IN THE SUPREME COURT OF THE UNITED STATES

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DON ROPER, :

SUPERINTENDENT, POTOSI :

CORRECTIONAL CENTER, :

Petitioner :

v. : No. 06-313

WILLIAM WEAVER. :

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Washington, D.C.

Wednesday, March 21, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

ANDREA K. SPILLARS, ESQ., Assistant Attorney General, Jefferson City, Mo.; on behalf of Petitioner.

JOHN H. BLUME, ESQ., Ithaca, N.Y.; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

[10:02 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument today in case 06-313, Roper versus Weaver.

Ms. Spillars.

ORAL ARGUMENT OF ANDREA K. SPILLARS

ON BEHALF OF THE PETITIONER

MS. SPILLARS: Mr. Chief Justice, and may it please the Court:

While this Court has laid out a framework for reviewing prosecutors' closing arguments, the fairness standard established in Donnelly and Darden is by its nature a very general standard. Under this Court's interpretation of AEDPA, the State court should therefore be provided more leeway in reaching outcomes. Nevertheless, the Eighth Circuit afforded no deference to the Missouri Supreme Court's decision. Instead, it improperly substituted its own evaluation for the comments, looking at each of them in isolation and without considering the totality of the proceedings.

That decision was wrong not only because the court of appeals failed to properly afford deference to the State court, but because when viewed within the entire proceedings the prosecutor's closing arguments did not deprive the Respondent of a fair trial.

Applying AEDPA correctly, the Missouri Supreme Court decision was well within reason given, one, the nonspecific standard of fundamental fairness and the fact that this Court has never applied that standard to a penalty-phase closing argument; and, two, because, considering the record in the entire proceedings of this case, the Respondent was not deprived of fundamental fairness.

CHIEF JUSTICE ROBERTS: Well, we didn't -- haven't applied it to a penalty-phase closing argument, but we've certainly applied the general standard to the penalty-phase.

MS. SPILLARS: That's correct, Your Honor. And it's certainly not our argument that it would not apply to the penalty-phase. However, there simply may be other considerations, because the fundamental fairness standard essentially answers the question, did the jury base their verdict on the evidence or did they base it improperly on the prosecutor's comments?

JUSTICE STEVENS: May I ask one sort of preliminary question? Supposing the prosecutor misstated the law in his closing argument, would that be reviewable in this Court under AEDPA?

MS. SPILLARS: I think it certainly could be. In Brown versus Payton there was certainly a

concern about the --

JUSTICE STEVENS: Do you think his argument here contained any misstatements of the law?

MS. SPILLARS: No, Your Honor.

JUSTICE STEVENS: You don't.

MS. SPILLARS: To help answer the question, though, in that context, Donnelly and Darden set down some general considerations that, while not exclusive, help provide the post and beams of the fundamental fairness standard. So even assuming that all of the statements were improper, those considerations when applied to this case show that the trial was not rendered unfair because of the prosecutor's arguments. First, none of the comments misstated the evidence nor did they misstate the law.

JUSTICE KENNEDY: Well, just on your assumption, to make your hypothetical clear, you, you want us to assume that three or four times at least he violated a constitutional standard?

MS. SPILLARS: No, Your Honor.

JUSTICE KENNEDY: I just want to know what arguendo assumption you were making.

MS. SPILLARS: The assumption is that under the first tier in Donnelly and Darden that the statements were improper in the sense that within the

context of the multi-factor kind of considerations, whether or not they were improper, because obviously, if they were proper --

JUSTICE KENNEDY: I mean, they'd be improper because they -- they were based on an emotional appeal that's improper?

MS. SPILLARS: It could be improper in the sense that it was a misstatement of evidence. I don't know that impropriety would include necessarily emotional appeal. I mean, the Constitution does not require a trial devoid of emotion. However, impropriety under Donnelly and Darden was the first tier of the multi-tier kind of post and beams fundamental fairness test. So even assuming that that first tier, that the statements were improper, they still did not rise to the level of fundamental unfairness.

Secondly, none of the individual comments implicated the defendant's rights under the Fifth or Sixth Amendment, nor were they of the very specific kind of comments that this Court has found to violate the Eighth Amendment under Caldwell.

JUSTICE STEVENS: Don't you think the argument based on the General Patton analogy told the jurors they had a duty to do what he suggested?

MS. SPILLARS: No, Your Honor. I would

disagree.

JUSTICE STEVENS: What is the relevance of that argument otherwise?

MS. SPILLARS: I would not -- it was not particularly relevant. It was probably an inartful attempt to imply or tell the jury that it was a difficult decision that they had ahead of them, one that they might face --

JUSTICE STEVENS: Do you think if he said in so many words, you have a duty to return the death penalty, that would have been a misstatement of the law?

MS. SPILLARS: Yes, a duty to return the death penalty, which certainly is a misstatement of the law.

JUSTICE STEVENS: And you don't think this could be so interpreted? You don't think you could interpret that, that passage, that way?

MS. SPILLARS: No, Your Honor.

JUSTICE KENNEDY: That passage was in the context of other statements in which I think it's fair to say that he analogized the role of the juror to the role of a soldier who has to have the courage and the duty to kill.

MS. SPILLARS: I think a reasonable interpretation of those statements could be that the

duty was to make the decision whether or not to impose the death penalty.

JUSTICE SCALIA: Wait. Why is it improper for, for the prosecution to argue that, given the facts of this case, given the aggravating factors and the lack of mitigating factors, the brutality of the crime, the only sensible decision for you ladies and gentlemen of the jury is the death penalty? That's an improper argument? Doesn't that amount to saying you have a duty to come back with the death penalty? Why can't the prosecution argue that?

MS. SPILLARS: It's certainly not improper to make statements based on inferences from the evidence.

JUSTICE SOUTER: Well, do you think the Patton argument has anything to do with the evidence? I mean, the Patton argument -- correct me if I'm wrong, but I thought the argument that referred to General Patton was an argument that, number one, talked about his addressing the troops before battle. And he was telling the troops that unfortunately it is sometimes their duty to kill. And he said: Go out there and do your duty, which I assume any reasonable listener would say, go out there and kill.

If a prosecutor, as in this case, tells that

story and uses that analogy, it seems to me that the argument is not an argument based upon evidence, but an argument based upon the situation, the situation of the jurors vis-á-vis a capital defendant.

And I would suppose that the reasonable inference from the argument is that they have a duty to go out there to kill, to impose the death penalty. That does not sound to me like an argument based upon the evidence specific to this defendant and specific to this case.

