Pace Law Review

Volume 12
Issue 3 *Fall 1992*

Article 3

September 1992

Unconstitutional Jury Instructions in Death Penalty Cases - Was the Missouri Supreme Court's Reliance on Walton Correct in Feltrop v. Missouri?

Daniel Eric Estrin

Notes & Comments

Unconstitutional Jury Instructions In Death Penalty Cases — Was The Missouri Supreme Court's Reliance On *Walton* Correct In *Feltrop v. Missouri*?

I. Introduction

Beginning with the holding in *Furman v. Georgia*,[1] the United States Supreme Court has been diligent in insisting that states apply their capital punishment statutes in ways that minimize arbitrary and capricious sentences.[2] As the Court has be-

---

1. 408 U.S. 238, 286 (1972). *See infra* notes 20-23 and accompanying text.

2. Maynard v. Cartwright, 486 U.S. 356, 362 (1988); Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980); Proffitt v. Florida, 428 U.S. 242, 258 (1976); Gregg v. Georgia, 428 U.S. 153, 189, 193 (1976); Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Furman v. Georgia, 408 U.S. 238, 291-95 (1972) (Brennan, J., concurring). The states which authorize capital punishment are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wyoming. *See* Whitmore v. Arkansas, 495 U.S. 149, 170 n.1 (1990) (Marshall, J., dissenting) (citing BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, BULLETIN, CAPITAL PUNISHMENT 1988 5 (1989); Linda E. Carter, *Maintaining Systematic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95, 113-14 (1987)). Of these, only Alabama (9), Arizona (1), Arkansas (3), Delaware (1), Florida (27), Georgia (15), Illinois (1), Indiana (2), Louisiana (20), Mississippi (4), Missouri (6), Nevada (5), North Carolina (4), Oklahoma (3), South Carolina (4), Texas (46), Utah (3), Virginia (13) and Wyoming (1) have actually executed prisoners since 1976 (number of executions in parentheses). Katherine Bishop, *Foes of Execution Fear California May Set Tone*, N.Y. TIMES, April 21, 1992, at A14. California is not listed in this source as having executed anyone because its first execution took place on the same day that the article was released. *Id.* Two days later, on April 23, 1992, Texas executed its 47th prisoner bringing

come increasingly conservative,[3] however, there has been a diminution in the once-thought untouchable safeguards established by the Court in *Furman* and its progeny.[4] The most recent example of this erosion is the United States Supreme Court's refusal to grant certiorari in *Feltrop v. Missouri*.[5]

The United States Supreme Court's denial of certiorari in *Feltrop v. Missouri*[6] is an example of the Rehnquist Court's refusal to apply its own precedent to protect individual rights in the context of the death penalty. In *Feltrop*,[7] the Missouri Supreme Court affirmed a trial court's denial of a post-sentencing motion for reduction of sentence made by the defendant.[8] In his motion, the defendant argued that United States Supreme Court precedent mandates that when a jury uses the "depravity of mind" aggravating factor[9] as a basis for imposing the death penalty, the judge must provide a limiting instruction designed to combat the inherent vagueness of that factor.[10] Despite acknowl-

---

the national total to 170 executions since 1976. *See Another U.S. Execution Amid Criticism Abroad*, N.Y. TIMES, April 24, 1992, at B7.

3. Since 1980, the following changes have occurred on the United States Supreme Court: In 1981, Sandra Day O'Connor replaced Justice Potter Stewart. In 1986, Antonin Scalia became an Associate Justice on the Court when Chief Justice Warren Burger retired. President Reagan appointed Justice William Rehnquist to the Chief Justice position. In 1988, Anthony Kennedy replaced Justice Lewis Powell. In 1990, David Souter replaced Justice William Brennan. In 1991, Clarence Thomas replaced Justice Thurgood Marshall. *See The Supreme Court: Changing Image of the Court*, S.F. CHRON., Oct. 21, 1991, at A10. *See also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW lxxxi (1986).

4. *See infra* notes 20-73 and accompanying text.

5. While it is understood that "a denial [of certiorari] carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review," Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950), it is striking that the Court would deny certiorari to a case which violated its recent ruling in Clemons v. Mississippi, 494 U.S. 738 (1990). See *infra* notes 95-96 and accompanying text.

6. 111 S. Ct. 2918 (1991).

7. Feltrop v. Missouri, 803 S.W.2d 1 (Mo. 1991).

8. *Id.* at 5.

9. MO. REV. STAT. § 565.032.2(7) (1986) ("The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind."). "Aggravation" is "[a]ny circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself." BLACK'S LAW DICTIONARY 65 (6th ed. 1990) (citing People v. Robinson, 416 N.E.2d 793, 799 (Ill. 1981)). Aggravating and mitigating factors which may be considered are provided for the sentencer in capital punishment statutes. *See, e.g.*, MO. REV. STAT. § 565.032.2, *infra* note 138.

10. The Supreme Court has held that if a state wishes to impose the death penalty

edging that the trial court had erred in its jury instruction for this very reason,[11] the Missouri Supreme Court refused to find that the defendant had been unconstitutionally sentenced to death.[12]

The court reasoned that it was presumed that the trial judge considered the limiting instruction when he *evaluated* the defendant's Motion for Reduction of Sentence, and therefore *Walton v. Arizona*,[13] was controlling. In *Walton*, the United States Supreme Court held that where the death sentence is imposed by the trial judge, the judge need not expressly state that he has relied upon the constitutionally necessary limiting instruction,[14] because "trial judges are presumed to know the law and to apply it in making their decision."[15]

Clemons v. Mississippi,[16] decided during the same term as *Walton*, precludes the Missouri Supreme Court's reasoning. In *Clemons*, the United States Supreme Court held that once a defendant is sentenced to death by an erroneously instructed jury, a reviewing court can resentence the defendant to death only if it clearly and expressly engages in either a harmless-error analy-

---

on murderers:

> [I]t has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a state's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion.". . . A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman."

Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980) (citing Gregg v. Georgia, 428 U.S. 153, 196 n.47 (1976)). In Maynard v. Cartwright, 486 U.S. 356, 363-64 (1988), the Court reiterated that if an aggravating circumstance is vague on its face, the sentencer should be given a limiting instruction so that it may have guidance in determining the meaning of "especially heinous."

11. *Feltrop*, 803 S.W.2d at 14-15. The court stated that it:

> [a]cknowledges that the language "depravity of mind . . . outrageously or wantonly vile, horrible or inhuman," without further definition, is too vague to provide adequate guidance to a sentencer . . . . The problem in this case rests upon the fact that the limiting definition was not given to the jury. In the absence of additional facts and circumstances revealed in the record in this case, vacation of the sentence might be required. *Walton*, however, indicates otherwise.

Id.

12. *See infra* notes 144-60 and accompanying text.

13. 110 S. Ct. 3047 (1990).

14. *See supra* note 10.

15. *Walton*, 110 S. Ct. at 3057.

16. 494 U.S. 738 (1990).

sis[17] or a reweighing of permissible aggravating and mitigating circumstances.[18] The *Clemons* holding was virtually ignored by both the Missouri Supreme Court and the United States Supreme Court.

This Comment advocates that the Court should have granted certiorari in the *Feltrop* case to clarify the problems identified by Justice Thurgood Marshall in his dissent to the denial of certiorari.[19] Part II discusses the Missouri Supreme Court's decision in *Feltrop* and the Supreme Court's decision in *Clemons*, *Walton* and relevant cases preceding these decisions. Part III analyzes the *Feltrop* decision, focusing on the legal reasoning of the *Feltrop* court. Part IV concludes that the Missouri Supreme Court in *Feltrop* erred in its interpretation and application of the Court's *Walton* decision, and that the *Clemons* decision should have been the controlling one.

II. Background

A. Furman v. Georgia

In *Furman v. Georgia*,[20] the Court held that the Georgia and Texas capital punishment statutes violated the "Cruel and Unusual Punishment" Clause of the Eighth Amendment because they were being applied in an arbitrary and capricious manner.[21]

---

17. An error is "harmless" if a reviewing court, after viewing the entire record, determines that no substantial rights of the defendant were affected and that the error did not influence or had only very slight influence on the verdict. BLACK'S LAW DICTIONARY 718 (6th ed. 1990) (citing U.S. v. McCrady, 774 F.2d 868, 874 (8th Cir. 1985)). A "harmless error" is additionally defined as "an error committed in the progress of the trial below, but which was not prejudicial to the rights of the party assigning it, and for which, therefore, the court will not reverse the judgment . . . ." BLACK'S LAW DICTIONARY 543 (6th ed. 1990).

18. *Clemons*, 494 U.S. at 750-55.

19. 111 S. Ct. 2918 (1991).

20. 408 U.S. 238 (1972).

21. *Id.* at 274-77. The Georgia statute provided that:

> The punishment for persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases: If the jury trying the case shall so recommend, or if the conviction is founded solely on circumstantial testimony, the presiding judge may sentence to confinement in the penitentiary for life . . . .

GA. CODE ANN. § 26-1005 (Supp. 1971). The Texas statute provided that:

> a person guilty of rape shall be punished by death or by confinement in the penitentiary for life or for any term of years not less than five.

