# Reconstruction of Arizona's Death Penalty Statute under *Watson*

Rebecca McLean

In *State v. Watson*,[1] the Arizona Supreme Court found a portion of Arizona's death penalty statute unconstitutional because the statute limited the trial court's consideration of mitigating circumstances in determining whether to impose the death penalty.[2] This finding was made in light of the United States Supreme Court's decision in *Lockett v. Ohio*.[3] The *Lockett* Court held that a death penalty statute that limits the number of mitigating circumstances to be considered by the sentencer is unconstitutional because it does not allow for an objective consideration of the particularized circumstances of the individual offense and offender.[4]

The *Watson* court further held that the unconstitutional portion of the Arizona statute could be severed[5] and that the law regarding mitigating circumstances could revert to prior law.[6] In addition, contrary to the decisions rendered by every other state court dealing with invalid

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1. 120 Ariz. 441, 586 P.2d 1253 (1978), *cert. denied*, 440 U.S. 924 (1979).

2. *Id.* at 444-45, 586 P.2d at 1256-57. The portion of the statute held unconstitutional can be found in 1973 Ariz. Sess. Laws ch. 138, § 5, at 970 (current version at ARIZ. REV. STAT. ANN. § 13-703(G) (Supp. 1980-81)), which provided:

> Mitigating circumstances shall be the following:
> 1. [The defendant's] capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of 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 a principal . . . in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
> 4. [The defendant] could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

In 1979, Arizona enacted a new death penalty statute providing that mitigating factors shall include any factors offered by either the state or the defendant "which are relevant in determining whether to impose a sentence less than death." ARIZ. REV. STAT. ANN. § 13-703(G) (Supp. 1980-81).

3. 438 U.S. 586 (1978).

4. *Id.* at 608-09.

5. 120 Ariz. at 445, 586 P.2d at 1257.

6. *Id.* Aside from the other problems raised by the court's action, the prior death penalty

death penalty statutes,[7] the *Watson* court declared that the judicially reconstructed statute could be imposed retroactively on defendants sentenced under the unconstitutional statute.[8] Under this new resentencing scheme, defendants on death row are being resentenced to death.[9]

This Note will first trace the development of the death penalty in Arizona followed by a discussion of the *Watson* opinion. Next, the judicial reconstruction undertaken by the *Watson* court regarding the severability of the statute will be analyzed. Finally, other issues presented in the supplemental opinion to *Watson* will be examined.

## BACKGROUND ON ARIZONA'S DEATH PENALTY

Arizona's initial death penalty statutes provided for a sentence of either death or life imprisonment to be imposed in the discretion of the sentencer.[10] The death penalty law remained virtually unchanged until the United States Supreme Court's decision in *Furman v. Georgia*.[11] In that case, the Court issued a short per curiam opinion, followed by nine separate opinions,[12] invalidating all death penalty statutes that left sentencing to the unguided discretion of the sentencer.[13] Since Arizona's statute provided only minimal standards to guide the sentencer in imposing the death penalty, the statute was clearly unconstitutional under *Furman*.[14]

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statute had earlier been declared unconstitutional. State v. Endreson, 109 Ariz. 117, 123, 506 P.2d 248, 254 (1973).

7. *E.g.*, People v. District Court, 196 Colo. 401, 408, 586 P.2d 31, 36 (1978); State v. Spence, 367 A.2d 983, 988-89 (Del. 1976); People *ex rel.* Rice v. Cunningham, 61 Ill. 2d 353, 362-63, 336 N.E.2d 1, 7 (1975); Blackwell v. State, 278 Md. 466, 474-75, 365 A.2d 545, 550 (1976), *cert. denied*, 431 U.S. 918 (1977); Miller v. State, 584 S.W.2d 758, 762 (Tenn. 1979).

8. 120 Ariz. at 445, 586 P.2d at 1257.

9. *See id.* at 451-52, 586 P.2d at 1263-64.

10. ARIZ. TERRITORIAL REV. STAT., PENAL CODE, tit. VIII, § 174 (1901). For a brief period between 1916 and 1918, Arizona abolished the death penalty. 1917 Ariz. Sess. Laws, Initiative and Referendum Measures, § 1, at 4-5 (amending ARIZ. REV. STAT., PENAL CODE, part I, tit. VIII, ch. 1, § 173 (1913)). The death penalty was later reenacted, and provided: "Every person guilty of murder in the first degree shall suffer death or imprisonment in the State prison for life, at the discretion of the jury trying the same, or, upon the plea of guilty, the Court shall determine the same. . . ." 1919 Ariz. Sess. Laws, Initiative and Referendum Measures, § 1, at 18.

11. 408 U.S. 238 (1972) (per curiam).

12. Two justices concluded that the death penalty was per se violative of the eighth and fourteenth amendments. *Id.* at 305 (Brennan, J., concurring); *id.* at 369-71 (Marshall, J., concurring). Three justices voted to reverse the judgment on other grounds. Justice Douglas concluded that discretionary sentencing unguided by statute violated the eighth amendment because it was "pregnant with discrimination." *Id.* at 257 (Douglas, J., concurring). Justice White voted to reverse the judgments because discretionary sentencing results in imposition of the death penalty with great infrequency and with no meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. *Id.* at 313 (White, J., concurring). Justice Stewart voted for reversal because he thought discretionary sentencing allowed the death penalty to be "wantonly" and "freakishly" imposed. *Id.* at 310 (Stewart, J., concurring). The Chief Justice and Justices Blackmun, Powell, and Rehnquist filed dissenting opinions.

13. *Id.* at 239-40.

14. *See* State v. Endreson, 109 Ariz. 117, 123, 506 P.2d 248, 254 (1973) (citing Stewart v. Massachussetts, 408 U.S. 845 (1972)).

