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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS L. CAREY, WARDEN, :

Petitioner :

v. : No. 05-785

MATTHEW MUSLADIN. :

- - - - - x

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.

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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.

1 JUSTICE SOUTER: That's the criterion.

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

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

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

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

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

1 issue.

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

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

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

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

1 constitutes an unreasonable application of clearly  
2 established law.

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

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

16 MR. OTT: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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



1 misapplied the holdings of this Court.

2 JUSTICE STEVENS: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 MR. OTT: I beg your pardon?

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

14 MR. OTT: Banners?

15 JUSTICE KENNEDY: Yes. Signs, placards.

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

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

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

22 JUSTICE SCALIA: Well, you also don't allow people  
23 to come into most courtrooms in tank shirts, and we don't  
24 allow people to, you know, to wear beany hats.

25 Everything that is inappropriate for a courtroom is not

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

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

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

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

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

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

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

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

23 MR. OTT: Well, Your Honor --

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE SOUTER: Okay, but what are the --

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

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

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

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

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

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

5 CHIEF JUSTICE ROBERTS: All right.

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

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

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

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

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

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

5 JUSTICE SOUTER: Why?

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

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

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

18 JUSTICE SOUTER: Pardon?

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

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

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

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

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

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

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

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

4 MR. OTT: Not necessarily, Your Honor.

5 JUSTICE SOUTER: Why?

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

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

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

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

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



1 JUSTICE STEVENS: That's at sentencing after  
2 conviction.

3 JUSTICE SCALIA: Yes, yes.

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

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

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

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

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

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

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

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

7 CHIEF JUSTICE ROBERTS: Thank you, Mr. Ott.

8 MR. OTT: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Fermino?

10 ORAL ARGUMENT OF DAVID W. FERMINO

11 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

4 JUSTICE BREYER: In this case.

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

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

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

20 JUSTICE KENNEDY: That was quoting Holbrook and  
21 Flynn.

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

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

1 that.

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

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

8 MR. FERMINO: That's correct.

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

10 MR. FERMINO: That's correct.

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

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

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

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

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

4 MR. FERMINO: That is correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

23 MR. FERMINO: That's correct.

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

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

4 MR. FERMINO: Justice --

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

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

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

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

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

25 MR. FERMINO: Well, in the First Amendment

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

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

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

11 JUSTICE SCALIA: Well, but that cuts against you.

12 MR. FERMINO: I understand that, but --

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

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

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

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

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

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

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

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

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

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

12 MR. FERMINO: Yes.

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

20 MR. FERMINO: That's correct.

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

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

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

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

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

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

1 judges don't allow this kind of conduct.

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

5 MR. FERMINO: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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



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

8 JUSTICE KENNEDY: Where does it say that?

9 MR. FERMINO: Those declarations appear --

10 JUSTICE STEVENS: These are in the joint appendix.

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

13 MR. FERMINO: They were filed actually as part of  
14 the state collateral review proceedings. They were filed  
15 with the habeas. And it appears that they are at the JA  
16 6 and 8.

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

19 MR. FERMINO: If I did -- I'm sorry, that question  
20 --

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

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

1 clear as to the frequency.

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

5 MR. FERMINO: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 tell me that --

2 MR. FERMINO: Here you have --

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

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

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

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

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

25 JUSTICE SOUTER: Do you accept that?

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

4 JUSTICE SOUTER: Okay.

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

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

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

1 wear a shirt that says "Blip the Draft."

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

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

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

13 If there are no other questions, I would --

14 CHIEF JUSTICE ROBERTS: Thank you, Mr. Fermino.

15 MR. FERMINO: Thank you.

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

18 REBUTTAL ARGUMENT GREGORY A. OTT,

19 ON BEHALF OF THE PETITIONER

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

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

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

1 above-entitled matter was submitted.)

