IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS L. CAREY, WARDEN, :

Petitioner :

v. : No. 05-785

MATTHEW MUSLADIN. :

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Washington, D.C.

Wednesday, October 11, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

GREGORY A. OTT, ESQ., Deputy Attorney General, San Francisco, Cal.; on behalf of the Petitioner.

DAVID W. FERMINO, ESQ., San Francisco, Cal.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Carey versus Musladin. Mr. Ott.

ORAL ARGUMENT OF GREGORY A. OTT

ON BEHALF OF THE PETITIONER

MR. OTT: Mr. Chief Justice, and may it please the Court:

This Court has never addressed the constitutionality of photo buttons worn by spectators during a criminal trial. The two closest decisions of this Court, Estelle v. Williams and Holbrook v. Flynn established only a general rule that some courtroom practices may be so inherently prejudicial that they violate the defendant's right to a fair trial. Neither Flynn nor Williams --

JUSTICE SOUTER: Well, it went a little bit beyond that. I mean, the -- Justice Marshall announced not merely the possibility of inherent prejudice, but he spoke in terms of practices that raised a risk that improper factors would come into play in the jury decision. Isn't that the criterion?

MR. OTT: An unacceptable risk, Your Honor.

JUSTICE SOUTER: That's the criterion.

MR. OTT: Well, the test has been formulated different ways --

JUSTICE SOUTER: That's the way he formulated it. That's the way the Court in Flynn formulated it.

MR. OTT: In Flynn, it did, but it also, just a paragraph or so earlier said that the only question we need to answer is whether this practice, and there the courtroom uniformed guards, is so inherently prejudicial that it violates the defendant's right to a fair trial. We don't believe that those are material --

JUSTICE SOUTER: That was the end point that they were reaching, and then he elaborated on that by referring to the unacceptable risk that improper considerations would come into play. And it seems to me that if you're going to talk about the criterion of the test or the standard, however you want to describe it in Flynn, you've got to get that latter point about unacceptable risk of improper factors.

MR. OTT: That certainly was a formulation of the test. It's been -- we can accept it as the formulation of the test. And it was accepted by the California courts below. They attempted to apply that test. They announced the proper -- the correct clearly established law of this Court, and then proceeded to analyze the

issue.

Below, however, on Federal habeas review, the circuit court of appeals used its own circuit case to define clearly established law under AEDPA. Instead of assessing the state court's application of the general rule, the circuit court narrowed this Court's general rule into one that specifically condemned buttons.

Instead of granting the state court wide leeway to apply this Court's general rule, it -- the circuit court created a narrow rule that would seemingly prohibit buttons in any case.

JUSTICE KENNEDY: Well, I suppose if the court of appeals had case A, and it said, we interpret the Supreme Court rule to be as follows, it could then later say in case B, this is how we've interpreted the Supreme Court rule, and we're bound by case A. This is the elaboration we've given to it. And we have to find that the state court, of course, isn't bound by what we do, but we're bound by what we do when we review what the state court has decided.

MR. OTT: Well, Your Honor makes a distinction between a post-AEDPA case and pre-AEDPA cases. In a post-AEDPA setting, it is -- the circuit court of appeals is looking at its own post-AEDPA case -- post A-E-D-P-A, AEDPA case which has said that this set of facts

constitutes an unreasonable application of clearly established law.

We don't disagree that stare decisis might come into play there. It doesn't mean that that first decision was correct, but we don't -- what happened here in contrast was a pre-AEDPA decision that was used to define the clearly established law of this Court, give it more detail such that the circumstances here fell outside of it.

JUSTICE SCALIA: To apply an opinion of this Court to particular circumstances, and find that in the view of the court of appeals, it produces a certain result is not necessarily to say that that is clearly established Supreme Court law. It just means that it is their best guess as to how it comes out, right?

MR. OTT: That's correct.

JUSTICE SCALIA: I mean, they're forced to decide it one way or the other, the Supreme Court opinion either means this or that. They're not applying a clearly established test to the Supreme Court, are they?

MR. OTT: Not by doing that. However, the circuit court of appeals here expressly stated it was looking to its own circuit authority to define the law that is clearly established. It specifically stated that this case, that the state's decision was unreasonable in light

of Norris. It specifically stated that the state court's decision could not reasonably be distinguished from Norris.

CHIEF JUSTICE ROBERTS: We're looking under AEDPA at an unreasonable application of Supreme Court law. What do you do in a situation where you think the state court has incorrectly articulated Supreme Court law, but nonetheless reached the correct result? In other words, correct understanding of the established Supreme Court law would have led to the same result as their incorrect articulation of it.

MR. OTT: Mr. Chief Justice, at first, the -- the first thing to do would be to look at the fair import, as this Court stated in Wilford v. Biscotti. Look at the fair import of the decision.

Now, I don't know if you are referring to the issue about the arguable misarticulation of the text at the end of the state court's decision here, but the first question is to look at the fair import. And if the fair import is that the correct test was applied, then habeas relief does not lie.

CHIEF JUSTICE ROBERTS: Right. My hypothetical, and we'll debate later whether it is this case or not, is let's say that the state court wrongly articulates Supreme Court law. But under the correct articulation,

it leads to the same result. What happens in that case under AEDPA?

MR. OTT: I believe that the habeas relief should not lie. Now, I have seen circuit courts treat it different ways. Some courts will decline to give deference and review it de novo, but I don't think Congress intended, in enacting AEDPA, the A-E-D-P-A, that a state habeas -- a state conviction should be overturned simply because of an accident in a statement or formulation of the test, but the conviction is otherwise constitutionally balanced --

JUSTICE STEVENS: You are actually saying the answer to the Chief Justice's question is that you would then review it de novo. But on de novo review, you would sustain the conviction if it came to the right result.