In response to the Supreme Court's invalidation in *Furman* of statutes such as Arizona's death penalty statute,[15] the Arizona Legislature enacted a new death penalty statute.[16] This statute required the imposition of the death penalty when the sentencer found the existence of one or more enumerated aggravating circumstances[17] and the absence of any enumerated mitigating factors sufficient to call for leniency.[18] In addition, in attempting to limit the discretion of the sentencer to comply with *Furman*, the Arizona Supreme Court consistently interpreted the list of mitigating factors to be exclusive.[19]

In *Richmond v. Cardwell*,[20] however, the statute's restriction on the number of mitigating circumstances that could be considered by the sentencer was found unconstitutional by the United States District Court for Arizona.[21] The court, listing a number of relevant factors

15. In response to several of the opinions rendered in *Furman*, many states enacted either mandatory death penalty statutes which eliminated the discretion of the sentencer altogether, or statutes such as the Arizona statute which attempted to guide the sentencer by listing specific aggravating and mitigating circumstances. Mandatory death penalty statutes were later declared unconstitutional in Woodson v. North Carolina, 428 U.S. 280 (1976), where the Court held that a mandatory death sentence is as irrational and arbitrary as a totally discretionary death sentence. *Id.* at 303. The sentencer must be allowed to consider not only the relevant aspects of the offense itself but must also be allowed to consider relevant aspects of the offender, including character and prior record. *Id.*

16. 1973 Ariz. Sess. Laws ch. 138, § 5, at 968-70 (current version at ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1980-81)).

17. 1973 Ariz. Sess. Laws ch. 138, § 5, at 969 (current version at ARIZ. REV. STAT. ANN. § 13-703(F) (Supp. 1980-81)) provided:

> Aggravating circumstances to be considered shall be the following:
> 1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
> 2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.
> 3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.
> 4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
> 5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
> 6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.
> 7. The defendant committed the offense while in the custody of the department of corrections, a law enforcement agency or county or city jail.

18. 1973 Ariz. Sess. Laws ch. 138, § 5, at 970 (current version at ARIZ. REV. STAT. ANN. § 13-703(G) (Supp. 1980-81)). See note 2 *supra*.

19. State v. Bishop, 118 Ariz. 263, 269, 576 P.2d 122, 128, *vacated*, 439 U.S. 810 (1978). The Arizona Supreme Court stated: "According to our law, the trial judge is bound, as are we, to consider only those aggravating and mitigating factors listed in the statute." *Id.* *See* State v. Knapp, 114 Ariz. 531, 532-33, 562 P.2d 704, 715-16 (1977), *cert. denied*, 435 U.S. 908 (1978); State v. Blazak, 114 Ariz. 199, 205-06, 560 P.2d 54, 60-61 (1977); State v. Richmond, 114 Ariz. 186, 195-96, 560 P.2d 41, 50-51 (1976), *cert. denied*, 433 U.S. 915 (1977); State v. Holsinger, 115 Ariz. 89, 98, 563 P.2d 888, 897 (1977).

20. 450 F. Supp. 519 (D. Ariz. 1978).

21. *Id.* at 526. The district court, after noting the post-*Furman* Supreme Court decision in Gregg v. Georgia, 428 U.S. 153 (1976), requiring the sentencer to consider the character of the defendant as well as the circumstances of the offense, held that the Arizona provision "is on its face in violation of the Eighth and Fourteenth Amendments for failing to allow for a consideration of relevant mitigating factors of an individual's character by the sentencing court when a determination is to be made whether or not the death penalty should be imposed." *Id.* at 526.

absent from the Arizona statute,[22] held that it was violative of the eighth and fourteenth amendments for its failure to allow consideration of any other relevant mitigating circumstances favoring a less onerous punishment.[23]

Further suspicion was cast on the constitutionality of the Arizona death penalty statute when the United States Supreme Court decided *Lockett v. Ohio*,[24] which struck down the Ohio death penalty statute's limitation on mitigating circumstances.[25] Since Arizona's statute limited the number of mitigating circumstances which could be considered in the same way as did the Ohio statute,[26] it became apparent that Arizona's death penalty statute was also unconstitutional.[27]

The Arizona Supreme Court officially declared Arizona's death penalty statute unconstitutional in *State v. Watson*.[28] The *Watson* court upheld the death penalty itself,[29] severed that portion of the statute limiting the mitigating circumstances which could be considered,[30] and reconstructed the statute to allow consideration of any mitigating circumstances in the sentencing procedure.[31]

## THE *WATSON* OPINION

Watson was tried and convicted of a murder committed in 1974.[32] The trial court conducted a sentencing hearing pursuant to the Arizona

22. *Id.* at 522. The court, "to name a few," listed the following factors absent from the Arizona statute: 1) the defendant's age at the time the crime was committed; 2) the defendant's prior record; 3) the amount and nature of the defendant's cooperation with the authorities; and 4) whether the defendant's "capacity at the time of the crime was affected by mental defect or intoxication." *Id.*

23. *Id.* at 521. Although the *Richmond* court declared Arizona's death penalty statute unconstitutional, this decision by the United States District Court does not control or have binding effect in Arizona state courts. State v. Gates, 118 Ariz. 357, 359, 576 P.2d 1357, 1359 (1978). The Arizona court in that case stated that federal district court decisions regarding federal constitutional issues are entitled to respectful consideration but are not binding on the Arizona Supreme Court. *Id.*

24. 438 U.S. 586 (1978).

25. *Id.* at 608. OHIO REV. CODE ANN. § 2929.04(B) (Page 1975) provided that the trial judge should consider whether any of these three mitigating factors exist:

1. The victim of the offense induced or facilitated it.
2. It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
3. The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

26. 1973 Ariz. Sess. Laws, ch. 138, § 5, at 970 (current version at ARIZ. REV. STAT. ANN. § 13-703(G) (Supp. 1980-81)). See note 2 *supra*.

27. *See* Lockett v. Ohio, 438 U.S. at 608, where the Court stated: "The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."

28. 120 Ariz. 441, 445, 586 P.2d 1253, 1257 (1978).

