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SUPREME COURT OF THE UNITED STATES

In the Matter of:)
)
 GARY D. MAYNARD, WARDEN,)
 ET AL.,)
)
) Petitioners)
)
 v.)
)
) WILLIAM T. CARTWRIGHT)
)

No. 87-519

PAGES: 1 through 46
 PLACE: Washington, D.C.
 DATE: April 19, 1988

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 GARY D. MAYNARD, WARDEN, ET AL., :

4 Petitioners, :

5 v. : No. 87-519

6 WILLIAM T. CARTWRIGHT :

7 -----x

8 Washington, D.C.

9 Tuesday, April 19, 1988

10 The above-entitled matter came on for oral argument
11 before the Supreme Court of the United States at 10:11 a.m.

12 APPEARANCES:

13 SUSAN S. DICKERSON, ESQ., Oklahoma City, Oklahoma

14 on behalf of the Petitioners.

15 MANDY WELCH, ESQ., Norman, Oklahoma,

16 on behalf of Respondent.

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1 PROCEEDINGS

2 (10:11 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument first
4 this morning in No. 87-519, Gary Maynard v. William Cartwright.

5 Ms. Dickerson, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF SUSAN S. DICKERSON

8 MS. DICKERSON: Mr. Chief Justice, and may it please
9 the Court:

10 The issue before the Court is whether the United
11 States Court of Appeals for the Tenth Circuit applied the
12 principle of Godfrey v. Georgia too restrictively when it
13 invalidated the Oklahoma Court of Criminal Appeals
14 determination and interpretation that the murder of Hugh Riddle
15 was especially heinous, atrocious or cruel.

16 Godfrey, in the plurality opinion, stated that the
17 capital sentencer's discretion must be channeled by clear and
18 objective standards. The State submits that the Tenth Circuit,
19 by its ruling, applied that principle in a manner that
20 affectively requires a finding of serious physical abuse prior
21 to a finding of this particular statutory aggravating
22 circumstance.

23 It is our position that physical abuse to the victim
24 is not a necessary element of a constitutional interpretation
25 of this circumstances, and that, moreover, the jury's

1 discretion was channeled appropriately in this case.

2 QUESTION: Ms. Dickerson, have the appellate courts
3 in Oklahoma since this court was decided, specifically I think
4 in the Stouffer case and the Brown case, recently adopted the
5 Tenth Circuit's view of the requirements for narrowing the
6 especially heinous, aggravating circumstance?

7 MS. DICKERSON: Yes, Justice O'Connor. As a direct
8 result of the Maynard decision, the Oklahoma Court of Criminal
9 Appeals, less than 40 days after the en banc pronouncement,
10 narrowed the interpretation.

11 The State's position would be that that narrowing was
12 an accent to the current status of interpretation of federal
13 constitutional law.

14 QUESTION: Was that decision, those decisions a
15 matter based on both state and federal law, do you think?

16 MS. DICKERSON: No, Your Honor. Our interpretation
17 would be that they were solely premised upon federal
18 constitutional law. All of the citations in the Stouffer case
19 refer only to Maynard v. Cartwright and to the prior opinions
20 of this Court.

21 QUESTION: What do those opinions do to your case?

22 MS. DICKERSON: Justice Blackmun, we would contend
23 that jurisdiction is still appropriate with this Court, and
24 that it is the ultimate decision of this Court to determine, as
25 a matter of federal constitutional law, whether or not a state

1 is limited to a finding of serious physical abuse.

2 QUESTION: In other words, you are taking the
3 position that the Tenth Circuit, and it was unanimous wasn't
4 it?

5 MS. DICKERSON: Yes, Your Honor, it was.

6 QUESTION: Misinterpreted our decisions here?

7 MS. DICKERSON: Yes, Your Honor, it is our
8 contention.

9 QUESTION: You are swimming upstream, aren't you,
10 with an en banc case?

11 MS. DICKERSON: In Godfrey, there was a dissent which
12 indicated that psychological torture could be used as a measure
13 of determining whether or not that --

14 QUESTION: That was a dissent, wasn't it?

15 MS. DICKERSON: Yes, it was, Your Honor.

16 QUESTION: Are you asking us to overrule Godfrey?

17 MS. DICKERSON: I don't believe it's necessary,
18 Justice O'Connor, to overrule --

19 QUESTION: Well, it sounds very much, to me, like it
20 would be necessary to reach the result you are asking for.

21 How do you distinguish Godfrey?

22 MS. DICKERSON: The distinctions in Godfrey are
23 that --

24 QUESTION: Other than by reliance upon the dissenting
25 opinion.

1 MS. DICKERSON: In Godfrey, Godfrey was a domestic
2 situation in which the killer had immediately prior to the
3 killing engaged in a heated conversation with this estranged
4 wife, proceeded immediately to the same, shot his wife and
5 killed here, and then proceeded to shoot and kill the mother-
6 in-law.

7 In Godfrey, only a portion of the statutory language
8 of the (b)(7) subsection circumstance was given. And in our
9 case, the entire language of the especially heinous, atrocious,
10 or cruel circumstance was given.

11 Additionally, in Godfrey, there was no further
12 definitional instruction given to the jury. And in our case,
13 in Instruction No. 16, which is found at Page 12 of the joint
14 appendix, definitions were given which provided guidance to the
15 jury in this instance.

16 At the outset I would note that this Court has held
17 that qualifying language used in an instruction can render
18 acceptable and appropriate an instruction which might otherwise
19 be infirm.

20 In the case of California v. Brown, this Court
21 approved of the giving on an anti-sympathy instruction during
22 the capital sentencing stage of a trial due to the fact that
23 the instruction cautioned against the use of mere sympathy as
24 opposed to sympathy alone.

25 Instruction No. 16 defines the terms apart from

1 "especially". However, the State would note initially that the
2 use of the word "especially" heinous, atrocious, or cruel
3 serves to channel and qualify those types of murders which are
4 more evil than any murder which is certainly heinous,
5 atrocious, or cruel.

6 In addition, the instructions given provided that
7 heinous means extremely wicked or shockingly evil. Atrocious
8 means outrageously wicked and vile. And cruel means pitiless
9 or designed to inflict a high degree of pain, utter
10 indifference to or enjoyment of the suffering of others.

11 These instruction and definitions were given in the
12 disjunctive term and provided further guidance which was not
13 provided to the jury in the Godfrey case.

14 As well in Godfrey, there was no other aggravating
15 circumstances found, and in this instance, a second aggravating
16 circumstance of great risk of death to more than one person was
17 found.

