AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice/Punishments

**Hidalgo v. Arizona, \_\_\_ U.S. \_\_\_** (2018)

*Abel Daniel Hidalgo was convicted of murder and sentenced to death for the murders of Michael Cordova and Jose Rojas. He as paid $1,000 to murder Cordova and murdered Rojas to eliminate an eyewitness. Hidalgo shot each victim five times to make sure they died. During the sentencing phase of his trial, Hidalgo claimed that the Arizona death penalty statute unconstitutionally failed to narrow the persons eligible to be sentenced. The aggravating factors that statute listed were a previous conviction of a crime subject to life imprisonment or death, a previous conviction of a serious crime, presenting a grave risk of death to bystanders, paying for the crime or receiving money for the crime, committing the offense in “an especially heinous, cruel, or depraved manner,” committing the offense when on release from jail or probation, committing more than one homicides, murdering a person under 15, over 70 or an unborn child in the womb, and knowingly murdering a police officer. In support of his claim, Hidalgo noted that that Arizona juries found at least one aggravating offenses in almost all capital trials. The trial court rejected this argument and that decision was affirmed by the Arizona Supreme Court. Hidalgo appealed to the Supreme Court of the United States.*

 *The Supreme Court unanimously denied certiorari. Justice Stephen Breyer, however, issued a separate statement, joined by the other more liberal members of the court, declaring that Hidalgo had raised a serious constitutional question, but that the legal issues were not sufficiently developed for the justices to resolve at this time. Why does Breyer find the Arizona death penalty statute constitutionally problematic? Is the failure of any of the more conservative justices to join this statement an indication that they are not troubled by Arizona law? Why might that be the case? Only four votes are necessary for the Supreme Court to hear a case. Do you think this statement is a sincere effort to raise an issue or a strategic decision that litigating the issue at this time would result in a defeat for the liberal position? Based on the facts presented in the first paragraph, how “bad” of a murder was this? How did you reach your conclusion?*

Statement of JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I2893a37b83e611e79822eed485bc7ca1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I2893a37b83e611e79822eed485bc7ca1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), JUSTICE [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I2893a37b83e611e79822eed485bc7ca1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and JUSTICE [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I2893a37b83e611e79822eed485bc7ca1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) join, respecting the denial of certiorari.

. . . .

“Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision.” . . . . In respect to the first, the “eligibility decision,” our precedent imposes what is commonly known as the “narrowing” requirement. “To pass constitutional muster, a capital sentencing scheme must ‘genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.’” To satisfy the “narrowing requirement,” a state *legislature* must adopt “*statutory factors* which determine death eligibility” and thereby “limit the class of murderers to which the death penalty may be applied.” The second aspect of the capital decisionmaking process, the “selection decision,” determines whether a death-eligible defendant should actually receive the death penalty.  In making this individualized determination, the jury must “consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.” . . .

Our precedent makes clear that the legislature may satisfy the “narrowing function ... in either of ... two ways.”  First, “[t]he legislature may itself *narrow the definition of capital offenses*....”  Second, “the legislature may more broadly define capital offenses,” but set forth by statute “aggravating circumstances” which will permit the “jury ... at the penalty phase” to make “findings” that will narrow the legislature's broad definition of the capital offense. . . .

Consider the first way a state legislature may satisfy the Constitution's narrowing requirement—namely, by enacting a narrow statutory definition of capital murder. Some States have followed this approach. For example, . . .  this Court upheld Louisiana's use of this method because it concluded that the State's capital murder statute narrowed the class of intentional murderers to a smaller class of death-eligible murderers.  Specifically, Louisiana's capital murder statute was limited to cases in which “‘the offender’” not only had “‘specific intent to kill or to inflict great bodily harm’” but also (1) targeted one of three specifically enumerated categories of victims (children, “‘a fireman or peace officer engaged’ ” in “ ‘lawful duties,’” or multiple victims); or (2) was “ ‘engaged in the perpetration or attempted perpetration of’” certain other serious specified crimes; or (3) was a murder-for-hire. . . .

. . . Arizona's capital murder statute makes all first-degree murderers eligible for death and defines first-degree murder broadly to include all premeditated homicides along with felony murder based on 22 possible predicate felony offenses. Perhaps not surprisingly, Arizona did not argue below and does not suggest now that the State's first-degree murder statute alone can meet the Eighth Amendment's narrowing requirement.

