

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ANDREA K. SPILLARS, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JOHN H. BLUME, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF	
9	ANDREA K. SPILLARS, ESQ.	
10	On behalf of Petitioner	54
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 [10:02 a.m.]

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

5 Ms. Spillars.

6 ORAL ARGUMENT OF ANDREA K. SPILLARS

7 ON BEHALF OF THE PETITIONER

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

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

21 That decision was wrong not only because the
22 court of appeals failed to properly afford deference to
23 the State court, but because when viewed within the
24 entire proceedings the prosecutor's closing arguments
25 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 is 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 argument.
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 are 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 JUSTICE KENNEDY: I mean, they'd be improper
4 because they -- they were based on an emotional appeal
5 that's improper?

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

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

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

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

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

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

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

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

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

17 MS. SPILLARS: No, Your Honor.

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

23 MS. SPILLARS: I think a reasonable
24 interpretation of those statements could be that the
25 duty was to make the decision whether or not to impose

1 the death penalty.

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

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

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

24 If a prosecutor, as in this case, tells that
25 story and uses that analogy, it seems to me that the

1 argument is not an argument based on evidence, but an
2 argument based upon the situation, the situation of the
3 jurors vis a vis a capital defendant.

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

10 Now, am I wrong?

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

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

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

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

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

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

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

15 MS. SPILLARS: I'm sorry?

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

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

23 JUSTICE GINSBURG: It's not just in
24 isolation. Didn't this prosecutor constantly say this
25 case is not about Weaver, this case is larger than

1 Weaver. I think several times in the closing the jurors
2 were told: Think big, think the large picture, don't
3 think about this individual.

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

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

19 You're not supposed to give an argument that
20 vouches as the U.S. attorney that I think that this is
21 what you should do. So in Newlon he says: I'm talking
22 to you as prosecuting attorney of the county, the top
23 law enforcement officer. And here he says: I'm the top
24 law enforcement officer and I decide in which cases we
25 have the death penalty and not. Worse than Newlon, I

1 would say.

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

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

20 And then another thing you're not supposed
21 to do is you're not supposed to tell them it's their
22 duty to the community. And this is just filled with
23 instances where you hardly even know that there's a
24 person called Weaver because he says: What you have to
25 do here is send a message to the drug lords, send a

1 message --

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

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

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

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

10 JUSTICE SCALIA: And is that the law here?

11 MS. SPILLARS: No, Your Honor.

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

17 MS. SPILLARS: To the extent that Newlon
18 sets out those arguments, no, that's not incorrect.
19 Those arguments were made in Newlon. However, for two
20 reasons Newlon is distinguishable. In this case there
21 were curative instructions given to the jury. In Newlon
22 there were no objections made. So in this case, when
23 the prosecutor made the statement, for example, that,
24 I'm the top law enforcement officer, there was an
25 objection and there was a curative instruction. So it

1 was not --

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

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

7 JUSTICE BREYER: Was there a curative
8 instruction?

9 MS. SPILLARS: No, there was not.

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

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

20 MS. SPILLARS: There is none, Your Honor.
21 And a reasonable interpretation of that comment is that
22 he was imparting to the jury the duty to make the
23 decision, not necessarily to impose the death penalty.

24 JUSTICE BREYER: In Viereck the words were:
25 "This is war, harsh, cruel, murderous war." And the

1 prosecutor went on to analogize the jury's duties to the
2 duties of soldiers and he said: Do your duty. Do you
3 think that's a lot different than this case?

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

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

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

21 JUSTICE GINSBURG: Certain statements.
22 There are were many objections made here that were
23 overruled.

24 MS. SPILLARS: Correct. There were 12
25 objections made total. Interestingly, though, the

1 defense attorney did not raise objections to the
2 majority of the comments that the Eighth Circuit found
3 improper. Now, while that's not dispositive, I think
4 that the defense attorney is certainly in the best
5 position to judge whether or not a comment prejudices
6 his client.

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

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

17 JUSTICE GINSBURG: Do you think --

18 MR. SPILLARS: So assuming that the defense
19 attorney was -- I'm sorry.

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

23 MS. SPILLARS: Correct.

24 JUSTICE GINSBURG: And that there was a
25 significant overlap in the three charges in the three

1 cases. The prosecutor had been told in two of them, you
2 went too far. In this one, just in terms of what the
3 prosecutor said in the closing argument, is this less
4 offensive or would you say they're all on a par?

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

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

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

23 I take it that the counsel for the
24 Respondent is going to say: Well, this is a Federal
25 standard, but the Eighth Circuit is entitled to apply

1 the specificity and the application that it's given to
2 this, so the Eighth Circuit's entitled to rely on its
3 cases in reversing.

4 Do you agree with that?

5 MS. SPILLARS: No, Your Honor.

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

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

10 JUSTICE KENNEDY: Why.

11 MS. SPILLARS: Clearly, it's not established
12 law by this Court, and this Court has not specifically
13 outlined the kind of post and beam that would result in
14 a reversal in a penalty phase Closing argument.

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

18 MS. SPILLARS: Correct, yes.

19 JUSTICE BREYER: So those things that are
20 improper for a prosecutor to make in summing up in the
21 guilt phase, are they then proper to say, exactly those
22 things, in a sentencing phase with capital -- with --
23 you know, capital sentencing?

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

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

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

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

15 JUSTICE STEVENS: May I ask you this
16 question about your position: We are trying to find
17 cases that clearly establish law by decisions of this
18 Court. Do you include in that group of cases, cases
19 such as Berger against the United States, and Viereck
20 against the United States, which were direct review of
21 Federal cases in which they say there was a denial of
22 the fair trial, but they're not setting aside State
23 cases?

24 Would it be proper for the Court of Appeals
25 to rely on those cases?

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

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

4 MS. SPILLARS: No. Because of the very
5 specific nature of the supervisory powers in those
6 cases, I don't believe that in the larger context, the
7 final standards, that we can say that those directly
8 apply.

9 CHIEF JUSTICE ROBERTS: If those direct
10 Federal cases were interpreting the constitutional
11 provisions directly, they would count as established
12 law?

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

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

21 Four of those instructions, numbers 21, 28,
22 26, and 27, told the jury in various forms that it was
23 their duty, and theirs alone, to render a verdict. The
24 jury was also told in instructions 23, 24, and 26 that
25 it was -- that their decision must be within the

1 confines of the evidence.

2 And thirdly, within the specific process
3 laid out for finding ways -- mitigating and aggravating
4 circumstances. And finally, the last instruction that
5 the jury heard before closing arguments was that closing
6 arguments were not evidence.

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

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

17 However, the jury did not find aggravator
18 number 1. So the very aggravator that the prosecutor
19 argued most about to the jury, they did not find.

20 It's more reasonable to conclude that the
21 jury made its decision based on the strength of the
22 evidence and the strong evidence in support of the death
23 penalty.

24 Having rejected the misidentification
25 defense, the jury necessarily found that the respondent

1 was the passenger who had returned to the woods to shoot
2 the victim several more times.

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

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

13 JUSTICE GINSBURG: That was a slip on the
14 District Court's part, wasn't it? I mean, that original
15 petition that was dismissed because he had filed a cert
16 petition to this Court should not have been dismissed,
17 it should have been held, in which case the petition
18 would have been timely and would not have been trumped
19 by an AEDPA variant.

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

22 JUSTICE KENNEDY: Well, didn't he seek a
23 COA?

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

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

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

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

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

12 Finally, given the overwhelming evidence --
13 it supported a finding that the respondent had carried
14 out an execution style murder for the purpose of
15 silencing a witness. I'll preserve --

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

25 MS. SPILLARS: Not directly, Your Honor.

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

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

5 JUSTICE STEVENS: That rule can be ignored
6 by State prosecutors?

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

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

15 JUSTICE STEVENS: Well, it is --

16 JUSTICE SCALIA: In this area of
17 constitutional violation.

18 JUSTICE STEVENS: Well, the question, I
19 suppose, is whether that is a constitutional rule. It
20 is established by the Supreme Court of the United
21 States, an opinion written by Chief Justice Stone a good
22 many years ago. But your argument is it is not
23 applicable to State prosecutors, as I understand it.

