

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This matter comes before the Appellate Division on the motions of the Cumberland County Prosecutor and the New Jersey Crime Victims' Law Center (attorneys for crime victims Kathryn Mason and Daniel Mason-surviving parents of 16 year old murder victim Nielsa Mason for leave to appeal the decision of the trial court denying their motions for an order permitting them to wear a photograph button of approximately 3 inches in diameter (A1) during their attendance at the public trial of the defendant.

On June 29, 2007 the Honorable Richard J. Geiger, J.S.C denied the joint motions. The Cumberland County Prosecutor's office submitted a proposed form of order. The order has not been signed as yet. It will be provided to this court upon receipt. Pursuant to court rule, Cumberland County Assistant Prosecutor is filing with this motion for leave to appeal, her affidavit/certification attesting to the decision of Judge Geiger in open court on June 29, 2007.

Sixteen year old Nielsa Mason was murdered on April 28, 1997. Defendant Peter Henriques was charged with the crime. On March 9, 1998, the trial court denied the State's motion to show a photograph of Nielsa during the trial. On January 22, 1999 the jury found defendant guilty of murder.

Defendant's conviction was subsequently reversed and remanded for a new trial on the basis that his confession was deemed inadmissible. On June 22, 2007, the trial judge stated in court at the hearing of the motions of the State and victims' attorney that the major issue at trial will be "Who is the attacker?" The trial is scheduled to begin within the next several months.

The motion before the trial court included the certification of Kathryn Mason, which stated in part:

9. *I request the opportunity to have myself, my husband, my son and possibly Nielsa's two grandparents wear a small button on our chest with Nielsa's photo on it. It is a small photo of her face, with no words, no graphics; just Nielsa's face. I have furnished a copy of the button to the prosecutor and to my attorney. The prosecutor is attaching it to her brief in its actual size.*

10. *As with the first trial, the jury will know who the spectators at trial are. They know who are the members the defendant's family, and they know who are the members of the victim's family. I do not want to convey any message to the jury of the defendant's guilt. The evidence will speak for itself. I understand that the defendant must receive a fair trial. I accept and support this. However, as a matter of fairness and respect to Nielsa, out of compassion for those of us who are Nielsa's survivors, I request permission have my daughter's beautiful face be present during the upcoming trial.* Certification of Kathryn Mason, pp.2-3, ¶'s 9 & 10 (A)

ARGUMENT

- I. **THE CONSTITUTION AND STATUTES OF NEW JERSEY MANDATE THAT THE RIGHTS OF CRIME VICTIMS IN THE CRIMINAL JUSTICE PROCESS BE FULLY RECOGNIED, AND THE VICTIMS HAVE STANDING TO ASSERT THESE RIGHTS.**

The constitutional and statutory rights afforded to victims of violent crime are civil rights, status rights that are automatically provided to persons when they step into the legal role of “victim,” and they are independent of the facts of the alleged crime, any defense asserted, or the conviction of defendant. *See* N.J. Const. art. I, ¶ 22 [Victim’s Rights Amendment] and N.J.S.A. 52:4B-36. [Crime Victims Bill of Rights]. These rights are about recognizing and respecting the victim in the criminal justice process. *Id.* See discussion, *State v. Timmendequas*, 161 N.J. 515, 554-555, 737 A.2d 55, 76-77 (1999). Victims’ civil rights include, *inter alia*, the right to be present, to be notified, to be heard, to participate in the process, to receive information about the process, to have interests adjudicated within the process, to be safe and free from intimidation, and to be treated with fairness, compassion, respect and dignity throughout the criminal justice process. *Id.*

Many of these rights are participatory in practice but they are substantive in nature. *State in the Interest of K.P.*, 311 N.J. Super. 123, 135-136 (Ch. Div. 1997). Their objective is to give to the victim a role, a function and a voice in the criminal justice proceedings. *See State v. Ruffin*, 853 A.2D 311, 321, 371 N.J. Super. 371, 387 (App. Div. 2004) where Judge Collester commented:

The rights of a crime victim are independent of the prosecutor. They are derived from common law and in this State, from the Constitution, N.J. Const. art. I, ¶ 22, and the Crime Victim's Bill of Rights, N.J.S.A. 52:4B-34 to -38. See, State v. Timmendequas, 161 N.J. 515, 737 A.2d 55 (1999).

