The Keta Taylor Colby Death Penalty Project

Avoiding *Furman*: The Unconstitutionality of Mississippi's Killing to Avoid Arrest Aggravator

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ON JULY 23, 1986, Rhonda Crane was traveling alone on Highway 29 in Perry County, Mississippi to meet her parents for a camping trip.[1] In broad daylight, Paul Woodward, who was driving a logging truck, forced Crane's vehicle to stop.[2] He ordered her into his truck at gunpoint and drove her to a secluded spot four and a half miles away.[3] Woodward, still holding the gun, took her approximately fifty to one hundred yards into the woods and raped her.[4] When Crane bent over to collect her belongings, Woodward shot her in the back of the head, killing her instantly.[5] Woodward then went back to his truck and continued to haul wood for the rest of the day.[6]

When initially questioned by law enforcement, Woodward claimed he saw nothing unusual near the scene of the kidnapping.[7]

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* Class of 2005. Thanks to Professor Josh Davis, Professor Steve Shatz, and the Office of Capital Defense Counsel, Jackson, Mississippi.

This Comment is the second in an occasional series of comments written by law students who have participated in the University of San Francisco School of Law's Keta Taylor Colby Death Penalty Project ("KTC Project"). The KTC Project funds, trains, and sends law students to spend a summer working with capital defense lawyers in the South. *See* Steven F. Shatz, *The Keta Taylor Colby Death Penalty Project: Prologue*, 38 U.S.F. L. REV. 747 (2004). This Comment arises from the author's work as a KTC intern in Mississippi during the summer of 2003.

1. Woodward v. State, 726 So. 2d 524, 526 (Miss. 1997).
2. *Id.* at 526, 539.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 539.
7. *Id.*

The next day, Woodward again reported to work.[8] Ms. Crane's father, searching the woods for his missing daughter, found her body where Woodward had left her.[9]

Woodward was soon arrested, indicted, and tried for capital murder (with the underlying crime of rape), kidnapping, and sexual battery.[10] In April 1987, Woodward was convicted on all three counts and sentenced to death.[11] The jury found the following aggravating circumstances[12] to exist: the murder was committed while Woodward was engaged in the commission of rape, the murder was especially heinous, atrocious, or cruel, and the murder was committed for the purpose of avoiding or preventing a lawful arrest, or effecting an escape from custody.[13]

Woodward argued on appeal that there was no evidence to support the proposition that the murder was committed for the purpose of avoiding or preventing a lawful arrest.[14] The court disagreed, finding sufficient evidence of this aggravator for several reasons. First, an officer stopped Woodward a few hours after the murder and he did not confess at that time. Additionally, after killing Crane, he completed his work for the day—presumably to avoid suspicion.[15] Woodward also allowed his truck to be searched, but did not mention that he had committed the crime.[16] Finally, he threw the murder weapon into a creek.[17] The court concluded that "[a]ll of these facts could reasonably indicate that Woodward did not want to be arrested for his crimes."[18]

True, these facts indicate that Woodward attempted to avoid apprehension for his crime. It is common sense that once a criminal commits the act, he hopes not to get caught. The facts in this case, however, do little to prove that Woodward's purpose in killing Crane

8. *Id.*

9. *Id.* at 526, 539.

10. *Id.* at 526.

11. *Id.* Woodward was re-sentenced in September 1995 because the Mississippi Supreme Court found that the first jury received an incorrect instruction regarding the aggravating circumstances. *Id.* at 527. The second jury also rendered a verdict that Woodward be sentenced to death. *Id.*

12. Aggravating circumstances will be referred to as "aggravators" or "aggravating factors."

13. *Id.* at 526–27.

14. *Id.* at 540.

15. *Id.* at 541.

16. *Id.*

17. *Id.*

18. *Id.*

was to avoid arrest, which is what the aggravator, on its face, seems to require. Indeed, even if Woodward's actions effectively eliminated Crane as a witness who could later assist in his apprehension, all murders eliminate a key witness—the victim. *Woodward v. State*[19] is just one example of the many Mississippi cases that demonstrate the unconstitutionality of the "killing to avoid arrest" aggravator.[20]

Aggravators in general were created by states to limit the arbitrariness of death sentences.[21] The United States Supreme Court has held that aggravators cannot be vague or overbroad.[22] The Fifth Circuit, which includes Mississippi, has also held that aggravators cannot be duplicative.[23] The issue is whether Mississippi's killing to avoid arrest aggravator violates any of these principles. This Comment concludes that in fact the aggravator offends both of these principles and should therefore be eliminated.

Part I of this Comment looks at the constitutional law surrounding the death penalty, specifically the role of aggravating circumstances in narrowing the class of defendants who are death penalty eligible. This section also lays out the framework for analyzing the constitutionality of an aggravator. Part II first addresses the statutory language of the aggravator and argues that it is both facially vague and overbroad. Next, this Comment reviews Mississippi case law to demonstrate the aggravator's constitutional deficiencies, including its overlapping with other statutory aggravators. After detailing other state approaches to this aggravator in Part III, Part IV challenges the Mississippi court's own construction of the aggravator. Because the construction fails to remedy the statute's arbitrary and overbroad application to defendants, the aggravator should be eliminated.

19. 726 So. 2d 524 (Miss. 1997).

20. The statutory language of the aggravator will be abbreviated as "killing to avoid arrest." Some Mississippi courts have referred to the aggravator as simply "avoiding arrest." *See, e.g.*, Foster v. State, 687 So. 2d 1124, 1139 (Miss. 1996); Walker v. State, 671 So. 2d 581, 611 (Miss. 1995). This abbreviation is a misnomer because it leads one to believe that a defendant only has to avoid arrest to qualify for the aggravator. *See infra* Part II.A.2.a.

21. *See* Gregg v. Georgia, 428 U.S. 153, 188–89, 195–97 (1976) (noting that the State of Georgia responded to this concern over arbitrariness by creating ten statutory aggravating circumstances).

22. *See* Zant v. Stephens, 462 U.S. 862, 876–77 & n.15 (1983) (interpreting the various opinions of Furman v. Georgia, 408 U.S. 238 (1972)).

23. *See* United States v. Jones, 132 F.3d 232, 250–51 (5th Cir. 1998).

I. The United States Supreme Court's Requirements for Aggravators and Mississippi's Response

To understand a constitutional challenge to an aggravator, one must understand what the Supreme Court and the Fifth Circuit require for state death penalty schemes and how aggravators are reviewed. This section examines the death penalty scheme adopted by Mississippi in response to these established principles.

A. The Supreme Court's Concern with Arbitrary Sentencing

One of the constitutional defects of the death penalty identified by the Supreme Court in *Furman v. Georgia*,[24] the starting point in modern death penalty jurisprudence, was that the judge or jury was allowed too much sentencing discretion in determining whether defendants would live or die.[25] Subsequent courts have interpreted *Furman* to prohibit the imposition of the death penalty under sentencing procedures that "create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner."[26] Rather, *Furman* requires a state's sentencing scheme to provide a *meaningful basis* for distinguishing the few cases in which the death penalty should be imposed from the many cases in which it should not.[27] This can be achieved only by narrowing the class of criminal defendants eligible for the death penalty.

B. Aggravators Must Limit Arbitrariness Without Being Vague or Overbroad

In response to *Furman*, at least thirty-five state legislatures amended their death penalty statutes.[28] In *Gregg v. Georgia*,[29] a plurality of the Supreme Court approved Georgia's new capital sentencing procedure in part because of the requirement that the jury find at least one valid statutory aggravating circumstance.[30] The Court believed that the aggravating circumstances requirement, in addition to other protections, "adequately protected against the wanton and

24. 408 U.S. 238 (1972).

