[Journal of Criminal Law and Criminology](https://scholarlycommons.law.northwestern.edu/jclc)

Volume 73
Issue 4 *Winter*

Article 10

Winter 1982

Eighth Amendment--Minors and the Death Penalty: Decision and Avoidance

Helene B. Greenwald
Northwestern University School of Law

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc

Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation
Helene B. Greenwald, Eighth Amendment--Minors and the Death Penalty: Decision and Avoidance, 73 J. Crim. L. & Criminology 1525 (1982)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

0091-4169/82/7304-1525
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 73, No. 4
Copyright © 1983 by Northwestern University School of Law
Printed in U.S.A.

EIGHTH AMENDMENT—MINORS AND THE DEATH PENALTY: DECISION AND AVOIDANCE

Eddings v. Oklahoma, 102 S. Ct. 869 (1982).

I. INTRODUCTION

Of the 1,058 inmates on the nation's death rows,[1] seventeen[2] had a special interest in *Eddings v. Oklahoma*,[3] a capital punishment case decided by the Supreme Court last term.[4] All seventeen were under the age of eighteen when they committed their crimes,[5] and all seventeen had been transferred from the protective custody of the juvenile court system[6] to the jurisdiction of the criminal courts, where they were tried as adults.[7] In *Eddings*, one of their number, Monty Lee Eddings, urged

---

1 Newsletter by Legal Defense and Education Fund, (August 20, 1982) (discussing death row).

2 Brief for Appellant at 19a, Eddings v. Oklahoma, 102 S. Ct. 869 (1982).

3 102 S. Ct. 869 (1982).

4 The Supreme Court decided three other capital punishment cases last term. *See* Enmund v. Florida, 102 S. Ct. 3368 (1982); Hopper v. Evans, 102 S. Ct. 2049 (1982); Zant v. Stephens, 102 S. Ct. 1856 (1982).

5 *See* Brief for Appellant at 19a, Eddings v. Oklahoma, 102 S. Ct. 869 (1982).

6 The juvenile court system is the product of an early nineteenth century movement which advocated that juvenile offenders be treated differently from adults, and that these youths be rehabilitated rather than punished. *See generally* R. PICKET, HOUSE OF REFUGE (1967); A. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Schultz, *The Cycle of Juvenile Court History*, 19 CRIM. & DELINQ. 457 (1973). Today every state has a juvenile court system and juvenile correctional facilities. The penalties administered by the juvenile courts are far less severe than those administered by the criminal system, and these courts cannot require that a juvenile be institutionalized beyond the age of majority. *See* S. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM (2d ed. 1980) (citing and summarizing current juvenile statutes of each state); M. LEVIN & R. SARRI, JUVENILE DELINQUENCY: A STUDY OF JUVENILE CODES IN THE UNITED STATES (1974). *See generally* Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7; Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Mennel, *Origins of the Juvenile Court: Changing Perspective on the Legal Rights of Juvenile Delinquents*, 18 CRIM. & DELINQ. 68 (1972); Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

7 In most states, juveniles charged with a criminal offense can, under certain circumstances, be transferred to adult criminal courts through the process of waiver. *See* Feld, *Legislative Policies toward the Serious Juvenile Offender*, 27 CRIM. & DELINQ. 497, 500-11 (1981); Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L.J. 583, 595-98 (1968). There are two types of waiver. The most common method is judicial waiver, whereby the juvenile courts are empowered to divest themselves of jurisdiction in certain cases. Judi-

the Court to adopt a blanket prohibition against the imposition of death sentences on juvenile offenders.[8] Such punishment, he contended, is cruel and unusual in violation of the eighth and fourteenth amendments.[9]

Although the Court had granted certiorari in *Eddings* solely to consider the constitutionality of imposing the death penalty on juvenile defendants,[10] the Court failed to address this unresolved[11] and increasingly contested[12] issue in its opinion. Instead, the Court's decision focused on

---

cial waiver is sometimes permitted only with respect to felonies. *See, e.g.*, D.C. CODE ENCYCL. § 11-1553 (West 1966). But in many states judicial waiver is permitted when a minor is charged with any criminal offense. *See, e.g.*, IOWA CODE ANN. § 232.45 (West 1981). Some states only permit judicial waiver when the juvenile is above a certain age. *See, e.g.*, ALA. CODE § 12-15-34(a) (1975); IOWA CODE ANN. § 232.45(11) (West 1981) (must be fourteen or older). Others permit judicial waiver at any age. *See, e.g.*, OKLA. STAT. ANN. tit. 10, § 1112(b) (West 1980).

The other type of waiver is legislative waiver, whereby the statute provides that the juvenile courts will not have jurisdiction over juveniles accused of capital or other serious crimes. *See, e.g.*, IND. CODE ANN. § 31-6-2-1(d) (Burns 1982); LA. REV. STAT. ANN. § 13-1570(A)(5) (West 1982).

The transfer process is said to serve three purposes: (1) protect the public from those juveniles who are incapable of being rehabilitated by the juvenile system; (2) ease the burden on the juvenile justice system; and (3) deter juveniles from committing serious crimes. *See* NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1976); Comment, *A Model for the Transfer of Juvenile Felony Offenders to Adult Court Jurisdiction*, 4 J. JUV. L. 170, 179 (1980). *See Generally* D. BESHAROV, JUVENILE JUSTICE ADVOCACY: PRACTICE IN A UNIQUE COURT 249-64 (1974); Browne, *Guidelines for Statutes for Transfer of Juveniles to Criminal Court*, 4 PEPPERDINE L. REV. 479 (1977); Comment, *Juveniles in the Criminal Courts: A Substantive View of the Fitness Decision*, 23 U.C.L.A. L. REV. 988 (1976); Note, *Waiver of Juvenile Court Jurisdiction Under Iowa's New Juvenile Justice Act*, 29 DRAKE L. REV. 405 (1979-1980); Note, *Juvenile Crime: The Misguided Target of the Current Solution*, 4 GLENDALE L. REV. 97 (1982).

[8] Brief for Appellant at 18-59, Eddings v. Oklahoma, 102 S. Ct. 869 (1982).

[9] *Id. See infra* notes 54-56 and accompanying text.

[10] Eddings v. Oklahoma, 450 U.S. 1040 (1981). Review of all other questions raised in the petition of certiorari was denied. The other questions raised in the petition were:

> [1] Whether the Oklahoma Court of Criminal Appeals had construed or applied 21 Okla. Stat. § 701.12(4) [the section of Oklahoma's death penalty statute listing the fact that a "murder was especially heinous, atrocious or cruel" as an aggravating circumstance] in an impermissibly vague fashion in violation of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment?
>
> [2] Whether a state is obligated by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to provide funds to all indigent capital defendants for necessary expert or investigative assistance when the state has chosen by statute to provide assistance to those defendants in counties with a population exceeding 200,000 persons?

Petition for Writ of Certiorari at i, Eddings v. Oklahoma, 102 S. Ct. 869 (1982).

[11] *See* Brief for Appellant at 18, Eddings v. Oklahoma, 102 S. Ct. 869 (1982). Although the Court has repeatedly held that the death penalty is not unconstitutional per se, all of its decisions have involved adult defendants. *See, e.g.*, Roberts v. Louisiana, 428 U.S. 325 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

[12] Tod Ice, a seventeen year old youth who was convicted and sentenced to death for a murder allegedly committed when he was fifteen years old, is presently challenging the consti-

a very different issue: one which was brought to its attention for the first time in the petitioner's brief.[13]

As an alternative ground for relief, Eddings argued that his sentence was unconstitutional because the sentencing judge had refused to consider his troubled childhood and lack of emotional and mental maturity as mitigating factors.[14] Finding that the lower courts had refused to consider these circumstances in mitigation, and that such refusal was unconstitutional, the Supreme Court reversed Eddings' sentence and remanded the case for resentencing.[15] Since it was able to resolve the case on the basis of well-established principles, the Court chose not to consider the highly controversial issue on which it had granted certiorari.[16]

As this note will demonstrate, the *Eddings* decision adds little to the Court's prior opinions in the area of mitigating circumstances.[17] It has long been the view of the Court that a state may not, by statute, preclude a sentencer from considering any relevant circumstances offered by a defendant in mitigation of the death penalty.[18] Moreover, the Court has previously provided guidelines by which to determine whether a particular circumstance is relevant.[19] In *Eddings*, the Court merely applied established rules and guidelines to the facts before it, holding that the sentencer may not refuse to consider any relevant mitigating circumstance, and that a youthful defendant's troubled childhood and mental and emotional difficulties are indeed relevant.[20]

Eddings may, therefore, prove to be of greater interest because it

---

tutionality of imposing the death sentence on minors in the Kentucky Supreme Court. *See* Ice v. Kentucky, No. 81-SC-5-I (Ky. filed Jan. 6, 1981). Several national and state organizations have also maintained that it is unconstitutional to sentence juveniles to death. In *Eddings*, for example, the National Council on Crime and Delinquency, the National Legal Aid and Defender Association, the American Orthopsychiatric Association, the Kentucky Youth Advocates and the Kentucky Office for Public Advocacy submitted *amici curiae* briefs in which they contended that such punishment was cruel and unusual. *See* Amici Curiae Brief of National Council on Crime and Delinquency, National Legal Aid and Defender Association, and American Orthopsychiatric Association, Eddings v. Oklahoma, 102 S. Ct. 869 [hereinafter cited as Brief of National Council on Crime and Delinquency]; Amici Curiae Brief of Kentucky Youth Advocates and the Kentucky Office for Public Advocacy, Eddings v. Oklahoma, 102 S. Ct. 869 [hereinafter cited as Brief of Kentucky Youth Advocates]. *See generally* Bedau, *Juveniles and Capital Punishment*, in THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY 52 (H. Bedau rev. ed. 1967); Gwin, *The Death Penalty: Cruel and Unusual Punishment When Imposed Upon Juveniles*, 45 KY. BENCH & B., Apr. 1981, at 16.

[13] Brief for Appellant at 64, Eddings v. Oklahoma, 102 S. Ct. 869 (1982).

