INTRODUCTION

For centuries, capital punishment has been at the center of the debate over crime and punishment. Capable of arousing strong emotions, the debate over capital punishment has continued unabated into the twentieth century. Beyond the personal preferences involved in the debate over the death penalty, the fact remains that convicted murderers are being executed in the United States. Using a facially constitutional, aggravating circumstances statute, Nebraska exemplifies a state that has been sentencing convicted murderers to death. Whether the particular murderer is sentenced to life imprisonment or death by electrocution depends primarily on the factual circumstances surrounding the crime.

Nebraska’s aggravating and mitigating circumstances statute lists eight circumstances that are to be evaluated by a court imposing the death penalty, and seven mitigating circumstances that are to be evaluated by a court imposing a life imprisonment sentence. One of the most controversial aggravating circumstance provisions provides: “The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence.”

Recently, the Nebraska Supreme Court in State v. Hunt reversed a defendant’s death sentence because the factual circumstances surrounding the murder were not “especially heinous.” In Hunt, the court’s determination of what constituted an “especially heinous” murder became the subject of extreme public debate and criticism. In light of the Hunt decision, this Note first examines...
how the aggravating circumstances statute, from which the "heinous" language is taken, has been interpreted and applied in Nebraska.\footnote{9} Second, this Note examines a similar Florida aggravating circumstances statute and how the "heinous" standard was interpreted and applied by the Florida Supreme Court.\footnote{10} Third, this Note analyzes the holding of the \textit{Hunt} court and concludes that the court's decision correctly applied and interpreted the "heinous" provision of Nebraska's aggravating circumstances statute.\footnote{11} Finally, as applied to first degree murder cases, this Note questions the workability and constitutionality of the "manifested exceptional depravity" language in relation to the "heinous" provision of the aggravating circumstances statute.\footnote{12}

\section*{FACTS AND HOLDING}

On the evening of April 12, 1984, officers of the Norfolk Police Department were summoned to the home of Robert Edward Hunt, Jr.\footnote{13} Upon arriving, the officers were met by Wanda Hunt, the wife of Robert Hunt.\footnote{14} Ms. Hunt directed the officers to the living room where her husband sat on the floor, weeping.\footnote{15} Robert Hunt told Officer Dekker, an acquaintance of Hunt's, that he had killed someone.\footnote{16} Hunt told the officers where to find a cassette box that contained several pairs of ladies' underwear, nylon stockings, magazines of a sexual nature, a pair of glasses, and a BB gun.\footnote{17} Officers Monroe and Klug left Hunt's house and went to the address given by Hunt to observe what had happened.\footnote{18} Officers Dekker and Brahmer remained at Hunt's house, where Hunt admitted to the of-

\begin{footnotes}
\item[9] See infra notes 103-71 and accompanying text.
\item[10] See infra notes 183-211 and accompanying text.
\item[11] See infra notes 244-351 and accompanying text.
\item[12] See infra notes 353-71 and accompanying text.
\item[13] \textit{Hunt}, 220 Neb. at 708, 371 N.W.2d at 711.
\item[14] \textit{Id.}
\item[15] \textit{Id.} at 708-09, 371 N.W.2d at 711-12.
\item[16] \textit{Id.} at 709, 371 N.W.2d at 712. Hunt told Officer Dekker: "Yeah, Doug, I killed her. Doug, I killed her." \textit{Id.} Hunt mumbled: "I gotta pay. I killed her. I gotta pay." \textit{Id.}
\item[17] \textit{Id.} Ms. Hunt informed Officer Brahmer that the underwear and glasses in the cassette case did not belong to her. Hunt told Officer Brahmer that he thought the glasses belonged to the victim. \textit{Id.}
\item[18] \textit{Id.}
\end{footnotes}
ficers that he had sexually assaulted a dead woman and that his vic-
tim had asked him not to kill her.19

Arriving at the victim's home, Officers Monroe and Klug entered
the home and found the victim nude, face down in the bathtub.20
The officers discovered a nylon stocking around the victim's neck,
and some nylon material in her mouth.21 Ascertaining that the vic-
tim was dead, Officers Monroe and Klug called Dekker and informed
him to arrest Hunt.22 After being advised of his Miranda
rights, Hunt explained to the police that he had longed to kill a woman and
have sex with her after she was dead.23 Hunt explained that he had
chosen his victim after he had seen her engagement photograph in
the Norfolk Daily News.24

The following chronologically ordered events were adduced by
the trial court as the circumstances leading up to the murder. Early
in the evening of April 12, 1984, Hunt shoplifted a BB gun, some
women's panties, and some nylon hosiery.25 He drove to the victim's
mobile home and discovered that the victim was inside.26 After ob-
serving the mobile home for some time, Hunt left his car, took the
cassette case and the BB gun, and walked around the victim's home
approximately two times.27

Using the BB gun to gain entrance to the victim's mobile home,
Hunt commanded the victim to lie on the floor while he bound her arms and legs with a nylon rope. Hunt then proceeded to stuff panties into the victim’s mouth. He dragged her into the living room and placed the nylon hosiery around her neck; tightening the nylon, Hunt rendered her unconscious. Once the victim was unconscious, Hunt removed his pants, masturbated, and ejaculated on her stomach. After checking her pulse, Hunt carried her into the bathroom and placed the victim face down into the partially filled bathtub. While Hunt held her head under the water, her body twitched and shook.

An autopsy was performed on the victim’s body the next morning by Dr. Harlan Papenfuss, who died prior to the trial. Dr. Papenfuss’ assistant testified by deposition that two pairs of women’s panties were found in the victim’s mouth and that the second pair of panties had obstructed the victim’s nasal passages. Dr. Steffen Lacy, a pathologist, reviewed the report filed by Dr. Papenfuss, as well as other evidence, and testified that the victim died of asphyxia as a result of ligature strangulation. Dr. Lacy concluded that the nylon stocking around the victim’s neck was the object used to accomplish the strangulation.

At the conclusion of the trial, the jury found Hunt guilty of first degree murder. In accordance with section 29-2520 of the Nebraska...
Revised Statutes, a panel of judges was convened for the determination of a sentence. Sentencing Hunt to death, the panel found that Hunt's behavior satisfied aggravating circumstances (1)(b) and (1)(d) of section 29-2523 of the Nebraska Revised Statutes. Pursuant to section 29-2521.01(5) of the Nebraska Revised Statutes, the Nebraska Supreme Court was required to review the Hunt sentence.

The Nebraska Supreme Court, pursuant to subsection (1)(b) of section 29-2523, held that Hunt had neither committed the murder to conceal his identity nor to conceal the commission of a crime. According to the majority, Hunt committed the murder in order to "play out his sexual fantasy with a female corpse." The majority determined that Hunt's sexual role-playing would necessarily be inconsistent with a finding that Hunt had committed the murder to conceal his identity or to conceal the commission of a crime.

Moreover, the majority held that the crime was not "especially heinous, atrocious, [or] cruel," and did not "manifest exceptional depravity by ordinary standards of morality and intelligence." The

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(1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2520 to 29-2524.

NEB. REV. STAT. § 28-303 (Reissue 1985).
40. Id.
41. NEB. REV. STAT. § 29-2521.01(5) (Reissue 1985).
42. Hunt, 220 Neb. at 724-25, 371 N.W.2d at 720.
43. Id. In determining that aggravating circumstance (1)(b) did not apply, the court reasoned:

The verdict that defendant is guilty of first degree murder must of necessity rest upon a finding that he killed purposely and with deliberate and premeditated malice. In order to so find under the evidence in this case, the jury first had to find that defendant went to the victim's home with the intention of killing her so that he could play out his sexual fantasy with a female corpse. Such a finding is inconsistent with the existence of aggravating circumstance (1)(b), which is defined in 29-2523 as: "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime." There is no question but that the murder was not committed for the purpose of concealing the commission of a crime. Nor does the evidence establish that it was committed for the purpose of concealing defendant's identity. Certainly, any killing has the effect of rendering the victim incapable of identifying the perpetrator; that truism, however, does not satisfy the requirement that the murder be committed "to conceal the identity of the perpetrator." . . . The purpose of the killing in this case was to fulfill a sexual desire.

Id. at 724-25, 371 N.W.2d 720-21.
44. Id.
45. Id. at 725, 371 N.W.2d at 721.
majority reasoned that the victim lost consciousness shortly after the strangulation began, and thus, the victim did not endure pain for a significant length of time, leading the court to conclude that the murder was not "of the nature described in aggravating circumstance (1)(d)."\textsuperscript{46}

Not to be misunderstood, the court noted that stuffing panties in the victim’s throat and strangling the victim were cruel acts.\textsuperscript{47} Nevertheless, the majority concluded that Hunt’s actions were not "especially cruel"; every murder, the majority explained, involved a certain amount of violence.\textsuperscript{48} According to the majority, the method that Hunt employed in killing his victim did not "entail something more than the ordinary circumstances which attend any death-dealing violence."\textsuperscript{49}

Dissenting, Judge Boslaugh, joined by Judges Shanahan and Grant, agreed with the majority in all respects; however, the dissent reasoned that the aggravating circumstances existed when considering all of the factual events surrounding the crime.\textsuperscript{50} The dissent noted that Hunt had shoplifted the items used in the murder in order that the authorities would not be able to trace the items to him.\textsuperscript{51} Furthermore, the dissent adhered to the findings of the sentencing panel, which determined that Hunt had believed that the victim was still alive, and had made sure his victim was dead by placing her face down in the water.\textsuperscript{52} Hunt wiped the residence clean of fingerprints

\textsuperscript{46} Id. at 725-26, 371 N.W.2d at 721. Explaining why aggravating circumstance (1)(d) was not applicable, the court reasoned:
To be sure, forcing items into the victim's throat and the strangulation itself were cruel, but not "especially so," for any forcible killing entails some violence toward the victim. There is no evidence the acts were performed for the satisfaction of inflicting either mental or physical pain or that pain existed for any prolonged period of time.
In order for aggravating circumstance (1)(d) to be present, the method of killing must entail something more than the ordinary circumstances which attend any death-dealing violence. [In \textit{State v. Reeves} aggravating circumstance (1)(d) was held not to be present where a murder was achieved "swiftly and suddenly," but was held to be present in another murder in which the victim, who "did not die quickly," was subjected to sexual penetration while conscious and defending herself. . . . In contrast, the sexual acts in the present case, as noted earlier, were practiced either on a woman who was unconscious or in whom life had ceased to exist.

