

THE SKY'S THE LIMIT: MITIGATION IN CALIFORNIA AND “FACTOR (K)”

*AYERS, ACTING WARDEN v. BELMONTES*¹

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On 13th November 2006 the U.S. Supreme Court ruled in the case of *Ayers, Acting Warden v. Belmontes* that California's death penalty statute is constitutional because, contrary to the arguments for the respondent and the decision of the U.S. Court of Appeals for the Ninth Circuit, the state law does allow the jury to consider all appropriate mitigating evidence. In a five-four decision the opinion of the court was delivered by Kennedy J. with whom Roberts C.J. and Scalia, Thomas and Alito JJ. concurred. The dissent was led by Stevens J. with whom Souter, Ginsburg and Beyer JJ. joined.

Fernando Belmontes was tried as long ago as 1982 for a murder committed in March 1981 when he was disturbed whilst committing a dwelling house burglary and killed nineteen year old Steacy McConnell. After conviction, in the sentencing phase of the trial, Belmontes introduced mitigating evidence to show that if sentenced to life imprisonment he would make positive contributions to society in the prison environment. Specifically he gave evidence about his conversion to Christianity during a previous period of incarceration and testified that although his new found love of God had lapsed upon his release he was now ready to rededicate himself fully to his religion. He called several witnesses as to the fact of his conversion and the good that he could do if his life was spared. Following closing arguments from the attorneys the judge gave the jury directions, in accordance with the statute then in force, to consider certain specific factors either as aggravating or mitigating. The court also instructed the jury to consider “any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.” Under the statutory scheme then in place this factor was codified at Cal. Penal Code Ann. §. 190.3 (k) and is referred to as “factor (k)”². The jury decided that the death penalty was the appropriate punishment.

On direct appeal, in state collateral proceedings and in federal *habeas* proceedings, Belmontes argued that

factor (k) and the trial court's other instructions prevented the jury from considering his forward-looking mitigation evidence as to the likelihood of his living a constructive life in prison and thus violated his Eighth Amendment right to present all mitigating evidence in capital sentencing proceedings – see e.g. *Penry v. Johnson*³. After numerous hearings in the U.S. District Court as well as the U.S. Court of Appeals for the Ninth Circuit⁴ in which the U.S. Court of Appeals held that the death sentence was invalid, the U.S. Supreme Court granted a petition by the state of California for *certiorari* and reversed the decision of the lower court.

In his judgment Kennedy J. began by considering two previous cases in which the U.S. Supreme Court had considered similar arguments in respect of the factor (k) instruction. In *Boyde v. California*⁵ the Court rejected a claim that factor (k), with its focus on circumstances that “extenuate the gravity of the crime”, precluded consideration of mitigating evidence unrelated to the crime, such as evidence of the defendant's character and background.⁶ The Court reasoned that since Boyde had an opportunity through factor (k) to argue that his background and character extenuated or excused the seriousness of the crime there was “no reason to believe that reasonable jurors would resist the view...that in an appropriate case such evidence would counsel imposition of a sentence less than death.”⁷ The jury had heard extensive evidence regarding the background and character of Boyde during the sentencing phase so that if factor (k) precluded consideration of that evidence by the jury this would transform the proceedings into a “charade” as well as requiring the jury to disregard the trial court's instruction “to consider all of the evidence which has been received during any part of the trial in this case.”⁸

The second case to which Kennedy J. referred was the more recent case of *Brown v. Payton*⁹. Again the U.S. Supreme Court had to consider the ambit of factor (k) but this time in respect of post-crime rehabilitation,

