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Godfrey v. Georgia: Possible Effects on Virginia's Death Penalty Law

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GODFREY V. GEORGIA: POSSIBLE EFFECTS ON VIRGINIA'S DEATH PENALTY LAW

I. INTRODUCTION

Virginia permits imposition of the death penalty for capital murder¹ only after a bifurcated trial in which the jury has found the defendant guilty of the crime and, in a separate proceeding, determined death to be the appropriate penalty.² In the second half of this process, the jury must find at least one of the two aggravating circumstances set out by statute³ before a death sentence is imposed.

Georgia, unlike Virginia, will impose the death penalty for "ordinary" murder.⁴ It too, however, requires the jury to find one or more of a number of aggravating circumstances, spelled out in statutory law,⁵ during the sentencing phase of a bifurcated trial.⁶ Both states provide, as one of the aggravating circumstances, that the defendant may be sentenced to death if 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."⁷ The United States Supreme Court, in the recent case of *Godfrey v. Georgia*,⁸ addressed the application of this provision and the issue of when its use may violate the eighth and fourteenth amendments' prohibition of cruel and unusual punishments by affording the sentencing authority overly broad discretion in imposing a death sentence on a given defendant.⁹

This comment will, first, briefly explore the Supreme Court opinions

1. VA. CODE ANN. § 18.2-31 (Cum. Supp. 1981). For a complete text of this section, see Appendix I(a).

2. VA. CODE ANN. § 19.2-264.3 (Cum. Supp. 1981). For a complete text of this section, see Appendix I(b).

3. VA. CODE ANN. § 19.2-264.2 (Cum. Supp. 1981). For a complete text of this section, see Appendix I(c).

4. GA. CODE ANN. § 26-1101 (1978). For a complete text of this section, see Appendix II(a).

5. GA. CODE ANN. § 27-2534.1(b) (1978). For a complete text of this section, see Appendix II(b).

6. GA. CODE ANN. § 26-3102 (1978). For a complete text of this section, see Appendix II(c).

7. VA. CODE ANN. § 19.2-264.2 (Cum. Supp. 1981); GA. CODE ANN. § 27-2534.1(b)(7) (1978).

8. 446 U.S. 420 (1980).

9. *Id.* at 423.

which form the historical and constitutional context of the *Godfrey* decision. It will then examine the facts, holding and rationale in *Godfrey* and, finally, it will speculate on the effects of the Court's decision on the current state of Virginia's death penalty law.

II. HISTORICAL BACKGROUND

The Supreme Court began its modern search for a permissible application of the ultimate sanction in the case of *Furman v. Georgia*.¹⁰ The decision, and its nine separate concurring and dissenting opinions,¹¹ was widely interpreted to hold that, while the death penalty was, *per se*, constitutional, statutory schemes which permitted it to be applied arbitrarily and capriciously were not.¹²

State legislatures adopted two divergent approaches attempting to comply with this perceived stricture of *Furman*. One group attempted to curb sentencing discretion through the imposition of mandatory death penalties for certain classes of crimes.¹³ The other group adopted various procedures such as bifurcated trials and automatic sentence review by the state supreme court in an effort to limit and direct the choice between incarceration and execution.¹⁴ Georgia chose the latter course when its capital punishment laws were overturned in *Furman*.¹⁵

The two approaches were reviewed during the 1976 Term of the United States Supreme Court. The Court, in *Woodson v. North Carolina*¹⁶ and *Roberts v. Louisiana*,¹⁷ rejected the mandatory sentencing approach based on the following reasoning:

[Such a sentencing procedure] treats all persons convicted of a designated

10. 408 U.S. 238 (1972). The *per curiam* opinion reversed petitioner's death sentence as violative of the eighth and fourteenth amendments' prohibition of cruel and unusual punishments, and remanded the case for further proceedings.

11. Concurring opinions were written by: Douglas, J., *id.* at 240; Brennan, J., *id.* at 257; Stewart, J., *id.* at 306; White, J., *id.* at 310; and Marshall, J., *id.* at 314. Dissenting opinions were written by: Burger, C.J., *id.* at 375; Blackmun, J., *id.* at 405; Powell, J., *id.* at 414; and Rehnquist, J., *id.* at 465.

12. For a thorough discussion of *Furman*, see Tao, *Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment*, 51 NOTRE DAME LAW. 722 (1976); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974).

13. Note, *supra* note 12, at 1700.

14. One authority divides this group into three subdivisions, but all three require a finding of aggravating circumstances before death may be imposed. *Id.* at 1699-700.

15. *Id.* at 1700-04.

16. 428 U.S. 280 (1976).

