DOUBLE COUNTING IN CAPITAL SENTENCING STATUTES

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ABSTRACT

The Supreme Court's narrowing requirement emerged from concerns in *Furman v. Georgia* (1972) that the death penalty was being implemented in a manner that was arbitrary, capricious, and discriminatory. For many states that continue to exercise the death penalty, the narrowing requirement is satisfied by statutory aggravating factors designed to limit the death-eligible class to the most heinous offenders.

This Note identifies a problem in the construction of statutory aggravating factors that has been severely overlooked and endures today: double counting. Double counting occurs when the statutory aggravating factors duplicate elements of the capital offense. In this context, a finding of guilt can mean an automatic finding of an aggravating factor, resulting in an automatic or mandatory death sentence. This Note contends that the persistence of double counting is due to a misinterpretation of *Lowenfield v. Phelps* (1988). This Note supports this contention through a comprehensive analysis of state supreme courts' and lower federal courts' approaches to upholding the practice of double counting. Finally, this Note provides a strategy to prevent the unconstitutional practice of double counting and to successfully enforce the narrowing requirement.

* J.D., Columbia Law School, 2025. Thank you to Professor James S. Liebman for his invaluable guidance, and for sharing his insight and deep knowledge in this field. Thank you to the *Columbia Human Rights Law Review* staffers and executive board for their thoughtful work on this piece. Most of all, thank you to my parents for their unwavering support.

TABLE OF CONTENTS

INTRODUCTION

"Double counting" looms large over the landscape of capital punishment. This phenomenon occurs when an element of a crime, used to elevate the offense to a capital level,[1] is duplicated by an aggravating factor[2] to justify the imposition of the death penalty.[3] The redundancy raises profound questions about the fairness and constitutionality of our legal system. The problem of double counting as an overarching phenomenon has never been examined in detail.[4] The imposition of the ultimate penalty—death—should require a legal process that is beyond reproach, ensuring that every safeguard against fraudulence and discrimination is firmly in place.[5] The practice of double counting, where aggravating factors overlap with elements of the capital offense itself, artificially inflates the defendant's culpability by establishing an aggravating factor that simply repeats the crime. The significance of this problem is profound: tipping the scales unfairly towards a death sentence.

This Note argues that the problem of double counting is rooted in the misinterpretation of the Supreme Court's ruling in *Lowenfield v. Phelps*[6] by state and lower federal courts. *Lowenfield* has been misinterpreted as a case that allowed for double counting when it in fact did not. Rather, it was a case in which the offense

1. Each state defines its own capital offenses (crimes that are punishable by death). The most common is first-degree murder. *See infra* Table 1.

2. Aggravating factors are "[s]pecific elements of a crime defined by statute. When present, these factors may allow a jury to impose a death sentence for a person convicted of a capital offense. Sometimes these are also called aggravating circumstances." TRACY L. SNELL, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CAPITAL PUNISHMENT, 2021 – STATISTICAL TABLES 3 (2023).

3. Double counting should not be confused with the practice of establishing multiple aggravating factors that duplicate each other. For example, in *Jones v. United States*, Justice Ginsberg criticized the majority's opinion for allowing the duplication of a victim's personal traits to serve as the foundation for multiple aggravating factors. 527 U.S. 373, 420–21 (1999) (Ginsburg, J., dissenting).

4. Scholars have explored the implications of the felony murder rule in the context of capital punishment and the use of the felony-murder aggravator. *See infra* note 12 and accompanying text.

5. This Note does not seek to venture an opinion on the constitutionality of capital punishment. Further, the suggested reforms to capital sentencing statutes presented in this Note are not indicative of support for capital punishment. The debate between refining capital sentencing laws and abolishing capital punishment altogether is complex and multifaceted. This Note focuses on the former as a step that aligns with constitutional mandates, but it does not discount the latter.

6. Lowenfield v. Phelps, 484 U.S. 231, 246 (1988).

became death-eligible through the finding of an aggravating factor at the guilt phase.[7] This did not present an instance of double counting and thus the Supreme Court did not address the issue at all.[8] The Supreme Court inadvertently triggered the problem by presenting a confusing and incomplete picture of the homicide crime and the separate aggravating circumstance involved in the case; that characterization only appeared to, but properly understood did not, constitute double counting—which thereafter has misled state and lower federal courts into thinking that double counting is permissible.[9] The Supreme Court has been remarkably silent on the double counting issue, refusing to take up any constitutional challenges relating to it for the last twenty years.[10] As such, this Note seeks to elucidate the practice of double counting across the country and why it continues to persist. Following *Lowenfield*, state courts have differed on the constitutionality of double counting.[11] This Note posits that the states that make double counting feasible and uphold the statutes that enable it are operating under a misinterpretation of *Lowenfield*.

While scholarship acknowledges the problem of "double counting" in the felony murder context, it often does not explain why the problem has persisted.[12] James Liebman and Peter Clarke noted

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7. *Id.*

8. *See infra* Section I.B.

9. *See infra* Part II.

10. In *Tennessee v. Middlebrooks*, the Supreme Court accepted the state's request for certiorari to determine the issue of whether the Eighth Amendment forbids a jury in a capital felony murder trial from considering the statutory aggravating factor that the homicide occurred during the commission of a felony. 507 U.S. 1028, 1028 (1993). However, the writ of certiorari was dismissed. Tennessee v. Middlebrooks, 510 U.S. 124, 1254 (1993).

11. *See*, *e.g.*, State v. Hall, 419 P.3d 1042, 1086 (Idaho 2018), *cert. denied* 139 S. Ct. 1618 (2019) (holding that an aggravating factor that duplicated the offense did not violate the narrowing requirement); McConnell v. State, 102 P.3d 606, 624 (Nev. 2004) (striking down a similar aggravating factor and holding that its duplicative nature was a constitutional violation).

12. *See* Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1106 (1990) (arguing that "the felony murder rule is particularly inadequate to fulfill th[e] constitutionally mandated function" of narrowing eligibility for capital punishment). The Model Penal Code notes that "[t]he classic formulation of the felony-murder doctrine declares that one is guilty of murder if a death results from conduct during the commission or attempted commission of any felony." MODEL PENAL CODE § 210.2 cmt. 6. The rule establishes the accused's culpability for murder when the death occurs as a consequence of, or in association with, the commission of a felony or the escape following the perpetration of a felony. George P. Fletcher, *Reflections*

that "[s]ome observers understand the Supreme Court's decision in *Lowenfield v. Phelps* . . . to embody a *holding* that approves the questionable practice we describe the Court as merely having *tolerated* by thus far refusing to forbid it."[13] Liebman and Clarke identified Kaplan, Weisberg, and Binder's casebook, *Criminal Law: Cases and Materials*, as an example of this misapprehension as the casebook authors maintain that "[under *Lowenfield*], as a matter of federal constitutional law, the Supreme Court would permit the [accompanying felony aggravating circumstance] 'bonus' . . . where the underlying murder charge was solely based on a felony-murder ground . . . ."[14] Liebman and Clarke then aptly observe that this is a mistaken interpretation of the holding in *Lowenfield*.[15] This Note extends Liebman and Clarke's proposition to contend that in fact, state supreme courts have incorrectly interpreted and thus erroneously relied on *Lowenfield* to uphold a practice of double counting through the use of aggravating factors that duplicate elements of the underlying offense statute. This Note is the first comprehensive scholarly legal commentary to analyze state and lower federal court decisions on the issue of double counting in light of the *Lowenfield* decision, on which most of the decisions upholding the practice have relied.[16]

This Note proceeds as follows. Part I illuminates the Supreme Court's constitutional death penalty jurisprudence beginning with

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on Felony-Murder, 12 SW. U. L. REV. 413, 414 (1981). The intent behind the killing is inconsequential. *Id.* at 422; Franklin E. Zimring & James Zuehl, *Victim Injury and Death in Urban Robbery: A Chicago Study*, 15 J. LEGAL STUD. 1, 31–36 (1986). Some states regard the concurrent felony as independently adequate to upgrade an unintentional killing to first-degree murder, thus potentially meriting the death penalty, and as the sole statutory aggravating factor necessary to sufficiently narrow first-degree murder to qualify for capital punishment. In such states, the accompanying felony propels an offense that would typically fall beyond the scope of capital punishment to its threshold (by classifying it as first-degree), and subsequently leverages the same felony to justify its inclusion within the ambit of death-eligible crimes, by deeming it "aggravated." James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1669–71 (2006).

13. James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 284–85 n.140 (2011).

14. *Id.* (quoting JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 472 (6th ed. 2008)).

15. *Id.*

16. *See infra* Section II.B.

Furman v. Georgia[17] and, in particular, its requirement that states confine the individuals eligible for the death penalty to ones who have committed exceptionally blameworthy murders.[18] Part I then illustrates the proper application of the Supreme Court's post-*Furman* narrowing requirement by reference to (1) Louisiana murder law, which had long identified first-degree murder as the highest form of homicide but was amended in the 1970s to satisfy the Supreme Court's constitutional narrowing requirement by adding a new, *higher* offense of "*capital* murder" defined as first-degree-murder-*plus*; and (2) the state's constitutionally appropriate application of that requirement in *Lowenfield*.[19] Part I closes by noting an unusual, but perfectly constitutional, feature of Louisiana procedural law: its allocation of the constitutional narrowing process via the finding of an aggravating factor to the so-called "guilt," rather than the "sentencing," phase of the bifurcated capital conviction and sentencing process that all states have adopted in the wake of *Furman*.[20]

Part II explains how simultaneously counting an element of murder as an aggravating factor prevents the aggravating factor from assuring that the offense committed is *exceptionally* blameworthy and narrower than—i.e., above and beyond—the highest degree of murder the state traditionally has recognized. Part II then proceeds to expose the extent to which double counting is occurring nationally, highlighting the magnitude and scope of the problem. Part II then reveals how misunderstandings of the implications of Louisiana's unusual (but fully constitutional) allocation of the narrowing process to the guilt, rather than the sentencing, phase of its capital trials has

17. *See* Sam Kamin & Justin Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981, 984 (2015) (referring to the line of cases that collectively flesh out the narrowing requirement).

18. Specifically, the U.S. Supreme Court limits death eligibility to murders that have an "aggravating" feature above and beyond the elements of the state's traditional definition of "first-degree murder" or some other designation of the most serious form of homicide recognized by state law. *See infra* Section I.B.

19. The defendant was found guilty of first-degree murder plus the aggravating factor that the defendant had intended "to kill or inflict great bodily harm upon more than one person." Lowenfield v. Phelps, 484 U.S. 231, 233 (1988).

20. As Part I develops, this quirk of Louisiana law is largely the result of how Louisiana went about curing a separate constitutional defect in its post-*Furman* death-sentencing procedures that the Supreme Court identified in two successive decisions, *Roberts I*, 428 U.S. 325 (1976), and *Roberts II*, 431 U.S. 633 (1977).

misled state and lower federal courts into thinking that *Lowenfield* validated this double counting, when in fact it did not.

Part III shows how a proper understanding of *Lowenfield* as barring double counting better aligns with the principles of proportionality and fairness fundamental to capital punishment jurisprudence. Part III then presents strategies to avoid unconstitutional double counting and guarantee that only the most reprehensible offenses are subject to the death penalty.

I. BACKGROUND

A. The Supreme Court's Narrowing Requirement

In *Furman v. Georgia*, the Supreme Court held that the rarity with which death sentences were imposed[21] and the capricious[22] and discriminatory[23] distribution of those sentences among those eligible for capital punishment violated the Eighth Amendment.[24] In subsequent cases reviewing capital punishment schemes that states adopted to avoid those problems, the Supreme Court gradually refined a set of substantive and procedural constraints on how states could constitutionally impose the death penalty. Among the features of constitutional capital statutes, first identified in *Gregg v. Georgia*[25] and later reinforced in, for example, *Godfrey v. Georgia*,[26] *Zant v. Stephens*,[27] *Maynard v. Cartwright,*[28] and *Arave v. Creech*,[29] is that

21. Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

22. *Id.* at 309–10 (Stewart, J., concurring).

23. *Id.* at 249–51 (Douglas, J., concurring).