In *K.P.*, the Record newspaper petitioned the trial court to be present in the courtroom during the sexual assault trial of the juvenile defendants. The court held that

under the authority of the Victims' Rights Amendment, *N. J. Const. Art. 1, ¶ 22* and the Crime Victims Bill of Rights, *N.J.S.A.52:4B-36* the victim had standing to oppose the newspaper's petition. *K.P.* has been cited as authority nationally for the proposition of victim standing.

Over the past 15 years, the New Jersey Crime Victims' Law Center has directly represented victims in the criminal justice system in the courts of New Jersey on numerous applications to safeguard the victim's rights under the authority of the Victims' Rights Amendment and the Crime Victims Bill of Rights. It has filed interlocutory appeals in criminal matters with the Appellate Division during this time period, and its standing has been recognized in each case to argue the substantive issue on the merits.

Crime Victims Bill of Rights

The rights of crime victims in the criminal justice system in New Jersey were first established in the "Crime Victim's Bill of Rights", N.J.S.A. 52:4B-34, *et seq.* This legislation that enumerates various rights for victims of crime to be "informed" and treated with "dignity and compassion by the criminal justice system" became law in 1985. The "legislative findings and declarations" to the Crime Victims Bill of Rights demonstrate the importance of the crime victim in the justice process:

The Legislature finds and declares that without the participation and cooperation of crime victims and witnesses, the criminal justice system would cease to function. The rights of these individuals should be given full recognition and protection. The Legislature has the responsibility to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process. In furtherance of this, the improved treatment of these persons should be assured through the establishment of specific rights. These rights are among the most fundamental and important in assuring public confidence in the criminal justice system. (Emphasis supplied). N.J.S.A. 52:4B-35.

The Victim's Rights Amendment

On November 5, 1991 at the general election, the voters of the State of New Jersey adopted the Victim's Rights Amendment to the New Jersey Constitution.

N.J. Const. Art. I, ¶ 22 (the Victim's Rights Amendment). The Amendment provides:

A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system. A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. A victim of a crime shall be entitled to those rights and remedies as may be provided by the Legislature. For the purposes of this paragraph, "victim of a crime" means: a) a person who has suffered physical or psychological injury or has incurred loss of or damage to personal or real property as a result of a crime or an incident involving another person operating a motor vehicle while under the influence of drugs or alcohol, and b) the spouse, parent, legal guardian, grandparent, child or sibling of the decedent in the case of a criminal homicide.

The Victim's Rights Amendment was the result of considerable effort on the part of legislators, prosecutors, crime victims and various individuals who sought to bring equal justice for crime victims into the criminal justice system in the State of New Jersey. It established certain rights for crime victims that are guaranteed "as a matter of State Constitutional imperative" along with such further constitutionally recognized and protected "rights and remedies as may be provided by the Legislature. *See, N.J. Const. Art. I, ¶ 22 and Interpretive Statement.* The Victim's Rights Amendment guarantees to a crime victim the right to be present at all public judicial proceedings along with the right to be treated with fairness, compassion and respect by those who work in the criminal

justice system. *“Instead of adopting a two-party State v. Defendant, paradigm, this provision requires that the system consider interests of third parties, specifically crime victims. Unfair practices that deny crime victims fairness, compassion and respect are unconstitutional under the amendment.”* *K.P.*, 311 N.J. Super. 123, 135-136 (Ch. Div. 1997).