18 Addressing specifically the definitions that were
19 given, heinous and atrocious turn specifically to consideration
20 of the killer's attitude and the manner of the killing. And
21 because the discretion was channeled by use of definitions, and
22 because the Oklahoma Court of Criminal Appeals then assessed
23 the definitions and the application of the facts to those
24 definitions, the State submits that sufficient narrowing
25 occurred.

1 In this case, the heinousness and atrocity of the
2 crime was evidenced by Defendant Cartwright's intent to get
3 even with the Riddles. He had spent over four months harboring
4 his grudge, and he had told two witnesses that he intended to
5 get even with the Riddles.

6 As pointed out in the Oklahoma Court of Criminal
7 Appeals' opinion, the Defendant either lay in wait or returned
8 under cover of darkness to commit his acts against the Riddles.

9 Additionally, he disconnected the phone. He provided
10 a note on the front door of the home to conceal his deeds. He
11 engaged in a larceny attempt, and rather than turn himself into
12 the authorities immediately upon completion of the crime, as
13 did the defendant in Godfrey, he fled the scene once the
14 authorities arrived on the scene, and turned himself in only
15 two days later at the convincing of his family members.

16 QUESTION: What is so especially atrocious, heinous
17 or cruel? It sounds like a routine murder to me.

18 MS. DICKERSON: Justice Scalia, we would contend that
19 this intent, this laying in wait, this return under cover of
20 darkness, all of the items I've mentioned previously, as well
21 as the cruelty inflicted by virtue of the fact that there were
22 psychological torture experienced by Mr. Riddle, although he
23 died instantly, which would set this murder apart from other
24 murders.

25 QUESTION: Well, I don't see the latter. I can see

1 how there was a lot of psychological suffering by Mrs. Riddle,
2 and I can see that his treatment of Mrs. Riddle was quite
3 atrocious, slitting her throat and so forth. But he just
4 dispatched Mr. Riddle with one blast of his shotgun.

5 MS. DICKERSON: I think it is appropriate to put the
6 entire crime scenario in perspective in that the Riddles had
7 been in the living room. Mrs. Riddle arose to go into the
8 hall, was confronted by Defendant Cartwright; was shot once;
9 fell to the floor; was shot again, and importantly, that second
10 shot Defendant Cartwright did not shoot her in the chest or in
11 the head where she would be rendered dead instantly, but left
12 her there to suffer such that Mr. Riddle would then in turn
13 hear his wife suffering in the hall, and then immediately was
14 confronted by Defendant Cartwright.

15 The Defendant fired two shots at Mr. Cartwright,
16 hitting him once in the chest and killing him instantly at that
17 point, but there was a period of psychological torture
18 involved. And, in fact, unlike the situation in Godfrey where
19 the prosecutor conceded that there was no torture, in this
20 instance, in the closing remarks of the prosecutor at Page 633
21 of the transcript, the prosecutor noted that Mr. Riddle must
22 have endured some psychological trauma from having heard his
23 wife injured in the next room immediately prior to being killed
24 himself.

25 QUESTION: Did the instructions here allow the jury

1 to consider the atrociousness or heinousness of the crime as a
2 whole? That is, could it take into account the torture of Mrs.
3 Riddle that went with the whole thing?

4 MS. DICKERSON: Yes, Your Honor. And we would --

5 QUESTION: Do you think that that's constitutionally
6 permissible under our decision; that we can look at the whole
7 crime and not just the murder of Mr. Riddle alone?

8 MS. DICKERSON: Yes, Your Honor. As long ago as
9 Gregg v. Georgia, this Court indicated that the circumstances
10 of the crime were appropriate for consideration by this Court
11 in assessing the validity of a death penalty.

12 Just O'Connor, in her special concurrence to the
13 California v. Brown opinion, indicated that validity of the
14 death sentence must reflect a reasoned moral response to the
15 defendant's background, character and crime. And part of the
16 crime in this instance was the inflicting of pain and suffering
17 that he inflicted on Mrs. Riddle.

18 QUESTION: Well, that seems to me a much stronger
19 part of your case than whatever happened to Mr. Riddle who was
20 dead quite soon. But the Defendant here intentionally shot her
21 in both legs rather than killing her. And then after he had
22 killed Mr. Riddle, came back and slit her throat. Somehow or
23 other she didn't die.

24 MS. DICKERSON: In all fairness, the first shot may
25 have been intended to have been aimed at another part of her

1 body, but there was some evidence that she deflected the gun
2 shot to her leg in the first instance. But clearly, he shot
3 her with the second shot in the leg as opposed to shooting her
4 in the chest or the head where she certainly would have died
5 instantly.

6 It is appropriate to consider the character of the
7 Defendant in this case, and we are looking in this particular
8 circumstance to see the evil character of a defendant. And
9 certainly the acts of this particular Defendant are more evil.

10 In connection with your question, Justice Scalia, I
11 would note that in the prior opinion of the three judge panel
12 of the Tenth Circuit prior to the reversal en banc, Judge
13 Tacha, who wrote the en banc decision, validated the existence
14 of the especially heinous, atrocious, or cruel finding upon the
15 existence of suffering to Mrs. Riddle.

16 QUESTION: May I ask about Mrs. Riddle? Is it your
17 understanding of the facts that the shooting of Mrs. Riddle,
18 the Defendant was trying to kill her when he shot her?

19 MS. DICKERSON: I would assume that his ultimate
20 intention were to kill her in that he did return to the bedroom
21 where she had managed to try to find the telephone working, he
22 did slit her throat and stab her in the abdomen rather than
23 assist her upon her plea for help.

24 QUESTION: The question I suppose I am wrestling
25 with, because I have the same concern Justice Scalia does,

1 should one view the attack on Mrs. Riddle as an attempt to
2 torture her and cause her to suffer unnecessary pain before she
3 would die, or was it just that he was kind of bungling the job
4 of trying to kill her? He hit her legs instead of shooting a
5 fatal shot, and he failed to kill her by stabbing here, but he
6 wasn't just trying to inflict pain that would not result in
7 death.

8 What position did the State take at the trial?

9 MS. DICKERSON: Justice Stevens, I think it would be
10 a fair characterization of the evidence that he intended not
11 only that Mrs. Riddle endure some torture, but that Mr. Riddle
12 endure torture as it related to the suffering of Mrs. Riddle as
13 well prior to the time that he did finally do what he thought
14 would in fact kill her.

15 QUESTION: Did the prosecutor's closing argument
16 explain why the State thought this was cruel, unusual and
17 atrocious?

