

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DON ROPER, :

4 SUPERINTENDENT, POTOSI :

5 CORRECTIONAL CENTER, :

6 Petitioner :

7 v. : No. 06-313

8 WILLIAM WEAVER. :

9 - - - - - x

10 Washington, D.C.

11 Wednesday, March 21, 2007

12

13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 10:02 a.m.

16 APPEARANCES:

17 ANDREA K. SPILLARS, ESQ., Assistant Attorney General,

18 Jefferson City, Mo.; on behalf of Petitioner.

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

20 Respondent.

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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.

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

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

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

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

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

1 concern about the --

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

4 MS. SPILLARS: No, Your Honor.

5 JUSTICE STEVENS: You don't.

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

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

20 MS. SPILLARS: No, Your Honor.

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

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

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

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

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

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

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

25 MS. SPILLARS: No, Your Honor. I would

1 disagree.

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

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

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

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

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

18 MS. SPILLARS: No, Your Honor.

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

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

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

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

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

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

25 If a prosecutor, as in this case, tells that

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

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

11 Now, am I wrong?

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

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

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

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

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

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

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

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

18 MS. SPILLARS: I'm sorry?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 JUSTICE SCALIA: And is that the law here?

14 MS. SPILLARS: No, Your Honor.

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

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

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

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

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

10 JUSTICE BREYER: Was there a curative
11 instruction?

12 MS. SPILLARS: No, there was not.

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

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

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

1 decision, not necessarily to impose the death penalty.

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

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

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

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

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

1 overruled.

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

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

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

20 JUSTICE GINSBURG: Do you think --

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

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

1 MS. SPILLARS: Correct.

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

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

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

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

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

7 Do you agree with that?

8 MS. SPILLARS: No, Your Honor.

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

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

13 JUSTICE KENNEDY: Why?

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

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

22 MS. SPILLARS: Correct, yes.

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

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

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

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

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

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

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

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

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

4 MS. SPILLARS: No. And this is why.

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

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

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

16 MS. SPILLARS: Certainly, yes, Your Honor.

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

24 Four of those instructions, numbers 21, 28,
25 26, and 27, told the jury in various forms that it was

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

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

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

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

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

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

1 penalty.

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

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

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

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

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

25 JUSTICE KENNEDY: Well, didn't he seek a

1 COA?

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

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

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

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

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

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

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

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

3 MS. SPILLARS: Not directly, Your Honor.

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

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

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

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

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

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

20 JUSTICE SCALIA: In this area of
21 constitutional violation.

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

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

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

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

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

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

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

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

24 MS. SPILLARS: I'm sorry?

25 JUSTICE KENNEDY: Where did Chief Justice

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

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

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

15 I'll reserve for the following comments.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Blume.

18 ORAL ARGUMENT OF JOHN H. BLUME

19 ON BEHALF OF RESPONDENT

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

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

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

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

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

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

25 MR. BLUME: I think the historical context

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

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

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

18 JUSTICE SCALIA: And a curative instruction
19 given.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 MR. BLUME: Uh-huh.

25 JUSTICE KENNEDY: To teach others. Can he say

1 that?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 JUSTICE KENNEDY: Right.

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

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

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

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

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

4 MR. BLUME: Judge Bowman --

5 CHIEF JUSTICE ROBERTS: That's why the standard
6 is unreasonable in light of clearly established law.

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

13 I wanted to --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 prosecutors can say.

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

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

13 JUSTICE BREYER: You were talking --

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

19 MR. BLUME: Well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 MR. BLUME: Yes.

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

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

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

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

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

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

20 You can't say that?

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

25 JUSTICE BREYER: Suppose that you said

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

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

15 Now would that violate the Constitution?

16 MR. BLUME: Of course.

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

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

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

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

1 principles of capital sentencing --

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

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

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

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

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

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

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

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

1 adaptability to confinement.

2 This was not a strong case for death.

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

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

12 MR. BLUME: I believe there were six.

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

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

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

25 JUSTICE SCALIA: Well, serve him right? I

1 mean, is that --

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

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

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

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

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

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

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

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

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

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

1 MR. BLUME: I'm sorry. I'm not sure --

2 JUSTICE KENNEDY: Is it moral culpability
3 for you to take as an example for your behavior the
4 criminal population?

5 MR. BLUME: I still -- I'm not trying to be
6 thick.

7 JUSTICE KENNEDY: You're talking about moral
8 culpability. Is it part of your moral culpability that
9 you take your values, your instructions, your behavior
10 from criminals, as opposed to people who uphold the law
11 in society? Is that part of moral culpability?

12 MR. BLUME: It might be part of the picture
13 of what this person is like.

14 JUSTICE KENNEDY: Well then, isn't it
15 relevant what's happening on the streets, et cetera?

16 MR. BLUME: I don't think it's proper to say
17 if you don't give this person death then all these other
18 things which are bad for society are going to happen.

19 CHIEF JUSTICE ROBERTS: Of course, the
20 defense argument was not focused on Weaver either. The
21 defense counsel said it was a vote for life, fight for
22 it. Always fight for life, always, always. The
23 argument by the defense wasn't -- and it's hard for me
24 to imagine in a penalty-phase how the arguments wouldn't
25 extend beyond the particular individuals.

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

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

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

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

1 lower court proceedings?

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

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

6 MR. BLUME: He filed before the act. The
7 district court dismissed and said, believing erroneously
8 --

9 JUSTICE STEVENS: No, I mean in this
10 proceeding.

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

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

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

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

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

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

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

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

14 MR. BLUME: Yes.

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

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

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Blume.

2 Ms. Spillars, you have four minutes
3 remaining.

4 REBUTTAL ARGUMENT OF ANDREA K. SPILLARS
5 ON BEHALF OF THE PETITIONER

6 MS. SPILLARS: Thank you, Your Honor.

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

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

1 is not the case here.

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

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

15 Thank you.

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

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

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