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 RESPONDENT

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QUESTION PRESENTED

Did the California Supreme Court render a decision which was contrary to or an unreasonable application of established federal law as determined by the Supreme Court of the United States in deciding that in the trial of Respondent's case, there was no reasonable likelihood that the jury believed that it was precluded from considering the post-crime mitigating evidence that Respondent presented at his penalty trial?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

I. Payton's Trial

In 1981, a California jury convicted Respondent William Payton ("Payton") of first degree murder and rape and two counts of attempted murder. P.A. 140.[1] The jury found true the special circumstance allegation that the murder was committed while engaged in the commission or attempted commission of rape, and this finding made Payton eligible for the death penalty. *Id.*; *Tuilaepa v. California*, 512 U.S. 967, 975 (1994) (describing California's death penalty scheme). The defense presented no evidence at the guilt trial. P.A. 143.

A. The Evidence in Aggravation and Mitigation

At the penalty trial, both sides waived opening statements. J.A. 3, 4, 15.[2] The State presented evidence in aggravation that seven years before the murder, Payton had stabbed a woman. J.A. 5-10. Pursuant to stipulation, the State presented evidence that four years before the murder Payton had been convicted of possessing marijuana and having unlawful consensual intercourse with a minor. J.A. 4-5. The State also presented the testimony of an inmate who claimed that while Payton was in jail awaiting his murder trial, Payton admitted to him that he "had a severe problem with sex and women" and that he would "[s]tab them and rape them." J.A. 12.

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[1] "P.A." refers to the appendix submitted with the State's Petition for Writ of Certiorari.

[2] "J.A." refers to the Joint Appendix filed by the parties.

The defense mitigation case consisted entirely of evidence that in the year and nine months since his arrest for murder, Payton had experienced a religious conversion and engaged in good works in jail, and would lead a useful life if sentenced to life in prison. J.A. 15-73; P.A. 15, 144, 159, 175-76.

Payton presented eight witnesses. J.A. 15-54. A minister testified that Payton's commitment to the Lord was sincere; the minister observed great remorse and regret in Payton for the things that he had done. J.A. 15, 18. A Christian fellowship missions director testified that because of his religious conversion, Payton had changed from self-centered to selfless, that he had established Bible study classes in jail, and that other inmates came to him for counseling. J.A. 19, 22, 23, 26. Four fellow inmates testified that Payton's religious conversion was sincere, that he had a positive and calming influence on other inmates, and that he had even persuaded one inmate not to commit suicide. J.A. 33, 34, 37-44. A deputy sheriff testified that Payton led Bible study sessions in jail, that he appeared to have a leadership role with other inmates, and that his influence on other inmates had been positive. J.A. 45-48. Payton's mother testified that since his arrest Payton had become "totally immersed in the Lord" and was a changed man. J.A. 52, 53.

The defense presented no evidence of Payton's conduct or condition at the time of the murder or any time before. That is, the defense did not present any "pre-crime" mitigating evidence, only "post-crime" mitigating evidence of his religious conversion and positive adjustment to incarceration since his arrest.

B. The Jury Instruction at Issue

The jury received an instruction designed to guide its consideration of the aggravating and mitigating evidence. J.A. 94-95; P.A. 7-9, 52-54, 94-95. The instruction was taken verbatim from a then-existing form instruction, California Jury Instructions, Criminal ("CALJIC") 8.84.1 (4th ed. 1979). J.A. 57-59; P.A. 7-9, 52-54, 94-95. The instruction incorporated the 11-factor test from California's death penalty statute (California Penal Code §190.3) that requires the jury to weigh and balance specific aggravating and mitigating circumstances in deciding whether to impose the death penalty. J.A. 94-96, P.A. 3, 187-90. The instruction stated:

> 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) 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 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 the law was impaired as a result of mental disease or defects 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 not a legal excuse for the crime.

J.A. 94-95; *see also* P.A. 7-9, 52-54, 94-95.

C. Denial of Payton's Requests to Modify the Instruction

Before the court instructed the jury, and before the penalty phase closing arguments, defense counsel asked at an in-chambers conference that the foregoing instruction be modified in two ways. J.A. 55; P.A. 7, 9. First, the defense requested that factor (k) be modified to read: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime, including evidence of the defendant's character, background, history, mental condition and physical condition." J.A. 55. Defense counsel noted that the additional language appeared in the death penalty statute. *Id.*; P.A. 187 ("In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to . . . the defendant's character, background, history, mental condition and physical condition."). Counsel argued that without the modification, a juror could read factor (k) "as saying, well, gee, there are a lot of interesting things about Mr. Payton, but they don't have anything to do with the crime. They have something to do with his potential for rehabilitation or his character or his background, but they don't have anything to do with the crime itself. . . . " J.A. 55.

The prosecutor objected to Payton's request. J.A. 55. The prosecutor argued: "I don't think that's at all what they mean by 'k.' I don't think his background or character has anything to do with 'k' because if it did, they'd say it." J.A. 57. He continued: "I read 'k' as being a circumstance attending a crime. That's the way I read it. Not a factor and background, the defendant's history; or else the Legislature would have said that." J.A. 58. The prosecutor

stated that he thought defense counsel could argue to the jury that it could consider Payton's mitigating evidence under factor (k), "but it's not what 'k' says either in the statute or CALJIC." J.A. 56-57.

The court stated: "I think the way I read the cases – and there isn't much case law – and the way I read 'k,' I think, as I said, it's wide open"; (k) is a "catch-all . . . intended . . . for all these factors . . . that don't fall into the other areas." J.A. 60; *see also id*. (the court further explains: "I think 'k' is the all encompassing one" and under (k) "almost anything can come in on behalf of the defendant").

Although the court agreed with Payton that the jury could consider his mitigating evidence under factor (k), it denied his request to modify and clarify the instruction. J.A. 59-60. The court stated that although it "could see [the defense] position for the edification and clarification of the jury," it was reluctant to "change a CALJIC instruction wherein it's verbatim from the 190.3 [death penalty] statute. . . . " J.A. 58-59.[3]

The court adopted the prosecutor's proposal to allow the parties to argue to the jury whether it could consider

[3] CALJIC instructions are created by a committee of the Los Angeles County Superior Court and "are only recommendations and do not carry the force of law." *McDowell v. Calderon*, 130 F.3d 833, 840 (9th Cir. 1997) (en banc), *overruled on other grounds*, *Weeks v. Angelone*, 528 U.S. 225 (2000). CALJIC itself "emphasizes that '[a] trial judge in considering instructions to the jury shall give no less consideration to those submitted by the attorneys for the respective parties than to those contained in the latest edition of . . . [CALJIC].' " *Id*. "All trial judges, prosecutors, and defense attorneys in California understand both the value of CALJIC recommendations, and their limitations." *Id*. at 840-41.

