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THE SEARCH FOR A CONSISTENT AND CONSTITUTIONAL DEATH PENALTY LAW IN GEORGIA

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INTRODUCTION

This article traces the interpretation of Georgia's death penalty law since 1972. It is the story of the mandate of the United States Supreme Court that capital sentencing procedures must contain specific factors to be considered by the sentencing authority to reduce the likelihood of arbitrary or capricious imposition of the death penalty. To comply with this mandate, the Supreme Court of Georgia has indulged in well-intentioned but inconsistent judicial legislation with respect to Georgia's death penalty law. This has resulted in a series of conflicting opinions which have created as much confusion as resolution. This article examines the Supreme Court of Georgia's attempts to deal with the strictures imposed on the death penalty law and proposes a possible statutory clarification. This article analyzes the Georgia death penalty law as it evolved from Furman v. Georgia1 to Gregg v. Georgia.2 The article reviews the United States Supreme Court's construction, in Godfrey v. Georgia,3 of O.C.G.A. § 17-10-30(b)(7). The article also illustrates the Georgia Supreme Court's inconsistent application of the Godfrey rule.

This article focuses on the authors' contention that the Supreme Court of Georgia has interpreted section (b)(7) in a manner which twists its language. This has created two serious problems for prosecutors. The first concerns the court's interpretation of depravity of mind. The Code section designates three aggravating

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1. 408 U.S. 226 (1972).
circumstances which justify the imposition of the death penalty: torture, depravity of mind, and aggravated battery to the victim. Godfrey and its progeny transformed depravity of mind from an independent aggravating circumstance into one which, in most cases, must exist in concert with torture or aggravated battery in order to support a death sentence. This interpretation of the statute has resulted in certain types of horribly depraved murders not being punishable as capital cases. Additionally, the inconsistent approach employed by the Supreme Court of Georgia in its review of section (b)(7) cases has led to confusion among prosecutors over the appropriate wording of sentence verdicts and the type of evidence needed to support findings of each (b)(7) element. The article concludes by proposing a new statute to replace section (b)(7) which would clarify this area of the law and provide a basis for consistent application of Georgia’s death penalty statute.

I. FROM FURMAN TO GREGG: MAKING GEORGIA’S DEATH PENALTY CONSTITUTIONAL

In 1972, the United States Supreme Court struck down the death sentences of two Georgia inmates and that of a Texas petitioner in the case of Furman v. Georgia. Prior to Furman, Georgia law provided that a person convicted of a capital felony

4. 408 U.S. 238 (1972). In Furman, the United States Supreme Court heard three consolidated capital appeals: one for murder and two for rape convictions. Id. at 239. All of the appellants were black. Id. at 252–53. Furman killed his victim while attempting a nighttime entry into a home. When the crime was committed, Furman was 26 years old with a sixth grade education. Mental examinations performed prior to the trial indicated that he was not psychotic, but contrary conclusions were reached regarding his ability to assist in the preparation of his own defense. Id. Jackson, the second appellant, was an escaped convict who had been serving time for auto theft. During the few days he was at-large he had committed several crimes, but was sentenced to death for the rape of a white woman. At the time of the attack, Jackson was 21 years old and possessed average intelligence and educational background. While Jackson had overpowered his victim by holding a pair of scissors to her neck, the woman suffered no long-term physical injury and did not require hospitalization. Id. at 252. The third appellant, Branch, broke into the home of a 65-year old white widow and raped her. The record did not contain any evidence of physical or emotional trauma to the victim as a result of the attack. Branch had a prior conviction of grand theft. He had an IQ in the dull-normal range and had received less than six years of elementary education. Id. at 253.

In overturning Georgia’s death penalty statute, the Court was persuaded by the fact that “[t]he death sentence [was] disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.” Id. at 249–50. The Court found that the statutes were “pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.” Id. at 257. The Court recognized but did not reach the issue of “[w]hether a mandatory death penalty would ... be constitutional.” Id.
could be punished by either death or a life sentence.\textsuperscript{5} Capital felonies included murder, rape, kidnapping, and treason.\textsuperscript{6} The sentencing authority, whether a judge or jury, had absolute discretion as to whether the sentence should be death or life imprisonment.

The Furman case provoked intense controversy and discussion.\textsuperscript{7} The case was decided per curiam, with all of the Justices filing separate opinions.\textsuperscript{8} Two members of the majority, Justices Brennan and Marshall, concluded that capital punishment was unconstitutional. They reasoned that capital punishment is cruel and unusual punishment and, therefore, violative of the eighth and fourteenth amendments.\textsuperscript{9} Justices Douglas, Stewart, and White, the other members of the majority, reasoned that the selective way in which the death penalty was being imposed under the existing Georgia and Texas statutes rendered the statutes unconstitutional.\textsuperscript{10}

If the five majority opinions have a common thread, it is that the laws left too much unfettered discretion to the sentencing authority. Thus, capital punishment might be applied in an arbitrary manner. The message of Furman was that a death penalty statute would need to provide a meaningful basis from which cases warranting the death penalty could be distinguished from those that did not.\textsuperscript{11} It appeared probable that if such a structure could be developed, the swing votes of Justices Stewart and White would fall with those of the four dissenting justices.

\textsuperscript{5} All of Georgia's capital felony statutes are still silent as to the procedure for imposing punishment.


\textsuperscript{7} Furman v. Georgia, 408 U.S. at 397. The dissenting opinion of Chief Justice Burger criticized the majority for imposing a remedy not urged in the oral arguments and briefs before the court. Also dissenting, Justice Powell noted that the barbarity of certain murders had resulted in a general public outcry in favor of capital punishment rather than revulsion at the thought of executing the murderers. \textit{Id.} at 444–45 (Powell, J., dissenting).

\textsuperscript{8} The members of the majority were Justices Brennan, Marshall, Douglas, White, and Stewart. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist filed dissenting opinions.

\textsuperscript{9} \textit{Furman}, 408 U.S. at 359.

\textsuperscript{10} \textit{Id.} at 306, 310.

\textsuperscript{11} \textit{Id.} at 256.
in *Furman*, thus ensuring a majority vote upholding the death penalty. With this in mind, the 1973 session of the Georgia General Assembly passed what is now Georgia's death penalty law, O.C.G.A. § 17-10-30.\(^{12}\)

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

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(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, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

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

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

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

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

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

(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 is 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 nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating
The statute allows the imposition of death for the offenses of aircraft hijacking, treason, or murder. The law includes a list of aggravating circumstances which shall be considered by the judge and which must be included in an instruction to the jury.

The new law survived its first test when it was upheld by the Supreme Court of Georgia in March, 1974, in the case of *Coley v. State*. The court concluded:

Georgia’s new statutory scheme is designed to accomplish the following objectives to meet the U.S. Supreme Court’s concern with arbitrariness. First, the new statute substantially narrows and guides the discretion of the sentencing authority to impose the death penalty and allows it only for the most outrageous crimes and those offenses against persons who place themselves in great danger as public servants. In addition, the new statute provides for automatic and swift appellate review to insure that the death penalty will not be carried out unless the evidence supports the finding of one of the serious crimes specified in the statute.

The *Coley* decision set the stage for further testing of the law. Although *Coley* dealt with the overall constitutionality of the law under *Furman*, the focus of this article is limited to one subsection, O.C.G.A. § 17-10-30(b)(7).

By its language, O.C.G.A. § 17-10-30(b)(7) unmistakably establishes an extreme category of death penalty cases. Section

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13. O.C.G.A. § 17-10-30(b)(7) (1982). The aggravating circumstances are listed in footnote 12 of this article. Although O.C.G.A. § 17-10-30(b) refers to mitigating circumstances, it does not give any direction or definition as to what they might be. In *Redd v. State*, 242 Ga. 876, 881, 252 S.E.2d 383, 387 (1979), the Supreme Court of Georgia concluded that “the legislature meant to empower the jury to consider mitigating anything they found to be mitigating, without limitation or definition.” *Id.* The court also held that mitigating circumstances relate to evidence about the particular defendant and not about the death penalty in general. *Id.* Other cases note factors that have been held to be mitigating circumstances. *Id. at 882, 252 S.E.2d at 387.* See, e.g., *Romine v. State*, 251 Ga. 208, 305 S.E.2d 93 (1983) (requests of defendant’s relatives for leniency); *Franklin v. State*, 245 Ga. 141, 263 S.E.2d 666 (1980) (any aspect of defendant’s character or record and any of the circumstances of the offense); *Lewis v. State*, 246 Ga. 101, 288 S.E.2d 915 (1980) (youthfulness of the defendant).


