No. 05-785

IN THE

Supreme Court of the United States

THOMAS L. CAREY, Warden,

Petitioner,

vs.

MATHEW MUSLADIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In the absence of controlling Supreme Court law, did the Court of Appeals for the Ninth Circuit exceed its authority under 28 U. S. C. § 2254(d)(1) by overturning respondent's state conviction of murder on the ground that the courtroom spectators included three family members of the victim who wore buttons depicting the deceased?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the all too familiar problem of a federal habeas court failing to accord the appropriate deference due to a state court opinion under 28 U. S. C. § 2254(d). The Ninth Circuit found that the state court's decision was an unreason-

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

able application of clearly established federal law based largely on a Ninth Circuit precedent, despite a large body of case law from other states consistent with the state court decision. This is contrary to the intent of Congress, the integrity of state court convictions, and the principle that the state courts and lower federal courts are coequal interpreters of the federal Constitution. This decision is contrary to the interests of justice and public safety that the CJLF seeks to advance.

SUMMARY OF FACTS AND CASE

In 1994, Mathew Musladin had a violent confrontation with his estranged wife, Pamela Musladin, her brother, Michael Albaugh, and her fiancé, Thomas Studer, at the home of her mother. See *People* v. *Musladin*, No. H015159 (Cal. App., Dec. 9, 1997), App. to Pet. for Cert. 55a-56a. He claimed self-defense, *id*., at 58a, but the jury rejected that claim and convicted him of the murder of Mr. Studer, attempted murder of his wife, and assault with a deadly weapon on Mr. Albaugh.

At trial, defense counsel asked the court to require members of the Studer family to remove buttons with a picture of Tom Studer. After noting that the buttons had no message but the photograph, the trial court denied the motion, finding no prejudice to the defendant. See J. A. 3-5. On appeal, the California Court of Appeal for the Sixth District rejected the claim, see App. to Pet. for Cert. 75a, and affirmed. See *id*., at 78a. The California Supreme Court denied review. See *id*., at 79a.

Musladin filed a state habeas petition in the California Supreme Court on June 16, 1999, which was denied June 2, 2000. See *id*., at 81a; Order Denying Writ of Habeas Corpus in *Musladin* v. *LaMarque*, No. C00-1998 U. S. Dist. (ND Cal., May 14, 2003), App. to Pet. for Cert. 33a. He immediately filed a federal habeas petition. See *ibid*. The Federal District Court rejected the claim, finding the case distinguishable from *Norris* v. *Risley*, 918 F. 2d 828, 834 (CA9 1990). See App. to

Pet. for Cert. 48a-49a. A divided panel of the Court of Appeals reversed. *Musladin* v. *LaMarque*, 427 F. 3d 653 (CA9 2005). The full court denied rehearing en banc, with seven judges dissenting. See *Musladin* v. *LaMarque*, 427 F. 3d 647 (CA9 2005). This Court granted certiorari on April 17, 2006.

SUMMARY OF ARGUMENT

The error in the Court of Appeals' opinion in this case is a common one. It occurs in several areas of law. Given a rule that limits a remedy to violations of clearly established law, the court evaded that limitation by defining the established law at an excessively high level of generality.

The state court decision in this case was consistent with a large body of jurisprudence from other jurisdictions. Every court in every state confronted with similar facts—spectator displays which were remembrances of the deceased with nothing more—has held that the practice was not inherently prejudicial so as to require reversal without a showing of prejudice.

This is a case where the clearly established law in this Court's cases consists of only a general principle and specific factual examples, none of which is on point. In such a case, the state court must develop a particularized rule from that principle. Where the particularized rule is consistent with a large body of jurisprudence from other jurisdictions, it is *per se* not an unreasonable application of the clearly established law. While an "outlier" decision may sometimes be unreasonable, the mainstream of jurisprudence cannot be. The outlier here is the Ninth Circuit.

ARGUMENT

I. The Court of Appeals determined the "clearly established federal law" at an excessively high level of generality.

The Court of Appeals' error in this case is one that has become all too familiar. Faced with a rule that limits a particular remedy to violations of clearly established law, the Court of Appeals sidestepped the limit by defining the established law at such a high level of generality as to render the limitation meaningless. This Court has reversed similar rulings many times in three different areas of law: the qualified immunity doctrine in suits under 42 U. S. C. § 1983, the habeas corpus retroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), and the deference standard of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2254(d).

