IN THE SUPREME COURT OF THE UNITED STATES

ROBERT L. AYERS, JR., ACTING WARDEN, Petitioner, v. FERNANDO BELMONTES. : No. 05-493

Washington, D.C.

Tuesday, October 3, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

MARK A. JOHNSON, ESQ., Deputy Attorney General, Sacramento, California; on behalf the Petitioner.

ERIC S. MULTHAUP, ESQ., Mill Valley, 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

[11:05 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument next in Ayers versus Belmontes.

Mr. Johnson.

ORAL ARGUMENT OF MARK A. JOHNSON

ON BEHALF OF PETITIONER

MR. JOHNSON: Mr. Chief Justice, and may it please the Court:

This case concerns the constitutional sufficiency of California's catchall factor (k) instruction, which was given in the penalty-phase portion of California capital cases, and which directed the jurors to consider any other circumstance that extenuates the gravity of the crime, even though it is not a legal excuse for the crime.

In this case, the Ninth Circuit Court of Appeals held that this instruction violates the Eighth Amendment because it allegedly misled the jurors to believe they could not consider so-called forward-looking evidence that did not relate directly to the defendant's actual culpability for the crime itself.

In the State's view, the Ninth Circuit's conclusion is fundamentally flawed, because it rests on an illusory distinction between different forms of character

evidence in a way that is inconsistent with this Court's prior decisions in California -- or Boyde versus California and Brown versus Payton.

In Boyde, this Court addressed, and rejected, a virtually identical challenge to the factor (k), and concluded that this instruction did, in fact, allow jurors to consider non-crime-related evidence; specifically, it allowed the jurors to consider evidence of the defendant's background and character. There was nothing in the Boyde decision to support the Ninth Circuit's distinction between different forms of character evidence. In fact, Boyde implicitly acknowledged that the factor (k) would, in fact, be understood to encompass Belmontes' good character evidence, in this case, because, for all practical purposes, there is no meaningful distinction between the nature of the background and character offered in Boyde and the nature of the background --

JUSTICE STEVENS: Mr. Johnson, would you comment on the footnote on the -- on the -- drawing the distinction with regard to the dance contest that the defendant won in that case, between -- it's over here; I'm asking the question -- between facts that occurred before the crime and facts that might have occurred after.

MR. JOHNSON: Yes, Your Honor. In footnote 5, this Court addressed a contention, raised for the first

time in argument, that Boyde's evidence might be admissible under Skipper versus South Carolina, and this Court distinguished Boyde from Skipper, for a couple of reasons. First, as the -- as Your Honor pointed out, the evidence in this case related to good-character evidence, events that occurred before the crime itself, unlike in Skipper, which dealt with post-crime events. The Court also pointed out that the evidence in Boyde -- his dancing achievement, his good character evidence in that case -- was not offered for the specific inference that the evidence in Skipper was offered. The Court, in footnote 5 -- and in the opinion, in general, in Boyde -- nonetheless found that this evidence did, in fact, constitute good-character evidence of the -- of the defendant's present good character, because it showed that his crime was an aberration from otherwise good character. Or, as Justice Marshall put it in his dissenting opinion, that Boyde had redeeming qualities, which is a decidedly forward-looking consideration.

And, as I was saying, the evidence in this case, and in Boyde --

JUSTICE SCALIA: It doesn't have to be forward-looking, does it? I mean, I thought we've said "so long as it can be taken into account in any manner," whether backward-looking or forward-looking. Haven't we said

that, explicitly?

MR. JOHNSON: Yes Your Honor. The -- and, in fact, the Court has, in Franklin versus Linite, said that they have not distinguished between different forms of character evidence. And I understand that, in the past, we've always discussed background and character evidence as sort of the same thing. In this case, however, the Ninth Circuit's conclusion does, in fact, rest on a distinction between different forms of backward-looking and forward-looking character --

JUSTICE KENNEDY: Well it was --

MR. JOHNSON: -- evidence.

JUSTICE KENNEDY: -- it was addressing itself to the fact -- to the words of the factor (k) instruction. How does post-crime prison conduct reduce the seriousness of a previous crime?

MR. JOHNSON: It does not -- it does not relate to the seriousness of the -- of the crime at all. The -- Boyde's dancing --

JUSTICE KENNEDY: Well, I mean, it has to relate to the gravity of the crime, under the words of factor (k), doesn't it?

MR. JOHNSON: It would relate to the gravity -- to circumstances that extenuate the gravity of the crime, for purposes of a jury's sentencing determination. And

the point I'd like to make on that point is this, Your Honor. In California, jurors are well aware what their task is at a sentencing determination. In California, the guilt and the death eligibility determinations are made during the guilt-phase trial and the jurors are expressly told, during the penalty-phase trial, that their lone determination, their one concern, is to decide between a sentence of death or a sentence of life without the possibility of parole. And, in that light, the jurors are very well aware that their only determination in a California case is to make a moral, normative determination, a single normal -- moral normative determination, as to whether this man, this defendant standing before them in this Court today, deserves death or life without possibility --

JUSTICE KENNEDY: Well, now, do you --

MR. JOHNSON: -- of parole.

JUSTICE KENNEDY: -- do you have an instruction that supports what you've just told us, that the jury is told they have to make a single moral determination? Is that what the court instructed the jury? Or was --

MR. JOHNSON: No, that's --

JUSTICE KENNEDY: -- instructed in items of factor (k)?

MR. JOHNSON: The --

JUSTICE KENNEDY: And I think you have to rest on your argument, that what we are talking about is the gravity of his crime "for purposes of sentencing." I understand that argument. But then, when you go on to make the argument you just made, the jury understands it is a single moral judgment, what -- is there some specific instruction you can point to, other than the factor (k) instruction itself?

MR. JOHNSON: No, they are -- and I may have been misleading. The jurors are expressly instructed that is -- that it is their duty to determine, and their only duty to determine, whether the defendant should receive life or death and parole, and -- or life without the possibility of parole -- and in --

CHIEF JUSTICE ROBERTS: Well --

MR. JOHNSON: -- light of that determination, jurors, naturally, would understand that they could take into account anything that extenuated the gravity of the crime.

