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Arave v. Creech: UTTER DISREGARD FOR THE "CLEAR AND OBJECTIVE" STANDARD FOR DEATH SENTENCING

INTRODUCTION

Because a sentence of death is unique in terms of its severity and irrevocability,[1] the Supreme Court of the United States will not tolerate capital sentencing systems that allow the death penalty to be "freakishly" and "wantonly" imposed.[2] To satisfy the demands of the Eighth and Fourteenth Amendments, many states enacted statutes defining the aggravating circumstances that determine whether a particular first-degree murder warrants the imposition of the death penalty. The Court has repeatedly held that a statutory aggravating circumstance must channel and limit the discretion of the sentencer by providing "clear and objective" standards.[3]

In *Arave v. Creech*,[4] the Supreme Court upheld the constitutionality of Idaho's aggravating circumstance, which authorized the imposition of the death penalty if the defendant exhibited "utter disregard for human life."[5] The Court held that the Idaho Supreme Court provided a constitutionally sufficient limiting construction of the "utter disregard" aggravating circumstance to refer to the "cold-blooded pitiless slayer."[6] *Arave* marks an unjustified expansion of the "clear and objective" standard to include statutory aggravating circumstances that make subjective reference to a defendant's state of mind.

This Comment analyzes the Court's decision that Idaho's limiting construction adequately channels sentencing discretion as required by the Eighth and Fourteenth Amendments. Part I examines the historical development of the "clear and objective" standard and the future implications of the decision. Part II provides the procedural history and factual background of *Arave v. Creech*. Part III scrutinizes the Court's reliance on *Walton v. Arizona*[7] as precedent for upholding Idaho's statutory aggravating circumstance. It specifically discusses how the majority's inaccurate application of *Walton* undermines the Court's prior decisions, which consist-

1. Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); Jeanne A. Burke, Casenote, *Nebraska's "Exceptional Depravity" Language at Death's Door:* Moore v. Clarke, 24 CREIGHTON L. REV. 1019, 1028 (1991); Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 946 (1986). For an illustration of the Supreme Court's acceptance of the "death is different" principle, see Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., Brennan, J., & Marshall, J., concurring in part and dissenting in part); Solem v. Helm, 463 U.S. 277, 306 (1983) (Burger, C.J., White, J., Rehnquist, J., and O'Connor, J., dissenting); Enmund v. Florida, 458 U.S. 782, 797 (1982); Beck v. Alabama, 447 U.S. 625, 637 (1980), *rev'd*, 485 So.2d 1203 (Ala. Ct. App. 1984); Rummel v. Estelle, 445 U.S. 263, 272 (1980).

2. *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

3. Godfrey v. Georgia, 446 U.S. 420, 428 (1980), *cert. denied*, 456 U.S. 919 (1982).

4. 113 S. Ct. 1534 (1993).

5. *Id.* at 1541 (quoting IDAHO CODE § 19-2515(g)(6) (1990)).

6. *Arave*, 113 S. Ct. at 1541.

7. 497 U.S. 639 (1990).

ently held that an aggravating circumstance must make reference to facts capable of objective determination. Finally, this Comment advocates the elimination of subjective criteria from capital sentencing schemes and suggests that the Supreme Court mandate that a limiting construction of a facially invalid aggravating circumstance must make objective reference to the suffering of the victim.

I. BACKGROUND

A. *The Eighth Amendment Principle of Guided Discretion*

Capital punishment has undergone dramatic change since it was inherited by the United States from English law.[8] At the time of independence, most homicides and all murders were automatically punishable by death. Beginning in the eighteenth century, the states created a two-degree sentencing scheme for murder and restricted automatic imposition of the death penalty to first-degree murderers.[9] From the middle of the nineteenth century until the 1970s, state capital sentencing schemes permitted unguided discretion by a judge or jury in deciding whether a murderer should live or die.[10]

The turning point in the struggle against unguided discretion in capital sentencing came in 1972 in *Furman v. Georgia*.[11] In *Furman*, the United States Supreme Court established that the arbitrary imposition of the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution.[12] The majority emphasized that a capital defendant deserves constitutional guarantees that ensure that the death penalty is imposed in a consistent and rational manner.[13] According to *Furman*, a state capital sentencing scheme must provide a "meaningful basis for distinguishing

8. For a history of the states' use of capital punishment before 1970, *see* WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982 (1984); Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980); Arthur J. Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355 (1973).

9. BOWERS, *supra* note 8, at 7-9.

10. *See id.* at 15-18.

11. 408 U.S. 238 (1972).

12. *Id.* at 239-40. For an in-depth discussion of the *Furman* decision, see Kenneth M. Murchison, *Toward a Perspective on the Death Penalty Cases*, 27 EMORY L.J. 469, 480-91 (1978); Note, *Discretion and Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1692-99 (1974); Thomas P. Gilliss, Recent Developments, *The Furman Case: What Life is Left in the Death Penalty*, 22 CATH. U. L. REV. 651 (1973).

13. All five justices who formed the majority wrote separate concurring opinions. *Furman*, 408 U.S. at 240. Justices Brennan and Marshall concluded that the death penalty was excessive and unnecessary and was therefore constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments. *Id.* at 305 (Brennan, J., concurring); *id.* at 358-59 (Marshall, J., concurring). Justices Brennan and Marshall continued to maintain that because the death penalty is cruel and unusual punishment, it should never be imposed by the states. *See* Maynard v. Cartwright, 486 U.S. 356, 366 (1988). Justices Douglas, Stewart, and White did not agree that the death penalty was a per se violation of the Eighth and Fourteenth Amendments, but held only that those amendments prohibited a sentence of death from being imposed at the complete discretion of the sentencer. *Furman*, 408 U.S. at 256-57 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 313-14 (White, J., concurring).

the few cases in which [the death penalty] is imposed from the many cases in which it is not."[14] *Furman* mandated that on a matter so grave as the determination of whether a human life should be taken or spared, a state cannot provide complete and unguided discretion to the sentencer.[15]

