CAREY v. MUSLADIN: A COMMENTARY ON WHAT IS NOT PREJUDICIAL

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I. INTRODUCTION

In a 9-0 decision,[1] the United States Supreme Court refused to find that a California state court had acted "contrary to, or involved an unreasonable application of, clearly established Federal law,"[2] when that court found that it was not prejudicial for trial audience members to wear buttons with the image of the defendant's alleged murder victim. The Court relied upon the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and its previous rulings in *Estelle v. Williams*[3] and *Holbrook v. Flynn*,[4] earlier cases that defined certain actions as prejudicial to a defendant in a court of law. The Court found that due to the lack of any Supreme Court ruling related to the fact pattern in this particular case, it could not find that the state trial court acted contrary to, or unreasonably applied federal law.[5]

In *Carey*, the Court skirts the issue of whether a trial court violated federal law concerning prejudice by determining that the particular law did not exist. Rather than filling the gap with new law, the Court opts not to formulate new law, despite the fact that the case brings up several important questions, namely: (1) whether tests such as those in *Williams*[6] and *Flynn*[7] apply to spectator's conduct; and, (2) where to draw the line of spectators' rights to express their views and

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1. Carey v. Musladin, 127 S. Ct. 649 (2006).
2. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (1996).
3. Estelle v. Williams, 425 U.S. 501 (1976).
4. Holbrook v. Flynn, 475 U.S. 560 (1986).
5. *Carey*, 127 S. Ct at 651.
6. *Williams*, 425 U.S. at 505.
7. *Flynn*, 475 U.S. at 570.

opinions in a court of law. The failure to answer these important questions may be best explained by the Court's desire to leave the question of what constitutes prejudicial conduct to trial court judges, the senators in the courtroom.

II. FACTUAL AND PROCEDURAL HISTORY

Matthew Musladin was convicted of first-degree murder and three related offenses in a California state court.[8] During his trial, the family members of the victim wore buttons with the image of the victim in the courtroom. Counsel for Musladin moved the court to order the family not to wear the buttons, claiming that they were prejudicial to the defendant.[9] The court denied the motion, finding the buttons did not prejudice the defendant.[10] Musladin appealed his conviction to the California Court of Appeal claiming that the lower court violated his Fourteenth and Sixth Amendment rights by allowing the family to wear the buttons.[11] The Court of Appeal, citing *Holbrook v. Flynn*,[12] noted that Musladin had to show actual or inherent prejudice in order to succeed on his claim. Instead, the California court concluded that although the practice of wearing photographs of the victim was to be discouraged, the wearing of the buttons created no such prejudice in this case.[13]

Upon his unsuccessful appeal in the California court system, Musladin filed an application for writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254.[14] The federal district court denied habeas relief. However, it granted a certificate of appealability on the buttons issue to determine if they were prejudicial.[15] When the case reached the Court of Appeals for the Ninth Circuit, that court reversed the district court decision and remanded for issuance of the writ. The Ninth Circuit held that the state court's ruling "was contrary

8. *Carey*, 127 S. Ct. at 651.
9. *Id.* at 652.
10. *Id.*
11. *Id.*
12. Holbrook v. Flynn, 475 U.S. 560 (1986).
13. *Carey*, 127 S. Ct. at 652.
14. *Id.* The statute permits an individual, in custody pursuant to a state court ruling, to file an application for a writ of habeas corpus if they believe their conviction was the result of the state court acting contrary to, or unreasonably applying federal law. The statute thus allows one to have their state court claim reviewed in federal court.
15. *Id.*

to clearly established federal law and constituted an unreasonable application of that law."[16]

The Ninth Circuit based its reasoning on the Supreme Court's decisions in *Estelle v. Williams*[17] and *Holbrook v. Flynn*,[18] determining that these cases provided a clearly established rule of federal law (the test for inherent prejudice applicable to spectators' courtroom conduct) that should have been applied to Musladin's case.[19] The Ninth Circuit's decision was appealed, and ultimately the Supreme Court vacated the ruling of the Ninth Circuit, finding that clear federal law relating to Musladin's case did not exist, and thus the California state courts did not act contrary to, or unreasonably apply, federal law.[20]

III. HOLDING

Justice Thomas delivered the opinion of the Court, which discussed the evolution of federal law relating to prejudicial practices in the courtroom.[21] The opinion begins by citing the AEPDA:

> [A]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.[22]

The Act clearly states that an application for a writ of habeas corpus can be granted only if the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law."[23] As a result, the Court noted the need to evaluate established federal law dealing with prejudice in the courtroom.

