IN THE SUPREME COURT OF THE UNITED STATES

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JILL L. BROWN, ACTING WARDEN, :

Petitioner :

v. : No. 03-1039

WILLIAM CHARLES PAYTON. :

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Washington, D.C.

Wednesday, November 10, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:58 a.m.

APPEARANCES:

ANDREA N. CORTINA, ESQ., Deputy Attorney General, San Diego, California; on behalf of the Petitioner.

DEAN R. GITS, ESQ., Chief Deputy Federal Public Defender, Los Angeles, California; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:58 a.m.)

JUSTICE STEVENS: We will now hear argument in Brown against Payton.

Ms. Cortina.

ORAL ARGUMENT OF ANDREA N. CORTINA

ON BEHALF OF THE PETITIONER

MS. CORTINA: Justice Stevens, and may it please the Court:

In this case, the Ninth Circuit violated AEDPA by reversing the California Supreme Court's decision affirming Payton's 1982 death sentence. The California Supreme Court applied the exact right case, namely Boyde v. California, in the very manner contemplated that -- by that decision when assessing Payton's claim that his jury misunderstood the court's instructions and, in particular, factor (k) so as to unconstitutionally preclude consideration of his mitigating evidence.

The California Supreme Court's application of Boyde is precisely the type of good faith application of Federal constitutional law to which AEDPA demands deference. It is manifestly not objectively unreasonable, and this can be demonstrated in three aspects of the decision.

The first is that the California Supreme Court

recognized Boyde's specific holding that factor (k) facially comported with the Eighth Amendment.

The second is --

JUSTICE SOUTER: Well, I thought the holding was that factor (k), standing alone, does -- does not raise a -- does -- does not, standing alone, raise a question of reasonable probability of -- of misunderstanding or misapplication of the law. And that's not what they're claiming here.

They're claiming here that there was something much more than (k) standing alone. As I understand it, they're claiming that the difference between this and Boyde and why this is not a standalone kind of case is that the prosecutor deliberately argued or argued law that was in fact wrong and -- and continued to do so even after the court interrupted the argument and that the court never gave an instruction that corrected the erroneous statements of law that the prosecutor had made. So that's -- that's why they're -- they're saying this is not a Boyde situation.

MS. CORTINA: Your Honor, Boyde has two specific components to its decision, which is, first, what factor (k) means standing alone, and you need to resolve that issue, which California did, in deciding the impact of the prosecutor's misstatements concerning factor (k). So

that, first, you start from the premise, as the California Supreme Court did, in following Boyde, that factor (k) facially directed for consideration of Payton's mitigating evidence.

JUSTICE SOUTER: Well, no, no. The -- the mitigating evidence that Boyde held could be considered without a -- (k) being a bar, was mitigating evidence about the -- the character of the individual prior to or at least up to the moment of the crime. So this is -- this is different kind of evidence, and I -- I mean, this is post-crime evidence. And -- and I don't see that -- that Boyde's holding is so broad as obviously to cover this at all. It might be a -- it would be a -- a closer question if it hadn't been for the prosecutor's argument and the judge's failure to correct it. But even -- even without those elements, there would be a serious question whether Boyde covered this at all.

MS. CORTINA: Your Honor, the -- respectfully I disagree. I believe that the California Supreme Court correctly and -- and reasonably determined that Boyde's holding encompassed Payton's character mitigating -- Payton's mitigating character evidence because the holding in Boyde -- or the issue directly presented by Boyde was whether factor (k) limited consideration to circumstances related to the crime or allowed for non-crime related

mitigating evidence in deciding the appropriate penalty.

JUSTICE GINSBURG: What do we make of the Chief Justice's clear statement, not once but twice, in Boyde? The prosecutor never suggested that background and character evidence could not be considered. So mustn't we take Boyde with that qualification when we have a case where the prosecutor, indeed, suggested that this information could not be taken into consideration as a mitigating factor?

MS. CORTINA: No, Justice Ginsburg. First, you must assess factor (k) facially and that's what Boyde did. Then the next question is did the prosecutor's misstatements concerning factor (k) mislead the jury to believe that they could no longer consider Payton's mitigating character evidence. And that would be the second component of Boyde which is a general test for assessing the reasonable likelihood a jury misunderstood the instructions in the context of the proceedings. And the particularly relevant and important inquiry in this case is the California Supreme Court's application of Boyde's reasonable likelihood test in the context of the proceedings.

JUSTICE KENNEDY: Well, do we take -- do we take the case on the assumption that the trial court erred in not giving a curative instruction and in saying, well,

this is a matter for the attorneys to argue? You -- you don't argue about what a statute means. That's a question of law. You don't argue that. You can argue the facts, that it's mitigating or not mitigating or that it's extenuating or not extenuating, which is I think how you can interpret a lot of this. But it -- it seems to me that the trial judge does make a mistake when he says, well, well, this is for the -- this is for them to argue when the -- the point of the objection was that there was a misinterpretation of the instruction. That's a legal point.

MS. CORTINA: And that is a fact that was expressly considered by the California Supreme Court in appropriately applying Boyde's general test for whether the jury misunderstood the court's instructions and an instruction that facially called for consideration --

JUSTICE GINSBURG: Not that -- that the jury misunderstood the judge's instruction, that there was no instruction. I mean, the -- the picture that's given here is the defense attorney says, I can use this to mitigate. The prosecutor says this is not legitimate mitigating evidence, and he said that several times. And the judge said, well, you can both argue it, and the judge never instructed the jury. He left it to the prosecutors to argue the law to the jury and for the jury to make that

legal determination. It -- it seems to me that that -- that is surely an error. Now, you could still say, well, even so, it was harmless. But -- but I don't think -- can there be any doubt when the judge tells the attorneys, you argue the law to the jury and let the jury decide what the law is?

