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Criminal Procedure: *Godfrey v. Georgia* and the "Especially Heinous, Atrocious, or Cruel" Murder

When Oklahoma's current death penalty statutes were enacted in 1976,[1] a similar statutory plan had already withstood facial challenge on constitutional grounds in *Gregg v. Georgia*.[2]

Sections 701.9-701.13 of Title 21 of the Oklahoma Statutes, like the Georgia statutes[3] that were reviewed by the United States Supreme Court in *Gregg*, provide for a bifurcated trial,[4] the finding of at least one of the statutorily specified aggravating circumstances,[5] and automatic review by the Oklahoma Court of Criminal Appeals in all capital punishment cases.[6]

Recently, however, the United States Supreme Court reexamined the Georgia statutes,[7] scrutinizing the factual situation in which one of the statutory aggravating circumstances becomes applicable to a murder.

The purpose of this note is to examine in particular the aggravating circumstance found at section 701.12(4) of Title 21 of the Oklahoma Statutes, "that the murder was especially heinous, atrocious, or cruel," in light of *Godfrey v. Georgia*.[8]

To accomplish that goal, it will be necessary to examine first the statutory aggravating circumstance[9] at issue in *Godfrey*, and to compare that statute to Oklahoma's comparable section 701.12(4). Then, following a fuller analysis of *Godfrey*, the implications of that case for Oklahoma will be discussed in light of two recent Oklahoma Court of Criminal Appeals decisions construing section 701.12(4),[10] *Chaney v. State*[11] and *Eddings v. State*.[12]

[1] 21 OKLA. STAT. §§ 701.9-701.15 (Supp. 1980).

[2] 428 U.S. 153, *reh. denied*, 429 U.S. 875 (1976).

[3] GA. CODE ANN. §§ 26-1101, 26-1311, 26-1902, 26-2001, 26-3301 (1972) define the crimes for which the death penalty may be imposed; § 27-2503 provides for a bifurcated trial; § 27-2534.1(b) enumerates ten aggravating circumstances, at least one of which must be found and specified if death is imposed, according to § 26-3102; § 27-2537 provides for direct review by the Georgia Supreme Court if death is imposed; § 27-2537(e) requires that if the sentence is affirmed, the court must include in its decision reference to similar cases that have been considered.

[4] 21 OKLA. STAT. § 701.10 (Supp. 1980).

[5] 21 OKLA. STAT. §§ 701.11, 701.12 (Supp. 1980).

[6] 21 OKLA. STAT. § 701.13 (Supp. 1980).

[7] Godfrey v. Georgia, 446 U.S. 420 (1980).

[8] *Id.*

[9] GA. CODE ANN. § 27-2534.1(b)(7). Section 27-2534.1 of the Georgia Code Annotated provides: "(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: . . . . (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."

[10] Section 701.12 of Title 21 of the Oklahoma Statutes specifies, "Aggravating circumstances shall be: . . . 4. The murder was especially heinous, atrocious, or cruel."

[11] 612 P.2d 269 (Okla. Cr. 1980).

[12] 616 P.2d 1159 (Okla. Cr. 1980).

Comparison of the Oklahoma and the Georgia Statutes

At the time of the Supreme Court's decision in *Gregg v. Georgia*,[13] the Georgia Supreme Court had affirmed two death sentences[14] when the only statutory aggravating circumstance found by the jury was that of subsection (b)(7).[15] One of those cases involved "a horrifying torture-murder," while the other was of "similar ilk."[16] In response to defendant Gregg's argument that this aggravating circumstance was so broad that capital punishment could be imposed for almost any murder, the Supreme Court responded: "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."[17]

By the time of the Supreme Court's review of Godfrey's conviction, which was also based wholly on subsection (b)(7), the Court found that the Georgia Supreme Court had indeed adopted such a "limiting construction" of subsection (b)(7),[18] and that failure to follow this limitation in imposing a death sentence in Godfrey's case constituted precisely the "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury"[19] prohibited earlier in *Furman v. Georgia*.[20]

Although the phraseology of Georgia's subsection (b)(7) differs facially from Oklahoma's section 701.12(4),[21] judicial construction of the respective statutes indicates that they are clearly parallel, and for that reason, the decision in *Godfrey* deserves close attention by the Oklahoma courts.[22]

In an opinion issued subsequent to *Gregg*,[23] the Georgia Supreme Court

[13] 428 U.S. 153, *reh. denied*, 429 U.S. 875 (1976).

