"HEINOUS, ATROCIOUS, OR CRUEL" (AND SIMILAR LANGUAGE): WHAT IT MEANS TODAY IN ALABAMA, GEORGIA, AND OKLAHOMA

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I. INTRODUCTION

An aggravating circumstance cannot apply to every defendant convicted of murder, but only to a subclass of those convicted.[1] An aggravating circumstance can elevate a capital offense into one eligible for the death penalty based on several different criteria, one of them being if the murder is "especially heinous, atrocious, or cruel." The United States Supreme Court has held three state aggravating circumstances similar to this unconstitutional as applied.[2] On the other hand, the Supreme Court has also upheld aggravating circumstances similar to this as constitutional as applied.[3]

What type of murder comes to mind when you hear the words heinous, atrocious, or cruel? Perhaps a particularly violent and bloody one, one involving mental torture, or one where a person is shot in an execution type manner. States that have this aggravator listed in their aggravating circumstances have worked to apply them in a constitutional manner, meaning the aggravator must be defined in state courts in a consistent and narrow interpretation to rein in on the discretion of the sentencer.[4] Three states that have this heinousness aggravator or one with similar language include Alabama, Georgia, and Oklahoma. This paper will discuss what the

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[1] Tuilaepa v. California, 512 U.S. 967 (1994).

[2] Shell v. Mississippi, 498 U.S. 1 (1990) (per curiam); Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980).

[3] Arave v. Creech, 507 U.S. 463 (1993); Walton v. Arizona, 497 U.S. 639 (1990).

[4] Cartwright, 486 U.S. at 365–66.

meaning of "heinous, atrocious, or cruel" is in these three selected jurisdictions, based on how their state courts have come to define it.

II. Alabama

In Alabama, one of the state's aggravating circumstances for elevating a capital offense to one eligible for the death penalty is if the offense was "especially heinous, atrocious, or cruel compared to other capital offenses."[5] "[A]ny brutality which was involved in it must have exceeded that which is normally present in any capital offense."[6] To determine this aggravator, the state must prove beyond a reasonable doubt that the act of the killing is "especially heinous, atrocious, or cruel."[7] "The term 'heinous' means extremely wicked or shockingly evil. The term 'atrocious' means outrageously wicked and violent. The term 'cruel' means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others."[8] Second, in determining if a capital offense was "especially heinous, atrocious, or cruel," Alabama courts use the *Kyzer* standard.[9] In *Ex parte Kyzer*, the Supreme Court of Alabama stated that this aggravating circumstance was "intended to apply to only those conscienceless or

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[5] ALA. CODE § 13A-5-49(8) (West, Westlaw through 2013 Regular Session).

[6] Broadnax v. State, 825 So.2d 134, 210 (Ala. Crim. App. 2000), *aff'd sub nom. Ex parte* Broadnax, 825 So.2d 134 (Ala. 2001).

[7] Hall v. State, 820 So.2d 113, 146 (Ala. Crim. App. 1999), *aff'd sub nom. Ex parte* Hall, 820 So.2d 152 (Ala. 2001).

[8] *Id.* (internal citations omitted).

[9] Broadnax, 825 So.2d at 209.

pitiless homicides which are unnecessarily torturous to the victim."[10] This torturous conduct can be either physical or psychological.[11]

There are three factors that can indicate a murder is "especially heinous, atrocious, or cruel."[12] To begin with, the first factor is the infliction of physical violence upon the victim that is beyond what is necessary or sufficient to cause death.[13] This can be accomplished "either or both by subjecting the victim to injury of a different nature than, and in addition to, that proximately causing death, or by the repeated infliction of injuries of the same nature as that causing death."[14] But, "(1) the time between at least some of the injurious acts must be an appreciable lapse of time, sufficient enough to cause prolonged suffering, and (2) the victim must be conscious or aware when at least some of the additional or repeated violence is inflicted."[15] One example where this factor was found was in *Barksdale v. State*, where the victim, after begging defendant not to shoot her, was shot at close range in the face and back.[16] The victim screamed for help, and was found facedown, attempting to crawl, and bleeding profusely.[17] She

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[10] *Ex parte* Kyzer, 399 So.2d 330, 334 (Ala. 1981).

[11] Wilson v. State, 777 So.2d 856, 881 (Ala. Crim. App. 1999), *aff'd sub nom*. *Ex parte* Wilson, 777 So.2d 935 (Ala. 2000).

[12] Norris v. State, 793 So.2d 847, 854 (Ala. Crim. App. 1999).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] Barksdale v. State, 788 So.2d 898, 907 (Ala. Crim. App. 2000).

[17] *Id.*

told several people, including medical personnel, that she knew she was going to die.[18] The victim suffered severe mental and physical pain for about four and a half hours before dying.[19]

The second factor that is indicative of a murder that is "especially heinous, atrocious, or cruel" is "whether a victim experienced appreciable suffering after a swift assault that ultimately resulted in death."[20] This factor focuses on whether the victim lost consciousness or died, without time for appreciable suffering, or if the victim lost consciousness or died, but only after a time period long enough to experience appreciable suffering.[21] One instance of this factor involved the attack on a two-month-old baby, whose injuries could have been inflicted within one minute, or over a period of up to an hour.[22] An expert stated that the infant's rib fractures and lacerations to his liver and spleen would have caused intense pain, and although it was unclear as to when the child's skull fracture took place, evidence determined by the medical examiner suggested that the baby was alive for at least part of the attack.[23] The expert even went so far as to say that even if the skull fracture had occurred immediately and rendered the baby quasi or fully comatose, he still would have felt intense pain from some of the injuries.[24]

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[18] *Id.*

[19] *Id.*

[20] Norris, 793 So.2d at 859.

[21] *Id.*

[22] Minor v. State, 914 So.2d 372, 441 (Ala. Crim. App. 2004).

[23] *Id.* at 441–42.

[24] *Id.* at 442.

