INTEREST OF *AMICUS CURIAE*

The New Jersey Crime Victims' Law Center (NJ-VLC) is a nonprofit legal advocacy center devoted to providing *pro bono* legal assistance to crime victims in the criminal justice system and litigating issues that affect the rights of crime victims. Founded in 1992, NJ-VLC was the first and remains the oldest crime victim law center in the United States that provides no cost services to crime victims and litigates victims' rights issues in the appellate courts. The mission of NJ-VLC is to provide competent *pro bono* legal assistance to crime victims, and to advocate the rights of victims through appearances as *amicus curiae* in the courts on issues affecting the rights of crime victims throughout the nation.

NJ-VLC[1] has appeared as *amicus curiae* in numerous cases in all courts of the State of New Jersey for over a decade. The matter before this Court involves an issue in which VLC is integrally involved, and one that it has litigated previously in state court.

SUMMARY OF THE ARGUMENT

1. "[W]hen a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt."[2] This association oftentimes includes the parents, children and spouses of homicide victims and under the authority of many state constitutional and

[1] Pursuant to Rule 37, *Amicus Curiae* states that no counsel for a party authored any part of this brief, and no person or entity other than Amicus Curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Payne v. Tennessee*, 501 U.S. 808, 838 (1991) (Souter, J., and Kennedy, J., concurring).

statutory provisions, these survivors are often given special rights affordable to direct victims of crime.[3]

Criminal trials are about people; people accused of doing bad things and the people who are harmed by their acts. Courts know this; lawyers know this; and without question, juries know this. Jurors know which individuals in the courtroom are the survivors of the homicide victim. They know why they are there. They know that these individuals are present because their loved one has been murdered, and someone is standing trial in a public forum accused of the ultimate crime, the killing of another human being.

Criminal trials do not take place behind private walls or in a laboratory controlled environment. They occur in a public setting reflecting our system of democratic justice. This public setting includes the rights of those who have suffered the greatest, the homicide survivors, to be present. Their presence and association with the decedent is understood, obvious and expected. For these individuals to wear a small button with the photo of the victim is as commonly understood as is their presence. Common sense dictates this. For the lower court to determine that such a showing of association with the victim by his loved ones violates the defendant's rights to a fair trial, fails to demonstrate a realistic understanding that the trial and all of its participants involve real people who come into the courtroom with independent perceptions, feelings and associations. The face of the victim worn on the lapels of those who loved him is understood by jurors in a common sense fashion; not one that calls upon them to prejudge the defendant as guilty.

[3] See, e.g., Cal. Penal Code § 679.02(a)(3) which provides that the rights afforded to a victim of crime extend to the victim's next of kin..

2. The victims' rights social movement along with the decisions of the federal and state courts throughout the United States over the last 20 years have recognized the existence and the rights of survivors of homicide. The decision of this Court in *Payne,* 501 U.S. 808 is demonstrative of this fact. In the instant matter, the Court of Appeals incorrectly accepted defendant's petition for *habeas corpus* because the decision of the state court below was not contrary to nor did it involve an unreasonable application of clearly established Federal Law as determined by the Supreme Court of the United States. *28 U.S.C.S. § 2254*.

I. CONDUCT AT TRIAL ON THE PART OF A HOMICIDE SURVIVOR THAT DEMONSTRATES AN ASSOCIATION WITH THE VICTIM DOES NOT CAUSE A DENIAL OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL UNLESS IT IS INHERENTLY PREJUDICIAL OR TENDS TO ERODE THE DEFENDANT'S PRESUMPTION OF INNOCENCE.

A. Crime victims are not mere spectators in the criminal justice process, and their rights must be given due weight in assessing the impact of their presence and conduct on the rights of the defendant.

Crime victims are given special status in the criminal justice system, and their rights are recognized by constitutional mandate. *See, e.g.*, Cal. Const. art.1, § 28. . Victims are entitled to be treated with dignity, respect, courtesy, and sensitivity in the criminal justice system, and these rights plus other enumerated participatory rights of victims are required to be "honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants." Cal Penal Code § 679.01.

