Clemons v. Mississippi--Shortcut to the Executioner

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Casenotes

Clemons v. Mississippi--Shortcut to the Executioner?

Statutes authorizing capital punishment exist in 37 states today, although the statutes vary among jurisdictions. These statutes have often been challenged for vagueness. Challenges to such statutes are based upon claims that the statutes lead to arbitrary or capricious death sentences, and thus constitute cruel and unusual punishment, which is prohibited by the eighth amendment. In addition, there have been several challenges on capital appeals of the methods by which appellate courts may...
uphold death sentences founded upon constitutionally defective statutes.  

*Clemons v. Mississippi* afforded the Supreme Court of the United States an opportunity to review both vagueness and appellate review technique challenges to a state death penalty statute. The case focused upon a capital punishment statute which contained an aggravating circumstance that had been declared unconstitutionally vague under the eighth amendment by the Supreme Court. Further, the case raised the issue of how much discretion an appellate court may exercise in upholding a death sentence which had been based, in part, upon an unconstitutional aggravating circumstance. In *Clemons*, the Court held that when a jury imposes a death sentence after weighing aggravating and mitigating circumstances against each other, and one of the aggravating circumstances is later deemed unconstitutionally vague under the eighth amendment, the defendant's due process rights are not compromised if an appellate court upholds the sentence by either reweighing the remaining circumstances or employing harmless error analysis to the judgment.

Part I of this Note will discuss the legal background of death sentence challenges based upon unconstitutionally vague statutes and the method of appellate review. Part II discusses the majority, concurring, and dissenting opinions in *Clemons*. Part III assesses the constitutional significance of *Clemons* with respect

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7. Id.

8. Id. at 1444-45.

9. Id. at 1446-49.

10. An error is "harmless" if it is trivial, formal, or merely academic, is not prejudicial to a party's substantial rights, and does not affect the outcome of the case. *State v. Johnson*, 1 Wash. App. 553, 463 P.2d 205, 206 (1969). See *infra* notes 129-135 and accompanying text (discussing the harmless error rule announced in *Clemons v. Mississippi*).


12. See *infra* notes 17-78 and accompanying text.

13. See *infra* notes 79-156 and accompanying text.
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to the eighth amendment.14 Part IV discusses the Clemons decision with respect to the relevant California capital sentencing laws.15 Finally, Part V presents the potential legal ramifications of Clemons.16

I. LEGAL BACKGROUND

Death sentence challenges are often based upon the failure of an imposed sentence to satisfy one of two primary constitutional requirements. The most common challenge asserts that the relevant capital punishment statute is unconstitutionally vague under the eighth amendment.17 The other type of challenge questions the amount of discretion an appellate court may exercise in upholding a death sentence which has been based upon a constitutionally-defective statute.18

A. "Void for Vagueness" Challenges and the Furman Rule

A common constitutional challenge asserted by capital punishment defendants is that the applicable death penalty statute is impermissibly vague,19 and thus violates the eighth

14. See infra notes 157-164 and accompanying text.
15. See infra notes 165-193 and accompanying text.
16. See infra notes 194-212 and accompanying text. The death penalty's validity and purpose in society has been debated since this country's inception. See D. Hook & L. Kahn, Death in the Balance—The Debate of Capital Punishment 21-28 (1989) (summarizing the historical developments of capital punishment in the United States). The controversy continues to this day. See generally R. Tabak & J.M. Lane, The Execution of Injustice—A Cost and Lack of Benefits Analysis of the Death Penalty, 23 Loy. L.A.L. Rev. 59 (1989) (asserting the death penalty's failure as an efficient means of punishment). However, a debate on the merits of the death penalty is beyond the scope of this Note. Instead, this Note focuses upon several constitutional aspects of appellate review of death sentences with respect to the recent United States Supreme Court decision in Clemons v. Mississippi. For a sampling of the arguments for and against capital punishment, see E. Van Den Haag & J.P. Conrad, The Death Penalty—A Debate (1983) and Hook & Kahn, supra.
17. See supra note 4 and accompanying text (citing cases illustrating void for vagueness challenges).
18. See supra note 5 and accompanying text (citing cases illustrating challenges based upon improper appellate court discretion).
The amendment's prohibition against cruel and unusual punishment. A statute violates the eighth amendment when the sentencing parameters provide a jury with insufficient detail about the circumstances of the crime which must exist to justify imposition of the death penalty. Such vagueness leaves jurors and appellate courts with constitutionally impermissible open-ended discretion. As a result, the death sentences rendered under these statutes are normally reversed or vacated on appeal by the Supreme Court of the United States.

The most significant case to arise from a void for vagueness challenge is Furman v. Georgia. In Furman, the Supreme Court held that a state may not impose the death penalty under sentencing procedures that create a substantial risk of punishment in an "arbitrary or capricious manner." To illustrate, one of the statutes under scrutiny in Furman authorized a jury to choose one of three punishments for murder: the death penalty, life imprisonment, or imprisonment and labor in the penitentiary for between one and twenty years. The statute provided no guidelines for the jury to use in determining when each type of sentence would be appropriate. Deciding in favor of one over

20. See U.S. Const. amend. VIII. See also supra notes 24-32, 40-47, 48-55 and accompanying text (describing cases which arose from void for vagueness challenges).
22. See Furman, 408 U.S. at 253-57 (Douglas, J., concurring).
25. Id. at 309-310 (Stewart, J., concurring). The Furman Court issued five opinions in support of the judgment's reversal and four dissenting opinions. Because Furman was combined with two other cases, three separate defendants were involved, each of whom was sentenced to death under a statute which was challenged as violative of the eighth amendment's prohibition against cruel and unusual punishment because of the vagueness of the statute. Id. at 239-40. Specifically, one defendant, Furman, was sentenced to death for murder under Georgia law, another was sentenced to death for rape under Georgia law, and the third was sentenced to death for rape under Texas law. Id. See Ga. Code Ann. § 26-1005 (Supp. 1971) (applicable murder statute); id. § 26-1302 (applicable rape statute); Texas Penal Code § 1189 (Vernon 1961) (applicable Texas rape statute).
27. Id. at 253 (Douglas, J., concurring).
the other two punishments was purely a matter of juror discretion. The Court held that, since the statutes in *Furman* provided insufficient guidance for a trier of fact to determine the appropriateness of the death penalty, the statutes were unconstitutionally vague.

The *Furman* void for vagueness rule rests on the belief that there must be an identifiable means by which to distinguish those who receive the death penalty from those who do not. Without statutory guidelines, jurors are left to themselves to decide which factors merit the death penalty over other punishments, thus

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28. *Id.* (Douglas, J., concurring).

29. *Id.* (Douglas, J., concurring). As Justice Douglas stated in condemning the statutes for their lack of guidance: "People live or die, dependent on the whim of one man or of 12 . . . Thus, these discretionary statutes are unconstitutional in their operation." *Id.* (Douglas, J., concurring).

30. *Id.* at 309-310 (Stewart, J., concurring). Of the five separate concurring opinions in *Furman*, two viewed the death penalty as per se cruel and unusual punishment and therefore violative of the eighth amendment in all instances. See *id.* at 257 (Brennan, J., concurring); *id.* at 370 (Marshall, J., concurring). The other three concurring opinions viewed the death penalty, as imposed under the statutes at issue, as unconstitutional under the eighth amendment, thereby implying the possibility that other less discriminatory statutes would be constitutional. *Id.* at 256-57 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313-14 (White, J., concurring). The four dissenting justices proclaimed the death penalty statutes at issue to be constitutional. *Id.* at 375 (Burger, C.J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 470 (Rehnquist, J., dissenting). Because of these diverse views, *Furman* left open the question of whether the death penalty is unconstitutional in all instances. As Chief Justice Burger stated in his dissent:

Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress.

*Id.* at 403 (Burger, C.J., dissenting). Four years later, the Court handed down three landmark decisions in one day, when it affirmed the death sentences in *Gregg v. Georgia*, 428 U.S. 153 (1976), *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976). In upholding three separate state statutes, the Court declared that each statute satisfied the eighth amendment because each statute more clearly defined the parameters for imposing a death sentence and thus eliminated the arbitrariness and capriciousness found in *Furman*. *Gregg*, 428 U.S. at 196-207 (opinion of Stewart, Powell, and Stevens, JJ.); *Proffitt*, 428 U.S. at 259-60 (opinion of Stewart, Powell, and Stevens, JJ.); *Jurek*, 428 U.S. at 268-276 (opinion of Stewart, Powell, and Stevens, JJ.). The *Gregg-Proffitt-Jurek* trilogy put to rest the issue of the death penalty's per se unconstitutionality and became the benchmark for future scrutinization of state statutes on constitutional grounds. See infra notes 40-47, 48-55, 62-76 and accompanying text (discussing cases based upon the *Gregg-Proffitt-Jurek* standard). However, a statute which provides a mandatory death sentence for a particular crime is unconstitutional. *Woodson v. North Carolina*, 428 U.S. 280, 296-305 (1976).
increasing the possibility that an improper factor such as race might become the determining characteristic. Since *Furman*, several Supreme Court cases have reinforced the rule that the channeling and limiting of a sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement.