[14] *Id.*

[15] 102 S. Ct. at 876-77.

[16] *Id.* at 874 n.5.

[17] *See infra* notes 103-07 and accompanying text.

[18] *See* Lockett v. Ohio, 438 U.S. 586, 608 (1978). *See also infra* notes 69-74 and accompanying text.

[19] *See infra* notes 105-07 and accompanying text.

[20] 102 S. Ct. at 875-77.

evidences the Court's desire to avoid ruling on the constitutionality of imposing the death sentence on juvenile offenders.[21] The Court had to clear two hurdles in order to decide the case on the basis of the mitigating factor issue. First, it had to overcome the procedural obstacles posed by Eddings' failure to raise the mitigating circumstance issue in his petition for certiorari, and his failure to properly present this issue to the state appellate court for review.[22] Second, it had to interpret the decisions of the lower courts and find that they had refused to consider Eddings' troubled youth and emotional and mental difficulties as mitigating factors.[23] An analysis of the Court's holdings on these matters strongly suggests that the Court was determined to decide the case on some ground other than the certiorari issue.[24] And, as will be seen, the Court did have reason to want to avoid that controversial question.[25]

Thus, *Eddings v. Oklahoma* has two dimensions: decision and avoidance. While the decision itself offers little which is new in the area of mitigating circumstances, the avoidance of the certiorari question is a classic example of the Court's improper use of judicial restraint to dodge questions which it does not want to decide.

A. FACTS

On April 4, 1977, Monty Lee Eddings, a sixteen year old youth, ran away from his home in Missouri.[26] Eddings, along with several of his friends, drove without destination or purpose in a southwesterly direction, eventually reaching the Oklahoma turnpike.[27] In the car, Eddings had a shotgun and several rifles which he had taken from his father. After Eddings momentarily lost control of the car,[28] an Oklahoma Highway Patrol Officer signalled for Eddings to pull over.[29] Eddings did so. When the officer approached the car, Eddings stuck a loaded shotgun out of the window and fired, killing the officer. Shortly thereafter, Eddings was arrested.[30]

---

[21] *See infra* notes 124-49 and accompanying text.

[22] *See infra* notes 124-35 and accompanying text.

[23] *See infra* notes 137-49 and accompanying text.

[24] *See infra* notes 124-49 and accompanying text.

[25] *See infra* notes 150-53 and accompanying text.

[26] 102 S. Ct. at 871.

[27] *Id.* at 871-72.

[28] *Id.* Eddings' attention was diverted because he dropped his cigarette and was trying to find it. The car went over a curb and down into a ditch before Eddings regained control, but he was able to pull the car back onto the highway and proceed onward. 616 P.2d at 1162.

[29] 102 S. Ct. at 872. A passerby had reported Eddings' driving incident to the officer, who then decided to investigate the matter. 616 P.2d at 1163.

[30] 102 S. Ct. at 872.

Eddings was certified to stand trial as an adult,[31] and found guilty of first degree murder upon his plea of nolo contendere.[32] In accordance with Oklahoma law,[33] a separate sentencing hearing was held to determine whether Eddings should be sentenced to death or life imprisonment. The Oklahoma death penalty statute provides that at this proceeding, "evidence may be presented as to any mitigating circumstances or as to any aggravating circumstance enumerated in the act."[34] The state introduced evidence to establish the existence of three statutory aggravating circumstances: the heinous nature of the killing; the commission of the killing to avoid arrest; and the probability that Eddings would commit criminal acts constituting a continuing threat to society.[35] In mitigation, Eddings presented evidence of his troubled childhood, which was characterized by a broken home,[36] lack of parental supervision,[37] and excessive physical punishment.[38] He also presented the testimony of psychologists and a sociologist who suggested that Eddings was emotionally disturbed and that his mental and emotional development was less than normal for a person of Eddings' age.[39]

At the conclusion of the presentation, the trial judge weighed the evidence of aggravating and mitigating circumstances. He found that the state had proved each of the three alleged aggravating circumstances beyond a reasonable doubt.[40] First, the judge ruled that the killing was "heinous, atrocious, and cruel," because it was " 'designed to inflict a high degree of pain in utter indifference to the rights of [the patrolman].' "[41] The trial judge further held that the crime was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution," because the officer's intent in stopping the car was to make a

---

31 *Id.* Oklahoma law provides that in certain cases, the juvenile court may waive jurisdiction, and certify a minor to stand trial in adult criminal court. OKLA. STAT. ANN. tit. 10, § 1112(b) (West 1980). *See generally supra* note 7 and accompanying text. The state moved that Eddings be certified and the juvenile court granted the motion. 102 S. Ct. at 872. This ruling was affirmed on appeal. Matter of M.E., 584 P.2d 1340 (Okla. Crim. App.), *cert. denied*, 436 U.S. 921 (1978).

32 102 S. Ct. at 872.

33 OKLA. STAT. ANN. tit. 21, § 701.10 (West 1981).

34 *Id.*

35 102 S. Ct. at 872. *See* OKLA. STAT. ANN. tit. 21, § 701.12(4), (5), (7) (West 1981).

36 Eddings' parents were divorced when he was five years old. 102 S. Ct. at 872.

37 Until he was fourteen, Eddings lived with his mother without rules or supervision. There was testimony at the sentencing hearing which indicated that his mother might have been an alcoholic and a prostitute at the time Eddings lived with her. *Id.*

38 At age fourteen, Eddings went to live with his father, who, according to the testimony of Eddings' Juvenile Officer, used excessive physical punishment to discipline the youth. *Id.*

39 These witnesses suggested that Eddings' mental and emotional development might be at the level of a person several years younger. *Id.* However, the evidence was not conclusive. *See infra* note 139 and accompanying text.

40 *Id.* at 873.

41 *Id.* n.3.

lawful arrest.[42] Finally, the judge found that Eddings' threats of violence, aimed at police officers during his incarceration,[43] established that Eddings posed a "continuing threat of violence to society."[44]

Turning to the evidence of mitigating circumstances, the judge found that Eddings' youth was a factor of great weight.[45] He decided, however, that in light of the serious aggravating circumstances, Eddings' youth could not persuade the Court to refrain from imposing the death penalty,[46] and added, " '[n]or can the Court in following the law, in my opinion, consider the fact of this young man's violent background.' "[47] The judge proceeded to sentence Eddings to death.[48]

Eddings appealed his sentence to the Oklahoma Court of Criminal Appeals, claiming, *inter alia*,[49] that his punishment was excessive because the mitigating factors outweighed the aggravating ones.[50] The appellate court held that the trial judge had correctly determined that Eddings' youth did not overcome the serious aggravating circumstances which had been established.[51] With regard to other evidence which Eddings had offered in mitigation, the court said that although Eddings' "personality disorder" and "family history" were "useful in explaining why he behaved the way he did, [they did] not excuse the behavior."[52]

---

42 *Id.*

43 According to testimony presented at the sentencing hearing, after Eddings had been taken to the county jail on the day of the murder, he told two officers that " 'if he was loose . . . he would shoot' them all." *Id.* Another time, when an officer refused to turn off the light in Eddings' cell, Eddings became angry and threatened the officer: " 'Now I have shot one of you people, and I'll get you too if you don't turn this light out.' " *Id.*

44 *Id.*

45 " 'I have given very serious consideration to the youth of the Defendant when this particular crime was committed.' " *Id.* at 873.

46 *Id.*

47 *Id.* The interpretation of this quote is a matter of dispute between the *Eddings* majority and dissent. *See infra* notes 65, 91-98 and accompanying text.

48 *Id.*

49 Eddings raised five additional arguments in his appeal: (1) that it is cruel and unusual punishment to impose the death penalty on a juvenile offender; (2) that his motion to strike the bill of particulars regarding the sentence should have been sustained; (3) that none of the statutory aggravating circumstances were established beyond a reasonable doubt; (4) that the state suppressed evidence which he could have used to counter one of the aggravating circumstances alleged in the bill of particulars; and (5) that he should have been given the services of an investigator and a psychiatrist at state expense. 616 P.2d at 1163. The appellate court held against Eddings on each of these claims. *Id.* at 1171.

50 *Id.* at 1167, 1169-70.

51 As stated earlier, the District Court indicated great weight had been given to this factor [his youth] but, nevertheless, found that it could not overbalance the aggravating circumstances of this case. We, too, have given serious consideration to the petitioner's youth. But the aggravating circumstances in this case are very serious; and we, too, have to conclude that the petitioner's youth can not outweigh them.

Id. at 1170.

52 *Id.* The *Eddings* majority and dissent disagreed over the meaning of these remarks. *See infra* notes 68, 99-101 and accompanying text.

The court of criminal appeals affirmed the sentence,[53] and Eddings appealed to the United States Supreme Court.

II. THE *EDDINGS* OPINION: MAJORITY AND DISSENT

A. THE *EDDINGS* MAJORITY

As noted earlier, Eddings presented two arguments to the Supreme Court. Initially, he argued that the eighth[54] and fourteenth[55] amendments prohibit the execution of anyone who was a minor at the time of the offense.[56] It was on this issue that the Court granted certiorari.[57]

---

53 *Id.* at 1171.

54 "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII.

55 "[N]o state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. The eighth amendment applies to the states through the due process clause of the fourteenth amendment. Furman v. Georgia, 408 U.S. 238, 257 n.1 (1972) (Brennan, J., concurring); Powell v. Texas, 392 U.S. 514, 531 (1968); Malloy v. Hogan, 378 U.S. 1, 6 n.6 (1964); Robinson v. California, 370 U.S. 660, 666 (1964).

56 Brief for Appellant at 18-59, Eddings v. Oklahoma, 102 S. Ct. 869 (1982). Eddings argued that the execution of juvenile offenders violates the eighth amendment because it is repudiated by society's "evolving standards of decency." *Id.* The petitioner reviewed the history of the juvenile justice system, legislative attitudes, and jury sentencing decisions to demonstrate the "contemporary repudiation of death as a punishment for juvenile offenders." *Id. See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"). *See also* Gregg v. Georgia, 428 U.S. at 173 (1976); Woodson v. North Carolina, 428 U.S. 280, 288 (1976); Furman v. Georgia, 408 U.S. at 330 (Marshall, J., concurring) (suggesting that a punishment is cruel and unusual if popular sentiment abhors it). *But see infra* note 150 and accompanying text.

