OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: A.J. ARAVE, WARDEN, Petitioner v. THOMAS E. CREECH

CASE NO: 91-1160

PLACE: Washington, D.C.

DATE: November 10, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

- X

A.J. ARAVE, WARDEN, :

Petitioner :

v. : No. 91-1160

THOMAS E. CREECH :

- X

Washington, D.C.

Tuesday, November 10, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

LYNN E. THOMAS, ESQ., Deputy Attorney General of Idaho, Boise, Idaho; on behalf of the Petitioner.

CLIFFORD GARDNER, ESQ., San Francisco, California; on behalf of the Respondent.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 91-1160, A.J. Arave v. Thomas E. Creech.

Mr. Thomas, you may proceed whenever you are ready.

ORAL ARGUMENT OF LYNN E. THOMAS

ON BEHALF OF THE PETITIONER

MR. THOMAS: Chief Justice, and may it please the Court:

This case is before the Court on a petition by the warden of the Idaho maximum security institution for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Idaho has in its statutory death sentencing scheme a provision that the death penalty is authorized if it is proven by the state that the murder was committed with utter disregard for human life.

The Ninth Circuit court of appeals has held that this provision is unconstitutionally vague and that the limiting construction imposed on it by the Supreme Court of Idaho is likewise deficient. That construction, the Idaho Supreme Court's construction, is to the effect that the utter disregard factor is to be limited by inquiring into whether the killing was committed with utmost callous disregard for human life, that is to say whether the

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killer was a cold-blooded, pitiless slayer.

QUESTION: At the outset is it, is the vagueness issue the only question in the case?

MR. THOMAS: Well, no, Your Honor, I don't think the vagueness issue is the only issue in the case. There is also a question about whether the court of appeals correctly reviewed or correctly deferred.

QUESTION: We didn't limit the grant of certiorari?

MR. THOMAS: Yes, Your Honor, the certiorari grant was limited to the vagueness question, the utter disregard question.

QUESTION: Then it is the only issue in the case.

MR. THOMAS: It is -- yes, it is. It's the only issue with respect to --

QUESTION: That you're going to argue.

MR. THOMAS: That's correct.

QUESTION: All right, thank you.

MR. THOMAS: The utter disregard or cold-bloodedness finding in this case is supported by a considerable background of murderous behavior by the defendant, and by the fact that in this case he killed another inmate in the state maximum security institution.

QUESTION: General Thomas, before you get into

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your argument can I just get one thing clear? Do you agree that unless the statutory language had been construed by the Idaho Supreme Court that it would be unconstitutionally vague, or do you defend the statute on its face as well?

MR. THOMAS: Well, no, Your Honor, I don't necessarily concede that it would be facially vague, but we did, when this case went to the Idaho Supreme Court for the first time, suggest that the court impose on it a limiting construction as to make sure that there was no doubt that the factor was to be applied in the narrowest kinds of circumstances. But I would not make the concession that there is an actual facial vagueness problem with it because we believe that the term utter disregard for human life has the kind of content that makes it possible to distinguish this kind of case from a larger universe of lesser murders.

QUESTION: Does this language come out of the model penal code?

MR. THOMAS: No, as far as I know, Your Honor, the precise language is not duplicated in any of the other statutes and it, to the best of my recollection, was not a model penal code suggestion.

QUESTION: The trier of fact in assessing this particular standard, the utter disregard for human life

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with the Osborn gloss on it, did not take into account the fact that he had killed previously. Am I correct about that or am I incorrect?

MR. THOMAS: That I believe is incorrect, Your Honor. He did find also that there was a propensity to commit murder. He had referred to the numerous past killings that the defendant had committed and --

QUESTION: But did that bear on the fact that he was cold-blooded and pitiless?

MR. THOMAS: I think it did. It's not entirely clear from the trial court's language, which was not extensive and not very precise. But I think when you take into account all of the things that the court said in its findings, that it's talking about a conclusion that this was a particularly cold-blooded killer and that had something to do with all of the other murders, with the pattern of murderous behavior that he had exhibited in the past.

QUESTION: Well, I had thought that the statute focused on, and this particular part of the statute, the pitiless killer, really focused more on the killer's conduct with respect to the slaying in question, in which case the previous killings would be irrelevant.

MR. THOMAS: I think the statute focuses on anything that reflects a cold-blooded or particularly

callous state of mind, and that can refer to a pattern of murderous behavior. The fact that it also establishes another aggravating circumstance doesn't necessarily take away from that in our view.

