LOCKETT SYMPOSIUM

LOCKETT AS IT WAS, IS NOW, AND EVER ~~SHALL~~ SHOULD BE

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Recognizing that the sentencing phase of a capital trial is a constitutionally indispensable part of the process of inflicting a death sentence,[1] the *Lockett* Court sought to give states "the clearest guidance" that limiting the range of mitigating factors which may be considered by the sentencer in a capital case was incompatible with the Eighth and Fourteenth Amendments.[2] In other words, a capital sentencing statute must not prevent the sentencer from considering any aspect of the defendant's character and record or circumstances of the offense as an independent mitigating factor.[3] It was through that lens that the Supreme Court struck down Ohio's capital sentencing statute.[4]

Lockett not only made clear what was unacceptable in capital sentencing statutes (limiting the range of mitigating factors to be considered)[5] but also heralded the significance and breadth of mitigating

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1. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).
2. Lockett v. Ohio, 438 U.S. 586, 602 (1978).
3. *Id*. at 605.
4. *Id*. at 608-09.
5. *Id*.

factors that must be affirmatively and independently considered by jurors, courts and counsel; the inverse correlation between mitigating factors and disproportionate sentencing; and the interrelationship between mitigating factors and narrowing—all in an effort to provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not."[6]

I. THE AFFIRMATIVE MANDATE OF *LOCKETT*

To ensure proportionality, states and the federal government must "limit the class of murderers to which the death penalty may be applied."[7] Specifically, "capital punishment must 'be limited to those defendants who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.'"[8] .

Given the need for treating each defendant in a capital case with the fundamental degree of respect due the uniqueness of the individual, *Lockett* held that the Eighth and Fourteenth Amendments require capital sentencing statutes to permit the "individualized consideration of mitigating factors" unique to the defendant.[9] In recognition of the fundamental respect for humanity, the *Lockett* Court explained that,

> a statute that prevents the sentencer in all capital cases from *giving independent mitigating weight* to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.[10]

While insisting upon a fine precision in the process—a process obviously having huge implications for all capital case participants—the Court left to the states the manner in which they would comply with *Lockett's* mandate.[11] Pursuant to that mandate, for example, we now understand that affording the fundamental degree of respect to the capital defendant (in recognition of his or her uniqueness) requires counsel to conduct sufficient investigation and engage in sufficient preparation to be

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

7. Brown v. Sanders, 546 U.S. 212, 216 (2006).

8. Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (internal quotation marks omitted) (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)). *See* Kansas v. Marsh, 548 U.S. 163, 206 (2006) (the death penalty is "reserved for 'the worst of the worst'").

9. *Lockett*, 438 U.S. at 605-06.

10. *Id*. at 605 (emphasis added).

11. *Id*. at 607-08.

able to present and explain the significance of all available mitigating evidence.[12] Complementary obligations accrue to other case participants, including the trial judge[13] and appellate courts,[14] and prosecutors.[15]

II. THE THREAT TO FULFILLMENT OF *LOCKETT'S* MANDATE BY "DOUBLE-EDGED" EVIDENCE

Post-*Lockett*, recognition of the breadth and essence of mitigation for its independent mitigating weight has evolved. That evolution, however, has coincided with clamorous efforts by states (and courts) to threaten and actually use "double-edged" aspects of mitigation evidence, imperiling the fulfillment of *Lockett's* individualized mitigating weight mandate through the transmogrification of some mitigating evidence (diminishing the defendant's moral culpability) into something not contemplated by *Lockett*. Rather, "double-edged" evidence is used to enhance the likelihood that jurors will consider and apply it as aggravation, *e.g.*, establishing future dangerousness, and through that process of mental evaluation, create the unacceptable likelihood and risk that jurors are rendered unable to consider and apply that same evidence for its independent mitigating weight. Thus, *Lockett's* mandate is undermined, increasing the risk that a defendant will receive a death sentence despite insufficient culpability. Viewing that risk intolerable as to capital defendants within two classes (those with intellectual disability and 16 and 17-year-olds—each identified by their shared characteristics

12. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 522-24 (2003); Williams v. Taylor, 529 U.S. 362, 393 (2000) ("[I]t is undisputed that Williams had a right—indeed, a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer").

