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THE "ESPECIALLY HEINOUS" AGGRAVATING CIRCUMSTANCE IN CAPITAL CASES—THE STANDARDLESS STANDARD

RICHARD A. ROSEN†

Capital sentencing statutes contain lists of aggravating circumstances. A sentencer must determine that at least one of these circumstances applies to a given case before the death penalty may be imposed. Professor Richard Rosen examines the "especially heinous" aggravating circumstance in light of the eighth amendment's guided discretion and the fourteenth amendment's due process vagueness doctrines, which require that state legislatures channel a sentencer's discretion to avoid the arbitrary, capricious, and discriminatory imposition of the death penalty. He then conducts a state-by-state analysis of appellate decisions applying the especially heinous circumstance. Professor Rosen concludes that the courts' overbroad and inconsistent application of this circumstance undermines the constitutional mandate that a legislature limit and guide a sentencer's discretion in a capital case. Because unbridled discretion increases the chance that arbitrariness, caprice, and discrimination will enter the sentencing process, Professor Rosen urges that the especially heinous aggravating circumstance be eliminated.

I. INTRODUCTION

Thirty-seven states provide for the imposition of capital punishment for defendants convicted of first degree murder.¹ All of these states require the sentencer, before imposing the death penalty, to find certain facts relating to the crime or to the defendant that elevate the offense above the norm of other first degree murders. In most states these aggravating circumstances² are spelled out

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1. Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1217 (1984). Some states still provide for the death penalty for crimes other than murder. *E.g.*, FLA. STAT. § 794.011(2) (Supp. 1984) (rape of a victim 12 years old or younger); GA. CODE ANN. § 17-10-30(a) (1982) (aircraft hijacking or treason); KY. REV. STAT. § 509.040(2) (1985) (kidnapping under specified circumstances); MISS. CODE ANN. § 97-3-65 (Supp. 1985) (rape of a child under the age of 14); *id.* § 97-25-55(1) (aircraft piracy); MONT. CODE ANN. § 45-5-303(2) (1985) (aggravated kidnapping). The constitutionality of these statutes is doubtful given the United States Supreme Court's ruling in *Coker v. Georgia*, 433 U.S. 584 (1977), invalidating the death penalty for rape of an adult victim. The scope of this Article will be restricted to the capital murder statutes.

2. The death penalty statutes in 32 states contain lists of specific "aggravating circumstances"

in the capital sentencing statutes, and most of them are relatively specific and narrow. Many states include as aggravating circumstances in their capital sentencing statutes factors such as: the victim's status as a law enforcement officer;³ the commission of the murder in connection with another felony;⁴ and the defendant's previous conviction for a crime of violence.⁵ The variations are numerous,⁶ but most aggravating circumstances are clear, understandable, precise,

or "aggravating factors." See Special Project, *supra* note 1, at 1220-21 n.617. The Virginia death penalty statute includes two circumstances, one of which must be found before the death penalty can be imposed, but these factors are not called "aggravating circumstances" in the statute. VA. CODE § 19.2-264.4(C) (1983). The California statute includes a list of "special circumstances," one of which must be found before a defendant can be sentenced to death or life without parole, and which also are used as aggravating circumstances at the penalty trial. CAL. PENAL CODE § 190.2 (West Supp. 1986); see *infra* note 140. In Utah and Washington the aggravating circumstances are included in the capital murder statutes as essential elements of the crime. UTAH CODE ANN. § 76-5-202(1) (Supp. 1985); WASH. REV. CODE ANN. § 10.95.020 (West Supp. 1986). In Texas the death penalty can be imposed only if the jury finds the defendant guilty of a narrowly defined category of first degree murder, with the elements of this narrow category "serv[ing] much the same purpose [as aggravating circumstances]." *Jurek v. Texas*, 428 U.S. 262, 270 (1976) (interpreting TEX. PENAL CODE ANN. § 19.03 (Vernon 1981)).

3. *E.g.*, GA. CODE ANN. § 17-10-30(b)(8) (1982) ("The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties."); IND. CODE ANN. § 35-50-2-9(b)(6) (Burns 1985) ("The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty."); LA. CODE CRIM. PROC. ANN. art 905.4(b) (West 1984) ("The victim was a fireman or peace officer engaged in his lawful duties.").

4. *E.g.*, ALA. CODE § 13-A-5-49(4) (1982 & Supp. 1985) ("The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnaping."); FLA. STAT. § 921.141(5)(d) (Supp. 1984) (In addition to felonies set forth in the Alabama statute, Florida adds arson, aircraft piracy, or "the unlawful throwing, placing, or discharging of a destructive device or bomb."); GA. CODE ANN. § 17-10-30(b)(2) (1982) (The offense was committed "while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree."); IND. CODE ANN. § 35-50-2-9-(b)(1) (Burns 1985) (The defendant "committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviant conduct, kidnaping, rape, or robbery.").

5. *E.g.*, FLA. STAT. § 921.141(5)(b) (1982) ("The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."); NEB. REV. STAT. § 29-2523(1)(a) (1979) ("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."); NEV. REV. STAT. § 200.033(2) (1979) ("The murder was committed by a person who was previously convicted of another murder or of a felony involving the use or threat of violence to the person of another.").

6. Special Project, *supra* note 1, at 1227-32. This Article recognizes five basic categories of aggravating circumstances. First, some aggravating circumstances focus on the defendant's motive. Committing a crime for pecuniary gain or for hire is an aggravating circumstance in 33 states, *id.* at 1227, and killing to prevent lawful arrest or to escape from custody is a factor in 22 states. *Id.* at 1228. Second, some aggravating circumstances arise from the defendant's method of committing the offense. Seventeen states include hiring another to commit the crime as an aggravating factor. *Id.* at 1229. Four states use lying in wait for the victim as a consideration. *Id.* Third, some aggravating circumstances emphasize facts about the defendant's background. The defendant's status as a prisoner at the time of the offense is an aggravating circumstance in 24 states. *Id.* A background of prior felonies or other violent crimes is a factor in 21 states. *Id.* at 1229-30. Fourth, the facts surrounding the crime also can constitute aggravating circumstances. Committing a murder in connection with a separate, violent felony is an aggravating circumstance in 25 states. *Id.* at 1230. Knowingly creating a grave risk of harm to more than one or to many people is also a factor in 25 states. *Id.* at 1231. The fifth and last category of aggravating circumstances relates to the status of the victim. Twenty-six states consider the killing of a police officer, fireman, or corrections employee an aggravating circumstance. *Id.* Sixteen states include the murder of a judge or prosecutor. *Id.* at

and easily applied by the sentencer and reviewed by the appellate courts.

There is one aggravating circumstance, however, that is considerably less precise. Twenty-four states permit imposition of the death penalty based on a finding that the murder was, in some ill-defined way, worse than other murders. The states use a variety of terms to denote this aggravating circumstance, with most statutes containing, either alone or in some combination, the terms "especially heinous, atrocious, or cruel," "depravity of mind," or "outrageously vile wanton or inhuman."⁷ These aggravating circumstances, which will be described collectively in this Article as "especially heinous" aggravating circumstances,⁸ have generated more controversy than any other aggravating

1231-32. Killing a witness is an aggravating circumstance in 13 states. *Id.* at 1232. Killing multiple victims is a factor in 10 states. *Id.*

7. Eight states recognize as an aggravating circumstance that the offense was "especially heinous, atrocious, or cruel." ALA. CODE § 13A-5-49(8) (1975 & Supp. 1985); FLA. STAT. § 921.141(5)(h) (1982); LA. CODE CRIM. PROC. ANN. art. 905.4(g) (West 1984); MISS. CODE ANN. § 99-19-101(5)(h) (Supp. 1985); N.H. REV. STAT. ANN. § 630:5(II)(a)(7) (Supp. 1983); N.C. GEN. STAT. § 15A-2000(e)(9) (1983); OKLA. STAT. ANN. tit. 21, § 701.12(4) (West 1983); WYO. STAT. § 6-2-102(h)(vii) (1983).

In three states the aggravating circumstance is that "the defendant committed the offense in a heinous, cruel or depraved manner." ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1978 & Supp. 1985); COLO. REV. STAT. § 16-11-103(6)(j) (1978 & Supp. 1985); CONN. GEN. STAT. ANN. § 53a-46a(g)(4) (West Supp. 1985). Five states use the terminology that the murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," or similar language. *See* GA. CODE ANN. § 17-10-30(b)(7) (1982); MO. ANN. STAT. § 565.032(2)(7) (Vernon Supp. 1985); N.J. STAT. ANN. § 2C: 11-3(c)(4)(c) (West 1982); S.D. CODIFIED LAWS ANN. § 23A-27A-1(6) (1979 & Supp. 1985); VA. CODE § 19.2-264.4(c) (1983). Idaho's standard is that "the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." IDAHO CODE § 19-2515(f)(5) (1979 & Supp. 1985). California has a "special circumstance" that "the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity, as utilized in this section, the phrase heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim." CAL. PENAL CODE § 190.2(a)(14) (West Supp. 1986). Nebraska's aggravating circumstance considers whether "the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." NEB. REV. STAT. § 29-2523(1)(d) (1979). Tennessee's statute reads: "[T]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." TENN. CODE ANN. § 39-2-203(i)(5) (1982). Delaware has the aggravating factor that "[t]he murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering him." DEL. CODE ANN. tit. 11, § 4209(e)(1)(1) (Supp. 1984). Nevada considers whether "[t]he murder involved torture, depravity of mind or the mutilation of the victim." NEV. REV. STAT. § 200.033(8) (1985). Utah's statute is the narrowest of this type of aggravating circumstance: "The homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death." UTAH CODE ANN. § 76-5-202(1)(q) (Supp. 1985). Illinois is unique in adding an age requirement: "the murdered individual was under 12 years of age and the death resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty." Act of June 24, 1982, § 1, ILL. ANN. STAT. ch. 38, § 9-1(b)(7) (Smith-Hurd Supp. 1985).

8. An analysis of the disparate "especially heinous" statutes under a single rubric is not an arbitrary choice; even state court judges, in discussing their particular state's "especially heinous" aggravating circumstance, have tended to ignore the differences between the specific terminology used in the individual state statutes. *See, e.g., State v. Gretzler*, 135 Ariz. 42, 50, 659 P.2d 1, 9, *cert. denied*, 463 U.S. 1236 (1983); *State v. Ortiz*, 131 Ariz. 195, 206, 639 P.2d 1020, 1031 (1981), *cert. denied*, 465 U.S. 984 (1984); *State v. Sonnier*, 402 So. 2d 650, 659 (La. 1981); *State v. Rust*, 197 Neb. 528, 538-39, 250 N.W.2d 867, 874 (1977), *cert. denied*, 434 U.S. 972 (1977); *State v. Goodman*, 298 N.C. 1, 25, 257 S.E.2d 569, 585 (1979); *Odum v. State*, 651 P.2d 703, 706-07 (Okla. Crim. App. 1982); *State v. Pritchett*, 621 S.W.2d 127, 137-39 (Tenn. 1981); *State v. Dicks*, 615 S.W.2d 126, 131-32 (Tenn.), *cert. denied*, 454 U.S. 933 (1981); *State v. Wood*, 648 P.2d 71, 86 (Utah 1981), *cert. denied*, 459 U.S. 988 (1982).

circumstance. Commentators have universally criticized them as vague, overbroad, and meaningless.⁹ Two state supreme courts have found their especially

9. "Probably no other aggravating circumstance has been as frequently attacked or as carefully scrutinized." Colquitt, *The Death Penalty Laws of Alabama*, 33 ALA. L. REV. 213, 296 (1982). The attacks generally focus on the vagueness of this aggravating circumstance, its lack of guidance to sentencers, and the failure of appellate courts to narrow its construction. See, e.g., C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 73-78 (2d ed. 1981) (Georgia's aggravating circumstance is a "nonstandard" allowing for "unbridled jury discretion"); Bowers & Pierce, *Arbitrariness and Discrimination under Post Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 627-29 (1980) (statistical analysis of the use of especially heinous circumstance in Georgia and Florida, concluding that this aggravating circumstance is an "instrument of arbitrariness and discrimination"); Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZ. L. REV. 651, 702 (1974) (especially heinous factor is "much more susceptible to discriminatory application than other common provisions in the new statutes"); Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 113, 135 (1979) (Appellate courts have failed to narrow the construction of this circumstance.); Gale, *S. 1 and the Death Penalty: The Persistence of Discretion*, 9 LOY. L.A.L. REV. 251, 282 (1976) ("Terms like 'heinous,' 'cruel,' and 'depraved' are almost without directive content."); Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 808 (1983) (varying interpretations of especially heinous factor may lead to arbitrary sentencing); Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 TEMP. L.Q. 261, 267 (1976) (especially heinous factor is a "very subjective" standard); Note, *The Death Penalty in Georgia: An Aggravating Circumstance*, 30 AM. U.L. REV. 835, 853 (1981) (especially heinous factor too vague) [hereinafter cited as Note, *An Aggravating Circumstance*]; Note, *Resurrection of the Death Penalty: The Validity of Arizona's Response to Furman v. Georgia*, 1974 ARIZ. ST. L.J. 257, 284 (Consideration of the especially heinous factor "requires rather than eliminates the use of discretion; what one sentencing judge regards as especially heinous, cruel, or depraved may not be so regarded by another."); Note, *The Death Penalty Cases: Shaping Substantive Criminal Law*, 58 IND. L.J. 187, 197-98 (1982) ("It is very difficult to tell whether [the especially heinous] aggravating circumstance is meant to describe the types of criminal acts for which the death penalty is being sought or whether it merely characterizes the defendant as the type of sadistic murderer who justly deserves the death penalty."); Note, *Capital Punishment Statutes After Furman*, 35 OHIO ST. L.J. 651, 677-78 (1974) ("[The heinous factor] is evidently intended to include those defendants who do not fit into another category and who might be apropos in a great number of cases, but its vague and pliable terminology allows the jury substantial freedom in applying it to defendants."). Concerning the North Carolina statute, one student commentator has observed:

Perhaps the most difficult of all to apply, the ["especially heinous"] circumstance addresses neither the factual pattern in which a murder is committed nor the purposes or circumstances of the perpetrator or victim. Rather, it . . . establishes that some murderers may be put to death solely on the basis of the level of revulsion that their acts incite in the jury.

Comment, *Capital Punishment in North Carolina: The 1977 Death Penalty Statute and the North Carolina Supreme Court*, 59 N.C.L. REV. 911, 929 (1981); see also Benson, *Constitutionality of Ohio's New Death Penalty Statute*, 14 U. TOL. L. REV. 77, 92 (1982) ("The Ohio [Death Penalty Statute] avoids the vagueness problem to a great extent by choosing not to include a 'catch-all' provision relating to particularly wanton, vile, offensive, horrible, inhumane, heinous or other socially reprehensible killings."); Richards & Hoffman, *Death Among the Shifting Standards: Capital Punishment After Furman*, 26 S.D.L. REV. 243, 251 (1981) (noting that wording of Florida's especially heinous circumstance is "apparently applicable to any first-degree murder," but recognizing that the statute may be given a more narrow judicial construction); Comment, *Constitutional Infirmities of the Capital Punishment Act*, 13 SETON HALL L. REV. 515, 535-36 (1983) (referring to New Jersey standard as vague); Comment, *Evolving Standards of Decency: The Constitutionality of North Carolina's Capital Punishment Statute*, 16 WAKE FOREST L. REV. 737, 757 (1980) (referring to North Carolina standard as vague and overbroad); Note, Gregg v. Georgia: *The Search for the Civilized Standard*, 1976 DET. C.L. REV. 645, 658 (1976) (noting that Florida statute provides no definition of "especially heinous, atrocious or cruel") [hereinafter cited as Note, *Civilized Standard*]; Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA. ST. U.L. REV. 108, 141 (1974) ("a sentencer could find any murder to be 'especially heinous, atrocious or cruel'") [hereinafter cited as Note, *Florida's Responses*]; Note, *Constitutional Law—Is the Current Test of the Constitutionality of Capital Punishment Proper?*, 17 LAND & WATER L. REV. 681, 691 (1982) (noting that almost "any murder would seem to fall within" the especially heinous circumstance of Wyoming's capital punishment statute) [hereinafter cited as Note, *The Current Test*].

heinous circumstances unconstitutional.¹⁰ Even those state appellate courts that have rejected constitutional challenges have acknowledged that their especially heinous aggravating circumstances are constitutionally suspect as potential "catch-all" factors.¹¹ In the 1980 *Godfrey v. Georgia*¹² decision, the United States Supreme Court recognized that the especially heinous aggravating circumstance is potentially overbroad and vague, holding that the standard must be narrowly defined and applied to be constitutionally acceptable.¹³

Despite all of this criticism, the especially heinous aggravating circumstance remains widely used as a basis for imposing the sentence of death on defendants.¹⁴ This Article demonstrates that many state courts, despite their rhetoric about the constitutional problems inherent in this aggravating circumstance,¹⁵ have refused to impose any meaningful restrictions on the scope of its application. The overbroad application has seriously undermined the constitutional mandate requiring legislatures to channel the sentencer's discretion in capital sentencing to avoid arbitrary, capricious, and discriminatory imposition of the death penalty;¹⁶ both the eighth amendment guided discretion doctrine¹⁷ and due process vagueness principles have been violated.¹⁸

This Article will show that the especially heinous aggravating circumstance, rather than channelling discretion, has broadened it; instead of limiting the opportunity for arbitrary, capricious, and discriminatory factors to enter the capital sentencing process, has expanded it; rather than providing a meaningful basis for distinguishing those few cases deserving the death penalty from those cases in which death should not be imposed, has allowed death to be imposed at the complete discretion of the sentencer. As set forth below, the practices of the state courts have constituted an affront to the eighth and fourteenth amendments, which, taken singly or together, require both a more precise channelling of discretion than is presently occurring and a more explicit delineation of the facts the prosecution has to prove before a death penalty can be imposed. The eighth and fourteenth amendments require more than what the especially heinous aggravating circumstance has become—a standardless standard.

10. See *People v. Superior Court*, 31 Cal. 3d 797, 806, 647 P.2d 76, 81, 183 Cal. Rptr. 800, 805 (1982); *State v. Chaplin*, 433 A.2d 327, 330 (Del. Super. Ct. 1981); cf. *State v. Payton*, 361 So. 2d 866, 871 (La. 1978) (especially heinous factor too vague to serve as essential element of first degree murder, but can be used in sentencing).

11. See *infra* note 154 and accompanying text.

12. 446 U.S. 420 (1980).

13. *Id.* at 428-29, 432.

14. For instance, a 1980 study of capital punishment statutes enacted after the Supreme Court revived the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), found that since Florida and Georgia enacted their statutes in 1972 and 1973, respectively, cases resulting in death sentences included findings of the especially heinous aggravating circumstance in 89% of the Florida cases and 46% of the Georgia cases. See *Bowers & Pierce, supra* note 9, at 627. A more recent study revealed that the Florida Supreme Court upheld findings of the especially heinous circumstance in 86 Florida death penalty appeals over the 10 year period from 1974 to 1984. Mello, *Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death Eligible Cases Without Making It Smaller*, 13 STETSON L. REV. 523, 534 n.54 (1984).

15. See *infra* note 154 and accompanying text.

16. See *infra* notes 23-97 and accompanying text.

17. See *infra* notes 23-63 and accompanying text.

18. See *infra* notes 64-97 and accompanying text.

II. CONSTITUTIONAL LIMITATIONS ON CAPITAL SENTENCING

Since 1976, when the Supreme Court affirmed the constitutionality of capital punishment in three states,¹⁹ the focus in death penalty jurisprudence has shifted away from the question of the per se constitutionality of death as a punishment and instead has focused on states' procedures in imposing the death penalty.²⁰ These procedures have been examined under both the eighth amendment's cruel and unusual punishment clause²¹ and the fourteenth amendment's due process clause.²² This section of the Article discusses the limitations placed on capital sentencing by both amendments, especially with regard to aggravating circumstances.

A. *The Eighth Amendment Guided Discretion Requirement*

The fundamental premise underlying present capital punishment law is that because "death is different" as a punishment²³ the eighth amendment requires that it only be imposed under a system that channels the sentencer's discretion. The aim is to avoid arbitrary, capricious, and discriminatory imposition of the death penalty. The genesis of this doctrine lies in the Supreme Court's 1971 *Furman v. Georgia*²⁴ decision in which a majority of the Court held that "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."²⁵

All five Justices joining in the majority judgment in *Furman* wrote separate concurring opinions. Justices Brennan and Marshall found that the death penalty was a *per se* violation of the eighth amendment's cruel and unusual punishment clause,²⁶ but Justices Douglas, Stewart, and White held only that capital punishment imposed at the complete discretion of the sentencer violates the eighth amendment.²⁷ Justice Douglas was offended by the potential for racial and economic discrimination inherent in this discretion;²⁸ Justice Stewart found that the discretionary system failed to provide means for avoiding the arbitrary

19. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

20. See *infra* notes 47-48.

21. See *infra* notes 23-53 and accompanying text.

22. See *infra* notes 64-97 and accompanying text.

23. All present members of the United States Supreme Court, as well as the late Justice Stewart, have joined in opinions accepting the principle that "death is different" as a punishment. See *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, Brennan, & Marshall, J.J., concurring in part and dissenting in part); *Solem v. Helm*, 463 U.S. 277, 306 (1983) (Burger, C.J., White, Rehnquist & O'Connor, J.J., dissenting); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (White, J., opinion for the court joined by Brennan, Blackmun, Marshall, & Stevens, J.J.); *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (Stevens, J., opinion for the court joined by Burger, C.J., Brennan, Stewart, Blackmun, & Powell, J.J.); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (Rehnquist, J., opinion for the Court joined by Burger, C.J., Stewart, White, & Blackmun, J.J.).

24. 408 U.S. 238 (1972) (*per curiam*).

25. *Id.* at 239-40.

26. *Id.* at 286 (Brennan, J., concurring); *id.* at 358-59 (Marshall, J., concurring).

27. *Id.* at 256-57 (Douglas, J., concurring); *id.* at 310 (Stewart, J., concurring); *id.* at 314 (White, J., concurring).

28. *Id.* at 242, 249-57 (Douglas, J., concurring).

and capricious imposition of the death penalty;²⁹ and Justice White held that the infrequency of the imposition of the death penalty indicated no meaningful basis for distinguishing the few cases in which it was imposed from the many in which it was not.³⁰

Following the suggestions made in Chief Justice Burger's *Furman* dissent on how the states could meet the objections of the majority Justices,³¹ state legislatures reacted by passing two types of capital punishment statutes: mandatory statutes requiring that the death penalty be imposed on all defendants convicted of a specified category of murder³² and statutes that allowed the sentencer to impose the death penalty under standards provided by the legislature.³³ In 1976 the Supreme Court, in *Woodson v. North Carolina*³⁴ and *Roberts v. Louisiana*,³⁵ held that mandatory sentencing schemes violated the eighth amendment.³⁶ In

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

30. *Id.* at 313 (White, J., concurring). Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist all dissented in *Furman*. Reviewing the history of the application of the eighth amendment, Chief Justice Burger determined the sole issue to be whether death was "cruel in the constitutional sense" and rejected arguments that the term "unusual" expanded upon "cruel"; the Chief Justice stressed that the moral judgment of society was being expressed, as it should be, by the state legislatures. *Id.* at 375-405 (Burger, C.J., dissenting). Justice Blackmun, although expressing personal abhorrence for the death penalty, found neither precedent nor constitutional basis for the plurality ruling. *Id.* at 405-14 (Blackmun, J., dissenting). Justice Powell focused primarily on the Court's abrupt reversal of precedent and its lack of deference to state legislatures. *Id.* at 414-65 (Powell, J., dissenting). Justice Rehnquist viewed the Court's decision as a dangerous departure from judicial self-restraint. *Id.* at 465-70 (Rehnquist, J., dissenting). For Articles discussing the *Furman* opinion in depth, see Murchison, *Toward a Perspective on the Death Penalty Cases*, 27 EMORY L.J. 469, 480-91 (1978); Comment, *Furman v. Georgia: A Postmortem on the Death Penalty*, 18 VILL. L. REV. 678, 697-718 (1973); Note, *The Furman Case: What Life is Left in the Death Penalty?*, 22 CATH. U.L. REV. 651 (1973); Note, *Florida's Responses*, *supra* note 9, at 110-25; Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1692-99 (1974) [hereinafter cited as Note, *New Death Penalty Statutes*]; Note, *Furman to Gregg: The Judicial and Legislative History*, 22 HOW. L.J. 53, 77-84 (1979) [hereinafter cited as Note, *Judicial and Legislative History*].

