

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DAVID DAWSON, Petitioner v. DELAWARE

CASE NO: 90-6704

PLACE: Washington, D.C.

DATE: Tuesday, November 12, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID DAWSON, :

4 Petitioner :

5 v. : No. 90-6704

6 DELAWARE :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, November 12, 1991

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 12:59 p.m.

13 APPEARANCES:

14 BERNARD J. O'DONNELL, ESQ., Wilmington, Delaware; on
15 behalf of the Petitioner.

16 RICHARD E. FAIRBANKS, JR., ESQ., Deputy Attorney General
17 of Delaware, Wilmington, Delaware; on behalf of the
18 Respondent.

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1 PROCEEDINGS

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 90-6704, David Dawson v. Delaware.

5 Mr. O'Donnell.

6 ORAL ARGUMENT OF BERNARD J. O'DONNELL

7 ON BEHALF OF THE PETITIONER

8 MR. O'DONNELL: Good afternoon, Mr. Chief
9 Justice, and may it please the Court:

10 This case presents a very narrow issue; may
11 States equate speech or association entitled to protection
12 under the First Amendment with character evidence, and
13 thereby enhance a criminal sentence, particularly so as to
14 impose a sentence of death, when those beliefs are
15 unrelated to the offense.

16 As Delaware concedes in its brief, the
17 petitioner, David Dawson, invokes two traditional First
18 Amendment precepts. First, that criminal penalties can
19 never be imposed nor aggravated because of an individual's
20 beliefs; and secondly, that Government, here in the form
21 of the sentencing jury, must always remain value or
22 content neutral within the realm of a person's beliefs or
23 views.

24 Delaware concedes that while it could not have
25 made constitutionally protected belief a statutory

1 aggravating circumstance, it instead argues the radical
2 proposition that the traditional First Amendment
3 constraints against governmental-viewpoint punishment are
4 not applicable to the highly-discretionary, weighing stage
5 of a death penalty proceeding in order to determine
6 whether a particular -- particular defendant should live
7 or die.

8 This Court, however, has made it clear that
9 States, in inflicting punishment -- particularly in
10 inflicting the penalty of death -- may not attach the
11 aggravating label to factors that are constitutionally
12 impermissible.

13 Delaware has done just that in this case.

14 QUESTION: Well, why do you say particularly
15 with respect to the punishment of death? I mean I assume
16 that if your proposition is correct, it would have to be
17 correct with respect to any sentencing. I mean, if it's a
18 First Amendment violation, you wouldn't say that you can,
19 you know, that it's good for other punishments, for life
20 imprisonment, for example?

21 MR. O'DONNELL: That is correct, Your Honor.
22 The passage, however, I was referring to is the Court's
23 principle as stated in Zant v. Stevens, which was a death
24 penalty case.

25 QUESTION: You're not relying on death as

1 different here? You're --

2 MR. O'DONNELL: No, sir, not with respect to
3 this claim.

4 QUESTION: Question presented, Mr. O'Donnell,
5 has the qualification that the murder here had no racial
6 motivations or connections. You're not arguing, then,
7 that if the murder did have racial connections or
8 motivations the State couldn't have used this evidence?

9 MR. O'DONNELL: Under that circumstance, Chief
10 Justice Rehnquist, the State could use that as an
11 aggravating factor.

12 QUESTION: So that's one limitation, isn't it,
13 on your very broad proposition?

14 MR. O'DONNELL: Yes, it is. There is a
15 broad -- the petitioner is stating a broad proposition.
16 However, there are narrow circumstances which this Court
17 has recognized where limited use of a belief or
18 association may be used in order to determine whether the
19 penalty of death or life imprisonment is appropriate.

20 QUESTION: (inaudible)

21 MR. O'DONNELL: Yes, Justice White.

22 QUESTION: Is it simply a First Amendment
23 argument you're making?

24 Suppose, for instance, that we were to conclude
25 that character, associations, beliefs, are relevant to a

1 whole range of sentencing issues. But that this
2 particular reference might be unduly prejudicial. Have
3 you preserved a due process argument? Or is it simply a
4 First Amendment inquiry that we're making?

5 MR. O'DONNELL: It is a First Amendment inquiry,
6 Your Honor. However, subsumed within that, or, more or
7 less the overarching consideration is -- but more
8 particularly subsumed within that claim is the due process
9 claim simply because it would be unfair to say to
10 individuals within our society who are protected by -- say
11 the First Amendment -- to say to them that, well,
12 you -- the Government may not abridge freedom of speech.

13 QUESTION: Would you --

14 MR. O'DONNELL: It says, however, you're going
15 to be punished in this instance.

16 QUESTION: Would you disagree with the comment
17 that this is simply a question of relevance?

18 MR. O'DONNELL: It is not simply a question of
19 relevance.

20 Evidence which is arguably relevant may
21 nonetheless be barred by some constitutional prohibition.
22 I would offer the Court as an example an instance in
23 perhaps a -- in a capital proceeding where the defendant
24 had asserted his right to remain silent, had asserted his
25 Fifth Amendment right to remain silent throughout the

1 trial, as in throughout the penalty proceeding.

2 Although lack of remorse is a criteria, is a
3 relevant criteria for determining whether a person should
4 live or die, if the State, nonetheless, argued to the jury
5 under those circumstances that an additional reason, or
6 the very reason you should put this man to death is
7 because you have not heard him apologize to you or anyone
8 else -- although the lack of remorse is relevant,
9 nonetheless, that would be barred under the Fifth
10 Amendment.

11 QUESTION: Well, the Fifth Amendment is in large
12 part a procedural safeguard at trial, for a systemic
13 reason. But your answer to the Chief Justice's question
14 seems to me to indicate that this is just a question of
15 relevance.

16 In the hypothetical he put to you, yes, the
17 evidence is relevant, it comes in.

18 MR. O'DONNELL: It can -- all sorts of evidence
19 can reflect on character. But then nonetheless, in any
20 circumstance, where a person's beliefs are used to impose
21 punishment, that is -- that is prohibited by the First
22 Amendment.

23 And there are only certain limited circumstances
24 in which any evidence can come into evidence, and only
25 then for limited purposes.

1 And, in fact, in some of those instances, the
2 trial courts or this Court has recognized that the trial
3 courts have, in fact, instructed juries as to that limited
4 purpose.

5 QUESTION: Well, what about a sentencing
6 proceeding in a noncapital case where you deal with a
7 probation interview, and there are probation officers
8 interviewing? The defendant who has been convicted, but
9 not yet sentenced says -- and the probation officer says,
10 are you sorry for having done this? And he says, no, I'm
11 not sorry. I -- I believe the guy should have been
12 killed, and that's the way I feel about it. I don't have
13 any remorse at all.

14 Now that, presumably, is a belief he has. But
15 surely that could be taken into consideration.

16 MR. O'DONNELL: Well, under those circumstances,
17 Your Honor, it's not -- there'd be no First Amendment
18 protection that would be relevant that determines his
19 propensity as to future conduct.

20 QUESTION: Well, it's his particular belief that
21 this guy should have been killed.

22 MR. O'DONNELL: Well, under those circumstances,
23 it would be relevant, because his belief took that belief
24 out of the context of First Amendment protection, because
25 the belief resulted in unlawful action, or a crime.

1 QUESTION: So it's like your exception for a
2 racially motivated crime, and in this case?

3 MR. O'DONNELL: Yes, Your Honor, very much so.

4 QUESTION: Well, what about -- what about in the
5 probation report it -- or in any sentencing proceeding,
6 evidence is brought in to the effect that this individual
7 was a really terrible son? His mother, you know, has
8 never heard from him. She's living in poverty, you know,
9 things of that sort.

