

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.)

FILED

FEB 9 1996

Linda Siler, Ct. Clk, Lincoln Co. Okla.
By: [Signature] Deputy

Case No. CRF-95-104

**THE DEFENDANT'S MOTION TO STRIKE
"CONTINUING THREAT" AGGRAVATING
CIRCUMSTANCE AS UNCONSTITUTIONAL AND ON
GROUNDS OF INSUFFICIENT EVIDENCE
AND BRIEF IN SUPPORT**

COMES NOW Joshua Daniel Stump, the Defendant, and moves this Court to strike from the Bill of Particulars filed in the instant case the aggravating circumstance of "continuing threat to society." Oklahoma's "continuing threat" aggravator violates both the state and the federal constitutions as being overbroad, vague and a denial of due process and equal protection of law. Recently, the *Williamson v. Reynolds*, No. Civ 94-539-S (1995) court held that the continuing threat aggravator is vague and a violation of a defendant's constitutional right to due process where a court has failed to limit the sentencer's discretion through appropriate objective

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instructions and where the court is merely relying upon Oklahoma's standardless construction of the aggravating circumstance.¹

Since the continuing threat aggravator, as defined in OKLA. STAT. tit. 21 § 701.12² and OUJI-CR 365, is in fact vague and overbroad, it thus also fails to adequately channel the sentencers' discretion as required by the Supreme Court in *Areve v. Creech*, 507 U.S. 463, 113 S.Ct. 1534, 1540, 123 L.Ed.2d 188 (1993). In *Areve v. Creech*, the Court stated that if the terms of the statutory language provided the constitutionally required channeling of the sentencer's discretion, then jury instructions quoting the statutory language would provide "...clear and objective standards that provide specific and detailed guidance... that make rationally reviewable the process for imposing a sentence of death...."³ The *Areve* Court was merely rehashing the groundwork previously laid by the *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853 (1988) Court which stated that ". . . Since *Furman v Georgia*, 408 U.S. 238 (1972) our cases have insisted that the channeling and limiting of the sentencer's discretion

¹ Williamson at 72. (emphasis added).

² Okla. Stat. tit. 21, §701.12(7) (1981) reads in pertinent part:

"Aggravating circumstances shall be . . .

7) The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. . . "

³ *Areve*, 507 U.S. 463, 113 S.Ct. 1534, 1540, 123 L.Ed.2d 188 (1993). See also *Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (quoting in turn *Godfrey v. Georgia*, 466 U.S. 420, 428, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398 (1980)).

in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action...." ⁴

The vagueness and overbreadth of Oklahoma's "continuing threat to society" aggravator provides no rational basis for excluding evidence from the jury's consideration. In fact, as this brief will indicate, the prosecution may attempt to bring into evidence virtually every negative aspect about the defendant's life such as evidence tending to show the defendant may be a threat to himself, to animals, to property, and etc.⁵ Moreover, according to *Perry v. State*, 893 P.2d 521, 536-37 (1995) and *Williamson v. State*, No. Civ 94-539-S (1995), there is no determinative standard by which to measure whether or not sufficient evidence has been amassed in order to support the alleged continuing threat aggravator.⁶ Furthermore, in *Perry v. State*

⁴ *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988). The court also stated that: "...Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis...."
See also *United States v. Powell*, 423 U.S. 87, 92-93 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975); and *Palmer v. City of Euclid*, 402 U.S. 544 (1971) where the Courts indicated that claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails to adequately inform juries of what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238 (1972).

⁵ See *Smith v. State*, 737 P.2d 1206 (Okla. Crim. App. 1987) (defendant who steadfastly maintained that he was actually innocent of the crime charged was charged as and found to be a "continuing threat" simply due to fact that he failed to show remorse; notwithstanding the fact that, as common sense would suggest, any man claiming innocence would naturally not show remorse).

⁶ By conducting an extensive overview of past capital opinions, the *Williamson v. State*, No. Civ 94-539-S (1995) court revealed that Oklahoma case law has never defined just exactly what type or amounts of evidence might support the continuing threat aggravating

the court held that the continuing threat aggravator is not justified absent evidence of prior crimes or unadjudicated offenses.⁷ In the case at bar, Joshua Daniel Stump's background contains no record or convictions in regard to harmful or violent behavior. Therefore, his incidental and limited involvement with the 7/15/95 occurrence could not possibly render him a continuing threat to society as alleged in the State's Bill of Particulars.

circumstance or even what factors a jury must find before it may be determined that a defendant could constitute a continuing threat to society. Williamson at 72-73. The Williamson court's survey indicated that:

Many cases hold that the aggravating factor is justified solely due to the "calloused" nature of the murder, the circumstances surrounding the offense, or the attitude of the defendant. See Brown v. State, 871 P.2d 56, 77 (Okla. Crim. App. 1994), cert. denied, 115 S.Ct. 517 (1994) (mere evidence of a bad attitude or evidence of ill-will toward victim, that defendant bore a grudge against his former wife, and his attitude of blaming everyone else for his mistakes); Fisher v. State, 736 P.2d 1003, 1009 (Okla. Crim. App. 1987) (nineteen-year-old boy found to be "continuing threat to society" based on fatal stab wound to victim); Ross v. State, 717 P.2d 117, 123-24 (Okla. Crim. App. 1986) (uncorroborated accomplice testimony about another alleged murder involving the defendant); See also Banks v. State, 701 P.2d 418, 426 (Okla. Crim. App. 1985) (evidence of prior convictions); Robinson v. State, 677 P.2d 1080, 1088 (Okla. Crim. App. 1984), cert. denied, 467 U.S. 1246 (1984) (manner of crime's commission sufficient); Stafford v. State, 665 P.2d 1205, 1217-18 (Okla. Crim. Ap. 1983) vacated on other grounds, 467 U.S. 1212 (1984); Ake v. State, 663 P.2d 1, 11 (Okla. Crim. App. 1983) (manner of crime's commission sufficient), rev'd on other grounds, 470 U.S. 68 (1985). However, in seeming contradiction the Oklahoma Court of Criminal Appeals has recently held this aggravating is not justified absent evidence of prior crimes or unadjudicated offenses. Perry v. State, 893 P.2d 521, 536-37 (1995).

Williamson, at 74. (original emphasis).

⁷ Perry v. State, 893 P.2d 521, 536-37 (1995).

A. To Satisfy the Eighth and Fourteenth Amendments, an Aggravating Circumstance must Direct and Limit the Sentencer's Discretion by Clear and Objective Standards that Provide Specific and Detailed Guidance.

