

A GRAND SLAM OF PROFESSIONAL IRRESPONSIBILITY AND JUDICIAL DISREGARD

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I. INTRODUCTION

Professor Monroe H. Freedman has devoted his professional life to studying and enhancing the professional ethics of lawyers. He has received the American Bar Association's highest award for professionalism, in recognition of a "lifetime of original and influential scholarship in the field of lawyers' ethics."¹ The *New York Times* described him as "a pioneer in the field of legal ethics,"² which he certainly is. From 1975, when he published his treatise *Lawyers' Ethics in an Adversary System*,³ to last year when he co-authored *Understanding Lawyers' Ethics*,⁴ he has asked questions others preferred to avoid⁵ and endeavored to assure that lawyers throughout the legal profession develop and adhere to high standards.⁶

Despite Professor Freedman's efforts, too many examples of bad lawyering and indifferent judicial responses to bad lawyering arise to give comfort to those of us who seek to raise the standards of professional conduct and assure adequate legal representation for all clients.

I have selected one case to illustrate just how poor the performance of lawyers can be and how largely indifferent judges often are to such performances. It is a death penalty prosecution. With the defendant's life

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1. Professor Freedman won the ABA Michael Franck Award for Professional Responsibility in 1998. See American Bar Association Michael Franck Award, http://www.abanet.org/cpr/mfranck_winner_bios.html (last visited Jan. 19, 2006).

2. David Margolick, *Like Sex Acts, Lawyer's Job is a Matter of Definition*, N.Y. TIMES, Sept. 26, 1998, at B7.

3. MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975). The year after it was published the book received the ABA Gavel Award Certificate of Merit as an "outstanding" contribution to the field.

4. MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* (3d ed. 2004).

5. Perhaps the most well known example is Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469 (1966).

6. One writer describes Professor Freedman as the primary creative force in legal ethics today. Ralph J. Temple, *Monroe Freedman and Legal Ethics: A Prophet in His Own Time*, 13 J. LEGAL PROF. 233, 233-34 (1988).

on the line, it appears that the prosecutor acted unprofessionally and disregarded the constitutional right of the defendant in a capital case to rely on mitigation evidence, the defense counsel failed in his responsibility to protect the defendant from the prosecutor's improper conduct, the trial judge failed to correct the prosecutor's conduct or to take measures to assure that conduct did not prejudice the defendant, and the California Supreme Court (and to some extent the United States Supreme Court) pretended that nothing untoward had occurred. Throughout almost a quarter-century of litigation, only two justices on the California Supreme Court and eight federal habeas corpus judges actually recognized that the defendant's rights had been violated.⁷ Although one federal district court judge and a closely divided en banc United States Court of Appeals for the Ninth Circuit would have granted relief to the defendant, they were dealing with the current state of federal habeas corpus.⁸ In the end, the United States Supreme Court held that the lower federal courts did not adequately defer to the state courts under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").⁹

The case to which I refer is the prosecution of William Charles Payton who was tried for rape, murder and attempted murder in 1981.¹⁰ The facts of the case, like the facts of most capital cases, are gruesome. Little reason appears in the reported opinions to question Payton's guilt of the crimes charged. Indeed, he put on no defense evidence at the guilt stage of the proceedings. The adversarial contest arose during the sentencing phase, when the defense sought to avoid a death sentence for Payton.

As long as the death penalty remains a constitutionally valid punishment, Payton's crimes and criminal record are such that the imposition of capital punishment on him would not appear to be an abuse of the penalty. But, before the ultimate sanction is imposed upon any person, basic notions of fairness suggest that the sentencing

7. As explained below, the federal district judge would have overturned a death sentence. On appeal, two of the three judges on the panel that originally heard the case would have reversed. None of the three judges on the panel sat en banc when the court divided 6-5. Thus, of the fourteen circuit judges who reviewed the case, seven would have affirmed the death sentence and seven would have overturned it. *Payton v. Woodward*, 258 F.3d 905, 926 (9th Cir. 2001); *People v. Payton*, 839 P.2d 1035, 1054 (Cal. 1992).

8. *Payton v. Woodward*, 258 F.3d at 914.

9. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996). When a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, as a result of AEDPA a federal court may not grant relief unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2000).

10. *People v. Payton*, 839 P.2d at 1038-39.

proceeding should be fair and the defendant's rights should be adequately protected. As I explain below, this was not the case for Payton. According to the reported opinions, none of the legally trained professionals at trial did what professional standards required of them.¹¹ The prosecutor acted improperly, defense counsel failed to respond appropriately, and the trial judge acted as though nothing improper had happened. Three lawyers, all professionals, knowing that life and death hung in the balance, failed to meet their professional responsibilities. At least that is so if the reported decisions describe accurately what occurred at trial.

In this Article, I rely upon the reported decisions and assume that their descriptions of trial events are accurate, because the courts treated these facts as accurate as they rendered decisions. They upheld Payton's death penalty on the basis of the factual description they provided. My conclusion is that the professionals at trial breached their responsibilities, one and all; the California Supreme Court failed to appreciate the extent of the breaches and affirmed the resulting death sentence; and federal habeas corpus review under AEDPA proved too limited to set aside a sentence that resulted from the breaches.

II. NO QUESTION OF GUILT

The California Supreme Court described how Payton engaged in a horrific assault in a boarding house in which he and his wife once lived.¹² The boarding house, in Garden Grove, California, was owned by Patricia Pensinger, who lived there with her three sons and some boarders. One of the boarders, Pamela Montgomery, had been in the house only two days, having moved there while her husband was on duty with the National Guard. Ms. Pensinger had difficulty sleeping on May 26, 1980, and was sitting in her kitchen working on a crossword puzzle at about 4:00 A.M. when she heard the front door open and saw Payton enter the kitchen. She knew Payton from his experience as a boarder. Payton claimed he had car problems and wanted to talk. Ms. Pensinger offered Payton a beer and talked with him for a while. During their talk, Pamela Montgomery entered the kitchen, and Ms. Pensinger introduced Payton to Ms. Montgomery. After Payton consumed three beers, he asked and obtained permission from Ms. Pensinger to sleep on her couch in the living room. Ms. Pensinger then retired to her bedroom where she fell asleep in a bed shared with her ten-year-old son Blaine.¹³

11. *Id.* at 1040-47.

12. *Id.* at 1039-40.

13. *Id.* at 1039.

Ms. Pensinger was brutally awakened with two blows on her back. She rolled over and saw Payton jump on top of her as he stabbed her repeatedly with a knife. Blaine awoke and tried to take the knife away from Payton, who also stabbed Blaine. Ms. Pensinger yelled, "Take me, leave my son."¹⁴ Payton, who had stabbed her primarily on the face and neck, then tried to stab her in the abdomen. On his second and third tries, the knife blade bent and would not penetrate. Payton got off the bed, left the room, and yelled, "I'm leaving now."¹⁵

Ms. Pensinger told Blaine to try to escape while she kept Payton busy, went into the kitchen, and saw the knife Payton had used lying on the counter. Payton grabbed a second knife and stabbed her in the back. Blaine ran through the kitchen, and Payton stabbed him in the back as he ran past before stabbing Ms. Pensinger some more. When another son woke up, Ms. Pensinger yelled for her sons to awaken a male boarder, and Payton dropped the second knife and fled the house.

Ms. Pensinger suffered forty stab wounds to her face, neck, back, and chest. Blaine suffered twenty-three stab wounds to his face, neck and back. Incredibly and fortunately, both survived. This was not the case for Pamela Montgomery. She was found dead lying in a pool of blood on her bedroom floor clad only in a nightgown that was open in the front. She had been stabbed twelve times, six of the wounds in a line from above the stomach to the pubic area. Three of the six wounds were so serious that each would have been fatal by itself. Some "defense wounds" were also visible and appeared to have been incurred when Ms. Montgomery tried to defend herself.¹⁶

The physical evidence regarding Ms. Montgomery's death included blood found in various places in the bedroom and in a nearby bathroom, a pair of panties entwined around some shorts on her bed, saliva consistent with Payton's¹⁷ on the victim's breast, semen that could have been Payton's in the victim's vaginal area. Payton's fingerprint was found on a beer bottle in the kitchen.¹⁸

Payton arrived home around 6:15 A.M. His wife, who waived her marital privilege not to testify against Payton, testified that when he came home his clothes, face, and hands were covered with blood, some of which was still wet, and his index finger was cut. She also testified that she observed that Payton's genital area, legs, chest and other parts of

14. *Id.*

15. *Id.*

16. *Id.*

17. The saliva was also consistent with a large portion of the general population. *Id.*

18. *Id.* at 1039-40. This was hardly surprising, since he had three beers when he first arrived and was talking with Ms. Pensinger. *Id.* at 1039.

his body were covered with a “lot” of blood, and his body contained scratches and what she described as “fingernail digs.”¹⁹ Payton and his wife fled town the very morning he came home, and Payton was eventually arrested in Florida.

In addition to the testimony of Ms. Pensinger and Blaine and the forensic evidence, the prosecution presented the testimony of an inmate who was incarcerated with Payton in the Orange County jail. He testified that Payton told him about the crime, and said Payton “raped and stabbed a woman, then stabbed a boy and the boy’s mother.”²⁰ The jury found that the defendant was guilty of the crimes charged.²¹

III. PENALTY PHASE EVIDENCE²²

During the sentencing phase of the proceedings, “[t]he prosecution presented evidence that in 1973, [Payton] stabbed a woman he was living with repeatedly in the chest and arm.”²³ The Orange County jail inmate testified that Payton told him that the reason he committed the crimes in the boarding house was “that he had a ‘severe problem with sex and women,’ and that he would ‘stab them and rape them.’”²⁴ The inmate reported that Payton said “that all women on the street that he seen was a potential victim, regardless of age or looks.”²⁵

The prosecution and defense stipulated that Payton had two prior 1976 felony convictions, “one in Idaho for possession of over three ounces of marijuana, and one in Oregon for unlawful consensual sexual intercourse with a minor under the age of eighteen.”²⁶

The defense presented evidence during the sentencing proceeding. It relied on the fact that Payton had become a religious person since he was arrested and confined in jail. The testimony supporting Payton’s sudden conversion came from various sources, including individuals who had known him for a long time and some who only recently made his acquaintance.

