SUPREME COURT OF THE UNITED STATES

No. 91–7580

GARY GRAHAM, PETITIONER *v.* JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January 25, 1993]

JUSTICE SOUTER, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE O'CONNOR join, dissenting.

In *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), we concluded that a petitioner did not seek the benefit of a "new rule" in claiming that the Texas special issues did not permit the sentencing jury in his case to give full mitigating effect to certain mitigating evidence, and we therefore held that the retroactivity doctrine announced in *Teague* v. *Lane*, 489 U. S. 288, 301 (1989) (plurality opinion), did not bar the claim. See 492 U. S., at 314–319. The only distinctions between the claim in *Penry* and those pre-sented here go to the kind of mitigating evidence pre-sented for the jury's consideration, and the distance by which the Texas scheme stops short of allowing full effect to be given to some of the evidence considered. Neither distinction makes a difference under *Penry* or the prior law on which *Penry* stands. Accordingly, I would find no bar to the present claims and would reach their merits: whether the mitigating force of petitioner's youth, unfortunate background, and traits of decent character could be considered adequately by a jury instructed only on the three Texas special issues.[1] I conclude they could not be, and I would

[1] After Texas' capital punishment statute was invalidated in *Branch* v. *Texas*, one of the cases decided with *Furman* v. *Georgia*, 408 U. S. 238 (1972), Texas enacted a new capital sentencing

reverse the sentence of death and remand for resentencing. From the Court's contrary judgment, I respectfully dissent.

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statute. This statute, under which petitioner Gary Graham was sentenced, provides that:

> "(b) On conclusion of the presentation of the evidence [at the sentencing phase of a capital murder trial], the court shall submit the following issues to the jury:
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> "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
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> "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
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> "(3) if raised by the evidence, whether the conduct by the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
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> . . . . .
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> "(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death." Tex. Code Crim. Proc. Ann. Art. 37.071 (Vernon 1981).

Following our decision in *Penry*, Texas adopted a new capital sentencing procedure which is not at issue here. See Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp. 1992).

The doctrine of *Teague* v. *Lane*, *supra,* that a state prisoner seeking federal habeas relief may not receive retroactive benefit of a "new rule" of law, has proven hard to apply. We have explained its crucial term a number of ways. JUSTICE O'CONNOR wrote in *Teague* itself that "[i]n general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent at the time the defendant's conviction became final." 489 U. S., at 301 (plurality opinion) (emphasis in original). We have said that novelty turns on whether the rule would represent a "developmen[t] in the law over which reasonable jurists [could] disagree." *Sawyer* v. *Smith*, 497 U. S. 227, 234 (1990), and we have emphasized that reasonableness is not a wholly deferential standard, by making it clear that the existence of conflicting authority does not alone imply that any rule resolving that conflict is a new one. *Stringer* v. *Black*, 503 U. S. ––––, ––– (1992) (slip op., at 13–14).

One general rule that has emerged under *Teague* is that application of existing precedent in a new factual setting will not amount to announcing a new rule. See *Wright* v. *West*, 505 U. S. ––––, ––– (1992) (slip op., at 8) O'CONNOR, J., joined by BLACKMUN and STEVENS, JJ., concurring in judgment) ("If a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying principle applies, the distinction is not meaningful, and any deviation from precedent is not reasonable"); *id.*, at ––– (slip op., at 4) (KENNEDY, J., concurring in judgment) ("Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that

it forges a new rule, one not dictated by precedent"); *id.*, at ––, (slip op., at 4) (SOUTER, J., concurring in judgment) (*Teague* "does not mean, of course, that a habeas petitioner must be able to point to an old case decided on facts identical to the facts of his own").

That said, it can be a difficult question whether a particular holding presents simply a new setting for an old rule, or announces a new one. The question is not difficult in this case, however, for its answer is governed by *Penry*, 492 U. S., at 313, 329, the first case in which a majority of the Court adopted the approach to retroactivity put forward by the plurality in *Teague*. See 492 U. S., at 313. The circumstances in which petitioner Penry sought relief, and the rule that he sought to have applied, are virtually indistinguishable from the circumstances presented and the rule of decision sought by Graham in this case. We denied certiorari in Penry's direct appeal in 1986. *Penry* v. *Texas*, 474 U. S. 1073 (1986). The Texas Court of Criminal Appeals affirmed Graham's conviction and sentence of death in 1984, *Graham* v. *State*, No. 68,916, and Graham did not seek certiorari in this Court. In both cases, therefore, under the reasoning employed by the majority, see *ante*, at 6, "[t]his Court's decisions in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), were rendered before [petitioners'] conviction[s] became final." *Penry*, 492 U. S., at 314–315. Because Penry was "entitled to the benefit of those decisions," *id.* at 315, so, on a comparable claim, is Graham.