24 MS. SPILLARS: Not necessarily not
25 applicable to State prosecutors. However, in the

1 context of fundamental fairness, does it establish a
2 clear -- a rule in the sense of those kinds of
3 statements will render a trial fundamentally --

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

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

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

15 MS. SPILLARS: Under the -- it is not the
16 law in the sense of fundamental fairness. It is
17 certainly an indication of what --

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

20 MS. SPILLARS: I'm sorry?

21 JUSTICE KENNEDY: Where did Chief Justice
22 Stone get it from? Just because of our supervisory
23 power? I mean, if it's just Federal supervisory power,
24 then I think you could tell the counsel, he doesn't have
25 to follow it, it's due process.

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

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

11 I'll reserve.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Blume?

14 ORAL ARGUMENT OF JOHN H. BLUME

15 ON BEHALF OF RESPONDENT

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

18 As the former prosecutor's brief makes
19 clear, George "Buzz" Westfall's penalty phase closing
20 argument in Mr. Weaver's case contained a number of
21 improper and mutually reinforcing statements which
22 exploited the authority of his office, analogized the
23 jury's duties to that of soldiers in war time, injected
24 extraneous matters into the proceedings, and appealed to
25 the jurors' passions and prejudice.

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

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

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

21 MR. BLUME: I think the historical context
22 is different, but this was set up in this case by
23 informing the jurors that we were involved in a war, in
24 a war on drugs in society. And then he uses the same
25 story, analogizing jurors' responsibilities to that of

1 soldiers in a war. I think it is also important to put
2 that comment in the context in which it occurred. Not
3 only in the broader context and the repeated -- the
4 prosecutor repeatedly leveraging the power of his office
5 behind this, but this came right on the heels of him
6 saying, I'm the top law enforcement officer in this
7 county. I decide in which cases we seek the death
8 penalty.

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

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

14 JUSTICE SCALIA: And a curative instruction
15 given.

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

24 If you read that logically --

25 CHIEF JUSTICE ROBERTS: Which in that case,

1 AEDPA says we look to clearly established law by our
2 U.S. Supreme Court decisions. Which is the clearest
3 U.S. Supreme Court decision that was violated here?

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

7 CHIEF JUSTICE ROBERTS: Well, pick which one
8 do you think is the most directly applicable.

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

13 CHIEF JUSTICE ROBERTS: It's not Romano.
14 Romano was an introduction of evidence case, right?

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

21 CHIEF JUSTICE ROBERTS: My point is simply
22 the level of generality at which the guiding principles
23 were articulated, which helps when you're applying it,
24 but in determining -- it is the point Judge Bowman in
25 dissent that when you don't have a case that's close,

1 that you have more leeway in terms of the deference to
2 the Court, because it's not a clearly established
3 precedent of the Supreme Court.

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

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

17 But in addition to that, the Missouri
18 Supreme Court in this case said the decision was
19 unreasonable because it failed to consider significant
20 portions of Mr. Weaver's challenge to this argument. It
21 did the analysis under a State law abuse of discretion
22 standard, and it refused to consider or failed to
23 consider several components of his claim.

24 JUSTICE SCALIA: What do you mean, how do
25 you it failed to consider? I mean, is there an

1 obligation to respond to every single point that's made?

2 MR. BLUME: Well --

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

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

11 JUSTICE SCALIA: If they did consider it,
12 you mean they did not respond to that argument in their
13 opinion.

14 MR. BLUME: They did not refer to it in
15 their opinion.

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

21 MR. BLUME: He also raised the point about
22 this is bigger than William Weaver. And that was
23 improper. And when the State court cited what he said,
24 they chose to ellipses that out, and didn't even put in
25 --

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

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

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

19 MR. BLUME: Uh-huh.

20 JUSTICE KENNEDY: To teach us. Can he say
21 that?

22 MR. BLUME: I think he could say that.

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

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

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

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

18 MR. BLUME: I think the import of this
19 argument is you should give the person the death penalty
20 even if you're not sure he deserves it in order to
21 further the deterrent function of the death penalty.

22 JUSTICE SOUTER: No, but you're -- you're
23 saying look, he can make a general statement that we
24 have a death penalty in part for its deterrent function,
25 but he cannot make the argument that you ought to apply

1 the death penalty in this case solely for deterrent
2 reasons, i.e., reasons unanchored in the culpability of
3 this particular defendant.

4 MR. BLUME: That's correct. Not because,
5 what this statement did. Especially --

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

14 MR. BLUME: I think that us the logical
15 inference from the six or seven times he says -- in
16 variety of -- he says this is bigger than William
17 Weaver. The one thing you've got to understand is this
18 is far more important than William Weaver; this is, goes
19 way beyond William Weaver; this does not pertain just to
20 William Weaver. He says that on six or eight occasions.
21 And I think you could interpret that -- the logical
22 interpretation --

23 JUSTICE SCALIA: If you let a person who is
24 as guilty as William Weaver go, you're affecting not
25 just William Weaver, you're affecting the whole war on

1 drugs, you're affecting the -- what's wrong with that?

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

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

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

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

19 MR. BLUME: I think as long as it is a
20 blanket sort of statement, that one purpose of the death
21 penalty is deterrence, that would probably be consistent
22 with this Court's decisions.

23 JUSTICE KENNEDY: Right.

24 MR. BLUME: That's not what is happening
25 here, Justice Kennedy, especially when it is tied in to

1 that, to send a message and then he also goes on to talk
2 about the consequences. If you don't sentence this
3 person to death, then the animals will reign in the
4 jungle and we can't have that in a civilized society and
5 there's no point in having jurors, the dope peddlers
6 prevail. You put all that together, he is telling these
7 people as the prosecutor in this county. If you don't
8 give this person the death penalty there will be all
9 these adverse social consequences.

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

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

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

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

23 MR. BLUME: Judge Bowman --

24 CHIEF JUSTICE ROBERTS: The standard is
25 unreasonable in light of clearly established law.

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

7 I wanted to --

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

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

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

16 MR. BLUME: Well, if I'm wrong about that,
17 I'm wrong. But even -- I don't think it is also under
18 Justice O'Connor's opinion in Williams versus Taylor,
19 you don't have to, this doesn't work at the level of
20 saying well, any one judge is unreasonable. The point
21 is, it's an objective standard, not is this judge, you
22 know, somehow out of touch here?

23 And I think -- so -- I wanted to make one
24 point before I forge about it, to correct one thing that
25 Petitioner said. Mr. Weaver filed this prior to the

1 act. It was dismissed. He did request counsel and a
2 COA. He did appeal this in the Eighth Circuit in his
3 first appeal.

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

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

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

15 JUSTICE BREYER: Can I ask you, where -- one
16 of the passages that I thought went a little far where
17 is he says to the jury, the one thing you've have got to
18 into your head; this is far more important than William
19 Weaver. This case goes far beyond William Weaver. This
20 touches all the dope peddlers and the murderers in the
21 world. That's the message you have to send. It just
22 doesn't pertain to William Weaver. It pertains to all
23 of us, the community. The message -- there are street,
24 et cetera.

25 Okay. Now. That struck me, as you argue

1 this is rather extreme. Its seems to be removing the
2 attention of the jury from William Weaver and saying you
3 have a duty to send this man for other reasons. Now --
4 to execute him.

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

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

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

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

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

7 JUSTICE BREYER: You were talking --

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

13 MR. BLUME: Well --

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

20 That's quite different it seems to me from
21 the situation in which guilt has already been
22 established. The trial's done. This person is guilty,
23 and the only thing they're arguing about is what the
24 penalty ought to be. I'm not sure that you can
25 analogize, you know, from the one situation to the other

1 in determining what kind of argument is proper. Because
2 in the former situation when the -- if the prosecutor
3 says this is not just about this defendant, it's about
4 the whole society, he's urging the jury to find the
5 person guilty. I mean -- and that's crazy. You don't
6 find the person guilty in order to stop drug
7 trafficking.

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

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

18 JUSTICE SCALIA: That's different. Look --
19 it could -- could -- would defense counsel be able to
20 argue during the guilt phase of the trial, in an
21 ordinary trial where there's no separate phase, "ladies
22 and gentlemen of the jury, this person has a large
23 family that's dependent on him; he's a miserable wretch.
24 You shouldn't find him guilt. Is there no mercy in your
25 heart?"

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

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

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

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

19 MR. BLUME: Well, I disagree with that, and
20 to this extent. Can a lawyer in a capital case argue at
21 the sentencing phase of the capital trial you should not
22 sentence this person to death because they've had a hard
23 life? Yes. Of course you can. And why can you do
24 that? Because according to this Court's cases, that
25 goes directly to the individual's moral culpability and

1 whether they deserve the death penalty.