MR. OTT: Yes. I believe so. If I understood you correctly -- the question correctly, yes.

JUSTICE STEVENS: You would not affirm -- you would not sustain the conviction relying on AEDPA. You would say AEDPA authorizes review, but on review, we conclude the conviction was correct. That's what I understand the AEDPA to be.

MR. OTT: Yes, with the caveat that we're assuming that the hypothetical is that the state court has misapplied, that the fair import has -- they have

misapplied the holdings of this Court.

JUSTICE STEVENS: Correct.

CHIEF JUSTICE ROBERTS: It misarticulated them. I guess the question of application is -- I mean, I assumed they reached what we would regard as the correct result under the correct standard, they just articulated the wrong standard.

Your answer, I take it, is that it would then be reviewed without AEDPA deference?

MR. OTT: No, Your Honor. Then I misunderstood the question. The deference would still apply if you could look at the decision as a whole and see that the correct standard was applied. If they have erroneously stated the standard -- if the state court erroneously stated the standard, but you can look to the decision as a whole, and see that the correct standard was nevertheless applied, deference is still due.

JUSTICE GINSBURG: We're concerned here with the court of -- the role, if any, that a circuit court, that opinions of courts other than this Court have in determining whether law is clearly established.

Do you exclude entirely from the province of what is proper for the Federal court to consider any court of appeals, Federal court of appeals decisions?

MR. OTT: Yes, we do, Your Honor.

JUSTICE GINSBURG: So that the only thing -- your argument is the only thing that is proper to look to are decisions of this Court, and that if you don't have a case on all fours, as we have no buttons case, then that's the end of it?

MR. OTT: No, Your Honor. We -- our position is that a Federal habeas court may not look at all to state or circuit authority on the question of what is clearly established, only the holdings of this Court, and what appears on their face.

If there's a general rule, such as here, the question moves to the reasonable application prong. And under that prong, because the rule is general, as this Court stated in Yarborough versus Alvarado, the more general the rule, the more leeway there is. Relief can still lie under certain circumstances, but it's -- it moves into a question of objective reasonableness of the state court's decision.

JUSTICE KENNEDY: Suppose all of the -- suppose there are five circuits. They're the only ones that looked at the issue. And they all say, we think the general rule of the Supreme Court is as follows, isn't that entitled to some weight? You're not supposed to cite that when you go to the Sixth Circuit court or you go to the state court?

MR. OTT: If Your Honor is speaking only to the clearly established prong, my answer would be no. If a circuit court says Jackson v. Virginia is clearly established law on the sufficiency of the evidence, we have no dispute with that. But to redefine or shape this Court's holdings beyond the face of those holdings, our position is that cannot be done with state or circuit law.

Circuit law and state law may be relevant to the question of reasonable application, but not on the first prong. If a Federal habeas court looks to circuit or state authority on the first prong of 2254(d)(1), the reasonableness becomes a foregone conclusion. The two -- the two sections of the statute collapse into what is essentially de novo review, as what happened here. Once, for instance, the habeas court here decided that its own circuit authority required -- or prohibited buttons, reasonableness was a foregone conclusion, even though it was addressed by the circuit.

But in further response to your question, Your Honor, our position is that on the reasonable application prong, a Federal habeas court may look to state and circuit cases. They are of varying relevance, but they should look to state and Federal circuit cases equally, but not all those cases have the same relevance. We have

-- there is a distinction between pre-AEDPA and post-AEDPA cases, and the distinction between whether those cases support or contradict the state court's opinion.

JUSTICE GINSBURG: So would there be any difference if this had been a post-AEDPA -- if the circuit precedent had been post-AEDPA.

MR. OTT: There would be a difference, Your Honor. The -- depending on the prong we're looking at, under -- our argument would still be the same under -- on the clearly established prong of 2254(d)(1), that even if Norris was a post-AEDPA case, that the circuit court could not look to Norris to define this Court's holdings.

But Norris, if it were a post-AEDPA case would have more relevance on the reasonable application prong. There, stare decisis might come into play. It doesn't mean Norris is correct. It doesn't mean that the result reached by the circuit court of appeals in this case would be correct, but it would certainly be more relevant.

JUSTICE KENNEDY: Can you tell us -- let's assume for a minute that this case were on direct review, that we don't have AEDPA. What is the standard that should control? Whether there is an impermissible -- an unacceptable risk that impermissible factors will be

taken into account by the jury? Is that the test?

MR. OTT: That is a test, the test, one of the formulations of it. I don't believe it materially differs from -- our position is it doesn't materially differ from the general due process, fair trial standard that applies in all cases.

JUSTICE KENNEDY: Well, but you should make it more specific for us. You say general due process. How does that work in this case? I want to know whether or not I can order or must order someone to remove a sign, a button, a piece of clothing. What's the test that I use?

MR. OTT: Your Honor, it is an assessment of all the circumstances, that if you're a trial judge --

JUSTICE KENNEDY: That -- unless you want to go on, that doesn't help me. We just tell all the judges in the country to assess all the circumstances, we say no more?

MR. OTT: No, Your Honor. Let's take the impermissible factor test. The state court judge should look at the circumstances before him and determine whether he believes that there is an unacceptable risk of impermissible factors coming into play.

Whether the practice at issue, whether it be buttons or ribbons or what have you, is so likely to prejudice this defendant or violate or infringe on his

fundamental rights that we need to order them removed. Not just as a matter of supervisory power, but as a constitutional requirement.