In addition to the petitioner's brief, two amicus curiae briefs supporting Eddings' argument were filed. One was filed by the Kentucky Youth Advocates and the Kentucky Office for Public Advocacy. *See* Brief of Kentucky Youth Advocates, *supra* note 12. They argued that sentencing juvenile offenders to death violates the eighth amendment because the death penalty is excessive punishment when applied to minors. *Id.* at 9-11. *See* Weems v. United States, 217 U.S. 349 (1910) (established that the eighth amendment prohibits excessive punishment). *See also* Coker v. Georgia, 433 U.S. 584, 592 (1977); Furman v. Georgia, 408 U.S. at 279 (Brennan, J., concurring). The Kentucky Youth Advocates also argued that it is cruel and unusual punishment to submit a child to the evironment of death row, because children are likely to have their sentences commuted, and their experience on death row is likely to cause them irreparable psychological trauma. Brief of Kentucky Youth Advocates, *supra* note 12, at 11-13. *See generally* Gallemore & Panton, *Inmate Responses to Lengthy Death Row Confinement*, 129 AM. J. PSY. 81 (1972); Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCH. REV. 141 (1979); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814 (1972).

The National Council on Crime and Delinquency, the National Legal Aid and Defender Association, and the American Orthopsychiatric Association also filed an amicus curiae brief supporting Eddings' eighth amendment argument. *See* Brief of National Council on Crime and Delinquency, *supra* note 12. They argued that sentencing minors to death was excessive punishment and therefore violates the eighth amendment, and also claimed that certification of a minor for trial in adult court does not indicate that the minor is mature, sophisticated, or should be treated as though he were an adult. *Id.* at 13-19.

However, in his brief, Eddings introduced a second argument: he claimed, for the first time, that his sentence was also unconstitutional because the sentencing judge had refused to consider his troubled childhood and emotional and mental difficulties as mitigating factors.[58] Despite the objections of four of the justices,[59] the majority agreed to address Eddings' new argument, maintaining that the issue was properly before the Court since the state had responded to the argument in its brief[60] and since Eddings had presented the issue to the Oklahoma Court of Criminal Appeals in his petition for rehearing.[61]

In considering Eddings' mitigating factor claim, the majority held, again over the strenuous objections of the dissenting justices,[62] that both the trial court and the Oklahoma Court of Criminal Appeals had refused to consider Eddings' unhappy upbringing and emotional problems in mitigation of the death penalty.[63] Relying solely on the trial judge's statement that " 'in following the law' " he could not " 'consider . . . this young man's violent background,' "[64] the Court concluded that it was "clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact," but that "he found that *as a matter of law* he was unable even to consider the evidence."[65] In the opinion of the majority, the appellate court had taken the same approach.[66] The court of criminal appeals said that while Eddings' family history and personality disorder were "useful in explaining his behavior," they did not "excuse" it.[67] The Supreme Court interpreted these remarks to mean that the appellate court "considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability."[68]

Having decided the factual question, the Court then reversed the

---

57 450 U.S. at 1040.

58 *See* Brief for Appellant at 64, Eddings v. Oklahoma, 102 S. Ct. 869 (1982).

59 *See infra* notes 88-89 and accompanying text.

60 102 S. Ct. at 876 n.9. *See also* Brief for Respondent at 53-57, Eddings v. Oklahoma, 102 S. Ct. 869 (1982).

61 102 S. Ct. at 876 n.9. Although the court of criminal appeals denied the petition for rehearing, it stated that it had given the matter full consideration and had been " 'fully advised in the premises.' " *Id. But see infra* notes 130-35 and accompanying text.

Justice O'Connor, in her concurring opinion, advised that even if the issue had not been properly raised and reviewed below, the Supreme Court could consider it " 'in the interests of justice.' " *Id.* at 878 n.* (O'Connor, J., concurring) (quoting Wood v. Georgia, 450 U.S. 261, 265 n.5 (1981)). *See infra* notes 175-76 and accompanying text.

62 *See infra* notes 90-101 and accompanying text.

63 102 S. Ct. at 875.

64 *Id.*

65 *Id.* (emphasis in original).

66 *Id.*

67 616 P.2d at 1170.

68 102 S. Ct. at 875.

lower courts on the ground that *Lockett v. Ohio*[69] required that the sentencer consider Eddings' troubled youth and emotional and mental difficulties in mitigation of the death penalty.[70] In *Lockett*, the plurality had held that the "Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[71] Because the Ohio death penalty statute[72] only permitted consideration of the three mitigating circumstances enumerated in the act,[73] the Court declared the statute to be invalid.[74]

The *Eddings* Court explained that the rule in *Lockett* was the product of the "law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual."[75] Tracing its pre-*Lockett* decisions, the Court noted that *Furman v. Georgia*[76] held discretionary death sentencing unguided by any legislative standards to be unconstitutional, because such unbridled discretion had led to arbitrary and capricious sentencing decisions.[77] However, the Court pointed out that in subsequent decisions it had recognized that while the eighth amendment requires standards

---

69 438 U.S. 586 (1978) (plurality opinion).

70 102 S. Ct. at 875-77.

71 438 U.S. at 604 (emphasis in original) (footnotes omitted).

72 OHIO REV. CODE ANN. § 2929.03-.04 (Page 1975).

73 The three mitigating factors specified in the statute were: (1) the victim induced or facilitated the offense; (2) it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation; and (3) the offense was primarily the product of the offender's psychosis or mental deficiency. *Id.* § 2929.04(B).

The *Lockett* Court noted that the Ohio statute prohibited the sentencer from considering, in mitigation, factors such as the defendant's comparatively minor role in the offense or his youth. *Lockett*, 438 U.S. at 608.

74 *Id.*

75 102 S. Ct. at 874.

76 408 U.S. 238 (1972).

77 102 S. Ct. at 874. Prior to *Furman*, most death penalty statutes were completely discretionary and provided no guidelines or standards. *See* Note, *Discretion and Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1690 (1974). *See also* Eddings v. Oklahoma, 102 S. Ct. at 874; Lockett v. Ohio, 438 U.S. at 597-98. Thus, *Furman* rendered almost every death penalty statute in the country void, and paved the way for the development of legislative guidelines in death penalty sentencing. For commentaries on *Furman*, see Junker, *The Death Penalty Cases: A Preliminary Comment*, 48 WASH. L. REV. 95 (1972); Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1; Note, *The Death Penalty—The Alternatives Left After Furman v. Georgia*, 37 ALB. L. REV. 344 (1973); Comment, *The Furman Case: What Life is Left in the Death Penalty?*, 22 CATH. U.L. REV. 651 (1973); Comment, *Capital Punishment After Furman*, 64 J. CRIM. L. & CRIMINOLOGY 281 (1973); Note, *Furman v. Georgia—Deathknell for Capital Punishment?*, 47 ST. JOHN'S L. REV. 107 (1972); Note, *The Death Penalty as Presently Administered Under Discretionary Sentencing Statutes is Cruel and Unusual*, 4 SETON HALL L. REV. 244 (1972); Note, *Death Penalty as Currently Administered Constitutes Cruel and Unusual Punishment*, 47 TUL. L. REV. 1167 (1973).

and guidelines, it also requires that the circumstances of the particular offense together with the character of the individual defendant be taken into account.[78]

Applying the rule of *Lockett*, the Court held that just as the state cannot by statute preclude a sentencer from considering mitigating factors, neither may the sentencer exclude mitigating evidence by refusing to consider it.[79] Further, the Court found that a youthful defendant's troubled childhood and lack of emotional and mental maturity are mitigating factors.[80] Youth is well-established as a mitigating circumstance precisely because it evidences impressionability and a lack of maturity and judgment.[81] The Court asserted that it therefore follows that a child's exposure to a neglectful and violent environment during these impressionable years, and a child's failure to attain a level of emotional and mental maturity commensurate to his own chronological age have a "particularly relevant" bearing on his character and must be considered as mitigating factors.[82]

Based on this analysis, the Court held that the sentence imposed on Eddings was unconstitutional,[83] and remanded the case to the Oklahoma trial court for further proceedings.[84] Having decided the

---

[78] 102 S. Ct. at 874. The Court cited Woodson v. North Carolina, 428 U.S. 280 (1976), as one instance in which it held that mandatory death penalty statutes were not a permissible response to the *Furman* problem of arbitrary sentencing discretion, because such statutes do not permit consideration of the "character and record of the individual offender and the circumstances of the particular offense." *Id.* at 304. The Court also pointed to Gregg v. Georgia, 428 U.S. 153 (1976), which upheld the constitutionality of a Georgia death penalty statute which required that the jury find at least one of the aggravating circumstances listed in the act before it could sentence anyone to death, but which, at the same time, allowed the jury to consider any mitigating circumstance proffered by the defendant. *Id.* at 206-07. *See also* Roberts v. Louisiana, 428 U.S. at 333-36 (Louisiana mandatory death penalty statute violated the eighth and fourteenth amendments because it did not permit the sentencer to consider the particular circumstances of the offense and the character of the offender); Jurek v. Texas, 428 U.S. at 276 (Texas statute constitutional because it authorizes jury consideration of individual mitigating circumstances and provides adequate guidance by requiring that the jury find at least one aggravating circumstance before it can sentence a defendant to death); Proffitt v. Florida, 428 U.S. at 252, 259-60 (Florida statute constitutional because it directs the trial judge's attention to individual circumstances of both defendant and crime, and appellate process and aggravating circumstance requirement ensure against arbitrary imposition of death sentence).

[79] 102 S. Ct. at 875-76. The Court noted that the Oklahoma death penalty statute permits the defendant to present evidence as to any mitigating circumstance, and added that "*Lockett* requires the sentencer to listen." *Id.* at 876 n.10.

[80] *Id.* at 876-77.

