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 KENNEDY delivered the opinion of the Court.

The United States Court of Appeals for the Ninth Circuit, convening en banc, granted habeas relief to respondent William Payton. It held that the jury instructions in the penalty phase of his trial for capital murder did not permit consideration of all the mitigation evidence Payton presented. The error, the court determined, was that the general mitigation instruction did not make it clear to the jury that it could consider evidence concerning Payton's postcrime religious conversion and the prosecutor was allowed to urge this erroneous interpretation. We granted the petition for certiorari, 541 U. S. 1062 (2004), to decide whether the Ninth Circuit's decision was contrary to the limits on federal habeas review imposed by 28 U. S. C. §2254(d). We now reverse.

I

In 1980, while spending the night at a boarding house, Payton raped another boarder, Pamela Montgomery, and then used a butcher knife to stab her to death. Payton proceeded to enter the bedroom of the house's patron, Patricia Pensinger and to stab her as she slept aside her

10-year-old son, Blaine. When Blaine resisted, Payton started to stab him as well. Payton's knife blade bent, and he went to the kitchen to retrieve another. Upon the intervention of other boarders, Payton dropped the second knife and fled.

Payton was arrested and tried for the first-degree murder and rape of Pamela Montgomery and for the attempted murders of Patricia and Blaine Pensinger. Payton presented no evidence in the guilt phase of the trial and was convicted on all counts. The trial proceeded to the penalty phase, where the prosecutor introduced evidence of a prior incident when Payton stabbed a girlfriend; a prior conviction for rape; a prior drug-related felony conviction; and evidence of jailhouse conversations in which Payton admitted he had an "urge to kill" and a "severe problem with sex and women" that caused him to view all women as potential victims to "stab . . . and rape." *People* v. *Payton,* 3 Cal. 4th 1050, 1058, 839 P. 2d 1035, 1040 (1992) (internal quotation marks omitted).

Defense counsel concentrated on Payton's postcrime behavior and presented evidence from eight witnesses. They testified that in the year and nine months Payton spent in prison since his arrest, he had made a sincere commitment to God, participated in prison Bible study classes and a prison ministry, and had a calming effect on other prisoners.

Before the penalty phase closing arguments, the judge held an in-chambers conference with counsel to discuss jury instructions. He proposed to give—and later did give—an instruction which followed verbatim the text of a California statute. Cal. Penal Code Ann. §190.3 (West 1988). The instruction set forth 11 different factors, labeled (a) through (k), for the jury to "consider, take into account and be guided by" in determining whether to impose a sentence of life imprisonment or death. 1 Cal. Jury Instr., Crim., No. 8.84.1 (4th rev. ed. 1979).

The in-chambers conference considered in particular the last instruction in the series, the so-called factor (k) instruction. Factor (k) was a catchall instruction, in contrast to the greater specificity of the instructions that preceded it. As set forth in the statute, and as explained to the jury, it directed jurors to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code Ann. §190.3 (West 1988). (The statute has since been amended).

Defense counsel objected to the instruction and asked that it be modified to direct the jury, in more specific terms, to consider evidence of the defendant's character and background. The prosecution, on the other hand, indicated that in its view factor (k) was not intended to encompass evidence concerning a defendant's background or character. The court agreed with defense counsel that factor (k) was a general instruction covering all mitigating evidence. It declined, however, to modify the wording, in part because the instruction repeated the text of the statute. In addition, the court stated "I assume you gentlemen, as I said, in your argument can certainly relate—relate back to those factors and certainly can argue the defendant's character, background, history, mental condition, physical condition; certainly fall into category 'k' and certainly make a clear argument to the jury." App. 59.

The judge prefaced closing arguments by instructing the jury that what it would hear from counsel was "not evidence but argument" and "[you] should rely on your own recollection of the evidence." *Id.,* at 62. In his closing, the prosecutor offered jurors his opinion that factor (k) did not allow them to consider anything that happened "after the [crime] or later." *Id.,* at 68. The parties do not now dispute that this was a misstatement of law. The defense objected to the comment and moved for a mistrial, which the trial court denied. The court admonished the jury that

the prosecutor's comments were merely argument, but it did not explicitly instruct the jury that the prosecutor's interpretation was incorrect. *Id.,* at 69–70.

