

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   JILL L. BROWN, ACTING WARDEN,   :

4                   Petitioner                   :

5           v.                                   :   No. 03-1039

6   WILLIAM CHARLES PAYTON.                   :

7   - - - - -X

8   Washington, D.C.

9   Wednesday, November 10, 2004

10                   The above-entitled matter came on for oral

11   argument before the Supreme Court of the United States at

12   10:58 a.m.

13   APPEARANCES:

14   ANDREA N. CORTINA, ESQ., Deputy Attorney General, San

15       Diego, California; on behalf of the Petitioner.

16   DEAN R. GITS, ESQ., Chief Deputy Federal Public Defender,

17       Los Angeles, California; on behalf of the Respondent.

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P R O C E E D I N G S

(10:58 a.m.)

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

Ms. Cortina.

ORAL ARGUMENT OF ANDREA N. CORTINA

ON BEHALF OF THE PETITIONER

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

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

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

The first is that the California Supreme Court

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

3 The second is --

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

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

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

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

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

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

1 mitigating evidence in deciding the appropriate penalty.

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

7 MS. CORTINA: I respectfully disagree.

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

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

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

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

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

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

9 JUSTICE STEVENS: May I ask --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 misstatement of law. And Boyde addresses that question.

2 Boyde --

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

6 MS. CORTINA: Yes.

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

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

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

23 MS. CORTINA: Right, and what was --

24 JUSTICE GINSBURG: And -- and you --

25 MS. CORTINA: Sorry.



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

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

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

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

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

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

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

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

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

15 JUSTICE KENNEDY: Have the California courts  
16 said that?

17 MS. CORTINA: That?

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

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

25 JUSTICE KENNEDY: I -- I thought the case was

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1     Isn't that all?

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

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

1 unreasonable.

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

5           JUSTICE BREYER: How long did the penalty phase  
6 take?

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

9           JUSTICE STEVENS: Thank you.

10           Mr. Gits.

11                   ORAL ARGUMENT OF DEAN R. GITS

12                   ON BEHALF OF THE RESPONDENT

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

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

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

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



1 is entitled to consider.

2 But what is important --

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

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

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

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

25 JUSTICE KENNEDY: And what was the question?

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

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

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

13          JUSTICE BREYER: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE BREYER: I mean, I would perhaps have

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

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

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

1 one --

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 didn't engage in a harmless error --

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

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

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

25 JUSTICE BREYER: Is it relevant at all? This

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

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

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

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

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

23 JUSTICE BREYER: Yes.

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

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

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

5 JUSTICE BREYER: Yes, one and two.

6 MR. GITS: Yes.

7 JUSTICE O'CONNOR: Is that --

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

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

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

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

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

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



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

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

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

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

23 MR. GITS: Of what hearing, Your Honor?

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

1 MR. GITS: Yes.

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

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

6 JUSTICE BREYER: The whole thing.

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

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

11 JUSTICE STEVENS: Thank you, Mr. Gits.

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

14 REBUTTAL ARGUMENT OF ANDREA N. CORTINA

15 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22            So when we start --

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

25            MS. CORTINA: The California Supreme Court's

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

4 JUSTICE STEVENS: I think we understand you.

5 MS. CORTINA: Exactly. Thank you.

6 (Laughter.)

7 JUSTICE STEVENS: Thank you. The case is  
8 submitted.

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