Notes

APPELLATE REVIEW OF DEATH SENTENCES: AN ANALYSIS OF THE IMPACT OF *CLEMONS V. MISSISSIPPI* IN ARIZONA

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INTRODUCTION

"Death as a punishment is unique in its severity and irrevocability."[1] Historically, constitutional constraints have limited the use of the death penalty.[2] Recently, however, the United States Supreme Court has exhibited a trend toward reducing the heightened scrutiny to which death sentences have traditionally been entitled.[3]

In 1972 the Supreme Court held that, to be constitutional, death penalty statutes must be designed to prevent arbitrary and capricious death sentences.[4] The Court held that death penalty statutes that provide sentencing authorities with "untrammeled discretion to let an accused live or insist that he die" violate the Eighth and Fourteenth Amendments.[5] The Court requires

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1. Barclay v. Florida, 463 U.S. 939, 958 (1983) (Stevens, J., concurring).

2. *See, e.g.*, Enmund v. Florida, 458 U.S. 782 (1982) (requiring a finding that the capital defendant killed, attempted to kill or intended to kill); Lockett v. Ohio, 438 U.S. 586 (1978) (requiring that the sentencing authority consider any and all mitigating evidence presented by the defendant); Gregg v. Georgia, 428 U.S. 153 (1976) (constitutionality of death penalty statute contingent on safeguards such as automatic appellate review and a narrowing of death-eligible cases); Woodson v. North Carolina, 428 U.S. 280 (1976) (mandatory death sentences held unconstitutional for failure to provide individualized sentencing).

3. *See, e.g.*, Payne v. Tennessee, 111 S. Ct. 2597 (1991) (Eighth Amendment does not prohibit capital sentencing jury from considering victim impact evidence); Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (admission of coerced confession harmless error in capital case); Coleman v. Thompson, 111 S. Ct. 2546 (1991) (defendant must bear burden of attorney's failure to follow state procedural rules for habeas corpus petition in capital case in all phases beyond the direct appeal); Clemons v. Mississippi, 494 U.S. 738 (1990) (appellate courts may reimpose death sentences after reweighing amended aggravation and mitigation findings); Satterwhite v. Texas, 486 U.S. 249 (1988) (admission of evidence at capital sentencing in violation of defendant's Sixth Amendment right to counsel harmless error).

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

5. *Id.* at 248. The Eighth and Fourteenth Amendments will not tolerate sentencing procedures that permit unguided sentencing authorities to sentence defendants to death arbitrarily. *Id.* at 256-57 (Douglas, J., concurring), 294-95 (Brennan, J., concurring), 309-10 (Stewart, J., concurring), 313-14 (White, J., concurring).

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The

certain statutory safeguards to save death penalty statutes from constitutional attack.[6] One of the most significant safeguards is the right to an automatic appeal to a state appellate court.[7] However, after *Clemons v. Mississippi*,[8] the automatic appeal may become an independent appellate sentencing proceeding rather than a check against arbitrary and capricious sentencing.

In *Clemons*, the Supreme Court expanded the scope of state courts' automatic appellate reviews of death sentences.[9] After *Clemons*, an appellate court can affirm a death sentence, even though the trial court improperly sentenced the defendant to death.[10] *Clemons* allows appellate courts to invalidate an aggravating or mitigating factor on appeal, weigh the remaining factors and determine the proper sentence.[11] *Clemons* also allows appellate courts to apply a harmless error test to improperly imposed death sentences.[12] If an appellate court invalidates an aggravating or mitigating factor, but finds the death sentence would have been imposed without that factor being considered, the error was harmless and the death sentence may be affirmed.[13] Although *Clemons* does not restrict an appellate court's ability to remand for resentencing, by not *requiring* a remand, the Court has taken a step toward expediting capital litigation in state courts.

Fourteenth Amendment provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. CONST. amend. XIV.

6. In *Gregg*, 428 U.S. 153, the Court held that with adequate procedural protections, the punishment of death is not cruel and unusual. *See also* Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

7. *See Gregg*, 428 U.S. at 198; *Proffitt*, 428 U.S. at 250; *Jurek*, 428 U.S. at 269.

8. 494 U.S. 738 (1990).

9. *See infra* text accompanying notes 46-61.

10. *See Clemons*, 494 U.S. at 741.

11. The terms "weigh" and "reweigh" have particular meanings in capital cases. In most jurisdictions, the guilt and sentencing phases of a capital case are bifurcated. At the sentencing proceeding, either the trial judge or the jury determines the existence of statutory aggravating and mitigating factors.

Aggravating factors in Arizona, for example, include prior conviction punishable by life imprisonment or death sentence; prior conviction of a violent felony; defendant created a grave risk to person(s) other than victim; defendant paid another to commit murder; defendant committed the murder for pecuniary gain; murder was especially heinous, cruel or depraved; defendant committed murder while he was in custody; multiple victims; defendant was an adult and the victim was under the age of 15; and the victim was on-duty peace officer. ARIZ. REV. STAT. ANN. § 13-703(F)(1)-(10) (1989). Mitigating factors include, but are not limited to, the defendant's impaired capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law; unusual or substantial duress; minor participation; risk of death was not reasonably foreseeable; and the defendant's age. ARIZ. REV. STAT. ANN. § 13-703(G)(1)-(5) (1989).

In a "weighing" jurisdiction, the statute requires the jury or judge to then "weigh" the aggravating factors against any mitigating evidence. The factors are balanced according to the weight the judge or jury gives each factor. *See, e.g.*, MISS. CODE ANN. § 99-19-101 (Supp. 1989); ARIZ. REV. STAT. ANN. § 13-703(E) (1989). It should be emphasized that, in most jurisdictions, this is a *balancing* process and the sentence is not determined by whether there are a greater number of aggravating factors than mitigating factors, or vice-versa. Thus, when an appellate court "reweighs" the evidence, it engages in this balancing process. It must determine the existence of the factors, and what weight to give to each factor, then weigh them against each other and determine the appropriate sentence.

12. *See Clemons*, 494 U.S. at 752.

13. *Id.*

The Arizona Supreme Court has not adopted either the reweighing or the harmless error approach used in *Clemons*. However, recent death penalty cases suggest that Arizona may not follow the path of *Clemons*. This Note argues that it should not.

This Note proposes that the Arizona Supreme Court adopt a uniform method of remanding for resentencing those death penalty cases in which the aggravating or mitigating factors are altered on appeal. The first section explores the propriety of imposing a death sentence at the appellate level, and discusses the benefits of appellate review procedures in capital cases. This Note demonstrates a trend toward allowing appellate courts to be sentencing courts; beginning with *Barclay* and culminating in *Clemons*. It then analyzes *Clemons v. Mississippi*, assessing the benefits and disadvantages of the approaches approved of, and examining the impact of *Clemons* on state appellate review. Finally, the Note discusses Arizona's death penalty scheme and proposes that Arizona reject *Clemons'* invitation to conduct appellate level sentencing and permit only original sentencing courts to impose death sentences.

BENEFITS OF APPELLATE REVIEW OF DEATH SENTENCES

Several United States Supreme Court decisions have emphasized the importance of meaningful appellate review of death sentences. The Court has found that appellate review acts as a check against arbitrary, capricious and discriminatory death sentences in several respects.[14] The Court has also determined that appellate review can correct certain procedural defects in sentencing.[15] Thus the Court has strongly suggested that appellate review is required for a constitutional death penalty statute.

In *Gregg v. Georgia*, the Court held that the Georgia Supreme Court's independent review of death sentences was constitutional, and, indeed, found that this additional safeguard enhanced the reliability of all death sentences in Georgia.[16] Generally, an independent review consists of an appellate court's close examination of the trial and sentencing records to determine whether the facts and the crime warrant the imposition of the death penalty.[17] Independent reviews promote consistent capital sentencing because state appellate courts that have statewide jurisdiction review every death penalty case and, therefore, can guard against an aberrant death sentence.[18]

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14. *See, e.g., Gregg*, 428 U.S. at 198, 206 (appellate review serves as an important check against arbitrary death sentences); *Proffitt*, 428 U.S. at 259-60 (Florida's appellate review assures "consistency, fairness and rationality in the evenhanded operation of the state law"). *See generally* George E. Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 105-09 (1979).

15. *See infra* text accompanying notes 26-33.

16. 428 U.S. at 204-05.

17. *See id.* at 198. The Arizona Supreme Court conducts its independent review essentially the same way as does the Georgia Supreme Court. *See* State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976).

18. *See Jurek*, 428 U.S. at 276; Dix, *supra* note 14, at 105.

