000). In *Johnson*, upon defense counsel's objection to the presence of the photograph buttons, the trial court ordered that "spectators would not be permitted to display the buttons in any manner that would allow the jurors to see them" and that "anyone wearing a button was required to refrain from any contact with any of the jurors." *Id.*

98. *Id.*

99. *State v. Braxton*, 477 S.E.2d 172, 176-77 (N.C. 1996).

100. *State v. Bradford*, 864 P.2d 680, 686-87 (Kan. 1993).

101. *Id.* at 687.

102. *Buckner v. State*, 714 So. 2d 384, 388-89 (Fla. 1998).

103. *Id.* at 389.

104. *Id.* The *Buckner* court did note that "[u]nder certain circumstances, prejudicial exhibition of emotion may deprive a defendant of a fair trial." *Id.* (citing *Woods v. Dugger*, 923 F.2d 1454 (11th Cir. 1991)).

In *State v. Speed*, the Supreme Court of Kansas refused to find that photographs of the victim displayed by spectators in the courtroom during the defendant's criminal jury trial violated the defendant's fair trial rights.¹⁰⁵ The court found that the record failed to show any "evidence that the jurors were in any way affected" by the photographs.¹⁰⁶ However, the court went on to state "it would seem that the wearing of [pictures by the spectators] is not a good idea because of the possibility of prejudice which might result."¹⁰⁷

These state court rulings suggest that, in some states, a defendant must show actual evidence that the jurors were influenced by, or at the least saw, the photographs of the victim in order to find that the defendant's constitutional rights have been impaired.¹⁰⁸ Absent such a showing, many state courts have held that the defendant has not been deprived of the right to a fair trial by an impartial jury. This standard requires a higher showing than the "inherent prejudice" test of *William and Flynn* and, therefore, is less protective of the criminal defendant's Sixth and Fourteenth Amendment fair trial rights.

3. *Decisions Prohibiting Photographs*

Only a few state courts have prevented spectators from displaying photographs of the victim during a criminal jury trial. For example, in *State v. Henriques*, a New Jersey court case, members of the victim's family sought an order allowing them to wear buttons depicting a photograph of the victim during the defendant's criminal jury trial.¹⁰⁹ The trial judge denied the motion, and the family members appealed the decision.¹¹⁰ Similarly, in the Nico Contreas murder trial in Illinois state court, the trial judge ruled that spectators could not display photographs of

105. *State v. Speed*, 961 P.2d 13, 29–30 (Kan. 1998).

106. *Id.* at 30.

107. *Id.*

108. *E.g.*, *Cagle v. State*, 6 S.W.3d 801, 803 (Ark. Ct. App. 1999) (no evidence in record that demonstrated jury saw badges being worn by some spectators or, if they did, that it affected their ability to be fair jurors); *Kenyon v. State*, 946 S.W.2d 705, 710–11 (Ark. Ct. App. 1997) (no evidence that jurors were prejudiced by spectators wearing badges); *Nguyen v. State*, 977 S.W.2d 450, 457 (Tex. Ct. App. 1998) (no evidence in record to show spectators wearing buttons was prejudicial).

109. See New Jersey Crime Victims' Law Center Website: New Jersey Cases, Brief Library–Photograph of Victim, <http://www.njcvlc.org/reference/brief/download.php?id=17%27>.

110. See New Jersey Crime Victims' Law Center Website, <http://www.njcvlc.org/reference/brief/download.php?id=16>.

the victim during the defendant's jury trial.¹¹¹ In a subsequent newspaper article, one of the spectators admitted the purpose of the buttons was that she "want[ed] the jury to be confronted with [the victim's] memory," and she "doesn't want anyone to forget it was an innocent little boy."¹¹² The trial court correctly recognized the inappropriate impact such photographs could have on the defendant's ability to obtain a fair trial by an impartial jury by "tug[ging] on jurors' heart strings and therefore potentially affect[ing] the outcome."¹¹³

Apart from the occasional trial court decision blocking spectators from displaying photographs of the victim during a defendant's criminal jury trial, trial court judges generally allow spectators to display such photographs. On appeal, such trial court decisions are nearly always upheld, either under the "inherent prejudice" standard of *William and Flynn* or by a finding that there is no evidence that the jurors were actually aware of, or influenced by, the victim photographs.¹¹⁴ State court judges fail to recognize the extent of the influence victim photographs may have on the jury, instead finding them to be nothing more than an ordinary showing of support for, and solidarity with, a deceased victim.