13. Trial judges, for example, must give sufficient special instructions to ensure that jurors give independent mitigating weight to mitigation evidence.

14. Appellate courts, in providing heightened meaningful appellate review, must step into the shoes of jurors, and, in assessing prejudice, must, "'consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against the evidence in aggravation.'" Sears v. Upton, 561 U.S. 945, 955–56 (2010) (quoting Porter v. McCollum, 558 U.S. 30, 41 (2009) (per curiam)); *Wiggins*, 539 U.S. at 534 (courts must "reweigh the evidence in aggravation against the totality of available mitigating evidence"). *See Williams*, 529 U.S. at 397-98 ("[The state court's] prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation.").

15. For example, the general requirement that capital sentencing statutes permit the individualized consideration of mitigating factors unique to the defendant and *Lockett's* more specific mandate that the significance and breadth of mitigating factors be affirmatively and independently considered have implications for prosecutors' discovery obligations.

reflecting insufficient culpability)—the Supreme Court intervened in *Atkins v. Virginia*[16] and *Roper v. Simmons*[17] to categorically exempt those classes from the death penalty.

Despite the Court having put *Atkins* and *Roper* defendants beyond the grasp of the states for purposes of capital punishment, states continue efforts to characterize mitigating evidence as "double-edged" in order to justify counsel's failure to investigate, present and explain that evidence to jurors. To this end, state courts have held that "mitigation evidence, by nature, often is a 'two-edged sword' that, with respect to a jury, may be as capable of damaging a case as it is of aiding it."[18] Such evidence has been widely recognized by courts as a "two-edged sword."[19] But, is the stated threat of "double-edged" evidence real?

The sleight of hand underlying the threatened use of "double-edged" evidence should be clear. First, double-edged evidence does not increase a capital defendant's culpability. In other words, the fact that there could be "double-edged" aspects of mitigation evidence doesn't speak to a defendant's *increased culpability*. Second, a defendant's mitigating evidence demonstrating lesser culpability should not be the basis of their subsequent execution.[20] Third, in light of liberally construed relevancy standards, to what extent is "double-edged" evidence of a kind the prosecution is not already entitled to present through, for example, the future dangerousness special issues, as in Oregon and Texas,[21] and through other states' aggravating factors and circumstances? Little to none.

In Oregon, for example, courts hold that the admissibility of evidence presented to establish future dangerousness is evaluated under the

16. 536 U.S. 304, 317-21 (2002).

17. 543 U.S. 551, 578 (2005).

18. Montez v. Czerniak, 322 P.3d 487, 506 (Or. 2014) (citations omitted).

19. Similarly, prosecutors argue that "virtually any potentially 'mitigating' evidence carries with it the risk of *adversely* affecting a defendant." Brief on the Merits of Respondent on Review at 48, Montez v. Czerniak, 330 P.3d 595 (2014).

20. *See, e.g.*, Beam v. Paskett, 3 F.3d 1301, 1310 (9th Cir. 1993), *overruled on other grounds by* Lambright v. Stewart, 191 F.3d 1181, 1185 (9th Cir. 1999) ("It should go without saying that victims of incest may not be further punished by making their misfortune the basis for their subsequent execution.").

21. The Texas capital sentencing statutes provide that a jury at the penalty phase of a capital trial first considers whether there is a probability that the defendant will be a future threat to society. TEX. CODE CRIM. PROC. ANN., art. 37.071, §(2)(b)(1) (West 2017). In parallel fashion, the Oregon capital sentencing statute requires a capital sentencing jury to determine whether, beyond a reasonable doubt, "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." OR. REV. STAT. § 163.150(1)(b)(B) (2018).

relevancy standard, which is described as a "low bar."[22] The prosecution, therefore, is allowed to present a broad range of evidence including, but not limited to, evidence of a defendant's entire criminal history, unadjudicated and uncharged bad acts,[23] and even evidence of acts for which the defendant has been acquitted.[24] In other words, because of the expansive reach of the future dangerousness special issue, there is very little "double-edged" evidence that the prosecution is not already allowed to present.

