QUESTION PRESENTED
(Capital Case)

Since this court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the standard of error and prejudice would be, does a court of appeals exceed its authority under 28 U.S.C. §2254(d)(1) by overturning a capital sentence on the ground that the prosecutor's penalty phase closing argument was "unfairly inflammatory?"

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No. 06-313
(Capital Case)

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The February 14, 2006 decision of the United States Court of Appeals for the Eighth Circuit under review (Pet. App. A-2) is reported at 438 F.3d 832 (8th Cir. 2006) (as corrected on February 23, 2006). The district court's May 7, 2003 decision (Pet. App. A-23) is unreported. An earlier decision by the court of appeals (Pet. App. A-187) is reported at 241 F.3d 1024 (8th Cir. 2001). An earlier decision by the district court (Pet. App. A-203) is also unreported. The decision of the Missouri Supreme Court affirming respondent's conviction, sentence, and the denial of state post-conviction relief (Pet. App. A-221) is reported at 912 S.W.2d 499 (Mo. 1995).

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on February 16, 2006, and corrected on February 23, 2006. Pet. App. A-2. The court of appeals denied rehearing and rehearing en banc on May 31, 2006. Pet. App. A-220. This Court's jurisdiction rests on 28 U.S.C. §1254(1). The court below had jurisdiction under 28 U.S.C. §2254. The petition for writ of certiorari was filed on August 29, 2006 and granted on December 7, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that:

> "[Nor] shall any State deprive any person of life, liberty or property, without due process of law[.]"

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §104(3), 110 Stat. 1214, 1219, 28 U.S.C. §2254(d)(1), provides in relevant part that:

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

STATEMENT OF THE CASE

Respondent William Weaver committed a murder-for-hire 19 years ago. He was convicted of first-degree murder and sentenced to death. After the Missouri Supreme Court reviewed and upheld his conviction and sentence, he sought a writ of habeas corpus in federal court. Eventually, the district court granted the writ on the basis that Weaver's due process rights were violated by the prosecutor's penalty-phase closing argument. A divided panel of the United States Court of Appeals for the Eighth Circuit affirmed, and the court denied rehearing en banc by a 5-5 vote.

The murder. The Shurn family owned and operated drug houses. Charles Taylor worked for the Shurns and held title to some of the Shurns' drug houses in his name. Pet. App. A-221. A federal drug prosecution began against Charles and Larry Shurn. Taylor was to be a key witness. *Id.* At some point, the Shurns asked Taylor to sign over some of the properties to them, but he refused. *Id.*, at A-222.

On the morning of July 6, 1987, Daryl Shurn and William Weaver drove to Taylor's apartment in St. Louis, Missouri. Their plan was to force Taylor to sign over the Shurns' drug properties. Then, after Taylor had signed the paperwork, Weaver would kill Taylor. *Id.* The plan went awry.

After Weaver and Shurn entered Taylor's apartment, Taylor unexpectedly pulled a gun and ran outside. *Id.* Weaver and Shurn chased him, firing several shots at him and following him into the woods, where he fell from his wounds. *Id.* Weaver and Shurn went back to the automobile, and Weaver reloaded. *Id.* Then Weaver returned to the woods and shot Taylor again. *Id.* Taylor had bullet holes in his abdomen and back, a bullet graze on his arm, and six bullet holes in his head. He died from the shots to his head, which left his skull malleable and semi-liquified his brain. Tr. 1068-1069.

Weaver and Shurn rapidly drove away. Pet. App. A-222. Witnesses at the scene immediately reported the incident to the police, giving a detailed description of the vehicle. *Id.* Police soon spotted it and gave chase. *Id.* Following a collision

during rush-hour traffic on Interstate 70, Weaver and Shurn fled on foot. *Id.* Shurn was captured at the scene, but Weaver ran off towards an apartment complex adjacent to the highway. *Id.* Not far away, another police officer spotted Weaver, running shoeless on a concrete street and sweating profusely. *Id.*

Weaver told the officer that he had been jogging and became lost. He was many miles from his home. *Id.* Weaver was taken to the scene of the accident, where one of the police officers who had originally pursued him positively identified him as the man who had run away from Shurn's car after the crash. *Id.*

While in jail awaiting trial, Weaver told a fellow inmate that he (Weaver) was a "hit man" on the streets and that he and Shurn had killed Charles Taylor. *Id.*, at A-222-A-223. Weaver also told the inmate that his trial testimony would be that he was out jogging when the police stopped him. *Id.*, at A-223.

The trial: guilt phase. The State's theme at trial centered on Weaver's role as the Shurns' hit man in a murder-for-hire to kill a federal witness. *E.g.,* Tr. 629, 637, 984.

The defense agreed in voir dire and throughout the trial that Taylor's murder was "gruesome" or "bad" and that the murder involved a "hit man." *Id.*, at 304-305, 308, 311, 370, 1141, 1153, 1158, 1168, 1177, 1182, 1191, 1196, 1201, 1212; Pet. App. A-289. But it attempted to show that ten of the State's witnesses who identified Weaver or somehow linked him to the murder scene were mistaken (Robert Mackin, Tr. 655-656; Christine Coslick, Tr. 676; Jean Henson, Tr. 698-699; Wendy Holliday, Tr. 713; Scott Smothers, Tr. 727; Officer Gardiner, Tr. 762-763; Willie Jones, Tr. 827; Officer Lee, Tr. 892-893; Jim Orbin, Tr. 1446; Officer Clark, Tr. 1492, 1495).

Rejecting Weaver's claim of mistaken identity, the jury found him guilty of first degree murder. Pet. App. A-223.

The trial: penalty phase. At the beginning of the penalty phase, the court instructed the jurors that consideration of the death penalty rested on the State's proving beyond a reasonable doubt certain propositions relating to aggravating

circumstances. Tr. 1728; Pet. App. A-300-A-303.

