right. The Court also found it important that "[Congress] may inform itself through factfinding procedures such as hearings that are not available to the courts."[73] But for cases as fact dependant as Robbins's, it is doubtful that meta-level factfinding would provide any useful information.

In fact, a thousand-cuts claim is much better addressed on a case-by-case basis in the common law fashion than by statutory law. Even if a statute were passed, the Constitution's requirement that property may not be taken without just compensation already provides as clear a statement as is possible, and such a fact-heavy issue would still require judicially driven doctrinal explication. In short, the same concerns with the proper judicial role would arise whether a cause of action was recognized first by the judiciary or the legislature. The only remaining question, then, is whether it is appropriate for the judiciary to take the initiative, and on that point it is enough to note that the constitutional right would otherwise go unprotected. Indeed, that is the core legitimizing purpose that the *Bivens* doctrine has come to embrace.

While the courts are right both to defer to Congress where that body has acted and to exercise care in acting on their own prerogative in this gray area between legislation and adjudication, the situation presented in *Wilkie* counsels strongly in favor of judicial initiative in ensuring enforcement of the Takings Clause. The legislature had yet to act, a damages remedy against officers was the only manner of deterrent sufficient to protect the right, and court-driven law was ultimately necessary given the fact-driven nature of the inquiry. It was effectively irrelevant that for Robbins "it [was] damages or nothing";[74] crucially, rather, it is damages or nothing for the Takings Clause of the Fifth Amendment. When viewed in reference to *Bivens*'s central purpose of safeguarding otherwise potentially nullified constitutional provisions, *Wilkie* presented a paradigmatic case for judicial recognition of a constitutional damages remedy.

B. Criminal Law and Procedure

1. Eighth Amendment — Death Penalty — Consideration of Mitigating Evidence. — The maxim that "death is different" has long guided the Supreme Court's death penalty jurisprudence.[1] In the

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[73] *Wilkie*, 127 S. Ct. at 2605 (alteration in original) (quoting *Bush v. Lucas*, 462 U.S. 367, 389 (1983)) (internal quotation marks omitted).

[74] *Id.* at 2613 (Ginsburg, J., concurring in part and dissenting in part) (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971)) (internal quotation marks omitted).

[1] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice."); *see also*

landmark case of *Lockett v. Ohio*,[2] a plurality of the Court declared that the Eighth Amendment mandates that a capital sentencing body be permitted to "consider[], *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[3] In *Penry v. Lynaugh*,[4] the Court applied the *Lockett* principle to a death sentence under a Texas statute mandating death if the sentencing body found that the defendant had acted deliberately and was likely to be dangerous in the future.[5] Under that statutory regime, the jury could not necessarily consider and give effect to the mitigating force of the defendant's mental retardation and history of childhood abuse.[6] Last Term, in *Abdul-Kabir v. Quarterman*[7] and *Brewer v. Quarterman*,[8] the Supreme Court addressed the constitutionality of two defendants' death sentences under that same statute. The Court held that the Texas Court of Criminal Appeals (CCA) had misapplied clearly established law by refusing to invalidate the sentences when the sentencers were not permitted to give meaningful effect to the defendants' mitigating evidence: childhood neglect and impulse-control disorder in *Abdul-Kabir*,[9] and mental illness, childhood abuse, and substance abuse in *Brewer*.[10] The Court therefore concluded that under the Antiterrorism and Effective Death Penalty Act of 1996[11] (AEDPA), federal habeas relief was warranted.[12] At first sight, the decisions in *Abdul-Kabir* and *Brewer* seemed to signal a departure from precedents granting wide deference to state court decisions where the relevant clearly established law was broad and general. In fact, however, the law that the Court invoked in these cases was much narrower than the opinions superficially suggest. Therefore, the Court's selection of a fact-specific, highly determinative holding as the relevant clearly established law explains how the strictness of the Court's review of the CCA's decisions is reconcilable with precedent.

Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976) (plurality opinion) (noting that the punishment of death is uniquely severe, and warning against a death-sentencing regime that ignores "compassionate or mitigating factors stemming from the diverse frailties of humankind").

[2] 438 U.S. 586 (1978).

[3] *Id.* at 604.

[4] 492 U.S. 302 (1989).

[5] *See id.* at 328.