Now, am I wrong?

MS. SPILLARS: No, Your Honor. It certainly was not a statement on the evidence in thw sense of was it a discussion of the facts in the case. However, based on the totality of the entire proceedings, it's clear that that statement did not render the entire trial unfair because --

JUSTICE SCALIA: I don't understand your concession. Surely, the prosecutor was not telling this jury that in all capital cases you have to come in with a death verdict. Surely, although he didn't explicitly mention the evidence, the underlying premise of his argument was sometimes when you have a case this bad, you have to do your duty. Nobody likes to kill, but just as soldiers sometimes have to do that if that's

their duty, so also jurors, if you really believe that the evidence is so one-sided in favor of the penalty that the State is asking for, it's your duty to bring in a death verdict. I don't see anything wrong with that.

MS. SPILLARS: And Your Honor, to the extent that I would certainly agree that those arguments based on the strength of the case were not necessarily --

JUSTICE GINSBURG: But they were -- the arguments were made in the context --

JUSTICE STEVENS: I suppose your concession about the duty is based on Chief Justice Stone's opinion in Viereck, isn't it?

MS. SPILLARS: Well, in the sense that Viereck was not directly --

JUSTICE STEVENS: Which did involve the very word "duty."

MS. SPILLARS: I'm sorry?

JUSTICE STEVENS: Chief Justice Stone's opinion in Viereck talked about telling the jury that they have a duty and condemned that. That's probably why you made the concession, I think.

MS. SPILLARS: I think the concession is important to get beyond the statements in isolation, because under --

JUSTICE GINSBURG: It's not just in isolation. Didn't this prosecutor constantly say this case is not about Weaver, this case is larger than Weaver. I think several times in the closing the jurors were told: Think big, think the large picture, don't think about this individual.

MS. SPILLARS: Yes. However, the jury was also told that it was their discretion to spare his life at appendix 275.

JUSTICE BREYER: It is -- I agree with you, I agree with you that we should look at the whole picture. When I look at the whole picture -- I've actually got a little chart that my law clerk prepared. And what he did, he went through this and looked at a case called Newlon and it was the same prosecutor. And the prosecutor was told in that case just what he shouldn't do. And now if we look what he did in this case and look what he did in that case and look at the law, the whole thing, not just little bits, it looks like he did an awful lot of what he wasn't supposed to do.

You're not supposed to give an argument that vouches as the U.S. attorney that I think that this is what you should do. So in Newlon he says: I'm talking to you as prosecuting attorney of the county, the top

law enforcement officer. And here he says: I'm the top law enforcement officer and I decide in which cases we have the death penalty and not. Worse than Newlon, I would say.

Then what you're not supposed to do is you're not supposed to tell them they're like soldiers. I mean, there's Supreme Court cases that say, don't tell them you're like a soldier doing duty. At least that's what all these prosecutors -- a case called Viereck versus the United States. So in Newlon what he says is: I want to impress on you, this is a war and it's justifiable to kill in war. Here he says: I -- there's a movie, "Patton", and in the movie George Patton is talking to his troops because they're going out in battle like the soldiers. And then he says: And when you're a soldier, you know what to do when you put your hand in a pile of goo that a moment before was your best friend's face; you'll know what to do; and last July this defendant's face was a pile of goo.

Okay, there we are. I mean, that sounds pretty emotional. It sounds like a soldier does his duty and you're doing it.

And then another thing you're not supposed to do is you're not supposed to tell them it's their duty to the community. And this has just filled with

instances where you hardly even know that there's a person called Weaver because he says: What you have to do here is send a message to the drug lords, send a message --

JUSTICE SCALIA: Who said he was not supposed to do these things?

JUSTICE BREYER: Well, there's a brief --

CHIEF JUSTICE ROBERTS: I'm sorry, counsel. Maybe, counsel, if you could answer that question?

MS. SPILLARS: In Newlon, Your Honor, it was a due process case in which the same prosecutor tried, and it was an Eighth Circuit case. And in that --

JUSTICE SCALIA: And is that the law here?

MS. SPILLARS: No, Your Honor.

JUSTICE BREYER: It's not? Why did they file -- is this brief wrong, then, the brief of the former prosecutors who are giving the propositions that I just stated and have the Supreme Court case next to each one? Are they wrong, those prosecutors?

MS. SPILLARS: To the extent that Newlon sets out those arguments, no, that's not incorrect. Those arguments were made in Newlon. However, for two reasons Newlon is distinguishable. In this case there were curative instructions given to the jury. In Newlon there were no objections made. So in this case, when

the prosecutor made the statement, for example, that, I'm the top law enforcement officer, there was an objection and there was a curative instruction. So it was not as if --

JUSTICE BREYER: Was there with the Patton and the goo?

MS. SPILLARS: There was not an objection -- there was an objection to the Patton, but it was overruled.

JUSTICE BREYER: Was there a curative instruction?

MS. SPILLARS: No, there was not.

CHIEF JUSTICE ROBERTS: Counsel, I'm looking at the quote, the statement, the reference to Patton, and I have to say I don't read it as imposing a duty. It says what the prosecutor says is that sometimes you've got to kill and sometimes you've got to risk death because it's right. His point is that at some point, at some times, you have to impose death because it's right, not because it's your duty as a soldier.

Now, where is the reference to you have this duty as a soldier in the prosecutor's statements?

MS. SPILLARS: There is none, Your Honor. And a reasonable interpretation of that comment is that he was imparting to the jury the duty to make the

decision, not necessarily to impose the death penalty.

JUSTICE BREYER: In Viereck the words were: "This is war, harsh, cruel, murderous war." And the prosecutor went on to analogize the jury's duties to the duties of soldiers and he said: Do your duty. Do you think that's a lot different than this case?

MS. SPILLARS: Well, I would distinguish Viereck on two grounds. One, it was not directly a due process case as this case is raised, because it was raised under this Court's supervisory powers. Secondly, in this case there was -- out of the eight separate comments that the Eighth Circuit found improper, only three of them were actually objected to, two of which were sustained and curative instructions were given.

JUSTICE GINSBURG: But you just -- that's a bit inconsistent with your point that Newlon is distinguishable because there were no objections at all and that was the reason for the court saying this goes too far to the prosecutor. But now you say when there are objections --

MS. SPILLARS: In Newlon the jury was never told to disregard the statements. In our case the jury was told to disregard the statements.