B. Specific Applications of the "'Void for Vagueness'" Rule in the Context of Aggravating and Mitigating Circumstances

Because of death sentence challenges based upon a statute's insufficient guidance, the Supreme Court has occasionally reviewed the aggravating and mitigating circumstances considered by the trier of fact in determining whether to impose the death penalty. Statutes containing aggravating and mitigating circumstances must describe to a jury, in precise terms, what conditions must exist for the crime to merit the death penalty. If an aggravating circumstance as defined by the statute is found to be unconstitutionally vague, the issue arises as to whether a "limiting construction" will cure this defect.

A limiting construction is a narrow and focused interpretation of an aggravating circumstance which, without such construction, could reasonably be interpreted in more than one manner. In order to ensure fairness under the eighth amendment, a court must give meaning to, and almost define the relevant terms in order to dispel any possible preconceptions jurors may harbor as to the

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33. Aggravating circumstances are those factors involved in the commission of a crime which tend to increase or amplify the crime's gravity or injurious consequences. See *Black's Law Dictionary* 60 (definition of aggravation) (5th ed. 1979). Mitigating circumstances tend to reduce the degree of "moral culpability." See *id.* at 903 (definition of mitigating circumstances). However, neither type of circumstance is an element of the crime itself. *Id.* at 60, 903.
36. See *id.* at 362-63.
meaning of the terms. Thus, a limiting construction by the court leads to a limiting jury instruction. Two significant cases illustrating this issue are Godfrey v. Georgia and Maynard v. Cartwright.

In Godfrey v. Georgia, the Supreme Court of the United States held that when a jury considers an aggravating circumstance that is susceptible to several meanings, the jury must receive specific instructions on the construction and application of the statute to the facts. In Godfrey, the defendant was sentenced to death under a statute which allowed a death sentence to be imposed if the trier of fact found the crime to have been "outrageously or wantonly vile, horrible, or inhuman." The Georgia Supreme Court had previously determined that this statutory wording warranted a limiting construction before being presented to the jury via a limiting instruction. For example, in two prior cases, the court assisted the jury in determining the statute's meaning by describing "outrageously or wantonly vile, horrible, or inhuman" to involve some degree of torture or aggravated battery inflicted upon the victim, or mental depravity regarding the offender. However, such a limiting construction was never utilized in Godfrey. In affirming the death sentence, the Georgia Supreme Court simply held that the statute's language was "not objectionable," and that

37. Id.
40. Godfrey, 446 U.S. at 428-29 (opinion of Stewart, Blackmun, Powell, and Stevens, JJ.).
42. Godfrey, 446 U.S. at 429 (opinion of Stewart, Blackmun, Powell, and Stevens, JJ.).
43. Id. at 430-31 (opinion of Stewart, Blackmun, Powell, and Stevens, JJ.) (citing Harris v. State, 237 Ga. 718, 732-33, 230 S.E. 2d 1, 10-11 (1976), cert. denied, 431 U.S. 933 (1977) and Blake v. State, 239 Ga. 292, 299, 236 S.E. 2d 637, 643 (1977)). In applying a limiting construction, the Georgia Supreme Court had relied upon the Supreme Court of the United States' decision in Gregg, in which the Court held the same Georgia statute as not unconstitutional "on its face." Id. at 427 (opinion of Stewart, Blackmun, Powell, and Stevens, JJ.).
44. Id. at 429 (opinion of Stewart, Blackmun, Powell, and Stevens, JJ.). In mandating a limiting construction of the statute in previous cases, the Georgia Supreme Court recognized that "there is a possibility of abuse of [an applicable statute's] aggravating circumstance." Harris v. State, 237 Ga. 718, 732, 230 S.E. 2d 1, 10 (1976). The Georgia Supreme Court refused to permit the statute's language to become a "catchall" for crimes not conforming to any of the other statutory circumstances. Id.
the evidence supported the finding of the presence of the aggravating circumstance.\footnote{45} On certiorari, the Supreme Court of the United States reversed, finding that the Georgia Supreme Court's affirmance of the death sentence was insufficient to cure the jury's unchanneled discretion.\footnote{46} The plurality stated that since an ordinary person could reasonably conclude that virtually any murder was "outrageously or wantonly vile, horrible, and inhuman," the statute's wording, by itself, did not sufficiently ensure that the statute was not applied in an arbitrary or capricious manner.\footnote{47}

In Maynard v. Cartwright, the Supreme Court of the United States applied the Godfrey rule by holding that a limiting statutory construction, provided in a limiting jury instruction, must be employed if a statute's aggravating circumstance merely describes the offense as "especially heinous, atrocious, or cruel."\footnote{48} If applied without such a construction, the statute is unconstitutionally vague under the Eighth Amendment.\footnote{49}

The jury in Maynard imposed the death penalty after finding that two aggravating circumstances outweighed any mitigating circumstances.\footnote{50} One aggravating circumstance allowed the jury to impose the death penalty if the jury found the crime to have been "especially heinous, atrocious, or cruel."\footnote{51} On certiorari, the Supreme Court of the United States held that the wording of the Oklahoma statute provided no more guidance to the jury than did the "outrageously or wantonly vile, horrible, or inhuman"

\footnotesize{\textsuperscript{45} Godfrey v. State, 243 Ga. 302, 308-09, 253 S.E. 2d 710, 717 (1979) cert. granted, 444 U.S. 897 (1979), reversed in part, 446 U.S. 420 (1980).\textsuperscript{46} Godfrey, 446 U.S. at 429, 433 (opinion of Stewart, Blackmun, Powell, and Stevens, JJ.).\textsuperscript{47} Id. at 428-29 (opinion of Stewart, Blackmun, Powell, and Stevens, JJ.). The Court further emphasized the recurring theme of "necessary fundamental fairness and impartiality" in death sentence imposition when it criticized the Georgia Supreme Court's affirmance of the sentence, because, under the Georgia court's ruling, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 433 (opinion of Stewart, Blackmun, Powell, and Stevens, JJ.).\textsuperscript{48} Maynard v. Cartwright, 486 U.S. 356, 362-64 (1988). See OKLA. STAT., tit. 21, § 701.12(2), (4) (1981) (statute at issue in Maynard).\textsuperscript{49} Maynard, 486 U.S. at 362-63.\textsuperscript{50} Id. at 358-59.\textsuperscript{51} Id.}
language the Court previously deemed unconstitutional in Godfrey. Moreover, the Court found that the state appellate court’s vague construction of the statute was identical to the construction employed by the Georgia court in Godfrey, which had failed to cure the jury’s unfettered discretion and thereby satisfy the eighth amendment. The Court felt that since a reasonable person could conclude that nearly every murder is “especially heinous,” the inherently unconstitutional wording of the statute could be cured only through a limiting construction, which the Oklahoma appellate court failed to employ. However, the Court refused to prescribe the exact construction necessary, leaving that for the state courts to interpret.

Thus, under the Godfrey and Maynard limiting construction rule, it is clear that a death sentence based upon an unconstitutionally vague aggravating circumstance may be salvaged if the sentencing jury is given an appropriate limiting construction. This limitation ensures that the Furman void for vagueness prohibition, and thus the eighth amendment, is satisfied.

C. May an Appellate Court Affirm a Death Sentence Which Was Based Upon an Invalid Aggravating Circumstance?

A complex issue arises when an appellate court invalidates an aggravating circumstance notwithstanding any limiting construction. When a court invalidates an aggravating circumstance, the appropriate limits of judicial review are at issue, because the court must attempt to determine the effect the invalid aggravating circumstance actually had upon the jury’s deliberation and the sentence rendered. The court must then decide whether to uphold, vacate, or reverse the sentence. To understand this issue of

52. Id. at 363-64.
53. Id. at 364.
54. Id. at 364-65.
55. Id.
56. See supra notes 40-47, 48-55 and accompanying text (discussing Godfrey and Maynard).
appellate review limitations, it is first essential to distinguish between "weighing" and "nonweighing" capital punishment jurisdictions.

To impose the death sentence in a weighing jurisdiction, the trier of fact must determine, based upon the evidence presented, whether any aggravating circumstances found outweigh any mitigating circumstances present. If aggravating circumstances outweigh mitigating circumstances, then the death penalty may be imposed. Conversely, nonweighing jurisdictions do not require aggravating circumstances to be balanced against mitigating circumstances. Instead, the trier of fact may impose death based upon the mere existence of a specified number of aggravating circumstances, regardless of whether any mitigating circumstances are found.

In Zant v. Stephens, the Supreme Court of the United States held that in nonweighing jurisdictions, an appellate court's invalidation of one aggravating circumstance contributing to a jury-imposed death sentence does not require vacation of the sentence by the appellate court. In Zant, the defendant was convicted of murder in a Georgia state court, and a sentencing jury imposed the death penalty after finding that three aggravating circumstances as defined by the state statute existed. The Georgia Supreme Court affirmed the sentence, despite having set aside one of the

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60. See, e.g., GA. CODE § 17-10-31 (1990) (permitting trier of fact to impose death penalty if there are any aggravating circumstances present, without weighing aggravating factors against mitigating factors).

