OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: RICHARD BOYDE, Petitioner V. CALIFORNIA

CASE NO: 88-6613

PLACE: Washington, D.C.

DATE: November 28, 1989

PAGES: 1 thru 45

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IN THE SUPREME COURT OF THE UNITED STATES

RICHARD BOYDE, :

Petitioner :

v. : No. 88-6613

CALIFORNIA :

Washington, D.C.

Tuesday, November 28, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:50 a.m.

APPEARANCES:

DENNIS A. FISCHER, ESQ., Santa Monica, California; on behalf of the Petitioner, (appointed by this Court).

FREDERICK R. MILLAR, JR., ESQ., Supervising Deputy Attorney General of California, San Diego, California; on behalf of the Respondent.

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PROCEEDINGS

(11:50 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 88-6613, Richard Boyde versus California.

We'll wait just a moment, Mr. Fischer. Very well, Mr. Fischer, you may proceed.

ORAL ARGUMENT OF DENNIS A. FISCHER

ON BEHALF OF THE PETITIONER

MR. FISCHER: Thank you, Mr. Chief Justice, and may it please the Court:

This case involves two issues of constitutional dimension concerning two aspects of California's 1978 death penalty initiative, which have since been corrected in measures adopted by the committee that controls the giving of instructions in state trial courts throughout California in 1983 and 1985, respectively, following decisions by the California Supreme Court disapproving of those instructions.

Petitioner Richard Boyde was found guilty by a Riverside Superior Court jury of murder with two special circumstance allegations being found true. Because the prosecutor had announced his intention to seek the death penalty before trial commenced and the jury was examined and death qualified, the trial proceeded into a penalty phase that, before the same jurors, that was directed and

governed by the statutory provisions at issue in this case.

The prosecutor presented evidence in aggravation that covered and tracked factors A, B and C of the eleven factors listed in Penal Code Section 190.3, and set forth in the jury instruction that is before the Court in this case, concerning both the crime itself, prior felony convictions on the part of the Defendant, and past activity of a -- criminal activity of a forcible or violent nature. Some of the evidence that he presented, the California Supreme Court subsequently determined had been improperly presented, because it did not relate to the statutory aggravating factors.

The defense then began its case, and presented testimony from Richard Boyde's mother, from two of his sisters, his stepfather, his wife, Brenda Dickson Green, his former girlfriend and mother of his child, and Mrs. Dickson, Mrs. Green's mother. Together, they presented a wide variety of evidence about the character and background of Richard Boyde that was not immediately related to the circumstances of the underlying crime, but did provide a basis for the jury, in Justice Powell's words in McCleskey versus Kemp, to decline to impose the death penalty.

Petitioner's evidence, in fact, was remarkable in

its comparison and similarity to cases previously before this Court, beginning with Lockett and Evans, and Eddings, and that, and the -- in showing that this defendant did not deserve to be sentenced to death, a point, indeed, that has not been questioned in Respondent's submission to this Court.

That evidence consisted of the following aspects. First, his impoverished childhood and difficult upbringing, including the fact that he had been fatherless and was obsessed with that fact, and obsessed with his father's abandonment. This is evidence very close to that recognized in Hitchcock versus Dugger, as being appropriate evidence to bring before the jury on the question of whether the defendant deserved the death penalty. His considerable health problems as a child, and his psychological difficulties that affected his performance at school, and which the family attempted unsuccessfully to obtain counseling assistance for, but was unable to do so. Besides Hitchcock, this factor is recognized in Mills versus Maryland's footnote 1, and is similar to other cases as well.

Third, his fondness and affection toward children, his kindness to family members. Justice O'Connor has spoken, in Franklin versus Lynaugh, in a concurrence in observing that evidence of kindness to others might

demonstrate positive character traits that might mitigate against the death penalty.

Fourth, his sisters' testimony that he liked dancing, that he wanted to pursue it as a career, but that his stepfather, being a stern gentleman, trying to do his best, but frowned on it and discouraged young Richard from pursuing it. And that testimony was followed by Mrs. Green's testimony that when Richard was incarcerated that he won a prize for his dance choreography while he was in custody. As in Skipper versus South Carolina, this certainly is a showing that the defendant could lead a useful life, at least behind bars. And finally, his futile attempts to find employment after his release, attempts that he conducted in earnest, but was unsuccessful because of his record.

Although these factors are basic to the concern of individualized sentencing, which this Court explicated in Woodings versus North Carolina, many subsequent cases, Petitioner's jury could not give effect to them, because this evidence was nowhere on the list of eleven factors set forth in Penal Code Section 190.3, and guided by the jury instructions which the jury was directed to consider and give effect to as the basis for its determination of whether the defendant should receive death or life imprisonment without parole. The, as --

QUESTION: You're referring now to the so-called factor (k) instruction?

MR. FISCHER: The factor (k) instruction, the instruction which directed the jury to crime related circumstances that extenuated the gravity of the crime, such as the seriousness --

QUESTION: Well, I don't see why the jury couldn't consider that. I mean, extenuate typically means lessen or excuse. Why wouldn't that evidence be thought by the jury to lessen or excuse the gravity of the crime?

MR. FISCHER: Well, there are a number of reasons why it wouldn't, beginning --

QUESTION: Give me some of them.

