SUPREME COURT OF THE UNITED STATES

No. 91–1160

A. J. ARAVE, WARDEN, PETITIONER *v.* THOMAS E. CREECH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March 30, 1993]

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

Confronted with an insupportable limiting construction of an unconstitutionally vague statute, the majority in turn concocts its *own* limiting construction of the state court's formulation. Like "nonsense upon stilts,"[1] however, the majority's reconstruction only highlights the deficient character of the nebulous formulation that it seeks to advance. Because the metaphor "cold-blooded" by which Idaho defines its "utter disregard" circumstance is both vague and unenlightening, and because the majority's recasting of that metaphor is not dictated by common usage, legal usage, or the usage of the Idaho courts, the statute fails to provide meaningful guidance to the sentencer as required by the Constitution. Accordingly, I dissent.

I discuss the applicable legal standards only briefly, because, for the most part, I agree with the majority about what is required in a case of this kind. As the majority acknowledges, *ante*, at 10, "an 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." *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983). A state court's limiting construction can

[1] J. Bentham, Anarchical Fallacies, in 2 Works of Jeremy Bentham 501 (1843).

save a flawed statute from unconstitutional vagueness, and where the sentencer is a judge there is nothing wrong with "presum[ing] that the judge knew and applied any existing narrowing construction." *Ante*, at 7. "The trial judge's familiarity with the State Supreme Court's opinions, however, will serve to narrow his discretion only if that body of case law articulates a construction of the aggravating circumstance that is coherent and consistent, and that meaningfully limits the range of homicides to which the aggravating factor will apply." *Walton* v. *Arizona*, 497 U. S. 639, 692 (1990) (dissenting opinion). We have "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." *Maynard* v. *Cartwright*, 486 U. S. 356, 363 (1988). A limiting construction must do more than merely invite the sentencer to assess in some indeterminate way the circumstances of each case. *Clemons* v. *Mississippi*, 494 U. S. 738, 757–761 (1990) (opinion concurring in part and dissenting in part). The source of this requirement is the paramount need to "`make rationally reviewable the process for imposing a sentence of death.'" *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion), quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (1976) (plurality opinion).

The Idaho Supreme Court has determined that under our cases Idaho's statutory phrase, "utter disregard for human life," requires a limiting construction, see *State* v. *Osborn*, 102 Idaho 405, 418, 631 P. 2d 187, 200 (1981); *Sivak* v. *State*, 112 Idaho 197, 209, 731 P. 2d 192, 204 (1986), and respondent does not challenge the Court of Appeals' conclusion that the phrase, unadorned, fails to meet constitutional standards. This is understandable. Every first-degree murder will demonstrate a lack of regard for human life, and there is no cause to believe that some murders somehow demonstrate only partial, rather than "utter" disregard. Nor is there any evidence that the phrase is intended to have a specialized meaning —other than that presented by the Idaho Supreme Court in its limiting constructions—that might successfully narrow the eligible class. The question is whether *Osborn*'s limiting construction saves the statute.[2]

Under *Osborn*, an offense demonstrates "utter disregard for human life" when the "acts or

[2]Of course, even if the phrase "utter disregard" were narrowing and clear, a purported limiting construction from the State's high court that actually undid any narrowing or clarity would render the statute unconstitutional. For example, if the statute allowed the death sentence where the murder was committed for pay, but an authoritative construction from the State Supreme Court told trial courts that the statute covered every murder committed for "bad reasons," the state scheme would be unconstitutional. In the present case, any clarity that may be imparted, and any channeling that may be done by the phrase, "utter disregard for human life," is destroyed by the boundless and vague *Osborn* construction adopted as the authoritative interpretation of the statute.

circumstances surrounding the crime . . . exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." 102 Idaho, at 419, 631 P. 2d, at 201. Jettisoning all but the term, "cold-blooded," the majority contends that this cumbersome construction clearly singles out the killing committed "without feeling or sympathy." *Ante*, at 12. As an initial matter, I fail to see how "without feeling or sympathy" is meaningfully different from "devoid of . . . mercy or compassion"—the definition of "pitiless" that the majority concedes to be constitutionally inadequate. See *ante*, at 11.

