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Eighth Amendment--Sentencer Discretion in Capital Sentencing Schemes

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EIGHTH AMENDMENT—SENTENCER DISCRETION IN CAPITAL SENTENCING SCHEMES

Arave v. Creech, 113 S. Ct. 1534 (1993)

I. INTRODUCTION

In *Arave v. Creech*,[1] the United States Supreme Court considered the constitutionality of a statutory aggravating circumstance to be considered by Idaho judges in capital cases. In accordance with its jurisprudence in this area, the Court did not examine the circumstance on its face, which allowed the death penalty to be imposed if the murderer exhibited "utter disregard for human life." Rather, the Court considered the Idaho Supreme Court's "narrowing construction," which, the Court found, applied the "utter disregard" aggravating circumstance exclusively to "cold-blooded pitiless slayer[s]."[2] The Court held that this narrowing construction of the aggravating circumstance both sufficiently channeled the sentencing judge's discretion and genuinely narrowed the class of persons eligible for capital punishment and therefore precluded arbitrary and capricious administration of the death penalty.[3] Hence, the Idaho statute did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.[4]

This Note examines the development of the Supreme Court's jurisprudence concerning sentencer discretion in state capital sentencing schemes. This Note argues that, in *Arave*, the Supreme Court took the unprecedented step of further channeling a state's narrowing construction of an aggravating circumstance and, as a result, approved an aggravating circumstance that provides less guidance to a sentencer than any previously validated by the Court. This Note concludes that the Court deviated from its own mandate that a state's death penalty sentencing scheme both provide clear and objective standards to the sentencer, and enable the sentencer

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1 113 S. Ct. 1534 (1993).
2 *Id.* at 1541.
3 *Id.* at 1542-43.
4 *Id.* at 1545.

to distinguish those who deserve the death penalty from those who do not.

II. BACKGROUND

In *Furman v. Georgia*,[5] the United States Supreme Court held that the death penalty did not, per se, violate the Eighth Amendment's prohibition against cruel and unusual punishment.[6] However, in *Furman* the Court established that a state's death penalty statute did violate the Eighth Amendment's prohibition if the statute granted too much discretion to a sentencer.[7] The *Furman* decision was splintered, but the fundamental premise that emerged from the various opinions was that the death penalty could not be imposed under sentencing procedures that granted untrammeled discretion to the sentencer and therefore created a risk that the death penalty would be administered in an arbitrary and capricious manner.[8] The Supreme Court currently interprets *Furman* and the cases that followed it as requiring a two-pronged inquiry into a state's capital sentencing procedures: (1) Does the state's capital sentencing procedure adequately limit the sentencer's discretion so as to minimize the risk of arbitrary and capricious administration of the death penalty? (2) Does the state's capital sentencing scheme genuinely narrow the class of defendants eligible for the death penalty?[9]

A. SUFFICIENT NARROWING OF A SENTENCER'S DISCRETION

While the United States Supreme Court has held that a state's

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[5] 408 U.S. 238 (1972).

[6] *Id.* at 307 (Stewart, J., concurring). The United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. See also Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1690-91 (1974), for a brief summary of the Court's holding in *Furman*.

[7] *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring). *See also* Leading Case, *Death Penalty—Aggravating and Mitigating Circumstances*, 104 HARV. L. REV. 139 (1990) [hereinafter *Leading Case*].

[8] *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).

[9] Arave v. Creech, 113 S. Ct. 1534, 1540, 1542 (1993) (citing Lewis v. Jeffers, 497 U.S. 764, 774 (1990); Zant v. Stephens, 462 U.S. 862, 877 (1983)). For further commentary regarding the required inquiry see Gary J. Vyneman, Comment, *Irreconcilable Differences: The Role of Mitigating Circumstances in Capital Punishment Sentencing Schemes*, 13 WHITTIER L. REV. 763 (1992); Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991); David R. Zipps et al., Project, *Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals* 1988-1989, 78 GEO. L.J. 1277, 1289-90 (1990); Omar Malone, Comment, *Capital Punishment Statutes and the Administration of Criminal Justice: (Un)equal Protection Under the Law!*, 15 T. MARSHALL L. REV. 87 (1989-90).

capital sentencing scheme must sufficiently channel a sentencer's discretion, it has never pinpointed the amount of discretion that constitutionally can be granted to a sentencer.[10] Indeed, the Court has struggled for years to identify such a standard.

1. The Inquiry Into Permissible Discretion

In attempting sufficiently to channel sentencers' discretion after *Furman*, the majority of states that allowed the death penalty adopted lists of aggravating circumstances to be considered before a court could impose a sentence of death.[11] Soon thereafter, the Supreme Court was called upon to define the amount of sentencer discretion permissible in aggravating circumstances.

In struggling to identify an acceptable amount of discretion, the Court, in *Gregg v. Georgia*,[12] first recognized that a state court's narrowing construction of an aggravating circumstance may be considered if a state's capital sentencing statute, on its face, allows for too

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10 *Leading Case*, *supra* note 7, at 139.

11 Capital sentencing schemes differ from state to state, but nearly all require a separate sentencing hearing after a conviction for a capital offense at which the sentencing judge or sentencing jury is required to weigh aggravating circumstances against mitigating circumstances. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703(E) (Supp. 1993) ("[T]he court shall take into account the aggravating and mitigating circumstances included in . . . this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in . . . this section and that there are no mitigating circumstances sufficiently substantial to call for leniency."); FLA. STAT. ANN. § 921.141(3) (West 1985) (before the death penalty is imposed, the court must find "[t]hat sufficient aggravating circumstances exist . . . and . . . [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances"); OKLA. STAT. ANN. tit. 21, § 701.11 (West Supp. 1994) ("Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed."). Although all states that implemented the death penalty enumerate aggravating circumstances, mitigating circumstances frequently are not enumerated. See *infra* note 102 for a typical enumeration of aggravating circumstances. For one example of enumerated mitigating circumstances see FLA. STAT. ANN. § 921.141(6) (West 1985):

(6) Mitigating Circumstances.—Mitigating circumstances shall be the following:
(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.

12 428 U.S. 153 (1976) (plurality opinion).

much sentencer discretion.[13] In that case, the Court addressed the constitutionality of Georgia's sentencing scheme, which required that the jury consider ten statutory aggravating circumstances, at least one of which had to be found to exist beyond a reasonable doubt before a death sentence could be imposed.[14] Although the petitioner did not claim that the jury relied on a vague or overbroad provision, the petitioner looked at the sentencing system as a whole, arguing that the circumstances were overly broad and too vague.[15] The petitioner explicitly attacked the aggravating circumstance that authorized the imposition of the death penalty if the murder was " 'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.' "[16] The petitioner claimed that this phrase was a catch-all that could be imposed in any murder case and therefore violated the Supreme Court's mandate in *Furman*, insofar as it allowed arbitrary implementation of the death penalty.[17]

In holding that Georgia's "wantonly vile" aggravating circumstance was not necessarily unconstitutionally vague, the Court agreed with the petitioner that any murder might involve depravity of mind or an aggravated battery.[18] However, the Court found that the language in question would not necessarily be construed in so broad a fashion by Georgia courts and that there was no reason to assume that the Georgia Supreme Court would adopt such an open-ended definition.[19] Thus, in *Gregg*, the Court indicated that if a state's sentencing scheme, on its face, did not sufficiently channel a sentencer's discretion, the state's courts could adopt a narrowing

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13 *Id.* at 201.

14 *Id.* at 164-65.

15 *Id.* at 200.

16 Id. at 201 (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1978)). Petitioner attacked this aggravating circumstance despite the fact that the sentencing jury did not find this circumstance to apply to him. *Id.* at 161.

17 *Id.* at 198, 201.

18 *Id.* at 201.

