LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SAMUEL A. LEWIS, DIRECTOR, ARIZONA

DEPARTMENT OF CORRECTIONS, ET AL., Petitioners

V. JIMMIE WAYNE JEFFERS

CASE NO: 89-189

PLACE: Washington, D.C.

DATE: February 21, 1990

PAGES: 1 - 52

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - - - - - - - - - - - - - -x

3 SAMUEL A. LEWIS, DIRECTOR, :

4 ARIZONA DEPARTMENT OF :

5 CORRECTIONS, ET AL. :

6 Petitioners :

7 V. : No. 89-189

8 JIMMIE WAYNE JEFFERS :

9 - - - - - - - - - - - - - - - - - -x

10 Washington, D.C.

11 Wednesday, February 21, 1990

12 The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States at

14 1:50 p.m.

15 APPEARANCES:

16 GERALD R. GRANT, ESQ., Assistant Attorney General of

17 Arizona, Phoenix, Arizona; on behalf of the

18 Petitioners.

19 JAMES S. LIEBMAN, ESQ., New York, New York; appointed by

20 this Court on behalf of the Respondent.

21

22

23

24

25

1 CONTENTS

ORAL ARGUMENT OF	PAGE
GERALD R. GRANT, ESQ.	
On behalf of the Petitioners	3
JAMES S. LIEBMAN, ESQ.	
Appointed by this Court	
on behalf of the Respondent	19
REBUTTAL ARGUMENT OF	
GERALD R. GRANT, ESQ.	
On behalf of the Petitioners	43

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 P R O C E E D I N G S

2 (1:50 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in No. 89-189, Samuel A. Lewis v. Jimmy Wayne

5 Jeffers.

6 Mr. Grant, you may proceed whenever you're

7 ready.

8 ORAL ARGUMENT OF GERALD R. GRANT

9 ON BEHALF OF THE PETITIONERS

10 MR. GRANT: Thank you, Your Honor. Mr. Chief

11 Justice, and may it please the Court:

12 The issue in this capital case is what standard

13 of review should a Federal habeas court apply in reviewing

14 a state court's finding that an aggravating circumstance

15 exists.

16 It's our position that once the Federal habeas

17 court has examined the aggravating circumstance and

18 determined that the state court has adopted a proper

19 narrowing construction of it, that the state court finding

20 that the aggravating circumstance exists is not generally

21 subject to Federal review. Only in those instances where

22 the finding is so unprincipled or arbitrary as to somehow

23 violate the Constitution should that finding be reviewed

24 by a Federal habeas court.

25 QUESTION: I suppose it would be reviewable

1 under the Jackson against Virginia standard at -- at any
2 rate if it were argued that there were no -- no juror
3 could possibly or no court could possibly find him beyond
4 a reasonable doubt.
5 MR. GRANT: That's an additional standard that
6 the dissent in the Ninth Circuit recognized. It's also a
7 standard we've mentioned in our briefs.
8 However, our one problem with that is that we do
9 not, and this Court has not, equated aggravating
10 circumstances with findings of guilt. The Jackson
11 standard does apply to standard of guilts -- findings of
12 guilt, and for that reason we would prefer the standard
13 stated in Barclay which is the -- so unprincipled or
14 arbitrary.
15 Briefly, in this case the Arizona trial court
16 found two aggravating circumstances in Mr. Jeffers' case.
17 He found that in committing the murder he created a grave
18 risk of death to others. He also found that the murder
19 was committed in an especially heinous, cruel or depraved
20 fashion.
21 In the Arizona State Supreme Court's independent
22 review of this case, it set aside the first aggravating
23 circumstance, the grave risk of death. And with regard to
24 the second, it set aside the cruelty portion of it. It
25 found that cruelty had not been shown beyond a reasonable

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 doubt. It, however, affirmed the finding that he had
2 committed the murder in an especially heinous and -- and
3 depraved fashion.
4 Mr. Jeffers then petitioned for cert. to this
5 court. Cert. was denied. He then subsequently filed a
6 Federal habeas corpus petition. In that petition he made
7 a number of attacks on his -- on his sentencing. Two of
8 those attacks were that the cruel, heinous or depraved
9 aggravating circumstance was void on its face, and,
10 secondly, that it was void as applied to him.
11 The district court ruled against him on both.
12 He then went to the Ninth Circuit and the Ninth Circuit --
13 with regard to the first question, the Ninth Circuit,
14 relying on its prior decision in Chaney, found that the
15 circumstance was not void on its face.
16 It then went on to address the question he had
17 presented, essentially that it was void as applied to him.
18 The Ninth Circuit concluded, after reviewing some Arizona
19 cases, that the evidence presented did not meet Arizona's
20 definition of cruel, heinous or depraved, the narrowing
21 decision -- the narrowing construction that they had
22 previously found had been made by the Arizona Supreme
23 Court.
24 It's our position that what the Ninth Circuit
25 essentially did, and what Respondent is asking this Court

1 to do, is to allow Federal habeas courts to act as a third
2 sentencer. Our position that's not the -- not the
3 responsibility --
4 QUESTION: What do you think its holding was in
5 the Ninth Circuit?
6 MR. GRANT: My interpretation of the Ninth
7 Circuit's holding was they first looked at Arizona's
8 definition of cruel, heinous or depraved. They said, yes,
9 this is properly narrowed.
10 QUESTION: Uh-huh.
11 MR. GRANT: They then looked at the facts and
12 they accepted the facts -- the historical facts --
13 QUESTION: Yes.
14 MR. GRANT: -- concerning what Mr. Jeffers had
15 done. They accepted those as correct.
16 They then made their own determination of
17 whether those facts met the standard. In essence, what
18 they did was resentence Mr. Jeffers. They made their own
19 determination as to whether or not these factors -- this
20 evidence, excuse me, met the definition of the factor.
21 QUESTION: Well, didn't the Ninth Circuit in
22 reaching that conclusion take into consideration other
23 Arizona cases in which the death penalty had not been
24 imposed?
25 MR. GRANT: They looked at -- they looked at six

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 cases. Essentially they all dealt with the cruel, heinous
2 or depraved circumstance, and I believe four of them --
3 four of the decisions were ones in which the state supreme
4 court had found that the circumstance did not apply.
5 Again -- and essentially what they did, besides
6 acting as a third level of sentencer, was to conduct a
7 proportionality review. They compared this case with
8 various other Arizona cases. Our position is that under
9 Pulley versus Harris that sort of proportionality review
10 is not constitutionally required and it should not have
11 been done.
12 QUESTION: Now, what do you say the standard for
13 review is for this so-called as applied challenge?
14 MR. GRANT: My position is that -- is that once
15 the determination has been made that the circumstance has
16 been narrowly defined. The actual finding that the
17 circumstance exists is not subject to Federal review
18 unless that finding is simply so unprincipled or arbitrary
19 as to somehow violate the constitution. And that test I
20 take from the plurality opinion in Barclay.
21 QUESTION: In -- in what case?
22 MR. GRANT: Barclay, Barclay versus Florida.
23 Our basic position is that since Furman this
24 Court's consideration in death penalty cases has been that
25 states should narrow the class of people eligible for the