CHIEF JUSTICE ROBERTS: Well, that's what they were told, right? They're instructed that the mitigating circumstances, including factor (k), are merely examples, right?

MR. JOHNSON: Yes. In this -- yes. In --

JUSTICE STEVENS: May I ask you about that?

This case is unusual, because it has that separate instruction that, "The mitigating circumstances are merely examples, and you should pay careful attention to those, but you may -- but you may rely on other mitigating circumstances."

May I ask you, would it have been constitutional if the judge had added a sentence at the end of that instruction which said, "However, you may not consider anything mitigating unless it extenuates the gravity of the crime"?

MR. JOHNSON: It would have been constitutional, to the extent that it would have allowed the jurors to give some use whatsoever to Belmontes' proffered evidence in mitigation, and that's what this Court's prior cases has -- and, particularly, the various Texas cases have said that jurors must be given an avenue to make use of the evidence. In California --

JUSTICE STEVENS: I'm not sure you've answered my question. Would it have been a constitutional addition to that instruction to say, "But I want to -- you to clearly understand that it is not to be considered mitigating unless it extenuates the gravity of the crime"? Would that have been permissible?

MR. JOHNSON: It would appear to -- no. It would appear not to be, because --

JUSTICE STEVENS: Because that would have foreclosed consideration of the Skipper-type evidence, right?

MR. JOHNSON: It would have -- well, it would foreclose consideration of all present good-character evidence, I believe. It would -- it would have foreclosed the consideration of Boyde's evidence, of Payton's evidence.

JUSTICE STEVENS: So, then the question in this case is whether the jury might have understood factor (k) to limit them to the consideration of factors that extenuate the gravity of the crime.

MR. JOHNSON: Well, the -- yes, the question is whether the jurors would reasonably understand the instruction to preclude the consideration of constitutionally -- of relevant evidence.

CHIEF JUSTICE ROBERTS: This Court, in Payton, said that it was not unreasonable to conclude that evidence of remorse extenuated the gravity of the crime. So, why wouldn't an instruction to the jury along the lines of Justice Stevens's hypothetical have been perfectly constitutional as extenuate the gravity of the crime that's interpreted in Brown versus Payton?

MR. JOHNSON: Well, to the -- to the extent -- the jurors would have likely understood that, it -- that

instruction in Belmontes and in Payton, to extenuate the gravity of the crime for purposes of their sentencing determination --

JUSTICE SCALIA: Well, that's what I thought your position was. And --

MR. JOHNSON: Yes --

JUSTICE SCALIA: -- then you back off of it, and you say, "extenuate the gravity" of the crime doesn't relate to anything that's after the crime. I would have -- I would have interpreted the phrase to mean "anything that justifies you in giving a lesser punishment for the crime."

MR. JOHNSON: That's precisely my argument.

JUSTICE SCALIA: Well, then your answer to Justice Stevens should have been different.

MR. JOHNSON: Well, if -- and I apologize if I was misunderstood. My --

JUSTICE GINSBURG: Do you think --

MR. JOHNSON: -- question --

JUSTICE GINSBURG: -- that the jury in this very case understood that, given the questions that were asked?

MR. JOHNSON: Oh, yes, Your Honor. In this -- in this case, I -- there is certainly no reasonable likelihood that the jurors felt precluded, because, as was previously discussed, first there was this additional

instruction that supplemented the other instructions in this case that made it very clear that the aggravating factors, the various factors listed in the standard instruction A through G, that those were the -- they could only rely on those two for aggravating factors, but their understanding of mitigating factors was not limited. In fact, they were expressly told that the previous factors were merely examples.

JUSTICE GINSBURG: What about the -- what actually went on? I mean, the jury first came in and said, "What if we can't decide? Can we decide by majority?" And then the question was asked, that seemed to indicate the jurors' understanding, that we take all those factors that you told us about, and we just take those factors into account. And there were clarifying instructions asked by the defense that were not given.

MR. JOHNSON: Well, there -- to answer your questions, Your Honor, first, there was no indication at this conference that the jurors were, in fact, confused about whether they could consider any particular evidence as being mitigating. The conference itself was called to address, as you mentioned, the jurors' concern -- or the jurors' inquiry about the result -- what would happen if they couldn't reach a unanimous verdict in this case.

JUSTICE SOUTER: Well, that may be why they had

the conference, but they got into the colloquy that Justice Ginsburg described. And the last -- as I recall, the last reference to "factors," whether aggravating or mitigating, was simply in terms of the list, or "the listing," I guess the term was, so that the -- it seems to me at least, there's a fair argument on the other side of this case, that the last reference that the -- that the judge made to the jurors with respect to aggravation or mitigation was to refer to a listing. The listing itself didn't have anything to do, as I understand it, with the instruction that you are not limited to the listed mitigating factors.

So, the concern is that, because the last reference was to the list, that the list included factor (k), without embellishment, and that jurors tend to give -- we have held that the jurors tend to give the greatest emphasis to clarifying instructions or later instructions in response to questions. Isn't it a pretty good argument that, in this case, there is -- there's a reasonable likelihood that the jurors went back to their task thinking that they were limited to the list?

MR. JOHNSON: Respectfully, no, Your Honor. And the reason why is --

JUSTICE SOUTER: Well, I -- I'm not necessarily saying that's my position, so you don't have to be

respectful to me about it. Just --

MR. JOHNSON: I'll be respectful anyhow, Your Honor.

JUSTICE SOUTER: -- knock it down if you can.

JUSTICE SCALIA: Be respectful anyway.

MR. JOHNSON: Yes. The point is, with this instruction conference, there -- the -- an argument that this reference to "the listing" reflected some unconstitutional -- or constitutionally restrictive view presupposes that the jurors reasonably would have misinterpreted the meaning of the factor (k); and there is nothing in there -- in any of these questions to put anybody on notice that that -- that they had any such concerns. And first --

JUSTICE SOUTER: Well, except for the language of factor (k) itself. And if -- without some embellishment, isn't it a bit of a stretch to think that factor (k) goes as far as Skipper evidence?