“[T]he victims' rights movement did not commence with the approval of the constitutional amendment; rather it has culminated with its ratification. As early as 1971, the Legislature began enacting laws that granted rights to victims of crime. . . . Since that time, the courts have rarely questioned the constitutionality of victim sensitive legislation.” *Id.* at 141. The Victims' Rights Amendment in the State of New Jersey formed a part of the national victim rights movement that has continued to this day to move with significant measure throughout the United States. The Victim's Rights Amendment was a direct response to the many reports of the lack of recognition and respect for crime victims in New Jersey that routinely included the practice of excluding the victims from the justice process.

The effect of the Victim's Right Amendment in New Jersey has been substantial in that there has been a clearly recognizable effort on the part of the executive, legislative and judicial branches of our State government to provide "fairness, compassion and respect" to crime victims and to continually reinforce the legislative intent under the Crime Victim's Bill of Rights that "these rights are among the most fundamental and important in assuring public confidence in the criminal justice process." *See* N.J.S.A. 52:4b-35.

New Jersey has been recognized as a national leader in respecting the rights of crime victims for well over a quarter century. It was one of the first states to provide for victim compensation under the Criminal Injuries Compensation Act of 1971 (N.J.S.A. 52:4B-1, *et seq*), and for a Crime Victim’s Bill of Rights in 1985 (N.J.S.A. 52:4B-34, *et seq.*) under which was established the State and 21 county offices of victim-witness advocacy. In addition, New Jersey was just the eighth state to adopt a victim’s rights amendment to its state constitution. Since 1971 there have been more than seventy (70) new laws passed involving the rights of crime victims; the most important being the first amendment to the 1947 New Jersey Constitution in the area of human rights, the Victim’s Rights Amendment, N.J. Const. Art. I, ¶ 22.

Accordingly, in light of the constitutional requirement that crime victims be placed on equal footing, there are times when the defendant’s rights will give way to the rights of the victim where the benefits to the defendant “*are outweighed by other important considerations*”, such as the victim’s rights under the Constitution and Statutory Bill of Rights. *State v. Gilchrist*, 381 N.J.Super. 138, 147, 885 A.2d 29, 35 (App.Div.2005).

II. CONDUCT AT TRIAL ON THE PART OF A HOMICIDE VICTIM-SURVIVOR THAT DEMONSTRATES AN ASSOCIATION WITH THE VICTIM DOES NOT CAUSE A DENIAL OF THE DEFENDANT’S RIGHT TO A FAIR TRIAL UNLESS IT IS INHERENTLY PREJUDICIAL OR TENDS TO ERODE THE DEFENDANT’S PRESUMPTION OF INNOCENCE, AND SUCH CONDUCT BY VICTIM-SURVIVORS MUST BE ACCORDED ITS FULL CONSTITUTIONAL RECOGNITION.

A. Conduct of a homicide survivor at trial that demonstrates an association with the victim does not cause a denial of the

defendant's right to a fair trial unless it is inherently prejudicial or tends to erode the defendant's presumption of innocence.

The United States Constitution as well as the Constitution of the State of New Jersey gives every person charged with a criminal offense, the right to a public trial by an impartial jury. (U.S. Const., amends VI, XIV; N.J. Const., art 1 § 10). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and the importance of their functions...." *People v. Woodward*, 4 Cal. 4th 376, 385 (Cal. 1992). While the constitutional guarantee of a public trial has historically been for the benefit of the accused and that guarantee cannot be compromised, the criminal justice system also serves another purpose. "[The families] of murder victims also have a stake in [seeing justice carried out]. Courts may also consider, and be sensitive to, the needs and concerns of crime victims and their families." *People v. Chatman*, 38 Cal. 4th 344, 364 (Cal. 2006). See e.g., *State v. Timmendequas*, 161 N.J. 515 (1999); *State v. Faunce*, 244 N.J. Super. 499 (App. Div. 1990); *State in Interest of O.G.*, 274 N.J. Super. 182 (Ch. 1993).

Criminal cases are often emotionally charged and impact many others beyond the defendant. Victim's family members and those affected by the victim's absence have, in the last decade, come to the forefront of the criminal justice system. In so far as the presence of the victims does not interfere with the proceedings, they do have a right and an interest in being present. *N.J. Const. Art. I, ¶ 22*.

