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JOHNSON v. TEXAS 113 S. Ct. 2658 (1993)

tirely on how the trial judge conducts the determination of whether the defendant's waiver is valid. In Moran's case, a more thorough examination most probably would have uncovered the extenuating circumstances surrounding Moran's guilty plea and waiver of counsel.

Virginia rule of criminal procedure 3A:8, which essentially mirrors Federal Rule of Criminal Procedure 11, codifies the *Boykin* requirements.[25] Form 6, included in the Virginia rules, ensures that a thorough record of the defendant's state of mind at the time of the guilty plea is on the record. That form includes twenty-four detailed (suggested) questions to be asked by the judge to an accused who pleads guilty. Assuming that the defendant is alert and fully understands the judge's inquiries, the form questions should protect the defendant's rights under *Boykin*.[26]

Defense counsel representing an individual like Moran, impaired by drugs or by mental illness, have special responsibilities. The Model Code of Professional Responsibility states: "Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer . . . ."[27] Counsel in such a criminal case assumes the role of a quasi-guardian as well as an advocate.[28] Although the client may be incapacitated, an attorney still has a responsibility to consider his wishes. As the comment to Model Rule 1.14 states: "[A] client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. . . ."[29] While counsel must take into consideration the wishes of his partially incapacitated client, he must not stray from his ultimate duty to act in the best interests of his client.

Finally, one of the most important lessons anyone acquainted with *Moran* must take away with them is the importance of discouraging pleas of guilty to capital murder unless a sentence other than death is assured.[30] The appellate process as it now stands often will make such decisions irrevocable. *Moran* is a clear example of how the true contentions of a defendant may be distorted in the appellate process. A defendant like Moran who emerges from a drug induced haze, may not be given the opportunity to withdraw his plea.

Summary and analysis by:
Paul M. O'Grady

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25 "A circuit court shall not accept a plea of guilty or nolo contendere without first determining that the plea is made voluntarily with the understanding of the nature of the charge and the consequences of the plea." Virginia rule of criminal procedure 3A:8(b).

26 The Supreme Court of Virginia held a defendant's guilty plea under *Boykin* invalid in *Gardner v. Warden of the Virginia State Penitentiary*, 222 Va. 491, 281 S.E.2d 876 (1981). In that case, defendant agreed to plead guilty to murder in return for a sentence of thirty years imprisonment and a five year suspended sentence. He was told to respond negatively should the judge ask if his plea was based on a deal with the Commonwealth's attorney. Not having been previously consulted, the trial judge accepted the guilty plea and sentenced defendant to sixty years with ten years suspended. The supreme court reversed the trial court holding that it was clear that under the circumstances that the guilty plea by the defendant had not been entered into intelligently and knowingly, and that the defendant should have had an opportunity to withdraw his guilty plea. *Id.* at 495, 281 S.E.2d at 878.

For other Virginia decisions applying *Boykin, see, e.g., Burton v. Peyton*, 210 Va. 484, 489, 171 S.E.2d 822, 826 (1970)(upholding validity of guilty plea based on *Boykin*); *Miracle v. Peyton*, 211 Va. 123, 126, 176 S.E.2d 339, 340 (1970)(same); *Anderson v. Warden*, 222 Va. 511, 515, 281 S.E.2d 885, 888 (1981)(noting *inter alia* that the "purpose of the [*Boykin*] examination on the record is to forestall 'the spin-off of collateral proceedings' . . . ." (quoting *Boykin*, 395 U.S. at 244)).

27 Model Code of Professional Responsibility E.C. 7-12.

28 *See* Henderson, *Presenting Mitigation Against the Client's Wishes: A Moral or Professional Imperative?*, Capital Defense Digest, this issue.

29 Model Rules of Professional Conduct Rule 1.14, cmt. 1.

30 *See Commonwealth v. Dubois*, 435 S.E. 2d 636 (Va. 1993), and case summary of *Dubois*, Capital Defense Digest, this issue.

