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Is Having Too Many Aggravating Factors the Same as Having None at All?: A Comment on the Hidalgo Cert. Petition

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Is Having Too Many Aggravating Factors the Same as Having None at All?: A Comment on the *Hidalgo* Cert. Petition

Chad Flanders•

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While the Court does not dispute that at first blush the defendant's argument appears logical, it is disturbed by the prospect of how one determines the point at which the number of aggravating circumstances causes the death penalty statute to be generally unconstitutional. Is the Court to engage in some mathematical calculation as to who might be covered by the statute and who is not; and if so, what would be reasonable and logical factors to

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*include in the formula? Can the Court arbitrarily declare that fifty aggravating circumstances is too many but forty-nine is permissible? Even assuming one could create a tool that would measure the percentage of defendants eligible for capital punishment, where is the dividing line of constitutionality and who makes that decision?*¹

INTRODUCTION

In order to use the death penalty, states must have "genuinely narrowed"² the class of people eligible for death to the so-called "worst of the worst."³ To do this (in a strategy blessed by the U.S. Supreme Court in its *Gregg*⁴ and *Jurek*⁵ cases), juries must find certain "aggravating factors" that ostensibly prove that *this* crime and *this* criminal were among the offenders most deserving of death.⁶ Death penalty opponents have developed two strategies, one old and one relatively recent, to attack the various aggravating factors employed by the states. The first strategy requires showing that some aggravating factors are so wide-open and amorphous that they do not genuinely limit who can get the death penalty. For example, factors like a murder being "inhumane" or "depraved" do not narrow the class of murderers eligible for the death penalty because arguably *all* murders

¹ State v. Steckel, 708 A.2d 994, 1000 (Del. Sup. Ct. 1996); see also Chelsea Creo Sharon, Note, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 239-42 (2011).

² Zant v. Stephens, 462 U.S. 862, 877 (1983) ("To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.").

³ Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) ("[W]ithin the category of capital crimes, the death penalty must be reserved for 'the worst of the worst.'"); see also Kennedy v. Louisiana, 554 U.S. 407, 446-47, as modified (Oct. 1, 2008), opinion modified on denial of reh'g, 554 U.S. 945 (2008) ("The rule of evolving standards of decency with specific marks on the way to full progress and mature judgment means that resort to the penalty must be reserved for the worst of crimes and limited in its instances of application.").

Gregg v. Georgia, 428 U.S. 153 (1976).

⁵ Jurek v. Texas, 428 U.S. 262 (1976).

⁶ See *Jurek*, 428 U.S. at 270 (approving statutory scheme that "in essence" required "the jury [to] find the existence of a statutory aggravating circumstance before the death penalty may be imposed"); *Gregg*, 428 U.S. at 197 (approving a system of aggravating circumstances, which "require[d] the jury to consider the circumstances of the crime and the criminal before it recommends sentence").

are inhumane and depraved.⁷ In the *Godfrey* case, the Court endorsed this strategy and required states to put limiting construction on these overbroad aggravating factors.⁸

According to the more recent - and high-profile⁹ - strategy, death penalty abolitionists argue that a *single* overly broad aggravating factor could also be present when a state has *too many* aggravating factors.¹⁰ This argument was set forth in the recent petition for the writ of certiorari in *Hidalgo v. Arizona*.¹¹ Arizona has fourteen aggravating

⁷ This objection was raised in the *Gregg* litigation, but the Court deferred consideration of it. See *Gregg*, 428 U.S. at 201 (finding "no reason" to assume the Georgia Supreme Court would adopt "open-ended" constructions of certain aggravating factors). *But see* *Godfrey v. Georgia*, 446 U.S. 420, 432 (1980) (faulting the Georgia Supreme Court for not giving a limiting construction to a sentencing factor that found aggravation if the murder was "outrageously or wantonly vile, horrible and inhuman" or showed "depravity of mind").

⁸ See *id.* The general rule for these types of cases was summarized by the Court in *Walton v. Arizona*:

When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms, and if they have done so, whether those definitions are constitutionally sufficient, *i.e.*, whether they provide *some* guidance to the sentencer.

Walton v. Arizona, 497 U.S. 639,654 (1990) (emphasis in original).

