

# **MAYNARD V. CARTWRIGHT: CHANNELING ARIZONA'S USE OF THE HEINOUS, CRUEL, OR DEPRAVED AGGRAVATING CIRCUMSTANCE TO IMPOSE THE DEATH PENALTY**

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## **INTRODUCTION**

"Death is qualitatively different from other punishments that can be imposed by the state."<sup>1</sup> Recognition of this disturbing conclusion led to the heightened scrutiny demonstrated in a series of United States Supreme Court rulings beginning with *Furman v. Georgia*,<sup>2</sup> which set forth the constitutionally acceptable range of discretion that a judge or jury may use in imposing the death penalty. States have attempted to bring their statutes within the *Furman v. Georgia* range by articulating aggravating circumstances that warrant the imposition of the death penalty. One controversial circumstance that many states employ permits a capital sentence where the offense is characterized as "heinous," "cruel," or "depraved."<sup>3</sup> In *Maynard v. Cartwright* (*Maynard II*), the United States Supreme Court's latest ruling applying heightened scrutiny,<sup>4</sup> the Court held that the Oklahoma Supreme Court's application of its state statute<sup>5</sup> violated the eighth and fourteenth amendments of the United States Constitution.<sup>6</sup> The Court focused on Oklahoma's "heinous" aggravating circumstance which provided the basis for the death penalty.

Arizona's death penalty statute<sup>7</sup> also contains an aggravating circumstance provision allowing the death penalty when a murder is "heinous, cruel, or

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1. *Cartwright v. Maynard*, 822 F.2d 1477, 1483 (10th Cir. 1987) [hereinafter *Maynard I*] (citing *Ford v. Wainwright*, 477 U.S. 399 (1986)). In *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980) (quoting *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (Stevens, J., plurality opinion)), the Court stated "[T]here is a significant constitutional difference between the death penalty and lesser punishments."

2. 408 U.S. 238 (1972) (per curiam).

3. See, e.g., ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1989); OKLA. STAT. ANN. tit. 21, § 701.12(4) (West 1983); FLA. STAT. § 921.141(5)(h) (1985). Similar terms include "depraved" and "horrible."

4. 486 U.S. 356 (1988), *aff'g*, *Maynard I*, 822 F.2d 1477 (10th Cir. 1987) [hereinafter *Maynard II*].

5. OKLA. STAT. ANN. tit. 21, § 701.12(4) (West 1983), allows the death penalty when a murder is "especially heinous, atrocious, or cruel."

6. *Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1857-58.

7. ARIZ. REV. STAT. ANN. § 13-703 (1989).

depraved.”<sup>8</sup> The Arizona courts hold that this statute may be read in the disjunctive.<sup>9</sup> This Note examines the history underlying the guidelines the United States Supreme Court has established for constitutionally permissible applications of “heinous, cruel, or depraved” aggravating circumstance provisions. The Arizona death penalty scheme and the accompanying attempts to limit application of the “heinous” aggravating circumstance provision will also be analyzed. The implications of *Maynard II* for Arizona’s capital sentencing scheme will then be examined by comparing the interpretation of the heinous provisions in Oklahoma and Arizona. Finally, this Note will advocate that Arizona narrow the use of its aggravating circumstance provision to comply with the mandate to channel the discretion of the sentencer.

## RELEVANT UNITED STATES SUPREME COURT CASES

In 1972,<sup>10</sup> the United States Supreme Court held in *Furman v. Georgia*<sup>11</sup> that the eighth amendment prohibition on cruel and unusual punishment and the fourteenth amendment guarantee of a right to life forbid a judge or jury from arbitrarily imposing the death penalty.<sup>12</sup> All five concurring justices wrote separate opinions.<sup>13</sup> While Justices Marshall and Brennan found Georgia’s use of the death penalty violated the eighth amendment,<sup>14</sup> the consensus among the other three justices, forming the majority, was that due process<sup>15</sup> and eighth amendment

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8. ARIZ. REV. STAT. ANN. § 13-703(F) (1989). The statute provides in part: “F. Aggravating circumstances to be considered shall be the following:

...

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

The remaining aggravating circumstances include conviction for another offense for which the death penalty could be imposed, conviction for a felony involving the use or threat of violence, creating a grave risk of death to a person in addition to the victim, paying another to commit murder, committing a murder for pecuniary gain, and murder committed while in custody of a law enforcement agency or department of corrections. *Id.*

9. See *infra* notes 172-74 and accompanying text.

10. For a pre-1972 history of the United States Supreme Court’s consideration of the states’ use of capital punishment, see Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355 (1973). The article discusses a dissenting opinion written by Justice Field, joined by Justices Harlan and Brewer, in *O’Neil v. Vermont*, 144 U.S. 323 (1892), which would have applied the eighth amendment for the first time to the states through the privileges and immunities clause of the fourteenth amendment. The same rationale was adopted in *Weems v. United States*, 217 U.S. 349 (1910). *Weems*, however, involved a special proceeding in the Philippine Islands, rather than the imposition of punishment by a state government. Justice Goldberg concludes that *Weems* supports a finding that states’ imposition of the death penalty violates the eighth and fourteenth amendments. Goldberg, *supra*.

11. 408 U.S. at 238.

12. *Id.* at 239-40.

13. *Id.* at 256-57 (Douglas, J., concurring); *id.* at 286 (Brennan, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 314 (White, J., concurring); *id.* at 358-59 (Marshall, J., concurring).

14. *Id.* at 305 (Brennan, J., concurring); *id.* at 370-01 (Marshall, J., concurring). Both Justices Brennan and Marshall continue to maintain that the death penalty is cruel and unusual punishment and should never be imposed by the states. See *Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1860.

15. The due process requirements serve a dual purpose of fair notice and the need to prevent arbitrary imposition of the death penalty. See Rosen, *The “Especially Heinous” Aggravating Circumstance in Capital Cases—the Standardless Standard*, 64 N.C.L. REV. 941, 954-55 (1986).

standards require a state to restrain and guide the discretion of the sentencer.<sup>16</sup> Discretion is sufficiently channelled by expressly stating the objective factors that may be considered when imposing the death penalty. This approach limits capricious or inconsistent imposition of capital punishment.<sup>17</sup> Moreover, application of objective standards distinguishes those murders more deserving of the death penalty from those that are not.<sup>18</sup>

The states responded to *Furman* in a variety of ways. Some states<sup>19</sup> attempted to remove the possibility of a jury's arbitrary action by making a capital sentence mandatory for all first degree murders.<sup>20</sup> In *Woodson v. North Carolina*,<sup>21</sup> the United States Supreme Court held that mandatory death penalties fail the *Furman* objective standards test.<sup>22</sup> The *Woodson* Court observed that although superficially objective, the fundamental right to life requires sentencers to consider the character and record of each convicted defendant individually.<sup>23</sup>

Thirty-four other states reacted to *Furman* by enacting statutes that list specific aggravating factors to guide a sentencer's discretion.<sup>24</sup> The sentencer, judge or jury, considers these factors as indicative of an offense more serious than other offenses. When objective factors are used, a capital sentence validly may be imposed.<sup>25</sup> The United States Supreme Court recognized in *Zant v. Stephens*,<sup>26</sup> that aggravating circumstance provisions perform a "constitutionally necessary function"<sup>27</sup> by narrowing the class of persons eligible for capital sentencing at the stage of legislative definition.<sup>28</sup> Aggravating circumstances are then balanced with mitigating circumstances.<sup>29</sup> The balance permits the sentencer to impose the death penalty objectively to those few cases distinguishing themselves as more serious.