Because Arizona law broadly defines capital murder, the State has sought to comply with the narrowing requirement through the second method—namely, by setting forth statutory “aggravating circumstances” designed to permit the “jury ... at the penalty phase” to make “findings” that will narrow the legislature's broad definition of the capital offense.  The Arizona Legislature has set forth a list of statutory aggravating factors that the jury must consider “in determining whether to impose a sentence of death.”  And under Arizona law, a person convicted of first-degree murder may be sentenced to death only if at least one of these aggravating factors is present.

In this case, the petitioner sought an evidentiary hearing to establish through witnesses, expert testimony, and documentary evidence that the statutory aggravating circumstances . . .  apply to virtually every first-degree murder case in the State. . . . In his request for a hearing, the petitioner pointed to, among other things, evidence he obtained through public records requests regarding more than 860 first-degree murder cases in Maricopa County (the county where he was charged) between 2002 and 2012. As the Arizona Supreme Court noted, this evidence indicated that “one or more aggravating circumstances were present in 856 of 866” cases examined. In other words, about 98% of first-degree murder defendants were eligible for the death penalty. . . .

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Despite assuming that the aggravating circumstances fail to materially narrow the class of death-eligible first-degree murder defendants, the Arizona Supreme Court nevertheless concluded that the State's death penalty system meets the Constitution's narrowing requirement. It said that the petitioner was “mistaken ... insofar as he focuses only on the legislatively defined aggravating circumstances” because use of those circumstances “is not the only way in which Arizona's sentencing scheme narrows the class of persons eligible for death. The Arizona Supreme Court mentioned five other ways it thought Arizona's death penalty system meets the Constitution's narrowing requirement. They were: (1) Arizona's first-degree murder statute; (2) the “identified aggravating circumstances”; (3) the fact that the State must prove “one or more” of the “alleged aggravating circumstances” “beyond a reasonable doubt”; (4) the existence of “mandatory appellate review”; and (5) Arizona's statutory provisions applicable to “individualized sentencing determinations” through consideration of “mitigating circumstances.”

We have considered (and rejected) the first of these other ways since Arizona's first-degree murder statute does not “provid[e] for categorical narrowing at the definition stage.”  What about the second way—that is, narrowing by means of the “statutory aggravators”? Again, the Arizona Supreme Court assumed that those factors do not, in fact, narrow the class of death-eligible first-degree murder defendants. Instead it assumed that “Hidalgo is right in his factual assertion that nearly every charged first degree murder could support at least one aggravating circumstance.” . . . Moreover, the third and fourth narrowing methods the Arizona Supreme Court invoked are basically beside the point—they do not show the necessary *legislative*narrowing that our precedents require. And the final other way (individualized sentencing determinations) concerns an entirely different capital punishment requirement—the selection decision—which is not at issue in this case.

Finally, the Arizona Supreme Court seemed to suggest that *prosecutors*may perform the narrowing requirement by choosing to ask for the death penalty only in those cases in which a particularly wrongful first-degree murder is at issue However, that reasoning cannot be squared with this Court's precedent—precedent that insists that States perform the “constitutionally necessary” narrowing function “at the stage of *legislative* definition.”

Although, in my view, the Arizona Supreme Court misapplied our precedent, I agree with the Court's decision today to deny certiorari. In support of his Eighth Amendment challenge, the petitioner points to empirical evidence about Arizona's capital sentence system that suggests about 98% of first-degree murder defendants in Arizona were eligible for the death penalty. That evidence is unrebutted. It points to a possible constitutional problem. And it was assumed to be true by the state courts below. Evidence of this kind warrants careful attention and evaluation. However, in this case, the opportunity to develop the record through an evidentiary hearing was denied. As a result, the record as it has come to us is limited and largely unexamined by experts and the courts below in the first instance. We do not have evidence, for instance, as to the nature of the 866 cases (perhaps they implicate only a small number of aggravating factors). Nor has it been fully explained whether and to what extent an empirical study would be relevant to resolving the constitutional question presented. Capital defendants may have the opportunity to fully develop a record with the kind of empirical evidence that the petitioner points to here. And the issue presented in this petition will be better suited for certiorari with such a record.