JUSTICE GINSBURG: Certain statements. There were many objections made here that were

overruled.

MS. SPILLARS: Correct. There were 12 objections made total. Interestingly, though, the defense attorney did not raise objections to the majority of the comments that the Eighth Circuit found improper. Now, while that's not dispositive, I think that the defense attorney is certainly in the best position to judge whether or not a comment is prejudicial to the client.

JUSTICE GINSBURG: To that extent the two cases were the same because in Newlon there were no objections either.

MS. SPILLARS: No objections at all. There were no objections at all. In our case there were 12 objections, so clearly the defense attorney was on the mark and was listening for prejudicial comments from the prosecutor. Of the eight comments that the Eighth Circuit found objectionable in this case, only three of them were objected to.

JUSTICE GINSBURG: Do you think --

MR. SPILLARS: So assuming that the defense attorney would -- I'm sorry.

JUSTICE GINSBURG: There were two cases cited as involving the same prosecutor? Was it Shurn also?

MS. SPILLARS: Correct.

JUSTICE GINSBURG: And that there was a significant overlap in the three charges in the three cases. The prosecutor had been told in two of them, you went too far. Is this one, just in terms of what the prosecutor said in the closing argument, is this less offensive or would you say they're all on a par?

MS. SPILLARS: I would actually -- if you compare the three arguments side by side, the prosecutor's statements were tempered in this case. The decision -- when he tried this case, it was approximately five weeks after the district court in Newlon had come down with the decision.

And there are statements that he made in Newlon and Shurn that were not in this case. For example, in Newlon he said this is the worst case ever and in Shurn he said the same thing. He did he not say that in this case. So I think from -- if you do a side-by-side comparison, his statements were actually tempered.

JUSTICE KENNEDY: Could you tell us -- as you know, AEDPA says decisions of settled precedents of the Supreme Court and there's the Supreme Court standard, a very general standard that we can get from Darden and Donnelly, although we didn't reverse there.

I take it that the counsel for the Respondent is going to say: Well, this is a Federal standard, but the Eighth Circuit is entitled to apply the specificity and -- the application that it's given to this, so the Eighth Circuit's entitled to rely on its cases in reversing.

Do you agree with that?

MS. SPILLARS: No, Your Honor.

JUSTICE KENNEDY: I assume that's what they're going to tell us.

MS. SPILLARS: No, Your Honor, I would not agree.

JUSTICE KENNEDY: Why?

MS. SPILLARS: Clearly, established law is law establishedby this Court, and this Court has not specifically outlined the kind of post and beams that would result in a reversal in a penalty-phase closing argument.

JUSTICE SCALIA: It says that in the text, doesn't it, "clearly established by the Supreme Court"? Is that not in the text of the statute?

MS. SPILLARS: Correct, yes.

JUSTICE BREYER: So those things that are improper for a prosecutor to make in a summing up in the guilt phase, are they then proper to say, exactly those

things, in a sentencing phase with capital -- with -- you know, capital sentencing?

MS. SPILLARS: Is it the same, the same arguments in the penalty --

JUSTICE BREYER: There are a number of cases in this Court that say what a prosecutor can't say, guilt phase. All of them happen to be guilt phase, I guess. You can't, you know, vouch. You can't use too much emotion. You have to focus on what the defendant did, not on what somebody else did. I mean, there are a number of things.

Now, do those -- is it fair or not fair to say that those precedents apply in the capital sentencing phase, too?

MS. SPILLARS: I think it is fair to say that. But it is also fair to say that there may be other considerations that apply in the penalty-phase that don't necessarily apply in the guilt phase.

JUSTICE STEVENS: May I ask you this question about your position: We are trying to find cases that clearly establish law by decisions of this Court. Do you include in that group of cases, cases such as Berger against the United States, and Viereck against the United States, which were direct review of Federal cases in which they say there was a denial of

a fair trial, but they're not setting aside State cases?

Is it -- would it be proper for the court of appeals to rely on those cases?

MS. SPILLARS: No. And this is why.

JUSTICE STEVENS: Even though those cases say in so many words it deprives you of a fair trial?

MS. SPILLARS: No. Because of the very specific nature of the supervisory powers in those cases, I don't believe in the larger context of fundamental fairness that we can say that those directly apply.

CHIEF JUSTICE ROBERTS: But if those direct Federal cases were interpreting the constitutional provisions directly, they would count as established law?

MS. SPILLARS: Certainly, yes, Your Honor.

There was also no mechanism in this case for the jury to apply any of the improper remarks to their deliberations because they were properly instructed. Instructions which we presume that they followed. In this case, the court read the instructions to the jury before closing arguments, and a copy was also given to the jury to deliberate with.

Four of those instructions, numbers 21, 28, 26, and 27, told the jury in various forms that it was

their duty, and theirs alone, to render a verdict. The jury was also told in instructions 23, 24, and 26 that it was -- that their decision must be within the confines of the evidence.

And thirdly, within the specific process laid out for finding, weighing, mitigating and aggravating circumstances. And finally, the last instruction that the jury heard before closing arguments was that closing arguments were not evidence.

It is counterintuitive to assume that the jury disregarded those instructions as a whole and instead improperly relied on the prosecutor's closing argument when they declined to find the one aggravating circumstance that the prosecutor spoke most about.

At appendix 285 is the part of the closing argument where the prosecutor discussed the aggravating circumstances. He argued to the jury that all four applied, but spent most time speaking about number one, which was that he had killed for money.

However, the jury did not find aggravator number one. So the very aggravator that the prosecutor argued most about to the jury, they did not find.

It's more reasonable to conclude that the jury made its decision based on the strength of the evidence and the strong evidence in support of the death

penalty.

Having rejected the misidentification defense, the jury necessarily found that the Respondent was the passenger who had returned to the woods to shoot the victim several more times.

JUSTICE STEVENS: May I go back to my question? Because there's a legal question here about what law we can look to under AEDPA. Of course, there's actually a question of whether AEDPA applies, I suppose. Because actually, wasn't this habeas petition filed two days before AEDPA was -- there's a footnote in the red brief that says -- raises that question.

MS. SPILLARS: There was a habeas petition filed prior to AEDPA, but it was dismissed and he did not appeal from that. This was filed after AEDPA.

JUSTICE GINSBURG: That was a slip on the district court's part, wasn't it? I mean, that original petition that was dismissed because he had filed a cert petition to this Court should not have been dismissed, it should have been held, in which case the petition would have been timely and he would not have been -- confronted an AEDPA barrier.