[6] *See id.*

[7] 127 S. Ct. 1654 (2007).

[8] 127 S. Ct. 1706 (2007). The two cases were consolidated. *Abdul-Kabir*, 127 S. Ct. at 1663.

[9] *See Abdul-Kabir*, 127 S. Ct. at 1660–61.

[10] *See Brewer*, 127 S. Ct. at 1710.

[11] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

[12] *See Abdul-Kabir*, 127 S. Ct. at 1659; *Brewer*, 127 S. Ct. at 1710.

Jalil Abdul-Kabir[13] was convicted of capital murder in Texas state court.[14] At his sentencing hearing, the government introduced evidence of his propensity for future dangerousness.[15] In response to that aggravating evidence, the defense presented two categories of mitigating evidence. First, members of Abdul-Kabir's family testified about his unhappy childhood.[16] Second, a psychologist testified that Abdul-Kabir's control of his impulses was limited by "central nervous damage," that he likely suffered from longtime depression, and that his background was "painful."[17] Another psychologist testified that "violent conduct is predominantly, overwhelmingly the province of the young," and is usually outgrown.[18] Both experts, however, acknowledged that Abdul-Kabir would likely be dangerous for years to come.[19]

The statute at issue in *Penry* controlled Abdul-Kabir's sentencing.[20] Although the mitigating evidence arguably strengthened the case for Abdul-Kabir's future dangerousness, it potentially called into question his moral culpability.[21] The prosecutor nonetheless discouraged the jury from taking that evidence into account in deciding the special issues, and the judge refused to invite the jury to give it effect by answering either of the special issues in the negative.[22] The jury returned affirmative answers to both special issues, and Abdul-Kabir was sentenced to death.[23] The CCA affirmed on direct appeal.[24] Abdul-Kabir sought post-conviction relief in state court, claiming, in relevant part, that the jury was unable to properly consider and give effect to his mitigating evidence, in violation of *Penry*.[25] The trial court rejected his claims, and the CCA affirmed.[26]

Abdul-Kabir then filed a habeas petition in federal district court.[27] The district court held that *Penry* did not apply, and the Fifth Circuit

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[13] Jalil Abdul-Kabir was born Ted Cole, the designation that the majority and dissenting opinions used. *See Abdul-Kabir*, 127 S. Ct. at 1659 n.1.

[14] *Id.* at 1660.

[15] *Id.*

[16] *Id.* at 1660–61.

[17] *Id.* at 1661.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 1660 (citing TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 2006)). In 1991, the statute was amended to allow the jury to give effect to any other mitigating circumstances not embraced by the two special issues. *Id.* at 1660 n.2.

[21] *See id.* at 1661.

[22] *Id.* at 1661–62.

[23] *Id.* at 1662.

[24] *Id.*

[25] *Id.* at 1662 & n.3.

[26] *Id.* at 1662–63.

[27] *See id.* at 1662 & n.4.

denied Abdul-Kabir a certificate of appealability.[28] The Supreme Court, however, vacated the denial and made clear that Abdul-Kabir's claim was entitled to analysis under *Penry*.[29] On remand, the Fifth Circuit analyzed the claim on the merits, but affirmed the district court's denial of habeas relief on the ground that "the Texas special issues allowed the jury to give 'full consideration and full effect'" to Abdul-Kabir's mitigating evidence.[30]

Brent Brewer was convicted of murder committed during the course of a robbery.[31] The sentencing phase of his trial was governed by the same Texas sentencing statute as in *Abdul-Kabir*.[32] Brewer introduced mitigating evidence of childhood abuse, drug use, and a history of depression.[33] Like Abdul-Kabir's mitigating evidence, Brewer's evidence supported the case for a finding of future dangerousness, while cutting against his moral culpability.[34] Nonetheless, the judge refused to instruct the jury to give mitigating effect to that evidence, and the prosecutor emphasized that Brewer's evidence could only be considered in its aggravating capacity as it bore on his future dangerousness.[35] Brewer was sentenced to death.[36] The CCA affirmed his sentence on direct appeal, distinguishing the facts from those in *Penry*;[37] it also denied his application for state post-conviction relief with a one-sentence explanation.[38] Brewer then filed a habeas petition in federal district court, which granted him conditional relief.[39] The Fifth Circuit, however, reversed and denied the petition.[40]