So it is a spectrum test, Your Honor. And it's essentially a totality test of the circumstances of the buttons, let's say, and there can't be a bright line rule. The circumstances --

JUSTICE BREYER: Why couldn't there be here? I mean, at some point, at some point, seeing every judge in this case say this is a thoroughly -- no, let me not exaggerate. But they say wearing buttons is a bad idea. For obvious reasons.

Now, at some point, if enough judges say that, each time they say, well, it is a bad idea, but we can't say in this case that it was so prejudicial, there's that inherent risk that it's unconstitutional. But if some point, if people begin enough is enough to say, this is quite a bad idea to have buttons being worn in a courtroom, which is not a place for demonstration, does it not become pretty clear, irrespective of exactly what opinions say what, that this is just very unfair and unconstitutional?

MR. OTT: Your Honor, my answer is no. As a supervisory matter, a state court can do whatever it wishes. Under the state constitution, state statutes,

state rules of court, can do many things under its supervisory power or even state constitutional power.

That is different altogether, however, from saying that all buttons violate the Constitution, which is different in turn from saying all buttons require habeas relief.

JUSTICE KENNEDY: What about banners? What would you do with banners?

MR. OTT: I beg your pardon?

JUSTICE KENNEDY: What would you do with banners? Would it make sense to say all banners are banned from the courtroom? I thought you would think that would make a lot of sense.

MR. OTT: Banners?

JUSTICE KENNEDY: Yes. Signs, placards.

MR. OTT: Your Honor, I haven't seen a case involving banners. I imagine that --

JUSTICE KENNEDY: I think I know why. Because it affects the atmospherics of the trial.

MR. OTT: And likewise, we don't see all the button cases where the buttons have been precluded.

JUSTICE SCALIA: Well, you also don't allow people to come into most courtrooms in tank shirts, and we don't allow people to, you know, to wear beany hats. Everything that is inappropriate for a courtroom is not

necessarily inappropriate because it would prejudice the trial; isn't that right?

MR. OTT: That's correct, Your Honor.

JUSTICE SCALIA: Maybe that's why we don't allow banners, because a courtroom is not the place for banners.

MR. OTT: That's correct, Your Honor. Decorum should not be confused with --

JUSTICE BREYER: Absolutely right. Suppose you think in this Federal court, which we are, that banners, posters, and buttons are a thoroughly bad idea.

Now, why? Not just because of decorum. But because they introduce an extraneous factor into the judgment of the jury.

And suppose I also think -- I'm not saying I do, I'm trying this out -- but it is pretty hard to draw lines among buttons. It is pretty hard to draw lines among banners. And the only way to guarantee fair trials in whole -- is to have a wholesale rule on this. No buttons, no banners, no petitions, no posters.

How would you explain -- you just say the law just doesn't permit that.

MR. OTT: Well, Your Honor --

JUSTICE BREYER: What do you want to say about that? Because that is a concern I have.

MR. OTT: I understand, Your Honor. And this Court obviously has the power to enact a prophylactic rule that -- but a prophylactic rule covers many unconstitutional as well as constitutional practices. And that a prophylactic rule requires -- the prophylactic rule that might be enacted would require preclusion of buttons does not mean that all the buttons that might come up are necessarily prejudicial.

JUSTICE KENNEDY: I'm not so sure. You think that we could just say we're going to exercise our best judgment, not necessarily amend the Constitution, just because it is a good idea, banners and buttons are hereby banned forever? Do we have the authority to just say that?

MR. OTT: Well, Your Honor, in this case, this case has -- this Court granted certiorari on the question of application of the AEDPA. So we are not asking -- certainly not asking for that.

JUSTICE KENNEDY: We're exploring initially what the rule ought to be.

JUSTICE STEVENS: May I ask this question? Supposing we all thought that this practice in this particular case deprived the defendant of a fair trial, but we also agreed with you that AEDPA prevents us from announcing such a judgment. What if we wrote an opinion

saying it is perfectly clear there was a constitutional violation here, but Congress has taken away our power to reverse it.

Then a year from now, the same case arises. Could we follow -- could the district court follow our dicta or could it -- would it be constrained to say we don't know what the Supreme Court might do?

MR. OTT: It could not follow this Court's dicta under this Court's statement in Williams v. Taylor that only the holdings, not the dicta, of this Court establish clearly -- clearly establish Supreme Court authority.

I believe that the rule, if there's going to be one, should be the rule that was applied here. A general rule of fundamental fairness considering the totality of the circumstances before the trial court. I think the rule works. And it worked in this case.

CHIEF JUSTICE ROBERTS: You don't need to establish that rule, do you? You just need to establish that what the Supreme Court determined was not an unreasonable application of this Court's law?

MR. OTT: That's correct, Mr. Chief Justice. We're not asking for a new rule applicable to buttons. The reason we're here is because of the circuit court's method in addressing this case and granting habeas relief.

JUSTICE SOUTER: What if the button had said -- the three buttons had said "Hang Musladin," would you say that there was not -- there was not sufficiently clear law from this Court to find that practice unconstitutional under Justice Marshall's formulation.

MR. OTT: Your Honor, it wouldn't change the clearly established prong. We still have the general rule, but I think that your instance is one that all judges would agree is so egregious that it falls within the ambit of that, and would require habeas relief.

JUSTICE KENNEDY: Falls within the ambit of what? Of a mob-dominated atmosphere or -- your answer to Justice Souter was AEDPA would -- was that this would require reversal even under AEDPA; is that your answer?

MR. OTT: I can concede that, yes, Your Honor, that --

JUSTICE SOUTER: We both want to know why you say that.

