No. 18-5039

In the Supreme Court of the United States

GUY KEVIN ROWLAND,

Petitioner,

v.

KEVIN CHAPPELL, Warden

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether this case is subject to the deferential review standards of the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d), under this Court's decision in *Woodford v. Garceau,* 538 U.S. 202 (2003), holding that the Act applies if a federal habeas petition presenting claims for relief on the merits was first filed on or after April 24, 1996.

2. Whether on the facts of this case it was objectively unreasonable for the California Supreme Court to reject petitioner's claim of ineffective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668 (1994).

3. Whether on the facts of this case it was objectively unreasonable for the California Supreme Court to reject petitioner's claim that two remarks by the prosecutor in his penalty argument violated due process and *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

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STATEMENT

1. On March 16, 1986, Marion Geraldine Richardson encountered, and apparently rebuffed, petitioner Rowland at a bar in Byron, California. Pet. App. 94. Later, after Richardson had left the bar alone, she encountered Rowland again. *Id.* He brutally beat Richardson about the head and face. *Id.* He also raped her. *Id.* Then he strangled her. *Id.*

Rowland dumped Richardson's body in the ocean at Half Moon Bay. Pet. App. 94. A few hours later, he told an acquaintance, Susan Lanet, that he had killed Richardson, and he asked for Lanet's help in cleaning his truck to remove "[b]lood and every strand of hair." *Id.* at 95. Lanet contacted the police, who arrived and arrested Rowland as he tried to flee. *Id.* Richardson's body was found at the base of a cliff at a beach near Half Moon Bay. *Id.*

2. The state charged Rowland with first-degree murder and rape. Pet. App. 93. It also charged, as a "special circumstance" making the murder punishable by death, that the murder had been committed in the course of a rape. *Id.* In addition, the state alleged that Rowland had committed, and had been sent to prison for, 12 prior serious felonies, and that he was on parole when he murdered Richardson. *Id.*

a. Two years before trial, Rowland's counsel consulted with a psychiatrist and a psychologist to investigate potential mental health defenses. Pet. App. 15, 54-57, 118, 123. Neither believed that a viable mental defense existed. *Id.* at 15, 53-57, 123. They recommended that counsel retain Dr. Hugh

Ridlehuber to examine Rowland for possible Attention Deficit Hyperactivity Disorder (ADHD). *Id.* Counsel retained Dr. Ridlehuber, but the doctor said that Rowland did not suffer from ADHD. *Id.* at 53, 119. Counsel also interviewed a doctor who had treated Rowland at the California Medical Facility. *Id.* Prior to the penalty phase of the trial, counsel asked Dr. Ridlehuber to testify about mitigation. *Id.* at 53.

b. At the guilt phase of the trial, the prosecution relied on statements of witnesses from the bar, Rowland's admissions to Lanet, evidence of injuries to Rowland's hands, bloodstains in his truck, and items belonging to the victim that Rowland had given to Lanet. Pet. App. 94-95; RT 4989-4995, 5258-5262, 5305-5306, 5445-5448, 5462-5463, 5634-5637, 5991-5995. Rowland offered no evidence in his defense. Pet. App. 95. He was found guilty as charged. *Id.* at 94.

c. At the separate penalty phase, the prosecution relied on the circumstances of the Richardson rape and murder, and on evidence of Rowland's other violent crimes resulting in felony convictions. Pet. App. 95. In 1978, Rowland assaulted a 63-year-old woman, who suffered a crushed vertebra. *Id.* In 1980, he battered and raped a 26-year-old woman. *Id.* Also in 1980, he and another man kidnapped two 13-year-old girls. Pet. App. 95. After one girl escaped, Rowland helped his partner rape the other girl twice; further, he himself raped her six times, forced her to orally copulate him, and twice sodomized her. *Id.* In 1986, Rowland beat two women in separate

attacks on the same day. *Id.* He drove one of the women to the top of a cliff and threatened to kill her and throw her body over. *Id.*

For the defense, Dr. Ridlehuber testified that Rowland exhibited a borderline personality disorder and a "major impairment" at the time of the killing. RT 6757, 6765-6766, 6769, 6796-6797. He also related information that as a child Rowland had suffered abuse, seizures, and night terrors. RT 6760-6774. Ridlehuber testified that, while Rowland could function normally most of the time, he could "cross-over to neurotic," and at times engaged in psychotic behavior when he was "out of control" and "not really oriented." RT 6757. Ridlehuber also discussed Rowland's mental state during the period leading up to the murder, saying that it included an escalation of anxiety, depression, and desperation leading to a loss of cognitive control. RT 6766-6780.