This suggests that, as seen in the Supreme Court's early capital jurisprudence, the inquiry should not focus upon the double-edged nature of the proposed evidence but instead on whether the prosecution already presented that or similar cumulative evidence. For example, in *Burger v. Kemp*, the Court held that counsel's strategic decision to conduct a limited investigation and not present additional *mitigating evidence that contained a substantial amount of aggravating evidence, which was "not disclosed" at trial* was reasonable under the circumstances.[25] Similarly, in *Darden v. Wainwright*, the Court held that petitioner's newly proposed mitigation evidence (that petitioner was a nonviolent man) *would have opened the door for the State to rebut with evidence of prior convictions, which "had not previously been admitted in evidence*."[26] Thus, in both *Burger* and *Darden*, the Court found that the double-edged nature of the newly proposed mitigation evidence would have opened the door to aggravation evidence that had not previously been admitted into evidence. The Court did not, however, find that the double-edged nature of the newly proposed mitigation evidence reflected increased culpability by the defendant. This suggests that any failure to investigate, present, and explain mitigating evidence consistent with *Lockett's* mandate must be assessed from the perspective of whether or not that mitigating evidence could elicit aggravating evidence that is not cumulative to evidence previously admitted.

22. State v. Langley, 363 Or. 482, 511 (2018) ("In terms of evidentiary admissibility, that standard represents a 'low bar'[.]") (citing State v. Davis, 261 P.3d 1197, 1205 (Or. 2011)).

23. *See, e.g.*, State v. Smith 791 P.2d 836, 852 (Or. 1990).

24. *See, e.g.*, State v. Williams 912 P.2d 364, 371 (Or. 1996), *cert. den.*, 519 U.S. 854(1996) (citing to State v. Smith, 532 P.2d 9, 10 (Or. 1975)) (acquittal alone, though it may lessen the probative value of evidence of other crime, does not render it inadmissible); Dowling v. United States, 493 U.S. 342, 343-44 (1990) (neither the Double Jeopardy Clause nor the Due Process Clause of the federal Constitution barred the use of evidence relating to an alleged crime that the defendant previously had been acquitted of committing).

25. 483 U.S. 776, 793 (1987).

26. 477 U.S. 168, 186 (1986) (emphasis added).

III. SPECIAL JURY INSTRUCTIONS AS A MEANS TO FULFILL *LOCKETT'S* MANDATE

In its post-*Lockett* reckoning, in addition to identifying the significance and breadth of mitigating factors, and given the manner of compliance with *Lockett's* mandate being left to the states, the Court opted to rely upon special jury instructions[27] to ensure that jurors would properly give independent mitigating weight to mitigating factors unique to the defendant (such as a defendant's intellectual disability).[28] The Court reaffirmed the importance of special instructions in 2007, noting that "[s]pecial instructions are necessary when the jury could not otherwise give *meaningful effect* to a defendant's mitigating evidence."[29]

Failure to provide sufficient special instructions allowing jurors to reliably give meaningful independent mitigating weight to evidence diminishing defendant's moral culpability creates an unacceptable likelihood and risk that a death sentence will be imposed in spite of factors calling for a less severe penalty.[30] Consistent with *Lockett's* mandate that jurors give independent consideration to a defendant's mitigating evidence, counsel is obliged to request special instructions that both encapsulate the mitigating evidence and do so in a manner giving that evidence its independent mitigating weight. The extent to which state capital sentencing statutes (or trial court action) fails to provide for sufficient special instructions to ensure jurors give independent mitigating weight to mitigation evidence suggests that the statute is vulnerable to either a facial or as-applied constitutional challenge.