31. *Furman*, 408 U.S. at 400-01 (Burger, J., dissenting).

32. Four states reacted to *Furman* by imposing death for all premeditated murder. See Act of Mar. 29, 1974, ch. 284, 59 Del. Laws 943-45; Act of Mar. 17, 1973, ch. 276, 1973 Idaho Sess. Laws 588-89; Act of Mar. 20, 1973, ch. 109, 1973 N.M. Laws 342-43; Act of Apr. 8, 1974, ch. 1201, 1974 N.C. Sess. Laws 323-24. Other states enacted mandatory death penalties if certain factors were present, such as the killing of a police officer, e.g., Act of April 24, 1973, Pub. L. No. 328, 1973 Ind. Acts 1806-08; Act of Feb. 24, 1973, ch. 136, 1973 Wyo. Sess. Laws 146-47, or killing more than one victim, e.g., Act of June 19, 1973, Act 109, 1973 La. Acts 217-19; Act of May 3, 1973, ch. 798, 1973 Nev. Stat. 1801-07, murder by a convicted felon serving a life sentence, e.g., Act of May 17, 1974, ch. 367, 1974 N.Y. Laws 1210; Act of May 17, 1973, ch. 167, 1973 Okla. Sess. Laws 240-42, felony murder, e.g., Act of June 19, 1973, Act 109, 1973 La. Acts 217-19; Act of Mar. 20, 1973, ch. 109, 1973 N.M. Laws 342-43, contract killing, e.g., Act of Apr. 24, 1973, Pub. L. No. 328, 1973 Ind. Acts 1806-08; Act of Apr. 23, 1974, ch. 576, 1974 Miss. Laws 863-67, murder by explosives, e.g., Act of May 3, 1973, ch. 798, 1973 Nev. Stat. 1801-07; Act of May 17, 1973, ch. 167, 1973 Okla. Sess. Laws 240-42, or cases in which the crime was a second capital offense, e.g., Act of June 19, 1973, Act 109, 1973 La. Acts 217-19; Act of Feb. 24, 1973, ch. 136, 1973 Wyo. Sess. Laws 146-47. For a complete list of post-*Furman* enactments, see Note, *New Death Penalty Statutes*, *supra* note 30, at 1699-1712.

33. See Act of May 14, 1973, ch. 138, 1973 Ariz. Sess. Laws 966; Act of Mar. 28, 1973, ch. 74, 1973 Ga. Laws 159; Act of Apr. 4, 1973, ch. 513, § 1, 1973 Mont. Laws 1335, 1355-56; Act of June 14, 1973, ch. 426, 1973 Tex. Gen. Laws 1122; Note, *New Death Penalty Statutes*, *supra* note 30, at 1704-11.

34. 428 U.S. 280 (1976).

35. 428 U.S. 325 (1976).

36. The plurality opinions in *Woodson* and *Roberts* found mandatory death sentencing unconstitutional under current standards of decency, as evidenced by jury determinations and legislative

three other cases decided on the same day, *Gregg v. Georgia*,³⁷ *Proffitt v. Florida*,³⁸ and *Jurek v. Texas*,³⁹ the Court upheld capital punishment imposed under statutes that allowed the sentencer to impose the death penalty but that, theoretically at least, provided legislatively drafted standards to channel the sentencer's discretion to avoid the arbitrariness, capriciousness, and discrimination condemned by *Furman v. Georgia*.⁴⁰ Under these decisions discretion would be allowed in capital sentencing, but only if properly guided.

In the Georgia capital punishment scheme approved in *Gregg*, sentencing discretion was limited by the requirement that at least one of the ten aggravating circumstances contained in the statute be found before the death penalty could be imposed.⁴¹ In Florida both the jury and the trial judge were required to consider and weigh legislatively enumerated aggravating and mitigating fac-

enactments. *Woodson*, 428 U.S. at 292-301 (plurality opinion); *Roberts*, 428 U.S. at 332-33 (plurality opinion). They found that mandatory death statutes merely mask unbridled jury discretion because, in practice, juries can avoid a mandatory penalty by convicting for lesser crimes. *Woodson*, 428 U.S. at 302-03; *Roberts*, 428 U.S. at 334-35. The opinions further concluded that capital sentencing statutes must allow for an examination of each defendant's individual characteristics. Thus, mandatory schemes violate the eighth amendment by failing to consider "both the offender and the offense." *Woodson*, 428 U.S. at 304; *Roberts*, 428 U.S. at 333.

37. 428 U.S. 153 (1976).

38. 428 U.S. 242 (1976).

39. 428 U.S. 262 (1976).

40. 408 U.S. 238 (1972) (per curiam). For a discussion of *Furman*, see *supra* notes 24-30 and accompanying text. In all five of the 1976 cases Justices Brennan and Marshall, consistent with their *Furman* opinions, expressed the view that the death penalty constitutes a per se violation of the eighth amendment. *Roberts*, 428 U.S. at 336 (Brennan, J., concurring); *id.* at 336-37 (Marshall, J., concurring); *Woodson*, 428 U.S. at 305-06 (Brennan, J., concurring); *id.* at 306 (Marshall, J., concurring); *Jurek*, 428 U.S. at 277 (Brennan, J., dissenting); *id.* (Marshall, J., dissenting); *Proffitt*, 428 U.S. at 260 (Brennan, J., dissenting); *id.* (Marshall, J., dissenting); *Gregg*, 428 U.S. at 227-31 (Brennan, J., dissenting); *id.* at 231-41 (Marshall, J., dissenting).

Justices Burger, Blackmun, White, and Rehnquist voted to uphold the death penalty in all of these cases. *Roberts*, 428 U.S. at 337 (Burger, C.J., dissenting); *id.* at 337-63 (White, Burger, & Rehnquist, J.J., dissenting); *id.* at 363 (Blackmun, J., dissenting); *Woodson*, 428 U.S. at 306-07 (Burger, C.J., White & Rehnquist, J.J., dissenting); *id.* at 307-08 (Blackmun, J., dissenting); *id.* at 308 (Rehnquist, J., dissenting); *Jurek*, 428 U.S. at 277 (Burger, C.J., concurring); *id.* at 277-79 (Burger, C.J., White & Rehnquist, J.J., concurring); *id.* at 279 (Blackmun, J., concurring); *Proffitt*, 428 U.S. at 260-61 (Burger, C.J., White & Rehnquist, J.J., concurring); *id.* at 261 (Blackmun, J., concurring); *Gregg*, 428 U.S. at 207-26 (Burger, C.J., White & Rehnquist, J.J., concurring); *id.* at 227 (Blackmun, J., concurring).

A centrist plurality of Justices Stewart, Powell, and Stevens cast the pivotal votes and wrote the prevailing opinions in all five cases, and their opinions have become the bases for subsequent capital punishment law. *Roberts*, 428 U.S. at 327; *Woodson*, 428 U.S. at 282; *Jurek*, 428 U.S. at 264; *Proffitt*, 428 U.S. at 244; *Gregg*, 428 U.S. at 158.

The 1976 capital punishment decisions are discussed at length in Angel, *Substantive Due Process and the Criminal Law*, 9 LOY. U. CHI. L.J. 61, 125-34 (1977); Murchison, *supra* note 30, at 491-508; Richards & Hoffman, *supra* note 9, at 244-52; Comment, *Resurrection of Capital Punishment—The 1976 Death Penalty Cases*, 81 DICK. L. REV. 543 (1976-77); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 63-76 (1976); Note, *Capital Punishment: A Review of Recent Supreme Court Decisions*, 52 NOTRE DAME LAW. 261, 274-89 (1976).

41. See GA. CODE ANN. § 17-10-31 (1981). Georgia's statutory aggravating circumstances are:

- (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;
- (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;
- (3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a

tors.⁴² In Texas, before the sentencer could impose death the jury first had to find that the crime fit one of the narrowly defined categories of first degree murder and then had to answer affirmatively three questions concerning the defendant's past behavior and predicted future behavior.⁴³

Addressing the fundamental policies underlying the Court's view of the

great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Id. § 17-10-30(b). If the jury recommends the death penalty, the trial judge must sentence the defendant to death. *Id.* § 17-10-31; see also *Gregg*, 428 U.S. at 165-66 (Georgia law requires trial judge to impose sentence recommended by jury).

42. FLA. STAT. § 921.141(2)(3) (1982). The statute requires that the jury render an advisory sentence which may be overridden by the judge. *Id.* Florida's statutory aggravating circumstances are:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

Id. § 921.141(5).

The Florida Legislature added the last aggravating circumstance ("i") in 1979. Act of July 5, 1979, ch. 79-353, 1979 Fla. Laws 1826, 1828. For a discussion of Florida's use of the jury in death sentencing, see *Spaziano v. Florida*, 468 U.S. 447, 450-51 (1984).

43. Texas limits capital murder to those murders that fall within one of six categories:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

eighth amendment's role in death penalty cases, Justice Stewart, in *Gregg*, reiterated ideas expressed earlier in *Furman*: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed . . . discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."⁴⁴ Turning to the concerns expressed in Justice White's *Furman* opinion,⁴⁵ Justice Stewart also held that the states must provide a rational and meaningful basis to choose those few who are given the death penalty from among all of those convicted of first degree murder.⁴⁶

Although the Supreme Court in the ten years since *Gregg* has ruled on many aspects of the guided discretion requirement for capital cases, overturning some state practices⁴⁷ and upholding others,⁴⁸ it has maintained the position

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution; or

(6) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.

TEX. PENAL CODE ANN. § 19.03(a) (Vernon Supp. 1986). After finding capital murder, the jury must consider three factors:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981). The jury must unanimously and affirmatively answer each question before imposing death. *Id.* art. 37.071(d)(1), (d)(2)(c). The plurality opinion in *Jurek* concluded that the definitions of capital murder in the Texas statute were the equivalent of aggravating circumstances. *See Jurek*, 428 U.S. at 270 ("While Texas has not adopted a list of aggravating circumstances . . . , its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose.")

44. *Gregg*, 428 U.S. at 188-89. Justice Stewart also noted that "[i]t is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." *Id.* at 193. His opinion in *Gregg* was the longest and most substantive of the three 1976 plurality opinions affirming the death penalty, and both Justice Powell in *Proffitt* and Justice Stevens in *Jurek* relied extensively on Justice Stewart's opinion in *Gregg*. *See Proffitt*, 428 U.S. at 247, 252-54, 256; *Jurek*, 428 U.S. at 268, 274.

45. *See supra* text accompanying note 30.

46. *Gregg*, 428 U.S. at 188.

47. *See, e.g.*, *Turner v. Murray*, 106 S. Ct. 1683 (1986) (capital defendant in interracial murder must be allowed to question prospective jurors about racial prejudice); *Skipper v. South Carolina*, 106 S. Ct. 1669 (1986) (defendant must be allowed to present evidence of positive adjustment to prison life to sentencer); *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985) (prosecutor's argument concerning appellate review of the jury's death sentence violated eighth amendment); *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985) (defendant must be provided with expert psychiatric assistance to help defense in capital trial); *Arizona v. Rumsey*, 467 U.S. 203 (1984) (double jeopardy clause precludes resentencing to death once sentencer rejects the death penalty even if sentencing is performed by trial judge); *Enmund v. Florida*, 458 U.S. 782 (1982) (eighth amendment prohibits the death penalty for felony murder when the defendant did not kill or intend to kill); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (sentencer must consider all relevant mitigating circumstances); *Estelle v. Smith*, 451 U.S. 454 (1981) (fifth and sixth amendments violated when statements of defendant at pretrial psychiatric examination were used against defendant); *Bullington v. Missouri*, 451 U.S. 430 (1981) (death penalty on retrial violates double jeopardy clause if death penalty rejected by prior sentencing jury); *Beck v. Alabama*, 447 U.S. 625 (1980) (defendant entitled to instruction on a lesser included noncapital offense when evidence supports it); *Godfrey v. Georgia*, 446 U.S. 420, 422

that the death penalty can be imposed only if the sentencer's discretion is adequately limited and guided.⁴⁹ The Court has reiterated and reaffirmed the following principles: There is a greater need for reliability in capital sentencing procedures than in noncapital sentencing procedures, both to minimize the risk of error and to avoid arbitrariness, caprice, and discrimination;⁵⁰ the choice to

(1980) (broad construction of "outrageously or wantonly vile, horrible or inhuman" aggravating circumstances violates eighth amendment); *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam) (Georgia hearsay rule could not be used to exclude reliable and relevant testimony from capital sentencing trial); *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam) (use of improper rape conviction as basis for death penalty constituted due process violation); *Lockett v. Ohio*, 438 U.S. 586 (1978) (sentencer cannot be precluded from considering, as a mitigating factor, any aspect of a defendant's character or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality) (sentence of death for rape of adult is disproportionate); *Roberts v. Louisiana*, 431 U.S. 633 (1977) (per curiam) (automatic death penalty for killing of police officer violates the eighth amendment); *Gardner v. Florida*, 430 U.S. 349 (1977) (denial of due process for defendant to be sentenced on the basis of a confidential presentencing report that he had no opportunity to deny or explain).

48. See, e.g., *Lockhart v. McCree*, 106 S. Ct. 1758 (1986) (death qualification of jurors permitted); *Poland v. Arizona*, 106 S. Ct. 1749 (1986) (on resentencing, judge can impose death penalty even if original death penalty based on invalid aggravating circumstance); *Cabana v. Bullock*, 106 S. Ct. 689 (1986) (finding of intent to kill, required for imposition of death penalty, can be made by reviewing court); *Baldwin v. Alabama*, 105 S. Ct. 2727 (1985) (conviction under now repealed statute that required jury to recommend death was valid because judge did actual sentencing); *Spaziano v. Florida*, 468 U.S. 447 (1984) (jury need not consider lesser included offenses once statutes of limitations have expired; the constitution does not require juries in all capital cases, nor does it prohibit judges from overturning jury recommendations of life imprisonment); *Pulley v. Harris*, 465 U.S. 37 (1984) (proportionality review not constitutionally required in capital sentencing); *California v. Ramos*, 463 U.S. 992 (1983) (not constitutional error for jury to be instructed that the governor can commute a life sentence without possibility of parole to shorter period); *Barclay v. Florida*, 463 U.S. 939 (1983) (trial judge's findings of nonstatutory aggravating factors did not preclude imposition of the death penalty when statutory factors also were found); *Barefoot v. Estelle*, 463 U.S. 880 (1983) (psychiatric testimony regarding potential "future dangerousness" is sufficiently reliable for death penalty sentencing); *Zant v. Stephens*, 462 U.S. 862 (1983) (under Georgia capital punishment system, consideration of an invalid aggravating circumstance does not void death sentence when jury also finds valid aggravating circumstances).

For a critical analysis of the Court's recent treatment of death cases, see Geimer, *Death At Any Cost: A Critique of the Supreme Court's Recent Retreat From Its Death Penalty Standards*, 12 FLA. ST. U.L. REV. 737, 760-79 (1985). Geimer views *Barefoot* as a "gross [retreat] from the Court's commitment to reliability," *id.* at 760; *Stephens* and *Barclay* as an abandonment of guided discretion, *id.* at 766; and *Pulley* as a failure to live up to the *Furman* doctrine of "evolving standards of decency," *id.* at 777. "Ostensibly seeking to monitor the fair administration of the death penalty, the Court has in fact operated under a conclusive presumption that despite the implications of the post-1976 decisions demonstrating the difficulty in administering the death penalty, it is to be administered nonetheless." *Id.* at 739.

49. See *Spaziano v. Florida*, 468 U.S. 447, 462 (1984) ("This Court's decisions indicate that the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable."); *Zant v. Stephens*, 462 U.S. 862, 874 (1983) ("[D]iscretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.") (quoting *Gregg*, 428 U.S. at 189). However, the Court has observed:

We expect that sentencers will exercise their discretion in their own way and to the best of their ability. As long as that discretion is guided in a constitutionally adequate way . . . and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more.

Barclay v. Florida, 463 U.S. 939, 950-51 (1983).

50. See *Spaziano v. Florida*, 468 U.S. 447, 466 (1984); *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Godfrey*, 446 U.S. at 427; *Roberts*, 428 U.S. at 335; *Woodson*, 428 U.S. at 305; *Gregg*, 428 U.S. at 188-89.

sentence someone to die must be based on reason, not caprice or emotion;⁵¹ and the state in its sentencing scheme must provide a rational and meaningful basis for the sentencer to use in singling out the few who are to die from among the many who are allowed to live.⁵² To ensure that these policies of the guided discretion system are realized, the Court has relied heavily on the states' abilities to formulate and apply aggravating circumstances properly.⁵³

B. *The Role of Aggravating Circumstances in the Guided Discretion System*

An aggravating circumstance is, simply, a factor that the sentencer must find before the death penalty can be imposed; it is the *sine qua non* of capital punishment, the essential element of a capital sentencing trial.⁵⁴ In approving the Georgia system in *Gregg* Justice Stewart relied heavily on the "clear and objective" statutory aggravating circumstances that had guided the jury in its deliberations.⁵⁵ In several later cases the Court held that specific challenged procedures did not violate the eighth amendment and upheld sentences of death in part because the statutes in question required findings of specific aggravating circumstances before death could be imposed.⁵⁶

Aggravating circumstances theoretically play a crucial role in two major aspects of the guided discretion system. First, they channel the sentencer's discretion, thus limiting the possibility of caprice, arbitrariness, and discrimination. Second, they narrow the class of those eligible for the death penalty. The Supreme Court, therefore, has required states to "channel the sentencer's discretion by clear and objective standards that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence

51. See *Zant v. Stephens*, 462 U.S. 862, 885 (1983) (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977)).

52. See *Spaziano v. Florida*, 468 U.S. 447, 460 (1984); *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Godfrey*, 446 U.S. at 427-28; *Gregg*, 428 U.S. at 188-89.

53. The Court has also required that proper consideration be given to factors in mitigation, an issue beyond the scope of this Article. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). *Lockett* held that the sentencer must be free to consider any possible mitigating circumstances that the defendant may offer, whether statutory or not. *Id.* at 604. Aggravating and mitigating circumstances thus play dichotomous roles in the capital sentencing process. As discussed below, aggravating circumstances limit discretion by circumscribing the class of defendants eligible for the death penalty, but mitigating circumstances increase sentencing discretion by allowing the sentencer to consider numerous factors in deciding *not* to impose a sentence of death. See Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 CAL. L. REV. 1143, 1148-55 (1980). Radin notes that the "unfettered" discretion found . . . impermissible in *Furman*, is now . . . constitutionally required" when mitigating factors are concerned. *Id.* at 1153. See, e.g., Note, *The Bitter Fruit of McGautha: Eddings v. Oklahoma and the Need for Weighing Articulation in Capital Sentencing*, 20 AM. CRIM. L. REV. 63, 69-71 (1982).

54. See *infra* notes 94-96 and accompanying text.

55. See *Gregg*, 428 U.S. at 197-98; see also *Jurek*, 428 U.S. at 270-71 (Texas statute narrowing categories of murders subject to death penalty serves purpose similar to requiring aggravating circumstances); *Proffitt*, 428 U.S. at 251-53 (Florida capital sentencing procedures sufficiently specific and detailed to be constitutionally valid).

56. See *Pulley v. Harris*, 465 U.S. 37, 51-52 (1984) (California's statute, although lacking proportionality review as one possible check on arbitrary sentencing, remains constitutionally sound by virtue of its requirement that one of certain enumerated "special circumstances" be found before death may be imposed.); *Zant v. Stephens*, 462 U.S. 862, 888-91 (1983) (as long as jury finds one valid aggravating circumstance, jury's consideration of invalid factors does not affect constitutionality of sentencing process).

of death.'"⁵⁷ The Court has noted that

an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. . . . [S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.⁵⁸

Given these important roles for aggravating circumstances in the capital sentencing process, two propositions are beyond argument. First, certain facts such as race, legitimacy, income level, sex, or political affiliation may not be considered aggravating factors without running afoul of both the equal protection clause of the fourteenth amendment and the cruel and unusual punishment clause of the eighth amendment.⁵⁹ Second, the aggravating factor must mean something; it must not be so vague that it allows the sentencer to make an unguided, ad hoc determination concerning the appropriateness of the death penalty. As Justice Stewart stated in *Gregg*: "A system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur."⁶⁰ For instance, an aggravating circumstance that the murder was "bad" or "aggravated" would not narrow the class of death-eligible defendants or eliminate arbitrariness, discrimination, and capriciousness, because the sentencer could decide that any first degree murder was "bad" or "aggravated."⁶¹ Indeed, following *Furman* the Supreme court invalidated a Connecticut capital punishment statute that allowed the jury to impose the death penalty if the murder was "aggravated."⁶²

57. *Godfrey*, 446 U.S. at 428 (quoting *Gregg*, 428 U.S. at 198; *Proffitt*, 428 U.S. at 253); see also *Proffitt v. Wainwright*, 685 F.2d 1227, 1263 (1982) (*Furman* requires clear, detailed, and objective standards), cert. denied, 464 U.S. 1002 (1983).

58. *Zant v. Stephens*, 462 U.S. 862, 877-78 (1983). In *Zant* the Supreme Court reviewed the Georgia capital punishment scheme in which, once a valid aggravating circumstance is found, the jury is free to consider all of the evidence in aggravation and in mitigation as it sees fit. *Id.* at 870-72. In other states, such as Florida, the jury is required to weigh the aggravating circumstances against the mitigating circumstances. *Barclay v. Florida*, 463 U.S. 939, 952-56 (1983). In both instances, however, the role of the aggravating circumstance remains the same: it must channel discretion and it must narrow the class of persons eligible for the death penalty.

59. "This court has stated that a death sentence based upon consideration of 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant,' would violate the Constitution." *Baldwin v. Alabama*, 105 S. Ct. 2727, 2733 (1985) (quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983)); see also *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (noting the Court's past emphasis on reaching consistent and fair results); *Godfrey*, 446 U.S. at 437-42 (Marshall, J., concurring) (stating that giving jury instructions solely by reading statute creates intolerable vagueness and discretion); *Furman*, 408 U.S. at 242 (Douglas, J., concurring) (noting the invalidity of death penalties imposed in a manner allowing for prejudice).

60. *Gregg*, 428 U.S. at 195 n.46; see also *California v. Ramos*, 463 U.S. 992, 1000 (1983) (noting the holding in *Gregg* that vague sentencing procedures lead to arbitrary and capricious penalties).

61. See Note, *Florida's Responses*, *supra* note 9, at 132 n.143; Note, *New Death Penalty Statutes*, *supra* note 30, at 1698-99 n.52.

62. *Delgado v. Connecticut*, 408 U.S. 940 (1972) (vacating 161 Conn. 536, 290 A.2d 338 (1971)), in light of *Furman*, even though the Connecticut statute required a separate penalty trial to consider evidence of the crime's circumstances, the defendant's background, and "any other facts in

What is required of an aggravating circumstance is not absolute precision but sufficient definiteness to ensure that the sentencing decision is made within the parameters of rational guidelines promulgated by the legislature. If an aggravating circumstance has an objective meaning, then the subjective factors condemned in *Furman* are less likely to be injected into the sentencing process. If, on the other hand, an aggravating circumstance is defined and applied so broadly that it conceivably could cover every first degree murder, then it obviously cannot fulfill its constitutional responsibilities to eliminate the consideration of impermissible factors and to provide a recognizable and meaningful standard for choosing the few who are to die.⁶³

C. *Aggravating Circumstances and the Due Process Vagueness Doctrine*

Although the use of the eighth amendment to regulate capital sentencing procedures is a relatively recent development, there is another constitutional provision that has been utilized for over a century to ensure that the procedures used by the states to deprive a person of life or liberty meet the minimum standards required to guarantee fundamental fairness—the due process clause of the fourteenth amendment.⁶⁴ Of all the myriad components of the due process clause, the one most relevant to an analysis of the role of aggravating circumstances in contemporary capital sentencing is the vagueness doctrine.⁶⁵

The due process prohibition against excessively vague statutes, which has a lengthy history of application in both civil and criminal cases, is supported by two underlying concerns. One is the concept of fair notice.⁶⁶ The second, which

aggravation or mitigation"). See Death Penalty Procedure Act of 1963, Pub. Act No. 588, 1963 Conn. Pub. Acts 823-24.