[81] *Id.* *See infra* notes 115-18 and accompanying text.

[82] *Id.* *See infra* notes 119-20 and accompanying text.

[83] *Id.* at 877.

[84] *Id.* The Court cautioned that although the sentencer and the court of criminal appeals may determine the weight to be given to Eddings' mitigating evidence, "they may not give it no weight by excluding such evidence from their consideration." *Id.* at 876 (footnote omitted).

case on these grounds, the Court, in accordance with the doctrine of judicial restraint,[85] did not address the certiorari issue regarding the constitutionality of sentencing juveniles to death.[86]

B. THE *EDDINGS* DISSENT

Chief Justice Burger, joined by Justices White, Blackmun, and Rehnquist, objected strenuously to the majority's decision.[87] The disagreement stemmed not from the question of law decided, but from perceived procedural improprieties and the majority's interpretation of the lower courts' decisions.

Regarding procedure, the dissent objected to the Court's willingness to consider the petitioner's *Lockett* claim.[88] The dissent argued that the *Lockett* issue was not properly before the Court because it had not been presented in Eddings' petition for certiorari, and had not been properly presented to the Oklahoma courts for review.[89]

On the substantive issue, the dissent, unlike the majority, found that the trial judge and the court of criminal appeals had considered Eddings' troubled childhood and emotional and mental difficulties.[90] The dissent claimed that the majority had strained its reading of the lower courts' opinions in order to "make out a violation of *Lockett*."[91] Focusing first on the majority's reading of the trial court's opinion, the dissent criticized the majority for relying entirely on one isolated remark made by the trial judge that the court could not be " 'persuaded entirely by the . . . fact that the youth was sixteen years old when this heinous crime was committed. Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background.' "[92] According to the dissent, the majority's interpretation of this comment ignored the trial court's expenditure of considerable time receiving the

---

85 *See infra* notes 154-58 and accompanying text.

86 102 S. Ct. at 874 n.5. Justice Brennan wrote a brief concurring opinion in which he pointed out that although he joined in the Court's opinion, he did not depart from his view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the eighth and fourteenth amendments. *Id.* at 877 (Brennan, J., concurring). *See also* Gregg v. Georgia, 428 U.S. at 229-31 (Brennan, J., dissenting).

Justice O'Connor also wrote a concurring opinion in order "to address more fully the reasons why this case must be remanded in light of *Lockett v. Ohio*." Eddings v. Oklahoma, 102 S. Ct. at 877 (O'Connor, J., concurring) (citation ommitted). She stressed that justice required that the case be remanded to ensure that all mitigating circumstances have been considered so that the death penalty would not be erroneously imposed. *Id.* at 878. *See infra* notes 173-74 and accompanying text.

87 *Id.* at 879 (Burger, C.J., dissenting).

88 *Id.*

89 *Id.* *See infra* notes 124-36 and accompanying text.

90 *Id.* at 881-83.

91 *Id.* at 881. *See infra* notes 137-49 and accompanying text.

92 102 S. Ct. at 881.

testimony of a probation officer and various mental health professionals who described Eddings' personality and family history: "an obviously meaningless exercise, if, as the Court asserts, the judge believed he was barred 'as a matter of law' from considering their testimony."[93] The dissent also complained that the majority failed to consider that the judge delivered his opinion extemporaneously from the bench and could not be expected "to frame each utterance with the specificity and precision that might be expected of a written opinion or statute."[94]

The Chief Justice further argued that even when examined in isolation, the trial court's statement was ambiguous.[95] In the first place, "it is not even clear what the trial court meant by Eddings' 'violent background.' "[96] Since there had been testimony that Eddings often got into fights and had once been charged with assault with intent to do great bodily harm, the dissent suggested that the trial judge might have been referring to these incidents.[97] Secondly, the dissent asserted that the judge's comments could just as easily have been understood as saying that while the court had taken account of Eddings' youth and his unfortunate childhood and personality problems, it did not consider any of these factors sufficient to offset the serious aggravating circumstances which had been established.[98]

Turning to the majority's reading of the court of criminal appeals' opinion, the dissent again accused the majority of relying entirely on a few isolated comments.[99] The dissent criticized the majority for ignoring the careful attention which the appellate court had given to the evidence of Eddings' troubled childhood and mental problems, and suggested that this was something the court would have been unlikely to do had it found the evidence to be "irrelevant."[100] According to the dissent, the appellate court's statements reflected nothing more than the conclusion that Eddings' background and personality problems were not sufficient to tip the scales, given the serious aggravating circumstances established beyond a reasonable doubt. "The Court's opinion offers no reasonable explanation for its assumption that the court of criminal ap-

---

[93] *Id.*

[94] *Id.*

[95] *Id.* (footnote omitted).

[96] *Id.* at 881 n.5. Although in its brief the state seemed to concede that the court was probably referring, at least in part, to Eddings' family history, at oral argument the state maintained that the remark was ambiguous and could have meant that the trial court was not going to consider Eddings' extensive juvenile record. *Id.*

[97] *Id.*

[98] *Id.* at 881.

[99] *Id.* at 881-82.

[100] *Id.* at 882. The dissent noted that the court of criminal appeals had spent several paragraphs summarizing the evidence of Eddings' troubled childhood and emotional problems in its opinion. *See* 616 P.2d at 1169-70.

peals considered itself bound by some unstated legal principle not to 'consider' Eddings' background."[101]

Therefore, the dissent concluded that Eddings' sentence should have been affirmed, since it was not inconsistent with *Lockett* for the sentencing body to have found that Eddings' family background and personality problems did not outweigh the serious aggravating circumstances which were established.[102]

III. Discussion and Analysis

A. The Court's Decision

The Court's resolution of the *Eddings* case merely required the application of rules established years before. By holding that the eighth amendment prohibits a sentencer from excluding relevant mitigating evidence, the Court did not broaden the *Lockett* rule; rather, the Court applied the rule in a manner wholly consistent with the spirit underlying its creation. If the legislature cannot limit the category of circumstances which may be considered in mitigation, it certainly follows that the sentencer should not be able to either. Thus, while an affirmation of the Court's position that the eighth amendment requires individual consideration in capital sentencing,[103] the *Eddings* holding breaks no new ground.[104]

Likewise, the Court's holding that a juvenile defendant's troubled childhood and emotional and mental difficulties are mitigating factors was also the result of applying previously established rules and guidelines. In *Lockett*, the Court defined a mitigating factor to be "any aspect of a defendant's character . . . and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[105] In addition to this definition, the Court has provided examples of the kind of personality traits and circumstances which would be

[101] 102 S. Ct. at 882 (Burger, C.J., dissenting).

[102] *Id.* at 882-83.

[103] *See supra* note 78 and accompanying text.

[104] For commentaries on *Lockett* and individualized consideration in capital sentencing, see Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980); Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317 (1981); Comment, *Evolutions of the Eighth Amendment and Standards for the Imposition of the Death Penalty*, 28 DE PAUL L. REV. 351 (1979); Note, *Right of a Defendant to Have any Relevant Aspect of His Character and Circumstances of Offense Used as Factors Mitigating a Death Sentence*, 25 WAYNE L. REV. 1147 (1979).

[105] Lockett v. Ohio, 438 U.S. at 604 (footnote omitted). *See supra* note 71 and accompanying text. This definition assumes that the particular characteristic or circumstance proffered is of such a nature that it would justify a lesser penalty. It is unthinkable, for example, that a sentencer would give a lesser penalty because the defendant introduces, in mitigation, evidence of his violent behavior and previous arrests and convictions. Yet, this evidence would have a bearing on his character.

mitigating factors.[106] In *Eddings*, the Court relied on one of its well-established examples—youth.[107] It reasoned that since youth is a mitigating factor, a juvenile defendant's troubled childhood and lack of emotional and mental maturity must be mitigating factors as well.

The Court's analysis was indeed correct. The recognition of youth as a mitigating factor is the product of the general recognition by the courts that the law should treat minors differently from adults. For example, the Supreme Court has acknowledged that children and adolescents are not always entitled to the same constitutional rights as adults.[108] Because youths are impressionable and lack the maturity and experience of their elders, the Court has limited their first amendment rights by restricting access to reading materials which the state defines as obscene for minors, but not for adults.[109] Moreover, the Court has upheld restrictive child labor laws[110] and denied female minors the privacy rights that are afforded to adult women in the context of abortion.[111] Finally, in the area of juvenile justice, the Court has upheld statutory schemes which fail to provide youths with rights fundamental to adult criminal defendants on the grounds that youths are better served by a system that recognizes their immaturity and amenability to regenerative treatment.[112]

---

[106] *See, e.g.*, *id.* at 608 (defendant's youth and comparatively minor role in the offense); Bell v. Ohio, 438 U.S. 637, 641-42 (1978) (defendant's cooperation with the police); Jurek v. Texas, 428 U.S. at 273 (quoting Jurek v. State, 522 S.W.2d 934, 939-40 (1975)) (defendant's lack of a prior criminal record; defendant's action occurred under duress or domination of another).

[107] Not only has the Supreme Court frequently asserted that youth is a mitigating factor, *see* Lockett v. Ohio, 438 U.S. at 608; Bell v. Ohio, 438 U.S. at 641-42; Jurek v. Texas, 428 U.S. at 273; Proffit v. Florida, 428 U.S. at 257-58, but appellate courts have often reduced sentences because of the youth of the defendant. *E.g.*, State v. Maloney, 105 Ariz. 348, 464 P.2d 793, *cert. denied*, 400 U.S. 841 (1970); Vasil v. State, 374 So. 2d 465 (Fla. 1979), *cert. denied*, 446 U.S. 967 (1980); People v. Wilkins, 36 Ill. App. 3d 761, 344 N.E.2d 724 (1976); Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968); State v. Coughlin, 176 Mont. 7A (1978); State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959).

[108] In Bellotti v. Baird, 443 U.S. 622, 634 (1979), the Court noted that the constitutional rights of children and adults could not be equated, in view of "the peculiar vulnerability of children," and their "inability to make critical decisions in an informed, mature manner." *Cf.* May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) ("Children have a very special place in life which the law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children").