MS. SPILLARS: However, Your Honor, he did not appeal from that.

JUSTICE KENNEDY: Well, didn't he seek a

COA?

MS. SPILLARS: Yes, he did. However, he did not appeal from --

JUSTICE KENNEDY: This is a pro se prisoner. He gets his -- all the claims are exhausted, it's dismissed. And he seeks a COA on that point.

MS. SPILLARS: However, the parties have -- the Respondent has not asserted that argument, that AEDPA does not apply in this case. And for good reason, because --

JUSTICE SCALIA: Certainly didn't say it in the brief in opposition. And we might well not have taken the case had that point been raised in the BIO.

MS. SPILLARS: That's correct, Your Honor.

Finally, given the overwhelming evidence -- it supported a finding that the Respondent had carried out an execution-style murder for the purpose of silencing a witness. I'll reserve --

JUSTICE STEVENS: May I ask this question before you sit down? In the Viereck opinion, Chief Justice Stone -- they reversed in that case. And one of the reasons was that the prosecutor indulged in an appeal wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice. Now that's part of our

Federal law. Is that law applicable in this case, do you think?

MS. SPILLARS: Not directly, Your Honor.

JUSTICE STEVENS: Well, it is either directly -- it's either yes or no.

MS. SPILLARS: I think certainly this Court can use --

JUSTICE STEVENS: In other -- do you think that rule can be ignored by State prosecutors?

MS. SPILLARS: Certainly not ignored, Your Honor. But in the context of fundamental fairness, as to whether or not that case applies, I would argue that it does not directly apply.

JUSTICE SCALIA: You have a much more limited point, as I understand it. Your more limited point is simply that this is not clearly established law pronounced by the Supreme Court.

JUSTICE STEVENS: Well, it is clearly established law --

JUSTICE SCALIA: In this area of constitutional violation.

JUSTICE STEVENS: Well, the question, I suppose, is whether that is a constitutional rule. It is established by the Supreme Court of the United States, an opinion written by Chief Justice Stone a good

many years ago. But you're argument is it is not applicable to State prosecutors, as I understand it.

MS. SPILLARS: Not necessarily not applicable to State prosecutors. However, in the context of fundamental fairness, does it establish a clear -- a rule in the sense of those kinds of statements will render a trial fundamentally unfair.

JUSTICE KENNEDY: Why would it be applicable to State prosecutors if it is not a rule? I don't understand that. Is it applicable to a State prosecutor or not? The State prosecutor asked you for your advice, is this opinion applicable. And you tell him yes or no.

MS. SPILLARS: Certainly, it is something that State prosecutors should follow in the sense of what they should say and what they should not say.

JUSTICE KENNEDY: But they must follow because it's the law, right?

MS. SPILLARS: Under the -- it is not the law in the sense of fundamental fairness. It is certainly an indication of what will be improper arguments.

JUSTICE KENNEDY: Well, where did Chief Justice Stone get it from?

MS. SPILLARS: I'm sorry?

JUSTICE KENNEDY: Where did Chief Justice

Stone get it from? Just because of our supervisory power? I mean, if it's just Federal supervisory power, then I think you could tell the counsel, he doesn't have to follow it, it's due process.

JUSTICE SCALIA: You can't have it both ways, counsel. I mean, you're really losing me here. Either it is our supervisory power and therefore the States don't have to follow it, or it is more than our supervisory power and the States do have to follow it. I don't know that there's any way to straddle that.

MS. SPILLARS: Well, I would argue that in those cases, it is a supervisory power case. And so to that extent, it's not applicable to this particular case.

I'll reserve for the following comments.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Blume.

ORAL ARGUMENT OF JOHN H. BLUME

ON BEHALF OF RESPONDENT

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

As the former prosecutors' brief makes clear, George "Buzz" Westfall's penalty-phase closing argument in Mr. Weaver's case contained a number of improper and mutually reinforcing statements which

exploited the authority of his office, analogized the jurys' duties to that of soldiers in war time, injected extraneous matters into the proceedings, and appealed to the jurors' passions and prejudice.

JUSTICE ALITO: Well, I think they overstated the significance of Viereck. Isn't Viereck -- does Viereck stand, do you think, for a per se rule that a prosecutor in a closing argument may never mention the word "soldier"? Isn't it a much more limited -- much more limited holding?

This was a prosecution during World War II of individuals for failing to register as agents of Nazi Germany, and the prosecutor said in the guilt phase -- and it wasn't a capital case obviously -- in the guilt phase of closing argument, that just as our soldiers who are fighting the Japanese on the Bataan Peninsula are doing their duty for the country, you have a duty to return a guilty verdict against these individuals.

Now, isn't that very different from saying that in a capital -- at the capital phase of the trial, you have a duty to consider something that's very unpleasant, and it's unpleasant in the same way that what soldiers have to do in wartime is different? Isn't that very different?

MR. BLUME: I think the historical context

is different, but this was set up in this case by informing the jurors that we were involved in a war, in a war on drugs in society. And then he uses the same story, analogizing jurors' responsibilities to that of soldiers in a war. I think it is also important to put that comment in the context in which it occurred. Not only in the broader context to the repeated -- the prosecutor repeatedly leveraging the power of his office behind this, but this came right on the heels of him saying, I'm the top law enforcement officer in this county. I decide in which cases we seek the death penalty.

CHIEF JUSTICE ROBERTS: That was objected to and the objection was sustained, correct?

MR. BLUME: It was objected to, and the objection was sustained. That doesn't mean that comment --

JUSTICE SCALIA: And a curative instruction given.

MR. BLUME: I agree with that. But that doesn't mean it's irrelevant for the due process totality of circumstances analysis. And then he proceeds from there directly in to the Patton analogy, and I think if you read that analogy in context, he is telling them you're soldiers in a war, you have a duty

to kill, I'm like Patton, I'm telling you it's your duty to kill, go kill.

If you read that logically, those two things together --

CHIEF JUSTICE ROBERTS: Which is the case -- AEDPA says we look to clearly established law by our U.S. Supreme Court decisions. Which is the clearest U.S. Supreme Court decision that was violated here?

MR. BLUME: The decision that was violated was the rule of Darden, Donnelly, and Romano, which is that --

CHIEF JUSTICE ROBERTS: No, pick -- which one do you think is the most directly applicable?

