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DEATH ON A WHIM: JURY DISCRETION AND "ESPECIALLY HEINOUS" CRIMES

Maynard v. Cartwright,
486 U.S. 356 (1988)

I. INTRODUCTION

Whether or not the death penalty should be abolished continues to be a subject of much debate among religious, social, legal, and other circles. However, since capital punishment has been established as a part of our criminal justice system, other more technical questions dealing with when and how someone should be sentenced to death must also be answered.

One such question is which crimes should be punished by this ultimate penalty. Many states have statutes which set forth certain circumstances for a jury to consider in making its decision. The statutory provision which seems to raise the most questions is the one which allows the death penalty to be imposed if the crime is found to be "especially heinous, atrocious, or cruel." The United States Supreme Court dealt with this issue in a case originally from Oklahoma, *Maynard v. Cartwright.* [1]

Cartwright was convicted of murder in the first degree and shooting with intent to kill. [2] The jury imposed the death penalty for the murder because of two aggravating circumstances: first, the defendant had "knowingly created a great risk of death to more than one person," [3] and, second, the murder was "especially heinous, atrocious, or cruel." [4]

After a long appellate process, the Supreme Court granted certiorari [5] limited to the issue of whether the statute defining an aggravating circumstance as "especially heinous, atrocious, or cruel" [6] was unconstitutionally vague under the eighth amendment.

II. HISTORY AND BACKGROUND

A. Early Considerations of the Jury's Role in Capital Cases

Until recently, the Supreme Court was seldom called upon to settle a ques-

1. Maynard v. Cartwright, 486 U.S. 356 (1988).
2. Cartwright v. State, 695 P.2d 548, 550 (Okla. Crim. App. 1985), *cert. denied,* 473 U.S. 911 (1985); Cartwright v. State, 708 P.2d 592 (Okla. Crim. App. 1985), *cert. denied,* 474 U.S. 1073 (1986); Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986); Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987); *cert. granted,* 484 U.S. 1003 (1988), *aff'd,* 486 U.S. 356 (1988).
3. OKLA. STAT. tit. 21, § 701.12(2) (1981).
4. OKLA. STAT. tit. 21, § 701.12(4) (1981).
5. Maynard v. Cartwright, 484 U.S. 1003 (1988).
6. OKLA. STAT. tit. 21, § 701.12(4) (1981).

tion concerning the eighth amendment. When the question arose, it usually involved whether a certain method of punishment was "cruel and unusual."[7] One early case involving the death penalty was *Wilkerson v. Utah*[8] where the Supreme Court upheld shooting as a method of execution. The issue seemed to be more one of the mode of execution than of the death penalty itself.[9]

The Supreme Court continued to view the death penalty as falling outside the eighth amendment,[10] but in *McGautha v. California*[11] a new issue was presented. The defendants in this case argued that the jury's having unguided discretion in imposing the death penalty violated the fourteenth amendment, which provides that no state shall deprive a person of his life without due process of law.[12] In his analysis of the case, Justice Harlan described the history of the jury's role in capital cases to establish the rationale behind allowing juries discretion in imposing the death sentence[13] and concluded that "[t]his history reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die."[14]

In colonial America a general sense of rebellion arose against the old common-law rule which imposed a mandatory death sentence on all persons convicted of murder. As early as 1794, Pennsylvania abolished capital punishment in all cases except those of "'murder of the first degree.'"[15] Many other states soon followed. Notwithstanding these legislative attempts to limit somewhat the imposition of the death penalty, circumstances still arose in which the death penalty technically applied although the jury believed it inappropriate; as a consequence, the jury would simply refuse to convict of the capital offense. In an effort to solve this problem, legislatures, including the United States Congress, did not try to refine further the definition of capital homicides but instead "adopted the method of forthrightly granting juries the discretion which they had been exercising in fact."[16] The Supreme Court subsequently approved this policy in *Winston v. United States.*[17]

Another case that the Court in *McGautha* discussed was *Witherspoon v. Illinois,*[18] in which the Supreme Court decided that individuals conscientious-

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7. U. S. CONST. amend. VIII. The full text of the eighth amendment reads as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

8. 99 U.S. 130 (1878).

9. *See* Furman v. Georgia, 408 U.S. 238, 275 (1972) ("[T]he Court concluded: 'Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to [treatises on military law] are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first decree [sic] is not included in that category, with the meaning of the [Clause].'" (quoting Wilkerson v. Utah, 99 U.S. 130, 134-36 (1878)).

10. *See, e.g., In re* Kemmler, 136 U.S. 436 (1890) (upholding electrocution as a means of execution).

11. 402 U.S. 183 (1971).

12. *Id.* at 196.

13. *Id.* at 197-203.

14. *Id.* at 197.

15. *Id.* at 198 (quoting Pa. Laws 1794, c. 1777).

16. *Id.* at 199.