Twenty-four of the above thirty-four states used aggravating circumstances to determine whether to allow the imposition of the death penalty where the offense

16. *Furman*, 408 U.S. at 255-57 (Douglas, J., concurring); *id.* at 308-10 (Stewart, J., concurring); *id.* at 312-14 (White, J., concurring).

17. *Id.* at 257 (Douglas, J., concurring); *id.* at 308-10 (Stewart, J., concurring); *id.* at 312-14 (White, J., concurring).

18. Justice Stewart stated,

[T]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

*Id.* at 309-10 (Stewart, J., concurring).

19. *See, e.g.*, N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975).

20. N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975). *See also* LA. REV. STAT. ANN. § 14:30 (West 1974) (held invalid in *Roberts v. Louisiana*, 428 U.S. 325 (1976)).

21. 428 U.S. 280 (1976).

22. *Id.* at 305.

23. *Id.* at 304.

24. Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1220-21 (1984).

25. *Maynard I*, 822 F.2d at 1485.

26. 462 U.S. 862 (1982).

27. *Id.* at 879.

28. *Id.*

29. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703(E) (1989). Mitigating circumstances are those factors relevant to show that a sentence less than the death penalty should be imposed. *Id.* § 13-703(G). In *Lockett v. Ohio*, 438 U.S. 586 (1978), a plurality held that the sentencer must be allowed to consider any relevant mitigating circumstances. This principle was reaffirmed by a majority in *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

was especially "heinous," "cruel," "vile," "inhuman" or some similar term.<sup>30</sup> Such statutes focus on circumstances enabling a sentencer to characterize a murder as more deserving of the death penalty than others. The difficulty, if not impossibility, of defining those factors constituting aggravating circumstances generates controversy.<sup>31</sup> In a series of cases beginning with *Gregg v. Georgia*,<sup>32</sup> these provisions have repeatedly come under the scrutiny of the Supreme Court.

In *Gregg*, the defendant was convicted of robbing and murdering two men who had picked him up while hitchhiking.<sup>33</sup> A Georgia statute required that at least one aggravating circumstance exist before a convicted defendant could be sentenced to death.<sup>34</sup> Among the aggravating circumstances the Georgia statute specified was a provision permitting the death sentence if the crime was "outrageously or wantonly vile, horrible or inhuman."<sup>35</sup> The *Gregg* Court focused on the Georgia Supreme Court's past application and construction of the statute. The Court upheld the Georgia Supreme Court's imposition of the death penalty and observed that although any murder might be vile, or said to involve depravity, the state court had avoided such an open-ended construction by consistently construing the statute to limit capricious imposition of capital punishment.<sup>36</sup> Thus, under *Gregg*, a state court's application of its death penalty statute is a factor in determining its constitutionality. While finding the Georgia provision facially valid, the Court underscored the principles set forth in *Furman*, stating that the sentencer's discretion must be channeled to avoid arbitrary and capricious action.<sup>37</sup>

In *Proffitt v. Florida*,<sup>38</sup> the United States Supreme Court examined Florida's death penalty statute which also contained an "especially heinous" prong.<sup>39</sup> The Court focused on the Florida courts' construction of this aggravating circumstance provision, finding it facially valid so long as Florida courts construed it narrowly.<sup>40</sup> The Court noted with approval that the Florida Supreme Court indicated the provision was aimed at only those crimes involving unnecessary

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30. See Rosen, *supra* note 15, at 943. California, however, has since found its especially heinous provision invalid under the California and United States Constitutions. See *People v. Superior Court*, 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982). Similarly, the Delaware Supreme Court observed that absent a limiting construction, Delaware's "outrageously or wantonly vile" provision is too vague to satisfy the eighth amendment. See *In re State*, 433 A.2d 325 (Del. 1981).

31. The Court examined and re-examined these provisions in a long line of cases including *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), *Godfrey v. Georgia*, 446 U.S. 420 (1980) and *Maynard II*, 486 U.S. 356.

32. 428 U.S. 153.

33. *Id.* at 158-60.

34. GA. CODE ANN. § 27-2534 (Supp. 1975). ARIZ. REV. STAT. ANN. § 13-703 (1989) also procedurally requires the finding of at least one aggravating circumstance prior to imposing the death penalty. The present Georgia statute is embodied in GA. CODE ANN. § 27-2534 (1987). Georgia's especially heinous circumstance provision reads, "The 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." *Id.* at § 27-2536(b)(7).

35. GA. CODE ANN. § 27-2534 (Supp. 1975).

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

37. *Id.* at 188.

38. *Id.* at 242. The decision was issued the same day as *Gregg*.

39. Florida's heinous aggravating circumstance provision is found in FLA. STAT. § 921.141(5)(h) (Cum. Supp. 1989). A capital felony has aggravating circumstances if it is especially heinous, atrocious, or cruel.

40. *Proffitt*, 428 U.S. at 256.

torture to the victim.<sup>41</sup> This further limited the statute's application. The *Proffitt* majority also observed that Florida successfully satisfied the *Furman* requirement that a meaningful basis be given for distinguishing those few cases where the death penalty is deserved from the many undeserving cases.<sup>42</sup> Moreover, the Florida Supreme Court had avoided cursory review and had responsibly insured a consistent application of the provision by comparing the circumstances of the instant case with other cases imposing a capital sentence.<sup>43</sup> The *Proffitt* decision reinforces the idea set forth in *Woodson*<sup>44</sup> that the constitutional right to life requires states to impose the death penalty only after objectively considering each defendant's character and the crime.

The United States Supreme Court continued to delineate an objective standard of construction when Georgia's sentencing scheme again came under scrutiny, in *Godfrey v. Georgia*.<sup>45</sup> In *Godfrey*, the state court relied on a statute allowing the death penalty for murders characterized as "outrageously or wantonly vile, horrible or inhuman . . ."<sup>46</sup> The prosecutor admitted several times during the trial and sentencing hearing that the crime did not involve torture or aggravated battery.<sup>47</sup>

The *Godfrey* Court examined the facts at length, searching for the presence of those factors the state court had consistently required for the application of the death penalty. The Court noted that in *Godfrey*, the defendant and his wife, the victim, were estranged; his wife and his eleven year old daughter lived with his wife's mother.<sup>48</sup> The defendant, who later said he had been thinking about the crime for eight years and would do it again if faced with the same decision, carried a shotgun to his mother-in-law's trailer.<sup>49</sup> He observed his wife, daughter and mother-in-law sitting at the kitchen table playing cards.<sup>50</sup> The defendant fatally shot his wife with a single shot through the window.<sup>51</sup> He entered the trailer, stopping to use the barrel of the gun to strike his daughter who was fleeing in terror.<sup>52</sup> He then killed his mother-in-law with one shot to the head.<sup>53</sup> The wife and mother-in-law each died from a single shot, without preliminary physical abuse.<sup>54</sup>

In a plurality opinion, the Court stated that the Georgia Supreme Court had previously required the state to prove serious physical abuse to the victim before

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41. *Id.* at 255.