The Court found that there was no way to distinguish those who received the death penalty from those who did not.[22] The Court's concerns about the erratic imposition of the death sentence by sentencing authorities who have complete discretion over defendants' lives were instrumental to the downfall of the statutes.[23] On the same day that *Furman* was decided, many other state death penalty statutes were invalidated on the same grounds.[24]

B. Gregg v. Georgia

In *Gregg v. Georgia*,[25] the Court ended the four-year *Furman* moratorium on capital punishment, holding that the prohibition against cruel and unusual punishment was not breached by the imposition of the death penalty after a conviction for murder under a state statute requiring at least one statutorily specified aggravating circumstance[26] to be found beyond

---

TEX. PENAL CODE ANN. art. 1189 (1961).

22. *Furman*, 408 U.S. at 294 (1972) (Brennan, J., concurring).

23. *Id.* Justice Brennan noted that at the time of the *Furman* decision, "[n]o one [had] yet suggested a rational basis that could differentiate . . . the few who die[d] from the many who [went] to prison." *Id.*

24. *See, e.g.*, Moore v. Illinois 408 U.S. 786 (1972); Stewart v. Massachusetts 408 U.S. 845 (1972). The Court also issued many memorandum decisions holding that the death penalty statutes in Alabama, Arizona, Connecticut, Delaware, Florida, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Virginia and Washington were invalid. 408 U.S. at 932-41 (1972).

25. 428 U.S. 153 (1976).

26. *See* GA. CODE ANN. § 17-10-30(b) (1981). The ten statutory aggravating circumstances under which a death sentence may be imposed in Georgia are:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree; (3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person; (4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value; (5) The murder of a judicial officer, former judicial officer, district attorney or solicitor was committed during or because of the exercise of his official duties; (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person; (7) The offense of murder, rape, armed

a reasonable doubt.[27] The Court held that the concerns expressed in *Furman* that the death penalty not be imposed arbitrarily or capriciously could be met by a carefully drafted statute ensuring that the sentencing authority is given adequate information and guidance.[28] The Court found the Georgia statute to be constitutional because the statute's procedures, on their face, satisfied the concerns of *Furman*.[29] That is, before the death penalty could be imposed there had to be specific jury findings as to the circumstances of the particular case and the character of the defendant.[30] In addition, the statute provided for an automatic appeal to the Georgia Supreme Court for a check on proportionality.[31] This finding of constitutionality ended a four-year period during which state legislatures were uncertain as to what the Supreme Court would require to uphold a death penalty statute. The *Gregg* decision gave states the guidance they needed in drafting capital punishment statutes that would withstand scrutiny under the Eighth and Fourteenth Amendments as interpreted by the Court.[32]

---

robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim; (8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties; (9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer, or place of lawful confinement; or (10) The offense of murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Id. The trial judge must impose the sentence recommended by the jury. *Gregg*, 428 U.S. at 165-66.

27. *Gregg*, 428 U.S. at 196-207. The term "beyond a reasonable doubt" means that the question at issue has been fully satisfied to a moral certainty. The phrase is the equivalent of the words clear, precise and indubitable. BLACK'S LAW DICTIONARY 161 (6th ed. 1990).

28. *Gregg*, 428 U.S. at 188-95.

29. *Id.* at 196-207.

30. *Id.*

31. *Id.*

32. *See* Rhonda G. Hartman, *Critiquing Pennsylvania's Comparative Proportionality Review in Capital Cases*, 52 U. PITT. L. REV. 871, 874 (1991). "While the Court did not intimate that these procedures were the only acceptable ones, it approved the specifics of the Georgia statute, which gave the states a clear direction in which to proceed." *Id.*

C. Proffitt v. Florida

In *Proffitt v. Florida*,[33] the Court held that facially vague death penalty statutes must be considered as they have been construed by their jurisdiction's high court and therefore, it is possible for a facially vague statute to be upheld.[34] The Florida statute[35] called for the jury to render an advisory verdict and for the trial judge to be the final sentencer.[36] Before sentencing, the judge was required to weigh aggravating and mitigating circumstances,[37] thus forcing the court to focus on the circumstances of the crime and the character of the defendant. This reduced the fears expressed in *Furman*. Further protection against *Furman* concerns existed in Florida's requirement that the state supreme court review the trial courts' decisions for proportionality of sentencing within the state.[38]

---

33. 428 U.S. 242 (1976).

34. *Id.* at 255.

35. FLA. STAT. ANN. § 921.141 (West 1976).

36. See *id.* § 921.141(2).

> After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5); (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Id.

> Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances . . . .

Id. § 921.141(3).

37. *Id.*

38. See *id.* § 921.141(4).

> The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

Id.

D. Jurek v. Texas

In *Jurek v. Texas*,[39] the defendant challenged the constitutionality of the Texas death penalty statute[40] which was enacted after *Furman*. The defendant argued first, that arbitrariness still pervaded the entire Texas criminal justice system in violation of *Furman*.[41] The Court rejected this argument, stating that the defendant had misinterpreted *Furman*.[42] Secondly, the defendant argued that because the statute required the jury to determine whether the defendant was likely to commit violent crimes in the future, it was unconstitutionally vague on its face. The defendant argued that it was impossible to determine what any person's future conduct might be.[43] The defendant's contention that this requirement could lead to arbitrary and capricious imposition of the death sentence was rejected by the Court.[44] The Court held that a state statute requiring the jury to consider the likelihood that the defendant would commit future violent criminal acts was not void under the Eighth Amendment, and that

---

39. 428 U.S. 262 (1976).

40. TEX. CODE. CRIM. PROC. ANN. art. 37.071 (West 1976).

On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. art. 37.071(b).

If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

Id. art. 37.071(e).

The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals. . . . Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Id. art. 37.071(h).

41. *Jurek*, 428 U.S. at 274.

42. *Id.*

43. *Id.* at 274-76.

44. *Id.*

determinations as to a defendant's probable future actions are an important element in many decisions rendered by the criminal justice system.[45] Therefore, *Jurek* was held to be similar to *Gregg v. Georgia* and *Proffitt v. Florida*, in that the statute gave the sentencer — in this case the jury — guidance in determining who lives and who dies, and more importantly, why.[46]

E. Godfrey v. Georgia

In *Godfrey v. Georgia*,[47] the Court held that a death sentence imposed under a facially valid aggravating circumstance could not be upheld because the jury's verdict only stated that the murder was "outrageously or wantonly vile, horrible or inhuman."[48] The statute[49] permitted the imposition of the death sentence if a murder was "outrageously or wantonly vile, horrible or inhuman *in that it involved torture, depravity of mind or an aggravated battery to the victim.*"[50] The verdict was reversed because the jury, and perhaps more importantly, the Georgia Supreme Court, failed to apply the facts to the finding and show that the offense involved torture or an aggravated battery to the victim.[51]

The facts of the case showed that the victims had been killed instantaneously, that they were causing the defendant extreme emotional distress at the time of the murders, and that the defendant acknowledged his responsibility and the heinousness of his crimes shortly after the murder.[52] The Supreme Court's plurality opinion stated that the Georgia Supreme Court had applied an unconstitutionally arbitrary construction of the statute's language when it upheld the death sentence in this case.[53] The murders committed by the defendant could not be said to have been any more "depraved" than any other

45. *Id.*
46. *Id.* at 268-76.
47. 446 U.S. 420 (1980).
48. *Id.* at 428-29.
49. GA. CODE ANN. § 27-2534.1(b)(7) (1978).
50. *Id.*
51. *Godfrey*, 446 U.S. at 426.
52. *Id.* at 433.
53. *Id.* at 432-33.

murders.[54] Following its earlier opinions in *Furman v. Georgia* and *Gregg v. Georgia*, the Court reiterated that if a state wishes to impose capital punishment on murder defendants, it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of death.[55] The Georgia Supreme Court, in its affirmance of the death sentence,[56] merely stated that the language in the verdict "was not objectionable,"[57] and that "the evidence supported the finding of the presence of the aggravating circumstance,"[58] thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim.[59]

F. Zant v. Stephens

In *Zant v. Stephens*,[60] the Court held that in a state such as Georgia, which does not mandate that the sentencer balance aggravating circumstances against mitigating factors to determine the sentence, but uses aggravating factors only to make a defendant subject to the death penalty (a "non-weighing state"),[61] the invalidation of one of the aggravating circumstances relied on in sentencing does not automatically force an appellate court to vacate a death sentence and remand it to the jury.[62] If, after removing the invalid circumstance from the verdict, the requisite requirements are still met for death to be imposed, the appellate court could, within the limits of the Constitution, affirm

---

54. *Id.*

55. *Id.* at 427-28.

56. Godfrey v. State, 253 S.E.2d 710 (Ga. 1979).

57. *Id.* at 718.

58. *Id.*

59. *Godfrey*, 446 U.S. at 426-27.

60. 462 U.S. 862 (1983).

61. In pointing out the difference between Georgia's statute and other states' "weighing" statutes, the court's opinion cited the statutes of Arkansas (ARK. CODE ANN. § 41-1302(1) (Michie 1977)), North Carolina (N.C. GEN. STAT. § 15A-2000(b) (1978)), Tennessee (TENN. CODE ANN. § 39-2-203(g) (1982)) and Wyoming (WYO. STAT. § 6-2-102(d)(i) (1983)), and stated that as opposed to the Georgia statute: "in each of these states, not only must the jury find at least one aggravating circumstance . . . to impose the death sentence; in addition, the law requires the jury to weigh the aggravating circumstances against the mitigating circumstances when it decides whether or not the death penalty should be imposed." *Stephens*, 462 U.S. at 874.