There are two primary Supreme Court opinions establishing rules related to this case: *Estelle* v. *Williams*, 425 U. S. 501 (1976) and *Holbrook* v. *Flynn*, 475 U. S. 560 (1986). *Holbrook* distinguished practices that are "inherently prejudicial" from those that are not. 475 U. S., at 568. Inherently prejudicial practices require "close scrutiny," *ibid*., and "should be permitted only where justified by an essential state interest specific to each trial." *Id*., at 568-569. On the other hand, "if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the [federal constitutional] inquiry is over." *Id*., at 572.

Although *Holbrook* establishes the rules for dealing with those practices that are inherently prejudicial and those that are not, it does not establish a clear rule for determining which category a particular practice falls into. We know from *Estelle* that compelled wearing of jail garb is inherently prejudicial. See 425 U. S., at 503-505; *Holbrook*, 475 U. S., at 568. We also know from *Holbrook*, *supra*, at 568 and *Illinois* v. *Allen*, 397 U. S. 337 (1970), that shackling the defendant in the guilt

phase of a trial is also in this category. It was not until 2005, long after the state court decision in the present case, that *Deck* v. *Missouri*, 544 U. S. 622, 635 (2005), determined that shackling in the penalty phase of a capital case also fell into the same category. On the other hand, we know from *Holbrook, supra*, at 569, that the presence of a substantial and visible security force is not inherently prejudicial.

The distinction between the general standard on the handling of inherently prejudicial practices and the particularized question of whether a given practice is inherently prejudicial is a level of generality problem similar to the problems this Court has addressed in a number of cases. Although qualified immunity, the *Teague* rule, and the AEDPA deference standard have important differences, they have two important aspects in common. First, each doctrine is a limit placed on a remedy that either Congress or this Court has found is particularly costly and intrusive and therefore should not be extended to every case where a court determines there has been a violation. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 925, 938-939, 958 (1998). Second, each one involves a determination of whether the law at some earlier time clearly prohibited the act or practice complained of.

Anderson v. *Creighton*, 483 U. S. 635, 639 (1987), a qualified immunity case, recognized the connection between "the level of generality at which the relevant 'legal rule' is to be identified" and the effectiveness of the remedy limitation in achieving its purpose. Abstract requirements such as due process are clearly established, but defining the relevant rule at this level would "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability . . . ." *Ibid.* For the limitation to achieve its purpose, "the right the official is alleged to have violated must have been 'clearly established' in a *more particularized*, and hence more relevant, sense . . . ." *Id*., at 640 (emphasis added).

This particularization requirement has been recognized in several qualified immunity cases since *Anderson*. *Wilson* v. *Layne*, 526 U. S. 603, 614 (1999), held that bringing media "ride alongs" on a search of a private home was a violation of the Fourth Amendment. However, there was no sufficiently specific precedent on the particular point, it was not obvious from general principles, and the body of precedent that did exist was inconclusive. See *id*., at 615-616; see also *Saucier* v. *Katz*, 533 U. S. 194, 202 (2001) (quoting *Anderson* "particularized" language).

Two terms ago, *Brosseau* v. *Haugen*, 543 U. S. 194 (2004) (*per curiam*), found these principles clear enough to warrant a summary reversal. Although the generalized rule against shooting nondangerous fleeing suspects was clearly established, see *id*., at 197, there was no particularized precedent that a recklessly driving suspect came within this rule, nor was it obvious. See *id*., at 199-200.

Sawyer v. *Smith*, 497 U. S. 227, 236 (1990), applied the *Anderson* principle to the *Teague* rule for retroactivity on habeas. Preexisting rules that lent general support to a later rule or that made it a predictable development were not enough to say that the later rule had been dictated by the earlier precedent. "In the petitioner's view, *Caldwell*[2] was dictated by the principle of reliability in capital sentencing. But the test would be meaningless if applied at this level of generality." *Ibid*.; see also *Wright* v. *West*, 505 U. S. 277, 311-313 (1992) (Souter, J., concurring in the judgment) (summarizing cases); *Gray* v. *Netherland*, 518 U. S. 152, 169 (1996) (quoting *Sawyer*); *Beard* v. *Banks*, 542 U. S. 406, 416 (2004) ("high level of generality").

