A Death Sentence May Be Constitutional Despite a Determination That Two of Four Special Circumstances Found by the Jury Were Invalid: *Brown v. Sanders*

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CONSTITUTIONAL LAW — DUE PROCESS OF LAW — CRIMINAL PROSECUTIONS — JUDGMENT AND SENTENCE — The United States Supreme Court held that the jury's consideration of two invalid special circumstances in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish the two invalid eligibility factors were properly provided under the valid special circumstances.


On Friday, January 30, 1981, Dale Boender and Janice Allen were getting ready for dinner when they heard a knock at the front door of their apartment. Boender answered the door to find John Cebreros and an armed Ronald Sanders. Sanders and Cebreros bound and blindfolded Boender and Allen. They proceeded to rummage through the apartment looking for drugs and money. Both Boender and Allen were then struck with a blunt object, and Allen died as a result of the blow.

At trial, Sanders was convicted of attempted robbery, robbery, burglary, attempted murder and murder. During the sentencing phase, the jury found true four special circumstance allegations which allowed the jury to render a death sentence during the penalty phase. The jury found that (1) the murder was committed...

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1. People v. Sanders, 797 P.2d 561, 566 (Cal. 1990). Boender and Allen were a couple that had moved from Oilsdale, California, to Bakersfield, California, in 1981. Sanders, 797 P.2d at 565. Boender supported himself and Allen by selling drugs. Id.
2. Sanders, 797 P.2d at 566.
3. Id.
4. Id.
5. Id. Allen suffered from a fractured skull and lacerated brain due to the blow. Id. Boender sustained a skull fracture but was conscious when police arrived. Id.
6. Id. at 565.
7. Sanders, 797 P.2d at 565. Under the California Penal Code, "the penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more [of a list] of special circumstances has been found . . . to be true." CAL. PENAL CODE § 190.2(a) (West 2001).
while the defendant was engaged in the commission of a robbery and (2) while he was engaged in the commission of a burglary; (3) the victim was intentionally killed to prevent her testimony regarding the burglary; and (4) the murder was especially "heinous, atrocious and cruel." Sanders was then sentenced to death during the penalty phase. An automatic appeal to the California Supreme Court followed.

After reviewing the case, the California Supreme Court determined that two of the four special circumstances were invalid; nonetheless, the court affirmed the trial court's sentence of death. Sanders then appealed to the United States Supreme Court, but his petition for writ of certiorari was denied. Subsequently, Sanders filed a first federal petition for writ of habeas corpus on December 20, 1993, in the United States District Court for the Eastern District of California. The district court ordered him to exhaust all of his state remedies before proceeding. Once all of his state remedies were exhausted, Sanders filed an amended habeas corpus petition in the district court, which was denied.

The Court of Appeals for the Ninth Circuit granted a certificate of appealability to Sanders and reviewed the case de novo. The court of appeals reversed the decision of the lower court. It concluded that the California Supreme Court failed to follow the constitutionally mandated procedures for appellate review in a weighing state where aggravating circumstances have been invalidated. As a result, the court determined that Sanders's death sentence could only be upheld by finding beyond a reasonable doubt that the jury's use of an invalid special circumstance was harmless or by reweighing each of the special circumstances inde-

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8. Sanders, 797 P.2d at 565. These four special circumstances fall under CAL. PENAL CODE § 190.2(a)(17), (10) and (14), respectively. CAL. PENAL CODE § 190.2.
10. Id.
11. Brown v. Sanders, 126 S. Ct. 884, 888 (2006). The California Supreme Court determined that the “heinous, atrocious and cruel” special circumstance was unconstitutionally vague. Sanders, 797 P.2d at 589. The court further held that the burglary-murder special circumstance should be set aside. Id. at 596.
16. Id.
17. Id.
18. Sanders, 373 F.3d at 1063.
pendently. The circuit court held that since the state courts had failed to perform either of these tasks, Sanders’s death sentence was not individualized as required by the Constitution. Thereafter, the United States Supreme Court granted certiorari.

