Denver Law Review

Volume 84 | Issue 2 Article 10

January 2006

Brown v. Sanders: Invalid Factors and Appellate Review in Capital Sentencing

Karen Lamprey

Brown v. Sanders: Invalid Factors and Appellate Review in Capital Sentencing

BROWN V. SANDERS: INVALID FACTORS AND APPELLATE REVIEW IN CAPITAL SENTENCING

INTRODUCTION

Death penalty jurisprudence in America is dynamic. Since *Furman v. Georgia*[1] in 1972, the states and the United States Supreme Court have elaborated constitutional and practicable systems of capital punishment and sentencing.[2] The Court has worked to ensure that the death penalty cannot be imposed arbitrarily, and to allow sentencers to review mitigating factors that can support lesser sentences.[3] Meanwhile, state appellate courts have examined death penalty statutes to ensure they meet revised sentencing guidelines.[4] The Supreme Court has carved out a jurisprudential approach to sentences rendered using invalid sentencing factors after new statutory factors were found too vague to ensure the constitutional rights of offenders.[5] The Court has maintained guidelines for valid factors[6] and has addressed cases in which sentences were imposed after a jury considered factors later determined invalid.[7]

This comment addresses a recent capital decision by the United States Supreme Court. *Brown v. Sanders*[8] is the latest in a series of cases addressing death sentences issued after the consideration of invalid sentencing factors. In deciding *Brown*, the Supreme Court eliminated the distinction between "weighing" and "non-weighing" jurisdictions[9] which had been in place for fifteen years.[10] While this change in jurisprudence will simplify the examination of sentences derived from invalid sentencing factors, the majority opinion in *Brown* failed to clarify the role of appellate review under the new system.

Part I provides an overview of the constitutional requirements for death sentences, and the approaches taken with respect to invalid sentencing factors. Part II discusses the decision in *Brown*. Part III analyzes the decision, first in a discussion of its elimination of weighing and

---

1. 408 U.S. 238 (1972) (per curiam).
2. Srikanth Srinivasan, Note, *Capital Sentencing Doctrine and the Weighing – Nonweighing Distinction*, 47 STAN. L. REV. 1347, 1347-48 (1995).
3. Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 TEX. L. REV. 441, 444-46; Srinivasan, *supra* note 2, at 1352-53.
4. *See, e.g.*, Brown v. Sanders, 126 S.Ct. 884, 888-89 (2006).
5. Tuilaepa v. California, 512 U.S. 967, 973-75 (1994).
6. *Id.* at 972-73.
7. *See, e.g.*, *Brown*, 126 S. Ct. at 888.
8. 126 S. Ct. 884 (2006).
9. *Id.* at 891-92.
10. *See generally* Clemons v. Mississippi, 494 U.S. 738 (1990) (holding that in death penalty cases it is constitutionally permissible for courts to weigh or reweigh aggravating or mitigating circumstances).

non-weighing jurisdictions, and then in regard to the risks to future cases regarding the requirement for appellate review which is strikingly absent from the opinion. In eliminating the distinction, the Court attempted to clarify the sentencing process for all jurisdictions, but neglected to discuss the crucial role of appellate review under the new system.

I. BACKGROUND

Three requirements apply to all death sentences: guided discretion, individualized sentencing, and appellate review.[11] When a sentencing factor used to meet either of the first two requirements is found invalid, appellate courts have previously determined whether the state is a weighing or a non-weighing jurisdiction to decide whether the sentence may stand.[12] Appellate review is always a requirement, but any sentence rendered after consideration of invalid sentencing factors may be "reweighed" or may go through harmless error analysis during the appellate process.[13]

A. Guided Discretion

Furman v. Georgia[14] established that a sentence of death is unconstitutional if a sentencing body had complete discretion in imposing it.[15] The Supreme Court explained that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[16] Statutes developed in response to *Furman* were upheld if they limited the group of offenders eligible for death, thus guiding the discretion of the sentencing bodies.[17] Most jurisdictions now meet this requirement by defining eligibility factors for the death penalty.[18] If the nature of a crime satisfies the factors required by the state, the sentencer has the opportunity to impose the death sentence.[19]

---

11. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 189, 193 (1976) (guided discretion); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (individualized discretion); Zant v. Stephens, 462 U.S. 862, 890 (1983) (appellate review).

12. *E.g.*, *Brown v. Sanders*, 126 S. Ct. 884, 889 (2006).

13. *See* Clemons v. Mississippi, 494 U.S. 738, 750-54 (1990).

14. 408 U.S. 238 (1972) (per curiam).

15. Hornbuckle, *supra* note 3, at 441-42; Srinivasan, *supra* note 2, at 1349.

16. *Gregg*, 428 U.S. at 189.

17. *Zant*, 462 U.S. at 874, 879; Srinivasan, *supra* note 2, at 1349-50; Marcia A. Widder, *Hanging Life in the Balance: The Supreme Court and the Metaphor of Weighing in the Penalty Phase of the Capital Trial*, 68 TUL. L. REV. 1341, 1347-48 (1994).

18. *See, e.g.*, *Brown*, 126 S. Ct. at 889; *see also* Srinivasan, *supra* note 2, at 1351 (suggesting that all guided discretion statutes require a showing of certain aggravated factors before imposing a death sentence); Tuilaepa v. California, 512 U.S. 967, 971-72 (1994) (explaining that a defendant cannot be sentenced to death without a finding of at least one "aggravating circumstance," which serves to limit the number of defendants eligible for the death penalty).