QUESTION: Mr. Thomas, will you give us some examples of first degree murders in Idaho that are not cold-blooded or pitiless?

MR. THOMAS: Well, I think that almost any murder, Your Honor, would be, would qualify as not cold-blooded or pitiless if there were any kind of emotional provocation that went with it, any kind of distress, any kind of justification or excuse that didn't rise to the level of a legal defense. And I think that if you look at the cases that the state supreme court has decided and the cases that have gone before the trial courts, what you find is that the cold-blooded factor encompasses a very small number of cases. It's a rather rare kind of circumstance.

QUESTION: But your description seems to describe this case, because isn't this the one in which the victim provoked the fight? The trial court I thought found that.

MR. THOMAS: There is language in connection with the court's mitigation considerations, Your Honor, that suggests that what the court found was that the

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defendant initially, I'm sorry, the victim initially provoked the attack. And what the evidence in the case reflects is a little different than that. We think that the trial court misspoke or used some ambiguous language taken in the full context of its findings because the evidence is pretty clear --

QUESTION: Let me just ask you this question. If we took the trial court at face value would it still satisfy your view of the utter disregard?

MR. THOMAS: I believe it would, Your Honor, although I would acknowledge that there are ambiguities in the trial court's description of the case and it is not as complete as we would have liked to see it. That of course is not the end of the line in our judicial sentencing system because the state supreme court conducts a full course of independent review of all death sentences.

QUESTION: Mr. Thomas, may I just go back to your answer to Justice Stevens' last question, because I'm not sure why it would, why this particular sentence would be consistent with your criterion. As I understand what you said a moment ago a murder would not qualify as manifesting utter disregard if it was committed with any kind of emotional provocation. There is certainly evidence of that, and that seems to be what the trial judge found. So I don't, I don't understand how it could

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be consistent. Can you explain that to me?

MR. THOMAS: Yes, Your Honor. The trial judge's finding, or at least his statement that the murder was committed in an excessive violent rage and that the victim initially provoked the attack is very troublesome because it's not entirely consistent with the evidence. The evidence really was that Creech arranged for the attack --

QUESTION: With respect, though, I think Justice Stevens' question was if we take the trial judge's finding on its face is this particular sentence consistent with your criterion.

MR. THOMAS: Oh, I'm sorry. I misunderstood your question. Yes, it is, but for a little different reason. The trial judge's findings at face value are ambiguous but they do contain findings that Creech had indicated he intended to keep on killing people, that he was remorseless and calculating, language essentially --

QUESTION: But the criterion is whether, as I understand it, is whether by the murder, which I assume, as Justice Kennedy was suggesting a moment ago, it means this murder or circumstances surrounding its commission, the defendant exhibits utter disregard. So I don't see how you can get beyond the record and say well, there are other, of this case, for the application of your standard. And hence I don't see how you can in effect get around the

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trial judge's finding by looking to circumstances having nothing to do with this killing.

MR. THOMAS: Well, let me in response to your question, if I may, focus on one aspect of what does appear in the trial court's finding, and that is that after the victim was helpless and after he had been completely dominated by Creech, Creech killed him at that point. Now, what the trial judge focused on, among other things I think, was the nature of the particularly indifferent or cold-blooded action of the defendant in stomping this individual to death after he was down on the floor --

QUESTION: And I can see that as a perfectly relevant consideration except for one thing. Your formulation of it was that if there is any kind of emotional provocation. Your formulation does, in effect simply requires that a provocation element be present, whatever else there may be. And it seems to me clear from the trial judge's finding, if we accept it, that there was some kind of emotional provocation, and I don't know why we don't stop right there and say therefore the utter disregard factor could not be applied here.

MR. THOMAS: I don't think that that necessarily accurately characterizes what the trial judge found here. He said that there was an excessive violent rage, but he

seems to have been describing the nature of the killing and not the original motivation of the defendant for setting things up in this fashion. I think that is the key factor here when you look at the cold-bloodedness of the defendant's behavior, and that is something that the trial judge did not entirely explain.

But that ambiguity I think is resolved when the state supreme court in the course of its independent review function says that it has never seen in 50 years of examining comparable cases a more remorseless, cold-blooded or calculating killer than this individual. So I think that ambiguity, if that's what it is in the trial court's finding, is cured by that --

QUESTION: Mr. Thomas, the victim had a handicap, didn't he?