II. Constitutional Fair Trial Rights

The Sixth Amendment provides the accused with certain rights during a criminal trial. Included in these rights is the right to a fair trial by an impartial jury. Such rights must be zealously enforced to ensure a fair prosecution and protect citizens against "illegal and immoral conduct [on the part] of the government,"¹¹⁵ as well the integrity of the criminal justice system.¹¹⁶

A. Sixth Amendment

The Sixth Amendment of the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to

111. Dave Parro, *Can Victim Pictures Influence a Jury?*, BEACON BLOG, http://blogs.suburbanchicagonews.com/beatonblog/2007/08/can_victim_pictures_influence_1.html (Aug. 13, 2007, 09:55 CST).

112. *Id.*

113. *Id.*

114. See *supra* notes 81–108 and accompanying text.

115. HAMID R. KUSHA, *DEFENDANT RIGHTS* 50 (2004); see also *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (fair trial rights protect against "arbitrary law enforcement").

116. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 574 (1980) (stating that "justice must satisfy appearance of justice" (quoting *Levine v. United States*, 362 U.S. 610, 616 (1960))).

a . . . trial, by an impartial jury”¹¹⁷ Embedded in this principle is the right to a presumption of innocence and the right to have one’s “guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on . . . other circumstances not adduced as proof at trial.”¹¹⁸ Therefore, criminal defendants have the right to a fair trial by an impartial jury in federal court.

B. Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”¹¹⁹ Under this clause, the provisions of the Bill of Rights that are “fundamental and essential to a fair trial” apply to the states.¹²⁰ In *Duncan v. Louisiana*, the United States Supreme Court held that “[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.”¹²¹ Therefore, the Sixth Amendment right to a jury trial in criminal proceedings has been held to apply to the states.¹²²

Even before the Supreme Court held that a criminal defendant is entitled to a jury trial in state court under the Sixth and Fourteenth Amendments, the Court recognized the importance of impaneling an impartial jury when a jury is used. The Court held that where the right to a jury trial is provided in state court, this right “guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.”¹²³ The failure to provide such a panel of impartial jurors “violates even the minimal standards of due process.”¹²⁴

In *Taylor v. Kentucky*, the Supreme Court of the United States reversed a criminal defendant’s conviction on the grounds that the defendant’s right to

117. U.S. CONST. amend. VI.

118. *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

119. U.S. CONST. amend. XIV, § 1.

120. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

121. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

122. KUSHA, *supra* note 115, at 28. (noting that many state constitutions already included the right to a jury trial prior to the incorporation of the Sixth Amendment as against the states).

123. *Turner v. Louisiana*, 379 U.S. 466, 471–72, (1965) (citing *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)).

124. *Irvin*, 366 U.S. at 722 (citing *In re Oliver*, 333 U.S. 257 (1948); *Tumey v. Ohio*, 273 U.S. 510 (1927)); *see also Turner*, 379 U.S. at 471–72.

a fair trial was violated.¹²⁵ The Court held that the prosecution's remarks during opening and closing statements, combined with the trial court's failure to adequately instruct the jury, "created a genuine danger that the jury would convict [the defendant] on the basis of those extraneous considerations, rather than on the evidence introduced at trial."¹²⁶ The fact that "extraneous, negative circumstance . . . may have influenced the jury's deliberations" was in violation of the defendant's fair trial rights under the Constitution.¹²⁷ Thus, the Sixth and Fourteenth Amendment require that an accused in a serious criminal proceeding, whether in state or federal court, receive a fair trial by an impartial jury.¹²⁸ Even where a jury trial is provided, if the jury is not impartial due to potential bias or outside factors influencing its decision, the defendant's fair trial rights are violated.

III. Importance of Protecting Rights to a Fair Trial

On numerous occasions, the Supreme Court has reiterated the importance that the right to a fair trial serves in our criminal justice system. However, the importance of affording criminal defendants a fair trial is not limited to the United States, but is generally a universally accepted proposition. For example, the Lawyers Committee on Human Rights has held that

[t]he right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which provides that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."¹²⁹

125. *Taylor v. Kentucky*, 436 U.S. 478, 490 (1978).