62. *Stephens*, 462 U.S. at 873-77.

the sentence.[63] However, the Court withheld judgment on whether or not the invalidation of an aggravating circumstance would force an appellate court to vacate the sentence in a "weighing" state such as Missouri or Mississippi, in which it is statutorily mandated that the sentencer weigh the aggravating circumstance(s) against mitigating factors to make a sentencing determination.[64]

G. Maynard v. Cartwright

In *Maynard v. Cartwright*,[65] the Court held that Oklahoma's statutory aggravating circumstance allowing a jury to impose the death penalty if it found that the murder was "especially heinous, atrocious or cruel"[66] was unconstitutionally vague as applied because it did not supply the jury with guidance,[67] and because the Oklahoma Supreme Court's application of the statute in its review left too great a risk for arbitrary and capricious application of the death sentence.[68] In its determination that *Godfrey v. Georgia* was the controlling case,[69] the Court reaffirmed its holding in *Furman*, stating that:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*.[70]

At the time of the *Maynard* decision, "the Oklahoma courts had no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance."[71] In Oklahoma,

---

63. *Id.*

64. *Id.* at 890. *See generally* Fred P. Cavese, Note, Clemons v. Mississippi — Shortcut to the Executioner, 22 PAC. L.J. 935 (1991) (discussing the differences between "weighing" and "non-weighing" jurisdictions).

65. 486 U.S. 356 (1988).

66. OKLA. STAT. tit. 21, § 701.12(4) (1981).

67. *Maynard*, 486 U.S. at 363-64.

68. *Id.*

69. *Id. See supra* notes 47-59 and accompanying text.

70. *Maynard*, 486 U.S. at 361.

71. Cartwright v. Maynard, 822 F.2d 1477, 1482 (10th Cir. 1987).

when situations arose in which a death sentence was found to rely on an unconstitutional aggravating factor, the death sentence was vacated and a life sentence was automatically imposed.[72] By its discussion of whether the Oklahoma courts had a method by which to "save" a death sentence that was erroneously imposed due to an unconstitutional aggravating circumstance, the Court, by implication, again gave its approval to the idea that in "non-weighing" states, a state supreme court could, by using its own "constitutionally approved" method, affirm sentences of death, even if they were imposed by a sentencer using an instruction that is facially vague under the Eighth Amendment.[73]

H. Clemons v. Mississippi

In *Clemons v. Mississippi*,[74] the defendant was convicted of capital murder for killing a pizza delivery man during a robbery.[75] During the sentencing, the prosecution introduced evi-

---

72. *Maynard*, 486 U.S. at 359.

73. It is arguable whether the Court meant to allow state high courts to affirm death sentences that were based on vague instructions to the jury. In Newlon v. Armontraut, 885 F.2d 1328 (8th Cir. 1989), Missouri argued that "consistent with *Godfrey*, the constitutional issue [was] not how an aggravating circumstance instruction is understood by the jury, but whether it is construed and applied properly by the state appellate court in its independent review of a petitioner's sentence." However, the court disagreed, stating that "[t]he language of *Godfrey* and its progeny . . . implies that the discretion of the *sentencing body* must be properly channeled." *Id.* at 1335 (emphasis in original).

74. 494 U.S. 738 (1990).

75. *Id.* at 741-42. Mississippi defines "capital murder" as:

(a) Murder which is perpetrated by killing a peace officer or fireman while such officer or fireman is acting in his official capacity . . . and with knowledge that the victim was a peace officer or fireman . . . .

(b) Murder which is perpetrated by a person who is under sentence of life imprisonment;

(c) Murder which is perpetrated by use or detonation of a bomb or explosive device;

(d) Murder which is perpetrated by any person who has been offered or has received anything of value for committing the murder, and all parties to such a murder, are guilty as principals;

(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

(f) When done with or without any design to effect death, by any person engaged

dence supporting two statutory aggravating factors: the murder occurred during the course of a robbery for "pecuniary gain" and it was an "especially heinous, atrocious or cruel" killing.[76] The prosecution extensively argued the "especially heinous" factor on the basis that the murder victim begged for his life, lived for a short time after the shooting, and arguably experienced much pain.[77] In regard to the "especially heinous" aggravating factor, the trial court instructed the jury in the bare terms of the statute.[78] The jury sentenced the defendant to death after finding the existence of both aggravating circumstances asserted by the prosecution.[79]

On appeal, the Mississippi Supreme Court found that the statute was unconstitutionally vague and provided insufficient guidance to the jury to decide whether to impose the death penalty.[80] It further acknowledged that the United States Supreme Court's decision in *Maynard v. Cartwright*[81] had invalidated Oklahoma's identical "especially heinous, atrocious or cruel" aggravating circumstance statute.[82] The court, however, attempted to distinguish *Clemons* from *Maynard*.

The court stated that in *Maynard*, the United States Supreme Court determined that Oklahoma did not have a method by which to salvage the death penalty if one aggravating circumstance was invalidated.[83] Conversely, in Mississippi, there was an established procedure that "when one aggravating circumstance is found to be invalid or unsupported by the evidence, a remaining valid aggravating circumstance will nonetheless support the death penalty verdict."[84] The court further relied on

---

in the commission of the crime of felonious abuse and/or battery of a child . . . .
(g) Murder which is perpetrated by the killing of any elected official of a county, municipal, state or federal government with knowledge that the victim was such public official.

MISS. CODE ANN. § 97-3-19 (1990).

76. *Clemons*, 494 U.S. at 742-43.

77. *Id.* at 742.

78. *Id.*

79. *Id.* at 743.

80. Clemons v. Mississippi, 535 So. 2d 1354, 1362-64 (Miss. 1988).

81. 486 U.S. 356 (1988).

82. *Clemons*, 535 So. 2d at 1361-64.

83. *Id.* at 1362.

84. *Id.*

the fact that in *Coleman v. State*,[85] it had given the "especially heinous, atrocious or cruel" factor a limited construction which it would apply when reviewing death penalty cases relying on this factor.[86] Concluding that *Maynard* was not controlling, the Mississippi Supreme Court affirmed the defendant's death sentence.[87]

The Supreme Court granted certiorari.[88] The Court held that, even in a state such as Mississippi where the sentencer weighs the aggravating circumstances against mitigating factors in deciding whether to impose the death penalty, it is constitutionally permissible for an appellate court to reweigh the aggravating and mitigating evidence.[89] The Court rejected the defendant's contention that there was an infringement on his Eighth Amendment rights because an appellate court is unable to fully consider a capital defendant's mitigating evidence which can only be truly appreciated when it is witnessed firsthand, and not when read off a cold record.[90]

The Court stated that there was "nothing in appellate weighing or reweighing . . . that is at odds with contemporary standards of fairness or that is inherently unreliable and likely to result in arbitrary imposition of the death sentence."[91] Additionally, the Court held, in what the dissent called an advisory opinion,[92] that even if Mississippi law precluded the appellate

---

85. 378 So. 2d 640 (Miss. 1979). In *Coleman*, the Mississippi Supreme Court limited this factor to apply to cases in which a murder is committed without conscience or pity and is unnecessarily torturous to the victim. *Id.*

86. *Clemons*, 535 So. 2d at 1363.

87. *Id.* at 1365.

88. Clemons v. Mississippi, 491 U.S. 904 (1989).

89. Clemons v. Mississippi, 494 U.S. 738, 744-50 (1990). This holding extended the holding from Zant v. Stephens, 462 U.S. 862 (1983), to include "weighing" states. *See supra* notes 60-64 and accompanying text.

90. *Id.* at 748-50.

91. *Id.* at 750.

92. *Id.* at 762. Justice Blackmun wrote that he dissented:

> from the majority's gratuitous suggestion that on remand the Mississippi Supreme Court itself may reweigh aggravating and mitigating circumstances and thereby salvage petitioner's death sentence. That portion of the Court's decision is pure and simple advisory opinion, something I thought this Court avoided and was disinclined to issue. . . . The Court's determination that reweighing is constitutional has no bearing upon our conclusion, which is to vacate the Mississippi judgment and remand the case for further proceedings in the state courts. Rather than awaiting, and then reviewing, the decisions of other tribunals, the Court today

court from reweighing the evidence because it infringed on the jury's function, applying harmless-error analysis[93] to the jury's decision would be a permissible alternative for the state appellate court to "save" the death sentence.[94] However, because it was unclear to the Court whether the Mississippi Supreme Court correctly applied either reweighing of aggravating and mitigating circumstances or harmless-error analysis, the case was remanded back to the Mississippi Supreme Court.[95]

The rule which has apparently emerged from *Clemons* is that once a defendant is sentenced to death by an erroneously instructed jury, an appellate court may affirm the sentence only if it *explicitly* engages in either reweighing of aggravating and mitigating circumstances, or applies harmless-error analysis to the jury's decision.[96]

---

assumes that its role is to offer helpful suggestions to state courts seeking to expedite the capital sentencing process.

Id.

93. *See supra* note 17.