19 *Id.* The Court did not know how Georgia courts interpreted the "wantonly vile" aggravating circumstance because it was not found to apply in this case and had only been relied on in three other cases. In Jarrell v. State, 216 S.E.2d 258, 270 (Ga. 1975), a number of other aggravating circumstances were found to exist as well, so the narrowing construction of the circumstance in question was not explicitly articulated. In Floyd v. State, 210 S.E.2d 810, 814 (Ga. 1974), two aggravating circumstances were found to apply to the defendant, but rather than investigate each on its own, the court opted simply to undertake a proportionality review. Thus, once again, the narrowing construction was not articulated. The third case, which relied exclusively on the "wantonly vile" aggravating circumstance, was a brutal torture-murder, and therefore the circumstance was deemed applicable without a narrowing construction. McCorquodale v. State, 211 S.E.2d 577 (Ga. 1974).

construction and therefore "save" the statute.[20]

When the Georgia sentencing scheme was revisited just four years later in *Godfrey v. Georgia*,[21] the Court found the aggravating circumstance considered in *Gregg* to be unconstitutionally vague as applied by the trial court.[22] Although the Court noted, as it had in *Gregg*, that the circumstance on its face did not preclude arbitrary and capricious infliction of the death penalty,[23] the Court recognized that Georgia's courts had sufficiently narrowed the scope of the circumstance in question in two prior cases.[24] Nonetheless, the Court held the circumstance unconstitutional as applied because the trial judge's sentencing instructions to the jury failed to articulate the narrowing construction and therefore did not sufficiently narrow the circumstance.[25]

Thus, in *Godfrey*, the Court again recognized that a state supreme court can narrow the scope of a circumstance that is unconstitutionally vague on its face.[26] Additionally, the *Godfrey* Court cautioned that, in order to save the circumstance from constitutional infirmity, the trial court must instruct the jury as to the narrowed construction.[27]

In *Walton v. Arizona*,[28] the Court clearly articulated the inquiry a federal court must make when considering a state's death penalty statute:

> [The federal court] must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must determine

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20 *Gregg*, 428 U.S. at 201. *See also* Walton v. Arizona, 497 U.S. 639, 654 (1990) (reaffirming the possibility of a state court narrowing construction).

21 446 U.S. 420 (1980).

22 *Id.* at 432.

23 *Id.* at 428-29. *See supra* note 18 and accompanying text.

24 *Id.* at 430-32. The Court noted that the Georgia Supreme Court, both in Blake v. State, 236 S.E.2d 637, 643 (Ga. 1977), and in Harris v. State, 230 S.E.2d 1, 10-11 (Ga. 1976), narrowed the definition of the "wantonly vile" aggravating circumstance:

> The *Harris* and *Blake* opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase, "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word, "torture," must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.

Godfrey, 446 U.S. at 431.

25 *Godfrey*, 446 U.S. at 430-33.

26 *Id.* at 428-32.

27 *Id.* at 429, 432.

28 497 U.S. 639 (1990).

whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, *i.e.*, whether they provide *some* guidance to the sentencer.[29]

In *Walton*, the petitioner challenged the constitutionality of an Arizona aggravating circumstance that charged the sentencer to consider whether a murder was committed " 'in an especially heinous, cruel, or depraved manner.' "[30] The Court held that, although the circumstance on its own was unconstitutionally vague, Arizona courts had sufficiently channeled the circumstance by declaring that " 'a crime [was] committed in an especially cruel manner when the perpetrator inflict[ed] mental anguish or physical abuse before the victim's death,' and that '[m]ental anguish include[d] a victim's uncertainty as to his ultimate fate.' "[31] Likewise, the Arizona Supreme Court found that a murder was committed in an "especially 'depraved' manner when the perpetrator 'relishe[d] the murder, evidencing debasement or perversion,' or 'show[ed] an indifference to the suffering of the victim and evidence[d] a sense of pleasure' in the killing."[32] The Court found that, although "the proper degree of definition of an aggravating factor . . . is not susceptible of mathematical precision," the Arizona narrowing construction sufficiently channeled the sentencer's discretion.[33]

The inquiry that a federal court must undertake, therefore, is quite clear: as long as a state's courts sufficiently narrow a vague aggravating circumstance and the sentencing jury is informed as to this narrowing construction, the sentencer's discretion has been sufficiently channeled.[34] However, the Court is still left with a difficult question: When is the guidance offered a sentencer—either by a statutory aggravating circumstance or by a narrowing construction—"sufficient"? The Court has wrestled with this question since *Furman*.

2. *The Sufficient Channeling of Discretion*

Since the inquiry into whether an aggravating circumstance or a narrowing construction sufficiently channels a sentencer's discretion

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[29] *Id.* at 654.

[30] *Id.* at 643 (quoting ARIZ. REV. STAT. ANN. § 13-703 (F)(6) (1989)).

[31] *Id.* at 654 (quoting State v. Walton, 769 P.2d 1017, 1032 (Ariz. 1989)).

[32] *Id.* at 655 (quoting *Walton*, 769 P.2d at 1033).

[33] *Id.* See also Lori L. Nader, Note, Walton v. Arizona: *The Confusion Surrounding the Sentencing of Capital Defendants Continues*, 40 CATH. U. L. REV. 475 (1991), for further analysis of the *Walton* decision.

[34] If sentencing is to be done by a judge, the only requirement is that the state courts sufficiently narrow a vague aggravating circumstance. The judge is assumed to know this narrowing construction. *Walton*, 497 U.S. at 653.

is necessarily done on a case-by-case basis, the United States Supreme Court, on a number of occasions, has reviewed the aggravating circumstances and/or the narrowing constructions of state capital sentencing schemes. A brief overview of a number of these decisions provides insight into the level of definition or channeling the Court deems "sufficient."

In *Proffitt v. Florida*,[35] the petitioner challenged the constitutionality of Florida's capital sentencing scheme, which required the sentencing judge to determine whether the capital crime committed was " 'especially heinous, atrocious, or cruel.' "[36] The petitioner claimed that this circumstance was unconstitutionally vague and therefore allowed arbitrary decisions in violation of *Furman*.[37] The Court, granting that the circumstance was unconstitutionally vague on its face,[38] considered the circumstance in conjunction with the narrowing construction offered by the Florida Supreme Court in *State v. Dixon*.[39] In that case, the Florida Supreme Court found that the aggravating circumstance in question was "directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' "[40] The United States Supreme Court found that, as so narrowed, the circumstance provided adequate guidance to sentencers and therefore was constitutional.[41]

Similarly, in *Godfrey v. Georgia*, the Supreme Court found that the Georgia Supreme Court had sufficiently narrowed Georgia's unconstitutionally vague "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance.[42] The Georgia Supreme Court had indicated that the circumstance required a showing that the offense demonstrated " 'torture, depravity of mind, or an aggravated battery to the victim.' "[43] More specifically, "depravity of mind" referred to "the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his

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35 428 U.S. 242 (1976).

36 *Id.* at 255 (quoting FLA. STAT. ANN. § 921.141 (5)(h) (Supp. 1976-77)).

37 *Id.*

38 *Id.*

39 283 So. 2d 1 (Fla. 1973).

40 *Proffitt*, 428 U.S. at 255 (quoting *Dixon*, 283 So. 2d at 9).

41 *Id.* at 255-56.

42 446 U.S. 420, 431-32 (1980). However, in *Godfrey*, after finding that the Georgia courts had sufficiently narrowed the aggravating circumstance in question, the Supreme Court reversed petitioner's death sentence because the judge did not instruct the sentencing jury as to this constitutionally satisfactory narrowing construction. *Id.* at 432. See *supra* notes 22-25 and accompanying text for a dicussion of this case.