Despite the reliance upon special instructions to ensure the fulfillment of *Lockett's* mandate, within a matter of 13 years after *Penry*, the Court was faced with the reality that it could not trust that evidence of intellectual disability would be given its independent mitigating weight.

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27. Penry v. Lynaugh, 492 U.S. 302, 328 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002) (finding that the absence of special jury instructions informing jurors that it could consider and give effect to Penry's evidence of mental retardation and abused background required a remand for resentencing pursuant to *Lockett*, "so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'").

28. *See, e.g.*, *Penry*, 492 U.S. at 337 ("It is clear that mental retardation has long been regarded as a factor that may diminish an individual's culpability for a criminal act.").

29. Abdul-Kabir v. Quarterman, 550 U.S. 233, 253 n.14 (2007).

30. *See* Graham v. Collins, 506 U.S. 461, 475 (1990) (acknowledging that a "constitutional defect lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer[,]" occurring not only when a jury is "precluded from even considering certain types of mitigating evidence[,]" as in *Lockett*, *Eddings*, *Skipper* and *Hitchcock*, but also when, as in *Penry*, "the defendant's evidence [is] placed before the sentencer but the sentencer [has] no reliable means of giving mitigating effect to that evidence").

Instead, the unacceptable likelihood was that, *e.g.*, intellectual disability evidence clearly demonstrating lesser culpability was being used as a "two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury."[31]

IV. CATEGORICAL EXEMPTIONS AS A MEANS TO FULFILL *LOCKETT'S* MANDATE

The Court's categorical exemption of certain classes of offenders from the death penalty is based in part on the unacceptable likelihood and risk that state capital penalty sentencing statutes and jurors will not give adequate weight to those defendants' diminished culpability in the face of the brutality of their crimes.[32] Beyond the categorical exemption extended to those with intellectual disability in *Atkins*, in discussing the need for a categorical bar against executing 16 and 17-year-old offenders, the Court was also concerned that "[i]n some cases a defendant's youth may even be counted against him."[33] Jurors' ability to give independent mitigating weight to the mitigating arguments based on a defendant's youth and attendant characteristics was impermissibly at risk when that mitigation was subject to being overpowered as a matter of course through use of the very factors central to mitigating arguments of the attendant characteristics of the youth. In short, the Court noted that there was an unacceptable likelihood that jurors would be unable to give independent mitigating weight to defendants' youth (and its attendant characteristics), resulting in a disproportionate sentence.

Lockett not only foreshadowed presently-existing categorical exemptions but similarly foreshadows possible future categorical exemptions. For example, based on the science of brain maturation and developmental psychology, the youthfulness and attendant characteristics of defendants 18 through 20 years of age are indistinguishable in

31. *Atkins*, 536 U.S. at 321. *See also*, *Penry*, 492 U.S. at 324 (noting that a defendant's intellectual disability "may diminish his blameworthiness for his crime even as it indicates that there is a probability that he *will be dangerous in the future*.") (emphasis added).

32. Roper v. Simmons, 543 U.S. 551, 572-73 (2005) ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime could overpower mitigating arguments based on youth as a matter of course[.]").

33. *Id*. at 573. Simmons was 17 years old and 5 months at the time of the commission of the charged murder. The prosecutor used Simmons's youth as an aggravating factor, blatantly urging jurors to ignore the mitigating weight of youth and instead using it to condemn Simmons to death. *Id*. at 558 ("Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.").

neurological development and functioning from the 16 and 17-year-old defendants the *Roper* Court categorically exempted from the death penalty due to their insufficient culpability.[34] Likewise, the youthfulness and attendant characteristics of the still-developing brain of a defendant under 21 years of age presents the same unacceptable likelihood (as in the case of a 16 and 17-year-old) that the brutality or cold-blooded nature of a particular crime would overpower mitigating arguments based on youth as a matter of course.[35] Further, the youthfulness and attendant characteristics of a defendant under 21 years of age are often not given their independent mitigating weight as required by *Lockett*, instead being used as "double-edged" evidence, thus increasing the likelihood and the risk that these defendants will be sentenced to death despite insufficient culpability.[36]