\textit{Id.}

\textsuperscript{47} Id. at 725, 371 N.W.2d at 721.

\textsuperscript{48} Id.

\textsuperscript{49} Id.

\textsuperscript{50} Id. at 726, 371 N.W.2d at 721 (Boslaugh, J., dissenting).

\textsuperscript{51} Id. Quoting from the decision of the sentencing panel, Judge Boslaugh wrote: "The only logical conclusion for the theft of these items is that they were stolen by the defendant to avoid the possibility that they might later be traced to the defendant."

\textit{Id.}

\textsuperscript{52} Id. at 727, 371 N.W.2d at 721 (Boslaugh, J., dissenting).
and took the items he had brought with him back to his home.\textsuperscript{53} All of these facts indicated to the dissenters that Hunt had attempted to conceal his identity.\textsuperscript{54}

Moreover, Judge Boslaugh concluded that the murder was "especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."\textsuperscript{55} In determining that Hunt's behavior satisfied the "exceptional depravity" aggravating circumstance, one of the facts relied upon by the dissent was that Hunt had randomly selected his victim.\textsuperscript{56} According to the dissent, among the facts which brought this murder within the ambit of aggravating circumstance (1)(d) were: the victim's plea for life before Hunt stuffed the panties into her mouth, Hunt's strangulation of the victim, and the placement of the victim face down in the water-filled bathtub.\textsuperscript{57}

\section*{BACKGROUND}

\textbf{STATE IMPOSITION OF THE DEATH PENALTY: UNITED STATES SUPREME COURT REVIEW}

The modern statutory scheme of aggravating and mitigating circumstances evolved in the wake of \textit{Furman v. Georgia},\textsuperscript{58} in which several people on death row appealed their death sentences, and the appeals were consolidated to determine whether the state's imposition of the death penalty was constitutional.\textsuperscript{59} Although each of the nine Justices wrote separate opinions, a plurality of the Court\textsuperscript{60} held unconstitutional those statutory schemes that provided juries with the unfettered discretion to decide who should be subject to the death penalty.\textsuperscript{61} The opinions of Justices Douglas, Stewart, and

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\bibitem{53} Id. at 727, 371 N.W.2d at 722 (Boslaugh, J., dissenting).
\bibitem{54} Id.
\bibitem{55} Id. In determining that aggravating circumstance (1)(d) existed, Judge Boslaugh, quoting the sentencing panel, opined: "This murder displays a callous, cold-blooded and cruel disregard for human life. This murder also manifests a shocking display of maliciousness and ruthlessness in that the victim was selected at random and hunted down. The murder of Beverly K. Ramspott manifested exceptional depravity by ordinary standards of morality and intelligence. The acts of killing this defenseless woman, Beverly K. Ramspott, was totally and senselessly bereft of any regard for human life.
\bibitem{56} Id. at 729, 371 N.W.2d at 723 (Boslaugh, J., dissenting).
\bibitem{57} Id.
\bibitem{58} Id. at 730, 371 N.W.2d at 723-24 (Boslaugh, J., dissenting).
\bibitem{59} 408 U.S. 238 (1972).
\bibitem{60} Id. at 239.
\bibitem{61} Id. at 240.
\bibitem{62} In holding the death penalty unconstitutional, Justice Douglas wrote that "we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should
White revealed the theme that the absence of sentencing standards made the states' imposition of the death penalty unconstitutional; accordingly, statutory provisions that afforded great discretion to judges or juries were unconstitutional.  

After Furman, state legislatures began to reconstruct their death penalty statutes. One of the first statutes enacted was Florida's criminal sentencing statute, which listed aggravating and mitigating circumstances to be considered by the judge and jury in order to limit discretion in sentencing and to provide for the even-handed, non-arbitrary imposition of the death sentence. Specifically, the Florida statute contained the so-called "catch-all" aggravating circumstance, which would allow the death sentence to be imposed if the murder was "especially heinous, atrocious, or cruel." The new statutes, which provided for the consideration of aggravating and mitigating circumstances when determining whether to impose the death penalty, were found to be constitutionally valid in Gregg v. Georgia and Godfrey v. Georgia.

In Gregg, the defendant was convicted of robbery and murder and was sentenced to death. The Court allowed a limited grant of certiorari to determine whether the statutory aggravating circumstances were vague and overbroad. After observing that the "punishment of death does not invariably violate the Constitution," the Court held that although all murders could be considered depraved,
the Georgia Supreme Court's narrow interpretation of the aggravating circumstances standard was constitutional.\textsuperscript{71} The \textit{Godfrey} Court was specifically concerned with the constitutionality of the "catch-all" language which provided for the imposition of the death penalty when a person committed a murder that "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."\textsuperscript{72} The Supreme Court determined that Georgia's statute was constitutional when the state court consistently applied a narrow construction of the broad statutory language.\textsuperscript{73}

Similarly, in \textit{Proffitt v. Florida},\textsuperscript{74} the revised Florida capital punishment statutory scheme of aggravating and mitigating circumstances was held constitutionally valid.\textsuperscript{75} The Supreme Court determined that the "catch-all" provisions of the new statutes were to be reviewed by the Court as they were construed by the state's highest court.\textsuperscript{76} The Supreme Court noted that the statute required "the trial judge to focus on the circumstances of the crime and the character of the individual defendant,"\textsuperscript{77} and that "trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life."\textsuperscript{78} The Florida scheme provided that the trial court's imposition of the death sentence was to be automatically reviewed by the state supreme court in order to obtain consistent results.\textsuperscript{79} Such automatic appellate review indicated to the Court that the scheme, on its face, was constitutional.\textsuperscript{80}

Finally, in \textit{Zant v. Stephens},\textsuperscript{81} the Court was asked to determine whether a state supreme court could rely upon aggravating circumstances other than those found by the trial court.\textsuperscript{82} In affirming the decision of the state supreme court, the Court held that the statutory scheme of aggravating circumstances was constitutionally required in order to adequately limit the class of defendants eligible for the

\textsuperscript{71} \textit{Id.} at 207. In determining that the aggravating circumstance was constitutional, the Court noted: "While such a phrase might be susceptible of an overly broad interpretation, the Supreme Court of Georgia has not so construed it." \textit{Id.} at 202.

\textsuperscript{72} \textit{Godfrey}, 446 U.S. at 422 (quoting GA. CODE ANN. § 27-2534 (b)(7) (Harrison 1978)).

\textsuperscript{73} \textit{Id.} at 428.

\textsuperscript{74} 428 U.S. 242 (1976).

\textsuperscript{75} \textit{Id.} at 253.

\textsuperscript{76} \textit{Id.} at 255.

\textsuperscript{77} \textit{Id.} at 251.

\textsuperscript{78} \textit{Id.} at 253.

\textsuperscript{79} \textit{Id.}

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} 462 U.S. 862 (1983).

\textsuperscript{82} \textit{Id.} at 864.
death sentence. In sum, as one commentator has concluded: "[T]he Court's initial approval of the Georgia and Florida statutes was tentative, contingent upon the state courts' adopting constructions narrowing the broad language."84

THE NEBRASKA DEATH PENALTY STATUTES

Basic Procedure

In light of the United States Supreme Court decisions which created new standards for imposing the death sentence, Nebraska enacted a death penalty statute. Sections 29-2519 through 29-2546 of the Nebraska Revised Statutes provide for statutory procedures in murder cases for the imposition of the death penalty. The Nebraska aggravating circumstance statute, as designed by the legislature, is quite similar to the Model Penal Code, and meets the standards set forth in Furman. Moreover, the purpose of the entire legislative scheme for sentencing a first degree murder defendant to death is to insure uniformity in sentencing. Once a defendant has been found guilty of first degree murder, the defendant may be sentenced to life imprisonment or death by electrocution.

Nebraska law provides that a panel of three district court judges may be convened to sentence a first degree murder defendant and, further, that the judge who presided over the trial may be a member of the panel. The sentencing provision requires that all relevant factors be considered by the sentencing panel when determining the appropriate sentence. Accordingly, evidence deemed to be of "pro-

83. Id. at 878.
84. Mello, supra note 63, at 527.
85. NEB. REV. STAT. 29-2519 to -2546 (Reissue 1985).
86. Id.
87. MODEL PENAL CODE § 210.6(3)(h) (1980). The model code provides that the death sentence may be imposed if the murder was "especially heinous, atrocious or cruel manifesting exceptional depravity." Id. The Nebraska Statute contains additional language which adds "manifested exceptional depravity by ordinary standards of morality and intelligence." NEB. REV. STAT. § 29-2523(1)(d) (Reissue 1985).
88. NEB. REV. STAT. §§ 29-2519, -2521.01 (Reissue 1985). The legislative intent of the aggravating circumstance statute was to prevent the arbitrary and prejudicial imposition of the death sentence. Id. § 29-2521.01(2). See supra notes 58-62 and accompanying text.
89. NEB. REV. STAT. § 29-2521.01 (Reissue 1985).
90. Id. § 29-2522
91. Id. § 29-2532
92. Id. § 29-2520. The statute provides for three types of sentencing authorities: (1) The presiding district court judge; (2) a panel of three district court judges appointed by the Chief Justice of the Nebraska Supreme Court, including the presiding district court judge; or (3) if the presiding district court judge is incapacitated, three district court judges, none of whom presided over the trial, appointed by the Chief Justice of the Nebraska Supreme Court. Id.
93. Id. § 29-2521.
bative value" and matters pertaining to the aggravating and mitigating circumstances of section 29-2523 may be taken into consideration.  