⁹ See Chris Geidner, *A Top Lawyer Has Aslided the Supreme Court to Hear a Major Death Penalty Case*, BUZZFEED NEWS (Aug. 15, 2017, 6:10 AM), www.buzzfeed.com/chrisgeidner/a-top-lawyer-asks-the-supreme-court-to-hear-a-case-to-end (noting Neal Katyal's role in the *Hidalgo* cert. petition); see also Charles Fain Lehman, *Former Obama Acting Solicitor General Files SCOTUS Challenge to Death Penalty Constitutionality*, WASH. FREE BEACON (Aug. 16, 2017, 2:30 PM), www.freebeacon.com/issues/fonner-obama-solicitor-general-scotus-challenge-death-penalty (same); Ryan Lovelace, *Former Obama Attorney Asks Supreme Court to Hear New Death Penalty Challenge*, WASH. EXAMINER (Aug. 15, 2017, 11:36 AM), www.washingtonexaminer.com/fonner-obama-attorney-asks-supreme-court-to-hear-new-death-penalty-challenge/article-2631552 (same). Several amici have already submitted in support of the *Hidalgo* petition. See *Hidalgo v. Arizona*, Pending Petition, SCOTUSBLOG, www.scotusblog.com/case-files/cases/hidalgo-v-arizona (accessed Sept. 22, 2017).

¹⁰ Although not the precise argument advanced in *Hidalgo*, the strategy was also hinted at in an important law review note from 2011. See Sharon, *supra* note 1, at 242-45.

¹¹ See *id.*; see also Petition for a Writ of Certiorari, *Hidalgo v. Arizona*, No. 17-251 (U.S. Aug. 14, 2017), 2017 WL 3531089 (U.S.) [hereinafter Petition for a Writ of Cert.]. For the Arizona Supreme Court's decision, see *Arizona v. Hidalgo*, 390 P.3d 783 (2017).

factors¹² and, what is more important, almost *every murder* in Arizona involves one or more of the fourteen aggravating factors.¹³ The petitioners contend that the aggravating factors taken as a whole cannot serve any narrowing function in limiting the class of those who are eligible for the death penalty.¹⁴ In other words, having too many aggravating factors can be as ineffective as having no aggravating factors or having a vague and amorphous aggravating factor. If everyone who commits murder becomes eligible, the process fails to select the very worst among the generic class of murderers for the death penalty.¹⁵ If everyone is the worst, given the scheme as a whole, then no one really is.

While the argument in the *Hidalgo* petition is superficially appealing, it involves a basic mistake. The petition confuses the empirical scope of a set of aggravators with the conceptual scope. The empirical scope of a set of aggravators covers the total number of murders *actually committed* that fall under one of the aggravators. But the conceptual scope goes to how many murders in principle are covered under a set of aggravators. The Court's death penalty jurisprudence, on my understanding, requires conceptual but not empirical narrowing. For the fact that a list of aggravating factors may fit every murder committed in a state for a given time period does not mean that the aggravating factors are not doing any narrowing work. After all, a state could have one very specific aggravating factor that fit all of the murders in that state for that year. Yet this does not allow us to conclude that the aggravating factor fails to limit in principle the class of those that are death penalty eligible. What is required is not just an empirical check on who is getting the death penalty given the aggravating factors (which is what the *Hidalgo* petition primarily relies on) but an actual conceptual investigation of the particular aggravating factors. But then, we are back to the first strategy - attack

¹² See ARIZ. REV. STAT. § 13-751(F) (2017).

¹³ Petition for a Writ of Cert., *supra* note 11, at 3 ("[V]irtually every' person - around 99% - convicted of first-degree murder is eligible for the death penalty."); *id.* at 7 ("In other words, 99% of first-degree murders [in Arizona] were eligible for the death penalty."); see also *id.* at 6 ("In support of his motion, Hidalgo submitted evidence demonstrating that virtually every first-degree murder committed in 2010 or 2011 in Maricopa County - where he was tried - had at least one aggravating factor present.").

¹⁴ See *id.* at 10-12.

¹⁵ See *id.* at 12 ("Petitioner in this case set out evidence demonstrating that the aggravating circumstances serve no narrowing function at all because 'virtually every first-degree murder case in Arizona presents facts that could support at least one of the legislature's aggravating circumstances.'").

certain aggravating factors as too broad based on what murders they conceptually cover.