In the case of homicide, the rights afforded to a victim of crime extend to the victim's next of kin. Cal Penal Code § 679.02. The court must recognize that the trial is not solely about the defendant, and if an individual is accused of causing the death of another, the court must consider the rights of the decedent's survivors to be treated with 'dignity, respect, courtesy and sympathy." *Id*. The often quoted language of Justices Souter and Kennedy in their concurring opinion in Payne v. Tennessee, 501 U.S. 808 (1991) presents a stamp of recognition by this Court that crime victims are not mere appendages to the criminal justice process. They are an integral part of the process and the courtroom stage on which the process unfolds each day in the courtrooms throughout this nation.

> "Every defendant knows, if endowed with the mental competence for criminal responsibility, that the life he will take by his homicidal behavior is that of a unique person, like himself, and that the person to be killed probably has close associates, 'survivors,' who will suffer harms and deprivations from the victim's death. Just as defendants know that they are not faceless human ciphers, they know that their victims are not valueless fungibles, and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands, but individuals with parents or children, spouses or friends or dependents. Thus, when a defendant chooses to kill, or to raise the risk of a victim's death, this choice necessarily relates to a whole human being and threatens an association of others, who may be distinctly hurt."

Id. at 838-839 (Souter, J., and Kennedy, J. concurring).

B. Conduct of a homicide survivor at trial that demonstrates an association with the victim does not cause a denial of the defendant's right to a fair trial unless it is inherently prejudicial or tends to erode the defendant's presumption of innocence.

The United States Constitution as well as the Constitution of the State of California gives every person charged with a criminal offense, the right to a public trial

by an impartial jury. (U.S. Const., amends VI, XIV; Cal. Const., art 1 § 15). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and the importance of their functions…." *People v. Woodward*, 4 Cal. 4th 376, 385 (Cal. 1992). While the constitutional guarantee of a public trial has historically been for the benefit of the accused and that guarantee must never be compromised, the criminal justice system also serves another purpose. "[The families] of murder victims also have a stake in [seeing justice carried out]. Courts may also consider, and be sensitive to, the needs and concerns of crime victims and their families." *People v. Chatman*, 38 Cal. 4th 344, 364 (Cal. 2006). Criminal cases are often emotionally charged and impact many others beyond the defendant. Victim's family members and those affected by the victim's absence have, in the last decade, come to the forefront of the criminal justice system. In so far as the presence of the victims does not interfere with the proceedings, they do have a right and an interest in being present.

One of the unavoidable consequences of the right to a public trial is the victim's communication through silent signals or the inferences that the jury makes of those signals. *Musladin v. Lamarque*, 2005 WL 2679717 *4 (9th Cir. (Cal.)) (Kleinfeld, J., Kozinski, J., O'Scannlain, J., Tallman, J., Bybee, J., Callahan, J., and Bea, J. dissenting). "Courts cannot expect that families will always conform their behavior to the standards of trained professionals. However, the court system must function in the face of occasionally imperfect behavior from the public." *Chatman*, 38 Cal. 4th at 365.

> "Sometimes there is a wall of brown or blue in the spectator's section, displaying that state or municipal police care a great deal about the case. Sometimes the courtroom is full of Hells Angels colors, signifying a

> concern for their brother in the defendant's chair. The local rape support center volunteers may crowd into the seats behind the prosecutor in a rape trial while the victim sits silently looking at the jurors through the entire trial… There is nothing wrong with the jury knowing that people care about the case and the parties… Public concern and public sympathy for one side or the other are part of what it means for a trial to be 'public.'

Musladin, 2005 WL 2679717 *4 (Kleinfeld, J., Kozinski, J., Scannlain,J., Tallman, J., Bybee, J., Callahan, J., and Bea, J. dissenting).

The question is therefore, what is the line of demarcation between what victim conduct is permissible and what is not. In *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986), the Supreme Court delineated the proper test to determine whether the conduct rises to such a level as to deprive the defendant of his sixth amendment right to a fair trial. The inquiry is whether the conduct is "so inherently prejudicial [meaning an 'unacceptable risk is presented of impermissible factors coming into play'] so as to pose an unacceptable threat of a denial of that right." 475 U.S. at 572. Impermissible factors are those that can be said to "brand the defendant with an unmistakable mark of guilt." *Id*. at 572.