MR. FISCHER: Surely. Beginning with the language of the statute itself, which has eleven factors, all but two of which are crime specific. So the jury, at the same time that it was listening to the, as an aggravating factor B, the prior felony convictions or the C, the prior criminal activity, very clearly prior or other activity, was then being told in all the remaining factors, except, even including age, by the way, at the time of the crime, at the time of commission of the offense, at the time of the homicidal act.

A jury, given this language, at least explicitly, would, might well conclude, and certainly its members,

just from the language alone, without anything further, that it, that related to the crime meant extenuating the gravity of the crime, and not extenuating the reasons why the defendant should not die.

And in fact you will notice that the CALJIC committee, the California judges and distinguished attorneys who create the instructions and followed this up, as we have set forth in the appendix and also appears in our amicus brief, use language very different to portray -- in effect saying any other reason that would favorably bear on the decision.

QUESTION: This was the change they made?

MR. FISCHER: Yes, in 1983.

QUESTION: Well, of course, the fact that the instruction might have been improved upon, may have been more precise, surely isn't controlling. The question is was this likely to prevent the jury from considering the sort of evidence you mention. And I must say I don't, I am not persuaded -- I speak only for myself -- by what you have said so far.

MR. FISCHER: I understand.

QUESTION: It says and any other circumstance.

MR. FISCHER: Well, there are definitely other circumstances, and I think the most telling aspect of this case is what we find in the record, taken from the

prosecutor's argument. There is -- it has been recognized as recently as last term's decision in Penry versus Lynaugh -- that it is appropriate to look at the arguments of the prosecutor in determining whether the jury may have been mislead by the instructions. And if we look at what the prosecutor said, we find a most revealing record, beginning -- which of course the dissenting judge in the California Supreme Court, speaking for the three, for the three justices in the dissent in Boyde --

QUESTION: We'll resume there at one o'clock.

MR. FISCHER: Very well.

(Recess)

QUESTION: Mr. Fischer, you may continue.

MR. FISCHER: Thank you. In discussing the question of the factor (k)'s effect on the jury, I have already mentioned the specific language of limitation of the factor and its context in comparison with others on the list. Justice Rehnquist has raised the question, however, of whether the jury might have been expected to understand that, notwithstanding those factors, that circumstances extenuating the gravity of the crime might also reach beyond the crime to character and background. And my answer is most tellingly, I think, taken from the prosecutor's argument on those issues, on that issue.

The district attorney started out in his opening

argument to the jury with a list on the board, and it must have been a very graphic. He went up to the list, he had the factors numbered, he pointed them out to the jury, he had the jury read the list on the board, and then, from that, he went down them one by one, individually reading them and counting up whether they were aggravating or mitigating. He ended up by, in his summation of, in his beginning argument, by saying ten solid factors in aggravation.

Then he went through the Petitioner's evidence. He used words to characterize it as a rationalization, as speculation. He asked rhetorically whether any of them made the crime less serious. He then jumped to the next aspect of the instruction, which told the jury that in making their determination they have taken an oath to follow the law, and asked them to go through each and every one of those factors and be guided by them in making that determination.

After the defense completed the opening argument, the prosecutor returned to the stand. Among the things that he talked about was that, and he used the term sympathy was to be filtered out under the instructions and is not a basis for anyone. He then defined sympathy as being underpowered, not knowing who his father was, having a poor childhood, some of the very factors that we have

talked about as, that this Court has recognized as mitigating factors of character and background that come, are derived from the Lockett line of cases.

He also stated that rehabilitation is not one of the factors up on that board, and is not a basis to make a decision like this, in seeming contradiction to Skipper, and the suggestion that one's usefulness in prison is a factor for the jury to consider. Then he said well, there is always the concern of losing someone of value. Well, I don't put much stock in that argument, he said, again, it is not on the list -- all of this, pages 4819, 4820, 4821 of the record -- in which he made these statements. You can't base it upon any kind of rational guidance. The deterrent value of the death penalty, he added, is not the basis for the decision. So, the prosecutor's own language suggested to the jury that if there was any question in their mind, that they were precluded from giving effect to this information.

Now, practitioners in California, during that time and during the time before the Easley case, clarified that this procedure should be abandoned, that this language was too narrow, were well aware of this language, and used it in their own practice. Indeed, prosecutors, defense counsel, and even trial judges made statements of this very kind in records that are available to us. And we

have, with the assistance of amicus curiae California appellate project, some actual examples of record, a significant number of them, in which this very, this very thing played out.

Consider just as one example, on page 13 of the CAP amicus brief, the reference to the case of People versus Payton, where the prosecutor argued the defendant's newborn Christianity, urged that there is no way that, under any other circumstance which extenuates or lessens the gravity of the crime, that what I am getting at you have not heard during the past few days any legal evidence of mitigation. I passed over the language I wanted too quickly. Let me repeat it. Seems to refer to a fact in operation at the time of the offense.

It is language like that which, and obviously the jury returned a death verdict in the Payton case. And in the following pages of the CAP amicus, which graphically, in real world terms, demonstrates what, in a particular case, we just know from a very skilled argument of a single state prosecutor. In some -- the mitigating evidence that was presented in this case could not be considered and given effect to by the jury as a basis for sentence less than death.

QUESTION: Mr. Fischer, let me ask you, I agree that that, that example is quite clearly an argument that

it simply can't be used under the gravity factor, quite simply and plainly. But that is not this case. Now, in order to uphold the law, you are talking, we are talking about the California statute, which you are asking us to strike down in its entirety with respect to all cases. That is what you want.

