Capital Defense Journal

Volume 6 | Issue 1 Article 3

9-1-1993

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United States Supreme Court

FACTS

In 1981, while serving life sentences for other murders, Thomas Eugene Creech beat and kicked to death a fellow inmate at the Idaho State Penitentiary. The victim, David Dale Jensen, was serving a sentence for stealing automobiles. Prior to his incarceration, part of Jensen's brain had been removed and a plastic plate inserted in his skull. Though Creech himself gave conflicting accounts of the incident, the Idaho Supreme Court found that Jensen had approached Creech wielding, as a weapon, a sock filled with batteries. Creech took the weapon away, beat Jensen until the plate in his head broke, and kicked him about the throat and head. Jensen died later the same day.

Creech pleaded guilty to first-degree murder. In accordance with Idaho law,[1] the judge held a sentencing hearing, after which he issued written findings in the format prescribed by Rule 33.1 of the Idaho Criminal Rules. Under the heading "Facts and Argument Found in Aggravation," the judge stated:

> [T]he victim, once the attack commenced, was under the complete domination and control of the defendant. The murder itself was extremely gruesome evidencing an excessive violent rage. With the victim's attack as an excuse, the . . . murder then took on many aspects of an assassination. These violent actions . . . went well beyond self-defense.[2]

The judge then found beyond a reasonable doubt five statutory aggravating circumstances, including that Creech, "[b]y the murder, or circumstances surrounding its commission, ... exhibited utter disregard for human life."[3] Finding that the aggravating circumstances outweighed the mitigating, the judge sentenced Creech to death.

After remanding for the trial judge to impose sentence in open court in Creech's presence, the Idaho Supreme Court affirmed. The court rejected Creech's argument that the "utter disregard for human life" circumstance is unconstitutionally vague, reaffirming the limiting construction it had placed on the statutory language in *State v. Osborn*,[4] that "the phrase is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., 'the cold-blooded, pitiless slayer.'"[5]

The United States District Court for the District of Idaho denied habeas relief. However, the Court of Appeals for the Ninth Circuit agreed with Creech that the "utter disregard" phrase does not adequately channel sentencing discretion, and that the narrowing construction fails as well, because it calls for a subjective determination, rather than defining the terms of the statutory aggravating circumstance through objective standards[6] as required by *Walton v. Arizona*.[7] The Ninth Circuit was also unable to reconcile the trial judge's findings, that Jensen attacked Creech "without provocation" and that the murder "evidenced an excessive violent rage," with the conclusion that Creech was a "cold-blooded, pitiless" killer.[8] The Court of Appeals therefore found the "utter disregard" standard facially invalid.[9]

HOLDING

The Supreme Court reversed the Ninth Circuit, holding that, because the narrowing construction placed upon the statutory language did not consist of perjorative adjectives such as "especially heinous, atrocious, or cruel" or "outrageously vile, horrible and inhuman," but instead defined a state of mind that is objectively ascertainable from surrounding facts, and because the circumstance as construed does serve to narrow the class of murderers eligible for the death penalty under Idaho's capital murder statute, the Idaho statutory language as construed by the narrowing construction of the Idaho Supreme Court meets constitutional standards.

ANALYSIS /APPLICATION IN VIRGINIA

The Court conducted its analysis of the Idaho "utter disregard" aggravating circumstance against the background of its decisions in two Arizona cases, *Walton v. Arizona*[10] and *Lewis v. Jeffers*,[11] addressing capital sentencing discretion. The Court has held, and noted here, that a capital sentencing scheme must "suitably direc[t] and limi[t]" the sentencer's discretion "so as to minimize the risk of wholly arbitrary and capricious action."[12] The scheme must channel sentencing discretion by "clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death."[13] The Court cited *Walton* for the inquiry it must undertake to determine whether a particular aggravating circumstance meets these standards. If the state courts have further defined the terms used in the language defining the circumstance, the federal court must determine whether the existing narrowing construction provides "**some** guidance to the sentencer."[14]

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[1] Idaho Code § 19-2515(d) (1987).

[2] *Arave v. Creech*, 113 S. Ct. 1534, 1539 (1993).

[3] *Id.* at 1539.

[4] 631 P.2d 187 (Idaho 1981).

[5] *Id.* at 201.

[6] *Creech v. Arave*, 947 F.2d 873, 884 (9th Cir. 1991).

[7] 497 U.S. 639 (1990). *See* case summary of *Walton*, Capital Defense Digest, Vol. 3, No. 1, p. 5 (1990).

[8] 947 F.2d at 884.

[9] *Id.* at 884-85.