10 Can that be in there?

11 MR. O'DONNELL: Yes, Your Honor, it could.
12 Because there's no --

13 QUESTION: All right, but what if it said
14 he -- he believes that mothers should be -- should be
15 disregarded and allowed to live in poverty? That must be
16 disregarded?

17 MR. O'DONNELL: If he has a belief --

18 QUESTION: I mean, if the one is relevant to
19 what sentence he should get, it seems to me the other is
20 relevant to what sentence he should get.

21 MR. O'DONNELL: If it's --

22 QUESTION: I mean, the fact that he left his
23 mother to live in poverty is only important because it
24 shows that he's the kind of a guy who believes it's okay
25 to leave your mother to live in poverty. But if he says

1 that directly, we can't use it.

2 That doesn't seem to make sense to me.

3 MR. O'DONNELL: It does make sense in the sense
4 he's not being punished for his belief. It's merely being
5 used, let's say, to evaluate his credibility as to other
6 evidence which he might offered.

7 QUESTION: No, that's not at all. It's being
8 used to show that this is a pretty bad person. And I'm
9 sure there are -- there are things like that in probation
10 reports.

11 MR. O'DONNELL: Under those
12 circumstances -- because it's not an abstract idea, it's
13 not -- it's an abstraction. It has nothing to do
14 with -- it's with abstraction, but perhaps relationship
15 with others. It's punishable, for that reason, too -- not
16 as an abstract idea, because he endorses or embraces that
17 abstract idea. It's because he has not -- he has not
18 offered his mother any --

19 If that is, in fact, so, if he has not offered
20 his mother any support, he has been unkind to her --

21 QUESTION: Right.

22 MR. O'DONNELL: -- it's perfectly -- it's
23 pertinent to character.

24 QUESTION: That shows his character?

25 MR. O'DONNELL: Ah --

1 QUESTION: But if he said, I don't have a
2 mother, but by God, if I had one, I'll tell you, I'd let
3 her live in poverty and starve to death?

4 MR. O'DONNELL: Well, were it -- were it --

5 QUESTION: That does not show his character?

6 MR. O'DONNELL: Were it related to the offense
7 itself, somehow, if there were -- if there were a
8 violation of some obligation, if it was the death of his
9 child, or his stepchild, or wherever -- whatever, it would
10 provide some insight into his state of mind with respect
11 to that offense. But he could not be punished for his
12 belief with respect to his mother, because that, you know,
13 is unrelated to the offense.

14 QUESTION: Well, I'm not punishing him for that
15 belief. I'm punishing him because on the basis of
16 everything I know about him, he is a bad character. That
17 is one of a whole mosaic of things that just comes out
18 with a picture of a bad character.

19 MR. O'DONNELL: I do not think evidence of that
20 nature is -- as such, is the abstraction, or whatever,
21 of -- he's not being punished for the idea itself. It
22 shows what -- how it might relate as to the offense having
23 been committed.

24 For instance, if it -- well, if it were in
25 respect to a totally unrelated offense, I would say it's

1 not -- I'd simply say there's no First Amendment
2 protection under those circumstances. And arguably, it's
3 not even relevant.

4 QUESTION: Well, does this case really involve
5 something about beliefs? I thought it was just membership
6 in a certain gang.

7 MR. O'DONNELL: Yes, it is about beliefs.

8 QUESTION: What?

9 MR. O'DONNELL: It is about beliefs, because the
10 evidence concerned his racist beliefs. And the jury was
11 asked --

12 QUESTION: I thought it was just -- it was just
13 that he was a member of a -- of a prison gang that was
14 racist. Isn't that all it was?

15 MR. O'DONNELL: An association is not
16 punishable, Your Honor.

17 QUESTION: Well, I'd hope so, but it
18 isn't -- but this isn't technically beliefs. There wasn't
19 any evidence about what the gang's beliefs were, except
20 for being racial.

21 MR. O'DONNELL: There was no evidence besides
22 that. And that --

23 QUESTION: So it was just his membership?

24 MR. O'DONNELL: Yes, sir, his membership in a
25 gang, which --

1 QUESTION: And there was no evidence about what
2 his connection with the gang was, other than membership?

3 MR. O'DONNELL: That is -- that is correct. And
4 that the gang embraced what most people in society
5 consider abhorrent beliefs, unpopular beliefs.

6 And that was used as the criteria --

7 QUESTION: Well, associational rights aren't
8 impervious too, are they?

9 MR. O'DONNELL: No, sir, they are not, if the
10 association -- if through the association it's evident
11 that the -- the person is inciting or attempting to
12 provoke unlawful action as a result of that association,
13 that -- that is not impermeable.

14 QUESTION: So you're --

15 QUESTION: There was a long colloquy between the
16 prosecutor and the defendant before the -- was it the
17 Superior Court judge before whom this case was tried?

18 MR. O'DONNELL: Yes, sir.

19 QUESTION: As to just what -- what should come
20 in about this membership. And what the judge actually let
21 in was not nearly as much, as I read it, as the State said
22 they could prove. Is that your impression too?

23 MR. O'DONNELL: Well, with respect to that, all
24 the State was willing to prove, in addition -- and they
25 were satisfied with what they did prove, but what they

1 offered, or proffered, rather, is evidence of other
2 persons' beliefs or gangs in other States. Nonetheless,
3 it was not pertinent to this defendant's.

4 QUESTION: Yeah, that never -- and that never
5 went to the jury here.

6 MR. O'DONNELL: It never went to the jury. And
7 that, in and of itself, would have been -- would have been
8 constitutionally impermissible.

9 QUESTION: So what went to the jury was
10 basically if they -- saying they could take into
11 consideration his membership in this organization which
12 had a particular belief, but which was not characterized
13 as advocating any particular action. Is that true?

14 MR. O'DONNELL: It was not characterized as
15 advocating any particular action. If, in fact, it was
16 characterized as advocating any particular unlawful
17 action, it would be --

18 QUESTION: Well, how likely has the unlawful
19 action got to be? I mean you're not proposing a kind of
20 clear and present danger test, are you? That if he
21 is -- if, in this -- in a capital case, if he is not
22 sentenced to death that he will engage in this behavior?

23 Are you arguing simply that the belief indicates
24 a propensity -- the statement of belief indicates a
25 propensity to engage in this kind of behavior? Is that

1 enough?

2 MR. O'DONNELL: A propensity is not enough, Your
3 Honor. It must be shown, or there must be a foundation
4 for distinguishing -- distinguishing between the belief in
5 abstract doctrine and the advocacy of unlawful action.

6 QUESTION: Yeah, well what is -- what is the
7 line-drawing criterion? That's -- in effect, that's what
8 you want us to hold. How would we write the sentence that
9 encapsulates that?

10 MR. O'DONNELL: Based on decisions by the Court
11 in, for instance, Yates and, and Noto, it would be along
12 the lines to the effect where the belief, or where there
13 is advocacy of unlawful action, is based on these facts.
14 There it takes it out of the realm of protection by the
15 First Amendment.

16 QUESTION: So there's, again -- I think you're
17 saying that there need not be, in order to make the belief
18 evidence admissible, there need not be any particular
19 degree of probability that that belief would, in fact,
20 be -- form the basis for later action, but merely a
21 possibility that it form a motive for later action. Is
22 that true?

23 MR. O'DONNELL: That --

24 QUESTION: Is that what you're saying?

25 MR. O'DONNELL: That is true. And under the

1 circumstances --

2 QUESTION: Then why doesn't any belief qualify?

3 MR. O'DONNELL: Any belief would qualify for
4 protection, so long as it is advocacy of an abstract
5 doctrine and does not incite or there's no attempt to
6 incite unlawful action, or provoke it.