15. 231 Ga. 829, 204 S.E.2d 612 (1974). Coley was convicted of rape, armed robbery (two counts), and kidnapping. He received the death penalty for the rape conviction. *Id.* at 830, 204 S.E.2d at 613.

(b)(7) cases are those in which the offender’s conduct shows a total disregard for any of the rules by which civilized people have chosen to live. Such cases lie “at the core and not the periphery” of the most shockingly evil conduct imaginable. The actual text reads: “The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.” Since 1980, the Supreme Court of Georgia has construed this statute in a manner which is at odds with its plain language and the established rules of statutory construction.

At the heart of Georgia’s rules for statutory construction lies the requirement that courts are to “look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy.” Most importantly, “[i]n all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter.” The case law is clear that although “[t]he legislative intent prevails over [the] literal import of words,” where a law is “plain and susceptible of but one natural and reasonable construction, the court has no authority to place a different construction upon it, but must construe it according to its terms.” Where statutory language is plain, “it is the sole evidence of the ultimate legislative intent.” Analysis of the language of O.C.G.A. § 17-10-30(b)(7) shows that it can be interpreted according to its plain meaning.

The death penalty statute has two provisions. The first provision lists the crimes to which the law applies: “murder, rape, armed robbery or kidnapping.” These are crimes which must be “outrageously or wantonly vile, horrible, or inhuman.” The Supreme Court of Georgia has held that these are words of common understanding.

19. O.C.G.A. § 1-3-1(a) (1982).
20. O.C.G.A. § 1-3-1(b) (1982).
25. Id.
The second provision reads "torture, depravity of mind, or an aggravated battery to the victim." This second part of the law is connected to the first by the phrase "in that it involved..." The plain meaning of this connective phrase is that a section (b)(7) case can only be "outrageously or wantonly vile, horrible, or inhuman" if it also involves an additional factor. The additional factors are: "torture, depravity of mind, or an aggravated battery to the victim." The three factors are listed in the disjunctive, not the conjunctive. Clearly, the grammatical structure dictates that any one of these three factors alone is sufficient to support a death penalty verdict.

Nevertheless, the Supreme Court of Georgia has reached conflicting conclusions over whether a combination of the factors is necessary to impose a death sentence or whether any one factor standing alone would be sufficient. In *West v. State*, decided in 1984, the court held that the sentencing authority can find depravity of mind only where an offender "committed aggravated battery or torture upon a living person or subjected the body of a deceased victim to mutilation, serious disfigurement or sexual abuse." Nothing in the statute seems to suggest this

Georgia, 446 U.S. 420 (1980), the *Hance* court stated that these words are included in the statute to distinguish ordinary murders, for which capital punishment is inappropriate, from those for which death may be imposed. *Id.*

28. *Id.*
29. *Id.*
30. *Id.* (emphasis added).
31. Black's Law Dictionary 274 (5th ed. 1979) defines the terms as follows:
CONJUNCTIVE. Connecting in a manner denoting union. A grammatical term for particles which serve for joining or connecting together. Thus, the word "and" is called a "conjunctive," and "or" a "disjunctive," conjunction.

*Id.* at 374.

DISJUNCTIVE TERM. One which is placed between two contraries, by the affirming of one of which the other is taken away; it is usually expressed by the word "or."

*Id.* at 555.
33. *West v. State*, 252 Ga. 156, 182, 313 S.E.2d 67, 71 (1984). The Supreme Court of Georgia provided the following suggested jury charge in an Appendix to the opinion:

The State contends that the offense of murder in this case was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or aggravated battery to the victim. The state has the burden of proving this statutory aggravating circumstance beyond a reasonable doubt. In this regard, the state must prove to your satisfaction and beyond a reasonable doubt, first, that the offense of murder was outrageously
kind of legislative intent. Indeed, none of the early section (b)(7) cases decided by the Supreme Court of Georgia in the mid-1970s ever referred to such a requirement.

The case of McCorquodale v. State\textsuperscript{34} provided one of the most shocking examples of a murder involving factors sufficient to

or wantonly vile, horrible or inhuman; and second, that it involved at least one of the following: torture or depravity of mind or an aggravated battery to the victim.

I charge you that an aggravated battery occurs when a person maliciously causes bodily harm to another by depriving him of a member of his body, by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof. In order to find that the offense of murder involved an aggravated battery, you must find that the bodily harm to the victim occurred before death.

I charge you that torture occurs when a living person is subjected to the unnecessary and wanton infliction of severe physical or mental pain, agony or anguish. Besides serious physical abuse, torture includes serious sexual abuse or the serious psychological abuse of a victim resulting in severe mental anguish to the victim in anticipation of serious physical harm. I charge you, however, that you would not be authorized to find that the offense of murder involved torture simply because the victim suffered pain or briefly anticipated the prospect of death. Nor would acts committed upon the body of a deceased victim support a finding of torture. In order to find that the offense of murder involved torture, you must find that the defendant intentionally, unnecessarily and wantonly inflicted severe physical or mental pain, agony or anguish upon a living victim.

I charge you that depravity of mind is a reflection of an utterly corrupt, perverted or immoral state of mind. In determining whether or not the offense of murder in this case involved depravity of mind on the part of the defendant, you may consider the age and physical characteristics of the victim and you may consider the actions of the defendant prior to and after the commission of the murder. In order to find that the offense of murder involved depravity of mind, you must find that the defendant, as the result of his utter corruption, perversion or immorality, committed aggravated battery or torture upon a living person, or subjected the body of a deceased victim to mutilation, or serious disfigurement or sexual abuse.

I charge you that you would not be authorized to return a finding of this statutory aggravating circumstance unless you are convinced beyond a reasonable doubt, not only that the murder involved torture, or depravity of mind, or an aggravated battery to the victim, but that the murder was also outrageously or wantonly vile, horrible or inhuman. Should you be convinced beyond a reasonable doubt of the existence of this statutory aggravating circumstance, then your verdict should also reflect your finding, if you so find, that the murder was outrageously or wantonly vile, horrible or inhuman; your verdict should also reflect your finding, if you so find, that the murder involved at least one of the following: torture, depravity of mind, or an aggravated battery to the victim; and your verdict should specify which—torture, depravity of mind, or an aggravated battery to the victim—was involved in the murder.

\textit{Id.} at 161–62, 313 S.E.2d at 71–72 (emphasis added).

34. 233 Ga. 369, 211 S.E.2d 577 (1974).

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warrant imposition of the death penalty.\textsuperscript{35} After recounting the graphic details of the crime, the Supreme Court of Georgia concluded that in no other murder case had the evidence and testimony of the witnesses so clearly established both the depravity of mind of the perpetrator and the torture inflicted upon the victim.\textsuperscript{36} Yet, nowhere in its opinion did the court state that a finding of torture was a necessary prerequisite for a finding of depravity of mind.

In a 1975 case, \textit{Barrow v. State},\textsuperscript{37} the defendant received the death sentence for an armed robbery-murder conviction. The Supreme Court of Georgia concluded that the evidence had been sufficient to authorize "the jury to consider whether the murder was inhumane in that it involved depravity of mind."\textsuperscript{38} The murder in \textit{Barrow} did not involve torture, either physical or psychological, nor was there an aggravated battery to the victim.\textsuperscript{39} The defendant walked into a liquor store intending to rob it. When the clerk of the store saw that the defendant had a gun, he gave him the money in the cash register and pleaded with the defendant not to shoot him. After assuring him that he would not be harmed, the defendant shot the clerk between the eyes, killing him.\textsuperscript{40} The defendant's death sentence was reversed on an error in the jury charge with respect to the law of confessions.\textsuperscript{41} The court held that the death penalty could be imposed when the statutory aggravating circumstance of armed robbery accompanied premeditated murder,\textsuperscript{42} or when the murder involved depravity of mind.\textsuperscript{43} Evidently, the court felt that when the facts and circumstances of a murder established the depravity of mind of the perpetrator, the jury could, on that basis alone, impose the death penalty.