The United States Supreme Court has held that an aggravating circumstance is constitutional only if the jurisdiction utilizing it applies and interprets the aggravating circumstance in a "limiting" and "consistent" manner.⁸ An aggravating circumstance must serve a narrowing function and should not serve as a standardless catch-all.⁹ Oklahoma's interpretation of the continuing threat to society aggravating circumstance has been so subjective and undefined that it does nothing to narrow the category of persons convicted of murder and thus does not provide a constitutional basis for distinguishing those persons who may be sentenced to death from those who may not be sentenced to death.

In *Maynard v. Cartwright*, the Supreme Court reaffirmed the principle that the death penalty may not be imposed where a State applies and construes a capital punishment statute in an arbitrary manner and thus provides no objective basis for distinguishing between those who are eligible to receive the death penalty and those who are not.¹⁰ In *Maynard v. Cartwright*, the Supreme Court affirmed the Tenth Circuit decision, which held that the jury received no guidance in its application of the "especially heinous, atrocious or cruel" aggravating circumstance.¹¹ Moreover, *Maynard v. Cartwright* stated that the Oklahoma courts had not formulated consistent, objective standards for the application or interpretation of the "especially

⁸ See *Proffitt v. Florida*, 428 U.S. 242, 255, 96 S.Ct. 2960, 2068, 49 L.Ed.2d 913 (1976).

⁹ See *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1988); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

¹⁰ See fn. 9 *supra*.

¹¹ *Id. infra*.

heinous, atrocious or cruel" aggravator since the courts were simply reviewing each individual case on an ad hoc basis and affirming the finding of the aggravating circumstance on facts peculiar to each case.¹²

Similar to the Maynard v. Cartwright decision regarding the "especially heinous" circumstance, Oklahoma's "continuing threat" aggravating circumstance is also a standardless catch-all. Remarkably, however, the Oklahoma Court of Criminal Appeals has affirmed almost every finding of this vague aggravator -- an aggravator challenged on appeal in fully two-thirds of Oklahoma capital cases.¹³ The Court of Criminal Appeals has rarely ever found the evidence to be insufficient to support the continuing threat allegation.¹⁴ In fact, already by 1994, the aggravator has been alleged in over 80 capital cases that are through direct appeal and the court has found -- and affirmed -- the aggravator in almost every one.¹⁵

Oklahoma case law regarding the constitutionality of the continuing threat aggravator all seems to indicate that when questioned, judges will often quickly dismiss the issue as being a

¹² See Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1988).

¹³ See fn. 6 supra discussing the Williamson survey. See also Vicki Ruth Adams Werneke's "Capital Cases in Oklahoma Chart," The Life Guardian, Vol. V, No. 1. p.5-11.

¹⁴ Some of the rare cases where the courts have not actually affirmed include: Jones v. State, 648 P.2d 1251 (1982); Coleman v. State, 670 P.2d 596 (1983); Kelly v. State, 692 P.2d 563 (1984); Romano v. State, 827 P.2d 368 (1993); Hogan v. State, 65 OBJ 2077 (June 8, 1994); Malone v. State, 876 P.2d 707, 65 Okla. B.J. 2161 (Okla. Crim. App. June 17, 1994); Maves v. State, 65 OBJ 2245 (June 24, 1994); Carter v. State, 65 OBJ (July 29, 1994); Perry v. State, 893 P.2d 521, 536-37 (1995) and Williamson v. Reynolds, No. Civ 94-539-S (1995).

¹⁵ See Vicki Ruth Adams Werneke's "Capital Cases in Oklahoma Chart," The Life Guardian, Vol. V, No. 1. p.5-11.

moot question adequately answered in the past.¹⁶ In upholding the constitutionality of the "continuing threat" aggravating circumstance, Oklahoma has erroneously relied upon cases such as Jurek v. Texas.¹⁷ In Jurek, the Supreme Court was able to conclude that the similar language in the Texas capital scheme was not unconstitutional as used in that scheme. However, Texas's capital sentencing scheme is quite different from Oklahoma's. In Texas, capital homicides are limited to intentional and knowing murders committed in five specific situations.¹⁸ Unlike Oklahoma, Texas does not resort to a list of statutory aggravating circumstances to strictly define the categories of those who may be eligible for the death sentence. Instead, "[Texas's] action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose."¹⁹ Moreover, in Jurek, the Supreme Court noted that the Texas Court of Criminal Appeals had yet to define precisely the meaning of the "continuing threat to society" language contained in the second of the three special verdict questions that Texas juries must answer. According to the Supreme Court, the Texas Court of Criminal Appeals had "indicated that it will interpret this second [continuing

¹⁶ See Lafevers v. State, 1995 WL 394543 (Okla. Cr. App. 1995), Wallace v. State, 893 P.2d 504 (Okla. Cr. App. 1995) and Valdez v. State, 1995 WL 107446 (Okla. Cr. App. 1995).

¹⁷ See Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), reh. denied 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976); see e.g., Liles v. State, 702 P.2d 1025 (Okla. Crim. App. 1985); Johnson v. State, 665 P.2d 815 (Okla. Crim. App. 1982). The "continuing threat" aggravating circumstance has been characterized as vague and overbroad. Criticisms include the courts' failure to define "society" and "criminal acts of violence." See e.g., Black, Due Process for Death: Jurek v. Texas and Companion Cases, 26 Cath.U.L.Rev. 1 (1976) (consideration of future dangerousness is vaguely worded in Texas statute); Waldo, The 1984 Oregon Death Penalty Initiatives: A State Constitutional Analysis, 22 Williamette L.Rev. 285, 316-317, 334 (1986).

¹⁸ See Jurek, 428 U.S. at 268, 96 S.Ct. at 2955.

¹⁹ Id., 428 U.S. at 270, 96 S.Ct. at 2955.

threat to society'] question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show."²⁰ Thus, for the **Jurek** Court, the constitutionality of the Texas statute "turn[ed] on whether the enumerated questions allow consideration of particularized mitigating factors." ²¹

In his article, The Death Penalty Case: Oklahoma's Aggravating Circumstances, 63 Okla.B.J. 2192, 2198 (July 25, 1992), William D. Lunn, Jr. observed with respect to the difference between the Texas "continuing threat to society" special verdict question and Oklahoma's "continuing threat to society" aggravating circumstance:

The focus of the Texas inquiry is on a defendant's rehabilitation potential: his age, mental and emotional problems, the range and severity of any significant criminal record. [citation omitted] . . . Oklahoma has taken Texas' mitigating consideration and made it an aggravating circumstance unto itself. The Supreme Court decision in **Jurek** never approved of the 'continuing threat' language in this context.²²

Thus, **Jurek** does not constitute an approval of Oklahoma's continuing threat aggravating circumstance as written. More importantly, it definitely does not approve the unbridled manner in which this circumstance has been interpreted and applied in Oklahoma. **Jurek** does not even qualify as an exception to the line of cases that absolutely require a death penalty scheme to narrow the class of murderers eligible for the death penalty and to provide "guided discretion"

²⁰ Jurek, 428 U.S. at 272, 96 S.Ct. at 2956 (emphasis added).

