

Assuming Too Much: An Analysis of *Brown v. Sanders**

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I. INTRODUCTION

Beginning with its decision in *Furman v. Georgia*, the United States Supreme Court has required states to narrow the class of individuals who may be sentenced to death.¹ The primary impetus behind its jurisprudence in this field has been the need to ensure that states comply with the Constitution’s prohibition against cruel and unusual punishment

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1. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

and the Due Process Clause of the Fourteenth Amendment.² While at the surface level its jurisprudence seems consistent with these needs, the rules that have evolved are quite open to criticism when applied in specific cases.

A particularly troubling area of death penalty law deals with the not uncommon scenario wherein a state trial court sentences a defendant to death partially based on factors that are later deemed invalid.³ Does the subsequent invalidation of those factors render the death sentence unconstitutional? While one might suppose that a person could not be sentenced to death based on invalid factors, the law is surprisingly complex and does not always comport with common sense. The Supreme Court's recent decision in *Brown v. Sanders* is a case in point⁴—although the Court's opinion ostensibly provides a bright-line rule to govern these situations, it is far from obvious that the Court got it right.

In holding constitutional a California jury's imposition of a death sentence partially based on subsequently invalidated sentencing factors,⁵ the *Sanders* majority propounded a new rule.⁶ In essence, the rule operates as follows: So long as the underlying evidence implicated by an invalid sentencing factor was properly considered by the jury under some other, valid factor, a death sentence rendered thereby is prima facie constitutional.⁷

This Note analyzes the majority and dissenting opinions in *Sanders* in an attempt to determine which Justice, if any, offers a satisfying solution

2. U.S. CONST. amends. VIII, XIV; see also *Furman*, 408 U.S. at 240 (Douglas, J., concurring) (explaining the issue as “whether the imposition and execution of the death penalty constitutes ‘cruel and unusual punishment’ within the meaning of the Eighth Amendment”); *id.* at 240-42 (stating that the Due Process Clause of the Fourteenth Amendment requires states to observe the Eighth Amendment); H. Mitchell Caldwell & Daryl Fisher-Ogden, *Stalking the Jets and the Sharks: Exploring the Constitutionality of the Gang Death Penalty Enhancer*, 12 GEO. MASON L. REV. 601, 607-12 (2004) (describing the rationale of *Furman* and progeny).

3. The frequency with which these situations arise is higher than one might think. The Supreme Court alone has dealt with twelve such cases: *Brown v. Sanders*, 126 S. Ct. 884 (2006); *Tuggle v. Netherland*, 516 U.S. 10 (1995); *Stringer v. Black*, 503 U.S. 222 (1992); *Richmond v. Lewis*, 506 U.S. 40 (1992); *Sochor v. Florida*, 504 U.S. 527 (1992); *Parker v. Dugger*, 498 U.S. 308 (1991); *Reeves v. Nebraska*, 498 U.S. 964 (1990); *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Wainwright v. Goode*, 464 U.S. 78 (1983); *Barclay v. Florida*, 463 U.S. 939 (1983); and *Zant v. Stephens*, 462 U.S. 862 (1983); see also Joseph L. Hoffman, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771, 1783-84 (2000) (describing this as a “recurring situation”).

4. *Sanders*, 126 S. Ct. at 884.

5. *Id.* at 894.

6. *Id.* at 892.

7. *Id.*

to the problem of death sentences partially based on subsequently invalidated factors. It argues that, while the dissenting opinions leave something to be desired, Justice Scalia's majority opinion is unacceptable because it treats too lightly the real possibility that a jury may choose death due to the role played by a subsequently invalidated sentencing factor. In response, this Note offers an alternate approach—one that would accommodate the needs of judicial economy while simultaneously protecting against the substantial risks that Scalia erroneously ignores.⁸

Part II begins by setting forth the basic contours of the Supreme Court's death penalty jurisprudence in this area prior to *Sanders*. Next, Part III reviews the litigation leading up to the High Court's opinion in this case. Part III then continues by summarizing the contents of the three *Sanders* opinions representing the Justices' divergent views on the law in this area. Finally, Part IV analyzes the legitimacy of the Court's opinion and recommends the aforementioned alternative approach.

II. BACKGROUND LAW

A. *The Rule of Furman v. Georgia and The Weighing–Non-Weighing Dichotomy*

Beginning with *Furman v. Georgia*, the Supreme Court has held that the Eighth Amendment's prohibition against cruel and unusual punishment, as applied to the states through the Fourteenth Amendment, compels states to narrow the class of murderers upon which the death penalty may be imposed.⁹ This requirement is generally satisfied when the jury determines that there is something particularly heinous about the defendant's conduct "according to an objective legislative definition."¹⁰

8. As explained in more detail *infra* Part IV, this Note recommends the Court adopt the following rule: When a death sentence is reached based to some degree on a subsequently invalidated eligibility factor, the sentence must be vacated as unconstitutional unless reliance on the invalidated factor is shown to be harmless error.

9. See *Furman*, 408 U.S. at 239-40 (holding that execution of three defendants convicted of murder, rape, and rape, respectively, would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments); *Sanders*, 126 S. Ct. at 889 ("Since *Furman v. Georgia*, we have required States to limit the class of murderers to which the death penalty may be applied."); see also *Zant v. Stephens*, 462 U.S. 862, 877 (1983) ("To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.").

10. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988).

The purpose of this narrowing requirement is twofold: (1) to guide the jury's discretion, thus guarding against an "arbitrary and capricious" decision to sentence the defendant to death; and (2) to ensure that only the most egregious of criminals receive the awful punishment of death.¹¹

In the main, the various states have developed a two stage sentencing process to comply with the *Furman* narrowing requirement.¹² In the first stage, the "eligibility stage," the jury determines whether the defendant is eligible for the death penalty.¹³ In the second stage, the "penalty stage," which is reached only if the jury has found the defendant eligible for death, the jury decides whether the defendant will in fact receive such punishment.¹⁴ At the penalty stage, however, states differ as to their approach.¹⁵

On the one hand, some states, known as "weighing states," instruct the jury to consider any and all mitigating factors and weigh them against the specific aggravating factors that the jury found made the defendant eligible for the death penalty at the eligibility stage.¹⁶ On the other hand, some states, known as "non-weighing states," require the jury weigh any and all mitigating factors against a set of aggravating factors that may or

11. See *Zant*, 462 U.S. at 876-77 & nn.14-15 (citing *Gregg v. Georgia*, 428 U.S. 153, 206-07, 222 (1976)); see also Randall K. Packer, *Struck by Lightning: The Elevation of Procedural Form over Substantive Rationality in Capital Sentencing Proceedings*, 20 N.Y.U. REV. L. & SOC. CHANGE 641, 649 (1994) (discussing the rationale underlying the *Furman* narrowing requirement).

12. See *Sanders*, 126 S. Ct. at 896 (Breyer, J., dissenting) ("Death penalty proceedings take place in two stages."); Adam Hine, *Life or Death Mistakes: Cultural Stereotyping, Capital Punishment, and Regional Race-Based Trends in Exoneration and Wrongful Execution*, 82 U. Det. Mercy L. Rev. 181, 186 n.29 (2005) ("In order to reduce the arbitrariness that existed in the imposition of capital punishment prior to *Furman*, most state death penalty statutes now bifurcate all capital trials into two phases . . .").

13. *Sanders*, 126 S. Ct. at 896.

14. *Id.* at 897. To better understand how the prototypical two stage death sentencing process works, it is helpful to consider the trial court proceedings in *Sanders*. In convicting *Sanders* of first degree murder, the jury found four "special circumstances," each of which independently made *Sanders* eligible for the death penalty. *Id.* at 888. This was the eligibility stage. Then, having determined that *Sanders* was eligible for death, the trial moved into the penalty stage. *Id.* There, the jury weighed a list of aggravating factors (which happened to include "any special circumstances [that is, eligibility factors] found to be true") against various mitigating factors to determine whether *Sanders* would in fact receive the death penalty. *Id.*

15. *Id.* at 897.

