No. 05-785

In The
Supreme Court of the United States

THOMAS L. CAREY, Warden,

Petitioner,

v.

MATHEW G. MUSLADIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

I. Statement of Facts

A. The Trial

On May 13, 1994, Tom Studer ("Studer") was shot and killed. Nearly eighteen months later Mathew Musladin ("Musladin") was tried for the murder of Studer. The central question to be answered at this trial was whether Musladin acted in self defense when he shot and killed Studer. In this trial, both Musladin and Studer claimed to be the "innocent" actor and one of them – Studer – was unfairly bolstered by buttons depicting his image that were pinned to the chests of a group of grieving survivors seated behind the prosecutor. Much of the evidence was in dispute, and other evidence was never presented to the jury.

In May of 1994, Musladin had been estranged from his wife, Pamela Musladin, but was permitted to take their three-year-old son, Garrick, to his home for weekend visits. RT 1681.[1] On May 13, 1994, Musladin went to Pamela's home to collect his son for one of those visits. Pamela was at the house, as was her fiancé, Tom Studer. Musladin retrieved Garrick and placed him in his car. Pamela came out of the garage door and approached the car. RT 1694. Musladin complained of Garrick's dirty pull-ups and asked for the overnight bag. Pamela told Musladin she would get it and went back into the house for ten to fifteen minutes before returning to the car with

[1] "JA II" refers to Volume II of the Joint Appendix. "PA" refers to the appendix submitted with the petition for writ of certiorari "RT" refers to Reporter's Transcript of Trial. "JA" refers to Volume I of the Joint Appendix filed by the parties.

the bag. RT 1699. Musladin told her that he was being sued by two credit-card companies for purchases she had made. RT 1699. Rather than discuss the issue, Pamela went over to Musladin and tried to put her head on his chest. RT 1699.

Musladin believed Pamela was under the influence of methamphetamine at the time. Pamela had a history of methamphetamine abuse, and Musladin testified that he could recognize her reaction to the drug. RT 1741-44. Although Pamela later testified that she was not under the influence that day, police found cut methamphetamine in the house, next to a television. RT 1638-39. Moreover, at the time of his death, Studer had 1.55 micrograms per milliliter of methamphetamine in his system. RT 1492. A third person present at the house that day also had been using methamphetamine: Michael Albaugh, Pamela's brother and roommate. RT 1599.

Musladin became exasperated with Pamela's behavior and pushed her away from him; he called her move "manipulating." RT 1699. Pamela retreated three or four steps, fell to the ground and began screaming, "Help, help, he's hurting me." RT 1699. Musladin heard some people inside the house say, "Get him, let's get him," and "There he is, kill the fucking bastard." RT 1701-02. At this time, Musladin was still near his son at the passenger side of the car. He reached below the seat and grabbed his gun case, unlocked it, and unlatched it. RT 1702. He did not take the gun out of its case.

Musladin turned, looked into the garage, and saw several people coming toward him – including a nearly 300-pound Michael Albaugh. Albaugh had a machete in his

hand and said something that sounded to Musladin like, "I'm going to do you." RT 1703.

Musladin turned toward the car once again and grabbed his gun from the gun case. RT 1703. As he was grabbing the gun, he heard Pamela say, "Get Garrick first." RT 1703. Musladin loaded the gun and turned around. He heard Michael Albaugh yell, "He's got a gun." RT 1704. Musladin saw two other people – someone in the garage and someone else near Pamela.

He then saw Albaugh and the unidentified person next to Pamela run away. RT 1704. Pamela remained sitting on the ground; the person who had been in the garage did not run. RT 1705. Musladin saw that the person in the garage had a gun, so he fired into the garage. RT 1705.

Musladin thought he may have hit the person in the garage because the person's upper torso jerked. RT 1705. Musladin testified that he wanted to get away from his son, so he walked away from his car and took approximately three to four steps toward the garage. RT 1706. He heard a loud banging noise from the right corner of the garage. RT 1706. He saw something move and shot at the location of the sound. RT 1706. At some point, Pamela ran into the garage. RT 1706.

Studer was shot in the back of the right shoulder and in the head. RT 511-12, 625-629. The forensic evidence revealed that both shots were fired from a distance. RT 1402-1407 Both prosecution and defense experts agreed that the mortal wound, the shot to the head, was the result of a bullet that had ricocheted. RT 629-31, 721, 723-32, 846-47, 905-08, 927, 1188, 1370-73.

Musladin argued at trial that he had acted in self-defense and in support of this theory sought to introduce evidence regarding his knowledge and personal experience of prior violence and drug use at his estranged wife's home. RT 1874-83. This evidence included prior threats against Musladin involving various weapons, including a crossbow and a broken beer bottle. RT 1881. Musladin also witnessed individuals at the residence involved in physical altercations. RT 1882. At trial, Musladin argued that this evidence was relevant to his state of mind at the time of the incident. RT 1874-79.

In addition, Musladin offered rebuttal evidence. At trial, the prosecutor claimed that Musladin was lying about having acted in self-defense because he never told police after his arrest about the threatening actions of the people in the house. Musladin attempted to counter this evidence with testimony from his father, explaining that Musladin had called him soon after his arrest and had told him about the threats. The trial court excluded all of this evidence. RT 1606-08, 1878, 1880, 1883-85.

Tom Studer's family attended the trial. At least three members of Studer's family were present every day of the trial. JA 3-4 Each member of the Studer family wore a button throughout the trial. The buttons were about two to four inches in diameter and bore a photograph of Studer. Studer's family members sat immediately behind the prosecutor, adjacent to the jury. JA 6-8. Before opening statements, defense counsel asked the trial court to preclude Studer's family from wearing the photo badges. JA 3-4. The trial court denied this motion. JA 3-4.

The jury trial began on October 16, 1995. The jury began deliberating on October 31, 1995. RT 1460. On

November 1, 1995, Musladin was convicted of all counts – first-degree murder, attempted murder, first-degree burglary and assault with a firearm. PA 33a, 55a.

B. The State Court of Appeal

Musladin appealed his conviction and argued that the buttons depicting Studer violated his constitutional right to a fair trial. The California Court of Appeal rejected this argument and affirmed the conviction. PA 55a-78a. In reaching this conclusion the state court adjudicated the claim using *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986). The Court determined that the wearing of the button was itself an impermissible factor and thereafter required the defendant to prove that the wearing of the buttons marked him with an "unmistakable mark of guilt." PA 74a-75a. In adjudicating the claim, the state court cited the controlling Supreme Court law in its decision and applied a rule with an additional requirement contrary to that Supreme Court law.

Musladin then filed a petition for a writ of habeas corpus with the California Supreme Court. JA 6-8. Notably, this petition permitted Musladin to supplement the record with further evidence regarding the buttons worn by Studer's family at trial. PA 6-8. The California Supreme Court denied the petition without comment. PA 81a.

