

CRIMINAL PROCEDURE — HABEAS CORPUS — NINTH CIRCUIT USES CIRCUIT OPINIONS TO INTERPRET “CLEARLY ESTABLISHED FEDERAL LAW.” — *Musladin v. Lamarque*, 403 F.3d 1072 (9th Cir.), *reh’g denied*, 427 F.3d 647 (9th Cir. 2005).

Federal habeas review of state decisions seeks to balance federal interests in protecting constitutional rights against state interests in the finality of criminal proceedings.¹ With the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),² Congress tipped the balance in favor of finality by curtailing the ability of federal courts to grant habeas relief, mandating that relief shall not obtain unless a state’s adjudication “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.”³ Although AEDPA’s language makes clear that the Supreme Court, and not inferior federal courts, shall be the final voice on what constitutes federal law, the question remains what role, if any, circuit decisions should play in the interpretation of “clearly established federal law.” Recently, in *Musladin v. Lamarque*,⁴ the Ninth Circuit maintained that circuit decisions have “persuasive value in an assessment of the meaning of the federal law that [is] clearly-established.”⁵ This interpretation was unnecessary to the Ninth Circuit’s decision in *Musladin* and conflicts with both the legislative intent behind AEDPA and the Court’s interpretation of the statute, providing the Supreme Court with a viable basis for reversal. Further, the Ninth Circuit’s decision sharpened a circuit split in which the majority position favors disregarding circuit precedent in issuing habeas relief. The Ninth Circuit’s circumvention of AEDPA’s mandate likely represents a strategic expression of its own discomfort with the statute, a discomfort that may include concerns regarding the statute’s constitutionality.

¹ See Jennifer Park, Comment, *Yarborough v. Alvarado: At the Crossroads of the “Unreasonable Application” Provision of the Antiterrorism and Effective Death Penalty Act of 1996 and the Consideration of Juvenile Status in Custodial Determinations*, 95 J. CRIM. L. & CRIMI-NOLOGY 871, 872–73 (2005). Arguably, at one time, the granting of habeas review was seen instead as facilitating a “string of pro-defendant . . . rulings by the Supreme Court.” Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA’s Standard of Review Operate After Williams v. Taylor?*, 2001 WIS. L. REV. 1493, 1497.

² Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

³ *Id.* § 104 (codified at 28 U.S.C. § 2254(d)(1)) (emphasis added).

⁴ 403 F.3d 1072 (9th Cir.), *reh’g denied*, 427 F.3d 647 (9th Cir. 2005).

⁵ *Id.* at 1075.

On May 13, 1994, Mathew Musladin picked up his three-year-old son from the house of his estranged wife, Pamela.⁶ A fight broke out between Musladin and his wife, at which point Pamela's brother, Michael Albaugh, and her fiancé, Tom Studer, rushed out to help.⁷ Musladin, allegedly believing both Studer and Albaugh to be armed, shot at Studer.⁸ According to the prosecution, Musladin then followed Studer into the garage and fired a second shot; the bullet ricocheted into Studer's head, ultimately killing him.⁹ Musladin contended that he fired out of fear in Studer's general direction and then drove away.¹⁰ Musladin claimed both perfect and imperfect self-defense.¹¹ During the fourteen-day jury trial, Studer's family sat in the courtroom directly behind the prosecution, and at any one time, at least three members of the family wore buttons bearing Studer's photograph.¹² The trial judge denied Musladin's motion to have the buttons removed, and the jury convicted Musladin of first-degree murder.¹³

On appeal, Musladin argued that the buttons depicting the victim violated his constitutional right to a fair trial.¹⁴ The California Court of Appeal rejected this argument and affirmed the conviction.¹⁵ The court first identified the appropriate test for inherent prejudice: "The test for inherent prejudice is not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play."¹⁶ The court then turned to *Norris v. Risley*,¹⁷ in which the Ninth Circuit found that the wearing of "Women Against Rape" buttons at a rape trial presented an "unacceptably high" risk of juror prejudice because the buttons conveyed the message that various spectators believed the defendant was guilty.¹⁸ The court distinguished Musladin's case from

⁶ *Id.* at 1073; *id.* at 1079 (Thompson, J., dissenting).

