CAPITAL PUNISHMENT:
RACE, POVERTY & DISADVANTAGE

Yale University
Professor Stephen B. Bright

Class Three - Part Two

AGGRAVATING CIRCUMSTANCES

Walter ZANT, Warden
v.
Alpha Otis O'Daniel STEPHENS

United States Supreme Court
462 U.S. 862, 103 S.Ct. 2733 (1983).

Stevens, J., delivered the opinion of the Court. White, J., filed an opinion concurring in part and concurring in the judgment. Rehnquist, J., filed an opinion concurring in the judgment. Marshall, J., filed a dissenting opinion, in which Brennan, J., joined.

Justice STEVENS delivered the opinion of the Court.

The question presented is whether respondent's death penalty must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Supreme Court of Georgia, although the other two aggravating circumstances were specifically upheld. The answer depends on the function of the jury's finding of an aggravating circumstance under Georgia's capital sentencing statute, and on the reasons that the aggravating circumstance at issue in this particular case was found to be invalid.

* * *

The trial judge instructed the jury that under the law of Georgia "every person found guilty of Murder shall be punished by death or by imprisonment for life, the sentence to be fixed by the jury trying the case." He explained that the jury was authorized to consider all of the evidence received during the trial as well as all facts and circumstances presented in extenuation, mitigation, or aggravation during the sentencing proceeding. He then stated:

> You may consider any of the following statutory aggravating circumstances which you find are supported by the evidence. One, the offense of Murder 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. Two, 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. Three, the offense of Murder was committed by a person who has escaped from the lawful custody of a peace officer or place of lawful confinement. These possible statutory circumstances are stated in writing and will be out with you during your deliberations on the sentencing phase of this case. They are in writing here, and I shall send this out with you. If the jury verdict on sentencing fixes punishment at death by electrocution you shall designate in writing, signed by the foreman, the aggravating circumstances or circumstance which you found to have been proven beyond a reasonable doubt. Unless one or more of these statutory aggravating circumstances are proved beyond a reasonable doubt you will not be authorized to fix punishment at death.

The jury followed the Court's instruction and

imposed the death penalty. It designated in writing that it had found the aggravating circumstances described as "One" and "Three" in the judge's instruction. It made no such finding with respect to "Two". * * *

While [Stephens'] appeal was pending, the Georgia Supreme Court held * * * that the aggravating circumstance described in the second clause of (b)(1) – "a substantial history of serious assaultive criminal convictions" – was unconstitutionally vague. Because such a finding had been made by the jury in this case, the Georgia Supreme Court, on its own motion, considered whether it impaired respondent's death sentence. It concluded that the two other aggravating circumstances adequately supported the sentence.

After the Federal District Court had denied a petition for habeas corpus, the United States Court of Appeals for the Fifth Circuit [. . .] held that the death penalty was invalid because one of the aggravating circumstances found by the jury was later held unconstitutional.

* * *

We granted Warden Zant's petition for certiorari.

* * * Although the Georgia Supreme Court had consistently stated that the failure of one aggravating circumstance does not invalidate a death sentence that is otherwise adequately supported, we concluded that an exposition of the state-law premises for that view would assist in framing the precise federal constitutional issues presented by the Court of Appeals' holding. We therefore sought guidance from the Georgia Supreme Court pursuant to Georgia's statutory certification procedure. * * *

* * * The [Georgia Supreme] Court then explained the state-law premises for its treatment of aggravating circumstances by analogizing the entire body of Georgia law governing homicides to a pyramid. It explained:

All cases of homicide of every category are contained within the pyramid. The consequences flowing to the perpetrator increase in severity as the cases proceed from the base of the apex, with the death penalty applying only to those few cases which are contained in the space just beneath the apex. To reach that category a case must pass through three planes of division between the base and the apex.

The first plane of division above the base separates from all homicide cases those which fall into the category of murder. This plane is established by the legislature in statutes defining terms such as murder, voluntary manslaughter, involuntary manslaughter, and justifiable homicide. In deciding whether a given case falls above or below this plane, the function of the trier of facts is limited to finding facts. The plane remains fixed unless moved by legislative act.

The second plane separates from all murder cases those in which the penalty of death is a possible punishment. This plane is established by statutory definitions of aggravating circumstances. The function of the factfinder is again limited to making a determination of whether certain facts have been established. Except where there is treason or aircraft hijacking, a given case may not move above this second plane unless at least one statutory aggravating circumstance exists.

The third plane separates, from all cases in which a penalty of death may be imposed, those cases in which it shall be imposed. There is an absolute discretion in the factfinder to place any given case below the plane and not impose death. The plane itself is established by the factfinder. In establishing the plane, the factfinder considers all evidence in extenuation, mitigation and aggravation of punishment. * * * There is a final limitation on the imposition of the death penalty resting in the automatic appeal procedure: This court determines whether the penalty of death was imposed under the influence of passion,

prejudice, or any other arbitrary factor; whether the statutory aggravating circumstances are supported by the evidence; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. * * * Performance of this function may cause this court to remove a case from the death penalty category but can never have the opposite result.

The purpose of the statutory aggravating circumstances is to limit to a large degree, but not completely, the factfinder's discretion. Unless at least one of the ten statutory aggravating circumstances exists, the death penalty may not be imposed in any event. If there exists at least one statutory aggravating circumstance, the death penalty may be imposed but the factfinder has a discretion to decline to do so without giving any reason. * * * In making the decision as to the penalty, the factfinder takes into consideration all circumstances before it from both the guilt-innocence and the sentence phases of the trial. These circumstances relate both to the offense and the defendant.

A case may not pass the second plane into that area in which the death penalty is authorized unless at least one statutory aggravating circumstance is found. However, this plane is passed regardless of the number of statutory aggravating circumstances found, so long as there is at least one. Once beyond this plane, the case enters the area of the factfinder's discretion, in which all the facts and circumstances of the case determine in terms of our metaphor, whether or not the case passes the third plane and into the area in which the death penalty is imposed.

* * *

In Georgia, unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard. Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty. For this reason, respondent argues that Georgia's statutory scheme is invalid under the holding in *Furman v. Georgia*.

* * *

[Stephens] argues that the mandate of *Furman* is violated by a scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute. But that argument could not be accepted without overruling our specific holding in *Gregg*. For the Court approved Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances.

* * *

Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death.

The Georgia scheme provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage. We therefore remain convinced, as we were in 1976, that the structure of the statute is constitutional. Moreover, the narrowing function has been properly achieved in this case by the two valid aggravating circumstances upheld by the Georgia Supreme Court – that respondent had escaped from lawful

confinement, and that he had a prior record of conviction for a capital felony. These two findings adequately differentiate this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed. Moreover, the Georgia Supreme Court in this case reviewed the death sentence to determine whether it was arbitrary, excessive, or disproportionate. Thus the absence of legislative or court-imposed standards to govern the jury in weighing the significance of either or both of those aggravating circumstances does not render the Georgia capital sentencing statute invalid as applied in this case.

* * *

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

* * * Today the Court upholds a death sentence that was based in part on a statutory aggravating circumstance which the State concedes was so amorphous that it invited "subjective decision-making without . . . minimal, objective guidelines for its application." In order to reach this surprising result, the Court embraces the theory, which it infers from the Georgia Supreme Court response to this Court's certified question, that the only function of statutory aggravating circumstances in Georgia is to screen out at the threshold defendants to whom none of the 10 circumstances applies. According to this theory, once one of the 10 statutory factors has been found, they drop out of the picture entirely and play no part in the jury's decision whether to sentence the defendant to death. Relying on this "threshold" theory, the Court concludes that the submission of the unconstitutional statutory factor did not prejudice respondent.