19. *Brown*, 126 S. Ct. at 889; *see also* Hornbuckle, *supra* note 3, at 446 (explaining that a factfinder can sentence a defendant to death only where at least one aggravating circumstance has been proven).

B. Individualized Sentencing

The second requirement for a constitutional death sentence is that the jury analyzes any mitigating factors in the circumstances of the crime or the character of the defendant.[20] This provides an individualized sentence for every offender eligible for death.[21] Because of the severity and finality of the death penalty, the Constitution requires that even if an offender is found eligible through guided discretion, his character and circumstances must be weighed against the aggravating factors found by the sentencer.[22] As opposed to their limited discretion in determining eligibility for death, the individualized sentencing requirement ensures that juries may consider any mitigating evidence that comes to light.[23] Though sentencers may impose the death penalty on eligible offenders, they may always consider mitigating factors, and they are never required to issue a sentence of death.[24]

C. Appellate Review

After *Furman*, appellate review is a safeguard that has ensured the constitutionality of death sentences.[25] *Gregg v. Georgia*[26] emphasized that in a system of guided discretion "the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."[27] The Court in *Zant v. Stephens*[28] noted that Georgia's sentencing procedure could be approved in part because every death sentence was reviewed by the state supreme court "to determine whether the sentence was arbitrary or disproportionate."[29] In the context of invalid sentencing factors, appellate review becomes even more important to prevent an unconstitutional sentence.

Barclay v. Florida[30] presents Florida's approach to appellate review of death sentences. As in many other jurisdictions, there is an automatic appellate review of any death penalty case by the state supreme court.[31] If a jury used an invalid sentencing factor to determine eligibility for a

20. Barclay v. Florida, 463 U.S. 939, 950 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

21. *See Barclay*, 463 U.S. at 950; *Zant*, 462 U.S. at 879.

22. *Barclay*, 463 U.S. at 950. Though not declared a constitutional requirement in the cases immediately following *Furman v. Georgia*, the court recognized prior to its decision in *Eddings v. Oklahoma*, that any jury's sentencing procedure involved a balance of the aggravating and mitigating factors of the case. Widder, *supra* note 17, at 1358.

23. Srinivasan, *supra* note 2, at 1353.

24. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976) (striking down a mandatory death penalty statute).

25. *See Gregg*, 428 U.S. at 195.

26. 428 U.S. 153 (1976).

27. *Id.*

28. 462 U.S. 862 (1983).

29. *Zant*, 462 U.S. at 876.

30. 463 U.S. 939 (1983) (upholding Florida's death penalty statute where the state supreme court reviewed each death sentence).

31. *Barclay*, 463 U.S. at 953.

death sentence, the United States Supreme Court requires either a reweighing of all the factors or a harmless-error review if no mitigating factors are present.[32] However, within this review it is accepted that the sentencing process involves subjective decisions.[33] The subjectivity of a sentencer's decisions is appropriate after the class of defendants eligible for the death penalty has been narrowed. After a defendant is found to be eligible, the sentencer uses discretion to impose a sentence appropriate to the offense and any mitigating factors.[34]

When an invalid factor is used in sentencing, appellate review or harmless-error analysis is required by the Eighth Amendment.[35] *Barclay* requires that when an invalid factor has been used in a death penalty decision, there be a reweighing of the factors leading to the sentence by either a jury or an appellate court.[36] When an appellate court affirms a death sentence, there must be no "automatic assumption that [an invalid] factor has not infected the weighing process."[37] *Barclay* made it clear that appellate review is a constitutional requirement for any death sentence involving an invalid sentencing factor.[38]

The Supreme Court has consistently recognized this precedent in prior and later cases. In *Zant*, the Court described "mandatory appellate review" of a sentence imposed using an invalid sentencing factor as an "important procedural safeguard" that was necessary to "avoid arbitrariness and assure proportionality" in sentencing.[39] When there is a risk of guided discretion going astray, appellate review is the safety measure that ensures the constitutionality of a death sentence. *Clemons v. Mississippi*[40] also discussed the importance of "meaningful appellate review" in cases involving invalid sentencing factors.[41] Though *Clemons* is most often cited as an example of a weighing state, the decision rested on the Mississippi Supreme Court's failure to analyze whether the use of an invalid sentencing factor was a harmless error.[42]

Stringer v. Black[43] reaffirmed the importance of appellate review in cases with sentencing errors.[44] The case framed the harmless-error re-

32. *See id.* at 954-58. Additionally, if a judge imposes a death sentence over the jury's recommendation, the state supreme court applies a clear and convincing standard to all the facts in favor of death to determine if the sentence should stand. *Id.* at 955-56.
33. *Id.* at 950. *See* Widder, *supra* note 17, at 1373.
34. *See Brown*, 126 S. Ct. at 889; Widder, *supra* note 17, at 1374.
35. *See Brown*, 126 S.Ct. at 901 (Breyer, J., dissenting).
36. *See Clemons*, 494 U.S. at 749, 751.
37. Stringer v. Black, 503 U.S. 222, 231 (1992).
38. *See Barclay*, 463 U.S. at 958.
39. *Zant*, 462 U.S. at 890.
40. 494 U.S. 738 (1990).
41. *Clemons*, 494 U.S. at 749.
42. *Id.* at 753-54; *see also* Hornbuckle, *supra* note 3, at 453.
43. 503 U.S. 222 (1992).
44. *Stringer*, 503 U.S. at 237. *But see* Srinivasan, *supra* note 2, at 1367 (arguing that *Stringer* added harmless-error analysis as a new element to individualized sentencing).

view requirement in respect to the distinction between weighing and non-weighing states, which it defined.[45] *Stringer* indicated that where an appellate court has determined that there would have been no difference in a sentence without the analysis of an invalid factor, the sentence is constitutional.[46] But the reviewing court may not assume such, and harmless-error review or appellate reweighing of sentencing factors is necessary to ensure that an offender has been sentenced individually.[47] Nonetheless, whether the state weighs or does not, an appellate review of an invalid sentencing factor is a constitutional requirement for a death sentence to stand.