63. In addition to those cases invalidating especially heinous aggravating circumstances, several courts have found other aggravating circumstances unconstitutionally vague. In *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (1976), the Georgia Supreme Court found Georgia's "history of serious assaultive criminal convictions" aggravating factor void for vagueness under the due process clause of the fourteenth amendment. *Id.* at 542, 224 S.E.2d at 392. In *State v. White*, 395 A.2d 1082 (Del. 1978), the Delaware Supreme Court held that the statutory aggravating circumstances that a victim was "elderly" or "defenseless" constituted vague terminology "susceptible [to] widely differing interpretations" and imposed a "substantial risk that sentencing authorities [would] inflict the death penalty in an arbitrary and diversified manner." *Id.* at 1091. Quoting the Georgia Supreme Court, the Delaware court stated that "'whenever a statute leaves too much room for personal whim and subjective decision-making without a readily ascertainable standard or minimal, objective guidelines for its application, it cannot withstand constitutional scrutiny.'" *Id.* at 1090 (quoting *Arnold v. State*, 236 Ga. 534, 541, 224 S.E.2d 386, 391 (1976)). In *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), cert. denied, 106 S. Ct. 546 (1985), the United States Court of Appeals for the Eighth Circuit held that Arkansas' application of its "pecuniary gain" aggravating circumstance to all robbery murder cases was unconstitutional. The court held that an aggravating circumstance that "merely repeats an element of the underlying crime cannot perform [its] narrowing function" as required by the Constitution. *Id.* at 264-65.

64. The due process clause provides, "nor shall any state deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV, § 1.

65. For an exhaustive analysis of early Supreme Court cases concerning the vagueness doctrine, see generally Note, *The Void-For-Vagueness Doctrine In the Supreme Court*, 109 U. PA. L. REV. 67 (1960), which has been recognized as Professor Anthony G. Amsterdam's work. Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985). As Professor Amsterdam notes, the vagueness doctrine, although now incorporated into the due process clause, also has extraconstitutional common-law roots. Note, *supra*, at 67 n.2.

66. The Supreme Court has described the concept of fair notice as follows:

the Supreme Court has described as the "more important" of the two foundations of the vagueness doctrine as applied to criminal cases,⁶⁷ is the need to prevent arbitrary and discriminatory enforcement of the laws. Thus, the Court has stated that "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."⁶⁸

The vagueness doctrine does not prohibit state rule making in a given area, but instead requires the legislature to draft its statutes with sufficient definiteness to eliminate the possibility of arbitrary and discriminatory application.⁶⁹ Although deference is given to state appellate decisions that narrow the scope of an otherwise overly vague statute,⁷⁰ a statute that "licenses the jury to create its own standard in each case"⁷¹ will be unconstitutionally vague even with this judicial gloss. Applying this test, the Supreme Court has most often used the vagueness doctrine to invalidate statutes that contain terms not easily susceptible to definitive clarification—terms of judgment and degree, which Professor Amsterdam describes as terms of "inherent discontrol."⁷² For example, the

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

McBoyle v. United States, 283 U.S. 25, 27 (1931); *see, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

67. Kolender v. Lawson, 461 U.S. 352, 358 (1983) (citing Smith v. Goguen, 415 U.S. 566, 574 (1974)).

68. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); *see, e.g.*, Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Herndon v. Lowry, 301 U.S. 242, 261-64 (1937). Professor Amsterdam, although acknowledging the Supreme Court's explicit reliance on the notice and arbitrariness principles, finds two other principles important in understanding the Supreme Court's sometimes erratic application of the vagueness doctrine. One is the Court's recognition that an overly vague statute inhibits review by appellate courts by concealing prejudiced, discriminatory, or overreaching applications under the broad rubric of the statute. Note, *supra* note 65, at 80. Second, the Court uses the vagueness doctrine to control the use of state power in areas of specific interest to the Court—to create a "buffer-zone" in such areas as first amendment expression, within which the states are allowed to exercise their power, but only to reduce the potential for arbitrary and discriminatory application. *Id.* at 75-78.

69. In some areas, such as in first amendment cases, the Court is more concerned with circumscribing the state's rule making power, especially when there is a possibility that a state statute will prohibit a constitutionally protected activity. *See* Parker v. Levy, 417 U.S. 733, 752 (1974); Smith v. Goguen, 415 U.S. 566, 572-73 (1974); Jeffries, *supra* note 65, at 196; Note, *supra* note 65, at 75-76. The distinction between statutes that might reach constitutionally protected conduct and those that do not has been described as the distinction between vagueness and overbreadth. *See* Kolender v. Lawson, 461 U.S. 352, 370-71 (1983) (White, J., dissenting). Both Professor Amsterdam and Professor Jeffries reject this distinction as artificial. Jeffries, *supra* note 65, at 216-18; Note, *supra* note 65, at 76-78.

70. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 355 (1983) (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982)). Professor Jeffries uses this practice to support an argument that the notice rationale for the vagueness doctrine is meaningless because it is highly unlikely that a putative defendant will have the ability to search the appellate reports to find out what limiting construction the courts have placed on the statute. Jeffries, *supra* note 65, at 207-08.

71. Herndon v. Lowry, 301 U.S. 242, 263 (1937); *see also* Giaccio v. Pennsylvania, 382 U.S. 399 (1966) (discussed *infra* note 77).

72. Note, *supra* note 65, at 93.

Court has invalidated statutes containing the terms "sacreligious,"⁷³ "credible and reliable,"⁷⁴ "unreasonable,"⁷⁵ and "injurious to public morals."⁷⁶

Historically, the vagueness doctrine has been used in criminal cases to invalidate statutes containing vague terms that describe the essential elements of a crime. In only one case prior to 1976 is it even arguable that the vagueness doctrine was applied to a sentencing statute.⁷⁷ For several reasons, however, it is now clear that the doctrine can and should be applied to evaluate aggravating circumstances in capital sentencing proceedings.

Despite holding in 1970 in *McGautha v. California*⁷⁸ that totally discretionary and standardless capital sentencing did not violate the due process clause of the fourteenth amendment,⁷⁹ since 1976 the Supreme Court has held that capital sentencing procedures must, in many respects, meet the dictates of the fourteenth amendment due process clause as well as the eighth amendment guided discretion doctrine.⁸⁰ Thus, in *Gardner v. Florida*⁸¹ a majority of the Court

73. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497 (1952).

74. *Kolender v. Lawson*, 461 U.S. 352, 358, 361 (1983).

75. *Cline v. Frank Dairy Co.*, 274 U.S. 445, 453 (1927).

76. *Musser v. Utah*, 333 U.S. 95, 96 (1948). The Court in *Musser* strongly intimated that the statute's language was unconstitutionally broad but remanded the case to the Utah Supreme Court, which had not had an opportunity to decide the vagueness issue. The Utah court invalidated the statute on vagueness grounds. *State v. Musser*, 118 Utah 537, 223 P.2d 193 (1950).

77. In *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), the Supreme Court upheld a defendant's vagueness challenge to an 1860 Pennsylvania statute that allowed the jury to impose costs on an acquitted defendant. Although the statute itself contained no standard for the jury's decision, the Pennsylvania Supreme Court had interpreted it in a number of cases to require a finding that the defendant's conduct, though not illegal, was "reprehensible," "improper," or "outrageous to morality and justice." *Id.* at 403-04. The dissenting Justice in *McGautha v. California*, 402 U.S. 183 (1971), asserted that the *Giaccio* court had applied vagueness principles to a sentencing statute. *Id.* at 262-64 (Brennan, J., dissenting). This position was rejected by the *McGautha* majority. *Id.* at 207-08 n.18.

78. 402 U.S. 183 (1971).

79. The *McGautha* Court, in specifically rejecting the petitioner's argument that the due process clause requires a guided discretion system, held that any attempt to categorize circumstances that would make the death penalty appropriate in a given case was "beyond present human ability." *Id.* at 204. Just one year later, in *Furman*, the Court found that standardless capital sentencing is prohibited by the eighth amendment. Although the majority Justices in *Furman* did not explicitly overrule *McGautha*, Justice Douglas did refer to the "tension" between the two cases. *Furman*, 408 U.S. at 248 n.11 (Douglas, J., concurring). Chief Justice Burger felt that *Furman* effectively overruled *McGautha*, a view shared by some commentators. *Id.* at 400 (Burger, C.J., dissenting); see, e.g., Hancock, *The Perils of Calibrating the Death Penalty Through Special Definitions of Murder*, 53 TUL. L. REV. 828, 835 n.23 (1979); Murchison, *supra* note 30, at 536; Note, *Judicial and Legislative History*, *supra* note 30, at 93-94. Chief Justice Burger's view is reinforced by the Court's explicit approval of guided discretion systems in 1976.

80. There is a close identity between the requirements of the guided discretion system for capital cases and the demands of due process. According to Professor Radin, the Supreme Court has functionally incorporated the due process clause into the eighth amendment. Radin argues that "in death penalty cases the eighth amendment . . . requires sentencing procedures amounting to a kind of super due process." Radin, *supra* note 53, at 1143. Radin finds that this "due process strain" entered the eighth amendment with *Furman* when the Court ruled that unfettered discretion could result in arbitrary sentencing violative of the eighth amendment. *Id.* at 1148. Radin asserts that the 1976 cases and *Lockett v. Ohio*, 438 U.S. 586 (1978), display the Court's dichotomous concern for equality of treatment (less discretion) and for flexibility to sentence defendants as unique individuals (more discretion). Radin, *supra* note 53, at 1149-51. Thus, the Court has set up a "super"—if not impossible—due process standard: treating defendants with respect for "the uniqueness of the individual" (see *Lockett*, 438 U.S. at 605 (Burger, C.J., separate opinion)), while maintaining clear sentencing guidelines. Radin concludes that "if death as a punishment requires both maximum

used the due process clause to invalidate a death sentence based on a confidential presentence report that was not made available to the defense.⁸² The Court found a due process violation in *Green v. Georgia*⁸³ because defendant was prevented by a state evidentiary rule from introducing exculpatory evidence at his capital sentencing hearing⁸⁴ and in *Presnell v. Georgia*⁸⁵ because the death sentence was based on a flawed underlying rape charge.⁸⁶

The Court in *Gardner*, by basing its decision on the due process clause instead of the eighth amendment, had to overrule its 1949 decision in *Williams v. New York*.⁸⁷ In *Williams* the Court had found no due process violation in the use of confidential sentencing information in a capital case. Several factors persuaded the Court to overrule *Williams*: the Court's recent recognition that "death is different";⁸⁸ the requirements of the recently mandated guided discretion system;⁸⁹ and the post-*Williams* application of the due process clause to the sentencing process.⁹⁰ These factors similarly support the application of the due process vagueness doctrine to capital sentencing.

More importantly, an aggravating circumstance in a capital penalty trial in many respects performs the same function served by an essential element of an offense in a guilt trial. Like an essential element at a guilt trial, an aggravating circumstance in a capital sentencing trial delineates the facts that the prosecution must prove to reach the desired verdict. If the prosecution cannot prove the existence of an essential element, the defendant must be found not guilty of the

flexibility and nonarbitrariness, and these requirements cannot be met (because flexibility and nonarbitrariness must vary inversely), then death cannot be a permissible punishment." Radin, *supra* note 53, at 1155; see also Radin, *The Jurisprudence of Death: Evolving Standards For the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 998-1000, 1013-16 (1978) (noting that the main thrust of the 1976 cases is procedural and arguing that courts should apply the *substantive* due process two-tier analysis to capital sentencing because the death penalty involves invasion of a fundamental interest—the right to life).

81. 430 U.S. 349 (1977).

82. Justice Stevens wrote the plurality opinion, which explicitly relied on the due process clause. *Id.* at 351. Justices Stewart and Powell joined this opinion. Justice Brennan's concurrence, *id.* at 364, as well as Justice Marshall's dissent (he would have stricken the death penalty instead of remanding to the state courts), *id.* at 365, also relied on a due process rationale.

83. 442 U.S. 95 (1979) (per curiam).

84. *Id.* at 97.

85. 439 U.S. 14 (1978) (per curiam).

86. The dissenting Justices in *Presnell* would have remanded the case for clarification but did not challenge the Court's reliance on the due process clause. *Id.* at 17-23 (Powell, J., dissenting). *Presnell's* continuing vitality as precedent for the application of the due process clause to capital sentencing has been called into question by a footnote in the plurality opinion in *Cabana v. Bullock*, 106 S. Ct. 689, 697-98 n.4 (1986), which states that "the *Presnell* Court appeared to assume that the jury's constitutional role in determining sentence was equivalent to its role in determining guilt or innocence. This assumption, of course, is no longer tenable in light of our holding in *Spaziano v. Florida*, [468 U.S. 447 (1984)]." Justice Blackmun, who wrote the plurality opinion in *Spaziano*, rejected this interpretation of *Spaziano*. *Cabana*, 106 S.Ct. at 703 n.1 (Blackmun, J., dissenting).

87. 337 U.S. 241 (1949).

88. *Gardner*, 430 U.S. at 357; see *supra* note 23.

89. *Gardner*, 430 U.S. at 358, 360.

90. *Id.* at 358 (citing *Mempa v. Rhay*, 389 U.S. 128 (1967)) (due process requires that indigents receive counsel at deferred sentencing proceedings); *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (excusing jurors for cause based upon their general objections to the death penalty constitutes due process violation); *Specht v. Patterson*, 386 U.S. 605 (1967) (due process requires right to counsel at commitment proceedings following sex offense conviction).

crime charged. If the prosecution cannot prove the existence of at least one aggravating circumstance, the defendant cannot be sentenced to death.⁹¹

The Supreme Court explicitly recognized this similarity of function in *Bullington v. Missouri*,⁹² a case in which the Court for the first time applied the double jeopardy clause to capital sentencing. The *Bullington* Court acknowledged that a capital penalty trial under the guided discretion system is, for purposes of double jeopardy analysis, more closely akin to a guilt/innocence trial than to a traditional sentencing proceeding⁹³ and indicated that an aggravating circumstance is, in essence, an essential element of the crime of capital murder.⁹⁴ In both proceedings the state must "under[take] the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts."⁹⁵ The "certain facts" that must be established in a capital trial are the aggravating circumstances, and these circumstances, like essential elements of a crime, must withstand scrutiny under the due process vagueness test.⁹⁶

91. See, e.g., GA. CODE ANN. § 17-10-31 (1982) ("a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance"); LA. CODE CRIM. PROC. ANN. art. 905.3 (West Supp. 1986) ("A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists.") OKLA. STAT. ANN. tit. 21, § 701.11 (West 1983) ("Unless at least one of the statutory aggravating circumstances . . . is so found . . . the death penalty shall not be imposed.").

Of course, there is one significant difference between an essential element of a crime and an aggravating circumstance. A failure of proof as to any essential element of a crime requires a not guilty verdict. In contrast, a negative finding as to any aggravating circumstance does not preclude the imposition of the death penalty so long as one aggravating circumstance is validly found. The Supreme Court relied on this distinction in *Poland v. Arizona*, 106 S. Ct. 1749, 1756 (1986), to approve a death sentence entered at a resentencing hearing that was based on one aggravating circumstance that had been erroneously rejected by the trial judge at the first sentencing hearing and another that had not been considered at the first hearing. Because the trial judge had initially imposed the death penalty and because the Arizona Supreme Court did not disapprove of the death verdict but only held that the trial judge had erred in relying on Arizona's "especially heinous" aggravating circumstance, the Court found no double jeopardy bar to the imposition of the death penalty based on different aggravating circumstances.

92. 451 U.S. 430 (1981).

93. *Id.* at 438. Despite this acknowledgment, the Supreme Court has not been willing to equate a guilt/innocence trial with a sentencing proceeding for all purposes. Thus, in *Spaziano v. Florida*, 468 U.S. 447, 464 (1984), the Court refused to apply the sixth amendment right to trial by jury to a capital sentencing trial. In *Cabana v. Bullock*, 106 S. Ct. 689, 700 (1986), the Court held that the finding of an intent to kill required by *Enmund v. Florida*, 458 U.S. 782 (1982), could be made by a reviewing court instead of the sentencer, and in *Poland v. Arizona*, 106 S. Ct. 1749, 1756 (1986), the Court approved the reimposition of the death penalty in a resentencing hearing so long as the initial sentencer imposed the death penalty.

94. *Bullington*, 451 U.S. at 438, 444, 446. In *Bullington* the jury performed the sentencing function. The Court held that the double jeopardy clause prohibited the imposition of the death penalty at a retrial when the original jury sentenced the defendant to life in prison. Under *North Carolina v. Pearce*, 395 U.S. 711 (1969), however, a different rule applies in noncapital sentencing. The Court reaffirmed the *Bullington* holding and applied it to a case in which the trial judge sentenced the defendant in *Arizona v. Rumsey*, 104 S. Ct. 2305 (1984); see also *Strickland v. Washington*, 104 S. Ct. 2052 (1984) (equating capital sentencing trial with guilt trial for purposes of evaluating effectiveness of counsel under the sixth amendment).

95. *Bullington*, 451 U.S. at 438.

96. The *Bullington* equation of aggravating circumstances in a penalty trial with elements of a crime in a guilt/innocence trial is both logical and justifiable. In both situations the presence of an additional element has the primary effect of increasing punishment. For instance, a person convicted of simple assault is guilty of a crime, and the primary effect of a jury finding that the defendant used a deadly weapon is to increase the authorized punishment. Crimes such as arson, burglary, and

It should be emphasized that of all the procedural protections embodied in the due process clause the prohibition against overly vague statutes is the one most relevant to capital sentencing. Both the eighth amendment guided discretion doctrine and the fourteenth amendment vagueness doctrine are concerned primarily with channelling discretion and lessening the opportunities for arbitrariness, capriciousness, and discrimination. Both doctrines operate under the assumption that the legislature has the power to legislate in a given area but can only do so in a way that protects a defendant from ad hoc, standardless decision making by judges and juries. It is clear that if an aggravating circumstance cannot survive the tests of the due process vagueness doctrine, then it cannot perform the role allotted to it by the eighth amendment.⁹⁷

murder commonly are divided into degrees, with the severity of punishment increasing if the jury finds the presence of factors that the legislature has determined make the crime more egregious. This similarity between aggravating circumstances and elements of a crime is discussed at length in George, *Aggravating Circumstances In American Substantive and Procedural Criminal Law*, 32 UMKC L. REV. 14 (1964).

The identity of function between aggravating circumstances and elements of a crime also is demonstrated by state statutes such as those of Utah and California. Those statutes, instead of listing separate aggravating circumstances to be considered by the sentencer, refer the sentencer to the list of elements that, in Utah, make the crime first degree murder and, in California, establish the defendant's eligibility for the death penalty or for life without parole. CAL. PENAL CODE § 190.2 (West Supp. 1986); UTAH CODE ANN. § 76-5-202(1) (Supp. 1985); see also *Kyzer v. State*, 399 So. 2d 317, 319 (Ala. Crim. App. 1979) (directing the sentencer to use the "multiple victims" essential element of first degree murder as an aggravating circumstance).

The North Carolina Supreme Court also has equated aggravating circumstances with elements of a crime. See *State v. Silhan*, 302 N.C. 223, 269, 275 S.E.2d 450, 482 (1981). In North Carolina the jury is required by statute to determine whether an aggravating circumstance exists, whether the aggravating circumstances found are sufficiently substantial, and whether mitigating factors outweigh the aggravating circumstances. N.C. GEN. STAT. § 15A-2000(c) (1983). In *Silhan* the North Carolina Supreme Court held: "[These] three requirements, in terms of a jury's function, are like the elements of a given criminal offense." *Silhan*, 302 N.C. at 269, 275 S.E.2d at 482; cf. *State v. David*, 468 So. 2d 1133, 1137 (La. 1985) (a jury's failure to find a submitted aggravating circumstance is not an "acquittal" of that circumstance).

The *Bullington* analogy has been limited by the Court's decision in *Poland v. Arizona*, 106 S. Ct. 1749 (1986). *Poland's* modification of *Bullington*, however, does not affect the policy arguments for applying the vagueness doctrine to aggravating circumstances. The *Poland* opinion assumed that the aggravating circumstances at issue were properly found, that they were constitutionally adequate "standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." *Id.* at 1755 (quoting *Bullington*, 451 U.S. at 438). Thus, in *Poland* the Court was concerned only with the role of aggravating circumstances in those cases in which the death penalty had initially been imposed for the wrong reason, not with those in which the adequacy of the aggravating circumstances relied on was questioned.

97. The use of the due process vagueness doctrine to determine the constitutionality of an aggravating circumstance is not without precedent. In *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (1976), which was decided before *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976), the Georgia Supreme Court used the vagueness doctrine to invalidate the aggravating circumstance that the defendant "has a substantial history of serious assaultive criminal convictions." *Arnold*, 236 Ga. at 539-42, 224 S.E.2d at 391-92 (invalidating former GA. CODE ANN. § 27-2534.1(b)(1) (1978)). The Court cited *Arnold* in *Godfrey v. Georgia*, 446 U.S. 420, 424 n.2 (1980). See also *People v. Superior Court*, 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982) (discussed *infra* notes 139-44 and accompanying text); cf. *State v. Payton*, 361 So. 2d 866, 871 (La. 1978) (especially heinous element of first degree murders fails vagueness test, but test found not applicable to identical aggravating circumstance).

III. THE "ESPECIALLY HEINOUS" AGGRAVATING CIRCUMSTANCE AND THE UNITED STATES SUPREME COURT

The United States Supreme Court first discussed the especially heinous aggravating circumstance in 1976 in *Gregg v. Georgia*⁹⁸ and *Proffitt v. Florida*.⁹⁹ In both cases the petitioners attacked this aggravating circumstance as being so broad and vague that it permitted the sentencer to act arbitrarily and capriciously in violation of *Furman*.¹⁰⁰ In *Gregg* the aggravating factor at issue was Georgia Code Annotated Section 27-2534.1(b)(7) (section (b)(7)), which permits the imposition of death if the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Noting first that this section was being reviewed only to determine whether its imprecision rendered the entire Georgia capital punishment system invalid under the eighth amendment,¹⁰¹ Justice Stewart acknowledged that "[i]t is, of course, arguable that any murder involves depravity of mind or an aggravated battery."¹⁰² He voiced the hope, however, that the Georgia Supreme Court would not adopt such an open-ended construction and noted that the only case in which the Georgia Supreme Court had approved an "outrageously vile" finding was a "horrifying torture-murder."¹⁰³ He therefore refused to find that this potentially vague aggravating circumstance alone invalidated the entire Georgia death penalty system.¹⁰⁴

The Supreme Court granted the same conditional approval in *Proffitt*. The aggravating circumstance at issue in *Proffitt* was Florida Statute Annotated Section 921.141(5)(h), which permits imposition of death if "the capital felony was especially heinous, atrocious, or cruel." As in *Gregg*, the Court reviewed the aggravating circumstance only to determine whether its potential vagueness made the entire Florida death penalty system so arbitrary and capricious as to be unconstitutional.¹⁰⁵ Thus, although the especially heinous aggravating factor had played a part in the imposition of the death penalty at Proffitt's trial, the Court did not rule on the factor's appropriateness in Proffitt's case.¹⁰⁶ Once again, the Court noted that all murders are arguably "especially heinous, atrocious or cruel,"¹⁰⁷ but found that because the Florida Supreme Court earlier had restricted this aggravating circumstance to a "conscienceless or pitiless crime which is unnecessarily tortuous to the victim,"¹⁰⁸ the circumstance as construed

98. 428 U.S. 153 (1976).

99. 428 U.S. 242 (1976).

100. See *Gregg*, 428 U.S. at 201; *Proffitt*, 428 U.S. at 255-56.

101. *Gregg*, 428 U.S. at 201 n.51.

102. *Id.* at 201.

103. *Id.* (citing *McQorqudale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974)).

104. *Id.* at 201. The validity of the especially heinous aggravating circumstance was not even in issue in *Gregg*'s appeal because this aggravating circumstance had been rejected by the jury at *Gregg*'s trial. *Id.* at 161.

105. *Proffitt*, 428 U.S. at 254 n.11.

106. In fact, the finding of especially heinous circumstances in Proffitt's case later was reversed by the United States Court of Appeals for the Eleventh Circuit. *Proffitt v. Wainwright*, 685 F.2d 1227, 1265 (11th Cir. 1982), *cert. denied*, 464 U.S. 1002 (1983).

