SUPREME COURT OF THE UNITED STATES

No. 92–5653

DORSIE LEE JOHNSON, JR., PETITIONER *v.* TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

[June 24, 1993]

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

Dorsie Lee Johnson was 19 years old when he committed the murder that led to his death sentence. Today, the Court upholds that sentence, even though the jurors who considered Johnson's case were not allowed to give full effect to his strongest mitigating evidence: his youth. The Court reaches this result only by invoking a highly selective version of *stare decisis* and misapplying our habeas precedents to a case on direct review. Therefore, I respectfully dissent.

By all accounts, Dorsie Johnson was not a model youth. As an adolescent he frequently missed school, and when he did attend, he often was disruptive. He was drinking and using drugs by the time he was 16, habits that had intensified by the time he was 19. Johnson's father testified that the deaths of Johnson's mother and sister in 1984 and 1985 had affected Johnson deeply, but he primarily attributed Johnson's behavior to drug use and youth. A jury hearing this evidence easily could conclude, as Johnson's jury did, that the answer to the second Texas special question —whether it was probable that Johnson "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)— was yes. It is possible that the jury thought Johnson might outgrow his temper and violent behavior as he matured, but it is more likely that the jury considered the pattern of escalating violence to be an indication

that Johnson would become even more dangerous as he grew older. Even if the jurors viewed Johnson's youth as a transient circumstance, the dangerousness associated with that youth would not dissipate until sometime in the future, and it is reasonably likely that the jurors still would have understood the second question to require an affirmative answer. See *Graham* v. *Collins*, 506 U. S. ___, ___ (1993) (slip op., at 17–18) (SOUTER, J., dissenting). Thus, to the extent that Johnson's youth was relevant at all to the second Texas special issue, there is a reasonable likelihood that it was an aggravating factor.

But even if the jury could give some mitigating effect to youth under the second special issue, the Constitution still would require an additional instruction in this case. The additional instruction would be required because not one of the special issues under the former Texas scheme, see Art. 37.071, allows a jury to give effect to the most relevant mitigating aspect of youth: its relation to a defendant's "culpability for the crime he committed." *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986). A violent and troubled young person may or may not grow up to be a violent and troubled adult, but what happens in the future is unrelated to the *culpability* of the defendant at the time he committed the crime. A jury could conclude that a young person acted "deliberately," Art. 37.071(b)(1), and that he will be dangerous in the future, Art. 37.071(b)(2), yet still believe that he was less culpable *because of his youth* than an adult. I had thought we made clear in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), that the vicissitudes of youth bear directly on the young offender's culpability and responsibility for the crime:

> "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults." *Id.*, at 115–116 (footnotes and internal quotation marks omitted).

See also *Graham, supra,* at ___ (slip op., at 15) (SOUTER, J., dissenting) ("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").[1] In my view, the jury could not express a "reasoned moral response" to this aspect of Johnson's youth in answering any of the special issues. *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989) (internal quotation marks omitted).