42. *Id.* at 253. But see Mello, *Florida's "Heinous, Atrocious Or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523 (1984) (arguing that the Florida Supreme Court's construction of the (5)(h) aggravating circumstance is unconstitutional).

43. *Proffitt*, 428 U.S. at 259.

44. *Woodson*, 428 U.S. at 304.

45. 446 U.S. 420 (1980).

46. GA. CODE ANN. § 27-2534.1(b)(7) (Supp. 1975). The Court also noted that this subsection of the statute has been interpreted as applying only to murders involving torture, depravity of mind, or an aggravated battery to the victim. *Godfrey*, 466 U.S. at 430.

47. *Godfrey*, 466 U.S. at 432.

48. *Id.* at 425.

49. *Id.* at 425-26.

50. *Id.* at 425.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

death to impose capital punishment.<sup>55</sup> Justice Stewart, joined by Justices Blackmun, Powell, and Stevens,<sup>56</sup> found that the state supreme court had departed from its own guidelines in sentencing the defendant to death.<sup>57</sup> The plurality ruled that the constitutionality of imposing the death penalty turns on whether the facts of the case at hand support the application of this type of aggravating circumstance provision.<sup>58</sup> The Georgia courts had previously required a finding of physical abuse to the victim, and no prior physical abuse was proven in *Godfrey*.<sup>59</sup> In holding the "outrageously vile" aggravating circumstance provision facially valid, the Court observed that the statutory language alone seemed to permit the imposition of the death penalty in any murder.<sup>60</sup> The difficulty in defining "heinous," "cruel," or "vile," therefore, required the state court to restrain the sentencer's discretion through precise application. Because the Georgia courts failed to limit its discretion in *Godfrey*, the death sentence was reversed and the case remanded for further proceedings.<sup>61</sup>

Thus, by the early 1980's, the Court had established predictable constitutional standards for application of aggravating circumstances in the states' death penalty schemes. *Furman* required the existence of objective factors to channel a sentencer's discretion and to prevent an arbitrary imposition of capital punishment.<sup>62</sup> The Court again required consistent construction and limiting definitions in *Proffitt*<sup>63</sup> and *Gregg*,<sup>64</sup> while upholding each court's application of the especially heinous aggravating circumstances provisions. *Godfrey* was a sharp reminder that the Court would not tolerate a vague or capricious application of a heinous aggravating circumstance provision.<sup>65</sup> The *Godfrey* decision became the foundation for a similar holding in *Maynard v. Cartwright* (*Maynard II*).<sup>66</sup>

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55. *Id.* at 430. The Court found that the Georgia Supreme Court had established a standard of serious physical abuse or torture in the cases of *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977), and *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976). In *Godfrey*, the Court held that the facts did not support a claim of aggravated battery or any physical injury to the victims prior to death. *Godfrey*, 446 U.S. at 426.

56. Justice Marshall, joined by Justice Brennan, concurred in the opinion, but wrote separately to reiterate his and Justice Brennan's opposition to the death penalty in all cases and to reject the plurality's characterization of the Georgia court's decision in *Godfrey* as aberrational. *Godfrey*, 446 U.S. at 433-42 (Marshall, J., concurring). See also Donohue, *Godfrey v. Georgia: Creative Federalism, The Eighth Amendment, and the Evolving Law of Death*, 30 CATH. U.L. REV. 13, 41-52 (1980) (arguing that the facts do not support the plurality's conclusion that prior to *Godfrey*, the Georgia Supreme Court had consistently narrowed its reading of the aggravating circumstance provision).

57. *Godfrey*, 446 U.S. at 431-32. The opinion noted that the circumstances in the case failed to meet the criteria established by the Georgia Supreme Court in *Blake*, 239 Ga. at 292, 236 S.E.2d. at 637 and *Harris*, 237 Ga. at 718, 230 S.E.2d at 1.

58. *Godfrey*, 446 U.S. at 432.

59. See *supra* note 55 and accompanying text.

60. *Godfrey*, 446 U.S. at 428-29.

61. *Id.* at 433.

62. See *supra* note 16.

63. See *supra* notes 38-43. See also *Jurek v. Texas*, 428 U.S. 262, 268-74 (1976). The *Jurek* opinion was issued on the same day as *Gregg*, 428 U.S. 153, and *Woodson*, 428 U.S. 280, and dealt primarily with the issue of admissibility of mitigating circumstances.

64. See *supra* note 36-37 and accompanying text.

65. *Godfrey*, 446 U.S. at 433.

66. 486 U.S. 356 (1988).

*MAYNARD V. CARTWRIGHT**The Tenth Circuit Opinion*

In 1987, the Tenth Circuit Court of Appeals, in *Cartwright v Maynard* (*Maynard I*),<sup>67</sup> issued an extensive opinion addressing the use of the heinous provision as grounds for capital punishment. The court applied the *Godfrey* standard to a capital sentence upheld by the Oklahoma Supreme Court. The Tenth Circuit ruled that Oklahoma applied the "especially heinous, atrocious, or cruel" provision of its death penalty statute in an unconstitutionally vague and overbroad manner.<sup>68</sup>

The facts of *Maynard I* are noteworthy. No torture or severe physical abuse of the victim occurred, but there was severe physical abuse directed toward a survivor, who was an intended murder victim.<sup>69</sup> The Tenth Circuit court observed that the Oklahoma court departed from its earlier consistent standards in defining "heinous," "atrocious," or "cruel."<sup>70</sup>

Accordingly, Oklahoma unconstitutionally failed to channel and guide the sentencer's discretion.<sup>71</sup> Similar to *Godfrey*, the *Maynard I* court found Oklahoma's death penalty statute did nothing on its face to limit the jury's discretion.<sup>72</sup> Moreover, the court also ruled that the Oklahoma courts did not cure the infirmity by limiting the interpretation of the heinous aggravating circumstance provision in this case.<sup>73</sup> The court stated that the statute failed to identify a critical factor or threshold necessary for imposing the death penalty.<sup>74</sup> Although the Oklahoma Supreme Court considered the defendant's state of mind, the manner of the killing and the suffering of the victim, each an acceptable factor to show an aggravating circumstance, it did not delineate any one indispensable factor that must be present to satisfy the "heinous," "atrocious," or "cruel" standard.<sup>75</sup> Rather, the Oklahoma court examined the relevant facts in a very generalized

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67. 822 F.2d 1477.

68. *Id.* at 1478.

69. *Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1853. In *Maynard*, a disgruntled ex-employee entered the home of an Oklahoma couple and shot the wife twice in the legs. He then went into the living room and fatally shot her husband. Returning to the wife, he slit her throat, stabbed her, and left her to die. The wife survived but the defendant was sentenced to death for the murder of the husband.

70. See *Eddings v. State*, 616 P.2d 1159 (Okla. Crim. App. 1980), *rev'd on other grounds sub nom.*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The standard set forth in *Eddings* required torture to the victim. The *Maynard I* court ruled that Oklahoma had abandoned this standard of torture to the victim in favor of defining cruel, atrocious, and heinous. *Maynard I*, 822 F.2d at 1489. Such attempts at definition, the court found, led to inconsistent applications of the provision. *Id.* at 1489-91. Arizona has also chosen to set standards for application of its heinous aggravating circumstance provision by defining cruel, heinous, and depraved. See, e.g., *State v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983).

