Tulsa Law Review

Volume 24 | Number 2

Winter 1988

Maynard v. Cartwright: How the Supreme Court Killed the Catchall Category in the Oklahoma Death Penalty

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MAYNARD v. CARTWRIGHT: HOW THE SUPREME COURT KILLED THE CATCHALL CATEGORY IN THE OKLAHOMA DEATH PENALTY

I. INTRODUCTION

Hugh and Charma Riddle returned home on May 4, 1982, ate supper, and began relaxing in front of the television.[1] In another part of the Riddles' Muskogee County, Oklahoma, home, William Thomas Cartwright waited with a shotgun.[2] Cartwright had been fired as an employee of the Riddles' remodeling business five months earlier; Cartwright had talked of revenge.[3] Walking from the living room into a hallway, Mrs. Riddle met with the intruder.[4] Cartwright's revenge no longer was just talk. Mrs. Riddle was shot in a struggle with Cartwright.[5] Proceeding to the living room, Cartwright shot and killed Mr. Riddle.[6]

A jury decided Cartwright deserved the death penalty for the murder of Mr. Riddle. The murder, the jury concluded, belonged in a category the Oklahoma death penalty statute reserves for the most horrible murders:[7] those that are "especially heinous, atrocious, or cruel."[8] In 1985, the Oklahoma Court of Criminal Appeals agreed with the jury that Cartwright had committed what the statute describes as an "especially heinous" murder.[9] The Court of Criminal Appeals concluded that the evidence considered as a whole satisfied the "especially heinous" standard.[10] The Tenth Circuit in 1987 disagreed;[11] the appeals court decided in Cartwright's case that the Oklahoma Court of Criminal Appeals had

1. Cartwright v. State, 695 P.2d 548, 550 (Okla. Crim. App. 1985), *cert. denied*, 473 U.S. 911 (1985).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *See infra* note 13.
9. Cartwright v. State, 695 P.2d 548, 553-54 (Okla. Crim. App. 1985), *cert. denied*, 473 U.S. 911 (1985).
10. *Id.* at 554.
11. Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).

given an unconstitutionally broad meaning to the words in the standard. On June 6, 1988, the United State Supreme Court in *Maynard v. Cartwright* agreed that the Oklahoma Court of Criminal Appeals had not given the five words a constitutionally specific definition.[12]

In technical terms, the "especially heinous" standard is an aggravating circumstance. In order to consider the death penalty in Oklahoma, a judge or jury must decide that a murder or murderer is "especially heinous" or satisfies one of the seven other statutory aggravating circumstances.[13] Aggravating circumstances are part of the sentencing process[14] that states have adopted to satisfy the Supreme Court that the choice of which murderers are deserving of the death penalty can be made in a non-discriminatory fashion. Aggravating circumstance is a complicated way of describing a simple concept: in order to separate the murders deserving of the death penalty from other murders, a jury must find the presence of certain facts about the defendant or the crime before being allowed to consider imposing the death sentence.[15] The "especially heinous" category has been described as the most controversial among aggravating circumstances because of criticism that the vague language does not actually function as a narrowing standard.[16] The Supreme

12. Maynard v. Cartwright, 108 S. Ct. 1853, 1857 (1988).

13. Generally, the Oklahoma death penalty is found at OKLA. STAT. tit. 21, §§ 701.7-.15 (1981 & Supp. 1987). Aggravating circumstances are found in § 701.12, which states:

> Aggravating circumstances shall be:
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> 1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
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> 2. The defendant knowingly created a great risk of death to more than one person;
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> 3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
>
> 4. The murder was especially heinous, atrocious, or cruel;
>
> 5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
>
> 6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
>
> 7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or
>
> 8. The victim of the murder was a peace officer as defined by Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

Id. § 701.12.

14. Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 306. With many variations, the process is: (1) a trial at which guilt or innocence is determined; (2) a penalty trial, during which juries are required to balance or weigh aggravating circumstances against mitigating circumstances. *Id.*

15. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases--The Standardless Standard*, 64 N.C.L. REV. 941 (1986).

16. Rosen, *supra* note 15, at 943-44. "These aggravating circumstances . . . have generated

Court has warned that the "especially heinous" type of aggravating circumstance may be unconstitutionally vague without guidelines from state appellate courts — a warning sometimes not heeded.[17] The problem with the term is that all murders arguably are especially heinous or atrocious or cruel.[18] In contrast, other aggravating circumstances list specific crimes or more precise factors about a defendant.[19] States often have not provided precise definitions of the broad language of the "especially heinous" type of standard.[20] As a result, critics argue that the standard does not serve the intended purpose of minimizing the chance of arbitrary capital sentencing practices.[21]

With a short opinion in June, 1988, the United States Supreme Court used Cartwright's appeal to make one of its few statements about how states must define the much-debated "especially heinous" standard. In *Maynard v. Cartwright*,[22] the Court for the most part agreed with the Tenth Circuit and summarized previous death penalty policy statements. Yet, the *Cartwright* decision clearly states that capital sentencing juries must be given objective standards which are to be applied consistently by state appellate courts. *Cartwright* indicates that the Supreme Court has not changed its mind about the necessity of aggravating circumstances. The Court continues to allow the use of vague statutory language to

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more controversy than any other aggravating circumstance. Commentators have universally criticized them as vague, overbroad, and meaningless." *Id.* (footnotes omitted). Weisburg's article provides another concise summary of the criticism of "especially heinous, atrocious, or cruel":

> The majority of the states, after listing such circumstances, conclude their lists with the infamous aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." Having attempted rule-like formality, these statutes then undermine their efforts with this paradigmatic, anti-rule-like moral standard. On the authority of *Godfrey v. Georgia*, the state courts must then haplessly try to restore the principle of legality by developing a common law of rule-like indicia to give shape to this remarkable provision.

Weisberg, *supra* note 14, at 333 (footnotes omitted).

17. Rosen, *supra* note 15, at 945.

18. *See* Proffitt v. Florida, 428 U.S. 242, 255 (1976).

19. Weisberg, *supra* note 14, at 329:

> Most of the common aggravating circumstances try to identify special indicia of blameworthiness or dangerousness in the killing. Aside from the almost universal circumstance that the killing was committed in the course of another dangerous felony, which significantly overlaps the felony murder rule, the common ones are that the murder was committed for hire or for pecuniary gain, or for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody, or to disrupt or hinder the lawful exercise of any government function or the enforcement of laws, or to conceal the commission of a crime or the identity of the perpetrator, or that the victim was either a witness to the defendant's independent crime or a law enforcement officer engaged in the performance of his duties.
>
> . . . One might describe them in the aggregate as a model penal code of aggravation.

Id. at 329-30 (footnotes omitted).

20. Rosen, *supra* note 15, at 945.

21. Rosen, *supra* note 15, at 945.

22. 108 S. Ct. 1853 (1988).

guide the discretion of sentencing juries provided that state appeals courts supply more specific definitions.[23] The Court implicitly warned states not to use "especially heinous, atrocious, or cruel" as a catchall[24] category for murders which do not fit into other more narrowly defined aggravating circumstances.