Similarly, other cases decided during this same time period contained little detailed analysis, but none made depravity of


\textsuperscript{36} \textit{Id.} at 377, 211 S.E.2d at 583. The Georgia Supreme Court affirmed McCorquadale's death sentence. \textit{Id.} at 378, 211 S.E.2d at 583.

\textsuperscript{37} 235 Ga. 635, 221 S.E.2d 416 (1975).

\textsuperscript{38} \textit{Id.} at 418, 221 S.E.2d at 418.

\textsuperscript{39} \textit{Id.} at 636, 221 S.E.2d at 416, 419 (1975) (citations omitted).

\textsuperscript{40} \textit{Id.} at 642, 221 S.E.2d at 421.

\textsuperscript{41} \textit{Id.} at 418–19 (citing Code Ann. § 27-2534.1(b)(2) (1973)).

\textsuperscript{42} \textit{Id.} (citing Code Ann. § 27-2534.1(b)(17) (1973)) (aggravated battery and torture were not considered).
mind contingent upon a finding of torture or aggravated battery. The case was significant for two major reasons. First, the Court held that capital punishment for the offense of murder was not a per se violation of the eighth and fourteenth amendments to the United States Constitution. Second, the Court was satisfied that Georgia's sentencing scheme had resolved the main constitutional deficiencies which had been raised in Furman. In a pertinent portion of the opinion, the Court wrote:

Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant...The Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of Furman.

Gregg addressed the general constitutionality of Georgia's sentencing scheme. The decision did not resolve the question of whether an individual section might have infirmities. Judicial interpretation of section (b)(7) was to come later.

II. HARRIS AND BLAKE: THE CREATION OF A PROBLEM

In 1976 and 1977 the Supreme Court of Georgia decided Harris v. State and Blake v. State, the two cases which became the basis for the distorted interpretation of the statute which currently prevails. Neither case stands for the specific proposition that depravity of mind must involve torture or an aggravated battery to a living victim or serious physical or sexual abuse to the body of a dead victim. These cases became, however, the authority for the creation of such a rule.

45. 428 U.S. 153 (1976). Gregg involved an armed robbery-murder in which the defendant killed two men by shooting them at close range. While the jury found other aggravating circumstances, it did not find section (b)(7) to be applicable. Id. at 161.
47. Id. at 162—63.
48. Id. at 198.
In *Harris*, the defendant, who had confessed hatred for his stepmother, went to a shopping center to find someone who resembled his stepmother so he could kill her. Harris found such a woman, followed her out to her car, pulled a handgun and abducted her. She offered him money, but Harris told her, “I don't want nothing you’ve got, except your life.” He made her lie down, covered her with a coat, shot her through the head, and remarked, “Bye Lady.” Harris felt good after the killing because he “had done ... what [he] set out to do.” Harris was convicted and sentenced to death.

On appeal, Harris challenged the constitutionality of section (b)(7) on the ground that depravity of mind, unlike the other aggravating circumstances enumerated in the death penalty statute, was so vague that it left too much discretion to the sentencing authority. Analyzing this contention, the Supreme Court of Georgia stated that torture and aggravated battery involve the effect of the crime on the victim, while depravity of mind deals with the mental state of the offender. Since each effect is exclusive to a particular party, the court reasoned that a bifurcation of the statute was required before the crime could lie at the core of the section (b)(7) aggravating circumstance. This meant that both depravity of mind and torture or an aggravated battery to the victim had to be present before a death sentence could be imposed. The court recognized that section (b)(7) could possibly be abused as a “catch all” for cases in which there was no evidence of any other statutory aggravating circumstance, but the court affirmed its intention to guard against that result.

In reaching its decision, the court reviewed three other death penalty cases which had involved section (b)(7) and wrote:

> We believe that each of these cases establishes beyond any reasonable doubt a depravity of mind and either involved

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53. *Id.*
54. *Id.*
55. *Id.* at 718, 230 S.E.2d at 3.
56. *See supra* notes 12–13 and accompanying text.
58. *Id.* at 732, 230 S.E.2d at 10.
59. *Id.* at 732–33, 230 S.E.2d at 10–11.
60. *Id.* at 732, 230 S.E.2d at 10.
torture or an aggravated battery to the victim as illustrating the crimes were outrageously or wantonly vile, horrible or inhuman. Each of the cases is at the core and not the periphery, and we intend to restrict our approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core.\textsuperscript{62}

Arguably, the court's statement merely refers to the presence of section (b)(7) elements in the other death penalty cases which the court reviewed.\textsuperscript{63} Yet the language also suggests that the court was enacting a rule that depravity of mind could be found only in conjunction with a finding of torture, aggravated battery, sexual abuse, or physical mutilation of the victim after death. The court did, however, signal its clear intent to scrutinize all section (b)(7) cases to ensure that each one was a "core" case; but the court did not clarify whether a "core" case was one in which both depravity of mind and torture or aggravated battery coexisted, or whether either element could independently lie at the "core" of the section (b)(7) aggravating circumstance. The cases cited in \textit{Harris} received such a review and the court concluded that the facts supported the aggravating circumstance finding,\textsuperscript{64} but no reference was made to any bright line rule.

The second important case, \textit{Blake v. State},\textsuperscript{65} was similar to \textit{Harris} in that it also contained language which later formed a basis for linking depravity of mind with torture and aggravated battery.\textsuperscript{66} In \textit{Blake}, the defendant had quarrelled with his girlfriend and had kidnapped her two-year-old daughter.\textsuperscript{67} Blake threw the child off a bridge which was more than one hundred feet high, killing her.\textsuperscript{68} The jury imposed the death penalty, finding "that the murder was 'outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.'"\textsuperscript{69}

\textsuperscript{62} \textit{Harris}, 237 Ga. at 733, 220 S.E.2d at 11.
\textsuperscript{63} In \textit{Banks v. State}, 237 Ga. 325, 227 S.E.2d 380 (1976), the Georgia Supreme Court found torture was inflicted upon at least one of the two victims, yet the opinion makes a general finding of depravity of mind without stating that torture is a prerequisite for this finding. \textit{Id.} at 327, 227 S.E.2d at 382.
\textsuperscript{64} \textit{Harris}, 237 Ga. at 732-34, 220 S.E.2d at 10-11.
\textsuperscript{65} 239 Ga. 292, 236 S.E.2d 637 (1977).
\textsuperscript{67} \textit{Id.} at 293, 236 S.E.2d at 640.
\textsuperscript{68} \textit{Id.} at 294, 236 S.E.2d at 640.
\textsuperscript{69} \textit{Id.} at 287, 236 S.E.2d at 641.
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The jury's verdict did not specify which of the individual elements it found; it merely recited the Code section. The elements of torture, depravity of mind, and aggravated battery were listed disjunctively. Counsel for Blake noticed this and argued that the jury should have been polled as to which of the three elements it had found.70 The Supreme Court of Georgia responded:

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

We find no significant dissimilarity between outrageously vile, wantonly vile, horrible or inhuman. Considering torture and aggravated battery on the one hand as substantially similar treatment of the victim and depravity of mind on the other hand as relating to the defendant, we find no room for nonunanimous verdicts for the reason that there is no prohibition upon measuring cause on the one hand by effect on the other hand. That is to say, the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim.71

Affirming the death sentence, the court combined depravity of mind with the other two elements in the statute, torture and aggravated battery. The court did not follow its own rules for interpreting statutes.72 The court overlooked the fact that the General Assembly had clearly listed the elements in the disjunctive. Georgia case law is equally clear: where a statute is written in the disjunctive, and thus may be violated in several different ways, proof of any one element is sufficient.73 Contrary to the court's reasoning, torture and aggravated battery are not necessarily the same. For example, psychological torture requires no aggravated battery at all. The statute's language does not indicate that depravity of mind is that mental state which results

70. Id. at 298—99, 236 S.E.2d at 642—43.
71. Id. at 299, 236 S.E.2d at 642—43.
72. See supra notes 19—23 and accompanying text.
in torture or aggravated battery to the victim. On the contrary, the disjunctive listing of the elements clearly indicates that each is a separate concept which must be judged individually. The court's puzzling and disquieting decision indicates its desire to answer an immediate problem without concern for the future implications of the answer.