⁷ *Id.* at 1073 (majority opinion).

⁸ *Id.* Stories differ as to whether Albaugh and Studer were armed. While Pamela testified that neither was armed, *see* *People v. Musladin*, No. H015159, slip op. at 5 nn.5-6 (Cal. Ct. App. Dec. 9, 1997), Musladin "testified that he believed Albaugh was carrying a machete and Studer a gun, and that he fired both shots out of fear for his life." *Musladin*, 403 F.3d at 1080 (Thompson, J., dissenting).

⁹ *Musladin*, 403 F.3d at 1080 (Thompson, J., dissenting).

¹⁰ *Id.*; *id.* at 1073 (majority opinion).

¹¹ *Id.* at 1073.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* For a discussion of the difficulty of respecting victims' rights while also ensuring that defendants' constitutional rights are not undermined, *see* Victoria Schwartz, *Recent Development, The Victims' Rights Amendment*, 42 HARV. J. ON LEGIS. 525, 538-39 (2005).

¹⁵ *People v. Musladin*, No. H015159, slip op. at 21-22, 24 (Cal. Ct. App. Dec. 9, 1997).

¹⁶ *Musladin*, No. H015159, slip op. at 21 (quoting *Woods v. Dugger*, 923 F.2d 1454, 1457 (11th Cir. 1991)) (internal quotation mark omitted).

¹⁷ 918 F.2d 828 (9th Cir. 1990).

¹⁸ *Musladin*, No. H015159, slip op. at 21 (citing *Norris*, 918 F.2d at 829, 831).

Norris, stating that the rape buttons conveyed a message of guilt, whereas the buttons depicting the deceased more likely conveyed a message of grief.¹⁹ In denying Musladin's motion, the court commented that while the buttons were an "impermissible factor coming into play,"²⁰ ultimately, the practice did not brand Musladin "'with an unmistakable mark of guilt' in the eyes of the jurors."²¹

Musladin subsequently filed a petition for a writ of federal habeas corpus, which the District Court for the Northern District of California denied.²²

The Ninth Circuit reversed. Writing for the panel²³ and applying AEDPA standards, Judge Reinhardt found that although the state court identified the correct federal law by citing the Supreme Court's decisions in *Estelle v. Williams*²⁴ and *Holbrook v. Flynn*²⁵ and looking to the Ninth Circuit's decision in *Norris* for persuasive authority, the state court was "objectively unreasonable" in its application of the law in two ways.²⁶ First, the majority noted that the "striking factual similarities between *Norris* and the present case"²⁷ made the two cases ultimately indistinguishable.²⁸ Specifically, because the primary issue in Musladin's trial was whether he acted in self-defense, allowing Studer's family to wear buttons depicting the deceased conveyed a message that Studer was the "victim" while Musladin was the "aggressor," and thus would likely prejudice the jury's determination of self-defense.²⁹

Second, the court rejected the state court's imposition of an additional requirement beyond that established by the Supreme Court. *Holbrook*'s test for determining when a defendant's due process rights have been violated requires the court to find only whether "an unacceptable risk is presented of impermissible factors coming into play."³⁰ Thus, when the state court found the "wearing of photographs of victims in a courtroom to be an 'impermissible factor coming into

¹⁹ *See id.*

²⁰ *Id.* (quoting *Woods*, 923 F.2d at 1457) (internal quotation marks omitted).

²¹ *Id.* at 21–22 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 571 (1986)).

²² *Musladin*, 403 F.3d at 1073.

²³ Judge Berzon joined Judge Reinhardt's opinion.

²⁴ 425 U.S. 501 (1976). In *Williams*, the Court held that compelling an accused to wear prison clothes at trial violates his right to a fair trial. *See id.* at 512–13.