25. *See Zant*, 462 U.S. at 875–77 & n.15 (interpreting *Furman's* holding in light of *Gregg*).

26. *See* Godfrey v. Georgia, 446 U.S. 420, 427 (1980) (explaining the central holding of *Furman* as interpreted in subsequent cases).

27. *Id.* at 427–28 (citing *Furman*, 408 U.S. at 313 (White, J., concurring)).

28. Gregg v. Georgia, 428 U.S. 153, 179–80 & n.23 (1976).

29. 428 U.S. 153 (1976).

30. *See* Zant v. Stephens, 462 U.S. 862, 875–77 (1983) (describing the Court's holding and reasoning in *Gregg*).

freakish imposition of the death penalty."[31] This conclusion rested on the premise that "each statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of *Furman*."[32] To meet this standard, the aggravator cannot be so vague or overbroad that it fails to channel the decision patterns of juries, resulting in a pattern of arbitrary and capricious sentencing similar to that declared unconstitutional in *Furman*.[33]

Since *Gregg*, the Court has reviewed claims that certain statutory aggravating circumstances are vague and overbroad.[34] An aggravator is vague if it possesses no "common-sense core of meaning . . . that criminal juries should be capable of understanding," and, thus, would likely cause juries to reach arbitrary or capricious decisions.[35] An aggravator is overbroad if it fails to "genuinely narrow the class" of those eligible for the death penalty[36] and may conceivably apply to virtually every defendant convicted of murder.[37] In practice, the Court has reviewed vagueness and overbreadth challenges together because the concepts are interrelated. An aggravator may be applied too broadly, in part, because it is vague. Conversely, vague aggravators may be overbroad because of their inconsistent application; they do not reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of similar crimes.[38]

Vagueness challenges were made in *Godfrey v. Georgia*[39] and *Maynard v. Cartwright*.[40] In *Godfrey*, the issue was whether the aggravating circumstance that the murder was "'outrageously or wantonly vile, horrible or inhuman'" was overbroad and vague in violation of the Eighth and Fourteenth Amendments to the Constitution.[41] In reaching its conclusion that the aggravator was unconstitutionally vague, the Court noted that there was nothing in the language of the statute that would prevent an arbitrary and capricious infliction of the death

31. *Id.* at 876. The Court found automatic appellate review to be another protection. *Id.*

32. *Id.*

33. *Id.* at 876–77.

34. *See* Arave v. Creech, 507 U.S. 463 (1993); Maynard v. Cartwright, 486 U.S. 356 (1988).

35. *See* Jurek v. Texas, 428 U.S. 262, 278–79 (1976) (White, J., concurring).

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

37. *Arave*, 507 U.S. at 474 (labeling aggravating circumstances that could apply to every defendant as "constitutionally infirm").

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

39. 446 U.S. 420 (1980).

40. 486 U.S. 356 (1988).

41. *Godfrey*, 446 U.S. at 422–23 (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1978)).

sentence.[42] "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'"[43] The concern was that the jury had no guidance on how to consider this aggravator in deciding whether to impose capital punishment.[44] Similarly, in *Maynard*, the Court considered whether Oklahoma's aggravator that the murder was "'especially heinous, atrocious, or cruel'" was unconstitutionally vague.[45] The Court recognized that the description "especially heinous, atrocious, or cruel" gave no more guidance to the jury than did the aggravating circumstance in *Godfrey*—and thus, the aggravator was unconstitutionally vague on its face.[46]

C. The Importance of Aggravators in Weighing States

As the Supreme Court recognized in *Zant v. Stephens*,[47] the significance of aggravating circumstances findings may depend on whether a state is a "weighing" or "non-weighing" state.[48] In both weighing and non-weighing states, the fact-finder must find true at least one statutory aggravating circumstance in order for the defendant to be death-eligible.[49] In a weighing state, at the conclusion of the penalty phase, the sentencer, in deciding whether to impose the death penalty, must determine whether all of the aggravating circumstances found *outweigh* the mitigating circumstances.[50] By contrast, in a non-weighing state, the sentencer is told only that it is to consider aggravating and mitigating circumstances in making its penalty determination; the sentencer is not, however, told to consider multiple aggravating circumstances to be any more significant than a single circumstance or to weigh the aggravating circumstances against the mitigating circumstances.[51]

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42. *Id.* at 428.

43. *Id.* at 428–29.

44. *See id.* at 429.

45. *Maynard*, 486 U.S. at 359–60 (quoting the challenged Oklahoma aggravator).

46. *See id.* at 359–60, 363–64 (affirming the lower court's judgment that the aggravator was unconstitutionally vague).

47. 462 U.S. 862 (1983).

48. *Id.* at 873–74, 880 (holding that the absence of governing standards for the jury in weighing the significance of aggravating circumstances did not render the Georgia capital sentencing statute invalid).

49. *See id.* at 876 & n.14.

50. *See, e.g.*, MISS. CODE ANN. § 99-19-101(2)(c) (1999).

51. *Zant*, 462 U.S. 873–74. The difference between weighing and non-weighing states can also be demonstrated by comparing Mississippi's jury instruction to that of Georgia, a non-weighing state. In Mississippi, juries are instructed that once they find one or more of the aggravators to exist beyond a reasonable doubt, they "must next examine and weigh

Mississippi is a weighing state.[52] In Mississippi, the jury is instructed to deliberate on whether statutorily defined aggravating circumstances and mitigating circumstances exist, and importantly, whether the mitigating circumstances outweigh the aggravating circumstances.[53] In a weighing state, aggravators "lie at the very heart of the jury's ultimate decision to impose a death sentence."[54] The Supreme Court noted that a vague aggravator used in a weighing state is worse than in a non-weighing state, because it creates the possibility of randomness and "the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance."[55] Conversely, in non-weighing states, aggravating circumstances do not "play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty."[56] In a weighing state, however, the presence of constitutionally infirm aggravators could tip the scale in favor of death.

D. A Response to *Furman* and Its Progeny: Mississippi's Death Penalty Scheme

Mississippi restructured its death penalty procedure after *Furman*.[57] To narrow the class of death penalty eligible defendants, the state first distinguished between "capital murder" and "murder," sometimes referred to as "simple murder."[58] Simple murder is punish-

any aggravating circumstances against any mitigating circumstances." MISS. JUDICIAL COLL., MISSISSIPPI MODEL JURY INSTRUCTIONS—CRIMINAL § 1.24(I) (2003) [hereinafter MISSISSIPPI JURY INSTRUCTIONS—CRIMINAL]. If the jury determines that "sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to *outweigh* the aggravating circumstances" the jury should impose the death penalty. *Id.* § 1.24(III). This instruction suggests that in order to overcome a sentence of death, the jury must find a mitigating circumstance to counterbalance each aggravator. By contrast, in Georgia the jury is instructed that once finding an aggravator it "would be authorized to recommend . . . a sentence of death, but [it] would not be required to do so." II COUNCIL OF SUPERIOR COURT JUDGES OF GA., GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS: CRIMINAL CASES § 2.04.50 (3d ed. 2003). The jury is told that "[i]t is not required, and it is not necessary, that [it] find any extenuating or mitigating fact or circumstance in order . . . to return a verdict setting the penalty to be imposed at life imprisonment." *Id.*

52. *See* MISS. CODE ANN. § 99-19-101(2)(c).

53. *See* MISS. CODE ANN. § 99-19-101(2).

54. United States v. Jones, 132 F.3d 232, 251 (5th Cir. 1998).

55. Stringer v. Black, 503 U.S. 222, 235 (1992).

56. *Zant*, 462 U.S. at 874; *see also Stringer*, 503 U.S. at 229–30.