Gregg also noted the importance of Georgia's proportionality review.[19] Proportionality reviews eliminate disparity and arbitrariness in sentences for similar crimes.[20] In conducting proportionality reviews, appellate courts compare the case at bar with cases that have similar facts and circumstances. The court then determines whether the sentence imposed is proportionate to sentences imposed in similar cases.[21] Thus, appellate courts, through automatic reviews, ensure that death sentences are imposed consistently and reliably, and also maintain individualized sentencing.[22]

In *Roberts v. Louisiana*,[23] the Court held that Louisiana's mandatory death sentence statute was unconstitutional. One of the bases for unconstitutionality was that the Louisiana statute did not provide for an appellate "review to check the arbitrary exercise of the capital jury's *de facto* sentencing discretion."[24] Thus the Court again endorsed the importance of meaningful appellate reviews of death sentences to ensure a reliable death sentence.[25]

BARCLAY V. FLORIDA — PRECURSOR TO *CLEMONS*

The Court began to expand the powers of appellate courts reviewing death sentences in *Barclay v. Florida*.[26] In *Barclay*, the Supreme Court upheld the application of a harmless-error test in a death penalty case. The Florida Supreme Court found that the trial judge improperly considered a nonstatutory aggravating factor.[27] However, the court found that the death

19. 428 U.S. at 203. The Court later held, however, that the Eighth Amendment does not require proportionality reviews as long as the statute under which the trial court imposed the sentence provides other adequate safeguards against arbitrariness. *See* Pulley v. Harris, 465 U.S. 37 (1984). In *Harris*, the Court upheld California's sentencing scheme that properly limited the cases which were eligible for the death penalty by requiring that the jury find at least one of the special (aggravating) circumstances listed in the statute. The California statute also provided for an automatic appeal to the state supreme court. The Court found that California's death penalty statute provided adequate checks against arbitrariness, and, therefore, was constitutionally sound. *Id.* at 53-54.

20. *See Gregg*, 428 U.S. at 203, 223; *Proffitt*, 428 U.S. at 258-59. *But see Harris*, 465 U.S. 37 (proportionality reviews not constitutionally required).

21. *See, e.g., Gregg*, 428 U.S. at 203, 206; *Richmond*, 114 Ariz. at 196, 560 P.2d at 51.

22. *See* Dix, *supra* note 14, at 107.

23. 428 U.S. 325, 335 (1976).

24. *Id.* at 335. The Court has recognized that the Constitution requires that death sentences be particularly reliable because of the "qualitative difference" of a death sentence. *See, e.g., Woodson*, 428 U.S. at 305. A reliable sentence is one that considers the individual circumstances of the defendant and the crime, and is imposed under a statutory scheme that prevents arbitrary sentencing. *Id.* at 304.

25. *Id.* at 304-05.

26. 463 U.S. 939 (1983).

27. Florida law requires that there be at least one valid statutory aggravating factor before a death sentence may be considered. FLA. STAT. ANN. § 921.141 (West 1985). If an aggravating factor is found, then the jury must weigh that against any mitigating evidence. Only statutorily determined aggravating factors may be weighed. *See* Mikenas v. State, 367 So. 2d 606, 610 (Fla. 1978),

sentence would have been imposed absent the improper factor and affirmed the death sentence.[28]

Barclay challenged the Florida Supreme Court's harmless-error analysis. The Florida Supreme Court has held that it may find harmless-error when the sentencing court relied on an invalid aggravating factor, *no* mitigating circumstances exist and at least one other valid aggravating factor remains.[29] Significantly, an error is deemed harmless only when there are no mitigating factors to weigh against the aggravating factors.[30] This is because under Florida law, a death sentence *must* be imposed if any aggravating factor is found and there are no mitigating factors.

In *Barclay*, the Court upheld the Florida Supreme Court's finding that the trial judge's reliance on an invalid factor was harmless because there were no mitigating factors.[31] Based on Florida's limited version of the harmless-error test[32] and the presence of automatic appellate reviews, the Court approved Florida's death penalty scheme.[33]

Barclay's approval of the harmless-error test did not go so far as to transform appellate courts into sentencing authorities because the Florida courts would remand if the case required the appellate court to weigh factors. However, when an appellate court invalidates an aggravating factor relied upon by the sentencing court and then reimposes a death sentence after *reweighing* the evidence, the appellate court becomes a sentencing court.[34] It was not until *Clemons* that the Court extended the powers of appellate courts beyond those of reviewing courts.

CLEMONS V. MISSISSIPPI

In April 1987, Chandler Clemons robbed a man at gunpoint and then joined two accomplices waiting in a nearby car.[35] One of the accomplices told Clemons to kill the victim to prevent him from identifying Clemons.[36] Clemons shot the victim and fled the scene.[37] A jury convicted Clemons of first degree murder and sentenced him to death. The jury found two aggravating factors:

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28. 463 U.S. at 939. The trial judge improperly considered the defendant's prior criminal record as an aggravating factor. *Id.* at 956. In *Mikenas*, 367 So. 2d at 612-13, the Florida court held that this was not a proper aggravating circumstance.

29. *See* Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977). The Florida court generally remands for resentencing if the case involves some mitigating evidence. *Id.*

30. *Barclay*, 463 U.S. at 955. *Cf.* Lewis v. State, 398 So. 2d 432 (Fla. 1981) (invalidating three of four aggravating factors and remanding because the remaining factor was "relatively weak"); Williams v. State, 386 So. 2d 538, 543 (Fla. 1980) (requirement that when jury recommends life, judge may only impose death where "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ" could not be met after court struck several of the aggravating factors) (citation omitted).

31. *Barclay*, 463 U.S. at 958.

32. The Court apparently adopted the lack of mitigating factors as Florida's single standard for determining whether harmless error occurred. *Id.*

33. *Id.*

34. *Clemons*, 494 U.S. at 762-64 (Blackmun, J., concurring in part and dissenting in part).

35. *Id.* at 742.

36. *Id.*

37. *Id.*

that Clemons committed the murder for monetary gain and that the killing was especially heinous. It also concluded that these outweighed the defendant's mitigating evidence.[38]

The Mississippi Supreme Court affirmed Clemons' death sentence on automatic appeal even though the trial court failed to instruct the jury to consider only a limited construction of the "especially heinous, atrocious or cruel" killing factor.[39] The court invalidated this aggravating factor because the United States Supreme Court has held that the "especially heinous, atrocious or cruel" factor is unconstitutionally vague when not accompanied by jury instructions which limit its scope.[40] However, the Mississippi court found that the death penalty was proper in this case for several reasons. First, it found that a remaining valid aggravating factor supported the sentence.[41] The court also found that the "especially heinous" factor had been constitutionally narrowed by the court in a past decision, and therefore, was not unconstitutional *per se*.[42] Finally, it found that the trial judge had instructed the jury that they were not required to hand down a death sentence regardless of the aggravating and mitigating factors.[43]

The Mississippi Supreme Court held that when a jury bases its verdict on invalid and valid aggravating factors, a death sentence can be affirmed if at least one valid aggravating factor remains.[44] The court then found beyond a reasonable doubt that the jury would have imposed a death sentence based on the remaining evidence even without the "especially heinous, atrocious or cruel" aggravating circumstance.[45]

In a five-to-four decision,[46] the United States Supreme Court affirmed, holding that the Mississippi Supreme Court could constitutionally invalidate one or more of the aggravating circumstances considered by the jury, yet affirm a death sentence after reweighing the remaining aggravating and mitigating factors.[47] Although the Court recognized that appellate courts "face

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38. *Id.* at 743. In mitigation, Clemons offered testimony from his mother and a psychologist. *Id.* at 742.

39. Clemons v. State, 535 So. 2d 1354, 1361 (Miss. 1988).

40. *See* Maynard v. Cartwright, 486 U.S. 356 (1988). In Coleman v. State, 378 So. 2d 640, 648 (Miss. 1979), Mississippi limited its identical statutory aggravating circumstance by applying it only to murders that are "conscienceless or pitiless [and] unnecessarily torturous to the victim." *Clemons*, 494 U.S. at 744 (citing *Coleman*, 378 So. 2d at 648). However, in *Clemons* the jury was not given this limited instruction; therefore, the aggravating circumstance was improperly found.

41. *Clemons*, 494 U.S. at 744 (citing *Coleman*, 378 So. 2d at 648). The court found that the pecuniary gain factor was supported by the evidence. Clemons v. State, 535 So. 2d at 1362-64.

42. *See Coleman*, 378 So. 2d 640.

43. *Clemons*, 535 So. 2d at 1364.

44. *Id.* at 1362 (citing cases).

45. *Id.* at 1364.

46. The majority were Justice White, Chief Justice Rehnquist, Justices O'Connor, Scalia and Kennedy. Concurring in part and dissenting in part were Justices Blackmun, Brennan, Marshall and Stevens. Justice Brennan also wrote a separate opinion restating his view that the death penalty, in all circumstances, constitutes cruel and unusual punishment.

