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Godfrey v. Georgia: Creative Federalism, the Eighth Amendment, and the Evolving Law of Death

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GODFREY v. GEORGIA: CREATIVE FEDERALISM, THE EIGHTH AMENDMENT, AND THE EVOLVING LAW OF DEATH

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I. THE ROAD TO *GODFREY*

In 1972, the wholly discretionary determination by a Georgia jury to impose a sentence of death on William Henry Furman became the vehicle for the United States Supreme Court's landmark decision in *Furman v. Georgia*,[1] overturning every death penalty statute in the United States as violative of the eighth amendment prohibition against cruel and unusual punishment.[2] *Furman* established that the eighth amendment proscribes the imposition of the death penalty "under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."[3] Apparently, the "evolving standards of de-

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1. 408 U.S. 238 (1972) (per curiam). Furman, a twenty-six-year-old man with a sixth grade education, was convicted of killing a householder during the course of a burglary by shooting the deceased through a closed door. Pending trial, the unanimous staff diagnosis at the Georgia Central State Hospital was that Furman suffered from "Mental Deficiency, Mild to Moderate with Psychotic Episodes associated with Convulsive Disorder." *Id.* at 252-53 (Douglas, J., concurring). The existence of mental disorder among capital offenders is not unusual. *See* D. ABRAHAMSON, THE MURDERING MIND (1973); D. LUNDE, MURDER AND MADNESS (1975); Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 GEO. L.J. 757 (1978).

2. Although *Furman* specifically considered only the Georgia and Texas death penalty procedures, it mandated invalidation of all 39 then-existing state death penalty statutes. Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974).

3. Godfrey v. Georgia, 100 S. Ct. 1759, 1764 (1980); Gregg v. Georgia, 428 U.S. 153, 188 (1976).

cency"[4] that had illuminated the Court's assessment of capital punishment were either undetected or widely disregarded by a substantial number of the country's elected lawmakers, as demonstrated by the swift legislative response to *Furman*: thirty-five states and the federal government enacted death penalty statutes within a relatively short time.[5]

Four years later, the United States Supreme Court was asked to evaluate the constitutionality of the rejuvenated death penalty schemes. In *Gregg v. Georgia*[6] a sharply divided Court concluded that the Georgia legislature had successfully responded to the constitutional concerns expressed in *Furman*.[7] The Court found that the bifurcated proceeding established by the Georgia statute suitably directed and limited the discretion of the sentencing body where the state sought the penalty of death.[8] The lead opinions in *Gregg* and its companion cases announced that the eighth amendment required that the sentencer's discretion to choose the death penalty must be channeled by " 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.' "[9] The Court held that the Georgia scheme, on its face, comported with these constitutional requirements:

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4. Trop v. Dulles, 356 U.S. 86, 101 (1958), *cited in* Furman v. Georgia, 408 U.S. at 242 (Douglas, J., concurring); *id.* at 269-70 (Brennan, J., concurring); *id.* at 327, 329 (Marshall, J., concurring).

5. *See* Gregg v. Georgia, 428 U.S. 153, 179-80 n.23 (1976).

6. 428 U.S. 153 (1976).

7. On the same day that it rendered its decision in *Gregg*, upholding the Georgia capital punishment statute, the Court passed upon the death penalty schemes of four other states. *See* Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). Justices Stewart, Powell, and Stevens approved the Georgia, Florida, and Texas death penalty schemes but disapproved of the mandatory death penalty statutes of Louisiana and North Carolina. Chief Justice Burger and Justices White, Blackmun, and Rehnquist uniformly approved the five death penalty schemes, and Justices Brennan and Marshall uniformly disapproved of the five statutes.

8. The Georgia death penalty statute enacted in response to the decision in *Furman* established a bifurcated proceeding, which initially determines whether the defendant is guilty of a capital offense and then decides whether to impose the death sentence. The Georgia scheme narrows the class of offenses for which capital punishment can be imposed by defining 10 statutory aggravating circumstances. GA. CODE ANN. § 27-2534.1 (1978). See note 14, *infra* for the text of the statute. During the sentencing phase, the jury determines whether any of the charged statutory aggravating circumstances apply; if at least one such aggravating factor is found, the jury then decides in its absolute discretion whether to sentence the defendant to life or death. GA. CODE ANN. § 27-2503(b) (1978). A decision to impose a death sentence is automatically reviewed by the Georgia Supreme Court, which is directed to determine whether the evidence supported the finding of a statutory aggravating circumstance. GA. CODE ANN. § 27-2537 (1978).

9. Godfrey v. Georgia, 100 S. Ct. 1759, 1764-65 (1980) (footnotes omitted).

> In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of *Furman*. No longer should there be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[10]

Justice Stewart, author of the lead opinion in *Gregg*, noted that a death penalty scheme "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."[11] The petitioner in *Gregg* argued that such impermissible vagueness and overbreadth existed in the language of Georgia's statutory scheme authorizing the imposition of the death penalty for murder, rape, armed robbery, or kidnapping if the sentencer found beyond a reasonable doubt that 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."[12] The Supreme Court, however, determined that this broadly worded "section(b)(7)" statutory aggravating circumstance was not unconstitutional *on its face*: "It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction."[13]

Four years after the *Gregg* decision, the affirmance by the Georgia Supreme Court of two sentences of death imposed on Robert Franklin Godfrey for the murder of his wife and his mother-in-law furnished the

10. Gregg v. Georgia, 428 U.S. at 198 (opinion of Stewart, Powell and Stevens, J.J.).

11. *Id.* at 195 n.46.

12. GA. CODE ANN. § 27-2534.1(b)(7) (1978). In the wake of the United States Supreme Court decision in Coker v. Georgia, 433 U.S. 584 (1977), this § (b)(7) statutory aggravating circumstance has, through judicial construction, been limited to instances of murder. Although the narrow holding of *Coker* was that the eighth amendment prohibits the imposition of the death penalty for rape of an adult woman where the victim is not killed, the Supreme Court of Georgia has recognized that "the rationale of *Coker* must be applied also to armed robbery and kidnapping." Collins v. State, 239 Ga. 400, 236 S.E.2d 759, 761 (1977).

13. Gregg v. Georgia, 428 U.S. at 201 (opinion of Stewart, Powell, and Stevens, J.J.).

United States Supreme Court with an opportunity to assess whether the section (b)(7) aggravating circumstance was constitutional *in its application*.[14] The two death sentences rested solely on the jury's partial finding

14. Section (b)(7) is one of 10 "statutory aggravating circumstances" found in § 27-2534 of the Georgia Code. The entire text of the statute reads as follows:

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(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, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robery, 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 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 during or because of the exercise of his official duty.

(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.

(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.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

GA. CODE ANN. § 27-2534.1 (1978).

of the section (b)(7) aggravating circumstance that the murders were "outrageously or wantonly vile, horrible and inhuman."[15] On October 8, 1979, the Supreme Court of the United States granted *certiorari* in *Godfrey v. Georgia* to decide "whether, in affirming the imposition of the sentences of death in the present case, the Georgia Supreme Court has 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."[16] The resulting decision in *Godfrey*, which defies facile description owing in part to the absence of a majority opinion,[17] has dramatically widened the scope of federal inquiry into state determinations to impose a sentence of death and marks an important milestone in the evolving law of death.

II. GODFREY'S CRIME AND THE GEORGIA PROCEEDINGS

A. The Facts of the Crime Adduced at Trial

On September 5, 1977, Robert Godfrey quarreled with his wife of twenty-eight years and, in the heat of the dispute, threatened her with a knife.[18] As a result, Mrs. Godfrey left home and went to stay with her mother, Mrs. Wilkerson. Shortly thereafter, Mrs. Godfrey filed suit for divorce, and a court hearing was set for September 22, 1977.

Godfrey attempted to secure a reconciliation with his wife, but his efforts were rebuffed. In the early evening of September 20, 1977, Godfrey's wife telephoned him at home and demanded all of the proceeds from the planned sale of their house. The two argued, and the conversation ended with Mrs. Godfrey stating that she would call back later. Somewhat later she called again, and another heated argument ensued. Mentioning that her mother supported her position, Mrs. Godfrey reaffirmed that reconciliation was impossible. She insisted that there was no point in further discussion and hung up.

At this point, Godfrey took his shotgun and walked the 200 yards from his house to his mother-in-law's trailer, where his wife, her mother, and his

15. Godfrey v. Georgia, 100 S. Ct. 1759, 1761 (1980). The jury's finding consisted only of the first clause of the § (b)(7) aggravating circumstance and omitted the second qualifying clause, "in that it involved torture, depravity of mind, or an aggravated battery to the victim." *See* note 14 *supra*.

16. Godfrey v. Georgia, 100 S. Ct. 204, 205 (1979).

17. *See* notes 45-47 and accompanying text *infra*.

18. Godfrey v. Georgia, 100 S. Ct. at 1763. The plurality opinion, authored by Justice Stewart, cites the basic facts that led up to the deaths of Godfrey's wife and mother-in-law. In addition, the dissenting opinion of Justice White and the briefs submitted by Godfrey and the State of Georgia to the Supreme Court provided some additional details of the crime. *Id.* at 1773.

eleven-year-old daughter were seated around a table. Aiming through a window, Godfrey shot his wife in the head, killing her instantly. As he entered the trailer, Godfrey struck his fleeing daughter in the head with the barrel of the gun "causing a laceration to the scalp of approximately one inch."[19] He then shot his mother-in-law in the head, killing her instantly.

Godfrey then called the local sheriff's office, identified himself, and, after explaining what he had done, asked the sheriff to come pick him up. Godfrey sat in front of the trailer and waited until the officers arrived, at which time he admitted that he had committed the murders. Subsequently, Godfrey told a police officer, "I've done a hideous crime . . . but I have been thinking about it for eight years . . . I'd do it again."[20]

A significant fact, not mentioned in any of the opinions issued by the Supreme Court[21] or in the decision of the Georgia Supreme Court, was that Godfrey had a history of mental illness.[22] At his wife's behest, Godfrey voluntarily submitted to confinement in a mental institution on at least three occasions in order to preserve his marriage. During these commitments he was treated for depression and a severe drinking problem.[23]

B. The Murder Convictions

The State indicted Godfrey on two counts of murder and on one count of aggravated assault for striking his daughter. In response to these charges, Godfrey raised an insanity defense, testifying that he had blacked-out following the second phone conversation with his wife. Dr. William S. Davis, a psychiatrist on the clinical staff at Emory Medical School and a past president of the Georgia Psychiatrists Association,[24] testified on behalf of the defense at trial. Dr. Davis, who in the mid-sixties had treated Godfrey for depression and alcoholism,[25] examined Godfrey following an injection of sodium amytal and found that, even after receiving the truth serum, Godfrey could not remember the crimes. On the basis of his examination, Dr. Davis concluded that the emotional trauma caused

19. Brief for Respondent at 3, Godfrey v. Georgia, 100 S. Ct. 1759 (1980).

20. 100 S. Ct. at 1763.

21. The plurality opinion did contain an oblique reference to the fact that Godfrey "had been hospitalized because of his drinking problem" on more than one occasion. *Id.* at 1763 n.3.

22. For an excellent analysis of the mitigatory significance of mental abnormality, see Liebman & Shepard, *supra* note 1.

23. Brief for Petitioner at 10, Brief for Respondent at 9, Godfrey v. Georgia, 100 S. Ct. 1759 (1980).

24. Brief for Petitioner at 14, Godfrey v. Georgia, 100 S. Ct. 1759 (1980).

25. Brief for Petitioner at 10, Brief for Respondent at 7, Godfrey v. Georgia, 100 S. Ct. 1759 (1980).

by the argument with his wife induced in Godfrey an altered state of consciousness known as a dissociative reaction.[26] The jury, however, rejected the defendant's insanity defense and returned guilty verdicts on both counts of murder and the one count of aggravated assault.

C. The Sentence of Death

Following the murder convictions, the sentencing phase of the bifurcated death penalty scheme began. No further evidence was presented in this presentence hearing, but counsel for each side made arguments to the jury on the issue of whether the punishment of death was appropriate for the defendant. The prosecutor urged that the death penalty should be imposed because, in the words of the section (b)(7) aggravating circumstance provision, the crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." On three occasions during the course of his argument, however, the prosecutor stated that the deaths had not involved "torture" or an "aggravated battery."[27]

Following the arguments of counsel, the trial judge instructed the jury. Both orally and in writing, the judge apprised the jury of the statutory language of the section (b)(7) aggravating circumstance in its entirety.[28] No attempt was made, however, to narrow the scope of this section or to offer any enlightenment as to the correct interpretation of its terms. The jury returned two sentences of death, specifying for each "that the offense of murder was outrageously or wantonly vile, horrible and inhuman."[29] The jury's verdict omitted the qualifying language of the statutory provision "in that it involved torture, depravity of mind, or an aggravated battery to the victim." Accepting the jury's partial incantation of section (b)(7) as adequate, the trial court imposed a sentence of death for each of the murders and a sentence of ten years imprisonment for the aggravated battery. In preparing a report for use on appellate review, the trial judge indicated that, apart from the actual murders, the victims had not been "physically harmed or tortured."[30] The trial judge also noted that the defendant had "no significant history of prior criminal activity."[31]

26. Brief for Petitioner at 14, Brief for Respondent at 8, Godfrey v. Georgia, 100 S. Ct. 1759 (1980). *See also* Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979), *rev'd*, 100 S. Ct. 1759 (1980).

27. 100 S. Ct. at 1763.

28. *Id.* at 1764.

29. *Id.*

30. *Id.*

31. *Id.* at 1764 n.4.

D. The Decision of the Georgia Supreme Court

Godfrey's conviction and sentences were appealed to the Georgia Supreme Court, which affirmed with two Justices dissenting.[32] Godfrey's challenge to the constitutionality of the section (b)(7) aggravating circumstance was summarily rejected. Citing *Gregg v. State*[33] and *Gregg v. Georgia*,[34] the Georgia court noted that "[t]he Georgia death penalty statute . . . has been upheld by this court and by the Supreme Court of the United States."[35] Responding to the charge that the catchall aggravating circumstance was unconstitutionally vague, the court declared that it had previously found this argument to be without merit.[36]

As part of its mandatory sentence review,[37] the Georgia Supreme Court had the responsibility of determining whether the evidence supported the jury's finding of the section (b)(7) aggravating circumstance.[38] The analysis of this issue was concise, if not cursory: "The statutory aggravating circumstance found by the jury as to each murder was 'the offense of murder was outrageously or wantonly vile, horrible and inhuman'. . . . The evidence supports the jury's finding of statutory aggravating circumstances, and the jury's phraseology was not objectionable."[39]

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32. Godfrey v. State, 243 Ga. 302, 253 S.E.2d 710 (1979). Justice Hill indicated his dissent without further comment; Justice Jordan dissented "as to Division 2." 253 S.E.2d at 718. Division 2 of the *Godfrey* decision rejected the defendant's claim that "the trial court erred in admitting over objection certain photographs taken at the scene of the crime depicting the victim's wounds and the surrounding area." 253 S.E.2d at 714. Neither justice specified whether his dissent applied only to the sentences of death or to the convictions for murder as well.

33. 233 Ga. 117, 210 S.E.2d 659 (1974), *aff'd*, 428 U.S. 153 (1976).

34. 428 U.S. 153 (1976).

35. Godfrey v. State, 253 S.E.2d at 717. As noted above, *Gregg* upheld the § (b)(7) aggravating circumstance against a facial constitutional attack. *See* notes 12 & 13 and accompanying text *supra*. The Georgia Supreme Court's bald citation of *Gregg* in rejecting Godfrey's constitutional challenge to § (b)(7) as applied did not address the distinction between a challenge to a statute *on its face* and challenge to the same statute *in its application*. *See* Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 108-09 & n.87 (1979).

36. Godfrey v. State, 253 S.E.2d at 717, *citing* Lamb v. State, 241 Ga. 10, 243 S.E.2d 59 (1978), and Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), *cert. denied*, 431 U.S. 933 (1977), *sentence vacated sub nom.*, Harris v. Hopper, 243 Ga. 244, 253 S.E.2d 707 (1979).

37. GA. CODE ANN. § 27-2537(a) (1978) provides in relevant part: "Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia."