Payton's mitigating evidence under factor (k). J.A. 59. Defense counsel objected: "The only problem I have with that is that 'k,' at least taken at face value, refers to extenuating the gravity of the crime, even though it's not a legal excuse for the crime. It doesn't sound to me like 'k' incorporates the other factors, even though I'm sure that was the intent of the Legislature." J.A. 59. The prosecutor replied: "I think he's stuck with trying to argue it." *Id*. The court affirmed that it agreed with defense counsel that Payton's mitigating evidence could be considered under factor (k), but it stuck by its ruling. J.A. 59-60.

Defense counsel made "one last observation": "My only problem is I think we all agree that that's the law [i.e., that the jury had to consider Payton's mitigating evidence under factor (k)], but the jury's not going to know." The court responded: "I agree with you. . . . But I'm going to deny it. . . . " J.A. 60-61.

Payton's second request to modify CALJIC 8.84.1 sought to add a factor (l) to inform jurors that "they may take into consideration the defendant's potential for rehabilitation." J.A. 57. The district attorney objected to the request, and the court denied it. *Id*.

D. The Prosecutor's Closing Argument

In closing argument, the prosecutor repeatedly argued to the jury that it legally could not consider any of the mitigating evidence presented by Payton. The prosecutor recited factors (a) through (k) of CALJIC 8.84.1 and then informed the jury "which ones seem to be applicable and which ones do not." J.A. 64-66. He argued that factors (a) through (c) were applicable and were aggravating factors, and that (d) through (h) and (j) were inapplicable. With

regard to factor (i) (defendant's age, 26 at the time of the crime), he stated that "[s]ome of you might consider that not to be a factor. Some of you might consider that young, to be somewhat mitigating." J.A. 67, 68.

Turning to factor (k), the prosecutor stated:

> I want to stop and talk to you about "k" for just a second because – and go over the wording.
>
> "K" says any other circumstance which extenuate or lessens the gravity of the crime. What does that mean? *That to me means* some fact – okay? – *some factor at the time of the offense* that somehow operates to reduce the gravity for what the defendant did.
>
> *It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.*

J.A. 68 (emphasis added).

Defense counsel interrupted the prosecutor's argument, and asked to approach the bench. Outside the presence of the jury, the following colloquy occurred:

> Mr. Merwin [defense counsel]: I don't know if the Court heard that part of the argument, but I think that's completely contrary to what we all agreed in chambers on the record "k" was designed to apply to. And I think this justifies a mistrial and [I] move for a mistrial right now on prosecutorial misconduct.
>
> * * *
>
> The Court: Well, as I understand the comments of the prosecutor is that they feel that the

> religious aspect of this as far as being a mitigating factor does not apply because it took place after the crime. Is that your position, Mr. Jacobs?
>
> Mr. Jacobs [the prosecutor]: Yeah, it doesn't read into "k". . . . If he wants to argue it does, that's his problem. But it doesn't.

J.A. 68-69.

The court did not declare a mistrial, stating: "I think you can argue it either way." J.A. 69. Defense counsel then renewed his request to modify the instruction to add language from the death penalty statute. *Id*. The court ruled:

> Well, I'd decline to do that at this time. I think you gentleman are entitled to argue that under "k," that you can make that argument either way. So again, I'm just going to indicate to the jury that that – what you gentleman say is not evidence, and I'll admonish them in any respect.

Id. The court then admonished the jury:

> 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've said, this is argument. And it's to be placed in its proper perspective. So with that in mind, you may continue, Mr. Jacobs.

J.A. 69, 70.

Immediately after the court's admonition, the prosecutor launched back into his argument that the jury could not consider Payton's mitigating evidence:

> Referring back to "k" which I was talking about, any other circumstance which extenuates

> or lessens the gravity of the crime, the only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody.
>
> *The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed.*
>
> Mr. Merwin will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when – under any other circumstance which extenuates or lessens the gravity of the crime, refers – seems to refer to a fact in operation at the time of the offense.
>
> *What I am getting at, you have not heard during the past few days any legal evidence mitigation* [sic]. What you've heard is just some jailhouse evidence to win your sympathy, and that's all.
>
> *You have not heard any evidence of mitigation in this trial*.

J.A. 70 (emphasis added).

Although the prosecutor repeatedly argued that the jury could not legally consider Payton's evidence suggesting that he would lead a constructive life if he was sentenced to life in prison, he argued that Payton would rape and kill again if he was not sentenced to death.

> Here also is a defendant who in his words to Alex Garcia [a prosecution guilt phase witness] has a "urge to kill" and why should we give a

> defendant to [sic] feed that urge again. Even when he – if in prison, what if Mr. Payton gets that urge to kill, if he sees the back of a prison guard again.
>
> Here's a defendant who views all women as his potential victims, who wants to rape and stab them. Why should we give this defendant another chance of finding another victim.

J.A. 72-73.

The prosecutor returned to his argument that the jury could not consider Payton's mitigating evidence:

> To vote for life without possibility of parole in this case is to say that somewhere there are mitigating factors that outweigh the aggravating and outrageous factors of what the defendant did, and *you've heard no evidence of any mitigating factors.*

J.A. 73 (emphasis added).

He continued:

> *I want to make a few comments about religion, the only evidence put on by the defendant*. I don't really want to spend too much time on it because *I don't think it's really applicable and I don't think it comes under any of the eleven factors*, and I certainly don't mean to demean a religion by any way, in what I say.

J.A. 73 (emphasis added).

Toward the end of his argument, the prosecutor stated:

> 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, her – 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. This is not close.
>
> You haven't heard anything to mitigate what he's done. If you wanted to distribute a thousand points over the factors, 900 would have to go to what he did to Mrs. Montgomery, and I really doubt if Mr. Merwin would dispute that breakdown of the facts.

J.A. 76.

E. The Defense Closing Argument

In his closing argument, defense counsel discussed factors (a) through (j), and "agree[d] that many of the factors . . . are just plain not applicable." J.A. 77. He did not argue that any of the mitigating evidence presented by the defense applied under any of factors (a) through (j).

Defense counsel stated that he disagreed "rather strenuously" with the prosecutor on the applicability of factor (k), J.A. 88, and he tried to convince the jury that it could consider Payton's mitigating evidence under (k). Counsel argued:

> 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.
>
> * * *

> 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 the factors. . . .

J.A. 88-89.

As to the substance of the evidence, defense counsel argued:

> [T]he evidence to me demonstrated that he has found a new productive, forward looking purpose for his life, and he plans to devote his life to that, namely, his prison ministry.
>
> * * *
>
> 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. 92.

F. The Penalty Instructions and Verdict

The jury received the form CALJIC 8.84.1 instruction without the modifications requested by Payton. J.A. 55-61, 94-95. The jury was also instructed that:

> 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.
>
> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, *you shall impose a sentence of death*.

> However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

J.A. 96 (emphasis added). The jury returned a death verdict. P.A. 2, 140.

