ORIGINAL

In the

Supreme Court of the United States

ROBERT FRANKLIN GODFREY)
)
PETITIONER,)
) No. 78-6899
V.)
)
THE STATE OF GEORGIA,)
)
RESPONDENT.)
)

Washington, D. C.
February 20, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT FRANKLIN GODFREY,

Petitioner,

v. No. 78-6899

THE STATE OF GEORGIA,

Respondent.

Washington, D.C.

Wednesday, February 20, 1980

The above-entitled matter came on for argument at 11:17 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

J. CALLOWAY HOLMES, JR., Esq., P.O. Box 63, Cedartown, Georgia 30125; for Petitioner.

JOHN W. DUNSMORE, JR., Esq., Assistant Attorney General, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334; for Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Godfrey against Georgia.

Mr. Holmes, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF J. CALLOWAY HOLMES, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. HOLMES: Mr. Chief Justice, and may it please the Court:

This is a death penalty case out of the State of Georgia. I represent Mr. Robert Franklin Godfrey, who was convicted of murder in the first degree in the killings of his wife and her mother, his mother-in-law. It is here by writ of certiorari from Georgia Supreme Court. The issue, as framed by this Court in this case, is whether in affirming the death sentence in this case, has the Georgia Supreme Court adopted such a broad and vague construction of Section 27-2534.1(b)(7) as to violate the Eighth and Fourteenth Amendments to the U.S. Constitution? Section (b)(7) is one of ten aggravating circumstances that are the statutory guides to jurors in posing the death sentence, the sentencing phase of the Georgia proceedings.

Before getting into the merits of the construction of Section (b)(7) by the Georgia Court, I would not want to dwell too long, but I think it would be important to cover

the facts in this case. This defendant, Mr. Godfrey, and his wife, the record shows, had had a stormy marriage. He had been committed by her on three previous occasions to the state mental hospital in Milledgeville, Georgia. They had had a violent argument early in September of 1977, and she had left the house after he had threatened her in a drunken rage. After about a week, the wife had filed divorce proceedings and had moved in with her mother, who was urging her to go ahead and finally put an end to this marriage.

The defendant had worked for approximately 20 years at the Northwest Regional Hospital as a surgical nurse and a post-operative male nurse. He had been to work that day, and his mother-in-law had called him out of the hospital to tell him that his wife wanted to speak to him that evening. The defendant testified that that led him to expect that he was--or to hope that he was going to be able to reconcile the situation as he had been able to do in the past. His commitments to the state mental hospital in the past had been voluntary, part of which was the condition for reconciliation with his wife.

When he got home, his wife did in fact call him. They had a rather violent argument, could not reach any kind of agreement on reconciliation or any of the divorce issues. She hung up, told him that she would call back later and see if they could discuss it further. He testified that that

affected him deeply, that he was put into a very depressed state.

After the second phone conversation, which was even more heated and she finally hung up on him, he testified at that point that he blanked out. He had had some--whatever history that is in the record--blackouts in the past. The record substantiates that he then proceeded to get a shotgun, go down the hill to where the mother-in-law's trailer was, about a hundred, two hundred yards away, came up behind the trailer, fired one shot through the back window, killing his wife instantly, came into the trailer, hit his daughter as she was going out, on the head, causing several stitches, went into the trailer, reloading his shotgun, and shot his mother-in-law in the head as well, creating a very gory scene inside the trailer, which the prosecutor in the case portrayed by color pictures even though he had black and white pictures of the same scenes in his file.

The petitioner then called the sheriff's office, told them what he had done, told them to come get him. They asked him where he was. He explained where he was. He then goes outside the trailer, places the shotgun in the branches of an apple tree, and then sits down under a shade tree to await the arrival of the police. When the police get there, he tells them that they are dead, it is all over with, and shows one officer where he has placed the gun. He is taken

into custody, taken downtown, is in the county police building. In the presence of one officer he has allegedly told him that he had done a heinous thing and had thought about it for a long time and would do it again.

At the trial Dr. Davis, the psychiatrist from Atlanta with quite impressive credentials, testified in behalf of the defendant. He had seen the defendant twice pursuant to court order, had also treated the defendant back in the '60s in Rome where the defendant worked in the hospital there.

The second session with Dr. Davis was for the purpose of a sodium amatol interview, truth serum, to aid the psychiatrist in his diagnosis of the mental state and I suppose also to determine the credibility of the defendant's story. The psychiatrist concluded that at the time of the second phone call and the blackout of the defendant, that the defendant had been impelled by the immense emotional provocation that he felt about the breakup of his marriage into what he described as a dissociative reaction and admitted on cross-examination that that state is an altered state of consciousness but that the defendant probably would have known right from wrong but would not have been able to consciously control his actions. There is a type of psychiatric condition where suppressed feelings are played out in sort of an automatic fashion without real conscious control over it. The state had psychiatric testimony from Milledgeville Hospital, with

some--also the records of the defendant's previous incarceration down there.

Q All these things you are telling us, Mr. Holmes, were advanced to persuade the jury to a contrary conclusion, I take it. The jury did not accept this defense, did they?

MR. HOLMES: They did not accept the defense of temporary insanity. They were advanced for two purposes, to try to establish the lack of criminal intent and also for purposes of mitigation. We felt that we were--this was a case that ought to be--ought to get a light sentence, felt that the prosecutor should not have requested the death sentence. But that testimony was really going more to the mitigation. Our psychiatric witness admitted that it was a non-psychotic condition, and they equated a psychotic condition with insanity. So, I think the jury by that concession concluded that there was no real insanity defense.