18 MS. DICKERSON: Not to the extent relied upon on
19 review by the Oklahoma Court of Criminal Appeals, but there was
20 reference made to the torture, the psychological trauma to
21 which Mr. Riddle had been exposed.

22 QUESTION: Which Mr. Riddle had suffered, yes.

23 MS. DICKERSON: Yes, Your Honor.

24 There was also a lengthy discussion as to the
25 circumstances of Mrs. Riddle's torture, because conjointly with

1 the trying for murder, there was a count of shooting with
2 intent to kill.

3 QUESTION: What would your view if -- as a matter of
4 the law. Assume the facts were clear, and they never are as
5 clear as we make them in our hypothetical question, but assume
6 it was perfectly clear that the Defendant had tried to kill
7 Mrs. Riddle as promptly and efficiently as he could, but he
8 missed and he was just a bungler and caused her to suffer the
9 equivalent of the same kind of physical torture that if he was
10 just trying to do.

11 Would that satisfy the aggravating circumstance?

12 MS. DICKERSON: In that instance, I believe it would
13 in that there would be actual suffering, and the end result,
14 the end circumstance of the crime would be that there would be
15 some suffering endured there such that the jury could rely upon
16 a finding of cruelty.

17 QUESTION: So that you don't focus really on the
18 mental state of the Defendant, but rather, on the pain suffered
19 by the victim. It really doesn't matter whether he was
20 deliberately a malicious sort of person or just a bungler.
21 That really wouldn't make any difference.

22 MS. DICKERSON: Well, Justice Stevens, I think our
23 approach would validate a finding of looking at the killer's
24 attitude as well as the circumstances of the crime.

25 QUESTION: But you don't have to look at it is what I

1 am asking, in your view. The element doesn't focus on the
2 Defendant's mental state, in your -- it focuses, rather, on the
3 impact of the hardship on the victim.

4 MS. DICKERSON: I would think it could focus on both.

5 QUESTION: Either one would be sufficient.

6 MS. DICKERSON: I wouldn't say that one would be
7 mutually exclusive of the other. And I think that that's what
8 the Oklahoma Court of Criminal Appeals had done is allow all of
9 the circumstances of the crime as well as the killer's attitude
10 to come into play based upon previous holdings of this Court
11 which would validate looking at the circumstances of the crime
12 and the killer's attitude.

13 QUESTION: Ms. Dickerson, I would like to come back
14 to Justice Stevens's question about specifically whether the
15 jury was asked to take into account the suffering that the wife
16 endured.

17 Was that part of the prosecution's argument, that
18 this was heinous and atrocious because of the torture of the
19 wife; was that part of the State's case?

20 MS. DICKERSON: It was part of the general closing
21 argument made to the jury; yes, Your Honor. It was not
22 emphasized to the great degree that it might have been, but it
23 was part of the closing argument.

24 QUESTION: And the whole thing went to the jury
25 together, not just the killing of the husband, but the whole

1 incident, including the wounding of the wife?

2 MS. DICKERSON: That's correct, Your Honor. Both
3 were tried simultaneously.

4 QUESTION: Could I bring you back to your comment
5 before the last series of questions?

6 You made a reference to the panel opinion, and I
7 didn't quite follow you there. What is the significance of the
8 panel opinion by Judge Tacha?

9 MS. DICKERSON: I believe, Justice Blackmun, I was
10 trying to indicate that prior to the panel opinion, prior to
11 the en banc opinion the three judge panel opinion involved an
12 opinion by Judge Tacha that the circumstances surrounding the
13 torture and abuse to Mrs. Riddle could appropriately be used to
14 assess --

15 QUESTION: But wasn't that vacated by the en banc
16 opinion?

17 MS. DICKERSON: Yes, Your Honor, it was.

18 QUESTION: Therefore, what significance is it?

19 MS. DICKERSON: I has no precedential value.

20 QUESTION: Then I wonder why you mention it.

21 MS. DICKERSON: I mention it merely in connection of
22 the fact that at least at one time one judge was of the opinion
23 that that information could be used.

24 QUESTION: But he is the same judge who wrote the en
25 banc opinion.

1 MS. DICKERSON: It is, Your Honor.

2 QUESTION: Ms. Dickerson, the Oklahoma Court of
3 Criminal Appeals, the new standard, as I understand their
4 opinion, is that only where there is evidence that the death of
5 the murder victim was preceded by torture or serious physical
6 abuse.

7 Now, that was not something prescribed by the Tenth
8 Circuit, was it?

9 MS. DICKERSON: The holding of the Tenth Circuit did
10 not explicitly state that would be the only constitutional
11 interpretation. However, the State's position is that it
12 effectively mandated that particular interpretation by virtue
13 of certain language in the en banc opinion.

14 QUESTION: I gather all that the Tenth Circuit did
15 really was to say that, as a whole, the past construction of
16 the especially heinous, atrocious, or cruel aggravating
17 circumstance was unconstitutionally vague; wasn't that it?

18 MS. DICKERSON: Yes, Justice Brennan.

19 QUESTION: And the Court of Criminal Appeals agreed
20 that, yes, it was. And then they established this new
21 standard; is that a --

22 MS. DICKERSON: Yes, Your Honor. Our position is
23 that the --

24 QUESTION: Yes, tell me, what does that do to your
25 case?

1 MS. DICKERSON: I think the issue remains with us in
2 that the Oklahoma Court of Criminal Appeals merely responded to
3 and assented to the current status of federal constitutional
4 law as interpreted by the Tenth Circuit.

5 The en banc opinion in the Maynard v. Cartwright case
6 indicated that initially the Oklahoma Court of Criminal Appeals
7 in Eddings had referred to, and it had expressly adopted the
8 profit standard, but had digressed from that standard. And it
9 was this digression from that standard which caused the Tenth
10 Circuit consternation and concern.

11 And our position would be that the digression from
12 that standard was not an unconstitutional digression, but was a
13 digression which would allow and account for the circumstances
14 of the crime and the killer's attitude to be reflected in a
15 finding of this particular circumstance that the murder was
16 more evil than your ordinary murder situation.

17 QUESTION: But I gather were this case to come before
18 the Court of Criminal Appeals at this time, that standard would
19 say that the death penalty could not be imposed in this case.

20 MS. DICKERSON: Justice Brennan, our argument would
21 be that it could be due to the fact that psychological torture
22 took place.

23 QUESTION: Ms. Dickerson, as between the Court of
24 Criminal Appeals and the Supreme Court, does the Court of
25 Criminal Appeals have to follow the Supreme Court?