II. Revisions to the Factor (k) Instruction Shortly After Payton's Trial

In 1983, two years after Payton's trial, the California Supreme Court ruled that

> [i]n order to avoid potential misunderstanding in the future, trial courts – in instructing on the factor embodied in section 190.3, subdivision (k) – should inform the jury that it may consider as a mitigating factor "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" and any other "aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death."

People v. Easley, 34 Cal. 3d 858, 878 n.10, 671 P.2d 813, 196 Cal. Rptr. 309 (1983) (*quoting Lockett v. Ohio*, 438 U.S. 586, 604 (1978)); P.A. 160, 178. The court was concerned that "CALJIC 8.84.1 – while listing a variety of aggravating and mitigating factors – does not explicitly inform the jury that it may consider *any* mitigating factor proffered by the defendant." *Easley*, 34 Cal. 3d at 878 (emphasis in original); *People v. McLain*, 46 Cal. 3d 97, 113-14, 757 P.2d 569, 249 Cal. Rptr. 630 (1988) ("the language of former factor (k) – with its exclusive focus on 'the crime' and not 'the criminal' – might mislead jurors

about the scope of their responsibility under the Constitution and about the evidence they might consider in exercising their responsibility"). The form CALJIC 8.84.1 instruction was changed to reflect the court's ruling. *People v. Davenport*, 41 Cal. 3d 247, 284 n.14, 710 P.2d 861, 221 Cal. Rptr. 794 (1986).

III. The California Supreme Court Opinion Denying Payton's Claim

The California Supreme Court denied the claim at issue here by a five-to-two vote in 1992. P.A. 139-86; *see especially id*. at 159-65. Relying on *Boyde v. California*, 494 U.S. 370 (1990), the majority held that it was not reasonably likely that Payton's jury was misled to believe that it was not permitted to consider Payton's mitigating evidence. P.A. 159, 162.

The state court explained that in *Boyde*, "the United States Supreme Court . . . held that the language of factor (k) satisfies the federal Eighth Amendment." P.A. 160. It noted that *Boyde* had "reasoned that factor (k) does not, as the petitioner in that case argued, 'limit the jury's consideration to "any other circumstance *of the crime* which extenuates the gravity of the crime."' [Citation omitted.] Instead, the factor directs the jury 'to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character.'" P.A. 160-61. The court stated that "*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). . . . However, in evaluating such claims we do not treat comments by attorneys as if they had the same force as the trial court's instructions on the law." P.A. 161.

"*Boyde* also teaches that comments by attorneys 'must be judged in the context in which they are made.' " *Id*.

The court explained that several considerations led it to reject Payton's claim. P.A. 162. The court observed that although "[i]t is true that the prosecutor during closing argument suggested a narrow and incorrect interpretation of factor (k)," "[a]ny impact this argument may have had . . . was immediately blunted by defense counsel's objection, which led the court to remind the jury that lawyers' comments were 'not evidence' but 'argument,' 'to be placed in their proper perspective.' " P.A. 162.

The court emphasized that "[l]ater in his closing argument, the prosecutor implicitly conceded the relevance of defendant's mitigating evidence by devoting substantial attention to it." P.A. 162. The court noted that "[t]he prosecutor also suggested, properly, how the jury might weigh defendant's evidence against the evidence in aggravation." P.A. 162-63. The court concluded that "[o]bviously, this exercise by the prosecutor had a point only if it was contemplated that the jury *would* consider defendant's evidence." P.A. 163 (original emphasis).

Further, according to the court, "[f]or 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." P.A. 163. The court thought "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." ' " *Id*. The court found "[t]he high court's observation . . . 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." *Id*.

Finally, the court emphasized that "[d]efense counsel, in his own closing argument, strongly reinforced the correct view that defendant's religious conversion was proper mitigating evidence." P.A. 164.

IV. Payton's Federal Habeas Action

Payton asserted his instruction claim in a federal petition for writ of habeas corpus filed on May 6, 1996. The district court granted penalty relief on the ground that Payton's penalty trial was rendered fundamentally unfair by the prosecutor's misconduct in incorrectly arguing to the jury that it could not consider Payton's mitigating evidence. P.A. 138. A panel of the Ninth Circuit Court of Appeals reversed the district court. P.A. 98-107. An en banc panel then granted penalty relief on Payton's instruction claim. P.A. 46-86. This Court granted the State's petition for a writ of certiorari, vacated the en banc decision, and remanded the case for further consideration in light of *Woodford v. Garceau*, 538 U.S. 202 (2003), P.A. 45, a case that made Payton's habeas action subject to the provisions of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §§2241 *et seq*. ("AEDPA"). Applying AEDPA, an en banc panel of the Ninth Circuit held that the California Supreme Court unreasonably applied clearly established federal law to the facts of Payton's case in denying Payton's instruction claim. P.A. 1-44.

SUMMARY OF ARGUMENT

Today, there is no question that the Eighth Amendment requires a sentencing jury to consider any evidence a capital defendant proffers as a basis for a sentence less than death. But in 1981, when William Payton's penalty trial was held, the law was much less clear. It was that lack of clarity that caused the problem that occurred in this case. Through a jury instruction that was ambiguous, conflicting interpretations of that instruction argued by the prosecutor and the defense counsel, and the failure of the trial court to resolve the conflict and clearly instruct the jury on the law, Payton's jury likely did not understand its obligation to consider the evidence the defense had presented when making its decision as to whether Payton should live or die.

California enacted a new death penalty statutory scheme in 1977. With minor changes, this scheme was approved by voter initiative in 1978. California Penal Code, §190.3. The statutory scheme provides that a sentence of death is to be imposed if the aggravating circumstances outweigh the mitigating circumstances and a sentence of life in prison without the possibility of parole is to be imposed if the mitigating circumstances outweigh the aggravating circumstances. The scheme also includes factors the jury is to consider in weighing the aggravating circumstances against the mitigating circumstances. All but one of the factors relate to the circumstances of the capital offense, the defendant's capacity or condition at the time of the offense, or the defendant's prior criminal history. The final factor listed in the statute is (k): "Any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime." This statutory list of factors was, for many years, including at

the time of Payton's trial, the instruction given to guide the jury in its penalty determination.

In 1978, this Court decided *Lockett v. Ohio*, 438 U.S. 586, holding that the Eighth Amendment requires a capital jury to consider mitigating evidence presented by the defendant. The evidence that Lockett's jury had been precluded from considering had included evidence of her minor role in the offense, her lack of a criminal record, her age and her history of mental health problems. This Court did not decide another case about the right of a capital defendant to have his mitigating evidence considered until 1982 in *Eddings v. Oklahoma*, 455 U.S. 104, the year after Payton's trial.

In 1979, the California Supreme Court upheld factor (k) against a claim that the provision was over-broad because it allowed the jury unbridled discretion with respect to the penalty decision. *People v. Frierson*, 25 Cal. 3d 132, 178, 599 P.2d 587, 158 Cal. Rptr. 281. The *Frierson* court noted that a capital defendant had similar latitude in the presentation of mitigating evidence, *id.*, but the factor (k) instruction given to penalty juries continued to simply quote verbatim the language of the statute.