When the prosecutor argued during the sentencing phase to the jury, under Section (b)(7), which was the only aggravating circumstance submitted to the jury, which is as follows: That the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involves torture, depravity of mind, or an aggravated battery to the victim--

Q Mr. Holmes, you are back to the statute. I have been waiting for you to get to it.

MR. HOLMES: Yes, sir.

Q And where are the soft words in the statute that you feel are improper? Is it depravity of mind or is it outrageously or wantonly vile, horrible, or inhuman, or both?

MR. HOLMES: I think it is both, Your Honor. Depravity of mind is not involved in this case. As a matter of fact, there is a case decided at the same time as Godfrey, Holton v. State, in which the Georgia Supreme Court expressed the opinion and dicta that if a circumstance was only composed of depravity of mind, that that would probably be insufficient under the Furman decision.

Q There were some factors here, were there not? I take it they were not argued. But the fact that the killing was before the young child, the fact that there were two murders, not one, two, and the fact that--at least I think it is a fact--that he forced the second victim to anticipate being killed.

MR. HOLMES: That is true.

Q Are those argued at all?

MR. HOLMES: The first killing was in the presence of the child. She ran out. The second killing did--there would have had to have been a few seconds. There was anticipation. There was anticipation of death as far as the mother-in-law was concerned. But I believe that if you--I think what

you are getting at is whether or not that, as one Georgia case has held, is sufficient to find torture. I do not think momentary anticipation of death is what is contemplated by the word "torture." The Georgia Supreme Court has not specifically held that. They have held one case that is similar to that--

Q At least these are not specifically in the statute, this kind of thing, killing somebody in front of a young child.

MR. HOLMES: Yes, that--

Q Suppose this were listed as an aggravating circumstance in the statute, would it be constitutional?

MR. HOLMES: Your Honor, they are non-statutory aggravating circumstances at present and could not be the basis for a death sentence. Whether or not--if there was an aggravating circumstance number eleven that said, "If you commit two first degree murders in the same transaction, then that permits the imposition of the death sentence," I would think, without a chance to analyze it, that that would probably be specific enough. It would certainly be as specific as some of the other--

Q Do you not get to a certain point where you have to use general language just because of the instances mentioned by Mr. Justice Blackmun? It is simply impossible to foresee all the manners in which killings can take place, and

you have to use some fairly general rubric in order to express what you mean over and above murder in the first degree.

MR. HOLMES: I think that that is of course true. The goal of perfection in this type instance would be very difficult to reach. But the prosecutor in this case told the jury that torture was not involved and that aggravated battery was not involved in this case. And the jury only found a partial finding of (b)(7). They found it was outrageously or wantonly vile, horrible, and inhuman. Those terms--and the court approved that. There is another case cited in the biref where a jury found under Section (b)(7) that the offense was both horrible and inhuman. So, our argument is that the authoritative construction of Section (b)(7) by the Georgia Supreme Court is that that language, standing alone, is sufficient. In other words, they have construed this to the effect that (b)(7) is really only composed of vile, horrible, and inhuman. And we feel strongly that that is no standard at all. That is totally subjective. It certainly has no objective component in it to make review rational.

Q What if the Georgia legislation, instead of saying vile, wanton and inhuman, had said committed in front of a small child or committed on a second person ten seconds after it was committed on the first person; what you say, would not comprise torture. Would that satisfy your objections?

MR. HOLMES: That would be a wholly different case, Your Honor. But if they chose to get that specific and they described a particular type mother and the facts of the case fit that description, then the question here is whether the aggravating circumstance can provide any guidance to channel the discretion of jurors. Under that standard, by describing the crime very specifically and the facts meet that crime very specifically, you have a standard that can be reasonably followed by a jury.

Q My point is that just the range of human experience suggests that you are not going to have a whole catalog before you of the circumstances over and above first degree murder, which may lead to a permissible capital offense and that some generalization is necessary.

MR. HOLMES: It may be, Your Honor, but I think it has to be qualified by some objective portion. If you take this Section (b)(7) as a whole, leaving torture and aggravated battery in it, that is something that you can point to that can be proved beyond a reasonable doubt. And the standard in the sentencing phase is beyond a reasonable doubt.

Q Are you telling us that shooting at about a five or six foot range with a shotgun, blowing the head off of a victim in the presence of two other potential victims, one of whom became a victim, is not an aggravated battery?

MR. HOLMES: Your Honor, to the extent that it--

under the Georgia statute, an aggravated battery is the depriving of a member. And if the top of the head is a member of the body, then that just fits the description.

Q That just deprived two people of their heads.

MR. HOLMES: Yes, sir.

Q That certainly is at least as bad as chopping off an arm or a leg, is it not?

MR. HOLMES: Certainly, Your Honor, because you can live if you just lost an arm. But that gets into some close questions of definition.

Q What I was trying to get at, do you say that the phrase in the statute "aggravated battery" does not embrace what took place here?

MR. HOLMES: I am saying, Your Honor, that it could conceivably embrace it. But the jury did not find it, and the Georgia Supreme Court upheld the partial finding and, in effect, said that the jury's phraseology in finding it vile, horrible, and inhuman only was not objectionable.

Q Suppose this, instead of being a shotgun murder, had been just a clean single-shot pistol through the heart. Would you not be here making this same argument?

MR. HOLMES: If the jury had made the same partial finding and under the entire circumstances and yet the judge, the court, had held that that was a sufficient standard or that was a sufficient finding, in effect saying that that

composes the standard, yes, sir.

