1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ROBERT L. AYERS, JR., :

4 ACTING WARDEN, :

5 Petitioner :

6 v. : No. 05-493

7 FERNANDO BELMONTES. :

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9

10 Washington, D.C.

11 Tuesday, October 3, 2006

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13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States at

15 11:05 a.m.

16 APPEARANCES:

17 MARK A. JOHNSON, ESQ., Deputy Attorney General,

18 Sacramento, California; on behalf the Petitioner.

19 ERIC S. MULTHAUP, ESQ., Mill Valley, California; on

20 behalf of the Respondent.

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1 P R O C E E D I N G S

2 [11:05 a.m.]

3 CHIEF JUSTICE ROBERTS: We'll hear argument next in

4 Ayers v. Belmontes. Mr. Johnson.

5 ORAL ARGUMENT OF MARK A. JOHNSON

6 ON BEHALF OF PETITIONER

7 MR. JOHNSON: Mr. Chief Justice and may it please

8 the Court:

9 This case concerns the constitutional sufficiency of

10 California's catchall factor (k) instruction which was

11 given in the penalty phase portion of California capital

12 cases and which directed the jurors to consider any other

13 circumstance that extenuates the gravity of the crime even

14 though it is not a legal excuse for the crime. In this

15 case the Ninth Circuit Court of Appeals held that this

16 instruction violates the Eighth Amendment because it

17 allegedly misled jurors to believe they could not consider

18 so-called forward-looking evidence that did not relate

19 directly to the defendant's actual culpability for the

20 crime itself.

21 In the State's view the Ninth Circuit's conclusion

22 is fundamentally flawed because it rests on an illusory

23 distinction between different forms of character evidence

24 in a way that is inconsistent with this Court's prior

25 decisions in Boyde v. California and Brown v. Payton.

1 In Boyde this Court addressed and rejected a virtually
2 identical challenge to the factor (k) and concluded that
3 this instruction did, in fact, allow jurors to consider
4 non-crime-related evidence; specifically it allowed the
5 jurors to consider evidence of the defendant's background
6 and character. There was nothing in the Boyde decision to
7 support the Ninth Circuit's distinction between different
8 forms of character evidence. In fact, Boyde implicitly
9 acknowledged that the factor (k) would in fact be
10 understood to encompass Belmontes' good character evidence
11 in this case because for all practical purposes there is
12 no meaningful distinction between the nature of the
13 background and character offered in Boyde and the nature
14 --
15 JUSTICE STEVENS: Mr. Johnson, would you comment on
16 the footnote on the -- drawing the distinction with regard
17 to the dance contest that the defendant won in that case,
18 between -- it's over here. I'm asking the question.
19 Between the facts that occurred before the crime and facts
20 that might have occurred after.
21 MR. JOHNSON: Yes, Your Honor. In footnote 5 this
22 Court addressed a contention raised for the first time in
23 argument that Boyde's evidence might be admissible under
24 Skipper v. South Carolina and this Court distinguished
25 Boyde from Skipper for a couple of reasons. First, as

1 Your Honor pointed out, the evidence in this case related
2 to good character evidence, events that occurred before
3 the crime itself, unlike in Skipper which dealt with post
4 crime events. The Court also pointed out that the
5 evidence in Boyde; his dancing achievement, his good
6 character evidence in that case was not offered for the
7 specific inference that the evidence in Skipper was
8 offered. The Court in footnote 5 and in the opinion in
9 general in Boyde nonetheless found that this evidence did
10 in fact constitute good character evidence of the, of the
11 defendant's present good character because it showed that
12 his crime was an aberration from otherwise good character.
13 Or, as Justice Marshall put it in his dissenting opinion
14 that Boyde had redeeming qualities which is a decidedly
15 forward looking consideration. And as I was saying, the
16 evidence in this case and in Boyde --
17 JUSTICE SCALIA: It doesn't have to be forward
18 looking, does it? I mean, I thought we've said so long
19 as it can be taken into account in any manner, whether
20 backward looking or forward looking. Haven't we said
21 that explicitly?
22 MR. JOHNSON: Yes Your Honor. In fact the Court has
23 in Franklin v. Linite said that they've not distinguished
24 between different forms of character evidence. And I
25 understand that in the past we have always discussed

1 background and character evidence as sort of the same
2 thing. In this case, however, the Ninth Circuit's
3 conclusion does in fact rest on a distinction between
4 different forms of backward looking and forward looking
5 character evidence.
6 JUSTICE KENNEDY: Well it was, addressed itself to
7 the fact -- to words of the factor (k) instruction. How
8 does post crime prison conduct reduce the seriousness of
9 a previous crime?
10 MR. JOHNSON: It does not, it does not relate to the
11 seriousness of the crime at all. Boyde's dancing --
12 JUSTICE KENNEDY: Well, I mean it has to relate to
13 the gravity of the crime under the words of factor (k),
14 doesn't it?
15 MR. JOHNSON: It would relate to the gravity, the
16 circumstances that extenuate the gravity of the crime for
17 purposes of a jury's sentencing determination. And the
18 point I'd like to make on that point is this, Your Honor.
19 In California jurors are well aware what their task is at
20 a sentencing determination. In California, the guilt and
21 the death eligibility determinations are made during the
22 guilt phase trial and the jurors are expressly told during
23 the penalty phase trial that their lone determination,
24 their one concern is to decide between a sentence of death
25 or a sentence of life without the possibility of parole.

1 And in that light the jurors are very well aware that
2 their only determination in a California case is
3 to make a moral, normative determination, a single moral
4 determination as to whether this man, this defendant
5 standing before them in this Court today deserves death
6 or life without possibility of parole.
7 JUSTICE KENNEDY: Do you have an instruction that
8 supports what you've just told us that the jury is told
9 they have to make a single moral determination? Is that
10 what the court instructed the jury to --
11 MR. JOHNSON: No, that's --
12 JUSTICE KENNEDY: -- instructed in terms of factor
13 (k), and I think you have to rest on your argument that
14 what we are talking about is the gravity of his crime for
15 purposes of sentencing. I understand that argument. But
16 then when you go on to make the argument that you just
17 made, the jury understands it's a single moral judgment,
18 is there some specific instruction you can point to other
19 than the factor (k) instruction itself?
20 MR. JOHNSON: There are, and I may have been
21 misleading. The jurors are expressly instructed that is --
22 that it is their duty to determine, and their only duty to
23 determine whether the defendant should receive life or
24 death in parole, or life without the possibility of
25 parole. And in light of that determination, jurors