**Review by the Nebraska Supreme Court**

Once sentence is passed on a criminal homicide defendant, the Nebraska Supreme Court will automatically review the case. According to section 29-2521.02, the Nebraska Supreme Court will review "(1) the facts, including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the imposed sentence." Furthermore, the court will compare prior criminal homicide cases with the case presently before the court. Under this comparative approach to criminal homicide cases, the legislature has mandated that "[n]o sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances."  

When reviewing a judge's application of the aggravating circumstances statute, the court should determine whether the sentencing authority properly weighed any aggravating and mitigating circumstances in the imposition of the sentence. If, for example, the court determines that the crime was "especially heinous," or that the defendant attempted to conceal the commission of a crime, these aggravating factors will work toward an imposition of the death sentence. If, however, the court finds that the defendant's young age played an important role in the crime, or that the defendant was suffering from an incapacity of some sort, these mitigating circum-

94. *Id.*
95. *Id.* § 29-2521.01 thru § 29-2521.03.
96. *Id.* § 29-2521.02.
97. *Id.* § 29-2521.03.
98. *Id.*
99. *Id.* § 29-2521.01(5), -2521.02.
100. *Id.* § 29-2523. Section 29-2523, the Nebraska aggravating circumstances statute, provides:

The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

1. **Aggravating Circumstances:**
   (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;
   (b) The murder was committed in an apparent effort to conceal the
stances would work toward a sentence of life imprisonment. Thus, the procedure adopted in Nebraska and interpreted by the supreme court guaranteed that "the discretion charged in Furman v. Georgia can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all."  

NEBRASKA DEATH PENALTY CASES

Aggravating Circumstance (1)(d) Defined

In State v. Rust, the Nebraska Supreme Court first interpreted the meaning of aggravating circumstance (1)(d) in section 29-2523 of the Nebraska Revised Statutes. Rust and two companions robbed the proprietor of a grocery store at gunpoint. While fleeing the scene of the crime, Rust fired several shots at police cruisers. Rust left the vehicle in which he was driving and continued his flight on foot. The police gave chase on foot, and Kellogg, a civilian, joined

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101. Id.
103. 197 Neb. 528, 250 N.W.2d 867 (1977).
104. Id. at 538, 250 N.W.2d at 874. See supra note 100 and accompanying text.
105. Rust, 197 Neb. at 532, 250 N.W.2d at 871.
106. Id.
107. Id.
the pursuit. Rust shot Kellogg four times and "was observed to be shooting into Kellogg's body after Kellogg had fallen as a result of an earlier shot fired by Rust." Rust was convicted of murder and sentenced to death.

On appeal, the Nebraska Supreme Court agreed with the trial court that aggravating circumstance (1)(d) did not exist. The sentencing panel determined that all murders could be characterized by the adjectives used in the statute, but the words "especially" and "exceptional" made it necessary for those characteristics to be present in a much greater degree. The panel, moreover, articulated that "murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering" would make such a crime "especially heinous," thus qualifying under aggravating circumstance (1)(d). The court concluded that a murder that was "coldly calculated" would fit this description of subsection (1)(d). The court agreed with the panel's interpretation and application of aggravating circumstance (1)(d). However, the court held that other aggravating circumstances outweighed the mitigating circumstances and affirmed the death sentence.

Decided on the same day as Rust, State v. Simants added a new wrinkle to the interpretation of the section (1)(d) aggravating circumstance by de-emphasizing the pain and suffering analysis discussed in Rust. The defendant, Simants, spent most of one afternoon and early evening drinking in a bar. That evening, Simants' sister drove him to her home, where Simants obtained a rifle from his brother-in-law's bedroom, and went to the home of James and

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108. Id. at 532-33, 250 N.W.2d at 871. During the exchange of gunfire, one police officer was severely wounded, and another officer was slightly wounded. Rust was wounded during the "fire fight." Id. at 533, 250 N.W.2d at 871.

109. Id.

110. Id. at 530, 250 N.W.2d at 870.

111. Id. at 539, 250 N.W.2d at 874. The sentencing panel termed the existence of aggravating circumstance (1)(d) as "a close question," but found that it did not exist because "the murder was effected by three bullets causing almost instantaneous death and the imposition of extreme suffering on the victim was not involved." Id.

112. Id. at 538, 250 N.W.2d at 874.

113. Id. at 538-39, 250 N.W.2d at 874.

114. Id. at 539, 250 N.W.2d at 874. The determination that a coldly calculated murder would be sufficient to fulfill the requirements of aggravating circumstance (1)(d) was announced in State v. Holtan, 197 Neb. 544, 547, 250 N.W.2d 876, 880 (1977), on the same day that Rust was decided. Id. See infra notes 139-42 and accompanying text.

115. Rust, 197 Neb. at 539, 250 N.W.2d at 874.

116. Id. at 543, 250 N.W.2d at 876.


118. See infra notes 131-38 and accompanying text. The court determined that the aggravating circumstance could be applied using the post-mortem attack on the victim. Id.

119. Simants, 197 Neb. at 552, 250 N.W.2d at 884.
Audrey Kellie. The evidence showed that Simants attempted to have sexual relations with Florence Kellie, the ten-year old granddaughter of the Kellies. At some point during that attempt, Simants shot and killed the child. Thereafter, Simants heard James Kellie approach, whereupon Simants shot and killed Kellie. Later, as Audrey Kellie entered the house, Simants killed her with a shot to the forehead. The Kellies' son, David, and his two children, Daniel and Deanna, entered the house; Simants shot and killed all three of them. There was some evidence that David's seven-year old daughter, Deanna, had been sexually molested. Simants was convicted of six counts of first degree murder and was sentenced to death.

The Simants court again undertook the interpretation of aggravating circumstance (1)(d). The supreme court reviewed the sentencing panel's finding that aggravating circumstance (1)(d) applied to the murders of the three female victims, but not to the three male victims. The sentencing panel found that the first murder was committed while Simants was sexually assaulting ten-year old Florence, concluding that the sexual assault must have caused pain. The sentencing panel, moreover, found that the circumstance applied to the murder of the Kellies' seven-year old granddaughter, Deanna. Emphasizing the difference in the ages of Simants and Audrey Kellie, and the post-mortem assault upon Audrey Kellie's body, the panel brought that murder within aggravating circumstance

120. Id. at 552, 250 N.W.2d at 884-85. While at his sister's house, Simants visited with his thirteen-year old nephew. Simants left, telling his nephew not to allow the children to leave the house. Approximately forty-five minutes later, Simants returned to his sister's house, unloaded the rifle, put it back in place, and wrote a note that read: "I am sorry to all-it is the best way out-do not crie [sic]." Then, Simants told his nephew that he had killed all of the Kellies. Id. at 552-53, 250 N.W.2d at 885.
121. Id. at 553, 250 N.W.2d at 885.
122. Id.
123. Id.
124. Id. The evidence indicated that Audrey Kellie had experienced some sexual molestation. Id.
125. Id.
126. Id.
127. Id. at 552, 250 N.W.2d at 884.
128. Id. at 566, 250 N.W.2d at 891.
129. Id. at 565-66, 250 N.W.2d at 891.
130. Id. The panel determined that "[t]he sexual assault caused pain, and when the young girl cried out she was killed and there was further sexual assault upon her after death." Id.
131. Id. at 566, 250 N.W.2d at 891. The court "specifically found that the murder perpetrated upon Deanna, the seven-year-old child, coupled with the bruises displayed on the inside of her thighs in the immediate vicinity of her pubic area, were sufficient to bring it within the ambit of the standard." Id.
On appeal, the court recognized that all murders could fall within the subsection (1)(d) circumstance; however, the legislature intended that the statute require an interpretation which would limit a sentencing panel's discretion to place all murders under the purview of aggravating circumstance (1)(d). Using the Florida Supreme Court decision in State v. Dixon, the Nebraska Supreme Court adopted Florida's interpretation of "heinous, atrocious, or cruel." The standard adopted by the Nebraska court defined the terms of the statute "to be directed to the conscienceless or pitiless crime which is unnecessarily torturous to the victim." In addition, the Nebraska Supreme Court noted that the Florida statute did not contain the "exceptional depravity by ordinary standards of morality and intelligence" language found in the Nebraska statute. Thus, the Simants court found that the "exceptional depravity" of circumstance (1)(d) was present, and the court affirmed the death sentence.

Continuing the analysis of the Simants line of cases, which de-emphasized the pain and suffering analysis of Rust, the court in State v. Holtan continued to apply the "especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence" language by de-emphasizing the pain and suffering of the victim. In Holtan, the defendant was convicted of first degree murder and sentenced to death after he robbed a bar, killed the bartender, and wounded one other person. The court agreed with the panel's finding of the presence of aggravating circumstance (1)(d) and affirmed Holtan's death sentence.