D. Non-Weighing States

In *Zant v. Stephens*,[48] the Supreme Court addressed a sentence that had been issued according to Georgia's statutes concerning guided discretion and individualized sentencing. On appeal, one of the factors making the defendant eligible for the death penalty was found to be unconstitutionally vague.[49] The Court had to determine whether the use of the invalid factor in determining eligibility required the sentence to be vacated.[50]

In *Zant*, the aggravating (eligibility) factors were used to narrow the class of offenders eligible for death, but the jury was not required to specifically analyze those factors in imposing a sentence.[51] *Zant* is now considered to be an analysis of a non-weighing state because of the jury's ability to consider non-statutory factors in sentencing.[52] Georgia's statute provided that at least one statutory eligibility factor must be found by a jury for a defendant to become eligible for the death penalty.[53] However, once a jury found the existence of one of the eligibility factors beyond a reasonable doubt, it could examine any other evidence from the trial proceeding and any mitigating circumstances to determine the final sentence.[54]

In *Zant*, though one factor used in determining eligibility for the death penalty was found to be invalid, the Court determined that the defendant was still eligible for his sentence, based on the valid eligibility

45. *Stringer*, 503 U.S. at 229. Courts have used the term "weighing" in regard to sentencing for some time. *See Zant*, 462 U.S. at 880. Justice Breyer argues in his dissent to *Brown v. Sanders* that *Stringer v. Black* was the first case to codify the distinction between weighing and non-weighing in jurisdictional approaches to eligibility factors as aggravating factors. *Brown*, 126 S. Ct. at 902 (Breyer, J., dissenting).

46. *Stringer*, 503 U.S. at 232.

47. *Id.*; Widder, *supra* note 17, at 1344.

48. 462 U.S. 862 (1983).

49. *Zant*, 462 U.S. at 867.

50. *Id.* at 864.

51. *Id.* at 879-81; Hornbuckle, *supra* note 3, at 447-48.

52. Hornbuckle, *supra* note 3, at 447-48.

53. *Zant*, 462 U.S. at 871-72.

54. *Id.*

factors that were found by the jury.[55] The purpose of the statutory factors in Georgia was primarily to guide the discretion of the jury in finding defendants eligible for the death penalty.[56] After the jury placed a defendant beyond that barrier, it had the liberty to base its sentence on all the evidence before it.[57] The Supreme Court held that the existence of at least one valid eligibility factor was sufficient to make the defendant eligible for the death penalty under Georgia law.[58] Although the categorizing of some evidence as an "aggravating circumstance" (as eligibility factors are termed by Georgia statute) "might have caused the jury to give somewhat greater weight to respondent's prior criminal record than it otherwise would have given," the Court did not find this to be a Constitutional error, as the jury properly had all available evidence before it in determining the sentence.[59] Because the invalid factor was not specifically a part of the sentencing process (i.e., because the invalid factor was not given any specific "weight"), the Court upheld the sentence.[60]

The Court limited its holding to states with statutory schemes similar to Georgia's.[61] The opinion distinguished the circumstances in *Zant* from a possible case in which a sentencer would be "specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty."[62] It was just such a case which elicited the next refinement in death penalty jurisprudence.

E. Weighing States

Seven years after it decided *Zant v. Stephens*, the Supreme Court addressed death sentences imposed with an invalid factor in a jurisdiction using the same set of factors for determining eligibility (guided discretion) and for imposing sentences (individualized sentencing).[63] *Clemons v. Mississippi* distinguished "weighing" jurisdictions from those following *Zant's* model.[64] Mississippi's statute, unlike Georgia's, used a set of statutory aggravating circumstances both to determine eligibility for the death penalty and to determine whether the death penalty was warranted.[65] Rather than using any evidence before it to determine the sentence, Mississippi juries were required to "weigh" specific statutory factors against any mitigating circumstances, also outlined in statute.[66] The

55. *Id.* at 884, 890.
56. *Id.* at 875.
57. *Id.* at 872.
58. *Id.*
59. *Id.* at 888-89.
60. *Id.*; *see also Clemons*, 494 U.S. at 744-45; Hornbuckle, *supra* note 3, at 450-51.
61. *Zant*, 462 U.S. at 890.
62. *Id.*
63. *See* Widder, *supra* note 17, at 1352-53.
64. *Clemons*, 494 U.S. at 744-45; Hornbuckle, *supra* note 3, at 448-49.
65. *Clemons*, 494 U.S. at 745.
66. *Id.*

jury's task was to determine if there were "insufficient mitigating circumstances . . . to outweigh the aggravating circumstances."[67]

The Court found a risk of "skewing" sentences in these jurisdictions if a jury was instructed to weigh an invalid factor during the sentencing process.[68] It held that such an error did not necessarily invalidate the death sentence, but that "meaningful appellate review" or a "reweighing" of aggravating and mitigating circumstances was required to preserve a sentence issued after weighing of an invalid factor.[69] If a new jury or an appellate court determined that the error was harmless, the sentence could be upheld.[70] Because it was not clear in *Clemons* that the appropriate reweighing or review had been performed by the appellate courts, the death sentence was vacated.[71]