1 naturally would understand that they could take into
2 account anything that extenuated the gravity of the crime.
3 CHIEF JUSTICE ROBERTS: Well, that's what they were
4 told, right? They were instructed that the mitigating
5 circumstances including factor (k) are merely examples,
6 right?
7 MR. JOHNSON: Yes. In this -- yes. In this --
8 JUSTICE STEVENS: May I ask you about that? This
9 case unusual because it has that separate instruction
10 that the mitigating circumstances are merely examples
11 and you should pay careful attention to those which are
12 made, but you may rely on other mitigating circumstances.
13 May I ask you, would it have been constitutional if
14 the judge had added a sentence at the end of that
15 instruction which said however, you may not consider
16 anything mitigating unless it extenuates the gravity of
17 the crime?
18 MR. JOHNSON: It would have been constitutional to
19 the extent that it would have allowed the jurors to give
20 some use whatsoever to Belmontes' proffered evidence in
21 mitigation, and that's what this Court's prior cases has
22 -- in particularly, the various Texas cases have said
23 that jurors must be given an avenue to make use of the
24 evidence. In California --
25 JUSTICE STEVENS: I'm not sure you've answered my

1 question.
2 Would it have been a constitutional addition to that
3 instruction to say but I want you to clearly understand
4 that it is not to be considered mitigating unless it
5 extenuates the gravity of the crime? Would that have
6 been permissible?
7 MR. JOHNSON: It would appear to -- no. It would
8 appear not to be.
9 JUSTICE STEVENS: Because that would have foreclosed
10 consideration of the Skipper type evidence, right?
11 MR. JOHNSON: It would have -- well, it would
12 foreclose consideration of all present good character
13 evidence, I believe. It would have foreclosed the
14 consideration of Boyde's evidence, of Payton's evidence.
15 JUSTICE STEVENS: So then the question in this case
16 is whether the jury might have understood factor (k) to
17 limit them to the consideration of factors that extenuate
18 the gravity of the crime?
19 MR. JOHNSON: Well the -- yes. The question is
20 whether the jurors would reasonably understand the
21 instruction to preclude the consideration of
22 constitutionally relevant -- of relevant evidence.
23 CHIEF JUSTICE ROBERTS: This Court in Payton said
24 that it was not unreasonable to conclude that evidence of
25 remorse extenuated the gravity of the crime. So why

1 wouldn't an instruction to the jury along the lines of
2 Justice Stevens' hypothetical have been perfectly
3 constitutional as extenuates the gravity of the crime
4 that's interpreted in Brown v. Payton?
5 MR. JOHNSON: Well, to the extent the jurors would
6 have likely understood that, that instruction in
7 Belmontes and in Payton to extenuate the gravity of the
8 crime for purposes of their sentencing determination.
9 JUSTICE SCALIA: Well, that's what I thought your
10 position was. And then you back off of it, and you say
11 extenuate the gravity of the crime doesn't relate to
12 anything that's after the crime. I would have
13 interpreted the phrase to mean anything that justifies
14 you in giving a lesser punishment for the crime.
15 MR. JOHNSON: That's precisely my argument.
16 JUSTICE SCALIA: Well, then your answer to Justice
17 Stevens should have been different.
18 MR. JOHNSON: Well, if -- and I apologize if I was
19 misunderstood. My question --
20 JUSTICE GINSBURG: Do you think that the jury in
21 this very case understood that, given the questions that
22 were asked.
23 MR. JOHNSON: Oh, yes, Your Honor. In this case,
24 there is certainly no reasonable likelihood that the
25 jurors felt precluded, because as was previously

1 discussed, first there was this additional instruction
2 that supplemented the other instructions in this case
3 that made it very clear that the aggravating factors,
4 the various factors listed in the standard instruction A
5 through G, that those -- they could only rely on those
6 two for aggravating factors, but their understanding of
7 mitigating factors was not limited. In fact, they were
8 expressly told that that the previous factors were merely
9 examples.
10 JUSTICE GINSBURG: What about the -- what actually
11 went on, the jury first came in, and said, what if we
12 can't decide, can we decide by majority. And then the
13 question was asked that seemed to indicate the jurors'
14 understanding that we take all those factors that you
15 told us about, and we just take those factors into
16 account. And there were clarifying instructions asked
17 by the defense that were not given.
18 MR. JOHNSON: Well, there -- to answer your
19 questions, Your Honor, first, there was no indication at
20 this conference that the jurors were, in fact, confused
21 about whether they could consider any particular evidence
22 as being mitigating. The conference itself was called to
23 address, as you mentioned, the jurors' concern -- or the
24 jurors' inquiry about the result -- what would happen if
25 they couldn't reach a unanimous verdict in this case.

1 JUSTICE SOUTER: Well, that may be why they had the
2 conference, but they got into the colloquy that Justice
3 Ginsburg described and the last, as I recall, the last
4 reference to factors, whether aggravating or mitigating,
5 was simply in terms of the list or the listing, I guess
6 the term was. So that the -- it seems to me at
7 least, there's a fair argument on the other side of this
8 case, that the last reference that the -- that the judge
9 made to the jurors with respect to aggravation or
10 mitigation was to refer to a listing.
11 The listing itself didn't have anything to do, as I
12 understand it, with the instruction that you are not
13 limited to the listed mitigating factors. So the concern
14 is that because the last reference was to the list, that
15 the list included factor (k) without embellishment, and
16 that jurors tend to give -- we have held that the jurors
17 tend to give the greatest emphasis to clarifying
18 instructions or later instructions in response to
19 questions. Isn't it a pretty good argument that in this
20 case, there is a reasonable likelihood that the jurors
21 went back to their task thinking that they were limited
22 to the list?
23 MR. JOHNSON: Respectfully, no, Your Honor. And the
24 reason why is that --
25 JUSTICE SOUTER: I'm not necessarily saying that's

1 my position, so you don't have to be respectful to me
2 about it.
3 MR. JOHNSON: I'll be respectful anyhow, your Honor.
4 JUSTICE SOUTER: Knock it down if you can.
5 JUSTICE SCALIA: Be respectful anyway.
6 MR. JOHNSON: The point is with this instruction
7 conference, an argument that -- that this reference to
8 the listing reflected some unconstitutional -- or
9 constitutionally restrictive view presupposes that the
10 jurors reasonably would have misinterpreted the meaning
11 of the factor (k), and there is nothing in there, in any
12 of these questions to put anybody on notice that they
13 had any such concerns. The first --
14 JUSTICE SOUTER: Well, except for the language in
15 factor (k) itself, and without some embellishment, isn't
16 it a bit of a stretch to think that factor (k) goes as
17 far as Skipper evidence?
18 MR. JOHNSON: No, Your Honor, it's not a stretch at
19 all, because any evidence relating to the defendant's
20 background and character, his present character in court,
21 could be seen as extenuating the gravity of the crime for
22 sentencing purposes. And the jurors --
23 JUSTICE GINSBURG: Well, California itself
24 recognized that there was a problem here of jury
25 confusion. And now they have amended the provisions, so

1 that it would be clear to any juror.