61. Id.


63. Id. at 890.

64. Id. at 864-66.
agravating circumstances defined by the statute.\textsuperscript{65} The court determined that the sentence was not impaired by the invalidated circumstance, because the remaining circumstances, by themselves, were sufficient to justify the death penalty.\textsuperscript{66} The Supreme Court of the United States agreed, holding that the invalidation of one aggravating circumstance did not necessarily render the death sentence void.\textsuperscript{67} The Court reasoned that the jury clearly had not relied exclusively upon this invalid circumstance.\textsuperscript{68} In reaching this conclusion, the Court distinguished the \textit{Zant} verdict from a \textit{general} guilty verdict, which must be set aside if the jury was instructed that it could rely upon any of two or more independent grounds of guilt, one of which is later ruled invalid.\textsuperscript{69} Such a sentence must be vacated, because when a jury relies upon any of two or more aggravating circumstances in reaching a general verdict, it is unclear whether the jury relied exclusively upon the invalid circumstance.\textsuperscript{70} Conversely, the jury in \textit{Zant} did not return a general verdict.\textsuperscript{71} Instead, the jury based its decision upon two distinct aggravating circumstances, thereby providing the basis for upholding the sentence when one circumstance was determined to be unconstitutional.\textsuperscript{72} The remaining circumstance did not render the sentence arbitrary of capricious, and was thus sufficient.\textsuperscript{73} Therefore, the Court upheld the sentence.\textsuperscript{74} The Court, however, specifically limited the \textit{Zant} salvage rule to nonweighing jurisdictions.\textsuperscript{75} The Court reserved judgment on the significance of an invalid aggravating circumstance in weighing jurisdictions.\textsuperscript{76}

\textsuperscript{66} Id.
\textsuperscript{67} \textit{Zant}, 462 U.S. at 891.
\textsuperscript{68} Id. at 888-91.
\textsuperscript{69} Id. at 881. \textit{See} Stromberg v. California, 283 U.S. 359, 367-70 (1931).
\textsuperscript{70} \textit{See} Stromberg, 283 U.S. at 367-70.
\textsuperscript{71} \textit{Zant}, 462 U.S. at 866-67.
\textsuperscript{72} Id. at 866-68.
\textsuperscript{73} Id. at 868, 889-90.
\textsuperscript{74} Id. at 889-91.
\textsuperscript{75} Id. at 890-91.
\textsuperscript{76} Id.
Thus, there are several ways a constitutionally defective death sentence may be affirmed. Under Godfrey and Maynard, a state appellate court may affirm a death sentence despite a vaguely-worded aggravating circumstance when the circumstance is given a limiting construction.\textsuperscript{77} Under Zant, a state appellate court in a nonweighing jurisdiction may uphold a death sentence despite an unconstitutional aggravating circumstance, so long as the invalidation of the circumstance does not make the sentence arbitrary or capricious.\textsuperscript{78} However, the issue of what a state appellate court may do in a weighing jurisdiction has remained open until the Court’s recent decision in Clemons v. Mississippi.

II. THE CASE

In Clemons v. Mississippi,\textsuperscript{79} defendant Chandler Clemons appealed the imposition of a death sentence for his murder conviction. Specifically, Clemons claimed that the state courts’ imposition and affirmance of the death penalty violated his rights under the eighth amendment’s requirement to properly channel the jury’s discretion, and under the fourteenth amendment’s due process clause.\textsuperscript{80}

A. The Facts

On the evening of April 17, 1987, Clemons told his friends, Anthony Calvin and Antonio Hay, that he needed money, and suggested that they rob a pizza delivery man.\textsuperscript{81} The men called a local pizza establishment and ordered a pizza for delivery at a nearby apartment complex.\textsuperscript{82} During the delivery, Clemons and Hay used a sawed-off shotgun to rob the employee, Arthur Shorter,

\textsuperscript{77} See supra notes 40-47, 48-55 and accompanying text (discussing Godfrey and Maynard).
\textsuperscript{78} Zant, 462 U.S. at 890.
\textsuperscript{79} 110 S. Ct. 1441 (1990).
\textsuperscript{80} Id. at 1447-48.
\textsuperscript{81} Id. at 1444.
\textsuperscript{82} Id.
of pizza and money.\textsuperscript{83} On the way back to their vehicle, Hay suggested to Clemons that he kill Shorter, due to the possibility of later identification.\textsuperscript{84} Clemons shot Shorter before driving away with his friends, and Shorter died soon thereafter.\textsuperscript{85}

Later that evening, Calvin related the events to his sister’s friend, a county jail employee.\textsuperscript{86} The next day, the county sheriff arrested Calvin and Clemons.\textsuperscript{87} Clemons waived his right to counsel, and then gave a statement to the sheriff naming Calvin as the triggerman in the killing.\textsuperscript{88} Two days later, Calvin made a statement proclaiming Clemons to have been the killer.\textsuperscript{89}

Calvin, Clemons and Hay were indicted for capital murder,\textsuperscript{90} and the trial court severed the cases for separate trials.\textsuperscript{91} After a change in venue, a jury convicted Clemons of capital murder.\textsuperscript{92} At

\begin{footnotes}
\item83. \textit{Id.} at 1444-45.
\item84. \textit{Id.} at 1445.
\item85. \textit{Id.}
\item86. \textit{Id.}
\item87. \textit{Id. See Brief for Petitioner at 3, Clemons v. Mississippi, 110 S. Ct. 1441 (No. 88-6873) (1990) [hereinafter Petitioner’s Brief].}
\item88. Petitioner’s Brief, supra note 87, at 3. \textit{See Clemons, 110 S. Ct. at 1445.}
\item89. Petitioner’s Brief, supra note 87, at 3. \textit{See Clemons, 110 S. Ct. at 1445.}
\item90. Petitioner’s Brief, supra note 87, at 3. Mississippi state law distinguishes murder from capital murder as follows: A homicide is classified as murder if the killing was either: (1) Premeditated; (2) not premeditated, but performed while endangering others and “evincing a depraved heart, regardless of human life . . . ;” or (3) performed during the actual or attempted commission of a felony other than rape, kidnapping, burglary, arson, robbery, sexual battery, unnatural intercourse with a child under 12 years of age, nonconsensual intercourse with mankind, or felonious child abuse and/or battery. \textsc{Miss. Code Ann.} \textsection 97-3-19 (1) (Supp. 1990). Capital murder is defined as any of the following: (1) The murder of a peace officer or fireman during the course of duty with knowledge of the victim’s identity; (2) a murder committed by an inmate already under a life sentence; (3) a murder which employed the use of an explosive device; (4) a murder committed while engaging in an unlawful act for personal economic gain; (5) a murder which occurs during the actual or attempted commission of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with a child under 12 years of age, nonconsensual unnatural intercourse with mankind, or felonious child abuse or battery; or (6) the murder of an elected governmental official, with prior knowledge of the victim’s identity. \textit{Id.} \textsection 97-3-19(2).
\item91. Petitioner’s Brief, supra, note 87, at 3. \textit{See Clemons v. Mississippi, 110 S. Ct. 1441, 1445 (1990).}
\item92. \textit{Clemons, 110 S. Ct. at 1445.}
\end{footnotes}
trial, the principal witness against Clemons was Calvin, with whom
the state had arranged a plea agreement.93

1. The Mississippi Statute

The Mississippi statute in question in Clemons sets forth the
sentencing procedures for capital cases.94 The statute calls for a
bifurcated trial procedure, whereby separate trials are held for
determining guilt and punishment.95 Under this statute, a person
convicted of a capital offense is entitled to a separate sentencing
proceeding before a jury.96 Both the state and the defendant may
present arguments for or against imposition of the death sentence,
but under no circumstances may unconstitutionally obtained
evidence be admitted into the proceeding.97

Since Mississippi is a weighing jurisdiction, the jury must
weigh any aggravating and mitigating circumstances present to
determine the appropriateness of a death sentence.98 One
aggravating circumstance the jury may consider under the statute
is whether "the capital offense was especially heinous, atrocious,
or cruel."99 This is the same terminology found in the Maynard
statute, which the Court determined to be unconstitutionally vague
if not narrowly construed, and presented to the jury with a limiting
instruction.100

93. Id. Under the plea arrangement, Calvin agreed to testify when requested to do so by the
state, in return for which: (1) Calvin's testimony would not be used against him at his own trial for
capital murder; and (2) the state would not seek the death penalty against him at his trial. Petitioner's
Brief, supra note 87, at 4.
96. Id. § 99-19-101(1).
97. Id.
98. Id. § 99-19-101(2). For the jury to impose death, it must unanimously find that there are
insufficient mitigating circumstances to outweigh the aggravating circumstances found. Id. § 99-19-
101(3).
2. The Sentence

After delivering a guilty verdict against Clemons, the jury heard evidence concerning aggravation and mitigation of the sentence. After deliberation, the jury found the existence of two aggravating circumstances: (1) That the capital offense was committed while the defendant was engaged in the commission of robbery and was committed for pecuniary gain; and (2) that the capital offense was especially heinous, atrocious, or cruel. The jury further found that there were insufficient mitigating circumstances to outweigh the aggravating circumstances, and sentenced Clemons to death.

101. Clemons, 110 S. Ct. at 1445. See Petitioner’s Brief supra, note 87, at 4-5. During the sentencing proceeding, the jury heard evidence in support of nine separate mitigating factors, ranging from Clemons’ lack of a prior criminal record to his impaired judgment attributable to organic brain damage. Petitioner’s Brief, supra, note 87, at 4-5. However, it is unclear which of these mitigating circumstances, if any, the jury found to exist, since to impose the death penalty the jury need not explicitly state whether it found any mitigating circumstances to have existed. See Miss. Code Ann. § 99-19-101(3) (Supp. 1990). Rather, the jury must state only that there were insufficient mitigating circumstances to outweigh the aggravating circumstances found. Id.