MR. JOHNSON: No, Your Honor, it's not a stretch at all, because any evidence relating to the defendant's background and character, his present character in court, could be seen as extenuating the gravity of the crime for sentencing purposes.

JUSTICE GINSBURG: Well --

MR. JOHNSON: And the jurors --

JUSTICE GINSBURG: -- California itself recognized that there was a problem here of jury confusion. And now they have amended the provision so that it would be clear to any juror.

MR. JOHNSON: That's correct, Your Honor, in People v. Easley the California --

JUSTICE SCALIA: Or maybe they thought that was a problem of Ninth Circuit confusion rather than jury confusion.

[Laughter.]

JUSTICE SCALIA: I mean, having that opinion in front of them, you would think they would amend it, of course, to prevent that kind of decision again.

MR. JOHNSON: Well, they -- what they were doing was certainly a prophylactic measure here, to -- they recognized that perhaps there might be some concern of confusion, and so they wanted to forestall any chance of that happening. But notably, this case and -- this case, and no other California Supreme Court case, has found that the factor (k) instruction, the pre-Easley version of it, by itself, did mislead the jurors. In fact, the Supreme Court, in this case, came down 7-0 in support of the conclusion that the jurors were properly told about the --

JUSTICE GINSBURG: Where does this factor (k) come from? What was the source of it?

MR. JOHNSON: The factor (k), as the entire standard instruction given in these cases, recites verbatim the language of the California statute, which is California penal code section 190.3. And, interestingly enough, the -- not only the California Supreme Court, but this Court, implicitly has -- have both said that not only the California statute, but the instruction -- this standard instruction, upon -- which is based on the statute, do allow consideration of all relevant mitigating factors. In fact, as far back as 1983, in this Court's California v. Ramos decision, this Court stated, albeit in dicta, that the factor (k) -- or that the standard instruction would allow consideration of background and character evidence; and, in fact, the Court stated, in footnote 20 --

JUSTICE STEVENS: General Johnson, I don't mean to interrupt you, but I want to be sure you answered your -- you stick to your answer on -- to my question, earlier, --

MR. JOHNSON: Okay.

JUSTICE STEVENS: -- because you -- I think you changed your answer after Justice -- the Chief Justice and Justice Scalia suggested you might have made a mistake.

Are you -- is it your position that it would be constitutional to instruct the jury that, "You may not

consider any evidence mitigating, unless it extenuates the gravity of the crime"?

MR. JOHNSON: Yes, Your Honor, because the jurors would -- even if that instruction were given, the jurors would understand that an instruction that extenuates the gravity of the crime would encompass any relevant character evidence. And this Court has made these determinations all the time.

JUSTICE STEVENS: Is --

MR. JOHNSON: That --

JUSTICE STEVENS: -- that answer consistent with the position of defense counsel, who said he would not insult the intelligence of the jury by suggesting to them that the religious conversion of the defendant did not extenuate the gravity of the crime?

MR. JOHNSON: No, Your Honor. What the -- what the counsel actually said was that the defendant's religious conversion did not provide an excuse for the crime itself. And, in fact, that argument was, itself, echoing the language of the factor (k) instruction, which of course --

JUSTICE STEVENS: That's right.

MR. JOHNSON: -- directs the jurors to consider any other circumstance that extenuates the gravity of the crime, even though it's not a legal excuse for the crime.

And so, counsel was dovetailing his very effective argument with the -- with the instruction itself. And what's significant here is that, like in Payton, like in Boyde, this case involved virtually all of Belmontes' penalty-phase evidence. And the entire main thrust of his argument to the jury was that he could not make it on the outside, but he could fit in the system and contribute to society in the future, if given a chance on the inside. And again, as was true in Boyde and Payton --

JUSTICE STEVENS: If that were true would that have extenuated the gravity of the crime, if he could get along in prison?

MR. JOHNSON: Yes, for purposes of jurors -- at jury's sentencing determination, absolutely, because it would be viewed as good-character evidence, precisely --

JUSTICE STEVENS: And you think juries would clearly understand that what he did in the future in prison would extenuate the gravity of the crime.

MR. JOHNSON: Yes, Your Honor, because, in light of everything that's been said and done in this trial, as the Boyde Court noted, jurors do not parse instructions for subtle shades of meaning; they understand instructions in a commonsense manner, and in --

CHIEF JUSTICE ROBERTS: The prosecutor didn't object to any of this mitigating -- mitigation evidence

that was submitted by the defendant, did he?

MR. JOHNSON: The prosecutor objected to none of this evidence. And, in fact, the prosecutor, in closing statement, argued that the -- not only could the jurors consider Belmontes' forward-looking prospects, but the jurors should consider those prospects. So, in this case what we have --

JUSTICE GINSBURG: Well, the prosecutor's closing was schizophrenic, because he said, "But really this shouldn't matter."

MR. JOHNSON: He acknowledged it was something that -- this argument was something that was proper for consideration, but -- however, he argued that the evidence of Belmontes' religious conversion, which happens -- you know, and then lapsed immediately before he committed the murder, in this case -- was very weak evidence. But he did, nonetheless, tell the jurors that they could consider Belmontes' prior character as bearing on his present character now.

JUSTICE SOUTER: But, didn't he go beyond saying it was weak? He did say that, but didn't he say that he doubted that it fit within (k)?

JUSTICE GINSBURG: Yes.

MR. JOHNSON: He's -- yes, the prosecutor first stated that the factor (k) was a catchall, a true

catchall.

JUSTICE SOUTER: So, the prosecutor, I take it, would have answered Justice Stevens's question the other way. The prosecutor would have said, "Well, no, this probably would not be understood by the jurors to refer to the gravity of the offense."

MR. JOHNSON: No, Your Honor, because in the -- in the previous page, the prosecutor did State that it was a catchall, you know, which, by implication, incorporates everything, but -- and the prosecutor's argument, that, "I'm not sure if it fits in there," signifies that there -- not that the evidence -- that such evidence could not be considered as mitigating as a -- in a general matter, but that -- just that the religious evidence in this case was extremely weak, to the point of having, as a practical purpose, no mitigating value. The prosecutor followed that comment. I'm not sure it fits in there, in next breath, with, "It's" -- something to the effect of, "It's no secret that Belmontes' religious evidence is pretty shaky here," and went on to conclude that. But then, in the next breath, he said, "But, nonetheless, this is something that's proper for you to consider."

