No. 04-980

IN THE

Supreme Court of the United States

JILL L. BROWN, Warden,

Petitioner,

vs.

RONALD L. SANDERS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Does the rule of *Zant* v. *Stephens* permit affirmance of a death sentence notwithstanding erroneous findings on two of four special circumstances when:

1) one special circumstance is sufficient to make the defendant eligible for capital punishment;

2) the stricken circumstances and the evidence supporting them involve matters which are relevant to culpability and proper subjects of consideration in sentencing; and

3) state law permits the sentencer to consider all "circumstances of the crime," which includes all of the facts supporting the stricken circumstances.

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, a sentence of death was overturned because the jury found two "special circumstances" which were later found to be insufficient to separate death-eligible murders from other murders, despite the facts that (1) this murderer was eligible

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

under other, valid factors also found by the jury, and (2) the stricken factors added nothing of substance to the final selection decision that was not properly considered under other, valid factors. Such an unnecessary overturning of a valid, thoroughly deserved, and long overdue sentence is a miscarriage of justice and contrary to the rights CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Twenty-four years ago, defendant Ronald Lee Sanders, Donna Thompson, and Brenda Maxwell attempted to rob Dale Boender and Janice Allen, but failed. "[D]efendant was worried Boender could identify him." See *People* v. *Sanders*, 51 Cal. 3d 471, 485-486, 797 P. 2d 561, 565-566 (1990). A few days later, defendant and John Cebreros pushed their way into Boender and Allen's apartment, bound them with electrical cord, stole drugs and money, and fractured both of their skulls. Boender survived and identified defendant, but Allen died of her wounds.

Sanders was convicted of first-degree murder, attempted murder, robbery, burglary, and attempted robbery. *Id*., at 485, 797 P. 2d, at 565. Burglary in California is entry of a building with the intent to commit larceny or any felony. See Cal. Penal Code § 459. The jury was instructed on several variants of first-degree murder, including premeditation, robbery felony murder, and burglary felony murder. The jury was further instructed that the intent for a burglary could be, among other possibilities, intent to commit an assault. See 51 Cal. 3d, at 509, 797 P. 2d, at 582. Although California law does allow intent to assault as the *mens rea* of burglary, it does not permit an assault-based burglary as the basis for a felony-murder instruction. See *ibid*., 797 P. 2d, at 582. The California Supreme Court affirmed the first-degree murder verdict based on the jury's robbery findings. *Id*., at 510, 797 P. 2d, at 582.

Concurrently with the guilt verdict, the jury found four special circumstances: robbery felony murder, burglary felony murder, murder of a witness to prevent her testimony, and "especially heinous, atrocious and cruel." See *id*., at 485, 797 P. 2d, at 565; Cal. Penal Code §§ 190.2(a)(17)(i), (a)(17)(vii), (a)(10), (a)(14). One special circumstance must be found to make the defendant eligible for the death penalty. See Cal. Penal Code § 190.2(a). The California Supreme Court set aside the burglary felony murder finding for the same reason as the burglary theory of felony murder. The "especially heinous, atrocious and cruel" circumstance was also set aside under a prior decision of the California Supreme Court, see *Sanders*, 51 Cal. 3d, at 520, 797 P. 2d, at 589, despite the fact that the language of the statute and instruction was copied from the language approved by this Court in *Proffitt* v. *Florida*, 428 U. S. 242, 255 (1976) (lead opinion).

In the penalty phase, Sanders instructed his attorney not to present mitigating evidence. The trial judge appointed independent counsel to advise Sanders and a psychiatrist to examine him. Sanders persisted in this choice despite the attempts of court and counsel to dissuade him. See *Sanders*, 51 Cal. 3d, at 524-525, 797 P. 2d, at 592-593.

The jury returned a verdict of death. The California Supreme Court rejected the argument that the stricken special circumstances required reversal of the penalty verdict. All of the facts underlying these circumstances were admissible in the penalty phase and were proper subjects of the jury's consideration under state law. See 51 Cal. 3d, at 520-521, 797 P. 2d, at 589-590.

Sanders filed a federal habeas petition on December 20, 1993. See *Sanders* v. *Woodford*, 373 F. 3d 1054, 1058 (CA9 2004). This petition contained unexhausted claims, and Sanders filed a state habeas petition to exhaust them. See *ibid*. Following denial of the state habeas petition, he amended his

federal habeas petition on September 25, 1999.[2] The District Court denied the petition on August 24, 2001. The Court of Appeals for the Ninth Circuit reversed, finding that the California Supreme Court had performed an inadequate harmless error analysis, citing *Sochor* v. *Florida*, 504 U. S. 527 (1992). See 373 F. 3d, at 1064.

SUMMARY OF ARGUMENT

The term "weighing State" is a misnomer and should be abandoned.

Once the defendant has been found eligible for capital punishment by the finding of at least one properly defined circumstance, states may either limit the prosecution's case in aggravation to those same eligibility circumstances or open the case up to a broader or even unlimited range of circumstances. This includes circumstances too vague to be valid eligibility circumstances.

The reason the vague circumstance in *Zant* v. *Stephens* was harmless was that Georgia allowed consideration of broad circumstances in the selection decision. For this reason, the substance of the stricken circumstance was properly before the jury, with or without the finding of that circumstance in the eligibility decision. This is what makes the Georgia system different from the States designated "weighing States." In reality, all sentencers "weigh." *Zant* v. *Stephens* applies to any

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2. The Court of Appeals held that the deference standard of 28 U. S. C. § 2254(d) does not apply because the initial petition was filed before enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See *ibid.*; *Lindh* v. *Murphy*, 521 U. S. 320, 336 (1997); *Woodford* v. *Garceau*, 538 U. S. 202, 207 (2003). This Court has not resolved whether § 2254(d) applies to an amended petition filed after AEDPA's effective date, and the State did not seek review of the Court of Appeals' holding on this point.

state with broadly defined aggravating circumstances in the selection decision.

The California Supreme Court does not have a rule of automatic affirmance but instead examines each case to insure that the premise of *Zant* v. *Stephens* is true. That is, it verifies that the substance of the stricken eligibility circumstance was properly before the jury under another, valid "special" circumstance or under California's broad selection circumstances. The state court properly applied *Zant* to this case.