[14] McQuordale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974); House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974).

[15] See note 9, *supra*, for express language of the statute.

[16] 446 U.S. 420, 429 (1980). The Supreme Court stated in *Godfrey* that the two cases cited in note 14, *supra*, had been decided prior to the *Gregg* decision; the *Gregg* case indicates that only one case, McQuordale v. State, 233 Ga. 369, 211 S.E.2d 377 (1974), had been decided at that time. Both *McQuordale* and House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), were decided in 1974, while the *Gregg* decision came in 1976.

[17] Gregg v. Georgia, 428 U.S. 153, 201 (1976).

[18] Godfrey v. Georgia, 446 U.S. 420, 429 (1980).

[19] *Id.*

[20] 408 U.S. 238 (1972) (imposition and carrying out of the death penalty under state statutes which authorize imposing such a sentence in the unguided discretion of the jury constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments).

[21] See notes 9-10, *supra*, for text of the respective statutes.

[22] As noted in *Gregg*, the new statutory aggravating circumstances, one of which must be found before a death sentence can be imposed, direct the jury's attention to the specific circumstances of the crime committed. Each factor named in the statute requires the jury to answer a question, and the test for applying the seventh aggravating circumstance found in subsection (b) is, "Was it [the murder] committed in a particularly heinous way. . . .?" 428 U.S. 153, 201 (1976). The comparable Oklahoma test is, "Was the murder especially heinous, atrocious, or cruel?"

[23] Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976).

indicated that subsection (b)(7) involves two factors—the effect on the victim, *i.e.*, of torture or aggravated battery, and the offender's depravity of mind. As to both factors, *"the test is that the acts were outrageously or wantonly vile, horrible or inhuman."*[24]

The Georgia jury that sentenced Godfrey to death used this same language in specifying the aggravating circumstance that they had found to exist in the murders for which they had previously convicted Godfrey. On appeal, the Georgia Supreme Court rejected Godfrey's contention that this phraseology of subsection (b)(7) was an inadequate statement of the statutorily specified aggravating circumstance.[25]

Finally, in *Godfrey* the Supreme Court found that the Georgia Supreme Court had reached three "separate but consistent" conclusions regarding this particular aggravating circumstance: (1) the evidence that the offense fell into this aggravating circumstance had to demonstrate torture, depravity of mind, or an aggravated battery to the victim; (2) "depravity of mind" comprehends only the kind of mental state that leads the murderer to torture or to commit an aggravated battery before killing the victim; (3) the word "torture" must be construed *in pari materia* with "aggravated battery," resulting in a requirement of serious physical abuse of the victim before death.[26]

In effect, then, Georgia's subsection (b)(7) sets forth an aggravating circumstance justifying the death penalty only when the acts culminating in the homicide were "outrageously or wantonly vile, horrible or inhuman,"[27] and such acts are those which result in "serious physical abuse of the victim before death."[28]

The test for application of Georgia's subsection (b)(7) promulgated in *Harris v. State*[29] bears close resemblance to the Oklahoma Court of Criminal Appeals' current construction of section 701.12(4) of Title 21.

In *Eddings v. State*,[30] the court rejected the defendant's contention that the murder to which he entered a plea of nolo contendere was no more heinous, atrocious, or cruel than every murder and quoted the Florida Supreme Court's[31] definition of "especially heinous, atrocious, or cruel"[32]:

> [H]einous means extremely wicked or shockingly evil; . . . atrocious means outrageously wicked and vile; . . . cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoy-

[24] *Id.*, 230 S.E.2d at 10-11 (emphasis added). *See also* Blake v. State, 239 Ga. 292, 299, 236 S.E.2d 637, 643 (1977) ("the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim.").

[25] Godfrey v. State, 243 Ga. 302, 310, 253 S.E.2d 710, 718 (1979).

[26] 446 U.S. 420, 431 (1980).

[27] See text accompanying note 24, *supra*.

