ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DORSIE LEE JOHNSON, JR.,Petitioner v. TEXAS

CASE NO: 92-5653

PLACE: Washington, D.C.

DATE: Monday, April 26, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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DORSIE LEE JOHNSON, JR., :

Petitioner :

v. : No. 92-5653

TEXAS :

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Washington, D.C.

Monday, April 26, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

APPEARANCES:

MICHAEL E. TIGAR, ESQ., Austin, Texas; on behalf of the Petitioner.

DANA E. PARKER, ESQ., Assistant Attorney General of Texas, Austin, Texas; on behalf of the Respondent.

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 92-5653, Dorsie Lee Johnson v. Texas.

Mr. Tigar.

ORAL ARGUMENT OF MICHAEL E. TIGAR

ON BEHALF OF THE PETITIONER

MR. TIGAR: Mr. Chief Justice of the United States, and may it please the Court:

Dorsie Johnson was 19 when he accepted the gun from Amanda Miles and, at her urging, entered the Allsup's convenience store and shot Jack Huddleston to death.

In the punishment phase of his trial for capital murder, the jury was limited to answering two special issues under the former Texas statute. Issue one, deliberately. The statute has a text. It mandates a narrow mens rea inquiry into the deliberateness of the act that proximately caused death.

The Texas Court of Criminal Appeals, whose cases respondent hardly cites and does not discuss, has so construed it. Indeed, respondent's reference at page 40 of its brief to how the issue might be construed is plain wrong. One need only look at Farris v. State in which the Court of Criminal Appeals said that the fact the defendant had a gun was enough. Hardly more than intentional said

the court in Farris, that is to say, the element of which Mr. Johnson had just been convicted. No, said the Court of Criminal Appeals in Farris. The issue doesn't even ask as much about the defendant's state of mind as the element of premeditation which, of course, was universally a part of first degree murder statutes after the Pennsylvania statutory compromise of 1792. Deliberately, as the district attorney said to the jurors here, can be two blinks of an eye.

The issue does not call for a reasoned moral response, but a narrow factual one, a construction we submit is supported by this Court's discussion Arrave v. Creech.

QUESTION: Mr. Tigar, you say that the petitioner was 19 when the offense was committed.

MR. TIGAR: Yes, Justice O'Connor.

QUESTION: Now, I guess under Texas law, he became an adult at 18?

MR. TIGAR: That's correct, Justice O'Connor.

QUESTION: So, how long in your view is youth a factor then in a case such as this? Presumably he was treated, for all purposes in Texas, as an adult at the age of 18.

MR. TIGAR: Surely the entitlement to an instruction on youthful age in our view lasts until a

defendant is 21 or 22. By the respondent referring to Jurek as a --

QUESTION: Well, why do you say that, and what do we look to? I find that a difficult aspect of the case.

MR. TIGAR: I submit that one could look first to respondent's concession here that Jurek was youthful although he was 22. But also there is this consensus, Justice O'Connor, the consensus that in the States that give an instruction on youth, the generality of those States -- and the roll call was called in Stanford v. Kentucky -- leave it to the jury, guided by cautionary instructions.

Another approach is to say up to the age of 21 or 22. The scientists we have spoken -- whose works we've cited, speak of the time of adolescence which lasts somewhat longer, perhaps 23 or 24. The legal tradition that dates to a statute of the 4th century B.C., to antiquity, cut off the age at 25.

It seems to us that 19 surely falls within the range as to which there is unanimity among the States --

QUESTION: Excuse me, Mr. --

MR. TIGAR: -- that as to the outer --

QUESTION: The legal tradition you were referring to that extended to 25, that's a legal tradition

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of what?

MR. TIGAR: The Lex Plaetoria of the 4th century B.C. as interpreted by Justinian and the institutes would have extended mercy up to the age of 25 despite the coming to majority at 14, which was the general rule under Roman law, Justice Scalia. That's the legal tradition of which we speak there.

QUESTION: Did that relate to the time the crime was committed or to the age of the defendant?

MR. TIGAR: To the time of the transaction under review, Justice Scalia, as I understand the institutes.

The point, however, for present purposes is not an idle stroll through antiquity, is that the statutes as to which -- of which the Court spoke in Stanford v. Kentucky focused on this factor of adolescence.

If we're looking not for numbers, Justice O'Connor, but for characteristics, I think there's no more eloquent statement of what you are like at 19 as an adolescent than Dorsie Johnson's father's statement. 19, he said, that's a foolish age.

QUESTION: This young man, Mr. Tigar, had tragedies in his early adolescence. His mother was killed and his sister murdered I think, and it caused him severe problems. It seems to me that that might even be more relevant than youth per se to a reasoned moral judgment,

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if that is indeed a constitutional requirement.

I'm not quite sure why you focus your argument on youth, and I suppose what I'm getting to is that in all of the cases that we've had -- held for this case that's being argued today, some 22 cases, there are factors such as this. And it seems to me that what you're arguing for is ultimately going to be that there should be a general instruction on mitigating evidence.

MR. TIGAR: No, Justice Scalia, we do not submit --

QUESTION: I'm Justice Kennedy.

MR. TIGAR: I'm sorry. I'm sorry, Justice Kennedy.

We do not submit that is constitutionally required.

First, with respect to the family factors that you mentioned, Justice Kennedy, of course this is a troubled background. I mean, his mother died, his sister is murdered, he falls in among companions, and that we say potentiates the effect. But the Court has granted certiorari limited to the effect of youth, and so --

QUESTION: But I'm trying to see if our decision can be so limited.

MR. TIGAR: Yes, Justice Kennedy, I submit that it can, and let me suggest the way in which that might be

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so.