24. *See* James S. Liebman*, Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1, 8–9 (2007) (delineating three central concerns in *Furman*: first, rarity (also referenced as arbitrariness) linked to Justice White, scrutinizing inconsistent application of capital punishment; second, capriciousness, likened to the randomness of being struck by lightning, linked to Justice Stewart; and third, discrimination, linked to Justice Douglas, highlighting prejudicial disparities in how death sentences were meted out).

25. Gregg v. Georgia, 428 U.S. 153, 196–97 (1976).

26. Godfrey v. Georgia, 446 U.S. 420, 436–37 (1980) (Marshall, J., concurring) ("[I]t) is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language. The jury be instructed on the proper, narrow construction of the statute.").

27. Zant v. Stephens, 462 U.S. 862, 877 (1983) ("[A]n 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[.]").

such statutes "genuinely narrow the class of persons eligible for the death penalty" and thereby "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder" and sentenced to lesser penalties.[30]

The Court requires states to satisfy the trio of concerns in *Furman*—rarity, capriciousness, and discrimination—through three steps: (1) limiting capital punishment to the offense of murder as traditionally defined to include killings that are intentional or at least highly reckless, or those committed in the course of serious felonies;[31] (2) requiring proof beyond a reasonable doubt of at least one statutorily enumerated "aggravating factor" relating to the offense or offender that is above and beyond the definition of, and thus makes the offense more blameworthy than, traditional murder;[32] and (3) requiring sentencing jurors to consider mitigating (i.e., the opposite of aggravating) factors relating to the offense or offender, to ensure that *even when discounted by extenuating factors*, the crime remains more blameworthy than traditional murder.[33]

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28. Maynard v. Cartwright, 486 U.S. 356, 362 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.").

29. Arave v. Creech, 507 U.S. 463, 474 (1993) ("When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so.").

30. *Zant*, 462 U.S. at 877.

31. Coker v. Georgia, 433 U.S. 584, 600 (1977); Enmund v. Florida, 458 U.S. 782, 801 (1982); Kennedy v. Louisiana 554 U.S. 407, 447 (2008).

32. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 372 (1995); *see also* Rosen, *supra* note 12, at 1125 (explaining that narrowing using aggravating factors has two requirements: a "quantitative requirement," that prohibits including "too many defendants," and a "qualitative requirement" that prohibits including defendants who are not more deserving of the death penalty); SNELL, *supra* note 2, at 3 (defining "[a]ggravating factors" as "[s]pecific elements of a crime defined by statute" that "may allow a jury to impose a death sentence for a person convicted of a capital offense"); Mark S. Hurwitz, *Give Him a Fair Trial, Then Hang Him: The Supreme Court's Modern Death Penalty Jurisprudence*, 29 JUST. SYS. J. 243, 249 (2008) ("The Court believed that a clear finding of aggravating factors during the sentencing phase was necessary 'to narrow the class of murderers subject to capital punishment,' so as to ensure against the arbitrary nature of the death penalty the Court discussed in *Furman*.") (quoting Gregg v. Georgia, 428 U.S. 153, 196 (1976)).

33. In *Skipper v. South Carolina*, the Supreme Court defined mitigation as "any aspect of a defendant's character or record and any of the circumstances of

In enforcing the third requirement, the Supreme Court in *Woodson v. North Carolina* and the two *Roberts v. Louisiana* decisions (involving defendants with the same last name) invalidated statutes that made death the mandatory sentence for anyone convicted of a capital crime.[34] Additionally, in *Lockett v. Ohio*, the Supreme Court ruled that the "Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[35] This third requirement, in turn, has led states to "provide[] for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence" but not to guilt.[36] All three requirements or steps must be achieved to meet the constitutionally mandated requirements under *Furman*.[37] This Note focuses primarily on the second of these three requirements, although the third requirement is important for understanding the development of death penalty law in Louisiana and thus the Supreme Court decision in the Louisiana case of *Lowenfield v. Phelps*.

The narrowing requirement, the second of the three steps, serves as a safeguard against the three fundamental problems identified in *Furman*. By mandating the presence of at least one statutorily specified aggravating factor that elevates the crime above

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the offense that the defendant proffers as a basis for a sentence less than death." 476 U.S. 1, 4 (1986) (quoting Eddings v. Oklahoma, 455 U.S. 104, 110 (1982)).

34. Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Roberts v. Louisiana (*Roberts I*), 428 U.S. 325, 336 (1976); Roberts v. Louisiana (*Roberts II*), 431 U.S. 633, 638 (1977).

35. Lockett v. Ohio, 438 U.S. 586, 604 (1978). Mitigating factors encompass a range of elements related to a defendant's personal history, character attributes, criminal record, details of the criminal act, or other relevant conditions presented by the defense. Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J. L. & SOC. CHANGE 237, 239 (2008). While these factors do not excuse or justify the offense, they can be influential in advocating for a punishment that is less severe than the death penalty. *Id.* at 242.

36. *Gregg*, 428 U.S. at 191–95; *see also* Rosen, *supra* note 12, at 1122 n.50 ("All of the states with capital punishment statutes have incorporated bifurcated proceedings."); Douglas C. Salzenstein, *The Constitutionality of Duplicative Aggravating Factors in Death Penalty Sentencing*, 46 WAYNE L. REV. 1603, 1613–14 (2000) (discussing the Supreme Court's holding in *Woodson* and *Roberts I* that mandatory death penalty statutes were unconstitutional because they failed to adequate consider the character of capital defendants and the circumstances surrounding a particular crime).

37. *See supra* note 24 and accompanying text.

traditional murder, the Court's rulings aim to ensure that only the most heinous crimes are considered eligible for the death sentence.[38] This approach helps avoid the rarity problem,[39] as it aligns with societal consensus on what constitutes a particularly serious crime, thereby increasing the likelihood of death sentences being imposed in such cases.[40] It counters capriciousness by providing juries with clear guidelines on when the death penalty should be applied, thereby reducing the randomness akin to "lightning striking."[41] Lastly, the narrowing requirement attempts to address the discrimination issue by minimizing the opportunity for unconscious bias to influence sentencing, constraining the jury's once-unfettered discretion that was criticized in *McCleskey v. Kemp*.[42] Therefore, narrowing the range of death eligibility more tightly than the traditional definitions of the highest degree of murder while specifying factors to be proved that make the crime especially serious and repugnant creates a structured capital sentencing framework designed to mitigate the concerns that originally rendered the death penalty unconstitutional under the *Furman* ruling.[43]

B. Narrowing in Practice

State legislatures utilize one of two constructs to satisfy the narrowing requirement—the second of the three requirements delineated in the previous section—and restrict eligibility for the death penalty based on aggravating factors. The minority approach involves enacting statutes that adopt a new form of "capital" murder, defined as the state's traditionally highest form of murder (often,

38. Zant v. Stephens, 462 U.S. 862, 877 (1983).

39. The rarity or arbitrariness problem is a concern highlighted by Justice White in *Furman* in relation to the inconsistent application of the death penalty. Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

40. *See Gregg*, 428 U.S. at 206–07 ("In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.").

41. *See* Godfrey v. Georgia, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty."). In *Furman*, Justice Stewart asserted that the unpredictability of the application of the death sentence rendered it "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring).

42. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 305–06 (1987) ("In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty.").

43. Liebman, *supra* note 24, at 8–9.

first-degree) *plus* one or more additional statutorily enumerated factors above and beyond that traditionally highest level of murder.[44] These states adjudicate the presence of that factor beyond a reasonable doubt at the guilt phase of trial, and then use the bifurcated, penalty phase of trial to address mitigating circumstances and any aggravating factors the state considers relevant to sentencing but not to guilt. By contrast, the majority approach requires a finding of the highest degree of murder at the guilt phase, then requires a finding beyond a reasonable doubt of at least one statutorily enumerated aggravating circumstance at the sentencing phase, during which the sentencing jury must also consider mitigating circumstances.[45] In some states, this is accompanied by consideration of aggravating factors that are not statutorily enumerated but are present in the case.[46] Both approaches allocate to the penalty phase the jury's ultimate decision of whether to impose the death penalty based on all the aggravating and mitigating evidence presented.[47] The Supreme Court has noted the difference between these two approaches, including their allocation of the

44. Certain states, such as Louisiana, adopt a more limited definition of capital murder, encompassing only a select group of first-degree murder cases. In states where the definition of capital murder is already sufficiently narrow, further narrowing through aggravating factors is not necessary. Lowenfield v. Phelps, 484 U.S. 2311, 246 (1988); LA. CODE CRIM. PROC. ANN. art. 905.4 (2024).

45. For example, the statutory schemes of Montana and Tennessee both use this procedure. MONT. CODE ANN. § 45-5-102 (2023); MONT. CODE ANN. § 46-18-303 (2023); TENN. CODE ANN. § 39-13-202 (2024); TENN. CODE ANN. § 39-13-204(i) (2024).

46. For example, the statutory schemes of Florida and Georgia use this procedure. FLA. STAT. § 782.04(1)(a) (2024); FLA. STAT. § 921.141(5) (2024); GA. CODE ANN. § 17-10-30 (2024). Further, the Supreme Court has upheld the use of non-statutory aggravating factors. Zant v. Stephens, 462 U.S. 862, 907 (1983); Barclay v. Florida, 463 U.S. 939, 957 (1983).

47. Some states require jurors at this stage to balance aggravators and mitigators and to impose death if some specification of the relative weights is present, while other states simply require the jury to consider all the evidence without specifying any decisional algorithm. Liebman, *supra* note 24, at 10. The Supreme Court has validated both approaches. *Zant*, 462 U.S. at 914–15 (Marshall, J., dissenting). Both aggravating and mitigating evidence may be presented at the guilt phase (aggravating evidence to support the elements of murder; mitigating evidence relevant to partial or complete defenses to guilt that the state recognizes like "provocation and passion"; insanity, self-defense, duress, and diminished capacity, evidence of which may be mitigating even if it does not avoid a guilt finding) as well as at the penalty phase. For a list of cases underpinning the use of mitigating evidence in death penalty cases, see *Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Ford v. Wainwright*, 477 U.S. 399 (1986); and *Lockett v. Ohio*, 438 U.S. 586 (1978).

finding of aggravating factors to the guilt versus the penalty phase, but has left the decision between the approaches to the states.[48]

One proper application of the narrowing requirement is demonstrated through the history of Louisiana's reaction to *Furman*. In response to the constitutional challenges identified in *Furman*, Louisiana made concerted efforts to refine its capital punishment statutes to address issues of arbitrariness, capriciousness, and discrimination.[49] The state achieved this in two fundamental ways. First, it redefined its traditional form of murder (which carried the death penalty), narrowing it to a new category of capital murder, which is first-degree murder accompanied by one or more specified aggravating factors. Second, the state initially made the death penalty mandatory for all individuals convicted of this narrower offense.[50] The Supreme Court's scrutiny of the Louisiana statute in *Roberts I* and *II* revealed a critical flaw: the mandatory death penalty contravened constitutional standards by not permitting the consideration of mitigating factors.[51] Although *Roberts I*, along with the concurrent decisions in *Gregg* and *Proffitt v. Florida*, affirmed Louisiana's first step toward compliance with *Furman* by acknowledging the validity of the narrowing strategy, the mandatory aspect was deemed unconstitutional.[52] Thus, Louisiana retained the narrowing mechanism, continuing to reserve the death penalty exclusively for first-degree murder cases that also involved one or more specified aggravating factors, but further refined its approach by introducing a bifurcated trial process, allowing defendants to present mitigating circumstances during a separate penalty phase.[53] During this phase, the jury is tasked with weighing the mitigating factors against the aggravating factors, including those substantiated during the guilt phase, to make a determination of whether the crime qualifies as capital murder.[54]

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48. Jurek v. Texas, 428 U.S. 262, 273 (1976).

49. Frank R. Baumgartner & Tim Lyman, *Louisiana Death-Sentenced Cases and Their Reversals, 1976-2015*, 7 S. UNIV. L. CTR. J. RACE, GENDER, & POVERTY 58, 60 (2016).