[28] See text accompanying note 26, *supra*.

[29] 237 Ga. 718, 230 S.E.2d 1, 10-11 (1976).

[30] 616 P.2d 1159 (Okla. Cr. 1980).

[31] State v. Dixon, 283 So. 2d 1 (Fla. 1973).

[32] FLA. STAT. § 921.141(5)(h) (1979) specifies an aggravating circumstance justifying imposition of the death penalty that is identical to 21 OKLA. STAT. § 701.12(4) (Supp. 1976).

> ment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.[33]

Additionally, in *Chaney v. State*,[34] the court approved trial court instructions that defined section 701.12(4) with substantially similar wording.[35] In rejecting the defendant's assertion that all murders are especially heinous, atrocious, and cruel, the court noted, "the manner of death in one case may certainly be distinguishable from another in the degree of atrocity or cruelty."[36]

Like Georgia, Oklahoma seems to have construed this particular aggravating circumstance to mean that a murder is especially heinous, atrocious, or cruel when the manner of causing death is outrageously wicked or vile. The definitions adopted in *Chaney* and *Eddings* indicate that such acts are those intended to result in torture of the victim or the infliction of "a high degree" of pain. As an analysis of *Godfrey* shows, the Supreme Court has restricted application of such an aggravating circumstance to cases in which the victim was physically abused prior to death. As the fact situations in *Chaney* and *Eddings* show, however, Oklahoma has not so restricted the application of our fourth statutory aggravating circumstance. The strong parallel between this Oklahoma aggravating factor (that the murder was especially heinous, atrocious, or cruel) and the Georgia statute construed in *Godfrey* makes the *Godfrey* decision significant for Oklahoma.

Godfrey v. Georgia

Defendant Godfrey was accused of the shotgun murders of his wife and her mother. In September of 1977, after an argument in which the defendant had threatened her with a knife, Mrs. Godfrey and the couple's 11-year-old daughter moved in with Godfrey's mother-in-law, who lived only a short distance from the Godfrey house. Mrs. Godfrey filed for a divorce, but the arguments between her and the defendant continued to occur frequently, conducted by telephone. On September 20, after two such telephone calls, Godfrey got out his shotgun, walked down the hill to his mother-in-law's house trailer, aimed the shotgun through the window of the trailer, and shot his wife in the forehead, killing her instantly. He then entered the trailer, striking his daughter with the butt of the gun as she fled, and shot his mother-in-law in the head; she also died instantly. Godfrey then called the

[33] 616 P.2d 1159, 1167-68 (Okla. Cr. 1980).

[34] 612 P.2d 269 (Okla. Cr. 1980).

[35] The trial court in *Chaney* instructed the jury that "heinous" means "extremely wicked or shockingly evil," "atrocious" is "outrageously wicked and vile," and "cruel" is defined as "designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless." 612 P.2d at 280.

[36] *Id.*

local sheriff's office, explained what had happened, and asked for the sheriff to "come and pick him up."[37]

He sat down in a chair in open view of the driveway to wait for the officers, and upon their arrival he showed them where he had put the shotgun. Later he said, "I've done a hideous crime . . . but I have been thinking about it for eight years. . . . I'd do it again."[38] Upon trial, he was convicted of two counts of murder and one count of aggravated assault. The jury returned death sentences as to each murder conviction, stating that they had found as an aggravating circumstance in both murders that the offense was "outrageously or wantonly vile, horrible and inhuman."[39]

This application of subsection (b)(7) presents a significant contrast to Georgia's prior construction of that aggravating circumstance. As the Supreme Court noted in *Godfrey*, "Three times during the course of his argument the prosecutor stated that the case involved no allegation of 'torture' or of an 'aggravated battery.' "[40] Additionally, in a questionnaire required in all capital cases,[41] the trial judge answered a question inquiring whether the victims had been physically harmed or tortured, "No, as to both victims, excluding the actual murdering of the two victims."[42] The Georgia Supreme Court, however, affirmed Godfrey's conviction and the imposition of the death penalty, stating simply that the evidence supported the jury's finding of the subsection (b)(7) aggravating circumstance in both murders.[43]