Lockyer v. *Andrade*, 538 U. S. 63 (2003), applied similar reasoning in an AEDPA case. In an Eighth Amendment proportionality challenge to a term of years, the only law that

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2. *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985).

was "clearly established" was a general principle that such sentences could not be grossly disproportionate. See *id*., at 72. The precise contours of this principle were unclear. See *id*., at 72-73. *Solem* v. *Helm*, 463 U. S. 277 (1983), and *Rummel* v. *Estelle*, 445 U. S. 263 (1980), stood as examples of sentences that did and did not violate the general principle, respectively, but neither was on point with the facts of *Andrade*. See 538 U. S., at 74. Given only a broad general principle and no particularized precedent applicable to the case before it, the California Court of Appeal's decision was neither contrary to nor an unreasonable application of that broad principle. See *id*., at 73-74, 77. *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004), also discussed the effect of the generality of the rule on the leeway given state courts under § 2254(d)(1).

Throughout these "level of generality" cases, the Court has always recognized that some actions may be such an obvious violation of a general principle that the law against them may be considered clearly established even in the absence of a particularized rule or a case factually on point. For this principle to apply, "in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U. S., at 640.

Such flagrant violations are rare. "The easiest cases don't even arise." *United States* v. *Lanier*, 520 U. S. 259, 271 (1997) (internal quotation marks omitted). Even in *Hope* v. *Pelzer*, 536 U. S. 730 (2002), the Court did not clearly state it had found such a violation. Hope, a prisoner, was tied to a hitching post, shirtless, all day in the Alabama summer sun. See *id*., at 734-735. The Court noted, "*Arguably*, the violation was so obvious that our own Eighth Amendment cases gave respondents fair warning that their conduct violated the Constitution." *Id*., at 741 (emphasis added). Without resolving that question, the Court proceeded to find the law clearly established by circuit court and administrative authorities. See *id*., at 741-

746.[3] If the egregious facts of *Hope* are close to the line, as the opinion implies, then *only* egregious actions are such obvious violations of general principles that the law against them can be considered clearly established without particularized rules or precedents factually on point.

The "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U. S. C. § 2254(d)(1), is that "*certain* practices," *Holbrook*, 475 U. S., at 568 (emphasis added), designated "inherently prejudicial," *ibid*., require "close scrutiny," *ibid*., and excuse a defendant from the otherwise required showing of actual prejudice. See *id*., at 572. The decision of the state court in the present case is not contrary to any precedent of this Court holding that allowing spectators to wear buttons is such a practice; there is no such precedent. We have the examples of *Holbrook* and *Estelle* on their facts, *Holbrook*'s statement that shackling is such a practice, and the general principle in *Holbrook* that the category includes practices "so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial . . . ." See *ibid*. Does the practice in this case so obviously qualify for that definition that no more specific precedent is needed? To illuminate that question, a survey of the legal landscape is helpful.

II. The state court's decision was consistent with a substantial body of jurisprudence.

In habeas cases involving the retroactivity rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), the "first and principal task is to

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3. Circuit precedent can clearly establish the law for the purpose of the qualified immunity doctrine. See *ibid*. Circuit precedent cannot clearly establish the law for the purpose of 28 U. S. C. § 2254(d)(1). The status of circuit precedent for the purpose of the *Teague* rule has never been squarely resolved. It would seem, though, that a rule cannot be dictated by a precedent the state court has no obligation to follow. See Scheidegger, *supra*, at 938-939, n. 362.

survey the legal landscape as of [the] date [of finality], to determine whether the rule [in question] . . . was dictated by then-existing precedent . . . ." *Lambrix* v. *Singletary*, 520 U. S. 518, 527 (1997). As we will explain in Part III, *infra*, in cases under § 2254(d) where there is no Supreme Court case on similar facts, it may be useful to take such a survey to see how other courts have treated similar cases.

The Kansas Supreme Court has repeatedly rejected claims that spectator conduct similar to that in the present case is inherently prejudicial and warrants reversal without a showing of prejudice. In *State* v. *McNaught*, 238 Kan. 567, 713 P. 2d 457 (1986), members of Mothers Against Drunk Driving (MADD) and Students Against Drunk Driving (SADD) wore buttons with their organizations' initials in the courtroom. See *id*., at 576-577, 713 P. 2d, at 466. The number of such spectators was disputed, but on the prosecution's version of the facts there were three or four, so the number was comparable to or greater than the present case. See *id*., at 580, 713 P. 2d, at 468. The court held that the spectators' wearing of these buttons was insufficient to show an abuse of discretion or to warrant reversal, see *id*., at 581, 713 P. 2d, at 468, rejecting the claim of inherent prejudice.

