No. 03-1039

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Acting Warden, *Petitioner,*

v.

WILLIAM CHARLES PAYTON, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

In *Boyde v. California*, 494 U.S. 370 (1990), this Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, which directs a jury to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The evidence at issue in *Boyde* was pre-crime evidence in mitigation. Relying on *Boyde*, the California Supreme Court held that California's "catch-all" mitigation instruction in this capital case is constitutional as applied to post-crime evidence in mitigation. In a six-to-five decision, the en banc Ninth Circuit held that the California Supreme Court decision was objectively unreasonable "because *Boyde* does not control this case." The question presented is:

Did the Ninth Circuit violate 28 U.S.C. § 2254(d) when it found the California Supreme Court objectively unreasonable in holding that California's "catch-all" mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation?

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

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Jill L. Brown, Acting Warden, California State Prison at San Quentin (hereinafter State) respectfully submits Petitioner's Brief on the Merits.

OPINIONS BELOW

The opinion of the Ninth Circuit (en banc) following remand by this Court is reported at *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003). Pet. App. ("P.A.") at 1-44. This Court's prior order granting certiorari and remanding to the Ninth Circuit is reported at *Woodford v. Payton*, 538 U.S. 975 (2003). P.A. at 45. The opinion of the Ninth Circuit (en banc) preceding remand by this Court is reported at *Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002). P.A. at 46-86. The opinion of the Ninth Circuit (panel) is reported at *Payton v. Woodford*, 258 F.3d 905 (9th Cir. 2001). P.A. at 87-129. The order of the district court is unreported. P.A. at 130-38.

The opinion of the Supreme Court of California is reported at *People v. Payton*, 3 Cal. 4th 1050, 839 P.2d 1035, 13 Cal. Rptr. 2d 526 (1992). P.A. at 139-86.

STATEMENT OF JURISDICTION

An en banc panel of the Ninth Circuit entered judgment granting habeas corpus relief as to the death penalty on October 20, 2003. The State filed a Petition for Writ of Certiorari on January 15, 2004, and the Court granted the Petition on May 24, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Eighth Amendment of the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1), which provides:

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

California Penal Code section 190.3, which provides in pertinent part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> . . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

P.A. at 188-89.

STATEMENT OF THE CASE

Payton's Rape And Murder And Two Attempted Murders

In the early hours of May 26, 1980, Respondent William Charles Payton went to the home of Patricia Pensinger in Garden Grove, California, where he had once been a boarder. After receiving permission from Patricia to sleep on her couch, Payton entered the room of one of Patricia's borders, Pamela Montgomery, and raped and stabbed her to death. P.A. at 141-42.

After cleaning himself off in the bathroom, Payton entered Patricia's bedroom while she and her ten year old son, Blaine, slept. Payton inflicted forty stabs wounds to Patricia's face, neck, back and chest. He inflicted twenty-three stabs wounds to Blaine's face, neck and back. Both survived. P.A. at 141-42. A state court jury found Payton guilty of first-degree murder, rape and two counts of attempted murder. The jury further found true the special circumstance of murder in the commission or attempted commission of rape and the personal knife use enhancement. P.A. at 140.

The Consideration And Imposition Of The Death Penalty

The California Capital Sentencing Scheme

In California, a defendant is eligible for the death penalty when the trier of fact finds him guilty of first-degree murder and finds one of the special circumstances true. *Tuilaepa v. California*, 512 U.S. 967, 975 (1994). Following that determination, a defendant's case proceeds to a penalty phase where the trier of fact determines whether to impose death or life imprisonment without the possibility of parole. Cal. Penal Code § 190.3; P.A. at 187-90. At the time of Payton's penalty trial, the standard jury instructions, also given to Payton's jury, identified eleven factors to be considered by the trier of fact in

deciding the appropriate penalty. Specifically, the instruction provided:

> In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

> (i) The age of the defendant at the time of the crime.
> (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

Cal. Jury Instructions, Criminal, No. 8.84.1 (4th ed. 1979) ("CALJIC"); J.A. at 94-95.

The factors were taken verbatim from California Penal Code section 190.3 and many of the listed factors could serve as either aggravating or mitigating circumstances, depending on what the trier of fact found. *See Tuilaepa,* 512 U.S at 978-79. The eleventh factor, (k), is known as the "catch-all" mitigation instruction.[1/] *Boyde v. California*, 494 U.S. at 373-74.

Payton's Penalty Trial And Verdict

At the penalty phase, the prosecutor introduced evidence of a prior incident in which Payton stabbed a former girlfriend in the chest and arms after waking her, as well as Payton's jail house conversations in which he said he had "a severe problem with sex and women" and "that all women on the street that he had seen was [sic] a potential victim, regardless of age or looks." J.A. at 5-19, 12. In mitigation, Payton's defense presented solely post-crime character evidence consisting of eight witnesses who testified that he had made a sincere commitment to God while in prison, was remorseful, had a calming effect on other prisoners, and could help others while in prison through Bible study classes and a prison ministry. J.A. at 15-26, 27, 33-34, 36-54.

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1. CALJIC No. 8.84.1 has been amended at various times and the factor (k) instruction is no longer phrased as it was when Payton was sentenced.

During closing argument, both the prosecutor and Payton's defense counsel discussed the "catch-all" mitigation evidence instruction, factor (k). The prosecutor initially argued incorrectly that the instruction "doesn't refer to anything after the fact or later." Defense counsel objected and moved for mistrial. J.A. at 68. The trial judge denied the mistrial motion but admonished the jury, "again, I want to emphasize to you that the comments by both the prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective." J.A. at 69-70. The prosecutor at first repeated his erroneous interpretation of factor (k), without objection, before discussing, at length, the weight of the evidence in aggravation and Payton's post-crime evidence in mitigation. J.A. at 70-76. The prosecutor concluded:

> Is this the type of defendant for whom we should listen to pleas for mercy?
>
> [Defense counsel] will tell you this is a defendant who can be rehabilitated because he's a good Christian and he helps the module deputy.
>
> In 1973, he stabbed Mrs. Stone [Payton's former girlfriend]. In 1976, he was convicted of two felony convictions. In 1981, he rapes and murders a girl and tries to kill two other people. You think he is going to be rehabilitated?
>
> The law in its simplicity is that . . . if the aggravating factors outweigh the mitigating, the sentence the jury should vote for should be the death penalty.
>
> How do the factors line up? The circumstances and facts of the case, the defendant's other acts showing violence, Mrs. Pensinger and Mrs. Stone, . . . Blane [sic] Pensinger, the defendant's two prior convictions line up against really nothing except defendant's newborn Christianity and the fact that he's 28 years old.

J.A. at 75-76.

Defense counsel argued to the jury that the factor (k) instruction was a catch-all instruction designed to include the kind of evidence that Payton presented. He explained:

> The whole purpose for the second phase or trial is to decide the proper punishment to be imposed. Everything that was presented by the defense relates directly to that.
>
> This section "k" may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phase [sic]. It was designed to include, not exclude, that kind of evidence.
>
> Any juror that wanted -- that was in the position of trying to determine the fairest possible sentences, select them between death or life without the possibility of parole, would not only want that kind of evidence but would need it to make an intelligent decision.
>
> I submit the facts of this case, and this would not always be true, that that is the most critical of the factors, not only is it not irrelevant, it's the most critical of all the factors.

J.A. at 88-89. After reviewing Payton's achievements while in prison, J.A. at 89-92, defense counsel concluded, "I think there are a lot of good reasons to keep Bill Payton alive, an awful lot of good reasons. And that's exactly what I think "k" is talking about." J.A. at 92.

The trial court instructed the jury pursuant to the standard jury instructions, including the direction to consider all of the evidence and the catch-all instruction. J.A. at 92-95. The trial court then concluded:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison without the possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence and after having heard and considered the argument of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

J.A. at 95-96.

The jury returned a verdict of death. The trial court denied Payton's motion to modify the verdict and sentenced Payton to death for the murder of Pamela Montgomery and to twenty-one years and eight months in state prison for the rape of Pamela Montgomery and the attempted murders of Patricia and Blaine Pensinger. P.A. at 140.

