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A Deadly Bias: First-Time Offenders and Felony Murder

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Introduction

Americans have reaffirmed for the courts time after time that capital punishment is very important to them. Indeed, the Supreme Court has recognized that if capital punishment were to be removed as a form of punishment that the people would move to self-help situations.\footnote{Furman v. Georgia, 408 U.S. 238, 308 (1972).} The Supreme Court surely did not want to see scenes like the one written by John Grisham in “A Time to Kill,” where the victim’s father shot the perpetrators on the courthouse steps with the police and other personnel standing by helplessly.\footnote{J\textsc{ohn} \textsc{G}risham, \textsc{A} \textsc{Time} \textsc{to} \textsc{Kill}, 151 (1989).} Without a doubt, the Court realized that capital punishment is deeply rooted in our society and will remain so against much opposition for years to come.\footnote{Furman, 408 U.S. at 278.}

Most people feel that the persons most deserving of the death penalty are the “worst of the worst.”\footnote{James R. Acker, \textit{Be Careful What You Ask For: Lessons From New York’s Recent Experience with Capital Punishment}, 32 VT. L. REV. 683, 693 (2008) (quote from Professor Robert Blecker of New York Law School).} Although the description “worst of the worst” gives most people a mental picture, there has never been anyone who has come forward and defined who the “worst of the worst” may be. Since there is no definition of the “worst of the worst,” there are situations in many states where first-time offenders make up more than fifty percent of the death row population.\footnote{Appendix A, B, & C} Perhaps some people will think of serial killers like Ted Bundy or Edward Gacy when imagining of the “worst of the worst,” or some think of people who kill children under the same description. The unfortunate reality is that first-time offenders make up a large portion of the death row inmates, and many of those are guilty of felony murder.\footnote{Id.}

In Florida and Georgia, first-time offenders who are found guilty of felony murder and given the death sentence compromise more than fifty-percent of the first-time offender population.\footnote{Id.}

Today’s capital punishment schemes are biased towards first-time offenders who are convicted of first degree murder under the felony murder rule. All three of the death penalty schemes currently in use allow for the elevation of the charge for killing someone during the commission of a crime to be elevated to first degree murder under the felony murder rule.\footnote{Tex. Penal Code Ann. § 19.03 (Vernon 2005); Ga. Code Ann. § 16-5-1 (West 2006); Fla. Stat. § 782.04 (2005).} This elevation makes the offender eligible for the death penalty. Although the felony murder rule by itself is not biased against the first-time offender, two of the three statutory schemes also include an aggravating factor that creates the bias. These statutory schemes allow for the elevation of the crime from a lesser degree to first degree felony murder and then to use the same felony as an aggravator in the penalty phase of the trial.\footnote{Ga. Code Ann. § 17-10-30 (West 2006); Fla. Stat. § 921.141 (2008).} This double use of the felony is what causes the capital punishment schemes to be biased towards the first time offender.

This paper focuses on the biases of the capital punishment schemes that cause the first time offender who is guilty of felony murder to end up on death row. Although there are
multiple solutions discussed, the solution that is advocated here is that all death penalty statutes be changed to follow the “directed” statute scheme, which requires the prosecution to show that the offender is a continued threat to society and not simply that the offender committed a felony in connection with the murder.\(^{10}\)

**History**

The founders of the United States brought many things with them from England. The liberal use of the death penalty was one of the many traditions borrowed. When the colonies were first formed, there were 222 crimes punishable by death.\(^{11}\) The crimes included stealing grapes, cutting down a tree, killing chickens or trading with Indians.\(^{12}\) Not only were the crimes that were punishable by the death penalty very plentiful, so were the different ways that the punishment could be carried out. The colonies used boiling, burning at the stake, beheading and drawing and quartering as modes of carrying out executions.\(^{13}\) After 1608, which is the year of the first recorded execution, the colonies began to limit the number of death-eligible crimes.\(^{14}\) This change was the first of many for the American people.

**Pre-Furman**

During the time period from 1608-1972, the United States Supreme Court grappled with whether or not a jury was capable of following directions and applying the law in capital cases.\(^{15}\) In 1971, the Court decided that it was not necessary for the states to guide the discretion of a capital jury.\(^{16}\) It even went so far as to state that it was not only unnecessary but impossible to guide the jury.\(^{17}\) Just a year later, the court reversed its determination that guiding the jury was unnecessary and impossible in its landmark decision, *Furman v. Georgia*.\(^{18}\)

Prior to the *Furman* decision, defendants had to choose between trying to prove their innocence or submitting enough mitigating circumstances so as to convince the jury that they did not deserve the death penalty.\(^{19}\) The reason a defendant had to make this decision is because the jury would make a single verdict.\(^{20}\) After the completion of the trial, the jury would retire to the deliberation room and make not only the decision as to whether or not the defendant was guilty, but also whether the defendant deserved the death penalty.\(^{21}\) This procedure did not give the defendant the opportunity to try to prove his or her innocence before attempting to show the jury

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\(^{10}\) Tex. Penal Code Ann. § 19.03 (Vernon 2005).

\(^{11}\) ROBERT M. BOHM, DEATHQUEST II, 2 (2003).

\(^{12}\) Id. at 5.

\(^{13}\) Id.

\(^{14}\) Id. at 6.


\(^{17}\) Id.

\(^{18}\) 408 U.S. 238 (1972).

\(^{19}\) Id. at 380.

\(^{20}\) Id. at 286.