Q The implication of my inquiry of course is whether any first degree murder under the Georgia theory would fit (b)(7), any one.

MR. HOLMES: Certainly as it has been construed in this case, any first degree murder and any loss of life under the common definitions is going to be vile, horrible, and inhuman. It encompasses the range entirely of first degree murder. I do not know how it could not be found to be.

Q Can we not assume reasonably that a jury could have reasonably thought it fit these adjectives because it was in effect an execution committed in the presence of the next victim and even a possible third victim? Apart from the manner, whether it was injection of some drug or shooting with the shotgun or a clean rifle bullet, the very nature of the staging of it, an execution style murder--does that not fall within the language "vile, outrageous, wanton"?

MR. HOLMES: Yes, sir, it is horrible and it is inhuman as well. But every other murder is. Every other murder is.

Q But this statute apparently reaches out for something that is a little more than just an ordinary killing, as was suggested by a clean bullet shot through the heart. Is that not what this statute is trying to reach?

MR. HOLMES: I think that was the intent of the

statute, Your Honor. But I think it has been construed in a totally open-ended fashion. It has not been narrowed by definition as the--

Q Whether it is construed somewhere else that way is not relevant to this case. How it was applied in this case is all we're are concerned with, is it not?

MR. HOLMES: Your Honor, I think the issue is in this case as to whether or not Section (b)(7) has been unconstitutionally construed on its face as well as the issue of whether it just simply been unconstitutionally applied in this case.

Q But I thought you had just agreed that this was outrageous, vile, horrible, and inhuman. You did not agree on the aggravated battery part, but you have agreed that as to these parts, it fits the statute, the events of this case. Did I misunderstand you?

MR. HOLMES: No, Your Honor, but I did qualify that answer by saying that if you asked me that question about any murder, I would agree.

Q It is not a question of whether we agree here. It is a question of what a jury could reasonably conclude.

MR. HOLMES: Your Honor, I think one reason--one problem that is pointed out by this is that the standard, as construed by the Georgia Court here, is so vague and overbroad that it is not capable of rational and objective

review. Of course, it could fit this circumstance. It could fit any number of other circumstances across the range of first degree murder. And factors in this case that are non-statutory aggravating circumstances cannot under the statute be sufficient to impose the death penalty.

If there are no further questions, I would like to reserve five minutes.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Holmes.

Mr. Dunsmore.

ORAL ARGUMENT OF JOHN W. DUNSMORE, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

MR. DUNSMORE: Mr. Chief Justice, and may it please the Court:

In 1973 the General Assembly of Georgia, in response to this Court's decision in Furman, felt that the states could still inflict a death penalty, providing the manner in which they did so set forth certain articulate standards. In March of 1978 a jury in Polk County found that one of these standards had been complied with, based upon the state's case, and imposed the death penalty under the seventh aggravating circumstance.

This is a case of premeditated murder. The district attorney on that basis sought the death penalty. I would like to briefly discuss some of the facts in light of counsel's going over those facts. While there was an altercation between the petitioner and his wife some three weeks prior

to the fatal shootings, that altercation also involved violence, and it also involved a weapon capable of producing death, a knife. On two occasions, on the 5th of September, the petitioner drew a knife on his wife the first time to make her remain seated at a couch in their house, and the second time, actually used that knife on his wife in the bathroom in which he cut her clothes to and through some of her underclothing, although there was no apparent physical injury as a result of that.

Q That might bear on whether he should have been acquitted or found guilty by reason of insanity or in mitigation; but what has it got to do with the issues now?

MR. DUNSMORE: All right, I think it has to do with the issues in this matter in that it shows a predisposition on behalf of the petitioner, in view of his later statement, following the shootings, when he said, "I've done a hideous crime. I've thought about it for eight years. And I'd do it again. Or I was glad that I did it." We need to take into consideration the fact that even though there had been some phone conversations between the petitioner and his wife, there appears to be a sufficient interval, which the jury considered, where there would have been a cooling off of any passions. The killing takes place at night. The petitioner is able to lurk in the back of this trailer, has the advantage of lights on so that he can silhouette, pick out his target. He used what was called an over and under

shotgun combination rifle. That means he could have use the rifle, but he chose instead to use the shotgun. And it is pretty hard at five or six feet to miss with broad pattern of a shotgun.

Q What gauge was it?

MR. DUNSMORE: I am not too sure. I think it was a 20 gauge. I believe that is a 20 gauge over and under. But he had that option.

Q Do you think that option made all the difference in the world in this case under your statute?

MR. DUNSMORE: Mr. Justice Blackmun, no, I am not too sure. But I think it is an essential fact because I think what makes this case outrageously and wontonly vile and inhuman is the cold-blooded, calculated course of action which the petitioner embarked in from the beginning with an avowed purpose to cause death. The type of weapon he used is evidence of his intention of inflicting a fatal injury.

Q You can say about the same thing of any premeditated murder, can you not?

MR. DUNSMORE: Yes, but the statute, the seventh aggravating statute, as defined by our court in Harris, looks to, as they said, the core--not the core, but the core cases like Pitlis, like they used in State v. Dixon in Florida. We are not looking at a common killing, as Mr. Chief Justice Burger suggested. We are looking at a

killing where there was an avowed, a conscientious decision made some time even before he arrived at the trailer to inflict grievous bodily harm. Now--

Q Is not this always in first degree murder?