C. The Federal Habeas Action

On June 5, 2000, Musladin filed a petition for writ of habeas corpus in the United States District Court for the

Northern District of California. JA 1. The district court issued an order to show cause on October 19, 2000, and the state filed an answer on May 14, 2001. JA 1. On August 16, 2001, Musladin filed a traverse.[2] JA 1. On May 14, 2003, the district court denied the petition for writ of habeas corpus in its entirety. PA 47a-50a.

On June 12, 2003, Musladin filed a notice of appeal and a motion for a Certificate of Appealability ("COA"). JA 1. On September 2, 2003, the district court granted Petitioner's Motion for a Certificate of Appealability as to all but the last claim – whether Petitioner was denied the effective assistance of counsel when his counsel unreasonably failed to present expert testimony that the entry path of the first bullet was not itself fatally inconsistent with the self-defense theory. JA 1.

On April 8, 2005, a divided panel of the Court of Appeals reversed the district court and granted the writ. PA 1a-18a. The court held that Musladin's right to a fair trial was prejudiced when the trial court allowed Studer's family to wear buttons emblazoned with a picture of Studer during the trial and that the California Court of Appeal's decision to the contrary was an objectively unreasonable application of clearly established federal law. The Ninth Circuit therefore determined that habeas relief was warranted under the Antiterrorism and Effective Death Penalty Act ("AEDPA").

The court of appeals began its analysis by first identifying the "clearly established Federal law" as derived from two cases from this Court *Williams*, 425 U.S. 501 and

[2] The District Court appointed Assistant Federal Public Defender David W. Fermino to represent Musladin after the filing of the traverse.

Holbrook v. Flynn, 475 U.S. 560 (1986). *Musladin v. Lamarque*, 427 F.3d 653, 656-57 (9th Cir. 2005). From these cases, the court extracted the rule to be applied to Musladin's claim: "[C]ertain practices attendant to the conduct of a trial can create such an 'unacceptable risk of impermissible factors coming into play,' as to be 'inherently prejudicial' to a criminal defendant." *Id*. at 656 (citing *Williams* and *Flynn*). It then discussed the facts of these two cases and their application of the rule. *Id.* at 656-57. The Court of Appeals also discussed its own prior case, *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990) as a tool for "assess[ing] . . . the meaning of the federal law that was clearly established by *Williams* and *Flynn* and whether the state court's application of that law in the case before [it was] objectively unreasonable." *Id.* at 657.

The Court of Appeals compared the rule of *Williams* and *Flynn* to the rule applied by the state court in Musladin's case. *Id*. at 658. The state court's decision was contrary to the rule of *Williams* and *Flynn*, the Ninth Circuit held, because it required that the challenged practice not only constitute an unacceptable risk of an impermissible factor coming into play but also that it "brand" the defendant with an "unmistakable mark of guilt." This additional test imposes too high and too unreasonable a burden on defendants and is contrary to established Supreme Court law. *Id*. at 659; *see Williams*, 529 U.S. at 393-99 (finding state-court decision contrary to Supreme Court precedent because it required petitioner to make additional showing beyond what Supreme Court rule required). The court of appeals then discussed this Court's use of the phrase "branding with an unmistakable mark of guilt" in *Williams* and *Flynn* to show that it was not part of the Court's rule and should not have been a

part of the test applied by the state court to Musladin's claim. *Id.* at 659-60 & n.2.

In light of "the specific message that the button conveys in light of the particular facts and issues before the jury," the court of appeals concluded that "a reasonable jurist would be compelled to conclude that the buttons worn by Studer's family members conveyed the message that the defendant was guilty." *Id.* at 661.

The Ninth Circuit thus held that the California Court of Appeal decision was both contrary to and an unreasonable application of this Court's precedents. *Id.* It held that the state court unreasonably applied a rule contrary to the rule set forth in *Flynn* when, despite its finding that the buttons were an "impermissible factor," it denied relief because the buttons did not brand Musladin with "an unmistakable mark of guilt." *Id.*

On October 21, 2005, the court of appeals denied the State of California's Petition for Rehearing and Rehearing En Banc. PA 19a. The State filed a petition for writ of certiorari, and certiorari was granted on April 17, 2006. *Carey v. Musladin*, 126 S. Ct. 179 (mem.) (2006).

SUMMARY OF THE ARGUMENT

The trial of Mathew Musladin took place more than seventeen months following the death of Tom Studer. When the Studer family came to court with the buttons prominently displayed they were not mourning: they were sending a message. In a trial where the defense was self-defense the buttons argued to the jury that the wearers'

"loss" was at the hands of Musladin. Family members wearing buttons with a photograph of the decedent, depicted in a manner inconsistent with the reality of his appearance on the day in question, are not spectators "exhibiting the normal grief occasioned by the loss of a family member." They are advocates.

The Fourteenth Amendment incorporates the essence of the Sixth Amendment right to be tried "by a panel of impartial, 'indifferent' jurors [whose] verdict must be based upon the evidence developed at trial." *Irwin v. Dowd*, 366 U.S. 717, 722 (1961). Due process requires courts to safeguard against "the intrusion of factors into the trial process that tend to subvert its purpose." *Estes v. Texas,* 381 U.S. 532, 560 (1965) (Warren, C.J. concurring). The buttons worn by the Studer family worked to undermine the presumption of innocence in this case and in effect militated against the fair and impartial assessment of Musladin's guilt. When the consequence of a courtroom practice is that an "unacceptable risk is presented of impermissible factors coming into play," there is inherent prejudice" to a defendant's constitutional right to a fair trial and reversal is required. *Flynn*, 475 U.S. at 570.

In its discussion of the standards applied under AEDPA, the court of appeals acknowledged that "AEDPA limits the source of clearly established federal law to Supreme Court cases." *Musladin v. Lamarque*, 427 F.3d 653, 655 (9th Cir. 2005). It also noted that federal appellate-court decisions have "persuasive value in our effort to determine whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and what law is 'clearly established.'" *Id.* at 655 (ellipses and some quotation marks omitted).

The court determined that [t]he underlying federal law in this case – that certain practices attendant to the conduct of a trial can create such an 'unacceptable risk of impermissible factors coming into play,' as to be 'inherently prejudicial' to a criminal defendant – was clearly established by the Supreme Court in *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560, 656 (1986).

The court of appeals then found that the state-court decision was "objectively unreasonable both in its ultimate conclusion and in the rationale it employed in denying Musladin's appeal." *Id.* The court below determined that the state-court decision was both contrary to and an unreasonable application of *Williams* and *Flynn* because it "impos[ed] an additional 'branding' requirement" that neither of those cases required. *Id.* at 659-60; *see also id.* at 661 (state court's application of Supreme Court law "was contrary to the Court's established rule of law and was objectively unreasonable"). In reaching this conclusion, the court of appeals in no way relied on *Norris*; it mentioned *Norris* in this section only in a footnote. *Id.* at 658-69 & n.1.