* * *

Today we learn for the first time that the Court did not mean what it said in *Gregg v. Georgia*. We now learn that the actual decision whether a defendant lives or dies may still be left to the unfettered discretion of the jury. Although we were assured in Gregg that sentencing discretion was "to be exercised by clear and objective standards," we are now told that the State need do nothing whatsoever to guide the jury's ultimate decision whether to sentence a defendant to death or spare his life.

Under today's decision all the State has to do is require the jury to make some threshold finding. Once that finding is made, the jurors can be left completely at large, with nothing to guide them but their whims and prejudices. They need not even consider any statutory aggravating circumstances that they have found to be applicable. Their sentencing decision is to be the product of their discretion and of nothing else.

If this is not a scheme based on "standardless jury discretion," *Gregg v. Georgia*, 428 U.S., at 195, n. 47, I do not know what is. Today's decision makes an absolute mockery of this Court's precedents concerning capital sentencing procedures. There is no point in requiring State legislatures to identify specific aggravating circumstances if sentencers are to be left free to ignore them in deciding which defendants are to die. If this is all *Gregg v. Georgia* stands for, the States may as well be permitted to reenact the statutes that were on the books before *Furman*.

The system of discretionary sentencing that the Court approves today differs only in form from the capital sentencing procedures that this Court held unconstitutional more than a decade ago. The only difference between Georgia's pre-*Furman* capital sentencing scheme and the "threshold" theory that the Court embraces today is that the unchecked discretion previously conferred in all cases of murder is now conferred in cases of murder with one statutory aggravating circumstance. But merely circumscribing the category of cases eligible for the death penalty cannot remove from constitutional scrutiny the procedure by which those actually sentenced to death are selected.

* * *

* * * It is patently unfair to assume that the jury that sentenced respondent somehow

understood that statutory aggravating circumstances were to receive no special weight and were not to be balanced against mitigating circumstances. Respondent is "entitled to have the validity of [his sentence] appraised on consideration of the case as it was tried and as the issues were determined in the trial court," * * * not on a theory that has been adopted for the first time after the fact.

* * *

* * * [T]his Court's decisions establish that the actual determination whether a defendant shall live or die – and not merely the threshold decision whether he is eligible for a death sentence – must be guided by clear and objective standards. The focus of the sentencer's attention must be directed to specific factors whose existence or nonexistence can be determined with reasonable certainty. * * *

Lowenfield v. Phelps

In *Lowenfield v. Phelps*, 484 U.S. 231 (1988), the Court rejected the contention that the Eighth Amendment was violated when an aggravating circumstance found at the penalty phase duplicated an element of the crime of which the defendant was convicted at the guilt phase. Lowenfield was convicted of three counts of first degree murder. An essential element of first-degree murder, set out in the Louisiana statutes, was that the defendant intended "to kill or inflict great bodily harm upon more than one person." After convicting Lowenfield of first degree murder, the jury imposed the death penalty finding as the sole aggravating circumstance that he "knowingly created a risk of death or great bodily harm to more than one person."

Lowenfield asserted that because the sole aggravating circumstance found by the jury phase was identical to an element of the crime of which he was convicted, the jury at the sentencing phase was free merely to repeat its findings made in the guilt phase, and thus not narrow in the sentencing phase the class of death-eligible murderers. The Court, in an opinion by Chief Justice Rehnquist, held:

> The use of "aggravating circumstances" is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in *Jurek v. Texas*, establishes this point.

After discussing how Texas had narrowed those eligible for the death penalty by its definition of capital murder – decided by the jury at the guilt phase – and finding that Louisiana's statutes regarding homicide operated in a similar manner, the Chief Justice continued:

> * * * [T]he narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. * * *
>
> Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution

requires no more.

Justice Marshall, joined by Justices Brennan and Stevens, dissented, stating:

> [N]arrowing the class of death eligible offenders is not "an end in itself" any more than aggravating circumstances are. Rather, as our cases have emphasized consistently, the narrowing requirement is meant to channel the discretion of the sentencer. It forces the capital sentencing jury to approach its task in a structured, step-by-step way, first determining whether a defendant is eligible for the death penalty and then determining whether all of the circumstances justify its imposition.
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> * * *
>
> * * * [T]he application of the Louisiana sentencing scheme in cases like this one, where there is a complete overlap between aggravating circumstances found at the sentencing phase and elements of the offense previously found at the guilt phase, violates constitutional principles in ways that will inevitably tilt the sentencing scales toward the imposition of the death penalty. The State will have an easier time convincing a jury beyond a reasonable doubt to find a necessary element of a capital offense at the guilt phase of a trial if the jury is unaware that such a finding will make the defendant eligible for the death penalty at the sentencing phase. Then the State will have an even easier time arguing for the imposition of the death penalty, because it can remind the jury at the sentencing phase, as it did in this case, that the necessary aggravating circumstances already have been established beyond a reasonable doubt. The State thus enters the sentencing hearing with the jury already across the threshold of death eligibility, without any awareness on the jury's part that it had crossed that line.

Ending Arbitrariness?

Aggravating circumstances such as murder in the commission of another felony do no narrow those sentenced to death to the worst of the worst.[1] Prosecutorial discretion from one judicial district to the next makes it possible that an individual who is accused of murder in one district may be significantly more likely to be charged with a capital offense than if he or she committed the crime in another district.[2] Even if a prosecutor decides to charge a capital offense, the case may be resolved with a plea bargain with a sentence of life imprisonment (usually without the possibility of release or parole) based on factors such as the strength of the case, public opinion, the wishes of the victim's family, whether the defendant is willing to cooperate in another trial, and other factors.

There are other factors as well, including whether the broad "catch-all" factors, such as "heinous, atrocious and cruel" or "vile, horrible and inhuman" narrow the sentencer's discretion sufficiently to prevent arbitrariness. We turn to that in the following section.

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1. *See, e.g.,* Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murders: A California Case Study*, 59 FLA. L. REV. 719 (2007). (detailing how the overbroad robbery-murder statute results in arbitrary imposition of the death penalty and does not narrow to the worst of the worst).

2. *See* Andrew Ditchfield, *Challenging the Interstate Disparities in the Application of Capital Punishment Statutes*, 95 GEO. L.J. 801, 810-20 (2007).

Vagueness and Overbreadth Challenges to Aggravating Circumstances

> There is, of course, something distasteful and absurd in the very project of parsing this lexicon of death. But as long as we are in the death business, we shall be in the parsing business as well.
>
> - Justice Harry A. Blackmun, dissenting in *Arave v. Creech*, 507 U.S. 463, 489 (1993)

Robert Franklin GODFREY, Petitioner,
v.
State of GEORGIA.

Supreme Court of the United States
446 U.S. 420, 100 S.Ct. 1759 (1980).

Stewart, J., announced the judgment of the Court and delivered an opinion, in which Blackmun, Powell, and Stevens, JJ., joined. Marshall, J., concurred in the judgment and filed an opinion in which Brennan, J., joined. Burger, C.J., dissented and filed an opinion. White, J., dissented and filed an opinion in which Rehnquist, J., joined.

Mr. Justice STEWART announced the judgment of the Court and delivered an opinion, in which Mr. Justice BLACKMUN, Mr. Justice POWELL, and Mr. Justice STEVENS joined.