[109] *See* Ginsberg v. New York, 390 U.S. 629 (1968).

[110] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944).

[111] *See* Bellotti v. Baird, 443 U.S. at 643-44.

[112] The juvenile justice system denies minors certain rights which are made available to adult defendants, such as the right to a jury. Yet, the Supreme Court has repeatedly upheld the constitutionality of the juvenile justice scheme, maintaining that minors are better served by a non- adversarial, informal, and protective proceeding. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971).

The theme which pervades these decisions is that the Constitution provides states with wide latitude in protecting minors because of their vulnerability and immaturity.[113] Pursuant to this authority, legislatures have acted to restrain minors from exercising certain rights to ensure that they avoid the harm which could result from youthful irresponsibility.[114]

For similar reasons, many courts and commentators have concluded that juveniles who are placed in the adult criminal system continue to deserve special treatment and protection. For instance, it has frequently been asserted that juveniles deserve less severe punishment than adults since minors have less capacity to control their conduct and to think in long-range terms.[115] Moreover, because youths are particularly impressionable, their crimes may not be exclusively their fault, but may also represent "a failure of family, school, and the social system which share responsibility in the development of America's youth."[116] Juveniles may also deserve greater leniency because they are still in the

---

113 Psychologists and sociologists have long shared the Supreme Court's opinion that youth evidences impressionability and a lack of maturity. *See, e.g.*, E. ERICKSON, CHILDHOOD AND SOCIETY (2d ed. 1963); E. PEEL, THE NATURE OF ADOLESCENT JUDGEMENT (1971); J. PIAGET, THE MORAL JUDGEMENT OF THE CHILD (1966); M. RUTTER, CHANGING YOUTH IN A CHANGING SOCIETY: PATTERNS OF ADOLESCENT DEVELOPMENT AND DISORDER (1980); Kohlberg, *Development of Moral Character and Moral Ideology*, in REVIEW OF CHILD DEVELOPMENT RESEARCH (Hoofman ed. 1964); Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 AM. J. ORTHOPSYCHIATRY 446 (1980); Rest, Davison & Robbins, *Age Trends in Judging Moral Issues: A Review of Cross-Sectional, Longitudinal, and Sequential Studies of the Defining Issues Test*, 49 CHILD DEVELOPMENT 263 (1978); Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 LAW & CONTEMP. PROBS. 38 (1975).

114 For example, states have enacted statutes which prohibit minors from purchasing alcohol and cigarettes. *See, e.g.*, CAL. PENAL CODE § 308(a) (West 1982); FLA. STAT. ANN. § 562.11 (West 1982); IDAHO CODE §§ 23-949, 18-1502A (1982); ILL. ANN. STAT. ch. 43, § 134(a) (Smith-hurd 1982); N.Y. PENAL LAW § 260.20 (McKinney 1980).

115 *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 41 (1967) (while minors must be held responsible for their misconduct, the level of juvenile responsibility is lower than for adults); TWENTIETH CENTURY FUND TASK FORCE, CONFRONTING YOUTH CRIME: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUTH OFFENDERS 7 (1978) [hereinafter cited as TWENTIETH CENTURY TASK FORCE REPORT] (although young offenders should be held legally responsible for intentional criminal harms, they "deserve less punishment because adolescents . . . have less capacity to control their conduct and to think in long-range terms than adults"; it is "unrealistic to treat young offenders as if they have fully mature judgment and control"). *See also* State v. Maloney, 105 Ariz. at 360, 464 P.2d at 805 ("The defendant has committed a heinous crime, the sheer brutality of which unquestionably shocked the jury. . . . Had he been of mature age the death penalty would have gone undisturbed by this court. . . . Because of his immaturity we are persuaded that he should not die"); State v. Telavera, 76 Ariz. 183, 187, 261 P.2d 997, 1000 (1953) (court reduces rape sentence because "[d]efendant was approximately 17 years of age at the time, immature both in judgment and in the exercise of discretion"); State v. Spinks, 66 N.J. 568, 334 A.2d 23 (1975) (court affirms sentence reduction for armed robbery because defendant's young age evidenced immaturity and lack of judgment).

116 TWENTIETH CENTURY TASK FORCE REPORT, *supra* note 115, at 7.

early stages of moral development,[117] and, therefore, are more amenable to rehabilitation than are adults.[118]

The same considerations which make youth a mitigating factor in sentencing also indicate that a juvenile's lack of emotional and mental maturity and his troubled childhood should be mitigating factors. If youth is mitigating because it evidences immaturity, and hence a limited capacity to control conduct and to think in long-range terms, then a juvenile defendant's abnormally immature level of emotional and mental development must also be mitigating. Such a juvenile may be even less culpable than his peer, who, while still immature, is at least at the proper stage of development.

Furthermore, since youth is a mitigating factor because it evidences impressionability, it follows that a minor's exposure to a neglectful, and sometimes even violent, family environment during his formative years should be a mitigating factor as well. In such situations, the impressionable youth's behavior is not his fault alone; it also represents the failure of the family, which did not provide him with proper attention and guidance, and of the school and social system, which failed to counteract the negative influences he was exposed to at home.[119] In fact, many

---

[117] *See* E. PEEL, *supra* note 113, at 131-34 (child's ability to think abstractly and to engage in mature judgment continues to develop into late adolescence and early adulthood). There is also a considerable body of research which demonstrates that a person's ability to think in moral terms and to engage in moral judgments reaches a plateau only after leaving school or reaching early adulthood. *See, e.g.*, M. RUTTER, *supra* note 113, at 238; Kohlberg, *supra* note 113, at 404-05; Rest, Davison & Robbins, *supra* note 113, at 276-77.

[118] *See* People v. Wilkins, 36 Ill. App. 3d at 767, 344 N.E.2d at 729 (court reduces murder sentence: "At the time of trial the defendant was 17 years of age and had no prior criminal record. . . . Although the nature of the crime is extremely serious, the sentence imposed does not adequately reflect the possibility of the defendant's rehabilitation"); Workman v. Commonwealth, 429 S.W.2d at 378 (court reduces sentence of life imprisonment without parole for rapist: "[t]he intent of the legislature was to deal with the incorrigible individual who presented a constant threat to society"; "incorrigibility is inconsistent with youth"); People v. Hiemel, 49 A.D.2d 769, 770, 372 N.Y.S.2d 730, 731 (1975) (court reduces sentence for first degree murder where the sixteen year old defendant has used time in prison to become "a classic example of the rehabilitation heights attainable within our existing penal system by an inmate desirous of taking advantage of the education facilities available"); State v. Coughlin, 176 Mont. at 7A (court reduces sentence because defendant is young and likely to be rehabilitated). *See also* The Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (1976). Under this Act, federal judges are obligated to consider the special rehabilitative sentencing alternatives created by the Act before sentencing any person between the ages of sixteen and twenty-two. The Act was expressly "designed to provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket, to rehabilitate them and restore normal behavior patterns." Dorszinski v. United States, 418 U.S. 424, 432-33 (1974).

[119] *See* TWENTIETH CENTURY TASK FORCE REPORT, *supra* note 115, at 7. The connection between adolescent violence and crime and the family environment has been validated by research. For example, a recent study, to be published in a forthcoming issue of the *The American Journal of Psychiatry*, suggests that the violent criminal behavior of adolescents is linked to the effects of abuse and violence in their families. *See* Collins, *The Violent Child: Some Patterns Emerge*, N.Y. Times, Sept. 27, 1982, § Y (Style), at 20. Numerous lawmakers have also

courts recognized the mitigating effect of this situation long before *Eddings* was decided.[120]

Thus, the *Eddings* Court neither broadened nor narrowed the *Lockett* rule or the definition of mitigating circumstances. Rather, the Court's decision represents a reaffirmation of the Court's commitment to individualized sentencing decisions in capital cases and to a definition of mitigating circumstances which permits the capital sentencer to make a fully informed decision. Yet, this affirmation of *Lockett* may be of great importance, since *Lockett* has been criticized as signalling a return to the pre-*Furman*[121] days of arbitrary discretion in death penalty sentencing.[122] The root of the problem, according to these critics, is that while *Lockett* mandates the consideration of mitigating factors, it also leaves the sentencing body with complete discretion in deciding how much weight to attribute to these factors and how to balance these factors against the aggravating factors present in each case. While these issues were not raised in *Eddings*, the Court implied it would continue to stand by its *Lockett* position and leave the weighing process in the hands of the lower courts.[123]

B. THE COURT'S AVOIDANCE

Analysis of the *Eddings* decision also reveals that the Court preferred to avoid ruling on the constitutionality of imposing the death

---

recognized that parents share in the responsibility for the crimes and other wrongful acts committed by their children. Many municipalities have enacted statutes which hold parents liable for acts of their children. In Deerfield, Illinois, for example, a 1975 parental responsibility ordinance makes parents liable for failing to prevent their children from committing crimes and violating local laws. Parents may be fined up to $500.00 for not controlling their children's behavior. *See* Deerfield, Ill., Code § 15-S-64 (1975). In Naperville, Illinois, a vandalism ordinance requires that parents or legal guardians make restitution to victims for the vandalism of their children. *See* Naperville, Ill., Code § 24.031 (1978). *See generally* Lipinski, *A Growing Movement: Making Parents Pay When Kids are Bad*, Chi. Tribune, Sept. 26, 1982, § 12 (Tempo), at 1.

120 *See, e.g.*, People v. Howell, 16 Ill. App. 3d 989, 994, 307 N.E.2d 172, 175 (1974) (court reduces attempted murder sentence: "This is his first felony conviction. . . . Many of his problems may have stemmed from an unstable family life . . . ."); State v. Blanton, 166 N.J. Super. 62, 398 A.2d 1328 (1979) (court reduces sentence for assault and battery of police officer because of defendant's youth and his disadvantaged background); Mattino v. State, 539 S.W.2d 824, 827 (Tenn. Crim. App. 1976) (court reverses denial of probation of larceny sentence to a young defendant: "The defendant is a first offender with no criminal record of any kind . . . . He comes from a broken home and had dropped out of high school after the tenth grade . . . .").