102. Id. The jury never explicitly found Clemons to have been the killer; the jury’s written findings were only: (1) That Clemons contemplated that lethal force would be employed; (2) that the capital offense was committed while Clemons was engaged in the commission of robbery and was committed for pecuniary gain; and (3) that the capital offense was especially heinous, atrocious, or cruel. Defendant’s Reply Brief on Remand from the United States Supreme Court 10-11 (No. 03-DP-83) (Jury’s Sentencing Instructions and Findings). These findings are marginally sufficient to impose the death penalty in light of Enmund v. Florida, and Tison v. Arizona. Enmund held that a finding that the defendant either actually killed, attempted to kill, or intended that a killing occur is sufficient to impose a death penalty. Enmund v. Florida, 458 U.S. 782, 788 (1982). Tison extended this doctrine to allow the death penalty if the defendant was a major participant in a felony, acting with “reckless indifference to human life.” Tison v. Arizona, 481 U.S. 137, 158 (1987). In Bullock v. State, a case similar to Clemons, the Mississippi Supreme Court reduced a sentence from death to life imprisonment, despite the existence of two aggravating circumstances. Bullock v. State, 525 So.2d 764, 770 (Miss. 1987). The only Enmund factor satisfied in Bullock was that, as in Clemons, the “defendant contemplated that lethal force would be used.” Id. The court justified reversing the death sentence because, at the time of the Bullock decision, “no capital defendant has had a death sentence affirmed in [Mississippi] where the sole finding was that he contemplated lethal force.” Id. Clemons was a departure from that ruling because the contemplation of lethal force was the sole finding used in affirming the death sentence.

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3. The Mississippi Supreme Court Appeal

Clemons appealed to the Mississippi Supreme Court. 104 While the appeal was pending, the United States Supreme Court held in Maynard v. Cartwright that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague. 105 Due to the identical language in the Mississippi capital sentencing statute, the Mississippi Supreme Court requested supplemental briefs on the effect the Maynard decision should have on Clemons' case. 106 The Mississippi Supreme Court then overruled all assignments of error and affirmed the death sentence, stating that Maynard was not controlling, for several reasons. 107 After the defendant's petition for a rehearing was denied, the Supreme Court of the United States granted certiorari to determine the effect an invalid aggravating circumstance might have on a jury-imposed death sentence rendered in a weighing jurisdiction. 108

B. The Majority Opinion

In Clemons, the Supreme Court of the United States held that in a weighing jurisdiction, when a jury-imposed death sentence is based in part upon an unconstitutional aggravating circumstance, a state appellate court may reweigh the remaining circumstances or

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106. Petitioner's Brief, supra note 87, at 6-7.

107. Clemons v. State, 535 So. 2d 1354, 1365 (Miss. 1988), cert. granted in part, 109 S. Ct. 3194 (1989). The Mississippi Supreme Court distinguished Clemons from Maynard on three grounds: (1) Mississippi courts had previously upheld death sentences when an aggravating circumstance was invalidated, because of the existence of other valid remaining circumstances; (2) the Mississippi Supreme Court had previously given the aggravating circumstance at issue a limiting construction; and (3) the trial court had repeatedly instructed the jury that it was not required to impose the death penalty, even in the absence of mitigating circumstances. Id. at 1361-65.

108. Clemons, 110 S. Ct. at 1446.
apply harmless error analysis to uphold the sentence. Justice White wrote the majority opinion, joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy.

In reaching its decision, the Court stated that *Maynard v. Cartwright* did not mandate reversal. Under *Maynard*, appellate courts are not required to reverse a death sentence solely upon the basis of unconstitutionally vague wording of a statute, so long as the trial court employs a limiting construction. Although no limiting construction was used in *Clemons*, the Court only vacated rather than reversed the death sentence, because of the possibility a limited jury instruction might cure the statute's defective language.

Justice White then distinguished *Zant v. Stephens* from *Clemons*, emphasizing that the *Zant* salvage rule applies only to nonweighing jurisdictions, while Mississippi is a weighing jurisdiction. Thus, an "automatic" death sentence affirmance based upon the existence of the remaining aggravating circumstance would have been improper. However, the Court prescribed two other grounds for upholding the sentence: appellate reweighing and harmless error analysis.

The Court announced a new standard of judicial review, by permitting appellate courts to reweigh aggravating and mitigating circumstances. Under this new standard, an appellate court may affirm a death sentence which was based in part upon an invalid

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110. *Id.* at 1444-52.
111. *Id.* at 1445-46.
112. *See supra* notes 48-55 and accompanying text (discussing *Maynard*’s invalidation of an aggravating circumstance).
115. The Court emphasized the necessity for an appellate court to reweigh aggravating and mitigating circumstances because an "automatic rule of affirmance . . . would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." *Clemons*, 110 S. Ct. at 1450.
116. *Id.*
117. *Id.* at 1446-52.
118. *Id.* at 1445-49.
aggravating circumstance, by removing that circumstance from consideration and reweighing all remaining factors.\textsuperscript{119}

1. Appellate Reweighing Does Not Violate the Eighth Amendment

Clemons asserted that appellate reweighing violates the eighth amendment because appellate courts are unable to fully consider and evaluate mitigating factors.\textsuperscript{120} In rejecting this argument, the Court stressed that the main objective of scrutinizing death sentences under an eighth amendment analysis is to ensure that the sentencing decision is based upon the particular facts and circumstances of the case,\textsuperscript{121} and that an appellate court is well-suited for this task.\textsuperscript{122} Justice White also emphasized the twin objectives of "measured consistent application" and "fairness to the accused" in reviewing death sentences with respect to the eighth amendment.\textsuperscript{123} The majority stated that these objectives are not compromised when an appellate court reweighs aggravating and mitigating circumstances, citing the long-standing proposition that meaningful appellate review promotes reliability and consistency.\textsuperscript{124} Since appellate courts regularly review death sentences under strict eighth amendment guidelines, the majority was satisfied that state appellate courts can, and do, give maximum deference to each defendant’s circumstances.\textsuperscript{125} Clemons also

\textsuperscript{119} Id.
\textsuperscript{120} Id. at 1448. See Petitioner's Brief, supra note 87, at 33-40. On certiorari, Clemons asserted that the Mississippi Supreme Court’s refusal to remand the cause to a jury for reconsideration violated its own prior adherence to the principle that a jury alone finds facts, assesses credibility and determines the sentence in capital proceedings. Id. at 36. In fact, the Mississippi Supreme Court stated in Clemons v. State that it was beyond the court’s province to decide these issues. Clemons v. State, 535 So. 2d 1354, 1359 (Miss. 1988), cert. granted in part, 109 S. Ct. 3184 (1989). The Mississippi Supreme Court stated: "The credibility of a witness is not for the reviewing court... It was the function of the jury to pass upon the credibility of witnesses and to resolve the issues." Id. (quoting Johnson v. State, 477 So. 2d 196, 207 (Miss. 1985), cert. denied, 476 U.S. 1109 (1986), reh'g denied, 476 U.S. 1189 (1986)).
\textsuperscript{121} Clemons v. Mississippi, 110 S. Ct. 1441, 1448 (1990).
\textsuperscript{122} Id. at 1448-49.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
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raised several due process challenges to reweighing, based upon the sixth\textsuperscript{126} and fourteenth amendments,\textsuperscript{127} but the Court rejected

\textsuperscript{126} Clemons raised an important sixth amendment corollary issue regarding appellate reweighing — whether an appellate court is competent to redetermine matters of credibility. \textit{Id.} at 1446-47. He claimed appellate reweighing violates the sixth amendment guarantee of the right to a jury trial, because factual determinations must now be made by the court rather than a jury. \textit{Id.} See U.S. Const. amend VI. However, the Supreme Court adhered to a narrow view of the term "trial," as elucidated in several prior decisions, and reasoned that the guarantee does not extend to sentencing. \textit{Clemons}, 110 S. Ct. at 1446. \textit{See}, e.g., Hildwin v. Florida, 109 S. Ct. 2055 (1989), McMillan v. Pennsylvania, 477 U.S. 79 (1986), and Spaziano v. Florida, 468 U.S. 447 (1984) (cases narrowly construing the sixth amendment right to jury trial). The Court also used the language of the sixth amendment itself in reasoning that nothing in the sixth amendment grants the jury the sole power to impose a sentence of death, or to make the requisite findings for the imposition of such a sentence. \textit{Clemons}, 110 S. Ct. at 1446. \textit{See} Cabana v. Bullock, 474 U.S. 376, 385 (1986) (holding that capital sentencing is not necessarily a jury function); \textit{Spaziano}, 468 U.S. 447, 460 (1984) (finding no constitutional requirement for jury sentencing in capital cases). Extending this strict interpretation of the sixth amendment even further, the Court augmented the reweighing power of appellate courts by determining that the sixth amendment does not require the jury to be the only body to specify the aggravating factors justifying a death sentence, or to sentence the defendant, even where specific findings of fact are required. \textit{Clemons}, 110 S. Ct. at 1446. Additionally, the Court found no double jeopardy basis for prohibiting a judge to override a jury's recommended sentence, since the double jeopardy clause prohibits multiple trials for the same offense, rather than judicial discretion in sentencing. \textit{Id.} at 1447. \textit{See} U.S. Const. amend. V (prohibiting any person "subject for the same offense to be twice put in jeopardy of life or limb"); amend. XIV, \textsection 1 (extending federal due process guarantees to state proceedings). Some states have further enforced this principle by statute. \textit{See}, e.g., Cal. Penal Code \textsection 687 (West 1985) (prohibiting a second prosecution for a public offense for which one has already been prosecuted and convicted or acquitted).

