SMU | Dedman School of Law

SMU Law Review

Volume 59 | Issue 1 Article 10

2006

# Note, Due Process - Habeas Review and outside Influences on the Jury - The Ninth Circuit Holds That Buttons Depicting the Victim's Photo, Worn by Immediate Family during Murder Trial, Pose an Unacceptable Risk of Impermissible Influence on the Jury under Clearly Established Law

S. Brannon Latimer

# NOTE, DUE PROCESS—HABEAS REVIEW AND OUTSIDE INFLUENCES ON THE JURY—THE NINTH CIRCUIT HOLDS THAT BUTTONS DEPICTING THE VICTIM'S PHOTO, WORN BY IMMEDIATE FAMILY DURING MURDER TRIAL, POSE AN UNACCEPTABLE RISK OF IMPERMISSIBLE INFLUENCE ON THE JURY UNDER CLEARLY ESTABLISHED LAW

*S. Brannon Latimer**

THE Ninth Circuit's recent decision in *Musladin v. Lamarque*[1] concluded that buttons bearing an image of the victim and worn by the victim's family at trial, prejudiced the jury and violated the accused's right to a fair trial. It reached this conclusion by misconstruing the authority of federal appellate decisions under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and by conducting an incomplete legal and factual analysis. While the court's holding was erroneous, it provides an opportunity for the Supreme Court to intervene in and clarify two disputed areas of law: the precedential value of federal appellate decisions in habeas proceedings and the boundaries of permissible spectator conduct in state criminal trials.

This note will begin with a factual and procedural summary of *Musladin v. Lamarque* and the Ninth Circuit's analysis. It will then criticize the Ninth Circuit's holding and argue that neither supplementing nor substituting "clearly established Supreme Court law" with federal appeals decisions is proper under the AEDPA. Next, it will critique the court's application of both its own precedent and Supreme Court law and con-

* J.D. Candidate May 2007, Southern Methodist University School of Law; B.S.E.E., 2003, Texas A&M University. I would like to thank my wife Meredity for her love and support throughout our marriage and especially during law school, and my family for their patience and encouragement over the last quarter-century. I would also like to thank the authors of Appellate Law & Practice, http://appellate.typepad.com, a legal blog which first brought this case to my attention, and the diligent staff and editors of the SMU Law Review.

1. 427 F.3d 653 (9th Cir. 2005), *reh'g en banc denied*, 427 F.3d 647 (9th Cir. 2005).

clude that *Musladin* presents an ideal opportunity for the Supreme Court to address two unresolved areas of law: the constraints the AEDPA imposes on federal courts in habeas proceedings and the boundaries of permissible spectator conduct in a state criminal jury trial.

In May of 1994, Mathew Musladin shot and killed Mr. Struder, the fiancé of his estranged wife Pam. Musladin traveled to Pam's house to pick up their son for visitation, and while there he and Pam engaged in an argument outside her house. Musladin pushed her to the ground, drawing the attention of Struder and Pam's brother. Musladin then returned to his car and drew a gun; the others fled. Musladin fired at Struder, hitting him in the shoulder, and fired again as the he attempted to crawl beneath a car in the garage. The bullet ricocheted and struck Struder in the head, killing him. At trial, Musladin admitted to killing Struder but claimed self-defense. According to Musladin's account of the facts, after he pushed Pam, Struder and Pam's brother approached him from the house, carrying weapons and making threats. Musladin claimed that he then grabbed a gun from his car and fired for his own safety, fleeing immediately thereafter. Throughout the fourteen-day trial, members of Struder's family sat behind the prosecutor, each wearing a button between two and four inches in diameter containing Struder's photograph. Except for the picture of Struder, the buttons bore no language or symbol. The defense asked the trial judge to order that the buttons be removed, but this request was denied.[2]