17. 172 U.S. 303 (1899).

18. 391 U.S. 510 (1968).

ly against the death penalty could not be automatically excluded from the jury in a capital case:

> [O]ne of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."[19]

Although the Court recognized in *McGautha* that some "academic and professional sources"[20] had suggested that standards were needed to guide discretion of capital jury sentencing, it also noted that no court had accepted this argument[21] and refused to do so itself. The Court stated: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."[22] Justice Harlan concluded that "[i]n light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."[23]

One year later, the Supreme Court made a dramatic change from these statements in its landmark decision of *Furman v. Georgia.*[24]

B. The Beginning of Statutory Standards for the Guidance of Juries

In the 1972 case of *Furman v. Georgia*, the Supreme Court was called upon to decide whether the death penalty was unconstitutional.[25] Although Justices Brennan and Marshall agreed that the death penalty is unconstitutional *per se*,[26] the per curiam opinion in *Furman v. Georgia* stated only that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[27]

One of the main concerns of the five concurring Justices[28] was the discriminatory infliction of the death penalty which they reasoned was a result of jury

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19. *McGautha*, 402 U.S. at 202 (quoting *Witherspoon*, 391 U.S. at 519 n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))).
20. *McGautha*, 402 U.S. at 202.
21. *Id.* at 202-03.
22. *Id.* at 204.
23. *Id.* at 207.
24. 408 U.S. 238 (1972).
25. *Id.*
26. *Id.* at 286 (Brennan, J., concurring), 358-59 (Marshall, J., concurring).
27. *Id.* at 239-40.
28. Justices Brennan, Douglas, Stewart, White, and Marshall wrote concurring opinions. *Id.* at 257, 240, 306, 310, 314. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist wrote dissenting opinions. *Id.* at 375, 405, 414, 465.

discretion.[29] In Chief Justice Burger's dissenting opinion in *Furman*,[30] he mentions the *McGautha* decision and reasons:

> Although the Court's decision in *McGautha* was technically confined to the dictates of the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment as made applicable to the states through the Due Process Clause of the Fourteenth Amendment, it would be disingenuous to suggest that today's ruling has done anything less than overrule *McGautha* in the guise of an Eighth Amendment adjudication.[31]

The eighth amendment premise is that the death penalty can "only be imposed under a system that channels the sentencer's discretion. The aim is to avoid arbitrary, capricious, and discriminatory imposition of the death penalty."[32] The vagueness doctrine, which prohibits excessively vague statutes, is to be applied to death penalty procedures to ensure that the due process requirement of the fourteenth amendment is met. The two principles involved in the vagueness doctrine are fair notice[33] and the prevention of "arbitrary and discriminatory enforcement of the laws."[34]

The immediate effect of *Furman* and the other cases decided that same day and dealing with the same issue[35] was the enactment of new death penalty statutes in thirty-five states.[36] The idea of writing new statutes to come within the framework of *Furman* seems to stem from Chief Justice Burger's dissent:

> [I]t is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant statutory changes will have to be made. Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.[37]

The new statutes either made the death penalty mandatory for specific categories

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29. *See Furman*, 408 U.S. 238, 256-57 (Douglas, J., concurring), 295 (Brennan, J., concurring), 310 (Stewart, J., concurring), 314 (White, J., concurring), 365 (Marshall, J. concurring).

30. *Id.* at 375-405.

31. *Id.* at 400.

32. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases – The Standardless Standard*, 64 N.C.L. REV. 941, 946 (1986) [hereinafter *The Standardless Standard*].

33. *Id.* at 954 & n.66.

34. *Id.* at 955.

35. *See* Moore v. Illinois, 408 U.S. 786 (1972); Stewart v. Massachusetts, 408 U.S. 845 (1972); and the other various memorandum decisions in 408 U.S. 932-40. Together with *Furman*, these cases affected the imposition of the death penalty in the following states: Alabama, Arizona, Connecticut, Delaware, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia, and Washington.

36. Cartwright v. Maynard, 822 F.2d 1477, 1484 (10th Cir. 1987).

37. *Furman*, 408 U.S. at 400.

of crime or "sought to channel the discretion of the sentencer by requiring separate guilt and sentencing proceedings, consideration of aggravating and mitigating circumstances, and appellate review of each death sentence."[38] In this second category, the most criticized of aggravating circumstances is the one that allows a jury to impose the death penalty following its finding that a murder was "especially heinous, atrocious, or cruel."[39]