43 *Id.* at 431 (quoting Harris v. State, 230 S.E.2d 1, 10-11 (Ga. 1976); Blake v. State, 236 S.E.2d 637, 643 (Ga. 1977)).

victim."[44] Additionally, " 'torture' require[d] evidence of serious physical abuse of the victim before death."[45] The narrowing construction, the Court held, sufficiently channeled a sentencer's discretion and therefore saved the vague aggravating circumstance.[46]

In *Lewis v. Jeffers*,[47] the Supreme Court found that Arizona had sufficiently narrowed its admittedly vague "especially heinous, cruel or depraved" aggravating circumstance.[48] The Court noted that the Arizona Supreme Court had consulted the dictionary and applied the dictionary definitions of the statutory terms in order to narrow the circumstance in question. The Arizona Supreme Court had determined that " '[t]he element of cruelty involves the pain and the mental and physical distress visited upon the victims. Heinous and depraved involve the mental state and attitude of the perpetrator as reflected in his words and actions.' "[49] Further, the Arizona Supreme Court identified factors that fulfilled the circumstance in question. For example, "gratuitous violence [to] the victim" was one factor to be considered; "the apparent relish with which the defendant committ[ed] the murder" was another.[50] These definitions and elements, the Supreme Court found, sufficiently channeled the vague aggravating circumstance and therefore cured the statute of constitutional infirmity.[51]

The *Jeffers* Court also refused to undertake a case by case analysis of Arizona decisions in attempting to determine whether the state's narrowing construction was sufficiently focused.[52] The Court held that "if a State [had] adopted a constitutionally narrow construction of a facially vague aggravating circumstance . . . [and had] applied that construction to the facts of the particular case," then the constitutional requirement of limited discretion had been met.[53] The consistency of application of the narrowing construction in other Arizona cases was irrelevant.[54]

In contrast, the United States Supreme Court has found in

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44 *Id.* (citing *Harris*, 230 S.E.2d at 10-11; *Blake*, 236 S.E.2d at 643).

45 *Id.* (citing *Blake*, 236 S.E.2d at 643). See *supra* note 24 for the full text of Georgia's narrowing construction.

46 *Id.* at 431-32.

47 497 U.S. 764 (1990).

48 *Id.* at 777-78.

49 *Id.* at 769 (quoting State v. Jeffers, 661 P.2d 1105, 1130 (Ariz. 1982)).

50 *Id.* at 770 (citing *Jeffers*, 661 P.2d at 1131).

51 *Id.* at 777-78.

52 *Id.* at 778-79.

53 *Id.* at 779.

54 *Id.* at 779-80.

other cases that the guidance offered to a sentencer either by an aggravating circumstance or by a narrowing construction was insufficient. For example, in *Maynard v. Cartwright*,[55] the Court was presented with the same circumstance that the Court assumed was facially unconstitutional in *Proffitt*.[56] Unlike *Proffitt*, however, in *Maynard* the Supreme Court found that the state had insufficiently narrowed this unconstitutionally vague aggravating circumstance.[57] In *Maynard*, the state of Oklahoma argued that some murders, based simply on their facts, qualified as " 'especially heinous, atrocious, or cruel.' "[58] The Supreme Court disagreed. It began its analysis asserting that "[c]laims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty."[59] With regard to this analysis, the Court agreed with the Tenth Circuit's finding that although the sentencer considered "the attitude of the killer, the manner of the killing, and the suffering of the victim to be relevant and sufficient to support the aggravating circumstance, [the trial court] had 'refused to hold that any one of those factors *must* be present for a murder to satisfy this aggravating circumstance.' "[60] Because the circumstance failed to inform sentencing juries what they *had to* find to impose the death penalty, it therefore allowed too much discretion.[61] Consequently, the circumstance was deemed unconstitutional under *Furman*.[62]

Likewise, in *Shell v. Mississippi*[63] the Court found Mississippi's narrowing construction of its "especially heinous, atrocious or cruel" aggravating circumstance unconstitutionally vague. The Mississippi narrowing construction declared that " 'the word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of[,] the suffering of others.' "[64] This, the Court determined, was too vague to

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55 486 U.S. 356 (1988).

56 The aggravating circumstance asked whether the crime committed was "especially heinous, atrocious, or cruel." *See supra* note 36 and accompanying text.

57 *Maynard*, 486 U.S. at 364-65.

58 *Id.* at 361 (quoting OKLA. STAT., TIT. 21, § 701.12(4) (1981)).

59 *Id.* at 361-62.

60 *Id.* at 360 (quoting Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987)).

61 *Id.* at 363-65.

62 *Id.* at 365-66.

63 498 U.S. 1 (1990) (per curiam).

64 *Id.* at 2 (Marshall, J., concurring) (quoting Shell v. State, 554 So. 2d 887, 905-06 (Miss. 1989)).

channel a sentencer's discretion sufficiently.[65]

To varying degrees, each of the narrowing constructions validated by the United States Supreme Court channeled a sentencer's discretion by "clear and objective standards."[66] For example, in *Proffitt*, the crime had to be "unnecessarily torturous" to the victim;[67] in *Godfrey*, evidence of torture or aggravated battery was required;[68] and in *Lewis*, the crime had to indicate that there was mental and physical distress visited upon the victim.[69] By contrast, in *Maynard*, the sentencing jury was not instructed that there was anything it *had to* find before it could impose the death penalty,[70] and in *Shell*, there was no "clear and objective" criteria in Mississippi's narrowing construction.[71] Thus, the requirement fundamental to the Supreme Court's analysis in each of these cases was the need for objective criteria in a state's aggravating circumstance or narrowing construction.

B. GENUINE NARROWING OF THE CLASS OF DEATH-ELIGIBLE DEFENDANTS

In *Zant v. Stephens*,[72] the Court identified an inquiry distinct from the "sufficiently channeled" requirement. In *Zant*, the Court declared that a state's capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to the others found guilty of murder."[73] The Court held that aggravating circumstances that allowed the death penalty to be imposed if the offender had a prior record of conviction for a capital felony or if the offender had escaped from lawful confinement genuinely narrowed the broad class of those eligible for the death penalty.[74]

In *Lowenfield v. Phelps*,[75] the Court identified two ways that a state may satisfy the "genuinely narrows" function. Either a state's legislature can "broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty

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65 *Id.* at 1.
66 Gregg v. Georgia, 428 U.S. 153, 198 (1976) (plurality opinion).
67 *See supra* note 40 and accompanying text.
68 *See supra* note 43 and accompanying text.
69 *See supra* note 49 and accompanying text.
70 *See supra* note 61 and accompanying text.
71 *See supra* note 65 and accompanying text.
72 462 U.S. 862 (1983).
73 *Id.* at 877.
74 *Id.* at 879.
75 484 U.S. 231 (1988).

phase," or "[t]he legislature may itself narrow the definition of capital offenses," so that the jury finding at the guilt phase meets the "genuinely narrows" requirement.[76] The Court indicated that Louisiana's capital sentencing scheme genuinely narrowed the class of defendants eligible for the death penalty by narrowing the definition of capital offenses. The Court held that since, at the guilt phase, the jury found that the defendant had " 'a specific intent to kill or to inflict great bodily harm upon more than one person,' " the class of death-eligible offenders had been genuinely narrowed.[77]

Although the difference between this requirement and the "sufficiently channel" prong is subtle, one can certainly imagine an aggravating circumstance or narrowing construction that completely channels a sentencer's discretion yet does not genuinely narrow the class of defendants eligible for the death penalty. For example, an aggravating circumstance that allows the administration of the death penalty in all cases of first-degree murder entirely eliminates sentencer discretion but, depending on the structure of a state's capital sentencing scheme, probably fails to narrow the class of defendants eligible for the death penalty.

In sum, prior to *Arave v. Creech*, an aggravating circumstance was unconstitutionally vague either if it failed sufficiently to channel the discretion of the sentencer or if it failed genuinely to narrow the class of defendants eligible for the death penalty. With this precedent as a guide, the United States Supreme Court decided the constitutionality of the Idaho aggravating circumstance that allowed implementation of the death penalty if the killer displayed an "utter disregard for human life."