\(^{21}\) Id.
that he or she deserved leniency.\textsuperscript{22} The \textit{Furman} Court likened a death sentence to that of being struck by lightning because there was no way to know, based on prior history, whether or not the defendant was likely to get the death penalty or not.\textsuperscript{23} The Court reasoned that this type of arbitrary decision-making, where there was no uniformity between the sentences of one jury to the next, was fundamentally against the United States Constitution.\textsuperscript{24} Therefore, all of the states’ death penalty statutes were held to be unconstitutional.\textsuperscript{25} The Court reasoned that the death penalty itself was not unconstitutional, but in order to have capital punishment, the states must find a way to guide the discretion of the jury and to remove the arbitrariness from the decisions.\textsuperscript{26} Once the \textit{Furman} decision ruled all death penalty statutes in the United States were unconstitutional, the states rushed to put new capital punishment statutes in place. Most states turned to the Model Penal Code, which had written updated death penalty schemes in 1962.\textsuperscript{27}

\textbf{Post-\textit{Furman}}

As a result of the states’ efforts to change their capital punishment statutes, four basic statutory schemes were challenged and brought before the Supreme Court for approval in 1976.\textsuperscript{28} The first type of scheme required mandatory death sentences for certain crimes.\textsuperscript{29} The Court determined that this scheme was unconstitutional because each defendant in a death penalty case was unique and no blanket punishment would be applicable to every defendant.\textsuperscript{30} It reasoned that a mandatory death sentence would make juries more prone to jury nullification and therefore cause criminals to go free.\textsuperscript{31} The Court determined that since the jury would know that a defendant would receive the death penalty if convicted, it would choose to find the defendant not guilty simply because the jurors did not think that the defendant should be placed on death row.\textsuperscript{32} The remaining three statutory schemes that were approved by the Supreme Court in 1976 were the threshold scheme\textsuperscript{33}, balancing scheme\textsuperscript{34} and the directed scheme.\textsuperscript{35} Most states have adopted a version of the balancing scheme.\textsuperscript{36}

\textsuperscript{22}Id.
\textsuperscript{23}\textit{Furman} v. Georgia, 408 U.S. 238, 309 (1972).
\textsuperscript{24}Id. at 310.
\textsuperscript{25}Id.
\textsuperscript{26}Id.
\textsuperscript{27}David McCord, \textit{Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery Be Sufficient to Make a Murderer Eligible for a Death Sentence?}, 49 SAN\textit{TA CLARA} L. REV. 1, 21 (2009).
\textsuperscript{29}Roberts, 428 U.S. at 325; Woodson, 428 U.S.at 280.
\textsuperscript{30}Woodson, 428 U.S. at 280.
\textsuperscript{31}Id.
\textsuperscript{32}Id.
\textsuperscript{33}Gregg, 428 U.S. at 153.
\textsuperscript{34}Proffitt v. Florida, 428 U.S. 242 (1976).
\textsuperscript{36}Bowers, \textit{supra} note 16, at 1049.
Almost immediately after deciding the capital jury needed guidance and rules to make a determination, the Court decided that the jury should have unbridled discretion in determining mitigating circumstances. In *Lockett v. Ohio*, the Supreme Court was asked to determine the constitutionality of a death penalty statute that enumerated only three mitigating factors that the judge could use to determine whether or not the defendant deserved leniency. The Court held that the entity making the sentencing decision should have the discretion to consider any mitigating evidence that the defendant may offer to show that he or she deserves leniency.

Later, in *Eddings v. Oklahoma*, the Court decided that although the jury should have unbridled discretion, the jury could not disregard any relevant evidence of mitigation that the defendant offered. The *Eddings* case involved a defendant who was sixteen at the time of his offense and charged with murdering a police officer. The trial judge refused to consider mitigating evidence that was relevant to the defendant’s circumstances. The Court found this to be against its prior holding in *Lockett v. Ohio*. To make matters more confusing, in 1988, the Supreme Court decided that the jury does not have to find mitigating evidence unanimously in order for it to be considered during deliberations. The case concerned the jury instructions requiring that the jury make all of its decisions unanimously before finding any circumstances to be present; this included both aggravating and mitigating circumstances. The Court stated that this requirement was also against its decision in *Lockett v. Ohio*, where it held that any relevant mitigating evidence should be considered. After all of the decisions that whittled away the guidance in determining mitigating factors, the Court turned its attention to aggravating factors. In 1995, it decided that the jury should also have unbridled discretion in deciding on nonstatutory aggravating circumstances. The Court held that as long as there was one statutory aggravator found, the jury could look at any other non-statutory aggravator. These changes to the guided discretion of jury have created challenges within the appellate courts.

The most important decisions that have emerged since the *Furman* decision are those that have changed what crimes are punishable by death. Many changes in the death-eligible crimes were actually created within the state court systems rather than the Federal court system. Most states require that all death penalty cases be reviewed by appellate courts before the death sentence can be carried out. Since 1985, the courts do not allow a person who is convicted of

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39 Id. at 586 (1978).
40 Id. at 604.
42 Id. at 104.
43 Id. at 114.
44 Id. at 113.
46 Id. at 379.
47 Id. at 383.
49 Id. at 880.
50 Bowers, supra note 16, at 1051.
51 Id. at 1050.
felony murder, but did not either plan to kill or actually kill someone, to be sentenced to death.\textsuperscript{53} This means that a getaway driver who sits outside a robbery with no control over what his partner inside does, and does not help to plan the killing of a human being, will receive life in prison without the possibility of parole rather than be eligible for a death sentence.

