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 KENNEDY delivered the opinion of the Court.

For the second time this Term, we consider a constitutional challenge to the former Texas capital sentencing system. Like the condemned prisoner in *Graham* v. *Collins*, 506 U. S. ___ (1993), the petitioner here claims that the Texas special issues system in effect until 1991 did not allow his jury to give adequate mitigating effect to evidence of his youth. *Graham* was a federal habeas corpus proceeding where the petitioner had to confront the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), barring the application of new rules of law on federal habeas corpus. In part because the relief sought by Graham would have required a new rule within the meaning of *Teague*, we denied relief. The instant case comes to us on direct review of petitioner's conviction and sentence, so we consider it without the constraints of *Teague*, though of course with the customary respect for the doctrine of *stare decisis*. Based upon our precedents, including much of the reasoning in *Graham*, we find the Texas procedures as applied in this case were consistent with the Eighth and Fourteenth Amendments.

Petitioner, then 19 years of age, and his companion, Amanda Miles, decided to rob Allsup's convenience store in Snyder, Texas, on March 23, 1986. After agreeing that there should be no

witnesses to the crime, the pair went to the store to survey its layout and, in particular, to determine the number of employees working in the store that evening. They found that the only employee present during the predawn hours was a clerk, Jack Huddleston. Petitioner and Miles left the store to make their final plans.

They returned to Allsup's a short time later. Petitioner, a handgun in his pocket, reentered the store with Miles. After waiting for other customers to leave, petitioner asked Huddleston whether the store had any orange juice in one gallon plastic jugs because there were none on the shelves. Saying he would check, Huddleston went to the store's cooler. Petitioner followed Huddleston there, told Huddleston the store was being robbed, and ordered him to lie on the floor. After Huddleston complied with the order and placed his hands behind his head, petitioner shot him in the back of the neck, killing him. When petitioner emerged from the cooler, Miles had emptied the cash registers of about $160. They each grabbed a carton of cigarettes and fled.

In April 1986, a few weeks after this crime, petitioner was arrested for a subsequent robbery and attempted murder of a store clerk in Colorado City, Texas. He confessed to the murder of Jack Huddleston and the robbery of Allsup's and was tried and convicted of capital murder. The homicide qualified as a capital offense under Texas law because petitioner intentionally or knowingly caused Huddleston's death and the murder was carried out in the course of committing a robbery. Tex. Penal Code Ann. §§19.02(a)(1), 19.03(a)(2) (Vernon 1989).

After the jury determined that petitioner was guilty of capital murder, a separate punishment phase of the proceedings was conducted in which petitioner's sentence was determined. In conformity with the Texas capital-sentencing statute then in effect, see Tex. Code Crim. Proc. Ann. Art. 37.071(b) (Vernon 1981),[1] the trial court instructed the jury that it was to answer two special issues:

"[(1)] Was the conduct of the Defendant, Dorsie

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[1]The Texas Legislature amended the statute in 1991. See Art. 37.071(2) (Vernon Supp. 1992–1993).

> Lee Johnson, Jr., that caused the death of the deceased, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> . . . . .
>
> "[(2)] Is there a probability that the Defendant, Dorsie Lee Johnson, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?"[2] App. 148–149.

The trial court made clear to the jury the consequences of its answers to the special issues:

> "You are further instructed that if the jury returns affirmative or `yes' answer *[sic]* to all the Issues submitted, this Court shall sentence the Defendant to death. If the jury returns a negative or `no' answer to any Issue submitted, the Court shall sentence the Defendant to life in prison." *Id.*, at 146.

The jury was instructed not to consider or discuss the possibility of parole. *Id.*, at 147. The trial court also instructed the jury as follows concerning its consideration of mitigating evidence:

> "In determining each of these Issues, you may take into consideration all the evidence submitted to you in the trial of this case, whether aggravating or mitigating in nature, that is, all the evidence in the first part of the trial when you were called upon to determine the guilt or innocence of the Defendant and all the evidence,

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[2]The statute also required that a third special issue, asking whether the defendant's act was "unreasonable in response to the provocation, if any, by the deceased," be submitted to the jury "if raised by the evidence." Art. 37.071(b)(3) (Vernon 1981). Petitioner does not contest the trial court's decision not to submit the third special issue in this case.