107. *Proffitt*, 428 U.S. at 255.

108. *Id.* (citing *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973)).

was not so overbroad or vague that it made the entire Florida system unconstitutional.¹⁰⁹

A. Godfrey v. Georgia

The Supreme Court again dealt with Georgia's "outrageously vile" aggravating circumstance just four years after *Gregg* in *Godfrey v. Georgia*.¹¹⁰ Defendant in *Godfrey*, after a prolonged period of friction with his wife, had approached his mother-in-law's trailer with a shotgun. Looking through a window, he had seen his wife, his eleven year old daughter, and his mother-in-law. He shot his wife once through the window, killing her instantly. He entered the trailer, struck his daughter with the barrel of his gun, and killed his mother-in-law with a single shot. He then called the sheriff's office, admitted the killing, and showed the officers where the gun was located. He later told a police officer that he had been thinking about the killing and would do it again.¹¹¹

At Godfrey's trial the State relied solely on the section (b)(7) aggravating circumstance: that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Despite the prosecutor's admission in his final argument that the murders involved no torture or aggravated battery, the jury found this aggravating circumstance in both murders and returned a death sentence in both.¹¹² The Georgia Supreme Court affirmed, cursorily rejecting Godfrey's vagueness challenge to section (b)(7), holding only that the "evidence supported" this aggravating circumstance.¹¹³ The United States Supreme Court granted certiorari and reversed.

Justice Stewart's plurality opinion in *Godfrey* was joined by Justices Blackmun, Powell, and Stevens. Justice Stewart first noted that the *Gregg* Court had held that section (b)(7) was not so broad as to be unconstitutional on its face. This holding however, had been based on the assumption that the Georgia Supreme Court would narrowly construe section (b)(7).¹¹⁴ Therefore, the issue as framed by Justice Stewart was whether the Georgia Supreme Court, in affirming Godfrey's conviction, had "adopted such a broad and vague construction of the section (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution."¹¹⁵ After acknowledging that all of the other aggravating circumstances in the Georgia statute "are considerably more specific or objectively measurable than § (b)(7),"¹¹⁶ Justice Stewart reiterated that the states have a constitutional responsibility to apply their capital punishment laws in a way that avoids the arbitrary and capricious infliction of capital punishment and that they must channel the sen-

109. *Id.* at 255-56.

110. 446 U.S. 420 (1980).

111. *Id.* at 425-26.

112. *Id.* at 426.

113. *Id.* at 426-27 (citing *Godfrey v. State*, 243 Ga. 302, 253 S.E.2d 710 (1979)).

114. *Gregg*, 428 U.S. at 202 n.54.

115. *Godfrey*, 446 U.S. at 423.

116. *Id.* at 423 n.2.

tencer's discretion "by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" ¹¹⁷

Justice Stewart then noted that the "outrageously or wantonly vile, horrible and inhuman" language of section (b)(7) does nothing to channel the sentencer's discretion and to avoid arbitrariness and caprice. "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible or inhuman.'" ¹¹⁸ Despite this acknowledgment of the inherently vague nature of section (b)(7), the *Godfrey* plurality refused to find this aggravating circumstance unconstitutional on its face. Instead, it viewed the Georgia Supreme Court's affirmance in *Godfrey* as an aberration from an otherwise narrow interpretation of section (b)(7), an interpretation that would limit the section to cases involving serious physical abuse of the victim before death. Such a narrow interpretation prevented the section from becoming a "catchall" aggravating circumstance and effectively limited it to so-called "core" cases. ¹¹⁹

The . . . opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstance. The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase, "depravity of mind," comprehended only the kind of a mental state that led the murderer to torture or to commit an aggravated battery killing his victim. The third, . . . was that the word "torture," must be construed *in pari materia* with the "aggravated battery" so as to require evidence of serious physical abuse of the victim before death. Indeed, the circumstances proved in a number of the § (b)(7) death sentence cases affirmed by the Georgia Supreme Court have met all three of these criteria. ¹²⁰

The facts of the *Godfrey* case obviously did not meet these criteria. Both victims were killed by a single shot, with neither of them receiving any physical injuries beyond the gunshot wounds. The State had conceded that there was no torture. The plurality, therefore, held that in approving the section (b)(7) finding in *Godfrey's* case the Georgia Supreme Court had applied an unconstitutionally broad construction of the statute. *Godfrey's* crimes were not more "depraved" than any other murderer's crimes. There was "no principled way to distinguish this case, in which the death penalty was imposed, from the many

117. *Id.* at 428 (quoting *Gregg*, 428 U.S. at 198; *Proffitt*, 428 U.S. at 253; *Woodson*, 428 U.S. at 280).

118. *Id.* at 428-29 (quoting GA. CODE ANN. §27-2534.1(b)(7) (1978)).

119. *Id.* at 429-31.

120. *Id.* at 431-32. The Court, however, was apparently unaware of the Georgia Supreme Court's decision in *Fair v. State*, 245 Ga. 868, 268 S.E.2d 316 (1980), decided one month prior to the Supreme Court's decision in *Godfrey*. In *Fair* the Georgia court upheld a § (b)(7) finding based solely on "depravity of mind." Noting that the statute was written in the disjunctive, the Georgia court stated that an additional finding of torture and/or aggravated battery was unnecessary. *Id.* at 872-73, 268 S.E.2d at 320-21.

cases in which it was not."¹²¹ The Supreme Court, therefore, reversed imposition of the death penalty.

In his concurrence in *Godfrey* Justice Marshall, joined by Justice Brennan, adopted a far less sanguine view of the Georgia Supreme Court's efforts to narrow the scope of the section (b)(7) aggravating circumstance. He noted that in two cases the Georgia court had approved section (b)(7) findings without any evidence of torture or serious physical abuse of the victim before death and concluded that the Georgia court "either . . . has abandoned its intention of reaching only 'core' cases under § (b)(7) or that its understanding of the 'core' has become remarkably inclusive."¹²² Justice Marshall also pointed out that prior to *Godfrey* the Georgia Supreme Court never had reversed a section (b)(7) finding, most often upholding the jury's finding without any real analysis,¹²³ and that juries in Georgia never were instructed on a narrow construction of the statute.¹²⁴ In short, Justice Marshall found that the Georgia Supreme Court consistently had interpreted section (b)(7) broadly enough to fit every first degree murder, and he, therefore, would have found section (b)(7) unconstitutional on its face.¹²⁵

There were two dissenting opinions in *Godfrey*. Chief Justice Burger disagreed with the Court's "second-guessing" of the jury's factual finding,¹²⁶ a view shared by Justice White.¹²⁷ Justice White also found that the Georgia Supreme Court had been "responsible and consistent" in its *in pari materia* construction of section (b)(7), although he acknowledged that a disjunctive construction of

121. *Godfrey*, 446 U.S. at 433. On remand *Godfrey* again was sentenced to death based on the aggravating factor that each murder was committed while the defendant was engaged in another capital crime. The Georgia Supreme Court held that *Godfrey* could not receive death for each murder based on this aggravating circumstance. Therefore, the court affirmed the death penalty for one of the murders and imposed a life sentence for the other. *Godfrey v. State*, 248 Ga. 616, 284 S.E.2d 422 (1981), *cert. denied*, 456 U.S. 919 (1982). *Godfrey's* death penalty and conviction subsequently were reversed. *Godfrey v. Francis*, 613 F. Supp. 747, 754 (C.D. Ga. 1985).

122. *Godfrey*, 446 U.S. at 436 (Marshall, J., concurring) (citing *Holton v. State*, 243 Ga. 312, 253 S.E.2d 736, *cert. denied*, 444 U.S. 925 (1979), and *Ruffin v. State*, 243 Ga. 95, 252 S.E.2d 472, *cert. denied*, 444 U.S. 995 (1979)). In *Holton* the jury found that the murder of a couple by gunshot wounds to the head of the husband and to the head and chest of the wife evidenced "depravity of mind" and sentenced the defendant to death. The husband had been hit in the shoulder with a tomahawk either before or after death, and the wife had been stabbed twice after her death. *Holton*, 243 Ga. at 312-13, 253 S.E.2d at 737. The assistant district attorney conceded that no torture had been involved, and the trial court instructed the jury that it could not find aggravated battery with regard to the wife. *Id.* at 317 n.1, 253 S.E.2d at 740 n.1. The Georgia Supreme Court voiced concern that the jury had found "depravity of mind" without stating that the murders were "outrageously or wantonly vile horrible or inhuman," noting that a finding of "depravity" alone was not sufficient. Although ordering a resentencing trial on other grounds, the court did not indicate that the "outrageously vile" finding was otherwise improper. In *Ruffin*, a case in which a child had been killed with a shotgun, the Georgia Supreme Court affirmed the § (b)(7) finding without analysis. *Ruffin*, 243 Ga. at 106-07, 252 S.E.2d at 480.

123. *Godfrey*, 446 U.S. at 440 (Marshall, J., concurring).

124. Justice Marshall insisted that because the sentencer's discretion must be guided, it is not enough to rely solely on appellate review to narrow the construction of § (b)(7): the jury itself must be instructed on the proper narrow construction of the statute. *Id.* at 441 (Marshall, J., concurring). The state courts have, for the most part, refused to require any narrowing instructions to the jury. See *infra* note 169.

125. *Godfrey*, 446 U.S. at 441 (Marshall, J., concurring).

126. *Id.* at 442-44 (Burger, C.J., dissenting).

127. *Id.* at 448, 454 (White, J., dissenting).

the terms of the aggravating circumstance "would arguably be assailable on constitutional grounds."¹²⁸

The scope of the *Godfrey* plurality opinion is open to question.¹²⁹ Because it assumed, albeit erroneously,¹³⁰ that the Georgia Supreme Court already had narrowed the scope of section (b)(7) to cases involving serious physical abuse before death, the plurality never explicitly held that the serious physical abuse limitation was constitutionally required. Chief Justice Burger, however, in his dissenting opinion, argued that the plurality implicitly had adopted such a standard,¹³¹ a view shared by two state supreme courts¹³² and rejected by others.¹³³

Although a fair reading of the *Godfrey* plurality opinion certainly could support Chief Justice Burger's interpretation, in a larger sense the real issue to be addressed remains the same whatever interpretation of the *Godfrey* opinion is adopted. *Godfrey* did not, after all, announce any startling new principles of constitutional law. To the contrary, *Godfrey* is best understood as a case applying, in a particular fact situation, constitutional rules developed in numerous other cases. In the eighth amendment realm, *Godfrey* does no more than give substance to the Court's warnings in *Gregg v. Georgia*¹³⁴ and *Proffitt v. Florida*¹³⁵ concerning the potential unconstitutionality of overly broad aggravating circumstances.¹³⁶ When examined in light of due process principles, *Godfrey* is simply one of many cases that requires a state to draft and interpret its statutes with sufficient definiteness to limit the possibility that arbitrariness, capriciousness, and discrimination will enter into the decision making process of the judge or jury.¹³⁷

128. *Id.* at 454.

129. "Unfortunately, the opinion is not the model of clarity, and it fails to provide a complete and accurate analysis of a number of the issues raised by the case." Donohue, *Godfrey v. Georgia: Creative Federalism, The Eighth Amendment, and the Evolving Law of Death*, 30 CATH. U.L. REV. 13, 23-24 (1980); see also Note, *An Aggravating Circumstance*, *supra* note 9, at 852-60 (The Court's analysis in *Godfrey* was "cursory" and offered "little guidance . . . creat[ing] a void in which the states must act, inevitably resulting in the states' unconstitutional infliction of capital punishment.").

130. See *infra* notes 278-92 and accompanying text.

131. *Godfrey*, 446 U.S. at 442, 443 (Burger, C.J., dissenting).

132. See *State v. Sonnier*, 402 So. 2d 650, 659 (La. 1981), *cert. denied*, 463 U.S. 1229 (1983); *State v. Wood*, 648 P.2d 71, 86 (Utah), *cert. denied*, 459 U.S. 988 (1982).

133. See *infra* notes 170-341 and accompanying text.

134. 428 U.S. 153 (1976).

135. 428 U.S. 242 (1976).

136. See *supra* notes 100-09 and accompanying text.

137. *Godfrey* is the only direct Supreme Court holding concerning the constitutional scope of the "especially heinous" aggravating circumstance, although the issue has arisen in other opinions. For instance, the Court has indicated disapproval of a state court decision holding the killing of a police officer to be per se especially heinous. *Eddings v. Oklahoma*, 455 U.S. 104, 106, 108 n.3, 109 n.4 (1982); see also *Spaziano v. Florida*, 468 U.S. 447, 466-67 (1984) (Court noted that trial judge's finding of especially heinous factor was supported by evidence that victim was cut numerous times while still alive); *Zant v. Stephens*, 462 U.S. 862, 866-67 (1983) (jury rejected "outrageously vile" aggravating circumstance); *Barclay v. Florida*, 463 U.S. 939, 947-49 (1983) (because defendant was engaged in a self-proclaimed "race war," it was not improper for trial judge to make analogies to Nazism in his discussion of weight given the especially heinous factor); *Enmund v. Florida*, 458 U.S. 782, 785, 787 (1982) (Court noted that Florida Supreme Court reversed the especially heinous factor). In *Turner v. Murray*, 106 S. Ct. 1683 (1986), *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985), and *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985), the sentencer found that the especially heinous factor was present, and the state appellate court approved the finding. See *Turner v. Commonwealth*, 221

At the very least, the *Godfrey* opinion imposes a duty on state appellate courts to apply the especially heinous aggravating circumstance within narrow, consistent, and discernible bounds to avoid constitutional infirmity. The real issue, therefore, is whether those states that have not adopted the serious physical abuse standard have been able to define and apply their especially heinous aggravating circumstances to avoid this constitutional defect. The next section of this Article shows that they have not.

IV. STATE COURT APPLICATION OF THE "ESPECIALLY HEINOUS" AGGRAVATING CIRCUMSTANCE

In nine of the twenty-four states that have an especially heinous aggravating circumstance the appellate courts have either not yet interpreted this circumstance or have done so in too few cases to indicate its eventual scope.¹³⁸ Of the other fifteen states, only four have completely eliminated or significantly limited their especially heinous factors.

Two state courts have eliminated their states' especially heinous aggravating factors, finding them unconstitutionally overbroad and vague. In *People v. Superior Court*¹³⁹ the California Supreme Court found unconstitutionally vague, under the California and federal due process clauses, the special circumstance¹⁴⁰ that "[t]he murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, . . . [meaning] a conscienceless, or pitiless crime

Va. 513, 273 S.E.2d 36 (1980), *rev'd*, 106 S. Ct. 1683 (1986); *Ake v. State*, 663 P.2d 1 (Okla. Crim. App. 1983), *rev'd*, 105 S. Ct. 1087 (1985); *Caldwell v. State*, 443 So. 2d 806 (Miss. 1983) (en banc), *rev'd*, 105 S. Ct. 2633 (1985). The Supreme Court, however, did not discuss the especially heinous findings in its opinions in these cases.

138. No reported cases could be found that interpret the especially heinous circumstances in Colorado, Connecticut, Illinois, New Hampshire, and South Dakota. Idaho, Nevada, and Wyoming courts have upheld especially heinous findings in cases of obvious aggravated battery or torture, but have not yet defined the limits of their states' especially heinous factors. *See State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984) (child beaten to death); *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981) (victim beaten and shot; case remanded on other grounds; especially heinous finding not overturned, but sentencing judge instructed to consider limited definition on remand), *aff'd on other grounds*, 104 Idaho 809, 663 P.2d 1111 (1983); *Ybarra v. State*, 100 Nev. 167, 679 P.2d 797 (1984) (victim beaten and burned to death), *cert. denied*, 105 S. Ct. 1372 (1985); *Hopkinson v. State*, 664 P.2d 43 (Wyo. 1983) (victim tortured with cigarette burns), *aff'd*, 679 P.2d 1008 (Wyo.), *cert. denied*, 464 U.S. 908 (1984). There have been no appellate decisions discussing New Jersey's especially heinous factor, although several published trial court opinions indicate a narrow construction of the statute. *See State v. Monturi*, 195 N.J. Super. 317, 478 A.2d 1266 (Law Div. 1984) (aggravating factor requires serious physical abuse before death); *State v. Bass*, 189 N.J. Super. 445, 460 A.2d 214 (Law Div. 1983) (aggravating factor requires serious physical abuse before death); *cf. State v. Wright*, 196 N.J. Super. 516, 483 A.2d 436 (Law Div. 1984) (holding victim under water until drowning occurs supports especially heinous factor).

139. 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982).

140. A "special circumstance" under the California system is a factor that, if found by the jury, triggers a sentencing trial to determine whether defendant should receive a death sentence or a sentence of life without parole. CAL. PENAL CODE §§ 190.2, 190.4 (West Supp. 1986). The California statute now contains 19 special circumstances, all of which parallel aggravating circumstances found in capital punishment statutes in other states. *See id.* § 190.2. The jury at the sentencing trial must weigh the special circumstances found against other statutory and nonstatutory mitigating circumstances. *Id.* § 190.3. Thus, a special circumstance in California plays both a "bridging" role, as does an aggravating circumstance in the Georgia capital punishment scheme, *see Zant v. Stephens*, 462 U.S. 862, 871, 874 (1983), and a "balancing" role as in Florida's death penalty system, *see Barclay v. Florida*, 463 U.S. 939, 954 (1983).

which is unnecessarily torturous to the victim."¹⁴¹ After reviewing the meaning of the individual words of the statute,¹⁴² the court noted that "[t]he terms address the emotions and subjective, idiosyncratic values. While they stimulate feelings of repugnance, they have no directive content,"¹⁴³ and therefore fail to meet the standards of certainty required by the vagueness doctrine.

The conclusion is inescapable that the language of subdivision (a)(14) is so vague that men of common intelligence must guess at its meaning, and trial judges and jurors will look in vain for a standard for ascertainment of guilt or, in this case, for determination of the truth of the special circumstance.¹⁴⁴

Similarly, in *In re State*¹⁴⁵ the Delaware Supreme Court invalidated the aggravating circumstance that "[t]he murder was outrageously or wantonly vile, horrible or inhuman."¹⁴⁶ The Delaware court, relying on the eighth amendment as interpreted in *Godfrey*, held that the absence of any words limiting the single phrase "outrageously vile, horrible or inhuman" rendered the circumstance overly broad and vague.¹⁴⁷

Louisiana and Utah, although not invalidating their especially heinous circumstances, have narrowed these circumstances by adopting a strict interpretation of *Godfrey*. In *State v. Sonnier*,¹⁴⁸ a case in which the Louisiana Supreme Court in an earlier appeal had approved an "especially heinous, atrocious, or cruel"¹⁴⁹ finding,¹⁵⁰ the court interpreted *Godfrey* as requiring evidence of seri-

141. CAL. PENAL CODE § 190.2(a)(14) (West Supp. 1986).

142. The court stated:

It is difficult to assign any specific content to the perjoratives contained in subdivision (a)(14). Webster's New International Dictionary (Second Edition) defines heinous as "[h]ateful; hatefully bad; flagrant; odious; atrocious; giving great offense." Atrocious is defined as "[s]avagely brutal; outrageously cruel or wicked" Cruel is defined as "[d]isposed to give pain to others; willing or pleased to hurt or afflict; savage inhuman, merciless." Depravity is defined as "corruption, wickedness."

People v. Superior Court, 31 Cal. 3d at 801-02, 647 P.2d at 78, 183 Cal. Rptr. at 802.

143. *Id.* at 802, 647 P.2d at 78, 183 Cal. Rptr. at 802.

144. *Id.* at 803, 647 P.2d at 78, 183 Cal. Rptr. at 802. The court rejected the State's argument that the Supreme Court's approval of the "especially heinous" aggravating circumstance in *Proffitt* precluded its due process ruling, noting the limited nature of *Proffitt*'s eighth amendment review. *Id.* at 804, 647 P.2d at 79, 183 Cal. Rptr. at 803. The court also attempted to distinguish the role of a special circumstance from that of an aggravating circumstance, *id.* at 804, 647 P.2d at 78-79, 183 Cal. Rptr. at 802-03, a distinction that is essentially meritless.

145. 433 A.2d 325 (Del. 1981).

146. DEL. CODE ANN. tit. 11, § 4209(e)(1)(n) (1979 & Supp. 1984).

147. The Delaware Supreme Court holding is contained in a two page, *per curiam* opinion affirming a much lengthier trial court opinion in *State v. Chaplin*, 433 A.2d 327 (Del. Super. Ct. 1981). The trial court relied on both *Godfrey* and the pre-*Godfrey* case of *State v. White*, 395 A.2d 1082 (Del. 1978), in which the court found the aggravating circumstances that the victim was "elderly" or "defenseless" too vague to satisfy the eighth amendment. See *supra* note 63. In 1982 the Delaware Legislature attempted to cure the defect in the statute by amending it to read: "The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering him." DEL. CODE ANN. tit. 11, § 4209(e)(l) (Supp. 1984). No cases interpreting the amended provision could be found.

148. 402 So. 2d 650 (La. 1981), *cert. denied*, 463 U.S. 1229 (1983).

149. LA. CODE CRIM. PROC. ANN. art. 905.4(g) (West 1984).

150. *State v. Sonnier*, 379 So. 2d 1336, 1361-62 (La. 1980).

ous physical abuse before death to uphold an especially heinous finding.

Because of the similarity of thought and language in the Georgia and Louisiana statutory definitions of "especially heinous" and "outrageously vile" aggravating circumstances, some of the teachings of *Godfrey* are directly applicable to the Louisiana capital punishment regime: This court should continue to apply the narrowing construction it has employed in previous cases, viz., in order for the jury to find that the offense was committed in an especially heinous, atrocious or cruel manner there must exist evidence, from which the jury could find beyond a reasonable doubt, that there was torture or the pitiless infliction of unnecessary pain on the victim. This construction should be clarified to include an explanation that "torture" requires evidence of serious physical abuse of the victim before death.¹⁵¹

In *State v. Wood*¹⁵² the Utah Supreme Court reversed the trial court's imposition of the death penalty based on a finding of "ruthlessness and brutality," holding, as did the Louisiana court, that *Godfrey* limited any such aggravating circumstance to cases involving an aggravated battery or torture before death.¹⁵³

Louisiana and Utah are alone in interpreting *Godfrey* to restrict their states' especially heinous aggravating circumstances to the serious physical abuse standard. Eleven other states have extensively used the especially heinous aggravating circumstance: Alabama, Arizona, Florida, Georgia, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, Tennessee, and Virginia. The courts in these states, although paying lip-service to *Godfrey's* pronouncement that the especially heinous aggravating circumstance must be limited to "core" cases,¹⁵⁴

151. *Sonnier*, 402 So. 2d at 659. The evidence in the case showed that defendant and his brother had kidnapped a male and a female victim, handcuffed the male victim to a tree, raped the female victim, and then shot both victims in the head, killing them instantly. *Id.* at 654. The court in the second *Sonnier* opinion held that the especially heinous findings were of questionable validity, both because the jury had not been instructed on the proper construction of the statute and because there was not enough evidence to show that the victims were subject to serious physical abuse before death. The death penalty was affirmed, however, because the jury found four other aggravating circumstances, including the aggravating circumstances that a rape and kidnapping had occurred during the murder. *Id.* at 659-60.

The Louisiana court has continued to adhere to the narrow construction propounded in *Sonnier*. See *State v. Moore*, 432 So. 2d 209 (La.) (defendant robbed store, abducted and shot manager; especially heinous finding reversed), *cert. denied*, 464 U.S. 986 (1983); *State v. Monroe*, 397 So. 2d 1258 (La. 1981) (victim stabbed seven times and lived for a short period of time; especially heinous finding reversed because wounds were inflicted to kill, not to maim or inflict pain), *cert. denied*, 463 U.S. 1229 (1983); *State v. Culbreth*, 390 So. 2d 847 (La. 1980) (especially heinous finding reversed because wounds inflicted to kill, not to maim or inflict pain); *cf.* *State v. Taylor*, 422 So. 2d 109 (La. 1982) (multiple stab wounds showing intent to inflict pain amounted to "serious physical abuse," and especially heinous factor upheld), *cert. denied*, 460 U.S. 1103 (1983); *State v. Moore*, 414 So. 2d 340 (La. 1982) (multiple stab wounds showing intent to inflict pain amounted to "serious physical abuse," and especially heinous factor upheld), *cert. denied*, 463 U.S. 1214 (1983).