50. *Roberts I*, 428 U.S. 325, 328–29 (1976) ("In the 1973 amendments, the legislature changed this discretionary statute to a wholly mandatory one, requiring that the death penalty be imposed whenever the jury finds the defendant guilty of the newly defined crime of first-degree murder.").

51. *Id.* at 336; *Roberts II*, 431 U.S. 633, 638 (1977).

52. *Roberts II*, 431 U.S. at 635–38.

53. LA. CODE CRIM. PROC. ANN. art. 905; *Roberts I*, 428 U.S. at 333–34.

54. LA. CODE CRIM. PROC. ANN. arts. 905.3, 905.4, 905.5.

This revised statute can be seen in the 1988 case of *Lowenfield*.[55] In *Lowenfield*, the Supreme Court examined the constitutionality of Louisiana's capital sentencing scheme.[56] The issue at hand was whether the scheme violated the Eighth and Fourteenth Amendments because it did not specifically narrow the class of murderers eligible for the death penalty through independent statutory aggravating circumstances during the sentencing phase.[57] The jury—upon establishing that the defendant was guilty of first-degree murder plus the aggravating circumstance that the defendant intended "to kill or inflict great bodily harm upon more than one person"—moved to the sentencing phase.[58] Here, they considered the aggravating factor of "knowingly creat[ing] a risk of death or great bodily harm to more than one person," which they had established during the guilt phase, against the mitigating evidence presented by Lowenfield.[59] Ultimately, the jury concluded that the death penalty was warranted.[60] Both the Louisiana and the U.S. Supreme Courts upheld this sentence, affirming that it satisfied the narrowing requirement through the established presence of an aggravating factor during the guilt phase.[61] Critically, the U.S. Supreme Court held that narrowing could be accomplished either at the guilt phase or at the sentencing phase.[62] In the Louisiana scheme, narrowing had already taken place at the guilt phase and therefore the fact that the aggravating factor mirrored an essential element of the offense was immaterial.[63]

With varying levels of success, capital prisoners have raised three types of challenges to states' implementation of the narrowing requirement associated with a finding of "aggravating factors." First, that an individual aggravating factor provision is overly vague or so broad that it potentially applies to the entire class of murders.[64]

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55. Lowenfield v. Phelps, 484 U.S. 231 (1988).
56. *Id.* at 233.
57. *Id.* at 241.
58. *Id.* at 233–34 (quoting LA. STAT. ANN. § 14:30A(3) (1986)).
59. *Id.* at 235 (quoting LA. CODE CRIM. PROC. ANN. art. 905.4(d) (1984)).
60. *Id.*
61. *Id.* at 235, 246.
62. *Id.* at 246.
63. Rosen, *supra* note 12, at 1135.
64. The *Gregg* Court did not provide clear guidelines for either identifying acceptable aggravating factors or specifying the degree of narrowness required for each factor's definition. Linda Carter, *A Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness*, 52 OHIO ST. L. J. 195, 197 (1991). Following *Gregg*, the statutes in Georgia and Florida were

Second, that the state's collective list of aggravating factors cumulatively accounts for all murders.[65] And third, that specified aggravating factors on which death is premised are identical to elements of the traditional murder definitions—for example, the presence of a felony in traditional felony murder cases, or the presence of premeditation in traditional first-degree murder cases—creating an automatic finding of an aggravating factor at the penalty phase once guilt of the offense has been proven.[66] This Note focuses on the third objection: "double counting."

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challenged on the basis of vaguely written aggravating circumstances. *Id.* In *Godfrey v. Georgia*, the aggravating circumstance in question was when the offense was "outrageously or wantonly vile, horrible and inhuman." 446 U.S. 420, 428 (1980). The Court maintained that any murder could be characterized as such and thus the provision violated the narrowing requirement. *Id.* at 428–29. Similarly, in *Proffitt v. Florida*, the Court acknowledged that the provisions of the Florida statute—which authorized a capital sentence for a murder committed in a manner that was "especially heinous, atrocious, or cruel"—could be interpreted to apply to all murders. 428 U.S. 242, 246 (1976).

65. A deficiency in the Supreme Court's approach is its failure to establish a maximum threshold for the quantity of aggravating factors that a state can incorporate. Steiker & Steiker, *supra* note 32, at 361. A significant number of states have a large number of aggravating circumstances in their death penalty statutes, with most states listing more than ten factors, such that more than 90% of murderers are death-eligible in many states. Chelsea Creo Sharon, *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, 223 (2011); Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1, 25, 39 (2006). Some scholars argue that states have expanded their statutory definitions of capital murder such that almost every murder is eligible for the death penalty in certain states. CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 161 (Belknap Press 2016) [hereinafter COURTING DEATH]. Experts have labeled this as "aggravator creep" (playing on the term "mission creep" in military contexts)—in which a "statute is passed with a list of aggravating factors, and then structural impulses often push that list to become longer and longer as new aggravators are added." *Id.*; Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, *in* THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE 81, 83 (Austin Sarat ed., 1999); Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 397–99 (1998).

66. *See infra* Section II.A.

II. THE PRACTICE OF DOUBLE COUNTING IN CAPITAL SENTENCING

Part II is the heart of this Note. It begins by delineating the problem of double counting. Section A establishes that capital statutes that allow for double counting fail to satisfy the U.S. Supreme Court's narrowing requirement and fail to address *Furman*'s trio of concerns. Section B argues that the persistence and practice of double counting is rooted in the misinterpretation of the Supreme Court's ruling in *Lowenfield*, by state and lower federal courts. It does this through a comprehensive analysis of state and lower federal court opinions and the reasoning therein for rejecting or accepting double counting challenges.

A. Defining the Problem of Double Counting

Double counting occurs when a state's death-sentencing statute permits the sentencing jury to count some element of the state's capital offense as an aggravating factor sufficient to impose the death penalty.[67] Manifestly, assigning to an element of traditional first-degree murder the amplified role of satisfying the constitutional "threshold test" of some factor in the case "that moves the defendant into that special, narrowed category of potentially death-deserving defendants"[68] defeats the purpose of the narrowing requirement; one plus nothing more than that same one equals one, not one *plus* or something *more* than one. As obvious as this principle may seem, state and lower federal courts, typically without much discussion,[69] have rejected challenges to the duplicate use of the same facts and evidence as proof beyond a reasonable doubt of both an element of the traditional offense of murder and the "narrowed" basis for death eligibility.[70]

Common practice in Florida capital cases illustrates this phenomenon. As is true of many states prior to *Furman*, Florida had

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67. Such elements could include, for example, premeditation, deliberation, or the commission of a serious accompanying felony such as rape or robbery. *Aggravating Factors by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/crimes-punishable-by-death/aggravating-factors-by-state [https://perma.cc/QX82-HREW].

68. Mona Lynch, *Double Duty: The Amplified Role of Special Circumstances in California's Capital Punishment System*, 51 COLUM. HUM. RTS. L. REV. 1008, 1022 (2020).

69. *See infra* Section II.B.

70. Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman*?*, 72 N.Y.U. L. REV. 1283, 1304 (1997). For further analysis on courts' discussions of such challenges, see *infra* Section II.B.

long designated first-degree murder as the highest degree of that crime, and the degree subject to the death penalty.[71] Florida had defined first-degree murder as killings that either were premeditated and deliberate or that occurred during the course of committing, attempting to commit, or being an accomplice to one of several enumerated serious felonies such as robbery, sexual battery, arson, burglary, or kidnapping.[72] Yet Florida's post-*Furman* death-sentencing statute identifies those same elements—killings that are "premeditated" and killings "committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; . . . arson; burglary; kidnapping"—as "aggravating circumstances" sufficient in and of themselves to create eligibility for a death sentence and to warrant that sentence absent proof of sufficient mitigating circumstances.[73] Therefore, if one is convicted of felony murder, where the felony was robbery or burglary, a statutory aggravating factor is automatically established and demonstrated in the guilt stage of the trial.[74]

As the Florida example shows, the most common form of double counting occurs when states have traditional first-degree murder statutes defined as killings in the course of a serious felony and include an identical definition of a felony accompanying the killing as an aggravating factor sufficient to establish death eligibility.[75] Idaho's death penalty scheme provides another illustration of the practice. In Idaho, first-degree murder encapsulates premeditated murder and second-degree murders that are supplemented by one of a number of circumstances listed in the statute, including felony murder.[76] Idaho then narrows the class of defendants at the sentencing phase through the finding of aggravating circumstances; at least one statutory aggravating factor

71. FLA. STAT. §§ 775.082(1), 921.141 (1971).

72. *Id.*

73. *Id.* § 921.141(3). Current provisions can be found in FLA. STAT. §§ 782.04, 921.141(6) (2024).

74. Multiple statutory aggravating factors could potentially be established in this way. Courts in certain states have initiated measures to curtail the counting of aggravating factors that are identical to each other, particularly when the "accompanying felony" and "pecuniary gain" statutory aggravating factors are available. James Higgins, *Avoiding Furman: The Unconstitutionality of Mississippi's Killing to Avoid Arrest Aggravator*, 39 U.S.F. L. REV. 175, 190–94 (2004).

75. *See infra* Table 1.

76. IDAHO CODE § 19-2515(1); §§ 18-4003(a), (d).

must be found for the death penalty to be given[77] (Idaho enumerates eleven statutory aggravating factors[78]), unless mitigating circumstances "are found to be sufficiently compelling that the death penalty would be unjust."[79] One of the aggravating circumstances, which we may refer to as a felony-murder aggravator, depicts felony murder as follows: "The murder was committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem and the defendant killed, intended a killing, or acted with reckless indifference to human life."[80] Therefore, a conviction of first-degree murder through felony murder would automatically establish the felony-murder aggravator, thus providing an immediate basis for a death sentence absent significant and compelling mitigating circumstances.[81]

Table 1 in the Appendix demonstrates the frequency with which states allow death sentences premised on felony-murder schemes of this sort.[82] As of this writing, twenty-seven states permit the death penalty for some form of murder. [83] Of those states, twenty-two allow felony murder to qualify as first-degree murder and subject felony murder to the death penalty.[84] Although fourteen of those states include as an "aggravating circumstance" the same accompanying felony that qualified the offense as first-degree murder, four of those states—Tennessee, Wyoming, Nevada, and North Carolina—forbid jurors to premise death eligibility on nothing more than the accompanying felony that served as a basis for the

77. *Id.* § 19-2515(5)(a).

78. *Id.* §§ 19-2515(9)(a)–(k).

79. *Id.* § 19-2515(3)(b).

80. *Id.* § 19-2515(9)(g).

81. *Id.* § 19-2515(3)(b); Lockett v. Ohio, 438 U.S. 586, 604 (1978). Underlying these statutes is often the belief that aggravating and mitigating factors can be easily differentiated and classified by jurors. However, the situation is more complex. For example, jurors might perceive some mitigating circumstances as actually exacerbating the severity of a capital offense. Joshua N. Sondheimer, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 410 (1990).

82. *See infra* Table 1.

83. This number excludes New Hampshire as the state prospectively abolished the death penalty in May 2019. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2023: YEAR END REPORT 3 (2023), https://dpic-cdn.org/production/documents/reports/year-end/Year-End-Report-2023.pdf [https://perma.cc/986T-WM94].

84. *See infra* Table 1.

conviction of first-degree felony murder.[85] Moreover, as discussed earlier, the Supreme Court in *Lowenfield* held that Louisiana's capital scheme sufficiently narrowed the pool of defendants and therefore the aggravating factor at the sentencing phase did not need to narrow the pool further.[86] This leaves nine states with capital statutory schemes that allow for the double counting of the accompanying felony first, as an element of the crime of murder, and second, as the aggravating circumstance that establishes death eligibility.[87] It is important to note that four of the states with statutory schemes that allow for double counting are among the states that apply capital punishment the most often.[88]

Highlighting the significance of this problem is an authoritative study that revealed that over 60% of death-eligible defendants, via first-degree murder, contemporaneously committed arson, burglary, kidnapping, rape, or robbery.[89] Further, the study notably identified that the act of robbery, when associated with a homicide, constituted the primary aggravating circumstance rendering a greater number of defendants eligible for the death penalty than any other factor.[90] Therefore, the misreading of *Lowenfield* by states[91] has considerable impact on a significant number of defendants. It can lead to an effectively mandatory death

85. The supreme courts in Tennessee, Wyoming, Nevada, and North Carolina have prohibited the use of the felony-murder aggravator when the underlying offense is felony murder. State v. Middlebrooks, 840 S.W.2d 317, 347 (Tenn. 1992); Engberg v. Meyer, 820 P.2d 70, 87 (Wyo. 1991); McConnell v. State, 102 P.3d 606, 624 (Nev. 2004); State v. Cherry, 257 S.E.2d 551, 567 (N.C. 1979).