> if any, in the second part of the trial wherein you are called upon to determine the answers to the Special Issues." *Ibid.*

Although petitioner's counsel filed various objections to the jury charge, there was no request that a more expansive instruction be given concerning any particular mitigating circumstance, including petitioner's youth.

In anticipation of the trial court's instructions, the State during the punishment phase of the proceedings presented numerous witnesses who testified to petitioner's violent tendencies. The most serious evidence related to the April convenience store robbery in Colorado City. Witnesses testified that petitioner had shot that store clerk in the face, resulting in the victim's permanent disfigurement and brain damage. Other witnesses testified that petitioner had fired two shots at a man outside a restaurant in Snyder only six days after the murder of Huddleston, and a sheriff's deputy who worked in the jail where petitioner was being held testified that petitioner had threatened to "get" the deputy when he got out of jail.

Petitioner's acts of violence were not limited to strangers. A longtime friend of petitioner, Beverly Johnson, testified that in early 1986 petitioner had hit her, thrown a large rock at her head, and pointed a gun at her on several occasions. Petitioner's girlfriend, Paula Williams, reported that, after petitioner had become angry with her one afternoon in 1986, he threatened her with an axe. There were other incidents, of less gravity, before 1986. One of petitioner's classmates testified that petitioner cut him with a piece of glass while they were in the seventh grade. Another classmate testified that petitioner also cut him with glass just a year later, and there was additional evidence presented that petitioner had stabbed a third classmate with a pencil.

The State established that the crimes committed in 1986 were not petitioner's first experience with the criminal justice system. Petitioner had been convicted in 1985 of a store burglary in Waco, Texas. Petitioner twice violated the terms of probation for that offense by smoking marijuana. Petitioner was still on probation when he committed the Huddleston murder.

The defense presented petitioner's father, Dorsie Johnson, Sr., as its only witness. The elder Johnson attributed his son's criminal activities to his drug use and his youth. When asked by defense counsel whether his son at the age of 19 was "a real mature person," petitioner's father answered:

> "No, no. Age of nineteen? No, sir. That, also, I find to be a foolish age. That's a foolish age. They tend to want to be macho, built-up, trying to step into manhood. You're not mature-lized for it." *Id.*, at 27.

At the close of his testimony, Johnson summarized the role that he thought youth had played in his son's crime:

> "[A]ll I can say is I still think that a kid eighteen or nineteen years old has an undeveloped mind, undeveloped sense of assembling not — I don't say what is right or wrong, but the evaluation of it, how much, you know, that might be — well, he just don't — he just don't evaluate what is worth — what's worth and what's isn't like he should like a thirty or thirty-five year old man would. He would take under consideration a lot of things that a younger person that age wouldn't." *Id.*, at 47.

The father also testified that his son had been a regular churchgoer and his problems were attributable in large part to the death of his mother following a stroke in 1984 and the murder of his sister in 1985. Finally, the senior Johnson testified to his son's remorse over the killing of Huddleston.

At the voir dire phase of the proceedings, during which more than 90 prospective jurors were questioned over the course of 15 days, petitioner's counsel asked the venirepersons whether they believed that people were capable of change and whether the venirepersons had ever done things as youths that they would not do now. See, *e.g.*, Tr. of Voir Dire in No. 5575 (132d Jud. Dist. Ct., Scurry County, Tex.), pp. 1526–1529 (Juror Swigert); pp. 1691–1692 (Juror Freeman); p. 2366 (Juror Witte); pp. 2630–2632 (Juror Raborn).[3] Petitioner's counsel returned to this theme in his closing argument:

> "The question — the real question, I think, is whether you believe that there is a possibility that he can change. You will remember that that was one thing every one of you told me you agreed — every one of you agreed with me that people can change. If you agree that people can

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[3]The colloquy on this point between petitioner's counsel and Juror Raborn is illustrative of the discussions had with the other jurors:

"Q. Okay. Do you feel that — let me ask you this. Do you feel a person who is — or a young person will do things that they will not do in later years, thirty or forty —

"A. I believe that.