Musladin was convicted of first-degree murder and subsequently sought review and post-conviction relief pursuant to state procedure. These attempts failed and he filed a petition for a writ of habeas corpus to the District Court for the Northern District of California, alleging in part that the presence of the spectators' buttons during the trial created an "unacceptable risk . . . of impermissible factors coming into play" that was inherently prejudicial to his right to a fair trial. The district court denied his petition and he appealed to the Ninth Circuit.[3]

On appeal, the Ninth Circuit held that under "clearly-established" Supreme Court law and Ninth Circuit precedent, the state court's conclusion—that the spectator buttons did not violate Musladin's right to a fair trial free from outside influences—was objectively unreasonable.[4] Musladin's habeas petition is governed by the AEDPA, which limits habeas relief to instances when the state court's decision is contrary to or an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States."[5] Although the Ninth Circuit initially noted that Supreme Court cases are the sole source of clearly established law under the AEDPA, the court added that "prece-

2. *Id.* at 654-55, 661-62.

3. *Id.* at 654-55.

4. *Id.* at 654. Judge Thompson, dissenting, argued that *Norris v. Riseley*, 918 F.2d 828 (9th Cir. 1990), should be distinguished because the buttons worn by Struder's family did not convey a message. *Id.* at 662 (Thompson, J., dissenting).

5. *Id.* at 655 (citing 28 U.S.C. § 2254(d)(1) (2005)).

dent from [the Ninth Circuit], or any other federal circuit court, has persuasive value" when determining what law is clearly established.[6]

Recognizing that the accused has a constitutional right to "a fair trial by an impartial jury free from outside influences," the Ninth Circuit identified two Supreme Court cases applying this principle to spectator conduct, *Estelle v. Williams* and *Holbrook v. Flynn*.[7] *Estelle* held that due process bars states from compelling defendants to wear prison clothing during trial because "an unacceptable risk is presented of impermissible factors coming into play," interfering with the presumption of innocence.[8] The *Musladin* court determined that this was the pivotal test: if a practice presents "an unacceptable risk of impermissible factors coming into play" at trial so as to be "inherently prejudicial" to the defendant, it is condemned by the Fourteenth Amendment.[9]

In *Holbrook*, however, the Supreme Court upheld the constitutionality of a potentially prejudicial practice.[10] The presence of four uniformed state troopers sitting in the front row of the courtroom, directly behind the defendants during trial, did not offend due process because the "inferences that a juror might reasonably draw from the officers' presence . . . need not be . . . that [the defendant] is particularly dangerous or culpable."[11] The Ninth Circuit explained that, in *Holbrook*, the Court determined that the officers' presence at trial would not lead to any impermissible inferences on the part of the jury "so long as their numbers or weaponry [did] not suggest particular official concern or alarm."[12] Thus the Ninth Circuit concluded that "[t]he law concerning the 'inherently prejudicial' nature of courtroom practices which convey an impermissible message . . . remained unchanged and clear."[13]

Having already decided that federal appellate decisions have persuasive value under the AEDPA, the Ninth Circuit turned its attention to its previous holding in *Norris v. Risley*.[14] In *Norris*, several women agreed to attend a rape trial wearing buttons which read "Women Against Rape."[15] The *Norris* court analyzed these facts under *Estelle*, to determine whether the buttons created an "unacceptable risk of impermissible factors coming into play[.]" It concluded that, like the compelled wearing of prison garb, the buttons continuously reminded the jury of the defendant's status as the accused.[16] Their "obvious communicative purpose . . . was far [clearer] and [more] direct than that deemed unlawful in [Estelle

6. *Id.* (citations omitted). *See infra* notes 35-36 for discussion of cited authority.
7. *Musladin*, 427 F.3d at 656 (citing Estelle v. Williams, 425 U.S. 501 (1976); Holbrook v. Flynn, 475 U.S. 560 (1986)).
8. *Estelle*, 425 U.S. at 505.
9. *Musladin*, 427 F.3d at 656.
10. *Holbrook*, 475 U.S. at 570-71.
11. *Id.* at 569.
12. *Musladin*, 427 F.3d at 656-57.
13. *Id.* at 657.
14. Norris v. Risley, 918 F.2d 828 (9th Cir. 1990).
15. *Id.* at 830.
16. *Id.* at 834.