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132. Id.
133. Id.
134. 283 So. 2d 1 (Fla. 1973). See infra notes 203-09 and accompanying text.
135. Simants, 197 Neb. at 566, 250 N.W.2d at 891.
136. Id.
137. Id. The court found:
   In interpreting this portion of the statute, the key word is "exceptional." It might be argued that every murder involves depravity. The use of the word "exceptional," however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. We find such depravity was present in the murder of the three females.
   Id.
138. Id.
139. 197 Neb. 544, 250 N.W.2d 876 (1977).
139. Id. at 547, 250 N.W.2d at 880.
140. Id. at 545, 250 N.W.2d at 879.
141. Id. at 547, 250 N.W.2d at 881. In affirming the sentencing court's determination that aggravating circumstance (1)(d) was present, the court added: "Although torture was not involved, it is clear that this element was applicable. The defendant killed, and attempted to kill, unresisting victims of the robbery. The act was totally
Following Holtan, the Nebraska Supreme Court in State v. Peery found aggravating circumstance (1)(d) present, even in the absence of pain and torture suffered by the victim. The defendant, Peery, entered a coin shop operated by Marianne Mitzer, bound Mitzer's arms and legs, and placed a gag in her mouth. Peery shot Mitzer in the head three times, killing her instantly. Although the victim died instantly, the court found that the existence of aggravating circumstance (1)(d) was a "close question," but the court determined that the victim suffered torture when the defendant placed the gun in her mouth. The court further determined that even if the victim was dead when the gun was placed in her mouth, "an attack on a body after death may be considered in evaluating the existence of this circumstance [(1)(d)]." The helplessness of the victim and the nature of the wounds indicated to the court that the murder was "coldly calculated," and that the defendant's state of mind was "bereft of regard for human life."

Using the Rust pain and suffering analysis and the Simants-Peery-Holtan state of mind analysis, the Nebraska Supreme Court in State v. Moore announced a two-facet approach to aggravating circumstance (1)(d). Moore was convicted of first degree murder in the deaths of two cab drivers. In each instance, Moore would call a cab and, after observing the driver to make sure he would be a suitable victim, Moore would enter the cab, perpetrate a robbery, and kill the driver.

In Moore, the court agreed with the sentencing panel that aggravating circumstance (1)(d) was present, and the court affirmed Moore's death sentence. Applying the definition provided in Rust, the Moore court found that two separate circumstances may exist which bring a murder within the ambit of aggravating circumstance (1)(d). The first circumstance, "especially heinous, atrocious, [or]
cruel," was defined as a "'pitiless crime which is unnecessarily torturous to the victim' and to cases where torture, sadism, or the imposition of extreme suffering exists."156 The second circumstance within subsection (1)(d), as set forth in Moore, described situations "where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence."157 Furthermore, this second circumstance could exist when a state of mind was "totally and senselessly bereft of any regard for human life."158 The Moore court agreed with the sentencing panel that the second circumstance existed because the murders were "coldly planned," as the victims were selected on the basis of the defendant's ability to control them, and that the murders would have continued as long as Moore needed money.159

Finally, the Nebraska Supreme Court, in State v. Reeves,160 returned to the pain and suffering approach first articulated in Rust.161 Reeves was convicted of the felony murders of Janet Mesner and Victoria Lamm.162 Reeves stabbed Janet Mesner seven times in the chest while he sexually assaulted her.163 In addition, Reeves fatally stabbed Victoria Lamm, who inadvertently walked in on the ass-

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156. Id. at 470, 316 N.W.2d at 41 (citations omitted).
157. Id. (quoting State v. Stewart, 197 Neb. 497, 522, 250 N.W.2d 849, 864 (1977)).
158. Id. at 470-71, 316 N.W.2d at 41.
160. Id. at 226-27, 344 N.W.2d at 446-47. See supra notes 103-16 and accompanying text.
161. Id. at 208-09, 344 N.W.2d at 438-39.
162. Id. at 227, 344 N.W.2d at 447.
The court concluded that aggravating circumstance (1)(d) was present with respect to the murder of Janet Mesner. The court noted that Janet Mesner had lived for a substantial period of time after being fatally wounded; moreover, she made several statements to Reeves that she was in a great deal of pain. The court, however, disagreed with the sentencing panel’s finding that aggravating circumstance (1)(d) was present with respect to the murder of Victoria Lamm. The court concluded that Victoria Lamm died “swiftly and suddenly” and was not sexually assaulted. The Reeves court held that Victoria Lamm’s murder did not satisfy the standard articulated in circumstance (1)(d). However, the court affirmed Reeves’ death sentence for the murder of Janet Mesner.

In State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977), the court vacated the defendant’s death sentence. The defendant was convicted of the first degree murder of a man who was supplying the defendant with drugs. The defendant shot and killed the drug supplier and set the supplier’s van on fire. The murder was not, according to the court, “especially heinous, atrocious, or cruel” because the victim died instantly. Furthermore, the court found that the murder was not “exceptionally depraved by ordinary standards of morality and intelligence,” as the defendant set fire to the van in order to conceal his identity or the commission of a crime, and that the victim had died instantly from the gunshot wound and not from the van fire.

In State v. Otey, 205 Neb. 90, 287 N.W.2d 36 (1979), the court affirmed a defendant’s death sentence. In Otey, the defendant, during a burglary, sexually assaulted the victim, stabbed her, beat her head with a hammer, and finally strangled her with a belt. Affirming the defendants’ death sentence, the court agreed with the sentencing panel that aggravating circumstance (1)(d) was present to a “great degree.”

Chief Justice Krivosha, writing for the court, affirmed the defendants’ death sentence in State v. Anderson & Hochstein, 207 Neb. 51, 296 N.W.2d 440 (1980). The defendants were convicted of first degree murder in a “murder for hire” case. The court found that the defendants’ death penalty was an “occupational hazard” and that the murder displayed an absolute disregard for human life.

The court also affirmed a death sentence in State v. Harper, 208 Neb. 568, 304 N.W.2d 663 (1981), in which Steven R. Harper placed a toxic chemical in the food in Sandra Johnson’s refrigerator. Harper was angry because Johnson had married someone other than Harper. Harper placed a toxic chemical in the food. Sandra Johnson’s husband, Duane, and nephew, Chad Shelton, were both killed by the toxic chemical in the food. Applying the facts
Nebraska Supreme Court Review of First Degree Murder Cases

The Nebraska Supreme Court's interpretation of aggravating circumstance (1)(d) was developed in a series of Nebraska cases beginning with *Rust*172 and ending with *Reeves*.173 The adoption of the Nebraska death penalty statute174 raised questions as to which cases with the same or similar circumstances the supreme court was required to compare with the case presently before the court, in order to obtain proportionality in death sentencing pursuant to the United States Supreme Court decision in *Furman*.175 In *State v. Williams*,176 the Nebraska Supreme Court initially adopted the position that proportionality in death sentencing could be obtained by reviewing other cases in which the death penalty was imposed.177 The majority's position in *Williams* was attacked in Chief Justice Krivosha's dissent:

[I]t is my belief that the fact that this case squares with the seven other cases in which the death penalty has been imposed does not answer the question. I am more concerned, as I believe L.B. 711, Laws 1978, requires me to be concerned, as to how this case squares with the remaining 25 cases where the death penalty was not imposed. . . . [I]t seem[s] clear to me that not only is this court required to examine aggravating and mitigating circumstances but in addition to that we are supposed to in some manner place each concerning the slow and painful death suffered by the victims, the district court found that aggravating circumstance (1)(d) existed. *Id.* at 575, 304 N.W.2d at 668. The district court further found that both murders were "conscienceless" and "pitiless" and were "unnecessarily torturous to the victim." *Id.* at 576, 304 N.W.2d at 668. Finally, the district court found that the murders were so coldly calculated as to indicate a state of mind "totally and senselessly bereft of regard for human life." *Id.* Affirming the defendant's death sentence, the supreme court concluded that the sentencing court had correctly weighed the aggravating and mitigating circumstances. *Id.*

172. 197 Neb. at 538-39, 250 N.W.2d at 874.
173. 216 Neb. at 226-27, 344 N.W.2d at 446-47.
174. NEB. REV. STAT. § 29-2521.03 (Reissue 1985). Section 29-2521.03 provides:
The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.
175. See supra note 58 and accompanying text.
177. *Id.* at 77, 287 N.W.2d at 29. The *Williams* court stated:
In all the death penalty cases previously affirmed or now pending in this court, each has involved at least three separate and distinct statutory aggravating factors and only one or no statutory mitigating factors. The case now before us also fits that pattern, and, in addition, is the only death sentence case now pending which involves multiple first degree murder.

*Id.*
first degree murder case one on top of the other to see whether or not they all conform. While I may be the first to concede that imposing such a duty upon the court is at best difficult and perhaps impossible, nevertheless, I cannot find how I can ignore that requirement.178

For Chief Justice Krivosha, it was difficult, if not impossible, to make the necessary distinctions from other first degree murder cases to impose the death penalty in Williams.179

The majority, in State v. Reeves,180 finally adopted Chief Justice Krivosha’s position in Williams181 that all first degree murder cases must be analyzed as opposed to only all death penalty cases. Reeves stood for the new proposition that a first degree murder case required “extensive review and analysis of all first degree murder convictions for offenses committed on or after April 20, 1973, including cases presently pending in the court on appeal.”182

THE FLORIDA STATUTE AND CASES

The Florida aggravating and mitigating circumstances statute is similar to the Nebraska aggravating and mitigating circumstances statute.183 The Florida statute provides that a death sentence may be imposed when “[t]he capital felony was especially heinous, atrocious, or cruel.”184 In Simants, the Nebraska Supreme Court adopted the Florida Supreme Court’s interpretation of what is “especially heinous, atrocious, or cruel,”185 as delineated in State v. Dixon.186 In Dixon, Justice Adkins, writing for a five-member majority, concluded that the meaning of the terms in the statute was “a matter of common knowledge.”187 Justice Adkins continued:

It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be in-

178. Id. at 81-84, 287 N.W.2d at 32-33 (Krivosha, C.J., dissenting).
179. Id. at 84, 287 N.W.2d at 33 (Krivosha, C.J., dissenting).
181. See supra note 178 and accompanying text.
182. Reeves, 216 Neb. at 230, 344 N.W.2d at 448.
183. Compare NEB. REV. STAT. 29-2523 (1)(d) (Reissue 1985) (stating that “[t]he murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence’) with FLA. STAT. ANN. 921.141 (5)(h) (West 1985) (stating that “[t]he capital felony was especially heinous, atrocious, or cruel.”).
184. FLA. STAT. ANN. § 921.141 (5)(h) (West 1985).
185. See supra notes 134-35 and accompanying text.
186. 283 So. 2d 1 (Fla. 1973).
187. Id. at 9.
cluded are those capital crimes where the actual commission
of the capital felony was accompanied by such additional acts
as to set the crime apart from the norm of capital felonies -
the conscienceless or pitiless crime which is unnecessarily
torturous to the victim.\textsuperscript{188}

\textbf{The Development of Aggravating Circumstance (5)(h) in Florida}

The Florida Supreme Court in \textit{White v. State}\textsuperscript{189} applied the stan-
dard of aggravating circumstance (5)(h) as interpreted in \textit{Dixon}.\textsuperscript{190}
In \textit{White}, the defendant was convicted of six counts of first degree
murder, two counts of attempted first degree murder, and four
counts of robbery.\textsuperscript{191} John Ferguson, an accomplice of White, posed
as an employee of a power company and gained entrance to the house
where Margaret Wooden was staying.\textsuperscript{192} Ferguson drew a weapon
and tied Margaret Wooden's hands behind her back, placing a blind-
fold over her eyes.\textsuperscript{193} Accomplishing the takeover of the house,
White and Marvin Francois joined Ferguson in the house.\textsuperscript{194} Later,
while the three intruders were robbing the house, Livingston
Stocker, the homeowner, arrived with five friends.\textsuperscript{195} Stocker and
his guests were forced to lie face down on the floor while their hands
were tied behind their backs.\textsuperscript{196} Soon thereafter, Margaret Wooden's
boyfriend arrived at the home and was also tied up.\textsuperscript{197} A mask worn
by one of the men slipped off his face, and the intruders discussed
the need for killing Wooden and her friends.\textsuperscript{198} Thereafter, Ferguson
shot Wooden and her boyfriend in the back of the head, while Fran-
cois shot the other six people in the head.\textsuperscript{199} Upon his conviction,
White was sentenced to death.\textsuperscript{200}

On appeal, the Florida Supreme Court decided that even though
the victims were killed instantly, aggravating circumstance (5)(h)
was present because the victims were alive for a period of time and

\textsuperscript{188} Id.
\textsuperscript{189} 403 So. 2d 331 (Fla. 1981).
\textsuperscript{190} Id. at 338-39.
\textsuperscript{191} Id. at 333.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id. The intruders "ransacked" the house looking for drugs, money, and jew-
elry. Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Id. As the victims were bound and blindfolded, they were also searched for
money or drugs. Id.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Id. Wooden and her boyfriend were removed to the bedroom, where they
were shot separately from the others. Id.
agonized about their impending deaths. The court emphasized the protracted mental anguish of the victims prior to their execution as the distinguishing factor in finding the existence of aggravating circumstance (5)(h).

In contrast, in Clark v. State, the defendant’s sentence of death was affirmed but the Florida Supreme Court did not affirm on the basis of the heinous aggravating circumstance. Clark and an accomplice entered a sign shop owned by Felix and Dorothy Satey, shot Felix Satey twice, and robbed him. Clark then entered the adjoining residence and killed seventy-four-year-old Dorothy Satey, who was confined to a wheelchair. Clark shot her in the head despite the pleas of Felix Satey not to harm his wife. The court concluded that shooting someone in the head does not qualify under aggravating circumstance (5)(h), since no evidence existed as to how much pain Dorothy Satey suffered or how long the victim lived after being shot. Furthermore, there was no evidence indicating “helpless anticipation of impending death” which might have served to prove the existence of the circumstance. Moreover, the court concluded that “it is the effect upon the victim herself that must be considered in determining the existence of this aggravating factor.”

Nebraska First Degree Murder Cases — Life Sentences

In Reeves, the Nebraska Supreme Court determined that it was statutorily bound to review and analyze all first degree murder cases in order to determine whether the sentence in the first degree murder case before the court was consistent with sentences imposed in similar cases. Once a defendant is convicted of first degree murder, the defendant is faced with two sentencing alternatives. In some cases, defendants are sentenced to death, while in others, because the facts surrounding the murder were less “aggravating,” the defendants are sentenced to life imprisonment. Reeves dictates
that the court will compare the death sentence on review with factual circumstances of all first degree murders, including non-capital murders, in order to ensure that the death sentence is imposed proportionately. The cases that follow demonstrate factual circumstances in which the Nebraska Supreme Court affirmed the defendants' life sentences.

In *State v. Nokes*, the defendant was convicted of one count of first degree murder and one count of second degree murder. Nokes became involved in an extra-marital sexual relationship with Kay Hein. Edwin and Wilma Hoyt, Hein's parents, accused Nokes of attempting to blackmail Hein. Nokes and his wife drove to the Hoyts' home with the intention to straighten out the misunderstanding; however, Nokes was carrying a revolver under his coat. After discussing the situation at the Hoyts' home, Nokes and his wife, along with the Hoyts, agreed to go to Nokes' home and have Hein meet them there.

Once at Nokes' residence, Edwin Hoyt became angered with Nokes and prepared to strike him, whereupon Nokes drew the revolver he had under his coat and fired one shot, killing Edwin Hoyt. Wilma Hoyt attempted to flee, and when she was about two steps up the stairs leading to the exit, Nokes shot her in the back, killing her.

Nokes and his wife decided to dispose of the bodies; Nokes cut up the bodies with a butcher knife, wrapped the pieces in paper, and placed them in a freezer. That evening, Nokes loaded the body parts into his car and drove to a lake where he dropped the pieces into the water. A three-judge panel sentenced Nokes to life imprisonment for the first degree murder death of Wilma Hoyt, and the district judge sentenced Nokes to a consecutive life term in prison for the second degree murder death of Edwin Hoyt. The Nebraska Supreme Court affirmed the sentences.

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215. *See supra* notes 180-82.
216. 192 Neb. 844, 224 N.W.2d 776 (1975).
217. *Id.* at 845, 224 N.W.2d at 777.
218. *Id.* at 846, 224 N.W.2d at 778.
219. *Id.*
220. *Id.*
221. *Id.* The Hoyts rode with the defendant to the Nokes' home in McCook. *Id.*
222. *Id.* at 846-47, 224 N.W.2d at 778.
223. *Id.* at 847, 224 N.W.2d at 778.
224. *Id.*
225. *Id.*
226. *Id.* at 847, 224 N.W.2d at 778.
227. *Id.* at 845, 224 N.W.2d at 777.
228. *Id.* at 851, 224 N.W.2d at 780.
In *State v. Record*, the defendant was sentenced to life in prison for first degree murder. Record and Domalakes, a friend of Record's, were driving in Domalakes' car when Record decided to rob someone. Domalakes drove the car to a secluded area and parked on the side of a road. When the victim's car drove past Domalakes' parked car, Domalakes pursued it, pulled alongside of it as if to pass, and Record fired a rifle shot at the victim, hitting him in the head. The victim's car left the road and came to rest, while Domalakes and Record drove on to dispose of the murder weapon. Upon returning to the victim's car, Record's robbery attempt was frustrated when Record became frightened by other cars passing by the crime scene. Record was sentenced to life imprisonment for first degree murder, and the sentence was affirmed by the Nebraska Supreme Court.

Finally, the defendant in *State v. Jones* was sentenced to life imprisonment for the shooting death of Elijah Kelly. Jones entered a club and requested an apology from Kelly, because three days earlier Kelly had fired several shots through Jones' apartment door. Kelly stated that he desired an apology from Jones, and, as Kelly prepared to leave, Jones shot Kelly several times. Kelly, who was unarmed, attempted to crawl away on the floor; Jones, however, followed Kelly and fired the remaining bullets into Kelly's body. After being convicted of first degree murder, Jones was sentenced to life in prison; Jones' sentence was affirmed by the Nebraska Supreme Court.

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230. Id. at 530, 253 N.W.2d at 848.
231. Id. at 531, 253 N.W.2d at 848.
232. Id.
233. Id. at 530-32, 253 N.W.2d at 848-49.
234. Id. at 532, 253 N.W.2d at 849.
235. Id.
236. Id. at 533, 253 N.W.2d at 849.
238. Id. at 436, 350 N.W.2d at 12.
239. Id. at 437, 350 N.W.2d at 12.
240. Id.
241. Id. When police officers arrived on the scene, the defendant stated: "I did it. I had to do it." Id. The defendant was arrested, but was not charged, for unknown reasons. It was not until the fall of 1982, when the defendant bragged about the crime to an undercover police officer, that the defendant was charged with the crime. Id.
242. Id. at 436, 350 N.W.2d at 12.
ANALYSIS

THE APPLICATION OF AGGRAVATING CIRCUMSTANCE (1)(d) IN STATE V. RUST

The preceding cases illustrate that the Nebraska Supreme Court, since the Rust decision, which focused upon the pain and suffering of the victim, has emphasized the second circumstance of aggravating circumstance (1)(d) which pertains to the defendant's depravity of mind. Initially, the court in State v. Rust announced a limited interpretation of aggravating circumstance (1)(d) by focusing upon the physical suffering of the victim. Yet, the same day, in State v. Simants and State v. Holtan, the court de-emphasized the pain and suffering analysis announced in Rust, focusing contemporaneously upon the state of mind of the defendant and the defendant's post-mortem attacks inflicted upon the victim. The Nebraska Supreme Court, however, signaled a return to the more limited Rust analysis in State v. Reeves by emphasizing only the pain and suffering of the victim. Reeves, nevertheless, was the calm before the storm. The storm occurred in State v. Hunt, which was a continuation of the Rust-Reeves pain and suffering analysis, but with factual circumstances that aroused strong public emotion.