One of the two witnesses who knew Payton for a long time was his mother, who testified that he was “totally immersed in the Lord.”²⁷ The other was a minister who believed that Payton’s “recent ‘commitment to

19. *Id.* at 1040.

20. *Id.*

21. *Id.* at 1038.

22. *Id.* at 1040.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

the Lord' was sincere."²⁸

The witnesses who knew Payton for a relatively short time included a mission director who testified about Payton's "religious conversion and the good qualities he exhibited in jail."²⁹ The mission director related that Payton "established Bible study classes in jail, and had almost completed an autobiography that had an 'excellent chance of being published in an international . . . Christian publishing house.'"³⁰

The mission director's testimony that "[m]any jail inmates 'respect him and trust him and have a confidence in him'" was supported by a deputy sheriff who "testified that [Payton] led Bible study sessions in jail, and had a positive influence on other inmates."³¹ The mission director also testified that Payton "hoped to develop a 'ministry within the prison system'" to rehabilitate people.³² Four fellow inmates testified about Payton's beneficial influence in jail. One of them testified that Payton had convinced him not to commit suicide.³³

Thus, the defense mitigation evidence was that, at the time of sentencing, Payton was not the same man who committed the violent acts. He had taken a life, but while in prison had also saved one and was helping others to reform their lives as he had reformed his.

IV. THE PROSECUTOR'S ARGUMENT

The only real battle in the prosecution was over the penalty. After offering no evidence during the guilt phase of the proceeding, the defense offered most of the evidence during the penalty phase.

Before the lawyers made their closing arguments in the penalty phase, the trial judge held an in-chambers conference. The judge made clear that he would give an instruction which followed verbatim the text of California Penal Code section 190.3 and was a standard California jury instruction.³⁴ The judge's instruction set forth eleven different factors, "labeled (a) through (k), for the jury to 'consider, take into account and be guided by' in determining whether to impose a sentence of life imprisonment or death."³⁵

28. *Id.*

29. *Id.*

30. *Id.* (alteration in original).

31. *Id.*

32. *Id.*

33. *Id.* at 1047.

34. *Brown v. Payton*, 125 S. Ct. 1432, 1436 (2005).

35. *Id.* 1 Cal. Jury Instr., Crim. 8.84.1 (4th rev. ed. 1979) provided:

In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be

To his credit, defense counsel objected to the instruction and asked the judge to more specifically direct the jury to consider evidence of the defendant's character and background.³⁶ The prosecution responded with its view that factor (k) was not intended to encompass evidence concerning a defendant's background or character. Although the judge agreed with defense counsel that factor (k) was a general instruction covering all mitigating evidence, the judge insisted upon using the standard jury instruction, thereby tracking the precise language of the statute.³⁷ The judge said to the lawyers the following: "I assume you gentlemen, as I said, in your argument can certainly relate—relate back to those factors and certainly can argue the defendant's character, background, history, mental condition, physical condition; certainly fall into category 'k' and certainly make a clear argument to the jury."³⁸

guided by the following factors, if applicable:

- (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.
- (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.
- (c) The presence or absence of any prior felony conviction.
- (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
- (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
- (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication.
- (i) The age of the defendant at the time of the crime.
- (j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
- (k) Any other circumstance which extenuates the gravity of the time even though it is not a legal excuse for the crime.

36. The United States Supreme Court indicates in its opinion that there was a conference on instructions and that defense counsel made the request for a specific instruction on mitigation at the conference. *Brown v. Payton*, 125 S. Ct. at 1436. The California Supreme Court suggests that the objection came while the judge gave instructions on the factors to be considered at the close of the guilt phase. *People v. Payton*, 839 P.2d at 1057. Whichever court is correct, the important thing is that defense counsel's request for a specific instruction came before the prosecutor's closing argument. No additional request was made, according to the opinions, after the prosecutor's argument.

37. *Brown v. Payton*, 125 S. Ct. at 1436.

38. *Id.*

Factor (k) was a “catchall,” in contrast to the greater specificity of the instructions that preceded it. It directed jurors to consider “[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.”³⁹

The prosecutor clearly did not feel bound by the judge’s construction of factor (k). In his closing argument, the prosecutor argued “that factor (k) referred to ‘some factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did’ but not ‘to anything after the fact or later.’”⁴⁰ The prosecutor used these exact words:

[Factor k] says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some . . . factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did. It doesn’t refer to anything after the fact or later. That’s particularly important here because the only defense evidence you have heard has been about this new born Christianity.⁴¹

The prosecutor’s argument was constitutionally infirm. A plurality of the United States Supreme Court had previously held in *Lockett v. Ohio* that the Eighth and Fourteenth Amendments require that “the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”⁴²

Although *Lockett* was a plurality decision, it built upon another plurality opinion in *Woodson v. North Carolina*,⁴³ which held that a jury must be able to consider the character of a defendant in deciding whether to impose a life or death sentence.⁴⁴ After *Lockett*, it was clear that there were six votes on the United States Supreme Court to strike down any death sentence imposed in a sentencing proceeding in which the jury was not permitted to consider the character of the defendant. A plurality opinion of the California Supreme Court had cited *Lockett* with favor in *People v. Frierson*⁴⁵ in rejecting an attack on the California death

39. 1 Cal. Jury Instr., Crim. 8.84.1 (4th rev. ed. 1979). The instruction has been amended and can now be found at 1 Cal. Jury Instr., Crim. 8.85 (Oct. 2005 ed.). The quoted language represents the language in effect at the time of the trial and sentencing proceeding.

40. *People v. Payton*, 839 P.2d at 1047.

41. *Id.* at 1048 (alteration in original).

42. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (footnotes omitted).

43. 428 U.S. 280 (1976) (plurality opinion).

44. *Id.* at 304 (Stewart, Powell, & Stevens, JJ.).

45. 599 P.2d 587, 608 (Cal. 1979).

penalty as permitting too much jury discretion. Although it is fair to say that the importance of mitigation evidence was made clearer not long after Payton's trial by the United States Supreme Court⁴⁶ and by the California Supreme Court,⁴⁷ the prosecutor cited no authority to the trial judge for the proposition that a defendant had no right to offer post-crime mitigating evidence.

The only factor to which the defendant's mitigating evidence appeared to relate was factor (k). The trial judge had made clear that he believed a defendant had the right to offer post-crime mitigating evidence regarding his character and that factor (k) was the factor to which such evidence related. The judge refused, however, to make this explicit to the jury.⁴⁸

Knowing that the judge would only instruct on the statutory language, the prosecutor argued to the jury that factor (k) focused solely on the crime itself.⁴⁹ The question is what impact the argument might have had on the jury. A fair examination of the precise words contained in factor (k) reveals that the prosecutor's argument tracks the language of the statute well. The language "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime" appears to address only "the crime," which seems to mean the crime for which the jury has found the defendant guilty.⁵⁰ It permits the jury to examine any circumstance that "extenuates the gravity of the crime" even if the circumstance is not a legal excuse.⁵¹ There is nothing in this language to suggest that, if the defendant had no redeeming qualities at the time of the crime, development of such qualities at a later time would extenuate the gravity of the crime. The language says nothing to suggest that the jury might consider characteristics of the defendant at sentencing that he did not possess when committing the crime or that mercy might be warranted at the time of sentencing that would not have been warranted when the crime was committed.

There is no reason to think that the *Payton* jury was aware of the capital punishment jurisprudence that had been developed since the Supreme Court struck down the death penalty in *Furman v. Georgia*,⁵² not long after the California Supreme Court had struck down the

46. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982); see also *Skipper v. South Carolina*, 476 U.S. 1, 4-9 (1986) (regarding good behavior in prison).

47. *People v. Easley*, 671 P.2d 813 (Cal. 1983).

48. *People v. Payton*, 839 P.2d 1035, 1047 (Cal. 1992).

49. *Id.*

50. *Id.*

51. *Id.* at 1048.

52. 408 U.S. 238, 239-40 (1972).

California death penalty in *Anderson v. California*.⁵³ Nor is there any reason to believe that the jury knew about *Lockett* or the importance the United States Supreme Court attached to mitigating evidence. The jury, like all juries, depended on the trial judge for an accurate statement of the law.

Surely a reasonable prosecutor would have known that in 1981 it was the province of the trial judge to declare what the law is. The relationship of trial lawyers to the court should have been as clear then as it is today. No counsel may deliberately ask the jury to follow his or her view of the law rather than the instructions on the law delivered by the trial judge.⁵⁴ In Payton's case, the trial judge interpreted factor (k) to conform with *Lockett* and let all counsel know his understanding of the factor. The prosecutor nonetheless deliberately argued to the jury that factor (k) precluded the jury from considering the mitigation evidence upon which the entire defense sentencing presentation relied. This defiance of the trial judge and instruction to the jury on the law was professional misconduct.