Treating the elements as conjunctive could have been avoided by reversing Blake as to the sentencing and requiring that the sentencing judge or jury specify which of the aggravating circumstances are supported by the evidence. Such a decision would have eliminated any question as to the unanimity of section (b)(7) verdicts and would have avoided the erroneous rule posited in this article.

III. Godfrey v. Georgia: The United States Supreme Court Enunciates the Rule

In 1980, the United States Supreme Court recognized the Blake decision in Godfrey v. Georgia\(^4\) as the authoritative construction of the section (b)(7) aggravating circumstance.\(^5\) This decision sent confusing signals as to the way in which appellate courts should review a finding of depravity of mind.\(^6\) Further, the Court's opinion ignored the imprecise wording of the sentencing verdict. The Godfrey decision, thus, created much confusion as to the appropriate standards to apply in section (b)(7) cases.

In Godfrey, a man was sentenced to death for the murder of his wife and mother-in-law.\(^7\) Godfrey and his wife argued frequently and separated more than once in the course of their twenty-eight year marriage. Godfrey also had a drinking problem.\(^8\) Several days prior to the murder, an especially bitter argument between the two resulted in Godfrey's threatening his wife with a knife and cutting her clothes.\(^9\) She had him arrested for

\(^{4}\) 446 U.S. 420 (1980).
\(^{6}\) The U.S. Supreme Court concluded that the Supreme Court of Georgia erred in affirming the death sentence in this particular case based on a finding of depravity of mind. Godfrey's "victims were killed instantaneously. They were members of his family who were causing him extreme trauma. Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes." Id. at 433. These factors "cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." Id.
\(^{7}\) Id. at 425-26.
\(^{8}\) Id. at 424 n.3.
\(^{9}\) Id. at 424.
aggravated assault, filed for divorce, and moved in with her mother. Subsequently, Godfrey's wife called him twice; both conversations ended in heated arguments.  His wife told him she considered the marriage to be irretrievably broken, and she had no intention of ever reuniting with him.

Suspecting that his mother-in-law was instigating his wife's refusal to reconcile, Godfrey took his shotgun and went to his mother-in-law's trailer. He looked through a window and saw that his wife, his mother-in-law, and his daughter were inside. Aiming the gun at his wife through the window, he shot her once in the head, killing her instantly.  He then entered the home, hit his fleeing daughter in the head with the shotgun barrel, and shot his mother-in-law once in the head, killing her instantly.  Godfrey then called the police and freely confessed that he had committed the murders.

The prosecution conceded from the beginning that the facts established neither torture nor aggravated battery. The death penalty was sought solely on the theory that the murders demonstrated depravity of mind. Nevertheless, the instructions of the trial judge used the precise language of the statute to include all three elements which comprise the section (b)(7) aggravating circumstance.

The jury found Godfrey guilty of two counts of malice murder and sentenced him to death on each count. The sentencing verdict specified, as an aggravating circumstance, "that the offense was outrageously or wantonly vile, horrible, or inhuman." The Supreme Court of Georgia affirmed the conviction and sentence, rejecting Godfrey's claim that the verdict was not supported by the evidence. The court also rejected the contention that section (b)(7) was so vague as to be unconstitutional.

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80. Id. at 425.
81. Id.
82. Id.
83. Id.
84. Id.
85. Id. "I've done a hideous crime, ... but I have been thinking about it for eight years ... I'd do it again." Id. at 426.
86. Id.
87. The trial court instructed the jury as to section (b)(7) in its entirety. Id.
88. Id.
89. Id.
91. Godfrey v. Georgia, 446 U.S. at 431 n.11.
On appeal to the United States Supreme Court, Godfrey presented a timely opportunity to review the Supreme Court of Georgia's construction and application of the section (b)(7) statutory aggravating circumstance. Four years earlier, the Supreme Court, in Gregg v. Georgia, had concluded that the statute was not unconstitutional on its face.\(^{92}\) The Court was unequivocal that the constitutionality of future death sentences imposed under the authority of O.C.G.A. § 17-10-30(b)(7) would depend upon whether the Supreme Court of Georgia fulfilled its responsibility to construe the language narrowly enough to guide jury discretion.\(^{93}\)

Justice Stewart, writing for the majority in Godfrey, began the analysis by reviewing cases in which the Supreme Court of Georgia had affirmed death sentences based solely on section (b)(7),\(^{94}\) but then focused on the Harris\(^{95}\) and Blake\(^{96}\) decisions as authority for a bright line definition of the section (b)(7) aggravating circumstances.\(^{97}\) The Court found that the Supreme Court of Georgia applied the following conclusions to section (b)(7):

The first was that the evidence that the offense was "outrageously or wantonly vile, horrible or inhuman" had to demonstrate "torture, depravity of mind, or an aggravated battery to the victim." The second was that the phrase, "depravity of mind," comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim. The third, derived from Blake alone, was that the word, torture, must be construed in pari materia with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death.\(^{98}\)

As to the first conclusion, the terms "outrageously or wantonly vile, horrible or inhuman"\(^{99}\) meant that the offense had to involve either "torture, depravity of mind, or an aggravated battery to the victim."\(^{100}\) The statutory language supported this construction.\(^{101}\)

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93. Id. at 189.
94. Godfrey, 446 U.S. at 430 n.10.
97. Godfrey, 446 U.S. at 431.
98. Id.
100. Id.
The second conclusion was that depravity of mind may exist only if at least one of the other disjunctively listed elements, torture or aggravated battery, is present. Depravity of mind was thus subsumed under torture or aggravated battery and was not recognized as a discrete concept. As previously stated in this article, the Court’s interpretation misreads the statute’s grammatical structure, and eliminates depravity of mind as an independent basis upon which to impose a death sentence.  

The Court’s final conclusion virtually eliminates the distinction between the other two section (b)(7) elements, torture and aggravated battery. The considerable overlap between the two definitions restricted the section (b)(7) aggravating circumstance to a relatively narrow list of offenses and did not recognize either psychological torture or physical abuse of the victim after death. Furthermore, a rule which requires one disjunctive term to be construed in pari materia with another violates rules of statutory construction as well as simple rules of grammar.

The United States Supreme Court then applied the Georgia test for finding depravity of mind. Since the prosecution had conceded that the murders involved neither torture nor aggravated battery, the analysis centered on whether depravity of mind existed. The rule which the United States Supreme Court derived from the Harris and Blake decisions was that depravity of mind could exist only if torture or aggravated battery had been committed. Applying that rule to the facts in Godfrey ended the analysis. Since no aggravated battery or torture was committed, depravity of mind could not exist.

The Godfrey Court concluded that the evidence was insufficient to support the finding of the section (b)(7) aggravating circumstance. The Court held that the facts in Godfrey did “not satisfy the criteria laid out by the Georgia Supreme Court itself in the Harris and Blake cases.” The Court found that Godfrey’s

102. See supra notes 27—31 and accompanying text.
103. “Torture” was defined as “evidence of serious physical abuse of the victim before death.” Godfrey, 446 U.S. at 431.
104. The Court defined “aggravated battery” according to Ga. Code Ann. § 26-1305 (1978): “A person commits aggravated battery when he maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof.” Godfrey, 446 U.S. at 431 n.13.
105. Godfrey, 446 U.S. at 433.
106. Id. at 432.
crimes did not warrant imposition of the death penalty based on the statutory language of section (b)(7) because the crimes involved neither torture nor aggravated battery and because the petitioner did not evince depravity of mind. "His victims were killed instantaneously .... Shortly after the killings, he acknowledged his responsibility and the heinous nature of his crimes."107 The Court acknowledged that "[t]hese factors certainly did not remove the criminality from the petitioner's acts,"108 but the death sentence could only be imposed when "based on reason rather than caprice or emotion."109

Despite its admonition against arbitrary application of the statute, the United States Supreme Court refused to require specificity in the sentencing verdict. The jury had not returned a finding that the evidence supported any of the three section (b)(7) elements.110 The verdict simply stated that "the offense of murder was outrageously or wantonly vile, horrible or inhuman,"111 without identifying which of the three elements of section (b)(7) was proved beyond a reasonable doubt. The Supreme Court of Georgia had concluded that "the jury's phraseology was not objectionable,"112 because it had been relied upon before to impose

107. Id. at 433 (footnote omitted).
108. Id.
109. Id.
110. Id. at 426. The Supreme Court of Georgia has rendered conflicting decisions on this issue. Some decisions accept jury verdicts which merely list the section (b)(7) terms disjunctively exactly as written in the statute. Other decisions have vacated the death penalty due to either insufficiently or improperly worded verdicts. See infra notes 131—86 and accompanying text.
111. Godfrey, 446 U.S. at 426.
112. Godfrey v. State, 243 Ga. 302, 310, 253 S.E.2d 710, 718 (1979); The Supreme Court of Georgia cited Ruffin v. State, 243 Ga. 95, 252 S.E.2d 472 (1979) as authority for that decision. Ruffin and two co-defendants were convicted of armed robbery, kidnapping, murder, aggravated assault, and possession of a firearm. The three men drove to a service station and took money from the cash register, forced the station operator and his 11 year-old stepson into the car at gunpoint. The victims were driven into a wooded area and forced to lie on the ground. Ruffin murdered the child by shooting him in the head with a sawed-off shotgun. The older victim was shot in the temple and wrist. He survived and went to a nearby house to contact the police. Id. at 95, 252 S.E.2d at 474.