7 QUESTION: No, but you're not -- I don't think
8 you're saying that the kind of relevant and admissible
9 belief evidence must consist of statements of incitement.

10 You're saying, somehow, that they must consist
11 of statements which, if they were followed by the
12 defendant, would entail unlawful conduct. That's true,
13 isn't it?

14 MR. O'DONNELL: That is true. If this
15 defendant --

16 QUESTION: Well, there's no incitement. I mean
17 we're not talking about statements of incitement. We're
18 simply talking about statements of belief. And what is
19 the criterion for judging between some statements of
20 belief which may be considered, and others which may not
21 be?

22 Two possibilities come to mind. One is, there
23 must be some high -- some degree of probability that he
24 will actually act on the statement. And I think you've
25 said that's not your criterion.

1 The other possibility is that the statement must
2 be -- must somehow relate to unlawful conduct which is
3 identical to or close to the conduct for which he is being
4 punished in this case. Would that be your criterion?

5 MR. O'DONNELL: That would be the criteria, so
6 long as there is advocacy to commit unlawful action. If
7 it was simply an abstract doctrine -- and I point out --

8 QUESTION: So if you're centering -- if you're
9 sentencing then, a burglar, a high degree of probability
10 based even on advocacy, even on statements of advocacy of
11 murder would be irrelevant?

12 MR. O'DONNELL: Under those circumstances it
13 would not be. For instance, where there's evidence that
14 he had advocated the death of a witness against him within
15 the prison, he had solicited a crime, unquestionably.
16 That advocacy would be outside the scope of any arguable
17 First Amendment protection.

18 QUESTION: Even when he's being sentenced for
19 burglary?

20 MR. O'DONNELL: Yes, sir -- yes, sir.

21 QUESTION: Well, then aren't you saying that
22 advocacy of any crime will satisfy your test? But if the
23 behavior is noncriminal, it's got to satisfy some further
24 relevance test -- if the belief is of noncriminal behavior
25 it's got to satisfy a different relevance test?

1 MR. O'DONNELL: No, I believe I'm saying it's
2 the advocacy to commit this crime, with the intent that
3 the crime be accomplished.

4 QUESTION: Okay.

5 MR. O'DONNELL: If it is simply -- merely
6 opposition to an abstract idea, or to a principle -- let's
7 say the principles reflected in the Thirteenth, and
8 Fourteenth, and Fifteenth Amendments -- that's advocacy of
9 abstract doctrine. And that's protected under the First
10 Amendment.

11 QUESTION: Even if you limit it that way,
12 though, you're really not describing a doctrine that
13 tracks the doctrine of the First Amendment. Because as
14 you've just described it, you could put before the jury
15 the fact that this person was a member of the Communist
16 Party.

17 MR. O'DONNELL: No, I believe that I --

18 QUESTION: Advocates the violent overthrow of
19 the Government. Now, to be sure, for the First Amendment,
20 you can't put somebody in jail for doing that. Because
21 advocacy is not enough. There has to be incitement,
22 or -- but as you've described it, you don't need the
23 incitement, you just need advocacy of something that's
24 unlawful. It certainly is unlawful violently to overthrow
25 the U.S. Government. So you could be -- put before the

1 jury, ladies and gentlemen, this is a bad person. He
2 advocates, right? He's a member of the Communist Party.

3 MR. O'DONNELL: That's correct.

4 QUESTION: You could do that.

5 MR. O'DONNELL: To the extent that I suggested
6 that advocacy didn't intend that those ends be
7 accomplished, and they were likely to be accomplished, I
8 may have misspoke.

9 There has to be some -- we must cross the line
10 of just advocacy of an abstract doctrine to take it
11 outside the First -- the realm of First Amendment
12 protection.

13 QUESTION: Mr. O'Donnell, I wonder if your case
14 shouldn't be aimed more at membership rather than
15 advocacy?

16 Let me read to you the stipulation which, I
17 understand, is what went to the jury in this case. The
18 Aryan Brotherhood refers to a white racist prison gang
19 that began in the 1960's in California in response to
20 other gangs of racial minorities. Separate gangs calling
21 themselves the Aryan Brotherhood now exist in many State
22 prisons, including Delaware.

23 Now, it says nothing about what this fellow
24 believes. It's simply talking about his membership in
25 a -- in a gang which is described as a white racist prison

1 gang.

2 I think you may be biting off more than you need to
3 when you get into all of this about advocacy.

4 MR. O'DONNELL: That is, in fact,
5 correct -- that in this case we are dealing with
6 association, and an association with others who embrace
7 beliefs, beliefs protected by the First Amendment, as
8 odious as those beliefs might be.

9 But there's no --

10 QUESTION: Well, in response to the Chief
11 Justice's question, you don't even need to concede that he
12 belonged to a gang that had racist views. The stipulation
13 says the California gang had racist views, not that this
14 one did.

15 MR. O'DONNELL: The stipulation said that.

16 However, there was some evidence introduced to
17 the effect that there was an association -- circumstantial
18 evidence of an association. The State introduced a
19 tattoo, and argued that was therefore associated with the
20 gangs.

21 QUESTION: But there was no direct evidence or
22 stipulation about what his own beliefs were.

23 MR. O'DONNELL: No.

24 QUESTION: Now, he might have joined these gangs
25 as a matter of self-protection.

1 MR. O'DONNELL: That is -- that could well be
2 so.

3 QUESTION: And I suppose you or -- did you try
4 the case?

5 MR. O'DONNELL: No, sir, I did not.

6 QUESTION: Well, I suppose trial counsel was
7 perfectly free to argue to the jury the -- the weight of
8 this evidence, even if it was admissible.

9 MR. O'DONNELL: He did, Your Honor. And he
10 argued strenuously to the jury to please do not consider
11 this, because this is simply a First Amendment belief
12 protected by the Constitution. And no --

13 QUESTION: And I suppose he went on and argued,
14 and furthermore, it isn't worth much.

15 MR. O'DONNELL: No, sir, he didn't. He asked
16 the jury to please consider that this is merely a belief
17 protected by the First Amendment.

18 No counselor, no defense counsel in our States
19 should be put in that position, to have to plead to a jury
20 to not punish his client because of beliefs protected by
21 the First Amendment.

22 QUESTION: Mr. O'Donnell, I hate to ask this
23 because it -- you know, if you give the wrong answer, this
24 case isn't very important.

25 But it just doesn't say he's a member of a

1 group. It says -- the stipulation was he's a member of a
2 prison gang. Doesn't that have a connotation of a group
3 of people that engage in unlawful activities, for
4 starters? I mean, you don't refer to, you know, he's a
5 member of a gang called the Kiwanis Club.

6 (Laughter.)

7 QUESTION: Or a gang called the American Civil
8 Liberties Union. He's a member of a prison gang.

9 What does that suggest to you? It suggests a
10 bunch of people that are --

11 MR. O'DONNELL: It is --

12 QUESTION: They are doing not nice things in the
13 prison, I think.

14 MR. O'DONNELL: It is -- it is still an
15 association. And those connotations, which just involve
16 speculation as to activities where there's no proof of the
17 illegal activities, or proof that he acted or carried out
18 unlawful acts pursuant to membership in a gang, simply
19 because of his association --

20 QUESTION: This isn't a sufficiency of the
21 evidence -- this that the jury can't take it into account
22 even if it is proven -- that, that -- you know, that he
23 was a member of a prison gang.