This Court's Decision In *Boyde v. California*

While Payton's direct appeal was pending, this Court issued its opinion in *Boyde*. The Court held that the "catch-all" mitigation instruction directing the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," the same one used in Payton's case, satisfied the Eighth Amendment requirement that the sentencer be permitted to consider and give effect to all relevant mitigating evidence in determining whether to impose a death sentence. *Boyde*, 494 U.S. at 377-82.[2/] In reaching that conclusion, the Court rejected Boyde's argument that the "catch-all" mitigation instruction limited the jury's consideration to "any other circumstance *of the crime* which extenuates the gravity of the crime." *Boyde*, 494 U.S. at 382 (emphasis in original, internal quotation marks omitted). Rather, the Court concluded that the "jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character." *Id.* (emphasis in original).

The Court in *Boyde* further held that "[e]ven were the language of the [catch-all] instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and

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2. The trial court in *Boyde* also provided the jury with a definition of "extenuates," namely "to lessen the seriousness of the crime as by giving an excuse." *Boyde*, 494 U.S. at 381. The definition, however, was not the basis for the decision.

character could be considered in mitigation." *Boyde*, 494 U.S. at 383. Examining the other instructions given to the jury, the Court concluded: "When factor (k) is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all *non-crime-related* evidence [in mitigation]." *Id.* at 383 (emphasis added).

Additionally, because the entirety of Boyde's evidence at the penalty phase related to his background and character and was introduced without objection, the Court found it "unlikely that reasonable jurors would believe the court's instructions transformed all of this 'favorable testimony into a virtual charade.'" *Boyde*, 494 U.S. at 383-84 (citation omitted). Finally, in response to Boyde's claim the prosecutor's argument reinforced an improper interpretation of factor (k), the Court observed that arguments by prosecutors regarding the relevance of mitigating evidence "carry less weight with a jury than do instructions from the court," and that they are not, therefore, "to be judged as having the same force as an instruction from the court." *Boyde*, 494 U.S. at 384-85.

Direct Appeal To The California Supreme Court

On automatic appeal to the California Supreme Court, Payton argued that his penalty-phase jury was unconstitutionally precluded from considering his mitigation evidence in determining whether he should receive a sentence of life or death. He maintained that the trial court's instructions were inadequate to counter the prosecutor's misstatement of law advising the jury that it could only consider circumstances related to the crime. In a five-to-two decision, the California Supreme Court rejected his claims and affirmed Payton's convictions and sentence of death.

The California Supreme Court recognized that "[t]he Eighth Amendment, of course, requires that the sentencer be

permitted to consider [background and character] evidence." P.A. at 160 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982), *Lockett v. Ohio*, 438 U.S. 586, 602-09 (1978) and *Skipper v. South Carolina*, 476 U.S. 1, 4-9 (1986) (regarding good behavior in prison)). The California Supreme Court held there was no Eighth Amendment violation because there was no reasonable likelihood that Payton's jury understood the court's instructions as precluding consideration of his evidence in mitigation. P.A. at 140, 162, 164.

In so holding, the California Supreme Court focused on this Court's decision in *Boyde*, which expressly cited and incorporated the Eighth Amendment principles in *Eddings, Lockett* and *Skipper* (as well as *Penry v. Lynaugh*, 492 U.S. 302 (1989)), and applied them to factor (k). The California Supreme Court noted that Payton's jury was instructed with the same "catch-all" mitigation instruction that this Court found constitutional in *Boyde*, and that this Court's decision in *Boyde* rejected many of the precise arguments made by Payton. P.A. at 160-62. Thus, citing *Boyde*, the California Supreme Court held that, although the trial court "did not embellish the language of factor (k), that fact standing alone does not support a claim of error." P.A. at 164.

Additionally, recognizing that "the high court's holding in *Boyde* does not prevent a defendant from asserting a claim to the effect that prosecutorial argument, or other factors, led the jury to misinterpret factor (k)," the California Supreme Court evaluated whether there was a reasonable likelihood the jury misunderstood factor (k) "in the context of the proceedings." P.A. at 161. The California Supreme Court found the prosecutor had incorrectly argued the meaning of factor (k). However, applying *Boyde,* the court noted that arguments of counsel do not carry the same force as the trial court's instructions on the law. Further, the court found that "[a]ny impact this argument may have had . . . was immediately blunted by defense counsel's objection" and the trial court's admonition. P.A. at 162. The court also found the prosecutor properly suggested how the jury

might weigh Payton's mitigating evidence against the evidence in aggravation and thereby implicitly recognized that the jury could and would consider the defense evidence. Thereafter, defense counsel's closing argument reinforced the correct interpretation of factor (k). P.A. at 164. Lastly, the California Supreme Court, like the Court in *Boyde*, found it unlikely that reasonable jurors would believe the court's instructions precluded them from considering the only evidence offered in mitigation. P.A. at 163. Accordingly, the California Supreme Court held that neither the instruction nor the context of the proceedings was reasonably likely to mislead Payton's jury into believing it could not consider Payton's post-crime character evidence in mitigation in determining his sentence. P.A. at 161-64. This Court subsequently denied Payton's petition for certiorari. *Payton v. California*, 510 U.S. 1040 (1994).

De Novo Federal Habeas Corpus Review

On May 6, 1996, Payton filed his first petition for a writ of habeas corpus in the United States District Court for the Central District of California. Although his petition was filed after the effective date of AEDPA, the district court (and later the Ninth Circuit panel and the initial en banc panel of the Ninth Circuit) reviewed Payton's claims *de novo*.

The district court granted the petition as to the penalty phase on the grounds of prosecutorial misconduct. The district court held that the prosecutor's incorrect factor (k) argument so infected the penalty trial as to deny Payton a fair trial. P.A. at 131, 138. On appeal to the Ninth Circuit, a divided panel reversed the grant of habeas relief, holding that the prosecutor's incorrect argument did not so infect the penalty trial as to preclude consideration of Payton's mitigation evidence. P.A. at 98-107. The Ninth Circuit granted Payton's petition for rehearing en banc.

In a six-to-five opinion, an en banc panel of the Ninth Circuit affirmed the district court's grant of habeas relief as to

the penalty phase. P.A. at 71. Applying *de novo* review, the majority found:

> *Boyde* did not address the question whether, on its face, the unadorned factor (k) instruction is unconstitutionally ambiguous as applied to post-crime evidence. The fact that all of Payton's mitigating evidence was post-crime distinguishes this case from the pre-crime evidence at issue in *Boyde* which more readily fits within factor (k).

P.A. at 60 (Paez, J., joined by Schroeder, C.J., Pregerson, J., Tashima, J., W. Fletcher, J., and Berzon, J.) (internal quotation, footnote and citation omitted).

According to the majority opinion:

> Most naturally read, the phrase "extenuates the gravity of the crime" refers to evidence relating to or ameliorating the crime itself. On its face, factor (k) does not encompass the kind of post-crime evidence of good works, leadership and religious beliefs that Payton presented at the penalty phase of his trial.

P.A. at 59. The majority ruled that, "[u]nlike the pre-crime evidence in *Boyde,* post-crime mitigation evidence is simply not covered by any natural reading of the words of the unadorned factor (k) instruction. Mitigation evidence occurring after the crime cannot possibly 'extenuate the gravity of the crime.'" P.A. at 60-61. Therefore, the majority concluded, "[b]ecause the unadorned factor (k) instruction does not encompass post-crime evidence, it violates *Skipper*'s requirement that the jury be permitted to consider post-crime good behavior as mitigating evidence in deciding whether to impose the death penalty." P.A. at 61. Accordingly, the majority held, "[s]tanding alone, the factor (k) instruction is unconstitutional as applied to post-crime evidence." P.A. at 61.

The majority further held that, because there was "an absence of instruction" directing the jury to consider Payton's post-crime evidence in mitigation, the prosecutor's incorrect argument concerning factor (k) constituted the instructions to the jury. As such, there was a reasonable likelihood the jury understood the instructions as precluding consideration of

Payton's mitigation evidence. P.A. at 62-66. The majority then imposed an affirmative duty on the state trial court to instruct Payton's jury "that it must take his post-crime [mitigation] evidence into account in determining whether to impose a sentence of life or death." P.A. at 71.