The third factor that can indicate a murder is "especially heinous, atrocious, or cruel" is the infliction of psychological torture.[25] Psychological torture "[c]an be inflicted by leaving the victim in his last moments aware of, but helpless to prevent impending death."[26] This mental suffering can be found where a victim is taunted with the prospect of his or her death, or if the victim watches the murder of another (especially a family member), and realizes that he or she will also be killed.[27] Evidence of fear experienced by the victim is significant in determining this aggravating circumstance.[28] Like the first two factors, psychological torture must be present for a period of time long enough to cause appreciable or prolonged suffering.[29]

In *Deardorff v. State*, the victim was taunted with the prospect of his own death when he was held captive for over twenty-four hours in a closet in his own home, where he complied with his captors, and never attempted to fight them or escape.[30] The victim was aware that defendant was armed because he had threatened to kill the victim by "blowing his brains out" immediately

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[25] Norris, 793 So.2d at 859.

[26] *Id.* at 859–60 (citation omitted).

[27] *Id.* at 860 (citation omitted). *See* Bui v. State, 551 So.2d 1094, 1109 (Ala. Crim. App. 1988), *aff'd sub nom*. *Ex parte* Quang Ngoc Bui, 551 So.2d 1125 (Ala. 1989), *and vacated on other grounds sub nom*. Bui v. Alabama, 499 U.S. 971 (1991), for an example of psychological torture resulting from witnessing the murder of a family member.

[28] *Ex parte* Rieber, 663 So.2d 999, 1003 (Ala. 1995).

[29] Norris, 793 So.2d at 860–61.

[30] Deardorff v. State, 6 So.3d 1205, 1227 (Ala. Crim. App. 2004), *aff'd sub nom*. *Ex parte* Deardorff, 6 So.3d 1235 (Ala. 2008).

upon encountering him, and the victim pleaded for his life.[31] Additionally, the victim had recently added an addendum to his will on the same day he obtained a judgment against defendant in a legal matter, noting on the will addendum "just in case Don Deardorff is really crazy," which the court stated that the victim feared that defendant might do something to him.[32] The defendant eventually took the victim from his house, placed duct tape over his mouth and a pillowcase over his head, drove him to another location, and ultimately shot him to death.[33] When the victim was taken from his house and had his mouth and face covered, "he had to know that his death was imminent," and this was found to be the type of prolonged psychological torture supporting an "especially heinous, atrocious, or cruel" murder.[34]

In *Brown v. State*, an 83-year-old woman endured extensive psychological torture at the hands of her murderer.[35] The victim's hands were wrapped and tied with an extension cord, and her hands were connected to her feet with a cord that did not allow her to stretch out her legs; essentially, the victim was 'hog-tied.'[36] Part of a t-shirt was placed in the victim's mouth and secured by wrapping duct tape tightly around her head, causing her dentures to be pushed into the back of her mouth.[37] The rest of the t-shirt was used to tie a tight knot around the victim's

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[31] *Id.* at 1212, 1227.

[32] *Id.* at 1211, 1227-28.

[33] *Id.* at 1228.

[34] *Id.*

[35] Brown v. State, 982 So.2d 565, 572, 607 (Ala. Crim. App. 2006).

[36] *Id.* at 607.

[37] *Id.*

neck.[38] Twice during the assault, the victim tried to escape; after she was bound and gagged, she cried, pleaded, and begged for her life.[39] The defendant was present at the victim's apartment for about thirty minutes, and the victim was 'hog-tied' for at least fifteen minutes.[40] The Alabama Court of Criminal Appeals found that the victim obviously underwent psychological torture, and suffered for an appreciable amount of time, noting that the amount of violence used against the elderly victim was excessive.[41]

In *Marshall v. State*, a firefighter was dispatched to an automobile on fire, and discovered two bodies in the trunk of the car.[42] The bodies showed evidence of assault, were charred and blistered, and both victims had their hands tied behind their backs with electrical cords.[43] Defendant bound his two victims' wrists and placed them side-by-side in the trunk of a car before proceeding to set the automobile on fire.[44] Expert testimony showed that there were accelerants in the car and on the victims' clothing, and that the victims were alive when they were set on fire.[45] The Alabama Court of Criminal Appeals noted that the accelerants on the victims' clothing indicated that "they were imminently aware of their impending death" and that

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Marshall v. State, 20 So.3d 830, 832–33 (Ala. Crim. App. 2008).

[43] *Id.* at 833.

[44] *Id.* at 842.

[45] *Id.* at 833.

“[t]hey were obviously still alive as they died of carbon monoxide poisoning.”[46] The victims’ deaths in the trunk of a burning car took at least three to five minutes, time enough for appreciable suffering through psychological torture.[47] The court stated that this crime was “without a doubt a consciousless and pitiless crime which was unnecessarily torturous to two victims” as well as “one in which the brutality exceeds that which is normally present in any capital offense.”[48]

One case that involved facts and circumstances insufficient to support a finding of the infliction of psychological torture under this aggravating circumstance was *Ex parte Clark*.[49] In *Clark*, defendant shot his victim a total of six times in an “execution style” fashion: three shots in the head and three shots to the back.[50] The Alabama Supreme Court has previously affirmed rulings of “execution style” murders as “especially heinous, atrocious, or cruel,” but in such cases where the victims were aware of what was happening to them.[51] Because execution-type murders evince a cold, calculated design to kill, these slayings fall into the heinous aggravator; instant death caused by gunfire, however, does not fall within this category.[52] In *Clark*, it was pure speculation as to whether the victim was conscious and aware after he was initially shot,

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[46] *Id.* at 842.

[47] *See id.*

[48] *Id.*

[49] *Ex parte* Clark, 728 So.2d 1126, 1137 (Ala. 1998).

[50] *Id.* at 1128.

[51] *Id.* at 1139.

