

No. 05-15275

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CARL MERTON IRONS, II,

Petitioner-Appellee,

vs.

TOM L. CAREY, Warden,

Respondent-Appellant.

**On appeal from the United States District Court for the Eastern District of California,
No. CV-04-00220-LKK
The Honorable Lawrence K. Karlton, Judge**

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION IN
SUPPORT OF APPELLANT AND SUPPORTING REVERSAL**

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CORPORATE DISCLOSURE STATEMENT
(Rule 26.1)

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**BRIEF AMICUS CURIAE OF THE
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INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves an attack on Congress's landmark reform of habeas corpus law in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This law, if and when properly implemented, will greatly

reduce unnecessary delay in the enforcement of capital punishment and reduce the number of correct criminal judgments erroneously overturned on federal habeas corpus. These changes would advance the rights of victims and society which CJLF was formed to protect.

CJLF was granted leave to file in this Court's order of June 8, 2005.

SUMMARY OF FACTS AND CASE

In 1984, petitioner Carl Irons murdered a neighbor whom he suspected of theft. *See Irons v. Warden*, 358 F. Supp. 2d 936, 940-941 (E.D. Cal. 2004) (magistrate judge's findings and recommendations). Irons shot the victim 12 times with a .22 rifle, stated he was going to let him bleed to death, then stabbed him twice in the back with a knife. After leaving the victim's body in his residence for 10 days, Irons attempted to dispose of it in the ocean by wrapping the body in wire mesh and weighting it down with pipe. The body washed up on the shore anyway. *Id.* at 941. The following year, Irons was convicted of second-degree murder and sentenced to 17 years to life: 15-to-life for murder, plus a two-year firearm enhancement. *Id.* at 939.

Noncapital murders in California remain subject to the Indeterminate Sentencing Law. The sentence is fixed by statute at a given number of years to life, and the Board of Prison Terms determines the actual time of release on parole. *See In re Powell*, 45 Cal. 3d 894, 901, 755 P.2d 881, 885 (1988).

The board's discretion is broad but not absolute. *See id.* at 902, 755 P.2d at 886. The board must have "some basis in fact for its decision." *Id.* at 904, 755 P.2d at 887.

In the present case, the board denied parole primarily on the cruel, callous, and calculated manner of the murder. 358 F. Supp. 2d at 942-943. The Marin County Superior Court found that the board's decision was supported by substantial evidence. *Id.* at 940. Because "petitioner received a silent denial from the California Supreme Court," *id.*, federal habeas courts look through that decision to the Superior Court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991).

The magistrate judge recites the standard for habeas relief required by Congress early in the opinion, *see* 358 F. Supp. 2d at 939-940, and then proceeds to ignore it, a disturbingly common pattern. *See, e.g., Price v. Vincent*, 538 U.S. 634, 639 (2003). Not once in the substantive discussion does the magistrate judge cite a Supreme Court precedent that the state court decision is contrary to or an unreasonable application of. *See* 358 F.Supp.2d at 941-949. The entire decision is based on the premise that "continued reliance on an unchanging factor such as the circumstances of the offense could result in a due process violation," *id.* at 941, based on a precedent of this Court. The opinion is devoid of any authority whatever that this premise is "clearly established Federal law, as established by the Supreme Court of the United States," as Congress has required. *See* 28 U.S.C. § 2254(d)(1).

On January 18, 2005, the District Court adopted the findings and recommendations, after finding they were "supported by the record and by proper analysis." *Id.* at 939.

The warden appealed. After briefing and oral argument before this Court, the Court ordered supplemental briefing on the constitutionality of § 2254(d)(1). *See infra* at 5.

SUMMARY OF ARGUMENT

This Court has already decided that § 2254(d)(1) is constitutional. If this issue is to be revisited, it should be heard en banc as an initial matter. Not only is the prior panel decision binding on the present panel, but the great importance of the issue and the enormously disruptive effect of any decision against the statute require that the issue go through as few levels of review as possible.

The theory underlying the question posed by the Court was thoroughly debated in the years following enactment of the Antiterrorism and Effective Death Penalty Act of 1996, and every Court of Appeals to consider the question upheld the statute. The statute is constitutional under either of two powers that Congress has always had and long exercised.