One of the unavoidable consequences of the right to a public trial is the victim's communication through silent signals or the inferences that the jury makes of those

signals.). “[Judges] who have actually tried cases to juries have frequently observed how spectators communicate their feelings. This communication is an unavoidable consequence of the Constitutional guarantee of “public trial.” *Musladin v. Lamarque*, 427 F.3d 647, 651 (9th Cir. (Cal.) 2005) (Kleinfeld, J., Kozinski, J., O’Scannlain, J., Tallman, J., Bybee, J., Callahan, J., and Bea, J. dissenting), *rev. Carey v. Musladin*, 127 S.Ct. 649. “Courts cannot expect that families will always conform their behavior to the standards of trained professionals. However, the court system must function in the face of occasionally imperfect behavior from the public.” *Chatman*, 38 Cal. 4th at 365.

“Sometimes there is a wall of brown or blue in the spectator’s section, displaying that state or municipal police care a great deal about the case. Sometimes the courtroom is full of Hells Angels colors, signifying a concern for their brother in the defendant’s chair. The local rape support center volunteers may crowd into the seats behind the prosecutor in a rape trial while the victim sits silently looking at the jurors through the entire trial... There is nothing wrong with the jury knowing that people care about the case and the parties... Public concern and public sympathy for one side or the other are part of what it means for a trial to be ‘public.’

Musladin v. Lamarque, 427 F.3d. 651(Kleinfeld, J., Kozinski,J., Scannlain, J., Tallman, J., Bybee, J., Callahan, J., and Bea, J. dissenting).

The question is therefore, what is the line of demarcation between what victim conduct is permissible and what is not? In *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986), the Supreme Court delineated the proper test to determine whether the conduct rises to such a level as to deprive the defendant of his sixth amendment right to a fair trial.

The inquiry is whether the conduct is “so inherently prejudicial [meaning an ‘unacceptable risk is presented of impermissible factors coming into play’] so as to pose an unacceptable threat of a denial of that right.” 475 U.S. at 572. Impermissible factors

are those that can be said to “brand the defendant with an unmistakable mark of guilt.” *Id.* at 572.

The case law suggests that for a defendant to be ‘branded’ the conduct must be unambiguous in its advocacy. In *Holbrook*, a bank robbery case, several uniformed officers were present in the courtroom, seated in the spectator section behind the bar. *Holbrook*, 475 U.S. 560. The defendant filed a *habeas corpus* petition claiming that the presence of the officers was inherently prejudicial and amounted to a denial of his sixth amendment right. The Court reversed the lower appellate court and denied the petition. The Court found that while prison clothes or shackles are an unmistakable sign of the defendant’s guilt, “the presence of guards at the defendant’s trial need not be interpreted as a sign that he is particularly dangerous or culpable.” *Id.* at 569. The Court went on to say that the jurors could have inferred that the officers were there to ensure decorum or prevent disruptions from outside the courtroom or the jury could have inferred nothing at all from their presence.

On the other hand in *Estelle v. Williams*, 425 U.S. 501 (1976) a defendant petitioned that his right to a fair trial was undermined because he was forced to wear prison clothing at trial. The Court found that the constant reminder that the defendant is in custody can impair the jury’s judgment and erode the presumption of innocence. The prison garb was a clear, “unmistakable mark of guilt” that constituted an “impermissible factor coming into play”. In *Estelle*, however, the court discussed *United States ex rel. Stahl v. Henderson*, 472 F.2d 556 (5th Cir. 1973), where a defendant was charged with murdering a fellow prison inmate. In that case, the fact that the defendant was tried wearing prison clothing was not found to be prejudicial because the jury already knew or

would soon inevitably learn of the defendant's incarceration. "No prejudice can result from seeing that which is already known." *Id.* at 557.