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<b>A</b>	<p><b>affect</b> 43:17  <b>affirm</b> 8:18  <b>agree</b> 19:9 29:24              32:23 46:2  <b>agreed</b> 17:24  <b>agreement</b>              20:21  <b>ahead</b> 39:14  <b>Alito</b> 41:17,21              41:24 42:14              43:3,8,21  <b>alive</b> 25:10  <b>allow</b> 15:22,24              16:4 39:1  <b>allowed</b> 24:23              34:11  <b>allowing</b> 25:13  <b>allows</b> 36:15  <b>altogether</b> 15:3  <b>Alvarado</b> 10:14  <b>ambit</b> 19:10,11  <b>amend</b> 17:11  <b>Amendment</b>              34:17,21,25              35:7 46:20  <b>analysis</b> 27:2              38:23 39:13,17  <b>analyze</b> 4:25  <b>announced</b> 3:20              4:24  <b>announcing</b>              17:25 43:1  <b>answer</b> 4:8 8:13              9:8 11:2 14:23              19:12,14 28:8  <b>anybody</b> 28:2  <b>apparent</b> 42:21  <b>appeals</b> 5:3,13              5:23 6:12,22              9:24,24 12:18              28:7 29:23              30:6  <b>appear</b> 33:6              36:14,22 41:9  <b>APPEARAN...</b>              1:13  <b>appearing</b> 37:3</p>	<p><b>appears</b> 10:10              26:15 41:15  <b>appendix</b> 26:16              26:22 41:10  <b>applicable</b> 18:22  <b>application</b> 5:5              6:1 7:5 9:4              10:12 11:10,21              12:15 17:17              18:20 21:4              29:16 39:24              40:9,13  <b>applications</b>              20:20  <b>applied</b> 7:20              9:13,17 18:13  <b>applies</b> 13:6  <b>apply</b> 4:23 5:9              6:10 9:11              36:18 46:16  <b>applying</b> 6:19              32:4  <b>approach</b> 45:15  <b>arguable</b> 7:17  <b>arguing</b> 46:21              46:24  <b>argument</b> 1:11              2:2,5,8 3:5,7              10:2 12:10              20:11 26:10              30:8 37:22              38:10 39:23,24              40:14 46:2              47:18  <b>arises</b> 18:4  <b>articulated</b> 7:7              9:6 29:5 37:11  <b>articulates</b> 7:24  <b>articulation</b>              7:11,25  <b>asking</b> 17:17,18              18:22  <b>assess</b> 13:16  <b>assessing</b> 5:5              39:6  <b>assessment</b>              13:12</p>	<p><b>assume</b> 12:21              21:18 44:7,8              44:11  <b>assumed</b> 9:4  <b>assuming</b> 8:23              24:1  <b>atmosphere</b>              19:12  <b>atmospherics</b>              15:19  <b>attacked</b> 33:11  <b>attempted</b> 4:23  <b>attention</b> 26:14              38:1  <b>attentive</b> 43:25              44:5  <b>Attorney</b> 1:14              26:24 27:3  <b>audience</b> 44:1,2  <b>authority</b> 6:23              10:8 11:12,17              17:13 18:11              29:25  <b>authorizes</b> 8:20  <b>awaiting</b> 47:4  <b>awful</b> 40:10,12  <b>A-E-D-P-A</b> 5:24              8:7  <b>a.m</b> 1:12 3:4</p>	<p><b>Bea</b> 43:4  <b>beany</b> 15:24  <b>bearing</b> 26:3  <b>bears</b> 35:5  <b>beg</b> 15:9  <b>behalf</b> 1:15,16              2:4,7,10 3:8              26:11 47:19  <b>behavior</b> 32:6              34:8 36:7              42:21 43:23  <b>believe</b> 4:11 8:3              8:16 13:3              18:12 22:22              26:21 29:2              35:9 36:13              42:9 46:13  <b>believes</b> 13:21  <b>below's</b> 46:15  <b>bench</b> 32:22  <b>best</b> 6:14 17:10  <b>beyond</b> 3:19              11:6 28:10              30:16 32:1              33:19 43:10  <b>big</b> 44:9  <b>binds</b> 30:2  <b>Biscotti</b> 7:14  <b>bit</b> 3:19  <b>black</b> 36:22 37:4  <b>blame</b> 26:4  <b>Blip</b> 47:1  <b>body</b> 39:18  <b>bound</b> 5:16,18              5:19  <b>box</b> 44:1  <b>branded</b> 28:13  <b>branding</b> 28:12              28:19 29:3  <b>Brennan's</b> 29:4              29:4,11  <b>Breyer</b> 14:8              16:9,24 27:10              28:3,4,10,14              30:23 31:22              35:13 36:5  <b>briefing</b> 26:24</p>
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