16. *Id.* at 889-90. However, disagreement over the true definitions of the terms "weighing" and "non-weighing" must be noted. See, e.g., *id.* at 894-95 (Stevens, J., dissenting) (discussed *infra* Part III.C). Nevertheless, the definition set forth above seems to represent the most common understanding of "weighing." Moreover, these terms, as opposed to the underlying concepts, did not appear in the Court's jurisprudence until 1990 (in the case of weighing states) and 1992 (in the case of non-weighing states). *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990) (discussing weighing states); *Stringer v. Black*, 503 U.S. 222, 231-32 (1992) (discussing non-weighing states).

may not include the factors making the defendant eligible for death, but which, in the event that such aggravating factors do include the eligibility factors, are not limited to them.¹⁷ While it may appear trivial at first blush, this weighing–non-weighing dichotomy took on much significance through the Supreme Court’s case law and served as the sticking point between the Justices in *Sanders*.

B. The Genesis and Evolution of the Weighing–Non-Weighing Dichotomy

The weighing–non-weighing dichotomy was developed through two principal Supreme Court cases: *Zant v. Stephens* and *Clemons v. Mississippi*.¹⁸ Despite the relatively clear framework established by *Zant* and *Clemons*, the Court has always been sharply divided as to the legal ramifications that should attend a state’s use of a weighing versus non-weighing sentencing structure.¹⁹

17. *Sanders*, 126 S. Ct. at 890. The above reflects Justice Scalia’s definition of “non-weighing,” which, though not universally accepted, is again reflective of the dominant understanding. *But see id.* at 894-95 (Stevens, J., dissenting) (contending that in a non-weighing state the “sole function” of an eligibility factor is to make the defendant eligible for death; it is entirely excluded from the penalty phase). One more dynamic to note is that the terms *weighing* and *non-weighing* are somewhat misleading. *See id.* at 897-98 (Breyer, J., dissenting) (explaining that the terms could be clearer). In both weighing and non-weighing states, the sentencer engages in a weighing process, balancing mitigating factors against aggravating factors to determine whether death is warranted. *See id.* at 889-90 (“[W]e have held that in *all* capital cases the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant’s mitigating evidence.”) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)). Thus, the distinction lies not in *whether* weighing occurs, but in *what* is weighed. Nevertheless, because these terms are used by the Court in *Sanders* and are central to its opinion, this Note likewise uses them.

18. *Zant v. Stephens*, 462 U.S. 862 (1983); *Clemons v. Mississippi*, 494 U.S. 738 (1990). It should also be noted that *Stringer v. Black* is rightly counted as one of the key Supreme Court cases dealing with this matter. *Stringer v. Black*, 503 U.S. 222 (1992). However, because the Court erected its weighing–non-weighing jurisprudence through *Zant* and *Clemons*, whereas it only further explained and built upon this jurisprudence in *Stringer*, this Note focuses more heavily on *Zant* and *Clemons*.

19. In *Zant*, Justice Stevens delivered the opinion of the Court, in which four other Justices joined. *Zant*, 462 U.S. at 862. Justice White filed a separate opinion concurring in part and concurring in the judgment. *Id.* at 891-93 (White, J., concurring). Chief Justice Rehnquist filed a separate opinion concurring in the judgment. *Id.* at 893-904 (Rehnquist, C.J., concurring). Justice Marshall, joined by Justice Brennan, issued a lengthy dissent. *Id.* at 904-18 (Marshall, J., dissenting). In *Clemons*, the Court divided even more decisively. Justice White issued the opinion of the Court, joined by Justices O’Connor, Scalia, Kennedy, and Chief Justice Rehnquist. *Clemons*, 494 U.S. at 740-55. Justice Brennan filed a separate opinion concurring in part and dissenting in part. *Id.* at

In *Zant*, the Court addressed the question of whether, in the context of Georgia's non-weighting regime, the invalidation of an eligibility factor subsequent to the jury's selection of the death sentence produced a constitutional defect.²⁰ Justice Stevens, speaking for the five-member majority,²¹ held it did not.²² While acknowledging the settled doctrine that the categorically unique stakes involved in capital decisions correspond to a greater need for reliability,²³ the Court reasoned that Georgia's non-weighting status²⁴ eliminated any real concern of

755-56 (Brennan, J., concurring in part and dissenting in part). Justice Blackmun dissented and was joined by Justices Brennan, Marshall, and Stevens. *Id.* at 756-74 (Blackmun, J., dissenting). In *Stringer*, the Court's other principal opinion on the weighing–non-weighting dichotomy, the Justices split as follows: Kennedy wrote the majority opinion, in which Rehnquist, White, Blackmun, Stevens, and O'Connor joined; Souter filed a dissenting opinion and was joined by Scalia and Thomas. *Stringer*, 503 U.S. at 224.

20. *Zant*, 462 U.S. at 864 (“The question presented is whether respondent’s death penalty must be vacated because one of the three statutory aggravating circumstances [that is, eligibility factors] found by the jury was subsequently held to be invalid The answer depends on the function of the jury’s finding of an aggravating circumstance under Georgia’s capital sentencing statute”).

21. *Id.* The reader should take special note of the fact that Justice Stevens authored the majority opinion in *Zant*; his dissenting opinion in *Sanders* is arguably inconsistent with his opinion in *Zant*. See *Sanders*, 126 S. Ct. at 894 (Stevens, J., dissenting).

22. *Zant*, 462 U.S. at 890-91.

23. *Id.* at 884-85. Specifically, Justice Stevens remarked: “[B]ecause 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 in a specific case.’” *Id.* (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). But see John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1992-93 (2005) (explaining that Supreme Court death penalty precedent, at least in regard to the Sixth Amendment, “is not so different after all”).

24. In truth, the Court had not yet adopted the terms *weighing* and *non-weighting* to describe death penalty schemes at the time of the *Zant* decision. See *supra* note 16. However, as the term has come to be understood (and indeed as *Zant* has been interpreted in retrospect), Georgia undoubtedly had a non-weighting system. See, e.g., Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today’s Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 357 n.93 (1998) (“*Zant* involved a state with a ‘nonweighing’ statute.”); Janet & Robert Morrow, *In a Narrow Grave: Texas Punishment Law in Capital Cases*, 43 S. TEX. L. REV. 979, 1003 (2002) (“[T]he Supreme Court in *Zant v. Stephens* upheld the death sentence from Georgia—a non-weighting state . . .”). The Georgia scheme operated as follows: At the eligibility stage, the factfinder was required to find at least one of ten statutorily defined aggravating circumstances. *Zant*, 462 U.S. at 870-71, 875 n.13. If it did so, the proceedings moved to the penalty phase wherein the factfinder would decide whether to actually impose the death sentence. *Id.* at 871. In making this determination, the factfinder would consider “‘all evidence in extenuation, mitigation, and aggravation of punishment.’” *Id.* (quoting the Georgia Supreme Court’s response to the United States Supreme Court’s certified question requesting explanation of the Georgia death penalty sentencing scheme). Thus, although consideration of the eligibility findings was not excluded at the penalty stage, the factfinder was not instructed to give the eligibility findings any particular weight when coming to its sentencing decision. *Id.* at 889 n.25.

prejudicial error.²⁵ Specifically, because the evidence implicated by the invalidated eligibility factor—that the defendant had a “substantial history of serious assaultive criminal convictions”²⁶—was nevertheless properly considered by the jury under a different rubric at the sentencing phase,²⁷ the Court reasoned that “any possible impact cannot fairly be regarded as a constitutional defect in the sentencing process.”²⁸

On the surface, the Court’s reasoning for upholding the death sentence in *Zant* seems strikingly similar to the logic of the rule promulgated by Justice Scalia in *Sanders*: Both opinions appear to hold the sentences constitutional because the evidence implicated by the invalidated factors was properly considered by the jury under another, valid factor. However, as the dissenting Justices in *Sanders* were quick to note, there is reason to think that the *Zant* rationale was significantly different. Specifically, it is arguable that the Court in *Zant* did not *assume* any error was harmless, but rather *found* the error to be harmless based on its review of the record.²⁹

25. *Id.* at 884-91. In particular, the Court emphasized two characteristics of the Georgia sentencing scheme as significant to the conclusion that the defendant suffered no real prejudice: (1) the “underlying evidence” implicated by the invalidated eligibility factor was “nevertheless fully admissible at the sentencing phase”; and (2) if the jury did place any greater emphasis at the penalty stage on its finding of the invalidated factor, it was “merely a consequence of the statutory label ‘aggravating circumstance.’” *Id.* at 886, 888.