In reviewing Godfrey's sentence, the Supreme Court noted the limiting criteria previously established by the Georgia Supreme Court for application of the subsection (b)(7) aggravating circumstance. The opinions in *Harris v. State*[44] and *Blake v. State*[45] suggested to the Supreme Court that the narrowing construction Georgia had adopted amounted, quite simply, to a requirement of evidence that the victim had been seriously physically abused prior to death.[46] Such a conclusion was manifested in the three-prong test that had evolved: (1) for this circumstance to apply, there must be evidence of torture, depravity of mind, or an aggravated battery to the victim; (2) depravity of mind is the mental state that leads to torture or aggravated battery before the victim is killed; (3) torture and aggravated battery must be construed together, imposing a requirement for evidence that the victim was seriously physically abused prior to death.[47]

In *Godfrey*, the Court concluded that the previously established criteria

[37] 446 U.S. 420, 424, 425 (1980).
[38] *Id.* at 425, 426.
[39] *Id.* at 426.
[40] *Id.*
[41] GA. CODE ANN. § 27-2537(a) (Supp. 1975).
[42] 446 U.S. 420, 426 (1980).
[43] 243 Ga. 302, 309-11, 253 S.E.2d 710, 717-18 (1979).
[44] 237 Ga. 718, 230 S.E.2d 1 (1976).
[45] 239 Ga. 292, 236 S.E.2d 637 (1977).
[46] 446 U.S. 420, 431 (1980).
[47] *Id.*

were not followed, and the Georgia Supreme Court had failed to meet the standards it had laid out for itself.[48] As expressly indicated by both the prosecutor in his opening remarks and by the trial court in its sentencing report,[49] the murder did not involve torture. Furthermore, no claim was ever made that the defendant had committed an aggravated battery upon either victim, "or, in fact, caused either of them to suffer any physical injury preceding their deaths."[50] In light of all these facts, the Supreme Court concluded that the Georgia court could not be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhuman in that [they] involved . . . depravity of mind. . . ."[51] In support of that conclusion the Court reiterated, "The petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously."[52] Significantly, the Court noted that in light of the fact that the victims did die instantly, "it is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. *An interpretation of section (b)(7) so as to include all murders resulting in gruesome scenes would be totally irrational.*"[53]

This conclusion, and the reasoning supporting it, is significant to a comparison of the factual situations under which the Oklahoma Court of Criminal Appeals has affirmed findings that a murder is "especially heinous, atrocious, or cruel."[54]

Chaney v. State

Larry Leon Chaney was convicted of first-degree murder in the death of Mrs. Kendal Inez Ashmore. Mrs. Ashmore and her assistant, Kathy Brown, had made a business appointment with a man whom neither woman knew for March 17, 1977. The women's bodies were found buried in a shallow grave on the defendant's property on March 22, 1977.[55]

The jury found four aggravating circumstances present before assessing the death penalty: (1) the defendant had in fact created a great risk of death to more than one person in that he did in fact kill two persons, Mrs. Kendal Inez Ashmore and Kathy Ann Brown; (2) he committed the murder for remuneration or the promise of remuneration in that he killed the two women while attempting to extort $500,000 from the Ashmore family; (3) the murder was especially heinous, atrocious, and cruel; (4) the murder was com-

[48] *Id.* at 432.
[49] *Id.* at 426.
[50] *Id.* at 432.
[51] *Id.*
[52] *Id.* at 433.
[53] *Id.* at n.16 (emphasis added).
[54] 21 OKLA. STAT. § 701.12(4) (Supp. 1980).
[55] Chaney was tried in this case only for the murder of Mrs. Ashmore. In separate cases he was charged with the murder of Ms. Brown and with the kidnapping of both women. 612 P.2d 269, 273-74 (Okla. Cr. 1980).

mitted for the purpose of avoiding or preventing a lawful arrest or prosecution.[56]

The opinion in *Chaney* gives minimal details with respect to the circumstances surrounding the murder for which the defendant was convicted. The bodies were discovered under a large pile of brush;[57] the state introduced into evidence strips of toweling, found on the bodies, which were used to bind and strangle the victims;[58] and the state proceeded on the theory that the victims were both killed shortly after their abduction on March 17.[59]

