NO PATH FORWARD: NEVADA’S DEATH PENALTY

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INTRODUCTION

In 2021, Nevada did not abolish the death penalty. This was not for lack of interest. The policing protests of 2020 brought renewed interest in ending symbols of racism and reforming criminal justice; the pandemic-related budget crisis meant legislators were looking for ways to cut costs.1 Abolishing the death penalty—an expensive punishment that historically and contemporarily reflect-

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ed racism—checked all these boxes. The assembly considered lengthy testimony on an abolition bill, A.B. 395, and passed the bill with unanimous support from assembly democrats. Key stakeholders in the senate had signaled support for the bill, or at least that they would not stand in its way.

But on the day before a key deadline in the senate, the governor issued a statement:

At this time, there is no path forward for Assembly Bill 395 this legislative session. I’ve been clear on my position that capital punishment should be sought and used less often, but I believe there are severe situations that warrant it. I understand there are those who will be disappointed by this outcome, however the process of determining which crimes are severe enough to warrant this punishment deserves thoughtful consideration.

Key legislators issued contemporaneous statements confirming the end of the abolition effort. The deadline passed; the bill was not enacted. Whether intentionally or not, the governor’s statement captures a dilemma posed by the death penalty: it is actually very difficult to decide which murders warrant the death penalty. All murders, in their own way, are heinous. How, then, to choose?

Testimony in support of the death penalty suggested an answer: we do not have to answer “how,” our district attorneys will choose, and will choose sparingly. The District Attorney of Elko County and President of the Nevada District Attorney’s Association explained, assuming every first-degree murder

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3 See Minutes of the Meeting of the Assembly Committee on Judiciary, 2021 Leg., 81st Sess. (Nv. 2021); see also Assembly Daily Journal, 2021 Leg., 81st Sess. 72 (Nv. 2021).

4 See Tabitha Mueller & Michelle Rindels, Mixed Signals from Governor, Election Considerations Blamed for Failure of Death Penalty Repeal Effort, NEV. INDEP. (May 23, 2021, 2:00 AM), https://thenevadaindependent.com/article/mixed-signals-from-governor-election-considerations-blamed-for-failure-of-death-penalty-repeal-effort [https://perma.cc/K3DT-ES8R ] (indicating that Senate Judiciary Committee Chairwoman “had appeared willing to give the bill a chance” and that “[a]t least one Republican lawmaker was a likely supporter of the bill . . . ”).


7 Compare Bill History, A.B. 395 with Nev. J. Standing R. 14.3.3.
could qualify for death, “that is not the end of the line.” Rather, “prosecutors[] also weigh the aggravating factors against those mitigating factors in making our decision to seek the death penalty.” The District Attorney of Clark County explained that his office filed fewer death penalty cases than his predecessor, and that his office sought “the death penalty in killings involving children where extreme torture or mutilation is involved or where there are multiple decedents.” The District Attorney of Washoe County explained that his office had sought the death penalty in only two cases over sixteen years, “the worst of the worst,” representing “just 1 percent of the murder cases prosecuted in that same time frame.”

Though each district attorney’s office offered that they had a process for choosing the worst of the worst, they did not suggest that they were applying the same standards. Each office chose their own worst of the worst. This kind of freedom suggests a lack of standards.

How to choose the worst of the worst is actually a very old problem. So old, in fact, that Nevada’s existing death penalty already represents an attempt to craft a system that seeks and uses the death penalty less often, saving it only for the “severe situations that warrant it.” Following the United States Supreme Court’s abolition of capital punishment in Furman, and its reinstatement in Gregg, Nevada adopted its current death penalty regime specifically to address the problems suggested by the governor. Nevada’s new death penalty would have a “limited number of aggravating circumstances” that would be “very defined.”

If Nevada already fixed its death penalty, why do we again need to narrow it to the most “severe situations”? There are three contributing factors.

First, in the forty-five years since Gregg, the Supreme Court has retreated from policing aggravating circumstances. The Supreme Court’s jurisprudence offers little constraint on aggravating circumstances as the federal courts are providing less and less review of state death sentences.

Second, since Nevada reinstated the death penalty after Gregg, the Nevada legislature has done the opposite of constraining the death penalty. On six oc-

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8 Minutes of the Meeting of the Assembly Committee on Judiciary, 2021 Leg., 81st Sess. 32–33 (Nv. 2021) (statement of Tyler Ingram, Dist. Att’y of Elko Cnty).
9 Id.
10 Id. at 34–35 (statement of Steven B. Wolfson, Dist. Att’y of Clark Cnty).
11 Id. at 35–36 (statement of Christopher Hicks, Dist. Att’y of Washoe Cnty).
12 Press Release, Steve Sisolak, supra note 5.
conscript, the legislature added an aggravating circumstance,\textsuperscript{14} while on another four occasions, the legislature broadened the scope of existing aggravating circumstances.\textsuperscript{15} This expansion undermines the protection promised by \textit{Gregg} and by Nevada’s original 1977 death penalty. These expansions demonstrate Nevada has been trending towards more death penalty, not less.

Third, where once constitutional and statutory law constrained the availability of a death sentence, now only prosecutorial discretion limits which murders qualify for the death penalty. Specifically, the effects of the first two factors correlated and helped cause a rise in the importance of prosecutorial discretion. Thus, the problem originally identified by \textit{Furman} remains unsolved, and will remain so as long as the death penalty is an available punishment.

This history shows that tinkering will not solve the death penalty’s problems. Nevada already tinkered, and its current statutory scheme is worse than it was before. The legislature should finish what it started in 2021 and abolish the death penalty.

This Article will proceed in two parts. Part I will describe Nevada’s three death penalty regimes: the pre-\textit{Furman} death penalty, the first (failed) revision, and the current death penalty. Part II will describe the Supreme Court’s backing away from its aggravating circumstance jurisprudence, Nevada’s ever-expanding aggravating circumstances, and the rise of prosecutorial discretion.