In an attempt to meet the constitutional demands of *Furman*, state legislatures passed two types of capital punishment statutes. The first type of statute required that the death penalty be imposed on all defendants convicted of first-degree murder.[16] In *Woodson v. North Carolina*[17] and *Roberts v. Louisiana*,[18] the Supreme Court struck down this type of statute, holding that mandatory sentencing schemes failed to meet *Furman*'s mandate that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of the death penalty.[19]

The second type of capital sentencing scheme enacted by the states required separate guilt and sentencing proceedings, consideration of aggravating and mitigating circumstances,[20] and appellate review of each death sentence.[21] An aggravating circumstance is "simply a factor that the sentencer must find before the death penalty can be imposed; it is the *sine qua non* of capital punishment, the essential element of a capital sentencing trial."[22] A mitigating circumstance is a factor that is relevant to show that a defendant should be spared a death sentence.[23] Under this type of sentencing scheme, once a defendant is found guilty of a capital offense, the aggravating circumstances are balanced against the mitigating circumstances to determine whether to impose a capital sentence. After *Furman*,

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14. *Furman*, 408 U.S. at 313 (White, J., concurring).

15. *Id.* at 255-57 (Douglas, J., concurring); Gregg v. Georgia 428 U.S. 153, 189 (discussing the *Furman* decision). Justice White stated that Georgia's existing capital sentencing procedures offered "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Furman*, 408 U.S. at 313 (White, J., concurring).

16. N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975); LA. REV. STAT. ANN. § 14:30 (West 1974).

17. 428 U.S. 280 (1976).

18. 428 U.S. 325 (1976).

19. *Woodson*, 428 U.S. at 302-03; *Roberts*, 428 U.S. at 334-35. The Court in each case found that mandatory death sentences, instead of rationalizing the sentencing procedure, may exacerbate unbridled jury discretion because in practice juries can avoid a mandatory death penalty sentence by convicting for a lesser crime. Rosen, *supra* note 1, at 947-48 n.36.

20. Rosen, *supra* note 1, at 948-49. These post-*Furman* statutes were patterned after the Model Penal Code Section 210.6, which provides that after a defendant has been found guilty of murder, the judge or jury in a separate hearing determines the existence of aggravating and mitigating circumstances and decides whether the aggravating circumstances outweigh any mitigating factors so as to justify the imposition of the death penalty. MODEL PENAL CODE § 210.6 (1980).

21. Rosen, *supra* note 1, at 948, and Burke, *supra* note 1, at 1029. For a complete list of statutory enactments after *Furman*, see Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1699-712 (1974).

22. Rosen, *supra* note 1, at 952.

23. In Lockett v. Ohio, 438 U.S. 586, 604 (1978), the Court held that in a capital case, the Eighth and Fourteenth Amendments require that the sentencer have a full opportunity to consider any relevant mitigating circumstances. The Court reaffirmed this decision in Eddings v. Oklahoma, 455 U.S. 104, 112 (1982), *cert. denied*, 470 U.S. 1051 (1985).

twenty-nine states adopted capital sentencing schemes that included statutory aggravating circumstances.[24]

Since *Furman*, the Supreme Court has focused on states' capital sentencing schemes rather than on the per se constitutionality of capital punishment.[25] The Court has required that each statutory aggravating circumstance satisfy the constitutional standards under *Furman*: channeling the sentencer's discretion by "clear and objective standards"[26] that provide "specific and detailed guidance"[27] and that "make rationally reviewable the process for imposing a sentence of death."[28] In *Zant v. Stephens*,[29] the Court held that a statutory aggravating circumstance "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[30] In addition, the Court has held that a sentence of death may not be imposed without a finding of at least one statutory aggravating circumstance.[31]

B. *Supreme Court Cases Scrutinizing Aggravating Circumstances*

Beginning with *Gregg v. Georgia*,[32] statutory aggravating circumstances have been continually challenged as being so broad and vague that they allowed the sentencer unguided discretion in violation of *Furman*.[33] In *Gregg*, the defendant was convicted of armed robbery and murder after he killed and robbed two men who had picked him up while hitchhiking.[34] The Supreme Court scrutinized Georgia's aggravating circumstance, which allowed death to be imposed if the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[35] The petitioner asserted that the alleged overbreadth of that provision rendered the entire Georgia statutory sentencing procedure unconstitutional.[36] The Court upheld the

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24. Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1220-21 (1984).

25. Rosen, *supra* note 1, at 946; *see* Barclay v. Florida, 463 U.S. 939, 960 (Stevens, J., concurring) (noting that "[a] constant theme of our cases from *Gregg* and *Proffitt* through *Godfrey*, *Eddings*, and most recently Zant v. Stephens, 462 U.S. 862 (1983), has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner.").

26. Gregg v. Georgia, 428 U.S. 153, 198 (1976).

27. Proffitt v. Florida, 428 U.S. 242, 253 (1976).

28. Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (Florida's capital sentencing procedures meet constitutional requirements by specific and detailed standards); Proffitt v. Wainwright, 685 F.2d 1227, 1263 (11th Cir. 1982), *cert. denied*, 464 U.S. 1002 (1983) (any decision to impose the death penalty must be based on clear, detailed, and objective standards; statutes allowing arbitrary and wanton jury discretion must be replaced by objective standards that guide, regularize, and make rationally reviewable a sentence of death).

29. 462 U.S. 862 (1983).

30. *Id.* at 877.

31. *See Gregg*, 428 U.S. at 206-07.

32. 428 U.S. 153 (1976).

33. *See* Burke, *supra* note 1, at 1031; Rosen, *supra* note 1, at 960; and *infra* notes 22-51 and accompanying text.

34. *Gregg*, 428 U.S. at 158-59.

35. *Id.* at 201 (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1978)).