First, when Congress authorizes a federal court to grant a remedy, Congress can limit the circumstances in which that remedy can be granted. The power to grant injunctions is generally given, but withheld in cases of tax collection and, with some exceptions, enjoining state courts. Damages are authorized for civil rights violations, with limitations for government officials under qualified immunity. This is so even though in many individual cases there is no other effective remedy.

Congress also has the power to prescribe the effect one court’s judgment will have in a case before another court. Since 1790, Congress has provided the general rule that final state court decisions are *res judicata* in federal courts, even on federal constitutional questions. Congress has the power to make an exception for habeas corpus, but in AEDPA it limited the scope of the exception to patently wrong state-court decisions. Arguably correct decisions are once again subject to the general rule of issue preclusion.

All of these examples are contrary to the thesis that an Article III court must always render independent judgment on the merits of the underlying claim. When a court decides that the law of remedies precludes the remedy requested or that the law of judgments requires that the prior judgment have preclusive effect, then the court has decided the case. Nothing in Article III requires the court to go any further.

ARGUMENT

I. Any challenge to the constitutionality of AEDPA should be heard en banc as an initial matter.

On May 18, 2005, this Court directed supplemental briefing in this case:

“The supplemental briefs shall discuss the constitutionality of the standards that Congress has set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2254(d)(1). Specifically, the parties should discuss, in light of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), whether 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 28 U.S.C. § 2254(d)(1), this court should decline to apply the AEDPA standards in this case.”

These are issues which had been vigorously debated between the enactment of AEDPA and the Supreme Court’s decision in *Williams v. Taylor*, 529 U.S. 362 (2000) but had been considered resolved since then. For the reasons that follow, amicus CJLF suggests that if the question is to be reopened, it should be heard and decided en banc as an initial matter, without a panel decision on the question.

In *Williams*, counsel for petitioner filed a certiorari petition in the Supreme Court posing four questions. Question 4 was, “Does the Fourth Circuit’s interpretation of 28 U.S.C. § 2254(d)(1), if statutorily sound, nonetheless violate Article III of the United States Constitution by improperly limiting the responsibility of federal courts to decide questions of federal constitutional law?”

The Supreme Court limited its grant of certiorari to parts of Question 1, the substantive question, and Questions 2 and 3, the statutory interpretation questions, effectively denying certiorari on Question 4. *See Williams v. Taylor*, 526 U.S. 1050 (1999) (order granting certiorari). Of course, the Supreme Court’s decision to deny certiorari, even in part, does not set a precedent. *See Teague v. Lane*, 489 U.S. 288, 296 (1989); *Missouri v. Jenkins*, 495 U.S. 33, 53 (1990). Yet it would seem very odd to construe a statute in a particular way over a timely objection that construction would be

unconstitutional without considering the objection, if the Court thought the objection had any merit. *Cf. Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-213 (1998) (not addressed where issue neither raised nor decided below). Although the Supreme Court’s interpretation of § 2254(d)(1) in *Williams* was not as deferential as the Fourth Circuit’s interpretation, *see* 529 U.S. at 409, it still rejected *de novo* determination of the questions of federal law, *see id.* at 407, which was the element of the statute that *Williams* had challenged as unconstitutional.

Looking at the Court of Appeals decisions on this statute prior to *Williams*, it is not hard to see why the high court did not consider the question “certworthy.” The constitutional argument had been rejected by every Court of Appeals to consider it, including this Court. *See, e.g., Duhaime v. Ducharme*, 200 F.3d 597, 601 (9th Cir. 2000); *Lindh v. Murphy*, 96 F.3d 856, 871-874 (7th Cir. 1996) (en banc), *rev’d on other grounds*, 521 U.S. 320 (1997); *Green v. French*, 143 F.3d 865, 874-875 (4th Cir. 1998), *approved in part and disapproved in part on other grounds, Williams*, 529 U.S. at 407, 409. Further, even though the high court had expressly denied review of the constitutional argument, petitioner got that argument in anyway by invoking the doctrine of “constitutional doubt” in support of his proffered interpretation of the statute. *See* Brief for Petitioner at 43-48, *Williams v. Taylor* (U.S.) (No. 98-8384). Justice Stevens’ opinion, which is effectively a dissent on the key interpretation point, obliquely refers to the *Marbury*-based argument. *See* 529 U.S. at 378-379 (concurring in the judgment). The Court’s rejection of the interpretation proffered by the petitioner and Justice

Stevens without discussing any doubts of constitutionality implies that the Court considered the constitutional argument insubstantial. *See* R. Fallon, D. Meltzer, & D. Shapiro, *Hart and Wechsler's Federal Courts and the Federal System* 1350 (5th ed. 2003) (“The Court, needless to say, implicitly rejects this view.”) The question has been treated as settled ever since, with federal courts at all levels exploring the meaning and applications of this statute, without questioning its constitutionality. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003).