1 MS. DICKERSON: When interpreting federal
2 constitutional standards, yes, Your Honor.

3 QUESTION: I mean, but there is no way to go from the
4 Court of Criminal Appeals to the Supreme Court, is there?

5 MS. DICKERSON: Not directly in this case, Your
6 Honor.

7 QUESTION: Well, can it go indirectly?

8 MS. DICKERSON: I would think in the event that --

9 QUESTION: I am trying to find -- if the Court of
10 Criminal Appeals says yes, and the Supreme Court says no, what
11 is it, yes or no?

12 MS. DICKERSON: Excuse me. I thought you were
13 speaking of this Court.

14 In Oklahoma --

15 QUESTION: No, I am talking about the Oklahoma
16 Supreme Court?

17 MS. DICKERSON: In Oklahoma, the Oklahoma Supreme
18 Court does not construe criminal law. We are one of the few
19 states --

20 QUESTION: It doesn't have any jurisdiction, does it?

21 MS. DICKERSON: No, Your Honor.

22 QUESTION: That's what I thought.

23 QUESTION: But once a statute is declared vague from
24 a federal standpoint, the only option the State has is to
25 construe it again as a matter of state law. And so we are now

1 in the position that Oklahoma has construed this statute as a
2 matter of state law, and that, I would assume, is binding on
3 us.

4 MS. DICKERSON: Justice Kennedy, our position would
5 be that they have construed it only as a matter of federal law
6 in that they were directed, as it were, by the Tenth Circuit
7 that their standard which they had previously employed did not
8 comport to federal constitutional standards.

9 QUESTION: If the Supreme Court of the United States
10 says a statute is vague, and the state reinterprets it, the
11 state is telling us what it means as a matter of state law.
12 And that is an interpretation that is binding on us.

13 MS. DICKERSON: Again, our position would be that
14 they were forced to adopt this standard by virtue of their
15 understanding of the Tenth Circuit --

16 QUESTION: Well, they could have said that they can't
17 save the statute. They could have said, we cannot construe the
18 statute as a matter of state law. Send it back to the
19 legislature, but they didn't. They reconstrued it as a matter
20 of state law, and we have to accept that. That's what the
21 statute means in Oklahoma now.

22 MS. DICKERSON: Under that court's understanding of
23 federal constitutional law.

24 QUESTION: Well, we are back to where we started.

25 QUESTION: Is it your position, Ms. Dickerson, that

1 if this Court were to disagree with the Tenth Circuit on the
2 federal constitutional issue, then the Oklahoma Court of
3 Criminal Appeals would take a different view of how the statute
4 should be construed?

5 MS. DICKERSON: Yes, Mr. Chief Justice. It very may
6 well go back to the previous interpretation which it had held
7 to be valid up until 40 days after the time of the Tenth
8 Circuit's opinion.

9 QUESTION: Did you try to bring up here, did the
10 Attorney General's Office try to bring up here, did somebody
11 try to bring up here the case in which the Oklahoma court made
12 the reinterpretation?

13 MS. DICKERSON: No, Your Honor, I don't believe that
14 was done in this case.

15 QUESTION: Pardon?

16 MS. DICKERSON: The other side petitioned for a writ
17 of certiorari in *Stouffer*, but our side did not.

18 QUESTION: Well, why not? Wasn't that the place to
19 fight out this issue?

20 I mean in that case, you could have said, you know,
21 the Oklahoma court has reinterpreted its state law solely as a
22 matter of federal constitutional law. We think that's wrong.
23 Essentially you are attacking that here in a collateral
24 proceeding, aren't you?

25 MS. DICKERSON: Yes, Your Honor. It may very well

1 have been a better tactic to have brought it up in that
2 particular case. However, because the entire Stouffer opinion
3 is based upon interpretation of the federal standards, I can't
4 speak to why it was not done, but I would state that it would
5 be appropriate to address it here.

6 QUESTION: Did the State win or lose in Stouffer?

7 MS. DICKERSON: The State won, because although they
8 invalidated the circumstance, they found that other
9 circumstances existed.

10 QUESTION: Well, then it would have been impossible
11 for the State to bring it here, I presume. What would the
12 State have been asking us to do? Affirm?

13 MS. DICKERSON: True, there would not have been an
14 issue which the State could have brought.

15 QUESTION: Well, they not only reinterpreted the
16 statute in that case, but they undertook -- the appellate court
17 itself took a weighing, didn't it?

18 MS. DICKERSON: Yes, Your Honor.

19 QUESTION: Which it did not do in this case.

20 MS. DICKERSON: Prior to --

21 QUESTION: And until then, it had not been doing
22 that.

23 MS. DICKERSON: That's correct, Justice White. Prior
24 to this case, contrary to the position of the Attorney General,
25 the Oklahoma Court of Criminal Appeals had refused to conduct a

1 reweighing in the event of an invalid circumstance.

2 QUESTION: And instead, they ordered a resentencing
3 hearing.

4 MS. DICKERSON: Prior to the amendment of the
5 statute, there was no resentencing hearing which was directly
6 validated by statute --

7 QUESTION: Oh, I see.

8 MS. DICKERSON: -- which they would automatically
9 modify.

10 QUESTION: It would be life then.

11 MS. DICKERSON: Yes, Your Honor.

12 QUESTION: All right.

13 MS. DICKERSON: But they have changed that.

14 QUESTION: Now they reweigh it.

15 MS. DICKERSON: Yes, Your Honor.

16 QUESTION: And they might -- and in a case like this,
17 they might affirm a death sentence even in the face of an
18 invalid circumstance.

19 MS. DICKERSON: That's correct, Your Honor. In the
20 event that this Court were to agree with the Tenth Circuit, it
21 would still be the prerogative of the Oklahoma Court of
22 Criminal Appeals to reweigh on remand and determine whether or
23 not the crime would still merit the death penalty.

24 QUESTION: Ms. Dickerson, getting back to the
25 question I asked you earlier, under the new standard I think

1 you answered me that psychological -- what did you say,
2 psychological torture or something?

3 MS. DICKERSON: Yes, Your Honor.

4 QUESTION: Well, the way this reads is -- I'm quoting
5 from it, "Only where there is evidence that the death of the
6 murder victim was preceded by torture or serious physical
7 abuse."

8 You are suggesting to me that torture means
9 psychological torture?

10 MS. DICKERSON: It can, Justice Brennan, and several
11 other states have included psychological torture.

12 QUESTION: What about your court?

13 MS. DICKERSON: They have never directly construed
14 that.

15 We would state that sufficient channeling has
16 occurred in this instance such that the opinion of the Tenth
17 Circuit should be reversed. And I would reserve the remainder
18 of my time for rebuttal.

19 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Dickerson.