²¹ Id., 428 U.S. at 272, 96 S.Ct. at 2956 (emphasis added); see also Franklin v. Lynaugh, 487 U.S. 164, 196, 108 S.Ct. 2320, 2339, 101 L.Ed.2d 2320 (1988), reh. denied, 487 U.S. 1263, 109 S.Ct. 25, 101 L.Ed.2d 976 (1988) ("Jurek did not turn on an understanding that the [enumerated questions] performed a narrowing function; rather our concern there . . . was whether the [enumerated questions] interfered with the jury's full consideration of mitigating evidence") (Stevens, Brennan, Marshall, JJ. dissenting) (emphasis added).

²² Id., 63 Okla.B.J. at 2198.

to the sentencer.²³ The Eighth Amendment's "guided discretion" doctrine requires that objective, standardized limitations be placed upon any aggravating circumstance that will serve as a basis for imposing the death penalty. As the United State Supreme Court has said:

[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to . . . channel the sentencer's discretion by 'clear and objective standards' [footnote omitted] that provide 'specific and detailed guidance' [footnote omitted] and that 'make rationally reviewable the process for imposing a sentence of death.' [footnote omitted]²⁴

Oklahoma should have looked to **Gregg, Furman, Godfrey** and other cases that establish clear guiding constitutional principles for capital sentencing schemes -- principles Oklahoma has consistently violated in the construction, interpretation and application of the continuing threat aggravating circumstance. Moreover, Oklahoma should have also looked to **Maynard v. Cartwright**. The **Maynard** case was the warning to Oklahoma to see that its aggravating circumstances were interpreted and applied in a constitutional manner. Instead, Oklahoma has obstinately refused to apply **Maynard** to the continuing threat aggravating circumstance.

B. Oklahoma's "Continuing Threat" Aggravator Fails to Genuinely Narrow the Class of Persons Eligible for the Death Penalty.

²³ See Godfrey v. Georgia, 446 U.S. at 427, 100 S.Ct. at 1764; see also Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); Gregg v. Georgia, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976), reh. denied, 429 U.S. 874, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

²⁴ See Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-65 L.Ed.2d 372 (1980).

In Battenfield v. State,²⁵ the court delineated three independent sets of facts that will support a finding of the "continuing threat to society" aggravator: (1) the defendant has participated in other unrelated crimes; (2) the nature of the homicide exhibits the defendant's calloused nature; and (3) the defendant has previously been convicted of a crime involving violence.²⁶ Despite this clear pronouncement, the Oklahoma court has never required that juries be instructed to consider only the three sets of facts described in Battenfield. Any attempt to construe the language of "continuing threat" to limit it to certain sets of facts is meaningless if the construction is not conveyed to the jury in a capital sentencing proceeding. Moreover, the Oklahoma court then went on to say that evidence is not limited to proof of any one or more of these three sets of facts. The Battenfield opinion simply referenced three cases where a finding of the aggravating circumstance was upheld on appeal²⁷ and then observed that the State "may present any relevant evidence in conformance with the rules of evidence, . . . including evidence from the crime itself, evidence of other crimes, admissions by the defendant of unadjudicated offenses or any other relevant evidence."²⁸

In fact, Oklahoma capital opinions have never set limits on what particular evidence might support the continuing threat aggravating circumstance or what factors a jury must find before it may be determined that a defendant will be a continuing threat to society. For example, many cases hold that the aggravating factor is justified solely due to the "calloused"

²⁵ See Battenfield v. State 816 P.2d 555 (Okla. Crim. App. 1991),

²⁶ Id., at 566.

²⁷ See Walker v. State, 723 P.2d 273, 285 (Okla. Crim. App. 1986); Nguyen v. State, 769 P.2d 167, 174 (Okla. Crim. App. 1988); and Newsted v. State, 720 P.2d 734, 741 (Okla. Crim. App. 1986)

²⁸ Battenfield, 816 P.2d at 566, quoting Liles v. State, 702 P.2d 1025, 1031 (Okla. Crim. App. 1985).

nature of the murder or the circumstances surrounding the offense.²⁹ Since all first degree murders are "callous" to one extent or another, this aggravating circumstance could apply to any or every murder and it utterly fails to distinguish between those who are eligible for the death penalty and those who are not. The same is true where the facts of any particular case, without reference to any objective factors, are held to support the circumstance. Furthermore, not only is there an arbitrary lack of guidance in such a construction as applied to this case, but this unfairly uses the nature of the murder to support both this aggravating circumstance and the "heinous, atrocious, or cruel" circumstance.³⁰ When using the same evidence to find more than one aggravator, the defendant actually faces the risk that the jurors, and indeed the court, will transpose or lose sight of which aggravator is being proved by the "nature" of the offense.³¹ In the case at bar, neither Joshua's background nor his mere involvement in the 7/15/95 incident could possibly support either aggravator; much less be smeared into supporting both aggravators simultaneously.

Maybe if Joshua Stump had committed other murders or if he had a criminal record for previous, life-threatening or other violent convictions, much like the defendants in the **Fisher** and **Ross** cases, then one could argue that these facts would support the jury's finding of the

²⁹ See Fisher v. State, 736 P.2d 1003 (Okla. Crim. App. 1987); Ross v. State, 717 P.2d 117 (Okla. Crim. App. 1986); see also Banks v. State, 701 P.2d 418 (Okla. Crim. App. 1985); Robinson v. State, 677 P.2d 1080 (Okla. Crim. App. 1984); Stafford v. State, 669 P.2d 285 (Okla. Crim. App. 1983); Ake v. State, 663 P.2d 1 (Okla. Crim. App. 1983).

³⁰ See E.g., Provence v. State, 337 So.2d 783, 786 (Fla. 1976), cert. denied, 341 U.S. 969, 97 S.Ct. 2929 (1977). See also Francois v. State, 407 So.2d 170, 175 (Fla. 1980).