126. *Id.* at 487-88.

127. *Id.* at 487 n.15.

128. *See generally* *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) (noting that under the Sixth and Fourteenth Amendments, a defendant in a criminal proceeding is entitled to a fair trial by an impartial jury).

129. LAWYERS COMMITTEE ON HUMAN RIGHTS, WHAT IS A FAIR TRIAL: A BASIC GUIDE TO LEGAL STANDARDS AND PRACTICE, (2000) (citing G.A. Res 2200A (XXI), U.N. GAOR, 21st Sess., 1496th plen. mtg. (Dec. 16, 1966)), available at http://humanrightsfirst.org/pubs/descriptions/fair_trial.pdf. The Lawyers Committee on Human Rights further states that "[t]he fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated but, most recently, by a proposal to include it in the non-derogable rights provided for in Article 4(2) of the ICCPR." *Id.*

In addition, the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights has found that the right to a fair trial "is a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms, most importantly of the right to liberty and security of person. It is an important aspect of the rights which enable effective functioning of the administration of justice."¹³⁰ The important interests protected by the right to a fair trial, including the protection of individual liberty against arbitrary government action, are essential to maintain the integrity of the criminal justice system.

IV. Spectators Displaying Victim Photographs in the Courtroom Violates the Defendant's Rights to a Fair Trial

Photographs of the victim displayed in the courtroom violate a defendant's Sixth and Fourteenth Amendment rights to a fair trial. Such photographs go beyond an ordinary showing of emotion by the spectators, and, in addition, victim photographs serve as a means of eliciting sympathy from the jurors and encouraging the jurors to vindicate the loss of the victim. In turn, victim photographs potentially bias the jurors and encourage them to reach a verdict on grounds other than the evidence presented at trial, in violation of the Sixth and Fourteenth Amendment right to a fair trial by an impartial jury.

A. Scientific Research Regarding Sympathy and Assessments of Guilt

Scientific research suggests that victim photographs may serve to influence a juror's decision regarding the guilt or innocence of the defendant. Although there is no study dealing directly with the effect of victim photographs on a juror's assessment of the defendant's guilt in a criminal jury trial, studies suggest that emotions, including sympathy, have an effect on juror decision making.¹³¹ In general, victim photographs displayed by spectators during a criminal defendant's jury trial serve as a constant reminder that the victim was a real person, someone's friend or family, and the loss of the victim occasions sympathy from the jurors.¹³² This sympathy, in turn, makes the jurors more likely to view the defendant

130. Office for Democratic Institutions and Human Rights, <http://www.legislationline.org/topics/topic/8> (last visited Jan. 23, 2009).

131. See *infra* note 137.

132. See *infra* note 136 and accompanying text.

as guilty, in part because they feel the need to do something to vindicate the suffering of the spectators and the loss of the victim.¹³³

A study by Stuart Fischhoff suggests that victim reminders, including photographs of the victim, displayed during a criminal jury trial had a statistically significant impact on the public's perception of the defendant's guilt.¹³⁴ Fischhoff found that such reminders serve to remind the public that "real persons, not vague abstractions, were victimized," and increased the public's perception of the defendant's guilt.¹³⁵ Although Fischhoff's study deals with the public in general, it lends support to the contention that victim photographs elicit sympathy above and beyond what would normally occur at the trial from those who perceive them. It also suggests that if such sympathy has an influential effect on the public's perception of the defendant's guilt, it may also have an influential effect on the jurors' perception.¹³⁶

A study by Barbara Reskin highlights the impact of extralegal variables, including the jury's perception of the victim, on the jury's decision making.¹³⁷ Reskin found that extralegal variables have a statistically significant effect on the juror's verdict, especially in trials where the case against the defendant is weak.¹³⁸ However, such extralegal factors are not part of the evidence introduced at trial, and thus, allowing such factors to influence the jury's decision is contrary to the criminal defendant's constitutional fair trial rights.