20 Ms. Welch, we will hear now from you.

21 ORAL ARGUMENT OF MANDY WELCH, ESQ.

22 ON BEHALF OF THE RESPONDENT

23 MS. WELCH: Mr. Chief Justice, and may it please the
24 Court:

25 There was some questions asked of Ms. Dickerson which

1 I would like to respond to, and hopefully clarify.

2 Just Scalia, you inquired with regard to whether or
3 not the jury was asked to take into consideration the suffering
4 of Ms. Riddle in its consideration of the heinous, atrocious,
5 or cruel aggravating circumstance.

6 The portion of the State argument which does relate
7 to this aggravating circumstance appears in the Joint Appendix,
8 and a reading of that will demonstrate that the State did not
9 at all rely upon the treatment of Mrs. Riddle in its argument
10 or allegations that this crime, the murder of Hugh Riddle, was
11 especially heinous, atrocious, or cruel.

12 It was noted that Justice Tacha, in her concurring
13 opinion concurring with the initial decision by the panel,
14 found that those circumstances, in her opinion, could
15 distinguish this murder from other murders, and noted that it
16 was not clear in her mind whether or not Oklahoma directed the
17 especially heinous circumstance to the suffering of persons
18 other than the murder victim, and that was an issue which we
19 were asked specifically to brief on rehearing before the Tenth
20 Circuit.

21 And when the Tenth Circuit considered on rehearing
22 the interpretation and construction of this aggravating
23 circumstance in Mr. Cartwright's case, it determined that
24 Oklahoma, that the Oklahoma Court of Criminal Appeals had not
25 adopted a construction of especially heinous, atrocious, or

1 cruel which provided any standard that guided and limited a
2 jury's discretion to impose death.

3 QUESTION: Ms. Welch, has the Oklahoma Court of
4 Criminal Appeals adopted a standard now as a matter of state
5 law?

6 MS. WELCH: Yes, Your Honor. The Oklahoma court has
7 adopted a requirement that in order for a murder to be heinous,
8 especially heinous, atrocious, or cruel it must involve torture
9 or physical abuse of the victim, the murder victim preceding --

10 QUESTION: And it's your position that they have made
11 clear under Stouffer and Brown that it would not be relevant to
12 consider what happened to another potential victim in the
13 incident?

14 MS. WELCH: The facts in Stouffer are strikingly
15 similar to the facts in Mr. Cartwright's case. In that case
16 there was a surviving victim. Mr. Stouffer was convicted of
17 shooting with intent to kill in connection with the shooting of
18 that victim. The shooting occurred prior to the shooting which
19 resulted in the death of Ms. Reeves. It occurred in the same
20 room. Mr. Ivans was shot twice by Mr. Stouffer with a gun that
21 Mr. Stouffer had borrowed under some pretense.

22 After shooting Mr. Ivans, he turned to Ms. Reeves and
23 shot her through her hand which she was holding up to protect
24 herself from the attack. And then he turned and shot Mr.
25 Reeves again in the face. Mr. Reeves survived and was able to

1 call the officers and report the shooting of both himself and
2 Ms. Reeves.

3 And considering whether or not the jury's finding met
4 the standard that Oklahoma adopted, it pointed out that the
5 suffering of the murder victim did not meet the requirement of
6 torture or serious physical abuse, because the evidence showed
7 that she died shortly after being shot.

8 QUESTION: So it's your position that as a matter of
9 state law in Oklahoma it is not possible to rely on what
10 happened in this case to Mrs. Riddle.

11 MS. WELCH: Yes, Your Honor.

12 QUESTION: Well, that would seem to -- you would also
13 argue then that that opinion for bad -- construing torture to
14 include psychological torture.

15 MS. WELCH: No, I don't -- we do not content that the
16 Tenth Circuit --

17 QUESTION: Well, what other kind of torture would it
18 be in that case just because the lady saw somebody else being
19 shot?

20 MS. WELCH: I'm sorry, I didn't understand the
21 question.

22 QUESTION: What was it you said the opinion for bad
23 referring to?

24 MS. WELCH: The Tenth Circuit does not forbade the
25 consideration --

1 QUESTION: I know, in the state case Justice O'Connor
2 was asking you about.

3 MS. WELCH: The State opinion does not take into
4 consideration the suffering of a surviving victim in
5 determining whether or not the murder was heinous, atrocious or
6 cruel.

7 QUESTION: Okay.

8 QUESTION: I think Justice White's point is that the
9 only suffering that could have been incurred by the surviving
10 victim there was psychological suffering, psychological
11 torture.

12 MS. WELCH: The surviving victim was shot three times
13 in the Stouffer case.

14 QUESTION: No, I'm sorry. The only torture imposed
15 upon the dead victim that could have been attributable to the
16 surviving victim was psychological torture.

17 MS. WELCH: Yes.

18 QUESTION: Right? So that seems to contradict what
19 you said earlier that psychological torture is not something
20 that the Oklahoma courts would take into account. They felt it
21 necessary to address it in this case, didn't they?

22 MS. WELCH: They did not address psychological
23 torture in the Stouffer case.

24 QUESTION: What other kind of torture -- what kind of
25 torture could they have been referring to then when they felt

1 it necessary to say the surviving, what happened to the
2 surviving victim is irrelevant?

3 It would have been unnecessary to address it if --

4 MS. WELCH: They didn't say it was irrelevant. They
5 just did not take it into consideration. They did not address
6 the treatment of Mr. Reeves when it decided Stouffer. It
7 adopted a standard which says, in order to prove that a murder
8 is especially heinous, atrocious, or cruel, there must be
9 presence of torture or physical abuse of the victim preceding
10 death.

11 It did not take into consideration and did not
12 discuss the impact of the shooting of Mr. Reeves on Ms. Ivans.

13 QUESTION: So you say that might be taken into
14 account. In the case before us now, the fact that the -- you
15 could take into account the effect on the husband of the
16 treatment of his wife --

17 MS. WELCH: You might be able to --

18 QUESTION: -- prior to his being shot.

19 MS. WELCH: You might be able to take into account a
20 suffering, suffering of the victim if it falls within a clearly
21 defined standard which focuses the jury on that aspect of the
22 murder.

23 But, in my opinion, the language torture or serious
24 physical abuse of the victim would not focus the jury's
25 attention on the malsuffering which is not caused by any

1 deliberate intent to inflict mental or physical suffering on
2 the part of the victim.

3 QUESTION: Well, an intruder in a bedroom in a home
4 clearly tortures the wife before he kills her, or before he --
5 he doesn't kill her but he then turns around and kills the
6 husband instantly.