29. *See id.*

30. *Id.*

31. *Id.*

32. State v. Watson, 114 Ariz. 1, 3, 559 P.2d 121, 123 (1976).

death penalty provision, and found the existence of three of the statutorily enumerated aggravating circumstances.[33] The trial court then considered the mitigating factors, and finding none of the four statutory mitigating factors sufficient to call for leniency,[34] sentenced Watson to death.[35]

On appeal, Watson contended that the imposition of the death penalty was unconstitutional because the trial court failed to consider relevant mitigating factors not specifically listed in the statute.[36] The Arizona Supreme Court recognized that the death penalty statute's limitation on the number of mitigating circumstances did not meet constitutional standards under *Lockett v. Ohio*[37] and held it unconstitutional.[38] The *Watson* court adopted the *Lockett* rationale that a death penalty statute that limits the introduction of mitigating circumstances creates the risk that the death penalty will be imposed despite the existence of other factors favoring a less severe penalty.[39] This risk is incompatible with the eighth and fourteenth amendments where the punishment includes a possible sentence of death.[40]

After holding the statute unconstitutional insofar as it limited the number of mitigating circumstances, the *Watson* court considered whether the offending limitation could be severed, leaving the constitutional portion of the statute in force.[41] When a statute contains an express severability clause, the court generally will give effect to such a clause whenever possible.[42] Since Arizona's death penalty statute contained no severability clause,[43] the court looked to legislative intent to determine whether the objectionable portion of the statute was severa-

33. State v. Watson, 120 Ariz. at 446, 586 P.2d at 1258.

34. *See id.* at 444, 586 P.2d at 1256.

35. 114 Ariz. at 3, 559 P.2d at 123. 1973 Ariz. Sess. Laws ch. 138, § 5, at 969 (current version at ARIZ. REV. STAT. ANN. § 13-703(E) (Supp. 1980-81)) provided:

> In determining whether to impose a sentence of death or life imprisonment without possibilty of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated . . . and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency.

36. 120 Ariz. at 444, 586 P.2d at 1256. This was the second appeal by Watson. In the first appeal, Watson's conviction was affirmed, the sentence vacated, and the case remanded for resentencing because a portion of the presentence report had not been disclosed to Watson. 114 Ariz. at 12-13, 559 P.2d at 133-34. On resentencing, Watson had again been sentenced to death. 120 Ariz. at 444, 586 P.2d at 1256.

37. 120 Ariz. at 444-45, 586 P.2d at 1256-57. The court stated: "It is apparent that this restriction on the use of mitigating circumstances does not now pass constitutional muster." *Id.*

38. *Id.* at 445, 586 P.2d at 1257.

39. *Id.* at 444, 586 P.2d at 1256.

40. *Id.*

41. *Id.* at 445, 586 P.2d at 1257.

42. *See* Selective Life Ins. Co. v. Equitable Life Assurance Soc'y, 101 Ariz. 594, 599, 422 P.2d 710, 715 (1967).

43. 120 Ariz. at 452-53, 586 P.2d at 1264-65.

ble.[44] The test for determining legislative intent to sever a portion of a statute in the absence of a severability clause is set forth in *Millett v. Frohmiller*[45] and *Selective Life Insurance Co. v. Equitable Life Assurance Society*.[46] Under this test, the valid part of a statute must be independent of the invalid portion so that the court may presume that the legislature, had it known of the invalidity, would have enacted the statute without the offending portion.[47] Further, the valid portion must be enforceable standing alone.[48]

Applying this severability test, the *Watson* court stated that since the legislature intended to enact a constitutional death penalty statute, the legislature would have enacted the valid portion without the unconstitutional provision for limited mitigating circumstances.[49] Therefore, it concluded that the proper legislative intent was present.[50] The court then considered whether the statute was operable without the restriction on mitigating circumstances.[51] The court stated that since defendants in Arizona had always been allowed to introduce any mitigating factors prior to the judicial reconstruction of the statute limiting such inquiry, the constitutional portion of the statute could be applied if defendants were thus allowed to introduce any mitigating factors.[52]

The court held that the statute, as reconstructed, was still in force.[53] Further, the *Watson* court allowed the reconstructed statute to be retroactively imposed on Watson.[54] Thus, it remanded the case for yet another sentencing hearing and instructed the trial judge to consider all mitigating circumstances proffered by the defendant.[55]

Watson objected to the court's findings that the unconstitutional portion of the statute could be severed, reconstructed, and retroactively imposed on him.[56] He filed a motion for rehearing which was denied in a supplemental opinion.[57] The Arizona Supreme Court found that

44. *Id.* at 445, 586 P.2d at 1257.
45. 66 Ariz. 339, 188 P.2d 457 (1948).
46. 101 Ariz. 594, 422 P.2d 457 (1967).
47. Millett v. Frohmiller, 66 Ariz. at 342-43, 188 P.2d at 460, *noted in* State v. Watson, 120 Ariz. at 445, 586 P.2d at 1257.
48. Selective Life Ins. Co. v. Equitable Life Assurance Soc'y, 101 Ariz. at 599, 422 P.2d at 462, *noted in* State v. Watson, 120 Ariz. at 445, 586 P.2d at 1257.
49. 120 Ariz. at 445, 586 P.2d at 1257.
50. *Id.*
51. *Id.*
52. *Id.* ARIZ. R. CRIM. P. 26.7(b) provides that at a resentencing hearing:
[A]ny party may introduce any reliable, relevant evidence, including hearsay, in order to show aggravating or mitigating circumstances, to show why sentence should not be imposed, or to correct or amplify the pre-sentence, diagnostic or mental health reports, the hearing shall be held in open court and a verbatim record of the proceedings made.
53. 120 Ariz. at 445, 586 P.2d at 1257.
54. *Id.*
55. *Id.*
56. *Id.* at 451, 586 P.2d at 1263.
57. *Id.*

the retroactive imposition of the death penalty did not violate the double jeopardy clause,[58] nor did such a retroactive imposition work an ex post facto violation.[59] Further, the Arizona court affirmed its position regarding the severabiliy of Arizona's death penalty statute.[60]