Each defendant was tried separately. Ruffin was found guilty as charged and was sentenced to death for murder. Two aggravating circumstances were submitted to the jury: (1) the murder "was committed while the offender was engaged in the commission of another capital felony," and (2) the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id. at 106, 252 S.E.2d at 480. The sentencing verdict stated: "By evidence presented to us, we the jurors conclude that this act was both horrible and inhuman. We conclude that Bonnie B. Bulloch, an eleven year old defenseless child, was taken by force
a death sentence. The United States Supreme Court expressed concern over the absence of specificity in the verdict, but did not reverse the death sentence for this reason. The Court recognized that the verdict, as written, offered no insight into the reasons why the murder was more aggravated than any other murder. The wording also cast into doubt the jury’s understanding of section (b)(7). Without a specific finding in the verdict that one or more of the elements had been proved beyond a reasonable doubt, the jury’s interpretation of the statute could “only be the subject of sheer speculation.” The Court stopped short of expressly finding that it was error for the trial court to accept the form of this verdict.

The United States Supreme Court, thus, missed an opportunity to rectify the failure of the Supreme Court of Georgia to take corrective action in Harris and Blake, i.e., to require verdicts to specify which section (b)(7) components formed the basis for the decision to impose the death sentence.

The issue raised could have been resolved by mandating that trial judges (1) define each applicable section (b)(7) element, and (2) instruct the jury that its verdict must state each element that it unanimously finds to have been proved beyond a reasonable doubt. This would have required the court to create an independent definition for depravity of mind to satisfy the Gregg mandate that sentencing discretion be guided by clear and objective standards. Additionally, it would have addressed the concern raised in Blake that a jury could unanimously agree that a death sentence is appropriate without reaching unanimous agreement as to which section (b)(7) elements supported that verdict. The Court chose instead to blur the distinction between the terms by ignoring the lack of precision in the Godfrey verdict.

and arms and was ruthlessly executed on July 28, 1976."

The Supreme Court of Georgia decided without discussion that the murder of the child constituted a statutory aggravating circumstance under both Ga. Code Ann. § 27-2534.1(b)(2) and (7). See supra note 30 and accompanying text.
114. Godfrey v. Georgia, 446 U.S. at 428—29. The Court stated:
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.

Id.
115. Id. at 429.
116. See supra notes 49—73 and accompanying text.
IV. THE SUPREME COURT OF GEORGIA RESPONDS TO GODFREY

In *Hance v. State*,117 the Supreme Court of Georgia sought to remedy the defects which caused the United States Supreme Court to reverse the death sentence in *Godfrey*. The *Hance* court first clarified the definition of aggravated battery. The court cited the statutory definition of aggravated battery and specified that the “bodily harm” must occur prior to the victim’s death.118 *Hance* substantially expanded the definition of torture beyond that which was recognized in *Godfrey*.119 The Supreme Court of Georgia declared that torture includes both serious sexual abuse and psychological abuse.120 While neither of these concepts was mentioned in *Godfrey*, serious sexual abuse had been previously recognized by the Supreme Court of Georgia as a form of physical abuse.121 Psychological abuse was a new concept introduced in *Hance*. It was defined as conduct which “resulted in severe mental anguish to the victim in anticipation of physical harm.”122 This concept excluded fact situations such as that in *Godfrey* which, although gruesome, did not involve torture or aggravated battery to the victim.

The *Hance* court restated the *Godfrey* principle that depravity of mind is linked to torture and aggravated battery, and that it may be found by determining that one of the other section (b)(7) elements is present.123 The most noteworthy expansion of this principle, however, was that depravity of mind was given an application and meaning independent of torture or aggravated battery. Both torture and aggravated battery were limited to

117. 245 Ga. 856, 268 S.E.2d 339 (1980). On remand, the Supreme Court of Georgia directed the trial court to vacate Godfrey’s death sentence. The court ordered either a sentence of life imprisonment or a resentencing trial based upon any aggravating circumstances other than those listed in section (b)(7). Godfrey v. State, 246 Ga. 355, 274 S.E.2d 339 (1980). The case then went back to the original trial court where Godfrey was again sentenced to death. The case was again appealed to the Supreme Court of Georgia claiming double jeopardy, where the court affirmed the sentence based on the murder of Godfrey’s mother-in-law alone. The court reasoned that since each murder constituted statutory aggravation of the other, the aggravating circumstances were mutually supporting; this warranted one death sentence for only one murder. Godfrey v. State, 248 Ga. 616, 625, 284 S.E.2d 422, 430 (1981). The United States Supreme Court denied rehearing. Godfrey v. Georgia, 465 U.S. 1001 (1982).
119. *See supra* note 103 and accompanying text.
120. *Hance*, 245 Ga. at 861, 268 S.E.2d at 345.
123. *Id.* at 862, 268 S.E.2d at 345.
acts inflicted on the victim prior to death. The Hance court declared that depravity of mind may be demonstrated by a defendant "who mutilates or seriously disfigures the victim's body after death, or who commits a sex act upon the victim's body after death...."124 Without imposing a strict requirement for the timing of the acts, the court stated:

Where it cannot be determined whether the victim was subjected to an aggravated battery or torture before death, or to mutilation or disfigurement after death, because the exact time of death or the precise act causing death cannot be ascertained, the penalty of death nevertheless may be sustained on the basis of aggravated battery or serious physical abuse before death or depravity of mind demonstrated after death.125

The Hance decision was designed to be the definitive statement of the criteria which must be applied to the facts of each section (b)(7) case. It established a framework to use in analyzing whether the evidence satisfies the statutory elements. In so doing, the court considered each phrase as a distinct concept with a separate definition. The court recognized the Godfrey interpretation that the terms are linked, but expanded each definition to preserve its independent identity.

While Hance was an important first step in resolving the problems created by Blake and Godfrey, it was an incomplete remedy. The expanded definition of the section (b)(7) terms addressed the problem created when Blake and Godfrey made those disjunctive terms interdependent. Unfortunately, the Hance court ignored the plain meaning of the statute by restricting the independent application of depravity of mind to cases in which acts were committed upon a victim's body after death. This precludes a finding of depravity of mind in cases which involve neither torture nor aggravated battery upon a living victim.

The Hance opinion further stated that "the facts of the case must show either an aggravated battery to the victim, torture of the victim, or depravity of mind of the defendant...."126 While this language addressed the problem created by the Godfrey Court's disregard for the imprecise phraseology of verdicts, the

124. Id.
125. Id. The court also held that when determining whether depravity of mind exists, a jury may consider the age and the physical characteristics of the victim. Id. See also Thomas v. State, 245 Ga. 688, 693, 266 S.E.2d 499, 503 (1980).
126. Hance, 245 Ga. at 861, 268 S.E.2d at 345 (emphasis added).
Hance opinion stopped short of solving the problem because the court failed to require the trial judges to instruct juries that each verdict must specifically state which section (b)(7) elements are supported by the evidence.127

An additional problem engendered by Godfrey was the way in which depravity of mind was to be evaluated. In Godfrey, the Court recognized that a test for determining whether depravity of mind exists must focus on the acts of the perpetrator.128 The Godfrey court mentioned several factors, however, which reflected an emphasis upon the attitude of the offender rather than on his criminal acts.129 The Hance decision did not address this apparent contradiction. This omission has paved the way for inconsistent appellate reviews in subsequent cases.