36. *Id.*

statute, acknowledging that although it is "arguable that any murder involves depravity of mind or an aggravated battery . . . there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction."[37]

In reaching this conclusion, the Court focused on the Georgia Supreme Court's past application and construction of this aggravating circumstance in capital murder cases. Based on the fact that the Georgia Supreme Court had approved an "outrageously vile" finding in only one case involving a "horrifying torture-murder,"[38] the Court held that Georgia's statutory aggravating circumstance suitably directed and limited sentencing discretion, thus minimizing the risk of the arbitrary and capricious infliction of the death penalty.[39]

In *Proffitt v. Florida*,[40] the Court upheld the constitutionality of Florida's aggravating circumstance that authorized a death sentence if the capital felony was "especially heinous, atrocious, or cruel."[41] While conceding that "all killings are atrocious,"[42] the Court concluded that because the Florida Supreme Court had limited this aggravating circumstance to a "conscienceless or pitiless crime which is unnecessarily torturous to the victim,"[43] an adequate objective standard existed to guide Florida's sentencing authorities.[44] *Gregg* and *Proffitt* identified that although the language of an aggravating circumstance is vague and overbroad and thus facially invalid, a state court may save the aggravating circumstance from constitutional infirmity by applying a narrowing construction that provides clear and objective standards to determine whether a death sentence should be imposed.

In 1980, the Court in *Godfrey v. Georgia*[45] warned that a state not only must adopt a constitutionally narrow construction of a facially vague aggravating circumstance, but also must consistently apply that construction to the facts of each particular case. In *Godfrey*, the Court once again reviewed Georgia's "outrageously or wantonly vile" aggravating circumstance to determine whether, since *Gregg*, the Georgia Supreme Court had continued to apply this circumstance to a limited class of defendants.[46] The Court held that the Georgia Supreme Court had adopted a constitutionally permissible construction of the vague circumstance by requiring a finding of

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37. *Id.*

38. *Id.* (citing McCorquodale v. State, 211 S.E.2d 577 (1974)).

39. *Gregg*, 428 U.S. at 206.

40. 428 U.S. 242 (1976).

41. *Id.* at 255 (quoting FLA. STAT. ANN. § 921.141(5)(h) (West 1985)). The "especially heinous" aggravating circumstance has been continually challenged as vague and overbroad. For a complete discussion of the controversy generated by this aggravating circumstance, see Rosen, *supra* note 1.

42. *Proffitt*, 428 U.S. at 255 (quoting Tedder v. State, 322 So.2d 908, 910 (Fla. 1975)).

43. *Proffitt*, 428 U.S. at 255 (quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)); Alford v. State, 307 So.2d 433, 445 (Fla. 1975).

44. *Proffitt*, 428 U.S. at 255-56.

45. 446 U.S. 420 (1980).

46. *Id.* at 430 (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1973)).

torture or aggravated battery to the victim before death.[47] Finding that the Georgia Supreme Court had failed to apply its limiting construction to the facts of the petitioner's case, the Court reversed Godfrey's death sentence.[48] Based on the evidence, the Court held that Godfrey neither tortured nor committed an aggravated battery on his victims, who died instantaneously.[49] In holding Georgia's application of the aggravating circumstance unconstitutional, the Court stated,

> [T]he Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman."[50]

The *Godfrey* Court plainly rejected the state's contention that a particular set of facts surrounding a murder, however shocking, were enough, without the application of a narrowing principle, to justify the imposition of a capital sentence.[51]

In *Maynard v. Cartwright*,[52] the Supreme Court unanimously affirmed the decision of the Court of Appeals for the Tenth Circuit, which invalidated Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance as impermissibly vague.[53] The Supreme Court held that the words "heinous," "atrocious," and "cruel," standing alone, failed to provide the sentencer with a clear and objective standard for imposing the death penalty.[54] In the Court's view, the Oklahoma Supreme Court had not applied a constitutional narrowing construction to the facially vague aggravating circumstance.[55] Rather, the Oklahoma Court simply evaluated all of the circumstances of the crime to determine whether the facts plainly constituted an "especially, heinous, atrocious or cruel" murder.[56] The Oklahoma court had considered the attitude of the killer, the manner of the killing, and the suffering of the victim to be relevant and sufficient to support an "especially heinous, atrocious, or cruel" finding, but had "re-

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47. *Godfrey*, 446 U.S. at 430-31 (citing Blake v. State, 236 S.E.2d 637, 643 (Ga. 1977); Harris v. State, 230 S.E.2d 1, 11 (Ga. 1976)).

48. *Godfrey*, 446 U.S. at 432-33. The Court concluded there was "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.

49. *Id.* at 432-33. In the trial court, the prosecutor admitted several times—and the trial judge wrote in his sentencing report— that Godfrey's crimes did not involve torture. *Id.* at 432.

50. *Id.* at 428-29.

51. *Id.*

52. 486 U.S. 356 (1988). For a thorough analysis of this decision, see Terrill Pollman, Note, Maynard v. Cartwright: *Channeling Arizona's Use of the Heinous, Cruel, or Depraved Aggravating Circumstances To Impose the Death Penalty*, 32 ARIZ. L. REV. 193 (1990).

53. *Maynard*, 486 U.S. at 359 (quoting OKLA. STAT. ANN. tit. 21 § 701.12(4) (1981)).

54. *Maynard*, 486 U.S. at 359-60.

55. *Id.* at 360.

56. *Id.*

fused to hold that any one of those factors *must* be present for a murder to satisfy this aggravating circumstance."[57]

The Court also rejected the state's argument that the addition of the word "especially" to the term "heinous" objectively guided jury discretion.[58] The majority reasoned that "[t]o say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'"[59] In holding that the Oklahoma court's subjective approach failed to meet the constitutional strictures of *Furman*, the Court reiterated the principle that a narrowing construction must require proof of some fact capable of objective determination. The Court also noted that torture or serious physical abuse to the victim would be a constitutionally valid limitation.[60]

The Court in *Maynard* did not hold that a limiting construction requiring torture or serious physical abuse to the victim was the only constitutionally permissible construction of a facially vague aggravating circumstance.[61] However, prior to the Court's decision in *Walton v. Arizona*,[62] the only construction the Court consistently approved as "clear and objective" had been one that identified a form of serious physical or mental abuse sustained by the victim.[63] *Walton* marks the first instance in which the Court noted that it would uphold a limiting construction that makes reference to the defendant's state of mind.