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 death penalty and that this Court -- and that state courts
2 should guide and minimize, but not eliminate, the
3 discretion of the sentencing authority.
4 The two main decisions that I think are relevant
5 here from this Court are Godfrey and Maynard. Neither of
6 those support the action taken by the Ninth Circuit.
7 Neither of those dictate the result that the Respondent
8 would like from this Court.
9 The problem in Godfrey and what caused this
10 Court to reverse Godfrey's death sentence was not that
11 this Court found that Godfrey's conduct was somehow less
12 atrocious -- I believe was the language in Godfrey -- than
13 that of other people in Georgia. The problem in Godfrey
14 was that Georgia had adopted a narrowing construction of
15 their aggravating circumstance, which is similar to
16 Arizona's. I believe they used the word atrocious rather
17 than -- than heinous and depraved.
18 This Court recognized that -- that Georgia had
19 done that, they had adopted a narrowing construction. The
20 problem with Godfrey, however, was that the jury who
21 sentenced Mr. Godfrey was not instructed in accordance
22 with that narrowing definition, and, therefore, their
23 finding that the circumstance existed was subject to
24 uncontrolled discretion.
25 And, secondly, on review by the state supreme

1 court of Georgia, the state supreme court also failed to
2 apply their own narrowing construction of the aggravating
3 circumstance.
4 Because of those two things, this Court
5 concluded that the danger of excessive discretion in an
6 unchanneled sentencing decision was too great and
7 therefore reversed Mr. Godfrey's death sentence.
8 In Maynard, which followed Godfrey, the problem
9 again was not -- or, the reason for the holding was not
10 that Mr. Maynard's conduct was somehow less atrocious or
11 less heinous than that of anyone else in Oklahoma.
12 QUESTION: May I just interrupt a second, Mr.
13 Grant? Why in Godfrey -- what was the standard that you
14 understand was applied to decide that the -- Georgia's
15 narrowing construction had not been followed? I want to
16 be sure I get the -- what you're saying the difference
17 between Godfrey and this case is. I'm not sure I -- I --
18 I may have lost you.
19 MR. GRANT: Well, I think the difference is,
20 simply by looking at the record this Court could
21 determine, number one, that the jury who sentenced Godfrey
22 were not instructed on the meaning, the narrowing
23 construction --
24 QUESTION: Right.
25 MR. GRANT: -- of the meaning of the aggravating

1 circumstance. There wasn't any instruction to the jury.

2 Secondly, this Court could determine by

3 reviewing the Georgia Supreme Court's review of Mr.

4 Godfrey's situation, that the Georgia Supreme Court had

5 not adopted -- or, had not applied that definition.

6 The distinction here is that, first of all, we

7 have judge sentencing in Arizona, not jury sentencing.

8 The judge is presumed to know the law.

9 QUESTION: But as to the second point -- is what

10 I'm most interest in.

11 MR. GRANT: As to the second point, you can look

12 at the Arizona State Supreme Court's opinion and you can

13 see -- it's in the Joint Appendix at, I believe, page 69

14 and following -- that they refer to the narrow definition

15 and they then proceed to apply it to Mr. Jeffers' case.

16 The only -- the difference here is that the

17 Federal court went beyond those questions, whether or not

18 there is a definition, whether or not the definition is

19 narrow, and whether or not the definition was applied by

20 the state supreme court. Those are the considerations

21 that this Court talked about in Godfrey and Maynard. It

22 went beyond those three and essentially substituted its

23 own judgment as to what the appropriate sentence should

24 be.

25 QUESTION: Well, I thought the -- I thought --

1 I'm -- I -- it's kind of a confusing opinion. But I
2 thought they in effect had said that the -- a proper
3 reading of the narrowed definition was not applied here.
4 I'm -- I'm stating it backwards. That the facts here
5 don't fit the narrowed definition.
6 MR. GRANT: I think that's what they said. But
7 I think the effect of that is we've looked at these facts
8 and we don't think this murder is especially heinous and
9 depraved.
10 QUESTION: Under the narrow definition?
11 MR. GRANT: Correct. They said -- they
12 acknowledged that Arizona had applied the definition.
13 They simply disagreed with the result that Arizona had
14 reached in applying that definition.
15 It's our position that that final step,
16 disagreeing with the result, is not a Federal question
17 subject to review in habeas cases unless that finding is
18 somehow so unprincipled or arbitrary.
19 Respondent's position and, by extension, that
20 taken by the Ninth Circuit, essentially would open almost
21 every step of a state court's sentencing process in
22 capital cases to Federal review. There is no logical
23 reason why Respondent's position and that taken by the
24 Ninth Circuit could not be extended to allow a Federal
25 habeas court to in effect find mitigation that the state

1 court had rejected, to allow a Federal court to in effect
2 find that mitigation, which the state court had found was
3 insubstantial and insufficient, was substantial to call
4 for a leniency, was indeed sufficiently substantial to
5 call for a leniency.
6 All of these things, the state would submit, are
7 simply beyond the power of the Federal habeas court and
8 are things that the Federal court should not be doing.
9 Respondent's position also asks this Court to --
10 and their answering brief demonstrates that fairly well --
11 wants this Court to conduct a wide ranging, case-by-case
12 comparison of Arizona cases and in effect any other state.
13 QUESTION: Well, tell me -- tell me again why --
14 why a -- why you think that the Jackson-type review to a
15 -- where -- where it's been found either in the trial
16 court or the -- by the appellate court that an aggravating
17 circumstance exists.
18 Now, that means you know what the aggravating
19 circumstance is defined as and if it -- it's an
20 application of that definition of the facts.
21 MR. GRANT: I don't have a major problem with
22 the Jackson standard. My only problem is the reservation
23 that aggravating circumstances are not equated with the
24 finding of guilt. I certainly think the --
25 QUESTION: Well, that's true.

1 MR. GRANT: -- in a Jackson-type standard --
2 QUESTION: Well, what's -- what's the difference
3 between the Jackson-type standard and what you're
4 promoting?
5 MR. GRANT: To a certain extent we're -- we're
6 discussing semantics. I think the Jackson standard and
7 this -- and this principle -- unprincipled or arbitrary
8 standard could be read --
9 QUESTION: Because a lot of people -- a lot of
10 people, including some maybe around here, thought there
11 was going to be a terrific terrible result from Jackson.
12 But that hasn't proved to be the case, has it?
13 MR. GRANT: I don't think so. I think the
14 Jackson standard is -- is something -- as long as the
15 distinction between aggravation and finding of guilt is
16 maintained, I think the Jackson standard is appropriate
17 because it pays deference to the state court finding,
18 which the Ninth Circuit in this case did not do under any
19 standard.
20 My position is that the Barclay standard would
21 perhaps pay a little more --
22 QUESTION: I thought the court went on to say
23 that because the -- because on these facts the
24 circumstance doesn't exist -- I thought they concluded
25 that the circumstance therefore, as defined, wasn't --