57. Gregg v. Georgia, 428 U.S. 153, 179–80 & n.23 (1976).

58. *See* MISS. CODE ANN. § 97-3-19 (Supp. 2003). Capital murder, while still encompassing a wide spectrum of murders, is limited to the killing of a peace officer or fireman;

able by life imprisonment.[59] Those convicted of capital murder are sentenced to death, life imprisonment without parole, or life imprisonment with eligibility for parole.[60]

Mississippi bifurcates its capital trials.[61] Once a jury returns a capital murder verdict in the guilt phase of the trial, usually the same judge and jury will conduct a sentencing phase as soon as practicable.[62] In this proceeding, evidence may be presented as to any matter that the court deems relevant to sentencing and must include matters relating to any of the aggravating or mitigating circumstances.[63]

After the jury determines at least one aggravating circumstance exists and the defendant is death penalty eligible, the jury then weighs the aggravating and mitigating circumstances to determine whether the death penalty should be imposed. The Mississippi statute lists eight aggravating circumstances, including one for when "[t]he capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."[64] Some of the other aggravators are objective, whereby the factual circumstances either exist or do not. An example of an objective aggravator is if the murder was committed by a person under sentence of imprisonment.[65] The jury may also consider seven mitigating circumstances, which include a defendant's lack of a prior record, whether the offense was committed while the defendant suffered from an extreme mental or emotional disturbance, and the defendant's age at the time of the crime.[66]

Aggravating circumstances play a crucial role in the death penalty scheme, for if no aggravator is found, the death penalty cannot be imposed.[67] Because the killing to avoid arrest aggravator is both facially vague and overbroad, a prosecutor can introduce this ag-

murder that is perpetrated by a person under life imprisonment; murder perpetrated by use of a bomb; murder where the perpetrator is offered or receives anything of value for committing the murder; felony-murder (including rape, burglary, kidnapping, arson, robbery, sexual battery, and other sex crimes); murder by one engaged in child abuse; murder on educational property; and murder of an elected official. *Id.* § 97-3-19(2).

59. MISS. CODE ANN. § 97-3-21 (1999).

60. *Id.*

61. MISS. CODE ANN. § 99-19-101(1) (1999). The Mississippi Supreme Court also automatically reviews all death sentences to further reduce the arbitrariness of death sentences. *See id.* § 99-19-101(4).

62. *Id.* § 99-19-101(1).

63. *Id.*

64. *Id.* § 99-19-101(5)(e). The jury instruction on this aggravator mirrors the statutory language. *See* MISSISSIPPI JURY INSTRUCTIONS—CRIMINAL, *supra* note 51, § 1:24(II)(e).

65. *See* MISS. CODE ANN. § 99-19-101(5)(a).

66. *See id.* § 99-19-101(6).

67. *See id.* § 99-19-101(3).

gravator knowing that a jury will easily find it. Therefore, how the jury and court interpret this aggravator and how appellate courts review the evidence literally become a matter of life or death.

II. The Killing to Avoid Arrest Aggravator Fails to Cure the Arbitrariness of Mississippi's Death Penalty Scheme

The first part of this section examines the statutory text of the killing to avoid arrest aggravator. As written, the aggravator is so vague that a jury could apply it to nearly all capital murders. Next, Mississippi case law will be reviewed as evidence that Mississippi juries apply the aggravator in an arbitrary and overbroad manner. The final section argues that the aggravator impermissibly duplicates other aggravators.

A. Vagueness and Overbreadth

1. The Statute Is Facially Vague and Thus Capable of an Overbroad Application

The killing to avoid arrest aggravator is not written with sufficient precision to prevent a jury from adopting an overly broad interpretation. The statute provides for an aggravating circumstance where "[t]he capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody."[68] This language permits the interpretation that the aggravator applies in any case where another crime has preceded the murder and the suspect has tried to evade arrest. Because the overwhelming majority of those that have committed a capital murder have also committed an underlying felony, a broad reading of the killing to avoid arrest aggravator therefore permits it to apply to almost all capital murders.[69] That is,

68. *Id.* § 99-19-101(5)(e). The focus of this Comment is on the first clause of the statute (avoiding or preventing a lawful arrest) and not the second clause (effecting an escape from custody). The latter clause seems to apply where an inmate escapes from jail or prison, and in the course of the escape, he kills a prison guard. This scenario seems relatively clear and there has been no dispute as to its application in Mississippi case law.

69. *See* Study from the Office of Capital Defense Counsel, Jackson, MS ("OCDC"), Death Sentences with County of Prosecution and Date of Sentence: October 5, 1976 through June 30, 2003 (Jan. 15, 2004) (unpublished data, on file with U.S.F. Law Review) [hereinafter OCDC Study]. The OCDC data tracks all death sentences imposed in Mississippi between October 5, 1976 and June 30, 2003. *See id.* Using this data, the author calculated that 142 of 191 death sentences imposed in Mississippi during this time period involved an underlying felony. *See id.* See also discussion Part II.B *infra* exploring how the killing to avoid arrest aggravator subsumes the felony-murder aggravator.

any time there is a felony-murder[70] the murder itself will help the perpetrator avoid arrest by eliminating a witness—the victim. Furthermore, most, if not all, murderers take measures after killing to avoid detection, such as changing one's appearance or simply leaving the crime scene. If this kind of commonplace evidence leads to a finding of the aggravator, then the aggravator unconstitutionally fails to narrow the application of the death penalty in any meaningful way.

Because Mississippi already has a felony-murder aggravator[71] designed to protect victims of felonies from being murdered, the Legislature, in drafting the killing to avoid arrest statute, would seem to have focused on a different kind of killing—something narrower than felony-murder.[72] One interpretation would be that the aggravator only applies when a defendant kills a witness to an underlying felony who is not the victim of the underlying felony.[73] Because the witness could assist in the defendant's eventual arrest, the defendant must have killed the witness to avoid arrest. Alternatively, perhaps the aggravator would only apply when the defendant's arrest is imminent and the defendant kills someone who is in the position to make a lawful arrest.[74] Under either of these constructions, the Mississippi

70. MISS. CODE ANN. § 99-3-19(2)(e). The statute defines felony-murder as the killing of a human being

> [w]hen done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies.

Id.

71. MISS. CODE ANN. § 99-19-101(5)(d). The statute provides that the felony-murder aggravator must be found when

> [t]he capital offense was 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, rape, arson, burglary, kidnapping, aircraft piracy, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or felonious abuse and/or battery of a child . . . , or the unlawful use or detonation of a bomb or explosive device.

Id.

72. The Mississippi Supreme Court has never referred to the statute's legislative history, nor is there a reference to this history in the annotated statute.

73. *See* State v. Loyd, 459 So. 2d 498, 504 (La. 1984).

74. *See* People v. Bigelow, 691 P.2d 994, 1007 (Cal. 1984) (holding that the special circumstance of avoiding arrest should be limited to cases in which the arrest is imminent). The court also noted that applying the aggravator in cases where the defendant may have killed the victim to prevent him from reporting the underlying crime was an "unreasonably expansive reading . . . which would cause that circumstance to overlap extensively with felony murder." *Id.* at 1006. For further discussion on duplicate aggravators, see discussion *infra* Part II.B.

Legislature would be protecting a different class of victims. However, the text of the statute is so awkwardly written that a jury could easily apply the aggravator to a broader range of murders.