The Hance decision recognized and agreed with the Supreme Court’s position that the phrase “outrageously or wantonly vile, horrible, or inhuman,” standing alone, imposes no restraint on a jury’s discretion.130 It is the remaining language in section (b)(7) that channels the jury’s exercise of discretion. The Hance decision presented detailed definitions of the remaining section (b)(7) terms to provide definitive criteria for both trial and appellate courts to apply to satisfy the constitutional requirements of Godfrey and Gregg.

V. INCONSISTENT APPLICATION OF SECTION (b)(7) AFTER HANCE

Gilreath v. State131 was the first in a series of post-Hance decisions which held that the terms of section (b)(7) require no

127. The general statutory rule regarding verdicts is: “The jury, if its verdict is 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.” O.C.G.A. § 17-10-30(c) (1982).

The court in Romine v. State, 251 Ga. 208, 305 S.E.2d 93 (1983), interpreted this provision to mean that: “[T]he written finding should recite all the essential, pertinent elements of the statutory aggravating circumstances found by the jury. At a minimum, the jury’s intent must be shown with sufficient clarity that this court can rationally review the jury’s finding.” Id. at 213, 305 S.E.2d at 98.

As will be discussed later, these rules have been applied inconsistently in section (b)(7) cases. Since the section (b)(7) aggravating circumstance contains three disjunctively listed elements, a specific rule requiring conjunctively worded verdicts should have been articulated.

129. Id. at 433.
130. The Supreme Court of Georgia reiterated that those “are words of common understanding [which] have essentially the same meaning, and are included in the statute to distinguish ordinary murders for which the penalty of death is not appropriate from those murders for which the death penalty may be imposed.” Hance, 245 Ga. at 381, 268 S.E.2d at 345.
definition or clarification. In Gilreath, the defendant had been convicted of the murder of his wife and father-in-law and was sentenced to death for each offense. At the sentencing phase of the trial, the judge simply recited the statutory language of section (b)(7) without explaining any of the terms. The defendant appealed the conviction, in part, on the ground that the absence of any definition of the terms resulted in the type of “standardless and unchannelled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury” that was prohibited by Gregg and Godfrey. The court responded by declaring:

While we do not read Godfrey as holding that no death sentence imposed on the basis of this aggravating circumstance may stand absent clarifying instructions by the trial court, we find it unnecessary to decide that question here because there was no request for clarifying instructions. Moreover, all of the terms in [section (b)(7)] are words of ordinary significance which require no explication, with the exception of “aggravated battery.”

The defendant contended that even without a request, it was error for the trial court to fail to charge that aggravated battery must occur before death. The Supreme Court of Georgia acknowledged that the Hance decision made this a correct statement of the law. The court stated, however, that “[t]he jury clearly would understand this from the definition of aggravated battery given in the charge,” so no clarification on this point was necessary.

As previously emphasized, the Hance decision created detailed definitions of the section (b)(7) terms to ensure that the exercise of jury discretion in the penalty phase of the trial would be sufficiently guided and controlled to avoid the arbitrary imposition of death sentences. The Gilreath ruling does not require trial courts to provide detailed or specific definitions unless requested because the section (b)(7) terms “require no explication”; this ruling is directly contrary to the Hance decision.

133. Id. at 836, 279 S.E.2d at 670—71.
134. Id. at 836, 279 S.E.2d at 670.
137. Id.
The next significant decision rendered by the Supreme Court of Georgia on this issue was West v. State. The case held that the Hance definition of depravity of mind need not be given absent a request because it is a phrase which is "subject to common understanding." However, this decision provided a proposed jury charge which is now the authoritative statement of the law concerning section (b)(7).

West was convicted of armed robbery and two counts of murder. He was acquainted with the victims in whose home the murders took place. On the night of the murders, West was welcomed into the home where he subsequently bound and gagged one of the victims, a pharmacologist. Prior to the execution of the pharmacologist and his live-in companion, West and another man drank homemade wine and "huffed toluene." West was sentenced to death by electrocution for each murder.

In response to the jury's request for clarification of the meaning of depravity of mind, the trial judge ignored the Godfrey and Hance decisions and read the definition of that phrase from BLACK'S LAW DICTIONARY. He also read the following quotation from a case cited in BLACK'S: "[A] mind which may become inflamed by alcohol, drugs, or passion to such a degree that it ceases to care for human life and safety is a depraved mind." On appeal, West contended that the definition was erroneous. The Supreme Court of Georgia agreed. Unfortunately, the opinion never mentioned that the appropriate definition of depravity of mind had been enunciated in Godfrey and expanded in Hance. Instead, the court's analysis began with a reiteration of the position articulated in Gilbreath that depravity of mind "is a term having a common meaning and subject to common understanding, unlike 'aggravated battery,' which has been given special meaning by statute."

The court then declared that while instructions explaining the meaning of section (b)(7) terms are not required absent a request,

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139. West v. State, 252 Ga. at 159, 313 S.E.2d at 69.
140. The jury charge is reproduced in footnote 33 of this article.
141. West, 252 Ga. at 156, 313 S.E.2d at 68.
142. Id.
143. Id.
144. Id.
145. Id. at 159, 313 S.E.2d at 69.
146. Id. at 158—59, 313 S.E.2d at 69.
147. Id. at 160, 313 S.E.2d at 70.
148. Id. at 159, 313 S.E.2d at 69.
they may be requested by the defendant or the jury. It is also possible that “a trial court may wish to give such clarifying instructions on its own motion.” To assist the bench and the bar in this regard, [the court] appended to [the] opinion a proposed charge regarding the section (b)(7) aggravating circumstance which has become the definitive interpretation of section (b)(7).

This charge is an accurate compilation of the previously stated definitions of section (b)(7) terms and the factors which jurors may consider when evaluating the evidence. Each of the terms is treated separately, and each is given a meaning which provides it with an independent identity. The charge also includes limitations on the way in which section (b)(7) terms are to be applied. It includes an admonition to jurors that “you would not be authorized to find that the offense of murder involved torture simply because the victim suffered pain or briefly anticipated the prospect of death.” The requirement that a victim experience more than a brief period of apprehension before death is a clarification of the definition of psychological torture. The clarification is an important contribution to the charge because it makes the evidentiary requirements regarding psychological torture equivalent to those relating to physical torture. Just as a murder which occurs instantaneously or with little forewarning cannot be said to involve physical torture, a person who only briefly anticipates the infliction of deadly force cannot be said to have been the victim of psychological torture.

The proposed charge which is appended to the West decision provides trial courts with an authoritative definition to use in death cases involving section (b)(7). In addition, the charge deals with the problem created by nonspecific language in jury verdicts. The court proposed that the trial judge direct the jury to specify which, if any, of the three section (b)(7) elements was involved.

While West made a significant contribution to the consistent application of section (b)(7) by creating the proposed charge, the

149. Id. at 160, 313 S.E.2d at 70.
150. Id.
151. Id.
152. Id. at 161 — 62, 313 S.E.2d at 71.
153. Id. at 161, 313 S.E.2d at 71. The court had previously declared that “we refuse to hold that the mere apprehension of death, immediately before the fatal wounds are inflicted, amounts to serious psychological abuse prior to death.” Phillips v. State, 250 Ga. 336, 341, 297 S.E.2d 217, 221 (1982).
decision did not resolve several problems relating to depravity of mind as an aggravating circumstance. First, the West definition of depravity of mind, while a correct restatement of the law, represents a well-intentioned but erroneous departure from the strict rules of statutory construction. Second, the question of what standard to use in evaluating whether depravity of mind exists remains unresolved. Third, juries are allowed to make findings without receiving definitions of section (b)(7) terms if no request has been made to include them in the charge.