Consolidating the cases, the Supreme Court vacated and remanded the Fifth Circuit decisions denying habeas relief to Abdul-Kabir and Brewer. Writing for the Court in two separate opinions, Justice Stevens[41] held that when the CCA had affirmed the defendants' sentences on the merits, it had misapplied clearly established law by failing to recognize that the defendants had been unconstitutionally denied the

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[28] The district court held, and the Fifth Circuit agreed, that the mitigating evidence at issue was not "constitutionally relevant." *See id.* at 1663 (quoting Cole v. Dretke, 418 F.3d 494, 498 (5th Cir. 2005)).

[29] *See* Tennard v. Dretke, 542 U.S. 274 (2004). The Supreme Court struck down the Fifth Circuit's constitutional-relevancy test. *See id.* at 284.

[30] *Abdul-Kabir*, 127 S. Ct. at 1664 (quoting *Cole*, 418 F.3d at 511).

[31] *Brewer*, 127 S. Ct. at 1710.

[32] *See id.* at 1710–11.

[33] *See id.* at 1710.

[34] *See id.* at 1712.

[35] *See id.* at 1710–11.

[36] *See id.* at 1711.

[37] *See id.* at 1712 n.5.

[38] *See id.* at 1711 & n.2.

[39] *Id.* at 1711.

[40] *Id.*

[41] Justice Stevens was joined by Justices Kennedy, Souter, Ginsburg, and Breyer.

opportunity to have the sentencing bodies give adequate effect to the mitigating evidence. Therefore, the defendants were entitled to federal habeas relief under AEDPA.[42]

In *Abdul-Kabir*, Justice Stevens began his legal analysis by distilling from the Court's capital sentencing jurisprudence the principle, first announced in *Lockett*, that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual."[43] Of particular importance, Justice Stevens explained, was the idea that "the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration."[44]

Justice Stevens stated that, had the CCA analyzed Abdul-Kabir's claim under the framework of *Penry* instead of giving so much weight to the Court's subsequent precedents, it would have realized that Abdul-Kabir's mitigating evidence was not embraced by the special issues and that the jury was therefore denied "a vehicle for expressing its 'reasoned moral response' to that evidence."[45] Penry's evidence of childhood abuse, emotional instability, and mental retardation had functioned as a "two-edged sword";[46] it was aggravating with respect to his future dangerousness, and mitigating with respect to his moral culpability.[47] Because the Texas special issues failed to give meaningful consideration to this type of mitigating evidence, Penry's death sentence was unconstitutional.[48] According to Justice Stevens, Abdul-Kabir's evidence of childhood neglect and impulse-control disorder was similar to Penry's mitigating evidence in that it failed to rebut deliberateness or future dangerousness but potentially provided a distinct reason for not imposing a death sentence.[49] Instead of following *Penry*, the state court had focused on the Court's later decision in

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[42] Under AEDPA, state court decisions may be invalidated only if they are "contrary to, or involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2000).

[43] *Abdul-Kabir*, 127 S. Ct. at 1664. The *Lockett* rule was confirmed and broadened by majorities of the Court in later decisions, especially in Justice Scalia's majority opinion in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). *See id.* at 398–99 (noting that because the jury was instructed not to "consider . . . evidence of nonstatutory mitigating circumstances," the "proceedings . . . did not comport with the requirements of" the Court's precedents); *see also* Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982).

[44] *Abdul-Kabir*, 127 S. Ct. at 1667 (emphasis omitted) (quoting Franklin v. Lynaugh, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring in the judgment)). The Court noted that the *Penry* majority opinion incorporated this statement. *Id.* at 1668.

[45] *Id.* at 1670.

[46] *Id.* at 1669 (quoting Penry v. Lynaugh, 492 U.S. 302, 324 (1989)) (internal quotation marks omitted).

[47] *See id.* at 1669–70.

[48] *See id.* at 1669; *Penry*, 492 U.S. at 328.

[49] *See Abdul-Kabir*, 127 S. Ct. at 1672.

