QUESTION PRESENTED FOR REVIEW

(Capital Case)

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

PARTIES TO THE PROCEEDING

Petitioner, Donald P. Roper, is the Superintendent of the Potosi Correctional Center, Missouri, where Respondent William Weaver is confined. Michael Bowersox, the custodian during earlier proceedings, is no longer the Superintendent of that facility.

Respondent Weaver is a prisoner in state custody pursuant to his conviction for first degree murder for which the jury sentenced him to capital punishment. He was the petitioner in the habeas corpus proceeding in the United States District Court for the Eastern District of Missouri.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

OPINIONS BELOW

The February 14, 2006 decision of the United States Court of Appeals for the Eighth Circuit, from which petitioner seeks review, is reported at 438 F.3d 832 (8th Cir. 2006) (as corrected on February 23, 2006) and is published in the Appendix - hereinafter App. A-2. The district court's May 7, 2003 decision is unreported but is published in the App. A-23. An earlier decision by the Court of Appeals is reported at 241 F.3d 1024 (8th Cir. 2001) and is published in the App. A-187. An earlier decision by the district court is also unreported but is published at App. A-203.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on February 16, 2006, and corrected on February 23, 2006 (App. A-2). The court of appeals denied rehearing and rehearing en banc on May 31, 2006 (App. A-220). Petitioner invokes this court's jurisdiction under 28 U.S.C. §1254(1) (2000). The court below had jurisdiction under 28 U.S.C. §2254 (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Amendment XIV, Section 1:

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

28 U.S.C. §2254(d)(1) provides:

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

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-0132, §104(3), 110 Stat. 1214, 1219 (AEDPA).

STATEMENT OF THE CASE

Respondent William Weaver was convicted of a murder he committed nineteen years ago. After the state courts reviewed and upheld his conviction and sentence, he sought a writ of habeas corpus from the federal courts. Eventually, the district court granted the writ on the basis that Weaver's due process rights were violated by the prosecutor's penalty phase closing argument. Notwithstanding the lack of controlling authority from this court, a panel of the court of appeals affirmed on a 2 - 1 vote. Rehearing en banc was denied on a 5 -5 vote.

1. The Murder

Before July, 1987, Charles Taylor and member of Daryl Shurn's family had been involved in the ownership and operation of drug houses. A federal drug prosecution began against Daryl Shurn's brothers, Charles and Larry Shurn, in which Taylor was to be a key witness. Taylor had worked for the Shurns and held some of the Shurns' drug houses in his name.

On the morning of July 6, 1987, William Weaver and Daryl Shurn arrived at Taylor's home in the Mansion Hills apartment complex in St. Louis, Missouri. Their plan was to force Taylor to sign over the Shurns' drug properties which Taylor was retaining in his name against the Shurns' will. After Taylor had signed the paperwork, Weaver was suppose to kill Taylor. The plan was not completely successful.

After Weaver and Shurn entered Taylor's apartment, Taylor unexpectedly pulled a gun and escaped. Weaver and Shurn gave chase and fired several shots at Taylor. Numerous residents saw Weaver and Shurn running after Taylor, shooting at him. Weaver and Shurn followed Taylor to a wooded area

where Taylor fell from his wounds. Weaver and Shurn went back to the automobile. Then Weaver returned to the wooded area and shot Taylor again. Taylor died from several gun shot wounds to the head.

Weaver and Shurn drove rapidly from the murder scene. Witnesses at the scene immediately reported the incident to the police, giving a detailed description of the vehicle. Shortly thereafter, police spotted the Shurn vehicle and gave chase. Following a collision during rush hour traffic on Interstate 70, Weaver and Shurn fled on foot. Shurn was captured at the scene, but Weaver ran off toward the Hillcrest apartment complex adjacent to the highway. Not far away, another police officer located Weaver running shoeless on a concrete street and sweating profusely. On approach by the officer, Weaver claimed he was jogging, although he was many miles from home. He claimed to be lost. Weaver was placed under arrest and returned to the scene of the accident where one of the original pursuing police officers positively identified Weaver as the man who ran away from Shurn's car after the crash.