17. 428 U.S. 325 (1976).

offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

. . . .
Because of the qualitative difference [between the death penalty and imprisonment], there is a corresponding . . . need for [certainty] that death is the *appropriate punishment in a specific case*.¹⁸

The Court confirmed this basic tenet in *Gregg v. Georgia*,¹⁹ a case handed down the same day as *Woodson* and *Roberts*. The decision in *Gregg* approved the Georgia death penalty laws passed in response to *Furman* and, hence, established a pattern for statutes under which a criminal may be executed.²⁰ A capital punishment law, as a constitutional minimum, must establish a meaningful method for distinguishing the cases in which the death penalty is imposed from those in which it is not.²¹ The Supreme Court will not permit the penalty to be "imposed under sentencing procedures that [create] a substantial risk that [will] be inflicted in an arbitrary and capricious manner."²²

One of the constitutional challenges raised by the petitioner in *Gregg* concerned the possible vagueness of the section (b)(7) aggravating circumstance.²³ The Court, however, dismissed the challenge and held the section valid on its face saying "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."²⁴ The Court approached *Godfrey v. Georgia* from this perspective.

III. *Godfrey v. Georgia*: FACTS, HOLDING AND RATIONALE

The facts in *Godfrey* are as follows. Robert Franklin Godfrey, petitioner, and his wife of twenty-eight years had a violent family dispute in

18. 428 U.S. at 304-05 (emphasis added).

19. 428 U.S. 153 (1976).

20. The Court in *Gregg* approved of Georgia's bifurcated trial procedure, the requirement that the sentencing authority specify the aggravating circumstances it found and the provisions for mandatory sentence review. Note, 52 NOTRE DAME LAW. 261, 279-80 (1976). Georgia's statutory form did not, however, establish an absolute model for a discussion of acceptable variations. See generally *Id.* at 280-85.

21. 428 U.S. at 188.

22. *Id.*

23. For the text of § (b)(7), see app. II(b). The petitioner in *Gregg* contended that "the seventh statutory aggravating circumstance . . . is so broad that capital punishment could be imposed in any murder case." 428 U.S. at 201 (footnote omitted).

24. 428 U.S. at 201 (footnote omitted).

early September, 1977, after which she left home to stay with her mother. Mrs. Godfrey then filed for divorce. On September 20, 1977, after his repeated efforts at reconciliation had failed, Godfrey shot his wife in the head from a vantage point outside her mother's trailer home as she sat at a table inside. He then hurried inside, struck his fleeing daughter with the barrel of his shotgun, reloaded the weapon and shot his mother-in-law in the head, killing her. While each woman died instantly, and within moments of the other, such a slaying left a predictably gory scene.²⁵

Godfrey was convicted of murder²⁶ in the first phase of his bifurcated trial and was sentenced to death following the second half of the proceeding.²⁷ The jury returned a written form stating that the aggravating circumstance it found to support the death sentence was that "each murder was 'outrageously or wantonly vile, horrible and inhuman.'"²⁸ The Georgia Supreme Court found the facts sufficient to support the jury's determination and, in the same sentence, held "the jury's phraseology was not objectionable."²⁹ The court then affirmed the sentence after determining, as required by statute,³⁰ that it had been neither imposed in passion³¹ nor was disproportionate to sentences resulting from similar cases.³²

The United States Supreme Court heard argument in *Godfrey v. Georgia*, and, on May 19, 1980, reversed the petitioner's death sentence and remanded the case to the Georgia Supreme Court for further proceedings.³³ While the opinion left Georgia statutory law untouched,³⁴ the Court applied the basic principles of *Furman* and *Gregg* in stating that "a State [which] wishes to authorize capital punishment has a constitutional

25. 446 U.S. at 424-25.

26. GA. CODE ANN. § 26-1101 (1978). For a complete text of this section, see Appendix II(a).

27. 446 U.S. at 426.

28. *Id.* The jury returned the verdict form pursuant to GA. CODE ANN. § 27-2534.1(c) (1978) which provides:

(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.

29. *Godfrey v. State*, 243 Ga. 302, 310, 253 S.E.2d 710, 718 (1979).

30. GA. CODE ANN. §§ 27-2537(c)(2)-(3) (1978).

31. 243 Ga. at 310, 253 S.E.2d at 718 (1979).

32. *Id.*

33. 446 U.S. at 433.

34. *Id.* at 422-23.

responsibility to tailor and apply its law in a manner that avoids . . . arbitrary and capricious infliction of the death penalty,"³⁵ a standard the Georgia court failed to meet.³⁶

Mr. Justice Stewart framed the issue in *Godfrey* as "whether . . . 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."³⁷ The plurality opinion³⁸ did concede that the Georgia Supreme Court had, in its earlier cases of *Harris v. State*³⁹ and *Blake v. State*,⁴⁰ narrowed the possible application of the section so that its scope was not so broad as to grant impermissible latitude to the sentencing authority.⁴¹ This narrowing had been accomplished in two ways. First, the prefatory words were construed to connote the same degree of contemptibility.⁴² Second, the three standards for evaluating the heinous nature of the crime were defined in terms of one another so as to become, essentially, a single requirement of severe physical harm to the victim before his murder.⁴³ The Supreme Court of Georgia itself summarized this latter

35. *Id.* at 428.