The state seizes on the brief reference to *Norris* in the opinion of the court below in its unsuccessful attempt to elevate passing reference to "wholesale reliance." Rhetoric cannot transform what is plain from the face of the opinion of the court below – the same conclusion could have been reached with or without reference to *Norris. Norris* is a red-herring.

To the extent that Petitioner now contends that the *Williams*/*Flynn* principle is not clearly established because

this Court has never applied it in a case where the challenged courtroom procedure involved spectators wearing buttons with a photograph of the person killed, Petitioner has waived this argument, and this Court's cases have foreclosed Petitioner's reading of § 2254(d)(1).

Assuming, arguendo, that Petitioner did not waive this argument, it is wrong on the merits. The Court already has held that it need not have applied the principle in a case factually on point for the principle to be "clearly established" under § 2254(d)(1). "Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer v. Andrade*, 538 U.S. 63 (2003). As the Court has explained, only one of the three grounds on which relief may be granted under § 2254(d)(1) calls for facts that are "materially indistinguishable" from those in a case in which the Court applied the principle. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Moreover, § 2254(d)(1) explicitly allows for the granting of relief when a state court has "unreasonabl[y] appl[ied]" a Supreme Court principle.

As Petitioner noted in its petition for certiorari, the *Williams/Flynn* principle is a broad rule of due process. When the Supreme Court principle at issue is general, its "meaning must emerge in application over the course of time." *Yarborough v. Alvarado*, 541 U.S. 652 (2000). Such general principles may be applied in a variety of contexts without creating a new rule or ceasing to be clearly established. *See Williams*, 529 U.S. at 382 (Stevens, J.) (application of general rule rarely requires creation of new rule

under *Teague*, quoting *Wright v. West*, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring)).

ARGUMENT

I. The Framework of Habeas Corpus Review Under 28 U.S.C. § 2254

As the State's Brief on the Merits tends to conflate the distinct analyses a habeas court must undertake pursuant to 28 U.S.C. § 2254(d)(1), a discussion of the general framework of federal habeas review is appropriate. Under § 2254(d)(1), a federal court may grant relief where the underlying state-court decision on the merits of the habeas petitioner's claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Williams*, 529 U.S. at 404-05.

The framework for merits review of a constitutional claim established by § 2254 as a whole indicates that the first question for a habeas court is whether the petitioner has established the existence of a constitutional violation under § 2254(a). If that question is answered in the negative, then the court need not concern itself with § 2254(d)'s limitation on the power to grant relief, because there is no error to remedy. Where, on the other hand, the federal court does find a constitutional violation such that § 2254(a) has been satisfied, the court must concern itself with whether it is authorized to remedy that violation within the meaning of § 2254(d). At this point, § 2254(d) requires the federal court to examine the state court's decision for meaningful defects in rule selection or application (§ 2254(d)(1)) or fact determination (§ 2254(d)(2)).

Under § 2254(d)(1), the rules a state court is obligated to identify and apply are those which have been "clearly established . . . by the Supreme Court."

This Court has identified two ways in which a state-court decision will be deemed contrary to its precedents. "A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Id.* at 405. "A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id*.

Likewise, this Court has identified two ways in which a state-court's decision will violate the "unreasonable application" clause of § 2254(d)(1). First, a decision involves an unreasonable application of clearly established law where "the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id*. 413; *see also id*. at 407-08. In addition, "[a] state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000) (plurality opinion); *Williams*, 529 U.S. at 407. To merit habeas relief, the state court's application of clearly established law must be objectively unreasonable. *Bell v. Cone*, 535 U.S. 685, 694 (2002); *Lockyer*, 529 U.S. at 75.

Although the State attempts to confound the multiple, distinct analyses prescribed by § 2254(d)(1) and this Court's precedent, a careful review of the court of appeals' opinion in the present case demonstrates its faithful application of the foregoing principles and its adherence to this Court's authority governing the review of habeas corpus petitions under AEDPA.

II. The Court of Appeals Correctly Identified Clearly Established Supreme Court Law and Correctly Determined that the State Court's Decision Was an Objectively Unreasonable Application of that Law

The gravamen of the State's complaint is that the court of appeals improperly derived "clearly established" federal law from its own precedent – *Norris*, 918 F.2d 828 – rather than from this Court's authority. That complaint is untrue.

There is nothing in the court of appeals' analysis that was inappropriate or unusual or that violated the precepts of AEDPA. The court of appeals' opinion makes quite clear that the clearly established federal law against which it measured the state court's decision was *Williams* and *Flynn*, and that the result would have been precisely the same if the Ninth Circuit had never even decided *Norris*. The opinion makes equally clear that the court of appeals use of *Norris* in its analysis was no different from the way in which other federal courts of appeals have used lower federal-court precedent in other habeas cases governed by § 2254(d)(1). Thus, the real – and only – issue in this case is whether the court of appeals was correct when it held that the state court's analysis was contrary to, and involved an unreasonable application of, *Williams* and

Flynn. As discussed below, the court of appeals was correct.

A. The Court of Appeals Did Not Use Its Precedent To Create, Neglect, Alter, or Otherwise Expand the Rule of *Williams* and *Flynn*

As this Court has noted, the "clearly established" standard is not meant to be complicated: "In most situations, the task of determining what we have clearly established will be straightforward." *Lockyer*, 538 U.S. at 72. This Court has identified four requirements for a principle to be "clearly established" as defined in § 2254(d)(1). First, the principle must be based on a decision or decisions of this Court, not of any lower court. *Williams*, 529 at 412. Second, the principle must derive from the holdings, not the dicta, of this Court's decisions. *Id*. Third, the principle must have been established by the Court "at the time of the relevant state-court decision." *Id*. Fourth, the principle must be grounded in the federal Constitution and thus apply to state-court proceedings. *Cf. Early v. Packer*, 537 U.S. 3, 10 (2002) (rejecting habeas court's conclusion that state-court decision was contrary to clearly established law in part because Supreme Court cases upon which court relied stated rule applicable only to federal-court proceedings). In short, "'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer*, 538 U.S. at 71-72.

In its decision below, the court of appeals correctly identified this Court's decisions in *Williams*, 425 U.S. 501

and *Flynn*, 475 U.S. 560 as providing the clearly established principle applicable to this case. It also properly followed the guidance of this Court in determining the clearly established general principle those cases stand for, namely that "certain practices attendant to the conduct of a trial can create 'such an 'unacceptable risk of impermissible factors coming into play,' as to be 'inherently prejudicial' to a criminal defendant." *Musladin*, 427 F.3d 653, 656 (9th Cir. 2005) (citing *Flynn*, 475 U.S. at 570).

