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Criminal Law - Capital Punishment - Aggravating Circumstances - Clear and Objective Standard

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CRIMINAL LAW—CAPITAL PUNISHMENT—AGGRAVATING CIRCUMSTANCES—CLEAR AND OBJECTIVE STANDARD—The United States Supreme Court held that the Idaho "utter disregard" aggravating circumstance provided a clear and objective standard for the sentencer to apply when determining if the death penalty should be imposed.

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

On May 13, 1981, a fight occurred in the maximum security unit of the Idaho State Penitentiary between two inmates, Thomas Creech ("Creech") and David Jensen ("Jensen").[1] Creech was serving life sentences for first degree murders, and Jensen was serving time for car theft.[2] The record states that Jensen approached Creech and began to attack him with a sock full of batteries.[3] Creech was able to take the weapon away from Jensen; however, a few minutes later Jensen returned with a toothbrush that had a razor blade taped to it, and Jensen proceeded to attack Creech with this weapon.[4] Creech retaliated by repeatedly swinging and striking Jensen in the head with the sock full of batteries until Jensen collapsed.[5] Creech then commenced kicking Jensen in the head and throat.[6] Jensen was subsequently taken to the hospital where he later died.[7]

Creech was charged with murder of the first degree and pled not guilty.[8] Later, however, Creech advised the trial judge by letter

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1. State v. Creech, 670 P.2d 463, 465 (Idaho 1983), *cert. denied*, 465 U.S. 1051 (1984). In the maximum security tier, only one inmate is allowed out of his cell at a time for a period of one hour. State v. Creech, 670 P.2d at 465. However, tier janitors are allowed out to perform their cleaning duties. *Id.* Creech was a tier janitor and, thus, was out when Jensen had his hour out for privilege. *Id.*

2. Arave v. Creech, 113 S. Ct. 1534, 1538 (1993). Before Jensen was incarcerated, he received a gun shot wound to the head which rendered him mentally and physically handicapped. Brief for Petitioner at 7, Arave v. Creech, 113 S. Ct. 1534 (1993) (No. 91-1160). Part of his brain had been removed, and he had a plastic plate in his skull. Arave v. Creech, 113 S. Ct. at 1538.

3. State v. Creech, 670 P.2d at 465.

4. *Id.*

5. *Id.* The blows with the sock to Jensen's head caused the plate in his head to shatter, which rendered him helpless. *Id.*

6. *Id.*

7. *Id.*

8. Creech v. Arave, 928 F.2d 1481, 1484 (9th Cir. 1991), *rev'd*, 113 S. Ct. 1534 (1993).

that he desired to change his plea to guilty.[9] Over the objection of defense counsel, the court accepted Creech's guilty plea and scheduled a sentencing hearing.[10]

At the sentencing hearing, the trial judge reviewed evidence regarding both the mitigation and aggravation of the assault.[11] Although the judge determined that Creech was initially justified in protecting himself, he stated that Creech went beyond self defense in his retaliation.[12] The trial judge also found that Creech displayed utter disregard for human life, and therefore, the court imposed the death penalty.[13] On May 23, 1983, the Idaho Supreme Court affirmed the sentence.[14]

After the sentence was affirmed, Creech filed a petition for writ of habeas corpus in the United States District Court for the District of Idaho.[15] The district court denied relief, and Creech appealed to the United States Court of Appeals for the Ninth Circuit.[16] The court of appeals reversed, holding that the utter

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9. Creech v. Arave, 928 F.2d at 1484.

10. *Id.*

11. *Id.* The Idaho statute requiring the review of mitigating and aggravating circumstances is found in § 19-2515(d) of the Idaho Code, which provides:

> 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. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trail shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitting may be repeated or amplified if necessary to complete the record.

IDAHO CODE § 19-2515(d) (1987).

12. Arave v. Creech, 113 S. Ct. at 1538-39.

13. *Id.* at 1539. The "utter disregard" aggravating circumstance as defined by the Idaho Code is as follows: "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: . . . (6) By the murder or circumstance surrounding its commission, the defendant exhibited utter disregard for human life." IDAHO CODE § 19-2515(g)(6) (1987).