MR. OTT: Well, the question is objective reasonableness. And we don't dispute that some circumstances may present such a situation that no one, no judge is going to disagree that the situation, at the state court, if it denied the relief on the three buttons you posed was unreasonable.

JUSTICE SOUTER: Okay, but what are the --

getting into the formulation, what are the impermissible factors as to which a risk is raised by wearing the "Hang Musladin" button? What are those factors?

MR. OTT: The "Hang Musladin" button, the impermissible factor first is the explicit message. "Hang Musladin." "Convict him." It's urging the jury to convict him and that --

JUSTICE SOUTER: Well, what's wrong with that? The prosecutor is going to get up and urge the jury to convict him. What is wrong with it on the button? What risk does the button raise that the prosecutor's argument does not? That's what we're getting at.

MR. OTT: It is an outside influence, Your Honor. It is an influence coming from --

CHIEF JUSTICE ROBERTS: How different is it from the victim's family sitting in the second row behind the prosecution every day of the trial? And I mean, I'm -- the hypothetical correctly focuses on the question, at least for me, of whether or not you can have specific applications of general rules that are clearly established. I'm just not sure your agreement with it is advisable because it seems to me that simply having -- how many people have to wear these buttons? One person shows up with a "Hang Musladin" button, does that mean it is a mob-dominated trial?

MR. OTT: No, Your Honor. My -- what I -- the point I meant to make was that we're not urging that relief can never lie because there's a general rule of application.

CHIEF JUSTICE ROBERTS: All right.

MR. OTT: It's a spectrum. And I would -- I'm not conceding that the example necessarily requires habeas relief, because there are a whole host of circumstances that we wouldn't know about it, for instance, whether it was ever seen, in cases that people don't see the button, or what have you.

JUSTICE SOUTER: What about simply the facts that we have in this case, which I thought I was doing, maybe I wasn't clear about it, but the button is different. Instead of putting a picture of the victim, it's got the statement, "Hang Musladin." It's worn every day by three members of his family who sit behind the prosecution table within the sight of the jury. Assume those facts. Would habeas relief be required under the general rule?

MR. OTT: I don't think it would be required. I think it would be reasonable to say that habeas relief must lie. There are many -- there are much fewer inferences that could be drawn there.

JUSTICE SOUTER: Is that a way of saying that it's

required? Should -- look, should a court grant habeas relief on my facts?

MR. OTT: Not necessarily, Your Honor. It -- there are --

JUSTICE SOUTER: Why?

MR. OTT: Well, as Mr. Chief Justice pointed out, three family members of the victim sitting in the front row, buttons or not, the buttons don't add -- add little, if anything, to the three victim's family members sitting there grieving through a trial. They add very little, for instance, in this case --

JUSTICE SOUTER: I don't know whether they are grieving or not, but I certainly know the sentiment that they are trying to convey to the jury if they wear a button that says "Hang Musladin."

MR. OTT: Your Honor, I submit that the sentiment is obvious to the jury.

JUSTICE SOUTER: Pardon?

MR. OTT: I would submit that that sentiment is obvious to the jury, that a juror --

JUSTICE SOUTER: They may not want him hung. They may not believe in the death penalty.

JUSTICE SCALIA: I wish you hadn't said that. Because I had thought that one of the things that made this case leaning in your direction is the fact that

merely having a picture of their loved one on the button doesn't convey the message, you know, hang the defendant, or even convict the defendant. It just conveys, at most, to the jury, you know, this is -- we have been deprived of someone we love, you should take this matter very seriously and consider the case carefully. It is an important matter to us. And therefore, you ought to deliberate carefully. I don't know that it means anything more than that.

MR. OTT: Your Honor, I did not intend at all to suggest that that was a message from those buttons. What I meant to say was the buttons add very little. Because I think a juror understands what a --

JUSTICE SCALIA: You said, you know, convict what's -- or hang What's His Name. That's quite -- you're equating that with the buttons in this case. And I don't think the buttons in this case say hang so and so, or even convict so and so. They just say we have been deprived of a loved one. This is a terrible matter. Please, jury, consider this case carefully. That's all it necessarily says.

MR. OTT: That's, if any message, what the buttons conveyed in this case. I was only speaking to the difference between the buttons that Justice Souter posed as putting forth a more explicit message.

JUSTICE SOUTER: Okay, assuming that explicit message, could habeas relief be granted in my hypothetical case?

MR. OTT: Not necessarily, Your Honor.

JUSTICE SOUTER: Why?

MR. OTT: Because in your case, I don't think that that message necessarily -- I think it is reasonable for a state court to conclude that those buttons did not add much to, if anything, to the presence of --

JUSTICE SOUTER: Is it reasonable for a state court to say that three family members sitting in a courtroom within sight of the jury for whatever number of days the trial ran, saying at the guilt stage, hang so and so, is exposing the jury to a proper influence, that it should, and may consider in deciding guilt or innocence?

MR. OTT: Your Honor, we could concede that for this case.

JUSTICE SOUTER: Okay. Why don't you concede that of course that would be exposing the jury to an improper influence, in the "Hang Musladin" case.

JUSTICE SCALIA: I thought some states require that the relatives of the victim be allowed to make their case to the jury for harsh penalty. I don't know that that's necessarily inappropriate to know that the --

JUSTICE STEVENS: That's at sentencing after conviction.

JUSTICE SCALIA: Yes, yes.

JUSTICE SOUTER: My hypo is at the guilt stage, not the sentencing stage.

MR. OTT: At the guilt stage, that's right. California statutes do require that victims' families be able to make a statement at sentencing. They also require that the victim's family, if the victim is not alive, be present at the guilt phase of the trial, during the guilt phase of the trial.