Today, the states are dealing with the most recent decisions by the Supreme Court that make serious changes to the death penalty. For example, in \textit{Ring v. Arizona}, the Supreme Court held that the jury must be the finder of fact for all factual findings pertaining to a defendant’s guilt, as well as penalty phase findings.\textsuperscript{54} Previously in Arizona, the jury would make the guilt or innocence determination and then it would be disbanded.\textsuperscript{55} The judge would sit as the finder of fact for the penalty portion of the trial and determine what aggravating and mitigating factors were relevant and then make the sentencing decision.\textsuperscript{56} Since the \textit{Ring} Court held that the jury must be the finder of fact for the penalty phase, the jury must now determine the relevant aggravating and mitigating factors.\textsuperscript{57} Although there are very few states that have only the judge make the sentencing decision, there are a number of states that could be affected by the \textit{Ring} decision because the judge writes the finding of fact in relation to the aggravating and mitigating factors.\textsuperscript{58} The \textit{Ring} decision calls into question any statute that does not require the jury to enumerate its findings.\textsuperscript{59}

\section*{Analysis}

\textbf{The Capital Punishment Schemes}

The Supreme Court affirmed three capital punishment schemes in 1976: the balancing scheme,\textsuperscript{60} the threshold scheme,\textsuperscript{61} and the directed scheme.\textsuperscript{62} Although no two states have exactly the same scheme, all of the states use some variation of these three.\textsuperscript{63} Many states have differences in their first degree murder definitions,\textsuperscript{64} as well as the method they employ to follow the decisions of the Supreme Court.\textsuperscript{65} Although these differences are plentiful, they do not affect the bias as related to the first time offender who is found guilty of felony murder, except in the few states that have eliminated the felony murder aggravator all together.\textsuperscript{66}

\begin{flushleft}
\textsuperscript{54} Ring v. Arizona, 536 U.S. 584, 603 (2002).
\textsuperscript{55} \textit{Id.} at 591-92.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.} at 603.
\textsuperscript{58} Fla. Stat. §921.141 (2008).
\textsuperscript{59} Bowers, \textit{supra} note 16, at 1052.
\textsuperscript{60} Proffitt v. Florida, 428 U.S. 242 (1976).
\textsuperscript{63} Bowers, \textit{supra} note 16, at 1046.
\textsuperscript{64} McCord, \textit{supra} note 27, at 7.
\textsuperscript{66} McCord, \textit{supra} note 27, at 39.
\end{flushleft}
Balancing Scheme

The balancing scheme is the most commonly used among the states.\(^6^7\) This scheme requires that the jury weigh the aggravating factors against the mitigating factors in order to determine whether or not the defendant should be sentenced to life in prison without parole or death.\(^6^8\) In 1976, the Supreme Court approved Florida’s balancing scheme in Proffitt v. Florida.\(^6^9\)

Florida has two crimes in which a defendant could be eligible for the death penalty.\(^7^0\) The first is first degree premeditated murder,\(^7^1\) which does not relate to the bias against first-time offenders. The second is a killing during the perpetration of, or the attempt to perpetrate any eighteen enumerated felonies under its felony murder statute.\(^7^2\) If a defendant commits, attempts to commit, or tries to escape from one of these enumerated felonies and kills another human being, they can be charged with first-degree felony murder.\(^7^3\) This elevation in the statute allows for the offender who has no desire to confront a person during the crime to end up with a capital felony charge against him or her.

Under Florida’s balancing scheme, once a defendant has been found guilty of a capital felony, the trial automatically goes into a second phase known as the “penalty phase.”\(^7^4\) A two-phase capital trial is called a bifurcated trial. Thus, after a defendant is found guilty of a capital felony, the jury, usually the same jury that decided the defendant’s guilt or innocence, will hear evidence for or against sentencing the defendant to death.\(^7^5\) By having the trial in two phases, it allows the defendant the opportunity to try to prove his or her innocence as well as to give reasons why the jury should sentence him or her to life in prison without the opportunity for parole instead of death.\(^7^6\) The jury must determine beyond a reasonable doubt that an aggravating factor exists before it can be used in the calculation to determine the sentence.\(^7^7\)

Florida has set out sixteen specific aggravating factors that the prosecution must use in order to show that the defendant should receive the death penalty.\(^7^8\) The statutory aggravators are special circumstances about the crime, the defendant, or the victim that would show that the defendant is a proper candidate for the death penalty.\(^7^9\) The aggravators must be found by the

\(^{67}\) Bowers, supra note 16, at 1049.  
\(^{68}\) Id. at 1046.  
\(^{71}\) Id.  
\(^{72}\) These felonies are robbery, burglary, arson, sexual assault and kidnapping, and others enumerated in the statute. Id.  
\(^{75}\) Id.  
\(^{76}\) Furman v. Georgia, 408 U.S. 238, 286 (1972).  
\(^{78}\) Id.  
\(^{79}\) The statutory aggravators in the Florida statutes are that the defendant committed a felony in connection with the murder, that the defendant was previously convicted of a felony, that the victim was under the age of twelve or a public servant, or that the crime was especially heinous, atrocious or cruel to name a few. Id.
jury beyond a reasonable doubt. Once the jury has found that at least one of the aggravating factors exist, it begins to determine whether or not any mitigating factors apply to the defendant’s case.

The mitigating factors are factors that the jury takes into account to show that the defendant deserves leniency in the sentencing. A mitigating factor is not an excuse for the crime or a reason why the crime should be excusable, but simply a factor that helps to understand why the defendant acted in the manner that he or she did and should therefore not receive the death penalty. Florida’s balancing scheme also enumerates the mitigating factors that the jury must consider. Florida’s statute complies with the Supreme Court’s decision in *Lockett v. Ohio* by allowing the jury to consider “any other factor in the defendant’s background that might mitigate against imposition of the death penalty.” Florida’s mitigating factors only need to be found by a preponderance of the evidence in order to be used in the weighing process.

Once the jurors have completed the decision-making process on the applicable aggravating and mitigating factors, they begin the process of completing the calculation required to determine if the defendant is deserving of the death penalty. The jury instructions provide that the jurors must assign each aggravating and mitigating factor a weight and then they must weigh the aggravating circumstances against the mitigating circumstances in determining their advisory sentence. However, both the jury instructions and the Florida statute are silent on how these calculations should be completed.