26. *Id.* at 867.

27. *Id.* at 886-88.

28. *Id.* at 889.

29. *See Sanders*, 126 S. Ct. at 900-01 (Breyer, J., dissenting). In particular, Justice Breyer describes the import of *Zant* as follows:

[In *Zant*,] the Court concluded that, under the circumstances, the error was harmless. . . . The Court in *Zant* did not say that the jury’s consideration of an improper aggravator is *never* harmless in a State like Georgia. It did say that the jury’s consideration of the improper aggravator was harmless *under the circumstances of that case*. And the Court’s detailed discussion [in *Zant*] of the jury instructions is inconsistent with a rule of law that would require an *automatic* conclusion of “harmless error” in States with death penalty laws like Georgia’s.

Id. Though it is not entirely clear, many of the Court’s statements in *Zant* do suggest that it upheld the death sentence because, upon review and given Georgia’s sentencing structure, the error that occurred appeared harmless. *See, e.g., Zant*, 462 U.S. at 889-90 (agreeing with the Georgia Supreme Court that the error had “an inconsequential impact on the jury’s decision regarding the death penalty”) (internal quotation marks omitted). If this is indeed what occurred in *Zant*, then Scalia’s approach in *Sanders* marks a categorical departure from precedent: Scalia expressly states that, if a death sentence passes muster under his new rule, it is *prima facie* constitutional, and though error obviously occurred, there is no need for harmless error review. *Sanders*, 126 S. Ct. at

The second major Supreme Court case discussing the weighing–non-weighing dichotomy is *Clemons*.³⁰ In contrast to Georgia’s sentencing regime in *Zant*, Mississippi used the weighing model.³¹ Under this system, if the defendant was convicted of murder, the jury would be instructed that the defendant would be eligible for death if it found at least one aggravating circumstance.³² Then, having found the defendant eligible, the jury would specifically weigh whatever aggravating circumstances, that is, eligibility factors, it found against any applicable mitigating circumstances to arrive at its sentencing decision.³³ Therefore, to use the imagery of a scale, one side—the side militating in favor of death—would be weighed down exclusively by whatever eligibility factors the jury had found; the other side—the side pointing towards imprisonment—would be weighed down by the relevant statutorily prescribed mitigating circumstances.³⁴ Under this approach, if an eligibility factor were subsequently invalidated, the weighing process would necessarily be improperly skewed in favor of death because the invalidated factor would have acted as an illegitimate aggravator.³⁵

Acknowledging as much and facing this situation, the Court in *Clemons* vacated the Mississippi Supreme Court’s decision upholding

892. In other words, if Breyer is right, then *Zant* supports the notion of traditional harmless error review in these situations, while Scalia’s approach in *Sanders* allows the court to *automatically assume* the error was harmless.

30. *Clemons v. Mississippi*, 494 U.S. 738 (1990).

31. Although the Court did not expressly label Mississippi a “weighing” state, it did use this term in discussing the significance of Mississippi’s sentencing regime to the outcome of the case. *Id.* at 748-49, 752 (“An automatic rule of affirmance in a weighing State [like Mississippi] would be invalid . . .”). More importantly, as the concept is generally understood, Mississippi undoubtedly used a weighing scheme. *See id.* at 742-43. Finally, the scheme at issue in *Clemons* has since been cited by the Court as being a classic example of a weighing system. *See, e.g., Sanders*, 126 S. Ct. at 891 n.3 (“*Clemons* maintains the distinction envisioned in *Zant* between Georgia (a non-weighing State) and Mississippi (a weighing State) . . .”) (citations omitted).

32. Unlike the more common system of bifurcating the eligibility and sentencing processes into two distinct stages, the Mississippi regime in *Clemons* collapsed these two stages into one. *Clemons*, 494 U.S. at 742-43. That is, at the sentencing hearing, the jury was instructed that it could only consider a short list of prescribed aggravating factors as justifying the death sentence (that is, making the defendant eligible for death). At the same time, the jury was to weigh any aggravating factors it found against any mitigating circumstances to determine whether to in fact impose the death sentence. *Id.*

33. *Id.* at 745 n.2. In addition, the jury members were instructed several times that, “regardless of aggravating circumstances, they were not required to impose the death penalty.” *Id.* at 744 (quoting *Clemons v. Mississippi*, 535 So. 2d 1354, 1364 (1988)).

34. *Id.* at 745 n.2.

35. *See id.* at 750-53 (holding that, given Mississippi’s weighing regime, the jury’s consideration of invalid eligibility factors required harmless error review or a reweighing of the valid factors to ensure the defendant would still have received the death sentence without the invalid factors).

the defendant's death sentence wherein the jury had relied on a constitutionally invalid eligibility factor to arrive at its sentence.³⁶ Significantly, the Court did not vacate the death sentence itself.³⁷ Rather, it remanded the case to the Mississippi Supreme Court with instructions to either: (a) conduct harmless error review to determine whether the jury would have chosen death in the absence of the invalidated factor; or (b) independently reweigh the remaining valid eligibility factor against the mitigating evidence to discern whether the death sentence was appropriate.³⁸ Thus, the message of *Clemons* was clear: Unlike the case of a non-weighing state, there was strong reason to believe that in a weighing state a jury might have opted for a sentence of imprisonment but for the role played by an invalidated eligibility factor.

Taken together, the Court's decisions in *Zant* and *Clemons* erected the weighing–non-weighing dichotomy. For the moment the law seemed, if not universally accepted, relatively clear.³⁹ Nevertheless, the critiques of

36. *Id.* at 755.

37. *Id.* at 754-55 & n.5.

38. *Id.* at 750-55. This approach makes sense in a weighing regime because, even though in such a system the jury's consideration of an invalid factor necessarily skews the sentencing process in favor of death, the jury may have chosen death had they not considered the invalid factor. In other words, the error may be harmless. *Clemons* is also significant for its holding that an appellate court may cure this sort of constitutional error not only through the traditional means of harmless error review, but also by independently reweighing the remaining valid sentencing factors to determine if death is appropriate. *Id.* at 744-50; Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 138 n.189 (2002). In coming to this conclusion, the Court roundly rejected the contention that the Sixth Amendment allows only the jury to engage in such a reweighing. *Clemons*, 494 U.S. at 745. Still, the reader may wonder why the Court in *Clemons* did not acknowledge that the jury, rather than the appellate court, could engage in reweighing the valid factors on remand. The reason is that, under Mississippi law, the reweighing task had been designated as an appellate function. Nevertheless, the Supreme Court made it clear that such reweighing could legitimately be performed by a jury, but that such decision was for the state appellate court to make:

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. In some situations, a state appellate court may conclude that peculiarities in a case make appellate reweighing or harmless-error analysis extremely speculative or impossible. We have previously noted that appellate courts may face certain difficulties in determining sentencing questions in the first instance. Nevertheless, that decision is for state appellate courts, including the Mississippi Supreme Court in this case, to make.

