

**HEINOUS, ATROCIOUS, OR CRUEL:
CHANNELING JURY DISCRETION IN THE POST-FURMAN ERA**

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I. INTRODUCTION

Thirty-two states currently allow defendants convicted of first degree murder to be sentenced to death.¹ Although all murders are indeed horrible, in each of these thirty-two states it is necessary for the judge or jury to find that facts relating to the offense elevate the crime beyond the norm of first degree murders.² These facts, commonly referred to as aggravating circumstances³, are statutory factors that make a defendant death-eligible.⁴ Death penalty jurisdictions have codified several aggravating circumstances, such as: the defendant's prior felony convictions,⁵ the commission of the murder for pecuniary gain,⁶ the victim's status as a law enforcement official,⁷ and the commission of the crime during the perpetration of another felony.⁸ The language and number of aggravating circumstances varies from state to state, yet most aggravating circumstances across all death penalty jurisdictions are considerably clear,

¹ Death Penalty Information Center, *States With and Without the Death Penalty*, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (accessed November 4, 2013).

² See *Woodson v. North Carolina*, 428 U.S. 280 (1976)(holding Eighth Amendment prohibits the mandatory imposition of death sentences for all first-degree murders).

³ Also referred to as "special circumstances" (California) or "aggravating factors" (Colorado).

⁴ Oregon, Texas, Utah, and Virginia make aggravated murders a separate crime referred to as "capital murder," wherein the aggravating circumstance is an element of the offense.

⁵ *E.g.*, Fla. Stat. Ann. § 921.141(5)(a) (West 2010)("The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation."); Ariz. Rev. Stat. Ann. § 13-751(F)(1) (West 2012)("The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable."); Cal. Penal Code § 190.2(a)(2)("The defendant was convicted previously of murder in the first or second degree.").

⁶ *E.g.*, Fla. Stat. Ann. § 921.141(5)(f) (West 2010)("The capital felony was committed for pecuniary gain."); Ariz. Rev. Stat. Ann. § 13-751(F)(4) (West 2012)(" The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value."; Cal. Penal Code § 190.2(a)(1)(" The murder was intentional and carried out for financial gain.").

⁷ *E.g.*, Fla. Stat. Ann. § 921.141(5)(j) (West 2010)("The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties."); Ariz. Rev. Stat. Ann. § 13-751(F)(10) (West 2012)("The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer."); Cal. Penal Code § 190.2(a)(8)(" The victim was a peace officer ... who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.").

⁸ *E.g.*, Fla. Stat. Ann. § 921.141(5)(d) (West 2010)("The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.").

narrow, and precise, making them fairly easy for the judge or jury to apply.⁹ One particular aggravating circumstance, however, differs from the others in this respect and has been the source of much litigation.¹⁰

Most jurisdictions allowing the death penalty have some variation of an aggravating circumstance making a defendant death-eligible if the judge or jury finds that the murder was “heinous, atrocious, or cruel,”¹¹ hereinafter referred to as “HAC.” This aggravating circumstance has been the subject of much criticism due to its imprecise and arguably vague nature.¹² As one scholar noted, “Probably no other aggravating circumstance has been as frequently attacked or as carefully scrutinized.”¹³ Yet despite its inherent potential for ambiguity, the HAC aggravating circumstance continues to be utilized by prosecutors across the country.

The focus of death penalty litigation has shifted away from addressing issues of whether the punishment itself is constitutional. Since 1976, the subject of death penalty jurisprudence has centered on the procedures used in imposing it.¹⁴ Because “death is different,”¹⁵ the Eighth Amendment requires that it only be imposed under a system that guides the sentencer’s discretion to avoid arbitrary, capricious, and discriminatory sentencing decisions.¹⁶ Therefore, based on its litigious history, it is not surprising that the HAC factor continues to be the source of much dispute today.¹⁷ This paper focuses on three death penalty jurisdictions: Florida, Arizona,

⁹ Richard A. Rosen, *The “Especially Heinous” Aggravating Circumstance in Capital Cases — The Standardless Standard*, 64 N.C. L. Rev. 941, 942-43 (1986).

¹⁰ *See id.*

¹¹ *See* David McCord, *Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape or Robbery Be Sufficient to Make a Murderer Eligible for a Death Sentence? — An Empirical and Normative Analysis*, 49 Santa Clara L. Rev. app. C, pt. 5 (2009).

¹² Much of the criticism surrounding these aggravating circumstances focuses on their vagueness, lack of guidance to sentencers, and the failure of the appellate courts to narrow their application. Rosen, *supra* note 10, at 943.

¹³ Joseph A. Colquitt, *The Death Penalty Laws of Alabama*, 33 Ala. L. Rev. 213, 296 (1982)

¹⁴ *See supra*, note 9.

¹⁵ *See, e.g., Furman v. Georgia*, 408 U.S. 238, 286–89 (1972) (Brennan, J., concurring) (“[d]eath is a unique punishment”; “[d]eath . . . is in a class by itself”).

¹⁶ *See supra*, note 9.

¹⁷ *See supra*, note 9.

and Oklahoma. Their versions of the HAC aggravating circumstance will be analyzed, as well as their application in recent cases, in an effort to demonstrate the difficulty these jurisdictions have faced in channeling jury discretion in the post-Furman era.

II. RELEVANT SUPREME COURT DECISIONS

Decades ago, the United States Supreme Court came to a revolutionizing conclusion when it acknowledged that “death is qualitatively different.”¹⁸ Starting with the Court’s decision in Furman v. Georgia,¹⁹ the Court began regulating the implementation of the death penalty in the United States. The Furman court held that death sentences handed down under the sentencing scheme in place at the time were arbitrarily imposed and therefore unconstitutional under the Eighth and Fourteenth Amendments.²⁰ “[W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty.”²¹

In an effort to implement a constitutional death sentence, many jurisdictions adopted the Model Penal Code’s aggravating circumstances following the Furman decision.²² Other jurisdictions enacted statutes requiring the death penalty to be imposed for all first degree murders.²³ Four years after Furman, the United States Supreme Court struck down the sentencing schemes calling for the mandatory imposition of death sentences in the cases of Woodson v. North Carolina²⁴ and Roberts v. Louisiana²⁵. The Court held that by mandating that the death

¹⁸ Ford v. Wainwright, 477 U.S. 399, 411 (1986)(“This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.”).

¹⁹ 408 U.S. 238 (1972) (per curiam).

²⁰ *Id.* at 239.

²¹ *Id.* at 253.

²² See Barry Latzer & David McCord, *Death Penalty Cases*, 428 (3d ed., Elsevier, Inc. 2011).

²³ See *Id.* at 85.

²⁴ *Supra* note 2.

²⁵ Roberts v. Louisiana, 428 U.S.325 (1976).

penalty be imposed, these statutes provided no standards to guide juries in their exercise of “the power to determine which first-degree murderers shall live and which shall die.”²⁶

That same day however, the Court upheld Georgia’s capital punishment law that applied certain judicial procedures in an effort to prevent the arbitrary imposition of the death penalty in the case of Gregg v. Georgia.²⁷ Georgia had adopted the aggravating factors from the Model Penal Code and authorized judges and juries to consider a death sentence only when one of the aggravating circumstances was found beyond a reasonable doubt.²⁸ The Court reasoned that Georgia had adequately addressed the issue of unfettered jury discretion.²⁹ The “guided discretion” approach to the death penalty upheld in Gregg continues to control capital sentencing in murder cases throughout the nation to the present day.³⁰

In 1980, the Court again examined Georgia’s version of the “heinous, atrocious, or cruel” aggravating circumstance in the landmark case of Godfrey v. Georgia.³¹ Georgia Code §17-10-30(b)(7) allowed a jury to issue a death sentence if they found beyond a reasonable doubt “that the offense of murder was outrageously or wantonly vile, horrible and inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.”³² The Gregg court had found this statutory aggravating circumstance was not constitutional on its face.³³ In Godfrey, however, the Court came to different conclusion.