On the same day as the West decision, the Supreme Court of Georgia decided another case which demonstrated the court's inconsistent approach to evaluating evidence relating to depravity of mind. In Whittington v. State, Rick Soto purchased the murder weapon, a gun, and eleven days later obtained a $50,000 term life insurance policy on his wife, Cheryl. The policy contained a double indemnity clause which would pay $100,000 if Cheryl died an accidental death. Three months later, Rick met Theresa Faye Whittington and began dating her. According to Whittington's statement to the police, she discovered that Rick was married when Cheryl Soto called her and asked if she was seeing her husband. A meeting of the two women ensued, and afterward Rick was told to make a choice. Whittington told the police that shortly thereafter Rick began talking about "getting rid" of Cheryl. Cheryl said he talked about throwing a radio into the tub while she was taking a bath.

On the day of the murder, Rick came to Whittington's home and picked her up. According to her statement, Rick said he wanted her to kill his wife because "he didn't know if he could pull the trigger." Rick showed Theresa Whittington how to fire the gun and drove Whittington to the victim's house. Theresa took the gun and entered the home. Cheryl Soto was in the bathtub. A radio was sitting on the edge of the tub. When Whittington pushed the radio into the tub, it became unplugged and caused no injury. Whittington then shot the victim once in the neck and left the house. She told Rick that she did not know if Cheryl was dead. He told her to go back inside and "get it

157. Whittington v. State, 252 Ga. at 170, 313 S.E.2d at 76.
158. Id.
159. Id. at 168—69, 313 S.E.2d at 75—76.
160. Id. at 169, 313 S.E.2d at 75.
161. Id.
over with.” She re-entered the home and saw a trail of blood leading from the bathroom to the bedroom. When Whittington found Cheryl Soto, the victim looked at her and said “Please don’t Theresa. You know you’re not doing right.” Whittington then shot the victim in the forehead and left the house again.162

After the shooting, Rick Soto drove Whittington to a grocery store. She then walked to a friend’s house. Fifteen minutes later, Rick called and said that Cheryl wasn’t dead yet. “He said he’d wait about an hour and check on her again.”163 The victim died of gunshot wounds. At the time of her death, she was approximately three months pregnant.164

Theresa Faye Whittington was sentenced to death for the murder of Cheryl Soto.165 Rick Soto was tried separately and received a life sentence after the jury deadlocked at seven to five during the deliberations in the penalty phase of his trial.166

The jury verdict as to the section (b)(7) aggravating circumstance was worded as follows: “The offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant.”167 The court expressed no concern over the disjunctive wording of the verdict. It simply interpreted the language as indicating a finding of both elements168 without any explanation.

The Supreme Court of Georgia reversed the jury’s finding of torture and depravity of mind, ruling that the evidence was insufficient to support such a finding. In its evaluation of whether the evidence supported a finding of depravity of mind, the Supreme Court of Georgia never applied the criteria contained in the West proposed charge. Instead, the court merely cited the first sentence of that charge; “Depravity of mind is shown by an utterly corrupt, perverted or immoral state of mind,” and then listed several factors in support of its conclusion that “[t]he evidence does not show that depravity of mind required by (b)(7).”169 The factors considered decisive by the court were:

162. Id. at 169–70, 313 S.E.2d at 75–76.
163. Id. at 170, 313 S.E.2d at 76.
164. Id. at 171, 313 S.E.2d at 77. There was no evidence that either defendant knew of the pregnancy. Id.
165. Id. at 168, 313 S.E.2d at 75.
166. Id. at 178, 313 S.E.2d at 81.
167. Id. (emphasis added).
168. Id. at 179, 313 S.E.2d at 82.
169. Id.
The 19-year-old defendant here had never been in any previous trouble, and had been shown the day before how to fire the gun Soto had purchased earlier, and was motivated by Soto who testified at his trial and convinced at least five jurors that he should not be put to death. Shortly after being questioned, the defendant made a complete confession accepting responsibility for the crime.\textsuperscript{170}

While the defendant’s actions both before and after the commission of a murder have been recognized as relevant considerations, the law requires that the jury’s decision ultimately be based on the acts of the defendant which constitute the murder.\textsuperscript{171} Since this case did not involve acts committed upon the victim’s dead body, the issue for the jury to decide was whether Whittington demonstrated depravity of mind by committing torture or an aggravated battery on a living person.\textsuperscript{172} Whittington did not commit aggravated battery;\textsuperscript{173} therefore, the only way the evidence would support the jury finding of depravity of mind was if torture were present.

Prior to its review of depravity of mind, the court examined the evidence relating to torture and found it to be insufficient to support the verdict,\textsuperscript{174} yet the court never mentioned the absence of torture in its discussion of depravity of mind. In addition, the court did not focus on the acts constituting the murder. Instead, the court’s analysis centered on considerations such as the age of the defendant, her lack of a prior record, and the numerical split of the deadlocked jury in the codefendant’s case.\textsuperscript{175} This kind of reliance upon irrelevant matters results in an inconsistent application of section (b)(7).

Contrary to the opinion, the evidence which had been presented in Whittington supported a finding of torture and depravity of mind.\textsuperscript{176} Whether the evidence was sufficient to support the

\textsuperscript{170} Id.
\textsuperscript{171} Godfrey v. Georgia, 446 U.S. 420, 430 (1980).
\textsuperscript{172} Whittington, 262 Ga. at 178—79, 313 S.E.2d at 82.
\textsuperscript{173} The portion of the statute dealing with aggravated battery was not charged. Id. at 178, 313 S.E.2d at 81 n.5.
\textsuperscript{174} The court declared that a finding of torture requires “evidence that the torture was deliberate, . . . that the victim in fact suffered prolonged pain prior to death.” The court held that “[t]here is no evidence here that the defendant intended to inflict the pain and anguish that the victim undoubtedly suffered.” Id. at 179, 313 S.E.2d at 82.
\textsuperscript{175} Id.
\textsuperscript{176} Whittington made three separate attempts to murder Cheryl Soto: by pushing the radio into the tub, by shooting her in the neck, and by shooting her in the forehead.
penalty portion of the verdict was a closer question. To reverse
the penalty verdict due to insufficient evidence without engaging
in a detailed analysis of the evidence raises a serious question
as to what standard was being applied by the Supreme Court of
Georgia.\footnote{177}

As has been shown throughout this article, the Supreme Court
of Georgia has rendered decisions which have simply declared,
without explanation, that the evidence supported a section (b)(7)
finding.\footnote{178} Whether the court affirms or reverses a jury verdict,
each decision on the section (b)(7) aggravating circumstance should
be supported by a thorough review of the evidence. If the Hance
decision and the West proposed charge are the complete
authoritative statements on section (b)(7), then they should be
strictly applied by both the trial and appellate courts.

Another troubling aspect of the Whittington decision is the
Supreme Court of Georgia's acceptance of the jury verdict which
stated that the murder involved "torture or depravity of mind."
The court decided that the jury intended to find that both elements
were supported by the evidence.\footnote{179} This is one of many inconsistent
and, at times, directly contradictory rulings of the Supreme Court
of Georgia regarding imprecisely or improperly worded verdicts.

The law requires that when a jury recommends the death
sentence, its verdict must specify which aggravating circumstance
or circumstances were found to exist beyond a reasonable doubt.\footnote{180}
This finding should contain "all the essential, pertinent elements

\footnote{177. Id. at 80, 313 S.E.2d at 83 (Marshall, J., dissenting). Justice Marshall wrote a
dissenting opinion, joined by Justices Weltner and Bell. He wrote that the evidence
supported a finding of torture and depravity of mind. Marshall also expressed concern
over the court's review of the evidence. He wrote, "I do not agree that we should seek
to evaluate torture, relative to this aggravating circumstance subjectively. It is, or is
not, torture, when viewed objectively as to what is done to the victim to cause the victim
to suffer mentally and physically." Id.}

\footnote{178. See Jarrells v. State, 258 Ga. 833, 375 S.E.2d 842 (1989); Blankenship v. State, 258
v. State, 246 Ga. 598, 272 S.E.2d 475 (1980).}

\footnote{179. Whittington, 252 Ga. at 178, 313 S.E.2d at 82.}

\footnote{180. O.C.G.A. § 17-10-30(c) (1982).}
of the statutory aggravating circumstances...."181 "At a minimum, the jury's intent must be shown with sufficient clarity that [the appellate] court can rationally review the jury's finding."182