As the warden's brief notes, a panel of this Court cannot overrule a precedent set by another panel. *See* Appellant's Supplemental Brief 2-4. Although the discussion in *Duhaime* is not extensive, it is sufficient to demonstrate that the essential elements of the argument set forth in this Court's supplemental briefing order were considered and rejected. *Duhaime* relied on *Green v. French, supra*, “holding that § 2254(d)(1) does not unconstitutionally limit inferior federal courts' independent interpretive authority to determine meaning of federal law in any Article III case or controversy” and rejecting the related separation of powers argument. *See* 200 F.3d at 601. The *Duhaime* court also rejected arguments based on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). *See* 200 F.3d at 601 & n.5. If the present panel disagrees with the *Duhaime* panel, all it could properly do is express that disagreement, follow *Duhaime* under protest, and then call for rehearing en banc. An internal call for an initial hearing en banc with a supporting memorandum would do the job as well.

Aside from the mandate to follow circuit precedent, there is another reason to consider this question en banc, if at all. A panel decision declaring this statute unconstitutional would have a massively disruptive effect on the handling of habeas corpus cases. Like any landmark reform, AEDPA created a host of legal questions, and the dust is only now settling to the point where courts can see their way clearly. A panel decision which finds a way to evade the *Duhaim* precedent would make the district courts temporarily obligated to follow a disruptive new precedent that is nearly certain to be reviewed further, either by this Court en banc or by the Supreme Court, under both the conflict and exceptional importance criteria. *See* Fed. R. App. P. 35(a); Sup. Ct. R. 10(a), (c). Deciding the question en banc initially would, if the decision is against the statute, shorten the period of uncertainty and disruption, because that decision could be, and almost certainly would be, reviewed directly by the Supreme Court. Although panel decisions can also be reviewed directly, such a decision would force the state to choose between massively disruptive delay and bypassing this Court's normal en banc procedures.

Only parties can actually petition for hearing en banc. *See* Fed. R. App. P. 35(b). However, the court can order hearing en banc *sua sponte*, and nonparties can always suggest. Amicus CJLF therefore suggests that, in the event the court decides to do anything other than accept *Duhaim* as precedent, the Court hear this issue en banc as an initial matter.

II. Section 2254(d)(1), as construed by the Supreme Court, does not violate Article III or the separation of powers.

A. Cases and Controversies.

The thesis that underlies the Court’s supplemental briefing order appears to be essentially the same one set forth in Liebman and Ryan, “Some Effectual Power”: The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696 (1998). As the leading textbook on federal courts notes, “Liebman and Ryan’s argument is rich and complex but bristles with difficulties, some of which are highlighted by Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum.L.Rev. 888 (1998).” R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler’s Federal Courts and the Federal System 1350 (5th ed. 2003). The response article to which Fallon et al. refer, written by counsel for amicus CJLF, refutes the Liebman thesis in more detail than is possible within the page limit for this brief. This brief will therefore discuss the main points and refer to the article for more detail.

The principle is, of course, well established that, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). However, that famous statement must be considered in the context of the sentence that immediately follows. “Those who apply the rule to particular cases, must of necessity expound and interpret that rule.” In other words, the duty and the authority of the judiciary “to say what the law is” is limited to the necessity of deciding “cases” and “controversies” within the meaning of Article III of

the United States Constitution. As *Marbury* itself makes clear, the decision of the case involves not only the question of whether the complaining party has a right which has been violated, but also the questions of whether the law provides the remedy he has asked and whether it authorizes the particular court to issue that remedy. *See id.* at 154.

The essence of the argument is that Article III requires federal courts in every case to independently decide every question of federal law and effectuate that decision, *i.e.*, provide an effective remedy whenever they find a violation. *See Liebman & Ryan, supra*, at 884. Fallon, Meltzer, and Shapiro, *supra*, at 1350-1351, note, “Considerable tensions exist between Liebman & Ryan’s approach” and numerous well-established rules of law. This is an understatement. Multiple contrary examples conclusively refute the Liebman thesis.