152. 648 P.2d 71 (Utah), *cert. denied*, 459 U.S. 988 (1982).

153. *Id.* at 85-86. "Ruthlessness and brutality" was not a statutory aggravating circumstance, which made its use as the sole justification for the death penalty in *Wood* constitutionally suspect. See *Henry v. Wainwright*, 661 F.2d 56 (5th Cir. 1981), *vacated on other grounds*, 457 U.S. 1114 (1982). The *Wood* court, however, did not discuss this issue. In 1983 the Utah Legislature adopted an aggravating circumstance that provides: "The homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death." UTAH CODE ANN. § 76-5-202(1)(q) (Supp. 1985).

154. See, e.g., *Keller v. State*, 380 So. 2d 926, 937 (Ala. Crim. App. 1979) ("An inclination to

have been unable to identify this core. Having rejected the serious physical abuse standard, the courts in these states have proven themselves unable to provide any other identifiable, consistent, and meaningful limitations on the especially heinous circumstance.

The problem starts with the subjective nature of the terms used in the especially heinous statutes. As the Supreme Court has noted repeatedly, for a person of ordinary sensibilities, every first degree murder could be "heinous," "cruel," "atrocious," "vile," or "depraved."¹⁵⁵ These are all highly subjective terms;¹⁵⁶ unless an appellate court provides limiting definitions, it would be unrealistic to assume that an aggravating circumstance containing such terms could in any way channel a sentencer's discretion.¹⁵⁷ The definitions, the "gloss" provided by the state appellate courts, have, however, proven to be of little assistance in curing the vagueness inherent in the terms of these statutes. The supreme courts of Georgia and Missouri, for instance, have refused to provide any definition of their "depravity" standards.¹⁵⁸

Even when definitions are propounded by the appellate courts, they usually consist of a string of equally subjective descriptive terms and thus provide little guidance. For example, the Arizona Supreme Court has defined its "especially heinous, cruel, or depraved"¹⁵⁹ aggravating circumstance as follows:

heinous: hatefully or shockingly evil; grossly bad. cruel: disposed to inflict pain esp. in a wanton, insensate or vindictive manner: sadistic. depraved: marked by debasement, corruption, perversion or deterioration.¹⁶⁰

Furthermore, the Arizona Supreme Court has held that the terms of Ari-

gradually broaden the scope of aggravating circumstances beyond the strict wording of the statute will eventually lead to an unconstitutional application."); *State v. Preston*, 673 S.W.2d 1, 10 (Mo.) (en banc) ("the danger of imposing death by mere wafture of 'depravity of mind' without proper tethers is manifest"), *cert. denied*, 105 S. Ct. 269 (1984); *State v. Goodman*, 298 N.C. 1, 25, 257 S.E.2d 569, 585 (1979) (especially heinous aggravating factor must not become a "catch-all" provision); *see also State v. Pritchett*, 621 S.W.2d 127, 137-38 (Tenn. 1981) (requirement of torture or acts evincing a depraved state of mind).

155. *Godfrey*, 446 U.S. at 422-23; *Gregg*, 428 U.S. at 201.

156. *See, e.g., Gale*, *supra* note 9, at 282 ("Terms like 'heinous,' 'cruel,' and 'depraved' are almost without directive content."); *Riedel*, *supra* note 9, at 267 (heinous factor is a "very subjective" standard); Note, *An Aggravating Circumstance*, *supra* note 9, at 854 ("Unfortunately what is 'outrageously or wantonly vile, horrible or inhuman' is open to many constructions. . . . It would be difficult to define [these terms] . . . narrowly because the terms are so subjective.").

157. *See, e.g., Note, Civilized Standard*, *supra* note 9, at 658 (The heinous factor "could become a catch phrase when no other aggravating circumstances exist; after all, murder is a cruel business."); Note, *Florida's Responses*, *supra* note 9, at 141 ("[A] sentencer could find any murder to be 'especially heinous, atrocious or cruel.'"); Note, *The Current Test*, *supra* note 9, at 691 ("[A]n open-ended definition of 'especially heinous, atrocious or cruel' would seem to give the judge or jury free rein to impose the death penalty.").

158. Instead, these courts merely discuss various facts which would in their view tend to show depravity. *See, e.g., Hance v. State*, 245 Ga. 856, 862-63, 268 S.E.2d 339, 346, *cert. denied*, 449 U.S. 1067 (1980); *Fair v. State*, 245 Ga. 868, 872-73, 268 S.E.2d 316, 325, *cert. denied*, 449 U.S. 986 (1980); *State v. Preston*, 673 S.W.2d 1, 10-11 (Mo.) (en banc), *cert. denied*, 105 S. Ct. 269 (1984).

159. ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1978 & Supp. 1985).

160. *State v. Gretzler*, 135 Ariz. 42, 51, 659 P.2d 1, 10 (quoting *State v. Knapp*, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), *cert. denied*, 435 U.S. 908 (1978)), *cert. denied*, 461 U.S. 971 (1983).

zona's statute can be read in the disjunctive,¹⁶¹ thus ignoring Justice White's comments in his dissenting opinion in *Godfrey*.¹⁶² A sentencer's finding of evidence that supports any one of these vague descriptive terms is enough to satisfy the statute's requirements. Therefore, a defendant can be sentenced to death in Arizona if the murder is deemed "grossly bad," or if it is "marked by . . . deterioration";¹⁶³ a murder can be especially heinous in Arizona even if it is not "grossly bad" so long as it fits one of the other vague terms of the circumstance. How these definitions serve to limit the scope of the statute is impossible to comprehend.

The definitions used by the Oklahoma Court of Criminal Appeals are equally meaningless. Heinous is defined as "extremely wicked or shockingly evil," atrocious as "outrageously wicked and vile," and cruel as "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others."¹⁶⁴ Like its Arizona counterpart, the Oklahoma court has expressly refused to read the terms of the statute in the conjunctive.¹⁶⁵ Thus, in Oklahoma, a murder is especially heinous if it is *either* "extremely wicked or shockingly evil," *or* "outrageously wicked and vile," *or* "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others," with no other limitation on the meaning of these words.

The courts in the other eleven states in this category use varying terminology to describe the individual words in their statutes, but like the definitions provided by the Oklahoma and Arizona courts, none of the terms used provides

161. *Id.* At least seven other states' courts have held that the terms of similar statutes can be read in the disjunctive. *See, e.g.,* *Johnson v. State*, 399 So. 2d 859, 869 (Ala. Crim. App. 1979) (heinous, atrocious, or cruel), *rev'd in part on other grounds*, 399 So. 2d 873 (Ala. 1981); *Hance v. State*, 245 Ga. 856, 860-62, 268 S.E.2d 339, 345 (either depravity of mind, or torture of the victim, or an aggravated battery to the victim), *cert. denied*, 449 U.S. 1067 (1980); *State v. Newlon*, 627 S.W.2d 606, 621 (Mo.) (en banc) (torture or depravity of mind), *cert. denied*, 459 U.S. 884 (1982); *State v. Moore*, 210 Neb. 457, 470, 316 N.W.2d 33, 41 (heinous, atrocious, or cruel or manifesting exceptional depravity), *cert. denied*, 456 U.S. 984 (1982); *Cartwright v. State*, 695 P.2d 548, 554 (Okla. Crim. App.) (heinous, atrocious or cruel), *cert. denied*, 105 S. Ct. 3538 (1985); *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985) (depravity of mind can be found even when no torture or serious abuse is found); *Bunch v. Commonwealth*, 225 Va. 423, 442, 304 S.E.2d 271, 282 (torture, depravity of mind or aggravated battery to the victim), *cert. denied*, 464 U.S. 977 (1983). Although the Florida and North Carolina courts have not held expressly that the terms of their especially heinous aggravating circumstances are to be read disjunctively, there are indications that the courts would approve such a finding. *See Johnson v. State*, 393 So. 2d 1069, 1073-74 (Fla. 1980) (discussed *infra* note 170) (disjunctive finding by trial court upheld without comment), *cert. denied*, 454 U.S. 882 (1981); *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826 (1985) ("The legislature specifically provided that this aggravating circumstance may be found only in cases in which the first degree murder committed was especially heinous, especially atrocious, or especially cruel.") (emphasis added); *see also Jordan v. State*, 464 So. 2d 475, 478 (Miss. 1985) (discussing definitions for Mississippi's "especially heinous, atrocious or cruel" aggravating circumstance without discussing conjunctive/disjunctive issue).

162. *See supra* note 128 and accompanying text.

163. Webster's defines "deteriorate" as "to make inferior in quality or value: impair," "dis-integrate," "to become impaired in quality functioning, or condition or state," or "degenerate." WEBSTER'S NEW COLLEGIATE DICTIONARY 345-46 (9th ed. 1985). What this term has to do with the capital sentencing process is hard to imagine.

164. *Eddings v. State*, 616 P.2d 1159, 1167-68 (Okla. Crim. App. 1980), *rev'd in part*, 455 U.S. 104 (1982).

165. *See Cartwright v. State*, 695 P.2d 548, 554 (Okla. Crim. App.), *cert. denied*, 105 S. Ct. 3538 (1985).

a true limiting definition.¹⁶⁶ To say that a murder is especially heinous if it is "grossly bad" or "shockingly evil" is to say nothing. To define depravity, as Arizona does, to mean "marked by debasement, corruption, perversion or deterioration" expands rather than limits the meaning of the aggravating circumstance. These definitions and others like them provide no limitations on the especially heinous circumstance.

What follows is a state-by-state analysis of appellate decisions applying the especially heinous circumstance in each of the eleven states. Although the courts in each of these states have approved especially heinous findings in cases involving serious physical abuse¹⁶⁷ and most have overturned some especially

166. Virginia, for instance, defines aggravated battery as "'a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.'" *Bunch v. Commonwealth*, 225 Va. 423, 445, 304 S.E.2d 271, 283 (quoting *Whitley v. Commonwealth*, 223 Va. 66, 79, 286 S.E.2d 162, 169-70, *cert. denied*, 459 U.S. 882 (1982)), *cert. denied*, 464 U.S. 977 (1983). An aggravated battery occurs in Georgia when "[a] person . . . maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof. . . . The bodily harm . . . must occur before death." *Hance v. State*, 245 Ga. 856, 861, 268 S.E.2d 339, 345 (quoting *Godfrey*, 446 U.S. at 431 n.13), *cert. denied*, 449 U.S. 1067 (1980). Depravity in Virginia means "a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967 (1979). In Nebraska the depravity standard is met when there is enough depravity "to obviously offend all standards of morality and intelligence." *State v. Simants*, 197 Neb. 549, 566, 250 N.W.2d 881, 891, *cert. denied*, 434 U.S. 878 (1977).

167. See, e.g., *Baldwin v. State*, 456 So. 2d 117 (Ala. Crim. App. 1983) (victim abducted, sexually assaulted, choked, stabbed, locked in a trunk, run over with a car, and finally killed by a blow from a hatchet), *aff'd*, 456 So. 2d 129 (Ala. 1984), *aff'd*, 105 S. Ct. 2727 (1985); *Dunkins v. State*, 437 So. 2d 1349 (Ala. Crim. App.) (victim tied naked to a tree and stabbed 66 times), *aff'd*, 437 So. 2d 1356 (Ala. 1983), *cert. denied*, 465 U.S. 1051 (1984); *State v. Gillies*, 142 Ariz. 564, 691 P.2d 655 (1984) (en banc) (victim kept alive for eight hours of beatings and rapes after which she was pushed from a four foot embankment, kicked, and killed with large rocks), *cert. denied*, 105 S. Ct. 1775 (1985); *State v. James*, 141 Ariz. 141, 685 P.2d 1293 (when victim remained conscious after being beaten and shot, defendants beat him further with fists, boards and rocks, finally throwing him down a mine shaft), *cert. denied*, 105 S. Ct. 398 (1984); *Scott v. State*, 411 So. 2d 866 (Fla. 1982) (victim brutally beaten after prolonged struggle); *Straight v. State*, 397 So. 2d 903 (Fla.) (victim tormented with hammer blows and stabbing for 30 minutes before he died), *cert. denied*, 454 U.S. 1022 (1981); *Conner v. State*, 251 Ga. 113, 303 S.E.2d 266 (victim beaten severely with bottles and sticks, then stomped to death), *cert. denied*, 464 U.S. 865 (1983); *Cervi v. State*, 248 Ga. 325, 282 S.E.2d 629 (1981) (defendant left victim tied to a tree to die after beating him and cutting his throat), *cert. denied*, 456 U.S. 938 (1982); *Billoit v. State*, 454 So. 2d 445 (Miss. 1984) (bludgeoning death), *cert. denied*, 105 S. Ct. 1232 (1985); *Leatherwood v. State*, 435 So. 2d 645 (Miss. 1983) (victim choked with a rope then stabbed and bludgeoned to death), *cert. denied*, 465 U.S. 1084 (1984); *State v. Battle*, 661 S.W.2d 487 (Mo. 1983) (Defendant raped and severely beat his victim, plunged a knife into her eye and left her to die.), *cert. denied*, 466 U.S. 993 (1984); *State v. Stokes*, 638 S.W.2d 715 (Mo. 1982) (victim raped and severely beaten before being strangled), *cert. denied*, 460 U.S. 1017 (1983); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (rape, stabbing, violent struggle), *cert. denied*, 105 S. Ct. 447 (1984); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (sexual molestation and shooting), *cert. denied*, 434 U.S. 878 (1977); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214 (After paralyzing victim's legs with a gunshot, defendant dragged her around and held her up against a wall to beat her before shooting her four more times to kill her.), *cert. denied*, 454 U.S. 933 (1981); *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979) (victim shot and cut repeatedly, then placed into a car trunk, from which his struggle to escape could be heard, and driven to a remote area where he was shot to death); *Brogie v. State*, 695 P.2d 538 (Okla. Crim. App. 1985) (victim raped, forced to kneel in gravel, throat slit, body stabbed, struck about the head); *Stout v. State*, 693 P.2d 617 (Okla. Crim. App. 1984) (victims severely beaten with a pipe), *cert. denied*, 105 S. Ct. 3489 (1985); *State v. Come*, 665 S.W.2d 87 (Tenn.) (victims severely beaten), *cert. denied*, 467 U.S. 1210 (1984); *State v. Melson*, 638 S.W.2d 342 (Tenn. 1982) (victim beaten with a hammer), *cert. denied*, 459 U.S. 1137 (1983); *Wayne v. Commonwealth*, 219 Va. 683, 251 S.E.2d 202 (victim raped, bitten, beaten, and stabbed), *cert. denied*, 422 U.S. 924 (1979); *Mason v. Commonwealth*, 219 Va. 1091, 254 S.E.2d 116

heinous findings,¹⁶⁸ what is readily apparent is that the courts have been unable to identify and apply any common core of meaning to their statutes listing especially heinous circumstances. What emerges instead is a pattern of ad hoc, standardless, and after-the-fact decision making—a pattern of judicial legislation.

In four of the states—Florida, North Carolina, Tennessee, and Nebraska—the courts have displayed at least an intention to limit application of their especially heinous circumstances. These good intentions, unfortunately, have been rendered meaningless by inconsistency and by approval of especially heinous findings in widely disparate situations. In the other seven states, no such limiting inclinations are apparent; the especially heinous circumstance truly has become a “catch-all.” Whether the problem is viewed as one of inconsistency or as one of overbreadth, the result is the same: any and all first degree murders potentially fall within the scope of the especially heinous aggravating circumstance.¹⁶⁹

(victim beaten, ax handle shoved into rectum, nail driven through wrist, victim set on fire while alive), *cert. denied*, 444 U.S. 919 (1979).

168. See, e.g., *Colley v. State*, 405 So. 2d 374, 389 (Ala. Crim. App. 1979) (error for trial court to base its “especially heinous” finding on the unnecessary nature of the killing), *rev’d on other grounds*, 405 So. 2d 391 (Ala. 1981); *Keller v. State*, 380 So. 2d 926, 937 (Ala. Crim. App. 1979) (stating that merely because a murder is hateful it is not necessarily “especially heinous”), *cert. denied*, 380 So. 2d 938 (Ala. 1980); *State v. Madsen*, 125 Ariz. 346, 352, 609 P.2d 1046, 1052-53 (en banc) (insufficient evidence to support “especially heinous” finding when defendant had planned the killing and had lured the victim into a helpless position), *cert. denied*, 449 U.S. 873 (1980); *State v. Lujan*, 124 Ariz. 365, 372-73, 604 P.2d 629, 636 (1979) (en banc) (court refused to uphold “especially heinous” finding when trial judge based decision only on the helplessness of the victim and the unnecessary nature of the killing); *State v. Watson*, 120 Ariz. 441, 447-48, 586 P.2d 1253, 1260 (1978) (en banc) (shooting victim four times in the back not “especially heinous”), *cert. denied*, 440 U.S. 924 (1979); *Herzog v. State*, 439 So. 2d 1372, 1379-80 (Fla. 1983) (“especially heinous” finding reversed because victim under influence of drugs when murdered); *Middleton v. State*, 426 So. 2d 548, 552 (Fla. 1982) (instantaneous death by shooting not “especially heinous”), *cert. denied*, 463 U.S. 1230 (1983); *Whittington v. State*, 252 Ga. 168, 178-79, 313 S.E.2d 73, 81-82 (1984) (reversal of “especially heinous” finding in case in which victim died by gunshots and defendant not shown to have intended pain); *Phillips v. State*, 250 Ga. 336, 339-40, 297 S.E.2d 217, 220-21 (1982) (brief apprehension of death by victim who died within five minutes of being shot would not support an “especially heinous” finding); *Evans v. State*, 422 So. 2d 737, 742-43 (Miss. 1982) (“especially heinous” finding rejected when defendant forced store clerk to kneel during robbery, then shot him), *cert. denied*, 461 U.S. 939 (1983); *State v. Reeves*, 216 Neb. 206, 227-28, 344 N.W.2d 433, 447 (reversal of especially heinous finding for case in which victim died immediately when stabbed), *cert. denied*, 105 S. Ct. 447 (1984); *State v. Stewart*, 197 Neb. 497, 523, 250 N.W.2d 849, 864 (1977) (defendant’s action in setting bodies on fire could not support an “especially heinous” finding when victims died instantly); *State v. Hamlet*, 312 N.C. 162, 174-77, 321 S.E.2d 837, 845-47 (1984) (shooting murder not “especially heinous” when victim immediately rendered unconscious); *State v. Moose*, 310 N.C. 482, 493-96, 313 S.E.2d 507, 515-16 (1984) (“especially heinous” finding reversed in case in which defendant followed victim’s car, honking and bumping it before forcing him over and shooting him); *Odum v. State*, 651 P.2d 703, 707 (Okla. Crim. App. 1982) (“especially heinous” finding reversed in case in which victim rendered unconscious immediately by a shot to the neck); *State v. Pritchett*, 621 S.W.2d 127, 139 (Tenn. 1981) (instantaneous shooting death not “especially heinous”); *Peterson v. Commonwealth*, 225 Va. 289, 300-01, 302 S.E.2d 520, 525 (1983) (court specifically approved jury’s rejection of the vileness factor in a shooting case), *cert. denied*, 464 U.S. 865 (1983). No reversals of “especially heinous” findings by the Missouri Supreme Court could be found.

169. The ensuing discussion will focus on state appellate decisions determining the scope of the “especially heinous” aggravating circumstances. In *Godfrey* both the plurality opinion and Justice Marshall’s concurrence expressed concern about the actual guidance provided to the jury in reaching its decision in this area. *Godfrey*, 446 U.S. at 428-29, 437 (Marshall, J. concurring). Justice Stewart

Florida

Long before *Godfrey*, the Florida Supreme Court attempted to limit its "especially heinous, atrocious or cruel" aggravating circumstance by holding that it applied only "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."¹⁷⁰ The last part of this phrase, which requires that the crime be "unnecessarily torturous to the victim," could be interpreted to limit this aggravating circumstance to cases involving serious abuse of the victim before death. It would therefore be logical to assume that the Florida court, having adopted this definition, has so limited the application of this factor. The Florida Supreme Court, however, has not done so.

The Florida Supreme Court has decided many cases involving the espe-

noted that "the jury's interpretation of § (b)(7) can only be the subject of sheer speculation." *Id.* at 429.

Notwithstanding these concerns, little care has been taken to ensure that sentencing juries are adequately instructed on the meaning of "especially heinous" aggravating circumstances. In Florida, for example, the jury need only be instructed that the factor is present if "[t]he crime for which the defendant is to be sentenced was wicked, evil, atrocious or cruel." *Pope v. State*, 441 So. 2d 1073, 1078 (Fla. 1983). The only difference between the instruction and the bare terms of Florida's statute is the substitution of the words "wicked" and "evil" in the place of "especially heinous." Obviously, this substitution does nothing to limit the sentencer's discretion. Other states have expressly held that a mere reading of the statute is sufficient. *See, e.g., Washington v. State*, 361 So. 2d 61, 65 (Miss. 1978) (en banc) (instruction beyond the terms of the statute unnecessary because the factor is "not confusing nor likely to be misunderstood"), *cert. denied*, 441 U.S. 916 (1979); *State v. Newlon*, 627 S.W.2d 606, 621 (Mo.) (en banc) ("depravity of mind" needs no definitional instruction to the jury because "there can be no precise objective definition") (emphasis added), *cert. denied*, 459 U.S. 884 (1982); *Irwin v. State*, 617 P.2d 588, 598 (Okla. Crim. App. 1980) (no instruction needed beyond terms of statute); *Tuggle v. Commonwealth*, 228 Va. 493, 515-16, 323 S.E.2d 539, 552-53 (1984) (no instruction needed beyond terms of statute), *vacated*, 105 S. Ct. 2315 (1985).

Even when the jury is given instructions, it is doubtful that any real guidance is provided. For instance, North Carolina juries are instructed as follows:

You are instructed that the words "especially heinous, atrocious or cruel" means [sic] extremely or especially or particularly heinous or atrocious or cruel. You're instructed that "heinous" means extremely wicked or shockingly evil. Atrocious means marked by or given to extreme wickedness, brutality or cruelty, marked by extreme violence or savagely fierce. It means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain, utterly indifferent to or enjoyment of the suffering of others.

State v. Goodman, 298 N.C. 1, 25, 257 S.E.2d 569, 569-85 (1979). Because the jurors are never instructed that the terms of the aggravating circumstance, which are stated in the disjunctive, have to be applied in the conjunctive, they are free to apply the circumstance simply by finding that the killing was evil or wicked or fierce.

170. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). This quotation is actually only the last part of the definition provided in *Dixon*. The court also defined the terms individually: "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." *Id.* The Florida Supreme Court has not indicated whether the terms should be applied in the conjunctive or disjunctive. The terms, however, are stated in the disjunctive, thereby enabling the jury and the trial court to base an especially heinous finding on any one of the three terms. This disjunctive interpretation is bolstered by the decision in *Johnson v. State*, 393 So. 2d 1069, 1073-74 (Fla. 1980), *cert. denied*, 454 U.S. 882 (1981), in which the trial court's finding that the murder was not heinous but was atrocious and cruel was affirmed without comment on the disjunctive nature of the finding. *See also Mello, supra* note 14 (an exhaustive study collecting and discussing every Florida appellate case dealing with the "especially heinous" circumstance).

cially heinous aggravating circumstance¹⁷¹ and, contrary to other states, has ostensibly placed some limits on what can be used to support an especially heinous finding. Thus, mutilation of the victim's body after death has been deemed irrelevant,¹⁷² and in a relatively large number of cases in which the victims were killed instantly by a gunshot, the court has reversed especially heinous findings.¹⁷³

On closer examination it is evident that despite the court's self-proclaimed intention to limit the especially heinous circumstance to cases with evidence of "additional acts" that are "unnecessarily torturous to the victim," this circumstance has not been applied in a manner to eliminate arbitrariness, caprice, and discrimination, to narrow the class of those eligible for the death penalty, or to provide a rational and meaningful standard to distinguish those who are to be executed from those who are allowed to live. In fact, the Florida Supreme Court's application of its especially heinous circumstance has led one commentator to conclude: "First, the [especially heinous aggravating] circumstance has been applied by the Florida Supreme Court to virtually every type of first degree murder . . . imaginable. Second, even where Florida courts have developed principles for applying . . . the [especially heinous aggravating] circumstance, those principles have not been applied with coherence or consistency."¹⁷⁴

Thus, disregarding the requirement of additional acts "which are unnecessarily torturous to the victim," the Florida Supreme Court affirmed a finding of especially heinous circumstances in *Spinkellink v. State*,¹⁷⁵ even though the victim apparently was killed instantly by two shots to the head and spine.¹⁷⁶ The "unnecessarily torturous" limitation also was ignored in *Christopher v. State*,¹⁷⁷ in which defendant killed two victims, each with a single shot. The murders were found to be especially heinous apparently because the victims had befriended defendant.¹⁷⁸ In *Thomas v. State*¹⁷⁹ defendant shot the victim five times.¹⁸⁰ The trial judge found the murder especially heinous because defendant sexually assaulted the victim's wife *after* the shooting,¹⁸¹ and the Florida Supreme Court approved this finding without comment.¹⁸²

171. See generally Mello, *supra* note 14, at 534 n.54 (noting that the Florida court has affirmed 87 cases involving the especially heinous circumstance).