A capital sentencing scheme must, in short, provide a ‘meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the

²⁶ *Supra* note 2, at 303.

²⁷ 428 U.S. 153 (1976).

²⁸ *Id.* at 161.

²⁹ *See Id.* at 192.

³⁰ *Supra* note 18 (“Consequently, the current statutes of every death penalty jurisdiction embody all or most of the Code’s aggravating circumstances.”).

³¹ 446 U.S. 420 (1980).

³² *Id.* at 426.

³³ *See Id.* at 422.

cases in which it is not'... It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'³⁴

The Court reasoned that most jurors would agree that any murder is "outrageously or wantonly vile, horrible, or inhuman," therefore the aggravating circumstance in §17-10-30(b)(7) was not an aggravating circumstance at all, allowing juries to act arbitrarily.³⁵ In fact, Godfrey's crime had been horrible – he had killed his wife and mother in law with a shotgun in front his young daughter.³⁶ The aggravating circumstance was overly inclusive, however, and "it is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."³⁷

The Court also invalidated aggravating circumstances with similar language from other jurisdictions in Maynard v. Cartwright³⁸ and Shell v. Mississippi.³⁹ Petitioner Cartwright was found guilty of first-degree murder and sentenced to death upon the jury's finding that the murder was "especially heinous, atrocious, or cruel."⁴⁰ The Court held that under Furman and its progeny, this aggravating circumstance failed to inform the jury of what it must find in order to impose the death penalty, leaving the jury with open-ended discretion.⁴¹ "

The language of the Oklahoma aggravating circumstance at issue — 'especially heinous, atrocious, or cruel'— gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in Godfrey ... To say that something is 'especially heinous' merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.' Likewise, in Godfrey the addition of

³⁴ *Id.* at 427-28.

³⁵ *Id.* at 428-29.

³⁶ *Id.* at 425.

³⁷ *Id.* at 433.

³⁸ 486 U.S. 356 (1988).

³⁹ 498 U.S. 1 (1990).

⁴⁰ *Supra* note 34, at 358-59.

⁴¹ *Supra* note 34, at 362.

‘outrageously or wantonly’ to the term ‘vile’ did not limit the over breadth of the aggravating factor.⁴²

The language of the aggravating circumstance in Shell was identical as the language in Maynard.⁴³ The Mississippi Supreme Court had distinguished Shell from Maynard on the grounds that the Shell trial court had included a limiting instruction defining the words heinous, atrocious, and cruel.⁴⁴ The United States Supreme Court explained that “a limiting instruction can be used to give content to a statutory factor that ‘is itself too vague to provide any guidance to the sentencer only if the limiting instruction’s own ‘definitions are constitutionally sufficient,’ that is, only if the limiting instruction itself ‘provide[s] some guidance to the sentencer.’”⁴⁵ Ultimately, the Court found no distinction between the Shell aggravating circumstance and the aggravating circumstance invalidated in Godfrey or Maynard.⁴⁶

The same year Shell was decided, the Supreme Court reversed the trend started by Godfrey and Maynard and upheld Arizona’s “especially heinous, cruel, or depraved” aggravating circumstance.⁴⁷ In Walton v. Arizona,⁴⁸ the Arizona Supreme Court had the cruelty aspect of the Arizona aggravating circumstance in an identical fashion as the construction approved of in Maynard.⁴⁹ The crux of the Maynard and Godfrey decisions, however, rested on the idea that “[w]hen a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.”⁵⁰ The distinguishing

⁴² *Supra* note 34, at 363-64.

⁴³ *Supra* note 35, at 2.

⁴⁴ The instruction read: “The word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of, the suffering of others.” *Id.*

⁴⁵ *Supra* note 35, at 3 (quoting Walton v. Arizona, *infra*, 497 U.S. 639, 654 (1990)).

⁴⁶ *Supra* note 35, at 3.

⁴⁷ Walton v. Arizona, 497 U.S. 639 (1990)(overruled in part by Ring v. Arizona, 536 U.S. 584 (2002)).

⁴⁸ *Id.*

⁴⁹ *Supra* note 47, at 655.

⁵⁰ *Supra* note 47, at 654.

factor in Walton lied on the fact that Walton had not been sentenced by a jury, but by the trial judge, and trial judges are presumed to follow the law and capable of applying the narrowed definition of “especially heinous, atrocious, or depraved”.⁵¹ Further, the Arizona Supreme Court had developed a body of law that defined the words "heinous, cruel, or depraved" thereby leaving legal standards for trial judges to follow in imposing death sentences.⁵² For the Walton Court, these two differences led to their conclusion that Arizona's "especially heinous, cruel, or depraved" aggravating factor satisfied the requirements of the Eighth Amendment.⁵³

III. FLORIDA

As of December 13, 2013, there are 403 inmates on Florida’s death row.⁵⁴ In the wake of the Furman decision, Florida was the first state⁵⁵ to rewrite its death penalty statute in a way the legislature believed would end arbitrariness in capital sentencing. Following Florida’s lead, thirty-four states proceeded to enact new death penalty statutes shortly thereafter.⁵⁶ In Proffitt v. Florida,⁵⁷ the Supreme Court upheld Florida’s statute as constitutional.

Florida’s capital punishment statute requires that a separate sentencing proceeding take place after a defendant is found guilty of a capital felony.⁵⁸ After hearing all the evidence in the sentencing phase, the jury must deliberate and return an advisory sentence to the court.⁵⁹ Notwithstanding the recommendation of a majority of the jury, the court then enters a sentence of life imprisonment or death.⁶⁰ There are currently sixteen aggravating circumstances judges

⁵¹ *Supra* note 49

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Death Row Roster*, Florida Department of Corrections, <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp> (last updated Dec. 13, 2013).

⁵⁵ *History of the Death Penalty*, <http://deathpenaltycurriculum.org/student/c/about/history/history-6.htm> (last visited Dec. 13, 2013) (“The states were led by Florida, which rewrote its death penalty statute only five months after *Furman*.”).

⁵⁶ *Supra* note 54.

⁵⁷ 28 U.S. 242, 247 (1976).

⁵⁸ Fla. Stat. Ann. § 921.141(1).

⁵⁹ Fla. Stat. Ann. § 921.141(2).

⁶⁰ Fla. Stat. Ann. § 921.141(3).

and juries may consider,⁶¹ including that “[t]he capital felony was especially heinous, atrocious, or cruel.”⁶²

As the Florida Supreme Court noted, the heinous, atrocious, and cruel aggravator is one “of the most weighty in Florida's sentencing calculus.”⁶³ However, the lack of a standardized definition of what heinous, atrocious, or cruel means indicates that this factor has been the source of confusion among Florida juries. “[W]hat does [heinous, atrocious, or cruel] mean? Must the perpetrator have intended to torture his victim? Must the victim have suffered even though suffering was not intended by the perpetrator?”⁶⁴ The following cases illustrate the varying perceptions of what juries in the Sunshine State have considered heinous, atrocious, and cruel.