36. *Id.* at 432.

37. *Id.* at 423 (footnote omitted).

38. Justice Stewart wrote the plurality opinion and was joined by Justices Blackmun, Powell and Stevens. *Id.* at 422. Justices Marshall and Brennan concurred in the judgment. *Id.* at 433.

39. 237 Ga. 718, 230 S.E.2d 1 (1976). Petitioner shot his victim in the head saying, "I don't want nothing you've got, except your life." *Id.* at 720, 230 S.E.2d at 4. He was convicted and sentenced to death. While the United States Supreme Court, in *Godfrey*, noted "that the *Harris* case apparently did not involve 'torture,'" it appeared to ignore that fact in its use of the legal reasoning from the case. 446 U.S. at 432 n.13.

40. 239 Ga. 292, 236 S.E.2d 637 (1977). The petitioner admitted to throwing his girlfriend's two year old daughter to her death from a bridge 100 feet high. The child drowned. *Id.* at 294, 236 S.E.2d at 640. The court noted that "[a]lthough there may be no direct evidence of suffering by the victim, the circumstances amply demonstrate it." *Id.* at 297, 236 S.E.2d at 641.

41. See generally notes 22-24 *supra* and accompanying text.

42. The Georgia Supreme Court stated in *Blake* "[w]e find no significant dissimilarity between outrageously vile, wantonly vile, horrible or inhuman." 239 Ga. at 299, 236 S.E.2d at 643.

43. The United States Supreme Court stated in *Godfrey* that:

The *Harris* and *Blake* opinions suggest that the Georgia Supreme Court had by 1977 reached three separate but consistent conclusions respecting the § (b)(7) aggravating circumstances. 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

narrowing to mean that "[t]he depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim."⁴⁴ In light of the Georgia court's requirement that the words "torture" and "aggravated battery" be construed in *pari materia*,⁴⁵ the conclusion that the aggravating circumstance of section (b)(7) has been narrowed to apply to that level of murder characterized only by "serious physical abuse of the victim before death"⁴⁶ seems inescapable.

With this constitutionally successful narrowing of section (b)(7) as a starting point, the plurality opinion concluded that the trial court and the Georgia Supreme Court had erred in their interpretation of law and application of law to fact in two ways. First, the Georgia Supreme Court failed to reverse the sentence for lack of the requisite physical torture in the slayings.⁴⁷ Second, the jury failed to enunciate the section (b)(7) aggravating circumstance in a manner that made "rationally reviewable the process for imposing a sentence of death."⁴⁸ This latter fault was complicated, in the plurality's view, by inadequate jury instructions.⁴⁹

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.

446 U.S. at 431 (footnotes omitted).

44. 239 Ga. at 299, 236 S.E.2d at 643.

45. 446 U.S. at 431. *In pari materia* is defined as "[u]pon the same matter or subject." BLACK'S LAW DICTIONARY 711 (5th ed. 1979). See note 43 *supra*.

46. 446 U.S. at 431. See note 43 *supra*. The Chief Justice seems to agree with this reading of Georgia case law. "The plurality's *novel physical torture requirement* may provide an 'objective' criterion, but it hardly separates those for whom a state may prescribe the death sentence from those for whom it may not." 446 U.S. at 443 (Burger, C.J., dissenting)(emphasis added).

47. 446 U.S. at 432. Justice White, implicitly disagreeing that torture must be physical to meet § (b)(7) requirements, contested this finding by the plurality.

[W]ho among us can honestly say that Mrs. Wilkerson did not feel "torture" in her last sentient moments. Her daughter, an instant ago a living being sitting across the table from Mrs. Wilkerson, lay prone on the floor, a bloodied and mutilated corpse. The seconds ticked by; enough time for her son-in-law to reload his gun, to enter the home, and to take a gratuitous swipe at his daughter. What terror must have run through her 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? And if this was not torture, can it honestly be said that petitioner did not exhibit a "depravity of mind" in carrying out this cruel drama to its mischievous and murderous conclusion?

Id. at 450-51 (White, J., dissenting). At the very least, Justice White would apparently contend that psychological torture meets the Georgia requirement that "the depravity of mind contemplated by the statute is that which results in torture . . . to the victim." 239 Ga. at 299, 236 S.E.2d at 643.

48. 446 U.S. at 428 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 303 (opinion of Stewart, Powell, and Stevens, JJ.) (1976)).

49. 446 U.S. at 428.