172. See, e.g., *Simmons v. State*, 419 So. 2d 316, 319 (Fla. 1982) (burning of victim's body after death irrelevant); *Halliwel v. State*, 323 So. 2d 557, 561 (Fla. 1975) (dismemberment after death irrelevant).

173. Mello, *supra* note 14, at 536 & n.56, 551.

174. *Id.* at 528.

175. 313 So. 2d 666 (Fla. 1975), *cert. denied*, 428 U.S. 911 (1976).

176. *Id.* at 668, 671. The court never even discussed why this murder was especially heinous but concluded that it was "premeditated, especially cruel, atrocious and heinous." *Id.* at 671.

177. 407 So. 2d 198 (Fla. 1981), *cert. denied*, 456 U.S. 910 (1982).

178. See *id.* at 202.

179. 374 So. 2d 508 (Fla. 1979), *cert. denied*, 445 U.S. 972 (1980).

180. *Id.* at 511 n.1.

181. *Id.*

182. *Id.* at 517. For another example of extraneous factors being used to support a finding of especially heinous circumstances, see *Knight v. State*, 338 So. 2d 201, 202 (Fla. 1976) (especially heinous finding based in part on the bravery displayed by the victim's husband when he returned to assist his wife).

The incoherency of the standards applied by the Florida Supreme Court is readily evident. The defendant's lack of remorse has been used to support an especially heinous finding in one case¹⁸³ and has been deemed irrelevant in another case.¹⁸⁴ The victim's intoxication has been used both to uphold¹⁸⁵ and to reverse¹⁸⁶ an especially heinous finding. The victim's helplessness before the shooting has been used to support an especially heinous finding¹⁸⁷ and to reject an especially heinous finding.¹⁸⁸ Both the victim's knowledge that he was going to die¹⁸⁹ and the defendant's willingness to kill a sleeping victim, who thus could not have known of impending death,¹⁹⁰ have supported findings of especially heinous circumstances. Murders that the Florida Supreme Court has loosely described as "execution-style" murders have been deemed both especially heinous and not especially heinous.¹⁹¹

Other cases illustrate further the Florida Supreme Court's inconsistent application of the especially heinous aggravating circumstance. In *Teffeteller v. State*¹⁹² the victim lived for a couple of hours after being shot, experienced pain, and knew death was imminent, but the court did not find the murder "especially heinous." Yet in *Mason v. State*,¹⁹³ a case decided just three weeks before *Teffeteller*, the court approved an especially heinous finding because the victim lived for one to ten minutes after being stabbed. In *Kampff v. State*¹⁹⁴ the murder was not especially heinous even though defendant had followed his wife to her place of work and shot her three times; in *Harvard v. State*¹⁹⁵ the Florida Supreme Court upheld an especially heinous finding because defendant

183. *Sireci v. State*, 399 So. 2d 964, 971-72 (Fla. 1981), *cert. denied*, 456 U.S. 984 (1982) (lack of remorse may be considered when determining whether murder was especially heinous).

184. *Pope v. State*, 441 So. 2d 1073, 1078 (Fla. 1983) (trial court based especially heinous finding, in part, on defendant's lack of remorse as shown by his not-guilty plea; court announced prospective rule that lack of remorse may not be considered in making especially heinous determination).

185. *White v. State*, 415 So. 2d 719, 720 n.2 (Fla.) (intoxicated victim "quite helpless and unable to defend herself"), *cert. denied*, 459 U.S. 1055 (1982).

186. *Herzog v. State*, 439 So. 2d 1372, 1380 (Fla. 1983) (victim drugged and semiconscious).

187. *Ford v. State*, 374 So. 2d 496, 502 n.1 (Fla. 1979) (victim already rendered helpless when defendant shot him again in the head, despite the fact that victim posed "no threat" to him), *cert. denied*, 445 U.S. 972 (1980).

188. *Lewis v. State*, 377 So. 2d 640, 646 (Fla. 1979) (victim wounded by two shots in chest, then killed by shot in the back); *see, e.g., Mello, supra* note 14, at 539-40 (citing cases).

189. *See Mello, supra* note 14, at 540 n.88.

190. *Breedlove v. State*, 413 So. 2d 1, 9 (Fla.), *cert. denied*, 459 U.S. 882 (1982); *see also Mello, supra* note 14, at 541 (referring to *Breedlove* decision). As Mello notes, in other cases the Florida Supreme Court has reversed the "especially heinous" findings because the victim was not aware of the impending attack. *Id.* at 541 n.89.

191. *See Mello, supra* note 14, at 542-45. Part of the problem with this category of murders is caused by the failure of the Florida Supreme Court to define what it means by "execution-style" murder. For instance, in *Armstrong v. State*, 399 So. 2d 953, 963 (Fla. 1981), *cert. denied*, 464 U.S. 865 (1983), the court held that execution slayings are those "evinced a cold, calculated design to kill." This definition obviously could include all first degree murders. The murders in *Godfrey* certainly would fall within this category.

192. 439 So. 2d 840, 846 (Fla. 1983), *cert. denied*, 465 U.S. 1074 (1984).

193. 438 So. 2d 374, 379 (Fla. 1983), *cert. denied*, 465 U.S. 1071 (1984). For a more detailed discussion of *Mason* and *Teffeteller*, *see Mello, supra* note 14, at 538-39.

194. 371 So. 2d 1008, 1010 (Fla. 1979).

195. 375 So. 2d 833, 835 (Fla. 1977), *cert. denied*, 441 U.S. 956 (1979). Although the original decision in *Harvard* was issued prior to the Supreme Court's decision in *Godfrey*, the Florida

"stalked" his wife and shot her once at close range. A single stab wound was insufficient to support an especially heinous finding in *Wilson v. State*,¹⁹⁶ but was sufficient in *Proffitt v. State*.¹⁹⁷

North Carolina

The same problem that has plagued the Florida Supreme Court—the inability to follow its announced rules governing the especially heinous aggravating circumstance—is also apparent in North Carolina Supreme Court decisions. In *State v. Goodman*,¹⁹⁸ the initial decision interpreting North Carolina's "especially heinous, atrocious, or cruel" aggravating circumstance,¹⁹⁹ the North Carolina court adopted Florida's "unnecessarily torturous to the victim" standard.²⁰⁰ It also limited this circumstance to acts committed during the commission of the murder itself and held that "there must be evidence that the brutality involved in the murder in question must exceed that normally present in any killing before the jury would be instructed upon this subsection."²⁰¹ In *State v. Hamlette*²⁰² the North Carolina Supreme Court followed the standard articulated in *Goodman* and reversed an especially heinous finding even though there was no motive for the murder and even though it took twelve days for the victim to die.²⁰³ In *State v. Stanley*²⁰⁴ the victim turned to defendant and said, "Please, Stan," (defendant's name) before defendant shot her nine times.²⁰⁵ The court did not find the murder especially heinous.²⁰⁶

Supreme Court reaffirmed the "especially heinous" finding two years after *Godfrey* was decided. *Harvard v. State*, 414 So. 2d 1032, 1036 (Fla. 1982), *cert. denied*, 459 U.S. 1128 (1983).

196. 436 So. 2d 908, 912 (Fla. 1983).

197. 315 So. 2d 461, 463, 466 (Fla. 1975), *aff'd*, 428 U.S. 242 (1976). The United States Court of Appeals for the Eleventh Circuit in *Proffitt v. Wainwright*, 685 F.2d 1227, 1263-65 (11th Cir. 1982), *cert. denied*, 464 U.S. 1002 (1984), reversed the finding of especially heinous circumstances. For other inconsistent Florida cases, *compare Rembert v. State*, 445 So. 2d 337, 340 (Fla. 1984) (per curiam) (beating death not especially heinous) and *Halliwell v. State*, 323 So. 2d 557, 561 (Fla. 1975) (per curiam) (beating death not especially heinous) with *Scott v. State*, 411 So. 2d 866, 869 (Fla. 1982) (per curiam) (beating death especially heinous); *compare Blanco v. State*, 452 So. 2d 520, 525-26 (Fla. 1984) (per curiam) (victim shot after struggle with defendant; especially heinous finding reversed), *cert. denied*, 105 S. Ct. 940 (1985) with *Johnson v. State*, 393 So. 2d 1069, 1073-74 (Fla. 1980) (per curiam) (victim shot in chest after shooting at defendant; especially heinous finding upheld), *cert. denied*, 454 U.S. 882 (1981); *compare Demps v. State*, 395 So. 2d 501, 505-06 (Fla.) (per curiam) (defendant stabbed a fellow inmate a number of times while other inmates held down the victim; especially heinous finding reversed), *cert. denied*, 454 U.S. 933 (1981) with *Washington v. State*, 362 So. 2d 658, 665 (Fla. 1978) (per curiam) (defendant stabbed a minister being held down by accomplices; especially heinous finding upheld).

198. 298 N.C. 1, 24-25, 257 S.E.2d 569, 585 (1979).

199. N.C. GEN. STAT. § 15A-2000(e)(9) (1983).

200. *Goodman*, 298 N.C. at 25, 257 S.E.2d at 585.

201. *Id.* The "especially heinous" finding in *Goodman* was upheld because the victim was abused for a long period of time before death. *Id.* at 26, 257 S.E.2d at 585.

202. 302 N.C. 490, 276 S.E.2d 338 (1981).

203. *Id.* at 504, 276 S.E.2d at 347.

204. 310 N.C. 332, 312 S.E.2d 393 (1984).

205. *Id.* at 340-41, 312 S.E.2d at 398.

206. *Id.* The North Carolina Supreme Court also has reversed especially heinous findings in *State v. Hamlet*, 312 N.C. 162, 166, 176-77, 321 S.E.2d 837, 840-41, 846-47 (1984) (defendant shot victim seven times); *State v. Moose*, 310 N.C. 482, 485-87, 496, 313 S.E.2d 507, 510-11, 516 (1984) (defendant followed victim's car and shot victim for racial reasons); *State v. Oliver*, 302 N.C. 28, 33-34, 59, 274 S.E.2d 183, 187, 202-03 (1981) (Hodge killing) (defendant shot victim in the head while leaving the scene of a robbery).

These cases would seem to indicate that the North Carolina Supreme Court, like the Louisiana Supreme Court,²⁰⁷ has narrowed the application of its especially heinous circumstance to require serious physical abuse before death. Such a conclusion, however, would be erroneous, because in several other cases the North Carolina court has failed to apply this circumstance in a similarly narrow manner. In *State v. Oliver*²⁰⁸ the court approved an especially heinous finding although the evidence showed only that defendant walked into a store, demanded money, and shot the victim once in the head after the victim opened the cash register and said "Please don't shoot me. Go ahead and take the money."²⁰⁹ The court held this evidence sufficient to support an especially heinous finding (1) because the victim was "begging," although in *Stanley* the victim's words were not significantly different;²¹⁰ (2) because it was a "senseless" murder, even though the senselessness of the crime had been deemed irrelevant in *Hamlette*;²¹¹ and (3) because defendant showed no remorse and later boasted and laughed about the murder, even though the *Goodman*²¹² opinion had restricted the especially heinous circumstance to acts committed during the commission of the capital felony itself.²¹³

Another case in which the North Carolina Supreme Court approved an especially heinous finding in the absence of serious physical abuse or torture is *State v. Pinch*.²¹⁴ Defendant shot two victims to death with a shotgun during a dispute in a motorcycle gang clubhouse. Before defendant shot the first victim in the chest, that victim said, "I will go down laughing."²¹⁵ Before being shot the second victim said, "'Don't shoot me,' [n]o, not me.'"²¹⁶ The victims were not tortured or abused. The North Carolina Supreme Court approved the especially heinous finding for both murders, holding that "they were especially despicable and wanton . . . [showing] that defendant carefully executed a deliberate and premeditated plan for murder."²¹⁷

In a recent decision, *State v. Brown*,²¹⁸ the North Carolina Supreme Court further demonstrated its willingness to continue to broaden the scope of the especially heinous circumstance. First, the court described a highly deferential type of appellate review:

207. See *supra* notes 148-51 and accompanying text.

208. 309 N.C. 326, 307 S.E.2d 304 (1983). This case was a subsequent appeal, after remand, of *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981).

209. *Oliver*, 309 N.C. at 342, 347, 307 S.E.2d at 316, 319 (Watts killing).

210. See *supra* notes 204-06 and accompanying text.

211. See *supra* notes 202-03 and accompanying text.

212. See *supra* notes 198-201 and accompanying text.

213. *Goodman*, 309 N.C. at 346-47, 307 S.E.2d at 318-19.

214. 306 N.C. 1, 292 S.E.2d 203 (1982), *cert. denied*, 459 U.S. 1056 (1983).

215. *Id.* at 6, 292 S.E.2d at 211.

216. *Id.*

217. *Id.* at 35, 292 S.E.2d at 228. The only facts that the court could muster to support these conclusions and differentiate these killings from other first degree murders were that the first victim was shot twice and that the second victim was shot after pleading with defendant, who showed no remorse. *Id.*; see also *State v. Huffstetler*, 312 N.C. 92, 115-16, 322 S.E.2d 110, 125 (1984) (fact that victim of beating could have been unconscious after the first blow was irrelevant given the severity and number of wounds), *cert. denied*, 105 S. Ct. 1877 (1985).

218. 315 N.C. 40, 337 S.E.2d 808 (1985).

In determining whether the evidence is sufficient to support a finding of essential facts which would support a determination that a murder was "especially heinous, atrocious, or cruel," the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom.²¹⁹

After enunciating this lenient standard, the court approved the especially heinous finding based on evidence that defendant first kidnapped the victim,²²⁰ killing a victim in the course of a kidnapping, however, is a separate aggravating circumstance in North Carolina.²²¹ The court also relied on a doctor's testimony that the victim *may* have lived for as long as fifteen minutes after being shot.²²² The court's reliance on this testimony is truly incredible given the court's previous reversal of an especially heinous finding in *State v. Hamlette*,²²³ a case in which the victim lived twelve days after being wounded.²²⁴

Tennessee

The experience in Tennessee with the especially heinous circumstance has been much the same as in North Carolina. Tennessee's especially heinous circumstance provides that the death penalty may be imposed if "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind."²²⁵ The Tennessee Supreme Court, like the North Carolina Supreme Court, showed an initial inclination to construe this statute narrowly. Thus, in *State v. Pritchett*,²²⁶ in which defendant shot the victim twice in the back of the neck with a shotgun, the court found that because the victim died instantly from the first shot, the lower court's especially heinous finding was erroneous.²²⁷ There was no evidence that the victim suffered or was seriously abused physically before death, and the second shot therefore was deemed irrelevant.²²⁸

The relevance of the *Pritchett* limitation to Tennessee's especially heinous aggravating circumstance, however, is cast into doubt by the court's decisions in several other cases. In *State v. Dicks*,²²⁹ defendant, while robbing a clothing store, rendered the victim unconscious with a single blow to the head. Instead of firing a second shot, as in *Pritchett*, defendant then cut the victim's throat.²³⁰ Despite its affirmative adoption of the Florida standard—that the crime must be "unnecessarily torturous to the victim"—and despite evidence that showed the victim did not suffer at all, the court found that defendant's cutting the uncon-

219. *Id.* at 66, 337 S.E.2d at 827.

220. *Id.*

221. N.C. GEN. STAT. § 15A-2000(e)(5) (1983).

222. *Brown*, 315 N.C. at 66, 337 S.E.2d at 828.

223. 302 N.C. 490, 504, 276 S.E.2d 338, 347 (1981).

224. *Id.* If *Brown* does represent the standard for especially heinous findings in North Carolina, then this aggravating circumstance will apply, even in the absence of any physical torture, whenever there is *any* evidence that the victim knew or might have known that death was approaching or if there is *any* evidence that the victim might not have been rendered unconscious immediately.

225. TENN. CODE ANN. § 39-2-203(i)(5) (1982).

226. 621 S.W.2d 127 (Tenn. 1981).

227. *Id.* at 139.

228. *Id.* at 137-39.

229. 615 S.W.2d 126 (Tenn.), *cert. denied*, 454 U.S. 933 (1981).

230. *Id.* at 127.

scious victim's throat was enough to make the crime especially heinous. The court justified its approval of the especially heinous finding by saying that " 'the factual circumstances which the jury found in the instant case, the nature of the slitting of the victim's throat, support such an interpretation.' "231 Another case demonstrating an expansive reading of the Tennessee statute is *Houston v. State*.232 Defendant shot the victim three times. There was no indication that the victim suffered.233 The jury found the especially heinous aggravating circumstance,234 and the Tennessee Supreme Court affirmed the death penalty without even discussing the appropriateness of the jury's finding.235

Nebraska

In several early cases it seemed that the Nebraska Supreme Court would narrowly construe its especially heinous aggravating circumstance, which provides that the death penalty may be imposed if the murder was "especially heinous, atrocious, cruel or manifested exceptional depravity by ordinary standards of morality and intelligence."236 In *State v. Rust*237 the court held that the circumstance was not present in a case in which defendant shot the victim three times.238 On the same day it decided *Rust*, the court also reversed an especially heinous finding in *State v. Sewart*,239 even though defendant, after killing the victim with a single shot and wounding a second victim, set fire to the van in which the first victim's body had been left.240

The holdings in two other cases, however, demonstrate the Nebraska court's willingness to expand the scope of this aggravating circumstance. First, in *State v. Holtan*241 defendant shot and killed one person and wounded another during a robbery. The court acknowledged that no torture or physical abuse had been involved in the single shot killing but upheld the especially heinous finding, stating: "The defendant killed, and attempted to kill, unresisting victims of the robbery. The act was totally and senselessly bereft of any regard for

231. *Id.* at 132 (quoting Brief for the State of Tennessee).

232. 593 S.W.2d 267 (Tenn. 1980).

233. *Id.* at 269.

234. *Id.* at 274.

235. *Id.* at 278. In *State v. Williams*, 690 S.W.2d 517 (Tenn. 1985), the Tennessee Supreme Court again indicated a willingness to expand the especially heinous aggravating circumstance, for the first time expressly holding both that the statute should be read in the disjunctive and that a "depravity of mind" finding could be based upon acts occurring after the victim's death. *Id.* at 529. In *Williams*, however, the court disapproved the especially heinous finding because the mutilation of the victim's body did not occur until well after the victim's death and thus was not relevant to defendant's state of mind at the time of the murder. *Id.* at 530-31. The court also found that the jury had not been sufficiently instructed as to the meaning of the terms of the aggravating circumstance. *Id.* at 532-33.

236. NEB. REV. STAT. § 29-2523(1)(d) (1979).

237. 197 Neb. 528, 250 N.W.2d 867, cert. denied, 434 U.S. 912 (1977).

238. *Id.* at 538-39, 250 N.W.2d at 874. The Court found this a "close question," but approved the sentencing panel's finding that the especially heinous circumstance was not present, even though the victim was killed while assisting the police in apprehending defendant after a robbery. *Id.*

239. 197 Neb. 497, 250 N.W.2d 849 (1977).

240. *Id.* at 523, 250 N.W.2d at 864.

241. 197 Neb. 544, 250 N.W.2d 876, cert. denied, 434 U.S. 912 (1977), *aff'd*, 205 Neb. 314, 287 N.W.2d 671 (1980), *aff'd*, 216 Neb. 594, 344 N.W.2d 661 (1984).

human life. It was wanton, deliberate, cruel, and inexcusable."²⁴²

In a second truly remarkable holding the Nebraska court managed to fill in a gap left by other courts in interpreting their especially heinous circumstances. Some courts have held that a murder is especially heinous if the victim is very young or very old.²⁴³ These holdings presumably insulate killers of middle-aged victims from "especially heinous" findings based on the victim's age. In *State v. Moore*,²⁴⁴ however, defendant shot his robbery victims in the head, apparently causing instant death, and the court found that the murders were "exceptionally depraved" in large part because defendant had intentionally chosen his victims to make sure that they were not too old or too young.²⁴⁵

Alabama

Although the Alabama appellate courts have acknowledged the potential constitutional problems with an open-ended interpretation of Alabama's "especially heinous, atrocious or cruel"²⁴⁶ aggravating circumstance,²⁴⁷ and although the Alabama Supreme Court overturned an especially heinous finding in a case factually indistinguishable from *Godfrey*,²⁴⁸ the Alabama courts have continually upheld especially heinous findings when the evidence has shown only that the defendant intentionally and with premeditation and deliberation killed the

242. *Id.* at 547, 250 N.W.2d at 880. In another robbery case, *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977), *cert. denied*, 439 U.S. 882 (1978), defendant shot the victim three times in the mouth and head. *Id.* at 658, 261 N.W.2d at 97. The court, apparently adopting Missouri's "two shot" rule, see *infra* notes 309-10 and accompanying text, found that the last shot to the mouth showed mutilation of the body and therefore depravity. *Perry*, 199 Neb. at 674-75, 261 N.W.2d at 105.

243. See *infra* notes 343-44 and accompanying text.

244. 210 Neb. 457, 316 N.W.2d 33, *cert. denied*, 456 U.S. 984 (1982).

245. *Id.* at 461, 471, 316 N.W.2d at 36-37, 41.

We agree that the following circumstances exhibit a state of mind exceptionally depraved and totally and senselessly bereft of regard of human life: (1) The murders here were coldly planned as part of the robberies. (2) The evidence clearly supports the conclusion that the murders were to be repetitive, i.e., the defendant intended to continue on his selected course of conduct so long as his needs required. (3) The victims were selected on the basis of certain characteristics which made it easier for the defendant to shoot them, namely, their ages. His unstated conclusion was that a human life in the middle years was less valuable than a younger life.

Id. at 471, 316 N.W.2d at 41.

The approval of the especially heinous findings in *Holtan* and *Moore* is even harder to understand in light of the Nebraska court's recent decision in *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985). In *Hunt*, defendant entered the victim's home, stuffed a pair of panties into her mouth, choked her, sexually abused her, and then drowned her. *Id.* at 711-12, 371 N.W.2d at 713. The court reversed the especially heinous finding because the victim had been rendered unconscious soon after defendant entered her home, and defendant, acting to fulfill his bizarre sexual fantasies, had not purposefully sought to prolong the victim's pain. *Id.* at 725-26, 371 N.W.2d at 721.

246. ALA. CODE § 13A-5-49(8) (1982) ("The capital offense was especially heinous, atrocious or cruel compared to other capital offenses.").

247. See *Ex parte Kyzer*, 399 So. 2d 330, 334 (Ala. 1981).

248. The similar Alabama case was *Kyzer v. State*, 399 So. 2d 317 (Ala. Crim. App. 1979), *rev'd sub nom. Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981). Defendant in *Kyzer* shot his wife in the heart during an emotional quarrel. He also shot and killed the two people with whom she was visiting. One of them was shot in the head, the other in the shoulder and head. The Alabama Court of Criminal Appeals sustained an especially heinous finding despite an admitted lack of "unusual suffering" or "high degree of pain," stating that the killings "could be deemed 'extremely wicked' or 'vile.'" *Id.* at 324. The Alabama Supreme Court reversed, relying on *Godfrey*.

victim. Thus, in *Bryars v. State*²⁴⁹ defendant killed the two victims instantly with a shotgun. There was no indication of torture or prolonged suffering.²⁵⁰ The trial court found especially heinous circumstances in both murders, in one because the victim had been ambushed as the result of a business dispute, and in the other because the victim had been a helpless bystander.²⁵¹ The Alabama Court of Criminal Appeals upheld the especially heinous findings, merely quoting the trial court's description of the murders as a "cold-blooded, carefully planned execution of two citizens . . . outrageously wicked, criminal, vile or cruel."²⁵² Similarly, in *Bracewell v. State*²⁵³ the court upheld an especially heinous finding, again without any analysis, in a case in which the victim had been shot in the head a number of times during a robbery.²⁵⁴ In neither *Bryars* nor *Bracewell* did the court give any explanation why the particular murders under consideration were especially heinous when compared to other murders. In neither case is there any indication what type of murder would fall outside this category. These two cases, however, are not isolated aberrations; a number of other Alabama cases reveal a pattern of summary affirmance of especially heinous findings, with little or no analysis, whenever the defendant intentionally killed the victim.²⁵⁵

Arizona

The Arizona Supreme Court has given a broad application to its "especially heinous, cruel or depraved"²⁵⁶ aggravating circumstance by expressly relying on a disjunctive reading of the statute. Cruelty is limited to the pain caused the victim before death.²⁵⁷ The court's view that depravity focuses on the defendant's state of mind and that heinousness focuses on society's view of the defend-

249. 456 So. 2d 1122 (Ala. Crim. App. 1983), *rev'd on other grounds*, 456 So. 2d 1136 (Ala. 1984).