MR. THOMAS: That's correct, Your Honor.

QUESTION: What was that handicap?

MR. THOMAS: He had at some time prior to his imprisonment shot himself in the head with a 38 caliber revolver. A portion of his brain had been damaged. He had some plastic, cranial plastic material over the top of the injured area. He was partially paralyzed, slow and uncoordinated, and, as Creech indicated in his confession, the law enforcement officers wasn't able to handle himself and Creech was quite well aware that he was not going to

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be able to put up much of a response.

QUESTION: Didn't the trial judge or the sentencing judge also find that even though the victim provoked the altercation, he went on to find that with the victim's attack as an excuse the defendant's murder then took on the many, took on many aspects of an assassination?

MR. THOMAS: That's correct, Your Honor, and I thin that is one of the really important factors that indicates the cold-bloodedness or the focus on cold-bloodedness that the trial court engaged in in its consideration of the case. When you talk about an assassination, when you talk about the victim's attack as an excuse for what happened later, I think what you see is that the trial court is really considering this the kind of utmost callous or cold-blooded behavior that the statute was intended to encompass.

We think that the Ninth Circuit Court of Appeals did not accurately or fully apply this Court's precedent in Walton v. Arizona which has two important components. One of them is that a judicial sentencing system such as we have is entitled to some more deference than other kinds of sentencing systems, and that the Godfrey-Maynard rationale does not fully apply in those circumstances. If you assume that the trial court and the state supreme

court knew the law in this case, knew the requirements of the Constitution and applied it, you have to reach the conclusion that in this process Idaho's courts applied the narrowest possible construction of the utter disregard factor to the circumstances of the case rather than the broadest possible factor.

In Walton and in some of the other cases involving the analogous especially heinous, atrocious, or cruel factor the courts were trying to define a word like heinousness, which is much broader and less specific and much more difficult to deal with in a sentencing situation than the term cold-blooded. Cold-blooded talks about a state of mind, and there are lots of circumstances in which courts have to deal with state of mind descriptions. There are circumstances such as arise when it's necessary to determine what is premeditated and what does it mean, or what is malice of forethought and what does it mean, what is reckless disregard and what does it mean. So there is nothing unusual about calling on the sentencing authority to apply a moral judgment in making the determination that an actor in a criminal case --

QUESTION: Do you think the issue in the case is whether or not this aggravating factor, as described or narrowed by the Idaho Supreme Court, could be applied in any case, or is the claim that it could not be applied to

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any case? Is it so vague that it just couldn't be applied to any, it could not be used as an aggravating factor in any case no matter what the facts are?

MR. THOMAS: Yes, I believe that is what the court of appeals said with this proviso, they said that the factor itself was not invalid, it was just that the Idaho Supreme Court's limiting construction hadn't provided any more guidance than the language of the statute.

QUESTION: Well, all right, but and so the conclusion was it couldn't be used as an aggravating factor in any case?

MR. THOMAS: Yes, as limited, that's correct.

QUESTION: Did the court of appeals make any effort to see if it could be applied to this particular case?

MR. THOMAS: They appeared not to have done so or not to have done so in a very significant fashion, Your Honor, because the court simply said, like the heinousness factor in Godfrey and Maynard or similar factors, the limiting instruction doesn't mean anything different than the statute, and they did not appear to make any --

QUESTION: It was so vague, it was so vague that there is no case that it could be applied to?

MR. THOMAS: That's the way I read the decision,

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Your Honor.

QUESTION: You didn't, the state didn't take the position, I take it in the court of appeals, that in fact as applied by a judge rather than a jury it was not constitutionally vague at all?

MR. THOMAS: We did take the position, as I recall, and I'm not, I don't recall specifically how we set this up. We took the position in a supplemental brief. Walton of course was decided after this case was argued. We took the position in a supplemental brief that our judicial sentencing system did make a difference.

What the Eighth Amendment requires us to do is to construct a sentencing system that is capable of setting aside in a principled and guided way those murderers which should be eligible for the death penalty or should have the death penalty from all the others. Walton tells us that we need to provide some guidance. I would suggest to the Court that we have done that. With the utter disregard factor as it has been limited in particular we have provided some guidance.