47. *See Clemons*, 494 U.S. at 745-46. In Zant v. Stephens, 462 U.S. 862, 890 (1983), the Court held that the invalidation of an aggravating circumstance did not require an appellate court to vacate the death sentence and remand to the jury in a non-weighing state. The

certain difficulties in determining sentencing questions in the first instance[,]" it permitted them to make their own sentencing determinations based solely upon the written record.[48]

The Court rejected all Clemons' arguments against allowing appellate courts to impose death sentences. The Court first concluded that the Sixth Amendment[49] does not require that a jury impose a death sentence or make the aggravation and mitigation determinations.[50] It then ruled that, under Mississippi law, Clemons did not have a due process right to a jury-determined sentence because the state supreme court claimed the authority to make sentencing determinations.[51] Thus, even after invalidating one aggravating factor, the Mississippi court was not bound to remand the case for a new sentencing proceeding by a jury.[52]

The Court also rejected Clemons' argument that an appellate court could not adequately consider a defendant's mitigating evidence presented at a sentencing hearing. It held that the state supreme court did not violate Clemons' Eighth Amendment rights to a reliable and individualized sentencing by reweighing the aggravating and mitigating factors and then affirming his death sentence.[53]

The Court held that appellate court reweighing is not unfair to the defendant, nor does it prevent consistent application of the death penalty.[54] The Court gave several reasons why it considered appellate courts capable of reweighing aggravating and mitigating evidence. First, appellate courts com-

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Court in *Clemons* noted that Mississippi required the jury to weigh the aggravating and mitigating circumstances in making its sentencing decision, therefore, *Zant* was not dispositive. *Clemons*, 494 U.S. at 745.

48. *Clemons*, 494 U.S. at 754.

49. "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury...." U.S. CONST. amend. VI.

50. *Clemons*, 494 U.S. at 746. In past decisions the Court has held that appellate courts could make the requisite finding that a defendant killed, attempted to kill or intended to kill before imposing a death sentence without violating the defendant's Sixth Amendment rights. Cabana v. Bullock, 474 U.S. 376 (1986). *See* Enmund v. Florida, 458 U.S. 782 (requiring such finding be made an element of capital murder). The Court has also held that the Sixth Amendment does not require that a jury make the sentencing determination in a capital case. Spaziano v. Florida, 468 U.S. 447 (1984). However, the Court has found that a capital sentencing proceeding is equivalent to a trial for double jeopardy purposes. *See* Bullington v. Missouri, 451 U.S. 430, 444 (1981). *Spaziano* held that the sentencing proceeding is not analogous to a trial for Sixth Amendment purposes. *Spaziano*, 468 U.S. at 458-59.

51. *See Clemons*, 494 U.S. at 746-47. The Mississippi Supreme Court has not limited the sentencing authority to juries. *Clemons*, 565 So. 2d at 1362 (citing cases). In this respect *Clemons* is distinguishable from Hicks v. Oklahoma, 447 U.S. 343 (1980), which held that a capital defendant is entitled to have a jury determine his sentencing because the state law created such a due process interest by giving juries the sole sentencing authority. Arizona statutorily provides that the trial judge shall impose the sentence in a capital case. ARIZ. REV. STAT. ANN. § 13-703(E) (1989).

52. *Clemons*, 494 U.S. at 747.

53. *Id.* at 748-50. A defendant's right to a reliable and individualized sentence is recognized by the Court in *Clemons*. *Id.* at 749. *See also* Penry v. Lynaugh, 492 U.S. 302, 319 (1989). The Court noted that the Constitution requires that courts "be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence." *Id.* (quoting *Woodson*, 428 U.S. at 304).

54. *See Clemons*, 494 U.S. at 748-50.

monly determine whether evidence supports a guilty verdict, and, in conducting an independent review, whether the evidence supports the aggravating and mitigating factors.[55] Appellate courts also weigh evidence during proportionality reviews.[56] Finally, appellate courts' sentencing determinations will be as reliable as a trial court's because appellate courts review numerous death sentences but jurors determine only one such case.[57]

Finally, the Court rejected Clemons' argument that appellate courts are unable to fully consider mitigating evidence when the trial court is not required to put its mitigation findings in writing.[58] In making this finding, the Court noted that trial judges may override a jury's recommendation to impose a life sentence without requiring the jury to write what it found as mitigating evidence.[59] The Court noted that appellate courts can make equally reliable sentencing determinations without the trial court putting its mitigation findings in writing.[60] Thus, the Court held that appellate reviews can sufficiently provide individualized and reliable sentencing determinations based on defendants' characteristics and the circumstances of the crime.[61]

The Court noted that the Mississippi court would have violated Clemons' constitutional right to an individualized sentencing if it had applied a rule that would automatically affirm a death sentence if at least one valid aggravating factor existed.[62] This kind of rule would deny the defendant his right to have the court consider mitigating evidence in determining his sentence. The Court ultimately remanded the case for further proceedings to determine whether the Mississippi court properly reweighed the remaining

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55. *Id.*

56. *Id.* In *Gregg*, 428 U.S. at 198, 203-05, and *Proffitt*, 428 U.S. at 258-59, the Court approved of the death sentencing schemes under which state supreme courts conduct proportionality reviews of each death case automatically appealed. The purpose of a proportionality review is to ensure that the death sentence is not disproportionate compared with the sentences imposed in similar cases.

57. *Clemons*, 494 U.S. at 749.

58. *Id.* at 750.

59. For support, the *Clemons* majority relied on *Spaziano*, 468 U.S. 447, which held that a defendant has no constitutional right to have a jury determine the sentence in a capital case and that a trial judge could constitutionally override a jury's sentence recommendation. The *Clemons* Court found that because *Spaziano* permitted a sentencing judge to overrule the jury recommendation, an appellate court could impose a death sentence to correct an invalid sentence imposed by the sentencing court. *Clemons*, 494 U.S. at 745-46. This rationale ignores the fundamental differences between the sentencing judge and the appellate court. The sentencing judge in *Spaziano* was present during the sentencing hearing. A detached appellate judge, who only has the trial court record before him, is not in a comparable position. Thus, *Spaziano* does not fully support the majority's conclusion that an appellate court can conduct a sentencing proceeding solely on the basis of a written record. *See id.* at 765 (Blackmun, J., concurring in part and dissenting in part).

60. *Clemons*, 494 U.S. at 750.

61. *See id.* at 749.

62. *Id.* at 752. *Accord* Lockett v. Ohio, 438 U.S. 586 (1978) (requiring that the sentencing authority consider any and all mitigating evidence presented by the defendant). Because of the severity and finality of the death penalty, the Court has held that the Eighth Amendment requires a heightened degree of sentencing reliability. *Id.* at 603-06; *Woodson*, 428 U.S. at 305. The Court has found that individualized sentencing proceedings provides a greater degree of reliability. *Lockett*, 438 U.S. at 603-05; *Woodson*, 428 U.S. at 305.

aggravating and mitigating factors.[63] The Court noted that state appellate courts are not *required* to, and probably should not, weigh aggravating and mitigating factors independently when the trial court has erred,[64] and it recognized the difficulties appellate courts face when making a sentencing determination in the first instance.[65] Nonetheless, the Court concluded that appellate reweighing is constitutionally permissible.[66]

ADVANTAGES AND DISADVANTAGES OF THE *CLEMONS* APPROACH

In *Clemons*, the Supreme Court opened the door to appellate court sentencing. The Court granted this power despite its recognition that appellate courts face difficulties in imposing sentences.[67]

Limitations on Appellate Courts' Abilities to Act as Sentencing Courts

The majority opinion in *Clemons* minimizes the difficulties appellate courts face in imposing sentences. Appellate courts must rely solely on a written record. This puts several unacceptable constraints on their ability to impose constitutionally reliable sentences.[68] First, the fact that appellate courts must rely on written records diminishes their ability to make reliable factual determinations. Second, this compulsory reliance on the written record prevents appellate courts from fully and effectively considering mitigating evidence. Finally, the costs of erroneous fact-finding are so high that an appellate court should not assume the task of capital sentencing.[69]

Past Supreme Court decisions have noted that appellate courts cannot make factual determinations with the same degree of reliability as can trial

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63. *Clemons*, 494 U.S. at 751-52. The Court did not determine whether the Mississippi Supreme Court weighed the remaining factors without considering the "especially heinous" factor at all, or weighed the mitigating factors against a constitutionally limited construction of the "especially heinous" factor, or applied an impermissible automatic affirmance rule.

64. *Id.* at 754.

65. *Id.* (citing Caldwell v. Mississippi, 472 U.S. 320, 330-31 (1985)). The Mississippi Supreme Court has itself recognized the difficulty of appellate fact finding. *Id.* at 766 (citing cases) ("[t]he trial judge ... is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire." Gavin v. State, 473 So. 2d 952, 955 (Miss. 1985)).