III. FACTS AND PROCEDURAL HISTORY

In 1981, Thomas Eugene Creech was serving life sentences in the maximum security tier of the Idaho State Correctional Institution (hereinafter "the Institution") after admitting to killing or taking part in the killing of twenty-six people.[78] "The bodies of 11 of his victims—who were shot, stabbed, beaten, or strangled to death—ha[d] been recovered in seven states."[79] Creech declared

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[76] *Id.* at 246.

[77] *Id.* (quoting the sentencing jury's findings pursuant to LA. REV. STAT. ANN. § 14:30A(3) (West 1986)).

[78] Arave v. Creech, 113 S. Ct. 1534, 1538 (1993). There is some ambiguity as to how many life sentences Creech was serving at this time. While the United States Supreme Court's opinion indicated that Creech was serving "life sentences" at the time of this murder, *id.*, the decision of the Idaho Supreme Court maintained that Creech was serving only "a life sentence." State v. Creech, 670 P.2d 463, 465 (Idaho 1983).

[79] *Arave*, 113 S. Ct. at 1538.

that he would continue to kill unless he was "completely isolated from humanity."[80]

On May 13, 1981, Creech beat and kicked David Dale Jensen to death. Jensen was an inmate of the same tier at the Institution and was serving a sentence for car theft.[81] Some years prior to his incarceration, Jensen was shot in the head; this wound required the removal of a part of his brain and the insertion of a plastic plate into his skull. As a result, Jensen's speech and motor functions were slightly impaired.[82]

Generally, only one maximum security prisoner at a time was allowed out of his cell.[83] Since Creech had been made a janitor, however, it was not uncommon for him to be out of his cell while another inmate was exercising or showering.[84] Prior to May 13, 1981, Jensen and Creech had argued about Jensen's littering and general untidiness, for which Creech, as janitor, was responsible.[85]

Although Creech gave conflicting stories of the events surrounding the killing,[86] the trial court settled on the following account:[87] On May 13, both Creech and Jensen were out of their cells.[88] Jensen approached Creech and swung at him with a sock containing two batteries.[89] Creech was able to take the weapon away from Jensen, who then returned to his cell.[90] Soon thereafter, Jensen emerged from his cell with a toothbrush with a razor blade attached to it.[91] A fight ensued in which Creech was hitting Jensen with the the battery-filled sock and Jensen was swinging the razor blade at Creech.[92] At some point, Creech connected with sufficient force to shatter the plate imbedded in Jensen's skull and splatter blood on the floor and walls.[93] Eventually, the sock broke and the

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80 *Id.*

81 Brief of Petitioner at 4, *Arave* (No. 91-1160).

82 *Creech*, 670 P.2d at 465.

83 *Id.*

84 *Id.*

85 *Id.*

86 Arave v. Creech, 113 S. Ct. 1534, 1538 (1993). In her opinion, Justice O'Connor indicated that there was a question as to whether Creech was acting in self-defense or whether he had been bribed by other inmates to kill Jensen. However, the Idaho Supreme Court clearly indicated that "the district court judge did not decide or find that the murder had been performed on contract or plan." *Creech*, 670 P.2d at 465.

87 Arave, 113 S.Ct. at 1538.

88 *Id.*

89 *Id.*

90 *Id.*

91 Brief of Respondent at 1-2, *Arave* (No. 91-1160).

92 *Creech*, 670 P.2d at 465.

93 *Id.*

batteries fell to the floor, but by this time Jensen was helpless.[94] Creech then began kicking the prone Jensen in the head and throat.[95] "Sometime later a guard noticed blood, and Jensen was taken to the hospital, where he died the same day."[96]

Creech originally pleaded not guilty to the charge of first degree murder.[97] However, over the objection of his attorney, he changed his plea to guilty.[98] At the sentencing hearing,[99] the court considered aggravating and mitigating evidence including evidence by both the State and the defense relating to the mental condition of Creech.[100] Among the mitigating factors, the judge found that since Jensen instigated the fight with Creech, Creech was initially justified in defending himself.[101] In aggravation, the court found five circumstances to exist beyond a reasonable doubt.[102] In relevant part,

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94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 Idaho law requires a sentencing hearing whenever the death penalty is possible punishment:

> In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation . . . .

IDAHO CODE § 19-2515(d) (1987).

100 *Creech*, 670 P.2d at 466. Following the hearing and the consideration of aggravating and mitigating circumstances, the judge issued written findings of factors found to exist both in aggravation and mitigation in the format prescribed by Rule 33.1 of the Idaho Criminal Rules. Arave v. Creech, 113 S. Ct. 1534, 1538 (1993).

101 *Id.* at 1538-39.

102 *Id.* IDAHO CODE § 19-2515(g) (1987) provides:

> The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:
> (1) The defendant was previously convicted of another murder.
> (2) At the time the murder was committed the defendant also committed another murder.
> (3) The defendant knowingly created a great risk of death to many persons.
> (4) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.
> (5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.
> (6) By the murder, or the circumstances surrounding its commission, the defendant exhibited utter disregard for human life.
> (7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e), or (f), and it was accompanied with the specific intent to cause the death of a human being.
> (8) The defendant, by prior conduct, or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

the court found that, following the initial attack, Jensen was under the complete domination of Creech.[103] Thus, although Creech initially acted in self-defense,[104] since Creech killed Jensen after he was helpless, he exhibited an "utter disregard for human life."[105] After weighing the aggravating and mitigating circumstances, the sentencing judge concluded that the mitigating circumstances did not outweigh the aggravating circumstances.[106] As a result, Creech was sentenced to death.[107]

In reviewing Creech's sentence,[108] the Idaho Supreme Court considered the constitutionality of the "utter disregard" statutory aggravating circumstance. The court held that the circumstance was not unconstitutionally vague once considered in conjunction with Idaho's narrowing construction.[109] The Idaho Supreme Court also independently reviewed the record and found the evidence supported the sentencing judge's weighing of aggravating and mitigating circumstances.[110] Thus, the Idaho Supreme Court affirmed Creech's sentence.[111] Creech then filed a petition for a writ of certiorari in the United States Supreme Court. The petition was denied.[112]

Subsequently, Creech filed a petition for a writ of habeas corpus in the United States District Court for the District of Idaho.[113] The petition claimed, in relevant part, that the "utter disregard" aggravating circumstance was unconstitutionally vague

(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty.

(10) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

103 *Arave*, 113 S. Ct. at 1539.

104 *Id.*

105 *Id.* IDAHO CODE § 19-2515(g)(6) lists "utter disregard for human life" as one of Idaho's statutorily enumerated aggravating circumstances. *See supra* note 102.

106 *Arave*, 113 S. Ct. at 1539.

107 *Id.*

108 State v. Creech, 670 P.2d 463, 465 (Idaho 1983). IDAHO CODE § 19-2827(a) (1987) states that "[w]henever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Idaho." Creech also appealed the proceedings, actions, and orders of the trial court. *Creech*, 670 P.2d at 465.

109 In State v. Osborn, 631 P.2d 187, 201 (Idaho 1981), the Idaho Supreme Court narrowed the "utter disregard" circumstance: "We conclude instead that the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded pitiless slayer."

110 *Arave*, 113 S. Ct. at 1539.

111 *Creech*, 670 P.2d at 476.