MR. FISCHER: Yes.

QUESTION: You want factor (k) out.

MR. FISCHER: That's right.

QUESTION: Must we establish that it does, it cannot be misdescribed in any case, or that it does not lend itself to misdescription in any case?

MR. FISCHER: Well, I think that the constitutional test -- and when I say that we want it out, in agreeing with you, I really would quality that by saying that we are comfortable, certainly, representing this Petitioner, and comfortable with the notion that the CALJIC modification in the instruction which is given throughout the state, very satisfactorily resolves that particular dilemma. So that we don't need to do any more than say that the practice will, or in all cases after Easley indeed, will have not been subject to constitutional problems.

QUESTION: Let's take every case before that.

MR. FISCHER: Sure. And in those cases, it seems

to me that if we can ascertain from empirical data like this that a reasonable juror would have been mislead into believing that he or she was precluded from giving weight, mitigating effect, to this language --

QUESTION: In the particular case.

MR. FISCHER: In the particular case.

QUESTION: Right. But that doesn't mean that simply because you are using a factor (k) instruction it is going to be always bad. In which case, calling attention to this other case, does not do your particular case any good.

MR. FISCHER: Well, for one thing, it does our case, hopefully, some good, because I believe it supplants, it reinforces, excuse me, reinforces the point we have made in our case. If you look at what the prosecutor said and did, he did nothing more than, for example on page 14, the immediately, case immediately following Payton, Guzman, the reference to the fellow's ability to paint. When you hear about the law, the court will instruct you, you won't hear anything about that, and you won't be able to consider that. This is exactly what happened with the prosecutor in this case. And in this case he gave the jury the unmistakable message that they could not give mitigating effect to evidence that did not fit within the four corners.

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QUESTION: Wasn't the court below unanimous on this phase of the case?

MR. FISCHER: They were, yes.

QUESTION: And they said that it was inconceivable that a reasonable juror would have been misled.

MR. FISCHER: Well, what I read in Justice Arguelles' dissent on the second issue, which I will turn to in a moment, in some respect, because there was no discussion by him of that, in some respect I think carries over. I do agree with you, I have to, the decision there is no, the dissenting vote concentrated, the dissenting judges concentrated on the second issue.

QUESTION: Well, I thought they said they agreed with the majority on the other aspects.

MR. FISCHER: Yes, they did, but they also indicated how the jury might be misled, and it seems --

QUESTION: Well, about the scope of his discretion under the shall language.

MR. FISCHER: Yes.

QUESTION: That is what they were talking about.

MR. FISCHER: But remember, they also allowed, since they rejected both errors, we don't -- it seems to me that it has a crossover effect, even a symbiotic effect, that could be found, since the jury neither could give weight to, could give effect to Boyde's evidence of

his --

QUESTION: Well, at least the majority said it was inconceivable that the jury, that the jury might have been misled.

MR. FISCHER: Well, I certainly don't want to quarrel with your characterization.

QUESTION: I know that is what they said. And the dissent didn't disagree with them.

MR. FISCHER: The dissent did not disagree with them. We maintain, nevertheless, that that conclusion was erroneous. The majority and the court did not have the benefit of this empirical study. We believe that --

QUESTION: I don't see what it proves, the empirical study. That -- you haven't explained that to me. It still seems to me that by giving all these other examples you -- it is sort of like error by association. Because a prosecutor in another trial described the factor (k) patently wrong, therefore the prosecutor in this trial described it patently wrong? I don't see how that follows.

MR. FISCHER: Well, I certainly think he did, when he described the factor incorrectly.

QUESTION: Well, fine, we can talk about this trial, and --

MR. FISCHER: It seems to me we could stop there.

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QUESTION: -- and this language, but I don't see how that is helped by --

MR. FISCHER: All right.

QUESTION: -- by saying that another prosecutor misdescribed it in another trial.

MR. FISCHER: I believe it reinforces, in sort of real world terms, what one would only know to speculate about without that. That is, that a jury, that if we just looked at this case alone, there was error, and error of constitutional dimension. I believe that any doubt as to whether juries in California were getting the right idea or not is dispelled by this. That is only a reinforcing point, and in my view is unnecessary to the Court's disposition of this issue in Petitioner's favor.

I want to turn very quickly to the second feature of this case, because the court also charged the jury erroneously; we urge, that if the aggravating circumstances outweighed the mitigating circumstances, that the penalty of death rather than life in prison without parole shall be imposed. Now, we have relied on a series of decisions that have recognized and affirmed the principle of individualized assessment of the appropriate punishment, beginning with Woodson versus North Carolina, through Sumner versus Shuman, and all the way to last term's decision in Penry, even. That the Constitu -- this

constitutional requirement is not satisfied by a state law which mandates punishment in a mechanistic way that does not allow the sentencers reasoned moral judgment about the proper sentence to be imposed.

In Sumner versus Shuman, for example, this Court concluded that, even though the defendant had committed murder while already serving life imprisonment for murder, that nevertheless it was necessary to, under the Eighth Amendment and Fourteenth Amendment, to assure reliability of sentencing and to assure the proper individualized determination of the appropriate punishment for that individual. It was constitutionally imperative that that defendant be allowed to have the jury's determination of appropriateness.