C. The Supreme Court and the "Especially Heinous" Statutes

In 1976 the Supreme Court held in the case of *Gregg v. Georgia*[40] that the statutory system of allowing juries to consider aggravating circumstances was constitutionally permissible. The Georgia statute considered listed a number of aggravating circumstances and required the jury to find beyond a reasonable doubt that at least one of them existed before imposing the death penalty.[41] Included in the statute was the aggravating circumstance that "[t]he offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[42] Since the question in *Gregg* was whether or not Georgia's entire statutory scheme was constitutional and since the jury had not used the "outrageously or wantonly vile" aggravating circumstance to impose the death penalty, the Supreme Court did not extensively deal with this section of the statute.[43] The Court did acknowledge that it was "arguable that any murder involves depravity of mind or an aggravated battery."[44] The Court continued, "But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction."[45]

On the same day that the *Gregg* decision was handed down, the Court decided *Proffitt v. Florida*,[46] which also involved an aggravating circumstance statutory system. The jury in this case had actually relied on the "especially heinous, atrocious, or cruel" statute[47] to advise the judge to impose the death penalty.[48] Florida used aggravating circumstances in a method slightly different from Georgia's: the jury was to look at all statutory mitigating and aggravating circumstances and weigh them against each other in its determination of whether or not to advise the judge to impose capital punishment.[49] The Supreme

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38. *Cartwright*, 822 F.2d at 1484.
39. *The Standardless Standard*, *supra* note 32, at 943-45. Variations of this wording include "outrageously or wantonly vile," "heinous," "horrible," "brutal," "depraved," "cruel," "inhuman," and "atrocious." *Id.* at 943 n.7.
40. 428 U.S. 153 (1976).
41. *Id.* at 196-97.
42. GA. CODE ANN. § 27-2534.1(b)(7) (Supp. 1975).
43. *See Gregg*, 428 U.S. at 201 n.51.
44. *Id.* at 201.
45. *Id.*
46. 428 U.S. 242 (1976).
47. FLA. STAT. ANN. § 921.141(5)(h) (West Supp. 1976-1977).
48. *Proffitt*, 428 U.S. at 246.
49. *Id.* at 248-51.

Court indicated that since Florida had narrowly construed the "especially heinous" statute as being "directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim,' "[50] it "[could not] say that the provision, as so construed, provide[d] inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases."[51]

Thus, in 1976, the Supreme Court indicated that "especially heinous" statutes were not unconstitutionally vague if the state judiciary interpreted them in such a way as not to allow every form of murder to fall within the statute.

Only four years later, Georgia's "outrageously or wantonly vile" provision[52] was again brought to the attention of the Supreme Court in *Godfrey v. Georgia.*[53] The petitioner in this case had gone to his mother-in-law's trailer where his estranged wife was living. Looking through a window, he saw his wife, mother-in-law, and eleven-year-old daughter inside playing cards. Aiming through the window, he shot his wife in the forehead, killing her instantly. He then went inside the trailer, hit his fleeing daughter with the barrel of the shotgun, and shot his mother-in-law in the head, killing her instantly.[54]

Godfrey immediately called the sheriff's office and turned himself in. He later told the police that he had committed a " 'hideous crime' " but that he had been " 'thinking about it for eight years' " and would " 'do it again.' "[55] He was convicted on two counts of murder and one count of aggravated assault.[56] The jury imposed the death penalty on the basis of the "outrageously or wantonly vile" provision.[57] The Georgia Supreme Court rejected the defendant's vagueness challenge and upheld the sentence by relying on *Gregg v. Georgia*[58] and its own past decisions. The court stated only that the jury's finding was supported by the evidence and that the language of the finding " 'was not objectionable.' "[59]

In writing the opinion for *Godfrey*, Justice Stewart noted that the provision had not been held unconstitutional in *Gregg*[60] but that the Supreme Court had based this ruling on the assumption that the Georgia courts would continue to apply a narrow construction to the provision.[61] The issue in *Godfrey* was "whether, in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court ha[d] adopted such a broad and vague construction of the § (b)(7) aggravating circumstance as to violate the Eighth and

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50. *Id.* at 255 (quoting State v. Dixon, 283 So. 2d 1, 9 (1973)).
51. *Proffitt*, 428 U.S. at 255-56 (emphasis added).
52. GA. CODE ANN. § 27-2534.1(b)(7) (Supp. 1975).
53. 446 U.S. 420 (1980).
54. *Id.* at 425.
55. *Id.* at 425-26.
56. *Id.* at 426.
57. *Id.*
58. 428 U.S. 153 (1976) (holding that Georgia's death penalty statutes were constitutional).
59. *Godfrey*, 446 U.S. at 427 (quoting Godfrey v. Georgia, 243 Ga. 302, 310, 253 S.E.2d 710, 718 (1979)).
60. 428 U.S. 153 (1976).
61. *Godfrey*, 446 U.S. at 422-23.