112 Creech v. Idaho, 465 U.S. 1051 (1984).

113 *Arave*, 113 S. Ct. at 1540.

even if considered along with Idaho's narrowing construction.[114] The district court denied the petition.[115]

Creech appealed to the United States Court of Appeals for the Ninth Circuit.[116] The court of appeals affirmed in part, reversed in part, and remanded.[117] The Ninth Circuit agreed with Creech that the "utter disregard" aggravating circumstance, on its own, was unconstitutionally vague because the circumstance did not enable the sentencer to make a principled distinction between those who deserved the death penalty and those who did not.[118] Additionally, the court found that the Idaho Supreme Court's narrowing construction did not cure this constitutional error because it gave no more guidance than the circumstance itself.[119] In dissent, three judges contended that the narrowing construction adopted by the Idaho courts sufficiently channeled a sentencing judge's discretion as it gave sentencers "substantive guidance" in administering the death penalty.[120] For this reason, the dissenters found that Idaho's narrowing construction made constitutional the "utter disregard" circumstance.[121]

The warden of the Institution petitioned the United States Supreme Court for a writ of certiorari.[122] The United States Supreme Court granted certiorari to address only the question of whether the "utter disregard" aggravating circumstance was unconstitutionally vague.[123]

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

The United States Supreme Court reversed and remanded the decision of the Ninth Circuit Court of Appeals insofar as the Court held that the "utter disregard" circumstance, as narrowed by the Idaho courts, met constitutional requirements.[124]

Justice O'Connor, writing for the Court,[125] identified two re-

114 Brief of Petitioner at 5-6, *Arave* (No. 91-1160).
115 *Arave*, 113 S. Ct at 1540.
116 Creech v. Arave, 947 F.2d 873, 875 (9th Cir. 1991) (en banc).
117 *Id.* at 888.
118 *Id.* at 883.
119 *Id.* at 883-84.
120 *Id.* at 890.
121 *Id.*
122 Brief of Petitioner at 6, Arave v. Creech, 113 S. Ct. 1534 (1993) (No. 91-1160).
123 Arave v. Creech, 113 S. Ct. 1534, 1540 (1993).
124 *Id.* at 1545.
125 *Id.* at 1538. Chief Justice Rehnquist and Justices Kennedy, Souter, Thomas, Scalia, and White joined in the opinion.

lated inquiries to be undertaken in determining whether an aggravating circumstance is unconstitutionally vague.[126] First, a capital sentencing scheme must " 'suitably direct and limit' the sentencer's discretion 'so as to minimize the risk of wholly arbitrary and capricious action.' "[127] A state must satisfy this requirement by channeling the sentencer's discretion with objective standards.[128] Second, a state's capital sentencing scheme must " 'genuinely narrow the class of defendants eligible for the death penalty.' "[129] With respect to this requirement, Justice O'Connor explained that, if a sentencer could conclude that an aggravating circumstance applied to every defendant eligible for the death penalty, then the circumstance is unconstitutional.[130]

Justice O'Connor referred to the procedure articulated in *Walton* in order to begin the first inquiry.[131] The majority held that, because Idaho courts had narrowed the "utter disregard" aggravating circumstance, it was not necessary to determine whether the circumstance was, on its own, constitutional.[132] Justice O'Connor indicated that in *State v. Osborn*[133] the Idaho Supreme Court narrowly interpreted the "utter disregard" circumstance as being " 'reflective of acts or circumstances surrounding the crime which exhibit[ed] the highest, the utmost, callous disregard for human life, i.e., the cold-blooded pitiless slayer.' "[134] Disregarding all but the last phrase of this narrowing construction,[135] the Court set out to determine whether the "cold-blooded pitiless slayer" element of the narrowing construction sufficiently narrowed the "utter disregard" circumstance.[136]

The majority first attempted to determine the "everyday"

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126 *Id.* at 1540, 1542.

127 *Id.* at 1540 (quoting Lewis v. Jeffers, 497 U.S. 764, 774 (1990)).

128 *Id.* (citing Lewis v. Jeffers, 497 U.S. 764, 774 (1990)).

129 *Id.* at 1542 (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)).

130 *Id.* (citing Maynard v. Cartwright, 486 U.S. 356, 364 (1988)).

131 *Id.* at 1540-41. *See supra* note 29 and accompanying text.

132 *Id.* at 1541.

133 631 P.2d 187 (Idaho 1981).

134 *Arave*, 113 S. Ct. at 1539 (quoting *Osborn*, 631 P.2d at 200-01).

135 Although Justice O'Connor did not explain why she disregarded all but the ultimate phrase of the narrowing construction, it is likely that she did so because the phrase "highest, utmost, callous disregard for human life" allowed for at least as much subjectivity as aggravating circumstances or narrowing constructions previously declared unconstitutional by the Court. *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980) (finding that Georgia's aggravating circumstance that allowed the sentencer to consider whether the offense was "outrageously or wantonly vile, horrible and inhuman" did not restrain the arbitrary and capricious infliction of the death penalty and therefore, on its own, was unconstitutionally vague).

136 *Arave*, 113 S. Ct. at 1541.

meaning of the terms "cold-blooded" and "pitiless." To do so, Justice O'Connor looked to Webster's Dictionary. "Pitiless," the Court found, was defined as "devoid of, or unmoved by, mercy or compassion"; "cold-blooded" meant " 'marked by absence of warm feelings: without consideration, compunction, or clemency,' " and " 'matter of fact, emotionless.' "[137] Condensing these definitions, the majority determined that, in everyday usage, "cold-blooded pitiless slayer" referred to the killer who killed "without feeling or sympathy."[138] In arriving at this definition, the Court dismissed Black's Law Dictionary's definition of "cold-blooded" as " 'premeditated.' "[139] Since premeditation is directly addressed in Idaho's homicide statutes, Justice O'Connor asserted, if the Idaho Supreme Court had thought the words were identical in meaning, it would have used the word "premeditated" instead of "cold-blooded."[140]

The Court then challenged the Ninth Circuit's claim that the phrase "cold-blooded pitiless slayer" required a subjective determination by the sentencer and therefore was unconstitutional.[141] The majority explained that "cold-blooded" and "pitiless" described the defendant's state of mind, "not a 'subjective' matter, but a *fact* to be inferred from the surrounding circumstances."[142] Justice O'Connor acknowledged that "[d]etermining whether a capital defendant killed without feeling or sympathy is undoubtedly more difficult than, for example, determining whether [the defendant] 'was previously convicted of another murder.' "[143] However, although " 'not susceptible of mathematical precision,' "[144] such a determination was not precluded by the United States Constitution.[145] In sum, the Court held that the Idaho Supreme Court's limiting construction was sufficiently narrow.[146]

Turning to the second inquiry, the Court considered whether the Idaho narrowing construction genuinely narrowed the class of defendants eligible for the death penalty. Justice O'Connor indicated that in Idaho all first degree murderers were eligible for capital punishment and that the category of first-degree murderers was

137 *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1726 (1986)).
138 *Id.*
139 *Id.* (quoting BLACK'S LAW DICTIONARY 260 (6th ed. 1990)).
140 *Id.*
141 Creech v. Arave, 947 F.2d, 873, 884 (9th Cir. 1991) (en banc).
142 *Arave*, 113 S. Ct. at 1541-42 (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716-17 (1983)).
143 *Id.* at 1542 (quoting IDAHO CODE § 19-2515(g)(1) (1987)). *See supra* note 102.
144 *Id.* (quoting Lewis v. Jeffers, 497 U.S. 764, 777 (1990)).
145 *Id.*
146 *Id.*

very broad.[147] The majority then acknowledged that the word "pitiless," on its own, might not narrow the class of defendants eligible for the death penalty because a sentencer might determine that every first-degree murderer was pitiless.[148] By contrast, the Court found that the phrase "cold-blooded" genuinely limited the class of defendants eligible for the death penalty because some first-degree murderers did exhibit feelings, such as anger, jealousy, or revenge.[149] Justice O'Connor was uneasy with this finding, however, and recognized that the question of whether the Idaho narrowing construction genuinely narrowed the class of defendants eligible for the death penalty was a "close" one.[150] Despite this uneasiness, the Court found that the Idaho limiting construction, particularly the phrase "cold-blooded," genuinely narrowed the number of defendants eligible for capital punishment.[151]

The majority then turned to Creech's argument that the "utter disregard" circumstance was unconstitutional because it had not been applied consistently in other cases decided in the Idaho courts.[152] This inconsistency, Creech maintained, proved that the circumstance was simply a catch-all.[153] The Court rejected this argument for three reasons. First, the majority held that the fact that the Idaho courts found first-degree murderers "pitiless" and "cold-blooded" in cases with varied fact patterns was to be expected and did not raise a constitutional question.[154] Second, referring to its decision in *Lewis*, the Court explained that it would not investigate whether an aggravating circumstance had been applied consistently by state courts;[155] rather, it would only consider whether the aggravating circumstance and its corresponding narrowing construction had been consistently formulated.[156] Indeed, the Idaho Supreme

147 *Id.* at 1542-43 (citing IDAHO CODE § 18-4004 (1987)).