\textsuperscript{127} Clemons also asserted that under Mississippi law, only a jury could validly impose a death sentence, and that this requirement provides the defendant with a fourteenth amendment liberty interest in having a jury make all findings relevant to the sentence. \textit{Id.} at 1447. Clemons asserted this right could not be denied without due process. \textit{Id.} See Miss. Code Ann. \textsection 99-19-101 (Supp. 1990) (describing sentencing proceeding in capital cases). The basis of the defendant's claim rested in the statute's wording that "[T]he (sentencing) proceeding shall be conducted by the trial judge before the trial jury as soon as practicable . . . If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose." \textit{See} Miss. Code Ann. \textsection 99-19-101(1) (Supp. 1990) (emphasis added). Clemons based this argument, in part, upon \textit{Gardner v. Florida}, in which the Court reaffirmed the recurring constitutional theme of fairness and impartiality when it stated 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." \textit{Clemons}, 110 S. Ct. at 1447. \textit{See} Gardner, 430 U.S. 349, 358 (1977) (opinion of Stevens, Stewart, and Powell, JJ.). Clemons also cited the Court's decision in \textit{Hicks v. Oklahoma}, which prohibits an appellate court from making speculative findings in lieu of a jury's particular findings, if particular findings are required under state law. \textit{Clemons}, 110 S. Ct. at 1447. In \textit{Hicks}, the defendant had been sentenced by a jury under an Oklahoma recidivist statute which required a 40-year term. \textit{Hicks v. Oklahoma}, 447 U.S. 343, 344-45 (1980). In another case, the state appellate court had held the applicable provision of the statute to be unconstitutional. \textit{Id.} at 345. The Oklahoma Court of Criminal Appeals refused to remand Hicks' sentence for a new hearing, reasoning that Hicks "was not prejudiced by the impact of the invalid statute, because his sentence was within the range of punishment that could have been
imposed in any event." Id. The Supreme Court of the United States reversed, stating:

Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Id. at 346 (citations omitted). The Court then described the due process violation by stating:

In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury might have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

Id. (emphasis in original). The Supreme Court distinguished between substantive due process claims and procedural due process claims, such as Clemons', when it stated that, "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." Carey v. Piphus, 435 U.S. 247, 259 (1978). When a state statute "creates" a life, liberty, or property interest, the statute itself may not also prescribe the procedure for its termination. See Vitek v. Jones, 445 U.S. 480, 491-94 (1980); Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538-41 (1985). Thus, when a court finds such a statutorily-created interest to exist, the due process clause then applies, and the remaining question of "what process is due" is determined on constitutional, not statutory principles. Loudermill, 470 U.S. at 541-42 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). As Justice White stated for the Loudermill Court: "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Id. at 542 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)). The Court in Clemons responded to petitioner's due process argument by construing the Mississippi statute as not restricting the power to impose the death penalty to juries. Clemons, 110 S. Ct. at 1447. In reaching this decision, the Court stated that the principles of due process permit the Mississippi Supreme Court to decide for itself whether the state statute permits the state court to affirm a death sentence despite an invalid aggravating circumstance. Id. at 1447-48. Thus, no liberty interest was infringed by reweighing the remaining circumstances, because it was the judiciary which determined the procedure for limiting that right. Id. The Court's determination seems consistent with Vitek and Loudermill, which prohibit a statute from prescribing the procedure for terminating a fundamental right, in this case, Clemons' right to jury imposition of a death sentence. Here, the termination procedure, affirming the sentence, was prescribed by the state supreme court, consistent with Vitek and Loudermill, although the source of the authority was the Mississippi statute. Id. Thus, so long as the judicially-determined procedure for terminating a capital defendant's life is "appropriate to the nature of the case," as required by Mullane, and which the Court determined to be true here, the due process clause is satisfied. Id.

2. Harmless Error Analysis is Permissible

Finally, the Court held that, even if Mississippi law prohibited an appellate court from reweighing aggravating and mitigating circumstances, the state supreme court nevertheless was within its authority to affirm the sentence on the basis of harmless error analysis.\footnote{Id. at 1450.} The Court relied upon the rationale employed by the \textit{Barclay v. Florida}\footnote{463 U.S. 939 (1983).} plurality.\footnote{Clemons, 110 S. Ct. at 1450.} In \textit{Barclay}, the Court asserted that a state appellate court could apply harmless error reasoning\footnote{See supra note 10 (explanation of harmless error).} to a trial judge-imposed death sentence.\footnote{Barclay, 463 U.S. at 958 (opinion of Rehnquist, J., joined by Burger, C.J., White, and O'Connor, JJ.).} The \textit{Clemons} Court extended this reasoning to conclude that harmless error analysis is permissible when an appellate court concludes beyond a reasonable doubt that a jury's verdict would have been the same had the jury not considered the invalid circumstance.\footnote{Clemons, 110 S. Ct. at 1451.} However, the Court admitted that a finding of harmless error in \textit{Clemons} would be strained, given the facts of record.\footnote{Clemons, 110 S. Ct. at 1451.} The Court vacated and remanded the case to the Mississippi Supreme Court for sentencing, because that court's opinion did not indicate whether it had in fact employed one of these two methods of judicial review.\footnote{Clemons, 110 S. Ct. at 1451-52.}

\begin{itemize}
\item \textit{Id.} at 1450.
\item 463 U.S. 939 (1983).
\item \textit{Clemons}, 110 S. Ct. at 1450.
\item See supra note 10 (explanation of harmless error).
\item Barclay, 463 U.S. at 958 (opinion of Rehnquist, J., joined by Burger, C.J., White, and O'Connor, JJ.).
\item \textit{Clemons}, 110 S. Ct. at 1451. The "beyond a reasonable doubt" standard was first announced in \textit{Chapman v. California}, wherein the Court upheld a death sentence after one of two aggravating circumstances involved was declared invalid, since the \textit{Chapman} Court felt that the jury's verdict would have been the same without that factor. \textit{Chapman v. California}, 386 U.S. 18, 24 (1967).
\item \textit{Clemons}, 110 S. Ct. at 1451. The dissent also agreed with this assertion. \textit{Id.} at 1459 (Blackmun, J., concurring and dissenting).
\item See supra notes 109-135 and accompanying text (discussing \textit{Clemons}).
\item \textit{Clemons}, 110 S. Ct. at 1451-52.
\end{itemize}
C. The Concurring and Dissenting Opinions

Justice Brennan concurred in the Court’s judgment that the sentence should be vacated, but dissented from the methodology employed by the majority in reaching that result.\(^\text{138}\) Justice Brennan has previously asserted that the death penalty is in all instances cruel and unusual punishment and thus, prohibited by the eighth amendment.\(^\text{139}\) Therefore, Justice Brennan dissented from the portion of the majority’s opinion which permits appellate courts to uphold death sentences by “reweighing” aggravating and mitigating circumstances.\(^\text{140}\)

Justice Blackmun also wrote an opinion concurring in the judgment and dissenting from the majority’s reweighing theory.\(^\text{141}\) Justices Brennan, Marshall, and Stevens joined in this opinion, criticizing the majority’s reasoning on several grounds.\(^\text{142}\) First, Justice Blackmun’s dissent asserted that \textit{Maynard v. Cartwright} mandated reversal of Clemons’ sentence, because \textit{Maynard} permits constitutionally-infirm death statutes to be employed only if given an appropriate limited construction.\(^\text{143}\) Prior to and including \textit{Clemons}, the Mississippi courts were reluctant to limit the construction of the “especially heinous, atrocious, or cruel” aggravating circumstance language.\(^\text{144}\) Furthermore, the Mississippi Supreme Court had consistently deferred to trial judges’ refusal to administer limiting

\begin{itemize}
  \item 138. \textit{Id.} at 1452 (Brennan, J., concurring and dissenting).
  \item 141. \textit{Clemons}, 110 S. Ct. at 1452-62 (Blackmun, J., concurring and dissenting).
  \item 142. \textit{Id.} (Blackmun, J., concurring and dissenting).
  \item 143. \textit{Id.} at 1452-53 (Blackmun, J., concurring and dissenting).
  \item 144. \textit{Id.} at 1453 (Blackmun, J., concurring and dissenting).
\end{itemize}
instructions. These errors, the dissenters argued, render the statute and sentence void under Maynard.

Second, Justice Blackmun stated that the majority’s suggestion that the Mississippi Supreme Court could salvage a death sentence by reweighing the remaining circumstances amounted to a “pure and simple advisory opinion,” a type of opinion which the Court has previously declined to issue. The Blackmun dissent claimed that the Court’s proper role is to await and then review the decisions of other courts, not to offer to state courts an entirely new and untested technique, such as reweighing. Consequently, Justice Blackmun felt the Court overstepped its bounds by offering the prospective reweighing guidance to lower courts.