Our description of Penry's claim applies, indeed, almost precisely to Graham's claim in this case. Of Penry, we said:

> "[He] does not challenge the facial validity of the Texas death penalty statute, which was upheld against an Eighth Amendment challenge in *Jurek* v. *Texas*, 428 U. S. 262 (1976). Nor does he dispute that some types of mitigating evidence

> can be fully considered by the sentencer in the absence of special jury instructions. See *Franklin* v. *Lynaugh*, 487 U. S. 164, 175 (1988) (plurality opinion); *id.*, at 185–186 (O'CONNOR, J., concurring in judgment). Instead, [he] argues that, on the facts of this case, the jury was unable to fully consider and give effect to the mitigating evidence . . . in answering the three special issues." *Ibid.*

In deciding whether he sought benefit of a "new rule," we went on to say:

> "*Lockett* underscored *Jurek*'s recognition that the constitutionality of the Texas scheme `turns on
> whether the enumerated questions allow consideration of particularized mitigating factors.' *Jurek*, 428 U. S., at 272. The plurality opinion in *Lockett* indicated that the Texas death penalty statute had `survived the petitioner's Eighth and Fourteenth Amendment attack [in *Jurek*] because three Justices concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness—so as to permit the sentencer to consider "whatever mitigating circumstances" the defendant might be able to show.' 438 U. S., at 607." *Id.*, at 317.

We then reviewed the reaffirmation in *Eddings* of the principle that "a sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as the basis for a sentence less than death." Thus, we said, "at the time Penry's conviction became final," as at the time Graham's did,

> "it was clear from *Lockett* and *Eddings* that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty. Moreover, the facial validity of the Texas death penalty statute had been upheld in *Jurek* on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a defendant might present." *Id.*, at 318.

Graham contends that *Jurek,* v. *Texas,* 428 U. S. 262 (1976), *Lockett* v. *Ohio,* 438 U. S. 586 (1978), and

Eddings v. *Oklahoma,* 455 U. S. 104 (1982), were not honored in the application of the Texas special issues on the facts of his case, and, in this respect, too, his position is identical to that of Penry, who argued that "those assurances [on which *Jurek* rests] were not fulfilled *in his particular case* because, without appropriate instructions, the jury could not fully consider and give effect to [his] mitigating evidence . . . in rendering its sentencing decision." 492 U. S., at 318. (emphasis in original). In *Penry*, we held that nothing foreclosed such a claim:

> "The rule Penry seeks—that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed—is not a `new rule' under *Teague* because it is dictated by *Eddings* and *Lockett*. Moreover, in light of the assurances upon which *Jurek* was based, we conclude that the relief Penry seeks does not `impos[e] a new obligation' on the State of Texas. *Teague*, 489 U. S., at 301." *Id.*, at 318–319.

Thus in *Penry* we held that petitioner sought nothing but the application to his case of the rule announced in *Eddings* and *Lockett*, that "a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." 492 U. S., at 318.

The first distinction between Penry's claim and that of Graham is the type of mitigating evidence involved. Penry's went to "mental retardation and abused childhood"; Graham's involves youthfulness, unfortunate background, and traits of decent character. But any assertion that this should make any difference flies in the face of JUSTICE KENNEDY's

opinion from last Term, quoted before, that "a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts [will only infrequently] yiel[d] a result so novel that it forges a new rule, one not dictated by precedent." *Wright* v. *West,* 505 U. S., at ––– (slip op., at 4) (KENNEDY, J., concurring in judgment). Nor is the second distinction any more material, that Penry's evidence of retardation could claim no mitigating effect under the second Texas issue, which asks the jury to assess a defendant's future dangerousness, whereas Graham's evidence of youth and decency could claim some.[2] The point under *Lockett*, *Eddings*, and *Penry* is that sentencing schemes must allow the sentencer to give full mitigating effect to evidence; Graham's claim that his evidence could receive only partial consideration is just as much a claim for application of the pre-existing rule demanding the opportunity for full effect as was Penry's claim that his retardation could be given no effect under the second Texas special issue.