Fourteenth Amendments to the United States Constitution."[62]

After briefly noting that all of the other aggravating circumstances in the Georgia statute were "considerably more specific or objectively measurable,"[63] the Court addressed the "outrageously or wantonly vile" provision. It reiterated that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."[64] The Court cited *Gregg v. Georgia*[65] as authority for requiring "'clear and objective standards'"[66] as guidance for juries in the imposition of the death penalty.[67] The Court found the application of the statute in this case to be an insufficient channeling of the discretion of the jury since "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman'"[68] and since judicial review had not corrected the problem.[69]

In the past the Georgia Supreme Court had interpreted the statute more narrowly than it did in *Godfrey*; three conclusions concerning the statute's aggravating circumstances had been applied:

> The first was that the evidence that the offense was 'outrageously or wantonly vile, horrible or inhuman' had to demonstrate 'torture, depravity of mind, or an aggravated battery to the victim.' The second was that the phrase, 'depravity of mind,' comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third . . . was that the word, 'torture,' must be construed in *pari materia* with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death.[70]

The Supreme Court found that the offense in *Godfrey* did not meet any of these criteria and, thus, that the Georgia Supreme Court had not "applied a constitutional construction of the [provision]."[71] Accordingly, the Court reversed the death sentence in this case.[72]

As can be seen in the *Cartwright* case,[73] problems remain with application of the "especially heinous" provisions to capital cases. State courts are still not applying a narrow enough construction to "especially heinous" statutes to meet constitutionally mandated guidelines.

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62. *Id.* at 423.
63. *Id.* at 423 n.2.
64. *Id.* at 428.
65. 428 U.S. 153 (1976).
66. *Id.* at 198 (quoting Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974)).
67. Godfrey, 446 U.S. at 428.
68. *Id.* at 428-29.
69. *Id.* at 429.
70. *Id.* at 431.
71. *Id.* at 432-33.
72. *Id.* at 433.
73. Maynard v. Cartwright, 486 U.S. 356 (1988).

III. Instant Case

A. *The Facts*[74]

In July, 1981, Thomas Cartwright began working for Hugh and Charma Riddle in their remodeling business in Muskogee, Oklahoma. In December of the same year, he was fired from the job. Cartwright claimed that the Riddles fired him because they did not want to pay for an injury which he allegedly received while working for them. The Riddles said he was laid off for lack of business. During the following year, Cartwright told an acquaintance "that he intended to 'get even' with the Riddles."[75]

On May 3, 1982, the Riddles spent the night with Charma's father. They returned to their rural home sometime during the early evening on May 4. After eating a meal, they went into the living room to watch television. During the evening, Charma left the living room and was on her way to the bathroom when she encountered a man in her hallway holding a shotgun in his hands. When she grabbed the gun, the man fired into her leg. After falling to the floor, she looked up and recognized her attacker as their ex-employee, Thomas Cartwright. He then shot her again.

Charma watched as Cartwright entered the living room and fired twice with the shotgun; she heard the screams of her husband, Hugh, who was killed almost instantly. After Cartwright disappeared into the living room, Charma managed to drag herself down the hall and into a bedroom. She tried to use the telephone but found that it was dead, so she began to write Cartwright's name on the bedsheet in her own blood. She had managed to write the letters "TOM CAR" when Cartwright entered the room and found her. When Charma asked why he had shot them, he answered that they should not have fired him. Charma asked him to help her, but he stabbed her twice, once in the throat, with a hunting knife the Riddles had given him for Christmas. He then left the room.

Charma heard the phone ring in another room and realized that the phone in the bedroom was only unplugged. After plugging it back in, she called the operator, who connected her with the Muskogee police. She informed the dispatcher that she had been shot by Tom Cartwright and that he was still in the house. She then gave him directions to her home.

Cartwright was fleeing from the house when the police arrived, and he managed to escape at that time.[76] The police took Mrs. Riddle to the Muskogee Hospital, and she lived to testify against Cartwright at his trial.

The jury found Cartwright guilty of both murder in the first degree and shooting

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74. The facts of this case are taken from the opinion of the Court of Criminal Appeals of Oklahoma, Cartwright v. State, 695 P.2d 548, 550-51 (1985). A summary of facts can also be found in any of the appellate opinions listed in *supra* note 2.

75. *Cartwright*, 695 P.2d at 550.

76. He was arrested two days later. *Id.* at 551.

with intent to kill and sentenced him to death for the murder and seventy-five years' imprisonment for the shooting.

