

THOMAS, 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 THOMAS, dissenting.

Petitioner must rely on *Penry v. Lynaugh*, 492 U. S. 302 (1989), to argue that Texas’ special issues framework unconstitutionally limited the discretion of his sentencing jury. I have long maintained, however, that *Penry* did “so much violence to so many of this Court’s settled precedents in an area of fundamental constitutional law, [that] it cannot command the force of *stare decisis*.” *Graham v. Collins*, 506 U. S. 461, 497 (1993) (concurring opinion). I therefore agree with JUSTICE SCALIA that a certificate of appealability cannot be issued based upon an “insubstantial right . . . derive[d] from case law in which this Court has long left the Constitution behind and embraced contradiction.” *Ante*, at 2 (dissenting opinion). I respectfully dissent.