A facial challenge to an aggravator requires the court to analyze the aggravator for "clarity, objectivity, and principled guidance."[75] The killing to avoid arrest aggravator, on its face, lacks this objectivity because the jury must initially consider the defendant's "purpose" in killing the victim. It is not simply that the defendant avoids or prevents a lawful arrest; rather, his *purpose* in the killing must be to avoid or prevent a lawful arrest. For example, if a defendant kidnaps and murders his estranged wife's daughter for revenge, then the purpose in killing the daughter is revenge, not to avoid arrest.[76] The fact that the defendant may subsequently avoid arrest because there are no other witnesses does not seem to qualify him for this aggravator.[77] However, because it is difficult to know the defendant's exact purpose in killing the victim, there must still be some objective factual evidence for the jury to use in finding the aggravator. The challenge for the jury is to rely on factual circumstances that do not apply to every murder.

The terms "avoiding" and "preventing" also contribute to the statute's lack of clarity and guidance. "Preventing" is a proactive verb in the sense that a defendant may literally prevent an arrest by shooting at his would-be capturer. Conversely, the term "avoiding" could refer to any post-killing expression, such as hiding the victim's body, which allows the defendant to remain at-large. Minimal efforts that a criminal undertakes to avoid detection could serve as a basis for inferring that the murder itself was an attempt to avoid arrest. By including both "avoiding" and "preventing," the Mississippi Legislature appears to have intended the aggravator to apply to a broad scope of actions.

Finally, it is questionable what the Mississippi Legislature intended by requiring the defendant to be avoiding or preventing a "lawful arrest" as opposed to simply an arrest. One argument is that the statute protects those that effectuate lawful arrests, namely police

75. Tuilaepa v. California, 512 U.S. 967, 986 (1994) (Blackmun, J., dissenting) (explaining that this standard is required in weighing states because in weighing states "a vague aggravator creates the risk of an arbitrary thumb on death's side of the scale").

76. *See* Taylor v. State, 672 So. 2d 1246, 1253–54, 1275 (Miss. 1996).

77. *See id.* at 1275. *Taylor* is the only case where the Mississippi Supreme Court reversed the jury's finding of the killing to avoid arrest aggravator. *See infra* note 115 (providing the author's survey of Mississippi Supreme Court cases discussing the aggravator).

officers.[78] The fact that the statute includes an "escape from custody" element to protect prison guards enhances this argument. Mississippi, however, has another aggravating circumstance that applies when the capital offense was committed to "disrupt the enforcement of laws."[79] This aggravator appears to be specifically directed at protecting those that enforce laws. Reading the two aggravators together, killing to avoid a "lawful arrest" can be read more broadly—it can apply to any case where the killing of the victim allows the defendant to avoid arrest for the underlying felony. When the aggravator is read this broadly, it fails to meet the constitutional requirement of narrowing the class of death-eligible defendants mandated by *Furman* and its progeny.

2. Case Law Confirms that Mississippi Juries Find the Aggravator Based on Evidence that Is Common to Virtually All Felony-Murders

Mississippi juries find the killing to avoid arrest aggravator in two overly broad ways. First, juries appear to apply the aggravator to those defendants that avoid arrest after a murder, as opposed to defendants whose purpose in killing was to avoid arrest. The cases show that mere evidence that defendants took steps to avoid detection qualified them for the aggravator. Second, juries have found the aggravator when the murder eliminates the felony victim-witness. This is a bootstrapping approach because all felony-murders eliminate these witnesses—the felony murder aggravator, not the killing to avoid arrest aggravator, is designed to deter this type of killing.

a. The Distinction Between "Purpose in Avoiding Arrest" and Avoiding Arrest

Many of the cases in which the jury found the aggravator show that the jury relied on evidence unrelated to the defendant's motivation in killing his victim. The jury appears to instead have focused on the "avoid" language of the statute, which has broad connotations. Essentially all defendants who fail to turn themselves in after the crime can be said to have tried to avoid arrest. This approach was

78. *See* Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979) (noting that in Florida "an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses").

79. MISS. CODE ANN. § 99-19-101(5)(g) (1999) ("The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.").

evident in *Walker v. State*,[80] a case where the defendant took his rape victim to a secluded lake, drowned her, and then burned her.[81] In this case there was evidence that the victim's hands and pubic area were burned to hamper investigation efforts.[82] Fingerprints and pubic hair were most likely to reveal the defendant's identity.[83] The jury's logic could only have been this: the defendant killed his victim by drowning her, the defendant wanted to make it difficult for law enforcement to find him; the defendant covered his tracks by burning the victim's body and hiding the dress; therefore it could be inferred that the defendant committed murder for the purpose of avoiding a lawful arrest for rape. A finding of the aggravator based on this type of evidence is impermissible because it disregards the "purpose" element in the aggravator's statutory language. A defendant's purpose in murdering his victim does not equate to a defendant subsequently avoiding detection after the murder.

The *Walker* case begs the question whether the killing to avoid arrest aggravator applies to all rape-murders. In *Holland v. State*,[84] the jury found the aggravator where evidence was presented that the victim was alive after the rape, the victim's panties were stuffed down her throat to silence her cries, and her genital area was mutilated to cause investigators to believe that a sex fiend committed the crime—thus, throwing them off from suspecting the defendant.[85]

Again, the problem in relying on this type of evidence is that it fails to prove the defendant's purpose in murdering his rape victim. First, a rape victim is usually, if not always, alive after the physical act of rape itself. The inference is that the defendant could have let his victim go once raped. But this does not mean that the defendant's motivation in killing the victim was to avoid arrest. If this were the case, then all rape-murders would be subject to the aggravator. Moreover, the fact that the defendant silenced his victim by stuffing her throat does not suggest why he killed her. Rapists, murderers, virtually all criminals for that matter, do not want to be detected while in the act of their underlying crimes. Focusing on measures used to achieve one's crime can easily create misperceptions as to one's purpose in committing the crime. Surely the Mississippi Legislature did not in-

80. 671 So. 2d 581 (Miss. 1995).
81. *Id.* at 588–91.
82. *Id.* at 610.
83. *Id.* at 610–12.
84. 705 So. 2d 307 (Miss. 1997).
85. *Id.* at 355.

tend for this aggravator to apply to all those who murder quietly or efficiently.

The evidence relied on in *Holland* also suggests that juries focus on the type of injuries suffered by the victim to find the aggravator.[86] Particularly in gruesome crimes such as rape-murder, it is difficult for any jury to rationalize what purpose the defendant had in killing the victims. The Florida Supreme Court aptly noted: "It is a tragic reality that the murder of a rape victim is all too frequently the culmination of the same hostile-aggressive impulses which triggered the initial attack and not a reasoned act motivated primarily by the desire to avoid detection."[87] The defendant's actions in *Holland* can just as easily be depicted as senseless acts of violence as showing that his purpose was to avoid arrest. The jury's reading of the aggravator makes it likely that all rape-murders will come within the broad scope of the aggravator.

Mississippi juries also rely on a multitude of evidence after the murder has been committed to find the aggravator. For example, in *Hughes v. State*,[88] the jury found the aggravator where there was evidence that the victim's body was covered with debris and hidden under the flooring of an abandoned house in a remote area and the defendant, after the crime, cut his hair short so the police would not recognize him.[89] Likewise, in *Edwards v. State*,[90] the jury found the aggravator where there was evidence that after killing his robbery victim and stashing the body in high weeds, the defendant removed stereo equipment from the victim's car, took the car to a sand pit, and burned it.[91] The jury must have inferred from the burned car that the defendant destroyed evidence linking him to the murder.

Relying on post-killing acts as evidence of the killing to avoid arrest aggravator fails to narrow the class of persons eligible for the death penalty. Once defendants complete the act of murder, their subsequent actions may have very little to do with their initial purpose in killing. Haircuts and burnt evidence prove that the murderers wanted to avoid arrest, not that their motivation in killing the victim was to avoid arrest. The jury's reliance on evidence that could occur in

86. *See id.* at 355–56.