It was not until 1983, in *People v. Easley*, 34 Cal. 3d 858, 878, 671 P.2d 813, 196 Cal. Rptr. 309 (1983), that the California Supreme Court recognized that there was "some force" to the argument that the wording of the factor (k) instruction was "potentially misleading." Citing *Lockett*, the *Easley* court instructed trial courts to add to the instruction a specific advisement to the jury to consider "any other aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." 34 Cal. 3d at 878 n.10. The standard penalty

instruction, CALJIC 8.84.1, was changed after *Easley* to incorporate the holding in that case. *People v. Davenport*, 41 Cal. 3d 247, 284 n.14, 710 P.2d 861, 221 Cal. Rptr. 794 (1986); *People v. Brown*, 40 Cal. 3d 512, 541, 726 P.2d 516, 230 Cal. Rptr. 834 (1986).

In 1981, Payton's jury was instructed pursuant to the language of factor (k) prior to the *Easley* adornment. *Lockett* had already been decided and may have adequately conveyed to attorneys and judges the requirement that the jury consider *Lockett*-type evidence, that is, mitigating evidence that existed at the time of, and related to, the offense. But Payton's proffered mitigating evidence was exclusively post-offense evidence, consisting of his post-arrest religious conversion and his ensuing good works in jail. It was not until 1986, in *Skipper v. South Carolina*, 476 U.S. 1, that this Court held that the *Lockett* principle applied to mitigating evidence subsequent to the offense, evidence that would include good conduct in jail. The pre-*Easley* language of factor (k) was sufficiently ambiguous that the prosecutor and the defense attorney in this case had conflicting interpretations: the prosecutor believed post-offense evidence was not relevant to the jury's consideration while defense counsel pleaded for an instruction that clearly told the jury of the requirement to consider the mitigating evidence that had been presented.

The trial court refused to give any instruction other than the standard, pre-*Easley* instruction. More significant, the trial court allowed the attorneys to argue their respective interpretations to the jury and gave no guidance to the jury as to how to resolve the conflict in interpretations. In short, the trial court allowed the jurors to determine for themselves whether the evidence was relevant to the penalty determination.

In *Boyde v. California*, 494 U.S. 370 (1990), this Court held that the pre-*Easley* factor (k) instruction was not likely to have misled the jury into not considering Boyde's proffered mitigating evidence. Boyde's proffered mitigation was evidence of his impoverished childhood and disadvantaged background; and the *Boyde* court saw "no reason to believe that reasonable jurors would resist the view, 'long held by society' . . . that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse.*" *Id.* at 382 (emphasis in original). The *Boyde* court also pointed out that there was no "objectionable prosecutorial argument"; the prosecutor "never suggested that the background and character evidence could not be considered." *Id.* at 385. And *Boyde* set forth factors to consider in determining whether a penalty jury was misled about consideration of the mitigating evidence, factors which include the nature of the evidence proffered, arguments of counsel and other instructions given by the court.

The California Supreme Court, relying on *Boyde*, rejected Payton's contention that his jury had been misled about consideration of his proffered mitigating evidence. In doing so, however, the California court simply followed the holding in *Boyde* without consideration of the differences between the two cases and without consideration of the very factors that this Court held in *Boyde* are to be considered. The state court not only was wrong in concluding that Payton's jury understood the requirement to consider the mitigating evidence, its application of the settled law at the time of its decision, law that included *Skipper* as well as *Boyde*, was unreasonable.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT WRONGLY DECIDED PAYTON'S CLAIM

As shown below, the California Supreme Court wrongly decided Payton's jury instruction claim. As shown in section II, *infra*, the court's decision was an unreasonable application of clearly established federal law that entitles Payton to relief under AEDPA.

A. Payton's Eighth Amendment Right to Have His Jury Consider and Give Effect to His Mitigating Evidence in Determining Penalty

At the time of the California Supreme Court's decision, it was settled law that in capital cases, the sentencer could not refuse to consider or be precluded from considering any relevant mitigating evidence offered by the defendant. *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987); *Penry v. Lynaugh*, 492 U.S. 302, 307, 320, 328 (1989) (reversing death sentence because jury was not instructed that it could consider and give effect to defendant's mitigating evidence), *overruled on other grounds, Atkins v. Virginia,* 536 U.S. 304 (2002); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality states three years before Payton's trial "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (original emphasis) (footnotes omitted).

It was also settled that "relevant mitigating evidence" included evidence of a defendant's good behavior in jail after his arrest on the capital charge, and evidence of his

likely future productive life in prison. *Skipper v. South Carolina*, 476 U.S. 1, 4, 7, 8 (1986); *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) ("virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances").

B. The Context of the Proceedings at Payton's Trial

When a capital defendant contends that an ambiguous instruction misled the jury to believe it could not consider his mitigating evidence, the court must examine the "context of the proceedings" to resolve the claim, including the nature of the evidence presented, the arguments of counsel to the jury, and the other instructions given. *Boyde*, 494 U.S. at 383-86. The question is whether, viewing the entire context, "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id*. at 379. "Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition." *Id*.

1. The Type of Evidence Presented

The most common type of mitigating evidence presented by a capital defendant is evidence regarding background, usually an impoverished childhood, often an abusive upbringing, frequently pre-existing mental health conditions. As this Court recognized in *Boyde*, there is "no reason to believe that reasonable jurors would resist the

view, 'long held by society' . . . that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse*." 494 U.S. at 382 (original emphasis). Thus, an instruction advising the jury to consider any "evidence which extenuates the gravity of the crime," the language of factor (k) as given to Payton's (and Boyde's) jurors, conveys to the jury the relevancy of background evidence.

But Payton's mitigation case consisted entirely of evidence of his behavior after the capital crime, and he argued that his evidence made him worth saving despite the gravity of the crime. Payton's evidence does not fit within the language of factor (k) because it does not extenuate the gravity of the crime or make him less culpable than defendants who do not share the traits and history he presented to his jury. As this Court explained in *Skipper*, evidence that a capital defendant has been a well-behaved and well-adjusted prisoner, and the favorable inferences therefrom regarding his character and probable future conduct, although mitigating, "would not relate specifically to [the defendant's] culpability for the crime he committed." 476 U.S. at 4. If the *Skipper* Court viewed such evidence in this fashion, it is reasonably likely that Payton's jury had the same view, and agreed with the prosecutor that it could not consider Payton's evidence because it was not a "circumstance which extenuates the gravity of the crime."

2. The Prosecutor's Incorrect Argument

The prosecutor repeatedly argued to the jury that legally it could not consider any of Payton's mitigating evidence. Thus, the prosecutor argued:

> "K" says any other circumstance which extenuate or lessens the gravity of the crime. What does that mean? *That to me means* some fact – okay? – *some factor at the time of the offense* that somehow operates to reduce the gravity for what the defendant did.
>
> *It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.*

J.A. 68 (emphasis added); J.A. 70-76 (similar statements by the prosecutor). The State admits that the prosecutor's argument was incorrect. Brief for Petitioner ("Pet. Br.") at 6.[4]

3. The Trial Court's Failure to Resolve the Conflict in Interpretation of the Instruction

The trial court's inadequate instructions and responses to the prosecutor's incorrect argument resulted in the jury having to decide the legal question of whether it could even consider Payton's mitigating evidence.