Indeed, the State agrees that the *Williams*/*Flynn* principle is a clearly established "general rule."[3] That the principle of *Williams*/*Flynn* is a general rule, however, does nothing to diminish the availability of habeas relief. When the Supreme Court principle at issue is a general rule, its "meaning must emerge in application over the course of time." *Alvarado*, 541 U.S. at 664. Such general principles may be applied in a variety of contexts without creating a new rule or ceasing to be clearly established. *See Williams*, 529 U.S. at 382 (Stevens, J.) (application of general rule rarely requires creation of new rule under *Teague*) (quoting *Wright v. West*, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring)). Moreover, "[s]ection 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer*, 538 U.S. at 76.

The court of appeals therefore properly considered the persuasive reasoning of *Norris*, in which it held that "Women Against Rape" buttons worn during a jury trial were inherently prejudicial under *Williams* and *Flynn*, in

[3] Pet'r Br. 10, 12, 15-18, 20.

assessing the meaning of this general rule that has emerged in application over the course of time. The State claims, however, that rather than follow *Williams* and *Flynn*, the Ninth Circuit "used" its decision in *Norris* to "determine" and "define" what was clearly established federal law. Pet'r Br. 14-16. The State is incorrect.

To the extent that the Ninth Circuit used its prior decision in *Norris* to "determine" whether this Court established a clear rule in *Flynn* and *Williams*, the State is correct – as is explained below, there is nothing wrong with the circuit looking to prior case law to ascertain or "determine" whether courts are in agreement that this Court has established a clear rule of law on a given subject. Insofar as *Norris* recognized that this Court had in fact set forth such a rule relating to potentially prejudicial courtroom practices in *Williams* and *Flynn*, the Ninth Circuit did nothing improper when it looked to *Norris* to help "determine" what the state of the law with regard to such courtroom practices happened to be.

But the State is clearly arguing something quite different when it contends that in employing the terms "define" and "determine," the court of appeals actually used *Norris* to either create, neglect, expand upon, or otherwise alter the *Williams*/*Flynn* rule that had been clearly established by this Court. This recharacterization (or rather, mischaracterization) is crucial for the State, because the role permitted for circuit authority changes depending upon the prong of the § 2254(d)(1) analysis. AEDPA's prohibition on the use of circuit authority to expand or alter a rule during the "clearly established" analysis is undisputed, while it is equally clear that circuit authority may play an appropriate, limited role in the "unreasonable application" analysis. Thus, a fundamental

question is how the court of appeals actually treated *Norris* in its decision below.

A fair and careful reading of the decision below reveals that the Ninth Circuit never used its decision in *Norris* to change or extend this Court's clearly established law. Rather, the court below undertook an analysis of the legal and factual issues before it in a manner that this Court has expressly approved. Of course, the decisions of this Court alone are the only proper source for federal law under § 2254(d)(1). The Ninth Circuit recognized as much below: "AEDPA limits the source of clearly-established federal law to Supreme Court cases." This does not mean, however, that state- or lower federal-court decisions play absolutely no role in the "clearly established" analysis. Several federal courts of appeals have recognized that non-Supreme Court authority may assist in analyzing whether there has been an unreasonable application of clearly established law or in confirming that this Court's decisions have in fact clearly created a rule of law. As the Ninth Circuit has previously stated:

> This does not mean that Ninth Circuit case law is never relevant to a habeas case after AEDPA. Our cases may be persuasive authority for purposes of determining whether a particular state court decision is an "unreasonable application" of Supreme Court law, and may also help us determine what law is "clearly established." See *MacFarlane v. Walter*, 179 F.3d 1131, 1139 (9th Cir. 1999) (looking to Ninth Circuit case law to confirm that Supreme Court case clearly establishes a legal rule).

Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000). *Accord Ouber v. Guarino*, 293 F.3d 19, 26 (1st Cir. 2002);

Serrano v. Fisher, 412 F.3d 292, 299 n.3 (2d Cir. 2005); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 885-91 (3d Cir. 1999) (en banc); *McCalvin v. Yukins*, 444 F.3d 713, 721 (6th Cir. 2006).

Nowhere in *Duhaime*, or in the court's decision below, does the Ninth Circuit hold that a prior circuit case can represent the source of clearly established law. Rather, prior decisions may confirm whether this Court has in fact created such clearly established law.

The State attempts to characterize the Ninth Circuit's decision as using its own precedent to alter this Court's clearly established law – or even create its own rule with respect to prejudicial courtroom behavior by spectators. The state's attempts to buttress this characterization by reference to the following statements in the lower court's opinion: (1) where the court noted that *Norris* had "persuasive value in an assessment of the meaning of the federal law that was clearly established by *Williams* and *Flynn*"; (2) where the court used *Norris* to determine whether the state court "misapplied" *Williams*; (3) where the court noted that *Norris* had persuasive weight "in determining the federal law as established by *Williams*"; and (4) where the court concluded that the state court was "objectively unreasonable in light of *Norris*." Pet'r Br. 16. From these statements, the State concludes that the Ninth Circuit used *Norris* – as opposed to this Court's holdings in *Flynn* and *Williams* – as the source of what it determined to be the clearly established federal law governing the case before it. *Id*.

The State's argument is misplaced. If one looks carefully at the context of the statements cited by the State, as well as the actual basis for the Ninth Circuit's decision, it is plain that the court of appeals recognized

that this Court – and this Court alone – established the governing legal principle in *Williams* and *Flynn*.

For example, in its analysis labeled, "Clearly Established Federal Law," the Ninth Circuit's first conclusion was that this Court's authority – *Williams* and *Flynn* – clearly established the underlying federal law in this case. *Musladin*, 427 F.3d at 655. That conclusion was unaffected by any subsequent reference to *Norris*. Indeed, before its first mention of *Norris*, the Ninth Circuit had already exhaustively discussed both *Williams* and *Flynn*, reported the facts of those decisions, and quoted, verbatim, the rule from those opinions. *Musladin*, 427 F.3d at 656-57.

Only after this extensive discussion of Supreme Court law in its "clearly established" analysis did the court of appeals turn to *Norris*. The court stated that *Norris* had persuasive value in a specific and a limited way for the "clearly established" analysis: *Norris*, explained the court of appeals, "has persuasive value in the assessment of the meaning of the federal law *that was clearly established* by *Williams* and *Flynn*." *Id*.

Thus, by the time the court of appeals finally turned to *Norris* in its "clearly established" analysis, the questions of whether the law was clearly established and the resolution of what that law was, were faits accomplis. As demanded by AEDPA, the court of appeals had considered this Court's authority, had identified the clearly established law, and had articulated the rule actually announced by this Court. A fair reading of the Ninth Circuit's analysis reveals that *Norris* played no role in determining the clearly established federal rule; at most, the court below recognized that *Norris* had applied this clearly

established law to analogous facts and thereby helped to give "meaning" to this Court's general *Williams/Flynn* rule in a similar factual context.