71. *Maynard I*, 822 F.2d at 1491.

72. *Id.* at 1486. The *Godfrey* court observed that the words of the Georgia statute standing alone did not restrain arbitrary imposition of the capital sentence. The State courts' narrowing construction could cure the vagueness of the statute. *Godfrey*, 446 U.S. at 428.

73. *Id.* at 1489.

74. OKLA. STAT. ANN. tit. 21, § 701.12(4) (West 1983).

75. *Maynard I*, 822 F.2d. at 1491.

way.<sup>76</sup> As a result, the *Maynard I* court found these terms vague, overbroad, and unconstitutional.<sup>77</sup>

Closely related to the failure to identify a critical factor in the application of the aggravating circumstance provision, the *Maynard I* court noted that the Oklahoma statute was written in the disjunctive; that is, the murder must be especially "heinous," "atrocious," or "cruel."<sup>78</sup> A murder, therefore, need only satisfy one of these vague terms to justify the imposition of a capital sentence.<sup>79</sup>

A disjunctive reading of the aggravating circumstance provision compounds the vagueness problem. Allowing the sentencer to use any one of several criteria within the provision means that each factor must be both limited and precise. If even one factor is vague or overbroad, the limiting function of the other sufficiently defined criteria is destroyed since the sentencer may always rely on the vague prong of the statute. A disjunctive reading of the provision, therefore, does nothing to circumscribe instances when a court may constitutionally impose the death penalty. Justice White, in his *Godfrey* dissent, supported his view that the Georgia courts had sufficiently narrowed the Georgia provision<sup>80</sup> by noting that the courts interpreted the provision in its entirety, and not in the disjunctive.<sup>81</sup>

The *Maynard I* decision sent an unambiguous message to the states in the Tenth Circuit: legislatures should write the heinous aggravating circumstance provision conjunctively. Furthermore, specific factors that, if present, will constitute "heinousness" in a murder should be clearly described in those statutes. Alternatively, the state courts should interpret the provision in the conjunctive, regardless of statutory language to the contrary. Ultimately, explicit and objective standards must underlie any death sentence.

The opinion of the Tenth Circuit was emphatic, following the principles first set forth in *Furman*<sup>82</sup> and further delineated in *Godfrey*.<sup>83</sup> In 1988, the State of Oklahoma petitioned the United States Supreme Court requesting certiorari review.<sup>84</sup> The Court granted certiorari soon after.

### Maynard II, *The Supreme Court Opinion*

In *Maynard v. Cartwright (Maynard II)*,<sup>85</sup> the United States Supreme Court unanimously<sup>86</sup> affirmed the Tenth Circuit's decision. The Supreme Court opinion again emphasized how narrowly state courts must apply "heinous" aggravating circumstance standards in capital sentencing.<sup>87</sup>

76. *Id.*

77. *Id.* at 1489.

78. OKLA. STAT. ANN. tit. 21, § 701.12(4) (West 1983). "Aggravating circumstances shall be: . . . (4) The murder was especially heinous, atrocious, or cruel."

79. *Maynard I*, 822 F.2d. at 1488.

80. GA. CODE ANN. § 27-2534.1(b)(7) (West 1978).

81. *Godfrey*, 446 U.S. at 448-49.

82. See *supra* notes 11-18 and accompanying text.

83. See *supra* notes 45-61 and accompanying text.

84. *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853.

85. *Id.*

86. Justice White wrote the opinion for a unanimous court. Justice Brennan, joined by Justice Marshall, concurred in the Court's judgment, but restated their view that the death penalty is cruel and unusual punishment in all circumstances. *Id.* at 1860.

87. *Id.* at 1859.



Because Oklahoma's application was insufficiently narrow, the Court struck down that state's death penalty statute.<sup>88</sup> The Court held statutory construction of the "especially heinous" provision impermissibly vague.<sup>89</sup> In so ruling, the Court distinguished a due process clause challenge of vagueness, resting on lack of notice, from an eighth amendment vagueness challenge that the statute is being applied in an arbitrary or capricious manner.<sup>90</sup> The Court observed that Oklahoma's statutory language gave no more guidance than Georgia's language had in *Godfrey*.<sup>91</sup> The use of the word "especially" to limit heinousness was specifically rejected.<sup>92</sup> Moreover, the state's judicial interpretation failed to cure the infirmity of the statute because it did nothing to curb the jury's choice of sentences.<sup>93</sup>

The Court refrained from requiring the state to prove serious physical abuse to the victim as a predicate to the imposition of the death penalty.<sup>94</sup> It noted, however, that serious physical abuse would be a constitutionally permissible aggravating circumstance.<sup>95</sup> Accordingly, whenever the United States Supreme Court has examined a state's construction of "heinous" as an aggravating circumstance, the only construction the Court has consistently approved has been one incorporating a standard of physical abuse or torture to the victim.<sup>96</sup>

Although the opinion in *Maynard II* is not long,<sup>97</sup> the message of the Court's unanimous ruling is clear. States with heinous aggravating circumstance provisions,<sup>98</sup> like Arizona, must curtail the application of that prong in conformity

88. *Id.*

89. *Id.* at 1857.

90. *Id.* at 1858.

91. *Id.* at 1858-59.

92. *Id.* at 1859. The Court specifically noted that the word "especially" does not limit overbreadth. "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.'" *Id.* at 1859 (quoting *Godfrey*, 446 U.S. at 428-29).

93. *Id.* The Court rejected the Oklahoma court's reliance on the facts that the defendant had a motive of revenge, that he lay waiting for his victims, that he came back again to brutally attack the wife, and that the murder victim heard the first shots that wounded his wife as sufficient to demonstrate that the murder was especially heinous, atrocious, or cruel. *See supra* note 86. In Arizona, when a victim hears or sees the murder of another, the state may rely on the anxiety the victim experiences over his own fate to establish cruelty. *See State v Rossi*, 146 Ariz. 359, 365, 706 P.2d 371, 377 (1985).

94. *Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1859-60.

95. The opinion in *Godfrey* also states that a standard requiring serious physical abuse of a victim before death would be a constitutionally acceptable interpretation of a heinous provision. *Godfrey*, 446 U.S. at 432. *See supra* text accompanying note 55.

96. *See Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1859 (the Court observed that the Court of Appeals made note that such a requirement validated an otherwise vague aggravating circumstance, but did not direct the State to adopt it); *Godfrey*, 446 U.S. at 432 (*see supra* note 55 and accompanying text); *Proffitt*, 428 U.S. at 256 (the *Proffitt* court noted the Florida provision was directed at crime unnecessarily torturous to the victim); *Gregg*, 428 U.S. at 201 (the Court noted that the only homicide where the Georgia Supreme Court found the provision was a torture-murder). The Court has, however, only considered two types of "heinous" statutes. One type offers no definition of "heinous," the other defines heinous as torture to the victim.

97. The unanimous opinion by Justice White is five pages in length, compared for example to *Furman*, 408 U.S. 238, where the nine opinions encompass over one hundred pages. The concurrence in *Maynard II* by Justice Brennan is only one paragraph long. *Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1860.

98. *See supra* notes 19-30 and accompanying text.

with the *Maynard II* standards. Some non-arbitrary limitation on the aggravating circumstance must channel the sentencer's discretion.