Even if there is a distinction, however, the "without feeling or sympathy" test, which never has been articulated by any Idaho Court, does not flow ineluctably from the phrase at issue in this case: "cold-blooded." I must stress in this regard the rather obvious point that a "facial" challenge of this nature —one alleging that a limiting construction provides inadequate guidance—cannot be defeated merely by a demonstration that there exists a narrowing way to apply the contested language. The entire point of the challenge is that the language's susceptibility to a *variety* of interpretations is what makes it (facially) unconstitutional. To save the statute, the State must provide a construction that, on its face, reasonably can be expected to be applied in a consistent and meaningful way so as to provide the sentencer with adequate guidance. The metaphor "cold-blooded" does not do this.

I begin with "ordinary usage." The majority points out that the first definition in Webster's Dictionary under the entry "cold-blooded" is "marked by absence of warm feelings: without consideration, compunction, or mercy." *Ante*, at 7, quoting Webster's Third New International Dictionary 442 (1986). If Webster's' rendition of the term's ordinary meaning is to be credited, then Idaho has singled out murderers who act without warm feelings: those who

act without consideration, compunction, or clemency. Obviously that definition is no more illuminating than the adjective "pitiless" as defined by the majority. What murderer *does* act with consideration or compunction or clemency?[3]

In its eagerness to boil the phrase down to a serviceable core, the majority virtually ignores the very definition it cites. Instead, the majority comes up with a hybrid all its own—"without feeling or sympathy"—and then goes one step further, asserting that because the term "cold-blooded" so obviously means "without feeling," it cannot refer as ordinarily understood to murderers who "kill with anger, jealousy, revenge, or a variety of other emotions." *Ante*, at 12. That is incorrect. In everyday parlance, the term "cold-blooded" *routinely* is used to describe killings that fall outside the majority's definition. In the first nine weeks of this year alone, the label "cold-blooded" has been applied to a murder by an ex-spouse angry over visitation

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[3]Cf. *State* v. *Charboneau*, 116 Idaho 129, 172, 774 P.2d 299, 342 (1989) (Huntley, J., concurring in part and dissenting in part) ("What first degree murderer fails to show `callous disregard for human life'? I suppose this would be the `pitiful' slayer, who, prior to delivering the fatal blow, tells the victim, `Excuse me, pardon me, I know it's inconvenient, but I must now take your life'").

rights,[4] a killing by a jealous lover,[5] a revenge killing,[6] an ex-spouse "full of hatred,"[7] the close-range assassination of an enemy official by a foe in a bitter ethnic conflict,[8] a murder prompted by humiliation and hatred,[9] killings by fanatical cult members,[10] a murderer who enjoyed killing,[11] and, perhaps most appropriately, *all* murders.[12] All these killings occurred with "feelings" of one kind or another. All

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[4]See Kuczka, Self-Defense Claimed in Murder Trial, Chicago Tribune, February 3, 1993, p. 5 ("To prosecutors, Eric Moen is a cold-blooded killer who gunned down his wife's former boyfriend in a Streamwood restaurant parking [lot] during a quarrel over visitation rights to the ex-boyfriend's infant daughter").

[5]See Caba, Friedman Prosecutor Rebuffed, Philadelphia Inquirer, February 19, 1993, p. 3 ("The prosecution contends she killed Edwards in cold blood because he was leaving [her] to return to his wife in Texas").

[6]See McMahon, Dad Does Everything Right, But Son Goes Wrong, Chicago Tribune, March 7, 1993, p. 1 (youth who, according to charges, killed victim after saying "he was going to kill him in retaliation for something [the victim] had done" is, "the state reminds, a cold-blooded killer").

[7]See Gorman, Millionaire Guilty of Killing Ex-Wife, Chicago Tribune, February 3, 1993, p. 1 ("Assistant State's Atty. Robert Egan portrayed Davis as a `manipulative,' cold-blooded killer . . . . Egan depicted Davis as a man so filled with hatred that he killed Diane Davis two weeks after an Illinois Appellate Court had ruled . . . that he must turn over $1.4 million of his inherited money to his former spouse").

