No. 10-490

In The
Supreme Court of the United States

STATE OF UTAH,

Petitioner,

vs.

MARK ANTHONY OTT,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR THE STATE OF UTAH

The Utah Supreme Court squarely decided an issue that this Court expressly left unresolved in *Payne v. Tennessee* two decades ago: whether the Eighth Amendment –without exception – continues to bar victims from offering an opinion on the crime, defendant's character, and sentence in a capital sentencing proceeding. Contrary to Respondent's contentions, this case presents an excellent vehicle for resolving that issue. This Court should resolve the issue because its continuing silence has hamstrung the States' ability to admit such evidence, even when that evidence is relevant and consistent with Due Process.

This Court should also resolve whether *Booth* should apply to a sentencing proceeding in which death is not an option. Contrary to Respondent's claim, the issue was presented to and passed upon by the Utah court. The Utah court's decision applying *Booth* casts constitutional doubt on the laws and constitutions of the many States that afford victims the right to voice their opinions on the defendant's character, crime, and appropriate sentence in non-capital sentencing proceedings.

1. This case presents an excellent vehicle for revisiting the remaining vestige of *Booth*.

With respect to the first question presented, Respondent contends that this case is not an appropriate vehicle for revisiting *Booth*, because the victim

evidence issue was raised below as an ineffective assistance of counsel claim. This, Respondent contends, would prevent this Court from cleanly reaching the merits of *Booth*. Br. Opp. at 26-28.

While it is true that Respondent raised this claim under ineffective assistance of counsel, the Utah court's resolution of the claim rested solely on *Booth*'s *per se* bar to a victim's opinions about the crime, defendant, and appropriate sentence. This case, therefore, presents an ideal vehicle for addressing the remaining vestige of *Booth*.

Before addressing whether counsel performed deficiently in not objecting to the victim evidence, the Utah Supreme Court addressed whether the victim evidence was admissible in the first place. App. at 13-16. The Utah court held that under *Booth*, the Eighth Amendment clearly imposed a blanket ban to the evidence. App. at 15-16. The Utah court concluded that because the evidence was *per se* inadmissible under *Booth*, trial counsel performed deficiently by not objecting to it: "Specifically, we hold that counsel was objectively deficient for failing to object to victim impact evidence that addressed Mr. Ott's character, chances for rehabilitation, and deserved sentence *because such victim impact evidence clearly violates the Eighth Amendment when introduced in capital sentencing hearings*." App. at 32 (emphasis added). *See also* App. at 26 ("A decision not to object to the victim impact evidence, especially when the evidence violated existing precedent prohibiting victims expressing opinions about the sentence or the defendant's

character, falls below the line of objective reason and therefore amounts to ineffective assistance of counsel.").

The Utah court's conclusion that trial counsel was ineffective thus rises and falls on the continuing viability of *Booth*'s blanket proscription on a victim's opinions about the crime, defendant, and appropriate sentence. Accordingly, the petition presents a perfect – and clean – opportunity for this Court to revisit *Booth* and its Eighth Amendment underpinnings.[1]

2. This Court's continuing silence has hamstrung the States' ability to admit relevant evidence in capital sentencing proceedings.

Respondent argues that because "the vast majority of courts in this country have been following *Booth*" for the past 23 years, there is no open question or confusion. Br. Opp. at 21-23. That misses the point. Lower courts have, of course, felt bound by that part of *Booth* not overruled in *Payne*. Only this Court can eliminate the unwarranted ban on victim statements

[1] Respondent also suggests that he was entitled to reversal based on other "interrelated" ineffective assistance of counsel claims, including a failure to object to a videotape celebrating the child victim's life. Br. Opp. at 28-34. But the Utah Supreme Court did not reverse on those other claims. *See* App. at 13-14 & n.3. It reversed only on *Booth*'s *per se* bar on victim evidence. App. at 13-16, 26, 31-32. Whether or not Respondent might be entitled to reversal on other grounds is thus irrelevant to whether this Court should grant the petition.

regarding the defendant's character, crime, and appropriate sentence.

This Court should remove that blanket ban because it unfairly and indiscriminately excludes evidence relevant to the "*individualized* determination" of whether the death penalty should be imposed. *Booth v. Maryland*, 482 U.S. 496, 502 (1987) (emphasis in original). Most states permit both sides in a capital sentencing proceeding to present evidence of the crime's circumstances; the defendant's character, background, and history; the victim and impact of the crime on the victim's family; and other relevant facts in aggravation or mitigation. *See, e.g.,* Utah Code. Ann. § 76-3-207(2). But while defendants are regularly permitted to put on relevant favorable character evidence through family, friends, employers, and others, *Booth*'s blanket ban excludes relevant unfavorable character evidence when it comes from the defendant's victims. By imposing a blanket ban on this type of evidence merely because it comes from victims, *Booth* unfairly prevents a capital sentencer "from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Payne v. Tennessee*, 501 U.S. 808, 826 (1991).

So long as *Booth* stands, the States are hamstrung in their ability to permit victims from ever offering an opinion on the crime, defendant's character, and sentence, even when those opinions are relevant and consistent with Due Process. For example, Arizona has enacted a statute that expressly permits

victims to make such statements in death penalty sentencing proceedings. *See* Ariz. Rev. Stat. Ann. § 13-4426. Yet, in apparent recognition of *Booth*'s blanket ban, that enactment is conditional and takes place only if on or before June 30, 2013, this Court or the Arizona Supreme Court holds that it is constitutionally permissible for a victim in a capital case to make a sentencing recommendation. *See id.* (Historical and Statutory Notes); *see also* 2003 Ariz. Sess. Laws, ch. 255, ¶¶ 7-8. Thus, until this Court breaks its silence on the remaining vestige of *Booth*, no state is free to enact or enforce a statute that permits what would otherwise be relevant and constitutionally permissible evidence. *See, e.g.,* N.H. Rev. Stat. Ann. § 651:4-a (permitting victims to give opinion evidence and sentencing recommendations in death penalty sentencing proceedings).