Graham v. Collins,[50] misreading that decision as calling for a case-by-case, fact-specific approach[51] when in fact *Graham* and other subsequent decisions "fail[ed] to disturb the basic legal principle that . . . [t]he jury must have a 'meaningful basis to consider the relevant mitigating qualities' of the defendant's proffered evidence."[52]

In *Brewer*, Justice Stevens largely incorporated his reasoning from *Abdul-Kabir*.[53] Like the mitigating evidence in *Penry* and *Abdul-Kabir*, Brewer's evidence had functioned as a "two-edged sword," even if its mitigating effect had been less compelling than that in *Penry*.[54] Justice Stevens explained that Brewer's mitigating evidence, despite being non-expert and despite showing only occasional, rather than permanent, mental problems, was no less deserving of meaningful juror consideration than Abdul-Kabir's.[55] The Court concluded its analysis by chiding the Fifth Circuit for its "difficult *Penry* jurisprudence" and for being content with jurors' ability to give mitigating evidence "sufficient" effect when the Court's precedents demanded that it be given "full" effect.[56]

Chief Justice Roberts dissented in both cases.[57] He noted that by the time of the relevant state court decisions, the Supreme Court had considered five challenges to the instructions at issue, and in only one of those cases — *Penry* — had it upheld the defendant's challenge to those instructions.[58] In light of the Court's "sharply divided, ebbing and flowing decisions in this area,"[59] the CCA could not have misap-

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[50] 506 U.S. 461 (1993).

[51] *See Abdul-Kabir*, 127 S. Ct. at 1671. In fact, according to Justice Stevens, *Graham* stood only for the narrow proposition that awarding collateral relief on these grounds to a defendant sentenced to death in 1984 would entail applying a new constitutional rule retroactively in violation of *Teague v. Lane*, 489 U.S. 288 (1989), and this proposition rested on a particular interpretation, since repudiated, of *Jurek v. Texas*, 428 U.S. 262 (1976). *See Abdul-Kabir*, 127 S. Ct. at 1671.

[52] *Abdul-Kabir*, 127 S. Ct. at 1671 (quoting Johnson v. Texas, 509 U.S. 350, 369 (1993)). The Court also found *Johnson*, in which the Court deemed mitigating evidence of the defendant's youth to have been adequately considered under the future dangerousness issue, *id.* at 369, to be distinguishable due to the "vast difference between youth . . . and the particularized childhood . . . abuse and neglect" at issue in *Penry* and *Abdul-Kabir*. *See Abdul-Kabir*, 127 S. Ct. at 1673.

[53] *See Brewer*, 127 S. Ct. at 1714.

[54] *See id.* at 1712.

[55] *See id.* ("Nowhere in our *Penry* line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability.").

[56] *Id.* at 1713–14.

[57] Chief Justice Roberts was joined by Justices Scalia, Thomas, and Alito. Chief Justice Roberts's dissents in the two cases were identical.

[58] *See Abdul-Kabir*, 127 S. Ct. at 1675 (Roberts, C.J., dissenting). The four other cases were *Johnson v. Texas*, 509 U.S. 350 (1993), *Graham v. Collins*, 506 U.S. 461 (1993), *Franklin v. Lynaugh*, 487 U.S. 164 (1988), and *Jurek v. Texas*, 428 U.S. 262 (1976). *See Abdul-Kabir*, 127 S. Ct. at 1675 (Roberts, C.J., dissenting).

[59] *Abdul-Kabir*, 127 S. Ct. at 1676 (Roberts, C.J., dissenting).

plied clearly established law — for the simple reason that there was no clearly established law to misapply.[60] Despite the lack of clarity in the law, Chief Justice Roberts argued, the majority selected *Penry* as representing clearly established law, while refusing to acknowledge that subsequent cases such as *Graham* and *Johnson v. Texas*[61] complicated the meaning of *Penry*.[62]

Justice Scalia also dissented in both cases.[63] He began by stating that in his view the Eighth Amendment did not require that a jury be allowed to consider all mitigating evidence[64] — a view at odds with *Lockett*. Conceding, however, that the Court's precedents held otherwise, he argued that when the CCA had rendered its decisions, the relevant federal law had been perfectly clear[65]: *Johnson* — the Court's most recent statement of the law at the time of the CCA's adjudications — had construed *Penry* narrowly as requiring only that jurors be able to give *some* mitigating effect to the defendant's evidence, not that they be able to "give effect to mitigating evidence in *every conceivable manner* in which the evidence might be relevant."[66] Justice Scalia argued that the CCA had appropriately applied *Johnson*'s less searching rule in denying post-conviction relief to the two defendants.[67]