14. State v. Creech, 670 P.2d at 476. The Idaho Supreme Court temporarily remanded to the trial judge in order that he comply with § 19-2503 of the Idaho Code, which provides that a sentence must be imposed in open court and in the defendant's presence. Creech v. Arave, 928 F.2d at 1489. Section 19-2503 of the Idaho Code states "[f]or the purpose of judgment, if the conviction is for a felony, the defendant must be personally present; if for a misdemeanor, judgment may be pronounced in his absence." IDAHO CODE § 19-2503 (1987).

15. Arave v. Creech, 113 S. Ct. at 1539.

16. Creech v. Arave, 928 F.2d at 1481.

disregard standard that the trial court relied on when imposing the capital punishment sentence was unconstitutionally vague.[17] On October 16, 1991, both a petition for rehearing and suggestion of rehearing en banc were denied, and the court reaffirmed its holding with a few amendments.[18] On August 12, 1992, the United States Supreme Court granted certiorari on the limited question of whether the utter disregard circumstance as interpreted by the Idaho Supreme Court in *State v. Osborn*[19] was unconstitutionally vague.[20] Specifically, the Court determined whether the Idaho standard provided a clear and objective test to be applied by the sentencer, and whether the standard adequately limited and channeled the sentencer's discretion as required by the Eighth and Fourteenth Amendments to the United States Constitution.[21]

When a federal court determines the issue of whether a state's aggravating circumstance adequately limits and channels a sentencer's discretion, the court applies a two-step analysis.[22] First, the court determines whether the statutory language itself is too vague, and if the court finds that it is, the court will look to see if state courts have defined the language further.[23] The United States Supreme Court stated that since the Idaho Supreme Court adopted a limiting construction, it was unnecessary to decide whether the statutory phrase "utter disregard for human life"[24] itself was constitutional.[25] Therefore, the Court focused on how the

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17. *Id.* at 1492.

18. Creech v. Arave, 947 F.2d 873, 875 (9th Cir. 1991). Judge Trott filed a dissenting opinion in which he stated that a rehearing of the case en banc should be granted. *Id.* Judge Trott stated that the "utter disregard" standard as narrowed by the Idaho Supreme Court in State v. Osborn, 631 P.2d 187 (Idaho 1981), was not unconstitutionally vague. *Id.* at 892 (Trott, J., dissenting).

19. 631 P.2d 187 (Idaho 1981). The court held that the phrase "utter disregard" "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." *Osborn*, 631 P.2d at 201.

20. Arave v. Creech, 113 S. Ct. 5 (1992).

21. Arave v. Creech, 113 S. Ct. at 1538. The Eighth Amendment to the Constitution of the United States provides in pertinent part: "[N]or [shall] cruel and unusual punishments [be] inflicted." U.S. Const. amend. VIII. The pertinent part of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

22. Arave v. Creech, 113 S. Ct. at 1541 (relying on Walton v. Arizona, 497 U.S. 639, 654 (1990)). See notes 78-85 and accompanying text.

23. Arave v. Creech, 113 S. Ct. 1541 (relying on *Walton*, 497 U.S. at 654). See notes 78-85.

24. Idaho Code § 19-2515(g)(6) (1987). See note 13.

25. Arave v. Creech, 113 S. Ct. at 1541.

Idaho Supreme Court defined the utter disregard standard.[26]

The Idaho Supreme Court defined "utter disregard" in *State v. Osborn*.[27] The United States Supreme Court stated that the terms "cold-blooded" and "pitiless" as set forth in *Osborn* described the "defendant's state of mind, not his *mens rea*, but his attitude toward his conduct and his victim."[28] Thus, the Supreme Court noted that one could determine another's state of mind by surrounding circumstances, and therefore, the "utter disregard" standard was held to be objective, not subjective.[29]