[52] *Id.* (citing Bush v. State, 431 So.2d 555, 560–61 (Ala. Crim. App. 1982)).

moving it more toward the instantaneous death by gunfire classification.[53] Because of this, the court refused to expand "especially heinous, atrocious, or cruel" to include this case simply because the State labeled it "execution style"; there was no infliction of torture on the victim to place it within the constitutional application of the aggravating circumstance.[54] The court held here that a victim must not only be alive, but also conscious and aware of his suffering.[55]

The cases of *Deardorff*, *Brown*, and *Marshall* easily support a finding of the infliction of psychological torture under the "especially heinous, atrocious, or cruel" aggravator as compared to where it was not found in *Clark*. First, in *Deardorff*, the victim was taunted with the prospect of his own death, held captive for over twenty-four hours, and threatened with his life.[56] The victim pleaded for his life, and added an addendum to his will based on his fear of the defendant.[57] Finally, the victim's mouth and face were covered and he was driven to another location, where he would unfortunately meet his death at the hands of the defendant.[58] The victim in *Clark* was not taunted with the prospect of her life, held captive for a lengthy period of time, nor was her life threatened, unlike in *Deardorff*.[59] The victim in *Clark* was not even aware that the defendant was going to harm or kill him, but was unexpectedly shot by the defendant, while in *Deardorff*, the victim was aware that he might die, and in particular, had to know his

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[53] *See id.* at 1140.

[54] *Id.*

[55] *See* Norris, 793 So.2d at 857; Clark, 728 So.2d at 1139.

[56] Deardorff, 6 So.3d at 1227.

[57] *Id.* at 1227–28.

[58] *Id.* at 1228.

[59] Deardorff, 6 So.3d at 1227; Clark, 728 So.2d at 1128.

death was imminent when he was removed from his house into a vehicle with his mouth and face covered.[60] Additionally, the victim in *Deardorff* feared the defendant prior to the incidents leading up to his death, as evidenced by the addendum to his will.[61] The victim in *Deardorff* was alive, conscious and aware of his suffering, and while the victim in *Clark* was initially alive, it was questionable as to whether he was even conscious or aware of his suffering.[62] There was strong evidence of psychological torture in *Deardorff*, which was simply lacking in *Clark*.[63]

Second, in *Brown*, the 83-year-old woman victim was 'hog-tied' by the defendant, and her mouth was wrapped up so tightly that it forced her dentures into the back of her mouth.[64] The victim tried to escape twice, and cried, pleaded, and begged for her life.[65] The defendant was at the victim's apartment for at approximately thirty minutes, and the victim was 'hog-tied' for about fifteen minutes.[66] Unlike in *Brown*, the victim in *Clark* was not tied up or bound, nor did he even have time to entertain the thought of escaping or pleading for his life.[67] While the victim in *Clark* was suddenly shot by the defendant, the victim in *Brown* suffered psychological torture for between fifteen and thirty minutes.[68] The victim in *Brown*, similar to *Deardorff*,

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[60] Deardorff, 6 So.3d at 1228; Clark, 728 So.2d at 1128.

[61] Deardorff, 6 So.3d at 1227–28.

[62] *See* Deardorff, 6 So.3d at 1227–28; Clark, 728 So.2d at 1139–40.

[63] Deardorff, 6 So.3d at 1228; Clark, 728 So.2d at 1140.

[64] Brown, 982 So.2d at 607.

[65] *Id.*

[66] *Id.*

[67] Clark, 728 So.2d at 1128; Brown, 982 So.2d at 607.

[68] Clark, 728 So.2d at 1128; Brown, 982 So.2d at 607.

clearly endured psychological torture for an appreciable amount of time to satisfy the aggravating circumstance, while the victim in *Clark* did not have this torture inflicted upon him.[69]

Lastly, in *Marshall*, two victims were tied up and placed in the trunk of a car.[70] Defendant poured accelerants on the victims' clothing and the car, and next set the car on fire.[71] The victims were alive at the time the car was set on fire, and were imminently aware that they would die.[72] The victims' deaths took at least three to five minutes before they died of carbon monoxide poisoning.[73] In *Clark*, the victim was shot without warning, and did not have time to be aware or conscious of any suffering; the victims in *Marshall*, however, were imminently aware and conscious of their suffering, as they were trapped in a burning car and dying of carbon monoxide poisoning.[74] In *Marshall*, the victims suffered extensive psychological torture for at least three to five minutes, while the victim in *Clark* was unexpectedly shot, leaving no time to suffer from the infliction of torture.[75] The victims in *Marshall*, just as in *Deardorff* and *Brown*, obviously suffered psychological torture appreciably to satisfy this aggravator, but again, the victim in *Clark* did not.[76]

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[69] Clark, 728 So.2d at 1140; Brown, 982 So.2d at 607.

[70] Marshall, 20 So.3d at 842.

[71] *Id.* at 833, 842.

[72] *Id.*

[73] *Id.* at 842.

[74] Clark, 728 So.2d at 1128; Marshall, 20 So.3d at 842.

[75] Clark, 728 So.2d at 1128; Marshall, 20 So.3d at 842.

[76] Clark, 728 So.2d at 1140; Marshall, 20 So.3d at 842.

III. GEORGIA

In Georgia, one of the state's aggravating circumstances for elevating a capital offense to one eligible for the death penalty is if the offense was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."[77] In the same year that the United States Supreme Court handed down its ruling in *Godfrey v. Georgia*, deeming this aggravating circumstance unconstitutional as applied[78], the Supreme Court of Georgia laid out criteria to remedy this application in *Hance v. State*:

> This statutory aggravating circumstance consists of two major components, the second of which has three sub-parts, as follows: (I) The offense of murder was outrageously or wantonly vile, horrible or inhuman (II) in that it involved (A) aggravated battery to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant.[79]

Evidence must be sufficient to satisfy the first component, and at least one sub-part of the second component by proof beyond a reasonable doubt.[80]

The first component, that the murder was "outrageously or wantonly vile, horrible or inhuman" are words of common understanding with similar meanings.[81] This phrase was included in the statutory language to "distinguish ordinary murders for which the penalty of

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[77] GA. CODE ANN. § 17-10-30(b)(7) (West, Westlaw through 2013 Regular Session).

