SUPREME COURT OF THE UNITED STATES

No. 03–1039

JILL L. BROWN, WARDEN, PETITIONER *v.*
WILLIAM CHARLES PAYTON

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

[March 22, 2005]

JUSTICE BREYER, concurring.

In my view, this is a case in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference. See 28 U. S. C. §2254(d)(1). Were I a California state judge, I would likely hold that Payton's penalty-phase proceedings violated the Eighth Amendment. In a death case, the Constitution requires sentencing juries to consider all mitigating evidence. See, *e.g., Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989). And here, there might well have been a "reasonable likelihood" that Payton's jury interpreted factor (k), 1 Cal. Jury Instr., Crim., No. 8.84.1(k) (4th rev. ed. 1979), "in a way that prevent[ed]" it from considering "constitutionally relevant" mitigating evidence—namely, evidence of his postcrime religious conversion. *Boyde* v. *California*, 494 U. S. 370, 380 (1990).

Unlike *Boyde,* the prosecutor here told the jury repeatedly—and incorrectly—that factor (k) did not permit it to take account of Payton's postcrime religious conversion. See *post*, at 6–8, 11–12 (SOUTER, J., dissenting). Moreover, the trial judge—also incorrectly—did nothing to correct the record, likely leaving the jury with the impression that it could not do that which the Constitution says it *must*. See *ante*, at 12 (majority opinion); *post*, at 12. Finally, factor (k) is ambiguous as to whether it encom-

passed Payton's mitigation case. Factor (k)'s text focuses on evidence that reduces a defendant's moral culpability for committing the offense. And evidence of postcrime conversion is less obviously related to moral culpability than is evidence of precrime background and character. See *Boyde, supra*, at 382, n. 5 (suggesting a distinction between precrime and postcrime evidence). For all these reasons, one could conclude that the jury here might have thought factor (k) barred its consideration of mitigating evidence, even if the jury in *Boyde* would not there have reached a similar conclusion.

Nonetheless, in circumstances like the present, a federal judge must leave in place a state-court decision unless the federal judge believes that it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." §2254(d)(1). For the reasons that the Court discusses, I cannot say that the California Supreme Court decision fails this deferential test. I therefore join the Court's opinion.