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

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

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

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

17 MR. BLUME: Yes.

18 CHIEF JUSTICE ROBERTS: How was that
19 message -- a different message, I guess, but he can
20 say send a message, but the prosecutor can't?

21 MR. BLUME: No. I think the important -- by
22 the time defense counsel said that, the prosecutor in
23 his opening statement had already made the send a
24 message statement about five times. She was trying in
25 that one limited instance to tackle that and say well,

1 okay, if you give him life that's a message, too.

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

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

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

14 You can't say that?

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

19 JUSTICE BREYER: Suppose that you said
20 explicitly, the prosecutor -- which he didn't say -- but
21 you're arguing basically, it is a fair, sort of an
22 implication, suppose he said there are a lot of drug
23 dealers around, and he's one of them. And this
24 sentencing phase isn't about just -- just isn't about
25 William Weaver. It is about sending a message to the

1 others.

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

9 Now would that violate the Constitution?

10 MR. BLUME: Of course.

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

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

16 JUSTICE BREYER: You don't find any one
17 where anybody ever had an argument like that.

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

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

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

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

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

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

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

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

17 There was substantial mitigating evidence
18 presented regarding his character, his good deeds, and
19 other things he had done in the community and his
20 adaptability to confinement.

21 This was not a strong case for death.

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

1 trial fundamentally unfair.

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

6 MR. BLUME: I believe there were six.

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

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

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

19 JUSTICE SCALIA: Well, serve him right? I
20 mean, is that --

21 MR. BLUME: I'm not suggesting it serves him
22 right. I'm suggesting that whether juries impose death
23 often depends in part as well on the moral
24 blameworthiness or how they perceived the victim. This
25 was not like witness, an innocent witness. This was

1 somebody who was involved in that. And that normally
2 makes it more difficult for the prosecution to obtain a
3 death sentence.

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

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

18 JUSTICE ALITO: Do you think moral
19 culpability is the only factor that can be mentioned? I
20 thought you said earlier it was okay for the prosecutor
21 to refer to deterrence.

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

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

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

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

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

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

21 JUSTICE KENNEDY: Is it moral culpability
22 for you to take as an example for your behavior the
23 criminal population?

24 MR. BLUME: I still -- I'm not trying to be
25 thick.

1 JUSTICE KENNEDY: You're talking about moral
2 culpability. Is it part of your moral culpability that
3 you take your values, your instructions, your behavior
4 from criminals, as opposed to people who uphold the law
5 in society? Is that part of moral culpability?

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

8 JUSTICE KENNEDY: Well then, isn't it
9 relevant what's happening on the streets, etcetera?

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

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

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

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

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

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

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

23 JUSTICE STEVENS: Two days before the act.

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

1 --

2 JUSTICE STEVENS: No, I mean in this
3 proceeding.

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

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

14 MR. BLUME: It was the same habeas
15 proceeding. It was a continuation of the same. It was
16 then remanded back to the district court. The district
17 court granted the writ on this ground and then it went
18 up on appeal. I don't think he would have been under
19 any obligation to appeal it again, having sort of gotten
20 a ruling on that in the same habeas proceeding.

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

25 MR. BLUME: I believe that -- I'm sorry, I

1 didn't mean to interrupt.

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

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

7 MR. BLUME: Yes.

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

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

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Mr. Blume.

20 Ms. Spillars, you have four minutes
21 remaining.

22 REBUTTAL ARGUMENT OF ANDREA K. SPILLARS

23 ON BEHALF OF THE PETITIONER

24 MS. SPILLARS: Thank you, Your Honor.

25 I would like to address two points. First,

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

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

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

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

8 Thank you.

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

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

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able 41:19 above-entitled 1:13 56:12 abuse 30:21 accept 31:3 account 32:15 48:15 acknowledge 46:21 acknowledged 47:13 act 38:1,7 52:22 52:23,24 53:10 53:11 action 40:15 adaptability 47:20 add 32:11 addition 30:17 additional 47:14 address 54:25 addressing 8:19 admission 29:18 adversarial 52:16 adverse 36:9 advice 25:8 advise 55:13 AEDPA 3:14 4:1,23 17:19 22:5,6,8,11,12 22:19 23:6 29:1 36:21 52:14,17 53:9 53:10 54:10 afford 3:22 afforded 3:16 56:6 agents 27:8 aggravating 8:4 21:3,10,13 35:6 46:6 aggravation 47:15 aggravator 21:17,18	ago 24:22 agree 10:6 11:7 11:8 18:4,9 28:16 48:11 Ah 45:21,21 ahead 7:6 ALITO 27:1 32:1 49:18 50:1 allow 33:3 allowed 42:1 allows 55:17 ameliorate 47:9 Amendment 6:18,20 45:14 amount 8:8 analogize 15:1 40:25 analogized 7:20 26:22 analogizing 27:25 analogy 6:22 8:25 28:19,20 31:7 41:9 analysis 28:18 30:21 53:8 ANDREA 1:17 2:3,9 3:6 54:22 animals 36:3 43:11 50:13 answer 5:6 13:6 46:12 52:1,3,5 52:6 answers 4:17 anybody 45:17 anyway 47:14 apart 50:12 appeal 6:4,9 22:12,21,25 23:19 38:2,3 53:18,19 appealed 26:24 38:4,6 53:5,7 appeals 3:22 19:24 APPEARAN...	1:16 appendix 11:6 21:12 37:15 55:23 applicable 23:23 24:23,25 25:4 25:6,8 26:9 29:8,17 37:10 application 18:1 30:15 56:5 applied 4:4,10 4:11 5:12 21:15 29:10 53:9,10 applies 22:6 24:9 52:14,17 54:10 apply 4:15 17:25 19:9,13,14 20:8,15 23:6 24:10 33:25 41:15 52:17 applying 4:1 29:23 42:15 appropriate 50:3 51:25 52:9,9,10 approximately 17:9 area 24:16 argue 8:3,10 24:9 26:7 38:25 41:20 42:1,2,20 44:4 44:10 49:9 argued 21:14,19 39:12 52:15,19 53:4 arguendo 5:22 arguing 40:23 44:21 argument 1:14 2:2,5,8 3:3,6 4:5,10,14,22 5:2,13 6:22 7:2 8:8,15,16,17 8:18 9:1,1,2,5	9:7,22 11:19 17:3 18:14 21:10,13 23:5 24:22 26:14,20 27:4,11 30:12 30:20 31:4,12 31:18 32:7 33:2,16,19,25 34:13 35:10 36:13 39:7 41:1 45:17 47:23,25 49:5 49:14,15 51:14 51:17 52:2,3,5 54:22 55:6,8,9 55:11,15 arguments 3:11 3:24 10:6 13:18,19 17:6 18:25 20:19 21:5,6 29:16 29:20 40:2 42:4,5 43:2 45:23 47:7 51:18,23 55:1 55:2,14,16,23 55:25 arouse 23:22 articulated 29:23 aside 19:22 46:25 asked 25:7 asking 10:2 44:12 aspire 50:18 assassination 48:4 assert 44:13 asserted 23:5 Assistant 1:17 assume 5:18 8:22 18:6 21:7 assuming 5:10 6:13 16:18 assumption 5:17 5:22,23	attempt 7:5 attention 39:2 attorney 1:17 11:20,22 16:1 16:4,12,19 authority 26:22 automatically 46:22 autres 34:9 awful 11:17 a.m 1:15 3:2 56:11
				B
				back 8:9 22:3 39:8 53:16 bad 9:22 51:12 baloney 46:7 base 4:18,19 based 6:4,22 8:12 9:1,2,7,13 10:6,9 21:21 30:12,13 49:14 basically 44:21 53:8 basis 36:19 52:22 54:15 Bataan 27:12 Batson 38:6 53:6 battle 8:19 12:11 beam 18:13 beams 5:9 behalf 1:18,19 2:4,7,10 3:7 26:15 54:23 behavior 50:22 51:3 believe 9:25 20:6 33:1 36:11 37:2 39:14 40:1 48:6 49:15 53:25 54:2 believing 52:25 Berger 19:19