The trial court therefore has discretion to decide whether conduct on the part of victim survivors or other spectators poses such a threat and the court has the responsibility to cure the prejudice if it is found. *Chatman*, 38 Cal. 4th at 369.

"A trial is the recreation of a human event. When the event involves life and death, the aftermath for all those affected is profound and emotions run high. Courts must be vigilant to ensure that the proper legal resolution is untainted by extraneous influence... Different people manage grief, anger, loving support and other human feelings in different ways. Surely, we would not say that the mother of either the victim or of the accused should be excluded from the courtroom simply because she might act beyond the strictures of accepted legal deportment. Courts have the responsibility to manage this reality but they cannot ignore it."

Id. at 369.

In *Chatman*, the victim's mother made several outbursts during the course of the proceedings including during defendant's testimony. The outbursts however did not speak to the defendant's guilt or innocence. They did not provide the jury with any new information outside the record. "Even without observing [the mother] in person, any reasonable juror would know that the crime caused the victim's family anguish." *Id.* at 369. The court found that the outbursts were curable by the court's admonition and no prejudice was found.

Similarly, in *People v. Lucero*, 44 Cal. 3d 1006 (Cal. 1988), the victim's mother cried out just as the jury was directed to leave the courtroom for deliberation. The substance of the outburst was information outside the record that the jury hadn't heard during the trial. The court found that the situation was "analogous to cases where a jury hears inadmissible evidence because of improper argument by the prosecutor or through the improper testimony of a witness. In such cases prejudice is not presumed. Indeed, it is

generally assumed that such errors are cured by admonition [and a jury instruction to disregard] unless the record demonstrates the misconduct resulted in a miscarriage of justice.” *Lucero*, 44 Cal. 3d at 1023. The court again found, just as in *Chatman*, that the jury was not prejudiced by the spectator misconduct. In fact, the court found that up to that point there had been no California cases that have reversed a judgment because of spectator misconduct. *Lucero*, 44 Cal. 3d at 1024 n10.

The conduct of a criminal trial cannot be a rigid and inflexible process. Many decisions made throughout the trial are subject to the exercise of the court’s sound discretion. *State v. Balthrop*, 179 N.J.Super. 14, 430 A.2d 240 (App.Div. 1981); . *State v. Casavina*, 163 N.J.Super. 27, 394 A.2d 142 (App.Div.1978). Commenting on the exercise of “sound discretion” by the court, Justice Perskie noted:

What does this phrase mean? Its meaning finds classic expression in the words used by Lord Mansfield in Rex v. Wilkes, 4 Burr. 2527, 2530, which read as follows: ‘But discretion, when applied to a court of justice means sound discretion, guided by law. It must be governed by rule not by humor. It must not be arbitrary, vague and fanciful, but legal and regular.’ Cf. State v. Then, 114 N.J.L. 413, 416, 177 A. 87. If I understand this definition it means that the exercise of a discretionary power must be bottomed on the cardinal factors of sound reason, fairness and justice. (Emphasis supplied).

Cintas v. American Car & Foundry Co., 38 A.2d 193, 194, 34 Backes 305, 306-307 (N.J.Err. & App. 1944) (J. Perskie dissenting).

In the exercise of this sound discretion, “*There is no legitimate way for the judges to prevent spectators in a public trial from showing that they care about the case and support one side or the other, even if only by where they sit and who they look at with sympathy or hostility.*” *Musladin*, 427 F.3d. 651 (Kleinfeld, J., Kozinski, J., O’Scannlain, J., Tallman, J., Bybee, J., Callahan, J., and Bea, J. dissenting).