Before closing arguments, the court rejected Payton's requests to modify the instructions to inform the jury that it could consider evidence of Payton's rehabilitation, character, background, history, mental condition and physical condition. J.A. 55-56.

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[4] At the oral argument before this Court in *Boyde*, the California Attorney General conceded that at Payton's trial, "the prosecutor in his closing summation 'misled the jurors' by arguing that the jury could not consider evidence, presented at the penalty phase of this capital case, that defendant had experienced a religious awakening." P.A. 174-75, 179-80.

During the prosecutor's closing argument, defense counsel objected to the inaccurate interpretation of law proffered by the prosecutor. Although the trial court had previously stated, again outside the presence of the jury, that it agreed with Payton that his evidence applied under factor (k), it overruled Payton's objection, denied his motion for a mistrial, and adopted the prosecutor's suggestion that counsel could argue to the jury their opposing interpretations of the legal scope of factor (k). The court then admonished the jury that the comments of counsel are not evidence but argument, and "it's to be placed in its proper perspective." However, the court never provided that perspective, but instead left the jury to decide for itself which of the competing views of the law was correct and whether it was allowed to consider Payton's evidence. Further, immediately after the admonition the prosecutor launched right back into his argument that the jury could not consider Payton's mitigating evidence, and he repeated that argument in the rest of his closing. That could only suggest to the jury that the defense objection had failed and the prosecutor's argument was sanctioned by the court.

Over a century ago, this Court explained that "in the courts of the United States it is the duty of juries in criminal cases to take the law from the court, and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law. . . . " *Sparf v. United States*, 156 U.S. 51, 102 (1895). These fundamental roles were subverted here. Because the trial court abdicated its duties to instruct the jury on the law and supervise the arguments of counsel accordingly, the jury was left to decide not only whether Payton should live or die (a monumental task in any

capital penalty trial), but also the preliminary legal question whether it could consider Payton's mitigating evidence at all. Only if every juror answered the preliminary question in the affirmative, i.e., that he or she was permitted to consider Payton's evidence as a matter of law, could Payton's Eighth Amendment right to have the jury give effect to his mitigating evidence possibly be vindicated. There is no assurance how the jurors answered that preliminary question.

It is hard to imagine a court having confidence in any criminal judgment resulting from a proceeding in which the jury was required to play the role of judge and determine which of the parties' competing views of relevance was correct as a matter of law. *Kelly v. South Carolina*, 534 U.S. 246, 256 (2002) ("A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part."); *Carter v. Kentucky*, 450 U.S. 288, 302 (1981) ("Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law.") A death judgment resulting from such a perverted process is too unreliable to stand. *Penry*, 492 U.S. at 328 ("in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence . . . by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its decision").

4. Other Instructions Compounded the Harm

The jury received an instruction to 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." J.A. 94. This instruction was immediately followed by the list of 11 penalty factors, including factor (k). *Id*.

The jury was further instructed that "[a]fter having heard all of the evidence and after having heard and considered the argument of counsel, you shall consider . . . the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." J.A. 96. Thus, the jury was instructed to consider the prosecutor's erroneous argument that Payton's entire penalty presentation did not qualify as mitigating evidence. The instructions compounded the harm of the prosecutor's repeated, incorrect arguments and made it more likely that the jury disregarded Payton's evidence.

C. The Reasonable Likelihood Payton's Mitigation Was Not Considered

When examined in the context of the actual proceedings in Payton's case, as required by *Boyde*, it is beyond doubt that there is a reasonable likelihood that the jury did not understand the requirement to consider the mitigating evidence. The instructions did not clearly advise the jurors of that requirement, the prosecutor and defense counsel argued conflicting interpretations of the instructions regarding consideration of mitigation, and the trial court did nothing to resolve that conflict for the jury. Given that the type of mitigation that was presented was

exclusively post-crime evidence and, as *Skipper* recognizes, such evidence does not reduce culpability for the offense but rather offers the jury a non-offense reason to spare the defendant's life, the conclusion becomes inescapable that there can be no reasonable assurance that Payton's jury understood the requirement to consider his mitigating evidence.

II. THE CALIFORNIA SUPREME COURT'S DECISION INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

Under AEDPA, a habeas petition challenging a state court judgment "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . . " 28 U.S.C. §2254(d)(1). "Clearly established federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

Clearly established federal law at the time of the state court decision here held that in capital cases, the sentencer may not refuse to consider, or be precluded from considering or giving effect to, any relevant mitigating evidence offered by the defendant, including evidence of a defendant's good behavior in jail after his arrest on the capital charge and of his likely future productive life in prison. *Penry*, 492 U.S. at 321-22, 328; *Hitchcock*, 481 U.S. at 394; *Skipper*, 476 U.S. at 4, 7, 8. Clearly established

federal law also required that when a capital defendant asserts that an ambiguous instruction misled the jury to believe it could not consider his mitigating evidence, the court must examine the "context of the proceedings," including the nature of the evidence presented, the arguments of counsel to the jury, and the other instructions given, to resolve the claim. *Boyde*, 494 U.S. at 383-86.

The state court relied on the outcome in *Boyde* in denying Payton's claim. The court's decision was not only wrong, as shown above, but an unreasonable application of clearly established federal law under AEDPA. The court's conclusion that *Boyde* required, or even supported, its holding is unreasonable because *Boyde* did not address the instruction at issue here in the context of post-crime evidence. Indeed, *Boyde* explicitly distinguished the type of evidence at issue there – pre-crime evidence of defendant's life history – from evidence that "pertain[s] to prison behavior after the crime for which [the defendant] was sentenced to death, as was the case in *Skipper*," 494 U.S. at 382 n.5, and here. *Boyde* also did not address other salient facts present here: repeated arguments by a prosecutor that the jury could not consider any of the defendant's mitigating evidence, and a trial court's failure not only to correct such arguments, but to force the jury to decide whether it could consider the evidence as a matter of law.

Boyde is an instrumental case, designed to effectuate and protect "[t]he Eighth Amendment require[ment] that the jury be able to consider and give effect to all relevant mitigating evidence offered by" the defendant. 494 U.S. at 377-78, 383. By applying *Boyde* as it did, the state court frustrated *Boyde*'s larger purpose, and the clear mandate of *Skipper*, *Penry, Eddings* and *Lockett*. As the Ninth Circuit properly held, and Payton shows below, the state

court decision unreasonably applied clearly established Supreme Court precedent to the facts of this case. P.A. 25.

