

a lack of an advanced psychiatry or psychology degree, but felt that those errors made her liable for negligence via a tort claim, not an Eighth Amendment claim.

In a final analysis, the court of appeals also agreed with the district court's finding that the senior Mr. Perez failed to show a genuine issue of fact as to whether the county demonstrated deliberate indifference by allowing case workers like Ms. Rice to make housing decisions that could affect inmates' medical needs. The court recognized that though there may be a valid negligence claim against the county, the finding of negligence would not meet a deliberate indifference standard.

Discussion

In *Perez v. Oakland County*, the Sixth Circuit Court of Appeals affirmed the lower court's decision of summary judgment in favor of the caseworker and the county, ruling on the question of deliberate indifference in the correctional setting. The court found that there remained a question of fact as to whether the caseworker met the objective and subjective standards, having been aware of Mr. Perez's potential for self-harm. However, when tackling the question of qualified immunity, the court ruled that Ms. Rice was entitled to this protection, because no law existed that would clearly establish for a person in her position that she had violated Mr. Perez's Eighth Amendment rights (i.e., correct suicide risk assessments are not guaranteed by law).

Some may view the actions of the clinicians in this case as ostensibly adequate or appropriate, given the clinical presentation of the deceased. The court considered this case to be close regarding deliberate indifference. Thus, when placed within the context of a strict and narrow legal interpretation, courts often yield different results than one might expect. The facts presented in this case underscore the difficulty of practicing correctional psychiatry, given a complex system of care with competing interests. Furthermore, the correctional psychiatry environment often places the psychiatrist in a diagnostic conundrum, having to differentiate character pathology from Axis I psychopathology, while considering risks and conforming to the policies of the institution in which one practices.

Death Penalty Mitigation

Sara Beszterczey, PhD

Postdoctoral Fellow in Forensic Psychology

Albert J. Grudzinskas, Jr, JD

Clinical Associate Professor of Psychiatry

Law and Psychiatry Program

Department of Psychiatry

University of Massachusetts Medical School

Worcester, MA

Future Likelihood of Making a Positive Contribution to Society (Rehabilitation) Considered Mitigating Evidence in Capital Sentencing

In *Ayers v. Belmontes*, 127 S. Ct. 469 (2006), the United States Supreme Court reviewed the decision of the Ninth Circuit Court of Appeals that overturned the death sentence of a California man (Fernando Belmontes) convicted of murder. The Ninth Circuit held that Mr. Belmontes' Eighth Amendment right to present all mitigating evidence in his capital sentencing proceeding was violated by jury instructions that, he alleged, precluded the consideration of his evidence that he would make a positive contribution to society if permitted to live. On *certiorari*, the U.S. Supreme Court, in considering the totality of the circumstances of the penalty phase of the trial and the Court's rulings in two other cases it deemed relevant, held that there was no reason to believe the jury had been prohibited from considering all of the mitigating evidence presented in deciding the sentence. The Court reversed the Ninth Circuit's ruling and remanded the case for further proceedings.

Facts of the Case

In 1982, Fernando Belmontes was convicted in a California state court of first-degree murder. In the sentencing phase of his trial, Mr. Belmontes offered mitigating evidence to demonstrate that, in the future, he "would make positive contributions to society in a structured prison environment" if incarcerated rather than executed. Specifically, he presented evidence that during a previous incarceration under the California Youth Authority (CYA), he had "behaved in a constructive way" by converting to Christianity and by "working his way to the number two position on a fire crew" in the CYA fire camp. Although he acknowledged that his religious commitment had dwindled following his release, Mr. Bel-

montes testified that he would return to it anew when able to fully dedicate himself to it. He also responded affirmatively when asked if he was “prepared to contribute in any way [he] can to society if [he was] put in prison for the rest of [his] life.” Testimony as to Mr. Belmontes’ precrime religious conversion and likelihood of making future positive contributions to society was also provided by two prison chaplains and Mr. Belmontes’ Christian sponsors from the time of his previous incarceration.

Following presentation of all the evidence, both the defense and prosecution made closing arguments in which they discussed the mitigating evidence and how it should be considered by the jury. The trial judge then provided the jury with instructions, pursuant to California Penal Code § 190.3(k) (1988), for considering and weighing the aggravating and mitigating factors to arrive at a sentencing decision. Mr. Belmontes received a death sentence. He appealed the decision and, after exhausting all state remedies, filed a petition in federal district court for a writ of *habeas corpus*.

Mr. Belmontes contended that the instructions given to the jury violated his Eighth Amendment right to present all mitigating evidence in capital sentencing proceedings. In particular, he identified the instruction known as “factor (k),” under California’s then-applicable statutory scheme, as barring the jury from considering his mitigating evidence about future behavior. At the time of his trial, the language of factor (k) instructed the jury to consider “any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.” He argued that this prohibited the jury from considering potentially mitigating evidence solely because it was unrelated to the commission of the crime or its seriousness. However, the federal district court denied his *habeas* petition.

The U.S. Court of Appeals for the Ninth Circuit reviewed the case and invalidated Mr. Belmontes’ death sentence after determining that the jury had been precluded from considering all mitigating evidence. However, the U.S. Supreme Court subsequently vacated the Ninth Circuit’s ruling and remanded the case for further consideration in light of the court’s recent decision upholding the constitutionality of the factor (k) instruction in another case (*Brown v. Payton*, 544 U.S. 133 (2005)). On reconsideration, the Ninth Circuit again invalidated the

appellant’s sentence, and the Supreme Court granted *certiorari*.