After completing its “calculation,” the jury makes an advisory sentencing decision for the judge, which is completely non-binding on the trial judge. Although the judge has the ability to follow the jury’s decision or to overrule it, it is rare for a judge not to follow the advisory sentence. If the judge decides to impose the death penalty, regardless of the jury’s advisory sentence, the judge must set out in an opinion the aggravating and mitigating factors that the judge found in the case, as well as the fact that the aggravating factors outweighed the mitigating factors. The jury, however, does not have to enumerate its findings regarding aggravating and mitigating factors. This process is in conflict with the Supreme Court’s decision in *Ring v. Arizona*, which held that the jury must be the finder of all facts related to the guilt and punishment of the defendant. Under Florida’s scheme, the judge sets out the facts relating to the death sentence of the defendant.

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80 *Id.*
81 *Id.*
83 The mitigating factors that the jury may find include that the defendant has no prior criminal record, that the victim was a participant in the conduct, or that the defendant was under extreme duress, among other factors. Fla. Stat. §921.141 (2008).
86 *Id.*
87 *Id.*
90 *Id.*
By looking at each individual part of Florida’s capital punishment statutes, it appears the arbitrariness and biases of past systems have been removed. However, from the standpoint of a first-time offender, the current statutes are quite biased because they allow for defendants, who make the unfortunate move of placing themselves within the grasp of a capital felony likely candidates for death row.

To illustrate, consider the case of Sam Someone. Sam Someone is an inexperienced criminal. He has never committed any crimes and has never been in any trouble with the law. But Sam has fallen on hard times with the changes in the economy and he can no longer afford all of the wonderful electronic gadgets he has always been so proud to buy and show off to his friends. Sam notices that the couple who lives down the road have a lot of items that he himself would love to own. Sam also knows that the couple goes on trips almost every weekend and they are seldom home. Sam decides that he is going to break into the home and steal some of those electronics so that he can have them for his house. On Friday, Sam watches the couple load their car with suitcases and leave. Later that evening, Sam sneaks over to the house and breaks in through a backdoor. Sam brought only a pair of winter gloves, a couple of boxes in which to put the electronics, and a flashlight so that he does not have to turn any lights on while he is inside. Unfortunately, Sam does not know that the couple is allowing their friend, Frank, to stay in their house this weekend. As Sam begins collecting all of the electronics he can get his hands on, he suddenly confronts Frank. Sam panics and tries to run. As Sam starts to run away, he pushes Frank out of his way. Sam leaves the house and runs as fast as he can to his own home. Unfortunately for Sam, when he pushed Frank, he fell, hitting his head on the marble fireplace and Frank dies from the head injury.

Using Florida’s balancing scheme, Sam could be charged with felony murder, which is a capital felony, because he committed the killing of a person during the commission of a burglary. Under Florida law, a burglary is the unlawful entering of a dwelling with the intent to commit a felony therein, which in this case was the theft of the electronic equipment. The jury would likely find Sam guilty of a capital felony.

After Sam is found guilty, the court will hear evidence for aggravating and mitigating circumstances. For this hypothesis, many of the aggravating circumstances listed under Florida’s statute would not apply. During a normal trial, the court would only discuss with the jury any aggravators that the prosecutor requests. The prosecutor must prove beyond a reasonable doubt that each aggravator exists, and so will only focus on aggravators that it believes it can show. In the case of Sam Someone, the only aggravator under the Florida statute that applies is that Sam committed the killing while engaged in the commission of one of the listed felonies. Once the jury has determined that an aggravator has been proven beyond a reasonable doubt, which in

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95 Fla. Stat. §810.02 (2005).
96 FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11.
98 Sam believed that there was no one home and he did not carry any weapons, so the aggravator for knowingly creating a great risk of death to many people would not apply, although due to the limited number of applicable aggravators the prosecutor may try to show this aggravator. Sam did not commit the crime for financial gain, since his purpose was to use the electronics in his own home. Another common aggravator is the heinous, atrocious and cruel aggravator, but Sam did not commit the crime in an especially heinous, atrocious or cruel way so it would not apply in this case. Fla. Stat. §921.141 (2008).
this case is the aggravator for the contemporaneous felony of which the jury found Sam guilty in the guilt phase of the trial, the jury would next determine if there are any mitigating circumstances to be considered.

In a normal trial, the judge will only read the instructions for mitigating factors that the defense requests. Sam’s defense would likely request the mitigating factor that Sam has no significant criminal history. This factor would be found by the jury since he is a first time offender. Once the jury has found a mitigating circumstance and an aggravating circumstance, it must weigh the two and decide Sam’s punishment.

Since there are no guidelines for the jury as to how the determination of weight should be decided or how the calculation should be completed, the jury has room to decide what it wants to do. The jury could determine a value for each aggravating and mitigating circumstance and then multiply it by the number of jurors who found the factor to exist. These products could then be subtracted to determine whether or not the defendant should or should not receive the death penalty. If the jury were to assign the aggravator that all twelve members of the jury found a value of two and the mitigating factor which nine of the jurors found a value of one, Sam will receive the death penalty. The odds are likely that Sam would receive the death penalty due to the lack of guidance in how to complete the calculation. If the jury returns a sentence of death, the trial judge is also likely to give Sam the same sentence. Although the case will automatically go through appellate review, it is unlikely to be overturned unless there was an error on the part of the judge or attorneys.

Through the hypothetical case of Sam Someone, it becomes apparent that the Florida statutes make it biased towards the first-time offender who is found guilty under the felony murder rule. By allowing the prosecutor to simply show that the defendant committed a felony along with the murder, the statutes allow for the prosecutor to have nothing to prove during the penalty phase of the trial, since the jury is allowed to use information from both the guilt and penalty phases of the trial in making its sentencing decision. Since the prosecutor has already shown that Sam committed a felony in order to have him convicted of first-degree murder, the jury’s finding of the aggravating factor would already be proven beyond a reasonable doubt.