Moreover, the Court analyzed whether the Idaho limiting construction narrowed the class of persons eligible to receive the death penalty.[30] The Supreme Court contended that the word "pitiless" alone would not be adequate to narrow the class because it is hard to imagine a person with compassion murdering another without justification.[31] However, the Court also stated that the term "pitiless" used in conjunction with "cold-blooded" would adequately narrow the class because not all first degree murderers are "cold-blooded."[32] The United States Supreme Court declared that first degree murderers who kill because of anger, revenge, jealousy, and various other emotions would not be subject to the death penalty under the Idaho standard.[33]

The Court rejected the argument made by Creech that the constitutionality of the utter disregard standard should be determined by reviewing Idaho cases to see if the limiting construction of *Osborn* had been applied consistently.[34] The Court announced that the question of whether state courts have consistently applied aggravating circumstances was different and separate from the question of whether the circumstance was constitutional.[35] Thus, whether state courts have consistently applied an aggravating circumstance was irrelevant to the issue of whether the limitation was

26. *Id.*

27. 631 P. 2d 187 (Idaho 1981). See note 19.

28. Arave v. Creech, 113 S. Ct. at 1541.

29. *Id.*

30. *Id.* at 1542.

31. *Id.* at 1543.

32. *Id.* The United States Supreme Court held that the term "cold-blooded" meant emotionless or "one marked by absence of warm feelings: Without consideration, compunction, or clemency." *Id.* at 1541 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1726 (1986)).

33. Arave v. Creech, 113 S. Ct. at 1543.

34. *Id.* at 1544.

35. *Id.* at 1543.

valid.[36]

Moreover, the United States Supreme Court held that the utter disregard circumstance as defined by the Idaho Supreme Court in *Osborn* adequately limited and channeled a sentencer's discretion.[37] Therefore, it met the constitutional requirements of the Eighth and Fourteenth Amendments.[38]

Justice Blackmun filed a dissenting opinion, and was joined therein by Justice Stevens.[39] Justice Blackmun argued that the limiting construction given in *Osborn*, specifically the "cold-blooded, pitiless slayer" qualification, did not adequately narrow the class of persons subject to capital punishment.[40] He stated that the Idaho Supreme Court's interpretation of the "utter disregard" standard in *Osborn* could cover any and every intentional or first degree murder.[41] Therefore, the dissent said that the formulation would be unconstitutional.[42]

Furthermore, Justice Blackmun maintained that the Court was incorrect when it declined to review past Idaho court cases to see if the limiting construction of *Osborn* was applied consistently.[43] The dissent argued that the fact that Idaho courts have not applied the limitation consistently was relevant to the determination of whether the limitation was constitutional.[44] Thus, Justice Blackmun concluded that the holding of the Court was incorrect, and that it should have found the utter disregard circumstance unconstitutional.[45]

The United States Supreme Court first addressed the issue of arbitrary and inconsistent impositions of the death penalty in 1972. In *Furman v. Georgia*,[46] the Supreme Court examined three

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36. *Id.*

37. *Id.* at 1544.

38. Arave v. Creech, 113 S. Ct. at 1544.

39. *Id.* at 1545 (Blackmun, J., dissenting).

40. *Id.* at 1546. The dissent stated that "cold-blooded" should be defined by everyday meaning or by legal usage. *Id.* at 1547. People routinely use the term "cold-blooded" to refer to anyone who kills. *Id.* Moreover, BLACK'S LAW DICTIONARY defines "cold-blooded" as follows: "to designate a willful, deliberate, and premeditated homicide." BLACK'S LAW DICTIONARY 260 (6th ed. 1990).

41. Arave v. Creech, 113 S. Ct. at 1548 (Blackmun, J. dissenting).

42. *Id.*

43. *Id.* at 1548-49.

44. *Id.* Justice Blackmun stated "[t]he majority misses the point. Idaho's application of the *Osborn* formulation is relevant not because that formulation has been inconsistently invoked, but because the construction has never meant what the majority says it does." *Id.* at 1548.