Id. at 754 (citation omitted).

39. However, despite the relative clarity of the framework established by *Zant* and *Clemons*, the Court created some confusion with its decision in *Stringer* one year later.

the *Zant-Clemons* jurisprudence were compelling,⁴⁰ and the Court's framework would be given the ultimate test in *Sanders*.

III. *BROWN V. SANDERS*

A. *Factual and Procedural History*

After invading Dale Boender's home, Ronald Sanders and a companion bound and blindfolded Boender and his girlfriend, Janice Allen.⁴¹ The two victims were then struck on the head with a blunt, heavy object, and Allen died from the attack.⁴²

At trial, Sanders was convicted of first degree murder for the killing of Allen, attempted murder of Boender, robbery, burglary, and attempted robbery.⁴³ In addition, the jury found that four "special circumstances," that is, eligibility factors, attended the murder, each of which independently made Sanders eligible for death.⁴⁴ At the penalty stage,

Stringer v. Black, 503 U.S. 222 (1992). Specifically, the Court in *Stringer* made statements confirming the importance of the weighing–non-weighing dichotomy, while also making statements that cast doubt on whether different rules applied in such regimes when a defendant was sentenced to death based on subsequently invalidated factors. For instance, on one hand, the Court remarked:

With respect to the function of a state reviewing court in determining whether the sentence can be upheld despite the use of an improper aggravating factor, the difference between a weighing State and a non-weighing State is not one of "semantics," as the Court of Appeals thought, but of critical importance.

Id. at 231-32 (citation omitted). On the other hand, some of the Court's statements seemed to suggest that a universal rule (entailing something like harmless error review) applied in both weighing and non-weighing States: "In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor." *Id.* at 230.

40. See, e.g., David McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of United States and Louisiana Supreme Court Case Law*, 59 LA. L. REV. 1105, 1153-57 (1999) (arguing that the Court's jurisprudence in both *Zant* and *Clemons* is fundamentally flawed in that neither decision sufficiently ensures reliability in death penalty cases); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 387 n.153 (1995) (questioning the legitimacy of the different rules that apply to weighing versus non-weighing states); Stephen Hornbuckle, Note, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Caselaw*, 73 TEX. L. REV. 441, 454-57 (1994) (criticizing *Zant* in particular on the grounds that it flies in the face of the traditional policy of requiring heightened reliability in capital decisions and that it ignores the extent to which a jury might rely on an invalidated factor).

41. *Brown v. Sanders*, 126 S. Ct. 884, 888 (2006).

42. *Id.*

43. *Id.*

44. *Id.*; see also CAL. PENAL CODE § 190.2 (Deering 1990) (listing the "special circumstances," each of which independently rendered a defendant eligible for the death penalty at the time Sanders was sentenced).

the court instructed the jury to consider a separate list of sentencing factors to guide its discretion in deciding whether to in fact impose the death penalty.⁴⁵ One of these considerations was “[t]he circumstances of the crime of which the defendant was convicted . . . and *the existence of any special circumstances found to be true*.”⁴⁶ In other words, the jury was instructed to take into account the fact that it had found Sanders eligible for death four times over.⁴⁷ In the end, the jury sentenced Sanders to death.⁴⁸

On direct appeal, the California Supreme Court invalidated two of the “special circumstances” found by the jury: (1) that “[t]he murder was committed while the defendant was engaged in . . . [b]urglary”; and (2) that it was “especially heinous, atrocious, or cruel.”⁴⁹ However, as each “special circumstance” independently rendered Sanders eligible for the death penalty,⁵⁰ the California Supreme Court nonetheless affirmed the sentence.⁵¹ In doing so it relied largely on the authority of *Zant*.⁵²

After the United States Supreme Court denied certiorari, Sanders filed a habeas petition in federal district court, contending that the jury’s

45. *Sanders*, 126 S. Ct. at 888; see also CAL. PENAL CODE § 190.3 (West 1999) (listing the factors to be considered by the jury at the penalty stage). It should be noted that, while section 190.3 limited the jury’s discretion by listing only eleven distinct factors to be considered by the jury in making its penalty decision, it nevertheless allowed any evidence, subject to a few minor exceptions, to be presented by either the people or the defendant “as to any matter relevant to aggravation, mitigation, and sentence . . .” *Id.*

46. *Sanders*, 126 S. Ct. at 888 (emphasis added). Interestingly, the sentencing factor relating to “the existence of any special circumstances found to be true” is the first factor listed in section 190.3. CAL. PENAL CODE § 190.3(a). It is therefore clear that the legislature considered this to be a significant factor, undermining somewhat the argument that the jury’s consideration of invalid “special circumstances” is, or was meant to be, inconsequential to its determination of whether to impose death.

47. Of course, section 190.3 did not explicitly instruct the jury to consider that it had found the defendant eligible for death, or that it had done so by a large margin. Nevertheless, by instructing the jury to take into account “the existence of any special circumstances found to be true,” it seems reasonable to suppose that many jurors would put two and two together: many jurors would justifiably think, “the more eligibility factors we found, the more the defendant deserves death.” See CAL. PENAL CODE § 190.3(a).

48. *Sanders*, 126 S. Ct. at 888.

49. *People v. Sanders*, 797 P.2d 561, 587, 589 (Cal. 1990); CAL. PENAL CODE § 190.2(a)(14), (17)(vii) (Deering 1990).

50. CAL. PENAL CODE § 190.2.

51. *Sanders*, 797 P.2d at 589.

52. *Id.* (holding *Zant* controlling because, according to the United States Supreme Court, *Zant* “upheld a death penalty judgment despite invalidation of one of several aggravating factors”).

weighing of the invalid factors at the penalty stage was a defect of constitutional proportions.⁵³ The district court denied relief, but the Ninth Circuit Court of Appeals reversed.⁵⁴ In particular, the Ninth Circuit held that the California Supreme Court had “erroneously believed it could apply the rule of *Zant v. Stephens*, which is applicable only to non-weighing states,” to uphold the death sentence.⁵⁵ In the Ninth Circuit’s opinion, California was a weighing state.⁵⁶ Therefore, relying on the U.S. Supreme Court’s language in *Clemons* and *Stringer*, the Ninth Circuit reversed and remanded on the ground that due to California’s weighing scheme the death sentence could only be upheld if it survived harmless error review or an independent reweighing *sans* the invalid sentencing factors.⁵⁷ Five Justices on the United States Supreme Court disagreed.⁵⁸

53. *Sanders*, 126 S. Ct. at 888-89. As Justice Scalia noted, because Sanders filed his habeas petition prior to April 24, 1996, the Supreme Court did not apply the deferential standard of review required by the Antiterrorism and Effective Death Penalty Act (AEDPA). *Id.* at 889 n.1; 28 U.S.C. § 2254(d) (2002). Under AEDPA, a federal court cannot grant habeas relief to a person imprisoned by a state court unless the state court’s decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” 28 U.S.C. § 2254(d)(1). Had this provision been applicable to Sanders’s claim, it is reasonably likely that the Supreme Court would have reversed the Ninth Circuit (and hence affirmed Sanders’s death sentence) based exclusively on AEDPA’s deferential standard of review.

54. *Sanders v. Woodford*, 373 F.3d 1054, 1064, 1070 (9th Cir. 2004).

55. *Id.* at 1064 (citation omitted).