24 MR. O'DONNELL: Well --

25 QUESTION: I'm not sure that I can't consider it

1 a sign of a bad character, that you're a member of a
2 prison gang, whatever they believe, whether it's a white
3 Aryan gang or any other gang.

4 MR. O'DONNELL: Your Honor, as the Court pointed
5 out in Lanzetta v. New Jersey, some years ago -- in fact,
6 it was 1928 -- in that case, one of the elements of the
7 offense was that the petitioner be a member of a gang, or
8 a gangster; in fact, that's how the crime was defined.
9 Some of the other elements were that he not have a job,
10 that he associate with other people.

11 But basically, the criteria used was the
12 connotations behind the word gangster. And that was
13 constitutionally impermissible.

14 QUESTION: Well, wasn't this breakout effected
15 by members of the gang? I thought that the people that
16 broke out were all members of this gang?

17 MR. O'DONNELL: I do not -- I do not think that
18 was clear. Even if they had been, unless it was -- unless
19 there was proof that it was one of the -- that that was
20 the reason for the gang or the beliefs were the reason
21 which prompted the unlawful activity, the escape, it would
22 still be inadmissible.

23 I'd like to point out that the State did offer,
24 as aggravating --

25 QUESTION: So your position is, is that if the

1 gang breaks out of prison, in sentencing, the judge can't
2 take into account that the -- that the prison breakout was
3 orchestrated by a gang?

4 MR. O'DONNELL: If there was -- if there was a
5 conspiracy to break out, yes. But if he was --

6 QUESTION: Well, that's in this record, isn't
7 it?

8 MR. O'DONNELL: If I -- if I may make the
9 distinction -- if there is a conspiracy to break out, yes.
10 However, if the -- if the evidence was only directed
11 towards the gang being racist, that's not punishable.
12 That he -- that has nothing to do with it. That there was
13 a conspiracy, or a solicitation, or a provocation --

14 QUESTION: Mr. O'Donnell, I thought there was an
15 acknowledgment by your opponent that the membership in
16 this organization had nothing to do with the offense for
17 which he was tried.

18 MR. O'DONNELL: It did not whatsoever.

19 QUESTION: And wasn't the evidence of Aryan
20 Brotherhood membership excluded until the penalty phase?

21 MR. O'DONNELL: It was. And it was only
22 admissible -- it was only admitted for one purpose, so
23 that the jury could argue that as an additional
24 aggravating circumstance, that he's a member of
25 this racist gang.

1 QUESTION: And aren't there some gangs that are
2 not necessarily invidious? How about a chain gang?

3 MR. O'DONNELL: If that were reflected to -- if
4 that reflected his criminal record, and certainly there
5 are, perhaps, less prejudicial ways of proving it, that
6 may be admissible.

7 If the Court please, I would like to reserve my
8 remaining time for rebuttal.

9 QUESTION: Very well, Mr. O'Donnell.

10 MR. O'DONNELL: Thank you, Mr. Chief Justice.

11 QUESTION: Mr. Fairbanks, we'll hear from you.

12 ORAL ARGUMENT OF RICHARD E. FAIRBANKS, JR.

13 ON BEHALF OF THE RESPONDENT

14 MR. FAIRBANKS: Thank you, Mr. Chief Justice,
15 and may it please the Court:

16 David Dawson was sentenced to death in a
17 Delaware courtroom, because he broke out of prison, he
18 broke into Madeline Kisner's home, he burglarized it, he
19 robbed her, he tied her up, he strangled her, then he
20 stabbed her 12 times, killing her.

21 There's no question in this case that his
22 membership in a prison gang, called -- a racist prison
23 gang called the Aryan Brotherhood is reflective of
24 character. Dawson concedes it's reflective of character.

25 There is no question --

1 QUESTION: Now the stipulation didn't show that
2 this was a racist prison gang. It was very careful on
3 that point. It said the California gang is racist. And
4 the prosecutor -- were you the -- did you prosecute the
5 case?

6 MR. FAIRBANKS: No, I did not.

7 QUESTION: Oh, well your prosecutor continued to
8 argue that this was a racist gang. And that -- that's not
9 reflected in the stipulation.

10 MR. FAIRBANKS: Well, what it says is is that
11 the Aryan Brotherhood refers to a racist prison gang, a
12 white racist prison gang which was founded in California.

13 I think -- and if the -- there's no quarrel that
14 these reflect David Dawson's beliefs. Because in closing
15 argument, Mr. Swierzbinski, who defended Dawson, says yes,
16 he's a racist. So that we're not here with the quarrel of
17 whether or not these accurately reflect -- whether this
18 particular description of the Aryan Brotherhood was, in
19 fact accurate, or whether it, in fact, reflected David
20 Dawson's views.

21 But when you look at all of this in context, you
22 have to put in the context of the Delaware system, the
23 Delaware death penalty system, which is a Gregg or
24 Georgia-type system, that's announced by this -- referred
25 to in this Court in Gregg and Zant.

1 And that is, that first the defendant is
2 convicted of first-degree murder. Thereafter, the
3 discretion of the jury is narrowed with the -- with
4 statutory aggravating circumstances.

5 Finally, the jury is left to assess whether or
6 not the penalty should be life imprisonment or death,
7 based upon an individualized determination of David
8 Dawson's characteristics and -- character and
9 propensities, and the circumstances of the offense.

10 QUESTION: Does the record show that any
11 minority members were on the jury?

12 MR. FAIRBANKS: Yes, it does.

13 QUESTION: And what does it show in that regard?

14 MR. FAIRBANKS: It shows that there was one
15 black juror. And what happened in this case -- if I can
16 sort of explain it -- there was voir -- voir dire of the
17 entire jury panel, individual voir dire, in which
18 the -- in which the judge said, in effect, can
19 you -- there may be evidence in this case about membership
20 in, or references to the Aryan Brotherhood, and described
21 it briefly. Will this evidence prevent you from being
22 fair?

23 That question was answered negative -- was
24 said -- four individuals who were selected for this jury
25 said, I can't be fair with this evidence. They were

1 excluded for cause.

2 Two others, for a total of six, knew something
3 about the case. But what they knew about the case was
4 that David Dawson belonged to the Aryan Brotherhood. And
5 they, similarly, were excluded, so that six members of the
6 jury were excluded.

7 Dawson had argued that you have to exclude this
8 up front. You have to -- his motion in limine to be dealt
9 with up front, because consistent with his views, his
10 racial stereotyping, he believed that blacks and Jews
11 would be more on his side with regard to the conviction.
12 And he wanted them on the jury.

13 But if this evidence was going to be presented,
14 he was going to exercise his preemptory challenges to
15 exclude all blacks. And that's what he did. He ran out
16 of preemptory challenges around juror number six or seven;
17 and juror number eight, I believe it was, was the one
18 black individual who he could not peremptorily challenge.
19 So that there is just one black member of this jury.

20 But when you look at what the -- that final,
21 discretionary stage, what a jury is supposed to do, the
22 jury is not to be value or content neutral. The jury is
23 to exercise moral judgment. And they are to exercise
24 moral judgment based upon the -- among other things, the
25 character and propensities of the defendant.

1 QUESTION: May I ask you, what does -- what does
2 the membership in the White Aryan Brotherhood tell us
3 about his character?

4 MR. FAIRBANKS: It tells us two things: one, a
5 general sense of lawlessness, and two --

6 QUESTION: Well, now how do you get that?

7 MR. FAIRBANKS: Because it's a prison gang.
8 It's a racist prison gang.

9 QUESTION: But racist prison gang -- you think
10 the word gang implies lawlessness, does it?

11 MR. FAIRBANKS: Yes, and I think that is what
12 the trial judge thought, and actually that's what the
13 supreme --

14 QUESTION: And is that the argument that the
15 prosecutor made, that it implied lawlessness? Or did he
16 just argue about the kind of views he had with respect to
17 the different races?