Threshold Schemes

The threshold scheme is so named because it requires that the jury reach a certain decision in order to narrow the class of defendants who are eligible for the death penalty. Georgia uses the threshold scheme for its capital punishment procedures. If at least one statutory aggravator be found before a defendant is eligible to receive the death penalty, then the jury has unbridled discretion to determine if the defendant should receive a death sentence. Under the Georgia statutes, there are no enumerated mitigating circumstances that the jury must

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99 FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11.
101 Id.
102 McCord, supra note 27, at 40.
103 FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, §7.11.
105 Id.
consider to determine if the defendant is deserving of its leniency.\textsuperscript{107} This requirement of a single statutory aggravator is the narrowing of the class of persons who will be eligible for the death penalty.\textsuperscript{108} The jury’s instructions simply state that the jury may return a sentence of life imprisonment for “any reason satisfactory to you or without any reason.”\textsuperscript{109} The jury in a capital case can consider any and all mitigating and aggravating factors that it determines to be relevant, but there are no rules about their necessity or the use of them.\textsuperscript{110}

In Georgia, there are two types of first-degree murder for which a defendant can receive a death sentence. These first type is premeditated murder.\textsuperscript{111} The second type is murder committed during the commission of, attempt to, or the escape from a felony.\textsuperscript{112} There are only two possible sentences for these two types of first-degree murder.\textsuperscript{113} First, a defendant could receive life in prison without parole; second, a defendant could receive death.\textsuperscript{114} In Georgia, once the jury has found the defendant guilty of first-degree murder, the trial automatically moves to the second phase of the trial, which is the penalty phase.\textsuperscript{115}

During the penalty phase of the trial, the prosecution must prove beyond a reasonable doubt that one of the enumerated statutory aggravator exists.\textsuperscript{116} The defendant is also given the opportunity to establish any mitigating factors that he or she wants the jury to consider in order to receive leniency for the crime.\textsuperscript{117} However, under Georgia’s threshold scheme, there are no enumerated mitigating circumstances for the jury to consider. Therefore, the jury is not guided in its discretion to consider any of the evidence.\textsuperscript{118} The jury only needs to find a mitigating factor by a preponderance of evidence.\textsuperscript{119} This is quite different from the requirement for aggravating circumstances which requires that the jury find it by finding it beyond a reasonable doubt.\textsuperscript{120} If the jury returns a verdict of death, the jury must state on the verdict form in writing the statutory aggravator it found.\textsuperscript{121} The jury is not required to enumerate any information about the mitigating circumstances that it found, nor must it enumerate any information if it chooses to impose a sentence of life without the possibility of parole.\textsuperscript{122} Since the jury is

\begin{enumerate}[\textsuperscript{107}]
  \item \textit{Gregg}, 428 U.S. at 165.
  \item \textit{Gregg}, 428 U.S. at 165.
  \item \textit{Ga. Code Ann. § 17-10-30 (West 2006)}.
  \item \textit{Ga. Code Ann. § 17-10-30 (West 2006)}.
  \item \textit{Id}.
  \item \textit{Id}.
  \item \textit{Id}.
  \item \textit{Id}.
  \item \textit{Id}.
  \item \textit{Id}.
  \item \textit{Id}.
  \item \textit{Id}.
  \item \textit{Id}.
\end{enumerate}
required to state on the verdict form the statutory aggravator that it found, Georgia’s threshold scheme does not fall under the problems associated with the Supreme Court’s decision in Ring v. Arizona.\(^{123}\) Unlike Florida’s balancing scheme, once the jury has reached a sentencing decision, the decision is binding on the court.\(^{124}\)

Like all capital punishment schemes, once the sentence has been entered, the case is automatically brought under appellate review.\(^{125}\) The Supreme Court of Georgia undertakes the task of completing a proportionality review of each death sentence imposed.\(^{126}\) The court must look at cases where both life imprisonment and death sentences were imposed in order to determine that the defendant did not receive a sentence that was not in proportion with other defendants in the state.\(^{127}\) The U.S. Supreme Court has recognized that the appellate review is a very integral part of Georgia’s death penalty scheme because the jury has unguided discretion in determining the sentence to impose once it finds a single statutory aggravator.\(^{128}\)

In 1984, the U.S. Supreme Court heard Pulley v. Harris, which involved a challenge to California’s proportionality review.\(^{129}\) In Pulley, the Court held that a comparative proportionality review was not required in every capital sentence.\(^{130}\) After this decision, the Georgia Supreme Court slowly decreased the amount of review it completes for each case.\(^{131}\) When the Court reached a decision in the Pulley case, it found that a proportionality review is not required; however, this decision was not applicable to Georgia.\(^{132}\) Since Georgia only requires one aggravator to be found in order for a person to be eligible for the death penalty, the appellate review process and subsequent proportionality review are crucial to ensure that the sentences are not arbitrary.\(^{133}\)

Applying Georgia’s threshold scheme to the case of Sam Someone, Sam would be charged with first-degree murder under Georgia’s felony murder rule, because he committed a burglary when the killing occurred.\(^{134}\) Under this statute, Sam would be eligible for the punishments of death or life in prison without the possibility of parole.\(^{135}\) Thus, the jury would begin hearing evidence of aggravating and mitigating circumstances.

The jury would generally only hear evidence on the aggravating circumstances that are relevant to the case.\(^{136}\) Since the offense was committed while Sam was engaged in the

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\(^{123}\) Ring v. Arizona, 536 U.S. 584 (2002)(Court found that the jury needed to be the finder of fact in all aspects of the capital trial).


\(^{125}\) Id.


\(^{128}\) Gregg, 428 U.S. at 166.


\(^{130}\) Id.

\(^{131}\) Walker, 129 at 481.

\(^{132}\) Id.

\(^{133}\) Discretion and the Constitutionality of the New Death Penalty Statutes, 87 HARV. L. REV. 1690 (1974).


\(^{135}\) Id.

\(^{136}\) GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS, § 2.15.30.
commission of a burglary, the jury would be able to find this aggravator beyond a reasonable doubt. Since a statutory aggravator could be found to be present, and there are no instructions as to any other information that should to be considered, Sam would likely receive the death penalty.