Although the emotional storm surrounding Hunt tended to cloud the legal issues as presented to the public, the Nebraska Supreme Court correctly decided the Hunt case in accordance with the first circumstance of aggravating circumstance (1)(d), which pertains to the conscious pain and suffering of the victim. The Hunt majority's interpretation and application of aggravating circumstance (1)(d) was correct for two reasons. First, the Hunt majority's factual analysis signaled a proper return to the narrow interpretation of aggravating circumstance (1)(d), which focuses upon the pain and suffering of the victim as a basis to impose the death penalty. Second, as a re-

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244. 197 Neb. 528, 250 N.W.2d 867 (1977).
245. See supra notes 103-16 and accompanying text.
248. See supra notes 117-38, 139-42 and accompanying text.
250. See supra notes 160-71 and accompanying text.
252. See supra notes 45-46 and accompanying text.
253. See supra notes 45-46 and accompanying text.
254. See supra notes 45-49 and accompanying text. In Hunt, the court did not find aggravating circumstance (1)(d) because the victim was unconscious; thus, she did not consciously experience the brutal treatment inflicted upon her by the defendant. Hunt, 220 Neb. at 725-26, 371 N.W.2d at 721.
sult of Hunt, the Nebraska Supreme Court's application of aggravating circumstance (1)(d) tends to narrow the class of defendants subject to the imposition of the death penalty. By applying a pain and suffering analysis, the court provides for a consistent and uniformly applied sentencing standard that avoids the confusion surrounding the application of the state of mind or the second circumstance of aggravating circumstance (1)(d). Thus, the court's limitation upon the application of aggravating circumstance (1)(d) is consistent with the United States Supreme Court's decision in Zant v. Stevens, which requires a state court to limit the class of defendants subject to the death penalty.

The Nebraska Supreme Court began its journey into the world of interpreting the phrase “especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence” in Rust. A reexamination of the facts in Rust illustrates that simply shooting a person was not “especially heinous, atrocious, [or] cruel” and did not “manifest exceptional depravity by ordinary standards of morality and intelligence.” The court concluded that in order for aggravating circumstance (1)(d) to be present, something more than just a murder must be found in the facts surrounding the crime. Specifically, torture or sexual abuse could bring a murder within the ambit of aggravating circumstance (1)(d).

THE CONSISTENCY OF RUST WITH THE FLORIDA APPROACH

The type of analysis employed in Rust is consistent with how the Florida Supreme Court interprets and applies what is “especially heinous, atrocious, or cruel.” The Nebraska Supreme Court adopted in Simants the Florida construction of what was “especially heinous, atrocious, or cruel.”

The terms of Florida's aggravating circumstances statute have been interpreted as emphasizing the suffering of the victim. For example, in order to find that a crime was heinous, the crime would have to be “extremely wicked or shockingly evil.” The same
would be true for "atrocious," which was defined as "outrageously wicked and vile," as well as for "cruel," which was defined as "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others."\textsuperscript{266} The Florida Supreme Court, therefore, looked to those extra facts surrounding a murder to set it apart from "the norm" of murders.\textsuperscript{267}

Nevertheless, in White v. State\textsuperscript{268} the Florida Supreme Court found the existence of the aggravating circumstance even when all of the victims were shot in the head and died instantly.\textsuperscript{269} The court emphasized the mental anguish of the victims, because the victims were present while the perpetrators of the crime discussed the need to kill the victims.\textsuperscript{270} The "protracted mental anguish of the victim" factor was a form of torture, and enabled the court to find the presence of the aggravating circumstance.\textsuperscript{271} Accordingly, White is consistent with Rust in light of the courts' discussions and applications of the pain and suffering analysis.

In contrast, the aggravating circumstance was not found in Clark v. State.\textsuperscript{272} In Clark, the Florida court found that the victim was shot in the head and did not suffer from much, if any, pain.\textsuperscript{273} Furthermore, the victim did not suffer from the torture of "helpless anticipation of impending death"; therefore, the Clark court could not find the existence of the aggravating circumstance.\textsuperscript{274} Thus, it appears that the Florida Supreme Court would not find that a murder was "especially heinous, atrocious, or cruel" if the victim died immediately after being wounded or if the victim lost consciousness after being wounded. Consistent with White and Clark, the Nebraska Supreme Court's analysis in Rust would not find aggravating circumstance (1)(d) present if the victim did not encounter conscious and prolonged suffering.

THE SHIFT OF EMPHASIS IN SIMANTS-HOLTAN-PERRY-MOORE

In Simants, the Nebraska Supreme Court shifted the focus to the second circumstance of aggravating circumstance (1)(d).\textsuperscript{275} The court's shift in focus culminated in Moore, in which the court expressly recognized the existence of two separate facets within aggra-

\textsuperscript{266} See supra note 188.
\textsuperscript{267} See supra note 188.
\textsuperscript{268} 403 So. 2d 331 (Fla. 1981).
\textsuperscript{269} See supra note 201 and accompanying text.
\textsuperscript{270} See supra notes 190-202 and accompanying text.
\textsuperscript{271} See supra notes 201-02 and accompanying text.
\textsuperscript{272} 443 So. 2d 973 (1983).
\textsuperscript{273} See supra note 209 and accompanying text.
\textsuperscript{274} See supra note 210 and accompanying text.
\textsuperscript{275} See supra notes 137-38 and accompanying text.
The Moore court stated that the first facet of the aggravating circumstance provision provided that an "especially heinous, atrocious, [or] cruel" murder involved pain and suffering experienced by the victim, while the second facet provided that the "exceptionally depraved" murder involved the state of mind of the defendant. The factual circumstances that must be present in a murder in order for the murder to fall within the aggravating circumstance provision were found in three of the six murders in Simants. The three male victims did not suffer prolonged pain; however, the three female victims suffered sexual assaults, two of the sexual assaults occurring after death. The finding that aggravating circumstance (1)(d) was not applicable to the murder of the three male victims, in the absence of any pain and torture suffered by the victims, was consistent with the finding in Rust.

The Simants court found that the three female victims had all been shot and sexually abused; the court, therefore, decided that the victims endured pain. If the three female victims had suffered a great deal of pain, then the imposition of aggravating circumstance (1)(d) would have been consistent with Rust. The Simants court, however, went on to state that the aggravating circumstance would be present even if the female victims had not suffered pain. Using the language "manifested exceptional depravity by ordinary standards of morality and intelligence" in aggravating circumstance (1)(d), the court found the existence of aggravating circumstance (1)(d), even though the sexual assaults occurred after the victims' deaths.

Simants thus departed from the pain and suffering analysis defined in Rust. Simants applied the second facet found within aggravating circumstance (1)(d) that allow for the imposition of the death sentence even when the "depraved" act occurred during a post-mortem attack on the victim. According to the Rust court, the "especially heinous, atrocious, cruel" language of aggravating circumstance (1)(d) is directed toward physical suffering consciously encountered by the victim. Simants, however, used the "exceptionally depraved" language of aggravating circumstance (1)(d) to find the existence of the aggravating circumstance when the attack

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276. See supra notes 155-58 and accompanying text.
277. See supra notes 156-58 and accompanying text.
278. See supra note 129 and accompanying text.
279. See supra notes 129-38 and accompanying text.
280. See supra notes 129-32 and accompanying text.
281. See supra note 132 and accompanying text.
282. See supra notes 129-32 and accompanying text.
283. See supra note 132 and accompanying text.
284. See supra note 113 and accompanying text.
DEATH PENALTY

occurred after the victim's death. Based upon the courts reasoning in Simants, the "exceptionally depraved" language is directed toward the defendant's state of mind, not the conscious suffering of the victim. Therefore, in Holtan, the court reasoned that the simple shooting of a bartender fit within the aggravating circumstance because the murder was "totally and senselessly bereft of any regard for human life." 

Simants and Holtan served as the genesis for the implementation of this two-facet approach to aggravating circumstance (1)(d) in Peery and Moore. The court in Peery narrowly found aggravating circumstance (1)(d) when the defendant shot the victim in the head. Of the three shots fired, no evidence was adduced to determine which of the shots killed the victim; nonetheless, the victim died instantly. At least one time, the defendant placed the barrel of the weapon into the victim's mouth; therefore, the court determined that such an action could be characterized as torturous. Yet, no evidence indicated that the victim was still alive when the barrel of the weapon was placed in her mouth. Indeed, under the Rust approach, if there was no evidence that the victim was alive when she was "tortured," then the crime could not be considered "especially heinous." The Peery court, however, found that aggravating circumstance (1)(d) existed in light of the victim's helpless situation and the "coldly calculated" nature of the murder. The court held that an attack on the body after death may be a factual circumstance in which aggravating circumstance (1)(d) may be found.

Similarly, the Moore court found the existence of aggravating circumstance (1)(d) when the defendant "coldly planned" the murders of two cab drivers. The Moore court explicitly relied upon the second circumstance within aggravating circumstance (1)(d) in order to find the existence of the aggravating circumstance. In Rust, the court was unable to find the aggravating circumstance when a person

285. See supra note 132 and accompanying text.
286. See supra notes 131-32, 137-38 and accompanying text.
287. Holtan, 197 Neb. at 547, 250 N.W.2d at 880.
288. See supra notes 148, 151 and accompanying text.
289. See supra note 147 and accompanying text.
290. See supra notes 145-48 and accompanying text.
291. See supra note 148 and accompanying text.
292. See supra note 148 and accompanying text.
293. See supra notes 112-13 and accompanying text.
294. See supra note 149 and accompanying text.
295. See supra note 148 and accompanying text.
296. See supra note 159 and accompanying text.
297. See supra note 159 and accompanying text.
was shot and killed instantly. Yet, in Peery and Moore, in which the victims were shot and killed instantly, the court was able to find aggravating circumstance (1)(d), by applying the "exceptionally depraved" language of aggravating circumstance (1)(d).