MR. DUNSMORE: That is true, but this seventh aggravating circumstance looks at the more heinous aspects of it. Now, there can be some overlapping--

Q Will you give me a motive that is not heinous?

MR. DUNSMORE: I think that they are all--the taking of any life would be--

Q No, I mean first degree murder.

MR. DUNSMORE: No. They are senseless killings, but some are more senseless than others, particularly when there is no avenue of escape; that is, there is no right to defend, no opportunity to defend against this course of action at all.

Q Do you not make your point when you say he planned it for a year in advance and after the event said that he would do it again if he had the chance?

MR. DUNSMORE: I believe that goes a far way in making our point, sir. I really do.

Q All murders are not accompanied by that kind of before and after sequence, are they?

MR. DUNSMORE: That is correct. And I think that is what makes this case so outrageously and wontonly vile.

For example, the outrageous nature of the case is the fact that it is heinous and atrocious and it offends human standards on the basis that an individual--these individuals--had no opportunity to defend themselves. We have the wantonness, that is, the aspect of the merciless killing where he comes in a trailer, a small area. We certainly do have torture in the terms of the anticipation of death, as we argued in our brief, which is a mental torture; I think the statute could include that. And our supreme court in the Floyd case, involving an armed robbery, double execution style killing, where the mother and daughter were separated for the purposes of determining where the money was in the house, paraded the individuals around the house, and then before the second killing the daughter witnesses her mother being killed, knowing that she is next on the list, so to speak. And in this case the evidence shows that when the wife was shot in the head--and I think that is another point that shows premeditation. Both victims were shot in the head, not like trying to get them out of the way or just to do some injury to them. In intent--

Q Mr. Dunsmore, could I ask two questions, one on the deliberate character of it? That is essential element of the offense itself, is it not?

MR. DUNSMORE: That is correct.

Q The second question I had is the charge of the

court directed the jury to designate in writing the aggravating circumstances, the circumstances which you found beyond reasonable doubt. And the next page of the record shows the form of verdict they returned, and it says that the offense of murder was outrageously or wantonly vile, horrible, and inhuman, and does not go on and say it involved depravity of mind and the like. The question I am unclear on is, Is this the jury's language or is this a form that the judge gave to them, that was pretyped and they just signed?

MR. DUNSMORE: I believe that this was the form that was given to them by the--and prepared by the prosecutor.

Q Is that a proper form? I wonder why it did not track the language of the statute and the language of the instruction then.

MR. DUNSMORE: I do not know. But on page 79 the judge instructs--

Q Seventy-nine of what?

MR. DUNSMORE: Of the appendix--instructed the complete language of the statute.

Q That was given orally, but the instruction did not go to the jury in writing, did it?

MR. DUNSMORE: It usually does.

Q Does it? I see.

MR. DUNSMORE: And that is the proceeding that

usually goes out in writing because they must designate. And it is a possibility, for example, in some cases more than one statutory aggravating circumstance may be submitted to the jury. For example, it is conceivable under the facts in this case that they could have found in the course of one of the murders.

Q The other question, just so I will get it all out and you have the time to comment on it, at the top of page 86, which is the part of the judge's form, which apparently accompanies the record on appeal, the defense of murder--and he strikes--the things that he instructed the jury on. It says, "The offense of murder"--then he strikes some language out--"was outrageously or wantonly vile, horrible"--and he changes "or" to "and inhuman in that it involved torture" and so forth. So you see that first one under the "g" there?

MR. DUNSMORE: Yes, sir.

Q And then there are brackets around the first part of it, and the brackets correspond with the jury's verdict, and the remainder corresponds with the instruction. Is it fair to infer that those brackets were inserted by the judge?

MR. DUNSMORE: I think that is the only thing that we could infer.

Q Do you attach any significance to that?

MR. DUNSMORE: The only significance that--I do not attach any significance to it other than the fact--and I cannot explain why he may have put those there--other than maybe it was a mental exercise, and he was trying to parrot the jury's finding, as appears on page 80 of the appendix.

In examining this case as to the--

Q Could I just interrupt you one more--in connection with Mr. Justice Stevens' inquiry, certainly on pages 80 and 81 the presence of the alternative at the top on each page, to fix the punishment at life, would indicate that this is a printed form of some kind or at least a typed form submitted to the jury. And what is your Georgia law when he instructs that they shall designate in writing the aggravating circumstances and they do not other than to use the form?

MR. DUNSMORE: I am not too sure I understand your question, Mr. Justice Blackmun.

Q Do you feel the jury in returning that form in each case complied with the instructions that you shall designate in writing the aggravating circumstances which you found beyond a reasonable doubt? I do not see any circumstances designated other than stating that the offense of murder was outrageously or wantonly vile.

MR. DUNSMORE: I think they did comply with it. And the reason I say they complied with it, in that they

found or the instruction was submitted to them in this form--I think there are two reasons why or basically one reason perhaps why they should designate in writing and why the court also submits for them, for their guidance. And that probably is that when jurors are given instructions, there is a lot that they have to remember. In a death case, we want to make sure that the jury's discretion is channeled and that they find within the terms of whatever aggravating circumstance or circumstances are are given to them. And I believe that is generally the reason why the prosecutors prepare the--a form ahead of time for the juries. It is to assist in arriving at their--to make sure they use the language of the statute.

Q They did not use all of the language of the statute though. The original record is lodged in the Court here, I take it.

MR. DUNSMORE: That is correct.

Q Will that include the two sheets of paper that were signed by the jury foreman and to which Mr. Justice Blackmun was referring?