II. STATEMENT OF THE CASE

A. *Facts*

To the Oklahoma Court of Criminal Appeals, the facts as a whole placed the murder of Riddle in the category for the most horrible murders. The jury was not given a specific definition of especially heinous. Instead, jurors concluded from the circumstances that the murder had to be especially heinous. Likewise, the Court of Criminal Appeals used all the facts to test whether the aggravating circumstance was applied constitutionally. The court's idea of a standard was a collection of highlighted facts, including: the likelihood that Cartwright had been in the Riddles' home earlier in the day to wait for them to return home; the probability that Riddle had heard the shots which wounded his wife and realized in terror his own fate; Cartwright's repeated attempts to kill Mrs. Riddle; and Cartwright's efforts to conceal the crime. All the evidence, the state appellate court decided, made the murder "especially heinous."[25]

For the standard it fashioned, the Oklahoma Court of Criminal Appeals found ample support in the crime at Hugh and Charma Riddle's home. After she fell wounded in the hallway, Mrs. Riddle recognized her assailant.[26] Cartwright shot her a second time. Cartwright next went to the living room. Cartwright fired two blasts; Riddle screamed, then fell dead. With Cartwright out of sight, Mrs. Riddle dragged herself into a bedroom. Finding that the phone was not working, she started writing on a bedsheet in blood. She completed six letters: "TOM CAR."[27]

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23. Proffitt v. Florida, 428 U.S. 242, 255-56 (1976). In *Proffitt*, the Court approved the statutory language "especially heinous, atrocious, or cruel," where defined by the Florida Supreme Court as meaning murders involving torture. *Id.*

24. Harris v. State, 237 Ga. 718, 230 S.E.2d 1, 10 (1976), *cert. denied*, 431 U.S. 933 (1977) (*Harris* is one source of the often-quoted "catchall" term); Comment, *The Death Penalty in Georgia: An Aggravating Circumstance*, 30 AM. U.L. REV. 835, 847 (1981).

25. Cartwright v. State, 695 P.2d 548, 554 (Okla. Crim. App. 1985), *cert. denied*, 473 U.S. 911 (1985).

26. *Id.* at 550.

27. *Id.*

When Cartwright found her in the bedroom, Mrs. Riddle asked him to explain the shootings. Cartwright's answer was that he should not have been fired.[28] In response to Mrs. Riddle's plea for help, Cartwright slashed her throat and stabbed her with a hunting knife which had been a Christmas gift to him from the couple. Mrs. Riddle was, a court later observed, miraculously still alive, although she became an amputee.[29]

Two days after Riddle was killed, the district attorney picked up Cartwright at his sister's house.[30] During questioning, Cartwright confessed.[31]

Prosecutors urged the jury to find that three of the statutory aggravating circumstances justified the death penalty. The state argued: (1) that the defendant knowingly created a great risk of death to one or more persons; (2) that the murder was especially heinous, atrocious, or cruel; and (3) that a probability existed that the defendant would commit acts of violence that would constitute a continuing threat to society.[32] The jury concluded that the first two aggravating circumstances were present, but not the third.[33]

In the opinion from Cartwright's direct appeal, the Oklahoma Court of Criminal Appeals explained that it did not need to use a single standard to test the finding by the trial court that the murder was "especially heinous, atrocious, or cruel."[34] The court noted in the opinion that it had not previously mandated a single definition such as the presence of torture.[35] The state court considered torture as just one term that could be used to define the standard.[36] The state appeals court explained that it

28. *Id.* Cartwright began working for the Riddles in July of 1981. Cartwright said he was fired because he had demanded that the Riddles pay the expenses of an on-the-job injury; Mrs. Riddle said he was laid off because of a lack of business. *Id.*

29. *Id.*

30. *Id.* at 551. Cartwright called his sister from a pay telephone in Muskogee two days after the shooting. She picked him up and pursuaded him to meet the Muskogee County District Attorney. She then called the district attorney. *Id.*

31. *Id.* Cartwright's testimony was different. Cartwright testified that he had spoken with Hugh Riddle on May 4 regarding his injury, and had been ordered to leave the property by Riddle. Cartwright claimed that when he turned he was struck on the head. Cartwright claimed he remembered nothing between May 4 and the call to his sister on May 6. At the trial, Cartwright said he did not recall the excerpts read to him from the confession and was not aware he had been talking to law enforcement officials. However, the Court of Criminal Appeals concluded: "we are convinced that the circumstances surrounding the appellant's interrogation indicate that he was coherent, and doubtless knew that he was dealing with law enforcement officials." *Id.* at 552.

32. Cartwright v. Maynard, 822 F.2d 1477, 1478 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).

33. *Id.*

34. Cartwright v. State, 695 P.2d 548, 553-54 (Okla. Crim. App. 1985), *cert. denied*, 473 U.S. 911 (1985).

35. *Id.* at 554.

36. *Id.*

preferred an overall evidence test in order not to isolate the murder from the related facts surrounding the crime.[37]

Cartwright's appeal soon was considered one of the fastest moving on the Oklahoma death row.[38] A state court in October, 1985, denied Cartwright's application for post-conviction relief.[39] Next, the United States District Court for the Eastern District of Oklahoma denied Cartwright's application for a writ of habeas corpus. In 1986, a three-judge panel of Tenth Circuit justices affirmed the denial of Cartwright's application for a writ of habeas corpus.[40] In early 1987, the entire Tenth Circuit court reviewed the issue of how the Oklahoma Court of Criminal Appeals was applying the aggravating circumstance.[41] The Tenth Circuit decision was announced in June 1987: the "especially heinous, atrocious, or cruel" circumstance as applied by the Oklahoma court was unconstitutionally broad.[42] The court vacated Cartwright's sentence without prejudice.

After having one of the more advanced appeals on its death row vacated, the state petitioned the United States Supreme Court for a writ of certiorari.[43] On June 6, 1988, the Supreme Court affirmed the Tenth Circuit decision in Cartwright's case.[44]

B. *One Narrow Issue*

At the Supreme Court, the question in the Cartwright appeal was framed extremely narrowly: whether the Tenth Circuit correctly ruled that the Oklahoma Court of Criminal Appeals had been interpreting the "especially heinous" standard in an overly broad manner.[45]

III. LAW PRIOR TO THE CASE

A. *Development of Aggravating Circumstances*

Aggravating circumstances was not a new idea when the term was

37. *Id.*
38. Ward, *Time running out for 3 on death row*, Tulsa Tribune, Jan. 9, 1987, at A-1, col. 1.
39. Cartwright v. State, 708 P.2d 592 (Okla. Crim. App. 1985), *cert. denied*, 474 U.S. 1073 (1986).
40. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).
41. Cartwright v. Maynard, 822 F.2d 1477, 1478 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).
42. *Id.* at 1491.
43. Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3327 (U.S. Sept. 21, 1987) (No. 87-519), *aff'd*, 108 S. Ct. 1853 (1988).
44. Maynard v. Cartwright, 108 S. Ct. 1853, 1860 (1988).
45. *Id.* at 1857.