²⁵ 475 U.S. at 560. The *Holbrook* Court found that the presence of four uniformed troopers at the trial of six defendants did not violate the defendants' right to a fair trial. *Id.* at 571.

²⁶ *Musladin*, 403 F.3d at 1076.

²⁷ *Id.*

²⁸ *Id.* at 1076–77.

²⁹ *See id.* at 1077.

³⁰ *Holbrook*, 475 U.S. at 570, cited in *Musladin*, 403 F.3d at 1077.

play,”³¹ the inquiry should have stopped — no additional showing was necessary since the impermissible factor finding rendered the practice “inherently prejudicial.”³² Nevertheless, the state court imposed an additional requirement that the buttons must also “‘brand’ the defendant ‘with an unmistakable mark of guilt.’”³³

Judge Thompson dissented. First, he distinguished the present case from *Norris*, noting that in this case the “buttons conveyed no ‘message’” of guilt.³⁴ More generally, the wearing of buttons depicting the deceased was indistinguishable from the “routine situation of a deceased victim’s family members, without buttons, sitting as a group in a courtroom during a trial” and displaying grief for their loss.³⁵ Judge Thompson interpreted the state court’s use of the “impermissible factor” language as discouraging the practice of wearing buttons depicting the victim, rather than as a legal conclusion that the buttons *actually* were an impermissible factor depriving the defendant of a fair trial.³⁶

The court denied a petition for panel rehearing.³⁷ The court also declined to rehear the case en banc, over seven sharp dissenting votes.³⁸

³¹ *People v. Musladin*, No. H015159, slip op. at 21 (Cal. Ct. App. Dec. 9, 1997) (alteration in original) (quoting *Holbrook*, 475 U.S. at 570).

³² *Musladin*, 403 F.3d at 1078 (internal quotation marks omitted).

³³ *Id.* While being branded with guilt is not a requirement of the test, the Supreme Court did use the “branding” language in *Holbrook* as an additional justification for finding that the presence of uniformed troopers in the courtroom did not deprive the defendant of a fair trial. *See Holbrook*, 475 U.S. at 571. The language originally comes from Justice Brennan’s dissenting opinion in *Estelle v. Williams*, 425 U.S. 501, 518 (1976) (Brennan, J., dissenting).

The relationship between these two recurring phrases — “impermissible factors coming into play” and “branding with guilt” — warrants clarification. A finding of “an unacceptable risk of impermissible factors coming into play” is equated with *inherent* prejudice, whereas a finding that a defendant has been “branded with an unmistakable mark of guilt” is equated with *actual* prejudice. The two findings are alternative methods of determining when courtroom practices have violated a defendant’s right to a fair trial. *See Musladin*, 403 F.3d at 1078 n.2 (“[R]eversal is required if a defendant can prove *either* actual *or* inherent prejudice.”). Contrary to logical intuition, inherent prejudice does not imply actual prejudice, though there is some overlap between the two. Inherent prejudice is an abstract finding that the courtroom *probably* influenced the jurors, whereas actual prejudice is a concrete finding that the “jurors *actually* articulated a consciousness of some prejudicial effect.” *Holbrook*, 475 U.S. at 570 (emphasis added). Hence, while “jurors will not necessarily be fully conscious of the effect [a practice] will have on their attitude toward the accused,” the court can still find inherent prejudice. *Id.* And even if the court makes a finding of inherent prejudice, it is still possible that the jurors would not have actually been prejudiced.

³⁴ *Musladin*, 403 F.3d at 1080 (Thompson, J., dissenting).

³⁵ *Id.*

³⁶ *See id.* at 1080–81.

³⁷ *Musladin v. Lamarque*, 427 F.3d 647, 647 (9th Cir. 2005).