The Georgia Supreme Court is statutorily required to examine independently the trial evidence and to ensure that it supports the finding of an aggravating circumstance.⁵⁰ The United States Supreme Court determined that Georgia's highest court had failed to carry out its duty properly.⁵¹ The plurality opinion noted that the trial judge, in his sentencing report, had found no torture and that "[t]hree times during the course of his argument the prosecutor stated that the case involved no allegation of 'torture' or of an 'aggravated battery.'"⁵² Asserting that "it is constitutionally irrelevant that the petitioner used a shotgun . . . as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer,"⁵³ the Court concluded that "nothing in the record before us suggests . . . the petitioner committed an aggravated battery upon his wife or mother-in-law or . . . caused either . . . to suffer any physical injury preceding their deaths."⁵⁴ Therefore, the opinion continued, "[t]he circumstances of this case . . . do not satisfy the criteria laid out by the Georgia Supreme Court itself in the *Harris* and *Blake* cases."⁵⁵ The petitioner's "crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder."⁵⁶

The Supreme Court's willingness to reverse Godfrey's death sentence on this basis is itself significant, being indicative of a heightened willing-

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

51. 446 U.S. at 432.

52. *Id.* at 426.

53. *Id.* at 433 n.16. However, Justice White denied the validity of this contention.

[It] ignores the obvious correlation between gruesomeness and "depravity of mind," between gruesomeness and "aggravated battery," between gruesomeness and "horrible," between gruesomeness and "vile," and between gruesomeness and "inhuman." Mere gruesomeness, to be sure, would not itself serve to establish the existence of § (b)(7). But it certainly fares sufficiently well as an indicator of this particular aggravating circumstance to signal to a reviewing court the distinct possibility that the terms of the provision, upon further investigation, might well be met in the circumstances of the case.

Id. at 450 n.2.

54. *Id.* at 432.

55. *Id.* But see notes 47 and 53 *supra*.

56. *Id.* at 433. This view, however, was not universally approved.

The plurality opinion states that there is no indication that petitioner's mind was any more depraved than that of any other murderer. *Ante*, at 433. The Court thus assumes the role of a finely tuned calibrator of depravity, demarcating for a watching world the various gradations of dementia that lead men and women to kill their neighbors. I should have thought that, in light of our other duties, such a function would better be performed by the state court statutorily charged with the mission. And unless this Court is willing to supplant the Georgia Supreme Court in the statutory scheme, it would be well-advised to reconsider its position.

Id. at 456 n.6 (White, J., dissenting).

ness on its part to closely scrutinize a state supreme court's review of trial facts and to alter the state court's ruling if the Justices would not personally have decided the case the same way.⁵⁷ *Godfrey* will be important to states imposing the death penalty if, for no other reason, than that it provides hard evidence of this tendency.

There are, however, even more fundamental implications in *Godfrey*, with respect to the language of section (b)(7). Mr. Justice Stewart cited with approval the Georgia Supreme Court's narrowing constructions of section (b)(7) which had inter-defined the notion of a depraved mental state with those of torture and aggravated battery.⁵⁸ The definitions are so intertwined that one cannot find depravity without a showing of serious physical harm to the victim before death.⁵⁹ The plurality opinion did more, however, than merely approve Georgia's construction of section (b)(7).⁶⁰ Rather than accepting it as one of any number of possible ways to narrow the statute, the Court endorsed it as the minimum standard which will still provide the jury with the "specific and detailed guidance"⁶¹ it must have to constitutionally apply the death penalty under the provisions of section (b)(7).⁶² The United States Supreme Court thereby adopted Georgia's physical harm theory as a constitutional prerequisite to the imposition of the death penalty under a statutory scheme requiring a finding of torture, depravity of mind or an aggravated battery to the victim. Mr. Justice Stewart would, essentially, require a finding of

57. The Chief Justice expressed this notion in his dissent. "More troubling than the plurality's characterization of petitioner's crime is the new responsibility that it assumes with today's decision—the task of determining on a case-by-case basis whether a defendant's conduct is egregious enough to warrant a death sentence." *Id.* at 443 (Burger, C.J., dissenting). Justice White likewise condemned this aspect of the decision. "Our mandate does not extend to interfering with factfinders in state criminal proceedings or with state courts that are responsibly . . . interpreting state law, unless . . . predicated on a violation of the Constitution. . . . [T]he issue here is not what *our* verdict would have been" *Id.* at 451 (White, J., dissenting).

58. See note 43 *supra* and accompanying text.

59. "[T]he depravity of mind contemplated by the statute is that which *results* in torture or aggravated battery to the victim." 239 Ga. at 299, 236 S.E.2d at 643.

60. "[T]he plurality appears to *require* 'evidence of serious physical abuse' before a sentence of death can be imposed under § (b)(7)." 446 U.S. at 443 (Burger, C.J., dissenting)(emphasis added).

61. *Id.* at 428.