added to capital sentencing statutes in the late 1970's. Two decades earlier, the drafters of the Model Penal Code had proposed a capital sentencing scheme similar to the one later adopted by Oklahoma and other states.[46] Among the aggravating circumstances proposed in the Code: "The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."[47] The drafters of the Code urged the use of statutory aggravating circumstances in capital sentencing statutes as a means of controlling the discretion of judges and juries.[48] The Code foreshadowed the coming debate over how successfully aggravating circumstances can be applied to make the imposition of capital punishment less arbitrary. The drafters of the Code recognized that the goal would be difficult to attain because the factors which determine whether death sentences are appropriate cannot easily be written into simple formulas.[49]

After the Supreme Court began to revise its capital sentencing doctrine in the 1970's, aggravating circumstances became an important element of state death penalties. In 1972, the Court in *Furman v. Georgia*[50] held that the death penalty was being imposed by the states in a manner which violated the eighth amendment prohibition against cruel and unusual punishments.[51] One of the Court's criticisms in *Furman* was that capital sentencing statutes were not giving juries and judges enough guidance for use in determining which crimes should be punished by

46. MODEL PENAL CODE § 201.6 (Tent. Draft No. 9, 1959) (revised and approved in 1962 as § 210.6 of the Proposed Official Draft). The draft proposed a bifurcated trial with separate guilt and sentencing proceedings. Under the proposal, a sentence of death could not be considered unless at least one of the listed aggravating circumstances was proven. *Id.*

47. MODEL PENAL CODE § 201.6 (1962). The complete list:

(3) Aggravating circumstances.

(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony or felonies involving the use or threat of violence to the person.

(c) At the time the murder was committed the defendant also committed another murder or murders.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or the attempt to commit, or flight after committing robbery, rape by force or intimidation, arson, burglary or kidnapping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for hire or pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

Id.

48. *Id.* at comment 3.

49. *Id.* § 201.6.

50. 408 U.S. 238 (1972) (per curiam).

51. *Id.* at 239-40.

death.[52] While the exact meaning of *Furman* as stated in nine separate opinions is debatable,[53] the Court often has emphasized the portion that held open-ended discretion unconstitutional.[54] The result of *Furman* was clearer. With capital punishment laws in 39 of 40 states invalidated by *Furman*,[55] states began rewriting their death penalties.

The death penalty statutes that states wrote after *Furman* can be placed in two categories: guided discretion and mandatory.[56] States which adopted the guided discretion approach provided sentencers with statutory aggravating and mitigating circumstances to use as guidelines for determining whether to impose the death penalty.[57] The mandatory approach was supposed to eliminate arbitrariness in the death penalty by eliminating discretion.[58] Under the mandatory laws, death was the automatic sentence for certain crimes.[59] On July 2, 1976, the Supreme Court ruled that guided discretion statutes were constitutional, but that mandatory death penalty laws were unconstitutional.[60] Four days later,

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52. Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988).

53. Weisberg, *supra* note 14, at 315-17. The author described the difficulty in gleaning a clear meaning from *Furman*:

> It is not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias. . . .
>
> . . . .
>
> In the manner of literary criticism, one can extract unifying "themes" in the *Furman* opinions, such as the dangers of arbitrariness and discrimination, which support later decisions to impose specific formal constraints on the penalty trial. But because there really is no doctrinal holding in *Furman*, it has not logically impeded the Court from later claiming that it has never tried to impose such constraints.

Weisberg, *supra* note 14, at 315-17; *See also* Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1141-42 (1984): "It is difficult to derive a constitutional standard from the decision because the five Justices who voted in *Furman* to strike down the Georgia and Texas statutes could not agree on a basis for the judgment." *Id.*; *See* Rosen, *supra* note 15, at 946-47. A summary of the *Furman* opinions: Among the 5-4 majority, there were five concurring opinions. "Justices Brennan and Marshall found the death penalty was a *per se* violation of the eighth amendment's cruel and unusual punishment clause, but Justices Douglas, Stewart and White held only that capital punishment imposed at the complete discretion of the sentencer violates the eighth amendment." Rosen, *supra* note 15, at 946-47 (footnote omitted). Douglas wrote of the potential for racial and economic discrimination in the capital sentencing statutes then in effect. Stewart decried the lack of standards to overcome arbitrariness. White wrote that the death penalty was imposed in so few cases that there was no meaningful way to distinguish the cases in which it was being imposed from those in which it was not. Rosen, *supra* note 15, at 946-47.

54. Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988).

55. Furman v. Georgia, 408 U.S. 238, 417 (1972) (Powell, J., dissenting). Justice Powell noted that only the mandatory death sentence for life term inmates in Rhode Island escaped *Furman*. *Id.*

56. Special Project, *supra* note 53, at 1147.

57. Special Project, *supra* note 53, at 1147.

58. Special Project, *supra* note 53, at 1147.

59. Special Project, *supra* note 53, at 1147.

60. Guided discretion statutes were reviewed in Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt

the Oklahoma mandatory capital sentencing law was voided.[61] Within days, a guided discretion statute was in effect in Oklahoma.[62]

In the first review of the "especially heinous" type of aggravating circumstance,[63] the Supreme Court expressed doubts that vague terms performed the intended function of guiding the discretion of sentencing juries. In *Gregg v. Georgia*,[64] the Supreme Court examined a Georgia aggravating circumstance which described a category of murder as "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[65] The Court decided that a state appellate court could make the broad term constitutional by applying a more specific definition.[66] In *Proffitt v. Florida*, one of the aggravating circumstances at issue was "especially heinous, atrocious, or cruel."[67] Again, the Court ruled that a state appellate court could adequately define the standard as applying only to crimes involving torture.[68]

B. Godfrey v. Georgia

In *Cartwright*, the Supreme Court revisited a 1980 decision, *Godfrey v. Georgia*.[69] In *Godfrey*, the Court was asked whether a state supreme court had interpreted an aggravating circumstance similar to the "especially heinous" standard in an overly broad manner. As in *Cartwright*,

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v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976). Mandatory capital sentencing laws were ruled unconstitutional in Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976).

61. The mandatory death penalty in Oklahoma was held to be cruel and unusual punishment. The Supreme Court granted certiorari, vacated the death sentences, and remanded the following cases to the Oklahoma Court of Criminal Appeals in the following orders: Green v. Oklahoma, 428 U.S. 907 (1976); Justus v. Oklahoma, 428 U.S. 907 (1976); Lusty v. Oklahoma, 428 U.S. 907 (1976); Davis v. Oklahoma, 428 U.S. 907 (1976); Rowbotham v. Oklahoma, 428 U.S. 907 (1976); and Williams v. Oklahoma, 428 U.S. 907 (1976).