While awaiting trial, Weaver was incarcerated with a man by the name of Robert Dutch Tabler. Tabler testified that Weaver told him he was a hit man on the streets, that Weaver and Shurn had killed Charles Taylor, and that Weaver's testimony at trial would be that he was merely out jogging when the police stopped him.

2. The Trial, Post-Conviction Proceedings Appeal

At trial, the jury found Weaver guilty of first degree murder and recommended a sentence of death. The jury found three statutory aggravating circumstances in the murder of Charles Taylor: 1) that the murder involved depravity of mind, and as a result thereof, the murder was outrageously and

wantonly vile, horrible and inhuman; 2) Weaver murdered a potential witness; and 3) Weaver acted as an agent for another (App. A-313-14). Accepting the jury's recommendation, the trial court sentenced Weaver to death.

Weaver filed a motion for post-conviction relief under Missouri Supreme Court Rule 29.15. After an evidentiary hearing, the court denied the motion (App. A-258).

Weaver pursued a consolidated appeal with the Supreme Court of Missouri. That court affirmed Weaver's conviction and sentence and affirmed the denial of post-conviction relief. State v. Weaver, 912 S.W.2d 499 (Mo. banc 1995) (App. A-221). This court denied review. Weaver v. Missouri, 519 U.S. 856 (1996).

3. Habeas Proceedings

Weaver pursued federal habeas corpus relief under 28 U.S.C. §2254 (2000). The United States District Court for the Eastern District of Missouri granted the petition and set aside the conviction and sentence. Weaver v. Bowersox, No. 4:96-CV-2220 CAS (E.D. Mo. Aug. 9, 1999) (App. A-203). The United States Court of Appeals for the Eighth Circuit reversed the grant of habeas relief. Weaver v. Bowersox, 241 F.3d 1024 (8th Cir. 2001) (App. A-187).

On remand, the district court granted relief as to the penalty phase only. William Weaver v. Michael Bowersox, No. 4:96-CV-2220 CAS (E.D. Mo. May 7, 2003) (App. A-23). The district court granted relief because it felt that Weaver's due process rights were violated by the prosecutor's penalty phase closing argument (App. A-56-72).

In a decision where each judge wrote separately, the court of appeals affirmed the district court's judgment in a 2 -

1 decision. Weaver v. Bowersox, 438 F.3d 832 (8th Cir. 2006) (App. A-2).

In the panel opinion, Judges Melloy and Bowman determined that review of the closing argument claim should be under the standard set forth by Congress in 28 U.S.C. §2254(d) (App. A-9, A-20). And Judges Melloy and Bye concluded that the Missouri Supreme Court's resolution of the penalty phase closing argument issue was unreasonable (App. A-11, A-16). Senior Judge Bowman dissented because there are no Supreme Court precedents that touch "on the distinct claims of prosecutorial misconduct on which the writ was granted" (App. A-21).

On May 31, 2006, the court of appeals denied the petition for rehearing. The court also denied the petition for rehearing en banc in a 5 -5 decision (App. A-220).[1]

[1]Circuit Judge Benton did not participate in the consideration or decision of the matter (App. A-220). He was a member of the Missouri Supreme Court that unanimously affirmed the conviction and sentence (App. A-256). And the dissent from the panel decision, Senior Judge Bowman, did not vote on the petition for rehearing en banc because he was a senior judge who was not "in regular active service." Federal Rule of Appellate Procedure 35(a).

REASONS FOR GRANTING THE WRIT

The lower federal courts exceeded their authority under 28 U.S.C. §2254(d)(1) because they did not give deference to the reasonable state court decision rejecting respondent's habeas claim.