The dissent, also applying the higher *de novo* standard of review, concluded that *Boyde*'s holding – that the "catch-all" mitigation instruction was constitutionally adequate – applied equally to Payton's case. P.A. at 72 (Tallman, J., joined by Kozinski, J., Trott, J., Fernandez, J., and T.G. Nelson, J.). Like the California Supreme Court majority, the dissent noted *Boyde*'s conclusion that factor (k) permitted consideration of "any other circumstance," not just circumstances related to the crime. P.A. at 76-77. Further, the dissent reasoned, "as both the Supreme Court in *Boyde* and our court's opinion here recognize, factor (k) allows jurors to consider a defendant's character. And that is basically what defense counsel tried to show during the penalty phase – that Payton had undergone a character transformation after being jailed." P.A. at 78. The dissent concluded: "there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths or are any more excluded from a reading of factor (k)." P.A. at 78.

The dissent also found that "the context of the proceedings" further bolstered its conclusion that there was no reasonable likelihood the jury understood the instructions to preclude consideration of Payton's mitigation evidence. Like the California Supreme Court, the dissent relied upon *Boyde*'s principles that arguments of counsel carry less weight, a jury is not likely to disregard the only evidence presented, and that other instructions told the jury to consider all of the evidence. P.A. at 78-83.

Federal Habeas Corpus Review Under AEDPA

Pursuant to *Woodford v. Garceau*, 538 U.S. 202 (2003), the Court granted the State's petition for a writ of certiorari and remanded this case to the Ninth Circuit to reconsider its decision under the principles of AEDPA. P.A. at 45.

By the identical six-to-five vote, the same en banc panel of the Ninth Circuit again affirmed the district court's grant of habeas relief as to the penalty phase on the ground that California's "catch-all" mitigation instruction was unconstitutional as applied to post-crime evidence in mitigation and that it was reasonably likely that Payton's jury understood the court's instructions as precluding consideration of Payton's post-crime character evidence in mitigation.

Writing for the majority, Judge Paez acknowledged the California Supreme Court's correct recitation of clearly established law, namely, that the Eighth Amendment requires the sentencer in a capital case to consider and give effect to all relevant mitigation evidence offered by the defendant. P.A. at 14-15. However, the majority found that the California Supreme Court unreasonably applied this precedent because, in analyzing Payton's claim, the California Supreme Court "focused entirely on the United States Supreme Court's decision in *Boyde*," which "does not control this case." P.A. at 15. "[I]n focusing almost exclusively on *Boyde*," explained the majority, "the court did not give proper effect to . . . *Skipper* and *Penry* that are controlling here." P.A. at 15. The majority then reiterated its reasoning that *Boyde*'s decision to uphold the constitutionality of the "catch-all" mitigation instruction turned on the pre-crime nature of Boyde's character and background evidence because such evidence related to the crime by providing an "excuse" for the crime. P.A. at 15. In contrast, found the majority, Payton's post-crime character evidence "cannot possibly 'extenuate the gravity of the crime.'" P.A. at 17.

The majority also found that the California Supreme Court was objectively unreasonable in finding the "context of the

proceedings" did not mislead the jury concerning its ability to consider Payton's mitigation evidence. The majority found wholly inapplicable *Boyde*'s principles that arguments of counsel carry less weight, that a jury is not likely to disregard the only evidence presented, and that the other instructions told the jury to consider all of the evidence. P.A. at 16-17. The majority concluded that because the prosecutor in Payton's trial misstated the law and Payton's mitigation evidence was post-crime, the California Supreme Court was objectively unreasonable in applying *Boyde*'s principles to Payton's case. P.A. at 20-25. Consequently, the majority opinion again held: "Payton is entitled to a penalty trial before a jury that is properly instructed that it must take his post-crime evidence [in mitigation] into account in determining whether to impose a sentence of life or death." P.A. at 30.

The dissent began by observing that "[t]oday, six judges of this court announce that the legal conclusion reached by *seven*[3] of their colleagues (*plus* five justices of the California Supreme Court) is not only wrong, but *objectively unreasonable* in light of clearly established federal law." P.A. at 31 (emphasis in original). To the contrary, contended the dissent, the "California Supreme Court's application of *Boyde* was not only reasonable but correct." P.A. at 33. The dissent reiterated its position that *Boyde*'s holding concerning the constitutionality of the "catch-all" instruction applied equally to Payton's post-crime evidence in mitigation. P.A. at 33-36. Moreover, the dissent emphasized the limits on federal habeas corpus review imposed by AEDPA:

> Perhaps I am wrong and the majority is correct that *Boyde* is distinguishable from this case because it

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3. The seven judges of the Ninth Circuit who reviewed Payton's claim of constitutional error *de novo* consist of the five dissenting judges in the initial en banc opinion (Judges Tallman, Kozinski, Trott, Fernandez, and T.G. Nelson) and the two judges of the three-judge panel (Judges Rymer and Gould).

> concerned precrime mitigation evidence. But even so, I am at a loss to understand how the California Supreme Court unreasonably applied any United States Supreme Court precedent. The pre-crime/post-crime mitigating evidence dichotomy offered by the majority is the majority's own untenable invention–not that of the United States Supreme Court. AEDPA commands that we show more respect for our counterparts in the California judiciary. We do not have the right to ignore AEDPA, however much our personal sense of justice urges us to overturn Payton's sentence. We are not Congress. We are not the United States Supreme Court.

P.A. at 41. The dissent similarly found that the California Supreme Court's thorough analysis of the context of the proceedings "faithfully followed the dictates of *Boyde*, the most analogous Supreme Court case." P.A. at 37. In the end, argued the dissent, "[t]he California Supreme Court is just as qualified as we are to distinguish and apply United States Supreme Court precedent. The majority's 'readiness to attribute error is inconsistent with the presumption that state courts know and follow the law.'" P.A. at 41 (quoting *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) (*per curiam*)).

SUMMARY OF ARGUMENT

Last term, the Court remanded this case to the Ninth Circuit with instructions to reevaluate its initial en banc decision under the highly deferential standard for evaluating state court rulings mandated by AEDPA. With no more than a few superficial changes and a passing citation to AEDPA, the Ninth Circuit issued a virtually identical opinion, again affirming the grant of habeas relief. By the same six-to-five vote, the Ninth Circuit held "objectively unreasonable" the legal conclusion of twelve judges – five justices of the California Supreme Court and seven judges of the Ninth Circuit – that, pursuant to *Boyde*, California's "catch-all" mitigation instruction is constitutional

as applied to post-crime evidence in mitigation and that there was no reasonable likelihood Payton's jury understood the court's instructions as precluding his evidence in mitigation.

Both the Ninth Circuit's methodology and its result violate AEDPA's mandate to "ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). First, the Ninth Circuit faulted the California Supreme Court for relying upon *Boyde* to decide whether the "catch-all" mitigation instruction impermissibly excluded consideration of Payton's post-crime character evidence, as opposed to *Penry* and *Skipper*. P.A. at 15. However, *Boyde*, not *Penry* or *Skipper*, addressed the constitutionality of California's "catch-all" mitigation instruction. Moreover, the generalized principle articulated in *Penry* and *Skipper*, that the Eighth Amendment requires the sentencer to consider any evidence in mitigation offered by the defendant in determining whether to impose life or death, including future prospects, was also embodied in *Boyde* and expressly recognized by the California Supreme Court. Thus, the California Supreme Court was more than reasonable in relying upon *Boyde* to decide Payton's claim that his jury was unconstitutionally precluded from considering his mitigation evidence.

Second, the Ninth Circuit criticized the California Supreme Court for finding that *Boyde*'s holding that factor (k) "standing alone" satisfied the Eighth Amendment applied equally to Payton's case. P.A. at 15-17. The issue squarely presented and decided in *Boyde* was whether factor (k) allowed for consideration of *non-crime related evidence in mitigation* or limited the jury to other evidence *related to the crime*. *Boyde*, 494 U.S. at 377-78. The Court in *Boyde* held that factor (k) allowed for consideration of *non-crime* related mitigation evidence that extenuated the gravity of the crime, "which certainly includes a defendant's background and character." *Id.* at 382. The California Supreme Court was, therefore, reasonable in concluding that factor (k) allowed for

consideration of Payton's non-crime related evidence in mitigation, particularly as it related to his character – even if that evidence consisted of post-crime acts.