## ARIZONA'S ATTEMPTS TO LIMIT ARBITRARY IMPOSITION OF THE DEATH PENALTY

The Arizona death penalty statute,<sup>99</sup> passed in response to *Furman*,<sup>100</sup> imposes several procedural limitations on capital sentencing.<sup>101</sup> The death sentence in Arizona applies only to those persons found guilty of first degree murder.<sup>102</sup> The statute requires the judge to hold a sentencing proceeding, without a jury, in order to hear evidence of aggravating and mitigating circumstances.<sup>103</sup> The state presents evidence of aggravating circumstances. The defendant may enter favorable character evidence as a mitigating circumstance.<sup>104</sup> Absent aggravating circumstances, the defendant serves a life sentence.<sup>105</sup> When aggravating circumstances are found, however, and no mitigating circumstances are shown, the statute requires the death penalty.<sup>106</sup> If both aggravating and mitigating circumstances exist, the judge must employ a balancing test.<sup>107</sup> Where mitigating circumstances outweigh aggravating circumstances the defendant is sentenced to life imprisonment. If, however, aggravating circumstances outweigh mitigating circumstances, the judge must sentence the defendant to death.<sup>108</sup>

### *Aggravating Circumstance (F)(6), "Especially Heinous, Cruel, or Depraved": Attempts to Define It.*

Aggravating circumstance, subsection (F)(6) of the Arizona death penalty statute,<sup>109</sup> allows imposition of the death penalty if the murder was committed in an "especially heinous, cruel or depraved" manner. Arizona courts have construed

99. ARIZ. REV. STAT. ANN. § 13-703 (1989).

100. See Note, *Reconstruction of Arizona's Death Penalty Statute under Watson*, 22 ARIZ. L. REV. 1037 (1980).

101. See ARIZ. REV. STAT. ANN. § 13-703 (1989).

102. *Id.* § 13-1105 (1989).

103. See *supra* text accompanying notes 23-29.

104. The evidentiary standards for admitting aggravating circumstances are the same as for admitting evidence at trial, but are relaxed for the admission of mitigating factors. ARIZ. REV. STAT. ANN. § 13-703(C) (1989). See also Pulaski, *Capital Sentencing in Arizona: A Critical Evaluation*, 1984 ARIZ. ST. L.J. 1. Other examples of mitigating circumstances include the defendant's capacity to appreciate the wrongfulness of his conduct, unusual duress, but not that constituting a defense, that the defendant's participation was relatively minor, that the defendant could not reasonably have foreseen that his conduct would cause death to another person and the defendant's age. ARIZ. REV. STAT. ANN. § 13-703(G) (1989). Mitigating circumstances are not limited to those listed in the statute but may include any aspect of the defendant's character or record and any circumstance of the offense. *Id.* For a list of aggravating circumstances used in Arizona, see *supra* note 8.

105. ARIZ. REV. STAT. ANN. § 13-703(E) (1989). The statute does not allow the possibility of parole for twenty-five years.

106. *Id.* § 13-703(E).

107. *Id.* § 13-703(E), provides in relevant part "[the court sentencer] shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency." The alternative to the death penalty is a life sentence without possibility of parole for twenty-five years if the victim was fifteen or more years old, and without the possibility of parole for thirty-five years if the victim was under the age of fifteen. *Id.* § 13-703(A).

108. *Id.* § 13-703(E).

109. *Id.* § 13-703(F)(6).

"heinous," "cruel," and "depraved" aggravating circumstances individually in judging whether a murder is worse than others and deserving of capital punishment.<sup>110</sup> The most critical distinction made is between the "cruel" factor, addressing suffering by the victim before death, and "heinous" or "depraved," which represent the defendant's state of mind when the crime was committed.<sup>111</sup>

### *The "Cruel" Factor*

Some commentators note that of the three factors, the "cruel" prong is the most clearly defined.<sup>112</sup> Arizona courts have attempted to limit cruelty to the pain the murderer causes to the victim.<sup>113</sup> For example, instantaneous death precludes a finding of cruelty in Arizona.<sup>114</sup> Additionally, the victim must be conscious to suffer cruelty.<sup>115</sup> Despite this superficial precision, the cruel factor may ultimately fail constitutional review.

First, the Arizona Supreme Court's definition of cruelty encompasses mental cruelty as well.<sup>116</sup> That interpretation is broader than the United States Supreme Court's suggested physical abuse requirement.<sup>117</sup> One commentator observes that because of this construction, the cruel factor is less restrictive than the heinous and depraved factors.<sup>118</sup> A finding of cruelty may occur when victims watch the death of family members or others and suffer anxiety over their own uncertain fate.<sup>119</sup> Likewise, cruelty may be found when the victim pleads for his life.<sup>120</sup> Thus, the cruelty factor might be invoked in any murder involving something other than a lone victim killed instantaneously and without the slightest warning.<sup>121</sup>

110. See *State v Knapp*, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), *cert. denied*, 435 U.S. 908 (1978) (the Arizona court used dictionary definitions for the three criteria to guide the sentencer's discretion). See also *infra* text accompanying notes 104-155.

111. See *Gretzler*, 135 Ariz. at 51, 659 P.2d at 10.

112. See, e.g., *Rosen*, *supra* note 15, at 980.

113. *Gretzler*, 135 Ariz. 42, 659 P.2d 1.

114. See *State v. Correll*, 148 Ariz. 468, 480, 715 P.2d 721, 733 (1986). In *Correll*, the court stated that victims uncertain about their fate "are to be contrasted with the individual who is killed instantly without knowing what happened." *Id.* (quoting *State v. Gillies*, 135 Ariz. 564, 570, 691 P.2d. 655, 661 (1984), *cert. denied*, 470 U.S. 1059 (1985)).

115. See, e.g., *Jeffers v. Ricketts*, 135 Ariz. 404, 429, 661 P.2d 1105, 1130 (1983) (murder found not to be cruel where the victim had lost consciousness from a large dose of heroin).

116. See *State v. McCall*, 139 Ariz. 147, 161, 677 P.2d 920, 934 (1983); *State v. Tison*, 129 Ariz. 526, 543, 633 P.2d 335, 352 (1981).

117. See *supra* notes 55-61 and accompanying text, and *Godfrey*, 446 U.S. at 432.

118. See, e.g., *Pulaski*, *supra* note 104, at 30-31. Professor Pulaski finds even more disturbing the holding of *State v. Adamson*, 136 Ariz. 250, 665 P.2d 972 (1983), where the court held that taunting the victim is not required, but rather, only the substantial likelihood that the victim will suffer from the defendant's acts. Professor Pulaski observes that this "substantial likelihood" applies to every case where the defendant uses lethal force and fears it "facilitates unconstitutional applications of the (F)(6) 'cruel' criterion." *Pulaski*, *supra* note 104 at 30-31.