56. *Id.* According to the Ninth Circuit, non-weighing states are those in which “aggravating factors matter for determining eligibility . . . , but have no specific function in the sentencing process [the penalty stage] itself.” *Id.* at 1059. Therefore, the Ninth Circuit believed, the invalidation of an eligibility factor in a non-weighing state did not render a death sentence based on such factor unconstitutional because, so long as another valid eligibility factor was found, the defendant would still be eligible for death and the invalid factor would not infect the weighing process at the penalty stage. *Id.* In contrast, in weighing states “the finding of aggravating factors [eligibility factors] is part of the jury’s sentencing determination, and the jury is required to weigh any mitigating factors against the aggravating circumstances [including the relevant eligibility factors].” *Id.* (quoting *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990)). In other words, according to the Ninth Circuit’s definitions of the schemes, if eligibility factors play any role in the penalty stage, then it is a weighing regime. *Id.* at 1059. With this in mind, the Ninth Circuit concluded that California was clearly a weighing state and therefore Sanders’s death sentence, based as it was on two subsequently invalidated eligibility factors, was *prima facie* unconstitutional. *Id.* at 1060, 1064.

57. *Id.* at 1064.

58. *Sanders*, 126 S. Ct. at 887-88. Justice Scalia delivered the opinion of the Court reversing the Ninth Circuit; he was joined by Chief Justice Roberts and Justices O’Connor, Kennedy, and Thomas. *Id.* *Sanders* was the Roberts Court’s first five-to-four decision. Linda Greenhouse, *A 1986 Case Could Aid Appeals Along Death Row*, N.Y. TIMES, Jan. 12, 2006, at A18.

B. Justice Scalia's Majority Opinion

In announcing the Court's opinion in *Sanders*, Justice Scalia set forth a compelling analysis which would be logically sound, but for that it rests on a false factual premise. Specifically, to make his rule work, Justice Scalia erroneously assumed that a jury's consideration of an invalid sentencing factor is essentially inconsequential in a broad range of cases.⁵⁹ Not only was this a serious factual mistake, but it also conflicts with the Court's longstanding recognition that the categorically unique stakes involved in death penalty decisions mandate "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."⁶⁰ Moreover, while Scalia's opinion purported to transcend the weighing–non-weighing dichotomy,⁶¹ his new rule hinges on the distinction: It only applies to non-weighing states.⁶²

Scalia's analysis began with a description of the weighing–non-weighing dichotomy and its development through Supreme Court case law.⁶³ Simultaneously, however, Scalia cast doubt on the continued validity of the distinction, questioning its actual usefulness.⁶⁴ Nevertheless, he did seem ultimately to affirm at least one facet of the Court's prior jurisprudence—the notion that, in an extreme or pure weighing state,⁶⁵ the subsequent invalidation of an eligibility factor

59. *Sanders*, 126 S. Ct. at 892 (“[S]uch skewing will occur, and give rise to constitutional error, only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor.”).

60. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

61. *See, e.g., Sanders*, 126 S. Ct. at 891 (“This weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations.”).

62. *Id.* at 892 (“We think it will clarify the analysis, and simplify the sentence-invalidating factors we have hitherto *applied to non-weighing States* if we are henceforth guided by the following rule . . .”) (emphasis added) (citation omitted).

63. *See id.* at 889-91. This portion of the opinion largely mirrors Part II of this Note.

64. *See supra* note 61. Nevertheless, while Justice Scalia implied a number of times that the weighing–non-weighing distinction is no more, he still used the dichotomy to support his conclusion. *See, e.g., Sanders*, 126 S. Ct. at 890 n.3 (noting with approval that “the Courts of Appeals have uniformly understood that different rules apply to weighing and non-weighing states, and that harmless error review is only necessary in the former”). In other words, Scalia criticized the distinction on the whole when it was not helpful to him, but then relied on it when it aided his cause. This inconsistency further undermined the persuasiveness of his opinion.

65. That is, a state wherein the *only* factors that may be considered as aggravating at the penalty stage are those factors which were found to make the defendant eligible for death at the eligibility stage.

necessarily skews the weighing process in favor of death, requiring harmless error review or independent reweighing to avoid unconstitutionality.⁶⁶

As to non-weighing states, however, Justice Scalia announced a new rule:

An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.⁶⁷

After announcing this rule, Scalia proceeded to classify California as a non-weighing state, contradicting the Ninth Circuit's finding.⁶⁸ In doing so, Scalia applied a common, though not universally accepted,⁶⁹ understanding of what makes a state weighing versus non-weighing.⁷⁰ He defined weighing states as "those in which the only aggravating factors permitted to be considered by the sentencer [are] the eligibility factors,"⁷¹ and non-weighing states as those "that permit[] the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors."⁷² Under this rubric, he declared California a non-weighing state because, at the penalty stage, the jury considers a set of aggravating factors that incorporates the eligibility factors⁷³ but which also contains a series of other, distinct considerations.⁷⁴

66. *Id.* at 890 ("In a weighing State, therefore, the sentencer's consideration of an invalid eligibility factor necessarily skew[s] its balancing of aggravators with mitigators, and require[s] reversal of the sentence (unless a state appellate court determine[s] the error was harmless or reweigh[s] the mitigating evidence against the valid aggravating factors).").

67. *Id.* at 892. Again, depending on how one reads *Zant*, this new rule could either be characterized as merely a clarification and slight extension of precedent, or as a major departure. See *supra* note 29 and accompanying text. In addition, as Justice Stevens pointed out in his *Sanders* dissent, it appears that two weeks after *Zant*, the Supreme Court characterized *Zant* as applying harmless error review rather than an automatic rule resulting in a finding of constitutionality. *Sanders*, 126 S. Ct. at 901 (Stevens, J., dissenting) (citing *Barclay v. Florida*, 463 U.S. 939 (1983) (plurality opinion)); *Barclay*, 463 U.S. at 951 n.8 (holding a death sentence constitutional and concluding that "we need not apply the type of federal harmless-error analysis that was necessary in *Zant*").

68. *Sanders*, 126 S. Ct. at 893 (holding that the sentencing scheme "caus[es] California to be (in our prior terminology) a non-weighing State").

69. See, e.g., *id.* at 894-95 (Stevens, J., dissenting) (arguing that, in a non-weighing state, the *sole* function of an eligibility factor is to render the defendant eligible for death); accord *Sanders v. Woodford*, 373 F.3d 1054, 1059 (9th Cir. 2004).

70. *Sanders*, 126 S. Ct. at 889-91.

71. *Id.* at 890.

72. *Id.*

73. *Id.* at 893. The jury considers "the existence of any special circumstances [eligibility factors] found to be true" CAL. PENAL CODE § 190.3(a).

74. *Sanders*, 126 S. Ct. at 893. Section 190.3 directs the jury to consider ten other factors (in addition to the presence of any eligibility factors) when discerning whether to impose the death penalty. CAL. PENAL CODE § 190.3.

Then, having found California to be a non-weighting state, Scalia applied his new rule to Sanders's appeal.⁷⁵ He reasoned that because the invalidated eligibility factors (for example, that the murder was committed in the course of a burglary and that it was "especially heinous, atrocious, or cruel"⁷⁶) only implicated facts and circumstances properly considered by the jury under another, valid aggravating factor at the penalty phase, Sanders's death sentence was constitutionally sound.⁷⁷ What made this all possible was the fact that, under California's death penalty scheme, the jury was instructed to consider an "omnibus 'circumstances of the crime' sentencing factor."⁷⁸ This valid sentencing factor thus allowed the jury to consider as aggravating the identical facts and circumstances which underlie the burglary-murder and "especially heinous" factors.⁷⁹ Invalidation of the latter two was therefore, in Justice Scalia's opinion, inconsequential: The predicate facts and circumstances were "properly considered whether or not they bore upon the invalidated eligibility factors."⁸⁰

Furthermore, in upholding Sanders's death sentence Scalia gave little credence to a rather convincing argument advanced by both Sanders and Justice Stevens in dissent: the possibility that the jury would "count the nature of the crime twice" (once under the "circumstances of the crime" omnibus factor and again under the invalidated eligibility factors),⁸¹ or that it would regard the legislature's decision that the invalidated factors made one eligible for death as an "imprimatur on the decision to impose

75. *Sanders*, 126 S. Ct. at 893.