[8]See Burns, U.N. to Ask NATO to Airdrop Supplies for Bosnians, New York Times, January 12, 1993, p. A10 (shooting of Bosnian Deputy Prime Minister by Serbian soldier was described by State Department

were described as cold-blooded. The majority's assertion that the Idaho construction narrows the class of capital defendants because it rules out those who "kill with anger, jealousy, revenge, or a variety of other emotions" clearly is erroneous, because in ordinary usage the nebulous description "cold-blooded" simply is not limited to defendants who kill without emotion.

In legal usage, the metaphor "cold blood" does have a specific meaning. "Cold blood" is used "to designate a willful, deliberate, and premeditated homicide." Black's Law Dictionary 260 (6th ed.

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spokesman Richard A. Boucher as "cold-blooded" murder).

[9]See Man Gets Life For Double Murder, Toronto Star, March 4, 1993, p. A12 (the prosecution "called it `a cold-blooded killing' spurred by [the defendant's] `humiliation and hate of these people,' with whom he had squabbled during the 1991 mayoralty campaign").

[10]See McKay, Koresh "Smiled Defiantly" Before Ambush, Agent Says, Houston Chronicle, March 5, 1993, p. A1 ("`These people aren't religious. These people are cold-blooded killers who were shooting at us from every window in that place'").

[11]See Milling, Man Charged in 2 Slayings, Crime Spree, Houston Chronicle, March 5, 1993, p. A23 ("`I'd describe him as a psychopath who gets his gratification by hurting other people,' Carroll said. `He's not your typical serial killer. He just likes to pull the trigger and watch people die.' . . . `We knew this guy was a cold-blooded killer,' Carroll said").

[12]See Longenecker, Penalizing Convicts, Chicago Tribune, March 4, 1993, p. 28 (letter) ("[L]egislation to expand the death penalty to include all convicted murderers is long needed. . . . [I]f an individual commits cold-blooded murder he should be removed from our society").

1990). As such, the term is used to differentiate between first- and second-degree murders.[13] For example, in *United States* v. *Frady*, 456 U. S. 152 (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

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[13]The line between the "ordinary" and the "legal" meaning of cold-blooded, however, is not always obvious. On the one hand, judges sometimes casually use the phrase in a variety of senses. In those circumstances, contrary to the majority's assumptions, the term regularly is applied to crimes committed "with anger, jealousy, revenge, or a variety of other emotions." See, *e.g.*, *McWilliams* v. *Estelle*, 378 F. Supp. 1380, 1383 (SD Tex. 1974) ("It was the theory of the prosecution that the store owner refused to serve petitioner, that he became angry, went to his hotel room, returned with a pistol, and shot the owner in cold blood"), app. dism'd, 507 F. 2d 1278 (CA5 1975); *People* v. *Sullivan*, 183 Ill. App. 3d 175, 180, 538 N.E. 2d 1376, 1380 (1989) (the defendant "exhibited repeatedly a very jealous, violent nature. . . . The trial court concluded that if the situation were to arise again, defendant in all probability would kill in cold blood again"); *People* v. *Yates*, 65 Ill. App. 3d 319, 325, 382 N. E. 2d 505, 510 (1978) ("This record reveals a concerted, deliberate attack by Shirley and Emma Yates against their victim, motivated . . . by cold-blooded revenge"). On the other hand, in ordinary parlance the term "cold-blooded" sometimes is used to mean "premeditated." See, *e.g.*, Reward Offered in Slaying of 2 Women in Shadow Park, Los Angeles Times, January 21, 1993, p. J2 (quoting mayor's statement: "`This was one of those in-cold-blood killings, not just a drive-by or random shooting. It was premeditated'").

or in the sudden heat of passion.'" *Id.*, at 170, n. 18 (1982), quoting *Austin* v. *United States*, 127 U. S. App. D.C. 180, 188, 382 F. 2d 129, 137 (1967). Murder in cold blood is, in this sense, the opposite of murder in "hot blood." Arguably, then, the *Osborn* formulation covers every intentional or first-degree murder. An aggravating circumstance so construed would clearly be unconstitutional under *Godfrey*.