The court of appeals violated AEDPA by failing to defer to a state court's decision that reasonably fits within the matrix of this court's broad due process standard, and by granting relief on the basis of its own circuit law rather than on the law "clearly established" by the holdings of this court's precedents. In addition, the court granted a new penalty phase proceeding based on the prosecutor's penalty phase argument that is neither erroneous nor prejudicial. Accordingly, this court should issue a writ of certiorari to review and then reverse the judgment of the court of appeals.

A. The Missouri Supreme Court decision is neither contrary to nor an unreasonable application of Supreme Court precedent.

The Eighth Circuit based its grant of habeas relief on its own circuit court cases and without deference to the Missouri Supreme Court's decision in violation of AEDPA.

"A necessary condition for federal habeas relief here is that the state court's decision be 'contrary to, or involv[e] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" Kane v. Espitia, 126 S.Ct. 407, 408 (2005) (per curiam) (quoting 28 U.S.C. §2254(d)(1)). In determining what constitutes clearly established federal law for purposes of §2254(d)(1), only this Court's holdings from the time the state court rendered its decision - - not dicta or circuit court authority - - are

controlling. Id. at 408; Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003).

No Supreme Court authority addresses the constitutionality of the prosecutor's penalty phase closing argument like the one presented by the prosecutor in the present case. See Kane v. Espitia, 126 S.Ct. at 408. In particular, there are no cases that hold when a prosecutor's penalty phase closing argument is erroneous under the Due Process Clause or what level of prejudice must be demonstrated to warrant a new penalty phase.

During Weaver's direct appeal, the Missouri Supreme Court considered the complained-of argument in detail and found that it did not warrant a new trial. State v. Weaver, 912 S.W.2d 499, 512-14. In summary, the Missouri Supreme Court found the penalty phase arguments were reasonable; thus, it concluded that the trial court did not abuse its discretion in permitting the argument. Id. at 514. Reviewing the state court decision under §2254(d) should reveal that the state court's decision was a reasonable one.

B. This Court has neither held a prosecutor's penalty phase closing argument to violate due process, nor articulated, in response to a penalty phase claim, what the due process standard would be.

The dissent from the court below would not grant habeas relief on the penalty phase closing argument issue because the state court's decision was neither contrary to nor an unreasonable application of federal law from the Supreme Court (App. A-20). And review of the panel majority decision amply demonstrates that the dissent was correct.

In Section IV of the panel majority opinion, the panel rejected this argument by referring to these circuit precedents: Copeland v. Washington, 232 F.3d 969 (8th Cir. 2000); Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995); Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989); James v. Bowersox, 187 F.3d 866 (8th Cir. 1999) (non-capital punishment case); Shurn v. Delo, 177 F.3d 662 (8th Cir. 1999); Miller v. Lockhart, 65 F.3d 676 (8th Cir. 1995); Sublett v. Dormire, 217 F.3d 598 (8th Cir. 2000) (non-capital punishment case); United States v. Johnson, 968 F.2d 768 (8th Cir. 1992) (non-capital punishment case) (App. A-12 to 15). These decisions are not "clearly established federal law" from the United States Supreme Court. And to the contrary, the current touchstone of due process, penalty phase prosecutorial argument analysis is a set of en banc decisions from the Eleventh Circuit. See Newlon v. Armontrout, 885 F.2d at 1337, 1338 citing Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc), vacated on other grounds, 478 U.S. 1015 (1986); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1020 (1986); William Tucker v. Kemp, 802 F.2d 1293 (11th Cir. 1986); (en banc); cert. denied, 480 U.S. 911 (1987); Richard Tucker v. Kemp, 762 F.2d 1496 (11th Cir. 1985) (en banc). Whether this court will adopt all, none or part of the analysis of these decisions as its Fourteenth Amendment prosecutorial penalty phase closing argument rubric is unknown.