The State alleged four aggravating circumstances: that Weaver murdered Taylor at the direction of another person; that the murder was outrageously or wantonly vile; that Taylor was killed because of his status as a witness; and that Weaver had murdered Taylor for money. Pet. App. A-304. The prosecutor introduced no new evidence, resting on evidence adduced during the guilt phase. Tr. 1728-1729.

In mitigation, the defense sought to prove that Weaver had no significant prior criminal history, that he had two young children at home and an ailing mother, that he had worked with young people to help them stay out of trouble before his incarceration, and that during his incarceration he had helped teach other inmates reading and language skills, assisted disable inmates, and was given the position of jail trustee. Pet. App. A-307-A-308. Weaver testified on his own behalf (Tr. 1744), and the defense put on five other witnesses, each of whom testified to Weaver's good character in the community (Debra Jones, Tr. 1731; Atrice Simpson, Tr. 1732-1733; Mary Wrice, Tr. 1736; Rev. Schroeder, Tr. 1737-1738).

After the parties rested, the court gave the jurors more specific instructions on the aggravating and mitigating circumstances and advised them that they were responsible for determining the punishment. Tr. 1756; Pet. App. A-304-A-311. The court also instructed them that they were "not compelled to fix death as the punishment even if [they did] not find the existence of one or more mitigating circumstances sufficient to outweigh [any] aggravating circumstances." Pet. App. A-309. Finally, the court advised the jurors that the attorneys would have the opportunity to argue the case, but instructed them that attorneys' arguments were "not evidence" and that it was the jurors' "duty to be governed in their deliberations by the evidence as [they] remember[ed] it, the reasonable inferences which [they] believ[ed] should be drawn therefrom, and the law as given in [the] instructions." *Id.*, at A-312.

In his closing, the prosecutor returned to Weaver's role as a hit-man for drug dealers. Pet. App. A-276, A-278, A-281-282, A-285. He argued that Weaver's guilt had been "obvious" based on the evidence and urged the jurors not to second-guess

the guilty verdict. *Id.,* at A-275. He also told them, "If you want to spare his life, that's your discretion; that's your decision. But do it for the right reasons, not the wrong ones." *Id.* He stated that the decision to impose the death penalty was a difficult one to make, regardless of the circumstances (*Id.*, at A-276, A-282-A-283, A-284, A-286), but that this case presented appropriate circumstances (*Id.*, at A-277, A-280, A-283-A-286).

In a portion of the argument highlighted by the court of appeals,[1] the prosecutor continued:

> "It strikes right at the heart of our system. You've got to look beyond William Weaver. This isn't personal. This is business. You people represent the entire community. You represent society. You have to give a message here. You have to tell the William Weavers and the Daryl Shurns of the world, and you have to be willing to look them right in the eye when you do it, that there's a point at which we won't allow you to go. And when you do, prison's too good. It's the death penalty.
>
> "Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been self-defense. Well it was right to kill then and it's right to kill him now." Pet. App. A-277.

Weaver did not object. *Id.*

The prosecutor then returned to the nature of Weaver's crime, emphasizing that a "high level drug operation" chose Weaver as its hit man to kill a federal witness. *Id.*, at A-278.

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[1] Pet. App. A-4-A-5.

The prosecutor again urged the jurors not to second-guess their verdict and reminded them that during voir dire they said that they could impose the death penalty in the right case. *Id.*, at A-278-A-279. The prosecutor also drew the jurors' attention to Weaver's lack of emotion during the trial and to the execution style of the killing. *Id.*, at A-283. And he argued that all four aggravating circumstances applied. *Id.*, at A-285.

Nearing the end of his time, the prosecutor made the following statement highlighted by the court of appeals[2]:

> "This case - - I guess it's one that just cries out to you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case.
>
> "When it comes time after [defense counsel] talks to you, I'll talk to you again briefly, and then you've got to go to the jury room and you've just got to toughen up and do what's right, even though it's going to be tough. You've got to say this is bigger than William Weaver. It's not personal; it's business." Pet. App. A-285-A-286.

Weaver did not object. *Id.*

When Weaver's counsel addressed the jurors, she told them that she honestly believed that her client was innocent and that there was a real possibility that the guilty verdict was wrong. *Id.*, at A-287-A-289, A-291. Approximately half of her closing centered on this theme. She also conceded that what had happened to Taylor "was bad. We cannot disagree on that." *Id.,* at A-289. But she urged the jurors to "fight for life,"

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[2]Pet. App. A-5.

telling them that the mitigating evidence showed that there was "good" in Weaver. *Id.*, at A-290-A-291.

Responding to the prosecutor's summation, defense counsel reminded the jurors that the law allowed them to consider life "even for a crime like this," and urged them not to "let [the prosecutor] make [them] feel that ... if you don't say death, there's no case." *Id.*, at A-289. She closed by arguing:

> "[I]f you vote for life, you are still doing your duty. If you vote for life, you are sending a message. Because nobody loves being incarcerated and nobody would want to be locked up for life, never to see the sun or touch a tree if you want to. Nobody wants that. One -- I don't know which juror said it. One juror said it's almost a living death as I see it. And she's right. It is like a living death. And you're behind these bars so you're away from society and society is protected because you don't come back, you see. So you don't have that concern. You've sent your message. You've done your job." *Id.,* at A-292.

In his final summation, the prosecutor began with a response to Weaver's concluding remarks, in another portion of argument that the court of appeals highlighted[3]:

> "And I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. The right message is life? For an execution? That's the right message? That's the message you want to send to the drug dealers, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and

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[3]Pet. App. A-6-A-7. The court of appeals highlighted the first and fourth quoted paragraphs in one block quote, with the intervening second and third paragraphs deleted, as indicated by ellipses.