45. *Id.* at 1550.

46. 408 U.S. 238 (1972). All five Justices who joined in the majority opinion wrote

different situations in which the death penalty was imposed.[47] The Supreme Court noted that in each of these cases the trier of fact in his or her sole discretion determined whether or not the death penalty should be imposed.[48] The Court held that this was a violation of the Eighth Amendment prohibition on cruel and unusual punishment and the Fourteenth Amendment right to life since it led to arbitrary and inconsistent impositions of capital punishment.[49] Thus, in order to avoid violating the Eighth and Fourteenth Amendments, the Court concluded that a state must adequately limit and channel a sentencer's discretion by its penal code and establish an objective standard to be applied to all capital defendants in the same manner.[50]

After the Court handed down its decision in *Furman*, the individual states began to adopt penal codes which established specific aggravating factors to assist and guide the discretion of the sentencer when determining whether the death penalty should be imposed.[51] The Supreme Court began examining a series of cases involving the constitutionality of aggravating circumstances in 1976.

The first case examined by the Court was *Gregg v. Georgia*.[52] In *Gregg*, the defendant was charged with, and found guilty of, the armed robbery and murder of two men.[53] At the sentencing hearing, the judge instructed the jury that the only way it would be authorized to impose the death penalty was if it found beyond a reasonable doubt that the murder occurred during the commission of another felony, or if the murder was committed for monetary gain, or if the murder "was outrageously and wantonly vile, horrible and inhuman."[54]

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separate concurring opinions. *Id.* at 240.

47. *Furman*, 408 U.S. at 252.

48. *Id.* at 256 (Douglas, J., concurring).

49. *Id.* Justices Brennan and Marshall found that the death penalty itself violated the Eighth Amendment. *Id.* at 305 (Brennan, J., concurring), 370-71 (Marshall, J., concurring).

50. *Id.* at 256 (Douglas, J., concurring).

51. 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, 428 (1992).

52. 428 U.S. 153 (1976).

53. *Gregg*, 428 U.S. at 157. Defendant and a companion were hitchhiking north in Florida when they were picked up by a motorist. *Id.* at 158. Later, at a rest stop in Georgia, the defendant robbed, shot and killed the motorist and his passenger. *Id.* at 159.

54. *Id.* at 161. The judge specifically stated that the death penalty could only be imposed if the jury found beyond a reasonable doubt one of the following aggravating circumstances:

> 'One'—That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of [Simmons

The jury found that the first two circumstances of the judge's instruction applied to the matter and thus returned the verdict of death.[55] The Supreme Court of Georgia affirmed the convictions and the imposition of the death penalty for murder.[56] The petitioner appealed, and the United States Supreme Court granted certiorari, which was limited to the question of whether the Georgia statutory system, which allowed the imposition of the death penalty if at least one aggravating circumstance was found in a murder trial, violated the Eighth and Fourteenth Amendments as cruel and unusual punishment.[57] The Court held that the Georgia sentencing scheme adequately channelled the sentencer's discretion so as to avoid inconsistent or arbitrary impositions of the death penalty.[58]

The next case the Court examined regarding aggravating circumstances was *Proffitt v. Florida*.[59] In deciding this case, the Court reviewed the Florida sentencing statute.[60] The defendant chal-

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> and Moore].
>
> 'Two'—That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.
>
> 'Three'—The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they [sic] involved the depravity of [the] mind of the Defendant.

Id.

55. *Id.*

56. Gregg v. Georgia, 210 S.E.2d 659 (Ga. 1974), *aff'd*, 428 U.S. 153 (1976).

57. Gregg v. Georgia, 423 U.S. 1082 (1976). Section 17-10-30 (b)(7) of Georgia's sentencing code provides:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
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> . . .
>
> (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

GA. CODE ANN. § 17-10-30 (b)(7) (Michie 1990).

58. *Gregg*, 428 U.S. at 206-07. The Court stated "[w]hile the jury is permitted to consider any aggravating or mitigating circumstances it must find and identify at least one statutory aggravating factor before it may impose a penalty of death." *Id.* at 206.

