No. 05-785

IN THE

Supreme Court of the United States

THOMAS L. CAREY, WARDEN,
Petitioner,

v.

MATHEW MUSLADIN,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers as *amicus curiae* in support of respondent. Letters of consent have been filed with the Clerk.[1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of over 10,000 attorneys and more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In connection with that mission, NACDL has frequently filed *amicus curiae* briefs in this Court in cases involving the application of the Antiterrorism and Effective Death Penalty Act (AEDPA), *see*, *e.g.*, *Gonzalez v. Crosby*, 125 S. Ct. 2641 (2005); *Dodd v. United States*, 545 U.S. 353 (2005); *Rhines v. Weber*, 544 U.S. 269 (2005); *Pliler v. Ford*, 542 U.S. 225 (2004), and in cases implicating a criminal defendant's right to a fair trial, *see*, *e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004).

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[1] Pursuant to Rule 37, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel contributed monetarily to the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Throughout respondent's state-court trial, the deceased's family wore buttons depicting the deceased's image in clear view of the jury. The state appellate court acknowledged that "the wearing of photographs of victims in a courtroom" constitutes an "'impermissible factor coming into play'" during a trial. Pet. App. 75a (quoting *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)). Even the State does not now contend that such practices are a proper component of a just and fair criminal trial. More to the point, this Court has squarely held that a courtroom practice creating an "unacceptable risk . . . of impermissible factors coming into play" violates a criminal defendant's right to a fair trial. *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976); *see Holbrook*, 475 U.S. at 569.

Despite the undisputed and unjustifiable harms caused by public displays of emotions by spectators, and despite this Court's square holding barring the introduction of prejudicial outside influences into the criminal trial process, the state appellate court refused to reverse respondent's conviction. On habeas review, the Ninth Circuit correctly held that (1) this Court's precedents in *Williams* and *Holbrook* "clearly established" the rule that outside influences cannot be allowed to intrude on a jury's dispassionate examination of the trial evidence, and (2) that the state court unreasonably failed to apply that rule in affirming respondent's conviction.

The judges dissenting from the denial of rehearing en banc incorrectly viewed the panel decision as deriving the "clearly established" law at issue from Ninth Circuit precedent, rather than from the precedents of this Court. Respondent's brief addresses the error in that construction of the Ninth Circuit's opinion, and NACDL will not repeat that analysis here.

We instead focus on the question whether fundamental principles of due process, and the precedents of this Court

applying those principles to the conduct of criminal trials, can reasonably be construed as authorizing the state to conduct a criminal trial infected by public displays of emotion by spectators on matters at issue in the proceeding. The answer is no. There is no conceivable version of a just and fair trial that includes the regular, deliberate intrusion of such outside influences into the trial process. Such factors are at once highly prejudicial to the disfavored party and utterly irrelevant to the trial's truthseeking function. They are also wholly unnecessary. The only justification even in theory is to allow family members to express their feelings of grief and mourning. But family members have infinite opportunities to express their emotions publicly outside the confines of the courtroom, and they are even provided the opportunity in most jurisdictions to express their emotions in the criminal justice process itself, in the context of victim impact statements during sentencing, *after* the facts have been found and guilt has been determined. There is no acceptable justification – none – for allowing spectators to convey their emotions before a jury seeking to ascertain the actual facts involved in the events that provoked whatever emotions public spectators might express.

Whether those emotions be grief, mourning, or outrage, the precedents of this Court clearly establish that they can play no permissible role in the fair adjudication of guilt or innocence. It was unreasonable for the state appellate court to conclude otherwise, as the decision below correctly held.

ARGUMENT

This Court's precedents have clearly established two closely related propositions that govern this case. First, "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *see Holbrook*, 475 U.S. at 567; *see also Patterson v. People of the State of Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.) ("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."). Second, when a courtroom practice creates "an unacceptable risk" of "impermissible factors coming into play," that practice causes inherent prejudice to the defendant's right to a fair trial. *Williams*, 425 U.S. at 505; *see Holbrook*, 475 U.S. at 570.