\section{\textit{Furman}, \textit{Gregg}, and \textit{Nevada: Guided Jury Discretion}}

In abolishing the death penalty, \textit{Furman} v. \textit{Georgia} was a lightning rod for the debate about the death penalty in the United States\textsuperscript{16} that framed all future debate and legal structure moving forward.\textsuperscript{17} \textit{Furman} identified several problems rendering the death penalty unconstitutional.

The Supreme Court identified two interrelated problems that bear emphasis: randomness and discretion. Four of the plurality justices were worried about how randomly the death penalty was applied, and the lack of direction given to sentencers.\textsuperscript{18} That is, no principle distinguished between those who received death sentences and those who did not. Indeed, actual death sentences were declining as populations and death-eligible crime rates were rising, exac-

\begin{footnotesize}
\textsuperscript{16} See \textit{Furman}, 408 U.S. at 238.
\textsuperscript{17} See generally EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 247–440 (2013).
\textsuperscript{18} \textit{Furman}, 408 U.S. at 247 (Douglas, J., concurring); \textit{id.} at 291, 293–95 (Brennan, J., concurring); \textit{id.} at 309–10 (Stewart, J., concurring); \textit{id.} at 311–12 (White, J., concurring); \textit{id.} at 364–66 (Marshall, J., concurring).
\end{footnotesize}
erbating the seeming randomness. Some Justices expressed concern that the death penalty was wholly in the discretion of judges or juries, whose conscious and unconscious biases went unchecked. Many of the Justices noted that the seeming randomness was troublingly explained by race or other improper factors.

A. Nevada’s Death Penalty Before Furman

Nevada’s death penalty presented all the problems the Furman plurality was concerned with. By 1972, Nevada’s death penalty was almost nonexistent: between 1924, when Nevada performed the world’s first lethal gas execution, and 1972, Nevada executed thirty-one people. But in 1972, it had been more than a decade since the most recent execution. Nevada only executed two people in the 1960s, one person in 1960, and one in 1961. In the 1950s, the state only executed eight people.

This was not for lack of death-eligible offenses. All first-degree murders were eligible for the death penalty. But only some would actually receive a death sentence. The process differed depending on the factfinder.

For jury trials, in addition to determining whether the defendant was guilty of murder, the jury had to designate whether it was first- or second-degree murder. If the jury designated first-degree murder, then it also needed to

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19 Mandery, supra note 17, at 62–63; see, e.g., Furman, 408 U.S. at 291, 293, 297 (Brennan, J., concurring); see also Stuart Banner, The Death Penalty: An American History 208–09, 214 (2003) (describing decline and its causes).
20 Furman, 408 U.S. at 253 (Douglas, J., concurring); id. at 297–98 (Brennan, J., concurring); id. at 311, 314 (White, J., concurring).
21 Furman, 408 U.S. at 253 (Douglas, J., concurring); id. at 310 (Stewart, J., concurring); id. at 364–65 (Marshall, J., concurring).
24 Nevada Gas Chamber, supra note 22.
25 Id.
27 Id. at 468 (Nev. Rev. Stat. § 200.030(4)).
28 Id. at 467–68 (Nev. Rev. Stat. § 200.030(2)–(4)).
29 Id. at 467 (Nev. Rev. Stat. § 200.030(2)).
choose between three punishment options: life with the possibility of parole, life without the possibility of parole, or death.\(^{30}\) Though, if the defendant committed the murder while already serving a prison sentence, the jury had to choose between death or life without the possibility of parole.\(^{31}\)

In some instances, the court chose the punishment.\(^{32}\) If the guilty plea was for anything below first-degree murder, a district judge would determine the sentence.\(^{33}\) But for a “confession in open court without a jury, or upon a plea of guilty without specification of a degree,” the Nevada Supreme Court would appoint two district court judges to join the original district court judge to examine witnesses and “determine the degree of the crime and give sentence accordingly.”\(^{34}\) For first-degree murder, the panel had the same three sentencing options for punishment.\(^{35}\)

A couple of points about this scheme are worth emphasizing. First, though the process differentiates between two degrees of murder, they remained one crime. In \textit{Howard v. Sheriff of Clark County}, the Nevada Supreme Court explained:

> Statutes which provide different punishments for first and second degree murder do not create two separate and distinct crimes—murder in the first degree and murder in the second degree—which must be pleaded accordingly. It is permissible to simply charge murder and leave the degree to be stated by the jury.\(^{36}\)

On a number of occasions, the Nevada Supreme Court explained that “murder in the first degree” refers to a legal conclusion.\(^{37}\) The jury (or judge) chose the degree of murder; the jury (or judge) then also determined, if a first-degree murder, whether to impose a death sentence.\(^{38}\) Prosecutors had limited discretion under this scheme: they could choose between first-degree murder or a lesser included offense, but it was common for prosecutors to charge open murder and leave the discretion to the jury or judicial panel.\(^{39}\)

\(^{30}\) \textit{Id.} at 468 (NEV. REV. STAT. § 200.030(4)).

\(^{31}\) \textit{Id.}

\(^{32}\) 1967 Nev. Stat. 467–68 (NEV. REV. STAT. § 200.030(3)).

\(^{33}\) \textit{Id.}

\(^{34}\) \textit{Id.} The process of having three judges determine degree and sentence was adopted in 1959; see \textit{Rainsberger v. State}, 81 Nev. 92, 95, 399 P.2d 129, 131 (1965) (describing change in legislation); see also 1959 Nev. Stat. 781 (S.B. 353).

\(^{35}\) 1967 Nev. Stat. 467-68 (NEV. REV. STAT. § 200.030(4)).