And, again, reasonable jurors, hearing this -- having been given the instruction here -- would reasonably interpret this -- all of this evidence as something they

could use to extenuate the gravity of the crime. And particularly in this context, because, like in Boyde, in addition to this factor (k), the standard instruction directed the jurors to consider all the evidence. The first factor of the enumerated factors -- (a) through (g), in this case -- told the jurors that they should -- that they should focus on -- that the first thing to consider was the -- or the circumstances of the crime itself.

The final factor, therefore, that any other circumstance that extenuates the gravity of the crime would clearly be understood to relate to matters outside the crime itself. And, to the extent that there was any ambiguity about the meaning of that in this particular case, the argument by counsel, the additional instruction here, clarified that to the point that there is certainly no reasonable likelihood that the jurors felt that they were constrained in considering any mitigating evidence in any way they thought fit.

JUSTICE GINSBURG: Mr. Johnson, when I asked you about the derivation of factor (k), you gave me a California statutory cite, but is there -- does it come from any model code? Does any other State have such a provision? How widespread is it?

MR. JOHNSON: Of the -- the actual wording of this instruction?

JUSTICE GINSBURG: How many States have an instruction that talks about extenuating the circumstances of the crime?

MR. JOHNSON: I'm not sure, Your Honor. I'm not sure. I know that this -- that this instruction itself came from the statute, which, in turn, was adopted from the California Briggs initiative in the 1978 statute. I'm not aware of any -- of any other States -- there may or may not be -- who have adopted the same statutory model that California has.

JUSTICE GINSBURG: Which -- California hasn't had it since 1983, right?

MR. JOHNSON: Pardon me, Your Honor?

JUSTICE GINSBURG: California hasn't used this instruction since 1983.

MR. JOHNSON: That's correct, Your Honor. After People v. Easely, the California Supreme Court augmented the instruction.

JUSTICE GINSBURG: So, is this a one-of-a-kind case? I mean, you said, in your brief, that the Ninth Circuit decision threatens many other valid California death judgments. But these would all have to be rather ancient cases.

MR. JOHNSON: Yes. And, unfortunately, there's -- there are several of them that are still being

litigated. I've done research on this issue, and, as of this date, I can't give you an actual -- an absolute number, but I believe there is approximately 15 cases pending, like this one, that involve the factor (k) instruction -- this factor (k) instruction -- that involve evidence of -- somehow, future-looking evidence, which -- all character evidence, frankly, is future-looking --

JUSTICE GINSBURG: And --

MR. JOHNSON: -- whereas --

JUSTICE GINSBURG: -- that wouldn't wash out, on the other grounds?

MR. JOHNSON: Right, that -- and -- that are still pending, and that are -- unlike Payton, are not governed by the AEDPA.

JUSTICE SCALIA: But you're saying those convictions are more than -- more than 23 years old?

MR. JOHNSON: Yes, Your Honor. Unfortunately, there's -- they're -- I believe all of them are being litigated now in the Federal court system in California.

If you have no further questions, I guess I'll reserve the rest of my time.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Multhaup.

ORAL ARGUMENT OF ERIC S. MULTHAUP

ON BEHALF OF RESPONDENT

MR. MULTHAUP: Mr. Chief Justice, and may it please the Court:

Here is Respondent's 60-second nutshell summary of our core position. This case does not turn on the constitutional factor (k) standing alone. Rather, it turns on a straightforward application of the Boyde test, to the unusual, unique circumstances that occurred during the arguments, instructions to deliberations at the penalty trial of this case.

Here are the two key components of our claim. During arguments to the jury, both counsel conveyed to the jury that Belmontes' evidence of Youth Authority religious experience was not covered by factor (k). However, both counsel suggested to the jury that it should be considered anyway. Now, this is unusual, because, of all -- of all the things that the district attorney and the defense counsel disagreed on, this was one that they did agree on, and it's likely that the jury would have taken note of that.

The case then proceeded to instructions and deliberations. The jury came back to court, announced that they were deeply divided, perhaps with a majority favoring life. The turning point occurred when one juror, Juror Hern, requested judicial confirmation that the specific list of factors previously given was the only

base -- was the only framework within which the penalty decision could be made. At that point, the trial court had a constitutional obligation to disabuse Juror Hern and the rest of the assembled jurors of that misapprehension and, at the very least, to reinstruct the jurors that the enumerated factors were merely illustrative and not exhaustive, and instruct the jurors that the jury had to consider all of the mitigating evidence.

The trial court did neither, with the result that the jury all too likely returned to its deliberations with the belief that the only factors -- the only matters they considered -- could consider were those encompassed within the enumerated factors, and believing -- based on counsel's prior arguments -- that factor (k) did not include the Youth Authority religious-experience evidence.

JUSTICE ALITO: When did the defense counsel say that this evidence did not fit within factor (k)?

MR. MULTHAUP: Your Honor, it occurred in argument. And my counsel -- esteemed co-counsel will give me the exact page -- but it occurred in the context -- the context -- during the prosecutor's argument, the prosecutor said to the jury that, "I suspect" -- and then he, for emphasis, said, "I can't imagine that you won't be told that the religious-conversion evidence doesn't fit within factor (k)." And, at that point, he expressed

reservations, doubts, as to whether it did fit in factor (k) or --

CHIEF JUSTICE ROBERTS: Why does that --

MR. MULTHAUP: -- any other factor.

CHIEF JUSTICE ROBERTS: Why does that matter? Because the jury was told that the factors were merely examples of the mitigating evidence they could consider.

MR. MULTHAUP: I'm more than --

CHIEF JUSTICE ROBERTS: It probably didn't fit into factor (h), either, but it doesn't matter.