7 Now could the jury's attention properly be focused on
8 the effect of the torture of the wife on the victim?

9 MS. WELCH: I don't think it could under -- I think
10 constitutionally I think it could under a standard that focuses
11 the jury on that aspect of the murder.

12 QUESTION: All right, that was my question.

13 MS. WELCH: Constitutionally I think it could if the
14 court adopts a standard which clearly focuses the sentencer on
15 that aspect of the murder. But I do not think, as a matter of
16 state law, that the standard Oklahoma has adopted --

17 QUESTION: Yes, all right.

18 MS. WELCH: -- treats it that way.

19 QUESTION: Oh, by the way -- well, you say under the
20 state adopted standard, you may not consider psychological
21 torture?

22 MS. WELCH: I do not think that the circumstances
23 that you described would amount to --

24 QUESTION: What other kind of torture is it?

25 MS. WELCH: I think if a --

1 QUESTION: As Justice Scalia asked you, what other
2 kind of an impact on the victim could there have been except
3 mental?

4 MS. WELCH: An impact on the victim and torture which
5 is directed toward the victim, in my mind, are two different
6 things. And if when the court focuses on torture it is
7 focusing on conduct which is directed at causing either --

8 QUESTION: You mean there must have been an intent to
9 torture?

10 MS. WELCH: Under the -- I don't think there has to
11 be an intent, because the court also --

12 QUESTION: We don't want a whole new body of law --

13 MS. WELCH: No.

14 QUESTION: -- just repeating of the elements of
15 murder, I wouldn't think.

16 MS. WELCH: No, no. Under Oklahoma's standard, it
17 requires torture or serious physical abuse.

18 QUESTION: By the way, what is the difference between
19 those two under -- torture, do you think torture has to be
20 physical?

21 MS. WELCH: No.

22 QUESTION: It does not?

23 MS. WELCH: No.

24 QUESTION: So it's an "or". Torture or.

25 MS. WELCH: Or serious physical abuse.

1 QUESTION: So it must have --

2 MS. WELCH: To the extent that --

3 QUESTION: Why would they even use torture unless the

4 word "torture", it's just repetitive of serious physical abuse

5 except for psychological torture.

6 MS. WELCH: As torture is commonly understood, it

7 encompasses acts which are intended to or which knowingly

8 produce extreme suffering beyond --

9 QUESTION: Well, that would always be serious

10 physical abuse except for psychological torture.

11 MS. WELCH: Well, I suppose it could be construed

12 that way. I don't read the --

13 QUESTION: In any event, I gather that so far the

14 Oklahoma Court of Criminal Appeals has not addressed

15 psychological torture, has it?

16 MS. WELCH: No.

17 QUESTION: In any case.

18 MS. WELCH: No. I know in Brown, the victim in Brown

19 was shot seven times, and it was unclear as to whether or not

20 the -- when the fatal shot was fired. And the court found that

21 for that reason they could not uphold a jury's finding, because

22 there was no evidence that the victim suffered before she died.

23 In that case the victim was fleeing from her husband who was

24 attempting to shoot her, which would indicate that there was at

25 least that amount of psychological trauma and panic that would

1 accompany a person who knows that they are about to be killed.
2 And the court did not consider that to amount to the kind of
3 suffering that's necessary under its standard.

4 QUESTION: Ms. Welch, do you think that our standard
5 requires that whatever torture or atrociousness there is in the
6 crime have been directed at the victim? That is to say,
7 suppose you have a crime in which someone comes and tortures
8 very maliciously eight people, kills the ninth. There is no
9 evidence that the ninth knew of the torture of the other eight,
10 and the whole thing goes to trial together.

11 Could he receive the death penalty because the
12 circumstances of the entire crime were especially heinous,
13 atrocious and cruel? He tortured nine people; only one of
14 them died.

15 MS. WELCH: I think that states can adopt standards
16 that focus on things other than the murder. And that --

17 QUESTION: That would be constitutional as you
18 understand our rules.

19 MS. WELCH: Yes, I think that knowingly creating a
20 great risk of death could very well apply in a situation where
21 the murder victim did not know or was not involved in the
22 specific act that created the great risk of death. In fact,
23 that was true -- that has been true in Oklahoma and in other
24 states.

25 I think the fact that it could be true does not

1 validate an application of a vague, unconstitutionally vague
2 and ambiguous circumstance just because some other state might
3 have adopted or because Oklahoma constitutionally could adopt a
4 standard that focused the jury's attention on that aspect of
5 the crime.

6 An example of that is Godfrey. In Godfrey, the court
7 found that Georgia had abandoned its previous construction of
8 its outrageously and wantonly, vile, aggravating circumstance,
9 and that based upon the language of the statute, there was no
10 principled way to distinguish Godfrey from other murders, but
11 it noted that other states had adopted a standard which made
12 the killing of two people an aggravating circumstance that
13 could result in the death penalty.

14 Since Georgia had not adopted that aggravating
15 circumstance, it did not say the death sentence in Mr.
16 Godfrey's case.

17 QUESTION: Ms. Welch, in Godfrey, the plurality
18 opinion, after having analyzed the legal aspect, said that the
19 facts of that case could not be brought under the outrageously
20 wanton, vile, et cetera.

21 Now the Tenth Circuit's opinion in this case did not
22 track Godfrey in that respect. The Tenth Circuit expressly
23 said it wouldn't decide whether on the facts of this case it
24 could be outrageously wanton or vile.

25 Why do you suppose the Tenth Circuit refused to opine

1 on that subject when they purported to be following Godfrey?

2 MS. WELCH: The Tenth Circuit said that it would not
3 attempt to determine whether this crime was heinous, atrocious,
4 or cruel, because it didn't see that as its responsibility.

5 In Godfrey, the court was able to say, these facts
6 don't meet Godfrey's -- Georgia's standard because Georgia had
7 adopted a clearly defined standard.

8 Oklahoma had not, and if the Tenth Circuit had said
9 this case can or cannot meet a constitutional interpretation of
10 heinous, atrocious, or cruel, it would in effect have been
11 dictating to the state an interpretation, or at least
12 suggesting to the state an interpretation that it should adopt.

13 What the Tenth Circuit did was tell the court, you
14 have not adopted any standard. We cannot identify any standard
15 in your construction of this aggravating circumstance that
16 guides or limits a jury's judgment.

17 And under Gregg, and Proffitt, and Godfrey, in order
18 to impose the death sentence, a state must define those crimes
19 for which death can be imposed in a way that obviates
20 standardless sentencing discretion. States must do that by
21 providing standards, clear and objective standards that provide
22 specific and detailed guidance.