121 *See supra* note 77 and accompanying text.

122 *See, e.g.*, Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1153 (1980). *See also* Lockett v. Ohio, 438 U.S. at 622-24 (White, J., concurring in part, dissenting in part).

123 "On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them." 102 S. Ct. at 877.

penalty on juvenile offenders. The Court's willingness to abandon its well-established procedures and its interpretation of the lower court opinions indicate that the Court was determined to decide the case on the basis of Eddings' *Lockett* claim, thereby sidestepping the issue on which it had granted certiorari.

1. Supreme Court Procedure

The introduction of Eddings' *Lockett* argument posed two procedural obstacles for the Court. The first was Eddings' failure to include the claim in his petition for certiorari.[124] The Court has traditionally refused to consider issues not properly presented on petition for certiorari,[125] and has incorporated this practice in Rule 40 of the Rules of the Supreme Court.[126] The only exception to this rule is that the Court may entertain, at its option, a "plain error" which had not been presented.[127] The *Eddings* majority, however, did not rely on the plain error exception[128] and, in fact, offered no explanation for circumventing the Court's own rules of procedure.[129]

Eddings' failure to present his *Lockett* claim to the Oklahoma Court of Criminal Appeals in his initial appeal posed the second procedural obstacle.[130] The Supreme Court has repeatedly held that it will not decide questions which have not been considered below.[131] To overcome

---

[124] *See* 102 S. Ct. at 876 n.9.

[125] *See, e.g.*, Dickinson Industrial Site v. Cowan, 309 U.S. 382, 389 (1940); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178-79 (1938). *See also* Bice, *The Limited Grant of Certiorari and the Justification of Judicial Review*, 1975 WIS. L. REV. 343, 345; Note, *Scope of Supreme Court Review: The Terminiello Case in Focus*, 59 YALE L.J. 971 (1950).

[126] "The phrasing of the questions presented [in the brief] need not be identical with that set forth in . . . the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded . . . ." SUP. CT. R. 40(1)(d)(2).

[127] *Id.*

[128] *But see infra* notes 175-76 and accompanying text.

[129] The only comment the Court made regarding this procedural irregularity was to point out that both sides had addressed the *Lockett* issue in their briefs. 102 S. Ct. at 876 n.9. Although this indicated that neither side would be at a disadvantage when the Court entertained the argument, it does not explain why the Court believed it was appropriate to ignore established practice in this case.

The Court has, on rare occasions, entertained an argument not presented in the petition for certiorari without relying on the plain error rule and without giving any explanations for abandoning its established procedure. *See, e.g.*, Redrup v. New York, 386 U.S. 767 (1967); Terminiello v. Chicago, 337 U.S. 1 (1949). However, such procedural improprieties have always been met with strenuous objections from members of the Court. *See* Redrup v. New York, 386 U.S. at 771-72 (Harlan, J., dissenting); Terminiello v. Chicago, 377 U.S. at 8 (Frankfurter, J., dissenting). Moreover, the infrequency of such impropriety suggests that it is by no means an accepted practice of the Court.

[130] *See* Eddings v. Oklahoma, 102 S. Ct. at 876 n.9.

[131] *See, e.g.*, Street v. New York, 394 U.S. 576, 581-82 (1969); Hanson v. Denckla, 357 U.S. 235, 243-44 (1958); McGoldrick v. Compagne Generale, 309 U.S. 430, 434 (1939); Duignan v.

this obstacle, the *Eddings* Court relied on Eddings' inclusion of the issue in his petition to the court of criminal appeals for rehearing.[132] In the past, however, the attempt to raise a question after judgment, upon a petition for rehearing, has been held to come too late, unless the court actually entertains the question and decides it.[133] Although the Oklahoma court stated that it gave Eddings' petition for rehearing full consideration and was " 'fully advised in the premises,' " when it denied his request,[134] the Supreme Court has previously held that such comments do not indicate that the lower court ruled upon the question; rather, the Court has held that such comments reveal nothing more than a denial of the motion for rehearing.[135] Thus, the Court's decision to entertain Eddings' *Lockett* claim does not square with its earlier

---

United States, 274 U.S. 195, 200 (1927). *See also* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 208-30 (5th ed. 1978); R. WOLFSON & P. KURKLAND, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 106-60 (1951).

132 102 S. Ct. at 876 n.9.

133 *See* Herndon v. Georgia, 295 U.S. 441, 443 (1934); Radio Station W.O.W. v. Johnson, 326 U.S. 120, 128 (1944); American Surety Co. v. Baldwin, 287 U.S. 156, 162-64 (1932). *See generally* R. STERN & E. GRESSMAN, *supra* note 131, at 220; R. WOLFSON & P. KURKLAND, *supra* note 131, at 129.

134 102 S. Ct. at 876 n.9.

135 In Consolidated Turnpike v. Norfolk & O.V.R. Co., 228 U.S. 326, 333-34 (1913), the lower court, in denying the motion for rehearing, stated that it had " 'maturely considered the petition.' " The Supreme Court found that the "words 'maturely considered' do not import any decision of the question made." The Court, therefore, refused to consider the issue. *See also* Forbes v. State Council of Virginia, 216 U.S. 396, 398-99 (1909). *Cf.* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476 (1975) (quoting Cox Broadcasting Corp. v. Cohn, 231 Ga. 60, 68, 200 S.E.2d 127, 134 (1973)) (where the federal question had been raised for the first time in a motion for rehearing in the highest state court, the Supreme Court's appellate jurisdiction was held properly invoked by virtue of the state court's express holding, in denying rehearing, that " '[a] majority of this court does not consider this statute to be in conflict with the First Amendment' "); Ungar v. Sarafite, 376 U.S. 575, 582-83 (1964) (where the federal constitutional claims apparently were first raised in a motion for re-argument, the Supreme Court granted certiorari because the New York Court of Appeals granted a motion to amend the remittitur to demonstrate that the federal claims had been passed upon in denying the motion).

There are situations where raising a question for the first time in the petition for rehearing is timely even though the state court says nothing in denying the petition. If, for example, the question is created by an unexpected decision of the highest state court or the United States Supreme Court, giving the litigant no prior opportunity to anticipate or assert the particular question, the petition for rehearing constitutes his first and probably his only chance to present the matter to that court. Accordingly, the Supreme Court will exercise its jurisdiction. *See, e.g.*, Herndon v. Georgia, 295 U.S. 441, 444-45 (1935); Great Northern R.R. Co. v. Sunburst Oil Co., 287 U.S. 358, 366-67 (1932); Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673, 677-78 (1930).

Eddings' *Lockett* claim does not fit into this exception. Eddings was sentenced to death by the trial judge in May of 1977, a year before *Lockett* was decided. However, the court of criminal appeals did not render judgment until March 21, 1980, two years after the *Lockett* decision. Thus, Eddings had ample opportunity to bring his *Lockett* claim to the attention of the appellate court, and need not have waited until his petition for rehearing.

decisions.[136]

2. *The Interpretation of the Lower Court Decisions*

In addition to these procedural improprieties, evidence of the majority's desire to avoid the certiorari issue is provided by its interpretation of the lower court opinions. As the dissent pointed out, the majority strained its reading of the lower court opinions in order to "make out" a *Lockett* violation:[137] the majority relied solely on a couple of ambiguous statements of the lower courts and it ignored the fact that, even examined in isolation, the statements could very easily have been read to mean that the courts simply concluded that the proffered mitigating circumstances did not outweigh the serious aggravating circumstances which had been established.[138]

In addition to the dissent's observations, there is further evidence suggesting that the Court strained to find a *Lockett* violation. First, an examination of the trial court record reveals that Eddings' emotional and mental difficulties were by no means conclusively demonstrated.[139] It therefore appears the trial judge may have considered the evidence, but found it insufficient to overcome the serious aggravating circumstances which had been proven beyond a reasonable doubt. The majority, however, completely ignored the comparative weakness of Eddings' proffered mitigating evidence.[140]

Second, even if the Supreme Court was justified in finding that the trial court had refused to consider the evidence in mitigation, the majority appears to have misinterpreted the appellate court's decision. The appellate court apparently did consider the mitigating factors, as it was required to do under *Lockett*, even devoting a separate section of its opinion to them.[141] After spending several paragraphs detailing the evidence

---

[136] *But see infra* notes 175-76 and accompanying text.

[137] *See supra* notes 91-101 and accompanying text.

[138] *See supra* notes 91-101 and accompanying text.

[139] Dr. Dietsche, a psychologist, testified that if forced to extrapolate from a standard intelligence scale

> he would place [Eddings'] 'mental age' at about fourteen years, six months; however, he then said that this mental age would have 'no meaning' since 'the mental age concepts break down . . . between fourteen and sixteen years of age.' He went on to state: 'My opinion is that [Eddings] has the intelligence of an adult. . . .' Describing a single interview with petitioner while he was awaiting trial . . . Dr. Rettig, a sociologist, said that petitioner's 'responses appeared to me to be several years below his chronological age'; he 'qualif[ied]' this answer, however, by noting that [Eddings] was 'under a great deal of constraint in the atmosphere in which I saw him.'

102 S. Ct. at 880 n.4 (Burger, C.J., dissenting) (citations omitted).

[140] It is of interest to note that the majority overstated and oversimplified the evidence presented at the sentencing hearing by stating categorically that Eddings' "mental and emotional development were at a level several years below his age." *See* 102 S. Ct. at 872, 877.

[141] *See* 616 P.2d at 1169-70.

of Eddings' troubled childhood and his psychological and emotional problems,[142] the appellate court went on to weigh the factors pleaded in mitigation against the aggravating factors established in the case.