Since the Georgia Supreme Court would complete a proportionality review, it is possible that the court could commute his sentence to life imprison without the possibility of parole. However, given the earlier discussion of the current state of its proportionality review, it is unlikely.

Through Sam’s hypothetical situation, it is possible to see how Georgia’s statutory scheme creates an unfair bias in terms of the first-time offender that is found guilty of first-degree murder under the felony murder rule. As of March 11, 2009, Georgia had 105 inmates on its death row. Of the 105 inmates in their population, sixty-seven of those inmates are first-time offenders. The bias becomes even more evident when the felony murder convictions of the first-time offenders are analyzed. Of the sixty-seven first-time offenders on Georgia’s death row, fifty-one inmates were felony murder convictions.

**Directed Schemes**

A directed scheme is one that requires the jury to answer specific questions in order to determine a defendant’s sentence. Texas is an example of a state that has a directed scheme for its capital sentencing procedures. Directed statutes are unique since they do not contain any statutorily enumerated aggravators or mitigators. Instead, a defendant is convicted under a much broader capital murder definition, which encompasses the enumerated aggravators which would normally be found in the balancing and threshold schemes’ penalty phase statutes. Under Texas statutes, a defendant could be convicted of capital murder under a number of different circumstances, including its felony murder rule which provides for the intentional murder of a person during the commission of, attempt to commit, or the escape from a felony, the killing of a public servant or child under the age of six, among other enumerated circumstances of the crime. Although Georgia and Florida defined felony murder as first-degree murder under the felony murder rule, the jury could possibly find that Sam committed the killing in order to receive something of monetary value. Although Sam committed the burglary in order to receive something of monetary value, the killing was not intentional and not necessary to the receipt of the item of value and would be difficult for the prosecution to prove the aggravator beyond a reasonable doubt. A common aggravator is when the prosecution proves that the crime was committed in an outrageously or wantonly vile, horrible, or inhuman, since there is no possible way that a jury could find this aggravator in this case, it will not apply. Ga. Code Ann. § 16-5-1 (West 2006).

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137 The jury could possibly find that Sam committed the killing in order to receive something of monetary value. Although Sam committed the burglary in order to receive something of monetary value, the killing was not intentional and not necessary to the receipt of the item of value and would be difficult for the prosecution to prove the aggravator beyond a reasonable doubt. A common aggravator is when the prosecution proves that the crime was committed in an outrageously or wantonly vile, horrible, or inhuman, since there is no possible way that a jury could find this aggravator in this case, it will not apply. Ga. Code Ann. § 16-5-1 (West 2006).
138 Georgia Suggested Pattern Jury Instructions, § 2.15.30.
140 Id.
141 Appendix C
143 Id.
144 McCord, supra note 27, at 8.
145 Id.
degree murder,\textsuperscript{147} Texas defines the same crime as “capital murder.”\textsuperscript{148} Once the jury finds the defendant guilty, the trial continues into a penalty phase trial.\textsuperscript{149}

During the penalty phase, a directed scheme requires that the jury answer three questions with a “yes” or “no” in order to determine if the death penalty is appropriate.\textsuperscript{150} In order for the jury to answer “yes” to either of the first two questions, the jurors must agree unanimously; however, to answer “no” to either of the same questions, only ten of the jurors must agree.\textsuperscript{151} The first question that the jurors must find that the prosecution has proven beyond a reasonable doubt that the defendant will constitute a continued threat to society, and the second that the defendant actually caused or intended to kill the victim or another human being.\textsuperscript{152} If the juror finds the answer to both of these questions to be yes than the jury must decide whether or not there are any mitigating circumstances that would warrant a sentence of life in prison.\textsuperscript{153} If the jury unanimously answers the final question in the negative, the defendant shall be sentenced to death.\textsuperscript{154} In order for the jury to answer the final question yes, ten or more jurors must agree.\textsuperscript{155} The jury is not given any specific instructions explaining how it should look at the mitigating and aggravating circumstances.\textsuperscript{156} The answers to the interrogatories completed by the jury bind the court to the sentence required by the statute.\textsuperscript{157} As with all other capital sentencing schemes, the case is automatically reviewed by the Texas Court of Criminal Appeals.\textsuperscript{158}

Applying Texas’s directed scheme to Sam’s case beginning with the guilt phase of the trial, Texas allows for a defendant to be convicted of capital murder when he or she commits the killing under the broader definition of capital murder.\textsuperscript{159} Under Texas’s definition of capital murder, Sam would not be eligible for the death penalty since he did not intentionally commit murder during the commission of the burglary.\textsuperscript{160}

Analyzing the penalty phase of a directed statute scheme using the scenario of a first time offender, it would be much more difficult for the prosecution to prove the necessary elements in order to get a death sentence imposed. It is possible in some cases for the prosecution to be able to show a continued threat to society.\textsuperscript{161} It could prove it based on statements made by the defendant during the investigation of the crime, the defendant’s actions around the crime, or in an easier case, crimes.\textsuperscript{162} There are cases where the prosecution was able to place witnesses on the stand to attest to the fact that although the defendant had not been charged or convicted of

\textsuperscript{148} Tex. Penal Code Ann. § 19.03 (Vernon 2005).
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Bowers, supra note 16, at 1054.
\textsuperscript{158} Id.
\textsuperscript{159} Tex. Penal Code Ann. § 19.03 (Vernon 2005).
\textsuperscript{160} Id.
\textsuperscript{161} Texas Dept. of Corrections Death Row Roster http://www.tdcj.state.tx.us/stat/deathrow.htm.
\textsuperscript{162} Id.
any other crimes, he or she had on numerous occasions been involved in criminal activity. Since the interrogatories require that the prosecution prove beyond a reasonable doubt that the defendant would be a continued threat to society, the death sentence seems unlikely.