2 MR. JOHNSON: That's correct, Your Honor, in People

3 v. Easley, the California --

4 JUSTICE SCALIA: Well, maybe they thought that was a

5 problem of Ninth Circuit confusion rather than jury

6 confusion. I mean, having that opinion in front of them,

7 you would think they would amend it, of course, to prevent

8 that kind of decision again.

9 MR. JOHNSON: Well, what they were doing was

10 certainly a prophylactic measure here, to -- they

11 recognized that perhaps there might be some concern of

12 confusion, and so they wanted to forestall any chance of

13 that happening. But notably, this case and -- this case

14 and no other California Supreme Court case has found that

15 the factor (k) instruction, the pre-Easley version of it,

16 by itself, did mislead the jurors. In fact, the supreme

17 court in this case came down 7-0 in support of a

18 conclusion that the jurors were properly told about the --

19 JUSTICE GINSBURG: Where does this factor (k) come

20 from? What was the source of it?

21 MR. JOHNSON: The factor (k), as the entire standard

22 instruction given in these cases recites verbatim the

23 language of the California statute which was California

24 penal code section 190.3 and interestingly enough not

25 only the California Supreme Court but this Court

1 implicitly has both said that not only the California
2 statute but the instruction, this standard instruction
3 upon which is based on the statute do allow consideration
4 of all relevant mitigating factors in fact as far back as
5 1983 in this Court's California v. Ramos decision this
6 Court stated, albeit in dicta, that the factor (k) -- or
7 that the standard instruction would allow consideration
8 of background and character evidence and in fact the
9 Court even stated in footnote 20 --
10 JUSTICE STEVENS: Johnson, I don't mean to interrupt
11 you but I want to be sure that you answer -- you stick to
12 your answer to my question earlier.
13 MR. JOHNSON: Okay.
14 JUSTICE STEVENS: Because you -- I think you changed
15 your answer after Justice -- the Chief Justice and
16 Justice Scalia suggested you might have made a mistake.
17 Are you -- is it your position that it would be
18 constitutional to instruct the jury that you may not
19 consider any evidence mitigating unless it extenuates
20 the gravity of the crime?
21 MR. JOHNSON: Yes Your Honor because the jurors
22 even if that instruction were given the jurors would
23 understand that an instruction that extenuates the
24 gravity of the crime would encompass any relevant
25 character evidence and this Court has made these

1 determinations all the time.
2 JUSTICE STEVENS: Is that answer consistent with
3 the position of defense counsel who said he would not
4 insult the intelligence of the jury by suggesting to
5 them that the religious conversion of the defendant did
6 not extenuate the gravity of the crime?
7 MR. JOHNSON: No, Your Honor. What the counsel
8 actually said was that the defendant's religious
9 conversion did not provide an excuse for the crime itself
10 and in fact, that argument was itself echoing the
11 language of the factor (k) instruction which of course --
12 JUSTICE STEVENS: That's right.
13 MR. JOHNSON: -- directs the jurors to consider any
14 other circumstance that extenuates the gravity of the
15 crime, even though it's not a legal excuse for the crime.
16 And so counsel was dovetailing his very effective
17 argument with the instruction itself. And what's
18 significant here is that like in Payton, like in Boyde,
19 this case involved virtually all of Belmontes' penalty
20 phase evidence. And the entire main thrust of his
21 argument to the jury was that he could not make it on the
22 outside but he could fit in the system and contribute to
23 society in the future if given a chance on the inside.
24 And again as was true in Boyde and Payton --
25 JUSTICE STEVENS: If that were true would that have

1 extenuated the gravity of the crime, if he could get
2 along in prison.
3 MR. JOHNSON: Yes, for purposes of jury sentencing
4 determination. Absolutely. Because it would be viewed
5 as good character evidence. Precisely --
6 JUSTICE STEVENS: And you think juries would
7 clearly understand that what he did in the future in
8 prison would extenuate the gravity of the crime?
9 MR. JOHNSON: Yes Your Honor. Because in light of
10 everything that's been said and done in this trial, as
11 the Boyde court noted jurors do not parse instructions
12 for subtle shades of meaning. They understand
13 instructions in a commonsense manner and --
14 CHIEF JUSTICE ROBERTS: The prosecutor didn't object
15 to any of this mitigating, mitigation evidence that was
16 submitted by the defendant, did he?
17 MR. JOHNSON: The prosecutor objected to none of
18 this evidence and in fact the prosecutor in closing
19 statement argued that not only could the jurors consider
20 Belmontes' forward-looking prospects but the jurors
21 should consider those prospects. So in this case
22 what we have --
23 JUSTICE GINSBURG: Well, the prosecutor's closing
24 was schizophrenic because he said, but really it
25 shouldn't matter.

1 MR. JOHNSON: He acknowledged it was something
2 that, this argument was something that was proper for
3 consideration, but however he argued that the evidence
4 of Belmontes' religious conversion which happens, you
5 know, and then lapsed immediately before he committed
6 the murder in this case, was very weak evidence. But
7 he did nonetheless tell the jurors that they could
8 consider Belmontes' prior character as bearing on his
9 present character now.
10 JUSTICE SOUTER: But didn't he go beyond saying it
11 was weak? He did say that. But didn't he say that he
12 doubted that it fit within (k)?
13 JUSTICE GINSBURG: Yes.
14 MR. JOHNSON: Yes. The prosecutor first stated that
15 the factor (k) was a catchall, a true catchall.
16 JUSTICE SOUTER: So the prosecutor I take it would
17 have answered Justice Stevens' question the other way.
18 The prosecutor would have said well, no, this probably
19 would not be understood by the jurors to refer to the
20 gravity of the offense.
21 MR. JOHNSON: No, Your Honor. Because in the
22 previous page the prosecutor did state that it was a
23 catchall, you know, which by implication incorporates
24 everything. And the prosecutor's argument that I'm not
25 sure if it fits in there, signifies that, not that the