94. *Clemons*, 494 U.S. at 752-54.

95. *Id.* at 741. *See infra* note 218 (results of the remand).

96. *Clemons*, 494 U.S. at 741. In her dissent to the denial of certiorari in Pensinger v. California, 112 S. Ct. 351 (1991), Justice O'Connor reiterated that *Clemons* requires an explicit reweighing of evidence or harmless-error analysis. In People v. Pensinger, 805 P.2d 899 (Cal. 1991), the California Supreme Court reversed an aggravating circumstance which was based on a vague jury instruction. The court expressly found that the error was not harmless. *Id.* at 921. However, the court upheld the death sentence, adding a paragraph to its opinion two months after its publication, which stated that "[t]he evidence of the shocking nature of the attack on the infant was properly before the jury. The erroneous special circumstance finding was only a 'statutory label' which could not have affected the verdict in light of the evidence properly before the jury." *Id.* at 933. In reference to the California Supreme Court's holding and the United States Supreme Court's denial of certiorari, Justice O'Connor stated that:

> [i]n [her] view, such cursory review is clearly insufficient under Clemons. . . . [B]ecause it was not clear whether the Mississippi Supreme Court had actually performed an independent reweighing of the evidence, and because the court had not engaged in a sufficient harmless error analysis based on the record, we vacated Clemons' death sentence and remanded, so that the Mississippi Supreme Court could choose one course or the other.

Pensinger, 112 S. Ct. at 351-52 (O'Connor, J., dissenting).

I. Walton v. Arizona

In *Walton v. Arizona*,[97] the defendant was convicted of capital murder for the robbery and killing of an off-duty marine.[98] After his arrest, the defendant led police to the murder site. The victim's body was found a short distance from the site of the shooting.[99] The autopsy revealed that the victim was not killed by the bullet wound. Instead, he lost his eyesight and floundered around blindly in the desert for approximately five days, before eventually dying of dehydration, starvation and pneumonia.[100]

After a jury conviction, the trial judge conducted a separate sentencing hearing as required by Arizona law.[101] At the hearing, the state argued that there were two aggravating circumstances: the murder was committed "in an especially heinous, cruel or depraved manner," and it was committed for pecuniary gain.[102] The defendant offered as mitigating circumstances his history of substance abuse and his age at the time of sentencing.[103] At the conclusion of the sentencing hearing, the court determined that both aggravating circumstances existed.[104] Although it had considered the mitigating evidence offered by the defendant, the court found "no mitigating circumstances sufficiently substantial to call for leniency."[105] The trial court then sentenced Mr. Walton to death.[106]

---

97. 110 S. Ct. 3047 (1990).

98. *Walton*, 110 S. Ct. at 3052.

99. *Id.*

100. *Id.*

101. *Id.* "When a defendant is found guilty of or pleads guilty to first degree murder . . . the judge . . . shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsection F and G of this section for the purpose of determining the sentence to be imposed." ARIZ. REV. STAT. ANN. § 13-703(B) (Supp. 1988).

102. *Walton*, 110 S. Ct. at 3052. Arizona law provides in pertinent part that:

> In determining whether to impose a sentence of death or life imprisonment . . . the court shall take into account the aggravating and mitigating circumstances included in subsections F and G of this section and shall impose a sentence of death if the court find one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency.

ARIZ. REV. STAT. ANN. § 13-703(E) (Supp. 1988).

103. *Walton*, 110 S. Ct. at 3052-53. The defendant was twenty years old. *Id.*

104. *Id.* at 3053.

105. *Id.*

106. *Id.*

In its review, the Arizona Supreme Court paid particular attention to the "especially heinous, cruel or depraved" aggravating circumstance found by the lower court.[107] The court held that there was evidence to support the trial court's findings regarding the "especially heinous" aggravating circumstance, noting its prior decisions defining "especially heinous, cruel or depraved."[108] Consequently, the Arizona Supreme Court affirmed the sentence of death.[109]

In its examination of the Arizona Supreme Court's decision in *Walton*, the United States Supreme Court analyzed the defendant's claim that Arizona's "especially heinous, cruel or depraved" aggravating circumstance was not sufficient to channel the sentencer's discretion under the Eighth and Fourteenth Amendments as required by *Godfrey*[110] and *Maynard*.[111] The Court distinguished *Godfrey* and *Maynard* from *Walton* because in *Godfrey* and *Maynard*, sentencing was committed to the jury, whereas in *Walton*, the judge passed sentence.[112] The Court held that the import of its holdings in *Maynard* and *Godfrey* is that when the *jury* is the final sentencer, it is essential

---

107. State v. Walton, 769 P.2d 1017, 1032 (Ariz. 1989).

108. *Id.* at 1032-33. *See, e.g.*, State v. Correll, 715 P.2d 721, 733 (Ariz. 1986); State v. Gretzler, 659 P.2d 1, 10 (Ariz. 1983) ("Especially cruel" applied by the court in situations where a murderer inflicted "mental anguish or physical abuse" before the victim's death). *See also Correll*, 715 P.2d at 733; State v. McCall, 677 P.2d 920, 934 (Ariz. 1983) ("Mental anguish" existed when the victim was uncertain of what his ultimate fate would be).

109. *Walton*, 110 S. Ct. at 3057-58. In addition, the court held that the "pecuniary gain" circumstance was correctly applied. *Id.*

110. *See supra* notes 47-59 and accompanying text.

111. *Walton*, 110 S. Ct. at 3056-57. For a discussion of *Maynard*, *see supra* notes 65-73 and accompanying text. The United States Supreme Court granted certiorari in *Walton* to clear up any questions as to the constitutionality of the statute. *Walton*, 110 S. Ct. at 3054. In Adamson v. Rickets, 865 F.2d 1011 (9th Cir. 1988), the Ninth Circuit Court of Appeals found the Arizona death penalty statute unconstitutional because the "especially heinous, cruel or depraved" aggravating circumstance had been applied arbitrarily and failed to channel the sentencer's discretion. *Id.* at 1045. The court additionally struck down the Arizona statute as being unconstitutional under the Eighth and Fourteenth Amendments on the grounds that, under the statute: 1) The court is precluded from considering all mitigating evidence due to the requirement that mitigating evidence must be proved by a preponderance of the evidence; and 2) The burden of proof in regard to these mitigating factors is on the defendant, and therefore creates a presumption that death is an appropriate penalty. *Id.*

112. *Walton*, 110 S. Ct. at 3057. *See* GA. CODE ANN. § 17-10-2 (1990); OKLA. STAT. tit. 21, § 701.10 (1990).

that the jurors be properly instructed regarding all facets of the sentencing process.[113] The Court further explained that trial judges are presumed to know the law and to apply it in making their decisions, and that if the Arizona Supreme Court had previously placed a limiting construction on the "especially heinous, cruel or depraved" aggravating circumstance, it is assumed that the trial judge applied this narrower construction.[114] The Court added that even if the trial judge had failed to apply the narrowing construction, this would not necessarily be fatal to the sentence, since *Clemons v. Mississippi*[115] allowed appellate courts to reweigh aggravating circumstances or apply harmless-error analysis to save a death sentence that is partly based on an invalidated aggravating circumstance.[116] The United States Supreme Court affirmed the Arizona Supreme Court, the Arizona capital punishment statute, and the defendant's death sentence, which the Court held valid under the Eighth and Fourteenth Amendments.[117]

J. Feltrop v. Missouri

1. *The Facts*

In *Feltrop v. Missouri*,[118] Ralph Cecil Feltrop (the "defendant"), appealed his first-degree murder conviction and subsequent sentence of death by the trial court.[119] Although there were many grounds for this appeal,[120] the most important, as indicated by Chief Justice Blackmar's dissent, was the trial court's use of an unconstitutionally vague aggravating factor in the instruction to the jury during the sentencing.[121]

The defendant was convicted for the first-degree murder of his live-in girlfriend. The facts of the case are as follows: After certain body parts of a murder victim were found in a trunk in a wooded area in St. Charles County, Missouri, the defendant was

113. *Walton*, 110 S. Ct. at 3057.
114. *Id.*
115. 494 U.S. 738 (1990). *See supra* notes 74-96 and accompanying text.
116. *Walton*, 110 S. Ct. at 3057.
117. *Id.* at 3054.
118. 803 S.W.2d 1 (Mo. 1991).
119. *Id.* at 5.
120. *Id.* at 6-22.
121. *Id.* at 22-23.

questioned about her whereabouts.[122] He had reported her missing that same day.[123] During this questioning, the defendant discussed, in detail, the series of events that led to the death of the victim.[124] He said that after she accused him of seeing other women, threatened him, and poked at him with a knife, he went into the bedroom and went to sleep.[125] He asserted that he was awakened by the victim coming at him with a knife.[126] The defendant stated that during a struggle for the knife, the victim was struck in the throat by the knife and "wound up dead."[127] He then cut her body into pieces hoping that she would not be identifiable.[128]

After attempting and failing to help the police find the missing parts of the victim's body with a map that the defendant drew, he agreed to come with them, and show them where the rest of the body was located.[129] The defendant directed the officers to a pond in the woods off a Jefferson County highway, and once there, pointed out a plastic bag that was partially submerged in the water.[130] Once retrieved, the remains of the victim were found in the bag. These remains included the victim's head, lower legs and hands.[131]

At trial, the Medical Examiner testified that the cause of the victims death was an "incised wound to the right side of her neck which severed her vertebral artery."[132] Because the wound involved the spinal cord, it most likely paralyzed the right side of the victim's body so that she could not walk properly.[133] The wound caused the victim to bleed to death, which could have taken from fifteen minutes to four hours.[134]

---

122. Brief for Respondent at 3-4, Feltrop v. Missouri, 803 S.W.2d 1 (Mo. 1991) (No. 70896) [hereinafter Respondent's Brief].