C. Walton v. Arizona

The petitioner Jeffrey Walton and his co-defendants robbed Thomas Powell at gunpoint and forced him into his car, which they drove out into the desert.[64] The victim was taken out of the car and forced to lie face down on the ground while Walton and his co-defendants decided what to do with him.[65] Walton then marched Powell into the desert, forced Powell to lie down on the ground, placed a foot on Powell's neck, and shot Powell once in the head.[66] Walton later told his co-defendants that he "had never seen a man pee in his pants before."[67] Although Walton intended to kill Powell immediately with the gunshot, a medical examiner determined that Powell had been blinded and rendered unconscious but

57. *Id.*
58. *Id.* at 364.
59. *Id.* (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980)).
60. *Maynard*, 486 U.S. at 365.
61. *Id.*
62. 497 U.S. 639 (1990).
63. *See Godfrey*, 446 U.S. at 432 (*see supra* notes 45-51 and accompanying text); *Proffitt*, 428 U.S. at 255-56 (*see supra* notes 41-44 and accompanying text); *Gregg*, 428 U.S. at 201 (*see supra* notes 33-40 and accompanying text); *Maynard*, 486 U.S. at 363 (*see supra* notes 51-60 and accompanying text).
64. State v. Walton, 769 P.2d 1017, 1022 (Ariz. 1989), *aff'd*, 497 U.S. 639 (1990).
65. *Id.*
66. *Id.*
67. *Id.* at 1033.

had not been killed instantly.[68] Instead, after regaining consciousness and floundering around in the desert, Powell ultimately died from dehydration, starvation, and pneumonia.[69]

The Arizona trial court convicted Walton of first-degree murder.[70] At the sentencing hearing, the judge sentenced Walton to death based on a finding of two statutory aggravating circumstances, including that the murder was committed in an "especially heinous, cruel, or depraved manner . . . ."[71] The Arizona Supreme Court rejected Walton's challenge to the constitutionality of the "especially heinous, cruel or depraved" aggravating circumstance and affirmed.[72] The court held that it had previously determined that a murder is committed in an "especially cruel" manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death and that mental anguish includes a victim's uncertainty as to his ultimate fate.[73] The court concluded that Powell suffered great mental anguish both during the car ride, when he was uncertain of his fate, and in his final march into the desert, when he knew he was going to be killed.[74] The court also defined the "especially depraved" prong to refer to a murder in which the perpetrator "relishes the murder, evidencing debasement or perversion."[75] The court noted that Walton's statement that "he had never seen a man pee in his pants before" demonstrated a callous fascination with the murder and supported an "especially depraved" finding.[76]

In *Walton v. Arizona*,[77] the Court addressed whether the Arizona Supreme Court had adopted a constitutionally permissible construction of the "especially heinous, cruel or depraved"[78] aggravating circumstance. The Court first identified the process by which a federal court properly reviews the constitutionality of an aggravating circumstance:

> [The 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 . . . so, whether those definitions

68. *Id.* at 1022.

69. *Id.*

70. *Id.*

71. *Id.* at 1032

72. *Id.* at 1038.

73. *Id.* at 1032-33.

74. *Id.* The court rejected the State's argument that the six days that Powell suffered after being shot constituted "cruelty" within the meaning of the statute. The court noted that in prior cases, it had limited the "especially cruel" prong of the aggravating circumstance to situations in which the suffering of the victim was intended by or foreseeable by the defendant. Based on the fact that Walton had placed the gun to Powell's head and pulled the trigger, the court concluded that Walton intended to kill the victim immediately. Thus, because Walton could not have reasonably foreseen Powell's survival or longevity, the court refused to sustain a finding of "cruelty." *Id.* at 1033.

75. *Id.*

76. *Id.*

77. 497 U.S. 639 (1990).

78. *Id.* at 654.

are constitutionally sufficient, i.e., whether they provide *some* guidance to the sentencer.[79]

In a 5-4 decision upholding the constitutionality of the aggravating circumstance,[80] the Court held that the Arizona court's limiting construction adequately guided sentencing discretion, even though "the proper degree of definition of an aggravating factor . . . is not susceptible of mathematical precision . . . ."[81] Specifically, the Court found that the definition given to the "especially cruel" provision by the Arizona Supreme Court provided meaningful guidance to the sentencer. The majority also declared, "[n]or can we fault the [Arizona] court's statement that a crime is committed in an especially 'depraved' manner when the perpetrator 'relishes the murder, evidencing debasement or perversion,' or 'shows an indifference to the suffering of the victim and evidences a sense of pleasure' in the killing."[82]

In opposition, Justice Blackmun noted that the plurality's approval of Arizona's limiting construction, which allowed a sentencer to impose the death penalty based on a finding that the defendant "relished or derived pleasure from crime," marked an expansion of the Court's constitutionally permissible standard.[83] He stated, "prior to today [the court's decision in *Walton*], we have never suggested that the aggravating factor can permissibly be construed in a manner that does not make reference to the suffering of the victim."[84] Blackmun added that the Arizona Supreme Court's inconsistent application of the "especially heinous, cruel or depraved" circumstance reflected the failure of this limiting definition to provide a "clear and objective" standard to prevent the arbitrary and capricious infliction of the death penalty.[85]

After *Walton*, the bounds of constitutionally permissible aggravating circumstances were less than clear. *Walton* marked the first time that the Court noted that it would uphold an aggravating circumstance that made subjective reference to a defendant's state of mind. To resolve the issue of whether *Walton* redefined the "clear and objective" constitutional standard to include subjective sentencing criteria, the Supreme Court granted certiorari in the present case, *Arave v. Creech*.[86]

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79. *Id.*

80. *Id.* at 655-56. In Lewis v. Jeffers, 497 U.S. 764 (1990), *rev'd*, 974 F.2d 1075 (9th Cir. 1992), decided the same day as *Walton*, the Court by a 5-4 majority denied a similar challenge to Arizona's "especially cruel, heinous or depraved aggravating circumstance." The Court held that "[W]e resolved any doubts about the matter in *Walton*." *Lewis*, 497 U.S. at 791.