23 What the Tenth Circuit said was Oklahoma had not done
24 that, and that they would not presume to tell the state what
25 they should do by saying whether or not this crime would fit

1 any particular constitutional standard.

2 QUESTION: So what was the Tenth Circuit's ultimate
3 judgment?

4 They enjoined the execution of petitioner under the
5 invalid death sentence, and this judgment is without prejudice
6 to further proceedings by the state for a redetermination of
7 the sentence on conviction.

8 MS. WELCH: Yes, Your Honor.

9 QUESTION: So it did not anticipate that there was
10 going to be an automatic life sentence.

11 MS. WELCH: No, they left that up to the state to
12 determine under the state laws.

13 QUESTION: I take it then that it anticipated that if
14 the state court adopted a narrowing, if on remand on this very
15 proceedings they adopted a narrowing construction, a
16 satisfactory narrowing instruction, that there could be a death
17 sentence imposed?

18 MS. WELCH: I think the difference between Godfrey
19 and --

20 QUESTION: Well, how about just answering my
21 question.

22 MS. WELCH: Okay. I think they anticipated that the
23 court could, if state law permitted, conduct a new sentencing
24 hearing.

25 QUESTION: Under a new standard that they would adopt

1 in this case.

2 MS. WELCH: Under a new standard, yes.

3 QUESTION: Well, then what did they mean in Footnote
4 8, "We express no opinion concerning the constitutionality of a
5 retroactive application of Oklahoma's new remand procedure."?

6 Does that refer to the reweighing?

7 MS. WELCH: No. Oklahoma amended its death penalty
8 statutes.

9 QUESTION: Yes?

10 MS. WELCH: To provide for a resentencing if there an
11 error in the sentencing stage. In the same amendment, they
12 eliminated proportionality review.

13 QUESTION: I see.

14 MS. WELCH: The court has --

15 QUESTION: Oh, that's what they referred to.

16 MS. WELCH: Yes, and the court has held, Oklahoma
17 court has held that the elimination of proportionality review
18 is retroactive, but they have not held that the resentencing
19 portion of it is. The issue is before the court but they have
20 not definitively resolved that, and that's what --

21 QUESTION: But anyway, you think the Tenth Circuit
22 anticipated a new sentencing hearing at which a proper standard
23 could be applied.

24 MS. WELCH: Yes.

25 QUESTION: Ms. Welch, the State relies upon the fact

1 that we approved language precisely like this in the Proffitt
2 case in 1976. What's your response to that?

3 MS. WELCH: Well, Proffitt approved the language
4 adopted by Florida courts that a crime must be unnecessarily
5 torturous to the victim. The Proffitt opinion does not even
6 quote the definitions. It does refer to the especially
7 heinous, atrocious, or cruel language of Florida's provision.
8 It noted that the terms could be applied to many murders.

9 The court pointed out that the grant of certiorari in
10 Proffitt was limited to the consideration of the
11 constitutionality of Florida's death penalty statutes as a
12 whole. And it reviewed the vagueness challenges to the
13 aggravating circumstances only to the extent that it was
14 necessary to determine whether or not the statute in its
15 entirety promised to alleviate the risk of arbitrary and
16 capricious death sentences. And it approved the Florida
17 statute with this aggravating circumstance in it, considering
18 it as construed by the Florida courts. In other words, as
19 limited to crimes which are unnecessarily torturous to the
20 victim.

21 The irony in the State's position is that it is
22 seeking constitutional approval of a subjective and
23 standardless sentencing process at all levels of the capital
24 sentencing process. It is asking the Court to approve an
25 aggravating circumstance which is intended under Oklahoma law

1 to limit the category of persons eligible for the death
2 sentence which does not in fact do that.

3 Oklahoma law relies solely on aggravating
4 circumstances to define those crimes which are eligible for the
5 death sentence. And if those aggravating circumstances do not
6 guide and limit the jury's discretion to impose death, then
7 sentencing discretion is left unfettered and it becomes
8 impossible to determine how a particular case differs in any
9 principled way from any other cases.

10 It is also impossible under such an aggravating
11 circumstance to determine the basis on which a particular jury
12 finds that a particular person is eligible for the death
13 sentence, and it is impossible to determine the basis on which
14 the Oklahoma Court of Criminal Appeals upholds the finding of
15 the jury.

16 The arguments which are advanced by the State are
17 premised upon a misreading of the Tenth Circuit's decision.
18 The State's arguments also reflect a disregard for the reasons
19 behind the constitutional requirement that states guide and
20 limit the capital sentencer's discretion to impose death.

21 The decisions of the Tenth Circuit and the Oklahoma
22 Court of Criminal Appeals are based upon constitutional
23 principles that this Court adopted in Gregg and Proffitt, a
24 requirement that states limits sentencer's judgments in
25 determining whether or not a person is eligible for the death

1 sentence, and which were relied upon by the Court in Godfrey
2 and have been reaffirmed by this Court's decisions through
3 Lowenfield.

4 QUESTION: The Court in Godfrey, there wasn't any
5 Court opinion in Godfrey, was there?

6 MS. WELCH: There was a plurality opinion and I
7 believe Justice Brennan and Justice Marshall, in a concurring
8 opinion, concurred with the finding of the plurality that
9 Georgia's construction of the aggravating circumstance was
10 unconstitutionally vague.

11 QUESTION: But there wasn't any Court opinion.

12 MS. WELCH: No, there was a plurality opinion.

13 QUESTION: Did you mean the Gregg case?

14 MS. WELCH: Yes, Your Honor.

15 QUESTION: To the vagueness issue?

16 MS. WELCH: To the question of vagueness, yes.

17 QUESTION: Ms. Welch, could I return for a moment to
18 the argument, which I do see as a problem here, that Oklahoma
19 has already construed its statute in a fashion that can't well
20 apply here?

21 What I am concerned about is if that construction by
22 Oklahoma was believed to be under compulsion of federal law,
23 that is, you wouldn't have wanted the Oklahoma Court of
24 Criminal Appeals to say, we're going to ignore Federal Circuit
25 Court's opinion as to what federal constitutional law, you

1 certainly wouldn't want them to ignore that. Indeed, they
2 couldn't ignore it because whoever is sentenced is going to
3 have to go to federal habeas eventually.

4 MS. WELCH: Yes.

5 QUESTION: But how does the state get review --
6 assuming that that decision was erroneous, if it were
7 erroneous, how would the state have gotten review of it if
8 indeed in the case where that new interpretation is announced,
9 the state wins even under the new interpretation?