More recently, Neal Feigenson and Jaihyun Park conducted a research review on the effects of emotion on judgments of legal responsibility.¹³⁹ In their review, Feigenson and Park discussed several different ways in which

133. See *infra* note 138 and accompanying text.

134. Stuart Fischhoff, *Influence of Victim Reminders on Public Perception of Guilt or Non-Guilt in a Celebrity Murder Trial*, 2 J. MEDIA PSYCHOL. 4 (1996). While Fischhoff's study focuses on the effect of victim reminders in celebrity criminal cases, mainly the O.J. Simpson trial, Fischhoff notes that "the notion of victim reminders is relevant to all civil or criminal trials." *Id.*

135. *Id.*

136. *Id.* Fischhoff recognizes that "the impact of victim reminders on how the public judges the guilt of a [defendant] and how actual jurors may judge [a defendant] can only be the subject of conjecture. The array of information available to a jury and the context of their judgment are dramatically different than for that of the public." *Id.* However, the fact that victim photographs influence the public's perception of the defendant's guilt or innocence lends some support to the contention that victim photographs influence a juror's perception of guilt or innocence. *Id.*

137. See generally Barbara F. Reskin & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decisions*, 20 LAW & SOC'Y REV. 423 (1986).

138. *Id.*

139. See generally Neal Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, 30 LAW & HUM. BEHAV. 143 (2006).

emotions can influence a juror's assessment of the defendant's innocence or guilt. They noted that a juror's emotional response to the victim influenced decision making in criminal cases.¹⁴⁰ More precisely, they found that in several studies, the research indicates that greater sympathy for the injured party made the jurors more likely to find the defendant blameworthy.¹⁴¹ Therefore, photographs of the victim, which function to elicit sympathy on behalf of the victims, are likely to influence the jurors' perception of the defendant's guilt.¹⁴²

In addition, Feigenson and Park noted that the jurors must be aware of such bias, be aware of the magnitude and direction of the bias, be motivated to correct the bias, and be able to adjust their responses accordingly in order to eliminate the effect of juror bias created by emotions.¹⁴³ They found that often "[l]egal decision makers may fail to satisfy any or all of these criteria."¹⁴⁴ Thus, "the research suggests that the affective influences on judgments of legal responsibility and blame are likely to persist in real legal settings."¹⁴⁵ Therefore, even where courts

140. *Id.* at 153.

141. *Id.* (explaining that in a products liability lawsuit, the more sympathetic mock jurors were to an injured plaintiff, the more likely they were to find the defendant liable). Professors Feigenson and Park note that Bornstein found that "[f]eelings aroused by a severe injury appear to operate by producing a specific motivation [in jurors] to alleviate the injured party's suffering or, to a somewhat lesser extent, to punish the defendant." (citing Brian H. Bornstein, *The Effect of Injury Severity on Mock Jurors' Liability Judgments*, 28 J. APPLIED SOC. PSYCHOL. 1477, 1485, 1493 (1998)); Brian H. Bornstein, *David, Goliath, and Reverend Bayes: Prior Beliefs About Defendants' Status in Personal Injury Cases*, 8 APPLIED COGNITIVE PSYCHOL. 233 (1994) (nothing that in a comparative negligence case, jurors who feel more sympathy for an accident victim are more inclined to hold the defendant more responsible).

142. See sources cited *supra* note 141.

143. Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULLETIN 117 (1994); Wilson et al., *Mental Contamination and the Debiasing Problem in THE PSYCHOLOGY OF JUDGMENT: HEURISTICS AND BIASES* 185 (Thomas Gilovich et al. eds., 2002).

144. Feigenson & Park, *supra* note 139 (citing Joyce Ehrlinger et al., *Peering Into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOCIAL PSYCHOL. BULL. 680 (2005); Wilson et al., *supra* note 143; Kerry Edwards & Tamara S. Bryan, *Judgmental Biases Produced by Instructions to Disregard: The (Paradoxical) Case of Emotional Information*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 849 (1997); Berkowitz et al., *On the Correction of Feeling-Induced Judgmental Bias*, in FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION 131 (Joseph P. Forgas ed., 2002)).