It is not mathematically precise guidance because the courts have to use words, but this process is simply one of predicting how words will be understood by other people, and in particular by courts. I think there is considerable predictive value in the cold-bloodedness

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language, the utmost disregard language that the Idaho Supreme Court has used.

QUESTION: Of course that's the very issue that you've just stated, and I still have a little trouble in finding murders that are not pitiless and cold-blooded in Idaho, first degree murders.

MR. THOMAS: That's a valid point, Your Honor. You could say that all murders are pitiless and cold-blooded. However, this factor is --

QUESTION: All first degree murders.

MR. THOMAS: I'm sorry, all first -- you may even say that about all murders, second degree murders at least. However, going back once again to the assumption that courts and judicial sentencers know and apply the law, and know and apply this Court's precedents interpreting the Constitution, one must I think reach the conclusion that all of the courts in this process know that they must apply the narrowest possible construction to the aggravating factor and did so, and therefore that sets what might be called, I suppose, ordinary murders apart in the way this factor is used, and I think that's all we're required to do under the Constitution.

QUESTION: Mr. Thomas, could I come back to the factual findings again? Am I correct that the trial court found both that the defendant had evidenced an excessive

violent rage and also that he had used the attack as an excuse for an assassination?

MR. THOMAS: That's exactly --

QUESTION: They're one and the same, same time found both of those things?

MR. THOMAS: Yes.

QUESTION: What was the authority of the supreme court when confronted with those what I consider utterly incompatible findings? Could it make up its own mind on the basis of the record?

MR. THOMAS: It could indeed. It has said, and said in the Osborn case that its duty was to perform a fully independent review, and that that review was to consider factual support, the evidentiary support for the sentence, whether it was excessive, and whether it was just --

QUESTION: And there was some evidence that although the victim was the attacker, the attack had been in effect invited by the defendant?

MR. THOMAS: Yes.

QUESTION: Had provided the attacker with the means of the attack, and so forth, intending to use that as an excuse.

MR. THOMAS: That is correct, Your Honor.

QUESTION: And presumably that's the finding

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that the supreme court made?

MR. THOMAS: That's our view. I might mention also that in the record that was before the sentencing court and before the supreme court is a record of other cases in which, at least one other case in which Creech was prosecuted, and it reflects an almost consistent behavior on his part of trying to create self-defense or defense of others appearances.

In a case in Idaho in which Creech was prosecuted in 1975 he killed two people in an automobile who had picked him and his girlfriend up while they were hitchhiking on the highway. He suggested to his girlfriend after he had killed them for no reason at all that the reason was to be a defense of her or defense of himself justification. In another case in Oregon where he murdered a young man in a church he threatened a witness and told him that he would kill him if he didn't support his self-defense theory.

QUESTION: Mr. Thomas, I don't see how this is relevant to the utter disregard criteria because it is written in this way, by the murder or circumstances surrounding its commission the defendant exhibits utter disregard. Why does this, why are the circumstances of other crimes entitled to consideration for the purposes that we're dealing with here?

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MR. THOMAS: Well, I think the principal relevant factor from the other crimes is that Creech, just as he did --

QUESTION: No, but why are other crimes relevant at all? Are you reading the utter disregard factor the way I am, the murder refers to this murder, and circumstances surrounding its commission refers to the circumstances of this murder? Are we reading this the same way?

MR. THOMAS: I see your point, Your Honor, and I think we are reading it the same way, but I don't --

QUESTION: Then why should we consider the circumstances of other crimes?

MR. THOMAS: Well, irrespective of the nature of the aggravating factor itself, the court is obliged to consider all of the aspects that are there about the defendant's character and his background and his criminal behavior. But --

QUESTION: But not for purposes of applying this particular section for independent, in order to discharge independent responsibilities, that's what you're saying.

MR. THOMAS: That's true enough.

QUESTION: Okay.

MR. THOMAS: But even with respect to the circumstances surrounding this crime. If one of the

circumstances surrounding the commission of the crime is that Creech is carrying out, consistently with his past behavior, simply his usual motivation that he likes to kill people, that is directly relevant to some of the circumstances surrounding the commission of the crime and it is directly relevant to the question of cold-bloodedness.

QUESTION: But does your code -- all the aggravating circumstances aren't quoted in the brief here, but is the fact that you killed people in the past a separate aggravating circumstance?

MR. THOMAS: Yes, it is, Your Honor.

QUESTION: So that it would have been relevant for that.