66. Justice Blackmun dissented from the majority opinion that the Mississippi Supreme Court could affirm Clemons' death sentence by reweighing the evidence. *Clemons*, 494 U.S. at 755. Justice Blackmun found that remand was warranted only because the court did not apply a constitutionally narrow construction of the "especially heinous" factor. *Id.* at 756-61. He noted that the majority did not need to address whether appellate courts could constitutionally impose capital sentences. To the extent it permitted such an appellate procedure, the majority's opinion was merely advisory. *Id.* at 762. Justice Blackmun rejected the notion that appellate courts should be given the role of sentencing authorities. *Id.*

67. *See supra* text accompanying note 48 & 65.

68. *See Clemons*, 494 U.S. at 765, 770 (Blackmun, J., dissenting).

69. *Id.* at 770.

courts.[70] Trial courts hear and see the witnesses in person,[71] and are in a better position to observe the demeanor and determine the credibility of the witnesses and their testimony.[72] In contrast, appellate courts must rely solely upon a written record that cannot reflect the demeanor of the witnesses.[73]

The traditional role of appellate courts is to determine whether evidence supports the findings of the trial court. They are not fact-finding bodies. This role prevents appellate courts from imposing death sentences with the requisite degree of reliability.[74] Weighing aggravating and mitigating factors is a function specifically granted to the trial courts in several death penalty statutes.[75] When an appellate court reweighs the remaining aggravating and mitigating factors and imposes a death sentence, as *Clemons* allows,[76] the appellate court assumes the role of a sentencing court. This is because the appellate court has not given the trial court an opportunity to impose a new sentence based upon proper aggravation and mitigation findings. This scheme conflicts with prior holdings delineating the proper conduct for an appellate court.[77]

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70. *See, e.g., Caldwell*, 472 U.S. at 330. The Court expressed concern that the appellate court engaging in capital sentencing could not adequately consider "'compassionate or mitigating factors stemming from the diverse frailties of humankind.'" *Id.* (quoting *Woodson*, 428 U.S. at 304). *See also* Wainwright v. Witt, 469 U.S. 412, 434 (1985) ("'Face to face with living witnesses the original trier of fact holds a position of advantage from which appellate judges are excluded.'" (quoting Boyd v. Boyd, 169 N.E. 632 (N.Y. 1930))).

71. *Witt*, 469 U.S. at 434.

72. Anderson v. Bessemer City, 470 U.S. 564 (1985); Smith v. Neely, 93 Ariz. 291, 380 P.2d 148 (1963); United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952); United States v. U.S. Gypsum Co., 33 U.S. 364 (1940); *Boyd*, 169 N.E. 632; Leeker v. Leeker, 23 Ariz. 170, 202 P. 397 (1921). *See generally* Annotation, *Advantage Which the Original Trier of Facts Enjoyed Over Reviewing Court from Opportunity of Seeing and Hearing Witnesses*, 111 A.L.R. 742 (1937).

73. *See Caldwell*, 472 U.S. at 330. The Court noted that appellate courts' sentencing abilities were limited by the fact that juries or trial judges are exposed to intangible aspects of defendants which affected their determinations. *Id.*

74. *Id.* For example, the Michigan Supreme Court has refused to conduct appellate sentencing and has held that trial courts are the proper body for imposing sentences. People v. Coles, 339 N.W.2d 440, 447 (Mich. 1983). The court reasoned that trial courts were better able to provide individualized sentencing because sentencing requires fact-specific information and credibility judgments about those facts. *Id.* at 447. Such tasks are not the function of appellate courts which only have "a skeletal picture from which to determine the propriety of a given sentence." *Id.*

75. *See, e.g.*, FLA. STAT. ANN. § 921.141 (West 1985); ARIZ. REV. STAT. ANN. § 13-703 (1989).

76. By "reweighing," the court conducts a balancing test, the outcome of which is determined by the weight given each factor. *See supra* note 11. The problem lies in the fact that the appellate court cannot adequately assess the weight of each factor because it must rely upon a written record. The trial judge who weighed the factors originally would be in the best position to conduct any reweighing.

77. In *Caldwell*, 472 U.S. at 330, the Court held that "an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance." The Court stated that when it recognized a defendant's right to have all mitigating evidence considered, it was "clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses." *Id.* at 331. *See generally* Michael L. Schultz, Note, *Eighth Amendment — References to Appellate Review in Capital Sentencing Determinations*, 76 J. CRIM. L. & CRIMINOLOGY 1051 (1985) (discussing *Caldwell v. Mississippi*).

The Court has always maintained that the severe nature of the death penalty requires heightened constitutional scrutiny of death sentences.[78] This requires a court to allow a capital defendant to present mitigating evidence at the sentencing proceeding.[79] This important right cannot be fully recognized by an appellate court only considering a written record. These mitigating factors are often intangible and, therefore, cannot be given full elaboration in the written record. In addition, when mitigating evidence is weighed against aggravating factors, the weight of the mitigating evidence may increase if the court invalidates an aggravating factor. An appellate court can only speculate as to the balance the trial court would have struck if it considered the proper aggravating factors.[80] Therefore, the better course is to remand to the trial court for resentencing.[81]

Because appellate courts must rely solely on written records, the chance for erroneous fact-finding by appellate courts is clearly increased.[82] An appellate court cannot properly act as a sentencing court when the chance for error is high and the cost to the defendant is great.[83]

Clemons' *Support For Appellate Court Reweighing*

Despite the limitations mentioned above and several Supreme Court cases espousing the necessity for procedural safeguards in capital cases,[84] *Clemons* allows appellate courts to reweigh aggravating and mitigating factors and to impose death sentences. Although the Court gave several reasons for approving appellate level sentencing, its rationale is flawed in several respects.

First, *Clemons* suggests that because appellate courts review sentences to determine whether the evidence supports the verdict in light of the aggravating and mitigating factors, they are equally capable of imposing sentences.[85]

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78. *See, e.g., Gregg*, 428 U.S. at 187 ("[w]hen a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed" (citations omitted)).

79. The Court has held unconstitutional statutes which limit the defendant's ability to present mitigating evidence. *See Penry*, 492 U.S. 302; *Eddings*, 455 U.S. 104; *Lockett*, 438 U.S. 586. In *Penry*, the Court held that failure to instruct the jury that it could consider and give effect to all the mitigating evidence offered by the defendant by refusing to impose the death penalty rendered the Texas death sentencing scheme unconstitutional as applied in that case. *Penry*, 492 U.S. at 323. Thus, the diminished ability of appellate courts to fully consider mitigating evidence infringes on defendants' constitutional rights.

80. *See infra* note 161 and accompanying text.

81. *See* A.B.A. STANDARDS FOR CRIMINAL JUSTICE § 20-3.3 commentary (1986). While the standards would empower the appellate courts to substitute for the sentence under review any sentence which could have been imposed by the original court, it also recognizes that remand is appropriate, and in fact best, in certain cases. Where the record is incomplete or where the error concerns the manner in which the sentence was imposed, or when the weight of the sentence is at issue, remand is said to be both "desirable" and the "most suitable" method of handling the appellate court's power. *Id.*

82. The Court has recognized this possibility. *See Cabana*, 474 U.S. at 388 n.5; *Caldwell*, 472 U.S. at 330.

83. *Clemons*, 494 U.S. at 770 (Blackmun, J., concurring in part and dissenting in part). *See also Lockett*, 438 U.S. at 605. "When the choice is between life and death, [the risk that the death penalty will be imposed despite the existence of factors calling for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.*

84. *See supra* note 2 and accompanying text.

85. *See Clemons*, 494 U.S. at 749.

This ignores the fundamental differences between a sentencing court and a reviewing court. A reviewing court gives great deference to the trial court's findings and presumes that the facts are correct.[86] In contrast, the sentencing court carefully examines each fact presented at the sentencing proceeding, weighs its credibility and makes its sentencing determination. Appellate courts cannot meet this degree of reliability because they must rely on the written record which cannot completely reflect the proceedings below.

The *Clemons* Court also reasons that because appellate courts review all the death cases in the state, they are better able to impose a reliable sentence than a jury which reviews only one death penalty case.[87] Although exposure to many death penalty cases may be an advantage when conducting proportionality reviews,[88] this does not enable appellate courts to make reliable factual determinations about a particular defendant from a written record. A jury is in a superior position because of its contact with the defendant and daily exposure to the facts of the case.[89]

Clemons also suggests that because appellate courts often conduct proportionality reviews,[90] they are capable of providing reliable and individualized sentences.[91] A proportionality review, however, differs greatly from weighing aggravating and mitigating factors. The Court itself has stated that in conducting proportionality reviews, appellate courts should grant substantial deference to the sentencing courts' determinations.[92] Moreover, there is no fact-finding involved in proportionality reviews.