³⁸ *Id.* Judges Kozinski, O’Scannlain, Tallman, Bybee, Callahan, and Bea joined Judge Kleinfeld’s dissenting opinion, while Judges Kozinski, O’Scannlain, and Kleinfeld joined Judge Bea’s dissent. Judge Kleinfeld’s dissent focused on AEDPA’s deference to state courts and the question of whether federal courts are permitted to look to lower federal court decisions in the interpretation of federal law. He surveyed other circuit positions on the latter issue, showing that at least

There is more underlying *Musladin* than a concern about a defendant's constitutional right to a fair trial: the decision also channels the Ninth Circuit's discomfort with enforcing AEDPA mandates. The court's position on the relative authority of lower court decisions under AEDPA³⁹ was unnecessary in reaching its result. Further, that this approach conflicts with both the Supreme Court's interpretation of AEDPA as well as the majority of circuits that have weighed in on this issue suggests that the Supreme Court may grant certiorari. Thus, the Ninth Circuit's opinion likely represents a strategic statement of its broader discomfort with the statute itself, a discomfort that may include reservations about the statute's constitutionality.

The Ninth Circuit's decision that state courts must "afford . . . persuasive weight" to lower federal court opinions in determining federal law⁴⁰ was unnecessary because the Ninth Circuit could have relied entirely on its second ground — that the state court had "unreasonably applied federal law" as determined by the Supreme Court.⁴¹ Under AEDPA, a federal court is well within its authority to overturn a state court ruling so long as the state court's decision was "contrary to" or "an unreasonable application" of federal law.⁴² By requiring a finding that the buttons "brand[]" the defendant with an "unmistakable mark of guilt"⁴³ in addition to the finding that the buttons were in fact an impermissible factor coming into play, the state court transformed a sufficient element into a necessary requirement. The imposition of an additional finding, beyond what the Supreme Court requires, is quite plausibly an "unreasonable application" of federal law.⁴⁴ Pragmatically, the Ninth Circuit should have relied exclu-

four circuits have expressly rejected the Ninth Circuit's position. *See id.* at 650–52 (Kleinfeld, J., dissenting from denial of rehearing en banc). In contrast, Judge Bea's dissent emphasized that to demonstrate deprivation of a fair trial, the defendant must show "actual prejudice" and not just the existence of conditions that are "inherently prejudicial." *See id.* at 652 (Bea, J., dissenting from denial of rehearing en banc) (quoting *Holbrook*, 475 U.S. at 572) (internal quotation marks omitted).

³⁹ *Musladin*, 403 F.3d at 1074 ("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 to determine 'whether a particular state court decision is an "unreasonable application" of Supreme Court law . . .'" (quoting *Duhaime v. Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000)); *see also id.* at 1075–76.

⁴⁰ *Id.* at 1076.

⁴¹ *Id.* at 1077–78.

⁴² *See* 28 U.S.C. § 2254(d)(1) (2000).

⁴³ *People v. Musladin*, No. H015159, slip op. at 21–22 (Cal. Ct. App. Dec. 9, 1997) (quoting *Holbrook*, 475 U.S. at 571) (internal quotation mark omitted).

⁴⁴ There are very few Supreme Court opinions that explicitly address what constitutes deprivation of a fair trial. On one end of the spectrum, the Court held in *Williams* that mandatory prison clothing deprives a defendant of a fair trial. *Estelle v. Williams*, 425 U.S. 501, 512–13 (1976). On the other end, the Court in *Holbrook* held that the presence of four uniformed troopers at a trial of six defendants did not result in an unfair trial. *Holbrook*, 475 U.S. at 571. Because

sively on this reading; instead, the court subjected itself to the possibility of reversal by including an interpretation of AEDPA that disregards the Supreme Court's reading of the statute.