1 evidence, that such evidence could not be considered as
2 mitigating in a general manner, but that -- just that
3 the religious evidence in this case was extremely weak
4 to the point of having as a practical purpose no
5 mitigating value, the prosecutor followed that comment,
6 I'm not sure it fits in there, in the next breath with
7 it's -- something to the effect of it's no secret that
8 Belmontes' religious evidence is pretty shaky here.
9 And went on to conclude that. But then in the next
10 breath he said but nonetheless this is something that's
11 proper for you to consider.
12 And again reasonable jurors hearing this, having
13 been given the instruction here would reasonably
14 interpret this, all of this evidence as something they
15 could use to extenuate the gravity of the crime. And
16 particularly in this context because like in Boyde, in
17 addition to this factor (k), the standard instruction
18 directed the jurors to consider all the evidence. The
19 first factor of the enumerated factors A through G in
20 this case told the jurors that they should, that they
21 should focus on -- that the first thing to consider was
22 the -- or the circumstances of the crime itself.
23 The final factor therefore that any other
24 circumstance that extenuates the gravity of the crime
25 would clearly be understood to relate to matters outside

1 the crime itself. And to the extent that there was any
2 ambiguity about the meaning of that in this particular
3 case, the argument by counsel, the additional instruction
4 here, clarified that to the point that there is certainly
5 no reasonable likelihood that the jurors felt that they
6 were constrained in considering any mitigating evidence
7 in any way they thought fit.
8 JUSTICE GINSBURG: Mr. Johnson when I asked you
9 about the derivation of factor (k) you gave me a
10 California statutory cite but does it come from any model
11 code? Does any other state have such a provision? How
12 widespread is it?
13 MR. JOHNSON: The actual wording of this
14 instruction?
15 JUSTICE GINSBURG: How many states have an
16 instruction that talks about extenuating the
17 circumstances of the crime?
18 MR. JOHNSON: I'm not sure, Your Honor. I'm not
19 sure. I know that this instruction itself came from a
20 statute which in turn was, was adopted from the
21 California Briggs initiative in the 1978 statute. I'm
22 not aware of any, of any other states, there may or may
23 not be, who have adopted the same statutory model that
24 California has.
25 JUSTICE GINSBURG: Which, California hasn't had it

1 since 1983, right?
2 MR. JOHNSON: Pardon me, Your Honor?
3 JUSTICE GINSBURG: California hasn't used this
4 instruction since 1983?
5 MR. JOHNSON: That's correct, Your Honor. After
6 People v. Easely, the California Supreme Court augmented
7 the instruction.
8 JUSTICE GINSBURG: So is this a one of a kind case?
9 And you said in your brief that the Ninth Circuit
10 decision threatens many other valid California death
11 judgments. But these would all have to be rather ancient
12 cases?
13 MR. JOHNSON: Yes. And unfortunately, there's
14 several of them that are still being litigated. I have
15 done research on this issue and as of this date, I can't
16 give you an actual, an absolute number but I believe
17 there is approximately 15 cases pending like this one
18 that involve the factor (k) instruction, this factor
19 (k) instruction, that involve evidence of somehow future
20 looking evidence, which all character evidence frankly
21 is future looking --
22 JUSTICE GINSBURG: And that wouldn't wash out on the
23 other grounds?
24 MR. JOHNSON: Right. That and -- that are still
25 pending and that are unlike Payton, are not governed by

1 the AEDPA.

2 JUSTICE SCALIA: You're saying those convictions

3 are more than 23 years old.

4 MR. JOHNSON: Yes, Your Honor. Unfortunately, there

5 is -- there -- I believe all of them are being litigated

6 now in the Federal court system in California. If you

7 have no further questions, I guess I'll reserve the rest

8 of my time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel. Mr.

10 Multhaup.

11 ORAL ARGUMENT OF ERIC S. MULTHAUP

12 ON BEHALF OF RESPONDENT

13 MR. MULTHAUP: Mr. Chief Justice and may it please

14 the Court:

15 Here is Respondent's 60 second nutshell summary of

16 our core position. This case does not turn on the

17 constitutional factor (k) standing alone. Rather it

18 turns on a straightforward application of the Boyde

19 test to the unusual, unique circumstances that occurred

20 during the arguments, instructions to deliberations at

21 the penalty trial of this case.

22 Here are the two key components of our claim.

23 During arguments to the jury both counsel conveyed to

24 the jury that Belmontes' evidence of Youth Authority

25 religious experience was not covered by factor (k).

1 However, both counsel suggested to the jury that it
2 should be considered anyway. Now this is unusual because
3 of all the things that the district attorney and defense
4 counsel disagreed on, this was one that they did agree
5 on and it's likely that the jury would have taken note
6 of that.
7 The case then proceeded to instructions and
8 deliberations. The jury came back to court, announced
9 that they were deeply divided, perhaps with the majority
10 favoring life. The turning point occurred when one
11 juror, Juror Hern, requested judicial confirmation that
12 the specific list of factors previously given was the
13 only basis, was the only framework in which the penalty
14 decision could be made. At that point, the trial court
15 had a constitutional obligation to disabuse Juror Hern
16 and the rest of the assembled jurors of that
17 misapprehension and at the very least to reinstruct the
18 jurors that the enumerated factors were merely
19 illustrative and not exhaustive, and instruct the
20 jurors that the jury had to consider all of the
21 mitigating evidence.
22 The trial court did neither, with the result that
23 the jury all too likely would turn to its deliberations
24 with the belief that the only factors, the only matters
25 they considered, could consider were those encompassed

1 within the enumerated factors and believing based on
2 counsel's prior arguments that factor (k) did not
3 include the Youth Authority religious experience
4 evidence.
5 JUSTICE ALITO: When did the defense counsel say
6 that this evidence did not fit within factor (k)?
7 MR. MULTHAUP: Your Honor, it occurred in
8 argument -- and my counsel -- esteemed co-counsel will
9 give me the exact page -- but it occurred in the context.
10 The context, during the prosecutor's argument, the
11 prosecutor said to the jury that, "I suspect," and then
12 he for emphasis said, "I can't imagine that you won't be
13 told that the religious-conversion evidence doesn't fit
14 within factor (k)." And, at that point, he expressed
15 reservations, doubts, as to whether it did fit in factor
16 (k) or --
17 CHIEF JUSTICE ROBERTS: Why does that --
18 MR. MULTHAUP: -- any other factor.
19 CHIEF JUSTICE ROBERTS: Why does that matter?
20 Because the jury was told that the factors were merely
21 examples of the mitigating evidence they could consider.
22 MR. MULTHAUP: I'm --
23 CHIEF JUSTICE ROBERTS: It probably didn't fit
24 into factor (h), either, but it doesn't matter.
25 MR. MULTHAUP: Well, it has -- if it -- oh,

1 Your Honor, the -- calling your -- or you've called my
2 attention to the instruction that said that the -- said
3 in the prior set of -- or in the general set of
4 instructions, that the enumerated factors were merely
5 illustrative. Now, that instruction had a cloud of
6 confusion surrounding it, because the way it was phrased
7 was the Court said, "The mitigating factors that I have
8 expressed to you are illustrative." There was no list
9 of mitigating factors. There was only a single list,
10 unitary list, of factors that could be either
11 aggravating or mitigating, depending on a jury's
12 decision.
13 The instruction that you're referring to, Your
14 Honor, was a -- the -- was the result of the trial court
15 denying some, and granting some, parts of the special
16 instructions requested by the defense. And so, when the
17 trial court said to the jury, "The list of mitigating
18 factors is illustrative only," I -- we, who know the
19 background of this, understand what -- the point he was
20 trying to make, but the jury hearing it, they would think,
21 very reasonably, "There's no list of mitigating factors."
22 JUSTICE ALITO: You said this case is
23 different, because both counsel told the jury that the
24 evidence that you're relying on did not fit within factor
25 (k). And I'm not sure what you're referring to.