18 MR. FAIRBANKS: No, what he argued goes to the
19 second part of what the Aryan Brotherhood deals with. And
20 that is his rejection of rehabilitation.

21 David Dawson presented evidence in his
22 case -- or brought out evidence in the State's case and
23 presented evidence in his case -- of essentially aspects
24 of rehabilitation. He said, look, in my years of prison,
25 I have gone to AA, I belong to other treatment programs.

1 These were signs and were admissible because they showed
2 that he had tried to rehabilitate himself to bring him
3 back into society.

4 This evidence counters that. This evidence is
5 that he rejects -- that the real David Dawson is not the
6 person that goes once a week or so to an AA meeting, but
7 the real David Dawson who was 24 hours a day, in the full
8 year, a member of the gang.

9 QUESTION: Well, Mr. Fairbanks, are you assuming
10 that we take judicial notice of what the beliefs are of
11 members of the Aryan Brotherhood chapter in Delaware? Are
12 we supposed to just make certain assumptions here?

13 MR. FAIRBANKS: No, I think that the --

14 QUESTION: Because the stipulation is so bare
15 bones that I didn't find any evidence connecting the
16 petitioner's membership in the brotherhood to lawlessness
17 or a rejection of rehabilitation. I just -- I didn't see
18 that in the stipulation.

19 MR. FAIRBANKS: Well, the stipulation is
20 something that Dawson agreed to, and it is subsumed within
21 the notion of a white racist prison gang. And I really
22 think that's --

23 QUESTION: Well, you keep saying that, but it's
24 a California gang that's white racist. And he's a member
25 of a Delaware gang with the same name. That's all it

1 said.

2 MR. FAIRBANKS: Well, but I --

3 QUESTION: And the prosecutor, just as you're
4 doing here, continues to argue that he's a racist. And
5 the question is, what is the evidence of that in this
6 case?

7 MR. FAIRBANKS: Well, he agrees that he is a
8 racist. I mean his closing argument says yes, this is
9 accurate. This accurately reflects my views.

10 QUESTION: Was his closing argument after the
11 argument given by the State?

12 MR. FAIRBANKS: Yes --

13 QUESTION: Thank you.

14 MR. FAIRBANKS: -- it was, it was sequential.
15 There is -- there is the prosecutor's argument, his
16 closing argument, and then final rebuttal.

17 But I think that -- that the point really is is
18 that we are not dealing here with a question of does this
19 accurately reflect. Does the -- does what we have said
20 about him accurately reflect David Dawson? And there's no
21 argument that it doesn't. I mean, he agrees that it does.

22 So we're not here --

23 QUESTION: Well, would it have been permissible
24 to just have -- you have the two first -- to simply put in
25 evidence that he was a white racist, period. He voted

1 for -- in a certain way in an upcoming election, for
2 example.

3 MR. FAIRBANKS: Well, I'm not sure how you
4 determine how he votes, given secrecy of the ballot.

5 QUESTION: Well, say he stipulated that he was
6 going to vote for this particular individual who's a
7 white -- alleged to be a white racist.

8 MR. FAIRBANKS: I think --

9 QUESTION: And he supports white racist causes,
10 generally.

11 MR. FAIRBANKS: I think --

12 QUESTION: Would that be sufficient to put in?

13 MR. FAIRBANKS: I think that what you have to
14 look at is not Dawson's per se rule, which simply works on
15 the syllogism of if he can attach a speech or association
16 element, it's excluded.

17 Rather, what you look at is what does it say
18 about a -- what characteristic does it say about him, and
19 is that characteristic relevant?

20 QUESTION: Well, but there are two parts to it.
21 Let's -- I'd like to separate -- one is he stipulates that
22 he was a member of a prison gang, without identifying it,
23 that it was formed in response to other prison gangs.
24 You -- that, you say, would be relevant because it shows
25 he's not capable of being rehabilitated.

1 MR. FAIRBANKS: Yes.

2 QUESTION: But then the second half of it, and
3 the one that was emphasized by the prosecutor, that he
4 stipulates that he is a member of a white racist group, a
5 group that believes the white race is superior to all
6 other races, and for political and other purposes he
7 subscribes to those beliefs.

8 Could that part separately be put in evidence in
9 your view?

10 MR. FAIRBANKS: I think if it speaks to a
11 characteristic that is --

12 QUESTION: Well, you know what it speaks to --

13 MR. FAIRBANKS: -- then it's relevant.

14 QUESTION: I've told you exactly what it is.

15 MR. FAIRBANKS: Yes, and I think it does speak
16 to a characteristic that is relevant to -- to sentencing.

17 QUESTION: So that it would be sufficient to
18 just identify him as a white racist?

19 MR. FAIRBANKS: He is -- he is fundamentally at
20 war with his society. And he rejects the values of the
21 society. And I think that's --

22 QUESTION: Well, some people -- there are a lot
23 of people, unfortunately, in this society who share those
24 values.

25 MR. FAIRBANKS: That's right.

1 QUESTION: And if they can all be -- that can
2 be a -- say it's not a capital case, just say a sentencing
3 guideline case. Your belief about the relative values of
4 the races can be an aggravating circumstance that imposes
5 a more severe penalty on you for a crime you commit under
6 the statutory sentencing guidelines. That's your view?

7 MR. FAIRBANKS: Yes, because it says something
8 very specific about his character, his rejection of --

9 QUESTION: Well, what does it say about his
10 character?

11 MR. FAIRBANKS: I think it says -- it says that
12 he -- is that he judges people not on the basis of who
13 they are, but based on the basis of race. He is, in
14 effect -- racism is the ultimate dehumanization of
15 individuals.

16 QUESTION: You could also put in, for example,
17 that he hates Catholics, period; or he hates a certain,
18 certain religion. And --

19 MR. FAIRBANKS: If he has -- I think that
20 religious or other prejudices, they are available, too.
21 But that's not this case. What this case is --

22 QUESTION: Well, what's the difference? It's
23 basically his views that are not shared by the majority
24 that make him susceptible to more severe penalty, if I
25 understand your position.

1 MR. FAIRBANKS: But that's not -- well -- it is
2 part of his character that is not acceptable.

3 QUESTION: Well, isn't it equally true, then,
4 that you could put in evidence that he's a socialist?
5 Socialists are at war with the -- with the property
6 structure of the United States. It's a minority position,
7 and you could say this man is a socialist. He's not a
8 Republican or a Democrat.

9 MR. FAIRBANKS: I'm not so sure that I go that
10 far.

11 QUESTION: Why not?

12 MR. FAIRBANKS: Because I'm not sure that --

13 QUESTION: Be at war with society -- aren't
14 socialists at war with the property structure of the
15 United States?

16 MR. FAIRBANKS: I don't think in the same -- in
17 the same sense that racism is.

18 QUESTION: Well, now --

19 QUESTION: Well, what if he -- what if he
20 either -- do you want to put a -- because you want to put
21 in, in the days when the Cold War -- that the man is a
22 Communist? He believes in the overthrow, the ultimate
23 overthrow of the capitalist system. And this is -- this
24 is a simple murder case. There are no political elements
25 to it. Can that come in?

1 MR. FAIRBANKS: I would think that if it speaks
2 to a relevant criteria in sentencing --

3 QUESTION: Well, that's what I've told you, I've
4 told you what the thing is.

5 MR. FAIRBANKS: And I think that the violent
6 overthrow of his society speaks to a relevant sentencing
7 trait. It is much like -- like remorse, or the lack of
8 remorse, which he would also reject in his analysis.