Discretion is the second important point: which individuals received death sentences was wholly in the discretion of the jury or judicial panel.\textsuperscript{40} And nothing guided this discretion; Nevada law provided no standards for the jury to apply.\textsuperscript{41} Nothing about this scheme protected against decisionmakers considering improper factors like race or socioeconomic status. And where the sentencer’s discretion was great, the prosecutor’s was limited. Prosecutors could charge a lesser-included offense such as second-degree murder or manslaughter, but for the death penalty, it was the sentencer’s discretion that mattered. This matters because \textit{Furman}, which effectively framed the future of the death penalty, did not discuss prosecutorial discretion, but it also did not really have occasion to do so. Under schemes like Nevada’s, prosecutorial discretion played little to no role in the death decision.

\textbf{B. Furman and Nevada’s Failed Death Penalty}

Following the abolition of the death penalty in \textit{Furman}, Nevada’s legislature quickly adopted a new scheme. Senate Bill 545, which eventually became Nevada’s first post-\textit{Furman} death penalty scheme, initially divided murder into three categories: capital murder, first-degree murder, and second-degree murder.\textsuperscript{42} Under this scheme, capital murder included four categories: killing of a peace officer, killing by a person under a life sentence, contract killing, and “willful and premeditated” murder.\textsuperscript{43} All capital murders were to be punished by death.\textsuperscript{44} The senate modified this language slightly, but passed it materially unaltered.\textsuperscript{45}

However, by the time the bill reached the assembly judiciary committee, there were concerns. The death-penalty offenses were “too all encompassing.”\textsuperscript{46} There was a concern that the bill passed judgment on prior jury verdicts, implying “that every time in the past when a jury gave a life sentence they were wrong.”\textsuperscript{47} Additionally, in making the vast majority of murders death-eligible, there was a concern that if the jury “felt that a person would get death they would be very likely to change 1st to 2nd degree.”\textsuperscript{48} Finally, in making so many murders subject to the death penalty, there was a concern that S.B. 545 would, ultimately, be unconstitutional.\textsuperscript{49}

\textsuperscript{40} 1967 Nev. Stat. 467–68 (\textit{NEV. REV. STAT.} § 200.030(4)).
\textsuperscript{41} See generally id.
\textsuperscript{42} S.B. 545, Sec. 5 (Nev. 57th Sess. 1973) (as introduced).
\textsuperscript{43} S.B. 545, Sec. 5 (Nev. 57th Sess. 1973) (as introduced).
\textsuperscript{44} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
So, the assembly judiciary committee modified the bill. It added more categories of capital murder, but removed “willful, deliberate, and premeditated” murder from the categories of capital murder and placed it back to first-degree murder.\textsuperscript{50} After adding legislative findings, this amended bill was approved by the assembly and sent back to the senate.\textsuperscript{51} With minor amendments, this was the version that passed.\textsuperscript{52}

This death penalty scheme addressed a number of the concerns expressed in *Furman*. In mandating the death penalty for certain categories of offenses, the scheme reduced the randomness inherent in Nevada’s previous discretionary scheme. No longer would juries or judicial panels elect to impose the death penalty as an act of discretion; a finding of guilt for capital murder would necessarily carry the penalty.\textsuperscript{53} No longer would the difference between death and non-death murders be an answerless question—the statute defined the difference.\textsuperscript{54}

Like the pre-*Furman* regime, prosecutorial discretion was relatively unimportant. Though prosecutors continued to have the discretion to charge second-degree murder instead of a greater offense, prosecutors lacked the discretion to choose between capital or first-degree murder.\textsuperscript{55} First-degree murder was not necessarily a lesser-included offense of capital murder; rather, the distinctions between capital and first-degree murder were distinctions of type.\textsuperscript{56}

Nevada’s new death penalty scheme, however, did not last long.

\textbf{C. Gregg and the End of the Supreme Court’s Moratorium}

In 1976, the Supreme Court revisited the death penalty in five sibling cases.\textsuperscript{57} The Supreme Court declared two state schemes unconstitutional but upheld the other three.\textsuperscript{58}

The two unconstitutional schemes—North Carolina’s and Louisiana’s—suffered the same defect: if the defendant was guilty of a capital offense, the jury was required to impose a sentence of death.\textsuperscript{59} These schemes failed “to provide a constitutionally tolerable response to *Furman*’s rejection of unbridled

\begin{itemize}
\item \textsuperscript{50} S.B. 545, 2d Reprint, Sec. 5 (Nev. 57th Sess. 1973).
\item \textsuperscript{51} See S.B. 545 3d Reprint (Nev. 57th Sess. 1973); see also J. of Assemb. 1224–25 (57th Sess. 1973).
\item \textsuperscript{53} See 1973 Nev. Stat. 1803–04.
\item \textsuperscript{54} 1973 Nev. Stat. 1803.
\item \textsuperscript{55} Id.
\item \textsuperscript{58} See Woodson, 428 U.S. at 280–81; Roberts, 428 U.S. at 325–26; Gregg, 428 U.S. at 154–56; Proffitt, 428 U.S. at 242–43; Jurek, 428 U.S. at 262–63.
\item \textsuperscript{59} Woodson, 428 U.S. at 286–87; Roberts, 428 U.S. at 331.
\end{itemize}
jury discretion in the imposition of capital sentences” because “American juries have persistently refused to convict a significant portion of persons charged with first-degree murder of that offense under mandatory death penalty statutes.”60 The mandatory schemes also failed “to allow the particularized consideration of relevant aspects of character and record of each convicted defendant before the imposition upon him of a sentence of death.”61

The three schemes upheld by the Supreme Court also shared certain features that guided the Nevada legislature in adopting its next capital sentencing scheme. First, murder by itself was insufficient to make someone eligible for the death penalty.62 Thus, only some—not all—murders could lead to a death sentence. Second, after the defendant was found guilty of the offense, there was some procedure by which the defendant could seek individualized consideration to argue for a sentence less than death.63

The Supreme Court explicitly rejected the argument that prosecutorial discretion posed a fundamental defect to these schemes. Counsel for the defendants argued “that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them.”64 The Court disagreed because this kind of discretion “may remove a defendant from consideration as a candidate for the death penalty,” and “[n]othing in any of our cases suggests that the decision to afford an individual mercy violates the Constitution.”65 Rather,

Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.66

As noted above, however, Furman really did not have a need to speak to prosecutorial discretion because under schemes like Nevada’s, prosecutorial discretion played a relatively small role. Nonetheless, Gregg disavowed any notion that courts would regulate prosecutorial discretion in charging (or not charging) death-eligible offenses.