62. The new law took effect at 12:01 a.m. on July 24, 1976. *State replaces nullified death law*, Tulsa Tribune, July 24, 1976, at 1, col. 1. OKLA. STAT. tit. 21, §§ 701.7-.15 (1981 & Supp. 1987) (effective July 24, 1976).

63. Cartwright v. Maynard, 822 F.2d 1477, 1486 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988). The Supreme Court first addressed the aggravating circumstance in 1976 in Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976).

64. 428 U.S. 153 (1976).

65. GA. CODE ANN. § 17-10-30 (b)(7) (1982). *See also* Cartwright v. Maynard, 822 F.2d 1477, 1486 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).

66. *Gregg*, 428 U.S. at 201.

67. Proffitt v. Florida, 428 U.S. 242, 255 (1976); FLA. STAT. ANN. § 921.141(5)(h) (West 1985). *See also* Cartwright v. Maynard, 822 F.2d 1477, 1486 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).

68. Proffitt v. Florida, 428 U.S. 242, 255-56 (1976). *See also* Cartwright v. Maynard, 822 F.2d 1477, 1486 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).

69. 446 U.S. 420 (1980).

the state appellate court in *Godfrey* concluded that categorizing the sentence under a worst-murder standard was justified by the facts of the crime.

In early September, 1977, Robert Franklin Godfrey's unhappy marriage was ending in divorce.[70] Godfrey thought his mother-in-law was trying to break up the marriage.[71] Following a heated phone conversation with his wife, Godfrey armed himself with a shotgun and went to his mother-in-law's trailer.[72] Through a window, he could see his mother-in-law, his wife, and his 11-year-old daughter playing cards.[73] Godfrey aimed the shotgun and fired. The shot hit his wife in the forehead.[74] Entering the trailer, Godfrey shot his mother-in-law in the head.[75] Godfrey said later, "I've done a hideous crime, . . . but I have been thinking about it for eight years . . . I'd do it again."[76]

The Georgia Supreme Court previously had defined the aggravating circumstance by using three criteria including torture, a depraved mind, or aggravated battery.[77] At the sentencing phase of Godfrey's trial, the prosecutor stated that torture and aggravated battery were not involved.[78] Nonetheless, the jury decided the aggravating circumstance was present.[79] Affirming the sentence, the Georgia Supreme Court decided—as did the Oklahoma Court of Criminal Appeals in *Cartwright*—that the jury's finding of aggravating circumstance was valid based on the overall evidence.[80]

While the *Godfrey* decision focused on the standard which a state court must apply to make a broadly worded aggravating circumstance constitutional, the message was unclear. The decision was fashioned after already familiar statements of Court policy governing vaguely worded aggravating circumstances. In *Godfrey*, the Court found an aggravating circumstance which did not satisfy its requirements of a true limiting definition.[81] One of the Court's now-familiar observations was that the

70. *Id.* at 424.
71. *Id.* at 425.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 426.
77. *See generally id.* at 429-33.
78. *Id.* at 426.
79. *Id.*
80. *Id.* at 427.
81. *Id.* at 428.

words "outrageously or wantonly vile" could describe almost any murder.[82] The Court decided that Godfrey's sentences were unconstitutional because the Georgia Supreme Court had failed to use a narrowing definition to ensure that the aggravating circumstance had been properly used.[83] One interpretation contends that *Godfrey* signaled state appellate courts to apply definitions of aggravating circumstances such as "especially heinous, atrocious, or cruel" in a consistent manner.[84]

C. *The Oklahoma Version of the Standard*

The Oklahoma Court of Criminal Appeals first interpreted the aggravating circumstance in *Eddings v. State*[85] in March, 1980, approximately two months before *Godfrey* was announced. Eddings, a 16-year-old runaway from his home in Missouri, shot and killed an Oklahoma Highway Patrol trooper who had stopped him on the Turner Turnpike.[86] The trial court found that the murder was "especially heinous."[87] Eddings argued that the murder of the trooper was no more heinous, atrocious, or cruel than any murder.[88] The Court of Criminal Appeals acknowledged Supreme Court policy by stating that the category was intended to include out-of-the-ordinary killings.[89] The court adopted the definition of especially heinous, atrocious, or cruel used by the Florida Supreme Court and approved by the United States Supreme Court in *Proffitt*.[90] The Florida court had defined the words in the phrase separately. Heinous was defined as "extremely wicked or shockingly evil."[91] Atrocious was defined as meaning "outrageously wicked and vile."[92]

82. *Id.* at 428-29.

83. *Id.* at 432-34. "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.* at 433.

84. Rosen, *supra* note 15, at 965.

85. 616 P.2d 1159 (Okla. Crim. App. 1980), *rev'd on other grounds sub nom.* Eddings v. Oklahoma, 455 U.S. 104 (1982).

86. *Id.* at 1162-63. Eddings had taken his brother's car and had run away with two friends and his sister. In addition, Eddings had taken three of his father's firearms and had shortened the barrel of a .410 gauge shotgun. On the turnpike, Eddings lost control of the car briefly when he dropped a cigarette. A man reported to Patrolman Larry Crabtree that he saw the car swerve into a ditch. After being stopped by Crabtree, Eddings loaded the shotgun. As the trooper approached the car, Eddings pointed the shotgun out the window and fired. *Id.*

87. *Id.* at 1167. The trial court also found that the murder was committed "for the purpose of avoiding or preventing a lawful arrest or prosecution," and that Eddings would "constitute a continuing threat to society." *Id.*

88. *Id.*

89. *Id.*

90. Cartwright v. Maynard, 822 F.2d 1477, 1487 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).

91. Eddings v. State, 616 P.2d 1159, 1167 (Okla. Crim. App. 1980) (quoting State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973)).

92. *Id.*

Cruel was defined as "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others."[93] The Oklahoma court's view was that under the borrowed definition, the crimes intended to be included were those which could be set apart from other capital felonies — as conscienceless or pitiless crimes which are "unnecessarily torturous to the victim."[94] The Oklahoma court concluded that the killing of an on-duty police officer satisfied the standard.[95] Even in *Eddings*, the Supreme Court expressed doubts that the standard had been used properly by the Court of Criminal Appeals.[96]

The Court of Criminal Appeals did not interpret *Godfrey* as requiring a mandatory standard. By the time the Court of Criminal Appeals reviewed Cartwright's conviction, it had abandoned its *Eddings* standard. In several cases, the state court followed the definition in *Eddings*[97] but did not make the narrower definition mandatory.[98] In some cases, the Court of Criminal Appeals specifically rejected the idea that the murders must involve torture if they are to qualify as "especially heinous."[99] In Cartwright's direct appeal, the state appellate court described torture as just one acceptable definition of "especially heinous."[100] For a standard in *Cartwright*, the state appellate court used all the key evidence of the murder.[101] Cartwright had urged the Court of Appeals to find that the murder of Riddle was not "especially heinous" because of the absence of torture.[102] The state appeals court responded by distinguishing *Godfrey*.[103] The Court of Criminal Appeals noted that unlike the Georgia Supreme Court, it had not made torture a mandatory

93. *Id.* at 1167-68.