In addition, the defense produced testimony, from family and friends, that Rowland's parents had come from abusive backgrounds and experienced a violent, alcoholic marriage. Pet. App. 96. It also produced evidence that Rowland's mother abused him, twice trying to drown him in his bath as a baby, and that the parents also had abused Rowland's siblings. *Id.*

Further, defense counsel produced evidence that Rowland had undergone psychotherapy and drug therapy beginning at an early age, and that he suffered from learning disabilities and behavioral issues at school, when he began abusing drugs and alcohol. Pet. App. 96. Moreover, Rowland

had spent a significant portion of his life in correctional facilities. *Id.* Over the course of his life he was diagnosed with various mental conditions, including hyperactivity at age six or seven, and borderline personality disorder at the time of trial. *Id.*

The defense also adduced testimony that Rowland had been kind and helpful to family members, friends, and acquaintances on several occasions; that he knew the difference between right and wrong and could act accordingly; and that he had accepted responsibility for the rape and murder of Richardson and felt remorse. *Id.*

In his penalty argument, the prosecutor urged the jury to vote for the death penalty, citing the savage nature of the rape and murder, and the "unspeakable horror, terror, and brutality" of Rowland's long list of prior violent crimes. RT 6696-6698, 7002-7018. He also argued why the evidence did not support a lesser sentence. RT 7019-7037. Early in the argument, in the context of discussing the appropriateness of the death penalty, the prosecutor referred to the portion of the earlier voir dire where jurors had been asked if they could consider imposing the death penalty in an appropriate case. RT 6997-6998. The prosecutor noted a then-recent election in which three California Supreme Court justices had been removed from office because they "were perceived by the voters not to be applying this law," and said that "it is the policy expressed by the will of the populace that there be a death penalty in California[.]" Pet. App. 160. He continued:

> In our system of justice the penalty should fit the crime and the criminal. Minor crimes, littering, things like that, we fine people[.] . . .
>
> Not all murder is qualified for the death penalty, as you know. There must be a special circumstance . . . —in this case it's rape—that you qualify for the death penalty.
>
> But not all people that qualify for the death penalty should get the death penalty. It's only those people like Mr. Rowland, that the bad outweighs the good in his background, and so substantially outweighs the good or the mitigation in his background, that death is justified, death is appropriate, death is warranted.

Id. The defense did not object to this portion of the argument. *Id.* at 111, 160.

Later, the prosecutor spoke of the difficult nature of the decision to impose an actual death sentence and the difference between supporting the death penalty in the abstract and being a "part of the judicial process that actually will result in it." Pet. App. 165. He told the jury that he would not ask others to do what he did not feel was right, or that he would not do himself, and that he believed that society had a right and a duty to protect itself "in the appropriate cases." *Id.* Then he said:

> And based on the system of justice where the punishment should fit the crime and the criminal, based on the law in this case as I've explained it and as the judge will explain it to you further, based on the savagery, and the brutality, and the horror of the crime against Marion Geraldine Richardson, based on his history of past criminal activity involving violence which represents a man of extreme cruelty, depravity, and violence, I now stand before you, and with a full realization of the awesome responsibility that's been entrusted to you and to me, and with a full realization of the gravity and enormity of what I am about to ask you, without reservation, without hesitation, I am asking that you return a verdict of death.

Id. at 165-166. The trial court overruled a defense objection that it was improper for the prosecutor to voice a personal opinion concerning the proper sentence, reasoning that the prosecutor's argument was properly tied to the evidence before the jury. *See id.* at 114.

The jury returned a death verdict. Pet. App. 93.

3. On direct appeal, the California Supreme Court rejected Rowland's challenges to the prosecutor's closing argument. Pet. App. 110-114. As to the reference to public support for the death penalty and the judicial election, the court explained that, "[i]n context, the message the prosecutor delivered was this: the jurors' function was judicial, not legislative; they had to decide whether the death penalty was the appropriate punishment in this case, not whether it should be available as a sanction in general." *Id.* at 110. In the court's view, there was no reasonable likelihood that the jury understood the prosecutor's remarks as minimizing its responsibility to determine the appropriate sentence. *Id.* As for the prosecutor's statement that he would not ask the jurors to do anything he was unwilling to do, the supreme court agreed with the trial judge that, while a prosecutor "may not 'state his personal belief regarding . . . the appropriateness of the death penalty, *based on facts not in evidence*,' . . . he may make a statement of this sort if, as here, it is 'based solely on the facts of record.'" *Id.* at 114 (citation omitted).