Now the Respondent has argued to the contrary. We suggest that the State of California's position is in derogation of Shuman. We suggest that it is directly contrary to Justice Stevens' opinions from the denial certiorari in Smith versus North Carolina and Pinch versus North Carolina, where, as Justice Stevens recognized, a jury may find that the aggravating circumstances warrant the death penalty, both apart from the mitigating circumstances, and also when weighed against each other, and yet feel that a comparison leaves it in doubt, the jury in doubt, as to the proper penalty.

We think that that language ought to be applied in this case. We urge that the weighing process is not a suitable proxy --

QUESTION: Suppose the jury is not in doubt as to the appropriate penalty, and that the penalty is death. That it is not in doubt that the aggravating factors outweigh mitigating factors. Must it then impose the sentence?

MR. FISCHER: Under California practice as it presently exists in the adorned and clarified instruction, the sentence of death must be imposed if the jury makes the determination that death is the appropriate punishment.

QUESTION: And isn't that just another way of saying that the jury must follow the law?

MR. FISCHER: Yes. But the question is is the law satisfied merely by weighing, merely by the mechanistic balancing process --

QUESTION: I said if suppose it is satisfied that it is the appropriate penalty. Would --

MR. FISCHER: Yes.

QUESTION: Would you object to an obstruction which says, if you are satisfied that this is the appropriate penalty, then you must impose it?

MR. FISCHER: No.

QUESTION: That that would be unconstitutional?

MR. FISCHER: Would I object to an instruction that said --

QUESTION: Yes.

MR. FISCHER: -- if the jury finds death is the appropriate punishment? Well, I am assuming, of course, that we have both the special circumstance and aggravating circumstance aspects of the law, both of which assure the proper channelization of the jury sentencing --

QUESTION: Assume all of that.

MR. FISCHER: Yes. And if, instead of asking the jury to make that final call, the jury could simply be asked is death the appropriate penalty, on the basis of findings from the circumstances, or at least consideration of the circumstances, I would say yes.

QUESTION: It seems to me that this case is not far removed from that.

MR. FISCHER: Well, I think there is a critical difference in this case. And I think the critical difference is that the jury is told that if they determine that the aggravating circumstances outweigh the mitigating circumstances, and parenthetically, nothing is said to them about appropriateness whatsoever, that, based on the finding, that weighing process, then you shall impose death. You have left something out of the equation.

QUESTION: (Inaudible)

MR. FISCHER: I am sorry?

QUESTION: With reference to the mitigating factors, it is instructed that it can and should consider all evidence in mitigation, and that it need not give any particular weight to any one of the factors, and that any one mitigating factor can outweigh all aggravating factors. So why isn't that just a surrogate for determination that death is the appropriate penalty?

MR. FISCHER: As long -- I am not certain I understood your question fully. As long as the jury is instructed to take into account Justice Stevens' views as to the problem of aggravating circumstances outweighing mitigating, both in terms of on their own and in comparison, as long as the jury is allowed to bring in a verdict that death is not the appropriate penalty, that is all that is constitutionally required.

Thank you, I will reserve the rest of my time.

QUESTION: Or to put it another way, you are saying that even though aggravating circumstances outweigh mitigating circumstances, there still should be a window where the jury could say death is not the appropriate penalty.

MR. FISCHER: That is all. That is all I am

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saying.

QUESTION: Thank you, Mr. Fischer. Mr. Millar, we'll hear now from you.

ORAL ARGUMENT OF FREDERICK R. MILLAR, JR.

ON BEHALF OF THE RESPONDENT

MR. MILLAR: Thank you, Mr. Chief Justice, and may it please the Court.

I would like to begin, if I might, by contrasting our basic position in this case with Petitioner's position, and then I would like to briefly clarify our position with regard to the facial validity of both of the instructions at issue in this case.

In the Petitioner's view, he had a jury which was foreclosed at every turn from exercising any discretion or moral judgment as to the appropriate penalty in this case. He argues that the jury was precluded as a matter of law by factor (k) from considering any of his four days of evidence in mitigation, almost 450 pages of transcript, over two volumes of transcript. He then argues that the jury was further foreclosed by the word "shall" from considering the alternative penalty of life without parole, life without possibility of parole, and was mandated by the word "shall."

QUESTION: That's a pretty mandatory word, isn't it?

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MR. MILLAR: Well, Your Honor, our position is that the jury would understand that word --

QUESTION: To mean "may."

MR. MILLAR: No. We, our position is that reasonable jurors would understand that means, that word "shall" to mean that after they had exercised their discretion and moral judgment in the application of the weighing process, then, and only then, would they be required to return a penalty which was appropriate and consistent with their own discretionary, normative application of the weighing process. Reasonable jurors would not understand that they were being told to leave behind their discretion and moral judgment. As a matter of fact --

QUESTION: Well, that has to be your argument, of course, but certainly the statute could be better drawn, couldn't it?

MR. MILLAR: I don't believe that is the constitutional issue in this case, Your Honor, as to whether it could be improved upon, or the instructions could be better worded. The question before the Court is whether they are constitutionally adequate, and we believe that they are clearly constitutionally adequate. And in Ramos, this Court specifically upheld the California statutory scheme, and said that the scheme was immune to

attack under Lockett, and further noted in footnote 28 of Ramos, referred not just to the statutory language, but to the specific instruction that was given in this case, the factor (k) instruction, as well as the instruction to consider all the other evidence in the case.