MR. BLUME: Well, I think Darden established the rule. This Court applied it to the penalty-phase in Romano, and thus the Darden rule that if a prosecutor's comments, the totality --

CHIEF JUSTICE ROBERTS: This is not Romano. Romano was an introduction of evidence case, right?

MR. BLUME: Yes, but logically, if you have established a rule for closing arguments, you've established it, you then say it is applicable to the penalty-phase for the admission of evidence, it would be completely illogical to say it didn't govern penalty phase closing arguments.

CHIEF JUSTICE ROBERTS: No, my point is simply the level of generality at which the guiding principles were articulated, which helps when you're applying it, but to determine -- this is the point Judge Bowman made in dissent that when you don't have a case that's close, that you have more leeway in terms of the deference to the court, because it's not a clearly established precedent of the Supreme Court.

Yes, there are the Jenner cases that establish the general principles, but the question is how clearly those were contravened before you can say it violated clearly established law.

MR. BLUME: That is what this Court's decisions say, Chief Justice Roberts. I think I want to make clear that we have two different positions on that. The first is that any State court decision finding this argument in its totality based on what happened and based on the weight of the evidence in this case that said that didn't render the proceedings fundamentally unfair would be an unreasonable application of Darden and Donnelly.

But in addition to that, the Missouri Supreme Court in this case said the decision was unreasonable because it failed to consider significant portions of Mr. Weaver's challenge to this argument. It

did the analysis under a State law abuse-of-discretion standard, and it refused to consider or failed to consider several components of his claim.

JUSTICE SCALIA: What do you mean, how do you know it failed to consider them? I mean, is there an obligation to respond to every single point that's made?

MR. BLUME: Well, on the first part --

JUSTICE SCALIA: Did they refuse to accept argument on those points?

MR. BLUME: No. But they -- on the first point, did they refuse to -- did they fail to consider a number of the challenges like the Patton analogy, that's clear. He raised that in his brief. He said this was something I'm complaining about. They did not consider it. He raised the point about --

JUSTICE SCALIA: They didn't consider it? You mean they did not respond to that argument in their opinion?

MR. BLUME: They did not refer to it in their opinion. And --

JUSTICE SCALIA: You don't know for sure that they didn't consider it. I mean, it may be argument to them. How could they not have considered it? They must have not considered it important, but that's a different --

MR. BLUME: He also raised the point about this is bigger than William Weaver. And that was improper. And when the State court cited -- quoted what he said, they chose to ellipses that out, and didn't even put in --

JUSTICE ALITO: Well, why is that improper? Is it improper at the penalty-phase for a prosecutor to refer to the concept of deterrence, which by definition is bigger than the individual whose sentence is being considered?

MR. BLUME: I don't think this can properly be considered a deterrence argument. When you say over and over, this is far more important than William Weaver, this goes way beyond William Weaver, this is bigger than William Weaver, this doesn't just pertain to William Weaver, then you add that in with a number of comments about you need to give this person the death penalty --

JUSTICE KENNEDY: Well, could the prosecutor say, one of the factors you must take into account when you begin to deliberate is the deterrent purpose of the death penalty? Deterrence is one of the reasons we have the death penalty.

MR. BLUME: Uh-huh.

JUSTICE KENNEDY: To teach others. Can he say

that?

MR. BLUME: I think he could say that. But What -- but deterrence --

JUSTICE KENNEDY: So then now we have the principle that you can talk about deterrence. Now it is just the way in which he talked about deterrence?

MR. BLUME: No, my point is I don't believe this is really a deterrence argument. Deterrence is not a substitute for moral culpability. We allow the deterrent function of the death penalty as a justification for it, but you couldn't give the death penalty to somebody who didn't deserve it under the State's scheme, in order to further deterrence.

JUSTICE SCALIA: As I recall, he didn't just say it is bigger than Weaver. He went on to discuss, you know, the drug gangs. And he says, they're not going to be affected by the threat of going to prison. They will be affected by the threat of dying.

I mean, it seemed to me he tied it very, very closely into deterrence. And if you say that deterrence is okay for him to refer to, I don't know how there's anything left to your argument about his saying it's bigger than Weaver.

MR. BLUME: I think the import of this argument is you should give this person the death penalty

even if you're not sure he deserves it in order to further the deterrent function of the death penalty.

JUSTICE SOUTER: No, but you're -- you're saying look, he can make a general statement that we have a death penalty in part for its deterrent function, but he cannot make the argument that you ought to apply the death penalty in this case solely for deterrent reasons, i.e., reasons unanchored in the culpability of this particular defendant.

MR. BLUME: That's correct. And I think that's what this statement did. Especially --

JUSTICE SCALIA: Where? Where? Where? Where? Where does it say that? Where does it say never mind the facts? Let's, let's give this guy the death penalty as Napoleon said, "Pour encourager les autres." You know, he said it didn't matter which, whether the general was guilty of, of cowardice or not; it would help to encourage the others to execute him. Where is there anything like that argument here? I don't see that.

MR. BLUME: I think that is the logical inference from the six or seven times he says -- in variety of -- he says this is bigger than William Weaver. The one thing you've got to understand is this is far more important than William Weaver; this is, goes way beyond William Weaver; this does not pertain just to

William Weaver. He says that on six or eight occasions. And I think you could interpret that -- the logical interpretation --

JUSTICE SCALIA: If you let a person who is as guilty as William Weaver go, you're affecting not just William Weaver, you're affecting the whole war on drugs, you're affecting the -- what's wrong with that?

I -- I fail to see any indication here that he's telling the jury never mind the facts. Never mind how -- you know -- how horrible you think the crime was. Never mind all of the instructions that the judge gives you about aggravating factors and mitigating factors. Forget all of that. Kill William Weaver because it's bigger than him.

I -- I just don't -- I just don't see the argument.

MR. BLUME: Of course, he does actually say kill him now at another point in there. But I think if you take those comments, you also look at those in the context of where he goes on and on about the consequences; you need to send a message to the drug dealers, that's a huge theme --

JUSTICE KENNEDY: What do you think, go on and on -- suppose he'd mentioned deterrence six times?

MR. BLUME: I think as long as it is a

blanket sort of statement, that one purpose of the death penalty is deterrence, that would probably be consistent with this Court's decisions.

JUSTICE KENNEDY: Right.

MR. BLUME: That's not what is happening here, Justice Kennedy, especially when it is tied in that that, to send a message and then he also goes on to talk about the consequences. If you don't sentence this person to death, then the animals will reign in the jungle and we can't have that in a civilized society and there's no point in having jurors, the dope peddlers prevail. You put all that together, he is telling these people as the prosecutor in this county, if you don't give this person the death penalty there will be all these adverse social consequences.