The distinction between weighing and non-weighing jurisdictions was crystallized in *Stringer v. Black*. In reviewing another Mississippi case, the court clarified the procedures used under Georgia (non-weighing) and Mississippi (weighing) law:[72]

> In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination, there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings. But when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.[73]

In *Stringer*, one of the aggravating factors used in determining a sentence was found to be vague or imprecise.[74] In a weighing state such as Mississippi, the sentence could not stand after the use of such a factor, unless the aggravating and mitigating circumstances were reweighed.[75] Because the aggravating factors were "weighed" in the sentencing process, as opposed to simply determining eligibility, a sentence in a weigh-

67. *Id.* at 745 n.2.
68. *Brown*, 126 S. Ct. at 890; *see also Stringer*, 503 U.S. at 232.
69. *Clemons*, 494 U.S. at 748-50.
70. *Id.* at 748-49; Hornbuckle, *supra* note 3, at 453-54.
71. *Clemons*, 494 U.S. at 753-54.
72. *Stringer*, 503 U.S. at 231.
73. *Id.* at 232.
74. *Id.* at 237.
75. *Id.*

ing state resulting from the use of an invalid factor could not stand without review.[76]

II. INSTANT CASE—*BROWN V. SANDERS*

A. Facts

The respondent, Ronald Sanders, and a companion broke into the home of the two victims.[77] They bound the victims and beat them on their heads with a blunt object.[78] One victim subsequently died.[79] Sanders was convicted of first-degree murder, attempted murder, robbery, burglary, and attempted robbery.[80] At the eligibility phase of sentencing, the jury found four special circumstances under California Penal Code 190.2[81], any of which would have made the defendant eligible for the death penalty.[82] At sentencing, after considering sentencing factors including the special circumstances from the eligibility phase and "the circumstances of the crime," the jury sentenced the respondent to death.[83]

B. Procedural History

The respondent appealed to the California Supreme Court.[84] The supreme court affirmed the death penalty, though it held that two of the special circumstances found by the jury in the eligibility phase were invalid, under the weighing standard from *Zant v. Stephens*.[85] After exhaustion of state remedies,[86] the defendant filed a motion for a writ of habeas corpus in the United States District Court of the Eastern District of California.[87] The district court denied relief.[88] The Court of Appeals for the Ninth Circuit reversed the sentence, on the grounds that the rule from *Zant* applied by the state court was not applicable to California as a weighing state.[89] The United States Supreme Court granted certiorari to determine whether California is a weighing or non-weighing state, and whether the consideration of invalid sentencing factors by the jury required the sentence to be vacated.[90]

---

76. *Id.*
77. Brown v. Sanders, 126 S. Ct. 884, 888 (2006).
78. *Id.*
79. *Id.*
80. *Id.*
81. CAL. PEN. CODE § 190.2 (West 2006).
82. *Brown*, 126 S.Ct. at 888.
83. *Id.*
84. *Id.*
85. *Id.*
86. *See* 28 U.S.C.A. § 2254(b)(A) (West 2006).
87. *Brown*, 126 S.Ct. at 888; *see also* 28 U.S.C.A. § 2254(d)(1).
88. *Brown*, 126 S.Ct. at 889.
89. *Brown*, 126 S.Ct. at 889.
90. *Id.*

C. The Majority Decision

Justice Scalia issued the opinion in *Brown v. Sanders*, joined by Chief Justice Roberts and Justices O'Connor, Kennedy and Thomas.[91] He began by distinguishing the two methods currently employed by the states to meet the narrowing requirement for death sentences required by *Furman v. Georgia*.[92] Scalia explained the procedures used in sentencing by weighing and non-weighing states, specifying, however, that all jurisdictions are required to meet the requirements for guided discretion and individualized sentencing by allowing a sentencer to weigh the factors meriting a death sentence with mitigating circumstances.[93] Scalia also devoted extensive dicta at this point to arguing against Justice Breyer's understanding that all jurisdictions require harmless error review of invalid sentencing factors, as well as highlighting the distinction between the types of jurisdictions as it was discussed in *Stringer*.[94] Scalia argued that *Zant* did not present a requirement for harmless error review, and that there is no such requirement in non-weighing states created in *Clemons*.[95]

However, because both types of jurisdictions face similar problems with invalid factors, the majority declared a new rule, eliminating the distinction between weighing and non-weighing jurisdictions.[96] Invalid sentencing factors will not upset a sentence of death unless analysis of that factor would provide a jury with facts and circumstances to which it would not otherwise have access.[97] The trigger of a requirement for harmless error review would be the presentation of new facts to a sentencer that it would not have seen without analysis of an invalid sentencing factor.[98]

Scalia argued that part of the reasoning for the elimination of the distinction is that most jurisdictions allow evidence to be presented to the sentencer through an eligibility factor or a sentencing factor, but that not all states fit neatly into the weighing/non-weighing categorization.[99] He noted that even in states that were placed by the court into one of the two categories, the particular scheme may have had elements of both.[100]

The opinion noted that under the former classification, California would have been a non-weighing state, validating the death sentence in

91. *Id.* at 884.
92. *Id.* at 889-91.
93. *Brown*, 126 S. Ct. at 889-91.
94. *Id.* at 891 n.3.
95. *Id.*
96. *Id.* at 891-92.
97. *Id.* at 892.
98. *Id.*
99. *Id.* at 891-92.
100. *Id.* at 892 n.5 (discussing *Stringer*'s use of an invalidated aggravating circumstance that was not an eligibility factor).