Finally, *Clemons* suggests that written mitigation findings are not necessary for an appellate court to impose a reliable sentence.[93] The Court bases this proposition upon the fact that trial judges in some jurisdictions impose death sentences without the jury putting its mitigation findings in its written sentence recommendation. This rationale fails to recognize the inherent limitation facing appellate courts. The trial judge has first-hand knowledge of the facts, the demeanor of the defendant and the other intangible factors that

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86. *Id.* at 768. Appellate reviews are generally based upon a clearly erroneous standard. *Id.*

87. *See Clemons*, 494 U.S. at 749.

88. Proportionality reviews require a comparison to similar cases, thus, a broad base would increase the chance of finding a similar case to look to for guidance and comparison. However, a broad background is not a significant advantage when imposing a sentence which turns on the characteristics of a particular defendant. For a general discussion of proportionality review, see *supra* text accompanying notes 19-22.

89. Furthermore, this rationale does not apply to jurisdictions in which a trial judge imposes the sentence. In Arizona, for example, the trial judge is the sole sentencing authority in capital cases. ARIZ. REV. STAT. ANN. § 13-703(D) (1989). Also, under Florida law the jury does not determine the sentence. Its recommendation is merely advisory; the trial judge ultimately imposes the sentence. FLA. STAT. ANN. § 921.141(2) (West 1985). Presumably the *Clemons* Court did not address this issue because Mississippi law requires the jury to impose the sentence.

90. *See supra* note 56.

91. *See Clemons*, 494 U.S. at 748-50.

92. In Solem v. Helm, 463 U.S. 277, 290 (1983), the Court recognized that when reviewing the proportionality of sentences, appellate courts should "grant substantial deference" to the trial courts' sentencing authority. The role of the appellate court was not "to substitute its judgment for that of the sentencing court." *Id.* at 290 n.16.

93. *See supra* text accompanying notes 58 & 60.

influence the sentencing decision.[94] A written record cannot provide sufficiently complete information to allow a reliable sentencing determination by an appellate court.[95] Therefore, a sentence imposed by an appellate court that had no written mitigation findings would clearly be unreliable.

By discounting these limitations, *Clemons* apparently disregards the Court's previous mandates for heightened procedural protections in capital cases[96] and seeks to expedite the course of death penalty litigation.

EFFECT OF *CLEMONS* IN OTHER JURISDICTIONS

An examination of the effect *Clemons* had on appellate review in several states reveals the trend toward expanding appellate courts' powers. Several state courts have elected to exercise the broad power granted in *Clemons*.

Oklahoma appellate courts will conduct reweighing if an aggravating factor is invalidated, even in the presence of several mitigating factors.[97] Nebraska appellate courts also purport to reweigh "anew" the altered aggravating and mitigating findings on appeal "as permitted by *Clemons*."[98]

Some courts have adopted the harmless-error test permitted by *Clemons*.[99] Under such a test a death sentence may be affirmed notwithstanding the fact that the aggravation and mitigation findings were altered on appeal if the court determines that the defendant would have received a death sentence without the invalid factor having been considered. For example, the Alabama Supreme Court declined to conduct an independent reweighing of the evidence, however, it openly accepted *Clemons'* invitation to conduct harmless-error reviews of death sentences.[100]

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94. *See supra* notes 70-75 and accompanying text.

95. *See supra* note 70 and accompanying text.

96. *See infra* note 145 (citing cases).

97. *See* Sellers v. State, 809 P.2d 676, 691 (Okla. 1991). In a concurring opinion, Justice Lane noted that the Oklahoma court had three options: reweigh and affirm, reweigh and reduce to life, or remand for resentencing. *Id.* at 692. Justice Lane noted that the court would remand for resentencing when it could not determine beyond a reasonable doubt whether or not a death sentence was appropriate absent the invalid aggravating factors. *Id.*

98. *See* State v. Otey, 464 N.W.2d 352, 361 (Neb. 1991). The court disregarded the improper aggravating factor and conducted its own balancing process, ultimately finding the death sentence appropriate. *Id.*

99. *See, e.g.*, People v. Pitsonbarger, 568 N.E.2d 783, 791-92 (Ill. 1990) (after noting that *Clemons* permits state courts to either independently reweigh or apply harmless error standard, Illinois Supreme Court adopts harmless error standard); State v. Jells, 559 N.E.2d 464, 475 (Ohio 1990) (applying harmless error analysis).

100. In Lawhorn v. State, 581 So. 2d 1159, 1176 (Ala. Crim. App. 1990), the court held that:

> [I]n reviewing the propriety of a death sentence after a jury recommendation based, in part, on an invalid aggravating circumstance, [the court] cannot resort to ... a reweighing, by the appellate court, of the valid aggravating and the mitigating circumstances.
>
> However, we find no impediment to prevent us from reviewing the insufficient instruction [for an aggravating factor] for harmless error.

The Florida Supreme Court also applies a harmless error test, but it usually does so only when no mitigating factors exist.[101] In fact, the Florida court has held that, when mitigating circumstances are present, it will remand for resentencing, refusing to engage in reweighing or sentencing because it is an appellate court.[102] The Florida court has even refused to affirm a death sentence when the aggravating factors are substantially altered and no mitigating circumstances exist.[103]

PROPOSAL TO REMAND TO TRIAL COURTS FOR RESENTENCING

Florida's limited application of the harmless-error test attempts to reduce the degree of difficulty an appellate court faces when it acts as a sentencing court. However, compelling reasons support an even more cautious practice of remanding to the trial court for resentencing.

First, the appellate court can never know what the results of the weighing process would have been had the trial court considered the proper statutory factors.[104] Even harmless-error review requires the appellate court to substitute its judgment for that of the sentencing court. This reason is particularly compelling in jurisdictions that do not require the trier of fact to put its mitigation findings in writing.[105]

A second reason for remanding for resentencing is to prevent the appellate court from arbitrarily imposing a death sentence.[106] The limitations on

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101. *See Barclay*, 463 U.S. at 955 (citing cases). *See also* White v. Dugger, 565 So. 2d 700, 702 (Fla. 1990) (affirmed death sentence after invalidating two aggravating circumstances in the absence of any mitigating factors); Ferguson v. State, 417 So. 2d 631 (Fla. 1982) (harmless error where there were no mitigating factors and one or more aggravating factors invalidated on appeal); Dobbert v. State, 375 So. 2d 1069 (Fla. 1979) (same), *cert. denied*, 447 U.S. 912 (1980).

102. *Barclay*, 463 U.S. at 955 (citing cases). *See also* Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989), *cert. denied*, 493 U.S. 875 (1990) ("[i]t is not within this Court's province to reweigh or reevaluate the evidence..."); Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981) ("[t]his Court's role after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition'"); *Mikenas*, 367 So. 2d at 610 ("[i]t is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, ... and then impose the proper sentence").

Cf. Shere v. State, 579 So. 2d 86, 96 (Fla. 1991) (found harmless error after invalidating one of three aggravating factors even though a single mitigating factor remained (defendant's young age)) (citing *Clemons*).

103. *See* Preston v. State, 564 So. 2d 120 (Fla. 1990). The court found harmless error due to the fact that two of four aggravating factors had been invalidated. *Id.* at 122. Additionally, the court noted that the prosecutor emphasized the invalid factors in closing, that there was mitigating evidence at trial even though no statutory factors were found, and that the jury recommended death by a one-vote margin. *Id.* at 123.

104. *See* Blair v. Armontrout, 916 F.2d 1310, 1350 (8th Cir. 1990) ("We can never be sure that the [challenged] aggravating factors were the decisive ones; nor are we entitled to presume that they were"); *Zant*, 462 U.S. at 905 (Marshall, J., dissenting); *Mikenas*, 367 So. 2d at 610 (quoting Elledge v. State, 346 So. 2d 998 (Fla. 1977)).

105. In Arizona, for example, trial courts are not required to state their aggravating and mitigating findings in writing. *See* State v. Leslie, 147 Ariz. 38, 708 P.2d 719 (1985).

106. *See Mikenas*, 367 So. 2d at 610 (quoting *Elledge*, 346 So. 2d 998).

appellate level sentencing[107] significantly increase the likelihood of an arbitrary sentence. Indeed, Forida has determined that capital defendants are entitled to new sentencing determinations by the trial courts because the death penalty must be imposed under procedures that prevent arbitrary sentencing.[108]

By maintaining the limited role of reviewing sentences rather than imposing them, appellate courts will best protect capital defendants' rights to reliable and individualized sentences. The Arizona Supreme Court, like Florida, appears to limit its role to that of a reviewing court. There are several reasons that support a proposal for Arizona to maintain a limited role rather than to adopt the expansive role permitted by *Clemons*.