A. "Unreasonable Application" Standards

When evaluating whether a state court's application of clearly established federal law is reasonable, AEDPA demands a context-specific examination of the record that was before the state court. *Holland v. Jackson*, 124 S. Ct. 2736, 2337-38 (2004) (per curiam) ("we have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it"); *Miller-El v. Cockrell,* 537 U.S. 322, 348 (2003) (reasonableness of state court's factual finding assessed "in light of the record before the court").

This Court's examination of the record in *Wiggins v. Smith*, 539 U.S. 510 (2003), is instructive. After concluding that the Maryland Court of Appeals had correctly identified *Strickland v. Washington*, 466 U.S. 668 (1984), as the controlling Supreme Court precedent, the Court turned to the factual record that was before the state court and conducted its own analysis of the merits. 539 U.S. at 523. The Court concluded that it was unreasonable for the Maryland Court of Appeals to have "assumed that because counsel had *some* information with respect to petitioner's background . . . they were in a position to make a tactical choice not to present a mitigation defense." *Id.* at 527 (original emphasis) (citations omitted). In reaching this conclusion, the Court emphasized that the Court of Appeals "did not conduct an assessment" of the decision by counsel to stop investigation as evidenced in the record, but merely assumed that the investigation was adequate.

Id. Additionally, the Court of Appeals was objectively unreasonable because its decision relied on an erroneous factual finding. *Id.* at 529.

As discussed further below, similar to the Maryland Court of Appeals in *Wiggins*, the California Supreme Court here made assumptions about the effect of the prosecutor's erroneous legal argument without conducting an appropriate assessment of the actual record before it. The court's failure to consider the significance of the type of evidence presented by Payton, and its difference from that presented in *Boyde*, was objectively unreasonable. The court's failure to identify that the trial court permitted the parties to argue the law is a factual omission tantamount to error and objectively unreasonable. The court's failures to assess the impact of both the prosecutor's repeated misstatements of law and the court's rulings forcing the jury to decide whether it could consider Payton's evidence as a matter of law were also objectively unreasonable. The court's decision is particularly unreasonable because of its failure to consider the totality of the pertinent facts in the record.

B. The State Court's Reliance on *Boyde* as Dispositive of Payton's Challenge is an Unreasonable Application of *Boyde, Skipper, Penry, Eddings* and *Lockett*

The California Supreme Court's rote application of *Boyde* to resolve Payton's challenge was objectively unreasonable because it failed to consider significant differences between the two cases.

1. The Nature of the Mitigating Evidence

The state court opinion accurately describes Payton's mitigating evidence but does not recognize the difference between the nature of Payton's mitigation and the nature of Boyde's mitigation. P.A. 159-65.[5]

Boyde presented pre-crime evidence of his impoverished childhood and disadvantaged background. In rejecting Boyde's claim that the instruction did not advise the jury to consider such non-crime related evidence, this Court saw "no reason to believe that reasonable jurors would resist the view, 'long held by society' . . . that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse*." 494 U.S. at 382 (original emphasis).

The nature of the evidence presented by Payton is critically different from that presented by Boyde. Payton's evidence of his post-arrest religious conversion and good behavior in jail did not even exist at the time of the crime and, as the Ninth Circuit noted, cannot "extenuate the gravity of the crime" under a natural reading of factor (k). P.A. 16-17. Payton's evidence, unlike Boyde's, did not explain why or how he had become the person he was at the time of the capital crime. Payton "relied on evidence of his behavior *after* commission of the crime, arguing in essence that *despite* the gravity of the crime he committed, he was nevertheless 'worth saving.'" P.A. 181 (original

[5] As Justice Kennard noted in her dissent in the state court opinion (which was joined by Justice Mosk), one of the important factors cited by *Boyde* in support of its holding was the type of mitigating evidence presented by the defendant. P.A. 181; *Boyde*, 494 U.S. at 383-85.

emphasis). Payton's evidence does "not relate specifically to [his] culpability for the crime he committed." *Skipper*, 476 U.S. at 4.

The state court's reliance on *Boyde* coupled with its failure to consider the difference in the nature of the evidence presented here, and the resulting effect on the jury, is particularly unreasonable given that *Boyde* explicitly distinguished Boyde's character and background evidence from evidence that "pertain[s] to prison behavior after the crime for which [the defendant] was sentenced to death, as was the case in *Skipper*." 494 U.S. at 382 n.5. The state court ignored the distinction noted by this Court and instead uncritically and unreasonably applied *Boyde*'s holding to a fundamentally different factual scenario. *Wiggins*, 539 U.S. at 520 ("a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced' ").

Ignoring the historical context of this case, the State asserts that "[t]he consideration of post-crime character evidence in determining the appropriate sentence is well rooted in contemporary standards regarding the infliction of punishment," and that the Ninth Circuit "improperly assumed" that "society would naturally consider pre-crime evidence of character and background but not post-crime character evidence such as Payton's rehabilitation." Pet. Br. at 18, 27. However, *Skipper* – the first Supreme Court case to hold that the Eighth Amendment requires juries to consider a capital defendant's post-arrest good behavior in jail as mitigating evidence – was not decided until over four years after Payton's trial. And the *Skipper* Court was not unanimous in holding that post-crime evidence was even relevant to penalty, let alone "well rooted in contemporary

standards." 476 U.S. 1, 4.[6] *Skipper* explained that evidence that a capital defendant has been a well-behaved and well-adjusted prisoner, and the favorable inferences therefrom regarding his character and probable future conduct, does "not relate specifically to [the defendant's] culpability for the crime he committed." 476 U.S. at 4. If the *Skipper* Court viewed such evidence in this fashion, it is unreasonable to conclude that Payton's jury had any other view, especially in light of the prosecutor's argument that it could not consider Payton's evidence because it was not a "circumstance which extenuates the gravity of the crime."

2. Counsel's Conflicting Arguments

In reaching its holding, *Boyde* emphasized its agreement "with the Supreme Court of California, which was without dissent on this point, that '[a]lthough the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde's conduct, he never suggested that the background and character evidence could not be considered.'" 494 U.S. at 385. The state court unreasonably applied federal law by failing to properly analyze the effect of the repeated arguments of Payton's prosecutor that the jury could not consider Payton's mitigating evidence.

The state court recognized that the prosecutor's argument was incorrect, P.A. 159-60, but concluded that any impact the argument may have had was "immediately

[6] Although the Court was unanimous in holding that the evidence in *Skipper* was admissible, three justices expressly took issue with post-crime evidence's relevancy in determining penalty, finding it admissible in *Skipper* only to rebut the prosecutor's evidence and argument. *Skipper*, 476 U.S. at 9-15 (Powell, J., concurring).

blunted by defense counsel's objection" and the court's admonition that statements of counsel are not evidence but argument and are to be placed in their proper perspective. P.A. 162. The first and only time the defense objected to the prosecutor's argument was after the prosecutor's first misstatement of law, and then only outside the presence of the jury. J.A. 68-70. The court overruled the objection (also outside the presence of the jury) and never corrected or condemned the prosecutor's incorrect argument before the jury. Instead, the court told counsel that they could argue their competing views of the law to the jury, and thereby authorized the prosecutor to continue his misstatements. Immediately after the admonition, the prosecutor launched right back into his argument that the jury could not consider Payton's evidence, and he repeated that argument throughout the rest of his closing. J.A. 70. The state court improperly evaluated the impact of the prosecutor's closing argument on the jury on the basis of only one of his comments, and failed to consider the cumulative impact of all of his misstatements of law. P.A. 17; *see Williams v. Taylor*, 529 U.S. 362, 416 (2000) (state court's "obvious failure to consider the totality of the omitted mitigating evidence" involved an unreasonable application of precedent in ineffective assistance of counsel case).