JOHNSON v. TEXAS

113 S. Ct. 2658 (1993)
United States Supreme Court

FACTS

On March 23, 1986, nineteen year-old Dorsie Lee Johnson and a friend, Amanda Miles, robbed a convenience store in Snyder, Texas. Johnson shot and killed the clerk, Jack Huddleston. A few weeks after the crime, Johnson was arrested for a subsequent robbery and attempted murder of a store clerk in Colorado City, Texas. At that time, Johnson confessed to Jack Huddleston's murder and the robbery in Snyder. The homicide qualified as a capital offense under Texas law because Johnson intentionally or knowingly caused the clerk's death and the murder occurred in the commission of a robbery.[1]

During the penalty phase of the bifurcated trial, the State presented a variety of evidence to establish future dangerousness, covering a time period from an incident in the third grade when Johnson stabbed a classmate with a pencil, to six days after Huddleston's murder when Johnson fired two shots at a man outside a Snyder restaurant, and culminating with testimony from a sheriff's deputy in a jail where Johnson was being held, stating that Johnson had threatened to "get" the deputy when he was released. In contrast, the sole witness in mitigation for the defense was Johnson's father, who testified that an eighteen or nineteen year-old does not fully evaluate his conduct in the same way as an older person. Johnson was sentenced to death.[2] The Texas Court of Criminal Appeals affirmed.[3]

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1 Tex. Penal Code Ann. §§19.02(a)(1), 19.03(a)(2) (Vernon 1989). *See* case summary of *Graham v. Collins*, Capital Defense Digest, Vol. 5, No. 2, p. 8 (1993). *Cf.* Va. Code Ann. §18.2-31(4).

2 At the time of Johnson's trial, the Texas capital-sentencing statute contained two "special issues" for the jury to consider:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the

Five days after the Texas Court of Criminal Appeals ruling, the United States Supreme Court issued its opinion in *Penry v. Lynaugh*.[4] Johnson's motion for rehearing in the appeals court was granted. Johnson argued that the Texas capital-sentencing statute did not allow a jury to adequately give effect to mitigating evidence of youth. The court rejected the argument on its merits, finding that the jury was able to express a reasoned moral response to mitigating evidence within the scope of Texas Criminal Procedure Code Article 37.071 instructions. The United States Supreme Court granted certiorari to decide whether the future dangerousness special issue allowed the jury to give adequate mitigating **effect** to evidence of defendant's youth.

HOLDING

On direct review, the United States Supreme Court affirmed. The Court ruled that the jury would be able to consider both the potential lack of maturity of defendant and the potential for lessened moral culpability for his actions.[5] The Court rejected Johnson's arguments that the Eighth Amendment, particularly as interpreted in *Penry v. Lynaugh*, required a separate jury instruction to permit the jury to give effect to youth as a mitigating factor.[6]

ANALYSIS/APPLICATION IN VIRGINIA

Johnson is the first case in which the Court has considered, on the merits, the issue of whether a Texas jury could fully consider and **give effect** to all mitigating aspects of youth.[7] In Johnson's case, the United States Supreme Court distinguished the defendant's situation from that of the defendant in *Penry v. Lynaugh*. In *Penry*, the Court concluded that the jury would view Penry's mental retardation only as tending to prove the aggravating factor of future dangerousness. Therefore an additional instruction was necessary to permit the jury to consider, and if it wished, give effect to the potential mitigating character of retardation as lessening moral culpability on the part of the defendant. The *Penry* court ruled that the Texas sentencing scheme limited the jury's ability to consider defendant's mental retardation, as "[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."[8]

In *Johnson*, the Court applied the test developed in *Boyde v. California*,[9] and found that "there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of petitioner's youth."[10] The Court in *Johnson* held that there was not the same double-edged sword regarding youth as there had been with mental retardation evidence in *Penry*, as any evidence of youth would not automatically be seen as aggravating. The Court stated that "[i]f 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."[11] The Court also concluded that the *Penry* problem did not arise in *Johnson* because the Texas statute included a nonexclusive list of mitigating factors that included defendant's age, while there was no such reference to mental retardation.[12]

In her dissent, Justice O'Connor explained that the requirement that mitigation evidence be relevant to the issue of future dangerousness does not permit the jury to give **full** effect to youth as a mitigating factor, although youth may be considered for some purposes (i.e., youth will grow out of their violent behavior as they grow older).[13] However, the "lessened moral culpability" aspect of youth has nothing to do with future dangerousness. Justice O'Connor correctly explained that "not one of the special issues under the former Texas scheme... allows a jury to give effect to the most relevant mitigating aspect of youth: its relation to a defendant's 'culpability for the crime he committed'."[14] The concept of "lessened moral culpability" is that certain classes of people will be deemed less blameworthy for their actions than would members of other classes who engaged in similar conduct. The decision is made by members of society that for one reason or another, certain people will not be held to as high a standard of moral responsibility as others.