My paper proceeds in three short parts. The first part sets out the argument in the *Hidalgo* petition and explains its claim that having too many aggravating factors is as ineffective as having no aggravating factors. The second part provides a straightforward critique of the *Hidalgo* argument along the lines detailed above - that the fact that aggravating factors may cover a large number of actual murders does not say much (indeed, practically nothing in the abstract) about whether those aggravating factors "narrow" the class of the death eligible. In the third part, I suggest that the "multiple aggravators" argument is in essence a version of the original worry about broad and amorphous aggravating factors. But this critique means analyzing how aggravators work (individually and together) as a conceptual matter, rather than analyzing whether all murders committed in the state happen to fit under one of the aggravating factors.

I. THE ARGUMENT IN THE *HIDALGO* CERT. PETITION

Appreciating the intuitive force of the argument in the *Hidalgo* petition means looking back to both *Furman* and *Gregg*: *Furman* to appreciate the nature of the problem of arbitrariness and *Gregg* to determine what the Supreme Court at the time thought was an adequate response to the arbitrariness problem. *Furman*,¹⁶ especially the concurring opinion by Justice Stewart,¹⁷ pointed to what several Justices saw as a fundamental flaw in the death penalty in America - it failed to adequately pick out *who*, among those who committed serious crimes, should receive the death penalty.¹⁸ To be sure, the problem at the time of *Furman* was fairly acute. In the 1970s, the death penalty could be given for rapists, for minor participants in felony murders, and even for burglars. Moreover, those under sixteen years old and the seriously mentally disabled were also death eligible.¹⁹ Accordingly, a burglar who was seventeen on one hand and

¹⁶ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁷ See *id.* at 306-10.

¹⁸ See *id.* at 309-10 ("For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.") (footnote omitted).

¹⁹ See Carol S. Steiker & Jordan M. Steiker, *Part II: Report to the ALI Concerning Capital Punishment*, 89 TEX. L. REV. 367, 376 (2010) ("[T]he Supreme Court . . . has limited capital punishment to the crime of murder, in comparison to the pre-*Furman* world in which death sentences for rape, armed robbery, burglary and

an adult mass murderer on the other hand could be among the class of the death eligible. The former could get death while the latter could get life, all based on nothing more than the jury's untutored sense of who was "worse." Justice Stewart and others found this possibility intolerable because this left the selection process for the death penalty (at least in theory) to chance rather than function of the awfulness of the crime and the depravity of the criminal.²⁰ To be sure, the death-eligible class was not limitless - even then only those who committed a fairly serious crime were considered. But it was not all that limited. Worse, the next narrowing step followed no logic. As the Court would put it later, at the stage of picking who among the death eligible should actually die, the discretion of the jury was hardly "channeled."²¹

In *Gregg*, however, it appeared that the arbitrariness associated with giving juries discretion over death was not beyond repair (something that had been hinted at just a few years earlier in the Court's *McGautha* opinion²²). In fact, the cure was a relatively simple formula: agree on "aggravating factors" for the juries to review, have the juries weigh those against possible mitigating factors, and then institute some form of appellate review. If states passed a "carefully drafted statute" that "ensure[d] that the sentencing authority" was "given adequate information and guidance" then the arbitrariness worry could be kept at bay.²³

kidnapping were authorized and more than occasionally imposed. The Court recently has categorically excluded juveniles and offenders with mental retardation from the ambit of the death penalty.") (footnote omitted).

²⁰ Stewart famously compared it to the odds of being struck by lightning. *See id.* at 309.

²¹ *See, e.g.,* *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion.").

²² *McGautha v. California*, 402 U.S. 183 (1971). *McGautha* had concluded that channeling jury discretion was a hopeless endeavor:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

Id. at 204.

²³ *Gregg v. Georgia*, 428 U.S. 153, 195 (1976). The full quotation reads:

In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these

There were some catches, however. The most relevant of which (for our purposes) was that if the aggravating factor was not narrow enough, it required further limiting construction. A statute that allowed the death penalty for every "heinous" murder would not channel the jury's discretion because *any* murder could fit under the category of being heinous, at least if "heinousness" was not carefully circumscribed. The purpose of having aggravators was to limit discretion, not to provide a mechanism for it. The Court flagged the issue in *Gregg*, and noted also the solution. If a particular aggravating factor was too "vague" or "broad," then the state courts must provide a limiting construction to use the aggravator. If the state court failed to do so, any death penalty sentence based on that factor risked being reversed.²⁴

From this basis in *Gregg*, the *Hidalgo* petition gets its foothold. According to *Gregg*, an aggravating factor by itself could fail to limit those eligible for the death penalty, and later cases affirmed this proposition. But so too, runs the argument in the *Hidalgo* petition, could a sentencing scheme that has *too many* aggravators. If every murder that comes down the pipe fits any of the many aggravating factors the state has set up, then *every murderer* becomes eligible for death.²⁵ It is the broad and vague aggravator problem in a slightly different guise. The problem with a broad aggravator is that any murder can fit it and thus it serves no limiting function.²⁶ Similarly, a long list of aggravating factors also fails to limit discretion if every murder can be matched up with at least one of the aggravating factors.

concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Id.