JUSTICE SOUTER: But at the guilt stage, is there any, is there any question in your mind that allowing the family members to display this message to a jury throughout the trial at the guilt stage is raising a risk, an unacceptable risk, that the jury will consider improper influences in reaching its verdict?
Is there any question?

MR. OTT: Your Honor, your -- your buttons might raise an impermissible risk.

JUSTICE SOUTER: That's my hypothetical. My buttons, "Hang Musladin," is there any question about the risk of improper influence on my hypothetical? Not this case, my hypothetical.

MR. OTT: They do, but it might still be

reasonable for a state court to conclude otherwise. And it was certainly reasonable for the state court here to conclude that three simple buttons bearing only a photo did not convey any message of blame, guilt, anything other than grief of this family.

If I may reserve the rest of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Ott.

MR. OTT: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Fermino?

ORAL ARGUMENT OF DAVID W. FERMINO

ON BEHALF OF THE RESPONDENT

MR. FERMINO: Mr. Chief Justice, may it please the Court:

I want to direct this Court's attention to the state court opinion which appears at 55A to 78A of the appendix to the petition for writ of certiorari in this case. I want Your Honors to take a look at that opinion. It is 25 pages in length, but the portion of the opinion dealing with the buttons issue is two pages in length.

Of those two pages, all but a few sentences deal directly with the Norris case. I believe it is at roughly page 72A in their -- 73A of the appendix. All but three sentences deal with the Norris case.

The Attorney General has said in its briefing that the court below teased out the particular reference to

the buttons, that it carefully parsed the opinion, that it gave a tendentious analysis. This is the description of the Attorney General. Nothing could be further from accuracy.

These two pages discuss Norris head on. It is the elephant in the room, if you will. The court below could not have -- it would have been impossible for the court below to write this opinion without addressing the Norris case head on.

JUSTICE BREYER: I thought the key sentence in this is he says the simple photograph of Tom Studer on a button which -- I don't know what the size is. Nobody has told them what the button is about. Nobody has put for the judge a picture of it. Nobody showed him what the button is. So he says a simple photograph of Tom Studer was unlikely to have been taken as anything other than the normal grief occasioned by the loss of a family member. Period. Now, what else is there to say? That's the court's conclusion.

And it is pretty hard for me -- I looked for the button. I couldn't even find the button in the record. I didn't even know what this looks like. It is a button, somebody later must have said two inches to four inches. I don't know who said that. I don't know how the judge could have known that. The button isn't in the record.

So why isn't it just a normal sign of grief unlikely to influence anybody? That's what they say.

MR. FERMINO: Justice Breyer, I think that the --

JUSTICE BREYER: In this case.

MR. FERMINO: That's correct. And I think that the court -- it is correct that the record before the state court of appeals was inadequate to address -- to answer the question. But I think what -- where the court erred is in adding and grafting on an additional element. It goes beyond that sentence that, Justice Breyer, you focused on. I think it is that the -- it is the element of branding. It's that this wearing of the buttons in a sense branded the defendant in the eyes of the jurors.

JUSTICE BREYER: It goes on frequently in an opinion. I have been known to do that myself. And I say this court over here says it's a da-da-da, and I say "sure isn't that." Well, what is it?

JUSTICE GINSBURG: And that language came from one of our opinions, didn't it? The branding language?

JUSTICE KENNEDY: That was quoting Holbrook and Flynn.

MR. FERMINO: That's correct, Justice Ginsburg. That's right.

JUSTICE GINSBURG: So you can't fault the court for just saying it isn't that. Mr. Ott says it isn't

that.

MR. FERMINO: That's correct. But I believe that it is not part of the test. It was that the branding language, as in Justice Brennan's -- in Justice Brennan's dissent was not part of the text articulated by --

JUSTICE SCALIA: Repeated later in opinions for the majority, I think.

MR. FERMINO: That's correct.

JUSTICE SCALIA: In later cases, so I mean --

MR. FERMINO: That's correct.

JUSTICE SCALIA: Don't just put it in Brennan's dissent.

CHIEF JUSTICE ROBERTS: I don't understand your point about the state court focusing on Norris. The question under AEDPA is still whether or not it is an unreasonable application of Supreme Court law.

MR. FERMINO: Well, in this instance, much has been said about the opinion and the carefully written opinion of the state court. But the portion of the opinion that focuses on this issue is, as I said, roughly two pages in length and deals almost entirely with Norris. Norris was the contrast case for the court of appeals.

JUSTICE GINSBURG: But in here it -- you agree that the California court has as much authority to say

what Federal law is as the Ninth Circuit, right? They are on a par. Ninth Circuit decisions in no way binds the Supreme Court of California. Isn't that so?

MR. FERMINO: That is correct.

JUSTICE GINSBURG: So that this state court of appeals chose to be respectful to the Ninth Circuit to consider what it had said, doesn't sound to me like a very strong argument.

MR. FERMINO: Well, Justice Ginsburg, I would respectfully disagree. I think that the -- were this discussion of Norris to be a much longer discussion -- or excuse me, part of a much longer discussion, that might be true. But its entire focus was Norris. It used Norris by way of negative explication to show that the facts before it didn't fall within the rule as derived from Williams and Flynn. And I think that goes beyond respect to the Ninth Circuit.

I think it took the case, it grappled with it, it decided that it was different than Norris. And I think that there would have been no way for the court below to have looked at the facts of this case without addressing Norris --

JUSTICE BREYER: Well, what was the -- what in your opinion -- this is why -- as you can see, I'm concerned about buttons. I think they're probably a

problem. I think all judges are concerned about them. But then I think about this particular case. And I look at that single sentence: "It was unlikely to be taken as a sign of anything other than normal grief."