The majority in *Johnson* did not consider that allowing jury instruction on the mitigating factor of youth only as it related to future dangerousness was a limitation per se on the consideration of mitigating evidence. Thus, they found no violation of *Lockett, Eddings* or *Penry*. Rather, citing *Boyde*, the majority held that states have some leeway in

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evidence, whether the defendant's act was unreasonable in response to the provocation, if any, by the deceased.

Tex. Crim. Pro. Code Ann. art. 37.071(b) (Vernon 1981). The death sentence was mandatory if the jury unanimously answered all three issues affirmatively. In effect, those three issues essentially boiled down to one question regarding future dangerousness.

In 1991, the Texas legislature amended this statute in response to the decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989). Now, if the jury answers in the affirmative to all three questions, the court must instruct the jury to determine "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." Tex. Crim. Pro. Code Ann. art. 37.071(2) (Vernon Supp. 1992-1993).

[3] *Johnson v. Texas*, 773 S.W.2d 322 (Tex. Crim. App. 1989).

[4] 492 U.S. 302.

[5] *Johnson v. Texas*, 113 S. Ct. 2658, 2669-70 (1993).

[6] *See Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that sentencer must not preclude presentation and consideration of evidence in mitigation that is relevant); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (holding that sentencer must consider all of the mitigating evidence that the defendant offers); and *Penry v. Lynaugh*, 492 U.S. 302 (ruling that jury must be able to give effect to mitigation evidence).

[7] The issue of whether or not the future dangerousness question posed to the jury adequately allows the jury to fully consider and **give effect** to all aspects of youth was first raised before the United States Supreme Court in *Graham v. Collins*, 113 S. Ct. 892 (1993). *See* case summary of *Graham*, Capital Defense Digest, Vol. 5, No. 2, p. 8 (1993). However, as *Graham* was before the Court on collateral review, the Court ruled that consideration of the issue was procedurally barred by the rule established in *Teague v. Lane*, 489 U.S. 288 (1989) (holding that a habeas petitioner may not create a new rule, nor employ a new rule from a case decided after his case has reached final judgment, unless the rule would (1) decriminalize a class of conduct or prohibit the imposition of capital punishment on a particular class of people; or (2) involve the creation of a watershed rule of criminal procedure).

[8] *Penry*, 492 U.S. at 320.

[9] 494 U.S. 370 (1990) (finding that the standard for jury instruction on mitigation is whether there is a reasonable likelihood that the jury has applied the challenged jury instruction in a way that prevents the consideration of constitutionally relevant evidence). *See* case summary of *Boyde*, Capital Defense Digest, Vol. 3, No. 1, p. 11 (1990).

[10] *Johnson*, 113 S. Ct. at 2669.

[11] *Id.* at 2670.

[12] *Id.* at 2669-70.

[13] *See Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that sentencer must not preclude presentation and consideration of evidence in mitigation that is relevant).

[14] *Johnson*, 113 S. Ct. at 2673 (O'Connor, J., dissenting) (quoting *Skipper v. South Carolina*, 476 U.S. 1,4 (1986)).

shaping the way in which mitigating evidence is considered by the jury.

Johnson suggests several matters of importance to Virginia attorneys. First, this case teaches the importance of thorough investigation in building a strong case in mitigation.[15] While the prosecution undertook a full-scale investigation into the defendant's past and found evidence relevant to future dangerousness in a multitude of occurrences from relatively early childhood up to the time of the trial, the defense utilized only the defendant's father, who testified about defendant's troubled childhood and the impaired judgments of nineteen year-olds. The father's testimony may have had some impact on the jurors, but the defendant needed more to combat the damaging evidence presented by the prosecution. Defense counsel must investigate every aspect of the defendant's background, personality and lifestyle that may be useful as mitigation evidence.

Virginia's capital sentencing scheme, like that of Texas, includes a "future dangerousness" factor.[16] Virginia's sentencing scheme does not require a mandatory death sentence upon the finding of aggravating factors, as did the former Texas statute.[17] If Virginia defense counsel work to ensure that the jury is made aware, through argument and jury instructions, and by presentation of a real case in mitigation, that it has the option to impose a life sentence, then *Johnson* should not be an impediment to defense practice in Virginia.