MS. CORTINA: Yes. There -- there is a reasonable likelihood that the jury did not take the prosecutor's statements so as to preclude consideration of Payton's mitigating evidence because the prosecutor's statements cannot --

JUSTICE SOUTER: Well, even -- even if -- even if that's argument is -- is on point, just taking your -- your response on its own terms, where do you get a reasonable likelihood?

MS. CORTINA: Because the prosecutor's statements cannot be construed in a vacuum. You have to look, as Boyde required and as California did, at the context of the entire proceedings. What we're here -- what the jury was doing in Payton was deciding whether Payton should live or die, the sentencing determination.

JUSTICE SOUTER: Well, but let's get specific. You -- you said there isn't a reasonable possibility. Why? Get -- get down to facts. Why isn't there a reasonable possibility?

MS. CORTINA: Why there is not a reasonable likelihood the jury misunderstood?

JUSTICE SOUTER: Yes. The prosecutor stands there and twice says, before the judge interrupts him and after the judge interrupts him -- says, you cannot legally consider this evidence. It does not fall within (k), and the judge never corrects it. Why is there not a -- a reasonable likelihood of -- of jury mistake?

MS. CORTINA: One, Your Honor, the judge admonished the jury that the prosecutor's statements were that of an advocate, and that --

JUSTICE SOUTER: No. Precisely, if I recall -- and you correct me if I'm wrong, but I thought what the judge said was that the prosecutor's statements were -- were not evidence. Of course, they're not evidence. The issue isn't whether they were evidence. They were statements of the law. The judge didn't say anything about whether they were correct or incorrect statements of the law. It seems to me that the judge's response to the objection was totally beside the point.

MS. CORTINA: The -- nevertheless, the judge's response relegated the prosecutor's statements as to his personal opinion as to that of a -- some -- as -- as -- of -- of -- to argument, which is a statement of an advocate. And the jury, from the time it was empanelled, guilt phase,

and through the penalty phase, and at the concluding instructions was repeatedly instructed that they would be getting the instruction on the law from the court. And here --

JUSTICE SOUTER: And the court didn't give them an instruction on this contested point.

MS. CORTINA: I respectfully disagree.

JUSTICE SOUTER: He didn't come out and say, yes, you can consider this under (k). He never said that.

MS. CORTINA: No, but (k) says you can consider it under (k).

JUSTICE SOUTER: (k) says you can consider evidence that -- that goes to the gravity of the crime. I will be candid to say I think you're stretching things about as far as you can stretch, as Boyde held, that -- that character evidence pre and up to the time of the crime can be considered reasonably under that factor. But certainly evidence of what an individual did after the crime is committed does not naturally follow within (k) at all, and I don't know why any juror would consider it unless a judge came out and said flatly you can.

MS. CORTINA: Your Honor, the California Supreme Court reasonably applied Boyde's holding, that factor (k) did call for consideration of character evidence, and that's precisely what Payton presented --

JUSTICE O'CONNOR: Well, what if we conclude that there was an error here? Is there a harmless error argument that you fall back on?

MS. CORTINA: Yes, Your Honor, there is a harmless error, but before we even get to harmless error, the fact that you disagree with the ultimate conclusion of the California Supreme Court under AEDPA is not sufficient.

JUSTICE STEVENS: May I ask --

MS. CORTINA: The California Supreme Court's decision --

JUSTICE STEVENS: May I ask a question that goes sort of to the beginning? What is your position on whether or not the prosecutor correctly stated the law?

MS. CORTINA: The State concedes, and as the California Supreme Court recognized, the prosecutor misstated the law, but the jury would not --

JUSTICE STEVENS: Do you also concede he did so deliberately? Do you concede there was prosecutorial misconduct is what I'm really asking.

MS. CORTINA: Absolutely not, Your Honor. The prosecutor did not commit misconduct. The prosecutor made a mistake, and the misconduct analysis, which is similar to what Boyde contemplated when they set forth the general standard for assessing whether a jury would misunderstood

-- misunderstand an instruction is -- is almost the same when -- when you're analyzing whether the question is prosecutorial misconduct. Boyde sets forth the test for how to assess a misstatement by the prosecutor, and Boyde said that at the first instance, a statement of the prosecutor is not to be considered as having the same force as instructions from the court. And that principle was recognized by the California Supreme Court and reinforced --

JUSTICE STEVENS: That -- that statement went to whether the jury was apt to accept it, not to the question of whether the prosecutor acted improperly.

MS. CORTINA: I'm sorry, Your Honor. The -- in this case, the prosecutor made a mistake. I don't think that there's any evidence to support the conclusion that the prosecutor committed misconduct in this case, particularly --

JUSTICE KENNEDY: Well, I -- I can see that a -- a prosecutor could say, you know, this isn't factor (k) evidence, as a way of saying that this evidence is of little weight. He did say at -- at one -- at one time, you have not heard any legal evidence of mitigation, and -- and that -- that's the troublesome part.

MS. CORTINA: Your Honor, the -- the State concedes that the -- the prosecutor did make

misstatements, but I think that the bulk -- as you pointed out, the bulk of the prosecutor's argument went to the weight to be attributed to Payton's mitigating evidence, and actually most of the argument by the prosecutor indicating that Payton's evidence didn't mitigate the seriousness of his rape and murder is -- there were similar arguments that were made by the prosecutor in Boyde and which Boyde found were not objectionable.