94. *Id.* at 1168.

95. *Id.*

96. Eddings v. Oklahoma, 455 U.S. 104, 109 n.4 (1982) states:

> We understand the Court of Criminal Appeals to hold that the murder of a police officer in the performance of his duties is "heinous, atrocious, or cruel" under the Oklahoma statute .... However, we doubt that the trial judge's understanding and application of this aggravating circumstance conformed to that degree of certainty required by our decision in *Godfrey v. Georgia* ....

Id.; In a footnote the court stated that the trial judge had found the crime was heinous, atrocious, or cruel because it was "designed to inflict a high degree of pain ... in utter indifference to the rights of Patrolman Crabtree." *Id.* at 108 n.3.

97. Cartwright v. Maynard, 822 F.2d 1477, 1487 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).

98. *Id.* at 1488.

99. *Id.*; Irvin v. State, 617 P.2d 588, 598-99 (Okla. Crim. App. 1980).

100. Cartwright v. State, 695 P.2d 548, 554 (Okla. Crim. App. 1985), *cert. denied*, 473 U.S. 911 (1985).

101. Cartwright v. Maynard, 822 F.2d 1477, 1489 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).

102. Cartwright v. State, 695 P.2d 548, 553-54 (Okla. Crim. App. 1980), *cert. denied*, 473 U.S. 911 (1985).

103. *Id.* at 554.

requirement for a finding of "especially heinous."[104]

Soon, Oklahoma had an assortment of "especially heinous" standards. The Tenth Circuit found the Oklahoma Court of Criminal Appeals had used: definitions of the terms heinous, atrocious and cruel; the manner of the killing; a killer's attitude; the suffering of the victim; and, as in *Cartwright*, all of the circumstances surrounding the murder.[105]

As a kind of "Godfrey II," *Cartwright* went to the Supreme Court. In each case, the state courts had approved the finding of the aggravating circumstance based on the overall facts of the crime.[106] The Tenth Circuit found a significant difference between the cases. The Georgia Supreme Court in *Godfrey* failed to consistently apply an established standard.[107] In Oklahoma, no standard existed which satisfied constitutional requirements.[108] Because of the similarities and differences in the issues of *Cartwright* and *Godfrey*, and because of the adherence to *Godfrey* by the Tenth Circuit, the appeal gave the Supreme Court an opportunity to follow, explain, or overturn *Godfrey*.

IV. THE *CARTWRIGHT* DECISION (OR "GODFREY II")

In *Maynard v. Cartwright*, the Supreme Court affirmed the Tenth Circuit ruling in Cartwright's appeal; indirectly, the Court announced that *Godfrey* remained part of its capital sentencing policy on aggravating circumstances. In the unanimous decision,[109] the Court (1) found in *Cartwright* a case similar to *Godfrey*; (2) rejected the argument that murders can be distinguished as "especially heinous" by juries without further guidance; and (3) refused to make torture and physical abuse a mandatory definition of the "especially heinous" standard. The Court, however, did not give any guidelines as to what other definitions would satisfy constitutional requirements.

As interpreted through *Cartwright*, *Godfrey* becomes a clearer statement by the Court that the eighth amendment requires that sentencing

104. *Id.*

105. Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).

106. *Id.* In *Cartwright*, the Oklahoma Court of Criminal Appeals concluded that the overall circumstances "adequately supported" the finding that the murder was especially heinous, atrocious, or cruel. Cartwright v. State, 695 P.2d 548, 554 (Okla. Crim. App. 1985), *cert. denied*, 473 U.S. 911 (1985). The appeals court noted "[t]his conclusion is no different than the finding that the verdict was 'factually substantiated' that was held inadequate in *Godfrey*." Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988) (citations omitted).

107. Cartwright v. Maynard, 822 F.2d 1477, 1492 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).

108. *Id.*

109. Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

discretion under the "especially heinous" standard be limited by objective and consistently applied standards. The Court rejected Oklahoma's argument that the language in the statute was not unconstitutionally vague.[110] The due process clause of the fourteenth amendment prohibits vague statutes.[111] Since *Furman*, the Supreme Court has required that capital sentencing laws satisfy the interrelated[112] concepts of due process[113] and the requirements that the discretion of sentencers be guided under the eighth amendment.[114] In *Cartwright*, the state argued that some murders are so obviously "especially heinous, atrocious, or cruel" that they do not need to be weighed by appellate courts against an objective standard.[115] The Court replied that claims of vagueness regarding aggravating circumstances are analyzed only under the eighth amendment.[116] The rationale of *Godfrey* was unclear. The murders in *Godfrey* took place in a domestic context. One way to read *Godfrey* is that the Court did not think the facts warranted the death penalty. But, the *Cartwright* Court interpreted *Godfrey* as applying the eighth amendment principle that limiting the sentencers' discretion in imposing the death penalty is a fundamental constitutional requirement.[117]

The Supreme Court agreed with the Tenth Circuit analysis that *Cartwright* presented the same problems addressed in *Godfrey*. The Court agreed with the Tenth Circuit that the Oklahoma aggravating circumstance gave inadequate guidance to sentencers.[118] The Court disregarded the argument made by the state that the addition of the word

110. *Id.* at 1857-58. The Court stated:

> As we understand the argument, it is that a statutory provision governing a criminal case is unconstitutionally vague only if there are no circumstances that could be said with reasonable certainty to fall within reach of the language at issue. Or to put it another way, that if there are circumstances that any reasonable person would recognize as covered by the statute, it is not unconstitutionally vague even if the language would fail to give adequate notice that it covered other circumstances as well.

Id. at 1857.

111. Rosen, *supra* note 15, at 954.

112. Rosen, *supra* note 15, at 954. Rosen states:

> Both doctrines operate under the assumption that the legislature has the power to legislate in a given area but can only do so in a way that protects a defendant from ad hoc, standardless decision making by judges and juries. It is clear that if an aggravating circumstance cannot survive the tests of the due process vagueness doctrine, then it cannot perform the role allotted to it by the eighth amendment.

Rosen, *supra* note 15, at 959.

113. Rosen, *supra* note 15, at 956.

114. Rosen, *supra* note 15, at 959.

115. Maynard v. Cartwright, 108 S. Ct. 1853, 1857 (1988).

116. *Id.* at 1857-58.

117. *Id.* at 1859.