Again, I think if we look at the issue of deliberately, this Court of Criminal Appeals has looked at that issue with respect specifically to youth. And in Zimmerman v. State, on the 9th of April 1993, they said that youth can be aggravated, indeed, that it was properly so considered in Zimmerman's case.

And, therefore, the Court of Criminal Appeals has shut off any consideration of youth for whatever worth youth may have as a mitigating factor. We regard that as a direct assault upon the language that you, Justice Kennedy, used for the Court in Saffle v. Parks at page 493 in which you said that the State must not cut off full and fair consideration of mitigating evidence.

QUESTION: Well, but the evidence was introduced in this case and counsel is not confined at all in their closing arguments. And my question is why is youth, under your submission in this case, any different than these other tragic instances that we've adverted to and that are present in this case and so many other capital cases.

MR. TIGAR: Justice Kennedy, first with respect to the factual premise, of course the jury heard evidence of youth in this case. It was obvious to them. The trial judge, however, shut off their inquiry rejecting proposed instructions the defendant had proposed, and instructing

the jury at joint appendix 147 at the top paragraph that the jurors were limited to answering the special issues that had been submitted to them.

Second, Justice Kennedy, we know, after Graham v. Collins, that we've got to confront and look at what this Court has done since 1984, and that's the answer it respectfully seems to us to your second question. Graham invited, indeed required, that kind of careful look. We take the Graham conclusion as being reasonable jurists would not in 1984 have been compelled to the conclusion we seek. So, I'd like to look at that.

The key phrase we submit is reasoned moral response not because we think the phrase is talismanic, but because it well describes what the Court has done since 1987. For example, the term was invoked by the Court in Sumner v. Shuman. There you rejected the categorical imperative of death. No matter how egregious the crime, you said that sentencer --

QUESTION: But why is this youth in this regard different from a tragic occurrence during adolescence? What's the difference?

MR. TIGAR: The difference is that this Court's decisions, particularly Lockett and Eddings, say that, recognize that youth has this uniquely powerful mitigating force. That tradition of Lockett and Eddings, which was

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summoned up again in Stanford v. Kentucky, is what identifies youth as such a factor. A troubled family background may also be such a factor, and the Court may have to reach that in another case.

The question for us, therefore, Justice Kennedy, is how is it, since 1984 or 1987, has the teaching of Lockett and Eddings that identifies this uniquely powerful factor focused on the sentencing process, and as to that, we put alongside Sumner v. Shuman, Stanford and Penry because there you rejected the categorical imperative of life. You thrust back again on the sentencer this duty of looking at the evidence in each individual case.

QUESTION: Your description of what the Texas courts hold these factors to be, namely, narrow, factual inquiries, suggests to me that -- although you purport to be making only an as-applied challenge, it seems to me that if we accept that description, this scheme is invalid. Maybe it's the same question that Justice Kennedy is asking. If we accept your description of the Texas system, this is invalid in all cases, not just for youth.

MR. TIGAR: The State and the amici have made that argument. Let me be clear. We do not believe that Jurek should be overruled, that this Court needs to overrule Jurek. After all, in Proffitt v. Florida, the

Court upheld the Florida sentencing statute on its face, and yet, when Hitchcock v. Dugger came to the Court in an as-applied challenge, a unanimous Court said that the statute as applied to that particular defendant didn't pass constitutional muster. If it could be done between Proffitt and Hitchcock, we suggest it could be done here.

And Penry puts paid, it seems to us, to the argument that Jurek needs to be overruled.

QUESTION: Yes, but Proffitt didn't -- I mean, we had never accepted the proposition that the State inquiry was a narrow, factual inquiry of whether there was, as you say there is in this case, premeditation or deliberateness. There either is or isn't. And what do you say? Two blinks of an eye or something --

MR. TIGAR: Well, that was the prosecutor's words, Justice Scalia.

QUESTION: But, I mean, if that's what this means in the Texas statute, surely it does not allow a reasoned moral response.

MR. TIGAR: The two special issues that were before the Court in Jurek, Justice Scalia, had at 1976 been considered only in two cases by the Court of Criminal Appeals, Jurek and a case called Smith. Indeed, the issue in Jurek was whether the Texas statute, like the others argued that day, impermissibly vested undue discretion in

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jurors.

So, what we are saying is that as applied, as it has played out, the jurisprudence of the Texas Court of Criminal Appeals has robbed the first special issue of any force it might have had to make this reasoned moral response. Hundreds of people have been sentenced to death under this statute. Fifty-six times the Court of Criminal Appeals has looked at this first special issue and never found the evidence wanting.

With respect to the second special issue, in the Zimmerman case, acknowledging, quoting Justice Souter's dissent that it could be and was appropriately used as aggravating, even in mental illness cases, these disturbed cases, in Earhart, the Court of Criminal Appeals said, well, mental illness, well, that's an aggravator, and then they go ahead and deny a mitigating instruction on Penry grounds, so that if, indeed, there is a gap between the promise of Jurek and what has, in fact, occurred, the gap has occurred because the Court of Criminal Appeals did not accept the invitation in Jurek. That, it seems to us, is the parallel between the Proffitt, Hitchcock, and Jurek, Penry, Johnson line, but I acknowledge --

QUESTION: In this connection, I was interested in reading Ex parte Mathis where the Texas Court of Criminal Appeals does say that future dangerousness is a

fact. It says ultimate fact. Was this a new insight by the Texas court or a new limitation in your view?

MR. TIGAR: No, I don't believe that it is a new limitation. The Court of Criminal Appeals' attitude toward the second special issue has changed gradually over the years. We've not, Justice Kennedy, for our purposes sought to identify a point at which it turned or didn't turn. Certainly in the wake of Penry, the Court of Criminal Appeals has been moved to reevaluate that second special issue.