But again, the important scrutiny is that the California Supreme Court evaluated the prosecutor's statements within the correct analytical framework matrix established by Boyde. They considered all the correct principles, the -- the effect of argument of counsel. They considered the instructions, and like Boyde, they found that factor (k) facially directed the consideration --

JUSTICE GINSBURG: Suppose -- suppose I were to take the view that it is a violation of clearly established law for a court to allow a prosecutor repeatedly to misstate the law, misinform the jury about what the law is on a life or death question without correcting that misstatement, without saying to the jury, jury, it's not for the prosecutor to argue what the law is. I tell you what the law. If the judge doesn't do that, then that meets any standard of violating clearly

established law about which there should be no doubt that when the prosecutor makes a misstatement on a life or death question, it is the judge's obligation to say, jury, he is wrong. You take your instruction from me and here's my instruction.

Suppose that's my view of this case. I don't -- Boyde and all these other cases -- it just strikes me that that's clearly wrong. What do I do with that?

MS. CORTINA: Well, you can find that the court was wrong and not like what you did -- what the court did, but the inquiry is whether the jury misunderstood the instructions as a result of the court's conduct. And that requires an analysis of the context of the proceedings, and that is precisely what the California Supreme Court did. They --

JUSTICE GINSBURG: Well, now you're getting to the question I think that Justice O'Connor raised a few minutes ago about are you urging, yes, this is error, but it was harmless?

MS. CORTINA: No, I am not agreeing that this was error at all. I agree that the prosecutor made a misstatement and that the California Supreme Court thoroughly and properly evaluated that statement --

JUSTICE KENNEDY: Well, but just on that point, if the prosecutor makes a misstatement, doesn't the trial

judge have an obligation to correct it if it's significant?

MS. CORTINA: The -- in this case --

JUSTICE KENNEDY: Or am I wrong? Or am I wrong about that? The judge just kind of watches the ship sail over the waterfall?

MS. CORTINA: The -- I mean, the -- the trial court did correct it. It may not be the sufficient correction in this Court's eye, but the court did give an admonition that relegated the prosecutor's statements to that of the advocate and not to the instructions of the court.

JUSTICE O'CONNOR: Well, what if the prosecutor had said several times to the jury during the course of his arguments that the burden of proof by the State is by a preponderance, not beyond a reasonable doubt? And the judge just says the prosecutor's arguments are just that, they're not the law. I'll instruct you. But he never says anything. Is that okay?

MS. CORTINA: It's not what we'd optimally want the court to do, but that's not the inquiry that's presented and answered by Boyde. The question is as a result of what happened. Trials are not error-free. We wish that they were, but they're not. The question is how do you respond to when a -- when a prosecutor makes a

misstatement of law. And Boyde addresses that question. Boyde --

JUSTICE O'CONNOR: Well, normally we would think the trial judge would correct a misstatement of the law by counsel. We would normally think that, wouldn't we?

MS. CORTINA: Yes.

JUSTICE O'CONNOR: And it wasn't clearly done here. I mean, the -- the jury was reminded that arguments of counsel are just that. But there was no attempt to correct what appeared to be a misstatement.

MS. CORTINA: The court's admonition was sufficient. But we're -- we -- we have to respond to the case that's before you.

JUSTICE GINSBURG: What -- what admonition was sufficient? The court said something about evidence and everybody -- I mean, there's no question what the prosecutor said isn't evidence. But he didn't tell them he has misstated the law. We're not talking about -- evidence is not at issue at all. Neither side suggests that it is. It's a question is what is the law that governs this controversy, what is the law that the jury must apply to make a life or death decision.

MS. CORTINA: Right, and what was --

JUSTICE GINSBURG: And -- and you --

MS. CORTINA: Sorry.

JUSTICE GINSBURG: -- you said the judge corrected it, and I read this joint appendix. I could not find any correction.

MS. CORTINA: The court's admonition that the prosecutor's argument was not evidence but argument of counsel relegated the statements of the prosecutor to that of an advocate and did not take the prosecutor's arguments and elevate it in place of the instructions given --

JUSTICE GINSBURG: Then -- then it -- then it has another problem with it because then the judge is saying that's an argument. Jury, you've heard arguments on both sides. You decide. But it isn't for the jury to decide what the law is.

MS. CORTINA: But the analysis is whether there was a reasonable likelihood the jury misunderstood the court's instructions so as to preclude consideration of Payton's mitigating evidence, and that --

JUSTICE KENNEDY: Did the judge instruct the jury that you are to consider all of the evidence which has been received during any part of the trial?

MS. CORTINA: Yes, Your Honor, and actually that's one of the inquiries that Boyde required, is that you look at the instruction itself, the other instructions, and that's an inquiry the California Supreme Court did, in fact, conduct. And that is, the jury was

presented with -- with a instruction that said, you shall consider all the evidence unless otherwise instructed, and nothing out of any of the factors (a) through (k) limited the jury's consideration of Payton's mitigating evidence or precluded -- pardon me --

JUSTICE KENNEDY: Oh, are you taking the position that as a matter of California procedure, the jury was entitled to consider matters that -- matter that was not within (a) through (k)?

MS. CORTINA: I think that the instructions encompass the jury considering something not specifically in (a) through (k) for purposes of mitigating evidence because the instructions say, you shall consider the evidence presented, and that was Payton's evidence --

JUSTICE KENNEDY: Have the California courts said that?

MS. CORTINA: That?

JUSTICE KENNEDY: Have the California courts said that (a) through (k) are -- is not intended to be exhaustive at the pre-Payton -- pardon me. Yes. Have they said that pre-Payton?

MS. CORTINA: I don't think that that issue has been presented and decided by the California Supreme Court specifically --

JUSTICE KENNEDY: I -- I thought the case was

being argued to us -- correct me if I'm wrong -- on -- on the theory that this was factor (k) evidence.