Finally, the dissent emphasized the traditional distinction between the functions performed by trial and appellate courts, and argued that an appellate court’s ability to reweigh facts infringes

145. Id. at 1453-54 (Blackmun, J., concurring and dissenting).
146. Id. at 1452-54 (Blackmun, J., concurring and dissenting). See supra notes 48-55 and accompanying text (discussing Maynard).
147. Clemons, 110 S. Ct. at 1455 (Blackmun, J., concurring and dissenting). See Michigan v. Long, 463 U.S. 1032, 1040-45 (1983); Bayard v. Lombard, 50 U.S. 530, 548-49 (1850) (both cases refusing to issue advisory opinions). See generally C. Wright, LAW OF FEDERAL COURTS § 12 (4th ed. 1983). The rule against issuing advisory opinions is derived from an “implicit policy” embodied in Article III of the Constitution, in which the Constitution’s framers restricted the federal courts to determination of “cases and controversies” as normally construed by English courts. Id. See U.S. CONST. art III. As Justice Frankfurter stated:

[A] court will not decide a question unless the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of Westminster when the Constitution was framed.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring). The policy against issuing advisory opinions results from the risk that arises when the court rules on abstract questions rather than limiting decisions to concrete cases in which genuine adversaries have precisely framed and explored every aspect of each issue. See Wright, supra, § 12; U.S. v. Fruehauf, 365 U.S. 146, 157 (1961).
148. Clemons, 110 S. Ct. at 1455 (Blackmun, J., concurring and dissenting).
149. Id. (Blackmun, J., concurring and dissenting).
150. Id. at 1455 (Blackmun, J., concurring and dissenting).
upon the domain of trial courts.\textsuperscript{151} In support of this view, Justice Blackmun noted the Supreme Court’s prior adherence to the view that appellate courts must defer to trial court findings of fact unless clearly erroneous.\textsuperscript{152} The dissent characterized as “inexplicable” the majority’s willingness to allow factual issues in a capital case to be decided by a standard of appellate review which the Court had previously determined to be inadequate even for civil litigation.\textsuperscript{153}

The dissent further criticized the principle of appellate reweighing of capital sentences because of the intangibles present in most capital sentencing proceedings, which cannot effectively be conveyed through the written medium.\textsuperscript{154} Justice Blackmun noted that one such intangible in this case was the mitigating factor of Clemons’ remorse.\textsuperscript{155} Justice Blackmun stated that to suggest that this factor could be given proper consideration through a written transcript violates the eighth amendment requirement to review each capital sentencing case with respect to the individual facts at hand.\textsuperscript{156}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 1459 (Blackmun, J., concurring and dissenting).
\item Id. (Blackmun, J., concurring and dissenting). See Anderson v. Bessemer City, 470 U.S. 564, 575 (1985) (stating that the trial judge is in the best position to discern the truth or falsity of testimony).
\item Clemons, 110 S. Ct. at 1459 (Blackmun, J., concurring and dissenting).
\item Id. at 1460 (Blackmun, J., concurring and dissenting).
\item Id. (Blackmun, J., concurring and dissenting). Other mitigating factors asserted by Clemons included: (1) His youth (18 years of age); (2) his lack of any prior criminal record; (3) his chance of benefitting from rehabilitation; (4) his status as a drug and alcohol abuser; (5) the fact that he was under the influence of drugs and alcohol at the time of the crime; (6) his organic brain damage which impaired his judgment; and (7) his voluntary surrender to the sheriff. See Clemons v. State, 535 So. 2d 1354, 1359-60 (Miss. 1988). See also Petitioner’s Brief, supra note 87, at 35.
\item Clemons, 110 S. Ct. at 1460 (Blackmun, J., concurring and dissenting). Justice Blackmun expressed a strong need to consider each capital case “with that degree of respect due the uniqueness of the individual.” Id. (Blackmun, J., concurring and dissenting).
\end{enumerate}
\end{footnotesize}
III. THE SIGNIFICANCE OF CLEMONS ON CAPITAL PUNISHMENT'S EIGHTH AMENDMENT'S LIMITATIONS

A. Clemons v. Mississippi Modifies the Zant v. Stephens Salvage Rule for Use in Weighing Jurisdictions

In Furman v. Georgia, the Supreme Court of the United States enunciated the basic rule that a death sentence is inherently invalid if founded upon an unconstitutionally vague statute that fails to effectively limit and channel the trier of fact's discretion by providing precise guidelines for imposing such a sentence. Later cases such as Godfrey and Maynard provide specific examples of unconstitutionally vague statutes, and Maynard illustrates how a trial court can use a limiting jury instruction to overcome an overly vague statute.

Further, Zant describes how an appellate court in a nonweighing jurisdiction can save a death sentence where no limiting jury instruction has been given, so long as there remains at least the statutory minimum number of valid aggravating circumstances. Now, in Clemons, the Court has prescribed how appellate courts in weighing jurisdictions may save a death sentence which was based in part upon an unconstitutionally vague aggravating circumstance. This can be done be either reweighing the remaining circumstances or employing harmless error analysis.

B. Clemons v. Mississippi Expands Appellate Review Powers

In Clemons, the Supreme Court once again affirmed the eighth amendment's prohibition of arbitrary and capricious death sentences, but the Court simultaneously expanded the power of appellate review by permitting reweighing and harmless error

157. See supra notes 24-32 and accompanying text (discussing Furman).
158. See supra notes 40-55 and accompanying text (discussing Godfrey and Maynard).
159. See supra notes 48-55 and accompanying text (discussing Maynard).
160. See supra notes 62-76 and accompanying text (discussing Zant).
161. See supra notes 109-135 and accompanying text (discussing Clemons).
analysis. Consequently, there are at least two possible ways to interpret this new power.

1. Will Appellate Review Authority over Death Sentences be Abused?

First, Clemons arguably results in a convenient exception to strict constitutional requirements, similar to a Maynard limiting construction, which an appellate court may employ in circumventing the eighth amendment's strict parameters. Critics might say that some appellate courts, anxious to expedite capital appeals, will use Clemons as a shortcut for indiscriminantly affirming death sentences, using the broad rubric of appellate reweighing or harmless error as the basis for their decisions. After all, the argument goes, one person's critical factual circumstance might be another's harmless error, so there is little to prevent judicial abuse of the Clemons rule. Naturally, the significance of this argument is heightened by the fact that a person's right to live is dependent upon the outcome of an appellate court's exercise in second-guessing a jury's mental processes.

2. The Clemons Rule Does Not Circumvent Eighth Amendment Requirements

However, in the author's opinion, the better view is that the Court did not authorize constitutional shortcuts by authorizing appellate reweighing. Instead, the Court in Clemons filled a void which had existed since the Zant salvage rule, the holding of which was inapplicable to weighing jurisdictions. Therefore, by permitting appellate reweighing and harmless error analysis, the

162. Of course, only the jury knows with absolute certainty which facts or circumstances were crucial to the verdict rendered. However, our judicial system does not require absolute certainty, and herein may lie the weakness in this criticism of Clemons. For an appellate court to affirm a death sentence on the basis of harmless error, the court must merely find, beyond a reasonable doubt, that "the error complained of did not contribute to the verdict obtained." Satterwhite v. Texas, 108 S. Ct. 1792, 1798 (1988); Chapman v. California, 386 U.S. 18, 24 (1967).

163. See supra notes 62-76 and accompanying text (discussing Zant).
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Court has merely prescribed clear, straightforward appellate review guidelines for reviewing death sentences in weighing jurisdictions. By doing this, the Supreme Court has not written a blank check for state appellate courts to cash as they see fit in capital cases. Rather, the Court has precisely specified how appellate courts in weighing jurisdictions may now write that check.

C. Clemons Reaffirms Eighth Amendment Sentencing Parameters

The eighth amendment is strengthened, rather than weakened, under Clemons. Since Clemons prohibits a death sentence from being affirmed via reweighing or harmless error analysis if the facts do not support such a result, the ruling has upheld the preeminence of the eighth amendment in the imposition of capital punishment. For example, the Supreme Court’s own refusal to affirm the sentence in Clemons and the Court’s decision to remand for reconsideration suggests that the Court will continue to ensure that each capital defendant is given individualized treatment under the law. To illustrate, note that in Clemons, the Court was not satisfied that the Mississippi Supreme Court had properly employed either reweighing or harmless error theory to the facts, and thus remanded the sentence for reconsideration under either of these two methods. Furthermore, all nine justices, albeit in dicta, offered the Mississippi Supreme Court some direction on remand by expressing their skepticism over the trial court’s error in Clemons to have been truly “harmless,” given the facts of record.164 Perhaps this suggests that the Supreme Court of the United States would not hesitate to once again grant certiorari if the Mississippi court were to affirm Clemons’ sentence on the questionable theory of harmless error. This close judicial scrutiny of Clemons’ individual circumstances, as required by Furman and its progeny, suggests that the seemingly broad discretionary power now

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164. Clemons v. Mississippi, 110 S. Ct. 1441, 1451 (1990); id. at 1459 (Blackmun, J., concurring and dissenting).
conferring upon appellate courts in weighing jurisdictions is sufficiently channelled and limited to satisfy the eighth amendment.