87. Doyle v. State, 460 So. 2d 353, 358 (Fla. 1984).

88. 735 So. 2d 238 (Miss. 1999).

89. *Id.* at 278.

90. 737 So. 2d 275 (Miss. 1999).

91. *Id.* at 288.

virtually any felony-murder proves that the aggravator's vague language contributes to an unconstitutionally overbroad application.

b. Finding the Aggravator When a Felony Victim-Witness Is Eliminated

Some jurisdictions limit their witness-protection aggravators to situations where the defendant murdered an eyewitness who was not the victim of the underlying crime.[92] Contrarily, Mississippi case law shows that if there is any indication that the murder victim was a witness to the underlying offense, regardless of the fact that the witness was also the victim of the underlying felony, then the aggravator is warranted. In *Leatherwood v. State*,[93] the defendants entered a taxicab, strangled and stabbed the driver, drove the cab to a dark alley, and robbed the victim.[94] The jury found the aggravator based on evidence that the defendant discussed leaving no witnesses during the crime's planning stage.[95]

The *Leatherwood* case shows that there is an inherent problem in finding the killing to avoid arrest aggravator in premeditated robbery-killings. Since the defendant already planned to kill the victim, there is a tendency to infer that the defendant killed to avoid arrest. There is, however, a more practical and plausible explanation—that the defendant killed the cabdriver to effectuate the robbery. That the defendant also eliminated the key witness is a collateral benefit for the defendant. The constitutional question is whether juries are reading the aggravator so broadly that it applies to every felony-murder.

This broad interpretation is seen in *Chase v. State*[96] and *Brown v. State*.[97] In *Chase*, the defendants intended to rob an older couple known to one of the defendants.[98] When the husband interrupted the robbery, the defendants shot him.[99] At trial, the jury found the aggravator where there was evidence that the defendants carried gloves, parked their get-away vehicle two hundred yards away, and blind-

92. *See* State v. Loyd, 459 So. 2d 498, 504 (La. 1984) (discussing LA. CODE CRIM. PROC. ANN. art. 905.4(h)); People v. Brownwell, 404 N.E.2d 181, 190 (Ill. 1980) (discussing ILL. REV. STAT. ch. 38, para. 9-1(b)(7) (1997)).

93. 435 So. 2d 645 (Miss. 1983); *see also* Tokman v. State, 435 So. 2d 664 (Miss. 1983) (*Leatherwood*'s companion case).

94. *Leatherwood*, 435 So. 2d at 647–48.

95. *See id.* at 651.

96. 645 So. 2d 829 (Miss. 1994).

97. 682 So. 2d 340 (Miss. 1996).

98. *Chase*, 645 So. 2d at 836.

99. *Id.* at 857.

folded the wife so that she could not identify them.[100] There was also evidence that, on leaving the crime scene, the defendants dusted out the tire prints.[101] While these facts suggest that the defendants wanted to avoid arrest, it is difficult to see how the fact that the wife was blindfolded is relevant to finding the aggravator. After all, the wife could still identify the other defendant who initially surprised her. Moreover, if the defendants had really wanted to avoid arrest they could have shot the wife, leaving no witnesses to identify them. Nevertheless, considering the evidence presented, the jury must have read the killing to avoid arrest aggravator to apply because the felony-victim was the best witness—one who could have aided in the defendant's eventual arrest.

In *Brown*, the defendant, high on crack-cocaine, walked into a convenience store, shot the clerk, and took the cash register.[102] The evidence suggests that the jury found the aggravator based on an inference that the victim tried to defend herself or set off an alarm before she was shot and because the defendant wore no disguise.[103] Like *Chase, Brown* was a typical robbery-murder. That the clerk could have identified the defendant as the perpetrator does not mean that his purpose in killing her was to avoid arrest. The defendant may have been motivated by his need to get more crack cocaine through completing the robbery, not to avoid arrest. In *Chase* the aggravator is based on the blindfolded victim, but in *Brown* the aggravator is based on the defendant's lack of a disguise. These two cases show that the vague statutory language of the aggravator may lead a jury to find it in virtually any felony-murder.

B. The Killing to Avoid Arrest Aggravator Duplicates Other Aggravators in Violation of Fifth Circuit Law

Because Mississippi is a weighing state, aggravators "lie at the very heart of the jury's ultimate decision to impose a death sentence."[104] The case law suggests that prosecutors often seek multiple aggravators with the hope that the jury finds evidence of as many as possible.[105] A

100. *Id.* at 856–57.

101. *Id.* at 857. The jury was also presented with evidence that one defendant failed to get out of the car at a service station because he had blood on him. *Id.* Furthermore, both defendants threw their bloody clothing into a kudzu patch. *Id.*

102. *Brown*, 682 So. 2d at 343.

103. *Id.* at 355. For facts and application similar to *Brown*, see *Puckett v. State*, 737 So. 2d 322 (Miss. 1999).

104. United States v. Jones, 132 F.3d 232, 251 (5th Cir. 1998).

105. *See, e.g.*, Carr v. State, 655 So. 2d 824 (Miss. 1995) (where the prosecutor sought five aggravators).

particular concern for defendants in weighing states is when the factual circumstances surrounding one aggravator overlap with or duplicate other aggravators. Under these circumstances, the prosecutor essentially gets two aggravators for the price of one because the same basis for culpability is counted twice.[106]

The Fifth Circuit holds that counting overlapping aggravators is inherently unfair to the defendant.[107] Robbery and pecuniary gain, as well as burglary and home invasion, are examples of aggravators found to be impermissibly duplicative because they double-count a single act of the defendant.[108] While courts have not adopted a universal test for duplicate aggravators, the Fifth Circuit seems to adopt the Tenth Circuit's approach, asking whether one aggravator "substantially overlaps" or "necessarily subsumes" another aggravator.[109] Aggravators substantially overlap if the actual conduct underlying both aggravators is identical.[110] If it is necessary for the jury to find one aggravator in order to find another, then one aggravator has subsumed the other.[111]

The issue with the Mississippi statute is whether the killing to avoid arrest aggravator overlaps or subsumes the felony-murder[112] and the disrupt the enforcement of laws aggravators.[113] Unlike burglary and home invasion, where the two aggravators could describe the same act, killing to avoid arrest and felony-murder are distinguishable from each other: felony-murder is an *objective* aggravator, while killing to avoid arrest requires a *subjective* analysis. If there is evidence that the

106. Duplicate aggravators are less of a concern in non-weighing states because, again, the jury is not instructed to weigh the total number of aggravating circumstances against the total number of mitigating circumstances. *See* Stringer v. Black, 503 U.S. 222, 229–30 (1992).

107. *See Jones*, 132 F.3d at 250–51 (stating that "double-counting of aggravating factors creates the risk of an arbitrary death sentence" and warrants reversal).

108. *See* Servin v. State, 32 P.3d 1277, 1286–87 (Nev. 2001); Willie v. State, 585 So. 2d 660, 680–81 (Miss. 1991).

109. United States v. McCullah, 76 F.3d 1087, 1111 (10th Cir. 1996); *see also Willie*, 585 So. 2d at 680–81. In *Willie*, the Mississippi Supreme Court, holding that robbery and pecuniary gain overlap, found that a jury could not be allowed the opportunity to "doubly weigh the commission of the underlying felony [(robbery)] and the motive behind the underlying felony [(pecuniary gain)] as separate aggravators." *Id.* However, the court articulated no specific rule for duplicate aggravators. *See id.*

110. *See Servin*, 32 P.3d at 1287–88 (concluding that the aggravators of burglary and home invasion are duplicative and thus invalid).