ARGUMENT

"On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined." *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. __ (No. 04-163, May 23, 2005) (slip op., at 1). The phrase "weighing State" has taken on a life of its own in this way, and it should be abandoned for the reasons discussed in Part III, *infra*. First, though, there are two misconceptions that need to be cleared away.

I. There is no *Godfrey* error in this case.

In most of the cases leading up to this one, the circumstance in question was invalid because it failed to perform the narrowing function required by the Eighth Amendment in capital cases under the standard established in *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion). See, *e.g.*, *Stringer* v. *Black*, 503 U. S. 222, 228 (1992). However, the "especially heinous, atrocious or cruel" instruction given to the jury in the present case complies with *Godfrey*. It is important to be clear on this point, lest a dictum in this case call into question the well-established law validating instructions that have long been used and are still in use in other jurisdictions. See, *e.g.*, *Lynch* v. *State*, 841 So. 2d 362, 379 (Fla. 2003) (Pariente, J., concur-

ring in the result) (noting codification of similar instruction in Florida), cert. denied, *Lynch* v. *Florida*, 540 U. S. 867 (2003).

When the drafters of California's death penalty law crafted the "especially heinous" special circumstance, they drew upon what appeared to be the safest possible source—language expressly upheld by this Court against a vagueness attack. Compare Cal. Penal Code § 190.2(a)(14), with *Proffitt* v. *Florida*, 428 U. S. 242, 255 (1976) (lead opinion). One would have thought that the codification verbatim of language approved by the Supreme Court of the United States was ironclad protection against a federal constitutional attack in any other court. However, in the surreal environment of the California Supreme Court's pre-1987 death penalty jurisprudence, nothing was ever safe. In *People* v. *Superior Court (Engert)*, 31 Cal. 3d 797, 806, 647 P. 2d 76, 81 (1982), the California Supreme Court held that the *Proffitt*-approved language violates the Due Process Clause of the Fourteenth Amendment as well as the Due Process Clauses of the California Constitution. See Cal. Const., Art. I, §§ 7(a), 15.

One reason given for not following *Proffitt* was differences in the Florida and California systems. See *Engert*, 31 Cal. 3d, at 804, 647 P. 2d, at 79. While the systems do differ, as discussed *infra*, at 19, they do not differ in a way that matters on this point. The "especially heinous" circumstances in both California and Florida serve to separate the cases where the death penalty may be considered from those where it may not, and that is the function to which the *Godfrey* vagueness requirement applies. See Part II, *infra*. The other reason given was to distinguish the Eighth Amendment requirement from the Due Process Clause requirement. See *id*., at 804-805, 647 P. 2d, at 79-80. As *Maynard* v. *Cartwright*, 486 U. S. 356, 361-362 (1988) subsequently made clear, the difference in these two clauses cuts the other way. While the Due Process Clause permits a statute which is vague at the edges to still be applied to cases clearly within its scope (except in First Amendment

cases), the Eighth Amendment forbids any use of a vague circumstance for determining eligibility for the death penalty.

The Fourteenth Amendment holding of *Engert* could not be reviewed by this Court at the time, because the judgment also rested on the adequate and independent basis of the state constitution. The California Supreme Court has not seen fit to reconsider the question in the years since.[3] By finding "*Engert* error" in the present case, the California Supreme Court held that the use of the "especially heinous" instruction violated the California Constitution's Due Process Clauses, and that holding is binding on federal courts. Analysis of the present case must proceed on the assumption that the "especially heinous" instruction was error, but it was not federal constitutional error, and the opinion in this case should not call into question the similar statutes and instructions in other jurisdictions. See, *e.g.*, 18 U. S. C. § 3592(c)(6); *Jones* v. *United States*, 527 U. S. 373, 377, and n. 1 (1999).[4]

II. A factor which is too vague to be used for the eligibility decision may be perfectly valid for the selection decision.

A. Eligibility and Selection.

This Court's "capital punishment cases under the Eighth Amendment address two *different* aspects of the capital

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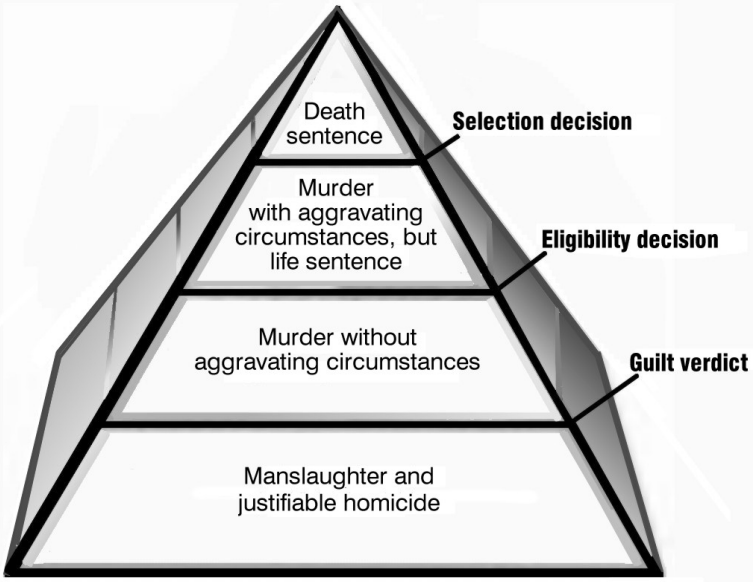
3. Another special circumstance for murders that "involve[] the infliction of torture," Cal. Penal Code § 190.2(a)(18), covers most if not all of the same cases as paragraph 14's "unnecessarily torturous to the victim." Given that there is little or no permanent effect on the scope of California's death penalty law, the California Supreme Court may have concluded that considerations of *stare decisis* weigh against reopening the *Engert* question.