MS. CORTINA: It is our position that it -- it does fall within factor (k) evidence, but in deciding whether the -- whether Payton's jury was unconstitutionally precluded from considering the evidence, you look to the -- all the instructions. And when you consider the direction to consider all -- that you shall consider all the evidence and then the concluding instruction --

JUSTICE STEVENS: But Ms. Cortina, the -- the red brief -- maybe it's not accurate. They say the instruction was all the evidence received during any part of the trial in this case, except as you may hereafter be instructed, and then that followed what -- the factor (k) discussion came after that. So would it not have been possible that the jury would have thought except for the following things? Or is there something more that I missed?

MS. CORTINA: No. The written instruction followed the arguments of counsels. And what -- and so no, there was no instruction after that.

JUSTICE STEVENS: So if they misunderstood the factor (k) instruction, they would have thought they could not consider all the evidence.

MS. CORTINA: There was no reasonable likelihood that they felt that they could not consider Payton's evidence under factor (k), and the California Supreme Court --

JUSTICE STEVENS: Well, if they believed the prosecutor, they would have thought they couldn't.

MS. CORTINA: But there -- but as analyzed by the California Supreme Court, it is not reasonably likely that the jury would have accepted the prosecutor's first few misstatements. And as I was saying, to do so, the jury would have had to --

JUSTICE STEVENS: But all -- all I'm directing my inquiry to is to the significance of the instruction to consider all the evidence. I think it's they could consider all the evidence, except that which may not be admissible, as I now -- or may not be relevant as I shall hereafter instruct you.

MS. CORTINA: However, nothing in the following instruction says you shall not consider Payton's mitigating evidence.

JUSTICE STEVENS: No, but the prosecutor said that if you interpret the last instruction properly, you shall not do so.

MS. CORTINA: He said that it didn't fall within factor (k). However, the -- the jury would -- there is no

reasonable likelihood and the California Supreme Court was not objectively unreasonable, including -- in concluding that the -- that the jury would have accepted the prosecutor's first few misstatements and chosen to disregard Payton's mitigating evidence because the jury just sat through eight witnesses testifying to Payton's post-crime remorse and rehabilitation. They sat through that without any misstatements by the prosecutor. So they recognized that they had heard this evidence and that it was relevant and that it was subject to consideration.

Then they heard the arguments of counsel concerning the weight to be attributed to Payton's mitigating evidence. And although the prosecutor did make the misstatements, his statements were relegated to that of an advocate. And to conclude that the jury would disregard the repeated instructions to follow the -- to take the law from the court and their inevitable, long-held societal beliefs that remorse and rehabilitation are relevant to making an appropriate moral reasoned response in deciding the life or death sentence is not a reasonable conclusion.

And we know that the fact -- in fact, that the jury did consider Payton's mitigating evidence by virtue of the questions that the juries -- the jury asked the court during deliberations. The jury asked whether Payton

would be eligible for parole and whether any change in the law could retroactively make him eligible for parole. You only get to a consideration of whether -- what the effect is of saving Payton's life, under the California sentencing scheme that was -- existed at that time, if you believe that there's mitigation evidence to consider because California, at the time of Payton's sentencing, instructed the jury that if the aggravating circumstances outweigh the mitigating circumstances, you shall impose death. Their --

JUSTICE SOUTER: They -- they might not have thought that the aggravating circumstances were entitled to -- to great weight. I mean, we don't know how they evaluated the aggravating circumstances.

MS. CORTINA: That might be one reasonable conclusion, but the other reasonable conclusion --

JUSTICE SOUTER: But I mean, that -- that is a possible conclusion, and therefore, it doesn't follow from the fact that they raised the question about life without parole that they necessarily had found -- that they were necessarily considering the mitigating evidence.

MS. CORTINA: It's a reasonable inference to be made from the questions asked, and that's what you're looking at.

JUSTICE SOUTER: It's -- it's one possibility.

Isn't that all?

MS. CORTINA: It's one reasonable inference, and that's what's the important inquiry, is that the trial -- the California Supreme Court reasonably considered the relevant, pertinent facts and all the applicable law in reaching a decision that Payton's jury was not unconstitutionally precluded from considering his mitigating character evidence. And I think that -- that the California Supreme Court's decision demonstrates that it applied Boyde to the letter faithfully and methodically, and that it -- it considered all the relevant facts and that its decision under these circumstances is manifestly not objectively unreasonable. And that is the requirement, and that is the inquiry that we're here today to resolve.

The -- the Ninth Circuit failed to give the appropriate deference to the California Supreme Court's decision in deciding that the penalty should be -- Payton's penalty should be reversed. And the Ninth Circuit instead conflated objectively unreasonable with a determination that it personally felt that there was constitutional error and doesn't respect the distinction recognized in AEDPA between a incorrect decision -- or a correct decision, incorrect decision, unreasonable decision, and the higher threshold of objectively

unreasonable.

And unless this Court has any further questions, Justice Stevens, I would like to reserve the remainder of my time.

JUSTICE BREYER: How long did the penalty phase take?

MS. CORTINA: The penalty phase took about a day with eight witnesses.

JUSTICE STEVENS: Thank you.

Mr. Gits.

ORAL ARGUMENT OF DEAN R. GITS

ON BEHALF OF THE RESPONDENT

MR. GITS: Thank you, Justice Stevens, and may it please the Court:

I'd like to start off, if I may, by addressing some of the points that were brought up just earlier, and I'd like to indicate to this Court that the California Supreme Court has held that factors (a) through (k) are the exclusive considerations that the jury must encompass in deciding whether or not to impose death or life.

JUSTICE KENNEDY: Has factor (k) been supplemented with a CALJIC instruction since Payton?