Instead of focusing on the reasonableness of the California Supreme Court's decision, the Ninth Circuit advanced inconsequential factual differences between *Boyde* and *Payton* in order to find *Boyde*'s factor (k) holding inapplicable. The Ninth Circuit found that *Boyde*'s holding that factor (k) allowed for consideration of a defendant's non-crime related evidence in mitigation was limited to cases, like *Boyde*, that involved pre-crime evidence in mitigation such as troubled childhood or emotional or mental problems. Bypassing the plain meaning of the Court's holding in *Boyde*, the Ninth Circuit turned to the Court's explanation for why Boyde's particular evidence was "certainly" included in the directive to consider "any other circumstance that extenuates the gravity of the crime even though it is not a legal excuse." Thus, the Ninth Circuit concluded that Boyde's evidence fell within factor (k) because it provided an excuse *for the commission of the crime*. P.A. at 16-17 n.9.

In so holding, the Ninth Circuit adopted the very argument this Court rejected in *Boyde*: that factor (k) only permitted consideration of circumstances related to the crime as opposed to "any other circumstance" that might justify a sentence less than death. The Ninth Circuit also improperly assumed that, in deciding the appropriate punishment to be imposed upon a capital defendant, society would naturally consider pre-crime evidence of character and background but not post-crime character evidence such as Payton's rehabilitation. P.A. at 15-16. Both concepts, however, are inherent in any sentencing determination and both fall within factor (k). Nevertheless, even assuming the Ninth Circuit were correct, it was at least reasonable for the California Supreme Court to find otherwise given its straightforward application of *Boyde* and the fact that, until the Ninth Circuit's decision in *Payton*, no other cases interpreted *Boyde* in such a fashion.

Finally, the Ninth Circuit found fault with the California Supreme Court's application of *Boyde* in its analysis of factor (k) "in the context of the proceedings." Again, instead of focusing on the reasonableness of the California Supreme Court's decision, the Ninth Circuit focused on factual differences immaterial to the analysis and refused to apply any of *Boyde*'s principles to *Payton*. Thus, because a portion of the prosecutor's argument in *Payton* misstated the meaning of factor (k), the Ninth Circuit found wholly inapplicable *Boyde*'s principles that arguments generally do not carry the same force as instructions, that correct arguments by the defense may be considered or that a jury is not likely to disregard the only evidence presented. P.A. at 17, 20, n.13 & n.14. Additionally, the Ninth Circuit wholly disregarded the Court's finding in *Boyde* that the other instructions made it even more improbable a jury would misconstrue factor (k). P.A. at 22-23. However, *Boyde* and the principles articulated therein governed precisely the claim and situation in *Payton* and the California Supreme Court reasonably applied *Boyde* in affirming the judgment. Because the Ninth Circuit did not give deference under AEDPA to the California Supreme Court's reasonable decision but instead improperly substituted its own judgment, its decision should be reversed.

ARGUMENT

THE EN BANC NINTH CIRCUIT FAILED TO ADHERE TO THE LIMITS CONGRESS IMPOSED, THROUGH AEDPA, ON FEDERAL HABEAS CORPUS REVIEW AND ITS DECISION SHOULD BE REVERSED

Under the requirements of AEDPA, a federal court "shall not" grant a writ of habeas corpus to a state prisoner with respect to any claim adjudicated on the merits in state court unless the state court's decision was "contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d); *Price v. Vincent*, 538 U.S. 634, 639 (2003). The Ninth Circuit's decision granting habeas relief to Payton turned on its conclusion that the California Supreme Court unreasonably applied clearly established Supreme Court precedent.

A state court decision constitutes an "unreasonable application" of this Court's precedent if the state court identifies the correct governing legal rule from this Court's jurisprudence but unreasonably applies it to the facts of a particular case. *Penry v. Johnson*, 532 U.S. 782, 792 (2001). It is now well settled that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). Therefore, a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court decision applied clearly established federal law erroneously or incorrectly; for a grant of habeas corpus relief the state court decision must also be objectively unreasonable. *Id.* at 75.

This "highly deferential standard for evaluating state court rulings" demands that federal courts give state court decisions "the benefit of the doubt." *Visciotti*, 537 U.S. at 24; *Williams v. Taylor*, 529 U.S. 362, 404-13 (2000). In that regard, AEDPA profoundly modified the role of federal habeas courts to, inter alia, "ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. at 693.

Although the Ninth Circuit en banc majority cited this precedent and labeled the California Supreme Court's decision "objectively unreasonable," its analysis demonstrates it did not adhere to the requirements of AEDPA but instead, again, substituted its own judgment. As noted by the dissent, even if the California Supreme Court were incorrect it was surely not "objectively unreasonable." P.A. at 41. Indeed, a review of the Ninth Circuit's reasoning shows that, not only was the

California Supreme Court reasonable, it was correct. The California Supreme Court properly identified *Boyde* as the controlling authority and reasonably applied *Boyde* in finding factor (k), on its face and in the context of the proceedings, satisfied the requirements under the Eighth Amendment that a sentencer be permitted to consider and give effect to a defendant's mitigating evidence. Only by utterly disregarding the limits imposed by AEDPA could the Ninth Circuit have affirmed the grant of habeas relief.

A. The California Supreme Court Reasonably Identified And Relied Upon *Boyde* As The Controlling Supreme Court Precedent For Assessing Claims That Factor (k) Failed To Instruct Jurors To Consider A Defendant's Background And Character Evidence

The first basis for the Ninth Circuit's decision that the California Supreme Court was "objectively unreasonable" was the California Supreme Court's focus on *Boyde* when analyzing Payton's claim that his jury was unconstitutionally precluded from considering his post-crime evidence in mitigation. According to the Ninth Circuit, "in focusing almost exclusively on *Boyde*, the court did not give proper effect to clearly established Supreme Court cases such as *Skipper* and *Penry* that are controlling here." P.A. at 15. That criticism is groundless. The California Supreme Court cannot be faulted for focusing on the one decision of this Court that has analyzed whether the specific mitigation instruction at issue in this case, factor (k), comports with the Eighth Amendment.

As this Court recently observed in *Beard v. Banks*, 124 S. Ct. 2504, 2511, 2512 (2004), the "line of cases beginning with *Lockett* . . . and *Eddings*" establish the general rule "that the sentencer must be allowed to consider any mitigating evidence." In *Boyde*, this Court cited *Lockett*, *Eddings*, and *Penry* for that proposition, 494 U.S. at 377-78, and then turned

to the question before it: whether California's capital sentencing system comported with the rule those cases established. California argued that the catch-all mitigation instruction, factor (k), ensured that it did. This Court agreed. The reasoning and holding of *Boyde* was, therefore, simply an application of *Skipper* and *Penry* (as well as *Lockett* and *Eddings*). There is no tension or inconsistency between *Boyde*, on the one hand, and *Skipper* and *Penry*, on the other.

Moreover, as the Ninth Circuit conceded, the California Supreme Court itself "acknowledged the teachings of *Eddings*, *Lockett,* and *Skipper* that the Eighth Amendment requires the sentencer in a capital case to consider evidence of character and background, including 'good behavior in prison.'" P.A. at 14-15. Accordingly, any suggestion by the Ninth Circuit that the California Supreme Court ignored the general principles of *Skipper* and *Penry* is unsupportable.

The only other basis upon which the Ninth Circuit criticized the California Supreme Court for focusing on *Boyde* was the existence of factual differences between this case and *Boyde*. The Ninth Circuit is certainly correct that the character evidence presented in *Boyde* involved pre-crime events, whereas the character evidence presented by Payton involved post-crime events. That factual difference, however, does not make *Boyde* any less relevant. To repeat the obvious, *Boyde* is the one decision of this Court that has addressed the claim that factor (k) failed to allow the jury to consider and give effect to all relevant mitigating evidence. It is plainly the most instructive decision of this Court with respect to that very same claim as applied to a different type of character evidence presented in mitigation. The California Supreme Court was reasonable, to say the least, in focusing on *Boyde*.