Rowland later filed a state habeas corpus petition in the California Supreme Court. Pet. App. 9. He claimed, among other things, that trial

counsel had been ineffective in failing to investigate and present a mental health defense at the guilt stage and mental health mitigation evidence at the penalty phase. Dist. Ct. Dkt. No. 53, Notice of Lodging, Petition for Writ of Habeas Corpus. The California Supreme Court summarily denied all his claims on the merits. Pet. App. 9.

4. In 1994, Rowland filed a motion for temporary stay of execution and appointment of counsel in the United States District Court for the Northern District of California. Pet. App. 167-170. Counsel was appointed in May 1995. *Id.* at 171. In June 1995, counsel filed a memorandum in support of the request for a temporary stay to allow counsel to prepare and file a habeas petition. *Id.* at 171-175. As required by local rule, the memorandum included a specification of non-frivolous issues: here, Rowland asserted that trial counsel suffered from a conflict of interest and that counsel had failed to fully investigate and present mitigation evidence and to adequately prepare Dr. Ridlehuber for the mitigation case. *Id.* at 171-175. The sole relief requested was an extension of the temporary stay of execution "to permit the preparation and filing of a habeas corpus petition by newly-appointed counsel." *Id.* at 175. The district court granted the stay.

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) became effective. *See Lindh v. Murphy,* 521 U.S. 320, 322 (1997). On June 28, 1996, Rowland filed a "mixed" federal habeas petition, raising some claims that had already been adjudicated in state court and others that

had not. Pet. App. 181. The stay of execution was extended to allow Rowland to return to state court and exhaust the new claims. Dist. Ct. Dkt. 77, 84. Rowland then filed a second state petition, which the California Supreme Court denied on procedural grounds and, alternatively, on the merits. *In re Rowland*, No. S061918. Rowland filed his final federal petition in the district court in 2007. Pet. App. 46, 183.

In 2012, the district court rejected all of Rowland's claims. Pet. App. 91. Citing *Woodford v. Garceau,* 538 U.S. 202 (2003), the court held that AEDPA applied to Rowland's petition and provided the standard of review for his claims. Pet. App. 46-49. Addressing Rowland's claims that counsel was ineffective in waiting until the end of the guilt phase to arrange for Ridlehuber to testify about mitigation, and in failing to present the doctor with certain information about Rowland's infancy, the district court concluded that, under *Strickland v. Washington*, 466 U.S. 668 (1984), Rowland had failed to establish either that his counsel's performance was deficient or that any alleged deficiency was prejudicial. *Id*. at 52. On Rowland's claim that the prosecutor had committed misconduct in his penalty-phase argument, the court—although disapproving of the challenged remarks—applied the deferential standard of review under 28 U.S.C. § 2254(d) and held that the California Supreme Court's rejection of the claim was neither contrary to nor an unreasonable application of *Darden v. Wainwright*, 477 U.S. 168 (1986), or *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *Id.* at 67-71.

5. The court of appeals affirmed. Pet App. 1-37. It first agreed that AEDPA applied to Rowland's petition under this Court's holding in *Woodford v. Garceau*. *Id.* at 11-14. The court explained that, whether or not Rowland's motion for a stay and memorandum of non-frivolous claims were denominated as a "petition" under the local rule or in the district court docket, they were "insufficient to preclude AEDPA's application because they did not place the 'merits' of Rowland's claims before the district court for adjudication," as *Garceau* held was necessary before a petition could be deemed "pending" prior to AEDPA's effective date. *Id.* at 12-13. As to Rowland's assertion that his counsel had relied on the local rule, the court held that that it lacked power to override Congress' intent and that, in any event, it would have been unreasonable for counsel to rely on the local rule, which predated AEDPA by six years. *Id.* at 13 n.1.

Next, although it concluded that counsel was deficient in failing both to arrange in a timely way for Ridlehuber's mitigation testimony and to provide him with adequate information, the court of appeals held that it was not unreasonable for the California Supreme Court to hold that Rowland had not been prejudiced given the brutal nature of the charged murder and Rowland's "egregious criminal record." Pet. App. 17-20. Similarly, although it also disapproved of the prosecutor's references to his personal opinion and to the California judicial election, the court of appeals upheld the district court's ruling that the state court's rejection of Rowland's prosecutorial misconduct

claims was not contrary to or an unreasonable application of federal law as clearly established by this Court. *Id.* at 23-30. The state court could reasonably have concluded that the prosecutor's remarks "did not undermine the fundamental fairness of the trial" (*id.* at 25; *see id.* at 29-30), and that "any prosecutorial misconduct amounting to a constitutional violation was harmless because it did not have a 'substantial and injurious effect' on the jury's verdict for death" (*id.* at 27, 30).