Thus, from our conclusion that the rule from which the petitioner sought to benefit in *Penry* was not

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[2] This distinction does not even apply to Graham's claim that the sentencing jury could not give full mitigating effect to the evidence of his unfortunate background. Of course, in this regard, despite their mitigating force, Penry's evidence of an abused childhood and Graham's evidence of an unfortunate background both have the same tendency to support only an affirmative answer to the future dangerousness special issue. The Court does not explain why, under its reasoning, Graham's claim concerning evidence of his background is barred by *Teague* v. *Lane,* 489 U. S. 288 (1989) (plurality opinion). See *ante* at 14 (undifferentiated references to all of "Graham's evidence").

"new," it necessarily follows that the rule petitioner Graham seeks here is not new either. Indeed, that is the conclusion reached even by respondent who concedes that "if Graham is asserting the existence of a constitutional defect that can be cured by supplemental instructions, his claim likewise is not barred." Brief for Respondent 29, n. 10.[3]

The Court's conclusion to the contrary rests on the assumption that an additional instruction is required under *Penry* only where there is mitigating evidence without any "mitigating relevance" to the second, future dangerousness special issue. See *ante*, at 14. But that was not the holding of *Penry*, which reiterates the Eighth Amendment requirement expressed in *Lockett* and *Eddings* that the jury be able "to consider fully [the defendant's] mitigating evidence," *Penry*, 492 U. S., at 323, and requires a separate instruction whenever such evidence "has relevance to . . . moral culpability beyond the scope of the special issues." *Id.*, at 322. Indeed, JUSTICE SCALIA's dissent in *Penry* recognized that "[w]hat the Court means by `fully consider' (what it must mean to

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[3]Respondent's only argument concerning the application of *Teague* is that petitioner's claim is *Teague*–barred if "his claim is so extensive as to constitute a facial challenge to the Texas statute." Brief for Respondent 13. In other words, "if sustaining Graham's claim would necessarily require that *Jurek* be overruled, it is barred by *Teague*." *Id.*, at 29, n. 10. However, petitioner does not ask that *Jurek* v. *Texas,* 428 U. S. 262 (1976), be overruled. Indeed, he concedes that the Texas statute has been applied constitutionally in those cases such as *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988), in which the mitigating evidence can be given "full" mitigating weight under the special issues. See Brief for Petitioner 15 and n. 12. Thus, respondent's *Teague* argument has no application to this case.

distinguish *Jurek*) is to consider *for all purposes, including purposes not specifically permitted by the questions*." 492 U. S., at 355 (opinion dissenting in relevant part) (emphasis in original). That dissent argued that this was not what was required by the Constitution, see *id.*, at 358–360,[4] but it correctly described the holding in the Court's opinion in *Penry* itself. Nothing in *Penry* aside from JUSTICE SCALIA's dissent, and nothing in the controlling opinions in *Lockett* or *Eddings*, suggested that this Eighth Amendment requirement will be obviated by the happenstance that a defendant's particular mitigating evidence is relevant to one of the special issues, even though it may have mitigating force beyond the scope of that issue.

Penry plainly answered the *Teague* question that the majority answers differently today, a question that even respondent did not see fit to raise again. *Penry* controls in this respect, and we should adhere to it.

I therefore turn to the merits of the claim,[5] which

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[4]See also *Penry*, 492 U. S., at 356 (SCALIA, J., dissenting in part) (arguing, contrary to the holding of the Court, that after *Jurek* "there remains available, in an as-applied challenge to the Texas statute," only "the contention that a particular mitigating circumstance is in fact irrelevant to any of the three questions it poses, and hence could not be considered").

[5]The full Court may do the same in responding to several pending petitions for certiorari presenting the same question involved in this case, but on direct review. See, *e.g., Johnson* v. *Texas,* (cert. pending) No. 92–5653; *Jackson* v. *Texas,* (cert. pending); No. 91–7399; *Boggess* v. *Texas,* (cert. pending) No. 91–5862.

are properly before us.[6] *Penry* again controls, for reasons already anticipated in the *Teague* analysis, but bearing some expansion here.