Moreover, contrary to Respondent's claim, there is deep split between Oklahoma and the Tenth Circuit that this Court should resolve. Respondent downplays the split by suggesting that "federal habeas is the remedy designed to correct such errors," as those committed by the Oklahoma courts in interpreting *Booth* and *Payne*. Br. Opp. 22. Thus, Respondent reasons, the Tenth Circuit is fully able to review and correct Oklahoma's interpretations of *Booth* and *Payne*. Br. Opp. 22-23.

Respondent overlooks the intractable nature of the split. Oklahoma's reading of *Booth* cannot be reconciled with that of the Tenth Circuit. Oklahoma has concluded that *Payne* overruled all of *Booth*, at

least insofar as *Booth* "had its roots in the Eighth Amendment." *Ledbetter v. State*, 933 P.2d 880, 890-91 (Okla. Crim. App. 1997). But the Tenth Circuit has concluded on federal habeas review that Oklahoma's conclusion that *Booth* allowed certain victim testimony was "contrary to established Supreme Court precedent." *Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002). Notwithstanding the Tenth Circuit's views, the Oklahoma Court of Criminal Appeals has interpreted this Court's repeated denial of petitions raising the issue as implicit approval of its position and has roundly rejected any "contention that our interpretation of *Payne* and *Booth*, or for that matter our own statute, is erroneous or unconstitutional." *Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002).

And, contrary to Respondent's assumption, a federal circuit court of appeals has no authority to overrule a decision by a state's court of last resort, even on a federal question. Only this Court has that authority. Thus, until this Court speaks to the issue, the irreconcilable split between Oklahoma and the Tenth Circuit will remain.

Respondent suggests that this Court should decline to review *Booth*'s blanket ban in this case because Utah law independently excludes it in capital sentencing proceedings. Br. Opp. at 36. As Respondent concedes, the Utah Supreme Court expressly declined to decide that issue in this case and, instead, rested its decision solely on *Booth*'s blanket ban. *See* App. 13-14. Thus, as explained in footnote 1 above,

whether Respondent might be entitled to relief on those grounds is not relevant to whether this Court should grant certiorari. In any event, Utah law does permit the kind of evidence barred under *Booth* and the lower court's decision. For example, Utah statute expressly permits relevant evidence of "the defendant's character, background, history, and mental and physical condition" to be presented at capital sentencing proceedings, without regard to its source. Utah Code Ann. § 76-3-207(2).

But even assuming that Utah law were coextensive with *Booth*, that is a reason to grant, not deny, review. As explained, so long as *Booth* stands, states – including Utah – are not free to permit the kind of victim evidence excluded here.

3. The second question presented was properly raised and passed upon below.

With respect to the second question presented – whether *Booth*'s blanket proscription applies to non-death sentencing proceedings – Respondent argues that it was neither timely nor properly presented below. Br. Opp. at 11-13. This Court's "practice," however, 'permit[s] review of an issue not pressed [below] so long as it has been passed upon. . . .'" *Citizens United v. Federal Elections Comm'n*, 130 S.Ct. 876, 892-93 (2010) (quoting *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995)) (additional citation omitted) (alterations in original).

The Utah Supreme Court passed upon the issue, here, when it applied *Booth*'s blanket proscription in a non-death sentencing proceeding, despite *Booth*'s express language that it applied only to death penalty cases. *See Booth*, 482 U.S. at 507 n.7, 508, & 509 n.12. The Utah court also passed upon the issue when it denied the State's timely petition for rehearing pointing out the court's obvious mistake.

Moreover, on certiorari review, "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Id.* (quoting *Lebron*, 513 U.S. at 379). The second question presented is not a new claim, but, "at most – 'a new argument to support what has been [a] consistent claim.'" *Citizens United*, 130 S.Ct. at 893 (quoting *Lebron*, 513 U.S. at 379) (alteration in original). The State argued below that counsel's failure to object to the evidence was not unreasonable, where Respondent's authorities were "either inapplicable, adverse, or unsettled with respect to the admissibility of victim impact evidence." State's Brief of Appellee at 60-61. The State then quoted *Payne*: "'evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision *as to whether or not the death penalty should be imposed*.'" *Id.* at 61 (quoting *Payne*, 501 U.S. at 827) (emphasis added). The argument that *Booth*, by its express terms, does not apply to non-death sentencing proceedings, supports the State's consistent claim below that counsel did not perform

deficiently by not moving to exclude the victim evidence, because no law required its exclusion. Thus, whether *Booth* applies to a sentencing hearing in which death is not an option was squarely presented to and passed upon by the lower court.

Respondent finally argues that this Court should deny review on the second question presented because the decision below and other Utah cases hold that *Booth* applies only to "capital sentencing hearings." Br. Opp. at 13. This case, however, was not a capital sentencing proceeding in the ordinary sense of that term. The State agreed to drop the death penalty in exchange for Respondent's plea. Thus, death was not an option at his sentencing proceeding. As explained above and in the Petition, *Booth* expressly limits its holding to cases where the death penalty is at issue. *See* Petition at 27-29.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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