THE DEATH PENALTY IN ARIZONA: SUPPORT FOR PROPOSAL TO REMAND

An Overview of Arizona's Death Penalty Statute

The Arizona legislature enacted its current death penalty statute[109] in response to the United States Supreme Court's invalidation of arbitrary death penalty statutes in *Furman v. Georgia*.[110] Arizona's statute permits courts to sentence a person found guilty of first-degree murder[111] to life imprisonment or death.[112] The trial judge, not the jury, determines the aggravating and mitigating circumstances at a separate sentencing hearing.[113] The state has the burden of proving aggravating factors.[114] The defendant may rebut the state's evidence and present mitigating evidence.[115] If the state proves a single aggravating factor, the trial judge must impose a death sentence.[116] The

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107. *See supra* text accompanying notes 68-94.

108. *See Mikenas*, 367 So. 2d at 610.

109. ARIZ. REV. STAT. ANN. § 13-703 (1989) (formerly §§ 13-453 to -454). *See generally* Charles A. Pulaski, Jr., *Capital Sentencing in Arizona: A Critical Evaluation*, 1984 ARIZ. ST. L.J. 1.

110. 408 U.S. 238 (1972).

111. First-degree murder is defined in ARIZ. REV. STAT. ANN. § 13-1105 (1989) as an intentional killing committed with premeditation or in the course and furtherance of certain enumerated felonies.

112. ARIZ. REV. STAT. ANN. § 13-703(A). A "life sentence" means the defendant is not eligible for parole for twenty-five years, or thirty-five years if the victim was a child. *Id.*

113. *See id.* § 13-703(B).

114. In order to establish an aggravating factor, the state must prove its existence beyond a reasonable doubt. *See* State v. Poland, 132 Ariz. 269, 285, 645 P.2d 784, 800 (1982). Aggravating evidence must also conform to the rules of evidence. ARIZ. REV. STAT. ANN. § 13-703(C).

115. Any relevant mitigating evidence shall be admissible; the defendant is not limited to those factors enumerated in the statute. ARIZ. REV. STAT. ANN. § 13-703(C). *Accord Lockett*, 438 U.S. 586; State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924 (1979). *See generally* William F. Begley, *The Aggravating Circumstances of Arizona's Death Penalty Statute: A Review*, 26 ARIZ. L. REV. 661, 664-66 (1984) (discussing the burdens of proving mitigating and aggravating circumstances).

116. *See* ARIZ. REV. STAT. ANN. § 13-703(E). The aggravating factors are: prior conviction punishable under Arizona law by life or death sentence; prior conviction of a violent felony; defendant created a grave risk to person(s) other than victim; defendant paid another to commit murder; defendant committed the murder for pecuniary gain; murder was especially heinous, cruel or depraved; defendant committed murder while he was in custody; multiple

defendant then has the burden of showing that the mitigating circumstances outweigh the aggravating circumstances and that a death sentence is inappropriate.[117] The trial court then must weigh these circumstances in making its sentencing determination.

The Arizona Supreme Court's Automatic Review Procedure

The Arizona Supreme Court conducts an automatic review of each death penalty case.[118] The Arizona Supreme Court recognizes that the severity of the death penalty mandates close scrutiny on appeal.[119] The court conducts an independent review to determine whether the evidence supports the trial court's findings of aggravating and mitigating factors and whether the mitigating circumstances were sufficiently substantial to call for leniency.[120] The court has the power to invalidate an improper aggravating or mitigating factor. However, the Arizona Supreme Court has not adopted a clear policy of reweighing or remanding after invalidating an aggravating factor.

The court first announced its role in conducting independent appellate

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victims; defendant was an adult and the victim was under the age of 15; and the victim was on-duty peace officer. *Id.* § 13-703(F)(1)-(10) (1989).

117. *See* ARIZ. REV. STAT. ANN. § 13-703(E). The mitigating circumstances listed in ARIZ. REV. STAT. ANN. § 13-703(G) are not exhaustive. The defendant may include any evidence relating to his character, record or circumstances of the offense that shows a mitigated sentence is warranted. ARIZ. REV. STAT. ANN. § 13-703(G) lists as possible mitigating circumstances:

> 1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
>
> 2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
>
> 3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, ...
>
> 4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
>
> 5. The defendant's age.

118. *See* State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976). The court derives its authority from its statutory power to correct illegal and excessive sentences. *Id. See* ARIZ. REV. STAT. ANN. §13-4037 (1989). The statute states in relevant part:

> A. [I]f an illegal sentence has been imposed ... the supreme court shall correct the sentence ...
>
> B. [T]he court shall have the power to reduce the extent or duration of the punishment imposed, if, in its opinion, ... the punishment imposed is greater than under the circumstances of the case ought to be inflicted.

Id.

119. *See Richmond*, 114 Ariz. at 196, 560 P.2d at 51 (citing State v. Toney, 113 Ariz. 404, 555 P.2d 650 (1976); State v. Moody, 67 Ariz. 74, 190 P.2d 920 (1948)).

120. *See Richmond*, 114 Ariz. at 196, 560 P.2d at 51. Other functions of the independent review include a determination of whether the death sentence was arbitrarily imposed and whether the death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id. Accord Gregg*, 428 U.S. at 203.

reviews of death sentences in *State v. Richmond*.[121] In *Richmond*, the Arizona Supreme Court upheld the trial court's finding of an aggravating circumstance.[122] The court also found that the trial court correctly determined that no mitigating circumstances existed.[123] The supreme court did not find any additional mitigating evidence after conducting its independent review.[124] The court held that the imposition of the death sentence was mandatory because one aggravating and no mitigating circumstances existed. It is unclear whether the court meant to review the findings of the trial court for error, or to hold a second "sentencing hearing" to determine if it would have imposed the same sentence. The scope of this appellate review remains unclear today.

Inconsistencies in Arizona's Independent Review Indicate A Need for A Uniform Rule

The Arizona Supreme Court attempted to facilitate meaningful appellate review by creating a largely undefined power to modify death sentences at the appellate level.[125] Subsequent case law demonstrates inconsistencies in the court's independent review.[126] These inconsistencies indicate a need for the Arizona Supreme Court to expressly reject *Clemons* and adopt the proposed practice of remanding the case to sentencing courts if an aggravating or mitigating factor is invalidated on appeal.

In several cases the court has indicated that its role is not that of a sentencing court.[127] In fact, in these cases the court apparently rejects the

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121. 114 Ariz. 186, 560 P.2d 41

122. *Id.* at 196, 560 P.2d at 51.

123. *Id.* at 198, 560 P.2d at 53.

124. *Id.*

125. *See Richmond*, 114 Ariz. 186, 560 P.2d 41.

126. *See, e.g.*, State v. Adamson, 136 Ariz. 250, 665 P.2d 972, *cert. denied*, 464 U.S. 865 (1983) (court will determine whether trial court correctly applied aggravating and mitigating circumstances); State v. Rumsey, 136 Ariz. 166, 665 P.2d 48 (1983) (independent review conducted "as an appellate court, not as a trial court"), *aff'd*, 467 U.S. 203 (1984); State v. Jeffers, 135 Ariz. 404, 661 P.2d 1105, *cert. denied*, 464 U.S. 865 (1983) (the court will determine for itself whether aggravating circumstances outweigh mitigating circumstances); State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (reversal of death sentence permitted only where death sentence "erroneously imposed"), *cert. denied*, 461 U.S. 971 (1983).

State law has not clearly established the authority of the Arizona Supreme Court to cure sentencing errors by remand or by independent review. *See* Walton v. Arizona, 110 S. Ct. 3047, 3083 (1990) (Blackmun, J., dissenting) (citing cases). Thus, the impact of *Clemons* remains uncertain.