145. Feigenson & Park, *supra* note 139, at 143 (citing Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001); Jonathan Haidt, *The Emotional Dog Does Learn New Tricks: A Reply to Pizarro and Bloom*, 110 PSYCHOL. REV. 197 (2003); Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556 (2000)). However, Feigenson and Park note that there may be some support for the contention that, for certain individuals in certain situations, the influence

instruct the jury to disregard victim photographs in the courtroom in assessing the guilt or innocence of the defendant, it is unlikely that such instructions will be effective.¹⁴⁶

In a different article on sympathy and legal judgment, Professor Feigenson argues that we should not encourage sympathy in legal decision making.¹⁴⁷ Feigenson defines sympathy as “a heightened awareness of the suffering of another and the urge to alleviate that suffering,” and he notes “both the causes and the effects of sympathy yield unfairly biased decisions.”¹⁴⁸ Feigenson cites research indicating “sympathy and impartial justice may conflict.”¹⁴⁹

Spectators displaying photographs of the victim during a criminal jury trial are a continuous reminder to the jury of the reality of the loss of the victim and the suffering of those who cared about the victim. Thus, these photographs function to elicit sympathy in the jurors. Scientific studies have shown that such sympathy is inconsistent with obtaining a fair trial by an impartial jury, rendering the jurors more likely to perceive the defendant as guilty and more likely to convict in order to vindicate the loss of the victim and the spectator's suffering. This infringes the defendant's Sixth and Fourteenth Amendment right to have guilt determined “solely on the basis of the evidence introduced at trial, and not on . . . other circumstances not adduced as proof at trial.”¹⁵⁰

B. Victim Photographs Are Especially Prejudicial in Self-Defense Cases

Photographs of the victim influence a jury in a number of ways. Victim photographs are especially prejudicial, however, to defendants in self-defense cases because they often serve to directly contradict the defendant's arguments at trial but are not properly admitted as evidence in the case.

For example, in *Musladin*, the defendant admitted to shooting the victim, but argued that his actions were taken in self-defense.¹⁵¹ The defendant had to convince the jury that the victim was the initial

of emotions on the legal decision makers' judgments may not be as intractable as Haidt and Alicke contend. Feigenson & Park, *supra* note 139, at 143.

146. See sources cited *supra* note 141.

147. Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 3–4 (1997).

148. *Id.*

149. *Id.* at 49 (citing C. Daniel Batson et al., *Immorality from Empathy-Induced Altruism: When Compassion and Justice Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 1042, 1042 (1995)).

150. *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978).

151. *Carey v. Musladin*, 549 U.S. 70, 72 (2006).

aggressor.¹⁵² In such a case, victim photographs are especially prejudicial to the defendant's constitutional rights to a fair trial because they often portray the victim in an innocent light.¹⁵³ This may make it more difficult for the jury to perceive the victim as an aggressor, undermining the defendant's self-defense claim.¹⁵⁴ Therefore, although victim photographs in the courtroom interfere with a defendant's rights to a fair trial in all criminal jury trials, they are particularly prejudicial in self-defense cases.

V. The First Amendment

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹⁵⁵ This right has been incorporated as against the states.

A. The First Amendment Does Not Protect Spectators Who Display Buttons

Although the Constitution does not explicitly guarantee the public's right to attend a criminal trial, courts have frequently found that this right is implicit in the First Amendment.¹⁵⁶ The Supreme Court has reasoned that "[w]ithout the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press 'could be eviscerated.'"¹⁵⁷ Obviously, spectators who attend a criminal jury trial will, on occasion, exhibit emotions. This is an unavoidable result of the right of public access to the courtroom. Several courts have

152. *Id.*

153. A picture of the photograph button at issue in *Musladin* is available at <http://www.daylife.com/photo/050E49V9nJbzf>. The victim photographs at issue in the Illinois state court case addressed above are available at http://blogs.suburbanchicagonews.com/beaconblog/2007/08/can_victim_pictures_influence_1.html.

154. *See, e.g.,* *Musladin v. Lamarque*, 427 F.3d 653, 660 (9th Cir. 2005) ("The primary issue at *Musladin*'s trial was whether it was the defendant or the deceased individual who was the aggressor. The buttons essentially 'argue' that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer, was the initiator of the attack, and, thus, the perpetrator of a criminal act.").

155. U.S. CONST. amend. I.

156. *See, e.g.,* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575–80 (1980) (recognizing that although great caution must be used in reading unenumerated rights into the Constitution, the right to attend a criminal trial is implicit in the enumerated rights of the First Amendment, including the freedoms of speech, press, and assembly).