²⁴ See *id.* at 201.

²⁵ See, e.g., Petition for a Writ of Cert., *supra* note 11, at 16 ("Thus, by the State's own lights, the constitutionality of Arizona's sentencing scheme turns on whether the aggravating circumstances 'impose statutory limits on capital sentencing discretion.' Petitioner has demonstrated that they do not. Instead, they render 'virtually every' defendant death eligible . . . ").

²⁶ See, e.g., *Arave v. Creech*, 507 U.S. 463, 474 (1993) ("If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm.") (emphasis in original). I return to this passage later in the paper. See *infra* note 33 and accompanying text.

This, according to petitioners, is what happens in Arizona.²⁷ According to the petition, ninety-nine percent of the murders committed in Arizona fit one or more of the fourteen aggravating factors in the state's death penalty statute.²⁸ But if *all* murders are moved into the category of "murders eligible for the death penalty," then the scheme - taken as a whole rather than in regards to one individual aggravator - fails to genuinely narrow.²⁹ In other words, under this sentencing scheme, *all* murderers in the state end up deserving the death penalty. And this starts to look like the fundamental flaw in *Funnan*.³⁰

II. THE PROBLEM WITH THE *HIDALGO* CERT. PETITION

Although seemingly compelling, the argument in the *Hidalgo* petition suffers from a basic confusion about the role of aggravators in limiting the class of those eligible for death. Consider a simple, and admittedly hypothetical, sentencing scheme in the State of "Alpha." Alpha's death penalty statute has only two aggravating factors. The first aggravator is that the murder is of more than twenty-seven people. The second aggravator is that the murder must have been preceded by at least three weeks of torture and severe psychological abuse of the victim. Suppose that all sixty-eight³¹ of the murders that take place within the State of Alpha are precisely these two types. Here, just like the situation in Arizona, the aggravators are not genuinely narrowing criminals eligible for death. All sixty-eight murders - *one hundred percent* - are covered by one of the two aggravators. The same objection lodged in the *Hidalgo* petition would seem to apply: the aggravators are not performing any real narrowing work because it turns out that all murders in the State of Alpha are

²⁷ See Petition for a Writ of Cert., *supra* note 11, at 12 ("The Arizona Supreme Court has disregarded that bedrock requirement of the Eighth Amendment, upholding the constitutionality of a capital punishment scheme that renders 'virtually every' defendant convicted of first-degree murder eligible for the death penalty.").

²⁸ *Id.* at 3.

²⁹ See *id.* at 12 ("Petitioner in this case set out evidence demonstrating that the aggravating circumstances serve no narrowing function at all because 'virtually every' first degree murder case in Arizona presents facts that could support at least one of the legislature's aggravating circumstances.").

³⁰ See *id.* at 12-13 ("That holding [that Arizona's scheme is constitutional] is plainly incompatible with this Court's insistence that a statutory scheme must *limit* the class of death-eligible defendants.") (emphasis in original).

³¹ It does not really matter how many murders there were, but let us say there were sixty-eight.

death eligible. According to the *Hidalgo* petition, the State of Alpha's sentencing scheme should be unconstitutional.

This is an absurd result, and it is a function of the fact that the "narrowing" requirement is capable of two interpretations; one of which is more plausible than the other. The *Hidalgo* petition trades on this ambiguity by presenting the weaker reading of this requirement as the correct one. For example, the Supreme Court has stated that an "aggravating circumstance may not apply to every defendant convicted of murder." Rather, "it must apply only to a subclass of defendants convicted of murder."³² Applied to a scheme as a whole, this would be problematic if a scheme had a *list* of aggravators that applied to "every defendant convicted of a murder."³³ Or consider what the Court said in *Arave* regarding when an aggravating circumstance would not pass a constitutional muster: "If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm."³⁴ Reading this passage, one might conclude that if a *list* of aggravators applied to *every* defendant eligible for the death penalty, then taken as a whole that list would be "constitutionally infirm" as well.