The Supreme Court set out to determine whether the death sentence was constitutional in light of a determination that two of the four special factors found by the jury were invalid. The Court found that “an invalid sentencing factor . . . will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.”

Justice Scalia began the Court’s analysis with a discussion of weighing and non-weighing states. Weighing states are “those in which the only aggravating factors permitted to be considered by the sentencer were the specified eligibility factors.” A non-weighing state is “a state that permitted the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors.” The Court proceeded by distinguishing the process in weighing states from that in non-weighing states. In a weighing state, the jury’s consideration of an eligibility factor that is invalid tends to tilt the balance between aggravating circumstances and mitigating circumstances. When such skewing occurs, a reversal of the sentence is generally required. However, reversal may not be required if an appellate court either determines that such an invalid eligibility factor was harmless or performs a reweighing of

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20. Id.
23. Id. at 892.
24. Id. at 890. Justice Scalia delivered the majority opinion and was joined by Chief Justice Roberts and Justices O'Connor, Kennedy and Thomas. Id. at 887-88.
25. Id.
26. Id. An eligibility factor is a statutorily defined fact or situation that allows a state to limit the class of murders to which the death penalty may be applied. Id. at 889. An aggravating circumstance is “[a] fact or situation that relates to a criminal offense or defendant and that is considered by the court in imposing punishment,” particularly death sentences. Black's Law Dictionary 259-60 (8th ed. 1999).
27. Brown, 126 S. Ct. at 890.
28. Id. A mitigating circumstance is “[a] fact or situation that does not bear on the question of a defendant's guilt but that is considered by the court in imposing punishment and especially in lessening the severity of a sentence.” Black's Law Dictionary 260 (8th ed. 1999).
the mitigating circumstances against the valid aggravating circumstances.\textsuperscript{30}

On the other hand, in a non-weighing state, such skewing may not occur.\textsuperscript{31} Skewing does not occur when the eligibility factors and the aggravating factors are entirely different or when "the aggravating factors added to the eligibility factors a category that would allow the very facts and circumstances relevant to the invalidated eligibility factor to be weighed in aggravation under a different rubric."\textsuperscript{32}

Accordingly, the majority explained that different rules must be followed with regard to invalidated special circumstances in non-weighing states.\textsuperscript{33} In a non-weighing state, there are two instances in which a jury's contemplation of an invalid special circumstance results in constitutional error.\textsuperscript{34} In the first instance, the Due Process Clause of the Fifth Amendment calls for the death sentence of a defendant to be withdrawn in situations where the invalid circumstance allowed the "jury to draw adverse inferences from conduct that is constitutionally protected."\textsuperscript{35} In the second instance, a death sentence must be withdrawn if evidence that would not have otherwise been heard was heard by the jury as evidence of an invalidated eligibility factor.\textsuperscript{36}

Justice Scalia declared that in order to clarify the analysis in weighing states, the following rule must be applied: the consideration of an invalidated sentencing factor renders a sentence unconstitutional if it adds an improper element to the aggravation scale during the weighing process.\textsuperscript{37} However, the sentence may be constitutional if another sentencing factor provides aggravating weight to the same facts and circumstances.\textsuperscript{38}

Under the California Penal Code, a person convicted of first-degree murder becomes eligible for the death penalty if any one of the special circumstances set forth in section 190.2 is found by the jury.\textsuperscript{39} Accordingly, the court of appeals determined that California is a weighing state because the jury was restricted to a weigh-

\begin{thebibliography}{9}
\bibitem{30} \textit{Id.}
\bibitem{31} \textit{Id.}
\bibitem{32} \textit{Id.}
\bibitem{33} \textit{Id.}
\bibitem{34} \textit{Brown}, 126 S. Ct. at 891.
\bibitem{35} \textit{Id.}
\bibitem{36} \textit{Id.}
\bibitem{37} \textit{Id.} at 892.
\bibitem{38} \textit{Id.}
\bibitem{39} \textit{Brown}, 126 S. Ct. at 892 (citing CAL. PENAL CODE § 190.2(a) (West 2001)).
\end{thebibliography}
ing of aggravating and mitigating circumstances, and "[was] pre-
vented from considering evidence in aggravation other than dis-
crete, statutorily-defined factors." 40