The most that can be said in defense of the prosecutor's conduct is that the trial judge's explanation of his approach to factor (k) was less than clear. When the judge told the lawyers "I assume you gentlemen, as I said, in your argument can certainly relate—relate back to those factors and certainly can argue the defendant's character, background, history, mental condition, physical condition; certainly fall into category 'k' and certainly make a clear argument to the jury,"⁵⁵ the judge almost certainly intended to permit both prosecutor and defense to argue that the mitigation evidence did or did not extenuate the gravity of the crime as a matter of fact (i.e., to decide how mitigating the evidence was). It would be a stretch, however, to claim that the prosecutor believed that the trial judge was permitting the prosecutor, as an officer of the court, to argue that the jury was prohibited from considering the defense evidence as a matter of law. The judge told the lawyers he did not believe that factor (k) limited the mitigation evidence the jury could consider. But, the prosecutor asked the jury to accept his view of law when he argued that factor (k) did not cover any post-crime conduct.

53. 493 P.2d 880, 898-99 (Cal. 1972).

54. *Gotcher v. Metcalf*, 85 Cal. Rptr. 566, 569 (Cal. Ct. App. 1970) ("[I]t is axiomatic that it is the function of the court, not counsel, to instruct the jurors as to the law of the case . . . it is the right of counsel . . . to discuss the law of the case in his oral argument, provided, of course, that his statement of the law is correct and is not at variance with instructions on the law which the court has advised counsel it will give.").

55. *Brown v. Payton*, 125 S. Ct. 1432, 1436 (2005).

V. DEFENSE COUNSEL'S RESPONSE

Defense counsel realized this, at least to some extent. He objected to the prosecutor's argument and moved for a mistrial.⁵⁶

That was both necessary and proper. But, that apparently is the first of only two steps that defense counsel took to protect the defendant from the damage of the prosecutor's argument.

Defense counsel, in his own closing argument, took the second step and argued strongly that Payton's religious conversion was proper mitigating evidence. Defense counsel directly responded to the prosecutor's closing argument that factor (k) permitted the jury to consider only crime-related evidence as follows:

[S]ection (k) may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all phrase. It was designed to include, not exclude, that kind of evidence. Any jury . . . that was in the position of trying to determine the fairest possible sentences, select them between death or life without possibility of parole, would not only want that kind of evidence but would need it to make an intelligent decision.⁵⁷

When defense counsel completed his argument, the trial judge declined to permit the prosecutor to argue in rebuttal.

The California Supreme Court seemed to think that defense counsel's response was more than adequate: "[A]ny impact this [the prosecutor's] argument may have had, however, was immediately blunted by defense counsel's objection, which led the court to remind the jury that lawyers' comments were 'not evidence' but 'argument,' and 'to be placed in [their] proper perspective.'"⁵⁸

The end result of the closing arguments was that the prosecutor argued as a matter of law that the jury was precluded from considering the defense evidence under factor (k), while the defense argued as a matter of law that the jury was not so precluded. The final decision on who was correct on the law was left to the jury.

The decision to leave it to the jury was, at the very least, partly attributable to the failure of defense counsel to take reasonable care. Defense counsel asked during the conference on jury instructions for an explicit instruction on the mitigating factors that the jury could consider. The trial judge declined to give such an instruction, while indicating that he expected the lawyers to argue mitigation appropriately.⁵⁹ Once the

56. *Id.*

57. *People v. Payton*, 839 P.2d 1035, 1049 (Cal. 1992) (alteration in original).

58. *Id.* at 1048.

59. *Id.* at 1047.

prosecutor argued as a matter of law that the jury was barred from considering the defense mitigation evidence under factor (k), the only factor under which the evidence conceivably might fit, defense counsel could and should have requested a corrective instruction from the judge. The prosecutor erred as a matter of law and invaded the province of the court. Yet, defense counsel confined himself to an objection and apparently failed completely to request that the judge do his job and take responsibility for telling the jury what the law of the case actually was.

Compounding this failure, defense counsel conceded that section (k) was “awkwardly worded,” which might have suggested to the jury that defense counsel believed that the jury was required to parse the words and decide what meaning to give them.⁶⁰ Whether or not defense counsel intended to say this, the undeniable fact is that defense counsel understood that the prosecutor had made an argument as to the legal meaning of factor (k), and defense counsel chose simply to join the issue and permit the jury to choose between the competing arguments. In short, the prosecutor said factor (k) precludes reliance on the mitigation evidence, while defense counsel said factor (k) does not preclude reliance.

The result was that defense counsel, along with the prosecutor, called upon the jury to decide a matter that belonged to the judge, as though the dispute as to the meaning of factor (k) were a disputed fact. There is no way of knowing whether the trial judge would have stricken the prosecutor’s argument regarding the meaning of the section had a proper request been made and had defense counsel pointed out that the prosecutor was arguing law, which was the province of the court. But, it is difficult to conceive of a trial judge doing nothing when faced with an explicit challenge by the prosecutor to his authority and responsibility to define the law for the jury. By failing to challenge the trial judge to do his job, defense counsel left the decision as to the meaning of the statute to the jury, which had no clue how to choose between the prosecutor’s and defense counsel’s reading of the words in factor (k).

VI. THE TRIAL JUDGE’S FAILURE TO ACT

If the trial judge had been asleep during the closing arguments, one might understand why he failed to act *sua sponte* to prevent the prosecutor from miscommunicating to the jury the meaning of a crucial part of the law governing the sentencing, indeed, the only legal issue that was likely to matter during the sentencing phase. We know, however,

60. *Id.* at 1049.

that the trial judge was awake and heard the prosecutor's argument. According to the United States Supreme Court, "[t]he [trial] court admonished the jury that the prosecutor's comments were merely argument, but it did not explicitly instruct the jury that the prosecutor's interpretation was incorrect."⁶¹ What could the trial judge have been thinking? That instruction left the jury with no more information than it had before the judge spoke. The jury surely understood that the prosecutor was making a "closing argument." By reminding the jury that the prosecutor was making an argument, the judge created an enormous risk that the jury would understand that it was to decide whether or not to accept the argument just as it would decide any other dispute between opposing counsel during closing argument.

It appears that the judge was reluctant to give a jury instruction that was not "standard" and had not yet been approved by California appellate courts. In giving the unhelpful admonition that he chose, the trial judge abandoned his role as arbiter of the law, permitted the prosecutor to raise a legal issue as though it were a factual dispute, and left the jury to resolve a question of law under a statute that defense counsel conceded was "awkwardly worded" and that, on its face, was entirely consistent with the prosecutor's argument.⁶²

From the reported opinions, there is no way to tell why the trial judge barred the prosecutor from making a rebuttal closing argument. The absence of a rebuttal meant, of course, that the prosecutor had no opportunity to compound his misstatement of the law, but it just as surely meant that he had no chance to correct his earlier misstatement. Thus, there can be no doubt that in Payton's sentencing proceeding the prosecutor mischaracterized the law, defense counsel offered his own view of the law for the jury, the trial judge abandoned his responsibility to assure that the jury was provided with an accurate statement of the law, and the jury was left to decide which side had the better argument without any background in capital punishment cases.

VII. THE CALIFORNIA SUPREME COURT'S RATIONALIZATIONS

One might suppose that the California Supreme Court would have been concerned that, in a case involving a choice between life and death, the prosecutor's misstatement of the law, if believed by the jury, meant that it would conclude that it was barred from considering the defense mitigation evidence. One might suppose that the highest state court would have been troubled that a trial judge in a capital case failed to

61. *Brown v. Payton*, 125 S. Ct. 1432, 1437 (2005).

62. *People v. Payton*, 839 P.2d at 1049.

issue a binding instruction on the key disputed legal issue in the sentencing stage of the case. There is nary a hint, however, in the majority opinion of the California Supreme Court that it understood that the jury was asked to decide a matter of law, one that might have been dispositive.

Instead, a majority of the California Supreme Court engaged in a series of rationalizations that inevitably minimized the significance of the failure of the professionals at trial to adequately carry out their responsibilities.⁶³ First, the court reasoned that “[a]ny impact this [the prosecutor’s] argument may have had, however, was immediately blunted by defense counsel’s objection, which led the court to remind the jury that lawyers’ comments were ‘not evidence’ but ‘argument,’ and ‘to be placed in [their] proper perspective.’”⁶⁴ This is an amazing bit of reasoning. Defense counsel’s objection led the trial judge to instruct the jury that the prosecutor was making an argument, and absent any further indication by the trial judge, the jury must have understood that its role was to decide whether to accept the argument as true. There is no recognition in the court’s opinion that the trial judge was obliged to instruct the jury on the law, and to make clear that the law was not subject to argument, for the lawyers were as bound by it as was the jury.

Second, the court observed that, after misstating the legal meaning of factor (k), “the prosecutor implicitly conceded the relevance of defendant’s mitigating evidence by devoting substantial attention to it.”⁶⁵ The court quoted as follows from the prosecutor’s closing argument:

The law in its simplicity is that . . . if the aggravating factors outweigh the mitigating, the sentence the jury should vote for should be the death penalty. How do the factors line up? The circumstances and facts of the case, the defendant’s other acts showing violence, Mrs. Pensinger and Mrs. Stone, . . . Blaine Pensinger, the defendant’s two prior convictions line up against really nothing except defendant’s newborn Christianity and the fact that he’s 28 years old. This is not close.⁶⁶

The court then concluded that “[o]bviously, this exercise by the prosecutor had a point only if it was contemplated that the jury *would* consider defendant’s evidence.”⁶⁷

The court’s reasoning is deeply flawed and obviously wrong. The

63. The vote was 5-2 to affirm Payton’s death sentence. *Id.* at 1054.

64. *Id.* at 1048.

65. *Id.* at 1049.

66. *Id.* (alteration in original).