State v. *Bradford*, 254 Kan. 133, 134, 864 P. 2d 680, 682 (1993), like the present case, was a homicide where the victim's family wore buttons with her picture. Although the trial court directed the spectators to remove the buttons, the jury had already seen them. Defendant claimed a mistrial should have been granted, relying on the first *Norris* opinion, *Norris* v. *Risley*, 878 F. 2d 1178 (CA9 1989). *Bradford*, *supra*, at 141-142, 864 P. 2d, at 686-687. The Kansas Supreme Court rejected the argument, holding that the case was controlled by *McNaught*. See *ibid*. This holding eliminates any doubt that the Kansas Supreme Court concluded that its *McNaught* rule is consistent with the federal constitutional requirements of *Estelle* v. *Williams*, 425 U. S. 501 (1976), and *Holbrook* v. *Flynn*, 475 U. S. 560 (1986), which were the basis of *Norris*.

State v. *Speed*, 265 Kan. 26, 961 P. 2d 13 (1998), is even more factually similar to the present case. Members of the victim's family wore buttons with his picture and later wore t-shirts with his picture. The trial court refused to order the spectators to remove the buttons and t-shirts. See *id*., at 47-48, 961 P. 2d, at 29. The Kansas Supreme Court stated that "the wearing of such buttons or t-shirts is not a good idea because of the possibility of prejudice" and "it would have been better for the district court to have ordered the buttons removed or the t-shirts covered up." However, reversal was not required under the *McNaught* standard because "the defendant has failed to show that his rights were prejudiced by the spectators' display." *Id.*, at 48, 961 P. 2d, at 30.

The North Carolina Supreme Court confronted the picture-button question in *State* v. *Braxton*, 344 N. C. 702, 709-710, 477 S. E. 2d 172, 176-177 (1996). The defendant argued that spectators' wearing of badges with pictures of the victim was inherently prejudicial. The court rejected the argument, finding the case distinguishable from cases where buttons convey a specific message or identify a well-known group, including *Norris*, *Woods* v. *Dugger*, 923 F. 2d 1454 (CA11 1991), and *State* v. *Franklin*, 174 W. Va. 469, 327 S. E. 2d 449 (1985). *Woods* and *Franklin* are discussed below.

Picture button claims were rejected on sparse appellate records in *Cagle* v. *State*, 68 Ark. App. 248, 251, 6 S. W. 3d 801, 803 (1999), and *Kenyon* v. *State*, 58 Ark. App. 24, 34-35, 946 S. W. 2d 705, 710-711 (1997). Both decisions hold that an affirmative showing of an impact on the jury's ability to fairly decide the case is required.

The Texas Court of Appeals found the wearing of large buttons with a picture of the deceased not to be inherently prejudicial in *Nguyen* v. *State*, 977 S. W. 2d 450, 457 (Tex. App. 1998). The court noted the inherent versus actual prejudice distinction, citing *Howard* v. *State*, 941 S. W. 2d 102, 117 (Tex. Crim. App. 1996), which in turn discusses *Holbrook*.

The Supreme Court of Washington applied *Holbrook* and distinguished *Norris* in a situation similar to the present case in *In re Woods*, 154 Wn. 2d 400, 416-418, 144 P. 3d 607, 616-617 (2005). In *Woods*, the victim's family wore black and orange remembrance ribbons. The court found that the displays were not inherently prejudicial within the meaning of *Holbrook*, citing *Braxton* and other similar cases. The court distinguished *Norris* on the ground that the displays were simple remembrances of the victim rather than implicit statements of the defendant's guilt. Twelve days later, apparently unaware of *Woods*, the Washington Court of Appeals applied *Holbrook* to a picture-button case and denied relief upon finding that the defendant had not shown prejudice. See *State* v. *Lord*, 128 Wn. App. 216, 114 P. 3d 1241 (2005).[4]

In every case in every state where the spectators' displays were simple remembrances of the victim, *i.e.*, a picture or a ribbon, the court has found the display not to be inherently prejudicial. Even when the display goes beyond remembrance, authority is mixed and depends on the facts of the case.