[78] Godfrey, 446 U.S. at 420.

[79] Hance v. State, 268 S.E.2d 339, 345 (Ga. 1980).

[80] *Id.* at 345–346. *See also* West v. State, 313 S.E. 2d 67, 71 (Ga. 1984) (The Georgia Supreme Court attached an appendix to their opinion containing a proposed charge regarding this aggravating circumstance.).

[81] *Id.*

death is not appropriate, from those murders for which the death penalty may be imposed."[82] Examples were the case facts satisfied this first component are *Ledford v. State* and *Conklin v. State*. In *Ledford*, the Georgia Supreme Court held that a murder committed by shocking and vicious stomping and kicking fulfilled the first factor.[83] In *Conklin*, the state's highest court found that the defendant's post-mortem mutilation of the victim's body was sufficient to support a finding of the first component.[84]

There are three possible ways to satisfy the second component, in that it involved: (1) an aggravated battery to the victim, (2) depravity of mind of the defendant, or (3) torture to the victim.[85] First, an aggravated battery occurs when an individual "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."[86] The bodily harm must occur prior to death to constitute an aggravated battery, and must involve a separate act from the act that caused instantaneous death.[87] One example found to be an aggravated battery to the victim was the infliction of a non-fatal gunshot wound to the victim's arm and shoulder before

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[82] *Id.* (citing Godfrey v. Georgia, 446 U.S. at 428).

[83] Ledford v. State, 709 S.E.2d 239, 257 (Ga. 2011).

[84] Conklin v. State, 331 S.E.2d 532, 539 (Ga. 1985) (noting that the offense of murder does not terminate at the instant of death).

[85] Hance, 268 S.E.2d at 345.

[86] *Id.* (internal quotation marks omitted).

[87] *Id.* at 345–46.

fatally shooting him.[88] Another example of an aggravated battery involved a defendant that severely beat his victim in the face with a heavy stick, and then crushed his skull with a log.[89]

Second, depravity of mind "may be found where the victim is subjected to serious psychological abuse before death, or to mutilation, serious disfigurement, or sexual abuse after death."[90] Mere apprehension of death before fatal wounds are inflicted does not equal serious psychological abuse severe enough to show a defendant's depraved mind.[91] One example of physical and mental suffering amounting to depravity occurred in *Strickland v. State*.[92] In that case, defendant inflicted fatal wounds on his victim that:

> were intended not to kill June [the victim] but to cause her great physical pain, and to cause her great mental anguish by disfiguring her body so she would not be desirable to any other man. Strickland [the defendant] accurately and methodically shot June twice in her abdomen, twice in each thigh, five times in her buttocks around her rectum and vagina, and once in her right foot. Strickland wanted June to live. He called an ambulance in an effort to make sure she did live. He was successful. She lived to experience all the physical and mental suffering he inflicted upon her.[93]

Additionally, depravity of mind can also be supported by the infliction of mental distress on someone other than the murder victim.[94] Age and physical characteristics of a victim can be

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[88] Lucas v. State, 555 S.E.2d 440, 449 (Ga. 2011).

[89] Jefferson v. State, 353 S.E.2d 468, 474 (Ga. 1987).

[90] Phillips v. State, 297 S.E.2d 217, 221 (Ga. 1982) (citing Hance, 268 S.E.2d at 346).

[91] Riley v. State, 604 S.E.2d 488, 499 (Ga. 2004).

[92] Strickland v. State, 275 S.E.2d 29, 41 (Ga. 1981).

[93] *Id.*

[94] *Id. See, e.g.,* McMichen v. State, 458 S.E.2d 833, 839–40 (Ga. 1995) (depravity of mind found where defendant walked his five-year-old daughter through her mother's blood and left her overlooking the murder scene).

considered to show depravity of mind, for example, if a victim is very young or very old.[95] Torture or an aggravated battery to a victim can also show a defendant's depraved mind.[96]

Third and finally, "[t]orture may be found where the victim is subjected to serious physical, sexual, or psychological abuse before death."[97] Physical and psychological abuse cannot be so generally construed as to simply mean pain and anticipation of death, which occurs in nearly every murder case.[98] Torture resulting from serious physical abuse can be found where a defendant inflicts deliberate, offensive and prolonged pain on a victim prior to death.[99] The mere apprehension of death prior to the infliction of mortal wounds does not equal serious psychological abuse prior to death.[100] Torture can also be found when a victim is subjected to an aggravated battery as defined above.[101]

Torture was found in the previously mentioned case of *Ledford*.[102] In this case, defendant knocked his victim off her bicycle, and dragged her to a shielded location.[103] He stripped the victim of her clothing from the waist down, and pulled her shirt up.[104] Her body was bruised all

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[95] *Id.* (depravity of mind found by arson-murder of conscious three-year-old child).

[96] Hance, 268 S.E.2d at 345.

[97] Phillips, 297 S.E.2d at 221 (citing Hance, 268 S.E.2d at 346).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] Hance, 268 S.E.2d at 339.

[102] Ledford, 709 S.E.2d at 257.

[103] *Id.* at 245.

[104] *Id.*

over during the struggle, and when defendant forced his penis into her mouth, she bit it, severely wounding it.[105] Because the victim resisted the defendant, defendant stomped on her face, larynx, and ribs, causing her to asphyxiate from her wounds bleeding into her lungs.[106] Torture was found based not only on the fact that the victim's death was not instantaneous, but also because defendant forced his penis into the victim's mouth, and because he stomped on the victim's face, nose, larynx, and ribs.[107] These actions constituted torture because both serious sexual and physical abuse occurred before death.[108] Additionally, both of these actions amounted to aggravated batteries, further supporting the finding of torture.[109] Moreover, the torture and aggravated batteries indicated a finding of the defendant's depravity of mind.[110] The evidence was sufficient to support a finding of this aggravator beyond a reasonable doubt based on torture.[111]

Torture also justified a finding of the heinousness aggravator in *Taylor v. State*.[112] After the victim was threatened by her husband, she attained a good-behavior warrant, and defendant agreed to move out of their apartment.[113] Defendant returned to the apartment to collect his

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[105] *Id.*

[106] *Id.*

[107] *Id.* at 257.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] Taylor v. State, 404 S.E.2d 255, 263 (Ga. 1991).