The case law suggests that for a defendant to be 'branded' the conduct must be unambiguous in its advocacy. In Holbrook, a bank robbery case, several uniformed officers were present in the courtroom, seated in the spectator section behind the bar. *Holbrook*, 475 U.S. 560. The defendant filed a *habeas corpus* petition claiming that the presence of the officers was inherently prejudicial and amounted to a denial of his sixth amendment right. The Court reversed the lower appellate court and denied the petition. The Court found that while prison clothes or shackles are an unmistakable sign of the defendant's guilt, "the presence of guards at the defendant's trial need not be interpreted

as a sign that he is particularly dangerous or culpable." Id. at 569. The Court went on to say that the jurors could have inferred that the officers were there to ensure decorum or prevent disruptions from outside the courtroom or the jury could have inferred nothing at all from their presence.

On the other hand in *Estelle v. Williams*, 425 U.S. 501 (1976) a defendant petitioned that his right to a fair trial was undermined because he was forced to wear prison clothing at trial. The Court found that the constant reminder that the defendant is in custody can impair the jury's judgment and erode the presumption of innocence. The prison garb was a clear, "unmistakable mark of guilt" that constituted an "impermissible factor coming into play". In *Estelle*, however, the court discussed *United States ex rel. Stahl v. Henderson*, 472 F.2d 556 (5th Cir. 1973), where a defendant was charged with murdering a fellow prison inmate. In that case, the fact that the defendant was tried wearing prison clothing was not found to be prejudicial because the jury already knew or would soon inevitably learn of the defendant's incarceration. "No prejudice can result from seeing that which is already known." *Id.*at 557.

The trial court therefore has discretion to decide whether conduct on the part of victim survivors or other spectators poses such a threat and the court has the responsibility to cure the prejudice if it is found. *Chatman*, 38 Cal. 4th at 369.

> "A trial is the recreation of a human event. When the event involves life and death, the aftermath for all those affected is profound and emotions run high. Courts must be vigilant to ensure that the proper legal resolution is untainted by extraneous influence… Different people manage grief, anger, loving support and other human feelings in different ways. Surely, we would not say that the mother of either the victim or of the accused should be excluded from the courtroom simply because she might act beyond the strictures of accepted legal deportment. Courts have the responsibility to manage this reality but they cannot ignore it."

Id. at 369.

In *Chatman*, the victim's mother made several outbursts during the course of the proceedings including during defendant's testimony. The outbursts however did not speak to the defendant's guilt or innocence. They did not provide the jury with any new information outside the record. "Even without observing [the mother] in person, any reasonable juror would know that the crime caused the victim's family anguish." *Id.* at 369. The court found that the outbursts were curable by the court's admonition and no prejudice was found.

Similarly, in *People v. Lucero*, 44 Cal. 3d 1006 (Cal. 1988), the victim's mother cried out just as the jury was directed to leave the courtroom for deliberation. The substance of the outburst was information outside the record that the jury hadn't heard during the trial. The court found that the situation was "analogous to cases where a jury hears inadmissible evidence because of improper argument by the prosecutor or through the improper testimony of a witness. In such cases prejudice is not presumed. Indeed, it is generally assumed that such errors are cured by admonition [and a jury instruction to disregard] unless the record demonstrates the misconduct resulted in a miscarriage of justice." *Lucero*, 44 Cal. 3d at 1023. The court again found, just as in *Chatman*, that the jury was not prejudiced by the spectator misconduct. In fact, the court found that up to that point there had been no California cases that have reversed a judgment because of spectator misconduct. *Lucero*, 44 Cal. 3d at 1024 n10.

The reality of a criminal trial is that it does not take place in a hermetically sealed vacuum. "There is no legitimate way for the judges to prevent spectators in a public trial from showing that they care about the case and support one side or the other, even if only by where they sit and who they look at with sympathy or

hostility." *Musladin,* 2005 WL 679717*4 (Kleinfeld, J., Kozinski, J., O'Scannlain,J.,Tallman, J., Bybee, J., Callahan, J., and Bea, J. dissenting).

There are countless impermissible inferences that the jury could make, that could be prejudicial but which the jury is instructed to ignore. Just as juries are instructed to ignore certain questions or witness answers, the jury in this case was instructed to base their decision on the facts and on the law, and not to let "sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" color their decision. It is assumed that regardless of spectator misconduct, the jury follows the instructions they are given. *Weeks v. Angelone,* 528 U.S. 225, 234 (2000).