best 12:14 16:4 45:7	37:1	26:8,10,20	23:17 24:21	closing 3:11,24
better 40:17	brain 46:8	27:10,22 28:25	25:18,21 26:12	4:5,10,22 11:1
beyond 10:21	Breyer 11:7	29:14,25 30:13	26:16 28:9,25	17:3 18:14
32:9 34:19	13:4,12 14:2,7	30:18 34:1	29:7,13,21	20:19 21:5,5,9
36:13 38:19	14:24 18:19	36:21,22 38:7	30:9 36:16,24	21:12 26:19
48:8 50:7	19:1 38:15	38:19 39:6,15	37:8,14 43:8	27:4,11 29:16
51:19,20,21,21	40:7 44:19	40:5,12 42:20	43:13,18 48:2	29:20 43:14
big 11:2	45:11,16,21	43:3 45:11	48:7 49:4	49:5 55:2
bigger 31:22	49:15	46:2 47:3,10	51:13 54:18	COA 22:23 23:3
32:4,10 33:9	brief 13:4,13,13	47:21 48:3	56:9	38:2
33:17 34:16	22:9 23:9	51:22 52:9	chose 31:24	come 8:9 9:19
35:8	26:18 31:8	55:4,19,20	Circuit 3:16	17:10 36:21,22
BIL 23:10	38:9	56:7,10,11	13:9 15:9 16:2	42:6,10
BIO 38:10,11	bring 10:2	cases 9:19 11:24	16:15 17:25	comment 14:21
bit 15:13	broad 37:11	12:4 16:8,20	38:2 53:5,6,8	16:5 28:2,13
bits 11:16	broader 28:3	17:1 18:3 19:1	53:21 54:6	40:6
blameworthin...	37:12	19:17,18,18,21	Circuit's 18:2	comments 3:19
43:4 48:24	Brown 4:25	19:23,25 20:2	circumstance	4:19 5:14 6:16
blanket 35:20	brutality 8:5	20:6,10 26:8	21:11	6:19 15:9 16:2
Blume 1:19 2:6	Buzz 26:19	28:7 30:4 40:9	circumstances	16:13,14 29:12
26:13,14,16	Byron 12:6	41:10 42:15,15	21:4,14 28:18	32:12 35:13
27:21 28:11,16		42:17,24 49:25	46:6	36:14 47:2,9
29:4,9,15 30:8	C	52:8,11 55:17	circumstantial	47:22
31:2,5,14,21	C 2:1 3:1	category 36:15	47:11	community
32:6,19,22	Caldwell 6:20	CENTER 1:5	cited 16:21	12:22 38:23
33:1,18 34:4	called 11:12	cert 22:15 37:4	31:23	44:13 47:19
34:14 35:11,19	12:6,24 42:7	54:14	City 1:18	compare 17:6
35:24 36:23	42:17	certain 15:21	civilized 36:4	comparison
37:1,13,16	capital 9:3,19	55:8	50:14	17:16
38:11 39:8	18:22,23 19:9	certainly 4:11	claim 30:23	complaining
40:13 41:11	27:10,16,16	4:14,24,25	claims 23:2	31:9
42:19 43:10,17	41:16,17 42:17	7:12 8:11 9:11	clause 40:3	complete 48:3
43:21 44:6,15	42:20,21	10:6 16:4	clear 5:17 9:14	completely
45:10,13,18	carried 23:13	20:13 23:8	25:2 26:19	29:19 44:7
46:1 47:1 48:6	case 3:4 4:7 5:12	24:3,7 25:10	30:10 31:8	components
48:11,21 49:8	8:4,24 9:9,13	25:17	54:2,12,13	30:23
49:22 50:6,20	9:22 10:7,25	cetera 38:24	clearest 29:2	conceded 37:6
50:24 51:6,10	10:25 11:12,13	challenge 30:20	clearly 16:12	concept 32:3
51:20 52:6,12	11:15,15 12:6	challenges 31:7	18:11,16 19:17	concern 5:1
52:21,24 53:4	13:8,9,15,20	chaos 43:11	24:13 29:1	concession 9:18
53:14,25 54:7	13:22 15:3,6,6	50:11	30:2,6,7 36:19	10:8,19,20
54:12,19	15:8,19 16:11	character 47:18	36:25 37:5	conclude 21:20
bottom 37:15	16:15 17:7,8	charges 16:25	39:21 55:1	conclusion
bounds 36:14	17:12,13,15	chart 11:10	clerk 11:10	46:23
Bowman 29:24	20:14,18 22:17	Chief 3:3,8 4:9	client 16:6	condemned
36:17,20,23	23:6,10,18,20	10:9,16 13:5	close 29:25	10:18
	23:23 24:9	14:10 20:9	closely 33:14	confinement

47:20 confines 21:1 conscientious 36:11 51:24 consequences 35:15 36:2,9 consider 27:17 30:19,22,23,25 31:6,9,11,17 55:22 considerations 4:16 5:8,11 6:1 19:13 considered 31:18,19 32:5 32:7 considering 3:20 4:6 consistent 35:21 constantly 10:24 Constitution 6:9 45:9 constitutional 5:19 20:10 24:17,19 contained 5:3 26:20 contains 36:14 contested 47:12 context 5:7 6:1 7:19 20:6 24:8 25:1 27:21 28:2,3,20 35:14 42:15 47:8 48:10 55:21 continuation 53:15 contrast 47:23 contravened 30:6 conviction 47:16 convince 46:14 copy 20:19 correct 4:13 8:16 15:24 16:23 18:18	23:11 28:10 34:4 37:24 CORRECTI... 1:5 correctly 4:1 counsel 13:5,6 14:10 17:23 25:24 26:2,12 38:1 39:24 41:19 43:22 44:4,9,10 46:11 51:15 56:9 count 20:11 counterintuitive 21:7 country 27:13 county 11:22 28:7 36:7 courage 7:21 course 22:6 35:11 42:2,3 42:23 45:10,11 51:13 court 1:1,14 3:9 3:10,14,22,23 4:2,4,23 6:19 12:4 13:15 15:15 17:9,20 17:20 18:12,12 18:16 19:2,18 19:24 20:18 22:16 24:3,14 24:20 26:17 29:2,3,10 30:2 30:3,11,18 31:23 36:15 38:5,13 39:15 39:17 40:5,9 41:10,12 44:9 44:17 45:12 46:13,23 52:15 52:20,25 53:16 53:17 54:3,14 55:17,22,23 56:2,4,6 courts 37:11	court's 3:14,17 15:7 22:14 30:8 35:22 42:24 44:7 45:14 54:16 55:16 56:5 cowardice 34:11 crazy 41:5 crime 8:5 35:4 43:6 49:10 52:7 criminal 39:19 50:23 criminals 51:4 cruel 14:25 culpability 33:3 34:2 42:25 49:13,19 50:16 50:19,21 51:2 51:2,5 curative 13:21 13:25 14:7 15:11 28:14 47:6	50:4,11,12 51:11 52:5,8 52:11 decide 11:24 28:7 44:12 52:10 decision 3:17,21 4:2 7:6,25 8:6 14:23 17:8,10 20:25 21:21 29:3,4 30:11 30:18 37:12 54:11 56:6 decisions 17:19 19:17 29:2 30:9 35:22 37:11 39:17 44:18 45:15 52:20 declined 21:10 deeds 47:18 defendant 9:3,8 19:5 34:3 41:3 defendant's 6:17 12:16 defense 16:1,4 16:12,18 21:25 39:24 41:19 42:5,6 43:13 43:22 44:9,9 51:14,15,17 deference 3:16 3:22 30:1 56:6 definition 32:3 deliberate 20:20 32:16 deliberations 20:16 denial 19:21 dependent 41:23 depends 48:23 deprive 3:25 deprived 4:8 deprives 20:3 deserve 33:6 43:1 49:13	deserves 33:20 despite 47:9 determined 48:8 53:9 determining 29:24 39:10 41:1 42:3 deterred 50:2 deterrence 32:3 32:7,17,24,25 33:2,2,7,14,14 35:18,21 49:21 50:5 55:1,7,8,9 55:15 deterrent 32:16 33:4,21,24 34:1 devoid 6:10 different 15:3 27:15,19,20,22 30:10 31:20 40:20 41:18 43:19 46:20 differently 36:22 53:23,23 difficult 7:6 42:9 49:2 direct 19:20 20:9 directly 10:12 15:5 20:7,11 23:25 24:2,10 28:19 29:8 39:15 40:5 42:25 44:16 disagree 6:25 42:19 discretion 11:5 30:21 44:7 discuss 33:9 discussed 21:13 52:19 discussion 9:13 dismissal 38:4 dismissed 22:11 22:15,16 23:3 38:1 52:25
---	--	--	---	---