1 wasn't sufficiently -- well, it wasn't -- as applied in
2 the courts, it was sort of a crazy quit. It was just --
3 you could -- it was -- it was just an arbitrary system.
4 MR. GRANT: I disagree with what the Ninth
5 Circuit did in that respect. I think -- again, the Ninth
6 Circuit was presented with two questions. The
7 circumstance is overbroad on its face. When it dealt with
8 that question, it --
9 QUESTION: It said no.
10 MR. GRANT: -- resolved it against --
11 QUESTION: Yeah.
12 MR. GRANT: -- Petitioner. It then went on to
13 -- to discuss whether or not it was applied properly here.
14 I mean, that -- on that question, it ruled against the
15 state.
16 QUESTION: And I thought it -- I meant to say
17 that if the Arizona court thought that on these facts that
18 circumstance existed, the whole system -- or, that whole
19 aggravating circumstance wasn't adequate to avoid an
20 arbitrary system.
21 MR. GRANT: I don't -- I don't think they went
22 that far. I think all they said was under these facts --
23 these facts cannot be plugged into that definition and
24 maintain a narrowing construction as to Mr. Jeffers. I
25 don't think they related it back to the first question and

1 -- and somehow undermined what they had done with respect
2 to that.
3 QUESTION: May I ask you another question, Mr.
4 Grant?
5 In the later case, contrary to this one, the
6 Ninth Circuit said the circumstance is -- is void on it's
7 face, or something, didn't it? That it's too broad?
8 MR. GRANT: Yes.
9 QUESTION: Now, if -- I'm not saying we should
10 -- but if we should agree with -- have that same view,
11 what do we do with this case? Do we -- are we bound sort
12 of by the law of the case that we must assume this is a
13 valid aggravating circumstance even if we don't think it
14 is?
15 MR. GRANT: Well, my first answer would be that
16 question is not before the Court in this case, although
17 Respondent disagrees with me.
18 QUESTION: But it's -- it would be sort of -- if
19 this is the sole aggravating circumstance and if we're
20 convinced, based on the Ninth Circuit's reasoning in the
21 other case that it's an invalid circumstance, I find it
22 rather difficult to say we should execute this man.
23 MR. GRANT: Well, my second --
24 QUESTION: You see?
25 MR. GRANT: -- then would be, first of all, that

1 issue is before this Court in Walton, which--

2 QUESTION: Right. I understand that. But I'm

3 just -- I'm really -- it's kind of hard to divorce them

4 completely in thinking about this. I'm just trying to be

5 candid with you.

6 MR. GRANT: Assuming -- assuming the Court ruled

7 against the state's position in Walton --

8 QUESTION: Yeah.

9 MR. GRANT: -- the question would then become

10 under Teague and Penry whether or not that rule, whatever

11 rule it is that the Court adopts, --

12 QUESTION: Well, assume they not only ruled

13 against you but they thought it was covered by Godfrey or

14 something like that so it wasn't a new rule.

15 MR. GRANT: If it is not a new rule under the

16 Penry and Teague analysis, it could be applied to this

17 case. My position would be that it is a new rule, --

18 QUESTION: I see.

19 MR. GRANT: -- it's not dictated by Maynard and

20 it's not dictated by Godfrey. It goes beyond what two --

21 two cases authorize.

22 QUESTION: And, of course, you say it's wrong

23 too. I mean, you say this circumstance is -- is proper?

24 MR. GRANT: Correct.

25 QUESTION: Yeah.

1 MR. GRANT: But assuming, as your hypothetical
2 was --
3 QUESTION: Yeah.
4 MR. GRANT: -- that -- that this Court were to
5 rule against us on that point, that would be my response.
6 My position is that indeed Arizona has adopted a narrowing
7 construction of the --
8 QUESTION: Yeah.
9 MR. GRANT: -- of the circumstance.
10 Getting back to the comments I made regarding
11 this Court's general holding since Furman, the need for
12 narrowing the class and restricting sentencing discretion
13 in capital cases, I think if you examine the Arizona
14 sentencing scheme, you'll see that Arizona has done just
15 that.
16 First of all, Arizona provides for sentencing by
17 a judge, rather than by a Jury, which this Court has noted
18 on some occasions should provide for more consistent
19 reasoned application of the death penalty.
20 Arizona also requires the sentencing judge to
21 make written findings to file a special verdict so that
22 the appellate court can review what it is that the -- that
23 the trial court based its death sentencing decision on.
24 Arizona also requires that the aggravating
25 circumstance which qualify a defendant for the death

1 penalty must be proven beyond a reasonable doubt. Arizona
2 further provides for automatic appeal in every death
3 penalty case.
4 The Arizona Supreme Court conducts an
5 independent review of the evidence concerning both
6 aggravation and mitigation. It does not defer to the
7 trial court's finding; it makes its own decision as to
8 whether or not the evidence is sufficient to meet the
9 aggravating circumstance or the mitigating circumstance.
10 And, also, as a matter of state law, the Arizona
11 Supreme Court conducts a proportionality review in which
12 it compares the sentence imposed in the case before it
13 with those in other cases. That proportionality review is
14 done as a matter of state law, and not as a matter of
15 Federal law.
16 As Pulley makes clear, one problem with that
17 sort of proportionality review being done by a Federal
18 court is that the Federal court -- this Court or any other
19 Federal court -- is not going to have the same access to
20 the record in the other death penalty cases from the state
21 that the Arizona Supreme Court will. The Arizona Supreme
22 Court will have those records before it, will have the
23 transcripts, will have the sentencing decisions, and can
24 make a much more informed and complete analysis than a
25 Federal court could do attempting to make a

1 proportionality review.

2 With respect to what happened in this case, our

3 position is that the standard applied is a

4 constitutionally narrow one, that the facts fit plainly

5 within that definition, and in fact fit within the core of

6 that definition.

7 It's our position that the Ninth Circuit,

8 instead of acting as a Federal reviewing court,

9 essentially acted as another sentencing court. In doing

10 so, it exceeded its authority and this Court should

11 correct the mistake, set aside that finding by the Ninth

12 Circuit, and reinstate the death penalty for Mr. Jeffers.

13 Unless the Court has additional questions, I'd

14 like to reserve the rest of my time for rebuttal.

15 QUESTION: Very well, Mr. Grant. Mr. Liebman,

16 we'll hear from you now.

17 ORAL ARGUMENT OF JAMES S. LIEBMAN

18 APPOINTED BY THIS COURT

19 ON BEHALF OF THE RESPONDENT

20 MR. LIEBMAN: Mr. Chief Justice Rehnquist, may

21 it please the Court:

22 The issues in this case have narrowed

23 considerably as a result of the briefing and particularly

24 the argument here.

25 It seems to me it is clear that both parties

1 agree that there are two questions, constitutional
2 questions, that the Court has to address in a case such as
3 this one, and it's also clear that the parties agree on
4 the standards that apply to both of those two questions.
5 What they disagree about is the answer to the first of
6 those questions.
7 The first question is whether or not Arizona's
8 definition -- Arizona has a definition of its especially
9 heinous and depraved aggravating circumstance that
10 satisfied the Eighth Amendment rule of Furman versus
11 Georgia, that it narrowed the class of death-eligible
12 first-degree murderers on the basis of an objective
13 principle.
14 That question entails an inquiry, as in both
15 Godfrey and Maynard, into first whether or not the state
16 has defined its aggravating circumstance in a
17 constitutional manner, and, secondly, whether it has
18 applied a constitutional definition in the particular
19 case.
20 QUESTION: This -- this is the point on which
21 the Ninth Circuit ruled against your client?
22 MR. LIEBMAN: No, Your Honor. The Ninth Circuit
23 did not rule against Mr. Jeffers on either of those
24 aspects of the Maynard and Godfrey rule.
25 QUESTION: Well, it did -- it did make one

1 favorable ruling to the state. What was that?