The appellate court first looked to Eddings' youth. It said it was giving "serious consideration to the petitioner's youth," but that the aggravating circumstances in the case were so serious that Eddings' youth could not outweigh them.[143] After considering the evidence of Eddings' troubled childhood and emotional problems, the court found that Eddings suffered from a personality disorder.[144] It held, however, that neither this disorder nor the petitioner's family history was such as to excuse his behavior. In saying that "all the evidence tends to show that [the petitioner] knew the difference between right and wrong at the time he pulled the trigger, [which] is the test of criminal responsibility in this State,"[145] the appellate court was supporting its conclusion that the mitigating factors being considered were not such as to outweigh the aggravating factors. That this conclusion is couched in terms of the petitioner's responsibility for his crime is merely a sign that the court had been particularly impressed by the fact that Eddings appeared to have known exactly what he was doing when he committed a crime which had been characterized as "heinous, atrocious and cruel."[146] Although it is unfortunate that the court used language commonly used in connection with an absolute defense to criminal responsibility, it would appear in the context of the entire opinion that the court concluded only that the mitigating factors pleaded were outweighed by the aggravating ones.

Concentrating on the appellate court's remark that criminal responsibility depends on knowledge of the difference between right and wrong, the *Eddings* majority concluded that the appellate court had not considered Eddings' evidence in mitigation, because it had "considered only that evidence to be mitigating which would tend to support a legal excuse from criminal liability."[147] To reach this conclusion, the majority had to ignore completely the section in the opinion in which the appellate court noted that the petitioner's youth was a mitigating factor of great weight;[148] after all, youth is not a legal excuse from criminal liabil-

---

[142] *See id.*

[143] *Id.* at 1170.

[144] *Id.*

[145] *Id.*

[146] *Id.* at 1167-68.

[147] 102 S. Ct. at 875.

[148] As stated, earlier, the District Court indicated great weight had been given to [the defendant's youth] but, nevertheless, found it could not overbalance the aggravating circumstances of the case. We, too, have given serious consideration to the petitioner's youth. But the aggravating circumstances in this case are very serious; and we, too, have to conclude that the petitioner's youth cannot outweigh them.

ity.[149] The majority also had to ignore the context of the remark on legal responsibility which attracted its attention. The Supreme Court's conclusion would appear, therefore, to be the result of a strained reading of the appellate court's opinion, rather than a close analysis of the decision under review.

3. *Judicial Restraint*

The Court's apparent eagerness to find a *Lockett* violation suggests it was determined to avoid the issue of whether it is constitutional to impose the death penalty on juvenile offenders. Indeed, the majority had reason to want to avoid the issue. Eddings' eighth amendment argument raised many difficult problems for the Court: it asked the Court to re-examine the standard used in applying the eighth amendment;[150] it challenged the legitimacy of the certification process by which juveniles are transferred to criminal courts and treated as adults;[151] and it asked the Court to perform the difficult task of determining at what age someone is so fully responsible for his criminal actions that the death penalty may be the appropriate and acceptable penalty.[152] Moreover, it is possible that sympathetic justices may have wanted to avoid the issue for fear that Eddings' sentence would be affirmed and a harsh new chapter in the law of capital punishment would be promulgated if this question were decided.[153]

---

616 P.2d at 1170.

[149] Although youth may lead the courts to treat the defendant differently in terms of punishment, *see supra* notes 115-18 and accompanying text, it does not absolve the defendant of criminal liability. Most states retain the common law presumption that children over fourteen know the difference between right and wrong, and are capable of criminal intention. *See* W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 6.12 (6th ed. 1958); J. MILLER, HANDBOOK OF CRIMINAL LAW § 34 (1934); R. PERKINS, CRIMINAL LAW 837-40 (2d ed. 1969); Frey, *The Criminal Responsibility of the Juvenile Murderer*, 1970 WASH. U.L.Q. 113; Kean, *The History of the Criminal Liability of Children*, 53 L.Q. REV. 364 (1937).

[150] The petitioner claimed that the imposition of the death penalty on juvenile offenders was cruel and unusual punishment because it was repudiated by society's "evolving standards of decency." *See supra* note 56 and accompanying text. However, the Supreme Court has never relied on that standard alone when finding that a particular form of punishment violated the eighth amendment. *See* Enmund v. Florida, 102 S. Ct. 3368, 3376 (1982) (popular opinion must weigh in the balance, but is not decisive); Gregg v. Georgia, 428 U.S. at 182 (public perceptions regarding a particular punishment are not conclusive in determining whether a punishment violates the eighth amendment).

[151] Although the petitioner did not explicitly challenge the transfer process, such a challenge was implied in his argument. By transferring juveniles to criminal courts, the state is allowing juveniles to be treated as adults. The petitioner's position assumed that in terms of criminal penalties juveniles should not be treated as adults.

[152] The petitioner recognized the difficulty of this task, pointing out in his brief: "The problem, of course, here as elsewhere in the evolution of constitutional law, resides in drawing the line. Shall it be 12, 15, 18, 20?" Brief for Appellant at 59, Eddings v. Oklahoma, 102 S. Ct. 869 (1982).

[153] This possibility is suggested by comments made in the dissenting and concurring opin-

It is certainly not unusual for the Court to avoid the resolution of constitutional questions of first impression.[154] In fact, the doctrine of judicial restraint, adhered to by the Court, encourages such avoidance.[155] The main tenet of this doctrine is that the Court should not rule on an unresolved constitutional question if there is some other ground on which to decide the case.[156]

---

ions. Chief Justice Burger, in his dissent, maintained that the "Court's opinion makes clear that some Justices who join it would not have imposed the death penalty had they sat as the sentencing authority." 102 S. Ct. at 883 (Burger, C.J., dissenting). Justice O'Connor, in her concurring opinion, noted that the "Chief Justice may be correct in concluding that the Court's opinion reflects a decision by some Justices that they would not have imposed the death penalty in this case had they sat as trial judge." *Id.* at 878-79 (O'Connor, J., concurring). This observation is certainly supported by the previous positions taken by some members of the majority. Justice Brennan has uniformly taken the position that the death penalty is always unconstitutional. *See* Gregg v. Georgia, 428 U.S. at 230-31 (Brennan, J., dissenting); Furman v. Georgia, 408 U.S. at 305 (Brennan, J., concurring). *See also* Eddings v. Oklahoma, 102 S. Ct. at 877 (Brennan, J., concurring). Justice Marshall has also taken that position. *See* Furman v. Georgia, 408 U.S. at 370-71 (Marshall, J., concurring). Justice Powell, who wrote the *Eddings* majority opinion, appears to be particularly sympathetic to Eddings' situation: "We are concerned here . . . with the manner of the imposition of the ultimate penalty: the death sentence imposed for the crime of murder upon an emotionally disturbed youth with a disturbed child's immaturity." 102 S.Ct. at 877.

Moreover, the fear that Eddings sentence would have been affirmed appears to be well-founded; at least four of the justices would have found that the imposition of the death penalty on an offender who was sixteen at the time of the offense is constitutional. At the conclusion of Chief Justice Burger's dissenting opinion, in which Justices White, Blackmun, and Rehnquist joined, the Chief Justice stated that "because the sentencing proceedings in this case were in no sense inconsistent with *Lockett v. Ohio* . . . I would decide the sole issue on which we granted certiorari *and affirm the judgment*." *Id.* at 883 (Burger, C.J., dissenting) (emphasis added).

[154] *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979); Flast v. Cohen, 392 U.S. 83 (1968); Poe v. Ullman, 367 U.S. 497 (1961). *See also* Ashwander v. Valley Authority, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

[155] *See generally* C. BLACK, JR., PERSPECTIVES IN CONSTITUTIONAL LAW (1970); D. FORTE, THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT (1972); L. HAND, THE BILL OF RIGHTS (1958); L. LEVY, JUDICIAL REVIEW AND THE SUPREME COURT (1967); Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1 (1981); Bickel, *supra* note 154.

[156] The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

Ashwander v. Valley Authority, 297 U.S. at 347 (Brandeis, J., concurring).

In addition to deciding cases on other grounds, the Court has developed several other rules by which it avoids constitutional issues: (1) the Court will not give advisory opinions; (2) the Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation; (3) the Court will not pass upon the validity of a statute upon complaint of one who has availed himself of its benefits; (4) the Court will not pass upon a constitutional question, unless the issue is "ripe"; (5) the Court will not decide "political questions"; (6) the Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *See id.* at 346-48; G. GUN-

The development of this doctrine was the product of the Court's recognition that its decision on constitutional questions is the final word on the matter, creating binding precedent which may have long-term and wide-ranging impact.[157] Thus, once such a decision is made there is often little room for growth or development in that particular area of the law, and the will of the legislatures, as representatives of the public, may, in many cases, be overridden. Believing that a government by the judiciary is no substitute for a government by the people, the Court has firmly established the doctrine of judicial restraint as a guiding principle in constitutional law, and has applied the doctrine most actively when faced with a question involving the constitutionality of a statute.[158]

Given the principle of judicial restraint, it may appear that the *Eddings* Court was justified in avoiding the certiorari issue raised by the petitioner. Eddings' claim would certainly have affected the numerous statutes which permit the execution of offenders who were minors at the time of the crime.[159] Moreover, the Court has often strained in its reading of lower court opinions in order to avoid constitutional questions.

In *Rescue Army v. Municipal Court*,[160] for example, the Supreme Court refused to reach the constitutional question raised because, in the view of the majority, the state supreme court had not clearly stated which sections of the municipal code the petitioner had violated. The Supreme Court maintained that jurisdiction should be exerted "only when the jurisdictional question presented by the proceeding in prohibition tenders the underlying constitutional issues in clean-cut and concrete form, unclouded by any serious problem of construction relating either to the terms of the questioned legislation or its interpretation by the state courts."[161] Because the state court failed to state explicitly which sections of the code were violated, the majority found that the constitutional question presented was not in "clean-cut" and "concrete" form. The dissent argued, however, that it was not at all unclear which

---

THER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1604-717 (10th ed. 1980); Bickel, *supra* note 154, at 42-64; Mendelson, *The Orthodox, or Anti-Activist, View—Mr. Justice Frankfurter*, in THE SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT 23-27 (1972).

[157] *See generally*, D. FORTE, *supra* note 155; L. HAND, *supra* note 155; Bickel, *supra* note 154; Wallace, *supra* note 155.