## SEVERABILITY OF THE STATUTE

The *Watson* court held that a portion of the Arizona death penalty statute was unconstitutional because it restricted the number of mitigating factors that the sentencer could consider.[61] This unconstitutional restriction occurred principally in a subsection of the statute which begins: "Mitigating circumstances shall be the following . . . ,"[62] and concluded by listing the four mitigating factors.[63] When a statute contains an unconstitutional provision, that provision must be deleted in its entirety if the remainder of the statute is to be constitutional.[64] Since the entire subsection would operate as an unconstitutional restriction, it must be deleted.[65] In addition, this unconstitutional subsection was referred to in every other portion of the statute except the portion listing the aggravating circumstances;[66] these references, therefore, must likewise be deleted to cure the statute of the unconstitutional restriction.[67]

Further, once the unconstitutional subsection and all references to it are deleted, the former statute stands without any provision for mitigating circumstances. As the Arizona Supreme Court recognized in its supplemental opinion to *Watson*, however, a death penalty statute without any provision for mitigating circumstances violates *Lockett v. Ohio* just as a statute that limits the number of mitigating circumstances violates the mandate of that case.[68]

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58. *Id.* at 453, 586 P.2d at 1265. When a defendant succeeds in having a death sentence reduced to life imprisonment, begins serving the life sentence, and then is sentenced to death again, the double jeopardy clause is violated. *Id.* The court reasoned that since Watson had not yet served his sentence of death, and since the sentence had never been reduced to life imprisonment, no double jeopardy violation occurred. *Id.*

59. *Id.* at 453-54, 586 P.2d at 1265-66.

60. *Id.* at 452-53, 586 P.2d at 1264-65.

61. *Id.* at 444-45, 586 P.2d at 1256-57.

62. 1973 Ariz. Sess. Laws ch. 138, § 5, at 970 (current version at ARIZ. REV. STAT. ANN. § 13-703(G) (Supp. 1980-81)).

63. *Id.* See note 2 *supra*.

64. Plas v. State, 598 P.2d 966, 968-69 (Alaska 1979) (portion of prostitution statute containing the words "by a female" is an unconstitutional discrimination under the Alaska constitution, but the statute is constitutional after deletion of the unconstitutional portion); Eastin v. Broomfield, 116 Ariz. 576, 586-87, 570 P.2d 744, 754-55 (1977) (provision requiring posting of $2,000 bond before taking decision of review panel to trial in medical malpractice action is an unconstitutional restriction and must therefore be deleted).

65. *See* cases cited at note 64 *supra*.

66. 1973 Ariz. Sess. Laws ch. 138, § 5, at 968-70 (current version at ARIZ. REV. STAT. ANN. § 13-703 (Supp. 1980-81)).

67. *See* Eastin v. Broomfield, 116 Ariz. 576, 586-87, 570 P.2d 744, 754-55 (1977).

68. 120 Ariz. at 452, 586 P.2d at 1264.

It follows, then, that the prior Arizona statute, even with the unconstitutional restriction deleted, remains unconstitutional since the reconstructed statute contains no authorization for the sentencer to consider any mitigating circumstances. Thus, the prior Arizona statute does not fall within the class of statutes that are constitutional as a result of the deletion of an unconstitutional provision.[69] Instead, language was added in 1979 to authorize the sentencer to consider any mitigating circumstances to make the Arizona statute conform to the constitutional mandate of *Lockett*.[70] In its supplemental opinion, the Arizona Supreme Court stated that "[t]he statute, with the addition of the amount of mitigating factors that may be presented, is still a workable statute even though shorn of its unconstitutional limitation."[71]

The test for severability cited by the *Watson* court,[72] however, does not provide for the judicial addition of language in severing a statute. Instead, under the *Millett* and *Selective Life* test:[73] "To be capable of separate enforcement, the valid portion of an enactment must be independent of the invalid portion and must form a complete act within itself."[74] This prohibition against the addition of language had been followed consistently prior to *Watson* by courts both in Arizona[75] and elsewhere.[76]

For example, in *United States v. Jackson*,[77] the United States Supreme Court held unconstitutional the death penalty provision in the Federal Kidnaping Act.[78] The Court also held that the death penalty provision was severable since the legislative intent was to enact a kidnapping statute, and since the statute was operable without added language.[79] The Court also expressly rejected an invitation to rewrite the

69. *See, e.g.*, Lynden Transport, Inc. v. State, 532 P.2d 700 (Alaska 1975), where the court stated:

> The test for determining the severability of a statute is twofold. A provision will not be deemed severable 'unless it appears both that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall'.

*Id.* at 713 (quoting Dorchy v. Kansas, 264 U.S. 286, 290 (1924)).

70. 1979 Ariz. Sess. Laws ch. 144, § 1, at 450-51 (codified at ARIZ. REV. STAT. ANN. § 13-703(G) (Supp. 1980-81)).

71. 120 Ariz. at 452, 586 P.2d at 1264.

72. *Id.* at 445, 586 P.2d at 1257.

73. *See* text & notes 45-47 *supra*.

74. Millett v. Frohmiller, 66 Ariz. at 343, 188 P.2d at 460 (quoting 2 L. SUTHERLAND, STATUTORY CONSTRUCTION § 2404 (3d ed. Horack 1943)).

75. *See* text & notes 86-90 *infra*.

76. *See* text & notes 77-84 *infra*.

77. 390 U.S. 570 (1968).