In summary, unlike the Simants-Holtan-Perry-Moore line of cases, the Rust approach to aggravating circumstance (1)(d) contemplates a murder that involves acute physical suffering by the victim. Specifically, Rust indicates that torture, sadism, or sexual abuse may bring a murder within the ambit of aggravating circumstance (1)(d). The murder victim in Rust and the three male victims in Simants all died relatively soon after being shot. These victims were neither subjected to torture, sadism, nor sexual abuse; accordingly, aggravating circumstance (1)(d) was not present under these facts.

NARROWING THE CLASS OF DEFENDANTS ELIGIBLE FOR THE DEATH SENTENCE

In Hunt, the court correctly returned to the sentencing standard articulated in Rust, which emphasized the pain and suffering of the victim. In Rust, the court could not find the existence of aggravating circumstance (1)(d) because the crime, while it may have been heinous, was not "especially heinous, atrocious, [or] cruel." The victim in Rust did not suffer prolonged pain from the gunshot wound, as the death was not especially torturous and the crime did not involve sexual abuse.

The court, however, announced in Rust that a "coldly calculated" murder may also fall within aggravating circumstance (1)(d). The Rust court did not find the presence of aggravating circumstance (1)(d); therefore, the defendant in Rust did not "coldly calculate" the victim's murder. Nevertheless, the Rust court was unclear as to whether the "coldly calculated" language was directed toward the "exceptionally depraved" language of the second facet of aggravating circumstance (1)(d), which was applied and refined by the court in the Simants-Holtan-Peery-Moore line of cases. As a result, the

298. See supra notes 109, 111 and accompanying text.
299. See supra notes 146-49, 154-59 and accompanying text.
300. See supra note 113 and accompanying text.
301. See supra notes 109, 123-27 and accompanying text.
302. See supra notes 109-16, 123-32 and accompanying text.
303. See supra note 113 and accompanying text.
304. See supra notes 111-12 and accompanying text.
305. See supra note 109 and accompanying text.
306. See supra note 114 and accompanying text.
307. See supra note 111 and accompanying text.
Rust court failed to provide a specific rationale for the "coldly calculated" language.309

In 1984, seven years after the Rust decision was announced, the Nebraska Supreme Court in Reeves signaled a return to the Rust pain and suffering analysis by emphasizing the conscious suffering of the victim.310 In Reeves, aggravating circumstance (1)(d) was found with respect to one of the murders and not found with respect to the other murder.311 The first victim, who had been repeatedly stabbed, lived for a period of time after being wounded and suffered a great deal of pain.312 That victim made statements to the effect that she was in pain; moreover, she had been sexually assaulted by the defendant.313 Thus, the court found that aggravating circumstance (1)(d) was applicable to her murder.314 The other victim, who had been stabbed twice by the defendant, appeared to have died "swiftly and suddenly."315 Furthermore, she had not been sexually assaulted.316 The majority of the court did not find the presence of aggravating circumstance (1)(d) with respect to the murder of the second victim.317 In neither of the murders did the supreme court attempt to find the aggravating circumstance by using the "exceptionally depraved" second facet of aggravating circumstance (1)(d).318

STATE V. HUNT: A RETURN TO THE PAIN AND SUFFERING ANALYSIS

In Hunt, the court limited the class of defendants eligible for the death penalty by emphasizing only the pain and suffering aspect of aggravating circumstance (1)(d). The victim in Hunt was strangled with a nylon stocking.319 Although she did not die immediately, the victim was rendered unconscious; consequently, the victim was unable to experience conscious prolonged suffering.320 Moreover, the victim was not sexually assaulted, which could have produced the existence of aggravating circumstance (1)(d).321 Like Rust and

309. Rust, 197 Neb. at 539, 250 N.W.2d at 874. The court noted only that the "coldly calculated" language came from Holtan. Id.
310. See supra notes 166-170 and accompanying text.
311. See supra notes 166, 168 and accompanying text.
312. See supra note 167 and accompanying text.
313. See supra note 163 and accompanying text.
314. See supra note 167 and accompanying text.
315. See supra note 170 and accompanying text.
316. See supra note 169 and accompanying text.
317. See supra note 168 and accompanying text.
318. Reeves, 216 Neb. at 226-28, 344 N.W.2d at 447.
319. See supra note 30 and accompanying text.
320. See supra note 46 and accompanying text.
321. See supra note 19 and accompanying text. Hunt masturbated and ejaculated on the victim, but there was no evidence of a sexual assault. See supra note 31 and accompanying text.
Reeves, the Hunt court did not attempt to fit the murder within the “exceptionally depraved” language of aggravating circumstance (1)(d). The apparent two-facet approach to aggravating circumstance (1)(d) established in Moore was not used in Hunt to bring the murder within the ambit of aggravating circumstance (1)(d).

Dissenting, Judge Boslaugh attempted to show that aggravating circumstance (1)(d) was present. Judge Boslaugh reasoned that the victim must have suffered pain during the course of the strangulation. Judge Boslaugh’s observation that the victim suffered physical pain was an attempt to fit the murder within the “especially heinous, atrocious, [or] cruel” language of aggravating circumstance (1)(d), which is directed toward the physical suffering of the victim. Determining that the victim had suffered some pain during the course of the strangulation and had been “sexually abused,” Judge Boslaugh relied solely upon these facts in attempting to fit the crime within the first facet of aggravating circumstance (1)(d). Judge Boslaugh, however, ignored the victim’s loss of consciousness soon after the defendant had initiated his attack upon the victim.

Judge Boslaugh offered a more convincing argument that the murder was “exceptionally depraved” pursuant to the second facet of aggravating circumstance (1)(d), when the defendant randomly selected his victim, rendered her unconscious with the intent to play out his sexual fantasy, and left her to die. These facts indicated to Judge Boslaugh that the murder was “exceptionally depraved” because the murder was “callous, cold-blooded and involved cruel disregard for human life.”

Assuming that the “exceptionally depraved” language of the second facet of aggravating circumstance (1)(d) should be given precedential value, the Hunt court nevertheless relied exclusively upon the pain and suffering provision of aggravating circumstance (1)(d). In light of the court’s previous decisions, the court had the opportunity to apply the “exceptionally depraved” circumstance. In Holtan, for example, the court applied the “exceptionally depraved” language

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322. Hunt, 220 Neb. at 725-26, 371 N.W.2d at 720-21.
323. Id.
324. See supra note 55 (Boslaugh, J., dissenting).
325. Hunt, 220 Neb. at 728, 371 N.W.2d at 722 (Boslaugh, J., dissenting).
326. Id.
327. Id. In fact, the evidence indicated that the victim had not been sexually assaulted. Id.
328. See supra note 46 and accompanying text.
329. Hunt, 220 Neb. at 729-30, 371 N.W.2d at 723-24 (Boslaugh, J., dissenting). See supra notes 56-57 and accompanying text
330. Hunt, 220 Neb. at 728-29, 371 N.W.2d at 723 (Boslaugh, J., dissenting).
after the defendant shot and killed a bartender.\textsuperscript{331} Moreover, the Moore court found that killing two cab drivers satisfied the "exceptionally depraved" language of aggravating circumstance (1)(d).\textsuperscript{332} Yet, the Hunt court did not apply the "exceptionally depraved" language when the defendant strangled his victim and then acted out his sexual fantasy.\textsuperscript{333}

Thus, the Hunt court's refusal to apply the "exceptionally depraved" language signaled the proper return to a pain and suffering standard for the application of aggravating circumstance (1)(d). Pain and suffering provides, at a minimum, legitimate standards by which defendants can consistently be sentenced. The pain suffered by the victim, or other conscious suffering encountered by the victim, can be proved from the facts surrounding a murder. In Reeves, for example, the victim, who had been stabbed and sexually assaulted, suffered extreme pain.\textsuperscript{334} The court found that the victim suffered pain when she remained conscious after being stabbed and continued to remain conscious during the sexual assault.\textsuperscript{335} Furthermore, the victim related to witnesses that she was in a great deal of pain.\textsuperscript{336} Indeed, a factual scenario similar to that in Reeves provides a concrete basis for the consistent application of the pain and suffering provision of aggravating circumstance (1)(d).\textsuperscript{337} When sufficient proof that the victim consciously suffered to a great degree exists, aggravating circumstance (1)(d) can be applied consistently when a sentencing panel weighs the aggravating and mitigating circumstances to determine the appropriate sentence.

In contrast, the "exceptionally depraved" language of aggravating circumstance (1)(d) has no concrete sentencing standards, resulting in an inconsistent application of the aggravating circumstance. The "exceptionally depraved" language is directed toward a tenuous determination of the defendant's state of mind. As a result, a court has not, nor could not, apply the "exceptionally depraved" language consistently.\textsuperscript{338} In the past, the court has looked to the "coldly calculated" nature of a murder in order to find that a murder was "excep-

\begin{thebibliography}{99}
\bibitem{331} See supra notes 140-41 and accompanying text.
\bibitem{332} See supra note 159 and accompanying text.
\bibitem{333} Hunt, 220 Neb. at 725-26, 371 N.W.2d at 721.
\bibitem{334} See supra note 167 and accompanying text.
\bibitem{335} See supra note 163 and accompanying text.
\bibitem{336} See supra note 167 and accompanying text.
\bibitem{337} See supra notes 163-70 and accompanying text.
\bibitem{338} Compare Moore, 210 Neb. at 470-71, 316 N.W.2d at 41 (stating that the "coldly calculated" murders of two cab drivers was "exceptionally depraved") with Reeves, 216 Neb. at 226-28, 344 N.W.2d at 447 (finding that when the victim was stabbed to death after walking in on a sexual assault, the murder was not "exceptionally depraved"). See also infra notes 342-46 and accompanying text.
\end{thebibliography}
tionally deprived." In addition, a murder which displayed a total lack of respect for human life could invoke the "exceptionally depraved" language.