Although the prosecutor again told the jury several times that, in his view, the jury had not heard any evidence of mitigation, he proceeded to argue that the circumstances and facts of the case, coupled with Payton's prior violent acts, outweighed the mitigating effect of Payton's newfound Christianity. *Id.,* at 70. He discussed the mitigation evidence in considerable detail and concluded by urging that the circumstances of the case and Payton's prior violent acts outweighed his religious conversion. *Id.,* at 75–76. In his closing, defense counsel argued to the jury that, although it might be awkwardly worded, factor (k) was a catchall instruction designed to cover precisely the kind of evidence Payton had presented.

The trial court's final instructions to the jury included the factor (k) instruction, as well as an instruction directing the jury to consider all evidence presented during the trial. *Id.,* at 94. The jury found the special circumstance of murder in the course of committing rape and returned a verdict recommending a death sentence. The judge sentenced Payton to death for murder and to 21 years and 8 months for rape and attempted murder.

On direct appeal to the California Supreme Court, Payton argued that his penalty phase jury incorrectly was led to believe it could not consider the mitigating evidence of his postconviction conduct in determining whether he should receive a sentence of life imprisonment or death, in violation of the Eighth Amendment of the U. S. Constitution. *Lockett* v. *Ohio,* 438 U. S. 586, 602–609 (1978) (plurality opinion). The text of the factor (k) instruction, he maintained, was misleading, and rendered more so in light of the prosecutor's argument.

In a 5-to-2 decision, the California Supreme Court rejected Payton's claims and affirmed his convictions and

sentence. *People* v. *Payton,* 3 Cal. 4th 1050, 839 P. 2d 1035 (1992). Applying *Boyde* v. *California*, 494 U. S. 370 (1990), which had considered the constitutionality of the same factor (k) instruction, the state court held that in the context of the proceedings there was no reasonable likelihood that Payton's jury believed it was required to disregard his mitigating evidence. 3 Cal. 4th, at 1070–1071, 839 P. 2d, at 1048. Payton sought review of the California Supreme Court's decision here. We declined to grant certiorari. *Payton* v. *California*, 510 U. S. 1040 (1994).

Payton filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California, reiterating that the jury was prevented from considering his mitigation evidence. The District Court held that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, did not apply to Payton's petition because he had filed a motion for appointment of counsel before AEDPA's effective date, even though he did not file the petition until after that date. The District Court considered his claims *de novo* and granted the petition.

On appeal to the Court of Appeals for the Ninth Circuit, a divided panel reversed. *Payton* v. *Woodford,* 258 F. 3d 905 (2001). The Court of Appeals granted Payton's petition for rehearing en banc and, by a 6-to-5 vote, affirmed the District Court's order granting habeas relief. *Payton* v. *Woodford,* 299 F. 3d 815 (2002). The en banc panel, like the District Court, held that AEDPA did not govern Payton's petition. It, too, conducted a *de novo* review of his claims, and concluded that postcrime mitigation evidence was not encompassed by the factor (k) instruction, a view it found to have been reinforced by the prosecutor's arguments.

The State petitioned for certiorari. Pursuant to *Woodford* v. *Garceau*, 538 U. S. 202 (2003), which held that a request for appointment of counsel did not suffice to make

"pending" a habeas petition filed after AEDPA's effective date, we granted the State's petition, *Woodford* v. *Payton,* 538 U. S. 975 (2003), and remanded to the Court of Appeals for reconsideration of its decision under AEDPA's deferential standards. See *Williams* v. *Taylor,* 529 U. S. 362 (2000).

On remand, the en banc panel affirmed the District Court's previous grant of habeas relief by the same 6-to-5 vote. *Payton* v. *Woodford,* 346 F. 3d 1204 (CA9 2003). In light of *Garceau*, the Court of Appeals purported to decide the case under the deferential standard AEDPA mandates. It concluded, however, that the California Supreme Court had unreasonably applied this Court's precedents in holding the factor (k) instruction was not unconstitutionally ambiguous in Payton's case.

The Court of Appeals relied, as it had in its initial decision, on the proposition that *Boyde* concerned precrime, not postcrime, mitigation evidence. *Boyde*, in its view, reasoned that a jury would be unlikely to disregard mitigating evidence as to character because of the long-held social belief that defendants who commit criminal acts attributable to a disadvantaged background may be less culpable than defendants who have no such excuse. As to postcrime mitigating evidence, however, the Court of Appeals concluded that "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." 346 F. 3d, at 1212. It cited no precedent of this Court to support that supposition.