In each of the majority opinions, the Court left unclear precisely what law the CCA should have recognized as "clearly established." At first, the majority seemed to suggest that the relevant law was the *Lockett* rule, as broadly conceived and as interpreted and refined by a long line of subsequent cases. Were such a broadly applicable rule, with its necessary mandate of case-by-case adjudication, in fact the clearly established law by which the Court evaluated the CCA's decisions, the Court's lack of deference to the CCA would have been a departure from the Court's recent AEDPA jurisprudence — and would have potentially marked a wide opening of the habeas door. A close reading of the majority opinions, however, reveals that the Court actually focused on the much more narrowly applicable, but specific and determinate, holding of *Penry*. The Court was too quick to find that the facts of *Abdul-Kabir* and *Brewer* were so similar to *Penry*'s as to call straightforwardly for the same resolution. Still, the Court's nar-

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[60] *Id.* at 1675–76.

[61] 509 U.S. 350 (1993).

[62] *See Abdul-Kabir*, 127 S. Ct. at 1676 (Roberts, C.J., dissenting).

[63] Justice Thomas joined Justice Scalia's dissent in full, and Justice Alito joined as to Part I. Like Chief Justice Roberts, Justice Scalia filed an identical dissent in both cases.

[64] *Abdul-Kabir*, 127 S. Ct. at 1684, 1686 (Scalia, J., dissenting). Justice Alito did not join the portions of Justice Scalia's dissent that advanced this view.

[65] *See id.* at 1684.

[66] *Id.* at 1684 (quoting *Johnson*, 509 U.S. at 372).

[67] *See id.* at 1685.

row focus on *Penry* to the exclusion of the broader *Lockett* tradition makes the rigor of its review of the CCA's decisions reconcilable with the Court's precedent.

Under AEDPA, federal courts must defer to state court decisions unless they contravene or unreasonably apply clearly established law.[68] In recent AEDPA review decisions, the Court has developed a sliding scale approach under which the degree of deference afforded to state courts is directly proportional to the breadth and generality of the "clearly established law" at issue. The Court's decision in *Williams v. Taylor*[69] laid the groundwork for this sliding scale approach by holding that a generally applicable principle that mandated a fact-specific test could count as clearly established law.[70] In applying AEDPA to a state court's denial of an ineffective assistance of counsel claim under *Strickland v. Washington*,[71] the *Williams* Court concluded that the fact "[t]hat the *Strickland* test 'of necessity requires a case-by-case examination of the evidence' obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court."[72] Rules of this sort, as the Court would make clear in later cases, would simply result in a relatively high degree of deference to state court decisions.

At the other end of the generality-specificity scale is "clearly established law" that consists of a fact-specific precedent applicable only in a narrow context. In *Ramdass v. Angelone*,[73] the Court acknowledged that this type of federal law, acting as a bright-line rule, would have sharply constrained the state court's discretion had it been relevant.[74] Because of its factual specificity, however, the law did not govern the factual context at issue.[75] The Court made its sliding scale approach explicit in *Yarborough v. Alvarado*,[76] stating that under AEDPA, the "range of reasonable judgment" permitted to a state court "can depend in part on the nature of the relevant rule," so that "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."[77]

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[68] *See* 28 U.S.C. § 2254(d)(1) (2000).

[69] 529 U.S. 362 (2000).

[70] *See id.* at 382.

[71] 466 U.S. 668 (1984).

[72] *Williams*, 529 U.S. at 391 (citation omitted) (quoting Wright v. West, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in the judgment)).

[73] 530 U.S. 156 (2000).

[74] *See id.* at 167. The legal rule at issue in *Ramdass* provided that if a defendant in a capital case was ineligible for parole, he could so advise the sentencing jury. *See id.* at 165.

[75] *See id.* at 167. The rule did not apply because the defendant was not technically ineligible for parole at the time of his sentence. *See id.*

[76] 541 U.S. 652 (2004).