The court has recognized that all murders could be characterized as being depraved, but has cautioned that such depravity must be exceptional. Yet, because of the absence of sentencing standards, the court has applied the "exceptionally depraved" language inconsistently. In Holtan, for example, the defendant was sentenced to death for the simple killing of a bartender. In order to sentence Holtan to death, the court used the second facet of aggravating circumstance (1)(d). The defendant's murder of a bartender was "totally and senselessly bereft of any regard for human life." In contrast, the defendant in State v. Nokes was sentenced to life imprisonment after killing and cutting up the bodies of his victims. Presumably, Nokes' actions were not as sufficiently depraved in order to invoke aggravating circumstance (1)(d) as were Holtan's actions in killing a bartender. The Holtan-Nokes example, therefore, is but one instance that demonstrates the inconsistency and lack of sentencing standards in the application of the "exceptionally depraved" language of aggravating circumstance (1)(d).

Applying aggravating circumstance (1)(d) only to the pain and suffering of the victim would meet the constitutional requirements set out in Furman v. Georgia, Godfrey v. Georgia, and Zant v. Stephens by: (1) supplying an identifiable, concrete standard to use in death sentencing; (2) insuring that cases with similar factual circumstances produce similar results; and (3) narrowing the class of defendants eligible for the death penalty. The Rust, Reeves, and Hunt line of cases meet these standards by applying a concrete standard of conscious pain and suffering when applying aggravating circumstance (1)(d).

339. See supra note 159 and accompanying text.
340. See supra note 149 and accompanying text.
341. See supra notes 133, 138 and accompanying text.
342. See supra note 141 and accompanying text.
343. Holtan, 197 Neb. at 547, 250 N.W.2d at 880.
344. Id.
345. 192 Neb. 844, 224 N.W.2d 776 (1975).
346. See supra notes 223-28 and accompanying text.
347. See supra notes 141-42, 217-28 and accompanying text.
349. 446 U.S. 420 (1980).
351. See supra notes 58-84 and accompanying text.
352. See supra notes 111-15, 166-70, 46-49 and accompanying text.
QUESTIONS ABOUT THE APPLICATION AND CONSTITUTIONALITY OF AGGRAVATING CIRCUMSTANCE (1)(d)

In light of Hunt's supplying an adequate sentencing standard and narrowing the class of defendants eligible for the death penalty, the possibility of an arbitrary and capricious decision when applying the "exceptionally depraved" language can be illustrated. The application of aggravating circumstance (1)(d) calls for making fine distinctions in the factual circumstances of a murder. Having two separate facets within aggravating circumstance (1)(d) compounds the difficulty in making the factual distinctions. Moreover, even if the fine factual distinctions can be made, applying aggravating circumstance (1)(d) as two separate facets may not be narrowing sufficiently the class of defendants eligible for the death penalty as is constitutionally required.353

Viewing the "exceptional depravity" circumstance of aggravating circumstance (1)(d), there is a question as to whether its application has consistently followed the dictates of the United States Supreme Court decisions. The relationship between the court's decision in State v. Record354 and Moore demonstrates how the "exceptionally depraved" facet of aggravating circumstance (1)(d) may be applied arbitrarily and capriciously. The court did not find the existence of aggravating circumstance (1)(d) in Record, in which the defendant planned to rob someone while the defendant sat beside the road in his car waiting for a victim.355 The defendant shot and killed the driver of a vehicle who was passing by.356 The court, however, affirmed the finding of aggravating circumstance (1)(d) and the defendant's death sentence in Moore in which the defendant robbed and killed two cab drivers.357 Pursuant to the second facet of aggravating circumstance (1)(d), the court characterized the murders as "coldly planned" and "totally and senselessly bereft of any regard for human life."358

Finally, the apparent inconsistency in applying the "exceptionally depraved" language can be observed in State v. Jones.359 In Jones, the defendant was sentenced to life in prison after emptying his revolver into his already wounded victim who was attempting to crawl away on the floor.360 In contrast, the murder of a bartender in

353. See supra note 83 and accompanying text.
355. See supra notes 231-36 and accompanying text.
356. See supra notes 232-33 and accompanying text.
357. See supra notes 152-53, 158-59 and accompanying text.
358. See supra notes 158-59 and accompanying text.
360. See supra notes 240-42 and accompanying text.
Holtan or the murder of two cab drivers in Moore warranted the imposition of the death penalty pursuant to the "exceptionally depraved" language.361

EXPANSION OF THE CLASS OF DEFENDANTS ELIGIBLE FOR THE DEATH PENALTY

The factual comparisons set forth above illustrate the absence of any minimum standards or guidelines when the court applies the exceptionally depraved language of aggravating circumstance (1)(d).362 Even if such distinctions in factual situations are possible, the question arises as to whether the Nebraska Supreme Court is currently applying aggravating circumstance (1)(d) in a manner that is not expanding the class of defendants eligible for the death penalty. The United States Supreme Court determined that death penalty statutes must "genuinely narrow the class of persons eligible for the death penalty."363 Even if the Nebraska death penalty statute is being applied consistently, it may not currently be following the dictates of Zant.

As early as the Rust decision, the court determined that the adjectives "especially" and "exceptional" in aggravating circumstance (1)(d) required the presence of the described characteristics to a great degree.364 Such an interpretation has the effect of limiting the class of persons eligible for the death penalty.365 Simply killing someone does not bring the crime within the aggravating circumstance.366 Similarly, in Reeves, the victim who died "swiftly and suddenly"367 was not murdered in an "especially heinous, atrocious, [or] cruel" manner, and the murder did not "manifest exceptional depravity by ordinary standards of morality and intelligence."368 Furthermore, in Hunt, the victim did not consciously experience prolonged pain, and aggravating circumstance (1)(d) was not found.369

However, the court's application of the second facet of aggravating circumstance (1)(d), which involves the "exceptional depravity" of the defendant, helped expand the class of persons eligible for the death penalty in Simants, Holtan, Peery, and Moore. In all of these

361. See supra notes 139-42, 157-59 and accompanying text.
362. See supra notes 354-61 and accompanying text.
363. See supra note 83.
364. See supra note 112 and accompanying text.
365. See supra note 133 and accompanying text.
366. See supra note 112 and accompanying text.
367. See supra note 170 and accompanying text.
369. See supra note 46 and accompanying text.
cases, the murders were committed in such a fashion that the victims all probably died instantly. Nevertheless, because the murders were characterized as "coldly planned" and "totally and senselessly bereft of any regard for human life," the crimes were brought within the ambit of aggravating circumstance (1)(d). With the exception of Simants, none of the cases evidenced torture, sadism, or sexual abuse; however, the death penalty was imposed in part because the court determined that the second facet of aggravating circumstance (1)(d) was present. While Rust determined that a murder must be "especially heinous" in order to find the existence of aggravating circumstance (1)(d), Simants, Holtan, Peery, and Moore imposed the death penalty not because of the suffering of the victims, but in part, because the murders were "coldly planned" or were "totally and senselessly bereft of any regard for human life." Not only would the pain and suffering analysis of Rust find aggravating circumstance (1)(d), but the Simants-Holtan-Peery-Moore line of cases would expand the class of death sentencing defendants to include almost any murderer who had a truly callous attitude concerning another person's right to exist.

CONCLUSION

Viewed in this light, Hunt was not the aberration that it was made out to be by the press and public. Moreover, Hunt was the constitutionally required return to a stricter standard of death sentencing. The Reeves decision signaled the return to the Rust pain and suffering analysis, and Hunt continued that tradition. The Simants-Holtan-Peery-Moore line of cases employed the "exceptionally depraved" language of aggravating circumstance (1)(d) to invoke the death sentence; the suffering of the victim was not the determinative factor. The factual distinctions applied by the court to find one

371. See supra notes 128-38, 140-42, 144-49, 152-59 and accompanying text.
372. See supra note 113 and accompanying text.
374. See supra notes 132-38, 139-42, 144-49, 156-59 and accompanying text. Subsequent to the writing of this Note, but prior to its publication, United States District Judge Warren K. Urbom for the District of Nebraska issued an opinion which vacated the death sentence in Holtan. In Holtan v. Black, No. CV84-L-393, slip op. (D. Neb. Nov. 5, 1986), Judge Urbom concluded that aggravating circumstance (1)(d) was unconstitutional because:

[T]he descriptive words of the second prong ['exceptional depravity'] are no more specific than the words of the statute, which are ambiguous. They therefore do not meet the constitutional requirement.

The words used by the Supreme Court of Nebraska in the second prong relate to the state of the offender's mind. They offer nothing objective, such as torture or other physical abuse as guidance to a sentencing panel by way of
murderer "exceptionally depraved" and deserving of the death sentence, and another murderer not "exceptionally depraved" and deserving of life imprisonment, are at best, tenuous, and at worst, unconstitutional. In the words of Justice Stewart in Furman,\textsuperscript{375} the application of the second facet of aggravating circumstance (1)(d) is cruel and unusual "in the same way that being struck by lightning is cruel and unusual."\textsuperscript{376}

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\textsuperscript{375} 408 U.S. 238 (1972).
\textsuperscript{376} Id. at 309.