A. Carroll v. State⁶⁵

In certain instances, the heinous, atrocious, or cruel nature of a murder is obvious and the jury can easily determine that the circumstances surrounding the victim's death meet the requisite level of “shock”⁶⁶ necessary for this aggravator to be found. Ten-year old Christine McGowan was raped and strangled to death in her own bed by Elmer Carroll on October 30, 1990.⁶⁷ During the penalty phase of Carroll's trial, the medical examiner testified that Christine had been conscious during the attack, that her vagina had been literally torn apart during the rape, and that she had experienced pain consistent with that of child birth.⁶⁸ The medical examiner further testified that the defendant attempted anal intercourse with her and that death by strangulation would take approximately three to four minutes, during which Christine would

⁶¹ Fla. Stat. Ann. § 921.141(5).

⁶² Fla. Stat. Ann. § 921.141(5)(h).

⁶³ *Sireci v. Moore*, 825 So. 2d 882, 887 (Fla. 2002).

⁶⁴ Rosemary Barkett, *Judicial Discretion and Judicious Deliberation*, 59 Fla. L. Rev. 905, 927-28 (2007).

⁶⁵ 636 So. 2d 1316 (Fla. 1994).

⁶⁶ See *State v. McKinney*, 579 So. 2d 80, 84 (Fla. 1991)(Evidence did not prove beyond a reasonable doubt that shooting murder was committed in a manner that “sets it apart from the norm of capital felonies.” Facts did not raise murder to the “shocking level required by [HAC] factor.”).

⁶⁷ *Id.* at 1317.

⁶⁸ *Id.* at 1319-20.

have been aware of her “impending doom”.⁶⁹ As the Florida Supreme Court wrote, “If any crime meets the definition of heinous, atrocious or cruel, it is this case.”⁷⁰

B. Rimmer v. State⁷¹

On May 2, 1998, Robert Rimmer and his accomplices entered the Audio Logic car stereo store intending to rob it.⁷² Rimmer went into the store, armed with a .380 caliber semiautomatic, and ordered the two employees and two customers in the store to lie face down on the ground.⁷³ He then duct-taped their hands behind their backs, took whatever belongings they had in their pockets, and began loading stereo equipment into his vehicle.⁷⁴ When the armed men finished loading the vehicle, the victims heard Rimmer start to drive the car out of the store’s bay area and then stop.⁷⁵ Rimmer exited the vehicle and walked over to one of the store employees and said, “You know me.”⁷⁶ The victim assured Rimmer he did not know him, but Rimmer placed his gun to the back of the employee’s head and shot him.⁷⁷ At the sound of the gunshot, the second employee jumped to his feet.⁷⁸ Rimmer ordered him to get back on the ground, walked over to him, and shot him in the back of the head as well.⁷⁹ A jury recommended the death penalty for Rimmer by a vote of nine to three.⁸⁰ The trial court followed the jury’s recommendation finding, *inter alia*, that the HAC aggravator was present.⁸¹

⁶⁹ *Id.* at 1320.

⁷⁰ *Id.*

⁷¹ 825 So.2d 304 (Fla. 2002).

⁷² *Id.* at 308.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 311.

⁸¹ *Id.*

On appeal, Rimmer argued that the evidence in this case failed to support the finding that the murders were heinous, atrocious, or cruel.⁸² The Florida Supreme Court agreed.⁸³ According to the Court, the fact that Rimmer had forced his victims to lie on the floor with their hands bound while he robbed the store was insufficient to assume they were in fear of their impending deaths.⁸⁴ The Court acknowledged that the two men must have suffered fear during the criminal episode, but “it was not the type of fear, pain, and prolonged suffering ... sufficient to support [the HAC] aggravating circumstance.”⁸⁵ The Court also rejected the State’s argument that even if the record was insufficient to establish the HAC aggravator as to the first victim, it was sufficient to establish it for the second victim.⁸⁶ The Court reasoned that the second victim was killed shortly after the first, therefore “he would have experienced only a very short period of mental anguish, if any at all.”⁸⁷

C. Diaz v. State⁸⁸

A month after Joel Diaz and Lissa Shaw’s two year relationship ended, Diaz confronted Lissa at gunpoint in the driveway of her parents’ home.⁸⁹ Diaz shot Lissa twice, but fortunately for her, she was able to escape; her father, Charles Shaw, however, was not so lucky.⁹⁰ After hearing the gunshots, Mr. Shaw encountered Diaz in the front yard.⁹¹ Diaz chased Mr. Shaw into the house at gunpoint; once inside, Mr. Shaw attempted to calm Diaz down.⁹² As Diaz held the gun with both hands, he aimed it at Mr. Shaw’s chest and pulled the trigger.⁹³ The gun, however,

⁸² *Id.* at 327.

⁸³ *Id.*

⁸⁴ *Id.* at 328.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ 860 So.2d 960 (Fla. 2003).

⁸⁹ *Id.* at 963.

⁹⁰ *Id.* at 964.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

was out of ammunition and only made a clicking sound.⁹⁴ Mr. Shaw relaxed, but Diaz reloaded the gun.⁹⁵ When he realized what Diaz was doing, Mr. Shaw ran to the bathroom where Diaz shot him three times.⁹⁶ Diaz then went to the bedroom where Mrs. Shaw was; he did not shoot Mrs. Shaw, but remained in the bedroom for approximately one minute before returning to the bathroom and shooting Mr. Shaw twice more.⁹⁷

Diaz was found guilty of first-degree murder for the death of Mr. Shaw and was sentenced to death.⁹⁸ On appeal, Diaz argued the court erred in instructing the jury on the heinous, atrocious, and cruel aggravating factor.⁹⁹ The Florida Supreme court held that the court's finding of this aggravator was not supported by the evidence.¹⁰⁰ Despite the fact that Diaz reloaded the gun in Mr. Shaw's presence, this was insufficient to establish an intent to inflict a high degree of pain or to torture the victim.¹⁰¹

D. Williams v. State¹⁰²

On October 7, 2006, the decomposing body of Susan Dykes was found floating in a lake with three cinderblocks tied to her chest, waist, and feet.¹⁰³ The medical examiner discovered five injuries to her skull consistent with the head being struck by an aluminum baseball bat.¹⁰⁴ Kirk Williams, a man that had been living with Dykes, was charged and convicted of first-degree

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 965.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 968.

¹⁰¹ *Id.* at 967-68.

¹⁰² 37 So.3d 187 (Fla. 2010)

¹⁰³ *Id.* at 192.

¹⁰⁴ *Id.* at 193.

murder for her death.¹⁰⁵ One of the aggravating circumstances the court used to impose the death penalty was that Dykes's murder had been especially heinous, atrocious, or cruel.¹⁰⁶

Williams argued there was not competent, substantial evidence to support the trial court's finding of the heinous, atrocious, or cruel aggravator; the Florida Supreme Court agreed.¹⁰⁷ Although the heinous, atrocious, or cruel aggravator has been previously upheld by the Court in other beating deaths, it is necessary for the State to present evidence to show that the victim was conscious and aware of impending death.¹⁰⁸ Noting the lack of defensive wounds on Dykes's body which would tend to show she was conscious during the attack, the Court held the evidence in this case was insufficient to establish HAC.¹⁰⁹

E. Hall v. State¹¹⁰

Donte Hall was sentenced to death for the murder of Anthony Blunt.¹¹¹ Blunt had been attending a house party when Hall and his accomplices entered the house carrying handguns and assault rifles with the intent to rob the partygoers.¹¹² The intruders ordered the partygoers on the ground and demanded money and jewelry.¹¹³ When one of the party attendees attempted to distract the gunmen, he was fatally shot in the face by Hall.¹¹⁴ Four other people were subsequently shot; three of the victims were non-fatally wounded, but Blunt was not so lucky.¹¹⁵ Hall was eventually found guilty of conspiracy to commit armed robbery, armed burglary, robbery with a firearm, two counts of attempted felony murder, and two counts of first-degree

¹⁰⁵ *Id.* at 190.