In response to these new Supreme Court decisions, the Nevada Supreme Court had no difficulty in concluding Nevada’s scheme was unconstitutional.67

60 Woodson, 428 U.S. at 302.
61 Woodson, 428 U.S. at 303; Roberts, 428 U.S. at 333–34.
64 Gregg, 428 U.S. at 199.
65 Id.
66 Id. (emphasis added).
D. Nevada’s “Narrowed” Death Penalty

In 1977, Senate Bill 220 became the next Nevada death-penalty scheme.\textsuperscript{68} The bill’s proponents understood \textit{Furman} and \textit{Gregg} to require “clear directions for the jury” and “some limited number of aggravating circumstances.”\textsuperscript{69} Larry Hicks, then Washoe County District Attorney and President of the Nevada District Attorneys’ Association, noted “[w]hat the Supreme Court has said in this regard is that before you impose the death penalty, there must be very defined circumstances which would support it.”\textsuperscript{70} Any factor “not written in the books of the State[] can create a problem on appeal.”\textsuperscript{71}

With these considerations in mind, the Nevada legislature approved a scheme in which first-degree murder constituted three categories: murder (a) perpetrated by means of poison, lying in wait, torture, or any other kind of willful, deliberate, and premeditated killing; (b) committed in the perpetration of rape, kidnapping, arson, robbery, or sexual molestation of a child; or (c) committed to avoid or prevent a lawful arrest.\textsuperscript{72} Anyone convicted of murder of the first degree would be eligible for the death penalty if at least one aggravating circumstance was found and any aggravating circumstances were not outweighed by mitigating circumstances.\textsuperscript{73} The legislature adopted nine aggravating circumstances:

1. The murder was committed by a person under sentence of imprisonment.
2. The murder was committed by a person who was previously convicted of another murder or of a felony involving the use or threat of violence to the person of another.
3. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.
4. The murder was committed while the person 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, forcible rape, arson in the first degree, burglary or kidnapping in the first degree.
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
6. The murder was committed by a person, for himself or another, for the purpose of receiving money or any other thing of monetary value.

\textsuperscript{68} See generally 1977 NEV. STAT. 1541–1546 (S.B. 220).
\textsuperscript{70} \textit{Id.} at Page Three.
\textsuperscript{72} 1977 NEV. STAT. 1541 (NEV. REV. STAT. § 200.030(2)).
\textsuperscript{73} 1977 NEV. STAT. 1542 (NEV. REV. STAT. § 200.030(4)(a)).
7. The murder was committed upon a peace officer or fireman who was killed while engaged in performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or fireman. [...] 

8. The murder involved torture, depravity of mind or the mutilation of the victim.

9. The murder was committed upon one or more persons at random and without apparent motive. 74

There are two important features of this scheme. First, the number of aggravating circumstances was limited. 75 As the bill’s proponents suggested, only some murders would be aggravated. Second, this scheme created a previously nonexistent role for prosecutorial discretion. The pre-\textit{Furman} scheme did not allow prosecutors to choose which first-degree murders were death-penalty offenses because the sentencer chose; the mandatory scheme did not allow prosecutors to choose between capital murder and first-degree murder at all because they were distinct offenses. Under this scheme, however, unaggravated first-degree murder was a de facto lesser included offense of aggravated first-degree murder. Prosecutors could, for the first time in Nevada, decide which first-degree murders were death penalty cases. Thus, this scheme opened up prosecutorial charging discretion to the death penalty in a way that neither of the two previous schemes allowed.

II. THE DECLINE OF NARROWING AND THE RISE OF PROSECUTORIAL DISCRETION

If the problem \textit{Furman} posed was arbitrariness and capriciousness in the death penalty, \textit{Gregg} left open a critical hole. In declining to consider prosecutorial discretion in its analysis, \textit{Gregg} left the possibility that prosecutorial-charging decisions could become the source of the very same arbitrariness and capriciousness bemoaned by \textit{Furman}. But so long as aggravating circumstances narrowed the availability of the death penalty, prosecutorial discretion would itself be constrained.

But two trends have weakened this critical protection: the Supreme Court has backed away from its narrowing jurisprudence at the same time that Nevada has expanded the number of aggravating circumstances.

\footnote{1977 \textbf{Nev. Stat.} \textbf{1542–43}.}  
\footnote{Though it would be reasonable to question whether this scheme actually narrowed the number of first-degree murders.}
A. The Supreme Court’s Retreat from Regulating Aggravating Circumstances

Following Gregg and its sibling cases, the Supreme Court considered a challenge to a specific aggravating circumstance in Godfrey v. Georgia.76 Explaining its prior decisions, the Court noted, “A capital sentencing scheme must . . . provide a ‘meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.’”77 The Court added, “[t]his means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.”78 But, as in Gregg, the Court’s emphasis was on tailoring the discretion of the sentencer.79

With this backdrop, the Court examined Georgia’s aggravating circumstance that the offence was “outrageously or wantonly vile, horrible and inhuman.”80 This, the Court held, was too standardless.81 The aggravating circumstance implied no “inherent restraint on the arbitrary and capricious infliction” of a death sentence and a “person of ordinary sensibility could fairly characterize almost every murder as ‘outrageously or wantonly vile, horrible and inhuman.’”82

Godfrey, like Gregg and Furman, strongly condemned arbitrariness of application of the death penalty. The Court repeated an earlier pronouncement that “it ‘is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.’”83 And, in concluding that Godfrey’s death sentence was unconstitutional, the Court explained, “[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.”84

In Zant v. Stephens, the Court elaborated on its holding in Godfrey, explaining that the Court disapproved of the “outrageously or wantonly vile, horrible and inhuman” aggravating circumstances because it “failed to narrow the class of persons eligible for the death penalty.”85 Summarizing its precedent, the Court further explained, “statutory aggravating circumstances play a consti-

76 446 U.S. 420 (1980).
77 Id. at 427 (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976); (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972))).
78 Id. at 428.
79 Id.
80 Id. at 429.
81 Id.
82 Id. at 428–29
83 Id. at 433 (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977)).
84 Id. at 433.
tutionally necessary function at the stage of legislative definition: they circumcribe the class of persons eligible for the death penalty.”