38. GA. CODE ANN. § 27-2537(c)(2) (1978).

39. Godfrey v. State, 253 S.E.2d at 718. This bare assertion that the finding of the § (b)(7) aggravating circumstance was supported by the evidence has been the Georgia Supreme Court's typical manifestation of the "meaningful appellate review" that the United States Supreme Court indicated was "available" under the constitutionally permissible death penalty schemes of Georgia, Gregg v. Georgia, 428 U.S. 153, 195 (1976), and Florida,

The Georgia court was also required by statute to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[40] The court concluded that Godfrey's death sentence was not excessive or disproportionate. Declaring that it had considered all the murder cases that had come before it since January 1, 1970, the court announced that fifteen "similar cases," which it listed in an appendix, supported the affirmance of Godfrey's punishment.[41]

The Georgia court did not specify the similarity between Godfrey's crime and the fifteen listed cases. An examination of these cases reveals that each involved a multiple murder. Nonetheless, there are some relevant differences between these cases and Godfrey's crime. For example, the first case listed in the appendix was *House v. State*,[42] in which the

Proffitt v. Florida, 428 U.S. 242, 251 (1976), but was lacking in the unconstitutional death penalty statute of Louisiana, Roberts v. Louisiana, 428 U.S. 325, 335 (1976) and North Carolina, Woodson v. North Carolina, 428 U.S. 280, 303 (1976). *See, e.g.*, Hamilton v. State, 244 Ga. 145, 259 S.E.2d 81 (1979), *vacated and remanded*, 100 S. Ct. 2936 (1980), *death sentence reinstated*, No. 35078 (Ga. Sup. Ct. Sept. 8, 1980); Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (1979), *vacated and remanded*, 100 S. Ct. 2936 (1980), *death sentence reinstated*, No. 34588 (Ga. Sup. Ct. Sept. 8, 1980); Holton v. State, 243 Ga. 312, 253 S.E.2d 736, *cert. denied*, 100 S. Ct. 263 (1979); Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979), *vacated and remanded*, 100 S. Ct. 2936 (1980), *death sentence reinstated*, No. 33879 (Ga. Sup. Ct. Sept. 8, 1980); Willis v. State, 243 Ga. 185, 253 S.E.2d 70, *cert. denied*, 100 S. Ct. 178 (1979); Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979), *vacated and remanded*, 100 S. Ct. 2935 (1980), *death sentence reinstated*, No. 34289 (Ga. Sup.Ct. Sept. 24, 1980); Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472, *cert. denied*, 100 S. Ct. 530 (1979); Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979), *vacated and remanded*, 100 S. Ct. 2934 (1980), *death sentence reinstated*, No. 34193 (Ga. Sup. Ct. Sept. 24, 1980); Redd v. State, 242 Ga. 876, 252 S.E.2d 383, *cert. denied*, 442 U.S. 934 (1979); Finney v. State, 242 Ga. 582, 250 S.E.2d 388 (1978), *cert. denied*, 441 U.S. 916 (1979); Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524 (1978), *cert. denied*, 439 U.S. 1102 (1979); Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978), *rev'd and remanded*, 442 U.S. 95, *new trial ordered*, 244 Ga. 27, 257 S.E.2d 543 (1979); Drake v. State, 241 Ga. 583, 247 S.E.2d 57, *cert. denied*, 440 U.S. 928 (1978); Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978), *cert. denied*, 439 U.S. 991 (1979); Bowen v. State, 241 Ga. 492, 246 S.E.2d 322 (1978); Lamb v. State, 241 Ga. 10, 243 S.E.2d 59 (1978); Moore v. State, 240 Ga. 807, 243 S.E.2d 1, *cert. denied*, 439 U.S. 903 (1978); Stanley v. State, 240 Ga. 341, 241 S.E.2d 173 (1977), *cert. denied*, 439 U.S. 882 (1978); Campbell v. State, 240 Ga. 352, 240 S.E.2d 828 (1977), *cert. denied*, 439 U.S. 882 (1978); Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977), *cert. denied*, 436 U.S. 914 (1978).

40. GA. CODE ANN. § 27-2537(c)(3) (1978). As Justice White observed in his concurrence in *Gregg*, the Georgia death penalty scheme requires the Georgia Supreme Court to do more than merely determine that the finding of an aggravating circumstance is supported by the evidence: "[The court] must do more than determine whether the penalty was lawfully imposed. It must go on to decide — after reviewing the penalties imposed in 'similar cases' — whether the penalty is 'excessive or disproportionate' considering both the crime and the defendant." Gregg v. Georgia, 428 U.S. at 223.

41. Godfrey v. State, 253 S.E.2d at 718.

42. House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), *cert. denied*, 428 U.S. 910 (1976).

defendant was found guilty of strangling two seven-year-old boys to death after committing anal sodomy upon them. Two persons were killed by House; two persons were killed by Godfrey. Are the cases "similar"?[43]

43. The other "similar cases listed in the Appendix [that] support the affirmance of the death penalty" for Godfrey, 253 S.E.2d at 718, were:

Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974), *aff'd*, 428 U.S. 153 (1976). In *Gregg*, the defendant shot two men who had picked him up while hitchhiking in order to steal their money and their car. The death penalty rested on a finding of § (b)(2) — that the offense was committed in the course of another capital felony. Section (b)(7) was charged but not found.

Floyd v. State, 233 Ga. 280, 210 S.E.2d 810 (1974), *cert. denied*, 431 U.S. 949 (1977), in which the defendant and two accomplices gained entry into the home of a stranger on the pretext of wanting to use the telephone. Once inside, the defendant bound the hands and feet of the occupant and her 17-year-old daughter and then shot each of them twice in the head.

Chenault v. State, 234 Ga. 216, 215 S.E.2d 223 (1975), involved a defendant who began firing two pistols in a crowded church, killing Mrs. Martin Luther King, Sr. and the church deacon, and wounding another parishioner. Only § (b)(3) — creating great risk of death to more than one person — was found.

Smith v. State, 236 Ga. 12, 222 S.E.2d 308, *cert. denied*, 428 U.S. 910 (1976), in which the defendant traveled from Florida to Georgia to kill his wife's ex-husband and the ex-husband's new wife in order to collect on an insurance policy. With the assistance of a paid accomplice, the defendant lured the couple to a secluded area and killed them both with a shotgun.

Birt v. State, 236 Ga. 815, 225 S.E.2d 248, *cert. denied*, 429 U.S. 1029 (1976), and Gaddis v. State, 293 Ga. 238, 236 S.E.2d 594 (1976). The defendants in these companion cases forced their way into the home of an elderly couple and slowly strangled them to death by tightening a coathanger around their necks in order to ascertain where they hid their money.

Coleman v. State, 237 Ga. 84, 226 S.E.2d 911 (1976), *cert. denied*, 431 U.S. 909 (1977); Isaacs v. State, 237 Ga. 105, 226 S.E.2d 922, *cert. denied*, 429 U.S. 986 (1976); Dungee v. State, 237 Ga. 218, 227 S.E.2d 746, *cert. denied*, 429 U.S. 986 (1976). The three defendants in these companion cases burglarized a home and killed the six members of the household as they returned home. The husband was shot seven times in the head. One of the sons was shot four times in the head. The defendants then blindfolded and bound the mother, took her to a remote area where they raped and mutilated her before killing her. The death sentence rested on § (b)(2) — the murder was committed during the commission of another capital felony. Section (b)(7) was not found.

Banks v. State, 237 Ga. 325, 227 S.E.2d 380 (1976), *cert. denied*, 430 U.S. 975 (1977), in which the defendant, who had a prior conviction for voluntary manslaughter, robbed and killed two strangers.

Young v. State, 239 Ga. 53, 236 S.E.2d 1, *cert. denied*, 434 U.S. 1002 (1977), in which the defendant attacked six elderly persons in their homes one evening and robbed them. All of the victims were severely beaten, kicked, and stomped, and three of them died.

Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), *cert. denied*, 439 U.S. 882 (1978), in which the defendant killed his brother by beating him to death with a stick. The defendant then raped his brother's girlfriend. When another man, alerted by the screams of the rape victim, arrived on the scene, the defendant beat him to death and then locked his dead brother and the raped girlfriend in the trunk of the second victim's car. The death sentences

III. THE CONSTITUTIONAL FLAWS IN GODFREY'S SENTENCE OF DEATH

The issues raised by the imposition of the death penalty are troubling and have sharply divided the Supreme Court in a number of the major death penalty decisions handed down since *Furman*.[44] The question confronted in *Godfrey* proved no less intractable. Once again, a fragmented Court has failed to produce a majority opinion in rendering its verdict on the constitutionality of a death sentence. Justices Stewart, Powell, Stevens, and Blackmun concluded that the construction given by the Georgia Supreme Court to the section (b)(7) aggravating circumstance in affirming Godfrey's sentence of death was unconstitutionally broad and vague in violation of the eighth and fourteenth amendments.[45] Justices Marshall and Brennan concurred in this judgment while also expressing their unwavering belief that the death penalty is in all circumstances cruel and unusual punishment forbidden by the eighth and fourteenth amendments.[46] Chief Justice Burger and Justices White and Rehnquist dissented on the grounds that no error of federal constitutional magnitude existed in the Georgia Supreme Court's affirmance of the death penalty imposed on Godfrey on the basis of a finding of the section (b)(7) aggravating circumstance for the gruesome, intentional murders of his wife and mother-in-law.[47]

To a large extent it is necessary to look to the plurality opinion for the "law" of *Godfrey*. Unfortunately, the opinion is not the model of clarity,

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rested on findings of § (b)(2) — murder committed during the commission of another capital felony. Section (b)(7) was not found.

Westbrook v. State, 242 Ga. 151, 249 S.E.2d 524 (1978), *cert. denied*, 439 U.S. 1102 (1979), and Finney v. State, 242 Ga. 582, 250 S.E.2d 388 (1978), *cert. denied*, 441 U.S. 916 (1979). In these companion cases, the defendants robbed and kidnapped two women, one of whom they both raped. The defendants took the women into the woods, tied them, and then beat them to death with 2x4 boards. Westbrook had a prior criminal record of 11 burglaries, one larceny, two weapons charges, and two jail escapes.

44. Furman v. Georgia, 408 U.S. 238 (1972). The sharp divisions within the Court about the correct approach to death penalty decisions have frequently been evidenced by the failure of any opinion to attract the support of a majority of the Court. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978); Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). In each of these cases, Justices Stewart, Powell, and Stevens — sometimes voicing their opposition to a death sentence or a capital sentencing scheme and other times expressing their approval — have joined in the lead opinion for the Court. At the same time, Justices Marshall and Brennan have consistently opposed and Justice Rehnquist has consistently supported the death penalties before the Court. The decision in *Godfrey* conformed to this pattern.

45. Godfrey v. Georgia, 100 S. Ct. at 1762.

46. *Id.* at 1767 (Marshall, J., concurring).

47. The Chief Justice authored a brief dissenting opinion. *Id.* at 1772. Justice White dissented separately in an opinion joined by Justice Rehnquist. *Id.* at 1773.

and it fails to provide a complete and accurate analysis of a number of the issues raised by the case. The opinion does succeed, however, in at least identifying three serious defects of constitutional magnitude tainting Georgia's attempt to kill Godfrey: (1) the jury's incomplete finding of section (b)(7); (2) the absence of jury instructions delineating a proper, narrow construction of section (b)(7); and (3) the Georgia Supreme Court's failure to apply a proper, narrow construction of section (b)(7) in reviewing Godfrey's sentence of death. This article will examine these constitutional problems and will attempt to provide a coherent and thorough analysis of each. The need for such a clarification would appear to be established by the judicial response to *Godfrey*: the Georgia Supreme Court has already begun to draw some startling conclusions regarding the meaning of this important case.[48]

A. The Incomplete Jury Finding of Section (b)(7)

Georgia law specifies that "a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed."[49] While the jury clearly recommended the death penalty in his case, Godfrey argued that the jury's partial recitation of section (b)(7) did not constitute a suitable finding of a statutory aggravating circumstance.[50] Thus, although section (b)(7) provides that the "offense of murder . . . was out-

48. *See, e.g.*, Fair v. State, 268 S.E.2d 316 (1980); Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980); Dampier v. State, 245 Ga. 426, 265 S.E.2d 565, *reviewed in light of Godfrey*, 268 S.E.2d 349 (1980). *See* notes 211-16 and accompanying text *supra*.

49. GA. CODE ANN. § 26-3102 (1978). The complete text of the statute reads:

> Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

50. The first argument in Godfrey's petition for writ of *certiorari* was that the "partial finding of the 'catchall' aggravating circumstance is incomplete under the law and should void the death sentence on the ground that it deprives him of his life without the process of law." Petitioner's Brief for Certiorari at 19, Godfrey v. Georgia, 100 S. Ct. 1759 (1980). The question formulated by the Supreme Court in granting *certiorari* in *Godfrey* is closely related to this issue. *See* note 16 and accompanying text *supra*.

rageously or wantonly vile, horrible or inhuman *in that it involved torture, depravity of mind, or an aggravated battery to the victim,*"[51] the jury specified only that each of Godfrey's two murders was "outrageously or wantonly vile, horrible and inhuman."[52]

The initial question confronting the United States Supreme Court, therefore, was whether the jury's failure to mention the existence of torture, depravity of mind, or an aggravated battery indicated that no statutory aggravating circumstance had been found.[53] Two possibilities exist: (1) the jury determined that the complete aggravating circumstance applied to Godfrey's crime but, through inadvertence, deleted the missing portion of the provision in recording its finding, or (2) the partial recitation of the language of section (b)(7) fully reflected the jury's finding — that is, although the jurors felt that both murders were "outrageously or wantonly vile, horrible or inhuman," they did not consider them to involve "torture, depravity of mind, or an aggravated battery to the victim."

There was little doubt in the minds of Justices White and Rehnquist that, in providing its written characterization of the murders as "outrageously or wantonly vile, horrible and inhuman," the jury had intended to express its finding of the entire section (b)(7) aggravating circumstance. In response to Godfrey's contention that the jury's finding was "incomplete and indicative of an unconstitutionally broad construction"[54] of section (b)(7), Justice White wrote: "I find petitioner's argument unpersuasive, for it is apparent that both the jury and the Georgia Supreme Court understood and applied section (b)(7) in its entirety."[55] In support of this proposition, Justice White noted that: (1) the jury was instructed to determine beyond a reasonable doubt whether a statutory aggravating circumstance existed; (2) section (b)(7) was the only statutory aggravating circumstance involved in the case; and (3) this aggravating circumstance was presented

51. GA. CODE ANN. § 27-2534.1(b)(7) (1978) (emphasis added).

52. Godfrey v. Georgia, 100 S. Ct. at 1764.

53. Chief Justice Burger's brief dissent did not specifically address this issue. The Chief Justice noted that the jurors concluded that Godfrey's crime was " 'outrageously or wantonly vile, horrible and inhuman' *within the meaning of § (b)(7).*" 100 S. Ct. at 1772 (emphasis added). This remark suggests that the Chief Justice believed that the jury's finding reflected its consideration and adoption of the unspecified qualifying language of § (b)(7). The Chief Justice did not offer any reasons to support this belief. All of the other Justices proceeded on the view that § (b)(7) must be found in its entirety — that is, the aggravating circumstance can only be found where both clauses of § (b)(7) apply to the crime. 100 S. Ct. at 1766 (plurality opinion); *id.* at 1768 n.3 (Marshall, J., concurring); *id.* at 1775 (White, J., dissenting).

54. *Id.* at 1774-75.

55. *Id.* at 1775.

to the jury in its entirety.[56]

While these considerations provide support for Justice White's view that the jury intended to express a complete section (b)(7) finding, they are not dispositive. In essence, the trial judge's charge on this point fixed two responsibilities on the jury if it wished to impose the death penalty: (1) to determine whether the section (b)(7) aggravating circumstance in its entirety applied; and (2) to record its precise finding on the furnished form.[57] Obviously, the jury violated at least one of these commands. But is it clear, as Justice White contends, that the jury's failure was only in the ministerial task of recording its finding? Perhaps the jury's partial finding reflects a greater homage to the trial judge's second command — that is, to state precisely what is found — than to his first, which contemplates only an all-or-nothing finding.[58] If so, it would be incorrect to assume that the partial recitation of section (b)(7) language reflected the jury's determina-

56. *Id.* The complete language of the § (b)(7) aggravating circumstance was presented to the jury both orally and in writing by the trial judge as required by GA. CODE ANN. § 27-2534.1(c) (1978). 100 S. Ct. at 1764.

57. GA. CODE ANN. § 27-2534.1(c) (1978) provides, in part, that:

> The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. Except in cases of treason or airplane hijacking, unless at least one of the statutory aggravating circumstances . . . is so found, the death penalty shall not be imposed.

The sole statutory aggravating circumstance presented to the jury was the entire § (b)(7) provision. 100 S. Ct. at 1764.

58. Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204 (1980), *reexamined in light of Godfrey*, 268 S.E.2d 351 (1980), sheds important light on the significance of a jury's finding of only a portion of the catchall aggravating circumstance. The defendant in *Mulligan* was convicted of murdering Captain Patrick Doe and his girlfriend, Marian Miller. The jury recommended death as punishment for each murder, finding that the murder of Doe "was outrageously and wantonly vile, horrible and inhuman," 264 S.E.2d at 208, and that the murder of Miller "was outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." *Id.* at 209. It is particularly noteworthy that the jury adopted a different locution for the two § (b)(7) findings. The jury's description of the murder of Doe was virtually identical to that of the finding in *Godfrey*. 100 S. Ct. at 1764. The finding relating to the murder of Miller, however, is more complete — specifically including the elements "torture" and "depravity of mind."