In *Graham* v. *Collins*, *supra*, the Court held that the

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[1]Of the 36 States that have death penalty statutes, 30 either specifically list the age of the defendant as a mitigating circumstance or prohibit the execution of those under 18. See Ala. Code §13A–5–51(7) (1982); Ariz. Rev. Stat. Ann. §13–703(G)(5) (1989); Ark. Code Ann. §5–4–605(4) (1987); Cal. Penal Code Ann. §190.3(i) (West 1988); Colo. Rev. Stat. §§16–11–802(1)(a), (4)(a) (Supp. 1992); Conn. Gen. Stat. §53a–46a(g)(1) (1985); Fla. Stat. §§921.141(6)(g), 921.142(7)(f) (Supp. 1992); Ill. Rev. Stat., ch. 720, ¶5/9–1(c) (1992); Ind. Code §35–50–2–9(c)(7) (Supp. 1992); Ky. Rev. Stat. Ann. §532.025(2)(b)(8) (Baldwin 1989); La. Code Crim. Proc. Ann., Art. 905.5(f) (West 1984); Md. Ann. Code, Art. 27, §413(g)(5) (Supp. 1992); Miss. Code Ann. §99–19–101(6)(g) (Supp. 1992); Mo. Rev. Stat. §565.032.3(7) (Supp. 1992); Mont. Code Ann. §46–18–304(7) (1991); Neb. Rev. Stat. §29–2523(2)(d) (1989); Nev. Rev. Stat. §200.035(6) (1992); N. H. Rev. Stat. Ann. §630:5(VI)(d) (Supp. 1992); N. J. Stat. Ann. §2C:11–3(c)(5)(c) (West 1982); N. M. Stat. Ann. §31–20A-6(I) (1990); N. C. Gen. Stat. §15A–2000(f)(7) (1988); Ohio Rev. Code Ann. §2929.04(B)(4) (1993); Ore. Rev. Stat. §163.150(1)(c)(A) (1991); Pa. Stat. Ann., Tit. 42, §9711(e)(4) (Purdon 1982); S. C. Code Ann. §16–3–20(C)(b)(7) (Supp. 1992); Tenn. Code Ann. §39–13–204(j)(7) (1991); Utah Code Ann. §76–3–207(3)(e) (Supp. 1992); Va. Code Ann. §19.2–264.4(B)(v) (1990); Wash. Rev. Code §10.95.070(7) (1992). The remaining six States allow the jury to consider any

relief Johnson seeks today was not "`*dictated* by precedent'" and therefore not available on collateral review. 506 U. S., at ___ (slip op., at 5) (quoting *Teague* v. *Lane*, 489 U. S. 288, 301 (1989) (plurality opinion)). The issue in *Graham* was not whether an additional instruction to allow the jury to give full effect to Graham's youth was constitutionally mandated. It was only whether the need for such an instruction was "susceptible to debate among reasonable minds." 506 U. S., at ___ (slip op., at 14) (internal quotation marks omitted). I did not agree with the Court's conclusion in *Graham*, see *id.*, at ___ (slip op., at 1) (SOUTER, J., dissenting), but even if I had, I would not find *Graham* controlling today.

Teague v. *Lane, supra,* states a rule of collateral review: New constitutional rules will not be applied retroactively to invalidate final state convictions on federal habeas review. *Teague* analysis is a threshold issue, see *id.*, at 300–301 (plurality opinion), however, and cases that reject a claim as requiring a new rule cannot constitute *stare decisis* on direct review. The purpose of *Teague* is to accommodate the competing demands of constitutional imperatives and the "principle of finality which is essential to the operation of our criminal justice system," *id.*, at 309. See *Desist* v. *United States*, 394 U. S. 244, 260–269 (1969) (Harlan, J., dissenting). But the finality concerns of *Teague* come into play only after this Court has denied certiorari or the time for filing a petition for certiorari from the judgment affirming the conviction has expired. See *Griffith* v. *Kentucky*, 479

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evidence in mitigation without specifying examples. See Del. Code Ann., Tit. 11, §4209(c) (1987 and Supp. 1992); Ga. Code Ann. §17–10–30(b) (1990); Idaho Code §19–2515(c) (1987); Okla. Stat., Tit. 21, §701.10(C) (Supp. 1992); S. D. Codified Laws §23A–27A–1 (Supp. 1993); current Tex. Code Crim. Proc. Ann., Art. 37.071, §2(e) (Vernon Supp. 1993).

U. S. 314, 321, n. 6 (1987). Until that time, the interests of finality and comity that caused us to implement the *Teague* standards of retroactivity are not at issue. The only demands with which we need, indeed, must concern ourselves are those of the Constitution. On direct review, it is our constitutionally imposed duty to resolve "all cases before us . . . in light of our best understanding of governing constitutional principles," *Mackey* v. *United States*, 401 U. S. 667, 679 (1971) (Harlan, J., concurring in judgment), without regard to reliance interests of the State.