> convict you. Life in prison? That's the message you want to send to the scum of the world? That when we catch you and we're convinced your guilty, we're going to give you life in prison? That's not the right message.
>
> "Prison doesn't scare these people. Death would scare them. They surrendered at the moment of truth. When Shurn was told by [Officer Gardiner to] stop [after the crash], he knew he was going to get blown away. Did he stop? Well, did you think he didn't think he'd end up going to prison. He was caught moments after the murder. He knew he'd go to prison, but he stopped because he doesn't want to get killed. William Weaver doesn't want to die. Charles Taylor didn't want to die.
>
> "William Weaver when he saw [Officer] Crain, he's too tired to run anymore. He's too tired, so he tried to talk his way out of it. Was he going to run? I mean when Crain said, 'I'm going to have to take you in,' did he bolt? No. He wants to live. The message has to be death for these types of people. That's the only message they are going to understand.
>
> "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. They are our streets, our neighborhoods, our family. The message is death, not life. And you've just got to geer [sic] yourself to that." Pet. App. A-292-A-294.

Weaver did not object. *Id.*

The prosecutor continued his response to Weaver's closing:

> "Yeah, there's a possibility your verdict could be wrong. Does that mean we shouldn't ever sentence anybody to die? That's the only logical result from that argument. That's what that means: Because there is a remote possibility we could be wrong, therefore, society never has the right to sentence anybody to die. All twelve of you said you agree with the death penalty, that you could impose it in the right case. Well, you're never a hundred percent sure of anything." *Id.*, at A-294.

Weaver did not object. *Id.*

The prosecutor continued in another portion of argument highlighted by the court of appeals[4]:

> "So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that. But that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty." Pet. App. A-294.

Weaver objected, and the court instructed the jurors to disregard the prosecutor's last statement. *Id*.

The prosecutor next argued that while Taylor could not be brought back to life,

> "we can save other lives. The death penalty deters. I'm convinced of that. People can argue for a thousand years whether it does or not, but I'm convinced it does. It doesn't deter passion killings. It doesn't deter crazed people who kill. But it deters business killings like this. If some of those people really thought they faced the

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[4]Pet. App. A-3.

> prospect of a death penalty, some of them wouldn't do it." Pet. App. A-295.

After referring again to Weaver's lack of emotion at the trial, in contrast to the tears Weaver shed during the penalty phase, the prosecutor continued with another statement identified by the court of appeals[5]:

> "He doesn't want to die. Same reason he surrendered to Officer Crain. He didn't want to get shot. He'd rather go to prison. You've got to think beyond William Weaver. As I told you earlier, this is our worst nightmare. This is society's worst nightmare. If they could kill witnesses and we don't execute them in exchange, then there's no deterrence. Then the whole system fails and then chaos reigns and our streets are never safe. The dope peddlers reign and people like William Weaver do." Pet. App. A-295.

Weaver did not object. *Id.*

The prosecutor then addressed the mitigating evidence and reemphasized the lack of doubt as to Weaver's guilt, the execution style of the killing, and Weaver's close relationship with the Shurn family. *Id.*, at A-296-A-297. The prosecutor next argued, in a statement highlighted by the court of appeals[6]:

> "It's bigger than William Weaver. And you've got to have the guts to do it. I'm the Prosecuting Attorney in this county, the top law enforcement office in the county. I decide in which cases we ask for the death penalty and in which cases we don't." Pet. App. A-297.

Weaver objected to the latter portion of this statement, and the

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[5]Pet. App. A-7. The court of appeals' quotation omitted the first four sentences from the quoted paragraph.

[6]Pet. App. A-7.

court instructed the jurors to disregard the prosecutor's "last comment." *Id.*, at A-298.

The prosecutor went on to state, as the court of appeals highlighted[7]:

> "Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?
>
> "I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they going to go out in battle and they were scared young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in a pile of goo that a moment before was your best friend's face, you'll know what to do." Pet. App. A-298.

Weaver objected to the movie example as intended to inflame. *Id.* The prosecutor responded that "[it was] just an analogy," and the court overruled the objection. *Id.,* at A-299.

The prosecutor then concluded his final summation:

> "[Patton] said, 'You'll know what to do.' Well, last July, Charles Taylor's face was a pile of goo and his brains were hanging out. You know what to do. Yesterday, you made the decision with your brain and you made the right decision. Today, you've got to reach down into

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[7]Pet. App. A-3-A-4.

> your belly, because that's where the death penalty comes from; it comes from your belly. You've got to reach down there and say, William Weaver, we sentence you to die. You know what to do. Please have the courage to do it. Thank you." Pet. App. A-299.

Weaver did not object. *Id.*

The jury recommended the death penalty, finding three statutory aggravating circumstances: that Weaver murdered Taylor at the direction of another person; that the murder was outrageously or wantonly vile; that Taylor was killed because of his status as a witness. Pet. App. A-313-A-314. Accepting the jury's recommendation, the trial court sentenced Weaver to death. *Id.*, at A-223.

The post-conviction proceedings and appeal. Weaver moved for post-conviction relief, which the trial court denied. Pet. App. A-258.

Weaver then pursued a consolidated appeal in the Missouri Supreme Court. His 125-page opening brief identified 21 points of error. Weaver Mo. S. Ct. Opening Br. 12-39. Point IV contained two relevant subsections that addressed the prosecutor's guilt and penalty phase closing arguments. Joint App. 44. Section A argued that the prosecutor, in both phases, improperly exploited his position as the elected prosecutor. *Id.,* at 46-52. Section C, consisting of two pages of argument, asserted that the prosecutor made "other improper arguments" that lacked adequate evidentiary support, including the argument that the death penalty was a deterrent. *Id.*, at 58-61. Weaver argued in the alternative that his trial counsel was ineffective for failing to object to many of the prosecutor's arguments. *Id.,* at 44-45, 61.

The Missouri Supreme Court unanimously affirmed Weaver's conviction, sentence, and the denial of post-conviction relief. *State v. Weaver*, 912 S.W.2d 499 (Mo. 1995); Pet. App. A-221. Concerning Point IV, the court held that its "review of the [prosecutor's] arguments discloses neither error in permitting the arguments nor ineffective assistance of

counsel in failing to object." Pet. App. A-232.