The United States Supreme Court disagreed with this charac-
terization. 41 The Court concluded that California was a non-
weighing state because the "circumstances of the crime" sentenc-
ing factor provided in section 190.3 of the California Penal Code 
had the effect of rendering all the special circumstances found by 
the jury nonexclusive. 42

Justice Scalia went on to point out that the determination of 
whether California was a weighing or non-weighing state may not 
even be necessary in the present case. 43 Since all of the facts and 
circumstances presented as evidence of the two invalidated factors 
were also properly considered by the jury as evidence of the valid 
factors, the determination of whether California was a weighing or 
non-weighing state was inconsequential. 44 Specifically, the jury 
found four special circumstances to be present. 45 The California 
Supreme Court invalidated two of the four special circum-
stances. 46 That court found the burglary-murder special circum-
stance invalid under state merger law and the "heinous, atrocious 
or cruel" special circumstance invalid because it was unconstitu-
tionally vague. 47 However, the California Supreme Court main-
tained that the death sentence was proper because two of the four 
special circumstances were properly considered. 48 The majority of 
the United States Supreme Court agreed with the California Su-
preme Court's reasoning that, even though the jury considered 
invalid special circumstances in the weighing process, this consid-
eration did not produce constitutional error because the evidence

40. Id. at 893.
41. Id.
42. Id. Section 190.3 of the California Penal Code provides, in relevant part, that "[i]n 
determining the penalty, the trier of fact shall take into account any of the following factors 
if relevant: (a) The circumstances of the crime of which the defendant was convicted in the 
present proceeding and the existence of any special circumstances found to be true." 
CAL. PENAL CODE § 190.3.
43. Brown, 126 S. Ct. at 893.
44. Id.
45. Id. The four special circumstances determined to be applicable by the jury were 
that: (1) "the murder was committed while the defendant was engaged in robbery," (2) it 
was "committed while the defendant was engaged in burglary of the first or second degree," 
(3) "the victim was a witness to a crime who was intentionally killed for the purpose of 
preventing her testimony in any criminal proceeding" and (4) "the murder was especially 
heinous, atrocious or cruel." Id.
46. Id. at 894.
47. Id.
considered by the jury to establish the invalid special circumstances was also provided to the jury for their consideration of the “circumstances of the crime” special factor. 49

Accordingly, the majority in Brown held that the jury’s consideration of invalid special circumstances did not rise to a constitutional violation, and the court of appeals was incorrect in ordering habeas relief. 50 Therefore, the judgment of the court of appeals was reversed, and the case was remanded for further proceedings. 51

In his dissenting opinion, Justice Stevens began by drawing a distinction between weighing states and non-weighing states. 52 In a non-weighing state, a jury’s finding of an aggravating factor serves only to make a defendant eligible for the death penalty. 53 Therefore, it can be presumed that in a non-weighing state the invalidation of one of several aggravating factors is harmless, because, e.g., the finding of four aggravating circumstances and the finding of three aggravating circumstances have the same legal significance, that is, making the defendant eligible for the death penalty. On the other hand, in a weighing state, once a defendant is eligible for the death penalty, the jury then weighs the aggravating circumstances against the mitigating circumstances to decide what particular sentence to impose on the eligible defendant. 54 Therefore, in a weighing state, four aggravating circumstances carry more weight than three aggravating circumstances. 55 Justice Stevens disagreed with the majority’s decision to convert the weighing and non-weighing distinction from “one focused on the role aggravating circumstances play in a jury’s sentencing deliberations to one focused on the evidence the jury may consider during those deliberations.” 56

Justice Stevens continued, arguing that, even though the error caused by the invalid special circumstances may have been harmless, that was not the question before the United States Supreme Court. 57 Rather, the Court was only requested to determine