If the jury's discriminating wording reflected its belief that "torture" and "depravity of mind" were present in the murder of Miller but not in the murder of Doe, then Justice White's supposition that the abbreviated phraseology in *Godfrey* reflects that jury's finding of the complete aggravating circumstance is undermined. In fact, the Georgia Supreme Court in *Mulligan* indicated that the evidence did not support a finding of § (b)(7) for the murder of Doe, but that it did for the murder of Miller. 264 S.E.2d at 209. Thus, it appears that, while the jury felt that the murder of Doe was "outrageously and wantonly vile, horrible and inhuman," both the jury and the Georgia Supreme Court did not believe that the murder involved torture or depravity of mind. In other words, the jury's elision of the qualifying clause in § (b)(7) with respect to the Doe murder reflected a purposeful determination that this language was inapplicable to the particular offense. Of course, it is only pure specu-

tion that at least one of the three qualifying elements of the aggravating circumstance — torture, depravity of mind, or aggravated battery — was applicable to Godfrey's crime. Moreover, in light of the repeated statements by the prosecutor that there was no evidence of torture or aggravated battery,[59] it would be inappropriate to conclude that the jury applied and found the entire section (b)(7) aggravating circumstance unless one assumes that the jury's partial declaration was premised on its actual finding that the murders revealed Godfrey's "depravity of mind."[60] Despite the dogmatic assertions of Justice White to the contrary, this assumption cannot be made with any reasonable degree of confidence. In fact, to the extent that Georgia case law sheds any light on this issue, it suggests that the jury's limited finding reflects a determination that none of the qualifying elements of section (b)(7) existed.[61]

The Georgia Supreme Court has recognized that a partial section (b)(7) determination should not automatically be treated as a finding of the entire aggravating circumstance in reviewing a sentence of death. In *Holton*

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lation to assume that the same jury finding in *Godfrey* should not be invested with the same significance.

An interesting sidelight in *Mulligan* is that the state had not charged the defendant with violating § (b)(7) in murdering Doe. Rather, the state attempted to base the death penalty for that murder on § (b)(4) of the statute, *see* note 14, *supra*, which provides that the offense was committed "for the purpose of receiving money or any other thing of value." GA. CODE ANN. § 27-2534.1(b)(4) (1980). The state did attempt to obtain a death sentence based on a finding of § (b)(7) *for the murder of Miller*. The jury returned a death sentence for the murder of Doe, making a partial finding of § (b)(7), which had not been charged for the Doe murder, while not finding § (b)(4), which had been charged. The Georgia Supreme Court affirmed the death sentence for the murder of Miller but vacated the death sentence for the murder of Doe, stating that "the evidence does not support a finding of . . . § 27-2534.1(b)(7) or (4) as an aggravating circumstance." 264 S.E.2d at 209. This curious statement suggests that, if the Georgia Supreme Court had determined that the evidence did support a finding of either one of these aggravating circumstances, it would have affirmed the death sentence. In other words, the Georgia court was apparently willing to uphold a death penalty based either on an aggravating circumstance that was not found — § (b)(4) — or on one that was not charged — § (b)(7).

59. The plurality opinion clearly assumes that the jury did not find torture or aggravated battery. Godfrey v. Georgia, 100 S. Ct. at 1767.

60. Of the three qualifying elements of § (b)(7), "depravity of mind" is the only one that was not effectively removed from the case by the prosecutor's admissions. In Blake v. State, 239 Ga. 292, 236 S.E.2d 637, *cert. denied*, 434 U.S. 960 (1977), the Georgia Supreme Court stated that "the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim . . . ." 236 S.E.2d at 643. Therefore, since in *Godfrey* there was no finding of torture or aggravated battery, *Blake* established that there was no basis for a finding of depravity of mind. Interestingly, then, the uninstructed jury, although perhaps through inadvertence, excluded from its specific finding "depravity of mind," which under *Blake* it was unauthorized to find. *See* notes 133-37 and accompanying text *infra*.

61. *See* discussion of *Mulligan* at note 58, *supra*.

v. State,[62] the state, relying solely on the section (b)(7) aggravating circumstance, sought the death penalty for a defendant convicted of committing a double murder. The jury returned a sentence of death, specifying that the crimes were "by reason of depravity of mind." The court, noting that this abbreviated finding was "only a part of a statutory aggravating circumstance," remarked that

> [i]t is unlikely that a statutory aggravating circumstance which consisted solely that the murder involved depravity of mind would survive a constitutional challenge based on *Furman v. Georgia*, . . . [because] such an aggravating circumstance could be so broad as to allow the death penalty to be imposed at random in any murder case.[63]

Although the case was reversed on other grounds,[64] the Georgia Supreme Court's statement indicates that the jury's partial section (b)(7) finding would not be construed to be a finding of the entire aggravating

62. 243 Ga. 312, 253 S.E.2d 736, *cert. denied*, 100 S. Ct. 263 (1979).

63. 253 S.E.2d at 740. This statement suggests that the Georgia Supreme Court's criterion for determining whether a partial finding of § (b)(7) is sufficient to support a death penalty is whether the partial finding, standing alone, would be a constitutionally adequate statutory aggravating circumstance. This criterion is certainly incorrect. Georgia law specifies that, prior to the imposition of the death sentence, the *jury* must find a statutory aggravating circumstance beyond a reasonable doubt. In *Holton*, the only aggravating circumstance presented to the jury was § (b)(7). If the jury did not find this aggravating circumstance, the death sentence would be constitutionally defective. Certainly nothing in the Georgia death penalty statute authorizes the jury to define its own aggravating circumstance as a means of satisfying the requirement that a *statutory* aggravating circumstance be found before a sentence of death can be imposed. Therefore, there is no reason for the Georgia Supreme Court to inquire whether such a jury-defined aggravating circumstance, standing alone, *would* be an appropriate statutory aggravating circumstance if it were adopted by the state legislature.

Consider the hypothetical crime of grand larceny, which is committed by one who (1) without consent (2) and with an intent to steal (3) takes the property of another (4) which is worth more than $1,000. Assume that the State of Georgia charges a defendant with committing this crime. After considering the evidence, the jury finds the defendant guilty of grand larceny, but it specifies that the property is only worth $750. The Georgia Supreme Court then affirms this conviction on the grounds that, although the jury did not find every element of the offense, the jury's finding would define a crime that the legislature *could* constitutionally punish. (Undoubtedly, the legislature already would have established such a crime.) Consequently, the Georgia Supreme Court allows the defendant to be punished *for grand larceny* when his conduct does not justify such a conviction.

The appropriate focus in this example and in *Holton* should be on whether the jury found all the elements of the *charged* offense beyond a reasonable doubt. If it did not, the verdict is constitutionally flawed. It is simply irrelevant that the legislature *could* have defined a constitutional statute that would punish the conduct identified in the jury's actual finding.

64. As the trial judge and the prosecutor conceded, the reversal was mandated because the jury had been incorrectly charged during the sentencing phase of the trial. 253 S.E.2d at 740. *See* note 153 *infra*.

circumstance, including the omitted language "outrageously or wantonly vile, horrible, or inhuman."[65] Just as the Georgia Supreme Court in *Holton* declined to extrapolate from a specific finding of only "depravity of mind" that the entire section (b)(7) aggravating circumstance had been found by the jury, it is inappropriate to extrapolate from the partial finding in *Godfrey* that the jury found the entire aggravating circumstance.[66]

Since, in *Godfrey*, the exact meaning of the jury's abbreviated finding remains, at best, a matter of conjecture, the plurality properly eschewed Justice White's curious attempt to give the benefit of the doubt to the prosecution. In light of the constitutional requirement that every element of an offense must be found beyond a reasonable doubt,[67] it would be entirely improper to assume that elements other than those expressly found by the jury have been proved. For this reason, the proposition is well-established that ambiguity in criminal jury verdicts cannot be reconciled unfavorably

65. Since in *Godfrey* a finding of torture or aggravated battery was not factually justified, the most that the jury could conceivably have found — putting aside the "*Harris-Blake*" criteria, *see* notes 126-43 and accompanying text *infra* — was that the murder was "*outrageously or wantonly vile, horrible or inhuman* in that it involved depravity of mind." The jury in *Godfrey* found only the italicized portion of this language and the Georgia Supreme Court found this acceptable. The jury in *Holton* found only the nonitalicized portion, and the Georgia court indicated this to be an unacceptable finding of § (b)(7). The rationale offered by the Georgia Supreme Court in *Holton* to support this distinction is that "depravity of mind" standing alone would not be a constitutionally permissible statutory aggravating circumstance. *See* note 63 and accompanying text *supra*. Logic would suggest, then, that the Georgia court's decision in *Godfrey* reflects its belief that the phrase "outrageously or wantonly vile, horrible or inhuman" standing alone would be a constitutionally permissible statutory aggravating circumstance. Justice Stewart, however, expressed his clear disagreement with the suggestion that the bare jury finding in *Godfrey* could be a constitutionally acceptable statutory provision: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." 100 S. Ct. at 1765.

66. In Georgia, there has been a presumption that the wording of the jury's finding of § (b)(7) reflects exactly what has been found. Holton v. State, 253 S.E.2d 736 (1979); Eberheart v. State, 232 Ga. 247, 206 S.E.2d 12 (1974), *vacated*, 433 U.S. 917 (1977). In *Eberheart*, the Georgia Supreme Court summarily rejected the defendant's argument that a finding of § (b)(7) was flawed because the jury simply repeated the full litany of words given to them in the written charge: "If the wording stated is what the jury found, and there is no contrary indication in the transcript of trial, they [sic] did not err in their finding." 206 S.E.2d at 18. *See also* Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), *cert. denied*, 434 U.S. 882 (1977), *modified sub nom.*, Harris v. Hopper, 253 S.E.2d 707 (1979). In *Godfrey*, the wording stated by the jury was that the offense was outrageously or wantonly vile, horrible and inhuman. *See* note 15 *supra*. This appears to be exactly and only what the jury found.

67. *In re* Winship, 397 U.S. 358 (1970). *See* note 181 *infra*. *See also* GA. CODE ANN. § 27-2534.1(c) (1978) which states, in relevant part: "The jury, if its verdict be a recommendation of death, shall designate in writing signed by the foreman of the jury, the aggravating circumstance or circumstances which it found *beyond a reasonable doubt*." (emphasis supplied).

to the defendant.[68]

As the United States Court of Appeals for the District of Columbia Circuit observed in overturning an ambiguous jury verdict of guilt in *Glenn v. United States*,[69] "[a]ppellant was constitutionally entitled to the judgment of the jury as to what her guilt was, and not to the judgment of others as to what the jury's judgment was." The court declined to indulge in guesswork about the intent behind the jury's verdict, for "[i]t goes without saying that that sort of conjecture is an impermissible technique in a system of jurisprudence entitling the accused 'to have his guilt found by a jury directly and specifically, and not by way of possible inference.' "[70]

The rationale of *Glenn* is certainly relevant to the situation in *Godfrey*. The section (b)(7) aggravating circumstance has two parts and the Georgia Supreme Court has declared that a section (b)(7) finding requires "that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute."[71] To conclude in *Godfrey* from the limited jury finding of the first portion of section (b)(7) that the *jury* believed that any part of the second clause applied in that case, one must engage in the precise sort of conjecture that the court in *Glenn* found objectionable.

Furthermore, the considerations underlying the *Glenn* decision apply *a fortiori* in a death penalty case where the defendant's life rests in the balance. As *Woodson v. North Carolina*[72] established, greater reliability is

68. *See* Sincox v. United States, 571 F.2d 876 (1978); Glenn v. United States, 420 F.2d 1323 (D.C. Cir. 1969).

69. 420 F.2d 1323, 1326 n.18 (D.C. Cir. 1969).

70. *Id.* at 1325-26, *quoting in part* United States v. DiMatteo, 169 F.2d 798, 801 (3d Cir. 1948). *See also* United States v. Nooks, 446 F.2d 1283 (1971); 23A C.J.S. *Crim. Law* § 1409; 53 AM. JUR. *Trial* §§ 1077-78, 1093 (1936); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 511 (1969).

71. Fair v. State, 268 S.E.2d 316 (1980). *See* notes 145-66 and accompanying text *infra*, for a discussion of whether this interpretation of the elements necessary for a finding of § (b)(7) has been consistently applied.

72. 428 U.S. 280 (1976). The proposition that procedures sufficient to warrant less severe penalties may violate the eighth amendment when used to obtain a death sentence has received judicial recognition in a long line of cases. *See* Lockett v. Ohio, 438 U.S. 586 (1978); Roberts v. Louisiana, 431 U.S. 633 (1977); Gardner v. Florida, 430 U.S. 349 (1977); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Furman v. Georgia, 408 U.S. 238 (1972). *See also* Liebman & Shepard, *supra* note 1, at 772 n.71 (1978) and cases cited therein. Chief Justice Burger acknowledged the need for greater accuracy in decision making in the death penalty setting in *Godfrey*, where he stated: "[I]n capital cases [the United States Supreme Court] must see to it that the jury has rendered its decision with meticulous care." Godfrey v. Georgia, 100 S. Ct. at 1773. Since the Chief Justice voted to affirm the death sentence, apparently he felt this standard was satisfied in *Godfrey*.

required in the determination that a death sentence should be imposed than in criminal cases generally:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[73]

This need for greater reliability in the death penalty setting has been recognized by the State of Georgia in adopting the requirement that "the jury, if its verdict be a recommendation of death, shall designate in writing . . . the aggravating circumstance or circumstances which it found beyond a reasonable doubt."[74] Thus, the Georgia legislature was not content to allow juries to impose a sentence of death by a general verdict. Presumably, this additional requirement that the jury specify at least one aggravating circumstance in its own writing was enacted to ensure greater reliability in the factfinding and appellate decisions.[75] This safeguard for the defendant is weakened, however, if the state is simply allowed to fill in the gaps in the jury's finding, as was done, in effect, in *Godfrey*.

As noted above, the Georgia Supreme Court's affirmance of Godfrey's death sentence in the face of the incomplete jury finding of the section (b)(7) aggravating circumstance fails, in violation of the eighth amendment, to ensure scrupulously the reliability of the decision to impose a death sentence and undermines Godfrey's right to have every element of his offense proved beyond a reasonable doubt. In addition, this affirmance flouts the state's own procedural rule that capital defendants will be sentenced to death only if all of the necessary elements of at least one statutory aggravating circumstance have been specifically found by the jury.[76] As the Supreme Court's recent decision in *Hicks v. Oklahoma*[77] confirms, a Georgia defendant has "a substantial and legitimate expectation" that he will be deprived of his life only if this state procedural rule is satisfied. In

73. Woodson v. North Carolina, 428 U.S. at 305 (footnote omitted).

74. GA. CODE ANN. § 27-2534.1(c) (1978).

75. In deciding to uphold the constitutionality of the Georgia death penalty scheme, the lead opinion in *Gregg* specifically adverted to the requirement that the jury must state the statutory aggravating circumstance it has found. "Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." Gregg v. Georgia, 428 U.S. at 195.

76. *See* note 74 and accompanying text *supra*.

77. 100 S. Ct. 2227, 2229 (1980).

Godfrey, the defendant was deprived of his right to a specific jury finding of every essential element of section (b)(7). This arbitrary disregard of the state's own procedural rule in itself constitutes a denial of due process.

Since the jury verdict, at best, is ambiguous about the existence of "depravity of mind," and the evidence negates a finding of torture or aggravated battery, the section (b)(7) finding was fatally defective. Accordingly, the imposition of a death sentence on Godfrey, based only on a partial and incomplete finding of the section (b)(7) aggravating circumstance, violated his right to due process of law as well as the eighth and fourteenth amendments.

B. The Absence of Jury Instructions Delineating a Proper, Narrow Construction of Section (b)(7)

The trial judge who instructed the jury during the sentencing phase of Godfrey's trial directed the jury to determine if the section (b)(7) aggravating circumstance existed. Despite the candid admission of the Georgia Supreme Court in *Harris v. State* that "there is a possibility of abuse of this statutory aggravating circumstance,"[78] the judge merely presented the jury with the bare words of the statute and left them to divine its meaning. The judge made no attempt to define the vague terms of this provision. Nor did he offer any narrowing construction that would limit its broad sweep.[79]

To determine if this failure to present a limiting instruction to the *Godfrey* jury is constitutional error, it is necessary first to establish that a narrowing construction of section (b)(7) is required and then to demonstrate that the jury must be apprised of this construction. If a statutory aggravating circumstance is applied in such a manner that it could be found in any murder case, then it would "not eliminate the dangers of arbitrariness and caprice in jury sentencing that were held in *Furman* to be violative of the eighth and fourteenth amendments."[80] The section (b)(7) aggravating circumstance is composed of two parts: (1) the offense is outrageously or wantonly vile, horrible, or inhuman in that (2) it involves torture, depravity of mind, or an aggravated battery to the victim. If each part can be applied indiscriminately to any murder,[81] then a limiting construction is

78. Harris v. State, 230 S.E.2d at 10.

79. The plurality observed that the trial judge's sentencing instructions "gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation." Godfrey v. Georgia, 100 S. Ct. at 1765.