³¹ Note that in two instances even though the jury allegedly found the defendant to be a continuing threat, the aggravator was not so much as even mentioned in the the court opinion. See Kelly v. State, 692 P.2d 563 (1984) and Coleman v. State, 670 P.2d 596 (1983).

continuing threat aggravating circumstance.³² Some cases have even taken the position that regardless of the factors set out in **Battenfield**, the particular facts of any murder or any defendant's background, without reference to a set of objective limitations, could suffice to sustain the jury's finding of this aggravating circumstance.³³ Thus the open-ended application and interpretation of the "continuing threat" aggravating circumstance truly does not limit the jury's discretion consistent with the requirements of the Eighth Amendment and both **Maynard v. Cartwright** and **Gregg v. Georgia**.

As previously indicated, the Supreme Court in **Areve v. Creech** stated that if the terms of the statutory language provided the constitutionally required channeling of the sentencer's discretion, then jury instructions quoting the statutory language would provide "clear and objective standards that provide specific and detailed guidance . . . that make rationally reviewable the process for imposing a sentence of death."³⁴ Instead however, Oklahoma's catchall "continuing threat to society" aggravator provides nothing but an opportunity for "juries

³² See Fisher v. State, 736 P.2d 1003 (Okla. Crim. App. 1987); Ross v. State, 717 P.2d 117 (Okla. Crim. App. 1986).

³³ Note that there are over 30 death penalty cases where the defendant's previous convictions were used in conjunction with the continuing threat aggravator. For example: Allen v. State, 821 P.2d 371 (1991), Broadrick v. State, 706 P.2d 534 (1985), Castro v. State, 745 P.2d 394 (Okla. Crim. App. 1987); Walker v. State, 723 P.2d 273 (Okla. Crim. App. 1986); Van Woudenberg v. State, 720 P.2d 328 (Okla. Crim. App. 1986); Banks v. State, 701 P.2d 418 (Okla. Crim. App. 1985); Robinson v. State, 677 P.2d 1080 (Okla. Crim. App. 1984); Dutton v. State, 674 P.2d 1134 (Okla. Crim. App. 1984) & etc. see also Banks v. State, 701 P.2d 418 (Okla. Crim. App. 1985); Ake v. State, 663 P.2d 1 (Okla. Crim. App. 1983).

³⁴ See Areve v. Creech, 507 U.S. 463, 113 S.Ct. 1534, 1540, 123 L.Ed.2d 188 (1993), quoting Lewis v. Jeffers, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990) (quoting Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398 (1980)).

to pursue their personal predilections," according to Kolender v. Lawson, and exercise impermissible unbridled discretion in imposing the death penalty.³⁵

Thus, not only is this aggravating circumstance infirm because Oklahoma has refused to impart objective limitations on its interpretation, but also the trial court's instructions do nothing to define the terms of the circumstance. Although the jury is given the statutory language of the aggravating circumstance and told the State has the burden to prove it beyond a reasonable doubt, the further instructions of the court do nothing to objectively define this aggravating circumstance. This means that the trial courts are giving juries a dangerous amount of latitude in finding continuous threat to exist. Moreover, the juries are invited to find the aggravating circumstance on an improper basis. The failure to limit the sentencer's discretion through appropriate objective instructions, combined with Oklahoma's standardless construction of the aggravating circumstance on appeal, is exactly like the situation confronted by the Supreme Court in Maynard v. Cartwright, and the Tenth Circuit in Cartwright v. Maynard, where it was held in part that the trial court's instructions supposedly defining the "especially heinous" aggravating circumstance provided the sentencer no guidance.³⁶

³⁵ See Kolender v. Lawson, 461 U.S. 352, 358, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).

³⁶ See also Jurek v. Texas, 428 U.S. 262, 272, 96 S.Ct. 2950, 2956, 49 L.Ed.2d 929 (1976) ("continuing threat" statutory question not overly broad or vague because Texas had determined certain specified factors that could be used to determine the existence of the circumstance); Lockett v. Ohio, 438 U.S. 586, 589, 98 S.Ct. 2954, 2962, 57 L.Ed.2d 973 (1978) (Eighth and Fourteenth Amendments would be violated if sentencing were wholly discretionary and unguided by legislatively defined standards); Rogeanu v. State, 738 S.W.2d 651 (Tex. Cr. 1987) (Texas juries must in all cases find that the defendant would be a continuing threat to society before death penalty may be imposed, and the "society" referred to means prison society).

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C. Oklahoma's "Continuing Threat" Aggravator Fails to Channel the Sentencer's Discretion by Clear and Objective Standards that make Rationally Reviewable the Process for Imposing a Death Sentence.

To return a death verdict based on the "continuing threat to society" aggravator, the jury must find "[t]he existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."³⁷ The terms "continuing" "threat" or "society" are not defined either in the statute or in jury instructions. Instead of narrowing the construction of the "continuing threat" terminology, the Court's decisions actually expand its already overly broad terms by finding that, under specific facts, the aggravator is not limited to certain factors, but rather, is all-inclusive in its terms. Accordingly, the word "society" is not restricted to the prison society where the defendant will be confined following conviction.³⁸ Rather, in Oklahoma, "society" may include anything from animals or property, to members of the defendant's own immediate family.³⁹

The vagueness and overbreadth of Oklahoma's "continuing threat to society" aggravator also fails to provide a rational basis for which to exclude evidence from the jury's consideration. Thus the state can force the defendant to face virtually every negative aspect of their own life. Moreover, the state is allowed to fashion such evidence as being relevant and tending to show the defendant may be so called "dangerous" without ever having to define or indicate what a "threat" is or to whom the defendant is a threat towards. The Oklahoma courts have even gone so far as to find that the defendant's "bad attitude" was sufficient to support the continuing threat

³⁷ See Okla. Stat. tit. 21, § 701.12(7) (1981).

³⁸ Berget v. State, 824 P.2d 364 (Okla. Crim. App. 1991); cf. Rougeau v. State, 738 S.W.2d 651, 660 (Tex. Crim. App. 1987), overruled on other grounds, Harris v. State, 784 S.W.2d 5, 19 (Tex. Crim. App. 1989).

³⁹ See Boltz v. State, 806 P.2d 1117 (Okla. Crim. App. 1991).

aggravator,⁴⁰ and that a defendant who steadfastly maintains his innocence of the crime charged is a "continuing threat" because he fails to show remorse.⁴¹ Indeed, the State may even call experts or lay witnesses to give their opinions, predictions and speculations about the defendant's future conduct after basing their testimony on the same aforementioned evidence.⁴²

⁴⁰ See Brown v. State, 871 P.2d 56 (Okla. Crim. App. 1994)

⁴¹ See Smith v. State, 737 P.2d 1206 (Okla. Crim. App. 1987).