On appeal, the defendant argued that the jury was not given any guidance during the sentencing stage of the trial in its evaluation of the aggravating and mitigating factors.[60] In particular, the defendant attacked the fourth aggravating circumstance listed in section 701.12, that the murder was especially heinous, atrocious, or cruel. The Court of Criminal Appeals, noting that "the manner of death in one case may certainly be distinguishable from another in the degree of atrocity or cruelty,"[61] approved the definition of "especially heinous, atrocious, or cruel" given by the trial court: "heinous" means "extremely wicked or shockingly evil," "atrocious" is "outrageously wicked and vile," and "cruel" is defined as "designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless."[62]

The facts that distinguished this case, however, are alluded to only in the final paragraphs of the opinion:

> We are of the opinion that this case is one of the most heinous and cruel cases considered by this Court. *The manner in which the women were killed*, coupled with the demand for ransom *and the manner in which the bodies were disposed of*, justifies the imposition of the death sentence.[63]

Such an interpretation of the evidence that justifies a finding that a murder was "especially heinous, atrocious, or cruel" seems irreconcilable with an analysis of *Godfrey* and with the Supreme Court's express indication that, where the victim dies instantly without prior physical abuse, the scene resulting from the murder is "constitutionally irrelevant"[64] for purposes of

[56] *Id.* at 282 n.1.

[57] *Id.* at 275.

[58] *Id.* at 278.

[59] According to appellate briefs filed by both parties, a medical examiner testified for the state that Mrs. Ashmore died of strangulation on March 17, approximately two hours after having eaten (the appointment with the unknown businessman had been at 1:00 p.m., March 17). Brief for Appellant at 12; Brief for Appellee at 11.

[60] 612 P.2d 269, 279 (Okla. Cr. 1980).

[61] *Id.* at 280.

[62] *Id.*

[63] *Id.* at 283 (emphasis added).

[64] 446 U.S. 420, 433 n.16 (1980).

determining whether the *murder* was in fact "outrageously or wantonly vile, horrible or inhuman. . . ."[65]

Furthermore, the facts in *Chaney* indicate only that the murder victim was strangled on the same day that she was abducted. Any argument that the victim's mental suffering during the interim between the kidnapping and the actual killing made the murder "outrageously wicked and vile"[66] also seems to be foreclosed by the opinion in *Godfrey*. The emphasis the Supreme Court has placed on physical harm prior to death is such that an instantaneous death without prior abuse is no more outrageously or wantonly vile, horrible, or inhuman than any other murder.[67]

Eddings v. State

Eddings v. State[68] provides an even closer factual comparison to *Godfrey*. On April 4, 1977, Monty Lee Eddings, a runaway juvenile from Missouri, was driving a stolen vehicle carrying four passengers along the Turner Turnpike when Highway Patrolman Larry Crabtree pulled up behind and turned on his cruiser's red light. Eddings pulled off the road, the patrolman got out of his cruiser, and when the patrolman was within about six feet of the Eddings vehicle, Eddings stuck a sawed-off .410 shotgun out the window and fired, killing Trooper Crabtree.[69]

After the state's motion to have Eddings certified to stand trial as an adult was granted and affirmed,[70] Eddings pleaded nolo contendere to a charge of first degree murder.[71] All three of the aggravating circumstances alleged by the state in its bill of particulars were found to exist beyond a reasonable doubt by the trial court: (1) that the murder was especially heinous, atrocious, or cruel; (2) that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; (3) that the defendant would constitute a continuing threat to society.[72]

In response to the defendant's claim on appeal that all murders are "especially heinous, atrocious, or cruel," the Court of Criminal Appeals looked to the Florida definition of the same terminology.[73] The court then looked to the state's position regarding this particular aggravating circumstance—"that the identity of the victim and the manner in which the killing was done make this murder especially abhorrent."[74]

[65] *Id.* at 432.

[66] See trial court's definition of "especially heinous, atrocious, or cruel," text accompanying note 63, *supra*.

[67] 446 U.S. 420, 428, 429 (1980). *See also* dissent by White and Rehnquist, *id.* at 450-51, arguing for precisely this line of reasoning ("mental suffering" of Godfrey's mother-in-law during the interim between her daughter's death and her own should not be ruled out as "torture").