118. *Id.*

"especially" gave the necessary guidance to juries.[119] The Court found that, like the Georgia Supreme Court in *Godfrey*, the Court of Criminal Appeals had used the facts of the murder to support the finding of the aggravating circumstance.[120] The Court said the Oklahoma court's decision in *Cartwright* could not be distinguished from *Godfrey*.[121]

The Court explained that torture or physical abuse is not the only acceptable definition of "especially heinous, atrocious, or cruel."[122] The State of Oklahoma had the same view of the Tenth Circuit ruling in *Cartwright* that Justice Burger had of the ruling in *Godfrey*. As Burger complained in *Godfrey*,[123] the state argued that the appeals court opinion could be interpreted as limiting "especially heinous, atrocious, or cruel" to cases where the victim has suffered physical abuse.[124] In *Cartwright*, Justice White wrote that the Court was not requiring some sort of torture or serious physical abuse as the only acceptable definition.[125]

The Court declined to examine the issue of whether a death penalty should stand where at least one aggravating circumstance found by the sentencer remains unchallenged after others are found invalid.[126] At the time *Cartwright* was decided by the Tenth Circuit, the policy of the Court of Criminal Appeals required that a death penalty be reduced to a life sentence when an aggravating circumstance was found invalid, even if other valid aggravating circumstances remained.[127] In Oklahoma, the sentencer is required to balance the statutory aggravating circumstances

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119. *Id.* "To say 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.' " *Id.* (citations omitted).

120. *Id.*

121. *Id.*

122. *Id.*

123. Godfrey v. Georgia, 446 U.S. 420, 443 (1980) (Burger, J., dissenting). Chief Justice Burger stated:

> [T]he plurality appears to require "evidence of serious physical abuse" before a death sentence can be imposed under § (b)(7).... The plurality's novel physical torture requirement may provide an "objective" criterion, but it hardly separates those for whom a state may prescribe the death sentence from those for whom it may not.

Id. (citation omitted).

124. Brief of Petitioners at 37, Maynard v. Cartwright, 108 S. Ct. 1853 (1988) (No. 87-519).

125. Maynard v. Cartwright, 108 S. Ct. 1853, 1859 (1988). Justice White stated:

> We do not, however, agree that the Court of Appeals imposed this requirement. It noted cases in which such a requirement sufficed to validate an otherwise vague aggravating circumstance, but it expressly refrained from directing the State to adopt any specific curative construction of the aggravating circumstance at issue here.

Id.

126. *Id.* at 1860.

127. Cartwright v. Maynard, 822 F.2d 1477, 1481 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).

with any mitigating circumstances presented by the defendant.[128] Immediately after the Tenth Circuit court ruling in *Cartwright*, the Court of Criminal Appeals reversed its policy against reweighing.[129] The Supreme Court refused to comment on the possible effects of the Oklahoma reweighing guidelines on *Cartwright*.[130]

Justice White, the author of the *Cartwright* opinion,[131] was a dissenter in *Godfrey*.[132] White, who along with Justice Rehnquist had been concerned that the Court was ignoring the circumstances of the murders,[133] wrote that the Court's proper role was to correct genuine constitutional errors, not to second-guess the interpretation of facts which reasonably satisfied the statutory language.[134] The Court's role, White wrote, was not to interfere with factfinders in state criminal cases absent a constitutional violation.[135] Because White was not convinced that a constitutional violation had arisen, he was willing to apply the Court's standard which would not disturb the sentence if a rational basis appeared to exist for the aggravating circumstance.[136] When the state of Oklahoma raised the same argument in *Cartwright*, Oklahoma found it no longer had the same two votes on the Court.

V. ANALYSIS

A. Godfrey *Becomes Unanimous*

The unanimous opinion in *Cartwright* states policy more forcefully than the plurality opinion in *Godfrey*, although no new law was announced. The Supreme Court did not use the opportunity to further define how states must test broadly worded aggravating circumstances such as the especially heinous standard. While the Court stated clearly that torture is not a required definition, it did not elaborate on how states must write standards. As a result, *Cartwright* stands as an action by the

128. *Id.* at 1480-82.

129. Stouffer v. State, 742 P.2d 562, 564 (Okla. Crim. App. 1987), *cert. denied*, 108 S. Ct. 763 (1988).

130. Maynard v. Cartwright, 108 S. Ct. 1853, 1860 (1988).

131. *Id.* at 1856. Justice White delivered the opinion for a unanimous court. *Id.* Justice Brennan filed a one-paragraph concurring opinion, in which Justice Marshall joined. Brennan restated his view that the death penalty is cruel and unusual punishment. *Id.* at 1860 (Brennan, J., concurring).

132. Godfrey v. Georgia, 446 U.S. 420, 444 (1980) (White, J., dissenting).

133. *Id.* at 446-47. Rehnquist had joined in White's dissent in *Godfrey*.

134. *Id.* at 450. White wondered, "Who is to say that the murders of Mrs. Godfrey and Mrs. Wilkerson were not 'vile,' or 'inhuman,' or 'horrible'?" *Id.*

135. *Id.* at 451.

136. *Id.* (quoting Jackson v. Virginia, 443 U.S. 307, 313 (1979)).

Court to enforce past policy. Writers have complained that no clear policy emerged from *Godfrey*,[137] in part because a majority did not agree on an opinion.[138] The Court did not return to the issue of how states must define the "especially henious" aggravating circumstance until *Cartwright*.[139] If *Godfrey* could be described as an opinion which applies established sentencing policy rather than making new law,[140] then *Cartwright* might best be described as an opinion which demonstrates the Court was not ready to re-examine those overall principles. Some states, including Oklahoma, had not adopted and applied adequate constitutional standards to define the "especially heinous" type of aggravating circumstance.[141]

B. *The Court Clarifies* Godfrey

In response to the complaint of the State of Oklahoma that the Tenth Circuit had required that the "especially heinous" aggravating circumstance be applied only where torture or serious physical abuse was found, the Supreme Court clarified *Godfrey*. In his dissent to *Godfrey*, former Chief Justice Burger wrote about the plurality's "novel physical torture requirement."[142] The plurality, Burger wrote, appeared to require evidence of torture or serious physical abuse as a prerequisite to approving a sentence under the "especially heinous" type of aggravating circumstance in effect in Georgia.[143] In *Cartwright*, the Court specifically stated that a form of torture or serious physical abuse is not the only narrowing standard of the "especially heinous" type of aggravating circumstance that would pass constitutional examination.[144]

The Supreme Court did not elaborate on what definitions of the "especially heinous" type of aggravating circumstance would satisfy constitutional requirements. States may continue to write the definitions under

137. Donohue, Godfrey v. Georgia: *Creative Federalism, The Eighth Amendment, and the Evolving Law of Death*, 30 CATH. U.L. REV. 13, 23-24 (1980); *See also* Rosen, *supra* note 15, at 964.