Brown under both the old and new systems.[101] Because the sentencing jury was able to consider the facts and circumstances related to the invalid factors under the heading of another valid factor, the majority held that the sentencing process was not skewed, and that the sentence was constitutional.[102]

D. Justice Stevens' Dissent

Justice Stevens' dissent, in which he is joined by Justice Souter, argued that the majority failed to address the question on which certiorari was granted.[103] The issue presented to the Court was whether California is a weighing state.[104] Though the majority did provide an answer to this question, Stevens maintained that the Court's choice to change settled sentencing law will complicate future decisions, and does not address the concerns presented by the California court in that context.[105]

E. Justice Breyer's Dissent

Justice Breyer, joined by Justice Ginsburg, reiterated that the question on certiorari was whether California is a weighing state.[106] However, Breyer argued that the more important issue for sentence review should turn on the nature of the sentencing error at trial rather than on the category of the issuing jurisdiction.[107] Appellate review of all death sentences rendered using invalid sentencing factors should be concerned with whether an error in sentencing was harmless beyond a reasonable doubt.[108]

Breyer discussed his opinion in regard to the two stages of sentencing that he found relevant in all jurisdictions, though he mentioned briefly that some states combine the stages into one proceeding.[109] First, sentencers determine eligibility for the death penalty, and only after this process do they weigh mitigating circumstances against aggravating circumstances (often in the form of eligibility factors).[110] Breyer argued that both types of jurisdictions face the same risks when juries consider invalid sentencing factors: giving undue weight to an issue or piece of evidence that should not have been under consideration.[111] Because information is presented under the rubric of an aggravating factor, it is

101. *Id.* at 893.
102. *Id.* at 894.
103. *Id.* at 896.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 898.
108. *Id.* at 896, 898.
109. *Id.* at 896-97.
110. *Id.*
111. *Id.* at 898-99.

unduly weighted for sentencers whether or not they may consider additional factors.[112]

Breyer read the decisions in *Zant* and *Clemons*, though they created the weighing/non-weighing distinction, as turning on the harmlessness of the errors made at trial: "Despite the Court's occasional suggestion to the contrary, the weighing/nonweighing distinction has little to do with the need to determine whether the error was harmless . . . reviewing courts should decide if that error was harmful, regardless of the form a State's death penalty law takes."[113] Breyer discussed the prejudice that can result from a sentencer's consideration of an invalid sentencing factor, reiterating that much of the distinction between the types of jurisdictions does not accurately reflect the statutory constructions of a number of states.[114] Breyer presented California as an example of the failure of the categories, as a state which presents one set of factors for guided discretion, and which adds additional factors (which define but do not limit the circumstances considered) for the individualized sentencing procedure.[115]

He analyzed *Stringer v. Black* as the first case to frame the appellate review process as a weighing/non-weighing issue, and to equate invalid factors in non-weighing states with harmless error automatically.[116] For Breyer, this is not an accurate depiction of death penalty jurisprudence. He also found that Scalia denied the importance of the emphasis placed on sentencing evidence inconsistently with *Clemons*, and "diminishe[d] the need to conduct any harmless-error review at all."[117] The majority decision to treat any error that does not present new evidence as harmless will limit the actual and necessary harmless-error review in many death penalty cases to come.[118]

III. ANALYSIS

This comment addresses *Brown v. Sanders*[119] in the light of capital sentencing precedent, and questions its impact on future cases. It commends the majority for the elimination of the distinction between weighing and non-weighing jurisdictions, as this will clarify the issues surrounding invalid sentencing factors. However, it questions the opinion's failure to set a universal standard for appellate review under the new scheme.

112. *See id.*
113. *Id.* at 898, 900-02.
114. *Id.* at 898-900.
115. *Id.* at 900.
116. *Brown*, 126 S. Ct. at 902.
117. *Id.* at 903.
118. *See id.* at 903-04.
119. 126 S. Ct. 884 (2006).

A. Attempting to Clarify Invalid Factor Issues – Eliminating the Weight

The majority in *Brown* eliminated the developing distinction between weighing and non-weighing states[120] that has been in the background of invalid factor cases since *Zant v. Stephens*.[121] The *Stringer v. Black* decision considered that distinction to be of "critical importance,"[122] but the lengthy analysis of the distinction in that opinion has not been easy to understand. The majority and Breyer's dissent in *Brown* followed different interpretations of the rule presented in *Stringer*,[123] and lower courts could easily share the confusion.

The decision in *Brown* recognized that categorizing states as weighing or non-weighing[124] was not accurate and did not solve the problem inherent in sentences imposed after consideration of invalid factors.[125] As one scholar noted, "[t]hat nonweighing states retain the weighing metaphor to describe the sentencing process suggests that the distinction the Court has created an illusion. Moreover, the distinction has engendered confusion and led to incoherent decisions."[126] The weighing/non-weighing distinction raised concerns that the same analysis took place in both types of jurisdictions, that the terms used in distinguishing the jurisdictions provided undue weight to sentencing factors, and that the states could not be broken into the two categories previously recognized by the Supreme Court.

1. Similar Analysis Across Jurisdictions

The Scalia opinion argued that the distinction between weighing and non-weighing jurisdictions can be eliminated because the same essential process of balancing aggravating and mitigating factors is used by all juries.[127] This view was the foundation for the opinion's emphasis on what evidence the jury has access to during the sentencing process.[128] In the instant case:

> [T]he jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all the facts and circumstances admissible to establish [the invalid factors] were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly

120. *Brown*, 126 S. Ct. at 892.
121. Zant v. Stephens, 462 U.S. 862, 888 n.24 (1983); *see also* Stringer v. Black, 503 U.S. 222, 229 (1992).
122. *Stringer*, 503 U.S. at 231-32.
123. *Brown*, 126 S. Ct. at 891 n.3.
124. *See Stringer*, 503 U.S. at 231-32.
125. *Brown*, 126 S. Ct. at 891-92.
126. Widder, *supra* note 18, at 1365 (noting an Illinois decision which mischaracterized the state as a weighing jurisdiction, relying on the analysis provided in *Stringer*).
127. *Brown*, 126 S. Ct. at 892.
128. *See id.* at 892.