86. Lowenfield v. Phelps, 484 U.S. 231, 246 (1988).

87. *See, e.g.*, State v. Hall, 419 P.3d 1042, 1086 (Idaho 2018) (holding that Idaho's felony murder aggravator met the constitutional narrowing requirements); Loden v. State, 971 So. 2d 548, 569 (Miss. 2007) ("[T]his Court consistently has held that there is no constitutional error in using the underlying felony as an aggravating circumstance.").

88. The nine states are Alabama, California, Florida, Idaho, Indiana, Mississippi, Montana, Ohio, and South Carolina. *See infra* Table 1. Four of these states—Alabama, Florida, Mississippi, and Ohio—were among the twelve states in the United States that have carried out executions in the last ten years. *States with No Recent Executions*, DEATH PENALTY INFO. CTR. (Aug. 16, 2023), https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions [https://perma.cc/ZT3G-CP9C].

89. David McCord, *Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery Be Sufficient to Make a Murderer Eligible for a Death Sentence? - An Empirical and Normative Analysis*, 49 SANTA CLARA. L. REV. 1, 1 (2009).

90. *Id.* at 32.

91. *See infra* Section II.B.

penalty by permitting juries to automatically establish an aggravating factor.

Double counting fails to fulfill the narrowing requirement, and thus fails to avoid the *Furman* trio of concerns.[92] The tactic recycles the qualifying criteria without adding a separate layer of specificity that would warrant the ultimate punishment. It does not address the rarity problem because it does not delineate the subset of crimes that are death-worthy and thus does not increase the likelihood of the death penalty being imposed in such cases. It falls short of mitigating capriciousness as it merely repackages the baseline qualification for capital murder without providing a clear and distinct threshold for when the death penalty should be applied. Moreover, it does not eliminate discrimination; by failing to introduce additional, well-defined standards, it leaves room for the same kind of undefined discretion that can lead to biased application of the death penalty, echoing the very issues the *Furman* decision sought to rectify.[93] In essence, double counting does not advance the goal of a fairer, more objective capital punishment system and addresses none of the concerns identified in *Furman* regarding rarity, capriciousness, and discrimination in the application of the death penalty.[94]

The Supreme Court had an opportunity to address the strongest challenge to double counting in 1993, but ultimately decided not to do so by dismissing certiorari as improperly granted.[95] *State v. Middlebrooks* presented a challenge to Tennessee's practice of double counting felony murder in its death penalty sentencing scheme.[96] As had long been the case in Tennessee, and as was true of the state's capital murder statute in place at the time of the crime,

92. *See supra* Section I.A.

93. Liebman, *supra* note 24, at 8–9.

94. Some states have invalidated the deployment of felony-murder aggravators on the grounds that they do not sufficiently narrow the pool of defendants who may be considered for the death penalty. These state supreme courts have prohibited the use of a felony-murder aggravator when the underlying crime is felony murder. Examples include *State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992); *Engberg v. Meyer*, 820 P.2d 70, 87 (Wyo. 1991); and *McConnell v. State*, 102 P.3d 606, 624–25 (Nev. 2004). The state supreme courts and federal circuit courts hold divergent views regarding both the implementation of the narrowing requirement and the fundamental interpretation of the narrowing requirement itself despite dealing with capital statutory schemes that are extremely similar. For a detailed explanation of the rationale used by these courts, see *infra* Section II.B.

95. State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), *cert. granted*, 507 U.S. 1028, *cert. dismissed as improvidently granted*, 510 U.S. 124 (1993).

96. *Id.* at 322–23.

the commission of murder in the course of kidnapping was a sufficient basis for convicting the defendant of first-degree murder.[97] Yet, the only "narrowing" or "aggravating" factor found in Middlebrooks' case was his commission of that very same felony.[98] Based on its reading of the U.S. Supreme Court's post-*Furman* narrowing decisions in *Zant*, *Tison v. Arizona*, and *Lowenfield*, the Tennessee Supreme Court ruled that the state's capital-sentencing statute, as applied in the case, did not sufficiently, and thus constitutionally, narrow the range of eligible candidates for the death penalty.[99] The state's extensive definition of felony murder as first-degree murder and the identical wording of "felony murder" as an aggravating circumstance—the sole basis for narrowing found in Middlebrooks' case—meant that his felony murder conviction automatically qualified him as eligible for the death penalty.[100] Because an unacceptably large and amorphous category of individuals qualified for the death penalty, the Tennessee Supreme Court ruled that the statute as applied in the case would not avoid the rarity, capriciousness, or discrimination found unconstitutional in *Furman*.[101]

The U.S. Supreme Court has already acknowledged the significance of aggravating factors duplicating the underlying offense by granting review of such a case.[102] After holding an oral argument, the Court ultimately dismissed the *Middlebrooks* case as improvidently granted.[103] The Court dismissed it because a subsequent decision of the Tennessee Supreme Court made clear that the *Middlebrooks* ruling was premised on both the state and federal constitutions, thus rendering any Supreme Court decision in the case advisory.[104] The Tennessee legislature then amended the statute to add a requirement for the felony-murder aggravating factors beyond those sufficient for conviction of first-degree murder: that the murder was "knowingly" committed, solicited, directed, or aided by the

97. *Id.* at 332 (citing TENN. CODE ANN. § 39-13-202 (1982)).
98. *Id.* at 322.
99. *Id.* at 342, 345–46.
100. *Id.* at 346.
101. *Id.*
102. Tennessee v. Middlebrooks, 507 U.S. 1028 (1993). In *Middlebrooks*, the Supreme Court accepted the state's request for certiorari to determine the issue of whether the Eighth Amendment forbids a jury in a capital felony murder trial from considering the statutory aggravating factor that the homicide occurred during the commission of a felony. Brief for Petitioner at 1, Tennessee v. Middlebrooks, 510 U.S. 124 (1993) (No. 92-989).
103. Tennessee v. Middlebrooks, 510 U.S. 124, 125 (1993).
104. State v. Howell, 868 S.W.2d 238, 259 n.7 (Tenn. 1993).

defendant and that the defendant had a "substantial role" in the underlying felony while the murder was committed.[105]

Similarly, North Carolina accepted a double counting challenge to its death penalty statute. In *State v. Cherry*, the North Carolina Supreme Court noted that their felony-murder aggravating factor would always be automatically established in felony-murder conviction cases, since the felony murder must logically have occurred during the commission or attempted commission of one of the enumerated felonies.[106] The legislature dealt with this by providing that "[e]vidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation."[107] The underlying principle of this rule is to prohibit the defendant from receiving additional penalties based on an aggravating factor that doubles as an inherent aspect of the initial criminal conviction. Furthermore, the supreme courts in two other states—Wyoming and Nevada—found that the use of death penalty statutes that allow for duplicate consideration of the felony during both the determination of guilt and the sentencing phase does not adequately narrow the group of individuals eligible for the death penalty.[108]

However, as illustrated by the above discussion of Florida's practice, numerous state and federal courts have upheld death sentences for first-degree felony murder for which the only aggravating factor was the defendant's commission of felony murder—a factor defined by language and elements identical to those sufficient to establish the crime of first-degree felony murder.[109] For

105. Bradley A. MacLean & H. E. Miller, Jr., *Tennessee's Death Penalty Lottery*, 13 TENN. J. L. & POL'Y 84, 114 (2018).

106. State v. Cherry, 257 S.E.2d 551, 567 (N.C. 1979).

107. N.C. GEN. STAT. § 15A-1340.16(d) (2024).

108. Engberg v. Meyer, 820 P.2d 70, 87 (Wyo. 1991); McConnell v. Nevada, 102 P.3d 606, 624 (Nev. 2004).

109. The nine states that have capital sentencing schemes that allow for double counting are Alabama, California, Florida, Idaho, Indiana, Mississippi, Montana, Ohio, and South Carolina. *See infra* Table 1. Four state supreme courts (Alabama, Florida, Idaho, and Mississippi) in those nine states have upheld the use of the felony-murder aggravator where the underlying offense was felony murder. *Ex parte* Kennedy, 472 So. 2d 1106, 1108 (Ala. 1985); Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997), *cert. denied*, 525 U.S. 837 (1998); State v. Hall, 419 P.3d 1042, 1086 (Idaho 2018), *cert. denied* 139 S. Ct. 1618 (2019); Wilcher v. State, 697 So. 2d 1087, 1108 (Miss. 1997). The Alabama Supreme Court has also more generally "upheld death sentences where the only aggravating circumstance supporting the death sentence overlaps with an element of the capital offense." *Ex parte* Trawick, 698 So.2d 162, 178 (Ala.1997); *see also Ex parte* Bohannon, 222 So. 3d 525, 529 (Ala. 2016) (quoting ALA. CODE § 13A-5-50 (1975)) ("The fact that a

example, in *Deputy v. Taylor* and *Johnson v. Dugger*, the Third and Eleventh Circuits upheld statutes in Delaware and Florida, respectively, that required consideration during both phases of any felony carried out concurrently to the killing.[110] Notwithstanding the divergent approaches that courts have taken, the Supreme Court has repeatedly declined to grant certiorari on the issue; most recently, in 2019, it denied certiorari to consider whether Idaho could constitutionally sentence a defendant to die based on a felony-murder aggravating factor that substantially duplicated the definition of first-degree felony murder, which was the basis for the defendant's conviction.[111] The only discussion of the problem in a Supreme Court case is in Justice Marshall's dissenting opinion in *Lowenfield*, joined by Justice Brennan and, in part, by Justice Stevens:

> [A]pplication of [a] sentencing scheme . . . where there is a complete overlap between aggravating circumstances found at the sentencing phase and elements of the offense previously found at the guilt phase, violates constitutional principles in ways that will inevitably tilt the sentencing scales toward the imposition of the death penalty.[112]

The critical fact in *Lowenfield*, however, was that the Court upheld Louisiana's capital sentencing scheme because it narrowed at the guilt phase, even if it did not at the penalty phase.[113] The majority held that a separate sentencing phase was not required to further narrow the class of death-eligible defendants if the class has already been narrowed at the conviction phase.[114] The majority did not weigh in on whether it is constitutional for an aggravating factor to be identical to an element of the capital offense statute where the capital offense statute does not narrow the class of death-eligible defendants.

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particular capital offense as defined in Section 13A-5-40(a) necessarily includes one or more aggravating circumstances as specified in Section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence.").

110. Deputy v. Taylor, 19 F.3d 1485, 1500–01 (3d Cir. 1994); Johnson v. Dugger, 932 F.2d 1360, 1369–70 (11th Cir. 1991).

111. *Hall*, 419 P.3d at 1085, *cert. denied*, 139 S. Ct. 1618 (2019).

112. Lowenfield v. Phelps, 484 U.S. 231, 258 (1988) (Marshall, J., dissenting).

113. *Id.* at 246 (majority opinion).

114. *Id.*

This Note contends that many courts have misinterpreted the *Lowenfield* decision to mean that double counting is constitutional.[115]

B. The Double Counting Divide: How Are States Justifying Double Counting?

This Section asks why some state courts allow double counting, while others forbid it as inconsistent with the narrowing required to avoid the rarity, capriciousness, and discrimination problems that led the U.S. Supreme Court in *Furman* to invalidate all pre-existing death-sentencing statutes in the nation. It concludes that decisions upholding the practice are rooted in an incorrect reading of *Lowenfield*.