127. *See, e.g.*, State v. Fierro, 166 Ariz. 539, 555, 804 P.2d 72, 88 (1990) (when court invalidates one of several aggravating factors, the "usual practice" is to remand for resentencing); State v. Hinchey, 165 Ariz. 432, 440, 799 P.2d 352, 360 (1990) (remanded for resentencing after vacating one of two aggravating factors because the court "[could not] determine from the record whether the court would have found the mitigating circumstances sufficient to overcome the single remaining aggravating circumstance...."); State v. Lopez, 163 Ariz. 108, 116, 786 P.2d 959, 967 (1990) ("Because one of the two statutory aggravating circumstances found by the trial court must be set aside, we remand for resentencing ... because we do not know and cannot ascertain what result would have obtained but for that finding."); State v. Wallace, 151 Ariz. 362, 369, 728 P.2d 232, 239 (1986) ("As we have set aside the finding of pecuniary gain, we must now allow the trial court another opportunity to exercise its sentencing discretion and reweigh...."), *cert. denied*, 110 S. Ct. 1513 (1990); State v. Gillies, 135 Ariz. 500, 516, 662 P.2d 1007, 1023 (1983) (supplemental opinion) ("Law and policy would indicate that the trial

role permitted by *Clemons*. For example, in *State v. Fierro*, the court announced that its usual practice is to remand for resentencing.[128]

The court has held that its power to conduct an independent review does not include a power to act as the trial court.[129] The role of the state supreme court is to ensure that death sentences are not imposed arbitrarily or disproportionately.[130] In addition, the Ninth Circuit has interpreted Arizona cases as establishing a practice in which the Arizona Supreme Court will remand for resentencing when one aggravating factor is invalidated yet other aggravating and mitigating factors remain.[131] Thus, the Arizona Supreme Court has an *appellate* role in reviewing death sentences, and the trial judge retains sentencing authority in capital cases.[132]

The Arizona Supreme Court can take one of several tacks when it reviews aggravating and mitigating factors. In certain cases the court must act in a prescribed manner. It must affirm a death sentence when it upholds the trial court's findings of aggravating and mitigating factors,[133] or when it agrees that no mitigating factors exist.[134] Moreover, when the court finds that the evidence does not support any of the aggravating factors found, then it must reduce the sentence to life regardless of mitigating evidence.[135] The inconsistencies lie in the cases that fall between those two extremes.

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judge should again make the determination...." Three of four aggravating factors had been struck on appeal), *cert. denied*, 470 U.S. 1059 (1985). *See also Walton*, 110 S. Ct. at 3084 (Blackmun, J., dissenting) ("Under Arizona law, the trial court is the sentencer, and the appellate court's review is intended to ensure that trial-level functions were properly carried out.").

128. 166 Ariz. at 555, 804 P.2d at 88.

129. *See Rumsey*, 136 Ariz. at 173, 665 P.2d at 54.

130. *Id.* at 174, 665 P.2d at 56.

131. *See* Adamson v. Ricketts, 865 F.2d 1011, 1037 n.42 (9th Cir. 1988) (citing *Gillies*, 135 Ariz. at 516, 662 P.2d at 1023), *cert. denied sub nom.* Lewis v. Adamson, 110 S. Ct. 3287 (1990).

132. *See* Arizona v. Rumsey, 467 U.S. 203, 210 (1984).

133. *See, e.g.*, State v. Serna, 163 Ariz. 260, 787 P.2d 1056 (1990); State v. McCall, 160 Ariz. 119, 770 P.2d 1165, *cert. denied*, 467 U.S. 1220 (1984); State v. Wallace, 160 Ariz. 424, 773 P.2d 983 (1989); State v. Walton, 159 Ariz. 571, 769 P.2d 1017 (1989); State v. Vickers, 159 Ariz. 532, 768 P.2d 1177 (1989), *cert. denied*, 494 U.S. 1058 (1990); *Fulminante*, 161 Ariz. 237, 778 P.2d 602, *cert. denied*, 110 S. Ct. 1528 (1990); State v. Beaty, 158 Ariz. 232, 762 P.2d 519 (1988), *cert. denied*, 491 U.S. 910 (1989); State v. Arnett, 158 Ariz. 15, 760 P.2d 1064 (1988); State v. Castaneda, 150 Ariz. 382, 724 P.2d 1 (1986); State v. Martinez-Villareal, 145 Ariz. 441, 702 P.2d 670, *cert. denied*, 474 U.S. 975 (1985); State v. Nash, 143 Ariz. 392, 694 P.2d 222, *cert. denied*, 471 U.S. 1143 (1985); State v. Hensley, 142 Ariz. 598, 691 P.2d 689 (1984); State v. Clabourne, 142 Ariz. 335, 690 P.2d 54 (1984); State v. Villafuerte, 142 Ariz. 323, 690 P.2d 42 (1984), *cert. denied*, 469 U.S. 1230 (1985); State v. Harding, 141 Ariz. 492, 687 P.2d 1247 (1984); State v. Fisher, 141 Ariz. 227, 686 P.2d 750, *cert. denied*, 469 U.S. 1066 (1984); *Gretzler*, 135 Ariz. 42, 659 P.2d 1; *Richmond*, 114 Ariz. 186, 560 P.2d 41.

134. *See, e.g.*, State v. Harding, 137 Ariz. 278, 670 P.2d 383 (1983), *cert. denied*, 465 U.S. 1013 (1984); State v. Smith (Joseph), 131 Ariz. 29, 638 P.2d 696 (1981).

135. *See* ARIZ. REV. STAT. ANN. § 13-703(E). *See also, e.g.*, State v. Johnson, 147 Ariz. 395, 710 P.2d 1050 (1985) (court struck the only two aggravating circumstances found by sentencing court and resentenced defendant to life).

When the supreme court finds additional mitigating circumstances that the trial court overlooked, it has imposed a life sentence.[136] It is also possible for the court to remand such a case to the sentencing court.[137] The inconsistencies also arise in cases, like *Clemons*, in which the court invalidates one of the aggravating factors considered by the sentencing court. In these cases, the court either reimposes the death sentence,[138] reduces the sentence to life,[139] or remands to the sentencing court for resentencing.[140] The court has not adopted a uniform policy of remanding or resentencing when it disagrees with the trial court's aggravation and mitigation findings. This raises reliability concerns and underscores the need for an express policy of remanding for resentencing.

After *Clemons*, the Arizona Supreme Court may constitutionally impose a death sentence after independently reweighing the aggravating and mitigating factors. In its most recent death penalty decisions, however, the court maintains that its role is limited to that of a reviewing court, and that only trial courts shall weigh the aggravating and mitigating factors and impose sentences.[141] The court declined to impose a death sentence because it was

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136. *See, e.g.*, State v. Marlow, 163 Ariz. 65, 786 P.2d 395 (1989) (court invalidated one of three aggravating factors and found one additional mitigating factor); State v. Rockwell, 161 Ariz. 5, 775 P.2d 1069 (1989) (court rejected two of three aggravating factors and found additional mitigating evidence); State v. Stevens, 158 Ariz. 595, 764 P.2d 724 (1988) (court attached more weight to mitigating evidence than sentencing court); State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983) (court found that the evidence supported one substantial mitigating factor); State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983) (struck one of two aggravating factors and found additional mitigating circumstances); State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982) (determined mitigating factor of age 16 outweighed two aggravating factors); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) (struck one of two aggravating circumstances and found substantial mitigating evidence); State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977) (on appeal found additional mitigating factor).

137. No cases were found in which the supreme court found additional mitigating circumstances and remanded for resentencing rather than reduce the sentence itself.

138. *See, e.g.*, State v. Smith (Bernard), 146 Ariz. 491, 707 P.2d 289 (1985) (struck two out of five aggravating factors on appeal); State v. Poland (Patrick), 144 Ariz. 388, 698 P.2d 183 (1985), *aff'd*, 476 U.S. 147 (1986) (invalidated one out of three aggravating factors on appeal); State v. Poland (Michael), 144 Ariz. 412, 698 P.2d 207 (1985), *aff'd*, 476 U.S. 147 (1986) (struck one out of two aggravating factors on appeal); *Gillies*, 135 Ariz. 500, 662 P.2d 1007 (struck three of four aggravating factors on appeal); State v. Blazak, 131 Ariz. 598, 643 P.2d 694, *cert. denied*, 459 U.S. 882 (1982) (struck one of two aggravating factors on appeal); State v. Ceja, 115 Ariz. 413, 565 P.2d 1274, *cert. denied*, 434 U.S. 975 (1977) (struck two of three aggravating factors on appeal). *See also Walton*, 110 S. Ct. 3047 (found that Arizona Supreme Court's independent review could effectively correct an unconstitutionally broad construction of "heinous, cruel or depraved" factor by the trial judge). This is the approach approved of in *Clemons*.

139. *See, e.g.*, *Marlow*, 163 Ariz. 65, 786 P.2d 395; *Rockwell*, 161 Ariz. 5, 775 P.2d 1069; *Graham*, 135 Ariz. 209, 660 P.2d 460; *Brookover*, 124 Ariz. 38, 601 P.2d 1322.

140. *See, e.g.*, *Fierro*, 166 Ariz. at 555, 804 P.2d at 88 (struck one of three aggravating factors; sentence vacated on other grounds); *Hinchey*, 165 Ariz. at 440, 799 P.2d at 360 (struck one out of two aggravating factors on appeal); *Lopez*, 163 Ariz. 108, 786 P.2d 959 (struck one of two aggravating factors on appeal); *Wallace*, 151 Ariz. 362, 728 P.2d 232 (struck one of two aggravating factors on appeal); *Gillies*, 135 Ariz. at 516, 662 P.2d at 1023 (struck three out of four aggravating factors on appeal).