Finally, I examine the construction's application by the Idaho courts. The majority acknowledges the appropriateness of examining "other state decisions when the *construction* of an aggravating circumstance has been unclear," such as where state courts have not adhered to a single limiting construction. *Ante*, at 13. Here, however, the majority believes such an inquiry is "irrelevant," *ante*, at 12, because "there is no question that Idaho's formulation of its limiting construction has been consistent," *ante*, at 13. The majority misses the point. Idaho's application of the *Osborn* formulation is relevant not because that formulation has been inconsistently invoked, but because the construction has never meant what the majority says it does. In other words, it is the majority's reconstruction of the (unconstitutional) construction that has not been applied consistently (or ever, for that matter). If, for example, a State declared that "jaberwocky" was an aggravating circumstance, and then carefully invoked "jaberwocky" in every one of its capital cases, this Court could not simply decide that "jaberwocky" means "killing a police officer" and then dispense with any inquiry into whether the term ever had been understood in that way by the State's courts, simply because the "jaberwocky" construction consistently had been reaffirmed.

An examination of the Idaho cases reveals that the *Osborn* formulation is not much better than "jaberwocky." As noted above, the Idaho courts never have articulated anything remotely approach-

ing the majority's novel "those who kill without feeling or sympathy" interpretation. All kinds of other factors, however, have been invoked by Idaho courts applying the circumstance. For example, in *State* v. *Aragon*, 107 Idaho 358, 690 P. 2d 293 (1984), the killer's cold-bloodedness supposedly was demonstrated by his refusal to render aid to his victim and the fact that "[h]is only concern was to cover up his own participation in the incident." *Id.*, at 367, 690 P. 2d, at 302. In *State* v. *Pizzuto*, 119 Idaho 742, 774, 810 P. 2d 680, 712 (1991), a finding of "utter disregard" was held to be supported by evidence that the defendant "approached Mr. Herndon with a gun, then made him drop his pants and crawl into the cabin where he proceeded to bludgeon the skulls of both of his victims with a hammer. He then left them lying on the floor to die and Mr. Herndon was left lying on the floor of the cabin convulsing." And, in the present case, the trial judge's determination that Creech exhibited utter disregard for human life appears to have been based primarily on the fact that Creech had "intentionally destroyed another human being at a time when he was completely helpless." App. 34. Each of these characteristics is frightfully deplorable, but what they have to do with a lack of emotion—or with each other, for that matter—eludes me. Without some rationalizing principle to connect them, the findings of "cold-bloodedness" stand as nothing more than fact-specific, "gut-reaction" conclusions that are unconstitutional under *Maynard* v. *Cartwright*, 486 U. S. 356 (1988).

The futility of the Idaho courts' attempt to bring some rationality to the "utter disregard" circumstance is glaringly evident in the sole post-*Osborn* case that endeavors to explain the construction in any depth. In *State* v. *Fain*, 116 Idaho 82, 774 P. 2d 252, cert. denied, 493 U. S. 917 (1989), the court declared that the `utter disregard' factor

refers to "the defendant's lack of conscientious scruples against killing another human being." *Id.*, at 99, 744 P. 2d, at 269. Accord, *State* v. *Card*, 121 Idaho, at 436, 825 P. 2d, at 1092. Thus, the latest statement from the Idaho Supreme Court on the issue says nothing about emotionless crimes, but, instead, sweepingly includes every murder committed that is without "conscientious scruples against killing." I can imagine no crime that would not fall within that construction.