78. *Id.* at 572. The statute in question, found at 62 Stat. 760 (current version at 18 U.S.C. § 1201(a) (1976)), provided in part:

> Whoever knowingly transports . . . any person who has been unlawfully . . . kidnaped, . . . shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

79. 390 U.S. at 585-86. The Court, quoting Champlin Ref. Co. v. Commission, 286 U.S. 210,

death penalty provision so as to make it constitutional, reasoning that such rewriting is the task of the legislature, not the courts.[80]

A similar request to rewrite California's death penalty statute was rejected as well by the California Supreme Court in *Rockwell v. Superior Court*.[81] The court in that case struck down California's mandatory death penalty statute[82] but held that the unconstitutional portion of the statute could be severed, leaving a sentence of life imprisonment as the punishment for first degree murder.[83] The court refused to rewrite the statute to permit the consideration of mitigating circumstances, reasoning that such an attempt would invade the legislative province, frustrate legislative intent, and force the court to objectively analyze the constitutionality of procedures the court itself had designed.[84]

Prior to *Watson*, the Arizona courts upheld statutes where the unconstitutional portions could be enforced without added language.[85] In *State ex rel. Berger v. Superior Court*,[86] the Arizona Supreme Court found unconstitutional but severable that portion of a statute providing for a bifurcated trial to determine issues of guilt and insanity.[87] The court stated that the unconstitutional portion could be deleted, leaving

234 (1932), stated: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Id.* at 585.

80. *Id.* at 584-85. The Court held: "If any such approach should be inaugurated in the administration of a federal criminal statute, we conclude that the impetus must come from Congress, not from this Court. The capital punishment provision of the Federal Kidnaping Act cannot be saved by judicial reconstruction." *Id.* at 585.

81. 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976).

82. *Id.* at 424-26, 556 P.2d at 1103-04, 134 Cal. Rptr. at 652-53. The statute at issue, 1973 Cal. Stats. ch. 719, §§ 2, 4-6, at 1297-1300 (current version at CAL. PENAL CODE §§ 190-190.3 (West Supp. 1980)) provided in part in § 2:

> Every person guilty of murder in the first degree shall suffer death if any one or more of the special circumstances enumerated in Section 190.2 have been charged and found to be true in the manner provided in Section 190.1. Every person otherwise guilty of murder in the first degree shall suffer confinement in the state prison for life.

83. 18 Cal. 3d at 445, 556 P.2d at 1116, 134 Cal. Rptr. at 665.

84. *Id.* at 444-45, 556 P.2d at 1116, 134 Cal. Rptr. at 665. In response to the prosecution's suggestion that mitigating circumstances could be considered because the legislature intended to write a constitutional statute, the court stated: "They urge that we find the mandatory 'shall' to be permissive in those cases in which the Legislature has directed that the penalty 'shall' be death. . . . We decline the People's invitation. They ask us not to interpret, but to rewrite the law in a manner which we have shown would be contrary to the manifest legislative intent in enacting sections 190 through 190.3." *Id.*

85. *See* text & notes 86-90 *infra*. When an act is not operable after the unconstitutional portions are deleted, however, the entire act will be declared unconstitutional. Hudson v. Kelly, 76 Ariz. 255, 274-75, 263 P.2d 362, 375 (1953). In *Hudson*, the Arizona Supreme Court ruled that a provision of the Financial Administration Act of 1953 was unconstitutional insofar as it attempted to abolish the office of State Auditor. *Id.* at 266, 263 P.2d at 369. Since the statute was not operable with the unconstitutional portions deleted, the entire act was declared unconstitutional. *Id.* at 274-75, 263 P.2d at 375.

86. 106 Ariz. 365, 476 P.2d 666 (1970).

87. *Id.* at 371, 476 P.2d at 672. The statute at issue was 1968 Ariz. Sess. Laws ch. 105, § 2, at 347-49 (repealed 1977).

the remainder enforceable without added language.[88] Similarly, in *Eastin v. Broomfield*,[89] a provision of Arizona's Medical Malpractice Act requiring posting of a bond was held unconstitutional but severable since the valid portions of the Act could be enforced standing alone.[90]

In these cases, once the unconstitutional portion of the statute was deleted, the remainder of each statute involved was constitutional without adding saving language. Thus, the remainder of each statute formed a complete statute within itself.[91] The statute examined in *Watson* as severed by the court, however, was not complete within itself because the court referred to Rule 26.7 of the Arizona Rules of Criminal Procedure and incorporated that provision in place of the deleted unconstitutional restriction.[92] By incorporating Rule 26.7, the *Watson* court departed from prior case law which held that a severed statute must be complete within itself and created a new rule in severability analysis.

This new rule provides that when the deletion of an unconstitutional restriction does not cure the statute of its constitutional infirmities, the court may add language found in other statutes and rules to make the statute constitutional.[93] Arguably, the Arizona death penalty statute was not, contrary to the supreme court's opinion, a reasonable and workable statute when shorn of its unconstitutional limitations because the statute as severed did not form a complete act within itself. In addition, as the Supreme Court of the United States recognized in *Jackson*, such reconstruction should be left to the legislature.[94]

The court's reconstruction of Arizona's death penalty statute not only expanded the traditional severability test of *Millett* that a severed

88. 106 Ariz. at 371, 476 P.2d at 672. The *Berger* court set forth the statute with each unconstitutional portion deleted and determined that the statute was enforceable merely by deleting the unconstitutional portions. *Id.*

89. 116 Ariz. 576, 570 P.2d 744 (1977).

90. *Id.* at 586-87, 570 P.2d at 754-55. The statute declared severable in *Eastin* is ARIZ. REV. STAT. ANN. § 12-567(I) (Supp. 1980-81), which imposed a $2,000 bond secured by cash before an appeal from the medical liability review panel can be taken. Deletion of the unconstitutional restriction of the right of appeal left the rest of the statute constitutional and workable. 116 Ariz. at 586-87, 570 P.2d at 754-55.

91. United States v. Jackson, 390 U.S. at 585-86; Eastin v. Broomfield, 116 Ariz. at 586-87, 570 P.2d at 754-55; State *ex rel.* Berger v. Superior Court, 106 Ariz. at 371, 476 P.2d at 672; Rockwell v. Superior Court, 18 Cal. 3d at 444-45, 556 P.2d at 1116, 134 Cal. Rptr. at 665.

92. 120 Ariz. at 445, 586 P.2d at 1257. ARIZ. R. CRIM. P. 26.7(b) is set forth at note 52 *supra*.