dismissing 54:4	15:2 20:23	36:14 37:6	extraneous	22:15 37:25
dispositive 16:3	27:13,13,17	establish 19:17	26:24	52:22,24 53:10
disregard 15:19	28:21,22 39:3	25:1 30:5	extreme 39:1	53:13
15:20	42:12,13 43:16	established 3:12		filled 12:22
disregarded	52:4	18:11,16 20:11	F	final 20:7
21:8	dying 33:12	24:13,20 29:1	face 12:15,16	finally 21:4
dissent 29:25	D.C 1:10	29:9,16,17	fact 4:4 38:6	23:12
37:2		30:2,7 36:19	49:24 55:4	find 19:16 21:10
dissented 36:18	E	36:25 37:5	factor 44:17	21:17,19 39:5
distinguish 15:4	E 2:1 3:1,1	39:22 40:22	49:19,23	40:16,18 41:4
distinguishable	earlier 49:20	55:1	factors 8:4,5	41:6,24 42:13
13:20 15:14	earliest 38:14	et 38:24	32:15 35:6,6	45:16
distinguishes	easily 45:14	etcetera 51:9	facts 8:3 9:13	finding 21:3
56:2	effect 23:21	evaluation 3:18	23:20 34:8	23:13 30:11
district 17:9	eight 15:8 16:14	evidence 4:18	35:3 42:13	first 5:14,24
22:14 38:5	34:20	5:14 6:7 8:13	46:14 48:10	6:11,13 30:11
52:25 53:16,16	Eighth 3:16 6:20	8:15 9:1,8,12	fail 31:6 35:2	31:5 38:3
54:3,16	13:9 15:9 16:2	9:21 10:1 21:1	failed 3:22 30:19	39:11 54:25
doing 12:5,19	16:14 17:25	21:6,22,22	30:22,25	five 17:9 43:24
27:13 43:16	18:2 38:2	23:12 29:14,18	failing 27:8	47:24
DON 1:3	45:14 53:5,6,7	30:13 39:25	fair 3:25 7:19	focus 19:5 49:11
Donnelly 3:12	53:21 54:5	47:7,11,14,17	19:8,8,11,12	49:11
5:7,24 6:11	either 16:9 24:1	49:9 55:4	19:22 20:3	focused 51:14
17:22 29:5	24:2 26:3	exact 45:23	44:21	follow 25:11,13
30:16	51:14 52:18	exactly 18:21	fairness 3:12 4:3	25:25 26:4,5
Donnelly/Dar...	ellipses 31:24	examine 39:23	4:8,17 5:10	followed 20:17
39:11	emotion 6:10	example 13:23	6:12 24:8 25:1	footnote 22:8
door 44:3	19:5	17:13 39:18	25:16	38:9
dope 36:5 38:20	emotional 6:4,9	50:22	fall 50:11	forge 37:24
doubt 48:8	12:18	exclusive 5:8	falls 55:7	forget 35:7 46:6
drug 12:25	encourage 34:9	execute 34:12	families 48:18	former 13:14
33:10 35:15	34:12	39:4 45:2,8	family 41:23	26:18 41:2
41:6 44:22	enforcement	executed 45:3	far 15:16 17:2	forms 20:22
48:4,16,17	11:23,24 13:24	execution 23:14	32:8 34:18	found 6:19 15:9
drugs 27:24	28:6	execution-style	38:16,18,19	16:2,15 21:25
35:1	entire 3:24 4:6	55:5	favor 10:1	48:12
due 13:8 15:5	9:14,15	exhaust 54:15	Federal 17:24	four 5:18 20:21
25:25 28:17	entitled 17:25	exhausted 23:2	19:21 20:10	21:14 54:20
40:3	18:2	explicitly 9:20	23:23 25:23	fours 37:9,12
duties 15:1,2	erroneously	44:20	37:5 39:22	framework 3:10
26:23	52:25	exploited 26:22	48:4 55:5,18	friend's 12:14
duty 6:23 7:9,11	especially 34:5	extend 51:19	Fifth 6:17	front 53:22
7:22,25 8:8,21	35:25	extent 10:5	fight 51:15,16	function 33:4,21
8:22 9:5,23,25	ESQ 1:17,19 2:3	13:17 16:7	52:2,2	33:24 54:11
10:2,9,14,18	2:6,9	26:9 42:20	fighting 27:12	fundamental
12:5,19,22	essence 37:2	46:18 55:6	file 13:13	4:3,8,16 5:9
14:12,17,19,22	essentially 4:17	56:4	filed 22:8,11,12	6:12,15 24:8

25:1,16 45:19 46:17,24 54:3 fundamentally 25:3 30:14 40:2 43:3 48:1 further 33:7,21	42:25 50:10 going 12:11 17:24 18:7 33:11,11 40:5 40:9 46:5 51:12 goo 12:14,16 14:3 good 23:6 24:21 47:18 55:2 gotten 53:19 govern 29:19 granted 38:5 53:6,17 ground 53:17 grounds 15:5 38:6 53:7 group 19:18 guess 19:4 43:19 guided 42:4 guiding 29:22 guilt 18:21 19:3 19:3,14 27:9 27:10 40:11,11 40:21 41:16,20 41:24 42:2,16 42:18 47:11 guilty 27:14 34:11,24 40:16 40:19,22 41:5 41:6 guy 34:8 48:9	harsh 14:25 head 38:18 48:5 head-on 47:2 hear 3:3 heard 21:5 heart 41:25 heavier 41:8 heels 28:5 held 22:17 help 5:6,9 34:12 helps 29:23 higher 50:17 historical 27:21 55:21 holding 27:6 Honor 4:13 5:4 5:20 6:24 7:17 9:11 10:5 13:7 13:11 14:20 18:5,8 20:13 22:20 23:11,25 24:8 54:24 horrible 35:4 hotly 47:12 huge 35:16 hundreds 51:23 hypothetical 5:17	14:16,23 41:8 43:5 48:22 50:3 imposing 14:12 impress 12:8 improper 5:11 5:25 6:2,3,5,6 6:14 8:2,7,11 15:9 16:3 18:20 20:15 26:21 31:23 32:1,2 36:14 38:4 39:13 44:3 47:2 50:5 55:2 improperly 3:18 4:19 21:9 impropriety 6:8 6:10 inartful 7:4 include 6:8 19:18 inconsistent 15:13 43:4 45:19 incorrect 13:18 indication 25:17 35:2 individual 6:16 11:3 32:4 40:18 individuals 27:8 27:14 51:19 individual's 42:25 43:4 49:12 indulged 23:19 inference 9:5 34:15 inferences 8:12 informing 27:23 initial 53:4 initially 38:5 53:6 injected 26:23 innocent 47:13 48:25	instance 43:25 55:15 instances 12:23 48:18 instructed 20:16 instruction 13:25 14:8 21:4 28:14 47:7 50:16 instructions 13:21 15:11 20:17,18,21,24 21:8 35:5 47:5 47:6 51:3 Interestingly 15:25 interpret 7:16 34:21 interpretation 3:14 7:24 14:21 34:22 interpreted 7:15 interpreting 20:10 interrupt 54:1 introduction 29:14 invalidates 46:19 involve 10:13 40:10 involved 27:23 48:16 49:1 involving 16:21 irrelevant 23:20 28:17 isolation 3:19 10:21,24 issues 23:20 43:6 Ithaca 1:19 i.e 34:2
G	H	I		J
G 3:1 gangs 33:10 general 1:17 3:13 4:11 5:8 6:22 8:17 17:21 30:5 33:23 34:11 47:7 49:8 generality 29:22 generally 37:10 gentlemen 8:6 41:22 42:7,11 44:10 46:5 52:4 George 12:10 26:19 Germany 27:9 GINSBURG 10:23 15:12,21 16:7,17,20,24 22:13 36:20 give 11:19 32:12 33:5,19 34:8 36:8 44:1 45:5 46:8 50:11 51:11 given 4:2 8:3,4 13:21 15:11 18:1 20:19 23:12 28:15 gives 35:5 giving 13:14 go 8:21,23 9:6 22:3 28:23 34:24 35:17 46:7 goes 15:15 32:9 34:18 35:14 36:1 38:19	H 1:19 2:6 26:14 habeas 22:7,10 53:5,12,13,14 53:20 hand 12:13 happen 19:3 51:12 happened 30:12 39:24 happening 35:24 51:9 hard 42:14,22 51:17	identical 45:23 ignored 24:5,7 II 27:7 illogical 29:19 imagine 51:18 imparting 14:22 implicated 6:17 implication 44:22 imply 7:5 import 33:18 important 10:21 28:1 31:19 32:8 34:18 38:18 43:21 50:3 impose 7:25 9:6		Japanese 27:12 Jefferson 1:18 Jenner 30:4