In addition, it reasoned that unlike in *Boyde* the prosecutor in Payton's case misstated the law and the trial court did not give a specific instruction rejecting that misstatement, relying instead on a general admonition that counsel's arguments were not evidence. These two differences, the Court of Appeals concluded, made Payton's case unlike *Boyde*. 346 F. 3d, at 1216. In its

view, the factor (k) instruction was likely to have misled the jury and it was an unreasonable application of this Court's cases for the California Supreme Court to have concluded otherwise.

II

AEDPA provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim "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). A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *Williams* v. *Taylor, supra,* at 405; *Early* v. *Packer*, 537 U. S. 3, 8 (2002) *(per curiam).* A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner. *Williams* v. *Taylor, supra,* at 405; *Woodford* v. *Visciotti*, 537 U. S. 19, 24–25 (2002) *(per curiam).* These conditions for the grant of federal habeas relief have not been established.

A

The California Supreme Court was correct to identify *Boyde* as the starting point for its analysis. *Boyde* involved a challenge to the same instruction at issue here, factor (k). As to the text of factor (k), *Boyde* established that it does not limit the jury's consideration of extenuating circumstances solely to circumstances of the crime. See 494 U. S., at 382. In so holding, we expressly rejected

the suggestion that factor (k) precluded the jury from considering evidence pertaining to a defendant's background and character because those circumstances did not concern the crime itself. *Boyde* instead found that factor (k), by its terms, directed the jury to consider any other circumstance that might excuse the crime, including factors related to a defendant's background and character. We held:

> "The [factor (k)] instruction did not, as petitioner seems to suggest, limit the jury's consideration to 'any other circumstance *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 a defendant's background and character." *Ibid.* (emphasis in original).

The California Supreme Court read *Boyde* as establishing that the text of factor (k) was broad enough to accommodate the postcrime mitigating evidence Payton presented. *People* v. *Payton,* 3 Cal. 4th, at 1070, 839 P. 2d, at 1048. The Court of Appeals held *Boyde*'s reasoning did not control Payton's case because *Boyde* concerned precrime, not postcrime, mitigation evidence. 346 F. 3d, at 1211–1212.

We do not think that, in light of *Boyde*, the California Supreme Court acted unreasonably in declining to distinguish between precrime and postcrime mitigating evidence. After all, *Boyde* held that factor (k) directed consideration of any circumstance that might excuse the crime, and it is not unreasonable to believe that a postcrime character transformation could do so. Indeed, to accept the view that such evidence could not because it occurred after the crime, one would have to reach the surprising conclusion that remorse could never serve to lessen or excuse a crime. But remorse, which by definition can only be experienced after a crime's commission, is something commonly thought to lessen or excuse a defen-

dant's culpability.

B

That leaves respondent to defend the decision of the Court of Appeals on grounds that, even if it was at least reasonable for the California Supreme Court to conclude that the text of factor (k) allowed the jury to consider the postcrime evidence, it was unreasonable to conclude that the prosecutor's argument and remarks did not mislead the jury into believing it could not consider Payton's mitigation evidence. As we shall explain, however, the California Supreme Court's conclusion that the jury was not reasonably likely to have accepted the prosecutor's narrow view of factor (k) was an application of *Boyde* to similar but not identical facts. Even on the assumption that its conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review.

The following language from *Boyde* should be noted at the outset:

> "We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. . . . [J]urors 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 the trial likely to prevail over technical hairsplitting." 494 U. S., at 380–381 (footnote omitted).

Unlike in *Boyde*, the prosecutor here argued to jurors during his closing that they should not consider Payton's mitigation evidence, evidence which concerned postcrime

as opposed to precrime conduct. Because *Boyde* sets forth a general framework for determining whether a challenged instruction precluded jurors from considering a defendant's mitigation evidence, however, the California Supreme Court was correct to structure its own analysis on the premises that controlled *Boyde*. The *Boyde* analysis applies here, and, even if it did not dictate a particular outcome in Payton's case, it refutes the conclusion of the Court of Appeals that the California Supreme Court was unreasonable.

The prosecutor's mistaken approach appears most prominently at three different points in the penalty phase. First, in chambers and outside the presence of the jury he argued to the judge that background and character (whether of precrime or postcrime) was simply beyond the ambit of the instruction. Second, he told the jurors in his closing statement that factor (k) did not allow them to consider what happened "after the [crime] or later." App. 68. Third, after defense counsel objected to his narrow view, he argued to the jury that it had not heard any evidence of mitigation. *Id.,* at 70. *Boyde*, however, mandates that the whole context of the trial be considered. And considering the whole context of the trial, it was not unreasonable for the state court to have concluded that this line of prosecutorial argument did not put Payton's mitigating evidence beyond the jury's reach.