148 *Id.* at 1543.

149 *Id.*

150 *Id.* at 1542.

151 *Id.* at 1543.

152 Brief of Respondent at 19-24, *Arave* (No. 91-1160).

153 *Id.* at 23-24.

154 *Arave*, 113 S. Ct at 1543.

155 *Id.* at 1543-44 (citing Lewis v. Jeffers, 497 U.S. 764, 778-80 (1990)). See *supra* notes 52-54 and accompanying text for a discussion of the Court's refusal to examine, case-by-case, a state's decisions implementing an aggravating circumstance in question.

156 *Id.* By "consistent formulation," the majority meant simply that the same facial language was employed. *Id.* at 1544. For example, because Idaho courts often cited verbatim the *Osborn* court's "cold-blooded pitiless slayer" narrowing construction, the courts consistently "formulated" the narrowing construction. *Id.* Alternatively, by "consistent application," the majority meant that the narrowing construction was applied only to a definable class of cases; for example, whether all defendants given death sentences shared an identifiable trait. *Id.* at 1543-44.

Court had consistently articulated the narrowing construction of the "utter disregard" aggravating circumstance, often simply quoting the *Osborn* "cold-blooded pitiless slayer" language.[157] Finally, the Court maintained that a comparison to other Idaho decisions would be "particularly inappropriate" in this case because none of the cases upon which Creech relied had been decided at the time the Idaho Supreme Court affirmed Creech's sentence.[158] Thus, the majority held that the sentencing judge was not influenced by these cases.[159] In sum, the majority held that "[i]n light of the consistent narrowing definition given the 'utter disregard' circumstance by the Idaho Supreme Court," the circumstance met constitutional standards.[160]

As a final point, the majority found unpersuasive Creech's argument that the "utter disregard" aggravating circumstance, if constitutional, could not apply to him because the trial judge found that he was provoked by Jensen and displayed an "excessive violent rage."[161] Creech maintained that this finding was irreconcilable with a finding of "utter disregard for human life."[162] The Court held that this was a question of state law and that such a finding by a state court would only violate the Constitution if " 'no reasonable sentencer' could find the circumstance to exist."[163] By refusing to reconsider the issue, the majority concluded that the decision to sentence Creech to death was reasonable.[164]

B. THE DISSENTING OPINION

Justice Blackmun wrote a blistering dissent in which he was joined by Justice Stevens. The dissenters agreed with the majority that, under *Walton*, federal courts should determine whether state courts have sufficiently narrowed an unconstitutionally broad aggravating circumstance.[165] The dissenters then addressed the question of whether the Idaho Supreme Court had sufficiently focused the aggravating circumstance with its "cold-blooded pitiless slayer" narrowing construction.[166]

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157 *Id.* at 1544.
158 *Id.*
159 *Id.*
160 *Id.*
161 Brief of Respondent at 25-27, *Arave* (No. 91-1160).
162 *Id.*
163 *Arave*, 113 S. Ct. at 1544 (quoting Lewis v. Jeffers, 497 U.S. 764, 783 (1990)).
164 *Id.*
165 *Id.* at 1545 (Blackmun, J., dissenting). See *supra* note 29 and accompanying text for the *Walton* Court's mandate.
166 *Arave*, 113 S. Ct. at 1545 (Blackmun, J., dissenting).

First, granting that "without feeling or sympathy" was a plausible definition of "cold-blooded pitiless slayer," Justice Blackmun argued that "without feeling or sympathy" did not sufficiently narrow a sentencer's discretion. The dissent argued that this definition was no different from the "devoid of mercy or compassion" definition of "pitiless" that the majority found did not genuinely narrow the class of those eligible for the death penalty.[167] However, even if there was a distinction between "devoid of mercy and compassion" and "without feeling or sympathy," the dissent contended first that "without feeling or sympathy" had never been employed by the Idaho courts as the definition of "cold-blooded pitiless slayer" and second, that such a definition certainly did not obviously flow from the phrase "cold-blooded pitiless slayer."[168] Justice Blackmun argued that this was evidence that the phrase was susceptible to a variety of definitions and therefore unconstitutional.[169] He claimed that "the State must provide a construction that, on its face, reasonably can be expected to be applied in a consistent and meaningful way so as to provide the sentencer with adequate guidance. The metaphor 'cold-blooded' does not do this."[170]

In making its first point the dissent deferred to the majority's definition of "cold-blooded pitiless slayer,"[171] but the dissent next challenged the majority's definition of "cold-blooded pitiless slayer" as "without feeling or sympathy" in three ways: (1) by investigating the ordinary usage of the phrase "cold-blooded";[172] (2) by determining its legal usage;[173] and (3) by examining its application in the Idaho courts.[174]

First, in addressing the ordinary usage of "cold-blooded," the dissent quoted the dictionary definition of "cold-blooded" used by the majority: " 'marked by absence of warm feelings: without con-

167 *Id.* at 1546 (Blackmun, J., dissenting). See *supra* notes 137, 148 and accompanying text for the majority's argument on this point. When the majority addressed whether Idaho's narrowing construction genuinely limited the number of first-degree murderers eligible for the death penalty, it asserted that the word "pitiless," on its own, did not genuinely narrow the eligible class. *Id.* at 1543. Prior to this determination the Court defined "pitiless" as "devoid of, or unmoved by, mercy or compassion." *Id.* at 1541. Thus, to the dissent, the phrase "without feeling or sympathy," because nearly identical to "devoid of, or unmoved by, mercy or compassion," had to be held constitutionally infirm under the majority's analysis.

168 *Id.* at 1546 (Blackmun, J., dissenting).

169 *Id.* (Blackmun, J., dissenting).

170 *Id.* (Blackmun, J., dissenting).

171 *See supra* note 167 and accompanying text.

172 *Arave,* 113 S. Ct. at 1546-47 (Blackmun, J., dissenting).

173 *Id.* at 1547-48 (Blackmun, J., dissenting).

174 *Id.* at 1548-49 (Blackmun, J., dissenting).

sideration, compunction or mercy.' "[175] "What murderer," Justice Blackmun asked incredulously, "*does* act with consideration or compunction or clemency?"[176] The dissent chastised the majority for virtually ignoring this constitutionally insufficient definition of "cold-blooded" and instead deriving its "without feeling or sympathy" "hybrid" definition.[177] In everyday usage, the dissent argued, the phrase "cold-blooded" does not mean "without feeling or sympathy," but rather is regularly used to describe killings that are spurred by deep emotion.[178] To support this view, Justice Blackmun cited a number of recent clippings from periodicals that described killings as "cold-blooded" despite the fact that they were provoked by jealousy, hatred, humiliation, and so forth.[179]

The dissent then cited Black's Law Dictionary to show that, in legal parlance, the term "cold-blooded" has generally been used to distinguish between first and second degree murders.[180] As so defined, the phrase could not possibly separate those first-degree murderers deserving the death penalty from those not so deserving and, therefore, was clearly unconstitutional.[181]

Finally, the dissent chastised the majority for refusing to examine cases decided by Idaho courts.[182] The dissent maintained that such precedent was relevant because the *Osborn* narrowing construction that the majority claimed was consistently invoked by Idaho courts had never meant what the majority said it meant; that is, "cold-blooded pitiless slayer" had never been defined by Idaho courts to mean "without feeling or sympathy."[183] The dissent strenuously contended that consistent citing of the "cold-blooded pitiless slayer" standard was of no value if the standard defied definition.[184] The dissent believed that the fact that the *Osborn* construction had been cited so frequently, yet had been applied to so many different fact patterns, indicated that the construction was not sufficiently narrow.[185]

As a final point, the dissent noted that the trial judge found that

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175 *Id.* at 1546 (Blackmun, J., dissenting) (quoting majority's definition). *See supra* note 137 and accompanying text.