JOHN 1:19 2:6 26:14 judge 16:5 29:24 35:5 36:16,16 36:20,23 37:1 37:20,21 39:24 44:4 46:5 July 12:15 jungle 36:4 43:12 50:13 juries 48:22 jurisprudence 46:23 juror 7:20 jurors 6:23 9:3 9:25 11:1 26:25 27:23,25 36:5 jury 4:18 7:5 8:7 9:19 10:17 11:4 13:21 14:22 15:18,19 20:15,18,20,22 20:24 21:5,8 21:14,17,19,21 21:25 35:3 38:17 39:2 40:16 41:4,22 42:7 43:5,14 44:10 48:7 jury's 15:1 26:23 justice 3:3,8 4:9 4:20 5:2,5,16 5:21 6:3,21 7:1 7:8,14,18 8:2 8:14 9:17 10:8 10:9,13,16,16 10:23 11:7 13:2,4,5,10,12 14:2,7,10,24 15:12,21 16:7 16:17,20,24 17:18 18:6,10 18:15,19 19:1 19:15 20:2,9 22:3,13,22	23:1,8,16,18 24:1,5,11,15 24:16,18,21 25:4,13,18,19 25:21,21 26:1 26:12,16 27:1 28:9,14,25 29:7,13,21 30:9,24 31:3 31:11,16 32:1 32:14,20,23 33:8,22 34:6 34:23 35:17,23 35:25 36:16,20 36:24 37:8,14 37:18 38:8,15 39:19 40:7,8 40:14 41:18 43:8,13,18 44:2,8,19 45:11,16,21 46:10 48:2,7 48:19 49:4,15 49:18 50:1,15 50:21 51:1,8 51:13 52:1,12 52:23 53:2,12 53:21 54:5,8 54:18 55:12 56:9 justifiable 12:9 justification 33:5	54:5 Kennedy's 55:12 kill 7:22 8:21,23 9:6,23 12:9 14:14 28:22,23 28:23 35:7,12 42:8,12 47:13 killed 21:16 55:5 killng 50:2 kind 6:1,12,18 18:13 39:6 41:1 kinds 25:2 55:17 know 5:21 6:8 12:13,15,23 17:19 18:23 19:4 26:6 31:16 33:10,15 34:10 35:4 37:22 40:25 45:24 46:1,7 46:21	54:11,12 lawyer 42:20 43:14 lead 46:22 leeway 3:15 30:1 left 33:16 legal 22:4 les 34:9 let's 34:8,8 level 6:14 29:22 37:19 56:3 leverage 41:14 leveraging 28:4 life 11:5 42:23 43:15,16 44:1 44:5,11,13 51:15,16 52:2 52:2 light 36:25 39:23 likes 9:23 limited 24:12,12 27:6,6 43:25 listener 8:22 listening 16:13 little 11:10,16 38:16 53:8 logical 34:14,21 logically 28:24 29:15 long 35:19 look 11:8,9,14 11:15,15 22:5 29:1 33:23 35:13 39:11 41:18 45:12,14 45:22,22 46:4 47:13 48:9 49:6 50:9 51:22 52:6,7 looked 11:11 looking 3:19 14:10 looks 11:16 lords 12:25 losing 26:2 lot 11:17 15:3	44:22 lower 52:19
	K K 1:17 2:3,9 3:6 54:22 Kennedy 5:16 5:21 6:3 7:18 17:18 18:6,10 22:22 23:1 25:4,13,18,21 32:14,20,23 35:17,23,25 38:8 44:2,8 50:15,21 51:1 51:8 53:21	L lack 8:4 ladies 8:6 41:21 42:7,11 44:10 46:4 52:3 laid 3:10 21:3 large 11:2 41:22 larger 10:25 20:6 43:6 law 4:22 5:3,15 7:10,13 11:10 11:16,23,24 13:10,24 18:12 19:17 20:12 22:5 23:23,23 24:13 25:14,16 28:6 29:1 30:7 30:21 36:19,25 37:5 39:22 42:12 51:4 54:3 Lawrence 53:22 53:24 54:2,5,8	M majority 16:2 making 5:22 man 39:3 March 1:11 mark 16:13 matter 1:13 34:10 45:6 52:18 56:12 matters 26:24 mean 6:3,9 8:16 12:4,17 19:6 22:14 25:23 26:2 28:12,17 30:24,25 31:12 31:17 41:5 48:20 53:2 54:1 mechanism 20:14 mention 9:21 27:5 49:16 mentioned 35:18 49:19 mercy 41:24 message 12:25 13:1 35:15 36:1 38:21,23 43:9,10,11,15 43:19,19,20,24 44:1,5,25 45:5 45:5,8 50:4 mind 34:8 35:3 35:3,5 minutes 54:20 misdemeanor 47:16 miserable 41:23 misidentificati... 21:24 Missouri 3:17 4:1 30:17 55:22 56:1,4 misstate 5:15	

misstated 4:22 5:14	Nevertheless 3:16	officer 11:23,24 13:24 28:6 38:13	page 2:2 37:15 55:23 56:1	55:22,24
misstatement 6:7 7:10,12	Newlon 11:12 11:21,25 12:7	okay 12:17 33:15 38:25	pages 49:16	Peninsula 27:12
misstatements 5:3	13:7,17,19,20 13:21 15:13,18	39:8 44:1 49:20	pale 51:21	people 36:7 51:4
mistake 37:3 39:10 54:3	16:8 17:10,12 17:13 47:24	one-sided 10:1	par 17:4	perceived 48:24
mitigate 55:9	56:2,3	opened 44:3	part 21:12 22:14 23:22 33:24	person 12:24 32:12 33:19
mitigating 8:5 21:3 35:6 46:6 47:17	nonspecific 4:3	opening 43:23	39:11 48:13,23 50:15 51:2,5,6	34:23 36:3,8 40:16,22 41:5 41:6,22 42:22 45:7 51:7,11 52:7
Mo 1:18	non-capital 40:11	operate 55:10	particular 26:9 34:3 40:6,15 41:15 46:14 51:19	pertain 32:10 34:19 38:22
moment 12:14	normally 49:1	opinion 10:9,17 23:17 24:21 25:8 31:13,15 37:18 41:14	particularly 7:4 55:3	pertains 38:22
money 21:16	noted 44:18	opportunity 38:14	parties 23:4	petition 22:7,10 22:15,16,17 37:4,15 38:5 54:4,15
moral 33:3 42:25 43:4 48:23 49:12,18 50:15,16,19,21 51:1,2,5	number 8:18 19:1,7 21:15 21:18 26:20 31:7 32:11 39:17 47:2,3	opposed 50:17 51:4	passage 7:16,18	Petitioner 1:6 1:18 2:4,10 3:7 37:25 47:10 54:23
movie 12:10,10	numbers 20:21	opposition 23:9	passages 38:16	Petitioners 37:3
multi-factor 6:1	N.Y 1:19	oral 1:13 2:2,5 3:6 26:14	passenger 22:1	petitions 53:10
multi-tier 6:12	<hr/> O	order 33:7,20 41:6,8 43:6 50:4 54:14	passion 23:22	phase 4:5,10,12 4:15 18:14,21 18:22 19:3,3 19:10,13,14 26:19 27:9,11 27:16 29:10,18 29:20 32:2 40:10,11 41:16 41:16,20,21 42:2,16,18,21 44:24 47:13 48:10 49:5,12 51:18 55:22,24
murder 23:14	O 2:1 3:1	ordinary 41:21	passions 26:25	pick 29:7
murderers 38:20 50:17	objected 15:10 16:16 28:9,11 47:4,5	original 22:14	Patton 6:22 8:15 8:16,18 12:10 12:10 14:2,5 14:11 28:19,22 31:7	picture 11:2,9,9 48:3 51:6
murderous 14:25	objection 13:25 14:4,5 28:10 28:12 47:4	ought 33:25 40:24	Payton 4:25	pile 12:14,16
must's 55:18	objectionable 16:15	outcome 41:15	peddlers 36:5 38:20	please 3:9 26:16
mutually 26:21	objections 13:22 15:14,17,22,25 16:1,9,10,11 16:12	outcomes 3:15	penalty 4:5,10 4:12,15 7:10 7:12 8:1,7,9 9:6 10:1 11:25 14:23 18:14 19:13 21:23 26:19 28:8 29:10,18,19 32:2,13,17,18 33:4,6,19,21 33:24 34:1,9 35:21 36:8 40:10,17,24 41:8,16 42:18 43:1,5 47:12 48:10 49:5,11 49:13 50:4,12 51:18 52:8	plenty 46:12
<hr/> N	objective 37:21	outlined 18:13		point 14:15,16 15:13 23:3,10 24:12,13 29:21 29:24 31:1,6
N 2:1,1 3:1	obligation 31:1 38:13 53:19	outrageous 46:3		
Napoleon 34:9	obtain 49:2	overall 39:25		
nature 3:13 20:5 49:9	obviously 6:2 27:10	overlap 16:25		
Nazi 27:8	occasions 34:20	overrule 44:4		
necessarily 6:8 10:7 14:23 19:14 21:25 24:24 55:14	occurred 28:2	overruled 14:6 15:23 47:4		
need 32:12 35:15	offensive 17:4	overstated 27:2		
needs 48:15 50:2	office 26:22 28:4 41:14	overwhelming 23:12 42:9		
never 4:4 15:18 27:4 34:7 35:3 35:3,5 45:6		O'Connor's 37:18		
		<hr/> P		
		P 3:1		