More specifically, with regard to Point IV.A., the court held that the trial court "properly sustained the objections and directed the jurors to disregard the argument" regarding the prosecutor's position as prosecuting attorney of the county. *Id.*, at A-234. In rejecting Weaver's limited, Point IV.C. argument, the court noted that Weaver had "put[] forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued matters outside the evidence that lacked evidentiary support," including "that the death penalty would be a deterrent." *Id.*, at A-236-A-237. But it found no merit to Weaver's claim:

> "Our review of the penalty phase arguments discloses that these arguments are reasonable. The fact that the crime had been planned for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future. The claim that the trial court abused its discretion in permitting the argument is without merit." Pet. App. A-237.

This Court denied review. *Weaver v. Missouri*, 519 U.S. 856 (1996).

Habeas proceedings. Weaver pursued federal habeas relief under 28 U.S.C. §2254. The United States District Court for the Eastern District of Missouri granted the petition for a violation under *Batson v. Kentucky*, 476 U.S. 79 (1986). *Weaver v. Bowersox*, No. 4:96-CV-2220-CAS (E.D. Mo. Aug. 9, 1999); Pet. App. A-203. The United States Court of Appeals for the Eighth Circuit reversed the *Batson* holding and remanded for consideration of Weaver's remaining habeas claims. *Weaver v. Bowersox*, 241 F.3d 1024 (8th Cir. 2001); Pet. App. A-187.

On remand, the district court granted Weaver relief as to the penalty phase on grounds that the prosecutor's penalty

phase closing argument violated his due process rights. *Weaver v. Bowersox*, No. 4:96-CV-2220-CAS (E.D. Mo. May 7, 2003); Pet. App. A-56-A-72.

A divided panel of the court of appeals affirmed, with each judge writing separately. *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006); Pet. App. A-2.

In the principal opinion, Judge Melloy concluded that the Missouri Supreme Court sufficiently decided Weaver's federal habeas claim to be entitled to deference under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* Judge Melloy then characterized the prosecutor's penalty phase closing arguments as falling into five categories:

> "(1) an analogy that the role of a juror is like that of a soldier who must do his or her duty and have the courage to kill; (2) statements by the prosecutor about his personal belief in the death penalty; (3) statements that executing Weaver was necessary to sustain a societal effort as part of the 'war on drugs'; (4) assertions that the prosecutor had a special position of authority and decided whether to seek the death penalty; and (5) arguments that were designed to appeal to the emotions of the jury (culminating in a statement that the jury should 'kill [Weaver] now')." *Id.,* at A-13.

With regard to "category (1)," Judge Melloy concluded that "[d]escribing jurors as soldiers with a duty eviscerates the concept of discretion afforded to a jury as required by the Eighth Amendment" (*id.*, *citing Zant v. Stephens*, 462 U.S. 862, 879 (1983)), and that it "'diminished the jury's sense of responsibility for imposing the death sentence, in violation of the Eighth Amendment'" (Pet. App. A-13, *quoting Caldwell v. Mississippi*, 472 U.S. 320 (1985)). He concluded that "categories (2), (4), and (5)" were "improperly inflammatory under several existing United States Supreme Court precedents," but cited only Eighth Circuit precedent in his analysis. *Id.,* at A-14, *citing Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995), *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir.

1989), *cert. denied*, 497 U.S. 1038 (1990), and *Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999), *cert. denied*, 528 U.S. 1010 (2000).

Calling "[c]ategory (3) ... factually distinct, but similar to arguments that are improper under existing law[,]" Judge Melloy identified several of this Court's Eighth Amendment cases as supplying the "controlling Supreme Court precedent" that "capital sentencing [must] be an individualized decision-making process." Pet. App. A-14, *citing Jones v. United States*, 527 U.S. 373 (1999), *Buchanan v. Angelone*, 522 U.S. 269 (1998), *Romano v. Oklahoma*, 512 U.S. 1 (1994), *Harmelin v. Michigan*, 501 U.S. 957 (1991), and *Zant*, 462 U.S., at 879. Citing Eighth Circuit precedent, Judge Melloy further concluded that arguments "that a signal must be sent from one case to affect other cases," invoking a jury's general fear of crime to encourage application of the death penalty," and "[u]sing the conscience of the community as a guiding principle for punishment" all improperly burden a defendant. Pet. App. A-15, *citing Sublett v. Dormire*, 217 F.3d 598, 600-601 (8th Cir. 2000), *cert. denied*, 531 U.S. 1128 (2001), *Copeland v. Washington,* 232 F.3d 969, 972-973 (8th Cir. 2000), *cert. denied*, 532 U.S. 1024 (2001), and *United States v. Johnson,* 968 F.2d 768, 770-771 (8th Cir. 1992).

Finally, Judge Melloy observed that it "is unclear which precedents the Missouri Supreme Court applied," but concluded that "there can be no interpretation of the inflammatory remarks by the prosecutor that is reasonable under the various applicable United States Supreme Court precedents." Pet. App. A-15-A-16.

Judge Bye concurred in the result, writing separately because he did not believe that AEDPA applied. *Id.,* at A-16. But he agreed with Judge Melloy that the prosecutor's arguments "clearly violated Weaver's constitutional rights." *Id.*, at A-20.

Senior Judge Bowman concurred with Judge Melloy that AEDPA applied, but he dissented because he did "not think that the Court correctly appl[ied AEDPA's] standard to Weaver's claims." Pet. App. A-20. In his view, the fact that Judge Melloy had described several of Weaver's claims as

"factually unique" or "factually distinct" raised "red flags." *Id.*, at A-20. In addition, Judge Bowman noted that the Supreme Court cases to which Judge Melloy referred stood only "for general propositions"; they did not "touch[] on [Weaver's] distinct claims of prosecutorial misconduct." *Id.*, at A-21. "Because of the apparent inconclusive state of Supreme Court jurisprudence on the alleged constitutional violation" alleged in Weaver's particular case, Judge Bowman concluded, he would "hold that the state court's decision was neither contrary to nor an objectively unreasonable application of federal law." *Id.*, at A-22.