119. See *State v. Bracy*, 145 Ariz. 520, 537, 703 P.2d 464, 481 (1985); *McCall*, 139 Ariz. at 161, 677 P.2d. at 934.

120. See *Rossi*, 146 Ariz. at 365, 706 P.2d at 377.

121. See *Pulaski*, *supra* note 104 at 30. In *Maynard II* the Court rejects the Oklahoma court's reliance on the fact that the murder victim heard the blast that wounded his wife. *Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1859. Although the point was not mentioned in the *Godfrey* opinion, it is also interesting to note that the United States Supreme Court overturned Georgia's imposition of the death penalty in *Godfrey* where the second victim, the defendant's mother-in-law, watched the death of her daughter and the terror of her granddaughter. The victim must certainly have experienced the "heightened anxiety" the Arizona court uses as a

Moreover, the Arizona Supreme Court's inconsistency in applying its own cruelty definitions may also create constitutional problems under the standards set forth in *Maynard II*.<sup>122</sup> For example, the court found cruelty in *State v. Adamson*,<sup>123</sup> noting that the defendant need only reasonably foresee a substantial likelihood that the victim would suffer. In contrast, in *State v. Brookover*,<sup>124</sup> the Arizona Supreme Court found no cruelty even though the victim lay on the floor moaning before the defendant shot him a second time.<sup>125</sup> Similarly, the court did not find cruelty in *State v. Nash*,<sup>126</sup> where the victim pled for mercy before being shot twice more.<sup>127</sup> It is difficult to discern a predictable and reliable pattern in the Arizona Supreme Court's cruelty findings. As a result, the consistency and notice that are required when imposing the death penalty are not present in Arizona to guide the discretion of the sentencer.<sup>128</sup>

### "Heinous" and "Depraved"

Arizona's heinous and depraved aggravating circumstance prongs are often addressed together because they require identical analysis. Both factors deal with the defendant's state of mind at the time the crime was committed. The nature of the crime and evidence of heinousness also contribute to a determination that the defendant's state of mind was depraved.<sup>129</sup>

In *State v. Gretzler*,<sup>130</sup> the Arizona Supreme Court enumerated five heinous or depraved factors.<sup>131</sup> They include the apparent relishing of the murder by the defendant,<sup>132</sup> gratuitous violence upon the victim,<sup>133</sup> needless mutilation of the victim,<sup>134</sup> senselessness of the crime,<sup>135</sup> and the victim's helplessness.<sup>136</sup> In *State v. Smith*,<sup>137</sup> the court held that the last two factors, senselessness of the crime and helplessness of the victim, if found alone without other factors, would not support a finding of heinousness or depravity.<sup>138</sup> The Arizona Supreme Court did not feel limited by these definitions, since later the court added that depravity may be found

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standard for the cruel prong of its aggravating circumstance provision. *Godfrey*, 446 U.S. at 426.

122. See *supra* notes 87-93 and accompanying text.

123. 136 Ariz. 250, 665 P.2d 972 (1983).

124. 124 Ariz. 38, 601 P.2d 1322 (1979).

125. The Arizona Supreme Court stated that the murder was cowardly, but not cruel or depraved. *Id.* at 43, 601 P.2d. at 1325. The death penalty was set aside and a sentence of life imprisonment was imposed. *Id.* at 42, 601 P.2d at 1324.

126. 143 Ariz. 392, 694 P.2d 222 (1985).

127. The death sentence in *Nash* was not based on a finding of the heinous, cruel, or depraved aggravating circumstance, but was imposed on other grounds. *Id.* at 407, 694 P.2d at 235. But see *Rossi*, 146 Ariz. at 365, 706 P.2d at 376 (upholding a finding of cruelty when the robbery victim pled for his life before he was shot).

128. See *Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1859; *Godfrey*, 446 U.S. at 429; *Proffitt*, 428 U.S. at 259; *Gregg*, 428 U.S. at 195.

129. See *State v. Roscoe*, 145 Ariz. 212, 700 P.2d 1312 (1985).

130. 135 Ariz. 42, 659 P.2d 1 (1983).

131. *Id.* at 51-52, 659 P.2d at 10-12.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. 146 Ariz. 491, 707 P.2d 289 (1985).

138. *State v. Smith*, 146 Ariz. 491, 503, 707 P.2d 289, 301 (1985) (quoting *Gretzler*, 135 Ariz. at 52, 659 P.2d at 11).

when the murder is committed to prevent the victim's testimony.<sup>139</sup> The Arizona Supreme Court has not made any of these factors an absolute prerequisite to imposing the death penalty. Since a court may choose among them, the factors do not narrow the discretion of the sentencer as effectively as they would if their existence was a predicate to a capital sentence.

The Arizona courts' inconsistent interpretation of "heinous" and "depraved" contributes to the vagueness and overbreadth of those factors. Because the *Gretzler* factors have also been subject to a variety of constructions, the constitutional problems with Aggravating Circumstance of subsection (F)(6) is compounded. For example, in *State v. Wallace*,<sup>140</sup> the defendant used bats and pipes to bludgeon to death a woman and her two children.<sup>141</sup> Since the first blow to the separate victims rendered each unconscious, the Arizona Supreme Court did not find cruelty.<sup>142</sup> The court, however, concluded that the crime had been committed in an especially heinous<sup>143</sup> and depraved way<sup>144</sup> because the defendant continued to beat the victims when any one of the blows was sufficient to kill. In contrast, the same court found nothing heinous about the defendant's in *State v. Watson*,<sup>145</sup> shooting the victim four times in the back.<sup>146</sup> Apparently, the number of bullets sufficient to kill was not considered.

Other Arizona Supreme Court decisions exhibit further inconsistency. In *State v. Correll*,<sup>147</sup> the court found depravity where the murders were unnecessary to accomplish a robbery and the victims were bound, gagged and helpless.<sup>148</sup> In *State v. Lujan*,<sup>149</sup> however, the court rejected use of the unnecessary nature of the killing during a robbery, and the helplessness of the victim as a basis for finding heinousness.<sup>150</sup>

Similar contradictions exist when comparing *State v. Martinez-Villareal*<sup>151</sup> and *State v. Graham*.<sup>152</sup> In *Martinez-Villareal*, the court decided depravity based on the defendant's bragging that the killing demonstrated his "machismo."<sup>153</sup> In *Graham*, the court ruled there was no heinousness or depravity despite the defendant's bragging that the victim had "squealed like a rabbit."<sup>154</sup>

Such irreconcilable conclusions support the contention that the Arizona Supreme Court has practiced standardless application of the especially "heinous," "cruel," or "depraved" aggravating circumstance provision of the Arizona death penalty statute. The United States Supreme Court has repeatedly warned of the constitutional infirmities accompanying inconsistent application of capital

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139. *State v. Hensley*, 142 Ariz. 598, 691 P.2d 689 (1984).

140. 151 Ariz. 362, 728 P.2d 232 (1986).

141. *Id.* at 364, 728 P.2d at 233.

142. *Id.* at 367, 728 P.2d at 237.

143. *Id.*

144. *Id.* at 368, 728 P.2d at 238.

145. 120 Ariz. 441, 586 P.2d 1253 (1978).

146. *Id.* at 447-48, 586 P.2d at 1260 (although the victim was face down on the floor during the last shots, the Arizona Supreme Court found the crime was distinguishable from heinous murders because the victim had a gun).

147. 148 Ariz. 468, 715 P.2d 721 (1986).

148. *Id.* at 481, 715 P.2d at 734.

149. 124 Ariz. 365, 604 P.2d 629 (1979).

150. *Id.* at 373, 604 P.2d at 637.

151. 145 Ariz. 441, 702 P.2d 670 (1985).

152. 135 Ariz. 209, 660 P.2d 460 (1983).

153. *Martinez-Villareal*, 145 Ariz. at 451, 702 P.2d at 680.