B. The California Supreme Court Was Not "Objectively Unreasonable" In Holding That, Under *Boyde*, Factor (k) "Standing Alone" Satisfied The Eighth Amendment

The second component of the California Supreme Court's decision that the Ninth Circuit found "objectively unreasonable" was the court's conclusion that, under *Boyde*, factor (k) standing alone instructed the jury to consider Payton's character evidence in mitigation. The California Supreme Court's holding was an eminently reasonable application of *Boyde*. AEDPA requires that it be respected.

1. *Boyde's* Analysis Of Factor (k) "Standing Alone"

The central issue in *Boyde*, as in Payton's case, was whether the "catch-all" mitigation instruction limited the jury to consideration of mitigation evidence directly related to the crime in violation of the Eighth Amendment's requirement that a jury "consider and give effect to all relevant mitigation evidence" offered by the defendant. *Boyde*, 494 U.S. at 377-78. Boyde argued "[t]hat the 'catch-all' factor (k) [instruction] did not allow the jury to consider and give effect to *non-crime-related mitigation evidence*, because its language . . . limited the jury to other evidence that was *related to the crime*." *Boyde*, 494 U.S. at 378 (emphasis in original and added). This Court rejected Boyde's contention.

Considering the instruction "standing alone," this Court held there was no reasonable likelihood "that the jury applied the instruction in a way that prevents consideration of constitutionally relevant evidence." *Id.* at 380-81. The Court explained: "The instruction did not, as petitioner seems to suggest, limit the jury's consideration to 'any other circumstances *of the crime* which extenuates the gravity of the crime.' The jury was directed to consider *any other circumstance* that might excuse the crime, which certainly

includes background and character." *Boyde*, 494 U.S. at 382 (emphasis in original). Thus, this Court held that California's "catch-all" mitigation instruction was constitutional, on its face, because it permitted – indeed, it "directed" – consideration of "any other circumstance" in mitigation when determining whether to impose the death penalty. *Id.* at 380-82.

2. The California Supreme Court's Reasonable Application Of *Boyde*

Quoting *Boyde*'s language emphasizing that the "catch-all" instruction constitutionally permitted consideration of "any other circumstance," not just mitigation circumstances related to the crime, the California Supreme Court rejected Payton's claim that the instruction itself precluded consideration of his non-crime related mitigation evidence. P.A. at 160-65. The court held: "While the [trial] court did not embellish the language of factor (k), that fact standing alone does not support a claim of error." P.A. at 164 (citing *Boyde*, 494 U.S. at 381). Given the specificity of *Boyde*'s holding that factor (k) permits consideration of non-crime related mitigation evidence, particularly character evidence, the California Supreme Court had no reason to rule otherwise. *See Yarborough v. Alvarado*, 124 S. Ct. 2140, 2149 (2004) ("[T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow.").

It was at least reasonable for the California Supreme Court to apply the same interpretation of the instruction as this Court did in *Boyde* to essentially the same argument that Boyde made. Indeed, there are numerous capital cases in California, pre- and post-*Boyde*, in which the defendant's evidence in mitigation included post-crime character evidence and the court instructed with the same factor (k) instruction used in *Payton* without a claim or finding that the instruction applied to pre-crime

mitigation evidence but not to post-crime mitigation evidence.[4/] The California Supreme Court's decision was precisely the sort of eminently reasonable application of this Court's precedents to which AEDPA demands deference.

3. The Ninth Circuit Violated AEDPA In Rejecting The California Supreme Court's Holding

Despite lip service to AEDPA, the Ninth Circuit majority did not analyze the California Supreme Court's decision with a deferential eye. Rather, the majority, as it did in *Andrade*, 538 U.S. at 75, conducted *de novo* review, found error, and labeled it "objectively unreasonable." At the threshold, this can be seen by the similarity in the two opinions issued by the en banc Ninth Circuit – the first premised on *de novo* review, the second purportedly under the AEDPA deference standard. More fundamentally, the Ninth Circuit's analysis of *Boyde* (and its analysis of the California Supreme Court's analysis of *Boyde*) reveals a fundamental unwillingness to grant deference to state court rulings. The California Supreme Court found that the reasoning and holding of *Boyde* instruct that factor (k) directs jurors to consider all character evidence in mitigation, including

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4. *See, e.g., People v. Brown*, 45 Cal. 3d 1247, 1252-57, 756 P.2d 204, 248 Cal. Rptr. 817 (1998) (defendant remorseful and no threat in custody because only threat to women); *People v. Mayfield*, 5 Cal. 4th 142, 167-68, 183-84, 852 P.2d 331, 19 Cal. Rptr. 836 (1993) (remorse and good prisoner); *People v. Gonzalez*, 51 Cal. 3d 1179, 1204, 1224-25, 1231-32, 800 P.2d 1159, 275 Cal. Rptr. 729 (1991) (remorse); *People v. Jones*, 53 Cal. 3d 1115, 1128, 1146, 811 P.2d 757, 282 Cal. Rptr. 465 (1991) (good prisoner); *People v. Hernandez*, 47 Cal. 3d 315, 355, 363, 365-67, 763 P.2d 1289, 253 Cal. Rptr. 199 (1988) (difficulty of life in prison, remorse and possibility of positive contribution in prison), *cert. denied*, 491 U.S. 910 (1989).

post-crime character evidence. The Ninth Circuit violated AEDPA by not deferring to that reasonable conclusion.

The Ninth Circuit put forth three reasons for its conclusion that, because the mitigating evidence in this case involved post-crime conduct, *Boyde* "does not control this case." P.A. at 15. First, the court stated that

> [w]hereas there may be no reason to doubt, in light of society's "long held" views, that a jury would consider a defendant's pre-crime background in sentencing him, there is reason to doubt that a jury would similarly consider post-crime evidence of a defendant's religious conversion and good behavior in prison.

P.A. at 15-16. That purported distinction between pre-crime and post-crime mitigating evidence cannot withstand scrutiny.

An equally "long held" view is the significance of rehabilitation and remorse in determining an appropriate sentence. *See, e.g., People v. Gonzalez*, 51 Cal. 3d at 1232 ("[T]he defendant's overt indifference or callousness toward his misdeed bears significantly on the moral decision whether a greater punishment, rather than a lesser, should be imposed."). It is precisely this view that underlies this Court's repeated holdings that the Eighth Amendment requires juries in capital cases to consider post-crime evidence in mitigation, such as remorse or good behavior in prison. *See, e.g., Skipper*, 476 U.S. at 7 ("[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination."); *Graham v. Collins*, 506 U.S. 461, 472 (1993) ("[T]he Texas statute satisfied the commands of the Eighth Amendment: It permitted petitioner to place before the jury whatever mitigating evidence he could show, including his age, while focusing the jury's attention upon what that evidence revealed about the defendant's capacity for deliberation and prospects for rehabilitation."); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (death penalty reversed for failure to allow for consideration of non-statutory mitigation including

rehabilitation); *Jurek v. Texas*, 428 U.S. 262, 274-76 (1976) (consideration of a defendant's future conduct is an inquiry common throughout the criminal justice system). The consideration of post-crime character evidence in determining the appropriate sentence is well rooted in contemporary standards regarding the infliction of punishment.

Neither precedent nor principle supports the sharp distinction drawn by the Ninth Circuit between societal views regarding the importance of "'a disadvantaged background, or . . . emotional and mental problems,'" P.A. at 15, on the one hand, and remorse and good behavior in prison, on the other. To the contrary, human nature suggests that it is *more* difficult to condemn a person who has come to terms with his crime, repented, and rehabilitated, than to condemn an unrepentant sociopath who had a troubled childhood. At the very least, the California Supreme Court was not unreasonable in declining to distinguish *Boyde* based on purported differences in society's "long held" views about the importance of pre- and post-crime character evidence.