9 QUESTION: Well --

10 QUESTION: A violent overthrow is at least a
11 crime. Racial attitudes, you're -- as far as I know, it's
12 not unlawful, short of taking some unlawful action, to
13 hate Catholics or to hate -- to hate any group, right?

14 MR. FAIRBANKS: That's true, as --

15 QUESTION: But that makes you a bad guy, and
16 therefore your sentence can be increased?

17 MR. FAIRBANKS: But here, it wasn't just the
18 beliefs in a vacuum. It was associated with a prison
19 gang. And I think that this case is -- is looked at in
20 two ways. One --

21 QUESTION: I thought we were on a line of
22 hypothetical questioning whether you could introduce the
23 fact that the person was a racist, independent of -- let's
24 not retreat back to the fact that he's in a gang. That's
25 a different issue.

1 We're just talking about the fact that the
2 person is a racist. You think that alone should be able
3 to be introduced, right?

4 MR. FAIRBANKS: I think that is a matter which
5 is not, per se, excluded. That at that point, the judge
6 must weigh and balance probative value versus risk of
7 prejudice.

8 And the judge may very well, and probably will,
9 in most of those instances, exclude it after that weighing
10 process.

11 What we are saying is that you -- you get to
12 that weighing process, that you don't have a per se rule.

13 QUESTION: What about if he's sexist? I suppose
14 that could be introduced as well, if a person is sexist,
15 or has a lot of --

16 MR. FAIRBANKS: I'm not sure how broad sexist
17 is defined.

18 QUESTION: That's not quite as bad as being a
19 racist, is that?

20 MR. FAIRBANKS: What I'm saying is, is that you
21 don't have the judges picking and choosing between what is
22 good and bad character before --

23 QUESTION: That's what I worry about. That's
24 exactly what I worry about. And once you say racism is
25 okay, you know, what isn't?

1 MR. FAIRBANKS: No, what I'm saying is there is
2 not a per se -- a per se rule which excludes all of this.
3 Because what he says, he wants to wrap himself in the
4 First Amendment, but he doesn't really want to wrap
5 himself in the First Amendment. The gown doesn't really
6 fit.

7 What he's -- because the premise of the First
8 Amendment is not you can't consider it against you. It is
9 neutrality. The premise of the First Amendment is that
10 Government needs to be neutral. And here, the structure
11 of the legislative scheme is itself neutral. The judge,
12 in itself, in analyzing this is neutral. They are basing
13 it on characteristics. It is simply -- the statute,
14 itself talks about character and propensity of the
15 defendant. It can be admitted in aggravation or
16 mitigation.

17 The judge does not decide whether it is good
18 character or bad character. He simply says, is it
19 relevant and -- to an important peneological concern,
20 something that's relevant and important to sentencing.

21 QUESTION: Now you're saying it's not relevant
22 to character? I thought that was your whole proposition.

23 MR. FAIRBANKS: No, I'm saying that it is
24 relevant to character. But he -- but he then goes and
25 says, what does that character trait tell us about this

1 individual? One can conceive of all sorts of character
2 traits that really don't have anything to do with
3 sentencing.

4 Here, rejection of rehabilitation, which was how
5 it was argued, it's how the Delaware supreme court viewed
6 this evidence, is relevant to sentencing. And it, in
7 fact --

8 QUESTION: Mr. Fairbanks, let me just be sure I
9 have not misunderstood your position on one point.

10 Do you agree with your opponent that it would be
11 impermissible to make membership in the Aryan Brotherhood
12 a statutory aggravating circumstance?

13 MR. FAIRBANKS: Yes.

14 QUESTION: Now why would it be impermissible?

15 MR. FAIRBANKS: Because at that point,
16 Government is deciding what groups are good and what
17 groups are bad. The legislature is making that judgment.
18 They could --

19 QUESTION: In other words, it's a judgment a
20 jury can make, but the legislature cannot make.

21 MR. FAIRBANKS: Because the jury -- because
22 the --

23 QUESTION: Then why do you draw the -- they're
24 both speaking for the Government.

25 MR. FAIRBANKS: Well, because at the -- at the

1 latter stage, they are looking at it not just as, as an
2 aggravating circumstance. They're looking at it in the
3 full context of all the variety of considerations that the
4 jury has to consider.

5 QUESTION: Well, what if the legislature looks
6 at it in the same full context, and they just say this is
7 always an aggravating circumstance, because it always
8 illustrates bad character?

9 MR. FAIRBANKS: Because it -- I suppose, because
10 at that point he is, he is made eligible for death because
11 of that --

12 QUESTION: Well, say it isn't death. Say it's
13 the sentencing guidelines, that you have a -- for robbery,
14 that you get an additional point, or whatever you do, to
15 get into a higher, more severe poten -- eligibility for a
16 more severe sentence, membership in the -- just as Justice
17 Scalia said. This is not necessarily just a death case.
18 Membership in the Aryan Brotherhood should be worth three
19 points, to move you from category A to category B. Could
20 the legislature do that?

21 MR. FAIRBANKS: We think not.

22 QUESTION: You think not? And why not?

23 MR. FAIRBANKS: Because we think that on that
24 point, the legislature is making value judgments. And
25 that unless you can show and be --

1 QUESTION: But why can the jury make a value
2 judgment that's impermissible for the elected
3 representatives of the whole people?

4 MR. FAIRBANKS: Because that's the jury function
5 in this instance. The jury -- what this Court has said
6 the jury is to do, is to make -- is to make a moral
7 judgment as to his fate based upon the consideration of
8 the -- of his characteristics.

9 QUESTION: Yeah, but the jury doesn't elicit
10 this information. The State presents it. The State
11 offers and argues that it's a quite a relevant
12 circumstance to determine whether this fellow's worth
13 living or not.

14 MR. FAIRBANKS: That's right.
15 But the State does not actually do the labeling.
16 The jury does the labeling. And the jury does the
17 labeling in the full range of circumstances about the
18 defendant.

19 QUESTION: Suppose the judge says, in my moral
20 judgment, members of the Aryan League are, by reason of
21 their beliefs, are more deserving of the death penalty
22 than people that are not members. And that's the
23 dispositive point in my decision. What result?

24 MR. FAIRBANKS: That is -- that is similar to
25 what the sentencing judge did in Barclay.

1 QUESTION: What -- and you would permit that?

2 MR. FAIRBANKS: I think that that -- membership
3 in a -- in a racist group does speak to a relevant
4 character trait, and the judge can make -- take that into
5 consideration when he considers all the aggravating and
6 mitigating circumstances.

7 QUESTION: Again, I don't see how that's any
8 different from the hypothetical Justice Stevens put to you
9 where the legislature tells the judges what to do. You
10 like individual discretion rather than concrete rules?

11 MR. FAIRBANKS: Well, because what this Court
12 has said in the context of death penalty -- penalty
13 hearings, is that what that jury is supposed to do is to
14 render a moral judgment based upon the character and
15 propensities of the defendant and the circumstances of the
16 offense.

17 You can't be content neutral, or value neutral,
18 and make moral judgments. So that they have to be free,
19 and they are asked to be free every day to make moral
20 judgments.

21 QUESTION: Your position is if -- if the
22 defendant at the sentencing hearing can show that he went
23 to dancing class in prison, and that's a mitigating thing,
24 you should be able to show something like this, maybe some
25 of the jurors will think it's -- it's a point against him?

1 MR. FAIRBANKS: Yes, I think -- and
2 that's -- and that ultimately is what his -- his final
3 position, as articulated in his reply brief is. And that
4 is, that if he presents membership, associational beliefs
5 in mitigation, the State can present associational beliefs
6 in aggravation.