67. *Id.*

prosecutor did not abandon his argument that the jury was precluded from relying on the mitigation evidence relating to post-crime events. Age is a factor that the statute permits a jury to consider, so factor (k) is not needed to deal with age. The fact that the prosecutor referred to the defendant's "new born Christianity," which presumably was only potentially relevant under factor (k), signified nothing more than the prosecutor realizing that his legal argument about the meaning of factor (k) could be rejected by the jury.⁶⁸ Thus, it was natural for him to add that, to the extent there was any mitigation evidence in the case, it was insufficient to outweigh the aggravating circumstances.⁶⁹ In fact, it was essential for the prosecutor to make the argument regarding weighing as long as age was a permissible factor for the jury to consider.⁷⁰ Once the jury decided to deliberate, it was entitled under the instructions given to it to decide that the prosecutor's legal argument was correct and that evidence that arose after the crimes could not be considered. Nothing in the prosecutor's argument conceded away the legal argument.

Third, the court reasoned that, "[f]or the jury to have accepted a narrow view of factor (k) in this case would have meant disregarding all of defendant's mitigating evidence, since the testimony of his eight penalty phase witnesses was all directed to his religious conversion and consequent behavior in prison."⁷¹ This is incorrect, however. The jury could easily have considered every bit of the evidence presented by the defendant and decided piece by piece that it simply did not fall within the legal meaning of factor (k), as the prosecutor contended.

Fourth, the court reasoned that the United States Supreme Court's opinion in *Boyd v. California*⁷² supported the conclusion that the jury would have understood the legal import of factor (k). In that case, the Supreme Court rejected the argument that factor (k) operates to "limit the jury's consideration to 'any other circumstance *of the crime* which extenuates the gravity of the crime.'"⁷³ The Court reasoned instead that factor (k) directs the jury "to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and

68. *Id.* at 1048.

69. As the dissenting judges pointed out, the prosecutor prefaced his argument to the jury that even if defendant's evidence could be considered, it was of little value, by saying, "I don't really want to spend too much time on it because . . . I don't think [defendant's evidence] comes under any of the eleven factors . . ." *Id.* at 1055 (alteration in original).

70. Moreover, the fact that the defendant had been drinking was a permissible mitigating factor for the jury to consider apart from factor (k). *Id.* at 1042.

71. *Id.* at 1049.

72. 494 U.S. 370 (1990). The Supreme Court divided 5-4 in the case.

73. *Id.* at 382.

character.”⁷⁴ The Court supported its conclusion by looking to the other sentencing factors that “allow for consideration of mitigating evidence not associated with the crime itself, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, and youth.”⁷⁵

According to the California Supreme Court, the reasoning of the United States Supreme Court also applied to *Payton*. Its reasoning was as follows:

To be sure, the high court’s holding in *Boyde* does not prevent a defendant from asserting a claim to the effect that prosecutorial argument, or other factors, led the jury to misinterpret factor (k). However, in evaluating such claims we do not treat comments by attorneys as if they had the same force as the trial court’s instructions on the law. This is because “[t]he former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter . . . are viewed as definitive and binding statements of the law.”

Rather than creating a rule to the effect that incorrect remarks by attorneys about the permissible scope of mitigating evidence are presumed to have misled the jury, *Boyde* teaches that there is constitutional error only if it is reasonably likely that such remarks led the jurors to understand the trial court’s instructions as precluding consideration of relevant mitigating evidence offered by the defendant. . . .

Applying this analysis to the case before us, we do not consider it reasonably likely that the jurors believed the law required them to disregard defendant’s mitigating evidence.⁷⁶

The problem with the court’s reasoning is that in *Boyde*, the prosecutor—an officer of the court representing the People of California—did not misstate the law. No instruction was given to limit the jury’s consideration of mitigating evidence. The jury was not asked to choose between two competing legal arguments without help from the trial judge. *Payton* was very different from *Boyde*. In *Payton*, the prosecutor argued to the jury that it was precluded from considering post-crime evidence, defense counsel joined the argument, and the trial judge left the jury without a binding instruction. The fact that paragraphs

74. *Id.*

75. *Id.* at 383.

76. *People v. Payton*, 839 P.2d 1035, 1048 (Cal. 1992) (citations omitted) (quoting *Boyde*, 494 U.S. at 378-81, 384).

(a)-(j) repeatedly used the term “the offense” and twice specifically used the words “at the time of the offense” might have strongly influenced the jury to conclude that factor (k) was a “catch-all” that simply invited it to consider any other evidence concerning the offense. The language of the instruction as a whole lends support to the prosecutor’s argument, at least when considered on a blank slate (i.e., without reference to the decided cases on capital punishment).⁷⁷

The 5-4 majority of the *Boyde* Court clearly stated “we agree with the Supreme Court of California, which was without dissent on this point, that ‘[a]lthough the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde’s conduct, he never suggested that the background and character evidence could not be considered.’”⁷⁸ This is precisely what the prosecutor suggested in *Payton*.⁷⁹ Despite the unmistakable difference between *Boyde* and *Payton*, the California Supreme Court declined to recognize the distinction between a prosecutor arguing facts (approved by the United States Supreme Court in *Boyde*) and prosecutors misstating the law, which occurred in *Payton*. It would be an overstatement to say that the *Boyde* majority condemned what occurred in *Payton*, but it is accurate to note that the *Boyde* majority thought that it was important that a prosecutor did not suggest to the jury that it could not consider character evidence, and it was undeniable in *Payton* that the prosecutor went beyond a suggestion and argued that the jury was precluded from considering post-crime evidence while the trial judge permitted the jury to accept the argument if it chose to do so.

77. Ironically, in *People v. Easley*, 671 P.2d 813 (Cal. 1983), the Supreme Court of California stated that:

In order to avoid potential misunderstanding [over the meaning of factor (k)] in the future, trial courts . . . should inform the jury that it may consider as a mitigating factor “any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime” and any other “aspect of [the] defendant’s character or record . . . that the defendant proffers as a basis for a sentence less than death.”

Id. at 826 n.10 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). Although the United States Supreme Court declined in *Boyde* to require such an instruction in all cases, California Jury Instruction, Criminal, No. 8.84.1 has been formally amended and the present factor (k) instruction directs 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 [and any sympathetic or other aspect of the defendant’s character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial].

1 Cal. Jury Instr., Crim. 8.85(k) (5th ed. 1988).

78. *Boyde*, 494 U.S. at 385 (quoting *People v. Boyde*, 758 P.2d 25, 47 (Cal. 1988)).

79. Justice Souter’s dissenting opinion, discussed *infra* notes 105-106 and accompanying text, quotes from oral argument in *Boyde* and suggests that the Supervising Deputy Attorney General of California cited *Payton* by name in oral argument as an example of prosecutorial misconduct in order to distinguish the case from *Boyde*.

In short, the opinion of the California Supreme Court failed to recognize that the jury was called upon to decide law and to do so without guidance from the trial judge.⁸⁰ The opinion also failed to recognize that defense counsel, after objecting, joined the argument and made it seem that the jury was empowered to choose between the prosecutor's construction of the statute and the defense's. Most surprisingly, the opinion failed even to mention that it is the responsibility of the judge, not the jury, to decide questions of law.

VIII. FEDERAL HABEAS REVIEW: THE LOWER COURTS

United States District Judge Manual Real upheld Payton's conviction when Payton sought federal habeas corpus relief, but held that the sentencing proceeding was tainted by the prosecutor's argument.⁸¹ A panel of the United States Court of Appeals disagreed and overturned Judge Real's ruling as to the fairness of the sentencing proceeding.⁸² A majority of the panel reasoned that "[a]s *Boyde* counsels, prosecutors' comments lack the force of jury instructions, and we cannot say that reasonable jurors in Payton's case were likely to conclude from the prosecutor's statements, in context of the arguments as a whole together with the court's instructions, that they could not consider Payton's mitigating evidence at all."⁸³ The majority relied in part upon the court's final instructions to the jury which directed the jury as follows:

In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.⁸⁴

80. As the dissent noted:

The jurors in this case were laypersons; presumably they were unfamiliar with the legislative history of factor (k) or with cases interpreting the Eighth Amendment. Thus, they were totally unequipped to decide whether the prosecutor or defense counsel had correctly explained to them which evidence they were entitled to consider in deciding whether defendant should live or die.

People v. Payton, 839 P.2d at 1057.

81. Payton v. Woodford, 258 F.3d 905, 910 (9th Cir. 2001).

82. *Id.* at 916.

83. *Id.* at 916-17.

84. *Id.* at 918.

The majority apparently did not realize the extent to which the instruction begged the crucial question. The judge instructed the jury to consider all evidence except to the extent it was instructed not to. Crucial to the jury was whether factor (k) limited or expanded the evidence the jury could consider. That was the issue left to argument by counsel.⁸⁵

Dissenting Judge Michael Daly Hawkins identified what had gone wrong in Payton's sentencing proceeding:

This is a case of compound error involving a serious and repeated misrepresentation of law by the prosecutor. The initial error occurred when the prosecutor was permitted, in effect, to instruct the jury that it could not legally consider Payton's mitigating evidence—evidence that the California appellate courts acknowledge was completely admissible. Bad enough that this should happen, but in a nearly complete abdication of its responsibility to properly explain the law to the jury, the state trial court not only failed to correct the misinformation, it permitted the prosecutor to argue his own interpretation of a sentencing factor as if it were the law. Because the prosecutor's "instructions" told the jury it must ignore the only mitigation evidence that Payton offered, the decision whether to consider it made the difference, quite literally, between life and death. All this was done without ever correctly instructing the jurors that the evidence was fully admissible and that they were required to consider it. The result of this deadly combination of prosecutorial misleading and judicial abdication "fundamentally affected the fairness" of the penalty phase of Payton's murder trial and violated his due process rights.⁸⁶

Judge Hawkins compared the prosecutor's and defense counsel's

85. Payton cross-appealed and argued that his trial counsel was ineffective for failing to investigate sufficiently, failing to request a court order to compel discovery compliance, and improperly conducting voir dire of jurors including disclosure of defense experts, and failing to confer sufficiently with him. *Id.* at 919-22. The court rejected these challenges which were directed at the guilt determination. *See id.* Payton also alleged ineffective assistance during the sentencing phase. *Id.* at 923. He claimed that defense counsel did not adequately voir dire the jury, failed to investigate fully the background of a jailhouse informant and Payton's own background, failed to investigate and present evidence of post-traumatic stress disorder, failed to object to the prosecutor's argument that "[w]hat you've heard is just some jailhouse evidence to win your sympathy, and that's all," and cumulatively erred. *Id.* at 923-25. Payton did not challenge the failure of defense to seek an adequate remedy for the prosecutor's erroneous argument to the jury.