Under Georgia law, a person convicted of murder may be sentenced to death if it is 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." Ga.Code § 27- 2534.1(b)(7) (1978). * * *

* * * The issue now before us is 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 § (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution.

I

On a day in early September in 1977, the petitioner and his wife of 28 years had a heated argument in their home. During the course of this altercation, the petitioner, who had consumed several cans of beer, threatened his wife with a knife and damaged some of her clothing. At this point, the petitioner's wife declared that she was going to leave him, and departed to stay with relatives. That afternoon she went to a Justice of the Peace and secured a warrant charging the petitioner with aggravated assault. A few days later, while still living away from home, she filed suit for divorce. Summons was served on the petitioner, and a court hearing was set on a date some two weeks later. Before the date of the hearing, the petitioner on several occasions asked his wife to return to their home. Each time his efforts were rebuffed. At some point during this period, his wife moved in with her mother. The petitioner believed that his mother-in-law was actively instigating his wife's determination not to consider a possible reconciliation.

In the early evening of September 20, according to the petitioner, his wife telephoned him at home. Once again they argued. * * * The conversation was terminated after she said that she would call back later. This she did in an hour or so. The ensuing conversation was, according to the petitioner's account, even more heated than the first. His wife reiterated her stand that reconciliation was out of the question, said that she still wanted all proceeds from the sale of their house, and mentioned that her mother was supporting her position. Stating that she saw no further use in talking or arguing, she hung up.

At this juncture, the petitioner got out his shotgun and walked with it down the hill from his home to the trailer where his mother-in-law lived. Peering through a window, he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game. He pointed the shotgun at his wife through the window and pulled the trigger. The charge from the gun struck his wife in the forehead and killed her instantly. He proceeded

into the trailer, striking and injuring his fleeing daughter with the barrel of the gun. He then fired the gun at his mother-in-law, striking her in the head and killing her instantly.

The petitioner then called the local sheriff's office, identified himself, said where he was, explained that he had just killed his wife and mother-in-law, and asked that the sheriff come and pick him up. Upon arriving at the trailer, the law enforcement officers found the petitioner seated on a chair in open view near the driveway. He told one of the officers that "they're dead, I killed them" and directed the officer to the place where he had put the murder weapon. Later the petitioner 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."

The petitioner was subsequently indicted on two counts of murder and one count of aggravated assault. He pleaded not guilty and relied primarily on a defense of temporary insanity at his trial. The jury returned verdicts of guilty on all three counts.

The sentencing phase of the trial was held before the same jury. No further evidence was tendered, but counsel for each side made arguments to the jury. Three times during the course of his argument, the prosecutor stated that the case involved no allegation of "torture" or of an "aggravated battery." When counsel had completed their arguments, the trial judge instructed the jury orally and in writing on the standards that must guide them in imposing sentence. Both orally and in writing, the judge quoted to the jury the statutory language of the § (b)(7) aggravating circumstance in its entirety.

The jury imposed sentences of death on both of the murder convictions. As to each, the jury specified that the aggravating circumstance they had found beyond a reasonable doubt was "that the offense of murder was outrageously or wantonly vile, horrible and inhuman."

* * *

The Georgia Supreme Court affirmed * * *. [It] rejected the petitioner's contention that § (b)(7) is unconstitutionally vague. The court noted that Georgia's death penalty legislation had been upheld in *Gregg v. Georgia*, and cited its prior decisions upholding § (b)(7) in the face of similar vagueness challenges. As to the petitioner's argument that the jury's phraseology was, as a matter of law, an inadequate statement of § (b)(7), the court responded by simply observing that the language "was not objectionable." The court found no evidence that the sentence had been "imposed under the influence of passion, prejudice, or any other arbitrary factor," held that the sentence was neither excessive nor disproportionate to the penalty imposed in similar cases, and stated that the evidence supported the jury's finding of the § (b)(7) statutory aggravating circumstance. Two justices dissented.

II

In *Furman v. Georgia*, the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. *Gregg v. Georgia* reaffirmed this holding:

> [W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

A capital sentencing scheme must, in short, provide a "'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'"

This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." It 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." As was made clear in *Gregg*, a death penalty "system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur."

In the case before us the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was "outrageously or wantonly vile, horrible and inhuman." There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These 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.

The 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. Under state law that court may not affirm a judgment of death until it has independently assessed the evidence of record and determined that such evidence supports the trial judge's or jury's finding of an aggravating circumstance.

In past cases the State Supreme Court has apparently understood this obligation as carrying with it the responsibility to keep § (b)(7) within constitutional bounds. Recognizing that "there is a possibility of abuse of [the § (b)(7)] statutory aggravating circumstance," the court has emphasized that it will not permit the language of that subsection simply to become a "catchall" for cases which do not fit within any other statutory aggravating circumstance. Thus, in exercising its function of death sentence review, the court has said that it will restrict its "approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core."

* * *

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

The Georgia courts did not, however, so limit § (b)(7) in the present case. No claim was made, and nothing in the record before us suggests, that the petitioner 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. Moreover, in the trial court, the prosecutor repeatedly told the jury – and the trial judge wrote in his sentencing report [to the Georgia Supreme Court] – that the murders did not involve "torture." Nothing said on appeal by the Georgia Supreme Court indicates that it took a different view of the evidence. The circumstances of this case, therefore, do not satisfy the criteria laid out by the Georgia Supreme Court itself in [its prior] cases. In holding that the evidence supported the jury's § (b)(7) finding, the State Supreme Court simply asserted that the verdict was "factually substantiated."

Thus, the validity of the petitioner's death sentences turns on whether, in light of the facts and circumstances of the murders that he was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind . . . ."[15] We conclude that the answer must be no. The petitioner's crimes cannot be said to have reflected a consciousness materially more "depraved" than that of any person guilty of murder. His victims were killed instantaneously.[16] They were members of his family who were causing him extreme emotional trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes. These factors certainly did not remove the criminality from the petitioner's acts. But, as was said in *Gardner v. Florida*, 430 U.S. 349, 358, 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."

That cannot be said here. There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not. Accordingly, the judgment of the Georgia Supreme Court insofar as it leaves standing the petitioner's death sentences is reversed, and the case is remanded to that court for further proceedings.

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15. The sentences of death in this case rested exclusively on § (b)(7). Accordingly, we intimate no view as to whether or not the petitioner might constitutionally have received the same sentences on some other basis. Georgia does not, as do some States, make multiple murders an aggravating circumstance, as such.

16. In light of this fact, it is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of § (b)(7) so as to include all murders resulting in gruesome scenes would be totally irrational.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, concurring in the judgment.

* * *

* * * I readily agree with the plurality that, as applied in this case, § (b)(7) is unconstitutionally vague. * * *

* * *

In addition, I think it necessary to emphasize that even under the prevailing view that the death penalty may, in some circumstances, constitutionally be imposed, it is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. 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. Such a defect could 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.

* * *

* * * The Georgia Supreme Court has given no real content to § (b)(7) in by far the majority of the cases in which it has had an opportunity to do so. * * * In no case has the Georgia court required a narrowing construction to be given to the jury – an indispensable method for avoiding the "standardless and unchanneled imposition of death sentences." * * *

* * * Just five years before *Gregg*, Mr. Justice Harlan stated for the Court that the tasks of

identifying "before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and [of] express[ing] these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be . . . beyond present human ability." * * *

* * * I believe that the Court * * * was substantially correct in concluding that the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system. For this reason, I remain hopeful that * * *, [the Court] it may eventually conclude that the effort to eliminate arbitrariness in the infliction of that ultimate sanction is so plainly doomed to failure that it – and the death penalty – must be abandoned altogether.