ARGUMENT

1. Petitioner seeks review on the question of whether AEDPA, and particularly the deferential review standard of 28 U.S.C. § 2254(d), governs his petition. Pet. 19-24. He claims that, under a local rule and his counsel's alleged reliance on it, his 1995 district-court motion for a stay and appointment of counsel, supplemented by a statement of non-frivolous issues, constituted a petition for a writ of habeas corpus; and that, because they were filed before AEDPA's April 24, 1996, effective date, that Act does not govern his case. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). In *Woodford v. Garceau*, 538 U.S. 202, 208-210 (2003), however, this Court held that a motion for stay and appointment of counsel, even when accompanied by a statement of non-frivolous issues, was not a habeas petition for purposes of applying AEDPA's effective date. Only "an application for habeas relief seeking an adjudication of the *merits* of the petitioner's claims" amounts to such a petition. *Id.* at 207. Here, Rowland's pre-AEDPA filings did not seek adjudication of the merits of

any claim. While they recited allegations that defense counsel suffered a conflict of interest and failed to fully investigate and present mitigation evidence and to adequately prepare the retained expert, the sole relief they sought was an extension of the temporary stay of execution to allow the later filing of an actual petition raising those (or other) claims. *Id.* at 171-175. The court of appeals correctly rejected Rowland's AEDPA argument under *Garceau*.

Rowland contends that his counsel relied upon a statement in the district court's Local Rule 296-8 that a pro se application for appointment of counsel and specification of nonfrivolous issues filed in support of a temporary stay "shall be deemed to be a petition for writ of habeas corpus." Pet. 2; Pet. App. 153-154. He also cites a docket entry of August 26, 1994, listing the filing of his pro se motion for appointment of counsel as a "petition for writ of habeas corpus." Pet. 2, 20; Pet. App. 177. The court of appeals' proper rejection of these fact-bound contentions (Pet. App. 13 n.1) does not warrant further review.

The local rule that Rowland cites has nothing to do with AEDPA. Following its decision in *Neuschafer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988), a case involving the proper handling of a "mixed" habeas petition containing both exhausted and unexhausted claims, the Ninth Circuit created a Death Penalty Task Force that "promulgated model local rules for the district courts." *Calderon v. U.S. District Court for the Northern District of California*, 134 F.3d

981, 985 (9th Cir. 1988). Local Rule 296-8 was based on one of those model rules and was adopted by the Northern District of California in 1990. The rule is titled "stays of execution," and subsections (b) and (c), which Rowland cites, address temporary stays for appointment of counsel and preparation of an actual habeas petition, respectively. Pet. App. 153-154. The temporary stays authorized by the rule remain in effect only for 45 or 120 days in the absence of the filing of a petition or good cause supporting an extension. *Id.* By "deem[ing]" a motion for appointment of counsel, or new counsel's specification of potential nonfrivolous issues, to be a habeas petition, the rule provided a procedural mechanism for opening a case and granting a temporary stay of any scheduled execution, for the period necessary to appoint counsel and for counsel to draft and file an actual federal habeas petition. That actual petition, when filed and if not frivolous, would then trigger the entry of a further stay under the rule's subsection (a), pending final disposition of the petition. *Id*. at 153.

As the court of appeals recognized (Pet. App. 13 n.1), once AEDPA had been enacted, counsel could not reasonably assume that such a rule, adopted six years earlier for a completely different purpose, would apply to "deem" a federal petition filed for purposes of the new Act. "Rowland provides no authority that would grant a court the power to change AEDPA's statutorily mandated standard of review"; and "it would have been unreasonable for

Rowland to rely on the local rule, which preceded AEDPA by six years, to avoid AEDPA's application." *Id.*

For the same reasons, neither *Raley v. Ohio*, 360 U.S. 423 (1959), nor *Cox v. Louisiana*, 379 U.S. 559 (1959), affords a basis for a federal court to refuse to apply AEDPA to a case where the petitioner failed to file a petition presenting, for resolution on their merits, claims for relief from a state-court conviction. *Cf.* Pet. 23-24. In those cases, the defendants were unconstitutionally entrapped, through personal advice communicated by the authorities, into committing a crime. *See Cox*, 379 U.S. at 571. Nothing like that happened here.