The analysis of our collateral review doctrine, as well as its purpose, makes the majority's emphasis on cases decided under *Teague* inappropriate in a direct review case. When determining whether a rule is new, we do not ask whether it fairly can be discerned from our precedents; we do not even ask if most reasonable jurists would have discerned it from our precedents. We ask only whether the result was *dictated* by past cases, or whether it is "susceptible to debate among reasonable minds," *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990). And we have recognized that answering this question is difficult, especially when we are faced with the application of settled law to new facts. *Id.*, at 414–415.

If the rule the petitioner sought in *Graham* was a new rule, it was one only because we had never squarely held that the former Texas special issues required an additional instruction regarding youth. That we have not addressed this particular combination of circumstances on direct review until today, however, cannot create an insurmountable reliance interest in the State of Texas, as the Court suggests. See *ante*, at 16. To allow our failure to address an issue to create such an interest would elevate our practice of letting issues "percolate" in the 50 States in the interests of federalism over our responsibility to resolve emerging constitutional

issues. On direct review, the question is what the Constitution, read in light of our precedents, requires. In my view, the Eighth Amendment requires an additional instruction in this case.

There is considerable support in our early cases for the proposition that the sentencer in a capital case must be able to give *full* effect to all mitigating evidence concerning the defendant's character and record and the circumstances of the crime. The Court first recognized the need to give effect to mitigating circumstances in the group of capital cases decided after *Furman* v. *Georgia*, 408 U. S. 238 (1972). In three of those cases, Justices Stewart, Powell, and STEVENS upheld capital sentencing laws against facial challenges, in large part because they believed that the statutes narrowed the category of defendants subject to the death penalty at the same time that they allowed for consideration of the mitigating circumstances regarding the individual defendant and the particular crime. See *Gregg* v. *Georgia*, 428 U. S. 153, 196–197 (1976) (joint opinion); *Proffitt* v. *Florida*, 428 U. S. 242, 250–253 (1976) (joint opinion); *Jurek* v. *Texas*, 428 U. S. 262, 270–274 (1976) (joint opinion). In two other cases, the joint opinions found mandatory death penalty statutes unconstitutional. See *Woodson* v. *North Carolina*, 428 U. S. 280, 303–305 (1976) (plurality opinion); *Roberts* v. *Louisiana*, 428 U. S. 325, 333–336 (1976) (plurality opinion). A mandatory death penalty certainly limited the discretion of the sentencer, but it was not "consistent with the Constitution." *Ante*, at 9. The plurality opinion in *Woodson* recognized that allowing a sentencer to consider but not to give effect to mitigating circumstances would result in the arbitrary and capricious jury nullification that prevailed prior to *Furman*. See *Woodson*, 428 U. S., at 303.

Furthermore, "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.*, at 304.

We returned to the issue of mitigating circumstances two Terms later. The Ohio death penalty statute required the sentencer to impose the death penalty on a death-eligible defendant unless one of three mitigating circumstances was established by a preponderance of the evidence. See *Lockett* v. *Ohio*, 438 U. S. 586, 599, n. 7, and 607 (1978) (plurality opinion). In determining the existence of the three circumstances, the sentencer was to consider "`the nature and circumstances of the offense and the history, character, and condition of the offender.'" *Id.*, at 612 (quoting Ohio Rev. Code Ann. §2929.04(B) (1975)). The Ohio Supreme Court had held that the mitigating circumstances were to be construed liberally, but a plurality of this Court nevertheless found the statute too narrow to pass constitutional muster. *Id.*, at 608. The *Lockett* plurality concluded from the post-*Furman* cases 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." *Id.*, at 604 (footnote omitted). The statute at issue specifically directed the sentencer to *consider* those very factors. Nevertheless, the plurality found the statute unconstitutional because it provided no *method* by which such consideration could "affect the sentencing decision." *Id.*, at 608. Accord, *Bell* v. *Ohio*, 438 U. S.

637, 641–642 (1978) (petitioner's counsel offered a wide range of mitigating evidence at the penalty phase, and according to the Ohio statute, the sentencer was to consider that evidence; petitioner's death sentence reversed nevertheless because the statute unconstitutionally limited consideration of the evidence as mitigating factors).