4. The Court of Appeals in *Jones* had rejected a *Maynard* challenge to the federal statute. See *United States* v. *Jones*, 132 F. 3d 232, 249-250 (CA5 1998). Jones did not seek review of this holding.

decision making process: the eligibility decision and the selection decision." *Tuilaepa* v. *California*, 512 U. S. 967, 971 (1994) (emphasis added). In recent years, we have seen a sharpening of the distinction between these two decisions and the factors that go into them. The eligibility factors must now be found by a jury, but the selection decision may still be made by the judge. See *Ring* v. *Arizona*, 536 U. S. 584, 597-598, n. 4, 609 (2002). A plurality of the Court has indicated that its confused precedents on double jeopardy and capital sentencing may be resolved by holding double jeopardy applicable to the eligibility decision but not the selection decision. See *Sattazahn* v. *Pennsylvania*, 537 U. S. 101, 110-112 (2003).

In *Zant* v. *Stephens*, 462 U. S. 862, 870-872 (1983), this Court quoted the Georgia Supreme Court's response to a certified question describing the process for determining which of the many persons who commit homicide will be sentenced to death. The pyramid metaphor of this response, illustrated in

Figure 1



The *Zant* v. *Stephens* pyramid.

Figure 1, is quite useful for understanding all jurisdictions' current capital sentencing processes, so we summarize it here.

Briefly, all homicides are in the pyramid, and several planes divide the homicides into levels of increasing culpability and severity of punishment. The first plane, the guilt verdict, separates murder from manslaughter and justifiable homicide. In states that divide murder into degrees, see, *e.g.*, Cal. Penal Code § 189, it also separates first-degree murder from second-degree murder. The second plane separates the murder cases (or first-degree murder cases) into those where the death penalty may be considered and those where it may not. This is the eligibility decision. It requires a finding of at least one statutory circumstance. The final plane separates the cases in which the death penalty will actually be imposed from those where it will not, even though the defendant is eligible for it. This is the selection decision.

Although they differ in the details, all capital sentencing systems in use in the United States today follow the same broad outline. *Gregg* v. *Georgia*, 428 U. S. 153 (1976), its companion cases, and their progeny effectively require it. All systems have an eligibility determination to narrow the class of potentially capital cases, and all systems follow this decision with a selection decision to determine whether to actually sentence an eligible defendant to death. See *Tuilaepa*, 512 U. S., at 971-973.

Using the pyramid metaphor, the plane that separates the death-eligible cases from those where death cannot be legally imposed is qualitatively different from the plane that separates the cases where death will actually be imposed from those who will be spared the death penalty, even though legally eligible for it. The eligibility decision is essentially factual, see *Tuilaepa*, 512 U. S., at 973, while the selection decision is necessarily discretionary.

The rule of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) preserves the factual nature of the eligibility decision. A

circumstance that "could fairly characterize almost every murder," *id*., at 428-429, is insufficient to perform the narrowing function required at this stage. See also *Maynard* v. *Cartwright*, 486 U. S. 356, 364 (1988).

At the selection stage, on the other hand, the state is not required to define the factors that the sentencer may consider at all. Indeed, on the mitigating side the state *must* permit any aspect of the crime or of the defendant's character or record that he wishes to proffer as mitigating. See *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). The state can do the same on the aggravating side if it wishes. The Georgia statute considered in *Gregg*, *supra*, authorized consideration of *any* appropriate aggravating circumstance in the selection decision, see 428 U. S., at 197, and the lead opinion not only upheld the procedure but commended it. See *id*., at 203-204. The state can, if it wishes, limit the prosecution's case in aggravation to the same factors found for eligibility, see, *e.g.*, *Zant*, 462 U. S., at 878, n. 17, but this limitation is not required.

B. California v. Ramos.

Two weeks after *Zant* v. *Stephens*, this Court made clear that the broad-circumstance principle of *Gregg* and *Zant* applies equally to a state where the jury is instructed to "weigh." Discussing the essential difference between the eligibility determination and the final sentencing decision in such a state, the Court said this in *California* v. *Ramos*, 463 U. S. 992, 1008-1009 (1983) (emphasis added):

> "*Once the jury finds that the defendant* falls within the legislatively defined category of persons *eligible* for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, *the jury then is free to consider a myriad of factors* to determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized. 'But *the Constitution does not require the jury to ignore other possible . . . factors* in the process of selecting . . .

those defendants who will actually be sentenced to death.' *Zant* v. *Stephens*, 462 U. S. 862, 878 (1983) (footnote omitted). As we have noted, the essential effect of the Briggs Instruction [regarding the possibility of commutation] is to inject into the sentencing calculus a consideration akin to the aggravating factor of future dangerousness in the Texas scheme. See *supra*, at 1003. This element '*is simply one of the countless considerations weighed by the jury* in seeking to judge the punishment appropriate to the individual defendant.' 462 U. S., at 900 (Rehnquist, J., concurring in the judgment).[22]

"[22] Consideration of the commutation power does not undermine the jury's statutory responsibility to *weigh* aggravating factors against mitigating factors and impose death only if the former outweigh the latter. *The desirability of the defendant's release into society is simply one matter that enters into the weighing process*. Moreover, the fact that the jury is given *no specific guidance* on how the commutation factor is to figure into its determination *presents no constitutional problem*. As we held in *Zant* v. *Stephens*, *supra*, the constitutional prohibition on arbitrary and capricious capital sentencing determinations is not violated by a capital sentencing 'scheme that permits the jury to exercise unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty by statute.' *Id*., at 875."

Thus, this Court has quite explicitly held that the sentence selection process is *not* governed by the same strict specificity requirements as the death eligibility determination. Moreover, as footnote 22 makes clear, the *Ramos* Court did so while very much aware that the statute in question called for a "weighing" process and that the factor before the Court was "one matter that enters into the weighing process."

C. Narrowing: Necessary for Rationalization.

In *Furman* v. *Georgia*, 408 U. S. 238 (1972), this Court struck down the existing system of unfettered discretion in capital sentencing, effectively overruling *McGautha* v. *California*, 402 U. S. 183, 207 (1971). None of the five Justices voting to reverse in *Furman* joined any of the others' opinions. Notwithstanding this fracture, it is clear enough what motivated a majority of the Court to make the dramatic about-face that it did. Pre-*Furman* death penalty law provided far too much leeway for racial discrimination. See *Graham* v. *Collins*, 506 U. S. 461, 479 (1993) (Thomas, J., concurring); *id*., at 501 (Stevens, J., dissenting).