Following the first grant of certiorari in this case, after we vacated the judgment and remanded for reconsideration in light of *Penry*, see *Graham* v. *Lynaugh*, 492 U. S. 915 (1989), a panel of the Court of Appeals for the Fifth Circuit decided to vacate Graham's death sentence and remand. *Graham* v. *Collins*, 896 F. 2d 893 (1990). The Court of Appeals then took the case en banc, however, and, by a vote of 7 to 6, construed *Penry* to require no additional instruction "in instances where no major mitigating thrust of the evidence is substantially beyond the scope of all the special issues." 950 F. 2d 1009, 1027 (CA5 1992) (en banc). It also limited the application

[6]At trial petitioner did not seek the additional *Penry* instruction that he now says is required. Whether the failure to request such an instruction is a bar to a subsequent challenge is a question of state procedure; if the conviction were affirmed by the state appellate courts on the ground that petitioner failed to raise his claim before the trial court, that affirmance could rest on an independent and adequate state-law ground. Here, the Texas Court of Criminal Appeals appears to have addressed petitioner's challenge on the merits in a state postconviction proceeding. See App. 37. In any event, under Texas law, a *Penry* claim is not procedurally barred even if no additional mitigating-evidence instruction is requested or there is no objection made at trial to the jury instructions. See *Selvage* v. *Collins*, 816 S. W. 2d 390, 392 (Tex. Crim. App. 1991); *Black* v. *State*, 816 S. W. 2d 350, 362–369 (Tex. Crim. App. 1991); *id.*, at 367–374 (Campbell, J., concurring). The adequacy of the Texas special issues in this case is therefore properly before us.

of *Penry* to mitigating evidence of circumstances that were not "transitory," but were "uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own." See *id.*, at 1029. *Penry* lends no support for these limitations, however, and they are plainly at odds with other controlling Eighth Amendment precedents, which the Court does not purport to disturb.

Our cases have construed the Eighth Amendment to impose two limitations upon a state capital sentencing system. First, in determining who is eligible for the death penalty, the "State must `narrow the class of murderers subject to capital punishment,' . . . by providing `specific and detailed guidance' to the sentencer." *McCleskey* v. *Kemp*, 481 U. S. 279, 303 (1987) (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 196 (1976), and *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976)). Second, "the Constitution [nonetheless] limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence." 481 U. S., at 304 (emphasis in original). It is this latter limitation that concerns us today.

Our cases require that a sentencer in a capital case be permitted to give a "reasoned moral response" to the defendant's mitigating evidence. See *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring) (emphasis deleted). In so doing, "[t]he sentencer . . . [cannot] 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." *Lockett*, 438 U. S., at 604 (plurality opinion) (emphasis in original; footnote omitted). This is understood to follow from our conclusion that "[a]ny exclusion of the `compassionate or mitigating factors stemming from the diverse frailties of humankind' that are relevant to

the sentencer's decision would fail to treat all persons as `uniquely individual human beings.'" *McCleskey*, *supra*, at 304 (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976)).

As we first described it in *Jurek*, the Texas scheme to be measured against this obligation assesses mitigating (as well as aggravating) evidence by looking both backward to the defendant's moral culpability for the crime itself, as distinct from strictly legal guilt, and forward to his likely behavior if his life is not taken. Thus the first issue requires the sentencer to determine whether the defendant acted deliberately, and the third asks for assessment of any provocation as mitigating the fault of any response. Each issue demands an examination of past fact as bearing on the moral significance of a past act. The second issue, on the other hand, calls for a prediction of future behavior, prompting a judgment that is moral in the utilitarian sense that society may legitimately prefer to preserve the lives of murderers unlikely to endanger others in the future, as against the lives of the guilty who pose continuing threats.