⁴² See Moore v. State, 788 P.2d 387 (Okla. Crim. App. 1990) (psychologist testified that defendant posed a continuing threat to society); cf. Green v. State, 713 P.2d 1032, (Okla. Crim. App. 1985), overruled on other grounds, Brewer v. State, 718 P.2d at 365-66, n.1 (1986) (testimony of warden of prison where the murder took place was allowed). The reliability of expert testimony in predicting future dangerousness has repeatedly been called into question. See e.g., Thornberry, T. and J. Jacoby, The Criminally Insane: A Community Follow-up of Mentally Ill Offenders, (1979) (80 percent of those predicted dangerous were non-violent in 3-5 year follow ups); Kozol, Boucher and Garofalo, The Diagnosis and Treatment of Dangerousness, 18 Crime and Delinq. 371, 390 (1972) (65.3 percent of those predicted dangerous were not violent); Steadman, A New Look at Recidivism Among Prison Inmates, 5 Bull. Am. Acad. Psychiatry & L. 200, 209 (1977) (58.7 percent were not violent); Wenk and Emrich, Assaultive Youth: An Exploratory Study of the Assaultive Experience and Assaultive Potential of California Youth Authority Wards, 9 J. Research Crime & Delinq. 171 (1972) (92 percent were not violent); Dix, Expert Prediction Testimony in Capital Sentencing: Evidentiary and Constitutional Considerations, 19 Am. Crim. L.Rev. 1 (1981) (discussing the inaccuracy of psychiatric predictions of future dangerousness); Green, Capital Punishment, Psychiatric Experts, and Predictions of Dangerousness, 13 Cap. U.L.Rev. 533 (1984); Comment, Psychiatric Testimony and the Issue of Future Dangerousness, 20 Hous.L.Rev. 1179 (1983). Applebaum, Hypotheticals, Psychiatric Testimony, and the Death Sentence, 12 Bull. Am. Acad. Psychiatry & L. 169 (1984) (criticizing the ability of psychiatrists to predict future dangerousness without having examined the defendant); Bonnie, Psychiatry and the Death Penalty: Emerging Problem in Virginia, 66 Va.L.Rev. 167 (1980) (analyzing the uses and limits of psychiatric testimony in capital cases); Worrell, Psychiatric Predictions of Dangerousness in Capital Sentencing: The Quest for Innocent Authority, 5 Behav. Sci. & L. 433 (1987) (the acceptance of predictions of future dangerousness by legislatures and courts is an inadequate attempt to satisfy society's desire for expert authority in capital cases); Forst, The Psychiatric Evaluation of Dangerousness in Two Trial Court Jurisdictions, Bull. Am. Acad.

The third set of facts identified in **Battenfield** -- that the defendant has previously been convicted of a crime involving violence -- overlaps with yet another Oklahoma aggravating circumstance, namely, "[t]he defendant was previously convicted of a felony involving the use or threat of violence to the person."⁴³ Consequently, proof of one aggravator is *ipso facto* proof of the other, making it all the more likely a jury will find mitigating evidence outweighed by two or more aggravating circumstances under the instructions given in death penalty cases. As discussed previously, evidence supporting the "heinous, atrocious or cruel" aggravating circumstance has also been used to support "continuing threat." This enhances the risk that any and all of the evidence in aggravation will be considered in support of two or more aggravators, thus improperly doubling or tripling its aggravating effect.

Moreover, Oklahoma has gone even further and sanctioned the use of past convictions not involving a violent act or threat to another, on the theory that these non-violent or non-threatening convictions can also be used to "predict" future acts of violence.⁴⁴ Ironically, one

Psychiatry & L. 98, 104 (1977) (finding that the psychiatrists who were the subjects of the study relied principally upon an offender's record to predict future dangerousness); See also, Barefoot v. Estelle, 463 U.S. 880, 884-885 (1983) (Blackmun, J., dissenting); Albertson, Future Dangerousness: The Testimony of Experts in Capital Cases, 3-WTR Crim. Just. 18 (1989).

⁴³ See Okla. Stat. tit. 21, § 701.12(1) (1981).

⁴⁴ Jurors' ability to make a determination of future dangerousness is questionable at best. See e.g., Davis, Texas Capital Sentencing Procedures: The Role of the Jury and the Restraining Hand of the Expert, 69 J. Crim. L. & Criminology 300 (1978) (jurors are not properly guided in determining future dangerousness and in taking mitigating factors into consideration); Dix, Administration of the Texas Death Penalty Statute: Constitutional Infirmities Related to the Prediction of Dangerousness, 55 Tex.L.Rev. 1343 (1977) (jury is not adequately guided in considering dangerousness issue and may take into account factors not related to dangerousness); Sorensen and Marquart, Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases, 18 N.Y.U.Rev.L. & Soc. Change 743 (1991); Marquart, Ekland-Olson & Sorensen, Gazing into the Crystal Ball: Can Jurors Accurately Predict Future Dangerousness in Capital Cases?, 23 Law

would think that the true focus of the "continuing threat to society" aggravating circumstance would be to look at prior violent history as an indicator of the defendant's propensity to continue to be a threat in the future.⁴⁵ However, contrary to public belief, a history of violence is not required to prove the "continuing threat to society" aggravator.⁴⁶

Further, as indicated, by holding that the mere facts surrounding any killing can alone be sufficient to support a finding of "continuing threat to society," it is nearly impossible to sustain a demurrer to the State's evidence.⁴⁷ In Battenfield where a jury found "continuing threat to society" based on the facts of the crime and the defendant's conviction for assault and battery, after former conviction of a felony, the Court said, "[t]he evidence of this calculated robbery, murder and attempted coverup, all for an expected return of one hundred dollars (\$100.00) or less, clearly established the calloused nature this of crime."⁴⁸ The Court went

& Soc.Rev. 449 (1989).

⁴⁵ See Berget, (supra) 824 P.2d at 370.

⁴⁶ See Fox v. State, 779 P.2d 562 (Okla. Crim. App. 1989); Eddings v. State, 616 P.2d 1159 (Okla. Crim. App. 1980), rev'd sub nom., Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), modified, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Munson v. State, 758 P.2d 324 (Okla. Crim. App. 1988); Boltz v. State, 806 P.2d 1117 (Okla. Crim. App. 1991).