The evil exposed in *Furman* was the result of two concurrent causes: the breadth of offenses for which death was an available punishment and the lack of guidance for selecting those actually sentenced to death from the eligible offenders.

> "[T]he risk of arbitrariness condemned in *Furman* is a function of the size of the class of convicted persons who are eligible for the death penalty. When the *Furman* case was decided, Georgia included virtually all defendants convicted of forcible rape, armed robbery, kidnaping and . . . murder in that class." *Walton* v. *Arizona*, 497 U. S. 639, 715 (1990) (Stevens, J., dissenting), overruled on other grounds, *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002).

To address this problem, the post-*Furman* statutes all have some form of "narrowing" for the crime of murder, and this Court has several times referred to narrowing as a constitutional requirement. See *Zant*, 462 U. S., at 877; *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988); *Tuilaepa*, 512 U. S., at 972.

For the most part, the identification of factors which separate the death-eligible defendants from the others is a matter for legislative and not judicial decision. The one major limitation on eligibility factors is tightly bound to the purpose

of those factors. That is, "aggravating [eligibility[5]] circumstances must be construed to permit the sentencer to make a principled distinction between those who deserve the death penalty and those who do not." *Lewis* v. *Jeffers*, 497 U. S. 764, 776 (1990).

Because eligibility turns on a "yes or no" answer to a question, that question must be one which is susceptible to such an answer. Because all murders are heinous, asking a jury whether the murder is "especially heinous" fails to provide a principled distinction. See *Maynard* v. *Cartwright*, 486 U. S. 356, 364 (1988). For eligibility circumstances to work properly, the jury must be asked to find a fact true or false, and not simply to place the crime on an unmarked continuum of heinousness, with no concrete indication as to where the line is drawn between "especially heinous" and "ordinarily heinous."

Narrowing the eligible class requires a factual determination, but the fact need not be externally visible or mathematically precise. The defendant's state of mind can be a valid eligibility circumstance, since state of mind is a factual determination, albeit a difficult one. See *Arave* v. *Creech*, 507 U. S. 463, 473-474 (1993).

D. Mitigation: Necessary for Individualization.

The most obvious answer to the *Furman* problem of arbitrariness and discrimination would appear to be mandatory sentencing. However, *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) struck down mandatory sentencing. The *Woodson* plurality gave three reasons for this holding: collective legislative judgment, see *id*., at 298-299, the inevitable widespread nullification of a sweeping, mandatory death penalty for first-degree murder, *id*., at 291-296, and an independent constitutional imperative of individualized sentencing. The

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5. Much of the confusion in this area stems from the use of the term "aggravating circumstances" for both eligibility factors and discretionary sentencing considerations.

plurality all but admitted the latter had no basis in precedent, see *id*., at 304 ("enlightened policy rather than a constitutional imperative"), but decided to declare the imperative nonetheless. *Id*., at 303-305.

The nullification point is far and away the strongest support for the *Woodson* rule. If the system has no formal outlet for the extension of mercy in appropriate cases, the operators of the system will find informal ways. This went on for centuries in England, from the faking of reading tests for "benefit of clergy," see F. Maitland & F. Montague, A Sketch of English Legal History 72-73 (Colby ed. 1915), to bogus insanity verdicts, which dropped sharply upon the abolition of capital punishment. See J. Wilson, Thinking About Crime 187 (1976). Justice and equality are better served by keeping the inevitable mercy decision out in the open and permitting the state to structure it. See Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95, 109 (1987).

The final choice between life imprisonment and death is fundamentally different from the eligibility determination. See *Ramos* quote, *supra*, at 10-11. While the Constitution requires the eligibility determination to be based on legislatively specified facts, see *supra*, at 13, the Constitution has been construed to require that the sentencer be permitted to consider "any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U. S., at 604 (plurality opinion).

Lockett is based on a conviction that the complexities of human behavior preclude any attempt to list the factors that ought to inform the final sentencing decision. An attempt to limit the factors in mitigation, the plurality believed, creates

"the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id*., at 605.[6]

E. Aggravation: The Indispensable Flip Side.

If the final stage of capital sentencing is truly to be individualized, mitigating circumstances cannot be considered in a vacuum. Whether the factors proffered in mitigation *really do* "call for a less severe penalty" necessarily depends on the relevant factors in aggravation.

A hypothetical will illustrate. A and B are both convicted of rape and murder, a death-eligible offense. They are equally culpable of the crime. They both offer the same mitigation: they were drunk. Both have criminal records, so neither can claim lack of a record as mitigation. A's record, however, is a single prior conviction of unarmed robbery, while B has committed numerous previous rapes, including exceptionally brutal and sadistic acts.

Prior conviction of a violent felony less than murder is generally not an eligibility circumstance. Indeed, in *Zant* v. *Stephens* the state court had previously stricken such a circumstance as unconstitutionally vague. 462 U. S., at 867. Yet if the criminal record cannot be considered as aggravating, the sentencing profiles of A and B are badly skewed. They appear to be equally deserving of the death penalty, when in fact B is far more deserving.

For mitigating evidence to perform its accuracy-enhancing function, it must be presented and considered in the context of aggravating evidence. Mitigation without aggravation makes

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6. The *Lockett* opinion does not explain why the people of a State cannot collectively decide, through their legislature, that a factor such as voluntary intoxication is simply not mitigating. Cf. 4 W. Blackstone, Commentaries 25-26 (1st ed. 1769); *Montana* v. *Egelhoff*, 518 U. S. 37, 44-45 (1996) (plurality opinion); *id*., at 57-59 (Ginsburg, J., concurring in the judgment). Under *Lockett* and *Mills* v. *Maryland*, 486 U. S. 367 (1988), each juror must decide that individually.

no more sense than peaks without valleys. Just as accuracy is enhanced by consideration of all relevant mitigating factors, so it is enhanced by consideration of all relevant aggravating factors. See *Tuilaepa*, 512 U. S., at 984 (Stevens, J., concurring in the judgment).

Time and again, this Court has reiterated the legitimacy of broad aggravating circumstances in cases where the jury is instructed to "weigh." In *Ramos*, quoted *supra*, at 10-12, the factor of future dangerousness was upheld. *Payne* v. *Tennessee*, 501 U. S. 808 (1991) permits consideration of the impact on the victim.