The second ground upon which the Ninth Circuit ruled that *Boyde* "does not control this case" was the court's "reading of the words of the unadorned factor (k)." P.A. at 16. In its initial opinion, the en banc Ninth Circuit held that, "[m]ost naturally read, the phrase 'extenuates the gravity of the crime' refers to evidence relating to or ameliorating the crime itself." P.A. at 59. Apparently recognizing that this holding directly contradicted *Boyde*, the second en banc opinion of Ninth Circuit excluded that sentence. But the thrust of the second en banc opinion was the same. Thus, the Ninth Circuit majority insisted: "Any natural reading of the words of the unadorned factor (k) does not support the inclusion of post-crime evidence because mitigation evidence occurring after a crime cannot possibly 'extenuate the gravity of the crime.'" P.A. at 16-17. This is so, according to the Ninth Circuit, because the words of factor (k) apply only to evidence related to "the commission of the crime." P.A. at 16 n.9 (favorably quoting Justice Kennard's dissent in

the California Supreme Court, P.A. at 181). A similar "natural reading" argument was made in *Boyde*, of course, and this Court rejected it.

As noted, Boyde argued that the phrase "any other circumstance which extenuates the gravity of the crime" instructed the jury to consider only "any other circumstance *of the crime*." *Boyde*, 494 U.S. at 382 (emphasis in original). This Court disagreed, concluding that any evidence that might convince a jury that a defendant "may be less culpable" – that might "counsel imposition of a sentence less than death" – is encompassed by the instruction. *Id.* (internal citations and quotation marks omitted).

Moreover, *Boyde* specifically held that the factor (k) instruction, on its face, instructed jurors to consider *character* evidence, which is precisely what Payton presented. *Boyde*, 494 U.S. at 382-83 & n.5. In *Skipper*, this Court recognized that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of character." *Skipper*, 476 U.S. at 7. The California Supreme Court was, therefore, reasonable in concluding that the "words of" factor (k), as construed in *Boyde*, instructed Payton's jury to consider and give effect to his post-crime character evidence in mitigation.

Indeed, to the extent any court in this case applied *Boyde* unreasonably, it was the en banc Ninth Circuit. The Ninth Circuit's view that factor (k) applies only to evidence related to "the commission of the crime" conflicts with *Boyde*'s reading of factor (k) as encompassing any evidence that might convince a jury that a defendant "may be less culpable" and that might "counsel imposition of a sentence less than death."[5/] As noted

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5. The Ninth Circuit has applied this same misunderstanding of the language of factor (k) and *Boyde* to grant habeas relief in another death penalty case. *Belmontes v. Woodford*, 350 F.3d 861 (2003), *reh'g denied*, 359 F.3d 1079, 1087 (9th Cir. 2004). A petition for writ of certiorari is currently

by the dissent from the initial en banc decision,

> [o]nce one acknowledges, as the Supreme Court did in *Boyde*, that factor (k)'s text allows for consideration of evidence beyond the crime itself, there is no logical reason to believe that post-crime character strengths are any less capable of extenuating the gravity of the crime than pre-crime character strengths or are any more excluded from a reading of factor (k).

P.A. at 78.

The key words here are "the gravity of the crime." "'[G]ravity of the crime' focuses not only on the culpability of the criminal, but includes the effect on society in general. To the extent that a criminal taunts or gloats after his crime, the gravity of the crime is enhanced. To the extent that the criminal shows remorse, repents or rehabilitates himself, the gravity of the crime is diminished." *Belmontes v. Woodford*, 359 F.3d 1079, 1087 (9th Cir. 2004) (Bea, J. dissenting, joined by Tallman, J.) Thus, if the defendant presents evidence of a troubled childhood as in *Boyde* or redemption as in *Payton*, such evidence may lessen the "gravity of the crime" because it suggests a basis for a sentence less than death.

This conclusion is reinforced by the nature of the task before the jury. The sole function of the jury at the penalty phase is to determine whether a defendant should receive life in prison or the death penalty. J.A. at 94-96. As noted by the dissent in the initial en banc, "It is difficult to argue that a murder is less severe because of either pre-crime or post-crime circumstances pertaining to the murderer. The victim is dead in either case." P.A. at 77 n.2. However, pursuant to California Penal Code section 190.3,

> the defense is allowed to present whatever constitutionally relevant evidence it wants to persuade the jury to spare the defendant's life, and the jury may choose to spare the defendant's life based on any evidence it concludes "extenuates the gravity of the crime" even though it is "not

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pending *sub nom. Goughnour v. Belmontes*, Case No. 03-1503.

> a legal excuse for the crime" and even though it does not literally make the crime any less "severe."

P.A. at 77 n.2.

Lastly, drawing from footnote 5 of this Court's decision in *Boyde*, the Ninth Circuit found the Court's listing of distinguishing facts between Boyde's evidence and the post-crime evidence of a model prisoner presented in *Skipper* indicated that the Court did not intend to include post-crime character evidence within the ambit of "background and character" evidence that it found subject to consideration under factor (k). P.A. at 16. However, the question of what does and does not constitute "background and character" evidence was not the issue before or decided by the Court in *Boyde*; the issue was whether factor (k) allowed for consideration of non-crime related evidence in mitigation or was limited to circumstances related to the crime. The Court did not find factor (k) limited to circumstances related to the crime as argued by Boyde, or limited to background and character that *related to the crime* as found by the Ninth Circuit. The Court found factor (k) allowed for consideration of "*any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character." *Boyde*, 494 U.S. at 382 (emphasis in original). Neither the phrase – "any other circumstance" nor "character" – *excludes* Payton's post-crime character evidence in mitigation.

Moreover, footnote 5 only further confirms that factor (k) is not limited to background and character evidence that is *related to the crime* but includes character evidence that would justify a sentence less than death. Footnote 5 responded to Boyde's additional evidence referred to at oral argument to the effect that he had won a dance prize while previously incarcerated. The Court found: "As with other evidence of good character, therefore, the jury had the opportunity to conclude through factor (k) that petitioner's dancing ability extenuated the gravity of the crime because it showed that Boyde's criminal conduct was an aberration from otherwise good character." *Boyde,* 494 U.S. at 382 n. 5. Good character evidence provides

a basis for concluding a defendant's life is worth saving; it does not relate to a defendant's culpability for the crime. Hence, the only way good character is subject to consideration under factor (k), is if the phrase "extenuates the gravity of crime" refers to the appropriate penalty to be imposed considering all of the circumstances presented by the defendant, not just the circumstances related to the crime as argued by the Ninth Circuit

Finally, even if the six judges of the Ninth Circuit correctly construed the words of factor (k) as drawing a line between pre-crime and post-crime mitigating character evidence, that is not the only reasonable interpretation of those words and of *Boyde*. Indeed, the Ninth Circuit itself had previously stated that this "Court has held that this instruction is neither erroneous nor ambiguous on its face." *Babbit v. Calderon*, 151 F.3d 1170, 1178 (9th Cir. 1998). By insisting that the California Supreme Court was objectively unreasonable in failing to apply its novel limitation of *Boyde,* the Ninth Circuit majority utterly disregarded AEDPA. Because the California Supreme Court's application of *Boyde*'s factor (k) holding is reasonable, habeas relief on this basis should be denied.

C. The California Supreme Court Was Not "Objectively Unreasonable" In Holding That, Under *Boyde*, Factor (k) "In The Context Of The Proceedings" Satisfied The Eighth Amendment

The third component of the California Supreme Court's decision that the Ninth Circuit found "objectively unreasonable" was the court's holding that factor (k), in the context of the proceedings, satisfied the Eighth Amendment. A key premise underlying the Ninth Circuit's context-of-the-proceedings holding was its prior conclusion that factor (k), on its face, did not instruct the jury to consider Payton's evidence of post-crime character evidence. P.A. at 21. Because it ruled that Payton's "jury was confronted with an ambiguous factor (k) instruction

and with post-crime mitigating evidence that, unlike the pre-crime character and background evidence in *Boyde*, did not clearly fit within the plain wording of the instruction," the Ninth Circuit placed extra weight on the prosecutor's argument. P.A. at 21. As shown in section B, *supra*, this premise was incorrect; Payton's jury, like *Boyde*'s jury, was confronted with an instruction that directed it to consider the mitigating evidence that had been presented to it. The California Supreme Court reasonably concluded that, and then faithfully applied *Boyde*'s principles for assessing whether there was a reasonable likelihood the jury misunderstood the trial court's instructions in the context of the proceedings so as to preclude consideration of constitutionally relevant mitigation evidence.