7 QUESTION: So I take it, under some
8 circumstances, you would say the State would be entitled
9 to put in evidence that although he belongs to the Boy
10 Scouts, he's an atheist?

11 MR. FAIRBANKS: Justice White, I think
12 that -- I'm not sure what -- what, from the -- from the
13 State's point of view, what membership in the Boy Scouts
14 says about somebody, and nor am I sure what atheism says
15 about somebody.

16 QUESTION: Well, supposing the defendant doesn't
17 put in any of this evidence, but the State thinks
18 that -- the State thinks that in this -- in this
19 particular county, evidence that he's a Catholic would be
20 very unpopular with the jury.

21 MR. FAIRBANKS: And that is material that the
22 Delaware supreme court has made clear would not be
23 admissible. Because what that is --

24 QUESTION: Because no reasonable juror could
25 think that he was a bad person for that reason?

1 MR. FAIRBANKS: Because what it is doing is
2 interjecting an arbitrary factor to appeal to prejudice or
3 bias, and that there is a limitation to this.

4 What --

5 QUESTION: What if he tries to introduce
6 evidence that he's a good, God-fearing man, goes to church
7 every Sunday -- you pick your denomination, I don't care.
8 Can he get that in?

9 MR. FAIRBANKS: This Court has held that that
10 is -- that that is relevant --

11 QUESTION: So the jury can say, gee, this is a
12 good, God-fearing man, so we'll let him live.

13 MR. FAIRBANKS: That's correct. And all this is
14 the counter to that sort of evidence.

15 QUESTION: But you say you couldn't produce
16 evidence that he's not a good God-fearing man, that he's
17 an atheist?

18 MR. FAIRBANKS: Well, because it does not speak
19 to a -- to a factor that is -- that is relevant --

20 QUESTION: I don't see why the one does and the
21 other doesn't. And what about the fellow who's not a good
22 God-fearing man? I mean he says, gee, if I were only a
23 good God-fearing man, I could get this evidence in and
24 maybe I wouldn't get the death penalty. Aren't you
25 punishing because of his beliefs? You'd be punishing him,

1 in effect, because he's not a good God-fearing man. He
2 cannot honestly say I go to church every Sunday.

3 MR. FAIRBANKS: Well, I think that is what
4 occurs, and may very well occur in death penalty cases up
5 to now -- that is, is that the jury has before them, the
6 characteristics that the defendant puts in which are not
7 related to conduct, which are First Amendment material.

8 I mean, he may say --

9 QUESTION: So if you're going to keep out the
10 bad stuff, you have to keep out all the good stuff too, to
11 be -- because the bad people who don't have it are being
12 prejudiced by the fact that they don't have it. And
13 therefore, you've got to keep it all out.

14 MR. FAIRBANKS: Yes, if this is a First
15 Amendment claim; which is what Dawson says that it is,
16 yes. Because the First Amendment is not designed to say
17 you can consider it all good, or you can consider it all
18 bad. It is neutrality.

19 If the jury is to be neutral, you can't consider
20 any of it. But if the jury, in this instance, is -- is
21 the Government, then the jury must be neutral. But if the
22 jury is neutral, they are not making moral judgments based
23 upon the character of this defendant.

24 In fact, in this case, he says in his reply
25 brief that if he can present evidence in aggravation -- in

1 mitigation that are associational beliefs, he's always
2 conceded -- although it's the first time in his reply
3 brief -- that the State can do the same in -- to counter
4 that evidence.

5 Well, as a matter of fact, what the record says,
6 is that immediately before they left, they adjourned to
7 enter the stipulation that he finally entered into, the
8 prosecutor offered just such an arrangement.

9 On Joint Appendix page 51, at the bottom of that
10 page, the prosecutor said, look. You can't be offering
11 associational beliefs unconnected to -- to conduct and
12 mitigation, and bar us from doing it -- doing the
13 counter -- doing the same thing.

14 And then he further goes on to say that, sure,
15 if you want to enter in this stipulation not to present
16 that, that evidence, we'll do the same.

17 QUESTION: And your position is, wholly aside
18 from that stipulation, you should be able to introduce
19 this evidence as relevant to character?

20 MR. FAIRBANKS: Yes, I think that is correct.

21 QUESTION: Did the State really offer to prove
22 that the -- that this prison gang was the kind of a gang
23 described in Barclay or in, what is it, Abel? Abel -- that
24 it's -- the Aryan Brotherhood is a secret prison gang that
25 required its members always to deny the existence of the

1 organization, to commit perjury, theft, and murder?

2 Did the State offer to characterize the Aryan
3 Brotherhood, and was that excluded?

4 MR. FAIRBANKS: No, what -- what happened, what
5 the sequencing of events were, is that the prosecutor
6 was -- began with a proffer. And he proposed, then to
7 move on to present voir dire testimony of the State's
8 witnesses, so the judge could then undertake a balancing
9 approach, which is what he said is -- he -- the judge
10 said, he's got a two-step process.

11 QUESTION: And what did he say the witnesses
12 were going to testify to?

13 MR. FAIRBANKS: That the -- there were two main,
14 and central characteristics, but that the individual from
15 the Bureau of Federal Prisons was going to come in, and he
16 was going to be our expert.

17 QUESTION: And he was going to say what the
18 Aryan Brotherhood was all about?

19 MR. FAIRBANKS: Yes, and what he said was, is
20 they have two main characteristics. The two main goals of
21 the Aryan Brotherhood are -- and this is at page, Joint
22 Appendix page 33 -- and he says their two, main goals are,
23 one, to control the drugs in prison, and two, violent
24 escape attempts.

25 QUESTION: Do what?

1 MR. FAIRBANKS: Violent escape attempts.

2 QUESTION: Well, I suppose that if that evidence
3 had gotten in -- maybe I misunderstood your colleague on
4 the other side that he thought that maybe if that had been
5 admitted, it would have -- it should be upheld, that kind
6 of evidence. Do you understand that?

7 MR. FAIRBANKS: It's -- he's sometimes hard to
8 pin down. But I think that that's one of the things that
9 he has said, yes.

10 And I think that -- that what happened was, is
11 that the parties --

12 QUESTION: So the State really got in trouble by
13 the exclusion of the testimony?

14 MR. FAIRBANKS: That's right.

15 I mean what he's saying is is he's trying to
16 have it both ways. He wants a sterile presentation of the
17 evidence. And then he wants to attack us for having
18 agreed to a sterile presentation of the evidence.

19 QUESTION: But the State lost something by that
20 sterile presentation, too. It lost any testimony
21 connecting this particular membership to the sort of
22 things that a lot of people would feel were quite relevant
23 to a sentencing determination.

24 MR. FAIRBANKS: Absolutely. That what
25 the prosecutor also proffered that the State would show

1 was a letter signed by Dawson --

2 QUESTION: But what -- what difference does it
3 make what the State proffered? The judge didn't turn down
4 their proffer. They had -- he was a most patient judge.
5 He heard him for page after page on this question.
6 Finally, they came up with this stipulation.

7 MR. FAIRBANKS: That's right. And now, having
8 accepted that stipulation, he cries foul.

9 QUESTION: Having accepted the stipulation are
10 crying foul --

11 (Laughter.)

12 MR. FAIRBANKS: Chief Justice, what I'm crying
13 foul is, is that -- is being attacked for the stipulation.

14 QUESTION: Yes, but he accepted the stipulation
15 as a substitute for keeping all this evidence out. And
16 there's a pretty good argument for keeping all this
17 evidence out. He's just a member of the gang. That's all
18 that you've proved so far, not that he'd participated in
19 any of these activities.