In *State v. Rose*, 112 N.J. 454 (1988) the defendant was convicted of capital murder in the death of an Irvington police officer. On appeal the death penalty was reversed but the conviction was affirmed. During the trial nine or ten of the victim's fellow police officers in full uniform attended the proceedings. In rejecting the defendant's argument, the Supreme Court upheld the trial judge's ruling when he stated: "*the officers have a right to be here,*" observing that "*I don't believe I can tell them how to dress when they come to court.*" *Id.* at 541. In *Rose*, the court referred commented:

"We note with approval the observation by the Supreme Court of Kansas in State v. McNaught, 238 Kan. 567, 713 P.2d 457 (Kan.1986), a vehicular homicide case in which defendant was allegedly driving while intoxicated and numerous spectators were present in court wearing buttons inscribed MADD (Mothers Against Drunk Driving) and SADD (Students Against Drunk Driving):" *Id.*

The language of the Kansas Supreme Court approved by the New Jersey Supreme Court, in part provides as follows:

In the administration of justice, the trial judge is charged with the preservation of order in his court and with the duty to see that justice is not obstructed by any person or persons whatsoever. A large measure of discretion resides in the trial court in this respect, and its exercise will not be disturbed on appeal unless it appears that prejudice resulted from the denial of a legal right. Rose, 112 N.J. 541 citing McNaught, 238 Kan. at 577, 713 P.2d at 466.

History has taught us that the civil rights of individuals continue to evolve and change with the times. The legal precedent today may be the social mistake of tomorrow. See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954) (Brown I), and *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, (1955) (Brown II)

Overruling *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138 (1896). There was a time in many people’s lives when they did not know a victim of violent crime. The rule at one time may now be the exception. There was a time before the Crime Victims Bill of Rights was passed in 1985 that victims were considered no more than appendages or a necessary evil to our system of justice. Less than 25 years ago, the most definitive study on the impact of the criminal justice system on victims concluded that “*the treatment of crime victims in America was a national disgrace. Ignored, mistreated or blamed, the innocent victims had been handled like photographs or fingerprints—mere evidence to be manipulated at the criminal justice system’s convenience.*”¹

“*In The general public, specifically victims, perceive the judge as the person ultimately administering the criminal justice system. Historically, the legal system did not view crime victims as having any rights. “The victims’ rights movement has resulted in the adoption of new procedural and substantive rights for victims. Judges must learn and implement those new constitutional provisions and statutes because they will bring about a better justice system.” (footnote citations omitted).*” *K.P.*, 311 N.J. Super. 123, 142.

In *Carey v. Musladin*, 127 S.Ct. 649 (2006)² the United States Supreme Court unanimously reversed the 9th Circuit Court of Appeals, holding that the state appellate court’s determination that the convicted killer, who had petitioned for *habeas corpus* to the federal court, was not inherently prejudiced at his state court trial when the victim’s survivors wore buttons depicting the murder victim. Musladin had been charged with

¹ OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T. OF JUSTICE, FOUR YEARS LATER: A REPORT ON THE PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, ii (1986).

² The New Jersey Crime Victims’ Law Center was granted leave to appear as *amicus curiae* by the Court, and it filed a brief in support of reversal of the decision of the 9th Circuit Court of Appeals.

murdering his estranged wife's fiancé in an argument, during which he admittedly fired a gun in the fiancé's general direction. (*Musladin v. LaMarque* 403 F.3d 1072, 1073 (9th Cir.2005)). Musladin argued perfect and imperfect self-defense, contending that there was no crime and no victim involved. During each of the 14 days of his jury trial, the deceased's family sat in the front row of the gallery, directly behind the prosecution and in clear view of the jury, with at least three family members at a time wearing "very noticeable" buttons several inches in diameter on their shirts displaying the deceased's photograph. Before opening statements, the court denied Musladin's request that it instruct the family members to refrain from wearing the buttons in court. *Id.*

Musladin, after he was convicted of first degree murder and related offenses and sought reversal in state court without success, filed a petition for writ of habeas corpus in federal district court arguing that the state court had unreasonably applied clearly established federal law in violation of the Anti-Terrorism and Effective Death Penalty Act in determining that his rights to a fair trial had not been violated by the family members' display of buttons. His petition was denied, and he appealed to the Ninth Circuit. *Id.*

The Supreme Court reversed the 9th Circuit Court of Appeals holding that the decisions of the state trial and appellate courts and the federal district court that upheld the wearing of the buttons was not contrary to established federal law so as to require a reversal.