MR. GITS: It has. In 1983, 2 years after Payton's trial, it was supplemented to include all of the mitigating evidence that this Court has indicated the jury

is entitled to consider.

But what is important --

JUSTICE KENNEDY: Excuse me. Do they still call it factor (k) or do they just have a supplemental instruction that follows factor (k)?

MR. GITS: It's been a couple of years since I've done a death penalty trial, but I think it's still called factor (k). It's just supplemented and changed that way.

The second thing is that this Court has indicated some concern over the jury question that was raised first in -- in the State's reply argument. And I need to put the Court, I think, in -- in proper context as to what occurred in -- in that jury question.

The case was given to the jury at 11:55 on the date of -- of the determination, and the jury was told to select a foreman. 5 minutes -- they went into the deliberations room. 5 minutes later they came out and went to lunch. They didn't commence their deliberations thereafter until 1 o'clock. At 1:10, they came out with a -- the question that is now before the Court. And I want to suggest to this Court that it is not reasonable to believe that during that 10-minute span of time the jury considered the -- whether or not factor (k) applied.

JUSTICE KENNEDY: And what was the question?

MR. GITS: The question -- there were really two questions. One -- and I'm paraphrasing -- is there any possibility Mr. Payton could be released on parole if we give him life, and the second one is if the law is amended, could that be construed to be retroactively applicable to Mr. Payton. Those were the two questions.

JUSTICE BREYER: Those don't sound as if they thought his conversion to Christianity made a difference.

MR. GITS: I think, Your Honor, what the jury articulated is what this Court has seen on many occasions, the jury's concern about does life without possibility mean life without.

JUSTICE BREYER: Yes.

MR. GITS: They never went beyond that at this point in time. So what I'm suggesting to this Court is that the short span that they had to write that question, which I agree, given enough time, might permit an inference that they did consider factor (k), isn't applicable in this case.

JUSTICE KENNEDY: Well, an equal inference is they just felt that it was entitled to no weight at all given the horrific nature of this -- of this crime.

MR. GITS: Yes, I agree. And my position isn't that -- that the short span of -- you know, assists our position. Our position is that this won't assist this

Court in arriving at a decision about whether the jury considered it.

JUSTICE KENNEDY: And you have to show there's a reasonable likelihood that the jury might have come to an opposite conclusion.

MR. GITS: Yes. And Boyde teaches that the way to do that is to look at the context of the entire case in conjunction with the -- the instruction that was given in this case. And I want to start out that I -- I agree with the State that the first thing this Court should do is look at the instruction standing alone. And I want to indicate that without reference to the context of the case, the instruction standing alone does not support the inference that Payton's post-crime evidence could be considered.

Now, I agree that in the context of the case, the context of the case could change that consideration. For instance, if the court, as this -- some member of this Court already indicated, told the jury that factor (k) is to encompass Payton's evidence, or even if the prosecutor may have said to the jury during his argument, ladies and gentlemen, although it might not seem like Payton's evidence could be considered by you under factor (k), in fact it can, then we would be left with a situation very similar to Boyde where there really is no argument among

counsel as to whether or not the evidence could be subsumed under (k). And that, in the context of that case, would permit it.

JUSTICE KENNEDY: Well, on -- on that point -- and I -- I recognize it's -- it's not nearly as clean as the hypothetical you present -- he did say -- this is the prosecutor. The law in its simplicity is that if the aggravating factors outweigh the mitigating factors, the sentence should be death, and so let's just line these up, and then he talks about the -- the conversion. So there were other parts of his argument that indicated by one interpretation this is not mitigating under special (k) -- under factor (k). But here he does say that you line that up and you weigh one against the other.

MR. GITS: I -- I would respond to that by saying two things. He does say that, but after he says, ladies and gentlemen, I want to address some of -- of Payton's evidence. I'm not suggesting and I'm -- and I don't believe that it applies under factor (k). But then he went on to discuss that evidence. And I agree he did. I certainly can't say he didn't.

But -- but the real issue here is what effect likely did that have on the jury, and I -- I'm indicating that -- that given the preliminary -- his preliminary part about it still doesn't apply but I will address it, that

is unlikely to give the jury any confidence that that evidence could be considered. So it's not at all a concession that occurred in this case whatsoever.

JUSTICE GINSBURG: Well, why wouldn't the jury conclude -- why isn't it the most logical conclusion that, gee, the judge had us sit here through eight witnesses and listen to all that and he didn't exclude any part of it, so of course we must consider it because otherwise we wouldn't have been exposed to all of it?

MR. GITS: That was a relevant consideration in Boyde and I think a powerful consideration in Boyde and in California v. Brown. Because of the context of this case, it's not relevant here. Once the judge permits both counsel -- one counsel to argue one way and the other counsel to argue the other way, the jury is now being relegated as the -- the finder of the law. In order to evaluate whether or not they could consider that evidence, they had to look at the evidence that was presented.

JUSTICE KENNEDY: Well, they -- they always have to say whether or not we're going to really weigh this or is it just too tangential, and that's one way of saying, well, this really isn't mitigating. And we know as lawyers that it is mitigating in a sense that is -- that is relevant and that it's there for the jury to give it the weight that it chooses. But jurors say, well, you

know, this -- this just is not important is what they're saying.

MR. GITS: Well, when the prosecutor says this doesn't fall under (k) and the defense attorney says it does fall under (k), all I'm indicating is that the argument that this would be viewed as a charade no longer has any effect. It is now a preliminary thing that the court -- that the jury must look to.

JUSTICE KENNEDY: Well, it's a shorthand for saying it doesn't fall under (k) because it just is of so little weight. Now, that's I think how the jury might have interpreted it.