2 MR. LIEBMAN: That ruling was that the statute

3 -- and it says statute repeatedly -- the statute on its

4 face was not unconstitutional, and it cites Gregg. That's

5 exactly the ruling this Court made in Gregg, which was

6 that the reason the statute isn't unconstitutional on its

7 face is it is, as the Ninth Circuit said, capable of

8 constitutional definition and application.

9 The question it set aside was are we going to

10 throw out the Arizona statute lock, stock and barrel? And

11 it said no, we're going to see if in the definition of

12 that statute and in the application of that statute it was

13 rendered constitutional before we're going to throw the

14 whole thing out. And it concluded that it was not

15 constitutional.

16 The state has said that that narrowing

17 requirement is met. In fact, the state began its argument

18 by saying once the state has adopted a proper narrowing

19 construction -- that's the critical premise -- then you go

20 on to its second question.

21 Well, we are challenging that premise, and the

22 reason we challenge that premise is that the state has

23 never told us what the narrowing principle is. There is

24 no statement of that in the state's briefs and the state

25 did not make that statement during the course of its

1 argument.

2 We don't know what that narrowing principle is,

3 and it's the absence of that principle that renders the

4 Arizona definition as applied in this case

5 unconstitutional. And it seems to me --

6 QUESTION: If -- if the Supreme Court of Arizona

7 had in effect said exactly what the Ninth Circuit said, I

8 take it we'd have jurisdiction on direct review to reverse

9 them under your theory?

10 MR. LIEBMAN: If the Supreme Court of Arizona

11 said --

12 QUESTION: Let's say -- let's say the Ninth

13 Circuit opinion was really written by the Supreme Court of

14 Arizona in this case, I take it under your theory we'd

15 have jurisdiction on direct review if -- assuming we

16 granted cert. -- to reverse them.

17 MR. LIEBMAN: Absolutely, because it would have

18 been decided on the --

19 QUESTION: You have to say to say that for your

20 theory of the case, I take it.

21 MR. LIEBMAN: Yes, but I think that there's no

22 question but that what the Ninth Circuit intended to do

23 here was to extract a standard. If you look at footnotes

24 9 and 10 and the text accompanying them in the decision of

25 the court of appeals, it very clearly says over and over

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 again what we're doing in this case is trying to extract a
2 standard and then looking at the constitutionality of that
3 standard.

4 If Arizona had done the same thing, said, well,
5 here's our standard, we decide that it's constitutional or
6 we decide that it's unconstitutional, this Court could
7 review it because the Federal question would be preserved
8 in the case and would be available for review here. I
9 think it's --

10 QUESTION: Well, I'll look at the case again. I
11 -- I had thought that the Ninth Circuit accepted the
12 statute as setting forth a proper standard and accepted
13 the cases as setting forth the proper standard but said
14 that they -- that they can't be applied here.

15 MR. LIEBMAN: Well, Your Honor, I think that's
16 not a fair reading of the decision of the Ninth Circuit
17 and I would like to take the Court through that --

18 QUESTION: Fine.

19 MR. LIEBMAN: -- because it seems to be an
20 important point. I think this -- the passage that we're
21 talking about is on 24 through 26 of the appendix to the
22 cert. petition.

23 The first passage of this is really at the top
24 of 24, it's the first full sentence after the citation
25 there, his, Mr. Jeffers's, argument that the statute --

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 the statute -- is void on its face is foreclosed by our
2 decision in Chaney.
3 You can't throw out the statute because Chaney
4 said the statute was okay. Why did Chaney say that?
5 That's the next sentence. There, we rejected a similar
6 challenge to the same statute, pointing out that although
7 the statutory language is broad, as any murder could be
8 cruel, heinous or depraved, the Arizona Supreme Court need
9 not construe the statute open-endedly.
10 QUESTION: Where are you reading?
11 MR. LIEBMAN: I'm sorry. It's on page 24 of the
12 Appendix to the cert. petition.
13 QUESTION: A-24.
14 MR. LIEBMAN: A-24. So, first of all, it says
15 we're going to look at the statute. Does the statute pass
16 constitutional muster? No, it doesn't. But we're not
17 going to throw it out because it's capable of
18 constitutional construction.
19 QUESTION: Well, yes, but on A-25 it says that
20 -- it says that in Chaney the court held that -- "the
21 Arizona Supreme Court appears to have sufficiently
22 channeled sentencing discretion to prevent arbitrary and
23 capricious capital sentencing decisions."
24 MR. LIEBMAN: Well, Your Honor, first of all,
25 you changed a word there, and I think it's an important

1 word. You said it held. All it says is, "In Chaney,
2 we" --
3 QUESTION: We stated in Chaney that --
4 MR. LIEBMAN: That it appears.
5 QUESTION: Uh-huh.
6 MR. LIEBMAN: Then it goes on to give in the
7 next sentence -- I think it's important, Your Honor,
8 because in the next sentence they do say the holding of
9 Chaney -- the holding of Chaney is that the application in
10 that case was constitutional.
11 And then you go on to what I think is the
12 critical passage, it's the first sentence, full sentence,
13 in the first paragraph that begins on the next page.
14 QUESTION: Well, I want you to get there, but
15 jut before you do -- in other words, you're going to
16 interpret that as saying we imposed a sentence on Chaney
17 under a statute that was not constitutional?
18 MR. LIEBMAN: No. What I interpret the -- the
19 Ninth Circuit to be doing here is to be doing exactly the
20 same thing with regard to the -- the definition that
21 Arizona uses that it was doing with regard to the statute.
22 It said, we don't know whether the statute is
23 constitutional. We're going to have to look for the
24 construction of it. We don't know if the definition is
25 constitutional because it will only become clear if it's

1 constitutional or not in the application --

2 QUESTION: You're -- you're attributing an

3 extraordinarily Jesuitical approach to Judge Canby, I

4 think.

5 MR. LIEBMAN: Well, no, Your Honor, and there's

6 a very good reason why I don't think I am doing that. And

7 that is that the Ninth Circuit in Adamson, which was

8 decided several months after this case -- at the end of

9 the discussion of heinous and depraved there said, in

10 order to find in Adamson that the definition in Arizona is

11 unconstitutional of heinous and depraved, do we have to

12 overrule any cases that this court has already decided?

13 And the answer it gave was no. At page 1038 of

14 the Adamson decision they said there is no prior case in

15 the Ninth Circuit that finds the definition to be

16 constitutional.