81. *Walton*, 497 U.S. at 655.

82. *Id.*

83. *Lewis*, 497 U.S. at 793-94 (Blackmun, J., dissenting) (discussing the *Walton* decision).

84. *Id.* at 794.

85. *Walton*, 497 U.S. at 693-701 (Blackmun, J., dissenting).

86. 113 S. Ct. 1534 (1993).

II. *ARAVE V. CREECH*

A. *Idaho's Statutory Capital Punishment Scheme*

In Idaho, once a defendant has been found guilty of first-degree murder, the court must conduct a sentencing hearing to determine whether a death sentence will be imposed.[87] The Idaho Legislature enacted a statute defining ten aggravating circumstances to be used by the sentencing judge to determine whether a particular first-degree murderer warranted the imposition of the death penalty.[88] The complete statute is set forth below.[89] To impose the death penalty, a sentencing judge must find that aggravating circumstance(s) are present and that the aggravating circumstance(s) outweigh any mitigating circumstance(s) that exist.[90]

The Idaho statutory aggravating circumstance at issue in *Arave v. Creech* allowed for a death sentence to be imposed if the defendant exhibited "utter disregard for human life."[91] In *State v. Osborn*,[92] the Idaho Supreme Court admitted that the phrase "utter disregard for human life" failed to provide a clear and objective constitutional standard to guide sentencing discretion. The court explicitly recognized that a limiting construction needed to be placed on this aggravating circumstance. The court concluded that the phrase "utter disregard for human life" was "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."[93]

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87. IDAHO CODE § 19-2515(d) (1990).
88. *Id.* at § 19-2515(g)(1)-(10).
89. IDAHO CODE § 19-2515(g)(1)-(10), states:
The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:
(1) The defendant was previously convicted of another murder.
(2) At the time the murder was committed the defendant also committed another murder.
(3) The defendant knowingly created a great risk of death to many persons.
(4) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.
(5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.
(6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.
(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e) or (f), and it was accompanied with the specific intent to cause the death of a human being.
(8) The defendant by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.
(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty.
(10) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.
90. *Id.* at § 19-2515(e).
91. *Id.* at § 19-2515(g)(6).
92. 631 P.2d 187 (Idaho 1981).
93. *Id.* at 200-01.

B. *Facts and Procedural History*

Thomas Creech, the petitioner, and Dale Jensen, the victim, were inmates at Idaho State Correction Institution.[94] Prior to the offense in question, Creech and Jensen engaged in an argument and "were not on good terms."[95] Jensen swung a weapon at Creech that consisted of a sock containing batteries.[96] Creech took the weapon away from Jensen, but minutes later Jensen attacked Creech with a toothbrush to which had been taped a razor blade.[97] Creech struck Jensen several times with the battery-laden sock, rendering Jensen helpless.[98] Creech then began kicking Jensen in the head and throat.[99] Jensen collapsed and died later that day.[100]

Creech pleaded guilty to first-degree murder.[101] At the sentencing hearing, the state trial court found in mitigation that "Creech did not instigate the fight with the victim [Jensen], but the victim, without provocation, attacked him. [Creech] was initially justified in protecting himself."[102] However, the court determined that Creech's actions went "well beyond self-defense"[103] and evidenced an "excessive violent rage."[104]

The trial court found five statutory aggravating circumstances, including that Creech "by the murder or circumstances surrounding its commission, exhibited utter disregard for human life."[105] After determining that the aggravating circumstances outweighed the mitigating circumstances, the court sentenced Creech to death.[106] Creech appealed, claiming that Idaho's "utter disregard for human life" aggravating circumstance was unconstitutionally vague in violation of the Eighth and Fourteenth Amendments of the United States Constitution.[107]

The Idaho Supreme Court affirmed.[108] The court reaffirmed the limiting construction it had placed on the "utter disregard for human life" aggravating circumstance in *Osborn*, to refer to the "cold-blooded pitiless slayer."[109] The court held that this limiting construction provided a principled definition that was sufficiently narrow and objective to withstand a constitutional challenge.[110]

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94. State v. Creech, 670 P.2d 463, 465 (Idaho 1983), *rev'd in part*, 113 S. Ct. 1534 (1993).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. Arave v. Creech, 113 S. Ct. 1534, 1538 (1993).
102. *Id.* at 1538-39.
103. *Id.* at 1539.
104. *Id.* The Court also stated that the murder, once commenced, appeared to have been an intentional, calculated act. *Id.*
105. *Id.*
106. *Id.* IDAHO CODE § 19-2515(c) (1990) provides that when the court finds a statutory aggravating circumstance, the court shall sentence the defendant to death unless the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstances and make the imposition of death unjust.
107. *Creech*, 670 P.2d at 471.
108. *Id.*
109. *Id.*
110. *Id.*

After the United States District Court for the District of Idaho denied Creech's petition for writ of habeas corpus,[111] Creech appealed to the United States Court of Appeals for the Ninth Circuit.[112] The Ninth Circuit Court of Appeals declared Idaho's utter disregard aggravating factor unconstitutionally vague because the limiting construction, "the cold-blooded pitiless slayer," failed to define the statutory aggravating circumstance by clear and objective standards which effectively limited the sentencer's discretion.[113] The court held that rather than requiring proof of some fact or circumstance capable of objective determination, the limiting construction called for a subjective determination of whether the defendant was a "cold-blooded, pitiless slayer."[114]