1 MR. MULTHAUP: Okay.
2 JUSTICE ALITO: Now, as the defense counsel, are
3 you referring to what you quoted on page 9 of your brief,
4 where he says, "I'm not going to insult you" -- what you
5 highlighted on page 9 -- "I'm not going to insult you by
6 telling you I think it excuses, in any way, what happened
7 here"? That's what you're -- is that what you're
8 referring to?
9 MR. MULTHAUP: That's one of the passages that
10 I'm referring to, and it came as a direct response to the
11 District Attorney, in effect, calling out the defense
12 attorney, "I can't imagine that you won't be told that
13 this fits within factor (k)." So, at that point, the
14 defense counsel had to make a decision, "Okay, either I
15 have to argue that my Skipper evidence is -- my square peg
16 of Skipper evidence has to fit in the round hole of" --
17 JUSTICE ALITO: Isn't he --
18 MR. MULTHAUP: -- "factor (k)" --
19 JUSTICE ALITO: -- saying something very
20 different there? He isn't -- he is not saying, "This
21 doesn't fit within factor (k)." And he makes no reference
22 to factor (k). He says nothing about "extenuating." He
23 says "excuses." Isn't that something very different,
24 "excusing" the crime?
25 MR. MULTHAUP: Your Honor, this Court has used

1 the terms "extenuate" and "excuse" as synonyms in Boyde
2 and --
3 JUSTICE ALITO: If you had
4 MR. MULTHAUP: -- in Payton --
5 JUSTICE ALITO: If you were arguing this to the
6 jury, would you have said, "You know, my client earned a
7 position of responsibility on the fire crew that patrolled
8 the Sierra Foothills, and, therefore, that excuses the
9 crime that you've found that he committed here"?
10 MR. MULTHAUP: No. No.
11 JUSTICE BREYER: I don't see anywhere in Mr.
12 Schick's statement, at least on 165 to 170, where he
13 says what you said he said. I mean, now, maybe he says it
14 some other place, but I'd like a reference to it. But I
15 -- what I have him as saying is that -- he says, for
16 example, several times, "The presence -- I don't suggest
17 that the -- that the presence of religion, in itself, is
18 totally mitigating." Well, it certainly wasn't, in this
19 instance. I gather I'm right. Am I right in thinking
20 that all this religious conversion took place before he
21 murdered the girl? So, this is not a case of your trying
22 to get some evidence that took place after the crime.
23 MR. MULTHAUP: That's right. And --
24 JUSTICE BREYER: All right. If that's right,
25 then maybe it does more easily fit within factor (k). The

1 prosecutor told the jury they should consider it, or they
2 could. The judge told the jury they could consider it --
3 says you take it -- this is an example -- he says,
4 "It's an example in factor (k)." Maybe he's wrong, but
5 they certainly likely think they can consider it. And
6 Mr. Schick doesn't say it's not in factor (k). At least,
7 I don't see it. That's why I'm asking.
8 MR. MULTHAUP: Your Honor, the whole point of
9 factor (k) is that -- evidence that's an excuse for the
10 crime. And if we're --
11 JUSTICE BREYER: No, no, I know the point of
12 factor (k). I'm trying to be absolutely certain, before
13 thinking --
14 MR. MULTHAUP: Right.
15 JUSTICE BREYER: -- he didn't say it, that I've
16 made every effort to get from you the place where -- that
17 this -- where the defense counsel says, "Jury, I agree,
18 you cannot put this into factor (k)."
19 MR. MULTHAUP: Okay. And, Your Honor, looking
20 at it in context, given the District Attorney's argument,
21 the District Attorney says, "I can't imagine you won't be
22 told that it doesn't -- that it -- that it doesn't fit
23 within factor (k)." So, the defense attorney gets up and
24 says, "I'm -- I am going to tell you that it doesn't
25 within -- fit within factor (k). It doesn't" --

1 JUSTICE KENNEDY: And that page --
2 MR. MULTHAUP: -- "constitute" --
3 JUSTICE KENNEDY: -- where he says that is
4 where?
5 MR. MULTHAUP: When he -- when he says, Your
6 Honor, "It doesn't constitute an excuse in any way."
7 JUSTICE BREYER: It doesn't constitute an
8 excuse.
9 MR. MULTHAUP: It doesn't excuse, in any way,
10 Your Honor. And we -- as a matter of semantics --
11 JUSTICE KENNEDY: But in -- but, in a sense,
12 that's right, just like remorse. Remorse doesn't excuse
13 the crime. It's a consideration that you take into
14 account in assessing the gravity of the crime for purposes
15 of punishment.
16 MR. MULTHAUP: Your Honor, this is a point of,
17 perhaps, semantics. But the -- by the time you get to
18 penalty phase, there's nothing to excuse the crime, in the
19 sense of self-defense or "not guilty by reason of
20 insanity." The only thing --
21 JUSTICE BREYER: -- "in any way."
22 MR. MULTHAUP: It does say "in any way."
23 JUSTICE BREYER: Where?
24 JUSTICE SCALIA: It's on page 9 of your -- of
25 your brief. The --

1 MR. MULTHAUP: Thank you.

2 JUSTICE BREYER: Thank you.

3 JUSTICE KENNEDY: -- italicized portion.

4 JUSTICE STEVENS: It's on 166 of the joint

5 appendix.

6 MR. MULTHAUP: Thank you.

7 And if the -- if trial counsel was trying to

8 make the point that, "Well, it doesn't constitute a legal

9 excuse, but it does constitute a partial excuse or some

10 kind of mitigating evidence under this factor," he would

11 have put that in there. The clear import, from the

12 context here, is that defense counsel was not trying to

13 sell the jury a position that was, on its face, untenable,

14 but, rather, to acknowledge that it did not fit within the

15 "excuse the gravity of the crime" factor --

16 JUSTICE SCALIA: Only if you think that excusing

17 the crime and extenuating its gravity are one and the same

18 thing, which I don't really think.