QUESTION: Well, of course, this is not a Teague case anyway. I wasn't thinking about it in that connection.

But it does -- I'm asking whether or not what the court of appeals said is an insight that it has come to after examining many of its cases. This is just a factual determination, which it seems to be somewhat inconsistent with reasoned moral judgment.

MR. TIGAR: The Court of Criminal Appeals has hued to the view that this is a narrow inquiry. That is certainly true. It has given the extra instruction, commanded by Penry in Penry type cases tried -- that weren't tried under the new statute where there really isn't any problem. So, the answer to your question is yes. The Court of Criminal Appeals has rejected every

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invitation tendered by any lawyer of whose existence I am aware to recognize what this Court has done since 1987.

And I know, Justice Kennedy, as you said, that this is not a Teague case, but Graham v. Collins was, and the issue was here. And Justice Scalia has asked me about Jurek, and I know other Justices are concerned about it. There is a reliance interest that the State can legitimately have in opinions of this Court, such as Jurek. We submit that the reliance interest is fully satisfied by holding these claims barred on Federal habeas corpus.

On direct appeal, the State, it respectfully seems to us, must take the consequences of not having paid careful attention to what this Court has done since 1987 because having rejected the categorical imperatives of death and life, you've put the sentencing process, this adversary inquiry, at the sentencing phase into new and very stark relief.

QUESTION: You think, Mr. Tigar, that the Court's jurisprudence in capital cases, since 1987 has become, at least in this -- more favorable to the defendant?

MR. TIGAR: No, Justice -- Chief Justice Rehnquist, I do not think it has become more favorable to the defendant.

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QUESTION: Well, then -- I thought from your statement that what the Court has done since 1987 we have to -- suggested that.

MR. TIGAR: Chief --

QUESTION: I'm wrong, I take it.

MR. TIGAR: Chief Justice Rehnquist, in some ways that jurisprudence has become more favorable to the State. Under Payne v. Tennessee, as warned by Dawson v. Delaware, the State has a freer play to put on aggravating evidence and have the jury fully consider it. The State took full advantage of that here, putting in the aggravating phase such things as the defendant had made a vulgar gesture to a teacher by way of showing he'd be dangerous in the future. And so, on the aggravating side, the Court has said, yes, there's this expanded right.

On the mitigating side, Chief Justice Rehnquist, there has also been an expansion, but guidance. The paragraph in Saffle, to which I adverted earlier, it respectfully seems to us, encapsulates this teaching on the mitigating side.

QUESTION: Have any of these cases since 1987 on the mitigating side that you're relying expressly noted that a change is contemplated?

MR. TIGAR: In Sumner, the Court closed the door for good and all, according to the opinion, on -- excuse

me -- the categorical imperative of death, and the Court has argued about whether principles are new or not new under the rubric of Teague. That's as best I can do in answer to your question. I think that notion of what was obvious when and what was new has been a significant focus of this Court's teachings since that time.

MR. TIGAR: Well, I would have thought your answer to the Chief Justice would have been that to the extent that the cases can be and must be read as saying that a reasoned moral judgment must be applied by the jury, that this is helpful to the defendant on the mitigating side of the ledger.

MR. TIGAR: Yes, Justice Kennedy, it is helpful, but guided -- guided.

QUESTION: I'm not sure that the cases must be read that way.

MR. TIGAR: It would be presumptuous of me to tell the Court how to read its own cases. I do suggest that the citation of Lockett and Eddings, followed by the admonition to prevent capricious leniency, followed by the statement that the State must not cut off full and fair consideration of mitigating evidence in Saffle v. Parks, encapsulates this idea, that these things are to be resolved in the crucible of the adversary system and not by categorical notions.

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I would also suggest another guidepost for the Court as it approaches this case. The State, after all, has said that the case ought to be tested under Saffle and Boyde. Give some deference say they. But if, indeed, these special issues do not permit a reasoned moral inquiry -- reasoned moral response, there is nothing to which deference may appropriately be given. And we submit, of course, that it is far more than a reasonable likelihood that these issues do not permit such consideration.

Now, respondent does suggest -- and this -- I know some of the Court's questions evoke it -- that, after all, the jurors heard the evidence. After all, the jurors were aware that -- what the effect of their questions would be. But that, we respectfully suggest is another way of saying that jurors might disregard their oaths and specific instructions, a concept this Court has rejected in other settings, in Griffin v. United States.

So, in sum, the respondent doesn't address reasoned moral response. You hardly find it in their brief. It doesn't address what the Court of Criminal Appeals has done in these cases that we have cited and talked about. It doesn't trace what we submit this Court has taught, particularly since 1987. And ultimately and critically, respondent says, well, the jurors might have

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done it anyway.

That last notion strikes very deep I respectfully submit. In Morgan v. Illinois, the Court held, and in so doing rejected in rather strong terms a dissent that argued the contrary, that if even one juror would not follow the instructions to apply mitigating evidence, that the verdict could not stand. What we are saying here is that when all 12 jurors are deprived of any vehicle at all to express their reasoned moral response, that matters are much worse.

This process to which the Court directs our attention, this adversary process -- Dorsie Johnson, his early life filled with horrors, as has been acknowledged in some of the discussion here, driven out into the arms to these peers who traced this path of violence and substance abuse, his father saying 19 is a foolish age -- I respectfully submit that no advocate in this Court who has ever confronted a jury to try a case that involves some aspect of the human condition can doubt that this evidence to a properly instructed jury would have unique power. And we respectfully suggest that this Court's emphasis on the adversary inquiry, by which life or death is determined, requires that a jury have such instructions so that its response may be a moral one, guided, to be sure as this Court has warned in Brown and Saffle, but

also taking account of the core value of this mitigating evidence.