In support of its conclusion that the impact of the prosecutor's argument was "blunted" by Payton's sole objection, the state court also quoted *Boyde* for the point that comments of counsel "'are likely viewed as the statements of advocates,' especially when 'billed in advance to the jury as matters of argument, not evidence.'" P.A. 162. *Boyde* explained:

> [A]rguments of counsel 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, see Tr. 3933, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of law. . . . Arguments of counsel which misstate the law are subject to objection and to correction by the court. . . . And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.

494 U.S. at 384 (citations omitted).

The state court failed to apply the full teaching of *Boyde* to the facts of this case. Although "arguments of counsel generally carry less weight with a jury than do instructions from the court," they carry more weight where, as here, the court does not give the jury "definitive and binding statements of law" or correct misleading arguments, but instead allows counsel to present their conflicting legal views to the jury for it to resolve. *Taylor v. Kentucky*, 436 U.S. 478, 488-89 ("arguments of counsel cannot substitute for instructions by the court").

Justice Kennard correctly analyzed the situation in her dissent:

> Despite defense counsel's objection, [the prosecutor's] argument was not corrected by the trial court, which ruled that the prosecutor and defense counsel could present *to the jury* their opposing interpretations of the scope of factor (k).
>
> The trial court's ruling was wrong. The proper scope of factor (k) is a question of *law*, not

> of fact. It is the trial court's duty to explain the law to the jury, not to place upon the jury the impossible burden of deciding which of two inconsistent views of the law is correct.

P.A. 182 (original emphasis); *see also* P.A. 21-23.

The prosecutor's argument here is analogous to telling the jury in a robbery case that the use of force or fear is not an element of the crime and that the jury can find the defendant guilty without considering that element. It would not protect the defendant's Sixth Amendment right to a jury finding on all elements to simply allow defense counsel to argue force or fear was required. Rather, when defense counsel would object, the court would correct the misstatement and admonish the jury to follow the instructions given by the court. What would be corrected as a matter of course in a run-of-the-mill criminal trial went uncorrected – indeed, was court-sanctioned – at Payton's death penalty trial.

The state court's opinion does not assess the impact of this critical aspect of the context of Payton's proceeding. It is improper to allow the jury to decide matters of law, and to decide them based on conflicting arguments of counsel. The court's admonition that comments of counsel are argument, not evidence, did nothing to help the jury decide whether the prosecutor was correct or defense counsel was. *Griffin v. United States*, 502 U.S. 46, 59 (1991) ("Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law. . . . When . . . jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error."). The prosecutor's misleading argument was never "blunted," and the

state court's conclusion to the contrary is an unreasonable application of *Boyde*. P.A. 20; *see Wiggins*, 539 U.S. at 527-28 (finding state court objectively unreasonable in ineffective assistance of counsel case where court assumed counsel's investigation was adequate but did not conduct an assessment of whether the decision to cease all investigation demonstrated reasonable professional judgment based on the record before the court).

The state court also emphasized that "[l]ater in his closing argument, the prosecutor implicitly conceded the relevance of defendant's mitigating evidence by devoting substantial attention to it." P.A. 162. The prosecutor made no such concession. At one point he did discuss how to weigh Payton's evidence, but only after he stated, again, that the evidence did not qualify for consideration under factor (k). At most, the prosecutor can be viewed as arguing a fallback position, contending that if the jury rejected his primary and repeated contention that it could not consider Payton's evidence, it should then – and only then – weigh the evidence and find it of little value. However, the prosecutor never acknowledged to the jury that it legally could consider Payton's evidence.

According to the state court, "[f]or 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." P.A. 163. The court thought it unlikely, "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."'" P.A. 163 (*quoting Boyde*, 494 U.S. at 383).

However powerful the charade metaphor may be in *Boyde*, it lacks force here. The fact that the jurors sat through Payton's penalty presentation does not mean that they must have considered his evidence in reaching their sentencing decision. Payton's jury was presented with competing legal opinions of whether it could consider Payton's evidence, and was left by the court to decide for itself whether it could consider the evidence. Thus, in contrast to *Boyde*, Payton's jury had to answer a preliminary legal question before it weighed the aggravating and mitigating evidence to decide whether Payton should live or die: did defendant's penalty evidence even qualify as mitigating evidence that it must consider under the ambiguously worded factor (k)? Only if each and every juror answered that question "yes" were Payton's Eighth Amendment rights vindicated. There is no assurance how the jurors answered that predicate legal question, a question they should never have been allowed to consider.

Again echoing *Boyde*, the state court highlighted that "[d]efense counsel, in his own closing argument, strongly reinforced the correct view that defendant's religious conversion was proper mitigating evidence." P.A. 164. Conflicting arguments without dispositive instructions hardly ensure that the jury either knew or followed the correct law. In *Boyde,* defense counsel's argument regarding consideration of the mitigating evidence was not in conflict with the prosecutor's argument. Given the conflict in arguments in this case, and the lack of conflict in arguments in *Boyde,* it was unreasonable of the California Supreme Court to hold that *Boyde* resolved the challenge in Payton's case.

Moreover, Payton's counsel was left to argue that factor (k) included his mitigating evidence despite being

"awkwardly worded." In light of the prosecutor's repeated and explicit arguments to the contrary, the court's failure to correct the prosecutor's misstatements or clarify the scope of factor (k), and the fact that the text of factor (k) more closely supported the prosecutor's view than Payton's, a reasonable jury would not have been persuaded by defense counsel's argument. *See Taylor*, 436 U.S. at 488-89 ("arguments of counsel cannot substitute for instructions by the court").[7]