¹⁰⁶ *Id.* at 194.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 198-99.

¹⁰⁹ *Id.* at 201.

¹¹⁰ 87 So.3d 667 (Fla. 2012).

¹¹¹ *Id.* at 669.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

murder.¹¹⁶ The jury voted eleven to one that the murder of Blunt had been especially heinous, atrocious, or cruel and voted eight to four in favor of a death sentence for Blunt's murder.¹¹⁷ The trial court also found the HAC aggravator present and sentenced Hall to death.¹¹⁸

On appeal, Hall claimed, *inter alia*, that the trial court had erred in finding the HAC aggravator with respect to Blunt's murder.¹¹⁹ The Florida Supreme Court noted that "fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel."¹²⁰ Accordingly, the Court ruled there was sufficient evidence to support a finding of the HAC aggravator.¹²¹ Blunt was shot multiple times and left groaning, breathing heavily, sweating, and begging for help.¹²² Blunt remained conscious, aware he had been shot, and in severe pain as he bled out.¹²³ He remained conscious while other partygoers were shot, including the man that was shot in the face.¹²⁴ The court noted that as Blunt bled to death, he repeatedly stated, "I don't want to die, I don't want to die."¹²⁵ With these facts preset, the Court held neither the jury nor the Court had erred in finding the HAC aggravating factor and Hall's death sentence was upheld.¹²⁶

¹¹⁶ *Id.* at 669

¹¹⁷ *Id.* at 670.

¹¹⁸ *Id.* at 671.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 672.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

F. Allen v. State¹²⁷

The defendant, Margaret Allen, was found guilty of the first-degree murder of Wenda Wright and the jury unanimously recommended a death sentence.¹²⁸ Finding that the capital felony was especially heinous, atrocious, or cruel,¹²⁹ the trial court imposed the death penalty.¹³⁰

Allen had held Wright captive and terrorized her for a period of time prior to her death.¹³¹ Wright begged to be let go and was punched repeatedly in the head by Allen when she tried to escape.¹³² While Allen's accomplice held Wright down, Allen poured a combination of chemicals on to her face, including bleach, hair spray, and nail polish remover.¹³³ Allen also beat Wright with belts while Wright was tied up.¹³⁴ Allen then placed a belt around Wright's neck and began to strangle her.¹³⁵ Allen's accomplice testified that Wright was terrified and screamed for Allen to stop because she was going to wet herself.¹³⁶

On appeal, Allen challenged the court's finding of the HAC aggravator.¹³⁷ The Florida Supreme Court found her claim had no merit.¹³⁸ The Court noted that the HAC aggravator has been upheld in numerous cases involving beatings, as well as in cases in which strangulation occurred while the victim was conscious.¹³⁹ Despite the fact that Wright's body had no defensive wounds, the Court held the trial court did not err in finding the HAC aggravator.¹⁴⁰

¹²⁷ 2013 WL 3466777

¹²⁸ *Id.* at *5.

¹²⁹ *Id.*

¹³⁰ *Id.* at *1.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at *13.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

G. King v. State¹⁴¹

The body of eighty-two year old Renie Telzer-Bain was discovered in her home on December 29, 2009.¹⁴² She had been struck several times with the head and claw of a hammer, sustaining three fatal blows to the head.¹⁴³ Cecil King, who had been working as a lawn maintenance man in her neighborhood, was convicted and sentenced to death for her murder.¹⁴⁴

On appeal, King challenged the trial court's finding of the HAC aggravator.¹⁴⁵ The Supreme Court again explained that it has consistently upheld HAC in beating deaths and noted the relevancy of the defensive wounds to the HAC analysis.¹⁴⁶ "The defensive wounds to the victim's hand and arm clearly demonstrate that the victim was conscious and aware of her impending death and attempting to fend off the attack."¹⁴⁷ Accordingly, the Court concluded the trial court's finding of HAC was supported by competent, substantial evidence.¹⁴⁸

IV. ARIZONA

Arizona's death row currently houses 122 inmates.¹⁴⁹ In response to Furman,¹⁵⁰ Arizona passed a death penalty statute imposing several procedural limitations on capital sentencing.¹⁵¹ As with other states, the death sentence in Arizona can only be imposed on those found guilty of first degree murder.¹⁵² The state must file notice of intent to seek the death penalty as well as notice of one or more aggravating circumstances prior to trial.¹⁵³ "If the trier of fact finds the

¹⁴¹ 2013 WL 3333096

¹⁴² *Id.* at *1.

¹⁴³ *Id.* at *2.

¹⁴⁴ *Id.* at *4.

¹⁴⁵ *Id.* at *5.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at *7.

¹⁴⁸ *Id.*

¹⁴⁹ *Death Row*, Arizona Department of Corrections, http://www.azcorrections.gov/inmate_datasearch/newDeathRow.aspx (last updated Dec. 13, 2013).

¹⁵⁰ *Supra* note 19.

¹⁵¹ Terrill Pollman, *Maynard v. Cartwright: Channeling Arizona's Use of the Heinous, Cruel, or Depraved Aggravating Circumstance to Impose the Death Penalty*, 32 Ariz. L. Rev. 193 (1990).

¹⁵² *See generally* Ariz. Rev. Stat. Ann. § 13-751.

¹⁵³ Ariz. Rev. Stat. Ann. § 13-752(A)-(B).

defendant guilty of first degree murder, the trier of fact shall then immediately determine whether one or more alleged aggravating circumstances have been proven. This proceeding is the aggravation phase of the sentencing proceeding.”¹⁵⁴ If the trier of fact then determines that the aggravating circumstance or circumstances have been proven, then the trier of fact must decide if the death penalty should be imposed; this is known as the penalty phase of the sentencing proceeding.¹⁵⁵

Arizona, like many other death penalty states, also contains an aggravating circumstance provision allowing the death penalty to be imposed when a murder is “heinous, cruel, or depraved.”¹⁵⁶ There is a distinction, however, between the “cruel” portion of the aggravator – which addresses suffering by the victim before death – and the “heinous or depraved” part, which relates to the defendant’s state of mind at the time of the crime.¹⁵⁷ The following cases illustrate the difficulty Arizona juries have faced in attempting to properly apply this aggravator.

A. State v. Benson¹⁵⁸

Trent Benson was sentenced to death for the murders of two women.¹⁵⁹ The first victim had been “beat her about her face and head, strangled her to death with a ligature, and severely sexually assaulted while she was dead or unconscious.”¹⁶⁰ Her partially nude body was then disposed of in an alley.¹⁶¹ The second victim was also strangled to death with a ligature.¹⁶² Benson dumped her body on a street and ran over it with his car.¹⁶³ During the aggravation

¹⁵⁴ Ariz. Rev. Stat. Ann. § 13-752(C).

¹⁵⁵ Ariz. Rev. Stat. Ann. § 13-752 (D).

¹⁵⁶ Ariz. Rev. Stat. Ann. § 13-751(F)(6). The statute provides in part: “F. The trier of fact shall consider the following aggravating circumstances in determining whether to impose a sentence of death: ...