154. *Graham*, 135 Ariz. at 212, 660 P.2d at 463.

punishment statutes.<sup>155</sup> An examination of the Arizona court's standards, or lack thereof, in applying the "heinous" aggravating circumstance provision in light of *Maynard II* will demonstrate the need for Arizona to define specifically and limit the statute through narrow interpretation of the provision.

### *Maynard II Applied to Arizona*

The *Maynard II* Court held that Oklahoma's imposition of the especially heinous provision of its death penalty was vague and overbroad and that Oklahoma courts had failed to interpret the statute to make it acceptably limited.<sup>156</sup> There are three main areas of similarity between Oklahoma's and Arizona's application of the aggravating circumstance provisions that make the constitutionality of Arizona's statute questionable. They are: (1) the language of the statutes;<sup>157</sup> (2) the disjunctive construction of the provision; and (3) the inconsistent judicial application of the aggravating circumstance.

The language of Oklahoma's and Arizona's especially heinous provisions is identical in all respects except for Oklahoma's use of the word "atrocious" where Arizona employs the word "depraved."<sup>158</sup> Arizona courts define depraved as "marked by debasement, corruption, perversion or deterioration,"<sup>159</sup> while Oklahoma courts have defined atrocious as "outrageously wicked and vile."<sup>160</sup> Commentators have compared the two states' definitions and observe that both states' definitions lack objectivity.<sup>161</sup> Moreover, both states' definitions provide little guidance to a sentencer determining whether the defendant's crime warrants the death penalty.<sup>162</sup>

An even more striking similarity is both state courts' use of the word "especially" to narrow the class of heinous crimes eligible for the death penalty. In *State v. Johnson*,<sup>163</sup> the Arizona Supreme Court emphasized its reliance on the word "especially" to narrow the class of murders deserving of a capital sentence.<sup>164</sup> The *Johnson* court observed that while most first degree murders were cruel, heinous, or depraved, the statute required more.<sup>165</sup> The *Johnson* court reiterated that the conduct required was "especially" cruel, heinous or depraved.<sup>166</sup>

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155. *Godfrey*, 446 U.S. at 432-33. See also *Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1857.

156. *Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1857.

157. OKLA. STAT. ANN. tit. 21, § 701.12(4) (West 1983); ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1989).

158. ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1989); OKLA. STAT. ANN. tit. 21, § 701.12(4) (West 1983).

159. Rosen, *supra* note 15, at 968-70.

160. *Id.*

161. Most notably Professor Rosen, *supra* note 15, whose law review article the Tenth Circuit quotes in *Maynard I*, 822 F.2d at 1491.

162. Rosen, *supra* note 15, at 968-71.

163. 147 Ariz. 395, 710 P.2d 1050 (1985).

164. *Id.* at 400-01, 710 P.2d at 1055-56.

165. *Id.* at 401, 710 P.2d at 1056.

166. *Id.* Some commentators have relied on the word "especially" in the Arizona death penalty statute to argue that Arizona courts have successfully limited the discretion of the sentencer when imposing capital punishment. See Begley, *The Aggravating Circumstances of Arizona's Death Penalty Statute: A Review*, 26 ARIZ. L. REV. 661, 673-79; Pulaski, *supra* note 104, at 29.

Oklahoma has also claimed that the word "especially" narrows the terms that follow it.<sup>167</sup>

The United States Supreme Court's decision in *Maynard II* unequivocally rejected the use of "especially" as constitutionally sufficient to channel the discretion of the sentencer.<sup>168</sup> The Court found the Oklahoma statute to be vague and conditioned its validity on a narrow construction by the state's courts.<sup>169</sup> After *Maynard II*, it is clear that Arizona may no longer rely on the word "especially" to channel unbridled discretion in its capital sentencing.<sup>170</sup>

Another similarity between the Oklahoma and Arizona death penalty statutes is the use of the disjunctive "or" in their "especially heinous" aggravating circumstances. The courts of both states read this statute literally, considering each item disjunctively.<sup>171</sup> This disjunctive reading of Arizona's death penalty statute adds to constitutionally impermissible vagueness.<sup>172</sup>

The *Maynard II* Court also rejected the Oklahoma court's review of all the facts surrounding a murder without holding that any one of those facts must be present to impose a capital sentence.<sup>173</sup> Observing that this totality of the circumstances approach leaves the discretion of the sentencer unfettered, the Court held that a state must find at least one factor determinative.<sup>174</sup>

Finally, the two states' inconsistent applications of the provision demonstrate yet another area of similarity. The United States Supreme Court emphasized the need for consistency in *Maynard II*.<sup>175</sup> Although the Arizona Supreme Court has gone to great lengths to define each factor in the especially "heinous," "cruel," or "depraved" aggravating circumstance clause,<sup>176</sup> its application of those definitions has been inconsistent.<sup>177</sup> That inconsistency circumvents the court's own efforts to arrive at the clear, objective, and predictable standards necessary for constitutionally acceptable application of an aggravating circumstance provision.

One characteristic distinguishing Arizona's method of imposing the death penalty from Oklahoma's is Arizona's use of a judge, rather than a jury in capital sentencing.<sup>178</sup> The United States Supreme Court has held non-jury capital sentence hearings constitutional.<sup>179</sup> The Court's approval of the non-jury

167. *Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1859. The Court compared Oklahoma's ineffective use of "especially" to guide the sentencer's discretion with Georgia's addition of "outrageously or wantonly" to the word vile which also did not cure the overbreadth problem. *Id.*

168. See *supra* note 92 and accompanying text.

169. *Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1859.

170. *Id.*

171. See *Maynard I*, 822 F.2d at 1489; *Correll*, 148 Ariz. at 480, 715 P.2d at 733.

172. See *supra* notes 78-81 and accompanying text.

173. *Id.* at 1857.

174. *Id.*

175. The Court held there must be a "principled means provided to distinguish those that received the penalty from those that did not." *Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1858 (referring to *Furman*, 408 U.S. at 310 (Stewart, J., concurring)). The Court also discusses the need for such consistency in *Godfrey*, 446 U.S. at 429, 432.

176. See, e.g., *Correll*, 148 Ariz. at 480-81, 715 P.2d at 733-34. See also *supra* notes 109-55 and accompanying text.

177. See *Rosen*, *supra* note 15, at 981.

178. ARIZ. REV. STAT. ANN. § 13-703 (1989).

179. The *Proffitt* Court held that jury sentencing was not constitutionally required when judges were given specific and detailed guidance as to when to impose the death penalty. *Proffitt*, 428 U.S. at 253. The United States Supreme Court reaffirmed *Proffitt* in *Spaziano v.*

sentencing hearings suggests a confidence in a judge's ability to apply legal standards in a non-arbitrary manner.<sup>180</sup> It should be noted, however, that if it is the statute itself that is vague, broad, and insufficiently channelled the constitutional problems remain.<sup>181</sup> As previously discussed, Arizona courts have failed to limit the interpretation of the statute so that its application is predictable and consistent,<sup>182</sup> thereby limiting the category of crimes eligible for capital sentences.<sup>183</sup>