76. *Id.* at 893-94. The California Supreme Court invalidated the burglary-murder eligibility factor under state merger law because it allowed the jury to find a burglary (and hence the burglary-murder eligibility factor) based on Sanders's intent to commit an assault, which is already an element of homicide. *People v. Sanders*, 797 P.2d 561, 587 (Cal. 1990). As to the "especially heinous, atrocious, or cruel" eligibility factor, the California Supreme Court struck this down as unconstitutionally vague. *Id.* at 589.

77. *Sanders*, 126 S. Ct. at 894.

78. *Id.* Specifically, Scalia reasoned as follows:

[T]he jury's consideration of the invalid eligibility factors in the weighing process [the penalty stage] did not produce constitutional error because all of the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the 'circumstances of the crime' sentencing factor.

Id.

79. *Id.*

80. *Id.*

81. *Id.* at 895 (Stevens, J., dissenting).

death and therefore give greater weight” to such factors.⁸² In Scalia’s mind, if this were a possibility, it did not rise to the level of a “constitutional defect.”⁸³

C. Justice Stevens’s Dissent

According to Justice Stevens, the majority’s conception of what makes a state weighing versus non-weighing is critically flawed. He argued that the Court’s “prior cases have drawn a simple categorical distinction” between such regimes.⁸⁴ In a non-weighing state, those factors which make the defendant eligible for death are *absolutely uninvolved* in the penalty stage.⁸⁵ Alternatively, if the eligibility factors play *any* role in the decision whether to actually impose death, then it is *ipso facto* a weighing state.⁸⁶

Having framed the distinction thus, Stevens concluded that the Ninth Circuit correctly found California to be a weighing state,⁸⁷ and that because of this, it also correctly declared Sanders’s sentence unconstitutional.⁸⁸ Specifically, under Stevens’s definition of a weighing

82. *Id.* According to Scalia, the Court addressed these very concerns in *Zant* and concluded that they were without merit. *See id.* at 894. In particular, Scalia rebuffed these contentions as follows:

Sanders argues that the weighing process was skewed by the fact that the jury was asked to consider, as one of the sentencing factors, “the existence of any special circumstances [eligibility factors] found to be true.” In Sanders’ view, that placed special emphasis upon those facts and circumstances relevant to the invalid eligibility factor. Virtually the same thing happened in *Zant*. There the Georgia jury was permitted to “consider all evidence in extenuation, mitigation and aggravation of punishment,” but also instructed specifically that it could consider “any of [the] statutory aggravating circumstances which you find are supported by the evidence.” This instruction gave the facts underlying the eligibility factors special prominence. Yet, even though one of the three factors (that the defendant had “substantial history of serious assaultive convictions”) was later invalidated, we upheld the sentence. We acknowledged that the erroneous instruction “might have caused the jury to give somewhat greater weight to respondent’s prior criminal record than it otherwise would have given”; indeed, we *assumed* such an effect. But the effect was “merely a consequence of the statutory label ‘aggravating circumstance.’” We agreed with the Georgia Supreme Court that any such impact was “inconsequential,” and held that it “cannot fairly be regarded as a constitutional defect in the sentencing process.” The same is true here.

Id. (citations omitted) (alterations in original).

83. *Id.* (quoting *Zant v. Stephens*, 462 U.S. 862, 889 (1983)).

84. *Id.* (Stevens, J., dissenting).

85. *See id.* at 894-95.

86. *See id.* at 895.

87. *Id.* at 896 (“[T]he court of appeals correctly decided that the statutory text [of CAL. PENAL CODE § 190.3] unambiguously” rendered California a weighing state.).

88. *See id.* at 895-96 (noting that the Court’s decisions in *Zant*, *Clemons*, and *Stringer* dictate that in a weighing state a defendant’s death sentence must be vacated

state, California clearly falls into this category because at the penalty phase the jury was instructed to, among other things, weigh “[t]he circumstances of the crime . . . and the existence of any [aggravating] circumstances [eligibility factors] found to be true.”⁸⁹ Therefore, when two of the four eligibility factors were invalidated, an improper “weight [was] added to death’s side of the scale, and one cannot presume that this weight made no difference to the jury’s ultimate conclusion.”⁹⁰

Nevertheless, Justice Stevens further noted that within weighing regimes, there are differences in that some schemes place more emphasis on eligibility factors at the penalty stage than others.⁹¹ Therefore, within some weighing systems—those placing little emphasis on eligibility factors at the penalty stage—the likelihood that the defendant will be prejudiced by the jury’s consideration of an invalid eligibility factor is diminished.⁹² California, he suggested, falls within this camp: Because courts permit jurors to consider the same facts and circumstances implicated by the invalidated eligibility factors under the valid “circumstances of the crime” factor, this “increases the likelihood that their consideration of a subsequently invalidated aggravating circumstance [eligibility factor] will be harmless”⁹³ Still, this dynamic “does not take California out of the ‘weighing state’ category.”⁹⁴ In the end, then, Stevens would affirm the Ninth Circuit’s holding that Sanders’s death sentence was unconstitutionally imposed, and that it can only be cured on a showing that any error was harmless or through independent reweighing of the valid sentencing factors.⁹⁵

unless the error is shown to be harmless or the sentence survives an independent reweighing of the valid factors).

89. *Id.* at 895 (quoting CAL. PENAL CODE § 190.3(a) (West 1999)).

90. *Id.*

91. *See id.* Specifically, Justice Stevens wrote:

There are, of course, different weighing systems. If a jury is told that only those specific aggravating circumstances making the defendant eligible for the death penalty may provide reasons for imposing that penalty, its consideration of an invalid factor is obviously more prejudicial than if the jury is told that it may also consider all of the circumstances of the crime. The fact that California sentencing juries may consider these circumstances increases the likelihood that their consideration of a subsequently invalidated aggravating circumstance will be harmless, but it does not take California out of the ‘weighing State’ category.

Id.

92. *See id.*

93. *Id.*

94. *Id.*

95. *See id.* at 896. Significantly, Justice Stevens noted that had the Court been

D. Justice Breyer's Dissent

In contrast to Stevens's dissent, Justice Breyer's critique of the majority opinion stemmed from the premise that regardless of a state's status as weighing or non-weighing, any time a jury renders a death sentence based on its consideration of an invalid sentencing factor, the sentence is *prima facie* unconstitutional.⁹⁶ In other words, he would eviscerate the weighing–non-weighing distinction as “unrealistic, impractical, and legally unnecessary,”⁹⁷ and adopt the simple rule that sentences such as Sanders's are unconstitutional unless the error is shown to be harmless.⁹⁸

More specifically, Breyer attacked Scalia's opinion on the ground that it is inconsistent with precedent and “common sense” because it framed the issue on appeal as merely “a problem of the admissibility of certain evidence.”⁹⁹ According to Justice Breyer, Scalia simply believed Sanders only suffered constitutional harm if the invalid eligibility factor allowed the jury to consider as aggravating at the penalty stage evidence which it otherwise would not have been permitted to weigh.¹⁰⁰ Precedent, said Breyer, is at odds with this approach: The Court's key cases on the topic¹⁰¹ have not been concerned with the *admissibility* of evidence, but with the *emphasis* placed on such evidence by the jury improperly considering it as a factor which the state has deemed

asked, he might have concluded that the error in Sanders's case was harmless. *Id.* However, because the petitioner, the State of California, merely asked the Court to decide whether California was a weighing or non-weighing State, Stevens refrained from addressing the issue. *Id.* In addition, Stevens criticized the majority opinion on the grounds that it will likely create confusion among the lower courts. *Id.* (“[T]his decision is more likely to complicate than to clarify our capital sentencing jurisprudence . . .”). This angle of criticism may be unfounded. In *United States v. Hammer*, the district court lucidly discussed the *Sanders* rule, and seemingly grasped its basic operation with no confusion whatsoever. See *United States v. Hammer*, No. 4:CR-96-239, 2006 WL 229057, slip op. at *2-3 (M.D. Pa. 2006).