Given the legislative intent as well as Supreme Court interpretation of the statute, it is possible that the Ninth Circuit's reading will not stand. AEDPA was motivated by Congress's desire to curb the ability of federal courts to issue habeas relief,⁴⁵ as evidenced by its insistence upon the finality of state decisions unless the state court "unreasonably applied" federal law. Consistent with this desire, the Supreme Court has sharply limited the range of sources that will enable lower federal courts to find an "unreasonable application" of federal law. The Supreme Court first rigorously applied AEDPA in *Williams v. Taylor*,⁴⁶ and although the Court has yet to address the constitutionality of AEDPA, *Williams* provides the most in-depth Supreme Court assessment of the statute. Specifically, in Justice O'Connor's majority opinion interpreting AEDPA, the Court stated that the "statutory language makes clear . . . that § 2254(d)(1) restricts the source of clearly established law to *this* Court's jurisprudence."⁴⁷ Justice O'Connor further narrowed the range of relevant authority "to the holdings, as opposed to the dicta, of this Court's decisions."⁴⁸

Moreover, the Ninth Circuit's pronouncement on the relative authority afforded to lower federal court decisions sharpened an existing circuit split,⁴⁹ in which the majority of circuits generally caution against the current Ninth Circuit interpretation. Current circuit opinion regarding the authority owed to lower federal court decisions falls on a spectrum — four circuits disallow federal habeas courts to use lower federal court decisions in determining "clearly established federal law," two circuits agree with the Ninth Circuit and allow federal habeas courts to afford such decisions persuasive authority, and one

Musladin falls somewhere between these extremes, it is probable that the state court did not misapply federal law by unreasonably analogizing to the facts of federal cases. However, the state court did unreasonably apply federal law by imposing an additional requirement to a clearly formulated test.

⁴⁵ See Park, *supra* note 1, at 873 ("The AEDPA was the result of an effort to reform habeas, and extensively revised the law of habeas corpus as practiced within the federal judicial system. Through this change, Congress hoped to curb delays, avoid retrials on federal habeas, and give effect to judgments made by state courts to the greatest extent possible under the law.")

⁴⁶ 529 U.S. 362 (2000). The case resulted in three opinions — two majority opinions and one partial dissent. Justice Stevens delivered the opinion of the Court with respect to how AEDPA applied to the particular case, *see id.* at 390–99 (Stevens, J., delivering the opinion of the Court in part), while Justice O'Connor delivered the majority opinion on how AEDPA limits federal habeas review in general, *see id.* at 402–13 (O'Connor, J., delivering the opinion of the Court in part).

⁴⁷ *Id.* at 412 (O'Connor, J., delivering the opinion of the Court in part) (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Musladin v. Lamarque*, 427 F.3d 647, 647 (2005) (Kleinfeld, J., dissenting from denial of rehearing en banc).

circuit occupies a middle ground.⁵⁰ Hence, out of a total of eight circuits that have considered this issue, the Ninth Circuit is in the minority, with only two other circuits adopting the same interpretation.

The Ninth Circuit's reliance on *Norris*, and its more general reliance on the persuasive authority of inferior federal court decisions, is controversial at the least, and will subject the court to reversal at the most. Including this argument, especially when not wholly necessary to its conclusion in *Musladin*, likely signifies the Ninth Circuit's own reservations about AEDPA.

Aside from personal and policy concerns that might have motivated the Ninth Circuit's decision in *Musladin*, another animating concern may have been the statute's constitutionality. AEDPA's constitutionality has been challenged since its inception — if the scope of “clearly established federal law” is restricted to Supreme Court holdings, as the Supreme Court and the majority of circuits maintain, then the logical consequence would be that “lower federal courts . . . must ignore final judgments entered by other district courts, or by the federal courts of appeals.”⁵¹ This interpretation may pose a constitutional problem because Article III establishes that inferior federal courts, once created, share the “judicial Power of the United States” with the “one supreme Court”;⁵² hence, inferior federal court judgments, “once final, are entitled to respect both as final decisions in the case and for stare decisis purposes.”⁵³ If AEDPA does not bind state courts to lower federal court decisions, and if the lower federal courts are instructed to ignore circuit decisions, then AEDPA has effectively “suspend[ed] the doctrine