On May 31, 2006, the court of appeals denied the State's petition for rehearing. The court also denied the State's petition for rehearing en banc in a 5-5 decision. *Id.*, at A-220.

SUMMARY OF ARGUMENT

The Missouri Supreme Court's decision rejecting Weaver's due process challenge to the prosecutor's penalty phase closing arguments was neither "contrary to" nor an "unreasonable application" of clearly established federal law within the meaning of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §2254(d)(1).

Under §2254(d)(1), the appropriate federal law framework for analyzing Weaver's due process claim is set forth in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Romano v. Oklahoma*, 512 U.S. 1 (1994). In each case, the Court reviewed alleged prosecutorial misconduct within the context of the "entire proceedings" to assess whether it "so infected" a criminal defendant's murder trial or capital sentencing hearing "with unfairness as to make the resulting conviction [or death sentence] a denial of due process." *Donnelly*, 416 U.S., at 643. In each case, the Court concluded that no due process violation occurred, even when the Court agreed that the prosecutor's conduct deserved universal condemnation.

The Missouri Supreme Court's decision was not "contrary to" *Donnelly*, *Darden*, or *Romano* because the state high court identified the correct constitutional principles and because, in finding no due process violation, it reached the

same result as this Court reached in *Donnelly*, *Darden*, and *Romano.*

The Missouri Supreme Court's decision was not an "unreasonable application" of *Donnelly*, *Darden*, or *Romano* either. In those cases, this Court looked to several guideposts to help determine the significance of the challenged prosecutorial conduct, including: (i) whether the prosecutor misstated or misrepresented the evidence; (ii) the nature of the trial court's instructions on the law and any curative instructions; (iii) the substance of, and any ambiguity in, the complained of prosecutorial remark or remarks, and any arguments or counter arguments by the defense; and (iv) the weight of the State's evidence favoring guilt or the death penalty, as appropriate.

Here, the prosecutor did not misstate or misrepresent any evidence. The trial court properly instructed the jury as to its role in sentencing and that the prosecutor's arguments were not evidence. The court also properly instructed the jury to disregard certain of the prosecutor's comments. Even if the jury had let the complained of prosecutorial comments influence its decision, the comments were effectively rebutted by defense counsel and were not so pervasive or unambiguously beyond the pale as to unconstitutionally taint the proceedings. In addition, the State's case for the death penalty was particularly strong. The three aggravating circumstances found by the jury were largely undisputed once Weaver's mistaken identity defense had been rejected, and the mitigating circumstances did not diminish Weaver's blameworthiness for the crime.

Finally, the court of appeals' contrary analysis rests on a flawed application of AEDPA and due process principles, and, to some extent, a misreading of the record. The principal opinion looked to circuit precedent, rather than this Court's on-point cases, when assessing the Missouri Supreme Court's decision. Further, the court of appeals examined the prosecutor's comments in a vacuum and did not mention, much less adequately consider, the *Donnelly/Darden/Romano* guideposts. Finally, the court chose to ascribe meanings to certain of the prosecutor's comments that are not well supported by the record.

ARGUMENT

WEAVER IS NOT ENTITLED TO FEDERAL HABEAS RELIEF BECAUSE THE MISSOURI SUPREME COURT'S DECISION WAS NOT CONTRARY TO NOR UNREASONABLY APPLIED CLEARLY ESTABLISHED FEDERAL LAW.

Weaver's ability to obtain federal habeas relief is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA prohibits federal habeas relief unless the state court decision under review either is contrary to or unreasonably applies "clearly established Federal law":

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1).

"Clearly established Federal law" means "the holdings, as opposed to the dicta of this Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 411 (2000); *Carey v. Musladin*, 127 S. Ct. 649, 653 (2006).

AEDPA review of state court decisions is thus "highly deferential." *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997). Under §2254(d)(1), a state court decision is not "contrary to" clearly established federal law unless the state court applies a different rule than one set forth in this Court's cases, or it reaches a different conclusion than this Court has reached when confronting materially indistinguishable facts. *Williams*, 529 U.S., at 405-408; *Bell v. Cone*, 535 U.S. 685, 694 (2002). A state court decision is not "an unreasonable application" of clearly established federal law unless the state court applies

correct legal principle to the facts of a particular case in an objectively unreasonable (as opposed to merely erroneous) manner. *Williams*, 529 U.S., at 409-410; *Cone*, 535 U.S., at 694.

A. *Donnelly v. DeChristoforo*, *Darden v. Wainwight*, and *Romano v. Oklahoma* supply the federal law framework for Weaver's due process claim.

Weaver claimed that the prosecutor's closing arguments violated his rights under the Due Process Clause of the Fourteenth Amendment. The "clearly established Federal law" applicable to his claim is set forth in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), *Darden v. Wainwright*, 477 U.S. 168 (1986), and *Romano v. Oklahoma*, 512 U.S. 1 (1994).

In *Donnelly*, the Court considered whether certain prosecutorial remarks made during closing argument of a state murder trial (namely, a personal expression as to guilt and a comment on the defendant's motives for standing trial), violated a habeas petitioner's due process rights. 416 U.S., at 639. The issue in *Donnelly* was not that "the State has denied a defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel," where "special care" must be taken "to assure that prosecutorial conduct in no way impermissibly infringes" on a particular guarantee. *Id.,* at 643. Rather, it was the more general one: whether challenged remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*

As to that inquiry, the Court emphasized, there was an "important" distinction between ordinary trial errors "which might call for application of supervisory powers" and constitutional infirmities that "constitute[] a failure to observe that fundamental fairness essential to the very concept of justice." *Id.,* at 642. *See also id.*, at 647-648. Examining the remarks through this lens, and in the context of "the entire proceedings," *id.*, at 643, the Court concluded that the remarks did not amount to a constitutional violation, in part because the trial court issued a curative instruction and because the prosecutor's remarks were ambiguous and "[i]solated passages" in an argument "billed in advance to the jury as a matter of opinion not of evidence." *Id.*, at 646.