[7] The California Supreme Court has often noted the absence of misleading prosecutorial argument in denying claims that former factor (k) led the jury to disregard mitigating evidence. *See, e.g.*, *People v. Wright*, 52 Cal. 3d 367, 441, 802 P.2d 221, 276 Cal. Rptr. 731 (1991) (" 'the jury was presented with "sympathy" evidence in the penalty phase . . . and the prosecutor said nothing to suggest the jury should not consider such evidence' "); *People v. Coleman*, 48 Cal. 3d 112, 156, 768 P.2d 32, 255 Cal. Rptr. 813 (1989) ("Here, the prosecutor made clear at the outset that 'the jury must consider not only the crime committed, the circumstances of the crime, but the character and background of the defendant. . . . [T]hough the prosecutor argued vigorously against the weight of that evidence as mitigation, he at no time intimated that the evidence should not be considered."); *People v. Hernandez*, 47 Cal. 3d 315, 366, 763 P.2d 1289, 253 Cal. Rptr. 199 (1989) ("while the prosecutor contested whether [defendant's mitigating] evidence merited the lesser penalty of life without possibility of parole, he never contested the jury's right or duty to consider it"); *People v. Allen*, 42 Cal. 3d 1222, 1276, 729 P.2d 115, 232 Cal. Rptr. 849 (1987) ("[s]ignificantly, the prosecutor said nothing to suggest the jury should not consider such [mitigating] evidence"). Conversely, in granting claims that former factor (k) misled the jury, the state court has emphasized the presence of incorrect prosecutorial argument. *See, e.g., People v. Davenport*, 41 Cal. 3d 247, 282, 284, 710 P.2d 861, 221 Cal. Rptr. 794 (1986) ("The district attorney argued that evidence of appellant's background could be considered as a circumstance mitigating penalty only if it bore some relationship to the crime of which he was convicted.").

3. The Instructions

The state court emphasized that, as in *Boyde*, the jury was instructed to consider "all of the evidence which has been received during any part of the trial" in determining penalty, and therefore it was unlikely the jury disregarded Payton's evidence. P.A. 163-64. However, the court omitted the very next words of the instruction, which stated that the jury could consider such evidence "except as you may be hereafter instructed." J.A. 94. This instruction was immediately followed by the list of the 11 penalty factors, including factor (k). *Id*. The jury was further instructed that, "[a]fter having heard all of the evidence and after having heard and considered the argument of counsel, you shall consider . . . the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." J.A. 96. In the context of this case, these instructions make it more likely Payton's jury was misled, not less.

The question here was not one of argument versus evidence, but one of argument versus law. That is, whereas in a typical trial arguments of counsel try to persuade the jurors how they should view or weigh the evidence under proper legal instructions, here the arguments of counsel tried to persuade the jury which of the parties' views of the law to apply. Payton's jury was never told clearly what the law was, but rather was left to make that conclusion on its own based on nothing more than argument from counsel. Telling Payton's jury to consider "all of the evidence" was irrelevant to resolving the key question before it – deciding whether the prosecutor or defense counsel was correct in stating the law. The jury had to resolve that legal question before it could decide what "all of the evidence" even was. If the jury concluded

that the prosecutor was correct, then "all of the evidence" included none of Payton's mitigating evidence. Thus, whereas in *Boyde* other instructions made it less likely the jury was misled, here the instructions focused the jury's attention on, and compounded the harm of, the prosecutor's repeated, incorrect arguments, and made it more likely that the jury disregarded Payton's evidence. This application of *Boyde* was objectively unreasonable.[8]

[8] Citing the Ninth Circuit dissent, the State asserts that the state court decision cannot be objectively unreasonable because seven federal judges and five state justices rejected Payton's claim, while "only" six federal judges accepted it. Pet. Br. at 15 & n.7, 41. This Court rejected such a rote "counting" theory of AEDPA in *Williams v. Taylor*, 529 U.S. at 409-10. *Williams* rejected a Fourth Circuit rule that a state decision could be deemed "unreasonable" only if the state court "applied federal law 'in a manner that reasonable jurists would all agree is unreasonable.'" *Id*. at 409. The Court also criticized a Fifth Circuit opinion which held that a "state court's application of federal law was not unreasonable because the Fifth Circuit panel split 2-1 on the underlying mixed constitutional question." *Id*. at 409-10.

Williams held that a state court's denial of a capital habeas petitioner's ineffective assistance of counsel claim was an unreasonable application of federal law even though all seven of the state justices and three of the four federal judges who previously considered the claim had rejected it. 529 U.S. at 370-74, 390-400; *Williams v. Warden*, 487 S.E.2d 194 (Va. 1997); *Williams v. Taylor*, 163 F.3d 860, 862 (4th Cir. 1998). Similarly, in *Wiggins*, the Court granted an ineffective assistance claim under §2254(d)'s "unreasonable application" prong where 10 of the 11 judges who had previously considered the claim denied it. 539 U.S. 510; *Wiggins v. State*, 724 A.2d 1 (Md. 1999); *Wiggins v. Corcoran*, 164 F. Supp. 2d 538 (D. Md. 2001); *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002).

III. THE ERROR WAS NOT HARMLESS

The Ninth Circuit correctly held that the constitutional error "was not harmless because it had a 'substantial and injurious effect or influence' on the jury's verdict, *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), and [the court was] left with 'grave doubt' as to the harmlessness of the error, *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)." P.A. 25. The State does not challenge this holding.

As shown above, although "[t]here is no question that this was a brutal crime," there is a reasonable likelihood that the jury concluded that it could not consider the only mitigating evidence offered by Payton. P.A. 28, 29. If the jury believed it could not consider Payton's mitigating evidence, and it gave any weight to the prosecution's evidence in aggravation (which included the circumstances of the capital crime), it was required to vote for death. J.A. 96 (jury was instructed that "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death"). An error that results in the jury not considering a capital defendant's entire case in mitigation cannot be harmless. *Skipper*, 476 U.S. at 8 ("it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error."); *Coleman v. Calderon*, 210 F.3d 1047, 1051 (9th Cir. 2000) (erroneous penalty phase instruction not harmless where "[t]he instruction was not only unconstitutionally misleading, it undermined the very core of [the capital defendant's] plea for life").

The harm was magnified by the prosecutor's argument to the jury that Payton would rape and kill again if he was not sentenced to death, but that the jury could not legally consider Payton's evidence suggesting that he would lead a constructive life if he was sentenced to life in prison. *Skipper*, 476 U.S. at 8 (exclusion of evidence that capital defendant was a good prisoner was not harmless where "[t]he prosecutor himself, in closing argument, made much of the dangers [defendant] would pose if sentenced to prison, and went so far as to assert that [defendant] could be expected to rape other inmates"); *Coleman*, 210 F.3d at 1051 ("[t]he prosecutor's closing argument exacerbated the impact of the misleading instruction by emphasizing the threat [the capital defendant] posed to the general public"); *Jones v. Dugger*, 867 F.2d 1277, 1280 (11th Cir. 1989) (exclusion of testimony of capital defendant's sister that defendant was "'a very nice person'" and "model prisoner" not harmless).

Further, "[i]n reviewing death sentences, [this] Court has demanded even greater certainty that the jury's conclusions rested on proper grounds." *Mills v. Maryland*, 486 U.S. 367, 376 (1988). That certainty is lacking here, and Payton is entitled to a penalty retrial to avoid the "'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Penry*, 492 U.S. at 328. "'When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.'" *Id*.

CONCLUSION

For all of the above reasons, this Court should affirm the judgment of the Ninth Circuit.

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Respectfully submitted,

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