59. 428 U.S. 242 (1976). The defendant in this case was charged, convicted, and sentenced to death for murder. *Proffitt*, 428 U.S. at 245. The Supreme Court of Florida affirmed the conviction and the United Sates Supreme Court granted certiorari limited to the question of whether the Florida statute which allowed the imposition of the death penalty for those convicted of first degree murder adequately channelled and limited the sentencer's discretion. *Id.* at 247.

60. *Id.* at 251. The Florida sentencing statute required the trial judge to weigh eight aggravating factors and seven mitigating factors when deciding whether to impose the death sentence, and it provided for the automatic review by the Florida Supreme Court when a

lenged that the statute was vague, particularly the eighth and third statutory aggravating circumstances "which authorize the death penalty to be imposed if the crime is especially 'heinous, atrocious, or cruel', or if the defendant knowingly created a great risk of death to many persons."[61] The Court examined the manner in which the Florida Supreme Court had construed and applied these circumstances, and found the Florida court had further defined these provisions by definition and in application to case law.[62] Therefore, the Court held that the circumstances as construed and narrowed by the Florida Supreme Court were not unconstitutionally vague.[63]

In 1980, the Court was asked in *Godfrey v. Georgia*[64] to examine the Georgia aggravating circumstance which allowed for the imposition of the death penalty if a murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[65] The defendant in *Godfrey* shot and killed his estranged wife and his mother-in-law.[66] He was tried and found guilty on two counts of murder and one count of aggravated assault and was sentenced to

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sentence of death had been imposed. *Id.* Chapter 921.141 (3) and (4) of the Florida sentencing statute provide:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death . . . .
>
> (4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

FLA. STAT. ch. 921.141 (3) and (4) (1985).

61. *Proffitt*, 428 U.S. at 255 (citing FLA. STAT. ch. 921.141 (5)(h),(c) (Supp. 1993)).

62. *Id.* at 256.

63. *Id.* at 258.

64. 446 U.S. 420 (1980).

65. *Godfrey*, 446 U.S. at 428-29.

66. *Id.* at 425. In *Godfrey*, the defendant and his wife were in the process of obtaining a legal separation and the wife had charged defendant with aggravated assault. *Id.* at 424. The defendant wanted to reconcile with his wife, but she refused to reconcile. *Id.* at 425. When his wife refused to reconcile, he went to his mother-in-law's trailer where his wife and daughter were staying and he shot his wife through the window; she died instantly. *Id.* He then entered the trailer and struck his eleven-year old daughter with the barrel of the gun and shot and killed instantly his mother-in-law. *Id.* He then called the police and turned himself in for the double murder. *Id.*

death.[67] The Georgia Supreme Court affirmed the conviction.[68]

In previous cases, the Georgia Supreme Court had required that the state prove serious physical abuse or torture before the death penalty would be imposed for the aggravating circumstance characterized as "outrageously or wantonly vile, horrible or inhuman."[69] The United States Supreme Court noted in *Godfrey* that there was no infliction of pain and both of the victims died instantly, so therefore the "outrageous" standard as defined by the Georgia Supreme Court could not apply.[70] Furthermore, the Court held that the "outrageously or wantonly vile, horrible or inhuman" standard, standing alone, without further definition from the Georgia Supreme Court, did not adequately channel the sentencer's discretion because this standard could depict any and every murder.[71] Therefore, since the narrowing limitation of abuse, as had previously been required by the Georgia Supreme Court, was not found, the Court reversed and remanded the case for further proceedings.[72]

Subsequently, the Court in *Zant v. Stephens*[73] and *Maynard v.*

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67. *Id.* at 426.