While these issues do not exhaust the categories of mitigating fact,[7] at the time *Jurek* was decided the Court of Criminal Appeals of Texas had indicated that the second special issue would be given a wide enough compass to allow jury consideration of such diverse facts as prior record and the character of past crimes, duress, or emotional pressure associated with the instant crime, and the age of the defendant. *Jurek*, 428 U. S., at 272–273. Thus, we had a reasonable expectation that the sentencer would have authority to give comprehensive effect to each defendant's mitigating evidence. As *Penry* revealed, however, and as the facts of this case confirm, neither the second nor the other special issues have been construed with enough scope to allow the full consideration of mitigating potential that *Lockett* and *Eddings* confirmed are required, and challenges to the Texas statute as applied may be sustained despite the statute's capacity to withstand *Jurek*'s facial challenge. In its holding that a death sentence resulting from the application of the Texas special issues could not be upheld unless the jury was able "to consider fully [the defendant's] mitigating evi-

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[7]Or, indeed, all the ways in which evidence may mitigate against imposition of a death sentence previously mentioned by Members of this Court. See *Franklin* v. *Lynaugh*, 487 U. S., at 186 (O'CONNOR, J., joined by BLACKMUN, J., concurring in judgment) (referring to "positive character traits that might mitigate against the death penalty"); *id.*, at 189 (STEVENS, J., joined by Brennan and Marshall, JJ., dissenting) (character evidence of "redeeming features" may reveal "virtues that can fairly be balanced against society's interest in killing [a defendant] in retribution for his violent crime"). My analysis today does not require extended consideration of the category suggested in *Franklin*. See, *infra,* at 17.

dence," 492 U. S., at 323,[8] *Penry* is a perfectly straightfor-

[8]See also *Jurek*, 428 U. S., at 272 (joint opinion of Stewart, Powell and STEVENS, JJ.) ("[T]he constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors").

ward application of the Eighth Amendment's requirement of individualized sentencing.[9]

The specific question in *Penry* itself was whether the mitigating evidence of Penry's mental retardation and history of abuse "as it bears on [Penry's] personal culpability" could be taken account of under the Texas special issues, *ibid.,* and in deciding that case, we examined each special issue in turn. We

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[9]JUSTICE THOMAS argues, *ante* at 16, that the rule applied in *Penry* "originated entirely from whole cloth in two recent concurring opinions," *California* v. *Brown*, 479 U. S. 538, 545 (O'CONNOR, J., concurring), and *Franklin* v. *Lynaugh, supra,* at 185 (O'CONNOR, J., concurring in judgment), and that it requires "unbridled" jury discretion, even to the point that the death penalty may be withheld on the basis of race, *ante*, at 17.

As to the first contention, *Lockett* v. *Ohio,* 438 U. S 586 (1978),

was understood at the time it was handed down to require that constitutionally-relevant mitigating evidence (the definition of which is given below) be given full consideration *and effect*. See, *e.g., id.,* at 623 (WHITE, J., concurring in part, dissenting in part, and concurring in judgments) (emphasis added) (*Lockett* "requir[es] as a matter of constitutional law that sentencing authorities be permitted to consider *and in their discretion to act upon* any and all mitigating circumstances"). This is the understanding upon which *Lockett* and *Eddings* have consistently been applied by the Court. See *Skipper* v. *South Carolina*, 476 U. S. 1, 7 (1986) ("Assuming . . . that [a State Supreme Court] rule would in any case have the effect of precluding the defendant from introducing otherwise admissible evidence for the explicit purpose of convincing the jury that he should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and

concluded first that the jury instruction barred full consideration of the evidence of retardation and personal abuse under the first, or "deliberate[ness]," special issue, see *ibid.,* and second that insofar as the evidence bore on personal culpability, it could not be given mitigating effect under the issue of "future dangerousness." As to the latter, indeed, it could have been considered only as an aggravating factor.

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could lead a useful life behind bars if sentenced to life imprisonment, the rule would not pass muster under *Eddings*"); *McCleskey* v. *Kemp*, 481 U. S. 279, 306 (1987) (emphasis added) ("States cannot *limit the sentencer's consideration* of any relevant circumstance that could cause it to decline to impose the [death] penalty"); *Franklin* v. *Lynaugh, supra,* at 184–185 (O'CONNOR, J., joined by BLACKMUN, J., concurring in judgment); *id.*, at 191–192 (STEVENS, J., joined by Brennan and Marshall, JJ., dissenting). While one may argue that this aspect of our Eighth Amendment jurisprudence is in tension with the sentence in *Gregg* that the State should give the jury guidance as to what factors it "`deems particularly relevant to the sentencing deci-sion,'" *ante*, at 7 (THOMAS, J., concurring) (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 192 (1976)), any such tension dates, at the latest, from *Eddings*, decided in 1982, not from *Penry* in 1989.