IV. CALIFORNIA'S CAPITAL SENTENCING SYSTEM

Like Mississippi, California is a weighing jurisdiction, and its capital sentencing system provides express statutory guidance to the trier of fact for determining the appropriate sentence. Additionally, the California Supreme Court has recently interpreted and applied the relevant statutes in a manner which, until the Clemons decision, raised a serious constitutionality question.

A. Statutes

California's capital offense adjudication and sentencing statutes are very similar to those of Mississippi. As in Mississippi,
California conducts bifurcated trials in capital cases. In addition, California specifies by statute the various aggravating circumstances which permit a death sentence to be imposed, as opposed to life imprisonment without the possibility of parole. One of these aggravating circumstances is the offense’s “heinous, atrocious, or cruel” nature, language identical to that of the Mississippi statute scrutinized in Clemons.
B. California Case Law Prior to Clemons v. Mississippi

Although the California Supreme Court has never addressed the issue of appellate reweighing of aggravating and mitigating circumstances, it has nevertheless affirmed constitutionally-tainted death sentences on harmless error grounds.171

1. People v. Allen and Harmless Error

In People v. Allen,172 the California Supreme Court held that a jury's consideration of eight special circumstance findings was harmless error, because three other valid special circumstance findings remained.173 In Allen, the defendant was convicted of three murders, as well as conspiracy to murder several witnesses.174 In arguing for imposition of the death penalty, the prosecution submitted evidence of eleven special circumstances175 for the jury's consideration.176 The jury found all eleven circumstances existed, and sentenced the defendant to death.177 On appeal, the California Supreme Court ruled that, because of prosecutorial error, eight special circumstances were erroneous.178 However, the sentence was affirmed on the basis of harmless error.179 Because of the existence of three valid circumstances, the court found no prejudicial effect from the eight invalid circumstances.180

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171. See infra notes 172-180 and accompanying text (discussing People v. Allen).
173. Id. at 1281-83, 729 P.2d at 152-53, 232 Cal. Rptr. at 886-87.
174. Id. at 1222, 729 P.2d at 115, 232 Cal. Rptr. at 849.
175. During the weighing process, special circumstances are included in the broader category of aggravating circumstances. See supra note 169 (describing sections 190.2 and 190.3 of the California Penal Code, which categorize special and aggravating circumstances).
176. Allen, 42 Cal. 3d at 1273, 729 P.2d at 146, 232 Cal. Rptr. at 880.
177. Id.
178. Id. at 1273-74, 729 P.2d at 146-47, 232 Cal. Rptr. at 880-81.
179. Id. at 1288, 729 P.2d at 157, 232 Cal. Rptr. at 891.
180. Id. at 1281-83, 729 P.2d at 152-53, 232 Cal. Rptr. at 886-87.

Two years after Allen, in People v. Silva, the California Supreme Court ruled that a jury’s consideration of three invalid special circumstance findings was harmless error, and that the sentence could be upheld on the basis of a single remaining special circumstance. In Silva, the defendant had been convicted of murder, and the jury found felony-murder, heinous murder, witness murder, and financial gain murder special circumstances to have existed. The defendant was sentenced to death. On appeal, the California Supreme Court ruled three of the four special circumstances invalid and the jury’s consideration of them improper. However, the court refused to vacate or reverse the sentence, despite the invalid circumstances. In affirming the sentence, the court relied heavily upon Zant v. Stephens. In Zant, the Supreme Court of the United States upheld a death penalty where one of the several aggravating circumstances found to be present by the jury was subsequently determined invalid, because the remaining circumstance was sufficient to warrant the death penalty. However, the Zant Court specifically restricted the case’s applicability to nonweighing jurisdictions. Since

182. Id. at 632-33, 754 P.2d at 1085-86, 247 Cal. Rptr. at 588-89.
183. Id. at 604, 754 P.2d at 1070, 247 Cal. Rptr. at 573.
184. Id. at 614, 754 P.2d at 1073, 247 Cal. Rptr. at 576.
185. Id. at 632-36, 754 P.2d at 1085-87, 247 Cal. Rptr. at 588-91.
186. Id.
187. Id. at 632, 754 P.2d at 1085, 247 Cal. Rptr. at 588 (citing Zant). The court also followed People v. Allen in ruling the erroneous consideration of those factors to have been harmless error. Id. In doing so, the majority reasoned that the exceptional nature of the lone remaining aggravating circumstance, and the apparent absence of any mitigating circumstances sufficient to justify the jury’s sentence. Id. Thus, the court concluded that the consideration of the invalid circumstances probably did not affect the jury’s determination. Id. But Allen is arguably distinguishable from Silva, because two of the invalid special circumstances considered by the jury in Silva were not merely duplicative of other valid circumstances, as in Allen, but were based upon independently considered invalid evidence and thus were inherently improper. Id. at 645-46, 754 P.2d at 1094-95, 247 Cal. Rptr. at 597-98 (Broussard, J., concurring and dissenting).
188. See supra notes 62-76 and accompanying text (discussing Zant).
California is a weighing jurisdiction, the California Supreme Court's reliance upon *Zant* may be flawed, thereby possibly rendering the *Silva* analysis invalid.

Until *Clemons v. Mississippi* was decided, the California Supreme Court had never reweighed remaining special circumstances, and had based at least one death sentence affirmanace upon *Zant*, a United States Supreme Court case which pertained to a different type of capital sentencing jurisdiction. Thus, when *Clemons* went to the Supreme Court of the United States, the constitutionality of California's capital sentence appellate review techniques was uncertain.

**V. LEGAL RAMIFICATIONS**

*Clemons v. Mississippi* extends the *Zant* salvage rule to appellate courts in weighing jurisdictions, by permitting them to reweigh remaining circumstances and thereby uphold a death sentence even if the initial sentence had to be determined by a jury. If a state appellate court elects not to reweigh the circumstances, the appellate court may nevertheless uphold the sentence on a harmless error theory.

A. *Clemons v. Mississippi* Validates *People v. Allen* and *People v. Silva*

Prior to *Clemons*, the Supreme Court of the United States had not ruled on the constitutionality of employing harmless error analysis to a jury-imposed death sentence, nor had it prescribed an

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191. *See Silva*, 45 Cal. 3d at 643, 754 P.2d at 1092-93, 247 Cal. Rptr. at 596 (Broussard, J., concurring and dissenting) (criticizing the majority's reliance upon *Zant* because of the inapplicability of the *Zant* case to weighing jurisdictions).
192. *See supra* notes 171-193 and accompanying text (discussing California case law preceding *Clemons*).
193. *See supra* notes 181-191 and accompanying text (discussing *People v. Silva*).
195. *Id.* at 1450-52.
appropriate appellate review technique for courts in weighing jurisdictions. Prior to Clemons, the California Supreme Court had employed harmless error theory in Allen, and had extended the Zant salvage rule to California, a weighing jurisdiction, in Silva. Thus, the decision two years later in Clemons confirming the validity of both appellate reweighing and harmless error analysis of jury-imposed death sentences appears to have eradicated the constitutional uncertainty surrounding the procedures employed by the California Supreme Court in Allen and Silva.

At first glance, Clemons presents an opportunity for appellate courts to expedite capital appeals and, in turn, increase the low execution rate which is often criticized by death penalty advocates. Hence, the Clemons ruling may have enabled California to move another step closer to its first execution in twenty-four years. However, a closer look at recent trends may suggest a contrary result.

196. See supra notes 172-191 and accompanying text (discussing Allen and Silva).

197. See, e.g., Savage, Panel Would End Death Row Inmates' Multiple Appeals, L.A. Times, Sept. 22, 1989, at 15, col. 1 (citing selected findings of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, led by former Supreme Court Justice Lewis F. Powell, Jr.). Approximately 2200 inmates are on death row in the United States. Id. However, fewer than 200 inmates have been executed since 1976, resulting in an average delay of eight years from sentencing to execution. Id. This extremely low execution rate has led Justice Powell to speculate that capital punishment will eventually be abolished in the United States because of lack of enforcement. See Coyle, Trade-off Proffered by Proposal, The Nat'l LJ., October 2, 1989, pg 3, col 1 (quoting Justice Powell).

198. The most recent execution in California occurred on April 12, 1967, when Aaron Mitchell was put to death for the murder of a Sacramento police officer. See Deukmejian, Murder & the Death Penalty--A Special Report to the People, Cal. Dept. of Justice, at App. III, p. i (1981). Widespread state attention has focused, however, on the fate of Robert Alton Harris, convicted of the 1978 murders of two San Diego youths. See Hager, Divided Court Upholds Harris' Death Penalty, L.A. Times, August 30, 1990, at A1, col. 2; Gross, California Closer to its First Execution Since 1967, N.Y. Times, August 30, 1990, at B10, col. 4. In 1990, Harris nearly made history as the first California executee in 23 years, but the Ninth Circuit Court of Appeals granted a stay of execution on March 30, 1990, and the U.S. Supreme Court refused to vacate that stay just 12 hours prior to Harris' appointment with the gas chamber. See Vasquez v. Harris, 110 S. Ct. 1799 (1990). The Ninth Circuit subsequently heard Harris' claim that he was denied competent psychiatric help at his trial in 1979. See Harris v. Vasquez, 913 F.2d 606 (1990). After the hearing, a divided three-judge circuit court upheld the sentence on August 29, 1990, but as of the date of this Note's writing (January, 1991), no execution date has been re-established. Id. at 609, 630.