Mr. Chief Justice BURGER, dissenting.

After murdering his wife and mother-in-law, petitioner informed the police that he had committed a "hideous" crime. The dictionary defines hideous as "morally offensive," "shocking," or "horrible." Thus, the very curious feature of this case is that petitioner himself characterized his crime in terms equivalent to those employed in the Georgia statute. For my part, I prefer petitioner's characterization of his conduct to the plurality's effort to excuse and rationalize that conduct as just another killing. The jurors in this case, who heard all relevant mitigating evidence obviously shared that preference; they concluded that this "hideous" crime was "outrageously or wantonly vile, horrible and inhuman" within the meaning of § (b)(7).

* * *

* * * It is this Court's function to insure that the rights of a defendant are scrupulously respected; and in capital cases we must see to it that the jury has rendered its decision with meticulous care. But it is emphatically not our province to second-guess the jury's judgment or to tell the states which of their "hideous," intentional murderers may be given the ultimate penalty. Because the plurality does both, I dissent.

Mr. Justice WHITE, with whom Mr. Justice REHNQUIST joins, dissenting.

* * *

* * * Our role is to correct genuine errors of constitutional significance resulting from the application of Georgia's capital sentencing procedures; our role is not to peer majestically over the lower court's shoulder so that we might second-guess its interpretation of facts that quite reasonably – perhaps even quite plainly – fit within the statutory language.[2]

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.

And who among us can honestly say that Mrs. Wilkerson did not feel "torture" in her last

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2. The plurality opinion states that "[a]n interpretation of § (b)(7) so as to include all murders resulting in gruesome scenes would be totally irrational" and that the fact that both "victims were killed instantaneously" makes the gruesomeness of the scene irrelevant. This view ignores the indisputable truth that Mrs. Wilkerson did not die "instantaneously"; she had many moments to contemplate her impending death, assuming that the stark terror she must have felt permitted any contemplation. More importantly, it also ignores the obvious correlation between gruesomeness and "depravity of mind," and "vile," and between gruesomeness and "inhuman." Mere gruesomeness, to be sure, would not itself serve to establish the existence of statutory aggravating circumstance. § (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.

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? I should have thought, moreover, that the Georgia court could reasonably have deemed the scene awaiting the investigating policemen as involving "an aggravated battery to the victim[s]."

The point is not that, in my view, petitioner's crimes were definitively vile, horrible, or inhuman, or that, as I assay the evidence, they beyond *any* doubt involved torture, depravity of mind, or an aggravated battery to the victims. Rather, the lesson is a much more elementary one, an instruction that, I should have thought, this Court would have taken to heart long ago. Our mandate does not extend to interfering with factfinders in state criminal proceedings or with state courts that are responsibly and consistently interpreting state law, unless that interference is predicated on a violation of the Constitution. * * *

* * *

The Georgia Supreme Court has * * * been responsible and consistent in its construction of § (b)(7). The provision has been the exclusive or nonexclusive basis for imposition of the death penalty in over 30 cases. In one excursus on the provision's language, the 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." I see no constitutional error resulting from this understanding of the provision. 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. And the court has noted that it would apply the provision only in "core" cases and would not permit § (b)(7) to become a "catchall."

* * *

* * * The Georgia Supreme Court, faced with a seemingly endless train of macabre scenes, has endeavored in a responsible, rational, and consistent fashion to effectuate its statutory mandate as illuminated by our judgment in *Gregg*. Today, a majority of this Court, its arguments shredded by its own illogic, informs the Georgia Supreme Court that, to some extent, its efforts have been outside the Constitution. I reject this as an unwarranted invasion into the realm of state law, for, as in *Gregg*, "I decline to interfere with the manner in which Georgia has chosen to enforce [its] laws" until a genuine error of constitutional magnitude surfaces.

* * *

Robert Godfrey was retried and again sentenced to death. However, on federal habeas corpus review it was determined that his second sentencing trial was barred by the double jeopardy clause. Godfrey v. Kemp*, 836 F.2d 1557 (11th Cir. 1988). Godfrey is serving a sentence of life imprisonment.*

Gary D. MAYNARD, Warden, et al.,
Petitioners,
v.
William T. CARTWRIGHT.

Supreme Court of the United States
486 U.S. 356, 108 S.Ct. 1853 (1988)

White, J., delivered the opinion for a unanimous Court. Brennan, J., filed a concurring opinion, in which Marshall, J., joined.

Justice WHITE delivered the opinion of the Court.

On May 4, 1982, after eating their evening meal in their Muskogee County, Oklahoma, home, Hugh and Charma Riddle watched television in their living room. At some point, Mrs. Riddle left the living room and was proceeding towards the bathroom when she encountered respondent Cartwright standing in the hall holding a shotgun. She struggled for the gun and was shot twice in the legs. The man, whom she recognized as a disgruntled ex-employee, then proceeded to the living room where he shot and killed Hugh Riddle. Mrs. Riddle dragged herself down the hall to a bedroom where she tried to use a telephone. Respondent, however, entered the bedroom, slit Mrs. Riddle's throat, stabbed her twice with a hunting knife the Riddles had given him for Christmas, and then left the house. Mrs. Riddle survived and called the police. Respondent was arrested two days later and charged with first-degree murder.

Respondent was tried and found guilty as charged. The State, relying on three statutory aggravating circumstances, sought the death penalty. The jury found two of them to have been established: first, the defendant "knowingly created a great risk of death to more than one person"; second, the murder was "especially heinous, atrocious, or cruel." Finding that the aggravating circumstances outweighed the mitigating evidence, the jury imposed the death penalty. The Oklahoma Court of Criminal Appeals affirmed on direct appeal, and later affirmed a denial of state collateral relief. Respondent then sought federal habeas corpus on several grounds. The District Court rejected each of them, * * *. A panel of the Court of Appeals for the Tenth Circuit affirmed, but rehearing en banc was granted limited to the claim concerning the challenged aggravating circumstance.

The en banc court * * * unanimously sustained the challenge. It stated that the words "heinous," "atrocious," and "cruel" did not on their face offer sufficient guidance to the jury * * * [nor] had the Oklahoma courts adopted a limiting construction that cured the infirmity and that was relied upon to affirm the death sentence in this case. It concluded that the Oklahoma Court of Criminal Appeals' construction of the aggravating circumstance was "unconstitutionally vague" under the Eighth Amendment. * * *

* * * We affirm the judgment of the Court of Appeals.

* * * The State * * * insists that in some cases there are factual circumstances that so plainly characterize the killing as "especially heinous, atrocious, or cruel" that affirmance of the death penalty is proper. As we understand the argument, it is that a statutory provision governing a criminal case is unconstitutionally vague only if there are no circumstances that could be said with reasonable certainty to fall within reach of the language at issue. Or to put it another way, that if there are circumstances that any reasonable person would recognize as covered by the statute, it is not unconstitutionally vague even if the language would fail to give adequate notice that it covered other circumstances as well.

The difficulty with the State's argument is that it presents a Due Process Clause approach to vagueness and fails to recognize the rationale of our cases construing and applying the Eighth Amendment. * * * Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate

courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*.

* * *

We think the Court of Appeals was quite right in holding that *Godfrey* controls this case. First, the language of the Oklahoma aggravating circumstance at issue – "especially heinous, atrocious, or cruel" – gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in *Godfrey.* The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous" does not, is untenable. To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." Likewise, in *Godfrey* the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor.