⁴⁷ See e.g., Fisher v. State, 736 P.2d 1003 (Okla. Crim. App. 1987) (nineteen-year-old boy found to be "continuing threat to society" based solely on single fatal stab wound to victim); Robinson v. State, 677 P.2d 1080, 1088 (Okla. Crim. App. 1984) (manner of crime's commission sufficient); Stafford v. State, 665 P.2d 1205, 1218 (Okla. Crim. App. 1983), vacated on other grounds, 467 U.S. 1212, 104 S.Ct. 2651, 91 L.Ed.2d 359 (1984) (despite lack of prior criminal acts of violence, circumstances of offense alone sufficient to support finding); See also e.g. Lafevers v. State, 1995 WL 394543 (Okla. Crim. App. 1995), Wallace v. State, 893 P.2d 504 (Okla. Crim. App. 1995) and Valdez v. State, 1995 WL 107446 (Okla. Crim. App. 1995) (ties with heinous, atrocious, and cruel aggravator).

⁴⁸ See Battenfield v. State, 816 P.2d 555, 566 (Okla. Crim. App. 1991).

on to say, "[t]his was not a random act of violence which simply got out of control."⁴⁹ Missing from this *Battenfield* type analysis, however, is any explanation of how the facts of that particular murder proved "continuing threat to society," where the facts of another murder would not. A person of ordinary sensibilities could reasonably find all first degree murders to be "calloused" and feel threatened by any and every person who ever commits a murder.⁵⁰

In *Cartwright v. Maynard*, the Tenth Circuit Court of Appeals has rejected the argument that evidence of the manner of the killing alone is sufficient to establish Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance, stating: "...[t]he cases in which the Court has found the manner of the killing to support this aggravating circumstance do not reveal any pattern or consistency in the way in which the murder was committed...."⁵¹ The same is true with respect to the Oklahoma court's analysis of the continuing threat aggravating circumstance -- there is no pattern or consistency in the way in which the murder was committed.

Further, in *Maynard v. Cartwright*, the Supreme Court has "...plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to

⁴⁹ *Id.*

⁵⁰ Note that in over 48 cases the state has used the heinous, atrocious and cruel aggravator in conjunction with the continuing threat aggravator. See for example: *Clayton v. State*, 840 P.2d 18 (1992), *Fisher v. State*, 736 P.2d 1003 (1987), *Liles v. State*, 702 P.2d 1025 (1985), *Roberts v. State*, 868 P.2d 712 (1994)

⁵¹ See *Cartwright v. Maynard*, 822 F.2d at 1490; But see *Lafevers v. State*, 1995 WL 394543 (Okla. Cr. App. 1995), *Wallace v. State*, 893 P.2d 504 (Okla. Cr. App. 1995) and *Valdez v. State*, 1995 WL 107446 (Okla. Cr. App. 1995). (ties with heinous, atrocious, and cruel aggravator)

warrant the imposition of the death penalty...."⁵² A limiting construction must do more than merely invite the sentencer to assess, in some indeterminate way, the circumstances of each case.⁵³ The *Areve v. Creech* Supreme Court recently said:

When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so. [citations omitted]. If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.⁵⁴

Incredibly, even evidence tending to show the defendant's involvement in any kind of unadjudicated misconduct is admissible even if the evidence is nothing more than uncorroborated allegations.⁵⁵ As previously stated, the unadjudicated acts need not involve violence or be particularly probative on the issue of the likelihood the defendant will commit future violence. The courts seem to infer that the prejudice suffered by the defendant from such irrelevant evidence is itself irrelevant.⁵⁶

While the Oklahoma courts have yet to find that the admission of evidence of unadjudicated acts is improper per se, the majority and dissenting opinions in a recent Oklahoma

⁵² See *Maynard v. Cartwright*, 486 U.S. at 363, 108 S.Ct. at 1859 (referencing *Godfrey v. Georgia*, where the Court struck down Georgia's construction of its "outrageously or wantonly vile, horrible or inhuman" aggravator).

⁵³ See *Clemons v. Mississippi*, 494 U.S. 738, 757-61, 110 S.Ct. 1441, 1453-55, 108 L.Ed.2d 725 (1990) (Blackmun, J., concurring in part and dissenting in part).

⁵⁴ *Areve v. Creech*, 113 S.Ct. at 1542. (emphasis in the original).

⁵⁵ See *Ross v. State*, 717 P.2d 117 (Okla. Crim. App. 1986) (uncorroborated accomplice testimony about another alleged murder involving the defendant).

⁵⁶ See *Liles v. State*, 702 P.2d 1025 (Okla. Crim. App. 1985) (approved use of the defendant's admissions to prior involvement with prostitution and narcotics).

Court of Criminal Appeals decision, and developments in other jurisdictions warrant revisiting this claim. In *Paxton v. State*, Judge Chapel, in his dissent, noted that eight states currently prohibit this evidence and ten more substantially restrict its use.⁵⁷ Judge Chapel found that the use of unadjudicated crimes evidence violates both the ban on cruel and unusual punishment and the guarantee of due process provided by the Oklahoma and United States Constitutions.⁵⁸ Judge Chapel's stance closely resembles the position taken by the Supreme Court of Washington in *State v. Bartholomew*.⁵⁹ The Washington Supreme Court correctly determined that the liberal standard of admissibility for mitigating evidence should not apply to evidence supporting aggravating factors and also found that the admission of evidence of other crimes violated both the Washington and the United States Constitutions.⁶⁰

While this specific issue has yet to be addressed by the United States Supreme Court, federal judges have also written in support of an absolute ban.⁶¹ Justices Marshall and Brennan found that the crucial requirement of reliability in capital sentencing, discussed at length in this brief, could not be met if evidence of this nature were permitted.⁶² In *Coleman v. Risly*, Judge Reinhardt, in his dissent, also determined that the unadjudicated crimes evidence was not

⁵⁷ See *Paxton v. State*, 867 P.2d 1309 (Okla. Crim. App. 1993).

⁵⁸ See *Paxton v. State*, 867 P.2d 1309 (Okla. Crim. App. 1993).

⁵⁹ See *State v. Bartholomew*, 683 P.2d 1079 (Wash. 1984).

⁶⁰ *Id.* 683 P.2d at 1086 (citing *Gregg v. Georgia*, 428 U.S. at 187, 96 S.Ct. at 2931-32; and *Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977)).

⁶¹ See *Williams v. Lynaugh*, 484 U.S. 935, 935-40, 108 S.Ct. 311, 312-14, 98 L.Ed.2d 270 (1987) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari).