[113] *Id.* at 257.

personal belongings, locked his children out of the apartment, and the victim was heard saying "Keith, don't do it."[114] Defendant had entered the apartment and locked the doors before he "viciously attacked his wife with a knife, cutting her five times in her face, once on her hand, another six times in her chest and back . . . , and slashing her throat at least seven times so deeply as to nearly decapitate her."[115] Her neck was cut nearly from ear to ear, severing her trachea completely, and reaching around to her spinal column.[116] Defendant inflicted "deliberate, offensive, and prolonged pain" on the victim prior to her death, and established the intentional commission of torture.[117] He deliberately and needlessly mutilated his victim wife.[118] This evidenced supported a finding of the aggravating circumstance beyond a reasonable doubt based on torture as well as an aggravated battery.[119]

In *Johnson v. Zant*, torture was found sufficient to maintain a finding of the aggravating circumstance.[120] Defendant and a co-defendant offered two girls marijuana, which they all smoked together.[121] When the two girls tried to leave, they were forced into a car at gunpoint, and told if they made any noise, they would be killed.[122] Both were bound with wire, and the

[114] *Id.*

[115] *Id.* at 263.

[116] *Id.* at 257.

[117] *Id.* at 263 (internal quotation marks omitted).

[118] *Id.*

[119] *Id.*

[120] Johnson v. Zant, 295 S.E.2d 63, 67 (Ga. 1982).

[121] *Id.* at 68.

[122] *Id.* at 67–68.

defendant raped one of the girls.[123] The girls were stripped of their clothes while they were still tied up, and one was shot and killed (while the other escaped) at point blank range, evincing torture.[124] The Georgia Supreme Court held that the murder here was completed "in a methodical, execution style fashion."[125]

One case that involved facts insufficient to support a finding of torture under this aggravating circumstance was *Phillips v. State*.[126] In *Phillips*, defendant went to his alienated wife's workplace, an elementary school where she was employed as a secretary.[127] Defendant concealed a rifle beneath his clothes, and signaled for his wife to come into the hallway.[128] When she came out to meet him, defendant shot her four or five times.[129] The State tried to argue that the victim suffered pain and anticipation of death that amounted to serious physical and psychological abuse.[130] The Supreme Court of Georgia found that this would be too broad of a construction of the aggravator, allowing it to be found in nearly every murder case.[131] As previously discussed, the mere apprehension of death does not equal serious psychological

[123] *Id.*

[124] *Id.*

[125] *Id.* at 67.

[126] Phillips, 297 S.E.2d at 222.

[127] *Id.* at 218.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 221.

[131] *Id.*

abuse.[132] Additionally, four or five shots fired in rapid succession does not amount to serious physical torture.[133]

The cases of *Ledford*, *Taylor*, and *Johnson* certainly support a finding of the infliction of serious physical, sexual, or psychological abuse amounting torture under the vileness aggravator as compared to where it was not found in *Phillips*. First, in *Ledford*, defendant caused severe bruising all over the victim's body when he attacked her, forced his penis into her mouth, and viciously stomped on her face, larynx, and ribs, causing her to asphyxiate to death.[134] These actions in *Ledford* constituted both serious sexual and physical abuse amounting to torture prior to death.[135] Comparing these two types of abuse to the facts in *Phillips*, there was absolutely no abuse to constitute torture because the victim was shot four or five times in rapid succession.[136] There was no time for the victim to suffer torture based on serious physical abuse or psychological abuse from the anticipation of death in *Phillips*, while *Ledford* highlighted both serious sexual and physical abuse indicating torture.[137]

Second, in *Taylor*, after the victim was threatened by her husband and heard by a witness to ask the defendant not to kill her, defendant viciously attacked and murdered his wife with a

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[132] *Id.*

[133] *Id.* at 222.

[134] Ledford, 709 S.E.2d at 245.

[135] *Id.* at 257 (These actions also were considered aggravated batteries, which together with torture pointed to the defendant's depravity of mind).

[136] *See* Phillips, 297 S.E.2d at 221–22.

[137] *See* Ledford, 709 S.E.2d at 257; Phillips, 297 S.E.2d at 221–22.

knife, almost decapitating her in the process.[138] The victim's neck was cut nearly from ear to ear, showing the intentional infliction of "deliberate, offensive, and prolonged pain" on the victim leading up to her death.[139] These facts, plus that this was a deliberate and needless mutation of the victim, established serious physical abuse amounting to torture, not to mention an aggravated battery.[140] Again comparing this case to *Phillips*, the victim in that case did not experience serious abuse of any kind amounting to torture because her death occurred so quickly by the infliction of four or five fast gun shots.[141] She did suffer physical or psychological abuse as compared to the terrible abuse the victim in *Taylor* must have felt as her head was nearly decapitated by knife wounds.[142]

Finally, in *Johnson*, two girls were forced into a car, and instructed that if they made any noise, they would be killed.[143] Both girls were found with wire, and the defendant raped one of the girls.[144] The girls were stripped of their clothing while tied up with the wire, and one was shot at point blank range.[145] Looking at *Phillips*, the victim once again did not experience serious physical or psychological abuse as the girls in *Johnson* did when they were threatened

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[138] Taylor, 404 S.E.2d at 257, 263.

[139] *Id.*

[140] *Id.* at 263.

[141] *See* Phillips, 297 S.E.2d at 222.

[142] Taylor, 404 S.E.2d at 263; Phillips, 297 S.E.2d at 222.

[143] Johnson v. Zant, 295 S.E.2d at 67–68.