I would respectfully request to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Tigar.

Ms. Parker, we'll hear from you.

ORAL ARGUMENT OF DANA E. PARKER

ON BEHALF OF THE RESPONDENT

MS. PARKER: Thank you, Mr. Chief Justice. May it please the Court:

Johnson, indeed, does not ask the Court to overrule Jurek v. Texas. He instead asks the Court to gut it and let it die without further comment.

To accomplish this, Johnson proposes an unprecedented rule, one that would require the State to provide an independent life option, despite the fact that proffered mitigating evidence maybe both considered and given mitigating weight under the special issues.

QUESTION: Mrs. Parker, may I ask you this question? And it -- what I'm going to put to you is what, in a very summary fashion I think is the argument in the as-applied sense here, and I want you to tell me if I'm wrong or if I'm -- or if there is a legal flaw in it.

As I understand the argument on the other side, it is if you start with the assumption that you're going

to keep Lockett and Eddings and Saffle, secondly, if a reasonable juror could have concluded in this case that Johnson was at least mature enough to have satisfied the deliberateness criterion, and likewise that he was still young enough so that for some period in the future -- I don't know -- a couple of years, 3, 4, 5 years -- the kind of youthful lack of judgment could continue to be a dangerous factor, then on those three premises, in effect, the jury would be in a bind, given the instructions they got, because there would, on the one hand, be an obligation to give mitigating effect to relevant mitigating evidence, but that on the facts of the case, there would have been no way to do it because the so-called mitigating evidence could not have been considered in any way favorable to the defendant under deliberateness and could only have been considered as a -- as an aggravating factor on the question of future dangerousness.

And I think his argument simply is that in this case, this kind of case -- this is an example of it -- there's no way that the so-called mitigating evidence of youthful impetuousness or bad judgment could have been considered for a mitigating purpose and could have been given the so-called reasoned moral treatment for that purpose.

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Do you understand that to be his argument? And if it is, what is your answer to it?

MS. PARKER: I do understand that to be his argument, Your Honor, and it is incorrect for three reasons. First of all, the question what a juror or jury could have done is not the pertinent inquiry under --

QUESTION: Well, I think you know I may have misspoken there. What a juror reasonably could be expected to do on the evidence of the case. I think you're right on that point.

MS. PARKER: Yes, Your Honor. What the jury was reasonably likely to do, how the jury was reasonably likely to interpret its instructions. That inquiry goes to whether the jury was precluded as a matter of law from giving any mitigating weight to the evidence. That is not the case here, Your Honor.

QUESTION: Well, isn't it -- isn't the proper way to apply it that if the jury was reasonably likely to view the evidence in the way that I think Mr. Tigar is suggesting, i.e., as certainly in no way contrary to the deliberateness of the act, and as also indicating under the second issue a continuing youthfulness for some period of time, which imports danger with it, if those two conclusions were reasonably likely, then there's no way they could consider it for a mitigating purpose. Isn't

that the proper way to apply the standard?

MS. PARKER: No, Your Honor, it is not. I think that that is inconsistent with how this Court has recognized that jurors are likely to view their instructions, and that in this type of case, where the evidence does possess mitigating relevance to the second issue, and where jurors --

QUESTION: Well, how -- in other words, why is he wrong when he assumes that a reasonable juror would view it as aggravating rather than mitigating?

MS. PARKER: I think there are -- that premise is legally incorrect for two reasons, the first being that it is not consistent with what the Court of Criminal Appeals said in Zimmerman. In Zimmerman, the Court of Criminal Appeals -- this is an as yet unpublished opinion, Your Honor, but on the very same page that is cited in the reply brief at page 12, the Court of Criminal Appeals stated that youth can be seen as mitigating because maturity often coincides with age. A jury might be merciful toward a young defendant in the belief the defendant could live a productive life after an extended period of incarceration. This --

QUESTION: Well, I think there's no question we would all agree that it can be seen in that way. But isn't the question here whether a reasonable jury could

have treated it as, in fact, aggravating, and if the reasonable jury did treat it as aggravating, which is possible I assume on this record, then it could not have given any mitigating effect? And his argument is they simply should have had that option.

MS. PARKER: No, Your Honor. The jury could still give the mitigating effect to that evidence. It is precisely to the extent that youth may reflect a reduced culpability in the sense that he is immature or impulsive, that that evidence equally indicates that he will not pose a future danger.

QUESTION: What does future dangerousness mean? Does it mean whether he is going to be dangerous tomorrow, or does it mean whether he is going to be dangerousness --danger after he has been released from a period of incarceration? Do we know that?

MS. PARKER: The Court of Criminal Appeals has stated that it's whether the defendant would continue to commit criminal acts of violence so as to constitute a continuing threat whether in or out of prison.

QUESTION: Well, how was the jury instructed on that in this case? Was the jury given any instruction on -- to explain what you have just said?

MS. PARKER: No, Your Honor, it was not.

QUESTION: So, the jury didn't know how to

interpret it. I mean, it was open to the jury to interpret it any way it could reasonably do given the basic language.

And if the jury had interpret -- if a reasonable juror had said I guess what they're getting at by this second question is whether for any period of time starting today and going into the future he would continue to be dangerous and would continue to be dangerous in part because of his youthfulness, then I would count youthfulness as an aggravating factor. And that was -- I assume that kind of an interpretation was certainly open to a reasonable juror given the instructions and given the evidence. Isn't that true?

MS. PARKER: A hypothetical juror certainly could view it that way, but that is not --

QUESTION: Well, as long -- I didn't mean -- I'm sorry. I shouldn't have interrupted you, but as long as a reasonable juror could have done that, then wasn't a further instruction required because if the reasonable juror had done that, wholly consistently with the court's instructions, then the juror would have been in the position, consistent with those instructions, of being unable to give any mitigating effect even if on a proper instruction mitigating effect could have been given?