Speaking for the Court, Justice Thomas stated:

In this case, a state court held that buttons displaying the victim's image worn by the victim's family during respondent's trial did not deny respondent his right to a fair trial. We must decide whether that holding was contrary to or an unreasonable application of clearly established federal law, as determined by this Court. 28 U.S.C. § 2254(d)(1). We hold that it was not. Id. at 651.

There are countless impermissible inferences that the jury could make, that could be prejudicial but which the jury is instructed to ignore. Just as juries are instructed to ignore certain questions or witness answers, the jury in this case was instructed to base their decision on the facts and on the law, and not to let “*sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling*” color their decision. It is assumed that regardless of spectator misconduct, the jury follows the instructions they are given. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

Communication from victim survivors or other spectators, whether silent signals of grief or conduct conveying solidarity do not corrode the defendant’s presumption of innocence. It is clear to the jury that the defendant is not there by choice. It is clear that the state thinks he is guilty. It is clear who the victim’s family is and that they mourn the loss of a loved one. Their tears and sadness and desire for justice in the courtroom do not prejudice the jury or corrode the defendant’s presumption of innocence. Their participation and faith in the system is crucial to the maintenance of societal order. They cannot and should not be excluded.

The dispositive question is whether the circumstances so clearly and unambiguously send signals to the jury of the defendant’s guilt that the presumption of innocence is corroded. In *Holbrook*, the presence of the uniformed guards did not send such signals. The jury could have inferred that they were there to preserve order or the jury could have inferred nothing at all. On the other hand, in *Estelle*, the prison garb was a clear and unambiguous mark of guilt that sent unmistakable signals to jury of the defendant’s guilt. *Holbrook* was followed by the New Jersey Supreme Court in *Rose*, with the court noting, “[W]e cannot believe that the use of the four troopers tended to

brand respondent in their eyes 'with an unmistakable mark of guilt.'” *Rose*, 112 N.J. 543.

In the present case, the buttons with the picture of Nielsa Mason do not send clear unmistakable signals to the jury of the defendant’s guilt. Even if they are visible to the jury and further assuming the jury recognizes Nielsa’s picture, the buttons do not send any explicit messages vis-à-vis the defendant. The buttons do not suggest or express any message in relation to defendant’s guilt or innocence.

Furthermore, the presence of the buttons are not prejudicial because just as in *ex rel. Stahl*, “[n]o prejudice can result from seeing that which is already known.” 472 F.2d at 557. During the trial, the jury will view, in all probability, several photos of the murder scene as well as post-mortem photos. The jury, having already seen, or imminently being exposed to such powerful scenes will not be affected by the innocuous photo of Nielsa on the button. The buttons in this case are not an “*unmistakable mark of guilt*” and therefore do not amount to an “*impermissible factor coming into play*”. Their presence in the courtroom does not rise to the level of “inherently prejudicial” and does not deprive the defendant of his sixth amendment right to a fair trial.

B. Crime victims are not mere spectators in the criminal justice process, and their rights must be given due weight in assessing the impact of their presence and conduct on the rights of the defendant.

Nielsa Mason is survived by her parents, her brother, her grandparents and a network of other relatives and resulting in many of victims of this crime. Under the Crime Victim’s Rights Amendment and the New Jersey Crime Victim’s Bill of Rights,

these individuals are direct victims of this crime, and each is entitled to the full protection of the statutes and Constitution of the State of New Jersey.

The words of Nielsa's mom Kathryn must be given recognition because the rights conferred upon her by *N.J. Const. Art. I, ¶ 22*. "*are fundamental and were meant to serve as a floor and not a ceiling.*" *K.P.*, 311 N.J. Super. 123, 140.