There was one novelty in the concurring opinions in *Brown* and *Franklin*, however, in the use of the phrase "reasoned moral response," see *supra*, at 11, to which JUSTICE THOMAS adverts in his concurring opinion. But as the concurring opinion explained in *Brown*, this is just a shorthand for the individual assessment of personal culpability that *Lockett* and *Eddings* mandate. See *Brown, supra,* at 545. It is, indeed, appropriate shorthand. JUSTICE THOMAS himself acknowledges, as I think everyone must, "that `capital punishment is an expression of

Although we described Penry's evidence as a "two-edged sword . . . diminish[ing] his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future," *id.*, at 324, the dilemma thus presented was not essential to our conclusion that the second special issue failed to meet the State's constitutional obligations. The point was simply that the special issue did not allow the jury to give effect to the mitigating force of Penry's evidence as it bore on his personal culpability. Finally we concluded that "a juror who believed Penry lacked the moral culpability to be sentenced to death could not express that view in answering the third ["provocation"] special issue if she also concluded that Penry's action was not a reasonable response to provocation." *Id.*, at 324–325. In sum, full consideration of the tendency of retardation and a history of abuse to mitigate moral

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society's moral outrage at particularly offensive conduct,'" *ante*, at 21 (quoting *Gregg* v. *Georgia*, 428 U. S., at 183 (joint opinion)), and he reminds us that "[a]ny determination that death is or is not the fitting punishment for a particular crime will necessarily be a moral one." *Ante*, at 14.

JUSTICE THOMAS's second concern, about "sympathy for a defendant who is a member of a favored group," *ante*, at 18, involves an issue of very great seriousness. But the *Lockett–Eddings* rule is not one of "unbridled" or "unbounded" discretion. See *ante*, at 17–18. Constitutionally-relevant mitigating evidence is limited to "any aspects 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." *Lockett, supra,* at 604 (plurality opinion). A defendant's race as such is not mitigating as an aspect of his character or record, or as a circumstance of any offense he may have committed.

culpability was impossible.

Graham's evidence falls into three distinct categories. As to each, our task is to take the same analytical steps we undertook in *Penry*, to see whether the sentencing jury could give it full mitigating effect.

First, there was the evidence of Graham's youth. He was 17 when he committed the murder for which he was convicted, and he was sentenced less than six months after the crime. Youth may be understood to mitigate by reducing a defendant's moral culpability for the crime, for which emotional and cognitive immaturity and inexperience with life render him less responsible, see *Eddings* v. *Oklahoma*, 455 U. S., at 115–116, and youthfulness may also be seen as mitigating just because it is transitory, indicating that the defendant is less likely to be dangerous in the future.

As with Penry's evidence of mental retardation, the mitigating force of Graham's youth could not be fully accounted for under the first, "deliberateness" issue, given the trial judge's explanation of that issue to the jury. While no formal jury instruction explained what "deliberate" meant, the judge emphasized at *voir dire* that "deliberate" meant simply "intentional," see App. 90, 127, 169, 205–206, 246, 291, 319–320, 353, 420, a definition that hardly allowed exhaustion of the mitigating force of youth. A young person may perfectly well commit a crime "intentionally," but our prior cases hold that his youth may nonetheless be treated as limiting his moral culpability because he "`lack[s] the experience, perspective, and judgment,' expected of adults." *Eddings, supra,* at 116 (quoting *Bellotti* v. *Baird*, 443 U. S. 622, 635 (1979)).

We have already noted that the Court of Appeals

answered this difficulty by reasoning that the "major mitigating thrust" of the evidence could be given effect under the second special issue calling for assessment of future dangerousness. The errors of this view we have also seen. First, nothing in *Penry* suggests that partial consideration of the mitigating effect of the evidence satisfies the Constitution. *Penry*, like *Eddings* and the *Lockett* plurality before that, states an Eighth Amendment demand that the sentencer "consider and give effect to . . . mitigating evidence" "fully," 492 U. S., at 318, and when such evidence "has relevance to . . . moral culpability beyond the scope of the special issues," constitutional standards require a separate instruction authorizing that complete effect be given. *Id.*, at 322. See *McCleskey*, 481 U. S., at 304 ("[A]ny exclusion" of mitigating evidence is inconsistent with the Eighth Amendment's individualized sentencing requirements). Thus, even if the future dangerousness issue allowed the jury to recognize Graham's evanescent youth as tending to mitigate any danger if he were imprisoned for life, it would still fail the test of the Eighth Amendment because the jury could not give effect to youth as reducing Graham's moral culpability.[10] The Eighth Amendment requires more than some consideration of mitigating evidence.