Both *Ramos* and *Payne* upheld, under statutes which instruct juries to "weigh," the consideration of aggravating factors which would fail the test of *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) and *Maynard* v. *Cartwright*, *supra*. These latter cases struck down the *eligibility* factors of "outrageously or wantonly vile" and "especially heinous," because every murder is vile and heinous, and the additional adverbs provide no meaningful place to draw the line. See *Maynard*, 486 U. S., at 364.

By the same logic, "future dangerousness" would fail as an eligibility circumstance, because virtually all murderers will be dangerous, although some will be more so than others. Yet *Ramos* expressly upheld it as a "weighing" circumstance. Victim impact would similarly fail *Godfrey*/*Maynard*. All murders have victims and virtually all victims leave survivors. See *Payne*, 501 U. S., at 838 (Souter, J., concurring). The prosecutor in *Payne* argued that victim impact was relevant to the "especially heinous" factor in the sentencing phase, see *id*., at 815-816, but an eligibility finding under this circumstance based on victim impact alone would unquestionably be insufficient. Thus *Payne* upholds a "weighing" circumstance which is broader and more diffuse than would be allowed for an eligibility circumstance. If the *Godfrey* standard applied, this Court "would not have decided *Payne* as [it] did." *Jones* v. *United States*, 527 U. S. 373, 401 (1999) (plurality opinion).

In *Barclay* v. *Florida*, 463 U. S. 939, 946 (1983), the trial judge considered Barclay's criminal record as an aggravating circumstance, even though Florida law does not permit this. Part II B of the plurality opinion addresses the question of whether Florida law could have permitted his criminal record to be considered. It holds that the principle of broad aggravating circumstances set forth in *Zant* v. *Stephens* applies equally to Florida. *Barclay*, *supra*, at 956.[7] "Criminal record" is a valid sentencing criterion, even though it is too vague to be a valid eligibility circumstance. Cf. *Zant*, 462 U. S., at 867-868. The *Barclay* concurrence, by the author of *Zant*, is in accord on this point. *Barclay*, *supra*, at 966-967, 969-970 (Stevens, J., concurring in the judgment).

As of 1991, then, the law seemed settled. Once the eligibility hurdle is cleared, the Constitution does not limit sentencers to considering aggravating factors which meet the specificity requirement of *Godfrey*/*Maynard.* This principle applies to all state systems, whether they instruct juries to "weigh," as in *Ramos*, *Payne*, and *Barclay*, or whether they do not, as in *Zant* v. *Stephens*.

F. Reconciling Stringer with Ramos.

The one flaw in this otherwise clear crystal is a single, citeless sentence in *Stringer* v. *Black*, 503 U. S., at 235: "A vague aggravating factor used in the weighing process is in a sense worse [than a vague eligibility factor], for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance."

This sentence could be misinterpreted to overrule the "myriad of factors" holding of *Ramos*. See *supra*, at 10-12. However, it could not mean that, because such a holding would have improperly created a new rule on habeas corpus. See

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7. The harmless error portion of *Barclay* is discussed *infra*, at 24-25.

Butler v. *McKellar*, 494 U. S. 407, 412 (1990) (overruling precedent is "new rule"). If it does not, then it must be reconciled with *Ramos*.

Stringer and *Ramos* cannot be distinguished on the ground that "future dangerousness" is somehow less vague than "especially heinous." As noted earlier, both factors ask the sentencer to place the crime or criminal on a continuum without objective markings. Furthermore, *Ramos*' "myriad of factors" discussion and extensive reliance on *Zant* v. *Stephens* preclude any distinction on this basis.

The two cases also cannot be distinguished on the ground of "weighing" versus "nonweighing." At the time *Ramos* was decided, the California system was *more* of a strict "weighing" process than the Mississippi system. Mississippi juries are told to further consider whether the aggravating circumstances are insufficient to warrant death despite their outweighing the mitigating, *Coleman* v. *State*, 378 So. 2d 640, 646-647 (Miss. 1979), while California juries at the time of *Ramos* were given no such instruction. See *Boyde* v. *California*, 494 U. S. 370, 373, n. 1 (1990) (quoting pre-1986 instruction).

The only distinctions which make a difference, then, are the breadth of factors considered on the aggravating side of the scale and the manner in which those factors are screened. In Mississippi, a statutory list is presented to the jury for unanimous findings of true or false. Only those "found to exist" are permitted to be considered. Miss. Code Ann. § 99-19-101(2)(c) (1992). In California, the jurors make no findings on the second-stage factors, and they need not agree on them. *People* v. *Cox*, 53 Cal. 3d 618, 692, 809 P. 2d 351, 395 (1991). Indeed, the factor of "circumstances of the crime," see Cal. Penal Code § 190.3(a), is not susceptible to a true or false answer.

This distinction is reinforced by *Stringer*'s description of the evil it sought to avoid: "the risk that the jury will treat the defendant as more deserving of the death penalty than he might

otherwise be by relying upon the *existence* of an *illusory* circumstance." *Stringer*, 503 U. S., at 235 (emphasis added). This creates a possibility of "randomness." *Id*., at 236, Why is this a risk in Mississippi and not in California?

Suppose two defendants, A and B, are tried for similar murders. Both crimes are heinous. In Mississippi, both juries are asked to decide, yes or no, whether the crimes are "especially heinous." With no further guidance, A's jury may say yes and B's may say no, based on differences in the jurors' sensitivity rather than an actual difference in the crimes. The circumstance was "found to exist" in A's case but not B's. A's jury would therefore include heinousness on "death's side of the scale," and B's would be instructed not to. This is "randomness," causing A to be considered "more deserving of the death penalty" than B, for no valid reason.

In Georgia and California, this randomness is absent. Both juries will consider the heinousness of the crime. In Georgia, they do so because the final phase is open to all aggravating circumstances. In California, they do so because heinousness is a "circumstance of the offense." All murders are heinous, and the *degree* of heinousness is a proper consideration among the "myriad of factors" permitted under *Ramos*. There is no illusory circumstance. There is no randomness. Both juries give "weight" to the heinousness in the proportion they believe it deserves.