In *Williams*, this Court unanimously concluded that the foregoing principles bar a state from forcing the defendant to wear prison garb against his will during his criminal trial. *See* 525 U.S. at 504-05; *id.* at 513 (Powell, J., concurring); *id.* at 515-16 (Brennan, J., dissenting).[2] The Court emphasized that "courts must be alert to factors that may undermine the fairness of the fact-finding process," *id.* at 503, because even though the "actual impact of a particular practice on the judgment of jurors cannot always be fully determined," there is "no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scru-

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[2] The only disagreement in *Williams* was whether the defendant's failure to object to being compelled to wear prison garb waived his right to be free from such compulsion. *See* 425 U.S. at 513 (Powell, J., concurring) ("[T]he Court opinion and the dissenting opinion essentially agree that a defendant has a constitutional right not to be so tried [i.e., in prison garb]. The disagreement is over the significance to be attributed to Williams' failure to object at trial.").

tiny." *Id.* at 504. Thus, courts must address any "possible impairment" of the right to a fair trial. *Id.* at 504. Forcing a defendant to wear prison garb creates such a "possible impairment" because it is a "constant reminder" to the jury of the defendant's status as an accused, which "may affect a juror's judgment." *Id.* at 504-05. Because prison attire is "likely to be a continuing influence [on the jury]," forcing a defendant to be tried in such attire presents "an unacceptable risk . . . of impermissible factors coming in to play." *Id.* at 505. Finally, the Court noted that while outside influences cannot always be entirely avoided – citing the example of shackles employed as "necessary to control a contumacious defendant," *id.*, upheld in *Illinois v. Allen*, 397 U.S. 337, 344 (1970) – "compelling an accused to wear jail clothing furthers no essential state policy." *Williams*, 425 U.S. at 505. The convenience of jail administrators was "no justification for the practice," and the State in that case "assert[ed] no interest whatever in maintaining the procedure." *Id.*

The Court applied the same established principles in *Holbrook* but reached the opposite result – again unanimously – upholding a state conviction where, at a trial with six co-defendants, "the customary courtroom security force was supplemented by four uniformed state troopers sitting in the first row of the spectator's section." 475 U.S. at 562. *Holbrook* begins by reiterating the most basic principle of due process in criminal trials:

> Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined *solely on the basis of the evidence introduced at trial, and not on grounds of* official suspicion, indictment, continued custody, or *other circumstances not adduced as proof at trial*."

Id. at 567 (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)) (emphasis added).

Applying that rule, the Court in *Holbrook* recognized that the presence of four officers "sitting quietly in the first row," *id.* at 571, created at least some possibility of prejudice from an inference that the defendant was especially dangerous. *Id.* at 569. The Court emphasized, however, the existence of a "wider range of inferences that a juror might reasonably draw," especially that the officers were present simply to provide standard courtroom security. *Id.* at 571 ("Four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings."). The strong likelihood that jurors drew that innocuous inference, rather than an inference affecting their deliberations, meant that the presence of the troopers did not create the "unacceptable risk of prejudice" requiring reversal. *Id.* What is more, even to the extent the troopers' presence did create prejudice, the Court emphasized that "the deployment of the troopers was intimately related to the State's legitimate interest in maintaining custody during the proceedings." *Id.* at 571-72; *see also id.* at 571 (despite any prejudice, "sufficient cause for this level of security could be found in the State's need to maintain custody").

Applied here, the due process and fair trial principles clearly established in *Williams* and *Holbrook* unambiguously require reversal of respondent's conviction. The public displays of emotion by spectators in respondent's trial inserted into the proceedings a continuing influence on the jury that both (a) inherently risked prejudice to respondent and (b) failed to further any essential State interest in the conduct of trial proceedings.