19 MR. MULTHAUP: Well, Your Honor, there's two --

20 I'd like to make two responses to that. First of all,

21 this Court has used those terms interchangeably in Boyde

22 and Payton, with respect to mitigating evidence. Second

23 of all, let's -- as a -- as a practical matter, we have a

24 defense attorney arguing a case to a jury in a Central

25 Valley California county. And if the defense attorney has

1 a choice between two synonyms, one which is used in common
2 parlance, "excuse," and one which is not used in common
3 parlance, "extenuate," it hardly constitutes an -- a
4 defect or concession on his part if he were to say, "This
5 does not excuse the crime in any way." That's plain
6 speaking to a jury. And what he --
7 JUSTICE GINSBURG: But wouldn't a jury think all this
8 evidence must have some purpose? The only purpose it
9 could have is to propel us toward life rather than death.
10 I mean, the bulk of the evidence at the sentencing phase
11 -- wasn't it -- was how he behaved when he was a prisoner
12 before.
13 MR. MULTHAUP: Your Honor, not -- that's not exactly
14 what happened at penalty phase here. This is not a case
15 like Boyde, where all the evidence was background and
16 character evidence, and it's not a case like Payton, where
17 the only evidence was a post-crime conversion. This case
18 involved a mixture of evidence, where first there was the
19 grandfather who testified to what a bad upbringing he had.
20 Traditional background and character evidence. The mother
21 testified to her undying love for her son. Traditional
22 evidence. Friends testified to his good characteristics,
23 and then at the end, there was a clear segment that
24 related to his good performance in Youth Authority and his
25 religious conversion. So, it was only a -- it was a

1 partial part -- partial part of the penalty-phase
2 presentation, but it certainly wasn't the entire
3 presentation as it was in Boyde and Payton.
4 JUSTICE GINSBURG: Even so, there was extensive
5 testimony about his prospects for doing good in a prison
6 setting.
7 MR. MULTHAUP: Well, certainly, Your Honor.
8 JUSTICE GINSBURG: And the jury must have thought
9 there's some reason why the judge allowed that evidence
10 in. And what reason could it be other than to show that
11 if he is given life, he will be a good prisoner?
12 MR. MULTHAUP: Your Honor, that's a very logical,
13 sensible thing for the jury to have thought. And now I'd
14 like to drop the second shoe of the key components of our
15 claim. The first shoe was the arguments of counsel that
16 we have discussed the various permutations on. The most
17 likely -- so the jury began deliberating based on the
18 instructions and the arguments that they had, that they
19 had had.
20 And it's entirely likely that when the jury was
21 favoring a life verdict during the first part of their
22 deliberations, Belmontes' prospects for good behavior in
23 prison and contributions were part of the debate. When
24 Juror Hern asked for judicial clarification -- not
25 clarification, confirmation of a very specific view that

1 only the enumerated factors could be considered in the
2 penalty phase deliberations.
3 The jury in the trial court assented without
4 qualification to that. At that point, the jury would have
5 very likely thought the trial court who holds a position
6 of great deference to us, much more than most other
7 authority figures we have in our life just told us what
8 the marching orders are here. This is the framework for
9 decision.
10 Now, what happened during the trial is the defense
11 -- and I'm suggesting what the jury might have thought
12 in relation to your question, that the defense attorney
13 was taking his best shot for his client, pushing the
14 envelope, maybe went over the top a little bit, but
15 defense attorneys do that. The prosecutor was being a
16 very decent stand up kind of person, and -- but right
17 now, when we get down to the business of making a
18 decision, we have to follow the rules. And the rules
19 are what the -- are what Judge Gisson just confirmed
20 to us, that we are limited to the enumerated factors,
21 and factor (k) does not include the Skipper evidence
22 because that was explained to us by counsel.
23 I would like to --
24 CHIEF JUSTICE ROBERTS: Before you move on, counsel.
25 JUSTICE KENNEDY: Well, of course don't you --

1 excuse me.

2 CHIEF JUSTICE ROBERTS: Don't you have to address

3 the Teague question a little bit. You're entitled to

4 this new rule adopted by the Court of Appeals only if

5 it was dictated by precedent at the time the judgment

6 became final. Isn't that kind of a hard argument to make

7 in light of our subsequent decision in Brown v. Payton.

8 MR. MULTHAUP: Your Honor, I don't see -- as to the

9 first part of Your Honor's question, I don't believe that

10 there is any new rule whatsoever in the Ninth Circuit

11 opinion, it's a straightforward application of Boyde, to

12 the totality of circumstances that occurred.

13 CHIEF JUSTICE ROBERTS: Boyde? It's a

14 straightforward application of Boyde?

15 MR. MULTHAUP: Yes. The Ninth Circuit began with

16 Boyde, and it went through all of the proceedings at trial

17 and concluded that there was a reasonable likelihood that

18 the jury didn't consider Skipper evidence. And that's

19 what we are asking this Court to do, the exact same

20 applying the Boyde test to the rule, the rule decision

21 that was clearly established by this Court as of 1986,

22 and reiterated and expanded by this Court in 1987 with

23 Skipper.

24 JUSTICE SCALIA: Yes, but what has to be clear

25 under Teague is not just the rule, but the rule's

1 application in circumstances like this. There are a
2 lot of rules that are clear, but if Teague means
3 anything at all it has to mean that you should have known
4 that in this case, the rule would produce this result.
5 So it's not enough to say that there was a rule. There
6 are a lot of rules out there, but the question is whether
7 the outcome should have been clear at the time. Isn't
8 that what Teague means?
9 MR. MULTHAUP: Certainly, Your Honor. And applying,
10 because when we take a look at Penrey I, this Court said
11 in response to a Teague argument by the Attorney General,
12 this Court held that Penrey got past the threshold
13 Teague issue, because at the time of the finality of his
14 direct appeal in 1986, the rule was well-established that
15 the sentencer may not be precluded from considering
16 relevant evidence in mitigation by Lockett, Eddings, and
17 others. So if that was a firmly established rule as of
18 1986 --
19 CHIEF JUSTICE ROBERTS: Well, Penrey was considerably
20 tightened by the subsequent decision in Graham v. Collins,
21 though.
22 MR. MULTHAUP: Graham v. Collins was an AEDPA case,
23 as was Payton. So we have a very, very different
24 standard of review. And if I may, Your Honor --
25 CHIEF JUSTICE ROBERTS: I know Payton was an AEDPA