There is little dispute that Congress need not create lower federal courts at all, and once it does create them, it need only invest them with such portion of the constitutionally authorized jurisdiction as it sees fit. *See Liebman & Ryan, supra*, at 722-723; Scheidegger, *supra*, at 894-895. Congressional control does not end at creation and jurisdiction. Congress also has control over what remedies may be provided for what types of cases and what the effects of a prior judgment may be.

Given the three requirements for the moving party to prevail (jurisdiction, meritorious claims, and authorized remedy), the duty of a court to decide the case or controversy ends as soon as it is clear that one of these is missing. When jurisdiction is in doubt, that question must be resolved first, because

without it there is no power to authoritatively decide anything else. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998). For nonjurisdictional hurdles, the order of consideration varies. *Compare Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (*Teague* before merits); *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) (contours of right before immunity); *Lockyer v. Andrade*, 538 U.S. at 71 (no fixed order for § 2254(d)(1)). Even so, there are enough instances where a federal court need not or must not reach the merits of the underlying claim to refute the notion of a constitutional mandate to always reach it.

B. Limits on Remedies.

A plaintiff who has a valid claim that his right has been violated will still lose his case if the law does not provide the remedy he seeks. Congress has limited otherwise available remedies in a number of instances when it has decided, as a policy matter, that the cost to society of providing that remedy for that right exceeds the benefits.

A taxpayer who asks a federal court to enjoin collection of a state tax will be refused if the state has a facially adequate remedy, even though in practice that remedy involves potentially ruinous delays. *See Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 529-530 (1981) (Stevens, J., dissenting). This statute is deemed jurisdictional, even though it does not use the word “jurisdiction.” *See id.* at 522 & n.29. However, a damages remedy is also precluded by the nonjurisdictional principle of comity. *See Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 107 (1981). In *Fair Assessment*, the Supreme Court affirmed a judgment in favor of state officials

without ever reaching the merits of the plaintiffs' equal protection and due process claims, finding that the comity principle did not permit federal courts to provide the remedy sought. *See id.* at 115-116.

The Anti-Injunction Act, 28 U.S.C. § 2283, is one of the oldest nonjurisdictional limits on remedies imposed by Congress. This prohibition on enjoining state court proceedings does not remove jurisdiction from federal courts but rather provides a rule of decision when such an injunction is asked. *Smith v. Apple*, 264 U.S. 274, 278-279 (1924). “[T]hat is, it prevents [federal district courts] from granting relief by way of injunction in the cases included within its inhibitions.” *Id.* at 279. Even though the federal court has jurisdiction, its inquiry ends upon finding that the Anti-Injunction Act applies, and this is so even if certiorari from the state court to the Supreme Court is the only mode for federal-court review of the merits. *See Scheidegger, supra*, at 919-921.

Another limit on remedies that sheds light on the present question is the doctrine of qualified immunity. Although the boundaries of official immunity in suits under 42 U.S.C. § 1983 are judge-made, the doctrine ultimately rests on an interpretation of the statute, *i.e.*, that Congress did not intend to abrogate traditional immunities. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

Congress has given the federal courts jurisdiction over claims of violation of federal rights by state and local officials, yet where immunity applies it withholds the remedy that is, in a great many cases, the only effective one. Liebman and Ryan attempt to distinguish qualified immunity from

§ 2254(d)(1) on the ground that declaratory or injunctive relief is available. *See* 98 Colum. L. Rev. at 858. This attempt fails. As Justice Harlan noted in a related case on immunity of federal officers, in the typical case of an officer’s violation of the rights of an innocent person, “it is damages or nothing.” *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971) (opinion concurring in the judgment).

For persons wrongly searched by police who reasonably but wrongly believed they had probable cause, it is nothing. Congress has granted jurisdiction but withheld the only meaningful remedy. A constitutional issue under the Due Process Clause might be raised if Congress stripped all courts of all remedial powers, *see* 1 R. Rotunda & J. Nowak, *Treatise on Constitutional Law* § 2.11, pp. 133-135 (3d ed. 1999), but Congress has not done that here. Constitutional challenges to state criminal judgments remain fully reviewable in state courts and by the Supreme Court on certiorari. Congress’s limitation on a redundant remedy raises no separation of powers problem.

C. Limits on Relitigation.

“The general rule implemented by the full faith and credit statute—that parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction—predates the Republic.” *San Remo Hotel, L. P. v. City and County of San Francisco*, 545 U.S. ___, No. 04-340, slip op.

at 12 (June 20, 2005).¹ The normal course of action when a party reasserts a claim settled by a final judgment is to simply deny relief based on the prior judgment without inquiring into the merits. *See Scheidegger, supra*, at 911.