68. Godfrey v. Georgia, 253 S.E.2d 710 (Ga. 1979), *rev'd in part*, 446 U.S. 420 (1980).

69. *See* for example, McCorquodale v. State, 211 S.E.2d 577 (Ga. 1974), *cert. denied*, 428 U.S. 910 (1976) (upholding the death penalty for a murder which involved the rape, abuse, and burning of the victim before the murder); Blake v. State, 236 S.E.2d 637 (Ga. 1977), *cert. denied*, 434 U.S. 960 (1977) (upholding the imposition of the death penalty for the murder of a two-year old child by her father, stating that the murder was "outrageously or wantonly vile, horrible or inhuman that it involved torture, depravity of mind, or an aggravated battery to the victim" *Id.* at 641.); and Harris v. State, 230 S.E.2d 1 (Ga. 1976), *cert. denied*, 431 U.S. 933 (1977) (upholding the death penalty for a murder in which the defendant forced the victim to beg for her life and then proceeded to shoot and kill the victim while the defendant laughed).

70. *Godfrey*, 446 U.S. at 433.

71. *Id.* at 428-29.

72. *Id.* at 433.

73. 462 U.S. 862 (1983). In the *Zant* case, the defendant, an escaped convict, was charged, found guilty, and sentenced to death for murder. *Id.* at 864. The jury imposed the sentence of death after finding two aggravating circumstances existed. *Id.* The two aggravating circumstances the jury found to apply were as follows:

> (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has substantial history of serious assaultive criminal convictions.
>
> . . .
>
> (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

GA. CODE ANN. § 17-10-30 (b)(1) and (b)(9) (Michie 1990).

After the defendant's conviction and sentence were imposed, the Georgia Supreme Court stated the second clause of GA. CODE ANN. § 17-10-30 (b)(1) - "a substantial history of serious assaultive criminal convictions" was unconstitutionally vague. *Zant*, 462 U.S. at 867 (ci-

Cartwright[74] reiterated the holding that, in order for an aggravating circumstance to be valid, it must genuinely narrow the class of persons eligible for the death penalty and must adequately channel a sentencer's discretion. Moreover, the cases stressed that an aggravating circumstance will be held invalid if it is applied in an arbitrary and inconsistent manner.[75]

In *Maynard*, the Supreme Court reviewed the Oklahoma aggravating circumstance which imposed the death penalty if the murder was "especially heinous, atrocious, or cruel."[76] The Court held that the "especially heinous, atrocious, or cruel" circumstance of Oklahoma gave no more guidance to the sentencer than the Georgia standard of "outrageously or wantonly vile, horrible or inhuman" which the Court held unconstitutionally vague in *Godfrey*.[77]

In 1990, the United States Supreme Court, in *Walton v. Arizona*[78] and *Lewis v. Jeffers*[79] addressed the constitutionality of the

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tations omitted). The Georgia Supreme Court affirmed the conviction since the other aggravating circumstance was valid but the United States Court of Appeals for the Fifth Circuit reversed. *Id.* at 868. The United States Supreme Court granted certiorari and held that since the jury found two aggravating circumstances and since "no suggestion [was] made that the presence of more than one aggravating circumstance should be given special weight," the subsequent invalidity of one should not effect the sentence since the jury must only find one aggravating circumstance to apply in order to impose the death penalty. *Id.* at 891.

74. 486 U.S. 356 (1988). In *Maynard*, the defendant, a disgruntled ex-employee, entered the home of his former employer and shot and killed his former employer. *Maynard*, 486 U.S. at 358. The defendant also shot his former employer's wife twice in the leg and stabbed her; however, she survived the attack. *Id.* The defendant was charged and found guilty of first degree murder and sentenced to death. *Id.* at 358-59.

75. *Maynard*, 486 U.S. at 362. *See also*, McCleskey v. Kemp, 481 U.S. 279 (1987) (holding that a state must adopt criteria which distinguishes situations in which capital punishment can be imposed and those that it cannot); California v. Brown, 479 U.S. 538, 541 (1987) (stating that one of the prerequisites to a valid death penalty is that the sentencer not be given unbridled discretion); Spaziano v. Florida, 468 U.S. 447, 460 (1984) (holding that "[i]f a state has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not").