111. *See McCullah*, 76 F.3d at 1111.

112. MISS. CODE ANN. § 99-19-101(5)(d) (1999). The most common felonies that qualify for felony-murder in Mississippi are robbery, rape, burglary, kidnapping, and sexual battery. *See* OCDC Study, *supra* note 69.

113. MISS. CODE ANN. § 99-19-101(5)(g).

defendant committed a felony during the commission of the murder, the jury must conclude that a felony-murder has occurred and consequently find the objective felony-murder aggravator. Killing to avoid arrest, on the other hand, requires the trier-of-fact to make a subjective determination regarding the defendant's purpose in killing the victim. For this reason, the two aggravators do not necessarily overlap one another.

However, the killing to avoid arrest aggravator subsumes the felony-murder aggravator.[114] In order to find the killing to avoid arrest aggravator, the defendant must be avoiding arrest for an underlying crime. In the twenty-five state cases where the jury found the killing to avoid arrest aggravator, they also found the defendant guilty of felony-murder in twenty-one cases; the court only reversed the jury's finding of the killing to avoid arrest aggravator in one of these cases.[115] This

114. The Webster's New Collegiate Dictionary defines "subsume" as "to classify within a larger category or under a general principle." WEBSTER'S NEW COLLEGIATE DICTIONARY 1153 (150th anniversary ed. 1981).

115. These figures are based on the author's research. The author identified twenty-five Mississippi appellate cases that addressed the killing to avoid arrest aggravator and determined that in these cases the jury had also found the defendant guilty of either felony-murder or capital murder of a police officer. *See* Wiley v. State, 750 So. 2d 1193, 1206 & n.3 (Miss. 1999) (felony-murder robbery); Walker v. State, 740 So. 2d 873, 887, 888 (Miss. 1999) (felony-murder robbery); Manning v. State, 735 So. 2d 323, 333, 350–51 (Miss. 1999) (felony-murder robbery); Hughes v. State, 735 So. 2d 238, 243, 278 (Miss. 1999) (felony-murder kidnapping); West v. State, 725 So. 2d 872, 877, 884 (Miss. 1998) (felony-murder robbery); Bell v. State, 725 So. 2d 836, 841, 857–58 (Miss. 1998) (felony-murder robbery); Holly v. State, 716 So. 2d 979, 981, 985, 987 (Miss. 1998) (felony-murder robbery); Woodward v. State, 726 So. 2d 524, 526, 540–42 (Miss. 1997) (felony murder rape); Evans v. State, 725 So. 2d 613, 631–32, 684, 689–90 (Miss. 1997) (felony-murder kidnapping); Holland v. State, 705 So. 2d 307, 318–19, 355–56 (Miss. 1997) (felony-murder rape); Chase v. State, 699 So. 2d 521, 524, 542 (Miss. 1997) (felony-murder robbery); Brown v. State, 690 So. 2d 276, 280, 284, 295–96 (Miss. 1996) (felony-murder felonious abuse and battery of a child); Brown v. State, 682 So. 2d 340, 353–56 (Miss. 1996) (felony-murder robbery); Doss v. State, 709 So. 2d 369, 373, 390–92 (Miss. 1996) (felony-murder robbery); Foster v. State, 687 So. 2d 1124, 1128, 1139–40 (Miss. 1996) (felony-murder robbery); Taylor v. State, 672 So. 2d 1246, 1275 (Miss. 1996) (felony-murder kidnapping where the court reversed the jury's finding of the killing to avoid arrest and felony-murder aggravators); Walker v. State, 671 So. 2d 581, 587, 611–12, (Miss. 1995) (felony-murder sexual battery); Davis v. State, 660 So. 2d 1228, 1246–47, 1250 (Miss. 1995) (felony-murder robbery); Carr v. State, 655 So. 2d 824, 852–54 (Miss. 1995) (felony-murder robbery); Hansen v. State, 592 So. 2d 114, 152–53 (Miss. 1991) (capital murder of a police officer); Wheeler v. State, 536 So. 2d 1341, 1342–44 (Miss. 1988) (capital murder of a police officer, where the court reversed the jury's finding because of insufficient evidence that the defendant knew the victim was a police officer); Lanier v. State, 533 So. 2d 473, 476, 490 (Miss. 1988) (capital murder of a police officer); Pinkton v. State, 481 So. 2d 306, 308, 312 (Miss. 1985) (felony-murder robbery); Leatherwood v. State, 435 So. 2d 645, 648, 650–51 (Miss. 1983) (felony-murder robbery); Johnson v. State, 416 So. 2d 383, 387, 393 (Miss. 1982) (capital murder of a police officer).

data indicates there is an eighty-eight percent chance that where a jury finds the defendant guilty of felony-murder, it will also find the killing to avoid arrest aggravator.[116] The defendant therefore enters the sentencing phase with two aggravators simply based on the existence of an underlying felony. This, in turn, tips the scale in favor of death for a weighing jury. Because those sentenced to death have committed an underlying felony in roughly seventy-five percent of all capital cases,[117] there is an immense risk that a jury will find both aggravators in an impermissibly broad number of circumstances.

Further proof that the two aggravators are duplicative is seen in the intent of the killing to avoid arrest statute. The Fifth Circuit noted that this aggravator "merely achieves the state's interest in protecting victims of felonies from being killed to prevent the felon's detection."[118] Similarly, felony-murder aims to protect victims of felonies from being killed during the commission of a felony.[119] A weighing jury, without a limiting instruction from the judge, is simply not capable of determining that one aggravator could apply and not the other.

A similar problem with duplication of aggravators arises with the disrupt the enforcement of laws aggravator. Out of the twenty-five cases where the killing to avoid arrest aggravator was at issue, four of these cases did not involve felony-murder, but instead involved the killing of a police officer.[120] In one of these cases, the court affirmed the jury's finding of the disrupt the enforcement of laws aggravator.[121] Whenever an officer is killed while trying to arrest a felon, the jury can find both aggravators: the defendant killed to avoid a lawful arrest and to disrupt the enforcement of laws. Like burglary and home invasion, the two aggravators overlap.

116. Since the court did not dispute the jury's finding of the killing to avoid arrest aggravator in twenty-four of the twenty-five cases where it was addressed and the defendant was convicted of felony-murder in twenty-one of these cases, felony-murder and the killing to avoid arrest aggravator overlap approximately eighty-eight percent of the time.

117. Percentage based on data from the OCDC. *See* OCDC Study, *supra* note 69.

118. Gray v. Lucas, 677 F.2d 1086, 1110 (5th Cir. 1982) (where the defendant was sentenced to death in Mississippi state court, but the Fifth Circuit reviewed the sentence, particularly the breadth of the killing to avoid arrest aggravator, in habeas corpus).

119. *See* State v. Johnson, 699 A.2d 57, 67 (Conn. 1997) (McDonald, A.J., concurring and dissenting).

120. *See Lanier*, 533 So. 2d 473; *Johnson*, 416 So. 2d 383; *Hansen*, 592 So. 2d 114; *Wheeler*, 536 So. 2d 1341.

121. *Lanier*, 533 So. 2d at 490. In *Wheeler*, the court reversed the jury's finding of the disrupt the enforcement of laws aggravator because the defendant did not know the victim was an officer. *Wheeler*, 536 So. 2d at 1342–44. The court gave no reason why this aggravator was absent in two other cases. *See Johnson*, 416 So. 2d at 393; *Hansen*, 592 So. 2d at 152–53.