"Q. Do you believe that people can change?

"A. Yes, I believe they can. I've known some that have.

"Q. Do you think that the way a person acts in the present or the past or how he has acted in the past is an absolute indicator of what he will do in the future, thirty or forty years down the road?

"A. No, not on down the line. Like I say, you can change." Tr. of Voir Dire 2630–2631.

> change, then that means that Dorsie can change and that takes question two [regarding future dangerousness] out of the realm of probability and into possibility, you see, because if he can change, then it is no longer probable that he will do these things, but only possible that he can and will do these things, you see.
>
> "If people couldn't change, if you could say I know people cannot change, then you could say probably. But every one of you knows in your heart and in your mind that people can and people do change and Dorsie Johnson can change and, therefore, the answer to question two should be no." App. 81.

Counsel also urged the jury to remember the testimony of petitioner's father. *Id.*, at 73–74.

The jury was instructed that the State bore the burden of proving each special issue beyond a reasonable doubt. *Id.*, at 145. A unanimous jury found that the answer to both special issues was yes, and the trial court sentenced petitioner to death, as required by law. Tex. Code Crim. Proc. Ann., Art. 37.071(e) (Vernon 1981).

On appeal, the Texas Court of Criminal Appeals affirmed the conviction and sentence after rejecting petitioner's seven allegations of error, none of which involved a challenge to the punishment-phase jury instructions. 773 S. W. 2d 322 (1989). Five days after that state court ruling, we issued our opinion in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). Petitioner filed a motion for rehearing in the Texas Court of Criminal Appeals arguing, among other points, that the special issues did not allow for adequate consideration of his youth. Citing *Penry*, petitioner claimed that a separate instruction should have been given that would have allowed the jury to consider petitioner's age as a mitigating factor. Although petitioner had not requested such an instruction at trial and had not argued the point prior to the rehear-

ing stage on appeal, no procedural bar was interposed. Instead, the Court of Criminal Appeals considered the argument on the merits and rejected it. After noting that it had already indicated in *Lackey* v. *State*, 819 S. W. 2d 111, 134 (Tex. Crim. App. 1989), that youth was relevant to the jury's consideration of the second special issue, the court reasoned that "[i]f a juror believed that [petitioner's] violent actions were a result of his youth, that same juror would naturally believe that [petitioner] would cease to behave violently as he grew older." App. 180. The court concluded that "the jury was able to express a reasoned moral response to [petitioner's] mitigating evidence within the scope of the art. 37.071 instructions given to them by the trial court." *Id.*, at 180–181.

Petitioner filed a petition for certiorari, which we granted. 506 U. S. ___ (1993).

This is the latest in a series of decisions in which the Court has explained the requirements imposed by the Eighth and Fourteenth Amendments regarding consideration of mitigating circumstances by sentencers in capital cases. The earliest case in the decisional line is *Furman* v. *Georgia*, 408 U. S. 238 (1972). At the time of *Furman*, sentencing juries had almost complete discretion in determining whether a given defendant would be sentenced to death, resulting in a system in which there was "no meaningful basis for distinguishing the few cases in which [death was] imposed from the many cases in which it [was] not." *Id.*, at 313 (WHITE, J., concurring). Although no two Justices could agree on a single rationale, a majority of the Court in *Furman* concluded that this system was "cruel and unusual" within the meaning of the Eighth Amendment. The guiding principle that emerged from *Furman* was that

States were required to channel the discretion of sentencing juries in order to avoid a system in which the death penalty would be imposed in a "wanto[n]" and "freakis[h]" manner. *Id.*, at 310 (Stewart, J., concurring).