A. Public Displays Of Emotion By Spectators On Matters Before The Jury Are Inherently Prejudicial

One issue crucial to the disposition of this case is not in serious dispute: allowing trial spectators to insert into the trial proceedings non-verbal public displays relating to any

matter at issue in the trial is *not* a practice characteristic of a just and fair trial. This follows directly from the settled proposition that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of . . . other circumstances not adduced as proof at trial." *Taylor*, 436 U.S. at 485; *see Holbrook*, 475 U.S. at 567.[3]

The State in this case does not question that proposition – nowhere does it assert that allowing spectators to display their emotions about a case through visible buttons is a sound criminal trial practice. Equally significant, the lower courts that have addressed this issue have uniformly condemned similar practices.[4] This includes even those courts that have ultimately affirmed convictions (often for procedural reasons such as waiver, as in *Williams*) in cases involving such practices. In this very case, for instance, the California appellate court acknowledged that "the wearing of

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[3] Among other things, allowing the introduction of outside influences, such as the expression of emotions by spectators, would violate the defendant's rights under the Confrontation Clause of the Sixth Amendment because such expressions would not be subject to cross examination.

[4] *See Norris v. Risley*, 918 F.2d 828, 834 (9th Cir. 1990) (holding that "Women Against Rape" buttons worn by spectators during trial were inherently prejudicial); *United States v. Yahweh*, 779 F. Supp. 1342, 1343-44 (S.D. Fla. 1992) (holding that members of the same organization as defendants could not wear their uniforms during the trial due to the possibility that the jury would be influenced or intimidated); *People v. Pennisi*, 563 N.Y.S.2d 612, 614-17 (N.Y. Sup. Ct. 1990) (holding that the deceased's family and other spectators could not wear ribbon corsages in the courtroom as "[t]he court and/or [the] jury must not be exposed to these forms of communication"); *State v. Franklin*, 327 S.E.2d 449, 454-55 (W. Va. 1985) (holding that the wearing of "MADD" buttons by spectators was reversible error and stating that the jury should be "insulated, at least to the best of the court's ability, from every source of pressure or prejudice").

photographs of victims in a courtroom to be an 'impermissible factor coming into play,' the practice of which should be discouraged." Pet. App. 75a (quoting *Holbrook*, 475 U.S. at 570). Other cases – including many cited by the State – are to similar effect.[5]

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[5] *See, e.g., United States v. Sheffey*, 57 F.3d 1419, 1431-34 (6th Cir. 1995) (stating that appellant's argument, raised for the first time on appeal, that he was denied a fair trial due to the anti-drunk driving buttons worn by spectators raised "troubling issues"); *Cagle v. State*, 6 S.W.3d 801, 803 (Ark. Ct. App. 1999) (stating that the court was "not unsympathetic" to defendant's argument that the trial court erred in refusing to prohibit spectators from wearing buttons bearing a photograph of the victim but that it could not reach the argument on the record before it); *People v. Houston*, 130 Cal. App. 4th 279, 320 (Cal. Ct. App. 2005) ("[W]e are most concerned that spectator practices such as the wearing of buttons and placards displaying a victim's likeness at trial can be unduly disruptive to the trial process. . . . The better practice of any trial court is to order such buttons and placards removed from display in the courtroom promptly upon becoming aware of them in order to avoid further disruption."); *State v. Speed*, 961 P.2d 13, 29-30 (Kan. 1998) (stating that the wearing by spectators of buttons or t-shirts depicting the victim "is not a good idea because of the possibility of prejudice which might result" and that "it would have been better for the district court to have ordered the buttons removed or the t-shirts covered up"); *Pachl v. Zenon*, 929 P.2d 1088, 1093 & n.1 (Ore. Ct. App. 1996) (holding that trial counsel was not ineffective based on his failure to object to spectators wearing buttons bearing pictures of the victim but noting that the court was not "indicating that the wearing of buttons by spectators in a trial could never deprive a defendant of a fair trial"); *State v. Lord*, 114 P.3d 1241, 1243 (Wash. Ct. App. 2005) ("the better practice would have been for the trial court to have prohibited the buttons [bearing the victim's picture] when Lord first requested, rather than on the fourth day of trial"), *review granted*, 156 Wash. 2d 1038 (2006); *cf. Howard v. State*, 941 S.W.2d 102, 117-118 & n.14 (Tex. Crim. App. 1996) (holding that the presence of uniformed peace officers as spectators during the *penalty phase* of a capital trial in which the defendant had been convicted of murdering a state trooper was not inherently prejudicial but noting that trial courts "must carefully determine the risk and probability of prejudice in this context").