⁵⁰ The Fourth, Sixth, Seventh, and Tenth Circuits look exclusively to Supreme Court decisions in interpreting federal law for the purposes of AEDPA. See *Mitzel v. Tate*, 267 F.3d 524, 531 (6th Cir. 2001); *Bell v. Jarvis*, 236 F.3d 149, 162 (4th Cir. 2000) (en banc); *Welch v. Pratt*, 214 F.3d 1219, 1222–23 (10th Cir. 2000); *Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir. 1996). The First and Third Circuits agree with the Ninth Circuit approach. See *Ouber v. Guarino*, 293 F.3d 19, 26 (1st Cir. 2002) (“[I]t is helpful to examine precedents from lower federal courts . . . [a]lthough such decisions are not themselves binding . . .”); *Matteo v. Superintendent*, 171 F.3d 877, 890 (3d Cir. 1999) (“[I]n certain cases it may be appropriate to consider the decisions of inferior federal courts as helpful amplifications of Supreme Court precedent.”). Occupying a middle position, the Eighth Circuit looks to lower federal court decisions in its determination that the state court did not unreasonably apply Supreme Court precedent. See *Williams v. Bowersox*, 340 F.3d 667, 672 (8th Cir. 2003). This middle position can be distinguished from the Ninth Circuit approach in that whereas the Eighth Circuit will look to other federal court opinions to *uphold* a state court's application of federal law, the Ninth Circuit will use lower federal decisions to *strike down* a state court's decision. Hence, given Congress's hope of curbing the ability of federal courts to issue habeas relief through AEDPA, the Eighth Circuit's middle ground position is undoubtedly less objectionable than the Ninth Circuit's position.

⁵¹ Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts — Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2467 (1998).

⁵² U.S. CONST. art. III, § 1.

⁵³ Jackson, *supra* note 51, at 2471 n.128.

of stare decisis in federal habeas corpus cases.”⁵⁴ Furthermore, restricting the source of federal law to the very limited number of Supreme Court decisions would “require the federal judiciary to hold that there is no constitutional violation simply because there is no case of the Supreme Court of the United States directly on point,” thus denying the federal judiciary its “right to refer to the corpus of jurisprudence to which it turns when it must ‘say what the law is.’”⁵⁵

In fact, the Ninth Circuit expressed similar constitutional concerns regarding AEDPA shortly after its decision in *Musladin*. In *Irons v. Carey*,⁵⁶ the Ninth Circuit, including Judge Reinhardt, issued an order requesting the filing of supplemental briefs addressing the constitutionality of AEDPA.⁵⁷ The court specifically asked:

[W]hether AEDPA unconstitutionally prescribes the sources of law that the Judicial Branch must use in exercising its jurisdiction or unconstitutionally prescribes the substantive rules of decision by which the federal courts must decide constitutional questions that arise in state habeas cases. The parties should consider whether, under the separation of powers doctrine or for any other reason involving the constitutionality of [AEDPA], this court should decline to apply the AEDPA standards in this case.⁵⁸

At its core, the Ninth Circuit’s decision in *Musladin* addressed more than just the surface issue of when a defendant is deprived of a fair trial — the decision likely represents a concern with AEDPA’s ramifications and possibly its constitutionality. The *Musladin* majority’s decision to indicate that circuit opinions constitute persuasive authority in interpreting federal law, in contravention of the Supreme Court’s reading of AEDPA, signals the circuit’s concerns about the statute. Regardless of whether the Supreme Court chooses to review *Musladin*, the Ninth Circuit undoubtedly has been building up its resistance to AEDPA, and the order in *Irons* may ultimately force the Supreme Court to assess the statute’s constitutionality.

⁵⁴ Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User’s Manual*, 51 VAND. L. REV. 103, 135 (1998).

⁵⁵ *Lindh v. Murphy*, 96 F.3d 856, 887 (7th Cir. 1996) (Ripple, J., dissenting) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). For an illustration of the difficulty in referring only to Supreme Court decisions “directly on point,” see *supra* note 44.

⁵⁶ 408 F.3d 1165 (9th Cir. 2005).

⁵⁷ *Id.* The order — issued May 18, 2005 — followed *Musladin* by approximately five weeks.

⁵⁸ *Id.*