1. *Boyde's* Analysis Of Factor (k) In The "Context Of The Proceedings"

The Court in *Boyde* addressed whether, "in the context of the proceedings," there was a reasonable likelihood the jury misunderstood factor (k) as precluding consideration of Boyde's non-crime related mitigation evidence. This Court held that even were the language of the "catch-all" instruction "less clear than we think," under the "reasonable likelihood" test, there was no reasonable likelihood that the jury would have believed it could not consider Boyde's mitigation evidence. *Boyde*, 494 U.S. at 383.

The Court examined other instructions, also given to Payton's jury, J.A. at 92-96, which directed the jury to consider mitigation evidence not associated with the crime itself, such as lack of prior criminal activity or felonies, the age of the defendant, and the instruction that the jury "*shall consider all of the evidence* which has been received during any part of the trial of this case." *Boyde*, 494 U.S. at 383 (emphasis in original). This Court concluded: "When factor (k) is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of

all *non-crime-related* evidence in mitigation." *Boyde*, 494 U.S. at 383 (emphasis added). Further, because the entirety of Boyde's evidence at the penalty phase related to his background and character, and was introduced without objection, the Court found it "unlikely that reasonable jurors would believe the court's instructions transformed all of this 'favorable testimony into a virtual charade.'" *Id.* at 383-84 (citation omitted).

Lastly, the Court examined the argument of counsel, observing they generally carry "less weight" with a jury than do instructions from the court. "The former are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." *Boyde*, 494 U.S. at 384. The Court found nothing objectionable about the prosecutor's argument that the mitigation evidence did not "'suggest that [petitioner's] crime is less serious or that the gravity of the crime is any less,'" and that "'nothing I have heard lessens the seriousness of this crime'." *Id.* at 385. Defense counsel also properly stressed a broad reading of the "catch-all" mitigation instruction. *Id.* at 386. Accordingly, the Court held that there was no reasonable likelihood that Boyde's jury interpreted California's "catch-all" mitigation instruction to preclude consideration of Boyde's non-crime related mitigation evidence. *Id.*

2. The California Supreme Court's Reasonable Application Of *Boyde*

The California Supreme Court faithfully – and reasonably – applied *Boyde*'s "context of the proceedings" analysis. The court reviewed each of the considerations addressed by this Court and concluded that here, too, there was no reasonable likelihood the jury in Payton's case believed the law required them to disregard his mitigation evidence. "Several considerations" led the court to this conclusion. P.A. at 162.

First, the California Supreme Court noted *Boyde*'s holding that the other instructions given in Boyde's case, which were also given in Payton's, made it "even more improbable that the jurors would arrive at an interpretation [of factor (k)] that precludes consideration of all non-crime related evidence." P.A. at 161.

Second, recognizing that Payton, like Boyde, also asserted a claim that the prosecutor's argument misled the jury concerning the meaning of factor (k), the California Supreme Court identified and applied *Boyde*'s principle that arguments of counsel are not treated as having the same force as the trial court's instruction. P.A. at 161. The court explained:

> Rather than creating a rule to the effect that incorrect remarks by attorneys about the permissible scope of mitigating evidence are presumed to have misled the jury, *Boyde* teaches that there is constitutional error only if it is reasonably likely that such remarks led the jurors to understand the trial court's instructions as precluding consideration of relevant mitigating evidence offered by the defendant. (*Boyde, supra*, 494 U.S. at pp. 378-381, 386 . . .) *Boyde* also teaches that comments by attorneys "must be judged in the context in which they are made." (*Id.*, at p. 385 . . .)

P.A. at 161.

Thereafter, the California Supreme Court carefully evaluated the prosecutor's argument in the context of the proceeding in which it was made. The California Supreme Court recognized that the prosecutor suggested a narrow and incorrect interpretation of factor (k). But the court found that error blunted by "defense counsel's objection, which led the court to remind the jury that lawyer's comments were 'not evidence' but 'argument' and 'to be placed in [their] proper perspective." P.A. at 162. In so finding, the California Supreme Court cited to *Boyde* and that portion of the decision in which this Court recognized "that such comments 'are likely viewed as the statements of advocates,' especially when 'billed in

advance to the jury as matters of argument, not evidence.'" P.A. at 162 (quoting *Boyde*, 494 U.S. at 384.)

The California Supreme Court also noted the other argument by the prosecutor and found that he implicitly conceded the relevance of Payton's mitigating evidence "by devoting substantial attention to it." P.A. 162. The court observed: "The prosecutor also suggested, properly, how the jury might weigh defendant's evidence [in mitigation] against the evidence in aggravation." P.A. at 162-63. The California Supreme Court reasonably concluded: "Obviously, this exercise by the prosecutor had a point only if it was contemplated the jury *would* consider defendant's evidence." P.A. at 163 (emphasis in original, citations omitted).

Additionally, the California Supreme Court considered the argument of defense counsel, noting: "Defense counsel, in his own closing argument, strongly reinforced the correct view that defendant's religious conversion was proper mitigating evidence." P.A. at 164. Thus, the state court found that defense counsel's argument further blunted the incorrect argument of the prosecutor. P.A. at 164.

Lastly, as did the Court in *Boyde,* the California Supreme Court considered the nature and extent of the mitigation evidence presented. The California Supreme Court found:

> For the jury to have accepted a narrow view of factor (k) in this case would have meant disregarding all of defendant's mitigating evidence, since the testimony of his eight penalty phase witnesses was all directed to his religious conversion and consequent behavior in prison. Indeed, it would have meant disregarding virtually the entire penalty phase, since the testimony of the prosecution's two witnesses occupies only eleven pages of the transcript. We think it unlikely, however, as did the high court in *Boyde*, "that reasonable jurors would believe the court's instructions transformed all of [defendant's] 'favorable testimony into a virtual charade.' " (*Boyde, supra*, 494 U.S. at p. 383 [108 L.Ed.2d at p. 331].) The high court's

> observation is especially apt when the trial court, as here, has also instructed the jury to consider "all of the evidence which has been received during any part of the trial" in determining the penalty. (Ibid.)

P.A. at 163. Accordingly, the California Supreme Court held: "On this record, it is not reasonably likely that the jury understood the court's instructions as precluding consideration of defendant's mitigating evidence." P.A. at 164.

The California Supreme Court's application of *Boyde* is similar to that employed by this Court in *Buchanan v. Angelone*, 522 U.S. 269 (1998). Like the California Supreme Court, this Court in *Buchanan* found, under *Boyde,* that it was "not likely that the jury would disregard [two days of testimony of mitigation evidence] in making its decision, particularly given the instruction to consider 'all the evidence.'" *Buchanan*, 522 U.S. at 278; *see also People v. Gonzalez*, 51 Cal.3d at 1204, 1224-26 (applying *Boyde*, the California Supreme Court held factor (k) allowed for consideration of defendant's non-crime related mitigation evidence); *Ward v. Whitley*, 21 F.3d 1355, 1365-66 (5th Cir.1994) (applying *Boyde*, the Fifth Circuit found the prosecutor's incorrect argument did not undo the court's correct instructions); *Bonin v. Vasquez*, 794 F. Supp. 957, 979-80 (1992), *aff'd*, 59 F.3d 815 (9th Cir. 1995) (applying *Boyde*, the district court found the prosecutor's incorrect argument did not undo the court's correct instructions). The similar interpretations of the principles of *Boyde* confirms the California Supreme Court's reasonable application of *Boyde*. *See Price v. Vincent,* 538 U.S. at 643 & n.2 (reasonableness of state court's holding was confirmed by similar holdings by other courts).

3. The Ninth Circuit's Readiness To Attribute Error Violates AEDPA

The approach the Ninth Circuit majority took in analyzing the principles of *Boyde* set forth in its "context of the

proceedings" analysis further evidences the Ninth Circuit's readiness to attribute error in violation of AEDPA. Instead of accepting the principles of *Boyde* at face value, or finding the California Supreme Court reasonable in doing so, the majority went to extraordinary lengths to corral *Boyde*'s principles to its particular facts. It then found the California Supreme Court objectively unreasonable in not doing the same, notwithstanding that the Ninth Circuit's bare majority opinion in this case is the first one to have so limited the language in *Boyde*.