[77] *Id.* at 664; *see also* Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death*

In *Abdul-Kabir* and *Brewer*, the Court's refusal to defer to the CCA's decisions may at first seem to signal a departure from the sliding scale approach that it had previously developed, because the Court appeared to identify the broad *Lockett* principle as the "clearly established law" that should properly have governed the CCA's adjudications. In the course of its analysis, the Court emphasized that *Penry*, the case that the CCA should have applied,[78] was not new law but simply an application of the original *Lockett* rule. The Court began by tracing the *Lockett* rule through *Eddings v. Oklahoma*[79] and *Skipper v. South Carolina*,[80] both of which "endorsed and broadened it";[81] then through *Hitchcock v. Dugger*,[82] which "unequivocally confirmed [its] settled quality";[83] and finally through Justice O'Connor's concurring opinion in *Franklin v. Lynaugh*[84] and her majority opinion in *Penry*, both of which described the "principle underlying *Lockett*, *Eddings*, and *Hitchcock*" as the notion "that punishment should be directly related to the personal culpability of the criminal defendant,"[85] such that "a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty."[86] Despite Justice Stevens's account of the Court's decisions in this area of law, he nowhere explicitly indicated what he was relying upon as the "clearly established law" relevant to the CCA's adjudications.

The Court's development and interpretation of the *Lockett* rule, however, did not stop with *Penry*, but continued in such later decisions as *Graham* and *Johnson*. Significantly, those later decisions clarified the nature of the *Lockett* principle as a broadly applicable rule mandating case-by-case adjudication. In *Johnson*, the Court held that the

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Penalty Act, 54 CATH. U. L. REV. 747, 782 (2005) ("As long as the petitioner identifies a principle in Supreme Court precedent, the petitioner will pass through the threshold determination, but questions about the clarity and specificity of the principle will affect the reasonableness of the state court's decision applying that principle.").

78 *See Abdul-Kabir*, 127 S. Ct. at 1670.

79 455 U.S. 104 (1982).

80 476 U.S. 1 (1986).

81 *Abdul-Kabir*, 127 S. Ct. at 1665.

82 481 U.S. 393 (1987).

83 *Abdul-Kabir*, 127 S. Ct. at 1666.

84 487 U.S. 164 (1988).

85 *Abdul-Kabir*, 127 S. Ct. at 1667 (quoting *Franklin*, 487 U.S. at 184 (O'Connor, J., concurring in the judgment)); *see also id.* at 1665 n.10 ("In *Penry* . . . itself, the Court noted that the rule sought by Penry — 'that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed — is not a "new rule" under *Teague*, because it is dictated by *Eddings* and *Lockett*.'" (quoting Penry v. Lynaugh, 492 U.S. 302, 318–19 (1989)) (citation omitted)); *id.* at 1670 n.17.

86 *Id.* (quoting *Franklin*, 487 U.S. at 184–85 (O'Connor, J., concurring in the judgment)).

defendant's mitigating evidence of youth could be given adequate effect under the future dangerousness special issue and that the fact that that evidence could conceivably have had mitigating effect beyond the special issues as to the defendant's moral culpability was not fatal to the death sentence.[87] In *Graham*, the Court held that the defendant's mitigating evidence of youth, family background, and positive character traits was sufficiently (even if not fully) embraced by the Texas special issues.[88]

In spite of these later decisions, the Court's analysis in *Abdul-Kabir* and *Brewer* reveals that the "clearly established law" that the Court meant to recognize was not a broadly applicable law mandating case-by-case adjudication — such as the *Lockett* rule had become — but rather a narrow, fact-specific application of a particular precedent. *Graham* and *Johnson* had emphasized that, under a *Lockett* analysis, the proper inquiry was not whether the mitigating evidence was sufficiently similar to that in *Penry*, but rather whether, on a case-by-case basis, the jury was actually able to give sufficient consideration and effect to the mitigating evidence. The *Abdul-Kabir* Court, however, focused only on whether the particular evidence offered by the defendant triggered the narrow holding of *Penry*.[89] The Court strayed so far from applying the *Lockett* principle in its full breadth that it faulted the trial judge for not analyzing Abdul-Kabir's application for collateral relief under "*Penry* . . . itself,"[90] and criticized the judge for assuming that it would be "appropriate to look at 'other testimony in the record' to determine whether the jury could give mitigating effect to the testimony."[91] As *Graham* and *Johnson* made clear, such a totality-of-the-circumstances test is precisely what the *Lockett* rule requires.[92]