Congress codified this rule in 28 U.S.C. § 1738, and Congress, not the courts, makes the exceptions. *See San Remo*, slip op. at 13. Congress did make an exception in the habeas corpus law, 28 U.S.C. §§ 2241-2255. In enacting AEDPA, Congress expressly decided to maintain some relitigation but limit its scope. The legislative history here is unusually clear. Senator Biden proposed an amendment to maintain *de novo* review. Senator Kyl proposed an amendment that would effectively have given full faith and credit to the state judgment. Both amendments were defeated. *See Scheidegger, supra*, at 945-946. Senator Hatch’s middle-ground language was adopted. It was called the “deference” standard in the debate, *see id.* at 945 & n.400, and lately by the Supreme Court. *See Bell v. Cone*, 543 U.S. ___, 160 L. Ed. 2d 881, 887, 125 S. Ct. 847, 848 (2005) (per curiam). It might also be called the “Nearly Full Faith and Credit Act.” *See Scheidegger, supra*, at 958.

Section 2254(d) establishes the same general rule for habeas that § 2283 establishes for most other cases—no relitigation. *See Scheidegger, supra*, at 946; *San Remo*, slip op. at 12. The two numbered subdivisions then make

1. Liebman and Ryan appear to question this use of the term “relitigation,” putting it in quotes. *See* 98 Colum. L. Rev. at 887 n.902; *see also* Scheidegger, *supra*, at 891 n.18. This brief and counsel’s article use the term as the Supreme Court used it in *San Remo*, and as this Court did in the same case. *See* 364 F.3d 1088, 1094 (2004).

exceptions to that general rule, the one pertinent here being for cases where the state court decision is contrary to or an unreasonable application of clearly established Supreme Court precedent. As the provision's chief sponsor noted, this exception preserves federal habeas corpus for its essential purpose of correcting "fundamental defects." See Scheidegger, *supra*, at 952; *cf. Reed v. Farley*, 512 U.S. 339, 354, n. 13 (1994).

The rule against relitigating issues decided in state court is not different in kind from the rule against successive habeas petitions in federal court. Indeed, prior to 1953, the two were merely different applications of the same rule. In *Salinger v. Loisel*, 265 U.S. 224, 230-231 (1924), the Supreme Court decided that a federal habeas court presented with a claim rejected on a previous petition could reject that claim based on the prior adjudication. *Ex parte Hawk*, 321 U.S. 114, 118 (1944) held that the same rule applied to a prior adjudication by a state court. Relitigation of issues decided in state court was discretionary before *Brown v. Allen*, 344 U.S. 443 (1953). See *Darr v. Burford*, 339 U.S. 200, 215 (1950), *overruled on other grounds*, *Fay v. Noia*, 372 U.S. 391, 435-436 (1963). Congress has, in a sense, returned to the pre-1953 general rule, although in a modified form.

The notion that an Article III court with jurisdiction is constitutionally mandated to reconsider the merits of any federal question decided by a non-Article III court is not supported by the authorities Liebman and Ryan cite for it, and it is contradicted by multiple Supreme Court decisions. See Scheidegger, *supra*, at 904-908, 912-914. For over two centuries, Congress has exercised the power to decide when state court judgments will have

preclusive effect in federal court. In enacting § 2254(d), Congress has decided on a general rule of *res judicata* with a small exception for patently wrong state-court judgments. Given that Congress can and has prescribed a rule of *res judicata* for most cases that gives a preclusive effect to state judgments regardless of how wrong they may be, *see Angel v. Bullington*, 330 U.S. 183, 187 (1947), it would be very curious if Congress could not make the rule in question here.²

D. The Duty to Decide.

With the sweeping power of Congress to regulate both remedies and relitigation in mind, we return to the question of the Article III court’s duty to decide. Decide what? Is it the duty to decide “every—and the entire—question affecting the normative scope of the law,” as Liebman and Ryan, *supra*, at 884, contend? No. Plain on the face of Article III, it is the duty to decide “cases” and “controversies.” The decision of the case is the decision of whether the moving party is entitled to the remedy he seeks for the violation he claims from a court which has the jurisdiction to grant it. As soon as it becomes apparent that the answer to any of those questions is no, the case is over, and the court has no power and certainly no duty to decide anything further.