MR. DUNSMORE: That would, Mr. Chief Justice. That would be--

Q Will you tell us whether those were typed up at the direction of the jurors, the foreman, or how they happened to be prepared.

MR. DUNSMORE: I do not believe it would tell us how they were prepared; that is, whether they were typed up at the direction of the judge, the state's attorney, or by the jurors. I believe that if they are in writing--and my memory escapes because I have been reading from the appendix--if they were in writing, more than likely--

Q In longhand, you mean?

MR. DUNSMORE: Longhand, probably by the jury. And if they were typed out ahead of time, most likely prepared by the district attorney who presided over the case.

Q Just looking at pages 80 and 81, there are two verdicts. Would you tell me whether the jury found that the conduct was outrageously or that the conduct was wantonly? Which was it according to this?

MR. DUNSMORE: Well, they found--

Q Which was it, according to this? They found it was one or the other. Were they satisfied that something is one or the other?

MR. DUNSMORE: They found all of all of it--I know it is used in the word--

Q They did not say outrageously and wantonly. They said outrageously or wantonly.

MR. DUNSMORE: I believe the words "outrageously" or "wantonly" are somewhat synonymous.

Q And that is the normal language used in Americus,

Georgia?

MR. DUNSMORE: This was not in Americus. This was in Cedartown. But--

Q In Cedartown. Is that normal, that something is outrageously and wantonly?

MR. DUNSMORE: Outrageous or wanton?

Q Or did this come straight from the judge's charge?

MR. DUNSMORE: The judge's charge uses those words. The state prosecutor uses those words.

Q So, the finding that and/or is a sufficient finding under charge of law, that the man is either guilty or not guilty or what? Where do you have a finding that uses "or"?

MR. DUNSMORE: I am not too sure I understand your question, Mr. Justice Marshall.

Q I asked you whether it was outrageously or wantonly, and you cannot answer.

Q The terms "outrageously" and "wantonly," both in the statute and in that form, are adjectives to the terms, the words "vile," "horrible," or "inhuman," are they not?

MR. DUNSMORE: That is correct.

Q Now, I ask you, is it one or the other?

MR. DUNSMORE: I think it is all of them, although

it could be one or the other. But I think it is all of them.

Q And it is sufficient to take a man's life?

MR. DUNSMORE: Well, it is sufficient to take a man's life when the facts support that beyond a reasonable doubt, which we contend they do support beyond a reasonable doubt.

Q The Court in Gregg rejected a constitutional attack on the seventh aggravating circumstance per se, did it not?

MR. DUNSMORE: Mr. Justice Stewart, if I were called in the opinion and the Court said we find no reason to believe that it would be applied too broadly or too vague--

Q And, therefore, we rejected the prosecutor's whole attack upon it.

MR. DUNSMORE: That is correct.

Q Per se on its language, which would include the--

MR. DUNSMORE: Per se, I would say, because the jury in Gregg did not even return that aggravating circumstances.

Q But you would include the disjunctive that Mr. Justice Marshall has just called to your attention--

MR. DUNSMORE: I do not believe that--

Q That was not the question that was presented in this case.

Q That is what the statute says, outrageously

or wantonly.

Q Then I would wonder why we grant cert in this case.

Q General Dunsmore, I take it that the typical sentencing, the charging form in a capital case in Georgia the judge is not obligated--in fact, it would probably be error to charge on all of the ten statutory aggravating circumstances. For instance, I know Section 1 says it is an aggravating circumstance if the murder was committed by a person who has a substantial history of serious assault, of criminal convictions. If the defendant who is being tried did not have such a history, the judge would not submit that to the jury, would he?

MR. DUNSMORE: That is correct, Mr. Justice Rehnquist. He only submits those aggravating circumstances which the prosecutor has put the defendant on notice that he would seek the death penalty on, only those. It may be one, it may be two. And I suppose in some instances it could be three. But I think--

Q I take it that in this case, the prosecutor, at least in his closing argument, said that this does not involve torture or an aggravated battery within the definition of the statute, but only outrageously or wantonly vile in that it displayed some depravity of mind. That was the argument?

MR. DUNSMORE: That is correct. And that was what--those are the words, and it is in the appendix. That is what he--that is what--that is how he phrased it. But I think it is important to keep in mind--

Q You say the prosecutor gives notice to the defendant as to the aggravating circumstance?

MR. DUNSMORE: That is correct.

Q But he just says like seven?

MR. DUNSMORE: Generally I would say--

Q He did not give formal notice to the defendant as precisely as he argued to the jury?

MR. DUNSMORE: That I do not know. But I would not say he would have to set out word for word. I think it is sufficient to put him on notice that I am seeking the death penalty under the second aggravating circumstance, the seventh aggravating circumstance. And I cannot conceive of any incident where any lawyer appointed would not, if he did not know it, number two or number seven, would not go and look at the statute in Title XXVII to see just exactly what it was, what it involved.

Q Let me interrupt you again. I take it this report or this form of the trial judge, is this made out and it goes to the appellate court in your state?

MR. DUNSMORE: That is correct, Mr. Justice Blackmun.

Q One thing that is of interest to me, and I have not noticed it before, was this--this is question, I think it was 21. Was the victim physically harmed or tortured? Answer: No. And if yes, state extent of harm or torture. And he answers that saying, "Excluding the actual murdering of the two victims." I do not know whether that is a formal finding, which would exclude your argument--insinuation anyway--of torture here.