138. Donohue, *supra* note 137, at 17.

139. Brief of Respondent at 13, Maynard v. Cartwright, 108 S. Ct. 1853 (1988) (No. 87-519).

140. Rosen, *supra* note 15, at 964.

141. Rosen, *supra* note 15, at 965.

142. Godfrey v. Georgia, 446 U.S. 420, 443 (1980).

143. *Id.*

144. Maynard v. Cartwright, 108 S. Ct. 1853, 1859-60 (1988). The Court also expressly disagreed with the State of Oklahoma's assertion that torture or serious physical abuse has been required by the Court of Appeals. *Id.* at 1859.

broad guidelines that prohibit only vague definitions.[145] *Cartwright* indirectly adds the requirement that the definitions must be mandatory.[146] The Tenth Circuit also had refused to offer additional guidelines for standard-writing, noting that the Supreme Court had declined to do so when given the opportunity.[147] The Tenth Circuit observed that the Supreme Court view has been that states should determine the relevant factors to be used in the standards.[148]

One possible explanation of the brevity of the *Cartwright* decision is that the Oklahoma Court of Criminal Appeals had conceded before the Supreme Court ruling that its interpretation of *Godfrey* was wrong. Curiously, one indication given by the Supreme Court for accepting *Cartwright* was the conflict between the Oklahoma Court of Criminal Appeals and the Tenth Circuit.[149] By the time *Cartwright* reached the Supreme Court, there was no conflict. The other explanation the Court gave for hearing the case remained: it wanted to address the important constitutional issue involved.[150] *Cartwright* left the Court mainly with the choice to agree or disagree with the Tenth Circuit interpretation of *Godfrey*.

C. *Oklahoma Defines the New Torture and Physical Abuse Standard*

When the Supreme Court announced the *Cartwright* decision on June 6, 1988, the appeal had been affecting the "especially heinous" standard in Oklahoma for almost a year. The Court of Criminal Appeals, on July 31, 1987, made two policy changes as a result of the Tenth Circuit ruling in *Cartwright v. Maynard*.[151] First, the Court of Criminal Appeals in *Stouffer v. State* defined "especially heinous" murders as only those in which death follows torture or serious physical abuse.[152] Second, the state appellate court ended a policy under which it reduced death sentences to life sentences when any of the aggravating circumstances were ruled invalid on appeal.[153]

In the cases since the Tenth Circuit ruling in *Cartwright v. Maynard*, the Court of Criminal Appeals has been defining what will be required to

145. Cartwright v. Maynard, 822 F.2d 1477, 1492 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).
146. *See* Maynard v. Cartwright, 108 S. Ct. 1853, 1857-58 (1988).
147. Cartwright v. Maynard, 822 F.2d 1477, 1492 (10th Cir. 1987), *aff'd*, 108 S. Ct. 1853 (1988).
148. *Id.* (quoting California v. Ramos, 463 U.S. 992, 999 (1983)).
149. Maynard v. Cartwright, 108 S. Ct. 1853, 1857 (1988).
150. *Id.*
151. Stouffer v. State, 742 P.2d 562 (Okla. Crim. App. 1987), *cert. denied*, 108 S. Ct. 763 (1988).
152. *Id.* at 563.
153. *Id.* at 564.

satisfy the torture or serious physical abuse standard. A clear test could emerge eventually, or the Court of Criminal Appeals could weigh the facts of each case without writing a rigid definition.

With *Stouffer*, the Court of Criminal Appeals began the process of defining torture and serious physical abuse by looking for evidence of physical suffering. The Court of Criminal Appeals decided in *Stouffer* that no torture or physical abuse was present in a case in which the murder victim was shot twice in the head and died within minutes.[154] To explain its decision, the state court pointed to the lack of evidence that the victim was conscious after the first shot.[155] The court upheld Stouffer's death sentence based on two additional aggravating circumstances. The "*Stouffer* standard" focused on the victim's condition after the fatal wounds were inflicted.[156]

In *Mann v. State,*[157] the Court of Criminal Appeals decided that prolonged, painful abuse before the fatal wounds were inflicted satisfied the torture or physical abuse test. Mann's sentence was based on the "especially heinous" standard alone. The state appellate court found that the standard was satisfied because the physical abuse resulted in severe pain and fright before death.[158] The victim was abducted, beaten, slashed, and shot in the head and chest.[159] There was also evidence that the victim was told he was to be killed.[160] In *Mann*, awareness of impending death — fright — was one factor which the court considered in finding extreme or serious physical abuse.[161]

Serious bullet wounds inflicted an undetermined period before death supported the new requirement in *Hale v. State*.[162] The victim of an extortion was observed badly wounded and was heard crying for help a day before his body was found.[163] The victim had been shot five times: two shots to the head were ruled to have been fatal. A wound to the abdomen was ruled potentially fatal. There also were wounds to an arm and a leg.[164] Though the time of death was uncertain, the Court was satisfied

154. *Id.*
155. *Id.*
156. Brief of Respondent at 41-42, Maynard v. Cartwright, 108 S. Ct. 1853 (1988) (No. 87-519).
157. 749 P.2d. 1151 (Okla. Crim. App. 1988).
158. *Id.* at 1160.
159. *Id.* at 1154.
160. *Id.* at 1160.
161. *Id.*
162. 750 P.2d 130 (Okla. Crim. App. 1988).
163. *Id.* at 143.
164. *Id.*

that the victim had suffered while conscious with serious wounds.[165]

Rape is another type of physical abuse and injury which may satisfy the new definition. In *Rojem v. State*,[166] a seven-year-old girl died from two large stab wounds to the neck region.[167] She had been injured in the vaginal area.[168] The evidence indicated the rape had occurred before death. The court decided there was no question that the rape and related injuries were painful.[169] The Court did not discuss the issue of consciousness during the physical abuse before death.

In *Brown v. State*,[170] the state appellate court found that the murder was not "especially heinous" because the evidence was unclear as to when fatal wounds were inflicted. Among several gunshot wounds, two were to the victim's heart and aorta.[171] There was testimony that the two chest wounds would have resulted in a rapid death.[172] Investigators theorized that the victim had been shot several times before her car crashed, then again after the wreck.[173] But, the Court of Criminal Appeals ruled the standard was not satisfied because the point at which the fatal shots were fired was uncertain.[174]

The first applications of the new standard show the Court of Criminal Appeals generally has required evidence of conscious pain before death. Fright has been taken into consideration when accompanied by physical injuries. Beating, stabbing, gunshot wounds, and rape have also satisfied the definition.