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.”

¹⁵⁷ See *supra* note 172 (citing State v. Gretzler, 659 P.2d 1, 10 (Ariz. 1983)).

¹⁵⁸ 307 P.3d 19 (Ariz. 2013).

¹⁵⁹ *Id.* at 25.

¹⁶⁰ *Id.* at 24.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

phase, the jury found three aggravating circumstances for each murder, including HAC.¹⁶⁴ The trial court, following the jury's recommendation, imposed a death sentence for each count.¹⁶⁵

On appeal, Benson challenged the sufficiency of the evidence to support findings of the HAC aggravator.¹⁶⁶ During the penalty phase, a pathologist testified that he had identified three ligature marks on the first victim's neck, indicating that the ligature was readjusted, thereby increasing the amount of time it took for her to die.¹⁶⁷ The body of the first victim also had other injuries suggesting she had fought back during the attack and "experienced pain and emotional trauma."¹⁶⁸ Because Benson witnessed the injuries and the victim's struggles, he knew or should have known that she suffered physical pain and mental anguish, supporting the jury's finding that the murder was cruel.¹⁶⁹

The Arizona Supreme Court reached a similar conclusion regarding the second victim.¹⁷⁰ In Arizona, a prosecutor can attempt to establish HAC by showing that the defendant used gratuitous violence – violence beyond that necessary to kill and that the defendant "continued to inflict violence after he knew or should have known that a fatal action had occurred."¹⁷¹ "According to Benson, after realizing that Karen was dead because her 'body was getting cold,' he dragged her to the backseat of his car, drove somewhere, stopped, pushed her out of the car, and then ran over her."¹⁷² Accordingly, the Court found ample evidence supported the jury's HAC finding in regard to the second victim.¹⁷³

¹⁶⁴ *Id.* at 25.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 31.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *See Id.*

¹⁷¹ *Id.* (citing State v. Bocharski, 189 P.3d 403, 494 (Ariz. 2008)).

¹⁷² *Id.*

¹⁷³ *Id.*

B. State v. Snelling¹⁷⁴

Adele Curtis was strangled to death with a ligature in her townhouse; an electrical cord, cut from a lamp in the bedroom, was found in the bathroom sink.¹⁷⁵ Gary Snelling was arrested and charged with her murder.¹⁷⁶ Snelling's cellmate testified at trial that Snelling had told him "Curtis yelled, 'Who's there?'" around the same time that [he] was cutting the cord in the upstairs bedroom ... Curtis opened the bathroom door, saw [him], and 'got belligerent and yelled' when 'he told her to just shut up and do what he said.' Snelling then strangled her with the cord 'to shut her up.'"¹⁷⁷ During the aggravation phase, the jurors found that Snelling had committed the murder in an especially cruel manner.¹⁷⁸ Arizona courts have held that a "a murder is especially cruel only if the state proves beyond a reasonable doubt that the victim consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur."¹⁷⁹ According to the Arizona Supreme Court, the facts did not support a finding of the HAC aggravator.¹⁸⁰

"Mental anguish" refers to a victim's uncertainty as to their fate.¹⁸¹ In determining whether a victim suffered mental anguish, the length of time the victim contemplated her fate must be evaluated to establish if it is "sufficient to bring a murder within that group of murders that is especially cruel."¹⁸² The Arizona Supreme Court concluded that although Ms. Curtis was likely terrified when she opened her bathroom door and saw Snelling standing there with an electrical cord, Snelling's cellmate's testimony suggested that little time elapsed when she first saw

¹⁷⁴ 236 P.3d 409 (Ariz. 2010).

¹⁷⁵ *Id.* at 412.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 415.

¹⁷⁸ *Id.* at 412.

¹⁷⁹ *Id.* at 415.

¹⁸⁰ *Id.* at 417.

¹⁸¹ *Id.* at 415.

¹⁸² *Id.*

Snelling and the murder.¹⁸³ In addition, there was no evidence that Curtis struggled with Snelling or pleaded for her life. The victim's body also lacked defensive injuries and only had a single ligature mark, indicating the ligature was not readjusted once placed on her neck.¹⁸⁴ "It is not inherently 'cruel' to murder a victim quickly and by surprise."¹⁸⁵

Physical pain can also establish that a murder was 'especially cruel.'¹⁸⁶ The Arizona Supreme Court has ruled that strangulations are not per se cruel; the State must prove that the victim consciously suffered physical pain.¹⁸⁷ A period of suffering eighteen seconds to two or three minutes can be sufficient to render a murder 'especially cruel.'¹⁸⁸ The medical examiner had testified that a strangulation victim generally remains conscious for ten to one hundred seconds if the ligature totally encircles the neck and the victim remains passive or for minutes if the ligature does not completely encircle the neck and the victim fights.¹⁸⁹ Yet the Court found no "conclusive" evidence was presented to indicate "whether, or for how long, Curtis was conscious while being strangled."¹⁹⁰ Therefore, the HAC aggravator was not upheld and Snelling's sentence was commuted to natural life.¹⁹¹

C. State v. Wallace¹⁹²

James Wallace was sentenced to death for the murders of his girlfriend's two children, sixteen-year-old Anna and twelve-year-old Gabriel.¹⁹³ When Anna, returned home from school, Wallace was waiting for her behind the door with a baseball bat.¹⁹⁴ He struck Anna over the head

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 416.

¹⁸⁵ *Id.* (citing State v. Jimenez, 799 P.2d 785, 795 (Ariz. 1990).

¹⁸⁶ *See Id.* at 415.

¹⁸⁷ *Id.* at 416.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 416-17.

¹⁹⁰ *Id.* at 417.

¹⁹¹ *Id.*

¹⁹² 272 P.3d 1046 (Ariz. 2012).

¹⁹³ *Id.* at 1048.

¹⁹⁴ *Id.*

at least ten time before breaking the bat on her.¹⁹⁵ Anna remained alive, however, and Wallace dragged her to the bathroom where he drove the broken bat through her throat.¹⁹⁶ Shortly thereafter, Gabriel arrived home from school and Wallace began attacking him with an 18-inch pipe wrench.¹⁹⁷ After the first blow, Gabriel fell to the floor where Wallace proceeded to strike him at least ten times before “crushing his skull.”¹⁹⁸ A jury found that Wallace murdered both children in an especially heinous or depraved manner through the use of gratuitous violence and that death was the appropriate sentence for each killing.¹⁹⁹

As previously stated, the State can prove heinousness or depravity by showing that a defendant inflicted gratuitous violence on the victim. At trial, the medical examiner had testified that Anna had suffered at least ten blows to the head and that “the bat went through the skin of Anna's lower neck, into her left chest cavity, breaking a rib in her lower chest cavity, and pushed through the body to her back, leaving a bulge in her back where the end of the bat came to rest.”²⁰⁰ He further testified that the wound through the neck was not the cause of death.²⁰¹ The Arizona Supreme Court concluded that “the evidence proved beyond a reasonable doubt that Wallace inflicted more injury on Anna than necessary to kill.”²⁰²

The question remained, however, whether Wallace continued to inflict injury after he knew or should have known that he had inflicted a fatal wound.²⁰³ According to Wallace’s own statements, Anna continued moaning and breathing before the neck wound was inflicted.²⁰⁴ The medical examiner testified that she might have continued moving in such a way that the person

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1049.

²⁰⁰ *Id.* at 1051.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 1052.