Four Terms after *Furman*, we decided five cases, in opinions issued on the same day, concerning the constitutionality of various capital sentencing systems. *Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976). In the wake of *Furman*, at least 35 States had abandoned sentencing schemes that vested complete discretion in juries in favor of systems that either (i) "specif[ied] the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence," or (ii) "ma[de] the death penalty mandatory for certain crimes." *Gregg*, *supra*, at 179–180 (opinion of Stewart, Powell, and STEVENS, JJ.). In the five cases, the controlling joint opinion of three Justices reaffirmed the principle of *Furman* that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.*, at 189; accord, *Proffitt*, *supra*, at 258 (opinion of Stewart, Powell, and STEVENS, JJ.).

Based upon this principle, it might have been thought that statutes mandating imposition of the death penalty if a defendant was found guilty of certain crimes would be consistent with the Constitution. But the joint opinions of Justices Stewart, Powell, and STEVENS indicated that there was a second principle, in some tension with the first, to be considered in assessing the constitutionality of a capital sentencing scheme. According to the three Justices, "consideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death."

Woodson, *supra*, at 304 (opinion of Stewart, Powell, and STEVENS, JJ.); accord, *Gregg*, *supra*, at 189–190, n. 38 (opinion of Stewart, Powell, and STEVENS, JJ.); *Jurek*, *supra*, at 273–274 (opinion of Stewart, Powell, and STEVENS, JJ.); *Roberts*, *supra*, at 333 (opinion of Stewart, Powell, and STEVENS, JJ.). Based upon this second principle, the Court struck down mandatory imposition of the death penalty for specified crimes as inconsistent with the requirements of the Eighth and Fourteenth Amendments. See *Woodson*, *supra*, at 305; *Roberts*, *supra*, at 335–336.

Two Terms later, a plurality of the Court in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), refined the requirements related to the consideration of mitigating evidence by a capital sentencer. Unlike the mandatory schemes struck down in *Woodson* and *Roberts* in which all mitigating evidence was excluded, the Ohio system at issue in *Lockett* permitted a limited range of mitigating circumstances to be considered by the sentencer.[4] The plurality nonetheless found this system to be unconstitutional, holding that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's

[4]Once an Ohio defendant was found guilty of aggravated murder involving at least one of seven aggravating circumstances, the judge was required to sentence the defendant to death unless at least one of three mitigating circumstances was present: (1) the victim induced or facilitated the offense; (2) it is unlikely the crime would have been committed but for the fact that the defendant was acting under duress, coercion, or strong provocation; or (3) the offense was primarily the product of the defendant's psychosis or mental deficiency. See *Lockett*, 438 U. S., at 607–608.

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. A majority of the Court adopted the *Lockett* rule in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); accord, *Hitchcock* v. *Dugger*, 481 U. S. 393, 398–399 (1987); *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986), and we have not altered the rule's central requirement. "*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." *McKoy* v. *North Carolina*, 494 U. S. 433, 456 (1990) (KENNEDY, J., concurring in judgment); see also *Graham*, 506 U. S., at ___ (slip op., at 13–14); *Saffle* v. *Parks*, 494 U. S. 484, 490–491 (1990).

Although *Lockett* and *Eddings* prevent a State from placing relevant mitigating evidence "beyond the effective reach of the sentencer," *Graham* v. *Collins*, *supra*, at ___ (slip op., at 13), those cases and others in that decisional line do not bar a State from guiding the sentencer's consideration of mitigating evidence. Indeed, we have held that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence `in an effort to achieve a more rational and equitable administration of the death penalty,'" *Boyde* v. *California*, 494 U. S. 370, 377 (1990) (quoting *Franklin* v. *Lynaugh*, 487 U. S. 164, 181 (1988) (plurality opinion)); see also *Saffle*, *supra*, at 490.

The Texas law under which petitioner was sentenced has been the principal concern of four previous opinions in our Court. See *Jurek* v. *Texas*, *supra; Franklin* v. *Lynaugh*, *supra; Penry* v. *Lynaugh*,

492 U. S. 302 (1989); *Graham*, *supra*. As we have mentioned, *Jurek* was included in the group of five cases addressing the post-*Furman* statutes in 1976.