123. *Id.*

124. *Id.* at 4-5.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 5.

130. *Id.*

131. *Id.*

132. *Feltrop*, 803 S.W.2d at 5.

133. *Id.*

134. *Id.*

At trial, the defendant did not testify in his own behalf.[135] At the close of the evidence, instructions and argument of counsel, the jury found the defendant guilty of first-degree murder.[136]

2. *The Sentencing*

At the defendant's sentencing, the state offered all of the evidence from the guilt phase of the trial.[137] The defendant presented the testimony of a number of witnesses who testified about his character with the hope of presenting sufficient mitigating evidence to outweigh any aggravating circumstance(s) the jury might find, and thus preclude the jury from sentencing him to death.[138]

---

135. Respondent's Brief, *supra* note 122, at 9-10.

136. *Id.*

137. *Feltrop*, 803 S.W.2d at 6.

138. *Id.* Missouri law provides a list of any aggravating circumstances which, if found, may lead the jury to sentence the defendant to death:

(1) The offense was committed by a person with a prior record of conviction for murder in the first degree, or the offense was committed by a person who has one or more serious assaultive criminal convictions;
(2) The murder in the first degree offense was committed while the offender was engaged in the commission or attempted commission of another unlawful homicide;
(3) The offender by his act of murder in the first degree knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person;
(4) The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another;
(5) The murder in the first degree was committed against a judicial officer, former judicial officer, prosecuting attorney or former prosecuting attorney, circuit attorney or former circuit attorney, assistant prosecuting attorney or former assistant prosecuting attorney, assistant circuit attorney or former assistant circuit attorney, peace officer or former peace officer, elected official or former elected official during or because of the exercise of his official duty;
(6) The offender caused or directed another to commit murder in the first degree or committed murder in the first degree as an agent or employee of another person;
(7) The murder in the first degree was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind;
(8) The murder in the first degree was committed against any peace officer, or fireman while engaged in the performance of his official duty;
(9) The murder in the first degree was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement;
(10) The murder in the first degree was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful con-

The judge instructed the jury on the "depravity of mind" aggravating factor,[139] and after deliberations, the jury sentenced the defendant to death.[140] The defendant then made a motion to

---

finement, of himself or another;
(11) The murder in the first degree was committed while the defendant was engaged in the perpetration or was aiding or encouraging another person to perpetrate or attempt to perpetrate a felony of any degree of rape, sodomy, burglary, robbery, kidnapping, or any felony offense in chapter 195, RSMo;
(12) The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness;
(13) The murdered individual was an employee of an institution or facility of the department of corrections of this state or local correction agency and was killed in the course of performing his official duties, or the murdered individual was an inmate of such institution or facility;
(14) The murdered individual was killed as a result of the hijacking of an airplane, train, ship, bus or other public conveyance;
(15) The murder was committed for the purpose of concealing or attempting to conceal any felony offense defined in chapter 195, RSMo;
(16) The murder was committed for the purpose of causing or attempting to cause a person to refrain from initiating or aiding in the prosecution of a felony offense defined in chapter 195, RSMo.

MO. REV. STAT. § 565.032.2 (1986). The statute also lists mitigating circumstances which may be considered.

(1) The defendant has no significant history of prior criminal activity;
(2) The murder in the first degree was committed while the defendant was under the influence of extreme mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to the act;
(4) The defendant was an accomplice in the murder in the first degree committed by another person and his participation was relatively minor;
(5) The defendant acted under extreme duress or under the substantial domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
(7) The age of the defendant at the time of the crime.

Id. § 565.032.3 (1986). Missouri law also stipulates that the trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole or release except by act of the governor "[i]f the trier finds the existence of one or more mitigating circumstances *sufficient to outweigh* the aggravating circumstance or circumstances found by the trier." *Id.* § 565.030.4 (1986) (emphasis added).

139. *Feltrop*, 803 S.W.2d at 14. The judge's instruction 4B read:

In determining the punishment to be assessed against the defendant for the murder of Barbara Ann Roam, you must first unanimously determine whether the following aggravating circumstance exists: Whether the murder of Barbara Ann Roam involved torture or depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.

Id.

140. *Id.* When the jury returned its verdict assessing the sentence of death, it found

the trial court for reduction of sentence.[141] The trial court, albeit a different judge,[142] denied the defendant's motion, and notice of appeal was filed with the Missouri Supreme Court.[143]

3. *Appellate Review*

The Missouri Supreme Court examined all of the defendant's claims.[144] However, the court's rejection of his argument concerning the vagueness of jury instruction 4B[145] during his sentencing must be addressed because the court's reasoning violates the United States Supreme Court's holding in *Clemons*.[146]

In its discussion of whether the "depravity of mind" aggravating factor as applied in the *Feltrop* case would need to be invalidated, the Missouri Supreme Court first acknowledged that the statute's language that the judge used to instruct the jury, "without further definition, is too vague to provide adequate guidance to the sentencer."[147] However, the court went on

---

that: "The murder of Barbara Ann Roam involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman." The jury did not find that torture had occurred. *Id.*

141. *Id.* at 15-16. Mo. R. CRIM. P. 29.05 (1980) provides in full: "The court shall have the power to reduce the punishment within the statutory limits prescribed for the offense if it finds that the punishment is excessive." *Id.*

142. The fact that a different judge evaluated the motion for reduction in sentence is certainly relevant. A different judge might have less motive to protect the verdict and deny the motion for reduction in sentence than the judge who gave the faulty instruction. The judge who gave the instruction (the trial judge) might be hesitant to grant the motion because this would be admitting fault. This is not to say that another judge would not attempt to protect him, but the motivation would not be as strong.

143. *Feltrop*, 803 S.W.2d at 16. The judge conducted a hearing on the motion after which he stated on the record: "[o]n the defense counsel's rather eloquent plea for reduction of sentence, the Court has listened attentively to that and has recalled the testimony and the evidence in this cause, and the Court will overrule the Motion for Reduction of Sentence at this time." *Id.*

144. *Id.* at 6-22.

145. *See supra* note 139 and accompanying text.

146. 494 U.S. 738 (1990). *See supra* notes 74-96 and accompanying text.

147. *Feltrop*, 803 S.W.2d at 14 (citing Godfrey v. Georgia, 446 U.S. 420 (1980)). *See* Shell v. Mississippi, 111 S. Ct. 313 (1990) ("especially heinous, atrocious or cruel" not constitutionally sufficient without limiting instruction to sentencer); Moore v. Clarke, 904 F.2d 1226, 1228-29 (8th Cir. 1990) (the language of "depravity of mind . . . outrageously or wantonly vile, horrible or inhuman," without further definition, is too vague to provide adequate guidance to the sentencer); Newlon v. Armontraut, 693 F. Supp. 799, 812-13, *aff'd*, 885 F.2d 1328, 1335 (8th Cir. 1989) (terms "outrageously or wantonly," "horrible or inhuman" and "depravity of mind" unconstitutionally vague).

to discuss the fact that it had interpreted and clarified the vague wording of the aggravating factor in prior cases through the use of a limiting definition.[148] In this limiting definition, the court had held that factors to be considered in determining whether the "depravity of mind" circumstance exists include the:

> mental state of defendant; infliction of physical or psychological torture upon the victim as when the victim has a substantial period of time before death to anticipate and reflect upon it; brutality of the defendant's conduct; mutilation of the body after death; absence of any substantive motive; absence of defendant's remorse; and the nature of the crime.[149]

The court has also held that at least one of these factors must be present before it will uphold a sentence of death that rests on the depravity of mind circumstance.[150] The court then acknowledged that the problem was that the limiting definition formulated by the court was never given to the *Feltrop* jury in the form of an instruction.[151] As a result, it was conceded that this might have been a fatal flaw requiring vacation of the sentence[152] had it not been for the United States Supreme Court's

---

148. *See* State v. Preston, 673 S.W.2d 1, 11 (Mo.) (en banc), *cert. denied*, 469 U.S. 893 (1984). In *Preston*, the court specifically listed factors to be considered in determining "depravity of mind." *Id.* In State v. Griffin, 756 S.W.2d 475 (Mo. 1988) (en banc), *cert. denied*, 490 U.S. 1113 (1989), the court, for the first time specifically required that the jury find one of the *Preston* factors before finding "depravity of mind." *Id.* at 490.

149. *Feltrop*, 803 S.W.2d at 14 (citing *Preston*, 673 S.W.2d at 11). These "factors" have been criticized as having no real guiding value, and possibly making the circumstances in which the jury may impose death broader instead of narrower. *See* Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases — The Standardless Standard*, 64 N.C. L. REV. 941, 968-71 (1986).