²⁰⁴ *Id.*

inflicting the blows would not have realized that she was already fatally injured.²⁰⁵ The Court concluded that “[i]f Anna continued moaning and breathing before Wallace inflicted the neck wound, as the evidence suggests, a logical inference would be that Wallace's jamming of the piece of bat into her neck ‘came in an attempt ... to kill the victim, not to engage in violence beyond that necessary to kill.’”²⁰⁶ Therefore, the HAC aggravator had not been established in regard to Anna.²⁰⁷

The medical examiner testified that Gabriel had suffered eleven lacerations to the head caused by no more than eleven blows.²⁰⁸ Although he was not able to determine the order of the blows, he testified that two wounds alone would have been fatal.²⁰⁹ The medical examiner had also testified that one fatal wound to Gabriel’s forehead had exposed his brain and caused a portion of brain tissue to separate from the rest of his brain and exit Gabriel's skull and that another fatal skull fracture near his right ear protruded inward, causing a deep depression in Gabriel's head.²¹⁰ Accordingly the Court found the State had proven beyond a reasonable doubt that Wallace inflicted more injury than necessary to kill Gabriel.²¹¹

The Court found the knowledge element of gratuitous violence in regard to Gabriel’s death a close one to determine.²¹² Unlike with Anna’s murder, Wallace’s recollection of Gabriel’s death was more uncertain; he could not say for sure whether Gabriel was “flinching during the attack.”²¹³ Further, the blows to Gabriel’s head occurred in rapid succession and with the means used to inflict death – facts which tend to cut against a finding of gratuitous violence.²¹⁴ In the

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1053.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

end, the Court could not definitely say that the State had proven Wallace continued to inflict violence on Gabriel after he knew or should have known that a fatal action had occurred.²¹⁵ Accordingly, the HAC aggravator was not upheld for Gabriel's murder either.

D. State v. Martinez²¹⁶

The body of Mabel Lopez was discovered in her home on September 2, 2000.²¹⁷ The medical examiner concluded she had died of hemorrhagic shock from bleeding caused by multiple stab wounds.²¹⁸ A trail of blood was found on the floor leading to where the body was found.²¹⁹ There was also blood found on a table in the room, and smeared blood and blood spatter was on the wall near the body.²²⁰ Pablo Martinez was charged with first-degree murder for Lopez's death and the State sought the death penalty alleging two aggravators: Martinez committed the murder for pecuniary gain and committed the murder in an especially heinous, cruel or depraved manner.²²¹ Martinez was found guilty of murder, but the jury concluded the State had failed to establish either aggravator.²²² Accordingly, the trial court sentenced Martinez to natural life.²²³

E. State v. Arias

Jodi Arias was convicted of the first-degree murder of her ex-boyfriend, Travis Alexander, in May of 2013.²²⁴ In June of 2008, Alexander's naked body was found in the bathroom of his home.²²⁵ He had been stabbed twenty-seven times in the back and torso and shot in the head; his

²¹⁵ *Id.*

²¹⁶ 100 P.3d 30 (Ariz. App. 2004).

²¹⁷ *Id.* at 32.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Elliott C. McLaughlin, *Haven't Been Following the Jodi Arias Trial? Read This*, CNN (May 8, 2013), <http://www.cnn.com/2013/05/04/us/jodi-arias-primer/>.

²²⁵ *Supra* note 224.

throat was also slit from ear to ear.²²⁶ After rejecting Arias’s self-defense claim, the jury found her guilty and began deliberating on whether she was death-eligible.²²⁷ It took the jury less than three hours to conclude the killing was committed in an especially cruel and heinous manner to complete the aggravation phase of the trial.²²⁸ That same jury panel, however, was unable to reach a unanimous decision regarding her punishment.²²⁹ The jury deliberated for more than 13 hours after a three-day penalty phase, but they were not able to come to a conclusion.²³⁰ Arias’s fate remains uncertain; she is currently awaiting a retrial of the penalty phase of her case.²³¹

V. OKLAHOMA

Fifty-five people are currently serving time on Oklahoma’s death row.²³² In Oklahoma, a person who is convicted of murder in the first degree “shall be punished by death, by imprisonment for life without parole or by imprisonment for life.”²³³ When the State is seeking the death penalty, a separate sentencing proceeding must be conducted wherein the same jury that found the defendant guilty must determine whether he should be sentenced to death.²³⁴ During the sentencing proceeding, evidence of any mitigating circumstances is presented by the defense and the State is allowed to present evidence in aggravation that they made known to the defendant prior to his trial.²³⁵ Like most other jurisdictions, Oklahoma too has an HAC aggravator.²³⁶

²²⁶ *Supra* note 224.

²²⁷ Brian Sokoloff, *Jurors Find Jodi Arias Eligible for Death Penalty* (May 15, 2013), <http://bigstory.ap.org/article/arias-back-court-jury-ponders-death-option>.

²²⁸ *Supra*, note 227.

²²⁹ David Lohr, *Jodi Arias Hung Jury: Panel Fails To Reach Unanimous Decision*, AP News (May 23, 2013), http://www.huffingtonpost.com/2013/05/23/jodi-arias-sentenced_n_3315338.html

²³⁰ *Supra* note 229.

²³¹ Graham Winch, *Live Blog: No Date Set for Jodi Arias Retrial*, HLNTV (Nov. 1, 2013), <http://www.hlntv.com/article/2013/08/26/live-blog-jodi-arias-back-court>.

²³² *Death Row Monthly Roster* (Nov. 25, 2013), available at <http://www.ok.gov/doc/documents/DRMR.pdf>.

²³³ Okla. Stat. Ann. § 701.9(1) (West 2013).

²³⁴ See Okla. Stat. Ann. § 701.10 (West 2013).

²³⁵ Okla. Stat. Ann. § 701.10(C) (West 2013).

²³⁶ See Okla. Stat. Ann. § 701.12(4) (West 2013) (“The murder was especially heinous, atrocious, or cruel”).

Oklahoma’s HAC aggravator came under heavy scrutiny in the late 80s. In Cartwright v. Maynard (Maynard I), the Tenth Circuit Court of Appeals held that Oklahoma had applied the “especially heinous, atrocious, or cruel” provision of its death penalty statute in an unconstitutionally vague and overbroad manner.²³⁷ The statute failed to channel and guide the sentencer’s discretion – on its face, the statute did nothing to limit the jury’s discretion and the Oklahoma courts’ failed to cure the infirmity by limiting the interpretation of the HAC aggravator.²³⁸ Overall, “the statute failed to identify a critical factor or threshold necessary for imposing the death penalty.”²³⁹

In Maynard v. Cartwright (Maynard II), the United States Supreme Court affirmed the Tenth Circuit’s decision.²⁴⁰ As mentioned in Part II, the Court observed that Oklahoma’s HAC aggravator gave no more guidance than Georgia’s language did in Godfrey.²⁴¹ The Court held that use of the word “especially” to limit heinousness did nothing to narrow its construction.²⁴²

Following Maynard I, the Oklahoma Court of Criminal Appeals narrowed the HAC aggravator by restricting its application to only those cases in which torture or serious physical abuse occurred.²⁴³ The jury is given an HAC instruction which contemplates a two-step analysis; they must first find the death of the victim was preceded by torture or serious physical abuse.²⁴⁴ “This threshold determination ... is a constitutionally approved manner of limiting the application of the HAC circumstance to only a specific class of crimes.”²⁴⁵ If the first prong is satisfied, then “the jury may apply the definitions given to them in the first paragraph of the

²³⁷ See Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987).

²³⁸ *Id.* at 1941-92.