The difference is "the different role played by aggravating factors." *Stringer*, 503 U. S., at 232. In Florida and Mississippi the finding of truth of the eligibility factors is the exclusive getaway to the prosecution's case for penalty, while in Georgia and California, the eligibility factors do not play this role exclusively.

G. Tuilaepa and Jones.

This Court examined the California system again and reaffirmed *Ramos* in *Tuilaepa*, *supra*. California takes a middle

course to aggravating circumstances in the selection decision, broader than Florida's original limitation to the eligibility circumstances,[8] but not as broad as Georgia's wide-open rule. The aggravating circumstances, include the eligibility ("special") circumstances plus all the circumstances of the crime, previous violent crimes, and previous felony convictions. See Cal. Penal Code §§ 190.3(a), (b), (c). In some cases, the age of the defendant, § 190.3(i), could also be an aggravating factor. See *Tuilaepa*, 512 U. S., at 977. As in *Payne*, these circumstances would have failed the *Godfrey* standard if it applied. "Circumstances of the crime" is even more diffuse than the "outrageously vile" circumstance in *Godfrey*, and "criminal activity . . . which involved the use or attempted use of force or violence" is at least as vague as the "substantial history of serious assaultive criminal convictions" circumstance in *Zant* v. *Stephens*, 462 U. S., at 867. Unlike *Payne*, however, the argument "that selection factors must meet the requirements for eligibility factors" was made in *Tuilaepa*, 512 U. S., at 977, and the Court rejected it, relying primarily on *Gregg* and *Zant*. See *id*., at 978-980.

The petitioners in *Tuilaepa* relied heavily on *Stringer*, and the Court distinguished *Stringer* this way:

> "In our decisions holding a death sentence unconstitutional because of a vague sentencing factor, the State had presented a specific proposition that the sentencer had to find true or false (*e.g.*, whether the crime was especially heinous, atrocious, or cruel). We have held, under certain sentencing schemes, that a vague propositional factor used in the sentencing decision creates an unacceptable risk of randomness, the mark of the arbitrary and capricious sentencing process prohibited by *Furman* v. *Georgia*, 408 U. S. 238 (1972). See *Stringer* v. *Black*, 503 U. S. 222 (1992). Those concerns are mitigated when a factor does

8. Florida now permits victim impact evidence for selection but not eligibility. See Fla. Stat. § 921.141(7).

> not require a yes or a no answer to a specific question, but instead only points the sentencer to a subject matter. See Cal. Penal Code Ann. §§ 190.3(a), (k) (West 1988)." 512 U. S., at 974-975.

This reconciliation of *Stringer* with *Ramos* is consistent with the analysis *amicus* has presented *supra*, at 17-19. The problem with the vague circumstance in *Stringer* was not the fact that the sentencer "weighed" it but rather the fact that the question of heinousness would be considered in a case or not based on the answer to a "specific proposition" that was too vague to provide any meaningful guidance. The randomness concern is mitigated when there is no "propositional" gateway, and the system allows the sentencer to consider the factor in every case where there is evidence to support it.

The federal system goes a step further than California in broadening the selection factors, although not quite as far as Georgia. The "statutory aggravating factors" for homicide, 18 U. S. C. § 3593(a); *Jones*, 527 U. S., at 377, serve the same function as California's "special circumstances." That is, at least one must be found for eligibility, and then they carry over into selection. See *Jones*, *supra*, at 377-378. In the selection decision, the jury can also consider other relevant "nonstatutory aggravating factors," but only those identified by the Government prior to trial. See *id*., at 378, n. 2; 18 U. S. C. § 3592(c). In *Jones*, the nonstatutory aggravating factors in the kidnapping and murder of Tracie Joy McBride were her "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas" and her "personal characteristics and the effect of the instant offense on Tracie Joy McBride's family . . . ." 527 U. S., at 378, n. 3. There can be no doubt that the factors of background, personal characteristics, and effect of the crime on the family would not meet the standard for eligibility factors. These factors were not unconstitutionally overbroad in *Jones*, however, because the standard of overbreadth for a factor that "is important only for selection purposes" is different. See *id*., at 401-402 (plurality opinion).

After *Tuilaepa* and *Jones*, it is no longer open to question that a jury may consider in the selection decision open-ended factors that would be too vague to serve as valid eligibility factors. This is true regardless of whether the jury is instructed to "weigh" aggravating and mitigating factors or given some other standard for decision.

III. The critical question is not whether the sentencer "weighs" but whether the substance of the stricken circumstance was proper to consider in the selection decision.

A. Zant v. Stephens.

In analyzing a contention that an invalid circumstance affected the selection process, "it is essential to keep in mind the sense in which that aggravating circumstance is 'invalid.' " *Zant* v. *Stephens*, 462 U. S 862, 885 (1983). Harmless error analysis requires an inquiry into whether the reason for a circumstance's invalidity for eligibility has any improper, harmful effect when it is considered for selection. That inquiry, in turn, requires an understanding of what properly goes into the selection decision in each jurisdiction's system. Simplistic labels such as "weighing State" will not do. As Justice Cardozo noted in *Snyder* v. *Massachusetts*, 291 U. S. 97, 114 (1934), "A fertile source of perversion in constitutional theory is the tyranny of labels."

In *Zant* v. *Stephens*, 462 U. S., at 866-867, the Georgia jury had found two aggravating circumstances: "a substantial history of serious assaultive convictions" and murder by an escaped inmate. As the Georgia Supreme Court subsequently explained, see *supra*, at 8-9, the aggravating circumstances as such are only used for the eligibility decision, while the selection decision is open to all relevant factors for both aggravation and mitigation. The state court overturned the first aggravating circumstance as impermissibly vague but affirmed the judgment. See *id*., at 867-868. Under Georgia's wide-open

aggravation rule, prior convictions can be considered in the selection decision without limit. Therefore, "the evidence of respondent's prior convictions had been properly received and could properly be considered by the jury." *Id*., at 873.