86. *Id.* at 926 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). Judge Hawkins pointed out an important fact not mentioned by the California Supreme Court. "The prosecutor continued this theme [i.e., factor (k) did not apply to the defense mitigation] throughout the closing, noting later on that 'You've heard no evidence of any mitigating factors' and then, even later, addressing Payton's evidence but reiterating that 'I don't think it's really applicable and I don't think it comes under any of the eleven factors.'" *Id.* at 927.

closing arguments and explained why the jury might well have accepted the prosecutor's construction of factor (k):

Although defense counsel told the jury it could consider Payton's evidence, he could point to no language in the statute or instruction that supported this claim. He instead was left with arguing that factor (k) was "awkwardly worded," but that it did not preclude consideration of the post-crime religious conversion. This is in stark contrast to the repeated argument of the prosecution, referring to the language in factor (k)—"extenuates or lessens the gravity of the crime"—to bolster the argument that the language of factor (k) refers only to some fact in operation at the time of the offense.⁸⁷

Unlike the California Supreme Court, Judge Hawkins recognized why the "consider all the evidence" instruction given to the jury could not have corrected the prosecutor's misleading argument.

More precisely, the jury was instructed to consider "all the evidence . . . *except as you may be hereafter instructed*." The very next instruction the jurors heard was CALJIC 8.84.1 regarding aggravating and mitigating factors, including factor (k), which the prosecution had told them precluded consideration of Payton's evidence. The generic "consider all the evidence" instruction did nothing to undo the damage.⁸⁸

Judge Hawkins' conclusion was the following:

This is not a case where the prosecutor made an offhand remark during the course of trial. The prosecutor's erroneous argument was far from subtle. It was explicit, deliberate, consistent and repeated. Certainly, arguments of counsel generally carry less weight than instructions from the court. But when the court expressly permits counsel to argue the legal meaning of an instruction, without ever instructing the jury which interpretation is correct, the arguments of counsel obviously take on significant importance. A lay jury is ill-equipped to determine which view of the law is correct.⁸⁹

The Ninth Circuit agreed to hear the case en banc and, in an opinion by Judge Richard A. Paez, adopted the three-judge panel's decision that there were no guilt phase errors, but affirmed the district court's decision with respect to the penalty phase by a 6-5 vote.⁹⁰ The en banc court agreed with the district court that there was error during Payton's

87. *Id.* at 928.

88. *Id.*

89. *Id.* at 929 (citation omitted).

90. *Payton v. Woodford*, 299 F.3d 815 (9th Cir. 2002) (en banc).

penalty phase and affirmed the grant of Payton's habeas petition.⁹¹ The court held that AEDPA did not apply to its analysis of Payton's habeas claims because Payton filed his petition for the appointment of habeas counsel prior to April 24, 1996, the effective date of AEDPA. After the en banc decision, the United States Supreme Court decided *Woodford v. Garceau*,⁹² in which it held that cases are "pending" before the effective date of AEDPA only if a habeas petitioner has filed an "actual application for habeas corpus relief" in district court. Because a petition for the appointment of habeas counsel was not enough to make a petition "pending," the Supreme Court granted a writ of certiorari, vacated the judgment, and remanded *Payton* to the court of appeals.⁹³ On remand, the Ninth Circuit applied AEDPA to its analysis of Payton's habeas claims and reiterated by the same 6-5 vote its earlier conclusion that the district court properly granted Payton's habeas petition.⁹⁴

IX. THE UNITED STATES SUPREME COURT: THE LAST WORD

The Supreme Court granted review⁹⁵ and reversed the Ninth Circuit by a 5-3 vote.⁹⁶ Justice Kennedy's opinion for the Court reasoned as follows:

We do not think that, in light of *Boyde*, the California Supreme Court acted unreasonably in declining to distinguish between precrime and

91. *Id.* at 815-16. Judge Richard C. Tallman dissented from the sentencing portion of the opinion and summarized the dissenting position as follows:

I respectfully dissent from most of the court's opinion. In *Boyde v. California*, the Supreme Court upheld against an Eighth Amendment challenge the same CALJIC jury instruction employed in Payton's penalty trial. I do not believe the result should be any different in this case because it is not reasonably likely that the prosecutor's incorrect remarks led jurors to understand the instructions as precluding consideration of all of the defendant's mitigating evidence, *i.e.*, virtually the entire penalty phase case. Moreover, if there was an error, it was surely harmless.

Id. at 830 (Tallman, J., dissenting) (citation omitted).

92. 538 U.S. 202 (2003).

93. *Id.* at 210.

94. *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003). Judge Tallman again wrote the dissent. This time he also relied upon AEDPA:

Today, six judges of this court announce that the legal conclusion reached by seven of their colleagues (*plus* five justices of the California Supreme Court) is not only wrong, but *objectively unreasonable* in light of clearly established federal law. According to the six judges in the majority, those twelve judges were so off-the-mark in their analyses of United States Supreme Court precedent that their shared legal conclusion—that Payton's constitutional rights were not violated by the "unadorned" factor (k) instruction—must be deemed objectively unreasonable. I respectfully dissent.

Id. at 1219 (Tallman, J., dissenting) (footnote omitted).

95. *Goughnour v. Payton*, 541 U.S. 1062 (2004).

96. *Brown v. Payton*, 125 S. Ct. 1432, 1435 (2005). Chief Justice Rehnquist did not participate in the decision.

postcrime mitigating evidence. After all, *Boyde* held that factor (k) directed consideration of any circumstance that might excuse the crime, and it is not unreasonable to believe that a postcrime character transformation could do so. Indeed, to accept the view that such evidence could not because it occurred after the crime, one would have to reach the surprising conclusion that remorse could never serve to lessen or excuse a crime. But remorse, which by definition can only be experienced after a crime's commission, is something commonly thought to lessen or excuse a defendant's culpability.⁹⁷

That leaves respondent to defend the decision of the Court of Appeals on grounds that, even if it was at least reasonable for the California Supreme Court to conclude that the text of factor (k) allowed the jury to consider the postcrime evidence, it was unreasonable to conclude that the prosecutor's argument and remarks did not mislead the jury into believing it could not consider Payton's mitigation evidence. As we shall explain, however, the California Supreme Court's conclusion that the jury was not reasonably likely to have accepted the prosecutor's narrow view of factor (k) was an application of *Boyde* to similar but not identical facts.⁹⁸ Even on the assumption that its conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review.⁹⁹

Justice Kennedy wrote "[t]here is . . . no indication that the prosecutor's argument was made in bad faith, nor does Payton suggest otherwise."¹⁰⁰ Justice Kennedy also pointed out something not previously emphasized in the reported opinions: i.e., when defense counsel objected to the prosecutor's closing argument, the trial judge, at

97. *Id.* at 1439. It is not at all clear that a lay person would agree that post-crime remorse lessens a defendant's culpability. Even if it were clear, in none of the opinions in the case is there a suggestion that defense counsel argued that Payton's life should be spared because he suffered remorse. Instead, the defense's argument was that Payton had changed and was a different man. There is absolutely nothing in the reported decisions to suggest that defense counsel, the judge or anyone suggested to the jury the reasoning used by Justice Kennedy or that such reasoning is common among lay individuals.

98. It is debatable whether *Payton* possibly could be fairly characterized as "similar but not identical facts." After all, the prosecutor in *Boyde* did not argue that the jury was precluded from considering any evidence. This was important enough for the Court to mention in its *Boyde* opinion, and important enough, according to Justice Souter's dissent, for the Supervising Deputy Attorney General of California to explicitly distinguish the two cases in his oral argument in *Boyde*. See *infra* notes 105-106 and accompanying text.

99. *Brown v. Payton*, 125 S. Ct. at 1439-40.

100. *Id.* at 1441. This is somewhat surprising given the trial judge's statement during the discussion with counsel as to instructions that he agreed with defense counsel's position as to factor (k), and the almost certain knowledge that all competent lawyers have that it is the province of the court, not counsel, to tell the jury what the law is.

a side bar conference, stated that one could “argue it either way.”¹⁰¹ In other words, it appears that the trial judge was permitting counsel to argue law to the jury and was deliberately refusing to assume responsibility for telling the jury the proper construction of factor (k).

The most surprising part of the majority opinion is its failure to reference what it found important in *Boyd*: “[A]lthough the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyd’s conduct, he never suggested that the background and character evidence could not be considered.”¹⁰² The ease with which the Court dismissed the harm arising to Payton from the prosecutor’s argument is astonishing. The prosecutor told the jury factor (k) did not cover the defense mitigation evidence, defense counsel chose to argue the point and did so rather weakly, the trial judge told the lawyers at sidebar that he thought the question could go either way, and the jury had none of the training in legal language that lawyers and judges are supposed to have. If the trial judge thought either side could prevail in its interpretation, why shouldn’t the jury think similarly? As between the prosecutor’s argument and the defense’s, the language of factor (k) and its placement in an instruction emphasizing the crime and the time the crime was committed certainly offer support for the prosecutor’s legal argument while providing nothing to help the defense argument. Indeed, defense counsel at trial pointed to nothing in the wording that supported his legal argument.