Under the weak reading of the narrowing requirement, the class of the death eligible is sufficiently "narrowed" when the number of death-eligible murderers is less than the total number of murderers in the state. I will call this weak reading an "empirical" reading of the narrowing requirement. This empirical reading interprets the narrowing requirement as a matter of sheer numbers. Applying this to the State of Alpha example, if the number of those who are death eligible is the same as all murders, then no real narrowing work has been done by the set of aggravators. That is, the State of Alpha's scheme fails because the number of murderers eligible for death and the total number of murderers are the same. As no empirical or numerical narrowing has been done, according to the *Hidalgo* petition, this scheme would be unconstitutional.

A better reading of the narrowing requirement, however, would find the State of Alpha's scheme constitutional. As a conceptual matter, the number of possible murderers that are death eligible are in fact narrowed down, and quite considerably. I will call this reading the "conceptual" reading because as a conceptual matter not all alleged murderers in Alpha are in fact eligible for the death penalty. Applying

³² *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) (citing *Arave v. Creech*, 507 U.S. 463, 474 (1993)).

³³ *Cd.*

³⁴ *Arave*, 507 U.S. at 474 (emphasis in original).

the State of Alpha example, if you shoot just two people without torturing them, and even if you shoot more than five people whom you torture for five days, you are not eligible for the death penalty in Alpha. The class of murderers eligible for death in theory is quite small in Alpha. It just so happens that Alpha has gone through a terrible stretch, where all the murders have been of an especially gruesome sort. As it turns out, the class of murderers and the class of death-eligible murderers are coextensive. But relying on the empirical number says *nothing* about whether real narrowing has occurred at the conceptual level because it would seem obvious that it has occurred.

The argument raised in the *Hidalgo* petition ignores this possibility, or at least glosses over it. Under the narrowing requirement in the context of *Gregg* and its progeny, states must provide a sound basis to categorize certain murders as worse than others.³⁵ This differs from what the *Hidalgo* petitioners argue. While they show that in parts of Arizona, every murder that happened fits one of the aggravated factors, this does not mean that no narrowing has been done by that state's aggravators. It could be, after all, that we are living in a state like the State of Alpha, where all two of the aggravators are providing a conceptual basis for narrowing the class of death-eligible murderers, even when all actual murders fit those two aggravators.³⁶

¶ The Arave passage in context says this:

If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm. See *Cartwright*, supra, 486 U.S., at 364, 108 S.Ct., at 1859 (invalidating aggravating circumstance that "an ordinary person could honestly believe" described every murder); *Godfrey*, supra, 446 U.S., at 428-429, 100 S.Ct., at 1765 ("A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman'").

Id. Note how the requirement is that the aggravator in principle describe every murder, not just that it describe every person who has murdered in that state.

¶ Moreover, I take it that the narrowing requirement would rule out - and I am indebted to Stephen Galoob for this point - a scheme which "narrowed" the number of death eligible by some principle such as "every seventh murderer is death eligible" or "every murderer who kills on Tuesdays" is death eligible. These aggravators would narrow, but not in a rational way. I am assuming that the State of Alpha's scheme meets this test of rational narrowing: it may be extreme, but we should not doubt either that multiple murders or torturing before murder would make a murder distinguishable from the mine-run of murders.

III. THE WAY FORWARD

The *Hidalgo* petition ironically comes close to realizing the confusion I have just identified when it gives an example similar to the one about the State of Alpha.³⁷ In response to the Arizona Supreme Court's opinion in *Hidalgo* that it was enough that the individual aggravators applied to "fewer than all murders," the petition argues that, "under that logic, a State would be free to adopt two aggravators: one that covers all murders with a particular feature, and the other that covers all murders that *lack* the particular feature."³⁸ This, indeed, is a variation on the State of Alpha example, but obviously with one important difference - the State of Alpha's aggravators seemed to cover only a very small class of murders. It just turned out that *all* the murders in Alpha that year happened to fit into that small class. Thus, the aggravators conceptually but not numerically narrowed the death-eligible murderers. On the other hand, two aggravators in the *Hidalgo* petition's example conceptually cover all murders. But this argument differs from the claim that all murderers fit under one of Arizona's aggravating factors.³⁹ Instead, the *Hidalgo* petition example suggests that the aggravators in *Arizona* are so broad that they conceptually "cover the field," meaning they encompass all possible murders.⁴⁰

A state like the one imagined in the petitioner's brief - which had two aggravators that covered the field of all possible murders - would likely have a problem under *Godfrey*. It is the same problem of having a vague and overbroad aggravator, but divided in two. Each aggravator would be too broad on its own. Further, if they, when taken together,

³⁷ See *supra* Part II.