This Court distinguished the situation of aggravating circumstances which are too vague for eligibility from other kinds of "invalid" circumstances. This kind of circumstance is different from one that "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected." *Id*., at 885. This distinction anticipated *Dawson* v. *Delaware*, 503 U. S. 159, 167 (1992). The *Zant* Court also distinguished circumstances that were improperly counted as aggravating when they are irrelevant, discriminatory, or mitigating. 462 U. S., at 885. Finally, the Court distinguished the case of an aggravating circumstance based on inaccurate information. *Id*., at 887, n. 24. This distinction anticipated *Johnson* v. *Mississippi*, 486 U. S. 578, 590, and n. 9 (1988), where the evidence "ha[d] been revealed to be materially inaccurate" when a prior conviction used as an aggravating circumstance was set aside.

Zant "involve[d] a statutory aggravating circumstance, invalidated by the State Supreme Court on grounds of vagueness, whose terms plausibly described aspects of the defendant's background that were properly before the jury and whose accuracy was unchallenged." 462 U. S., at 887. Under these circumstances, the only thing that was before the jury in its selection decision that did not belong there was "the statutory label 'aggravating circumstance.' " *Id*., at 888. There was no "thumb [improperly] on death's side of the scale," cf. *Tuilaepa* v. *California*, 512 U. S. 967, 986 (1994) (Blackmun, J., dissenting), but only a cellophane wrapper. The *contents* of the wrapper were *properly* "on death's side of the scale." *Zant* held that "it is not constitutional error for the trial judge to place an incorrect label the prosecutor's evidence . . . ." *Id*., at 983 (Stevens, J., concurring in the judgment).

B. The "Weighing State" Cases.

In footnote 12, *Zant* v. *Stephens*, 462 U. S., at 873-874, distinguished the decisions of courts of four states that set aside death sentences upon a finding of one invalid aggravating circumstance.

> "[I]n each of these States, not only must the jury find at least one aggravating circumstance in order to have the power to impose the death sentence; in addition, the law requires the jury to weigh *the* aggravating circumstance against the mitigating circumstances when it decides whether or not the death penalty should be imposed. See Ark. Stat. Ann. § 41-1302(1) (1977); N. C. Gen. Stat. § 15A-2000(b) (1978); Tenn. Code Ann. § 39-2-203(g) (1982); Wyo. Stat. § 6-2-102(d)(i) (1983)." (Emphasis added).

The *Zant* Court referred back to this footnote in reserving judgment on whether its rule applied to such a statute. See 462 U. S., at 890.

Every one of the statutes cited not only required "weighing" but also limited the aggravating circumstances in the selection decision to the same list used for eligibility. The conflation of these two distinct aspects of death penalty statutes has confused the issue ever since. See, *e.g.*, *Williams* v. *Calderon*, 52 F. 3d 1465, 1478, and n. 13 (CA9 1995) (en banc) (noting split of authority when statute has only one of these features).

Two weeks after *Zant*, *Barclay* v. *Florida*, 463 U. S. 939 (1983) addressed harmless error analysis in a state where the sentencer "weighs" and aggravating selection circumstances are limited to the eligibility circumstances. See *id.*, at 954 (plurality opinion). The judge considered a nonstatutory aggravating circumstance that was improper under state law, even though it would have been constitutional to consider the eligibility decision. See *id*., at 956. The error was harmless given the presence of valid aggravating circumstances and absence of any mitigating circumstances. See *id*., at 955, 958; see also *id*., at

967-968 (Stevens, J., concurring in the judgment). This is, in effect, "reweighing," in that the appellate court determines that anything outweighs nothing.

In *Maynard* v. *Cartwright*, 486 U. S. 356, 365 (1988), a death sentence was overturned without harmless error analysis when one of the aggravating circumstances was found insufficient under *Godfrey*. This holding was based on state practice, see *ibid*., and not on the characteristics of the state's capital sentencing system.

The term "weighing State" makes its debut in *Clemons* v. *Mississippi*, 494 U. S. 738, 749 (1990). The *Clemons* Court distinguished the Mississippi system from the Georgia system by both the continued role of the eligibility factors in the selection decision and the fact that the sentencer weighs "any mitigation factors against the aggravating circumstances." *Id*., at 745. A footnote at that point quotes the statute, which limits the aggravating selection factors to the same list used for eligibility. Under this system, an aggravating circumstance that is too vague might be salvaged by harmless error analysis, *i.e.*, a finding that the jury would have found it if it had been properly narrowed. See *id*., at 751. Otherwise, the defendant is entitled to a reweighing of the "mix" without that circumstance. *Id*., at 752.

Parker v. *Dugger*, 498 U. S. 308, 318-319 (1991) gives us this definition of a "weighing State": "the death penalty may be imposed only where *specified* aggravating circumstances outweigh all mitigating circumstances. Fla. Stat. § 921.141(3) (1985); *McCampbell*, 421 So. 2d, at 1075; *Jacobs*, 396 So. 2d, at 718." (Emphasis added). The citations are significant here. *McCampbell* v. *State*, 421 So. 2d 1072, 1075 (Fla. 1982) (*per curiam*) holds on the cited page that it is error for the sentencer to consider in the selection decision any aggravating factor not on the statutory list. It says nothing about the process being a "weighing" process as opposed to some other kind. *Jacobs* v. *State*, 396 So. 2d 713, 718 (Fla. 1981) holds on the cited page that the sentencer must consider nonstatutory mitigating factors.

Stringer v. *Black*, 503 U. S. 222, 229-230 (1992) defines "weighing States" with reference to the factors considered in the selection decision, distinguishing the Georgia system in *Zant* on the ground that the sentencer there " ' "takes into consideration *all* circumstances before it." ' " (Quoting *Zant*, quoting in turn Georgia Supreme Court's response, emphasis added). In later cases, though, we see the label "weighing State" take on a life of its own, divorced from the reason why this type of harmless error analysis is different in Georgia-type systems than it is in Florida-type systems. *Espinosa* v. *Florida*, 505 U. S. 1079, 1081 (1992) refers to "a State where the sentencer weighs . . ." as the defining criterion. See also *Sochor* v. *Florida*, 504 U. S. 527, 532 (1992).