* * *

The State also insists that the death penalty should stand because the jury found two aggravating circumstances, one of which was unchallenged and is sufficient to sustain the sentence. * * * As the Tenth Circuit said, there was "no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance." * * * [T]he Court of Appeals cannot be faulted for not itself undertaking what the state courts themselves refused to do.

* * *

[Justices Brennan and Marshall concurred. No justice dissented.]

Walton v. Arizona, Lewis v. Jeffers & Arave v. Creech

The Supreme Court upheld a finding of Arizona's aggravating circumstance which provided for the death penalty it is were committed in an "especially heinous, cruel or depraved manner" in *Walton v. Arizona*, 497 U.S. 639 (1990), and *Lewis v. Jeffers*, 497 U.S. 764 (1990)

In both cases, the Court found that the Arizona Supreme Court had previously defined "especially cruel" to mean that the victim had suffered mental anguish before his death and had defined "especially depraved" to mean that the perpetrator "relishes" or derives "pleasure" from the crime, evidencing debasement or perversion and applied this construction in each cases, thereby satisfying the Eighth and Fourteenth Amendments. Writing in dissent, Justice Blackmun said the Court failed to determine whether the construction used by the Arizona court would prevent the arbitrary and capricious imposition of death sentences and suggested that the court had widened rather than narrowed the level of discretion.

In *Arave v. Creech*, 507 U.S. 463 (1993), the Court found it unnecessary to decide whether the aggravating factor "utter disregard for human life" passes constitutional muster because the Idaho Supreme Court had adopted a limiting construction, saying the circumstance applied only to "callous" murders by a "cold-blooded, pitiless slayer." The U.S. Supreme Court explained:

> Webster's Dictionary defines "pitiless" to mean devoid of, or unmoved by, mercy or compassion. The lead entry for "cold-blooded" gives coordinate definitions. One, "marked by absence of warm feelings: without consideration, compunction, or clemency," mirrors the definition of "pitiless." The other defines "cold-blooded" to mean "matter of fact, emotionless." It is true that "cold-blooded" is sometimes also used to describe "premedita[tion]," – a mental state that may coincide with, but is distinct from, a lack of feeling or compassion. But premedi-

tation is clearly not the sense in which the Idaho Supreme Court used the word "cold-blooded." Other terms in the limiting construction – "callous" and "pitiless" – indicate that the court used the word "cold-blooded" in its first sense. * * *

> In ordinary usage, then, the phrase "cold-blooded, pitiless slayer" refers to a killer who kills without feeling or sympathy. We assume that legislators use words in their ordinary, everyday senses, and there is no reason to suppose that judges do otherwise. * * *
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> * * * The terms "cold-blooded" and "pitiless" describe the defendant's state of mind: not his mens rea, but his attitude toward his conduct and his victim. The law has long recognized that a defendant's state of mind is not a "subjective" matter, but a fact to be inferred from the surrounding circumstances.
>
> Determining whether a capital defendant killed without feeling or sympathy is undoubtedly more difficult than, for example, determining whether he "was previously convicted of another murder." But that does not mean that a State cannot, consistent with the Federal Constitution, authorize sentencing judges to make the inquiry and to take their findings into account when deciding whether capital punishment is warranted. * * *

The Court observed that, "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm" but found the construction adopted by the Idaho court satisfied the requirement of narrowing from all murders eligible for death, those in which death should be imposed:

> [T]he word "pitiless," standing alone, might not narrow the class of defendants eligible for the death penalty. A sentencing judge might conclude that every first-degree murderer is "pitiless" * * *. [H]owever, we believe that a sentencing judge reasonably could find that not all Idaho capital defendants are "cold-blooded." That is because some within the broad class of first-degree murderers do exhibit feeling. Some, for example, kill with anger, jealousy, revenge, or a variety of other emotions. In *Walton* we held that Arizona could treat capital defendants who take pleasure in killing as more deserving of the death penalty than those who do not. Idaho similarly has identified the subclass of defendants who kill without feeling or sympathy as more deserving of death. By doing so, it has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed.

Justice Blackmun, with whom Justice Stevens joined, dissented. Justice Blackmun characterized the majority's opinion as "nonsense upon stilts," because defining "utter disregard" as "cold-blooded" is "both vague and unenlightening and because the majority's recasting of that metaphor is not dictated by common usage, legal usage, or the usage of the Idaho courts, the statute fails to provide meaningful guidance to the sentencer as required by the Constitution." He continued:

> * * * The entire point of the challenge is that the language's susceptibility to a variety of interpretations is what makes it (facially) unconstitutional. To save the statute, the State must provide a construction that, on its face, reasonably can be expected to be applied in a consistent and meaningful way so as to provide the sentencer with adequate guidance. The metaphor "cold-blooded" does not do this.
>
> * * * The majority points out that the first definition in Webster's Dictionary under the entry "cold-blooded" is "marked by absence of warm feelings: without consideration, compunction, or mercy." If Webster's rendition of the term's ordinary meaning is to be credited, then Idaho has singled out murderers who act without warm feelings:

those who act without consideration, compunction, or clemency. Obviously that definition is no more illuminating than the adjective "pitiless" as defined by the majority. What murderer does act with consideration or compunction or clemency?

> * * * [T]he majority comes up with a hybrid all its own – "without feeling or sympathy" – and then goes one step further, asserting that because the term "cold-blooded" so obviously means "without feeling," it cannot refer as ordinarily understood to murderers who "kill with anger, jealousy, revenge, or a variety of other emotions." That is incorrect. In everyday parlance, the term "cold-blooded" routinely is used to describe killings that fall outside the majority's definition. In the first nine weeks of this year alone, the label "cold-blooded" has been applied to a murder by an ex-spouse angry over visitation rights, a killing by a jealous lover, a revenge killing, an ex-spouse "full of hatred," the close-range assassination of an enemy official by a foe in a bitter ethnic conflict, a murder prompted by humiliation and hatred, killings by fanatical cult members, a murderer who enjoyed killing, and, perhaps most appropriately, all murders. All these killings occurred with "feelings" of one kind or another. All were described as cold-blooded. The majority's assertion that the Idaho construction narrows the class of capital defendants because it rules out those who "kill with anger, jealousy, revenge, or a variety of other emotions" clearly is erroneous, because in ordinary usage the nebulous description "cold-blooded" simply is not limited to defendants who kill without emotion.
>
> In legal usage, the metaphor "cold blood" does have a specific meaning. "Cold blood" is used "to designate a willful, deliberate, and premeditated homicide." As such, the term is used to differentiate between first- and second-degree murders. * * * Murder in cold blood is, in this sense, the opposite of murder in "hot blood." * * *
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> * * * [T]he Idaho courts never have articulated anything remotely approaching the majority's novel "those who kill without feeling or sympathy" interpretation. All kinds of other factors, however, have been invoked by Idaho courts applying the circumstance. For example, in *State v. Aragon*, the killer's cold-bloodedness supposedly was demonstrated by his refusal to render aid to his victim and the fact that "[h]is only concern was to cover up his own participation in the incident." * * *
>
> * * * In *State v. Fain*, the court declared that the "utter disregard" factor refers to "the defendant's lack of conscientious scruples against killing another human being." Thus, the latest statement from the Idaho Supreme Court on the issue says nothing about emotionless crimes, but, instead, sweepingly includes every murder committed that is without "conscientious scruples against killing." I can imagine no crime that would not fall within that construction.
>
> The record * * * includes an explicit finding by the trial judge that Creech was the subject of an unprovoked attack and that the killing took place in an "excessive violent rage." If Creech somehow is covered by the "utter disregard" factor as understood by the majority (one who kills not with anger, but indifference), then there can be no doubt that the factor is so broad as to cover any case. If Creech is not covered, then his sentence was wrongly imposed.
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> * * *
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> There is, of course, something distasteful and absurd in the very project of parsing this lexicon of death. But as long as we are in the death business, we shall be in the parsing business as well. Today's majority stretches the bounds of permissible construction past the breaking point. "'Vague terms do not suddenly become clear when they are defined by reference to other vague terms,'" nor do sweeping categories become narrow by mere

restatement. The [Idaho Supreme Court's] formulation is worthless, and neither common usage, nor legal terminology, nor the Idaho cases support the majority's attempt to salvage it. The statute is simply unconstitutional and Idaho should be busy repairing it.