250. *Id.* at 1125.

251. *Id.* at 1132.

252. *Id.* at 1135.

253. 407 So. 2d 848 (Ala. Crim. App. 1980), *rev'd on other grounds sub nom. Ex parte Bracewell*, 407 So. 2d 853 (Ala. 1981).

254. *Id.* at 851 (The trial court found "[t]hat the capital felony . . . is an especially heinous, atrocious or cruel crime in that the deceased victim . . . was shot eight (8) times in and about the head and face.") The recitation of the facts in a prior decision in the case revealed no evidence of pain or suffering. *See* *Bracewell v. State*, 407 So. 2d 827, 829-37 (Ala. Crim. App. 1979).

255. *See, e.g.*, *Hill v. State*, 455 So. 2d 930, 937 (Ala. Crim. App.) (defendant shot three victims to death; "heinous, atrocious, and cruel" finding upheld without comment), *aff'd*, 455 So. 2d 938 (Ala. 1984); *Bush v. State*, 431 So. 2d 555, 557, 560-61 (Ala. Crim. App. 1982) (one victim was shot once in the face; the second victim was shot twice; especially heinous finding upheld), *aff'd*, 431 So. 2d 563 (Ala.), *cert. denied*, 464 U.S. 865 (1983); *Johnson v. State*, 399 So. 2d 859, 869 (Ala. Crim. App.) (especially heinous finding upheld in shooting of robbery victim), *rev'd on other grounds*, 399 So. 2d 873 (Ala. 1979); *Richardson v. State*, 376 So. 2d 205, 228 (Ala. Crim. App. 1978) (child killed instantly by a bomb; especially heinous finding approved), *aff'd*, 376 So. 2d 228 (Ala. 1979), *cert. denied*, 460 U.S. 1017 (1983); *Williamson v. State*, 370 So. 2d 1054, 1063-65 (Ala. Crim. App. 1978) (especially heinous finding upheld when victim beaten, even though victim unconscious after first blow), *vacated and remanded on other grounds*, 448 U.S. 903 (1980).

256. ARIZ. REV. STAT. ANN. § 13-703(F)(6) (Supp. 1985) ("The defendant committed the offense in an especially heinous, cruel or depraved manner.").

257. *See, e.g.*, *State v. Gillies*, 142 Ariz. 564, 569, 691 P.2d 655, 660 (1984) ("The aggravating factor of cruelty focuses on the victim's mental and physical suffering."); *State v. Ortiz*, 131 Ariz. 195, 206, 639 P.2d 1020, 1031 (1981), *cert. denied*, 465 U.S. 984 (1985).

ant as compared to other murderers,²⁵⁸ however, has allowed the court the freedom to approve or disapprove especially heinous findings based solely on either of these two amorphous concepts.

The Arizona Supreme Court has reversed especially heinous findings in several cases involving shooting deaths.²⁵⁹ Whenever *anything* about a murder has proved offensive to the court, however, it has approved especially heinous findings even after specifically noting that a victim did not suffer before death. In *State v. Ceja*²⁶⁰ defendant shot the two victims a number of times. The Arizona Supreme Court reversed the trial court's "cruelty" finding because there was no evidence that the victims had suffered,²⁶¹ but the court nevertheless upheld the especially heinous circumstance because the number of shots indicated that defendant had a "'shockingly evil' state of mind 'marked by debasement.'"²⁶² In other cases, after specifically finding that the victims did not suffer, the court approved especially heinous findings (1) because the victim had been kind to the defendant in the past,²⁶³ (2) because the defendant had used more than the minimum force necessary to kill the victim,²⁶⁴ (3) because the defendant had inflicted harm on others during the murder and tried to cover up his crimes,²⁶⁵ and (4) because the murder had been committed to eliminate a witness.²⁶⁶

The list of considerations that the Arizona Supreme Court has been willing to use to support one of the three terms that comprise its especially heinous aggravating factor is extremely broad. Included in that list is the victim's apprehension of death;²⁶⁷ the defendant's use of a bomb;²⁶⁸ the victim's taking up to

258. See *State v. Ortiz*, 131 Ariz. 195, 206, 639 P.2d 1020, 1031 (1981), *cert. denied*, 465 U.S. 984 (1984).

259. See, *State v. Blazak*, 131 Ariz. 598, 604, 643 P.2d 694, 700 (especially heinous finding reversed in case in which defendant killed a bartender and patron during a robbery attempt), *cert. denied*, 459 U.S. 882 (1982); *State v. Brookover*, 124 Ariz. 38, 40-41, 601 P.2d 1322, 1324-25 (1979) (especially heinous finding reversed in case in which drug dealer was shot twice, even though victim spoke to defendant to complain of pain after the first shot); *State v. Watson*, 120 Ariz. 441, 448, 586 P.2d 1253, 1260 (1978) (especially heinous finding reversed in case in which defendant shot robbery victim four times in the back during a shootout, and the last shot was fired into the victim as he lay face down on the floor), *cert. denied*, 440 U.S. 924 (1979).

260. 126 Ariz. 35, 612 P.2d 491 (1980).

261. *Id.* at 39, 612 P.2d at 495. There was evidence that the defendant had kicked one of the victims in the head, but the trial court made a finding of fact that the kicking had occurred after the victim's death. *Id.* at 37, 612 P.2d at 493.

262. *Id.* at 39-40, 612 P.2d at 495-96.

263. See *State v. Fisher*, 141 Ariz. 227, 252, 686 P.2d 750, 775 (defendant killed the victim with the first of three blows to the head; especially heinous finding upheld because of the victim's kindness to defendant as well as because defendant used more force than was necessary to kill the victim), *cert. denied*, 105 S. Ct. 548 (1984); *State v. Clark*, 126 Ariz. 428, 430, 437, 616 P.2d 888, 890, 896-97 (1980) (Defendant shot three people, who died instantly, and stabbed another, who was sleeping at the time. The court relied on the fact that two of the victims had befriended defendant and also that defendant later bragged about the killings and "kept a spent bullet as a 'grisly souvenir.'"), *cert. denied*, 449 U.S. 1067 (1981).

264. *State v. Fisher*, 141 Ariz. 227, 252, 686 P.2d 750, 775, *cert. denied*, 105 S. Ct. 548 (1984).

265. *State v. Ortiz*, 131 Ariz. 195, 210, 639 P.2d 1020, 1035 (1981), *cert. denied*, 465 U.S. 984 (1984).

266. See *State v. Gillies*, 142 Ariz. 564, 570, 691 P.2d 655, 661 (1984) (elimination of a witness both heinous and depraved), *cert. denied*, 105 S. Ct. 1775 (1985); *State v. Smith*, 141 Ariz. 510, 511-12, 687 P.2d 1265, 1266-67 (1984) (killing a witness "tends to prove depravity").

267. *State v. Carriger*, 143 Ariz. 142, 160, 692 P.2d 991, 1009 (1984), *cert. denied*, 105 S. Ct.

thirty minutes to die;²⁶⁹ the defendant's intentional use of a high-powered rifle;²⁷⁰ the defendant's mutilation of the victim's body;²⁷¹ the age of the victim;²⁷² the defendant's boasting about the killing;²⁷³ and the court's conclusion that the murder was senseless and unnecessary.²⁷⁴

Georgia

Contrary to the Supreme Court plurality's assertion in *Godfrey*,²⁷⁵ the Georgia Supreme Court, both before and after *Godfrey*, has shown no inclination to restrict its section (b)(7) "outrageously vile" aggravating circumstance²⁷⁶ to cases involving serious physical abuse before death. Instead, like the Arizona Supreme Court,²⁷⁷ the Georgia court has read its statute disjunctively to expand this aggravating circumstance to include other fact situations that the court thinks reprehensible. This expansive interpretation of the circumstance has led to an inconsistent application of section (b)(7).

The Georgia Supreme Court has expanded the meaning of the terms of section (b)(7) as follows: Torture is expanded to include psychological²⁷⁸ as well as sexual²⁷⁹ abuse of the victim. Depravity of mind is not limited to that state of

2347 (1985); *State v. Steelman*, 126 Ariz. 19, 26, 612 P.2d 475, 482, *cert. denied*, 449 U.S. 913 (1980).

268. *See State v. Adamson*, 136 Ariz. 250, 266, 665 P.2d 972, 988, *cert. denied*, 464 U.S. 865 (1983).

269. *See State v. Chaney*, 141 Ariz. 295, 312, 686 P.2d 1265, 1282 (1984).

270. *Id.*

271. *See State v. Carriger*, 143 Ariz. 142, 160, 692 P.2d 991, 1009 (1984), *cert. denied*, 105 S. Ct. 2347 (1985); *State v. Vickers*, 129 Ariz. 506, 515, 633 P.2d 315, 324 (1981).

272. *See State v. Fisher*, 141 Ariz. 227, 252, 686 P.2d 750, 775 (age 73), *cert. denied*, 105 S. Ct. 548 (1984); *State v. Zaragoza*, 135 Ariz. 63, 69-70, 659 P.2d 22, 28-29 (age 78), *cert. denied*, 462 U.S. 1124 (1983); *State v. Tison*, 129 Ariz. 526, 543, 633 P.2d 335, 352 (1981) (age 22 months), *cert. denied*, 459 U.S. 882 (1982).

273. *See, e.g., State v. Lambright*, 138 Ariz. 63, 75, 673 P.2d 1, 13 (1983) (defendant was apprehended wearing his victim's jewelry as a "memento"), *cert. denied*, 105 S. Ct. 267 (1984); *State v. Bishop*, 127 Ariz. 531, 534, 622 P.2d 478, 481 (1980) (defendant mocked his dead victim as he drove away); *State v. Clark*, 126 Ariz. 428, 436-37, 616 P.2d 888, 896-97 (defendant bragged of the crime), *cert. denied*, 449 U.S. 1067 (1980); *cf. State v. Smith*, 141 Ariz. 510, 512, 687 P.2d 1265, 1267 (1984) (court states that laughing about the crime afterwards may indicate depravity); *State v. Gretzler*, 135 Ariz. 42, 52, 659 P.2d 1, 11 (relishing a murder is one sign of depravity), *cert. denied*, 461 U.S. 971 (1983).

274. *State v. Carriger*, 143 Ariz. 142, 160, 692 P.2d 991, 1009 (1984), *cert. denied*, 105 S. Ct. 2347 (1985); *State v. Fisher*, 141 Ariz. 227, 252, 686 P.2d 750, 775, *cert. denied*, 105 S. Ct. 548 (1984); *State v. Summerlin*, 138 Ariz. 426, 436, 675 P.2d 686, 696 (1983); *State v. Steelman*, 126 Ariz. 19, 26, 612 P.2d 475, 482, *cert. denied*, 449 U.S. 913 (1980).

275. *See supra* notes 118-20 and accompanying text.

276. GA. CODE ANN. § 17-10-30(b)(7) (1982) ("The offense . . . was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.").

277. *See supra* notes 256-74 and accompanying text.

278. *See, e.g., Rivers v. State*, 250 Ga. 303, 311, 298 S.E.2d 1, 8-9 (1982) (victim watched others killed); *Brooks v. State*, 246 Ga. 262, 263, 271 S.E.2d 172, 173 (1980) (victim taunted), *cert. denied*, 451 U.S. 921 (1981); *Dampier v. State*, 245 Ga. 882, 884, 268 S.E.2d 349, 350 (victim kidnapped before killing), *cert. denied*, 449 U.S. 938 (1980); *Hance v. State*, 245 Ga. 856, 861, 268 S.E.2d 339, 345 (noting that psychological abuse is sufficient to support finding), *cert. denied*, 449 U.S. 1067 (1980).

279. *See, e.g., Brooks v. State*, 246 Ga. 262, 263, 271 S.E.2d 172, 173 (1980) (victim raped), *cert. denied*, 451 U.S. 921 (1981); *Hance v. State*, 245 Ga. 856, 861, 268 S.E.2d 339, 345 (sexual abuse sufficient to support "outrageously vile" finding), *cert. denied*, 449 U.S. 1067 (1980).

mind that causes the defendant to inflict torture or an aggravated battery on the victim before death, but instead includes such disparate factors as the victim's age²⁸⁰ and any mutilation or abuse of the body after death.²⁸¹

In accordance with this broad application, the court approved an especially heinous finding in *Fair v. State*,²⁸² even though the victim had been killed instantly by a single shot and had had no knowledge that death was imminent.²⁸³ The approval was based on evidence that after the victim had died, an accomplice cut the victim's throat and set on fire a car with the body in it; also, defendant later laughed about the killing.²⁸⁴ In *Gilreath v. State*²⁸⁵ the court similarly approved a section (b)(7) finding based in part upon mutilation of the bodies. Defendant, however, did not actually harm the bodies, but only showed an intention to do so when he poured gasoline on them.²⁸⁶

Further, despite holding in *Phillips v. State*²⁸⁷ that the victim's mere apprehension of death combined with multiple gunshot wounds does not bring a killing within the scope of section (b)(7),²⁸⁸ in *Banks v. State*²⁸⁹ the Georgia Supreme Court found the murders "outrageously vile" because defendant had killed each victim with two shots, using a single action shotgun that required taking the time to reload between each shot.²⁹⁰ Finally, in its most expansive application of section (b)(7), the Georgia Supreme Court in *Strickland v.*

280. See, e.g., *Smith v. State*, 249 Ga. 228, 234, 290 S.E.2d 43, 48 (82-year-old victim), *cert. denied*, 459 U.S. 882 (1982); *Messer v. State*, 247 Ga. 316, 325-26, 276 S.E.2d 15, 23 (victim was defendant's eight-year-old niece), *cert. denied*, 454 U.S. 882 (1981); *Thomas v. State*, 247 Ga. 233, 234, 275 S.E.2d 318, 319 (nine-year-old victim), *cert. denied*, 452 U.S. 973 (1981); *Nelson v. State*, 247 Ga. 172, 178, 274 S.E.2d 317, 323 (six-year-old victim), *cert. denied*, 454 U.S. 882 (1981); *Blake v. State*, 239 Ga. 292, 300-01, 236 S.E.2d 637, 643-44 (two-year-old victim; to uphold a finding of depravity the court relied solely on the victim's age and the defendant's intent to punish the victim's mother), *cert. denied*, 434 U.S. 960 (1977).

281. See, e.g., *Fair v. State*, 245 Ga. 868, 880-81, 268 S.E.2d 316, 325, *cert. denied*, 449 U.S. 986 (1980) (body cut and burned); see also *West v. State*, 252 Ga. 156, 161-62, 313 S.E.2d 67, 71 (1984) (mutilation of corpse shows depravity); *Patrick v. State*, 247 Ga. 168, 169-70, 274 S.E.2d 570, 571-72 (1981) (mutilation of corpse shows depravity), *cert. denied*, 459 U.S. 1089 (1982); *Hance v. State*, 245 Ga. 856, 862, 268 S.E.2d 339, 346 (mutilation of corpse shows depravity), *cert. denied*, 449 U.S. 1067 (1980).

282. 245 Ga. 868, 868-69, 268 S.E.2d 316, 318, *cert. denied*, 449 U.S. 986 (1980).

283. *Id.* at 869, 268 S.E.2d at 318.

284. *Id.* at 869, 872-73, 268 S.E.2d at 318, 321.

285. 247 Ga. 814, 839, 279 S.E.2d 650, 672 (1981), *cert. denied*, 456 U.S. 984 (1982).

286. The § (b)(7) findings also were upheld because the defendant had killed the victims with multiple shots, thus raising the possibility that the victim had not lost consciousness after the first shot. *Id.* at 838-39, 279 S.E.2d at 672.

The mutilation concept as conceived by the Georgia Supreme Court would support a § (b)(7) finding in every case in which the defendant struck more than one blow or fired more than one shot, because blows or shots occurring before death support findings of serious physical abuse, and those occurring after death constitute evidence of depravity. See *Patrick v. State*, 247 Ga. 168, 169, 274 S.E.2d 570, 571 (1981) (if victim died after first blow, ensuing blows would be sufficient to show depravity of mind), *cert. denied*, 459 U.S. 1089 (1982).

287. 250 Ga. 336, 297 S.E.2d 217 (1982).

288. *Id.* at 338-42, 297 S.E.2d at 220-22.

289. 237 Ga. 325, 327, 227 S.E.2d 380, 382 (1976), *cert. denied*, 430 U.S. 975 (1977).

290. *Id.* at 327, 227 S.E.2d at 382. Banks later received a new trial when his attorneys discovered evidence pointing to his innocence. *Banks v. State*, 246 Ga. 1, 268 S.E.2d 630 (1980). His case later was dismissed by the prosecutor. Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U.L.Q. 573, 600 (1985).

*State*²⁹¹ upheld an especially heinous aggravating circumstance finding because defendant had shot the victim to inflict mental distress on a witness, the victim's sister.²⁹²

Mississippi

Trying to determine the scope of Mississippi's "especially heinous, atrocious, or cruel"²⁹³ aggravating circumstance is a difficult task, partly because prior to the 1982 decision of the United States Court of Appeals for the Fifth Circuit in *Jordan v. Watkins*,²⁹⁴ Mississippi courts did not always indicate which aggravating factors the jury found.²⁹⁵ Despite this difficulty the Mississippi Supreme Court has approved enough especially heinous findings to demonstrate a lack of control over this factor.

In *Caldwell v. State*²⁹⁶ the court upheld an especially heinous aggravating circumstance finding without comment. Defendant had shot the victim twice during a robbery. There was no indication that the victim had suffered, nor was there an indication of any other unusual circumstance. In *Irving v. State*²⁹⁷ the court approved the especially heinous finding because defendant had known the victim for many years and had used this acquaintance to gain entrance to the victim's store where he shot the victim to death for a small amount of money.²⁹⁸ A defendant's admission that he had shot the victim to avoid identification was sufficient in one case.²⁹⁹ In another case the especially heinous finding was upheld when defendant, upon being approached by two policemen, shot one of them, rendering him unconscious in seconds, with death following within five minutes.³⁰⁰ In *Gilliard v. State*³⁰¹ the victim had been shot once in the chest during a robbery. The especially heinous finding was summarily upheld.³⁰²

291. 247 Ga. 219, 275 S.E.2d 29, cert. denied, 454 U.S. 882 (1981).

292. *Id.* at 231-32, 275 S.E.2d at 40-41.

293. MISS. CODE ANN. § 99-19-101(5)(h) (Supp. 1985) ("The capital offense was especially heinous, atrocious or cruel.")

294. 681 F.2d 1067 (5th Cir. 1982).

295. In *Jordan* the United States Court of Appeals for the Fifth Circuit found Mississippi's sentencing procedures constitutionally inadequate for failing to "limit or define the number or nature of aggravating circumstances" and for failing to require the jury to list which aggravating circumstances it relied on in imposing the death penalty. *Jordan*, 681 F.2d at 1082-83; see, e.g., *Bullock v. State*, 391 So. 2d 601, 614 (Miss. 1980), cert. denied, 452 U.S. 931 (1981); *In re Jordan*, 390 So. 2d 584, 586-87 (Miss. 1980). Even after *In re Jordan* the Mississippi court seemed to have difficulties in understanding its role in reviewing aggravating circumstances. For instance, in *Evans v. State*, 422 So. 2d 737 (Miss. 1982), appeal denied, 441 So. 2d 520 (Miss. 1983), cert. denied, 461 U.S. 939 (1984), the victim was shot during a robbery, and the court held both that the especially heinous factor was properly submitted to the jury and that an especially heinous finding based on these facts might not pass "constitutional muster" under *Godfrey*. *Id.* at 743.

296. 443 So. 2d 806 (Miss. 1983), rev'd on other grounds, *Caldwell v. Mississippi*, 105 S. Ct. 2633 (1985).

297. 441 So. 2d 846 (Miss. 1983), cert. denied, 105 S. Ct. 1774 (1985).

298. *Id.* at 850.

299. *Edwards v. State*, 413 So. 2d 1007, 1013 (Miss.), cert. denied, 459 U.S. 928 (1982). The court in *Edwards* never stated whether the especially heinous factor was used, but in *Irving* the court described *Edwards* as an "especially heinous" case. *Irving*, 441 So. 2d at 850.

300. *Edwards v. State*, 441 So. 2d 84, 86 (Miss. 1983). There is a strong dissent by three justices regarding the especially heinous finding. *Id.* at 94-96 (Prather, J., dissenting as to sentencing phase).

301. 428 So. 2d 576 (Miss.), cert. denied, 464 U.S. 867 (1983).

302. *Id.* at 586.

The Mississippi Supreme Court failed in all of these cases to explain why these murders were especially heinous when compared to other first degree murders. None of the cases indicates any objective limitations on this aggravating circumstance. The court simply affirmed especially heinous findings and left those findings as precedent for future cases.

Missouri

In *State v. Newlon*³⁰³ defendant walked into a store and asked for a pack of cigarettes. When the clerk turned around defendant shot him twice in the back with a shotgun. There was no evidence that the clerk suffered in any way or was even aware that defendant had a gun. The jury, following an unsuccessful request to the trial judge for a definition of "depravity of mind,"³⁰⁴ found only one aggravating circumstance: that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."³⁰⁵ On appeal the Missouri Supreme Court rejected defendant's contention that the depravity finding was unconstitutional under *Godfrey*³⁰⁶ because there was no aggravated battery or torture. Instead, the court found that the murder was depraved because defendant had planned the killing and had killed the victim without warning or provocation.³⁰⁷ The murder also was depraved because it was "senseless."³⁰⁸ The court held that the jury's finding was supported by the evidence that defendant shot twice: if the victim still was alive after the first shot, the victim must have suffered; if the victim died after the first shot, the second shot showed a purpose to mutilate the corpse.³⁰⁹

The *Newlon* "two shot" rule also apparently was applied in *State v. McIlvoy*,³¹⁰ a case in which defendant shot the victim five times. There was no evidence of physical abuse, torture, or suffering; the victim had died within five minutes of receiving the gunshot wounds, all of which were potentially fatal.³¹¹

These cases show that the Missouri court has little inclination to narrow the scope of the especially heinous aggravating circumstance. It is hard to imagine a first degree murder that is not "senseless," in which the defendant did not plan the killing, or in which the defendant used only one shot or one blow to commit the murder. These are, however, not the only factors that the Missouri court will use to determine depravity of mind, as the following quote demonstrates:

In following the mandate of *Godfrey* to establish "clear and objective

303. 627 S.W.2d 606 (Mo.) (en banc), cert. denied, 459 U.S. 884 (1982).

304. *Id.* at 621.

305. *Id.*; see MO. ANN. STAT. § 565.032(2)(7) (Vernon Supp. 1985).

306. See *supra* notes 110-37 and accompanying text.

307. *Newlon*, 627 S.W.2d at 622. Presumably, if defendant had warned the victim the court would have found psychological torture.

308. *Id.* This finding raises the question of what is a "sensible" first degree murder.

309. *Id.* There was, however, no evidence that defendant had any purpose other than to kill the victim, and obviously he did not know if the victim was alive or dead after the first shot. There was certainly no evidence that defendant intended to mutilate the body. There also was no evidence to support the court's conclusion that the victim must have undergone "extreme suffering."

310. 629 S.W.2d 333 (Mo. 1982) (en banc).