²³⁹ *Supra* note 151, at 199.

²⁴⁰ See Cartwright v. Maynard, 4 86 U.S. 356 (1988).

²⁴¹ *Id.* at 1858-59.

²⁴² *Id.* 1859.

²⁴³ See Stouffer v. State, 742 P.2d 562, 564 (Okla. Crim. App. 1987).

²⁴⁴ Nuckols v. State, 805 P.2d 672, 674 (Okla. Crim. App. 1991).

²⁴⁵ *Id.*

instruction to measure whether or not the crime can be considered to have been heinous, atrocious or cruel.”²⁴⁶

Despite Oklahoma’s attempt to narrow the HAC aggravator, juries continue to err in applying it correctly. The following Oklahoma cases illustrate examples where the HAC aggravator found by the jury was upheld on appeal and instances where it was not.

A. Postelle v. State²⁴⁷

Gilbert Postelle was tried by jury and convicted of four counts of first-degree murder.²⁴⁸ The jury imposed the death penalty on Counts 1 and 4 after finding that each of those murders was especially heinous, atrocious or cruel.²⁴⁹ On the day of the murders, the defendant, his brother, and his father went to the home of a man that they believed had injured his father in a motorcycle accident.²⁵⁰ One of the State’s witnesses testified at trial that upon their arrival, the men opened fire.²⁵¹ The defendant went inside the home looking for others and firing his gun.²⁵² He located a man by the name of James Alderson and chased him down.²⁵³ The defendant shot Alderson as he attempted to crawl underneath a parked boat.²⁵⁴ Alderson’s hands and clothing revealed the presence of gravel and grass and he had chipped and damaged fingernails with dirt underneath them consistent with trying to escape by digging underneath the boat before being shot twice in the head from behind.²⁵⁵ The second victim, Amy Wright, was found near Alderson’s body.²⁵⁶ She was barefoot, suggesting that she ran from the trailer in a desperate attempt to escape after

²⁴⁶ *Id.*

²⁴⁷ 267 P.3d 114 (Okla. Crim. App. 2011).

²⁴⁸ *Id.* at 122.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 125.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 143.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 144.

hearing the shots.²⁵⁷ She sustained three gunshot wounds to the head and lower back, all of which were fired from behind.²⁵⁸

On appeal, Postelle claimed the evidence was insufficient to prove beyond a reasonable doubt that the murders of James Alderson and Amy Wright were especially heinous, atrocious or cruel.²⁵⁹ The Court found that this appeared to be a blitz-style attack; the evidence showed what appeared to be a sudden, surprise attack that sent both of these victims running out the home after hearing the outbreak of gunfire that resulted in the deaths of two other people moments before.²⁶⁰ According to the Court, the evidence supported a reasonable inference that Wright and Alderson were aware of the attacks on the two other individuals and that they knew they were running for their lives when they were shot and killed.²⁶¹ “Evidence that the victim was conscious and aware of the attack supports a finding of torture ... [and] the anticipation of death caused by the knowledge that others around the victim are being shot is sufficient to support the mental anguish requirement of the aggravator.”²⁶² Accordingly, the HAC aggravator was upheld.

B. Simpson v. State²⁶³

While at a hip-hop club in downtown Oklahoma City, Kendrick Simpson and three other men got into an argument when one of the men made a remark about the Chicago Cubs baseball cap Simpson was wearing.²⁶⁴ During this encounter, Simpson told them that he was going to “chop” them up and walked away.²⁶⁵ A short time later, Simpson returned to the men and

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 143.

²⁶⁰ *Id.* at 144.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ 230 P.3d 888 (Okla. Crim. App. 2010).

²⁶⁴ *Id.* at 894.

²⁶⁵ *Id.*

extended his hand saying, “We cool.”²⁶⁶ One of the men, however, hit Simpson in the mouth, knocking him to the floor.²⁶⁷ Simpson and his friends left the club, but stopped at a gas station on the way home where they again encountered the three men from earlier.²⁶⁸ Simpson then instructed the driver of their vehicle to follow the Chevy the men were driving and told his other friend to retrieve the gun that was in the back of the car.²⁶⁹ When Simpson’s vehicle caught up to the Chevy, he rolled down his window and began firing at the three men.²⁷⁰ The Chevy jumped the curb and hit an electric pole and fence before coming to a stop.²⁷¹ The two men in the front seat had been shot.²⁷² The man in the passenger seat had been shot in the side of the head and torso and was unconscious.²⁷³ The driver had been shot in the chest and was initially conscious and able to talk, but soon lost consciousness when he could no longer breathe.²⁷⁴ Both men died from their injuries.²⁷⁵

A jury found Simpson’s crimes had been heinous, atrocious, or cruel and sentenced him to death.²⁷⁶ Simpson appealed alleging there was insufficient evidence to support this aggravator.²⁷⁷ The Court found that the driver of the Chevy had been shot four times.²⁷⁸ The third man in the car testified that the driver was initially conscious after being shot and that immediately after he had been shot, he was able to speak, was aware that he had been shot and was fearful that the shooters would return.²⁷⁹ His breathing then became heavy and he made gurgling sounds as his

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 902.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

chest filled with blood.²⁸⁰ The Court concluded that the evidence supported a finding that the driver's death was preceded by physical suffering and mental cruelty.²⁸¹

The death of the second man, however, was almost immediate.²⁸² He received numerous gunshot wounds, including wounds to his head and chest.²⁸³ The Medical Examiner testified that his injuries were not survivable and that he likely died within seconds after being shot.²⁸⁴ The Court concluded that the HAC aggravator was not supported by evidence showing his death was preceded by torture or that he endured conscious physical suffering before dying.²⁸⁵

C. Hayes v. State²⁸⁶

Nine-year-old Carrie Kendall was abducted, raped, and murdered.²⁸⁷ Her throat was slit with a sharp instrument and her body was dumped in a wellsite near her home.²⁸⁸ Roger Hayes was indicted for her murder and a jury found her death had been especially heinous, atrocious, or cruel.²⁸⁹ Hayes was sentenced to death, but was granted a retrial by the district court.²⁹⁰ Following the second trial, a jury again found the HAC aggravator and sentenced him to death once more.²⁹¹ Hayes appealed and the Court of Criminal Appeals of Oklahoma affirmed his sentence.²⁹² The United States Supreme Court granted his petition for writ of certiorari, vacated

²⁸⁰ *Id.* at 902-03.

²⁸¹ *Id.* 903.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ 845 P.2d 890 (Okla. Crim. App. 1992).

²⁸⁷ Facts explained in previous decision: *Hayes v. State*, 738 P.2d 533 (Okla. Crim. App. 1987)(*vacated Hayes v. Oklahoma*, 86 U.S. 1050 (1988)).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Hayes*, 845 P.2d at 892.