MR. DUNSMORE: I do not think it would because I think this is the judge's--how he puts it in his own terms. He makes a--it is sort of like an evaluation to go along. And this goes with the record for the Georgia Supreme Court--

Q He obviously used it in forming his charge obviously because of that bracket that is on page 86.

MR. DUNSMORE: That is correct. And there may be--and there probably is some inconsistency because I think the facts would show that there is some torture, at least the anticipation of death as to the mother-in-law. And perhaps the judge at that time--many of us think of torture in the terms of the McCorquodale sense or the Dix sense where they are taking a knife or cutting a person.

Q Here is what the prosecutor said. You know what the prosecutor said in his closing argument on page 75 of the appendix: "Of course you cannot find there was torture. There wasn't any torture." That is his argument to

the jury. Are you suggesting that the jury nevertheless thought there might be torture here?

MR. DUNSMORE: It could be because the jury the law not from the district attorney and his argument, but from the judge.

Q I understand that.

MR. CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

[A luncheon recess was taken at 12:00 o'clock p.m.]

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AFTERNOON SESSION - 1:01 o'clock

MR. CHIEF JUSTICE BURGER: You may continue, counsel.

MR. DUNSMORE: Prior to the noon break, there was reference made on page 87 of the appendix to--in question 21 by the trial judge in this report in which he checked "No" after the phrase "Was the victim physically harmed or tortured?" And then he adds on "If yes, state extent of harm or torture: excluding the actual murdering of the two victims." That is what the trial judge thought in his mind. It is his reflection. He qualifies it, saying there is definitely physical harm to the victims. And I think the record more than adequately establishes that by virtue of the nature of the wounds to these two victims. We have argued and still maintain, consistently maintain, that the Supreme Court of Georgia when it conducts its review, as mandated by our general assembly, carefully goes over the facts to make sure that they are supported by a reasonable doubt, compares them with similar cases, and then also looks to determine whether or not there has been any arbitrariness or discrimination or prejudice in the case.

We have had the argument by petitioner that (b)(7), the seventh aggravating circumstance, is a catch-all. And yet we have had language by our court in Harris which looked for guidance from the Dixon case. And we are going to look

at the essential, the hardcore, the gruesome type, execution type slayings.

Q What would you say in a case of the so-called clean rifle shot to the heart, just bang, and the prosecutor nevertheless relies on (7) as an aggravating circumstance, and the jury comes back and finds it?

MR. DUNSMORE: All right, I think--

Q Would you say--and there is an Eighth Amendment challenge to that in the sense that if the seventh aggravating circumstance can cover this, it can cover anything. And so you are back to unruled discretion.

MR. DUNSMORE: No, I do not think we are, Justice White. And this is why I say we are not. I do not think the outcome would be any different as far as saying unruly discretion because if that individual preplans that execution--and let us say that he does it with a single shot rifle and stands on the top of a building and waits for his victim to come to look and pick him off--

Q You are just going to change my example. I will posit any set of circumstances that you require to say that Section 7 should not reach it. But, nevertheless, it is relied upon, and the jury finds it. And it is affirmed. What could we do about it?

MR. DUNSMORE: When you say it is affirmed, you are--

Q By the supreme court.

MR. DUNSMORE: I think it depends on the facts in the case. What I am saying is you need to look at it, does it fit within the mold of the other cases, similar cases which have arisen?

Q What if it does not?

MR. DUNSMORE: If it does not, then you ought to reverse it.

Q On what ground? What would we say? What would we say, that the seventh aggravating circumstance is unconstitutional as applied in this case?

MR. DUNSMORE: I would say that is probably what you would say because it does not fit in. The similarity--now, the similarity goes to--

Q Would we have to say that this is a construction of this section by the supreme court of the state and it reaches this far, and therefore it could reach that far in any case, and it is void on its face?

MR. DUNSMORE: But I do not think we have to get that far because I think in their review to date, they have--all of the cases which have come before it have been horrible crimes.

Q But how about this one?

MR. DUNSMORE: I think this is as horrible and maybe more horrible than others that have. But the only

reason it is here is because it is such a horrible crime.

Q Well, I do not know.

Q It may be just the reverse. You did not petition for cert.

MR. DUNSMORE: That is correct.

Q It may be here because we think it is not as horrible as others.

MR. DUNSMORE: That is a possibility.

Q What can you do if we happen to disagree with you and think that on the facts of this case this is way out of line with what the Georgia Supreme Court has done in other cases? Let us just suppose that.

MR. DUNSMORE: All right. As I read the question posed in this case, if you disagreed that this case--the infliction of the death penalty was not outrageously, wantonly and vile, then what you would--

Q We have to accept that it was and is within the meaning of that seventh circumstance as construed by the supreme court of the state.

MR. DUNSMORE: That is correct.

Q We just have to say that--

MR. DUNSMORE: All right.

Q --that this does fit within that meaning. And, therefore, what should we do?

MR. DUNSMORE: If you say it does fit within that meaning?

Q We have to accept that it does.

MR. DUNSMORE: Right. And if it fits within that meaning, then you should affirm on the basis of the facts presented in the case. If I understand you--and maybe I do not understand your question correctly, but if you assume that the Supreme Court of Georgia is correct, the facts show conduct which is outrageously and wantonly and vile and that they have not too broadly construed what is an outrageous, wanton, and vile and inhuman killing--

Q That is the question. That is the question for Eighth Amendment purposes, I suppose.

MR. DUNSMORE: I think--I think--

Q We cannot say that they misconstrued their statute.