The Court next addressed the constitutional requirement that a sentencer be allowed to give *full* consideration and *full* effect to mitigating circumstances in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). Although the Oklahoma death penalty statute contained no specific restrictions on the types of mitigating evidence that could be considered, neither the Oklahoma trial court nor the Court of Criminal Appeals believed that it could consider, as mitigating factors, the evidence of petitioner's unhappy upbringing and emotional disturbance. See *id.*, at 109–110. The Court reversed petitioner's death sentence. In so doing, it reaffirmed the rule of *Lockett*: The sentencer in a capital case must be permitted to consider relevant mitigating factors in ways that can affect the sentencing decision. This rule, the Court explained, accommodated the twin objectives of our Eighth Amendment jurisprudence: "measured, consistent application and fairness to the accused." 455 U. S., at 111.

Four years later, the Court again made plain that *Lockett* and *Eddings* meant what they said. In *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), we reiterated that evidence, even if not "relate[d] specifically to petitioner's culpability for the crime he committed," *id.*, at 4, must be treated as relevant mitigating evidence if it serves "`as a basis for a sentence less than death,'" *id.*, at 5 (quoting *Lockett*, *supra*, at 604). We summarized the "constitutionally permissible range of discretion in imposing the death penalty" the following Term in *McCleskey* v. *Kemp*, 481 U. S. 279, 305 (1987):

> "First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. . . . Second, States cannot *limit* the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, *the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant*." *Id.*, at 305–306 (emphases added).

We have adhered to this "constitutionally permissible range of discretion" again and again in the years since we decided *McCleskey*, most recently in *McKoy* v. *North Carolina*, 494 U. S. 433 (1990). Accord, *Hitchcock* v. *Dugger*, 481 U. S. 393, 398–399 (1987); *Penry* v. *Lynaugh*, 492 U. S. 302, 319–328 (1989). The Court attempts to limit these cases by relying on plurality opinions, concurrences, and dicta, see, *e.g.*, *ante*, at 10–11, but until today a majority of this Court has declined to upset our settled Eighth Amendment jurisprudence.

Despite the long line of precedent supporting Johnson's argument that the State impermissibly limited the effect that could be given to his youth, the Court, like respondent and the Texas Court of Criminal Appeals, clings doggedly to *Jurek* v. *Texas*, 428 U. S. 262 (1976) (joint opinion). The interpretation on which the Court today relies, however, has nothing to do with what the Court actually decided in *Jurek*. *Jurek* was one of five cases in which this Court evaluated the States' attempts after *Furman* to enact constitutional death penalty statutes. The statutes at issue had been applied a limited number of times, and, of necessity, the challenges were all facial. The

Texas Court of Criminal Appeals, for example, had examined the application of the Texas statute only twice: in *Jurek* itself, and in one other case. 428 U. S., at 273. Because of the posture of the case and the limited history of the statute's application, the Court could not, and did not, determine the statute's constitutionality in all circumstances. Instead, the joint opinion, which contained the narrowest ground of decision in the case, read the Texas court's interpretation of the statute as allowing the jury to consider the "particularized circumstances of the individual offense and the individual offender" before death is imposed. *Id.*, at 274. Therefore, the joint opinion held that the statute fell within what we later called the "constitutionally permissible range of discretion in imposing the death penalty," *McCleskey* v. *Kemp, supra,* at 305. *Jurek*, *supra*, at 276.

Because *Jurek* involved only a facial challenge to the Texas statute, the constitutionality of the statute as implemented in particular instances was not at issue. Nor was the "as-applied" constitutionality of the statute implicated in any of our cases until *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988). In *Adams* v. *Texas*, 448 U. S. 38 (1980), for example, the Court still expressed the view that the statute allowed members of the jury to consider *all* relevant evidence, and to use that evidence in answering the special questions, "while remaining true to their instructions and their oaths." *Id.*, at 46. The same is true of the plurality opinion in *Lockett*, which stated that the joint opinion in *Jurek* had approved the Texas statute because it "concluded that the Texas Court of Criminal Appeals had broadly interpreted the second question—despite its facial narrowness." 438 U. S., at 607.