93. *See* 120 Ariz. at 452, 586 P.2d at 1264.

94. 390 U.S. at 585. This was in fact done by the Arizona legislature in 1979. Basically, the legislature amended the mitigating factors provision such that those factors enumerated, see note 2 *supra*, are no longer deemed exclusive. 1979 Sess. Laws. ch. 144, § 1, at 450-51 (codified at ARIZ. REV. STAT. ANN. § 13-703(G) (Supp. 1980-81)). The mitigating factors provision, ARIZ. REV. STAT. ANN. § 13-703(G) (Supp. 1980-81) now provides in part:

> Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following . . . [enumeration].

statute must stand alone to be constitutional, but also ignored the specific legislative intent expressed in the session law.[95] The session law in question clearly and unequivocally states that should the death penalty be found unconstitutional, persons sentenced to death under the invalid law shall be resentenced to life imprisonment.[96] Therefore, the sole issue is whether Arizona's death penalty statute is unconstitutional.[97] If the statute is unconstitutional, the legislature intended the prisoner to be sentenced to life imprisonment.[98] If the statute is constitutional, then no resentencing is necessary.[99] In considering this issue in its supplemental opinion, the court stated: "We did not find the death penalty unconstitutional. We only held that in determining the death penalty there are certain factors which, if presented by the defendant, the court must consider."[100] But the *Watson* court did declare the death sentence imposed upon Watson unconstitutional since it stated: "We hold that A.R.S. § 13-454(F), insofar as it limits the right of the defendant to show additional mitigating circumstances, is unconstitutional."[101] Clearly the *Watson* court held the death penalty statute unconstitutional, and once the court declared the statute unconstitutional, the legislative intent that defendants be resentenced to life imprisonment should have become operative.

The *Watson* court's holding thus effectively violates both aspects of the *Millett* test. Under the *Millett* test, the Arizona statute cannot be severed—first because the statute, once severed, is not a complete act within itself,[102] and second because the legislature provided for a penalty of life imprisonment should the death penalty statute be held unconstitutional.[103] Under the newly created *Watson* test, however,

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95. 1973 Ariz. Sess. Laws ch. 138, § 10, at 973 provides:
In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first degree murder or another offense punishable by death who has been sentenced to die shall be resentenced by the sentencing court to life imprisonment without possibility of parole until the person has served a minimum of twenty-five calendar years.

96. *See* note 95 *supra*.

97. *Id.*

98. *Id. Cf.* People *ex rel.* Rice v. Cunningham, 61 Ill. 2d 353, 362, 336 N.E.2d 1, 7 (1975); Riggs v. Branch, 554 P.2d 823, 827-29 (Okla. Crim. App. 1976); Kennedy v. State, 559 P.2d 1014, 1017 (Wyo. 1977) (per curiam).

99. *See* note 95 *supra*.

100. 120 Ariz. at 453, 586 P.2d at 1265. Arizona is the only state to authorize resentencing to death where the death penalty has been unconstitutionally imposed. *See, e.g.*, People v. District Court, 196 Colo. 407, 411, 586 P.2d 31, 35 (1978); State v. Rondeau, 89 N.M. 408, 412, 553 P.2d 688, 692 (1976); State v. Lindquist, 99 Idaho 766, 770-71, 589 P.2d 101, 104-05 (1979); Kennedy v. State, 559 P.2d 1014, 1017 (Wyo. 1977). In death penalty cases, it is not the death penalty per se that is declared unconstitutional but only the procedure employed in determining who should suffer the death penalty. *See, e.g.*, State v. Duren, 547 S.W.2d 476, 480 (Mo. 1977); State v. Rodgers, 270 S.C. 285, 292-93, 242 S.E.2d 215, 218 (1978).

101. 120 Ariz. at 445, 586 P.2d at 1257.

102. *See* text & notes 61-94 *supra*.

103. *See* text & notes 95-101 *supra*.

severability depends not upon whether the statute is operable without added language nor upon whether the legislature intended severability but rather depends upon whether the statute, after substantial judicial revision, is what the court considers a "reasonable and workable" statute.[104] The *Watson* court's expansion of existing case law does not end with its new severability rule, however, because it also determined that a judicially reconstructed death penalty statute may be retroactively imposed on defendants sentenced under the unconstitutional statute.[105]

## RETROACTIVE IMPOSITION OF THE DEATH PENALTY

After considering the severability of the unconstitutional restriction on mitigating circumstances, the *Watson* court discussed possible ex post facto violations inherent in the retroactive imposition of the death penalty.[106] An ex post facto violation occurs whenever a newly enacted criminal statute is retroactively imposed on a defendant.[107] A similar concept applies when the judiciary unforeseeably enlarges the scope of a criminal statute to the detriment of a defendant.[108] Such an unexpected construction of a statute deprives the defendant of the fair warning required by the due process clause.[109] When a defendant is sentenced under an unconstitutional statute, a later resentencing under a new, constitutional statute has been held violative of the due process clause.[110] Watson contended that the reconstruction and retroactive imposition of the death penalty constituted precisely this type of ex post facto/due process violation.[111]

The *Watson* court in its supplemental opinion, relying on the

104. 120 Ariz. at 452-53, 586 P.2d at 1264-65.

105. *Id.* at 445, 586 P.2d at 1257.

106. *Id.* at 453-54, 586 P.2d at 1265-66.

107. Bouie v. City of Columbia, 378 U.S. 347, 353 (1964). U.S. CONST. art. I, § 10 provides in part: "No State shall . . . pass any . . . ex post facto Law. . . ." Although the ex post facto clause literally applies only to legislative action, the same principle applies through the due process clause to a court's unexpected construction of a criminal statute. 378 U.S. at 353-54.

108. 378 U.S. at 353-54.

109. *Id.* at 354-55. In addition to giving defendants fair warning of the punishment to be exacted for a crime, the ex post facto and due process clauses serve another function. As Justice Harlan stated:

> Aside from problems of warning and specific intent, the policy of the prohibition against *ex post facto* legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct, even though the conduct could properly have been made criminal and even though the defendant who engaged in that conduct in the past believed he was doing wrong (as for instance when the penalty is increased retroactively on an existing crime), may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons.