49. Id.
50. Id.
51. Id.
52. Id. (Stevens, J., dissenting). Justice Souter joined Justice Stevens in his dissenting opinion. Id.
53. Brown, 126 S. Ct. at 894-95 (Stevens, J., dissenting).
54. Id. at 895.
55. Id.
56. Id. at 895-96.
57. Id.
whether California was a weighing state.\textsuperscript{58} Justice Stevens further contended that the Court's decision modified the law and ignored certain aspects of California's death penalty system.\textsuperscript{59} Therefore, Justices Stevens and Souter chose not to join the majority because they believed that the majority's opinion would complicate rather than simplify the capital sentencing jurisprudence.\textsuperscript{60}

In a separate dissent, Justice Breyer argued that the Court did not need to decide whether California was a weighing or a non-weighing state in order to determine whether to apply "harmless error" review.\textsuperscript{61} In the first part of his opinion, Justice Breyer set forth the stages of a death penalty proceeding and discussed the particulars of weighing and non-weighing states.\textsuperscript{62} In part II, Justice Breyer illustrated how distinguishing between weighing and non-weighing states is unnecessary for the purposes of determining whether it is appropriate to apply "harmless error" analysis in cases where a special circumstance has been invalidated.\textsuperscript{63} In part III, Justice Breyer evinced a belief that a reviewing court should be required to examine whether a jury's consideration of invalid special circumstances was harmless in both weighing and non-weighing states.\textsuperscript{64} This dissenting opinion goes on in part IV

\textsuperscript{58} Brown, 126 S. Ct. at 896 (Stevens, J., dissenting). In the State's Petition for Writ of Certiorari, the State of California presented three questions for the Supreme Court's review. Petition for Writ of Certiorari at i, Brown, 126 S. Ct. 884 (No. 04-980). The Court first considered the following issue: "Is the California death penalty statute a 'weighing statute' for which the state court is required to determine that the presence of an invalid special circumstance was harmless beyond a reasonable doubt as to the jury's determination of penalty?" Id. The Supreme Court granted the State's petition but limited its review to this question and another unrelated issue. Brown, 544 U.S. at 947.

\textsuperscript{59} Brown, 126 S. Ct. at 896 (Stevens, J., dissenting).

\textsuperscript{60} Id.

\textsuperscript{61} Id. (Breyer, J., dissenting). Justice Ginsberg joined Justice Breyer in his five-part dissenting opinion. Id.

\textsuperscript{62} Id. at 896-97.

\textsuperscript{63} Id. at 898. Justice Breyer illustrated this example using the following two statements:

\textit{Statement One} — The judge tells the jury in a weighing State: "You can sentence the defendant to death only if you find one, or more, of the following three aggravating circumstances, X, Y, or Z. If you do, the law requires you to consider those aggravators and weigh them against the mitigators." \textit{Statement Two} — The judge tells the jury in a non-weighing State: "You can sentence the defendant to death only if you find one, or more, of the following three aggravating circumstances, X, Y, or Z. If you do, the law permits you to consider all mitigating and aggravating evidence, including X, Y, and Z, in reaching your decision."

Id. at 899. Justice Breyer contended that there was no meaningful difference between the two statements. Id.

\textsuperscript{64} Brown, 126 S. Ct. at 902 (Breyer, J., dissenting).
to state that the majority reached a similar conclusion, namely, that the importance of the distinction between weighing and non-weighing states should be diminished. However, Justice Breyer disagreed with the majority's belief that the need to conduct "harmless error" review should also be diminished. Finally, in part V, Justice Breyer concluded that the distinction between weighing and non-weighing states should be abolished, and that the case should be remanded to the Ninth Circuit for reconsideration of the entire decision.

The death penalty may only be applied to defendants convicted of homicide in certain circumstances. In Zant v. Stephens, Justice Stevens declared that "statutory aggravating circumstances play a constitutionally necessary function of ... [circumscribing] the class of persons eligible for the death penalty." In most states, such a "narrowing" requirement is met if the jury finds that at least one aggravating factor is present.