The Court again considered a challenge to an aggravating circumstance in Maynard v. Cartwright. The challenged aggravating circumstance targeted offenses that were “especially heinous, atrocious, or cruel.” In explaining the test for the constitutionality of the circumstance, the Court noted this was an Eighth Amendment “vagueness” challenge, asserting that the “challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of openended discretion which was held invalid in Furman v. Georgia.” The Court again emphasized the importance of “channeling and limiting” the “sentencer’s discretion in imposing the death penalty” as “a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.” Because the “especially heinous, atrocious, or cruel” circumstance did not guide the jury’s discretion, the Court held it unconstitutional.

But following Maynard, the Supreme Court began retreating from its own narrowing jurisprudence in the 1990s. So in Walton v. Arizona, the Court accepted the “especially heinous, atrocious, or cruel” aggravating circumstance because Arizona, unlike Georgia in Godfrey or Oklahoma in Maynard, had adopted a narrowing construction. The Arizona Supreme Court construed the provision to require that “the perpetrator inflicts mental anguish or physical abuse before the victim’s death,” including “a victim’s uncertainty as to his ultimate fate.” The Court would presume that judge-sentencers “are applying the narrower definition,” and that “a state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined . . . .” The narrowing construction was enough, the Court held.

Walton is important for two reasons. First, it recognized and approved a specific workaround to an aggravating circumstance challenge. The state court simply needed to adopt a narrowing construction; the Supreme Court, in turn, would assume the sentencing judge applied the construction, and then further assume that, even if the sentencing judge did not apply the construction, the state appellate court did. Second, the Court accepted a narrowing construction

86 Id. at 878.
88 Id. at 359.
89 Maynard, 486 U.S. at 361–62.
90 Id. at 362.
91 Id. at 363–64.
93 Id. at 654.
94 Id. at 653–54.
95 Id. at 655–56.
notwithstanding evidence that the construction was not actually narrowing, which the four-justice dissent chronicled.\textsuperscript{96}

The Court repeated this analysis to uphold aggravating circumstances in \textit{Lewis v. Jeffers} and \textit{Arafe v. Creech}, both cases in which the sentence was a judge.\textsuperscript{97} In 2005, the Court expanded this workaround by including jury-sentencing. In \textit{Bell v. Cone}, the Court assumed that the Tennessee Supreme Court cured any defect on appeal by applying a narrowing construction—notwithstanding the fact that the jury had not done so.\textsuperscript{98}

Though \textit{Godfrey} and its progeny remain good law, their reach has been diminished. In \textit{Tulalapa v. California}, the Court summarized the “two requirements” an aggravating circumstance must meet: “[f]irst, the circumstance may not apply to every defendant convicted of murder” and “[s]econd, the aggravating circumstance may not be unconstitutionally vague.”\textsuperscript{99} These requirements leave much open.\textsuperscript{100} Under the first, an aggravating circumstance would be upheld even if most murders would qualify, as Justice Blackmun pointed out in his \textit{Walton} dissent.\textsuperscript{101} Under the second, the availability of appellate courts to “cure” the error through broad narrowing constructions renders the requirement near nugatory. Moreover, this jurisprudence does nothing to address a scheme of aggravating circumstances holistically. By looking to individual aggravating circumstances only, the Supreme Court left open the possibility that the system as a whole might not narrow.\textsuperscript{102}

Without an effective mechanism to challenge aggravating circumstances, there is nothing to prevent the arbitrary and capricious application of the death penalty bemoaned by \textit{Furman}. In Nevada (and many other states), this has been exacerbated by the unidirectional expansion of aggravating circumstances.

\textsuperscript{96} \textit{Id.} at 692–99 (Blackmun, J., dissenting, with Brennan, Marshall, Stevens, JJ.).


\textsuperscript{98} \textit{Bell v. Cone}, 543 U.S. 447, 455–60 (2005). Bell was a case governed by the deferential standards of 28 U.S.C. 2254(d). \textit{See Bell}, 543 U.S. at 452. However, the Supreme Court explicitly indicated that it would have reached the same result “absent such a presumption in the state court’s favor . . . .” \textit{Id.} at 456.

\textsuperscript{99} 512 U.S. 967, 972 (1994).

\textsuperscript{100} Justice Alito acknowledged as much in 2008 when he dissented in \textit{Kennedy v. Louisiana}, 554 U.S. 407 (2008), to point out that states had aggravating factors for rape that were “far more definite and clear cut than aggravating factors we have found to be adequate in murder cases.” \textit{Id.} at 464 (citing \textit{Creech}, 507 U.S. at 471; \textit{Walton}, 497 U.S. at 646).

\textsuperscript{101} \textit{Id.} at 692–99 (Blackmun, J., dissenting, with Brennan, Marshall, Stevens, JJ.).

\textsuperscript{102} In \textit{Hidalgo v. Arizona}, petitioner Hidalgo asked the Supreme Court to grant a writ of certiorari on the question of whether Arizona’s plethora of aggravating circumstances, under which 98% of murders were death eligible, was unconstitutional. No. 17-251, 138 S. Ct. 1054, 1056 (2018) (Statement of Breyer, J., respecting denial of certiorari, with Ginsburg, Sotomayor, Kagan, J.). The Supreme Court denied certiorari, but Justice Breyer issued a statement regarding denial, indicating interest in the issue, which Justices Ginsburg, Sotomayor and Kagan joined. \textit{Id.} at 1057.
B. Nevada’s Expanding Aggravating Circumstances

Nevada began with nine aggravating circumstances. This statute has been amended sixteen times. With two exceptions (and excluding stylistic changes), every amendment has expanded the scope of aggravating circumstances. Six times, the Nevada legislature added an aggravating circumstance. Four times, the Nevada legislature amended the statute to broaden an existing aggravating circumstance. On the two occasions that the legislature reduced the scope of an aggravating circumstance, the legislature did so to make an aggravating circumstance consistent with Supreme Court precedent.