80. Gregg v. Georgia, 428 U.S. at 200.

81. Since the statute is worded in the disjunctive, the trier of fact need only find that one

required because the state would be failing in its "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."[82]

Justice Stewart commented on the first clause of section (b)(7) in the plurality opinion in *Godfrey*: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence . . . [because a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' "[83] But, as the Georgia Supreme Court itself has recognized, the disjunctive nature of the second clause of section (b)(7) enables that clause to be found "at random in any murder case," because of the overbreadth of the "depravity of mind" phrase.[84]

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of the phrases in the first part exists due to the existence of one of the phrases in the second part. Fair v. State, 268 S.E.2d 316 (1980). *See* note 71 *supra*, and notes 145-66 and accompanying text *infra*. Therefore, § (b)(7) can be applied indiscriminately to any murder if only two phrases — one in each clause — are overbroad. Furthermore, it is possible for a jury to construe § (b)(7) as a tautology — that is, the definition of an offense that is "outrageously or wantonly vile, horrible or inhuman" is an offense evidencing "torture, depravity of mind, or an aggravated battery to the victim." The "in that" language separating these two § (b)(7) clauses makes this interpretation plausible. If an uninstructed jury were to adopt this construction, then only the second clause — "torture, depravity of mind or an aggravated battery to the victim" — would be operative. Given such an interpretation, the jury could return a sentence of death based on a finding of § (b)(7) relying only on the existence of "depravity of mind." This is the precise finding that the Georgia Supreme Court declared in *Holton* could not constitute a statutory aggravating circumstance because it could be applied at random to any murder. *See* note 63 and accompanying text *supra*. Thus, given an entirely reasonable construction of § (b)(7) that an uninstructed jury might well adopt, a finding of this catchall aggravating circumstance could be based solely on an element that even the Georgia Supreme Court has acknowledged to be unconstitutionally broad and vague.

82. Godfrey v. Georgia, 100 S. Ct. at 1764.

83. *Id.* at 1765

84. Holton v. State, 253 S.E.2d at 740. *See* note 63 *supra*. The disjunctive phrasing of the qualifying clause of § (b)(7) reveals that if any one of its three elements can apply to any murder, then the entire clause can similarly apply to any murder. *See* note 81 *supra*. Thus, overbreadth in any one element of the qualifying clause of § (b)(7) taints the entire clause. While the phrase "depravity of mind," is the most amorphous term in the second clause of § (b)(7), it is not the only one that is potentially overbroad. Professor Black has criticized the expansive definition that the Georgia Supreme Court has given to the term "aggravated battery." C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 66-67 (1974). *See* note 171 *infra*. The third qualifying term of § (b)(7) — "torture" — is, presumably, a far more definite concept than "depravity of mind" or "aggravated battery." The statement that the defendant tortured the victim is generally understood to mean that the defendant intentionally inflicted offensive, prolonged, and extreme pain on a fully conscious individual. The Supreme Court of Georgia has not construed this term in accordance with common parlance. On the contrary, as Justice Marshall noted in *Godfrey*,

> [t]he Georgia court has given an extraordinarily broad meaning to the word "torture." Under that court's view, "torture" may be present whenever the victim suf-

Furthermore, there is nothing to suggest that, when these two overbroad clauses are merged into section (b)(7), their ability "to channel the sentencing decision patterns of juries" is in any way enhanced. Accordingly, the prevailing opinion in *Godfrey* establishes that a limiting construction of section (b)(7) is constitutionally indispensable.[85]

The preceding discussion has demonstrated the necessity for some limiting construction of the catchall aggravating circumstance. Must the jury be informed of this construction? Justice Marshall provided the unequivocal answer:

> The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the *sentencer's* discretion that must be channeled and guided by clear, objective, and specific standards . . . . To give the jury an instruction in the form of the bare words of the statute — words that are hopelessly ambiguous and could be understood to apply to any murder, . . . — would effectively grant it unbridled discretion to impose the death penalty.[86]

The conclusion that the proper, narrow construction of the catchall aggravating circumstance must be presented to the jury follows directly from the decisions in *Furman* and *Gregg*. In both these cases the Court repeatedly emphasized that the discretion of the *jury* must be limited if a statutory death penalty scheme is to comport with the requirements of the Constitution.[87] Where, as in *Godfrey*, the jury is merely presented with the bare language of the catchall aggravating circumstance, it is left to grapple aimlessly with the broad and vague language of the statute. Under such circumstances, it is unlikely that there will be any "principled way to distinguish [those cases], in which the death penalty [is] imposed, from the many cases in which it [is] not."[88] By failing to require jury instructions that provide some discernible content to the vague terms of section (b)(7), the Georgia Supreme Court has validated the 1974 criticism of this aggra-

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> fered pain or anticipated the prospect of death. That interpretation would of course enable a jury to find a § (b)(7) aggravating circumstance in most murder cases.

Godfrey v. Georgia, 100 S. Ct. at 1771 n.12 (Marshall, J., concurring). Thus, the Georgia court's interpretation of § (b)(7), if anything, broadened the reach of this aggravating circumstance. *See* Dix, *supra* note 35, at 119. The United States Supreme Court's decision in *Godfrey* narrowed the expansive concept of torture to include only the intentional infliction of serious physical abuse. *See* notes 167, 172-75 and accompanying text *infra*.

85. Justices Marshall and Brennan also agreed with this conclusion. 100 S. Ct. at 1769 (Marshall, J., concurring).

86. *Id.*

87. Gregg v. Georgia, 428 U.S. at 189-95.

88. Godfrey v. Georgia, 100 S. Ct. at 1767.

vating circumstance by Professor Charles Black: "No jury need be hampered by such nonstandards. The practical position remains unchanged; the Georgia jury, without real restraint and without real standards, chooses life or death."[89]

Justice Marshall further noted that the failure to instruct the jury in the proper interpretation of section (b)(7) would constitute a fatal constitutional defect that

> [c]ould not be cured by the *post hoc* narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.[90]

Similarly, the plurality agreed that "[t]he standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court."[91]

The Supreme Court in *Godfrey* properly refused to be swayed by the declaration of the Georgia Supreme Court in *Harris* that, in exercising its function of sentence review, it would restrict its "approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core."[92] Of course, while it is essential for the Georgia Supreme Court to conduct this type of review, this function alone cannot rescue an otherwise faulty death sentence, such as that imposed on Godfrey, by a jury left unguided by an appropriate narrowing instruction.[93] For exam-

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89. C. BLACK, *supra* note 84, at 67.

90. 100 S. Ct. at 1769. Again, the rationale of Hicks v. Oklahoma, 100 S. Ct. 2227 (1980), supports the view that the appellate court may not step in to perform the jury's function. *See* note 77 and accompanying text *supra*. As Justice Stewart stated in *Hicks*, in an opinion joined by every member of the Court except Justice Rehnquist:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, . . . and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

100 S. Ct. at 2229 (citations omitted).

91. *Godfrey*, 100 S. Ct. at 1765. Although the plurality went on to hold that the construction of § (b)(7) applied by the Georgia Supreme Court was also unconstitutional, the decision could have stopped with the determination that the jury was not informed of any limiting interpretation of § (b)(7).

92. Harris v. State, 237 Ga. 718, 230 S.E.2d 1, 11 (1976).

93. Presnell v. Georgia, 439 U.S. 14 (1978); Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965).

ple, a broad aggravating circumstance that simply required a finding of first degree murder before the jury would be permitted to impose the death sentence could not be rescued on appellate review in the Georgia Supreme Court because that court allowed the death sentence to stand only in extreme cases. Such a procedure would violate the requirement of *Furman* that the discretion *of the sentencer* "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[94]

Justice White, on the other hand, was unconcerned by the trial judge's failure to offer guidance to the jurors concerning the appropriate construction of section (b)(7).[95] Noting that the plurality opinion "is troubled by the fact that the trial judge gave no guidance to the jurors by way, presumably, of defining the terms in section (b)(7)," White charged that it "does not demonstrate that such definitions were provided in cases in which the plurality would agree that section (b)(7) was properly applied."[96] Thus, Justice White contended that the plurality was inconsistent in faulting Godfrey's death sentence because of the absence of jury instructions defining the terms of section (b)(7) while maintaining that section (b)(7) had been properly applied in other cases where the plurality did not know whether jury instructions were supplied.

The error in Justice White's contention is a result of his confusion over two separate issues: (1) the need for a limiting construction of section (b)(7) and, (2) the content of the actual limiting construction. Consider, for example, the case of *McCorquodale v. State*,[97] which is apparently one of the cases for which White claimed that "the plurality would agree that section (b)(7) was properly applied." In *McCorquodale*, a finding of torture, which could support a finding of section (b)(7), was justified by the defendant's extreme and prolonged abuse of the victim, who was beaten, burned, raped, and otherwise severely abused before being strangled to death.[98] On these facts, a finding of section (b)(7) would be appropriate under the limiting construction articulated in *Godfrey*. By simply observing, though, that the facts of *McCorquodale* as reported by the Georgia Supreme Court during appellate review conformed to the elements of a limiting construction of section (b)(7),[99] the *Godfrey* plurality did not thereby condone all of the procedures employed in securing the death sen-

94. Gregg v. Georgia, 428 U.S. at 189.

95. Chief Justice Burger did not comment in his dissent on the issue of the lack of jury instructions in *Godfrey*.

96. Godfrey v. Georgia, 100 S. Ct. at 1777 n.3.

97. 233 Ga. 369, 211 S.E.2d 577 (1974).

98. 211 S.E.2d at 579-80.

99. Godfrey v. Georgia, 100 S. Ct. at 1766-67 n.14.

tence imposed in that case. If the procedures in *McCorquodale* were inconsistent with the dictates of the eighth and fourteenth amendments, then clearly the death sentence in that case could not be constitutional. For the reasons set forth above,[100] any death sentence resting on a finding of section (b)(7) by a jury uninstructed by an appropriate limiting construction would not satisfy these constitutional requirements and must, therefore, be reversed.[101]

Justice White also argued that the plurality opinion failed to "demonstrate that such definitions obtain a constitutional significance apart from an independent showing — absent here — that juries and courts cannot rationally apply an unequivocal legislative mandate."[102] This remark is somewhat baffling. Does Justice White really believe that the language of the catchall aggravating circumstance is "unequivocal?" Does he mean that if one can demonstrate that the language of section (b)(7) is "equivocal" — that is, the provision "can have more than one interpretation"[103] — then a jury instruction will be required? If so, that standard would certainly seem to have been met, as even the most casual glance at the widely varied dictionary definitions of the terms of section (b)(7) reveals.[104] Fur-

100. *See* notes 80-94 and accompanying text *supra*.

101. *Godfrey* established that a capital defendant has a constitutional right to have the jury apprised of the appropriate narrowing construction of § (b)(7). Can a violation of this right be found to be harmless error? One might contend that a murder that was consummated after days of prolonged torture to a helpless yet fully conscious victim would satisfy *any* definition of § (b)(7) and therefore a failure to instruct the jury would be harmless. The Supreme Court has recognized, however, that certain constitutional rights are of such importance "that their infraction can never be treated as harmless error." Chapman v. California, 368 U.S. 18, 23 (1967). In Gardner v. Florida, 430 U.S. 349, 358 (1977), the Supreme Court recognized that it "is of vital importance to the defendant and to the community that any decision to impose the death sentence be, [and appear to be], based on reason rather than caprice or emotion." The protection of this "vital" interest may impel the insistence that constitutional defects affecting the very essence of the decision to impose the death sentence — such as the failure to tell the jury the *reasons* on which it must base its decision — can never be deemed to be harmless.

102. Godfrey v. Georgia, 100 S. Ct. at 1777 n.3.

103. WEBSTER'S NEW WORLD DICTIONARY 474 (1978).

104. Justice White appears to accept the conclusion of the Georgia Supreme Court in Harris v. State, 230 S.E.2d at 10, that the terms of § (b)(7) are "subject to understanding and application by a jury." The Georgia court based this conclusion on the fact that "[e]ach of these terms used is clearly defined in ordinary dictionaries, Black's Law Dictionary, or Words and Phrases." *Id.* The Georgia court failed to explain how these guides to meaning would be of assistance to a jury that received no instructions beyond the bare words of the catchall aggravating circumstance. Moreover, even if the jurors had access to a dictionary, what would govern their choice of the appropriate definition? For example, § (b)(7) includes the term "wantonly." Which of the many definitions of "wanton" should jurors apply? Webster's first definition: undisciplined or unmanageable? The second: sexually loose or unrestrained? The third: frisky, playful, or frolicsome? The fourth: capricious or unre-

thermore, if the language of section (b)(7) were considered unequivocal, how would a defendant make an "independent showing" that "juries and courts cannot rationally apply" the catchall provision? Would Justice White insist upon an analysis of an extensive number of cases showing that the finding or rejection of section (b)(7) does not succumb to a discernible pattern?

Justice White's view that juries and courts can rationally apply section (b)(7) is seriously undermined by *Gates v. State*,[105] which was cited by Godfrey in his brief to the United States Supreme Court.[106] In *Gates*, the trial judge presented the jury with a grammatically erroneous statement of the section (b)(7) aggravating circumstance that "the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind *to the victim*."[107] Forty-three minutes after receiving this charge, the jury returned and told the court that the jurors "would like a definition of the following phrase: Depravity of mind to the victim." The trial judge, armed with Black's Law Dictionary and Webster's International Dictionary, replied:

> All right, sir, I anticipated that was going to be your question. That's why I've got these dictionaries here. And I can only give you the definition of what a depraved mind is in the dictionary.
>
> One legal dictionary here, Black's Law Dictionary, says a depraved mind is an inherent deficiency of moral sense and rectitude, equivalent to statutory phrase, "depravity of heart" defined as highest grade of malice.
>
> And the definition of deprave is to defame; vilify; exhibit contempt for.

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strained? The fifth: senseless, unprovoked, or unjustifiable? The sixth: deliberately malicious? The seventh: recklessly or arrogantly ignoring justice, decency, or morality? Or the eighth: lavish, luxurious, or extravagant? Does the word "wantonly" in § (b)(7) have the same meaning as in Justice Stewart's comment that the eighth amendment prohibited the execution of Furman because the death penalty throughout the United States was "wantonly and so freakishly imposed?" Furman v. Georgia, 408 U.S. at 310. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979), reveals that resort to dictionaries for guidance concerning the definitions of the terms of § (b)(7) is not always successful. *See* notes 105-11 and accompanying text *infra*.

105. 244 Ga. 587, 261 S.E.2d 349 (1979).

106. Brief for Petitioner at 26-27, Godfrey v. Georgia, 100 S. Ct. 1759 (1980).

107. 261 S.E.2d at 357 (emphasis added). The trial judge in *Gates* is not the only one who has believed that the § (b)(7) phrase "depravity of mind" describes the mental state of the victim. In Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979), *vacated and remanded*, 100 S. Ct. 2937 (1980), *death sentence reinstated*, No. 34813 (Ga. Sup. Ct. Sept. 8, 1980), the jury found the murder "outrageously or wantonly vile, horrible and inhuman, in that it involved *depravity of mind to the victim* [*sic*]." 261 S.E.2d at 387 (emphasis added). The Georgia Supreme Court affirmed, indicating that the finding was supported by "sufficient evidence." *Id.*

> Now, this is a bigger dictionary and let me see if I can give you the definition of that. And that is as far as I can go gentlemen. The legislature created that law and they did not place a definition in the Code on it.
>
> This dictionary says the definition of depraved is to make bad the judgment rather than making it more discriminating, to pervert the meaning of something, to make corrupt, to bring about the moral debasement, to reduce in value.
>
> That's what the legal dictionary says that depraved and depravity is. *And so, my interpretation — and I hope it is correct — that his actions were so vile, horrible or inhuman that he created such a state of mind in the victim as defined by the word depravity.*
>
> That is the very best I can do for you, ladies and gentlemen. I wish I could do better.[108]

In light of the ensuing finding of section (b)(7), accompanied by a recommendation of death, it is distressing to realize that the jury foreman's response upon hearing this hopelessly confused, inaccurate, and unhelpful instruction was the statement: "In that case, we shouldn't be very long in reaching a verdict."[109] Since it should be expected that "an experienced

108. Brief for Petitioner at A (appendix), Godfrey v. Georgia, 100 S. Ct. 1759 (1980); Transcript of Record, Oct. 24, 1979, Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979) (emphasis added).

109. *Id.* Remarkably, the Georgia Supreme Court refused to reverse this sentence of death. The Georgia court conceded that "[t]his defendant's jury was not charged on the meaning of this aggravating circumstance as it was intended by the legislature and has been interpreted by this court." 261 S.E.2d at 357. Nonetheless, the court affirmed the death sentence because the jury had found another aggravating circumstance — that the murder was committed while the offender was engaged in the commission of another capital felony. This disposition is clearly erroneous. Since the jury's recommendation of life or death is discretionary, the finding of aggravating circumstances does not automatically mean that the jury will opt for the death penalty. As *Gates* shows, the jury foreman was obviously concerned about whether the § (b)(7) aggravating circumstance should be found. Only after the jury had determined that § (b)(7) applied did it return a verdict calling for a death sentence. It is impossible to determine whether the jury would have reached the same decision on death had it found § (b)(7) inapplicable. Thus, when the jury's discretion is exercised in favor of death on the basis of a finding of more than one aggravating circumstance, the failure of any one circumstance invalidates the death sentence. The contrary view is necessarily predicated on the purely speculative argument that the discretion would have been exercised the same way even if one of the essential props for the death penalty had been absent. The affirmance of a death sentence on such a speculative basis violates both the due process clause and the eighth amendment. *See* Hicks v. Oklahoma, 100 S. Ct. 2227 (1980); Godfrey v. Georgia, 100 S. Ct. at 1769 (Marshall, J., concurring). *See* note 90 *supra*.