1. Superficial Reliance on *Lowenfield*

Many of the state supreme courts and federal circuit courts that have upheld double counting since 1988, when *Lowenfield* was decided, have relied on a superficial analysis of that decision. In *Lowenfield* it is briefly noted (1) that the death sentence was premised on a finding of "capital murder" at the guilt phase—defined as first-degree murder (in that case first-degree premeditated and deliberate murder) plus the aggravating factor of the intention "to kill or inflict great bodily harm upon more than one person"[116]—and (2) that the jury was invited to and did rely on that same factor at the sentencing phase, when it came time to balance the aggravating and mitigating circumstances in the process of deciding whether death was the appropriate penalty in the case.[117] Courts have misconstrued this discussion of the circumstances in *Lowenfield* to affirm double counting practices.

For example, in *Deputy v. Taylor,* the Third Circuit simply noted that "following *Gregg* and *Lowenfield*, federal courts of appeals have consistently held that a sentencing jury can consider an element of the capital offense as an aggravating circumstance even if it is

115. This Note purports that narrowing did occur in *Lowenfield*. However, Justice Marshall dissented on this basis. *Id.* at 247 (Marshall, J., dissenting). This Note takes the view that narrowing is sufficient if it occurs at the guilt phase in reference to traditional definitions of murder. Justice Marshall argued for a broader rule: that even narrowed definitions of capital murder are insufficient absent further narrowing at the sentencing phase. *Id.* at 256–57.

116. *Id.* at 233 (majority opinion).

117. *Id.*

duplicitous."[118] Likewise, in *Perry v. Lockhart*, the Eighth Circuit said little more than that *Lowenfield* required it to overrule a prior holding that Arkansas' double counting was unconstitutional.[119] In *Coe v. Bell*, the Sixth Circuit commented that "[d]ouble-counting analysis—the consideration of when a single factor can be used both to make a murderer eligible to receive the death penalty, and as an aggravating circumstance leading to actual imposition of the death penalty—must *begin* with *Lowenfield*."[120] The decision then proceeded to *end* its analysis by simply noting the reliance on the "great risk" factor at both the guilt phase in finding capital murder and at the penalty phase in the balancing process.[121] Similarly, in *Wilcher v. State*, the Mississippi Supreme Court weakly concluded that in *Lowenfield*, "the United States Supreme Court has confirmed that this practice does not render a death sentence unconstitutional."[122]

Lowenfield did not actually address double counting. It did not need to because the Louisiana capital scheme narrowed at the guilt phase of the trial. Therefore, the duplicate felony-murder aggravator did not have the nefarious effect that it normally would have had there been no narrowing at the guilt phase. As discussed earlier, Louisiana revised its death penalty laws after *Furman* highlighted constitutional issues of arbitrariness, capriciousness, and discrimination.[123] The state narrowed the eligibility for capital

118. Deputy v. Taylor, 19 F.3d 1485, 1502 (3d Cir. 1994).

119. *See* Perry v. Lockhart, 871 F.2d 1384, 1393 (8th Cir. 1989) ("We conclude, therefore, that *Collins* can neither be harmonized with nor distinguished from *Lowenfield*, and we therefore deem it to have been overruled by *Lowenfield*."). *Collins v. Lockhart* determined that applying the death sentence in a case of capital felony murder due to an aggravating factor that merely replicates an aspect of the core felony is unconstitutional. 754 F.2d 258, 264 (8th Cir. 1985). This is because such a methodology fails to genuinely narrow the group of individuals who qualify for capital punishment. *Id.*; *see also* Rosen, *supra* note 12, at 1135 ("The Eighth Circuit acted prematurely . . . . *Lowenfield* simply held that, because this genuine narrowing occurred at the definitional stage, no eighth amendment requirement arose for further narrowing at the sentencing stage.").

120. Coe v. Bell, 161 F.3d 320, 349 (6th Cir. 1998) (emphasis added). Although the court in *Coe v. Bell* acknowledged that narrowing can occur at either the eligibility or the imposition stage, it did not articulate how the Tennessee scheme in question narrows at the guilt stage. *Id.*

121. *Id.*

122. Wilcher v. State, 697 So. 2d 1087, 1108 (Miss. 1997). In this case, the defendant was procedurally barred from raising the issue of the use of the underlying felony as an aggravating circumstance in that it does not genuinely narrow the class of death-eligible defendants because the defendant failed to raise the issue at trial, yet the court decided to address it anyway. *Id.*

123. *See supra* Section I.A.

punishment to first-degree murder with specific aggravating factors and initially mandated the death penalty for such offenses. The U.S. Supreme Court, however, in *Roberts I* found the lack of consideration for mitigating factors unconstitutional, prompting Louisiana to introduce a bifurcated trial process.[124] This two-stage trial allowed for the assessment of mitigating circumstances during a separate penalty phase, where jurors weigh them against any proven aggravating factors to decide on the crime's capital status.[125] This revised approach was the one examined in *Lowenfield*, where the Supreme Court confirmed that the narrowing requirement had been met during the guilt phase, rendering additional statutory aggravating circumstances at the sentencing phase unnecessary. Steps 1 and 2 (of the constitutional mandate to resolve the trio of *Furman* concerns) had been achieved at the guilt phase.[126] The additional aggravating factor was considered at the sentencing phase, where mitigating evidence was evaluated—thereby achieving Step 3.[127]

2. Slight Variations in the Language Defining the Offense and Aggravating Factor

A second argument on which some courts have relied to uphold double counting of factors to satisfy both the guilt and eligibility requirements is that slight variations in the language between the statutory definitions of the offense and the aggravators fulfill the narrowing requirement. In *State v. Hall*, for example, the Idaho Supreme Court relied on a minor variation in the language defining felony murder as first-degree murder and the language defining the felony-murder-based aggravating factor on which the jury premised death eligibility.[128]

The Idaho Supreme Court properly understood *Lowenfield* to require states to narrow by finding first-degree murder *plus* something more, and to allow states to carry out that narrowing function at either the guilt or the penalty phase. The court had determined in a previous case[129] that the "narrowing function" as required by the Constitution was accomplished by the legislature in

124. *See supra* Section I.B.

125. M. Dwayne Johnson, *Sentence Review in Louisiana: Capital Sentencing Review Under Supreme Court Rule 28*, 42 LA. L. REV. 1100, 1102–03 (1982).

126. *See supra* Section I.A.

127. *See supra* Section I.A.

128. State v. Hall, 419 P.3d 1042, 1085 (Idaho 2018).

129. State v. Wood, 967 P.2d 702, 716–17 (Idaho 1998).

constraining the class of death-eligible defendants, in the same way as the Louisiana statute in *Lowenfield*. The defendant in *Hall* argued that this was wrongly decided.[130] Hall differentiated the legislature's actions in Idaho from those in *Lowenfield* by citing *Arave*, where the U.S. Supreme Court characterized Idaho law as broadly defining the qualifying class of defendants for capital punishment.[131] The argument was that if the Idaho offense statute was deemed overly broad, then the aggravating factors needed to genuinely narrow the class, which an aggravating factor that duplicated the offense would not accomplish. The Idaho Supreme Court rejected this argument.[132] The court looked to a test laid out in *Tuilaepa v. California*, which established two requirements for aggravating circumstances: "First, the circumstance may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague."[133] The court held that the felony-murder aggravator in question meets the requirements in *Tuilaepa*.[134] The felony-aggravator applies only to those murders which are committed in the perpetration of "arson, rape, robbery, burglary, kidnapping or mayhem"—meaning it may apply to many murders, but would not apply to every first-degree murder.[135] The central idea here is that if the aggravator managed to weed out even one murderer from the class, it satisfied the narrowing requirement.

This view does not account for judicial interpretation. Courts may interpret similar language in the offense statute and the aggravating factor as addressing the same underlying conduct or intent.[136] So, while the language used could technically narrow, the

130. *Hall*, 419 P.3d at 1086.

131. *Id.*; Arave v. Creech, 507 U.S. 463, 475 (1993). However, in *Arave*, this was not the reasoning the Supreme Court used to uphold the statute. A plus of "cold blood" killing in addition to "deliberate" killing was required for first-degree murder. *Id.* at 484. The Supreme Court's logic was that some deliberate killings are committed in hot blood, and thus are not cool killings. *Id.* at 476. So, the "cold blood" requirement in the aggravating factor did narrow. *Id.* at 475–76.

132. *Hall*, 419 P.3d at 1086.

133. *Id.* (quoting Tuilaepa v. California, 512 U.S. 967, 971–72 (1994)).

134. *Id.*

135. *Id.*

136. Mona Lynch and Craig Haney examined jurors' understanding of capital penalty instructions and how this influences jury decisions and sentencing determinations. Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW & HUM. BEHAV. 481, 481 (2009). The study showed that 92% of participants found the existence of

way it is understood in practice could easily *not* narrow. If the variations are seen as distinctions without a meaningful difference, the same aspects of the crime could be counted twice in the eligibility and selection phases of the death penalty proceedings. Justice Marshall's dissenting opinion in *Lowenfield* addresses this: "The Court treats the narrowing function as a merely technical requirement that the number of those eligible for the death penalty be made smaller than the number of those convicted of murder. But narrowing the class of death eligible offenders is not 'an end in itself.'"[137]

In the parallel case *McConnell*, the Nevada Supreme Court held that "although the felony aggravator of NRS 200.033(4) can theoretically eliminate death eligibility in a few cases of felony murder, the practical effect is so slight that the felony aggravator fails to genuinely narrow the death eligibility of felony murderers."[138] There, the court concluded that, while the language was altered such that it would narrow the class of murderers, the felony-murder aggravator's narrowing capacity was "largely theoretical."[139]

In *McConnell*, the court looked first at how broad the offense statute was in comparison to the one in *Lowenfield*, echoing Hall's argument before the Idaho Supreme Court.[140] The court discussed how, under the U.S. Supreme Court's decision in *Lowenfield*, an aggravating factor may overlap with an element of the capital murder charge, provided the state's definition of capital murder is sufficiently narrow.[141] In instances where a state's definition of capital offenses is expansive, the critical narrowing process must transpire during the penalty phase, where the jury identifies specific aggravating circumstances.[142] Since Nevada had a broad definition of capital offenses, especially in cases of felony murder, the court felt it was imperative that the narrowing be achieved through the jury's determination of distinct aggravating factors.[143]

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a felony-murder aggravator during the penalty phase when the crime was felony murder. *Id.* at 487 tbl.1.

137. Lowenfield v. Phelps, 484 U.S. 231, 256–57 (1988) (Marshall, J., dissenting).

138. McConnell v. State, 102 P.3d 606, 624 (Nev. 2004).

139. *Id.* at 623.

140. *Id.* at 621–22.

141. *Id.* at 621–23.

142. *Id.* at 621–22.

143. *Id.* at 622.

Similarly, in *State v. Cherry*, where the North Carolina Supreme Court struck down the state's use of felony-murder aggravators where the defendant was convicted of a felony murder, the court considered that a "defendant convicted of a felony murder, nothing else appearing, will have one aggravating circumstance 'pending' for no other reason than the nature of the conviction."[144] The court then contrasted this against those convicted of premeditated murder: "a defendant convicted of a premeditated and deliberated killing, nothing else appearing, enters the sentencing phase with no strikes against him."[145] Here, the court was concerned with the idea that the probability that a defendant convicted of felony murder would be sentenced to death was disproportionately higher than that of a defendant convicted of premeditated murder.[146] The Tennessee Supreme Court also found this disparity significant in *Middlebrooks*, where the court noted that "[a] simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated, and deliberate murder."[147] These cases underscore the critical scrutiny applied to disparities in sentencing based on the nature of convictions, with both the North Carolina and Tennessee Supreme Courts highlighting concerns over the disproportionate likelihood of a death sentence for individuals convicted of felony murder compared to those convicted of premeditated murder.