[144] *Id.*

[145] *Id.*

with their lives, bound up, raped, and stripped of their clothing.[146] There was enough evidence to prove the aggravating factor based on torture in *Johnson*, just as in *Ledford* and *Taylor*, but again not enough to support the aggravator in *Phillips*.

IV. Oklahoma

In Oklahoma, one of the state's aggravating circumstances, similar to the one discussed in Alabama in Part II, for elevating a capital offense to one eligible for the death penalty is if the offense was "especially heinous, atrocious, or cruel."[147] This is the only Oklahoma aggravating circumstance that focuses on the way in which the crime affects the victim.[148] The Tenth Circuit Court of Appeals (relying on *Godfrey v. Georgia*, discussed earlier) found that this aggravating circumstance was unconstitutionally vague and overbroad as applied.[149] Prior to the United States Supreme Court affirming this holding, [150] the Oklahoma Court of Criminal Appeals restricted this aggravating circumstance to those murders preceded by torture or serious physical abuse.[151]

In *DeRosa v. State*, the same Oklahoma court laid out a uniform jury instruction for all future capital murder trials where the "heinous, atrocious, or cruel" aggravator is involved.[152]

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[146] Phillips, 297 S.E.2d at 221–22; Johnson, 295 S.E.2d at 67–68.

[147] OKLA. STAT. ANN. tit. 21, § 701.12(4) (West, Westlaw through Chapter 23 (End) of the First Extraordinary Session of the 54th Legislature (2013)).

[148] Coddington v. State, 254 P.3d 684, 709 (Okla. Crim. App. 2011).

[149] Cartwright v. Maynard, 822 F.2d 1477, 1482 (10th Cir. 1987), *aff'd*, 486 U.S. 356 (1988).

[150] *Id.*

[151] Stouffer v. State, 742 P.2d 562, 563 (Okla. Crim. App. 1987).

[152] DeRosa v. State, 89 P.3d 1124, 1156 (Okla. Crim. App. 2004).

The State must prove beyond a reasonable doubt that first, the murder was preceded by torture or serious physical abuse of the victim, and second, that the facts and circumstances show that the murder was heinous, atrocious, or cruel.[153] Torture includes great physical anguish or extreme mental cruelty, and for both great physical anguish as well as serious physical abuse, the victim must have experienced conscious physical suffering.[154] "[T]he term 'heinous' means extremely wicked or shockingly evil; the term 'atrocious' means outrageously wicked and vile; and the term 'cruel' means pitiless, designed to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of others."[155]

Moreover in *DeRosa*, the Oklahoma Court of Criminal Appeals declined to adopt language that serious physical abuse should include "the infliction of gratuitous violence beyond the act of killing", and that conscious physical suffering should refer to "suffering in addition to that brief period of conscious suffering present in virtually all murders.[156] Also, in *Coddington v. State*, the same Oklahoma court rejected defendant's proposed requirement that the aggravating circumstance should also separately require that the defendant intended to torture or abuse a victim.[157]

First, serious physical abuse requires that the victim must have experienced conscious physical suffering.[158] One example of serious physical abuse occurred in *Coddington*, where

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[153] *Id.*

[154] Coddington, 254 P.3d at 708–09 (citing DeRosa, 89 P.3d at 1155–57).

[155] DeRosa, 89 P.3d at 1156.

[156] *Id.* at 1155.

[157] Coddingto*n*, 254 P.3d at 709–10.

[158] *Id*. at 708–09.

defendant struck his victim at least times in the head with a claw hammer, and left him for dead.[159] Witnesses testified that when the victim was found several hours after the crime, he was partially conscious, moaning, in pain, and attempting to communicate.[160] "The medical evidence showed that Hale [the victim] had defensive wounds as well as several extremely serious wounds to the head and skull, which would have been very painful. Blood pools, blood spatter, transferred blood, bloody handprints, clothing and rags, and feces were found throughout Hale's kitchen, bathroom and bedroom."[161] This suggested that the victim lost control of his bowels, and that when he regained consciousness, he tried to clean himself up.[162] The Court of Criminal Appeals of Oklahoma did not directly point to either serious physical abuse or great physical anguish as the support for the aggravator, but it appears that either could have been found, as the victim clearly experienced conscious physical suffering.[163] Another example of serious physical abuse occurred in *Harmon v. State*, where defendant shot his victim three times shortly before 7:30 pm, and the victim died the next morning around 4:00 a.m.[164] Witnesses observed the victim bleeding and moaning from pain, and a 911 call placed by him showed that he was conscious and begging for help.[165] The court here again did not select either serious physical

[159] *Id.* at 693.

[160] *Id.* at 710.

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] Harmon v. State, 248 P.3d 918, 942 (Okla. Crim. App. 2011).

[165] *Id.* at 942–43.

abuse or great physical anguish, but simply stated that "[t]here is no dispute that the victim endured conscious physical suffering before death."[166]

Second, torture includes great physical anguish or extreme mental cruelty, and for great physical anguish, the victim must have experienced conscious physical suffering.[167] Torture may take any of several forms, and:

> must be the result of intentional acts by the defendant . . . [and] must produce mental anguish in addition to that which of necessity accompanies the underlying killing. Analysis must focus on the acts of the defendant toward the victim and the level of tension created. The length of time which the victim suffers mental anguish is irrelevant.[168]

There are no uniform criteria applicable in all murder cases that would make determination of the "especially heinous, atrocious, or cruel" aggravator a mechanical procedure.[169] In determining whether the aggravator has been proved, a case-by-case examination of the facts is necessary.[170]

In *Turrentine v. State*, the Oklahoma Court of Criminal Appeals focused on the torture aspect of this aggravating circumstance.[171] In this case, defendant shot and killed four victims: his sister, his girlfriend, and his girlfriend's two children, ages thirteen and twenty-two.[172]

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[166] *Id.* at 943.

[167] Coddington, 254 P.3d at 708–09.