76. *Maynard*, 486 U.S. at 359.

77. *Id.* at 364.

78. 497 U.S. 639 (1990). The defendant in this case was convicted and sentenced to death for murder. *Walton*, 497 U.S. at 644. The defendant in *Walton* and two other accomplices robbed the victim at gunpoint, forced him into the car and drove him into the desert where the defendant later shot the victim in the head and left him to die. *Id.* The medical examiner determined that the gun shot did not kill the victim, but blinded him and he later died from dehydration, starvation and pneumonia. *Id.* at 644-45.

79. 497 U.S. 764 (1990). In *Lewis*, the defendant injected an overdose of heroin into the victim which rendered her unconscious, strangled her until no pulse was found, and at that point proceeded to strike the victim and call her abusive names. *Lewis*, 497 U.S. at 766-

Arizona "especially heinous, cruel or depraved" aggravating circumstance.[80] In *Walton*, the Court announced the standard two-step procedure a federal court must undertake when reviewing the constitutionality of a state's aggravating circumstance.[81] Under this test, the federal court must first determine whether the statutory language is too vague to guide the sentencer's discretion.[82] If the court finds the language too ambiguous, it must next determine if the state courts have further defined the vague terms as to provide a clear standard to be applied.[83]

The Supreme Court found that the Arizona "especially heinous, cruel or depraved" circumstance was vague, but that the Arizona Supreme Court had further defined the circumstance to mean any crime which inflicted mental or physical abuse to the victim before death, or one in which the murderer takes pleasure or relishes.[84] The Court held that the further definition by the Arizona Supreme Court provided an adequate guidance for the sentencer, and thus, held it to be constitutional.[85]

The United States Supreme Court has repeatedly stated that the death penalty in and of itself is not cruel and unusual punishment

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67. The defendant was charged, convicted, and sentenced to death for murder. *Id.* at 771.

80. The pertinent parts of the Arizona statute are § 13-703(E) and § 13-703(F)(6). Section 13-703(E) provides:

> In determining whether to impose a sentence of death or life imprisonment, . . . the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in Subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

ARIZ. REV. STAT. ANN. § 13-703(E) (Supp. 1993).

Section 13-703(F)(6) provides "[a]ggravating circumstances to be considered shall be the following: . . . The defendant committed the offense in an especially heinous, cruel or depraved manner." ARIZ. REV. STAT. ANN. § 703(F)(6) (Supp. 1993).

81. *Walton*, 497 U.S. at 654.

82. *Id.*

83. *Id.*

84. *Id.* at 654-55.

85. *Id.* at 655. *See also*, *Lewis*, 497 U.S. at 777 (quoting *Walton*, 497 U.S. at 655), in which the Court stated, "[r]ecognizing that the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision, we conclude that the definition given to the 'especially cruel' provision by the Arizona Supreme Court is constitutionally sufficient because it gives meaningful guidance to the sentencer." *Id.* Also, in *Lewis*, the Court was faced with the issue of whether a federal court may make a *de novo* review of state cases to determine if the narrowing definition of an aggravating circumstance has been applied consistently. *Lewis*, 497 U.S. at 780. The Court held that a federal court should not engage in such activity except if a state court's application of an aggravating circumstance is such that no 'reasonable sentencer' could find that the circumstances exist. *See* Arave v. Creech, 113 S. Ct. at 1544.

as long as it is not inflicted in an arbitrary or inconsistent manner.[86] The Court in *Arave v. Creech* clearly reinforced the principle that it set out in its prior decisions.[87] This established principle stipulates that, in order for an aggravating circumstance to be constitutional, the circumstance must adequately limit and channel the sentencer's discretion when determining whether to apply the death penalty, and it must distinguish the class of persons eligible to receive the death penalty from those who are not.