James v. United States, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring and dissenting).

110. State v. Lindquist, 99 Idaho 766, 769, 589 P.2d 101, 104 (1979); Meller v. State, 94 Nev. 408, 409, 581 P.2d 3, 4 (1978); Commonwealth v. McKenna, 476 Pa. 428, 435-37, 383 A.2d 174, 178-79 (1978); State v. Rodgers, 270 S.C. 285, 291, 242 S.E.2d 215, 217-18 (1978).

111. 120 Ariz. at 453-54, 586 P.2d at 1265-66.

Supreme Court's decision in *Dobbert v. Florida*,[112] dismissed Watson's argument. It reasoned that the mere existence of the death penalty provision served as an operative fact warning defendants such as Watson of the penalty that the state intended to exact for the crime of first degree murder.[113] Since Watson received warning of the statute's intended effect, he could not later complain that the judicial reconstruction of the statute was unexpected.[114] Since the judicial enlargement was not unexpected, the court concluded that no ex post facto violation had occurred.[115]

Watson, however, is not similarly situated to the petitioner in *Dobbert*. Dobbert murdered his children in late 1971.[116] In 1972, Florida's death penalty statute was declared unconstitutional in light of *Furman v. Georgia*.[117] The Florida legislature then rewrote the death penalty statute in late 1972.[118] Dobbert was thereafter brought to trial, convicted, and sentenced to death under the new, concededly constitutional statute.[119] The Supreme Court upheld Dobbert's sentence against ex post facto challenge.[120]

Unlike Dobbert, Watson not only committed his crime while an unconstitutional death penalty statute was in effect but also was tried, convicted, and sentenced under the same unconstitutional provision.[121] The *Dobbert* rule, which upholds against ex post facto challenge a sentence obtained under a constitutional procedure not in effect when the crime was committed, but in force when the defendant was sentenced,[122] simply does not reach the *Watson* situation where the sentence was obtained unconstitutionally.[123] Thus, even under the system upheld by *Dobbert*, Watson would have been resentenced to life imprisonment.[124] Nevertheless, the Arizona Supreme Court chose to expand the *Dobbert* rationale to the *Watson* situation.[125] No other court thus far has chosen to expand *Dobbert* in this manner.[126] Indeed, all

112. 432 U.S. 282 (1977).
113. 120 Ariz. at 454, 586 P.2d at 1266 (quoting Dobbert v. Florida, 432 U.S. 282, 297-98 (1977)).
114. *See id.*
115. *See id.*
116. 432 U.S. at 284.
117. Donaldson v. Sack, 265 So. 2d 499, 501 (Fla. 1972). For a discussion of *Furman*, see text & notes 11-19 *supra*.
118. 1972 Fla. Laws ch. 72-72, § 1, at 241-44 (current version at FLA. STAT. ANN. § 921.141 (West Supp. 1980)).
119. 432 U.S. at 287.
120. *Id.* at 292 & n.6.
121. 120 Ariz. at 443-45, 586 P.2d at 1255-57.
122. 432 U.S. at 293-94.
123. *See* cases cited at note 110 *supra*.
124. *See* Dobbert v. Florida, 432 U.S. at 293-94.
125. 120 Ariz. at 453-54, 586 P.2d at 1265-66.
126. *See* cases cited at note 110 *supra*.

other courts considering *Dobbert* have held the factual distinction between the *Dobbert* situation and the *Watson* situation to be determinative of the due process/ex post facto issue.[127] These courts, including the Florida court from which Dobbert appealed,[128] have uniformly distinguished from *Dobbert* the *Watson* case where the sentence is obtained unconstitutionally and have reduced all such unconstitutional sentences to life imprisonment.[129] These courts find the operative fact analysis of *Dobbert* inapposite when the sentence is imposed unconstitutionally.[130]

Dobbert was sentenced only once, and under a constitutional statute, so there was no retroactive imposition of a judicially reconstructed statute. A defendant in Watson's position, however, has been sentenced twice: first unconstitutionally and second under a reconstructed statute as judicially enlarged.[131] Whereas the defendant who is sentenced only once may have been on notice of the intended penalty, the second attempt to impose the death penalty has been rejected uniformly, on various grounds, by the other courts faced with the question.[132]

The *Dobbert* Court itself recognized this distinction. Defendants in Florida who were, like Watson, actually sentenced under the unconstitutional procedure were uniformly resentenced by the Florida Supreme Court to life imprisonment.[133] Dobbert contended he should receive the same reduction in his sentence.[134] The Supreme Court rejected Dobbert's argument and upheld the Florida court's reasoning that defendants actually sentenced under the unconstitutional statute had progressed sufficiently far in the criminal process to be governed solely by the old statute.[135] When that statute was declared unconstitutional, those defendants could obtain the benefits thereof—a reduction

127. People v. Harvey, 76 Cal. App. 3d 441, 445-47, 142 Cal. Rptr. 887, 889-90 (1978) (the crucial distinction was that the appellant, unlike Dobbert, had already been sentenced under an invalid law); Meller v. State, 94 Nev. 408, 410 n.3, 581 P.2d 3, 4 n.3 (1978) (declining to apply *Dobbert* in a similar situation); State v. Rodgers, 270 S.C. 285, 291, 242 S.E.2d 215, 217-18 (1978) (*Dobbert* is distinguishable because Dobbert was convicted and sentenced under a valid capital punishment statute).

128. *See* Dobbert v. Florida, 432 U.S. at 301.

129. *E.g.*, Meller v. State, 94 Nev. 408, 410 n.3, 581 P.2d 3, 4 n.3 (1978); State v. Rodgers, 270 S.C. 285, 291, 242 S.E.2d 215, 217-18 (1978).