And you wrap all this up; there is no conscientious prosecutor who could possibly believe that these statements were proper. No.

This argument is an outlier; it is beyond the bounds; it contains essentially improper comments in virtually every category that this Court --

CHIEF JUSTICE ROBERTS: So Judge -- Judge Bowman would be an unreasonable prosecutor? He dissented; he thought these were not unreasonable on the basis of on clearly established law.

JUSTICE GINSBURG: I thought Judge Bowman said were it not for AEDPA this case might come out -- in his view this case might have come out differently.

MR. BLUME: Judge Bowman --

CHIEF JUSTICE ROBERTS: Thats why the standard is unreasonable in light of clearly established law.

MR. BLUME: Judge Bowman did say that. But I believe the essence of his dissent was that, I think that he made the mistake which the Petitioners made in the cert petition, and he thought there was no clearly established Federal law. A point which is essentially conceded at this point in the proceedings.

I wanted to --

CHIEF JUSTICE ROBERTS: Well no, he specifically recognized that there was nothing on all fours and that there were these other generally applicable decisions and he thought the state courts had broad -- a broader range when there was no decision on all fours.

MR. BLUME: Well, if I'm -- I'm sorry --

CHIEF JUSTICE ROBERTS: I'm reading at the bottom of page 820 in the petition appendix.

MR. BLUME: Well, if I'm wrong about that, I'm wrong. But even -- I don't think it is also under Justice O'Connor's opinion in Williams versus Taylor, you don't have to -- this doesn't works at the level of

saying well, any one judge is unreasonable. The point is, it's an objective standard, not is this judge, you know, somehow out of touch here?

And I think -- so -- I wanted to make one point before I forget about it, to correct one thing that Petitioner said. Mr. Weaver filed this prior to the act. It was dismissed. He did request counsel and a COA. He did appeal this to the Eighth Circuit in his first appeal.

He appealed the improper dismissal of his petition. The district court initially granted the writ on Batson grounds. He appealed the fact that it should be -- his case should not be subject to the act --

JUSTICE KENNEDY: You have this only in a footnote in your reply brief. It wasn't raised in the BIO.

MR. BLUME: It was not raised in the BIO. I did not represent Mr. Weaver at that time. But I thought it was my obligation as an officer of the court to raise this at the earliest possible opportunity.

JUSTICE BREYER: Can I ask you, where -- one of the passages that I thought went a little far was where he says to the jury, the one thing you've got to get into your head; this is far more important than William Weaver. This case goes far beyond William Weaver. This

touches all the dope peddlers and the murderers in the world. That's the message you have to send. It just doesn't pertain to William Weaver. It pertains to all of us, the community. The message -- there are street, et cetera.

Okay. Now. That struck me, as you argue this is rather extreme. Its seems to be removing the attention of the jury from William Weaver and saying you have a duty to send this man for other reasons. Now -- to execute him.

But where do I find in the U.S. Reports the case or statement that then says this is the kind of argument the prosecutor cannot make?

MR. BLUME: Okay. Let me -- I want to back up, and I want to take on the premise of the question. Which may be a mistake, but I think in determining the first part of the Donnelly/Darden standard is, you look at what the prosecutor argued and whether it was improper.

I don't believe you have to have a United States Supreme Court case directly on point for everything the prosecutor said on that. There are decisions from this Court on a number of things he said. There are also other touchstones, for example, the standards on criminal justice which regulate what

prosecutors can say.

Then the way I understand this clearly established Federal law to work, is you take what the prosecutor said, you examine that in light of what happened, what defense counsel did, what the trial judge did, and the weight of the overall evidence.

And if you believe that the prosecutor's arguments rendered the proceedings fundamentally unfair, then there's a violation of the due process clause. I don't think I have -- you have to show that there's some Supreme Court case directly on point going to each particular comment.

JUSTICE BREYER: You were talking --

JUSTICE SCALIA: Even -- even the Supreme Court cases going to the other points, they didn't -- did any of them involve a separate penalty-phase? They were all just in the guilt, guilt phase of a noncapital case, weren't they?

MR. BLUME: Well --

JUSTICE SCALIA: So that, so that when the prosecutor was urging particular action, he was urging the jury to find the person guilty. He was not just urging them what penalty is better or worse. He was saying for these reasons you should find the individual guilty.

That's quite different it seems to me from the situation in which guilt has already been established. The trial's done. This person is guilty, and the only thing they're arguing about is what the penalty ought to be. I'm not sure that you can analogize, you know, from the one situation to the other in determining what kind of argument is proper. Because in the former situation when the -- if the prosecutor says this is not just about this defendant, it's about the whole society, he's urging the jury to find the person guilty. I mean -- and that's crazy. You don't find the person guilty in order to stop drug trafficking.

But you do impose a heavier penalty in order to do that. So I just don't, don't see the analogy from the Supreme Court cases you have.

MR. BLUME: Well, I think that, I don't see any reason why a principle which this Court has repeatedly reaffirmed that a prosecutor is not supposed to leverage his opinion and the prestige of his office behind a particular outcome, would apply any less at the penalty-phase of a capital trial than at the guilt phase of a capital trial.

JUSTICE SCALIA: Your argument is different. Look -- it could -- could -- would defense counsel be able

to argue during the guilt phase of a trial, in an ordinary trial where there's no separate phase, "ladies and gentlemen of the jury, this person has a large family that's dependent on him; he's a miserable wretch. You shouldn't find him guilt. Is there no mercy in your heart?"

Would he be allowed to argue that? Of course not. Can he argue it in a guilt phase? Of course he can. And it seems to me in determining what arguments the prosecution can make you have to be guided by what arguments the defense can make.

The defense can surely come in and say ladies and gentlemen of the jury, you're being called upon to kill somebody. Do you realize what a -- what a difficult, overwhelming thing that is?

And then you say the prosecution can't come in and say ladies and gentlemen, sometimes if you do your duty, you have to kill. This is the law here. If you find the facts this way, that's your duty.

I -- I -- I think you're, you're taking our cases very much out of context by applying cases that relate to the guilt phase, to a very special procedure that we've set up in capital cases which is called the guilt -- the penalty-phase.

MR. BLUME: Well, I disagree with that, and

to this extent. Can a lawyer in a capital case argue at the sentencing phase of a capital trial you should not sentence this person to death because they've had a hard life? Yes. Of course you can. And why can you do that? Because according to this Court's cases, that goes directly to the individual's moral culpability and whether they deserve the death penalty.