96. See *Sanders*, 126 S. Ct. at 896 (Breyer, J., dissenting). Justice Breyer put it bluntly:

In my view, it does not matter whether California is a “weighing” or a “nonweighing” State, as ordinary rules of appellate review should apply. 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.

Id.

97. *Id.* at 898.

98. See *id.* at 902.

99. *Id.* at 903.

100. *Id.* (“If all the evidence was properly admitted and if the jury can use that evidence when it considers other aggravating factors, any error, the Court announces, must be harmless.”).

101. *Stinger v. Black*, 503 U.S. 222 (1992); *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Zant v. Stephens*, 462 U.S. 862 (1983).

aggravating enough to make one eligible for death.¹⁰² In this sense, Breyer echoed the concern voiced by Stevens—that harmless error review is necessary out of fear that the jury may consider the state’s choice to classify a factor as rendering one death-eligible as a “legislative imprimatur on the decision to impose death”¹⁰³

In a way, though, Breyer’s disagreement with the majority reflects a more profound difference of opinion over the degree of reliability needed in capital punishment cases. In Breyer’s view, “‘given the acute need for reliable decision-making when the death penalty is at issue,’ reviewing courts should decide if [the] error was harmful, regardless of the form a State’s death penalty law takes.”¹⁰⁴ Therefore, while Breyer was willing to acknowledge the possibility that the error was harmless in this case, he was not ready to assume it.¹⁰⁵

IV. WHICH JUSTICE, IF ANY, GOT IT RIGHT?

Based on considerations of policy, precedent, and logic, none of the opinions in this case is perfect.¹⁰⁶ That being said, while Scalia’s

102. *Sanders*, 126 S. Ct. at 903 (Breyer, J., dissenting) (“Common sense suggests, however, and this Court has explicitly held, that the problem before us is *not* a problem of the admissibility of certain evidence. It is a problem of the emphasis given to that evidence by the State or the trial court.”).

103. *Id.* at 895 (Stevens, J., dissenting). Breyer noted that the “jury might do so because the judge or prosecutor led it to believe that state law attaches particular importance to that factor: Indeed, why else would the State call that factor an ‘aggravator’ and/or permit it to render a defendant death eligible?” *Id.* at 898 (Breyer, J., dissenting).

104. *Id.* at 898 (Breyer, J., dissenting) (quoting *Deck v. Missouri*, 125 S. Ct. 2007, 2014 (2005)) (citation omitted).

105. *Id.* at 904.

106. Among other things, whether any of the Justices correctly defined the weighing–non-weighing framework is not clear. Scalia and Breyer approached the matter as if there were a bright-line distinction between weighing and non-weighing schemes, when the framework is perhaps better understood not as a dichotomy, but as a continuum: on one end of the spectrum is the most extreme form of a weighing scheme; on the other end, the most extreme non-weighing scheme; and in between are regimes that share aspects of both frameworks. Stevens came closest to acknowledging this idea by recognizing that not all weighing schemes pose the same risk of prejudice. Ultimately, though, none of the Justices’ constructions of the weighing–non-weighing framework is clearly right as a matter of precedent. By the same token, none of their constructions is clearly wrong. The precedent is, to a significant degree, ambiguous, and we see this play out in *Sanders*: all three opinions espoused different interpretations of the weighing–non-weighing dichotomy, and all three proclaimed them to be supported by the Court’s prior cases.

opinion is clearly unacceptable, Breyer's comes closest to providing a satisfactory solution.

Justice Scalia's approach to the issue in *Sanders*—whether the subsequent invalidation of an eligibility factor considered by a jury at the penalty stage renders a death sentence based thereon prima facie unconstitutional¹⁰⁷—is critically flawed in two ways. First, it incorrectly assumes that as long as a jury can consider the same facts and circumstances under some other, valid sentencing factor, the jury's consideration of an invalid eligibility factor will not present enough of a risk of prejudice to justify harmless error review.¹⁰⁸ This is simply counterfactual. If a jury finds that a certain circumstance renders the defendant eligible for death, it is fallacious to assume that the jury will not place more weight on such circumstance at the penalty stage. A jury might foreseeably do this by either counting that circumstance as doubly aggravating or by viewing it as particularly heinous given the state's decision to deem it capable of making one eligible for the death penalty.¹⁰⁹

Second, although it might be reasonable in another context to view this risk as insufficient to justify the judicial expense of harmless error review, it is unacceptable to do so in the qualitatively different context of capital punishment. The Court has consistently held the tremendous stakes involved in death penalty decisions mandate a greater need for reliability,¹¹⁰ so while there may be a time and place to put a premium on

107. *Sanders*, 126 S. Ct. at 888.

108. *Id.* at 892; see also *supra* note 59 and accompanying text.

109. See G.M. Filisko, *High Court 'Weighs' in on Death Penalty Verdicts: First 5-4 Ruling of Roberts Era Shows a Court Reluctant to Budge on Capital Punishment*, 5 A.B.A. J. E-REPORT (2006) (“[T]he opinion [in *Sanders*] is ‘very troubling’ and it ‘strongly suggests that . . . the majority’s understanding of how juries make decisions is untethered to reality’ . . .”) (quoting Professor Elizabeth Semel, director of the Boalt Hall Death Penalty Clinic and former director of the American Bar Association’s Death Penalty Representation Project); see also Steiker & Steiker, *supra* note 40, at 375 (noting that the Baldus study, a famous study of death sentencing rates, suggests that jurors give special weight to statutory sentencing factors beyond the weight they would otherwise attach to the facts and circumstances underlying those factors) (citing DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 102-03 (1990)); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 352 (1983) (“A jury facing a difficult moral judgment on the basis of lots of raw evidence is likely to be somewhat affected by the idea that the legislature had placed a special imprimatur on the defendant’s criminal record . . .”); Marcia A. Widder, Comment, *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, 1368 & n.123 (1994) (arguing that it is “ludicrous to assume” a jury would only consider eligibility factors as relevant to the extent they made the defendant death-eligible when, at the penalty stage, the jury was instructed to consider the eligibility factors it had found).

110. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“This conclusion [that the Constitution is more demanding in the context of death penalty

judicial economy, the questionable death sentence case is not it.¹¹¹ Therefore, while Scalia's position is reasonably consistent with the court's weighing–non-weighing precedent (though certainly not dictated by it),¹¹² it falters in terms of logic and policy.¹¹³

Justice Breyer, on the other hand, brought us much closer to an acceptable approach. Given the confusion surrounding the weighing–non-weighing dichotomy, he rightly recommended an evisceration of this framework, at least in the sense that the constitutionality of a death sentence should not turn on a state's classification as being either weighing or non-weighing. From Breyer's basic premise—that harmless error review or independent reweighing is necessary anytime a sentencer has relied to some degree on a subsequently invalidated sentencing

cases] rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”); *accord* *Callins v. Collins*, 510 U.S. 1141, 1149 (1994) (mem.) (Blackmun, J., dissenting); *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (vacating death sentence due to proceeding's inconsistency with Eighth Amendment's “heightened ‘need for reliability in the determination that death is the appropriate punishment’”) (quoting *Woodson*, 428 U.S. at 305); *Gardner v. Florida*, 430 U.S. 349, 363-64 (1977) (White, J., concurring) (concurring in the judgment on the ground that the death sentence proceeding did not comport with *Woodson*); *cf.* Kevin Michael Miller, Note, *Romano v. Oklahoma: The Requirement of Jury's Sense of Responsibility and Reliability in Capital Sentencing*, 44 CATH. U. L. REV. 1307, 1328-30 (1995) (observing that since the early 1980s, the Court has slowly moved away from its insistence on heightened reliability in capital decisions).