As soon as it appears that the responding party has an affirmative defense, such as statute of limitations or *res judicata*, there is no need to decide whether the elements of the moving party’s case are true. He is not entitled

2. A holding that Congress must choose between total preclusion and none might very well have the effect of prompting it to choose total.

to relief regardless. As soon as it becomes clear that the law forbids the remedy the moving party seeks, there is no need to decide anything else.

Once a federal court decides that a habeas petitioner's claim has been decided on the merits by a state court and that neither of the exceptions in paragraphs (1) and (2) of § 2254(d) applies, the case is over as to that claim. The court has decided "the only question that matters," *Lockyer v. Andrade*, *supra*, 538 U.S. at 71, *i.e.*, that the claim is precluded by a modified rule of *res judicata*, just as it does when it decides a case under the Full Faith and Credit Act. The court has decided that the extraordinary remedy that petitioner seeks, collateral attack on a judgment, does not extend to the violation he claims, just as it does when denying a damages claim under qualified immunity or a nonconstitutional claim on habeas under *Reed v. Farley*, 512 U.S. 339 (1994). *See Medellin v. Dretke*, 544 U.S. ___, No. 04-5928, slip op. at 4 (May 23, 2005) (per curiam).

City of Boerne v. Flores, 521 U.S. 507 (1997) made no change in the law in this regard. As pertinent here, *Boerne* simply reiterated the *Marbury* principle, that the judicial power "embraces the duty to say what the law is." *Id.* at 536. In the course of discharging that duty, the courts will follow their precedents. *See id.* Nothing in *Boerne* states or even remotely implies that a court must follow its own precedents in ruling on a claim already decided in a final judgment of another court. In the course of deciding *San Remo*, *supra*, this Court looked at its own Takings Clause precedents only to the extent necessary to decide the issue preclusion question. *See* 364 F.3d at 1097-1098. The Court did not decide and did not need to decide if the

California Supreme Court's decision was actually consistent with those precedents. Once issue preclusion applied, the case was over. *See id.* at 1098-1099. No relitigation of the merits in federal court was required, because state courts are competent to decide federal constitutional questions. *San Remo* (U.S.), slip op. at 23; *see also* Scheidegger, *supra*, at 902-903.

In deciding the issue preclusion question under § 2254(d), courts look to the precedents needed to decide whether an exception to the general rule of preclusion applies. For paragraph (1), that means looking to precedents of the only federal court that state courts are obligated by *stare decisis* to follow—the Supreme Court. *See* Scheidegger, *supra*, at 898-899.

The substantive precedents of other courts may be relevant to the decision of the preclusion question, but those of the particular circuit deciding the question have no more weight than others. Where the federal circuits are split on the interpretation or application of a Supreme Court precedent, for example, a state court's decision to follow the precedents of other circuits rather than this one will rarely, if ever, be unreasonable or contrary to clearly established federal law within the meaning of § 2254(d)(1). *See Boyd v. Newland*, 393 F.3d 1008, 1017 (9th Cir. 2004).

The Article III power and duty to decide the case remains unimpaired by § 2254(d). Congress has changed the criteria for deciding the cases by amending the law of remedies and the law of preclusion. Prescribing such rules of decision is the very essence of the legislative power. *See* Scheidegger, *supra*, at 909-911. Congress has not attempted to alter the constitutional rules governing criminal trials. It has, however, designated the

state courts as the primary forum for adjudicating whether those rules have been obeyed, subject to *de novo* review by the Supreme Court alone. The general rule of preclusion with the exception for egregiously wrong decisions returns federal habeas to its “secondary and limited” role, *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), of correcting “extreme malfunctions in the state criminal justice systems.” *Brecht v. Abrahamson*, 507 U.S. 619, 634 (1993), quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring).

CONCLUSION

The Court should apply 28 U.S.C. § 2254(d), as interpreted by the Supreme Court, to this case. The statute was easily within the power of Congress to enact.

June, 2005

Respectfully submitted,

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Form 8.

**Certificate of Compliance Pursuant to Fed. R. App. 32(a)(7)(C)
and Circuit Rule 32-1 for Case Number 05-15275.**

**(see next page) Form Must Be Signed By Attorney or Unrepresented
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June 29, 2005
Date

Signature of Attorney or
Unrepresented Litigant

DECLARATION OF SERVICE BY MAIL

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document by depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

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