As further evidence of the Court's treatment of *Penry* as the relevant "clearly established law," the Court seemed to ignore *Graham* and *Johnson*'s clarification that the *Lockett* rule demanded not that a capital sentencing body be able to consider and give effect to all of a defendant's mitigating evidence in every reasonable way in which it could be mitigating, but rather only that it be able to give such evidence "sufficient" or "adequate" consideration and effect.[93] *Penry*, on

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[87] *See* Johnson v. Texas, 509 U.S. 350, 368 (1993). The Court explained that the fact "[t]hat the jury had a meaningful basis to consider the relevant qualities of petitioner's youth is what distinguishes this case from *Penry*." *Id.* at 369.

[88] *See* Graham v. Collins, 506 U.S. 461, 474 (1993).

[89] *See Abdul-Kabir*, 127 S. Ct. at 1673.

[90] *Id.* at 1670.

[91] *Id.* at 1672.

[92] *See Johnson*, 509 U.S. at 367–70; *Graham*, 506 U.S. at 474–76.

[93] *See Johnson*, 509 U.S. at 361–62, 370, 372.

its face, might suggest otherwise,[94] and the Court's endorsement of a principle consistent with *Penry* but inconsistent with *Graham* and *Johnson* suggests that the Court's ultimate allegiance was to *Penry*.[95]

The Court was able to invoke *Penry* as the applicable "clearly established law" only by finding that the mitigating evidence at issue in *Abdul-Kabir* and *Brewer* was materially equivalent to that at issue in *Penry*.[96] Whether the Court correctly equated the evidence in *Abdul-Kabir* and *Brewer* with the evidence in *Penry* is debatable. Faced with the *Johnson* Court's finding that a jury had been able to meaningfully consider the defendant's mitigating evidence of youth, the majority went to great lengths to distinguish the mitigating evidence in *Abdul-Kabir* and *Brewer* from that in *Johnson* and to suggest that it was "closer in nature" to that in *Penry*.[97] As the dissent pointed out, however, the mitigating features at issue in *Abdul-Kabir* and *Brewer* were not necessarily as permanent in effect as those in *Penry*, and a state court following the case-by-case approach mandated by *Graham* and *Johnson* could reasonably have found that the evidence had indeed been meaningfully considered.[98] Whether or not the Court correctly concluded that the evidence was materially the same as that in *Penry*, on the basis of that conclusion, the Court acted naturally when it evaluated the CCA's decisions based not on the broadly applicable but discretionary *Lockett* rule, but rather on the narrowly applicable but highly determinative *Penry* holding.[99] The factual predicates for the *Penry* holding had, in the Court's view, been met. Applying a "clearly established" legal principle that was narrower than it at first appeared, the Court let the two petitioners here pass through the habeas door — while giving little cause for other petitioners to hope that the Court's approach to AEDPA review had, as a general matter, changed.

2. Eighth Amendment — Death Penalty — Execution of the Presently Incompetent. — The Supreme Court's capital punishment jurisprudence might be characterized as a struggle for coherence.[1] Since its

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[94] *See* Penry v. Lynaugh, 492 U.S. 302, 328 (1989) ("[F]ull consideration of evidence that mitigates against the death penalty is essential if the jury is to give '"a reasoned moral response to the defendant's background, character, and crime."'" (emphasis omitted) (quoting Franklin v. Lynaugh, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring in the judgment))).

[95] *See Abdul-Kabir*, 127 S. Ct. at 1672 (adopting the standard that "the jury must be permitted to 'consider fully'" a defendant's mitigating evidence (quoting *Penry*, 492 U.S. at 323)).

[96] *See id.* at 1670. This was itself a violation of the *Lockett* rule, which, as *Graham* and *Johnson* made clear, emphasized case-by-case application.

[97] *See id.* at 1673.

[98] *See id.* at 1681–82 (Roberts, C.J., dissenting).

[99] *See id.* at 1670 (majority opinion).

[1] *See, e.g.*, Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) ("For more than 20 years I have endeavored — indeed, I have struggled — along with a majority of this Court, to develop . . . rules that would lend more than the mere appear-