[68] 616 P.2d 1159 (Okla. Cr. 1980).

[69] *Id.*

[70] *In re* M.E., 584 P.2d 1340 (Okla. Cr.), *cert. denied*, 436 U.S. 921 (1978).

[71] 616 P.2d 1159 (Okla. Cr. 1980).

[72] *Id.* at 1167.

[73] *Id.* at 1167-68. See also text accompanying notes 32-34, *supra*.

[74] *Id.* at 1168.

The distinguishing fact surrounding this murder, the Court of Criminal Appeals found, was that the victim had not been prepared for danger in this particular situation—"Indeed, he had no reason to expect it."[75]

The problem with such reasoning, of course, is that the same argument could have applied factually to *Godfrey*; in the instant before Godfrey aimed his shotgun through the window of his mother-in-law's trailer to shoot his wife, "he observed his wife, his mother-in-law, and his 11-year-old daughter playing a card game."[76] A moment later, Godfrey had killed his wife, and after a lapse of time only long enough to enter the trailer, he had also killed his mother-in-law.[77] As in *Eddings*, therefore, the manner of death was a fatal shotgun blast that came without warning.

Perhaps significantly, the Oklahoma court seemed to rely more heavily on the state's first justification for applying section 701.12(4)—that the identity of the victim made the murder especially abhorrent. The court concluded: "We believe this killing of a police officer in the performance of his duties was, in the words of the Florida Court, 'extremely wicked' and 'shockingly evil,' and 'outrageously wicked and vile.' "[78] In a footnote to this statement, the court noted that the statutes of three states, Texas, Florida, and Georgia, do provide that the killing of a law enforcement officer under such circumstances is in itself an aggravating circumstance.[79] Simultaneously, the court concluded that the evidence regarding the manner in which the defendant committed the crime was indeed "designed to inflict a high degree of pain with utter indifference to . . . the suffering of others," in the words of the Florida Supreme Court.[80]

In creating such a dichotomy between the identity of the victim and the manner of death, the court seems to have indicated that manner of death, much less physical abuse of the victim prior to that death, is not to be the sole test for determining whether a murder was in fact "especially heinous, atrocious, or cruel." Rather, in *Eddings*, the identity of the victim seems to be the controlling factor. In effect, the court has apparently legislated a new aggravating circumstance: All murders will be especially heinous, atrocious, and cruel when the victim is a police officer who was murdered while in the performance of official duties.

Limitations on an Application of Godfrey

There exists a significant difference in comparing factual situations in which the Oklahoma Court of Criminal Appeals found sufficient evidence to justify a determination that a murder was especially heinous, atrocious, or cruel to the guidelines issued in *Godfrey v. Georgia*. The difference is that no

[75] *Id.*
[76] 446 U.S. 420, 425 (1980).
[77] *Id.*
[78] 616 P.2d 1159, 1168 (Okla. Cr. 1980).
[79] *Id.*, n.3.
[80] *Id.*, *quoting from* State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

Oklahoma court has sentenced a defendant to death based solely on the finding of that aggravating circumstance.[81] As specifically noted by the Supreme Court in *Godfrey*, the defendant's sentences of death by the Georgia jury were based entirely on subsection (b)(7). Accordingly, the Court gave "no view as to whether or not the petitioner might constitutionally have received the same sentences on some other basis."[82]

Such a disclaimer as to the possibility that, under the same facts, a death sentence could be constitutionally imposed for other reasons does not in any way vitiate the express decision that a reviewing court cannot be said to have applied a constitutional construction of phrases such as "outrageously or wantonly vile, horrible or inhuman" when used to describe murders resulting in instantaneous death unaccompanied by prior physical abuse of the victim. The question of the validity of death sentences imposed by reason of an erroneous application of the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, combined with the finding of one or more other statutory aggravating circumstances, remains open.