17 It then goes on to look at the Chaney case. And

18 it says all that Chaney says is -- and it quotes the

19 portion that Justice White read to me, underlines the word

20 appears, and said that word was simply --

21 QUESTION: Was that the same panel?

22 MR. LIEBMAN: It was an en banc court. On this

23 point it was without dissent and one of the judges who sat

24 and signed --

25 QUESTION: Right.

1 MR. LIEBMAN: -- the Adamson decision also
2 signed the Ninth Circuit decision in this case, in the
3 panel case, Judge Pregerson. So essentially what you're
4 -- if the state's reading is correct, that the Ninth
5 Circuit decided that the definition was constitutional, it
6 would require this Court to believe that Judge Pregerson
7 decided that in this case and a few months later signed on
8 to another decision in which he said that there was no
9 Ninth Circuit case --
10 QUESTION: Well, that may be a later
11 interpretation of what they thought they said in Chaney,
12 but we're -- we're reviewing this case.
13 MR. LIEBMAN: But, Your Honor, we're
14 reviewing --
15 QUESTION: We're reviewing this case.
16 MR. LIEBMAN: Excuse me. But we're reviewing
17 the identical language that this Court used. All it did
18 is say --
19 QUESTION: Well, I still don't see how you're
20 helped because I think you're going to go to A -- the
21 first paragraph on A-26.
22 MR. LIEBMAN: Uh-huh.
23 QUESTION: Isn't that where you were going to
24 take us on this same point?
25 MR. LIEBMAN: Yes, it was. And if I could, it

1 states that while Chaney establishes that the Arizona
2 statute is not void on its face, and is capable of
3 constitutional application, it naturally doesn't answer
4 the question of whether the Arizona statute was
5 constitutionally applied.
6 The critical passage there --
7 QUESTION: Applied to Jeffers in this case.
8 MR. LIEBMAN: To Jeffers in this case. But the
9 critical passage is "is not void on its face and is
10 capable of constitutional application." That refers --
11 QUESTION: But that -- that isn't the language.
12 You're -- you're not using the words that you just quoted
13 from.
14 MR. LIEBMAN: Well, let me --
15 QUESTION: Is capable of -- it does not answer
16 the question whether the Arizona statute was
17 constitutionally applied to Jeffers in this case.
18 MR. LIEBMAN: Right. If I could, though, Your
19 Honor, what it says is, while Chaney establishes -- it's
20 going to tell us what Chaney established. Chaney
21 establishes that the Arizona statute -- not the definition
22 -- the statute -- is not void on its face.
23 And the next clause is, "is capable of
24 constitutional application." Then it says, we've got to
25 determine whether it was applied constitutionally, and it

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 goes on to do that in the rest of the decision.

2 If I could just give you another explanation

3 here of why I think this has to be the proper reading. If

4 you look at page 36 of this same opinion that we're

5 reading, the court goes on to say it looks at the varied

6 Gretzler standard. That is, the Arizona definition of

7 heinous and depraved.

8 The Gretzler standard is that you've got to have

9 a case that convinces the sentencer that based on the

10 totality of the circumstances there's something about that

11 case that -- quote -- sets the case apart from the norm,

12 that makes it unusually especially heinous of depraved.

13 That's the Arizona definition.

14 QUESTION: I'm not sure we're not spending a

15 disproportionate amount of time, considering each side has

16 half an hour, on an interpretation of what the lower court

17 meant. That's up to you -- not entirely up to you because

18 you have to answer questions.

19 MR. LIEBMAN: You may be right, Your Honor. Let

20 me move on because I think that the important point here

21 is whether or not Mr. Jeffers can rely upon the Adamson or

22 the Maynard analysis in this case whatever the Ninth

23 Circuit did.

24 I believe that the Ninth Circuit did rely upon

25 this ground. But it doesn't matter. There are two

1 reasons that I want to stress to the Court why this issue
2 is here in this Court.
3 The first issue is it is included within the
4 question presented. Now, the question presented is
5 whether a Federal court may set aside a state court's
6 finding of an aggravating circumstance in a capital case
7 without applying a standard that requires some deference
8 to the state court's finding.
9 The answer to that question is if the
10 aggravating circumstance, as applied in the case -- as
11 defined and applied in the case, is constitutional, you do
12 defer. But if it is not constitutional, you don't defer.
13 QUESTION: If you -- are you talking about a
14 case-by-case analysis of each case to see whether the
15 aggravating circumstance was -- quote -- constitutional or
16 not?
17 MR. LIEBMAN: No. Your Honor, I'm not talking
18 about that at all. I think that the process by which you
19 go about assessing that question is laid out very clearly
20 in Godfrey and Maynard, and that's exactly what I want to
21 turn to now, to go through the Godfrey/Maynard analysis as
22 applied to this case and show why it requires the result
23 -- the judgment that was granted below.
24 Godfrey and Maynard proceed according to a four-
25 step process. That process indicates that the heinous and

1 depraved interpretation by the Arizona courts and
2 application in this case is unconstitutional.
3 The first step says you look at the words of the
4 statute and you see if the words of the statute are
5 capable of narrowing. Most aggravating circumstances are
6 going to win at that point and you would never get beyond
7 that point with 95 -- 99 percent of the aggravating
8 circumstances.
9 The problem is that as a result of the joint
10 decisions in Godfrey and Maynard, Godfrey knocked out
11 depravity and Maynard knocked out heinousness as on their
12 face sufficient. So you've got to go to the next
13 question.
14 Was the problem with those words cured at the
15 trial court level? If it was cured at the trial court
16 level, again, that would be the end of the case. But
17 there's no argument here that it was cured at the trial
18 level for two reasons.
19 First of all, all the trial judge did here was
20 to recite the words of the statute, heinous and depraved.
21 Those words don't suffice on their own.
22 Secondly, the only instructions that we can
23 assume that the trial court used in this case were the
24 instructions given to it by the Arizona Supreme Court in
25 prior decisions. And the only explanation or definition

1 that existed as of 1980 in Arizona as to what heinous and
2 depraved meant was that the dictionary synonyms were used.
3 That was the only definition existing at the time.
4 Those dictionary synonyms are that heinous is
5 defined as grossly bad or shocking evil, and depraved is
6 defined as marked by deterioration.
7 We know that those synonyms as a substitute do
8 not constitutionally suffice because this Court held that
9 they don't in Maynard because those same dictionary
10 synonyms from Webster's Third International were read to
11 the jury in the Maynard case at the trial level. So, the
12 trial definition is precisely the same in both cases and
13 it's constitutionally insufficient.
14 Then you get to the third step of both Godfrey
15 and Maynard. And that step says look at the
16 constitutionality of the definition that the state supreme
17 court has used. And that's what I want to go immediately
18 because it's the heart of the analysis here and that is
19 the Gretzler definition. Gretzler is cited in both of the
20 briefs, all of the briefs, saying that's the standard.
21 There's no dispute about that.
22 And Gretzler begins -- it's a five-step process.
23 It begins by reciting once again the dictionary
24 definitions.
25 The next thing it does is to say there's some

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 factors that we've looked at in the past in looking at
2 whether those definitions are met, and it lists some
3 factors. They include such things as whether the violence
4 in the case was gratuitous, whether there was relish, and
5 whether the killing was senseless.
6 Then, the third step of the process is the
7 critical one. The court states its standard at page 12 of
8 Gretzler. And there it says that the court will reverse a
9 finding that the crime was committed in an especially
10 heinous or depraved manner only -- quote -- where the
11 circumstance -- or, where no circumstances, such as the
12 specific factors discussed above, separate the crime from
13 the norm of first-degree murder.
14 And the court has made clear, not only because
15 it said it three times in Gretzler, but in numerous cases
16 afterwards, that those five factors that it set out do not
17 need to be present. You can find heinous and depraved if
18 some factor beyond those five is present. And, indeed,
19 the Arizona Supreme Court in a number of cases has found
20 heinous and depraved present without finding any of the
21 Gretzler factors that were specifically mentioned because
22 it's factors such as those that are critical.
23 It's also critical that those factors don't
24 control the outcome. What controls the outcome is whether
25 looking at those factors and those definitions the court