[10] 497 U.S. 639 (1990).

[11] 497 U.S. 764 (1990). *See* case summary of *Lewis*, Capital Defense Digest, Vol. 3, No. 1, p. 7 (1990).

[12] 113 S. Ct. at 1540 (quoting *Lewis v. Jeffers*, 497 U.S. at 774).

[13] 497 U.S. at 774.

[14] "'. . . [A] federal court . . . must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and if they have done so, whether those definitions are constitutionally sufficient, i.e., whether they provide **some** guidance to the sentencer.'" 113 S. Ct. at 1541 (quoting *Walton*, 497 U.S. at 654 (emphasis in original)). The Court found that, as the Idaho Supreme Court had adopted a limiting construction, it was not necessary to decide whether the "utter disregard" circumstance was facially constitutional. *Id.*

In *Osborn*, the Idaho Supreme Court had defined "utter disregard for human life" as "reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer."[15] Justice O'Connor, writing for the majority in *Creech*, defined "pitiless" as "devoid of, or unmoved by, mercy or compassion," and "cold-blooded" as "marked by absence of warm feelings: without consideration, compunction or clemency; matter of fact, emotionless."[16] The Court went to considerable length to point out that the Idaho Supreme Court had **not** used "cold-blooded" to imply or denote premeditation.[17] As premeditation is specifically addressed elsewhere in the Idaho homicide statutes, the Court reasoned, had the Idaho Supreme Court meant premeditation it would have used the statutory language.

The import of this narrowing of the language and meaning of the aggravating circumstance, according to the Court, is that it requires the sentencer to make an **objective** determination about the defendant's attitude toward his conduct and his victim. The terms "cold-blooded" and "pitiless" describe the defendant's state of mind to a degree beyond that which is necessary to prove an element of the offense. The state of mind described by the aggravating circumstance is not the mens rea required by the homicide statutes, but is in fact an absence of feeling or sympathy about and toward the act and the victim. The Court noted the difficulty of finding the negative, but held that the construction adequately guides the discretion of the sentencer in that it "defines a state of mind that is ascertainable from surrounding facts."[18]

In conducting its analysis, the Court noted that it was not faced with pejorative adjectives such as "especially heinous, atrocious, or cruel" or "outrageously or wantonly vile, horrible and inhuman."[19] Because these terms describe a crime as a whole, the Court has held them to be unconstitutionally vague.[20] The Idaho "utter disregard" circumstance and its narrowing construction of "cold-blooded, pitiless slayer," as construed by the Court, survive because they describe only the defendant's attitude toward his act and his victim, and not the crime as a whole.

The Court's application of this reasoning and analysis is crucial to the Virginia practitioner litigating the constitutionality of the Virginia "vileness" factor. The Virginia "vileness" aggravating circumstance requires a sentencer to find that a defendant's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim."[21] It is clear from the holding of *Godfrey v. Georgia*,[22] and subsequent Supreme Court holdings, that the statutory language is unconstitutional on its face. In applying the *Walton* vagueness analysis to Virginia's aggravating circumstance, then, the Court would have to look to the narrowing construction, as it did with Idaho's. Though the Court found that the Idaho construction survived scrutiny, the opinion does not suggest the same result for Virginia's narrowing construction, and in fact indicates the contrary.

The Supreme Court of Virginia, in *Smith v. Commonwealth*,[23] has construed "depravity of mind" to mean "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."[24] The court contextually construed the term "aggravated battery" to mean "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder."[25]

Arguably, Virginia's narrowing construction is deficient because of language and characteristics the Court has found unconstituional in the past, but found not to be present in the Idaho construction. The Virginia construction describes the crime as a whole, in that it addresses the defendant's conduct in committing the entire offense. Further, it requires the sentencer (in Virginia, usually a jury) to know and assess the legal terms of art "malice" and "premeditation," and then make a subjective and comparative determination about the facts surrounding the act in question. If the sentencer feels that the "degree of moral turpitude and psychical debasement," patently pejorative terms, displayed by the act surpass the legal requirements for the commission of first degree murder, then the sentencer may find the aggravating circumstance. Further, the language requires the fact finder to assess the legal concept of "murder," determine the degree of culpability in the battery underlying the killing in question, and measure the one against the other. In no way is either of the undertakings an objective determination about some aspect of the act that will guide the sentencer in discerning a greater degree of individual culpability in a particular defendant. They do not suitably direct and limit the sentencer's discretion "so as to minimize the risk of wholly arbitrary and capricious action."[26] Because the *Smith* construction is indeterminate and subjective, it does not add any measure of specificity to the language of the circumstance. What is left is the

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[15] 631 P.2d at 200-01.