The panel majority does refer to some Supreme Court decisions, but those decisions do not involve a Fourteenth Amendment/due process challenge to the penalty phase closing argument by the prosecutor (App. A-12 to 14). The panel cites Darden v. Wainwright, 477 U.S. 168, 181 (1986), but that decision concerned a guilt phase closing argument, not a penalty phase closing argument. In Darden, the prosecutor referred to the defendant as an animal, but the court rejected the claim that a new trial was warranted on the basis of that statement. This decision has been described as an "imprecise

command." Ewing v. California, 538 U.S. 11, 33 n.2 (2003) (Stevens, J., dissenting); see also Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) ("constitutional line drawing" concerning guilt phase argument is "necessarily imprecise."). The panel did not grant relief because the prosecutor called Weaver an animal or the like. Assuming that the Darden standard should apply to penalty phase closing argument in addition to guilt phase closing argument, see Ramdass v. Angelone, 530 U.S. 156 (2000), the standard provided by Darden, "a prosecutor's argument violates due process if it 'infect[s] the trial with unfairness'" does not provide guidance for application to a complaint about a prosecutor's penalty phase closing argument.

An example in the context of non-retroactivity under Teague v. Lane, 489 U.S. 288 (1989) illustrates this point. In Gilmore v. Taylor, 508 U.S. 333 (1993), the offender contended that the complained-of jury instruction "interfered with his fundamental right to present a defense." Id. at 343. While such a constitutional right existed at the time of the offender's trial, id. quoting Crane v. Kentucky, 476 U.S. 683, 690 (1985) (right to present evidence supporting defense), the court declined to generalize the proposition to constitutionalize guilt phase jury instruction claims. "And the level of generality at which respondent invokes this line of cases is far too great to provide any meaningful guidance for purposes of our Teague inquiry." Id. at 342. In the language from Justice O'Connor's concurrence, the court's previous decision did not resolve conclusively the issue in the offender's favor; thus, the Illinois state courts acted reasonably in rejecting the offender's claim of constitutional error. See id. at 351 (O'Connor, J., concurring in judgment). Similarly, the statement that the constitutional criteria is whether the argument "infects the trial with unfairness" is such a generality that a specific application of the generality is not "clearly established" federal law within the meaning of §2254(d). Stated another way, if the due

process constitutional criteria for a new trial or penalty phase is whether the original trial was "unfair," then the phrase "clearly established federal law" would serve no function in distinguishing between clearly established federal law and that which is not clearly established.

The panel majority also cited other United States Supreme Court decisions construing the Eighth Amendment Cruel and Unusual Punishments Clause, not the Fourteenth Amendment's Due Process Clause. For example, in Zant v. Stevens, 462 U.S. 862 (1983), the issue involved whether a new penalty phase was warranted when a court found a statutory aggravating circumstance invalid. The court did not decide whether or under what constitutional standard a prosecutorial penalty phase closing argument claim should be reviewed. Similarly, Buchanan v. Angelone, 522 U.S. 269 (1998) involved a challenge to the Virginia penalty phase instructions, not prosecutorial argument. Romano v. Oklahoma, 512 U.S. 1, 7 (1994) involved a challenge to the admission of evidence at the penalty phase, not prosecutorial argument. Harmelin v. Michigan, 501 U.S. 957 (1991) involved an Eighth Amendment challenge to a life sentence for possession of a controlled substance. It was fitting for the panel dissent to conclude: "None of the Supreme Court cases cited in the court's opinion touches on the distinct claims of prosecutorial misconduct on which the writ was granted" (App. A-21).

The panel majority stated it had already rejected the state's argument that this court had not addressed penalty phase closing argument previously in Copeland v. Washington, 232 F.3d at 974 (App. A-12). But to support its conclusion, the Copeland court cited Donnelly v. DeChristoforo, 416 U.S. 637 (1974) (guilt phase argument) and Darden v. Wainwright, 477 U.S. 168 (1986) (guilt phase argument). Since both Donnelly and Darden concern guilt phase argument by a prosecutor, neither decision is a holding concerning penalty phase closing

argument, or the standard of constitutional review that should be employed. And, as noted earlier, the "imprecise" constitutional standard employed in each was "fairness" without a rubric for deciding how the argument was error or prejudicial.