v.] *Williams*[,]" and thus violated the defendant's due process rights.[17]

Applying these cases to *Musladin*, the Ninth Circuit concluded that the State court "was objectively unreasonable both in its ultimate conclusion and in the rationale it employed in denying Musladin's appeal" for two reasons.[18] First, the state court attempted to distinguish *Norris* when "*Norris* simply cannot reasonably be distinguished."[19] The state court held 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[,]" but the Ninth Circuit held that this conclusion is both objectively unreasonable and wrong as a matter of law because courts must examine the specific message carried by the buttons in light of the facts presented.[20] Under the facts of *Musladin*, a court must hold that "a reasonable jurist would be compelled to conclude that the buttons worn by Struder's family members conveyed the message that the defendant was guilty, just as the buttons worn by spectators in *Norris* did[.]"[21]

Second, according to the Ninth Circuit, the state court erroneously concluded that, although the buttons *were* an "impermissible factor," relief was not appropriate because they did not brand the defendant with an "unmistakable mark of guilt."[22] In the Ninth Circuit's view, *Estelle* and *Holbrook* "announced" that once there is "a finding of an unacceptable risk of impermissible factors coming into play," the inquiry is over because the practice is "inherently prejudicial" and therefore unconstitutional.[23] The court asserted that both *Estelle* and *Holbrook* "are clear as to the legal standard, and neither suggested that 'branding' was necessary."[24]

The Ninth Circuit's *Musladin* decision is flawed because it relied on appellate court precedent as a source of clearly established law, a practice explicitly condemned by Congress in the AEDPA. The AEDPA went into effect in 1996 to govern federal court intervention in state criminal cases.[25] Prior to the statute, federal courts entertaining habeas petitions reviewed state court decisions de novo.[26] The AEDPA significantly restricted this practice, barring lower federal courts from considering their own precedent in habeas proceedings and restricting the source of rele-

17. *Musladin*, 427 F.3d at 657-58 (citing *Norris*, 918 F.2d at 831-32). Here, the word "*Rape*" was "underlined with a broad red stroke" on the spectators' buttons. *Norris*, 918 F.2d at 830.

18. *Musladin*, 427 F.3d at 658.

19. *Id.* at 660.

20. *Id.* at 658.

21. *Id.* at 660-61.

22. *Id.* at 658.

23. *Id.* at 658-59.

24. *Id.* at 659.

25. *See* Williams v. Taylor, 529 U.S. 362, 404 (2000); Scott Dodson, *Habeas Review of Perfunctory State Court Decisions on the Merits*, 29 AM. J. CRIM. L. 223, 226 (2002).

26. Dodson, *supra* note 25, at 226 (citing Schiro v. Farley, 510 U.S. 222, 232 (1994); Miller v. Fenton, 474 U.S. 104, 111-12 (1985); O'Brien v. Dubois, 145 F.3d 16, 20 (1st Cir. 1998)).

vant case law to Supreme Court decisions.[27] It was meant "to ensure a level of 'deference to the determinations of state courts'[28] and promote federalism and finality[29] by curbing delays, preventing "retrials" via federal habeas, and giving greater effect to state convictions.[30] The Supreme Court performed a detailed analysis of the statute and affirmed the AEDPA's restrictive effect on federal courts in *Williams v. Taylor*,[31] interpreting it to mean that

> [i]f [the Supreme] Court has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar . . . . As [the Seventh Circuit] explained: "This is a retrenchment from former practice, which allowed the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court. The novelty in this portion [of the AEDPA] is . . . the reference to 'Federal law, as *determined by the Supreme Court of the United States.*' This . . . limit[s] the source of doctrine on which a federal court may rely in addressing the application for a writ."[32]