[16] 113 S.Ct. at 1541 (citing Webster's Third New International Dictionary at 1726 (1986)). It is important to note, as the Ninth Circuit did below, that the trial court's finding that Creech's actions "evidenc[ed] an excessive, violent rage," 113 S.Ct. at 1539 (citing App. 32)., does not seem to coincide with the Court's definition of the aggravating circumstance he was sentenced under, i.e., the pitiless slayer, "emotionless." The Supreme Court did not address this inconsistency, however, as Creech was awarded a new sentencing hearing, at which the issue would presumably be addressed. *Id.* at 1544-45.

[17] In rebuttal on this point, the dissent cited Justice O'Connor's own words for the majority in *United States v. Frady*, 456 U.S. 152, 170 (1982):

> Justice O'Connor, writing for the court, described the District of Columbia's homicide statute: "'In homespun terminology, intentional murder is in the first degree if committed in cold-blood, and is murder in the second degree if committed on impulse or in the sudden heat of passion.'"

113 S. Ct. at 1548. (Blackmun, J., dissenting) (citations omitted).

[18] 113 S. Ct. at 1542. *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716-717 (1983) ("The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove . . . but if it can be ascertained it is as much a fact as anything else." (quoting *Edginton v. Fitzmaurice*, 29 Ch.Div. 459, 483 (1885))). *Id.*

[19] 113 S. Ct. at 1541.

[20] *Id.* (citing *Shell v. Mississippi*, 498 U.S. 1 (1990) (*per curiam*). *See* case summary of *Shell*, Capital Defense Digest, Vol. 3, No. 2, p. 3 (1991); *See also Maynard v. Cartwright*, 486 U.S. 356 (1988); case summary of *Maynard*, Capital Defense Digest, Vol. 1, No. 1, p. 15 (1988); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

[21] Va. Code Ann. § 19.2-264.4(C) (1990).

[22] 446 U.S. 420 (1980). The *Godfrey* court found the defendant's death sentence invalid because of the failure of the state court to apply a constitutional limiting construction to the aggravating circumstance where a murder is found to be "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." The Court found that "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.* at 433. *See* Lago, *Litigating the Vileness Factor*, Capital Defense Digest, Vol. 4, No. 1, p. 25 (1991).

[23] 219 Va. 455, 248 S.E.2d 135 (1978).

[24] *Id.* at 478, 248 S.E.2d at 149.

[25] *Id.*

[26] *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

very language rejected as constitutionally infirm by the *Godfrey* Court.

In *Shell v. Mississippi*,[27] the Court examined limiting instructions very similar to Virginia's *Smith* construction. In *Shell*, the Mississippi trial court instructed the sentencing jury that "heinous" meant "extremely wicked or vile;" that "atrocious" meant "outrageously wicked and vile;" and that "cruel" meant "designed to inflict a high degree of pain with indifference."[28] The Court's summary opinion stated that these limiting constructions are not constitutionally sufficient. In his concurrance, Justice Marshall wrote that, "there is no meaningful distinction between these ... formulations and the 'outrageously or wantonly vile, horrible and inhuman' instruction expressly invalidated in *Godfrey v. Georgia*," as they provide no further guidance to the sentencer.[29] The Georgia factors are, of course, facially identical to Virginia's.

The Supreme Court of Virginia has held that a trial court's refusal to give a definitional instruction to the jury and instead instructing only in the statutory language of aggravating factors "does not constitute reversible error."[30] While Virginia's limiting construction has not yet been addressed by the United States Supreme Court, the decision in *Shell* indicates that even if the trial court elects to give it as a limiting jury instruction, it is probably not sufficient and should be consistantly challenged.

The second part of the Court's analysis of the Idaho "utter disregard" circumstance also suggests that *Creech* provides no support for the Virginia "vileness" factor. Here, the Court addressed the degree to which the aggravating circumstance narrows the class of persons eligible for the death penalty. Justice O'Connor stated that if the sentencer could fairly conclude that the aggravating circumstance applies to **every** defendant eligible for the death penalty, the circumstance is constitutionally infirm.[31] The acceptability of the Idaho narrowing construction hinges, under this analysis, on the great breadth of the Idaho capital murder statute. While the Court acknowledged that the word "pitiless," standing alone, "might not narrow the class of defendants eligible for the death penalty," it found that, given the Idaho statutory scheme, a sentencing judge could reasonably find that not all Idaho capital murderers are "cold-blooded."[32]