> considered whether or not they bore upon the invalidated eligibility factors.[129]

This is the justification the Court relied upon for the *Brown* decision,[130] but there were other points in favor of eliminating the distinction as well.

2. Weighing Terminology Skewed Analysis of Sentencing Factors

Some scholarship on the weighing/non-weighing distinction focused on the terms used by the courts as much as on their analysis. When a jury is given a set of facts and circumstances, increased significance is given those which are recognized by statute or considered to be automatically "aggravating," no matter whether the jurisdiction officially "weighs" those factors or not.[131] One analysis of *Clemons v. Mississippi* highlighted the importance of these labels to a sentencing jury, and the inconsistent treatment of it by the Court:

> The underlying rationale of the *Clemons* opinion must be that the jury goes about its decisionmaking [sic] process in a different way when it is explicitly instructed to weigh aggravating and mitigating circumstances. Otherwise the distinction makes little sense -- if the thought process is the same as it is in a nonweighing state, then either no reweighing is required or the sentence must be reweighed under both types of statutory schemes.[132]

In distinguishing between two types of statutes when *Clemons* was decided, the Court may have allowed an inconsistency between the treatment of *Zant* and *Clemons* to become law.[133] The Court's somewhat backward terminology[134] further muddied the waters, giving jurisdictions two categories based on the word "weigh," while the distinction was actually based on the limitation of factors presented to the jury, rather than what it does with them.[135] In relying on this inconsistency, courts may have been lulled into using a metaphor that is unrelated to the actual statutes determining sentencing procedure.[136]

3. The Distinction Was Illusory

A concern in Breyer's dissent to *Brown* was that it is rarely possible to cleanly categorize jurisdictions as weighing or non-weighing.[137] While some states do mirror the classic weighing or non-weighing para-

---

129. *Id.* at 894.
130. *Id.*
131. *See* Widder, *supra* note 17, at 1370-71.
132. Hornbuckle, *supra* note 3, at 455.
133. *See Zant*, 462 U.S. at 873-74; *Clemons*, 494 U.S. at 743-44.
134. *See Brown*, 126 S. Ct. at 889, 898.
135. *See Id.*
136. Widder, *supra* note 17, at 1363-64.
137. *See Brown*, 126 S. Ct. at 898 (Breyer, J., dissenting).

digms of *Zant* and *Clemons*, others "fall somewhere in between."[138] California is one example, using specific factors for eligibility, and adding factors to the list to be used in sentencing.[139] Also, as noted in *Zant*, states are not required to follow sentencing schemes such as Georgia's in order to meet the *Furman v. Georgia* requirement for guided discretion.[140] If a state were to choose a different system for narrowing its class of capital offenders, it might have no place at all in the weighing/non-weighing scheme.

Breyer also noted that some jurisdictions have combined the eligibility and sentencing stages into one sentencing process.[141] In such a jurisdiction, there may be no way for an appellate review to determine what evidence is limited to eligibility and what is limited to sentence selection, and there is less chance that a jury would make such a distinction. Though the use of the weighing and non-weighing categories had been useful for analyzing several specific statutes, it does not seem that it was suited to bear the entire weight of capital sentencing. The Court used it as an explanatory tool, but it may never have been intended as a means of determining the constitutionality of all sentences. As one critic noted, "[t]he Supreme Court's weighing doctrines allow procedure to distort substance in an area of law in which it is acutely necessary that procedural rules be finely tuned to promote substantive law."[142] It is clear from *Brown's* ease in removing the distinction,[143] as well as from the complicated analysis engendered from its use[144] that the termination of classifying jurisdictions as weighing or non-weighing will not hinder substantive law in capital sentencing.

B. Unseen Risks? Where Is the Emphasis on Appellate Review?

Though *Brown* attempts to clarify sentencing decisions, it contains a flaw that could have serious repercussions. While it does not overturn any existing law on appellate reweighing or harmless-error review, the opinion fails to make this crucial element of invalid factor analysis clear for lower courts to apply along with its new rule on evidentiary analysis by trial juries. Appellate review, which may consist of reweighing of sentencing factors or a harmless-error review to determine the impact of the consideration of an invalid factor, is an important element of the decisions in invalid sentencing factor precedent.[145] *Stringer*'s discussion of harmless-error review and appellate review has led to completely different interpretations of the requirement. With the consolidation of weigh-

138. *Id.* at 900..
139. *Id.*
140. *Zant*, 462 U.S. at 874-75.
141. *Brown*, 126 S. Ct. at 900.
142. Widder, *supra* note 17, at 1346.
143. *See Brown*, 126 S. Ct. at 892.
144. Widder, *supra* note 17, at 1365; *see also Stringer*, 503 U.S. at 232-33.
145. *Clemons*, 494 U.S. at 749; *Zant*, 462 U.S. at 888, 890; *see also Stringer*, 503 U.S. at 236.

ing and non-weighing jurisdictions, jurists must exercise care that this constitutional requirement does not fall by the wayside.