MR. THOMAS: That would be correct.

QUESTION: I thought that the relevance of the past, the past activities was simply to prove the fact that he was using this as an excuse because he has used things as an excuse in the past. It doesn't, it doesn't make it any worse, but it goes to prove the fact.

MR. THOMAS: What --

QUESTION: That he has done this before makes it more likely that he, that that indeed was what he was up to this time. I assume it's relevant for that purpose.

MR. THOMAS: It certainly is, and that is a,

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that's a different factor. That is a propensity to commit murder factor which the court also found.

QUESTION: But was this evidence put before the trier of fact for the purpose of supporting a conclusion that this was simply a pretext, that the provocation was simply a pretext?

MR. THOMAS: The sentencing hearing was, involved no additional production of witnesses. It involved the reference back to the preliminary hearing transcript and to other information that was before the court.

QUESTION: He pleaded guilty here, didn't he?

MR. THOMAS: He pleaded guilty. So the argument wasn't specifically made, I don't think, by the prosecuting attorney at that time as to how it should be considered.

If there are no further questions, Your Honor, I will reserve a few moments for rebuttal.

QUESTION: Thank you, Mr. Thomas.

Mr. Gardner.

ORAL ARGUMENT OF CLIFFORD GARDNER

ON BEHALF OF THE RESPONDENT

MR. GARDNER: Mr. Chief Justice, and may it please the Court:

In light of the broad request for relief

contained in petitioner's reply brief and partially in response to Justice White's question, I think it's important to focus for a moment on a procedural aspect of this case that hasn't yet garnered much attention. Pursuant to several aspects of the Ninth Circuit's decision which are not before the Court today this case has been remanded and will be, there will be a resentencing in the Idaho state court.

Thus I think the narrow issue before this Court today, in light of the fact that the case has been remanded, is the propriety of the Ninth Circuit's decision that the Osborn formulation is unconstitutional. And of course as we know from Walton and Lewis that generally mandates a three or four-step inquiry. Is there a valid limiting construction of an aggravating factor, was it applied in the particular case, and if so, is there sufficient evidence to in fact support it.

QUESTION: You say, Mr. Gardner, that the question in this case is whether that, the judicial gloss placed on the Idaho statute by the Idaho Supreme Court was constitutional as applied to this particular defendant?

MR. GARDNER: Well, the Ninth Circuit I think reached two decisions, Your Honor. The first was that the Osborn formulation itself did not provide sufficient guidance, and the --

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QUESTION: In any case.

MR. GARDNER: In any case. And the second was that accepting the attorney general's characterization of the utter disregard factor or the cold-blooded limitation as without emotion, it was not in fact applied in this case.

QUESTION: So it made two separate holdings in --

MR. GARDNER: I believe that's an accurate characterization of the appellate court's opinion.

QUESTION: Do we know that on remand the Idaho Supreme Court is going to rest the sentence on this factor, on the particular aggravating factor, circumstance in question here?

MR. GARDNER: Well, Your Honor, because of the nature of the remand it's actually going back for a full resentencing hearing because there was a failure to allow any evidence in mitigation. So it's not in fact going back to the Idaho Supreme Court, it's going back to the Idaho trial court.

QUESTION: I see.

QUESTION: Did we limit the grant in this case?

MR. GARDNER: Yes, Your Honor.

QUESTION: Just to the vagueness.

MR. GARDNER: Just to the vagueness question.

QUESTION: Just to the first holding that you described.

MR. GARDNER: I believe that's right. That is, the narrow issue before us today is simply the question of whether the utter --

QUESTION: Not the second holding that you described.

MR. GARDNER: I don't believe that is at issue in light of the remand.

QUESTION: So the particulars of this particular defendant, the evidence against this particular defendant are not really before us?

QUESTION: Your submission --

QUESTION: Let him answer my question.

MR. GARDNER: Well, I think necessarily, Your Honor, in the context of this case in defending the Ninth Circuit's decision on the vagueness issue, and perhaps my response to Your Honor's question was somewhat too quick, is that the Ninth Circuit decision can be defended on, I believe on either ground, the decision on the vagueness issue which is that the utter disregard factor as formulated by Osborn is vague, and its decision that if it's not vague, if it does mean without emotion, as the state has contended --

QUESTION: But if there's going to be a

resentencing here in any event, at least the most important element that we could decide, I suppose, is whether or not the judicial gloss, et cetera, is or is not constitutional on its face.