Although the Court correctly enunciated the basic principles of previous case law in *Arave v. Creech*, the Court incorrectly found that those principles exist in the Idaho "utter disregard" aggravating circumstance. The majority held that the definition expounded by the Idaho Supreme Court in *Osborn*[88] sufficiently narrowed and channelled the sentencer's discretion. However, the Court merely substituted one admittedly vague and broad phrase ("utter disregard for human life") with another ("the utmost callous disregard for human life, i.e., the cold-blooded, pitiless slayer").[89]

In *Furman v. Georgia*,[90] the Court stated that any statute which left the decision of whether the death penalty should be imposed up to the sole discretion of the trier of fact was unconstitutional.[91] The Court called for legislatures to write penal codes which were "even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."[92]

Obviously, the Court in *Arave v. Creech* did not follow this rationale. The phrase "utmost callous disregard for human life, i.e., the cold-blooded, pitiless slayer" is a subjective phrase which may mean different things to different triers of fact depending upon the moral character and makeup of the sentencer. Since the Idaho Supreme Court never fully defined what it meant by "cold-blooded, pitiless slayer," the sentencer was left with unbridled discretion.

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86. *See for example*, Furman v. Georgia, 408 U.S. 238 (1972). See notes 46 - 50 and accompanying text; Gregg v. Georgia, 428 U.S. 153 (1976). See notes 52 - 58 and accompanying text; Godfrey v. Georgia, 446 U.S. 420 (1980). See notes 64-72 and accompanying text.

87. *See for example*, Furman v. Georgia, 408 U.S. 238 (1972). See notes 46 - 50 and accompanying text; Gregg v. Georgia, 428 U.S. 153 (1976). See notes 52 - 58 and accompanying text; Godfrey v. Georgia, 446 U.S. 420 (1980). See notes 64 - 72 and accompanying text; Maynard v. Cartwright, 486 U.S. 356 (1988). See notes 74 - 77 and accompanying text; Walton v. Arizona, 497 U.S. 639 (1990). See notes 78 - 85 and accompanying text.

88. See note 19.

89. Olsen, cited at note 51, at 440.

90. 408 U.S. 238 (1972). See notes 46-50 and accompanying text.

91. *Furman*, 408 U.S. at 256 (Douglas, J., concurring).

92. *Id.*

One trier of fact may consider a planned murder which was carried out in a very calm and calculated manner to be cold-blooded and pitiless, whereas another trier of fact may not find a murder to be cold-blooded unless the murder involved some violent act or period of extended torture or pain.[93]

Thus, under the Eighth and Fourteenth Amendments, the Idaho aggravating circumstance phrase does not provide a clear and objective standard for the sentencer to apply, nor does it provide a meaningful basis of the classification of which murderers would and which would not be subject to the death penalty. Therefore, when the United States Supreme Court announced its holding that the "utter disregard" aggravating circumstance was constitutional, the Court took a step backwards and reinstated the very arbitrariness in imposing capital punishment that it sought to avoid in *Furman v. Georgia*.[94]

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93. *See* State v. Aragon, 690 P.2d 293, 302 (Idaho 1984) (holding that the "utter disregard" aggravating circumstance applied when the defendant drowned a defenseless eight-month old girl in the bathtub, was only concerned with covering up his participation, and refused to request medical aid). *Compare* State v. Creech, 670 P.2d 463 (Idaho 1983) (holding that the "utter disregard" circumstance applied when Creech retaliated to a provoked attacked, called for emergency assistance for the victim, and confessed to the crime).

94. 408 U.S. 238 (1972). See notes 46 - 50 and accompanying text. *Cf.* Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases-The Standardless Standard*, 64 N.C. L. REV. 941 (1986). In this article, Rosen explores the "especially heinous, atrocious, or cruel" aggravating circumstance applied by 24 states when determining whether the death penalty should be imposed. *Id.* at 943. Rosen stated that when the legislatures enacted this circumstance they placed a burden on the sentencer to try to determine with little or no guidance when the death penalty should be imposed. *Id.* at 992. He further stated that "[b]ecause of their inability to bear this burden, the courts have allowed the evils identified in Furman v. Georgia and condemned by the due process vagueness doctrine to reenter the capital punishment system." *Id.*