1 decides that there's something about the case that sets
2 the crime apart from the norm of first-degree murder. And
3 that norm has never been defined.
4 So, therefore, there are a number of cases as
5 well in which the Arizona Supreme Court has found the
6 Gretzler factors present but nonetheless said that's not a
7 heinous and depraved case because those factors or no
8 other factors set it apart from the norm.
9 By the way, the court has used a number of
10 alternative phrases. But they're all to the same effect.
11 Elsewhere it has said that the case is heinous and
12 depraved under the circumstance if it is more heinous or
13 depraved than the usual first-degree murder. Sometimes
14 the phrase is that the case is -- quote -- particularly
15 disturbing. Or, oftentimes it simply says the case has to
16 be especially heinous or especially depraved and it
17 underlines especially.
18 The next step in the Gretzler procedure is to
19 say, well, how are sentencers supposed to know whether the
20 violence in a case is sufficiently gratuitous, for
21 example, to suffice, or how are sentencers to go about
22 identifying factors such as but in addition to the factors
23 that Gretzler listed. And it says very clearly the courts
24 are to look and see whether there are any additional
25 circumstances so as to set the crime apart from the usual

1 or the norm.

2 It is clear in Arizona, as a result of Gretzler

3 and as a result of all other cases, that the standard is

4 you look at all of the factors, such as those listed in

5 Gretzler, but not by any means limited to them -- and the

6 court has added since then about 20 additional factors --

7 and you ask whether any of those factors, or something

8 else in the case, adds up to something additional that

9 makes this case especially bad.

10 QUESTION: So that's basically the way the

11 Supreme Court of Arizona has defined for state law

12 purposes that term in its capital statute?

13 MR. LIEBMAN: Right. And that's exactly what

14 happened in Mr. Jeffers case. In other words, the next

15 step in the Godfrey/Maynard analysis is to see whether

16 that same kind of definition was applied in the particular

17 case. And, again, there's no dispute. Gretzler was

18 applied in this case. Gretzler was decided about three

19 weeks before Mr. Jeffers' case. Gretzler is cited

20 numerous times in Jeffers' case and his case follows the

21 same protocol.

22 First, it says look at the dictionary synonyms.

23 Then it says you look at the various factors in the case,

24 and it quotes about nine or ten such factors. And it says

25 that it finds that this case does satisfy the factor

1 because there are -- quote -- additional circumstances
2 that distinguished the murder from the usual or the norm
3 of first-degree murders. It applies the Gretzler
4 standard.
5 Most importantly I think, for your purposes here
6 -- for our purposes, it goes at the very end of the
7 discussion of heinous and depraved and it confronts Mr.
8 Jeffers' argument under Godfrey that the Arizona
9 definition was unconstitutional for lack of a narrowing
10 construction.
11 And the court says we do have a narrowing
12 construction. That construction is -- and this is how we
13 satisfy the requirements of Godfrey -- that construction
14 is -- and I quote -- it says that the case has to be --
15 has to stand apart from the norm and the killing has to be
16 especially heinous and especially depraved. Again, the
17 especially underlined.
18 So, again, it's clear that that same standard
19 extracted from Gretzler was applied in Mr. Jeffers' case.
20 That standard from Gretzler applied in Mr. Jeffers' case
21 is unconstitutional because it is identical to the
22 standard that Oklahoma used in the Maynard case, and it
23 has the exact same two defects that this Court identified
24 in the Maynard case in unanimously overturning the
25 Oklahoma construction.

1 The first problem is that the standard used in
2 Arizona is a totality of the circumstances approach.
3 There is no objective factor that must be present for the
4 murder to satisfy the --
5 QUESTION: Well, what if -- what if the -- the
6 -- what if the court says here is a series of things that
7 will show that something is depraved -- that the killing
8 was depraved. But there could be a lot of other
9 circumstances. And it turns in out in a lot of cases
10 there are a lot of other circumstances.
11 But in this particular case suppose the court
12 says, here is why this is depraved -- A, B -- and they
13 apply this open-ended definition as though it had a
14 closed-in.
15 MR. LIEBMAN: Well, you're suggesting --
16 QUESTION: And in application here is -- so,
17 shouldn't the question be whether the factors that they
18 used in concluding that this was a depraved murder are
19 valid?
20 MR. LIEBMAN: That's exactly right, Your Honor.
21 I think you're suggesting sort of the reverse of Godfrey.
22 Godfrey said we've got an okay standard --
23 QUESTION: Well, I asked you the question --
24 MR. LIEBMAN: Okay. And let me try and answer
25 it. That -- in -- in -- if you had a case in which that

1 kind of thing happened that you have hypothesized, I think
2 it might be possible to save an application from an
3 otherwise unconstitutional definition.
4 QUESTION: Yes?
5 MR. LIEBMAN: The answer is yes. But that is
6 not what happened in this case. And there are a number of
7 reasons for that.
8 QUESTION: Well, you might -- you might say that
9 if you look at all of the cases that this definition
10 they're applying is just sort of -- all it amounts to is
11 saying especially depraved.
12 MR. LIEBMAN: That's right.
13 QUESTION: That's what kind of an argument you
14 make. But in my example if they said A, B, and -- there's
15 no question that that would indicate depravity.
16 MR. LIEBMAN: Well, Your Honor, I -- if I take
17 your hypothetical --
18 QUESTION: Yeah. Right.
19 MR. LIEBMAN: -- I'm saying that you -- you
20 could save -- you could save it in -- in that way in an
21 individual case. But --
22 QUESTION: Yes. But not here?
23 MR. LIEBMAN: -- that's the process that
24 Oklahoma is now going through in looking at case after
25 case in the wake of Maynard and saving some cases and not

1 savings others because it's finding that there were
2 factors in those cases.
3 But that's not this case, Your Honor, for a
4 couple of reasons. First of all, we obviously have to
5 take the Arizona Supreme Court at its word here, and its
6 word is that it followed the Gretzler standard and it
7 didn't rely on any one or two factors that are set. It
8 looked to see whether in its subjective judgment the facts
9 of the case as a whole set it apart from the norm.
10 The second thing is the only two factors that
11 one could point to are these words "relish" and
12 "gratuitous violence." Those words don't have any more
13 content than the words "heinous" and "depraved," and,
14 therefore, even if you could have a case where there were
15 just two factors and those factors would be enough, it
16 couldn't be where those factors are equally as
17 unconstitutional as heinous and depraved.
18 The second and final point that I want to make
19 here is really the point that Justice White suggested in
20 his question, and that is that if you have a standard that
21 uses a definitional strategy that says we're going to
22 define, looking at this totality of the circumstances, a
23 qualifying case -- a heinous and depraved case -- as one
24 in which we look at it all and we say it's especially bad,
25 this Court said quite clearly in Maynard that that kind of

1 an approach is unconstitutional.

2 The Court actually said -- it explicitly ruled

3 in Maynard that the requirement that the crime be -- quote

4 -- more than just heinous, does not satisfy the Eighth

5 Amendment because it does not in the words of Maynard

6 inform sentencers of what they must find to impose the

7 death penalty.

8 If I might, it seems to me what the standard in

9 Maynard is -- is that you can't just have an adjective and

10 an adverb. You've got to have a noun or a verb to go with

11 it. Especially what? Abnormally what? Unusually what?