Because Virginia juries are free to set sentence at life in prison for any reason satisfactory to themselves, the relevance problems at issue in *Johnson* are simply not present. Although it is constitutionally impermissible to limit mitigating factors to those highlighted by the legislature, it is still permissible for Virginia defense attorneys to offer jury instructions noting that the Virginia General Assembly has specifically recognized youth as mitigating.[18]

Summary and analysis by:
Mari Karen Simmons

15 *See* Chipperfield, *Preparing Mitigation Prior to Guilt Phase*, Capital Defense Digest, Vol. 1, No. 2, p. 19 (1989). *See also* Geimer, *Law and Reality in the Capital Penalty Trial*, N.Y.U. Rev. of L. & Soc. Change, Vol. 18, No. 2, p. 273 (1990-1991).

16 *See* Va. Code Ann. §19.2-264.4(c) (1990).

17 The 1991 amendments to the Texas statute allow the jury to sentence a defendant to life imprisonment even if all aggravating factors are found. Tex. Crim. Pro. Code Ann. art. 37.071(2) (Vernon Supp. 1992-1993).

18 *See* Va. Code Ann. §19.2-264.4(B)(v) (1990). *But Cf. Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985) (holding constitutional a verdict form that generally required the jury to consider mitigation evidence, but specifically listed vileness and future dangerousness as aggravating factors).

DELO v. LASHLEY

113 S. Ct. 1222 (1993)
United States Supreme Court

FACTS

Seventeen year-old Frederick Lashley beat and stabbed to death his physically impaired foster mother, Janie Tracy, during the course of a robbery. Lashley was treated as an adult under Missouri law and was convicted of capital murder. He was sentenced to death.[1]

Before the penalty phase of Lashley's trial, one of his defense attorneys requested that the jury be instructed on the mitigating circumstance that "[t]he defendant ha[d] no significant history of prior criminal activity."[2] The defense attorney faced a difficult dilemma. The trial judge had informed defense counsel that he would allow the prosecution to introduce evidence of the defendant's juvenile record if the defense team attempted to offer evidence that Lashley had no prior criminal record.[3] As a result, the defense attorney decided not to offer evidence but still requested the instruction. The trial judge did not grant the requested instruction.

The Supreme Court of Missouri affirmed the decision of the trial judge not to give the instruction, reasoning that Missouri law requires mitigating instructions to be supported by evidence.[4] Lashley's petition for certiorari to the United States Supreme Court was denied.[5] Lashley then filed a habeas petition in the United States District Court for the Eastern District of Missouri, but the claim was dismissed.[6] On appeal, the Eighth Circuit Court of Appeals granted relief[7] and held that the failure to give the instruction was unconstitutional under the Eighth Amendment as interpreted in *Lockett v. Ohio*.[8] The Eighth Circuit reasoned that because there was no evidence of prior criminal activity, the judge should have given the instruction.[9]

HOLDING

The United States Supreme Court held that "to comply with due process state courts need give jury instructions in capital cases only if the evidence so warrants."[10] The Court went on to state that "[b]ecause the jury heard no evidence concerning Lashley's prior criminal history, the trial judge did not err in refusing to give the requested instruction."[11] Nor did the Court accept the dissent's assertion that this holding would

1 Mo. Rev. Stat § 565.001 (Vernon 1979) (repealed Oct. 1, 1984).

2 Mo. Rev. Stat. § 565.012.3(1) (Vernon 1979) (current version Mo. Rev. Stat. § 565.032.2(1) (Vernon Supp. 1993)).

3 This was error under Missouri law. Mo. Rev. Stat. §211.271 (Vernon 1983) (prohibiting the use of the juvenile record for any purpose in any proceeding other than a juvenile proceeding).

4 *State v. Lashley*, 667 S.W.2d 712, 714-15 (Mo. 1984) (en banc).

5 469 U.S. 873 (1984).

6 *Lashley v. Armontrout*, No. 87-897(c)(2) (E.D.Mo., June 9, 1988).

7 *Lashley v. Armontrout*, 957 F.2d 1495 (1992).

8 438 U.S. 586 (1978) (requiring that death penalty schemes allow the jury to consider all mitigating factors).

9 957 F.2d at 1502.

10 *Delo v. Lashley*, 113 S. Ct 1222, 1224 (1993) (citing *Hopper v. Evans*, 456 U.S. 605 (1982)).

11 *Id.* at 1225.