Individually, the changes appear consistent with the goal of identifying the most heinous offenses. The two substantive changes in the 1980s, for example, broadened existing factors so that not only would murder committed during a forcible rape or burglary be aggravated, but all murder committed during a sexual assault or home invasion would be aggravated. In the case of home invasion, a proponent of the bill explained that “the prosecution would not have to prove the person entered with a specific intent” as would be required for burglary.

In 1993, the legislature considered adding two aggravating circumstances, one for multiple murders and one for victims under the age of fourteen. One assemblyman expressed concern about creating “preferred victims in several different categories” and how “the trend seemed to be expanding,” thus “it was important to consider the appropriateness of making all the different classifications.” Another assemblyman stated a related concern, “that by aggravating, we’re adding to the aggravation statutes, that we may in some way be jeopardizing our death penalty statute at some point, by expanding it.”

112 Id. at 24–25.
ly, the 1993 legislature adopted the multiple murder aggravating circumstance, but declined to adopt the circumstance for victims under age fourteen.\footnote{113}{See 1993 Nev. Stat. 77.}

But the very next session, the legislature revisited the issue and added not just that aggravating circumstance, but another one for hate crimes, and expanded the definition of “peace officer.”\footnote{114}{1995 Nev. Stat. 2–3; 1995 Nev. Stat. 138–39.} In considering whether to add an aggravating circumstance where the victim was under the age of fourteen, proponents made much of “Willie Blockson,” who “killed a sleeping 12 year-old boy.”\footnote{115}{Minutes of the S. Comm. on Judiciary, 1995 Leg., 68th Sess., at 7 (Nev. Jan. 17, 1995).} “Blockson escaped the death penalty because there [were] no circumstances that fit the list . . . .”\footnote{116}{Id. It is unclear that no aggravating circumstance applied to Blockson’s crime. In a later hearing, a legislator explained that Blockson committed the murder “because [he] was afraid that [the victim] was going to tell that the defendant had molested him.” S. Journal, 68th Sess., at 70 (Nev. 1995). However, by 1995, the Nevada Supreme Court had already interpreted the avoid lawful arrest aggravating circumstance as encompassing witness killing. See, e.g., Cavanaugh v. State, 729 P.2d 481, 486 (Nev. 1986).} This circumstance also passed.

The 1995 legislature also sought to ensure that “peace officer” included investigators for the Attorney General or district attorneys, and parole and probation officers.\footnote{117}{Minutes of the S. Comm. on Judiciary, 1995 Leg., 68th Sess., at 3 (Nev. Mar. 7, 1995).} A proponent of the bill from Parole and Probation explained that, although no one from parole and probation had ever been lost, he wanted to “send a clear message to the crooks . . . which will cause some of these offenders to think twice . . . you are dealing with a law enforcement official.”\footnote{118}{Id. at 5.} One legislator expressed concern about going “too far down the slippery slope” of adding “categories that have no rational basis.”\footnote{119}{Id. at 3–4.} Specifically, the “definition of peace officer” could become “so broad that it will not withstand constitutional challenges.”\footnote{120}{Id. at 5.} Ultimately, they relied on language from another part of the Nevada Revised Statutes.\footnote{121}{Minutes of the S. Comm. on Judiciary, 1995 Leg., 68th Sess., at 11 (Nev. Mar. 14, 1995).} The hate crimes aggravating circumstance was later added to this bill, with almost no discussion.\footnote{122}{Id. at 12–13.}

In the following session, in 1997, the Nevada legislature responded to a Nevada Supreme Court decision that had invalidated a sexual assault conviction because the State had failed to prove that the acts occurred while the victim was alive.\footnote{123}{Minutes of the S. Comm. on Judiciary, 1995 Leg., 68th Sess., at 11 (Nev. Mar. 14, 1995).} A proponent of the bill from the Washoe County District Attorney’s Office explained that the related “aggravation found by the jury in sup-
port of the death penalty became defective because of the finding.”  124 This was an incorrect recitation of the Nevada Supreme Court’s decision because, in fact, the jury had not found the sexual assault aggravating circumstance in that case.  125 Despite the fact that the aggravating factor was not before the Nevada Supreme Court, the representatives of the district attorney’s office explained that the Nevada Supreme Court decision was an “unplug or undo” of an aggravating circumstance.  126 So, the legislature added another aggravating circumstance for nonconsensual sexual penetration.  127 During this session, the legislature also clarified that the prior murder or violent felony aggravating circumstance referred to any murder or violent felony that occurred prior to the penalty hearing, not just prior to the capital offense.  128

In 1999, the legislature again added an aggravating circumstance, this time for murder “committed on the property of a public or private school . . . .”  129 In 2003, the legislature added an aggravating circumstance for terrorism.  130 In 2017, the hate crime aggravating circumstance was reworded to add murder because of the gender identity or expression of the victim.  131

Each of these changes to the list of aggravating circumstances, by themselves, reflect a purported desire to identify the worst kinds of murder, and ensure that those worst murders are eligible for death. But in the aggregate, these changes are broad. Not only did the original nine aggravating circumstances become sixteen circumstances, but many of the individual circumstances became broader. It is difficult to imagine any murder that would not qualify for at least one aggravating circumstance, bringing Nevada’s murder statute back to where it was in 1972: any murder could be capital murder.


125 Doyle, 921 P.2d at 916 (affirming the “aggravating circumstances found by the jury, namely, murder committed by a person under sentence of imprisonment, murder committed by a person engaged in the commission of or an attempt to commit kidnapping, and murder committed to avoid or prevent lawful arrest . . . .”).