157. *Id.* at 580 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)).

acknowledged that such ordinary expressions of emotion are not prejudicial.¹⁵⁸

However, victim photographs go beyond an “ordinary showing of emotion” and, as discussed above, function as a continuous and extreme reminder to the jurors of the loss of the victim and the suffering endured by the spectators displaying such photographs. Because victim photographs function to send a message to the jury, they are the equivalent of speech that participates in the criminal proceeding.

In his concurrence in *Musladin*, Justice Stevens recognized the lack of First Amendment protection for the participatory role that victim photographs play in a criminal jury trial. In response to Souter’s contention that “an interest in protected expression on the part of the spectators wearing mourners’ buttons has been raised,”¹⁵⁹ Stevens argued that “there is no merit whatsoever to the suggestion that the First Amendment may provide some measure of protection to spectators in a courtroom who engage in actual or symbolic speech to express any point of view about an ongoing proceeding.”¹⁶⁰ Because spectators display of victim photographs in the courtroom amounts to participatory conduct, such photographs are not protected under the First Amendment.

B. First Amendment Right Must Yield to Sixth Amendment

In addition, even if there is some First Amendment protection for spectator displays of victim photographs inside the courtroom, the First Amendment right is not absolute and must yield to the defendant’s Sixth and Fourteenth Amendment rights to a fair trial.¹⁶¹ In *Richmond Newspapers v. Virginia*, the Supreme Court held that the First Amendment “rights of access may be curtailed where there are sufficiently powerful countervailing considerations.”¹⁶² The Court has recognized that limiting

158. See, e.g., *Burns v. State*, 609 So. 2d 600, 604–55 (Fla. 1992) (victim’s wife crying three times during defendant’s criminal jury trial was not a prejudicial showing of emotion); see also *State v. Chaney*, 169 Ohio App. 3d 246, 251–52 (Ohio Ct. App 2006).

159. *Carey v. Musladin*, 549 U.S. 70, 83 (2006) (Souter, J., concurring in judgment).

160. *Id.* at 79 (Stevens, J., concurring in judgment).

161. See *Norris v. Risley*, 918 F.2d 828, 832 (9th Cir. 1990) (recognizing the superiority of defendant’s constitutional fair trial rights over spectators’ first amendment rights of access (citing *Richmond Newspapers*, 448 U.S. at 564)); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 629 (1978) (suggesting that the rights of access to court proceedings, as guaranteed by the first amendment, are only limited by a defendant’s constitutional fair trial rights). In *Norris*, the court held that “[w]here fair trial rights are at significant risk, however, the first amendment rights of trial attendees can and must be curtailed at the courthouse door.” *Id.* at 832.

162. *Richmond Newspapers*, 448 U.S. at 581 n.18.

access to the courtroom during a criminal proceeding may be appropriate where the closure is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.¹⁶³

Here, the government has a compelling interest in ensuring that the defendant's constitutional right to a fair trial by an impartial jury is not violated. In fact, the Supreme Court has explicitly recognized the importance of the defendant's fair trial rights as against the First Amendment right to access, acknowledging that where such rights conflict, the First Amendment right must yield.¹⁶⁴ In addition, prohibiting victim photographs from the courtroom during a criminal proceeding is narrowly tailored, targeting only the prejudicial conduct while continuing to allow spectators access to the courtroom.¹⁶⁵

VI. State Interest in Allowing Victim Photographs

In addition to the potential First Amendment protection for spectators displaying photographs of the victim inside the courtroom, the state may have other interests in allowing such photographs. In particular, the state may have an interest in allowing supporters of the victim a forum to express the emotions associated with their loss and to show their solidarity with the victim. Traditionally, victims and supporters of victims have had a very minimal, if any, role in the criminal justice process.¹⁶⁶ Even in light of the Victims' Rights Movement, which sought to provide victims with an increased role in criminal prosecutions, states currently provide such individuals with varying degrees of involvement in the prosecution of crimes.¹⁶⁷ The state may have a legitimate interest in providing victims and victim supporters with an outlet to express their emotions and solidarity in the criminal justice system, which may function to help repair the harm caused to the individuals and society by the commission of a crime.¹⁶⁸

163. *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 607 (1982) (citing *Brown v. Hartlage*, 456 U.S. 45, 53–54 (1982); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 101–03 (1979); *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

164. *Norris*, 918 F.2d at 832 (citing *Richmond Newspapers*, 448 U.S. at 564).