The Supreme Court has acknowledged that the existence of at least one arguably unassailable statutory aggravating circumstance will not immunize a death sentence from invalidation where another aggravating circumstance found by the jury is constitutionally flawed. Thus, one week after rendering its decision in *Godfrey*, the Court vacated and remanded for reconsideration in light of *Godfrey* five death sentences in which one or more aggravating

trial judge, who daily faces the difficult task of imposing sentences,"[110] would be more familiar with and better able to interpret and apply section (b)(7) than the typical juror, the problems experienced by the trial judge in *Gates* raise severe doubts whether an uninstructed jury could rationally apply this statutory aggravating circumstance.[111]

Justice White's dissenting view that jury instructions providing a proper narrowing construction of section (b)(7) are not necessary is therefore unconvincing. The holding in *Godfrey*, that such instructions are required to inform the jury of the proper interpretation of section (b)(7), is merely the logical outgrowth of the conclusion articulated in *Furman* and *Gregg* that it is the discretion of the sentencing body — *i.e.*, the jury — that must be limited and guided if the decision to impose capital punishment is to conform to the requirements of the eighth and fourteenth amendments. Thus, the plurality and concurring opinions in *Godfrey* properly focused upon the evil of leaving a jury free to adopt any interpretation that it chooses when confronted with extremely broad and imprecise statutory language. The thrust of the decision is that, before a jury can be entrusted with the authority to decide whether a defendant shall live or die based on a potential finding of the section (b)(7) aggravating circumstance, the trial judge must instruct the jury as to the proper limiting construction of the terms of this statutory provision. These instructions must "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 of death.' "[112]

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circumstances in addition to § (b)(7) had been found. Brooks v. Georgia, 244 Ga. 574, 261 S.E.2d 379 (1979), *vacated and remanded*, 100 S. Ct. 2937 (1980), *death sentence reinstated*, No. 34813 (Ga. Sup. Ct. Sept. 8, 1980); Hamilton v. State, 244 Ga. 145, 259 S.E.2d 81 (1979), *vacated and remanded*, 100 S. Ct. 2936 (1980), *death sentence reinstated*, No. 35078 (Ga. Sup. Ct. Sept. 8, 1980); Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (1979), *vacated and remanded*, 100 S. Ct. 2936 (1980), *death sentence reinstated*, No. 34588 (Ga. Sup. Ct. Sept. 8, 1980); Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979), *vacated and remanded*, 100 S. Ct. 2936 (1980), *death sentence reinstated*, No. 33879 (Ga. Sup. Ct. Sept. 8, 1980); Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979), *vacated and remanded*, 100 S. Ct. 2934 (1980), *death sentence reinstated*, No. 34193 (Ga. Sup. Ct. Sept. 24, 1980). In the companion case to *Davis*, Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979), *vacated and remanded*, 100 S. Ct. 2936 (1980), *death sentence reinstated*, No. 34289 (Ga. Sup. Ct. Sept. 24, 1980), section (b)(7) was the sole aggravating circumstance found by the jury.

110. Gregg v. Georgia, 428 U.S. at 190.

111. Even if uninstructed juries could, on their own initiative, formulate and apply some rational construction of the catchall circumstance, the prospect that they would be applying the same construction as that adopted by the Georgia Supreme Court is entirely chimerical.

112. Godfrey v. Georgia, 100 S. Ct. at 1764-65 (footnotes omitted) (emphasis added).

C. The Georgia Supreme Court's Failure to Apply a Proper, Narrow Construction of Section (b)(7)

The plurality decision in *Godfrey* stated that the United States Constitution imposes substantive limits on the state's ability to construe broadly the language of the catchall statutory aggravating circumstance. This conclusion follows directly from the proposition established above that the language of section (b)(7) standing alone is impermissibly broad and vague and that, therefore, a construction limiting the scope of this statutory provision is necessary.[113] Once a limiting construction is deemed to be constitutionally required, the state then must ensure that these limits are respected. Thus, Justice Stewart noted that the Georgia Supreme Court has a "responsibility to keep section (b)(7) within constitutional bounds."[114]

Having established that *some* narrowing construction of section (b)(7) is constitutionally indispensable, the United States Supreme Court was then confronted with the question whether the particular narrowing construction that the state had adopted, if any, was within or beyond the constitutional dividing line. The *Godfrey* plurality's attempt to explain why the Georgia Supreme Court's construction of section (b)(7) transgressed these substantive constitutional limits represents the most novel, and most controversial, aspect of the *Godfrey* decision.

1. The Plurality's Interpretation of Section (b)(7) Based on Its Reading of Harris and Blake

After proclaiming the need for a limiting construction of section (b)(7), the plurality launched into an extended discussion of the Georgia case law interpreting section (b)(7) to determine what, if any, narrowing construction had been supplied by the Georgia Supreme Court. Justice Stewart quoted the Georgia Supreme Court's candid acknowledgment in *Harris v. State*,[115] that "there is a possibility of abuse of [the section (b)(7)] statutory aggravating circumstance."[116] Curiously, the Georgia court in *Harris* stated that it had "no intention of permitting this statutory aggravating circumstance to become a 'catch all' for cases simply because no other statutory aggravating circumstance is raised by the evidence."[117] Of course,

113. *See* notes 79-85 and accompanying text *supra*.

114. Godfrey v. Georgia, 100 S. Ct. at 1765.

115. 237 Ga. 718, 230 S.E.2d 1 (1976), *cert. denied*, 431 U.S. 933 (1979).

116. 230 S.E.2d at 10.

117. *Id.* In every case in which § (b)(7) was charged and found by the jury, the Georgia Supreme Court has concluded that the finding was justified by the evidence. Godfrey v. Georgia, 100 S. Ct. at 1771 (Marshall, J., concurring).

this statement is utterly absurd: the entire purpose of section (b)(7) is to be a catchall for cases that do not fit within any of the other more specific statutory aggravating circumstances.[118] Indeed, if the conduct always fit within one of the other statutory aggravating circumstances, there would be no reason to use section (b)(7) at all.[119] In fact, the prosecutor in *Godfrey* has admitted that he charged Godfrey with only the section (b)(7) statutory aggravating circumstance because he felt that none of the other aggravating circumstances were applicable.[120]

118. As the plurality in *Godfrey* noted, the nine "other statutory aggravating circumstances upon which a death sentence may be based after conviction of murder in Georgia are considerably more specific or objectively measurable than § (b)(7)." 100 S. Ct. at 1762 n.2.

119. In his questioning of Godfrey's counsel during oral argument, Justice Rehnquist seemed to be concerned with the inherent tension in a catchall circumstance: the purpose of the section is to reach those crimes that are "deserving" of extraordinary punishment but which the legislature is unable to foresee or describe in precise language. This purpose can only be achieved through the drafting of broad and encompassing language. It is this very feature, however, that carries with it the danger of a due process or eighth amendment violation. On the other hand, if there is no catchall statutory aggravating circumstance, then the potential for arbitrary and capricious sentencing of another sort occurs: those who have committed "egregious offenses" that do not fall within the rubric of one of the specific aggravating circumstances will be spared, while those convicted of "less culpable offenses" that do fall within such circumstances may be executed. Professor Black has discussed the inherent antagonistic considerations that make the decision to include or exclude a catchall aggravating circumstance in a death penalty scheme a choice between the Scylla of irrational underinclusiveness and the Charybdis of vagueness and overbreadth. Black concludes: "There is no solution; the situation is dilemmatic, hopelessly so." Black, *The Death Penalty Now*, 51 TUL. L. REV. 429, 444 (1977). In McGautha v. California, 402 U.S. 183, 204 (1971), Justice Harlan, writing for a majority of the Court, conceded that the tasks of identifying "before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and express[ing] these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be . . . beyond present human ability."

120. Telephone conversation with John T. Perrin, former District Attorney for Tallapoosa Judicial Circuit (June 2, 1980). Apparently, the prosecutor did not believe it was appropriate to try to base Godfrey's death sentence on a finding of § (b)(2) — *i.e.* that the offense of murder was committed while the defendant was engaged in the commission of another capital felony or aggravated battery. In Holton v. State, 343 Ga. 312, 253 S.E.2d 736 (1979), the Georgia Supreme Court, confronted by a double murder in which the prosecutor had sought the death penalty under § (b)(7), commented parenthetically that "[t]he state did not rely on one of the murders to obtain the death penalty as to the other murder, GA. CODE ANN. § 27-2534.1(b)(2)." 253 S.E.2d at 740 n.1. *See also* Banks v. State, 237 Ga. 325, 227 S.E.2d 380, 385 (1976) (Hill, J., dissenting). Perhaps inspired by the Georgia Supreme Court's remark in *Holton*, and Justice Hill's *Banks* dissent, Georgia prosecutors have begun to use § (b)(2) in a manner that the prosecutor in *Godfrey* (and apparently in *Holton* and *Banks*) felt was inappropriate. *See, e.g.*, Fair v. State, 268 S.E.2d 316 (1980); Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204 (1980).

The indiscriminate use of § (b)(2) as an aggravating circumstance when two individuals are murdered is problematic. As Justice White remarked in his concurrence in *Gregg*, the purpose behind § (b)(2) is to allow the state to seek the death penalty in "witness-elimina-

The plurality opinion stated that the Georgia Supreme Court had, by

tion" murders. 428 U.S. at 221 n.10. Of course, every murder is a witness-elimination murder in the sense that at least one witness — the victim — is eliminated, but it is equally obvious that § (b)(2) does not — and, consistently with the Constitution, could not — apply to all murders. *See* notes 80-82 and accompanying text *supra*. The import of Justice White's observation in *Gregg* is that a necessary condition for a finding of § (b)(2) is that the defendant has killed someone to avoid being identified as the perpetrator of another crime. Although Godfrey committed two murders, neither one was committed to eliminate a witness, as evidenced by Godfrey's action of immediately surrendering himself to the police and admitting his guilt. Accordingly, § (b)(2) would not apply in the *Godfrey* double-murder situation. Nonetheless, despite obvious double jeopardy problems, Georgia responded to the Supreme Court's reversal of Godfrey's death sentence by instituting a new capital sentencing proceeding against him based on § (b)(2). On November 21, 1980, following a second jury trial, Godfrey was again sentenced to death for each of the murders.

Furthermore, not every murder that is arguably motivated by a desire to eliminate a witness would be reached by § (b)(2). The language of this aggravating circumstance — that "the offense of murder . . . was committed while the offender was engaged in the commission of another capital felony" — is circumscribed by the statute's manifest temporal restriction. The Georgia Supreme Court, however, has broadly construed this "while engaged in" clause. Thus in Fair v. State, 268 S.E.2d 316 (1980), the defendant was sentenced to death following his plea of guilty of the murder of Jackie Morris. The state contended that the defendant and his accomplices, including Jackie Morris, had killed an individual in Hambersham County in a dispute over a money matter. Later that night, the defendant killed Jackie Morris in Hall County. The state charged the defendant during the sentencing trial with violations of § (b)(2) and § (b)(7). The state's theory was that the murder of Jackie Morris was committed while the defendant was engaged in the commission of the murder of the Hambersham County victim.

The Georgia Supreme Court affirmed the death sentence based on § (b)(2) and § (b)(7). The significant temporal and spatial separation of the two capital felonies did not prevent the Georgia Supreme Court from concluding that both murders were "part of a continuous transaction and . . . were mutually dependent crimes." Fair v. State, 268 S.E.2d at 319. This expansive construction of § (b)(2) may well meet the same fate as the Georgia court's broad construction of § (b)(7) in *Godfrey*.

Remarkably, the defendant in *Fair* was acquitted of the first murder in a separate trial, but the Georgia Supreme Court did not view this as an obstacle to affirming the finding of § (b)(2). In other words, the Georgia Supreme Court upheld the defendant's sentence of death for murder number two (Jackie Morris) based on the aggravating circumstance that he had also committed murder number one; yet, in a separate trial, the defendant was found not guilty of murder number one! The court observed that two different triers of fact were involved and "[d]ifferent triers of facts may reach different results." Fair v. State, 268 S.E.2d at 320. The court concluded that "[t]he subsequent acquittal simply has no bearing on the issue of whether the trier of fact is presented with sufficient evidence to find beyond a reasonable doubt the existence of an aggravating circumstance." *Id.* Not surprisingly, the Georgia court's affirmance did not allude to the United States Supreme Court's solemn observation, repeated in *Godfrey*, that it "is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1976). *Cf.* People v. Taylor, 12 Cal. 3d 686, 527 P.2d 622 (1974), in which the California Supreme Court refused to permit a robber to be convicted of first degree murder based on his vicarious liability for the acts of a confederate who was acquitted on the same murder charge in a separate trial. The court declared:

[This result is necessary] to prevent the compromising of the integrity of the judi-

1977, reached three separate but consistent conclusions concerning this section (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 mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from *Blake* alone, was that the word "torture" must be construed *in pari materia* with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.[121]

The first proposition that the plurality attributed to the Georgia Supreme Court was hardly remarkable. Indeed, it merely involved, with only slight modification, a recitation of the statutory language.[122] Certainly, it added virtually nothing to the meaning of the catchall circumstance.

The second and third propositions were far more significant. The second established that a finding of "depravity of mind" would require a showing that the murderer *intentionally tortured or committed an aggravated battery* upon the victim. Moreover, the murderer had to engage in this intentional conduct "*before killing his victim*."[123] The third proposition indicated that torture or aggravated battery would not be found to exist absent "evidence of *serious physical abuse of the victim before death*."[124]

The plurality then went on to explain how the Georgia Supreme Court had failed to adhere to any of these restricted views of section (b)(7) in affirming Godfrey's sentence of death. This is not surprising because, while the plurality's construction of section (b)(7) is supported by selected statements by the Georgia Supreme Court, it bears only the most tenuous

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> cial system. . . . Few things undermine the layman's faith in the integrity of our legal institutions more than the specter of a system which results in a person being punished for the acts of another, when the actor himself under identical charges had been previously exonerated from responsibility for those very acts.

527 P.2d at 628-29. For a discussion of the inconsistency between the interpretation of § (b)(7) articulated by the plurality in *Godfrey* and that provided by the Georgia Supreme Court in *Fair*, see notes 155-58 and accompanying text *infra*.

121. Godfrey v. Georgia, 100 S. Ct. at 1766 (footnotes omitted).

122. The plurality acknowledged this fact in stating that this first construction of § (b)(7) "finds strong support in the language and structure of the statutory provision." *Id.* at 1766 n.12.

123. *Id.* at 1766 (emphasis added).

124. *Id.* (emphasis added).

relationship to the *law* of section (b)(7) that has governed the imposition of the death penalty in Georgia.[125]

The plurality ascribed its tripartite interpretation of section (b)(7) to the Georgia Supreme Court's opinions in *Harris v. State*[126] and *Blake v. State*.[127] An examination of these cases, however, reveals that they support neither the second nor third "consistent conclusions respecting the section (b)(7) aggravating circumstance."[128]

In *Harris*, the defendant, who suffered from a "pronounced personality disorder,"[129] set out to kill someone who reminded him of his hated stepmother. Spotting a woman in a department store who fit this description, the defendant followed her to her car, where he threatened her with a gun and forced her to drive to a deserted part of the parking lot. When the woman tried to appease the defendant by offering him money, he responded by saying, "I don't want nothing you've got, except your life."[130] The defendant then placed a coat over the woman's head, said "Bye Lady," and shot her. After sitting in the car for a few minutes, the defendant shot her again. The defendant later declared that the killing made him "happy" and that he "wanted to go back, and shoot her again . . . and then again, and then again."[131] For this crime, the defendant was sentenced to death because the jury found that "[t]he murder was outrageously and wantonly vile, horrible, and inhuman in that it involved torture and depravity of the mind."[132]

As do many of the section (b)(7) cases, *Harris* demonstrates the fine line that jurors are asked to draw between the bizarre murders that involve no criminal responsibility because the defendant is declared insane and those that lead to a death penalty because a section (b)(7) finding is made.[133]

125. *See* discussion at notes 126-76 and accompanying text *infra*.

126. 237 Ga. 718, 230 S.E.2d 1 (1976), *cert. denied*, 431 U.S. 933 (1977), *sentence vacated sub nom.*, Harris v. Hopper, 243 Ga. 244, 253 S.E.2d 707 (1979).

127. 239 Ga. 292, 236 S.E.2d 637, *cert. denied*, 434 U.S. 960 (1977).

128. Godfrey v. Georgia, 100 S. Ct. at 1766.

129. Harris v. State, 230 S.E.2d at 4.

130. *Id.*

131. *Id.* at 11.

132. *Id.* at 10.

133. *See* note 1 *supra*. *See also* Lamb v. State, 241 Ga. 10, 243 S.E.2d 59 (1978), in which the defendant, while watching the television show "Barnaby Jones," was seized by the urge "to get his gun and blow somebody away." 243 S.E.2d at 60. The defendant then took a shotgun, went to a neighbor's house, and, aiming through a window, fired at the sleeping woman inside, wounding her in the head. He then entered the house, beat the woman over the head with the butt of the gun, causing a skull fracture and exposing the brain. The defendant next took two knives from the kitchen and stabbed the victim twenty-two times. He completed his attack by picking her up by her feet and throwing her to the floor. *Id.* The jury, which subsequently recommended a sentence of death based on the catchall

According to the so-called "*Harris-Blake*" criteria, however, was a finding of section (b)(7) justified in *Harris*? From conclusions one and two, we know that a finding of section(b)(7) is not appropriate unless the defendant tortured or committed an aggravated battery upon the victim.[134] Moreover, conclusion three establishes that a finding of torture or aggravated battery will not be appropriate absent evidence of the "serious physical abuse of the victim before death."[135] Since the victim in *Harris* was not *physically* abused prior to death,[136] there was no basis for a finding of section (b)(7) according to the criteria announced in *Godfrey*. The plurality acknowledged this fact with an unadorned footnoted remark that "we note . . . that the *Harris* case apparently did not involve 'torture' in this sense."[137]

Apparently, then, *Blake* is the key decision in providing the interpreta-

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§ (b)(7) aggravating circumstance, *id.* at 63, rejected the defendant's insanity defense despite the judge's instruction: "I further charge you, Ladies and Gentlemen, that the act itself may be so utterly senseless and abnormal as to furnish satisfactory proof of a diseased mind." *Id.* at 62.