[158] *See*, *e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. at 500 ("[a]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available"). *See also* United States v. Butler, 297 U.S. 1, 68 (1936); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 436 (1827); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810).

[159] There are presently twenty-eight states with such statutes. *See* Brief for Appellant at 46, Eddings v. Oklahoma, 102 S. Ct. 869 (1982).

[160] 331 U.S. 549 (1947).

[161] *Id.* at 584.

sections of the municipal code were involved because the courts below and the parties all acted on the assumption that the appellant was charged with having violated two particular sections of the code.[162] The dissent thus asserted that the constitutional issue was properly shaped and presented, according to the majority's requirements.

A more recent example of the Court's twisted reading of lower court opinions in order to avoid constitutional questions occurred in *City of Mesquite v. Aladdin's Castle*.[163] In that case, the city appealed, *inter alia*,[164] the finding of the court of appeals that its ordinance forbidding people under seventeen to operate amusement devices violated the due process clause of the fourteenth amendment. Under the cloak of judicial restraint, the Court refused to decide the question and remanded the case back to the court of appeals because the appellate court cited three Texas court decisions, in its holding, after a long string of federal cases upon which the decision was based. The Court found that the citation to these three state cases might have indicated that there was an independent state ground on which the case was decided, precluding the need to reach the federal question.[165]

Justice Powell objected strenuously to the *Mesquite* Court's ruling.[166] He pointed out that a reading of the cases indicated that they did not provide an independent state ground and that, more importantly, "the inclusion of three cursory state-law citations in a full discussion of federal law by a federal court is neither a reference to nor an adoption of an *independent* state ground."[167]

---

162 *See id.* at 585 (Murphy, J., dissenting). *See also* G. GUNTHER, *supra* note 156, at 1613, 1670.

163 102 S. Ct. 1070 (1982).

164 The City also appealed the appellate court's holding that the statute's language "connect[ed] with criminal elements" was unconstitutionally vague. *Id.* at 1072-74. After certiorari had been granted, the City amended the statute by eliminating the phrase. *Id.* at 1074. Despite the amendment of the statute, the Court still "confront[ed] the merits of the vagueness holdings," ruling that the phrase was not unconstitutionally vague. *Id.* at 1075-76.

165
> If Texas law provides independent support for the Court of Appeals' judgment, there is no need for decision of the federal issue. On the other hand, if the City is correct in suggesting that the Court of Appeals' interpretation of state law is dependent on its federal analysis, that court can so advise us and we can then discharge our responsibilities free of concern that we may be unnecessarily reaching out to decide a novel constitutional question.

Id. at 1077-78 (footnote omitted).

It is a well-established principle of constitutional law that the Court will not review state court decisions resting on "adequate and independent state grounds." *See, e.g.*, Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945) ("The reason [for this principle] is so obvious that it has rarely been thought to warrant statement. . . . We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

166 City of Mesquite v. Aladdin's Castle, 102 S. Ct. at 1079 (Powell, J., concurring in part, dissenting in part).

167 *Id.* at 1080-81 (emphasis in original).

4. An Alternative to Judicial Subterfuge

While the strained interpretation of lower court opinions in order to avoid constitutional questions appears to be an accepted practice of the Supreme Court, there are strong policy arguments to be made against such subterfuge. In the first place, it undermines the credibility of the doctrine of judicial restraint. The Court has repeatedly recognized that avoidance of constitutional questions is only justified when the case can "fairly" be decided on other grounds.[168] If the Court can simply twist its reading of lower court opinions to avoid constitutional questions, then judicial restraint will become a mechanism by which the Court can shirk its fundamental responsibility of redressing constitutional violations by employing the power of judicial review. For example, the *Eddings* Court's avoidance of the certiorari issue affected inmates who were sentenced for crimes they committed as juveniles and who remain on death row, perhaps unconstitutionally.

Another reason why the Court's practice is pernicious is that it can lead to unnecessary remands as in *Mesquite*. Such remands create extra costs for the parties,[169] and place extra burdens on the lower courts.[170] Furthermore, the *Eddings* remand may simply provide more ammunition to those who claim that capital defendants get too many opportunities for review at the taxpayer's expense, and seek to limit the number of appeals available.[171]

The *Eddings* majority did not have to resort to stretching its interpretation of the lower court opinions in order to reverse Eddings' sentence and remand the case on the basis of his *Lockett* claim. The majority could have, and should have, adopted the approach suggested by Justice O'Connor in her concurring opinion. Justice O'Connor will-

---

[168] For example, the Court has held that it will only construe a statute so as to avoid constitutional questions if such construction is "fairly possible." *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. at 510-11 (Brennan, J., dissenting); Pernell v. Southall Realty, 416 U.S. 363, 365 (1974); Johnson v. Robison, 415 U.S. 361, 367 (1974); Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974); Ashwander v. Valley Authority, 297 U.S. at 348 (Brandeis, J., concurring); Crowell v. Benson, 285 U.S. 22, 62 (1932).

[169] The increasing costs of litigation have been a matter of concern for many members of the legal community, and many have urged attorneys and courts to take measures to reduce litigation expenses. *See* Burger, *Annual Report on the State of the Judiciary*, 62 A.B.A. J. 443, 445-46 (1976); Leuteneker, *Litigation: Saving Time and Money*, 12 HAWAII B.J., Winter 1977 at 9; Thompson, *The Expense of Litigation: Can it be Reduced*, 52 L.A.B. BULL. 96 (1976).

[170] In 1980 alone, the United States court of appeals heard 54,694 criminal and civil cases. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 185 (102d ed. 1981). Most courts, state as well as federal, are overburdened, resulting in lengthy delays and case backlog. *See generally* Blair, *Attacking the Caseload Dilemma: An Open Letter to the Bench and Bar of Iowa*, 27 DRAKE L. REV. 319 (1978); Janes, Paras & Shapiro, *The Appellate Settlement Conference Program in Sacramento*, 56 CAL. ST. B. J. 110 (1981).

[171] *See* Note, *Administering the Death Penalty*, 39 WASH. & LEE L. REV. 101 (1982). *See also* Coleman v. Balkcom, 451 U.S. 949, 957, 963-64 (1981) (Rehnquist, J., dissenting).

ingly admitted that it was by no means clear that the lower courts had refused to considered Eddings' troubled youth and emotional and mental difficulties in mitigation.[172] She argued, however, that since death is the gravest penalty our society can impose, a death sentence should not be upheld, if there is any indication that an error was made in imposing the sentence.[173] She, therefore, asserted that Eddings' sentence should be reversed and the case remanded because justice requires that the Supreme Court be certain that all mitigating circumstances had been considered and that the death penalty had not been erroneously imposed.[174]

By adopting Justice O'Connor's approach, the Court could still have protected capital defendants, and it would not have undermined judicial restraint, since a fair reading of the lower court opinions would have been given. Nor would the Court have created an unnecessary remand, because the remand would have been in the interests of justice, and not the result of a strained reading. Moreover, the remand would have encouraged the lower courts to be more clear in their future decisions in order to avoid similar remands.

Justice O'Connor also offered the Court an opportunity to entertain Eddings' *Lockett* claim without violating its own procedural rules. She argued that the Court could consider Eddings' *Lockett* claim by invoking the plain error doctrine.[175] According to this doctrine, the Court may review an issue not raised below or in the petition for certiorari if the Court finds that some basic unfairness might otherwise go uncorrected.[176] Based on this doctrine, the majority could have found, as Justice O'Connor did, that there was enough of a possibility that an error

---

172 "[O]ne can reasonably argue that these extemporaneous remarks [made by the trial judge] are of no legal significance . . . ." 102 S. Ct. at 878 (O'Connor, J., concurring). "[T]he Court has sought to emphasize the variety of mitigating information that *may* not have been considered [in this case]." *Id.* at 879 (emphasis added).

173 *Id.* at 878.

174 [W]e may not speculate as to whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them insufficient to offset the aggravating circumstances, or whether the difference between this Court's opinion and the trial court's treatment of the petitioner's evidence is 'purely a matter of semantics,' as suggested by the dissent. *Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Id.

175 *Id.* at 878 n.*.

176 *See* SUP. CT. R. 40(1)(d)(2) (questions not presented in the petition for certiorari will be disregarded by the court, "save as the court, at its option, may notice as a plain error not presented"). *See also* Wood v. Georgia, 450 U.S. at 265 n.5. ("Even if one considers that the conflict-of-interest question was not technically raised below, there is ample support for a remand required in the interests of justice."); United States v. Atkinson, 297 U.S. 157, 160 (1936) (Court may recognize plain errors where the errors "affect the fairness, integrity or public reputation of public proceedings.").

had been committed by the courts below to justify reviewing Eddings' *Lockett* claim. Such reasoning would have been more sound and forthright than that which was offered by the majority.[177]

Thus, the problem with the majority decision was not the outcome, but the process by which it was reached. Had the Court taken a straightforward approach, acknowledging the ambiguities in the decisions below and relying on the plain error rule, the result would have been an opinion which represented a commitment to fairness in capital sentencing. Instead, the majority's opinion suggests that the Court violated its own procedural rules and deliberately twisted its interpretation of the lower court decisions in order to avoid an important constitutional question. In *Eddings*, there was no need for such procedural impropriety, nor for such distortion of the doctrine of judicial restraint.

IV. Conclusion

Eddings v. Oklahoma is unlikely to be remembered for what the Court decided. While the decision is an affirmation of the Court's position that death penalty sentencing must focus on the uniqueness of the individual defendant, it breaks no new ground. Rather, *Eddings* is far more likely to be remembered for the Court's failure to resolve the increasingly contested issue of whether it is constitutional to impose the death penalty on minors. Yet, the Court may have only temporarily avoided the issue; in August of 1982 Monty Lee Eddings was resentenced to death.[178] He intends to appeal.[179]

HELENE B. GREENWALD

---

[177] *See supra* notes 129, 132-36 and accompanying text.

[178] Telephone interview with Jay C. Baker, Monty Lee Eddings' attorney (Sept. 28, 1982).

[179] Telephone interview with Jay C. Baker, Monty Lee Eddings' attorney (Sept. 28, 1982).