The United States Supreme Court set forth this "narrowing" requirement in Furman v. Georgia. The Court reviewed decisions of the Georgia Supreme Court in which African-American defendants were given the death penalty after being convicted of murder and rape, respectively. The Court also reviewed a decision of the Court of Criminal Appeals of Texas that affirmed the imposition of the death penalty where an African-American defendant was convicted of rape. In a per curiam opinion, the Court set out to determine whether "the imposition and carrying out of the death penalty [in these cases] constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."

In a concurring opinion in Furman, Justice Douglas stated that capital punishment was being used against minorities, the poor and other unpopular groups because no proper guidelines had

65. Id. at 903.
66. Id.
67. Id. at 904.
70. Zant, 462 U.S. at 878.
71. 41 C.J.S. Homicide § 519.
72. 408 U.S. 238 (1972) (per curiam).
73. Furman, 408 U.S. at 239.
74. Id.
75. Id. (citing U.S. CONST. amends. VIII, XIV). A per curiam opinion is "[a]n opinion handed down by an appellate court without identifying the individual judge who wrote the opinion." BLACK'S LAW DICTIONARY 1125 (8th ed. 1999).
been provided to the jury for the imposition of the death penalty.\textsuperscript{76} In order to avoid disproportionate applications of the death penalty, the Court set forth the proposition that when discretion is afforded to a jury in death penalty sentencing, that discretion must be limited in a manner such that the risk of arbitrary and discriminatory sentences is minimized.\textsuperscript{77} Therefore, it was held that the imposition of the death penalty in these specific cases violated the Eighth and Fourteenth Amendments to the United States Constitution.\textsuperscript{78}

Based on the decision in \textit{Furman}, many states enacted legislation in which the death penalty was applied based on whether one or more aggravating factors or special circumstances was found by the jury.\textsuperscript{79} However, the issue of whether a death sentence could stand even if a special circumstance found by the jury was determined to be invalid was not presented to the Court until 1983 in \textit{Zant v. Stephens}.\textsuperscript{80} In the \textit{Zant} opinion, delivered by Justice Stevens, the Court held that a death sentence need not be vacated even if one of three statutory aggravating circumstances is subsequently found to be invalid.\textsuperscript{81}

On August 19, 1974, Alpha Stephens escaped from the Houston County Jail and proceeded to commit several burglaries, an armed robbery and three auto thefts.\textsuperscript{82} On August 21, Stephens and an accomplice were burglarizing a home when Roy Asbell encountered them.\textsuperscript{83} Stephens proceeded to beat and rob Asbell.\textsuperscript{84} Then, along with his accomplice, he drove Asbell into Bleckley County where they shot and killed him.\textsuperscript{85} Stephens was convicted of murdering Roy Asbell and was sentenced to death.\textsuperscript{86}

During the sentencing phase of the trial, the State of Georgia requested that the jury impose the death penalty and set forth three aggravating factors for the jury's consideration.\textsuperscript{87} The jury

\textsuperscript{76} \textit{Furman}, 408 U.S. at 249-50 (Douglas, J., concurring).
\textsuperscript{78} \textit{Furman}, 408 U.S. at 239-40 (citing U.S. CONST. amends. VIII, XIV).
\textsuperscript{80} 462 U.S. 862, 864 (1983).
\textsuperscript{81} \textit{Zant}, 462 U.S. at 884.
\textsuperscript{82} \textit{Id.} at 864-65.
\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.} at 865.
\textsuperscript{86} \textit{Zant}, 462 U.S. at 865.
\textsuperscript{87} \textit{Id.} The three aggravating circumstances before the jury were provided in subparagraphs (b)(1), (b)(7) and (b)(9) of the Georgia capital sentencing statute. \textit{Id.} Subparagraph (b)(1) provided that "[t]he offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of
imposed the death penalty based on their finding of the first and third aggravating factors. As the first aggravating factor rested on two grounds, the jury actually found three aggravating factors.

While the case was on appeal, the Georgia Supreme Court held in another case that one of the aggravating circumstances found by the Zant jury was unconstitutionally vague. The invalidated circumstance was that "the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions." Accordingly, the United States Supreme Court set out to determine whether a death penalty "must be vacated because one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid . . . although the other two aggravating circumstances were specifically upheld."