STATE of Arizona, Appellee,
v.
Gary Wayne SNELLING, Appellant.

Supreme Court of Arizona, En Banc.
236 P.3d 409 (2010).

PELANDER, Justice.

Gary Wayne Snelling was convicted of first degree murder and sentenced to death. * * *

FACTUAL AND PROCEDURAL BACKGROUND

On July 14, 1996, Adele Curtis was cleaning a townhouse she owned in Phoenix so it could be rented. The prospective tenant met Curtis at the townhouse around noon, stayed for about two hours, and left through the unlocked front door. She last saw Curtis sitting on the stairs with a drink and sandwich and Curtis's truck parked outside the townhouse.

* * *

* * * [Curtis's niece went] to the townhouse on July 18 and discovered Curtis's naked body lying on the upstairs bathroom floor. Curtis had marks on her neck consistent with a ligature. The medical examiner opined that she had died of asphyxia by strangulation. When the autopsy was performed on July 19, Curtis's body was in an advanced state of decomposition consistent with her having died three to four days earlier.

Police collected scrapings of a blood smear on an upstairs bedroom door frame and a blood drop on the bathroom floor near Curtis's body. An electrical cord, cut from a lamp in the upstairs bedroom, was in the upstairs bathroom sink. Fingerprints were found on receipts in the downstairs bathroom; a fingerprint and palm print were on the upstairs bathroom's sink counter. Curtis's partially eaten sandwich and drink were on the stairway landing. On the kitchen counter, police found Curtis's purse without any cash inside and with checks missing from a checkbook. Police also found a discarded beverage can in Curtis's truck.

Curtis's murder remained unsolved for several years. In 2003, a detective re-opened the investigation and submitted evidence for DNA testing. A DNA profile obtained from the beverage can matched Snelling's profile, which had been obtained in an unrelated matter in 1999. Snelling's profile also matched the profiles obtained from the blood smear and blood drop, and his DNA was likely present on the electrical cord. In addition, Snelling's prints matched the prints found at the townhouse, and he had lived in the same complex as Curtis at the time of the murder.

After his arrest, Snelling was incarcerated in the same jail pod as Jerry Rader and told him about having murdered Curtis. Snelling told Rader that he had watched Curtis cleaning the townhouse after the previous tenants moved out. He informed Rader that he had entered Curtis's townhouse intending to sexually assault her, taken $1,000 from her purse, gone upstairs, cut a cord in case he needed a weapon, surprised her in the bathroom, and choked her to death when she screamed.

Snelling was indicted for first degree murder (both premeditated and felony) and found guilty. During the aggravation phase of the trial, the jurors found that Snelling had committed the murder in an especially cruel manner, but could not decide whether he had committed the murder in expectation of pecuniary gain. The jury also could not reach a unanimous verdict on the appropriate penalty.

A second jury was impaneled to re-try the penalty phase. After finding no mitigation sufficiently substantial to call for leniency, the

second jury determined that Snelling should be sentenced to death.

* * *

INDEPENDENT REVIEW

* * *

The first jury found only one aggravating factor [the (F)(6) factor] – that Snelling murdered Curtis in an especially cruel manner. We review the record de novo to determine whether the evidence supports that finding beyond a reasonable doubt. * * *

The United States Supreme Court has determined that Arizona's (F)(6) aggravator is facially vague but may be remedied by judicial constructions limiting its application to specified circumstances. * * *[5]

Our case law has so limited the (F)(6) aggravator. We have held that a murder is especially cruel only if the state proves beyond a reasonable doubt that "the victim consciously experienced physical or mental pain prior to death, and the defendant knew or should have known that suffering would occur." Although "[t]he victim ... does not need to be conscious for each and every wound inflicted," the (F)(6) aggravator cannot be found if the evidence on consciousness is inconclusive.

In addition, we have been "unwilling to say that all stranglings are per se cruel." Rather, to establish that a murder by strangulation or any other means is especially cruel, the state must prove that the particular victim consciously suffered mental anguish or physical pain before death.

I. Mental Anguish

"Mental anguish includes the victim's uncertainty as to her ultimate fate." In evaluating uncertainty, "[t]he length of time during which a victim contemplates her fate affects whether the victim's mental anguish is sufficient to bring a murder within that group of murders that is especially cruel." Evidence of a victim's pleas or defensive injuries can show that she suffered mental anguish. "The entire murder transaction, not just the final act, may be considered."

The record contains no evidence that Curtis contemplated her fate for very long. Based on what Snelling had told him, Rader testified in the guilt phase that Curtis yelled "Who's there?" around the same time that Snelling was cutting the cord in the upstairs bedroom. According to Rader, Curtis opened the bathroom door, saw Snelling, and "got belligerent and yelled" when "he told her to just shut up and do what he said." Snelling then strangled her with the cord "to shut her up" and "freaked" when "she fell down."

Curtis likely was terrified when she heard a noise, opened her bathroom door, and saw Snelling holding an electrical cord. * * * But the clear inference from Rader's testimony is that very little time elapsed between Curtis's initially seeing Snelling and the murder.

The record also does not show that Curtis had any defensive injuries. The medical examiner, when questioned about the possibility of sexual assault, testified that Curtis did not have any obvious lacerations or bruises; and she discussed only the single ligature mark on Curtis's neck when asked about external physical injuries.

In addition, there was no evidence that Curtis struggled with Snelling or pleaded for her life. Curtis had only a single ligature mark, indicating the ligature was not readjusted once placed on her neck. The small bathroom in which the murder occurred was undisturbed; Curtis's clothes were neatly stacked on the toilet seat, and cleaning supplies were lined up on the toilet tank. *Cf. State v. Walden,* 618, 905 P.2d 974, 997 (1995) (finding signs of a struggle when victim's hands were

5. Because Arizona now requires jury findings of aggravation and jury sentencing in capital cases, the facial vagueness of the (F)(6) aggravator "may be remedied with appropriate narrowing instructions," *State v. Tucker*, 160 P.3d 177, 189 (2007).

intertwined in the electrical cord used to strangle her and blood was sprayed around the room); *State v. Amaya-Ruiz,* 166 Ariz. 152, 177-78, 800 P.2d 1260, 1285-86 (1990) (noting as evidence supporting cruelty that "[t]he crime scene exhibited signs of a violent and bloody struggle").

Absent any evidence of defensive injuries, a struggle, or pleas for help, the record shows only that Curtis was suddenly confronted by an assailant who promptly strangled her to death. "It is not inherently 'cruel' to murder a victim quickly and by surprise." On this record, we cannot find beyond a reasonable doubt that, before her death, Curtis experienced the mental anguish required by our prior decisions.