Justice Breyer concurred and wrote that “[w]ere I a California state judge, I would likely hold that Payton’s penalty-phase proceedings violated the Eighth Amendment.”¹⁰³ He concluded, however, that AEDPA standard required a federal court to find that the California Supreme Court’s decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” and the standard had not been satisfied.¹⁰⁴

Justice Souter, joined by Justices Stevens and Ginsburg, dissented. He identified the position the trial judge found himself in when defense counsel objected to the prosecutor’s closing argument:

Although the prosecutor’s argument rested on a perfectly fair reading of the text of the pattern instruction, its effect, in the absence of any further instruction, was to tell the jury that it could not consider the

101. *Id.*

102. *Boyd v. California*, 494 U.S. 370, 385 (1990) (quoting *People v. Boyd*, 758 P.2d 25, 47 (Cal. 1988)).

103. *Id.* at 1442 (Breyer, J., concurring).

104. *Id.* at 1443 (Breyer, J., concurring) (citing 28 U.S.C. § 2254(d)(1)(2000)).

conversion evidence as mitigating. Payton's lawyer immediately objected. He expressed his understanding that the trial judge had agreed that consideration of the mitigating evidence was constitutionally required and meant to let respective counsel argue only about its probative value, even though the judge himself had refused to address this essential constitutional issue specifically in any particular instruction. One would reasonably suppose that the trial judge would have realized that the prosecutor's argument put him on the spot, forcing him to correct the misleading statement of law with an explicit instruction that the jury was free to treat the conversion evidence as mitigating, evaluating its weight as the jury saw fit. It is, after all, elementary law, federal and state, that the judge bears ultimate responsibility for instructing a lay jury in the law. But the trial judge did no such thing. Instead, he merely told the jury that the prosecutor's argument was not evidence. This instruction cured nothing. The prosecutor's objectionable comment was not a statement about evidence but a statement of law. Telling the jury that a statement of law was not evidence did nothing to correct its functional error in misstating the law.¹⁰⁵

Justice Souter focused on the language of the Court in *Boyde*, which had emphasized that the prosecutor had not argued that the jury was precluded from considering all the evidence, and wrote that

[i]f the *Boyde* majority thus anticipated a case like this one, with a possibility of substantial prejudice arising from misrepresentation of the law, the Court's prescience is attributable to the State's position in the *Boyde* argument: the Supervising Deputy Attorney General of California appearing for the State in *Boyde* urged the Court to see that case in a light favorable to the State, in contrast to Payton's case, to which counsel referred by name, as a case in which the prosecutor had "misled the jurors."¹⁰⁶

Four Justices, the majority without Justice Breyer, might have reached the same result as the California Supreme Court if they were free to engage in *de novo* review. Justice Breyer and the dissenters clearly would have reached a different result but for AEDPA. This is not the place to address the merits of AEDPA, for the focus here is on professionalism. The important thing is that a majority of the Supreme Court was not prepared to say that what happened to Payton should never happen when professional lawyers and judges satisfy their professional obligations. The 5-2 majority of the California Supreme

105. *Id.* at 1448-49 (Souter, J., dissenting) (citations omitted).

106. *Id.* at 1449-50 (Souter, J., dissenting) (citing Transcript of Oral Argument in O.T. 1989 at 29 (No. 88-6613)).

Court failed to appreciate the breakdown of professional standards during Payton's sentencing when it rendered its decision in 1992. Thirteen years later, four of eight United States Supreme Court justices failed again to do so.

X. CONCLUSION

Five United States Supreme Court justices apparently agreed in *Payton* that it is not deliberate misconduct for a prosecutor to argue law to the jury that has not been approved by the trial judge even though the argument flies in the face of what the trial judge told the lawyers the law was. The same five justices apparently agree that it does not violate clearly established Supreme Court precedents for a trial judge to permit a jury to decide in a capital case, by weighing competing legal arguments, whether it was or was not precluded from considering post-crime mitigation evidence that might make the difference between life and death.¹⁰⁷ This speaks volumes about the Court's view of the state of professional standards in this country, those governing both lawyers and judges, and it makes a statement as well about the confidence one can have in the fair imposition of capital punishment.

One might have thought that few principles were more firmly established in all cases, and with special significance in capital cases, than these three: (1) it is the province and duty of the court to state the law that the jury is to apply,¹⁰⁸ (2) counsel have no right to ask the jury to accept as true statements of law not approved by the court,¹⁰⁹ and (3) trial lawyers and trial judges act unprofessionally when they ask a jury to decide a question of law based upon competing arguments of counsel.¹¹⁰ One might have hoped that the highest court in the largest state of the union would have firmly embraced these principles, and that, if it failed to do so, the United States Supreme Court could be counted on to do so. As it turns out, a majority of both courts failed to do so.

The title of this Article is "A Grand Slam of Professional Irresponsibility and Judicial Disregard." In the case of William Charles

107. See *id.* at 1442.

108. See, e.g., *Gotcher v. Metcalf*, 85 Cal. Rptr. 566, 569 (1970).

109. *Id.* California trial and appellate judges indicated prior to Payton's trial that they understood the judge's right and responsibility to correct erroneous arguments on the law. See, e.g., *Sparks v. Bledsaw*, 49 Cal. Rptr. 246, 252 (1966). Courts in other jurisdictions have recognized that "misstatements of law are impermissible during closing argument and a positive and absolute duty, as opposed to a discretionary duty, rests upon a trial judge to restrain and purge such arguments." *Heshion Motors, Inc. v. W. Int'l Hotels*, 600 S.W.2d 526, 534 (Mo. Ct. App. 1980).

110. See John W. Poulos, *The Lucas Court and the Penalty Phase of the Capital Trial: The Original Understanding*, 27 SAN DIEGO L. REV. 521, 641 (1990).

Payton, the prosecutor invaded the province of the court and misrepresented the law to the jury, defense counsel chose to respond to the argument instead of insisting that the trial judge do his job and tell the jury what the law was, and the trial judge sat back and permitted the lawyers to argue the only legal issue that mattered in the case and allowed the jury to decide which view of the law to adopt.¹¹¹ Three lawyers acted and none did what he should have done, resulting in a triple failure. Add to it the California Supreme Court's failure (and possibly that of half of the United State Supreme Court) to recognize how bad the triple failure was and there is a grand slam, professionals failing to meet the standards of the profession, and judges disregarding their responsibilities.

That this death penalty case, highly visible and with the kind of appellate review not always provided in ordinary cases, ended as it did ought to cause alarm about the state of legal standards. Death penalty cases are the ultimate adversary contests. It is clear that AEDPA imposes serious constraints on federal judges correcting state errors. A violation of due process is not enough, even in a capital case, to warrant habeas corpus relief. Unless the United States Supreme Court has clearly decided an issue, and a state court's decision is contrary to or unreasonably applied the Supreme Court's decision, a habeas prisoner will be unable to prevail. It does not matter how unfair a state court decision is, even though a death sentence is the result. Surely, in a world in which habeas corpus review has been so greatly reduced, it is not too much to ask that prosecutors, defense counsel and judges be held in all criminal cases, but particularly in capital cases, to adherence to professional standards of conduct and to voice our dismay and concern when they are not.¹¹²

I hereby voice my dismay and concern.

QUESTION & ANSWER

MR. BLACK: Barry Black. Good morning. Thank you for your talk, Professor. One question with regard to your position that there was prosecutorial misconduct here, let me preface my comments by pointing out that Professor Freedman's view on prosecutorial ethics differs

111. *People v. Superior Court*, 561 P.2d 1164, 1171 (Cal. 1977) (holding that "although a court may not instruct an attorney which arguments he shall make and when, it may order him to cease a prejudicial, profane, insolent, unconstitutional or other improper argument which threatens the integrity of the trial").

112. I was tempted to say "the highest" standards, but after reviewing what happened to Payton, I concluded it would be a great step forward to expect adherence to basic standards of conduct to which all lawyers should be expected to conform.

substantially from that which we see in common practice. You could hold the prosecutor to a much higher standard of proof before he proceeded. Having said that, if a prosecutor has before him a statute, horrible as it may be, is it not on a lesser standard of the Freedman's prosecutorial standard of ethics you could not give, not only province, but responsibility to argue it according to exactly the way he did it?

PROFESSOR SALTZBURG: That's a good question. On the slide I had put up, the Supreme Court decided two cases before the trial in which a majority of the Supreme Court indicated that a defendant has a constitutional right to rely on mitigating evidence, all mitigating evidence. So, the prosecutor's argument was in conflict with the United States Supreme Court's decisions. You're not allowed to argue against the defendant by stating what the Supreme Court has said is unconstitutional or prohibited.

MR. BLACK: So would the prosecutor have to take the position that the statute he has before him is unconstitutional? And I mean, I would assume he'd be fired if he took that position.