The Court concluded that if a death sentence was supported by even one valid aggravating circumstance, then it was improper to set the sentence aside, notwithstanding the jury's finding that an invalid aggravating circumstance was insufficient to support a death sentence on its own. It was determined that the jury's finding that Stephens had a "substantial history of serious assaultive criminal convictions" failed to provide a sufficient basis for imposing the death penalty. Justice Stevens noted that a different result could be reached in instances where evidence that would have otherwise been inadmissible was presented to a jury in support of an invalidated aggravating circumstance. In Zant, any evidence regarding Stephens's prior convictions was properly provided to the jury during the sentencing hearing, and Stephens was provided with the opportunity to explain these convictions. Therefore, since two valid aggravating circumstances were found,
the death sentence was proper, even though the jury relied on a third aggravating circumstance that was later found to be invalid.97

In 1990, the United States Supreme Court held in Clemons v. Mississippi98 that the Sixth Amendment right to a trial by jury was not infringed when an appellate court invalidated one of several aggravating circumstances the jury found at the trial level.99 Justice White delivered the opinion of the Court.100 Chandler Clemons was convicted of capital murder and was sentenced to death.101 During the sentencing phase of the trial, the State presented evidence to the jury in the hope of establishing two aggravating factors.102 The first aggravating factor was that the murder was committed during a robbery, and the second aggravating factor was that "it was an especially heinous, atrocious or cruel killing."103 On appeal, the Mississippi Supreme Court found that the latter aggravating circumstance was unconstitutional.104 However, the court upheld the death sentence because Mississippi had an established procedure whereby a valid aggravating circumstance will support a death penalty sentence despite subsequent invalidation of a separate aggravating circumstance.105 The

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97. Zant, 426 U.S. at 868.
99. Clemons, 494 U.S. at 744. The Sixth Amendment to the United States Constitution provides that:
[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.
U.S. CONST. amend. VI.
100. Clemons, 494 U.S. at 741.
101. Id. at 742. The events leading to Clemons's conviction are as follows: On April 17, 1987, Clemons decided to order a pizza and then rob the deliveryman. Id. at 741. From a pay phone, Clemons ordered a pizza and asked that it be delivered to an apartment complex. Id. When the deliveryman arrived, an armed Clemons ordered the deliveryman, Arthur Short, to get out of the car. Id. After robbing the deliveryman, Clemons shot and killed him. Id.
102. Id. The aggravating factors in this case were provided in section 99-19-101 of the Mississippi Code Annotated. Id. The relevant portions of this section of the Mississippi Code provide that "[a]ggravating circumstances shall be limited to the following: ... [t]he capital offense was committed while the defendant was engaged ... in the commission of ... any robbery" and "[t]he capital offense was especially heinous, atrocious or cruel." MISS. CODE ANN. § 99-19-101(5)(d) and (h) (2005).
103. Clemons, 494 U.S. at 743.
104. Id.
105. Id.
United States Supreme Court then granted certiorari to determine whether the United States Constitution permits a death sentence to be upheld if the jury that imposed the sentence relied in part on an invalid aggravating factor. The Court determined that the Constitution permits an appellate court to uphold a sentence of death that a jury imposed while relying in part on an invalid aggravating factor.

The holding in Clemons is distinguished from the holding in Zant, because in Mississippi, aggravating circumstances are utilized by a jury during the actual sentencing of the defendant. During this phase of the trial, the jury must weigh mitigating factors against aggravating factors to determine what sentence shall be imposed. However, in Georgia, aggravating factors are used only to make a person eligible for the death penalty and not to determine punishment. Mississippi is considered a weighing state, whereas Georgia is considered a non-weighing state. Since Clemons was convicted in Mississippi, a weighing state, he argued that the appellate court erred by reweighing the aggravating and mitigating circumstances, and the death sentence violated his Eighth Amendment rights.