Richmond v. *Lewis*, 506 U. S. 40 (1992) strays the furthest afield, possibly because Arizona did not contest its "weighing State" status. See *id*., at 47. The statute in Arizona at the time required the court to "take into account the aggravating and mitigating circumstances . . . ." *Ibid*. (quoting Ariz. Rev. Stat. Ann. § 13-703(E) (1989)). *Richmond* held that this statute required the aggravating and mitigating circumstances to be considered against each other, and hence weighed. See *id*., at 47-48. It does, but after *Lockett* and certainly after *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), all sentencers must weigh. As discussed *supra*, at 15-17, the only intelligible way to consider mitigating circumstances is to consider them in the context of opposing aggravating circumstances.

The Georgia system in *Zant* is the exemplar of a "nonweighing State," yet the jury in that case was instructed to " 'consider all facts and circumstances in extinuation [sic], mitigation and aggravation of punishment . . . .' " *Zant* v. *Stephens*, 456 U. S. 410, 411, n. 1 (1982). The difference, if any, between the decision process in *Zant* and the one in *Richmond* is too thin to support any major difference in harmless error analysis. Arizona judges who "take into account the aggravating and mitigating circumstances" are not engaged in a different mental process from that of Georgia juries who

"consider all facts and circumstances in . . . mitigation and aggravation . . . ." The key difference between the Georgia and Arizona systems lies in what the sentencer considers, not how. That is also the key similarity between Arizona and Florida.

"There is a simple and logical difference between rules that govern *what factors* the jury must be permitted to consider in making its sentencing decision and rules that govern *how* the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle* v. *Parks*, 494 U. S. 484, 490 (1990) (emphasis added). Florida and Georgia differ on both these points, but the label "weighing State" seizes on the wrong one. The Third Circuit rejected the tyranny of labels in *Flamer* v. *Delaware*, 68 F. 3d 736, 749 (1995) (en banc). The fact that Delaware permitted consideration of all relevant aggravating facts made the *Zant* v. *Stephens* rule applicable, despite the fact that the statute instructs the sentencer to "weigh." The Illinois Supreme Court came to the same conclusion on a similar statute in *People* v. *Pasch*, 604 N. E. 2d 294, 317 (1992). Unfortunately, this Court's review and resolution of the issue was blocked by the defendant's death and resulting mootness. See *Pasch* v. *Illinois*, 510 U. S. 910, 910-911 (1993).

The label "weighing State" is misleading and should be abandoned. The question under *Zant* v. *Stephens* is whether the substance of the stricken eligibility circumstance was nonetheless properly considered in the sentencer's selection decision.

IV. The California Supreme Court correctly applied *Zant* v. *Stephens* to this case.

The California Supreme Court does not have a rule of automatic affirmance in cases where a special circumstance has been held invalid but valid circumstances remain. Cf. *Clemons* v. *Mississippi*, 494 U. S. 738, 752 (1990). Instead, the court examines each case on its facts. The most important element in these examinations is whether the premise of the *Zant* v.

Stephens, 462 U. S. 862 (1983) rule is true. That is, were the facts underlying the stricken circumstance proper subjects for consideration by the jury in the selection phase, so that nothing but a statutory label was wrongly added to what was rightly on the aggravating side of the scale?

In *People* v. *Wade*, 44 Cal. 3d 975, 998, 750 P. 2d 794, 807 (1988), the jury had found both "a 'heinous' murder and a 'torture' murder." As noted *supra*, at 7, n. 3, these two special circumstance are largely redundant. The California Supreme Court held that evidence supporting the stricken circumstance was equally admissible for the valid one, and that it was also proper to consider the evidence as "circumstances of the crime." See *ibid*. Because nothing but the label was improper, *Zant* v. *Stephens* applied.

The present case is similar. Defendant argued that all four special circumstances were invalid, but the court *sua sponte* also considered whether the finding of two valid and two invalid circumstances was prejudicial. See *People* v. *Sanders*, 51 Cal. 3d 471, 520, 797 P. 2d 561, 589 (1990). With regard to the heinous murder circumstance, the court noted that the prosecutor did not emphasize the finding it was especially heinous, see *id*., at 521, 797 P. 2d, at 590, what this Court would later call its "propositional" content. See *supra*, at 20. Instead, the emphasis was on the circumstances of the crime, under which the same facts were admissible and proper subjects for consideration in the selection decision. Similarly, for the technically invalid burglary circumstance, its facts were essentially the same as the proper robbery circumstance. See *ibid*. They are also circumstances of the crime.

The Court of Appeals in this case criticized the California Supreme Court for not using the term "harmless error" or expressly citing the "beyond a reasonable doubt" standard of *Chapman* v. *California*, 386 U. S. 18 (1967). See *Sanders* v. *Woodford*, 373 F. 3d 1054, 1064 (CA9 2004). *Zant* v. *Stephens* does not use these terms, either. *Zant* is based on separate consideration of the eligibility and selection decisions. The

jury's finding of a vague but superfluous circumstance at the eligibility decision does not violate any constitutional right of the defendant, because he has been placed into the narrowed, death-eligible class by other, valid findings. When nothing but a label carries forward to the selection decision, and the substance of the vague circumstance is properly considered anyway, *Zant* holds that "any possible impact [of the label] cannot fairly be regarded as a constitutional defect in the sentencing process." 462 U. S., at 889.

Arguably, at least, *Zant* is not a case of harmless error but rather a case where there was no federal constitutional error at all. Alternatively, it could be taken as defining a set of cases where the error is *per se* harmless. Either way, there is no need to recite the *Chapman* litany.

The Court of Appeals in this case held that the California Supreme Court's invocation of *Zant* was error, because the Court of Appeals concluded that California is a "weighing State" to which *Zant* does not apply. See *Sanders*, 373 F. 3d, at 1064. This premise was based on a belief that nonweighing States are limited to those where the scope of aggravating factors at the selection decision is "boundless." See *id*., at 1062. As we have explained, this narrow interpretation of *Zant* is erroneous.

In the present case, as in every case where it applies *Zant*, the California Supreme Court examined the evidence supporting the stricken special circumstance to see that it was admissible and that the facts were proper subjects for consideration under a valid special circumstance, a nonpropositional aggravating circumstance, or both. Where this condition is met, the rule of *Zant* applies, and there has been "no constitutional defect in the sentencing process." 462 U. S., at 889.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed and the sentence of death reinstated.

June, 2005

Respectfully submitted,

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