311. *Id.* at 335. Because the court reversed the imposition of the death penalty on proportionality grounds, the *McIlvoy* opinion did not deal at length with the especially heinous finding, merely noting that the finding was supported by "some evidence." *Id.* at 341.

standards" as to what types of murders constitute "depravity of mind," this Court, while not expressly adopting a precise definition, has noted the following factors to be considered in finding "depravity of mind": mental state of defendant, infliction of physical or psychological torture upon the victim as when victim has a substantial period of time before death to anticipate and reflect upon it; brutality of defendant's conduct; mutilation of the body after death; absence of any substantive motive; absence of defendant's remorse and the nature of the crime.³¹²

Because this list, which does not purport to be an exclusive description of the relevant factors, includes the "mental state of the defendant" and "the nature of the crime," it is evident that the Missouri court does not feel bound by any objective limitations on what factors it will look to before upholding an "outrageously vile" finding.³¹³

Oklahoma

The Oklahoma Court of Criminal Appeals' view of its state's "especially heinous, atrocious or cruel" aggravating circumstance³¹⁴ has proven to be remarkably inclusive. The court consistently has upheld especially heinous findings in cases involving no torture or abuse of the victim. In some cases the court has not even bothered to give a reason for its affirmance of the finding,³¹⁵ and in other cases, without enunciating any standard, it has used whatever it finds distasteful about a murder to affirm an especially heinous finding. Thus, in one case the murder was especially heinous because defendant knew the victim and planned the murder to avoid identification,³¹⁶ and in another case the murder was especially heinous because there was no apparent reason for the shooting of the victims.³¹⁷

In *Cartwright v. State*³¹⁸ the victim was killed instantly by a gunshot. The court, nevertheless, upheld an especially heinous finding because defendant also had attacked the victim's wife, had planned the murder as revenge for having been fired by the victim, had lain in wait in the victim's home, and had at-

312. *State v. Preston*, 673 S.W.2d 1, 11 (Mo.) (en banc), cert. denied, 105 S. Ct. 269 (1984). The *Preston* court did acknowledge, in a flight of rhetorical grandeur, that "[t]he danger of imposing death by mere wafture of 'depravity of mind' without proper tethers is manifest: that circumstance could be utilized as a 'catchall' for murders not falling into any other statutory aggravating circumstances." *Id.* at 10-11.

313. For instance, in *State v. Blair*, 638 S.W.2d 739, 759-60 (Mo. 1982) (en banc), cert. denied, 459 U.S. 1188 (1983), the court supported its especially heinous finding by noting that defendant was a hired killer, had stalked the victim, had planned the killing, and had shown no remorse.

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

315. See, e.g., *Coleman v. State*, 668 P.2d 1126, 1129, 1138 (Okla. Crim. App. 1983) (two victims shot to death during a burglary; finding of especially heinous factor upheld because "the evidence supports" it), cert. denied, 464 U.S. 1073 (1984); *Hays v. State*, 617 P.2d 223, 226-27, 231-32 (Okla. Crim. App. 1980) (robbery victim shot; "evidence supports" finding of especially heinous factor).

316. *Boutwell v. State*, 659 P.2d 322, 329 (Okla. Crim. App. 1983).

317. *Jones v. State*, 648 P.2d 1251, 1259 (Okla. Crim. App. 1982), cert. denied, 459 U.S. 1155 (1983). In support of the especially heinous finding, the court also noted that the victim was shot a second time after having been wounded and that the defendant "mocked" the victim. The court found these motiveless killings to be "extremely wicked and shockingly evil." *Id.* at 1259.

318. 695 P.2d 548 (Okla. Crim. App.), cert. denied, 105 S. Ct. 3538 (1985).

tempted to conceal his deeds by disconnecting the telephone.³¹⁹ The murder of a police officer was held to be per se especially heinous in *Eddings v. State*.³²⁰ In *Davis v. State*³²¹ the court held that killing two victims made the crime a "mass murder" and therefore especially heinous.³²² A new twist was added in *Stafford v. State*,³²³ in which the court deemed the shooting murders especially heinous because the victims were family members on their way to a funeral and had stopped to help defendant, who was posing as a stranded motorist.³²⁴ In *Robinson v. State*³²⁵ the court satisfied itself with the statement: "A death occurring at close range by two gunshot wounds between the eyes amply supports a finding that the death occurred in a heinous, atrocious or cruel manner."³²⁶

Virginia

The Virginia Supreme Court has shown a similar unwillingness to keep its "outrageously or wantonly vile, horrible or inhuman"³²⁷ aggravating circumstance within identifiable boundaries. In *Turner v. Commonwealth*³²⁸ defendant shot the victim during a robbery after the victim summoned the police. The first shot, which was to the head, came without warning, and the victim fell. Defendant then shot twice more. There was no evidence that the victim was conscious after the first shot; a witness testified only that the victim "gurgled."³²⁹ The court found that because defendant fired more than one shot he had committed an aggravated battery; defendant had used more force than "the minimum necessary to accomplish an act of murder."³³⁰ The murder was also "outrageously vile" because one witness asked defendant not to shoot and another witness became ill while watching the murder.³³¹

319. *Id.* at 554.

320. 616 P.2d 1159, 1168 (Okla. Crim. App. 1980), *rev'd in part and remanded*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The United States Supreme Court noted that the especially heinous finding in *Eddings* was of doubtful constitutionality. *Eddings*, 455 U.S. at 109 n.4.

321. 665 P.2d 1186 (Okla. Crim. App.), *cert. denied*, 464 U.S. 865 (1983).

322. *Id.* at 1190. The court held that "since appellant perpetrated a mass-murder by inflicting multiple gunshot wounds to his victims the jury was presented with sufficient evidence from which they could find the acts 'atrocious' as defined in the instructions." *Id.* at 1202-03.

323. 669 P.2d 285 (Okla. Crim. App. 1983), *vacated and remanded on other grounds*, 467 U.S. 1212 (1984).

324. *Id.* at 299.

325. 677 P.2d 1080 (Okla. Crim. App.), *cert. denied*, 104 S. Ct. 3524 (1984).

326. *Id.* at 1088. The Oklahoma court did reverse an especially heinous finding in *Odum v. State*, 651 P.2d 703, 707 (Okla. Crim. App. 1982), in which the defendant had shot the victim in the neck, killing him instantly. What unarticulated factors caused the court to deviate from its otherwise unswerving path in this area are impossible to fathom.

327. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused . . . that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

V.A. CODE § 19.2-264.4(C) (1983).

328. 221 Va. 513, 273 S.E.2d 36 (1980), *rev'd on other grounds*, 106 S. Ct. 1683 (1986).

329. *Id.* at 527, 273 S.E.2d at 45.

330. *Id.* (quoting *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967 (1979)).

331. *Id.* *Godfrey* was distinguished because the *Turner* victim "did not die instantaneously from a single discharge of a firearm." *Id.* at 527, 273 S.E.2d at 45 (emphasis added).

The court used a different rationale to uphold one of the "outrageously vile" findings in *Jones v. Commonwealth*.³³² In *Jones* defendant was convicted of the murders of two victims. The murder of the female victim involved torture, but the male victim was killed instantly by a single gunshot wound. The court, nevertheless, found both murders "outrageously vile," rejecting defendant's *Godfrey*³³³ challenge. The court upheld the "outrageously vile" finding in the second murder because defendant had killed two victims, not one, and because the *first* victim had suffered.³³⁴ The court also said that although defendant did not burn the second victim's body, he had poured "accelerants" on the body, thus demonstrating "depravity of mind" and therefore "vileness."³³⁵

The elasticity of the Virginia "outrageously vile" factor is demonstrated further by *Clark v. Commonwealth*.³³⁶ In *Clark* defendant had been hired to kill the victim. Defendant and an accomplice broke into the victim's house. When the victim arrived, a struggle ensued, and the victim was shot and killed instantly.³³⁷ The "outrageously vile" factor was used as the basis for the death penalty.³³⁸ The Virginia Supreme Court never commented directly on the trial court's finding that an aggravated battery had occurred because defendant had fired a number of hollow-point bullets at close range.³³⁹ The supreme court, however, did concede that the brutality of the murder was not excessive.³⁴⁰ The aggravating factor finding nevertheless was upheld because defendant had been hired to commit the murder; because the murder had been planned for a number of days; because defendant stole money and food after shooting the victim; because defendant and his accomplice celebrated the murder; and because defendant and his accomplice called the person who hired them to say "the beast is deceased."³⁴¹

V. THE SEARCH FOR A STANDARD

As the cases discussed in the previous section make painfully obvious, the problem that the Supreme Court addressed in *Godfrey v. Georgia*³⁴² is not an isolated aberration. Rather, it is a symptom of an underlying problem inherent in the nature of the especially heinous aggravating circumstance. The circumstance's terms are too vague, too broad, and too subjective to provide any real

332. 228 Va. 427, 323 S.E.2d 554 (1984), *cert. denied*, 105 S. Ct. 2713 (1985).

333. *See supra* notes 110-37 and accompanying text.

334. *Jones*, 228 Va. at 448-49, 323 S.E.2d at 565-66. Defendant was convicted of capital murder only because he had killed more than one person. *Id.* at 449, 323 S.E.2d at 566.

335. *Id.* at 448, 323 S.E.2d at 566.

336. 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049 (1980).

337. *Id.* at 205-06, 257 S.E.2d at 786-87.

338. The initial appeal does not state which aggravating circumstances the jury actually found. *Id.* at 213, 257 S.E.2d at 791-92. On a subsequent appeal the court confirmed that the death penalty had been based on the "outrageously vile" factor. *Virginia Dep't of Corrections v. Clark*, 227 Va. 525, 528, 318 S.E.2d 399, 400 (1984).

339. *Clark*, 220 Va. at 216, 257 S.E.2d at 794.

340. *Id.* at 217, 257 S.E.2d at 794.

341. *Id.*

342. 446 U.S. 420 (1980); *see supra* notes 110-37 and accompanying text.

guidance to a sentencer or a court. Instead of acting as a limitation on discretion, the circumstance has served as an invitation to expanded discretion. Having refused, even after *Godfrey*, to limit the especially heinous aggravating circumstance to cases involving serious physical abuse before death, the courts have proven themselves incapable of identifying any other meaningful limitations on the scope of this circumstance.

If the especially heinous circumstance truly operated as a meaningful standard, there would be some unifying thread connecting all of the cases in which especially heinous findings have been approved, a core of meaning that could explain why some cases are especially heinous and others are not. This core cannot be found, whether one looks at all of the cases together or examines them, as this Article has done, on a state-by-state basis. The only thing that the cases have in common is that the reviewing courts have been able to find *something* disturbing in each case. This is simply not enough.

The problem is not only that the limitations on this aggravating circumstance are too widely sketched but also that there do not appear to be any recognizable limitations at all. Any murder can be especially heinous. It can be especially heinous because the victim is too young,³⁴³ too old,³⁴⁴ or because the defendant chose his victims so that they were not too young or too old.³⁴⁵ If the defendant killed for no reason, the murder is especially heinous,³⁴⁶ as is a murder committed for a reason the appellate court does not like.³⁴⁷ A killing is especially heinous if the victim is aware of the impending death,³⁴⁸ and also if the killing is done without warning.³⁴⁹ The circumstances under which a first degree murder can be committed are limitless, but so is the willingness of courts to include these circumstances within the scope of their states' especially heinous aggravating circumstances.

The courts' experience with the especially heinous circumstance demonstrates the validity of the underlying premise of both the vagueness and guided discretion doctrines. If discretion is to be controlled, it must be controlled by the legislature. The legislature must provide a standard of sufficient definiteness to limit the discretion of juries and courts. Experience shows that the terms "heinous, atrocious or cruel," "depravity of mind," and "outrageously vile, wan-

343. See, e.g., *State v. Tison*, 129 Ariz. 526, 543, 633 P.2d 335, 352 (1981) (two-year-old), *cert. denied*, 459 U.S. 882 (1982); *Thomas v. State*, 247 Ga. 233, 234, 275 S.E.2d 318, 319 (nine-year-old), *cert. denied*, 452 U.S. 973 (1981).

344. See, e.g., *State v. Zaragoza*, 135 Ariz. 63, 69-70, 659 P.2d 22, 28-29 (1983) (78-year-old), *cert. denied*, 462 U.S. 1124 (1983); *Smith v. State*, 249 Ga. 228, 234, 290 S.E.2d 43, 48 (82-year-old), *cert. denied*, 459 U.S. 882 (1982).

345. See *State v. Moore*, 210 Neb. 457, 471, 316 N.W.2d 33, 41 (discussed *supra* notes 244-45 and accompanying text), *cert. denied*, 456 U.S. 984 (1982).

346. See, e.g., *State v. Newlon*, 627 S.W.2d 606, 622 (Mo.) (en banc), *cert. denied*, 456 U.S. 984 (1982); *Jones v. State*, 648 P.2d 1251, 1259 (Okla. Crim. App. 1982), *cert. denied*, 459 U.S. 1155 (1983).

347. See, e.g., *Bush v. State*, 431 So. 2d 555, 560-61 (Ala. Crim. App. 1982) (murder to avoid identification), *aff'd*, 431 So. 2d 563 (Ala.), *cert. denied*, 464 U.S. 865 (1983); *Cartwright v. State*, 695 P.2d 548, 554 (Okla. Crim. App. 1985) (murder for revenge), *cert. denied*, 105 S. Ct. 3538 (1985).

348. See *supra* note 189 and accompanying text.

349. See *supra* note 190 and accompanying text.

ton or inhuman" cannot perform this function. These terms, largely because they are so subjective and emotion laden, cannot, under the eighth amendment, limit the class of those eligible for the death penalty or provide a meaningful basis to distinguish the few who are to die from the many who are to live. They cannot, as required by the fourteenth amendment, adequately define and limit the elements that the prosecution must prove before a sentence of death can be imposed. They cannot, as required by both the eighth and fourteenth amendments, sufficiently channel the sentencer's discretion to eliminate, or at least to minimize, the possibility of arbitrariness, capriciousness, and discrimination.³⁵⁰

Certainly, the states have a right to decide that the presence of certain factors in a murder makes that murderer particularly deserving of the death penalty. This decision, however, should be made in the legislatures and not in the courts. The legislatures of Alabama, Oklahoma, and Arizona, after due deliberation, could have decided to follow the lead of thirteen other states and make the killing of a witness an aggravating circumstance.³⁵¹ The legislatures in these

350. In both the guided discretion and due process vagueness contexts, the Supreme Court has not required actual statistical proof of the arbitrary, capricious, or discriminatory application of a statute before invalidating that statute. Thus, in *Furman v. Georgia*, 408 U.S. 238 (1972), Justices Stewart and White voted to overturn standardless capital sentencing based solely on their subjective impressions of how capital sentences were being imposed. In all of the cases discussed *supra* text accompanying notes 64-97, the Court relied on the possibility of arbitrariness, capriciousness, and discrimination entering the decisionmaking process rather than on statistical evidence. Indeed, as Professor Amsterdam notes, one of the policies underlying the vagueness doctrine is that "[p]rejudiced, discriminatory, or overreaching exercises of state authority may remain concealed beneath findings of fact impossible for the Court to redetermine when such sweeping statutes have been applied to the complex, contested fact constellations of particular cases." Note, *supra* note 65, at 80 (footnotes omitted); see also *Turner v. Murray*, 106 S. Ct. 1683, 1687 (1986) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.").

There is, however, some indication that sentencers have used the "especially heinous" aggravating circumstance in a manner that obviates the requirements of the guided discretion and vagueness doctrines. In a study published in 1980, Bowers and Pierce examined the use of aggravating circumstances found in Georgia and Florida cases in which the death penalty had been imposed. Bowers & Pierce, *supra* note 9, at 625-29. In comparing the aggravating circumstances found in each state, these authors found the statistics most similar with respect to the most objective aggravating circumstance: that murder was committed in the course of another felony. This aggravating factor was found in 87% of the Georgia cases and 71% of the Florida cases. The disparity between the states' statistics was greatest with respect to the most subjective aggravating factor, the "especially heinous" aggravating circumstance. This factor was found in 89% of the Florida cases and 46% of the Georgia cases—a 43% differential. *Id.* at 627. The authors then examined more closely the cases with especially heinous findings and discovered that, by all objective indicators, despite the lower percentage of especially heinous findings in Georgia, "Georgia's capital murders would appear to be more heinous than Florida's." *Id.* at 628. Bowers and Pierce concluded that "[t]hese results are consistent with the proposition that the laws are bent to accomplish the extralegal functions of capital punishment," *id.*, but did not offer any explanation as to why this bending would be more likely to occur in Florida than in Georgia. There is, however, an explanation for this difference—one that can be found in the different role aggravating circumstances play in the Georgia and Florida statutes. In Georgia an aggravating circumstance acts primarily as a "bridge"; once the jury finds a valid aggravating circumstance, it has complete discretion in determining whether to impose the death penalty. *Zant v. Stephens*, 462 U.S. 862 (1983). Thus, once a jury has found one aggravating circumstance, there is little incentive to try to fit the crime into one of the other aggravating categories. In Florida, on the other hand, the statute requires that all aggravating circumstances found be weighed against mitigating circumstances found. *Barclay v. Florida*, 463 U.S. 939, 952-54 (1983). Thus, a sentencer in Florida would have more incentive than a sentencer in Georgia to expand the limits of the especially heinous aggravating circumstance in a given case in order to justify imposition of the death penalty.

351. *Special Project*, *supra* note 1, at 1232 n.687.

three states did not do so. The appellate courts in these three states, however, have included witness elimination murders within their especially heinous aggravating circumstances³⁵²—a prime example of the judiciary's usurpation of a legislative responsibility.³⁵³

Nor is there any bar to the enactment of aggravating circumstances that would cover the "core" cases identified in *Gregg v. Georgia*³⁵⁴—the "horrifying torture murder[s]."³⁵⁵ Several states have made "torture" an aggravating circumstance.³⁵⁶ The Utah statute, which specifically requires the presence of "serious physical abuse before death," also would serve this purpose.³⁵⁷ Neither of these solutions would permit the unchannelled discretion, the ever widening net,

352. "Ending the life of a human being so that that person cannot testify against the defendant indicates a complete lack of understanding of the value of a human life. Killings committed with this cold-blooded logic in mind are especially depraved." *State v. Smith*, 141 Ariz. 510, 512, 687 P.2d 1265, 1267 (1984); *see also* *Bush v. State*, 431 So. 2d 555, 560-61 (Ala. Crim. App. 1982) (shooting victim "in a calculated fashion to avoid later identification" supports "especially heinous" finding), *aff'd*, 431 So. 2d 563 (Ala.), *cert. denied*, 464 U.S. 865 (1983); *State v. Gillies*, 142 Ariz. 564, 570, 691 P.2d 655, 661 (1984) (killing witnesses "illustrates heinousness and depravity"), *cert. denied*, 105 S. Ct. 1775 (1985); *Boutwell v. State*, 659 P.2d 322, 329 (Okla. Crim. App. 1983) (robbery victim killed to avoid arrest or prosecution).

353. The Oklahoma Court of Criminal Appeals has proven itself especially susceptible to the practice of using its especially heinous circumstance in lieu of legislative enactments. In *Eddings v. State*, 616 P.2d 1159 (Okla. Crim. App. 1980), *rev'd in part and remanded*, *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Oklahoma court went so far as to use the adoption by the legislatures of other states of an aggravating circumstance covering the killing of a police officer as a reason to include this factor under the rubric of Oklahoma's especially heinous aggravating circumstances. *Id.* at 1167-68. Similarly, in *Davis v. State*, 665 P.2d 1186, 1202-03 (Okla. Crim. App.), *cert. denied*, 464 U.S. 865 (1983), the Oklahoma court found that the murder of two people was a "mass murder" and therefore especially heinous, disregarding the Oklahoma legislature's failure to follow the lead of ten other legislatures in making the killing of more than one person an aggravating circumstance. *See* Special Project, *supra* note 1, at 1232 n.688.

The courts in Alabama, Virginia, and Nebraska have in the the same way cured their legislatures' omissions by using the murder of more than one victim to support especially heinous findings. *See Kyzer v. State*, 399 So. 2d 317, 324 (Ala. Crim. App. 1979) (because defendant shot three victims, the killings "could be deemed 'extremely wicked,' or 'vile'"); *Beck v. State*, 365 So. 2d 985, 996 (Ala. Crim. App.) (trial court found "[t]he capital felony was especially heinous, atrocious or cruel . . . wherein [sic] two or more human beings are intentionally killed by the Defendant"), *aff'd*, 365 So. 2d 1006 (Ala. 1978), *rev'd and remanded on other grounds*, 447 U.S. 625 (1980). In *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981), the Alabama Supreme Court recognized that this practice was prohibited by *Godfrey*, but held that the problem could be corrected without resorting to legislative action by having the definition of capital murder as one "wherein two or more human beings are intentionally killed" do double duty as an aggravating circumstance. *Id.* at 334; *see also* *State v. Moore*, 210 Neb. 457, 471, 316 N.W.2d 33, 41 (defendant exhibited an "exceptionally depraved" state of mind by engaging in the "repetitive" murder of two cabdrivers), *cert. denied*, 456 U.S. 984 (1982); *State v. Holtan*, 197 Neb. 544, 547, 250 N.W.2d 876, 880 ("defendant created a great risk of death to several persons"), *cert. denied*, 434 U.S. 912 (1977), *aff'd*, 205 Neb. 314, 287 N.W.2d 671 (1980), *aff'd*, 216 Neb. 594, 344 N.W.2d 661 (1984). In neither *Moore* nor *Holtan* did the court discuss physical or psychological suffering. Both cases regarded killing, or attempting to kill, more than one person as an act "totally and senselessly bereft of regard for human life." *Moore*, 210 Neb. at 471, 316 N.W.2d at 41; *Holtan*, 197 Neb. at 547, 250 N.W.2d at 880; *see also* *Jones v. Commonwealth*, 228 Va. 427, 449, 323 S.E.2d 554, 566 (1984) ("[o]bviously, a multiple killing is more heinous than a single homicide"), *cert. denied*, 105 S. Ct. 2713 (1985).

354. 428 U.S. 153 (1976); *see supra* notes 41-46 and accompanying text.

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

356. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 9711(d)(8) (Purdon 1982); S.C. CODE ANN. § 16-3-20(c)(a)(1)(i) (Law. Co-op. 1985).

357. *See supra* note 153.

that has so characterized the use of the especially heinous aggravating circumstance.

VI. CONCLUSION

The difficulties that the courts have had in limiting the scope of their especially heinous aggravating circumstances are not surprising. Commentators at an early stage predicted these difficulties, and the Supreme Court's discussions in *Gregg v. Georgia*³⁵⁸ and *Proffitt v. Florida*³⁵⁹ and its pointed warning in *Godfrey v. Georgia*³⁶⁰ foreshadowed the problems. The legislatures that enacted these vague aggravating circumstances placed a burden on their sentencers and their courts to try to find, with little guidance, rational distinctions among a universe of first degree murder cases, a universe to which all but the most hardened will react with shock and repulsion. This burden has proven impossible to bear.

Because of their inability to bear this burden, the courts have allowed the evils identified in *Furman v. Georgia*³⁶¹ and condemned by the due process vagueness doctrine to reenter the capital punishment system. Discrimination, arbitrariness, caprice—all can be present when the sentencer is left free to choose to execute or not depending on a subjective evaluation of the “badness” or “heinousness” of the murder. Whether and to what extent arbitrariness, caprice, and discrimination can be removed entirely from the capital sentencing process are questions beyond the scope of this Article.³⁶² What is certain is that the especially heinous aggravating circumstance, by itself, has unnecessarily provided an opportunity for these evils to reenter the capital sentencing process and therefore should be eliminated.

358. 428 U.S. 153 (1976); see *supra* notes 41-46 and accompanying text.

359. 428 U.S. 242 (1976).

360. 446 U.S. 420 (1980); see *supra* notes 110-37 and accompanying text.

361. 408 U.S. 238 (1972).

362. Some observers have concluded that the attempt is futile:

The response of the states to *Furman* was a valiant effort to introduce evenhandedness where irregularity had prevailed. But the outcome has been no more successful than that of the prior system of capital punishment. This failure has not resulted from lack of effort but rather from the impossibility of fashioning an acceptable method of administering capital punishment while maintaining the system of rights that our Constitution mandates.

Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 928 (1982); see also C. BLACK, *supra* note 9, at 103 (“We have to keep using [the legal process] as a means of choosing for other punishment, even as we slowly try to make it better, but for the death of a person it will not do, it cannot be reformed enough to do.”).