And the Court referred to that in the context of saying, in Ramos, that the Briggs instruction, the commutation instruction, did not really divert the jury's focus from the central purpose of the sentencing scheme. This was merely an appendage. And in contrasting the effect of the Briggs instruction, the Court looked specifically, in footnote 28, to the instruction to consider all the evidence, and in particular to the unadorned factor (k) instruction, which was given in that case, in cite of the transcript record for that proposition.

QUESTION: At least the situation has been ameliorated since this case, hasn't it?

MR. MILLAR: The California Supreme Court suggested that the language be clarified to prevent any possibility, possibility --

QUESTION: Clarified or improved?

MR. MILLAR: I think it could be described either way, Your Honor, improved in the sense of making it clearer. I think any instruction is capable of being

clarified or made clearer. In California versus Brown, for example, I don't think the issue before this Court was whether the so-called anti-sympathy or mere sympathy instruction was worded as well as it might possibly be worded. The issue was whether it was constitutionally adequate --

QUESTION: But it is important when a man's life is in danger, isn't it?

MR. MILLAR: I am sorry, Your Honor, I missed that.

QUESTION: I say it is important when a man's life is at issue, isn't it?

MR. MILLAR: I think it's important, and the test that this Court has applied in California versus Brown is what reasonable jurors would do. With respect to factor (k) it is our position that reasonable jurors would understand that the words any other circumstances which extenuate mean just that, any other circumstances which extenuate, or mitigate, or lessen the penalty, the culpability of the defendant.

And I think, referring to Justice O'Connor's concurring opinion in California versus Brown, I think it is interesting that she noted there that the reason why we allow jurors to consider such things as deprived childhoods and things like that is because of society's collective belief that these things mitigate culpability.

Now, reasonable jurors are part of society. They presumably go into the jury room sharing this basic notion. When they see factor (k), which says any other circumstance which mitigates or which extenuates the gravity of the crime, there is no reason to think that these reasonable, common sense jurors are going to adopt a construction of factor (k) which is inconsistent with society's basic belief, that such evidence does mitigate or extenuate.

I would point out, also, that the Petitioner's position really changes the language of factor (k). What he wants that instruction to read is any other circumstance of the crime which extenuates the gravity of the crime. It does not say that. It says any other circumstance which extenuates the gravity of the crime. He wants to add the words of the crime to the first part. The words any other circumstance are not modified by of the crime.

QUESTION: But they only relate to matters that extenuate the gravity of the crime, not the, reflect the character of the individual who committed the crime.

MR. MILLAR: But, Your Honor, --

QUESTION: I mean, how does the fact that he had a bad childhood extenuate the gravity of the crime? It is still a murder in exactly the same facts as if none of

that had happened.

MR. MILLAR: Same thing could be true, said, of the other factors (b) through (j). How does the age of the defendant change the fact that this victim has been killed --

QUESTION: That's right.

MR. MILLAR: -- in a terrible way.

QUESTION: That is precisely the point.

MR. MILLAR: But, I --

QUESTION: The test is whether this evidence extenuates the gravity of the crime.

MR. MILLAR: My point --

QUESTION: And I don't see how any of it does.

MR. MILLAR: Excuse me. My point is that factors (b) through (j) all relate to the individual culpability of the defendant. Factor (k) tells the jury any other circumstance which extenuates --

QUESTION: Extenuates the gravity of the crime.

MR. MILLAR: -- to relate to the culpability of the defendant. And I would point this out, the words the gravity of the crime, what does the gravity of the crime mean? It is not specifically defined in any of these instructions. The gravity of the crime is factors (a) through (j), and then adding on (k). (A) is the circumstances of the crime. If in fact, and there was not

here, but if in fact there were any mitigating circumstances of the crime, directly related to the crime, they can already be considered by the jury under factor (a). The jury does not even need factor (k) to tell them that. Reasonable jurors would understand that factor (k) is therefore necessarily different and much broader than just factor (k), factor (a), excuse me, relating to the circumstances of the crime.

QUESTION: Let me ask you about the prosecutor's argument in the other case that your opponent referred to, and I understand that we have to deal with this case, but that prosecutor must in good faith have misread this instruction, wouldn't you say? He apparently understood the law to be as he described it to his jury. I don't assume he acted in bad faith.

MR. MILLAR: I don't believe, and I would -- our position is this Court should not get into a discussion of what particular prosecutors did --

QUESTION: No, but we're only trying to decide whether reasonable people might read this language in a particular way. And I suggest to you that in another case a well-trained prosecutor read it in this way, presumed he is literate and acting in good faith. Why can't we assume jurors would read it the same way that prosecutor did?

MR. MILLAR: Well, in the first place, Your Honor,

we're talking about two cases that the defendant has been able to cite --

QUESTION: Well, just even if we had one. At least one prosecutor, you would agree, has read it the way your opponent says the jury might read it.

MR. MILLAR: But, the issue here --

QUESTION: Wouldn't you agree with that?

MR. MILLAR: Well, the issue here is whether --

QUESTION: Wouldn't you agree with that?

MR. MILLAR: I would say that, that --

QUESTION: Or do you think he was acting in bad faith?

MR. MILLAR: I would say that he misled the jurors in those case, as far as what the face of that --

QUESTION: But don't you suppose he did so because that is the way he read the instruction?