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rather than pre-crime background and character. The prosecutor at trial had argued that factor (k) did not permit consideration of post-crime rehabilitation evidence, but whilst the U.S. Supreme Court accepted that this was an error it also concluded that the California Supreme Court had reasonably applied *Boyd* in finding that there was no Eighth Amendment violation.¹⁰ The U.S. Supreme Court held that to accept the prosecutor's reading of the factor would have required "the surprising conclusion that remorse could never serve to lessen or excuse a crime."¹¹ The Court pointed out that the defence had presented extensive evidence and argument regarding a post-crime religious conversion and other good behaviour, that the judge had instructed the jury to consider all evidence admitted "during any part of the trial in this case, except as you may be hereafter instructed", and that the prosecution had "devoted substantial attention to discounting the post crime evidence's importance as compared to the aggravating factors",¹² all of which tended to counter any misimpression created by the prosecutor's argument. Hence the state court in *Payton* could reasonably have concluded that, as in *Boyd*, there was no reasonable likelihood that the jury understood the instruction to preclude consideration of the post crime mitigation evidence it had heard.¹³ This much can be said of Kennedy J.. He was at least consistent since he had voted with the majority in *Boyd* and actually wrote the opinion for the majority in *Payton*.

The issue before the U.S. Supreme Court in this case was therefore "whether there is a reasonable likelihood that the jury had applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." As in *Payton* the present case involved forward looking evidence. The U.S. Supreme Court held that the Ninth Circuit was wrong to find a "reasonable probability" that the jury did not consider the respondent's future potential.

The U.S. Supreme Court held that the U.S. Court of Appeals for the Ninth Circuit had erred in adopting a narrow and unrealistic interpretation of factor (k). The Court of Appeals had concluded that "most naturally read, this instruction allows the jury to consider evidence that bears upon the commission of the crime by the defendant and excuses or mitigates his culpability for the offence."¹⁴ The U.S. Supreme Court however held that "this interpretation is too confined." The instruction to the jury did not limit consideration to "any other circumstance of the crime which extenuates the gravity of the crime." Rather, the jury was directed to consider *any other circumstance* that might excuse the crime. Just as pre-crime background and character (*Boyd*) and post-crime rehabilitation (*Payton*) may "extenuate the

gravity of the crime", so may some likelihood of future good conduct count as a circumstance tending to make a defendant less deserving of the death penalty.

Kennedy J. continued by stating that, given the extent of the forward looking evidence called on behalf of the respondent, the jury could only have disregarded this evidence if they had concluded that the court's instruction effectively rendered this favourable testimony into a virtual charade as envisaged in *Boyd*.¹⁵ Kennedy J. then suggested that "it is improbable that jurors believed that the parties were engaged in an exercise in futility when respondent presented (and both counsel later discussed) his mitigating evidence in open court." Later Kennedy J. stated that "other instructions from the trial court make it quite implausible that the jury would deem itself foreclosed from considering respondent's full case in mitigation." He pointed out that whilst the judge had instructed the jury that they could only consider as an aggravating circumstance something that he had specifically referred them to, what he had said to them about potential mitigating evidence had been by way of example only of some of the factors that they could take into account as reasons for imposing a life sentence rather than death.

All this, concluded Kennedy J., led to the conclusion that as in *Boyd* and as in *Payton* the jury in such circumstances "is not reasonably likely to believe itself barred from considering all the defence evidence as a factor "extenuating the gravity of the crime." Therefore, "the factor (k) instruction is consistent with the constitutional right to present mitigating evidence in capital sentencing proceedings."

Despite being in the minority (as he had been in both *Boyd* and *Payton*) the opinion of Stevens J. is a stinging rebuff to the blandishments offered by the majority in this case. He took as his starting point the leading case of *Lockett v. Ohio*¹⁶ in which the U.S. Supreme Court held that death penalty schemes must allow consideration as a mitigating factor of "any aspect of the defendant's character or record and any of the circumstances of the offence that the defendant proffers as a basis for a sentence less than death." He pointed out that Belmontes' own death sentence was imposed only four years after the decision in *Lockett* and at a time when "there remained significant residual confusion" as to whether juries were required to consider whether evidence which did not extenuate the defendant's culpability for the commission of the crime might nevertheless call for a sentence less than death. This confusion, he said, was evidenced by the decision of

the California Supreme Court in its 1983 decision in *People v. Easley*¹⁷ in which the Court said that in order to clarify the situation judges should add to their instruction to juries the very words cited above from *Lockett*. In *Skipper v. South Carolina*¹⁸ the U.S. Supreme Court held that States do not have the right to limit what evidence may be considered in mitigation. These developments however came after Belmontes had been sentenced to death and, said Stevens J., he was victim of the sort of confusion about the extent of mitigation that was prevalent at that time.