165. See *Globe Newspaper*, 457 U.S. at 607.

166. See, e.g., Debbie Selinsky, *In Pursuit of Restorative Justice*, 7 DIVINITY 1 (2001), available at http://www.divinity.duke.edu/publications/2007.09/features/feature3/print_feature3.htm ("When I began working with the families of murder victims . . . I found that there is really no outlet for sharing their stories and expressing the pain of their loss.").

167. Christa Obold-Eshleman, Note, *Victims' Rights and the Danger of Domestication of the Restorative Justice Process*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 571, 584 (2004).

168. *Id.* at 587 (citing Kent Roach, *Due Process And Victims' Rights: The New Law and Politics of Criminal Justice* 28, 35 (1999)).

Allowing victim photographs to be displayed in the courtroom is one possible means of accomplishing this objective.

However, as discussed earlier in this Note, allowing spectators to display victim photographs in the courtroom during a criminal jury trial violates a defendant's constitutional rights to a fair trial. These rights are essential to maintaining the integrity of the criminal justice system,¹⁶⁹ and the trial judge has a responsibility to ensure that these rights are not infringed during a criminal jury trial.¹⁷⁰ In addition, the sole purpose of a criminal trial is to "determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose."¹⁷¹ Using the criminal trial as an outlet for expression of victims and their supporters is inappropriate. Thus, even in light of any potential interests in allowing such photographs, spectators must be prohibited from displaying photograph of the victim inside the courtroom during a criminal jury trial.

VII. Options for Rules

A. Maintain the Status Quo

One option for the Supreme Court would be to maintain the status quo and not establish a rule dealing with effect of spectator conduct on the victim's fair trial rights. By not ruling on the issue, the Supreme Court allows state courts to continue to apply their own standard in analyzing the effect of victim photographs in the courtroom on a criminal defendant's constitutional right to a fair trial.

However, this option does not sufficiently protect a criminal defendant's rights to a fair trial. As discussed above, state courts have applied varying standards in determining whether victim photographs infringe on a criminal defendant's rights to a fair trial. The majority of courts ruling on the issue have underestimated the influence of victim photographs, allowing such photographs to be displayed by spectators in

169. See *Richmond Newspapers*, 448 U.S. at 574.

170. See, e.g., *Taylor v. Kentucky*, 436 U.S. 478, 489 n.17 (1978) (citing THE ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, FUNCTION OF THE TRIAL JUDGE § 1.1(a) (App. Draft 1972)) ("The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.").

171. *Id.*

the courtroom during a criminal jury trial.¹⁷² And, if the Supreme Court fails to establish a rule dealing with the effects of spectator conduct on a criminal defendant's rights to a fair trial, then under the AEDPA standard of review, federal courts are precluded from granting relief on collateral review to a defendant whose rights are violated by the presence of victim photographs in the courtroom.¹⁷³

B. Adopt the *Williams* and *Flynn* "Inherent Prejudice" Standard

Another option is for the Supreme Court to extend the "inherent prejudice" test established in *Williams* and *Flynn* to cover not only state sponsored courtroom activities, but also spectator activities. Under this approach, a court would look to whether spectators displaying victim photographs in the courtroom create "an unacceptable risk of impermissible factors coming into play."¹⁷⁴

As seen in *State v. Lord* and many other cases where this test was applied, the inherent prejudice test does not provide adequate protection for criminal defendant's fair trial rights.¹⁷⁵ In analyzing the effect of victim photographs displayed in the courtroom under the inherent prejudice test, the majority of state courts have allowed victim photographs into the courtroom during a criminal proceeding.¹⁷⁶ As discussed above, allowing such photographs violates the defendant's fair trial rights.

However, such an approach would be better than maintaining the status quo. In applying the inherent prejudice test to spectator conduct, the Supreme Court would authorize federal courts to grant relief under AEDPA to defendants whose constitutional fair trial rights have been violated by spectators displaying victim photographs during the criminal jury trial. AEDPA requires such Supreme Court precedent before a federal court can reverse a state court decision on the grounds that the state court decision was "contrary to, or an unreasonable application of," clearly established federal law.¹⁷⁷ Currently, as displayed in *Musladin*, absent such Supreme Court precedent, federal courts do not have the authority to review state

172. See *supra* notes 84–108 and accompanying text.

173. 28 U.S.C. § 2254(d)(1) (2007). Under the first prong of AEDPA, a federal court can grant relief from a state court decision only where the state court decision was "contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States." *Id.*

174. *Estelle v. Williams*, 425 U.S. 501, 505 (1976); *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986).