Similarly, when the court below stated that it had used *Norris* to "determine" federal law as established by *Williams*, its discussion was limited to noting the "striking factual similarities" between *Norris* and the facts of *Musladin*. *Id*. ("In determining whether a state court's decision involved an unreasonable application of clearly established federal law, it is appropriate to refer to decisions of the inferior federal courts in factually similar cases.") (citation omitted). The reasoning is sound in this, the last paragraph of the Ninth Circuit's "clearly established" analysis. The logic and analysis of a factually similar case will, of course, be more likely to be persuasive than a previous decision that is not on all fours. The court of appeals did not attempt to expand or alter the *Williams/Flynn* rule through its reference to *Norris*; rather, it merely uses *Norris* to show how, in a prior federal case that was factually analogous, the court had determined, using the reasoning of *Williams* and *Flynn*, that buttons worn by spectators in a courtroom could deny a defendant a fair trial.

There remain two other *Norris* references cited by the State. Both of these references, however, relate to the application of clearly established law to the facts of the case. Importantly, those references underscore how the Ninth Circuit actually used *Norris* – as persuasive reasoning on the issue of whether the state court had, as an objective matter, unreasonably applied this Court's rule to the facts before it. *See* discussion at Section III, *infra*. Nowhere in its brief does the State cite a single passage or statement from the decision below that indicates that the

Ninth Circuit created, neglected, altered, or expanded upon this Court's *Williams/Flynn* clearly established rule. Thus, the State's assertion that the court below "extended" clearly established federal law in an improper fashion is simply wrong. *See* Pet'r Br. 17.

Notwithstanding this fact, the State apparently contends that what the Ninth Circuit did below was "define" clearly established law, and that such an undertaking was improper; "if circuit or state precedent is necessary to define what law is clearly established, then such law is not clearly established by this Court." Pet'r Br. 17.

There are two answers to this assertion by the State. First, as described above nowhere does the court of appeals say that it was necessary to use *Norris* to define what was clearly established law; rather, the court used *Norris* because of its factual similarity, and because the state court of appeal relied on it. Second, the State plays a semantic game with the term "define" in an effort to mischaracterize what the court below did through its references to *Norris*. Whenever a court takes a general rule of law and applies it to a given set of facts, its decision will give further "definition" to the general rule, at least in some factual context. This is not improper because such an undertaking does not change the general rule. If, on the other hand, a circuit court takes a general rule and independently "defines" that rule to add elements to a test or create legal parameters for the rule where none exist, that would be improper. *See Alvarado*, 541 U.S. at 666. No one has suggested this is what the court of appeals did below.

As noted above, that a general rule must be examined by lower courts and applied to varying fact patterns does

not mean that the rule is not clearly established. *See, e.g., Lockyer*, 538 U.S. at 76 ("Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced.") The State's implicit suggestion otherwise is mistaken. Pet'r Br. 17. As the State correctly notes, the "only 'rule' the court of appeals was permitted to consider as authority under § 2254(d)(1) was the general principle in *Flynn* and *Williams*. . . ." Pet'r Br. 17. The Ninth Circuit did precisely that below.

B. The Court of Appeals Properly Concluded that the State Court's Analysis Was Contrary to Clearly Established Federal Law

Because the court of appeals correctly identified the rule of law at issue here, and did not use its own authority to alter or expand upon that rule, the question becomes whether the state court below properly applied that rule to deny Musladin's claim. It did not. The state court's decision was contrary to federal law as clearly established by this Court in *Williams* and *Flynn*.

A state-court decision is contrary to this Court's clearly established precedent under § 2254(d)(1) "if the state court applies a rule that contradicts the governing law set forth in our cases." *Williams*, 529 U.S. at 405; *Lockyer*, 538 U.S. at 73. As discussed above, the State agrees that *Williams*/*Flynn* properly governs Musladin's claim and further acknowledges that the state appellate court relied on the *Williams*/*Flynn* principle to resolve Musladin's claim. Pet'r Br. 5.

As the state court noted, "[i]n order for defendant to prevail on his claim of being denied a fair trial he must show either actual or inherent prejudice." PA 74a (citing *Flynn*, 475 U.S. at 570). Citing an Eleventh Circuit case that applied *Williams* and *Flynn*, the state court correctly identified this Court's test for inherent prejudice: inherent prejudice is established when "'an unacceptable risk is presented of impermissible factors coming into play.'" *Id*. (quoting *Woods v. Dugger*, 923 F.2d 1454, 1457 (11th Cir. 1991)). Significantly, the state court then found the "wearing of photographs of victims in a courtroom *to be* an 'impermissible factor coming into play.'" PA 75a. (emphasis added) The state court thus determined that this Court's test for inherent prejudice had been satisfied. *See Flynn*, 575 U.S. at 570. This should have been the end of the state court's analysis.

The state court went on, however, to deny Musladin's claim because it did "not believe the buttons in this case branded defendant 'with an unmistakable mark of guilt' in the eyes of the jurors." PA 74a (quoting *Flynn*, 475 U.S. at 570-71). This was error. As the court of appeals noted:

> [T]he state court unreasonably applied federal law by imposing an additional and unduly burdensome requirement – demanding that the challenged practice cause the "brand[ing]" of the defendant with an "unmistakable mark of guilty" – even though the *Williams* test for finding "inherent prejudice" had already been met. The court specifically found "the wearing of photographs of victims in a courtroom to be an 'impermissible factor coming into play'" (emphasis added). Under *Williams* and *Flynn*, that finding, in itself establishes "inherent prejudice" and requires reversal.

Musladin, 427 F.3d at 658 (quoting state court decision at issue); *see also id*. X [*id*. at 659] ("This additional test imposes too high and too unreasonable a burden and is contrary to established Supreme Court law."). Discussing *Williams* and *Flynn*, the court of appeals correctly noted that this Court has never required that a challenged courtroom practice "brand" the defendant as guilty before he can establish inherent prejudice. *Id*. at 659. The court of appeals thus concluded that "[t]he state court's imposition of the additional 'branding' requirement was contrary to clearly established federal law and constituted an unreasonable application of that law." *Id*. at 659-60. The court of appeals had authority to – and properly did – grant habeas relief under § 2254(d)(1) because this ruling was correct.

The State disagrees with the court of appeals conclusion for several reasons. Pet'r Br. 32-34. In particular, it contends that the state court's decision was correct because it "precisely recited the correct standard at the outset of addressing [Musladin's] claim." Pet'r Br. 32. What the State fails to recognize, however, is that after citing this Court's *Williams*/*Flynn* rule, the state court relied upon a confusing and potentially improper formulation of that rule as set forth by the Eleventh Circuit in *Woods*. The state court mistakenly gleaned from *Woods* a test that actually differs from the test set forth by this Court in *Williams*/*Flynn*.