Similarly, the insufficient culpability of defendants with the prenatally established, immutable condition of Fetal Alcohol Spectrum Disorder (FASD) is congruent with the classes of defendants categorically exempt from the death penalty by way of *Atkins* and *Roper*.[37] Indeed, the mitigating value of the prenatally established, immutable condition of FASD presents the same unacceptable likelihood and risk (as present in the case of a defendant with intellectual disability or a 16 and 17-year-old) that the brutality or cold-blooded nature of a particular crime would overpower mitigating arguments as a matter of course.[38] Further, the

34. *See* Commonwealth v. Bredhold, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 14-CR-161, 12 (Fayette [Kentucky] Circuit Court Div. 7, 8/1/2017); Commonwealth v. Smith, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 15-CR-584-002 (Fayette [Kentucky] Circuit Court, 9/6/2017); and Commonwealth v. Diaz, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, 15-CR-584-001, (Fayette [Kentucky] Circuit Court, 9/6/2017). After having held pre-trial evidentiary hearings, the Kentucky Circuit Court held it unconstitutional to sentence to death individuals "under twenty-one years of age at the time of their offense." The state of Kentucky appealed the Circuit Court's order. The cases were transferred to the Kentucky Supreme Court where briefing is scheduled to conclude on 10/12/2018, and amicus curiae appearances by 17 organizations have been authorized. *See*, Docket, Kentucky v. Bredhold, 2017-SC-000436 (Ky.), available at: https://appellate.kycourts.net/SC/SCDockets/CaseDetails.aspx?cn=2017SC000436 (last accessed Oct. 10, 2018).

35. *Id*.

36. *Id*. A number of cases seeking the categorical exemption of youth from capital punishment have been made, are pending, or are in a state of preparation. *See*, *e.g*., *Bredhold*, *supra* note 34; U.S. v. Fell, Case No. 5:01-CR-00012, Donald Fell's Motion for an order Categorically Exempting Him from the Death Penalty Because He was Twenty Years Old at the Time of the Alleged Capitals Crimes (7/3/2018 D.Vt.) (issue moot given the case having been resolved through settlement on 9/28/2018); and *Guzek v. Kelly, Supt. of the Oregon State Penitentiary*, Marion County No. 17CV08248 (challenge to be filed by the author in 2019 in the context of an amended petition for post-conviction relief).

37. *See* Trevino v. Davis, 861 F.3d 545, 549-50 (5th Cir. 2017).

38. *Id*. at 550-51.

mitigating value of the evidence associated with FASD is often not given its independent mitigating weight as required by *Lockett*, instead being used as "double-edged" evidence and thus increasing the likelihood and the risk that these classes of defendants will be sentenced to death despite insufficient culpability.[39]

The same mitigation impediments identified in *Atkins* and *Roper* exist in relation to the mitigation evidence in these classes of capital defendants. Thus, trial participants—jurors, courts, prosecutors, and defense counsel accused of breach of duty—cannot be trusted to fulfill their obligations to give that evidence its independent mitigating weight. Categorical exemptions are indicated where the state and trial participants fail to protect and ensure the viability of *Lockett's* mandate, those failures creating the unacceptable likelihood and risk that a death sentence will be imposed in spite of factors calling for a less severe penalty.

V. IMPLICATIONS OF SHIFTING NARROWING FROM LEGISLATIVE DETERMINATION TO JUROR SENTENCING FINDINGS

State legislatures in *Lockett's* time generally provided narrow statutory definitions of capital murder as a means of satisfying the requirement that capital sentencing schemes genuinely narrow the class of persons eligible for the death penalty.[40] It was in that environment that *Lockett* mandated that jurors give independent mitigating weight to

