

IN THE DISTRICT COURT OF THE TWENTY-THIRD JUDICIAL  
DISTRICT SITTING WITHIN AND FOR LINCOLN COUNTY  
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Joshua Daniel Stump, )  
 )  
 Defendant. )

Case No. CRF-95-104

ORIGINAL

FILED  
MAR 7 1996  
Linda Siler, Ct. Clerk Lincoln Co. Okla.  
By                      Deputy

**THE DEFENDANT'S MOTION TO STRIKE  
"HEINOUS, ATROCIOUS, AND CRUEL  
AGGRAVATING CIRCUMSTANCE  
AND BRIEF IN SUPPORT**

COMES NOW the Defendant and moves this Honorable Court to strike the aggravating circumstance of "heinous, atrocious or cruel." The prosecutor has alleged that the Defendant deserves the death penalty because the first degree murder was committed in an especially heinous, atrocious, or cruel manner.

The decedent, Kathrina Knight, died after being shot one time by a 12 gauge shotgun after a brief encounter with her assailants. There were traumatic injuries to the decedent's heart, lungs, abdomen. The medical examiner will testify that the one shot was sufficient to cause her death almost instantly.

In order for the prosecutor to get to a jury on the issue of whether the murder was especially heinous, atrocious, or cruel, he must prove beyond a reasonable doubt that the murder of the victim

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was preceded by torture or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty. Cheney v. State, 66 O.B.J., Vol. 45, p. 8916 at 3918 (Dec. 16, 1995). In Cheney, the Defendant gunned his wife down in a parking garage. She was awake and tried to flee prior to her death. The court reviewed the history of this aggravating circumstance beginning with Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), in which the Supreme Court found this aggravating circumstance was unconstitutionally vague under the Eighth Amendment of the United States Constitution. Following Cartwright, the Oklahoma Court of Criminal Appeals has reversed approximately ten cases because the trial court failed to channel the jury's discretion by allowing the jury to consider this aggravating circumstance. In Battenfield v. State, 816 P.2d 555, 556 (Okl.Cr.1991), the court established that "Absent evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met." In Battenfield, the decedent died as a result of multiple blunt force injuries to the head and chest, consistent with the use of a tire iron. The medical examiner testified that the decedent lived a few minutes after receiving an injury which fractured three of his ribs. The court held that there was insufficient evidence to establish the requisite torture or serious physical abuse beyond a reasonable doubt in order to support the especially heinous, atrocious, or cruel aggravating circumstance. Battenfield at 566.

In Marquez v. State, 890 P.2d 980, 987 (Okla.Cr.1992), the aggravating circumstance of "especially heinous, atrocious, or cruel" was not found where the victim was asleep when shot three times. In Odum v. State, 651 P.2d 703, 707 (Okla.Cr.1982), a single gunshot wound was found insufficient. In Brown v. State, 753 P.2d 908, (Okla.Cr.1988), the court held that seven gunshot wounds were insufficient to establish the murder was preceded by serious physical abuse. In Davis v. State, 888 P.2d 1018, 1020, the heinous, atrocious or cruel aggravating circumstance was not found where one victim received a gunshot wound to the head and back and other victim received two gunshot wounds to the head. Also in Booker v. State, 851 P.2d 544 (Okla.Cr.1993), the court held the evidence did not support heinous, atrocious or cruel aggravator where victim was shot once in the chest and death was instantaneous.

Like the majority of the cases cited above, the decedent in this case died as the result of a gunshot wound. There is absolutely no evidence to establish beyond a reasonable doubt that the murder of the victim was preceded by torture or serious physical abuse. She suffered, if at all, only fleeting pain. The cases cited and others make it abundantly clear that torture or serious physical abuse must be at the heart of the murder to sustain this aggravating factor.

WHEREFORE, premises considered, the Defendant moves this court to strike the "heinous, atrocious, and cruel" aggravating circumstance from the Bill of Particulars.

Respectfully submitted,

James T. Rowan  
James T. Rowan, OBA #7787  
Oklahoma Indigent Defense System  
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ATTORNEY FOR JOSHUA STUMP

#### CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument was delivered to Miles C. Zimmerman, District Attorney, Lincoln County Courthouse, Chandler, Oklahoma 74834 on this 5th day of March, 1996.

James T. Rowan  
James T. Rowan

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