Since felony-murder and the murder of law enforcement officers are the two most common types of capital murder,[122] an overwhelming number of capital murderers face the prospect of beginning their sentencing phase with two aggravators.[123] The killing to avoid arrest aggravator is superfluous in a weighing state like Mississippi because in nearly all situations where it applies either the felony-murder or the disrupt the enforcement of laws aggravator will be found on the same facts. This scenario contributes to the arbitrary sentencing of defendants in violation of Fifth Circuit law,[124] as well as *Furman*—a defendant with both aggravators is no more deserving of death than a defendant with only one aggravator.

III. The Narrowing of Killing to Avoid Arrest: Other State Approaches

Recognizing that the killing to avoid arrest aggravator applies to an impermissibly broad number of defendants, other state supreme courts have limited its scope. In cases where juries might focus on a defendant's action after the murder, the North Carolina Supreme Court held that "a post-killing expression evidencing an after-the-fact desire not to be detected or apprehended" does not imply that the defendant killed for the purpose of avoiding lawful arrest.[125] Moreover, it found that "'[i]n a broad sense every murder silences the victim, thus having the effect of aiding the criminal in the avoidance or protection of his arrest.'"[126] To find the aggravator in North Carolina, evidence must show that "at least one of the purposes motivating the killing was defendant's desire to avoid subsequent detection."[127] The court's focus on "purpose" attempts to narrow the class of defendants subject to the aggravator because proof of the requisite intent to avoid arrest must be very strong.

122. *See* OCDC Study, *supra* note 69.

123. *See id.* (providing that 157 of 191 death sentences involved at least one of these types of capital murder).

124. *See* United States v. Jones, 132 F.3d 232, 250–51 (5th Cir. 1998).

125. State v. Williams, 284 S.E.2d 437, 456 (N.C. 1981) (where the court reversed the jury's finding of the aggravator, which was based on evidence that the defendant wanted to leave the crime scene at a slow rate of speed so as not to attract attention). North Carolina's aggravator shares the precise language of the Mississippi statute. *Compare* N.C. GEN. STAT. § 15A-2000(e)(4) (2003) ("The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.") *with* MISS. CODE ANN. § 99-19-101(e) (1999).

126. *Williams*, 284 S.E.2d at 456 (quoting State v. Goodman, 257 S.E.2d 569, 586 (N.C. 1979)).

127. *Id.*

Florida, another state where the death penalty is frequently imposed, similarly finds that "an intent to avoid arrest is not present, at least when the victim is not a law enforcement officer, unless it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses."[128] This finding directs Florida courts to focus on motive, much like the North Carolina courts focus on purpose. Both states' interpretations of the aggravator imply that Mississippi's broad approach is unconstitutional.

Louisiana, which does not have a killing to avoid arrest aggravator, has another aggravator that deals with defendants who eliminate witnesses. It states that an aggravating circumstance shall be found where "[t]he victim was . . . an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant."[129] The state court addressed the problem of a broad application and held that it applies only where the victim of the murder was an eyewitness to an *earlier independent crime* allegedly committed by the accused.[130] Here, the aggravator would not apply in the rape-murder or robbery-murder context.

Other jurisdictions have also acknowledged duplicate aggravator concerns. The Alabama Supreme Court argued: "One interpretation of this provision would enable it to be applied in all felony cases in which death has ensued, for it could be said that one of the purposes of inflicting any death would be to prevent identification by the victim."[131] The court, however, believed that "the legislature . . . placed special emphasis upon the protection of persons effecting lawful arrests . . . and thus sought to deter such conduct by applying the extreme sanction to it."[132] This reading limits application to those in law enforcement that effectuate lawful arrests.[133]

128. Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979) (interpreting FLA. STAT. ANN. § 921.141(5)(e) (2004), which mirrors the precise language of Mississippi's aggravator).

129. LA. CODE CRIM. PROC. ANN. art. 905.4(8) (West 2004).

130. *See* State v. Loyd, 459 So. 2d 498, 504 (La. 1984).

131. *Ex parte Johnson*, 399 So. 2d 873, 874 (Ala. 1979).

132. *Id.* at 874. Alabama's killing to avoid arrest aggravator also shares the precise language as Mississippi's aggravator. *See* ALA. CODE § 13A-5-49(5) (Supp. 2003) ("The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.").

133. Alabama's criminal code, like Mississippi's, states that an aggravating circumstance may be found where a "capital offense was committed to disrupt or hinder the lawful exercise of . . . the enforcement of laws," yet it still applies the killing to avoid arrest aggravator narrowly. *See* ALA. CODE § 13A-5-49(7) (Supp. 2003).

North Carolina has also held that the aggravators of killing to avoid arrest and disrupt the enforcement of laws are unconstitutionally duplicative.[134] If Mississippi were to adopt any of these approaches, the aggravator would perhaps be sufficiently narrow to comport with *Furman*. As the next section examines, however, this has simply not been the case.

IV. The Mississippi Supreme Court's Own Construction of the Aggravator Fails to Cure the Statute's Facial Vagueness and Allows for an Overbroad Application

A. Curing Unconstitutional Aggravators

Although the killing to avoid arrest aggravator remains facially vague and overbroad, states like North Carolina, Florida, and Alabama are able to limit the scope of the aggravator via their appellate courts. The Supreme Court implied in cases after *Furman* and *Gregg* that a facially infirm aggravator may be cured by either a trial judge supplying the jury with a limiting definition of the aggravator[135] or by the appellate court applying its own narrowing construction.[136] The Court has suggested that consistent adherence to a narrowing construction on appellate review can make a facially vague aggravator constitutional.[137] For example, in *Godfrey* the Court stated that the Georgia Supreme Court could have cured the constitutional defect in its aggravator that the murder was "outrageously or wantonly vile, horrible or inhuman" by limiting the aggravator to cases where there was evidence of "'torture, depravity of mind, or an aggravated battery to the victim.'"[138] Under this construction, the basic approach is to define vague terms with more objective factors.

Because neither the Supreme Court nor state supreme courts have ever explicitly held that the killing to avoid arrest aggravator is facially unconstitutional, there is no legal mandate for appellate and trial judges to limit the scope of the aggravator. Arguably, Mississippi's neighboring jurisdictions narrow their application of the aggravator

134. State v. Goodman, 257 S.E.2d 569, 587 (N.C. 1979).

135. *See* Walton v. Arizona, 497 U.S. 639, 653 (1990).

136. *See* Maynard v. Cartwright, 486 U.S. 356, 360 (1988) (affirming the Tenth Circuit's conclusion that the state appellate court's failure to limit the aggravating circumstance when affirming the death sentence rendered it unconstitutionally vague).

137. *See id.* at 363 (noting the constitutional requirement of channeling and limiting discretion in imposing death penalty to avoid capricious and arbitrary action).

138. Godfrey v. Georgia, 446 U.S. 420, 431–32 (1980).

on appellate review because they recognize its frailties and want to prevent an overbroad application. Mississippi does not share this concern.

B. Mississippi's Construction of the Aggravator Is Illusory

When Mississippi defendants have argued that its courts should adopt narrower approaches to the aggravator the Mississippi Supreme Court has replied that these approaches are "too restrictive."[139] Moreover, the court has held that a limiting instruction for the jury is "unnecessary."[140] Instead, the court reviews the aggravator under the following court-created construction:

> If there is evidence from which it may be reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer or killers or to "cover their tracks" so as to avoid apprehension and eventual arrest by authorities, then it is proper for the court to allow the jury to consider this aggravating circumstance.[141]

The court, noting that each case must be decided on its own "peculiar fact situation," implicitly wants to give judges some objective guidelines when reviewing a mainly subjective aggravator.[142] Jurors, however, never hear this construction, and the Mississippi Supreme Court assumes that trial judges are aware of the construction during the sentencing phase and will not allow the jury to consider the aggravator if there is insufficient evidence.[143] It appears then that the construction serves two purposes. First, it is an evidentiary threshold for sentencing judges, and second, it is a standard for the Mississippi Supreme Court to review the sufficiency of the evidence.[144]

On its face, the construction seems to limit the reviewing court's application of the aggravator—it gives judges evidence to look for and it requires that a defendant's purpose be "substantial." In practice, the construction does just the opposite—it actually broadens the application of the aggravator.

