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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.

JUSTICE SOUTER: That's the criterion.

MR. OTT: Well, the test has been formulated

1 different ways --

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

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

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

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

25 Below, however, on Federal habeas review, the

1 circuit court of appeals used its own circuit case to
2 define clearly established law under AEDPA. Instead of
3 assessing the State court's application of the general
4 rule, the circuit court narrowed this Court's general
5 rule into one that specifically condemned buttons.

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

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

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

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

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

14 MR. OTT: That's correct.

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

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

1 Norris.

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

10 MR. OTT: Mr. Chief Justice, at first, the -- the
11 first thing to do would be to look at the fair import, as
12 this Court stated in Woodford v. Visciotti. Look at the
13 fair import of the decision.

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

20 CHIEF JUSTICE ROBERTS: Right. My hypothetical,
21 and we'll debate later whether it is this case or not, is
22 let's say that the State court wrongly articulates
23 Supreme Court law. But under the correct articulation,
24 it leads to the same result. What happens in that case
25 under AEDPA?

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

10 JUSTICE STEVENS: Aren't you saying the answer to
11 the Chief's question is that you would then review
12 it de novo. But on de novo review, you would sustain
13 the conviction if it came to the right result.

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

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

21 MR. OTT: Yes, with the caveat that we're assuming
22 that the hypothetical is that the State court has
23 misapplied, that the fair import has -- they have
24 misapplied the holdings of this Court.

25 JUSTICE STEVENS: Correct.

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

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

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

16 JUSTICE STEVENS: But why do you need deference?

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

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

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

25 JUSTICE GINSBURG: So that the only thing -- your

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

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

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

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

25 MR. OTT: If Your Honor is speaking only to the

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

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

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

1 post-AEDPA cases, and the distinction between whether
2 those cases support or contradict the State court's
3 opinion.

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

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

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

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

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

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

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

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

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

22 Whether the practice at issue, whether it be
23 buttons or ribbons or what have you, is so likely to
24 prejudice this defendant or violate or infringe on his
25 fundamental rights that we need to order them removed.

1 Not just as a matter of supervisory power, but as a
2 constitutional requirement.

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

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

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

22 MR. OTT: Your Honor, my answer is no. As a
23 supervisory matter, a State court can do whatever it
24 wishes. Under the State constitution, State statutes,
25 State rules of court, can do many things under its

1 supervisory power or even State constitutional power.

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

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

8 MR. OTT: I beg your pardon?

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

13 MR. OTT: Banners?

14 JUSTICE KENNEDY: Yes. Signs, placards.

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

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

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

21 JUSTICE SCALIA: Well, you also don't allow people
22 to come into most courtrooms in tank shirts, and we don't
23 allow people to, you know, to wear beany hats.
24 Everything that is inappropriate for a courtroom is not
25 necessarily inappropriate because it would prejudice the

1 trial; isn't that right?

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

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

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

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

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

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

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

22 MR. OTT: Well, Your Honor --

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

25 MR. OTT: I understand, Your Honor. And this

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

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

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

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

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

1 violation here, but Congress has taken away our power to
2 reverse it.

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

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

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

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

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

25 JUSTICE SOUTER: What if the button had said --

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

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

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

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

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

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

24 JUSTICE SOUTER: Okay, but what are the --
25 getting into the formulation, what are the impermissible

1 factors as to which a risk is raised by wearing the "Hang
2 Musladin" button? What are those factors?

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

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

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

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

25 MR. OTT: No, Your Honor. My -- what I -- the

1 point I meant to make was that we're not urging that
2 relief can never lie because there's a general rule of
3 application.

4 CHIEF JUSTICE ROBERTS: All right.

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

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

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

24 JUSTICE SOUTER: Isn't that a way of saying that it's
25 required? Should -- look, should a court grant habeas

1 relief on my facts?

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

4 JUSTICE SOUTER: Why?

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

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

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

17 JUSTICE SOUTER: Pardon?

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

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

22 JUSTICE SCALIA: I wish you hadn't said that.
23 Because I had thought that one of the things that made
24 this case leaning in your direction is the fact that
25 merely having a picture of their loved one on the button

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

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

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

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

25 JUSTICE SOUTER: Okay, assuming that explicit

1 message, should habeas relief be granted in my
2 hypothetical case?

3 MR. OTT: Not necessarily, Your Honor.

4 JUSTICE SOUTER: Why?

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

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

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

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

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

25 JUSTICE STEVENS: That's at sentencing after

1 conviction.

2 JUSTICE SCALIA: Yes, yes.

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

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

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

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

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

24 MR. OTT: They do, but it might still be
25 reasonable for a State court to conclude otherwise. And

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

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

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

7 MR. OTT: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Fermino.

9 ORAL ARGUMENT OF DAVID W. FERMINO

10 ON BEHALF OF THE RESPONDENT

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

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

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

23 The Attorney General has said in its briefing that
24 the court below teased out the particular reference to
25 the buttons, that it carefully parsed the opinion, that

1 it gave a tendentious analysis. This is the description
2 of the Attorney General. Nothing could be further from
3 accuracy.

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

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

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

1 influence anybody? That's what they say.

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

3 JUSTICE BREYER: In this case.

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

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

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

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

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

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

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

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

7 MR. FERMINO: That's correct.

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

9 MR. FERMINO: That's correct.

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

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

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

23 JUSTICE GINSBURG: But in here it -- you agree
24 that the California court has as much authority to say
25 what Federal law is as the Ninth Circuit, right? They

1 are on a par. Ninth Circuit decisions in no way binds
2 the Supreme Court of California. Isn't that so?

3 MR. FERMINO: That is correct.

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

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

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

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

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

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

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

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

21 MR. FERMINO: Well, Justice Breyer, that is
22 certainly a plausible reading of the State court opinion.
23 However, I think you've also identified one -- the
24 problem with this. It is the risk, not the reality. And
25 that's why we have to look beyond the facts of this case

1 and look to the rule as derived from the Williams and
2 Flynn case, as I think the court below properly did.

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

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

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

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

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

1 Williams and Flynn teaches us is wrong.

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

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

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

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

22 MR. FERMINO: That's correct.

23 JUSTICE KENNEDY: Yes. And you're having the
24 judge say that you can't wear certain signs, you can't
25 make certain demonstrations. If the family were there

1 and they -- and one of the members of the family was
2 sobbing, with tears coming out of her eyes, I -- that --

3 MR. FERMINO: Justice --

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

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

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

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

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

24 MR. FERMINO: Well, in the First Amendment
25 context, though, there's a balancing test that needs to

1 be employed, and it --

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

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

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

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

12 (Laughter)

13 JUSTICE BREYER: This reason -- suppose,
14 hypothetically, I were to think -- look, the rule should
15 be no buttons. No buttons, no signs, no banners. A
16 courtroom is a place of fair trial, not a place for
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 here.

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 as though there's a
10 pretty darn good argument for saying, yes, an unacceptable
11 risk has been raised of emotionalism in the jury's
12 deliberations as opposed to dispassionate consideration of
13 courtroom 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 this button was worn.
19 A, is it clear from the record how many days the button
20 was 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 ALITO: Where does it say that?

9 MR. FERMINO: Those declarations appear --

10 JUSTICE STEVENS: They 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 State habeas. And it appears that they are at the
16 JA 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 JUSTICE 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 would 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 likens it to a family wedding, and as 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 they see in the jury box --
2 I 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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