³⁸ Petition for a Writ of Cert., *supra* note 11, at 14-15 (emphasis in original).

³⁹ This is true despite what the Petition seems to suggest, as in this passage:

But under that logic, a State would be free to adopt two aggravators: one that covers all murders with a particular feature, and the other that covers all murders that *lack* the particular feature. Or - as Arizona has done here - it could adopt a long list of aggravators such that every convicted murderer is somehow made eligible for death. Either system utterly fails to offer a meaningful basis for distinguishing the few cases in which death is imposed from the many cases in which it is not.

Id. (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976)).

o For example, you could imagine distinct aggravators for murders that involved the killing of: (1) police officers, (2) firefighters, (3) judges, and (4) potential witnesses. These would all pick out murders that are distinct from so-called "ordinary" murders, but unless we had a statute that picked out *every type of employment* (and unemployment), the class of the death-eligible would not become coextensive with the class of all murderers.

covered conceptually all possible murders, then the whole scheme would certainly have a problem under *Gregg* and related cases.⁴¹

But the *Hidalgo* petition has failed to show that the many aggravating factors in Arizona add up to something that "covers the field" and makes all murderers, as a conceptual matter, eligible for death. Instead, it engages in the weak, or empirical, reading of the narrowing requirement that I noted above: because all murders match an aggravator, all murderers are eligible for death. This is true as a matter of empirical fact, but not as a conceptual truth. The conceptual truth requires us to look at what the aggravators do *individually*. Only then can we see whether, when taken altogether, they cover the field of all possible murders and the scheme as a whole serves a narrowing function. I am skeptical that this latter possibility is actually the case in Arizona, or anywhere else. One could imagine a scheme that has hundreds of aggravators, but that still comes nowhere close to covering the field for *all* possible murders.⁴²

Running a successful and sound *Hidalgo-type* argument would not involve any empirical investigation as to how many murders fell under the existing aggravating factors. This is not the limiting function that the Court has indicated it requires of aggravating factors. And as the State of Alpha hypothesetical shows, it should strike us as clearly the *wrong* kind of limiting. The scheme could conceptually limit the death-eligible murders to a great degree without empirically narrowing the number of the murders.

By contrast, a successful and sound *Hidalgo-type* argument would build on *Godfrey*, not depart from it. It would look at the aggravators and see, when taken together, whether they conceptually include all murders. Suppose a scheme had an aggravator that included murders "out in the open" and suppose it *also* had an aggravator that included "concealed" killings.⁴³ Here, we have a facially plausible claim that the

⁴¹ See *Gregg v. Georgia*, 428 U.S. 153, 200 (1976) (stating that the Court will look at the "sentencing system as a whole"); see also *Petition for a Writ of Cert.*, *supra* note 11, at 15 (calling this approach "holistic"). This is one definite contribution of the petition, in that it urges a look at how the aggravators work together. My concern is that the petition does not go far enough in showing a real constitutional problem with these schemes when taken as a whole.

⁴² Again, this shows why we cannot simply say in the abstract that there are too many aggravators without looking to see what those aggravators cover. Without looking at the *content* of the aggravators, we are left with the question raised in the quotation that opens my essay, viz., when we get to the point of "too many aggravators." I return to this point in my conclusion. See also *supra* example in note 40.