Darden v. Wainwright involved a similar issue. Again, a state prisoner claimed that he was denied the process due to him by a prosecutor's guilt-phase closing argument. Some of the challenged prosecutorial remarks "implied that the death penalty would be the only guarantee against a future similar act." 477 U.S., at 180. Others called the defendant an "animal," a word used by the defense attorney during his summation to describe the perpetrator of the crimes (whom he suggested was someone other than the defendant). *Id.* Yet other of the prosecutor's remarks were, in this Court's words, "offensive comments reflecting an emotional reaction to the case." *Id.*[8]

Although the Court believed that the prosecutor's "argument deserve[d] the condemnation it has received from every court to review it," it nonetheless concluded that the argument "did not deprive [the petitioner] of a fair trial." *Id.*, at 181. In reaching this holding, the Court found several points significant. First, that the prosecutor's argument "did not manipulate or misstate the evidence." *Id.,* at 181-182. Second, that many of the prosecutor's comments were in reaction to statements made by the defense in its opening summation. *Id.,* at 182. Third, that the trial court had "instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence." *Id.,* at 182. Fourth, that there was "overwhelming eyewitness and circumstantial evidence" to convict, "reduc[ing] the likelihood that the jury's decision was influenced by argument." *Id.* And last, that the defense had effectively turned prosecutor's statements against him during rebuttal. *Id.*

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[8]As quoted in *Darden*, such comments included the following: "He shouldn't be out of his cell unless he has a leash on him and a prison guard at the other end of that leash." "I wish [the victim] had had a shotgun in his hand when he walked in the back door and blown [the defendant's] face off. I wish that I could see him sitting here with no face, blown away by a shotgun." "I wish someone had walked in the back door and blown his head off at that point." "He fired in the boy's [another victim's] back, number five, saving one [bullet]. Didn't get a chance to use it. I wish that he had used it on himself." 477 U.S., at 181 n.12.

Finally, *Romano v. Oklahoma* addressed a claim that introduction of evidence of a prior death sentence deprived a state habeas petitioner of due process during the sentencing phase of his capital murder trial. Noting that it was "settled" that the Fourteenth Amendment's Due Process Clause "applies to the sentencing phase of capital trials," the Court drew on *Donnelly* and *Darden* to formulate the appropriate test for this claim – "whether the admission of evidence regarding petitioner's prior death sentence so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." 512 U.S., at 12-13.

The Court concluded that no such denial occurred, because "the instructions did not offer the jurors any means by which to give effect to the [challenged] evidence ..., and the other relevant evidence presented by the State was sufficient to justify the imposition of the death sentence in this case." *Id.,* at 13. The Court also observed that even if the jurors had let the prior death sentence affect their decision, it seemed "equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so," a point that rendered acceptance of the petitioner's theory "an exercise in speculation, rather than reasoned judgment." *Id.*, at 14.

B. The Missouri Supreme Court's decision was not "contrary to" *Donnelly*, *Darden*, or *Romano*.

The court of appeals' decision rested on §2254(d)(1)'s "unreasonable application" rather than its "contrary to" prong. But the court did not rule out the latter possibility, specifically commenting that it was "unclear which precedents the Missouri Supreme Court applied" in assessing Weaver's claim. Pet. App. A-16. There is no question, however, that the state high court decision was not "contrary to" clearly establish law within the meaning of AEDPA.

In analyzing Weaver's claim, the state high court looked to federal appellate precedent that itself relied on *Donnelly* and *Darden* to determine if a due process violation occurred. *See id.*, at A-235, *citing Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990). Furthermore, the state court reviewed the challenged prosecutorial comments

for reasonableness and assessed the effect of the trial court's curative instructions, consistent with the approach taken in *Donnelly*, *Darden*, and *Romano*. *See* Pet. App. A-233-A-237. And so the state court's decision was not "contrary to" this Court's cases for having applied the wrong rule.[9] *See Early v. Packer*, 537 U.S. 3, 8 (2003) (per curiam) (§2254(d)(1) does "not require citation" or "awareness" of this Court's cases "so long as neither the reasoning nor the result of the state-court decision contradicts them.") (emphasis removed).

In addition, the state high court's rejection of Weaver's claim was not "contrary to" this Court's cases for having reached a different conclusion than this Court when confronting materially indistinguishable facts. This Court likewise rejected the due process claims considered in *Donnelly*, *Darden*, and *Romano*.

C. The Missouri Supreme Court's decision was not an "unreasonable application" of *Donnelly*, *Darden*, or *Romano*.

The second prong of §2254(d)(1) is whether the Missouri Supreme Court unreasonably applied clearly established federal law to the facts of Weaver's case. The answer is "no." In fact, a conclusion that the prosecutor's arguments did not so "infect[] [Weaver's] sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process," *Romano*, 512 U.S., at 12-13, is wholly consistent with *Donnelly*, *Darden*, and *Romano*.

As discussed above, in *Donnelly*, *Darden*, and *Romano* the Court looked to several guideposts to help determine the significance of the challenged prosecutorial remarks in the context of the proceeding as a whole. These included: (i) whether the prosecutor misstated or misrepresented the

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[9]Even Weaver conceded in his federal appellate briefs that the state high court identified "the correct" constitutional principles in analyzing his habeas claim. Weaver Ct. App. Br. 13.

evidence[10]; (ii) the nature of the trial court's instructions on the law and any curative instructions[11]; (iii) the substance of, and any ambiguity in, the complained of prosecutorial remark or remarks, and any arguments or counter arguments by the defense[12]; and (iv) the weight of the State's evidence favoring guilt or the death penalty, as appropriate.[13]

These guideposts indicate that Weaver's sentencing proceeding was not fundamentally unfair.

First, the prosecutor did not misstate or misrepresent any evidence. Indeed, the evidence of the aggravating (and mitigating) factors in this case was largely undisputed, including the heinous nature of Charles Taylor's killing and the fact that it was a murder-for-hire to prevent a witness from testifying against a major drug family in a federal drug prosecution.