The distinction between a defendant who should not be punished because he has a "diseased mind" and one who should be killed because he has a "depraved mind" is not easily discerned. Professor Black has discussed this paradox at some length:

> Let us remember that we have committed ourselves not to kill by law, or even to punish, anyone who satisfies certain criteria as to the connection of "insanity" with the commission of the act. Yet the astounding fact is that, having made this commitment, for what must be the most imperative moral reasons, we cannot state these criteria in any understandable form, in any form satisfying to the relevant specialists or comprehensible to either judge or jury, despite repeated and earnest trials. . . . I have heard it said, by people I must respect, that they generally deplore the use of capital punishment . . . but that they believe a few crimes . . . to be so horrible as suitably to be atoned only by death. . . . Where the killing is of a kind colloquially describable as mad, . . . where the crime exhibits a total wild departure from normality, we come exactly to the point where consideration of the insanity problem is at once most necessary and most difficult. . . . In every case, therefore, of the supremely revolting murder, we face in particularly acute form the exculpatory insanity question, without adequate means, to say the very least, for answering it. How likely is it that we will answer it rightly?

C. BLACK, *supra* note 84, at 52-54.

134. Conclusion one establishes that a finding of § (b)(7) requires evidence demonstrating torture, depravity of mind, or an aggravated battery to the victim. Conclusion two establishes that depravity of mind does not exist unless the murderer intentionally tortured or committed an aggravated battery before killing the victim. *See* note 121 and accompanying text *supra*. Consequently, torture or aggravated battery must be present in order to support a finding of § (b)(7) that is consistent with the *Harris-Blake* criteria.

135. Godfrey v. Georgia, 100 S. Ct. at 1766.

136. Her demise is similar to that befalling Mrs. Wilkerson, which the Supreme Court in *Godfrey* determined did not fall within the rubric of § (b)(7). The victim in *Harris* and Mrs. Wilkerson anticipated death, but neither suffered any physical injury prior to death.

137. Godfrey v. Georgia, 100 S. Ct. at 1766 n.13. This footnote, as well as the plurality's application of the *Harris-Blake* criteria to Godfrey's crime, suggests that the death penalty

tion of section (b)(7) set forth in *Godfrey* as the *Harris-Blake* criteria. In *Blake*, the defendant was sentenced to death for killing his girlfriend's two-year-old daughter by throwing her off a 100-foot bridge. The child suffered internal injuries from the fall and then drowned.[138] Despite the Georgia Supreme Court's statement in *Blake* that the depravity of mind contemplated by the statute is the kind of mental state that prompts the murderer to torture or commit an aggravated battery on the victim, the facts of *Blake* raise serious doubts whether the Georgia court considered this statement in affirming the jury's finding of the section (b)(7) aggravating circumstance.[139]

In seeking to apply the *Harris-Blake* criteria to *Blake*, it is first necessary to determine whether the "serious physical abuse of the victim before death" that would justify a finding of torture or aggravated battery existed. The defendant in *Blake* argued that the "record wholly fails to show any torture and/or other aggravated battery to the victim . . . . There is no proof of suffering on the part of the victim or an intent to kill on the part of Blake."[140] As *Godfrey* teaches,[141] if the death in *Blake* was instantaneous, then a finding of torture or aggravated battery would not have been appropriate. Because the child survived the fall and then drowned, however, the Georgia court contended that a finding of section (b)(7) was justified. The "severe mechanical trauma in general and damage to the internal organs"[142] of the child furnished support for the Georgia Supreme Court's view that "torture" had occurred. In the words of the Georgia court, "[a]lthough there may be no direct evidence of suffering by the victim, the circumstances amply demonstrate it."[143] While the court did not specify what these circumstances were, it apparently relied upon the injuries resulting from the fall. However, these same injuries almost certainly rendered the victim unconscious, thereby obviating any possibility of suffering

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could not be sustained in *Harris* on the basis of a finding of § (b)(7). In his dissent, Justice Burger acknowledged this fact with evident dismay. *Id.* at 1772 (Burger, C.J., dissenting).

138. Blake v. State, 236 S.E.2d at 640.

139. *Id.* at 643. This critical statement in *Blake* about the meaning of the phrase "depravity of mind" was not rendered in the course of an evaluation of whether § (b)(7) applied to the particular murder. Rather, this statement was made in rejecting the defendant's argument that the disjunctive character of § (b)(7) undermined the requirement of unanimous jury findings. The procedural posture that gave rise to this interpretation of § (b)(7) may well explain why the Georgia Supreme Court has ignored it in other contexts. *See* notes 140-44, and 158-66 and accompanying text *infra*.

140. Blake v. State, 236 S.E.2d at 641.

141. *See* notes 170-75 and accompanying text *infra*.

142. 236 S.E.2d at 641.

143. *Id.*

or torture.[144] Thus, it appears that according to the so-called *Harris-Blake* criteria, a section (b)(7) finding was not warranted in either *Harris* or *Blake*.

2. Pre-Godfrey Georgia Cases Interpreting Section (b)(7) in the Wake of Harris and Blake

Clearly, the *Harris-Blake* criteria did not govern the Georgia Supreme Court's review of section (b)(7) cases before the decisions in *Harris* and *Blake*. And, as has just been demonstrated, the *Harris-Blake* criteria were not even adhered to in *Harris* and *Blake*.[145] Furthermore, as Justice Marshall reminded, "we cannot stop reading the Georgia reports after those two cases."[146] Marshall cited *Ruffin v. State*[147] and *Holton v. State*[148] to show that the Georgia Supreme Court had not adhered to the *Harris-Blake* criteria after *Harris* and *Blake*.[149]

In *Ruffin*, the victim — an eleven-year-old child — and his stepfather were abducted from a service station where they worked by a group of armed robbers. They were taken to the woods, ordered to lie on the ground, and shot. The boy died, having received no physical abuse prior to death. The jury returned a death sentence, stating that "we the jurors conclude that this act was both horrible and inhuman."[150] Despite the absence of torture or an aggravated battery, the Georgia Supreme Court accepted this partial finding of section (b)(7) without questioning its propriety. Had the *Harris-Blake* criteria been applied, a finding of section (b)(7) under these circumstances would have been reversed.

The treatment of "torture" and "aggravated battery" in *Holton* reflects a similar disregard of the *Harris-Blake* criteria. The defendant robbed and murdered a married couple in their home by shooting the husband in the head after striking him in the ear and shoulder, apparently with a tomahawk. The wife died of gunshot wounds to her head and chest. Following her death, she was stabbed twice in the back with a kitchen steak knife that

144. *See* notes 174-75 and accompanying text *infra*. *See also* Dix, *supra* note 35, at 119. Furthermore, *Godfrey* establishes that aggravated battery is not present in the absence of some physical abuse apart from the defendant's rendering of the fatal act or blow. Therefore, the finding of § (b)(7) could not be predicated upon the existence of aggravated battery.

145. *See* notes 128-44 and accompanying text *supra*.

146. Godfrey v. Georgia, 100 S. Ct. at 1768 (Marshall, J., dissenting).

147. 243 Ga. 95, 252 S.E.2d 472, *cert. denied*, 100 S. Ct. 530 (1979).

148. 243 Ga. 312, 253 S.E.2d 736, *cert. denied*, 100 S. Ct. 263 (1979).

149. 100 S. Ct. at 1768-69.

150. Ruffin v. State, 252 S.E.2d at 480. See notes 49-77 and accompanying text *supra* for an analysis of the constitutional defects attendant to such an incomplete finding of the catch-all aggravating circumstances.

was found broken into two pieces at her shoulder.[151] As the Georgia Supreme Court noted: "The assistant district attorney conceded that the word 'torture' should be omitted as there was no evidence of torture before the deaths occurred. The court also instructed the jury . . . that they could not find an aggravated battery to Mrs. Pickrel." The jury then returned two death penalties, noting that the murders evidenced "depravity of mind."[152]

Although the sentences of death were set aside on other grounds and a new trial was ordered to assess punishment,[153] the Georgia Supreme Court was uneasy about the partial finding of section (b)(7).[154] The court did *not* suggest, however, that the absence of torture and aggravated battery with respect to Mrs. Pickrel would present any obstacle to a finding of section (b)(7). Since the *Harris-Blake* criteria established the existence of torture or aggravated battery as a *sine qua non* of a section (b)(7) finding, we again see that the Georgia high court has not been attentive to these requirements.

Although the Georgia Supreme Court offered no discussion in *Ruffin* or *Holton* concerning its interpretation of section (b)(7), the facts in these cases provide further confirmation that the *Harris-Blake* criteria have not governed the appellate review of section (b)(7) jury determinations. The absence in *Ruffin* or *Holton* of any analysis by the Georgia court in affirming these section (b)(7) jury determinations makes it difficult to know what, if any, standard was being applied. It is possible that the Georgia Supreme Court believed it was adhering to the *Harris-Blake* criteria but

151. Holton v. State, 253 S.E.2d at 737.

152. 253 S.E.2d at 740 n.1.

153. 253 S.E.2d at 740. Although Justice White attributed the reversal in *Holton* to the invalidity of the partial finding of the § (b)(7) aggravating circumstance, Godfrey v. Georgia, 100 S. Ct. at 1778 (White, J., dissenting), this is clearly incorrect. As Justice Marshall noted, the reversal was required because "the trial judge had given an inadequate charge on mitigating circumstances and . . . the jury had not been informed that it could recommend a life sentence even though it found a statutory aggravating circumstance." *Id.* at 1771 n.11 (Marshall, J., concurring). While Justice White's dissent suggests that the Georgia Supreme Court ferretted out this error with its exacting appellate review, *id.* at 1778, both the *trial court* and the *district attorney* acknowledged that the faulty jury instructions necessitated a new trial on sentencing. Holton v. State, 253 S.E.2d at 740.

Apparently, in devising his list of cases in which the Georgia Supreme Court reversed sentences of death, Justice White relied on the brief of the Attorney General of Georgia, which similarly misstated the grounds for reversal in *Holton*. Brief for Respondent at 18, Godfrey v. Georgia, 100 S. Ct. 1759 (1980).

154. Interestingly, the Georgia Supreme Court was not concerned by the partial finding of § (b)(7) in *Ruffin* — that the murder was "horrible and inhuman" — while it was troubled by the finding in *Holton* — "by reason of depravity of mind." *See* notes 62-65 and accompanying text *supra*.

that it simply erred in its analysis. On the other hand, perhaps the Georgia court was not interested in applying these criteria. *Fair v. State*,[155] which was not cited in any of the *Godfrey* opinions, does discuss the Georgia court's interpretation of section (b)(7), and it directly contradicts the *Harris-Blake* criteria that allegedly — in the view of the plurality opinion in *Godfrey* — had represented the Georgia law of section (b)(7) since 1977.

In *Fair*, the trial judge conducted a sentencing trial following the defendant's plea of guilty to the murder of one Jackie Morris. The defendant and Morris had been accomplices in the murder of another individual in a dispute over a money matter. Fearing that Morris might incriminate him for this other crime, the defendant shot the unsuspecting accomplice in the head, presumably killing him instantly.

The sentencer found that the murder was outrageously and wantonly vile, horrible, and inhuman in that it involved depravity of mind on the part of the defendant.[156] As the *Harris-Blake* criteria would suggest, the defendant argued that this finding was incomplete because it did not include either torture or aggravated battery. In language that directly refutes its statement in *Blake*, the Georgia Supreme Court summarily dispensed with the defendant's argument:

> The statute [§ (b)(7)] is worded in the disjunctive, not the conjunctive. It is not required that a trier of fact find the existence of each disjunctive phrase of the statute, only that at least one phrase of the first clause of the statute exists due to the existence of at least one phrase of the second clause of the statute.[157]

The holocaust was complete! Any life that was left in the beleaguered

155. Fair v. State, 268 S.E.2d 316 (1980). The Georgia Supreme Court's decision in *Fair* was issued after *Godfrey* was briefed and argued in the United States Supreme Court but before the case was decided on May 19, 1980. After the *Godfrey* decision was released, the Georgia Supreme Court issued an addendum to *Fair*, 268 S.E.2d at 324, reaffirming the death sentence in that case. *See* notes 211-14 and accompanying text *infra*.

156. The trial court also found that the murder of Jackie Morris violated the § (b)(2) aggravating circumstance because it occurred during the commission of another capital felony — *i.e.*, the first murder in which Morris and the defendant had been accomplices. In other words, the trial judge found that the defendant in *Fair* killed Morris while the defendant and Morris were engaged in the commission of the murder of a third individual. See note 120 *supra* for a discussion of the problems associated with this finding of § (b)(2) in *Fair*.

157. 268 S.E.2d at 320. The Georgia Supreme Court concluded its treatment of this issue by stating: "Furthermore, this court has upheld an identical finding of this statutory aggravating circumstance in Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977)." Fair v. State, 268 S.E.2d at 320. In *Corn*, the court followed its common practice of simply quoting the finding of § (b)(7) — along with two other statutory aggravating circumstances that had been found — concluding without further discussion that "[t]he evidence supports the statutory aggravating circumstances found." 240 S.E.2d at 702. *See* note 39 *supra*.

Harris-Blake criteria was snuffed out by *Fair*. Contrary to the statement of *Blake*, a finding of "depravity of mind" was wholly independent and separable from torture and aggravated battery.[158]

Is there anything that can explain this direct contradiction between the explicit statements of the Georgia Supreme Court in *Blake* and *Fair*? In answering this question, it is important to be aware of the context of the comments in *Blake* that were the provenance of the *Harris-Blake* criteria.

In *Blake*, the jury found 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."[159] The defendant recognized that the disjunctive character of this finding raised the possibility of impermissible nonunanimous jury verdicts. As the Georgia court summarized:

> The defendant urges that if one juror found the murder to be outrageously vile whereas another found it to be horrible and another found it to be inhuman, their verdict would not be unanimous. He urges that some jurors might find torture to the victim whereas others might find not torture but depravity in the mind of the defendant. He argues that the disjunctive factors are so dissimilar as to render possible fragmented findings by different jurors nevertheless arriving at a unanimous conclusion.[160]

The defendant's attack on the jury's finding was troublesome. Reversal of the section (b)(7) aggravating circumstance — the only one found by the jury[161] — would result in overturning a death sentence for the murder of

158. *See* note 121 and accompanying text *supra*. The clear holding of *Fair* is that § (b)(7) is to be applied in the disjunctive. If Justice White had been aware of this case, he might well have voted for reversal in *Godfrey*, or at least deleted his frequent references to the "consistent" interpretation that the Georgia Supreme Court had given to the catchall aggravating circumstance. Justice White declared: "Indeed, the Georgia Supreme Court has expressly rejected an analysis that would apply the provision disjunctively . . . *an analysis that, if adopted, would arguably be assailable on constitutional grounds.*" Godfrey v. Georgia, 100 S. Ct. at 1778 (White, J., dissenting) (emphasis added). *See also* Stromberg v. California, 283 U.S. 359, 367-70 (1931). Since the Georgia Supreme Court did explicitly and unmistakably adopt this position in *Fair*, Justice White apparently would find the Georgia court's construction of § (b)(7) constitutionally repugnant. Moreover, the Georgia Supreme Court has reaffirmed this construction in reexamining *Fair* in light of the *Godfrey* decision. Fair v. State, 268 S.E.2d at 324-25.

159. Blake v. State, 236 S.E.2d at 641.

160. *Id.* at 642-43.

161. As noted above, reversal of any aggravating circumstance on which the death sentence rests requires reversal of the death sentence. *See* note 109 *supra*. Therefore, it should not have mattered whether one or a number of aggravating circumstances had been found. Nonetheless, this fact would be viewed as critical by the Georgia Supreme Court which has repeatedly, albeit erroneously, held that the reversal of findings of statutory aggravating circumstances will not jeopardize a death sentence as long as one aggravating circumstance

an innocent two-year-old child.[162] If, however, section (b)(7) could be construed in a manner that would obviate the possibility of a nonunanimous jury decision, the reversal of the death sentence could be avoided. The Georgia Supreme Court supplied just such a construction in rejecting the defendant's claim:

> We find no significant dissimilarity between outrageously vile, wantonly vile, horrible or inhuman. Considering torture and aggravated battery on the one hand as substantially similar treatment of the victim and depravity of mind on the other hand as relating to the defendant, we find no room for nonunanimous verdicts for the reason that there is no prohibition upon measuring cause on the one hand by effect on the other hand. That is to say, the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim. Thus, that aggravating circumstance specified in section 27-2534.1(b)(7) is not incapable of unanimity.[163]

It is this language that the United States Supreme Court plurality quoted in developing the *Harris-Blake* criteria.[164] But, as noted above,[165] when the Georgia Supreme Court was later faced in *Fair* with a jury finding of "depravity of mind" where no torture or aggravated battery occurred, the court entirely repudiated the notion that the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim.[166] Of course, if the *Blake* language had governed the decision in *Fair*, the jury's finding of section (b)(7) could not have been sustained. Thus, the Georgia Supreme Court reached two wholly contradictory conclusions about section (b)(7) in *Blake* and *Fair*, enabling it to affirm the finding of this catchall aggravating circumstance in both cases.