MS. PARKER: Again, Your Honor, that is not

consistent with the reasonable likelihood standard. That standard --

QUESTION: You're saying that you think a reasonable juror would not have interpreted it the way Justice Souter says.

MS. PARKER: That is precisely correct, Mr. Chief Justice, and that is particularly true in a case where the jury believes that the crime is attributable to a mitigating aspect of youth and that that defendant, precisely to that extent, is likely not to pose a future danger. That is what the Court of Criminal Appeals recognized in Zimmerman.

And certainly nothing in the Constitution requires that the jury view evidence only as a mitigating or give it only mitigating effect. The Court recognized this in the context of a claim of ineffective assistance of counsel in Berger v. Kemp.

The problem in Penry was not that the jury was free to choose whether to view the evidence as aggravating or mitigating or that it could give effect to both edges in the context of answering the special issues.

QUESTION: But -- when you speak of giving effect to both edges, don't we usually premise everything we say about jury instructions on the assumption that if a juror could reasonably view the evidence in one of two --

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in either of two ways, that the juror has got to be given instructions as to the legal significance of viewing it one way and the legal significance of viewing it the other? And if in a case like this, the jury -- a reasonable juror might have said, gee, I think this is aggravating, he'll do it again in another couple of years, or a reasonable juror might have said, no, I think in the long run he is going to outgrow it, so it's mitigating, if reasonable jurors could have viewed it either way, the normal rule would be to give them legal instructions as to what effect to give the total evidence depending on which way they saw it. They didn't get instructions on the two alternatives that were open to them. Isn't that true?

MS. PARKER: Your Honor, they were instructed not in that regard, but they were instructed that they could consider all of the evidence whether aggravating or mitigating. And under the reasonable likelihood standard, a jury is --

QUESTION: But they could only consider it -- maybe I'm missing something. They could only consider it for the purpose of answering these two questions. Isn't that true?

MS. PARKER: That is correct, and as the evidence in this case reflects, the jury could give mitigating effect to Johnson's youth precisely as the

evidence was presented and --

QUESTION: But if the reasonable juror said I regard this as an aggravating factor in the sense that the -- under the second question, in the sense that I think this person is going to remain impetuous for a few years and he's likely to do it again, then the juror could not, under -- or I was going to say under the instruction -- under the lack of instruction, have said but I still think I ought to give a mitigating significance to the youth. That's the thing that he couldn't have done unless he was behaving irrationally. I suppose we -- it's always possible that a juror might be irrational, but we can't base our law on that. So, if the juror had said, no, this is aggravating, the juror could not consistently with those questions have given it a -- any other or different mitigating effect. Isn't that true?

MS. PARKER: No, Your Honor. Again, I think the jury or the juror could weigh both aspects of it with respect to the special issues. These terms, as you have recognized are not defined. They have a common sense core meaning. Nothing requires the jury to view the second special issue in the manner that you describe. Both sides were free to argue precisely how the evidence supported an answer to that issue that was favorable to them, and --

QUESTION: Would it have been proper for counsel

to argue in the terms of this statement? If you, the jury, find that Johnson's youth was an aggravating factor so that you conclude that he is more likely to be dangerous in the future for some period of time as a result of his youth and you so answer the second question that he will be dangerous in the future, you may still in some way give effect to the mitigating character of his youth. Would that have been a proper argument?

MS. PARKER: For defense counsel to make?

QUESTION: Yes.

MS. PARKER: Yes, Your Honor, I believe it would be because --

QUESTION: And if a juror had -- and I suppose this isn't possible, but if a juror had said please tell me how, what would the answer have been? The jury has got to return answers to two questions, the deliberateness question and the future dangerousness question. That's all the jury can do, as I understand it. So, how would the juror, on the view of the evidence I have just expressed, have given the mitigating effect?

MS. PARKER: Your Honor, because the question not only asks about continuing criminal acts of violence, but whether that would render this defendant a continuing threat to society, and nothing --

QUESTION: Well, let's assume it will be. I

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mean, let's assume the juror can reasonably say, look, he's going to be very dangerous for another 3 or 4 years until he gets older. And therefore the answer to the second question is yes, he is going to be dangerous in the future. But I happen to think, even though he is dangerous, he shouldn't get the death penalty here because he was young when he committed the act. I don't see how the juror could give -- in any way give vent to that final conclusion consistently with his answers to the two questions.

MS. PARKER: I think that the answer to that again is that nothing requires the jurors to take that narrow a view of the special issues and that --

QUESTION: No, but the jurors -- I mean, that is a reasonable way for the jurors to interpret the question, isn't it? You say, well, they don't have to. They might have read the question a different way, but if that's a reasonable way for them to interpret the question, it's consistent with any instruction or lack of instruction, they say he is going to be dangerous in the future, but I happen to think because he was young, he shouldn't get the death penalty, there's no way they can express that last conclusion.

MS. PARKER: Again, Boyde makes it clear that the reasonable likelihood standard does not assume that

jurors will pick from among various interpretations of their instructions the one that will render the presentation of mitigating evidence and the punishment phase a nullity. And that is precisely what that hypothetical is premised on.

QUESTION: Mrs. Parker, I certainly as a reasonable juror, given this instruction, would not think that what you were asking me was whether he's going to be future -- whether he's going to be dangerous tomorrow, but rather whether he's going to be dangerous after he's released from prison --

MS. PARKER: And that is --

QUESTION: -- for whatever term you might give him for the murder. And therefore he should be executed because he will be dangerous in the future no matter how long you leave him in prison.