In *Jurek*, the joint opinion of Justices Stewart, Powell, and STEVENS first noted that there was no constitutional deficiency in the means used to narrow the group of offenders subject to capital punishment, the statute having adopted five different classifications of murder for that purpose. See *Jurek*, 428 U. S., at 270–271. Turning to the mitigation side of the sentencing system, the three Justices said: "[T]he constitutionality of the Texas procedures turns on whether the enumerated [special issues] allow consideration of particularized mitigating factors." *Id.*, at 272. In assessing the constitutionality of the mitigation side of this scheme, the three Justices examined in detail only the second special issue, which asks whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Although the statute did not define these terms, the joint opinion noted that the Texas Court of Criminal Appeals had indicated that it would interpret the question in a manner that allowed the defendant to bring all relevant mitigating evidence to the jury's attention:

> "`In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however

> inflamed, could withstand.' [*Jurek* v. *State*,] 522 S. W. 2d [934], 939–940 [(Tex. Crim. App. 1975)]." *Id.*, at 272–273.

The joint opinion determined that the Texas system satisfied the requirements of the Eighth and Fourteenth Amendments concerning the consideration of mitigating evidence: "By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.*, at 276. Three other Justices agreed that the Texas system satisfied constitutional requirements. See *id.*, at 277 (WHITE, J., concurring in judgment).

We next considered a constitutional challenge involving the Texas special issues in *Franklin* v. *Lynaugh*, *supra*. Although the defendant in that case recognized that we had upheld the constitutionality of the Texas system as a general matter in *Jurek*, he claimed that the special issues did not allow the jury to give adequate weight to his mitigating evidence concerning his good prison disciplinary record and that the jury, therefore, should have been instructed that it could consider this mitigating evidence independent of the special issues. 487 U. S., at 171–172. A plurality of the Court rejected the defendant's claim, holding that the second special issue provided an adequate vehicle for consideration of the defendant's prison record as it bore on his character. *Id.*, at 178. The plurality also noted 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. 487 U. S., at 180. The plurality concluded that, with its special issues system, Texas had guided the jury's consideration of mitigating evidence while still providing for sufficient jury

discretion. See *id.*, at 182. Although JUSTICE O'CONNOR expressed reservations about the Texas scheme for other cases, she agreed that the special issues had not inhibited the jury's consideration of the defendant's mitigating evidence in that case. See *id.*, at 183–186 (O'CONNOR, J., concurring in judgment).

The third case in which we considered the Texas statute is the pivotal one from petitioner's point of view, for there we set aside a capital sentence because the Texas special issues did not allow for sufficient consideration of the defendant's mitigating evidence. *Penry* v. *Lynaugh*, *supra*. In *Penry*, the condemned prisoner had presented mitigating evidence of his mental retardation and childhood abuse. We agreed that the jury instructions were too limited for the appropriate consideration of this mitigating evidence in light of Penry's particular circumstances. We noted that "[t]he jury was never instructed that it could consider the evidence offered by Penry as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence." 492 U. S., at 320. Absent any definition for the term "deliberately," we could not "be sure that the jury was able to give effect to the mitigating evidence . . . in answering the first special issue," *id.*, at 323, so we turned to the second special issue, future dangerousness. The evidence in the case suggested that Penry's mental retardation rendered him unable to learn from his mistakes. As a consequence, we decided the mitigating evidence was relevant to the second special issue "only as an *aggravating* factor because it suggests a `yes' answer to the question of future dangerousness." *Ibid.* The Court concluded that the trial court had erred in not instructing the jury that it could "consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty." *Id.*, at 329. The Court was most explicit in rejecting the dissent's

concern that Penry was seeking a new rule, in contravention of *Teague* v. *Lane*, 489 U. S. 288 (1989). Indeed, the Court characterized its holding in *Penry* as a straightforward application of our earlier rulings in *Jurek*, *Lockett*, and *Eddings*, making it clear that these cases can stand together with *Penry*. See *Penry*, 492 U. S., at 314–318.