Like the Ninth Circuit's opinion, the Supreme Court opinion cites

16. Musladin v. Lamarque, 427 F.3d 653, 659–60 (9th Cir. 2005).
17. Estelle v. Williams, 425 U.S. 501 (1976).
18. Holbrook v. Flynn, 475 U.S. 560 (1986).
19. *Musladin*, 427 F.3d at 657–58.
20. Carey v. Musladin, 127 S. Ct. 649, 652 (2006).
21. *Id.*
22. 28 U.S.C. § 2254(d)(1).
23. *Id.*

the two major cases dealing with this issue: *Estelle v. Williams*[24] and *Holbrook v. Flynn*.[25] In *Williams*, the Court considered whether a defendant's presence in the courtroom while dressed in prison clothing was prejudicial.[26] The *Williams* Court found that a State violates the Fourteenth Amendment if it "compel[s] an accused to stand trial before a jury while dressed in identifiable prison clothes."[27] In *Flynn*, the Court considered whether the sitting of four uniformed state troopers behind the defendant was prejudicial.[28] Unlike in *Williams*, the *Flynn* Court held that the "presence of the troopers was not so inherently prejudicial that it denied the defendant a fair trial."[29] The opinion notes that both of these situations were factually dissimilar from the situation in Musladin's case. The Court distinguishes *Williams* and *Flynn* on other grounds as well, noting that the cases dealt with government-sponsored practices, but the situation in *Musladin* dealt with the actions of private spectators at trial.[30] The Court acknowledged that it has "never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial."[31] The opinion notes that the tests established by *Williams* and *Flynn* to determine the existence of prejudice at a trial ask whether a given practice furthers an essential state interest, which "suggests that those cases apply only to state-sponsored practices."[32]

As a result of the lack of a clear standard derived from Supreme Court precedent, the lower courts have diverged in how they handle the issue of spectators' conduct. Lower courts have taken four general approaches to these types of claims for spectators' conduct: (1) they apply *Williams* and *Flynn*;[33] (2) they decline to extend *Williams* and *Flynn*;[34] (3) they have distinguished *Flynn* on the facts;[35] and (4) they

24. Estelle v. Williams, 425 U.S. 501 (1976).
25. Holbrook v. Flynn, 475 U.S. 560 (1986).
26. *Williams*, 425 U.S. at 502.
27. *Id.* at 512.
28. *Flynn*, 475 U.S. at 562.
29. Carey v. Musladin, 127 S. Ct. 649, 653 (2006) (citing *Flynn*, 475 U.S. at 571).
30. *Id.*
31. *Id.*
32. *Id.* at 654.
33. *See* Norris v. Risley, 918 F.2d 828, 834 (9th Cir. 1990) (holding that the wearing of buttons worn by spectators' during a trial violated the defendant's rights under *Williams* and *Flynn*); In re Woods, 114 P.3d 607, 617 (Wash. 2005) (en banc) (holding that *Flynn* applied, however ribbons worn by spectators did not harm the defendant).
34. *See* Billings v. Polk, 441 F.3d 238, 247 (4th Cir. 2006) (finding that *Williams* does not

have ruled on spectator-conduct claims without relying on, discussing, or distinguishing *Williams* or *Flynn*.[36]

Due to the lack of holdings by the Supreme Court regarding the prejudicial effect of spectators' courtroom conduct, and the fact that no ruling of the Court has held that the tests of *Williams* and *Flynn* must be applied to spectators' conduct, the majority in *Carey* held that "it cannot be said that the state court 'unreasonably applied clearly established federal law.'"[37] As a result, the Court vacated the Ninth Circuit's ruling, and remanded the case for further proceedings consistent with its opinion.[38]

Justices Stevens, Kennedy, and Souter delivered concurring opinions.[39] The concurring opinions pay homage to the various questions that arose in this case, which the majority failed to answer. Although these opinions make note of the unanswered questions, they still do not provide any clarity, and instead state that they should be answered at another time. As a result, the concurring opinions are simply used to inform the reader that the court is aware of the various issues in this case, but is reluctant to deal with them. It can be argued that the Court's reluctance is based on its desire to keep power in the hands of the state courts.