Why would the jury be asked whether this person must be executed because he's going to be dangerous tomorrow even though he's going to be in prison for the next 10 years at least? I can't imagine if you're talking about reasonable understanding of the jury.

MS. PARKER: I would agree with you there, Your Honor. It is very unlikely --

QUESTION: Does the supreme -- does the court of Texas criminal appeals agree with you?

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MS. PARKER: The Court of Criminal Appeals has stated that society does encompass prison.

QUESTION: No. But doesn't the court -- maybe I'm again mis -- doesn't the Court of Criminal Appeals say that one way to consider -- one possible interpretation of youth as to dangerousness is its aggravating effect over the short term?

MS. PARKER: No, Your Honor.

QUESTION: Isn't that what it said in Zimmerman, that that's one way to consider this evidence under the question?

MS. PARKER: No, Your Honor, that is not what the Court of Criminal Appeals said in Zimmerman. In Zimmerman, the court stated that, for example, youth might be considered as aggravating because the defendant would use his remaining years to continue in a life of crime.

That same thing may be said about a defendant of any age. The fact that a 35-year old defendant would use his continuing years in that fashion would not transform the biological fact that he is 35 years old or the age of 35 years into an aggravating factor. That is much more properly viewed a reflection of character and not of age and not of the limitations of youth.

QUESTION: In your answers to Justice Souter, were you making the assumption that in its deliberations

and in giving its answer with reference to special issue 2, the jury was making a reasoned moral judgment?

MS. PARKER: I think that that underlies the jury's answer to that special issue. It affects the weight that the jury gives particular evidence.

QUESTION: Well, if it underlies it, the jury was then exercising in your view a reasoned moral judgment?

MS. PARKER: That is correct, Your Honor, and --

QUESTION: How is that consistent with the statement by the Texas Court of Criminal Appeals that the jury in answering question number 2 is making a finding of fact?

MS. PARKER: I think it has always been recognized that the special issues are factual issues, that they are factual in nature, and that a jury or jurors must be able to answer those issues without conscious distortion or bias. But there is a range of discretion and judgment consistent with those issues being factual ones. It is precisely for this reason that Witherspoon applies to Texas.

QUESTION: Well, I suppose that factual assessments, factual assumptions underlie many reasoned moral judgments, but isn't there an element of judgment -- I think you used the word merciful earlier -- an element

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of judgment that is different than simply a factual determination?

MS. PARKER: No, Your Honor, that is not correct. Because these issues --

QUESTION: Factual determinations are reasoned moral judgments? Is that what you're asking us to accept?

MS. PARKER: They are in this case. The Court recognized this in Adams v. Texas. The plurality recognized this in Franklin v. Lynaugh, and even the dissenting Justices in Blystone recognized that in answering the special issues, because they are the ultimate sentencing issues, that the jury, in fact, does make a moral judgment about this defendant and about his crime.

QUESTION: Yes, but in Blystone the jury weighed the aggravating and the mitigating factors.

MS. PARKER: Yes, Your Honor, but a finding that aggravation outweighs mitigation is no more or no less utilitarian than an answer to these special issues. A jury in Pennsylvania, for example, would not be free to return a sentence less than death if it honestly believed that the aggravation outweighed the mitigation, but nonetheless, a jury in Pennsylvania is not required to have an independent life option independent of its weighing of the evidence according to the State statute.

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These issues in Texas I think very importantly must be proven by the State beyond a reasonable doubt. A wide range of evidence, both aggravating and mitigating, is relevant to the issues, and because they must be proven beyond a reasonable doubt, the State certainly does not require that the jury give much weight to the evidence before it can answer a special issue no.

Unlike the typical enumerated aggravating and mitigating factors that are used in pure balancing States, Texas does not require the jury to find the existence of preliminary facts before it can then proceed to weigh those factors in deciding the ultimate issues. The catchall in Blystone, for example, is merely a vehicle by which evidence can make its way into the actual weighing process, into the process that is dispositive of punishment.

QUESTION: May I ask you? You've answered it, but I'm not quite sure I understood your answer to Justice Scalia and Justice Kennedy on the question of what the special issue 2 means when it asks is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. What period of time and what conditions does that refer to? Does it refer to conduct in prison, for example?

MS. PARKER: Yes, Your Honor, the Court of

Criminal Appeals has held that it would.

QUESTION: So, it doesn't refer as I thought -- I thought you suggested to Justice Scalia it referred to conduct after being released from prison only. No. It refers to what he might immediately do even in prison.

MS. PARKER: There is nothing about the issue that requires the jury to view it that way, and as defense counsel argued in this case, society should be viewed to exclude prison and that the jury should consider only what Johnson might do 20 or 40 years down the road. This --

QUESTION: No. That's what a lawyer may argue, but what does the instruction mean to the jury? What do you think? Is the jury permitted to consider probable conduct 10 days after he goes to prison?

MS. PARKER: That is certainly a factor that is relevant to the jury's assessment of that issue. It is not necessarily dispositive of that question, and this play in the issues --

QUESTION: Well, what if the jury came back to the judge and said we think if he's kept in jail for the rest of his life, he would not be a continuing threat, but if he were released tomorrow, he would be a continuing threat? Which is the right view of how we answer the question? How should we answer the question? What would the judge tell the jury? Say I don't know?

MS. PARKER: I believe that in all likelihood he probably would tell the jury that they --

QUESTION: Figure it out either way you want to.

MS. PARKER: Yes, that -- yes, Your Honor, that the term was not defined.

QUESTION: And this gives meaningful guidance as to whether the man should be put to death or not.

MS. PARKER: That is merely within the jury's range of discretion and judgment about the issues. There is -- it certainly is not a very wide one, and it is certainly very unlikely that a jury passing upon the fate of the particular defendant would choose that type of an interpretation of the instructions.