MR. MILLAR: Well, I think we are speculating as far as what particular prosecutors did in particular --

QUESTION: Well, normally we presume that lawyers act in good faith, at least I do, and I assume he was acting in the best of faith. He just thought that is what this language meant.

MR. MILLAR: He may have, Your Honor, but these jurors did not hear that prosecutor.

QUESTION: No, but they all, they read the same

language he read. And I am saying it must be a reasonable reading if a trained prosecutor read it that way. That is the only point I am making.

MR. MILLAR: Well, if that is the test then, Your Honor, then the test is whether anyone could possibly misunderstand the instruction. The test that this Court has set forth in California versus Brown is whether reasonable jurors would. These jurors did not hear arguments by a prosecutor in their case which would mislead them.

QUESTION: The prosecutor might have had an incentive to misunderstand the meaning of the instruction as well. Correct? I mean, he misunderstood it in his favor.

MR. MILLAR: Yes, Your Honor. Yes, that is correct. These jurors did not hear that in this case. These jurors were told, and I might even note this, with respect to the factor (k) instruction, the prosecutor repeatedly referred to all the evidence in the case. In fact, he repeatedly referred to the defendant's own expert testimony, expert witness, Dr. Rothenstein. And he told the jury that he had a lot of trouble disagreeing and cross-examining Dr. Rothenstein, because he agreed with so much of what he said. That was a defense witness. How can the prosecutor be arguing to the jury in this case not

to consider any of the defense evidence when he specifically told the jury that he agreed with Dr. Rothenstein and what he was saying?

Dr. Rothenstein talked about why this defendant needed to exercise violence, and why he needed to exercise control over the lives of individuals, over the lives of victims. Dr. Rothenstein suggested that was because of the defendant's childhood and background. However, the prosecutor argued it was because that was part of the defendant's personality, that was the way he was. And, with respect, by the way, to that evidence, that's at Reporter's Transcript pages 4770, 4774 and 4775, where the prosecutor repeatedly referred to the testimony of the defendant's own expert.

The prosecutor could not have been arguing on the one hand, consider Dr. Rothenstein's testimony, and on the other be arguing to the jury you can't consider any of the ex, any of the defendant's --

QUESTION: Well, that is consistent with his just saying it is not mitigating.

MR. MILLAR: Well --

QUESTION: I mean, that is all he is saying.

MR. MILLAR: Yes, he argued that in the --

QUESTION: (Inaudible)

MR. MILLAR: Yes, exactly, Your Honor. Every --

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yes, and he argued that in the context of this case it was his belief that that evidence was not mitigating to the extent that it outweighed the gravity of what this defendant did, when you looked at all of the factors in this case. And he never told the jury, don't consider any one of these particular factors. He told them, to the contrary, consider all of these factors.

QUESTION: Somewhere in your argument you are going to touch upon the prosecutor's behavior at voir dire?

MR. MILLAR: Yes, Your Honor. Our position with respect to the prosecutor's behavior at voir dire is that, first of all, we don't believe that that is a valid, reliable basis for determining whether jurors properly understood the court's charge to the jury at the conclusion of the penalty phase of the trial. And second of all, that even should the court conclude that we can look at the voir dire examination, that the prosecutor did not in fact mislead the jury.

What he did, simply, was to tell the jury that they were not going to be having totally arbitrary and free reign in deciding the penalty, that they were going to have standards which were going to guide the exercise of their discretion, that it was important that they proceed to come to a rational conclusion, that it was not a matter of on Monday you can reach one result in the case and on

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Tuesday that you can reach a different result. He specifically told the jury that we used to have a system like that, where the jury had unbridled discretion to do whatever it wanted, but that the courts had said we needed more rationality in the process, and that they would be required to apply some standards, some criteria, to guide a rational determination of the appropriate penalty in this case.

And it is our position that there is nothing wrong with telling the jury that. That is exactly what this Court has required ever since Furman.

QUESTION: Well, that has to be your position, of course, but I guess I don't whitewash it as easily as you do.

MR. MILLAR: Well, I certainly respect Your Honor's right to disagree with what I am arguing, but I believe that --well, first of all, the California Supreme Court, the majority of the California Supreme Court, said, with respect to the prosecutor's voir dire examination, that it was no more in substance than a capsule summary of what this Court has required of jurors.

And the prosecutor was only exploring general attitudes of jurors during the voir dire examination. He was not specifically arguing the case to them at that time. His purpose, and the purpose of voir dire

examination under California law, is simply to determine whether the jurors are able to follow the law. And we think that any voir dire comments ought to be construed, if they are going to be looked at at all, in that light.

QUESTION: Of course your California Supreme Court split four to three on this, didn't it?

MR. MILLAR: Well, the court was unanimous, as has been pointed out previously, I believe by Justice White, was unanimous on the factor (k) issue, and split four to three on the "shall" issue.

QUESTION: Well, they split also on the voir dire propriety remarks, didn't they?

MR. MILLAR: Yes, Your Honor, the majority said two things --

QUESTION: Four to three.

MR. MILLAR: Yes. The majority -- yes, Your Honor, that is correct. The majority said that they did not believe that that was a valid, reliable basis that they should look to, and second of all, that even if they did look to it, that the dissent had misconstrued the substance of what the prosecutor had told the jurors in voir dire, and that given the context of voir dire, he did no more than tell the jurors in substance what this Court has required of jurors, to be rational. That they would be required to apply certain criteria, and would not have

total and absolute discretion. And he asked them will you be able to follow the law.