MR. MULTHAUP: Well, it has -- if it -- oh, Your Honor, the -- calling your -- or you've called my attention to the instruction that said that the set -- in the prior set of -- or in the general set of instructions, that the enumerated factors were merely illustrative. Now, that instruction had a cloud of confusion surrounding it, because the way it was phrased was, the Court said, "The mitigating factors that I have expressed to you are illustrative." There was no list of mitigating factors. There was only a single list, unitary list, of factors that could be either aggravating or mitigating, depending on a jury's decision.

The instruction that you're referring to, Your Honor, was a -- was the result of the trial court denying some, and granting some, parts of the special instructions

requested by the defense. And so, when the trial court said to the jury, "The list of mitigating factors is illustrative only," I -- we, who know the background of this, understand what -- the point he was trying to make, but the jury, hearing it, they would think, very reasonably, "There's no list of mitigating factors."

JUSTICE ALITO: You said this case is different because both counsel told the jury that the evidence that you're relying on did not fit within factor (k). And I'm not sure what you're referring to.

MR. MULTHAUP: Okay.

JUSTICE ALITO: Now, as to defense counsel, are you referring to what you quoted on page 9 of your brief, where he says, "I'm not going to insult you" -- what you highlighted on page 9 -- "I'm not going to insult you by telling you I think it excuses, in any way, what happened here"? That's what you -- is that what you're referring to?

MR. MULTHAUP: That's one of the passages that I am referring to, and it came as a direct response to the District Attorney, in effect, calling out the defense attorney, "I can't imagine that you won't be told that this fits within factor (k)." So, at that point, the defense counsel had to make a decision, "Okay, either I have to argue that my Skipper evidence is -- my square peg

of Skipper evidence has to fit in the round hole of" --

JUSTICE ALITO: Isn't he --

MR. MULTHAUP: -- "factor (k)" --

JUSTICE ALITO: -- saying something very different there? He isn't -- he's not saying, "This doesn't fit within factor (k)." And he makes no reference to factor (k). He says nothing about "extenuating." He says "excuses." Isn't that something very different, "excusing" the crime?

MR. MULTHAUP: Your Honor, this Court has used the terms "extenuate" and "excuse" as synonyms in Boyde and --

JUSTICE ALITO: If you had been --

MR. MULTHAUP: -- in Payton with --

JUSTICE ALITO: -- if you were arguing this to the jury, would you have said, "You know, my client earned a position of responsibility on the fire crew that patrolled the Sierra Foothills, and, therefore, that excuses the crime that you've found that he committed here"?

MR. MULTHAUP: No. No. The --

JUSTICE BREYER: I don't see, anywhere in Mr. Schick's statement, at least from 165 to 170, where he says what you said he said. Now, maybe he says it some other place, but -- I'd like the reference to it -- but I

-- what I have him as saying is that -- he says, for example, several times, "The presence -- I don't suggest that the -- that the presence of religion, in itself, is totally mitigating." Well, it certainly wasn't, in this instance. I gather I'm right. Am I right in thinking that all this religious conversion took place before he murdered the girl? So, this is not a case of your trying to get some evidence that took place after the crime.

MR. MULTHAUP: That's right. And --

JUSTICE BREYER: All right. If --

MR. MULTHAUP: -- then --

JUSTICE BREYER: -- that's right, then maybe it does more easily fit within factor (k). The prosecutor told the jury they should consider it, or they could. The judge told the jury they could consider it -- it sounded as -- says, "You take it -- this is an example" -- he says, "It's an example in factor (k)." Maybe he's wrong, but they certainly likely think they can consider it. And Mr. Schick doesn't say it's not in factor (k). At least, I don't see it. That's why I'm asking.

MR. MULTHAUP: Your Honor, the whole point of factor (k) is that -- evidence that's an excuse for the crime. And if we're --

JUSTICE BREYER: No, no, I know the point of factor (k). I'm trying to be absolutely certain, before

thinking --

MR. MULTHAUP: Right.

JUSTICE BREYER: -- he didn't say it, that I've made every effort to get from you the place where -- that this -- where the defense counsel says, "Jury, I agree, you cannot put this into factor (k)."

MR. MULTHAUP: Okay. And, Your Honor, looking at it in context, given the district attorney's argument, the district attorney says, "I can't imagine you won't be told that it doesn't -- that it -- that it doesn't fit within factor (k)." So, the defense attorney gets up and says, "I'm -- I am going to tell you that it doesn't within -- fit within factor (k). It doesn't" --

JUSTICE KENNEDY: And that page --

MR. MULTHAUP: -- "constitute" --

JUSTICE KENNEDY: -- where he says that is where?

MR. MULTHAUP: When he -- when he says, Your Honor, "It doesn't constitute an excuse in any way."

JUSTICE BREYER: Were his words "it doesn't constitute an excuse"?

MR. MULTHAUP: "It doesn't excuse, in any way," Your Honor. And we -- as a matter --

JUSTICE KENNEDY: But in --

MR. MULTHAUP: -- of semantics --

JUSTICE KENNEDY: -- but, in a sense, that's right, just like remorse. Remorse doesn't excuse the crime. It's a consideration that you take into account in assessing the gravity of the crime for purposes of punishment.

MR. MULTHAUP: Okay. Your Honor, this is a point of, perhaps, semantics. But the -- by the time you get to penalty phase, there's nothing to excuse the crime, in the sense of self-defense or "not guilty by reason of insanity." The only thing --

JUSTICE BREYER: -- "in any way."

MR. MULTHAUP: It does say "in any way."

JUSTICE BREYER: Where?

JUSTICE SCALIA: It's on page 9 of your -- of your brief. The --

MR. MULTHAUP: Thank you.

JUSTICE BREYER: Thank you.

JUSTICE SCALIA: -- italicized portion.

JUSTICE STEVENS: It's on 166 of the joint appendix.

MR. MULTHAUP: Thank you.

And if the -- if trial counsel was trying to make the point that, "Well, it doesn't constitute a legal excuse, but it does constitute a partial excuse or some kind of mitigating evidence under this factor," he would

have put that in there. The clear import, from the context here, is that defense counsel was not trying to sell the jury a position that was, on its face, untenable, but, rather, to acknowledge that it did not fit within the "excuse the gravity of the crime" factor, which --

JUSTICE SCALIA: Only if you think that excusing the crime and extenuating its gravity are one and the same thing, which I don't really think.