Three judges dissented.[115] The dissenters found Idaho's limiting construction indistinguishable from the Arizona limiting construction upheld by the Supreme Court in *Walton*, which called for a determination of whether the defendant relished or evidenced a sense of pleasure in killing.[116] These judges adhered to the Idaho state court's finding that the limiting construction did not call for a subjective determination of whether the defendant was a "cold-blooded pitiless slayer," but rather called for an objective evidentiary determination based on facts and circumstances.[117]

C. *Supreme Court Decision*

1. Majority Opinion

In the majority opinion, written by Justice O'Connor, the Court held that the Idaho Supreme Court's limiting construction of its "utter disregard for human life" aggravating circumstance to refer to the "cold-blooded pitiless slayer" adequately channeled sentencing discretion as required by the Eighth and Fourteenth Amendments.[118] The Court first addressed whether the terms "cold-blooded" and "pitiless" provided clear and objective standards that effectively cured the inherent vagueness in the phrase "utter disregard for human life."[119] In answering this question, the Court turned to *Webster's Dictionary* and *Black's Law Dictionary* and concluded that "pitiless" meant "devoid of mercy . . . or compassion" and that

111. *Arave*, 113 S. Ct. at 1540.

112. Creech v. Arave, 947 F.2d 873 (9th Cir. 1991), *rev'd in part*, 113 S. Ct. 1534 (1993).

113. *Id.* at 883-84. The court remanded to allow the state court to balance the remaining constitutionally valid aggravating and mitigating factors before determining whether Creech should be sentenced to death. *Id.* at 888. For a thorough analysis of this decision, see Troy R. Olsen, *"Utter Disregard For Human Life"—A Clear and Objective Standard for the Purpose of Imposing the Death Penalty?*, 28 IDAHO L. REV. 421 (1991-92).

114. *Creech*, 947 F.2d at 884.

115. *Id.* at 888 (Trott, J., dissenting, joined by Kozinski, J., and Nelson, J.).

116. *Id.* at 890 (citing Walton v. Arizona, 497 U.S. 639, 655 (1990)). Judge Trott stated, "How 'objective' is 'relishing the murder, evidencing debasement or perversion'? How is that different from evidencing an 'utter disregard for human life,' defined as intentional, cold-blooded, and without pity . . . ?" *Id.*

117. *Id.*

118. Arave v. Creech, 113 S. Ct. 1534, 1541 (1993).

119. *Id.*

"cold-blooded" meant "matter of fact, emotionless."[120] The Court noted that although in legal usage, "cold-blooded" is sometimes used to describe premeditation, the Idaho court did not use the term in this sense.[121] Based on its assumption that "legislators use words in their ordinary, everyday senses,"[122] the majority concluded that in ordinary usage the phrase "cold-blooded pitiless slayer" referred to a killer who kills without feeling or sympathy.[123]

Holding that the terms "cold-blooded" and "pitiless" describe the defendant's state of mind, which is a fact to be inferred from the surrounding circumstance rather than a subjective matter, the Court found Idaho's limiting construction to be sufficiently objective.[124] The Court explained that the language at issue was "no less 'clear and objective' than the language sustained in *Walton*," which examined whether a defendant relished or derived pleasure from his crime.[125]

The second issue the majority addressed was whether Idaho's limiting construction provided a principled basis for narrowing the class of persons eligible for the death penalty.[126] The majority conceded that "pitiless" standing alone might fail to adequately channel the sentencer's discretion, because a sentencing judge could reasonably conclude that any first-degree murderer kills without mercy or compassion.[127] Acknowledging that "the question is close," the majority found that the term "cold-blooded" provided a principled means to narrow the class of capital defendants.[128] The majority rationalized that not all killers are "cold-blooded" because some killers exhibit feelings such as anger, jealousy, or revenge.[129] The Court concluded that the phrase, "the cold-blooded pitiless slayer" identified a subclass of defendants who kill without feeling or sympathy and thus provided a constitutional limitation to the range of homicides eligible for the death penalty.[130]

2. Dissenting Opinion

Justices Blackmun and Stevens strongly dissented. They argued that the majority's interpretation of the phrase "cold-blooded pitiless slayer" failed to provide an adequate constitutional standard for death sentencing.[131] The dissenters did not see how the majority's "without feeling or sympathy" construction meaningfully differed from "'devoid of . . . mercy'

120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 1541-42 (citing United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716-17 (1983)).
125. *Arave*, 113 S. Ct. at 1542.
126. *Id.*
127. *Id.* at 1543.
128. *Id.* at 1542-43.
129. *Id.* at 1543.
130. *Id.*
131. *Id.* at 1545 (Blackmun, J., and Stevens, J., dissenting).

. . . the definition of 'pitiless' that the majority concede[d] to be constitutionally inadequate."[132]

The dissenting Justices rejected the majority's assertion that the Idaho construction narrows the class of capital defendants because it rules out those who kill with anger, jealousy, or revenge.[133] The dissenters argued that the majority's interpretation of the "cold-blooded pitiless slayer" to refer solely to those murderers who kill without emotion or sympathy was unsupported by ordinary usage, legal usage, and the usage of the Idaho courts.[134] First, to show that the term "cold-blooded" is simply not limited to defendants who kill without emotion or sympathy, the dissenters provided numerous examples from major newspapers that had labeled a murder committed with either jealousy, revenge, hatred, or a variety of other emotions as "cold-blooded."[135]

Second, the dissenting Justices explained that the only consistent legal usage of "cold-blooded" referred to a willful, deliberate, and premeditated murder.[136] Therefore, the term "cold-blooded" could reasonably cover every intentional or first-degree murder and thus would fail to constitutionally limit the class of murderers eligible for the death penalty.[137] Finally, after an examination of Idaho capital cases, the dissenters determined that the Idaho courts had never applied the majority's "those who kill without feeling or sympathy" interpretation.[138] The Justices concluded that instead of making a finding of "utter disregard for human life" depend on the presence of particular facts, the Idaho sentencing scheme allows the death penalty to be imposed based on subjective criteria.[139]