199. See infra notes 210, 212 and accompanying text (examining trends in execution rates in various jurisdictions).
B. Appellate Reweighing Not Required

_Clemons_ permits appellate courts to reweigh aggravating and mitigating circumstances.\(^{200}\) _Clemons_ does not, however, _require_ appellate courts to perform this function.\(^{201}\) Indeed, the majority opinion specifically permits appellate courts to remand such causes to the trier of fact for reconsideration.\(^{202}\) To this end, Justice White openly acknowledged that the "peculiarities" of some cases will render meaningful appellate reweighing or harmless error analysis extremely speculative or even impossible.\(^{203}\) Justice Blackmun echoed these concerns in his dissent, questioning the validity of appellate reweighing in all capital cases, since such a procedure is disallowed in civil lawsuits.\(^{204}\)

Because of these concerns, and in light of the gravity of erroneous capital sentencing decisions, appellate courts may refuse to affirm death sentences based upon questionable issues of fact. Appellate court judges, far removed from actual witnesses' testimony, may become very reluctant to play the role of the jury by reweighing evidence on the basis of only a written transcript. If true, this would reduce the rate of death sentence affirmances, and in turn, reduce the execution rate.

C. Will Harmless Error Lead to Wrongful Execution?

Appellate courts might be reluctant to apply the Supreme Court-approved harmless error approach, for the same reason these courts might hesitate to reweigh circumstances. To illustrate, note that the evidence in _Clemons_ led all nine justices to agree that a harmless error ruling in that case would have been strained.\(^{205}\)

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201. _Id._ at 1451. "Nothing in this opinion is intended to convey the impression that state appellate courts are required to or necessarily should engage in reweighing or harmless error analysis when errors have occurred in a capital sentencing proceeding. Our holding is only that such procedures are constitutionally permissible." _Id._
202. _Id._
203. _Id._
204. _Id._ at 1459 (Blackmun, J., concurring and dissenting).
205. _Id._ at 1451; _id._ at 1459 (Blackmun, J., concurring and dissenting).
Indeed, the sheer impact of ruling almost anything in a capital case to be “harmless” when second-guessing a jury’s motives could make an observer wonder about the judiciary’s perception of the value of human life. Therefore, assuming appellate court judges are sensitive to the public’s perceptions, they may hesitate to “rubber stamp” death sentences containing seemingly innocuous errors.

However, the California Supreme Court’s activist approach to affirming death sentences, as illustrated in Allen and Silva, suggests otherwise. The California Supreme Court’s willingness to extend harmless error analysis to jury-imposed death sentences, as well as its usage of the Zant nonweighing jurisdiction salvage rule in a weighing jurisdiction, prior to express Supreme Court of the United States approval, may lead one to believe that the California Supreme Court will interpret appellate review authority as defined in Clemons very broadly.

D. Juror Awareness May Affect Sentencing

Although Clemons provides appellate courts the power to expedite capital appeals, and assuming, arguendo, that the courts will be willing to use this power, the realization of this prospect may ultimately have an anomalous effect upon the capital sentencing system. This is due to the effect individual jurors’ consciences may have upon the capital sentencing mechanism. To illustrate, one should examine an issue other than the harmless error issue which arose in Silva. The issue involves the jury’s perceptions of the judiciary’s power of reversal. After receiving jury instructions and beginning penalty deliberations, the Silva jury questioned the trial court about the extent of the court’s authority to override a verdict of death. The trial court refused to answer this question, nor did the court modify the jury instructions in light

206. See supra notes 172-180 and accompanying text (discussing People v. Allen); supra notes 181-191 and accompanying text (discussing People v. Silva).


208. Silva, 45 Cal. 3d at 640-41, 754 P.2d at 1091, 247 Cal. Rptr. at 594.
of this inquiry, and these decisions were upheld by the California Supreme Court on appeal.footnote{209}

The jury’s inquisitive act in Silva raises concerns about jurors’ subconscious, or perhaps conscious thoughts encountered during deliberations. The logical question to ask in light of Silva is: “Why would a jury want to know about the trial court’s inherent power to overturn a death sentence?” The answer might be: “If individuals know that an erroneous death sentence can be overturned, they will be more likely to gamble and decide in favor of death over life imprisonment.” Conversely, if a jury thinks that an erroneous death sentence can be summarily approved at the appellate level merely on a reweighing or harmless error theory, the jury may hesitate to choose in favor of the ultimate punishment. The recent decline in death sentences rendered in several jurisdictions supports this theory.footnote{210} Perhaps this suggests that,

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209. Id.

210. See Sullivan, New Jersey’s Death Penalty: Fair or Fake?, N.Y. Times, September 13, 1990 at B1, col. 5 (recounting the recent decline in New Jersey’s execution rate, despite strong judicial support in applying the law). New Jersey officials have stated that juries are becoming more reluctant to impose the death penalty. Id. Said one prosecutor:

   If you ask people in the street if they support the death penalty, most would say they did. But it becomes a different matter when they sit in a jury box and look at the person on trial and hear things about them, both good and bad, that bring home the fact that the life of a human being is in their hands.

Id. See also Feldman, Livesay, Deathsay; Assistant D.A. Serves as the Final Arbiter in Capital Cases, L.A. Times, May 5, 1988, § 2 at 1, col. 1 (citing the fact that two out of every three Los Angeles juries reject the death penalty). “When push comes to shove with a jury, they are very reluctant to impose the death penalty,” said Ira Reiner, Los Angeles District Attorney. Id. Also, the defendant’s age can influence jurors and judges alike. See Vanore, The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles, 61 Ind. L.J. 757, 790 (1986). Jurors are often reluctant to impose capital punishment on minors, and appellate courts sometimes use the defendant’s youth as the basis for overturning death sentences. Id. Further, many jurors are reluctant to impose capital punishment on teenagers because they often have children of their own, and can empathize with the defendants’ parents. Fein, Juveniles Get a Big Reminder, The Washington Times, July 11, 1989, at F1 (commentary). Studies have also indicated juror reluctance over imposing the death penalty when the method of execution seems cruel. See Bayer, No Nice Face for Death, N.Y. Times, July 15, 1983, at A23, col. 5. For this reason, some jurisdictions now use or are contemplating using lethal injection, instead of hanging, the firing squad, electrocution, and even the gas chamber, as the preferred method of execution. Id. See also Hohler, Not Carried Out For Fifty Years, Boston Globe, July 9, 1989, New Hampshire Weekly Section, at 1 (summarizing state attorney general’s view that New Hampshire’s execution rate will increase now that lethal injection has replaced hanging).
although the public generally supports the concept of capital punishment,211 few individuals want to be the ones who get blood on their hands.212

Thus, while Clemons might expedite the capital punishment appellate review process, the net result might be that appellate courts will have fewer death sentences to review in the future, possibly resulting in little or no change in the execution rate.

CONCLUSION

Prior to Clemons, there existed no clear rule for appellate courts in weighing jurisdictions to employ in upholding constitutionally infirm death sentences. Now, in weighing jurisdictions, when a jury-imposed death sentence is based, in part, upon an unconstitutional aggravating circumstance, a state appellate court may affirm the sentence in either of two ways: (1) By reweighing the remaining circumstances and determining that the aggravating circumstances outweigh the mitigating circumstances; or (2) by determining that the jury's consideration of the unconstitutional aggravating circumstance was harmless error.

This seemingly broad allotment of appellate review authority may at first lead one to believe that Clemons will expedite the capital appeal process and in turn lead to a higher execution rate. However, even if appellate courts decide to exercise this power and

211. See Mouat, Death Penalty Gains Favor in U.S., Christian Science Monitor, July 26, 1990, at 6 (asserting support for capital punishment in the United States to be at an all-time high of 70 to 80 percent).

212. See Bloom, Salcido Must Die, Jury Says; Sacramento Bee, November 17, 1990, at A1 (recounting jurors' sentiments after delivering their verdict in a recent California capital case). Although the jury imposed the death sentence, several jurors expressed sympathy for the defendant. Id. One juror summed it up by saying, "Sentencing someone to death is something none of us wanted to do. It will take a very long time to get over this for all of us." Id. In assessing the possibility of a lighter sentence being imposed had the defendant testified on his own behalf, the juror stated, "We were looking for anything that would have shown us he was sorry for his actions." Id. Perhaps the trial judge in People v. Silva described jurors' self-imposed restraint best when, after refusing to answer the jury's questions about the possibility of overturning a death sentence, the judge stated, "I think [the possibility of death sentence reversal] suggests an easy way out to the jury and allows them to think in terms of the Pontius Pilate theory, 'I wash my hands of it.’” People v. Silva, 45 Cal. 3d 604, 641, 754 P.2d 1070, 1091, 247 Cal. Rptr. 573, 594.
expedite capital appeals, these courts may, in the long term, have fewer death sentences to expedite because of jurors’ reluctance to impose death sentences when execution seems likely.

Therefore, Clemons’ long-term effect on the nation’s execution rate will depend primarily upon two factors: (1) appellate courts’ willingness to employ this newly-approved discretion; and (2) the extent to which jurors will impose softer sentences in response to that willingness. The result could be an ironic power struggle which only further delays the imposition of justice by a method a majority of Americans claim to support.

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