⁶² See *Gregg*, 428 U.S. at 187, 96 S.Ct. at 2931-32.

of sufficient quality to pass constitutional muster in capital cases.⁶³ While the cited opinions are dissents, they are drawn from and supported by principles absolutely central to death penalty jurisprudence.

Thus, there is ample support in the law and especially in logic for a per se ban on unadjudicated crimes evidence in second-stage proceedings. In Mr. Stump's case, other than incorporating the evidence from the first-stage of his trial, the only evidence offered in support of the aggravating circumstances alleged involves an unadjudicated incident regarding the possession of a weapon while he was still in school. Such evidence is simply not reliable, especially where a person's life may depend on it. The use of evidence of unadjudicated misconduct places defendants, like young Mr. Stump, in the untenable position of having to defend against multiple, totally unrelated charges and clearly should not be countenanced by the Oklahoma court in a capital case.

Again, there is simply no "pattern or consistency" to the homicides in the cases where Oklahoma has affirmed jury findings that the defendant constitutes a "continuing threat to society."⁶⁴ The only consistency is that almost all findings of the aggravator are systematically affirmed, for one reason or another, without regard to the actual relevant or significant differences in case factual patterns, individual propensities or individual characteristics. As indicated, the continuing threat aggravating circumstance, as interpreted by Oklahoma's highest court, can be supported on the facts of every homicide case.⁶⁵ Therefore, it is difficult to

⁶³ See Coleman v. Risly, 839 F.2d 434, 504 (9th Cir. 1988),

⁶⁴ See e.g., Banks v. State, 701 P.2d 418 (Okla. Crim. App. 1985); Berget; Fisher; Fox v. State, 779 P.2d 562 (Okla. Crim. App. 1989); Fowler v. State, 779 P.2d 580 (Okla. Crim. App. 1989); Liles v. State, (citation omitted).

⁶⁵ The "continuing threat" aggravating circumstance has been criticized for its failure to "narrow the pool of persons eligible for the death penalty," See e.g., Note, Oregon Joins Texas at the Constitutional Outpost: The Oregon Supreme Court Upholds the Death Penalty Statutes in State v. Wagner, 25 *Williamette L. Rev.* 653,

argue that the facts of any case do not support it as currently applied. Thus it is the harsh reality of how this aggravator is in fact applied that requires the invalidation of this aggravating circumstance. Without narrowing guidelines and standards of proof, the subjective determinations of juries with regard to a defendant's future dangerousness creates an impermissible risk of unreliable and arbitrary decisions to impose death.

D. Oklahoma's "Continuing Threat" Aggravator is Unconstitutionally Overbroad and Vague on its Face and Fails to Channel the Sentencer's Discretion by Clear and Objective Standards in Violation of the Eighth and Fourteenth Amendments to the United States Constitution.

It is clear that the Oklahoma court's approach to the "continuing threat" aggravating circumstance does not provide the necessary safeguards to insure that the death penalty not be imposed in a arbitrary and capricious manner. Again, the Supreme Court's discussion in *Godfrey v. Georgia*, is entirely analogous to the construction of continuing threat.⁶⁶ Where is the limiting, definitive guidance to be found which insures that a juror will not find that every just-convicted murderer constitutes such a "continuing threat"? Even in the absence of other acts of violence, prosecutors clearly feel entitled to invoke societal alarm in jurors simply by alleging the continuing threat to society aggravator. Moreover, Oklahoma juries have virtually unlimited discretion in finding this aggravator and are thus quite prone to arbitrarily make the life-or-death decision. Therefore, by using such a "catch-all" phrase, the Oklahoma courts are in essence authorizing the death penalty in the same despotic manner that was condemned in *Furman v. Georgia*.

676-678 (1989).

⁶⁶ See *Godfrey v. Georgia*, 446 U.S. at 428-29, 433, 100 S.Ct. at 1764-65,

Further, the Oklahoma court has refused, despite repeated requests, to revisit the issue and provide some definition or standards. Recently, in **Brown v. State**, the Court of Criminal Appeals again refused a request to reconsider the constitutionality of the death-qualifying circumstance and its application:

Appellant acknowledges this Court has previously held this aggravator to be constitutional, (citations omitted), but urges us to reconsider. We refuse.⁶⁷

In **Brown**, the minimal facts found to support the aggravating circumstance were that the defendant had a bad attitude and blamed others for his problems. The evidence of this alleged character flaw consisted of a few incidents during the course of a domestic dispute -- a dispute the court conceded was over. During the domestic dispute the defendant, Brown, allegedly committed such sins as bearing a continuing grudge against his ex-wife and harboring anger at more than one person.⁶⁸ The entire support for the aggravator boiled down to this -- the defendant's "attitude in blaming everyone else for his misfortunes."⁶⁹ It is submitted that if evidence of a bad attitude qualifies an individual for the death penalty, such evidence can be presented as to the vast majority of the population, including many attorneys and possibly even a few judges. Again, the point is this -- Oklahoma's continuing threat aggravating circumstance fails completely to guide the jury or limit the class of persons eligible for the death penalty.

The Oklahoma Court of Criminal Appeals recently reaffirmed its prior cases upholding the validity of this aggravating circumstance.⁷⁰ Indeed, the court has on numerous occasions

⁶⁷ See Brown v. State, 871 P.2d 56, 73 (Okla. Crim. App. 1994)

⁶⁸ Brown, 871 P.2d at 77.

⁶⁹ Id.

⁷⁰ See Paxton v. State, 867 P.2d 1309, 1331 (Okla. Crim. App. 1993) ("The 'continuing threat' aggravating circumstance has been analyzed and upheld by this Court as specific, not vague, and readily understandable").

pronounced this aggravator to be "specific, not vague, and readily understandable," or words to that effect.⁷¹

The *Chaney v. State* case is the genesis of the "specific, not vague, and readily understandable" language.⁷² *Chaney*, however, did not involve the "continuing threat" aggravating circumstance. While having initially alleged the "continuing threat" aggravating circumstance against Chaney, the State later dropped that aggravator from the bill of particulars. Moreover, Chaney's jury was not instructed on the "continuing threat" aggravator, and the District Attorney did not argue it to the jury.⁷³ When the defense nevertheless challenged the "continuing threat" aggravator on appeal, the Court of Criminal Appeals responded, "We do not understand why the defendant complains about this [aggravating circumstance]," and proceeded to address the validity of the "especially heinous, atrocious, or cruel" aggravator, which was at issue in *Chaney*.⁷⁴

Elsewhere in *Chaney*, however, in ostensibly passing on the facial validity of the aggravating circumstances enumerated in Okla. Stat. tit. 21, § 701.12 (Supp. 1979), the Oklahoma court said:

⁷¹ See e.g., *Boyd v. State*, 839 P.2d 1363, 1371 (Okla. Crim. App. 1992); *Berget v. State*, 824 P.2d 364, 375 (Okla. Crim. App. 1991); *Battenfield v. State*, 816 P.2d 555, 563 (Okla. Crim. App. 1991); *Boltz v. State*, 806 P.2d 1117, 1125 (Okla. Crim. App. 1991); *VanWounderberg v. State*, 720 P.2d 328, 336 (Okla. Crim. App. 1986); *Liles v. State*, 702 P.2d 1025, 1031 (Okla. Crim. App. 1985).