The *Musladin* court's reliance on *Norris* is in direct opposition to the Supreme Court's interpretation of the AEDPA because *Musladin* placed *Norris* on equal analytical footing with Supreme Court case law. Although the court characterized the *Norris* decision as merely persuasive, it applied *Norris* as *Estelle*'s equivalent throughout its analysis when articulating the legal test to be applied.[33] The court admitted as much, declaring its "reliance on *Norris* . . . appropriate[.]"[34] But none of the

---

27. 28 U.S.C. § 2254(d) (2005). The AEDPA states in pertinent part that: "An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . ." *Id.*

28. *Williams*, 529 U.S. at 386 (citing H. R. Conf. Rep. No. 104-518, p. 111 (1996)).

29. Peter Hack, *The Roads Less Traveled: Post Conviction Relief Alternatives and the Antiterrorism and Effective Death Penalty Act of 1996*, 30 AM. J. CRIM. L. 171, 176 (2003).

30. *Williams*, 529 U.S. at 386.

31. *Id.* at 404-16.

32. *Id.* at 381-82. (citing Lindh v. Murphy, 96 F.3d 856, 869 (7th Cir. 1996)) (emphasis in original).

33. Musladin v. Lamarque, 427 F.3d 653, 655-61 (9th Cir.), *reh'g en banc denied*, 427 F.3d 647 (9th Cir. 2005). The weight placed on *Norris* is apparent: "AEDPA limits the source of clearly established federal law to Supreme Court cases. Nevertheless, we recognize that precedent from this court, or any other federal circuit court, has persuasive value in our effort . . . ." *Id.* at 655 (citations omitted) (authority discussed further *infra*, notes 35-36). The court moreover framed its legal inquiry in terms of *Norris*: "we must therefore assess whether the buttons . . . at the trial posed a risk of impermissible factors coming into play that is similar to those previously found to exist in other circumstances, such as in . . . [*Estelle v.*] *Williams* . . . and . . . *Norris*." *Id.* at 656. It concluded in the same manner: "Because we conclude that no significant difference exists between the circumstance of this case and the 'unacceptable risks' found to exist in *Williams* and *Norris*, we hold that the state court unreasonably applied established Supreme Court law in denying Musladin relief." *Id.*

34. *Id.* at 657.

justifications the Ninth Circuit offered for this maneuver withstand scrutiny. It first asserted that granting appellate decisions persuasive weight under the AEDPA is accepted, citing other circuits purportedly in agreement.[35] However, a closer look at the cited support indicates that the court's sweeping dismissal of the statute's effect is unprecedented.[36] The Ninth Circuit proceeded to offer two additional reasons for adopting the *Norris* analysis. First, it asserted that because the same legal and factual issues are at stake—whether buttons worn by spectators at a jury trial were impermissible factors—*Norris* is entitled to reliance.[37] Second, it argued that *Norris* controls because the state court "sought to apply [it] when reaching its determination."[38] Indeed, the state court would be wise to consider *Norris* in its analysis (it did), but even if the cases were *factually identical* (they were not), the Supreme Court's interpretation of the AEDPA unmistakably excluded federal appellate decisions as sources of clearly established law.[39] A state court may choose to consider federal appellate decisions, but it is free to follow, refute, or completely ignore their conclusions.[40] The Ninth Circuit thus erred by relying upon *Norris*

---

35. *See id.* at 655-65 (citing Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 2000); Robinson v. Ignacio, 360 F.3d 1044, 1057 (9th Cir. 2004); Williams v. Bowersox, 340 F.3d 667, 671 (8th Cir. 2003); Ouber v. Guarino, 293 F.3d 19, 26 (1st Cir. 2002); Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 890 (3d Cir. 1999)).

36. *See* Musladin v. Lamarque, 427 F.3d 647, 649-51 (9th Cir. 2005) (denial of rehearing en banc) (Kleinfeld, J., dissenting, joined by Kozinski, J., O'Scannlain, J., Tallman, J., Bybee, J., Callahan, J., and Bea, J.) [hereinafter *Musladin II*].