6. *It is now 10 years since my daughter's death. Once again we will be required to sit quietly through this terrible slow motion replay of the murder of our child. We will be there because we must be there for our daughter.*

7. *It is so important to my family and me that during this public trial Nielsa's face be in the courtroom; not her beaten face, but the beautiful face that keeps her spirit alive in all those who knew and loved her.*

8. *And I ask once again; "How can Nielsa's picture hurt anyone?"*

Certification of Kathryn Mason, p.2, ¶'s 6,7, &8.

Crime victims are not mere appendages to the criminal justice process. They are an integral part of the process and the courtroom stage on which the process unfolds each day in the courtrooms throughout this nation. In his concurring opinion in *Payne v.*

Tennessee, 501 U.S. 808 (1991), Justices Souter opined:

"Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death. Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles, and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents. Thus, when a

defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt."

Id. at 838-839 (Souter, J., and Kennedy, J. concurring).

Criminal trials are about people; people accused of doing bad things and the people who are harmed by their acts. Courts know this; lawyers know this; and without question, juries know this. Jurors know which individuals in the courtroom are the survivors of the homicide victim. They know why they are there. They know that these individuals are present because their loved one has been murdered, and someone is standing trial in a public forum accused of the ultimate crime, the killing of another human being.

Criminal trials do not take place behind private walls or in a laboratory controlled environment. They occur in a public setting reflecting our system of democratic justice. This public setting includes the rights of those who have suffered the greatest, the homicide survivors, to be present. Their presence and association with the decedent is understood, obvious and expected. For these individuals to wear a small button with the photo of the victim is as commonly understood as is their presence. Common sense dictates this. Such a showing of association with the victim by her loved ones does not violate the defendant's rights to a fair trial because every individual who enters that courtroom comes into it with independent perceptions, feelings and associations. The face of the victim worn by those who loved her is understood by jurors in a common sense fashion; not one that calls upon them to prejudge the defendant as guilty.

The face of Nielsa Mason worn on a small button only 3 inches in diameter will have no adverse impact on the defendant and his right to a fair trial. The wearing of this

button is a recognition by the justice system that the victim is not a “faceless stranger”³ and that “ *when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt.*” *Payne*, 111 S.Ct. 2616.

The victims’ rights movement along with the decisions of the federal and state courts throughout the United States over the last 20 years have recognized the existence and the rights of survivors of homicide. The Constitution of New Jersey mandates that victims and their survivors be treated with “*fairness, compassion respect.*” The words were not meant to be empty promises. They were meant to secure “fair treatment for victims.” *Muhammad*, 145 N.J. 42

The Interpretive Statement to the Victim’s Rights Amendment says that the rights conferred upon crime victims by the New Jersey Constitution are intended to place them on “equal footing” with the defendant in the criminal justice system. While it may be expedient or even practical on the part of the trial court to err on the side of caution with the thought of minimizing the potential number of appealable issues if the defendant is ultimately convicted, the constitutional rights of crime victims cannot be compromised in favor of expediency or practicality. The small button worn innocuously by the loved ones of a murder victim maintains a balance on the scales of justice; and that balance respects the intent of *N.J. Const. Art. I, ¶ 22*.

The major issue at trial, as noted by the trial judge is “Who is the attacker?” There is no question that Nielsa Mason is the murder victim. The photo button of the murder victim does not diminish the rights of the defendant; it acknowledges that trials do not take place in a vacuum, and that this trial is about the killing of a human being. It accomplishes a recognition and respect for the people who come into the justice system, defendant and victim alike.

CONCLUSION

³ *South Carolina v. Gathers*, 490 U.S. 805, 821, 109 S.Ct. 2207, 2216 (1989), (O'Connor, J. dissenting).

Based on the foregoing it is respectfully requested that the decision of the trial court be reversed and an order be entered permitting the victim-survivors to wear the button on their person containing the photo of Nielsa Mason subject to reasonable restrictions and controls being established by the trial court in order to ensure that the rights of the defendant to a fair be guaranteed.

New Jersey Crime Victims' Law Center
Attorney for Victim-Survivors

Dated: July 16, 2007

By _____
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