Justice Stevens's concurring opinion focuses on dictum by Justice O'Connor in the *Williams* decision, which stated that "clearly established Federal law, as determined by the Supreme Court" refers to "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."[40] Though the *Carey* majority agrees with this statement, Justice Stevens does not. Instead, Justice Stevens believes that inclusion of dicta provides a correct interpretation of the AEDPA. He explained that when the Court's opinions announce a new application of a constitutional principle, any

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clearly establish a rule that any article worn in the courtroom violates a defendant's rights).

35. *See* Pachl v. Zenon, 929 P.2d 1088, 1093 (Or. Ct. App. 1996) (en banc) (noting that although the wearing of buttons by spectators seemed to meet the *Flynn* test, when considering the entire trial it could not be said that the defendant was prejudiced).

36. *See* Buckner v. State, 714 So.2d 384, 389 (Fla. 1998) (holding without any reference to *Williams* and *Flynn* that the trial judge properly found spectator conduct not to be prejudicial); State v. Speed, 961 P.2d 13, 30 (Kan. 1998) (holding without any reference to *Williams* or *Flynn* that buttons worn by spectators did not prejudice the defendant).

37. *Carey*, 127 S. Ct. at 654.

38. *Id.*

39. *Id.* at 651.

40. *Id.* at 655 (Stevens, J., concurring).

explanatory language that is intended to provide guidance to lawyers and judges should be considered, regardless of whether it is dicta.[41] Justice Stevens's concurrence was closely aligned with Justice Souter's concurrence, discussed below, with one notable exception. Justice Souter viewed the buttons as a potential First Amendment right,[42] but Justice Stevens argued that there was "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."[43]

Justice Souter drafted a concurring opinion. He explained how the Court has clearly adopted a federal standard for evaluating prejudicial behavior in a court of law, and that "it reaches the behavior of spectators."[44] He cites a history of Supreme Court cases that defined prejudice in the courtroom as anything open to the jurors' courtroom observations that can prejudice a defendant. These prejudicial observations are contrary to federal law, regardless of whether the prejudice inheres to the state or a spectator.[45] He espoused the possibility that the buttons worn by a victim's family could create an air of prejudice against a defendant, in that an "expected response [by the jury] could well seem to be a verdict of guilty."[46] Despite this, he stated that the buttons are only impermissible if the risk of prejudice reaches an unacceptable level.

Here, Justice Souter provides two reasons why the risk does not reach an unacceptable level.[47] First, several courts have dealt with similar facts as those in this case, and the majority of them have found a lack of prejudice.[48] Second, there is an interest in protecting the expression of the spectators in a courtroom.[49] Justice Souter does not go so far as to find First Amendment protection granted to spectators,

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41. *Id.*

42. *See id.* at 658 (Souter, J., concurring) ("[I]n the absence of developed argument it would be preferable not to decide whether protection of speech could require acceptance of some risk raised by spectators' buttons.").

43. *Id.* (Stevens, J., concurring)

44. *Id.* at 657 (Souter, J., concurring).

45. *Id.* The cases cited include *Holbrook v. Flynn*, 475 U.S. 560 (1986) and *Estelle v. Williams*, 425 U.S. 501 (1976).

46. *Carey*, 127 S. Ct. at 658 (Souter, J., concurring).