MR. DUNSMORE: I agree with you.

Q We cannot say that. They are in charge of construing the statute.

MR. DUNSMORE: That is correct.

Q And these facts, whatever they are, we have to accept as being deemed outrageously wanton and vile by the Supreme Court of Georgia.

MR. DUNSMORE: I do not think we have an Eighth Amendment problem because I think the facts show--

Q No, you do not, but that is the question that was posed to be argued here.

MR. DUNSMORE: Our position is we do not have an Eighth Amendment position or an argument against it in this aspect because this is a crime which comes down in a well defined set of circumstances, controlled discretion in the statute, appellate review channeling, making sure that the jury does not go off on some tangent within the state's right to prescribe the death penalty for certain standards of conduct, particularly where the defendant from the beginning has engaged in that course of conduct where he intends, from the outset, to take the victim's life, different from the fact that he goes in and he robs a store and he says, "Gee, this guy might be able to identify me." So, at that point.

Here we have before he even gets to his intended victim the intent.

Q Mr. Dunsmore, could I ask you a question about the way the Georgia Court construes the statute? Are the words "in that it involved torture, depravity of mind, and aggravated battery" still part of the essential definition of of this aggravated circumstance, in your judgment?

MR. DUNSMORE: No, I think--

Q I read that out of the statute.

MR. DUNSMORE: --in Harris they have--in Harris they said, "We view the words 'outrageously, wantonly vile' as applying to the conduct of the defendant, his act"--

Q Right.

MR. DUNSMORE: --"and also as its impact upon the victim," which is illustated or exemplified by either torture, aggravated battery or depravity of mind.

Q You regard those as illustrative words rather than limiting words?

MR. DUNSMORE: That is correct.

Q And of course when the Court in the Gregg case considered the statute, I think the Court assumed that those were limiting words. Would that not be? I do not know if we really had to reach that.

MR. DUNSMORE: You did not reach it. And I would be speculating if I--

Q We should then construe the statute just as though those words were not in it at all. And, if that is true, then I suppose the bloody character of the shotgun killing could make it vile.

MR. DUNSMORE: I think there is no question about it.

Q So, you would rely on the fact that it was a shotgun rather than a rifle to justify the finding of--

MR. DUNSMORE: No question. He had the choice between the weapons, and I think the vileness is shown. He picked the weapon which would do the greatest damage because it blew both their heads off or literally reduced them to a pulp.

Q So, then the constitutional problem is whether a statute which just in broad language says any murder, rape, armed robbery, or kidnapping that is outrageously or wantonly vile, horrible, or inhuman, period, is enough to be an aggravated circumstance.

MR. DUNSMORE: That would be correct. And I say that it would because those words are sufficient enough to put a defendant on notice as to what conduct is to be defended against, and they are also words--

Q I do not know how they put him on notice if you say they are just illustrative and you say anything else somewhat similar is also going to be covered.

MR. DUNSMORE: I think the essential words of the statute are what the jury found and what the Georgia Supreme Court has said, particularly in view of the Holton case where they just had depravity of mind.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Holmes?

REUBTTAL ARGUMENT OF J. CALLOWAY HOLMES, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. HOLMES: Yes, Your Honor. I would like to make a couple of points that were raised during the questioning on the Gregg case. The first point that I would like to make is that we take the position very strongly that the Gregg

case did not hold Section (b)(7) constitutional. There was a limiting footnote in that case, footnote No. 51 that referred to limited grant of certiorari in that case, which was limited to the question of whether the death penalty in that case was unconstitutional. In that case, even though Section (b)(7) was charged, it was not found. The Court in responding to the arguments of counsel that Section (b)(7) could apply to any murder, the Court said in part it is of course arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way. And there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction.

Q Where do you find that in Gregg? I have Gregg in front of me.

MR. HOLMES: That is 96 Supreme Court 2909 at 2938.

Q Oh, it is in the text, I see, at page 201.

MR. HOLMES: It is recorded in page 21-22 of the brief. Footnote 51 I think indicates that Section (b)(7) was considered in that case only to the extent they considered the attack against the entire system. So, I do not believe the Court has really decided that question... But this question is somewhat somewhat narrower because this question is limited to how the court, the Supreme Court of Georgia, has construed Section (b)(7). They have construed it, as conceded

by the state, to really only include outrageously or wantonly vile, horrible, and inhuman. And another case, I think the Blake v. State case, has said that outrageously and wantonly only modify vile, and they do not modify horrible and inhuman. And since the statute is couched in disjunctive terms, that means that a jury would be authorized to find the death penalty in Georgia on a finding that the murder was horrible. That is why we say that the open-ended construction that this Court was not willing to assume that the Georgia Supreme Court would adopt has in fact been adopted. And the facts of this case with reference in the brief to the 42 to 45 other domestic murder cases in Georgia that have been appealed where life sentences were granted, of those there has been no death penalty. Many of those cases--they are indicated in the brief--are similar on the facts to this Godfrey case, including two or three multiple murders.

Q Suppose you look back over the history of the oversight of the sentencing by the Georgia Supreme Court and you find that in every single one, up until this one, when the seventh aggravating circumstance is relied on, any guy in his right mind would think it was an outrageous crime and it was really bad. And let us assume that you would agree that in every one but this one, until this one, the Georgia Supreme Court had applied the seventh aggravating circumstance in that way. Is that what you are suggesting

they have until this one? You have just said there are an awful lot of them where they had life sentences on facts like these.