State v. *Franklin*, 174 W. Va. 469, 327 S. E. 2d 449 (1985) is similar to *McNaught* and *Norris* in that the display was a button of a well-known organization. *Franklin* is also one of the few button cases in which relief was granted. *Franklin* is an aggravated case, quite different from the others. The county sheriff was the president of the local chapter of MADD. While in uniform, he handed a MADD button to a prospective juror as she came in the courthouse door. See *id.*, at 474, 327 S. E. 2d, at 454. There were 10 to 30 MADD members present throughout the trial. See *ibid*. Under these circumstances, the court found that the spectators were a formidable influence, and, in combination with the activities of the sheriff, constituted reversible error. See *id.*, at 475, 327 S. E. 2d, at 455.

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4. The Washington Supreme Court granted review in *Lord* on May 4, 2006, after this Court had granted certiorari in the present case. See 156 Wn. 2d 1038.

The active involvement of the sheriff distinguished the case from other spectator cases. See *ibid*.[5]

Woods v. *Dugger*, 923 F. 2d 1454 (CA11 1991), is similarly distinguishable. Where a police or correctional officer is the victim, a heavy presence of officers in uniform as spectators can send a message similar to the MADD buttons. However, *Woods* did not find inherent prejudice from the presence of the officers alone, but only in the total circumstances of a heavily publicized murder of a correctional officer in a small county with a large prison. See *id*., at 1456-1460.

Norris v. *Risley*, 918 F. 2d 828 (CA9 1990), is extensively discussed in the other briefs and opinions in this case and need only be mentioned here. That decision found that the presence of spectators wearing "Women Against Rape" buttons, without more, constituted an inherently prejudicial practice within the meaning of *Holbrook*. See *id*., at 834.

Our survey of the cases finds that the Ninth Circuit stands alone in this view. No other court has found that the presence of spectators wearing a button or uniform constituted inherent prejudice except in the presence of additional factors. No court under any circumstance has found that buttons or ribbons that merely indicate remembrance of a deceased victim, with no other implication as to the guilt of the defendant, was inherently prejudicial. Numerous courts have found to the contrary.

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5. We have omitted from the survey the button cases where trial counsel did not object. Although these cases deny relief, the prejudice standard required is influenced by issues of procedural default or ineffective assistance not present in this case. See *United States* v. *Sheffey*, 57 F. 3d 1419, 1432 (CA6 1995); *Pachl* v. *Zenon*, 145 Ore. App. 350, 359-360, 929 P. 2d 1088, 1093 (1996); see also *Johnson* v. *Commonwealth*, 259 Va. 654, 676, 529 S. E. 2d 769, 781-782 (2000) (court ruling at beginning of trial that buttons not be worn where jurors could see them; no further objection by counsel).

III. Where a state decision derives a particularized rule from general principles in this Court's precedents, a rule supported by substantial authority in numerous jurisdictions is *per se* a reasonable application within the meaning of AEDPA.

Since Congress enacted 28 U. S. C. § 2254(d)(1) and this Court defined its meaning in *Williams* v. *Taylor*, 529 U. S. 362, 412-413 (2000), reversing federal court of appeals decisions for failure to give state court decisions their legally required deference has taken up an inordinate portion of this Court's docket. Many of these decisions were so clearly erroneous as to warrant summary reversal. See *Bell* v. *Cone*, 535 U. S. 685 (2002); *Early* v. *Packer*, 537 U. S. 3 (2002) *(per curiam)*; *Woodford* v. *Visciotti*, 537 U. S. 19 (2002) (*per curiam*); *Lockyer* v. *Andrade*, 538 U. S. 63 (2003); *Price* v. *Vincent*, 538 U. S. 634 (2003); *Yarborough* v. *Gentry*, 540 U. S. 1 (2003) (*per curiam*); *Mitchell* v. *Esparza*, 540 U. S. 12 (2003); *Middleton* v. *McNeil*, 541 U. S. 433 (2004) (*per curiam*); *Yarborough* v. *Alvarado*, 541 U. S. 652 (2004); *Bell* v. *Cone*, 543 U. S. 447 (2005) (*per curiam*); *Brown* v. *Payton*, 544 U. S. 133 (2005); *Kane* v. *Garcia Espitia*, 546 U. S. __, 126 S. Ct. 407, 163 L. Ed. 2d 10 (2005) (*per curiam*).