Stevens J. reviewed the proceedings in the present case and concluded that three propositions had been established. First, that there was no real dispute about the credibility of the witnesses called on Belmontes' behalf; second, that little if any of the evidence extenuated the severity of his crime; and finally, that this evidence did however "afford the jury a principled basis for imposing a sentence other than death." It was nevertheless clear from the record that the trial judge was of the view that factor (k) did limit the extent of the mitigating evidence that the jury could consider and that he had refused to include a reference that "you may consider any other circumstances as reasons for not imposing the death sentence" which Belmontes' counsel had requested. As Stevens J. pointed out, only one of the items on the list of potential aggravating and mitigating factors, namely the age of the defendant at the time of the crime, did not relate to the severity of the crime itself. Even when including factor (k) no factor permitted the jury to consider "any other aspect of the defendant's character or record ...that the defendant proffers as a basis for a sentence less than death" as had been mentioned as necessary in *Easley* and *Lockett*.

Stevens J. then turned to a part of the transcript in which the jury asked the judge various questions which appeared to demonstrate a degree of confusion on their part as to how they were to approach the balancing exercise of aggravating and mitigating factors and concluded that the judge's responses only served to confirm that the jury's task was simply to

balance the limited statutory factors to which he had referred against each other and to ignore evidence which was beyond those factors. "In my judgment", said Stevens J., "it is for that reason much more likely than not that the jury believed that the law forbade it from giving that evidence any weight at all." Accordingly the Ninth Circuit Court of Appeals had been right to set aside Mr Belmontes' death sentence. Stevens J. said that "nothing in the Court's opinion in *Boyde* upsets my view that respondent's death sentence cannot stand." He also considered that *Payton* had little bearing on the present case since that case was about the deference that the U.S. Supreme Court is obliged to give to the "reasonable" conclusions of State Courts in *habeas corpus* proceedings under the terms of the Antiterrorism and Effective Death Penalty Act 1996, and was not in truth a case about the proper understanding of the scope of factor (k).

Stevens J. was of the view that lay jurors would almost certainly give the words "circumstance which extenuates the gravity of the crime" their ordinary meaning and feel obliged to ignore evidence that might be very good mitigation but which nonetheless had nothing to do with the commission of the crime. He expressed dismay at the suggestion that a jury in 1982 would be able to anticipate the decision several years later in *Skipper* and take account of evidence outside the ambit of their jury instructions. "Read however generously" he went on, "the factor (k) limitation remains unconstitutional." At the very least the exchanges between the judge and the jury during their deliberations was evidence that the jury must have been confused as to whether the mitigation evidence put forward could properly be considered. In conclusion Stevens J. stated his opinion that "that confusion has created a risk of error sufficient to warrant relief for a man who has spent more than half his life on death row." For these reasons the decision of the Ninth Circuit Court of Appeals was correct in setting aside the death sentence in this case.

¹ The judgment is available at www.deathpenaltyinfo.org via the link to the U.S. Supreme Court and also at www.findlaw.com also via the link to the U.S. Supreme Court.

² "(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" Cal. Penal Code Ann. § 190.3.

³ 532 U.S. 782,792 (2001); *Skipper v. South Carolina* 476 U.S. 1, 4-5,8 (1986).

⁴ The references to the five hearings in the District Court and the U.S. Court of Appeals for the Ninth Circuit can be found in the final paragraph of the introduction to Kennedy J.'s opinion on page 3 of the judgment.

⁵ 494 U.S. 370 (1990).

⁶ *Ibid* at 377-378, 386.

⁷ *Ibid* at 382, citing *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

⁸ *Ibid* at 383.

⁹ 544 U.S. 133.

¹⁰ *Ibid* at 142, 146-147.

¹¹ *Ibid* at 142.

¹² *Ibid* at 145-146.

¹³ *Ibid* at 147.

¹⁴ 414 F 3d 1094, 1134.

¹⁵ *Boyde, supra* at 383.

¹⁶ 438 U.S.586 (1978).

¹⁸ 34 Cal. 3d 858,875-880, 671 P. 2d 813, 823-827 (1983).

¹⁹ 476 U.S. 1 (1986).