Second, the trial court properly instructed the jurors as to their role and as the matters that they were to consider in determining punishment. At the beginning of the proceeding, the court advised the jurors that their consideration of the death penalty was dependent on the State proving "certain propositions relating to aggravating circumstances" beyond a reasonable doubt. Pet. App. A-300. After the close of evidence, the trial court gave a more detailed instruction –Instruction No. 23– listing the four aggravating circumstances in the case. Tr. 1756; Pet. App. A-304-A-305. Then, in Instruction No. 24, the court instructed the jurors that when assessing whether aggravating circumstances warranting the death penalty existed they could consider any of the aggravating circumstances they had unanimously found beyond a reasonable

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[10] *Donnelly*, 416 U.S., at 646; *Darden*, 477 U.S., at 181-182;

[11] *Donnelly*, 416 U.S., at 644-645; *Darden*, 477 U.S., at 182; *Romano*, 512 U.S., at 13.

[12] *Donnelly*, 416 U.S., at 646-647; *Darden*, 477 U.S., at 182; *Romano*, 512 U.S., at 14.

[13] *Darden*, 477 U.S., at 182; *Romano*, 512 U.S., at 13.

doubt under Instruction No. 23 and the "evidence relating to the murder of Charles Taylor." Pet. App. A-306. The last instruction the jurors heard before closing arguments was the court's instruction that the attorneys' arguments were "not evidence," and that it was the jurors' "duty to be governed in [their] deliberations by the evidence as [they] remember[ed] it ... and the law as given in these instructions." *Id.*, at A-312.

The trial court's instructions during the prosecutor's closing argument further undercut a conclusion that the state court's decision was less than reasonable. When the defense objected to the prosecutor's statement that "if you don't sentence [Weaver] to die in this case, there's no point in having a death penalty," the court sustained the objection and instructed the jurors to "disregard the [prosecutor's] last comment." Pet. App. A-294. The trial court also sustained the defense's objection to, and instructed the jurors to disregard, the prosecutor's statement that he was the "top law enforcement office in the county" and decided "which cases we ask for the death penalty and which we don't." *Id.*, at A-297-A-298. Under this Court's precedents, it is presumed that the jurors followed these, and all other of, the trial court's instructions. *Richardson v. Marsh*, 481 U.S. 200, 206-207, 211 (1987); *Romano*, 512 U.S., at 13.

While Weaver's defense counsel did not object to the remaining remarks about which Weaver has since complained (with the exception of the prosecutor's analogy to the movie "Patton"), the jury did not consider the arguments, assuming – as the law requires – that the jury followed the trial court's general instructions. None went directly to the fact issues before the jury – whether the State proved aggravating circumstances and whether the aggravating circumstances outweighed any mitigating circumstances, such that the death penalty was appropriate – and none were evidence in the case.

Third, even if the jurors had let the prosecutor's remarks influence their decision, the remarks, when considered in the context of the proceedings as a whole, were not so beyond the pale that they deprived Weaver of a fair sentencing proceeding. As the Court explained in *Darden*, a defendant must show more than that the prosecutor's arguments were "undesirable" or even "universally condemned." 477 U.S., at 181 (internal quotations

omitted). A defendant must show that the comments "so infected the sentencing proceeding with unfairness as to make the jury's imposition of the death penalty a denial of due process." *Romano*, 512 U.S., at 12.

Here, the remarks that the trial court specifically instructed the jurors to disregard were "[i]solated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence." *Donnelly*, 416 U.S., at 647. As such, they are unlikely to have "profoundly impress[ed]" the jurors and tainted the entire proceedings. *Id.*

The other comments about which Weaver complained (which the jurors were not specifically instructed to disregard) primarily centered around the prosecutor's theme that imposing the death penalty on Weaver would "send" a "message" to other drug dealers and their hit men that would "deter business killings." Pet. App. A-277, A-295. Others alluded to self defense and the movie "Patton." *Id.,* at A-277, A-298.

If the former comments had any impact, it was lessened by the defense counsel's arguments that the alternative punishment – life in prison without possibility of parole – would also "send[] a message," because "nobody loves being incarcerated and nobody would want to be locked up for life, never to see the sun or touch a tree" and because being behind bars was "like a living death." Pet. App. A-292. Defense counsel's reminder that the law allowed the jurors to consider life "even for a crime like this" and her urges not to "let [the prosecutor] make [them] feel that ... if you don't say death, there's no case" also effectively countered the prosecutor's statements. *Id.*, at A-289.[14]

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[14]With regard to the prosecutor's comments about imposing the death penalty as a message to others, it is important to note that these comments were part of the prosecutor's larger argument that the death penalty serves to deter premeditated capital crimes, which is one of the recognized justifications for the death penalty. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (noting that "'retribution and deterrence of capital crimes by prospective offenders'" have been identified as "the social purposes served by the death penalty"), *quoting Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion

The prosecutor's allusions to self defense and a scene in the movie "Patton" likewise were unlikely to have unconstitutionally contaminated the proceedings. Read in context, the prosecutor's statements appear to have been intended to make the points that for people who respect the law, choosing death is difficult, but there are certain instances in which the law recognizes killing as justified and appropriate, and that Weaver's case was one of them. *See, e.g.,* Pet. App. A-277 ("Sometimes killing is not only fair and justified; it's right." "If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been in self-defense. Well it was right to kill then and it's right to kill him now."); *id.*, at A-298 (describing scene in "Patton" in which General Patton was talking to his troops the night before a battle and was trying to explain to them "that sometimes you've got to kill ... because it's right").

While the "Patton" analogy in particular could have been more artfully drawn, under *Donnelly*, "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." 416 U.S., at 647. And here, the fairest contextual reading of these comments is the least damaging.