Ruling and Reasoning

The Supreme Court initially referenced its decisions in two other cases in which the factor (k) instruction had been challenged as unconstitutional on the grounds that it precluded consideration by the jury of otherwise mitigating evidence. In *Boyde v. California*, 494 U.S. 370 (1990), the Court rejected the argument that potentially mitigating evidence “unrelated to the crime,” such as the defendant’s background and character, had been excluded from the jury’s consideration by the factor (k) emphasis on only those mitigating circumstances “extenuating the gravity of the crime.” In *Brown v. Payton*, the Court similarly found that the factor (k) instruction had not precluded jury consideration of potentially mitigating evidence, which, in *Payton*, was related to the defendant’s postcrime rehabilitation (described as “a postcrime religious conversion and other good behavior”).

Even though the prosecutor had incorrectly argued to the jury that factor (k) precludes consideration of such evidence, the Court concluded that in the context of both the defense’s extensive presentation of this evidence to the jury and the trial court’s additional instructions to “consider all of the evidence which has been received during any part of the trial of this case” (*Brown v. Payton*, pp 145–6), the state court “could reasonably have concluded that, as in *Boyde*, there was no reasonable likelihood that the jury understood the instruction to preclude consideration of the postcrime mitigation evidence that it had heard” (*Ayers v. Belmontes*, p 474). Moreover, the Court held that accepting the prosecutor’s interpretation of factor (k) would have been equivalent to arriving at “the surprising conclusion that remorse could never serve to lessen or excuse a crime.”

In both *Payton* and *Boyde*, the Supreme Court asserted that the appropriate question to consider was “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence” (*Ayers v. Belmontes*, p 474). The Court then applied the same reasoning to Mr. Belmontes’ argument “that factor (k) prevented the jury from giving effect to his forward-looking evidence.” It opined that the Ninth Circuit’s interpretation of the factor (k) instruction in *Belmontes* as allowing con-

sideration only of the circumstance related to the “commission of the crime by the defendant” that also “excuses or mitigates his culpability for the offense” was “narrow” and “unrealistic.” The Court opined that the proper interpretation of the instruction was that the jury could consider “any other circumstance that might excuse the crime” or “extenuate the gravity of the crime,” which could include “precrime background and character [*Boyde*] and postcrime rehabilitation [*Payton*].” The Court also noted that “some likelihood of future good conduct” could similarly “count as a circumstance tending to make a defendant less deserving of the death penalty.”

Finally, the Court concluded that its interpretation of the factor (k) instruction was “most consistent” with the totality of the circumstances of the *Belmontes* trial, including the nature of the evidence presented to the jury, closing arguments, and additional instructions provided by the court. Specifically, the Court determined that “nothing barred the jury from viewing the inmate’s future prospects as extenuating the gravity of the crime” and therefore, there was no “reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence.” The Court reversed the lower court’s decision and remanded the case for further proceedings.

Dissent

In the dissenting opinion (of four justices), Justice Stevens posited that pervasive “confusion” in Mr. Belmontes’ sentencing hearing raised significant doubt as to whether the jury had applied the factor (k) instruction in a way that did not preclude constitutionally relevant information. Justice Stevens identified, among other factors, jurors’ questions to the court and the court’s responses as indicators of this confusion about permissible mitigating evidence. For example, one juror asked whether Mr. Belmontes would receive psychiatric treatment if incarcerated, and the judge replied, “That is something you cannot consider in making your decision.” Justice Stevens argued this “lent further support to the conclusion that respondent’s future conduct. . . was not relevant” in contrast to the Supreme Court’s majority opinion to the contrary. Moreover, Justice Stevens noted that the uncertain and risky nature of the factor (k) instruction was confirmed by subsequent amendments made to the instruction by the California Supreme Court in *People v. Easley*, 34

Cal.3d 858 (Cal. 1983), and by the California legislature in 2005. By statute, the instruction was amended to include “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.”

Discussion

In this decision, the United States Supreme Court addressed whether evidence about a defendant’s potential for future good conduct, including his likelihood of making a positive contribution to society while in prison, was unconstitutionally precluded from consideration as mitigating evidence by the jury that sentenced him to death. Although the case primarily concerned the constitutionality of a specific California juror instruction, factor (k), the nature of the reasoning and rulings throughout the history of the case reveal an ongoing affirmation that a defendant’s future potential good conduct, rehabilitation, or positive contribution to society can be considered mitigating evidence in death penalty sentencing. To the extent that a defendant’s future potential may be affected by psychological factors and that the courts may solicit the opinions of mental health clinicians as to the nature and prognosis of mental disorders and the likelihood of treatment outcomes for defendants, this case has relevance to mental health clinicians.

Speedy Trial Act of 1974

Kerry J. Eudy, JD, PhD
Postdoctoral Fellow in Forensic Psychology

Ira K. Packer, PhD
Clinical Professor of Psychiatry

Law and Psychiatry Program
Department of Psychiatry
University of Massachusetts Medical School
Worcester, MA

Prospective Waiver of the Application of the Speedy Trial Act Is Not Permissible

In *Zedner v. United States*, 126 S. Ct. 1976 (2006), the Supreme Court considered whether a prospective waiver of a defendant’s right to a speedy trial for “all time” violated the federal Speedy Trial Act of 1974 (18 U.S.C.S. §§ 3161-3174).