The problem with many of the arguments which were made in this case is they are fundamentally inconsistent with the individual's moral blameworthiness and they ask the jury to impose the death penalty in order to stop larger issues, to stop crime, to protect society.

CHIEF JUSTICE ROBERTS: To -- to send a message?

MR. BLUME: To send a message. And if you don't send a message, chaos will prevail and the animals will reign in the jungle.

CHIEF JUSTICE ROBERTS: What the defense lawyer said to the jury in his closing was if you vote for life, you are sending a message. He said if you vote for life, you are still doing your duty.

MR. BLUME: Yes.

CHIEF JUSTICE ROBERTS: How was that message -- it's a different message, I guess -- but he

can say send a message, but the prosecutor can't?

MR. BLUME: No. I think the important -- by the time defense counsel said that, the prosecutor in his opening statement had already made the send a message statement about five times. She was trying in that one limited instance to tackle that and say well, okay, if you give him life that's a message, too.

JUSTICE KENNEDY: So if the prosecution had not opened the door, that would have been improper? You overrule -- the judge said counsel, you can't argue about sending a message for life?

MR. BLUME: I think that would have been completely within the trial court's discretion.

JUSTICE KENNEDY: You -- you think the trial court could tell the defense counsel that the defense counsel cannot argue to the jury, ladies and gentlemen there is nothing more precious than life and that's what we're asking you to decide here and we want you to assert the values of this community that we value life?

You can't say that?

MR. BLUME: Maybe. But I think that what she -- but what she's saying here, though, is directly responsive. And that is also a factor which this Court has noted in its decisions.

JUSTICE BREYER: Suppose that you said

explicitly, the prosecutor -- which he didn't say -- but you're arguing basically, it is a fair, sort of an implication, suppose he said there are a lot of drug dealers around, and he's one of them. And this sentencing phase isn't about just -- just isn't about William Weaver. It is about sending a message to the others.

And if you execute him, even if you think he shouldn't be executed, you don't think he ever should be, but, you see, others will think that this is a message. So do it just to give a message. Even if you think he never did it. No matter what you think of him, you think he's the best person in the world. Still execute him just to send a message.

Now would that violate the Constitution?

MR. BLUME: Of course.

JUSTICE BREYER: Yes. Of course. What case in the Supreme Court would you look to to show that it did?

MR. BLUME: I think it would -- there you would easily just look to this Court's Eighth Amendment decisions which say --

JUSTICE BREYER: I don't find any one where anybody ever had an argument just like that.

MR. BLUME: Right. It wouldn't be an -- but it would be inconsistent with the fundamental

principles of capital sentencing --

JUSTICE BREYER: Ah. Ah. So you are saying we should look not just to -- if we try to look for exact, identical arguments maybe we'll get into that problem? Of having to uphold things we all know -- or is that right? Or what?

MR. BLUME: Well, I think, you know, at some point, right, you can say well, you don't have a case on point because no one has said anything so outrageous. If a prosecutor went up and said look, ladies and gentlemen, the judge is going to tell you about aggravating and mitigating circumstances; forget all that baloney, go in there, you know, put all that out of your brain, and give him death. I don't think there would be any question that that's unconstitutional.

JUSTICE SCALIA: The question has been switched here, counsel. The question before us is not whether it was wrong, even if you answer there's plenty of Supreme Court precedent, even though none on these particular facts, to convince me that he shouldn't have said it.

That's not the question before us. The question before us is whether it violates fundamental unfairness, whether it's wrong to such an extent that it invalidates the whole prosecution and -- and sentence.

That's quite a different question. I can acknowledge, yes, the prosecutor, you know, shouldn't do it. But that doesn't lead me to the, automatically to the conclusion that Supreme Court jurisprudence shows that this so violates fundamental unfairness that the, that the verdict has to be set aside.

MR. BLUME: Well, let me tackle that head-on. There were a number of improper comments made in this case. Most, many of them -- a number of them were objected to and the objection was overruled. Some of them were not objected to. The only instructions they got were two curative instructions on two points and a general evidence is not arguments instruction.

So nothing was really done in the context to ameliorate the presence of these comments. And despite what the Petitioner says, this was not a strong case for death. The evidence of guilt was circumstantial and hotly contested. Even the prosecutor in his penalty phase acknowledged, look, he might be innocent, but kill him anyway. The State presented no additional evidence in aggravation of punishment. Mr. Weaver had no prior record other than a misdemeanor conviction.

There was substantial mitigating evidence presented regarding his character, his good deeds, and other things he had done in the community and his

adaptability to confinement.

This was not a strong case for death.

So you take these comments, which were -- they're trying to contrast this to Newlon -- this argument is worse than Newlon in most respects. It was made five weeks after he was told that this argument rendered another trial fundamentally unfair.

CHIEF JUSTICE ROBERTS: Your recital was not a complete picture of the case. This was an assassination of a witness in a Federal drug prosecution, with how many shots to the head?

MR. BLUME: I believe there were six.

CHIEF JUSTICE ROBERTS: Six. And the jury determined unanimously beyond a reasonable doubt that this was the guy who did it. So you do have to look at the penalty-phase in the context of those facts.

MR. BLUME: I agree. But to say that -- and they found -- and I'm not suggesting that not part of the totality of the proceedings.

But there's one significant point there that also I think needs to be taken into account. He was a witness, but he was also a drug dealer and involved in the drug trade and was a straw purchaser for these Shurn families. And in many instances --

JUSTICE SCALIA: Well, serve him right? I

mean, is that --

MR. BLUME: I'm not suggesting it serves him right. I'm suggesting that whether juries impose death often depends in part as well on the moral blameworthiness or how they perceived the victim. This was not like a witness, an innocent witness. This was somebody who was involved in that. And that normally makes it more difficult for the prosecution to obtain a death sentence.

CHIEF JUSTICE ROBERTS: What do you -- what should a prosecutor's closing -- penalty-phase argument look like? What are the sorts of things that he should be talking about?

MR. BLUME: I think in general they can stick to the evidence. They can argue that the nature and severity of the crime itself warrants the ultimate punishment and focus on -- the focus of the penalty phase is supposed to be on the individual's moral culpability and whether they deserve the death penalty based on what they did. This argument, most of this argument I believe, as Justice Breyer suggested, it went on for pages and there was no mention really in any substance of William Weaver and what he had done.