MR. MULTHAUP: Well, Your Honor, there's two -- I'd like to make two responses to that. First of all, this Court has used those terms interchangeably, in Boyde and Payton, with respect to mitigating evidence. Second of all, let's -- as a -- as a practical matter, we have a defense attorney arguing a case to a jury in a Central Valley California county. And if the defense attorney has a choice between two synonyms, one which is used in common parlance, "excuse," and one which is not used in common parlance, "extenuate," it hardly constitutes an -- a defect or concession on his part if he were to say, "This does not excuse the crime in any way." That's plain speaking to a jury, that -- and what he -- what he -- counsel --

JUSTICE GINSBURG: But wouldn't a jury think all this evidence must have some purpose? The only purpose it could have is to -- is to propel us toward life rather

than death. I mean, the bulk of the evidence at the sentencing phase -- wasn't it? -- was how he behaved when he was a prisoner before.

MR. MULTHAUP: Your Honor, not -- that's not exactly what happened at penalty phase here. This is not a case like Boyde, where all the evidence was background and character evidence, and it's not a case like Payton, where the only evidence was a post-crime conversion. This case involved a mixture of evidence, where first there was the grandfather who testified to what a bad upbringing he had, traditional background and character evidence. The mother testified to her undying love for her son, traditional evidence. Friends testified to his good characteristics. And then, at the end, there was a clear segment that related to his good performance in Youth Authority and his religious conversion. So, it was only a -- it was a partial part of -- partial part of the penalty-phase presentation, but it certainly wasn't the entire presentation, as it was in Boyde and --

JUSTICE GINSBURG: Even so, there was --

MR. MULTHAUP: -- Payton.

JUSTICE GINSBURG: -- there was extensive testimony about his prospects for doing good in a prison setting.

MR. MULTHAUP: Well, certainly, Your Honor.

JUSTICE GINSBURG: And the jury must have thought there's some reason why the judge allowed that evidence in. And what reason could it be, other than to show that, if he is given life, he will be a good prisoner?

MR. MULTHAUP: Your Honor, that's a very logical, sensible thing for the jury to have thought. And now I'd like to drop the second shoe of the key components of our claim. The first shoe was the arguments of counsel that we've discussed the various permutations on. The most likely -- so, the jury began deliberating based on the instructions and the arguments that they had -- that they had had. And it's entirely likely that when the jury was favoring a life verdict during the first part of their deliberations, Belmontes' prospects for good behavior in prison and contributions were part of the debate.

When Juror Hern asked for judicial clarification -- not clarification, confirmation -- of a very specific view that only the enumerated factors could be considered in the penalty-phase deliberations, the jury -- and the trial court assented without qualification to that -- at that point, the jury would have very likely thought, "The trial court who holds a position of great deference to us, much more than most other authority figures we have in our life, just told us what the marching orders are here.

This is the framework for decision."

Now, what happened during the -- during the trial is the defense -- and I'm suggesting what the jury might have thought, in relation to your question -- that, "The defense attorney was taking his best shot for his client, pushing the envelope, maybe went over the top a little bit. But defense attorneys do that. The prosecutor was being a very decent stand-up kind of person, and -- but, right now, when we get down to the business of making the decision, we have to follow the rules. And the rules are what the -- are what the -- are what Judge Gisson just confirmed to us, that we are limited to the enumerated factors, and factor (k) does not include the Skipper evidence, because that was explained to us by counsel."

I would like to --

CHIEF JUSTICE ROBERTS: Before you move on, Counsel --

JUSTICE KENNEDY: Well, of course you --

CHIEF JUSTICE ROBERTS: -- don't you --

JUSTICE KENNEDY: -- don't you -- excuse me. Excuse me.

CHIEF JUSTICE ROBERTS: -- don't you have to address the Teague question a little bit? You -- you're entitled to this new rule adopted by the Court of Appeals

only if it was dictated by precedent at the time the judgment became final. Isn't that kind of a hard argument to make in light of our subsequent decision in Brown v. Payton?

MR. MULTHAUP: Your Honor, I don't see -- as to the first part of Your Honor's question, I don't believe that there is any new rule whatsoever in the Ninth Circuit opinion. It's a straightforward application of Boyde to the totality of circumstances that occurred.

CHIEF JUSTICE ROBERTS: Of Boyde? It's straightforward application of Boyde?

MR. MULTHAUP: Yes. The Ninth Circuit began with Boyde, and it went through all of the proceedings at trial, and concluded that there was a reasonable likelihood that the jury didn't consider Skipper evidence. And that's what we're asking this Court to do, the exact same -- applying the Boyde test to the rule -- the rule of decision that was clearly established by this Court as of 1986, and reiterated and expanded by this Court in 1987, with Skipper.

JUSTICE SCALIA: Yes, but what has to be clear under Teague is not just the rule, but the rule's application in circumstances like this. There are a lot of rules that are clear, but if Teague means anything at all it has to mean that you should have known that, in

this case, the rule would produce this result. So it's not enough to say that there was a rule. There are a lot of rules out there, but the question is whether the outcome should have been clear at the time. Isn't that what Teague means?

MR. MULTHAUP: Certainly, Your Honor. And applying -- because when we -- when we take a look at Penry I, this Court said -- in response to a Teague argument by the attorney general, this Court held that Penry got past the threshold Teague issue because of -- at the time of the finality of his direct appeal, in 1986, the rule was well-established that the sentencer may not be precluded from considering relevant evidence in mitigation, by Lockett, Eddings, and others. So if that was a firmly established rule as of 1986 --

CHIEF JUSTICE ROBERTS: Well, Penry was considerably tightened by the subsequent decision in Graham versus Collins, though.

MR. MULTHAUP: Graham v. Collins was an AEDPA case, as was Payton. So, we have a very, very different standard of review. And, if I may, Your Honor --

CHIEF JUSTICE ROBERTS: No, I know Payton was an AEDPA case, but it, nonetheless, concluded that it was not unreasonable for the California Supreme Court to read instruction (k) in a way that allowed this evidence to be

considered. And I would have thought, if it was not unreasonable to have that reading, that the contrary reading that you're proposing, and that the Ninth Circuit adopted below, could hardly be said to have been dictated by existing precedent.