62. The plurality did not permit the Georgia Supreme Court, by finding support for a § (b)(7) death penalty in the facts of the *Godfrey* murders, to retreat from its rigid interpretation of the section. While the United States Supreme Court may be constrained from construing a state statute, *Jurek v. Texas*, 428 U.S. 262, 272 n.7 (1976), it was willing, in this situation, to hold the Georgia court to a construction already made.

torture.⁶³

It follows, then, from such a contrived reading of the provisions of the statute, that merely reading its terms to a lay jury would not likely inform them of all the constitutionally derived nuances of meaning which attach to the statute's ordinary vocabulary.⁶⁴ This was the determination of the plurality. The jury in *Godfrey* was instructed by the trial court in the pure language of section (b)(7).⁶⁵ The Court criticized this instruction for giving "the jury *no guidance concerning the meaning of any § (b)(7) terms.*"⁶⁶ Mr. Justice Stewart expressed the opinion that "[a] person of ordinary sensibilities could fairly characterize almost every murder"⁶⁷ as falling within the scope of the section and that without further guidance from the trial court "the jury's interpretation of § (b)(7) can only be the subject of sheer speculation."⁶⁸

The United States Supreme Court also disapproved of the language the jury used to explain which aggravating circumstance it found to justify its imposition of the death penalty.⁶⁹ The plurality stated:

In the case before us the Georgia Supreme Court has affirmed a sentence of

63. In the plurality's view, the Georgia Supreme Court had adopted the physical torture standard to "restrict its 'approval of death penalties under this statutory aggravating circumstances to those cases that lie at the core.'" 446 U.S. at 429 (quoting *Harris v. State*, 237 Ga. 718, 733, 230 S.E.2d 1, 11 (1976). *But see* note 47 *supra*. Justice White would have had no trouble finding torture in Mrs. Godfrey's mother's mental trauma.

64. Justice Marshall stated this view succinctly. "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." 446 U.S. at 437 (Marshall, J., concurring). Otherwise, Justice Marshall continues his opposition to the death penalty as violative of the eighth and fourteenth amendments. *Id.* at 433.

65. *Id.* at 448.

66. *Id.* at 429 (emphasis added). Justice White disagrees that the words of the statute themselves are not adequately instructive.

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 § (b)(7). . . . Yet the opinion does not demonstrate that such definitions were provided in cases in which the plurality would agree that § (b)(7) was properly applied. Nor does the opinion 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.

Id. at 452 n.3 (White, J., dissenting).

67. *Id.* at 428.

68. *Id.* at 429.

69. The offensive language was: "[T]he offense of murder was outrageously or wantonly vile, horrible and inhuman." 243 Ga. at 310, 253 S.E.2d at 718. For full text of § (b)(7), see Appendix II(b).

death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible or inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the . . . infliction of the death sentence.⁷⁰

The Court saw the failure of the jury to explain which, if any, of the statutory criteria⁷¹ it followed in reaching its verdict as exacerbated by the trial court's faulty jury instructions.⁷² In other words, the jury gave no indication of its understanding of the statute, and the trial court had left it free to apply whatever understanding it may have had of the statutory provisions. This not only rendered impossible, in the plurality's opinion, adequate judicial review,⁷³ it also granted the jury impermissibly broad sentencing discretion resulting in "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not."⁷⁴

IV. *Godfrey v. Georgia*: POSSIBLE EFFECTS ON VIRGINIA LAW

The holding in *Godfrey* provokes questions concerning Virginia's employment of its statutory provisions equivalent to those of Georgia's section (b)(7).⁷⁵ These questions arise from the three points of law made in

70. 446 U.S. at 428. Justice White was again unconvinced.

I find [the] argument unpersuasive, for it is apparent that both the jury and the Georgia Supreme Court *understood and applied* § (b)(7) *in its entirety*. The trial court instructed the jurors that they were authorized to fix petitioner's punishment for murder as death or imprisonment for life and that they could consider any evidence in mitigation. . . . They were also specifically instructed to determine whether there was a statutory aggravating circumstance present beyond a reasonable doubt and that the aggravating circumstance that they could consider was "that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." . . . *That the jury's ultimate recitation of the aggravating circumstance was abbreviated reveals, in my view, no gap of constitutional magnitude* in its understanding of its duty. It is perfectly evident, moreover, that, in exercising its review function, the Georgia Supreme Court understood that the provision applied in its entirety, just as in the past it has insisted that the provision be read as a whole and not be applied disjunctively.

Id. at 448 (White, J., dissenting)(emphasis added).

71. The "criteria" to be found are that the crime "involved torture, depravity of mind, or an aggravated battery to the victim." GA. CODE ANN. § 27-2534.1(b)(7) (1978). As noted above, these "criteria" have, in the plurality's view, merged into a single "criterion" of "serious physical abuse of the victim before death." 446 U.S. at 431.

72. *Id.* at 429.

73. *Id.* It would not, however, disable the scope of judicial review envisioned by Justice White. See notes 56-57 *supra*.

74. 446 at 433.

75. VA. CODE ANN. § 19.2-264.2 (Cum. Supp. 1981). For full text see Appendix I(c).

the plurality opinion: first, a murder must involve serious physical injury to the victim prior to death before it may be adjudged "vile, horrible or inhuman;"⁷⁶ second, the trial court must give the jury guidance as to the meanings of the statute's terms; and, third, the jury must return a verdict indicating it understood the statute and applied its terms to the facts in a manner commensurate with an adequately channeled exercise of its sentencing discretion.⁷⁷ The questions of how closely Virginia law conforms to these strictures will, hopefully, be answered by examining the pertinent Virginia Supreme Court decisions and comparing them to the mandates of *Godfrey v. Georgia*.