Under the Idaho murder statute,[33] all first-degree murderers are eligible for the death penalty. Further, the class of first-degree murderers under Idaho law is itself broad and includes some who kill without specific intent or who kill with some provocation.[34] Some of these death-eligible defendants, therefore, do exhibit feeling. "Some, for example, kill with anger, jealousy, revenge, or a variety of other emotions."[35] Idaho satisfies the narrowing requirement, then, because it has "identifie[d] the subclass of defendants who kill without feeling or sympathy as more deserving of death."[36]

In contrast, the Virginia capital murder statute, in enumerating the categories of killings that qualify a defendant for the death penalty, specifies that under each category the killing must be "willful, deliberate, and premeditated," and must include a predicate felony or further circumstance.[37] This language eliminates those who act with any provocation or without specific intent. The requirement that an aggravating circumstance must "genuinely narrow the class of persons eligible for the death penalty" is much harder to satisfy when applied to the Virginia statute than when applied to the broad Idaho statute.

The Idaho construction eliminates from the death eligible class those who kill with some emotion or feeling, defendants who are initially included in the class of first-degree murder defendants. Virginia's definition of first-degree murder, however, already limits the class to those who kill with specific intent in the course of certain specified conduct. The Virginia "vileness" factor does not narrow this class in any way.

Arave v. Creech also provides some additional guidance for defense attorneys in habeas proceedings. The *Godfrey* and *Maynard* line of cases suggests that appellate action by state courts can save a death sentence even if instructions at trial were insufficient.[38] In *Walton*, the Supreme Court advised that federal courts were not to undertake a review of state appellate courts' application of an aggravating circumstance, when evaluating a claim that the court was not consistantly adhering to a constitutionally acceptible narrowing construction. However, in *Sochor v. Florida*, the Court found that the Florida Supreme Court had not adhered to a single limiting construction of its "heinousness" factor.[39] In *Jeffers*, the Court stated that the question whether state courts have applied an aggravating circumstance properly is separate from the question whether the circumstance, as applied, is facially valid.[40] In *Creech*, the Court uses these precedents to hold that "a federal court may consider state court **formulations** of a limiting construction to ensure that they are consistent. But our decisions do not authorize review of state court cases to determine whether a limiting construction has been **applied** consistently."[41]

When arguing in habeas proceedings, then, that nothing the Supreme Court of Virginia has done saves the "vileness"circumstance from constitutional infirmity, it is imperative to be aware of and honor this distinction. While the distinction may be specious and for practical purposes purely semantic, the lesson seems to be that deficiencies in Virginia's application of the "vileness" circumstance should characterized as failure to adhere to a single limiting construction.[42] Federal courts will not review the application of narrowing constructions. They will review the consistency of their formulations.

Summary and analysis by :
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[27] 498 U.S 1 (1990) (per curiam). *See* case summary of *Shell*, Capital Defense Digest, Vol. 3, No. 2, p. 3 (1991).

[28] 498 U.S at 2.

[29] *Id.* at 4 (interior cites omitted).

[30] *Clark v. Commonwealth*, 219 Va. 237, 243, 257 S.E.2d 784, 790 (1979). Though the Supreme Court has not addressed this ruling as yet, the decisions in *Godfrey*, *Maynard*, and *Shell* indicate that this opinion is no longer good law.

[31] 113 S. Ct. at 1542 (citing *Maynard*, 486 U.S. at 364 (invalidating circumstance that "an ordinary person could honestly believe" described every murder)) (emphasis in original).

[32] 113 S. Ct. at 1543.

[33] Idaho Code § 18-4004 (1987).

[34] Idaho Code § 18-4001 (1987). The Court noted that these homicides would be second-degree murder in other jurisdictions, but are elevated to the first degree under Idaho law by the presence of additional factors, one of which, that the homicide was committed by an inmate serving time for a prior murder, was applicable to Creech. (*See* Idaho Code § 18-4003(c)(1987)). 113 S.Ct. at 1543.

[35] 113 S. Ct. at 1543.

[36] *Id.*

[37] Va. Code Ann. § 18.2-31 (1990).

[38] *See, e.g., Smith v. Dixon*, 996 F.2d 667 (4th Cir 1993) and case summary of *Smith*, Capital Defense Digest, this issue.

[39] *Sochor v. Florida*, 112 S. Ct. 2114 (1992). *See* case summary of *Sochor*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992).

[40] 497 U.S. at 778-80.

[41] 113 S. Ct. at 1544 (emphasis added).

[42] *See Sochor*, 112 S. Ct. 2114 (holding that Florida state courts had not adhered to a single limiting construction of "heinous, atrocious or cruel").