Speaking for the Court, Justice White responded that an appellate court's reweighing of aggravating and mitigating circumstances is not unfair to a defendant such as Clemons. Justice White maintained that such reweighing produces "measured consistent application" of the death penalty. The Court concluded that even if the weighing of mitigating and aggravating circumstances was a jury function and not an appellate function, the Mississippi Supreme Court could find that an error which occurred during the sentencing phase was harmless. Accordingly, there are no compelling reasons why an appellate court cannot examine the balance struck and decide whether the elimination of an improperly considered special circumstance affects the bal-

106. Id. at 744.
107. Id. at 748-49.
109. Id. at 745
110. Id.
111. Id.
112. Id. at 748. The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
113. Clemons, 494 U.S. at 748.
114. Id.
115. Id. at 752.
In closing, Justice White noted that this opinion was not intended to convey the idea that state appellate courts are required to engage in reweighing because of errors in the capital sentencing procedure. Instead, the Court merely decided that such reweighing by an appellate court is constitutionally permissible. In conclusion, the Supreme Court held that the constitution permits an appellate court to uphold a death sentence that a jury, relying in part on an invalid aggravating factor, has imposed.

In 1992, the United States Supreme Court clarified the distinctions between weighing and non-weighing states with regard to the finding of an invalid special circumstance in Stringer v. Black. Justice Kennedy delivered the opinion of the Court. James R. Stringer was found guilty of capital murder during a robbery. At the sentencing phase of the trial, the jury found three aggravating circumstances. Upon exhausting all of his options for relief at the state level, Stringer filed a petition for federal habeas corpus relief. Stringer claimed that one of the aggravating factors the jury found was so vague as to render it unconstitutional. The Supreme Court proceeded to grant certiorari.

During the Court’s analysis of the case, Justice Kennedy described the importance of determining whether a state is a weigh-
In determining whether a sentence can be upheld in light of the use of an invalid aggravating circumstance, "the difference between weighing and non-weighing states is not merely one of 'semantics.'" This difference is of critical importance in deciding such cases. In a non-weighing state, the finding of an invalid aggravating factor does not taint the process of determining whether the death penalty is appropriate as long as at least one aggravating circumstance remains valid, making the defendant eligible. Justice Kennedy continued, stating that the defendant's Fifth Amendment right to due process is not violated by the jury's finding of an invalid aggravating factor, if a state appellate court determines that such a finding would not have affected the jury's decision.

In a weighing state, when a jury is instructed to weigh an invalid aggravating factor in rendering a sentence, the appellate court is unable to assume that the invalid factor made no difference. In such instances, the weighing process performed by the jury becomes skewed. There are two ways in which such skewing can be avoided: (1) the reviewing court may perform a constitutional "harmless error" analysis, or (2) a reweighing of the aggravating and mitigating factors may be performed at either the trial or appellate level.

Therefore, due to the differences discussed above with regard to weighing and non-weighing states, the Supreme Court held that the same rules cannot be applied in both weighing and non-weighing states.

In Tuggle v. Netherland, the United States Supreme Court held that the rule in Zant does not apply to weighing states. Lem Tuggle was found guilty of murder by a state court in Virginia. During the sentencing phase of the trial, the jury sen-

127. Id. at 231.
128. Id.
129. Id. at 232.
130. Id.
132. Id.
133. Id.
134. Id.
135. Id.
137. Tuggle, 516 U.S. at 11. The rule set forth in Zant is that "a death sentence supported by multiple aggravating circumstances need not always be set aside if one aggravator is found to be invalid." Zant v. Stephens, 462 U.S. 862, 884 (1983).
138. Tuggle, 516 U.S. at 11. The events leading to Tuggle's conviction were as follows: On June 2, 1983, a state trooper stopped a truck that Tuggle was driving and Tuggle ad-
tenced Tuggle to death after it found that the two statutory aggra-

vating factors had been established. The Supreme Court

granted certiorari to determine whether the rule in Zant applied

in weighing states.