Following *Middlebrooks*, in 1995, the Tennessee legislature, recognizing the need for more precise criteria, revised the felony murder aggravator. Firstly, it specified that the murder must have been committed, solicited, directed, or facilitated "knowingly" by the defendant.[148] Secondly, it demanded that the defendant played a "substantial role" in the commission of the underlying felony that accompanied the murder.[149] Bradley MacLean and H. E. Miller, Jr., however, noted that despite these legislative efforts, the practical impact of such amendments remains ambiguous.[150] The incorporation of the "knowing" and "substantial role" requirements into the revised

144. State v. Cherry, 257 S.E.2d 551, 567 (N.C. 1979). Notably, the North Carolina Supreme Court did not refer to *Lowenfield* in addressing this issue. Rosen, *supra* note 12, at 1134 n.79.

145. *Cherry*, 257 S.E.2d at 567.

146. *Id.* at 568.

147. State v. Middlebrooks, 840 S.W.2d 317, 345 (Tenn. 1992).

148. TENN. CODE ANN. § 39-13-204(i)(7) (2024).

149. *Id.*; *see also* MacLean & Miller, *supra* note 105, at 114 (noting that the revised felony-murder aggravator was upheld in *State v. Banks*, 271 S.W.3d 90, 152 (Tenn. 2008)).

150. MacLean & Miller, *supra* note 105, at 114–15.

statute, while seemingly precise, are in practice readily demonstrable and could conceivably pertain to the vast majority of felony murders. Consequently, these additions may fall short in their intended purpose of sufficiently narrowing the criteria for application of the aggravator.[151]

Overall, the cases illuminate the intricate debates that *Lowenfield* creates around the constitutional requirements for narrowing the class of death-eligible defendants in the context of felony murder. The tension boils down to whether the fact that an aggravator does not *definitionally* apply to all murders means that the aggravator "*genuinely*" narrows.[152]

3. Heightened Mens Rea Requirements

With regard to felony murder qualifying as capital murder, the U.S. Supreme Court narrowed the scope of capital murder liability for accomplices in predicate felonies in *Enmund v. Florida* and *Tison v. Arizona*.[153] The Court stipulated that such liability is confined to individuals who demonstrate an extreme indifference to human life—a level of recklessness typically requisite for incurring murder liability beyond the confines of a felony context.[154]

Some state supreme courts view this heightened mens rea requirement as protection against the kind of automatic death sentence described earlier. This is evidenced by the Mississippi Supreme Court's reasoning in *Loden v. State*.[155] The court upheld the state's sentencing scheme that allowed for double counting of felony murder in the guilt and sentencing stages because "a jury must find that the defendant actually killed, attempted to kill, intended that a killing take place, or contemplated that lethal force would be

151. *See supra* Section I.A.

152. *See supra* Section I.A (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983) (emphasis added)).

153. Enmund v. Florida, 458 U.S. 782, 801 (1982); Tison v. Arizona, 481 U.S. 137, 158 (1987).

154. In *Enmund*, the Court ruled that the death penalty was a disproportionate punishment for Enmund's level of participation in the homicides. 458 U.S. at 801. In *Tison*, the Court held that the death penalty can be imposed on defendants who did not actually kill anyone but were major participants in a felony that led to murder and acted with reckless indifference to human life. 481 U.S. at 158. This case expanded upon the ruling in *Enmund* by allowing capital punishment for certain non-triggermen involved in a felony where a homicide occurs (i.e., those who did not commit the killing), provided these two key elements—major participation and reckless indifference—are present. *Id.*

155. Loden v. State, 971 So. 2d 548, 569 (Miss. 2007).

employed in order to impose a death sentence."[156] Similarly, Guyora Binder maintained that "[a] homicide offense requiring extreme indifference to human life is not a true felony murder offense."[157] In essence, this argument emphasizes that a heightened mens rea standard at both the guilt and sentencing phases differentiates and narrows the class of murderers eligible for the death penalty.

On the other hand, in *McConnell v. State*, the Nevada Supreme Court concluded that the emphasized mens rea language, which highlighted the aforethought and the conscientiousness of the perpetrator, merely articulated the fundamental constitutional threshold necessary to administer capital punishment for felony murder.[158] Furthermore, states' statutory schemes vary with regard to the level of mens rea required. For example, prior to *McConnell*, Nevada's statutory scheme had a stricter standard than Idaho does for criminal intent; Idaho broadens the pool of death-eligible defendants to those who acted with reckless indifference to human life, while Nevada statutes did not extend to such defendants.[159] Therefore, there is disagreement among states on both whether the mens rea standard helps with the double counting problem and, if it does, what level of mens rea would resolve it.

The reliance on mens rea is wrong because it treats practices designed to satisfy the first step of the constitutional mandate in response to the *Furman* trio of concerns—regarding crimes for which death can even be considered—as if they were sufficient to satisfy the second step—narrowing *beyond* the type of crime.[160] A state's statutory sentencing scheme needs to satisfy both Step 1 and Step 2, and Step 2 cannot replace Step 1. Similarly, Step 2 cannot be satisfied by having satisfied Step 1.[161] Ultimately, the same criminal act (the felony leading to death) is still being used to satisfy both the element of the capital offense (the felony murder) and the aggravating factor (the heightened mens rea requirement within that felony murder), which means that the conduct is being counted twice. Further, the heightened mens rea requirement is imposed to ensure the proportionality of the death penalty to the defendant's

156. *Id.* (quoting Evans v. State, 725 So. 2d 613, 684 (Miss. 1997)).

157. Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 408 n.23 (2011).

158. McConnell v. State, 102 P.3d 606, 623 (Nev. 2004).

159. IDAHO CODE § 19-2515(9)(g) (2022); NEV. REV. STAT. § 200.033(4) (2024).

160. *See supra* Section I.A.

161. *See supra* Section I.A.

culpability.[162] It does not change the fact that the aggravating factor is based on the same underlying felony, which can lead to the disproportionate application of the death penalty if the felony is also used as an independent basis for the death sentence.

4. Discretion with Mitigating Evidence

Federal circuit courts have also addressed double counting in state statutes.[163] Such courts have considered an additional factor: a jury's ability to weigh mitigating evidence against the aggravating factor.[164] In *Johnson v. Dugger*, the petitioner contended that the redundant application of the statutory aggravating circumstance undermined the constitutionality of his sentence.[165] Here, the Eleventh Circuit held that imposing the death penalty for felony murder, classified as a statutory aggravating factor, was discretionary rather than obligatory.[166] In accordance with the prescribed individualized sentencing procedure, the jury retained the latitude to weigh all presented mitigating evidence and possessed the option to advocate for a sentence of life imprisonment.[167]

The Eleventh Circuit did not consider the fickleness of jury instructions in capital cases. Juries may not fully understand the distinction between the elements of the crime and the aggravating factors, especially if they are similar or overlap. Further, the consideration of mitigating evidence is intended to balance against the aggravating circumstances.[168] This problem is further evidenced

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162. Enmund v. Florida, 458 U.S. 782, 798 (1982).

163. The primary circuit cases that address double counting in state statutes include *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989); *Johnson v. Dugger*, 932 F.2d 1360 (11th Cir. 1991); *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998); and *Deputy v. Taylor*, 19 F.3d 1485 (3d Cir. 1994).

164. This ability is rooted in *Lockett v. Ohio*, where the Supreme Court held that the Eighth and Fourteenth Amendments require that the sentencing judge or jury in a death penalty case must not be restricted from considering any aspects of a defendant's character or the circumstances of the offense that might be a basis for a sentence less than death. 438 U.S 586, 604 (1978). In other words, the decision determined that states cannot limit the mitigating factors that can be considered in the sentencing phase of a capital trial.

165. *Johnson*, 932 F.2d at 1368.

166. *Id.* at 1368–69.

167. *Id.*

168. Scholarship suggests that many jurors mistakenly assume that mitigating factors require the same level of proof as beyond a reasonable doubt, when in reality, mitigating factors simply need to be more compelling than the aggravating circumstances. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1543 (1998);

by a study conducted by Mona Lynch and Craig Haney[169] examining how jurors in California understood capital penalty instructions regarding "special circumstances" (i.e., aggravating circumstances).[170] The study involved a fictional case where the defendant was convicted of felony murder (here, during the commission of a robbery) and where, in the sentencing phase, there existed the *real* special circumstance that the murder occurred during the commission of a robbery. The study found that 92% of participants weighed the special circumstances, automatically found to be true, in favor of death.[171] There is an inherent unfairness if the aggravating circumstances are automatically established while the mitigating factors are yet to be proven by the defense;[172] in this way the sentencing scheme affords the prosecution the upper hand. This conflicts with a primary function of statutory aggravators: to meaningfully constrict the extensive latitude afforded to both prosecutors, in electing to pursue the death penalty, and juries, in determining whether to impose it.[173]

The mitigating evidence argument aims to use the fact that a state accomplishes the third step in satisfying the narrowing requirement—consideration of all mitigating factors—to also mean that the state has accomplished the second step.[174] Again, however, states must achieve all three steps and cannot use its satisfaction of the first or second as sufficient to fulfill the third.[175] Thus, if a state decided to completely omit all aggravating circumstance requirements (thus violating the Step 2 requirement), it could not

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Julie Schroeder et al., *Mitigating Circumstances in Death Penalty Decisions: Using Evidence-Based Research to Inform Social Work Practice in Capital Trials*, 51 SOC. WORK 355, 358 (2006). Studies indicate that mitigation frequently has a minimal impact on decisions to apply the death penalty; it has been observed that jurors often reach conclusions about sentencing prematurely. Schroeder et al., *supra*, at 356.

169. Lynch, *supra* note 68, at 1022–30.

170. In California, statutory aggravating factors are referred to as "special circumstances." CAL. PENAL CODE §§ 187–199 (West 2024).

171. Lynch, *supra* note 68, at 1024.

172. James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2099–100 (2000).

173. Katherine Barnes et al., *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 321 (2009); *see also* Lowenfield v. Phelps, 484 U.S. 231, 257 (1988) (Marshall, J., dissenting) ("Rather, as our cases have emphasized consistently, the narrowing requirement is meant to channel the discretion of the sentencer.").

174. *See supra* Section I.A.

175. *See supra* Section I.A.

then justify that choice through a particularly fulsome consideration of mitigators (used to satisfy the Step 3 requirements). All three steps must be satisfied.[176]

III. FATAL DUPLICATION: RESOLVING THE DOUBLE COUNTING DILEMMA

Double counting creates the problem of a potential automatic qualification for the death penalty, as is evidenced by the felony-murder aggravator in states where felony murder qualifies as first-degree murder.[177] The root of the double counting problem is states' disagreement over the nuances of the narrowing requirement.[178] Section A explains how courts must collectively settle on a uniform interpretation of the narrowing requirement and states' obligations to satisfy it. Section B explores strategies courts might use to enforce the narrowing requirement, as understood in Section A, to eliminate the problem of double counting in death penalty statutes.

A. Construing the Narrowing Requirement

The disagreement among states on the issue of double counting boils down to the Supreme Court's understanding of and real intention behind the narrowing requirement. In other words, it is necessary to delineate what the Court meant by its ruling that the Eighth Amendment requires states to "genuinely narrow the class of persons eligible for the death penalty."[179]

In *Furman*, a central concern that resonated within the opinions of Justices Stewart, White, and Douglas[180] was an apprehension regarding the disparity between the large pool of offenders who could potentially be condemned to death and the minute fraction that actually received the death sentence.[181] The

176. *See supra* Section I.A.

177. *See supra* Section II.A.

178. *See supra* Section II.B.

179. Zant v. Stephens, 462 U.S. 862, 877 (1983).

180. These three Justices held the controlling opinion that the death penalty was unconstitutional as then applied. Furman v. Georgia, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 311 (White, J., concurring).