We confirmed this limited view of *Penry* and its scope in *Graham* v. *Collins*. There we confronted a claim by a defendant that the Texas system had not allowed for adequate consideration of mitigating evidence concerning his youth, family background, and positive character traits. In rejecting the contention that *Penry* dictated a ruling in the defendant's favor, we stated that *Penry* did not "effec[t] a sea change in this Court's view of the constitutionality of the former Texas death penalty statute," 506 U. S., at ___ (slip op., at 12), and we noted that a contrary view of *Penry* would be inconsistent with the *Penry* Court's conclusion that it was not creating a "new rule," 506 U. S., at ___ (slip op., at 13). We also did not accept the view that the *Lockett* and *Eddings* line of cases, upon which *Penry* rested, compelled a holding for the defendant in *Graham:*

> "In those cases, the constitutional defect lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer. In *Lockett*, *Eddings*, *Skipper*, and *Hitchcock*, the sentencer was precluded from even considering certain types of mitigating evidence. In *Penry*, the defendant's evidence was placed before the sentencer but the sentencer had no reliable means of giving mitigating effect to that evidence. In this case, however, Graham's mitigating evidence was not placed beyond the jury's effective reach." *Graham*, 506 U. S., at ___ (slip op., at 14).

In addition, we held that Graham's case differed from

Penry in that "Graham's evidence—*unlike* Penry's—had mitigating relevance to the second special issue concerning his likely future dangerousness." 506 U. S., at ___ (slip op., at 14). We concluded that, even with the benefit of the subsequent *Penry* decision, reasonable jurists at the time of Graham's sentencing "would [not] have deemed themselves compelled to accept Graham's claim." 506 U. S., at ___ (slip op., at 16). Thus, we held that a ruling in favor of Graham would have required the impermissible application of a new rule under *Teague*. 506 U. S., at ___ (slip op., at 15).

Today we are asked to take the step that would have been a new rule had we taken it in *Graham*. Like Graham, petitioner contends that the Texas sentencing system did not allow the jury to give adequate mitigating effect to the evidence of his youth. Unlike Graham, petitioner comes here on direct review, so *Teague* presents no bar to the rule he seeks. The force of *stare decisis*, though, which rests on considerations parallel in many respects to *Teague*, is applicable here. The interests of the State of Texas, and of the victims whose rights it must vindicate, ought not to be turned aside when the State relies upon an interpretation of the Eighth Amendment approved by this Court, absent demonstration that our earlier cases were themselves a misinterpretation of some constitutional command. See, *e.g.*, *Vasquez* v. *Hillery*, 474 U. S. 254, 265–266 (1986); *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984).

There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury if a death sentence is to meet the requirements of *Lockett* and *Eddings*. See, *e.g.*, *Sumner* v. *Shuman*, 483 U. S. 66, 81–82 (1987); *Eddings*, 455 U. S., at 115; *Lockett*, 438 U. S., at 608 (plurality opinion).

Our cases recognize that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and psychological damage." *Eddings*, *supra*, at 115. A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. A sentencer in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence.

The question presented here is whether the Texas special issues allowed adequate consideration of petitioner's youth. An argument that youth can never be given proper mitigating force under the Texas scheme is inconsistent with our holdings in *Jurek*, *Graham*, and *Penry* itself. The standard against which we assess whether jury instructions satisfy the rule of *Lockett* and *Eddings* was set forth in *Boyde* v. *California*, 494 U. S. 370 (1990). There we held that a reviewing court must determine "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." *Id.*, at 380. Although the reasonable likelihood standard does not require that the defendant prove that it was more likely than not that the jury was prevented from giving effect to the evidence, the standard requires more than a mere possibility of such a bar. *Ibid.* In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a "commonsense understanding of the instructions in the light of all that has taken place at the trial." *Id.*, at 381.