Communication from victim survivors or other spectators, whether silent signals of grief or conduct conveying solidarity do not corrode the defendant's presumption of innocence. It is clear to the jury that the defendant is not there by choice. It is clear that the state thinks he is guilty. It is clear who the victim's family is and that they mourn the loss of a loved one. Their tears and sadness and desire for justice in the courtroom do not prejudice the jury or corrode the defendant's presumption of innocence. Their participation and faith in the system is crucial to the maintenance of societal order. They cannot and should not be excluded.

The dispositive question is whether the circumstances so clearly and unambiguously send signals to the jury of the defendant's guilt that the presumption of innocence is corroded. In *Holbrook*, the presence of the uniformed guards did not send such signals. The jury could have inferred that they were there to preserve order or the jury could have inferred nothing at all. On the other hand, in *Estelle*, the prison garb was

a clear and unambiguous mark of guilt that sent unmistakable signals to jury of the defendant's guilt.

In the present case, the buttons with the picture of Tom Struder do not send clear unmistakable signals to the jury of the defendant's guilt. Assuming they were visible to the jury and further assuming the jury recognizes Tom's picture, the buttons did not send any explicit messages vis-à-vis the defendant. The buttons could have conveyed the message that the family was upset and mourning his death but as the California Court of Appeal noted, they were nothing more than "the normal grief occasioned by the loss of a family member." The buttons do not suggest or express any message in relation to Musladin's guilt or innocence.

Furthermore, the presence of the buttons are not prejudicial because just as in *ex rel. Stahl*, "[n]o prejudice can result from seeing that which is already known." 472 F.2d at 557. During the trial, the jury viewed several photos of the murder scene as well as post-mortem photos. The jury, having already seen, or imminently being exposed to such powerful scenes would not have reacted to the innocuous photo of Tom on the button. The buttons in this case are not an "unmistakable mark of guilt" and therefore do not amount to an "impermissible factor coming into play". Their presence in the courtroom does not rise to the level of "inherently prejudicial" and does not deprive the defendant of his sixth amendment right to a fair trial.

II. UNDER FEDERAL LAW THE ACTION OF THE NINTH CIRCUIT COURT OF APPEALS IN GRANTING THE PETITION OF HABEAS CORPUS WAS NOT A PROPER EXERCISE OF FEDERAL AUTHORITY OVER A STATE COURT DECISION

Habeas corpus should not have been granted by the Ninth Circuit Court of Appeals because the California state court decision was not contrary to nor did it involve an unreasonable application of clearly established Federal Law as determined by the Supreme Court of the United States, nor was the decision based on an unreasonable determination of the facts in light of the evidence presented. *28 U.S.C.S. § 2254.*[4]

The task of the Ninth Circuit Court of Appeals was to review a petition for a writ of *habeas corpus* with a limited review and a degree of deference in order to determine whether the state court acted contrary to clearly established Supreme Court precedent or whether it unreasonably applied the facts.

In 1996, Congress amended the standard that federal courts must apply to state criminal convictions in *habeas* cases. The *Musladin* petition for *habeas corpus* is governed by the Anti-Terrorism and effective Death Penalty act (hereinafter "AEDPA").

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[4] *28 U.S.C.S. § 2254* provides in part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court 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; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The AEDPA limits the source of clearly established federal law to Supreme Court cases. Under the AEDPA a writ of *habeas corpus* could not be granted unless a state court decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. As the result of the AEDPA, an appellate court can no longer reverse a state court decision merely because that decision conflicts with the United States Court of Appeals for the Ninth Circuit precedent on a federal constitutional issue. *Moore v Calderon*, 108 F3d 261 (9th Cir. 1997).

In the instant matter, it is not the responsibility of the Ninth Circuit Court to review the decision of the state courts, but instead to determine whether the state court acted contrary to the "clearly established Supreme Court" precedent. Furthermore, a state court decision may not be overturned on *habeas* review, because of a persuasive Ninth Circuit-based law, but rather a writ may issue only when the state court decision is "contrary to, or involved an unreasonable application of," an authoritative decision of the Supreme Court." *Moore*, 108 F.3d 261. Under the *habeas* statute, unless a state has done something that violates clearly established Supreme Court precedent, then the petitioner is not entitled to *habeas* relief. Federal *habeas* courts are precluded from considering the decisions of the inferior federal courts when evaluating whether the state court's application of the law was reasonable.