When the Court addressed its first as-applied challenge to the Texas death penalty statute in *Franklin*, it was clear that any statements in *Jurek* regarding the statute's constitutionality were

conditioned on a particular understanding of state law. *Jurek* simply had not upheld the Texas death penalty statute in all circumstances. In fact, five Members of the Court rejected the *Franklin* plurality's reliance on *Jurek* and disagreed with the plurality's suggestion that a State constitutionally could limit the "ability of the sentencing authority to give *effect* to mitigating evidence relevant to a defendant's character or background or to the circumstances of the offense." 487 U. S., at 183–185 (O'CONNOR, J., joined by BLACKMUN, J., concurring in judgment) (emphasis added); *id.*, at 194–200 (STEVENS, J., joined by Brennan and Marshall, JJ., dissenting). See also *Penry* v. *Lynaugh*, 492 U. S., at 320–321 ("[B]oth the concurrence and the dissent [in *Franklin*] understood *Jurek* as resting fundamentally on the express assurance that the special issues would permit the jury to fully consider all the mitigating evidence a defendant introduced").

The view of the five concurring and dissenting Justices that the facial review in *Jurek* did not decide the issue presented in *Franklin* is not surprising. After all, the same day we approved the Texas death penalty statute in *Jurek*, we also approved the death penalty statutes of Georgia and Florida. See *Gregg* v. *Georgia*, 428 U. S. 153 (1976) (joint opinion); *Proffitt* v. *Florida*, 428 U. S. 242 (1976) (joint opinion). Yet after *Gregg* and *Proffitt* and prior to *Franklin*, we held unconstitutional specific applications of the same Georgia and Florida statutes we earlier had approved. See *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) (vague and overly broad construction of aggravating factor rendered death sentence unconstitutional); *Hitchcock* v. *Dugger*, *supra* (holding it unconstitutional to restrict jury's consideration of mitigating factors to those enumerated in the statute). Despite this majority view of *Jurek* and the Texas death penalty statute, the Court today relies on the minority view in *Franklin*. It goes so far as to note with approval the

minority position that "*Jurek* foreclosed the defendant's argument that the jury was still entitled to cast an `independent' vote against the death penalty even if it answered yes to the special issues." *Ante*, at 13 (citing *Franklin*, *supra*, at 180). This reading of *Franklin* turns *stare decisis* on its head.

Although the majority of Justices in *Franklin* did not accept the contention that the State constitutionally could limit a sentencer's ability to give effect to mitigating evidence, two Justices concurred in the judgment because they believed that on the facts of that case the State had not limited the effect the evidence could be given. 487 U. S., at 185 (O'CONNOR, J., joined by BLACKMUN, J., concurring in judgment). Thus, resolution of the issue was left open. The following Term, however, the Court squarely addressed the constitutionality of limiting the effect a Texas jury could give to relevant mitigating evidence, and contrary to the majority opinion today, we plainly held that the Texas special issues violated the Eighth Amendment to the extent they prevented the jury from giving full consideration *and* effect to a defendant's relevant mitigating evidence. *Penry* v. *Lynaugh*, 492 U. S. 302 (1989).

Penry was in no way limited to evidence that is only aggravating under the "future dangerousness" issue. We stated there that "*Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.*, at 319. That we meant "full effect" is evident from the remainder of our discussion. We first determined that Penry's evidence of mental retardation and his abused childhood was relevant to the question whether he acted deliberately under the first special issue. *Id.*, at 322. But having *some* relevance to an issue was not sufficient, and the problem was not, as the Court today suggests, see *ante*, at 14, simply that no jury

instruction defined the term "deliberately." Instead, we noted that the jury must be able to give effect to the evidence as it related to Penry's "[p]ersonal culpability," which "is not solely a function of a defendant's capacity to act `deliberately.'" 492 U. S., at 322. The jury could not give full effect to Penry's evidence under the first special issue because "deliberately" was not defined "in a way that would clearly direct the jury to consider fully Penry's mitigating evidence *as it bears on his personal culpability*." *Id.*, at 323. That is, the evidence had relevance beyond the scope of the first issue. *Id.*, at 322.