175. See, e.g., *State v. Lord*, 165 P.3d 1251 (Wash. 2007) (en banc).

176. *Id.*

177. 28 U.S.C. § 2254(d)(1) (2007).

court decisions regarding the effect of spectator conduct on a defendant's right to a fair trial.¹⁷⁸

C. Prohibit Spectators From Displaying Victim Photographs in the Courtroom

Finally, the Supreme Court could adopt an outright rule prohibiting spectators from displaying victim photographs inside the courtroom during a criminal jury trial. Upon hearing the issue on direct appeal, the Court could rule that prohibiting the display of victim photographs in the courtroom is necessary to ensure the defendant's constitutional fair trial rights and, thus, required under the Sixth and Fourteenth Amendments.¹⁷⁹ In light of the division among lower courts as to the role of victim photographs in the courtroom, such a rule is necessary to provide clarification on the issue.¹⁸⁰ In addition, prohibiting such photographs would not infringe the First Amendment right of courtroom spectators.¹⁸¹ Therefore, adopting such a rule would be the best approach to dealing with spectators displaying photographs of victims in the courtroom during a criminal jury trial.

Conclusion

The United States Supreme Court has yet to rule on the issue of when spectator conduct during a criminal jury trial—such as spectators displaying photographs of the victim—violates the defendant's fair trial rights. In the absence of Supreme Court precedent, state courts have generally allowed spectators to display such victim photographs. Absent Supreme Court precedent on point, AEDPA precludes federal courts from reviewing such decisions on collateral attack.¹⁸²

178. *Carey v. Musladin*, 549 U.S. 70, 77 (2006).

179. *See supra* notes 115–28 and accompanying text.

180. S. Brannon Latimer, Note, *Due Process—Habeas Review and Outside Influences on the Jury—the Ninth Circuit Holds That Buttons Depicting the Victim's Photo, Worn by Immediate Family During Murder Trial, Pose an Unacceptable Risk of Impermissible Influence on the Jury Under Clearly Established Law*, 59 S.M.U. L. REV. 395, 403 (2006) (“The Musladin decision raises important questions about the constitutional limitations of spectator influence at trial. Here lies a delicate balance of constitutional guarantees. On one hand is the [Sixth and] Fourteenth Amendment[s] and the right to a fair trial free from outside influences. On the other are the Sixth Amendment’s guarantee of a public trial and the First Amendment’s protection of free expression. Scholars and courts alike are divided on the proper solution, and the Supreme Court should bring clarity to this area by articulating guidelines for trial judges.”).

181. *See supra* notes 155–65 and accompanying text.

182. *Musladin*, 549 U.S. at 77.

However, photographs of the victim in the courtroom during a criminal defendant's jury trial impair the ability of the defendant to receive a fair trial by an impartial jury. Scientific evidence shows that such photographs serve to elicit sympathy from the jurors by making the loss of the victim more real, and this sympathy, in turn, makes the jury more likely to judge the defendant as blameworthy or guilty.¹⁸³ Also, jurors may feel the need to vindicate the loss of the victim by convicting someone, whether or not they truly believe the defendant is guilty of the charged crime. Victim photographs play an especially strong role in self-defense cases, where such photographs can directly contradict the defendant's arguments in the case. Thus, photographs of the victim in the courtroom during a criminal jury trial impair the defendant's constitutional right to receive a fair trial by an impartial jury.

The Sixth and Fourteenth Amendments provide certain protections for a criminal defendant. These rights are essential to protecting the defendant's life and liberty and maintain the integrity of the criminal justice system; therefore, they must be zealously protected. In order to ensure that the criminal defendant receives a fair trial by an impartial jury, as required under the Constitution, the Supreme Court should adopt a rule prohibiting spectators from displaying photographs of the victim during a defendant's criminal jury trial. If the Court is not willing to adopt such a rule in all criminal jury trials, it should, at the least, adopt a rule prohibiting victim photographs during criminal jury trials in which the defendant is arguing self-defense, as victim photographs are particularly prejudicial in such cases.

183. See *supra* notes 131–50 and accompanying text.