2. Rowland argues briefly (Pet. 24-25) that his counsel rendered ineffective assistance by delaying in retaining Ridlehuber and arranging for him to testify at the penalty phase and by failing to provide him with certain information. The court of appeals also correctly rejected that claim. *See* Pet. App. 17-20.

To establish a violation of the right to effective counsel, a defendant must show both that counsel's performance was deficient under prevailing professional norms and that, as a result of such deficiency, the defendant was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). *Strickland* mandates a strong presumption of competence, *id.*; and, when federal habeas review is undertaken under AEDPA, this Court has further held that "double" deference is due. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). The state

court's summary order rejecting Rowland's ineffective-assistance claim here is entitled to such doubly deferential review. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011).

As the district court noted in rejecting the claim, counsel had undertaken the early retention of other mental health experts and they had determined that there was no viable mental defense. Pet. App. 53. Ridlehuber had examined Rowland for 12 hours and had spent an additional 14 hours on research prior to his extensive testimony at the penalty phase. *Id.* at 56-57. Moreover, "[t]he record does not reflect . . . that Dr. Ridlehuber indicated to counsel at the time he was retained or at the time of the penalty phase trial that he believed that he had not had adequate time to examine petitioner or that he had been retained too late to perform a thorough evaluation." *Id.* at 57. Rebutting Ridlehuber's claim that he lacked certain information that would have better informed his opinion, the district court pointed to testimony from him that demonstrated knowledge of much of the information, including Ridlehuber's statement that Rowland had presented a reliable, complete, and detailed picture of himself. *Id.* at 57-58.

The court of appeals concluded that counsel was deficient in the timing of retaining Ridlehuber for the penalty phase and in failing to provide him all necessary material, relying on circuit precedent. Pet. App. 17-19. Here, however, as the district court recognized, the record provides ample justification for a state court conclusion that Ridlehuber was able—in

conjunction with other mental-health experts consulted by counsel—to perform a reasonable evaluation of Rowland for use in the penalty phase of the trial.

In any event, as both the district court and the court of appeals correctly held, there was nothing unreasonable about the California Supreme Court's determination that Rowland failed to establish *Strickland* prejudice from any deficiency in the performance of counsel. Pet. App. 19-20, 59. Ridlehuber testified about violence, alcoholism, and sexual abuse in Rowland's family, thus providing significant mitigation evidence. *Id.* at 59. Conversely, as the court of appeals recognized (*id.* at 19), Ridlehuber merely speculated that Rowland had organic brain damage. It was therefore reasonable for the California Supreme Court to determine that "the limited value of additional testimony from Dr. Ridlehuber about Rowland's mental diagnoses would not have changed the outcome of the penalty phase when weighed against the aggravating evidence of Rowland's brutal rape and murder of Richardson, and Rowland's egregious criminal record of multiple sexual assaults and violent attacks, including repeatedly raping a kidnapped 13-year-old girl." *Id.*[1]

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[1] Rowland points to Ridlehuber's statement that he believed there was a "very high probability of an organic brain condition." Pet. 25. But that was only one among a number of speculative statements he made, including the following: "I suspect that Mr. Rowland may have an organic brain condition"; "psychiatric data now available show that early abuse … can effect development"; new information "indicates the possibility of Mr. Rowland having a Bipolar Affective Disorder"; "possible" birth complication "could have

3. Finally, there is no reason for further review of Rowland's claims of prosecutorial misconduct in closing argument during the penalty phase. *See* Pet. 26-31. In asking for the death penalty, the prosecutor spent the vast majority of his argument reviewing the violent and brutal nature of the rape and murder of Richardson, listing the evidence of Rowland's multiple prior violent offenses—including multiple convictions arising out of the kidnapping of two young girls and the multiple rapes, sodomy and oral copulation of one of them—and explaining how the mitigation evidence proffered by the defense did not warrant a life sentence. RT 6696-6998, 7002-7037. Rowland points instead to two brief portions of the argument: where the prosecutor mentioned a then-recent retention election involving members of the state supreme court, and where he told the jury that he would not ask them to do anything he would not be willing to do himself. Pet. 26-27.