1 case, but it nonetheless concluded that it was not
2 unreasonable for the California Supreme Court to read
3 Instruction (k) in a way that allowed this evidence to
4 be considered. And I would have thought, if it was not
5 unreasonable to have that reading, that the contrary
6 reading that you're proposing, and that the Ninth Circuit
7 adopted below, could hardly be said to have been
8 dictated by existing precedent.
9 MR. MULTHAUP: Well, the -- our position in
10 relation to that is the direct quote from -- direct
11 quote from Payton itself in which the Court said that
12 assuming the California Supreme Court was incorrect,
13 Payton nonetheless loses. Here we are arguing that
14 the California Supreme Court was incorrect, and
15 therefore Belmontes should win.
16 CHIEF JUSTICE ROBERTS: That's because even if
17 incorrect, it was nonetheless reasonable. And I'm
18 just having trouble understanding how, if a contrary
19 position is dictated by precedent under Teague, a
20 reading 180 degrees the opposite of that could be
21 regarded by this Court as reasonable.
22 MR. MULTHAUP: The unusual facts of this case are
23 much stronger in favor of relief under the Boyde test
24 than with those in Payton. Therefore, applying the
25 long-standing rule of Lockett and Eddings to the

1 different and more compelling facts of this case,
2 there is no reason -- there is every reason to provide
3 Belmontes relief where it was denied to Payton. And
4 there is no reason to believe that the California Supreme
5 Court was being incorrect but reasonable in -- to presume
6 or find, based on Payton, that the California Supreme
7 Court was being incorrect but reasonable in this case.
8 Penrey could not have won his case under the, under
9 the -- that particular analysis, because the Texas
10 Supreme Court--
11 CHIEF JUSTICE ROBERTS: Graham didn't win his case.
12 MR. MULTHAUP: And Payton didn't win either, but we
13 are operating under the prior regime. So I understand,
14 the Court is suggesting, I believe, that somehow Payton
15 is a sword in some sense to deny relief as to all
16 California defendants under penalty phase instructional
17 claims cited by the California Supreme Court, even under
18 different facts and under more egregious circumstances.
19 I may be misinterpreting the Court's argument, but
20 I would argue that there are any number of scenarios,
21 notwithstanding Payton, that would require relief under
22 the pre-AEDPA standards when you apply the test of Boyde
23 to all the circumstances of the case.
24 JUSTICE GINSBURG: Mr. Multhaup, one aspect of your
25 argument I wish you would clarify and that's in your

1 brief at page 20 footnote three. As I understand it,
2 you are saying you are not challenging factor, the factor
3 (k) instruction as excluding Skipper evidence. Your
4 challenge is limited to this particular case. Is that
5 what you're saying in that footnote.
6 MR. MULTHAUP: Yes, Your Honor. I'm not here to
7 refight the battle of Boyde. You know, I spilled tons
8 of hours of time and printer's ink in an amicus brief in
9 1989 and I understand the concept of "you lose." What
10 we are arguing is that the Boyde test should be applied
11 to the circumstances of this case, and that factor (k)
12 standing alone in a case where the defendant relies on
13 Skipper evidence does not warrant relief by that fact
14 alone. Here we have much more than that fact which under
15 Boyde does call for, for relief. I would like to give
16 Respondents --
17 JUSTICE GINSBURG: And the much more is the
18 questions that the Jury asked?
19 MR. MULTHAUP: The much more includes the arguments
20 by counsel which notwithstanding differing, reasonably
21 different views of it does put a context on the -- put
22 into context on what defense counsel was arguing. We
23 have the confusion inherent in the instruction that the
24 Court gave the putatively proper instruction about them
25 being illustrative rather than exhaustive. We have the

1 colloquy during the penalty deliberations. We have Juror
2 Hailstone's follow-up question regarding the possibility
3 of considering the availability of psychiatric treatment,
4 which was explicitly rejected, and very likely confirming
5 the message that had just been given via the answer to
6 Juror Hern's case that only the enumerated factors could
7 be considered.
8 CHIEF JUSTICE ROBERTS: Well, there is no evidence
9 on that question presented, right, the reason that the
10 possibility of psychiatric treatment could not be
11 considered is because neither party had put evidence
12 on that question before the jury.
13 MR. MULTHAUP: Well, Your Honor, you know that
14 because you're the Chief Justice, but the people of San
15 Joaquin County had no idea that that was the reason,
16 and if not explained --
17 CHIEF JUSTICE ROBERTS: But it's a question of what
18 mitigating evidence was put before the jury. The jurors
19 couldn't consider that because it was quite proper for
20 the trial judge to say you can't consider that because
21 there was no evidence on it.
22 MR. MULTHAUP: It would have been perfectly proper
23 for the trial court to say you can't consider that
24 because, appended exactly the explanation that you gave,
25 and the jurors would have understood that they had to

1 consider the evidence presented but they couldn't
2 speculate about other things. If at the crucial point
3 in the proceedings the trial court had said Juror Hern,
4 you do have to pay attention to those factors, but they
5 are illustrative rather than exhaustive, and you must
6 consider all of Belmontes' evidence, please go back and
7 deliberate, that would have cured the errors here.
8 However, the error occurred when the court didn't do
9 that, and Juror Hailstone's question, the trial court's
10 answer could only have reaffirmed the misimpression that
11 the court returned to the -- to deliberate with.
12 And if -- just a few minutes. I'd like to give
13 Respondent's answer to Justice Kennedy's question to
14 Petitioner paraphrasing somewhat, how does Skipper
15 evidence extenuate the gravity of the crime? And the
16 answer is, it doesn't at all logically, ethically or
17 morally. As defense counsel conveyed to the jury, the
18 circumstances of the crime are what they are and there
19 is nothing that can be done about that. The
20 circumstances of the crime are immutable and irreparable.
21 The only thing that can be extenuated in a penalty
22 presentation is Petitioner's culpability for the crime,
23 and counsel argued that Petitioner's culpability was to
24 some extent extenuated and mitigated because the evidence
25 showed that there was no plan to kill the decedent when

1 they went to her house.

2 JUSTICE KENNEDY: But we have said that remorse

3 extenuates the gravity of the crime for punishment

4 purposes under factor (k). And that's --

5 MR. MULTHAUP: Of course --

6 JUSTICE KENNEDY: And that's post crime.

7 MR. MULTHAUP: Your Honor, this pre and post

8 distinction I don't believe has, is a relevant

9 distinction. It's whether it's functionally related to

10 the culpability for the crime, because when a defendant

11 expresses remorse --

12 JUSTICE KENNEDY: Oh, you think the pre and post

13 distinction has no bearing on this case? I thought that

14 was really the linchpin of your argument?