The directed scheme does not have an unfair bias against the first-time offender who is convicted under the felony murder rule. Since the statutory scheme does not provide for the double use of the felony that helped in the conviction, the bias does not exist. Further indication that this scheme eliminates the bias is that less than twenty-five percent of Texas’ death row population are first-time offenders convicted of felony murder.

Other Factors Creating Additional Bias

Although the different capital punishment schemes play a role in the number of first-time offenders that receive death sentences each year, there are a number of other reasons that contribute. The balanced and threshold schemes are both biased towards the first-time offender, when taken along with other factors, the first-time offender does not have a fair opportunity to request leniency. Since all capital punishment cases are affected by the capital jury’s bias towards death, it is not strange to believe that this same bias when seen in correlation with the biases of the statutes would cause large numbers of criminals to be on death row.

Voir Dire

During voir dire, it is not uncommon for each juror to be asked if they have an opposition to the death penalty. A juror can be challenged for cause if the juror is committed to voting against death. Courts have long recognized that they must give allow the jurors to be questioned on whether or not they can impose the death penalty if the facts so warrant it. In 1992, the Supreme Court held that if a defendant so requests, the judge must ask the jurors if they are absolutely inclined to impose the death penalty if the defendant is found guilty. Although the courts are allowed to ask jurors if they are opposed to sentencing the defendant to life in prison, the main consensus is that for the most part the questions asked during voir dire create juries that are prone to imposing the death penalty. The reason that the juries are prone to imposing the death penalty is that all jurors are asked if they are able to follow the law and could impose the death penalty if it was necessary, but are only asked the opposite question if so requested.

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163 Id.
165 Appendix B
170 Id.
171 Id.
175 Morgan, 504 U.S. at 719.
The Capital Jury Project

With all of the discussions among the courts about the capital jury, a group of researchers decided to look into the thought processes and the problems associated with the jurors. This project is called the Capital Jury Project (CJP). The CJP completed interviews with persons who served on capital juries within fourteen states. The interviewers asked each juror the same questions and compiled the data into usable sources for the states to use in making changes to their capital punishment statutes. The results from the compiled interviews show some disturbing problems within the process.

Juries

For most capital jurors, the feeling is that death is the necessary punishment unless the defendant can prove that he or she deserves leniency. A result of the voir dire process is that fifty-four percent of the jurors interviewed by the CJP presumed that death was the appropriate punishment at the beginning of the trial. The jurors felt that through the interrogatories and through the actions of the prosecution, death was the sentence that they were supposed to return, which is troubling for the defendants since they should have an equal chance to show that they deserve to be spared. Perhaps even more disturbing than the presumption of death being the correct punishment is the revelation that sixty-nine percent of jurors who voted for leniency in cases where the defendant received life in prison, they did so because they had lingering doubts as to whether or not the defendant was actually guilty. Perhaps the problem within the capital jury is less that the jury has a presumption that they should vote for death and more that the jurors are generally new to the legal arena. By definition, jurors are a collected group of laypersons and therefore are unfamiliar with the language and policies of the legal arena. Many jurors have never heard of mitigating and aggravating circumstances and do not completely understand what they are or how to use them. Moreover, courts give the jury instructions that make little to no sense to the jurors and the instructions themselves have little information that explains how the jurors are to do their jobs. Although a defendant has the right to be tried by a jury of his or her peers, the capital jury may be more of a disservice to the defendant than a bench trial.

Appellate Review

Unfortunately, after a defendant has gone through the trial and is at the point of having his or her case reviewed by the appellate courts, the process is just as problematic as the trial procedures. All states require that any case where the defendant receives a sentence of death

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177 Id. at 1078.
178 Id. at 1076.
179 Id. at 1102.
180 Id. at 1074.
181 Bowers, supra note 16, at 1074.
182 Id.
183 Id. at 1053.
184 Id.
185 Id.
automatically go through at least one appellate review. However, such review is different depending on the state in which the trial was completed. In states like Georgia, the defendant automatically receives a proportionality review to validate that a defendant who committed a similar crime to his or hers. Other states are not required to complete a proportionality review on every capital case. Perhaps one of the largest problems within the appellate review process is that no state requires that the mitigating or aggravating factors be enumerated when the sentence is not death. Therefore, there are no factual findings for the appellate courts to look to for guidance when determining if a defendant’s case places him closer to the leniency side of a decision.

Lack of Standards

Another issue in capital cases is that there are no set standards that determine against whom the prosecution will seek the death penalty and those whom they will not. Although prosecutors normally seek cases that they will win, there does not seem to be a set pattern dictating which defendants will have the death penalty sought against them or not. In a study conducted over a two-year period of time, research found that out of 1128 defendants that had committed a death eligible crime, 624 of those defendants were offered a plea bargain and spared the death penalty. Of the remaining cases that went to trial, more than fifty percent of the defendants received the death penalty. Without any specific standards to determine which defendants the prosecutor should pursue the death penalty and which ones they should not, the bias against the defendant in a trial will likely continue.

Solutions

Although researchers have and will probably always disagree on how the death penalty statutes should be revised in order to create the best way to administer capital punishment, there are definitely steps that can be taken today to eliminate many of the current issues. There is not a single possibility nor is there a single solution that will correct all of the issues within the system to everyone’s satisfaction. The focus in this paper will be on correcting the bias that faces a first time offender under the felony murder rule and aggravator, which is the aggravator that states that a defendant who committed the killing during the commission of, attempt to commit, or escape from a felony. There are three solutions to the bias against the first time offender that are discussed in more detail later. The first being to simply eliminate the felony murder rule, the second being to eliminate the statutory aggravator that allows for the defendant to be eligible for a death sentence, and the final is to completely get rid of the balancing and threshold schemes and move all states to a directed scheme.