MR. GARDNER: I think that is absolutely right. Because there will be a remand for resentencing, that is the primary issue before the Court. And I think --

QUESTION: That's the issue we limited our grant to.

MR. GARDNER: Well, Your Honor is correct. The grant of cert was limited to question 1 presented in the petition. Question 1, I have to say, incorporated a number of sub-issues. The first and the most important issue was in fact whether the Osborn formulation is constitutional, but with that came a number of subsidiary issues, if so was it applied, was there sufficient evidence, or was it cured on appeal. And I suppose my point is that in light of the remand those latter three issues I think are less important for this Court's consideration.

QUESTION: Are there any statutory aggravating factors other than utter disregard that could be the basis for imposing the death sentence here?

MR. GARDNER: Certainly the trial court found a number of statutory aggravating circumstances true, under

the Idaho scheme any one of which is enough. The answer I suppose is yes on the facts of this case.

Turning then to the question of whether the Osborn formulation adequately channels the sentencer's discretion, the parties below and the Ninth Circuit, and in fact the Eighth Circuit and Tenth Circuit in Newlon v. Armontrout, Moore v. Clarke, and the original Cartwright decision have all focused on the distinction between subjective and objective criteria. And while I think that's a useful distinction I think in some ways with respect to this factor, although it's accurate, it is a little too broad to accurately describe the precise problem with the utter --

QUESTION: May I interrupt you just a second? Do you take the position that subjective factors can never be aggravating factors?

MR. GARDNER: No, Your Honor, I don't.

QUESTION: Okay, so this is within the terminology that you're using. Utter disregard is a subjective factor, right?

MR. GARDNER: Utter disregard is a subjective factor.

QUESTION: Okay.

MR. GARDNER: And I think this is precisely where I am headed, Your Honor, and that is it's not merely

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that utter disregard or that cold-blooded is subjective. It's that if you look at the record actually before the Court in this case you will see that cold-blooded can mean three or four very different things, and that is the problem with --

QUESTION: So, I mean, you're saying that they have given so many limiting definitions that there is no limiting definition. You're not saying, now at least, that there cannot be a valid limiting definition which is phrased in terms solely of subjective factors.

MR. GARDNER: I think that's right.

QUESTION: Okay.

MR. GARDNER: I think there are some subjective factors that in fact can properly limit the sentencer's discretion. The problem with cold-blooded as one of them is that it is an umbrella term which incorporates several very different concepts. In fact I think some of the Court's questions earlier today indicate that very problem. Let me illustrate if I can with what I believe some of those different definitions are.

In 1983 when this case was first argued to the Idaho Supreme Court the attorney general of Idaho defending the utter disregard factor in this case said that it applied to defendants who lacked the moral restraints against killing, lacked the moral precepts

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against killing. That was how it was defended in 1983. The case came into Federal court and before this Court and it's now defined as a killing without emotion, without significant provocation. Now there is a significant shift. Those are two very different definitions. In Florida, of course as we know from the attorney general's briefing and from all the briefing in the case, the coldness factor is defined as something that we call super premeditation, which is yet another way to describe coldness.

And so we see in this case that that, I think, is the fundamental problem with using a term like cold-blooded, not merely that it is subjective, but that it is an umbrella term that can refer to many different concepts. When, there is a real practical --

QUESTION: I suppose it's okay if it refers to several different concepts, so long as they are a limited number of concepts. Is there anything that says the limiting, each limiting factor must be limited to one single thing? I mean, so long as it separates the, from the generality of murderer the murderer in the particular case, what difference does it make if it embraces more than one single characteristic?

MR. GARDNER: I agree with Your Honor. The problem, however, is that when none of them or even all of

them haven't been identified, then the, there's a real practical side to the problem which is when you come into court in Idaho and you have this umbrella-like definition which contains three or four different possibilities, the parties, the defendant and the prosecutor and indeed the trial court who is the sentencer in Idaho, doesn't know which of the definitions to use, if any, or all. And so the problem is that you may have one trial judge applying the super premeditation factor, the parties present their evidence and the trial court either finds utter disregard or finds no utter disregard based on super premeditation. You may have a trial judge in the next court room that's applying without emotion.

And so the problem isn't that any of these aren't valid or that all of them aren't valid, but we don't know which ones are being used in which court rooms.