Specifically, the Eleventh Circuit in *Woods* stated that a court looking at a *Williams*/*Flynn* claim "must examine two factors: first, whether there is an impermissible factor coming into play, and second, whether it poses an unacceptable risk." 923 F.2d at 1457. This formulation is confusing because it seems to suggest that the word "risk"

relates to the issue of whether a particular courtroom practice is an impermissible factor. In fact, under the *Williams/Flynn* rule, "risk" relates to the issue of whether the impermissible factor did or could come into play. *Cf. Flynn*, 475 U.S. at 570 (explaining that the constitutional question is whether there is "an unacceptable risk . . . of impermissible factors coming into play") (internal quotation omitted). The state court fell prey to this confusion because it had already found that an impermissible factor had come into play, a finding which – standing alone – was sufficient to demonstrate a constitutional violation under *Williams/Flynn* but apparently believed it needed to go one step further due to the manner in which the test was articulated in *Woods*.

The state court then went on to conclude that the buttons at issue did not brand Musladin with an "unmistakable mark of guilt," a statement which could only be construed as: (1) an additional requirement not contained in – and, therefore, contrary to – the *Williams/Flynn* rule, or (2) a finding that the buttons were not an impermissible factor. The latter construction, however, would render the state court's decision internally inconsistent. Therefore, the only reasonable way to construe the state court's opinion is precisely the way the Ninth Circuit did below: the addition of an element to this Court's *Williams/Flynn* rule. *Musladin*, 427 F.3d at 658.

Finally, the State argues that because the "branding" standard is an alternate test for inherent prejudice, the state-court decision was not contrary to or an unreasonable application of the *Williams/Flynn* principle. Pet'r Br. 34-35. Its argument is premised on its position that "branding with an unmistakable mark of guilt" and "unacceptable risk of impermissible factors" are alternative standards for

establishing inherent prejudice. *Id*. The State's proposition misunderstands *Williams*/*Flynn*. While the question of whether a challenged courtroom practice brands a defendant "with an unmistakable mark of guilt" may be relevant to a determination of whether the practice is impermissible, nothing in *Williams*/*Flynn* states that a defendant fails to make out a constitutional violation absent such "branding." *See Flynn*, 475 U.S. at 56-57.

The state court properly found that an impermissible factor had come into play – a factual determination that, the State would seemingly agree, is entitled to great deference from all reviewing federal courts. *See* 28 U.S.C. § 2254(e)(1) (according presumption of correctness to state-court factual determinations). Under this Court's clearly settled law at the time of the state-court decision, that determination conclusively established that constitutional error occurred during Musladin's trial.

C. The Ninth Circuit Correctly Determined that the State Court's Application of Clearly Established Federal Law to the Facts of this Case Was Objectively Unreasonable

As explained in Section II (B), supra, the Ninth Circuit correctly concluded that the state court's decision was contrary to federal law that was clearly established by this Court in *Williams* and *Flynn*. This should end the inquiry, for the Ninth Circuit's discussion of *Norris* was not essential to its core holding and did not offend the limitations of AEDPA. Moreover, the court of appeals properly considered persuasive circuit authority in its "unreasonable application" analysis of the habeas claim. The result of that analysis was also correct: the state court was objectively

unreasonable in its application of this Court's clearly established law from *Williams* and *Flynn*.

1. The Court of Appeals Correctly Held that the State Court's Application of the *Williams/Flynn* Rule Was Objectively Unreasonable

With or without *Norris*, the conclusion of the court of appeals was correct: the state court's application of the *Williams*/*Flynn* rule was objectively unreasonable. The *Williams*/*Flynn* principle is designed to help protect a defendant's right to a fair trial, as guaranteed by the Fifth, Sixth and Fourteenth Amendments. *Williams*, 425 U.S. at 503; *Flynn*, 475 U.S. at 567. This Court has recognized that courtroom factors may deny a defendant a fair trial by undermining the presumption of innocence and by suggesting guilt through "'circumstances not adduced as proof at trial.'" *Flynn*, 475 U.S. at 567 (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)); *see also Williams*, 425 U.S. at 503-04 (noting fundamental, constitutional nature of presumption of innocence). In assessing whether a challenged courtroom factor impermissibly affects the defendant's right to a fair trial, "[c]ourts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." *Williams*, 425 U.S. at 504. This means that courts deciding whether a courtroom practice is inherently prejudicial must take into account the nature of the proceedings and issues before the jury. *See, e.g., Flynn*, 475 U.S. at 569 (noting that security officers in courtroom might suggest that defendant is dangerous or untrustworthy under certain circumstances); *Deck v. Missouri,* 544 U.S. 622, 632-33 (2005) (considering nature of issues

before jury in deciding whether routine shackling at penalty phase of capital trial is constitutionally acceptable).

The State argues that the state appellate court's alleged finding of no prejudice was supported by the trial court's conclusion that the buttons were not prejudicial. Pet'r Br. 29 ("The judge viewed the buttons, was present throughout the trial, and was in the best position to determine any potential prejudicial effect the buttons may have had."). The State's argument ignores the fact that the trial court ruled on the buttons' prejudicial effect at the very beginning of the case, before opening statements, when it presumably did not know that Musladin's claim of self-defense would be the central issue for the jury to decide. *See* PA 73a (defense counsel moved to exclude buttons just before opening statements); *see also* JA 5 (prosecution starts opening statement). Although the state appellate court knew that self-defense was at issue, *see* PA 58a (Musladin "admitted shooting Tom, but claimed self-defense"), it did not consider the effect of the buttons on Musladin's claim of self-defense – or on any other facts specific to Musladin's trial. PA 73a-75a.

The Ninth Circuit held that the state court erred by failing to analyze the effect of the buttons in light of the particular circumstances of Musladin's case and the issues before the jury. *Musladin*, 427 F.3d at 660-61. It noted that the message from the buttons in this case was "even stronger and more prejudicial than the one conveyed in *Norris*." *Id*. at 660.

> In this case, the buttons actually depicted the individual that the defendant was charged with murdering and represented him as the innocent party, or the victim. Here, the direct link between

> the buttons, the spectators wearing the buttons, the defendant and the crime that the defendant allegedly committed was clear and unmistakable. The primary issue at Musladin's trial was whether it was the defendant or the deceased individual who was the aggressor. The buttons essentially "argue" that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer, was the initiator of the attack, and, thus, the perpetrator of a criminal act.

Id. The court below, unlike the state courts, properly "look[ed] beyond the general sentiment a button reflects and . . . determine[d] the specific message that the button convey[ed] in light of the particular facts and issues before the jury." *Id.* at 661. This approach mirrors that of this Court, which has routinely examined the specific message of external factors present at trial. *See, e.g., Flynn*, 475 U.S. at 569 (discussing message sent by security officers); *Deck*, 125 S. Ct. at 2014 (discussing message sent by shackling).