An important aspect of the ruling in Zant was that even after

the invalid aggravating factor was eliminated, the death sentence

still rested on two unimpeachable aggravating factors. In Tug-
gle, however, the invalid aggravating factor prevented Tuggle

from obtaining his own psychiatric evidence to rebut the similar

evidence the State presented against him. Therefore, since the

State's evidence was uncontested, it was likely that the jury found

the evidence more persuasive. The Court went on to state that

although the rule in Zant does not require a death sentence to be

set aside due to the finding of an invalid special circumstance, the

rule does not support the proposition that "the existence of a valid

aggravator always excuses a constitutional error in the admission

or exclusion of evidence." 

In cases dealing with an imposition of the death penalty, a court

must take the utmost care in order to ensure that the jury has the

proper instructions to impose this penalty fairly and properly.

Since Furman, the discretion of the jury in imposing the death

penalty has been limited such that the risk of arbitrary and dis-

...
criminatory sentences is minimized.\textsuperscript{145} Legislation has been passed in many states that requires the jury to consider aggravating and mitigating circumstances before the death penalty can be applied.\textsuperscript{146} A defendant is found to be eligible for the death penalty if the jury finds that one or more aggravating factors or special circumstances are applicable.\textsuperscript{147}

However, an issue arises if one of the aggravating circumstances considered by the jury is later found to be invalid because it is unconstitutional or in violation of a state or federal law. In the instant case, the Supreme Court held that the jury's consideration of two invalid special circumstances in the weighing process did not produce constitutional error because all of the evidence admissible to establish the two invalid eligibility factors was also relevant to the valid special circumstances.\textsuperscript{148} However, as Justice Breyer noted in his dissenting opinion, the reviewing court failed to determine whether the jury's consideration of the two invalid special circumstances was harmless beyond a reasonable doubt.\textsuperscript{149}

The majority seemed more concerned with determining whether California should be classified as a weighing state or a non-weighing state.\textsuperscript{150} This determination, however, is not the most significant factor in such a case. The distinction between a weighing and a non-weighing state has little or nothing to do with the determination of whether consideration of an invalid special circumstance constitutes harmless error.\textsuperscript{151} This distinction does not change the fact that the jury's consideration of the two invalid special circumstances must still be considered harmless for the death sentence to stand.\textsuperscript{152}

While it true that an invalid special circumstance will be found harmless in a non-weighing state more readily than in a weighing state, this does not excuse a reviewing court from conducting a “harmless error” analysis.\textsuperscript{153} The reason that an invalid special circumstance is more likely to be harmless in a non-weighing state is because in such states the jury considers any and all aggravating factors during the sentencing phase, not just those that are

\textsuperscript{146} 41 C.J.S. \textit{Homicide} § 518 (2006).
\textsuperscript{147} \textit{Id.}
\textsuperscript{149} \textit{Brown}, 126 S. Ct. at 902 (Breyer, J., dissenting).
\textsuperscript{150} \textit{Id.} at 898.
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.} at 902.
\textsuperscript{153} \textit{Id.}
statutorily prescribed. Nevertheless, in a non-weighing state, a jury's consideration of an invalid special circumstance may be what causes the imposition of the death penalty if "the judge or prosecutor led [the jury] to believe that state law attaches particular importance to that factor." Therefore, it is "unrealistic, impractical and legally unnecessary" to distinguish between weighing and non-weighing states to determine whether to apply "harmless-error" analysis. "Harmless-error" analysis should be performed in all cases and in all states where a special circumstance has been deemed invalid.

Since a life is in question, the deciding court must take all necessary precautions to ensure that the death penalty is properly applied. If the possibility exists that the finding of an invalid special circumstance could render a death sentence unconstitutional, the reviewing court must perform an analysis to determine that the error was harmless before upholding the sentence.

As Justice Breyer stated in his dissenting opinion in Brown, "in cases where the error is in fact harmful, [a defendant has been deprived] of a fair and reliable sentencing proceeding." The reviewing court must not allow such an injustice to occur. Regardless of whether a state is a weighing or a non-weighing state, if a special circumstance considered by the jury during the sentencing phase is found to be invalid, the reviewing court must conduct some type of "harmless error" analysis before upholding the death penalty.

Ryan J. Miller

154. Brown, 126 S. Ct. at 899 (Breyer, J., dissenting).
155. Id. at 898.
156. Id.
157. Id.