3. The Application of the "Harris-Blake" Criteria to Godfrey

The United States Supreme Court plurality's narrowing construction of the section (b)(7) statutory circumstance, purportedly derived from *Harris* and *Blake*, specified *inter alia* that a finding of "depravity of mind" required that the murderer possess a mental state causing him to torture or commit an aggravated battery against the victim. This requirement would not be satisfied unless the murderer intentionally inflicted serious physical

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is affirmed. *See* Burger v. State, 245 Ga. 458, 265 S.E.2d 796 (1980); Gates v. State, 244 Ga. 587, 261 S.E. 349 (1979).

162. *See* notes 138-44 and accompanying text *supra*.

163. Blake v. State, 236 S.E.2d at 643.

164. Godfrey v. Georgia, 100 S. Ct. at 1766.

165. *See* notes 155-58 and accompanying text *supra*.

166. Fair v. State, 268 S.E.2d at 320.

abuse upon the victim before death.[167] The plurality pointed out that these *Harris-Blake* requirements were not met in *Godfrey*. No claim was made that Godfrey committed an aggravated battery upon his wife or mother-in-law "or, in fact, caused either of them to suffer any physical injury preceding their deaths."[168] Furthermore, at trial the prosecutor repeatedly told the jury that the murders did not involve torture or aggravated battery.[169] In his sentencing report, moreover, the trial judge confirmed that the murders did not involve torture.

Godfrey is, therefore, an important benchmark in determining which acts do not constitute torture or aggravated battery. First, an aggravated battery cannot exist where the victim has not suffered any physical injury preceding his death.[170] If the intentional imposition of the bodily harm causes immediate death, then the aggravated battery will merge with the murder and cannot provide the basis for a finding of section (b)(7).[171]

Second, torture cannot exist unless the victim suffers from extreme *physical* pain prior to death. Thus, the experience of seeing one's daughter decapitated by a shotgun blast and the realization that one is about to meet

167. Godfrey v. Georgia, 100 S. Ct. at 1766.

168. *Id.* at 1767.

169. *Id.* at 1763.

170. *Id.* at 1766.

171. The Georgia Supreme Court has apparently considered that the § (b)(7) term "aggravated battery" should be defined in accordance with GA. CODE ANN. § 26-1305 (1978). Hance v. State, 268 S.E.2d 339, 345 (1980); Holton v. State, 243 Ga. 312, 253 S.E.2d 736, 740 n.1 (1979). Section 26-1305 provides, in relevant part: "A person commits aggravated battery when he 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." Of course, since the instantaneous killings of Mrs. Wilkerson and Mrs. Godfrey deprived them of the use of all their members, the statutory definition would technically apply to Godfrey's crime, and indeed, to any murder. Therefore, the holding that no aggravated battery existed in *Godfrey* is necessary to avoid the unconstitutional overbreadth of § (b)(7). *See* notes 80-82 and accompanying text *supra*.

Professor Black has observed that, even if it is given a limiting construction, the "aggravated battery" provision "functions absurdly as an 'aggravating circumstance,' since it can make little difference to a dead man whether he can lift his right leg." C. BLACK, *supra* note 84, at 67. *See also* Hance v. State, 268 S.E.2d 339 (1980), in which the Georgia Supreme Court found that the murder involved an aggravated battery because "the victim's elbow and face were . . . rendered useless." *Id.* at 348.

One should also remember that Godfrey was convicted of the aggravated battery of his daughter. The infliction of this one inch cut on his daughter brought Godfrey a punishment of 10 years imprisonment. If he had delivered a similar blow to Mrs. Wilkerson or Mrs. Godfrey before he killed them, the state undoubtedly would have argued that this "aggravated battery" would have justified a finding of § (b)(7). The acceptance of such an argument would indeed "trivializ[e] the Constitution." 100 S. Ct. at 1772 (Burger, C.J., dissenting). Therefore, although the blow given to his daughter might satisfy Georgia's statutory definition of aggravated battery, it would clearly not satisfy the plurality's requirement of "serious physical abuse of the victim before death." 100 S. Ct. at 1766.

the same end is not "torture" within the meaning of section (b)(7).[172] Furthermore, any murder resulting in instantaneous death, regardless of the manner by which this result is accomplished or the gruesomeness of the ensuing spectacle, will not be considered to involve torture.[173] Such cases do not involve torture because one of the necessary conditions for torture within the meaning of section (b)(7) — physical pain — is absent when

172. This conclusion follows from the determination in *Godfrey* that Mrs. Wilkerson was not "tortured." 100 S. Ct. at 1767. Justice White was clearly displeased with this finding. In his *Godfrey* dissent, he wrote: "What terror must have run through [Mrs. Wilkerson's] veins as she first witnessed her daughter's hideous demise and then came to terms with the imminence of her own. Was this not torture?" 100 S. Ct. at 1776 (White, J., dissenting). Apparently, Justice White was dissatisfied with the negative answer supplied to this question by both the Georgia prosecutor and the trial judge, and six Justices of the United States Supreme Court.

Moreover, the plurality's requirement that torture would not occur absent the "serious abuse of the victim before death," *id.* at 1766, may well have been adopted precisely to avoid the argument that the anticipation of death constituted "torture." As the lead opinion in *Gregg* declared: "The American draftsmen, who adopted the English phrasing [prohibiting 'cruel and unusual' punishments] in drafting the Eighth Amendment, were primarily concerned . . . with proscribing 'tortures' and other 'barbarous' methods of punishment." Gregg v. Georgia, 428 U.S. at 169-70. As early as 1879 the United States Supreme Court announced that "[i]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty are forbidden by that amendment to the Constitution." Wilkerson v. Utah, 99 U.S. 130, 136 (1879). Justice White's graphic description of the horrors that attend the anticipation of one's own demise would appear to be fully applicable to the situation of John Spenkelink, the only person involuntarily executed in the United States since *Furman*. Indeed, Camus has argued that the anticipation of capital punishment is virtually unique in the suffering it inflicts:

> [In considering the argument from *lex talonis*] let us leave aside the fact that the law of retaliation is inapplicable and that it would seem just as excessive to punish the incendiary by setting fire to his house as it would be insufficient to punish the thief by deducting from his bank account a sum equal to his theft. Let us admit that it is just and necessary to compensate for the murder of the victim by the death of the murderer. But beheading is not simply death. It is just as different, in essence, from the privation of life, as a concentration camp is from prison. It is a murder, to be sure, and one that arithmetically pays for the murder committed. But it adds to death a rule, a public premeditation known to the future victim, an organization, in short, which is itself a source of moral sufferings more terrible than death. Hence there is no equivalence. Many laws consider a premeditated crime more serious than a crime of pure violence. But what then is capital punishment when the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? *For there to be an equivalance, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.*

A. CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH 199 (1961) (emphasis added). Of course, if this anticipation of death constituted "torture" then any execution would be barred by the eighth amendment.

173. Godfrey v. Georgia, 100 S. Ct. at 1767 n.16.

death occurs instantly.[174] Similarly, a finding of torture would not be appropriate where the victim is asleep, unconscious, or so drugged or drunk that he cannot experience intense physical pain.[175]

Since under the *Harris-Blake* criteria "depravity of mind" comprehends only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim, the absence of torture or aggravated battery in *Godfrey* established conclusively that the defendant did not have the requisite depravity of mind for a finding of section (b)(7). Consequently, none of the three qualifying elements of section (b)(7) — torture, depravity of mind, or aggravated battery to the victim — was applicable to the Godfrey murder, and, accordingly, no finding of section (b)(7) was permissible under the *Harris-Blake* criteria.[176]

4. The Constitutional Bases for Reversal of Godfrey's Death Sentence Given the Harris-Blake Criteria

As we have seen, the *Godfrey* plurality's examination of the Georgia Supreme Court's pre-*Godfrey* construction of the section (b)(7) aggravating circumstance led it to announce that the *Harris-Blake* criteria represented the Georgia Supreme Court's "three separate but consistent conclusions respecting the section (b)(7) aggravating circumstance."[177]

174. That the victim experienced intense physical pain is a necessary although not sufficient condition for a finding of torture. While the trip to the dentist is often accompanied by a feeling of physical pain, at times intense, the dentist is rarely accused of "torturing" his patients.

175. Of course the extreme case where torture cannot occur is where the victim is dead. The plurality in *Godfrey* recognized as much in its statement that torture would not exist absent "evidence of serious physical abuse of the victim *before death*." 100 S. Ct. at 1766 (emphasis added). While this proposition would seem to be axiomatic, it has been ignored in at least one Georgia death penalty case. *See* Baker v. Georgia, 243 Ga. 710, 257 S.E.2d 192 (1979), *vacated and remanded*, 100 S. Ct. 2936 (1980), *death sentence reinstated*, No. 34588 (Ga. Sup. Ct. Sept 8, 1980). In *Baker* the defendant shot the victim in the chest, killing him instantly. After the victim was dead, the defendant shot him again in the scrotum area. 257 S.E.2d at 193. While under *Godfrey* the final shot after death could not constitute torture, the prosecutor tried to persuade the jury that this shot did represent "torture." Though first conceding, "[s]ure, he didn't feel it," the prosecutor then concluded that "[i]f that ain't torture then I don't understand the word torture." Petition for Certiorari at 15 n.7, Baker v. Georgia, 100 S. Ct. 2936 (1980). *Cf.* Halliwell v. State, 323 So. 2d 557 (Fla. Sup. Ct. 1975), in which the court held that the dismemberment of a murder victim several hours after death occurred could not be considered as an aggravating circumstance of the murder, because the murder was completed when the victim died. *Id.* at 561.

176. Interestingly, the plurality's application of the *Harris-Blake* criteria to the facts of *Godfrey* is consistent with the precise language of the jury's finding in *Godfrey*. Thus, the plurality determined that the case did not involve torture, depravity of mind, or aggravated battery, and in fact none of these elements was mentioned in the jury's written finding.

177. Godfrey v. Georgia, 100 S. Ct. at 1766.

The plurality then considered the evidence adduced at Godfrey's trial and concluded that "the circumstances of this case . . . do not satisfy the criteria laid out by the Georgia Supreme Court itself in the *Harris* and *Blake* cases."[178]

Once this conclusion was reached, the reversal of Godfrey's death sentence was mandated by well-established constitutional principles.[179] First, the Georgia Supreme Court's affirmance of Godfrey's death sentence violated the basic precept, articulated in *In re Winship*,[180] that the state must prove every element of an offense beyond a reasonable doubt.[181] Since the plurality accepted the *Harris-Blake* criteria as defining the elements of the catchall aggravating circumstance, its conclusion that "the circumstances of this case . . . do not satisfy the criteria laid out by the Georgia Supreme Court itself in the *Harris* and *Blake* cases," is constitutionally equivalent to the statement that the state has failed to prove every element of section (b)(7) beyond a reasonable doubt.[182]

Second, the plurality could have struck down Godfrey's death sentence as violative of the defendant's due process rights as enunciated in *Bouie v.*

178. *Id.* at 1767. This conclusion is clearly correct. *See* notes 167-76 and accompanying text *supra*.

179. *See* notes 180-86 and accompanying text *infra*.

180. 397 U.S. 358 (1970). *See also* Jackson v. Virginia, 99 S. Ct. 2781 (1979).

181. Although *Winship* addressed the standard of proof that must be met in determinations of guilt rather than of punishment, the rationale behind the "beyond a reasonable doubt" standard applies *a fortiori* in the death sentence context. As Justice Harlan noted in his concurrence in *Winship*, the standard of proof required by due process depends upon the "consequences of an erroneous factual determination." 397 U.S. at 372 (Harlan, J., concurring). Since an erroneous finding of a statutory aggravating circumstance can subject a defendant to the possibility of the forfeiture of his life, the consequences are indeed extreme. *See also* Woodson v. North Carolina, 428 U.S. 280 (1976), which held that the eighth amendment requires greater reliability in the determination to impose the death sentence than for decisions in criminal cases generally. *See* notes 72-73 and accompanying text *infra*.

182. In *Godfrey*, the state's constitutional violation is arguably even more egregious than the simple failure to prove every element of § (b)(7) beyond a reasonable doubt; in *Godfrey*, there was absolutely no evidence that torture or aggravated battery existed. Therefore, the death sentence imposed on Godfrey also violated the "no-evidence" rule of Thompson v. Louisville, 362 U.S. 199 (1960), in derogation of Godfrey's right to due process of law.

In addition, the absence of torture and aggravated battery reveals that there was no fair evidentiary support for the finding of § (b)(7). Thus, the finding of § (b)(7) in *Godfrey* was by definition arbitrary, *see* Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957), and could not supply any principled way to distinguish a case in which the death penalty is imposed, from the many cases in which it is not.

In death penalty cases — as in all cases in which federal rights are at stake — factual findings are subject to plenary and independent federal review on appeal. Gardner v. Florida, 430 U.S. 349, 362 (1977) (plurality opinion); Edwards v. South Carolina, 372 U.S. 229, 235 (1963); Haynes v. Washington, 373 U.S. 503, 515-16 (1963). The finding of § (b)(7) in *Godfrey*, and the death sentence based thereon, was therefore defective since it "rest[ed] on an erroneous factual predicate." Gardner v. Florida, 430 U.S. at 362.

City of Columbia.[183] The Georgia Supreme Court's affirmance of Godfrey's death sentence on section (b)(7) grounds — unsupportable under the Georgia court's own *Harris-Blake* standards — might be construed as evidencing a change in the court's construction of the statutory aggravating circumstance. In effect, conduct that previously would not have been considered as included within the meaning of section (b)(7) under the *Harris-Blake* criteria was brought within its contours by the Georgia court's new interpretation. It is well-established that such an unforeseeable judicial enlargement of a criminal statute will be struck down as violative of due process when, as in *Godfrey*, the state applies it retroactively.[184]

Thus, the Georgia Court's violation of its own standards in affirming Godfrey's sentence of death constituted clear constitutional error. If the *Harris-Blake* criteria still accurately described the state's construction of section (b)(7), then under the *Winship* test,[185] the finding of section (b)(7) violated Godfrey's right to due process of law. If, on the other hand, Georgia were to maintain that it had changed the appropriate legal standard in *Godfrey*, the state would avoid this first due process trap only to be ensnared by another: by altering its legal standard without notice, the Georgia court would violate Godfrey's due process right not to be the victim of a retroactive judicial enlargement of a criminal statute. Furthermore, this departure from the "consistent conclusions" presented in *Harris* and *Blake* would violate the settled rule that state courts may not juggle their laws in an unpredictable and inconsistent fashion to the prejudice of federal constitutional rights.[186]

The plurality in *Godfrey* chose not to rely on these well-established constitutional grounds in reversing Godfrey's death sentence. Instead, the plurality chose to base its reversal on the far more sweeping and previously uncharted holding that the affirmance of Godfrey's death sentence reflected the Georgia Supreme Court's adoption of an unconstitutionally broad construction of the section (b)(7) aggravating circumstance.[187] The

183. 378 U.S. 347 (1964).

184. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 478 (1978).

185. The same result could be reached in *Godfrey* using the "no-evidence" rule of Thompson v. Louisville, 362 U.S. 199 (1960). *See* note 182 *supra*.

186. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 293-301 (1964); Wright v. Georgia, 373 U.S. 284, 289-91 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 454-58 (1958); Staub v. City of Baxley, 355 U.S. 313, 320 (1958).

187. It should be noted that the question whether the Georgia court adhered to its own interpretation of § (b)(7) in affirming Godfrey's death sentence is logically distinct from the question whether the interpretation employed is unconstitutionally broad. For example, assume Georgia had initially adopted an extremely stringent limiting construction of its catch-all aggravating circumstance. Then, the court is confronted by a case in which a finding of § (b)(7) would not be justified under this extremely stringent construction but which would

implicit premise underlying the plurality's decision is that the construction of section (b)(7) is unconstitutionally broad if it can apply to any murder.[188] From this premise, the plurality reasoned that the Georgia court's interpretation of section (b)(7) embodied in the *Godfrey* affirmance would permit a finding of this catchall aggravating circumstance for any murder because "[t]he petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder."[189] Therefore, if depravity of mind — and consequently section (b)(7)[190] — could be found to exist in *Godfrey*, it could be found in any murder. In support of this conclusion, the plurality noted that: (1) Godfrey's victims were killed instantaneously; (2) the victims were relatives of Godfrey who were causing him extreme emotional trauma; and (3) shortly after the murders, Godfrey acknowledged his responsibility for the deaths.[191] On the basis of these factors, the plurality concluded that the concerns of *Furman* were not satisfied in *Godfrey* because of the absence of any principled way to distinguish Godfrey's crime, for which a death sentence was imposed, from the many murders that are not so punished.[192]

Importantly, the three factors that the plurality cited as evidence that the Georgia court's interpretation of section (b)(7) was unconstitutionally broad were *mitigating* factors.[193] The plurality realized that mitigating circumstances must be accorded significance in sentencing determinations in order to ensure consistency and proportionality in capital sentencing and to avoid the arbitrariness condemned by *Furman*.[194] Thus, the plurality

be justified under the *Harris-Blake* criteria. The affirmance of the finding of § (b)(7) in such a case would represent an unconstitutional departure from a prior, more limiting construction, of the aggravating circumstance. *See* notes 183-84 and accompanying text *supra*. Since *Godfrey* indicates that the *Harris-Blake* criteria are sufficiently circumscribed, then such an affirmance of a finding of § (b)(7) would not be defective on the grounds that the Georgia court had applied an unconstitutionally broad and vague construction of this aggravating circumstance.