Despite these facts, the State argues that the state court was not objectively unreasonable because "there does not appear to be any decision reversing a judgment on the basis of spectators wearing buttons bearing photographs of a victim." *See* Pet'r Br. 29. There are a host of reasons why these cases do not mean what the State claims they mean. What the State misses is the fact that virtually all of these cases condemn the practice of having buttons, or similar

communicative garb such as T-shirts, worn by trial spectators in a jury trial.[4]

[4] Most lower courts addressing this issue agree that spectators wearing buttons, shirts, or ribbons in support of either the victim or defendant should not be permitted in the courtroom, or if allowed in the courtroom, any obvious displaying of the buttons to the jury should not be allowed. **Federal Appellate Courts:** *see Norris*, 918 F.2d at 831 ("Just as the compelled wearing of prison garb during trial can create an impermissible influence on the jury throughout trial, the buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence."). **State Supreme Courts:** *see Wright v. State*, 577 S.E.2d 782, 784, 276 Ga. 419, 420 (2003) ("The trial court forbade those wearing the T-shirts [bearing the victim's likeness] from entering the courtroom, and the record does not show that any juror was ever exposed to a relative of [the deceased] who was wearing one."); *Johnson v. Commonwealth*, 529 S.E.2d 769, 781-782, 259 Va. 654, 676 (2000) ("When Johnson raised his objection to the buttons at the beginning of trial, the court ruled that the spectators would not be permitted to display the buttons in any manner that would allow the jurors to see them. The court also ruled that anyone wearing a button was required to refrain from any contact with any of the jurors."); *State v. Speed*, 961 P.2d 13, 30, 265 Kan. 26, 48 (Kan. 1998) ("[I]t would seem that the wearing of such buttons or t-shirts is not a good idea because of the possibility of prejudice which might result. Under the circumstances, it would have been better for the district court to have ordered the buttons removed or the t-shirts covered up."); *State v. Rose*, 548 A.2d 1058, 1104, 112 N.J. 454, 541-542 (N.J. 1988) ("In appropriate circumstances, [the power to assure fair proceedings and an impartial jury] might properly be exercised by imposing limitations on the dress of police or correction officers, by prohibiting the display of buttons or emblems, or by other proscriptions necessary to preserve decorum and an atmosphere of impartiality. . . ."); *State v. Franklin*, 327 S.E.2d 449, 455, 174 W. Va. 469, 475 (1985).

Indeed, the court's cardinal failure in this case was to take no action whatever against a predominant group of ordinary citizens who were tooth and nail opposed to any finding that the defendant was not guilty. This Court quite simply cannot state that the mere presence of the spectators wearing MADD buttons and the pressure and activities of the uniformed sheriff leading them did not do irreparable damage to

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Courts have admittedly ruled in many of these cases that such buttons or T-shirts did not compromise a defendant's right to a fair trial because the jury did not see the buttons or because the effect of the buttons was de minimis, but there is an almost universal consensus condemning communicative clothing being worn in the courtroom. In light of this overwhelming authority, it cannot be said that courts legitimately differ on whether buttons should be allowed in a courtroom. Indeed, even in this Court, where a display of victim support would seem to be an unlikely threat to fair and reasoned decision making, visitors are nonetheless admonished to refrain from

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the defendant's right to a fair trial by an impartial jury. Indeed, it constitutes reversible error.

> **State Appellate Courts:** *see State v. Lord*, 114 P.3d 1241, 1243, 128 Wash. App. 216, 219 (Wash. Div. 2005) *review granted in part by* 134 P.3d 233 (Wash. May 4, 2006) ("We agree that the better practice would have been for the trial court to have prohibited the buttons when Lord first requested, rather than on the fourth day of trial."); *People v. Houston*, 29 Cal. Rptr. 3d 818, 851-852 (Ct. App. 2005) ("The better practice of any trial court is to order such buttons and placards [bearing the victim's likeness] removed from display in the courtroom promptly upon becoming aware of them in order to avoid further disruption."). **State Trial Courts:** *see People v. Pennisi*, 563 N.Y.S.2d 612, 616 (N.Y. Sup. Ct. 1990) ("[T]he wearing of noticeable or obtrusive, expressive or symbolic clothing, uniforms, and/or accessories, including . . . buttons . . . , whether utilized as illustrations of concern, etc., for or against persons, issues, or causes can constitute conduct disruptive of a courtroom environment . . . dedicated to the appearance as well as the reality of fairness and equal treatment." The *Pennisi* Court also cited a New York County Supreme Court Justice's banning from the courtroom of a t-shirt worn by the defendant's brother, which bore the words, "My Brother Antron McCray Is Innocent." *Id.* at 616, 149 Misc. 2d at 41 (citation omitted).).

taking, *inter alia*, "**display buttons**" into the courtroom when Court is in session.[5] The Ninth Circuit decision that the state appellate court acted unreasonably by refusing to reverse Musladin's conviction is eminently reasonable and legally sound.

Moreover, it was objectively unreasonable for the state appellate court to apply the *Williams*/*Flynn* principle to the facts of this case without considering Musladin's claim of self-defense – the key issue before the jury. Without considering the context of this defense, the state court could not have reasonably decided whether the buttons raised an "unacceptable risk of impermissible factors." Because the state-court decision was an objectively unreasonable application of *Williams* and *Flynn*, the Ninth Circuit had authority under § 2254(d)(1) to grant the writ.

III. This Court Need Not Undertake a Harmless Error Analysis

A. The State Waived Any Harmless Error Defense, or Alternatively, the Case Should Be Remanded to the Ninth Circuit for Harmless-Error Analysis

After the state court's decision was delivered in the present case, this Court appears to have clarified that harmless-error analysis should apply to the review of *Williams*/*Flynn* constitutional violations. *See Deck*, 544 U.S. at 635. However, because the State waived its harmless error defense, this Court need not undertake a harmless-error review. Alternatively, this Court should remand

[5] See *Visitor's Guide to Oral Argument in the United States Supreme Court*.

this case to the Ninth Circuit for evaluation of this defense in the first instance.

1. The State Waived Its Claim that the Constitutional Error in this Case Was Harmless

It is widely recognized that "[l]ike other defenses to habeas corpus relief, the 'harmless error' obstacle does not arise unless the state asserts it; the state's failure to do so in a timely and unequivocal fashion waives the defense." Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 31.2(a) (5th ed. 2005); *see also Trest v. Cain*, 522 U.S. 87, 89 (1997) (explaining that state may waive procedural-default defense by not raising it).

Because the State failed to assert a defense of harmless error before both the Ninth Circuit and the district court, this Court should deem the issue waived in its entirety and should grant the writ of habeas corpus.

First, while the State did contest Musladin's constitutional claim on federal habeas appeal – that the spectator's wearing of buttons was inherently prejudicial and violated his right to a fair trial – it did not argue alternatively that any such constitutional error nevertheless was harmless. *See* Appellee's Br. at 26-34. The State's decision not to assert harmlessness stands in marked contrast to the position it took with respect to at least two of Musladin's other claims on appeal.[6] *Cf. id.* at 21-22 (asserting harmlessness defense

[6] Nor does the State's mere recitation of the harmless error standard in its appellate brief competently assert the defense. *See, e.g.*, *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("We see no reason to abandon the settled appellate rule that issues adverted to in a

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to Musladin's Sixth Amendment right-to-counsel claim); *id.* at 40-41 (asserting harmlessness defense to Musladin's claim that fair trial was denied when he was prevented from putting in evidence relevant to self-defense).