A case was recently heard in which the Ninth Circuit Court of Appeals applied *Maynard II* to Arizona. In *Adamson v. Ricketts*,<sup>184</sup> a December 1988 decision, the Ninth Circuit relied on *Maynard II* to hold the Arizona Supreme Court's application of the heinous aggravating circumstance provision unconstitutional.<sup>185</sup> The opinion emphasized the broad range of definitions for the terms "heinous," "cruel," and "depraved," and pointed out that nothing restricts the Arizona courts from creating new definitions.<sup>186</sup> Additionally, the court observed that the Arizona Supreme Court's application of the provision in the disjunctive creates problems.<sup>187</sup> The Ninth Circuit also relied on *Maynard II* to hold that using the word "especially" does not sufficiently limit a sentencer's discretion.<sup>188</sup>

The Ninth Circuit opinion contains a statistical analysis showing the heinous circumstance is the most often invoked of all of Arizona's aggravating circumstance provisions.<sup>189</sup> Since 1973, there were 72 death penalty cases where an aggravating circumstance was involved.<sup>190</sup> The heinous provision was invoked 68 percent more often than the next most commonly used option.<sup>191</sup> In the 56 cases where the heinous provision was employed, the Arizona Supreme Court upheld its use 43 times.<sup>192</sup> The Ninth Circuit court found such frequent use

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Florida, 468 U.S. 447 (1984) where it held that a jury's participation in a sentencing hearing is not constitutionally required. In *Spaziano*, the Court reasoned that the considerations involved in imposing the death penalty do not differ greatly from those in non-capital cases. *Spaziano*, 468 U.S. at 461. The *Spaziano* Court acknowledged that jurors have a significant role as a link between the community and the penal system. *Id.* at 463. Nevertheless, the Court observed the community's voice is heard clearly through the legislature when the penalty is authorized. *Id.*

180. In *Proffitt*, the Court stated "it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury." *Proffitt*, 428 U.S. at 252. However, in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), the Ninth Circuit struck down the Arizona statutory sentencing scheme on the basis that the defendant's right to a jury decision on the elements of a crime is violated when the death penalty lists elements of the crime as aggravating factors to be determined by the sentencing judge. *Adamson*, 865 F.2d at 1023. The Ninth Circuit held that the aggravating circumstances function in Arizona to create another category of murder eligible for the death penalty. *Id.* at 1025-26. This "remarkably mirrors the attributes of an essential element of the offense during the guilt phase of a trial." *Id.* at 1026.

181. See *supra* notes 99-111 and accompanying text.

182. See *supra* text accompanying notes 112-55.

183. *Id.*

184. 865 F.2d 1011.

185. *Id.* at 1030, 1036.

186. *Id.* at 1029-39.

187. *Id.* at 1058.

188. *Id.* at 1030.

189. *Id.* at 1031.

190. *Id.* at 1031 n.35.

191. In 56 out of 72 post-*Furman* cases, Arizona courts found a murder to be especially heinous, cruel, or depraved. The next most often used aggravating circumstance was subsection (F)(5), whereby the defendant committed the offense for pecuniary gain. *Id.*

192. *Id.*



constitutional, but suspiciously symptomatic of an impermissible catch-all function of the provision.<sup>193</sup>

The *Adamson* court also noted the Arizona court's inconsistent application of the heinous aggravating circumstance provision.<sup>194</sup> The varying interpretation of this provision results in an absence of objective criteria which would sufficiently restrain the discretion of the sentencer. Thus, the *Adamson* court held that Arizona courts violated the eighth and fourteenth amendments of the United States Constitution by failing to define the heinous aggravating circumstance in such a manner as would prevent arbitrary and capricious applications.<sup>195</sup>

The *Adamson* decision plainly illustrates the need for the Arizona legislature and Arizona courts to re-examine the statutory death penalty scheme. If Arizona wants to maintain an aggravating circumstance for murders that can be distinguished as more heinous than others, there are steps the courts and the legislature can take to insure constitutionally permissible use of the provision.

### *Proposed Changes in Arizona's Application of the Especially Heinous Provision in Light of Maynard II*

As mentioned, the similarities between the Oklahoma heinous provision examined in *Maynard* and Arizona's provision today are striking.<sup>196</sup> Arizona's death penalty statute has been successfully undermined by the Ninth Circuit on constitutional grounds<sup>197</sup> and, if left intact, appears destined to follow the fate of Oklahoma's provision.<sup>198</sup> Accordingly, Arizona courts must be sensitive to *Maynard II* guidelines and use them to fashion a more precise and narrow capital sentencing scheme. While the United States Supreme Court has expressly stated that some kind of torture or serious physical abuse to the victim before death is not the only constitutionally acceptable construction of a heinous, cruel or depraved aggravating circumstance,<sup>199</sup> it has been the only construction to withstand the heightened scrutiny that death penalty cases require.<sup>200</sup>

Arizona's continued application of a wider definition is doomed to constitutional invalidity. Certainly Arizona's use of "especially" to restrict imposition of the heinous provision of its death penalty statute is no longer adequate. Arizona should accordingly confine the use of the heinous provision to those times when there has been severe physical abuse of a victim before death. While such terms as "torture" and "severe physical abuse" are also subject to a number of interpretations, at least the United States Supreme Court has recognized these terms as an acceptable standard. The Arizona legislature may choose to limit the terms of the provision either within the statute or in a definitional section. Whether the legislature chooses to act or not, the courts must narrow the statute's application. Moreover, the provision must be applied consistently and must be construed in the conjunctive.

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193. *Id.* at 1031

194. *Id.* at 1034.

195. *Id.* at 1029.

196. See *supra* text accompanying notes 156-74.

197. *Adamson*, 865 F.2d 1011.

198. See *supra* text accompanying notes 185-96.

199. *Maynard II*, 486 U.S. at \_\_\_, 108 S. Ct. at 1859-60.

200. See *supra* text accompanying note 96.

Alternatively, the legislature may chose to rewrite the statute, dividing the provision into three separate aggravating circumstances, defining each term narrowly. The Arizona courts adoption of these standards would ensure predictability in the use of the capital sentence, thereby enhancing the liklihood that the statute will withstand constitutional scrutiny. Moreover, Arizona citizens could rely on consistent, non-arbitrary imposition of capital punishment.

## CONCLUSION

*Maynard II*<sup>201</sup> reinforces the principles set forth in *Furman v. Georgia*,<sup>202</sup> *Gregg v. Georgia*,<sup>203</sup> *Proffitt v. Florida*,<sup>204</sup> and *Godfrey v. Georgia*.<sup>205</sup> Under *Maynard II*, Arizona must limit the discretion of judges in the application of Arizona's aggravating circumstances provision. Additionally, the especially heinous, cruel, or depraved aggravating circumstance provision of the Arizona death penalty statute must be applied in a consistent, circumscribed manner.

The Arizona Supreme Court's present reading of the statute in the disjunctive and its inconsistent and broad construction of the provision is at odds with the *Maynard II* decision. Arizona must narrow the category of crimes eligible for capital sentencing by strictly defining objective standards for predictable imposition of the death penalty. Restricting the use of the especially heinous, cruel, or depraved provision to those defendants who torture or severely physically abuse their victims before death is the surest way to accomplish the needed change. If Arizona wants a constitutionally acceptable death penalty scheme, it must learn to limit occasions for its use.

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201. *Maynard II*, 486 U.S. 356, 108 S. Ct. 1853.

202. 408 U.S. 238.

203. 428 U.S. 153.

204. 428 U.S. 242.

205. 446 U.S. 420.