QUESTION: What about a slight variation on it? What if the jurors came back to the judge and said we find that there's a very high likelihood that this impetuous individual will kill again on slight provocation. If he is sentenced to prison, we think there's a serious likelihood that he's going to commit a murder in prison. May we, consistently with that conclusion of ours, answer the second question yes, that he will be dangerous in the future? Would the judge say that is an option that you have? In other words, that would be a fair answer to the question. Or would he say, no, you may not return a yes answer to the question on that assumption?

MS. PARKER: I do not believe that the judge would instruct the jury that they could not accept that assessment.

QUESTION: He would -- so, they would have the option to return a yes answer.

MS. PARKER: Yes, Your Honor, precisely depending upon their view of the evidence and whether it is, in fact, mitigating or aggravating.

QUESTION: Ms. Parker, under Texas law, is a trial judge authorized to give an answer to a question like that? I mean, these two questions are statutory, are they not?

MS. PARKER: Yes, Your Honor. Not -- I do not believe to that extent that the judge would be able to tell the jury specifically in that regard how to precisely view the evidence in the context of these issues. Trial judges are authorized -- they are not required -- to define terms in the issues. In this case --

QUESTION: Was any instruction like that asked for here?

MS. PARKER: Yes, Your Honor. Johnson asked for an -- a definition of deliberately that was, in fact, much narrower than the definition that he urged the jury to accept at the punishment phase. Depending on the jury's assessment of the evidence, it was free to accept

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Johnson's argument with respect to the interpretation of that issue. Johnson did not request any vehicle or instruction by which the jury could measure his culpability independent of the issues. He requested that the judge direct the jury to consider mitigating evidence, and the judge granted that instruction despite the fact that the Court of Criminal Appeals does not require that the instruction be given.

The future dangerousness question, Your Honor, encompasses a wide range of factors that do pertain to the defendant's culpability. That is merely an assessment that is made when the jury weighs the evidence, for the jury, as here, typically is instructed that it is free to give the evidence whatever weight it deems appropriate.

QUESTION: In your view under Texas law, would the defendant be entitled to an instruction that in answering issue 2, the jury is to exercise its reasoned moral judgment?

MS. PARKER: I think that is inherent in answering the special issues.

QUESTION: Well, if it's inherent, would he be entitled to that instruction?

MS. PARKER: No, Your Honor. It is not necessary. Juries in Pennsylvania do not have to be told that a reasoned moral judgment must underlie their

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weighing of aggravating and mitigating factors.

QUESTION: Would it be error for the judge not to give that instruction and to tell the jury that when it answers question 2, it's making a finding of fact?

MS. PARKER: No, Your Honor, it would not be. Despite the factual nature of that inquiry, there is a moral quality that is inherent in the ultimate issues of any capital sentencing scheme here.

QUESTION: But isn't it a utilitarian, moral response? In other words, isn't it a moral judgment by the jury about what ought to be done rather than a moral conclusion by the jury about the moral character of the defendant or his act?

MS. PARKER: No, Your Honor. It is no more utilitarian than a mere balancing or weighing of aggravation and mitigation.

QUESTION: Then I have to admit I don't understand the second question.

MS. PARKER: Again, consistent -- so long as jurors do not consciously distort the inquiries to the issues, they are free, depending on their view of the evidence, to give that evidence mitigating effect under the issue so long as the evidence possesses mitigating relevance to the special issues, which was true of Johnson's youth as proffered in this case, for it was

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proffered for no purpose other than the special issues. The jury is provided with an adequate procedural vehicle by which to give effect to the evidence.

The Constitution does not require an independent life option by which the jury can say that for whatever reason the death penalty is not appropriate. The proper view and the proper analysis of reduced culpability with respect to the Texas special issues is the broad rule adopted by the Fifth Circuit Court of Appeals en banc in Graham v. Collins.

QUESTION: Does the statute that Texas has amended, the present Texas death penalty statute, give an independent life option in your view?

MS. PARKER: Yes, Your Honor, I believe it does.

QUESTION: That's how you would interpret that.

MS. PARKER:. Yes, Your Honor, I believe that it does. And again, that was not a statute that was scripted by our office.

QUESTION: If you were in the legislature, is there any way you could accommodate Mr. Tigar's objection in this case without giving an independent life option?

MS. PARKER: With Mr. Tigar's view of culpability?

QUESTION: Objection in this case that youth should be considered more extensively than it was as a

mitigating factor. Is there any way you could draft a statute to accommodate that concern without creating a so-called independent life option?

MS. PARKER: No, Your Honor. I do not believe that that is possible with the overly expansive reading of Penry that he has taken and with the all-encompassing view of culpability that is advocated here and was advocated in Graham v. Collins.

The Firth Circuit identified the aspect of culpability and reduced culpability that this Court said posed the potential for problems under the Texas statute where evidence of a reduced culpability, where the major mitigating thrust of the evidence shows a reduced culpability, and that evidence is mitigating under the special issues -- thank you, Your Honor.

QUESTION: Thank you, Mrs. Parker.

Mr. Tigar, you have 8 minutes remaining.

REBUTTAL ARGUMENT OF MICHAEL E. TIGAR

ON BEHALF OF THE PETITIONER

MR. TIGAR: Mr. Chief Justice, and may it please the Court:

In answer to Justice Kennedy's last question, it is, of course, true that Texas has amended article 37.071 of its Code of Criminal Procedure and now provides expressly a question that gives this life option by asking

in terms about moral blameworthiness. Texas, thus, makes it unanimous among the States by asking some form of question that is a -- an inclusive question, but with respect to how you treat the answers to the questions one asks jurors, it is not our position that the independent life option must be provided. The States are free to shape and guide how the sentencer deals with answers to questions that are clearly put.