IV. ANALYSIS

The United States Supreme Court's decision in *Arave* marks the expansion of the fundamental constitutional requirement that a state's capital sentencing scheme channel the sentencer's discretion by "clear and objective" standards. Rather than providing a meaningful basis to distinguish those who deserve capital punishment from those who do not, the majority's approval of Idaho's limiting construction results in a subjective determination of whether a defendant is a "cold-blooded pitiless slayer" and authorizes a sentence of death to be imposed at the complete discretion of the sentencer.[140]

Relying on its prior decision in *Walton v. Arizona*,[141] the majority held that the constitutionality of an aggravating factor does not depend on the presence of objective standards, but rather on the ability of the limiting

132. *Id.* at 1546.
133. *Id.* at 1547.
134. *Id.* at 1545.
135. *Id.* at 1547.
136. *Id.*
137. *Id.*
138. *Id.* at 1548.
139. *Id.* at 1549-50.
140. *Creech*, 947 F.2d at 884.
141. 497 U.S. 639 (1990).

construction to define a state of mind that is ascertainable from surrounding facts.[142] Justice O'Connor concluded that because the Court in *Walton* approved Arizona's limiting construction of its "depraved" factor as referring to one who "relishes the murder, evidencing debasement or perversion," Idaho's limiting construction had to be upheld because it "is no less 'clear and objective' than the language sustained in *Walton*."[143] This conclusion is based on a misinterpretation and misapplication of the Court's holding in *Walton*.

Contrary to the majority's assertion, the *Walton* decision did not establish that Arizona's construction of its "depraved" factor was sufficient to meet constitutional standards. The Court in *Walton* upheld Arizona's "especially cruel, heinous or depraved" aggravating factor primarily because the limiting construction given to the "cruelty" factor by the Arizona Supreme Court provided an objective standard by referring to "physical abuse" before the victim's death.[144] The Arizona Supreme Court's and the United States Supreme Court's affirmance of Walton's sentence did not depend on a determination that Walton's crime was especially "depraved." It rested rather on the conclusion that Walton committed the murder in an "especially cruel" manner.[145] Although the Arizona court indicated that the murder was "especially depraved," it stated that this conclusion was not necessary to sustain a finding of the "especially heinous, cruel or depraved" aggravating circumstance.[146] Justice O'Connnor neglected the fact that the Court in *Walton* made no effort whatsoever to justify its assertion that the Arizona Supreme Court's construction of "depraved" provided clear and objective standards to the sentencer.[147] Instead, in just one sentence, the *Walton* Court merely stated "nor can we fault"[148] the Arizona Supreme Court's construction of "depraved."[149] As Justice Blackmun noted in *Lewis v. Jeffers*,[150] this sentence is nothing more than a "wholly gratuitous" scrap of dictum.[151]

The majority's reliance on *Walton* also ignores the Court's prior decisions in *Furman*,[152] *Gregg*,[153] *Proffitt*,[154] *Godfrey*,[155] and *Cartwright*.[156] These

142. *Arave*, 113 S. Ct. at 1541-42.
143. *Id.*
144. *Walton*, 497 U.S. at 654.
145. Lewis v. Jeffers, 497 U.S. 764, 792 (1990) (Blackmun, J., dissenting), *rev'd*, 974 F.2d 1075 (9th Cir. 1992).
146. State v. Walton, 769 P.2d 1017, 1033-34 (Ariz. 1989), *aff'd*, 497 U.S. 639 (1990).
147. *Lewis*, 497 U.S. at 793.
148. *Walton*, 497 U.S. at 655.
149. *Id.*
150. 497 U.S. 764 (1990). In *Lewis*, decided on the same day as *Walton*, the Court rejected Jeffer's claim that Arizona's "especially, cruel, heinous or depraved" aggravating factor was unconstitutionally vague. The Court held that *Walton* disposed of Lewis's claim, stating, "[W]e resolved any doubt about the matter in Walton v. Arizona . . . where we upheld, against a vagueness challenge, the precise aggravating circumstance at issue in this case." *Id.* at 776
151. *Lewis*, 497 U.S. at 795.
152. 408 U.S. 238 (1972).
153. 428 U.S. 153 (1976).
154. 428 U.S. 242 (1976).
155. 446 U.S. 420 (1980), *cert. denied*, 456 U.S. 919 (1982).
156. 486 U.S. 356 (1988).

cases established that for a limiting construction to meet constitutional standards, it must make reference to the suffering of the victim. Justice O'Connor cites *Proffitt* to exemplify the Court's willingness to approve aggravating factors that although "not susceptible of mathematical precision" are not so overbroad as to be unconstitutional.[157] The majority neglects to note, however, that in *Proffitt*, the Court upheld the Florida statute because it identified an objective standard that referred to the "unnecessary torture" suffered by the victim, rather than solely the defendant's state of mind.[158] Departing from its prior decisions, which delineate a consistent objective standard for death sentencing, the majority readily accepts the brief and passing dictum of *Walton* as authority to uphold limiting constructions that make subjective reference to a defendant's state of mind.

The dissent correctly pointed out that because the Idaho Supreme Court failed to define "cold-blooded" and "utter disregard" with objectively verifiable definitions, the construction provides no more guidance than the statute itself.[159] The only definitions given by the Idaho Supreme Court have defined the construction to mean a killer who "acts randomly without motive or conscience" and "does not possess the normal restraints against committing murder"[160] and a killer who acts without "conscientious scruples against killing."[161] What first-degree murderer possesses the normal restraints against murder or acts with conscientious scruples against killing? In the absence of an objectively verifiable limiting construction, the term "cold-blooded pitiless slayer" could apply to every first-degree murderer.[162] The Idaho construction is unconstitutional because it does not make findings of aggravating factors depend on the presence of particular facts. Instead, as the State of Idaho admits, it "rel[ies] on the ability of the sentencing judge to make principled distinctions between capital and non-capital cases with guidance that is somewhat subjective . . . ."[163] This unbridled approach to death sentencing is precisely forbidden under the Court's "clear and objective" standard.