B. The Appellate Decisions

On appeal to the Court of Criminal Appeals of Oklahoma, the defendant raised several issues,[77] but it was the review of the death penalty which eventually merited discussion by the Supreme Court.[78]

The jury had imposed the death penalty after finding that two aggravating circumstances existed: first, that the murder was "especially heinous, atrocious or cruel" and, second, that the defendant had "knowingly created a risk of death to more than one person."[79] In Oklahoma the sentencer is required to balance all the aggravating circumstances with all the mitigating circumstances in making its determination of the sentence.[80] On appeal, Cartwright argued[81] that since Hugh Riddle had died almost instantly, the murder was not torturous and thus not especially heinous under the principle of *Godfrey v. Georgia*.[82]

The Court of Criminal Appeals of Oklahoma stated that in *Godfrey* the Georgia Supreme Court before *Godfrey* had always required some form of torture;[83] no torture was involved in the *Godfrey* case, but the Georgia Supreme Court upheld a finding that the murders were "outrageously wanton or vile" anyway. Thus, the court seemed to be saying that it was the sudden change in the interpretation of the statute in *Godfrey* that was unconstitutional, not that no torture was involved. The court went on to say that Oklahoma had never defined their "especially heinous" provision in such a way.[84] Oklahoma had defined "heinous" as "extremely wicked or shockingly evil."[85] The court cited several cases in which the "especially heinous" provision had applied even though torture had not been involved.[86] Therefore, the court of criminal appeals upheld the death sentence by saying that the circumstances surrounding the murder supported the jury's finding that it was "especially heinous, atrocious or cruel," that the defendant had "created a great risk of death to more than one person," and that the death penalty was not "excessive or disproportionate to the penalty

77. *Id.* at 550-51.
78. Maynard v. Cartwright, 486 U.S. 356 (1988).
79. *Cartwright*, 695 P.2d at 553.
80. OKLA. STAT. ANN. tit. 21, § 701.11 (West 1983).
81. *Cartwright*, 695 P.2d at 553-54.
82. 446 U.S. 420 (1980).
83. *Cartwright*, 695 P.2d at 554.
84. *Id.*
85. *Id.* (quoting Eddings v. State, 616 P.2d 1159, 1168 (Okla. Crim. App. 1980) (quoting State v. Dixon, 283 So. 2d 1 (Fla. 1973))).
86. Davis v. State, 665 P.2d 1186 (Okla. Crim. App. 1983); Boutwell v. State, 659 P.2d 322 (Okla. Crim. App. 1983); Jones v. State, 648 P.2d 1251 (Okla. Crim. App. 1982); Eddings v. State, 616 P.2d 1159 (Okla. Crim. App. 1980); Chaney v. State, 612 P.2d 269 (Okla. Crim. App. 1980) (all cited in *Cartwright*, 695 P.2d at 554).

imposed in similar cases."[87]

The Supreme Court denied certiorari,[88] and the state court denied an application for post-conviction relief[89] for which the Supreme Court again denied certiorari.[90] The defendant then appealed to the United States District Court for the Eastern District of Oklahoma for a writ of habeas corpus and was denied.[91] A panel from the Tenth Circuit affirmed the denial[92] but granted a rehearing *en banc* on the question of the "especially heinous, atrocious, or cruel" aggravating circumstance.[93]

The Tenth Circuit stated the issues as follows:

> First, we must decide whether reliance upon an unconstitutionally vague or overbroad statutory aggravating circumstance requires the reversal of a death sentence where the sentencer was required to balance the aggravating circumstances with the mitigating circumstances. Second, if such reliance requires that the death sentence be vacated, we must then decide whether the Oklahoma courts in this case applied a constitutionally adequate narrowing construction of 'especially heinous, atrocious, or cruel' to the facts of this case. Finally, if the state courts failed to apply a proper narrowing construction, we must decide whether this court can apply a narrowing construction of 'especially heinous, atrocious, or cruel' to the facts of this case.[94]

Regarding the first issue, the Tenth Circuit considered the fact that Oklahoma uses a balancing of all mitigating and aggravating circumstances to determine whether to apply the death penalty. If one of the factors were found to be invalid on appeal, the Oklahoma courts would not reweigh the balancing factors without the invalid factor but would simply modify the death penalty to life imprisonment. Thus, the court decided that if it found the "especially

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87. *Cartwright*, 695 P.2d at 554-55. In discussing what made the crime "especially heinous," the court stated the following:

> We deem it proper to gauge whether the murder was heinous, atrocious or cruel in light of the circumstances attendant to the murder, including the evidence that the appellant had previously expressed his intentions to 'get even' with the Riddles; that he probably had been inside the Riddles' home as early as 11:13 a.m. on the day of the murder; that he either lay in wait for them, or returned under the cover of darkness, and broke into their home to stalk them; that he attacked Charma immediately upon being discovered; that having gunned her down, he went into the living room and slayed Hugh; that Hugh doubtless heard the shotgun blasts which tore through Charma's body; that he quite possibly experienced a moment of terror as he was confronted by the appellant and realized his impending doom; that the appellant again attempted to kill Charma in a brutal fashion upon discovery that his first attempt was unsuccessful; that he attempted to conceal his deeds by disconnecting the telephone and posting a note on the door [which stated that the Riddles were out of town, *Id.* at 551]; and that his apparent attempt to steal goods belonging to the Riddles by loading them in their vehicle was prevented only by the arrival of police officers, adequately supported the jury's finding.

Id. at 554.