10 MS. WELCH: Well, if the Court continues to apply it,
11 the state could resist that and present its arguments on direct
12 appeal on rehearing. And if it were to lose, it could file a
13 petition for certiorari.

14 QUESTION: In a later case.

15 MS. WELCH: In a later case.

16 QUESTION: But why not this one?

17 MS. WELCH: Well --

18 QUESTION: Why is that any better than this case?

19 MS. WELCH: If I may, I would like to respond to the
20 Court's position -- I mean to the State's position that this is
21 a response to a Tenth Circuit's decision which they have
22 considered binding and that they can't get away from.

23 In *Stouffer*, the Court merely noted that the
24 *Cartwright* decision held that the aggravating circumstance was
25 unconstitutionally vague.

1 In Brown, the Court of Criminal Appeals specifically
2 said, we agree with the Tenth Circuit's decision that our past
3 construction of this circumstance was unconstitutionally vague.
4 And the Oklahoma Court of Criminal Appeals has a history of
5 disagreeing with decisions of Federal Courts and the Supreme
6 Court.

7 And when it has felt --

8 QUESTION: And vice-versa, I suppose.

9 MS. WELCH: Right. And when it is felt compelled to
10 follow along with a decision that it disagreed with, it has
11 been quick to state that. That is not what happened here.

12 I believe there was a question asked I believe by
13 Justice O'Connor earlier about whether or not the Oklahoma
14 court's decision rested solely upon federal constitutional
15 grounds. And if I recall, the response was that it rested on
16 Cartwright v. Maynard.

17 Oklahoma did its own analysis of the opinion of
18 Godfrey, and looked at its previous construction of heinous,
19 atrocious, or cruel, and said we find that our reliance upon
20 the terms of the statute in these definitions did not guide the
21 jury.

22 QUESTION: But it was still relying on Godfrey, if
23 not on Cartwright.

24 MS. WELCH: That is correct. It did rely upon
25 Godfrey, but it relied upon its analysis of Godfrey, and just

1 as important, it relied upon its analysis of Oklahoma law which
2 was applied in Cartwright. It noted that the construction
3 which it did not think guided and limited juries was applied in
4 Mr. Cartwright's case. And when it adopted a standard, it
5 didn't cite Cartwright v. Maynard. It cited an Oklahoma Court
6 of Criminal Appeals decision, Odum v. State, in which it said
7 it had previously relied upon that standard, but obviously had
8 not continued to construe the statute in that limiting fashion.

9 The State's arguments also reflect a disregard for
10 the reasons behind the constitutional requirement of the
11 state's guide, and limits sentencer's discretion and a lack of
12 understanding for the differences between the various stages of
13 a capital sentencing process; differences which have resulted
14 in part from the State's efforts and this Court's efforts to
15 balance the need for uniformity and predictability that is
16 essential in avoiding arbitrary and discriminatory decisions to
17 impose death, and the equally important necessity that jurors
18 have unlimited discretion to consider mitigating circumstances
19 which may prevent or result in a decision not to impose death.

20 Standardless decisionmaking is the essence of
21 arbitrariness. Both the Oklahoma Court and the Court of
22 Criminal Appeals have agreed that that Oklahoma's past
23 construction did not limit or guide a jury's discretion to
24 impose death in Oklahoma. And they recognized that in order to
25 avoid -- in order for standards to avoid the risk of arbitrary

1 application, those standards just be susceptible to --

2 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Welch. Your
3 time has expired.

4 Ms. Dickerson, you have three minutes remaining.

5 ORAL ARGUMENT OF SUSAN S. DICKERSON, ESQ.

6 ON BEHALF OF PETITIONERS - REBUTTAL

7 MS. DICKERSON: Mr. Chief Justice, and may it please
8 the Court:

9 There is no dictate in the Constitution of the United
10 States or in the plurality opinion in Godfrey v. Georgia which
11 would mandate a requirement of physical abuse prior to the
12 existence of a finding that the statutory aggravating
13 circumstance of an especially heinous, atrocious, or cruel
14 existed.

15 As Justice Stevens pointed out earlier, an argument,
16 and I would concur that the circumstance can be proven by
17 either focus upon the Defendant's intent, or upon the suffering
18 inflicted by the victim regardless of whether or not there was
19 an intent to torture.

20 In this case, we do have clear objective standards
21 which provided guidance to the jury. We have the existence of
22 the use of the word "especially". We have the definitions
23 which were given. And although those definitions were not
24 explicitly cited in Proffitt, they were in State v. Dixon which
25 was cited to in the Proffitt decision.

1 The Proffitt language was approved by this Court.
2 However, the State would submit that Proffitt is not the only
3 constitutional interpretation of this particular aggravating
4 circumstance.

5 It is our position that the Oklahoma Court of
6 Criminal Appeals, in the issue on rehearing in Stouffer, was
7 compelled by what it felt to be the dictates of federal
8 constitutional law to alter its long-time previous opinion, and
9 it did so with great haste in order to avoid refusing to follow
10 the current status of federal law.

11 There is not a subjective standardless approach used
12 in this case. Certainly the definitions, the application of
13 the facts to the crime in this case, as reflected in the
14 opinion of the Oklahoma Court of Criminal Appeals, indicates
15 that this decision was certainly more objective in assessing
16 that the crime was especially heinous, atrocious, or cruel more
17 so than with regard to other circumstances. All circumstances
18 are not capable of equal objectivity.

19 Some states have, as an aggravating circumstance,
20 that which is clearly objective. For example, that the victim
21 was pregnant at the time of the murder. That is something that
22 either exists or does not exist. Along the lines of the
23 continuum there, this Court has approved the existence of the
24 notion that the Defendant constitutes a continuing threat. And
25 certainly that is less objective than the standard that we have

1 here before this Court wherein you can look at the killer's
2 intent, or you can look at the suffering endured, be it
3 psychological or physical suffering.

4 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Dickerson.
5 The case is submitted.

6 (Whereupon, at 11:11 a.m., the case in the
7 above-entitled matter was submitted.)

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REPORTERS' CERTIFICATE

1
2
3 DOCKET NUMBER: 87-519
4 CASE TITLE: GARY D. MAYNARD, WARDEN, ET AL., V.
5 WILLIAM CARTWRIGHT
6 HEARING DATE: April 19, 1988
7
8 LOCATION: Washington, D.C.

9 I hereby certify that the proceedings and evidence
10 are contained fully and accurately on the tapes and notes
11 reported by me at the hearing in the above case before the
12 United States Supreme Court
13 and that this is a true and accurate transcript of the case.

14 Date: 4-22-88

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