176 *Arave*, 113 S. Ct. at 1546 (Blackmun, J., dissenting).

177 *Id.* at 1546-47 (Blackmun, J., dissenting).

178 *Id.* at 1547 (Blackmun, J., dissenting).

179 *Id.* (Blackmun, J. dissenting) (citations omitted).

180 *Id.* (Blackmun, J., dissenting) (citing BLACK'S LAW DICTIONARY 260 (6th ed. 1990)).

181 *Id.* at 1548 (Blackmun, J., dissenting).

182 *Id.* (Blackmun, J., dissenting).

183 *Id.* at 1548-49 (Blackmun, J., dissenting).

184 *Id.* at 1548 (Blackmun, J., dissenting).

185 *Id.* at 1548-49 (Blackmun, J., dissenting).

Creech had acted in an "excessive violent rage" in killing Jensen.[186] Given this characterization, "[i]f Creech somehow [was] covered by the 'utter disregard' factor as understood by the majority (one who kills not with anger, but indifference), then there can be no doubt that the factor [was] so broad as to cover any case." Conversely, "[i]f Creech [was] not covered, then his sentence was wrongly imposed."[187] Thus, either the circumstance as construed by Idaho courts was unconstitutionally vague, or it could not apply to Creech.

V. ANALYSIS

In *Arave v. Creech*, the United States Supreme Court altered the procedure used to determine whether a statutory aggravating circumstance sufficiently channels a sentencer's discretion and genuinely narrows the class of defendants eligible for the death penalty. As a result, the Court extended the amount of discretion that constitutionally may be granted to a sentencer in administering the death penalty.[188] The Court began its analysis by identifying the standards for determining whether an aggravating circumstance is unconstitutionally vague.[189] In determining whether the Idaho statute in question met these standards, however, the Supreme Court undertook an unprecedented inquiry. By consulting the dictionary to define Idaho's "cold-blooded pitiless slayer" narrowing construction and then further narrowing the procured definition, the Court exhibited a willingness to uphold an aggravating circumstance even if the Supreme Court itself must further define the state's narrowing construction. By taking the unprecedented step of narrowing a state's own narrowing construction, the Supreme Court allowed to stand an aggravating circumstance that neither sufficiently channeled a sentencer's discretion nor genuinely narrowed the class of defendants eligible for the death penalty.

A. THE COURT NARROWED IDAHO'S NARROWING CONSTRUCTION

Prior to *Arave*, the Supreme Court had never independently channeled a state's narrowing construction. Yet the Court did just

186 *Id.* at 1549-50 (Blackmun, J., dissenting).

187 *Id.* at 1550 (Blackmun, J., dissenting).

188 *See* Troy R. Olsen, Comment, *"Utter Disregard for Human Life"—A Clear and Objective Standard for the Purpose of Imposing the Death Penalty?*, 28 IDAHO L. REV. 421 (1991-92). This Comment praises the Ninth Circuit Court of Appeals' decision in Creech v. Arave, 947 F.2d 873 (9th Cir. 1991), which declared Idaho's "utter disregard" aggravating circumstance unconstitutionally vague. *See supra* notes 118-19 and accompanying text for the Ninth Circuit's opinion.

189 *Arave*, 113 S. Ct. at 1540, 1542.

that in *Arave* in order to save the Idaho death penalty statute. The majority distilled several dictionary definitions of "cold-blooded" and "pitiless" and determined that the phrase "cold-blooded pitiless slayer" referred to a killer who killed "without feeling or sympathy."[190] The Court adopted this definition of "cold-blooded pitiless slayer," despite the fact that the Idaho Supreme Court had never articulated a similar definition.[191]

In cases decided before *Arave*, the Court simply examined a state's narrowing construction of its aggravating circumstance to determine whether the aggravating circumstance sufficiently channeled a sentencer's discretion. For example, in *Walton*, the Court recognized that the Arizona Supreme Court had sufficiently narrowed the scope of the state's "especially heinous, cruel or depraved" aggravating circumstance.[192] In making this determination, the Court simply considered the narrowing done by the Arizona Supreme Court, and refrained from defining further the Arizona narrowing construction.[193] Similarly, in *Proffitt*, the Court considered only the Florida Supreme Court's narrowing construction of Florida's "especially heinous, atrocious, or cruel" aggravating circumstance in finding the circumstance constitutional.[194]

Perhaps even more illustrative of this point is *Shell*, in which the Supreme Court determined that Mississippi's narrowing construction of its "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague.[195] Despite the fact that the Court was eventually to find the circumstance unconstitutionally

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190 *Id.* at 1541. *See supra* notes 137-40 and accompanying text.

191 *Id.* at 1548 (Blackmun, J., dissenting). *See* State v. Charboneau, 774 P.2d 299, 322 (Idaho 1989) (citing the "cold-blooded pitiless slayer" language of *Osborn* without offering any further definition); State v. Fain, 774 P.2d 252, 269 (Idaho 1989) ("utter disregard" circumstance "refers not to the outrageousness of the acts constituting the murder, but to the defendant's lack of conscientious scruples against killing"); State v. Card, 825 P.2d 1081, 1092 (Idaho 1991) (simply citing the *Fain* definition of the "utter disregard" circumstance); Fetterly v. Paskett, 747 F. Supp. 594, 605 (D. Idaho 1990) (holding that Idaho courts had sufficiently narrowed the "utter disregard" circumstance in *Osborn*, *Fain*, and *Charboneau* and therefore that further definition was not needed); State v. Aragon, 690 P.2d 293, 302 (Idaho 1984) (no expansion of the *Osborn* definition); State v. Pizzuto, 810 P.2d 680, 710 (Idaho 1991) (citing *Charboneau*, *Aragon*, and other Idaho cases and failing to define further the circumstance). *See also* State v. Paz, 798 P.2d 1 (Idaho 1990); Sivak v. State, 731 P.2d 192 (Idaho 1986); State v. Caudill, 706 P.2d 456 (Idaho 1985); State v. Paradis, 676 P.2d 31 (Idaho 1983).

192 Walton v. Arizona, 497 U.S. 639, 655 (1990). *See supra* notes 30-33 and accompanying text.

193 *Walton*, 497 U.S. at 655.

194 Proffitt v. Florida, 428 U.S. 242, 255-56 (1976) (citing State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973)). *See supra* notes 36-41 and accompanying text.

195 Shell v. Mississippi, 498 U.S. 1 (1990) (per curiam). *See supra* notes 63-65 and accompanying text.

vague, in a brief per curiam opinion, the Court never consulted a dictionary or considered the plain meaning or any other meaning of a word in the narrowing construction. Rather, the Court held that "[a]lthough the trial court in this case used a limiting instruction to define the 'especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient."[196] By contrast, when presented with an unconstitutional construction in *Arave*, the Court went to great pains to derive a serviceable definition. The Supreme Court's unprecedented narrowing of Idaho's "cold-blooded pitiless slayer" narrowing construction was tantamount to an acknowledgment that the construction, on its own, was unconstitutionally vague.