I mean, suppose this had been a different case. Suppose the defense in this case was the defendant Smith didn't pull the trigger. It was an unknown person called Jones. Then if I were on the jury, I would look out, see the buttons, and I'd say, hmmm, the family thinks it was Smith. Otherwise they wouldn't be here with those buttons. I could think that.

But this isn't that case. This is a case where everyone thinks your client pulled the trigger. The only question is whether the family's son came at him with a machete. So when I look at the buttons, I'd think sure, they don't think the son came at him with -- I mean, they don't think that. He's their son. What would you expect them to think?

So that's why I thought that they are saying that sentence, in this case. In this case, it would be taken as sign of grief and nothing more.

MR. FERMINO: Well, Justice Breyer, that is certainly a plausible reading of the state court opinion. However, I think you've also identified one -- the problem with this. It is the risk, not the reality. And

that's why we have to look beyond the facts of this case and look to the rule as derived from the Williams and Flynn case, as I think the court below properly did.

And in doing so, in applying it to this case, I think you have to do away with this kind of courtroom behavior. It is simply not acceptable. It is not acceptable to wear --

CHIEF JUSTICE ROBERTS: To wear any buttons? It says, "Fair Trial."

MR. FERMINO: Any courtroom practice that causes an impermissible risk that the jury's -- that the jury would come to a conclusion based on a factor not introduced at trial is entirely prejudicial --

CHIEF JUSTICE ROBERTS: I mean, most -- I don't think -- a typical jury will understand that the victim is going to have a family, and they're going to be sorry that he's dead, and they might be there at his trial. And they may not like the person accused of murdering their son. That is not -- that is sort of like in every case. That's not -- the buttons don't seem to add much to what the jury will derive from seeing the family seated behind the prosecution bench.

MR. FERMINO: I agree with Mr. Chief Justice up unto the point of it's not different wearing the buttons. I think that you add the buttons, and you are creating --

you are doing essentially what the rule derived from both Williams and Flynn teaches us is wrong.

JUSTICE GINSBURG: But in Williams and Flynn and all of the cases that we have had, whatever way they went, it was always the government requiring a defendant to do something, wear prison clothes, appear in court with shackles. And in the case that went for the government, the extra officers in the courtroom.

We haven't had a case, have we, where it is spectator conduct as opposed to government conduct that's being attacked?

MR. FERMINO: That is correct, Justice Ginsburg. There isn't a case that is, that -- where the state action element, if you will, is not present. However, I would posit that in this case, where you have a judge, a trial judge who denies a lawyer's motion, that you have implicit in that state action, that the court has endorsed the practice of --

JUSTICE GINSBURG: That certainly goes beyond where our precedent leaves off. That is, we are dealing with direct impositions by government in a way that poses an unacceptable risk of prejudice to the defendant.

MR. FERMINO: That's correct.

JUSTICE KENNEDY: Yes. And you're having the judge say that you can't wear certain signs, you can't

make certain demonstrations. If the family were there and they -- and one of the members of the family was sobbing, with tears coming out of her eyes, I -- that --

MR. FERMINO: Justice --

JUSTICE KENNEDY: -- much, it has much more impact than a button.

MR. FERMINO: It -- and it might. But that kind of behavior by a courtroom spectator can be controlled by a trial judge if -- when it occurs. If it is spontaneous, it can be controlled. A rule that spectators aren't allowed to emote would be implausible, or would be impractical. We are not talking here today about controlling the emotions of spectators. We are talking about an impermissible factor like a message or the risk of a message.

JUSTICE SCALIA: Yeah, but there is a First Amendment problem when you're dealing with activities of people other than the prosecution, people other than the state, who is bringing this prosecution.

MR. FERMINO: There is no question that there is a First Amendment issue here.

JUSTICE SCALIA: So that makes it a different case. It makes it very hard to say, well, the Supreme Court's already decided this matter.

MR. FERMINO: Well, in the First Amendment

context, though, there's a balancing test that needs to be employed, and it --

JUSTICE SCALIA: Sure, it may come out the way -- it may come out the way you want, but it's hard to say that the Supreme Court, any Supreme Court case bears upon it, when we haven't had a case that involves weighing the First Amendment right of the people in the courtroom to wear buttons or cry or --

MR. FERMINO: I believe that Mr. Cohen in New Hampshire wearing his sign regarding the draft --

JUSTICE SCALIA: Well, but that cuts against you.

MR. FERMINO: I understand that, but --

JUSTICE BREYER: This reason -- suppose, hypothetically, I would think -- well, the rule should be no buttons. No buttons, no signs, no banners. A courtroom is a place of fair trial, not a place for a demonstration of any kind. Now, if I were to think that, and I also were to think it's just too difficult to figure out case by case whether there is or is not an improper influence, suppose I thought both of those things.

Now, you've heard, quite rightly, the other side says: One, you're supposed to decide whether this was clear in the law. Two, if you're worried about the future, you can't lay down a rule that's clear in the law

either because of A, AEDPA, and B, the case that was cited, which said it's holdings that count, not dicta.

All right. You write for me the words I'm supposed to put on paper to achieve your position.

MR. FERMINO: Justice Breyer, I think that the rule derived from the Williams and Flynn cases is that courtroom -- courtroom behavior that creates an unacceptable risk that impermissible factors have -- or have caused a jury's verdict to be based not solely on evidence introduced at trial is inherently prejudicial.

