# 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]

CHIEF JUSTICE REHNQUIST, dissenting.

A certificate of appealability may only issue if the applicant has "made a substantial showing of the denial of a constitutional right," 28 U. S. C. §2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack* v. *McDaniel,* 529 U. S. 473, 484 (2000). Because I believe that reasonable jurists would not find the District Court's assessment of the constitutional claims debatable or wrong, I dissent.

The District Court conducted the proper inquiry by examining whether Tennard's evidence of low intelligence was "'within the effective reach'" of the jury. App. 128 (quoting *Johnson* v. *Texas,* 509 U. S. 350, 375 (1993)). And the District Court came to the correct result; that is, the special issues allowed the jury to give some mitigating effect to Tennard's evidence of low intelligence. *Id.*, at 369; *Graham* v. *Collins*, 506 U. S. 461, 475 (1993).

In *Jurek* v. *Texas,* 428 U. S. 262 (1976), this Court held that the Texas special issues system, as a general matter,

is constitutional. The special issues system guides the jury's consideration of mitigating evidence at sentencing. We have stated:

> "Although [*Lockett* v. *Ohio,* 438 U. S. 586 (1978),] and [*Eddings* v. *Oklahoma,* 455 U. S. 104 (1982),] prevent a State from placing relevant mitigating evidence 'beyond the effective reach of the sentencer,' *Graham*, *supra*, at 475, those cases and others in that decisional line do not bar a State from guiding the sentencer's consideration of mitigating evidence. Indeed, we have held that 'there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty."' *Boyde* v. *California,* 494 U. S. 370, 377 (1990) (quoting *Franklin* v. *Lynaugh,* 487 U. S. 164, 181 (1988) (plurality opinion))." *Johnson*, *supra*, at 362.

In *Penry* v. *Lynaugh,* 492 U. S. 302 (1989) *(Penry I)*, the Court concluded that the Texas special issues were too limited to give effect to Penry's mitigating evidence of his mental retardation and severe childhood abuse. But we have noted that *Penry I* did not "effec[t] a sea change in this Court's view of the constitutionality of the former Texas death penalty statute," *Graham*, *supra*, at 474. Tennard's evidence of low intelligence simply does not present the same difficulty that Penry's evidence did.

There is no dispute that Tennard's low intelligence is a relevant mitigating circumstance, and that the sentencing jury must be allowed to consider that mitigating evidence. See, *e.g., Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) ("'[T]he sentencer . . . [may] 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'"(emphasis deleted) (quoting *Lockett* v. *Ohio*, 438

U. S. 586, 604 (1978))). But the Constitution does not require that "a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence may be relevant." *Johnson*, *supra*, at 372. The only question in this case is whether reasonable jurists would find the District Court's assessment that Tennard's evidence of low intelligence was within the effective reach of the jury via the Texas special issues debatable or wrong.

The Court concludes that "[t]he relationship between the special issues and Tennard's low IQ evidence has the same essential features as the relationship between the special issues and Penry's mental retardation evidence." *Ante*, at 14. I disagree. The first special issue asked whether Tennard had caused the death of the victim "'deliberately and with the reasonable expectation that the death of the deceased or another would result.'" *Ante*, at 2. As the Court of Criminal Appeals of Texas noted and the District Court agreed, the mitigating evidence of Tennard's low intelligence could be given effect by the jury through this deliberateness special issue. It does not follow from the Court's conclusion in *Penry I* that mental retardation had relevance to Penry's moral culpability beyond the scope of the deliberateness special issue that evidence of low intelligence has the same relevance. And, after *Johnson* and *Graham*, it is clear that the question is simply whether the jury could give *some effect* to the mitigating evidence through the special issues. *Johnson*, *supra*, at 369 (rejecting the petitioner's claim that a special instruction was necessary because his evidence of youth had relevance outside the special issue framework); *Graham*, *supra*, at 476–477 ("[R]eading *Penry [I]* as petitioner urges—and thereby holding that a defendant is entitled to special instructions whenever he can offer mitigating evidence that has *some* arguable relevance beyond the special issues—would be to require in all cases that a fourth 'special issue' be put to the jury: '"Does any

mitigating evidence before you, whether or not relevant to the [other special issues], lead you to believe that the death penalty should not be imposed?'" The [*Franklin* v. *Lynaugh,* 487 U. S. 164 (1988)], plurality rejected precisely this contention, finding it irreconcilable with the Court's holding in *Jurek,* [487 U. S., at 180, n. 10], and we affirm that conclusion today.")

The second special issue asked "'[i]s there a probability that the defendant . . . would commit criminal acts of violence that would constitute a continuing threat to society?'" *Ante,* at 2. Here, too, this case is very different from *Penry I*, where there was expert medical testimony that Penry's condition prevented him from learning from experience. 492 U. S., at 308–309. Here, no such evidence was presented. Given the evidence, the jury could have concluded that low intelligence meant that Tennard is a slow learner, but with the proper instruction, he could conform his behavior to social norms. It also could have concluded, as the Court of Criminal Appeals of Texas noted, that Tennard was a "'follower'" rather than a "'leader,'" App. 91, and that he again could conform his behavior in the proper environment. In either case—contrary to *Penry I*—the evidence could be given mitigating effect in the second special issue. In short, low intelligence is not the same as mental retardation and does not necessarily create the *Penry I* "two-edged sword." 492 U. S., at 324. The two should not be summarily bracketed together.

Because I do not think that reasonable jurists would disagree with the District Court's conclusion that the jury in this case had the ability to give mitigating effect to Tennard's evidence of low intelligence through the first and second special issues, I dissent.