88. 473 U.S. 911 (1985).

89. Cartwright v. State, 708 P.2d 592 (Okla. Crim. App. 1985).

90. 474 U.S. 1973 (1986).

91. Cartwright v. Maynard, 822 F.2d 1477, 1478 (10th Cir. 1987).

92. Cartwright v. Maynard, 802 F.2d 1203 (10th Cir. 1986).

93. *Cartwright*, 822 F.2d at 1478.

94. *Id.*

heinous" provision to be constitutionally invalid, it would have to vacate the death sentence.[95]

In making its determination, the circuit court reviewed the Supreme Court decisions involving similar challenges[96] and stated that "[t]he narrowing function of an aggravating circumstance demands that such a factor be capable of objective determination."[97] After noting that twenty-three other states had similar statutes, the court went on to say that, while the Supreme Court had not held any of them to be facially unconstitutional, it went beyond the face of the statute and "'probed the application of statutes to particular cases.'"[98] If a state court interprets the aggravating circumstance broadly, "'it may . . . vitiate[] the role of the aggravating circumstance in guiding the sentencing jury's discretion.'"[99]

The Tenth Circuit then looked at the role that the "especially heinous" statute had played in past Oklahoma decisions[100] and found that, while Oklahoma purported to follow the narrowing construction approved by the Supreme Court in *Proffitt v. Florida,*[101] Oklahoma courts had never said that the language used in *Proffitt*, "unnecessarily torturous to the victim," was mandatory and had even "'[made] clear that suffering of the victim is not the major factor . . .'"[102] but that the "'manner of the killing'" and the surrounding circumstances are also relevant.[103]

After a comparison with *Godfrey v. Georgia,*[104] the court restated the definitions of the "especially heinous" statute that the court had given in the jury instructions in Cartwright's trial. The judge had stated: "'[T]he 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 the others.'"[105] The circuit court decided that since the Oklahoma Court of Criminal Appeals had stated that the statute is disjunctive–heinous, atrocious, *or* cruel–the jury could have determined that the death penalty could be imposed under only one of the three definitions.[106] The Tenth Circuit held that this was as arbitrary and capricious as the statute in *Godfrey* and failed for the same reasons–these definitions could be used to describe any murder and thus were not narrow enough

95. *Id.* at 1483.
96. *See supra* notes 40-72 and accompanying text.
97. *Cartwright*, 822 F.2d at 1485.
98. *Id.* (quoting McCleskey v. Kemp, 481 U.S. 279, 304-05 (1987)).
99. *Cartwright*, 822 F.2d at 1485-86 (quoting *McCleskey*, 481 U.S. at 305).
100. *Cartwright*, 822 F.2d at 1487-91.
101. 428 U.S. 242 (1976).
102. *Cartwright*, 822 F.2d at 1488 (quoting Nuckols v. State, 690 P.2d 463, 472 (Okla. Crim. App. 1984)).
103. *Cartwright*, 822 F.2d at 1488 (quoting *Nuckols*, 690 P.2d at 472).
104. 466 U.S. 420 (1980).
105. *Cartwright*, 822 F.2d at 1488.
106. *Id.*

to avoid "arbitrary and capricious infliction of the death sentence."[107] Put another way, "vague terms do not suddenly become clear when they are defined by reference to other vague terms."[108]

The Court of Appeals continued:

> The Oklahoma court has never explained why one manner of killing is 'especially heinous, atrocious, or cruel' and why another manner of killing is not. The cases in which the court has found the manner of the killing to support this aggravating circumstance do not reveal any pattern or consistency in the way in which the murder was committed . . . . Therefore, the court's reliance upon the manner of the killing does not serve to distinguish among those murders that are punishable by death and those that are not.[109]

The court accordingly held that "the Oklahoma Court of Criminal Appeals failed to apply a constitutionally required narrowing construction of 'especially heinous, atrocious, or cruel' in this case."[110]

Because of the inconsistencies of the Oklahoma decisions applying the "especially heinous" statute, the Tenth Circuit decided that "there [was] no constitutionally adequate narrowing construction adopted by the state courts that [it could] apply to the instant case."[111] As a result it enjoined the execution of Cartwright but stated that the "judgment [was] without prejudice to further proceedings by the state for redetermination of the sentence."[112]

C. The Supreme Court Opinion

On June 6, 1988, the United States Supreme Court affirmed the decision of the Tenth Circuit.[113] On appeal the State argued that there are some "factual circumstances that so plainly characterize the killing as 'especially heinous, atrocious, or cruel' that affirmance of the death penalty is proper."[114] The Supreme Court interpreted this argument as saying 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."[115] In other words, the State was arguing "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."[116]

The Supreme Court said that this reasoning is only applicable under the due process clause vagueness doctrine and "fails to recognize the rationale of our