141. *See Fierro*, 166 Ariz. 539, 804 P.2d 72; *Hinchey*, 165 Ariz. at 440, 799 P.2d at 360 ("[W]e believe it is appropriate to allow the trial court another opportunity to exercise its

unsure what weight the trial court attached to the mitigating evidence.[142] The court, however, has not consistently followed its own language.[143] This indicates that the court may ultimately adopt the *Clemons* approach rather than continue the practice of remanding for resentencing.[144]

Reasons Supporting Proposal For Remand

The severity and irreversibility of the death penalty mandates increased procedural safeguards.[145] Among the most important safeguards are appellate review and the guarantee of an individualized and reliably imposed death sentence. Although the Supreme Court has determined that appellate level sentencing meets constitutional requirements, a more prudent approach is to limit the sentencing power to trial courts. The Arizona Supreme Court has implicitly recognized this in recent cases.[146]

An appellate court's proper role in reviewing a death sentence is to examine the record for errors. When an aggravating factor is invalidated, the appellate court should either reduce the sentence to life if no aggravating factors remain, or remand to the trial court for resentencing based on proper aggravating factors. An appellate court should also be permitted to reduce the death sentence to life if it finds substantial additional mitigating evidence.[147] Arizona should formally adopt such a limited role for several reasons.

First, this approach will yield the most reliable sentencing results. The proper imposition of a death sentence is based upon many factual determinations, and appellate courts are not as effective as factfinders as are trial courts.[148] Even in civil cases, the Arizona Supreme Court refuses to disturb trial court factual findings absent abuse of discretion or clearly erroneous determinations. The trial court is best situated to make these factual determi-

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sentencing discretion."); *Lopez*, 163 Ariz. at 116, 786 P.2d at 967 ("[W]e do not know and cannot ascertain what result would have obtained....").

142. *See Fierro*, 166 Ariz. at 555, 804 P.2d at 88; *Hinchey*, 165 Ariz. at 440, 799 P.2d at 360.

143. *See supra* note 138. *See also* State v. Robison, 165 Ariz. 51, 60, 796 P.2d 853, 862 (1990).

144. *Cf. Fierro*, 166 Ariz. at 555, 804 P.2d at 88; *Hinchey*, 165 Ariz. 432, 799 P.2d 352; *Lopez*, 163 Ariz. 108, 786 P.2d 959.

145. *See* Gardner v. Florida, 430 U.S. 349, 357 (1977) (Stevens, J., plurality opinion) ("[D]eath is a different kind of punishment from any other which may be imposed in this country."); *Lockett*, 438 U.S. at 605 ("[T]he imposition of death by public authority is so profoundly different from all other penalties...."); *Woodson*, 428 U.S. at 305 ("[T]he 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."); *Gregg*, 428 U.S. at 187 (Stewart, J., plurality opinion) ("[D]eath as a punishment is unique in its severity and irrevocability."); *Furman*, 408 U.S. at 306 (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind."). *Accord Richmond*, 114 Ariz. at 196, 560 P.2d at 51.

146. *See supra* note 127.

147. Appellate courts can reduce a sentence to life without the difficulties that arise when an appellate court imposes a death sentence. *See supra* note 118. Imposing a life sentence qualitatively differs from reimposing a death sentence. *See supra* note 145. Also, the constitutionality of a death sentence, unlike a life sentence, is dependent upon a heightened degree of reliability. *See Gregg*, 428 U.S. 153; *Proffitt*, 428 U.S. 242; *Jurek*, 428 U.S. 262.

148. *See supra* text accompanying notes 70-73.

nations.[149] An appellate court can only base its decision on a "cold record."[150] If appellate courts' limited factfinding abilities are not tolerated in civil matters, they cannot be tolerated in capital cases.[151]

The significance placed on mitigating evidence in capital cases supports limiting the role of appellate courts.[152] Trial courts are better able to fully consider mitigating evidence. This is particularly true in Arizona because sentencing judges are not required to record the aggravating and mitigating factors in writing.[153] When the mitigating evidence considered by the trial judge is unclear, the appellate court must remand the case for resentencing.[154] Otherwise, the appellate court is merely speculating about the countervailing mitigating factors. The Arizona Supreme Court has refused to speculate about the balance the trial court might have struck if it had considered the proper factors.[155]

Arizona's statute requires mitigating evidence to be "sufficiently substantial to call for leniency."[156] Therefore, a defendant can present mitigating evidence that fails to outweigh the aggravating factors found by the trial court. However, the same mitigating evidence may be sufficient to require leniency if aggravating factors are invalidated on appeal. This is a balancing process and the appellate court cannot adequately assess the trial judge's consideration of mitigating evidence without a detailed statement of his findings[157] unless it holds its own evidentiary hearing.[158]

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149. *See supra* text accompanying notes 71-72.

150. *See* Nesmith v. Nesmith, 112 Ariz. 248, 252, 540 P.2d 1229, 1233 (1975) (quoting Leeker v. Leeker, 23 Ariz. 170, 183, 202 P.2d 397, 40 (1921)):

> The lower court had every advantage of personal contact and observation of all the parties and was certainly in a better position to determine what the facts showed than are we. That we, from a reading of the cold record, might have come to a different conclusion, we do not feel, would justify us in substituting our judgment for that of the person the law has designated to try and determine the facts.

151. *See Clemons*, 494 U.S. at 769 (Blackmun, J., concurring in part and dissenting in part).

152. *Id.* at 771 (Blackmun, J., concurring in part and dissenting in part). "[D]efendant's right to present mitigating evidence cannot be fully realized if that evidence can be submitted only through the medium of a paper record." *Id.*

153. *See* State v. Leslie, 147 Ariz. 38, 708 P.2d 719 (1985); State v. Vickers, 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981).

154. *See Leslie*, 147 Ariz. 38, 708 P.2d 719.

155. *See Lopez*, 163 Ariz. at 116, 786 P.2d at 967. *See also supra* note 127. The Ninth Circuit has recognized that a change in aggravating and mitigating findings upsets the balance struck by the lower court. In Creech v. Arave, 928 F.2d 1481, 1492-93 (9th Cir. 1991), the court invalidated three aggravating factors but left at least one valid aggravating factor during a habeas corpus proceeding. The court noted that the Idaho death penalty statute required a balancing of the aggravating and mitigating factors. *Id.* It stated that "[g]iven our findings, the weight of both types of factors is apt to change. Thus, we cannot rely on the trial court's conclusion that Creech deserved the death penalty." *Id.* at 1493.

156. ARIZ. REV. STAT. ANN. § 13-703(E) (1989).

157. *See supra* text accompanying notes 78-81.

158. Arizona statutes only provide appellate courts with authority to reduce excessive sentences. *See* ARIZ. REV. STAT. ANN. § 13-4037(B) (1989). There is no express authority for a substitution of sentences. *See supra* note 118 and accompanying text. When an appellate court finds additional mitigating evidence and determines that a death sentence is too harsh, it can

The function of the Arizona Supreme Court's independent review is to prevent arbitrary and capricious death sentences.[159] The court reserves the imposition of death sentences for the trial courts.[160] Thus, the better procedure when the court invalidates an aggravating factor is to remand to the trial court for resentencing.

CONCLUSION

Constitutionally sound death penalty statutes must provide appellate review of death sentences to protect against arbitrary and capricious death sentencing. The Eighth and Fourteenth Amendments also mandate that every death sentence be individually and reliably imposed. However, when an appellate court invalidates one of the statutory aggravating factors and imposes a death sentence on appeal, the court is acting as a sentencing court. In *Clemons*, the Supreme Court held that these constitutional requirements are not violated by appellate level sentencing.[161] There are, however, serious flaws in the Court's rationale in *Clemons*. Appellate courts are limited as fact-finders because they must rely on the written record. This limitation prevents appellate courts from fully considering mitigating evidence and thereby infringes on capital defendants' constitutional rights.

Appellate sentencing is particularly troublesome in jurisdictions that require the jury to balance aggravating and mitigating factors in determining whether to impose a death sentence. The proper role of appellate courts reviewing death sentences consists of affirming proper sentences, or remanding for resentencing when aggravating factors are invalidated or additional mitigating circumstances are found on appeal, or reducing excessive death penalty cases to life sentences. This limited role best protects capital defendants' constitutional right to reliable sentencing. Arizona appears to reject the expansive role permitted by *Clemons*. However, the court's inconsistent disposition of capital cases on appeal in the past underscores the need for the Arizona Supreme Court to formally adopt a limited role of appellate review.

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statutorily reduce the sentence to life. The statutes do not appear to provide appellate courts with authority to resentence the defendant to death.

159. *See Richmond*, 114 Ariz. at 196, 560 P.2d at 51.

160. *See, e.g., Hinchey*, 165 Ariz. at 440, 799 P.2d at 360.

161. *See Clemons*, 494 U.S. at 741.