111. This is not to suggest that considerations of efficiency have absolutely no place in the context of death penalty decisions. Rather, while notions of judicial economy are still relevant, they should figure only minimally into the overall calculus. The Court recognized as much in *Zant*: “[A]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error.” *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

112. In addition to the fact that *Sanders* was a five-four decision with both dissents criticizing the majority opinion as inconsistent with precedent, it should also be noted that the Ninth Circuit's decision below was unanimous in reaching the opposite conclusion, which it felt was dictated by Supreme Court precedent. *Sanders v. Woodford*, 373 F.3d 1054, 1056 (9th Cir. 2004). If these contradictory opinions are any indication, it is clear that the Supreme Court's precedent on this issue is murky at best.

113. The upshot of *Sanders* is that reviewing courts will have an easier time upholding death penalty decisions partially based on erroneous sentencing factors. *See* Filisko, *supra* note 109 (“The effect is that this opinion will make it somewhat easier for reviewing courts to uphold death sentences in cases where there was some kind of error in the way one of the aggravating circumstances was defined.”) (quoting Joseph L. Hoffman, Professor of Law at Indiana University School of Law).

factor¹¹⁴—we can extrapolate a solution that is clear and at the same time consistent with the policy of ensuring reliability in capital sentencing.

The ideal approach would operate as follows: In a state where the eligibility factors play *some* role at the penalty stage, a death sentence rendered based on a subsequently invalidated eligibility factor will always require reversal unless it survives harmless error review or an independent reweighing minus the invalid factor. On the other hand, in a sentencing scheme wherein the eligibility factors serve *absolutely no function* at the penalty stage, the invalidation of an eligibility factor subsequent to a death sentence leaves the sentence constitutional and not subject to harmless error review so long as the defendant would still be eligible for death in the absence of the invalidated eligibility factor.¹¹⁵ This framework would ensure the reliability of death sentences in those instances where there is actual reason to suspect prejudice, yet would not require gratuitous review in those cases where there is no reason to have such fear.

Applying this alternative approach to Sanders’s appeal, the sentence would have to be vacated unless the error was shown to be harmless. That is, because the invalidated eligibility factors (that “[t]he murder was committed while the defendant was engaged in . . . [b]urglary” and

114. *Brown v. Sanders*, 126 S. Ct. 884, 896, 902 (2006) (Breyer, J., dissenting).

115. Justice Breyer’s position may indeed be very close to this. On the other hand, it may not. It is difficult to tell whether Breyer argued for harmless error review all the time, regardless of a state’s sentencing regime, or whether he in fact would agree with this Note that harmless error review is unnecessary when eligibility factors serve absolutely no function at the penalty stage. At first glance, Breyer’s approach seems to insist on harmless error review all the time:

In my view, it does not matter whether California is a “weighing” or a “nonweighing” State, as ordinary rules of appellate review should apply. A reviewing court must find that the jury’s consideration of an invalid factor was harmless beyond a reasonable doubt, regardless of the form a State’s death penalty law takes.

Id. at 896. However, given Breyer’s definition of weighing and non-weighing schemes, it is possible Breyer would agree that harmless error review need not be conducted when the invalidated factor was *only* considered at the eligibility stage. Breyer defined weighing states as those in which the jury is instructed to weigh at the sentencing stage all mitigating factors against only the previously found eligibility factors. *Id.* at 897. He defined non-weighing states as those in which the jury is to weigh all mitigating factors against any and all aggravating factors, including, but not limited to, the previously found eligibility factors. *Id.* So defined, the solution advanced by this Note would likewise mandate that harmless error review always be conducted in both weighing and non-weighing schemes. However, because Breyer never discussed the regime wherein the jury is to weigh at the sentencing stage the mitigating factors against a list of aggravating factors that is *different from, and completely exclusive of, the invalidated eligibility factors*, it is not clear whether Breyer would embrace this Note’s conclusion that harmless error review is unwarranted in such a situation.

that it was “especially heinous, atrocious, or cruel”¹¹⁶) served a function at the penalty stage,¹¹⁷ a court could not presume that the jury would have chosen death in the absence of these factors. Rather, a reviewing court would have to conduct harmless error review or an independent reweighing of the valid sentencing factors to determine if the death sentence could stand.¹¹⁸

In Sanders’s case it seems somewhat probable that the error was in fact harmless because: (1) the function served by the invalidated eligibility factors at the penalty stage was rather limited;¹¹⁹ and (2) a number of other applicable sentencing factors existed which the jury may have considered as warranting death.¹²⁰ Under this alternative approach, a reviewing court would be cognizant of these dynamics when inquiring whether the error was harmless.¹²¹ Nevertheless, a court could not *presume* that the error was harmless as Scalia would have it,¹²² but rather would have to make a factual determination as to whether the error was *actually* harmless.

V. CONCLUSION

The *Brown v. Sanders* decision is important far beyond its disposition of Sanders’s appeal. By assuming that a jury’s reliance on invalid sentencing factors automatically represents harmless error in a broad range of cases, Justice Scalia assumed too much. Not only is this position flawed as a matter of fact, it also conflicts with the Court’s

116. *People v. Sanders*, 797 P.2d 561, 587, 589 (Cal. 1990).

117. CAL. PENAL CODE § 190.3(a) (West 1999); *Sanders*, 126 S. Ct. at 888; *see also supra* note 46 and accompanying text.

118. Of course, a jury could also perform this independent reweighing function.

119. *See supra* notes 45-46 and accompanying text.

120. CAL. PENAL CODE § 190.3. These other applicable factors included, among other things, “the presence . . . of criminal activity by the defendant which involved the use . . . of force or violence.” *Id.*

121. Justice Stevens acknowledged as much:

If a jury is told that only those specific aggravating circumstances making the defendant eligible for the death penalty may provide reasons for imposing that penalty, its consideration of an invalid factor is obviously more prejudicial than if the jury is told that it may also consider all of the circumstances of the crime. The fact that California sentencing juries may consider these circumstances increases the likelihood that their consideration of a subsequently invalidated aggravating circumstance will be harmless, but it does not take California out of the ‘weighing State’ category.

Sanders, 126 S. Ct. at 895 (Stevens, J., dissenting).

122. *Id.* at 892; *see also supra* Part III.B.

repeated commitment to the notion that death penalty cases require a heightened degree of reliability.¹²³ As the lower courts take up this new rule, it will likely deprive numerous defendants of the right to a fair capital proceeding; within many sentencing schemes,¹²⁴ it will allow courts to assume the sentencer's consideration of invalidated eligibility factors was harmless without even reviewing the record to make this determination.

The approach suggested by this Note provides a preferable alternative. In doing away with the murky framework that is the weighing–non-weighing dichotomy, this alternative would offer courts clear guidance while at the same time ensuring that any real risk of prejudice does not go unchecked. With so much at stake, the defendant in a capital case deserves no less.

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123. The Court has recognized this greater need for reliability in a number of cases. *See supra* note 110: *see also* *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993) (explaining that “the Eighth Amendment requires a greater degree of accuracy and factfinding [in capital cases]”); *Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982) (O’Connor, J., concurring) (reasoning that, “[b]ecause sentences of death are ‘qualitatively different’ from prison sentences, this court has gone to extraordinary measures to ensure [the defendant is not prejudicially sentenced]”) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.”).

124. Scalia’s new rule is inapplicable to only two types of sentencing schemes: (1) pure weighing schemes (schemes wherein the *only* aggravating factors considered at the penalty stage are the eligibility factors found at the eligibility stage); and (2) non-weighing schemes that do not possess an omnibus “circumstances of the crime” factor allowing the jury to consider the evidence implicated by the invalidated factor under the rubric of the valid “circumstances of the crime” catch-all. *See Sanders*, 126 S. Ct. at 892.