We decide that there is no reasonable likelihood that the jury would have found itself foreclosed from

considering the relevant aspects of petitioner's youth. Pursuant to the second special issue, the jury was instructed to decide whether there was "a probability that [petitioner] would commit criminal acts of violence that would constitute a continuing threat to society." App. 149. The jury also was told that, in answering the special issues, it could consider all the mitigating evidence that had been presented during the guilt and punishment phases of petitioner's trial. *Id.*, at 147. Even on a cold record, one cannot be unmoved by the testimony of petitioner's father urging that his son's actions were due in large part to his youth. It strains credulity to suppose that the jury would have viewed the evidence of petitioner's youth as outside its effective reach in answering the second special issue. The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside. We believe that there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination. As we recognized in *Graham*, the fact that a juror might view the evidence of youth as aggravating, as opposed to mitigating, does not mean that the rule of *Lockett* is violated. *Graham*, 506 U. S., at ___ (slip op., at 13–14). As long as the mitigating evidence is within "the effective reach of the sentencer," the requirements of the Eighth Amendment are satisfied. *Ibid.* (slip op., at 13).

That the jury had a meaningful basis to consider the relevant mitigating qualities of petitioner's youth is what distinguishes this case from *Penry*. In *Penry*, there was expert medical testimony that the defendant was mentally retarded and that his condition prevented him from learning from experience. 492 U. S., at 308–309. Although the

evidence of the mental illness fell short of providing Penry a defense to prosecution for his crimes, the Court held that the second special issue did not allow the jury to give mitigating effect to this evidence. Penry's condition left him unable to learn from his mistakes, and the Court reasoned that the only logical manner in which the evidence of his mental retardation could be considered within the future dangerousness inquiry was as an aggravating factor. *Id.*, at 323. *Penry* remains the law and must be given a fair reading. The evidence of petitioner's youth, however, falls outside *Penry*'s ambit. Unlike Penry's mental retardation, which rendered him unable to learn from his mistakes, the ill effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of the second special issue.

Petitioner does not contest that the evidence of youth could be given some effect under the second special issue. Instead, petitioner argues that the forward-looking perspective of the future dangerousness inquiry did not allow the jury to take account of how petitioner's youth bore upon his personal culpability for the murder he committed. According to petitioner, "[a] prediction of future behavior is not the same thing as an assessment of moral culpability for a crime already committed." Brief for Petitioner 38. Contrary to petitioner's suggestion, however, this forward-looking inquiry is not independent of an assessment of personal culpability. It is both logical and fair for the jury to make its determination of a defendant's future dangerousness by asking the extent to which youth influenced the defendant's conduct. See *Skipper*, 476 U. S., at 5 ("Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing"). If any jurors believed that the transient qualities of petitioner's youth made him less

culpable for the murder, there is no reasonable likelihood that those jurors would have deemed themselves foreclosed from considering that in evaluating petitioner's future dangerousness. It is true that Texas has structured consideration of the relevant qualities of petitioner's youth, but in so doing, the State still "allow[s] the jury to give effect to [this] mitigating evidence in making the sentencing decision." *Saffle*, 494 U. S., at 491. Although Texas might have provided other vehicles for consideration of petitioner's youth, no additional instruction beyond that given as to future dangerousness was required in order for the jury to be able to consider the mitigating qualities of youth presented to it.

In a related argument, petitioner, quoting a portion of our decision in *Penry*, *supra*, at 328, claims that the jurors were not able to make a "reasoned moral response" to the evidence of petitioner's youth because the second special issue called for a narrow factual inquiry into future dangerousness. We, however, have previously interpreted the Texas special issues system as requiring jurors to "exercise a range of judgment and discretion." *Adams* v. *Texas*, 448 U. S. 38, 46 (1980). This view accords with a "commonsense understanding" of how the jurors were likely to view their instructions and to implement the charge that they were entitled to consider all mitigating evidence from both the trial and sentencing phases. *Boyde*, 494 U. S., at 381. The crucial term employed in the second special issue—"continuing threat to society"—affords the jury room for independent judgment in reaching its decision. Indeed, we cannot forget that "a Texas capital jury deliberating over the Special Issues is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it formulates these answers in a manner similar to that employed by capital juries in `pure balancing' States." *Franklin*,