1. Appellate Review in Capital Sentencing Precedent

The *Brown* decision highlighted the need for harmless-error review in weighing jurisdictions,[146] but the requirement for appellate review is not limited to those states. *Zant* recognized appellate review as an "important procedural safeguard."[147] It also made clear that whether the analysis of an invalid factor is a constitutional error depends on the specific circumstances of a case.[148] Though *Zant* is an example of a case in which a sentence imposed using an invalid factor stood, the sentence was only validated through appellate review.

The decision in *Clemons* hinged on the importance of appellate review in the form of reweighing of sentencing factors.[149] The case recognized that a harmless-error review of some kind took place, but the Supreme Court held that it was insufficient under the circumstances.[150] The *Clemons* decision did not outline the exact requirement for appellate review after consideration of an invalid factor, but it was made clear that reweighing or appellate review of some kind was necessary after a sentencer considered an invalid sentencing factor.[151] The Court acknowledged that the state court's reliance on one valid circumstance for sentencing[152] was "not conducting appellate reweighing as we understand the concept,"[153] and reversed the state court's decision.[154] Later analysis of this case indicates an understanding of the importance of appellate review, but case law presents no clear distinction between the general requirement for appellate review of death sentences and the specific processes of reweighing of factors[155] and harmless-error review.[156] Unfortunately, while Scalia devoted discussion to harmless error review in regard to his digression on Breyer's dissent, he did not clarify its role in the new system.[157] This may be the basis for Breyer's fear that harmless error review will no longer occur at all.[158]

146. *Brown*, 126 S. Ct. at 890.
147. *Zant*, 462 U.S. at 890.
148. *Brown*, 126 S. Ct. at 901 (Breyer, J., dissenting).
149. *See Clemons*, 494 U.S. at 749-50.
150. *Id.* at 740, 753.
151. *Id.* at 740.
152. *Id.* at 751.
153. *Id.* at 752.
154. *See* Widder, *supra* note 17, at 1353 n.133 ("The *Clemons* Court did not explain its mysterious distinction between harmess-error analysis and reweighing aggravating and mitigating factors.").
155. *See* Hornbuckle, *supra* note 3, at 453-54.
156. *See Brown*, 126 S. Ct. at 901 (Breyer,J., dissenting).
157. *See id.* at 891 n.3 (majority opinion).
158. *Id.* at 903 (Breyer, J., dissenting).

Appellate review as a constitutional requirement was set out in *Barclay*[159], and has remained an element of invalid sentencing factor decisions since. However, the precise requirements for appellate review have not been set out, and the repercussions of the vague standard are apparent in *Brown*'s lack of discussion on the issue and in Breyer's dissent.[160] In fact, the only mention of appellate review in the decision that is not dicta for the benefit of Breyer is a procedural note of the Ninth Circuit's holding that a harmless-error review was necessary.[161] Nonetheless, scholarship recognizes the appellate review requirement based on the line of cases on invalid sentencing factors.[162] What its requirements are, and how the terms used differ in meaning, remain a murky area not yet clarified by the courts.[163] The appellate review requirement is an area that has not been adequately explored, and which may be the source of the confusion and differing interpretations of *Stringer*.

2. The Confusing Heritage of *Stringer*

Stringer recognized that an appellate review of a death sentence took place at the state level.[164] It reiterated the general requirement of "appellate scrutiny of the import and effect of invalid aggravating factors"[165] and clarified the *Clemons* requirement that at least in weighing jurisdictions, there must be harmless-error review.[166] However, where *Stringer* fits into non-weighing jurisdictions and how it affects future sentences[167] is a subject of disagreement.

Some instances within *Stringer* seem to apply to invalid factor sentencing in general.[168] Consider the final statement of the *Stringer* court before its reversal order: "the precedents even before *Maynard* and *Clemons* yield a well-settled principle: Use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system."[169] There is no question that *Stringer* is an example of a weighing state.[170] Nonetheless, as *Clemons* was the first example of a weighing jurisdiction to be presented to the United States Supreme Court,[171] any precedent prior to it must have referred to a non-weighing jurisdiction. Thus, it would seem that the proposition in

159. Barclay v. Florida, 463 U.S. 939, 1941 (1983).
160. *See Brown*, 126 S. Ct. at 901.
161. *Id.* at 889.
162. Hornbuckle, *supra* note 3, at 442; Widder, *supra* note 17, at 1344, 1354.
163. *See* Widder, *supra* note 17, at 1370 n.133.
164. *Stringer*, 503 U.S. at 234.
165. *Id.* at 230.
166. Srinivasan, *supra* note 2, at 1368.
167. *Brown*, 126 S. Ct. at 889.
168. *See Stringer*, 503 U.S. at 230-31, 236.
169. *Id.* at 237.
170. *See id.* at 232.
171. *Clemons*, 494 U.S. at 744-45.

Stringer requiring appellate reweighing or harmless-error review[172] applies to both types of jurisdictions.