D. *After* Cartwright

For Oklahoma, most of the impact of William Thomas Cartwright's appeal took place almost a year before the Supreme Court considered the case. The Court of Criminal Appeals already was writing and applying a new torture or serious physical abuse test to comply with the Tenth Circuit interpretation of *Godfrey*. For other states which have been applying the "especially heinous" type standard in the same manner as Oklahoma, *Cartwright* means that juries no longer may use standards based on the

165. *Id.*
166. 753 P.2d 359 (Okla. Crim. App. 1988).
167. *Id.* at 362.
168. *Id.*
169. *Id.* at 369.
170. 753 P.2d 908 (Okla. Crim. App. 1988).
171. *Id.* at 913.
172. *Id.*
173. *Id.*
174. *Id.*

facts of a murder. For Cartwright, a death sentence could become a life sentence.[175]

The Supreme Court quickly applied its ruling in *Cartwright* to invalidate four death sentences: two more in Oklahoma appeals,[176] one in Arizona,[177] and one in Mississippi.[178] In applying its statutory standard for murders described as "especially heinous, cruel, or depraved," the Arizona Supreme Court has used a broad definition comparable to the one used in Oklahoma.[179] The Mississippi Supreme Court has affirmed some findings of its "especially heinous, atrocious, or cruel" aggravating circumstance without using a standard.[180]

The death row appeals most likely to result in life sentences as a result of *Cartwright* are those in which "especially heinous" was the sole aggravating circumstance, and in which the juries were not given the torture or serious physical abuse instruction. Kirk Wayne Brogie's death sentence was the first to be reduced to life as a result of *Cartwright*.[181] Brogie and three passengers in a car stopped on Interstate 40 in Oklahoma City in August, 1979, when they saw a woman stranded because of a flat tire.[182] The woman thought she was being driven home.[183] Instead, she was threatened at knife point, undressed, robbed, sexually assaulted, and stabbed.[184] Brogie participated in the repeated stabbings,[185] then ordered the others to drag the seriously wounded woman into the weeds along a roadside.[186] Two of Brogie's companions hit her in the head with a piece of asphalt.[187] In affirming Brogie's sentence in

175. Interview with Mandy Welch, Deputy Appellate Public Defender, Cartwright's appellate attorney (Sept. 22, 1988). Welch believes the Oklahoma Court of Criminal Appeals must modify Cartwright's sentence to life imprisonment. *Id.*; Interview with Susan Stewart Dickerson, Assistant Attorney General, chief of criminal division (Sept. 23, 1988). The state has asked the Court of Criminal Appeals to reinstate the death penalty by reweighing the aggravating circumstances. *Id.*

176. Stout v. Oklahoma, 108 S. Ct. 2814 (1988), *vacating* Stout v. State, 693 P.2d 617 (Okla. Crim. App. 1985); Hayes v. Oklahoma, 108 S. Ct. 2815 (1988), *vacating* Hayes v. State, 738 P.2d 533 (Okla. Crim. App. 1987).

177. Woratzeck v. Ricketts, 108 S. Ct. 2815 (1988), *vacating* 820 F.2d 1450 (9th Cir. 1987).

178. Jones v. Mississippi, 108 S. Ct. 2891 (1988), *vacating* Jones v. State, 517 So. 2d 1295 (Miss. 1987).

179. Rosen, *supra* note 15, at 980.

180. Rosen, *supra* note 15, at 984. *See also* Washington v. State, 361 So. 2d 61, 65-66 (Miss. 1978), *cert. denied*, 441 U.S. 916 (1979). The court wrote that it believes the average jury understands the words and is able to apply the standard without further definition. *Id.*

181. Brogie v. State, 760 P.2d 1316 (Okla. Crim. App. 1988).

182. Brogie v. State, 695 P.2d 538, 541 (Okla. Crim. App. 1985).

183. *Id.*

184. *Id.*

185. *Id.* at 542.

186. *Id.* at 543.

187. *Id.*

1985, the Court of Criminal Appeals concluded that the evidence supported the aggravating circumstance.[188] The state court modified Brogie's sentence to life two months after *Cartwright* was announced.[189] The jury at Brogie's trial was given the same instruction about the meaning of "especially heinous" as was the *Cartwright* jury.[190] In the terse order, the Court of Criminal Appeals explained that because the jury had not been instructed that "especially heinous" murders involve torture or serious physical abuse, it was required under *Cartwright* to modify the sentence.[191]

Cartwright may not signal the end of the catchall aggravating circumstance. Another possible catchall aggravating circumstance asks the jury whether the killer will threaten society in the future.[192] The State of Oklahoma argued in *Cartwright* that the "continuing threat" standard, which the Court had previously approved, was even more vague than the "especially heinous" standard.[193]

Cartwright does not resolve the issue of whether standards supplied by an appellate court should be substituted for the lack of adequate narrowing guidelines given to juries. The Oklahoma Uniform Jury Instructions direct the "especially heinous" standard to murders which are preceded by torture or serious physical abuse.[194] However, the instruction does not require that "especially heinous" be found by a jury only where evidence of torture or serious physical abuse exists. The wording of the jury instruction under the new state torture or physical abuse requirement creates the possibility of new challenges to the "especially heinous" aggravating circumstance. The Supreme Court then would likely be asked to resolve the issue of whether a standard designed to guide sentencers' discretion can be applied constitutionally at the appellate level.

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188. *Id.*

189. Brogie v. State, 760 P.2d 1316 (Okla. Crim. App. 1988).

190. *Id.*; Brief of Respondent at 3, Maynard v. Cartwright, 108 S. Ct. 1853 (1988)(No. 87-519). The following instruction was given at Cartwright's trial; "[a]s used in these instructions, the term 'heinous' means extremely wicked or shockingly evil, 'atrocious' means outrageously wicked and vile, 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others." *Id.*

191. *Brogie*, 760 P.2d at 1316.

192. OKLA. STAT. tit. 21, § 701.12 (1981 & Supp. 1987).

193. Brief of Petitioners at 57-58, Maynard v. Cartwright, 108 S. Ct. 1853 (1988) (No. 87-519). The state agreed that the Supreme Court had approved an even more vague aggravating circumstance in the continuing threat standard because it called on juries to predict future conduct.

194. OKLA. UNIF. JURY INSTRUCTIONS, CRIMINAL, No. 436 (1981). An Order of the Oklahoma Court of Criminal Appeals effective May 1, 1982, requires trial courts to use the uniform instructions where applicable. *Id.* at iv.

VI. CONCLUSION

Cartwright does not announce new policy. The decision explains, but does not expand, the policy in *Godfrey*. When read with the Tenth Circuit opinion which it affirms, *Cartwright* clearly states a policy that the standards which states adopt to define the "especially heinous" aggravating circumstance must be consistently applied. A state appellate court must not only compare sentencers' findings of an aggravating circumstance against some form of standard, but the standard must be made mandatory.

While refusing to change policy, the Supreme Court has also missed a chance to address some of the criticized aspects of the aggravating circumstance "especially heinous, atrocious, or cruel," and similar language in statutes. Vague statutory terms are usually not accidents. They are written in vague language because public policymakers want a few general, catchall aggravating circumstances to make the death penalty available in cases that do not fit into other categories. As one of the most critical elements of the Supreme Court's modern death penalty doctrine, aggravating circumstances will continue to be a focus of creative death row appeals. Prosecutors searching for a catchall aggravating circumstance still can turn to the aggravating circumstance dealing with future behavior. The reaction to *Cartwright* and other cases may well be that legislatures will pass new broad aggravating circumstances.

While Oklahoma finally has a post-*Cartwright/Godfrey* standard in place, the standard chosen is as potentially broad as the pre-*Cartwright* standard. The broad terms "especially heinous, atrocious, or cruel" are being defined by words which could be used to describe any murder. Because murder implies physical abuse, the new standard also could apply to all murders.

Stephen Richard Ward