The Supreme Court of Georgia's interpretation of the legal standard on this issue has varied widely over the course of this decade. The court has often accepted verdicts which have simply restated the disjunctive listing of section (b)(7) terms exactly as they appear in the statute,183 without specifying which elements are supported by the evidence. The court has also refused to use a disjunctively worded jury finding of "torture or depravity of mind" as a basis for affirming a death sentence.184 Surprisingly, the court has also accepted the same disjunctive wording "torture or depravity of mind" in an opinion which affirmed a death sentence.185 Another death sentence was vacated because the jury did not include in its verdict a finding that the first element of section (b)(7) "outrageously or wantonly vile, horrible or inhuman," was proved beyond a reasonable doubt.186

CONCLUSION

In an effort to solve the problems posed by such inconsistent interpretations and decisions, the authors propose several changes

182. Id. In this case the trial court resolved any ambiguity created by the verdict through polling the jury. The Supreme Court of Georgia held that: "The poll of the jury clarified its written finding, and absent any objection to the form of the jury's verdict, we find no error in the court's failure to require the jury to amend its written verdict to reflect more precisely its intent." Id.
184. Lipham v. State, 257 Ga. 808, 813, 364 S.E.2d 840, 845 (1988). The court stated that "[t]he finding should have been returned in the conjunctive." Id.
185. Felker, 252 Ga. at 384, 314 S.E.2d at 648. The Supreme Court of Georgia held that, "[t]he evidence was sufficient to authorize a finding that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." Id. (citing Hamilton v. State, 246 Ga. 264, 265, 271 S.E.2d 173, 174 (1980); Gaddis v. State, 239 Ga. 238, 242, 236 S.E.2d 594, 598 (1977)).
186. Patrick v. State, 247 Ga. 168, 169, 274 S.E.2d 570 (1981). The verdict stated: "We find the following aggravating circumstances; one, kidnapping and two, aggravated battery to the victim, and we recommend the death penalty." Id. at 169, 274 S.E.2d at 571.
both in the wording of the statute and in the manner in which it is applied by trial and appellate courts. First, the phrase "outrageously or wantonly vile, horrible or inhuman" should be deleted from the statute. Second, a new definition should be assigned to the term "depravity of mind." The new definition should be specific enough to guide jury discretion, yet at the same time broad enough to preserve depravity of mind as a concept with an independent identity. The new definition of depravity of mind should be included in the statute with the existing definitions of aggravated battery and torture. Third, trial courts should be required to charge the definition of each applicable section (b)(7) term in every case which involves aggravating circumstances, even absent a request. The legal requirement that each verdict include a written finding that specifies which section (b)(7) element, if any, is supported by the evidence beyond a reasonable doubt should be strictly applied. Fourth, any review of the evidence of depravity of mind should be structured so that the Supreme Court of Georgia will consider whether the evidence conforms to the new definition of depravity of mind. The supreme court should make specific findings as to why the evidence is in conformity with the definition of depravity.

The authors have drafted the following proposed revision of section (b)(7):

(7) The offense of murder, rape, armed robbery, or kidnapping involved torture, depravity of mind, or an aggravated battery to the victim.

(A) Torture occurs when a living person is subjected to the unnecessary and wanton infliction of severe physical or mental pain, agony, or anguish. Torture includes serious physical abuse, serious sexual abuse, or the serious psychological abuse of a victim resulting in severe mental anguish to the victim in anticipation of serious physical harm. Torture does not occur simply because a victim suffers pain or briefly anticipates the prospect of death, nor does it include acts committed upon the body of a deceased victim. 187

(B) Depravity of mind means an utterly corrupt, perverted, or immoral state of mind. In connection with the offense committed, it means not only that the perpetrator has violated the statutory law, but that he has demonstrated a total abandonment of all of the basic moral law which governs human existence. The question as to the existence of deprav-

ity of mind must always depend on a consideration of the
criminal act itself, and must also take into account the follow-
ing factors:
(i) The age and physical characteristics of the victim
insofar as they place the victim at a significant disadvantage
to the defendant;
(ii) The actions of the defendant prior to, during, and
after the commission of the offense insofar as the actions
shed light upon his mental state at the time of the commission
of the offense itself. The factors which may be considered in
this regard are the degree of violence, enjoyment, or lack of
conscience with which the defendant acts at the time of the
commission of the offense;
(iii) The commission of an aggravated battery or torture
upon a living person; and
(iv) The commission of mutilation, serious disfigurement,
or sexual abuse upon the body of a deceased victim. 188
(C) Aggravated battery occurs where a person maliciously
causes bodily harm to another by depriving him of a member
of his body, by rendering a member of his body useless, or
by seriously disfiguring his body or a member thereof. 189

This revision is proposed with the full knowledge that depravity
of mind is an abstract concept while torture and aggravated
battery are relatively more concrete. Clearly, the legislature has
expressed the desire of the public to punish the most depraved
kinds of murders with the death penalty. If depravity of mind is
to be a basis for the imposition of a section (b)(7) death sentence,
then the sentencing authority will always have some degree of
discretion when imposing the sentence. There is no way to define
depravity of mind by limiting it to specific examples of conduct
because such a definition would invariably exclude conduct which
most reasonable members of society would find to be depraved. 190

188. This section combines elements of the definition contained in West, but adds
factors which allow a finding of depravity of mind in more fact situations than presently
possible. It leaves intact the present categories involving aggravated battery, torture to
living victims, and mutilation, serious disfigurement, or sexual abuse to deceased victims.
It allows the trier of fact to use additional categories to make a determination as to
whether depravity of mind existed at the time of the offense.
189. This definition is presently codified in O.C.G.A. § 16-5-24(a) (1982).
190. No clearer example of this could be cited than the case of State v. Ferrell, a death
penalty case tried by the authors. State v. Ferrell, Indictment Number 88CR1251-3,
DeKalb County Superior Court, Death Verdict on September 17, 1988.
The evidence in Ferrell indicated that Eric Ferrell was on probation for forgery, owed
money to pay restitution in that case, and murdered his 72-year-old grandmother and 15-
The authors believe that it is possible to enact a revised section (b)(7) which will allow flexibility for the sentencing authority in determining the existence of depravity of mind without running afoul of the mandates of Furman and Gregg. The appellate courts must realize that depravity of mind will never be susceptible to absolute definition. Given this drawback, it is still possible to set limits on its application and to require that the sentencing authority consider specific factors in its deliberations.

A sentencing scheme such as that suggested in this article does not leave unfettered discretion to the sentencing authority. Rather, it focuses upon the presence or lack of articulable characteristics. Thus, it allows for even-handed imposition of capital punishment under section (b)(7). The proposed revision of O.C.G.A. § 17-10-30(b)(7) would make it possible to guarantee the benefit of uniform procedural safeguards for all defendants facing potential imposition of the death penalty.

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year-old cousin in order to obtain the funds to satisfy his financial obligations. The case was a circumstantial one, but the most probable order of events was that Ferrell waited until both victims were asleep. He then shot his cousin in the head as the cousin lay sleeping. The noise of the shot awakened Ferrell's grandmother, who came to investigate. Ferrell forced his grandmother to the floor and held her face down. He shot her twice through the head. See State v. Ferrell, Indictment Number 85CR1251-3, DeKalb County Superior Court, Transcript.

During the course of the jury's deliberations during the sentencing phase of the trial, the jury sent a question to the trial judge asking whether it would have to find torture before it could find depravity of mind. Id. The exact question read: "For us to consider depravity of mind ... must the act involve ... torture upon a living person?" State v. Ferrell, Trial Transcript at p. 1724. The trial judge had charged the suggested charge from the appendix of West, and the judge answered the question (correctly under West) in the affirmative. State v. Ferrell, Trial Transcript at p. 1725—29. The jury returned a verdict which found depravity of mind in connection with the murder of Ferrell's grandmother, who had clearly suffered psychological torture prior to her death. State v. Ferrell, Trial Transcript at p. 1736. The jury did not find depravity of mind in connection with the murder of Ferrell's sleeping cousin, even though subsequent conversations with jurors revealed that they would have made such a finding had the law so permitted. State v. Ferrell, Trial Transcript at p. 1737. Clearly, the jurors believed that an individual who executes a 15-year-old boy as he is sleeping exhibits depravity of mind. What person would not think this? Unfortunately, the law, as presently enunciated in West, does not allow for such a determination. The law in Georgia should be amended to allow such a finding.