MR. MULTHAUP: Ah. Well, the -- our position in relation to that is, the direct quote from -- direct quote from Payton itself, in which the Court said that, assuming the California Supreme Court was incorrect, Payton, nonetheless, loses. Here we're arguing that the California Supreme Court was incorrect, and, therefore, Belmontes --

CHIEF JUSTICE ROBERTS: Because if it was --

MR. MULTHAUP: -- should win.

CHIEF JUSTICE ROBERTS: -- because, even if incorrect, it was, nonetheless, reasonable. And I'm just having trouble understanding how, if a contrary position is dictated by precedent under Teague, a reading 180 degrees the opposite of that could be regarded by this Court as reasonable.

MR. MULTHAUP: The unusual facts of this case are much stronger in favor of relief under the Boyde test than were those in Payton. Therefore, applying the longstanding rule of Lockett and Eddings to the different, and more compelling, facts of this case, there is no

reason -- there is every reason to provide Belmontes relief, where it was denied to Payton. And there's no reason to believe that the California Supreme Court was being incorrect, but reasonable, in -- to presume, or find, based on Payton, that the California Supreme Court was being incorrect, but reasonable, in this case.

Penry could not have won his case under the -- under the -- that particular analysis, because the Texas --

CHIEF JUSTICE ROBERTS: Well, I --

MR. MULTHAUP: -- Supreme Court --

CHIEF JUSTICE ROBERTS: Graham didn't win his case.

MR. MULTHAUP: And Payton didn't win either, but we're operating under the prior regime. So -- I understand the -- the Court is suggesting, I believe, that somehow Payton is a sword, in some sense, to deny relief as to all California defendants under penalty-phase instructional claims cited by the California Supreme Court, even under different facts and under more egregious circumstances. And I -- I may have -- be misinterpreting the Court's argument, but I would argue that there are any number of scenarios, notwithstanding Payton, that would require relief under the pre-AEDPA standards when you apply the test of Boyde to all the circumstances of the

case.

JUSTICE GINSBURG: Mr. Multhaup, one aspect of your argument I wish you would clarify, and that's in your brief at page 20, footnote 3. As I understand it, you are saying -- you are not challenging factor -- the factor (k) instruction as excluding Skipper evidence. Your challenge is limited to this particular case. Is that what you're saying in that footnote?

MR. MULTHAUP: Yes, Your Honor. I'm not here to refight the battle of Boyde. You know, I spilled tons of hours of time and printer's ink in an amicus brief in 1989, and I understand the concept of "you lose." What we are arguing is that the Boyde test should be applied to the circumstances of this case, and that factor (k), standing alone, in a -- in a case where defendant relies on Skipper evidence, does not warrant relief by that fact alone. Here we have much more than that fact which, under Boyde, does call for relief.

I would like to give --

JUSTICE GINSBURG: And the --

MR. MULTHAUP: -- Respondent's --

JUSTICE GINSBURG: -- the "much more" is the questions that the jury asked?

MR. MULTHAUP: The "much more" includes the arguments by counsel, which, notwithstanding different --

reasonably differing views of it, does put a context on the -- put into context what defense counsel was arguing. We have the confusion inherent in the instruction that the Court gave the -- the putatively proper instruction about them being illustrative rather than exhaustive. We have the colloquy during the penalty deliberations. We have Juror Hailstone's follow-up question regarding the possibility of considering the availability of psychiatric treatment, which was explicitly rejected, and very likely confirming the message that had just been given to -- via the answer to Juror Hern's case, that only the enumerated factors can be considered.

CHIEF JUSTICE ROBERTS: Well, there is no evidence on that question presented, right? The reason that the possibility of psychiatric treatment couldn't be considered is because neither party had put evidence on that question before the jury.

MR. MULTHAUP: Well, Your Honor, you know that, because you're the Chief Justice, but the people of San Joaquin County had no idea that that was the reason, and if not explained --

CHIEF JUSTICE ROBERTS: No, no. It's a question of what mitigating evidence was put before the jury. The jurors couldn't consider that, because it was the -- quite proper for the trial judge to say, "You can't consider

that, because there was no evidence on it."

MR. MULTHAUP: It would have been perfectly proper for the trial court to say, "You can't consider that, because" -- appended exactly the -- the explanation that you gave. And the jurors would have understood that they had to consider the evidence presented, but they couldn't speculate about other things. If, at the crucial point in the proceedings, the trial court had said, "Juror Hern, you do have to pay attention to those factors, but they're illustrative rather than exhaustive, and you must consider all of Belmontes' evidence. Please go back and deliberate," that would have cured the errors here.

However, the error occurred when the -- when the court didn't do that. And Juror Hailstone's question -- the trial court's answer could only have reaffirmed the misimpression that the court returned to the -- to deliberate with.

I have a -- just a few minutes, and I would like to give Respondent's answer to Justice Kennedy's question to Petitioner, paraphrasing somewhat, How does Skipper evidence extenuate the gravity of the crime? And the answer is, it doesn't at all, logically, ethically, or morally. As defense counsel conveyed to the jury, the circumstances of the crime are what they are, and there's nothing that can be done about that. The circumstances of

the crime are immutable and irreparable. The only thing that can be extenuated in a penalty presentation is Petitioner's culpability for the crime. And counsel argued that Petitioner's culpability was some -- to some extent, extenuated and mitigated because the evidence showed that there was no plan to kill the decedent when they went to her house.

JUSTICE KENNEDY: But we have said that remorse extenuates the gravity of the crime, for punishment purposes, under factor (k).

MR. MULTHAUP: Well, of --

JUSTICE KENNEDY: And that --

MR. MULTHAUP: -- course --

JUSTICE KENNEDY: And that -- and that -- that's post -- that's post-crime.