II. Physical Pain

Strangulations are not per se physically cruel absent specific evidence that the victim consciously suffered physical pain. Yet "[t]his Court has held that a period of suffering from eighteen seconds to two to three minutes can be enough to warrant application of the cruelty aggravator."

The State presented no evidence of physical suffering. The medical examiner did not testify that victims in general always experience, or that Curtis in particular experienced, pain during strangulation.[6] Nor did she mention any other injuries unrelated to the strangulation itself that might have caused Curtis pain. *Cf. State v. Brewer,* 826 P.2d 783, 798-99 (1992) (finding the strangulation victim suffered physical pain from the injuries to her eye and the numerous bruises and abrasions on her body).

The record also does not support a finding of physical pain relating to a sexual assault. *Cf. Sansing,* 77 P.3d at 34 (finding "[t]he evidence of the [victim's] rape independently establishes both mental and physical suffering"). Although found naked, Curtis apparently disrobed voluntarily to take a shower in the upstairs bathroom. Neither semen nor sperm was found on the swabs collected in the sexual assault kit. The medical examiner testified that Curtis had no "obvious lacerations" or "gross bruises." The positioning of Curtis's body on its side when found also did not indicate a sexual assault. And the trial court directed a verdict against the State on the sexual assault predicate for the felony murder charge (but not the attempted sexual assault predicate) after determining that the evidence did not support such a finding.

In addition, the evidence on whether Curtis consciously experienced physical pain was inconclusive. Based on unidentified reports in medical literature, the medical examiner testified that a strangulation victim generally remains conscious for ten to one hundred seconds if the ligature totally encircles the neck and the victim remains passive. She further testified that such victims might remain conscious for minutes if the ligature does not completely encircle the neck and the victim fights. No other evidence, however, indicated whether, or for how long, Curtis was conscious while being strangled. *Cf. State v. Morris,* 160 P.3d 203, 220 (2007) (finding cruelty when the state presented evidence of a struggle in addition to expert testimony that strangulation victims remain conscious and experience pain for some time). And even if Curtis was conscious for some time during the strangulation, that alone does not support a finding of physical pain.

Although one might reasonably suspect that any strangulation victim must experience physical pain, speculation cannot support a finding of especial cruelty when, as here, the record contains no evidence of the physical pain required for an (F)(6) finding. Absent evidence of the pain experienced during strangulation or other bruises, abrasions, or wounds on the victim, and lacking any proof of a struggle, we cannot find beyond a reasonable doubt that Curtis consciously suffered physical pain before or during the strangulation. * * *

6. The medical examiner testified that Curtis's thyroid cartilage was fractured during strangulation, but noted that this cartilage, like the hyoid bone, is "easily fractured." In addition, she did not describe the nature or extent of any pain associated with that internal injury.

"The death penalty may be imposed only if the state has proved the existence of at least one aggravating factor beyond a reasonable doubt," and we "will reduce a death penalty to life imprisonment where the evidence of aggravating factors is inconclusive."

CONCLUSION

* * * On independent review, * * * we find the record insufficient to support the (F)(6) aggravator because the evidence does not prove beyond a reasonable doubt that Curtis consciously suffered mental anguish or physical pain sufficient to render the murder especially cruel. Therefore, we vacate Snelling's death sentence and sentence him to imprisonment for natural life. * * *

Assessing Prejudice Where There is an Invalid Aggravator

The result in *Zant v. Stephens* depended upon Georgia statutory scheme which made a defendant eligible for death upon the finding of one aggravating circumstance. In later cases, the Court found the same result would not necessarily be reached in a states which require a weighing of aggravating and mitigating circumstances, if one of the aggravating circumstances was invalid. *See Clemons v. Mississippi*, 494 U.S. 738 (1990).

In those circumstances the state court can do one of three things: it can remand the case to the trial court for resentencing, it may reweigh without the invalid aggravating factor if state law allows the appellate court to reweigh, *Clemons*, 494 U.S. at 741, or it may determine whether the error is harmless, applying the standard for harmlessness established for constitutional violations in *Chapman v. California*, 386 U.S. 18 (1967) (whether the error was harmless beyond a reasonable doubt). *See*, *e.g.*, *Clemons*, *Sochor v. Florida*, 504 U.S. 527 (1992): *Parker v. Dugger*, 498 U.S. 308, 321(1991); or it may remand the case to the trial court for a new sentencing trial.

A death sentence may also be invalid if the sentencer heard evidence that it would not have otherwise received in considering an invalid aggravating factor. In *Tuggle v. Netherland*, 516 U.S. 10 (1995), a Virginia death sentence was based upon findings of both future dangerousness and vileness aggravating factors. The future dangerousness factor was set aside on appeal. However, the jury had considered evidence in support of the future dangerousness factor that should not have been admitted. The Virginia Supreme Court still upheld the death sentence, but the U.S. Supreme Court vacated and remanded the case for further consideration, including the possibility of harmless error.

The Court reconsidered its approach to determining the impact of an invalid aggravating factor in the case that follows.

Jill L. BROWN, Warden, Petitioner,
v.
Ronald L. SANDERS.

Supreme Court of the United States
546 U.S. 212, 126 S.Ct. 884 (2006).

Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and O'Connor, Kennedy, and Thomas, JJ., joined. STEVENS, J., filed a dissenting opinion, in which Souter, J., joined. Breyer, J., filed a dissenting opinion, in which Ginsburg, J., joined.

Justice SCALIA delivered the opinion of the Court.

We consider the circumstances in which an invalidated sentencing factor will render a death sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the jury's weighing process.

I

Respondent Ronald Sanders and a companion invaded the home of Dale Boender, where they bound and blindfolded him and his girlfriend, Janice Allen. Both of the victims were then struck on the head with a heavy, blunt object; Allen died from the blow. Sanders was convicted of first-degree murder, of attempt to murder

Boender, and of robbery, burglary, and attempted robbery.

Sanders' jury found four "special circumstances" under California law [at the guilt phase of the trial], each of which independently rendered him eligible for the death penalty. The trial then moved to a penalty phase, at which the jury was instructed to consider a list of sentencing factors relating to Sanders' background and the nature of the crime, one of which was "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." The jury sentenced Sanders to death.

On direct appeal, the California Supreme Court declared invalid two of the four special circumstances found by the jury. It nonetheless affirmed Sanders' death sentence, relying on our decision in *Zant v. Stephens* * * *.

* * *

II

Since *Furman v. Georgia,* we have required States to limit the class of murderers to which the death penalty may be applied. This narrowing requirement is usually met when the trier of fact finds at least one statutorily defined eligibility factor at either the guilt or penalty phase. Once the narrowing requirement has been satisfied, the sentencer is called upon to determine whether a defendant thus found eligible for the death penalty should in fact receive it. Most States channel this function by specifying the aggravating factors (sometimes identical to the eligibility factors) that are to be weighed against mitigating considerations. The issue in the line of cases we confront here is what happens when the sentencer imposes the death penalty after at least one valid eligibility factor has been found, but under a scheme in which an eligibility factor or a specified aggravating factor is later held to be invalid.

To answer that question, our jurisprudence has distinguished between so-called weighing and non-weighing States. * * * In a weighing State * * * the sentencer's consideration of an invalid eligibility factor necessarily skewed its balancing of aggravators with mitigators, and required reversal of the sentence (unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors).