39. *See, e.g.*, Appellee's Brief at 17-18, Trevino v. Davis, 861 F.3d 545 (5th Cir. 2017) (No. 15-70019) ("Petitioner assumes that evidence of his alleged FASD would necessarily have mitigated his blameworthiness in the jury's eyes. There is no basis for that assumption. Evidence of diminished mental capacity—even when it amounts to intellectual disability—can have both an aggravating and a mitigating effect. *See* Penry v. Lynaugh, 492 U.S. 302, 324 (1989) ("Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). Petitioner's effort to prove that he suffers from FASD would only have aggravated the jury's finding of future dangerousness with no offsetting mitigation."). *See also*, Defendant's Trial Memorandum at 78-79, Jesse Johnson v. Premo, Circuit Court for the State of Oregon, Marion County No. 08C11553 (Dec. 6, 2013) ("[E]ven if counsel had found an expert in 2004 who diagnosed petitioner with FASD, counsel could reasonably have concluded that that diagnosis is a 'two-edged sword' that might cause the jurors to conclude that petitioner is too damaged to be safely controlled in prison. *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 131 S. Ct. 1388, 1410 (2011) ('mitigating evidence can be a 'two-edged sword' that juries might find to show future dangerousness').").

40. The United States Supreme Court has consistently held that "[o]ur capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision." Hidalgo v. Arizona, 138 S. Ct. 1054, 1054 (2018) (Breyer, J., concurring in the denial of certiorari, joined by Ginsburg, Sotomayor, and Kagan, JJ.) (quoting Tuilaepa v. California, 512 U.S. 967, 971 (1994)).

evidence demonstrating lesser culpability or calling for a sentence less than death.

In contrast to relying solely on offense definitions to satisfy the narrowing function, as was prevalent during *Lockett's* time, states have increasingly sought to achieve constitutionally-mandated narrowing through penalty phase jurors' aggravating circumstance findings. Those schemes now rely upon penalty phase juror findings for both eligibility *and* selection determinations,[41] using the same body of evidence for both determinations. This increases states' abilities to undermine the mitigating value of a defendant's mitigation; encourages and allows jurors to transmogrify a defendant's mitigating evidence into aggravation; and provides no means by which jurors can give that potentially life-saving evidence independent *mitigating* weight.[42] The result leads to the unacceptable risk that jurors will use mitigating evidence as a basis for death eligibility and, once having done that, the evidence will have lost its mitigating value for purposes of jurors giving it independent mitigating weight, effectively limiting the range of mitigating factors to be considered—the very thing *Lockett* condemned.

VI. CONCLUSION

"Where life itself is what hangs in the balance, a fine precision in the process must be insisted upon."[43] Despite the passage of 40 years, *Lockett* continues to guide and inform our understanding of what cannot take place in the context of a capital sentencing statute, what has to take place in order to treat each capital defendant with the fundamental degree of respect due the uniqueness of the individual, and the necessary steps all capital case participants must take to counter present and future efforts to imperil *Lockett's* mandate.

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41. *Hidalgo*, 138 S. Ct. at 1055 ("Our precedent makes clear that the legislature may satisfy the 'narrowing function. . . in either of. . . two ways.' Lowenfield v. Phelps, 484 U.S. 231, 246 (1988). First, "[t]he legislature may itself *narrow the definition of capital offenses. . .*" *Id*. (emphasis added). 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*. *Id*.; *see also Tuilaepa*, 512 U.S. at 972 ("The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both).") (emphasis added in second instance).

42. *See, e.g.*, Respondent/Cross-Appellant's Combined Answering and Cross-Opening Brief at 35, Sparks v. Premo, 408 P.3d 276 (Or. Ct. App. 2017) (A151267) ("appellate courts have recognized, when a defense counsel offers evidence as 'mitigating,' the reality is that the jurors may not choose to consider it as mitigating. Jurors reasonably may choose to review such evidence as *aggravating - e.g.*, as showing that he is seriously damaged and beyond possible redemption. Consequently, such evidence is considered a 'two-edged sword.'").

43. Lockett v. Ohio, 438 U.S. 586, 620 (Marshall, J., concurring).