⁴³ I owe this example to Joe Welling.

sentencing scheme *leaves no murders out*.⁴⁴ This is not a matter of empirical fact: we do not need to look at the murders that happened to determine if the aggravators would cover all murders. Instead, it is a matter of the concepts, now not only scrutinized individually, but also taken as a whole.⁴⁵

Thus, I propose that to determine if a group of aggravators taken as a whole "covers the field," we must first look at the aggravators one by one to see if each factor is too broad, and then take them together to see if it conceptually narrows the class of those eligible for death. When taken as a whole, courts must consider whether they narrow the class of murderers who are death eligible beyond the "ordinary" murder, not whether the aggravators in fact cover all the murders for a given period of time. As the Court has made clear, "ordinary" is not defined statistically, but conceptually as a murder that *only* involves

⁴⁴ Justice Blackmun attempts just such an argument about the California death penalty sentencing scheme in his dissent in *Tuilaepa* (which I quote at length):

Prosecutors have argued, and jurors are free to find, that "circumstances of the crime" constitutes an aggravating factor because the defendant killed the victim for some purportedly aggravating motive, such as money, or because the defendant killed the victim for no motive at all; because the defendant killed in cold blood, or in hot blood; because the defendant attempted to conceal his crime, or made no attempt to conceal it; because the defendant made the victim endure the terror of anticipating a violent death, or because the defendant killed without any warning; and because the defendant had a prior relationship with the victim, or because the victim was a complete stranger. Similarly, prosecutors have argued, and juries are free to find, that the age of the victim was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly; or that the method of killing was aggravating, because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire; or that the location of the killing was an aggravating factor, because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.

Tuilaepa v. California, 512 U.S. 967, 986-88 (1994) (Blackmun, J., dissenting). I leave it open whether Justice Blackmun's argument works (that he correctly describes all the aggravators in the scheme, and in fact the aggravators taken together "cover the field," etc.). My point only is: *it is the right kind of argument*. Note that if Justice Blackmun is right, it does not matter what kinds of murders are committed in California in any given year, or even ever. We just need to look, conceptually, at what aggravators there are and how they work together.

⁴⁵ Of course, this does not conflict with *also* pursuing the *Godfrey* case for individual aggravators, viz., that some aggravators are too broad taken by themselves. However, the meaning of "broad" is unclear given the limited number of cases on this issue, except when the aggravator selects all murders as death eligible. See *supra* note 8 and accompanying text. It is also consistent with attacking individual aggravators as not picking out a feature that plausibly makes a murder one of the worst of the worst. See *supra* note 3 and accompanying text.

the unjustified killing of another person, stripped of any aggravators that pick out that killing as special or especially bad.⁴⁶

Unconstitutional aggravators will fail to narrow the class of the death eligible either individually - this is what happens in the non-limited version of the "heinous" aggravator - or when taken as a whole - this is what *might* happen if two or more aggravators covered the field to include all murders. Both are part of the death penalty opponents' original strategy except that the latter applies to the scheme as a whole. The upshot of successful argument under either strategy is the same. The scheme does not narrow because it fails to select those murders that are worse than what *all* murders share conceptually - the unjustified killing of another person. Such a scheme would be "constitutionally infirm," not under the novel (and flawed) argument in the *Hidalgo* petition, but under the original argument set forth in *Godfrey*.

CONCLUSION

Posed in the abstract, "How many aggravators is too many?" has no clear answer. We can, however, identify two possible ways of answering this question. First, any aggravator is one too many if that aggravator does not narrow the class of death-eligible murderers to less than the class of murderers taken as a whole. In other words, a state must show how *this* murderer is worse than every other murderer convicted in that state. The Court pointed out this problem in *Godfrey*. Second, any *group* of aggravators may be found unconstitutional if that group makes up a scheme where every possible murderer is death eligible. In other words, if any murder always has an aggravator that matches it, then the scheme conceptually covers all possible murders.

This second answer is the constitutional problem that the *Hidalgo* petition gestures at, but does not fully establish. For both of these kinds of answers, the problem is not ultimately one of numbers. Neither case against aggravating factors can be made by merely showing that a lot or even all murders in a state matches an

⁶ As the Arizona Supreme Court put it, the idea is to guarantee that "no defendant will be subject to a death sentence merely by virtue of being found guilty of first degree murder . . ." *Arizona v. Hidalgo*, 390 P.3d 783, 791 (Ariz. 2017); see also *Zant v. Stephens*, 456 U.S. 410, 416 (1982) ("The existence of one or more aggravating circumstances is a threshold finding that authorizes the jury to consider imposing the death penalty; it serves as a bridge that takes the jury from the general class of all murders to the narrower class of offenses the state legislature has determined warrant the death penalty.").

aggravator. The case that an aggravator or a scheme of aggravators is too broad and captures too many murderers can only be made by looking at what the aggravator or aggravators conceptually cover - taken singly, or taken as a whole. It is in making this kind of case that we might be able to fulfill the promise of the *Hidalgo* petition.