MR. GITS: Yes, Your Honor, they might. But the issue here is whether or not there's a reasonable likelihood that the jury did not consider that, and -- and that's --

JUSTICE BREYER: Actually that isn't really the issue. I think -- I find that easy. The harder issue is -- is whether the -- a person who thought about it differently than me, a judge, would have -- be objectively unreasonable. At least for me, that's the hard question. The question you're arguing is not hard.

MR. GITS: Yes. I don't think I understand Your Honor.

JUSTICE BREYER: I mean, I would perhaps have

come to a different conclusion than California Supreme Court on that question, but we can overturn them only if they're objectively unreasonable. And that's -- that's the hard thing because -- for me.

MR. GITS: Yes. I -- there is very -- relatively little guidance that we have so far on the AEDPA. I think the -- the cases that do have some relevance are both Wiggins v. Smith and Taylor v. Williams. Wiggins v. Smith dealt with the failure of the State court to actually evaluate evidence that occurred in this case.

The California Supreme Court opinion on the issue of whether or not the -- the court properly conducted itself has one sentence, and the sentence says -- and I'm paraphrasing -- something to the effect of the fact that the court refused to adorn factor (k) is not in itself a -- an error. Well, we all, I think, would -- would concur that that's true, but that doesn't address what happened here. It's a complete failure to address an all-encompassing event that happened, something close -- and I have to be careful here -- something close to structural error where the judge gives over the obligation to decide what the law is to the jury. The California Supreme Court not once ever considered that, and there is no reference to them doing anything other than making that

one --

JUSTICE BREYER: Well, no, but I mean, that's -- that's really wrong what the judge did. But -- but the -- that -- that's tangential to the question. The question is, is it reasonably likely, if that hadn't occurred, that the jury would have considered the evidence that he was converted? But since it did occur, you know, they -- they didn't consider it. Is it reasonably likely they never considered it? That's -- that's the question.

And then I can imagine, for what reason that Justice Ginsburg said, myself sitting in the California Supreme Court and saying, well, they heard the evidence for 2 days or a day, six witnesses, eight witnesses. They're not technicians, the jury. And -- and of course, they considered it. I can imagine that and that's why I'm having -- even though I don't agree with it.

MR. GITS: Yes. Considered I agree. They certainly considered the evidence, but they also, if they were following their obligation under the law, they considered whether or not they were entitled to give that any weight under factor (k). That was the primary function that was given to them. So certainly they discussed the evidence, but then did they arrive -- did they go in that room and arrive at a decision that maybe we can't by law consider this evidence? And I think

that's the focal point here and that's the thing this Court doesn't know what happened in that jury room.

JUSTICE O'CONNOR: Except if they heard so much of the evidence, isn't it unlikely that the jury thought they couldn't consider what they heard?

MR. GITS: The more evidence they hear, the more likely it is I think that human beings are going to consider the evidence.

The evidence -- the -- the penalty evidence took place over a 2-day period of time, but I want to indicate that it took place over two half-day periods of time, and that if you put the time together, I think it comes to around 70 pages, which should be substantially less than a half-day altogether. Now, it encompassed eight witnesses, and there was a lot of evidence brought out about post-crime conduct. But it -- it wasn't a massive amount such as there was in Boyde, 400 pages and weeks of testimony. So I think that that's a -- a -- an important consideration too.

The -- the Court's concern about whether or not the jury would likely consider that, it seems to me, starts with the -- an examination of -- of factor (k) itself. And -- and I want to indicate that Mr. Payton really didn't start out at the same mark as -- as the State did in its case. The language of factor (k) just

doesn't on its face appear to permit consideration of that evidence. And -- and so, therefore, something had to have happened in the trial, we assert, to change that, to make the ambiguous, at least as applied to Payton, evidence of factor (k) applicable so that the jury would reasonably likely consider it.

The events that could have happened during the context of that trial didn't happen. In fact, everything happened against the defendant. He starts off with an instruction that's against him that supports, under any natural reading, the prosecutor's language, and then he's buttressed with a prosecutor that given the plain and natural meaning of the language, is going to have a far more compelling position with the jury about whether or not it could be considered. And the -- and the defense attorney's position is really nothing more than an assertion, when he looks at the language itself -- an assertion that it was awkwardly worded.

Now -- now, the defense attorney made reference to if this was the kind of evidence -- if I was a juror and I was considering this, I would think this would be important evidence. And the answer to that is of course, it is important evidence, but that's not the question. The question is whether or not it could be considered under (k). He gives -- he, the defense attorney, gives

his position that -- that (k) was meant to be a catchall factor and it was meant to consume and take into effect Payton's evidence, but he had nothing to support that. He had no legal position to support it. He was faced with the plain language of the statute that didn't permit him to do that.

JUSTICE BREYER: Doesn't it? I mean, it -- it says that -- what's -- what's the exact language of that statute? I just had it here. It's -- it's gravity. It's the --

MR. GITS: It is any other circumstance which extenuates the gravity of the crime.

JUSTICE BREYER: Of the crime. You could say it. Yes, his -- his later conversion extenuated the gravity of the crime, not the -- not the -- when I try to think of this person, who is not me, thinking of that, I say, well, plausible. Plausible, not perhaps the best, but plausible, isn't it?

MR. GITS: Well, as we pointed out in our brief, this Court in -- in Skipper -- some Justices in -- in that decision indicated that -- well, in fact, the majority indicated that the post-crime evidence of rehabilitation in prison is, in fact, not anything that relates to culpability. Factor (k), however way you look at it -- and I agree that it's sufficiently ambiguous to where,

given the right context, the right events happening at trial, a jury would reasonably likely look at it as covering that. But not under this case, though, because there wasn't anything that happened in Payton's trial which permitted a reasonable inference that in fact that evidence should be considered.