Simply to assert that because Oklahoma's statutes require the finding of only one aggravating circumstance,[83] imposition of the death penalty can be upheld under such circumstances is a dangerous generalization. Such an oversimplification ignores the alternative provisions of the statute: "Unless at least one of the statutory aggravating circumstances . . . is found *or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances*, the death penalty shall not be imposed."[84] If the jury in such a multiple-circumstance case had not been permitted to apply the fourth aggravating circumstance (that the murder was especially heinous, atrocious, or cruel) to facts which, under *Godfrey*, it is clearly inapplicable, might that jury have found that the additional aggravating circumstances were outweighed by mitigating factors?[85] Such a possibility, although conjectural, should be considered when the validity of imposing the ultimate penalty for a criminal offense is at stake.

A far more troubling problem lies in the Supreme Court's failure to take the *Godfrey* guidelines to their ultimate conclusion—that such an aggra-

[81] *See* Irvin v. State, 617 P.2d 588 (Okla. Cr. 1980); Eddings v. State, 616 P.2d 1159 (Okla. Cr. 1980); Hays v. State, 617 P.2d 223 (Okla. Cr. 1980); Chaney v. State, 612 P.2d 269 (Okla. Cr. 1980).

[82] 446 U.S. 420, 433 n.15 (1980).

[83] 21 OKLA. STAT. § 701.11 (Supp. 1976).

[84] *Id.* (emphasis added).

[85] The language of the statute refers in the singular to the outweighing of *an* aggravating circumstance by one or more mitigating factors. This language apparently has not been construed, but it is illogical to infer from it that if the jury has found more than one aggravating circumstance the finding of mitigating factors can never outweigh those aggravating circumstances. Such an interpretation would result in a mandatory death penalty whenever more than one aggravating circumstance is found. *See* Woodson v. North Carolina, 428 U.S. 280 (1976), wherein the Supreme Court held that mandatory death penalty statutes do not meet the guidelines established in Furman v. Georgia, 408 U.S. 238 (1972).

vating circumstance cannot constitutionally be applied at the trial level without adequate instruction to jurors as to the application of the statute. The *Godfrey* plurality did sternly comment that the Georgia trial court's instructions to the jury gave no guidance concerning the meaning of subsection (b)(7) and that, therefore, "the jury's interpretation of section (b)(7) can only be the subject of sheer speculation."[86] The ultimate blame, however, was repeatedly placed upon the Georgia Supreme Court for its failure to apply clear reviewing standards for distinguishing this case, in which the death penalty was imposed, from other cases, in which it was not.[87] As Justice Marshall noted in a concurring opinion, "[I]t is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. The jury must be instructed on the proper, narrow construction of the statute."[88]

Conclusion

Although the statutory language of the aggravating circumstance at issue in *Godfrey* and its Oklahoma counterpart differ, the definitions both states have applied to the respective statutes indicate that they are clearly parallel. The similar fact situations in *Godfrey, Chaney*, and *Eddings* strengthen this conclusion in light of the similarity between the Georgia decision overturned by the Supreme Court in *Godfrey* and the Oklahoma court's recent decisions in *Chaney* and *Eddings*. For those reasons, the Supreme Court's decision in *Godfrey* is significant for Oklahoma.

If it is clear that Oklahoma has not correctly applied its fourth statutory aggravating circumstance (that the murder was especially heinous, atrocious, or cruel), however, the effect on Oklahoma's recent death penalty cases is most unclear. The *Godfrey* decision is expressly limited to the particular fact that the Georgia jury that convicted Godfrey found no other aggravating factors justifying imposition of the death penalty. In all of the Oklahoma cases to date, however, the fourth statutory circumstance was one of multiple aggravating factors found to exist. Nevertheless, it should not be lightly assumed that a jury would have imposed the death penalty based only on other aggravating factors found in a particular case.

In light of that problem, steps must be taken to insure that the decision to impose a death sentence is not influenced by erroneous application of section 701.12(4). First, the state's bill of particulars should include this aggravating circumstance only when the facts of a particular case indicate that it is applicable in light of *Godfrey*. Second, the jury should be given clear instructions regarding the fact situations to which that aggravating factor is applicable. As to both, the appropriate fact situations should be those in which there is evidence that the victim was physically abused prior to death.

Bobbie Thomas Shell

[86] 446 U.S. 420, 429 (1980).
[87] *Id.* at 427-33.
[88] *Id.* at 436-37.