Regrettably, experience has shown that the *Williams* Court's confidence in the ability and willingness of the lower federal courts to apply its generalized requirement of reasonableness accurately and faithfully was overly optimistic. Some clearer and more objectively defined rules are needed if the goals of the legislation are to be achieved. *Amicus* CJLF does not propose any universal rule for all § 2254(d)(1) cases. However, this case presents a frequently recurring situation that does lend itself to a clear and easily applied rule that is well within the language and intent of the statute and consistent with this Court's precedents.

The only clearly established Supreme Court case law relevant to this case is a general principle with a few specific examples provided by the facts of the Supreme Court cases

themselves. The present case lends itself to a particularized rule, but none appears to date in Supreme Court cases. However, the fact pattern is common enough that a number of courts, both state and federal, have ruled on the question. Specifically for this case, the particularized rule is whether spectators wearing buttons or ribbons in remembrance of a deceased victim is, without more, an inherently prejudicial practice within the meaning of *Holbrook* v. *Flynn*, 475 U. S. 560 (1986).

Caspari v. *Bohlen*, 510 U. S. 383 (1994), showed the importance of a survey of the legal landscape, including *both state and federal* decisions, when Supreme Court precedent alone provides no clear answer. A substantial split of authority means that neither branch is dictated by precedent, the ultimate resolution of the split is "a 'developmen[t] in the law over which reasonable jurists [could] disagree,' *Sawyer* v. *Smith*, 497 U. S. 227, 234 (1990), [and] the Court of Appeals erred in resolving it in [the habeas petitioner's] favor." *Id*., at 395. In the same way, a decision consistent with a substantial body of jurisprudence cannot be said to be objectively unreasonable.

This is not to say that a single precedent may immunize a decision from being considered objectively unreasonable. The judicial system is not perfect, and even reasonable judges may occasionally make decisions that can be seen to be clearly wrong based on established law. Yet if any decision on the particularized rule relevant to this case is an "outlier" and potentially in the realm of "objectively unreasonable," it is the Ninth Circuit's decision in *Norris*, as explained in Part II, *supra*.

Amicus CJLF submits that this Court should adopt a clear standard for the application of § 2254(d)(1) in the circumstances of this case, making explicit what is implied by *Price*, 538 U. S., at 643. When a state court must derive a particularized rule from a general principle in this Court's precedents, and when a survey of the legal landscape reveals a substantial

body of jurisprudence consistent with that rule, the rule is *per se* not an unreasonable application of the precedents.

Two red herrings in the federal court opinion can be easily disposed of. The fact that the state court chose to distinguish rather than reject *Norris* v. *Risley*, 918 F. 2d 828 (CA9 1990), see App. to Pet. for Cert. 74a-75a, does not elevate that decision to the status of a Supreme Court precedent for the purpose of AEDPA. Cf. *Musladin*, 427 F. 3d, at 657-658. The Congress decided that only Supreme Court precedent would be dispositive on federal habeas, and the wording of the state court opinion cannot change that.

The second red herring is the federal court's contention that merely quoting the words "impermissible factor coming into play" amounts to some kind of binding admission that the "inherent prejudice" test had been met. In context, the quote is nothing more than an inartful way of discouraging trial courts from allowing buttons, something many other courts have done. Cf. *supra*, at 10. Read fairly, the opinion holds that the buttons do not constitute an inherently prejudicial practice, and that holding is what is to be measured by the AEDPA standard.

The state court of appeal that decided this case has a workload of 117 majority opinions per year per judge. Judicial Council of California: Statewide Caseload Trends, 2006 Court Statistics Report 16, available at http://www.courtinfo.ca.gov/reference/documents/csr2006.pdf (as visited June 15, 2006). The fact that an unpublished *per curiam* opinion in one of these cases contains less than artful wording is not a ground to bypass the deference standard in a game of "gotcha." Congress surely did not intend for its landmark reform to be so easily evaded.

The basic holding, however awkwardly expressed, is that the inherent prejudice standard of *Holbrook* is not met by permitting the victim's family to wear buttons with his picture. As we have shown in Part II, *supra*, that holding is consistent with the overwhelming weight of authority. Just as *Caspari* v.

Bohlen required that state court precedent be considered equally with federal for the purpose of deciding what was dictated by precedent, so should state-court authority be considered for deciding what is clearly established and what is a reasonable application for § 2254(d)(1). The weight of authority in this case makes the state court decision *per se* reasonable.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

June, 2006

Respectfully submitted,

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