130 2003 Nev. Stat. 2947. This aggravating circumstance was passed as part of a package of legislation in response to Sept. 11, 2001. Speaker of the Assembly Richard Perkins explained, “I requested this legislation to provide Nevada law enforcement and other public safety agencies with the necessary tools to combat terrorist activities in our state, and to send a message to tourists coming to Nevada that we are a safe destination.” Minutes of the Assemb. Comm. on Judiciary, 2003 Leg., 72nd Sess., (Nev. Mar. 19, 2003), http://search.leg.state.nv.us/isyquery/01976eb8-7f64-4580-91fd-d0078a9ed451/doc/2244.html [https://perma.cc/P GU2-G6ZF].

C. The Rise of Prosecutorial Discretion

The two trends described above—the Supreme Court’s backing away from regulating aggravating circumstances and the Nevada legislature’s expansion of aggravating circumstances—have fundamentally changed the relationship between prosecutorial discretion and the death penalty. In a way unprecedented in Nevada history, prosecutors play the most important role in determining which murders are death-penalty murders.

This was inevitable. As described by influential legal scholar William J. Stuntz, “prosecutorial discretion leads legislatures to expand criminal law’s net, and discretion plus legislative supremacy prevents courts from reining in that tendency.” Legislators are incentivized to make it easier for prosecutors to secure convictions; they are also incentivized to take popular symbolic stands by creating “new crimes not to solve [a] problem, but to give voters the sense that they are doing something about it.” Prosecutors, in turn, are incentivized to win cases. Prosecutors and legislators, thus, form an easy alliance because their incentives align: creating new crimes or creating overlapping crimes helps both their goals. There is no effective counterweight to these interests, so legislators “tend to see criminal law as a one-way ratchet.”

The result is broader criminal liability, more overlapping offenses, and more specifically defined offenses, which make it easier for prosecutors to prosecute more defendants and to induce more of those defendants to plead guilty. But these general trends pose problems of policy. Vast prosecutorial discretion “necessarily undermines, and maybe destroys, criminal law’s ability to send normatively attractive messages, to signal [to] potential violators that this or that behavior is bad and ought to be condemned.” Coercing pleas “evad[e] the adjudication system,” making mistakes more likely. Vesting so much discretion with prosecutors shifts decisions of criminalization away from the legislature to prosecutors and creates a risk of disparate treatment.

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133 Id. at 531–32.
134 Id. at 534.
135 Id. at 547.
137 Stuntz, supra note 132, at 569.
138 Id. at 572; see also Nat’l Ass’n of Crim. Def. Lawyers, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It 8 (2018) (“As trials and hearings decline, so too does government accountability.”).
This is evident in Nevada’s death penalty. There are more aggravating circumstances, meaning more people are eligible for death; the aggravating circumstances overlap, meaning prosecutors have the discretion to charge multiple aggravating circumstances for the same conduct; the newer aggravating circumstances are more specific, meaning there is less room for defendants to challenge them. Each of these changes provide more power and discretion to prosecutors by creating stronger incentives for defendants to accept a plea agreement.

This discretion presents a fatal flaw to the death penalty. First, all the problems identified by *Furman* are present in Nevada’s death penalty. Between 1990 (when data is readily available) and 2018, there have been roughly 5,100 murders in Nevada.¹⁴⁰ But there are currently only sixty-eight people on Nevada’s death row.¹⁴¹ Even applying the version of the statute in 1990, substantially more than sixty-eight people should be on death row. To use more recent data: between 2014 and 2018 there were 1,049 murders in Nevada.¹⁴² Given the broad reach of Nevada’s death penalty statute, the vast majority of these murders would be death-eligible. Yet, during this same time, only six death sentences were imposed.¹⁴³ The sixty-eight people currently on death row represent an extremely small percentage of the offenders who were eligible for death. This discrepancy itself suggests randomness. Of these sixty-eight, more than half are people of color.¹⁴⁴ And, in more than forty years of Nevada’s current death penalty, only twelve people have been executed; only one was executed without waiving his appeals.¹⁴⁵ Nevada’s death penalty today is the same as its 1972 predecessor: sparingly imposed and without principled explanation for distinguishing the murders leading to a death sentence from those that do not. The randomness and discrimination concerns that motivated the Supreme Court in *Furman* remain.


¹⁴⁴ Id.

But, second, this discretion undermines policy justifications for the death penalty. Studies have already shown, generally, that the death penalty does not deter crime.\textsuperscript{146} However, it is obvious that a death sentence sparingly sought cannot deter: any would-be offender rationally weighing potential punishment would know the high improbability of receiving a death sentence, and even higher improbability of having a death sentence imposed.

Less obviously, prosecutorial discretion also undermines the other penological purpose of the death penalty: retribution.\textsuperscript{147} Retribution reflects a concern that the guilty—all the guilty—should be punished in proportion to the severity of their crime.\textsuperscript{148} But Nevada’s death penalty undermines this goal by providing for death, not in proportion to the severity of the crime, but in proportion to the prosecutor’s exercise of discretion. The legislature has graded capital offenses: prosecutors, though, undercut this grading by exercising their discretion—in almost all murder cases—to not seek death. This may not seem like a problem: prosecutors showing mercy in the vast majority of cases suggests a proper place for prosecutorial discretion; and neither prosecutors nor abolitionists want to see more death penalty cases. But this shows how far from retribution Nevada’s death penalty has gone. It suggests that mercy to the majority justifies randomness for the rest. A system that routinely relies on discretion is not a system supporting retribution because a capriciousness of mercy necessarily means a capriciousness of convictions.

Nevada’s death penalty has moved from a system of arbitrary jury discretion on the death penalty to arbitrary prosecutorial discretion.