12 And that what --

13 QUESTION: Well, then you find another adjective

14 than heinous to modify by that adverb or --

15 MR. LIEBMAN: If you had another phrase --

16 instead of heinous if you had some core definition that

17 has, as Justice White I think put it in Jurek, that has a

18 common sense core of meaning -- for example, torture, or,

19 for example, an intent to inflict great harm. Those are

20 concepts. Or kidnapping or killing a police officer, all

21 of the other aggravating circumstance have that common

22 core of meaning.

23 But the words heinous and depraved don't have

24 that common core and no matter how many "especialies" or

25 "particularlies" you put in front of them, you don't give

1 the content that this Court required in Furman to make it
2 constitutional.
3 That was the problem that this Court found in
4 Maynard, that indeed in Oklahoma they had said, we are
5 going to look at the manner of the killing and we're going
6 to look at the attitude of the killer and we're going to
7 see if those factors, when we look at them, make this case
8 especially bad. And this Court said you can't do that,
9 you need to say what it is, what that factor is, or what
10 those factors are that make it bad and that have that
11 common sense core of meaning. And that common sense core
12 doesn't exist here.
13 Just to answer one of the questions that the --
14 was raised in the first argument here. The Ninth Circuit
15 did not conduct proportionality review in this case, and I
16 don't think that proportionality review would be
17 appropriate in a constitutional review of an aggravating
18 circumstance.
19 It was very clear about why it looked at those
20 cases, and it looked at cases -- and it's more than six --
21 it quoted about 12 cases because it also looked at the
22 ones that are discussed in Gretzler. And it said, we
23 can't find the definition that Arizona has given to be
24 constitutional on its face, but let's see if we can look
25 at cases and extract from those cases a better definition,

1 a definition that would save the statute. And that's why
2 it looked at those cases.
3 However, when it looked at those cases, it said,
4 you cannot extract a definition from those cases that both
5 saves the constitutionality of the standard by providing a
6 principal means to separate death from life cases and that
7 applies to this case. There's simply no definition that
8 you could extract.
9 So, it's not proportionality review at all. It
10 is simply a look to the cases to see if you can save an
11 otherwise unconstitutional statute and definition by
12 looking to the cases and finding in the application, as
13 reflected in those cases, a definition that would be
14 constitutional and would save the application.
15 But because the Court found that the line had
16 not, as it put, been made clear -- that line between a
17 special and usual depravity, as it said -- since that line
18 hadn't been made clear in Mr. Jeffers' case and you
19 couldn't find a line that applied from the other cases,
20 you had to find that as applied in this case it was
21 unconstitutional.
22 It seems to me then, in conclusion, that this
23 case is controlled by both Godfrey and Maynard's use of
24 Godfrey in that case. Arizona's construction of the
25 especially heinous and depraved circumstance stands on

1 exactly the same footing as Oklahoma's. It is open-ended
2 and there is no common sense core of meaning to it.
3 For those reasons, Mr. Jeffers -- the judgment
4 of the court below should be affirmed, that Mr. Jeffers'
5 death sentence is unconstitutional, both as the definition
6 of that circumstance has been given in the definition, and
7 as it was applied in this case.
8 QUESTION: Thank you, Mr. Liebman.
9 Mr. Grant, you have ten minutes remaining.
10 REBUTTAL ARGUMENT OF GERALD R. GRANT
11 ON BEHALF OF THE PETITIONERS
12 MR. GRANT: Thank you, Your Honor.
13 Respondent here in his argument, as he has done
14 in his answering brief, essentially is attempting to
15 resurrect an issue the Ninth Circuit decided against him
16 that he failed to ask the Ninth Circuit to rehear and that
17 he failed to cross-petition for cert. on in this case.
18 Going back to the Ninth Circuit, there were two
19 arguments raised by Respondent there. One, that (F)(6),
20 the cruel, heinous or depraved aggravating circumstance
21 was unconstitutionally vague on its face. The second,
22 that it was unconstitutionally vague as applied to him.
23 I think those two questions can be more
24 accurately phrased in the following manner. One, Arizona
25 has not adopted a narrowing construction of the cruel,

1 heinous or depraved aggravating circumstance. That is
2 his, on-its-face argument.
3 The as applied argument essentially is -- what
4 it boils down to is the evidence here doesn't support the
5 finding. I think it's plain that if you look at what the
6 Ninth Circuit did here, that they ruled against Respondent
7 on the first question -- again, page A-24 of the Appendix
8 to the petition for cert. -- "his argument that the
9 statute is void on its face is foreclosed by our decision
10 in Chaney".
11 If you look at what the Ninth Circuit said in
12 Chaney, which is 801 F.2d 1191 at page 1195, they stated
13 -- first of all, they said -- they said what Mr. Chaney
14 was claiming, which is the exact same thing that Mr.
15 Jeffers was claiming in the Ninth Circuit. He was
16 challenging (F)(6) on its face and in its application.
17 The Ninth Circuit went on to state in Chaney,
18 which is the decision that in Jeffers the panel of the
19 Ninth Circuit found foreclosed that first question -- they
20 stated, "the statute is not unconstitutional on is face.
21 Although the statutory language is broad, as any murder
22 could be considered cruel, heinous or depraved, the
23 Arizona Supreme Court need not construe the statute open-
24 endedly."
25 They then went on to say -- and this is all at

1 page 1195 of the Chaney decision -- "The Arizona Supreme
2 Court appears to have sufficiently channeled sentencing
3 discretion to prevent arbitrary and capricious capital
4 sentencing decisions. The court has defined each of the
5 factors set forth in Section 13-703(F)(6)," which is the
6 cruel, heinous or depraved. They then cited Gretzler and
7 referred to the Gretzler definitions.
8 And they went on to say -- and this sentence is
9 left out of the decision in Adamson at page 1038, which
10 Respondent referred to -- this sentence is left out of
11 that decision. "These definitions have been applied
12 consistently."
13 That was the holding in Chaney. That is why in
14 Jeffers the panel of the Ninth Circuit found that that on
15 its face issue was foreclosed. It was decided against
16 Respondent.
17 He did not move for a hearing. In fact, in
18 response to our petition for a hearing on the second issue
19 -- the as applied issue -- and this is in his response to
20 petition for a hearing with suggestion for a hearing en
21 banc at page 4 -- Respondent acknowledged that that first
22 issue had been decided against him. In effect, he argued
23 that the decision of the Ninth Circuit here was really not
24 a significant one, it did not throw out the entire (F)(6)
25 circumstance. He acknowledged that it had been decided

1 against him.

2 It's our position, plainly, that that issue is

3 not before this Court. The only issue before this Court

4 is the insufficiency of the evidence type claim, the on

5 its -- what he terms the on its face claim.

6 QUESTION: Yes, but he -- he won below.

7 MR. GRANT: He won below on the second issue.

8 QUESTION: And why can't he -- why can't he

9 defend the judgment on the other ground?

10 MR. GRANT: I would have two responses to that.

11 One would be Rule -- this Court's Rule 14.1(a) which

12 states that the statement of any question presented will

13 be deemed to comprise every subsidiary question fairly

14 included therein.

15 My response would be the as applied question is

16 included within the on its face question, not vice versa.