⁷² The bedrock cases underlying the *Chaney v. State*, 612 P.2d 275 case include: *Boyd v. State*, 839 P.2d 1363, 1371 (Okla. Crim. App. 1992); *Berget v. State*, 824 P.2d 364, 375 (Okla. Crim. App. 1991); *Battenfield v. State*, 816 P.2d 555, 563 (Okla. Crim. App. 1991); *Boltz v. State*, 806 P.2d 1117, 1125 (Okla. Crim. App. 1991); *VanWounderberg v. State*, 720 P.2d 328, 336 (Okla. Crim. App. 1986); *Liles v. State*, 702 P.2d 1025, 1031 (Okla. Crim. App. 1985).

⁷³ *Id.*, 612 P.2d at 280.

⁷⁴ *Id.*

Another argument aimed at the second stage is the defendant's contention that the jury was not given any guidance in its evaluation of the aggravating and mitigating factors. Title 21 O.S.Supp.1979, § 701.12, names seven aggravating circumstances. Section 701.10 provides that evidence of any of these may be presented to the jury, provided the defendant has been given appropriate notice. Section 701.11 provides that the death penalty cannot be imposed unless at least one of these seven circumstances is found. Circumstances named are specific, not vague, and are readily understandable.⁷⁵

Subsequent events have shown, however, that in at least one instance, the Chaney court's summary pronouncement that the aggravators listed in Okla. Stat. tit. 21, § 701.12 (Supp. 1979), as being "specific, not vague, and . . . readily understandable" on their face was blatant error.⁷⁶ In Cartwright v. Maynard, the Court stated that: "... We . . . hold that the Oklahoma Court of Criminal Appeals [has] failed to apply a constitutionally required narrowing construction of [the] 'especially heinous, atrocious, or cruel' aggravating circumstance..."⁷⁷ Prior to Maynard, the Oklahoma courts had also affirmed virtually every case alleging the "heinous, atrocious, or cruel" aggravating circumstance using the same language the the courts now apply to the "continuing threat" aggravator.

Because the court has elected to rely on Chaney's "specific, not vague, and . . . readily understandable" language whenever the "continuing threat" aggravating circumstance has been challenged, it is clear that the Court of Criminal Appeals has never endeavored to "analyze" the constitutionality of this particular aggravator or fashioned a "constitutionally required narrowing construction" of the aggravator.⁷⁸ Moreover, since "continuing threat" was not at issue in

⁷⁵ Chaney, 612 P.2d at 279. (Emphasis added).

⁷⁶ Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1988), aff'd sub nom. Maynard v. Cartwright, 486 U.S. 356, 365, 108 S.Ct. 1853, 1860, 100 L.Ed.2d 372 (1988)

⁷⁷ See Maynard, 822 F.2d 1477, 1491 (10th Cir. 1988)

⁷⁸ See e.g. Paxton; Boyd; Berget; Battenfield; Boltz; VanWoundenberg; Liles (citations omitted).

Chaney, the "specific, not vague, and . . . readily understandable" language from Chaney is clearly dictum with respect to the "continuing threat" aggravator.⁷⁹

The persistent refusal of Oklahoma's highest court with criminal jurisdiction to apply the fundamental constitutional principles announced recently in Maynard to aggravating circumstances invites, indeed requires, this Court to step in and enforce the Constitutional safeguards. This is particularly true since, remarkably, Oklahoma does not seem to have accepted the lesson of Maynard, a case concerning another vague aggravator in its own sentencing scheme.

E. Jurors are Inadequately Informed of the Procedural Background of Oklahoma's Parole Procedures to Intelligently and Justifiably Sentence the Defendant to Death Due to the Continuous Threat Aggravator.

Joshua Stump should be allowed to present relevant evidence regarding the State's policies and practices regarding parole in order to rebut the State's contention that he represents a continuing threat to society.⁸⁰

1) Oklahoma's Procedural Background

⁷⁹ See Chaney 612 P.2d at 280.

⁸⁰ Currently 21 Okl. St. Ann. § 701.9 "Punishment for murder" states that a person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death, life, or life without parole. If convicted of or pleads guilty or nolo contendere to murder in the second degree, the defendant shall be punished by imprisonment in a state penal institution for "no less than 10 years" yet no more than life. See also, 21 Okl. St. Ann. §701.15 regarding the Constitutionality of the sentence. (When the death penalty is unconstitutional then the defendant shall be sentenced to life without parole). (emphasis added)

In Oklahoma's sentencing proceeding for murder in the first degree, the trial court conducts a separate sentencing proceeding to determine whether the defendant should receive a sentence of life without parole, life imprisonment or death. The proceeding is conducted by a trial judge before the same trial jury as soon as practicable without presentence investigation. At the time of the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances so as to argue for or against the death sentence.⁸¹ However, the trial courts sometimes seem to forget that:

[W]hile one of the goals of the criminal justice system is to punish criminals and protect public safety, some 'crimes of the most atrocious character' must not be the subject of criminal sanctions if the imposition of such sanctions would require the courts 'to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice.'⁸²

When considering cases where life imprisonment without the possibility of parole is available as a punishment, a jury is likely to seriously err if it holds the common, yet incorrect, belief that life imprisonment does not actually mean "life imprisonment." This common belief leads jurors to accordingly hand down death sentences to a convicted defendant because the jury wants to prevent the defendant's reintroduction into the community, especially when the state paints the defendant as one who may be a "continuing threat."

⁸¹ See Okla. Stat. tit 21 §701.10.

⁸² See United States v. Denny-Shaffer, 2 F.3d 999 (10th Cir. 1993) (quoting Justice Harlan in Davis v. United States, 160 U.S. 469, 493, 16 S.Ct. 353, 360, 40 L.Ed.2d 499 (1895)).