181. *Id.* at 244–45 (Douglas, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id*. at 311–12 (White, J., concurring). Justice Stewart articulated this anxiety by noting the stark inconsistency that, among the many individuals convicted of heinous crimes in 1967 and 1968, only a select, seemingly random few, were given the death penalty. *Id.* at 309–10. Justice Stewart likened the

narrowing requirement in *Furman* was designed to tackle the three concerns of rarity, capriciousness, and discrimination.[182] The critique regarding rarity and arbitrariness, associated with Justice White, examines the uneven enforcement of the death penalty.[183] The critique of capriciousness, connected to Justice Stewart, was likened to the unpredictable nature of a lightning strike.[184] The critique concerning discrimination, attributed to Justice Douglas, emphasizes the historical biases and unequal application of capital sentences.[185] Due to these three faults, the criminal offenses that were considered death-eligible cast too wide a net such that they allowed for jurors to exercise a considerable amount of discretion in deciding which of the death-eligible defendants actually received the death penalty—rendering the process arbitrary and discriminatory.[186]

Consequently, as outlined in Part I, to tackle the *Furman* trio of concerns, the Supreme Court mandates three steps.[187] Firstly, the imposition of the death penalty must be confined to certain types of crimes—typically first-degree murder, which is narrowly defined to encompass intentional homicides or those reflecting extreme recklessness or occurring in the midst of grave felonies.[188] Secondly, it is imperative for the prosecution to establish, beyond a reasonable doubt, the presence of one or more predefined aggravating factors that elevate the severity and culpability of the crime beyond that of standard murder (i.e., the narrowing requirement).[189] Lastly, the

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imposition of the sentences to the unpredictable and indiscriminate nature of a lightning strike, implying that such decisions were driven more by chance than by rational assessments of the offenders' culpability. *Id.* at 309.

182. Liebman, *supra* note 24, at 8–9; *see also supra* Section I.A.

183. *Furman*, 408 U.S. at 311–12 (White, J., concurring).

184. *Id.* at 309–10 (Stewart, J., concurring).

185. *Id.* at 256–57 (Douglas, J., concurring).

186. *Id.* at 249–51; *id.* at 309–10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

187. *See supra* Section I.A.

188. This restriction is for the purpose of reserving capital punishment for "the worst of the worst"—i.e., a more culpable subset of defendants. Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting); *see also* Zant v. Stephens, 462 U.S. 862, 877 (1983) ("[A]n 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."); Rosen, *supra* note 12, at 1114–15.

189. *Furman*, 408 U.S. at 304. Additionally, the aggravator must "reasonably justify the imposition of a more severe sentence," channeling the jury's discretion by helping it identify the most culpable defendants. *Zant*, 462 U.S. at 877. Further, for an aggravator to "genuinely narrow" death-eligible first-degree convictions, it must do so in a meaningful, non-theoretical manner. *See*

Court mandates that jurors in sentencing deliberations give due consideration to any "mitigating factors"—circumstances that might lessen culpability—pertaining to the crime or the defendant, ensuring that the offense stands out as particularly heinous even when weighed against any potential extenuating elements.[190] In *Godfrey* and *Maynard*, both Justices Stewart (in the former) and White (in the latter) insisted on aggravators that are not themselves vague or true of all murders.[191] These holdings make clear that aggravators have a primary purpose: to narrow by requiring a real, discernable "plus." The narrowing requirement was intended to address the trio of *Furman* concerns.[192]

There are two ways the narrowing device of aggravating factors can take shape in practice. First is the requirement that an aggravator not apply to literally every first-degree murder. Second, that if an aggravator is to "genuinely narrow," it must narrow the pool of first-degree convictions in a meaningful and non-theoretical way.[193] As demonstrated in Part I, many states have relied on the first construction to uphold aggravators that effectively duplicate the offense statute. This Note maintains that the Supreme Court has intended the narrowing requirement to meaningfully confine the pool of death-eligible offenders. Moreover, the mere fact that not all capital offenses definitionally align with an aggravating factor does not ensure that jurors are effectively directed toward identifying the

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McConnell v. State, 102 P.3d 606, 624 (Nev. 2004) (invalidating a statutorily defined felony aggravator because it failed to "genuinely narrow the death eligibility of felony murders" in practice even though it could "theoretically eliminate death eligibility"); *see also* Godfrey v. Georgia, 446 U.S. 420, 428–29 (holding that a death sentence based on a single aggravating circumstance that could apply to "almost every murder" was unconstitutional). Aggravating factors should work to achieve the narrowing requirement by "excluding certain offenders and offenses from death penalty's reach." COURTING DEATH, *supra* note 65, at 161.

190. *See* Kirchmeier, *supra* note 65, at 392–95 (presenting an argument that through *Johnson v. Texas*, 509 U.S. 350 (1993), and *Buchanan v. Angelone*, 522 U.S. 269 (1998), the Court has permitted states to put limitations on mitigating evidence while not requiring states to give clear instructions to jurors regarding their obligation to consider mitigating evidence).

191. *Godfrey*, 446 U.S. at 427–28; Maynard v. Cartwright, 486 U.S. 356, 361–62 (1988).

192. *See supra* Section I.A.

193. *See McConnell*, 102 P.3d at 624 (concluding that the challenged statutory aggravator was impermissible under the U.S. and Nevada Constitutions because in practice "the felony aggravator fails to genuinely narrow the death eligibility of felony murderers").

most culpable individuals, as jurors are unlikely to perceive those slight nuances.[194] Aggravating factors should work to achieve the narrowing requirement by "excluding certain offenders and offenses from death penalty's reach."[195]

B. Strategies to Successfully Enforce the Narrowing Requirement

In the realm of capital punishment, the principle of proportionality mandates that the imposition of the death penalty be reserved only for the most culpable of offenders.[196] This Section explores two strategies designed to reinforce this principle. The first strategy involves prohibiting double counting, wherein aggravating factors that merely echo elements of the capital offense are excluded from further tipping the scales towards a death sentence. The second strategy insists on the necessity of aggravating factors to discern and select only those offenders whose actions place them in the most blameworthy and irredeemable category.

1. Disallowing Double Counting of Aggravating Factors

Justice Marshall's dissent (joined by Justice Stevens) in *Lowenfield* called for prohibiting double counting of aggravating factors.[197] Justice Marshall wrote:

> the jury's sentence of death could not stand because it was based on a single statutory aggravating circumstance that duplicated an element of petitioner's underlying offense. This duplication prevented Louisiana's sentencing scheme from adequately guiding the discretion of the sentencing jury in this case and relieved the jury of the requisite sense of responsibility for its sentencing decision.[198]

Justice Marshall highlighted the unfairness that double counting triggered during jury deliberations at the sentencing phase,

194. *See* Lynch, *supra* note 68, at 1022 ("For those serving as capital jurors, this is usually their closest contact to the tragedy of murder; therefore, the emotionally charged impact of the details and circumstances of the case at hand are persuasively condemning.").

195. COURTING DEATH, *supra* note 65, at 163.

196. Enmund v. Florida, 458 U.S. 782, 798 (1982).

197. Lowenfield v. Phelps, 484 U.S. 231, 247 (1988) (Marshall, J., dissenting).

198. *Id.*

via jury instructions.[199] Further, he pointed out that at the penalty hearing, "the prosecutor twice reminded the jury that it had already found during the guilt phase one of the aggravating circumstances that the State urged was applicable to petitioner's sentence."[200] Eliminating all aggravators that duplicate capital offenses could potentially resolve the issue of jury confusion.

Several reforms are required to implement this approach. Legislatures would need to define what constitutes an aggravating factor with precision to avoid overlap with elements of the crime. Judges would have to provide juries with clear instructions that they may not consider the elements of the crime as separate aggravating factors. The prosecution would have to ensure that it is not merely restating elements of the crime when presenting evidence of aggravating factors. And the defense would need to have an opportunity to challenge the presentation of any factor that duplicates the underlying offense.

The difficulty would arise with monitoring and reporting.[201] To ensure double counting is not occurring, a system for checking sentencing practices would need to be implemented to police states and strike duplicative aggravating factors. Further, there might be unwillingness among states to withdraw their problematic aggravating factors, leading to extensive and disruptive litigation.[202]

Another problem surfaces in determining the threshold for duplication. This was seen in Tennessee following *Middlebrooks*.[203] The Tennessee legislature revised the felony-murder aggravating factor by incorporating a mens rea component and requiring that the defendant have played a "substantial role" in the commission of the underlying felony that accompanied the murder.[204] MacLean and Miller argued that despite the amendments to the aggravating facts, whether the changes actually stop double counting remains

199. *Id.* at 257–58.

200. *Id.*

201. *Learning the Game*, NAT'L CONF. OF STATE LEGISLATURES, (July 2018), https://www.ncsl.org/legislative-staff/civics-education/learning-the-game [https://perma.cc/MT92-CDEV] ("There are many similarities but no constants in the state legislative process. Every state is unique in its method of legislative operations and in its lawmaking procedures. Individual states take pride in doing things their own way.").

202. COURTING DEATH, *supra* note 65, at 162.

203. *See supra* Section II.B.

204. MacLean & Miller, *supra* note 105, at 115 (providing details on the revised felony-murder aggravator that was upheld in *State v. Banks*, 271 S.W.3d 90, 152 (Tenn. 2008)).

ambiguous.[205] Similarly, eliminating aggravating factors that literally duplicate the underlying offense could still leave aggravators that more implicitly emulate the underlying offense. Randall Packer argued that "the strong likelihood that the underlying felony will also create an additional aggravating circumstance causes the prohibition on double counting to have little substance."[206] Packer cited that post-*Cherry*, North Carolina vacated death sentences on double counting but affirmed the submission of a "pecuniary gain" aggravating circumstance which would naturally encompass cases where defendants committed a homicide during the course of a robbery.[207]

Nevertheless, outright prohibition of aggravating factors that double count is an effective approach, as it fulfills the narrowing mandate.[208] While the reforms suggested—clear legislative definitions, precise jury instructions, careful consideration by the prosecution, and diligent defense challenges—offer a pathway to mitigate the problems of double counting, the challenges of enforcement and standardization persist. The ambiguity around what constitutes true reform, as evidenced by the experiences in Tennessee and North Carolina, underscores the necessity for a more robust and transparent system.

2. Ensuring that Aggravating Factors Select the Most Culpable Offenders

Justice Blackmun's dissent (joined by Justice Stevens) in *Arave* and Justice Steven's dissent in *Payne v. Tennessee* can function as a map for "tightening constitutional limits on factors that can qualify as aggravating."[209] This can manifest in two ways. First, calling for "tightening" in how courts construe the availability of aggravating factors. And second, calling for "tightening" of the process for legislating and drafting aggravating factors.

Justice Blackmun wrote that a "state court's limiting construction can save a flawed statute from unconstitutional vagueness."[210] Similarly, a court's limiting construction can save a

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205. *Id.* at 115–16.

206. Randall K. Packer, *Struck by Lightning: The Elevation of Procedural Form over Substantive Rationality in Capital Sentencing Proceedings*, 20 N.Y.U. REV. L. & SOC. CHANGE 641, 656 n.76 (1994).

207. *Id.* (referring to *State v. Oliver*, 274 S.E.2d 183, at 202, 204 (N.C. 1981)).

208. *See supra* Section I.A.

209. Liebman & Marshall, *supra* note 12, at 1672.

210. Arave v. Creech, 507 U.S. 463, 480 (1993) (Blackmun, J., dissenting).

flawed statute from double counting. Courts could use their discretion on whether an aggravating factor is applicable in each case (depending on whether it duplicates the underlying criminal offense in that case) and pass on this discretion via jury instructions. This provides more guidance to the sentencer as advocated by Justice Stevens in *Payne*.[211] In practice, however, judges face immense political pressure when it comes to the death penalty.[212] Giving judges the power to select which aggravating factors are available to jurors in each case may not be a practical source of limitation.

The second construction involves a strategy calling for more meticulous analysis by courts of the legislative intent behind the addition of aggravating factors. Such scrutiny is particularly pertinent when the aggravator is solely linked to the victim's identity or to aspects of the defendant unrelated to the crime's circumstances.[213] The justification for a more stringent review of these aggravators stems from the concern that they may reflect a breakdown in the legislative process, where political biases against certain defendant groups may have overshadowed a thorough evaluation of the offender's actual culpability, as is exhibited in "aggravator creep."[214]

There needs to be conscientious comparison of the relative culpability of the offenders before assigning them an aggravating factor. Chelsea Creo Sharon notes that this method would deviate from the standard rational basis review, as it would not merely ascertain if the legislation had a rational connection to any "legitimate legislative purpose."[215] Rather, it would require that the legislation's primary aim was to pinpoint the most blameworthy offenders. This strategy could be perceived as infringing upon states' sovereign right to determine their criteria for imposing the death

211. Payne v. Tennessee, 501 U.S. 808, 861 (1991) (Stevens, J., dissenting).

212. Political pressure can manifest in various forms, from campaigns by death penalty proponents or abolitionists to the influence of upcoming elections on elected judges. The looming presence of media coverage and potential political repercussions can challenge a judge's ability to remain impartial and adhere strictly to the law. *See* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 314 (1997) (detailing a clear example of political pressure on the judiciary applied to Tennessee Supreme Court Justice Penny White).