As to the statement of "personal belief," the California Supreme Court held that, while "a prosecutor may not 'state his personal belief regarding . . . the appropriateness of the death penalty, *based on facts not in evidence*[,]'" he may make such a statement if "it is 'based solely on the facts of record.'" Pet. App. 114. The court further concluded that there was no reasonable likelihood that the jury in this case understood the remarks in the way Rowland argued

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caused organic brain problems"; fetal distress syndrome "could have been caused by [maternal] alcohol consumption"; and Rowland "could quite possibly still be afflicted with Attention Deficit Hyperactivity Disorder." Pet. App. 126-130

they might have. *Id.* The court of appeals, while disapproving of the statements, properly recognized that it was not unreasonable for the state court to hold that, under this Court's decision in *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), the remarks did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 24, 30. As the court of appeals observed, this Court "has emphasized that 'the *Darden* standard is a very general one, leaving courts "more leeway . . . in reaching outcomes in case-by-case determinations[.]"'" Pet. App. 26 (ellipses in original). For purposes of federal habeas review under AEDPA, "[t]he California Supreme Court's rejection of Rowland's *Darden* claim . . . was not 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" Pet. App. 27.

The court of appeals squarely addressed this Court's holdings in *Berger v. United States*, 295 U.S. 78 (1935), and *United States v. Young*, 470 U.S. 1 (1985). Pet. App. 24 & n.2; *see* Pet. 27. The court observed that in *Young* itself this Court concluded that the remarks in question, taken in context, did not undermine the fairness of the trial. Pet. App. 24; *Young*, 470 U.S. at 17-18. *Berger* involved statements referring to the prosecutor's knowledge of evidence outside the record, in a case where the evidence was otherwise weak. Pet. App. 24 n.2; *Berger*, 295 U.S. at 84-89. Similarly, the decision below does not conflict with those of other circuits. *See* Pet. 26, 27-29. As the court of appeals noted,

the statements at issue here "do not rise to the level of the statements in *Weaver* [*v. Bowersox*, 438 F.3d 832, 840-841 (8th Cir. 2006)], which involved "a litany of improper statements," including that the prosecutor "'had a special position of authority and decided whether to seek the death penalty.'" Pet. App. 25-26.[2]

As to the remarks relating to public support for the death penalty and the judicial election, both the California Supreme Court and the court of appeals correctly applied this Court's decision in *Caldwell v. Mississippi*. Pet. App. 27-30, 111. *Caldwell* held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rest elsewhere." 472 U.S. at 328-329. There, the prosecutor told the jury that its decision was not the final one, but that it was "automatically reviewable by the Supreme Court. *Id.* at 325-326. Here, in contrast, the California Supreme Court recognized that "[i]n context, the message the prosecutor delivered was this: the jurors' function was judicial, not legislative; they had to decide whether the death penalty was the

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[2] In *Bates v. Bell*, 402 F.3d 635 (6th Cir. 2005), the other case cited by Rowland as reflecting a conflict (*see* Pet. 28-29), the court considered another litany of remarks, including a dismissive characterization of defense evidence with the statement, "I don't care what Marshall says. I don't really care what Griffin says. I don't care at all what Mr. Peters or really, what Mr. Bean says because I believe this to be true, and I believe you share the same belief." *Id.* at 645.

appropriate punishment in this case, not whether it should be available as a sanction in general[,]" and that there was no reasonable likelihood that the jury understood the remarks "in such a way as to 'minimize [its] sense of responsibility for determining the appropriateness of death'" as construed in *Caldwell*. Pet. App. 111. Particularly in light of the remarks immediately following, which included the statements that "[n]ot all murder is qualified for the death penalty" and "not all people that qualify for the death penalty should get the death penalty" (*id.* at 160), the California Supreme Court's adjudication was at the least a reasonable application of *Caldwell* and thus may not be set aside under AEDPA.

The court of appeals agreed that the prosecutor's argument, rather than minimizing responsibility, conveyed only "that the jury's responsibility was not to determine whether the death penalty should be available as a sanction in general[,]" but whether it was appropriate for Rowland specifically, which does not violate *Caldwell*. Pet. App. 29-30. It also correctly recognized that the state court was reasonable in concluding that the comments did not result in a denial of due process under *Darden*, and that any misconduct was harmless as it "did not have a 'substantial and injurious effect' on the jury's verdict for death." *Id.* at 30. There is no basis for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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August 28, 2018

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Guy Kevin Rowland v. Kevin Chappell, Warden***

Case No.: **18-5039**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On August 28, 2018, I served the attached **BRIEF IN OPPOSITION** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 28, 2018, at San Francisco, California.

M. Mendiola	**/s/ *M. Mendiola***
Declarant	Signature

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