The State in its brief embraces *Fain*'s broad construction. "In every case in which the Idaho Supreme Court has upheld a death sentence based wholly or in part on a finding of utter disregard for human life, the defendant had acted without conscientious scruple against killing." Brief for Petitioner 25. The State cites this reassuring fact as the "best evidence that Idaho's utter disregard factor is not so broad that it operates simply as a catch-all for murders not covered by other aggravating circumstances." *Id.*, at 24. This "best evidence" is not very good evidence, especially when viewed against the fact that the Idaho Supreme Court never has reversed a finding of utter disregard.[14] Equally unsettling is the

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[14]The State suggests in its brief that on one occasion the Idaho Supreme Court found that the evidence did not support an utter disregard finding. Brief for Petitioner 27, citing *State* v. *Charboneau*, 116 Idaho 129, 774 P. 2d 299 (1989). It is not at all clear, however, that that is what occurred in *Charboneau*. The court there vacated a sentence because it was "unclear from the [trial court's] Findings whether the trial court would have imposed the death penalty without having [mistakenly] concluded that [the victim] was not mortally wounded until the second volley of shots was fired." *Id.*, at 151, 774 P. 2d, at 321. There is no mention in this part of the opinion of the "utter disregard" factor, nor any suggestion that

State's frank admission that the *Osborn* construction "does not make findings of the aggravating factors depend on the presence of particular facts. Instead Idaho has chosen to rely on the ability of the sentencing judge to make principled distinctions between capital and non-capital cases with guidance that is somewhat subjective . . . ." *Id.*, at 9. That kind of gestalt approach to capital sentencing is precisely what *Cartwright* and *Godfrey* forbid.

Ultimately, it hardly seems necessary to look beyond the record of this case to determine that either the majority's construction is inadequate, or that there was insufficient evidence to support the "utter disregard" factor here. The record, which the majority takes pains to assure us "could not be more chilling," *ante*, at 1,[15] includes an explicit finding by the trial judge that Creech was the subject of an unprovoked attack and that the killing took place in

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the erroneous finding tainted the "utter disregard" factor rather than the "heinous, atrocious, and cruel" circumstance that was at issue in that case.

[15] I note that much of the majority's discussion of the "facts underlying this case" centers on Creech's *other* crimes—which obviously do not bear on whether "[b]y the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life"—and on the argument, repeatedly rejected by the state courts, that Creech engineered the fight with Jensen in order to create a pretext for killing him. The Idaho Supreme Court explicitly noted that the trial court did not "find that the murder had been performed on contract or by plan." *State* v. *Creech*, 105 Idaho 362, 364, 670 P. 2d 463, 465 (1983), cert. denied, 465 U. S. 1051 (1984). In fact, the trial court not only found that Jensen's attack was "unprovoked," but it went further and found that the unprovoked nature of the attack actually constituted a *mitigating* factor. See App. 52.

an "excessive violent rage." App. 52. If Creech somehow is covered by the "utter disregard" factor as understood by the majority (one who kills not with anger, but indifference, *ante*, at 12), then there can be no doubt that the factor is so broad as to cover any case. If Creech is not covered, then his sentence was wrongly imposed.

Let me be clear about what the majority would have to show in order to save the Idaho statute: that, on its face, the *Osborn* construction—"the highest, the utmost, callous disregard for human life, *i.e.*, the cold-blooded, pitiless slayer"—refers *clearly* and *exclusively* to crimes that occur "without feeling or sympathy," that is, to those that occur without "anger, jealousy, revenge, or a variety of other emotions." No such showing has been made.

There is, of course, something distasteful and absurd in the very project of parsing this lexicon of death. But as long as we are in the death business, we shall be in the parsing business as well. Today's majority stretches the bounds of permissible construction past the breaking point. "`Vague terms do not suddenly become clear when they are defined by reference to other vague terms,'" *Walton* v. *Arizona*, 497 U. S., at 693–694, n. 16 (dissenting opinion), quoting *Cartwright* v. *Maynard*, 822 F. 2d 1477, 1489 (CA10 1987), nor do sweeping categories become narrow by mere restatement. The *Osborn* formulation is worthless, and neither common usage, nor legal terminology, nor the Idaho cases support the majority's attempt to salvage it. The statute is simply unconstitutional and Idaho should be busy repairing it.

I would affirm the judgment of the Court of Appeals.