31:10,21 33:1 35:12 36:5 37:5,6,20,24 39:15 40:5 46:2,3 48:14 50:12 53:7 points 31:4 40:9 47:6 54:25 population 50:23 Por 34:9 portions 30:20 position 16:5 19:16 positions 30:10 possible 38:14 possibly 36:11 post 5:9 18:13 POTOSI 1:4 power 25:23,23 26:3,5,8 28:4 powers 15:7 20:5 precedent 30:3 46:13 precedents 17:19 19:9 56:5 precious 44:11 prefaced 55:8 prejudice 23:22 26:25 prejudices 16:5 prejudicial 16:13 preliminary 4:21 premise 9:21 39:9 prepared 11:10 presence 47:9 presentation 52:16 presented 47:14 47:18 preserve 23:15 prestige 41:14	presume 20:17 pretty 12:18 prevail 36:6 43:11 previously 55:13 pre-spoken 55:11 principle 32:24 41:12 principles 29:22 30:5 45:20 prior 22:11 37:25 47:15 prison 33:11 prisoner 23:1 pro 23:1 probably 7:4 10:18 35:21 50:6 54:13 problem 43:2 45:24 procedure 42:16 proceeding 53:3 53:15,20 proceedings 3:20,24 4:7 9:14 26:24 30:14 37:6 40:2 48:13 proceeds 28:19 process 13:8 15:6 21:2 25:25 28:17 40:3 pronounced 24:14 proper 18:21 19:24 36:12 41:1 51:10 properly 3:22 20:16 32:6 propositions 13:14 prosecute 36:11 prosecuting 11:22	prosecution 8:3 8:10 27:7 42:4 42:10 44:2 46:19 48:5 49:2 prosecutor 4:21 8:24 9:18 10:24 11:12,13 13:8,23 14:13 15:1,16 16:14 16:21 17:1,3 18:20 19:2 21:11,13,18 23:19 25:6,7 27:4,9 28:4 32:2,14 36:7 36:17 39:7,12 39:16,23 40:15 41:2,13 43:20 43:22 44:20 46:4,21 47:12 49:20,24 50:1 51:24 52:10 55:7 prosecutors 3:11 12:6 13:14,16 24:6 24:23,25 25:5 25:11 39:20 49:25 55:13,18 prosecutor's 3:24 4:19 5:13 14:19 17:7 21:9 26:18 29:11 40:1 49:5 protect 43:6 provide 5:9 provided 3:15 provisions 20:11 punishment 47:15 49:11 purchaser 48:17 purpose 23:14 23:21 32:16 35:20 put 12:13 28:1	31:24 36:6 46:7 <hr/> Q <hr/> question 4:17,21 5:6 13:6 19:16 22:4,4,6,9 23:16 24:18 30:5 39:9 46:9 46:10,11,16,17 46:20 49:23 52:13,15 55:13 quite 40:20 46:20 quote 14:11 <hr/> R <hr/> R 3:1 raise 16:1 38:14 raised 15:6,7 23:10 31:8,10 31:21 38:9,11 raises 22:9 range 37:12 reaching 3:15 read 14:12 20:18 28:20,24 51:23 reading 37:14 reaffirmed 41:13 realize 42:8 really 9:25 26:2 33:2 47:8 49:16 54:10 reason 4:2 15:15 23:6 41:12 55:2 56:7 reasonable 7:23 8:22 9:4 14:21 21:20 48:8 reasons 13:20 23:19 32:17 34:2,2 39:3 40:18 REBUTTAL 2:8 54:22 recall 33:8	recital 48:2 recognized 37:9 record 4:6 47:16 red 22:9 refer 31:14 32:3 33:15 49:21 reference 14:11 14:18 referred 8:17 refile 53:9 refuse 31:3,6 refused 30:22 regarding 47:18 register 27:8 regulate 39:19 reign 36:3 43:12 50:11,13 reinforcing 26:21 rejected 21:24 relate 42:16 relevance 7:1 relevant 7:4 51:9 relied 21:9 rely 18:2 19:25 remaining 54:21 remanded 53:16 remarks 20:15 removing 39:1 render 9:15 20:23 25:3 30:14 rendered 5:13 40:2 47:25 repeated 28:3 repeatedly 28:4 41:13 reply 38:9 reports 39:5 represent 38:12 request 38:1 require 6:10 reserve 26:11 respect 53:24 respects 47:24 respond 31:1,12
--	--	---	--	--

respondent 1:20 2:7 3:25 4:7 17:24 21:25 23:5,13 26:15 55:4	55:17 Romano 29:5,11 29:13,14 Roper 1:3 3:4 rule 24:5,19 25:2,5 27:3 29:5,10,11,16 ruled 52:16 53:22,23 ruling 53:20 54:16	seek 22:22 28:7 52:11 54:14 seeks 23:3 50:18 send 12:25,25 35:15 36:1 38:21 39:3 43:8,10,11,20 43:23 45:8 50:4 sending 43:15 44:5,25 sense 5:25 6:7 9:12 10:11 25:2,11,16 sensible 8:6 sentence 32:4 36:2 42:22 46:19 49:3 sentencing 18:22,23 19:10 42:21 44:24 separate 15:8 40:10 41:21 serve 48:19 serves 48:21 set 5:7 27:22 42:17 46:25 sets 13:18 setting 19:22 settled 17:19 seven 34:15 severity 49:10 shoot 22:1 shots 48:5 should's 55:18 show 5:12 40:4 45:12 shows 46:24 Shurn 16:21 17:12,14 48:17 side 17:6,6,15,16 significance 27:2 significant 16:25 30:19 48:14 silencing 23:15	simply 4:15 24:13 29:21 single 31:1 sit 23:17 situation 9:2,2 40:21,25 41:2 six 34:15,20 35:18 48:6,7 Sixth 6:18 slip 22:13 social 36:9 society 27:24 36:4 41:4 43:7 50:11,14,18 51:5,12 soldier 7:21 12:5 12:13,18 14:17 14:19 27:5 soldiers 9:24 12:3,12 15:2 26:23 27:11,19 28:1,21 solely 34:1 somebody 19:6 33:6 42:8 49:1 sorry 10:15 13:5 16:19 25:20 37:13 50:20 53:25 sort 4:20 35:20 44:21 53:19 sorts 49:6 sound 9:7 sounds 12:17,18 SOUTER 8:14 33:22 spare 11:5 speaking 21:15 special 42:16 specific 6:18 9:8 9:8 20:5 21:2 55:10 specifically 18:12 37:9 55:24 specificity 18:1 spent 21:15	Spillars 1:17 2:3 2:9 3:5,6,8 4:13,24 5:4,6 5:20,23 6:6,24 7:3,11,17,23 8:11 9:11 10:5 10:11,15,20 11:4 13:7,11 13:17 14:4,9 14:20 15:4,18 15:24 16:10,18 16:23 17:5 18:5,8,11,18 18:24 19:11 20:1,4,13 22:10,20,24 23:4,11,25 24:3,7,24 25:10,15,20 26:7 54:20,22 54:24 spoke 21:11 stand 27:3 standard 3:12 3:13 4:3,5,11 4:17 5:10,19 17:21,21,25 30:22 36:24 37:21 39:11 standards 20:7 39:19 50:18 state 3:14,23 10:2 19:22 24:6,23,25 25:5,6,7,11 30:11,21 31:23 37:11 47:14 52:8 56:4,6 stated 13:15 statement 9:12 9:15 13:23 14:11 33:23 34:5 35:20 39:6 43:23,24 statements 5:11 5:25 6:13 7:19 7:24 8:12
--	---	---	--	--