15 MR. MULTHAUP: No, Your Honor. It's -- the Skipper

16 evidence is a specific and different kind of mitigating

17 character evidence that doesn't extenuate the gravity of

18 the crime but it provides a different kind of reason for

19 sparing the defendant's life. There is --

20 JUSTICE GINSBURG: And yours is both pre and post,

21 that is, you're referring to conduct that took place

22 before this crime was committed, that is his prior

23 incarceration, and asking the jury to project that

24 forward to say that's how he behaved in prison before

25 he committed this most recent crime, and that's how he

1 is likely to behave again.
2 MR. MULTHAUP: Well, all of the Skipper evidence in
3 this case has occurred as a matter of historical fact
4 before the capital crime and, which in fact gives it
5 much more weight because it can't be suggested that he
6 contrived his good conduct after being arrested for the
7 capital crime. But, I'm going to make a broad statement
8 here. There is no reported case in California where
9 either a defense attorney or the California Supreme Court
10 makes a text-based argument that Skipper evidence
11 extenuates the gravity of the crime, because it's
12 illogical and doesn't work. Look what the defense
13 attorney did in Payton. He argued that, well, of course
14 you have to consider that evidence under factor (k)
15 because it's a catchall. It's supposed to be inclusive.
16 That's not a text-based argument, that's a circumstantial
17 evidence kind of argument. When we look at that -- when
18 you look at that phrasing of extenuating the gravity of
19 the crime, with it's plain meaning in English, and the
20 distinction made in Skipper itself that Skipper evidence
21 does not relate to Petitioner's culpability for the
22 crime, the jury is going to appreciate what the attorney
23 said to them, that the Youth Authority religious
24 evidence does not extenuate the gravity of the crime,
25 but has independent mitigating effect outside those

1 enumerated factors. There is nothing -- that's a
2 perfectly appropriate position to take, no constitutional
3 problem there, until during deliberations the trial court
4 confirmed that they could only consider the enumerated
5 factors and could not consider nonstatutory mitigation,
6 any other kind of mitigation, because that in effect
7 closed out consideration of the, of the Skipper evidence.
8 JUSTICE SCALIA: If the judge's response to Juror
9 Hern was so misleading, why didn't counsel object to it,
10 if it was as obviously misleading as you say?
11 MR. MULTHAUP: Your Honor, it's like being --
12 stepping off a curb and being hit by a bicycle that you
13 didn't see coming. This occurred in the middle of jury
14 deliberations. Nobody expected a juror to ask a
15 question of this type, and of course I'm speculating
16 here, but the trial court fielded the questions,
17 responded off the cuff, and the jury went back.
18 JUSTICE SCALIA: That's why you have counsel there,
19 to help the court when the court makes a real boo-boo,
20 and if this was as obviously error as you say, one would
21 have expected some objection from defense counsel.
22 MR. MULTHAUP: One could also have expected the
23 trial court to say let's take a minute to think about
24 that, we're going into recess, and I'd like counsel's
25 opinion on this because this is a difficult question,

1 it's not a simple yes or no answer. Under --

2 CHIEF JUSTICE ROBERTS: Thank you, counsel. Mr.

3 Johnson, you have six minutes remaining.

4 REBUTTAL ARGUMENT OF MARK A. JOHNSON

5 ON BEHALF OF PETITIONER

6 MR. JOHNSON: Thank you, Your Honor. In a minute

7 I'd like to briefly touch on the Teague issue. At the

8 time Belmontes' judgment was pending, there was no

9 precedent that would have dictated the Ninth Circuit's

10 conclusion here regarding the sufficiency of the factor

11 (k) instruction and indeed, this Court's subsequent

12 holdings in Boyde and Payton, bear out of the fact that

13 it was at least -- that that decision certainly was not

14 dictated by precedent. In Boyde, this Court dealt with

15 evidence of good character that was precisely the same

16 as the evidence of good character here, that Belmontes'

17 evidence of having succeeded during a prior commitment

18 and religious conversion, that he might be able to help

19 others in the future, was good character evidence in

20 the same way that Boyde's evidence of having won a

21 dancing prize, of having helped children, of having

22 helped artistic -- of having artistic abilities, was

23 all good character. And there is certainly nothing in

24 Boyde to suggest that there is any distinction, but even

25 if there was, it would not be one that would have

1 compelled all rational jurors to distinguish the two
2 cases.
3 And that's further buttressed, of course, by this
4 Court's more recent opinion in Payton, which found that
5 it was at least reasonable for the state court to
6 conclude that Payton's post-crime forward-looking
7 evidence would be understood to fall within the factor
8 (k) instruction if it was at least reasonable for
9 California to find that such forward -- post-crime
10 forward-looking evidence would fit within the factor (k),
11 the Ninth Circuit's conclusion to the contrary regarding
12 precrime good character evidence certainly was not
13 dictated by precedent.
14 I'd also like to address quickly in my remaining
15 time Mr. Multhaup's arguments regarding the jury, the
16 argument of counsel and the jury questions.
17 Again, Boyde counsels that the relevant consideration
18 is whether there is any reasonable likelihood that the
19 jurors view the instructions in a way as to foreclose
20 consideration of constitutionally relevant evidence.
21 In this case, both the jurors were instructed with the
22 factor (k) said they were given the supplemental
23 instruction that said that the previous listing --
24 factors were only examples of some, and then both counsel
25 clearly said that the jurors could and should consider

1 this evidence. Is there some possibility out there that
2 some juror might have misinterpreted this in a different
3 manner? I suppose so, but there is certainly no
4 reasonable likelihood especially in light of the fact
5 that Belmontes' evidence virtually all of it was directed
6 at this main thrust of the argument. And just like in
7 Payton and Boyde, for the jurors to have believed that
8 they could nonetheless not consider that evidence would
9 have turned the whole proceedings into a virtual charade
10 or pointless exercise. So far as the questions during
11 juror deliberations, it's first important to recognize
12 none of these jurors said anything to suggest that they
13 were actually confused about whether they could consider
14 any evidence offered. Their question -- Juror Hern's
15 question merely related to her -- she wanted to confirm
16 her understanding about the role of balancing mitigating
17 versus aggravating factors under California law and
18 certainly the parties there would have been in a better
19 position to realize that if these questions somehow
20 suggested some ambiguity. There was no objection there
21 moreover in the same conference, the judge advised the
22 jurors to review the instructions again which of course
23 again included the factor (k) and which of course
24 included the supplemental instruction that said that
25 their consideration of mitigating factors was not limited

1 to those that had been listed, but those that had been
2 listed were merely examples. If the Court has no
3 further questions, I will submit the case.
4 CHIEF JUSTICE ROBERTS: Thank you counsel, the
5 case is submitted.
6 [Whereupon, at 12:03 p.m., the case in the
7 above-entitled matter was submitted.]
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