Faced with an "insupportable limiting construction of an unconstitutionally vague statute,"[164] the majority concocted its own "constitutional" definition of the state court's formulation by turning to the most basic of all references—a dictionary.[165] However, the majority neglected the fact that the Idaho courts have not limited a finding of "cold-blooded" explicitly to the majority's "those who kill without feeling or sympathy" interpretation. Contrary to the majority's assertion that premeditation is clearly

157. *Arave*, 113 S. Ct. at 1542 (citing Proffitt v. Florida, 428 U.S. 242, 260 (1976) (White, J., concurring)).
158. *Proffitt*, 428 U.S. at 255.
159. *Arave*, 113 S. Ct. at 1545 (Blackmun, J., and Stevens, J., dissenting).
160. State v. Osborn, 631 P.2d 187, 214 (Idaho 1981).
161. State v. Fain, 774 P.2d 252, 269 (Idaho 1989), *cert. denied*, 112 S. Ct. 2970 (1992).
162. *See Arave*, 113 S. Ct. at 1548.
163. Petitioner's Reply Brief on the Merits at 11, Arave v. Creech, 113 S. Ct. 1534 (No. 91-1160).
164. *Arave*, 113 S. Ct. at 1545 (Blackmun, J., and Stevens, J., dissenting).
165. *Id.* at 1541.

not the sense in which the Idaho Supreme Court defined "cold-blooded," in *State v. Fetterly*,[166] the Idaho Supreme Court upheld a finding of "cold-blooded" based on the fact that the crime had been planned as in much as two or three days in advance.[167] Similarly, in the present case, the State argued in its brief that a finding of "cold-blooded" could be proven by "facts such as Creech's staging a pretext to kill Jensen."[168]

The Idaho courts have not even limited a finding of "cold-blooded" to those convicted of first-degree murder. In *State v. Romero*,[169] Judge Bistline, in a dissent from a denial of a petition for review, characterized a defendant as a "cold-blooded" murderer, even though the defendant had been convicted by the trial court of manslaughter, rather than murder.[170] In light of the fact that the defendant killed in anger after being struck first by the deceased, this finding directly contradicts the majority's "without feeling or sympathy" interpretation of "cold-blooded."

The illusory nature of the majority's definition is further highlighted by the present case. The trial court found that Creech did not provoke the fight that resulted in Jensen's death but that Creech, although initially justified in protecting himself, killed in an excessive rage.[171] If the limiting construction refers to a killer who kills without feeling or sympathy, as the majority asserts that it does, then it was improperly applied to Creech. Clearly, a crime committed in an excessive rage is not an emotionless crime. Based on this evidence, it is reasonable to infer that Creech's prior conviction for the murders of at least twenty-six people[172] may have encouraged the Idaho Supreme Court and the United States Supreme Court to uphold the constitutionality of Idaho's aggravating circumstance and affirm Creech's death sentence.

The overbroad and inconsistent application of Idaho's limiting construction illustrates the danger of subjective sentencing standards. Rather than providing a clear and objective standard to channel and limit the sentencer's discretion, the Idaho limiting construction, as applied by the Idaho court and interpreted by the majority, is a "kitchen sink aggravating circumstance[ ] which enable[s] the state to make *every* first-degree murderer not just a candidate for, but an actual recipient of, the harshest and most final of all criminal penalties."[173]

In the future, to eliminate the arbitrariness and discrimination that results from subjective sentencing criteria, the Court must strictly redefine the "clear and objective" constitutional standard. The Court in prior deci-

166. 710 P.2d 1202 (Idaho 1985), *cert. denied*, 113 S. Ct. 607 (1992).

167. *Id.* at 1209.

168. Petitioner's Reply Brief on the Merits at 21, Arave v. Creech, 113 S. Ct. 1534 (No. 91-1160). The record contained some evidence that other inmates may have offered to pay Creech or help him escape if he killed Jensen. The trial court did not find that such evidence established premeditation. State v. Creech, 670 P.2d 463, 465 (Idaho 1983).

169. 815 P.2d 453 (Idaho 1991).

170. *Id.* at 456 (Bistline, J., dissenting).

171. *Arave*, 113 S. Ct. at 1539.

172. *Id.* at 1538.

173. State v. Charboneau, 774 P.2d 299, 342 (Idaho 1989) (Huntley, J., concurring and dissenting), *cert. denied*, 493 U.S. 922 and 493 U.S. 923 (1989).

sions recognized that a limiting construction that limits the application of the death penalty to a finding of torture or serious mental or physical abuse satisfies constitutional standards.[174] Rather than expand the "clear and objective" standard based on the dicta in *Walton*, the Court should adhere to its prior decisions and restrict the constitutionality of a state's limiting construction to a finding of torture or serious mental or physical abuse.

CONCLUSION

The majority, in declaring Idaho's limiting construction constitutionally valid, concedes that "the question is close."[175] When determining whether a person is to live or die, close is not close enough. The Court's expansion of the "clear and objective" standard to include capital sentencing schemes that determine death sentencing based on subjective factors will likely result in the execution of numerous inmates in Idaho and elsewhere who would not otherwise be put to death. It is deeply disturbing that instead of seizing the opportunity to proclaim that Idaho's aggravating circumstance fails to adequately guide and limit the sentencer's discretion, the Court resorted to definitional quibbling to validate a construction that allows for the arbitrary and capricious infliction of the death penalty.

Jonah H. Goldstein

174. *See supra* note 63 and accompanying text.
175. *Arave*, 113 S. Ct. at 1542.