> The panel notes that the Eighth Circuit in *Williams v. Bowersox* held that the "diversity of opinion" among federal courts on a particular issue suggested that the state court did not unreasonably apply Supreme Court precedent. But saying that the state court decision is *not* unreasonable because some federal courts have reached similar conclusions is not at all the same as saying that the state court decision *is* unreasonable because a circuit court has reached a contrary conclusion. The First Circuit in *Ouber v. Guarino* and the Third Circuit in *Matteo v. Superintendent* come much closer to supporting the panel's decision, but our panel is unique in how boldly it has flown in the face of the statutory restriction to Supreme Court decisions.

*Id.* at 650-51. The dissent also points out that at least four circuits have explicitly held that the AEDPA limits the source of clearly established law to Supreme Court cases, and federal appellate decisions are not applicable to a habeas inquiry. Id. at 650 (citing Mitzel v. Tate, 267 F.3d 524, 531 (6th Cir. 2001); Welch v. City of Pratt, 214 F.3d 1219, 1222 (10th Cir. 2000); Bocian v. Godinez, 101 F.3d 465, 471 (7th Cir. 1996); Bell v. Jarvis, 236 F.3d 149, 162 (4th Cir. 2000) (en banc) (stating that "any independent opinions we offer on the merits of the constitutional claims will have no determinative effect in the case before us, nor any precedental effect for state courts in future cases. At best, it constitutes a body of constitutional dicta.")).

37. *Musladin*, 427 F.3d at 657-580.

38. *Id.* The two arguments are actually one, since factual parallels must have motivated the state court to consider *Norris* in the first place. Furthermore, it is inconceivable that the *Musladin* court would have ruled differently had the state court *not* considered *Norris* in its decision. The Ninth Circuit would likely consider such an omission proof of faulty analysis and a more compelling reason to apply *Norris* on review.

39. *See Williams*, 529 U.S. at 381-82, 404-16 (citing Lindh v. Murphy, 96 F.3d 356, 869 (7th Cir. 1996)).

40. *See Musladin II*, 427 F.3d at 549-50.

> California could properly decide the case at bar by distinguishing *Norris*, disagreeing with *Norris*, or in complete ignorance of *Norris*. Under AEDPA's restriction to Supreme Court decisions, we are obligated to deny the writ so

in its analysis of Musladin's habeas petition. The only clearly established Supreme Court law directly on point with *Musladin*—the *Williams* rule *against* reliance on *Norris*—is unjustifiably discarded by the Ninth Circuit.[41]

But even accepting *Norris* as persuasive authority, careful analysis shows that the state court's decision was not contrary to clearly established Supreme Court law. The *Musladin* court placed great weight on the factual similarities between the case on appeal and its prior holding in *Norris*. It's of "striking factual similarities" between *Norris* and *Musladin*, however, cannot survive a close comparison of the cases.[42] The women donning the buttons in *Norris* were members of the National Organization of Women ("NOW") and an interest group called the Rape Task Force. This organized group created the buttons with a clear message, literally "Women Against Rape,"[43] and collaborated so that at all times, at least three women wearing buttons were in the court room. Astonishingly, the women had significant contact with the jurors *outside* the courtroom—they rode on the elevators together, stood near the courtroom entrance, and sold the jurors refreshments during breaks.[44] Also, in response to questioning during an evidentiary hearing, one of the women from NOW declared that wearing the buttons "was a statement [they] were making and "that they wanted to see some action taken[.]"[45] Another woman from the task force admitted that they were 'anxious for a conviction' and that its members believed Norris guilty even before hearing the evidence."[46] Finally, an evidentiary hearing *six years after the trial* revealed that three of the six jurors who testified could recall the women's presence and the buttons they wore.[47]

These facts bear little resemblance to *Musladin*. There, the buttons bore no literal message, only an image that may not have even been discernable from the jury box. The individuals who wore them were members of the deceased's immediate family, and there was no evidence

---

long as the California decision was not contrary to or an unreasonable application of *Estelle* and [*Holbrook v.*] *Flynn*.