And unless it advances some important state interest, some compelling state interest like the concern that I believe Justice Ginsburg raised about the forcing a defendant to appear in prison garb or the shackling cases, that rule I think allows the opinion in this case of the court below to not violate the prescriptions of the AEDPA. I think that's clear. I think what the court below did was essentially apply the rule that I just discussed. And I think --

CHIEF JUSTICE ROBERTS: So what about -- what if the issue was mourning? The trial is being held and the families appear and they're all in black because they're still in mourning. Does that violate this clearly established rule?

MR. FERMINO: I think you're getting -- Mr. Chief

Justice, I think the hypothetical gets closer to it as well. I think a defendant's -- excuse me, a victim's family wearing, appearing in court every day wearing black gets closer to the kind of message import -- again, the risk, not the reality -- that this case is -- that the court below was concerned with.

CHIEF JUSTICE ROBERTS: No, my question is under AEDPA, if the state court said, you know, I'm not going to keep the family out even in mourning, that would violate the clearly established rule that you've just articulated?

MR. FERMINO: Yes.

JUSTICE SOUTER: Even if it didn't, though, I suppose you could draw a line between people who were doing what they naturally do, and some people do wear mourning, and some people will come into a courtroom and be reminded of the person who died and sob. But in this case, they're going out of their way to do something that people in mourning do not normally do.

MR. FERMINO: That's correct.

JUSTICE SOUTER: And so you've got -- I think you've got a stronger argument.

The problem that I have in this case is that, number one, I view the wearing of the buttons, as I just described it, as something that is abnormal and something

that is intended to presumably get the jury's attention. I don't know why otherwise they would be doing it.

And from whatever source, we do know that the button was at least two inches wide and maybe larger. So it's reasonable to suppose that the jury saw it and understood perfectly that these were people who were raising, in effect, an issue of sympathy. I can understand that, and under the general rule out of Williams and Flynn, it seems to me there's a pretty darn good argument for saying, yes, an unacceptable risk has been raised of emotionalism in the jury's deliberations as opposed to dispassionate consideration of courtroom evidence.

What, however, do I make of the fact that not one single court has ever reached that conclusion and -- you know, as a constitutional matter? Am I in the position of sort of being Jim, and they're all out of step with Jim? I'm raising a question about my own judgment in relation to the fact that no other court seems to have come to that conclusion. What do you think I should make of that?

MR. FERMINO: I think it is a factor to consider in the Court's analysis. However, I think the facts of this case are unique precisely because this typically doesn't -- we don't get this far because most trial

judges don't allow this kind of conduct.

JUSTICE GINSBURG: But there have been -- haven't there been court decisions that have held that buttons didn't compromise a fair trial right?

MR. FERMINO: That's correct.

JUSTICE GINSBURG: So in assessing the reasonableness of the California Supreme Court's decision, how could we say Federal law was clearly established when other courts considering our precedent have gone the other way?

MR. FERMINO: Because I think that under -- I think that this Court looking at the "contrary to" prong of the analysis would -- can come to a conclusion that the state court's decision wasn't -- I'm getting ahead of myself.

I think the Court can properly, in looking at it from a "contrary to" analysis, come to the conclusion that, even with that body of case law, that the state court got it wrong, that it misapplied the clearly established law of this Court.

CHIEF JUSTICE ROBERTS: You don't want to put your -- hang your hat on the "contrary to" prong, though, do you? Your argument, I thought, was an unreasonable application argument.

MR. FERMINO: I think it's both, Mr. Chief

Justice. I think it's both. I think -- I don't need to hang my hat on the "contrary to" because I think under either prong --

CHIEF JUSTICE ROBERTS: Well, but, as Justice Ginsburg pointed out, we've never even had a case involving spectators. So it's not contrary to clearly established law. We have cases stating the general principle on which it relies, so maybe it's an unreasonable application. But "contrary to" seems an awful stretch.

MR. FERMINO: I wouldn't go -- Mr. Chief Justice, I would not go as far as "an awful stretch," but I would think that we, under the unreasonable application prong, we certainly win. I think that there is also an argument under the "contrary to."

JUSTICE KENNEDY: The record is confusing, at least as I read it -- please correct me if I'm wrong -- on the showing of how many days these buttons were worn. A, is it clear from the record how many days the buttons were worn?

MR. FERMINO: It is not. It is not clear at all from the record how many days.

JUSTICE KENNEDY: So it may have been for just one day of the trial?

MR. FERMINO: It may have been. But according to

the declarations that were submitted in the petition for collateral review, those are petitions -- those are declarations of the trial counsel and of respondent's mother -- it is that they were worn on multiple days by several members of the family, and that the buttons were anywhere from two to four inches in diameter. And that's in the record.

JUSTICE KENNEDY: Where does it say that?

MR. FERMINO: Those declarations appear --

JUSTICE STEVENS: These are in the joint appendix.

JUSTICE KENNEDY: These were declarations filed with the United States district court in habeas?

MR. FERMINO: They were filed actually as part of the state collateral review proceedings. They were filed with the habeas. And it appears that they are at the JA 6 and 8.

JUSTICE ALITO: Where does it say in there that the buttons were worn every day?

MR. FERMINO: If I did -- I'm sorry, that question --

JUDGE ALITO: It says that the family members were there every day, or for many days. It doesn't say they wore the buttons every day, unless I'm missing --

MR. FERMINO: No, Justice Alito, if I said that, I misspoke. I was trying to say that the record is not

clear as to the frequency.

JUSTICE GINSBURG: There was a time when the trial judge said stop. Was there not? He initially denied the motion.

MR. FERMINO: Correct.

JUSTICE GINSBURG: But I thought that there was a time in the course of the trial when he told the family members to stop wearing the buttons.