> To say that a murder is especially heinous if it is "grossly bad" or "shockingly evil" is to say nothing. To define depravity . . . to mean "marked by debasement, corruption, perversion or deterioration" expands rather than limits the meaning of the aggravating circumstance. These definitions and others like them provide no limitations on the especially heinous circumstance.

Id. at 970. The *Preston* factors have not been accepted by all of the members of the court. For example, in State v. Elliston, 811 S.W.2d 371 (Mo. 1991) (en banc), Chief Justice Blackmar stated that he was "not prepared to commit [himself] . . . to the endorsement of each of the circumstances detailed in *Preston*, as sufficient under *Godfrey* and *Maynard*." *Id.* at 375 (Blackmar, C.J., concurring).

150. State v. Griffin, 756 S.W.2d 475, 490 (Mo. 1988).

151. *Feltrop*, 803 S.W.2d at 15.

152. *Id.*

decision in *Walton v. Arizona*.[153]

In its application of the *Walton* decision to the *Feltrop* case, the court relied on a motion to reduce sentence made by the defendant under Rule 29.05.[154] Rule 29.05 gives the trial judge discretion to reduce the defendant's sentence if he finds that it is excessive.[155] In *Feltrop*, the trial judge denied the defendant's motion to reduce the death sentence to life imprisonment.[156] The court reasoned that because the defendant made a Rule 29.05 motion for reduction of sentence, which was ultimately denied, the trial judge acted as the "final sentencer."[157] Consequently, the court found the *Walton* framework applicable since trial judges are presumed to know the law and to apply it in making their decisions.[158] The court applied this theory by stating that it "presume[d] that the trial judge knew and applied the relevant factors enunciated in *State v. Preston* when he evaluated and ruled on defendant's motion for reduction of sentence."[159] It followed, the court held, that because the trial judge denied the defendant's motion, and thus, became the "final sentencer," there was sufficient guidance to the sentencer in light of *Walton*, which presumes that the trial judge has knowledge of the narrowing instruction.[160]

In his dissent, Chief Justice Blackmar called the application of *Walton* to a case where a defendant's motion for reduction of sentence is ruled on by a trial judge a "startling proposition."[161] In raising his points, Chief Justice Blackmar pointed out weaknesses throughout the court's reasoning as it pertained to the issue in question.[162] First, he stated that *Walton* could not possibly apply to the *Feltrop* case because of the faint connection between a judge as sentencer, at issue in *Walton*, and a judge who rules on a motion and is thereby self-designated to be a

153. 110 S. Ct 3047 (1990). *See supra* notes 97-117 and accompanying text.
154. *See supra* note 141.
155. *See supra* note 141.
156. *Feltrop*, 803 S.W.2d at 15-16.
157. *Id.*
158. *Id.*
159. *Id.* at 16.
160. *Id.*
161. *Id.* at 22 (Blackmar, C.J., dissenting).
162. *Id.* at 22-23 (Blackmar, C.J., dissenting).

"final sentencer" as was the case in *Feltrop*.[163] Additionally, he explained that *Godfrey*[164] and *Maynard*[165] should have been the controlling cases since there was "no assurance that a jury would have authorized a death sentence if it had been properly instructed in accordance with [these cases] and the limiting instruction announced in [*Preston*]."[166] The Chief Justice's dissent closed with a meaningful paragraph:

> But we should be true to our own law and traditions. Up to now the right of trial by jury has been considered to be a right of trial by a properly instructed jury. The principal opinion is judicial legislation substantially altering the right of trial by jury in death cases. I cannot join it. We should not strain to affirm death sentences. We should, if anything, insist on stricter adherence to procedural requirements when the ultimate penalty is at stake.[167]

The defendant petitioned the United States Supreme Court in an application for certiorari that was subsequently denied over the strong dissent of Justice Thurgood Marshall.[168]

IV. Analysis

A. *The Missouri Supreme Court's Incorrect Application of* Walton *to* Feltrop

It is clear that the United States Supreme Court in *Walton*,[169] by limiting its holding to cases in which the court is the

---

163. *Id.*

164. 446 U.S. 420 (1980). *See supra* notes 47-59 and accompanying text.

165. 486 U.S. 356 (1988). *See supra* notes 65-73 and accompanying text.

166. *Feltrop*, 803 S.W.2d at 22 (Blackmar, C.J., dissenting).

167. *Id.* at 23. Since the *Feltrop* decision, Chief Justice Blackmar has noted that the court does not seem to want to follow its own holding in that case. *See* State v. Cline, 808 S.W.2d 822, 827 (Mo. 1991) (Blackmar, C.J., concurring). In *Cline*, the Missouri Supreme Court held that if a trial judge overstates the maximum punishment for an offense, plain error exists, even if the jury sentences the defendant to a term within the statutory range. Chief Justice Blackmar stated that if the court actually believed that the judge was the final sentencer in Missouri, than the *Feltrop* rule should apply. He stated that he:

> agree[s] that [the *Cline* majority opinion] correctly expounds the authorities as they existed prior to *State v. Feltrop*. . . . [M]y dissent in *Feltrop* commanded little support and I shall not repeat my arguments here. . . . I am disposed to suggest that *Feltrop* is a mutant decision which I hope will not be followed.

Id.

168. Feltrop v. Missouri, 111 S. Ct. 2918 (1991).

169. 110 S. Ct. 3047 (1990).

sentencer, meant its decision to apply only to states, like Arizona, in which the trial judge is statutorily mandated to be the "final sentencer."[170] Recognizing this, the Missouri Supreme Court in *Feltrop*, attempted to fit the Missouri statutes and rules, and the procedural details involved in the *Feltrop* case into *Walton's* "judge as sentencer" framework.[171] However, the idea that the judge is the "final sentencer" in Missouri when a jury trial is not waived by the defendant, is a tenuous and baseless attempt to ignore legislatively made law in favor of judicial legislation aimed at achieving what seems to be the court's goal of "saving" death sentences.[172]

Missouri's statutes make it clear that unless a jury trial is waived by the defendant, the jury is delegated the task of sentencing.[173] In the *Feltrop* case, there was no waiver of jury trial by the defendant. However, the Missouri Supreme Court held that because Missouri Rules of Criminal Procedure Rule 29.05 gives a trial judge discretion to reduce the sentence in cases where the judge determines that the punishment is excessive, the judge may be proclaimed to be the "final sentencer."[174] But, as Chief Justice Blackmar stated in his dissent in *Feltrop*, the court's designation of the trial judge in a capital murder trial as the "final sentencer" because he has the authority to reduce sentences in certain situations is inaccurate.[175] In fact, under Missouri law, in a jury trial, a judge may not pronounce a death sentence unless a jury authorizes the death sentence, or has found the requisite aggravating circumstance(s) but is unable to

---

170. ARIZ. REV. STAT. ANN. § 13-703(B) (Supp. 1988). *See supra* note 101 and accompanying text.

171. *Feltrop*, 803 S.W.2d at 14-16.

172. MO. REV. STAT. § 565.030 (1989), after discussing the trial procedure for first degree murder in which reference is repeatedly made to the jury, provides that: "[t]he court shall follow the same procedure as set out in this section whenever it is required to determine punishment for murder in the first degree." This sentence seems to be aimed at situations in which the defendant waives his right to a jury trial. This was clearly not the case in *Feltrop*. *See id.* § 565.032 (1989), which provides that: "[i]n all cases of murder in the first degree for which the death penalty is authorized, the judge in a jury-waived trial shall consider, or he shall include in his instructions to the jury for it to consider . . . ." Again, this demonstrates that the legislature considers the jury to be the sentencer unless the defendant has waived his right to a trial by jury.

173. *See supra* note 172.

174. *See supra* notes 154-60 and accompanying text.

175. *See supra* notes 161-67 and accompanying text.

agree on a sentence.[176] It is nonsensical that the Missouri Supreme Court saw fit to ignore the clear mandate of its legislature in calling the trial judge the "final sentencer" to conveniently fit the facts of *Feltrop* into the *Walton* framework.

B. *Irony of the Defendant's Motion to Reduce Sentence in* Feltrop

Additionally, there is a serious point that should be brought to light that Justice Marshall in his dissent to the denial of certiorari,[177] and Chief Justice Blackmar in his *Feltrop* dissent,[178] seem to have overlooked. That is, the use of a court rule, Rule 29.05,[179] which is designed to protect defendants in certain situations,[180] actually contributed to the defendant's demise in this case.

Rule 29.05 gives the trial judge discretion to reduce the defendant's sentence if he finds that it is excessive.[181] In *Feltrop*, the trial judge denied the defendant's motion to reduce the death sentence to life imprisonment under rule 29.05.[182] Ironically, however, the trial judge would not have made a pronouncement under Rule 29.05 if the defendant had never made the motion to reduce the sentence. Indeed, the Missouri Supreme Court majority in *Feltrop* relied on the fact that the trial judge ruled on the defendant's motion for reduction of sentence to justify its finding that *Feltrop* was governed by *Walton* instead of *Maynard* and *Godfrey*.[183] It certainly seems strange that a Rule 29.05 motion, obviously promulgated for the protec-

---

176. *Feltrop*, 803 S.W.2d at 23 (Blackmar, C.J., dissenting). *See* MO. REV. STAT. § 565.030.4(4) (1989) ("If the trier is a jury it shall be instructed . . . that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death.").