The first problem is posed by the apparent requirement that physical abuse be present to classify a murder as "vile, horrible or inhuman." In the case of *Smith v. Commonwealth*,⁷⁸ the Virginia court seemed to begin the narrowing process carried out by the Georgia court in the *Harris* and *Blake* cases.⁷⁹ In *Smith* the supreme court responded to a contention that Virginia's "vileness" provisions⁸⁰ (the "second aggravating circumstance") were unconstitutionally vague⁸¹ by stating:

[I]t is conceivable that the language defining the second aggravating circumstance could be tortured to mean that proof of an intentional killing is all the proof necessary to establish that circumstance. We regard such a construction as strained, unnatural and manifestly contrary to the legislative intent. The General Assembly was selective in choosing the types of intentional homicide it felt justified a potential sentence of death; clearly, then, it did not intend to sweep all grades of murder into the capital class.⁸²

The opinion went on to define "depravity of mind" as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."⁸³ "Aggravated battery" was said to encompass "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder."⁸⁴ The court continued "that these are the only constructions rationally related to the commonly accepted connotation of the prefatory

76. 446 U.S. at 432.

77. *Id.* at 429.

78. 219 Va. 455, 248 S.E.2d 135 (1978). This was the first case decided after Virginia's current law was enacted.

79. See note 43 *supra* and accompanying text.

80. VA. CODE ANN. § 19.2-264.2 (Cum. Supp. 1981).

81. The argument for its unconstitutionality was basically the same as that advanced in *Gregg* concerning § (b)(7). See note 23 *supra*.

82. 219 Va. at 478, 248 S.E.2d at 149.

83. *Id.*

84. *Id.*

words 'outrageously or wantonly vile, horrible or inhuman.'"⁸⁵ While the court had thereby plainly narrowed the standard for review of this section, it developed its construction no further in the cases which followed, as they either quoted *Smith* or merely cited its rationale.⁸⁶

Until the recent opinion of *Justus v. Commonwealth*,⁸⁷ the cases in which the Virginia Supreme Court approved the penalty of death strongly implied that the court had adopted a severe physical injury standard for Virginia's second aggravating circumstance.⁸⁸ The opinion in *Justus* belies such an assertion. The supreme court in *Justus* found no error in the trial court's admission of two photographs into evidence:

[The photographs were used] to show the *extensive mutilation* of the victim's face caused by the gunshot wounds inflicted . . . at contact range. The evidence was admissible to show that the defendant's conduct was *outrageously and wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim.*⁸⁹

This opinion appears to violate the holding in *Godfrey* that mere gruesomeness in the chosen means of murder cannot serve as support for a finding of vileness.⁹⁰ As the victims in *Justus* and *Godfrey* suffered nearly identical fates, there is no justification for treating the cases differently. Moreover, there is no clearly articulated inter-definition of depravity and physical abuse on which Virginia law may rest; *Justus* indicates an understanding by the Virginia court which allows depravity of mind, though restricted by the definition in *Smith*,⁹¹ to exist independently of severe

85. *Id.*

86. See, e.g., *Clark v. Commonwealth*, 220 Va. 201, 211, 257 S.E.2d 784, 790 (1979) (quoting *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978)); *Waye v. Commonwealth*, 219 Va. 683, 700, 251 S.E.2d 202, 212 (1979) (quoting *Smith v. Commonwealth*).

87. 220 Va. 971, 266 S.E.2d 87 (1980) (conviction reversed for trial court's failure to strike a venireman for cause).

88. The Virginia Supreme Court approved death penalties based on the "second aggravating circumstance" in the following cases: *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979) (one decedent had been beaten and cut before being killed); *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979) (woman choked to death during robbery after being repeatedly struck in the face and having her head beaten on the floor); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979) (man killed after being assaulted with chloroform, knifed and robbed); *Mason v. Commonwealth*, 219 Va. 1091, 254 S.E.2d 116 (1979) (elderly woman burned to death after having a nail driven through her wrist, having been raped, beaten and sodomized with an ax handle); *Waye v. Commonwealth*, 219 Va. 683, 251 S.E.2d 202 (1979) (woman killed after being raped and receiving 42 stab wounds).

89. 220 Va. at 980, 266 S.E.2d at 93 (emphasis added).

90. 446 U.S. at 433 n.16.