The Ninth Circuit majority began its analysis of factor (k) "in the context of the proceedings" with the incorrect premise that factor (k) did not naturally allow for consideration of Payton's mitigation evidence. The Ninth Circuit then assessed whether there was anything in the context of the proceedings to counter the allegedly inadequate factor (k), as opposed to whether there was anything to mislead the jury concerning the constitutionally adequate factor (k). As demonstrated above, both the Ninth Circuit's approach and its conclusion that factor (k) applies only to evidence related to the "commission of the crime" contravene *Boyde*.

Additionally, in finding that the California Supreme Court unreasonably applied *Boyde*'s principle that arguments of counsel generally carry "less weight" than instructions from the court, the Ninth Circuit ruled that this principle applies only when there is no objectionable argument by the prosecutor. P.A. at 17 ("Key to the Court's reasoning was the fact that there was 'no objectionable prosecutorial argument.'"). The principle set forth by this Court in *Boyde*, however, did not turn on the correctness of the prosecutor's argument. *Boyde* expressly stated: "This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court." *Boyde*, 494 U.S. at 384-85. Both the principle that arguments have less force than the trial court's instructions and the recognition that there are exceptions were recognized by the California Supreme Court. P.A. at 161-62. The California

Supreme Court simply determined that the prosecutor's incorrect argument did not undo the court's proper instructions given the context of the entire proceedings.

In that regard, the Ninth Circuit majority also improperly assailed the California Supreme Court for evaluating "the impact of the prosecutor's comments on the jury on the basis of only *one* of his comments." P.A. at 17 n.11 (italics in original). Once again the Ninth Circuit has incorrectly accused a state court of "ignoring" or "failing to consider" something that the state court in fact considered. *Visciotti*, 537 U.S. at 24-25; *see also Middleton v. McNeil*, 124 S. Ct. 1830, 1832 (2004) ("Contrary to the Ninth Circuit's description, the state court did not 'ignor[e]' the faulty instruction. It merely held that the instruction was not reasonably likely to have misled the jury given the multiple other instances . . . where the charge correctly stated . . . .").

The California Supreme Court demonstrated a thorough knowledge of the entire record and specifically addressed the critical aspect of the prosecutor's argument, that the prosecutor misstated the meaning of factor (k), in its decision. The contention that more was required strains credulity. *See Early v. Packer*, 537 U.S. 3, 8-9 (2002) ("The contention that the California court 'failed to consider' facts and circumstances that it had taken the trouble to recite strains credulity. The Ninth Circuit may be of the view that the Court of Appeal did not give certain facts and circumstances adequate weight (and hence adequate discussion); but to say that it did not consider them is an exaggeration."). In that regard, the Ninth Circuit's *presumption* that the California Supreme Court did not consider the entirety of the prosecutor's argument because it quoted portions different that what the Ninth Circuit determined should be quoted is precisely the type of analysis foreclosed by AEDPA. *Visciotti*, 537 U.S. at 24 (AEDPA demands that state-court decisions be given the benefit of the doubt.) Accordingly, the Ninth Circuit was "nowhere close to the mark," *Alvarado*, 124 S. Ct. at 2150, in finding the California

Supreme Court unreasonable in applying *Boyde* to its analysis of the prosecutor's argument.

The Ninth Circuit majority also found that the California Supreme Court unreasonably applied *Boyde* by finding that defense counsel's correct argument "blunted" the impact of the prosecutor's incorrect argument. The majority stated that, "[a]ccording to *Boyde*, only instructions by the court have the force to 'blunt' attorneys' comments." P.A. at 20 n.13. *Boyde* held nothing of the kind; indeed, the proposition is directly contrary to *Boyde*'s directive to consider the context of the proceedings and the Court's express consideration of the correct argument of defense counsel. *Boyde,* 494 U.S. at 386 ("Defense counsel also stressed a broad reading of factor (k) in his argument to the jury:"). The context of the proceedings logically includes arguments of counsel. *Weeks v. Angelone*, 528 U.S. 225, 236 (2000). In fact, the Court in a recent per curiam opinion, *Middleton v. McNeil*, 124 S.Ct. at 1830, rejected a similar attempt by the Ninth Circuit to disregard the impact of correct argument by counsel in assessing a claim of instructional error. In *Middleton*, an AEDPA case, the Ninth Circuit found the California Court of Appeal unreasonable in relying upon the correct argument of a prosecutor in assessing a claim of instructional error. In reversing the Ninth Circuit's decision, the Court held: "Nothing in *Boyde* precludes a state court from assuming that counsel's argument clarified an ambiguous jury charge." *Id.* at 1833. The Ninth Circuit majority therefore erred in finding the California Supreme Court unreasonable in also considering the correct argument of defense counsel.

In a similar fashion the Ninth Circuit reinterpreted the other jury instructions which this Court in *Boyde* held, and the California Supreme Court agreed, made it even more improbable a jury would misunderstand California's "catch-all" mitigation instruction to preclude consideration of non-crime related evidence in mitigation. Thus, contrary to *Boyde*, the Ninth Circuit found that the trial court's additional instructions, which were also given in Boyde's trial, compounded the

problem of the "catch-all" mitigation instruction. P.A. at 20-24. The Ninth Circuit disregarded the other instructions directing the jury to consider non-crime related evidence such as factors (b) [existence of prior violent criminal history], (c) [existence of prior felonies], (i) [age], and the repeated instructions to "consider all of the evidence," as well as the trial court's repeated admonishments to the jury throughout the penalty phase that it heard the evidence and was responsible for evaluating it. J.A. at 81-82, 85-86. The Ninth Circuit instead focused on the phrase at the end of the instructions directing the jury to also be guided by the arguments of counsel. P.A. at 20-24. The Ninth Circuit majority reasoned that this phrase effectively melded the court's instructions with the objectionable portion of the prosecutor's argument. P.A. at 21-23.

But that analysis again fails to give appropriate deference to the California Supreme Court, which carefully examined the instructions and found the same effect as this Court in *Boyde*. Moreover, it is not logical or reasonable to conclude that jurors would parse the instructions and the arguments of counsel in a manner to exclude the *only* mitigating evidence presented by Payton. Unlike other capital defendants, Payton did not offer any evidence of a disadvantaged childhood, abusive father or abusive mother, brain damage, drug abuse or the like. The *only* evidence offered by Payton was his post-crime character transformation.

In that regard, in finding a reasonable likelihood the jury misunderstood the court's instructions, the Ninth Circuit also improperly failed to consider the principle in *Boyde* that a jury would not readily interpret California's "catch-all" mitigation instruction to disregard the *only* evidence presented in mitigation, particularly when there is no objection to the introduction of the evidence. *Boyde*, 494 U.S. at 383-84. As in *Boyde*, all of Payton's penalty phase evidence was *non-crime* related character evidence in mitigation. Thus, as in *Boyde*, it is unlikely that reasonable jurors would believe the court's

instruction transformed all of this favorable testimony into a "virtual charade." *Boyde*, 494 U.S. at 383-84.

As this Court noted in *Boyde*, the "reasonable likelihood" test does not turn on whether a single hypothetical "reasonable" juror could or might have interpreted an instruction in a way that prevents consideration of constitutionally relevant evidence. Rather, it turns on whether there was a reasonable likelihood the jury as a whole could have or might have done so. *Boyde*, 494 U.S. at 380. The Court reasoned that:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at trial likely to prevail over technical hairsplitting.

Id. at 380-81. Contrary to *Boyde*, the Ninth Circuit's analysis improperly bespeaks a solitary isolation booth in which the instructions were parsed and the most unlikely meaning given to exclude the only evidence presented.

Indeed, even applying *de novo* review, seven judges of the Ninth Circuit agreed with the five justices of the California Supreme Court and likewise found that there was no reasonable likelihood that Payton's jury understood the instructions so as to preclude consideration of his post-crime evidence in mitigation. P.A. at 31-41. Thus, even though the Ninth Circuit majority did not agree with the California Supreme Court's decision that there was no constitutional error, "it was at least reasonable" for the California Supreme Court "to conclude otherwise." *Price v. Vincent*, 538 U.S. at 643. Consequently, under AEDPA habeas relief is precluded.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

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