In order to determine whether Musladin is entitled to federal *habeas* relief, the issue of whether the buttons depicting the deceased individual worn by members of the public at the trial posed a "risk of impermissible factors" that is similar to those previously found to exist in other circumstances. The relevant Supreme Court cases that

the Ninth Circuit reviewed were *Estelle,* 425 U.S. 501 , (permitting spectators at a rape trial to wear anti-rape buttons was a denial of the defendant's rights of due process), and *Holbrook,* 475 U.S. 560 (armed uniformed officers in the spectators' row behind the prisoner is not inherently prejudicial.).

Contrary to the mandate of the AEDPA, the Ninth Circuit did not limit its decision to a reliance on Supreme Court precedent; instead the court based its decision of the *habeas corpus* on a Ninth Circuit case, *Norris v. Risley,* 918 F.2d 828 (9th Cir. 1990). In *Norris,* the court held that the wearing of "Women Against Rape" buttons by spectators during appellant inmate's trial was so inherently prejudicial as to pose an unacceptable threat to the right to a fair trial. It was not shown that this case illustrated an unreasonable application of the Federal Law under the Supreme Court. The Ninth Circuit considers *Norris* a persuasive case, and does not follow the limitations of the AEDPA restrictions of showing the contradictory and unreasonable application of Federal law as established by the Supreme Court.

In *Mitzel v. Tate*, 267 F.3d 524 (6th Cir. 2001**)** the Court held that "we may not look to the decisions of our circuit, or other courts of appeals, when deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law." Similarly, the Tenth Circuit held in *Welch v. City of Pratt*, 214 F3d 1219 (10th Cir. 2000) held that the AEDPA "restricts the source of clearly established law to [the Supreme] Court's jurisprudence" and federal courts are therefore "no longer permitted to apply our own jurisprudence." Additionally, the Seventh Circuit determined that "federal courts are no longer permitted to apply their own jurisprudence, but must look exclusively to Supreme Court case-law." In our case, the Ninth Circuit used a circuit

case, not a Supreme Court case, *Norris v. Risley*, but the statute says we cannot do that, and that it must be limited to the law "as determined by the Supreme Court of the United States." Furthermore, according to *Lockyer v Andrade*, 538 U.S. 63, 75 (US 2003), the state court's application of clearly established law must be “objectively unreasonable." In the instant matter, it was not.

In *Williams v. Taylor*, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000), the Supreme Court interpreted the language of AEDPA, and decided that a distinction must be made between what is "contrary to" and an "unreasonable application of" clearly established Supreme Court precedent. The Court held that for a state court's decision to be "contrary to" clearly established Supreme Court precedent, it must "arrive at a conclusion opposite to that reached by this Court on a question of law [,]" or it must face a set of "facts that are materially indistinguishable from a relevant Supreme Court precedent and" still arrive at an opposite result. (Id. at 405)

As stated in *Williams*, the federal courts may not overturn a state court's decision simply because the courts believe that the state court applied U.S. Supreme Court precedent incorrectly. Instead, the state court's application of Supreme Court precedent must also be objectively unreasonable. (*Id.* at 411) The state appellate court in the present case commented that it "considered the wearing of the photographs of victims in a courtroom to be an 'impermissible factor coming into play,' the practice of which should be discouraged," quoting the "impermissible factor" language from *Williams*.

In this case, the Ninth Circuit Court of Appeals misapplied the federal review statute and 'took the concept of fairness" and permitted it to be "strained till it is narrowed to a filament." In doing so, the court failed to "keep the balance true." [5] The decision of the Ninth Circuit handed the defendant a windfall, and in doing so, rendered the victim a "faceless stranger." *South Carolina v. Gathers,*, 490 U.S. 805, 821, 109 S.Ct. 2207, 2216 (1989) (O'Connor, J. dissenting).

CONCLUSION

For the foregoing reasons, and those asserted by Petitioner and other *amici*, the decision of the Court of Appeals or the Ninth Circuit should be reversed.

Respectfully Submitted,

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[5] Quoting Justice Benjamin N. Cardozo in Snyder v. Massachusetts, 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed. 674 (1934)