91. See text accompanying notes 83-84 *supra*.

physical harm to the victim before death.⁹²

The second problem arises from the supreme court's willingness to approve death sentences, based on the crime's vileness, when the trial court's jury instructions were couched in the undefined terms of the statute,⁹³ or when the definitions given were "not artfully drawn."⁹⁴

This willingness first surfaced in *Clark v. Commonwealth*.⁹⁵ After reiterating its definitions from *Smith*, the court stated:

[The chosen construction of the terms] does not mean . . . that those definitions are the best or the only ones. We agree with the trial court that the terms used in the statute are *commonly used* and each has an *accepted meaning*. While the terms may have been defined in an instruction to the jury, in a manner satisfactory to this Court, the fact that *the trial court did not choose to give such a definitional instruction does not constitute reversible error*. Although in our review of this case we are guided by our definitions in *Smith*, it does not necessarily follow that these particular [ones] were necessary for the jury to determine whether the conduct of Clark was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind or aggravated battery to the victim.⁹⁶

92. This is, essentially, the position Justice White takes as well. He would permit a more subjective approach to qualify a murder as vile.

Who is to say that the murders of Mrs. Godfrey and Mrs. Wilkerson were not "vile," or "inhuman," or "horrible"? In performing his murderous chore, petitioner employed a weapon known for its disfiguring effects on targets, human or other, and he succeeded in creating a scene so macabre and revolting that, if anything, "vile," "horrible," and "inhuman" are descriptively inadequate.

446 U.S. at 450 (White, J., dissenting). Even he, however, would insist that the statute be read as a whole.

[T]he court in effect held that the section is to be read as a whole, construing "depravity of mind," "torture," and "aggravated battery" to flesh out the meaning of "vile," "horrible," and "inhuman." . . . Indeed [it] has expressly rejected an analysis that would apply the provision disjunctively, . . . an analysis that, if adopted, would arguably be assailable on constitutional grounds.

Id. at 454 (White, J., dissenting).

The Virginia court declined to adopt this reasoning from *Godfrey* in both *Turner v. Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980) and *Briley v. Commonwealth*, 221 Va. 563, 273 S.E.2d 57 (1980). In these cases, decided the same day, the court limited *Godfrey* very narrowly to its facts and held that the Virginia statutory scheme satisfied constitutional mandates by requiring "the jury [to] conclude that the conduct establishes *one* of the following: torture of the victim, an aggravated battery to the victim, or the perpetrator's depravity of mind." 221 Va. at 526, 273 S.E.2d at 45 (emphasis added).

93. See *Justus v. Commonwealth*, 220 Va. at 979, 266 S.E.2d at 92-93; *Clark v. Commonwealth*, 220 Va. at 211, 257 S.E.2d at 790.

94. See *Coppola v. Commonwealth*, 220 Va. 243, 254, 257 S.E.2d 797, 805 (1979).

95. 220 Va. 201, 257 S.E.2d 784 (1979).

96. *Id.* at 211, 257 S.E.2d at 790-91 (emphasis added).

This sentiment runs counter to the plurality's fear in *Godfrey* of "standardless and unchanneled imposition of death sentences [resulting from] the uncontrolled discretion of a *basically uninstructed jury*."⁹⁷ The condemned instructions in *Godfrey* had given "the jury no guidance concerning the meaning of [the statute's] terms."⁹⁸ Those instructions had been given in the exact words of the statute,⁹⁹ words identical to those in Virginia's second aggravating circumstance, words used as instructions in *Clark*.¹⁰⁰ The Virginia Supreme Court reconsidered this issue in *Justus* and emphatically reiterated its original position: "[T]he statutory language was recited in an instruction given to the jury. The argument [that it was error] advanced by the defendant has been considered and rejected by this court."¹⁰¹

The argument advanced by the Virginia court has, likewise, been "considered and rejected" by the United States Supreme Court. According to the plurality in *Godfrey* such instructions leave a jury's understanding of the statutory provisions to "be the subject of sheer speculation."¹⁰² The argument used by the Virginia court in *Clark*, that the statute's terms are "commonly used" and have "accepted meanings,"¹⁰³ is precisely the one used by the United States Supreme Court to invalidate such instructions; they leave the jury with unchecked discretion in applying the section to the defendant's conduct.¹⁰⁴

The final problem concerns the form in which a jury returns its verdict. The Virginia Supreme Court in *Clark* tolerated a jury returning the statutorily required sentence form¹⁰⁵ without explaining which standard it

97. 446 U.S. at 429 (emphasis added).

98. *Id.*

99. *Id.* at 448.

100. See text accompanying note 96 *supra*.

101. 220 Va. at 979, 266 S.E.2d at 92-93.

102. 446 U.S. at 429.

103. 220 Va. at 211, 257 S.E.2d at 790.

104. Justice Marshall supports this generalized view: "I believe that the vices of vagueness and intolerably broad discretion are present in any case in which an adequate narrowing construction of § (b)(7) was not read to the jury." 446 U.S. at 437 (Marshall, J., concurring).