While these cases demonstrate the general judicial hostility toward courtroom displays by trial spectators relating to issues in the trial, the button displays in this case almost certainly had especially powerful effects. As the court of appeals explained, the "primary issue" in respondent's trial "was whether it was the defendant or the deceased who was the aggressor." *Musladin v. Lamarque*, 427 F.3d 653, 660 (9th Cir. 2005). The spectators' courtroom portrayal of the deceased obviously was not intended to single out the deceased as an unjust aggressor in that dispute, nor was it intended to be taken as purely neutral with respect to each actor's respective culpability. Rather, the buttons were plainly – and, to be sure, understandably – intended to convey a sense of sympathy and loss for the deceased, a remembrance of an innocent life unfairly and unjustly taken. In other words, the buttons "essentially argue[d] that [the deceased] was the innocent party and that the defendant was necessarily guilty; that the defendant, not [the deceased], was the initiator of the attack, and, thus, the perpetrator of a criminal act." *Id.* Even if there is some small chance the jury did not draw that obvious inference from the buttons, it is unreasonable to deny that the buttons imposed an "unacceptable *risk*" of such "impermissible factors coming into play." *Williams*, 425 U.S. at 505 (emphasis added).

The State argues otherwise, citing the state appellate court's observation that "the buttons were 'unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member.'" State Br. 25 (quoting Pet. App. 75a). But even on this account, the buttons plainly introduced an "impermissible factor" into the proceedings. Nobody would contend that family members could take the stand in the guilt phase of a trial and testify as to the depth of their feelings of mourning or outrage at the death of their loved one – matters wholly irrelevant to the question whether the defendant is criminally culpable and

yet likely to inflame the jury's passion to vindicate the family's loss. By the State's own theory, however, that was precisely the message conveyed by the buttons at issue here. In short, even to the extent the inference conveyed by the buttons was *exactly as the State contends*, that inference was unquestionably an impermissible factor influencing the jury's deliberations to respondent's detriment.[6]

B. Allowing Displays of Spectator Support at Criminal Trials Impedes, Rather than Furthers, Compelling State Interests

The State's ostensible interest – or lack thereof – in the courtroom practice at issue is also a factor in this Court's precedents. In *Williams*, the Court held that compelling a defendant to wear prison garb during trial did not serve any "essential state policy," and indeed the state in that case did not even assert any interest in continuing the policy. 425 U.S. at 505. In *Holbrook*, by contrast, the Court held that the

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[6] The State notes that "no evidence was adduced from any of respondent's jurors" establishing with certainty the existence of *actual* prejudice. State Br. 39. But this Court has held that such evidence is unnecessary in this context: "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.'" *Holbrook*, 475 U.S. at 570 (quoting *Williams*, 425 U.S. at 505); *see Sheppard*, 384 U.S. at 351-52. It is likewise irrelevant under *Holbrook* and *Williams* whether the jury was instructed not to let passion affect its verdict. *See Holbrook*, 475 U.S. at 568 ("Our faith in the adversary system and in jurors' capacity to adhere to the trial judge's instructions has never been absolute, however. We have recognized that certain practices pose such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.'" (quoting *Williams*, 425 U.S. at 503-04)); *see also Bruton v. United States*, 391 U.S. 123, 129 (1968) ("The naïve assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.") (internal quotation marks omitted).

quiet presence of armed officers served the important state interest in maintaining custody over the defendant. 475 U.S. at 571-72.