*Id.*

41. *See id.* at 647.

Our decision in this case has the practical effect of erasing the statutory phrase "as determined by the Supreme Court of the United States." Our tools for statutory construction are many, but they do not include an eraser. Yet here we go, erasing the "clearly established" phrase and expanding the "as determined" phrase. The statute in nine states now says, as a practical matter, "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, *giving "persuasive weight" to Ninth Circuit decisions that have applied Supreme Court decisions*." We do not have that legislative authority.

*Id.* (emphasis in original) (citations omitted).

42. *Musladin*, 427 F.3d at 658.
43. *Norris*, 918 F.2d at 830.
44. *Id.* at 829-31.
45. *Id.* at 832 n.3 (citations and internal quotations omitted).
46. *Id.*
47. *Id.* at 831.

indicating they intended to influence the jurors or the trial atmosphere. There were no evidentiary findings that the jurors ever saw the buttons or the family members.[48] In short, the only common element was that the spectators wore buttons. In view of these factual discrepancies, the Ninth Circuit addressed whether the state court was "objectively unreasonable" in distinguishing *Norris* from *Musladin*.[49] It authoritatively answered that it was. According to this court, under clearly established Supreme Court law as understood by its holding in *Norris*, spectators wearing buttons depicting a photo of a victim at trial created such a risk of impermissible influence on the jury that a new trial was warranted. This holding is in direct conflict with several other jurisdictions[50] and, surprisingly, an unpublished Ninth Circuit case decided just one year earlier.[51]

Carefully examining the relevant Supreme Court cases further illustrates the Ninth Circuit's error. As the dissent to the denial of rehearing en banc noted, the *Musladin* facts are more like those in *Holbrook* than those in *Estelle*.[52] *Estelle* involved a defendant who was compelled to wear prison clothing, and the Court condemned this unambiguous statement of government accusation toward the defendant.[53] *Holbrook*, however, examined the presence of several uniformed law enforcement officers at trial and concluded that their presence was permissible because of a wide range of possible inferences that the jury could have drawn from their presence.[54] "With these two Supreme Court cases as bookends—showing what denies due process and what does not—the California courts were well within the bounds of reasonable interpretation in determining that this case is more like [*Holbrook*]."[55] Yet the

48. *See* Musladin v. Lamarque, 427 F.3d 653, 662, *reh'g en banc denied*, 427 F.3d 647 (9th Cir. 2005).

49. *Id.* at 661.

50. *See* North Carolina v. Braxton, 477 S.E.2d 172, 176-77 (N.C. 1996) (holding that the wearing of buttons with the victim's photo did not prejudice the jury when there was no factual showing that the jury noticed them); Pachl v. Zenon, 929 P.2d 1088, 1090-94 (Or. Ct. App. 1996) (upholding conviction despite presence of spectators during trial wearing buttons bearing the words "Crime Victims United"); Cooper v. Virginia, 2004 Va. App. LEXIS 403, *10 (Va. Ct. App. 2004) (holding that buttons bearing photo of victim, worn by spectators during trial, were not inherently prejudicial and upholding the conviction because nothing in the record showed that they caused the defendant actual prejudice); *In re* Personal Restraint of Woods, 114 P.3d 607, 617 (Wash. 2005) (holding that allowing victims' families to wear ribbons in remembrance of the victims at trial did not prejudice the defendant's right to a fair trial); .

51. Palumbo v. Ortiz, 89 Fed. App'x 3 (9th Cir. 2004). Here, the state trial judge allowed members of the victim's family to wear buttons bearing the victim's image in the courtroom. On habeas review, the Ninth Circuit held that "[b]ecause the Supreme Court has not ruled on whether actual prejudice must result from spectators wearing badges in the courtroom, the California Court of Appeal's decision can not be contrary to Supreme Court precedent. Nor was it an unreasonable application of precedent." *Id.* at 5. The court then discussed *Holbrook* and *Norris*, noting that "the California Court of Appeal was bound neither by our result [in *Norris*], nor by our use of the *Holbrook* test. We cannot grant Palumbo's petition based on the Court of Appeal's divergence from *Norris*." *Id.*

52. *See Musladin II*, 427 F.3d 647, 649 (9th Cir. 2005) (denial of rehearing en banc).