And as to harmless error, I -- as we pointed out in our brief, it -- under the California statute, which in effect requires that if the aggravating evidence outweighs the mitigating evidence, the jury shall return a verdict of death, if there's no reasonable likelihood that the jury considered factor (k), then in effect Bill Payton was left without any mitigating evidence to be considered by the jury at all. And that means that the jury had to come back with a verdict of death.

Now, that brings this Court, once the Court -- if the Court becomes satisfied as to constitutional error, that brings the Court, I think, very closely to -- to this case -- this Court's case in Penry v. Johnson because there the jury will not have had a vehicle in order to give effect to Payton's mitigating evidence.

In Penry v. Johnson, in fact, in discussing at least the Eighth Amendment issue, this Court never really even discussed harmless error. It was reversed without any discussion. Now, I don't want to suggest the Court

didn't engage in a harmless error --

JUSTICE KENNEDY: I -- I see where you're going, and I -- I see that there's some parallel. The problem in Penry was that the jury -- the jurors had to actually violate their instructions, and you have to escalate your argument a bit before you get to that point.

MR. GITS: Yes, I -- I agree. It's not exactly identical, but we're very close to -- to that point in Penry.

Beyond that, the prosecutor did argue vociferously that the jury should -- in its determination, should be concerned about whether or not Bill Payton is going to stab the prison guards in the back, in effect, argued dangerousness, which was appropriate. But if the jury -- he also argued that the jury couldn't consider evidence which plainly pointed to his lack of dangerousness, his good adjustment in prison, his conversion to Christianity. So, in effect, the prosecutor was able to argue its side and -- and the jury wasn't able, when you get to the harmless error analysis, to argue its side. And that's what makes this, it seems to me, a very strong showing that -- that harmless error -- that the error in this case is not harmless. It had a clearly important effect.

JUSTICE BREYER: Is it relevant at all? This

happened 24 years ago. We're sitting here trying to think of what a jury would have been thinking in a state of the law that's a quarter of a century old and facts -- I don't know what to think. I guess that's just irrelevant?

MR. GITS: Well, it's certainly relevant to Bill Payton, and -- and I don't demean the position of the Court.

It's not relevant in terms of its impact as to future cases. There are some cases left that are still dealing -- out there, dealing with factor (k). The best our knowledge, we've -- we've done a search and we believe there is about 70 cases dealing with the old, unadorned factor (k), but of those 70 cases, none of them from -- and we haven't reviewed all of them, but of the ones we've reviewed, none of them deal both with Payton's pure post-crime evidence, coupled with the prosecutor's unrelenting position to the Government that they cannot consider that evidence.

JUSTICE BREYER: So all this was at a time before Penry was decided.

MR. GITS: It is the time before Penry v. Johnson was decided.

JUSTICE BREYER: Yes.

MR. GITS: It is not the time before Penry v. Lynaugh was decided. And when I say --

JUSTICE BREYER: Which is the Texas -- the Texas -- you know, the ones --

MR. GITS: Both are the Texas case. Both deal with Mr. Penry.

JUSTICE BREYER: Yes, one and two.

MR. GITS: Yes.

JUSTICE O'CONNOR: Is that --

MR. GITS: Yes. And when I say it was not before that, I'm talking about on the date of the California Supreme Court's decision. At the time of the jury determination, this Court only had -- or that court only had Lockett to make a determination as to whether the evidence could be -- could be considered. And the court made the decision that he thought the -- it could be considered, but then refused to make any adjustments once it became clear that both counsel were going to argue their respective positions on the law.

The -- the Court earlier talked about other instructions as impacting upon the -- the context of the case, and those were important considerations in Boyde, especially the observation that the jury was to consider any other evidence presented at either time in the trial. But in the context of this case, Your Honor, it means nothing. As I've indicated, the jury was required to ignore any evidence it heard at either phase of the trial

unless it fit within factors (a) through (k). If it didn't fit within there, even though they heard that evidence, they were instructed to ignore it.

Beyond that, they were also instructed that the -- that they were to consider the arguments of counsel. Now, being that there was no clear instruction to the jury that they had to consider factor (k) as being relevant evidence, the jury then likely put greater weight on counsel's argument, and that's why it becomes important.

So the other instructions, when you put them all together, rather than putting in proper context what did occur in this case, in effect make it even harder for Bill Payton's position that the jury should consider factor (k) to be relevant.

JUSTICE GINSBURG: The -- the prosecutor, at the very end of his closing to the jury, did seem, even if grudgingly with it, to recognize that -- that this evidence was mitigating. I'm looking at page 76 of the joint appendix at the top of the page. He makes the statement, the law is simple. It says aggravating factors outweigh mitigating, and then how do those factors line up? Well, the facts of the case showing the violence, et cetera -- that's on the aggravating side. And then against that, defendant really has nothing except newborn Christianity and the fact that he's 28 years old. So that

-- in that final word to the jury, the prosecutor seems to be saying, yes, they have mitigating factors, but they're insubstantial, 28 years old and the claim that he's a newborn Christian.

MR. GITS: It'll be up to this Court to make a determination as to where the prosecutor was going and whether or not this constitutes a concession that -- that the jury could consider the evidence. I -- our position is that viewed as a whole, he did not go to that. Certainly he permitted the jury, and he did address the issue of if the jury does consider that. He premised it by saying, I don't think this is relevant, but if -- and I'm paraphrasing here. But if you think it's relevant, it's still not entitled to weight.

If the issue before this Court is whether or not there's a reasonable likelihood that the jury considered that evidence, then given the context of that statement, I don't think the jury can hardly be satisfied that the prosecutor in fact gave in and agreed that Payton's evidence --

JUSTICE BREYER: Do -- do we have a transcript of that hearing here?