We concluded that the second special issue, like the first, did not allow a jury to give effect to a mitigating aspect of mental retardation: the diminution of culpability. *Id.*, at 323–324. The Court today makes much of our finding that the "only" relevance of Penry's evidence to the second issue was as an aggravating factor, see *id.*, at 323. *Ante*, at 14. But in so doing, it takes our factual description of Penry's evidence as a "two-edged sword" out of context. The second special issue was not inadequate because the evidence worked only against Penry; it was inadequate because it did not allow the jury to give full effect to Penry's mitigating evidence. *Penry*, 492 U. S., at 323. Our discussion of the third special issue —whether the defendant's conduct was unreasonable in response to the provocation—also focused on the inability of a juror to express the view that Penry lacked "the moral culpability to be sentenced to death" in answering the question. *Id.*, at 324–325. The point of *Penry* is clear: A death sentence resulting from application of the Texas special issues cannot be upheld unless the jurors are able to consider fully a defendant's mitigating evidence. Accord, *id.*, at 355 (SCALIA, J., concurring in part and dissenting in part) (The Court today holds "that the constitutionality turns on whether the [special] questions allow

mitigating factors not only to be considered . . . , *but also to be given effect in all possible ways, including ways that the questions do not permit*").

Our recent cases are not to the contrary. In *Boyde* v. *California*, 494 U. S. 370 (1990), for example, the Court relied on two straightforward propositions to reject petitioner's claim that the California death penalty was unconstitutional. First, we rejected the argument that requiring the jury to weigh aggravating and mitigating factors, and then sentence petitioner accordingly, violated the requirement of individualized sentencing. The petitioner in *Boyde* did not allege that the instruction interfered with the jury's consideration of mitigating evidence; instead, he essentially argued for the constitutional right to an instruction on jury nullification. See *id.,* at 377. We also addressed (and rejected) petitioner's challenge to a "catch-all" instruction that told the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Id.*, at 374 (internal quotation marks omitted). We reiterated our long-time understanding that the "Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner," *id.*, at 377–378, but found that the challenged instruction did not "restrict impermissibly [the] jury's consideration of relevant evidence," *id.*, at 378. Accord, *id.*, at 382–384. Our holding in *Boyde* did not constrict or limit our prior cases on the requirements of the Eighth Amendment.

The Court's reliance on *Saffle* v. *Parks*, 494 U. S. 484 (1990), also is misplaced. In *Saffle*, the only issue was whether it would be a new rule under the standards of *Teague* v. *Lane*, 489 U. S. 288 (1989), for a defendant to be entitled to an instruction allowing the jury to decline to impose the death penalty based

on mere sympathy. We held that it would. 494 U. S., at 489. To be sure, there is language in *Saffle* suggesting that a State may limit a sentencer's consideration of mitigating evidence so long as the sentencer may give some effect to the evidence. See, *e.g.*, *id.*, at 490–491. But to the extent *Saffle* suggests anything more than that the State may prevent the sentencer from declining to impose the death penalty based on mere sympathy, the language is *dictum* and cannot be construed as overruling 17 years of precedent. Limiting a sentencer's discretion to react based on unfocused sympathy is not the equivalent of preventing a sentencer from giving a "reasoned *moral* response," *id.*, at 493 (internal quotation marks omitted), based on "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," *id.*, at 489 (internal quotation marks omitted). This Court has reaffirmed continually since 1976 that the Constitution prohibits the latter limitation.

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"[Y]outh is more than a chronological fact." *Eddings*, 455 U. S., at 115. The emotional and mental immaturity of young people may cause them to respond to events in ways that an adult would not. Because the jurors in Johnson's case could not give effect to this aspect of Johnson's youth, I would vacate Johnson's sentence and remand for resentencing.