In that connection, I think it's worth noting that counsel here, contrary to the assertion made, did seek to give the jurors a life option. At joint appendix 128, there's the requested instruction as to whether mitigating outweighs aggravating so the defendant can be rehabilitated. So, there was some effort to ameliorate, which was turned back by the trial judge.

But more significantly, in our respectful submission, what has happened since 1984 and particularly since 1987 is that this adversary process is supposed to work in a particular way, and the respondent is plain wrong in not recognizing that a majority of this Court said in Saffle v. Parks that the State may not cut off full and fair consideration -- not some consideration, not a little bit, not by torturing the language, but full and fair consideration. And here's Dorsie Johnson.

Justice O'Connor, when I was on my feet before,

I had forgotten Sandra Lockett was 21, and Hitchcock was 20. And why that escaped my mind I don't have any good reason for. Ultimately --

QUESTION: You'll understand that when you get a little older.

(Laughter.)

QUESTION: And, Mr. Tigar, could I ask you with this open-ended question that you say every State presents to the jury, do you think there's any real likelihood that you would be up here arguing some day that -- making the same argument that prevailed in Furman, that there's really -- that everything is up for grabs for the jury and there's no real way to know how a jury operates? Reasoned moral judgement. What does that mean?

MR. TIGAR: Justice White, no, I will not be here making that --

QUESTION: You will not. You will not ever come up here making that argument.

MR. TIGAR: I will never make that argument, Justice White, because I don't regard it as --

QUESTION: Well, somebody may not hire you.

(Laughter.)

MR. TIGAR: Well, I have no control over that, but that does not accord with this Court's precedents in any sense of the word; that is to say, this Court has

shorn off the mandatory parts. It has directed the individualized inquiry. I have spent the whole of my law life believing that jurors do reach moral responses, but I have spent an equal amount of time seeking instructions that make sure those responses are reasoned.

I don't find in the use of that phrase anything other than an --

QUESTION: Would you have made the arguments that were made in Furman in favor of the defendant?

MR. TIGAR: Justice White, had I at that time been asked to argue broadly about the constitutional defects of the death penalty system, I might very well have made such arguments, but I am here --

QUESTION: But what if you had been writing a law journal article as a professor? Would you have said that's the -- that is the result that should obtain in Furman?

MR. TIGAR: I might very well at that time have said that that is the result that should have obtained in Furman, Justice White. But I wish to insist equally that I have read carefully the Court's opinion in Graham, and I believe that we have fully addressed the considerations that you put on the table there about what this Court has taught. Those were the past, and in the times -- the six times before I've been here, the Court and particularly

Justice White has reminded me that one day I may argue one thing, and then I'll see what the Court does and try to take account of it --

QUESTION: I agree with you, and you should. As you should as a good lawyer.

MR. TIGAR: But -- and I think that finally where this comes out is this, that the factual inquiry posed by these two special issues is appropriate perhaps to the guilt phase. That's where we make factual inquiries to begin with. We treat the defendant as if the defendant understood. It's the sort of Kantian imperative.

But in this sentencing phase, we ask the real question, who is this defendant? What choices did he or she make and how did he or she come to make them? This is not a wide-open, rootless inquiry, particularly in light of Lockett and Eddings.

And I close, Justice White, by saying again that I think your opinion for the Court in Morgan v. Illinois is the guidepost we can follow because there legality --

QUESTION: Flattery is a great thing.

(Laughter.)

QUESTION: Flattery is a great thing.

MR. TIGAR: I feel disabled from responding to it.

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(Laughter.)

MR. TIGAR: I read --

QUESTION: That was my intent.

(Laughter.)

MR. TIGAR: Well, that being the case --

QUESTION: I would still like to know --

MR. TIGAR: -- if there are no further questions, I respectfully request leave to yield the remainder of my time.

QUESTION: No. I would still like to have you tell me, because I'm not as familiar as some of the others are, why is the Morgan case relevant.

MR. TIGAR: Because, Justice Stevens, in Morgan the Court dealt with a juror who said I don't care what the instructions are, I won't follow them. Morgan, in the last part where the Court speaks of the dissent and the dissent's view of the Court's precedents, puts the Morgan holding firmly in the context of everything the Court had done since Woodson, and then reaffirms the conclusion. The notion is that having a juror who says I don't care what the instructions are, I won't follow it, that's illegality. That invalidates the process.

We say that's the same as -- indeed, not as bad as -- not giving the jurors any instruction at all about full and fair consideration of this very uniquely powerful

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category of mitigating evidence. That to us is a part of this process of making sense, a part of this process of saying that there is a response to be called for, and yes, it is moral, but that the process of reason controlling what some judges -- Judge Higgenbotham of the Fifth Circuit has called black box decisions -- must be one of which the touchstone is legality.

QUESTION: One other question, Mr. Tigar. If we were to attach significance to reasoned moral response, would that permit the imposition of the death penalty in the same category of cases that was permissible at the time Furman was decided?

MR. TIGAR: It would permit it in the sense that --

QUESTION: For example, for rape, for --

MR. TIGAR: You mean with respect to categories of offenses? Absolutely not, Justice Stevens, because the Court -- reasoned moral response becomes newly important since 1987 because the Court has rejected the categorical imperative of life with respect to offenses such as rape and the -- categorical imperative of death with respect to offenses such as rape and the categorical imperative of life with respect even to youthful and mentally retarded offenders. So --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tigar.

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I think you've answered the question.

The case is submitted.

(Whereupon, at 11:10 a.m., the case in the above-entitled matter was submitted.)

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Dorsie Lee Johnson, Jr., Petitioner v. Texas

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BY Lora M. May

(REPORTER)