The prosecutor's argument came after the defense presented eight witnesses, spanning two days of testimony without a single objection from the prosecution as to its relevance. As the California Supreme Court recognized, like in *Boyde*, for the jury to have believed it could not consider Payton's mitigating evidence, it would have had to believe that the penalty phase served virtually no purpose at all. Payton's counsel recognized as much, arguing to the jury that "[t]he whole purpose for the second phase [of the] trial is to decide the proper punishment to be

imposed. Everything that was presented by the defense relates directly to that." App. 88. He told the jury that if the evidence Payton presented was not entitled to consideration, and therefore "all the evidence we presented [would not be] applicable, why didn't we hear any objections to its relevance?" *Ibid.* The prosecutor was not given an opportunity to rebut defense counsel's argument that factor (k) required the jury to consider Payton's mitigating evidence.

For his part, the prosecutor devoted specific attention to disputing the sincerity of Payton's evidence, stating that "everybody seems to get religion in jail when facing the death penalty" and that "[s]tate prison is full of people who get religion when they are in jail." *Id.,* at 74. Later, he intimated the timing of Payton's religious conversion was suspect, stating "he becomes a newborn Christian, after he's in custody" after "he gets caught." *Ibid.* As the California Supreme Court reasonably surmised, this exercise would have been pointless if the jury believed it could not consider the evidence.

Along similar lines, although the prosecutor characterized Payton's evidence as not being evidence of mitigation, he devoted substantial attention to discounting its importance as compared to the aggravating factors. He said:

> "The law in its simplicity is that the aggravating—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 . . . , the defendant's two prior convictions line up against really nothing except [the] 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 [the victim], and I really doubt if [defense counsel] would dispute that breakdown of the facts." *Id.*, at 76.

Indeed, the prosecutor characterized testimony concerning Payton's religious conversion as "evidence" on at least four separate occasions. *Id.,* at 68, 70, 73. In context, it was not unreasonable for the state court to conclude that the jury believed Payton's evidence was neither credible nor sufficient to outweigh the aggravating factors, not that it was not evidence at all.

To be sure, the prosecutor advocated a narrow interpretation of factor (k), an interpretation that neither party accepts as correct. There is, however, no indication that the prosecutor's argument was made in bad faith, nor does Payton suggest otherwise. In addition, the first time the jury was exposed to the prosecutor's narrow and incorrect view of factor (k), it had already heard the entirety of Payton's mitigating evidence. Defense counsel immediately objected to the prosecutor's narrow characterization, and the trial court, noting at a side bar that one could "argue it either way," admonished the jury 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." *Id.,* at 69–70.

The trial judge, of course, should have advised the jury that it could consider Payton's evidence under factor (k), and allowed counsel simply to argue the evidence's persuasive force instead of the meaning of the instruction itself. The judge is, after all, the one responsible for instructing the jury on the law, a responsibility that may not be abdicated to counsel. Even in the face of the trial court's failure to give an instant curative instruction, however, it was not unreasonable to find that the jurors did not likely believe Payton's mitigation evidence beyond

their reach. The jury was not left without any judicial direction. Before it began deliberations as to what penalty was appropriate, the court instructed it to consider all evidence received "during any part of the trial in this case, except as you may be hereafter instructed," *id*., at 94, and it was not thereafter instructed to disregard anything. It was also instructed as to factor (k) which, as we held in *Boyde*, by its terms directs jurors to consider any other circumstance that might lessen a defendant's culpability.

Testimony about a religious conversion spanning one year and nine months may well have been considered altogether insignificant in light of the brutality of the crimes, the prior offenses, and a proclivity for committing violent acts against women. It was not unreasonable for the state court to determine that the jury most likely believed that the evidence in mitigation, while within the reach of the factor (k) instruction, was simply too insubstantial to overcome the arguments for imposing the death penalty; nor was it unreasonable for the state court to rely upon *Boyde* to support its analysis. Even were we to assume the "'relevant state-court decision applied clearly established federal law erroneously or incorrectly,'" *Lockyer* v. *Andrade,* 538 U. S. 63, 76 (2003) (quoting *Williams* v. *Taylor,* 529 U. S., at 411), there is no basis for further concluding that the application of our precedents was "objectively unreasonable." *Lockyer, supra,* at 76. The Court of Appeals made this last mentioned assumption, and it was in error to do so. The judgment of the Ninth Circuit is reversed.

It is so ordered.

THE CHIEF JUSTICE took no part in the decision of this case.