105. VA. CODE ANN. § 19.2-264.4(D)(1) (Cum. Supp. 1981) provides:

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punish-

used to find that the crime was vile. "The most the parentheses could accomplish would be to indicate which factor, i.e. (torture), (depravity of mind) or (aggravated battery to the victim), the jury found."¹⁰⁶ By not including at least one of these parenthetical factors, the sentencing form would have been left reading "his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman."¹⁰⁷ This language is nearly identical to that of the jury's verdict in *Godfrey*.¹⁰⁸ The Supreme Court disapproved of such partial verdicts, as they fail to indicate a jury's understanding of the limits constitutionally inherent in its sentencing discretion.¹⁰⁹ While a narrow point, the positions of the Virginia and United States Supreme Courts are at odds on this issue, as they are on the preceding two.

V. CONCLUSION

On the basis of an analysis of *Godfrey v. Georgia*, taken in its historical context of *Furman*, *Gregg* and *Woodson*, there appear to be three areas of Virginia law which conflict with current Supreme Court thinking. The Virginia Supreme Court has not adequately narrowed its construction of Virginia's second aggravating circumstance, as it does not require proof that the victim suffered severe physical abuse before death. Also, the Virginia court has not required the trial court to give jury instructions explaining the meanings of the terms of the aggravating circumstance. Finally, the court has been willing to accept a verdict form which did not indicate the aggravating factor on which the jury based its death sentence.

One may attempt to distinguish *Godfrey* from the Virginia cases on the strength of statutory differences.¹¹⁰ Before a jury may initially find a defendant guilty, the Virginia capital murder statute requires it to determine the existence of a factor (the murder was committed during a rape, for example) which would constitute a separate aggravating circumstance

ment at death.

Signed. foreman"

106. 220 Va. at 213, 257 S.E.2d at 792. The court's use of the term "parentheses" evidently is meant to refer to the entire parenthetical expression, not merely the punctuation marks themselves.

107. See note 105 *supra* for full text of the jury verdict form.

108. "[T]he offense was 'outrageously or wantonly vile, horrible and inhuman.'" 446 U.S. at 428.

109. "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Id.*

110. Compare GA. CODE ANN. § 27-2534.1(b) (1978) with VA. CODE ANN. §§ 18.2-31, 19.2-264.2 (Cum. Supp. 1981). For text of these sections, see Appendices I and II.

under Georgia law. As the Virginia court noted, this represents a significant narrowing of the statute's scope.¹¹¹ Unlike Georgia, Virginia does not put every murderer at risk of execution.

Whether or not the United States Supreme Court will ultimately seize upon this difference, or another, is uncertain. *Woodson*, however, requires that there be a certainty "that death is the appropriate penalty in a specific case,"¹¹² and *Gregg* mandates that there be "a meaningful basis for distinguishing" the cases in which death is the penalty from those in which it is not.¹¹³ These two principles appear to bind the narrow, as well as the broad scheme. The Virginia Supreme Court should correct the three noted failings in its application of Virginia's second aggravating circumstance to ensure that this portion of Virginia capital punishment law is being constitutionally applied. The risk of not doing so is high. As Mr. Justice Stewart noted in *Jurek v. Texas*, only a state supreme court may construe a state statute.¹¹⁴ That would seem to leave the United States Supreme Court with a choice of either distinguishing *Godfrey* or declaring Virginia's second aggravating circumstance unconstitutional as applied.

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111. "The General Assembly was selective in choosing the types of intentional homicide it felt justified a potential sentence of death; clearly, then, it did not intend to sweep all grades of murder into the capital class." 219 Va. at 478, 248 S.E.2d at 149.

112. 428 U.S. at 304-05.

113. 428 U.S. at 188.

114. 428 U.S. at 272 n.7.

APPENDIX

I. *Virginia Code Sections*

(a) VA. CODE ANN. § 18.2-31 (Cum. Supp. 1981) provides:

The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money, or a pecuniary benefit;

(b) The willful, deliberate and premeditated killing of any person by another for hire;

(c) The willful, deliberate and premeditated killing of any person by an inmate in a penal institution as defined in § 53-19.18, or while in the custody of an employee thereof;

(d) The willful, deliberate and premediated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premediated killing of a person during the commission of, or subsequent to rape;

(f) The willful, deliberate and premediated killing of a law-enforcement officer as defined in § 9-108.1 H when such a killing is for the purpose of interfering with the performance of his official duties;

(g) The willful, deliberate and premeditated killing of more than one person as a part of the same act or transaction.

(b) VA. CODE ANN. § 19.2-264.3 (Cum. Supp. 1981) provides:

A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment for such offense as provided by law.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in § 19.2-264.4.

(c) VA. CODE ANN. § 19.2-264.2 (Cum. Supp. 1981) provides:

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the

offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

II. *Georgia Code Sections*

(a) GA. CODE ANN. § 26-1101 (1978) provides:

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

(b) GA. CODE ANN. § 27-2534.1(b) (1978) provides:

(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 robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a 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 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 outra-

geously or wantonly vile, horrible or inhumane 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) GA. CODE ANN. § 26-3102 (1978) provides:

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.