By contrast, in a non-weighing State – a State that permitted the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors – this automatic skewing would not necessarily occur. * * * The sentencer's consideration of an invalid eligibility factor amounts to constitutional error in a non-weighing State in two situations. First, due process requires a defendant's death sentence to be set aside if the reason for the invalidity of the eligibility factor is that it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected," or that it "attache[s] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, . . . or to conduct that actually should militate in favor of a lesser penalty." *Zant* [*v. Stephens*], 462 U.S., at 885. Second, the death sentence must be set aside if the jury's consideration of the invalidated eligibility factor allowed it to hear evidence that would not otherwise have been before it.

This weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations. * * *

We think it will clarify the analysis, and simplify the sentence-invalidating factors we have hitherto applied to non-weighing States, if we are henceforth guided by the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

* * * If the presence of the invalid sentencing

factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here. The issue we confront is the skewing that could result from the jury's considering *as aggravation* properly admitted evidence that should not have weighed in favor of the death penalty. * * * As we have explained, such skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor.

III

In California, a defendant convicted of first-degree murder is eligible for the death penalty if the jury finds one of the "special circumstances" listed in Cal. Penal Code Ann. § 190.2 (West Supp.2005) to be true. These are the eligibility factors designed to satisfy *Furman*. If the jury finds the existence of one of the special circumstances, it is instructed to "take into account" a *separate* list of sentencing factors describing aspects of the defendant and the crime. These sentencing factors include, as we have said, "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding."

* * *

More specifically, Sanders' jury found four special circumstances to be true: that "[t]he murder was committed while the defendant was engaged in . . . Robbery,"; that it was "committed while the defendant was engaged in . . . Burglary in the first or second degree,"; that "[t]he victim [Allen] was a witness to a crime who was intentionally killed for the purpose of preventing . . . her testimony in any criminal . . . proceeding,"; and that "[t]he murder was especially heinous, atrocious, or cruel." The California Supreme Court set aside the burglary-murder special circumstance under state merger law because the instructions permitted the jury to find a burglary (and thus the burglary-murder special circumstance) based on Sanders' intent to commit assault, which is already an element of homicide. The court invalidated the "heinous, atrocious, or cruel" special circumstance because it had previously found that to be unconstitutionally vague.

As the California Supreme Court noted, however, "the jury properly considered two special circumstances [eligibility factors] (robbery-murder and witness-killing)." These are sufficient to satisfy *Furman's* narrowing requirement, and alone rendered Sanders eligible for the death penalty. Moreover, the jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors.

* * *

Justice STEVENS, with whom Justice SOUTER joins, dissenting.

* * *

* * * [W]hen a jury is told to weigh aggravating circumstances against mitigating evidence in making its penalty decision, four aggravators presumptively are more weighty than three. * * * For example, when a jury, as here, is incorrectly informed that its finding that a killing was "heinous, atrocious, or cruel" provides a reason for imposing death, that error may well affect the jury's deliberations. Having been told to weigh "[t]he circumstances of the crime . . . *and* the existence of any [aggravating] circumstances found to be true," the jury may consider its conclusion that the killing was heinous separately from the "circumstances of the crime" underlying that erroneous conclusion, improperly counting the nature of the crime twice in determining whether a sentence of death is warranted. Or the jury, recognizing that the legislature has decided that a "heinous, atrocious, or cruel" murder,

without more, can be worthy of the death penalty, may consider this a legislative imprimatur on a decision to impose death and therefore give greater weight to its improper heinousness finding than the circumstances of the crime would otherwise dictate. Under either scenario a weight has been added to death's side of the scale, and one cannot presume that this weight made no difference to the jury's ultimate conclusion.

* * *

The majority, however, has decided to convert the weighing/nonweighing distinction from one focused on the role aggravating circumstances play in a jury's sentencing deliberations to one focused on the evidence the jury may consider during those deliberations. * * * But whether an aggravating circumstance finding plays a role in the jury's decision to impose the death penalty has nothing to do with whether the jury may separately consider "all the 'circumstances of the crime.'"

In this case, if the question had been presented to us, I might well have concluded that the error here was harmless. * * *

* * *

Justice BREYER, with whom Justice GINSBURG joins, dissenting.

* * * In my view, it does not matter whether California is a "weighing" or a "nonweighing" State, as ordinary rules of appellate review should apply. A reviewing court must find that the jury's consideration of an invalid aggravator was harmless beyond a reasonable doubt, regardless of the form a State's death penalty law takes.

* * *

II

To distinguish between weighing and nonweighing States for purposes of determining whether to apply harmless-error analysis is unrealistic, impractical, and legally unnecessary.

A

Use of the distinction is unrealistic because it is unrelated to any plausible conception of how a capital sentencing jury actually reaches its decision. First, consider the kind of error here at issue. It is not an error about the improper admission of evidence. It is an error about the importance a jury might attach to certain admissible evidence. Using the metaphor of a "thumb on death's side of the scale," we have identified the error as the "possibility not only of randomness but also of bias in favor of the death penalty." * * *

Second, consider why that error could affect a decision to impose death. If the error causes harm, it is because a jury has given special weight to its finding of (or the evidence that shows) the invalid "aggravating factor." The jury might do so because the judge or prosecutor led it to believe that state law attaches particular importance to that factor: Indeed, why else would the State call that factor an "aggravator" and/or permit it to render a defendant death eligible? * * *

* * *

The only difference between the two kinds of States is that, in the nonweighing State, the jury can also consider other aggravating factors (which are usually not enumerated by statute). * * * But the potential for the same kind of constitutional harm exists in both kinds of States, namely that the jury will attach special weight to that aggravator on the scale, the aggravator that the law says should not have been there.

* * *

B

The distinction is impractical to administer for it creates only two paradigms – States that weigh *only* statutory aggravators and States that weigh any and all circumstances (*i.e.,* statutory and nonstatutory aggravators). Many States, however, fall somewhere in between the two paradigms. A State, for example, might have a set of aggravating factors making a defendant eligible for the death penalty and an additional set of

sentencing factors (unrelated to the eligibility determination) designed to channel the jury's discretion. California is such a State, as it requires the jury to take into account the eligibility-related aggravating factors and 11 other sentencing factors – including an omnibus factor that permits consideration of all of the circumstances of the crime. * * *

C

Our precedents, read in detail, do not require us to maintain this unrealistic and impractical distinction. * * *

* * *

The Court in *Zant* [*v. Stephens*] did not say that the jury's consideration of an improper aggravator is *never* harmless in a State like Georgia. It did say that the jury's consideration of the improper aggravator was harmless *under the circumstances of that case*. And the Court's detailed discussion of the jury instructions is inconsistent with a rule of law that would require an *automatic* conclusion of "harmless error" in States with death penalty laws like Georgia's. * * *

* * *

III

* * * I would require a reviewing court to examine whether the jury's consideration of an unconstitutional aggravating factor was harmful, regardless of whether the State is a weighing State or a nonweighing State. I would hold that the fact that a State is a nonweighing State may make the possibility of harmful error less likely, but it does not excuse a reviewing court from ensuring that the error was *in fact* harmless. Our cases in this area do not require a different result.

* * *

Common sense suggests, however, and this Court has explicitly held, that the problem before us is *not* a problem of the admissibility of certain evidence. It is a problem of the emphasis given to that evidence by the State or the trial court. If that improper emphasis is strong enough, it can wrongly place a "thumb on death's side of the scale" at Stage Two (sentencing). * * *