The Copeland court also cited Romano v. Oklahoma, 513 U.S. at 3, but Chief Justice Reinquist articulated the issue in the Romano case as: "Petitioner contends that the admission of evidence regarding his prior death sentence undermine the Sarfaty jury's sense of responsibility for determining the appropriateness of the death penalty, in violation of the Eighth and Fourteenth Amendments. We disagree and hold that the admission of this evidence did not amount to constitutional error." Id. at 3. Romano is an evidence case, not an argument case.

And the Copeland decision cited the Supreme Court decision in Caldwell v. Mississippi, 472 U.S. 320 (1985). Caldwell, however, involved an Eighth Amendment challenge to a prosecutor's penalty phase closing argument, not a Fourteenth Amendment due process challenge to the penalty phase closing argument. In Caldwell, the Supreme Court concluded that the Eighth Amendment prohibited resting "a death sentence on a determination made by a sentencer who had been led to believe that the responsibility for determining the appropriateness of the defendant's death rest elsewhere." Caldwell, 472 U.S. at 329. Of course, the Eighth Amendment issue in Caldwell is much different in the Fourteenth Amendment basis for the grant of relief in the present case. In Caldwell, the prosecutor sought to minimize the jury's sense of importance by informing the jury that a death sentence would be automatically reviewable by the Mississippi Supreme Court. Id. at 325-26. In discussing Caldwell, this court later made clear that Eighth Amendment analysis applied only to prosecutorial comment that had "the effect of misleading the jury into thinking it had a reduced role in the sentencing

process." Darden v. Wainwright, 477 U.S. at 183 n.15 (1986). That such a penalty phase closing argument concerning judicial review violates the Eighth Amendment is the sole expression by this court on the topic of penalty phase closing argument. The scope of review for an Eighth Amendment claim under Caldwell is separate from the concerns of the due process clause. E.g., Gates v. Zant, 863 F.2d 1492, 1503 n.11 (11th Cir. 1989).

As should be clear at this point, the premise of the court of appeals' decision, that the Supreme Court precedents concerning Fourteenth Amendment process prosecutorial penalty phase argument is a well-defined field, is an unsupported and unsupportable premise. The panel dissent properly concluded that the state court's resolution of the penalty phase argument is reasonable given the lack of clearly established Supreme Court precedent.

C. AEDPA bars the lower federal courts from issuing a writ unless the state court decision is contrary to or involves an unreasonable application of federal law provided by the Supreme Court.

This court has held that "[t]he more general the rule, the more leeway [state] courts have in reaching outcomes in case by case determinations." Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). If the constitutional rule is specific, the range of reasonable application is narrow. But if the constitutional rule is general, its meaning will emerge over time from this court. See id. at 664. The question for the federal habeas court then is whether the state court's decision fits within the overall "matrix" of this court's prior decisions. Id. at 665; see Mitchell v. Esparza, 540 U.S. 12, 17 (2003) (per curiam) ("a federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is,

at best, ambiguous."); Lockyer v. Andrade, 538 U.S. at 76 (holding where the "precise contours" of Supreme Court law were unclear, state court decision was not unreasonable).

As noted, the panel majority relied on its circuit precedent in determining that the penalty phase argument was improper. Such practice is strikingly similar to the fact pattern in Kane v. Espitia, 126 S.Ct. at 408. In Kane, this court reversed the court of appeals grant of relief when the appellate court had based its decision on circuit authority that a self-represented defendant had a constitutional right to access to law materials. Given the lower court's reliance on circuit precedent, the opinion creates uncertainty for the state courts in the Eighth Circuit. Those state courts will be unsure whether Eighth Circuit precedent is binding in criminal cases within those jurisdictions. Which, in effect, would turn the Eighth Circuit into the Supreme Court of the seven states in the circuit.

D. The decision of the court of appeals is strikingly similar to that of the Ninth Circuit in Muladin v. Lamarque, 427 F.3d 653 (9th Cir. 2005).