47. *Id.*

48. *Id.*

49. *Id.*

stating that "it would be preferable not to decide whether protection of speech could require acceptance of some risk raised by spectators' buttons."[50]

Justice Kennedy's concurring opinion discusses the importance of keeping trials free of a coercive or intimidating atmosphere.[51] Justice Kennedy cited several cases, including *Frank v. Mangum*,[52] *Moore v. Dempsey*,[53] and *Sheppard v. Maxwell*,[54] all of which required "a court, on either direct or collateral review, to order a new trial when a defendant shows his conviction has been obtained in a trial tainted by an atmosphere of coercion or intimidation."[55] The concurrence noted that if the wearing of buttons created a form of intimidation similar to that in the aforementioned cases, then relief should be granted, regardless of whether or not a Supreme Court case dealt directly with a situation similar to Musladin's.[56] Justice Kennedy's examination of the *Carey* facts, however, determined that the buttons created no type of coercion or intimidation. His concurrence differed from the plurality because he believed it was necessary for the Court to develop a new rule dealing with the situation in Musladin's case.[57]

IV. CONCLUSION

Justice Kennedy, in his concurring opinion, makes it clear that the Court should rule on the factual issue of whether a button with the image of a victim worn in the courtroom would prejudice a defendant.[58] The majority refuses to rule on that for two possible reasons, alluded to above. First, the Court defers to trial judges' discretion to determine whether or not items, such as the buttons, are prejudicial. Because the trial judges are in the courtroom at the time, they are the best candidates to determine whether or not a given practice is prejudicial. As support for this notion, Justice Souter's

50. *Id.* Justice Souter noted the possibility that a First Amendment argument could be made in this situation, but felt it should not come into play with these facts. Justice Stevens rejected the possibility that a First Amendment argument could be present. *Id.* at 656.
51. *Id.* at 656 (Kennedy, J., concurring).
52. Frank v. Mangum, 237 U.S. 309 (1915)
53. Moore v. Dempsey, 261 U.S. 86 (1923)
54. Sheppard v. Maxwell, 384 U.S. 333 (1966)
55. *Carey*, 127 S. Ct. at 656 (Kennedy, J., concurring).
56. *Id.*
57. *Id.* at 657.
58. *Id.*

concurrence notes the importance of the lower court judges' rulings, stating his reluctance to find prejudice when the majority of lower-court judges did not find buttons of this nature to be prejudicial.[59] A second rationale for the Court's failure to address the issue is the Court's fear of moving towards the development of a laundry list of prejudicial items, thereby eroding the powers of trial court judges. A judicial economy argument is at hand. Such a list would likely result in more petitions to the Court, and the overturning of otherwise valid convictions.

The second issue the Court fails to resolve is whether the tests for prejudicing the defendant extend to spectators. Although Justice Souter directly addressed this issue in his concurring opinion, stating that "there is no serious question that [the prejudicial test] reaches the behavior of spectators,"[60] the majority does not attempt to resolve the issue. The majority's failure to address the matter, other than pointing to the fact that the Court has never specifically dealt with the issue, enhanced the idea that federal law on trial prejudice is hazy, and thus supports the actions of the California state court. By noting that the Court has not addressed the issue before, and then failing to do so now, the Court further supports the lack of a clear federal law, and instead provides that the lower courts should be applying the standard of law regarding prejudice in the courtroom because it is the trial judges who can best determine if a courtroom practice or conduct is prejudicial.

Finally, the Court fails to address whether any rights are violated if spectators are not allowed to express themselves in a court of law. Neither the majority opinion nor any of the concurring opinions seek to provide an answer to this question. The reluctance of the Court to deal with this First Amendment question is likely due to the magnitude of the issue. This case did not have anything to do with the free speech rights of the spectators, and although the Court is allowed to consider any given issue when ruling on a case, it is more likely that the Court would want to address this issue when it is the question for which certiorari is granted.

It is often disappointing when the Supreme Court passes on an opportunity to establish a bright line rule on a given issue, but there

59. *Id.* at 658 (Souter, J., concurring).
60. *Id.* at 657.

are certain legal issues that simply can not be resolved in that way. Instead, it is sometimes necessary for the Court to allow rulings to occur on a case-by-base basis. This is the situation in *Carey*. Although the Court could have easily established a bright line rule as to whether spectators could wear buttons bearing an image of the victim in the courtroom, because of the competing interest on both sides—fairness to the defendant and freedom of speech—the Court decided to defer to the lower courts, and allow them to determine on a case-by-case basis whether a given practice in the trial courtroom is prejudicial.