PROFESSOR SALTZBURG: He just has to refrain from arguing what's not constitutional. By the way, as crazy as it is, under the *Boyde* case if the prosecutor had said nothing about what the statute meant, the jury might have concluded on its own that it couldn't consider the defense evidence, and the United States Supreme Court said that's okay. That's what it said in *Boyde*, and that's bad enough, but what the *Payton* prosecutor did, he went a step further. He told them—and he is after all, as I said, speaking for the state of California. He told them they were barred from considering the defense evidence, and the judge said to the jury it could consider his argument, so if you think he's right, you're barred. But, even if the Supreme Court had not spoken on the matter, and there had been no law, the DA would still have not been warranted in arguing law not approved by the trial judge. And let's suppose, by the way, that for the first time on appeal, the California Supreme Court said that was the wrong argument, then you couldn't say the prosecutor engaged in misconduct for ignoring U.S. Supreme Court decisions; the argument would be simply error, right? But it ought not to matter, should it? In a death case when there is misconduct or error, if it's the wrong law, don't you think it should matter?

MR. BLACK: Well, that's the question. I personally tend to adopt Professor Freedman's approach and being a defense attorney, I'd like to see prosecutors stand up and say, you know what, I don't believe in this argument. I have it. I have the law on my side, bad statute as it is, that I'm not going to go forward, and I see very few prosecutors doing that realistically, but that's not what we see in practice, and prosecutors want

to move up the alter on a Sunday being nominated to the Supreme Court of the United States and definitely do what they can to get ahead.

PROFESSOR SALTZBURG: Well, I think that's the issue of what standard we ought to be holding the prosecution to—probably a little bit removed. I don't disagree with you. The point I have raised, number one, is that if there was error, the error went to the heart of the trial, and this trial was only about one thing. As I said this trial was not about guilt. The trial was about whether the jury could consider mitigating evidence, and if so decide to spare the guy's life. If they got it wrong, it was because of the prosecutor's argument. The prosecutor should have known the law, number one, but even if the law hadn't been decided, there was error when the prosecutor argued law not approved by the trial judge. Whether or not this was misconduct, it was error that was not cured by anything that happened at trial.

MR. BLACK: Right. Thank you.

PROFESSOR APPLEMAN: This is a little off the topic, but we're talking about—I'm sorry, I'm Laura Appleman. So any discussion of prosecutorial ethics, which I'd like to put in quotes, you know, I wonder, considering both the Supreme Court and really all courts in the land, it's really a harmless error problem. I'll admit my bias here, but I practiced criminal defense in New York City for five years. But just looking at the law as it is, it's very rare that any sort of the prosecutorial misconduct is ever punished. We take the example of Nancy Grace, take the example without—leave it up to CNN person who has their own show. She actually was chastised by the Fifth Circuit several times for lying about witnesses and, you know, having *Brady*¹¹³ violations, and yet this is not only—did not impede her career, I think it may sort of, you know, have shot her up into the main stream, in terms of prosecutorial ethics, it just seems that prosecutors more and more, especially in so many criminal defense trials, so many cases are resolved by guilty pleas and by plea bargaining that there's an immense amount of coercion going on, and whether it's state or federal, and I guess, you know, what you're talking about is just, you know, you're a little removed, but it's just, for me maybe for many criminal defense lawyers, it's just yet another example of how all criminal defendants, whether they're extraordinarily well represented by Martin Weinberg like Martha Stewart or the average criminal defense lawyer. I think that ethics is really falling by the wayside, I think the courts aren't doing their job in reversing, in chastising. There are very few rules to punish prosecutors besides out of the judicial reversal, so I just want to hear your thought on this.

113. *Brady v. Maryland*, 373 U.S. 83 (1963).

PROFESSOR SALTZBURG: You raised several different points. Let me address each of them. I'm not one who wants to run around campaigning on the theory that all prosecutors are bad or that all prosecutors engage in misconduct. I do think there's been a lowering of standards. I think it is true generally that people's pride in their work, and the use of their authority to do the right thing have been—they've diminished over time. I had lunch with Justice Kennedy—and by the way, I chaired the ABA Justice Kennedy Commission for a year, and looked at issues he asked us to look at about criminal justice, and I did it with great pride, even though my view is Justice Kennedy is in part responsible for some of the horrible decisions that have to do with criminal justice, and *Payton* is one of them. This is absolutely one of them, writing a majority opinion that couldn't figure out that one of the most basic principles known to the law is that the judge is responsible for the law. It is shocking that that is not something that he and the other justices thought was clearly so well established that they could overturn the California Supreme Court. But, I spoke with Justice Kennedy about prosecutions and prosecutorial discretion, and I was surprised. I said "well, have you ever read the book *The Just and the Unjust*?"¹¹⁴ He looked at me, he said "James Gould Cozzens." He actually knew James Cozzens's middle name. Well, I doubt that any of the law students in the room ever heard of this book. If you can't find it in regular print, I urge you to read it, go out and get it at a used book store. When I was going to law school, and that was not actually when Gutenberg was living, it was not that long ago. Back then the reading was *Gideon's Trumpet*, *The Just and The Unjust*, and there were a couple of others. *Billy Budd* also still was a favorite. The *Just and the Unjust* was about a small town prosecutor, and I don't remember if it was actually true or if I want to remember it this way, the basic lesson I learned from that book was that a prosecutor has a greater chance to do justice for those who are accused or suspected of crimes than a defense lawyer, because he has a portfolio of cases and the decision not to prosecute is always as important a decision as the decision to prosecute. The discretion not to prosecute everything gives prosecuting officials the opportunity to make the most important decisions they are ever called upon to make, and I tell you, I think prosecutors don't understand that. When I was in the Department of Justice, I remember it was Dick Thornberg, the Attorney General, who sent out a memo that required that every prosecutor to charge the most serious offense possible unless the prosecutor honestly believed that it couldn't be proved. I thought why would you require that? Why

114. JAMES GOULD COZZENS, *THE JUST AND THE UNJUST* (1965).

wouldn't you let prosecutors exercise the kind of judgment that you would hope they would have, to be held worthy of the title of United States Attorney? And by the way, the Attorney General of the United States is not anybody. He is the chief prosecutor, the leader of prosecutors. Now the decision not to prosecute is as important as the decision to do it, and one of the problems we have, is that there aren't any voices, aren't any voices in the public arena speaking up on these issues, because people have been intimidated and there's a continuing war on crime that is very popular. You recall Bill Clinton when he raced back to Arkansas in 1992 to preside over the execution of a mentally retarded defendant. It was disgraceful, and it sent the wrong message about what matters in criminal justice. I didn't like it when the U.S. Sentencing Commission bit the bullet and said let's equalize powder cocaine and crack cocaine—because a hundred times the penalty for what are largely African American defendants in one category and white defendants in the other violates any notion of equal protection and fairness—and the White House ordered the Attorney General to urge Congress to overturn the Commission. She did it and we still have the crack and powder cocaine disparity. We have this new bill in the house, with a death penalty provision, and it diminishes the right to a jury trial.¹¹⁵ We have a bill that streamlines procedures in habeas corpus cases in the Senate, Senator Spector has put it forward, and it would basically and effectively take habeas corpus off the table for any case, including capital cases.¹¹⁶ These are all popular things. I haven't heard a prosecutor who has to run for election, stand up and say, well, I have to use discretion not to prosecute something, because that's justice. People don't want to hear it. Society is still afraid of crime. It still sells to be tough on crime, and as long as that is the case, then prosecutors get the message. The message is, they ought to prosecute vigorously and prosecute everybody vigorously. They ought to over-prosecute, and part of the result is that, as we all know, we have more criminal statutes than in any other country. One of my friends is a state prosecutor in Minnesota. He was in a meeting of a group of ABA representatives, and they were talking about privacy, and they were talking about prosecutorial overreaching, and after a while, he got a little tired of it, and he looked around the room. He said, "I just want you to know the reality." He said there are so many criminal statutes that are out there. He said "if you gave me twenty-four hours, I could indict every one of you," and he was serious, and that didn't mean he could convict us, but

115. Terrorist Penalties Enhancement Act of 2005, H.R. 1763, 109th Cong. (2005).

116. Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005).

the indictment itself, we all know, is enough to ruin your name. We joked about this yesterday when we talked about Scooter Libby, but I believe in the presumption of innocence. I'll give Scooter his day in court. I'm not raising him as an example to condemn the guy, because the moment we condemn Scooter without knowing what really happened, without giving him a chance for a trial, we condemn everybody who's being indicted by a prosecutor. I would say that I thought Patrick Fitzgerald stood up and actually spoke as eloquently as I heard a prosecutor speak in many years, and it dearly warmed my heart, I don't know about yours, when he stood there and said I want to remind you, he's presumed to be innocent, and he ain't going to be guilty unless and until a jury of twelve people unanimously agree he is—and he didn't say it was going to happen. It was the most—it was the fairest statement I've ever heard, and the fact that a guy spent two years with a virtually unlimited budget to investigate this, usually produces a gung-ho person who wants everybody to convict in their minds the person charged and he didn't do that, and I thought there may be hope out there, there may be hope, but I think the truth is, it was so unusual and so unexpected and so wonderful, that it was probably the exception that reminded us of the rule which is there are not many like him out there and there ought to be more. I'm sorry, that's a long response. [Applause]

MR. ELDEIRY: Mark Eldeiry. I was wondering, since this case *People v. Payton*, and during the case, had anyone challenged the constitutionality of the statute itself and why isn't that a bigger issue? It seems to me if the statute were stricken as unconstitutional, then the trial court would have to overturn, the whole case would be over.