²⁹¹ *Id.*

²⁹² *Id.*

the judgment affirming the conviction and sentence, and remanded the case for further consideration in light of *Maynard II*.²⁹³

As previously mentioned, after *Maynard II*, the Oklahoma courts narrowed the application of the HAC aggravator to those murders that were preceded by torture or physical abuse. On remand, the Oklahoma Court of Criminal appeals agreed with Hayes that there was insufficient evidence to support the HAC aggravator.²⁹⁴ The Court found no evidence had been presented at trial to show that the murder was preceded by torture or serious physical abuse²⁹⁵, despite the fact that Carrie had been raped. The medical examiner had testified that there were numerous abrasions, scrapes, bruises, and contusions on her head and face, but that it was likely she had been rendered unconscious at the beginning of the assault due to the lack of defensive wounds on her body.²⁹⁶ Carrie had died as a result of the slash to her throat, but no blood was found in the lungs, indicating she did not breathe in any of her blood after her throat was cut corroborating the theory that she unconscious when she died.²⁹⁷ The Court explained that the jury had been properly instructed on the aggravating circumstance of “especially heinous, atrocious, or cruel,” but that their findings were invalid as there was insufficient evidence upon which to support the circumstance.²⁹⁸

D. Myers v. State²⁹⁹

Karl Myers was convicted of first-degree murder for the death of Shawn Williams.³⁰⁰ Ms. Williams’s body was discovered near the Verdigris River at Rocky Point, a camping site.³⁰¹ Her

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ 133 P.3d 312 (Okla. Crim. App. 2006).

³⁰⁰ *Id.* at 319-20.

³⁰¹ *Id.* at 320.

car was found eleven miles from Rocky Point.³⁰² Investigators discovered a large blood stain in the parking lot of Rocky Point and drag marks from that stain to where her body was found.³⁰³ She had been raped prior to her death and shot five times.³⁰⁴ Other injuries were also found on her body, including abrasions to her chest and abdomen, a laceration on the back of her head, contusion and laceration to her left ear, abrasions to her knees, to her right hip and to her left buttocks.³⁰⁵ A medical examiner testified the laceration to the back of her head was consistent with falling and striking her head on the ground; the contusion over her left ear was consistent with being struck by an object.³⁰⁶ A jury found the murder was especially heinous, atrocious, or cruel and set punishment at death.³⁰⁷

On appeal, the court disagreed with the jury's finding.³⁰⁸ "The evidence where Williams's body was discovered suggests she was shot at Rocky Point and, if she were taken there unwillingly, one might guess that she feared she would not see her children again."³⁰⁹ The court found this circumstantial evidence was insufficient to support the jury's conclusion that her death had been preceded either by torture or serious physical abuse.³¹⁰ According to the court, the evidence did not prove she was conscious and aware of her attack or that she was conscious and alive suffering pain after the attack.³¹¹ The evidence also failed to show that she suffered extreme mental anguish.³¹² Therefore, the HAC aggravator was not upheld.³¹³ The court did not address the other injuries Williams sustained or the sexual abuse she suffered prior to her death.

³⁰² *Id.* at 332.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 320.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 332.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

E. Warner v. State³¹⁴

It is often when the facts of a case are so disturbing that the jury correctly applies the HAC aggravator. In Warner v. State,³¹⁵ Charles Warner was charged and convicted of the first-degree rape and murder of eleven month old Adrianna Waller.³¹⁶ The victim and her mother lived with Warner and his two children.³¹⁷ On the afternoon of Adrianna's death, her mother left her in the care of Warner while she ran errands.³¹⁸ She returned home to find Adrianna limp and unresponsive.³¹⁹ Adrianna was rushed to the hospital where she was pronounced dead.³²⁰

At the hospital, doctors observed bright red blood staining the skin around the victim's rectum and tears around the rectum.³²¹ Two skull fractures were also discovered, one of which was depressed.³²² Her jaw and three ribs were fractured, her liver was lacerated, and her spleen and lungs were bruised.³²³ A doctor testified that she had suffered a crushing type injury to her head and internal injuries to her brain.³²⁴ A jury found the defendant guilty and the existence of the HAC aggravator.³²⁵

On appeal, the defendant argued there was insufficient evidence to prove Adrianna's "conscious physical suffering."³²⁶ The evidence concerning when the victim would lose consciousness was conflicting; one doctor testified that head injury would not result in the immediate loss of consciousness, while another testified he believed she would have lost

³¹⁴ 144 P.3d 838 (Okla. Crim. App. 2006).

³¹⁵ *Id.*

³¹⁶ *Id.* at 856.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* at 857.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 880.

consciousness immediately upon sustaining the head injury.³²⁷ Furthermore, doctors were not able to determine which injury, to the victim's head, chest, liver or abdomen, occurred first.³²⁸ The court explained, however, that the jury is the judge of the weight and credibility of the evidence.³²⁹ Therefore, despite conflicts in the evidence, a jury's findings will not be disturbed if there is ample evidence to support them.³³⁰ Ultimately, the court found the evidence was sufficient to support the jury's conclusions that Adrianna consciously suffered pain from the anal rape and violent shaking at Warner's hands prior to her death.³³¹

VI. PROPOSED CHANGES

The presence of the heinous, atrocious, or cruel aggravator can be the difference between a life and death for defendants in jurisdictions allowing for the imposition of the death penalty. It is therefore crucial that juries have standards by which to weigh and decide what crimes are the worst of the worst. Attorneys must be able to make arguments to the jury supported by case law to demonstrate their points, whether it is a prosecutor arguing that the murder was heinous, atrocious, or cruel, or whether its defense counsel arguing that it is not. "Without standardized discretion, jury decisions on whether a crime is depraved are all too often contaminated by details about the 'who' of a crime as opposed to focusing on 'what' the defendant actually did."³³²

In other aspects of criminal law, attorneys are allowed to support their argument by demonstrating to a judge how his or her case is factually similar or distinguishable from prior rulings. In a motion to suppress hearing, a prosecutor make its closing argument by showing to

³²⁷ *Id.* at 881.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² Michael Welner, *Response to Simon: Legal Relevance Demands that Evil be Defined and Standardized*, 31 J. Am. Acad. Psychiatry L. 417, 217 (2003).

the judge similar scenarios where courts of appeal or supreme courts have upheld denying the defendant suppression. Defense attorneys try to distinguish their client's case from the cases used by the State and attempt to demonstrate to the judge how this case is more akin to other situations where the evidence was ruled inadmissible. This method of arguing a case must be implemented in the aggravation phase of murder cases where the State seeks the death penalty.

The HAC aggravator places a burden on juries to try to find, with little guidance, “rational distinctions among a universe of first degree murder cases.”³³³ Without further guidance than the instructions alone, juries are left to blindly guess what constitutes heinousness, atrociousness, or cruelty when the case is not as obviously shocking as Carroll v. State or Warner v. State. Yet even in instances where the crimes seem to meet the “shock” threshold, as in State v. Wallace, juries are still not getting it right according to the appellate courts. This guidance must come in the form of factual scenarios to give the jury insight to what the higher courts approve of as heinous, atrocious, or cruel and to what they do not.

VII. CONCLUSION

The constitutionality of the heinous, atrocious, or cruel aggravator is no longer in question as arguments against it continue to be struck down. However, the problems foreshadowed by Gregg, Proffitt, and Godfrey will surface as juries continue to be unable to bear the burden of attempting to decipher what is heinous, atrocious, or cruel. “Discrimination, arbitrariness, caprice – all can be present when the sentence is left free to choose to execute or not depending on subjective evaluation of the badness or heinousness of the murder.”³³⁴ Since the Furman decision, courts have attempted to rewrite their capital sentencing schemes in an effort to

³³³ *Supra* note 9, at 992.

³³⁴ *Supra* note 9, at 992.

eliminate these evils, but use of the HAC aggravator as it stands today continues to pose a threat to the advances that have been made.

Based on reading just the facts of the cases described above, it is not immediately clear whether the court would uphold the jury's HAC finding. However, when the reasoning of the court is understood, it is easier to determine how the aggravator must be applied. Ultimately, it is evident that juries need further guidance to aid them in deciding what offenders are death eligible; current sentencing procedures have failed to channel jury discretion in applying this aggravator.