177. Feltrop v. Missouri, 111 S. Ct. 2918 (1991).

178. *Feltrop*, 803 S.W.2d at 22-23.

179. *See supra* note 141.

180. *See infra* text accompanying note 189. *See also supra* note 141.

181. *See supra* note 141.

182. *See supra* notes 141-43 and accompanying text.

183. *See supra* notes 154-60 and accompanying text. "On the authority of *Walton*, this court presumes that the trial judge knew and applied the relevant factors enunciated in *State v. Preston* when he evaluated and ruled on appellant's motion for reduction of sentence." *Feltrop*, 803 S.W.2d at 16.

tion of defendants, was used here against the defendant. In fact, use of the Rule 29.05 motion as applied by the Missouri Supreme Court had to be completely unforeseeable from the perspective of the defendant.[184]

It seems obvious that after a defendant has been sentenced to death, the natural response would be to make a motion to reduce the sentence if the jurisdiction in question provides such relief. It is doubtful that any attorney, no matter how competent, could have foreseen the risk that the defendant was taking by making a Rule 29.05 motion, or that the Missouri Supreme Court would use the motion made by the defendant and denied by the trial judge to justify a finding that the trial judge was the "final sentencer" to utilize the holding in *Walton*. In light of these circumstances, it seems that the defendant was prejudiced because of a lack of notice from the Missouri Supreme Court.[185]

---

184. *See infra* note 185 and accompanying text.

185. "Notice" is information; the result of observation, whether by the senses or the mind; knowledge of the existence of a fact or state of affairs; the means of knowledge. BLACK'S LAW DICTIONARY 1061 (6th ed. 1990). The theory espoused here in regard to notice, argues that, in effect, the defendant was injured by a type of ex post facto law through the Missouri Supreme Court's pronouncement. "No Bill of Attainder or ex post facto Law shall be passed." U.S. CONST. art. I, § 9. "The prohibition against ex post facto laws ordinarily applies to legislative acts only, and not to judicial acts; however, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, may operate precisely like an ex post facto law." 16A C.J.S. *Constitutional Law* § 410 (1986).

> The ex post facto clause is a limitation upon the powers of the Legislature . . . and does not of its own force apply to the judicial branch of government. But the principle on which the Clause is based — the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties — is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment.

Marks v. United States, 430 U.S. 188, 191-92 (1977) (citations omitted). Although a court rule, and not a criminal statute was at issue in *Feltrop*, some authorities have stated that all that is necessary is that the law "operates on *penal or criminal matters*." 16A C.J.S. *Constitutional Law* § 409 (1986) (emphasis added). The Supreme Court has stated that an ex post facto law may include "any change which alters the situation of a party to his disadvantage." *See* Kring v. Missouri, 107 U.S. 221, 235 (1882). However, *Kring* was explicitly overruled in Collins v. Youngblood, 110 S. Ct. 2715, 2723 (1990). In *Collins*, the Court stated that a violation of the ex post facto clause occurs when a law "punishes as crime an act previously committed, which was innocent when done; makes more burdensome the punishment for crime after its commission; or deprives one charged with crime of any defense available under law in effect when act was committed." *Id.* at 2719. Under this definition, it seems that there was no violation of the ex post facto clause in *Feltrop*. However, in different contexts, the United States Supreme Court has held that the Due Process Clause may require procedural fairness. *See, e.g.*, Burns v. United States, 111 S.

In other words, if the defendant's attorney had realized the risk in making a Rule 29.05 motion, she may never have made it. The defendant objected to the submission of the "depravity of mind" aggravating circumstance prior to trial in his "Motion to Declare Statute Unconstitutional."[186] He also included the claim of error in his "Motion for a New Trial" because of the unconstitutional vagueness of the aggravating circumstance.[187] This is important because these objections would have preserved a claim of unconstitutionality for appeal to the Missouri Supreme Court even if the Rule 29.05 motion had never been made.[188] Because certiorari was denied in *Feltrop*, the claim of lack of notice in regard to the unforeseen and previously undetermined risks of making a Rule 29.05 motion may never be heard.

Additionally, it seems improbable that the Missouri legislature intended Rule 29.05 to be used by the judiciary in a way that is prejudicial to defendants because the rule only gives judges authority to decrease punishment — not increase it.[189] These points clearly demonstrate that *Walton* was erroneously applied by the Missouri Supreme Court in *Feltrop*. This leads to the next question: should the court have applied *Clemons*[190] instead, and why or why not?

Ct. 2182, 2187 (1991) (holding that since Congress had not made its intention clear, the district court could not depart upward from sentencing guidelines without first providing notice to the defendant that it intended to do so). *See also* Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988), in which the Court provided that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature]." *Id.* at 575. It seems clear that the Missouri legislature never intended Rule 29.05 to be used by the court to fit a defendant into the *Walton* framework. The fundamental unfairness in applying *Walton* to *Feltrop* through the use of Rule 29.05 should, by itself, be grounds for the Supreme Court to grant certiorari.

186. Brief for Appellant at 50, Feltrop v. Missouri, 803 S.W.2d 1 (Mo. 1991) (No. 70896).

187. *Id.*

188. MO. REV. STAT. § 547.030 (1990) (Objections to evidence or rulings during the trial must be included in the Motion for a New Trial in order for the objections to be preserved on appeal).

189. *See supra* note 141.

190. Clemons v. Mississippi, 494 U.S. 738 (1990). *See supra* notes 74-96 and accompanying text.

C. *What Would the Result Have Been If the Missouri Supreme Court Had Correctly Applied* Clemons *to* Feltrop?

Although the United States Supreme Court in *Clemons* held that state appellate courts may save some death sentences that are based *in part* on erroneous instructions, it is important to understand that much of their discussion in the case may be considered *dicta*,[191] and that *Clemons* itself was remanded because of improper procedure on the part of the Mississippi Supreme Court.[192] The reason for the remand was that it was unclear whether the court had properly engaged in either of the approved methods for "saving" death sentences based on invalid aggravating circumstances — reweighing of aggravating and mitigating circumstances or harmless-error analysis.[193] It is equally unclear in *Feltrop* whether either of the reviewing courts, the trial court in its ruling on the defendant's Rule 29.05 motion,[194] or the Missouri Supreme Court in its review of the case,[195] properly engaged in either of the techniques that allow appellate courts to "resentence" defendants to death after it has been conceded that their original sentence rests at least *in part* on an unconstitutionally invalid aggravating circumstance.[196]

1. *In Order to Reweigh Aggravating and Mitigating Circumstances, There Must Be a Valid Aggravating Circumstance Remaining After the Invalid Circumstance is Excised*

In its discussion of reweighing aggravating and mitigating circumstances in *Clemons*, the United States Supreme Court

---

191. *Id.* at 762 (Blackmun, J., dissenting).

192. *See supra* notes 95-96 and accompanying text.

193. *See supra* notes 89-94 and accompanying text.

194. *See supra* notes 141-43 and accompanying text. *See also infra* text accompanying note 213.

195. *See supra* notes 144-60 and accompanying text.

196. In response to Mr. Feltrop's motion for a reduction in sentence, the trial judge stated on the record, "the court has listened attentively . . . and has recalled the testimony and the evidence in this cause, and the court will overrule the Motion for Reduction of Sentence at this time." The trial court never made any reference to either reweighing of circumstances or harmless-error analysis. Feltrop v. Missouri, 803 S.W.2d 1, 16 (Mo. 1991). The Missouri Supreme Court relied on the trial judge's denial of the motion. Perhaps this is why it never applied either of the *Clemons* "sentence-saving" techniques. *Id.*

stated:

> [n]othing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of *two or more* aggravating circumstances found by the jury but affirms the death sentence after itself finding that the *one or more valid* remaining aggravating factors outweigh the mitigating evidence.[197]

In *Feltrop,* as in *Clemons*, it was conceded that the statutory aggravating circumstance was unconstitutionally invalid without a narrowing instruction to provide guidance to the sentencer.[198] A major difference between the cases, however, is that in *Clemons*, once the invalid circumstance was removed from appellate consideration, there was still a second circumstance for the Mississippi Supreme Court to weigh against any mitigating evidence.[199] In *Feltrop*, the only aggravating circumstance that the jury found to be present was the "depravity of mind" circumstance.[200] If this invalid finding is removed, there is no longer an aggravating circumstance to be weighed against the existing mitigating evidence.

Under Missouri law, at least one aggravating circumstance must exist for the death sentence to be imposed.[201] If the only existing aggravating circumstance is invalidated as unconstitutional because a narrowing instruction was not read to the jury, it becomes impossible to execute the defendant under Missouri law because there is no longer a valid aggravating circumstance on which the death sentence can rest.[202] As a result, reweighing of aggravating and mitigating circumstances as prescribed in *Clemons* would have been impossible in *Feltrop.*

---

197. *Clemons*, 494 U.S. at 745 (emphasis added).

198. *Feltrop*, 803 S.W.2d at 14-15.

199. *Clemons*, 494 U.S. at 742-43. In addition to the "especially heinous" aggravating circumstance, the jury also found an additional aggravating circumstance to exist in the *Clemons* case: "that the murder was committed during the course of a robbery for pecuniary gain." *Id. See supra* notes 75-79 and accompanying text.