MR. HOLMES: That is what the jury did. The Georgia Supreme Court in no case has found that the death penalty was not warranted on the facts, particularly under Section (b)(7).

Q What if, following Mr. Justice White's question, all of the cases affirming death penalties in Georgia under aggravating circumstances, number seven, had been like McCorquodale except this one?

MR. HOLMES: Your Honor, if they had been, I believe that I have to agree that that is included, the horrible torture murder is probably or necessarily what was intended to be reached. But because if you assume that they had all been that horrible and then this one comes along, really the Georgia Supreme Court has, under that hypothesis, never had an occasion yet to demonstrate how they did construe this section.

Q Until this one.

MR. HOLMES: Until this one. This one shows that they construe it to indicate any first degree murder where the jury has imposed the death sentence.

Q Has the prosecution carried its burden if it shows that the circumstances and facts of the particular case

fit in any one of these categories?

MR. HOLMES: You mean categories--

Q In the statute.

MR. HOLMES: --of vile, horrible or inhuman as separate categories?

Q If the facts show that it fits any one of them, even though as a practical matter we know--probably I do--if it fits one, it is likely to fit more. But if it just fits one, does that not meet the prosecution's burden?

MR. HOLMES: Your Honor, I would agree that if it fits one, it would fit all of them. And in Blake v. State that is really what the Georgia Supreme Court held.

Q If it fits one, has the prosecution met its burden under the statute?

MR. HOLMES: In theory, yes. Under this case, no. For one thing, I do not know how it could meet the burden of proving something--some murder was horrible beyond a reasonable doubt. It is completely subjective, you know.

Q That may be. Any one of us might have that subjective reaction. But 12 presumably representative citizens of Georgia concluded that it did fit under at least one of these, did they not?

MR. HOLMES: Yes, Your Honor, I would have to assume that they did. The course of the sentence review--in this case the state has characterized this domestic

murder in its brief as an execution style murder. They did not dream up that separate category of murder. I believe not-for-profit execution style murder is what they have called it. The Georgia Supreme Court did not mention that in the Godfrey case. But in another case they created that category in order to uphold a Section (b)(7). So, they have ignored the 45 domestic murder cases, although I would have to say that the death penalty was not even sought in but 14 of those. And the jury did not find the death penalty or a Section (b)(7).

Q Are you saying that a not-for-profit death by execution style murder could not fit within the language of Section 7?

MR. HOLMES: I could not say that it could not fit because our point is that anything--any characterization of a first degree murder could fit within Section (b)(7).

Q Are you saying that if the Georgia Supreme Court says a non-for-profit, gangland, execution type killing fits, any first degree murder fits even though it is a clean rifle shot?

MR. HOLMES: No, Your Honor. They have created this category. Our point is to--in order to--under the statute--they have a duty under the statute to compare these death sentence cases with similar cases, and they have in the past said that that will be determined by the--what juries

have done in similar cases in Georgia before. So, they have ignored the category to which this properly belongs, domestic murders with a great deal of emotional and psychological diminished capacity. In taking it and putting it into another category where they can compare with 15 cases cited in the appendix and say that that is similar, they are using the similar word under the sentence review in a very elastic manner in order to uphold these Section (b)(7). And they do not compare Section (b)(7) cases with only other Section (b)(7) cases. In this case there are only two of the 15 cited as similar that were Section (b)(7) only. The rest of them were (b)(2), rape, armed robbery murders.

MR. CHIEF JUSTICE BURGER: Your time has expired.

Q Mr. Holmes, you filed this long list of summaries of other cases in which the death sentence was not imposed, for one reason or another.

MR. HOLMES: Yes, sir.

Q In some of these cases I notice there was no authorization to impose the death sentence at the time of these convictions. For one reason or another the death sentence was not imposed in these cases, summaries of which you filed, and there are I do not know how many of them.

MR. HOLMES: I have got 221.

Q Two hundred and some. What is the argumentative purpose of this? I want to be sure I understand it.

MR. HOLMES: I think Justice White pointed out in his concurrence in the Gregg case that in addition to the aggravating circumstance guidelines, there was the additional sentence review to be conducted by the Georgia Supreme Court, which would be an additional safeguard against capricious and arbitrary infliction of the death sentence.

Q Yes. That does not really answer my question.

MR. HOLMES: They have construed their duty under that to compare it--

Q With other cases in which...

MR. HOLMES: --with all other cases, life sentence cases, appealed to the Georgia Supreme Court and other cases where the death sentence had been imposed and compare those and then cite which cases they find to be similar in order to uphold the death sentence.

Q Right.

MR. HOLMES: That is why I think those cases are relevant because there are many of them in there that are very similar to Godfrey that they have apparently ignored.

Q Were these all on-appeal cases?

MR. HOLMES: Those are all life sentence cases that were appealed. Those are the only ones--

Q These were appealed, were they not?

MR. HOLMES: The only ones that they considered are the ones that were appealed.

Q Right.

MR. HOLMES: That discounts all those where a prosecutor made a decision to allow a plea for a life sentence or for voluntary manslaughter.

Q What is the point of this list, the point of view?

MR. HOLMES: The point is that if the Court were to feel that the construction that we contend is open-ended on its face--

Q Right.

MR. HOLMES: --is somehow cured by the fact of the statutory sentence review, then this, we think, demonstrates that the statutory sentence review is not anything like was expected by this Court in Gregg and that they are not performing the duty that they are supposed to perform.

Q None of these was a death sentence?

MR. HOLMES: None.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[The case was submitted at 1:22 o'clock p.m.]

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