Fourth, the State's case for the death penalty was particularly strong, further lessening the likelihood that the jury was unfairly swayed. As noted, it was essentially undisputed that Taylor's killing was a particularly wanton murder-for-hire of a potential federal witness. So, once Weaver's mistaken identity defense was rejected in the guilt phase, the jury's finding of three aggravating factors was largely a foregone conclusion. Furthermore, Weaver's mitigating evidence was not particularly strong or dramatic. The defense was able to show that he had no significant criminal history, that he had two young children and an ailing mother, and that he had worked with young people to encourage them to stay out of trouble and with inmates. Because none of those factors lessened Weaver's

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of Stewart, Powell, and Stevens, JJ.).

blameworthiness for the killing, the aggravating circumstances plainly outweighed the mitigating, making the jury's choice of the death penalty the logical outcome.

Finally, even if the Missouri Supreme Court's rejection of Weaver's due process claim cannot be considered wholly consistent with *Donnelly*, *Darden*, and *Romano*, at the very least it was not an "unreasonable application" of those cases. The due process principle discussed in *Donnelly*, *Darden*, and *Romano* is a broad and general rule, with "fundamental fairness" in light of the "entire proceedings" as its touchstone. As this Court observed in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), the more general the rule, the more leeway courts have in reaching outcomes in case by case determination" under the "unreasonable application" prong of §2254(d)(1). *Id.*, at 664. Here, for the reasons stated above, the state high court's application of the Court's broad and general due process rule cannot fairly be deemed "unreasonable" within the meaning of §2254(d)(1).

D. The court of appeals' contrary analysis was wrong.

The court of appeals determined that Weaver was entitled to relief notwithstanding §2254(d)(1). But the result it reached rests on a flawed analysis of the law and, to a lesser extent, the record.

First, despite quoting §2254(d)(1) and citing *Williams v. Taylor*, 529 U.S. 362 (2000), the court of appeals did not accord the Missouri Supreme Court's decision AEDPA deference. For example, rather than comparing the state court's analysis to that of this Court's due process cases (the "clearly established Federal law" under §2254(d)(1)), the court of appeals judged the state court's decision against its own circuit precedents, some of which predated AEDPA. *See* Pet. App. A-13, *citing Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989), *cert. denied*, 497 U.S. 1038 (1990) and *Antwine v. Delo*, 54 F.3d 1357 (8th Cir. 1995), *cert. denied*, 516 U.S. 1067 (1996); Pet. App. A-14, *citing Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995); and Pet. App. A-15, *citing United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992).

And when the court of appeals did refer to this Court's

cases, it frequently referred to cases that did not address due process claims like Weaver's, but Eighth Amendment precedent not directly on point. *See* Pet. App. A-14, *citing Jones v. United State*, 527 U.S. 373 (1999) (Eighth Amendment did not require jury to be instructed on consequences of a deadlock), *Buchanan v. Angelone*, 522 U.S. 269 (1998) (Eighth Amendment did not require jury to be instructed on concept of mitigation or be given express guidance on particular statutorily defined mitigating factors), and *Harmelin v. Michigan*, 501 U.S. 957 (1991) (Eighth Amendment proportionality principle was offended by life sentence without possibility of parole for crime of possession of approximately 1.5 lbs of cocaine); Pet. App. A-15, *citing Zant v. Stephens*, 462 U.S. 862 (1983) (Eighth Amendment not violated by Georgia's statutory aggravating circumstance scheme, which did not guide sentencing body in exercising its discretion apart from narrowing class of murderers eligible for the death penalty).

Second, the court of appeals' analysis of Weaver's claim was itself contrary to the approach taken in *Donnelly*, *Darden*, and *Romano*. Whereas this Court's cases teach that any allegedly improper prosecutorial remarks must be judged after "an examination of the entire proceedings," *Donnelly*, 416 U.S., at 643, the court of appeals looked at each comment in a vacuum. The court of appeals did not mention, much less adequately consider, the trial court's instructions, the defense's counter arguments, or the overwhelming strength of the aggravating circumstances as compared to the mitigating circumstances shown by the defense – all things that this Court considered in *Donnelly*, *Darden*, and *Romano*.

Third, some of the court of appeals' statements about the nature of the prosecutor's comments are difficult to square with the record. For instance, the court described the prosecutor as having suggested that "executing Weaver was necessary to sustain a societal effort as part of the 'war on drugs'" (Pet. App. A-13), when the prosecutor never referred to a "war on drugs" and his comments about "sending a message" to other criminals was evidently directed at deterring other for-hire murders. In another passage, the court characterized some of the prosecutor's comments as "arguments against a rational decision by the jury" which "implor[ed] the jury to kill the defendant immediately." Pet. App. A-14; *see also id.*, at A-13

(referring to argument as one "designed to appeal to the emotions of the jury (culminating in a statement that the jury should 'kill [Weaver] now')"). But taken in context, the prosecutor was apparently trying to argue that imposing the death penalty is similar to self-defense killings in that both are instances in which the law recognizes death as justified. *See* Pet. App. A-277, A-298.

Most egregious, however, is the court's suggestion that the prosecutor's reference to the movie "Patton" "should be taken as 'calculated to remove reason and responsibility from the sentencing process.'" Pet. App. A-13, *quoting Newlon*, 885 F.2d, at 1338. The prosecutor's "Patton" reference was, of course, imprecise. As then-Justice Rehnquist aptly observed in *Donnelly*, closing arguments "are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." 416 U.S., at 646-647. And so courts must be careful when trying to assess the impact a particular argument or comment may have had on the jury. *Id.*, at 647.

But regardless of its clarity, the prosecutor's "Patton" reference was not, as the court of appeals suggested, akin to a commanding officer's order to his subordinates to kill the enemy, intended to relieve the jurors of any individual responsibility in selecting punishment. As discussed above, in context the prosecutor appears to have intended to make the more innocuous point that choosing death is a difficult decision for law-abiding persons, but that there are certain instances in which the law recognizes death as justified, and that Weaver's case was one of them. Even if the jurors took the statements differently, however, it is equally plausible that they understood the prosecutor to be emphasizing their personal responsibility in choosing the appropriate punishment, rather than diminishing it, for he reiterated that *the jury* had to make the decision to impose death, as the trial court had properly instructed. Pet. App. A-299.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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