107. *Id.* at 1489.
108. *Id.*
109. *Id.* at 1490.
110. *Id.* at 1491.
111. *Id.* at 1492.
112. *Id.*
113. Maynard v. Cartwright, 486 U.S. 356, 366 (1988).
114. *Id.* at 361.
115. *Id.*
116. *Id.*

cases construing and applying the Eighth Amendment."[117] The Court further stated:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia.*[118]

The Court held that the circuit court was "quite right in holding that *Godfrey* controls this case"[119] since the language in this statute gives no more guidance to the jury than the language in *Godfrey*[120] and that the Oklahoma court's conclusion that the circumstances " 'adequately supported the jury's findings' "[121] did no more to "cure the unfettered discretion of the jury . . . to satisfy the commands of the Eighth Amendment"[122] than the Georgia court's analysis had.

The Supreme Court refused to agree with the state that the Tenth Circuit required that for the "especially heinous" statute to be valid "torture or serious physical abuse" must be present[123] and stated that "[w]e also do not hold that some kind of torture or serious physical abuse is the only limiting construction of the heinous, atrocious, or cruel aggravating circumstance that would be constitutionally acceptable."[124]

Since at the time Cartwright was sentenced, Oklahoma did not try to uphold a death penalty where one of the aggravating circumstances was found to be invalid even if the others were valid, the State's argument that the death penalty should stand because another aggravating circumstance had been found was held to be without merit. Taking notice of *Stouffer v. State,*[125] in which the Court of Criminal Appeals of Oklahoma held "that it would not necessarily set aside a death penalty where on appeal one of several aggravating circumstances has been found invalid or unsupported by the evidence,"[126] the Supreme Court held that its judgment affirming the court of appeals, and thus vacating Cartwright's death sentence, was "without prejudice to further proceedings in the state courts for redetermination of the appropriate sentence."[127]

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117. *Id.*
118. *Id.* at 361-62 (citing *Furman*, 408 U.S. 238 (1972)).
119. *Maynard*, 486 U.S. at 363.
120. 446 U.S. 420 (1980).
121. *Maynard*, 486 U.S. at 364 (quoting *Cartwright*, 695 P.2d at 554).
122. *Maynard*, 486 U.S. at 364.
123. *Id.* at 364-65.
124. *Id.* at 365.
125. 742 P.2d 562 (Okla. Crim. App. 1987).
126. *Maynard*, 486 U.S. at 365 (citing *Stouffer*, 742 P.2d at 564)).
127. *Maynard*, 486 U.S. at 365-66. The Court of Criminal Appeals of Oklahoma subsequently decided not to modify Cartwright's death penalty to a life sentence as in its past practice but remanded the case to Muskogee County District Court for resentencing. *See* Cartwright v. State, 778 P.2d 479 (Okla. Crim. App. 1989).

IV. ANALYSIS

Oklahoma is not the only state which has had problems with interpreting the "especially heinous" provision of its aggravating circumstances.[128] Although the Supreme Court states that "some kind of torture or serious physical abuse is [not] the only limiting construction of the heinous, atrocious, or cruel aggravating circumstance that would be constitutionally acceptable,"[129] it is difficult to imagine any other circumstance that it would uphold given its record. This decision does little more than reiterate the holding in *Godfrey v. Georgia.*[130] The instant case shows that the decision in *Godfrey* solved few problems.

The difficulty appears to be in the statutes themselves. The very words used are subjective, so how can one follow objective standards which are required by the Supreme Court's decision in *Gregg?*[131]

The Supreme Court, by requiring exact and specific situations for the imposition of the death penalty by the jury, had already effectively blocked any path which the wishes of the people could follow except through the representative body of the legislature. The legislature in enacting the "especially heinous" statutes supposedly was following public opinion. It is likely that such provisions were intended as a "catch all" to encompass those situations which the more specific aggravating circumstances would not cover and yet in which general sentiment would be that the death penalty should be applied. The Supreme Court's requirement of some method of "channeling and limiting . . . the sentencer's discretion"[132] has subverted the actual purpose of the "especially heinous" provisions.

Although one author has questioned the judiciary's power to circumvent the authority of the people and has even suggested that the Court's actions are unconstitutional,[133] the decisions have been made; the question is what states can or should do to conform to Supreme Court standards.

A. Legislative Action

Perhaps the simplest approach to abolishing any possible confusion in the interpretation of the "especially heinous" provisions would be to repeal them and to draft more objective and specific provisions to replace them.[134] A legislature could consider all the prior cases in its jurisdiction involving the "especially heinous" statute to find a specific pattern of what were considered to be especially heinous crimes—the best example being murder involving torture—and

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128. For a thorough discussion of different states' applications of "especially heinous" statutes and the inconsistencies in their application, see *The Standardless Standard, supra* note 32.

129. *Maynard*, 486 U.S. at 365.

130. 446 U.S. 420 (1980).