20 MR. FAIRBANKS: Well, the proffer actually does
21 go farther than that. I mean, because the proffer said
22 that one of the things they seized from his -- from his
23 cell was a letter signed by -- by Dawson, saying that
24 Aryan Brothers must take flight. Now, that is at Joint
25 Appendix page 36.

1 QUESTION: Aryan Brothers must take flight. And
2 what does that prove?

3 MR. FAIRBANKS: That is -- that connects to the
4 second of the two principal goals of the Aryan Brotherhood
5 that Mr. Aaron was going to testify to.

6 QUESTION: Because neither of those goals had
7 anything to do with white supremacy, did they? The
8 two -- none that he was going to testify, and white
9 supremacy is the key to the prosecutor's closing argument.

10 MR. FAIRBANKS: No, I don't think that is the
11 key to the prosecutor's closing argument.

12 The key to the prosecutor's closing argument is
13 comparison between what Dawson says about his conduct in
14 prison, and his association with his family, and what he
15 really is. And he almost invariably connected --

16 QUESTION: But his conduct in prison, and what
17 he really is, why don't you put in evidence of what he did
18 in prison, instead of what organization he belonged to?

19 MR. FAIRBANKS: Because the organization -- just
20 like his joining AA, his going to AA meetings -- I mean he
21 has a right to say that, not because he's proven that he
22 has actually been rehabilitated, but that he goes to those
23 meetings as offer -- as an offer to show that he is making
24 attempts at rehabilitation.

25 This is the counter of that evidence. This is

1 what the Delaware supreme court understood that this
2 evidence was designed to deal with. And he does not
3 really argue that that is improper.

4 He wants to say that simply because the evidence
5 is -- attaches to First Amendment that it cannot be used
6 against him, but it can be used for him. And that, we
7 say, is not the premise of the First Amendment. The First
8 Amendment is not the evidentiary rule that he wishes it to
9 be.

10 As this Court said in Barclay and in Abel, both
11 cases in which associations were properly used -- in
12 Barclay to sentence, in Abel to convict -- that the
13 associations, if they are relevant to a -- to a matter
14 that's properly before the jury are not excluded simply
15 because they are associations or beliefs.

16 He says that's wrong. He says that what -- that
17 there -- his syllogism is very simple, that if he can
18 identify something as an association or belief, it's
19 excluded as aggravation. And we say that is not what the
20 First Amendment is designed to deal with, and that's not
21 what this Court has said that the jury is supposed to do
22 when they consider death cases.

23 Or, in fact, any other case, any sentencing
24 case. Because it -- just to give you one --

25 QUESTION: That's not the syllogism I understood

1 him to mean -- he said if you can't make it a statutory
2 aggravating circumstance, how in the world can you make it
3 a nonstatutory aggravating circumstance. That's the
4 syllogism I understand him to be advancing.

5 MR. FAIRBANKS: Now, well, what I think he's
6 saying is if you cannot punish it as -- if you can't
7 criminalize it you can't -- or regulate against it, is why
8 you can't consider it when you talk about his character.
9 And we simply say that you can.

10 It's much like remorse or the lack of remorse.
11 One can demonstrate lack of remorse not simply by not
12 testifying, but actively by saying something, or by making
13 a gesture.

14 Clearly, that is pure speech. That is something
15 which talks about what's inside of you. That is relevant
16 to --

17 QUESTION: And membership in this organization
18 proves lack of remorse. That's the argument?

19 MR. FAIRBANKS: No, I am saying, and what the
20 Delaware supreme court said is two things. It shows he is
21 a bad -- has bad character -- he's a bad character,
22 lawlessness; and two, that it's a rejection of
23 rehabilitation. Both of those factors are relevant, much
24 as the lack of remorse.

25 QUESTION: Thank you, Mr. O'Donnell.

1 Mr. Fairbanks, you have four minutes remaining.

2 REBUTTAL ARGUMENT OF BERNARD J. O'DONNELL

3 ON BEHALF OF THE PETITIONER

4 MR. O'DONNELL: Thank you, Mr. Chief Justice.

5 First, if I may, allow me to respond to the
6 State's points concerning this being rebuttal evidence.

7 This is not rebuttal evidence which we're
8 talking about. The State suggests that it counters what
9 the defendant proffered, what the petitioner proffered.

10 The State used a very inept example. The
11 pointed out that the defendant asked the court to
12 consider, asked the jury to consider as an example his
13 alcoholism. Now the State suggests that somehow evidence
14 concerning his racism countered or rebutted that
15 mitigating evidence.

16 If Delaware or Mr. Fairbanks knows of a rational
17 relationship between alcoholism and racism, or any other
18 ism in this country, they should share that finding with
19 the Surgeon General, as well as with Delaware juries.

20 QUESTION: As I understand you on your direct
21 argument that you thought that if there was -- if the
22 judge -- if there was evidence offered about the -- what
23 this group was all about, that it really -- it really was
24 a -- a criminal enterprise, and did incite escapes, would
25 that evidence be admissible?

1 MR. O'DONNELL: Well, unless he adopted and
2 advocated the escapes.

3 And I might point out that --

4 QUESTION: Well, now, say that again?

5 MR. O'DONNELL: Unless he advocated, or if part
6 of it was that he was engaged in a conspiracy to commit
7 the escapes --

8 QUESTION: All the -- all that was offered was
9 that he's a member of this group, and this group believes
10 and is actively engaged in the -- in criminal activities.

11 Now, is that evidence admissible? Is his
12 membership in that kind of a group --

13 MR. O'DONNELL: No, no it is not. Because
14 there's no evidence that he intended to accomplish those
15 ends.

16 The State, I may point out, introduced evidence
17 in this case that he escaped.

18 QUESTION: So you have to really -- you have to
19 really show that he participated in these criminal
20 activities?

21 MR. O'DONNELL: Your Honor, it was shown in this
22 case that he escaped. What his white racism had to do
23 with it has nothing to do with --

24 QUESTION: Well, just answer my question.
25 That's all I needed to -- all you need to do. You say

1 that in order to get the evidence in, you would have to
2 show that he participated in these criminal activities?

3 MR. O'DONNELL: Yes.

4 QUESTION: Um-hum.

5 QUESTION: Mr. O'Donnell, you introduced
6 evidence of group membership, right -- AA -- now, I guess
7 if you say that a person can't be sentenced on the basis
8 of his membership, I guess you would logically have to say
9 he shouldn't be sentenced because of his nonmembership
10 either.

11 But doesn't that happen every time somebody who
12 doesn't belong to AA is sentenced? I mean your client can
13 come in and say I'm a member of AA. And this other fellow
14 is being punished because he's a nonmember of AA.

15 MR. O'DONNELL: No, it does not, Justice
16 Kennedy.

17 QUESTION: I mean what I'm suggesting is that
18 there's just no end. Once you say you can't use
19 membership, there's no end to every -- to what has to be
20 kept out of all our sentencing determinations.

21 MR. O'DONNELL: It is not just because belonging
22 to AA is not a belief, and the judge is not exhorting him
23 to inflict punishment because he does not belong to AA.

24 QUESTION: It's not a belief? Certainly it's a
25 belief. It's a belief against -- against drinking, and

1 self-discipline -- all those are beliefs, aren't they?

2 MR. O'DONNELL: They are beliefs, yes. However,
3 they're not punishment.

4 Thank you, Mr. Chief Justice.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
6 O'Donnell.

7 The case is submitted.

8 (Whereupon, at 1:59 p.m. the case in the
9 above-entitled matter was submitted.)
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90-6704 DAVID DAWSON, Petitioner v. DELAWARE

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