187 Gregg, 428 U.S. at 166.
189 Bowers, supra note 16, at 1052.
190 McCord, supra note 27, at 40.
191 Id. at 36.
192 Id. at 38.
Eliminate the Felony Murder Rule

The first solution would be for all states to remove the felony murder rule from their first-degree/capital murder statutes. Considering that more than sixty percent of defendants have committed a felony along with the murder, the felony murder rule appears to be a necessary means of removing offenders from the streets.\textsuperscript{194} If the felony murder rule was eliminated from the statutes rather than the statutory aggravator, the states would have a more difficult time keeping offenders off the streets since the maximum punishment would go from death under the current scheme, to life in prison with the possibility of parole. The shift under this rule would then be that offenders who committed a felony and killed someone in the process would be allowed to be released back into society. Although taken together, the two create a bias against the first time offender, the felony murder rule that elevates their crime to the highest degree is not biased, as it allows for all offenders to be responsible for their actions.

Eliminate the Aggravator

Probably the fastest solution to the bias created by the double jeopardy under the felony murder rule and subsequent aggravator is to simply remove the aggravator from the statutes. The legislatures of the various states could simply repeal that portion of the capital punishment statutes.

There is a general consensus that there are some criminals who deserve the death penalty.\textsuperscript{195} In eliminating the felony murder aggravator, these criminals would not be any less likely to receive the death penalty. Under each statutory scheme there are a number of different aggravators that can be used in order to give a deserving criminal the death penalty. However, by eliminating the aggravator, the first-time offender convicted under the felony murder rule would have a less biased sentencing phase. Although each state has different aggravators in their statutes, they are all quite similar and are well-rounded enough to capture almost every scenario under which a defendant should receive the death penalty. Under the schemes analyzed, there are aggravators relating to premeditated killing, killing for financial gain, prior criminal record, killing of victims that are deserving of special attention, great risk others and the heinous, atrocious and cruel nature of the crime.\textsuperscript{196} The use of these aggravators would allow for many offenders to be placed on death row and would not completely eliminate the ability of prosecutors to place first-time offenders on death row, only that there are some first-time offenders who go into the system under such a bias that they are unable to overcome it. There are certainly offenders who have no prior criminal history who act in such a manner that they should be considered a danger to society.

Although most states have a heinous, atrocious and cruel (HAC) aggravator, no two legislatures have worded it exactly the same way.\textsuperscript{197} In the statutes analyzed, Florida worded the aggravator as heinous, atrocious, or cruel;\textsuperscript{198} whereas Georgia worded it as outrageously or wantonly vile, horrible or inhumane.\textsuperscript{199} Each state anticipates the usage of the aggravator in very similar situations. Generally, these aggravators have some sort of mention of torture or

\textsuperscript{194} McCord, \textit{supra} note 27, at 27.
\textsuperscript{195} Acker, \textit{supra} note 3, at 693.
\textsuperscript{197} \textit{Id.}
inhumane treatment of the victim within the statutory definition. The HAC aggravator is designed to capture the truly grotesque murders. One issue with using this aggravator is that the Supreme Court has found it to be vague and the jury instructions unable to give enough guidance to the jury to allow it to be properly applied.

Although there are still changes being made to the aggravators and corresponding jury instructions, there is still enough certainty in the use of these aggravators to correct the bias that is created in regards to the first-time offender, who is convicted under the felony murder rule.

**Move to a directed statute**

The second solution for the bias against first-time offenders is for the states to move to a directed scheme. Under a directed scheme, juries are “more coherent in their decision-making” and therefore create a better decision. By focusing the jury’s attention on whether or not the defendant is likely to be a continued threat to society, the statutes allow for a more concise and unbiased approach to the first-time offender. The ability of the prosecution to show that the defendant is a continued threat to society is not diminished, as is evident since there are first-time offenders on Texas’s death row. The directed statutes simply change the range of information that the jury considers in such a way as to make the process more streamlined and definitive.

One of the reasons that the directed statute is a good choice in order to eliminate the bias is also one of the reasons that opponents dislike the directed schemes. Opponents feel that the narrowing effect of the statutes discourage defendants from presenting mitigating evidence, by focusing the decision-making process on whether or not the prosecution proves the defendant is a continued threat to society. Although the directed statutes may discourage some mitigating evidence, in cases where the defendant does not believe the prosecution met its burden, there is certainly the opportunity for the defendant to show that they deserve the leniency of the jury. The jury has to make three decisions unanimously in order for the defendant to be sentenced to death. The final of those decisions is related to whether or not the defendant has shown mitigating circumstances that the jury believes should make the defendant ineligible for the death penalty. There are not any guidelines as to what mitigating evidence they can consider or what mitigating evidence the defense can present. Unlike the balancing scheme where the mitigating factors that the jury should consider are stated directly in the statute, the directed statutes have no such requirements.

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203 Id.
204 Id.
205 Id. at 1075-76.
206 Id.
207 Id.
208 Bowers, supra note 16, at 1076.
209 Id.
210 Id.
Conclusion

After the problems and solutions have been identified and analyzed, the best solution to eliminate the bias against the first-time offender convicted under the felony murder rule is to vacate the threshold and balancing schemes and adopt a directed scheme. The directed scheme allows for the conviction of first-time offenders for capital murder without passing the bias that is related to the statutory aggravators. Under Texas’ directed scheme, the state has less than fifty percent of their death row population being first-time offenders.\(^{213}\) Since it is possible for the first-time offender to have the death penalty imposed against him or her, there would not be an undue amount of death worthy offenders released back into society.

The other solutions, which are eliminating the felony murder rule or eliminating the aggravator relating to the commission of a felony, are not as viable as moving to the directed statute. Eliminating the felony murder rule would allow for a large percent of convicts to be released back into society.\(^{214}\) While eliminating the aggravator relating to the commission of a felony would end some of the bias, it would be more cumbersome for the court systems. The current aggravators available to the court system have issues in relation to the definitions within the statutes and the jury instructions.\(^{215}\)

In order to adequately protect the first-time offender who is convicted under the felony murder rule, all states should adopt a directed scheme.

\(^{213}\) Appendix B

\(^{214}\) Appendix A, B, C