The State in this case has identified no essential state interest served by allowing trial spectators to publicly display their emotions about a case during the trial, and there is none.

The display of support or sympathy for one side or interest in a criminal trial by spectators assuredly does not improve the truthseeking function of a trial; nobody contends otherwise. Nor is any burden on the state or the court imposed by requiring courtroom spectators to remove such displays from their attire while in attendance at trial – just as this Court's own marshals easily require spectators to remove their hats when entering the courtroom, trial court personnel can secure the removal of buttons and other impermissible insignia with the gentlest of commands.

Neither can this practice be justified by the understandable desire of family members to express their grief, as the State tacitly concedes by its silence on this point. Family members have no "right" to bring outside emotional influences to bear on the factfinding process of a trial, and their interest in expressing their grief publicly, and even within the confines of the criminal justice process, is already amply protected.

First, it is true that crime victims and their families and supporters are, like other members of the public, afforded the right of access to criminal trials.[7] This Court has unequivocally held that the First Amendment mandates that criminal

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[7] As *amici* in support of petitioner point out, several states have codified a crime victim's right to attend trial. *See* Br. of *Amici Curiae* Nat'l Crime Victim Law Inst., *et al*., at 5 n.2.

trials be open to the public absent an overriding interest in the closure of the trial. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980). The Court reached this conclusion based on the rationale that "[f]ree speech carries with it some freedom to listen." *Id.* at 576 (describing the right to attend a criminal trial as the right to hear, see, and gather information). But "[i]n securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries." *Pennekamp v. Florida*, 328 U.S. 331, 366 (1946) (Frankfurter, J., concurring). Spectators therefore have no constitutionally protected interest in conveying messages of any kind to the jury during a criminal trial, and such conduct is inconsistent with this Court's precedents holding that jurors must reach their conclusions based solely on evidence of record. *See* Christopher R. Goddu, Comment, *Victim's "Rights" or a Fair Trial Wronged?*, 41 Buff. L. Rev. 245, 271-72 (1993) ("To avoid any chance of a miscarriage of justice, victim participation, at the trial level, should be limited to spectator access to the courtroom, and nothing more.").

Second, crime victims already have a voice at trial in the form of the prosecution. The States are charged with vindicating victims' rights. *See Johnson v. Texas*, 509 U.S. 350, 366 (1993). Prosecutors, not spectators supporting victims, are therefore the appropriate parties to enter into the trial record any evidence regarding the victim that is properly relevant to the adjudication of the defendant's guilt or innocence.

Third, this Court has also held that states may provide victims and their families and friends with a direct role in the *penalty* phase of a trial through the use of victim impact statements. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The federal government and all fifty states allow victim impact evidence at sentencing. *See* Joshua Greenberg, *Is Payne Defensible? The Constitutionality of Admit-*

ting Victim Impact Evidence at Capital Sentencing Hearings, 75 Ind. L.J. 1349, 1381 (2000). The use of such statements is premised on the view that when a defendant *has already been convicted*, victim impact evidence is relevant to a determination of the level of harm caused by the defendant to the community. That determination may be relevant at sentencing, but it has no bearing on the determination of guilt or innocence.

The State is thus left with literally *no justification at all* for the courtroom practice at issue here. Viewed in that light, the risk of prejudice from spectator displays of emotion is surely all the more categorically "unacceptable" – inasmuch as such displays never serve any essential state interest in the trial process, there is no reason to accept *any* risk of prejudice they may present. As shown above, of course, there is in fact a *serious* risk of prejudice from such displays – including from the very inference the State insists is the most reasonable here.

Under the fair trial and due process law clearly established by this Court's precedents, respondent was unambiguously denied his right to a trial free from outside influences potentially affecting the jury's dispassionate assessment of the record evidence in his case. The state appellate court's decision refusing to reverse his conviction was an unreasonable application of that law, as the Ninth Circuit correctly concluded.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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