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139. Leatherwood v. State, 435 So. 2d 645, 651 (Miss. 1983) (criticizing Florida's approach to the aggravator).

140. Brown v. State, 682 So. 2d 340, 355 (Miss. 1996).

141. *Leatherwood*, 435 So. 2d at 651.

142. *See id.*

143. *See id.* It is assumed the jury only hears the aggravating factor as it is written in the statutory text. *See* MISSISSIPPI JURY INSTRUCTIONS—CRIMINAL, *supra* note 51, § 1:24(II); Walton v. Arizona, 497 U.S. 639, 653 (1990) (noting that "trial judges are presumed to know the law and to apply it in making their decisions").

144. It is unclear whether sentencing judges actually rely on this narrowing construction when deciding whether jurors should be instructed on the aggravator.

The court reviews whether a substantial reason for the killing was to "conceal [the defendant's] identity" or to "cover [his] tracks" so as to avoid apprehension and eventual arrest by the authorities.[145] This inquiry adds an extra and unwarranted element into the analysis. One who kills to avoid a lawful arrest is different from one who kills to conceal his identity, which in turn may lead to avoiding apprehension. The appellate court, reviewing a jury's finding of the aggravator, could reasonably infer that all felons murdered their robbery or rape victims to conceal their identity.[146]

Even if this construction purports to guide a trial judge, the reviewing court has failed to adhere to this construction and has instead consistently sustained the jury's finding of the aggravator.[147] The court has focused on evidence showing that a defendant concealed his identity during and after the murder. The court has also held that jurors may make the "logical connection" between the injuries suffered and the inference that the defendant murdered his victim to avoid arrest.[148] Recall the cases above where juries found the aggravator based on evidence that the victim's throat was stuffed to silence her cries,[149] that the defendant hid the victim's body,[150] and that the defendant initially did not confess to the crime.[151] This evidence does not show that the defendant's *purpose* in killing was to conceal his identity or cover his tracks—it only shows that he concealed his identity or covered his tracks.

Another fault with this construction is that the court interprets the term "lawful arrest," which suggests that law enforcement is attempting to apprehend the suspect, to mean "eventual arrest."[152] The problem with "eventual arrest" is that all criminals may eventually be arrested, and in fact this will be true in all cases in which a defendant is standing trial.[153] This allows courts to affirm the jury's focus on post-killing acts, like haircuts, that may be completely unrelated to the defendant's initial purpose in murdering the victim.

145. *Leatherwood*, 435 So. 2d at 651.

146. Recall that the Mississippi Supreme Court automatically reviews all death sentences. MISS. CODE ANN. § 99-19-101(4) (1999).

147. The Mississippi Supreme Court has only reversed a jury finding of the aggravator in one of the twenty-five cases surveyed by the author. *See supra* note 115.

148. Holland v. State, 705 So. 2d 307, 355 (Miss. 1997).

149. *See id.*

150. *See* Hughes v. State, 735 So. 2d 238, 278 (Miss. 1999).

151. *See* Woodward v. State, 726 So. 2d 524, 541 (Miss. 1997).

152. *See, e.g., Leatherwood*, 435 So. 2d at 651.

153. *See* People v. Bigelow, 691 P.2d 994, 1006–07 (Cal. 1984) (holding that the special circumstance of avoiding arrest should be limited to cases in which the arrest is imminent).

The final concern with the court's construction is its use of the term "substantial" when referring to a defendant's reason for killing. The statute and the jury instruction refer only to the defendant's "purpose," not to a "substantial purpose."[154] The inclusion of the term substantial could mean that the court recognizes both the subjectivity of the aggravator and the statute's facial overbreadth, because any juror could reasonably conceive that at least one of the defendant's purposes was to avoid arrest. Including the term substantial allows the trial judge and appellate court to distinguish those defendants who killed for numerous reasons from those who killed specifically to avoid a lawful arrest. However, when the term is not included in the jury instructions the same cannot be said to be true with respect to the jury's analysis of the aggravator.

Moreover, because the court is unwilling to concede the statute's overbreadth and simply affirms the jury's finding of the aggravator, even when unwarranted, inclusion of the term "substantial" serves no purpose. The fact that the court has only once in twenty-five cases reversed a finding of the killing to avoid arrest aggravator evidences this superficial interpretation of the term substantial. The reviewing court deemphasizes the subjective element of the aggravator, which explicitly refers to the defendant's purpose in killing the victim, as much as an uninstructed jury does. While a cursory reading of the court's construction appears to follow other jurisdictions' limiting approaches to the aggravator, case law shows that the Mississippi Supreme Court affirms the aggravator's overbroad application. The court's consistent affirmation violates both the principles derived from *Furman* and the Fifth Circuit prohibition of the use of duplicate aggravators.

Conclusion

In addition to narrowing the class of persons eligible for the death penalty, aggravators exist to "justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[155] Mississippi's felony-murder, killing to avoid arrest, and disrupt the enforcement of laws aggravators justify a more severe sentence for those who kill in the course of committing a felony, those who kill to avoid arrest and to eliminate witnesses, and those who kill

154. MISS. CODE ANN. § 99-19-101(5)(e) (1999); MISSISSIPPI JURY INSTRUCTIONS— CRIMINAL, *supra* note 51, § 1:24(II)(e).

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

law enforcement, respectively. Through these aggravators, the State aims to protect these particular victims. The challenge is to continue to protect these classes of victims without the constitutionally infirm killing to avoid arrest aggravator.

Mississippi can only comport with the mandates of *Furman* and its progeny by eliminating the killing to avoid arrest aggravator. The aggravator's statutory language is too vague, and the Mississippi Supreme Court continues to muddle the aggravator's application to each case. The court's treatment of the aggravator is so misguided it cannot be remedied with a limiting or narrowing construction. Even if the court were to require that a defendant's purpose be "substantial," this would not take the subjectivity out of the aggravator. Would substantial mean that the defendant's purpose in killing to avoid arrest represents more than fifty percent of his entire purpose? Any speculation by the jury would result in arbitrary and overbroad findings.

In the aggravator's absence, felony-murder and the disrupted the enforcement of laws aggravators will continue to protect felony victims and law enforcement. To continue to protect witnesses, Mississippi should adopt Louisiana's witness-protection aggravator, which requires that "[t]he victim was . . . an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant."[156] Like its sister state, Mississippi would have to preclude its application in cases where the victim of the murder cannot be shown to have been an eye witness to an earlier independent crime allegedly committed by the accused.[157] This should be achieved by a limiting instruction to the jury.

Until Mississippi eliminates the killing to avoid arrest aggravator, defendants, especially those guilty of felony-murder, will continue to be sentenced to death in an overly broad manner—a manner that the United States Supreme Court explicitly condemned in *Zant*.[158] The injustice in Mississippi's use of the killing to avoid arrest aggravator make it—and any death sentences that rely upon it—unconstitutional.

156. LA. CODE CRIM. PROC. ANN. art. 905.4(8) (1997).
157. *See* State v. Loyd, 459 So. 2d 498, 504 (La. 1984).
158. *Zant*, 462 U.S. at 876–77.