53. *See* Estelle v. Williams, 425 U.S. 501, 502 (1976); *Musladin II*, 427 F.3d at 648.

54. Holbrook v. Flynn, 475 U.S. 560, 562 (1986); *see also Musladin II*, 427 F.3d at 649.

55. *Musladin II*, 427 F.3d at 649.

problems do not en there. As one can note, closer scrutiny of the Ninth Circuit's reasoning casts even more doubt on *Musladin*'s integrity.[56]

In sum, the Ninth Circuit's erroneous decision in *Musladin* should be reviewed by the Supreme Court for five reasons. First, by undermining the effect the AEDPA, the Ninth Circuit installed itself as the overseer of the criminal courts in nine states. "Few things incumbent on powerful government officials are more fundamental than their duty to comply with the legal limitations on their power."[57] The Supreme Court should intervene to reaffirm the AEDPA's limit on federal judicial power. Second, the *Musladin* decision raises important questions about the constitutional limitations of spectator influence at trial. Here lies a delicate balance of constitutional guarantees. On one hand is the Fourteenth Amendment and the right to a fair trial free from outside influences. On the other are the Sixth Amendment guarantee of a public trial and the First Amendment's protection of free expression. Scholars and courts alike are divided on the proper solution, and the Supreme Court should bring clarity to this area by articulating guidelines for trial judges. Whether these issues are resolved on review of *Musladin*, or on another case yet to be decided, one thing is certain: the "clearly established" law of *Musladin v. Lamarque* is neither clear, nor established.

---

56. For example, consider the Ninth Circuit's misleading analysis of *Holbrook*, maintaining that it simply reaffirmed *Estelle*'s holding that any practices "inherently prejudicial" to the defendant are condemned by the Fourteenth Amendment. Musladin v. Lamarque, 427 F.3d 655, 656 (9th Cir. 2005), *reh'g en banc denied*, 427 F.3d 647 (9th Cir. 2005). But *Holbrook*, decided ten years after *Estelle*, made clear that "close scrutiny of inherently prejudicial practices has not always been fatal." *Holbrook*, 475 U.S. at 568. Thus the Supreme Court noted in *Illinois v. Allen* that, although *binding and gagging* the defendant would no doubt prejudice the jury against him, in certain situations it could be "the fairest and most reasonable way to handle" a dangerous and disruptive defendant and would thus be acceptable. *Id.* (citing Illinois v. Allen, 397 U.S. 337 (1970)).

Other problems lurk. The Ninth Circuit fails to address the fact that *Holbrook* characterized the *Estelle* holding as resting at least in part on equal protection grounds rather than due process, because the defendants most likely to be compelled to wear prison garb at trial were those who could not afford to post bail. *See id.* at 571-72 (citations omitted). But perhaps the most astonishing aspect of the *Musladin* opinion was its emphatic condemnation of the state court's view that the buttons were likely to be perceived as an expression of grief. *Musladin*, 427 F.3d at 658. As the dissent in *Musladin II* notes, "[spectator] communication is an unavoidable consequence of the Constitutional guarantee of 'public trial' . . . . There is nothing wrong with the jury knowing people care about the case and the parties." *Musladin II*, 427 F.3d at 651.

Finally, note that *Norris* was decided in 1990, pre-AEDPA. Before the statute, federal courts reviewed habeas petitions de novo. *See* Dodson, *supra* note 25. Thus the restrictive standard of review imposed by the AEDPA may have altered the outcome of that case, calling its precedential value into question. The Ninth Circuit's failure to address any of these concerns when determining whether a state interpretation was "objectively unreasonable" is alarming.

57. *Musladin II*, 427 F.3d at 651.