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[10]I note in this regard that the trial judge's remarks at *voir dire* may have inappropriately left the jury to consider whether Graham would have been dangerous in the future *if he were set free*. See Brief for Petitioner at 8, n. 4. In light of my conclusion that Graham's death sentence should be vacated, I need not address here the propriety of a sentence imposed on the basis of future dangerousness to the public when there is no possibility that a defendant will be sentenced to a term less than life without the possibility of parole.

The Court of Appeals also erred in thinking the second special issue adequate even to take account of the possibility that Graham may be less dangerous as he ages. The issue is stated in terms of the statutory question "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann., Art. 37.071 (b)(2) (Vernon 1981). Because a boy who killed at 17 and was promptly tried (as Graham was) could well be held dangerous in the future by reason of continuing youth, it was error to limit *Penry* to cases in which a mitigating condition is permanent. See 950 F. 2d at 1029. It is no answer to say youth is fleeting; it may not be fleeting enough, and a sufficiently young defendant may have his continuing youth considered under the second issue as aggravating, not mitigating. In this case, moreover, the possibility of taking youth as aggravating without any recognition of mitigating effect was vastly intensified by remarks of the trial judge permitting a finding of future dangerousness based even on the probability that petitioner might commit minor acts of criminal vandalism to property such as scratching someone's car or tearing up the lawn of a high school by riding a motorcycle over it. See App. 128–129, 172, 210, 247–248, 295, 321–322, 354–355, 389–390, 422, 455.

Finally, because Graham was convicted of shooting and killing a man during a robbery, the situation with respect to the third special issue in this case is the same as it was for petitioner in *Penry*. The evidence of youth was irrelevant to the reasonableness of any provocation by the deceased of which there was no evidence in any event.

A juror could thus have concluded that the responses to the special issues required imposition of the death penalty even though he believed that Graham, by reason of his youth, "lacked the moral culpability to be sentenced to death." *Penry*, 492

U. S., at 324. Without more, the case is controlled by *Penry*, and additional instruction was required.

The next category of evidence at issue is that of Graham's difficult upbringing, of his mother's mental illness and repeated hospitalization, and his shifting custody to one family relation or another. We have specifically held that such circumstances may be considered in mitigation, particularly on the conduct of a defendant so young, see, *e.g., Eddings*, 455 U. S., at 115, where upbringing might be deforming enough to affect the capacity for culpability. Where, as here, however, that is not obviously the case, and deliberateness is said to turn on intention, there is no assurance that the first issue allows the full scope of its mitigating effect to be considered. As with youth itself, upbringing could be treated as aggravating under the future dangerousness issue, and it has no mitigating potential under the third issue of provocation. Again, as with youth, there is no room in the former Texas special issues as applied in this case to take full account of such mitigating relevance as the jury might find.

Finally, Graham argues that the jury was unable to take account of redeeming character traits revealed by evidence that growing up he had voluntarily helped his parents and grandparents with household chores, that he was a religious person who had attended church regularly with his grandmother, and that he had contributed to the support of his own children with money earned from a job with his father.

I do not accept petitioner's contention that the jury could not give adequate consideration to the testimony on these matters. Insofar as the evidence tended to paint Graham as a person unlikely to pose a future danger, the jury could consider it under the second special issue. Insofar as the jury was unable, as Graham alleges, to give the evidence further effect

to diminish Graham's "moral culpability," Brief for Petitioner 36, 37, 39, it is enough to say that the relevance of the evidence to moral culpability was simply *de minimis*. Voluntary chores for and church attendance with a relative, and supplying some level of support for one's children have virtually no bearing on one's culpability for crime in the way that immaturity or permanent damage due to events in childhood may. Because I do not understand petitioner to be arguing that the jury should have been allowed to consider the evidence as revealing some element of value unrelated to the circumstances of the crime, see *Franklin*, 487 U. S., at 186 (O'CONNOR, J., concurring in judgment); *id.*, at 189 (STEVENS, J., dissenting), I do not address that issue.

I would hold that *Penry* and preceding Eighth Amendment cases of this Court require petitioner's death sentence to be vacated, and would remand the case for resentencing by the state courts.