[168] Berget v. State, 824 P.2d 364, 373 (Okla. Crim. App. 1991).

[169] Robinson v. State, 900 P.2d 389, 401 (Okla. Crim. App. 1995).

[170] *Id.*

[171] Turrentine v. State, 965 P.2d 955, 976 (Okla. Crim. App. 1998), *aff'd in part, rev'd in part sub nom*. Turrentine v. Mullin, 390 F.3d 1181 (10th Cir. 2004).

[172] *Id.* at 963.

Defendant's own statements provided the foundation for a finding of this aggravator in regards to the murder of defendant's girlfriend.[173] Defendant and his girlfriend were in the midst of an argument that turned into a struggle in which defendant told his girlfriend that she and her children were going to die.[174] Defendant then shot his girlfriend once in the head, and the court concluded that although the defendant was in his girlfriend's home for no longer than ten minutes, his conduct and threats were sufficient to support a finding of mental torture based on extreme mental anguish.[175] The United States Court of Appeals for the Tenth Circuit affirmed the Oklahoma court's conclusions, and additionally pointed to evidence of defendant's girlfriend pleading with defendant, "Kenneth, no, no . . ." immediately before she was shot by the defendant as further support for a finding of the aggravating circumstance.[176]

Concerning defendant's girlfriend's thirteen-year-old son, Martise, there was also sufficient evidence to support a finding of this aggravator based on mental torture.[177] Martise tried to break up the struggle between his mother and the defendant by hitting the defendant.[178] Medical personnel found Martise laying across his mother's lap, and his nearness to her when she was shot supported an inference that he feared he would be shot next.[179] Evidence was

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[173] *Id.* at 976.

[174] *Id.*

[175] *Id.*

[176] Turrentine v. Mullin, 390 F.3d at 1198.

[177] Turrentine v. State, 965 P.2d at 976.

[178] *Id.*

[179] *Id.*

sufficient to warrant a finding of "especially heinous, atrocious, or cruel" based on torture for both defendant's girlfriend, and her teenage son.[180]

In *Neill v. State*, during the course of a bank robbery, defendant caused his multiple victims to suffer extreme mental distress prior to their death.[181] Defendant pointed a gun at one female victim, and she pleaded with defendant to put the gun away and to not harm them.[182] Defendant directed this victim and two other women to lay face down with their hands behind their backs in a back room of the bank.[183] The first victim again pleaded with defendant for their lives, and defendant began stabbing her in the back, causing her to repeatedly cry that she was dead.[184] Defendant turned her over and stabbed her in the heart, and moved onto his second victim, hitting her in the head with his gun, and next stabbing her in the back and chest.[185] Defendant stabbed his third victim in the same manner as the first two, and individuals at the bank during the crime heard moaning coming from the back room.[186] The Oklahoma Court of Criminal Appeals found ample evidence of extreme mental anguish suffered by these women, who realized they were going to be harmed and even killed by the defendant.[187] Two of the women suffered added mental anguish when they heard their co-workers being murdered, and

[180] *Id.*

[181] Neill v. State, 896 P.2d 537, 555–56 (Okla. Crim. App. 1994).

[182] *Id.* at 556.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

recognized that they could be next.[188] Additionally, the court noted that the multiple, deep stab wounds demonstrated an indifference to the victims' suffering.[189] Evidence was sufficient to support a finding of "especially heinous, atrocious, or cruel" for the murders of these three women.[190]

A fourth victim in *Neill* was forced to lie down in the back room where the previous three murders had taken place while the defendant debated this victim's fate; ultimately, the defendant shot the victim twice in the head.[191] "Mental anguish includes the victim's uncertainty as to his ultimate fate", and the court determined that this victim suffered mental torment prior to being shot to warrant a finding of torture.[192] Overall, evidence clearly justified a finding of mental anguish beyond that which necessarily accompanies a killing amounting to torture for these four victims in the context of the "especially heinous, atrocious, or cruel" aggravator.[193]

In *Brown v. State*, the victim, a convenience store employee, was attacked by four people and dragged to a back room.[194] The victim was yelling and screaming for help when the named defendant received a baseball bat from a co-defendant, and proceeded to beat the victim to death with it.[195] Prior to the introduction of the baseball bat, the defendant and another co-defendant

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[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.* at 556–57.

[194] Brown v. State, 989 P.2d 913, 919–20 (Okla. Crim. App. 1998).

[195] *Id.* at 930.

restrained the victim in the back room.[196] Before the beating, the Court of Criminal Appeals of Oklahoma found that the victim "suffered the extreme mental anguish of being held captive, knowing that his ultimate fate rested in the hands of his attackers whom he could identify if left to live."[197] The victim recognized that he was going to be harmed and even killed by the four individuals who attacked and dragged him into a back room.[198] There was ample evidence to prove the "especially heinous, atrocious, or cruel" aggravating factor here based on torture.[199]

One case that involved facts and circumstances insufficient to support a finding of torture under this aggravating circumstance was *Cheney v. State*.[200] In this case, defendant and his wife were engaged in a short confrontation before defendant fatally shot his wife five times.[201] The State attempted to argue that the victim wife suffered extreme mental cruelty before her death when she was confronted by her husband, but the Court of Criminal Appeals of Oklahoma rejected this suggestion.[202] The court stated that the victim's fear here was no different from that suffered by any other victim faced with the prospect of death, noting that a victim must be terrorized for a significant period of time before death for it to constitute torture.[203]

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[196] *Id.*

[197] *Id.* at 931.

[198] *Id.*

[199] *Id.*

[200] Cheney v. State, 909 P.2d 74, 79–80 (Okla. Crim. App. 1995).

[201] *Id.* at 81.