QUESTION: Don't misunderstand me. I -- it may well be that if this case were reversed, and a new trial came along, or a new penalty phase anyway, he probably would get the death penalty again, or possibly could. But, that is not our issue here.

MR. MILLAR: Yes, Your Honor. I would point out that the jury was specifically told twice during the instructions by the court to consider all the evidence in the case. The prosecutor emphasized that to the jury. The prosecutor did not ignore the evidence under factor (k). In fact, his argument with respect to factor (k) was rather that he had a different view of what the defendant was like than the defense counsel was arguing. His view was that we have here a man who lies, who deceives, who would make up a fictitious big Mike, who would even blame his cousin for the commission of this terrible crime, who was a violent individual. He said that is the kind of person we have.

And then he turned to the evidence in mitigation, and he said that that evidence simply did not mitigate against the gravity of the crime, all of the other factors, which the jury was entitled to consider under the instructions. And he said, I suppose we are all a product

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of our backgrounds to some degree or another. He did not say you can't consider that. What he said was, we are all a product of our backgrounds. I am not saying you can't consider that, but how much does that count in the context of this case, in the context of the gravity of this crime. How much does it count. He suggested first that it counted not at all, and then he suggested later in, I believe it was his rebuttal argument, that even if the jury disagreed with him and was inclined to give it some weight, they still needed to ask themselves the ultimate question, which was does it outweigh the other circumstances, which he argued were all in aggravation.

I would like to turn my attention at this point to the second issue, the "shall" issue. As I have indicated before, it is our position that this instruction, like the factor (k) instruction, is valid on its face. It is our position that this Court should not even have to look at the arguments of counsel to reach that determination, but that if the Court wants to, to satisfy itself as the California Supreme Court did, we don't believe that that is constitutionally prohibited. But our basic --

QUESTION: Let me ask in this argument, Mr. Millar, is it your position that the outweigh "shall" instruction is the functional equivalent of an instruction that says, if after listening to all the evidence you think death is

the appropriate penalty, you shall enter it? Or do you say it is something different, that it is all right to tell the jury that outweighing is enough, even if you don't think that death is the appropriate penalty?

MR. MILLAR: Well, I think that, that it's the functional equivalent to the extent that, as our California Supreme Court has said, that what the jury is supposed to do is to weigh the various factors --

QUESTION: Right.

MR. MILLAR: -- and decide what outweighs. And in the context of doing that, they apply their discretion and moral judgment.

QUESTION: Right.

MR. MILLAR: And to that extent, I think that it is a functional equivalent. Our position --

QUESTION: Well, if --

MR. MILLAR: -- is there is no separate and independent requirement of appropriateness.

QUESTION: If, if that is your position, what do you have to say about the amicus brief that points out that in Oakland there were some 15 cases, and about half of those, I guess eight of them, the jury found that the factor, that the aggravating circumstances did outweigh the mitigating circumstances, but nevertheless, death was not the appropriate penalty.

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MR. MILLAR: What I would say is that those cases really prove nothing. They would prove no more than comparing how many cases where the jury came back with --

QUESTION: Well, don't --

MR. MILLAR: -- for death in California versus Virginia, which has a different system. They are comparing apples and oranges. The system that is used in those Alameda County cases, which is not the standard norm set forth in California by our California Supreme Court, is a two-step system --

QUESTION: Right.

MR. MILLAR: -- and the jury is told may. And, there are two possibilities.

QUESTION: But don't those cases demonstrate that at least in those eight cases juries concluded one, that aggravating circumstances outweighed mitigating circumstances, and two, that nevertheless, death was not the appropriate penalty?

MR. MILLAR: Except that we don't know what they are doing when they are deciding outweighs in the first step of that two-step process. We --

QUESTION: Well, is there any reason to believe they were doing anything different there than they were doing in the case before us?

MR. MILLAR: Yes, because in the case of the one-

step process we know that they are applying their discretion and moral judgment, because that is the only opportunity they have to do that. In that two-step process, jurors may well believe, first of all, that they are supposed to make some kind of a mechanical determination in the determination of what outweighs what, perhaps adding them up or something like that. And not until they get to the second part are they really deciding the penalty. In Petitioner's case, they had one procedure by which they were to decide penalty.

The second possibility with respect to those Alameda County cases is, is that the jurors may be disregarding totally the weighing process, when they are told you may do this or you may do that. We don't really know how they are --

QUESTION: Mr. Millar, does Alameda County have some sort of home rule under the death penalty statute?

(Laughter)

MR. MILLAR: Well, what I would say in that regard is that may be a constitutional variation. I am not saying, and I don't want to be understood as saying that that is an unconstitutional procedure, but that is not the norm. And it is not the norm, as the Cali -- the majority of the California Supreme Court specifically said in this case, it is not a two-step process, it is a one-step

process. Now, Alameda --

QUESTION: This case came from Riverside County?

MR. MILLAR: Yes, Your Honor. Yes, Your Honor. And whether that is a constitutional approach is not something I am -- is before this Court. I am defending the constitutionality here of the approach in this case, which is the norm in California, and which the California Supreme Court has said it is a one-step process where the jury exercises discretion and moral judgment as part of that process. When you break it down into two-steps, and you tell the jury may, you really don't know what is happening. So, just to take those figures and to say they mean a certain thing, it does not follow from those assumptions.