Both the decision of the court below and the Ninth Circuit's decision in Muladin v. Lamarque, 427 F.3d 653 (9th Cir. 2005) involved broad pronouncements of the regulation of a criminal trial by the Due Process Clause. Citing Estelle v. Williams, 425 U.S. 501 (1976) and Holbrook v. Flynn, 475 U.S. 560 (1986), the Ninth Circuit found due process error and an unfair trial when three spectators wore buttons displaying a picture of the victim. Neither Estelle nor Holbrook sets forth constitutionally-based rules governing the attire of spectators at a criminal trial. But the Ninth Circuit issued a writ of habeas corpus. And this court issued a writ of certiorari to review that decision. Carey v. Muladin, 126 S.Ct. 1769 (2006).

Similarly, the court below issued its writ because of the prosecutor's penalty phase closing argument even though this court has not issued a holding or for that matter, discussed a due process prosecutorial penalty phase closing argument issue. A state court's application of a broad, general pronouncement from this court, such as Estelle, Holbrook, Donnelly and Darden should be declared unreasonable very rarely. Yarborough v. Alvarado, 541 U.S. at 664. And this court may provide guidance on that rarity in its decision in Carey v. Muladin, No. 05-785 (oral argument October 11, 2006).

E. The prosecutor's argument was reasonable.

The Missouri Supreme Court's determination that the prosecutor's penalty phase closing arguments were reasonable is a rational and reasonable resolution of the constitutional claim. The court of appeals placed the prosecutor's arguments into five categories (App. A-13).[2] The first category suggested that the prosecutor drew an analogy of the role of the juror to that of a soldier who must do his or her duty and have the courage to kill (App. A-13). The panel majority conceded that this argument was "factually unique" (App. A-13), a concession the panel dissent noted meant that there had not been a Supreme

---

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

Court decision on the topic (App. A-20). But the words articulated by the prosecutors do not match up with the panel majority's characterization of those words (App. A-13). The prosecutor actually stated:

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

(App. A-298). There is no language by the prosecutor telling the jury that it had the duty of a soldier or to automatically "kill the enemy." The prosecutor empathized with the jury by noting that the decision to impose a death sentence was difficult. And the prosecutor should be allowed to argue that imposing death, while difficult, is at times sanctioned by the state because of compelling reasons such as national security or deterring crime. See Brooks v. Kemp, 762 F.2d at 1412. The argument also notes the somberness of the occasion when the jury considers

imposition of capital punishment. Both activities, being a juror and being a soldier, are responsibilities of citizenship and it was proper for the prosecutor to so argue. Commonwealth v. Rollins, 738 A.2d 435, 449 (Pa. 1999).

The panel majority seems to find that the argument somehow minimized the jury's responsibility to provide individual sentencing of Weaver (App. A-13). No. When reviewing the argument in its totality, the prosecutor argued, "if you want to spare his life, that's your decision; that's your decision" (App. A-275). The prosecutor argued that there were four statutory aggravating circumstances (App. A-285). The defense counsel also encouraged individualized sentencing of Mr. Weaver (App. A-286 to 92). The prosecutordid not urge execution merely because Weaver was part of a broader criminal element. See Davis v. Kemp, 829 F.2d 1522, 1527 (11th Cir. 1987). And the penalty phase jury instructions properly instructed the jury under Missouri law (App. A-300 to 12). The court instructed the jury that argument was not evidence (App. A-312). The jury found three of four submitted statutory aggravating circumstances (App. A-314). The record amply reflects the prosecutor, the defense attorney and the courts giving argument and instruction on individualized sentencing. There was no error and no prejudice.

The second category of prosecutor argument was statements by the prosecutor about his personal belief in the death penalty (App. A-14). The panel majority did not identify which argument quoted in Section I of the panel majority opinion this generalization applied to. In any event, it is proper for the prosecutor to discuss the purposes of capital punishment. Brooks, 762 F.2d at 1406-07. The Brooks court noted that a prosecutor's statement of belief in the death penalty is not prejudicial given the prosecutor's vigorous argument for capital punishment in the case before the jury. And given the fact that the state legislature had enacted capital punishment,

the prosecutor's belief merely echoed the legislative judgment. There is no error or prejudice with category 2 of the argument. Brooks, 762 F.2d at 1413 n.47.