[202] *Id.*

[203] *Id.*

The cases of *Turrentine*, *Neill*, and *Brown* easily support a finding of torture under the "especially heinous, atrocious, or cruel" aggravator as compared to where it was not found in *Cheney*. To begin with, in *Turrentine*, defendant's girlfriend was told that she and her children were going to die.[204] Additionally, defendant's girlfriend's son was near his mother at the time of her death, causing him to fear that he himself might be next to die.[205] Although the length of the encounter between defendant and his victims was brief, just as it was in *Cheney*, in *Turrentine* it was enough to find that mental torture had been inflicted upon both victims.[206] Defendant's conduct and threats in *Turrentine* inflicted extreme mental cruelty on his victims, while the victim in *Cheney* experienced only fear typical to that endured by other victims faced with the prospect of death.[207]

Second, in *Neill*, three women were forced to lay face down with their hands behind their backs in a back room of the bank, and realized they were going to be harmed and even killed by the defendant.[208] Two of the women suffered added mental anguish when they heard their co-workers being murdered, and recognized that they could be next.[209] The defendant's infliction of multiple, deep stab wounds demonstrated an indifference to the victims' suffering.[210] A fourth victim in *Neill* was forced to lie down in the back room where the previous three murders had

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[204] Turrentine v. State, 965 P.2d at 976.

[205] *Id.*

[206] *Id.*; Cheney, 909 P.2d at 81.

[207] Turrentine v. State, 965 P.2d at 976; Cheney, 909 P.2d at 81.

[208] Neill, 896 P.2d at 556.

[209] *Id.*

[210] *Id.*

taken place while the defendant debated this victim's fate.[211] Comparing *Neill* to *Cheney*, the victims in *Neill* realized they were going to be hurt and potentially killed by the defendant starting when the defendant held the victims at gunpoint, while in *Cheney*, the encounter was so brief that the victim hardly had time to fear for her life other than that fear any other victim would experience.[212] Plus, two of the victims in *Neill* heard others being murdered, and knew they could be next.[213] Additionally, the defendant in *Cheney* did not demonstrate indifference to his victim's suffering when he rapidly shot her five times, unlike the defendant in *Neill* who inflicted numerous deep stab wounds on his victims.[214] Moreover, unlike the fourth victim in *Neill*, the victim in *Cheney* did not experience mental anguish at the thought of whether or not she was going to be killed by the defendant; rather, after a brief encounter with the defendant, she was quickly shot to death.[215] Overall, there was plenty of evidence to support a finding of mental anguish amounting to torture in *Neill*, like in *Turrentine*, while the victim in *Cheney* simply experienced fear typical to that endured by other victims faced with the prospect of death.[216]

Finally, in *Brown*, the victim was attacked, taken into a back room, and restrained against his will, all the while yelling and screaming for help.[217] When the victim was being held captive,

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[211] *Id.*

[212] Cheney, 909 P.2d at 81; Neill, 896 P.2d at 556.

[213] Neill, 896 P.2d at 556.

[214] Cheney, 909 P.2d at 81; Neill, 896 P.2d at 556.

[215] Cheney, 909 P.2d at 81; Neill, 896 P.2d at 556.

[216] Cheney, 909 P.2d at 81; Neill, 896 P.2d at 556–57.

[217] Brown, 989 P.2d 913, 919–20, 930.

he suffered extreme mental anguish knowing that his fate, of being harmed and even killed, rested in the hands of the defendant and the other co-defendants.[218] Although the length of time between when defendant was captured to when he was beat to death with a baseball bat was not necessarily lengthy, it was unlike the brief confrontation in *Cheney* in that it was significant enough because the defendant knew something harmful was going to happen to him.[219] The victim in *Cheney* did not suffer extreme mental cruelty being her death, only fear that any other victim might experience when faced with the prospect of death.[220] There was enough evidence to prove the aggravating factor based on torture in *Brown*, just as in *Turrentine* and *Neill*, but again not enough to support the aggravator in *Cheney*.[221]

V. CONCLUSION

In conclusion, the jurisdictions of Alabama, Georgia, and Oklahoma have developed manners to apply the "heinous, atrocious, or cruel" aggravator in a constitutional manner. Alabama's application first requires that the offense must be "especially heinous, atrocious, or cruel."[222] Second, it involves the use of the *Kyzer* standard, which provides for a finding of the aggravator if there is: (1) the infliction of physical violence upon the victim that is beyond what is necessary or sufficient to cause death; (2) appreciable suffering after an assault that ultimately results in death; or (3) the infliction of psychological torture.[223] Georgia's application of the

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[218] *Id.* at 931.

[219] Brown, 989 P.2d at 931; Cheney, 909 P.2d at 81.

[220] Cheney, 909 P.2d at 81.

[221] Brown, 989 P.2d at 931; Cheney, 909 P.2d at 81.

[222] Hall, 820 So.2d at 146.

[223] Norris, 793 So.2d at 854, 859.

aggravating circumstance has two components: (1) that the offense was outrageously or wantonly vile, horrible or inhuman, and (2) that it involved an aggravated battery to the victim, torture to the victim, or the depravity of mind of the defendant.[224] For the application of the aggravator in Oklahoma, first, the murder must be preceded by torture or serious physical abuse of the victim, and second, the facts and circumstances must show that the murder was heinous, atrocious, or cruel.[225]

Alabama, Georgia, and Oklahoma's applications all involve a component that utilizes their state's statutory language regarding the aggravator, although not much of the discussion in the cases considered in this paper touch on this element heavily, if at all. All three jurisdictions have elements that involve either physical abuse or torture. Only Alabama has criteria regarding appreciable suffering after an assault that results in death, but this can be somewhat likened to physical torture in Georgia and Oklahoma. Interestingly, Georgia's depravity of mind element is not similar to anything found in either Alabama or Oklahoma. Whether one state's application of their "heinous, atrocious, or cruel" aggravator works better or worse than the other two is unclear, as all three states continue to face challenges in state courts on a regular basis. What can be learned from these states' applications of their heinousness aggravator is that their current applications are aligned with the Constitution, as none of them have recently faced challenge in the nation's highest court.

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[224] Hance, 268 S.E.2d at 345.

[225] DeRosa, 89 P.3d at 1156.