QUESTION: Well, but maybe you're not entitled to know that. If all of them are valid, which is one hypothesis you advance, then the fact that one judge may say well, this is a case involving super premeditation and then the judge in the next court says well, this particular capital case involves cold-blooded, there's no fatal flaw about that, is there?

MR. GARDNER: Well, let me back up a step and say the first point is that I wouldn't concede that the

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definitions I have just given you are necessarily independently valid, but let's assume for a minute that they are. I think the problem is that it still leads to the type of arbitrary and capricious sentencing. You could have a case -- and this Court has two cases before it right now. One is Arave v. Paradis which came out of the Ninth Circuit on this where the trial court in fact appears to have applied the super premeditation factor, finding that there was no emotion. You have this case where the trial court says I find utter disregard because there is emotion. It's something like a catch-22. The judge knows it when he sees it, the parties really have no knowledge of which theory the trial court is going to be relying on.

QUESTION: Well, then you, but you have to say then that one of the, one of those factors is, one of those approaches is invalid as a limiting construction, not that they're different from one another. Because you could have two limiting constructions both of which were different and both of which were valid, I think, by hypothesis.

MR. GARDNER: I think that's right. And if the Idaho Supreme Court were to pick either one of these, or in fact even to say that all three of these were, to articulate a limiting definition that said all three of

these, any one of which may be found, that might be sufficient. I use these three examples as illustrative of the problem. They are not necessarily all-inclusive of all the possibilities of cold-blooded. They are simply those possibilities that are apparent on the record.

One I didn't mention was the Webster's definition that has been provided to us by the attorney general which, contrary to Judge Trott's view that cold-blooded meant without any emotion, Webster says without warm emotion. I mean, there are as many definitions probably as there are dictionaries.

QUESTION: Okay, but that is a failing you can find with almost any definition. You can find different meanings in the dictionary for words. You're never going to get away from that.

MR. GARDNER: Well, necessarily we communicate in words and there is an inherent imprecision in all words, as Your Honor suggests. I guess the principle here is that when there are so many different definitions and we don't know which one any trial court is using and we have no notice, we have no statement that any or all of them are proper, then that leads to the type of arbitrary imposition of the death penalty.

QUESTION: Do you have any trouble with the Walton decision in upholding that aggravating

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circumstance?

MR. GARDNER: No, Your Honor, I don't. I think it's entirely consistent with the notion I am presenting of it's not merely that we have a subjective term, what we have is an umbrella term that has these varying definitions --

QUESTION: Well, the umbrella term in Walton was, one of them was especially depraved, and I thought we held that that was given a meaningful construction if the killer showed an indifference to the suffering of the victim.

MR. GARDNER: Showing an indifference to the suffering of the victim, yes, Your Honor.

QUESTION: So that would, you would accept that?

MR. GARDNER: Oh, I think so.

QUESTION: Or evidences a sense of pleasure.

MR. GARDNER: Evidences -- as I recall the limitation it was evidencing the murder, evidencing a sense of debasement or perversion.

QUESTION: Evidences a sense of pleasure.

MR. GARDNER: And I think the reason that the cases are distinguishable gets back to really the practical side of the problem which is when you go into court in Arizona and the parties are looking at the Arizona limiting definition, the parties are going to see,

okay, what I have to prove, what I have to defend against, or the trial judge will say what he or she has to find, is not simply depraved, which I think is analogous to cold-blooded, but I have to find relishing the murder, evidencing debasement or perversion. I have to find that there was an indifference, a shown indifference to the murder. The parties, if I can use somewhat of a loose expression, they know what they're about.

In Idaho the parties have to come in and they have to say okay, I have to show he's cold-blooded or not cold-blooded. That's an abstraction. It means other things. And what you're proving will depend on what those other things mean, and it can mean so many other things. That's the difference between Walton on the one hand and Osborn on the other, the difference between an abstraction, which is Osborn, cold-blooded, and something that is I think quite real.

Turn for a moment to the factual findings that were made in this case. There were several questions on it earlier. As Your Honor has, I think Justice Souter, you noted some of the factual findings. Defendant did not instigate the fight. That was a factual finding. The victim engaged in an unprovoked attack. The defendant was justified in defending himself, and significantly, once commenced the killing appears to be intentional. Those

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were the factual findings, of course in addition to the fact that it was an excessive violent rage.