200. *See supra* notes 139-40 and accompanying text.

201. MO. REV. STAT. § 565.030.4(1) (Supp. 1990) ("The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole or release . . . [i]f the trier does not find beyond a reasonable doubt at least one of the aggravating circumstances . . . .").

202. *Id.*

2. *The Missouri Supreme Court Did Not Perform An Explicit Harmless-Error Analysis as Required By* Clemons

This leads to the second *Clemons* technique that the Court stated in *dicta* it would allow appellate courts to perform to "salvage" death sentences — harmless-error analysis.[203] When performing harmless-error analysis, appellate courts examine the erroneous procedures that occurred during the trial to determine what effect these errors may have had on the outcome.[204] For a judgment to be upheld, it must be found that the error which occurred at the trial level would not have caused a different result in the case at hand, thereby rendering the error harmless.[205] The standard to be applied is the "beyond a reasonable doubt" standard.[206]

The question that the trial court in its ruling on the defendant's Rule 29.05 motion or the Missouri Supreme Court in its appellate review would have had to ask itself in applying harmless-error analysis is: "If the jury had been read the limiting instruction that the Missouri Supreme Court formulated in *State v. Preston*,[207] is it true, beyond a reasonable doubt, that it would have found the 'depravity of mind' aggravating circumstance to exist and sentenced the defendant to death in this case?"

However, this question was never asked or answered by the Missouri Supreme Court in *Feltrop*. Granted, the court makes it clear that if it had been the sentencer, it would have found the "depravity of mind" circumstance to exist even if it were applying the *Preston* factors.[208] However, the court does not even purport to be applying harmless-error analysis in this section of its opinion. Instead, the court states that it is simply fulfilling its duty mandated by Missouri law.[209] There is certainly a differ-

---

203. *See supra* note 17.
204. *See supra* note 17.
205. *See supra* note 17.
206. Chapman v. California, 386 U.S. 18, 24 (1967).
207. 673 S.W.2d 1 (Mo. 1984).
208. *Feltrop*, 803 S.W.2d at 16. *See supra* notes 148-49 and accompanying text.
209. *Feltrop*, 803 S.W.2d at 16. The court performed its analysis as required by Mo. REV. STAT. § 565.035.3, which mandates that the court determine: "[w]hether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance . . . .".

ence between a court making sure that a sentencer's findings are adequate to support the death penalty as was done in *Feltrop*, and a court applying harmless-error analysis to determine beyond a reasonable doubt that a jury would have sentenced the defendant to death even if it had been read the limiting instruction. In fact, the Missouri Supreme Court's opinion does not discuss harmless-error, and further, never attempts to get into the mind of the jury to determine what the jury would have found if it had been given the limiting instruction.

If the Missouri Supreme Court had applied harmless-error analysis in the *Feltrop* case, it might have found the erroneous instruction to have been harmless and sustained the sentence. It is important, however, that the *Feltrop* jury expressly found that torture did not occur.[210] It is possible that a jury would have found one or more of the *Preston* factors existed and sentenced the defendant to death. The problem here is that we do not know, beyond a reasonable doubt, that the jury would have done so. Even if the court believed that the jury would have handed down the same sentence, it did not clearly and expressly explain why, as required by *Clemons*.[211]

IV. Conclusion

The Missouri Supreme Court had no basis for applying the *Walton v. Arizona* holding in *Feltrop v. Missouri*. Additionally, although the case may fit into the *Clemons v. Mississippi* framework, appellate reweighing of aggravating and mitigating evidence in *Feltrop* is impossible because of the nonexistence of statutory aggravating evidence after the invalidation of the "de-

---

210. *Feltrop*, 803 S.W.2d at 14. *See supra* notes 148-49 and accompanying text (narrowing construction of the "depravity of mind" aggravating circumstance as formulated in State v. Preston). It has been suggested that it is doubtful under Maynard v. Cartwright, 486 U.S. 356 (1988), "that a finding based on 'depravity of mind', without torture, would suffice to authorize a death sentence." State v. Smith, 756 S.W.2d 493, 502 (Mo. 1988).

211. *See supra* notes 95-96 and accompanying text. Arguments have been made that the *Preston* factors could still support a finding of the "depravity of mind" aggravating circumstance in any first degree murder case. Recently, a similar "curative" limiting construction of a similar aggravating circumstance was found to be "necessarily subjective" and had no curative effect on the unconstitutionally vague aggravating circumstance. Moore v. Clark, 904 F.2d 1226, 1232 (8th Cir. 1990).

pravity of mind" circumstance.[212] The only manner in which the defendant's sentence of death could have been sustained under *Clemons* and the United States Supreme Court's current capital punishment doctrine would have been if the trial judge, in his ruling on the defendant's Motion to Reduce Sentence, or the Missouri Supreme Court, in its appellate review, had clearly and expressly engaged in harmless-error analysis.[213]

Although harmless-error analysis was not performed by either court in *Feltrop*, the United States Supreme Court denied certiorari,[214] which would have given the defendant the opportunity to receive a constitutionally adequate sentence. It is possible that the defendant would have been sentenced to death on remand. However, it is also possible that he would not have been. It is not determinable beyond a reasonable doubt that a correctly instructed jury would have sentenced the defendant to death. As Chief Justice Blackmar stated in his dissent in *Feltrop*, "[u]p to now the right of trial by jury has been considered to be a right of trial by a properly instructed jury."[215] With the ultimate penalty at stake, it seems only fair to give the defendant the benefit of a jury that has received a constitutionally adequate instruction.

It is clear that the United States Supreme Court is not heading in a direction that will lead to a declaration of capital punishment as *per se* cruel and unusual.[216] However, the Court should be especially careful in ensuring that states do not violate the United States Constitution through the use of discriminatory, arbitrary and/or capricious application of capital punishment. Additionally, state high courts should exercise due diligence[217] in protecting the constitutions of their individual states

---

212. *See supra* notes 200-02 and accompanying text.

213. *See supra* notes 208-09 and accompanying text.

214. Feltrop v. Missouri, 111 S. Ct. 2918 (1991).

215. *Feltrop*, 803 S.W.2d at 23 (Blackmar, C.J., dissenting).

216. In fact, the Court seems to be heading in the opposite direction. Since Furman v. Georgia, 408 U.S. 238 (1972), the only justices who have stated that capital punishment is *per se* cruel and unusual have been Justices Brennan and Marshall. *See Furman*, 408 U.S. at 375 (Burger, C.J., dissenting). With their recent departures from the court, we are surely left with an increasingly pro-capital punishment bench.

217. "Due diligence" means "[s]uch a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [body] under the particular circumstances. [It is] not measured by any absolute stan-

and of the United States. Due to the United States Supreme Court's consistent refusal to uphold protective precedent in this context, perhaps state appellate courts should hold trial courts to an even higher procedural standard under individual state constitutions than the Supreme Court would under the United States Constitution. In his dissent in *Clemons*, Justice Blackmun stated:

> The one consolation, in my view, lies in the possibility that the Supreme Court of Mississippi will decline the invitation that this Court proffers today. The majority, as I see it, has abdicated its responsibility to enforce federal constitutional norms. That failure, however, cannot absolve the Mississippi Supreme Court of its duty to apply state procedural rules in a fair and consistent manner. The Supreme Court of Mississippi repeatedly has stated that it cannot and will not fulfill the role that the majority suggests for it today. Despite this Court's decision, it is still the responsibility of the Mississippi Supreme Court to ensure that "[T]here will be no shortcuts to the execution chamber."[218]

Daniel Eric Estrin†

---

dard, but depending upon the relative facts of the special case." BLACK'S LAW DICTIONARY 457 (6th ed. 1990).

218. 494 U.S. at 774 (Blackmun, J., dissenting) (*citing* Pinkton v. State, 481 So. 2d 306, 310 (Miss. 1985)). Justice Blackmun's hopes for the Mississippi Supreme Court came true. On remand to the court, the invitation that the United States Supreme Court proffered in *Clemons* was declined by the Mississippi Supreme Court. Clemons v. State, 593 So. 2d 1004 (Miss. 1992). The court determined that as a matter of state law, it did not have the authority to reweigh aggravating and mitigating evidence because this function had been statutorily delegated to a jury. *Id.* at 1006. With regard to harmless-error analysis, the court believed that it would be too difficult to make a determination in *Clemons* that beyond a reasonable doubt, the jury's sentencing verdict would have been the same. *Id.* at 1007. The court cited Johnson v. State, 547 So. 2d 59 (Miss. 1989), stating that "there is no way to throw out this aggravating circumstance and say with any confidence that the jury verdict would have been the same." *Clemons*, 593 So. 2d at 1007. The court then cited Coleman v. State, 378 So. 2d 640, 648 (Miss. 1979), stating that they were:

> not convinced beyond a reasonable doubt that under the facts of this case a jury would have found that "the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies — the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

Clemons, 593 So. 2d at 1007. The court remanded the case to the trial court to "impanel another sentencing jury to consider punishment in the case." *Id.* The court reaffirmed this holding in Shell v. State, 595 So. 2d 1323 (Miss. 1992).

† The author wishes to thank his parents, sisters, family, friends, and especially Marla E. Wieder. All of their unyielding support during his schooling and the production of this piece is immensely appreciated.