In view of the State's consistent failure to raise the defense of harmless error, this Court should deem the issue waived and should decline to address it here. This Court generally will not address issues that were not raised, briefed or resolved in the lower federal courts. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 34 (2001); *Glover v. United States*, 531 U.S. 198, 205 (2001); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994); *Schiro v. Farley*, 510 U.S. 222, 228 (1994).

2. If this Court Determines that No Waiver Occurred Then Remand Is Appropriate

Assuming that this Court does not find that the State waived the harmless error defense, and accepting that a *Williams*/*Flynn* violation requires harmless-error review, the appropriate course would be a remand. A remand for a full harmless-error analysis is appropriate because that analysis was not conducted by the Ninth Circuit below. Indeed, this Court adopted precisely such a rule in *Calderon v. Coleman*, 525 U.S. 141, 146-47 (1998).

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perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."); *Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001) (following *Zannino*'s "settled appellate rule" regarding waiver).

3. Should this Court Nevertheless Undertake a Harmless-Error Analysis, A Writ of Habeas Corpus Must Issue

Any review for harmless-error should lead to the conclusion that the Ninth Circuit's decision should be affirmed. Where a federal habeas court must determine whether constitutional trial error was harmless, the question is "whether the error had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also O'Neal v. McAntrich*, 513 U.S. 430, 435-36 (1995) (reviewing these cases).

Further, the "risk of doubt" over the harmlessness of a constitutional trial error falls on the State.[7] *O'Neal*, 513 U.S. at 439; *see also id.* at 438-39 (rejecting language from *Brecht* suggesting that a habeas petitioner is not entitled to relief based on trial error "unless they can establish that it resulted in '*actual prejudice*.'") (emphasis in original). This "doubt-as-to-harmlessness question" was fully explained in *Kotteakos* – the genesis of the current

[7] As *O'Neal* recognized, "the original common-law harmless-error rule put the burden on the beneficiary of the error [here, the State] . . . to prove that there was no injury." *Id.* (*quoting Chapman v. California*, 368 U.S. 24 (1967)). *O'Neal* further noted that the same rule was applied in *Kotteakos*. *Id.* While *O'Neal* eschews phrasing the harmless-error analysis in terms of burdens of proof, *see id.* at 995, the common-law "burden" rule nonetheless informs the analysis. *Cf. United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004) ("When the Government *has the burden of showing that constitutional trial error is harmless* because it comes up on collateral review, the heightened interest in finality generally calls for the Government to meet the more lenient *Kotteakos* standard.") (emphasis added).

Brecht/*O'Neal* harmless error standard. There, the Court stated:

> If, when all is said and done, the [court's] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

O'Neal, 513 U.S. at 437-38 (quoting *Kotteakos*, 328 U.S. at 764-65)). Indeed, as *O'Neal* held, "if the harmlessness of the error is in grave doubt," the court must grant the habeas petitioner relief. *Id.* at 440.

Under the framework set forth by *O'Neal* and *Kotteakos*, the facts of the present case compel a conclusion that the constitutional error at Musladin's trial (1) "had a substantial and injurious . . . influence on the jury's decision, or at a minimum that (2) "grave doubt" remains as to the harmlessness of that constitutional error. *Id.* at 440-42.

The court of appeals' opinion below sets forth compelling reasons to conclude that the constitutional error in this case had a substantial effect on the jury's decision. As the court of appeals explained, the Studer family sat in the front row of the gallery, "directly behind the prosecution

and in clear view of the jury," and wore buttons on their shirt with a photo of the deceased, Tom Studer. PA X; *Musladin*, 427 F.3d at 655. The buttons were several inches in diameter and "very noticeable." *Id.* That the jury saw the buttons is an entirely reasonable inference. Moreover, Musladin's defense at trial was one of self-defense. *See id.* at 654-55. Accordingly, a critical component of the jury's decision on guilt was its assessment of whether or not Tom Studer was, on one hand, really a "victim," or, on the other, really the aggressor. *Id*. As the Court of Appeals explained,

> In this case, the buttons actually depicted [Tom Studer] and represented him as the innocent party, or the victim. Here, the direct link between the buttons, the spectators wearing the buttons, the defendant, and the crime that the defendant allegedly committed was clear and unmistakable. . . . The buttons essentially "argue" that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer was the initiator of the attack, and, thus, the perpetrator of the criminal act.

Id. at 660.

Given the spectators' close proximity to the prosecutor, and the fact that the buttons they wore were in clear view of the jury, it is entirely reasonable to conclude that the buttons' message – a message in direct contrast to Musladin's defense – had a substantial influence on the jury.

Habeas "relief must be granted" in the present case because, at a minimum, "grave doubt" remains over whether the constitutional violation at Musladin's trial

constituted harmless error. *O'Neal*, 513 U.S. at 440. In addition to the compelling reasoning of the Ninth Circuit as set forth above, *id*. at 437, the existence of grave doubt here also is supported by this Court's prior decisions discussing the uncertainty intrinsic to a quantitative analysis of constitutional error that impacts a jury. As this Court explained in *Riggins v. Nevada*:

> We accordingly reject the dissent's suggestion that Riggins should be required to demonstrate how the trial would have proceeded differently if he had not been given Mellaril. Like the consequences of compelling a defendant to wear prison clothing, see *Estelle v. Williams*, or of binding and gagging an accused during trial, see Allen, the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript. What the testimony of doctors who examined Riggins establishes, and what we will not ignore, is a strong possibility that Riggins' defense was impaired. . . .

504 U.S. 127, 137 (1992) (emphasis added, internal citations omitted).

Deck echoed this same logic. Rejecting Missouri's argument that "the defendant suffered no prejudice" from being shackled during the sentencing phase of his trial, this Court stated that the

> argument fails to take account of this Court's statement in *Holbrook* that shackling is inherently prejudicial. That statement is rooted in our belief that the practice will often have negative effects, but – like the consequences of compelling a defendant to wear prison clothing or of forcing

> him to stand trial while medicated – those effects cannot be shown from a trial transcript.

Deck, 544 U.S. at 635.

The common thread running through *Deck*, *Riggins*, and *Flynn* is that certain errors are presumptively prejudicial not only by their very nature, but also because their effects on a jury are not quantifiable by reference to a trial record. Criminal defendants, therefore, "need not demonstrate actual prejudice to make out a due process violation" based on such error. *Id*. at 635. Just as the presumptive prejudice establishes a due process violation in the first instance, it follows that the presumptive prejudice also raises substantial doubt as to how that violation affected the jury.

CONCLUSION

For the reasons provided above, this Court should uphold the decision of the Ninth Circuit Court of Appeals. Alternatively, the Court should remand this case to the Ninth Circuit for a determination in the first instance of whether the *Williams*/*Flynn* error was harmless.

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Respectfully submitted,

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