Justice Scalia, in his *Brown* opinion, vehemently disagreed with this point: "Justice Breyer contends that harmless-error review applies in *both* weighing and non-weighing States. It would be strange indeed to discover at this late stage that our long-held distinction between the two sorts of States for purposes of reviewing invalid eligibility factors in fact made no difference."[173] Justice Scalia did not mention in this note the other purported differences between the types of jurisdictions, such as the use of limited sentencing factors in weighing states versus broad or unlimited factors or circumstances in sentencing in non-weighing states.[174] Scalia, in recognizing that harmless error review is an important element at least in weighing jurisdictions, seemed to recognize that there is a role for appellate review of sentences rendered using invalid factors even under the new system.[175] Unfortunately, Scalia made no mention of this role in the body of the case.[176]

Justice Scalia perhaps overstated Justice Breyer's interpretation of *Stringer*. Breyer's contention that harmless-error review is necessary in all jurisdictions is based on *Zant* and *Clemons*.[177] As to *Stringer*, Breyer discussed its reference to non-weighing cases specifically as a "single ambiguous sentence of dicta" that should not be a basis for future law.[178]

Other scholarship indicates the same divergent interpretations of *Stringer*, some interpretations indicating that reweighing and harmless-error review apply only to weighing states,[179] and others applying it to both types.[180] There have also been no definitions of "appellate reweighing" or "harmless-error review" beyond the references in cases such as *Clemons* and *Stringer*. The terms may or may not be interchangeable: "Regardless of the validity of assessing capital sentencing errors under a harmless-error analysis, it remains unclear how harmless-error review is functionally different from appellate reweighing of aggravating and mitigating factors in evaluating the effect of invalid aggravating factors on a death sentence."[181] With no consensus on terms, and no consensus on what is a rule and what is dicta, or to which jurisdictions rules apply to, it is no small wonder that *Stringer* has been the source of confusion and discord. Nonetheless, *Brown* and its followers must still apply the requirement of appellate review to invalid factor sentencing.

---

172. *Stringer*, 503 U.S. at 230.
173. *Brown*, 126 S. Ct. at 891 n.3 (citation omitted).
174. *Id.* at 890.
175. *See id.* at 891 n.4.
176. *See id.* at 892.
177. *Brown*, 126 S. Ct. at 900-02 (Breyer, J., dissenting).
178. *Brown*, 126 S. Ct. at 902 (Breyer, J., dissenting).
179. Widder, *supra* note 17, at 1344.
180. Srinivasan, *supra* note 2, at 1367.
181. Widder, *supra* note 17, at 1371 n.133.

3. What Is Required for Appellate Review after *Brown*?

Despite the uniformity of capital sentencing jurisprudence at the Supreme Court level, there are varied opinions on what is required as far as appellate review of sentences based on invalid factors. One extreme holds that an erring sentence cannot ever stand: "When a sentence of death has been based in part on invalid aggravating factors, the only remedy faithful to the Eighth Amendment is to reverse the sentence and remand for a new sentencing proceeding."[182] An approach foreseen by Justice Breyer based on the majority opinion in *Brown* is a limiting of the appellate review requirement.[183] Breyer's favored approach stands between these points, more in line with prior cases: "A reviewing court must find that the jury's consideration of an invalid aggravator was harmless beyond a reasonable doubt, regardless of the form a State's death penalty law takes."[184] Based on sentencing precedent, it seems unlikely that there will be any changes in the requirements for a constitutional death sentence. But these alternative approaches to sentencing indicate a continued recognition of the vital role appellate sentencing takes.

Future cases will rely on *Brown* as well as on its predecessors, and one could wish that the opinion had made the Court's stance on appellate review clear within the decision that changed standing law from a two-pronged to a unified system. Without the distinctions of weighing or non-weighing states to rely on, lower courts may find themselves at a loss for what rule of appellate review to apply. Justice Scalia, in devoting space to arguing with Justice Breyer over what is not required under a now obsolete classification, failed to address the standard of review required in all jurisdictions under the new rule.[185] Even if *Stringer* clearly outlined the requirements for weighing states[186] (which is a debatable proposition in itself), there is no new law as to what is required for the jurisdictions as they are now unified. So, it seems that lower courts must continue to rely on the law as it was defined in *Zant*, "the mandatory appellate review of each death sentence . . . ."[187]

If the Court chooses to clarify its stance on appellate review in a future decision, the prudent course may be an approach which applies the most stringent standard. If weighing and non-weighing jurisdictions are no longer distinct, the level of review required should be that required for weighing jurisdictions, which previously held a greater risk of harmful error.[188] According to the most recent appellate review precedent,

182. *Id.* at 1346.
183. *Brown*, 126 S. Ct. at 903 (Breyer, J., dissenting).
184. *Id.* at 896.
185. *See id.* at 891 n.3 (majority opinion).
186. *Stringer*, 503 U.S. at 232.
187. *Zant*, 462 U.S. at 890.
188. *See Brown*, 126 S. Ct. at 890; *see also Stringer*, 503 U.S. at 232.

Stringer, the new rule for all invalid factor sentencing cases would be that "[w]hen the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence."[189] If, as Justice Scalia stated, all jurisdictions require a weighing of aggravating and mitigating factors,[190] it seems only appropriate that all jurisdictions now be considered weighing jurisdictions.

CONCLUSION

Brown v. Sanders represents forward progress in its elimination of the unwieldy distinction between weighing and non-weighing jurisdictions in the treatment of invalid sentencing factors. However, it fails to bring up to date the law on the appellate review requirement of erring capital sentencing cases, and thus could present future problems. The most prudent course would be for the Court to clearly outline the requirement for all cases sentenced under invalid factors to be subjected to reweighing of the sentencing factors or a harmless-error review. The necessity for meaningful appellate review cannot be understated in the case of sentencing error. As the Court exhorted in *Zant v. Stephens*: "because there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment . . . .'"[191] Precedent provides a foundation for reliability through appellate review, but it is the responsibility of the Court to make it law.

Karen Lamprey[*]

189. *Stringer*, 503 U.S. at 232.

190. *Brown*, 126 S. Ct. at 889.

191. *Zant*, 462 U.S. at 884-85 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

*. J.D. Candidate, 2008, University of Denver Sturm College of Law. Thanks to Professor Sam Kamin and Steve Arvin for their editorial assistance, and to Nate Obee for his unfading and constant support.