QUESTION: But couldn't one also at least speculate that under the one-step process, one cannot be sure that the jury did make the moral judgment that you assume they did. Now, is your argument, if I understand you correctly, is that we should assume that the, if the jury thought the aggravating factors outweighed the mitigating factors, it also thought that death was the appropriate penalty. I think that is your, that is basically what you are saying. So that it gives them appropriate discretion. But is it not possible, at least, that they might have thought one outweighed the other, but still not by enough

to justify the death penalty?

MR. MILLAR: I guess anything is possible, but we don't believe that reasonable, common sense jurors would have done that. And that's certainly not they were, what they were told in this case. And in that regard I would point out --

QUESTION: Well, where were they not told that? I don't understand that. Because I thought the outweigh shall instruction is kind of the end of, the last thing they are told. Because they -- the difference between your system and the Alameda County one was they are told that, and then it is said, furthermore, if you think death is the appropriate penalty, then go ahead and impose the death penalty. But they never had, did have such an instruction here.

MR. MILLAR: Well, we don't -- they were not specifically told that that is what they were doing. We believe that that is what reasonable jurors would do.

QUESTION: That that is implicit in the weighing process.

MR. MILLAR: And when I say they weren't told, I want to point out in the arguments they were clearly told that. The very last thing that the prosecutor told this jury in this case, his first opening argument was, he said but don't try to avoid the tough decision by sitting and

trying to rationalize or trying to seek a way out of a tough decision. You are going to have to face it head on. You are going to have to decide, have to go through each and every one of these factors and decide it. Is this the case, is this the kind of case, as I am guided by these factors, that warrants the death penalty. I don't read that as some kind of mandatory language analogous to Roberts or Woodson. And that is at joint appendix page 24.

And the prosecutor told the jury exactly the same thing in the very last words that he left the jury with. In his concluding argument he said this is the last time I will speak to you, and I don't really have much more to say. I am not going to go through each one of these factors in aggravation. You have all heard this case. You all understand it. You know it as well as I do. I ask only that as you begin the deliberation process, that you all participate, that you all approach it with the eye of coming and reaching a decision if you can do so. That you listen to everyone else, that you be willing to accept their ideas, and that you think in your mind and be guided by this one thing, the case, which according to law is given, and the aggravating and mitigating circumstances warrants the death penalty. Ask yourselves that. You might also ask yourselves what would I like to have or not

have more that would warrant it one way or the other. That is at joint appendix pages 30 to 31.

That is not mandatory language. This jury knew that it was to exercise its discretion and moral judgment. There is absolutely no question about that, both on the face of the instruction and in terms of what they were told by counsel in this case.

And if I might just conclude my argument, I would point out again that, in our position, reasonable, common sense jurors would have understood these instructions on their face to be constitutionally valid, and to describe accurately their constitutional duty. If the Court feels any need to look at the arguments of counsel in this case, it will only confirm that conclusion.

And, if the Court has no questions, we will submit.

QUESTION: Thank you, Mr. Millar. Mr. Fischer, you have four minutes remaining.

REBUTTAL ARGUMENT OF DENNIS A. FISCHER

ON BEHALF OF THE PETITIONER

MR. FISCHER: Very quickly, the Respondent points to the 250 pages of transcript that it took to elicit the evidence, and tries to make some point about it must have had some effect. In fact, in Hitchcock versus Dugger, we know that considerable evidence was elicited, but that the jury was precluded from giving effect to it.

Counsel several times has stated the language of factor (k) in somewhat different language here. He invariably uses the words any other circumstance which extenuates. But at least once or twice I heard him say a word other than the gravity of the crime, because I think he is using the word culpability, or penalty, without the gravity of the crime, as the catchword. If indeed that is his concept of what it means, then surely there is no problem, under Lockett and Eddings. But our position is that the language that the jury heard, the language which the prosecutor talked about and stressed over and over again, both in context and specifically, is the language that this jury had before it, was advised by the final instructions to give effect to and be guided by, and to make its determination based on it.

The -- I may have misstated or conceded something a bit too quickly in answering Justice White's question. A quick review of the opening words of the dissenting opinion by Justice Arguelles in this case indicates that his total outright concurrence was only as to the guilt and special circumstance phases. We are, however, past both of those. Justice --

QUESTION: (Inaudible), he expressed no disagreement on the other issue.

MR. FISCHER: Well, Justice White, I believe, in

looking at that --

QUESTION: Well, at least that is the way I read it.

MR. FISCHER: Yes, I understand. And my reading, in fact triggered by something that Justice Blackmun suggested in referring to the voir dire problem, suggests that indeed that the supreme court's difficulty with the voir dire extended to the meaning of the final special circumstance.

Mr. Millar indicated that he believes that the jury well understood its responsibility in this case. We can only look back at the district attorney's own voir dire questions and explanations of his understanding of the factor and the meanings of the word shall, and how that weighing process operated, to know that his state of mind, in understanding of both the scope of factor (k) and the shall instruction, was very different than he would now have us accept as the jury's.

I have no further questions, and thank you for your attention.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fischer. The case is submitted.

(Whereupon, at 1:45 p.m., the case in the above-entitled matter was submitted.)

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BY Lynn M. Mayo

(REPORTER)