213. Sharon, *supra* note 65, at 249.

214. COURTING DEATH, *supra* note 65, at 161.

215. Sharon, *supra* note 65, at 249.

penalty, an authority implicitly recognized under the Tenth Amendment.[216]

The dual approach of tightening both judicial discretion and legislative drafting aims to address the constitutional concerns of vagueness and double counting, while also ensuring that the most blameworthy offenders are accurately identified. The practicality, however, of empowering judges with more discretion remains contentious due to political pressures, and the call for greater legislative scrutiny may challenge states' rights. Nevertheless, the pursuit of justice demands that the death penalty, if it is to be administered at all, be applied fairly and equitably, with a rigorous assessment of each aggravating factor and the potential for arbitrary, capricious, and discriminatory practices.

CONCLUSION

This Note illuminates the troubling and unconstitutional practice of double counting in death penalty statutes, a practice that has gone unchecked largely due to the Supreme Court's silence post-*Lowenfield*. Double counting effectively distorts the culpability of defendants, unjustly skewing the scales towards the imposition of the death penalty, thereby inflating the class of individuals eligible for the ultimate punishment beyond what *Furman* and its progeny contemplated. A considerable number of states have misinterpreted the Court's ruling in *Lowenfield*, allowing for a constitutional misstep that has profound implications for the rights of those on trial for capital offenses. Consequently, the national landscape is marked by states' inconsistency and confusion with regard to applying the narrowing mandate.

The path forward requires a concerted effort to realign state practices with the Supreme Court's narrowing requirement, ensuring that double counting does not continue to taint capital sentencing. The Court's narrowing requirement, in response to the *Furman* trio of concerns, is satisfied only when its three mandatory steps have been achieved. No step can be conflated with another. Double counting prevents the satisfaction of the second required step: narrowing. There is an urgent need for judicial clarification that addresses the

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[216] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

current misapplications, and for increased scrutiny over the legislating of aggravating factors.

The gravity of the death penalty demands a system free from error and bias. This Note calls for a recommitment to these principles, urging the courts to recognize the injustice of double counting and to take decisive action. Failure to do so risks the lives of non-culpable individuals. It is time for the Supreme Court to break its silence, clarify the confusion generated by *Lowenfield*, and ensure that the death penalty is reserved for the "worst of the worst."[217]

217. Zant v. Stephens, 462 U.S. 862, 877 (1983).

APPENDIX

Table 1

State	**Capital Statutory Scheme**	**Felony Murder as a Capital Offense**	**Felony Murder as an Aggravating Factor**
Alabama	Intentional murder with at least one of fourteen statutory aggravating factors[218]	Yes[219]	Yes[220]
Arizona	First-degree murder with at least one of ten statutory aggravating factors[221]	Yes[222]	No[223]
Arkansas	Capital murder defined by statute[224]	Yes[225]	Not applicable
California	First-degree murder with at least one of twenty-two statutory special circumstances[226]	Yes[227]	Yes[228]
Florida	First-degree murder with at least one of sixteen statutory aggravating factors[229]	Yes[230]	Yes[231]

218. ALA. CODE §§ 13A-5-40(a)(1)–(21), 13A-5-49 (2019). There is some duplication between elements of the capital offenses and the aggravating factors. For example, "murder done for a pecuniary or other valuable consideration" is a capital offense and an available aggravating circumstance is "[t]he capital offense was committed for pecuniary gain." *Id.*

219. §§ 13A-5-40(a)(1)–(21).

220. § 13A-5-49(4).

221. ARIZ. REV. STAT. ANN. § 13-1105 (2009); ARIZ. REV. STAT. ANN. § 13-751(F) (2019).

222. § 13-1105(A)(2).

223. § 13-751(F).

224. ARK. CODE ANN. § 5-10-101(1)(B) (2024).

225. *Id.*

226. CAL. PENAL CODE §§ 187–99 (West 2024).

227. PENAL § 187.

228. PENAL § 190.2.

229. FLA STAT. §§ 782.04(1)(a), 921.141(5) (2023).

230. § 782.04(1)(a)(2).

231. § 921.141(6)(d).

Georgia	Capital murder defined by statute[232]	Yes[233]	Not applicable
Idaho	First-degree murder with at least one of eleven statutory aggravating factors [234]	Yes[235]	Yes[236]
Indiana	Murder with at least one of eighteen aggravating factors[237]	Yes[238]	Yes[239]
Kansas	Capital murder defined by statute[240]	Yes[241]	Not applicable
Kentucky	Intentional murder with at least one of eight statutory aggravating circumstances;[242] and capital kidnapping[243]	No[244]	Yes[245]
Louisiana**	First-degree murder with aggravating circumstances;[246] and treason	Yes[247]	Yes[248]
Mississippi	Murder with at least one of eight statutory aggravating circumstances[249]	Yes[250]	Yes[251]

232. GA. CODE ANN. § 17-10-30 (West 2017).
233. § 17-10-30(b).
234. IDAHO CODE ANN. §§ 18-4003, 19-2515 (West 2022).
235. § 18-4003(d).
236. § 19-2515(9)(g).
237. IND. CODE ANN. §§ 35-42-1-1, 35-50-2-9(b) (West 2016).
238. § 35-42-1-1(2).
239. § 35-50-2-9(b)(1).
240. KAN. STAT. ANN. 21-5401 (2011).
241. *Id*.
242. KY. REV. STAT. ANN. § 507.020 (West 1984).
243. KY. REV. STAT. ANN. § 532.025 (West 2024).
244. *Id*.
245. § 532.025(2)(a)(2).
246. LA. STAT. ANN. § 14:30 (2015); LA. CODE. CRIM. PROC. ANN. art. 905.4 (2015).
247. § 14:30(A)(1).
248. CRIM. PROC. art. 905.4(A)(1).
249. MISS. CODE ANN. §§ 97-3-19(1)–(2) (2023).
250. § 97-3-19(1)(c).
251. § 97-3-19(2)(e).

Missouri	First-degree murder with at least one of seventeen statutory aggravating circumstances[252]	No[253]	Yes[254]
Montana	Deliberate homicide with at least one of nine statutory aggravating circumstances;[255] aggravated kidnapping resulting in death of victim/rescuer; attempted deliberate homicide, aggravated assault, or kidnapping while in detention; and capital sexual intercourse without consent	Yes[256]	Yes[257]
Nebraska	First-degree murder with one of eight statutory aggravating circumstances[258]	Yes[259]	No[260]
Nevada*	First-degree murder with one of fifteen statutory aggravating circumstances[261]	Yes[262]	Yes[263]
North Carolina*	First-degree murder with one of eleven statutory aggravating circumstances[264]	Yes[265]	Yes[266]
Ohio	Aggravated murder with at least one of ten statutory aggravating circumstances[267]	Yes[268]	Yes[269]

252. MO. REV. STAT. §§ 565.020, 565.032.1 (2017).
253. § 565.020.
254. § 565.032.1.
255. MONT. CODE ANN. §§ 45-5-102, 46-18-303 (2023).
256. § 45-5-102(1)(b).
257. § 46-18-303(1)(a)(vi).
258. NEB. REV. STAT. ANN. §§ 28-303, 29-2523 (2002).
259. § 28-303.
260. § 29-2523.
261. NEV. REV. STAT. §§ 200.030, 200.033 (2024).
262. § 200.030(1)(b).
263. § 200.033(4).
264. N.C. GEN. STAT. §§ 14-17, 15A-2000(e) (2023).
265. § 14-17(a).
266. § 15A-2000(e)(5).
267. OHIO REV. CODE ANN. §§ 2903.01, 2929.04 (West 2019).
268. § 2903.01(B).
269. § 2929.04(A)(7).

Oklahoma	First-degree murder with one of eight statutory aggravating circumstances[270]	Yes[271]	No[272]
Oregon	Aggravated murder as defined by statute[273]	No[274]	Not applicable
Pennsylvania	First-degree murder with at least one of eighteen statutory aggravating circumstances[275]	No[276]	Yes[277]
South Carolina	Murder with at least one of twelve statutory aggravating circumstances[278]	Yes[279]	Yes[280]
South Dakota	First-degree murder with one of ten statutory aggravating circumstances[281]	Yes[282]	No[283]
Tennessee*	First-degree murder with one of seventeen statutory aggravating circumstances[284]	Yes[285]	Yes[286]
Texas	Murder with one of seven statutory aggravating factors[287]	No[288]	Yes[289]

270. OKLA. STAT. tit. 21, §§ 701.7, 701.12 (2023).
271. tit. 21, § 701.7.
272. tit. 21, § 701.12.
273. OR. REV. STAT. 163.095 (2019).
274. *Id*.
275. 18 PA. CONS. STAT. § 2502(a) (2024); 42 PA. CONS. STAT. § 9711 (1999).
276. *Id*.
277. 42 § 9711(d)(6).
278. S.C. CODE ANN. §§ 16-3-10, -20 (2024).
279. *Id*.
280. § 16-3-20.
281. S.D. CODIFIED LAWS §§ 22-16-4, 23A-27A-1 (2024).
282. § 22-16-4(2).
283. It is worth noting that there is ambiguity in the language of one of the aggravating factors: "defendant committed the offense for the benefit of the defendant or another, for the purpose of receiving money or any other thing of monetary value." § 23A-27A-1(3).
284. TENN. CODE ANN. §§ 39-13-202, -204(i) (West 2022).
285. § 39-13-202.
286. § 39-13- 204(i)(7).
287. TEX. PENAL CODE ANN. §§ 19.02(b)(1), 19.03 (West 2023).
288. § 19.02(b)(1).
289. § 19.03(a)(2).

Utah	Aggravated murder as defined by statute[290]	Yes[291]	Not applicable
Wyoming	First-degree murder with one of twelve statutory aggravating factors[292]	Yes[293]	Yes[294]

*The supreme courts of these states have prohibited double counting through the use of a felony-murder aggravator when the defendant has been convicted of felony murder. In Tennessee, *State v. Middlebrooks* held that double counting is prohibited by Article I, Section 16 of the Tennessee Constitution.[295] In Nevada, *McConnell v. State* held that the narrowing capacity of the aggravators was largely theoretical and therefore did not meet the narrowing requirement.[296] In Wyoming, *Engberg v. Meyer* held that the use of the felony-murder aggravator was unconstitutional because the Wyoming statute provides that the narrowing occurs in the sentencing phase of the trial.[297] In North Carolina, *State v. Cherry* held that "when a defendant is convicted of first degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstance concerning the underlying felony."[298]

**While the Louisiana statute does have a felony aggravator that duplicates the offense, the U.S. Supreme Court in *Lowenfield v. Phelps* held that the offense statute sufficiently narrowed the pool of defendants and therefore the aggravating factor did not need to narrow the pool further.[299] The Court did not invalidate the aggravating factor.[300]

290. UTAH CODE ANN. § 76-5-202 (West 2022).
291. § 76-5-202(2)(a)(iv).
292. WYO. STAT. ANN. §§ 6-2-101, 6-2-102(h) (2021).
293. § 6-2-101(a).
294. § 6-2-102(h)(xii).
295. State v. Middlebrooks, 840 S.W.2d 317, 341–47 (Tenn. 1992).
296. McConnell v. State, 102 P.3d 606, 620–25 (Nev. 2004).
297. Engberg v. Meyer, 820 P.2d 70, 89–93 (Wyo. 1991).
298. State v. Cherry, 257 S.E.2d 551, 567 (N.C. 1979).
299. Lowenfield v. Phelps, 484 U.S. 231, 246 (1988).
300. *Id.*