10:21 14:19 15:19,20,21 17:7,11,16 25:3 26:21 36:12 56:3 States 1:1,14 12:7 19:19,20 24:21 26:4,5 39:15 State's 33:7 statute 18:17 STEVENS 4:20 5:2,5 6:21 7:1 7:8,14 10:8,13 10:16 19:15 20:2 22:3 23:16 24:1,5 24:15,18 52:12 52:23 53:2 54:8 stick 49:8 Stone 23:18 24:21 25:19,22 Stone's 10:9,16 stop 41:6 43:6,6 story 8:25 27:25 straddle 26:6 straw 48:17 street 38:23 50:17 streets 51:9 strength 10:7 21:21 55:3 strong 21:22 47:10,21 struck 38:25 style 23:14 subject 38:7 submitted 56:10 56:12 subsequent 53:13 substance 49:17 substantial 47:17 substitute 33:3 substituted 3:18	suggested 6:23 49:15 suggesting 48:12,21,22 summing 18:20 SUPERINTE... 1:4 supervisory 15:7 20:5 25:22,23 26:3 26:5,8 55:16 support 21:22 supported 23:13 suppose 9:4 10:8 22:7 24:19 35:18 44:19,22 supposed 11:17 11:19 12:2,3 12:20,21 13:3 41:13 49:12 Supposing 4:21 Supreme 1:1,14 3:17 4:2 12:4 13:15 17:20,20 18:16 24:14,20 29:2,3 30:3,18 39:15 40:5,8 41:10 45:12 46:13,23 55:22 56:1 sure 31:16 33:20 40:24 50:20 surely 9:18,20 42:6 sustained 15:11 28:10,12 switched 46:11	48:15 talk 32:24 36:1 talked 8:18 10:17 32:25 talking 11:21 12:10 40:7 49:7 51:1 52:21 Taylor 37:18 teach 32:20 tell 7:5 12:3,4,21 17:18 18:7 25:8,24 44:9 46:5 telling 8:20 9:18 10:17 28:21,22 35:3 36:6 tells 8:24 tempered 17:7 17:17 terms 17:2 30:1 55:10 test 6:12 text 18:15,17 Thank 26:12 54:17,18,24 56:8,9 theirs 20:23 theme 35:16 they'd 6:3 thick 50:25 thieves 50:16 thing 11:16 12:20 17:14 34:17 37:24 38:17 40:23 42:9 50:9 things 13:3 18:19,22 19:7 39:17 45:24 47:19 49:6 51:12,22 think 4:24 5:2 6:21 7:8,14,15 7:19,23 8:14 10:19,20 11:1 11:2,2,3,20	15:3 16:3,17 17:15 19:11 23:24 24:3 25:24 27:1,3 27:21 28:1,20 29:8,9 30:9 32:6,22 33:18 34:14,21 35:4 35:12,17,19 37:2,17,23 39:10 40:4 41:11 42:14 43:21 44:6,8 44:15 45:2,3,4 45:6,6,7,13 46:1,8 48:15 49:8,18,22 50:6 51:10,21 53:18 54:13 thirdly 21:2 55:20 thought 8:17 36:18,20 37:4 37:11 38:13,16 49:20 51:24 threat 33:11,12 three 5:18 15:10 16:15,25,25 17:6 tied 33:13 35:25 tier 5:24 6:11,13 time 21:15 26:23 27:19 38:12 43:22 52:13 timely 22:18 times 5:18 11:1 14:16 22:2 34:15 35:18 43:24 today 3:4 told 6:22 11:2,5 11:13 15:19,20 17:1 20:22,24 47:25 top 11:22,23 13:24 28:6 total 15:25	totality 3:20 9:14 28:18 29:12 30:12 48:13 touch 37:22 touches 38:20 touchstones 39:18 trade 48:17 trafficking 41:7 trial 3:25 5:12 6:10 9:15 19:22 20:3 25:3 27:16 39:24 41:16,17 41:20,21 42:21 44:7,8 48:1 trials 55:10 trial's 40:22 tried 13:8 17:8 troops 8:19,20 12:11 troubled 52:14 trumped 22:18 try 45:22 trying 19:16 43:24 47:23 50:24 turn 55:17 two 4:5 13:19 15:5,10 16:7 16:20 17:1 22:8 30:10 47:6,6 52:23 54:25
U				
				uh 42:18 Uh-huh 32:19 ultimate 49:10 unanchored 34:2 unanimously 48:8 underlying 9:21 understand 9:17 24:12,23 25:6

34:17 39:21 52:17 55:6 unfair 5:13 9:15 30:15 40:2 48:1 unfairness 6:15 46:18,24 unfortunately 8:20 United 1:1,14 12:7 19:19,20 24:20 39:14 unpleasant 27:18,18 unreasonable 30:15,19 36:17 36:18,25 37:20 56:5 uphold 45:24 51:4 urging 40:15,15 40:17 41:4 use 19:4 24:4 55:14,16 uses 8:25 27:24 U.S 11:20 29:2,3 39:5	15:5 19:19 23:17 27:2,2,3 55:20 view 36:22 viewed 3:23 violate 6:19 45:9 violated 5:19 29:3,4 30:7 violates 46:17 46:24 violation 24:17 40:3 virtually 36:15 vis 9:3,3 vote 43:14,16 51:15 52:4 vouch 19:4 vouches 11:20	34:18,19,20,24 34:25 35:7 37:25 38:12,19 38:19,22 39:2 44:25 47:15 49:17 51:14 Weaver's 26:20 30:20 Wednesday 1:11 weeks 17:9 47:24 weight 30:13 39:25 went 11:11 15:1 17:2 33:9 38:16 46:4 49:15 50:7 53:17 weren't 40:12 Westfall's 26:19 we'll 3:3 45:23 we're 44:12 we've 4:11 42:17 wholly 23:19 William 1:8 31:22 32:8,9 32:10,11 34:16 34:18,19,20,24 34:25 35:7 38:18,19,22 39:2 44:25 49:17 williams 37:18 witness 23:15 48:4,16,25,25 50:2 55:5 woods 22:1 word 10:14 27:5 words 7:9 14:24 20:3 54:10 55:9,10 work 39:22 works 37:19 world 27:7 38:21 45:7 worse 11:25	40:17 47:23 worst 17:13 wouldn't 45:18 51:18 wrap 36:10 wretch 41:23 writ 38:5 53:6 53:17 written 24:21 wrong 3:21 8:16 9:10 10:3 13:13,16 35:1 37:16,17 46:12 46:18 54:6	54 2:10 8 820 37:15
V	W		X	
v 1:7 valid 55:11 value 44:13 values 44:13 51:3 variant 22:19 variety 34:16 various 20:22 verdict 4:18 9:20 10:3 20:23 27:14 46:25 versus 3:4 4:25 12:6 37:18 victim 22:2 48:24 Viereck 10:10 10:12,17 14:24	Wait 8:2 want 5:18,21 12:8 30:9 39:8 39:9 44:12 52:13 wanted 37:7,23 war 12:8,9 14:25,25 26:23 27:7,19,23,24 28:1,21 34:25 warrants 49:10 Washington 1:10 wasn't 11:17 22:7,14 27:10 38:9 51:17 way 7:16 26:6 27:18 32:9,25 34:19 39:21 42:13 50:7 51:21 54:9 ways 21:3 26:2 Weaver 1:8 3:4 10:25 11:1 12:24 31:22 32:9,9,10,11 33:9,17 34:17		Y	
			yeah 46:21 years 24:22	
			0	
			06-313 1:7 3:4	
			1	
			1 21:18 10:02 1:15 3:2 11:00 56:11 12 15:24 16:11	
			2	
			2007 1:11 21 1:11 20:21 23 20:24 235 56:1 237 55:23 24 20:24 26 2:7 20:22,24 27 20:22 275 11:6 28 20:21 285 21:12	
			3	
			3 2:4	
			5	