17 If we were here on the -- on the as applied, or the

18 narrowing construction issue, we could get to the second

19 issue. But we're here only on the second issue and,

20 therefore, we can't get to the first. It's not included

21 therein.

22 QUESTION: Well, I know. But he's a Respondent.

23 Why can't he defend the judgment, as Justice Blackmun

24 asks?

25 MR. GRANT: My second response would be -- and

1 the name of the case doesn't jump to my mind at the
2 moment, but it's cited in the answering brief --
3 essentially Respondent's position is that he can defend
4 the judgment below on any grounds available to him. The
5 logic of that would -- would to me mean that he can defend
6 it on any of the sentencing attacks that he made below,
7 which were decided against him, and even those which were
8 not decided. The Ninth Circuit didn't rule on all of its
9 sentencing attacks.
10 QUESTION: Yeah, but at least he can defend it
11 on a -- on a ground that was raised below and it was
12 decided against him.
13 MR. GRANT: Well, my second response then would
14 be he can -- and, according to that case which he cited in
15 his brief, he can decide it -- he can defend it on that
16 ground so long as it does not expand the relief. If you
17 get to that first question.
18 My position is that it expands the relief. The
19 relief granted in this case was that Mr. Jeffers' death
20 penalty was set aside. If you get to the first question,
21 the on its face of the narrowing construction, it would
22 expand the relief by essentially throwing out the entire
23 (F)(6) circumstance, which the Ninth Circuit did not do
24 here.
25 QUESTION: But that wouldn't expand the relief

1 for this particular individual.

2 MR. GRANT: Correct.

3 QUESTION: I mean, he's either got -- may I ask,

4 your --

5 MR. GRANT: It would expand it for other cases

6 because the Ninth Circuit would apply it there.

7 QUESTION: Yes. May I ask -- your opponent in

8 effect says you never do tell us what the standard is.

9 And -- can you state the standard and are there any

10 objective requirements for this particular standard?

11 MR. GRANT: Well --

12 QUESTION: Is there any one fact that must --

13 MR. GRANT: First, as to why I didn't state the

14 standard. Number one is because it is not within the --

15 within the question presented. Our -- our position is --

16 QUESTION: Well, I'm not -- I'm not criticizing

17 you for it. I'm just asking you are you able to state the

18 standard>

19 MR. GRANT: Well, I think the standard is --

20 QUESTION: Can you tell us one -- one

21 requirement that must be met?

22 MR. GRANT: I think the standard is stated in

23 the Gretzler case, which I referred to in my reply brief.

24 QUESTION: I don't have the Gretzler case in

25 front of me.

1 MR. GRANT: The first two --

2 QUESTION: Can you state the standard?

3 MR. GRANT: The first two examples, as Mr.

4 Liebman stated, the Supreme Court of Arizona essentially

5 first looked to the dictionary definitions of the terms.

6 It then went on in the Gretzler case to provide a number

7 of examples. The first two of those are relishing the

8 murder and excessive or gratuitous violence.

9 And our position is that under the evidence

10 presented here Mr. Jeffers --

11 QUESTION: Now, is either one of those -- is

12 either one of those sufficient?

13 MR. GRANT: I think yes. I think --

14 QUESTION: Does that mean -- we had a case that

15 I was thinking about during the argument in which the

16 murderer was upset about what the victim had done to his

17 sister and he participated in a brutal killing and there

18 was -- when the killing took place, he in effect said, you

19 got what you deserved. Would that satisfy the standard?

20 Was a -- is a revenge killing always a relish factor?

21 MR. GRANT: I don't think it is always, but I

22 think what you have here went beyond a simple statement of

23 you got what you deserved.

24 QUESTION: What -- what revenge killings would

25 and what would not comply with the relish factor?

ALDERSON REPORTING COMPANY, INC.
1111 FOURTEENTH STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20005
(202)289-2260
(800) FOR DEPO

1 MR. GRANT: I would think a situation where the
2 defendant after injecting his victim with heroin, an
3 overdose of heroin, and finding that that wasn't
4 sufficient to kill her, after he makes statements to
5 another person in the room that he's given her enough
6 heroin to kill a horse and that the bitch won't die, where
7 he then climbs on top of the victim, who is unconscious
8 lying on a bed --
9 QUESTION: And is that climbing on top to finish
10 the job off -- is that the gratuitous violence where he --
11 MR. GRANT: That's getting to it.
12 QUESTION: -- thought it was --
13 MR. GRANT: That's getting to it.
14 QUESTION: What?
15 MR. GRANT: We're not there yet.
16 QUESTION: What is the gratuitous violence?
17 MR. GRANT: The gratuitous violence -- he then,
18 after climbing on top of her, choked her with a belt.
19 When that wasn't sufficient, he choked her with his hands.
20 He then --
21 QUESTION: When does it become gratuitous is
22 what I'm trying to figure.
23 MR. GRANT: At that stage.
24 QUESTION: Is it when it's no longer necessary
25 to kill?

1 MR. GRANT: At that stage he eventually he -- I
2 believe at that point the evidence shows that Ms. Chaney
3 was dead. He then forced Doris Van Der Veer, who was also
4 present, to get on top of her -- of the victim herself,
5 inject her with additional heroin and he photographed her
6 while doing so. He then got back up on top of --
7 QUESTION: When she did that was the victim
8 already dead?
9 MR. GRANT: Yes. He then got back on top of Ms.
10 Chaney himself and began striking her in the face, which
11 caused bleeding, according to the evidence.
12 QUESTION: I thought the lower court said that
13 what happened after she died didn't count.
14 MR. GRANT: The lower court only stated that
15 with respect to Ms. Jeffers' conduct in disposing of the
16 body three days later. It did not state that with respect
17 to the -- to the conduct that he engaged in right at the
18 time and immediately after death.
19 And what he did, as he was striking her in the
20 face, was to state, "this one is for", and he named a
21 number of names --
22 QUESTION: Yeah.
23 MR. GRANT: -- of people who he felt that Ms.
24 Chaney had informed on. I think that sort of conduct
25 clearly falls within those first two Gretzler definitions,

1 which I submit would be the core of the Gretzler
2 definitions.
3 Respondent's basic position with respect to the
4 Adamson-type issue is that the only definition that can be
5 upheld is that which allows for no discretion. I don't
6 think this Court has ever stated that. And in -- in
7 Pulley it's plainly stated that in state capital
8 sentencing procedures there will be some anomalies. But
9 so long as the discretion is limited to a constitutional
10 extent, the sentencing scheme will survive.
11 Additionally, Mr. Liebman referred -- again,
12 getting back to that type of Gretzler definition -- he
13 attempted to tie it to a finding of torture and in effect
14 stated that if -- if we could tie it to that, that would
15 be sufficient. I think this Court rejected specifically
16 that type of argument in Maynard.
17 This Court stated in Maynard that we are not
18 stating that merely because -- merely tying it to such a
19 finding as torture would be the only constitutionally
20 sufficient way in which it could be defined.
21 Thank you, Your Honors.
22 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Grant.
23 The case is submitted.
24 (Whereupon, at 2:49 p.m., the case in the above-
25 entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#89-189 - SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL.

Petitioners V. JIMMIE WAYNE JEFFERS

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan Friedman

(REPORTER)

RECEIVED
SUPREME COURT, U.S
MARSHAL'S OFFICE

'90 MAR -2 P12:01