JUSTICE ALITO: But you think moral culpability is the only factor that can be mentioned? I

thought you said earlier it was okay for the prosecutor to refer to deterrence.

MR. BLUME: I don't think it's the only factor, but I was responding to the question of what should a prosecutor do and in fact what most prosecutors do in most cases.

JUSTICE ALITO: Can a prosecutor say that killing a witness is something that needs to be deterred and therefore it's important, it's appropriate to impose the death penalty here in order to send a message of deterrence? Is that improper?

MR. BLUME: I think something probably like that would be. But this -- again, this went way beyond that.

The other thing that you have to look at here is that then he goes on to say, and if you don't give him death chaos will reign, society will fall apart, there's no point in having a death penalty, and the animals will reign in the jungle and you can't have that in a civilized society.

JUSTICE KENNEDY: Is it part of moral culpability that you take moral instruction from thieves and murderers on the street, as opposed to those higher standards for which society seeks to aspire? Is that moral culpability?

MR. BLUME: I'm sorry. I'm not sure --
JUSTICE KENNEDY: Is it moral culpability for you to take as an example for your behavior the criminal population?
MR. BLUME: I still -- I'm not trying to be thick.
JUSTICE KENNEDY: You're talking about moral culpability. Is it part of your moral culpability that you take your values, your instructions, your behavior from criminals, as opposed to people who uphold the law in society? Is that part of moral culpability?
MR. BLUME: It might be part of the picture of what this person is like.
JUSTICE KENNEDY: Well then, isn't it relevant what's happening on the streets, et cetera?
MR. BLUME: I don't think it's proper to say if you don't give this person death then all these other things which are bad for society are going to happen.
CHIEF JUSTICE ROBERTS: Of course, the defense argument was not focused on Weaver either. The defense counsel said it was a vote for life, fight for it. Always fight for life, always, always. The argument by the defense wasn't -- and it's hard for me to imagine in a penalty-phase how the arguments wouldn't extend beyond the particular individuals.

MR. BLUME: But there's beyond and there's way beyond and there's beyond the pale. And I think if you look at all these things that were said in this case -- I have read hundreds of these arguments -- and I submit no conscientious prosecutor could have thought that this was appropriate.

JUSTICE SCALIA: How do you answer the argument, fight for life, always fight for life? How do you answer that argument, except by saying: Ladies and gentlemen, sometimes, sometimes it's your duty to vote for death? How else would you answer that argument?

MR. BLUME: You could answer it that, look at what this person did. You know, look at this crime. We have the death penalty in this State. In some cases it's appropriate. It's appropriate in this case. It's not appropriate to say: I'm the prosecutor, I decide in which cases we seek death.

JUSTICE STEVENS: Mr. Blume, before your time is up, I just want to ask you one other question. I'm still troubled about whether AEDPA applies. And was it argued in any court below? Was the question actually ruled on after an adversarial presentation as to whether AEDPA applies or does not apply? Because, as I understand it, it either does or it doesn't and it doesn't matter whether it was argued. But was it discussed in any of the

lower court proceedings?

MR. BLUME: You're talking about on the basis that he filed before the act?

JUSTICE STEVENS: He filed before -- two days before the act.

MR. BLUME: He filed before the act. The district court dismissed and said, believing erroneously --

JUSTICE STEVENS: No, I mean in this proceeding.

MR. BLUME: It was argued in his initial habeas. It was appealed to the Eighth Circuit, because the Eighth Circuit initially granted the writ on Batson grounds. So he appealed it at that point and the Eighth Circuit said, basically with very little analysis, determined that AEDPA applied because he had to refile after the act and AEDPA applied to petitions filed after the act.

JUSTICE SCALIA: And was that this habeas? Then he filed a subsequent habeas or what?

MR. BLUME: It was the same habeas proceeding. It was a continuation of the same. It was then remanded back to the district court. The district court granted the writ on this ground and then it went up on appeal. I don't think he would have been under

any obligation to appeal it again, having sort of gotten a ruling on that in the same habeas proceeding.

JUSTICE KENNEDY: If the Eighth Circuit had had Lawrence in front of it, would it have ruled differently? Or should it have ruled differently, in respect to Lawrence?

MR. BLUME: I believe that -- I'm sorry, I didn't mean to interrupt.

I believe Lawrence makes clear that the district court made a fundamental mistake of law in dismissing his petition and should not be --

JUSTICE KENNEDY: Under Lawrence the Eighth Circuit would have been wrong?

MR. BLUME: Yes.

JUSTICE STEVENS: And if Lawrence had gone the other way, then it also -- then it would be right. In other words, whether AEDPA applies really is a function of our decision in Lawrence?

MR. BLUME: Yes. I mean, Lawrence made clear what I think should have probably been clear beforehand, that you didn't have to seek cert to this Court in order to exhaust a petition, but that was the basis of the district court's ruling.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Blume.

Ms. Spillars, you have four minutes remaining.

REBUTTAL ARGUMENT OF ANDREA K. SPILLARS

ON BEHALF OF THE PETITIONER

MS. SPILLARS: Thank you, Your Honor.

I would like to address two points. First, it is not clearly established that deterrence arguments in closing arguments are improper, and for good reason, particularly because of the strength of this -- the evidence in this case and the fact that the Respondent had killed a Federal witness execution style. To that extent, as I understand the Respondent's argument, the deterrence rises or falls on however the prosecutor has prefaced his deterrence argument, if he says certain words to mitigate the deterrence argument. However, trials don't operate in terms of specific words that must be pre-spoken before an argument can be valid.

Secondly, in response to Justice Kennedy's question previously, I would advise that prosecutors should not use some arguments, not necessarily the deterrence argument, but not that in every instance they must not use those arguments. This Court's supervisory role in those kinds of cases allows this Court to turn should's into must's for Federal prosecutors, but that

is not the case here.

Second -- thirdly, the Viereck case is in a historical context which we don't have here, and the Missouri Supreme Court did consider the penalty-phase arguments. At page 237 of the appendix the court specifically said: "We have reviewed the penalty-phase arguments."

And then at page 235, the Missouri Supreme Court distinguishes Newlon and says that they do not rise to the level of the statements made in Newlon. So to that extent the Missouri State court was not an unreasonable application of this Court's precedents and deference should be afforded to that State court decision. For that reason we would ask that this case be reversed.

Thank you.

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

[Whereupon, at 11:00 a.m., the case in the above-entitled matter was submitted.]