The panel majority criticizes category 3 which is labeled as arguments concerning the "war on drugs" (App. A-14). The constitutional criticism of this argument appears to be the same as with category 1, the lack of individualized sentencing (App. A-14). But the main thrust of the prosecutor's argument was not to exhort the jury to impose the death penalty because petitioner was a member of the criminal element; instead, the prosecutor suggested to the jury that capital punishment should be imposed because of the execution-styled murder was horrible, the evidence of guilt was overwhelming, petitioner showed no remorse and there was no chance that petitioner could be rehabilitated. The prosecutor's rhetoric was based on the brutal nature of the murder, which should be constitutionally appropriate. Both the prosecutor and the defense counsel encouraged the jury to determine punishment based upon the facts and circumstances of petitioner's case. And the jury instructions properly informed the jury of its responsibility to impose sentence based upon the facts and circumstances in mitigation in aggravation. Again, this is the form of analysis performed by the en banc Brooks court, 762 F.2d at 1414-15, analysis omitted by the panel majority (App. A-14 to 15).

The fourth category of argument was that the prosecutor had a special position of authority and he decided to seek capital punishment. Omitted from the listing of categories is the fact that Weaver objected to that argument. The trial court sustained the objection and instructed the jury to disregard the statement (App. A-7, A-297 to 98). This category is neither error nor prejudicial.

The fifth category that the panel majority condemns is argument designed to appeal the emotions of the jury (App. A-14). The panel majority's articulation is unclear. If the panel is complaining that the prosecutor presented his argument with zest, then this complaint fails to state a constitutional claim. "A permissible argument, no matter how 'prejudicial' or 'persuasive' can never be unconstitutional." Brooks, 762 F.2d at 1403. Recognizing that capital sentencing is an emotional issue, the Brooks court would not declare an argument violative of the constitutional merely because of such emotion. Id. 1404-05.

The panel majority seems to criticize the argument because it implored the jury to kill the defendant immediately (App. A-14). But after that characterization (App. A-14), the panel majority does not link the characterization to any of the particular arguments made by the prosecutor (App. A-14). Perhaps the panel majority was referring to the following statement:

> Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been self defense. Well, it was right to kill then and it's right to kill him now.

(App. A-277). Petitioner respectfully disagrees with the characterization that that language is designed "to appeal to the emotions of the jury." Such language does not appear emotionally based. And the Eighth Amendment principles in Caldwell require the jury to feel that its verdict will actually be carried out and not that another court will determine the

appropriate punishment. Emphasizing to the jury the importance of its role in imposing sentence should not violate the federal constitution.

The question of how much prejudice Mr. Weaver must show before being entitled to a new trial is a question that is not answered by this court's precedent. At the local level, the court of appeals requires the offender to demonstrate that "there is a reasonable probability that the outcome of the sentencing phase would have been different, taking into account all the aggravating and mitigating circumstances" (App. A-12 quoting Antwine v. Delo, 54 F.3d 1357, 1363 (8th Cir. 1995)); see Strickland v. Washington, 466 U.S. 668 (1984). While that is the prejudice standard articulated, the court of appeals failed to conduct prejudice analysis on any of the categories of argument (App. A-15). The panel majority did not examine the facts surrounding the offense, the overwhelming evidence of guilt, the jury's finding of three statutory aggravating circumstances beyond a reasonable doubt, the lack of mitigating evidence, or the like in determining whether there was sufficient prejudice to set aside the opinion (App. A-15), assuming that is even the standard of prejudice this court eventually selects as being appropriate.

CONCLUSION

For the foregoing reasons, respondent prays the court grant the petition for writ of certiorari.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor
STEPHEN D. HAWKE
Counsel of Record
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-3825

Counsel for Petitioner