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

132. *Maynard*, 486 U.S. at 362.

133. R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE 156 (1982).

134. This is the solution supported by Professor Rosen in his article, *The Standardless Standard, supra* note 32, at 989-92.

draft the provision accordingly. Should no pattern be found, the legislature would understand why the statutes could be considered "arbitrary and capricious."[135]

In drafting the new provisions, legislators should also consider the narrow constructions of the "especially heinous" aggravating circumstance which have been upheld by the Supreme Court. One good example is that of Georgia before *Godfrey*.[136] The courts in Georgia had interpreted their "outrageously or wantonly vile" statute to mean "'torture, depravity of mind, or an aggravated battery to the victim.'"[137] The Florida courts' construction of a "'conscienceless or pitiless crime which is unnecessarily torturous'"[138] was also upheld.[139]

In light of the above decisions, one possible replacement provision would be to require that the crime involve depravity of mind as evidenced by mental or physical torture to the victim before death. Such a provision should be sufficient to "adequately . . . inform juries what they must find to impose the death penalty."[140]

B. Judicial Construction

If legislatures will not take action to remove the "especially heinous" provisions from the capital sentencing statutes, the courts will be forced to interpret the meaning of the statutes and to remain within narrow interpretations. Courts continue to fail in this endeavor.[141] Not only do interpretations differ among states, but interpretations have not been consistent from case to case within the same court.[142] This failure to follow consistently a stated standard is the problem with the "especially heinous" provisions. No one seems to be able to find a definition of the statute to which the courts are willing to adhere; cases still arise in which neither the trial judge, jury, nor appellate courts can rationally show why the "especially heinous" statute should apply based on prior decisions, but in which the circumstances of the case seem to merit the provisions' application.

However, in *Maynard v. Cartwright*,[143] the Supreme Court once again pointed out that the only way the "especially heinous" statutes will be constitutionally permissible is for the state courts to limit their construction. Courts need to set a standard for what will be considered heinous in their jurisdictions and then stay within the boundaries of their decisions. One cannot be adequately informed of the consequences of his actions as required by the fourteenth amendment if courts continue to uphold jury findings that a crime was "especially heinous" with no specific definitions of the terms.

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135. *Maynard*, 486 U.S. at 362.
136. 446 U.S. 420 (1980).
137. *Id.* at 431.
138. *Proffitt*, 428 U.S. at 255 (quoting State v. Dixon, 283 So. 2d 1, 9 (1973)).
139. *Proffitt*, 428 U.S. at 256.
140. *Maynard*, 486 U.S. at 361-62.
141. *See The Standardless Standard*, *supra* note 32.
142. *Id.*
143. 486 U.S. 356 (1988).

C. Supreme Court Response

Should all else fail and too much discretion still be allowed juries, the Supreme Court may eventually need to declare the "especially heinous" statutes unconstitutional. Past Supreme Court decisions, beginning with *Furman*,[144] have already paved the way for such an action.

In *Furman*, the Court declared the death penalty unconstitutional because the existing statutes allowed juries to inflict the death penalty arbitrarily, thus violating both the eighth and fourteenth amendments.[145] The Court later upheld the "especially heinous" provisions with the understanding that the state courts would limit their construction so as to channel a jury's discretion within constitutional means.[146] In *Godfrey v. Georgia*,[147] and now *Maynard v. Cartwright*,[148] while not declaring the statutes unconstitutional, the Court did hold that the actual application of the statutes can be unconstitutional. In light of these decisions, if inconsistencies continue to prevail among the courts, the Supreme Court would have a strong foundation upon which to base its decision to declare "especially heinous" statutes and their variations unconstitutional under both the eighth and fourteenth amendments.

V. Conclusion

Though *Godfrey*[149] should have settled the question as to "especially heinous" provisions, *Maynard v. Cartwright*[150] proves that it did not. Perhaps this decision will cause legislatures to take a closer look at the statutes and courts to consider more carefully whether their own interpretations of the "especially heinous" provisions are following constitutional standards. Unfortunately, since *Godfrey* solved few problems, the possibility remains that state courts will continue to justify their inconsistent applications of the provisions, thereby forcing the Supreme Court to decide on the constitutionality of the statutes themselves. It remains to be seen what effect this latest decision will have on the fate of those who commit what the jury considers to be an "especially heinous" crime.

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144. 408 U.S. 238 (1972).
145. *Id.* at 240.
146. *Gregg*, 428 U.S. at 201 & n.51 (Although "[i]t is, of course, arguable that any murder involves depravity of mind or an aggravated battery . . . there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction."); *Proffitt*, 428 U.S. at 255-56 ("We cannot say that the provision, *as so construed*, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." (emphasis added)).
147. 446 U.S. 420 (1980).
148. 486 U.S. 356 (1988).
149. 446 U.S. 420 (1980).
150. 486 U.S. 356 (1988).