

SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 02–10038

ROBERT JAMES TENNARD, PETITIONER *v.* DOUG
DRETKE, DIRECTOR, TEXAS DEPARTMENT OF
CRIMINAL JUSTICE, CORRECTIONAL
INSTITUTIONS DIVISION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

[June 24, 2004]

JUSTICE SCALIA, dissenting.

Petitioner argues that Texas’s statutory special issues framework unconstitutionally constrained the jury’s discretion to give effect to his mitigating evidence of a low IQ score, violating the requirement that ““a sentencer must be allowed to give *full* consideration and *full* effect to mitigating circumstances.”” Reply Brief for Petitioner 4 (quoting *Penry v. Johnson*, 532 U. S. 782, 797 (2001) (*Penry II*), in turn quoting *Johnson v. Texas*, 509 U. S. 350, 381 (1993) (O’CONNOR, J., dissenting)). This claim relies on *Penry v. Lynaugh*, 492 U. S. 302 (1989) (*Penry I*), a case that applied principles earlier limned in *Eddings v. Oklahoma*, 455 U. S. 104 (1982), and *Lockett v. Ohio*, 438 U. S. 586 (1978).

I have previously expressed my view that this “right” to unchanneled sentencer discretion has no basis in the Constitution. See *Penry I*, *supra*, at 356–360 (opinion concurring in part and dissenting in part). I have also said that the Court’s decisions establishing this right do not deserve *stare decisis* effect, because requiring unchanneled discretion to say *no* to death cannot rationally be reconciled with our prior decisions requiring canalized discretion to say *yes*. “[T]he practice which in *Furman* [v.

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Georgia, 408 U. S. 238 (1972) (*per curiam*)] had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in *Woodson* [v. *North Carolina*, 428 U. S. 280 (1976) (plurality opinion)] and *Lockett* renamed the discretion not to sentence to death and pronounced constitutionally required.” *Walton v. Arizona*, 497 U. S. 639, 662 (1990) (SCALIA, J., concurring in part and concurring in judgment).

The Court returned greater rationality to our *Penry* jurisprudence by cutting it back in *Graham v. Collins*, 506 U. S. 461 (1993), and *Johnson v. Texas*, *supra*. I joined the Court in this pruning effort, noting that “the essence of today’s holding (to the effect that discretion *may* constitutionally be channeled) was set forth in my dissent in *Penry*.” *Id.*, at 374 (concurring opinion). As THE CHIEF JUSTICE notes, the lower courts’ disposition of petitioner’s *Penry* claim in the present case was entirely appropriate under these cases. *Ante*, at 2–4 (dissenting opinion). Yet the opinion for the Court does not even acknowledge their existence. It finds failings in the Fifth Circuit’s framework for analyzing *Penry* claims as if this Court’s own jurisprudence were not the root of the problem. “The simultaneous pursuit of contradictory objectives necessarily produces confusion.” *Walton, supra*, at 667.

Although the present case involves only a COA ruling, rather than a ruling directly on the merits of petitioner’s claim, I cannot require the issuance of a COA when the insubstantial right at issue derives from case law in which this Court has long left the Constitution behind and embraced contradiction. I respectfully dissent.