B. SUFFICIENT CHANNELING

The phrase "cold-blooded pitiless slayer" provides significantly less guidance to a sentencer than any construction upheld by the Court prior to *Arave*. Absent from the phrase are objective criteria, considered crucial by the Court in *Walton*, *Proffitt*, and *Godfrey*.[197] The "cold-blooded pitiless slayer" construction requires no such objective criteria and therefore violates the standard originally set forth in *Gregg*.[198]

A comparison of the narrowing construction found unconstitutionally vague in *Shell* and the one validated in *Arave* clearly illustrates that the Court validated an unconstitutional narrowing construction in *Arave*. First, the construction under consideration in *Arave* simply contained the phrase "cold-blooded pitiless slayer," whereas the construction in *Shell* contained elements similar to those previously deemed sufficient by the Court. For example, in *Shell v. State*,[199] the Mississippi Supreme Court had held that "cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of[,] the suffering of others."[200] This standard echoed standards previously validated by the Court that, for example, required a sentencer to determine whether there was torture to

196 *Shell*, 498 U.S. at 1.

197 *See supra* notes 24, 30-33, and 36-41 and accompanying text for the Court's analysis of the aggravating circumstances in *Godfrey*, *Walton*, and *Proffitt* respectively.

198 Gregg v. Georgia, 428 U.S. 153, 198 (1976) (plurality opinion). *See* Olsen, *supra* note 188, at 433. "Rather than defining 'utter disregard,' the court in *Osborn* merely emphasized it. Unlike the limiting constructions considered in *Walton*, *Maynard*, *Godfrey* and *Proffitt*, there is nothing in the *Osborn* court's construction which contained even the slightest reference to any objectively-verifiable facts."

199 554 So. 2d 887 (Miss. 1989).

200 *Id.* at 906.

the victim or whether the murderer relished his crime.[201] Despite this similarity, the *Shell* construction was deemed unconstitutional. By contrast, the "cold-blooded pitiless slayer" construction contains none of these facial similarities.

Second, while determining whether an action is "designed to inflict a high degree of pain," or whether an actor displayed "indifference to, or even enjoyment of, the suffering of others," suggests an objective look at the facts of a case (for example, such a determination can be made by simply investigating an individual's actions), the phrase "cold-blooded pitiless slayer" commands no such objective inquiry. It is not at all apparent how one would objectively determine whether an individual is a "cold-blooded pitiless slayer." Indeed, the Court virtually admitted this by further defining the phrase "cold-blooded pitiless slayer." Only when the Court defined "cold-blooded pitiless slayer" as a killer who acted "without feeling or sympathy" was it able to point to objective criteria that indicated "cold-bloodedness" and "pitilessness."[202]

There can be little doubt that the narrowing construction offered in *Shell* channeled a sentencer's discretion to a greater extent than did the limiting construction offered in *Arave*; yet the construction in *Arave* was validated by the Supreme Court, while the construction in *Shell* was deemed constitutionally infirm. Essentially, the "cold-blooded pitiless slayer" narrowing construction is "both vague and unenlightening,"[203] and therefore offers little (if any) guidance to the sentencer.

C. GENUINE NARROWING

For similar reasons that the "cold-blooded pitiless slayer" narrowing construction in *Arave* does not sufficiently channel Idaho sentencers' discretion, the narrowing construction fails genuinely to narrow the class of defendants eligible for the death penalty. Because the narrowing construction is vague insofar as it lacks objective criteria, it fails to reduce the number of offenders eligible for the death penalty.

In both *Lowenfield* and *Zant*, the aggravating circumstances considered by the Court clearly narrowed the class of defendants eligible for the death penalty. In *Lowenfield*, the Court held that the jury's finding that the defendant had "a specific intent to kill or to inflict great bodily harm upon more than one person" met the re-

201 *See, e.g.*, Lewis v. Jeffers, 497 U.S. 764, 769-70 (1990).

202 *See supra* notes 137-38, 142-45 and accompanying text.

203 Arave v. Creech, 113 S. Ct. 1534, 1545 (1993) (Blackmun, J., dissenting).

quirements of this prong of the Court's test.[204] The Court concluded that some individuals eligible for the death penalty would not meet this standard and that therefore the class of death-eligible offenders was genuinely limited.[205] In *Zant*, the Court similarly found that not every death-eligible offender either had a prior conviction for a capital offense or had escaped from lawful confinement. Therefore, the aggravating circumstances in question limited the number of individuals eligible for the death penalty.[206]

By contrast, the standardless narrowing construction in *Arave* fails this prong of the test. The dissent correctly recognized that the "cold-blooded pitiless slayer" construction fails to offer a standard that "reasonably can be expected to be applied in a consistent and meaningful way."[207] Because "cold-blooded pitiless slayer" defies consistent definition, it can be applied to any death-eligible offender and therefore fails genuinely to narrow the class of death-eligible defendants.

D. *ARAVE* AND THE FUTURE

By validating a narrowing construction of an aggravating circumstance that was not itself sufficiently narrow, the United States Supreme Court has taken a treacherous path that may lead to a subversion of its jurisprudence in the capital sentencing arena. A final look at *Shell* bears this out.

In *Shell*, the Court held that Mississippi's narrowing construction of its aggravating circumstance insufficiently narrowed the sentencer's discretion and therefore was unconstitutional.[208] Yet, if the line of reasoning established in *Arave* had been applied in *Shell*, it is likely that the Court would have determined that the Mississippi courts had sufficiently narrowed Mississippi's "heinous, atrocious and cruel" aggravating circumstance. After determining that the narrowing construction was unconstitutionally broad, the Court simply would have resorted to a dictionary to further narrow the terms in question (as it did in *Arave*). As long as the Court was able to locate a sufficiently narrow interpretation of Mississippi's narrowing construction (that is, as long as the narrowing construction was capable of constitutionally satisfactory limitation), the aggravating circumstance would have survived.

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204 Lowenfield v. Phelps, 484 U.S. 231, 246 (1988).

205 *Id.*

206 Zant v. Stephens, 462 U.S. 862, 877 (1983).

207 *Arave*, 113 S. Ct. at 1546 (Blackmun, J., dissenting).

208 Shell v. Mississippi, 498 U.S. 1, 2 (1990) (Marshall, J., concurring). *See supra* notes 63-65 and accompanying text.

As this analysis indicates, following *Arave*, it is uncertain that a state's capital sentencing scheme can be found invalid due to insufficient channeling of a sentencer's discretion. After all, what aggravating circumstance or narrowing construction is not *capable of* a narrow interpretation? By deviating from its mandate that a *state's courts* adequately channel an unconstitutional aggravating circumstance,[209] the Supreme Court has raised doubts about the vitality of its precedent requiring the voiding of state capital sentencing schemes that do not adequately channel sentencers' discretion.

VI. CONCLUSION

With its decision in *Arave v. Creech*, the United States Supreme Court has indicated a willingness to be extremely deferential to states' capital sentencing schemes. In *Arave*, the Court validated a scheme that was merely *capable* of being construed in a narrow way instead of requiring that the state "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death."[210] Essentially, the Supreme Court undercut its own precedent that required a state's capital sentencing scheme both to adequately channel a sentencer's discretion in administering the death penalty and to genuinely limit the number of individuals eligible for the death penalty. By channeling Idaho's own narrowing construction, the Court violated its own dictate that a *state* must adequately channel its vague aggravating circumstance.[211] In so doing, the Court allowed to stand an aggravating circumstance that affords little or no guidance to a sentencer and thus fails both prongs of the Court's test.[212]

The precedent set by this case is a dangerous one. The Supreme Court has now expressed a willingness to attempt to define state court narrowing constructions of statutory aggravating circumstances. If the Court arrives at a sufficiently narrow definition, it will allow the statute to stand, regardless of whether the definition it arrived at was ever applied by the state itself. By so doing, the Court has opened the door to the validation of capital sentencing schemes that might defy definition by all but the Justices of the Court.

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209 *See, e.g*, Walton v. Arizona, 497 U.S. 639, 654 (1989).
210 Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (internal quotations omitted).
211 *See, e.g., id.*
212 *See generally* Olsen, *supra* note 188.