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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT L. AYERS, JR., :
ACTING WARDEN, :
Petitioner, :

v. : No. 05-493

FERNANDO BELMONTES. :

- - - - - x

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.

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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

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

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

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

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

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

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

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

1 that, explicitly?

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

11 JUSTICE KENNEDY: Well it was --

12 MR. JOHNSON: -- evidence.

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

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

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

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

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

16 JUSTICE KENNEDY: Well, now, do you --

17 MR. JOHNSON: -- of parole.

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

22 MR. JOHNSON: No, that's --

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

25 MR. JOHNSON: The --

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

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

15 CHIEF JUSTICE ROBERTS: Well --

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

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

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

25 JUSTICE STEVENS: May I ask you about that?

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

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. JOHNSON: Yes --

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

13 MR. JOHNSON: That's precisely my argument.

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

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

18 JUSTICE GINSBURG: Do you think --

19 MR. JOHNSON: -- question --

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

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

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

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

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

25 JUSTICE SOUTER: Well, that may be why they had

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

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

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

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

1 respectful to me about it. Just --

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

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

5 JUSTICE SCALIA: Be respectful anyway.

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

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

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

24 JUSTICE GINSBURG: Well --

25 MR. JOHNSON: And the jurors --

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

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

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

10 [Laughter.]

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

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

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

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

16 JUSTICE STEVENS: General Johnson, I don't mean
17 to interrupt you, but I want to be sure you answered your
18 -- you stick to your answer on -- to my question, earlier,
19 --

20 MR. JOHNSON: Okay.

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

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

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

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

9 JUSTICE STEVENS: Is --

10 MR. JOHNSON: That --

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

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

22 JUSTICE STEVENS: That's right.

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

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

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

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

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

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

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

1 that was submitted by the defendant, did he?

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

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

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

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

23 JUSTICE GINSBURG: Yes.

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

1 catchall.

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

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

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

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

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

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

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

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

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

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

13 MR. JOHNSON: Pardon me, Your Honor?

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

16 MR. JOHNSON: That's correct, Your Honor. After
17 *People v. Easley*, the California Supreme Court augmented
18 the instruction.

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

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

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

8 JUSTICE GINSBURG: And --

9 MR. JOHNSON: -- whereas --

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

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

23 Mr. Multhaup.

24 ORAL ARGUMENT OF ERIC S. MULTHAUP

25 ON BEHALF OF RESPONDENT

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

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

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

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

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

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

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

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

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

3 CHIEF JUSTICE ROBERTS: Why does that --

4 MR. MULTHAUP: -- any other factor.

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

8 MR. MULTHAUP: I'm more than --

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

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

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

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

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

11 MR. MULTHAUP: Okay.

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

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

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

2 JUSTICE ALITO: Isn't he --

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

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

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

13 JUSTICE ALITO: If you had been --

14 MR. MULTHAUP: -- in Payton with --

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

21 MR. MULTHAUP: No. No. The --

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

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

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

10 JUSTICE BREYER: All right. If --

11 MR. MULTHAUP: -- then --

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

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

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

1 thinking --

2 MR. MULTHAUP: Right.

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

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

14 JUSTICE KENNEDY: And that page --

15 MR. MULTHAUP: -- "constitute" --

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

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

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

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

24 JUSTICE KENNEDY: But in --

25 MR. MULTHAUP: -- of semantics --

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

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

11 JUSTICE BREYER: -- "in any way."

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

13 JUSTICE BREYER: Where?

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

16 MR. MULTHAUP: Thank you.

17 JUSTICE BREYER: Thank you.

18 JUSTICE SCALIA: -- italicized portion.

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

21 MR. MULTHAUP: Thank you.

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

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

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

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

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

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

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

20 JUSTICE GINSBURG: Even so, there was --

21 MR. MULTHAUP: -- Payton.

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

25 MR. MULTHAUP: Well, certainly, Your Honor.

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

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

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

1 This is the framework for decision."

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

16 I would like to --

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

19 JUSTICE KENNEDY: Well, of course you --

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

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

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

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

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

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

12 MR. MULTHAUP: Yes. The Ninth Circuit began
13 with *Boyde*, and it went through all of the proceedings at
14 trial, and concluded that there was a reasonable
15 likelihood that the jury didn't consider *Skipper* evidence.
16 And that's what we're asking this Court to do, the exact
17 same -- applying the *Boyde* test to the rule -- the rule of
18 decision that was clearly established by this Court as of
19 1986, and reiterated and expanded by this Court in 1987,
20 with *Skipper*.

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

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

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

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

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

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

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

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

13 CHIEF JUSTICE ROBERTS: Because if it was --

14 MR. MULTHAUP: -- should win.

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

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

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

7 Penry could not have won his case under the --
8 under the -- that particular analysis, because the Texas
9 --

10 CHIEF JUSTICE ROBERTS: Well, I --

11 MR. MULTHAUP: -- Supreme Court --

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

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

1 case.

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

9 MR. MULTHAUP: Yes, Your Honor. I'm not here to
10 refight the battle of Boyde. You know, I spilled tons of
11 hours of time and printer's ink in an amicus brief in
12 1989, and I understand the concept of "you lose." What we
13 are arguing is that the Boyde test should be applied to
14 the circumstances of this case, and that factor (k),
15 standing alone, in a -- in a case where defendant relies
16 on Skipper evidence, does not warrant relief by that fact
17 alone. Here we have much more than that fact which, under
18 Boyde, does call for relief.

19 I would like to give --

20 JUSTICE GINSBURG: And the --

21 MR. MULTHAUP: -- Respondent's --

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

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

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

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

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

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

1 that, because there was no evidence on it."

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

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

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

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

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

11 MR. MULTHAUP: Well, of --

12 JUSTICE KENNEDY: And that --

13 MR. MULTHAUP: -- course --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Johnson, you have 6 minutes remaining.

17 REBUTTAL ARGUMENT OF MARK A. JOHNSON

18 ON BEHALF OF PETITIONER

19 MR. JOHNSON: Thank you, Your Honor.

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

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

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

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

1 precedent.

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

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

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

25 So far as the questions during juror

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

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

20 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

21 The case is submitted.

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

24

25

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