487 U. S., at 182, n. 12 (plurality opinion). In *Blystone* v. *Pennsylvania*, 494 U. S. 299 (1990), four Members of the Court in dissent used the Texas statute as an example of a capital sentencing system that permitted the exercise of judgment. That opinion stated:

> "[The two special issues] require the jury to do more than find facts supporting a legislatively defined aggravating circumstance. Instead, by focusing on the deliberateness of the defendant's actions and his future dangerousness, the questions compel the jury to make a moral judgment about the severity of the crime and the defendant's culpability. The Texas statute directs the imposition of the death penalty only after the jury has decided that the defendant's actions were sufficiently egregious to warrant death." *Id.*, at 322 (Brennan, J., dissenting).

The Texas Court of Criminal Appeals' view of the future dangerousness inquiry supports our conclusion that consideration of the second special issue is a comprehensive inquiry that is more than a question of historical fact. In reviewing death sentences imposed under the former Texas system, that court has consistently looked to a nonexclusive list of eight factors, which includes the defendant's age, in deciding whether there was sufficient evidence to support a yes answer to the second special issue. See, *e.g.*, *Ellason* v. *State*, 815 S. W. 2d 656, 660 (Tex. Crim. App. 1991); *Brasfield* v. *State*, 600 S. W. 2d 288 (Tex. Crim. App. 1980).

There might have been a juror who, on the basis solely of sympathy or mercy, would have opted against the death penalty had there been a vehicle to do so under the Texas special issues scheme. But we have not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant. Indeed, we have said that "[i]t would be very difficult

to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." *Saffle* v. *Parks*, 494 U. S., at 493; see also *California* v. *Brown*, 479 U. S. 538, 542–543 (1987) (permitting an instruction that the jury could not base its sentencing decision on sympathy).

For us to find a constitutional defect in petitioner's death sentence, we would have to alter in significant fashion this Court's capital sentencing jurisprudence. The first casualty of a holding in petitioner's favor would be *Jurek*. The inevitable consequence of petitioner's argument is that the Texas special issues system in almost every case would have to be supplemented by a further instruction. As we said in *Graham*,

> "[H]olding that a defendant is entitled to special instructions whenever he can offer mitigating evidence that has *some* arguable relevance beyond the special issues . . . would be to require in all cases that a fourth `special issue' be put to the jury: `"Does any mitigating evidence before you, whether or not relevant to the above [three] questions, lead you to believe that the death penalty should not be imposed?"'" *Graham*, 506 U. S., at ___ (slip op., at 15) (quoting *Franklin*, 487 U. S., at 180, n. 10).

In addition to overruling *Jurek*, accepting petitioner's arguments would entail an alteration of the rule of *Lockett* and *Eddings*. Instead of requiring that a jury be able to consider in some manner all of a defendant's relevant mitigating evidence, the rule would require that a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant.

The fundamental flaw in petitioner's position is its failure to recognize that "[t]here is a simple and

logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle*, *supra*, at 490. To rule in petitioner's favor, we would have to require that a jury be instructed in a manner that leaves it free to depart from the special issues in every case. This would, of course, remove all power on the part of the States to structure the consideration of mitigating evidence—a result we have been consistent in rejecting. See, *e.g.*, *Boyde*, 494 U. S., at 377; *Saffle*, *supra*, at 493; *Franklin*, *supra*, at 181 (plurality opinion).

The reconciliation of competing principles is the function of law. Our capital sentencing jurisprudence seeks to reconcile two competing, and valid, principles in *Furman*, which are to allow mitigating evidence to be considered and to guide the discretion of the sentencer. Our holding in *Jurek* reflected the understanding that the Texas sentencing scheme "accommodates *both* of these concerns." *Franklin*, *supra*, at 182 (plurality opinion). The special issues structure in this regard satisfies the Eighth Amendment and our precedents that interpret its force. There was no constitutional infirmity in its application here.

The judgment of the Texas Court of Criminal Appeals is affirmed.

It is so ordered.