MR. GITS: Of what hearing, Your Honor?

JUSTICE BREYER: Well, the penalty phase. I mean --

MR. GITS: Yes.

JUSTICE BREYER: -- one way -- if I'm having trouble, I'll just read it.

MR. GITS: It is in the -- in the joint appendix, the entire --

JUSTICE BREYER: The whole thing.

MR. GITS: Yes, the entire penalty evidence and all argument and the instructions is in there.

And that's -- unless the Court has any additional questions, I have nothing further. Thank you.

JUSTICE STEVENS: Thank you, Mr. Gits.

Ms. Cortina, you have a little over 5 minutes left.

REBUTTAL ARGUMENT OF ANDREA N. CORTINA

ON BEHALF OF THE PETITIONER

MS. CORTINA: Justice Stevens, the real inquiry is whether the California Supreme Court's decision was objectively unreasonable. It is not whether there was a reasonable likelihood. And Payton, like the Ninth Circuit -- Payton's counsel --

JUSTICE KENNEDY: Could you help me on that? I thought it was two steps. I thought the question is whether there's a reasonable likelihood that the jury was misled, and then you have to ask whether it was unreasonable for the State supreme court to conclude that

there was that reasonable likelihood. Or correct me if I'm wrong.

MS. CORTINA: That is one way of approaching the case, but I think under AEDPA, what you'd look at, which would be the more appropriate way, is how the California Supreme Court analyzed the claim and not first conduct a de novo review about whether there was a reasonable likelihood. I don't think that in the end that there's much difference --

JUSTICE KENNEDY: But you can't overturn it on habeas unless there's a reasonable likelihood.

MS. CORTINA: Right. That would be -- right. You would have to find that the -- you would have to find an error and one that was objectively -- and then the California Supreme Court objectively unreasonable in not finding the error. This is true. So obviously the reasonable likelihood test is a -- is a relevant inquiry, but it is not the inquiry.

And I think that -- that that's what Payton's argument demonstrates and the Ninth Circuit's analysis demonstrates, is that they are effectively equating a decision that the California Supreme Court's conclusion was incorrect with their personal -- in their subjective opinion with a -- with the standard that the decision must be objectively unreasonable. And in this case, the

California Supreme Court's decision was manifesting not objectively unreasonable.

We know -- we -- we know that objectively unreasonable doesn't have a clear definition. We do have an example of what is objectively unreasonable, and that was cited in Payton's brief and that is a failure to consider particular facts or relevant law. And we know that that didn't occur in this case. The very argument and facts that Payton insists were not considered by the California Supreme Court in applying Boyde -- if not in the majority opinion -- are found within Justice Kennard's dissent. So we have no question that the California Supreme Court identified the correct case and the correct principles within the case and considered all the necessary facts. And that should make this decision subject to deference under AEDPA.

This Court last term provided additional guidance on how to assess the range of reasonable judgment through the lens of AEDPA in Yarborough v. Alvarado. And one of the things that the Ninth Circuit and Payton's analysis keeps overlooking is the -- Boyde's specific holding concerning factor (k). And when you analyze the -- the range of reasonable judgment of the California Supreme Court concerning factor (k), the specific rule of factor (k), the -- the range of reasonable judgment was

less. The California Supreme Court had little to no leeway to conclude otherwise.

Boyde's holding is broad. Boyde held that factor (k) was a broad, catchall mitigation instruction that allowed for any other circumstance that counseled a sentence less than death and specifically found that background and character fell within the ambit of factor (k). And no decision of this Court or the California Supreme Court in analyzing character has ever drawn a distinction between post-crime and pre-crime character evidence --

JUSTICE BREYER: There's a footnote in Boyde that seems to draw that distinction.

MS. CORTINA: The footnote in Boyde actually supports more California's position that factor (k) encompasses any other circumstance that would counsel a sentence less than death as opposed to the Ninth Circuit and Payton's interpretation that factor (k) is limited to the crime.

In both the first part of footnote 5, the -- the -- Chief Justice Rehnquist rejects the dissent's argument that the gravity of the crime focused the consideration to the circumstances of the crime. Rather, it allowed the jury to assess the seriousness of what the defendant has done in light of what's the appropriate punishment, and

that involves a consideration of the defendant's background and character.

And then the last part of footnote 5 expressly recognizes that factor (k) allows for consideration of good character evidence, and good character evidence is only relevant to a decision about whether the person should live or die, not to circumstances related to the crime. And good character evidence under Payton and the Ninth Circuit's interpretation of factor (k) would not and could not, whether it existed pre or post-crime, fall under the meaning of factor (k).

So the footnote 5 actually bolsters the ultimate broad interpretation that the California Supreme Court adopted when it applied Boyde -- Boyde's specific holding concerning factor (k) to the analysis of Payton's claim.

And although they did, in footnote 5, distinguish the fact that it did not involve post-crime evidence in mitigation, it didn't decide the question. It was simply noting a fact that distinguished the case from Skipper. And -- and AEDPA requires that we follow the holdings of the Court and not dicta.

So when we start --

JUSTICE STEVENS: Thank you, Ms. -- go ahead and make one more sentence.

MS. CORTINA: The California Supreme Court's

decision was a reasonable application of Boyde and the Ninth Circuit's reversal of it is -- and this Court should --

JUSTICE STEVENS: I think we understand you.

MS. CORTINA: Exactly. Thank you.

(Laughter.)

JUSTICE STEVENS: Thank you. The case is submitted.

(Whereupon, at 11:53 a.m., the case in the above-entitled matter was submitted.)