MR. FERMINO: I don't believe so, Justice Ginsburg. I think that they were never admonished not to wear them, but that the original ruling of the trial judge stood as far as the wearing of the buttons was concerned.

JUSTICE ALITO: In his opinion on denial of rehearing, Judge Kleinfeld on the Ninth Circuit made the point that at criminal trials -- and I suppose at other trials -- it is an accepted feature of the proceeding that there are going to be spectators who identify with one or the other party. And there may be relatives of the defendant in a criminal case. There may be relatives of the victims. And it's apparent from their behavior what they think about the case and which side should win.

And that's sort of a baseline that has to be accepted in judging, not whether wearing buttons is good as a -- whether we think it would be good if we were

announcing a court rule, but whether there's a violation of due process. Do you accept that?

MR. FERMINO: Justice Alito, I do, as far as it goes, accept that as a baseline. I think Judge Bea in a separate dissent likened it to a family wedding, that we all know who is here for which party. That we have no quarrel with.

JUSTICE ALITO: So what is it about these particular buttons that's reflected in the record that shows that it goes significantly beyond what would be inferred just from that rather common feature of trials?

MR. FERMINO: I think in looking at the rule again derived from Williams and Flynn, we don't have to go there. It's the risk, not the reality. I don't know what could be inferred, and we don't know what was in the jurors' minds as they saw those buttons. But the point is that it could affect the outcome. It is an impermissible factor that causes the possibility that the jurors' verdict is based on something other than the evidence.

JUSTICE ALITO: Why is there a greater risk? Why do the buttons convey -- involve a greater risk than the kind of behavior that Judge Kleinfeld was referring to?

MR. FERMINO: Because you can imagine as a juror -- jurors are very attentive during trials -- that they

look out into the audience and see in the jury box -- I mean, out in the audience, a group of people wearing buttons. What are those buttons? What's on there? What's the point of -- there's a degree of scrutiny that's naturally going to occur by an attentive juror. That's really the issue.

JUSTICE SCALIA: Let's assume -- risk of what? That's what I'm puzzled by. Let's assume that the buttons were big enough that they could recognize that the buttons were the face of the deceased for whose murder the trial was about. Let's assume all that. What risk is that?

You know, during sentencing I can understand, oh, he caused so much grief to so many people, once we found him guilty, we should sock him with a stiff sentence. But during the guilt trial? I mean, I see, gee, the victim's family loved him a lot. This guy must be guilty. That doesn't follow at all.

In the guilt phase, I don't see how that can have any effect on the jury.

MR. FERMINO: Well, Justice Scalia, I think it's a risk of a factor that is not subjected to adversarial testing. It is the possibility that it could have an impact.

JUSTICE SCALIA: I don't see the possibility. You

tell me that --

MR. FERMINO: Here you have --

JUSTICE SCALIA: Is there a real possibility that a jury is going to say, since this man's -- this victim's family loved him so much, this guy must be guilty?

MR. FERMINO: But that's only one possible message of this button. And again, that's where I'm contrasting the risk versus the reality. It's that it could be any message that's sent.

JUSTICE SOUTER: Do you have to depend on there being a message? Isn't it enough if there is an influence that is conveyed? I mean, what I thought the problem was, was that there was as a result of the obtrusive wearing of the button, that it created a risk simply of an emotional approach to the determination of guilt or innocence.

The jurors are more likely to feel sorry for the family members sitting there a few feet away from them. Perhaps they may be more likely to feel sorry for the victim, but certainly for the family members. And it would be that improper influence of emotionalism as opposed to a particular message that is the problem here, isn't it?

MR. FERMINO: I don't disagree with that.

JUSTICE SOUTER: Do you accept that?

MR. FERMINO: I do accept that, and I don't need to rely on a message. I would agree with the argument that you've advanced.

JUSTICE SOUTER: Okay.

MR. FERMINO: The -- I think it is important here to look at the fact that no party in this case -- that the state has not advanced that this is a practice that should be endorsed or adopted. It is clear that everyone involved has had a concern with the wearing of buttons or any other kind of introduction into the proceeding that would otherwise not be subject to meaningful adversarial testing, and I think that's the problem in this case.

And I do believe if you look closely at the state court opinion in this case, you will see that the court below's opinion was correct, that they did not tease out of the opinion or parse or apply any kind of tendentious reading, when you look at exactly what the state court decided.

JUSTICE SCALIA: Well, that's just because we haven't had a First Amendment case yet. I mean, we just have parties arguing in the context of the criminal trial for the defendant, for the state. Let's wait until the ACLU brings a case about people who want to wear buttons in court. Then you're going to have people arguing, people ought to be able to wear buttons, just as they can

wear a shirt that says "Blip the Draft."

MR. FERMINO: But this Court, I think, could craft an opinion that addresses that concern without the need for simply awaiting that day.

JUSTICE STEVENS: Counsel, I'm not sure you're right that nobody was concerned about -- everybody thought the factors were wrong. I don't think the trial judge did. The trial judge said he saw no possibility of prejudice.

MR. FERMINO: And I misspoke. You're correct, Justice Stevens. The trial judge did reach that conclusion.

If there are no other questions, I would --

CHIEF JUSTICE ROBERTS: Thank you, Mr. Fermino.

MR. FERMINO: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Ott, you have one minute remaining.

REBUTTAL ARGUMENT GREGORY A. OTT,

ON BEHALF OF THE PETITIONER

MR. OTT: Thank you, Mr. Chief Justice. If the Court has no further questions, I would submit this matter.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Ott. The case is submitted.

(Whereupon, at 12:00 p.m., the case in the

above-entitled matter was submitted.)