I think if you look at those factual findings I think you see that the Ninth Circuit was very correct in holding that if the cold-blooded means without emotion it could not have been applied in this case. I think it's very difficult to look at the trial court's findings in this case and think that in fact the trial court was operating under some impression that it was without emotion, was the touchstone.

QUESTION: Did the Idaho Supreme Court have to accept the findings of the trial court or could it reexamine the whole thing de novo?

MR. GARDNER: Yes, Your Honor.

QUESTION: So we don't know that the Idaho Supreme Court was accepting -- I find it impossible to see how you could accept both the finding that the defendant used it as an intentional excuse to assassinate and the finding that he was in an excessive violent rage.

MR. GARDNER: Well, the Idaho Supreme --

QUESTION: I think those two are quite incompatible to me, so I assume that the Idaho Supreme Court selected one or the other. It was free to select one or the other, I assume.

MR. GARDNER: The Idaho Supreme Court could make

a de novo review. I think if you look at the Idaho Supreme Court opinion you find a similar tension because they find in the same sentence both the aggravating circumstances and the mitigating circumstances are supported by the evidence. And that's really the only statement that the Idaho Supreme Court makes as to these findings that Your Honor has suggested are inconsistent.

The only additional insight we can gain from the Idaho Supreme Court's opinion is their observation that in fact the trial court did not find that this was committed by plan by Mr. Creech. So although they may have been free to, they did not. I think that much we can glean from the actual opinion.

QUESTION: All of this is getting us into the facts of the particular case rather than the question on which we granted cert, which was whether the, whether the aggravating factor in itself is a permissible one --

MR. GARDNER: I think Your Honor --

QUESTION: -- regardless of how it was applied here.

MR. GARDNER: It does go beyond the actual language of the Osborn formulation and talks about the application to this case. Then if there are no other questions on the actual application of the utter disregard factor I would be prepared to submit it.

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QUESTION: Does Lewis v. Jeffers prohibit us from looking at the way in which Idaho has applied the particular definition in order to understand the meaning of the definition?

MR. GARDNER: I think solely looking at Lewis my answer would be yes, Your Honor. Lewis of course suggested that once a limiting definition is proposed by the state and if it's a valid limiting definition you can't look at actually how it's applied. That simply falls under the third part, the Jackson v. Virginia, whether a rational fact finder could reach the result.

I think, however, there is a tension between that aspect of Lewis and Sochor v. Florida. In Sochor v. Florida this Court recognized that in a judge sentencing state if the limiting definition is not quite up to snuff you can in fact look at applications. That was a case out of Florida where the limiting definition that this Court had approved had not been in fact used by Florida and this Court looked at how it was applied.

QUESTION: When we're passing upon the limiting definition in the first instance is it then appropriate to see the manner in which the court, the courts of the state have applied the definition over a number of cases?

MR. GARDNER: I think under Sochor v. Florida it is, and certainly in a judge sentencing case it should be.

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Trial courts are presumed to be aware not only of the articulated principles that come down in cases, but I assume of the applications in those very cases. So I think it makes sense that in a judge sentencing case, as Idaho is, that the cases applying the limiting definition should be considered.

QUESTION: Why?

MR. GARDNER: Well, I think, Your Honor --

QUESTION: Do you think if you looked at a series of these cases you think you could construct out of the, out of the way this factor was applied a, some limiting construction that would be satisfactory?

MR. GARDNER: I don't believe so, Your Honor. I think there are two separate questions --

QUESTION: Well then why are the application facts relevant?

MR. GARDNER: I think that you cannot construct one in this case because in fact the limiting definition is not constitutionally proper. I think were it constitutionally proper, perhaps you could construct, as in Sochor the Court was able to construct a reasonable interpretation. The reason, the more I suppose theoretical reason why I think it's proper in a judge sentencing case or a judge sentencing state to look at the applications is because the court is presumed, the trial

courts are presumed to be aware of those applications. So it has at least to me some intrinsic sense to look at those applications to see what a trial judge sitting in the day-to-day rigors of his practice, or of judging, is going to be aware of.

QUESTION: Thank you, Mr. Gardner.

Mr. Thomas, you have 4 minutes remaining.

MR. THOMAS: Thank you, Mr. Chief Justice. If the Court has no further questions, we would conclude our argument.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Thomas.

The case is submitted.

(Whereupon, at 11:48 a.m., the case in the above-entitled matter was submitted.)

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BY Ann-Marie Federico

(REPORTER)