MR. MULTHAUP: And, Your Honor, this pre- and post- distinction, I don't believe has -- is a relevant distinction. It's whether it's functionally related to the culpability for the crime, because when a defendant expresses remorse --

JUSTICE KENNEDY: Oh, you think pre- and crime -- pre- and post- distinction has no bearing on this case? I thought that was really the linchpin of your argument?

MR. MULTHAUP: No, Your Honor. It's that Skipper evidence is a specific and different kind of

mitigating character evidence that doesn't extenuate the gravity of the crime, but it provides a different kind of reason for sparing the defendant's life. There is --

JUSTICE GINSBURG: And yours is both pre- and post- -- that is, you're referring to conduct that took place before this crime was committed -- that is, his prior incarceration -- and asking the jury to project that forward to say, "That's how he behaved in prison, before he committed this most recent crime, and that's how he's likely to behave again."

MR. MULTHAUP: Well, all of the Skipper evidence in this case occurred as a matter of historical fact before the capital crime and -- which, in fact, gives it's much -- gives it much more weight, because it can't be suggested that he contrived his good conduct after being arrested for a capital crime.

But, I'm going to make a broad statement here. There is no reported case in California where either a defense attorney or the California Supreme Court makes a text-based argument that Skipper evidence extenuates the gravity of the crime, because it's illogical and doesn't work. Look what the defense attorney did in Payton. He argued that, "Well, of course you have to consider that evidence under factor (k), because it's a catchall. It's supposed to be inclusive." That's not a text-based

argument, that's a circumstantial-evidence kind of -- kind of argument.

When we look at that -- when we look at that phrasing of "extenuating the gravity of the crime," with its plain meaning in English, and the distinction made, in Skipper itself, that Skipper evidence does not relate to Petitioner's culpability for the crime, the jury is going to appreciate what the -- what the attorney said to them, that the -- that the Youth Authority religious evidence does not extenuate the gravity of the crime, but has independent mitigating effect outside those enumerated factors. There's nothing -- that's a perfectly appropriate position to take, no constitutional problem there until, during deliberations, the trial court confirmed that they could only consider the enumerated factors and could not consider nonstatutory mitigation, the -- any other kind of mitigation, because that, in effect, closed out consideration of the -- of the Skipper evidence.

JUSTICE SCALIA: If the judge's response to Juror Hern was so misleading, why didn't counsel object to it, if it was as obviously misleading as you say?

MR. MULTHAUP: Your Honor, it's like being -- stepping off a curb and being hit by a bicycle that you didn't see coming. This occurs in the middle of jury

deliberations. Nobody expected a juror to ask a question of this type. And, of course, I'm speculating here, but the trial court fielded the questions, responded off-the-cuff, and the juror -- jury went back.

JUSTICE SCALIA: That's why you have counsel there, to help the court when the court makes a real boo-boo, and if this was as obviously error as you say, one would have expected some objection from defense counsel.

MR. MULTHAUP: One could also have expected the trial court to say, "Let's take a minute to think about that. We're going into recess, and I'd like counsel's opinion about this, because this is a difficult question. It's not a simple yes-or-no answer." Under --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Johnson, you have 6 minutes remaining.

REBUTTAL ARGUMENT OF MARK A. JOHNSON

ON BEHALF OF PETITIONER

MR. JOHNSON: Thank you, Your Honor.

In a minute, I'd like to briefly touch on the Teague issue. At the time Belmontes' judgment was pending, there was no precedent that would have dictated the Ninth Circuit's conclusion here regarding the sufficiency of the factor (k) instruction. And, indeed, this Court's subsequent holdings, in Boyde and Payton,

bear out the fact that it was at least -- that that decision certainly was not dictated by precedent.

In Boyde, this Court dealt with evidence of good character that was precisely the same as the evidence of good character here. The -- Belmontes' evidence of having succeeded during a prior commitment and religious conversion, that he might be able to help others in the future, was good-character evidence in the same way that Boyde's evidence of having won a dancing prize, of having helped children, of having helped artistic -- having artistic abilities, was all good character. And there is certainly nothing in Boyde to suggest that there is any distinction. But, even if there was, it would not be one that would compel all rational jurists to distinguish the two cases.

And that's further buttressed, of course, by this Court's more recent opinion in Payton, which found that it was at least reasonable for the State Court to conclude that Payton's post-crime forward-looking evidence would be understood to fall within the factor (k) instruction if it was at least reasonable for California to find that such forward -- post-crime forward-looking evidence would fit within the factor (k). The Ninth Circuit's conclusion, to the contrary, regarding pre-crime good-character evidence, certainly was not dictated by

precedent.

I'd also like to address, quickly in my remaining time, Mr. Multhaup's arguments regarding the jury -- or the argument of counsel and the jury questions.

Again, Boyde counsels that the relevant consideration is whether there is any reasonable likelihood that the jurors view the instructions in a way as to foreclose consideration of constitutionally relevant evidence. In this case, both -- the jurors were instructed with the factor (k). As I've said, they were given the supplemental instruction that said that the -- that the previous listing -- factors were only examples of some. And then, both counsel clearly said that the jurors could, and should, consider this evidence.

Is there some possibility out there that some juror might have misinterpreted this in a -- in a -- in a different manner? I suppose so, but there is certainly no reasonable likelihood, especially in light of the fact that Belmontes' evidence, virtually all of it, was directed at this main thrust of the argument. And, just like in Payton and Boyde, for the jurors to have believed that they could nonetheless not consider that evidence would have turned the whole proceedings in a virtual charade or a pointless exercise.

So far as the questions during juror

deliberations, it's, first, important to recognize, none of these jurors said anything to suggest that they were actually confused about whether they could consider any evidence offered. Their question -- Juror Hern's question merely related to her -- she wanted to confirm her understanding about the role of balancing mitigating versus aggravating factors under California law. And certainly the parties there if -- would have been in a better position to realize it if these questions somehow suggested some ambiguity. There was no objection there. Moreover, in the same conference, the judge advised the jurors to review the instructions again, which, of course, again included the factor (k), and which, of course, included the supplemental instruction that said that their consideration of mitigating factors was not limited to those that had been listed, but those that had been listed were merely examples.

If the Court has no further questions, I will submit the case.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

The case is submitted.

[Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.]