130. *E.g.*, Meller v. State, 94 Nev. 408, 410 n.3, 581 P.2d 3, 4 n.3 (1978); State v. Rodgers, 270 S.C. 285, 291, 242 S.E.2d 215, 217-18 (1978).

131. *See* 120 Ariz. at 453, 586 P.2d at 1265.

132. *E.g.*, Miller v. State, 584 S.W.2d 758, 759-60 (Tenn. 1979) (the court recognized the *Dobbert* rule but relied on the Tennessee ex post facto provision to refuse resentencing to death); State v. Rodgers, 270 S.C. 285, 292, 242 S.E.2d 215, 218 (1978) (the court refused to resentence defendants to death since there was no legislative intent to apply the statute retroactively).

133. 432 U.S. at 301.

134. *Id.*

135. *Id.*

of their sentences to life imprisonment.[136] But defendants in Dobbert's position, who had not been sentenced under the unconstitutional statute, had not progressed sufficiently far in the criminal process and thus could not obtain the benefits of the reduced sentence.[137] Watson quite clearly falls within the class of defendants discussed in *Dobbert* who, having been sentenced under an unconstitutional statute, had progressed far enough in the criminal process so as to prevent the imposition of a newly constructed statute and a concomitant ex post facto or due process violation.[138]

By allowing defendants sentenced once unconstitutionally to be resentenced to death, Arizona has parted company with her sister states.[139] Although it is unclear precisely why the Arizona Supreme Court felt compelled to apply the *Dobbert* rationale to the *Watson* situation, such an unprecedented construction of *Dobbert* in the context of death penalty cases is perhaps reasonable. If Dobbert had fair warning of the Florida statute's intended effect, then perhaps Watson likewise was on notice of the Arizona death penalty provision's intended effect. Yet prior to *Watson*, such notice was not considered sufficient grounds for finding the reconstruction of unconstitutional death penalty statutes and retroactive application of new, constitutional death penalty statutes to be sufficient compliance with the due process and ex post facto clauses.[140]

As the dissenting Justices in *Dobbert* recognized, the *Dobbert* majority's reliance solely upon the fair warning aspects of the ex post facto clause represents a clear departure from past cases construing the clause.[141] Indeed, a broad reading of the *Watson* court's fair warning rationale would lead to absurd and arbitrary results.[142] If this rule applies in all cases, then any judicial statutory reconstruction can be applied retroactively as long as a similar punishment existed in a former, albeit unconstitutional provision.[143] Yet as the *Dobbert* dissenters

136. *Id.*
137. *Id.*
138. *See id.*
139. *See* note 132 *supra*.
140. *See* Dobbert v. Florida, 432 U.S. at 305 (Stevens, J., dissenting). Indeed, the *Dobbert* majority cited no cases construing the ex post facto clause in support of its "fair warning" conclusion. *Id.* at 305 n.4 (Stevens, J., dissenting).
141. *Id.* at 305 (Stevens, J., dissenting). Justices Brennan and Marshall joined in Justice Stevens' dissent. Discussing the test previously applied by the Court, Justice Stevens stated: "The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer." *Id.* (Stevens, J., dissenting) (quoting Lindsey v. Washington, 301 U.S. 397, 401 (1937)). Justice Stevens further stated that "[i]n the case before us, the new standard created the possibility of a death sentence that could not have been lawfully imposed when the offense was committed. A more dramatically different standard of punishment is difficult to envision." *Id.* at 307 (Stevens, J., dissenting).
142. *See id.* at 308 (Stevens, J., dissenting).
143. *See id.* at 309-310 (Stevens, J., dissenting).

question, what standard should be considered in determining whether a warning was in fact fair?[144] The standard cannot be actual knowledge of the existence of the statute on the books, for then everyone would be judged according to that person's subjective knowledge.[145] The standard also cannot be one of presumed knowledge. This presumption, carried to its logical conclusion, would require a finding that no one had "fair warning" of the statute's effect because if everyone was presumed to know of the statute's existence, then likewise everyone must be presumed to know of the statute's invalidity.[146] Further, under either test, the retroactive imposition of such a statute must necessarily be capricious[147] because no one can determine in advance whether a reconstructed statute will, at the whim of a court, be applied retroactively. When human life is at stake, the need to prevent capricious punishment is greatest, as the Supreme Court's decision in *Furman* establishes.[148]

Clearly, Arizona's reliance on *Dobbert* to find that Watson had fair warning of the Arizona death penalty statute's intended effect departs from substantial case law developed in other states. In addition, the *Watson* decision undercuts much of the substantive protection previously afforded by the due process and ex post facto clauses, and bodes ill for all other criminal defendants should such a holding be extended beyond the facts of the *Watson* case.

## CONCLUSION

The Arizona Supreme Court in *State v. Watson* held that a former provision of the Arizona death penalty statute was unconstitutional insofar as it limited the number of mitigating circumstances to be considered by the sentencer. The court found this unconstitutional restriction severable even though the statute did not, after severance, form a complete act within itself. Severance also seemingly violates legislative intent. To uphold the statute, the court adopted a new rule of severability which arguably invades the legislative province. Further, the court found that the statute as judicially reconstructed could be retroactively applied to Watson because he had fair warning of the punishment that the state intended to exact for the crime of murder.

The court's reliance solely upon the fair warning rationale repre-

144. *Id.* at 308 (Stevens, J., dissenting).
145. *See id.* (Stevens, J., dissenting).
146. *Id.* (Stevens, J., dissenting).
147. *Id.* at 309 (Stevens, J., dissenting). Justice Stevens stated: "If I am correct that the Ex Post Facto Clause was intended as a barrier to capricious government action, today's holding is actually perverse." *Id.* (Stevens, J., dissenting).
148. *Id.* (Stevens, J., dissenting).

sents an expansion of prior case law construing the fair warning protection of the due process and ex post facto clauses. Such an expansion negates any substantive protection afforded by these clauses. Clearly, if the fair warning aspects of the due process clause are to carry substantive weight in the future, the *Watson* court's authorization of reconstruction and retroactive application of criminal statutes should be read narrowly in the future.