CONCLUSION

During Nevada’s 2021 legislative session, prosecutors defended the death penalty. The District Attorney of Elko County, and President of the Nevada District Attorneys Association, explained that his office had pursued death twice, with a likely third on the way, but the three “represent cases that are unthinkable, barbaric, and devastating for our entire community.”\textsuperscript{149} In response


to the possibility that every murder could be aggravated, he explained “that is not the end of the line,” rather, “[w]e, as prosecutors, also weigh the aggravating factors against those mitigating factors in making our decision to seek the death penalty.”\textsuperscript{150}

The District Attorney of Clark County noted that the “criminal justice system relies upon graduated punishment, and if the appropriate punishment for a single murder is life without parole, how do you punish a person who commits multiple murders?”\textsuperscript{151} He explained that, under his leadership, his office had filed “far fewer death notices than other Clark County district attorneys” and that he believed the penalty “should be reserved for the very rare and extreme circumstances.”\textsuperscript{152} The District Attorney of Washoe County explained that his office only sought the death penalty “in just 1 percent of the murder cases prosecuted in that same time frame,” the cases that “represent the worst of the worst.”\textsuperscript{153} Then, after describing two cases in detail, he concluded, “[s]imply put, some crimes are so heinous and inherently wrong that they demand strict penalties, up to death.”\textsuperscript{154} A deputy district attorney from Clark County added that “if [elected district attorneys] are judicious in deciding which cases to seek death in, there is an automatic and immediate cost[] savings to the judicial system . . . .”\textsuperscript{155}

The message was simple: there are heinous crimes—the worst of the worst—and prosecutors appropriately exercise their discretion to choose which qualify. Nevada’s history shows that both parts of this message should give policymakers pause.

Nevada’s current death penalty is the result of an attempt, in 1977, to define the worst of the worst. And, in doing so, to remedy the problems of randomness in the death penalty’s application. This required narrow and objective criteria limiting the availability of the death penalty. But, nearly forty-five years of one-sided tinkering has resulted in a death penalty that is effectively as broad as Nevada’s pre-	extit{Furman} death penalty. Nevada’s death penalty is no longer narrowly defined. Nearly every murder could be a death penalty case. This is instructive for those seeking to preserve Nevada’s death penalty yet reduce its availability. Nevada’s experience suggests a narrowed death penalty grows.

But policymakers should also take stock of prosecutorial discretion in death penalty decisions. Though most murders are death-eligible, prosecutors only actually seek death in a small percentage of cases. Under existing law there is no rule or principle—other than prosecutorial discretion—that distinguishes the death penalty cases from the non-death penalty cases. Without a

\textsuperscript{150} Id. at 33.
\textsuperscript{151} Id. at 34.
\textsuperscript{152} Id. at 35.
\textsuperscript{153} Id. at 35–36.
\textsuperscript{154} Id. at 36.
\textsuperscript{155} Id. at 37–38.
rule of law to distinguish the worst of the worst from the rest, prosecutors are effectively unconstrained in the exercise of their discretion. This, too, should give policymakers pause. But more fundamentally, lawmakers should ask themselves whether it is appropriate for prosecutors—not legislators—to decide what constitutes death-eligible conduct. “Discretionary justice too often amounts to discriminatory justice.”\textsuperscript{156} Nevada’s death penalty numbers—with a disproportionate number of people of color represented—suggest that Nevada’s death penalty reflects discriminatory justice.

Additionally, there are good reasons to question the wisdom of how Nevada prosecutors exercise their discretion. A 2013 study concluded that Clark County was ranked fifth in the entire United States for how many individuals it had sent to death row.\textsuperscript{157} Washoe County’s practices, in 1994, were the subject of an equal protection challenge because “the Washoe County District Attorney has sought the death penalty in eighty percent of cases involving a black defendant with no prior felony convictions whereas it [had] not sought the death penalty in eighty percent of the cases involving a white defendant with a prior felony conviction.”\textsuperscript{158} And, though both district attorneys lauded their restraint in front of the legislature, both neglected to mention that their offices continue to defend the death sentences of their predecessors.

These problems are intractable: narrowing the death penalty is not a permanent solution because it will simply be broadened with time as it has been over the forty-five years since Nevada previously narrowed the death penalty. Prosecutorial discretion is not a permanent solution either because it is prosecutorial discretion that gave us the death row we have today. Abolishing the death penalty is the only feasible solution to the problems identified by \textit{Furman}.

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In 2021, Nevada did not abolish the death penalty. But, on a technical level, it was not the governor who ended the push to abolish the death penalty. A press release, after all, has no legal or legislative effect. Rather, the death penalty repeal failed because of Joint Standing Rule 14.3.3, which put a time limit on when a bill passed from one house, was required to be acted upon in the committee in the second house.\textsuperscript{159} If a bill was not acted on, it would quietly fail. For Assembly Bill 395, this meant that the Senate Judiciary Committee needed to have heard and approved abolition of the death penalty by May 14, 2021. Whether to hear a bill is at the discretion of the committee’s chair.\textsuperscript{160} In the 81st

\textsuperscript{157} RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL 29 (2013).
\textsuperscript{158} Lane v. State, 881 P.2d 1358, 1362 (Nev. 1994). The Nevada Supreme Court rejected this challenge because it did not find the study to be sufficiently detailed. \textit{Id.} at 1363.
\textsuperscript{159} See Nev. J. Standing R. 14.3.3 (2021).
\textsuperscript{160} Nev. S. Standing R. 53.10 (2021).
Legislative Session, the Senate Judiciary Committee was chaired by a deputy district attorney.\footnote{See, e.g., Tabitha Mueller et al., \textit{Senator Governing Fate of Death Penalty Bill Points to Governor’s Office, but Recently Expressed Support for Abolition}, \textit{The Nevada Independent} (Apr. 29, 2021, 9:00 AM), https://thenevadaindependent.com/article/senator-governing-fate-of-death-penalty-bill-points-to-governors-office [https://perma.cc/P59N-8K9S].}

It was the act of a prosecutor, exercising her discretion, that kept the death penalty in Nevada.