188. *See* notes 80-82 and accompanying text *supra*.

189. Godfrey v. Georgia, 100 S. Ct. at 1767.

190. The plurality observed that nothing in the first clause of § (b)(7) "implies an inherent restraint on the arbitrary and capricious infliction of the death sentence." Godfrey v. Georgia, 100 S. Ct. at 1765. The disjunctive wording of the second clause — "torture, depravity of mind, or an aggravated battery to the victim" — indicates that the finding of only one of these three elements by an uninstructed jury would support a finding of the catchall aggravating circumstance. *See* note 81 *supra*.

191. 100 S. Ct. at 1767.

192. *See* Gregg v. Georgia, 428 U.S. at 198.

193. Justice Stewart observed that although the mitigating factors did not remove the criminality of Godfrey's acts, they must be considered if the decision whether or not to impose the death sentence is to rest on a rational basis. Godfrey v. Georgia, 100 S. Ct. at 1767.

194. As Professor Dix has noted:

engaged in the precise weighing against each other of aggravating and mitigating circumstances that the authors of the Model Penal Code considered to be "rationally necessary" in a capital sentencing scheme.[195]

IV. REFLECTIONS ON THE *GODFREY* DECISION

The plurality opinion in *Godfrey* is somewhat puzzling. It discusses at great length the "three separate but consistent conclusions respecting the section (b)(7) aggravating circumstances"[196] that the Georgia Supreme Court had supposedly reached by 1977. Yet, Justice Marshall's opinion certainly alerted the plurality justices to the fact that the narrowing construction of section (b)(7) that they extracted from *Harris* and *Blake* did not represent the law in Georgia prior to *Godfrey*.[197] Nevertheless, having interpreted the law of Georgia in this manner, the plurality could have relied on established precedent by reversing Godfrey's sentence of death on the grounds that the finding of section (b)(7) was not warranted under the *Harris-Blake* criteria.[198] But, the plurality ignored its exegesis of the *Harris-Blake* standards and confronted the thorny issue of delimiting the constitutional bounds of Georgia's catchall aggravating circumstance. By

> Cases in which sentencing authorities have declined to give potentially mitigating factors the same significance given them in similar cases can . . . be regarded as violating the requirement of reasonable proportionality [as articulated in *Gregg, Proffit*, and *Jurek*]. The Court's concern with rationality and consistency in the administration of the death penalty suggests that appellate review is also designed to encourage "greater uniformity" within individualized sentencing as another goal independent of proportionality.

Dix, *supra* note 35, at 107.

195. MODEL PENAL CODE § 201.6, Comment (Tent. Draft No. 9, 1959). The authors of the Model Penal Code anticipated one of the pitfalls of the Georgia capital sentencing scheme requiring proof of at least one of the statutory aggravating circumstances: "Such an approach has the disadvantage . . . of according disproportionate significance to the enumeration of aggravating circumstances when what is rationally necessary is . . . the balancing of any aggravations against any mitigations that appear." *Id.* The Georgia Supreme Court has clearly fallen into this trap. Thus, the Georgia court's failure to evaluate mitigating factors allowed it to conclude that Godfrey's crime was "similar" to every other multiple murder, regardless of the different motivations for the killings, the different circumstances of the crimes, and the differences in the characters and the criminal records of the defendants. *See* notes 40-43 *supra*. Thus, as Professor Dix has concluded, the Georgia court's "concern with categorizing cases and finding aggravating circumstances has distracted it from adequately considering potential mitigating circumstances." Dix, *supra* note 35, at 115. The plurality in *Godfrey* has now determined that for each capital defendant the Georgia Supreme Court must inquire "not only 'what did this person do?' but also '*who* is he and *why* did he do it?' " Bonnie, *Psychiatry and the Death Penalty: Emerging Problems in Virginia*, 66 VA. L. REV. 167, 168 (1980).

196. Godfrey v. Georgia, 100 S. Ct. at 1768-69.

197. *Id.* *See* notes 146-49 and accompanying text *supra*.

198. *See* notes 180-86 and accompanying text *supra*.

eschewing the established precedents and choosing to break new ground, the plurality has insulated its holding — that a death sentence could not constitutionally rest on a finding of the catchall aggravating circumstance for a crime similar to that committed by Godfrey[199] — from subsequent dilution by the Georgia Supreme Court.[200]

This is not to say that the plurality's analysis of the *Harris-Blake* criteria is irrelevant. On the contrary, this extended discussion of these criteria will undoubtedly have a strong influence on the Georgia court's future interpretation of section (b)(7). For while the plurality did not, in the end, rely on its assessment of the Georgia law of the catchall aggravating circumstance in reaching its decision in *Godfrey*, the plurality did achieve the purpose of supplying an objective and understandable interpretation of section (b)(7) where one had not previously existed.[201]

The plurality may well have intended this result, fearing that a reversal accompanied by an instruction to the Georgia Supreme Court to furnish a proper, narrow construction of section (b)(7) might prove unavailing. Rather than merely prodding the Georgia Supreme Court to come up with an appropriate narrowing construction, the plurality simply supplied one itself. Thus, the plurality's discovery of the *Harris-Blake* criteria — surely a landmark in creative federalism — will have a significant impact on future section (b)(7) cases. Furthermore, any attempt to depart from these criteria — unless given purely prospective application — will founder on the principles of *Bouie*[202] and *Staub v. City of Baxley*.[203]

The most immediate impact of *Godfrey*, however, will be on prior Georgia death penalty cases in which the jury has made a finding of the catchall

199. In its affirmance of Godfrey's death sentence, the Georgia Supreme Court presented 15 cases that it found to be "similar" to *Godfrey*. *See* note 43 and accompanying text *supra*. If the cases are truly "similar," then *Godfrey* requires a reversal of the finding of § (b)(7) in all such cases. If the cases are not "similar," what does this say about the Georgia Supreme Court's appellate review of death sentences?

200. Had the *Godfrey* opinion rested on the established but narrower ground that the finding of § (b)(7) was inconsistent with the *Harris-Blake* standards, the Georgia Supreme Court, or the legislature, could expand the reach of this state law provision and then apply it prospectively. By holding that § (b)(7) could not constitutionally apply to Godfrey's crime, the state's ability to expand its catchall aggravating circumstance, even prospectively, was eliminated.

201. The *Harris-Blake* criteria cannot reasonably be said to have governed the finding or affirmance of § (b)(7) determinations before, in, or after *Harris* and *Blake*. *See* notes 115-66 and accompanying text *supra*.

202. Bouie v. City of Columbia, 378 U.S. 347 (1964). *See* notes 183-86 and accompanying text *supra*.

203. 355 U.S. 313 (1958).

aggravating circumstance.[204] As discussed previously,[205] *Godfrey* confirms that capital sentencing juries must be apprised of a proper, narrow construction of the section (b)(7) aggravating circumstance. Since Georgia trial judges have only rarely attempted to present a limiting construction of section (b)(7) to jurors,[206] and, in all likelihood, have never presented the correct *Harris-Blake* interpretation, *Godfrey* mandates the reversal of virtually every death penalty decision involving a finding of section (b)(7). Moreover, since the recommendation of death is purely discretionary once a statutory aggravating circumstance has been found, the invalidation of a finding of section (b)(7) under *Godfrey* will require reversal of any death sentence resting in whole *or in part* on the catchall aggravating circumstance.[207]

Perhaps the aspect of *Godfrey* carrying the greatest implications for all death penalty cases concerns the plurality's weighing of the mitigating and aggravating elements in Godfrey's case.[208] By requiring such a balancing, the Court has mandated a dramatic change in the death penalty review thus far undertaken by the Georgia Supreme Court.[209] This weighing requirement will serve, however, to further the goals of consistency and rationality in capital sentencing that inspired the decision in *Furman*.[210]

The Georgia Supreme Court, however, has sought to minimize the significance of *Godfrey*. In its pronouncements on the catchall aggravating circumstance since *Godfrey*, the court has simply ignored the *Harris-Blake* criteria in those cases that would not satisfy these standards.[211] Where a

204. In 85 of the 152 sentencing determinations that resulted in a death sentence under the Georgia death penalty law, the § (b)(7) statutory aggravating circumstance was charged and found. American Civil Liberties Union of Georgia, Judge's Charge/Jury Findings (Oct. 5, 1980) (informational compilation of Georgia death penalty cases). A number of these cases have already been reversed for other errors tainting the death sentences.

205. *See* notes 78-112 and accompanying text *supra*.

206. *Gates* represents one of the isolated exceptions to this general rule. The unfortunate consequences of that trial judge's attempt to clarify the meaning of the terms of § (b)(7) perhaps suggest why other judges have been less intrepid. *See* notes 105-11 and accompanying text *supra*.

207. *See* note 109 *supra*.

208. *See* note 193 and accompanying text *supra*.

209. *See* note 195 and accompanying text *supra*.

210. *See* note 194 and accompanying text *supra*.

211. *See, e.g.*, the decisions in Fair v. State, 268 S.E.2d 316 (1980), and Dampier v. State, 245 Ga. 426, 268 S.E.2d 565, *reviewed in light of Godfrey*, 268 S.E.2d 349 (1980), and the discussion of these cases at notes 212-16 and accompanying text *infra*. The death sentences in *Fair* and *Dampier*, which rested on findings of the catchall aggravating circumstance, were affirmed by the Georgia Supreme Court prior to the United States Supreme Court decision in *Godfrey*. On June 24, 1980, without any notice to counsel that it was reexamining these cases, the Georgia Supreme Court issued addenda to the initial affirmances in *Fair, Dampier*, and another § (b)(7) case, Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204, *reexam-*

more comprehensive interpretation of section (b)(7) has been necessary to affirm the jury's finding, it has been supplied.

Thus, in *Fair v. State*,[212] the Georgia Supreme Court reaffirmed its initial pre-*Godfrey* determination that a finding of section (b)(7) was appropriate despite the absence of any torture or aggravated battery to the victim. Ignoring the explicit limitation of the *Harris-Blake* criteria requiring "evidence of serious physical abuse of the victim *before death*,[213] the court ruled that a finding of "depravity of mind" was justified because the defendant abused the victim *after death*.[214] Similarly, in *Dampier v. State*,[215] the Georgia Supreme Court declared that the Supreme Court's decision in *Godfrey* did not undermine the finding of section (b)(7), even though the victim was not physically abused and was killed instantly. The court dealt with the *Harris-Blake* requirement of serious physical abuse by first observing that the defendant had listened to the victim plead for his life for five minutes before the killing and then reasoning that psychological abuse may be construed to be the type of "serious physical abuse" that will support a finding of section (b)(7).[216] Thus, while the plurality in *Godfrey* provided the Georgia Supreme Court with some comprehensible limiting standards to guide its future review of section (b)(7) determinations, the Georgia court seems intent upon widening the door that the plurality sought partially to close.

The subsequent experience in the six Georgia death penalty cases that the United States Supreme Court vacated and remanded to the Georgia Supreme Court for reconsideration in light of *Godfrey* is instructive.[217] The Georgia court reinstated all six death sentences, refusing to allow counsel for any of the defendants to argue that *Godfrey* mandated reversal.[218] Such conduct is startling. As the Supreme Court announced over seventy years ago, the right to notice and an opportunity to be heard represents a fundamental condition that seems "to be universally prescribed in all systems of law established by civilized countries."[219] The Georgia

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ined in light of Godfrey, 268 S.E.2d 351 (1980). *See* note 58 *supra*. The Georgia court announced that the validity of these death sentences was not affected by *Godfrey*.

212. Fair v. State, 268 S.E.2d 316 (1980).

213. Godfrey v. Georgia, 100 S. Ct. at 1766. *See* note 121 and accompanying text *supra*.

214. Fair v. State, 268 S.E.2d at 325.

215. Dampier v. State, 268 S.E.2d at 350.

216. *Id.*

217. *See* note 109 *supra*.

218. *See, e.g.*, the Georgia Supreme Court's denial of defendant's motion for additional briefing and oral argument in light of *Godfrey* in Baker v. State, No. 34588 (Ga. Sup. Ct. July 15, 1980).

219. Twining v. New Jersey, 211 U.S. 78, 111 (1908).

Supreme Court's action assaults "the very *essence* of justice,"[220] for as Justice Frankfurter wrote:

> The validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.[221]

The Georgia Supreme Court's record in death penalty cases has been troubling. Justice White is perhaps correct in alluding to "the constancy of the state supreme court in performance of its statutory review function."[222] The Georgia court has proclaimed that it can affirm a death penalty if it determines that one of the charged statutory aggravating circumstances found by the jury is supported by the evidence;[223] the court has never failed to affirm at least one such aggravating circumstance.[224] The Georgia Supreme Court has indicated that it will not permit section (b)(7) to become a "catchall" and will restrict its approval of jury determinations of "this statutory aggravating circumstance to cases that lie at the core," and not at the periphery;[225] however, the Georgia court has never concluded that a jury was incorrect in accepting a prosecutor's insistence that section (b)(7) should be found in a given case.[226] The Georgia court is invested by statute with the responsibility of determining whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;"[227] in no case has the court discerned such impermissible influences.[228]

Justice White observed in *Gregg v. Georgia* that "[m]istakes will be made and discriminations will occur which will be difficult to explain."[229]

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220. L. TRIBE, *supra* note 184, at 503 (emphasis in original).

221. Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171-72 (1950) (Frankfurter, J., concurring). Furthermore, the Georgia court's refusal to allow the participation of counsel in evaluating the relevance and legal significance of aggravating and mitigating factors in light of *Godfrey* disregards the importance of the role of counsel in the capital sentencing context. *See* Gardner v. Florida, 430 U.S. 349, 360 (1977) (Stevens, Stewart, and Powell, J.J.).

222. Godfrey v. Georgia, 100 S. Ct. at 1774.

223. *See* note 161 *supra*.

224. *See* Dix, *supra* note 35, at 112.

225. Harris v. State, 230 S.E.2d at 10-11.

226. Godfrey v. Georgia, 100 S. Ct. at 1771 (Marshall, J., concurring).

227. GA. CODE ANN. § 27-2537(c)(1) (1978).

228. *See* Dix, *supra* note 35, at 115. Not surprisingly, a number of the Georgia death penalty cases have generated intense passions. *See* Mullin, *The Jury System in Death Penalty Cases: A Symbolic Gesture*, 43 L. & CONTEMP. PROB. 136, 141, 146 n.34, 149 (1980).

229. Gregg v. Georgia, 428 U.S. at 226 (White, J., concurring).

This analysis of the imposition of death sentences under the Georgia statutory scheme certainly seems to provide support for his assertion. In an imperfect world the existence of some errors is inevitable. At some point, however, the mistakes and problems become sufficiently serious and frequent that they call into question the integrity of the entire death penalty scheme.

The mounting number of cases "raising troubling issues of noncompliance with the strictures of *Gregg* and its progeny,"[230] coupled with the Georgia court's insensitivity to the most basic due process rights of capital defendants in the wake of *Godfrey*, can only serve to fuel the criticism that the Georgia Supreme Court has a pro-death penalty bias.[231] The implications are sobering if it truly is of vital importance that decisions "to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."[232]

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230. Godfrey v. Georgia, 100 S. Ct. at 1770 (Marshall, J., concurring).

231. Georgia Supreme Court Chief Justice H.E. Nichols has reportedly engaged in a "public crusade" to renew executions in Georgia. Atlanta Constitution, Dec. 3, 1978. Appearing before civic clubs and legal groups, and on radio and television talk shows, Nichols expressed his belief in the effectiveness of public hangings in deterring crime and commented that he was "in favor of capital punishment applying to everybody, across the board," in cases of rape, murder, and kidnapping with bodily injury. When asked if there were sufficient facts and figures to support his belief that the death penalty was a deterrent, Nichols replied:

> My knowledge . . . is based on what I have seen around. I can remember when I was a boy coming up, a rape was almost unheard of. Now, you pick up the paper every morning and everybody's being raped. Why the difference? Because you took them down to the courthouse or down in front of the courthouse and hanged them.

Id.

On December 18, 1978, the defendant in Alderman v. State, 214 Ga. 496, 246 S.E.2d 642 (1978), *cert. denied*, 439 U.S. 991 (1979), argued to the United States Supreme Court that Chief Justice Nichols' pro-death penalty bias had so infected the Georgia Supreme Court that it denied the defendant an impartial and unbiased review of his death sentence. *See* Petition for Rehearing of Denial of Certiorari, Alderman v. Georgia, 99 S. Ct. 1036 (1979).

232. Gardner v. Florida, 430 U.S. 349, 358 (1977).