PROFESSOR SALTZBURG: That's a really good question, and let me point out one of the reasons that I'm hard on the judges here, is judges are not supposed to blink and pretend things that happened didn't happen. Lawyers do make mistakes, you know, judges are to call it right but your point is in the *Boyde* case, the California Supreme Court had exactly the opportunity to—to indicate that the statute was a problem and they ought to have said it. The challenge of that statute was, it could be read by a jury to—to bar it from considering the mitigating evidence that the defendant has a constitutional right to offer, and the California Supreme Court construed it basically to permit what the Constitution requires. It said we don't need a jury instruction to make the law clear. We think that jurors would understand and that it doesn't mean what it seems to say, and then the case went to the U.S. Supreme Court, which had a chance to say, come on, in a capital case, whatever the law might be in another setting, in a capital case, we can't run the risk of error here. If ever you have to call it so that an instruction has to be correct and has

to be clear and has to be in context, it is in a capital case. But, the U.S. Supreme Court said we agree with the California Court instruction. At least the Court left open what would happen if some prosecutor got up and argued for a construction of the statute that would make it unconstitutional. I mean, they red flagged *Payton* in the *Boyde* case. Now, I want to add one thing, *Boyde* was decided long after the prosecutor actually made his argument in the *Payton* case, so it wasn't like the prosecutor disregarded *Boyde*. That case didn't exist, but the law in California as approved by United States Supreme Court is that you can give this statutory language to the jury, and let the jury figure out what it means without a further judicial explanation. In *Boyde*, the Court approved an instruction that left the jury sort of grappling with the instruction but without anybody arguing that it barred consideration of mitigating evidence. It's another thing entirely to have the spokesperson for the state misstate the law as in *Payton*, and you can see the result. I mean, you're right—your point is well taken—even though there's plenty of evidence that juries don't understand most of the instructions they get. I guarantee you, a jury can understand this instruction: "Ladies and gentlemen, in deciding what the penalty should be you may consider any and all mitigating evidence, any and all no matter when or what that evidence involves, it's up to you." Now, I guarantee the jury would understand that, but the judge didn't say that in *Payton*—the judge thought it was the law, and yet he didn't have the courage—it was more important to that judge not to risk giving an instruction that might in some way have been in error. I don't know how he thought it could be an error or how the instruction I just crafted here could have been erroneous, and who would have complained about it. The defendant would have had no complaint and would have been justly sentenced to death if the jury imposed that sentence after understanding that it could consider all mitigating evidence. The prosecutor couldn't appeal if the sentence were life imprisonment and would have been protected if the sentence was death. But a spineless trial judge backed up by—as I say, a duplicitous—and I don't use that lightly—California Supreme Court that didn't want to overturn another death penalty pretended that the penalty phase was fair. Some of you remember, two justices on the California Supreme Court got booted out of office in an election, and one of the arguments against them was that they overturned too many death penalties. Chief Justice Rose Bird being one of them. That lesson wasn't lost on trial judges or on the California Supreme Court. You want to think that, when your judges are elected, they are nonetheless insulated from public sentiment. But, there is no way that is true; it is sad—sad, but true—that they can be influenced by a concern about the public's

reaction to their decisions. When you have people who are not returned to the court, and the principal campaign against them is the death penalty, you send a message to the court, and that message appears to have been well understood by the California Supreme Court. Now, the U.S. Supreme Court doesn't have that excuse. They don't run for election.

MR. MILLER: Hi. Mark Miller. I want to elaborate on the prior question, because I thought that the statute that was asking why isn't it unconstitutional is not the state court statute, the state statute, but the AEDPA, since the Supreme Court was relying on that basically to advocate its responsibility in deciding that case, why didn't it just turn around and say, because the prosecutor is arguing we shouldn't hear this case under the AEDPA. We find that that statute is unconstitutional since it's a death penalty case that's relevant, the Supreme Court should be allowed to hear it and do what they would.

PROFESSOR SALTZBURG: I see. That's a very powerful question. You, of course, sir, are asking about whether or not a statute like that involves a suspension of the writ of habeas corpus, and the U.S. Supreme Court, by the way, has not taken that issue head on. It has spent nine years interpreting this awful statute, because it was so badly written that the lower courts couldn't agree on what it meant in many, many parts, and there is a serious question about how far Congress can go in limiting the writ before it is deemed to be a suspension. The law is not very clear on that, because prior to the 1960s, there was very limited habeas review of state cases largely because most of the Bill of Rights weren't incorporated against the states. It was only in the 60s, when the Warren Court—some people would say created jurisprudence—expanded habeas corpus. I don't know. I don't know, whether this Supreme Court will say that there are limits on what Congress can do. It's had several cases where the issue has at least reared its head in different settings. You have the terrorist case involving the so-called enemy combatant, the citizen enemy combatant Hamdi, and Justice Scalia said you can't detain people unless you charge them criminally or you suspend the writ, and Congress hasn't suspended the writ. Whether he thought Congress could suspend the writ in some circumstances he didn't address, but he really said that, if Congress was going to do it, it had to do it clearly.¹¹⁷ I think it's a serious issue, and it's probably one that the Court may have decide if the current bill that is in the Senate actually goes through, because I'm not exaggerating when I say it takes away almost anything that a habeas writ might address and the effect on

117. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

federal habeas corpus review is for all practical purposes to take it off the table.

PROFESSOR YAROSHEFSKY: Ellen Yaroshefsky from Cardozo Law School. Thank you very much for putting the issues up front of accountability, judicial accountability from the center. For people to—for students who want to look at this case, this in my mind is the tip of the iceberg, and I want to give you the opportunity for a second to talk about innocence cases. One of things we've seen over time, is that these kinds of errors occur occasionally in cases, not with an egregious fact in allowing—but in cases where people say I didn't do it. It's not me. Even those kinds of cases we find these kinds of errors and the courts look askant. There is—I think the innocence movement around the country has probably been most effective in ensuring that we at least spend some time looking at these issues and what it raises, I think that this group and criminal defenses and others need to think about it more seriously. How do we try to ensure greater prosecutorial accountability, not just the courts. The disciplinary system doesn't want the function, they don't get involved in looking at a real prosecutorial misconduct. And I say real, because I'm sympathetic to prosecutors who every single day in court are accused of misconduct whether in fact it may not be misconduct. Bennett Gershman has written a treatise on prosecutorial misconduct, and there are many, many errors that are called misconduct, but for the real ones, it seems to me if you put in front and center and I think it's important the issue of what responsibility this profession takes for errors of prosecutors.

PROFESSOR SALTZBURG: Let me answer that with three points, then I'll be done, because my time is up. Number one, one of the greatest changes we could make in our system could go a long way, I think, to improving prosecutorial performance by eliminating a lot of the claims dealing with *Brady* issues. Those of you who know, *Brady* requires prosecutors to turn over exculpatory evidence, but the law is, it has to be—in order to have a violation it has to be exculpatory evidence that in the end might change the result. You got a prosecutor saying to herself "I'm going to turn it over or not. No, I don't think it would be important enough to be turned over." If I were on the Supreme Court, the law would be that a prosecutor must turn over all exculpatory evidence to the judge. You can't hide anything and the judge will decide whether or not anything should be withheld from the defendant, and if I were judge, I wouldn't withhold anything that might help the defense. The current state of affairs permits prosecutors to make bad calls, and makes it difficult for judges to clean up the system. The current situation with regard to *Brady*, more than any other single thing, creates problems.

By allowing prosecutors to make the call on their own, what we do, number one, is to assure that, if the evidence never comes out, nobody will know (other than the prosecutor) that a call was made. And number two, when it does come out in some cases after the fact, we end up litigating these issues of how important the evidence was in fact, and then we get make-believe where appellate courts don't want to overturn the convictions that are stale, because witnesses may not be there and memories may fade. That's change number one, point number one.

Point number two is I think that, as a profession and particularly as academics, we need to encourage a dialogue in which defense lawyers talk more to prosecutors and not have this sense that prosecutors are here, while defense lawyers are there. I'm in line to be the Chair of the Criminal Justice Section of the American Bar Association, and basically what I'm intending to do is to continue the Section's work at getting prosecutors and defense lawyers to try and talk more to each other and to find more common ground. Justice is what we're after and justice doesn't always mean winning for the prosecutor or the defense. That's point number two.

Point number three, this is a great way to end, because it shows you the law of unintended consequences. We need to preserve meaningful post-conviction review. I've been a witness—I've been up on the hill talking to the Senate and their staff about this proposed habeas corpus change. Here is what the bill does, it's so ironic. The bill basically will change the well-known standard that some of you are familiar with, cause and prejudice, that excuses certain defense failures to raise claims in state court and permits them nevertheless to be heard in federal court, and will replace cause and prejudice with a requirement the defendant show cause and innocence, which is almost impossible to show. The irony here is that in the Senate, they are saying, all you people, all you liberals, all you people out there are talking about the innocent people, so if the focus is on innocence, that's where we ought to spend our time. That's where the attention should be. Let's focus on the innocent, not on procedural technicality. I've been trying to explain to them the world does not have to be divided so that we must choose to care only about the innocent or about anyone whose trial was unfair. People may be innocent of the crime of conviction but may technically be guilty of something. It is important to get it right. To show you how bad the bill was written, the bill said, if you were involved in a criminal episode, you can't get federal review. To be innocent means that you weren't involved in any way in the episode. Consider a hypothetical. A defendant is at a football game. Defendant is part of a group. There's a fight. There's a melee, then finally the defendant hits somebody.

Somebody else shoots somebody. The defendant is wrongly charged and wrongly convicted and sentenced to death for the shooting he didn't do. The defendant is given an incompetent counsel who doesn't know how to defend and it's a clear Sixth Amendment violation. Under the proposed bill, this defendant cannot obtain review in federal court, because he was involved in the episode. It doesn't matter that he didn't do the crime that he was charged with. It doesn't matter that he's been convicted of capital murder, and it doesn't matter that he's going to be executed. Innocence now means, not that you're innocent of the crime charged. It means you're innocent of everything, and let me tell you one thing, if you have to be innocent of everything in order to get any relief in this world, I don't get any. [Applause]